

No. 26-0760

In the Supreme Court of Texas

IN RE PIONEER NATURAL RESOURCES USA, INC.,

Relator.

*Original Proceeding from
the 118th Judicial District Court of Martin County, Texas
Cause No. 7738*

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RELATOR

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IDENTITY OF PARTIES, *AMICUS CURIAE*, AND COUNSEL

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae the Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business organization. As the nation’s leading advocate for business, the Chamber represents 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, like this one, that raise issues of concern to the nation’s business community.

The Chamber is particularly interested in this case because of the impact it will have on both the ability of lawyers to give legal advice and the ability of businesses to receive it. The Chamber has participated as *amicus* in the U.S. Supreme Court and the federal courts of appeals in cases involving the attorney-client privilege in the corporate context. *See, e.g.*, Brief for the Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Petitioner, *In re Grand Jury*, 598 U.S. 15 (2023); Brief of Amicus Curiae the Chamber of Commerce of the

United States of America Supporting Petitioners, *In re Express Scripts, Inc.*, No. 25-3006 (6th Cir. Jan. 14, 2025).

The Chamber continues to participate in such cases because it has a strong interest in ensuring that businesses can rely on their in-house counsel to provide competent legal advice, and, in turn, on adequate judicial remedies for willful violations of the bedrock attorney-client privilege.¹

¹ *Amicus Curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *Amicus Curiae*, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. See Tex. R. App. P. 11(c).

INTRODUCTION AND SUMMARY OF ARGUMENT

Businesses in Texas, like everywhere else, depend on in-house counsel to advise the officers, directors, and other individuals who act on their behalf. Companies are willing to share sensitive information with in-house counsel because they know that lawyers are bound to protect it and that courts will ensure that such protections are upheld. At the heart of the relationship between in-house lawyers and their clients is the same attorney-client privilege and duty of confidentiality that applies to any lawyer—the oldest of all privileges, and one “rooted in the imperative need for confidence and trust.” *Trammel v. United States*, 445 U.S. 40, 51 (1980). Businesses are only able to obtain the benefits of “full and frank communication between attorneys and their clients,” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), because they know what they say to their lawyers will remain sacrosanct. The benefits of such “full and frank communication,” *id.*, moreover, extend far beyond clients alone. “[S]ound legal advice or advocacy serves *public* ends,” advancing the “broader *public* interest[] in the observance of law and administration of justice.” *Id.* at 389 (emphasis added).

Society's interest in compliance with the law is best served when specialized lawyers who understand a business's situation are able to give frank, forward-looking advice to anyone within the company, and that ability rests on reliable enforcement of the privilege. Here, as Relator's petition suggests, a thriving business community requires a court system dedicated to preserving the attorney-client privilege—one that both understands the importance of legal advice from in-house counsel and endeavors to protect that privileged advice using a test focused on objective harm to the *client*. This standard cannot focus on subjective facts about attorneys but instead must be designed to discourage objectively wrongful actions that harm clients.

This petition offers this Court an opportunity to again signal to the business community (and everyone else) that the attorney-client privilege has meaning in Texas, a State that has now cemented its place as a national financial hub. *See New York Stock Exchange Opens Texas Headquarters in Latest Nod to Y'all Street*, Reuters (Aug. 27, 2026), <https://perma.cc/LP59-JPQ4>. This Court should do just that by reviewing and reversing the decision below, which seriously undermines the attorney-client privilege.

I. When companies encounter legal issues, those issues almost always have far-reaching business implications—and, for many businesses, the first person to consider and address such legal issues will be an in-house lawyer. Businesses routinely seek advice from in-house lawyers and use that candid advice in deciding what to do, including whether to retain outside counsel. A robust attorney-client privilege thus is indispensable to a business's robust compliance with the law. To perform this function, in-house counsel must know the business's most intimate information. A lawyer's ongoing duty to protect such confidential information, backed by the judiciary, is the key that allows in-house counsel to provide frank and honest advice.

Protecting the attorney-client relationship is always important but is especially so when a business is involved in litigation. In such cases, the need for legal advice is not just hypothetical, it is immediate and recurring. So where, as here, an in-house lawyer with highly sensitive information is manipulated into breaching his duty of confidentiality during ongoing litigation, the consequences for both the client and the overall legal system are dire. "Once information has been disclosed, loss of confidentiality is irreversible. The bell cannot be unrung, and neither

dissemination nor use can be effectively restrained.” *Paxton v. City of Dallas*, 509 S.W.3d 247, 261 (Tex. 2017). If not adequately remediated, such a breach of the attorney-client privilege will chill a company’s ability to trust in-house counsel, and judicial proceedings will be tainted. In assessing Relator’s petition, the Court cannot lose sight of this fundamental principle.

II. The attorney-client privilege is nothing more than a parchment promise unless clients know that there will be vigorous judicial enforcement when the privilege is breached. To preserve the relationship between client and in-house counsel, courts must employ objective standards and impose remedies stern enough to signal credibly that confidential communications will be protected. Absent such a commitment, businesses will not be able to communicate freely with in-house lawyers.

As explained in Relator’s petition, the decision below threatens the predictable enforcement of the privilege across Texas by applying a subjective standard that focuses more on the perspective of lawyers than the objective harm felt by clients. But the attorney-client privilege belongs to clients, not lawyers. Where, as here, a lawyer objectively has

engaged in egregious misconduct that renders a court’s privilege ruling a nullity, courts must prevent the wrongdoer from obtaining any possible benefit and reassure the business community that the privilege has meaning. Otherwise, the privilege will not serve its purpose. The Court should grant review and reiterate these key principles.

ARGUMENT

I. A Robust Attorney-Client Privilege Is Essential to the In-House Counsel Role and the Businesses It Serves.

A. The attorney-client privilege is the “oldest of the privileges for confidential communications known to the common law.” *Upjohn*, 449 U.S. at 389. It shields confidential communications made for the purpose of obtaining legal advice, *Fisher v. United States*, 425 U.S. 391, 403 (1976), and is “rooted in the imperative need for confidence and trust” between “attorney and client,” *Trammel*, 445 U.S. at 51. Put differently, “[t]he attorney-client privilege exists—and has been a cornerstone of our legal system for nearly 500 years—because the interests protected and secured by the promise of confidentiality are not merely significant; they are quintessentially imperative.” *City of Dallas*, 509 S.W.3d at 261.

To obtain those “quintessentially imperative” benefits, *id.*, an attorney must “know all that relates to the client’s reasons for seeking

representation,” *Trammel*, 445 U.S. at 51. This requires “full and frank communication between attorneys and their clients.” *Upjohn*, 449 U.S. at 389. “As 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. “Safeguarding the privilege [thus] is important—indeed, compelling—because the consequences of disclosure are far from inconsequential.” *City of Dallas*, 509 S.W.3d at 261. “Once information has been disclosed, loss of confidentiality is irreversible” because “[t]he bell cannot be unrung, and neither dissemination nor use can be effectively restrained.” *Id.*

The benefits of the attorney-client privilege, moreover, redound to more than just clients. Instead, the privilege plays a vital role in “the proper functioning of our adversary system of justice.” *United States v. Zolin*, 491 U.S. 554, 562 (1989). That is why the attorney-client privilege has important “*public*” benefits. *Upjohn*, 449 U.S. at 389 (emphasis added). If clients could not trust that the attorney-client privilege will be broadly construed and reliably enforced, “[l]itigation costs would rise and

judicial efficiency would fall as attorneys attempt to advise clients after receiving only partial information.” Tom Spahn, *Corporate Attorney-Client Privilege in the Digital Age: War on Two Fronts?*, 16 Stan. J.L. Bus. & Fin. 288, 291 (2011). “Our profession [thus] recognizes few duties more important than protecting client confidences.” *In re Zaidi*, 732 S.W.3d 525, 531 (Tex. 2026). Such “systemic” benefits cannot be overstated. *City of Dallas*, 509 S.W.3d at 261.

B. Given the centrality of the attorney-client privilege to the effective functioning of both individual businesses and the legal system as a whole, it is black-letter law in Texas that the duty to keep client confidence and trust does not end when the attorney-client relationship does. Instead, the “attorney-client privilege continues after the relationship terminates,” *Md. Am. Gen. Ins. Co. v. Blackmon*, 639 S.W.2d 455, 458 (Tex. 1982), and, indeed, endures the client’s death, *see* Tex. R. Evid. 503(c) (preserving attorney-client privilege beyond client’s death); 8 Wigmore, Evidence § 2323 (McNaughton rev. 1961).

For good reason: A client “may be concerned about reputation, civil liability, or possible harm” resulting from counsel’s intimate knowledge about the client’s affairs, but that concern does not end alongside the

representation. *Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998). Instead, by sharing confidential information with a lawyer, a client effectively has *forever* turned over to someone else the prospect of embarrassment or loss. Unless the client knows “that the[] communication[] will not be subject to subsequent disclosure,” even after a matter is done, “unrestrained communication[] between an attorney and client” is impossible. *Blackmon*, 639 S.W.2d at 458.

Privilege, moreover, “belongs to the client”—not the lawyer. *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012). And “[a] client,” not a lawyer, may “refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client.” Tex. R. Evid. 503(b)(1); *see also* Tex. Disciplinary Rules Prof’l Conduct R. 1.13(a) (“A lawyer employed or retained by an organization represents the entity.”). This point explains why courts allow “the loss of evidence admittedly caused by the privilege.” *Swidler*, 524 U.S. at 408. After all, if there were no privilege, “the client may not have made such communications in the first place.” *Id.* Simply put, “[t]he preservation of clients’ secrets and confidences is not an option”—it is a requirement. *In re George*, 28 S.W.3d

511, 517 (Tex. 2000) (quoting *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 399 (Tex. 1989)).

C. Especially critical here, the attorney-client privilege applies with full force to in-house counsel. *Cf. CFTC v. Weintraub*, 471 U.S. 343, 348 (1985). The privilege's goals—frank disclosure, well-informed advice, and legal compliance—are equally important in the corporate context, where in-house counsel's *daily* ability to advise its client is predicated on confidence and trust. “[C]orporations, unlike most individuals, ‘constantly go to lawyers to find out how to obey the law’” because the corporate regulatory milieu makes “compliance with the law in this area ... hardly an instinctive matter.” *Upjohn*, 449 U.S. at 392 (citation omitted). And as law becomes increasingly complicated, it almost always is the case that the first attorney from whom those within a company are likely to seek advice is an in-house lawyer who is always available to assist them.

By definition, hiring in-house counsel reduces the need to routinely seek outside legal advice or support. Legal scholars recognized 40 years ago that “[a] striking development in the legal profession ... has been the rapid growth in both importance and size of in-house, or corporate,

counsel.” Abram Chayes & Antonia Chayes, *Corporate Counsel and the Elite Law Firm*, 37 Stan. L. Rev. 277 (1985). Now, “[i]nternal legal departments routinely employ dozens of lawyers, and many large companies have general counsel (GC) offices that rival the size of large outside law firms.” David B. Wilkins, *The In-House Counsel Movement*, Harvard Law School: Center on the Legal Profession (May 2016), <https://perma.cc/S9NL-WSXA>. Indeed, “[i]n 2025, there were approximately 11,730 in-house counsel in Texas” alone. *US In-house Counsel Population Tracker*, Association of Corporate Counsel (Sept. 22, 2025), <https://perma.cc/HH3A-XXXH>. Those lawyers advise officers, directors, middle managers, and wage-earners on every conceivable legal issue a business might encounter.

Today, “[t]he roles of in-house counsel are many, *e.g.*, overseeing the corporation’s compliance with myriad regulatory regimes.” *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 369 (3d Cir. 2007), as amended (Oct. 12, 2007). So too are the “primary advantages” of having “in-house (rather than outside) counsel”: “their knowledge of the corporation and their ability to begin advising senior management on important

transactions at the earliest possible stage, often well before anyone would think to hire a law firm.” *Id.*

But this is not the only role that in-house counsel plays. Mixed in with those legal duties are often various roles with legal overlays regarding compliance, risk control, human resources, and government affairs. See 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, 455-56 (2016); Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 Fordham L. Rev. 955, 957-58 (2005). Businesses, seeing this value, therefore spend more than ever on their in-house legal teams. See Elizabeth Olson, *Corporate Lawyers Say They Are Spending More In-House*, N.Y. Times (Jan. 29, 2016), <https://perma.cc/632F-D7MH>.

When it comes to attorney-client privilege, nothing changes just because a lawyer operates in-house rather than as outside counsel. As then-Judge Kavanaugh explained, “a lawyer’s status as in-house counsel does not dilute the privilege.” *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014) (citation modified). Rather, as with any other attorney-client relationship, the in-house counsel’s “loyalty” to the

business “serve[s] to fortify the [business]’s trust” in its counsel. *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 370 (5th Cir. 1998). The duty to protect confidentiality thus applies to in-house lawyers “[j]ust like any other lawyer.” David M. Majchrzak, *Ethical Challenges Every In-House Lawyer Must Navigate*, Daily Journal (May 11, 2026), <https://perma.cc/4ECC-5ZY7>.

Neither attorney nor client can operate without the other: a lawyer cannot offer competent, fully informed legal advice until the business “freely ... confide[s] in the lawyer,” and the business cannot “freely ... rely on the advice provided” unless it trusts that what it tells the lawyer in confidence will not be unethically disclosed. *In re Am. Airlines, Inc.*, 972 F.2d 605, 618, 620 (5th Cir. 1992). Nothing about that basic rule changes depending on whether a lawyer is inside or outside counsel.

D. Finally, when litigation occurs, the attorney-client privilege between in-house counsel and a business becomes especially important. When a business is involved in litigation, in-house counsel often plays quarterback for the organization: Whatever advice the in-house lawyer provides must be communicated quickly and effectively throughout the company to meet the human, business, and legal crisis facing the team.

In-house counsel’s importance in this context cannot be overstated: they collect the facts and decide how to frame the case; they hire, direct, and supervise outside counsel; and they advise the corporation on exposure, strategy, and settlement. *See, e.g.,* 1 John K. Villa, *Corporate Counsel Guidelines* §§ 4:3, 4:14, 4:15 (2025-2026 ed.). That central role requires in-house counsel to have access to the corporation’s most sensitive litigation information.

Businesses, especially those engaged in litigation, therefore place extraordinary trust in their in-house lawyers. As a Texas general counsel has explained, in-house counsel during trial must, among other things, “be the face of the company,” “provide[] updates ... to senior management,” “[a]ct as a buffer between senior management and the board of directors and [the] trial team,” and “read everything.” Sterling Miller, *Ten Things – What Should In-House Counsel Do During Trial?*, Ten Things Blog (Nov. 30, 2020), <https://perma.cc/X47T-A7CU>. An attorney cannot capably perform these functions if not protected by the attorney-client privilege.

II. Courts Must Credibly Commit to Protect the Attorney-Client Privilege or the Benefits of the Privilege Will Be Lost.

Unfortunately, the attorney-client privilege, for all the essential benefits it confers, is only as strong as its enforcement. Unless courts credibly commit to protecting the privilege—including by evaluating violations based on objective harm to clients—businesspeople will not be able to confidently seek legal advice from their in-house counsel.

A. Just like requests for legal advice from any other lawyer, if communications between in-house counsel and a business can be obtained through a former lawyer, company officials naturally will say less, write less, and hedge more when they talk to in-house counsel. *Cf. Zaidi*, 732 S.W.3d at 531. This can only damage the relationship of trust between in-house counsel and management and impede in-house counsel's ability to advise businesses on everything from deals to litigation strategy. No wonder the Court has recognized prejudice where opposing counsel receives another party's privileged litigation strategy. *See In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (citing *In re Meador*, 968 S.W.2d 346, 351 (Tex. 1998)). Nothing about that common-sense principle of Texas law turns on whether the lawyer in question is internal or external to the client.

Here, the misconduct that caused a former in-house lawyer to divulge privileged information was egregious. As Relator explains, Real Parties’ attorney Robert C. Vartabedian’s “misrepresentation to [Pioneer’s former in-house counsel Jefferson] Rees that all privilege had been waived in this matter put Rees in the very same situation as a lawyer or legal staff person who does switch sides.” Pet. 28. For the attorney-client privilege to serve its function, such brazen misconduct must have consequences, and courts must use an objective test to assess the nature of the wrongdoing. An inquiry that turns on the subjective belief of the lawyer attacking the privilege would inject unpredictability into the privilege and inexorably chill attorney-client communication.

B. “Once a secret has been disclosed, the proverbial bell cannot be unrung.” *Zaidi*, 732 S.W.3d at 531-32; *see also City of Dallas*, 509 S.W.3d at 261 (“Once information has been disclosed, loss of confidentiality is irreversible.”). As the Court explained in *Zaidi*, “a mind’s inner workings are often opaque and its contents not easily partitioned,” and the “sharing of confidences ... is the prejudice.” 732 S.W.3d at 538-39. “Even the possibility that counsel may later be compelled to be a witness undermines the trust between client and attorney and the assurance of

confidentiality that is the essence of legal counseling.” H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 Ky. L.J. 1191, 1197-98 (1999).

A chilled attorney-client relationship inevitably results. Officers and directors will be less candid with the lawyers whose advice depends on full disclosure. Employees will be less willing to alert in-house counsel to potential compliance concerns in a fashion that allows the company to prospectively address them. And in-house counsel will be less able to provide the frank and complete advice that their duty as an officer of this Court requires.

The deleterious effects of such lack of candor are especially damaging in the context of communications related to litigation. Take this case. As the petition explains, Rees’s disclosures included advice to Pioneer’s board and senior management, its strategy for top leases and well scheduling, and its own assessment of its claims. *See* Pet. 16. These are the types of highly sensitive communications Pioneer *most* needs to keep confidential when preparing for court. Yet the court of appeals’ decision requires Pioneer to litigate against an attorney who has permanent mental impressions of this privileged material. If decisions

like the one below become the norm, businesses will be much less confident—and candid—when seeking legal advice about their most pressing legal questions. After all, businesses routinely (and often especially) rely on “inside counsel to assess high risk[]” dangers, Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 Stan. L. Rev. 399, 439 (1985)—a foundational point that applies in spades to litigation.

“No attorney has a right to obtain ... information or to be a participant in a conversation in which he knows (or manifestly should know) that the adversary’s former lawyer is disclosing privileged information.” *Ag Gro Servs. Co. v. Sophia Land Co.*, 8 F. Supp. 2d 495, 497 (D. Md. 1997). That rule applies even more so where, as here, the information directly concerns ongoing litigation. “The integrity of the justice system is at risk unless a stand is taken against conduct of the sort that occurred here.” *Camden v. State of Maryland*, 910 F. Supp. 1115, 1123 (D. Md. 1996).

C. Finally, “[f]or the attorney-client privilege to be effective, it must be predictable.” *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 183 (2011). A test that asks whether the attorneys’ misconduct in

procuring privileged information was objectively wrongful advances predictability and safeguards the privilege's purpose.

Under an objective test, in determining whether an attorney acted “wrongfully,” courts would only assess whether the attorney’s *acts*—here, those of opposing counsel—in obtaining privileged communications were wrongful. *See Meador*, 968 S.W.2d at 352, 354. That standard does not ask whether the former lawyer (in-house or otherwise) exercised sound judgment or whether the procuring lawyer subjectively believed he was entitled to the information. Otherwise, the focus would be on the attorney—not the *client* who holds the privilege. Only when the law governing sanctions focuses on the harm that violations of the attorney-client privilege do to the client can in-house counsel confidently tell a board, an officer, or a business manager that a candid conversation will remain protected. By contrast, a subjective inquiry necessarily will leave in-house counsel unable to give that assurance because a business client’s protection ultimately will depend on factors that the business cannot see or control.

Here, opposing counsel’s conduct—as the trial court found—was objectively wrongful: Vartabedian, among other things, used a job lead to

convince Rees to join him for lunch to elicit Pioneer’s privileged litigation strategy; advised Rees that any privilege was waived; secretly recorded the conversation; and then counseled Rees on how to avoid later scrutiny. *See* Pet. 14-17 (citing MR.3282, 3774-75, 3777, 3910, 4057-64, 4076-83, 4235).

Yet the court of appeals did not focus on those objective facts. Instead, the court focused on the views and beliefs of Rees. For example, it emphasized that Rees was “a licensed attorney” who “could easily determine the scope of the waiver,” and reasoned that he disclosed privileged matters while “exercising his own professional judgment.” Supp.MR.0299. The court then treated “whether Vartabedian acted with the intent and purpose to exceed the trial court’s waiver” as a vital fact. Supp.MR.0299-300; *see also* Pet. 35.

That is an untenable result—and one this Court should now grant review to correct. The Court should confirm that, in Texas, a corporation’s privilege is protected by an objective inquiry into whether its communications were wrongfully procured. That protection should not depend on the individual judgment of a departing lawyer or on the subjective intent of the lawyer who sought that lawyer out.

In short, “free discussion should prevail between lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system.” *Zaidi*, 732 S.W.3d at 531 (quoting Tex. Disciplinary Rules Prof’l Conduct R. 1.05 cmt. 1) (cleaned up). The Court should grant the petition and reiterate that effective representation depends on clients having confidence that their confidential information will remain protected. Focusing on the subjective belief of a former in-house lawyer or opposing counsel, rather than the objective fact that some of a client’s most sensitive privileged information was turned over to the other side, betrays a profound misunderstanding of what attorney-client privilege entails and why courts so ardently protect it.

CONCLUSION

The Court should grant Relator's petition and set this case for full briefing and argument.

Date: October 15, 2026

Respectfully submitted,

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