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 THE AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American College of Tax Counsel (the College) respectfully submits this brief as *amicus curiae* in support of Petitioner.[1] The College is a nonprofit professional association of tax lawyers in private practice, law school teaching positions, and government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

The College, composed of approximately 700 Fellows, is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College. This *amicus* brief is submitted for the College by the Board of Regents and does not

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[1] No counsel for a party authored any part of this brief, and no person other than the College, its members, or its counsel made any monetary contribution intended to fund its preparation or submission. All parties have provided written consent to the filing of this brief.

necessarily reflect the views of all members of the College, including those who are government employees.[2]

The College submits this brief in furtherance of its mission to improve the tax system. While acknowledging the need for tax authorities to obtain factual information relevant to assessing tax compliance, the College strongly supports protecting taxpayers' ability to seek legal advice from tax counsel and thus to communicate in confidence about the information needed to obtain appropriate guidance. The question presented in this case concerns when attorney-client privilege attaches to "dual purpose" communications—confidential communications between a lawyer and a client that have both a legal purpose and a non-legal purpose (where the non-legal discussion cannot be reasonably segregated from the legal discussion). In such situations, is it sufficient for the legal purpose to be a "significant purpose[]," *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757, 760 (D.C. Cir. 2014) (*KBR*), or instead must it be a "predominate purpose," Pet.App. 12a (Ninth Circuit)? The College believes that the Ninth Circuit's test is unduly restrictive and practically unworkable, especially in the tax context. The College thus encourages this Court to adopt the D.C. Circuit's test instead.

SUMMARY OF ARGUMENT

Both Respondent and the Ninth Circuit have suggested that applying the "a significant purpose" test would be particularly inappropriate "in the tax context." BIO 15-16; Pet.App. 11a & n.5. Amicus submits this brief to explain that, to the contrary, the tax context underscores why this Court should adopt that test.

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[2] Caroline D. Ciraolo, Michael J. Desmond, and Susan E. Morgenstern abstained from the decision to file this brief and did not participate in preparing or reviewing it.

Compared to other contexts with dual-purpose communications, the legal purpose and the asserted non-legal purpose in the tax context are generally more intertwined. That is because, in the tax context, lower courts sometimes treat a lawyer's assistance in *preparing a tax return* as effectively "non-legal."

This makes it particularly difficult, if not impossible, to determine whether a taxpayer's significant legal purpose of obtaining a lawyer's advice *about the best tax position* is nevertheless "predominated" by the asserted "non-legal" purpose of obtaining the lawyer's assistance to prepare tax returns *reflecting that legal advice*. This brief demonstrates the futility of that endeavor through common examples spanning tax lawyers' wide range of practice areas. And the brief also demonstrates that the problem is exacerbated by the substantial overbreadth of the rationales that lower courts have offered for sometimes treating a lawyer's assistance in tax-return preparation as effectively "non-legal." Indeed, a confidential communication between a lawyer and a client in order to properly prepare and file a mandatory form with the government is a conventional case for attorney-client privilege, and courts have failed to justify treating the tax-return-preparation context differently. Rather than requiring the untenable balancing that the "predominate purpose" test would entail in the tax context, this Court should hold that attorney-client privilege attaches to a dual-purpose communication so long as "a significant purpose" was for the client to obtain confidential legal advice from the lawyer.

ARGUMENT

THE "A SIGNIFICANT PURPOSE" TEST TO DETERMINE ATTORNEY-CLIENT PRIVILEGE FOR CONFIDENTIAL DUAL-PURPOSE COMMUNICATIONS IS ESPECIALLY WARRANTED IN THE CONTEXT OF COMMUNICATIONS WITH TAX COUNSEL

A. Compared To Non-Tax Contexts, The Legal Purpose Of Providing Tax Advice And The Asserted Non-Legal Purpose Of Assisting In Tax-Return Preparation Are More Intertwined

Outside the tax context, dual-purpose attorney-client communications typically involve a non-legal inquiry that is *not materially dependent* upon the legal inquiry. For example, lawyers advising on financial transactions may need to assess the legal ramifications and "also the commercial needs of their client and the financial benefits or risks of … alternative strategies." *Note Funding Corp. v. Bobian Inv. Co.*, No. 93 Civ. 7427, 1995 WL 662402, at *2 (S.D.N.Y. Nov. 9, 1995). Likewise, counsel may be tasked with conducting an internal investigation both to provide "legal advice" about "compliance with the law" and to ensure adherence to a "corporate policy" adopted independent of legal requirements. *KBR*, 756 F.3d at 757, 760. In such situations, the legal and non-legal decisions are conceptually separate, even if there is overlap in the relevant facts.

Notwithstanding that distinctiveness of the legal and non-legal inquiries, it remains challenging to assess their relative importance and select which one "predominates." Many communications contain substantial discussion on both topics. *E.g.*, *Note Funding Corp.*, 1995 WL 662402, at *3 (communications had "fairly extensive discussions of[] financial questions and issues of commercial strategy and tactics," but "in a context that makes it evident that the attorney is presenting the issues and analyzing the choices on the basis of his legal expertise and with an

obvious eye to the constraints imposed by applicable law"). In fact, counsel's advice may bear *simultaneously* on legal and non-legal goals, such as a lawyer "formulating her legal advice regarding a possible settlement," given that "whether and at what price to settle ultimately [is] a business decision as well as a legal decision." *FTC v. Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1268 (D.C. Cir. 2018). Thus, as Petitioner's brief well explains, it typically is "not useful or even feasible" to assess "*the* one primary purpose for a communication." *KBR*, 756 F.3d at 759.

Critically, the problems are magnified in the tax context because the non-legal purpose at issue tends to be closely related to the legal purpose of advising about tax law. In particular, lower courts have sometimes treated a lawyer's assistance in preparing tax returns as effectively "non-legal." *See, e.g.*, *United States v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999); *United States v. Davis*, 636 F.2d 1028, 1043 & n.18 (5th Cir. Unit A Feb. 1981); *United States v. Cote*, 456 F.2d 142, 144-45 (8th Cir. 1972). Notwithstanding that tax-return preparation "requires some knowledge of the law, and the manner in which a tax return is prepared can be viewed as an implicit interpretation of that law," courts have sometimes concluded that "the preparation of a tax return should not be viewed as legal advice." *In re Grand Jury Investigation*, 842 F.2d 1223, 1225 (11th Cir. 1987). To support that conclusion, such courts have reasoned that accountants and other non-lawyers are permitted to assist in return preparation and/or that the contents of the return are disclosed to the government. *See* Part C, *infra*. Accepting for the moment that attorney-client communications concerning return preparation can be characterized as "non-legal," that purpose is tightly intertwined with an indisputably legal purpose, for two reasons.

First, even courts that treat tax-return preparation by a lawyer as non-legal recognize that, at least in some circumstances, "the giving of tax advice" by an attorney in connection with return preparation is a "matter[] sufficiently within the professional competence of an attorney to make [it] prima facie subject to the attorney-client privilege." *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962). For example, the Ninth Circuit has suggested that, "[a]though communications made *solely* for tax return preparation are not privileged, communications made to acquire legal advice about what to claim on tax returns may be privileged." *United States v. Abrahams*, 905 F.2d 1276, 1284 (9th Cir. 1990); *accord* Pet.App. 5a n.2. Likewise, the Fifth Circuit has said that it "would be reluctant to hold that a lawyer's analysis of the soft spots in a tax return and his judgments on the outcome of litigation on it are not legal advice." *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982). In such situations, distinguishing between the legal tax advice and the "non-legal" return preparation is illusory.

Second, even when an attorney's task is to provide legal advice about the tax implications of a potential course of action, initially independent of return preparation, that advice necessarily "will shape the way the client, or the return preparer, ultimately characterizes and reports" the action on a return. Claudine Pease-Wingenter, *Does the Attorney-Client Privilege Apply to Tax Lawyers?: An Examination of the Return Preparation Exception to Define the Parameters of Privilege in the Tax Context*, 47 Washburn L.J. 699, 725 (2008). For example, advice about "how best to structure contemplated financial transactions … from a tax consequences standpoint" is generally considered legal and privileged. *United States v. Willis*, 565 F. Supp. 1186, 1190 (S.D. Iowa 1983). The task of identifying how a client can structure a transaction to "reduce its tax liabilities" is one "rooted virtually entirely

in the law." *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002). Yet the inevitable and intended result of that endeavor is to shape the client's tax returns. So a party seeking to pierce the privilege will always be able to argue that an equally significant purpose of the communications was to ensure that the client's tax returns were prepared consistent with the legal advice provided, especially where the same attorney is the one who also prepared the returns.

Each of the foregoing points is underscored by the pervasive complexity of the tax laws. The Internal Revenue Code (the Code) creates a "vast and exceedingly complex statutory apparatus," *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 410 (4th Cir. 2003), which some courts have deemed the most complicated area of the law, *see Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987); *see also Murphy v. IRS*, 460 F.3d 79, 92 (D.C. Cir. 2006) ("Albert Einstein may have been correct that 'the hardest thing in the world to understand is the income tax'" (cleaned up)), *rev'd on other grounds*, 493 F.3d 170 (D.C. Cir. 2007). Because tax law can be difficult even for "the most expert legal practitioner," "[t]he very nature of the tax laws requires taxpayers to rely upon attorneys." *United States v. Judson*, 322 F.2d 460, 468 (9th Cir. 1963).

B. Comparing The Relative Significance Of Advising About Tax Law And Assisting In Tax-Return Preparation Is A Futile Endeavor

Because tax-law advice and tax-return preparation are inextricably intertwined, it is artificial to ask whether the more significant purpose of a confidential communication with a tax lawyer is obtaining legal advice about the best tax position to take or "non-legal" assistance for the preparation of tax returns reflecting that legal advice. The problem can be seen across myriad areas spanning the practice of tax law. It exists regardless of whether the

legal advice is given in the course of return preparation or in anticipation of return preparation. Indeed, even when considered wholly apart from return preparation, legal tax advice sometimes can itself require analyzing a business's non-legal objectives. For all these reasons, the "a significant purpose" test is especially appropriate for ascertaining whether dual-purpose communications with tax counsel are privileged.

1. Significant legal advice is frequently necessary to prepare tax returns

a. Determining what positions to take on a tax return often raises significant legal questions, given the complexities of determining both what to disclose and how to disclose it. Although countless examples exist, a few should suffice to illustrate the range and difficulty of the issues.

First, taxpayers may choose to include disclosures in their tax returns to mitigate the risk of monetary penalties in the face of legal uncertainty. Given the complexity of the Code, the ultimately "correct" tax treatment for a particular item may be unclear even when analyzed by sophisticated legal advisors. But making a mistake can expose a taxpayer to significant civil penalties—under 26 U.S.C. § 6662(a), underpayment of taxes can result in a penalty of up to 20 percent of the underpayment. This penalty is avoidable if the tax position is based on "substantial authority" or at least has a "reasonable basis" (plus adequate disclosure). 26 U.S.C. § 6662(d)(2)(B). "Substantial authority" requires that "the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment," taking into account the "relevance," "persuasiveness," and "type" of authorities. 26 C.F.R. § 1.6662-4(d)(3)(i)-(iii). A "reasonable basis," though a lower standard, is still "significantly higher than

not frivolous." *Id.* §§ 1.6662-3(b)(3), 1.6662-4(d)(2). And a reasonable basis protects against penalties only if "the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return." 26 U.S.C. § 6662(d)(2)(B)(ii).

In short, when choosing a tax position and how much to disclose in support of it, a taxpayer must consider the position's relative legal strength. If there is "substantial authority," a taxpayer need not make any additional disclosures to be protected against penalties, but if there is only a "reasonable basis," a taxpayer may decide to make a disclosure statement on Form 8275 describing the basis for the position. And if the taxpayer chooses to take a more aggressive position that is not "frivolous" but which may lack a "reasonable basis" under the governing standard, additional disclosures on Form 8275 might not be the best strategic approach—without a "reasonable basis," these voluntary disclosures will provide no protection against underpayment penalties. A common task for a tax lawyer is to provide a taxpayer with an opinion letter as to where within these gradations of legal uncertainty its position falls. *See, e.g.*, 31 C.F.R. § 10.37; Patricia B. Hsue, Comment, *Lessons from* United States v. Stein*: Is the Line Between Criminal and Civil Sanctions for Illegal Tax Shelters a Dot?*, 102 Nw. U. L. Rev. 903, 911 (2008). Such opinion letters are plainly significant legal advice, *see Frederick*, 182 F.3d at 500—yet also directly address what will be reported on tax returns.

Second, taxpayers must decide whether they are under an obligation to identify a transaction as a "reportable transaction" as defined in Treasury regulations. Any party that fails to disclose a "reportable transaction" risks substantial penalties—up to $200,000 in some cases. 26 U.S.C. § 6707A. But identifying whether a particular transaction is "reportable" is no trivial task. By law, there

are five categories of such transactions, each of which has a multi-factorial definition that often requires legal judgment to apply. *See* 26 C.F.R. § 1.6011-4.

One such category covers "listed transactions." A taxpayer must first determine whether the transaction at issue is "one of the types of transactions that the Internal Revenue Service (IRS) has … identified by notice, regulation, or other form of published guidance as a listed transaction." *Id.* § 1.6011-4(b)(2). If so, it must be disclosed; if not, the taxpayer must determine whether the transaction is at least "substantially similar" to an expressly listed transaction, in which case it also must be disclosed. *Id*. Substantial similarity, in turn, means that a transaction "is expected to obtain the same or similar types of tax consequences and … is either factually similar or based on the same or similar tax strategy." *Id*. § 1.6011-4(c)(4). Because this definition relies so heavily on the term "similar," a transaction may qualify "even though it involves different entities or uses different [Code] provisions" from a listed transaction. *Id*. Ultimately, whether a transaction is sufficiently "similar" to a listed transaction is a legal question resolved by a court, based not only on the regulations and IRS notices but also on prior precedent. *See, e.g.*, *Turnham v. Comm'r of Internal Revenue*, 979 F.3d 1322, 1325 (11th Cir. 2020) (evaluating substantial similarity based, in part, on decisions from other courts).

And even after a taxpayer concludes that a particular transaction is "reportable," preparing the disclosure raises additional legal questions, since a taxpayer must determine the *scope* of the required disclosure. By rule, the disclosure must include "all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement, and … any series of steps carried out as part of a plan." 26 C.F.R. § 1.6011-4(b)(1).

Determining the scope of disclosure thus means identifying which elements are "relevant" for tax purposes and determining what acts constitute part of a "series of steps carried out as part of a plan." These are quintessential legal questions. *Cf. H.J. Inc. v. Nw. Bell Tel. Co*., 492 U.S. 229, 232 (1989) (considering what must be shown to demonstrate a "pattern of racketeering activity" for purposes of RICO liability); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 655-56 (1995) (explaining the difficulty of determining whether a state law "relate[s] to" employee-benefit plans for purposes of ERISA preemption). It makes no sense to try to identify and then weigh the relative importance of resolving these legal questions and preparing the resulting returns. Regardless of the answer to that academic question, privilege should attach because confidential communications between taxpayers and their counsel to satisfy these legal obligations have "a significant" legal purpose.

Finally, legal tax advice and tax-return preparation collide in dramatic fashion when income derived from potentially criminal conduct is involved. Imagine an individual under criminal investigation for operating an illegal business. When it comes time to file a tax return, the client asks a tax attorney how to prepare the return in compliance with the Code but without incriminating him. After learning the details of the client's situation, the attorney advises the client to disclose all reportable income—including income that might be relevant to the criminal investigation. But the attorney further advises that, because a full disclosure would be incriminating, the client's returns should expressly include only a net income number and should otherwise state on the return that the client asserts his right against self-incrimination as to all other information regarding his income.

This Court has long recognized the right of a taxpayer to plead the Fifth rather than divulge incriminating information under compulsion of the tax laws. *Garner v. United States*, 424 U.S. 648, 656 (1976). But if the attorney-client privilege did not attach to the taxpayer's conversations with counsel—because the "predominate purpose" for consulting the attorney is deemed to be obtaining return-preparation assistance—then the prosecutor could subpoena the attorney to learn all the details of the client's unlawful income that were not disclosed. That would eviscerate this Court's holding that the government cannot obtain information confided in an attorney that it could not obtain directly from the client. *See Fisher v. United States*, 425 U.S. 391, 403 (1976) ("As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.").

b. The complexity of the legal analysis compounds when a taxpayer is considering whether to make additional disclosures to the IRS *after* an initial return has been filed. In some situations, taxpayers might consider filing superseding or amended returns.

"[A] taxpayer under civil or criminal tax investigation"—or even one not yet under scrutiny—"might well seek an attorney's counsel as to the prospects of civil or criminal liability and the best way for the client to avoid or minimize any such liability." *Willis*, 565 F. Supp. at 1191. Such legal advice from a tax litigator unquestionably should be privileged, "even though the attorney might ultimately advise the client to file an amended return." *Id.* Filing an amended return is not mandatory and the IRS need not accept such filings, *see*

Badaracco v. Comm'r of Internal Revenue, 464 U.S. 386, 393 (1984), but the IRS has formalized procedures for specific types of supplemental or voluntary disclosures. Indeed, recognizing the complexity of deciding whether participation in these programs makes sense for a given taxpayer, the IRS "encourages taxpayers to consult with professional tax or legal advisors in determining which option is the most appropriate for them."[3]

Among these options is one with particularly high stakes: the IRS Criminal Investigation (IRS-CI) Voluntary Disclosure Practice. Under this program, IRS-CI "takes timely, accurate, and complete voluntary disclosures under consideration when determining whether to recommend criminal prosecution."[4] Because this process applies to taxpayers who "have committed tax or tax-related crimes and have criminal exposure," engaging with this program effectively entails confessing to a crime in hopes of receiving favorable legal treatment.

A taxpayer who consults an attorney for assistance about whether to prepare an amended return may not even be aware of the existence of such programs. Yet when the attorney learns the details of the proposed amendments to a previously filed return, the result may well be participation in one of these programs. Disentangling whether a client's "predominate purpose" in contacting a lawyer under these circumstances was to obtain assistance in preparing amended returns or to

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[3] IRS, *Options Available For U.S. Taxpayers with Undisclosed Foreign Financial Assets*, https://www.irs.gov/individuals/international-taxpayers/options-available-for-us-taxpayers-with-undisclosed-foreign-financial-assets (last updated May 16, 2022).

[4] IRS, *IRS Criminal Investigation Voluntary Disclosure Practice*, https://www.irs.gov/compliance/criminal-investigation/irs-criminal-investigation-voluntary-disclosure-practice (last updated May 6, 2022).

obtain legal advice is hopeless. A communication that began with the issue of whether a tax form may be corrected to avoid penalties could quickly turn into counseling about potential criminal liability. In short, a taxpayer facing this scenario should obviously contact a lawyer, not an accountant, for assistance—highlighting the need for attorney-client privilege to apply.

2. Even if initially independent of return preparation, significant legal tax advice is inevitably provided in anticipation of return preparation

Tax lawyers routinely provide significant legal advice about how to structure transactions to obtain favorable tax treatment. That advice necessarily informs how the transactions and their effects will be reported on tax returns. Indeed, it is often most efficient for the tax lawyer who designed the transaction to communicate how its implementation should be reflected on the return that is prepared. Again, therefore, trying to disentangle the significant legal advice from the return preparation, and then weigh the two to determine which "predominates," is a quixotic task.

a. For example, tax attorneys are often asked to advise on settlement agreements. In that role, they must advise both on how to structure the settlement to minimize tax burdens and how to report the settlement on returns to obtain the desired tax treatment.

Consider settlements with a regulator. The general rule is that no tax deduction is allowed for payments to any government related to a legal violation, regardless of whether the amount was determined "by suit, agreement, or otherwise." 26 U.S.C. § 162(f)(1). But an exception exists if the payment (i) "constitutes restitution (including remediation of property) for damage or harm … caused by the violation of any law" or "is paid to come

into compliance with any law which was violated"; (ii) "is identified as restitution or as an amount paid to come into compliance with such law … in the court order or settlement agreement"; and (iii) in cases of restitution for tax non-payment, "would have been allowed as a deduction … if it had been timely paid." *Id*. § 162(f)(2)(A).

A tax attorney's legal advice might have a substantial effect on how the settlement is executed, with respect to both how payment amounts are classified and how much the client is willing to pay in light of possible tax savings. For the same reason, though, the attorney is necessarily advising about the extent to which the settlement payments can be deducted on a tax return. Trying to differentiate between these flip sides of the same coin makes little sense. Moreover, if privilege does not attach, then the government could be able to use discovery to obtain the client's communications with the attorney before the settlement is finalized, which would prejudice the client in settling or litigating the matter. And of course, the mere risk that privilege may be pierced may deter the client from consulting with a tax lawyer about the settlement in the first place.

b. A similar dynamic exists for trusts-and-estates lawyers. When advising on how to structure wills, trusts, and gifts, "minimizing the tax burden of the estate is one of the central tasks entrusted to" an estate-planning attorney. *Estate of Schneider v. Finmann*, 933 N.E.2d 718, 721 (N.Y. 2010). These attorneys must consider myriad federal taxes potentially affecting an estate, including the estate tax, 26 U.S.C. § 2001; gift tax, *id.* § 2501; and generation-skipping transfer tax, *id.* § 2601. Their resulting advice inevitably will address return preparation, such as by determining what assets will be reported as part of the estate, *see, e.g.*, *Crosley v. Comm'r of Internal Revenue*, 47 T.C. 310, 317-18 (1966) (proceeds

from irrevocable life insurance trust fall outside estate), and what tax deductions or credits the client or the eventual estate should claim, *see, e.g.*, 26 U.S.C. § 2010 (unified credit against estate tax); *id.* § 2056 (marital deduction from estate tax).

Again, it is fanciful to try to differentiate whether the more significant purpose of communication with an estate-planning attorney is to determine how to structure the client's estate in a manner that legally minimizes taxes or how to prepare the tax returns that are an inevitable and integral component of the estate plan. In fact, attorneys in this arena are particularly likely to pre-draft the returns that will eventually be necessary, the same tax year or much later, to effectuate the often complex and unique tax strategies that they have personally designed. The law should not incentivize the client to make the inefficient decision of parroting the attorney's advice to a different return preparer, rather than having the attorney implement her own advice in a return she prepares, just in order to increase the likelihood of convincing courts that the attorney's assistance remained "predominately" legal. And here too, the consequences and risks of forfeiting privilege may extend beyond exposing attorney-client communications to the IRS. For example, a client's communications with an estate-planning attorney could be exposed to discovery by her spouse during a divorce or other family-law proceedings.

c. Finally, business counsel routinely provide advice about how to structure transactions and operations based on tax consequences.

For example, some corporate "reorganizations," as defined in 26 U.S.C. § 368, are effectively exempted from some taxes by 26 U.S.C. §§ 354 and 361. The exemptions apply only to certain enumerated types of transactions

and only where they have certain features and purposes. *See* 26 C.F.R. § 1.368-1(b); *Honbarrier v. Comm'r of Internal Revenue*, 115 T.C. 300, 310 (2000). Designing the deal correctly is critical: "a taxpayer's ability to identify an alternative path to a given end result that provides more favorable tax consequences than the path actually taken is not enough to entitle the taxpayer to the desired tax treatment." *Complex Media, Inc. v. Comm'r of Internal Revenue*, 121 T.C.M. (CCH) 1089 (2021).

Likewise, maintaining the workforce of a business in a way that permits classifying the workers as "independent contractors" rather than "employees" has broad implications, including for tax preparation. Generally, a business must withhold certain taxes from an employee's paycheck and pay other taxes as an employer. 26 U.S.C. §§ 3102, 3111, 3402, 6302. By contrast, a business need not withhold or pay taxes on payments to independent contractors. *Hospital Res. Pers., Inc. v. United States*, 68 F.3d 421, 424 (11th Cir. 1995). Businesses are also required to report payments to employees differently from payments to independent contractors for tax purposes. *Compare id*. ("In connection with payments to 'independent contractors,' employers only have to send annual information returns, on Form 1099 to the workers and on Forms 1096 & 1099 to the IRS."), *with United States v. Romanow*, 505 F.2d 813, 814 (1st Cir. 1994) (employers must file a quarterly Form 941 reporting their employee withholdings). Drawing the line between "employees" and other workers under the Code generally requires looking to the "usual common law rules," 26 U.S.C. § 3121(d)(2), which in turn requires applying a multi-factor standard that is the subject of frequent disagreement and litigation, *see, e.g.*, *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (citing IRS revenue ruling that "set[] forth 20 factors as guides" applicable "in various tax law contexts").

A tax attorney thus might be called on to advise a company about how to structure a reorganization or its workforce to ensure that business needs are satisfied while obtaining favorable tax treatment by falling on the desired side of the complex lines above. It is anyone's guess how to decide whether the "predominate" purpose is to obtain legal tax advice or to obtain assistance about what the resulting tax returns should say. But it is clear that confidential communications with a lawyer in these circumstances have a "significant" legal purpose and should be shielded by attorney-client privilege from the IRS, competitors, workers, and others who may seek to obtain the communications without the client's consent.

3. Tax law itself sometimes requires analyzing a business's non-legal goals

Wholly apart from the relationship between tax legal advice and tax-return preparation, substantive tax law sometimes requires tax attorneys to analyze a client's business objectives, which further undermines the feasibility of determining whether "legal" or "non-legal" purposes predominate. Although this inter-relationship arises in several areas, it is most evident in the application of a group of closely related tax-law doctrines that look behind the technical form of a transaction to ascertain its substantive essence. *See Feldman v. Comm'r of Internal Revenue*, 779 F.3d 448, 455 (7th Cir. 2015) (describing the "substance-over-form" doctrine, the "business purpose" doctrine, and the "economic substance" doctrine).

Under these doctrines, even where a transaction meets "every element required by" the governing statutory or regulatory language, it may nonetheless be disregarded for tax purposes if "its real character" falls "outside the plain intent of the statute." *Gregory v. Helvering*, 293 U.S. 465, 468-70 (1935). Because tax law will not "exalt

artifice above reality," *id*. at 470, a transaction that is "devoid of economic substance … simply is not recognized for federal taxation purposes." *Lerman v. Comm'r of Internal Revenue*, 939 F.2d 44, 45 (3d Cir. 1991). Determining whether transactions will "be respected for tax purposes turns on both the 'objective economic substance of the transactions' and the 'subjective business motivation' behind them." *ACM P'ship v. Comm'r of Internal Revenue*, 157 F.3d 231, 247 (3d Cir. 1998). Specifically, a transaction "shall be treated as having economic substance only if" it "changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position" and "has a substantial purpose (apart from Federal income tax effects)." 26 U.S.C. § 7701(o)(1). Taxpayers can rely on "profit potential" to satisfy these requirements "only if the present value of the reasonably expected pre-tax profit from the transaction is substantial in relation to the present value of the expected net tax benefits that would be allowed if the transaction were respected." *Id*. § 7701(o)(2).

Because of these doctrines, to advise a client regarding a transaction's likely tax treatment, a tax lawyer must also advise whether the transaction is "rationally related to a useful nontax purpose." *Buyuk LLC v. Comm'r of Internal Revenue*, 106 T.C.M. (CCH) 502 (2013). In other words, a tax lawyer must evaluate whether a transaction makes business sense to determine whether it will qualify as a valid transaction for tax purposes. For example, in *Bank of New York Mellon Corp. v. Comm'r of Internal Revenue*, 801 F.3d 104 (2d Cir. 2015), the court considered a "foreign tax credit regime [that] was intended to facilitate business abroad and foreign trade." *Id.* at 107. Although the taxpayer argued that "a court should never be able to question a taxpayer's use of the credits" so long as it "compl[ies] with all statutory and

regulatory requirements, *id.* at 113, the court disagreed, applying the "economic substance" doctrine to disallow the credit because the taxpayer "had little to no potential for economic return apart from the tax benefits," *id.* at 119; *see also Feldman*, 779 F.3d at 456 (finding that a transaction "lacked any valid nontax business purpose"). Thus, whenever a client is considering whether to engage in a transaction at least in part *for the legal purpose* of obtaining a tax benefit, an attorney will also need to analyze the *business purpose* of the transaction. This makes it particularly perilous for a court to try to determine whether the lawyer is "predominately" analyzing the business strategy for its own sake or instead for the legal implications under the tax code.

C. The Folly Of Weighing The Relative Significance Of Legal Tax Advice Is Exacerbated By The Substantial Overbreadth Of The Rationales For Treating Return-Preparation Assistance As "Non-Legal" In The First Place

Outside the context of tax returns, when a lawyer and a client communicate in confidence in order to properly prepare and file a mandatory form with the government, that is a heartland scenario for attorney-client privilege. After all, one of the most "valuable" roles played by attorneys is "to ensure their client's compliance with the law," *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981), and helping a business this way "does not transform quintessentially legal advice into business advice," *KBR*, 756 F.3d at 760. This is true even for mandatory filings that may include data submission and numerical calculations, given the legal requirements that inform how to properly provide such information. *See, e.g.*, *Roth v. Aon Corp.*, 254 F.R.D. 538, 541 (N.D. Ill. 2009) (noting that "how best to legally comply with SEC regulations" in connection with Form 10-K filings is

"precisely the type of day-to-day guidance for which a corporation would likely rely on counsel").

Lower courts nevertheless have offered two reasons for sometimes treating communications between tax lawyers and taxpayers as effectively "non-legal" in the context of tax-return preparation. But each rationale is substantially overbroad, and neither one supports treating tax returns differently from other legally mandated filings. *Cf. Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011) (refusing "to carve out an approach to administrative review good for tax law only").

First, some lower courts have suggested that simply because *accountants and other non-lawyers* are permitted to provide advice and assistance to taxpayers in preparing tax returns, such work should necessarily be treated as non-legal even when confidentially performed by lawyers instead. *See Frederick*, 182 F.3d at 500 ("a taxpayer must not be allowed, by hiring a lawyer to do the work that an accountant … normally would do, to obtain greater protection from government investigators"); *see also, e.g.*, *Davis*, 636 F.2d at 1043; *In re Grand Jury Investigation*, 842 F.2d at 1225. Such sweeping reasoning reflects a fundamental category error. *See United States v. Summe*, 208 F. Supp. 925, 928 (E.D. Ky. 1962) ("The fact that a nonlawyer could perform whatever service the communication is related to does not mean that the communication cannot be privileged."). Although policymakers sometimes create exceptions from the general prohibition on non-lawyers' providing legal services, those exceptions in no way imply that clients lose the right to claim the benefits of privilege if they choose to retain an actual lawyer rather than an authorized non-lawyer practitioner. *See, e.g.*, *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 383, 385 (1963)

(recognizing that Congress and the Commissioner of Patents have "authorize[d] practice before the Patent Office by non-lawyers," without "question[ing] the determination that … the preparation and prosecution of patent applications for others constitutes the practice of law," much less suggesting that attorney-client privilege does not apply to patent lawyers who prepare and prosecute patents); *Medlock v. LegalZoom.Com, Inc*, No. 2012-208067, 2013 S.C. LEXIS 362, at *5 (S.C. Oct. 25, 2013) (finding that LegalZoom was not engaged in unauthorized practice of law even though it assisted customers in preparing documents for, among other things, divorce, corporate dissolution, wills, partnership agreements, and real estate leases), *adopting*, 2014 S.C. LEXIS 358, at *1 (S.C. Mar. 11, 2014).

It is up to policymakers to decide whether, and to what extent, to extend privilege to non-lawyers authorized to provide services also provided by lawyers. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (no common-law accountant-client privilege exists). Indeed, "[w]ith respect to tax advice," Congress has provided, subject to exceptions, that "the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney." 26 U.S.C. § 7525(a)(1). Whatever the rule that policymakers may select for authorized non-lawyer practitioners, however, the common-law attorney-client privilege properly applies to confidential communications between lawyers and clients for purposes of obtaining legal services related to return preparation.

Properly cabined, the principle that privilege does not attach for attorneys performing accountants' work applies only where the client has not retained the lawyer *in a legal capacity*. For example, a person who is "both an attorney and [an] accountant" cannot assert privilege for communications if retained by a client solely in the latter capacity. *See, e.g.*, *Olender v. United States*, 210 F.2d 795, 806 (9th Cir. 1954). Likewise, if an attorney has "acted not as a lawyer, but merely as a scrivener," then privilege does not attach. *Canaday v. United States*, 354 F.2d 849, 857 (8th Cir. 1966). For present purposes, what is important is that such scenarios do not show that attorney-client communications about return preparation inherently have a "non-legal" purpose, let alone one that must somehow be weighed against a significant legal purpose in obtaining tax advice. They just illustrate that, for privilege to attach, there must actually be *a significant legal purpose* for the attorney-client communication in the first place, as the D.C. Circuit held in *KBR*.

Second, some lower courts have suggested that simply because the contents of *the tax return itself are disclosed* to the government and therefore are not confidential, the earlier attorney-client communications when preparing the return are necessarily not privileged either. *See United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983) ("If the client transmitted the information so that it might be used on the tax return, such a transmission destroys any expectation of confidentiality which might have otherwise existed."); *see also, e.g.*, *Davis*, 636 F.2d at 1043 n.18; *Colton*, 306 F.2d at 638; *Cote*, 456 F.2d at 144-45. Again, such sweeping reasoning reflects a fundamental category error. "Public disclosure of facts does not destroy the attorney-client privilege with respect to confidential communications about those facts." *United States v. Murra*, 879 F.3d 669, 682 (5th Cir. 2018); *see Frederick*, 182 F.3d at 500 ("We do not, however, accept

the government's argument that there is no issue of privilege here because the information was transmitted to a tax preparer with the expectation of its being relayed to a third party, namely the IRS.”). That precept is the converse of the maxim in *Upjohn* that “[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.” 449 U.S. at 395.

Accordingly, while the facts disclosed in a tax return are not (and never were) privileged, the attorney-client communications about preparing the return continue to be privileged so long as the communications themselves remain confidential. The implications of a contrary rule would be staggering. Clients routinely engage in privileged communications with counsel in the course of preparing all types of documents that will later be disclosed to all sorts of third parties, including correspondence,[5] contracts,[6] and affidavits.[7] The disclosure of such documents obviously does not vitiate the privilege in preparing them.

Properly cabined, the principle that attorney-client privilege concerning tax-return preparation is vitiated by disclosure applies only where *the communications themselves* are not confidential. For example, if the communications were always intended to be disclosed to a third party (e.g., an independent auditor), then they never had the confidentiality necessary for privilege to attach. *See, e.g.*, *El Paso*, 682 F.2d at 539-40. Or if the

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[5] *E.g.*, *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984).

[6] *E.g.*, *BankDirect Cap. Fin., LLC v. Cap. Premium Fin., Inc.*, 326 F.R.D. 176, 183 (N.D. Ill. 2018).

[7] *E.g.*, *Ideal Elec. Co. v. Flowserve Corp.*, 230 F.R.D. 603, 606 (D. Nev. 2005).

communications are later disclosed to a third party (e.g., to justify the client's actions), then the privilege has been waived. *See, e.g.*, 1 MCCORMICK ON EVID. § 93 (8th ed. July 2022 update) (where "advice of counsel" is "essential element of a claim or defense," privilege is waived "as to all advice received concerning the same subject matter"). Once more, such scenarios do not show that attorney-client communications about return preparation inherently have a "non-legal" purpose, let alone one that must somehow be weighed against a significant legal purpose in obtaining tax advice. They just illustrate that *attorney-client confidence* must be maintained.

In sum, given the sweeping overbreadth of the rationales that have been offered for sometimes treating attorney-client communications about tax-return preparation as effectively "non-legal", it is all the more essential that this Court adopt the "a significant purpose" test for determining whether attorney-client privilege attaches to dual-purpose communications. That at least will mitigate the problem of trying to distinguish between a "legal" purpose and an assertedly "non-legal" purpose that is inherently intertwined with confidential legal advice from a lawyer about how to comply with the law.

CONCLUSION

The judgment below should be reversed or vacated.

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