No. 26-OA-0001

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IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

In re Meta Platforms, Inc. and Instagram, LLC,

Petitioners

On Petition for a Writ of Mandamus to the
Superior Court of the District of Columbia
No. 2023 CAB 006550
(Yvonne M. Williams, J.)

BRIEF FOR LAWYERS FOR CIVIL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND GRANTING THE PETITIONERS' WRIT OF MANDAMUS

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Lawyers for Civil Justice ("LCJ") is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases.[1] Since 1987, LCJ has been proposing and advocating for procedural reforms that (1) promote balance in the civil justice system, (2) reduce the costs and burdens associated with litigation, and (3) make the resolution of civil disputes more consistent and efficient. LCJ, and its members, have deep knowledge of and interest in the substance and correct interpretation and application of the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the attorney-client privilege.

Because LCJ is an organization comprised of both corporations and their outside lawyers, LCJ has an interest in ensuring that the rules applicable to privilege (1) are practicable given the way modern corporations communicate with their counsel; and (2) facilitate the attorney-client relationship by ensuring that legal advice and requests for legal advice are protected, such that open and frank discussion between lawyers and clients is not chilled.

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[1] Petitioner Meta Platforms, Inc. is an LCJ member. Neither of Petitioners has had any involvement in the authorship of LCJ's *Amicus* Brief and neither has contributed money to LCJ to specifically fund the preparation and submission of this brief.

LCJ is submitting this *amicus* brief due to the importance of correctly applying the procedural and substantive safeguards in connection with any invocation of the crime-fraud exception, and the national impact beyond this case that the resolution of this issue will have.

II. SUMMARY OF THE ARGUMENT

Communications protected by the attorney-client privilege are traditionally deemed worthy of maximum protection from disclosure to ensure that clients can have candid, confidential communications with counsel to seek and receive legal advice. The availability of this protected space for legal discussions and advice is important for clients of all sizes and types, but it is notably important for business entities that are continuously navigating various regulatory compliance demands and litigation exposures.

Courts should intrude upon the sanctity of the attorney-client privilege only in truly exceptional circumstances and with the utmost caution. That principle reflects decades of settled law recognizing the privilege as a cornerstone of the legal system and an essential safeguard of the right to effective counsel. Here, however, the Superior Court failed to adhere to the procedural and substantive protections long required in the discovery context—protections that have been consistently and uniformly applied by courts nationwide, including in the District of Columbia, for many years. If allowed to stand, the resulting departure from established law would

seriously undermine the privilege and set a precedent whose harmful consequences cannot be overstated.

First, in concluding in its October 23, 2025, order (the "October Order") that the four redacted documents were subject to the crime-fraud exception, the Superior Court misapplied controlling District of Columbia precedent and improperly expanded that exception well beyond its traditionally narrow scope. *Second,* the court further erred by invoking the crime-fraud exception despite the absence of evidence sufficient to establish a *prima facie* showing—under the totality of the circumstances—that the communications were made in furtherance of an ongoing or future crime or fraud, as District of Columbia law requires. *Third,* the court failed to consider the full context of the challenged communications and denied the defendant any opportunity to rebut the purported *prima facie* showing through an evidentiary hearing, compounding these errors and depriving the defendant of the procedural protections fundamental to preservation of the attorney-client privilege.

In its January 5, 2026, Order Denying Reconsideration (the "January Order"), the Superior Court changed the basis of its October Order, essentially providing new justifications for its crime-fraud finding – but again without an evidentiary hearing. Importantly, the court refused to consider any evidence. In short, the Superior Court again acted without the full consideration of the facts and circumstances required to

comply with the procedural and substantive safeguards for applying the crime-fraud exception to otherwise privileged communications.

In the short time since the Superior Court issued its rulings, the broad impact of the court's ruling has been significant. Litigants have raced to courts across the country seeking to apply the crime-fraud exception in their respective cases against the same defendant. Two courts considering the application of the crime-fraud exception to the identical redactions and documents disagreed with the District of Columbia Superior Court and found that the crime-fraud exception was not applicable. Similar disputes in other courts are pending.

Moreover, this case has garnered widespread attention in the legal press.[2] There is a substantial risk that other matters wholly unrelated to this case will become subject to similar privilege challenges based on erroneous application of the crime-fraud exception, especially if counsel perceive that they can bypass the well-settled procedural and substantive safeguards against summary application of the doctrine to eviscerate privilege claims.

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[2] *See, e.g.,* Isaiah Poritz, *Meta Loses Bid to Block Internal Docs on Teen Mental Health*, BLOOMBERG LAW (Oct. 23, 2025); Kat Black, *D.C. Judge Orders Meta to Produce Documents on Blocking Research Into Teen User Safety*, LAW.COM (Jan. 7, 2026); Dorothy Atkins, *Meta To Face Sanctions Bid Over Alleged Atty-Advice Fraud*, LAW360 (Oct. 24, 2025); Mike Curley, *Meta Can't Revisit Order Blocking Clawback Of Attorney Docs*, LAW360 (Jan. 6, 2026).

At bottom, leaving the October and January Orders in place risks not only further proliferation of litigation with potentially inconsistent outcomes in this and related cases, but more broadly, the decision will create substantial confusion and uncertainty regarding the scope of the crime-fraud exception to the attorney-client privilege generally. In turn, this uncertainty will not only inevitably yield multiple challenges and disputes regarding attorney-client privilege claims in the context of corporate advice, but also the realistic potential of such challenges will have an immediate chilling effect on the ability of clients to seek, and attorneys to provide, timely and candid advice to corporate clients. It will also inevitably lead to substantial additional burdens on litigants and courts as litigation disputes involving the application of the crime-fraud exception multiply.

For these reasons, and those stated below, LCJ respectfully advises the Court to grant the Petition for a Writ of Mandamus and reiterate the long-standing procedural protections and substantive contours of the narrow crime-fraud exception to privilege.[3]

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[3] To be clear, LCJ is focused in this *amicus* brief on the proper articulation and application of the procedural safeguards and substantive contours of the crime-fraud exception to the attorney-client privilege, and the broader impact on the privilege as applied to corporations when those safeguards are not observed. LCJ does not take any position (one way or the other) as to any underlying allegations as to Meta and its conduct apart from the assessment of the record cited by the Superior Court and the shortcomings of that record to support the Superior's Court's application of the crime-fraud exception. That said, any litigant (such as

III. ARGUMENT

The attorney-client privilege is one of the oldest recognized privileges for confidential communications. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998). As the Supreme Court explained in *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), the privilege is foundational to the attorney-client relationship, as it allows clients to seek legal guidance with confidence that their communications will remain private. It "encourag[es] full and frank discussions between attorneys and their clients," and "promotes broader public interests in the observance of law and the administration of justice." *In re Ti.B.*, 762 A.2d 20, 27-28 (D.C. 2000).

Courts have placed strict guardrails on application of the crime-fraud exception to the attorney-client privilege. First, it applies only if the client sought legal advice to further "an ongoing or future crime or fraud" or other misconduct. *See Pub. Def. Serv.*, 831 A.2d 890, 902 (D.C. 2003). Second, to trigger an *in camera* review based on the crime-fraud exception, the party challenging the privilege must present evidence sufficient to support a reasonable belief that it applies (*i.e.*, "*prima facie*" evidence that the client sought the legal advice to further its crime or fraud).

Meta here) should be accorded full due process protections to address and rebut any purported *prima facia* showing of crime-fraud in light of the seriousness of such charges and the substantial impact of an adverse determination. Without such protections, it is fundamentally unfair to castigate the actions of the client and/or counsel.

United States v. Zolin, 491 U.S. 554, 574 (1989); *see also Pub. Def. Serv.*, 831 A.2d at 903. Neither requirement was satisfied in the proceedings below.

The District of Columbia Court of Appeals established a probable cause standard in *In re Public Defender Service* for the crime-fraud exception, requiring a heightened showing to overcome the attorney-client privilege, stating "[w]e do not believe that the attorney-client relationship should be invaded upon anything less than a showing of probable cause to believe that the communications fall within the crime-fraud exception." *Id.* at 904. *In re Public Defender Service* requires courts to assess if "the totality of the facts and circumstances presented would warrant a reasonable and prudent person in the belief that the attorney-client communications in question were in furtherance of an ongoing or future crime or fraud as explained in this opinion." *Id.* at 904. (citing *Davis v. United States*, 781 A.2d 729, 734 (D.C. 2001), for the probable cause standard).

A. The Superior Court Fundamentally Erred in its Application of the Crime-Fraud Exception.

1. The Superior Court's October Order Was Not Based on *Prima Facie* Evidence that There Was a Crime, Fraud, or Other Misconduct.

In its October Order, the Superior Court did not identify a cognizable "ongoing crime or fraud" that could establish the crime-fraud exception to the attorney-client privilege. Rather, the court based its application of the exception on the contention that Meta was "obfuscating the adjudication of Meta's liability" in

related multidistrict litigation pending in the Northern District of California. *See* October Order at 11; *see also In re: Social Media Adolescent Addiction,* No. 22-md-03047-YGR (N.D. Cal.) ("*Social Media Addiction* MDL").

Purportedly "obfuscating" liability in another matter is an insufficient basis for the crime-fraud exception. According to the Court of Appeals in *In re Public Defender Service*, the *prima facie* showing of crime or fraud "need not rise to the level of dispositive proof, *but it must at least have some substance*." *Id.* (emphasis added). Although "[t]he government is not obliged to come forward with proof sufficient to establish the essential elements of a crime or fraud beyond a reasonable doubt, ... it isn't enough for the government merely to allege that it has a sneaking suspicion the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney." *Id.* (internal citations omitted).

The October Order erred because it failed to articulate an actionable crime or fraud in furtherance of which the defendant purportedly engaged its counsel. Instead, its reliance on alleged "obfuscation" is exactly like the mere "sneaking suspicion the client was engaging in or intending to engage in a crime or fraud when it consulted the attorney" that fails to meet the standard. *See id.* Consequently, the October Order does not provide the "specific showing" that the crime-fraud exception applies as required by *In re Public Defender Service*. *See id.* at 904.

Critically, the ruling risks imperiling a core attorney role: Advising clients about how to minimize litigation risk, which very often includes advice about risks of putting things in writing that can be discovered and used against it later. Under the Superior Court's ruling, every time an attorney advises a client to not say something in a press conference, or to change a public statement, they risk the invocation of the crime-fraud exception under the Superior Court's rationale just because that activity could be viewed as "obfuscating" liability in some future proceeding. Such a conclusion is untenable as attorneys would never be able to help clients manage risk in a confidential and privileged matter.

Moreover, the Superior Court's unmistakable castigation of counsel in providing such advice is severely misplaced. No less than the U.S. Supreme Court itself recognized in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), for example, that "under ordinary circumstances, it is not wrongful for a manager to instruct his employees to comply with a valid document retention policy, even though the policy, in part, is created to keep certain information from others, including the Government." *See also Valassis Communs., Inc. v. News Corp.*, No. 17-cv-7378 (PKC), 2018 WL 4489285, at *2 (S.D.N.Y. Sept. 19, 2018) ("The act of 'vetting' a proposed strategy with a lawyer is what an honest client may choose to do before implementing a strategy.").

Finding that "obfuscating" liability in a future proceeding is sufficient to invoke the crime-fraud exception improperly risks transforming ordinary legal advice into purported wrongful acts. The impact on a company of criminalizing legal advice can be enormous. For example, in the *Arthur Andersen* case, even though the Supreme Court ultimately vacated Arthur Andersen's criminal conviction for obstruction of justice, it was too late. The firm had shut down its U.S. operations after the jury verdict because it lost most of its business, and tens of thousands of employees lost their jobs.[4]

2. There Was No Evidence Cited by the Superior Court to Support a Conclusion That the Privileged Material Was "In Furtherance Of" an Ongoing or Future Crime or Fraud.

Even if purported "obfuscation" of liability were sufficient to trigger the crime-fraud exception (which it is not), such obfuscation would have actually had to occur for the exception to apply. Neither the October Order nor the January Order established that the redacted documents were "in furtherance of" any ongoing or future crime or fraud because there is no indication that evidence was actually destroyed or altered. The crime-fraud exception requires more than attorney advice standing alone. Even when there is evidence of an "illegal scheme," the crime-fraud

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[4] *See* David Shaper, *Court Ruling Little Comfort for Ex-Andersen Employees,* NPR (June 1, 2005) ("Andersen had employed 28,000 people in the US and more than 80,000 worldwide, nearly all of whom were out of a job after the conviction.").

exception "does not apply" absent evidence that the "illegal scheme was advanced." *In re Pub. Def. Serv.*, 831 A.2d at 895.

In considering the crime-fraud exception for the same documents and redactions that are at issue here, the Northern District of California determined that there was no evidence that any documents were actually destroyed or any research findings were actually altered as a result of the alleged legal advice. *See* Order Resolving Dispute Re: Four Meta Documents and Crime Fraud Exception to Attorney-Client Privilege, *In re: Social Media Adolescent Addiction,* No. 22-md-03047-YGR (N.D. Cal. Jan. 13, 2026), ECF No. 2630 ("*In re Social Media Addiction* MDL Order") at 17 ("Based on the record submitted, there was no destruction of documents at issue here. At best, the record indicates that there was discussion with Meta's lawyers about redesigning the MYST study.").

Indeed, the *In re Social Media Addiction* MDL Order states that based on the documents that the defendant represented were already preserved in the case, "there has been no destruction of evidence, because the versions of the MYST study documents which both predate and postdate the attorney advice here still exist." [5]

[5] The defendant's preservation obligations pertaining to any drafts or versions of documents that were the subject of legal advice about litigation risks in the underlying cases are outside the scope of this brief, but the defendant represented that many pre-advice and post-advice versions existed were preserved and could be produced in the *In re Social Media Addiction* MDL.

Id. at 18. Nor did the court find that there was "irreversible or unreviewable alteration of evidence, because the pre- and post- advice versions exist, and thus, any changes are discoverable from simple comparison of the text of the various versions." *Id.*; *see also Valassis*, 2018 WL 4489285, at *2 (denying a motion to compel potentially privileged documents based on party "insinuating" documents were altered or destroyed when there "has been no evidence of it; rather, the documents have been logged and preserved for in camera review by a court.").[6]

In this case, there is no record of any act or misconduct taken in furtherance of any crime or fraud, which is reflected in the fact that the Superior Court's orders do not cite to any. Consequently, the crime-fraud exception simply cannot apply on the facts cited by the Superior Court.

3. The Superior Court Erred by Refusing to Consider the Context of the Redacted Attorney-Client Communications or Relevant Evidence.

The Superior Court's determination that there was a crime or fraud must be based on "evidence that if believed by the trier of fact would establish the elements

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[6] While Meta apparently agreed in the Northern District of California that it would provide access to documents pre-dating and post-dating the document and communications at issue, there should be no broad sweeping rule or expectation that clients or in-house counsel providing advice during on-going investigations and litigation need to keep (and produce) shadow copies of all iterations of documents or communications that may have been the subject of the legal advice, especially if they are not otherwise subject to a duty to preserve.

of an ongoing or imminent crime or fraud." *In re Pub. Def. Serv.*, 831 A.2d 890, 903 (D.C. 2003). Additionally, *In re Public Defender Service* requires that even when a *prima facie* showing of crime or fraud is found, the evidence considered will only suffice "until contradicted and overcome by other evidence." *Id*. at 904 (citing *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982)).

Importantly in this case, ***none*** of the four documents in question directly contained advice provided by an attorney to the defendant's employees. Two of the documents involved non-lawyer employees providing secondhand characterizations of advice from outside counsel, and two of the documents involve non-lawyer employees generally discussing advice from Meta's in-house legal team.

The Superior Court appears to have relied heavily if not solely on its *in camera* review of the four documents themselves in making its finding of a crime or fraud. Yet, these documents are secondhand characterizations of legal advice that may constitute multiple levels of hearsay, and do not, standing alone, demonstrate "probable cause to believe a crime or fraud has been committed." *See id.* at 903.

Given the lack of context and multiple potential levels of hearsay in the documents, it is critically important that the context of the conversations be considered to determine "whether the totality of the facts and circumstances presented would warrant a reasonable and prudent person in the belief that the attorney-client communications in question were in furtherance of an ongoing or

future crime or fraud[.]" *Id.* at 904. *Both parties* attempted to provide exactly that when they requested an evidentiary hearing before the October Order. The defendant later offered declarations from its researchers that would have provided context on the facts and circumstances. But the Superior Court refused to hold an evidentiary hearing, and also refused to consider the declarations. *See* Petition for Writ of Mandamus at 27 ("Even before the trial court's initial ruling, Meta had requested a hearing, App.122, and in responding to Meta's motion for reconsideration, the District likewise urged the Court to "hold an evidentiary hearing where all these facts can be examined," App.199.").

In short, the Superior Court's procedural errors and shortcuts deprived it of the opportunity to consider properly the "totality of the facts and circumstances" before invoking the crime-fraud exception.

B. The Court's January Order Denying the Motion for Reconsideration Exacerbated the Procedural and Substantive Errors in the October Order.

The Superior Court's January Order shifted its grounds for finding a purported *prima facie* case for crime-fraud, again refused to consider evidence, and faulted the defendant for not responding sooner to a finding that had not been made at the time when the court contended it should have introduced the evidence.

1. The January Order Revised the Basis for the Superior Court's Crime-Fraud Finding.

The Superior Court's January Order recharacterized the court's basis for finding a crime or fraud. In the October Order, the basis was "i.e., obfuscating the adjudication of Meta's liability in the related multidistrict litigation." In the January Order, the court changed the basis by (1) stating that "obfuscation" was just an "illustrative restatement" and not the basis for the crime-fraud finding; and (2) citing for the first time two counts in the government's complaint for deceptive trade practices as grounds for finding a crime or fraud. *See* January Order at 13.[7]

The court's new reference in its January Order to deceptive trade practices claims lacks substance and constitutes nothing more than the "sneaking suspicion" that the Court of Appeals in *In re Public Defender Service* found to be insufficient.

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[7] The court's use of "i.e." in "i.e., obfuscating the adjudication of Meta's liability in the related multidistrict litigation" is telling. The court stated in the January Order that its use of "i.e." demonstrated that obfuscating liability was merely one example of a crime or fraud giving rise to the crime-fraud exception. But "i.e." is a common abbreviation meaning "that is" or "in other words." If the court had intended "obfuscating liability" as an illustrative example, it would presumably have instead used "e.g." (meaning "for example") instead of "i.e." Notwithstanding any observations about nomenclature, however, the draconian application of the crime-fraud exception simply cannot be invoked by passing references to possible justification "by way of example" or otherwise. The procedural protections afforded under the law require a precise application of safeguards, including a showing of sufficient evidence to establish a *prima facie* basis for finding a crime or fraud, to ensure that any invocation of the crime-fraud is narrowly circumscribed to the precise circumstances where the exception applies.

See January Order at 13. Importantly, the Superior Court's invocation of the deceptive trade practices statutes is not based on any evidence in the record constituting a *prima facie* basis for finding a violation.

These recharacterizations materially changed the grounds for the Superior Court's October Order, and demonstrate the lack of a *prima facie* basis for applying the crime-fraud exception and the need to afford the party asserting the attorney-client privilege an opportunity to present contradictory and contextual evidence.

2. Despite Providing a New Basis for Its Crime-Fraud Finding, The Superior Court Refused to Consider Additional Evidence.

The Superior Court's January Order stated that the court would not consider additional evidence in part "because Meta's ex post declarations serve not to rebut the Court's probable cause finding [that the crime-fraud exception applies] but instead serves as conflicting evidence as to whether Meta, in fact, engaged in any crime, fraud, or other misconduct." *See* January Order at 7. The Superior Court further concluded that the question of whether the defendant engaged in such conduct was a question for a jury, as it purportedly went to the ultimate question of whether it had engaged in fraudulent misrepresentations of what it knew about the effects of its platforms on youth as alleged in the Complaint. *See id.*

The Superior Court's statement that whether the defendant was engaged in a crime or fraud is a question for the jury—and not for the court to consider in

determining whether the crime-fraud exception applies—is plainly erroneous in the context of the procedural and substantive safeguards to surround any consideration of the crime-fraud exception. Even if there is a proper probable cause finding that the crime-fraud exception applies, any "conflicting evidence as to whether Meta engaged in any crime, fraud, or other misconduct" would necessarily rebut the finding that there was probable cause to believe that a crime or fraud occurred in the first place. Failing to consider such evidence is fatal to the Superior Court's ruling.

Moreover, even if the same declarations could also go to the ultimate question of fact for the jury, it does not mean that the court cannot consider them in determining whether the crime-fraud exception applies. By extension of the court's logic, *nothing* could rebut a crime-fraud probable cause showing if it could also be used in the underlying case itself, and a party would be helpless to respond to any crime-fraud allegations where the purported crime or fraud was related to the ultimate question in the case. That is not consistent with legal precedent.

Finally, it is notable that in considering the exact same documents for the crime-fraud exception, the court in the *In re Social Media Addiction* MDL by contrast considered the declarations and evidence providing the totality of the circumstances. It then determined that the crime-fraud exception did not apply, based on the lack of evidence of any action taken in furtherance of a crime or fraud,

and that there was no evidence that any research was actually destroyed or altered. *See In re Social Media Addiction* MDL Order at 21, 22.

C. Other Cases Considering the Same Redactions Have Applied the Crime-Fraud Exception Differently.

In the short time since the Superior Court's October and January Orders, plaintiffs in multiple jurisdictions have sought on crime-fraud exception grounds disclosure of the same privilege redactions in the same four documents at issue here. And they have sought to unredact and compel production of more documents based on the crime-fraud exception.[8]

As alluded to above, two courts that have ruled on these exact same documents and redactions, the Northern District of California in the *In re Social Media Addiction* MDL and the Los Angeles Superior Court in the coordinated California

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[8] *See* Plaintiffs' Motion to Supplement Opposition to Meta's Motion for Stay of Proceedings, *State of Nevada v. Meta Platforms, Inc.*, No. A-24-886110-B (Nev. Dist. Ct., Clark Cnty. Oct. 30, 2025) (Plaintiffs filed a motion to supplement an existing opposition with "additional critical information," citing to the Superior Court's October Order and asking for the opportunity to challenge Meta's redactions under the crime-fraud exception); Plaintiffs' Reply in Support of Motion to Compel Clawed-Back Documents or for In Camera Review, *State of New Mexico v. Meta Platforms, Inc.*, No. D-101-CV-2023-02838 (N.M. Dist. Ct., Santa Fe Cnty. Jan. 5, 2026) (citing the D.C. Superior Court's January Order and seeking the crime-fraud exception and a motion to compel production of the same documents); Motion Requesting In Camera Review and for an Order Finding no Privilege over Documents, *State of Tennessee v. Meta Platforms, Inc.*, No. 23-1364-IV (Tenn. Ch. Ct., Davidson Cnty.) (providing notice of the D.C. Court's Orders as well as the *Social Media* MDL and *Social Media* JCCP Orders).

state court cases, *Social Media Cases* (California) (JCCP5255) ("*Social Media* JCCP") both considered the crime-fraud exception case law and found that these same privilege redactions are not subject to the crime-fraud exception. *See In re Social Media Addiction* MDL Order; *see also* Ruling on Plaintiffs' Motion to Compel Production of Unredacted Documents, *Social Media Cases* (JCCP5255) (Cal. Super. Ct., L.A. Cnty. Jan. 15, 2026) ("*Social Media* JCCP Order"). The differences in the courts' reasoning in these cases compared to the District of Columbia Superior Court's reasoning in this case demonstrate the flaws in the Superior Court's October and January Orders.

In both the *In re Social Media Addiction* MDL and in the *Social Media* JCCP Orders, the plaintiffs alleged and the courts considered specific crimes or fraud. *See In re Social Media Addiction* MDL Order at 9 ("communications regarding that advice could be subject to the crime-fraud exception because such advice would run afoul of the lawyer's duties under the rules of professional conduct and could implicate criminal statutes concerning fabricating or destroying evidence"); *Social Media* JCCP Order at 3 ("Plaintiffs' principal theory of the crime committed is that evidence was destroyed or concealed at the direction of counsel.")

Additionally, both the *In re Social Media Addiction* MDL and the *Social Media* JCCP Orders discuss what the Superior Court did not, i.e., that no evidence was destroyed or altered at the direction of counsel, and thus the crime-fraud

exception did not apply. *See Social Media* JCCP Order at 3-4 ("The Documents at issue, read in their entirety without redactions, do not, on the face of the documents, indicate that any evidence was destroyed or concealed."); *Social Media* MDL Order at 21 ("Based on the record submitted, there was no destruction of documents at issue here.") These courts' rulings are consistent with *In re Public Defender Service*, i.e., the crime-fraud exception "does not apply" absent evidence that the "illegal scheme was advanced." *See In re Pub. Def. Serv.*, 831 A.2d at 895. The *In re Social Media Addiction* MDL and the *Social Media* JCCP courts did not find evidence that any illegal scheme was advanced.

Indeed, the court in the *Social Media* JCCP described the facts surrounding these documents (involving "advice by counsel concerning the direction of a client's future research activities, how that research should be characterized, and whether research findings should be made public") as being squarely "within the protection of the attorney-client privilege so long as evidence concerning such research is not destroyed and is not concealed in litigation." *Social Media* JCCP, Order at 4.

The court in the *Social Media* JCCP case observed that plaintiffs are welcome to "comment on the research itself, the direction of the research, the characterization of the research findings, or the fact that research was not made public," but it does not rise to the level of furtherance of a fraud that would allow one to "invade any

attorney-client privileged communications that may have motivated the client's decision-making regarding research." *Id.*

Both the *Social Media Addiction* MDL and the *Social Media* JCCP Orders considered the totality of the circumstances, including considering the declarations providing additional context. The courts also correctly placed the burden on the plaintiffs to establish their theory that there was a crime or fraud, including requiring evidence that an ongoing or imminent fraud was advanced with the attorney's advice. *See Social Media* JCCP, Order at 3 ("Plaintiffs have not articulated a theory of fraud perpetrated using the advice or assistance of counsel).

Ultimately, the courts in both the *In re Social Media Addiction* MDL and the *Social Media* JCCP reached similar conclusions, i.e., that the crime-fraud exception did not apply on these facts. Beyond offering differing outcomes, however, the equally important takeaway from the California decisions is that they both resulted from a proper application of recognized procedural safeguards and consideration of rebuttal evidence offered.

D. The Superior Court's October and January Orders Create Substantial Uncertainty Regarding Application of the Crime-Fraud Exception.

The proliferation of litigation and inconsistent rulings since the October Order and the January Order have created uncertainty regarding the scope and bounds of the attorney-client privilege and when routine and ordinary legal advice risks being

discoverable under an expanded and incorrect application of the crime-fraud exception and disregard for the procedural safeguards set forth in the Supreme Court's *Zolin* decision and its progeny[9] and the fundamental requirement that there must be a *prima facie* showing that the privileged materials at issue are both related to the alleged crime or fraud ***and*** in furtherance of it.[10]

The Supreme Court has emphasized that the attorney-client privilege must be predictable to serve its purpose. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. 383, 393. The uncertainty caused by the Superior Court's expansion of the crime-fraud exception will have widespread deleterious effects, especially for corporations that rely heavily on legal advice in their day-to-day operations. Clients might be hesitant to consult attorneys to assess the potential impacts of research, press statements, and other public communications

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[9] *See United States v. Zolin,* 491 U.S. at 574. *See also U.S. ex rel. Maxman v. Martin Marietta Corp*., 886 F. Supp. 1243 (D. Md. 1995) (court cannot examine otherwise privileged document without *prima facie* showing).

[10] *See, e.g. In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 643-44 (8th Cir. 2001) (mandamus granted as district court failed to link specific communication to the alleged fraud); *United States v. White,* 887 F.2d 267, 271 (D.C. Cir. 1989) (communication must be both related to and in furtherance of the crime or fraud)**;** *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986) (related to a crime is insufficient; the communication also "must have been with the intent to further the crime").

because opposing litigants might later claim that the statements were inaccurate or misleading and allege that the crime-fraud exception should apply to legal advice around those statements. *See Valassis*, 2018 WL 4489285, at *2 ("Providing business people with ready access to lawyers to ensure that their business activities are in compliance with the law is not a nefarious activity.")

At the same time, the lawyers will be hesitant to provide legal advice lest they be labeled as participating in some type of crime or fraud perpetrated by the client, which can negatively impact the reputations of counsel. And, ironically, this unjustified uncertainty risks the perverse outcome of more legal violations if attorneys are not able to provide candid legal advice to clients on issues such public statements. *Id.* ("Prudent lawyers counsel against, and thus often prevent, unlawful actions by a client.")

The uncertainty of an unclear and expanded crime-fraud exception will also lead to increased litigation costs and use of already scarce and overstretched court resources, as parties race to bring new and broader privilege challenges based on the crime-fraud exception to documents that previously would have been clearly privileged. Given the sensitivity of privilege challenges, this will inevitably increase the need for time-consuming *in camera* reviews and appointments of discovery referees and special masters as well as the associated costs to litigants and courts.

Here, the Superior Court rushed to a decision about the impropriety of purported legal advice based on a reading of the four clawed-back documents themselves, without providing sufficient opportunity for the party in question (and its counsel) to be heard and subsequently considering the totality of the circumstances in light of such additional evidence and argument. The loss of the due process protections here that should have been given to the holder of the attorney-client privilege creates an untenable inconsistency and uncertainty as to how the crime-fraud exception is applied to routine and ordinary legal advice in the District of Columbia (and potentially beyond).

IV. CONCLUSION

For the reasons set forth above, LCJ advises the Court to grant the Petition for a Writ of Mandamus to the Superior Court of the District of Columbia.

Dated: February 2, 2026

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This amicus brief complies with DC Court of Appeals Rules 29 and 32.

Dated: February 2, 2026 /s/ *Jonathan M. Redgrave*
Jonathan Redgrave

CERTIFICATE OF AUTHORSHIP AND SUPPORT

Amicus Curiae Lawyers for Civil Justice states that no counsel for any party authored this brief in whole or in part. Only Lawyers for Civil Justice and Lawyers for Civil Justice's undersigned attorney and law firm prepared its content. No party or party's counsel contributed any money to Lawyers for Civil Justice specifically for preparing or submitting this brief, and no person or entity other than Lawyers for Civil Justice, its members and its counsel contributed money to fund the preparation and submission of this brief. Although Petitioner Meta Platforms, Inc. ("Meta") is an LCJ member, neither Meta nor any other Petitioner has had any involvement in the authorship of LCJ's *Amicus* Brief, and neither of the Petitioners has contributed money to LCJ to specifically fund the preparation and submission of this brief.

Dated: February 2, 2026 /s/ *Jonathan M. Redgrave*
Jonathan Redgrave

CERTIFICATE OF SERVICE

I certify that on this 2nd day of February 2026, the foregoing was served on the parties via electronic mail and is being filed electronically with the Clerk of Court.

Dated: February 2, 2026

/s/ *Jonathan M. Redgrave*
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