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 *AMICUS CURIAE* DRI CENTER FOR LAW AND PUBLIC POLICY IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The DRI Center for Law and Public Policy is the public policy and advocacy voice of DRI, an international organization of approximately 14,000 attorneys, including in-house attorneys and outside counsel, involved in the defense of civil litigation. The Center addresses issues that not only are germane to in-house attorneys and their corporate clients, but also are important to improvement of the civil justice system. DRI and the Center, through publications and the filing of amicus curiae briefs in the Supreme Court, federal courts of appeals, and state appellate courts, long have participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

This case fits those criteria. DRI's member in-house lawyers and outside counsel representing corporate entities have a critical interest in an unvarying federal common-law standard governing privilege protection for multipurpose communications. DRI's member lawyers and their corporate clients must engage in candid, free-flowing discussions so that the lawyers can provide optimal legal advice. Many of these legal-related discussions necessarily involve or affect business considerations, and the lack of a consistent standard for these multipurpose communications results in uncertain privilege protection that chills unhindered attorney–client

1. Petitioner and Respondent have consented to the filing of this brief. Pursuant to Rule 37 of the Supreme Court of the United States, amicus curiae certify that no counsel for any party authored this brief in whole or in part and that no counsel or party made any monetary contribution toward the brief's preparation and submission.

dialogue. DRI, therefore, has a vital interest in ensuring that the attorney–client privilege protects a multipurpose communication where providing or obtaining legal advice was one of its significant purposes.

SUMMARY OF ARGUMENT

The attorney–client privilege serves the public good by encouraging corporate entities, acting through their employees, to engage in full and frank communications with the entities' lawyers so that these lawyers can supply "sound legal advice." *Upjohn Co. v United States*, 449 U.S. 383, 389 (1981). In-house counsel are often the first lawyers to receive these confidential inquiries and, thereafter, deliver "valuable efforts" in ensuring the entities' "compliance with the law." *Id.* at 392.

These efforts frequently arise from employees' communications that cover multiple topics, a significant one of which is to obtain or provide legal advice. Corporations face an ever-increasing collection of legal requirements and regulatory obligations, and their in-house lawyers correspondingly take on non-legal roles that contribute to a range of corporate decisions. Recognizing these realities "in the light of reason and experience," Fed. R. Evid. 501, this Court should establish a standard that supplies privilege protection in a way that allows in-house lawyers and their clients to "predict with some degree of certainty whether particular discussions will be protected." *Upjohn*, 449 U.S. at 393.

The primary purpose test for determining whether the attorney–client privilege protects a communication inappropriately conscripts judges into the task of

determining the sole purpose for communications that often do not have a sole purpose. The test discourages companies from seeking advice from in-house attorneys. Judges that apply the primary purpose test often recognize that in-house attorneys are closest to the company's business operations. But instead of viewing this as advantage, judges apply a presumption against privilege for communications with in-house attorneys for the same reason that makes those attorneys uniquely prepared to steer a company away from legal peril: they are often involved in business discussions. Because of this unique role, in-house attorneys are disproportionately affected by the search for a single primary purpose in a multipurpose communication. And because the test seeks what often does not exist—a single primary purpose—the results are unpredictable.

The significant purpose standard, however, creates a more predictable foundation through which in-house attorneys can assure their clients of the confidentiality of their communications. The test still ensures that attorneys will not be included in communications merely to gain privilege instead of obtaining legal advice. It recognizes the realities of modern communication while staying true to the privilege's roots and its purpose—to enable attorneys to provide legal advice by encouraging full disclosure and assuring clients that their confidences will be respected. The significant purpose test enables in-house attorneys to effectively advise their business colleagues and ensure the company's compliance with the ever-increasing trove of statutory and regulatory obligations, and amicus curiae urges the Court to adopt it.

ARGUMENT

I. The Significant Purpose Test Appropriately Promotes the Attorney–Client Privilege's Objectives and the Important Role of In-House Attorneys.

1. The attorney–client privilege protects from disclosure confidential communications between a corporate client and its lawyer made for legal-advice purposes. *Fisher v. United States*, 425 U.S. 391, 403 (1976). The privilege's purpose "is to encourage full and frank communication" between clients and their lawyers and thereby "promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. A lawyer's sound, optimal legal advice "depends upon the lawyer's being fully informed," *id.*, because, "[a]s a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure *** the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher*, 425 U.S. at 403; *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U.S. 457, 458 (1876) ("If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance."). With this "wise and liberal policy" in mind, *Schaefer*, 94 U.S. at 458, the interpretation of the scope and contours of the attorney–client privilege "is guided by 'the principles of the common law *** as interpreted by the courts *** in the light of reason and experience.'" *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting Fed. R. Evid. 501).

2.a. In-house attorneys provide "valuable efforts" to their corporate client "to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392. Corporate entities face a "vast and complicated array of regulatory legislation" and need their in-house attorney's legal advice "to find out how to obey the law." *Id.* (citations omitted). In-house lawyers are often the first, go-to counsel to whom non-lawyer corporate employees provide "full and frank communication" so that in-house lawyers can supply the company with "sound legal advice." *Id.* at 389. In-house attorneys more regularly communicate with, and gather business-related information from, the company's employees to calculate their legal advice. *Id.* at 390–91 (recognizing that the first step is "ascertaining the factual background and sifting through the facts with an eye to the legally relevant"). This step is vital because "advocacy depends upon the lawyer's being fully informed by the client." *Id.* at 389.

b. If corporate entities and their lawyers faced a "vast and complicated array" of legal issues when this Court decided *Upjohn* over forty years ago, *id.* at 392, they must confront exponentially greater challenges in today's regulatory environment. *See* Hon. Justin R. Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum*, 95 Ind. L.J. 923, 930 (2020) (stating that "the ratio of the number of pages of legally binding regulations promulgated in one year by administrative agencies versus the number of pages of legislation passed by Congress *** is approximately 100:1"). While the mounting complexity of administrative law and the difficulty of compliance with it is not new, this Court has consistently recognized that corporate clients, "unlike most individuals, 'constantly go to lawyers to find out how

to obey the law,' particularly since compliance with the law in this area is hardly an instinctive matter." *Upjohn*, 449 U.S. at 392 (quoting Bryson P. Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 Bus. Law. 901, 913 (1969)) (internal citation omitted).

c. In this evolving environment, the role of in-house lawyers likewise develops and has "grown increasingly complex, often including advisory and compliance roles as well as the more general aim of ensuring a successful business." *Karstetter v. King Cnty. Corr. Guild*, 444 P.3d 1185, 1189 (Wash. 2019); *see also Faloney v. Wachovia Bank, N.A.*, 254 F.R.D. 204, 209 (E.D. Pa. 2008) ("In-house counsel performs a dual role of legal advisor and business advisor."); Grace M. Giesel, *The Ethics or Employment Dilemma of In-House Counsel,* 5 Geo. J. Legal Ethics 535, 544 (1992) (noting that corporate executives consider in-house counsel "an essential component of the management team" who "affect the full range of corporate decisions"). The unique role of in-house attorneys in providing legal advice means that their communications with non-lawyer employees often involve non-legal information. *Burton v. Zwicker & Assocs., PSC*, No. CV 10-227-WOB-JGW, 2012 WL 12925675, at *2 (E.D. Ky. Jan. 9, 2012) ("Because of in-house counsel's unique role, communications with in-house counsel may involve both business and legal considerations."). This mix of content does not diminish the reality that one of the significant purposes of lawyer–employee communications is to seek in-house counsel's legal advice to ensure the corporation's compliance with applicable laws and regulations. *See Exxon Mobile Corp. v. Hill*, 751 F.3d 379, 382 (5th Cir. 2014) (explaining that "[c]ontext here is key" and noting that Exxon Mobile approached its in-house

attorney for legal advice rather than "business advice divorced from its legal implications").

3. Reason and experience, therefore, dictate that in-house attorneys operate in a corporate environment that necessarily involves multipurpose communications, one of which is legal, with non-lawyer employees. Permitting this experienced reality to result in a narrow interpretation of the privilege, however, would make it "difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem." *Upjohn*, 449 U.S. at 392. Moreover, a privilege-assessment standard that is "difficult to apply in practice," *id.* at 393, produces uncertainty, and "[a]n 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*. To implement the privilege's purpose—to encourage non-lawyer employees to engage fully and frankly with in-house lawyers so those lawyers can provide the company with optimum legal advice—corporate entities and their lawyers "must be able to predict with some degree of certainty whether particular discussions will be protected." *Id.*

A. The Significant Purpose Test Produces More Predictable and Warranted Results.

The significant purpose test, best articulated in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), supplies privilege protection to a multipurpose communication between a company's lawyers and its employees where "one of the significant purposes" of the communication was to obtain or provide legal advice. *Id.* at 760. Under this analysis, the privilege precludes

disclosure of a multipurpose communication so long as the non-lawyer employee consults the in-house lawyer "to gain advantage from the lawyer's legal skills and training *** even if the client may expect to gain other benefits as well, such as business advice." Restatement (Third) of the Law Governing Laws., § 72 cmt. c (2000).

The primary purpose test, as it has been applied across the country, improperly assumes that courts can boil down each attorney–client communication to a single predominating purpose through an arduous balancing of a communication's multiple purposes. Supreme Court precedent does not support this privilege analysis, and it risks eradicating the privilege in certain circumstances. *Kellogg*, 756 F.3d at 759 (recognizing that the primary purpose test is "not the law" and would eliminate privilege protection for "numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege").

In-house attorneys' daily communications frequently contain overlapping business and legal purposes. After all, the job is to help the company achieve business goals while complying with applicable laws and regulations, thereby limiting liability exposure. So, when a business officer or manager seeks advice from the company's in-house attorney, she is often seeking that advice for the purposes of accomplishing business objectives *and* ensuring compliance with legal obligations. Yet, under the Ninth Circuit's analysis, the determination of whether the attorney–client privilege protects these communications from disclosure is in the eye of the *post hoc* beholder. Some courts may view communications that largely include business content as made primarily for business purposes.

Others may recognize that the communication benefits the business but is made to enable the attorney to limit the business's exposure to liability. Regardless of the outcome, the point is that the significant purpose test recognizes the practical reality that these multipurpose communications are in fact multipurpose and not incidentally. It removes the laborious compare-and-balance task of picking which significant purpose prevails and instead allows the attorney to guarantee privilege so long as one of the significant purposes of the communication is legal advice.

In contrast to some of the cases applying the primary purpose test, cases that rely on *Kellogg*'s significant purpose test arrive at more predictable results that nevertheless adhere to the privilege's underlying rationale. For example, following *Kellogg*, the court in *Jones v. Carson*, No. 15-310 (CKK/GHM), 2018 WL 11410070 (D.D.C. Mar. 30, 2018), considered whether the attorney–client privilege protected from discovery the Housing and Urban Development internal attorneys' reviews as part of a sexual-harassment investigation. The lawyers conducted the reviews "pursuant to employee disciplinary procedures *** required by HUD's Adverse Action Handbook" and not pursuant to any statutory or regulatory obligation. *Id.* at *12. The court recognized that the in-house lawyers conducted the reviews to comply with the agency policy but also to provide legal advice and held that, "[a]s long as one of the significant purposes of the communications at issue was the provision of legal advice or guidance, the agency will get the benefit of the privilege even with respect to its personnel decisions made consistent with an agency employee discipline policy." *Id.*

Though communications surrounding internal investigations often come up in multipurpose communications cases, the significant purpose test remains more practical in other contexts. In *Federal Trade Commission v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 892 F.3d 1264 (D.C. Cir. 2018), a pharmaceutical company grappled with the decision of whether to settle after coming under FTC scrutiny. The communications at issue "had a legal purpose: to help the company ensure compliance with the antitrust laws and negotiate a lawful settlement," but they "also had a business purpose: to help the company negotiate a settlement on favorable financial terms." *Id.* at 1267. Rather than determining which purpose predominated, the court applied the *Kellogg* standard and reasoned that, although "the communications at issue *** also served a business purpose[,] *** one of the significant purposes of the[] communications was to obtain or provide legal advice." *Id.* at 1268. There, the warranted and predictable result prevailed without the judge engaging in a subjective, painstaking attempt at ascertaining a winner between two clearly intertwined purposes.

Despite the Ninth Circuit's comments to the contrary, there is not an obvious reason why the significant purpose test's "reasoning does not apply with equal force in the tax context," not to mention the larger sphere of business in general. *In re Grand Jury*, 23 F.4th 1088, 1094–95 (9th Cir. 2022). Nor is it obvious that the "test would only change the outcome of a privilege analysis in truly close cases, like where the legal purpose is just as significant as a non-legal purpose." *Id.* at 1095. On the contrary, the significant purpose test avoids the pitfalls associated with that inquiry. In *Boehringer*, the court did not assign a relative weight to

the level of significance of the legal and business purposes. Instead, it recognized that the legal purpose was significant (not as significant, not more significant, just significant) and held the communications were privileged. The elegance of the test is that it does just the opposite of the Ninth Circuit's characterization. That elegance need not be confined to internal investigations alone.

B. The Primary Purpose Test Destabilizes Privilege Protection for In-House Counsel Communications.

The Ninth Circuit here held that dual-purpose communications receive privilege protection only if *the* single, primary purpose of the communication was to seek legal advice. *In re Grand Jury*, 23 F.4th at 1092. But "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*, 756 F.3d at 759. In search of the impossible, the Ninth Circuit has undermined the predictability of the privilege and subordinated in-house attorneys in a privilege analysis even though they stand closest to the client and in the best position to ensure compliance with the law.

The primary purpose test's misguided mission to find one predominating purpose in every communication leads to undesirable results. Trial courts employing this standard necessarily engage in the tedious task of identifying, weighing, and balancing the legal and non-legal purposes in each putatively privileged in-house lawyer–employee communication. District judges, magistrate judges, and appointed special masters must

examine the content of the communication, the context in which lawyer and employee communicated, and the facts surrounding the communication's creation, and identify and assess the recipient list—all to determine "whether the legal purpose so permeates any non-legal purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 629 (D. Nev. 2013) (internal quotations omitted). And, even then, the "line between legal advice and business advice *** is not always clear." *Harrington v. Freedom of Info. Comm'n*, 144 A.3d 405, 415 (Conn. 2016).

Critically though, this subjective search, often conducted years after a putatively privileged document's creation, results in hyper-strict analyses that in-house attorneys simply cannot predict. Take *In re Polaris, Inc.*, 967 N.W.2d 397 (Minn. 2021), which applied the predominant purpose test, as an example. There, faced with a government-enforcement action, Polaris hired attorneys to conduct an audit of its safety processes and policies. *Id.* at 402. The report was inadvertently disclosed, and counsel attempted to claw it back.

The lower court permitted some redactions but held that the predominant purpose was business advice and determined that the report in its entirety was not privileged. *Id.* The Minnesota Supreme Court affirmed. In doing so, the court recognized that the "audit report contains both legal advice and business advice." *Id.* at 407. But it narrowly focused its analysis on the search for a single primary purpose, rather than understanding that the advice was sought in the context of an enforcement action.

Justice Anderson, in dissent, aptly explained that the court had ignored the context in which the advice was sought. *Id.* at 418 (Anderson, J., dissenting); *see also id.* at 420 (stating that the "court's mistake is to overlook the purpose for which an attorney has been hired"). In the dissent's view, Polaris hired attorneys to audit its "corporate practices, safety, engineering, and product design" to ensure that Polaris was compliant with its regulatory obligations and to avoid future liability. *Id.* at 419. Especially in the face of an enforcement action, this was squarely within the realm of legal advice.

In explaining how the majority erred, Justice Anderson argued that courts should define business advice as "that which is intended to make a client's enterprise *more profitable other than through the mitigation of legal liability*." *Id.* at 417. This definition accurately reflects the role in-house attorneys play in a corporation: understand the business and provide advice on how to make the business more profitable by limiting legal liability and ensuring compliance with applicable regulations.

The *In re Polaris* majority's context-agnostic reasoning and undue focus on the search for a single primary purpose produced results that no attorney would have reliably predicted in the moment—that a trial judge years later would find that a communication's business purpose outweighed its legal purpose. Instead, the decision and the test it employed subordinated communications with in-house counsel to the realm of business advice. Justice Anderson's more reasonable and practical definition of business versus legal advice would help restore in-house attorneys to their status as important legal advisors equipped to help corporations

avoid liability. But the broader problem embodied in *In re Polaris* is that the quest for one primary purpose within a web of often intertwined content leads to results that counsel cannot predict.

Even when courts properly look to the context of communications, the search for a single primary purpose—rather than a significant purpose—still leads to unwarranted and unexpected results. For instance, in *RCHFU, LLC v. Marriott Vacations Worldwide Corp.*, No. 16-cv-1301-PAB-GPG, 2018 WL 3055774 (D. Colo. May 22, 2018), the court ordered production of a memorandum despite finding that it contained attorney–client privileged information. Holding that it must determine *the* primary purpose of the memorandum, the court opined that it contained legal advice "intertwined within business advice." *Id.* at *4. Because the legal advice was "intertwined so completely that it would be impractical to attempt redaction," the court ordered the entire memorandum disclosed in unredacted form. *Id.* Though the parties to the communication surely expected it to remain confidential, the unexpected result prevailed.

The most important lesson from *In re Polaris* and *Marriott Vacations* is that attempting to parse language in a communication and place it in a business box or legal box, when it is often in both, leads to results that neither the client nor the attorney expected in the moment. At bottom, in-house attorneys, integral to ensuring business operations comport with the law and the numerous regulations, risk their communications being deemed business rather than legal, and are therefore unable to guarantee the level of confidentiality that corporate employees expect when communicating with company

lawyers. This undermining of confidence unnecessarily encourages the use of outside counsel, increases legal costs, and devalues in-house attorneys' contributions merely because they are tasked with being closer to the business. Ironically, in-house attorneys' proximity to the business places them in a greater position to provide confidential legal advice and ensure regulatory compliance.

The complex search for a single primary purpose in these communications impedes the attorneys most capable of ensuring corporate compliance with the law by undermining the predictability of their attorney–client privilege. To fulfill the privilege's purpose of promoting "full and frank communication between attorneys and their clients" so that attorneys can provide "sound legal advice," *Upjohn*, 449 U.S. at 389, a corporate entity's in-house attorney and non-lawyer employees "must be able to predict with some degree of certainty whether particular discussions will be protected." *Id.* at 393. The significant purpose test provides that certainty, and amicus curiae urges the Court to adopt it.

II. The Significant Purpose Test Levels the Playing Field for In-House Attorneys and Promotes Predictability.

Attorney–client communications involving in-house attorneys are just as privileged as communications involving outside counsel. "In the corporate context, the attorney–client privilege applies to communications between corporate employees and a corporation's counsel made for the purpose of obtaining or providing legal advice. The privilege applies regardless of whether

the attorney is in-house counsel or outside counsel." *Boehringer*, 892 F.3d at 1267.

But when clients seek advice from outside counsel, federal courts often presume that attorney–client privilege applies to the communications in which that advice is sought or received. In *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1997), the Eighth Circuit explained that Diversified Industries had prima facie established the existence of attorney–client privilege because it had sought advice from a professional legal advisor—an outside law firm. *Id.* at 610. And in *Chen v. United States*, 99 R.3d 1495 (9th Cir. 1996), the Ninth Circuit held, "If 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." *Id.* at 1501.

District courts across the country, however, have stripped this presumption from in-house attorneys notwithstanding that they are also professional legal advisors. This is because in-house attorneys are often involved in the day-to-day activities of the business. *Dolby Labs. Licensing Corp. v. Adobe Inc.*, 402 F. Supp. 3d 855, 866 (N.D. Cal. 2019); *Lindley v. Life Invs. Ins. Co. of Am.*, 267 F.R.D. 382, 389 (N.D. Okla. 2010) (collecting cases); *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002). Yet that involvement in day-to-day business activities is precisely what uniquely positions in-house attorneys to steer companies toward legal compliance. The added scrutiny on communications with in-house attorneys paired with the subjective, *post hoc* search for a sole predominating purpose in those

communications compromises an in-house attorney's ability to provide sound legal advice. *See generally* Philip J. Favro, *Inviting Scrutiny: How Technologies Are Eroding the Attorney-Client Privilege*, 20 Rich. J.L. & Tech 2 (2013) (recognizing that courts apply heightened scrutiny to communications with in-house counsel). The heightened standard places in doubt the privilege and renders the confidence unpredictable.

The significant purpose test levels the playing field that has been stacked against in-house attorneys under the primary purpose test. The presumption in favor of outside counsel might remain, but by recognizing the practical reality that many communications with in-house attorneys have multiple significant purposes, the *Kellogg* test mitigates the concerns associated with in-house attorneys' unique role in business operations. The significant purpose standard still requires that the attorney's involvement not be incidental, yet it removes from the judge's docket the inherently impossible task of later trying to determine which of the significant purposes predominates, even if barely. Instead, if a company's attorneys and its employees communicate in significant part for legal-advice purposes, then the communication is privileged, and the confidences will be respected.

III. The Significant Purpose Test Insulates the Attorney–Client Privilege from Future Erosion Due to Emerging Technologies.

The Court's embrace of the significant purpose test would further ensure that in-house attorneys are not prejudiced by new technologies. Emerging collaborative communication software programs provide a company's

in-house attorneys and non-lawyer employees more and easier avenues through which to communicate. For example, corporate entities' use of Google Drive collaborative software allows employees and in-house lawyers to simultaneously draft and comment on a document, such as a contract. The Microsoft Teams software contains instant chat features that more readily permit non-lawyers to immediately summon in-house counsel's advice within an ongoing business discussion. To be sure, these issues are not new. *See generally* Favro, *supra* Section II, at 37 (noting, just eight years ago, that the proliferation of communication technologies, such as email, "provides a seamless opportunity for companies to draw in-house counsel into various aspects of their operations"). But just as technology evolves exponentially, so do the privilege concerns accompanying them. For example, courts are just beginning to grapple with privilege and discovery issues with these emerging technologies. *See, e.g.*, *Milbeck v. TrueCar, Inc.*, No. CV 18-02612-SVW, 2019 WL 4570017, at *2–3 (C.D. Cal. May 2, 2019) (finding that an estimated seventeen million Slack messages "would not realistically be available for use in discovery").

A uniform, predictable test will enable in-house attorneys—who are more likely to deal with these concerns—to best forecast when the attorney–client privilege will hold. The added predictability is key to instilling confidence in the privilege. But to enable in-house attorneys to function as attorneys on the same level as their outside counsel counterparts, the Court should recognize that these collaborative tools often make legal and business content even more intertwined. They exacerbate the inherent impossibility of searching

for a single primary purpose and increase the risk that an in-house lawyer's legal advice is disclosed to opposing counsel.

IV. The Significant Purpose Test Will Not Unduly Inhibit Truth Seeking.

In *In re Grand Jury*, the Ninth Circuit expressed concern that companies would merely "add layers of lawyers to every business decision in hopes of insulating themselves from scrutiny in any future litigation." 23 F.4th at 1093–94. In sounding this alarm, the court was analyzing the "because of" test, and not the significant purpose test. Nevertheless, any similar concern in applying the significant purpose test is unwarranted.

The court's decision in *Jones v. Carson*, discussed *supra* Section I(A), shows that courts applying the significant purpose test will not merely note the existence of multiple purposes and declare the communication privileged. There, the court analyzed each item closely to determine when legal advice was not a significant purpose. In one example, a draft of the final version had only typographical edits, and so it did "not reflect the provision of legal advice." *Jones*, 2018 WL 11410070, at *18.

In sum, the significant purpose test means just that—the legal-advice portion of a multipurpose communication must be "one of the significant purposes" of the communication to secure privilege protection. *Kellogg*, 756 F.3d at 760. Applying this test will not shelter a communication where legal advice is merely incidental to a business discussion. Critics may imagine scenarios in which companies include attorneys in every business

conversation to avail themselves of the cloak of privilege. But in those circumstances, courts can identify whether the legal purpose is significant with greater ease and confidence than comparing the relative weight of legal and non-legal purposes. Those unwarranted privilege claims would not hold. *See United States ex rel. Barko v. Halliburton Co.*, 74 F. Supp. 3d 183, 188 (D.D.C. 2014) (no significant legal purpose existed because, in part, of "the attorney's merely incidental connection to the documents"); *see also New Jersey v. Sprint Corp.*, 258 F.R.D. 421, 444 (D. Kan. 2009); *Neuder v. Battelle Pac. Nw. Nat'l Lab.*, 194 F.R.D. 289, 292 (D.D.C. 2000).

CONCLUSION

The Ninth Circuit's primary purpose test ignores both the practical realities of multipurpose communications and the important role that in-house attorneys play in helping companies comply with relevant statutory and regulatory obligations. The significant purpose test instead recognizes the "valuable efforts" of corporate counsel, *Upjohn*, 449 U.S. at 392, and implements the privilege's purpose of encouraging corporate employees to relay candid information so companies can "find out how to obey the law," *id.*, while maintaining safeguards against the privilege's improper use. The Court should adopt the significant purpose test, rule that the attorney–client privilege protects a communication between a corporate entity's lawyers and its employees where "one of the significant purposes" of the communication was "obtaining or providing legal advice," and task trial courts with answering the question that better aligns with this Court's precedent: "Was obtaining or providing legal advice *a* primary purpose of the communication, meaning

one of the significant purposes of the communication?" *Kellogg*, 756 F.3d at 760.

Respectfully submitted,

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