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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The long-established test for attorney-client privilege protects a client's confidential communications with a lawyer, acting in his or her capacity as such, made for the purpose of seeking or obtaining legal advice. 8 Wigmore, Evidence § 2292 (1961 ed.); Restatement (Third) of the Law Governing Lawyers § 68 (2000) ("Restatement"). The D.C. Circuit's significant purpose test faithfully applies this traditional approach and the values of disclosure and voluntary compliance with the law it is designed to effectuate. The Ninth Circuit's single primary purpose test does not. That test requires parties and courts to undertake the "inherently impossible" task of separating and weighing multiple purposes for a single communication. And it withdraws the privilege from legal communications that have a significant legal purpose any time the proponent of the privilege fails to convince a court that legal advice was the single most important purpose. Such a test is unworkable and under-protective, and this Court should reject it.

The government has no real answer to these objections to the primary purpose test. Instead, the government principally contends that the primary purpose test is preferable because clients may use the significant purpose test to throw a cloak of privilege over nonlegal communications, particularly work that might overlap with accountants' work. That argument is misconceived.

All of the traditional limits on the scope of the attorney-client privilege apply in the dual-purpose context as in any other. The proponent of the privilege still bears the burden of demonstrating each element of privilege, including that the communication serves a bona fide legal purpose. Communications with no

expectation of privacy are not protected. The crime-fraud exception prevents clients from abusing the privilege to further their frauds or crime. Underlying facts do not become privileged merely because they are embedded in legal communications. *Upjohn Co.* v. *United States*, 449 U.S. 383, 395 (1981). If the legal and nonlegal aspects of a communication are not inextricably intertwined, the privileged parts can be redacted and the nonlegal parts disclosed. And disclosure can waive the privilege as to the disclosed material.

Many of these doctrines will lead to disclosure in the tax preparation context without the need for special limits on the privilege. Petitioner disclosed approximately 1600 documents in response to the government's subpoena; the court ordered disclosure of over a hundred others by applying these general limitations; and only a few dozen documents are disputed dual-purpose communications. Pet. App. 31a, 78a-138a. With existing safeguards in place, there is no reason to fear the kinds of abuse hypothesized by the government or that applying the significant purpose test to attorney-client communications relating to tax-return preparation will create a new accountant privilege. There is, in contrast, every reason to fear that adopting the primary purpose test will lead to intractable problems of administration and will systematically under-protect privileged communications.

The significant purpose test is by every measure the better approach. It ensures that communications properly subject to the attorney-client privilege are reliably and predictably protected from disclosure, and it poses no material risk of abuse.

ARGUMENT

I. The Significant Purpose Approach Adheres To The Long-Established Privilege Test

1. The significant purpose test is a straightforward application of the traditional test for attorney-client privilege. It focuses on whether a communication serves a bona fide legal purpose, instead of insisting that courts undertake the intractable task of isolating and then weighing each purpose for a communication to determine (often years later) which purpose predominated.

The classic formulation of the attorney-client privilege protects confidential communications "[w]here legal advice of any kind is sought * * * from a professional legal adviser in his capacity as such." 8 Wigmore, Evidence § 2292; Paul Rice, *Attorney-Client Privilege in the United States* § 2:1 (2022) (repeating Wigmore formulation); *Fisher* v. *United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged."); *Upjohn*, 449 U.S. at 394 (privilege applied to communications "made by Upjohn employees to counsel for Upjohn acting as such * * * to secure legal advice from counsel").

The traditional approach for attorney-client privilege claims can and should apply when communications involve intertwined legal and nonlegal purposes. If the communication has a significant legal purpose—meaning the client was communicating confidentially with a lawyer acting as a lawyer, and there was a bona fide legal purpose—then the communication is privileged. That the communication may simultaneously serve some additional, nonlegal purpose should not strip the legal communication of the privilege to which it would otherwise be entitled.

Because the significant purpose approach is a straightforward application of the traditional privilege test, the government is wrong to characterize it as novel or disruptive. U.S. Br. 39-40. As the D.C. Circuit recognized in *Kellogg*, the significant purpose approach faithfully tracks *Upjohn*. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (2014) (KBR's privilege claim was "materially indistinguishable from Upjohn's assertion of the privilege in that case."). The attorney-client communications in *Upjohn* obviously encompassed both legal and nonlegal purposes. The investigation into alleged bribes to foreign officials implicated business issues, including the SEC and IRS disclosures' effect on shareholders and the company's need to discipline employees who may have paid bribes. *Upjohn*, 449 U.S. at 386-387; see 1 Edward J. Imwinkelried, *The New Wigmore: A Treatise on Evidence: Evidentiary Privileges* § 6.11.2 (4th ed. 2022) ("The investigation [in *Upjohn*] could certainly help prepare the corporation for a subsequent prosecution of the corporation, but the investigation could also serve the internal purpose of identifying rogue employees who should be disciplined or fired.") These business purposes extended beyond the company's purely legal interests in securities and tax law. *Upjohn*, 449 U.S. at 394. But this Court never weighed the relative importance of the legal and business purposes to decide which predominated; it concluded the communications were privileged because they "were made by Upjohn employees to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel." *Id.* The same approach should apply here.

The government attacks the significant purpose test but never states that *Kellogg* was wrongly decided. Instead, it acknowledges the "appeal" of the

Kellogg approach "in the context of an internal investigation," which it posits should presumptively be considered "predominantly legal." U.S. Br. 37. But nothing in *Kellogg* suggests it was limited to internal investigations or established a presumption that investigations are "predominantly legal." Nor would any such assumption make sense. Internal investigations often implicate nonlegal purposes, and there is no reason to assume that such purposes are always subordinate to an investigation's legal purposes. See *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596, 601-602 (8th Cir. 1977) (lawyer-conducted internal investigation non-privileged where conducted solely for business reasons).

2. The significant purpose test does not improperly expand the privilege or invite clients to cloak nonlegal communications in secrecy. Cf. U.S. Br. 34.

a. As the Restatement explains: "The claimant of privilege must have consulted the lawyer to obtain legal counseling or advice, document preparation, litigation services, or any other assistance customarily performed by lawyers in their professional capacity." Restatement § 72 cmt. b. Clients cannot manufacture a privilege by "copying or 'cc-ing' legal counsel" on an email or pointing to some *de minimis* connection to the law, which "is not enough to trigger the attorney-client privilege." *Jordan* v. *U.S. Dep't of Labor*, 273 F. Supp. 3d 214, 232 n.22 (D.D.C. 2017) (citation omitted). Nor may a client "buy" a privilege by engaging a lawyer to perform services not "customarily performed" by lawyers. See, e.g., *Matter of Fischel*, 557 F.2d 209, 211 (9th Cir. 1977) (traditional Wigmore privilege test does not "permit an attorney to conduct his client's business affairs in secret"); Restatement § 72 cmt. b ("a consultation with one admitted to the bar but not

in that other person's role as lawyer is not protected."); cf. U.S. Br. 16.

When a communication has multiple intertwined purposes, focusing on whether the communication has a significant legal purpose roots the test in ordinary privilege requirements. The legal purpose must be bona fide—*i.e.*, meaningful or legitimate. See Webster's Third New International Dictionary ("significant" means "deserving to be considered"); accord *Onishea* v. *Hopper*, 171 F.3d 1289, 1297 (11th Cir. 1999) (following Webster's definition of "significant"); *Humane Soc'y of the U.S.* v. *Pritzker*, 548 F. App'x 355, 359 (9th Cir. 2013) ("[Agency's] interpretation of 'significant negative impact' as an impact that is 'meaningful' and 'not insignificant,' is consistent with the common and ordinary meaning of the word significant." (internal citation omitted)). If the lawyer is acting as a lawyer and the communication has a meaningful or legitimate legal purpose, it should be privileged. Restatement § 72 cmt. c ("So long as the client consults to gain advantage from the lawyer's legal skills and training, the communication is [privileged], even if the client may expect to gain other benefits as well, such as business advice or the comfort of friendship.")

Courts have resolved serious disputes about whether a communication has a legal purpose without labeling the communication "dual-purpose" or trying to discern a single primary purpose. See, e.g., *In re Bieter Co.*, 16 F.3d 929, 938-939 & n.9 (8th Cir. 1994) (lawyers "involved in discussions regarding political, business, land use and other topics, as well as legal matters" but privilege applied because the communications were "made for the purpose of seeking legal advice"). Approaching dual-purpose communications

through the lens of the ordinary privilege test and focusing on a significant legal purpose is a familiar and predictable approach to privilege. It is the primary purpose test that departs from the traditional privilege analysis by requiring courts to disentangle and weigh competing purposes—guaranteeing uncertain outcomes.

b. Applying the significant purpose approach does not improperly shield discoverable information. As this Court held in rejecting a similar argument in *Upjohn*, the privilege never protects the "underlying facts" from discovery, just communications. *Upjohn*, 449 U.S. at 395. The proponent must establish all the elements of the privilege, including the significant legal purpose, the expectation of confidentiality, and the lack of waiver. See *Fed. Trade Comm'n* v. *Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1269 (D.C. Cir. 2018) (Pillard, J., concurring). When legal and nonlegal communications can be segregated, redactions can be used. Br. 22. And if a client communicates with a lawyer in furtherance of a crime or fraud, the crime-fraud exception applies. Pet. App. 70a-78a.

A significant purpose approach will not cause a massive expansion of privilege claims in the tax context or elsewhere. Petitioner here produced without a privilege objection approximately 1600 documents exceeding 20,000 pages. Pet. App. 31a. Privilege was ultimately disputed on 303 withheld documents. *Id.* at 35a. The district court ordered more than 100 of these produced based on doctrines like waiver or crime-fraud, *id.* at 45a-48a, 70a-78a; and sustained the privilege claim for others or ordered redactions of severable, privileged portions of documents, *id.* at 78a-138a. Fewer than 54 documents are in dispute as dual-purpose communications. Br. 8 & n.3.

But when legal and nonlegal communications are inextricably intertwined, withdrawing the privilege from communications that serve a bona fide legal purpose does not further the goals of the attorney-client privilege—it subverts them. See *United States* v. *Chen*, 99 F.3d 1495, 1499 (9th Cir. 1996) ("People need lawyers to guide them through thickets of complex government requirements, and, to get useful advice, they have to be able to talk to their lawyers candidly without fear that what they say * * * will be transmitted to the government.").

II. The Ninth Circuit's Single Primary Purpose Test Disserves the Purposes of the Attorney-Client Privilege

The Ninth Circuit's single primary purpose test negates the privilege over even indisputably legal communications whenever a court later determines that an intertwined nonlegal purpose outweighs the legal purpose. *City of Roseville Emps.' Retirement Sys.* v. *Apple Inc.*, 2022 WL 3083000, at *3 (N.D. Cal. Aug. 3, 2022) (Ninth Circuit requires "single 'primary' purpose" test). Neither "reason" nor "experience" supports that approach. *Swidler & Berlin* v. *United States*, 524 U.S. 399, 406 (1998).

1. The government contends that protecting the confidentiality of communications with a lawyer primarily seeking "business, accounting, or other [nonlegal] assistance" is unnecessary because, unless the "primary or predominant purpose" of the communication is legal, the "particular communication would have been made absent the privilege." U.S. Br. 25-26. This is just another way of stating the "but for" test rejected by the D.C. Circuit as contrary to *Upjohn*. *Kellogg*, 756 F.3d at 756-757.

In *Upjohn*, the Court rejected a similar "but for" theory advanced by the government, which argued that the "risk of civil or criminal liability * * * ensure[s] that corporations will seek legal advice in the absence of the protection of the privilege." 449 U.S. at 393 n.2. The Court concluded that the "depth and quality" of the investigation "would suffer" without allowing privileged communications between counsel and employees outside the "control group." *Id.* And it reasoned that the government's theory "proves too much" because "an individual trying to comply with the law * * * also has strong incentive to disclose information to his lawyer" even absent the privilege. *Id.*

This Court should reject the government's renewed "but for" argument for the same reasons. As the D.C. Circuit observed, it would eliminate the privilege for a wide range of attorney-client communications, including businesses required by regulation to conduct internal investigations. *Kellogg*, 756 F.3d at 759; see also Rice, § 7.2 ("[V]irtually all internal legal communications are, to some extent, relevant to the business ends of the company.")

The government also wrongly assumes that courts could reliably decide after-the-fact which communications would have been made absent the request for legal advice. *Swidler* rejected a similar argument that a posthumous privilege was unnecessary because disclosure would "reveal only information that the client himself would have revealed if alive." 524 U.S. at 407. The Court recognized that "[c]lients consult attorneys for a wide variety of reasons," and that, even if the client might have disclosed some information when alive, clients would be chilled from disclosing other sensitive information to their attorneys. *Id*. at 407-408 (citing *Jaffee* v. *Redmond*, 518 U.S. 1, 12 (1996)).

The government's proposal that a lawyer's advice, (at least related to tax-return preparation) has a legal purpose only when it involves "relatively novel or especially complicated questions of law" highlights the problem with the single primary purpose test. U.S. Br. 20. Not only is this framework contrary to well-established privilege law, which has never required that "legal counseling or advice" be on a *novel or complex* topic, Restatement § 72 cmt. b, it is hopelessly uncertain. What is novel or complex to one lawyer or client may be normal and simple to another, meaning parties cannot reasonably predict how a court might draw the line. Given these uncertainties, the government's proposal would chill attorney-client communications. *Jicarilla Apache Nation*, 564 U.S. at 183; *Upjohn*, 449 U.S. at 393.

2. The government's argument that courts have long used the primary purpose test to evaluate dual-purpose communications is vastly overstated.

a. Many of the decisions the government cites invoking the "primary" or "predominant" purpose language do not actually weigh competing purposes. Rather, they focus directly on the legal purpose. For example, the Eighth Circuit in *Diversified Industries Inc.* v. *Meredith*, 572 F.2d at 601-602, quoted a formulation of the test referring to a client consulting with a lawyer "primarily" to secure legal advice. But the court found no privilege applied because the company's law firm "was not hired * * * to provide legal services" but instead was employed "solely for the purpose of making an investigation of facts and to make business recommendations." *Id.* at 603; see also *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 805 (Fed. Cir. 2000) (referencing primary purpose, but holding communi-

cation of a patent "invention record" privileged because it was communicated to a company attorney "for the purpose of obtaining legal advice"); *Taylor Lohmeyer L. Firm PLLC* v. *United States*, 957 F.3d 505 (5th Cir. 2020) (quoting primary purpose language, but holding that client names are not privileged).

Many of the cited state court cases similarly turned on the presence or absence of a significant legal purpose without weighing multiple purposes to identify the primary one. See *In re Appraisal of Dole Food Co., Inc.*, 114 A.3d 541, 561-562 (Del. Ch. 2014) (quoting primary purpose language but holding investment memo not privileged where its author "no longer serves as an in-house lawyer and does not practice law" but instead "aim[s]" to "make his firm money"); *Harrington* v. *Freedom of Info. Comm'n*, 144 A.3d 405, 419 (Conn. 2016) (adopting primary purpose test but reversing privilege rulings for failure to "distinguish communications that expressly [or impliedly] sought legal advice from those that did not"); *Spectrum Systems Int'l Corp.* v. *Chemical Bank*, 581 N.E.2d 1055, 1060-1061 (N.Y. 1991) (describing a communication's "primarily * * * legal character" only after holding the resulting "confidential report from lawyer to client transmitted in the course of professional employment" privileged because "its purpose was to convey legal advice to the client").

The focus of these "primary purpose" decisions on the legal purpose, and not a weighing of competing purposes, is consistent with the Restatement Reporter's Note, which states: "American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is

that of obtaining legal assistance." Restatement § 72 Reporters Note.[1]

The government points to a sentence in the Restatement indicating that the client must consult the lawyer "for the purpose of obtaining legal assistance and not predominantly for another purpose." U.S. Br. 24 (quoting Restatement § 72 cmt. c). But the Restatement also focuses on the existence of a "significant" legal purpose: "Whether a purpose is significantly that of obtaining legal assistance or is for a nonlegal purpose depends upon the circumstances, including the extent to which the person performs legal and nonlegal work, the nature of the communication in question, and whether or not the person had previously provided legal assistance relating to the same matter." Restatement § 72 cmt. c.

b. Even if courts had been regularly applying the Ninth Circuit's single primary purpose test, this Court should not perpetuate a flawed approach here. Before *Upjohn*, courts had "overwhelming[ly] accept[ed]" the "control group" test, *United States* v. *Upjohn Co.*, 1978 WL 1163, at *8 (W.D. Mich. Feb. 23, 1978), but this Court rejected that approach because it was too narrow and uncertain. The single primary purpose test suffers from the same flaws. See Rice, § 7:7 ("The primary purpose requirement has been widely adopted by the courts despite the fact that neither the purpose, logic, nor focus of the requirement is clear.").

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[1] The government protests that Reporter's Notes do not formally represent the view of the American Law Institute. U.S. Br. 41 n.3. But the Reporter's Note refutes the government's contention that a significant purpose approach is a novel departure from traditional privilege law.

One of the few post-*Kellogg* decisions to endorse a primary purpose test over the significant purpose test, *In re Polaris, Inc.*, 967 N.W.2d 397, 408 & n.1 (Minn. 2021), illustrates the intractable problems of administration that the primary purpose test produces. The *Polaris* majority and dissent agreed that the primary purpose test governed whether an outside-counsel report about compliance with consumer safety laws was privileged, but disagreed completely over how that test should be applied. See *id.* at 418 (Anderson, J., dissenting) (arguing that majority wrongly focused on the content, rather than context, of the report, and that it was "obvious that the predominant purpose" of the report was "legal advice."). *Polaris* illustrates how the subjectivity of the primary purpose test will lead to "[d]isparate decisions." U.S. Br. 39 (quoting *Upjohn*, 449 U.S. at 393.)

III. The Significant Purpose Test Should Apply In the Tax Context

The significant purpose test should apply to all legal communications, including those in the tax context. The government describes *Kellogg* as a "sensible" approach to privilege in "certain contexts, like internal investigations," but it urges this Court to apply the single primary purpose approach "in contexts, like tax preparation, in which a purpose may be 'significant,' but nonetheless discernibly subsidiary." U.S. Br. 32. But in service of that approach, the government is forced to advocate for a novel and uncertain line between legal and nonlegal advice in the tax context. U.S. Br. 10-22.

1. Requiring a legal purpose to predominate for communications to be privileged in some legal practice areas but not others is a recipe for confusion. This Court declined to apply a different privilege test for

criminal cases because doing so would create "substantial uncertainty." *Swidler*, 524 U.S. at 408-409; Br. 29. Applying stronger attorney-client privilege protection to investigations and lesser protection to tax-return preparation invites courts to create an ad hoc hierarchy of privilege across the legal landscape.

Applying different tests in different contexts would also be utterly impractical because law practice rarely divides into neat categories. One purpose of the *Upjohn* internal investigation was "to supply a basis for legal advice concerning compliance with * * * tax laws," 449 U.S. at 394, which could have resulted in preparing and filing amended returns if payments deducted as business expenses turned out to be non-deductible illegal bribes, 26 U.S.C. 162(c). As amici observe, the point of tax advice at any stage, and the point of an investigation focused on tax law, is to file a *legally-compliant* tax return. Because "almost any tax-related legal advice [can] ultimately be tied in some way to a tax return" a privilege test cannot be confined to the area of tax-return preparation. Silicon Valley Amicus at 25; see also Buckeye Amicus at 3.

2. In any event, the significant purpose test makes just as much sense in the tax context as elsewhere. The government's arguments largely relate to where the line should be drawn between legal and nonlegal purposes in the tax-return preparation context. But that is an argument about whether a communication serves a significant legal purpose. Once a court determines that it does, the privilege should apply, regardless of whether the legal purpose predominates over other purposes.

a. The district court found that "communications that are only about tax return preparation are not cov-

ered by the attorney-client privilege," but that "communications seeking legal advice about what to claim on tax returns or other tax-related legal advice may be privileged." Pet. App. 44a. This is the line followed by the Ninth Circuit and other precedent. *United States* v. *Abrahams*, 905 F.2d 1276, 1284 (9th Cir. 1990), *overruled on other grounds by United States* v. *Jose*, 131 F.3d 1325 (9th Cir. 1997); see also, e.g., *United States* v. *Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (distinguishing "mathematical calculations" in preparing a tax return from decisions that "undoubtedly involve[] legal considerations," such as whether to "file an amended return").

The district court's error came after, when the court held that *even if* a communication served a legal purpose, it was protected from disclosure only if that purpose was the "primary purpose of the communication." Pet. App. 44a.

b. The crux of the government's argument is that legal advice in the tax-return preparation context begins where the ability of accountants to advise clients ends, specifically, where the legal issues become "relatively novel or especially complicated." U.S. Br. 20.[2] Protecting the privilege over anything less than advice on "relatively novel" or "especially complicated" legal issues, the government argues, would threaten to create the accountant privilege this Court rejected in *Couch* v. *United States*, 409 U.S. 322 (1973), and *United States* v. *Arthur Young & Co.*, 465 U.S. 805 (1984).

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[2] Below, the government argued that *any* legal advice that "relate[s] to tax return preparation" should not be privileged, a position the district court rejected. Pet. App. 43a.

The government's premise is wrong. "The fact that the task performed could have been accomplished as easily by a nonlawyer does not necessarily mean that the privilege will not apply." Rice, § 7:10; *Attorney General of U.S.* v. *Covington and Burling*, 430 F. Supp. 1117, 1121 (D.D.C. 1977) ("C&B has argued that the test of a client's legal purpose is not whether the work could have been performed by a non-lawyer, or whether the attorney at times took non-legal considerations into account in rendering assistance. On both counts, C&B is correct."). Instead, the question is whether the lawyer's advice concerns "legal rights and obligations," in which case the communication "would receive protection." *Chen*, 99 F.3d at 1501-1502 ("one not a lawyer is sometimes asked for legal advice—as where a policeman or a clerk of court is consulted"—but if "the general purpose [of a communication between a lawyer and client] concerns legal rights and obligations," the privilege applies) (citation omitted); see also *United States* v. *Summe,* 208 F. Supp. 925, 928 (E.D. Ky. 1962).

Individuals often seek advice from non-lawyers on legal topics. Someone renting an apartment might ask her real estate broker about the enforceability of lease terms and receive adequate answers based on the broker's experience, but she would still be seeking legal advice if she asked the question to a lawyer. Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 Geo. J. Legal Ethics 201, 228-229 (2010). Someone contemplating divorce might get advice from his financial planner about the division of marital assets, but seeking that same advice from a family-law lawyer would be privileged. See also, e.g., American College of Tax Counsel Br. 21-22 (patent agents represent clients at Patent Office, and on-line

resources such as LegalZoom provide legal documents). Unlike brokers, financial planners, or accountants, lawyers can provide advice about what the law requires, permits, or forbids based on their legal training and experience that allows them to interpret statutes, regulations, and precedent. Restatement § 72 cmt. b. It would be a sea change to approach the attorney-client privilege from the perspective of whether a nonlawyer could offer nonlegal opinions on the same question.

In support of withdrawing the privilege from work that could be done by non-lawyers, the government quotes *Pollock* v. *United States*, 202 F.2d 281, 286 (5th Cir. 1953) that there is "no magic in a law license." U.S. Br. 17. But the lawyer's work there "included no confidential communication, but simply the acts of depositing money." *Pollock*, 202 F.2d at 286 (privilege applies when "attorney acts in his professional capacity" not when "attorney is a mere scrivener"). No one, including the district court here (Pet. App. 44a), disputes that "filling out a Form 1040" by transcribing information provided by a client falls outside the privilege because it is not legal work. *Federal Practice & Procedure* § 5478 & n.91 ("filling out of an income tax return is well within the intellectual abilities of most high school graduates"). But when the "lawyer's professional skill and training would have value in the matter," the work has a legal purpose—even if nonlawyers could also do the work. Restatement § 72 cmt. b; see also Imwinkelried, *The New Wigmore* § 6.11.1 (recognizing not all tax preparation work is privileged, but observing, "it is spurious to claim that an attorney's preparation of a tax return does not involve the application of the attorney's knowledge of the law or skill in applying law to fact.").

ii. Applying the significant purpose test in the tax context does not conflict with this Court's refusal to create an accountant privilege. *Arthur Young* rejected an accountant work-product privilege, but *not* because it decided that no legal privilege applies to anything a lawyer does that is also within an accountant's competence. Rather, the Court distinguished between an "attorney's role as the client's confidential advisor and * * * loyal representative" and the accountant's role when preparing audited financial statements as a "public watchdog" with "total independence from the client [and] complete fidelity to the public trust." *Arthur Young & Co.*, 465 U.S. at 817-818; Br. 36. The Court never questioned the attorney work-product doctrine; it emphasized that the "IRS summons power" remains "subject to the *traditional* privileges and limitations." *Id.* at 815-817 (citation omitted). Protecting a lawyer's legal advice in the tax-return preparation context is entirely consistent with *Arthur Young*.

Congress's subsequent creation of a limited accountant privilege is not evidence that a lawyer's advice becomes "legal" only when beyond an accountant's competence, let alone a reason to adopt the single primary purpose test. Cf. U.S. Br. 19-20. Section 7525 extends a privilege to accountant-client communications when accountants advocate for clients before the IRS or federal courts. 26 U.S.C. 7525(a)(3); see also 31 U.S.C. 330. Extending the privilege in these circumstances recognizes that when accountants represent clients in adversary proceedings, they are stepping away from the nonprivileged, "disinterested" public role ascribed to accountants in *Arthur Young* and stepping into the "loyal representative" role the Court ascribed to lawyers. 465 U.S. at 817-818. Allowing accountants a privilege solely when they function as lawyer-like advocates in adversary proceedings does not

suggest that the attorney-client privilege should be so limited. Long ago, courts abandoned the idea that the attorney-client privilege applies only in anticipation of litigation. Rice § 1:13. It makes no sense to read into Congress's choice to afford a privilege to accountants a *limitation* on the traditional attorney-client privilege.

The government cites a snippet of legislative history to support the claim that tax preparation work is not privileged. U.S. Br. 19-20. Those congressional reports, however, do not address the line between legal and nonlegal advice other than to say that the "attorney-client privilege will not *automatically* apply to communications and documents generated in the course of preparing the return." H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 267-268 (1998) (emphasis added); accord S. Rep. No. 174, 105th Cong., 2d Sess. 70 (1998). These statements support the uncontroversial point that transmitting information to an attorney to include on a tax return is not privileged. Br. 6. They have nothing to say about whether to apply a single primary purpose test.

3. Applying the significant purpose test to legal advice related to tax return preparation would not eliminate other long-established limitations on the privilege.

The government notes that when a client provides information to a lawyer for tax-return preparation, the client may not expect confidentiality. U.S. Br. 13. But no one disputes that the proponent of the privilege has the burden to establish an expectation of confidentiality, e.g., *United States* v. *Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009), or that when a client provides information expecting it will be disclosed on a tax form, the privilege would not apply, Br. 6. Similarly, once a tax return is filed, the taxpayer waives the privilege as to

the disclosed information, as the district court held here. Pet. App. 46a-47a. Nor may a client shelter underlying facts from disclosure just by transmitting them to a lawyer. *Upjohn*, 449 U.S. at 395.

That tax returns are disclosed does not mean, however, that lawyer-client communications about the return can never be privileged. The district court did not so hold, and courts have long protected confidential attorney-client communications concerning public disclosures. See, e.g., *Chen*, 99 F.3d at 1500-1501 ("The government's argument implies that when a lawyer speaks on a client's behalf to a jury, the client forfeits his privilege for the attorney-client communications relating to the lawyer's statements on the client's behalf, obviously an untenable proposition."); *United States* v. *Schmidt*, 360 F. Supp. 339, 347 (M.D. Pa. 1973) ("to the extent that preparation of a return requires the exercise of legal judgment" the privilege applies to confidential communications). Long-established doctrines refute the government's fears about overly broad privilege assertions, without creating special and unmanageable rules for tax advice.

IV. This Court Should Remand For The District Court To Apply The Significant Purpose Test

This Court should remand for the district court to apply the significant purpose test. E.g., *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388, 394 (2006).

1. Echoing its argument from the Brief in Opposition, the government wrongly asserts that the district court "ordered production only of 'communications made * * * solely for the purpose of preparing a tax return.'" U.S. Br. 45 (quoting Pet. App. 53a); Cf. Opp. 8-9. The district court distinguished between "legal

advice about what to claim on a tax return" and unprivileged communications "solely for the purpose of preparing a tax return." Pet. App. 53a (citing *Abrahams*, 905 F.2d at 1284.) The court ordered disclosure of communications where "the primary or predominate purpose was about the procedural aspects of the preparation of [Client's] tax returns." Pet. App. 54a. The district court on remand should determine whether those dual-purpose communications nevertheless had a significant legal purpose.

The district court also found that some of the 54 documents in the Sealed Joint Appendix involved an accountant "provid[ing] advice as an accountant," not as the lawyer's agent. Pet. App. 54a.[3] When the government protests that selected documents in the Appendix appear to lack any legal purpose at all, U.S. Br. 43-44, that is just a feature of the district court's order grouping communications with a "primary or predominant" nonlegal purpose and those the court found were entirely nonlegal accountant communications, Br. 8 & n.3.

2. Many of the documents ordered produced plainly include a legal purpose. One email exchange (JA 134-136) involves detailed questions and analysis about whether the Client should amend tax returns, including reference to consulting with litigation counsel. Br. 40-41. The government asserts that because there was no legal obligation to file the amended returns, none of this advice can turn on *legal* considerations. U.S. Br. 47. But because the decision to amend

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[3] The privilege extends to communications with an accountant when the accountant acts as an agent for the attorney. Rice, § 3:3; *United States* v. *Kovel*, 296 F.2d 918, 921 (2d Cir. 1961). The accountant here served in that capacity for many communications. (Pet. App. 29a, 51a.)

is discretionary, courts have held that advice "as to whether the taxpayer[] should file an amended return undoubtedly involved legal considerations." *Cote*, 456 F.2d at 144; *Fed. Trade Comm'n* v. *TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980). Advising that a course of action is legally permissible is still legal advice. See, e.g., *Chen*, 99 F.3d at 1500. The government cites no authority to the contrary.

The government argues an exchange between the Client and a lawyer about a persuasive submission to the IRS advocating for mitigation of tax penalties was not legal. U.S. Br. 47-48; JA 141-144. But the submission required lawyers to argue that the taxpayer's conduct met the "reasonable cause" standard in 26 U.S.C. § 6664(c). That standard is clearly a legal one—and a lawyer must interpret regulations and precedent to advocate it has been met. See *Hoakison* v. *Comm'r*, T.C.M. (RIA) 2022-117 (2022) (citing tax regulations and tax court precedents to explicate this standard); cf. *United States* v. *Boyle*, 469 U.S. 241, 242 (1985) (interpreting "reasonable cause" standard under 26 U.S.C. § 6651(a)(1), for late filings).

In another exchange (JA 196-200), the Client corresponded with the accountant and one of Petitioner's lawyers (see JA 21) about requirements related to Reports of Foreign Bank and Financial Accounts (FBARs). Br. 38. The accountant specifically conveyed advice from the lawyers about the account-disclosure requirements, JA 197; and the exchange addresses legal questions the client had about the reporting requirements, JA 196-198. The government concedes in a footnote that this communication involved legal advice, but urges withdrawal of the privilege because, in the government's opinion, the advice was not

about a sufficiently "complex and unsettled [legal] question." U.S. Br. 47 n. 5; supra 9-10, 15-19.

Because documents reveal legal communications, this Court should remand for the district court to apply the significant purpose test.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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