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

AMICUS CURIAE BRIEF OF FEDERATION OF DEFENSE & CORPORATE COUNSEL IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Under rule 29.6 of the Rules of this Court, *amicus curiae* Federation of Defense & Corporate Counsel states the following:

Federation of Defense & Corporate Counsel is a not-for-profit corporation with no shareholders.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Federation of Defense & Corporate Counsel (FDCC) is a not-for-profit corporation with national and international membership of 1,550 defense and corporate counsel working in private practice, as in-house counsel, and as insurance industry professionals. A significant number of FDCC members practice in the trial and appellate courts of the United States both at the federal and state level. Since 1936, its members have established a strong legacy of representing the interests of civil defendants, including publicly and privately owned businesses, public entities, and individual defendants. The FDCC seeks to assist courts in addressing issues of importance to its membership that concern the fair and predictable administration of justice.

As in-house and outside counsel in civil litigation, FDCC members have a deep interest in the scope and application of the attorney-client privilege and the establishment of a clear and uniform test for

[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amicus curiae* and counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner has filed a blanket consent to the filing of amicus briefs. Respondent has separately consented to the filing of this brief as well.

determining when communications with dual purposes of both legal and business advice are privileged.

SUMMARY OF ARGUMENT

The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also Mitchell v. Superior Court*, 37 Cal.3d 591, 599-600 (1984) (footnote omitted) ("The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for [more than] 400 years," which "our judicial system has carefully safeguarded with only a few specific exceptions."); Harmar Brereton, A. Kenneth Pye, James R. Withrow, Jr., *The Attorney-Corporate Client Privilege*, 24 Record of the Bar Association of New York 230-31 (1969) (describing the evolution of the attorney-client privilege from the Sixteenth Century forward). The privilege, as this Court has acknowledged, exists "to encourage clients to make full disclosure to their attorneys"; this not only promotes trust between an attorney and her client, but also reflects a recognition 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*, *supra*, 449 U.S. at 389.

"[F]or the attorney-client privilege to be effective, it must be predictable." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 183 (2011). "An uncertain privilege, or one which purports to be certain but

results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, *supra*, 449 U.S. at 393. The single primary purpose test adopted by the Ninth Circuit in this case – unlike the "one significant purpose" test in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (Kavanaugh, J.) that has also been adopted by many district courts and state appellate courts – adds heightened uncertainty to privilege protection, since it depends on a court's interpretation of a client's primary motivation in seeking the lawyer's advice in the first place. *See* Amber Stevens, *An Analysis of the Troubling Issues Surrounding In-House Counsel and the Attorney-Client Privilege*, 23 Hamline L. Rev. 289, 316 (1999-2000) (observing that "much of the uncertainty regarding whether the privilege will apply in the corporate context relates to the diverse application of the predominant purpose test").

The need for certainty is heightened further by the new realities of corporate life, in which legal advice is often sought for combined legal and business reasons by digital means, including email and Slack chains, leading to even more dual-purpose legal communications. *See generally* Mark C. Van Deusen, *The Attorney-Client Privilege for In-House Counsel When Negotiating Contracts: A Response to* Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp., 39 Wm. & Mary L. Rev. 1397, 1397-98 (1998) ("[E]xecutives increasingly are seeking legal advice from 'corporate' or 'in-house' attorneys. . . . The work of these attorneys has changed significantly. . . . They routinely perform more substantive

work, including litigation. . . . In-house counsel often perform dual roles, acting as both executives and attorneys. Additionally, attorneys without formal business duties often intermingle business advice with legal advice."); Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 Fordham L. Rev. 955, 957-58 (2005). In this environment, the *Kellogg* test strikes the right balance between what is privileged and what is not.

ARGUMENT

I. This Court should adopt a privilege test that encompasses attorney communications for which legal advice was not necessarily the primary purpose, but one of the significant purposes.

A. A "one significant purpose" test aligns with the Restatement and the current approach of many federal and state courts.

According to the Restatement Third of the Law Governing Lawyers, "[i]n general, American decisions agree that the privilege applies if one of the significant purposes of a client communicating with a lawyer is that of obtaining legal assistance." Restatement (Third) of the Law Governing Lawyers § 72, Reporter's Note, cmt. c. at 554 (2000).

This is the approach endorsed by the D.C. Circuit in *In re Kellogg Brown & Root, Inc.*, *supra*, 756 F.3d

754. In that case, the court rejected the "primary purpose" test as inappropriate because it "would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege." *Id.* at 759. The more appropriate approach to determining whether the attorney-client privilege applies, the court held, is to analyze whether "obtaining or providing legal advice was one of the significant purposes of the [communication.]" *Id.* at 758; *see also FTC v. Boehringer Ingelheim Pharm., Inc.*, 892 F.3d 1264, 1267-68 (D.C. Cir. 2018) (holding that whether legal advice "was *one of* the significant purposes of the attorney-client communication . . . helps to reduce uncertainty regarding the attorney-client privilege" (emphasis in original)).

This is the approach endorsed by many district courts, as Petitioner's Brief on the merits notes. (Pet. Brief at 21-22); *see also United States ex rel. Bibby v. Wells Fargo Bank, N.A.*, 165 F.Supp.3d 1319, 1329 (N.D. Ga. 2015) ("If one of the primary purposes of the communication is to seek legal advice, then the privilege attaches."); *Edwards v. Scripps Media, Inc.*, 2019 WL 2448654, at *1-2, Case No. 18-10735 (E.D. Mich. June 10, 2019) (adopting "significant purpose" analysis in *Kellogg*); *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-MD-2836, 2019 WL 6122012, at *4 (E.D. Va. July 16, 2019) (finding that communications were privileged even though they addressed business as well as legal issues); *Pitkin v. Corizon Health, Inc.*, 2017 WL

6496565, at *3-4, Case No. 3:16-cv-02235-AA (D. Or. Dec. 18, 2017).

Several state courts have endorsed this approach too. *See Morgan v. Butler*, 85 N.E. 3d 1188, 1195-96, 2017 Ohio 816 (Ohio Ct. App. 2017) (holding that obtaining legal advice need not be the *only* purpose for a communication; so long as "a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged."); *In re Fairway Methanol LLC*, 515 S.W.3d 480, 489 (Tex. Ct. App. 2017) (holding that Texas attorney-client privilege law "does not require that the *primary* purpose of the communication be to facilitate the rendition of legal services; it only requires that the communication be made to facilitate the rendition of legal services." (emphasis in original)); *Am. Zurich Ins. Co. v. Mont. Thirteenth Jud. Dist. Ct.*, 280 P.3d 240, 245 (Mont. 2012) (attorney-client privilege protects confidential communications "necessary to obtain informed legal advice").

In adopting this test, these courts, consistent with this Court's precedent, have rejected an after the fact balancing test that fails to sufficiently define the contours of the privilege, and may give clients pause in consulting a lawyer because they cannot determine whether their communications will remain confidential. *See generally Swidler & Berlin v. U.S.*, 524 U.S. 399, 409 (1998); *Jicarilla Apache Nation*, *supra*, 564 U.S. at 183. *See also* Tom Spahn, *Corporate Attorney-Client Privilege in the Digital Age: War on Two Fronts*, 16 Stan. J.L. Bus. & Fin. 288, 301-05 (2011)

(describing Association of Corporate Counsel and other corporate counsel group surveys, resolutions, and proposals by both the Conference of Chief Justices and the U.S. Congress voicing concerns about erosion of the attorney-client privilege and its chilling effect on corporate compliance programs and executives' willingness to seek early guidance on complex regulatory issues).

B. Such a test also reflects the modern role of in-house counsel and online communication.

A "one significant purpose" test takes into account the convergence of two trends: the expanding role of in-house counsel and the ubiquitous use of email and online communications.

In the modern era, lawyers "offer mixed legal and non-legal advice at many points in the decision-making process, especially in highly regulated industries where nearly every decision involves some legal aspect. Lawyers have also become involved much earlier in the decision-making process, often providing legal insight from the very earliest stages of forming company policy or decisions." Tom Spahn, *Corporate Attorney-Client Privilege in the Digital Age: War on Two Fronts*, *supra*, 16 Stan. J.L. Bus. & Fin. at 293.

At the same time, "technological advances have fundamentally changed how the world communicates. E-mail, text messages, electronic document editing,

and other digital communication tools have had a particularly dramatic effect on the pace and efficiency of business decisions." *Id*. at 292. *See also* Victor Fredstrand and Yacoub Hanna, *Remote Work – Redefining the workplace through the lense of change management. A case study on the demands that arise when working remotely in the perspective of employees and managers* 1, 6 (2021), https://www.divaportal.org/smash/get/diva2:1583381/FULLTEXT01.pdf. ("In the last decade there has been an exponential and ongoing digital transformation that has changed our society and thus the way people interact and work on a daily basis," including, for example, the replacement of traditional in-person seminars and meetings with "webinars using video streaming applications, e.g., Zoom, Google Meet and Microsoft Teams.") As one author has observed: "[D]igital age innovations have facilitated communication between organizations and their lawyers. While messaging was previously limited to traditional options such as telephone calls, paper letters, and facsimiles, lawyers and clients now enjoy an abundance of media through which they can instantaneously exchange information. Besides e-mail, companies and counsel now trade messages through short message service, instant messages, social networking sites, and voice over Internet protocol (VoIP). The methods for doing so have also expanded, with small form factor (SFF) devices such as smartphones and tablet computers replacing desktop computers and other antiquated tools. And with the proliferation of cloud computing, both client and counsel essentially have an unlimited

virtual warehouse in which to store their digital discussions." Philip J. Favro, *Inviting Scrutiny: How Technologies Are Eroding the Attorney-Client Privilege*, 20 Rich. J.L. & Tech. 2, 2-3 (2013), *available at* http://jolt.richmond.edu/v20i1/article2.pdf.

"The free flow of communications across corporate departments has greatly enhanced efficiency as legal, business, and scientific members of the company collaborate continuously," "greatly enhanc[ing] the value of in-house counsel." *Corporate Attorney-Client Privilege in the Digital Age: War on Two Fronts*, *supra*, 16 Stan. J.L. Bus. & Fin. at 293.

These trends are likely to continue, given the continued prevalence of remote and hybrid work environments; "[r]emote work has existed long before the Covid pandemic, but the occurrence of the pandemic has forced the shift to remote working and thereby accelerated the digital transformation of today's workplaces." Victor Fredstrand and Yacoub Hanna, *Remote Work, supra*, at 2 (citations omitted). For example, "[a]lthough video conferencing tools have existed for a long time they have evolved and increased rapidly in use due to the Covid pandemic which ha[s] forced large parts of the workforce to communicate and interact digitally." *Id*. at 6 (citations omitted). Moreover, according to a September 2022 ABA report, 87% of lawyers surveyed said that their workplaces continue to allow them to work remotely, either in a hybrid or fully remote format. Amanda Robert, *Working remotely is now a top priority, says new ABA report highlighting lasting shifts in practice of law* (September 28, 2022),

https://www.abajournal.com/web/article/new-aba-report-highlights-lasting-shifts-in-practice-of-law-and-workplace-culture#:~:text=According%20to%20the%20ABA's%20report,to%20three%20days%20a%20week. At the same time, the number of emails, both sent and received, continues to grow worldwide: from 269 billion in 2017 to 333 billion each day in 2022. *See* Number of sent and received emails per day worldwide from 2017 to 2025 (in billions) (February 2021), https://www.statista.com/statistics/456500/daily-number-of-emails-worldwide/ (last visited November 17, 2022).

The convergence of an increased use of technology in the workplace and the expanded role of inhouse counsel makes it much easier for legal communications to be intertwined with business communications. The "one significant purpose" test reflects this new reality.

CONCLUSION

For these reasons, and for the reasons stated in the Petitioner's briefing on the merits, this Court should adopt the "one significant purpose" test for assessing the scope of the attorney-client privilege.

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Respectfully submitted,

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