No. 21-1397

In the Supreme Court of the United States

IN RE GRAND JURY

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ASSOCIATION OF CORPORATE COUNSEL, AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI 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, like this one,

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

that raise issues of concern to the Nation's business community.

The Association of Corporate Counsel ("ACC") is the leading global bar association that promotes the common professional and business interests of in-house counsel. ACC has over 40,000 members who are in-house lawyers employed by over 10,000 corporations, associations, and other organizations in more than 80 countries. Founded as the American Corporate Counsel Association in 1981, ACC has grown from a small organization of in-house counsel to a worldwide network of legal professionals, focused on delivering a mix of relevant and timely services, including information, education, networking opportunities, and advocacy. ACC has long sought to aid courts, legislatures, regulators, and other law or policy-making bodies in understanding the role and concerns of in-house counsel, and is a frequent *amicus* participant at the United States Supreme Court and high courts globally.

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset managers operating in the United States and global capital markets. On behalf of the industry's one million employees, SIFMA advocates on legislation, regulations, and business policies affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. With offices in New York and Washington, D.C., SIFMA is the

United States regional member of the Global Financial Markets Association.

Amici are particularly interested in this case because of the impact it will have both on the ability of lawyers to give legal advice and on the ability of businesses to receive it. The Chamber and ACC have participated together as *amici* in other cases addressing privilege protections of dual-purpose communications. *See, e.g.*, Br. of Amicus Curiae, *In re Kellogg Brown & Root, Inc.*, No. 14-5055, 2014 WL 1091038 (D.C. Cir. Mar. 19, 2014). *Amici* continue to participate in such cases because both they and their members have a strong interest in a predictable privilege standard for dual-purpose communications. This predictability is necessary to ensure the full and frank communication between lawyers and their clients that effective legal practice requires. A standard that protects dual-purpose communications when a significant purpose of the communication is obtaining or providing legal advice guarantees predictability. For the reasons given by petitioner, and those set forth below, the Ninth Circuit erred in recognizing a privilege test for dual-purpose communications that seeks to identify *the* primary purpose of the communication.

INTRODUCTION AND SUMMARY OF ARGUMENT

A salesperson comes to the company's general counsel with a problem. A significant customer with a long-term contract wants to change the terms of the deal. The salesperson is looking for legal advice: Do the changes requested by the customer violate the law? Do they require a written amendment to the contract and how could that be effectuated? And would they undermine other contracts this customer has with the business? At the same time, the salesperson is frustrated. It took weeks for this contract to be negotiated, and the sales

manager is not going to be happy with any revisions. And the salesperson's commissions could be affected by one of the changes proposed by the customer. The salesperson is thinking about offering the customer other accommodations.

According to the Ninth Circuit, the salesperson's request for legal advice would only be privileged if the "single 'primary' purpose" of the communication was legal. Pet.App.4a. But privilege protections should not depend on an exegesis of how long the salesperson lingered on the personal issues animating the request for advice, or the order in which the issues were presented, in an attempt to divine some metaphysical "primary" purpose to the request for legal advice.

Instead, a request for legal advice should be privileged so long as "one of the significant purposes" of the communication was legal advice. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014); *accord* Restatement (Third) of the Law Governing Lawyers § 72 (2000), Reporter's Note to cmt. c at 554 (noting that "the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance"). This significant-purpose test is consistent with the purposes of the privilege in making sure that lawyers receive the kind of "full and frank communication" from their clients that allow them to provide complete legal advice. *E.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

For example, the salesperson may not realize it, but the seemingly "nonlegal" issues at play could be critically important for the lawyer to provide competent legal advice to the company. The manager's unhappiness could reveal an issue with the company's practices under antitrust or consumer-protection laws. The salesperson's

worries about commissions could reveal an ambiguity in the wording of contractual provisions or corporate policies. And any half-measures or accommodations the salesperson is considering could expose the company to liability down the road.

The significant-purpose test also reflects the realities of how businesses and their lawyers operate today. Business clients require their counsel, especially in-house counsel, to perform a wide range of tasks on a daily basis. A review of examples that *amici*'s members confront every day underscores that the purposes of the attorney-client privilege are best served by a test that looks only to whether a significant legal purpose motivated an attorney-client communication. These examples also show how the Ninth Circuit's standard puts judges in the impossible role of discerning a single "primary" purpose for communications and the negative effects that can have on the provision of legal advice in real time.

Lastly, the tax context in which this case arises does not merit different consideration. Courts, including this one, regularly recognize that the tax context is not necessarily unique. The purposes underlying the attorney-client privilege apply with equal force in the tax context.

ARGUMENT

I. The Significant-Purpose Test Serves the Purposes of the Attorney-Client Privilege and the Attorney-Client Relationship.

A. The Attorney-Client Privilege

1. The "oldest of the privileges for confidential communications known to the common law," *Upjohn*, 449 U.S. at 389, the attorney-client privilege shields from disclosure confidential communications made for the

purpose of obtaining legal advice, *e.g.*, *Fisher v. United States*, 425 U.S. 391, 403 (1976); Restatement (Third) § 68. It protects communications, not the underlying facts themselves or a client's knowledge of them. Restatement (Third) § 69 cmt. d; *see, e.g.*, *FTC v. Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264, 1268 (D.C. Cir. 2018) (noting that privilege does not prevent "discovery of the underlying facts and data … [or] of pre-existing business documents").

The attorney-client privilege serves the "broader public interests in the observance of law and the administration of justice" that it "promote[s]." *Upjohn*, 449 U.S. at 389; *accord Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). The privilege accordingly places a "seal of secrecy upon communications between client and attorney" because legal advice "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *see Upjohn*, 449 U.S. at 389 ("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.").

Self-censorship by clients robs the privilege of its function. "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States*, 445 U.S. 40, 51 (1980). "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. Put simply, "without the privilege, the client may not have made such communications in the first place." *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998). As this Court has often noted, the privilege cultivates "full and frank communication between attorneys and their clients." *Upjohn*, 449 U.S. at 389; *accord United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 (2011); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009); *Swidler & Berlin*, 524 U.S. at 403; *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996); *United States v. Zolin*, 491 U.S. 554, 562 (1989); *Weintraub*, 471 U.S. at 348.

This Court has thus recognized what *amici* and their members know from experience: lawyers and clients can only have "full and frank communication[s]" if the rules surrounding privilege are "predictable." *Jicarilla Apache Nation*, 564 U.S. at 169, 183 (noting that "for the attorney-client privilege to be effective, it must be predictable"). A privilege test that is "difficult to apply in practice"—especially by businesspeople untrained in legal or evidentiary standards—will inexorably chill attorney-client communication. *Upjohn*, 449 U.S. at 393. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.*

To ensure this predictability, clients and lawyers need to know ex ante whether a conversation that includes an undisputedly significant legal purpose will remain protected. It would undercut frank and confident exchanges if a communication could lose privilege protection because—in the eyes of a court years later and judged on a cold record—the communication strayed into other, nonlegal topics. The notion that discussing one business topic too many, or for too long, would rob legal

advice of privilege would compel lawyers and clients to segregate their conversations and censor themselves. And the costs of those practices would be that clients receive worse advice and meet their legal obligations less frequently and ably.

2. The significant-purpose test is far more predictable than the primary-purpose test applied by the Ninth Circuit. Under the significant-purpose test, the question is simply whether a legal purpose is "one of the significant purposes of the communication." *Boehringer Ingelheim*, 892 F.3d at 1268; *Kellogg*, 756 F.3d at 760; Restatement (Third) § 72, Reporter's Note to cmt. c. That analysis is fairly simple: one looks at the purposes of the communication, determines which (if any) are legal, and then asks only whether a legal purpose is significant. None of those steps are difficult to apply, especially given that the "significant" criterion principally serves to ensure that the legal purpose is a legitimate one posed in good faith. *See infra* pp. 13-14.

The significant-purpose test is "clearer, more precise, and more predictable" than the "the primary-purpose test" used by the Ninth Circuit. *Kellogg*, 756 F.3d at 759-60; Pet.App.6a. The primary-purpose test sets courts on a quixotic quest to find "a single 'primary' purpose" to a communication. Pet.App.4a. But as then-Judge Kavanaugh warned in *Kellogg*, such an inquiry "can be an *inherently impossible task*. 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." 756 F.3d at 759 (emphases added). Vague, ex-post balancing 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. Worse yet,

a task that is "inherently impossible" for judges is completely unworkable for attorneys and, most importantly, their clients, who are untrained in the metes and bounds of privilege law.

By asking only if "one of the significant purposes of the communication" was legal, *e.g.*, *Kellogg*, 756 F.3d at 760; Restatement (Third) § 72, Reporter's Note to cmt. c, the significant-purpose test is predictable for courts and litigants to follow. It therefore facilitates the kind of "full and frank communication" between clients and lawyers that the attorney-client privilege is intended to encourage. *E.g.*, *Upjohn*, 449 U.S. at 389.

B. The Attorney-Client Relationship

A holding that the significant-purpose test applies to communications with more than one purpose would also better serve the purposes of the attorney-client relationship generally. It will facilitate the ability of lawyers to learn the underlying facts, maintain the trust of their clients, and provide meaningful and fulsome advice. At the same time, the requirement that the legal purpose be "significant" minimizes the risk that the privilege will be abused.

1. Effective legal advice depends on gathering the facts. That is "[t]he first step in the resolution of any legal problem." *Upjohn*, 449 U.S. at 390. A lawyer must "ascertain[ ] the factual background and sift[ ] through the facts with an eye to the legally relevant." *Id.* at 390-91. Accordingly, the "privilege covers … those communications in which the client informs the attorney of facts that the attorney needs to understand the problem and provide legal advice." *Boehringer Ingelheim*, 892 F.3d at 1267. Fact gathering depends on clients' willingness to share information "even as to

embarrassing or legally damaging subject matter." Model Rules of Prof'l Conduct R. 1.6, cmt. 2 (Am. Bar Ass'n 2022).[2]

The significant-purpose test facilitates the full presentation of factual information to lawyers. Clients need not be concerned that factual information will be deemed relevant to only a nonlegal, or business, purpose. Nor need they be worried that the thrust of their request will be deemed to have focused on their personal or business concerns rather than a legal one. Consider again the example at the beginning of the brief regarding the salesperson and the customer who wants to change the sales contract. The salesperson may well be focused on how the customer's demands would affect the salesperson's compensation and position. But it behooves the lawyer—and the company the lawyer represents—to hear as much from the salesperson as possible regarding those concerns, because the lawyer is then able to learn the full scope of facts that could affect the legal analysis.

2. The significant-purpose test also better creates the "trust that is the hallmark of the client-lawyer

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[2] The Court has relied on the American Bar Association's Model Rules of Professional Conduct in cases involving lawyers' conduct. *See, e.g.*, *Jerman v. McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 600 (2013); *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 94-95 (2009); *Commissioner v. Banks*, 543 U.S. 426, 436 (2005). The Model Rules were first adopted in 1983 by the ABA's House of Delegates and are the basis for the state rules that directly govern lawyers' professional responsibilities. *See, e.g.*, Restatement (Third) § 1 cmt. b. Indeed, since 2018, when California substantially revised its rules, all 50 states model their professional-responsibility regimes for lawyers on the ABA's Model Rules. *See* Lorelei Laird, *California Approves Major Revision to Attorney Ethics Rules, Hewing Closer to ABA Model Rules*, ABA J. (Oct. 2, 2018, 2:20 PM), https://tinyurl.com/ypycdkdh; *Jurisdictional Rules Comparison Charts*, ABA, https://tinyurl.com/28ba44vv.

relationship." *Id.* The attorney-client privilege, like other privileges, is "rooted in the imperative need for confidence and trust" between client and attorney. *Trammel*, 445 U.S. at 51; *see generally Stockton v. Ford*, 52 U.S. 232, 247 (1850) ("There are few of the business relations of life involving a higher trust and confidence than that of attorney and client ...."). The maintenance of the privilege and confidentiality itself encourages clients to trust their lawyers and their lawyers' discretion. By requiring only that one of the significant purposes of the communication be legal, the significant-purpose test fosters fulsome communication which necessarily will deepen trust, especially if the subject matter is sensitive.

The Ninth Circuit's standard, on the other hand, puts the lawyer in the unfortunate role of gatekeeping the client's presentation of information. Because that court's standard applies privilege only if the "single 'primary' purpose" of a communication is legal, a lawyer could reasonably fear that a given subject will cause the communication to become overly personal or business-focused rather than legal. It would be understandable if the lawyer therefore urged a client to stop speaking on that subject. And it would be equally understandable in such a circumstance for the client to feel alienated from the lawyer and unable to trust the lawyer's advice and understanding of the client's issues.

3. A rule for dual-purpose communications that embraces privilege protection so long as a significant purpose is legal not only supports the lawyer's gathering of information to provide advice, it also improves the advice itself. Lawyers are obligated to "render candid advice." Model Rules of Prof'l Conduct R. 2.1. "Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront." *Id.* cmt. 1.

"Purely technical legal advice … can sometimes be inadequate." *Id.* cmt. 2. "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant." *Id.* Lawyers are not failing to provide legal advice when they give advice that accounts for, and refers to, practical business or personal issues. Rather, the rules of professional conduct encourage lawyers to give clients advice that considers "moral, economic, social and political factors" in addition to legal issues. *Id.* R. 2.1. That is not only an effective way to communicate advice; it reflects legal judgments as well. In some circumstances, "moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." *Id.* cmt. 2.

The Ninth Circuit's standard, however, chills lawyers from presenting advice in these most effective ways. For fear that they were communicating in such a manner that the "single 'primary' purpose" might be perceived as practical or moral advice, Pet.App.4a, lawyers will be drawn to using "narrow legal terms" that professional guidance and common sense instruct are often "of little value" to clients. Model Rules of Prof'l Conduct R. 2.1 cmt. 2.

The privilege's ability to serve its purpose of fostering compliance with law depends on clients' following their lawyers' advice. "Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld." Model Rules of Prof'l Conduct R. 1.6 cmt. 2. But that can be the case only when lawyers are able to effectively present that advice so that clients can fully appreciate it. "[F]ull and frank" communication "encourages observance of the law and aids in the administration of justice." *Weintraub*, 471 U.S. at 348.

4. The significant-purpose test does not unduly expand privilege protections. For over 70 years, courts have used modifiers such as "significant" to describe the requisite importance of a legal purpose in the privilege standard. *See, e.g.*, *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792, 794 (D. Del. 1954); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950). These modifiers ensure that the attorney-client privilege does not become a "carbon copy" privilege, where every communication involving a lawyer automatically receives protection.

The party asserting the privilege must have a good-faith basis for claiming that there was a legal purpose for the communication. As the plain meaning of "significant" denotes, the requirement that the legal purpose be "significant" means that it must be legitimate or genuine. *See, e.g.*, *Onishea v. Hopper*, 171 F.3d 1289, 1297 (11th Cir. 1999) ("'significant' means 'deserving to be considered'" (citing Webster's Third International Dictionary 2116 (1986))); Significant, *Oxford English Dictionary* (2d ed. 1989) (defining "Significant" as "sufficiently great or important to be worthy of attention"). That requirement ensures that there is a bona fide legal purpose for the communication, and not a mere effort to shield communications between individuals for other reasons.

What the "significant" modifier does not do, however, is act as a backdoor for courts to engage in the type of balancing inquiry the Ninth Circuit engaged in below or to search for a principal or "predominant" purpose. *See* Restatement (Third) § 72, Reporter's Note to cmt. c, at 554 (comparing the "American decisions [which] 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" with the "English view, differently stating a '*predominant* purpose' test" (emphasis added)). It is an impossible task in practice to parse multiple purposes and determine which are the most significant. *Kellogg*, 756 F.3d at 759.

The Court should reject any invitation to encourage such balancing. In pronouncing a uniform rule for federal cases, and to avoid confusion, the Court should clarify that the "significant" modifier is not authorization to engage in the mischief that a "most significant" balancing inquiry invites. Instead, it should make clear that "significant" means only that the legal purpose is legitimate under the circumstances at issue, and thus not a mere ploy to cloak business or personal communications under privilege protections.

II. The Significant-Purpose Test Reflects the Legal Needs of Modern American Business.

1. Almost 40 years ago, it was already the case that "corporations ha[d] come to rely more upon internal specialists and inside counsel to assess high risks and make related business judgments." Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 Stan. L. Rev. 399, 439 (1985). Corporations' reliance on in-house lawyers has only grown since that time, and that reliance has precipitated increases in the size of internal law departments and the number of roles lawyers play. 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, 450-52 (2016) (Note & Comment); Jennifer M. Pacella, *The Regulation of Lawyers in Compliance*, 95 Wash. L. Rev. 947, 949 (2020) (noting the "evolution of lawyer roles over recent years, continuously shifting from what was once predominately

a law firm or litigation-based practice to 'quasi-legal' settings at the intersection of both business and law"). The ethics rules reflect the centrality of in-house counsel to the provision of legal services to businesses in our country. *See* Model Rules of Prof'l Conduct R. 1.0(c) (including in the definition of "law firm" a corporation's internal legal department).

Today, in-house counsel perform numerous legal functions within businesses. Mixed in with those legal roles are often various roles with legal overlays regarding compliance, risk control, human resources, and government affairs. O'Connor, 25 J.L. & Pol'y at 455-56; Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 Fordham L. Rev. 955, 957-58 (2005); *see also* Pacella, 95 Wash. L. Rev. at 949 (citing surveys showing "the general counsel serves simultaneously as chief compliance officer in forty-eight percent of companies" and "forty-one percent of in-house counsel reported that managing compliance or regulatory issues is the 'greatest priority' for their legal teams over the next year"). Uniting the lawyer's roles, however, are questions of legal judgment and assessment. O'Connor, 25 J.L. & Pol'y at 457. "For example, legal feasibility and risk levels"—quintessential legal issues—also are "critical factors in the calculus of whether or not to proceed with new projects or redesign existing programs," which are sometimes business issues that are tasked to an in-house lawyer. *Id.* Ultimately, many in-house counsel are charged with the "far-reaching duty … to provide legal advice to officers, directors, and other constituents acting on behalf of" the businesses that employ them. *Id.* at 453 (Note & Comment) (citation omitted).

The need for competent, accessible legal counsel follows from the swelling complexity of our legal system.

See Pacella, 95 Wash. L. Rev. at 954; Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. Pa. J. Bus. L. 285, 338 (2017) (noting the "growing array of regulatory mandates and modes of regulatory enforcement"); DeMott, 74 Fordham L. Rev. at 960 (noting the increasing cost of legal services due to "increases in regulation and … complexity of business operations"); Model Rule R. 1.6 cmt. 2 ("Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct."). Already in 1950, a reason for the privilege was that "[i]n a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential." *United Shoe Mach.*, 89 F. Supp. at 358 (quoting Model Code of Evid., R. 210 cmt. (Am. Law Inst. 1942)). In 1981, this Court recognized the particular strains that growing legal complexity put on businesses and their need for thorough legal advice, stating in the *Upjohn* decision that, "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law'…" 449 U.S. at 392 (quoting Bryson P. Burnham, *The Attorney–Client Privilege in the Corporate Arena*, 24 Bus. Law. 901, 913 (1969)).

There have been no signs of abatement over the last forty years. "As of 2018, the Code of Federal Regulations filled 242 volumes and was about 185,000 pages long, almost quadruple the length of the most recent edition of the U. S. Code. And agencies add thousands more pages of regulations every year." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2447 (2019) (Gorsuch, J., concurring in the judgment). Those regulations impose "hundreds of thousands of criminal penalties." Neil Gorsuch, *A*

Republic, If You Can Keep It 242 (2019). And, especially in highly regulated areas such as finance or the capital markets, businesses find themselves subject to multiple regulators at both the state and federal levels. But, even in less regulated arenas, businesses—and especially small businesses—turn to in-house counsel to advise on numerous issues as they develop. *See, e.g.*, *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[ir] business[es]."); Pacella, 95 Wash. L. Rev. at 956-57 ("Lawyers in compliance roles advise entities on conforming behavior to the complex regulatory climate and often make predictions as to how a possible adjudicator would evaluate the entity's compliance function, thereby offering judgment based on their distinct education and expertise.").

2. To ensure compliance with those regulations and laws, in-house counsel depend on receiving candid and comprehensive information from the business lines in their companies. Unlike outside counsel, who often receive inquiries either directly from or in the presence of other lawyers (*e.g.*, internal counsel), lawyers working within corporations receive inquiries from non-lawyers who do not necessarily know what information is relevant to the legal issues in play, or even the kinds of legal issues that a proposed course of conduct raises. Lawyers add tremendous value in spotting and diagnosing legal problems—and doing so in their infancy before a legal issue becomes a regulatory investigation or civil lawsuit.

In their discussions with internal counsel, business managers expect to receive guidance that they can understand and that acknowledges their perspectives and concerns. Academic legal analysis alone is much less

useful and actionable than prescriptive advice about courses of conduct to take and the risks of not doing so. *See* Model Rule R. 2.1 cmt. 2. Providing candid advice encourages regular contact and candid conversations between legal counsel and businesspeople, and encourages businesspeople to seek out legal advice.

Ultimately, in-house counsel (and outside counsel) assist businesses with problems *for their businesses*. Legal and nonlegal purposes can be intertwined. In litigation, "[t]he decision whether and at what price to settle ultimately [i]s a business decision as well as a legal decision." *Boehringer*, 892 F.3d at 1268. In the regulatory space, a company wants to comply with new regulations but wants to do so in a cost-effective way. In a business combination, the companies want a business organization that will appeal to the market as well as be the most advantageous from corporate-governance and tax perspectives.

3. Across those situations and many more, the Ninth Circuit's "single 'primary' purpose" test provides worse outcomes than the significant-purpose test. Pet.App.4a. Under that approach, lawyers receive less, and worse, information upon which to base their advice. And the advice that they provide is less effective and meaningful. In short, the Ninth Circuit's test makes for fewer "full and frank communication[s]" *to lawyers* and *to clients*. *Upjohn*, 449 U.S. at 389. And, as a result, the "single 'primary purpose" test undermines the "public ends" that are "serve[d]" by the "sound legal advice or advocacy" that the privilege fosters. *Id.*

a. Begin with the litigation, regulatory, and transactional examples above.

* A lawyer advising a client on a settlement needs to be able to speak candidly about the trade-offs and benefits of a possible deal term. A businessperson may want to expand the scope of the release the company receives, but that will come at a cost—either in the settlement amount or a compromise on a deal term. The lawyer needs to be able to address those tradeoffs.

* So too must a lawyer be able to advise a client in the regulatory space. If the client is considering a cheaper alternative for regulatory compliance but that alternative carries extra risk, the lawyer should be able to speak freely about the issue without worrying that the privilege may be broken. It is effective legal advice to tell a businessperson: "We are only talking about a few thousand dollars. The risk isn't worth it." A lawyer should be able to give that advice without worrying that a court would one day say that the "primary" purpose of that communication was cost-evaluation and not regulatory risk.

* And a lawyer needs to be able to advise the company that the benefits to calling a deal a "merger of equals" in terms of market reaction or morale does not outweigh the benefits of choosing a particular structure for the transaction over another. In the deal-making context, businesses know well the importance of lawyers being "in the room where it happens." The Room Where It Happens, *on* Hamilton (Atl. Recording Corp. 2015). When the communication in that room involves a significant legal purpose, the communication should be privileged.

b. Consider a company contemplating a press release. Businesses issue press releases for various reasons, from announcing the opening of a new location to the launch of new products to changes in key personnel.

Some of the legal issues involved in issuing a press release may be obvious to non-lawyers. Public-relations personnel likely realize, for example, that they need to confirm the accuracy of factual statements in the company's message. But other legal issues will not be so obvious. Those same personnel might not consider, for example, the securities-law issues associated with whether certain statements could be considered material or statements of fact rather than opinion. *See generally Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186-87 (2015); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38-39 (2011). The business is best served, from a legal perspective, by the public-relations personnel being able to describe the press release and its contents without thinking that they need to circumscribe their communications with in-house counsel to only what they assume (perhaps wrongly) are the legal issues.

c. Similarly, a business line at a corporation may be considering how to improve the sales of a struggling product. Some sales managers have the idea that they should reach out to distributors to sign exclusive distribution agreements. The managers might realize that such engagement raises contract issues and thus present legal counsel with the discrete contract language. But the same conduct could also trigger antitrust concerns, depending on the relationship of the parties. Without knowing the broader business reason underlying the sales personnel's request, the lawyer will be in the dark as to a more foundational legal risk. And the business could be buying itself an antitrust suit.

The single, primary purpose test would also undermine the effectiveness of the lawyer's legal advice in that situation. In many instances, the most useful advice

that a lawyer can give is to offer an alternative business solution, especially because "practical considerations, such as cost or effects on other people, are [often] predominant." Model Rules of Prof'l Conduct R. 2.1 cmt. 2; *see* Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 Ind. L.J. 1401, 1440 (2017) ("The lawyer may go beyond a yes or no answer and suggest creative ways that a client could alter behavior to increase the likelihood that the adjudicator would find the client in compliance."). So, as part of counseling the businesspeople to avoid the sole-distributor agreements, the in-house counsel could remind them of what the company did to shore up demand for another one of its products. That advice, and reminding the businesspeople of the corporate benefits from that campaign, could prove critical to delivering legal advice that the businesspeople would follow. But the single primary-purpose standard encourages the lawyer to avoid giving that advice and to instead address only legal principles.

d. An internal investigation puts these concerns, and others, in stark relief. Effective, reliable legal advice requires a lawyer to ascertain the relevant facts; indeed, it is the necessary "first step" in the exchange. *Upjohn*, 449 U.S. at 390. But uncovering the facts is also relevant to other nonlegal purposes. And courts adhering to the flawed primary-purpose test sometimes require disclosure of otherwise privileged communications with counsel on the ground that the communications also involved nonlegal purposes, such as compliance with a company policy to investigate certain types of allegations. *See, e.g.*, *Buckley LLP v. Series 1 of Oxford Ins. Co.*, 876 S.E.2d 248, 249 (N.C. 2022) (per curiam). Under the significant-purpose standard, however, "if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply."

Kellogg, 756 F.3d at 760. As a result, the communications are privileged "whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy." *Id.*

If the primary-purpose test applies, however, lawyers' are hindered in accessing critical information, especially when the investigation involves sensitive issues. For example, an interviewed employee is likely to be particularly hesitant if the subject matter is "embarrassing or legally damaging." Model Rules R. 1.6 cmt. 2. The Ninth Circuit's test fuels that hesitance by failing to protect confidentiality and raising the risk of future embarrassment to the witness should the communication come to light in later collateral litigation.

e. Along similar lines, suppose that a financial-services firm asks an in-house counsel to inquire how a key business unit is managing client funds following a recent merger. The legal issues to be investigated will necessarily involve business issues. The legal questions are significant. They include whether the funds were managed in accordance with client agreements and account statements, and whether federal and state regulations were satisfied. The business questions are equally important: Do the new business unit's processes align with the company's existing ones? Are clients well-served? And are they happy with the change? It would hardly be unusual for client displeasure with the company's practices to stem from requirements imposed by regulation. Learning how employees address that client unhappiness would then be critical to the in-house counsel's ability to gauge the firm's compliance. But under the primary-purpose test, line employees are discouraged from explaining to counsel the way they

actually go about addressing the business problem of a client's frustrations, in turn defeating the purpose of the attorney-client privilege.

Similar issues would arise if a bank receives an investigatory subpoena for the transaction records for a customer. That can raise a cluster of issues for an in-house lawyer. While ensuring appropriate compliance with the subpoena as well as compliance with customer-privacy rules, the lawyer may need to advise its customer-facing employees about the scope of the request and what they legally can and cannot say to the customer about the subpoena or any attendant investigation. And the lawyer also needs to understand the bank's interactions with the customer to ensure that it did not violate its legal obligations. To be sure, the lawyer's communications with the customer and with the regulator are not privileged. But the lawyer needs to be able to receive complete information from the bank's businesspeople. The in-house counsel also needs to provide effective advice to the customer-facing employees that they can understand and appreciate as they address the business issue of dealing with the bank customer.

f. Sometimes the situation confronting the business is tragic. Consider the issues facing a company if one of its shuttles crashes and employees on-board die. In the immediate aftermath, executives would naturally want to express remorse, both as a matter of public relations and empathy for the victims. Making such a statement, however, could harm the company's legal interests. An apologetic statement could be perceived as an admission of liability. And, even if not, the release itself could encourage litigation by turning the spotlight on the company's involvement or affecting the local jury pool.

Whatever advice the in-house lawyer gives, that advice needs to be given quickly and effectively to meet the human, business, and legal crisis facing the company. The "single 'primary' purpose" standard would all but demand that counsel give wooden, overly legal advice—couched in terms like "proximate cause" and "proportionate fault"—and omit the moral and emotional dimensions of the situation. To say that "technical legal advice … can sometimes be inadequate" in a situation like that is an understatement. Model Rule R. 2.1 cmt. 2. In order for the lawyer to provide legal advice that will be heard and acted upon, the lawyer needs to be able to meet the moment facing the company and speak to management in a way they will understand. *See id.*

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In circumstances tragic and ordinary, involving issues mundane and groundbreaking, lawyers are called upon to advise businesses on problems with legal and nonlegal dimensions. The business receives the most informed and most compelling legal advice when the privilege protects communications made for a significant legal purpose even if a nonlegal purpose was an equal or more significant factor in requesting the advice.

III. The Tax Context Does Not Warrant a Unique Rule.

The analysis is no different when the legal purpose involves tax law. The purposes underlying the attorney-client privilege necessitate a uniform rule. *See Upjohn*, 449 U.S. at 393 ("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."); *supra*, at 6-8. Nothing about the tax context changes that, and the Court should decline any invitation to create a special rule for attorney-client communications

involving tax considerations. In fact, this Court regularly rejects attempts to treat the tax context as *sui generis*.

1. In *Mayo Foundation for Medical Education and Research v. United States*, the petitioner asked the Court to apply "a less deferential standard of review to Treasury Department regulations" than it would "apply to the rules of any other agency." 562 U.S. 44, 55 (2011). The Court instead recognized the importance of uniformity: "[W]e are not inclined to carve out an approach to administrative review good for tax law only." *Id.*; *see* Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 Minn. L. Rev. 221, 222-24 (2014) (chronicling how federal courts have rejected tax exceptionalism).

Similarly, in *South Dakota v. Wayfair, Inc.*, the Court overruled precedent that imposed stricter scrutiny of state action in the tax context, thereby bringing uniformity to Commerce Clause jurisprudence. 138 S. Ct. 2080, 2099 (2018). In doing so, the Court recognized that unique rules may be especially improper when they are "removed from economic reality" and result in "artificial competitive advantages." *Id.* at 2092, 2094. As Justice Scalia said in questioning the majority's reasoning in the case overruled by *Wayfair*: "It is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax." *Quill Corp. v. North Dakota*, 504 U.S. 298, 319 (1992) (Scalia, J., concurring in part and concurring in the judgment). As the Second Circuit observed soon thereafter, "jurisdictional rules in the tax context have not been developed and applied in a unique way. Rather, the standard jurisdictional principles typically operate in the same fashion in tax as in all other fields of law." *United States v. Forma*, 42 F.3d 759, 766 (2d Cir. 1994).

2. The same practice should apply to the principles of attorney-client privilege, which should "apply with full force in the tax context." *Mayo*, 562 U.S. at 55. Those principles are (1) encouraging "full and frank communication," and (2) promoting the "broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389; *see supra*, at 6-8. Neither is subject-matter dependent.

Consider an example. The CEO of a company asks two in-house counsel to evaluate corporate structures for a subsidiary. The first is asked to analyze the tax implications of the dispute. The second is asked to consider the implications for intellectual-property ownership and licensing. In both cases, the lawyer must "know all that relates to the client's reasons for seeking representation." *Trammel*, 445 U.S. at 51. And in both cases, the public has an interest in the CEO receiving advice that will promote compliance with the law and regulations. *See Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 131 & n.12 (2007) ("[S]eeking [tax] advice serves the public's interest in making it more likely than not that the tax law will be followed.").

The significant-purpose test requires that a significant *legal* purpose motivate attorney-client communications for the privilege to apply, *Kellogg*, 756 F.3d at 759-60, and that test can just as readily be satisfied in the tax context. In fact, most of the work lawyers do in the tax context involves "bread and butter" legal tasks. *Schering-Plough Corp. v. United States*, 651 F. Supp. 2d 219, 271 (D.N.J. 2009) (advising clients on how to comply with a statute—subpart F of the Internal Revenue Code—is the "bread and butter of international tax practice"), *aff'd sub nom, Merck & Co. v. United States*, 652 F.3d 475 (3d Cir. 2011). Tax laws are just that—laws. Lawyers interpret and

apply them just like any other statute. Lawyers' communications about how to comply with the Tax Cuts and Jobs Act, for example, should not receive any less protection than lawyers' communications about how to comply with the Sherman Act.

This overlap is especially important in the business community. *Amici* and their members regularly confront issues that are bound up with tax considerations. *See Upjohn*, 449 U.S. at 384 (describing communications made "in order to secure legal advice from counsel … concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas"); *Evergreen Trading*, 80 Fed. Cl. at 125 ("[I]n the area of federal income taxation … business planning, tax return preparation and legal advice tend to coalesce."). From business combinations to employee benefits, tax law and planning permeate questions that internal counsel answer on a daily basis. Gregg D. Polsky & Adam H. Rosenzweig, *The Up-C Revolution*, 71 Tax L. Rev. 415, 419 (2018) ("While there may be some important nontax considerations in how [a] transaction is accomplished, tax considerations often drive the structure."); Michael L. Schler, *Basic Tax Issues in Acquisition Transactions*, 116 Penn St. L. Rev. 879, 888 (2012) ("Most importantly, it is vital for the corporate lawyer to consult a tax lawyer at every stage of an acquisition transaction.").

A rule that segregates legal purposes by subject matter defies the realities businesses face. And it serves only to provide a competitive advantage to the best-funded clients, which can afford to segregate their tax professionals from all others. For all these reasons, the same privilege rule should apply for attorney-client communications in all contexts.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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