No. 21-40190

In the United States Court of Appeals for the Fifth Circuit

IN RE THE BOEING COMPANY,

Petitioner.

From the United States District Court
for the Eastern District of Texas, Sherman Division
Hon. Amos L. Mazzant, District Judge
Case No. 4:19-cv-507

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ASSOCIATION OF CORPORATE COUNSEL SUPPORTING PETITIONER

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CERTIFICATE OF INTERESTED PERSONS

No. 21-40190
In re The Boeing Company,
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The undersigned counsel of record certifies that, in addition to the persons and entities identified in the petitioner's certificate, the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification of recusal.

Amici Curiae:

The Chamber of Commerce of the United States of America.

The Association of Corporate Counsel.

Neither the Chamber of Commerce of the United States of America nor the Association of Corporate Counsel has a parent corporation. No publicly held company has any ownership interest in either entity.

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

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 more than 45,000 members who practice in the legal departments of corporations, associations, and other organizations in the United States and abroad. For over 35 years, ACC has sought to aid courts, legislatures, regulators, and other law- or policy-making bodies in understanding the role and concerns of in-house counsel. A frequent topic of ACC's advocacy is the attorney-client privilege in the corporate context.

Amici have a vital interest in preserving the corporate attorney-client privilege and encouraging companies to cooperate with law enforcement.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the amici, their members, and their counsel made a monetary contribution to fund the preparation or submission of this brief.

Amici's members devote substantial time and resources to complying with the wide range of corporate legal and regulatory obligations. Their aim is to cooperate with the government when appropriate, while also preserving the confidentiality necessary to the effective functioning of the attorney-client relationship. For these reasons, amici support rules that promote information-sharing, reward the development of in-house compliance programs, and allow the government and regulated parties to work together to meet common ends. The District Court's misapplication of the crime-fraud exception to attorney-client privilege undermines these goals.

SUMMARY OF THE ARGUMENT

The attorney-client privilege "promote[s] broader public interests in the observance of law and administration of justice" by "encourag[ing] full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As the Supreme Court cautioned, "narrow[ing]" the privilege's scope in the business context "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Id.* at 392. Undue narrowing of the privilege is a serious risk in civil litigation such as this, because the modern "proliferation of administrative crimes" has "presented plaintiffs' attorneys with an extraordinary opportunity, in purely civil actions, to compel the discovery of the confidential communications of defendants' counsel, on the grounds that such communications were in furtherance of some crime." David J.

Fried, *Too High A Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. Rev. 443, 475 (1986).

If allowed to stand, the District Court's misapplication of the crime-fraud exception to attorney-client privilege will discourage companies from entering into deferred-prosecution agreements (DPAs)—and their out-of-court analogues, non-prosecution agreements (NPAs). This will also chill corporate internal investigations and fulsome public disclosures of misconduct. These voluntary agreements are important tools for businesses and law enforcement to resolve criminal investigations cooperatively, strengthen corporate compliance and governance, and avoid the uncertainty and cost of lengthy litigation. DPAs and NPAs benefit the government, the public, and companies alike. Their mutual benefits disappear, however, if entering into them compromises privilege protections for any attorney-client communications related to admitted misconduct. The Department of Justice recognized as much in the face of objections by "a wide range of commentators and members of the American legal community" that federal prosecutors had been coercing businesses to waive their privilege. U.S. Dep't of Justice Manual § 9-28.710 (2008) (JM). It clarified that "waiving the attorney-client and work product protections has never been a prerequisite. . . for a corporation to be viewed as cooperative." *Id.*

The District Court's unlawful discovery order threatens to undo that policy. It effectively requires waiving the attorney-client privilege as a condition of entering into DPAs and NPAs, undermining their significant

benefits. This Court should grant the petition for writ of mandamus to correct the lower court's misapplication of the crime-fraud exception.

ARGUMENT

I. Deferred-prosecution and non-prosecution agreements (DPAs and NPAs) benefit the government, the public, and companies.

"In certain situations, rather than choose between the opposing poles of pursuing a criminal conviction or forgoing any criminal charges altogether, the Executive may conclude that the public interest warrants the intermediate option of a deferred-prosecution agreement (DPA)" or a non-prosecution agreement (NPA). *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 737 (D.C. Cir. 2016). These agreements ensure that defendants do not "evade accountability" when "a criminal conviction may be difficult to obtain or may result in unwanted collateral consequences for a defendant or third parties." *Id.* at 738. They accordingly "occupy an important middle ground." JM § 9-28.200 (2020). The added prosecutorial flexibility "is better for companies, better for the government, and better for the American people." Lanny A. Breuer, Assistant Attorney General, Address at the New York City Bar Association, New York, NY, Sept. 13, 2012, http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html (last visited on April 2, 2020) (Breuer Speech).

DPAs and NPAs are contracts between the government and a criminal defendant. *United States v. Hicks*, 693 F.2d 32, 33 (5th Cir. 1982). Their primary difference is procedural. "Under a DPA, the government formally initiates

prosecution but agrees to dismiss all charges if the defendant abides by negotiated conditions over a prescribed period of time." *Fokker Servs.*, 818 F.3d at 737. By contrast, under an NPA, "formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court." *Id.* at 738 (internal quotation marks omitted).

Under both types of agreements, a defendant typically cooperates with the government's investigation, admits some wrongdoing, and accepts financial sanctions like fines or restitution. Corporate defendants also usually accept other "conditions designed . . . to promote compliance with applicable law and to prevent recidivism." JM § 9-28.1100 (2020). Such conditions include strengthened compliance programs, restructured governance, and additional reporting duties for the duration of the agreement. If the defendant complies with these conditions for the agreed period, the government in exchange will close its criminal investigation without prosecuting. But "if the defendant fails to abide by the terms of the agreement, the government can prosecute based on the admitted facts." *Fokker Servs.*, 818 F.3d at 738.

"While prosecutors at one time seldom relied on NPAs and DPAs, their use has grown significantly in recent years." *Id.* These agreements date back at least to the early 1990s. *See* Wulf A. Kaal & Timothy A. Lacine, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, 70 Bus. Law. 61, 72–73 (2015). Since then, "their use in the corporate context has increased exponentially." *Id.* at 71. Over the last 20

years, federal authorities have executed approximately 580 DPAs and NPAs. *See* Gibson, Dunn & Crutcher, *2020 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements* 28-29 n.1 (Jan. 19, 2021) (2020 Year-End Update), *available at* https://perma.cc/F6DL-TH47. During the early 2000s, such agreements numbered only 2 or 3 per year. *Id.* at 2. In 2015, they peaked at 102. *Id.* Of the 38 agreements that DOJ entered into during 2020, "9 are NPAs and 29 are DPAs." *Id.* at 1. DPAs and NPAs have grown in popularity because their mutual benefits encourage cooperation between corporate defendants and the government. Compared to the all-or-nothing alternatives, these agreements often present a superior law-enforcement tool for the government, the public, and companies.

A. DPAs and NPAs improve compliance and hold corporations accountable without the risks of a costly trial.

The government (and thus, the public) benefits from corporate DPAs and NPAs in a few different ways. For starters, through these agreements, the government can exert its negotiating power to strengthen corporate compliance programs and governance, giving regulators a more active role in preventing future criminal violations. According to one study, over 97% of the 264 DPAs and NPAs entered into from 1993-2013 contained relevant corporate-governance changes. *See* Kaal & Lacine, 70 Bus. Law. at 69. The authors accordingly conclude that such agreements "can play a significant role in improving corporate governance." *Id.*

As then-chief of the DOJ Criminal Division Larry Breuer explained in 2012, DPAs "have had a truly transformative effect on particular companies, and more generally, on corporate culture across the globe." Breuer Speech, *supra*. Since these agreements became "a mainstay of white collar criminal law enforcement," Breuer observed, "[t]he result has been, unequivocally, far greater accountability for corporate wrongdoing—and a sea change in corporate compliance efforts." *Id.*

DPAs and NPAs also give prosecutors "much greater ability to hold companies accountable for misconduct," without the risk of losing after a costly trial. *Id.* Avoiding trial frees up scarce prosecutorial resources for additional enforcement. As a result, "companies know that they are now much more likely to face punishment than they were when [DOJ's] choice was limited to indicting or walking away." *Id.* The now-dominant practice "of settling most cases against publicly-held and other large corporations" through these agreements, "in lieu of indictment and conviction, has enabled enforcement authorities to leverage corporate compliance programs and internal investigations to detect and obtain actionable evidence of misconduct, thereby allowing simultaneous pursuit of numerous complex enforcement actions." Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. Cal. L. Rev. 697, 700 (2020). Corporations have a comparative advantage over prosecutors because they "are able to detect and investigate individual misconduct at far less public cost . . . . Firms can deploy compliance

programs to deter and detect misconduct, pursue internal investigations to develop proof of misconduct, report detected wrongdoing to the government, and assist the government in gathering probative evidence of crime." *Id.* at 706.

What's more, DPAs and NPAs "are such a powerful tool" because, "in many ways," they "ha[ve] the same punitive, deterrent, and rehabilitative effect as a guilty plea." Breuer Speech, *supra*. When a corporate defendant enters into such an agreement, it "almost always" must publicly and in detail admit wrongdoing, agree to cooperate with the government's investigation, agree to improve its compliance program, and agree to face prosecution if it violates the agreement's terms. *Id.* And because the defendant also typically pays a fine or other financial penalty, DPAs and NPAs help achieve "prompt restitution and other compensation for victims." JM § 9-28.1100. Indeed, "2020 proved to be a record-breaking year in terms of the sums recovered through corporate resolutions." 2020 Year-End Update at 1. "At nearly $9.4 billion, recoveries associated with NPAs and DPAs in 2020 are the highest for any year since 2000"—"nearly twice the average yearly recoveries from 2005 through 2020." *Id.* at 2.

B. DPAs and NPAs avoid the risks of a criminal conviction and the potentially devastating collateral consequences for innocent third parties.

DPAs and NPAs mitigate risk for companies too. Not only do these agreements allow corporate defendants to avoid the risk of criminal

conviction after trial, they also remove the uncertainty regarding what discretionary penalty the government or a judge might impose upon conviction. DPAs and NPAs permit companies to efficiently resolve government investigations "[r]ather than endure a lengthy, expensive trial and potentially suffer harm to their business and goodwill." Joel Androphy & Ashley Gargour, *The Intersection of the Dodd-Frank Act and the Foreign Corrupt Practices Act: What All Practitioners, Whistleblowers, Defendants, and Corporations Need to Know*, 45-SPG Tex. J. Bus. L. 129, 137 (2013).

Such agreements accordingly avoid potentially "great collateral consequences on the entire entity and also blameless employees, shareholders, consumers, and creditors." Brandon L. Garrett, *Structural Reform Prosecution*, 93 Va. L. Rev. 853, 879 (2007). "Those collateral consequences include severe regulatory prohibitions such as debarment or revocation of licensing. Even for firms without extensive reliance on government contracts or licensing, the reputational effects of an indictment, much less a conviction, may be severe." *Id.* at 879-80; *see also* JM § 9-28.1100 (noting that "a conviction may produce a result that seriously harms innocent third parties").

This advantage of DPAs and NPAs became especially clear after the failed federal prosecution of accounting firm Arthur Andersen for destroying documents concerning Enron. The Supreme Court ultimately reversed Arthur Andersen's conviction. *See Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). But by then the company had already gone out of

business—costing approximately 28,000 American jobs. *See* Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 Am. Crim. L. Rev. 107, 107-08 (2006). "[T]he public benefits generated by prosecuting Andersen criminally were minimal or, if they existed at all, were exceedingly subtle." *Id.* at 109. DPAs and NPAs avoid the potentially devastating collateral damage of criminal prosecution.

II. Unduly expansive misapplications of the crime-fraud privilege exception discourage companies from entering into DPAs and NPAs.

"[I]ncreased reliance on the crime-fraud exception . . . challenges the fundamental trust that is the essence of the attorney-client relationship." H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 Ky. L.J. 1191, 1263 (1999). Courts should therefore be "hesitant and deliberate" in invoking the exception "lest the privilege be swallowed." *Id.* at 1199. Where a corporation is the client, the crime-fraud exception applies only to communications made with a specific *corporate* intent to further misconduct. The District Court failed to heed this crucial limitation, allowing two employees' misdeeds to destroy Boeing's attorney-client privilege. By threatening discovery of any privileged communications related to admitted misconduct, the court's unduly expansive misapplication of the crime-fraud exception will discourage companies from entering into DPAs and NPAs. That reluctance will undermine law enforcement and ultimately harm the public.

A. The crime-fraud exception is narrow, applying only to communications purposely made to further misconduct.

The crime-fraud exception to attorney-client privilege "is narrow and comes into play only when the attorney-client relation is abused such that the benefits of client candor with a legal advisor are outweighed." Brown, 87 Ky. L.J. at 1243; *see also United States v. Jacobs*, 117 F.3d 82, 88 (2d Cir. 1997) ("the crime-fraud exception has a narrow and precise application"), *abrogated on other grounds by Loughrin v. United States*, 573 U.S. 351 (2014). The exception's "proper reach . . . is limited to those communications and documents *in furtherance of* the contemplated or ongoing criminal or fraudulent conduct." *In re Grand Jury Subpoena*, 419 F.3d 329, 343 (5th Cir. 2005) (emphasis added).

As then-Judge Ruth Bader Ginsburg explained for the D.C. Circuit, "[i]t does not suffice that the communications may be related to a crime. To subject the attorney-client communications to disclosure, they must actually have been made with an intent to further an unlawful act." *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989); *accord In re Grand Jury Subpoena*, 745 F.3d 681, 692–93 (3d Cir. 2014). "The proponent must show that the client's very purpose in communicating was to obtain advice or information in order to facilitate the misconduct." Edward J. Imwinkelried, The New Wigmore: Evidentiary Privileges § 6.13.2(d)(1) (3d ed. 2016) (New Wigmore); *see In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982). Without this showing, good-faith client communications that the attorney-

client privilege is designed to encourage could be improperly excluded from protection.

A court may not simply "assume[], without any further showing . . . that all contemporaneous attorney-client communications could be construed as in furtherance of the alleged fraud." *In re Grand Jury Subpoena*, 419 F.3d at 345 (internal quotation marks omitted). "Companies operating in today's complex legal and regulatory environments routinely seek legal advice about how to handle all sorts of matters." *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997). "There is nothing necessarily suspicious about the officers of [a] corporation getting such advice. . . . Showing temporal proximity between the communication and a crime is not enough." *Id.*; *see also In re Grand Jury Proc. in Matter of Fine*, 641 F.2d 199, 203–04 (5th Cir. 1981). "Standing alone, the fact that the client later perpetrated the crime or fraud—even soon after the communication—is insufficient to demonstrate that the necessary intent existed at the time of the communication." New Wigmore § 6.13.2(d)(1).

B. The crime-fraud exception turns on corporate management's intent, not the intent of a single employee.

It is "well established . . . that the attorney-client privilege attaches to corporations as well as to individuals." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). The privilege is especially important for corporations because, "unlike most individuals," corporations "constantly go to lawyers to find out how to obey the law" given "the vast

and complicated array of regulatory legislation" that they face. *Upjohn*, 449 U.S. at 392 (internal quotation marks omitted).

Where a company is the client, the crime-fraud exception does not apply without a "showing that the *[c]ompany*"—not particular employees or officers—"intended to further and did commit a crime." *In re Sealed Case*, 107 F.3d at 50 (emphasis added). For purposes of that showing, a company's intent arises from the motives of its *management*, not from the employee making the communication with counsel. *See Weintraub*, 471 U.S. at 348; *Upjohn*, 449 U.S. at 394-95. To be sure, a corporation may be criminally responsible for the acts of its employees through the doctrine of respondeat superior liability. *See New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493–94 (1909). But the crime-fraud exception requires more. Respondeat superior liability does not necessarily imply that a corporation's management *or other employees for that matter* intended any particular attorney-client communications to further an employee's criminal acts.

As a result, an employee merely acting on his or her own does not trigger the crime-fraud exception. The D.C. Circuit accordingly rejected the exception because a corporate employee could have been "on a frolic of his own" and his discussions with the company's general counsel did not alone suggest that the company intended to further the employee's crimes. *See In re Sealed Case*, 107 F.3d at 50-51. Where many employees may be involved in responding to alleged corporate misconduct, it is crucial that the misdeeds

of a single employee do not thwart the corporation's ability to obtain confidential, candid advice from its counsel.

But that is exactly what the District Court allowed here. Petitioner entered into a DPA admitting that two of its former employees had engaged in a conspiracy to defraud the Federal Aviation Administration, while acknowledging that the misconduct "was neither pervasive across the organization, nor undertaken by a large number of employees, nor facilitated by senior management." MR287 ¶ 4(h). It would be seriously unfair and unlawful, based on such isolated conduct, to strip petitioner of its attorney-client privilege for any document concerning communications with the FAA about the relevant flight-control system simply because the documents were produced around, or even after, the time of the two employees' misconduct. Yet the District Court invoked the crime-fraud exception for all such documents—even privileged communications that the employees merely passively received—without analyzing the relevant client intent. The court completely failed to consider whether, at the time the communications were made, *petitioner* itself—not any of its employees—intended particular communications to further the misconduct described in the DPA. That failure is a clear and indisputable legal error.

C. The District Court's lax approach to the crime-fraud exception will chill internal investigations and discourage companies from entering into DPAs and NPAs.

Corporations rely on the attorney-client privilege to ensure that they, and their counsel, may engage in candid and full discussions during internal investigations. Government regulators and prosecutors in turn depend on voluntary disclosure of these investigations' findings to ensure cooperation and compliance from corporations. If allowed to stand, the District Court's discovery order will significantly weaken the attorney-client privilege. As then-Judge Kavanaugh recognized for the D.C. Circuit, "prudent counsel monitor court decisions closely and adapt" their privilege and investigation "practices in response." *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 762-63 (D.C. Cir. 2014) (*KBR*). If publicly admitting misconduct triggers the crime-fraud exception for any "reasonably related" attorney-client communications, companies will limit the scope of their internal investigations and disclosures. They may even completely refuse to admit wrongdoing. This will undermine the government's strong interest in encouraging and rewarding voluntary compliance and self-reporting, ultimately harming the public.

The District Court's unduly expansive misapplication of the crime-fraud exception will likewise discourage companies from entering into DPAs and NPAs. In deciding whether to resolve government investigations via these negotiated contracts, companies carefully consider whether and how their

included admissions might be used against them in subsequent civil or criminal proceedings. Applying the crime-fraud exception to any "reasonably related communications" will deprive signatories of these agreements' bargained-for benefits. Faced with potential loss of the privilege, many companies may decline to enter into DPAs and NPAs altogether.

With companies less willing to enter into these agreements, law enforcement and the general public will lose their unique advantages. *See supra* Part I. Less corporate cooperation means more resource-intensive investigations, reducing enforcement and accountability. The District Court's privilege holding will have far-reaching consequences.

Because the District Court's discovery order "has generated substantial uncertainty about the scope of the attorney-client privilege in the business setting," a writ of mandamus is urgently warranted. *See KBR*, 756 F.3d at 756.

CONCLUSION

The Court should grant the petition for writ of mandamus.

Dated: April 2, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 2, 2021, this brief was transmitted to the Clerk of the Court via CM/ECF and served on all registered counsel. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses. No paper copies were filed in accordance with the COVID-19 changes ordered in General Docket No. 2020-3.

/s/ Scott A. Keller
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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,618 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

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