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 CALIFORNIA LAWYERS ASSOCIATION IN SUPPORT OF THE PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Under Supreme Court Rule 29.6, Amicus Curiae, the California Lawyers Association certifies that it is a nonprofit organization with no corporate parents or stockholders.

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BRIEF OF THE CALIFORNIA LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The California Lawyers Association ("CLA") respectfully submits this brief as amicus curiae in support of Petitioner, a law firm.[1]

INTEREST OF *AMICUS CURIAE*

CLA is a nonprofit professional association operating under Section 501(c)(6) of the Internal Revenue Code. CLA has approximately 72,000 members; it is one of the largest statewide voluntary bar associations in the United States. CLA's members include lawyers in private practice, in-house counsel, government lawyers, judges and other judicial officers, law professors and other academic professionals, and others affiliated with the legal profession who are not lawyers, although CLA's members are predominantly lawyers.

CLA's mission is promoting excellence, diversity, and inclusion in the legal profession and fairness in the administration of justice and the rule of law. CLA is engaged in a broad range of activities, including advocating on behalf of the legal profession before the legislative, executive, and judicial branches; providing continuing legal education and other training for lawyers; and partnering with lawyers, judges, affinity

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[1] Notice pursuant to Sup. Ct. R. 37.2(a) was given to all parties, all parties consented to CLA filing this amicus brief, no party or counsel for a party helped to draft this brief, and this brief was funded solely by CLA. (Sup. Ct. R. 37.6.)

bar associations, local bar associations, and members of the community to promote diversity, equity, inclusion, and access to justice. CLA has the below eighteen sections that focus on specific areas of expertise:

- Antitrust and Unfair Competition Law
- Business Law
- Criminal Law
- Environmental Law
- Family Law
- Intellectual Property Law
- International Law and Immigration
- Labor and Employment Law
- Law Practice Management and Technology
- Litigation
- New Lawyers
- Public Law
- Privacy Law
- Real Property Law
- Solo and Small Firm
- Taxation
- Trusts and Estates
- Workers' Compensation

CLA has several CLA-wide committees that deal with issues of relevance to multiple practice areas and the legal profession overall, such as the Ethics Committee, which addresses opinions and rules impacting attorney-ethics and professionalism, often relating to confidential client information and the attorney-client privilege.

This amicus brief is submitted by CLA but does not necessarily reflect the views of all members of CLA, including those who are government employees.

The attorney-client privilege, founded in common law, is a principled evidentiary rule that advances the fair administration of justice. As this Court explained more than a century ago, "The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

The test used to determine whether a communication is protected by the attorney-client privilege substantially affects a broad spectrum of attorneys in all practice areas. CLA has a strong interest in ensuring there are uniform and clear rules regarding whether a communication is protected by the attorney-client privilege. CLA has an equally strong interest in ensuring that courts uphold the attorney-client privilege whenever doing so enhances effective legal representation and the orderly administration of justice.

The Circuits have adopted three different tests for when the attorney-client privilege applies in the context of dual-purpose communications; communications that provide both legal and non-legal advice. This split of authority has created uncertainty for CLA's attorney members with multistate practices

and those who represent clients with national interests.

In the case before this Court, the Ninth Circuit adopted a *primary purpose* test, which CLA disfavors because it relies on subjective balancing that creates uncertainty in its application, will suppress the open discourse between client and attorney, and result in the disclosure of communications that should be privileged. The Seventh Circuit's test—which eliminates the privilege as to any communication, even legal correspondence, where tax return preparation is part of the conversation—is likewise disfavored. Although that test provides certainty, it is unduly restrictive and therefore fails to further the salutary goals of the privilege.

CLA supports adoption of the test formulated by then-Judge Kavanaugh of the D.C. Circuit, which applies the privilege whenever "*a significant purpose*" of the communication is to convey legal advice, because it provides the most clarity and certainty to attorneys and their clients and preserves the foundation upon which the attorney-client privilege was established.

For these reasons, CLA urges this Court to adopt the D.C. Circuit's "a significant legal purpose" test to determine when the attorney-client privilege applies in the context of dual-purpose communications.

INTRODUCTION

This case presents the issue of what test courts should use to determine whether the attorney-client privilege applies to dual-purpose communications that provide both legal and non-legal advice. CLA urges this Court to adopt the test formulated by Judge Kavanaugh when he sat on the D.C. Circuit, which upholds the privilege whenever "a significant purpose" of the communication is to solicit or convey legal advice. This test provides the most clarity and certainty to attorneys and their clients, while furthering the salient reasons why the attorney-client privilege has been long recognized in Anglo-American jurisprudence.

This Court has long recognized the attorney-client privilege as a bedrock doctrine of the legal profession, which is needed to protect the confidentiality of candid communications between attorneys and clients made for the purpose of obtaining or providing legal advice. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). Courts also have recognized that the attorney-client privilege is inapplicable to "[c]ommunications from a client that neither reflect the lawyer's thinking nor are made for the purpose of eliciting the lawyers' professional advice or other legal assistance . . . ." *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999). The line between protected legal advice and unprotected non-legal advice is often difficult to draw, especially when Circuit Courts adopt different tests.

Attorneys often have multiple roles when advising a client: that of lawyer, counselor, therapist, business

advisor, financial advisor, and confidant. Thus, many communications between attorneys and their clients contain both legal and non-legal advice, thereby serving dual-purposes.

In this case, the Ninth Circuit employed a "primary purpose" balancing test to determine if the communications at issue were protected by the attorney-client privilege. Under this test, courts are required to compare the legal purposes to the non-legal purposes of a communication to establish which is the most significant. *In re Grand Jury*, 23 F.4th 1088, 1091 (9th Cir. 2021). If the legal purpose is weightier, the communication is privileged and non-discoverable. *Id.* The inverse is true if the court finds the non-legal purpose to have greater significance, thereby making the communication open to discovery. *Id.*

The Seventh and D.C. Circuits decide whether dual-purpose communications are discoverable using tests that are irreconcilable with the test used in the Ninth Circuit.

In the Seventh Circuit, "a dual-purpose document – a document prepared for use in preparing tax returns and for use in litigation – is not privileged." *Frederick,* 182 F.3d at 501. There is no balancing of purposes and no analysis to determine whether a significant legal purpose motivated the communication. If a document or communication was made "for use in connection with the preparation of tax returns" it is not privileged regardless of how much or in what context any legal advice was sought or conveyed. *Id.* In the Seventh Circuit, communications between attorneys and clients are chilled by the knowledge that legal communications

related to the preparation tax returns are not protected from compelled disclosure. *Id.* at 501-02.

In the D.C. Circuit, courts evaluate communications to determine if the legal purpose motivating the communication was "significant." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014). Unlike the Ninth Circuit, the D.C. Circuit test requires no balancing; the legal purpose simply needs to be *a* significant purpose for the privilege to apply. *Id.* at 759-60. If *a* significant purpose of the communication was to provide legal advice, then it is protected by the attorney-client privilege even if the communication primarily served some non-legal purposes. *Id.*

Three divergent evidentiary standards make for an unworkable environment for practitioners and their clients trying to navigate the scope of the attorney-client privilege applied to dual-purpose communications. CLA urges this Court to adopt the D.C. Circuit's test for determining when the attorney-client privilege attaches to dual-purpose communications because it both provides a high degree of predictability and fosters the open and candid communications between attorneys and clients that is needed to ensure the proper administration of justice.

SUMMARY OF THE ARGUMENT

The attorney-client privilege is a foundational doctrine of the legal profession needed to foster and protect the confidentiality of candid communications between attorneys and clients made for the purpose of giving and receiving legal advice. The circuit courts have articulated divergent and irreconcilable tests for

determining when the attorney-client privilege applies to dual-purpose communications. A communication has a "dual-purpose" when it was made for both legal and non-legal purposes. The United States Court of Appeals for the Ninth Circuit's primary purpose test requires a court to identify both the legal and non-legal purposes of the communication and then weigh their relative importance. If the legal purpose outweighs the non-legal purpose, it is considered the communication's sole primary purpose and thus privileged. The Ninth Circuit applied this test in *In re Grand Jury* and determined that Petitioner's dual-purpose communications were not privileged. *In re Grand Jury*, 23 F.4th at 1090.

In order to promote the "observance of law and administration of justice," application of the attorney-client privilege must be predictable and applied with uniformity. *Upjohn*, 449 U.S. at 389. The Ninth Circuit's "primary purpose" test fails this requirement. By requiring a court to determine a communication's primary purpose, the Ninth Circuit's test produces unpredictable and inconsistent results, thereby creating uncertainty that is detrimental to the integrity of the attorney-client privilege.

The Ninth Circuit's test leaves the privilege to the subjective discretion of the Court, is applied after-the-fact, and limits the privilege to the point it frustrates the purpose of encouraging full and frank communications between attorney and client. This Court previously rejected this type of judicial balancing to determine privilege precisely because it created too much uncertainty. *Swidler & Berlin*, 524 U.S. 399, 409

(1998); *Upjohn*, 499 U.S. at 393. For the same reason, this Court should likewise reject the Ninth Circuit's primary purpose test.

The United States Court of Appeals for the Seventh Circuit held that dual-purpose communications in the tax return preparation context are not privileged. *Frederick*, 182 F.3d at 501. CLA urges this Court to disapprove *Frederick,* and hold that, while underlying information that is disclosed on the return itself is considered unprivileged because it is disclosed to a third party outside of the attorney-client relationship such as the Internal Revenue Service, communications made for the purpose of giving or receiving legal advice are protected by the attorney-client privilege in the context of tax return preparation.

In *Kellogg*, the United States Court of Appeals for the District of Columbia adopted the "significant purpose" test, under which courts need not attempt to decern a communication's primary purpose. Instead, courts uphold the assertion of privilege if seeking or providing legal advice was "*a* significant purpose" of the communication. *Kellogg*, 756 F.3d at 760 (emphasis added).

The D.C. Circuit's "significant purpose" test both leads to predictable results and encourages the full and open attorney-client communications needed for effective representation and the orderly administration of justice. Accordingly, CLA urges this Court to resolve the current circuit split by adopting the D.C. Circuit's "a significant purpose" test for determining when dual-purpose communications are protected by the attorney-client privilege.

ARGUMENT

I. The attorney-client privilege is a hallmark of Anglo-American jurisprudence that courts carefully guard and seek to clearly delineate to facilitate attorneys' ability to provide fully informed legal advice.

As the California Supreme Court has repeatedly observed, the attorney-client privilege has been a sacred "'hallmark of Anglo-American jurisprudence for [over] 400 years' that 'our judicial system has carefully safeguarded with only a few specific exceptions.'" *Los Angeles County Bd. of Supervisors v. Superior Court*, 386 P.3d 773, 778 (Cal. 2016). This privilege against third party disclosure of attorney-client communications exists to enable an attorney to provide legal advice based on a client's full and candid disclosures. *Id.*; *accord, Upjohn*, 449 U.S. at 390 (The attorney-client privilege "encourage[s] full and frank communication between attorneys and their clients, and thereby promote[s] broader public interest in the observance of law and administration of justice"). "However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403 (1976).

It is essential that attorneys and their clients know the boundaries of the attorney-client privilege to ensure that confidential communications will remain confidential. *Upjohn,* 499 U.S. at 393 ("if the purpose

of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected"). 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." *Id*. This Court has recognized that, "[a]s a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher*, 425 U.S. at 403.

In sum, "for the attorney-client privilege to be effective, it must be predictable." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 183 (2011). The scope of the privilege must be expansive enough to encourage the full and frank communications between attorneys and their clients that are essential to effective legal representation.

In California, as in most jurisdictions, the attorney is required to keep client communications confidential, or risk disciplinary action. California Business and Professions Code section 6068, subdivision (e), states that it is the duty of an attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." This duty is subject to a very narrow exception.[2] California Rules

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[2] Under section 6068, an "attorney may, but is not required to, reveal confidential information relating to the representation of a

of Professional Conduct, Rule 1.6, which mirrors the American Bar Association's Rule 1.6 in most respects, states that: "A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068 . . . ." Attorneys who disclose information protected by the attorney-client privilege without client consent face potential disciplinary action, not to mention a potential civil lawsuit by the client. Moreover, the disciplinary power of the State Bar of California extends both to breaches outside of California if the attorney is licensed in California and to breaches inside California even if the lawyer is licensed in a different jurisdiction. Thus, attorneys and their clients must have a predictable rule regarding when the attorney-client privilege applies, and the *Kellogg* "substantial purpose" test best meets that need.

II. This Court should reject the Ninth Circuit's primary purpose test because it results in uncertain and inconsistent application of the attorney-client privilege to dual-purpose communications.

This case concerns the discoverability of dual-purpose communications related to tax advice by an attorney who acted both as legal counsel and tax return preparer. *In re Grand Jury,* 23 F.4th at 1091; Pet. App. 24a-28a. While the attorney-client privilege is

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client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."

sacrosanct, there is no accountant-client privilege.[3] *Couch v. United States,* 409 U.S. 322, 335 (1973). The Ninth Circuit therefore adopted a balancing test to determine whether the primary purpose of the communication "is to give or receive legal advice, as opposed to business or tax advice." *In re Grand Jury,* 23 F.4th at 1091. The assertion of privilege is upheld only when the legal purpose predominates. *Id.*

Under the Ninth Circuit's test, courts must examine the communication to parse the legal and non-legal portions. *Id.* Courts must then balance the two and determine whether the legal or non-legal purpose is the most predominant. *Id.* Only when the legal purpose of the communication is more significant than the non-legal purpose will the attorney-client privilege apply. *Id.* "The natural implication of this inquiry is that a dual-purpose communication can only have a single 'primary' purpose." *Id.*

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[3] Subject to certain limitations, 26 U.S.C. § 7525 extends the "same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney…to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney." 26 U.S.C. § 7525(a)(1). This privilege does not apply to work product and does not protect the preparation of tax returns and other documents filed with the Internal Revenue Service. *See, Frederick,* 182 F.3d at 502 and *In re Grand Jury Investigation,* 842 F.2d 1223, 1224-1225 (11th Cir. 1987). This privilege also does not apply in criminal contexts. I.R.C. § 7525(a)(2); *United States v. BDO Sideman, LLP,* 492 F.3d 806, 821 (2007).

The Ninth Circuit's test creates unpredictability by leaving much to the subjective discretion of the presiding court. Uncertainty already exists in determining what defines legal versus non-legal advice in many settings, whether lawyers are providing non-litigation, prelitigation, and/or litigation services. In those circumstances, there is no clear delineation on where legal advice stops and business advice starts. *See Sedco Int'l S. A. v. Cory,* 683 F.2d 1201, 1205 (8th Cir. 1982) ("[L]egal advice concerning commercial transactions is often intimately intertwined with and difficult to distinguish from business advice."). That uncertainty is compounded and creates an unworkable situation when the court is left to decide on a case-by-case basis how important the legal advice is compared to the non-legal advice in every communication.

Courts balancing whether legal or non-legal aspects of attorney-client communications predominate must consider and weigh the nature of the attorney-client relationship, what motivated the particular attorney-client communication, the nature of the advice sought, and what precisely was said in each communication. Balancing these factors necessarily leads to a subjective determination by the court regarding whether to apply the privilege. Under this "primary purpose" test, it is impossible for attorneys and clients exchanging dual-purpose communications to predict in advance how courts may later balance the purposes motivating the communications to determine whether it will be protected by the privilege.

The attorney-client privilege only works to effectively foster open dialog between client and

attorney when they know at the outset that courts will use a test producing predicable results as to what is privileged. For that reason, this Court has previously rejected a balancing test to determine the breadth of the attorney-client privilege after the fact. *Swidler,* 524 U.S. at 409; *see also, Upjohn* 499 U.S. at 393 ("The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected"). This Court should similarly rule that the Ninth Circuit's test is unacceptably uncertain and impermissibly frustrates attorneys' ability to counsel their clients based on full and candid information.

Notably, the Ninth Circuit did not completely reject the significant purpose test adopted by the D.C. Circuit in *Kellogg*. *In re Grand Jury,* 23 F.4th at 1094. It did, however, limit the application of *Kellogg* to only "truly close cases, like where the legal purpose is just as significant as a non-legal purpose." *In re Grand Jury,* 23 F.4th at 1095. Apparently, the *Kellogg* significant purpose test applies in the Ninth Circuit only in the rare instance where the court finds a perfect 50-50 balance between the legal and non-legal purposes of a communication. It is, of course, impossible to predict when a court may find such a perfect 50-50 balance of purposes, so this remote possibility does little to encourage the type of frank and open communications

between attorneys and their clients that is needed to ensure that proper legal advice is conveyed.

The Ninth Circuit's test for when to apply the attorney-client privilege to dual-purpose communications chills such communications, contrary to the intent behind the privilege. It also creates uncertainty for both attorney and client and lends itself to a lack of uniformity in application by requiring the courts to engage in a subjective balancing of purposes. For these reasons, this Court should reject the primary purpose balancing test adopted by the Ninth Circuit.

III. This Court should reject the Seventh Circuit's refusal to apply the attorney-client privilege in the context of tax advice because it exposes communications that should remain confidential.

In *United States v. Frederick*, the Seven Circuit rejected the assertion of the attorney-client privilege to communications relating to both tax return preparation and litigation in a case where the attorney was providing both legal advice and non-legal accounting services. *Frederick,* 182 F.3d at 499, 501. Unlike the Ninth Circuit, the Seventh Circuit does not require courts to determine or balance the significance of the legal purpose motivating a dual-purpose communication. The mere fact that the document contains nonlegal information renders the privilege inapplicable. *Id.* ("The Lenzes undoubtedly benefited from having their lawyer do their returns, but they must take the bad with the good; if his legal thinking infects his worksheets, that does not cast the cloak of privilege over the worksheets; they are still

accountants' worksheets, unprotected no matter who prepares them.")

Frederick creates a dilemma for tax attorneys practicing in the Seventh Circuit. While it creates certainty in the knowledge that no privilege will apply to dual-purpose communications, it greatly inhibits the ability of tax attorneys and their clients to have full and honest discourse for purposes of securing both sound legal advice and tax preparation services. The tax system in the United States relies upon the honesty of the taxpayer to self-report income and pay the correct amount of taxes due thereon. While preparing and filing an income tax return is supposed to be possible for the average taxpayer, the Internal Revenue Code's complexity and harsh penalties for non-compliance often make that an arduous and often impossible task. In many instances, such as in the business or international context, preparing and filing a tax return without first consulting a multitude of professionals, including tax attorneys, is ill-advised.

It is settled that information provided to the attorney that later appears on a tax return, is not privileged. *United States v. Cote,* 456 F.2d 142, 144 (8th Cir. 1972). ("[C]ommunications made solely for tax return preparation are not privileged."); *see also, Frederick,* 182 F.3d at 501, *citing, United States v. Arthur Young & Co.,* 465 U.S. 805, 817-819 (1984) ("a lawyer's privilege…is no greater when he is doing accountant's work"). "[I]f the client transmitted the information so that it might be used on the tax return, such a transmission destroys any expectation of confidentiality." *Frederick,* 182 F.3d at 500-501, *citing,*

United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983).

However, there are often situations where an attorney must render legal advice related to a client's tax return, and that legal advice should be protected by the attorney-client privilege. For example, the Internal Revenue Service frequently issues audit initiatives and annually publishes its Dirty Dozen list of transactions that it has identified as scams and without substantive tax basis. www.irs.gov/newsroom/irs-warns-taxpayers-of-dirty-dozen-tax-scams-for-2022 (IR-2022-113, June 1, 2022). Many of those purported scams are founded on a legitimate transaction that is manipulated to achieve illegitimate results, such as overinflated deductions or artificially suppressed income. A client might consult their tax attorney to determine if a transaction meets the guidelines in the Internal Revenue Code, associated regulations, and IRS guidance prior to adopting a position with respect to that transaction on their income tax return. That determination requires legal research and analysis that is best described as core legal advice and not accounting work or the mere transcribing of numbers on a return. Accordingly, communications related to that research and the attorney's legal opinion and advice should be protected from disclosure by the attorney-client privilege. Under the Seventh Circuit's test, that protection is largely eviscerated. *See, Frederick,* 182 F.3d at 501.

Nevertheless, even the Seventh Circuit recognized that "it cannot be assumed that everything the taxpayer gave [his counsel] was intended to assist him

in his tax-preparation function and so might be conveyed to the IRS, rather than in his legal-representation function." *Frederick,* 182 F.3d 501. That recognition is small comfort to tax attorneys and their client because their entire communication becomes unprivileged whenever any part of it is used to prepare a return. "[A] dual-purpose document—a document prepared for use in preparing tax returns and for use in litigation—is not privileged." *Id.*

While the holding in *Frederick* concerns a document created both to prepare an income tax return and for use in litigation, the same rationale could apply to non-tax dual-purpose communications, especially in situations where the attorney is providing legal advice and preparing documents to be submitted to a third party, such as in the business or regulatory landscape. The *Frederick* holding has not been adopted outside the Seventh Circuit, but it nevertheless has resulted in unworkable complexity and uncertainty for practitioners and their clients, especially those who practice in multiple jurisdictions. *See, e.g., Schaeffler v. U.S.*, 806 F.3d 34, 44, fn. 4 (2nd Cir. 2015) (discussing the inapplicability of *Frederick* in situations where the client is accompanied by counsel in an audit for the purposes of providing advice on statutory interpretation or case law).

For the above reasons, this Court should disapprove of the Seventh Circuit's decision in *Frederick*. As we now explain, this Court should approve the D.C. Circuit's substantial purpose test adopted in *Kellogg* for determining when the attorney-client privilege applies to dual-purpose communications.

IV. CLA urges this Court to approve the "a significant purpose" test adopted by the D.C. Circuit in *Kellogg*.

In *In re Kellogg Brown & Root, Inc.,* the D.C. Circuit adopted the "significant purpose" test when it held that the attorney-client privilege applied to dual-purpose documents created during an internal investigation. *Kellogg* 756 F.3d at 759-760. The test adopted in *Kellogg* requires courts to identify the legal purpose behind a communication and determine whether it is significant. *Id.* at 759. If the answer is yes, the privilege applies. *Id.* at 760 ("Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was *one of the significant purposes* of the attorney-client communication." (Emphasis added)).

Under the significant purpose standard, there is no balancing as required by the Ninth Circuit. As then-Judge Kavanaugh articulated:

> It is often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B. It is thus not correct for a court to presume that a communication can have only one primary purpose. It is likewise not correct for a court to try to find *the* one primary purpose in cases where a given communication plainly has multiple purposes. Rather, it is clearer, more precise, and more predictable to articulate the test as follows: Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one

> of the significant purposes of the communication?

Kellogg, 756 F.3d at 759-760 (emphasis in original). Under the D.C. Circuit's test, the court need not compare the significance of any contemporaneous nonlegal purposes that also may have motivated the communications. *Id.* at 759–60.

The D.C. Circuit's significant purpose test is broader and more protective than the Ninth Circuit's primary purpose test. While the D.C. Circuit's test will shield more communications from discovery than the tests used in the Seventh and Ninth Circuits, the privilege is worthy of the deference afforded it under the *Kellogg* test. "[W]e acknowledge that the privilege carries costs. The privilege means that potentially critical evidence may be withheld from the factfinder . . . . But our legal system tolerates those costs because the privilege is intended to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Kellogg,* 756 F.3d at 764, *citing, Swidler*, 534 U.S. at 403 (*quoting Upjohn*, 499 U.S. at 389) (internal quotations omitted); *see also Costco Wholesale Corp. v. Superior Court*, 219 P.3d 736, 740–41 (Cal. 2009) ("Although exercise of the privilege may occasionally result in the suppression of relevant evidence, . . .these concerns are outweighed by the importance of preserving confidentiality in the attorney-client relationship. . . . 'The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may

sometimes result from the suppression of relevant evidence.'").

The facts in *In re Grand Jury* concern the application of the attorney-client privilege to communications between tax attorneys and their clients. 23 F.4th at 1091. Tax attorneys routinely advise clients about the likely tax consequences of proposed actions and how to structure transactions to achieve both compliant and favorable tax consequences. This is *legal* advice that should be privileged. "[C]ommunications made to acquire legal advice about what to claim on tax returns may be privileged." *United States v. Abrahams*, 905 F.2d 1276, 1284 (9th Cir. 1990). *United States v. Cote,* 456 F.2d 142, 144 (8th Cir. 1972) ("Tax advice rendered by an attorney is legal advice within the ambit of the privilege.") Adopting the D.C. Circuit's "significant purpose" test rather than the Ninth Circuit's "primary purpose" test will lead to the proper application of privilege in these circumstances.

V. The D.C. Circuit's "significant purpose" test aptly applies in numerous circumstances other than tax law matters.

While tax attorneys undoubtedly have a clear interest in the applicable test to determine the protections afforded dual-purpose attorney-client communications, adopting the *Kellogg* "significant purpose" test has universal application to all practices of law. In today's varied legal world, no practice area is immune to the inconsistent application of the privilege to dual-purpose communications that currently exists.

Clients, particularly laypersons, seeking legal advice in all contexts frequently do not know precisely what information is or is not required to receive adequate legal advice, and attorneys providing such advice may not know how to categorize the client's information until all communications have been received. *See Swidler,* 524 U.S. at 409 ("[A] client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter"). As a result, dual-purpose communications are ubiquitous in all legal practices.

One need only look to the variety of practices involved in published opinions to understand the complexity of this issue. Notably, two cases cited frequently in the parties' merits briefing, *Upjohn* and *Kellogg*, both concern the application of the attorney-client privilege to communications produced by in-house counsel during an internal investigation. *See generally, Upjohn,* 449 U.S. 383 (concerning reports disclosed to the Securities and Exchange Commission ("SEC") and the Internal Revenue Service ("IRS") regarding questionable payments made by a foreign subsidiary to foreign government officials) and *Kellogg*, 756 F.3d 754 (concerning federal defense contractor regulations). Both cases stemmed from the companies' responses to regulatory requirements to ensure corporate compliance with the law. *See Kellogg,* 756 F.3d at 757 (finding the issues presented before it to be materially indistinguishable from the underlying factual issues in *Upjohn*).

Other cases illustrate various circumstances in which privilege questions in the context of dual-

purpose communications can arise. In *Federal Trade Commission v. Boehringer Ingelheim Pharmaceuticals, Inc.,* the court found the attorney-client privilege applied to documents concerning a settlement reached in an antitrust matter. *Federal Trade Commission v. Boehringer Ingelheim Pharmaceuticals, Inc.,* 892 F.3d 1264, 1267 (D.C. Cir. 2018). Cases have also arisen concerning the application of the attorney-client privilege to dual-purpose communications in products liability (*In re General Motors LLC Ignition Switch Litigation,* 80 F. Supp. 3d 521 (S.D.N.Y. 2015)), commercial transactions (*Sedco Int'l S.A. v. Cory,* 683 F.2d at 1205), employment law (*Koumoulis v. Indep. Fin. Mktg. Grp., Inc.,* 29 F. Supp. 3d 142, 146 (E.D.N.Y. 2014)), patent law (*Hercules, Inc. v. Exxon Corp.,* 434 F. Supp. 136, 143 (D. Del. 1977)), and corporate matters (*Dolby Labs. Licensing Corp. v. Adobe, Inc.,* 402 F. Supp. 3d 855, 873 (N.D. Cal. 2019).

It is significant that in *Kellogg,* based on the findings of its internal investigation, the company made disclosures to the Department of Defense ("DOD") pursuant to its obligations under 41 U.S.C. §§ 51-58 (the Anti-Kickback Act), but properly declined to disclose the investigative report itself to the DOD because it was protected by the attorney-client privilege. *Kellogg,* 796 F.3d at 142. Similarly, disclosures were made to the SEC and the IRS in *Upjohn* based on a corporation's internal investigation. *Upjohn,* 449 U.S. at 387. In both *Upjohn* and *Kellogg*, assertions of the attorney-client privilege were upheld, which is inconsistent with the Seventh Circuit's rule that any third-party disclosure waives the privilege

regarding the disclosed subject matter. *See Frederick,* 182 F.3d at 500-01.

In sum, the D.C. Circuit's significant purpose test best promotes the uniform and consistent application of the privilege across numerous practice areas and provides a reliable framework for complex and dynamic advice provided by attorneys to their clients. That test, which when "[s]ensibly and properly applied…boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication," best fits with the evolving landscape of the legal profession and promotes the open discourse the attorney-client privilege was designed to protect. *Kellogg,* 756 F.3d at 760.

For these reasons, CLA urges this Court to expressly adopt the *Kellogg* "significant purpose" standard as the appropriate test for determining when the attorney-client privilege applies to dual-purpose communications, regardless of the type of law at issue. By doing so, the Court will safeguard the full and frank communications needed between attorney and client and ensure that dual-purpose communications containing significant legal advice remain privileged.

CONCLUSION

Uniformity in the application of the attorney-client privilege to dual-purpose communications is imperative to promote full and candid communications between attorneys and their clients, which is essential to proper legal representation and the fair administration of the law. To meet these dual objectives, this Court should approve the "significant purpose" test adopted by

Justice Kavanaugh in the D.C. Circuit's *Kellogg* decision, reverse the Ninth Circuit's decision in this case, and disapprove the Seventh Circuit's *Frederick* decision.

Respectfully submitted by,

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