No. 21-1397

In the Supreme Court of the United States

IN RE GRAND JURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JENNIFER B. DICKEY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062

LISA S. BLATT
Counsel of Record
WILLIAM T. BURKE
JOHN S. WILLIAMS
JESSE T. CLAY
KEES D. THOMPSON*
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

Counsel for Amicus Curiae

* Admitted in New York and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Statutes and Rules:

Other Authorities:

Page

Other Authorities—continued:

In the Supreme Court of the United States

IN RE GRAND JURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

This is one such case. The business community has a strong interest in a uniform privilege standard for dual-

[1] Petitioner and Respondent have consented to the filing of this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

purpose communications. For this reason, the Chamber filed an *amicus curiae* brief in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), one of the principal cases comprising the circuit split on the question presented.

Businesses often rely on their counsel to serve a variety of legal and non-legal roles. And predictability as to the confidentiality of communications with counsel is paramount to ensuring frank and open disclosure to, and proper legal advice from, counsel. Such predictability is especially critical for businesses that operate across jurisdictions and for small businesses that rely on a limited number of employees to perform a wide array of functions. The disagreement among the courts of appeals regarding the proper test for determining whether dual-purpose communications are privileged creates uncertainty. And this uncertainty hinders the business community's ability to operate effectively and efficiently.

SUMMARY OF ARGUMENT

This case concerns the circumstances under which the attorney-client privilege protects communications motivated by both legal and nonlegal purposes. As the petitioner explains, the Ninth Circuit in the decision below set out and applied a standard for such communications that is profoundly at odds with the test that the D.C. Circuit has applied for many years. The decision below asserts that the differences between its standard and the D.C. Circuit's test are not significant or outcome-determinative. But the Ninth Circuit's analysis on those points only underscores exactly how different the tests are. As the decision below shows, this case squarely implicates the split: The Ninth Circuit expressly held that the disputed attorney-client communications are not privileged because the predominant purpose of the

communications was not legal advice. That is exactly the analysis that the D.C. Circuit has held is improper.

The Court should seize this golden opportunity to resolve the split and address the critically important question presented. Numerous obstacles usually make it difficult for this Court to cleanly address questions regarding the scope of the attorney-client privilege. Interlocutory appeals of privilege issues are rare. When appellate courts do consider privilege issues, those issues usually come in procedural wrappers—such as the heightened standard of review for mandamus or the harmlessness inquiry on appeal from final judgment—that make it difficult (or unnecessary) to address the privilege issue. This case presents no such obstacles. With this clean vehicle, the Court can provide much needed clarity to the district courts where litigation on privilege issues usually occurs.

It is vitally important that this Court do so. Uncertainty in the area of privilege law has particularly pernicious consequences, as it may lead to less fulsome disclosures to lawyers—or avoidance of lawyers altogether—and thus less fulsome compliance with the law.

Here, the uncertainty comes not only from the circuit split, but also from the Ninth Circuit's standard. That standard is impossible to apply in practice. Courts, lawyers, and clients will all struggle to identify the single, predominant purpose of a communication. And the premise that there is a clear dividing line between "legal" and "nonlegal" purposes is itself questionable. If precedent is any guide, drawing such distinctions is often haphazard and counterintuitive, leading to greater uncertainty for those relying on the confidentiality of attorney-client communications.

Most fundamentally, the Ninth Circuit's single-purpose standard does not reflect the modern role that lawyers play in advising businesses. Businesses frequently call on lawyers to tackle problems that have both legal and non-legal elements. For example, a company may want to expand its market share, but faces unfair-competition or deceptive-advertising issues. A company may want to terminate an employee, but must consider whether the non-compete provision in the employee's employment contract is enforceable. And so on. The point is that legal issues often arise in analyzing larger business issues. When legal and business issues are discussed in the same communication, the reasons for protecting the confidentiality of legal communications do not suddenly evaporate.

ARGUMENT

I. The Court Should Resolve The Circuit Split On The Proper Test For Determining Whether The Attorney-Client Privilege Protects Communications With Multiple Purposes.

The courts of appeals have adopted three distinct tests that govern the privilege protections provided to dual-purpose client communications with attorneys. The Ninth Circuit's decision below amplifies the conflict, warranting this Court's review.

1. The Ninth Circuit held that the "primary-purpose test" applies to dual-purpose communications. Pet.App.6a. The natural implication of this holding, as the court explained, is that a "dual-purpose communication can only have a single 'primary' purpose." Pet.App.4a. The Ninth Circuit's standard requires courts to balance each possible motive for an attorney-client communication. The communication is privileged only if

the legal purpose is the *most* significant. Pet.App.11a–12a.

This reasoning is irreconcilable with the test that the D.C. Circuit adopted in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 759–60 (D.C. Cir. 2014). Only by misunderstanding that test did the Ninth Circuit conclude that it had avoided a conflict with it. According to the Ninth Circuit, the *Kellogg* test differs only "in truly close cases"—like when the legal purpose is "just as significant" as a nonlegal one. Pet.App.12a. *Kellogg*'s holding is not so limited. Rather, in the D.C. Circuit, if "obtaining or providing legal advice was *one of the significant purposes* of the communication," the communication is privileged. *Kellogg*, 756 F.3d at 760 (emphasis added); *accord FTC v. Boehringer Ingelheim Pharm., Inc.*, 892 F.3d 1264, 1268 (D.C. Cir. 2018). As a result, the Ninth Circuit's standard conflicts with the D.C. Circuit's test.

The Ninth Circuit insisted there was no conflict because the District Court had found that "*the* predominate purpose of the disputed communications was not to obtain legal advice." Pet.App.12a. But that is the precise analysis that *Kellogg* rejects. The D.C. Circuit specifically instructed that it is "not correct for a court to try to find *the* one primary purpose in cases where a given communication plainly has multiple purposes." *Kellogg*, 756 F.3d at 760 (emphasis in original).

The Ninth Circuit's attempt to distinguish *Kellogg* on its facts likewise fails. According to the Ninth Circuit, *Kellogg* "dealt with the very specific context of corporate internal investigations, and its reasoning does not apply with equal force in the tax context." Pet.App.11a. But nothing in *Kellogg* restricts its holding in this way, and the federal courts in the District of Columbia do not treat its

rule as confined to internal investigations. *See, e.g.*, *Boehringer Ingelheim*, 892 F.3d at 1267 (applying *Kellogg*'s rule to communications with in-house counsel regarding settlement of patent dispute); *Louise Trauma Ctr., LLC v. Dep't of Just.*, No. 20-3517, 2022 WL 278771, at *9 (D.D.C. Jan. 30, 2022) (citing *Kellogg*'s rule when assessing communications between a government agency and their attorneys regarding asylum training). Despite its contrary assurances, the decision below plainly creates a split between the Ninth Circuit and the D.C. Circuit.

2. The Ninth Circuit's standard also conflicts with the Seventh Circuit's decision in *United States v. Frederick*, 182 F.3d 496 (7th Cir. 1999). While the D.C. Circuit's test offers broader privilege protections than the Ninth Circuit's standard, both offer more than the Seventh Circuit, which has held that "a dual-purpose document—a document prepared for use in preparing tax returns and for use in litigation—is not privileged." *Id.* at 501; *see also* Pet.App.5a n.2 (suggesting that the Ninth Circuit case law "does not go so far" to "suggest that dual-purpose communications in the tax advice context can never be privileged").

While the Ninth Circuit held that some of the dual-purpose communications at issue were privileged, the Seventh Circuit would have ordered Petitioner to produce all the communications at issue. The only exception to the Seventh Circuit's categorical rule is for attorney-client communications regarding an active audit that include "statutory interpretation or case law"—a significantly smaller set of privileged communications than those protected under either the Ninth Circuit's standard or the D.C. Circuit's test. *Frederick*, 182 F.3d at 502.

3. The federal courts of appeals have accordingly adopted three competing privilege regimes regarding

dual-purpose attorney-client communications, at least in the context of tax preparation. Consider a communication from an attorney that advises a client about the strength of an argument that a regulation entitles the client to a particular deduction, and also discusses the size of the potential deduction in advising whether to adopt the tax position. The Ninth Circuit treats the interpretation of the regulation as a legal purpose. *See* Pet.App.4a. And it would presumably treat the calculation of the deduction as "preparation of tax returns" and thus nonlegal. Pet.App.3a, 11a n.5. That type of communication, one where the legal and nonlegal purposes are both significant and intertwined, presumably happens every day. Currently, however, its privilege treatment would be starkly different in Los Angeles, Washington, and Chicago.

In the D.C. Circuit, so long as one of the significant purposes for the communication was legal advice, the communication is privileged. *Kellogg*, 756 F.3d at 759–60. By contrast, the Ninth Circuit would afford privilege protection only if a court found legal advice to be "*the*" primary purpose for the communication. Pet.App.10a. And, in the Seventh Circuit, the same communication is not privileged if *any* purpose for the communication was non-legal. *Frederick*, 182 F.3d at 500–01. The Court should resolve this pronounced circuit split.

II. This Case Is A Rare, Golden Opportunity To Resolve The Question Presented.

This case presents an exceptionally clean—and exceptionally rare—opportunity to squarely address the question presented. It is no accident that it took until 2021 for the Nation's largest circuit court to do so. The Court should capitalize on this golden opportunity to announce

a precise and predictable test and prevent further damage from the lack of uniformity among the circuit courts.

1. This case is a rare opportunity to address an important question of privilege law on direct appeal. Under *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), parties cannot immediately appeal most privilege determinations, no matter how consequential. *Id.* at 103. As the Petition notes, some parties may nonetheless seek interlocutory appeal under 28 U.S.C. § 1292(b). Pet. at 28. But such an appeal requires both that a district court certify the question for appeal *and* that the court of appeals exercise its discretion to accept it. *See In re The City of New York*, 607 F.3d 923, 933 (2d Cir. 2010) (rejecting appeal under 28 U.S.C. § 1292(b) as an "adequate means" to challenge privilege determinations).

An aggrieved party can also petition for a writ of mandamus in the courts of appeals under the All Writs Act. *See* 28 U.S.C. § 1651(a). But "[a]n erroneous district court ruling on an attorney-client privilege issue by itself does not justify mandamus." *Kellogg*, 756 F.3d at 762. Rather, a mandamus petitioner "must show that his right to the issuance of the writ is 'clear and indisputable.'" *Id.* (quoting *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 381 (2004)). Accordingly, even meritorious assertions of privilege may often not receive full review in a mandamus posture.

Even when a court of appeals grants a mandamus petition, as the D.C. Circuit did in *Kellogg*, cases on mandamus review in the courts of appeals present obstacles to this Court's review. A circuit court addressing a mandamus petition necessarily makes other discretionary determinations that complicate subsequent review by this Court. *See Cheney*, 542 U.S. at 381

(requiring the issuing court to be "satisfied that the writ is appropriate under the circumstances"). And a party that is unsuccessful on mandamus review may struggle to show whether it lost below because of the legal question itself rather than one of the underlying equitable factors that barred relief.

True, a party unhappy with a privilege determination can defy a discovery order and sometimes appeal any contempt order imposed by the court. But that relief—limited as it is—is not even available for a party who sought but failed to overcome an assertion of privilege. For a losing party seeking documents, there is no way to defy a court's denial.

Moreover, immediate appeal rights are not categorically available. While a party can immediately appeal a *criminal* contempt order, there is no right to immediately appeal a *civil* contempt order. *See Mohawk Indus.*, 558 U.S. at 111; *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992) (recognizing that only a non-party can immediately appeal a civil contempt order). And "the choice of sanctions—civil or criminal—is vested in the discretion of the District Court." *City of New York*, 607 F.3d at 934; *see id.* ("conclud[ing], along with [its] sister Circuits, that the uncertainty of seeking a criminal contempt order bespeaks its inadequacy" as a means of appellate review (internal quotations omitted)). So a district court can essentially insulate itself from review by imposing an "onerously coercive civil contempt sanction with no means of review until the perhaps far distant day of final judgment." *Id.* (quoting 15B Charles Alan Wright, Arthur R. Miller, & Edward C. Cooper, *Federal Practice and Procedure* § 3914.23 (2d ed. 1992)).

This uncertainty disproportionally hinders those parties who cannot afford the risk. "Institutional litigants

that regularly face an important discovery problem are most likely" to "invite such a sanction for the purpose of taking an immediate appeal." 15B Charles Alan Wright, Arthur R. Miller, & Edward C. Cooper, *Federal Practice and Procedure* § 3914.23 (2d ed. April 2022 update). Individual citizens, sole proprietorships, and small businesses—part of *amicus*' membership—suffer most from a rule that preferences the privilege concerns of repeat litigation players.

2. That leaves review from final judgment. Of course, an adverse privilege determination is just as likely to burden the winning party in a lawsuit as the losing party. And, practically speaking, most cases settle before trial or summary judgment, depending on the outcome of discovery. *See generally* Shari S. Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives From Attorneys and Judges*, 81 La. L. Rev. 119, 122 (2020) ("[T]he percentage of civil cases disposed of by jury trial decreased from approximately 5.5% in 1962 to 1.2% by 2002 and to 0.8% by 2013.").

Regardless, at final judgment, a party must primarily concern itself with the actual merits of the underlying dispute. A privilege issue, even one that presents an important legal issue, may well not merit briefing on appeal. *See Makiel v. Butler*, 782 F.3d 882, 897–98 (7th Cir. 2015) (noting that "when appellate judges address professional education programs on appellate practice, they almost always stress this need for careful selection of just a few issues on appeal").

Harmlessness analysis further frustrates this Court's review. When considering an appeal from final judgment, courts of appeals sometimes sidestep review of privilege determinations if they would not have changed the outcome. *See, e.g.*, *Adams v. Mem'l Hermann*, 973 F.3d

343, 350–51 (5th Cir. 2020) (declining to analyze if excluding testimony based on attorney-client privilege was proper because any error would have been harmless). The foreclosure of normal avenues for plenary appellate review drastically reduces the opportunities for considered decisions on privilege issues by the federal courts of appeals and therefore also this Court.

3. This Petition thus presents a rare procedurally clean vehicle to address an important question of privilege law. Interlocutory review was available because, as the recipient of a grand-jury subpoena, Petitioner was treated as a *nonparty* who could immediately appeal a civil contempt order. *See Byrd v. Reno*, 180 F.3d 298, 300 (D.C. Cir. 1999); *Church of Scientology of Cal.*, 506 U.S. at 18 n.11. As a result, this case squarely presents the privilege question while it is still live and not mitigated by settlement or unrelated case developments. Nor is the question here presented through the filter of any discretionary findings or deferential standards of review.

The Court may not have such another clean opportunity to address the question presented for many years. After all, it has been nearly 25 years since the Court last considered the scope of the attorney-client privilege. *See Swidler & Berlin v. United States*, 524 U.S. 399 (1998).[2] And because the bounds of the attorney-client privilege in federal court are generally governed by the common law as interpreted by the federal courts and, ultimately, this Court, *see* Fed. R. Evid. 501, the law will

[2] Although the Court analyzed the attorney-client privilege in *United States v. Jicarilla Apache Nation*, the question presented in that case involved not the extent of the privilege but whether the "fiduciary exception" applied to a particular relationship between the United States and the Jicarilla Apache Nation tribe. 564 U.S. 162, 178–87 (2011).

remain fixed absent further judicial review. Legislative intervention remains extremely unlikely. Given the dire need for a clear, precise, and uniform answer to the question presented, the Court should take this golden opportunity to address the issue while it is presented cleanly.

III. The Decision Below Creates Profound Uncertainties Regarding The Attorney-Client Privilege.

The attorney-client privilege is a doctrine animated by the incentives it creates. It exists "to encourage clients to make full disclosure to their attorneys." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Id.* Accordingly, "for the attorney-client privilege to be effective, it must be predictable." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 183 (2011). "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. The decision below fosters uncertainty in two critical ways.

1. The main source of uncertainty is the now apparent three-way split among the courts of appeals. To state the obvious, companies regularly face the prospect of litigation and government investigation in several jurisdictions depending on their operations and where they sell products or services. To take a simple example, a pharmaceutical company could face an antitrust investigation by the Federal Trade Commission regarding a reverse-payment patent settlement. *See generally FTC v. Actavis, Inc.*, 570 U.S. 136 (2013). It is

not unusual for the FTC, or other federal agencies, to initiate subpoena enforcement proceedings in the D.C. federal courts. *See, e.g.*, *Boehringer Ingelheim*, 892 F.3d 1264. A civil antitrust case could arise from the same settlement in a different jurisdiction. And there could also be patent litigation regarding the same underlying patents in yet a third jurisdiction.

The risk of inconsistent treatment of privilege issues is heightened by the prospect of litigation in state court or investigations by state authorities. Many state courts have adopted a primary purpose test similar to *Kellogg*, while their federal counterparts apply a different standard. *See, e.g.*, *Am. Zurich Ins. Co. v. Mont. Thirteenth Jud. Dist. Ct.*, 280 P.3d 240, 245 (Mont. 2012) (holding that the attorney-client privilege protects confidential communications "necessary to obtain informed legal advice"); *see also* 1 Restatement (Third) of the Law Governing Lawyers § 72 (2000), Reporter's Note, at 554 ("In general, 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."). While this Court does not control how state courts apply the common law of privilege, its decisions on that subject nevertheless provide leading and highly persuasive guidance, promoting national uniformity. *See* Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 Hastings L.J. 769, 785 (2002) ("The *Upjohn* case has been particularly significant in the state court system. . . . Not all state courts have accepted the *Upjohn* approach but many have.").

Litigation in different fora is not unusual for American businesses, and the possible application of different rules is not unusual for the courts. What is untenable, however,

is that the same underlying communication could have different privilege protections in different federal jurisdictions. It is bad enough that there will be different outcomes. For purposes of the privilege, the more pointed problem is that the accompanying uncertainty could chill the provision of legal advice. *See Swidler & Berlin*, 524 U.S. at 407–08 ("[W]ithout the privilege, the client may not have made such communications in the first place.").

2. The second way that the Ninth Circuit's standard fosters unpredictability is also familiar to this Court. A test that is "difficult to apply in practice" yields "unpredictability [in] its application." *Upjohn*, 449 U.S. at 393. The Ninth Circuit's standard is not just difficult to apply, but often "inherently impossible." *Kellogg*, 756 F.3d at 759. As then-Judge Kavanaugh explained in *Kellogg*:

> 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.

Id. An "inherently impossible task" is bound to yield arbitrary and unpredictable results. And a task that is "inherently impossible" for judges is completely unworkable for run-of-the-mill attorneys and, most importantly, their clients, who are untrained in the metes and bounds of privilege law.

That is doubly so because the line between a business purpose and a legal purpose is frequently blurry. For example, most litigators would be surprised to hear that helping a client "negotiate a settlement on favorable financial terms" is "a business purpose." *Boehringer Ingelheim*, 892 F.3d at 1267. Lawyers are frequently

called on to perform that function. To be sure, as in *Boehringer Ingelheim* itself, the D.C. Circuit's test asks a court to determine what legal purposes are served by a communication. But because the legal purpose need only be "*one of* the significant purposes of the communication," *id.* at 1267 (emphasis in original), the inquiry is far more predictable.

This Court has rejected vague, *ex-post* balancing tests for evaluating the attorney-client privilege because such tests cannot sufficiently define the contours of the privilege to assure clients ahead of time that their communications will remain confidential. *Swidler & Berlin*, 524 U.S. at 409; *see Jicarilla Apache Nation*, 564 U.S. at 183 (rejecting a test for application of the "fiduciary exception" to the attorney-client privilege because it was unpredictable). The Court should grant the petition and do the same here.

IV. The Decision Below Disregards The Realities Facing Modern Businesses And Discourages Informed Decisionmaking.

The D.C. Circuit's *Kellogg* test reflects the reality that legal issues permeate the various challenges facing American business. As this Court observed in 1981, a "vast and complicated array of regulatory legislation confront[s] the modern corporation." *Upjohn*, 449 U.S. at 392. That morass has hardly abated. *See generally* Neil Gorsuch, *A Republic, If You Can Keep It* 242 (2019) (noting the proliferation of federal criminal violations and "the hundreds of thousands of criminal penalties federal agencies impose through their regulations").

To navigate this dense legal thicket, American businesses have come to rely on lawyers to provide legal advice about business problems as they develop and change in real time. The Ninth Circuit's single-purpose

standard rests on an outmoded (if not completely fictional) conception of the attorney-business client relationship. Pet.App.4a. Just as the *Upjohn* Court recognized that the "control group" standard was incompatible with the realities of corporate legal practice, *see* 449 U.S. at 391, the Court should grant review here and reject the Ninth Circuit's unrealistic single-purpose standard.

1. In the real world, corporate decisionmaking is complex, fluid, and dynamic. It involves multiple parties communicating for multiple purposes about mixed legal and non-legal issues of varying and changing importance. Imagine a CEO who receives news of a crisis confronting her company: there has been an explosion at one of the company's manufacturing plants. The problems facing the company are multifaceted. The CEO needs direct legal advice from the company's general counsel about the company's potential legal exposure. Line executives for the plant and business line need to be consulted, both about the explosion and about disruptions to the business. The head of human resources should be contacted to advise and assist the personnel at the plant. There likely will be financial ramifications to the company, and so the Chief Financial Officer will be consulted. And there could be important public-relations issues that result as well.

Significant legal issues are likely to arise in connection with all of these lines of communication. The line executives' views on the damage to the plant or community would inform the general counsel's perspective on the company's potential liability. The human-resources issues could quickly turn to questions of lawsuits and inquiries about the company's compliance with workplace regulations. The financial impact on the company may well involve disclosures to lenders and

shareholders (especially if the company is publicly traded). And any public statements by the company could affect future litigation or potentially trigger a defamation action.

Lawyers would be consulted on those issues as needed throughout the crisis, and the need and salience of any lawyer's involvement would change with the issue and the context. In those discussions, the legal and business considerations affecting the client will often become intertwined and discussed together. The rules of professional ethics encourage lawyers to give clients advice that considers "moral, economic, social and political factors" in addition to legal issues. ABA Model Rules of Professional Conduct, Rule 2.1 ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."). This advice is desirable and necessary. The legal issues facing a business are not siloed from the practical ones.

Under the Ninth Circuit's standard, however, the only communications that would be protected would be those where *the* primary purpose was legal advice. Pet.App.10a. In the above scenario, the communications involved business issues that also had important legal dimensions. Litigants will claim that "*the*" primary purposes of most of the communications with other corporate officers—the CFO, or head of public relations, or line executives—were business-related, not legal. Pet.App.10a. Indeed, that would likely be the correct application of the Ninth Circuit's standard.

2. But this is the wrong result for businesses, their counsel, and the public ends that the privilege serves. *See generally, e.g.*, *Upjohn*, 449 U.S. at 389. A lawyer's ability

to provide sound legal advice and advocate effectively on the client's behalf "depends upon the lawyer's being fully informed by the client." *Id.* The Ninth Circuit's standard "discourag[es] the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 392. It accordingly runs contrary to "the very purpose of the privilege." *Id.*

Worse yet, it puts clients in the place of determining what information to share with their legal counsel. But "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." *Id.* at 390–91. One aspect of a lawyer's professional judgment is determining which information is relevant and important to the underlying legal issue. ABA Model Rules of Professional Conduct, Rule 1.6, cmt. ¶ 2. The Ninth Circuit's standard makes that impossible. Out of fear that providing too many irrelevant and unimportant facts may lead a later-reviewing court to conclude that a non-legal purpose primarily motivated the communication, legally untrained clients may omit important facts that they erroneously assume are legally irrelevant.

The practical import of the Ninth Circuit's standard is that businesses and non-lawyers will be less likely to seek legal advice, especially from in-house counsel. Even when an employee with a clear purpose of seeking legal advice communicates with an attorney, if a court later determines that a non-legal purpose was predominant in the employee's mind, the communication will be discoverable. Pet.App.4a, 12a. The same holds true if a lawyer responds with legal advice but also includes a greater amount of business advice. Given this cloud that hangs over dual-purpose communications under the

Ninth Circuit's standard, the client may choose not to communicate with the attorney at all. *Swidler & Berlin*, 524 U.S. at 407–08; *Fisher*, 425 U.S. at 403.

3. That lack of communication has harmful consequences. First, "businesses would be less likely to disclose facts to their attorneys and to seek legal advice." *Kellogg*, 756 F.3d at 759. That "would 'limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.'" *Id.* (quoting *Upjohn*, 449 U.S. at 392). So the public purpose animating the privilege's existence will be undermined. *See Upjohn*, 449 U.S. at 389.

Second, the Ninth Circuit's single-purpose standard imposes additional costs on the business community. Only granting privilege protections to communications where legal advice was the primary purpose guarantees inefficiency. Communications with lawyers will need to become siloed, with information needlessly repeated or lost in the process. In-house counsel, whose responsibilities often include a multitude of non-legal tasks, will be marginalized and provide less value to their employers. Thomas O'Connor, *When You Come to a Fork in the Road, Take It: Unifying the Split in New York's Analysis of In-House Attorney-Client Privilege*, 25 J.L. & Pol'y 437, 455–58 (2016) (Note & Comment) (discussing how, in addition to legal roles, in-house counsel must often perform corporate secretarial, human resources, governmental affairs, compliance, and corporate officer responsibilities); *see* Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 Fordham L. Rev. 955, 957–58 (2005). Indeed, companies may decide to opt for the advice of outside counsel more frequently because they traditionally perform more discrete roles that are easier to cabin. *See* O'Connor, *supra*, at 455.

While large companies may be able to absorb these costs, small businesses cannot. "Small businesses are the lifeblood of the U.S. economy: they create two-thirds of net new jobs and drive U.S. innovation and competitiveness. A new report shows that they account for 44 percent of U.S. economic activity." Press Release, U.S. Small Business Administration, Small Businesses Generate 44 Percent Of U.S. Economic Activity (Jan. 30, 2019), https://tinyurl.com/2p82wmvv. But they are most likely to rely on a single lawyer, be the lawyer in-house or external, to perform multiple functions. *See Swidler & Berlin*, 524 U.S. at 407–08 ("Many attorneys act as counselors . . . of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business."). Small businesses bear an outsized burden under the Ninth Circuit's standard.

In sum, the Ninth Circuit's single-purpose standard discourages clients from seeking legal advice. This chilling effect restricts corporate counsel's ability to advise their company and reduces the number of conversations that company employees have with lawyers—both of which run counter to the objectives of the attorney-client privilege. *See Upjohn*, 449 U.S. at 392; *Fisher*, 425 U.S. at 403. The ultimate result may be worse legal compliance.

* * *

The petition for a writ of certiorari affords the Court a golden opportunity to resolve a split among the federal courts of appeals on an important privilege issue that arises every day for businesses across the country. The Ninth Circuit's approach to that issue not only creates unpredictable results, it fails to reflect the realities of every-day discussions that lawyers have with their business clients. It thus undermines the attorney-client

privilege and its underlying goal of fostering legal compliance.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

JENNIFER B. DICKEY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062

LISA S. BLATT
Counsel of Record
WILLIAM T. BURKE
JOHN S. WILLIAMS
JESSE T. CLAY
KEES D. THOMPSON*
WILLIAMS & CONNOLLY LLP
680 Maine Avenue, S.W.
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

Counsel for Amicus Curiae

June 1, 2022

* Admitted in New York and practicing law in the District of Columbia pending application for admission to the D.C. Bar under the supervision of bar members pursuant to D.C. Court of Appeals Rule 49(c)(8).