No. 26-OA-0001

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
(YVONNE M. WILLIAMS, J.)

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NETCHOICE IN SUPPORT OF PETITIONERS

Jonathan D. Urick
Kevin R. Palmer
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

Paul D. Taske
NetChoice
1401 K Street NW, Suite 502
Washington, DC 20005

Counsel for Amicus Curiae NetChoice

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000

Allison N. Douglis*
JENNER & BLOCK LLP
1155 Avenue of the Americas
New York, NY 10023
(212) 891-1600

**Not admitted to practice in the District of Columbia*

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

OTHER AUTHORITIES

* Authorities upon which we chiefly rely are marked with an asterisk.

INTEREST OF AMICI CURIAE

Amicus the Chamber of Commerce of the United States of America (the "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 briefs in cases, like this one, that raise issues of concern to the nation's and the District's business communities.

Amicus NetChoice is a national trade association of online businesses that share the goal of promoting free enterprise and free expression on the internet. NetChoice fights to ensure the internet remains innovative and free. Toward those ends, NetChoice engages in litigation, amicus curiae work, and political advocacy.

Amici take no position on the underlying consumer protection litigation. However, preservation of a robust and predictable attorney-client privilege is an issue of significant concern to amici and their members. Amici's members seek legal advice on a wide range of topics—often in evolving and emerging areas of the law—and rely on consistent application of the privilege. They wish to comply with

the law without exposing themselves to unnecessary litigation risk, while simultaneously retaining the confidentiality necessary to the effective functioning of the attorney-client relationship. The trial court's misapplication of the crime-fraud exception in this case undermines these interests by threatening to encompass routine attorney advice within the scope of that exception. Thus, amici submit this brief on the discrete privilege issues raised on petition for mandamus.

INTRODUCTION

The attorney-client privilege serves the purpose of "encourag[ing] full and frank communication between attorneys and their clients and thereby promot[ing] broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege both protects the ability of "corporate attorneys to formulate sound advice when their client is faced with a specific legal problem" and "the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Id.* at 392–93.

Of course, the privilege is not unbounded. But because the privilege is sacrosanct, it should not be disturbed except in very limited circumstances. Pursuant to the crime-fraud exception, the privilege yields only in narrow circumstances, including when "the client uses the attorney's advice or services to pursue a crime or fraud, or if the attorney-client communication itself materially advances a crime

or fraud, even if the client's efforts are frustrated or halted short of consummation of the evil deed." *In re Pub. Defender Serv.*, 831 A.2d 890, 902 (D.C. 2003). It is axiomatic that simply seeking advice on how to avoid triggering liability cannot itself be the proof that sustains the exception. Instead, the exception is exacting, requiring a finding that the client "made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act." *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997). The party seeking to establish the exception bears the burden of establishing probable cause that the exception applies via a "specific showing." *In re Pub. Defender Serv.*, 831 A.2d at 903–04.[1] The crime-fraud exception is a narrow carve-out; it is not supposed to be an exception that swallows the rule.

Respondent in this matter did not come close to satisfying this burden, and the trial court misapplied the fundamental requirements of the crime-fraud exception. The trial court's approach to the exception introduces new uncertainty about whether and how it will be applied in the District, and, if not corrected, threatens to make the District a jurisdiction uniquely hostile to the privilege. Indeed, since the trial court

[1] Amici note that probable cause is not the only available standard; some jurisdictions apply a preponderance-of-the-evidence standard. *See, e.g.*, *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1094–95 (9th Cir. 2007), *abrogated on other grounds*, *Mohawk Indus., Inc. v. Carpenter*, 588 U.S. 100 (2009).

issued its decisions, two other courts reviewing privilege claims regarding the same documents have rejected application of the crime-fraud exception to the privilege. *See* Order Resolving Dispute re: Four Meta Documents and Crime Fraud Exception to Attorney-Client Privilege, *In re: Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.*, No. 22-md-3047 (N.D. Cal. Jan. 12, 2026), ECF No. 2630 [hereinafter "MDL Order"]; Ruling, *Social Media Cases*, No. JCCP5255 (Cal. Sup. Ct., Los Angeles Cnty. Jan. 15, 2026) [hereinafter "JCCP Ruling"[2]].

In its two orders applying the exception, the trial court suggested two different rationales for its ruling. Either rationale falls well short of satisfying District law, and if not corrected by this Court on mandamus review, threatens to interfere with clients' ability to confidentially seek routine legal advice. First, the trial court suggested in its initial ruling that any attorney advice about mitigating litigation risk can qualify as misconduct falling within the crime-fraud exception because it may "obfuscate" liability, without making any attendant finding that the advice was sought for the purpose of facilitating misconduct sufficient to trigger the exception. Indeed, the trial court reached this conclusion without holding an evidentiary hearing or considering other evidence bearing on whether the client used the advice for any improper purpose, such as spoliation of evidence. This approach threatens to remove

[2] "JCCP" stands for "Judicial Counsel Coordinated Proceeding."

the privilege from a wide range of commonplace legal advice, and stands in contrast to that of two other courts to consider these same documents. This Court should grant mandamus review to confirm that, as in the other jurisdictions to consider this matter, District law does not permit the privilege to be pierced on such a threadbare record.

Second, the trial court suggested in its order denying reconsideration that the exception applies simply because the attorney-client communications at issue are relevant to the underlying claims of consumer fraud. But companies routinely face such allegations, and that logic would improperly nullify the privilege whenever an opposing party alleges fraud or similar claims. Absent a finding that a client solicited and used advice to defraud consumers, and without at least a showing of spoliation or other similar misconduct, the exception cannot apply.

The trial court's overly expansive application of the crime-fraud exception will cause harm well beyond this particular case and legal context. Predictability is the cornerstone of the attorney-client privilege. As the Supreme Court explained in *Upjohn*, "[a]n uncertain privilege ... is little better than no privilege at all." 449 U.S. at 393. It further observed that because modern corporations face a "vast and complicated array of regulatory legislation," they "constantly go to lawyers to find out how to obey the law." *Id.* at 392. Companies should not be forced to tread on

uncertain ground twice: first, regarding the complex legal issues with which they need help, and second, regarding whether they can safely seek that help in the first place. The trial court's broad reasoning undermines this necessary predictability, leaving companies unsure if their good-faith efforts to minimize litigation risk will remain confidential.

The court's broad holding also encourages aggressive litigants to assert exceptions to privilege. In modern litigation, plaintiffs often wield unequal leverage: their own discovery burdens are minimal, while corporate defendants face massive costs and tremendous pressure to settle even non-meritorious claims. If the crime-fraud exception becomes a routine battleground based on mere allegations of fraud, it will exacerbate this asymmetry. Forcing companies to litigate the sanctity of their own legal counsel as a prerequisite to defending the merits would hand plaintiffs a powerful new tool to coerce settlements, further distorting the litigation process.

Finally, the trial court's refusal to consider additional evidence after it completed its *in camera* review paradoxically pressures future parties arguing against the crime-fraud exception to proactively disclose far more about the confidential communications (through affidavits or otherwise), even before a court has had a chance to evaluate whether the party arguing against privilege has raised a *prima facie* exception.

Potential litigants cannot turn a blind eye to the possibility that their assertions of privilege will be treated differently in litigation within the District than in other jurisdictions. In turn, that uncertainty generates the very chilling effect on candid discussions between clients and counsel that the attorney-client privilege is designed to protect. The Court should grant mandamus relief.

ARGUMENT

I. The Trial Court's Approach Threatens to Remove the Privilege from Routine Corporate Counsel Guidance on Minimizing Litigation Risk.

The trial court suggested two distinct rationales for applying the crime-fraud exception here. First, it held in its October 23 Order that the attorney advice at issue falls within the crime-fraud exception and thus is not privileged because the advice was geared at "obfuscating the adjudication of Meta's liability." App.139. Then, it held in its January 5 Order denying reconsideration that the communications at issue are not privileged because taken as true, they provide "direct evidence that Meta engaged in a consumer fraud." App.400–01. Both of these rationales are clearly wrong and threaten to expand the crime-fraud exception to a wide array of conventional attorney advice on which the adversary system depends.

A. The Crime-Fraud Exception Does Not and Should Not Apply to Routine Attorney Advice on Minimizing Litigation Risk.

To the extent that the trial court held that "other misconduct" sufficient to trigger the crime-fraud exception includes spoliation of evidence, *see* App.139, its application of that rule was straightforwardly wrong under these facts because there has been no showing (and the trial court did not find probable cause) that evidence was spoliated, or that the client sought advice for the purpose of spoliating evidence or otherwise unlawfully concealing discoverable evidence.

That key point underpinned the two decisions rejecting application of the crime-fraud exception to these communications. With the benefit of sworn affidavits from the relevant employees disclaiming spoliation—evidence the trial court here refused to consider—the MDL court in the Northern District of California held that there was no showing that Meta destroyed or deleted the underlying documents that were the subject of the attorney-client communications. MDL Order at 10–22. Correspondingly, it held that "there has been no irreversible or unreviewable alteration of evidence, because the pre- and post-advice versions exist." *Id.* at 13.

The JCCP court in California likewise held that "[a]dvice 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 is within the protection of the attorney-client privilege so long as evidence concerning

such research is not destroyed and is not concealed in litigation." JCCP Ruling at 4. While a party-opponent is free 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" to the extent relevant, that opponent may not "invade any attorney-client privileged communications that may have motivated the client's decision-making regarding research." *Id.* Without an additional showing that evidence was "destroyed or concealed," *id.* at 3, the crime-fraud exception simply does not apply to the alleged conduct. Here too, the JCCP court considered the "additional record" submitted by the parties and reasoned that none of it substantiated destruction or concealment of evidence. *Id.*

Once the trial court here determined based on its *in camera* review that there was a *prima facie* possibility that the crime-fraud exception applied, it should have held an evidentiary hearing to probe whether there was in fact probable cause that Meta engaged in spoliation or other unlawful discovery misconduct or was counseled to engage in such misconduct, or at minimum consider the declarations the parties submitted, as the MDL court did. It fundamentally erred by not doing so.

The trial court then exacerbated its error by reasoning that it was sufficient to find probable cause that "Meta sought and heeded the advice of its counsel to obfuscate its potential liability." App.139; *see also* App.401–02. Implicitly, the trial

court viewed advice on mitigating litigation risk as falling within the exception because such mitigating steps could make it more difficult for a litigant to prove liability in a current or future case. Under that theory, all attorney advice about how to mitigate legal risk would be subject to the crime-fraud exception.

"Companies operating in today's complex legal and regulatory environments routinely seek legal advice about how to handle all sorts of matters, ranging from their political activities to their employment practices to transactions that may have antitrust consequences." *In re Sealed Case*, 107 F.3d at 50. One "particularly critical stage of a legal representation" is when lawyers provide advice to "help clients avoid litigation or to strengthen available defenses should litigation occur." *In re Sealed Case*, 146 F.3d 881, 886 (D.C. Cir. 1998). Such advice, far from furthering crime or fraud, is a commonplace and essential part of corporate legal counseling.

Among other things, lawyers routinely counsel corporate clients on the risk that documents created by individual employees may be discoverable and that care should be taken to avoid creation of documents that do not reflect the client's final position on a matter. *See, e.g.*, Katie Maechler, Stephanie Laws & Abigail Maier, *Ten Steps to Avoid Creating the Internal Document from Hell (United States)*, Ass'n of Corp. Counsel (Aug. 10, 2023), https://www.acc.com/resource-library/ten-steps-

avoid-creating-internal-document-hell-united-states; *C3 Business Law Monographs* § 4.04 (2025) ("As part of a general corporate training program, management should be educated about the hazards of litigation and the discovery process," including that "[c]ounsel should instruct managers and employees to stop writing memos or correspondence regarding the dispute").

Relatedly, counsel play a vital role in reviewing drafts to identify language that an aggressive adversary might distort. This review ensures accuracy and nuance. For example, lawyers routinely flag imprecise language that could needlessly generate litigation risk—such as framing a single employee's speculation as the company's conclusion. *See, e.g.*, Maechler et al., *supra* (recommending that when the author of a document "venture[s] beyond [their] knowledge," they should "make it clear that [they] are sharing an opinion"). Lawyers may also counsel that when employees who are not on the legal team effectively render "legal conclusions like 'this is negligence'—even in notes—[it] can create a smoking gun for the other side," even if it only reflects one person's opinion or imprecise, colloquial language rather than the entity's knowledge. *Id.* For public communications, counsel's input is equally critical to identify statements that may generate "legal ramifications and potential adverse use." *Viacom, Inc. v. Sumitomo Corp.* (*In re Cooper Mkt. Antitrust Litig.*), 200 F.R.D. 213, 219 (S.D.N.Y. 2001).

Under the trial court's approach, all of this guidance could be viewed as "obfuscating" the adjudication of a company's liability in a way that is somehow misconduct falling within the crime-fraud exception—and thus unprotected by attorney-client privilege. That demonstrates precisely why the trial court's reliance on the vague concept of "obfuscation" cannot be the right benchmark for when the exception applies. As discussed above, companies routinely seek advice from lawyers that may incidentally make it harder for litigation adversaries to prove their claims against the company. But that is different from providing advice geared specifically at unlawful discovery misconduct or similar ethical breaches. Here, the trial court did not provide any other basis to conclude that the company sought the communications at issue with intent to block lawful discovery or hide unfavorable evidence, let alone that the communications actually served that function. At most, in the trial court's words, "Meta's counsel … offered legal advice *potentially clouding* Meta's conduct and liability." App.138 (emphasis added). That is far too thin and vague a basis on which to pierce attorney-client privilege.

The need for frank and confidential legal advice does not cease when a lawsuit is threatened or filed. As long as a company complies with its litigation obligations and lawyers comply with their ethical obligations, it is not crime or fraud (or any type of misconduct) to advise clients as to data and document hygiene and the ways

in which imprecise language may increase litigation risk. Indeed, this is an essential and commonplace function of responsible corporate counsel. The trial court's decision imperils attorney-client privilege over these important types of communications.

B. The Underlying Substantive Claims Should Not Impact the Scope of the Exception.

In its reconsideration decision, the trial court pivoted from potential litigation misconduct to the underlying consumer fraud allegations. *See* App.401. But the trial court failed to explain *how* the legal advice furthered the alleged fraud—a critical error that is a clear misapplication of District law. *See In re Pub. Def. Serv.*, 831 A.2d at 895 (reversing crime-fraud finding where "the government made no showing that those communications actually were in furtherance of an ongoing or future crime or fraud"). For example, the trial court did not identify any link between the internal-facing communications at issue and alleged misstatements to the public or users, despite suggesting that the crime-fraud exception applied because the communications provided evidence of a "consumer fraud." *See* App.401. By relying solely on the nature of Respondent's claims, the trial court's approach threatens to expose a wide range of ordinary, innocuous attorney-client communications whenever a company faces fraud allegations.

The trial court's approach improperly presumes that attorney advice about minimizing litigation risk from potential fraud *claims* is advice solicited in furtherance of a fraud. That inference does not follow. Legal advice often takes place against a backdrop of evolving or unclear doctrines that have not yet been applied to analogous facts. "Lawyers are occupationally engaged in advising clients about activities on which law has an often uncertain bearing." *Restatement (Third) of the Law Governing Lawyers* § 94 cmt. c (2000). In doing so, attorneys frequently advise their clients from a "conservative" perspective on risk "in light of evolving legal precedent and" the litigating positions taken by regulators or private lawyers. *In re Grand Jury Subpoena to Kan. City Bd. of Pub. Utils.*, 246 F.R.D. 673, 682 (D. Kan. 2007).

Advising a client that a certain course of conduct or framing increases litigation risk is not the same as recognizing that the client has done something wrong—much less *facilitating* wrongdoing, the high bar a party must prove to trigger the exception. That issue is typically "one of the ultimate questions" for the litigation, especially where there are "complexities and uncertainties" as to what the law requires. *United States v. BDO Seidman, LLP*, No. 02-cv-4822, 2005 WL 742642, at *9 (N.D. Ill. Mar, 30, 2005), *vacated in part on other grounds*, 492 F.3d 806 (7th Cir. 2007). An attorney therefore might readily advise a client that certain

statements or the creation of certain documents may increase litigation risk, without furthering any actual unlawful conduct in doing so.

Not only is the trial court's inference flawed—it is an incredibly dangerous inference that threatens to expand the crime-fraud exception into the rule, swallowing the privilege. Because the trial court did not provide any basis connecting the attorney advice to the alleged fraud on consumers, much less substantiate a finding of probable cause, its approach threatens to encompass a wide range of ordinary and totally innocuous attorney-client communications involving companies facing actual or potential fraud claims. This cannot possibly be consistent with District law, and mandamus review is thus warranted.

II. At Minimum, the Trial Court's Approach Undermines the Privilege by Generating Uncertainty About Its Application.

Amici urge the Court to grant mandamus to correct the trial court's errors, which, if uncorrected, will create harmful uncertainty for companies and their employees. As discussed above, the trial court's decision threatens to strip the privilege from quotidian advice about document creation, retention, and language precision—strategies that companies across all industries rely on to mitigate legal risk. Without this Court's intervention, that uncertainty will undermine the privilege whenever a company faces fraud allegations.

A diminishment or weakening of the privilege in the District will discourage

the free and candid exchange of information and advice that is at the heart of the attorney-client relationship. "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). In particular, those charged with making key business or communications decisions may be hesitant to seek attorney advice to strengthen those decisions and insulate them from legal challenge. And, rather than seeking attorney guidance on what types of litigation risk mitigation measures are prudent, companies may choose to take a more aggressive approach and self-censor internal or external communications. Each of these second-order effects would harm the practice of law in the District, to the detriment of clients and of the adversary system as a whole.

Moreover, an ill-defined crime-fraud exception will warp incentives and provide improper tools to aggressive litigants. "Motions to penetrate clearly applicable privileges can be tools for harassment" and "abused for … tactical purposes," in addition to "chill[ing] the communications that the privileges are designed to encourage." *Laser Indus., Ltd. v. Reliant Techs., Inc.*, 167 F.R.D. 417, 424 (N.D. Cal. 1996). Particularly where the underlying claims involve allegations

of fraud or deception, litigants will have every incentive to invoke the trial court's decision here as justifying discovery of attorney-client communications related to the conduct at issue.

Finally, the trial court's procedural approach compounds these risks, and stands in contrast to the MDL court's careful handling of the same question. Both the trial court and the MDL court decided, based on *in camera* review, that there was some potential basis for applying the crime-fraud exception. The trial court leapt directly to holding that the exception applies. That was insufficient, and reversible error. The MDL court proceeded to review evidence and pose questions to the parties as to the nature, context, and use of the attorneys' advice. *See* MDL Order at 1–2. It based its conclusion, in part, on Meta's evidence explaining how the communications at issue were *not* related to altering or deleting evidence, and that Meta's counsel had never advised the relevant chat participants to "delete, conceal, alter, or amend research data, results, or conclusions"—evidence the trial court here expressly refused to consider. Pet'n 5 (citation omitted); *see* App.396. Indeed, it is common for the party asserting privilege to provide additional evidence after the court's *in camera* review in order to show "that there is a reasonable explanation for the conduct or communication." 18 Am. Jur. 2d *Witnesses* § 361, Westlaw (database updated Nov. 2025); *see United States v. BDO Seidman, LLP*, 492 F.3d 806, 820

(7th Cir. 2007) (observing that the district court appropriately "gave [the party arguing privilege] the opportunity to explain the communication" after initially "concluding that there had been a prima facie showing that [the communication was] made in furtherance of a crime or fraud"). The trial court's approach instead will pressure litigants to disclose further confidential information about the communications at issue before the trial court even engages in *in camera* review, forfeiting the confidentiality otherwise guaranteed by the attorney-client privilege.

CONCLUSION

The Court should issue a writ of mandamus providing the relief requested by Petitioners.

Respectfully submitted,

/s/ Adam G. Unikowsky

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000

Allison N. Douglis*
JENNER & BLOCK LLP
1155 Avenue of the Americas
New York, NY 10023
(212) 891-1600
**Not admitted to practice in the District of Columbia*

Counsel for Amici Curiae

Jonathan D. Urick
Kevin R. Palmer
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

Paul D. Taske
NetChoice
1401 K Street NW, Suite 502
Washington, DC 20005

Counsel for Amicus Curiae NetChoice