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

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BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS[1]

The ABA is the largest voluntary association of attorneys and legal professionals in the world. Its members come from all fifty States, the District of Columbia, and the United States territories, as well as foreign countries. The ABA's membership includes attorneys practicing at law firms, corporations, nonprofit organizations, the federal, State and local governments, as well as judges,[2] legislators, law professors, law students, and associates in related fields.

In their various practices, attorney members of the ABA, in every field of practice, and their clients, routinely rely on the attorney-client privilege to protect legal-advice communications from disclosure to third parties. The attorney-client privilege, as this Court has often recognized, is essential to maintaining the confidential relationship between client and attorney, which ultimately benefits our entire society. Thus, the ABA has adopted policies strongly supporting "the preservation of the attorney-client privilege."[3] These policies, which again are in line with this Court's precedents, recognize that preservation of the privilege is beneficial "to encourage clients to discuss their legal matters fully and candidly with their counsel so as to: (1) promote compliance with law through effective

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[1] No counsel for any party authored this brief in whole or in part, and no person other than the amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The Petitioner filed a blanket consent to all amicus filings, and the Respondent consented to this filing.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council has participated in the adoption or endorsement of the positions set out in this brief.

[3] ABA Resolution 05A111 (adopted 2005).

counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice."[4] To further these goals, the ABA has consistently expressed opposition to "policies, practices and procedures * * * that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections."[5]

The ABA has repeatedly adopted policies supporting the attorney-client privilege in specific business law contexts, including "in connection with audits of company financial statements,"[6] "between in-house counsel and their clients,"[7] and between American lawyers and their clients in the European Union.[8] The ABA's interest in protecting the attorney-client privilege, however, is not limited to business law, but extends to all areas of practice, including criminal, immigration, family law, and other essential legal services. Thus, the ABA and its broad membership from all aspects of the profession have a strong interest in how this Court construes and applies the time-honored attorney-client privilege and have deep concerns regarding any possible narrowing of the privilege beyond already well-established exceptions.

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[4] *Id.*

[5] *Id.*

[6] ABA Resolution 06A302A (adopted 2006).

[7] ABA Resolution 97A120 (adopted 2006).

[8] ABA Resolution 08M301 (adopted 2008).

SUMMARY OF ARGUMENT

I. The attorney-client privilege is fundamental to the fair operation of our adversarial system of justice and to society's trust and confidence in the legal system. Knowing that adversaries cannot access communications between lawyers and their clients (absent criminal or fraudulent intent) enables clients to make frank and complete disclosures to their lawyers. Full disclosure between clients and their lawyers enables better and more accurate legal advice, which in turn enables clients to make better-informed decisions. By enabling lawyers to provide complete and honest legal advice based on candid client-lawyer communications, the privilege helps clients better conform their conduct to the law, to the benefit of society as a whole.

A broad and clearly understood attorney-client privilege is vital to effectuating these underlying beneficial purposes of the privilege.

II. Certainly, when a significant purpose of a client-lawyer communication is a request for legal advice or counsel, that communication should be protected, even if some aspects of the communication are not necessarily for that purpose. However, many such communications are "mixed" in purpose, and parsing them to determine the "significance" of various client purposes is uncertain at best, and unnecessary. Existing limitations on the attorney-client privilege—for example, the crime-fraud exception, waiver by publication to third parties, and inapplicability when not seeking legal advice at all—are well-established and sufficient to serve competing interests.

The Ninth Circuit's test would narrow the privilege well beyond already well-established exceptions and limitations, without justification. It would also introduce

substantial uncertainty into the existence and extent of the privilege. For this reason, this Court should firmly reject it.

The unhealthy difficulties of a "primary-purpose" test are real. It is common for clients to seek legal counsel in situations where legal purposes substantially overlap with business, regulatory compliance, and other not-exclusively-law-related purposes. Indeed, clients will sometimes discuss entirely irrelevant, personal topics with their lawyers, while also seeking legal advice. Moreover, client discussions are often interwoven with a variety of communications, without regard to precise purpose-minding, in ways that make separating and evaluating the purpose of every aspect almost impossibly complex and uncertain—particularly for a reviewing court charged with the task in most cases years after the fact. There is no need in this case to place such a new burden on clients, their attorneys, and reviewing courts. Such discussions should be protected as a whole, not parsed sentence by sentence or phrase by phrase. Requiring courts to untangle multiple purposes and determine which was the "primary" purpose will result in honest communications about legal matters between attorneys and clients being exposed in unclear and unpredictable ways.

This Court should reject the primary-purpose test for several reasons. That test does not allow clients to confidentially share full information with their lawyers in dual-purpose scenarios. It also inhibits both lawyers and clients from fully exploring potentially relevant facts and full legal options. And, it would involve courts in endless parsing of communications, whether *in camera* or otherwise—a process that would, of itself, inhibit full and candid communication. Moreover, the primary purpose test would prove costly

and inefficient by incentivizing clients and lawyers to take steps to minimize or compartmentalize the role of lawyers and the range of discussion held with them, when arguably non-legal purposes are involved.

Additionally, and importantly, the Court should avoid going any further in this case than is necessary to reject the "primary-purpose" test and should not adopt any *other* test that would narrow the existing privilege beyond well-established exceptions and limitations. For example, while a "significant purpose" test is certainly better, because it is less intrusive on the attorney-client relationship than the Ninth Circuit's test, it still would leave substantial uncertainty and less protection for clients searching for legal advice. A test that looks to a "significant purpose" of attorney-client communications is similarly problematic to the extent it also requires difficult determinations of what purposes pass the threshold of "significance." Attorneys and clients should be able to have certainty that their communications are privileged so long as *any* purpose of those communications is to obtain or provide legal advice and no other well-established exception applies. There is no reason to carve out a new exception for communications that involve a genuine yet somehow "insignificant" legal purpose, and this case does not require the Court to do so.

Where, as here, a purpose of the communication is to obtain or provide legal advice, the communication should be protected, and the Ninth Circuit's contrary approach should be rejected. The Court should not narrow the attorney-client privilege when a purpose of communications is for legal consultation, and it should not muddy the analysis of a time-honored privilege that is, by comparison, relatively clear and understandable by clients and lawyers alike.

ARGUMENT

I. A Strong and Certain Attorney-Client Privilege is Essential in Our Adversarial System of Justice and Ultimately Benefits Society as a Whole.

As this Court has long recognized, "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." *Fisher v. United States*, 425 U.S. 391, 403 (1976). This principle has been a foundation of the American legal system from the earliest days of the nation. The well-understood certainty and breadth of that privilege protects both clients and lawyers, ensuring that clients feel able to provide complete information to their lawyers and that lawyers are in turn able to provide fully informed legal advice. The Ninth Circuit's primary-purpose test for privilege undermines the certainty necessary to the attorney-client relationship and harms society's interest in the availability of confidential and sound legal advice.

A. A Strong and Certain Attorney-Client Privilege Is a Bedrock Principle of American Law.

American courts recognize that, to protect certain relationships highly valued by society, confidential communications made within those relationships must be shielded from forced disclosure. Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 3.2.3 (4th ed. 2022). That has given rise to privileges for communications made between spouses, attorney and client, clergy and penitent, physician and patient, and psychotherapist and patient. *Id.* at § 3.2.4. Of these, the attorney-client privilege is the

oldest, with roots dating back to sixteenth-century England. *Id.* at § 2.2.

By the time of the founding of the United States, the attorney-client privilege was well established as a means to ensure a "client's freedom of action when dealing with his legal advisor," and American courts of the founding era applied the privilege. Paul R. Rice et al., *Attorney-Client Privilege in the United States* §§ 1:3, 1.12 n.2 (2021) (collecting cases between 1782 and 1817).

In keeping with this tradition, this Court has also long recognized that encouraging full and frank communication between lawyers and their clients promotes the public "interest and administration of justice." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). In *Hunt*, the Court noted that the assistance of an attorney "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Id.* As then-Justice Rehnquist later explained in his opinion for the Court in *Upjohn*, the purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege recognizes that sound legal advice or advocacy based on full and candid information serves the public good, and that this depends upon lawyers' being fully informed by clients without inhibition. There are of course exceptions and limitations to this general rule, such as when a client discloses information to a lawyer to seek legal advice in furtherance of an ongoing crime or fraud or when there is intentional disclosure to a

third party.[9] But, crucially, those exceptions and limitations are of limited number and well defined so that they do not inject uncertainty into the privilege.

Additionally, protecting attorneys and their clients' communications from disclosure prevents litigants in our adversarial system of justice from building their cases on the factual investigation and legal analysis performed by their opponents. *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions * * * on wits borrowed from the adversary.").

B. A Strong and Certain Privilege Protects Clients and the Legal System's Interests.

Clients can obtain meaningful legal advice to guide their conduct within the bounds of the law only if their lawyers are fully aware of all the facts. Such candid communication depends on clients' faith that their communications with their lawyer will be shielded from future disclosure. Thus, clients must "be in a position to forecast whether a privilege would later protect" those communications. Imwinkelried, *supra* § 1.2.2. If disclosure to lawyers means that information may become more easily available to an adverse party somewhere down the road, clients will be more reticent about what they choose to share with their lawyer. *United States v Fisher*, 425 U.S. 391, 403

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[9] When portions of the communications are published to a third party, such as on a tax return filing, the privilege is lost with respect to such communications. 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, 715-720 (2008) (collecting cases).

(1976). Of course, the less the client shares with the lawyer, the lower the quality of the advice. Good legal advice, provided on full information by lawyers presumptively acting within the bounds of the law and ethical rules, benefits our legal system as a whole.

The process of obtaining legal advice is a dynamic and often "messy" one, with the client communicating all sorts of information (relevant or not) and goals, and the lawyer asking follow-up questions to refine the application of the law to the facts of the client's specific circumstances. At the outset, clients often seek advice because they are unaware of the legal principles and the potential magnitude or scope of consequences of their actions or contemplated actions. Clients do not neatly separate the "purposes" of their communications with attorneys, but instead often "dump" a mess of information and thoughts into wide-ranging and interwoven discussions. In situations where a reviewing court might say the client had "dual purposes" in obtaining a lawyer's assistance, the reality will often be less clear. Inherent uncertainty about what legal issues might be in play and what facts and goals are relevant makes it difficult for the client to know the relative ("primary" or "significant") importance of various aspects of the conversation. Indeed, the very reason for client consultation with a lawyer is to determine the legal relevance of facts and purposes, and the potential for, and magnitude of, any legal exposure.

In these common circumstances, it is crucial that a lawyer can confidently advise the client that communications "made in order to obtain legal assistance are privileged," *Fisher*, 425 U.S. at 403, regardless of whether the client may also have other purposes in their conversations with lawyers. It should be enough that *one* of the purposes of involving a lawyer was the

desire to obtain legal advice. Otherwise, clients will be inhibited in their disclosures to their lawyers, fearful that "after the fact of communication, a judge could surmount the privilege on the basis of the judge's ad hoc assessment." Imwinkelried, *supra* § 1.2.2.

C. A Strong and Certain Privilege Also Fosters Full Evaluation of Conflicts of Interest.

Certainty in the privilege not only allows lawyers to provide fully informed legal advice but also reduces lawyers' concerns about their own potential liabilities for advice rendered with less than full information. In highly regulated areas of the law like federal taxation, for example, rules exist governing the conduct of practitioners (including lawyers). In the tax arena, tax return preparers and tax advisers can be penalized civilly[10] or criminally,[11] may be enjoined,[12] and may be subject to discipline by the IRS Office of Professional Responsibility.[13] Accordingly, when the government reviews a taxpayer's tax filings, it may also review the role of the return preparer or tax adviser if it believes there are significant errors. If a lawyer does not receive all of the facts due to the client's fear of disclosure, the risk of prosecution or penalty for inadvertently giving poor advice increases many times over. The same is true in other areas of the law where lawyers are subject to regulation by the agencies they practice before.

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[10] 26 U.S.C. §§ 6694, 6695, 6700, 6701, 6707, and 6708.

[11] 26 U.S.C. § 7206(2).

[12] 26 U.S.C. §§ 7407 and 7408.

[13] 31 U.S.C. § 330(c).

Allowing information to flow freely under the cover of the privilege means not only that the client does not have to worry that information divulged to the lawyer could be used against the client, but that the lawyer likewise does not have to worry that he or she could be the target of a regulatory or criminal investigation based on discussions with the client that are deemed unprotected by the privilege. Thus, when privilege protections are in place, the lawyer does not have to worry as much about personal self-interest when determining what to advise the client.

D. A Strong and Certain Privilege Benefits Society as a Whole.

A certain privilege also provides societal benefits beyond the attorney and client. Our system of justice is based in part on lawyers' ability to counsel clients about their rights and obligations under the law. For example, this Court recognized in *Upjohn* that attorneys must be able to obtain the full information necessary to advise their clients about compliance with the law. 449 U.S. at 492. Clients who are afraid to provide their lawyers with the full story will not end up with the same quality of advice regarding compliance with the law that they otherwise would if the privilege provided more certainty. In addition to the deleterious effect on lawyers' ability to ensure compliance with the law, this could also affect the client's bottom line because not receiving timely advice to mitigate or remediate prior conduct often proves expensive in the long run.

To ensure lawful conduct, it is essential that "the attorney and client * * * be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn,* 449 U.S. at 393. Thus this Court in *Swidler & Berlin v. United States*, 524 U.S.

399 (1998), rejected a posthumous exception to the privilege, even for communications that have a "substantial importance" to criminal litigation. As Chief Justice Rehnquist explained, for the Court such an exception would introduce "substantial uncertainty into the privilege's application." *Id.* at 409. Likewise, in *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Court held that applying a balancing test for communications subject to the mental-health-professionals privilege "would eviscerate the effectiveness of the privilege." *Id.* at 17–18.

Moreover, if a primary-purpose test is adopted, clients may try to dissociate and distance their legal advisors from any roles that might be viewed as non-legal. For example, rather than have the trusted, long-time legal advisor prepare a tax return or a regulatory filing, the client might choose to hire an additional non-legal professional to be primarily responsible for the filing. Going forward, the client would ask the trusted legal advisor only very specific "clearly legal" questions. This will come at an additional cost to the client. It may also have an impact on the quality of the advice received. The lawyer may not review the client's situation as carefully as in the past because the lawyer is no longer primarily responsible for the submission and does not engage in the dynamic and interactive process at the outset of a complex legal engagement; rather, the lawyer receives only very specific information, narrowly tailored to fit the discrete "purely legal" question that the client believes should be presented and nothing more. This may hinder the lawyer's ability to provide the best possible advice to the client.

E. A Protective and Certain Privilege Furthers Every Area of Legal Practice, Not Just "Business" Interests.

While this particular case arises in the tax-law context, it is vitally important to recognize that what this Court says will affect *every* area of legal practice. Many, if not all, areas of legal practice involve client communications where the purposes will be mixed and unclear, not just at the outset but throughout the attorney-client relationship. This Court, then, should be extremely cautious in endorsing a new "test"—which creates an *exception* to the privilege—that would impose unclear boundaries and that is also unnecessary to decide this case.

Thus, unsophisticated clients in contexts involving criminal law, family law, immigration, bankruptcy, and trusts and estates all often approach their lawyers without legal knowledge or a clear division of "purposes" in their minds. One can easily imagine the criminal suspect, the undocumented refugee, the distraught spouse, or the elderly testator, trying to determine the lawful path, significance, and magnitude of their choices and actions. Even if their lawyer may also be assisting them in a non-legal capacity as well, each of these individuals is seeking legal counsel and thus presumptively within the existing attorney-client privilege as limited by its well-established exceptions. And what "purposes" in their consultation are "primary" or "significant" versus just "important," or "minor" versus simply confused, is neither apparent nor—absent adoption of some new test by this Court—necessary to their communications. Without belaboring this point, this Court must recognize that what it says in this case will affect clients and lawyers in all these, and other, law practice contexts. For that

reason, the Court should avoid endorsing any specific "test" that will amount to a new and undefined exception to the otherwise broad and well-understood attorney-client privilege and its already well-established exceptions. We urge the Court to decide what is necessary for this case—rejecting a "primary purpose" exception to the privilege—and not say more.

II. The Ninth Circuit's Primary Purpose Test Is Unworkable.

A. The Primary Purpose Test Unnecessarily Restricts the Privilege and Undermines the Provision of Legal Advice.

The provision of full and well-considered legal advice requires a robust attorney-client privilege free from unnecessary restrictions. It is common for clients to consult their attorneys and discuss both legal and other aspects of their lives and conduct. In those discussions, clients and attorneys have the right to expect that the attorney-client privilege will govern the communications, unless an already well-recognized exception to privilege applies. To maintain a clear, understandable, and protective privilege for such "dual purpose" attorney-client communications, the privilege should apply so long as a purpose of the communications is to solicit or provide legal advice, regardless of whether the communication also served some other purpose—even if that other purpose was more significant.

The Ninth Circuit's primary-purpose test for dual-purpose communications creates exactly the type of uncertainty regarding privilege that this Court rejected in *Upjohn*, *Swidler & Berlin*, and *Jaffee*. For example, under the Ninth Circuit's test, to determine whether a given communication was covered by the

privilege, a lawyer (and later, a reviewing court) would have to determine what the client's *primary* purpose was, when they communicated. Such an arcane parsing of motivations is difficult, time-consuming, and subject to a wide range of present and post-hoc variations. Even if the lawyer concluded that a legal purpose was the primary purpose for the communication, in a close case, the lawyer could not affirmatively assure the client that communications between the two parties would remain privileged.

Moreover, as Judge Roth observed almost two decades ago, "courts must be particularly careful not to craft rules that cause application of the privilege to turn on the answers to extremely difficult substantive legal questions." *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 237 (3d Cir. 2004). The "need for the attorney-client privilege is at its height where the law with which the client seeks to comply is complicated and the penalties for noncompliance are great." *Id.* A client's "ability to secure confidential legal advice should not be at its lowest when complex legal obligations are at their highest." *Id.* In this case, which involves the preparation of sophisticated tax returns, as in many other contexts, it is often impossible to know which issues, legal or other (tax, business, personal), are the "primary" issues. Advising the client as to whether communications with the lawyer will be protected by the privilege will be fraught with uncertainty—and that uncertainty will encourage clients to avoid providing the full and candid information the attorney needs most.

Under the Ninth Circuit's test, if potentially privileged dual-purpose communications are sought in civil or criminal litigation, a court will be required to determine whether the client's primary purpose in

making the communications was seeking legal advice or something else. This requires multiple levels of review—first, to determine what portion of the advice is legal and what portion is for a different purpose; and second, to measure which purpose was "primary." Lawyers and clients will have little certainty as to how these inquiries would be resolved by a court after the fact. Moreover, many of these determinations will involve *in camera* review, which courts recognize is "an awkward, time-consuming process." *PaineWebber Group, Inc. v. Zinsmeyer Trusts Partnership*, 187 F.3d 988, 992 (8th Cir. 1999). In cases where the "primary purpose" becomes an issue, privilege determinations—already not an easy task—will become even more difficult, unpredictable, and time-consuming, requiring the court to compare the magnitude of the legal issue (including an assessment of the merits during what is intended to be a preliminary discovery stage) with the significance of the non-legal purpose.

B. Dual-Purpose Communications Occur in An Endless Variety of Common Circumstances.

The primary purpose test is not just theoretically flawed, but would prove practically unworkable in a variety of contexts that arise every day. In practice, it is commonplace for attorneys to receive communications from clients that have more than one purpose. Whether it is a call from a corporate general counsel, a long-time client, or a friend or family member, an attorney is frequently asked for advice that has business, economic, regulatory, or personal components as well as legal ones. Indeed, at its core, virtually all legal advice received by businesses can be viewed as being for the purpose of furthering the client's business, which will severely complicate the

task of determining the primary purpose of any communication. And virtually all legal advice received by individuals has some personal, financial, or other non-legal purpose as well.

Nevertheless, clients and attorneys expect and should have a right to expect those communications to be protected by the attorney-client privilege so long as any purpose of the communication was to solicit or provide legal advice. Consider the following examples:

Example 1: Traffic Accident

Danny the driver called his friend and legal adviser Larry the lawyer to complain about a traffic accident he was in earlier that day. He told Larry that he was mostly calling just to vent. A car smashed into his as he was turning at an intersection. He was sure the light was green. He noted how irresponsible some drivers are and that he wound up missing his son's soccer game. In the course of the conversation, he mentioned that he might have forgotten to use his turn signal and had two drinks before he left home. Toward the end of the conversation, he mentions that he might have to talk to the insurance company and asks if Larry has any advice. Although the primary purpose of the communication was not to solicit legal advice, the conversation should be privileged.

Example 2: Knowledge of Criminal Conduct

Billy the burglar is a longtime client of Larry's and calls periodically just to chat. He calls one day mostly to discuss his daughter's boyfriend who is a freeloader and is staying at his house. In the course of the conversation, he mentions that he has recently been questioned by detectives about a burglary with which he was not involved. But he says he is pretty sure one of his friends was involved. He says he does not want

to implicate his friend, but also does not need any more trouble with the police. At the end of the conversation, Billy asks if Larry thinks Billy "needs" to tell the police about his friend's possible involvement in the burglary. Although the primary purpose of the communication was not to solicit legal advice, the conversation should be privileged.

Example 3: Business/Antitrust Advice

Gina the general counsel is advising the Board of Directors of a pharmaceutical company that is considering whether to enter a settlement to resolve patent litigation with a generic manufacturer. Gina is also serving as the lead negotiator in the settlement discussions. Gina and her staff create a number of economic forecasts regarding the effect of the patent settlement on the company's profits. Some of the scenarios include analyses of the costs and possible resolutions of potential antitrust claims against the company for settling the patent litigation. Gina ultimately recommends entering a settlement agreement, and the company does so. Later, the FTC investigates the settlement and seeks the economic forecasts and all information that went into those forecasts. Although legal advice was not the primary purpose of Gina's analysis, the forecasts and underlying communications should be privileged. *See FTC v. Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264 (D.C. Cir. 2018).

Example 4: Business/Regulatory Advice

Gina the general counsel is advising the Board of Directors of a large corporation about building a new manufacturing facility along a river that supplies drinking water for the surrounding area. Eddie, the company's chief engineer, tells Gina that the plant will necessarily dump a small quantity of concerning

chemicals into the river. The Board has asked for a cost/benefit analysis of building the new facility. Gina and her staff run several scenarios regarding possible profits and losses for the new facility. In at least a few of the scenarios, they include environmental cleanup/compliance costs as an input, and in one scenario they include the possible costs of litigation arising from environmental contamination caused by the new facility. The EPA later asks Gina to turn over all of the scenarios she and her staff created and to detail any communications that were considered in generating those scenarios. Although the primary purpose of Gina's analysis was not the provision of legal advice, the scenarios generated and Eddie's communications with Gina should be privileged.

Example 5: Health Care/Compliance Advice

Deborah the doctor calls her friend and legal adviser Larry the lawyer to set up a play date for their children. In the course of the conversation, Deborah mentions that she is thinking about starting her own practice and asks Larry if he thinks that is a good business move. Later in the conversation, she mentions that one of her colleagues in her current practice has a habit of looking into the records of her patients and mentions to Larry that she thinks that is "creepy." She notes that she doesn't want to make a big deal about it but asks Larry if he thinks she is obligated to report her colleague for violating HIPAA. Although the primary purpose of the conversation was not the provision of legal advice, the conversation should be privileged.

In all of these examples, the client, attorney, and the system benefit from free disclosure and provision of legal advice, regardless of the primary purpose of the communications. The Board of Directors receives

better advice from Gina, allowing the Board to make better decisions in compliance with the law. Larry can provide better counsel to Danny, Billy, and Deborah because he has a fuller, more accurate understanding of the facts. A test that restricts the privilege only to communications where the primary purpose is to solicit or provide legal advice would inhibit free discussion in situations like these that occur every day and hamper the provision and receipt of legal advice.

C. Dual-Purpose Communications Occur Frequently in Tax Matters.

In cases involving client interactions with government agencies in particular, lawyers regularly consult with clients about decisions that reflect both business concerns on the one hand and legal concerns on the other, and determining which purpose is "primary" may depend both on how broadly the time period of communications is viewed and on the subjective view of the Court on the relative importance of "business" and legal purposes. These are not the decisions judges should be asked to make. This case, for example, involves tax law—a heavily regulated area that demonstrates with particular force the myriad legal and non-legal concerns that underly communications between tax counsel and their clients.

Understanding federal tax law is no easy task. As of October 2015, the Internal Revenue Code and its accompanying regulations exceeded 10 million words in length, having increased dramatically from a mere 1.4 million words in 1955.[14] The Internal Revenue

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[14] Scott Greenberg, *Federal Tax Laws and Regulations are Now Over 10 Million Words Long*, The Tax Foundation (Oct. 8, 2015), https://taxfoundation.org/federal-tax-laws-and-regulations-are-now-over-10-million-words-long/.

Service also issues many types of guidance, both formal and informal,[15] and courts have also interpreted tax law in thousands of cases. Backstopping the substantive tax law are more than 150 civil penalties,[16] and several criminal penalties.[17]

Perhaps the best description of the complexity of the tax law was provided by the Fifth Circuit in *United States v. El Paso Co.*, 682 F.2d 530, 534 (5th Cir. 1982):

> The income tax laws, as every citizen knows, are far from a model of clarity. Written to accommodate a multitude of competing policies and differing situations, the Internal Revenue Code is a sprawling tapestry of almost infinite complexity. Its details and intricate provisions have fostered a wealth of interpretations. To thread one's way through this maze, the business or wealthy taxpayer needs the mind of a Talmudist and the patience of Job.
>
> Even endowed with these qualities, however, no taxpayer completes a return with the certainty that the IRS will agree with the

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[15] In addition to regulations, the Internal Revenue Service issues formal guidance that taxpayers can rely on (e.g., Revenue Rulings and Revenue Procedures), as well as less formal guidance such as Private Letter Rulings, Technical Advice Memoranda, and (more recently) website FAQs. Rev. Proc. 89-14, 1989-1 C.B. 814; IRS News Release IR-2021-202 (October 15, 2021), https://www.irs.gov/newsroom/irs-updates-process-for-frequently-asked-questions-on-new-tax-legislation-and-addresses-reliance-concerns.

[16] *See* IRS Internal Revenue Manual, Exhibits 20.1.1-3, 20.1.1-4, 20.1.1-5, and 20.1.1-6, https://www.irs.gov/irm/part20/irm_20-001-001r (summarizing the different penalties that might be applied to taxpayer accounts).

[17] *See* 26 U.S.C. § 7201 *et seq*.

> bottom line, or the many steps taken to get there. There is no tax oracle one may consult to learn how a return will fare under the scrutiny of the revenue agents and the courts. The Code, after all, is a finite system of rules designed to apply flexibility to an infinite variety of situations. There are many "gray areas" in the tax world, twilight zones in which one may only dimly perceive how properly to treat a given accretion to wealth or given expenditure of funds.

Given the level of complexity and the stakes involved—from greater tax liability to civil penalties to jail—courts have consistently held that tax advice is a species of legal advice.[18] As one pair of commentators observed, "[t]ax practice is based on statutes and regulations and requires in-depth analysis to form an opinion on a tax issue." Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney-Accountant Tax Turf War*, 36 St. Mary's L.J. 1, 3 (2004).

It is understood by the tax bar that virtually all of the advice that lawyers provide to their clients about a tax issue, whether it concerns the tax consequences of a multi-billion-dollar merger or the availability of a Child Tax Credit, will ultimately end up being reflected on a tax return:

> With few exceptions, when a taxpayer/client follows an attorney's advice with respect to tax issues, that advice will in some fashion

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[18] *See, e.g., United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065 (N.D. Cal. 2002); *In re Federated Dep't Stores*, 170 B.R. 331 (Bankr. S.D. Ohio 1994); *United States v. Willis*, 565 F. Supp. 1186, 1190 (S.D. Iowa 1983).

> ultimately be reflected on the taxpayer/client's tax returns filed with the government. In this sense, almost all tax law advice is, in some regard, associated with return preparation activities.[19]

A good tax lawyer kicks the tires on the financial information proffered by the client and asks questions designed to ascertain the appropriate tax treatment or potential tax consequences. Thus, the lawyer-preparer or lawyer-counselor is often the one who discovers the potential legal issue and brings it to the client's attention. Even if the client expected the engagement to be simple, it may turn out to be far more complex than expected.

As an example of this iterative process, consider the case where a small corporate client provides its QuickBooks files to the corporation's lawyer, thinking that the lawyer could prepare a simple corporate tax return. In reviewing the company's QuickBooks files, the lawyer discovers large questionable cash entries in the "Travel and Entertainment" account. Based on the lawyer's experience, the lawyer believes that employees in one of the taxpayer's overseas offices may have been paying bribes. Bribes are generally not deductible under 26 U.S.C. § 162(c). Moreover, if the payment is to a foreign official, the company may have civil and criminal exposure under the Foreign Corrupt Practice Act of 1977. 15 U.S.C. § 78dd-1 *et seq*.

At the lawyer's urging, the lawyer and client discuss the matter and attempt to determine the nature of the

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[19] 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, 699 (2008).

payments and resolve any tax and FCPA issues. This seems like the paradigmatic case where the privilege should apply. If a client's fear of disclosure leads the client to avoid a lawyer's counsel, no one benefits—not the client, not the system, and not society.

A multitude of different scenarios come to mind where communications with tax lawyers have more than one purpose, but where those communications should be privileged:

Example 1: The client does not expect that tax compliance will involve significant legal advice, but the lawyer discovers a significant tax issue.

A client who has already expatriated hires a lawyer to prepare a Form 8854, Initial and Annual Expatriation Statement. This form is for the purpose of determining the amount of any tax due under 26 U.S.C. § 877A, a complicated statute that taxes expatriates on unrealized gains in assets as of the date of expatriation. The client assumes that the process will be largely mechanical but understands that there may be some questions that require legal analysis. However, in reviewing the information provided by the client, the lawyer discovers a significant issue with respect to whether one of the client's assets is properly treated as a "deferred compensation item" pursuant to 26 U.S.C. § 877A(d). The bulk of the lawyer's fees relate to this issue, and the lawyer advises the client that treating the asset as a deferred compensation item will save him $2 million but that he has a 50% likelihood of prevailing if the IRS challenges his position. The client elects to treat the item as a deferred compensation item on the Form 8854, and the IRS challenges this position. In the examination, the IRS seeks production of communications between the lawyer and the client. Although it is unclear whether the

"primary purpose" of the communications was for the provision of legal advice, those communications should be protected.

Example 2: The client does not expect that tax compliance will involve significant legal analysis, but the lawyer discovers a non-tax legal issue during return preparation.

The client hires an attorney to prepare his income tax return, assuming that it will largely be a simple and mechanical process of translating his books of accounts into tax return entries, but the client wants to be sure that the lawyer evaluates any issues that do arise. In discussing the preparation of the return with the client, the lawyer discovers that the client has been paying bribes to a shell company owned by the procurement manager for the client's largest U.K. customer. As bribe payments are not deductible,[20] on the lawyer's advice, no deduction is claimed on the tax return. Later, pursuant to a Mutual Legal Assistance Treaty request from the U.K. authorities investigating the bribery of the procurement manager, the government issues a subpoena for the lawyer's files. Again, although it is not clear whether the provision of legal advice is the "primary purpose" of the communications, the communications should be privileged.

Example 3: Tax compliance does not involve significant legal issues, but the lawyer raises additional issues that cause the client to depart from the initial plan.

A dual citizen asks her lawyer to prepare a draft Form 8854, which she plans to submit when she expatriates. Because the amount of net gain in her

[20] 26 U.S.C. § 162(c).

assets is below the threshold amount (*see* 26 U.S.C. § 877A(a)(3)) and no tax will be due, the client expects this to be a simple project. In discussions with the client about her assets, the lawyer learns that the client inherited a multi-million-dollar residence located in another country while the client was a U.S. citizen. The client had failed to report this inheritance on a Form 3520, as required by 26 U.S.C. § 6039F. The lawyer explains that, while there is no tax due on the receipt of a foreign inheritance, failure to file the required report can subject the recipient to a penalty of 25% of the asset's value. 26 U.S.C. § 6039F(c). Because of the risk that a review of the Form 8854 might lead to the IRS asserting a penalty with respect to the failure to file a Form 3520 reporting the inheritance, the client determines not to expatriate, and never files a Form 8854. Later, in divorce proceedings, the client's spouse issues a subpoena for the lawyer's file, seeking to obtain asset value information communicated by the client to her lawyer. Again, although it is unclear whether the "primary purpose" for the communications was the provision of tax advice, the communications should be privileged.

As the above examples illustrate, the primary purpose test would be unmanageable, would unnecessarily restrict the privilege, and would inject uncertainty and unpredictability into the attorney-client relationship. In any given case involving dual purposes, predicting how a court might resolve a "principal purpose" inquiry will be difficult. Assume the question is close, and the trial court regards it as such, but rules that the purpose was significant but not primary. Given the potential consequences of disclosure—including that privileged information, once disclosed, is a genie that cannot be put back into its bottle—a client may be compelled to seek interlocutory relief. This will

substantially increase costs for litigants and could become a burden on courts.

Requiring clients, lawyers and ultimately courts to determine the "principal purpose" of attorney-client communications by identifying the relative weight of multiple purposes injects uncertainty into the attorney-client relationship. In doing so, it threatens both candor and trust. As the D.C. Circuit has held, where significant purpose of the communication was to obtain or provide legal advice, the privilege should apply. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014).

To be sure, even the D.C. Circuit's "significant purpose" test could prove to be concerning in some situations, to the extent that it requires a "significance" determination that could likewise be difficult and unpredictable and leave some communications unprotected that arguably should be privileged. There may be situations in which the solicitation or provision of legal advice is a genuine but very minor purpose of the conversation; yet in such situations, there would still be good reason to ensure that clients and attorneys can feel secure that communications having a legal purpose will be privileged. Whether and how the privilege should apply in such a circumstance is an important question in its own right, but it is not a question presented in this case. A "significant" purpose of the communications at issue here was to obtain legal advice. The Court should accordingly reverse the decision below, and in doing so should take care not to imply a new exception to the attorney-client privilege for communications that have a legal purpose that some might characterize as "insignificant." *See McWilliams v. Dunn*, 137 S. Ct. 1790, 1800 (2017)

(declining "to issue a sweeping ruling when a narrow one will do").

CONCLUSION

The Court should reject the primary purpose test and reverse the judgment below.

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