2022 WL 1355596 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

In re GRAND JURY.

No. 21-1397.
April 5, 2022.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

Evan J. Davis, Hochman Salkin Toscher Perez P.C., 9150 Wilshire Blvd., Suite 300, Beverly Hills, CA 90212, (310) 281-3200, Davis@taxlitigator.com.

Donald B. Verrilli, Jr., Counsel of Record, Rachel G. Miller-Ziegler, Munger, Tolles & Olson LLP, 601 Massachusetts Ave. NW, Suite 500E, Washington, DC 20001-5369, (202) 220-1100, Donald.Verrilli@mto.com.

Daniel B. Levin, Munger, Tolles & Olson LLP, 350 S. Grand Avenue, 50th Floor, Los Angeles, CA 90071-3426, (213) 683-9135, Daniel.Levin@mto.com, Counsel for Petitioner.

***i QUESTION PRESENTED**

Whether a communication involving both legal and non-legal advice is protected by attorney-client privilege where obtaining or providing legal advice was one of the significant purposes behind the communication.

***ii PARTIES TO THE PROCEEDINGS**

Petitioner [Text redacted in copy] was the recipient of a grand jury subpoena in the district court and appellant in the court of appeals.

Respondent [Text redacted in copy] was the recipient of a grand jury subpoena in the district court and appellant in the court of appeals. Petitioner has concurrently filed a statement under Rule 12.6 notifying the Clerk of this Court of Petitioner's belief that [Text redacted in copy] does not have an interest in the outcome of the petition.

Respondent United States sought to compel compliance with the grand jury subpoenas in the district court and was appellee in the court of appeals.

***III RULE 29.6 DISCLOSURE STATEMENT**

[Text redacted in copy] has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

***IV RELATED PROCEEDINGS**

The proceedings directly related to this petition are:
• *In re Grand Jury,* Nos. 21-55085, 21-55145 (9th Cir. Jan. 27, 2022)

• *In re Grand Jury,* No. 18-CM-01758-UA (C.D. Cal. Feb. 10, 2021)

• *In re Grand Jury,* No. 20-CM-00046-UA (C.D. Cal. Jan. 27, 2021)

***v TABLE OF CONTENTS**

***vii TABLE OF AUTHORITIES**

FEDERAL CASES

***1** Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's amended opinion regarding dual-purpose communications and its order denying the petition for rehearing are published at 23 F.4th 1088. Pet. App. la. The Ninth Circuit's memorandum opinion regarding other privilege issues is sealed and unpublished. Pet. App. 13a. The contempt order of the district court is sealed and unpublished. Pet. App. 20a. The redacted in chambers order of the district court granting in part the government's motion to compel is sealed and unpublished. Pet. App. 23a. [1]

JURISDICTION

On September 13, 2021, the Ninth Circuit entered its judgment. On January 27, 2022, the Ninth Circuit denied a petition for rehearing and issued an amended panel opinion. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULE OF EVIDENCE INVOLVED

Federal Rule of Evidence 501 provides:

***2** The common law-as interpreted by United States courts in the light of reason and experience-governs a claim of privilege unless any of the following provides otherwise:

• the United States Constitution;

• a federal statute; or

• rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

INTRODUCTION

Clients routinely seek advice from lawyers with multiple goals in mind. As a result, lawyers often give advice that is both legal and non-legal in nature. The attorney-client privilege protects from disclosure confidential communications between attorneys and their clients made for the purpose of obtaining or providing legal advice. But the circuits are split as to when a communication made for multiple purposes-some legal and others not-is privileged.

Three circuits have announced different and incompatible tests for these so-called "dual-purpose" communications. In the D.C. Circuit, such a communication is privileged whenever it has a significant legal purpose. The Ninth Circuit in this case held that courts must weigh all of the purposes for a communication and that a communication is privileged only where a legal purpose is *at least as* significant as any non-legal purpose. And, in the Seventh Circuit, dualpurpose communications are *never* privileged no matter how significant the legal purpose, at least in cases, like the present one, involving tax returns. The Court should grant the petition to resolve this clear and significant conflict among the circuits, to allow lawyers ***3** and their clients throughout the country to predict with a high degree of certainty whether their communications are privileged.

This Court's review is also needed to correct the Ninth Circuit's misguided view and bring muchneeded clarity to privilege law. The Ninth Circuit announced a view of privilege that requires courts to identify the legal and non-legal reasons for making a communication, and then weigh the relative importance of those reasons to determine the most significant purpose of the communication. That *ex post* balancing of subjective considerations is precisely the sort of approach this Court has refused to adopt for privilege determinations in the past. It is near (if not actually) impossible to apply in practice-precisely the reason the D.C. Circuit, in an opinion authored by then-Judge Kavanaugh, staked out a different test. And it breeds significant uncertainty in an area of law where this Court has recognized the need for certainty is paramount.

Clients and lawyers regularly engage in dual-purpose communications, and clients and lawyers need clear and predictable rules on when such communications will be deemed privileged. Yet, while lawyers frequently must assess privilege issues, this Court has few chances to clarify privilege law because of the limits on appellate review of privilege decisions. This case presents an excellent-and rare-vehicle to address this important question of federal law. The Court should grant the petition.

STATEMENT

1. a. Petitioner is a law firm that specializes in international tax issues, including the practice of advising clients on the tax consequences of expatriation. Ninth Circuit Excerpts of Record, vol. 2, p. 234 (2-ER-234). ***4** Upon expatriation, most individuals are subject to an "exit tax." 26 U.S.C. 877A. Expatriation gives rise to complex legal questions, including how transactions and investments should be characterized for tax reporting purposes and what assets must be reported to the Internal Revenue Service (IRS).

Petitioner provided legal advice to one of its clients (the Client) regarding the tax consequences of their anticipated expatriation, and prepared several of the Client's individual income tax returns and their Form 8854, to certify their compliance with expatriation tax requirements, for the year of their expatriation. Pet. App. 24a-28a.

Petitioner and two of its employees were served with grand jury subpoenas seeking documents related to a criminal investigation of the Client. Pet. App. 23a, 31a. The subpoenas sought communications and other materials related to the Client's expatriation and tax return preparation. See Motion to Compel, Exhibit 3. In response to the subpoenas, Petitioner produced over 1,700 records, exceeding 20,000 pages, but withheld others on the basis of attorney-client privilege and work-product doctrine. 2-ER-175.

b. The attorney-client privilege protects from disclosure confidential communications between attorney and client made to obtain or provide legal advice. See *Fisher v. United States,* 425 U.S. 391, 403 (1976); Restatement (Third) of the Law Governing Lawyers § 68 (2000) (Restatement). In the tax context, courts generally distinguish between two types of work performed by an attorney. First, advice regarding tax planning and controversy is treated as legal, and communications for that purpose are privileged. See, *e.g., United States v. Abrahams,* 905 F.2d 1276, 1284 (9th Cir. 1990) ("[C]ommunications made to acquire legal ***5** advice about what to claim on tax returns may be privileged."), *overruled on other grounds by United States v. Jose,* 131 F.3d 1325 (9th Cir. 1997); *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983,* 731 F.2d 1032, 1037 (2d Cir. 1984) ("Tax advice rendered by an attorney is legal advice within the ambit of the privilege."); *United States v. Cote,* 456 F.2d 142, 144 (8th Cir. 1972) (holding that communications designed to address "whether the taxpayers should file an

amended return undoubtedly involved legal considerations which mathematical calculations alone would not provide" and were therefore privileged). Second, preparation of a tax return is deemed a non-legal function, and communications for that purpose are accordingly not privileged. See, *e.g., Abrahams,* 905 F.2d at 1284 ("communications made solely for tax return preparation are not privileged"); *Cote,* 456 F.2d at 144 (explaining that communications "simply ** * mak[ing] the correct mechanical calculations" would not be privileged).

Some of the communications Petitioner withheld on the basis of attorney-client privilege were made both to allow Petitioner to provide the Client with legal advice about taxes and to facilitate Petitioner's preparation of the Client's tax returns. For example, the documents included communications related to unsettled statutory requirements regarding whether certain assets are subject to Treasury Department foreign reporting requirements, to strategies for filing amended income tax returns including for purposes of expatriation, and to the drafting of a submission to the IRS advocating for the abatement of a penalty assessment. See pp. 15-17, *infra.* Petitioner withheld these dual-purpose communications on the ground that, while relating to the Client's tax returns, they were ***6** sufficiently motivated by the additional purpose of obtaining or providing legal advice regarding Petitioner's taxes that they were protected under attorney-client privilege.

The government filed a motion to compel, requesting the district court order Petitioner to produce the withheld records. Pet. App. 31a.

c. The district court held that it would apply "the primary purpose test" to analyze the dual-purpose communications. Pet. App. 42a. The court acknowledged that the D.C. Circuit had adopted an approach to this test under which "a communication can have more than one primary purpose" and where "a record is privileged" if "solicitation of legal advice was one of the material purposes of the communication." Pet. App. 42a (citing *In re Kellogg Brown & Root, Inc.,* 756 F.3d 754, 760 (D.C. Cir. 2014)). Rejecting that approach, the district court adopted a formulation of the test under which "the relevant consideration is whether the primary or predominate purpose of the communication was to seek legal advice, or to provide corresponding legal advice." Pet. App. 43a.

Applying that articulation of the test, the district court held certain documents were privileged as they were made "for the primary purpose" of receiving or providing legal advice. Pet. App. 46a; see Pet. App. 48a-53a. But, the district court concluded, "[t]he outcome is different as to communications where the primary or predominate purpose was about the procedural aspects of the preparation of [the Client's] tax return[s]."[2] Pet. App. 54a. The district court did not ***7** address-as it acknowledged the D.C. Circuit would require-whether the "solicitation of legal advice" was *also* "one of the material purposes of the communication[s]." Pet. App. 42a (citing *Kellogg,* 756 F.3d at 760).

With the concurrence of the parties, the district court subsequently issued an order holding Petitioner in contempt for its non-compliance with the court's order to produce documents. Pet. App. 20a. The court stayed its contempt sanction to allow Petitioner to appeal. Pet. App. 21a.

2. Petitioner appealed, and the Ninth Circuit affirmed.[3] In its published opinion, the Ninth Circuit held "that the primary-purpose test applies to attorney-client privilege claims for dual-purpose communications." Pet. App. 6a. The Ninth Circuit first declined to utilize the test for dual-purpose attorney work-product protection and apply it to dual-purpose communications in the attorney-client privilege context. Pet. App. 6a-10a. The Ninth Circuit then addressed what form of the primary-purpose test to ***8** adopt. Pet. App. 6a-12a. Like the district court, the Ninth Circuit recognized that the D.C. Circuit had applied a test that assesses whether obtaining or providing legal advice was "one of the significant purposes of the communication," rather than *the* primary purpose of the communication. Pet. App. 10a (quoting *Kellogg,* 756 F.3d at 760).

Noting that no other circuit had adopted the D.C. Circuit's approach, the Ninth Circuit declined to do so as well. Pet. App. 11a. The Ninth Circuit first observed that *Kellogg,* the D.C. Circuit's opinion, "dealt with the very specific context of corporate internal investigations." Pet. App. 11a. The Ninth Circuit took that to mean that "its reasoning does not apply with equal force in the tax context." Pet. App. 11a

The Ninth Circuit then concluded that "the facts here [do not] require us to reach the *Kellogg* question." Pet. App. 11a. It reached this conclusion because it viewed *Kellogg* as treating communications as privileged "in truly close cases, like where the legal purpose is just as significant as a non-legal purpose." Pet. App. 12a. Here, it explained, the district court had concluded that *"the* predominate purpose of the disputed communications was not to obtain legal advice," which meant they "do not fall within the narrow universe where the *Kellogg* test would change the outcome of the privilege analysis." Pet. App. 12a. Because it read *Kellogg* narrowly to apply only to documents for which the legal and non-legal purposes were in equipoise, the Ninth Circuit did not address whether the legal purpose for the disputed communications was still "one of the significant purposes of the communication." Pet. App. 10a (quoting *Kellogg,* 756 F.3d at 760).

3. In response to a timely petition for rehearing, the Ninth Circuit amended its opinion to narrow the ***9** scope of tax-related advice it had indicated would not be privileged, Pet. App. la-2a, 11a, but it otherwise denied the petition.

REASONS FOR GRANTING THE PETITION

A. The Circuits Are Split Regarding The Question Presented.

There is now a three-way split among the circuits as to how to assess dual-purpose communications.

Although the Ninth Circuit purported to avoid deciding whether the D.C. Circuit's test for attorney-client privilege is correct, the law of the two circuits is irreconcilable. The D.C. Circuit directs courts to look to the legal purpose behind a communication and evaluate whether it is significant. It does not matter whether there is also a significant-or more significant-non-legal purpose. The Ninth Circuit, on the other hand, directs courts to compare the legal purpose to the non-legal purpose (or purposes) of a communication and assess which is more significant. If the legal purpose is more significant, then the communication is privileged; if the non-legal purpose is more significant, then it is not.

The Ninth Circuit purportedly declined to decide whether to adopt the D.C. Circuit approach, but the only question it left open was how to evaluate a communication with equally significant legal and non-legal purposes. But the D.C. Circuit does not apply a balancing test; in that circuit, courts look only at whether the legal purpose for a dual-purpose communication was significant. In short, the Ninth Circuit could avoid "reach[ing] the *Kellogg* question" only by misconstruing the D.C. Circuit's test. Pet. App. 11a.

The Seventh Circuit has taken yet another approach, at least in the context of tax law, concluding ***10** that "a dual-purpose document-a document prepared for use in preparing tax returns and for use in litigation-is not privileged." *United States v. Frederick,* 182 F.3d 496, 501 (7th Cir. 1999). Thus, in the Seventh Circuit, even where the legal purpose of a dualpurpose communication is more significant than any other purpose, the communication is unprivileged-a result that splits with both the Ninth and D.C. Circuits and that would eviscerate the privilege in a wide range of cases.

This Court's review is necessary to bring uniformity to the rule for assessing attorney-client privilege for dual-purpose communications. [4]

1. a. The D.C. Circuit treats communications as protected by the attorney-client privilege so long as a significant purpose of the communication was obtaining or providing legal advice-regardless of the relative significance of any other purpose of the communication. The court of appeals articulated that approach in a decision authored by then-Judge Kavanaugh in *In re Kellogg Brown & Root, Inc.,* 756 F.3d 754 (D.C. Cir. 2014). That case arose out of a False Claims Act (FCA) suit filed against defense contractor Kellogg Brown & Root, Inc. (KBR). *Id.* at 756. KBR had previously conducted an internal investigation into the same allegations alleged in the FCA suit, and the relator sought documents from that investigation during discovery. ***11** *Ibid.* The district court rejected KBR's assertion of attorney-client privilege over those documents, reasoning that '"the primary purpose'

of [KBR's] internal investigation 'was to comply with federal defense contractor regulations, not to secure legal advice.'" *Id.* at 759 (quoting *United States ex rel. Barko v. Halliburton Co.,* 4 F. Supp. 3d 162, 166 (D.D.C. 2014)).

The D.C. Circuit granted a petition for a writ of mandamus, explaining that the district court "employed the wrong legal test." *Id.* at 759. The court of appeals reasoned that "trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task." *Ibid.* Because doing so "is often not useful or even feasible," the D.C. Circuit held that courts should not "try to find *the* one primary purpose in cases where a given communication plainly has multiple purposes." *Id.* at 759-760. Instead, the D.C. Circuit offered a "clearer, more precise, and more predictable" test: "Was obtaining or providing legal advice *a* primary purpose of the communication, meaning one of the significant purposes of the communication?" *Id.* at 760. Because there was "no serious dispute that one of the significant purposes of the KBR internal investigation was to obtain or provide legal advice," the D.C. Circuit held the district court had clearly erred in denying KBR's privilege claim. *Ibid.*

The D.C. Circuit applied the *Kellogg* approach four years later in *Federal Trade Commission v. Boehringer Ingelheim Pharmaceuticals, Inc.,* 892 F.3d 1264 (D.C. Cir. 2018). There, a drug manufacturer that had received a Federal Trade Commission subpoena asserted privilege over certain documents relating to a settlement between the drug manufacturer ***12** and another company. See *id.* at 1266-1267. In an opinion also authored by then-Judge Kavanaugh, the D.C. Circuit explained that the communications in question "had a legal purpose: to help the company ensure compliance with the antitrust laws and negotiate a lawful settlement." *Id.* at 1267. They "also had a business purpose: to help the company negotiate a settlement on favorable financial terms." *Ibid.*

The D.C. Circuit did not try to weigh or disentangle these two purposes to determine which was "the primary purpose." Once it concluded that "one of the significant purposes of the communications" was "settlement and antitrust advice," it followed that the documents were protected by the attorney-client privilege. *Id.* at 1268.

b. While other circuits have not yet embraced the D.C. Circuit's approach, a number of district courts, recognizing the persuasiveness of *Kellogg's* reasoning and its consistency with this Court's precedent, have adopted it. For example, *In re General Motors LLC Ignition Switch Litigation,* 80 F. Supp. 3d 521 (S.D.N.Y. 2015), explained that the D.C. Circuit's reasoning was both consistent with the Second Circuit's decisions and "consistent with-if not compelled bythe Supreme Court's logic in *[Upjohn Co. v. United States,* 449 U.S. 383 (1981)]." 80 F. Supp. 3d at 530. The documents at issue there-notes and memoranda from witness interviews conducted during General Motors' internal investigation into an ignition switch defect-"plain[ly]" had non-legal purposes: "identify[ing] and correct[ing] the problems that resulted in the delayed recalls and * * * address[ing] a public relations fiasco by reassuring investors and the public that [General Motors] takes safety seriously." *Id.* at 529-530. But the documents also had a legal purpose ***13** because the law firm conducting the investigation was retained to provide legal advice and the interviews had been used in connection with that representation. See *id.* at 530. Applying the D.C. Circuit's approach, the district court held the documents were privileged because "regardless of whether [General Motors] had other purposes in retaining" the law firm, the investigation and interviews "had *a* 'primary purpose' of enabling [the law firm] to provide [General Motors] with legal advice." *Id.* at 531 (emphasis added).

Other district court decisions are in accord. See, *e.g., Aetna Inc. v. Mednax, Inc.,* 2019 WL 6467349, at *1 (E.D. Pa. Dec. 2, 2019) (noting that "[b]usiness and legal matters are often difficult to distinguish" and explaining that "[i]f getting or receiving legal advice 'was one of the significant purposes of the [communication]' the privilege should apply, even if there were additional purposes" (quoting *Kellogg,* 756 F.3d at 758-759)); *Smith-Brown v. Ulta Beauty, Inc.,* 2019 WL 2644243, at *3 (N.D. Ill. June 27, 2019) ("The Court finds *[Kellogg's]* analysis persuasive."); *Ramb v. Paramatma,* 2021 WL 5038756, at *3 (N.D. Ga. Sept. 22, 2021); *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.,* 331 F.R.D. 218, 231 (E.D.N.Y. 2019); *In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prods. Liab. Litig.,* 2019 WL 2330863, at *2-4 (D. Md. May 31, 2019); see also *Pitkin v. Corizon Health, Inc.,* 2017 WL 6496565, at *4 (D. Or. Dec. 18, 2017) (explaining, prior to the decision below in this case, that court was "persuaded by the *Kellogg* court's reasoning" and would "adopt it here").

2. a. The Ninth Circuit here adopted a rule that is fundamentally different from the D.C. Circuit's approach. The Ninth Circuit began by holding that the ***14** "primary purpose" test governed claims of attorney-client privilege on dual-purpose communications. Pet. App. 6a-10a. It then concluded, however, that there was no need to decide whether to embrace the D.C. Circuit's *Kellogg* approach. Pet. App. 11a-12a.

The Ninth Circuit avoided *Kellogg* only by wrongly construing its holding. According to the Ninth Circuit, *Kellogg* "would only change the outcome of a privilege analysis in truly close cases, like where the legal purpose is just as significant as a non-legal purpose." Pet. App. lla-12a.[5] The Ninth Circuit thus read the primary purpose test to compare the legal and non-legal purposes behind a communication and viewed the D.C. Circuit test as expanding the privilege only to situations where such purposes are equally significant. Pet. App. 11a-12a; see also, *e.g.,* Pet. App. 10a-lla (reasoning that the D.C. Circuit's approach "would save courts the trouble of having to identify a predominate purpose among two (or more) potentially equal purposes").

The Ninth Circuit's test is incompatible with the D.C. Circuit test. It is now the law of the Ninth Circuit that courts must weigh the relative significance of the legal and non-legal purposes for a communication. If ***15** a non-legal purpose is the more significant motivator, then the communication is not privileged. Pet. App. 12a (affirming district court based on its "finding that *the* predominate purpose of the disputed communications was not to obtain legal advice"); Pet. App. 6a ("[T]he 'client must consult the lawyer for the purpose of obtaining legal assistance and not predominantly for another purpose."' (quoting Restatement § 72, cmt. c)). If a legal purpose is the more significant motivator, then the communication is privileged. Pet. App. 6a. Only in "the narrow universe" of cases where two purposes are in equipoise, is it an open question in the Ninth Circuit whether the communication is privileged. Pet. App. 12a.

That approach looks nothing like the D.C. Circuit's. The D.C. Circuit does not compare the significance of different purposes. As then-Judge Kavanaugh explained, doing so "can be an inherently impossible task" that is "not useful or even feasible." *Kellogg,* 756 F.3d at 759-760. Nor does it necessarily reject a privilege claim where *"the* predominate purpose" of the communication-i.e., the *most* significant purpose-is "not to obtain legal advice." Pet. App. 12a. In the D.C. Circuit, it is error for a court even "to try to find *the* one primary purpose" for communications with multiple purposes. *Kellogg,* 756 F.3d at 760. Instead, the question in the D.C. Circuit is simply whether the legal purpose is significant-regardless of how much a non-legal purpose may have also motivated the communication. See, *e.g., Boehringer,* 892 F.3d at 1268.

b. Had the Ninth Circuit followed the D.C. Circuit test, it would have found the communications here privileged. For example, among the withheld documents were emails containing attorney recommendations regarding whether, why, and how the Client ***16** should file Reports of Foreign Bank and Financial Accounts (FBARs) to report certain assets. 6-ER-986-989 (IST_0000001953). Even though these emails were exchanged in the course of preparing the Client's tax returns, a significant purpose was to communicate Petitioner's legal advice regarding unsettled and complex legal issues. See, *e.g.,* Patrick J. McCormick, *FEAR Penalty Assessment and Enforcement,* 28 J. Int'l Tax'n 46, 52 (2017) (noting legal complexities associated with FBAR reporting standards).

Other communications at issue involved discussions of legal strategy. For example, some documents included emails between the Client and their attorney regarding persuasive submissions to the IRS aimed at mitigating tax penalties. 6-ER-1080-1087 (DECRYPTED_0000000139-140). Far from "simply * * * mak[ing] the correct mechanical calculations," *Cote,* 456 F.2d at 144, these submissions "involve[d] quite a bit of storytelling," 6-ER-1082. And, just as one would expect in correspondence regarding a legal brief, the communications included, for example, the Client's line edits suggesting changes to the text of the filings, 6-ER-1085, and the attorney's explanation of legal strategy and assessment of the likelihood that certain arguments would succeed, 6-ER-1087.

Another email walked the Client through the considerations involved in whether to amend their state income tax returns. 6-ER-952-955 (DECRYPTED_ 0000000136). As "[t]here is no legal obligation to file an amended return even if an error is discovered," Allen D. Madison, *The Legal Framework for Tax Compliance,* 70 Tax Law. 497, 527 (2017), whether and when to file such a return is an individualized strategic decision guided by legal judgments. See ***17** *Cote,* 456 F.2d at 144 (noting that

"decision as to whether the taxpayers should file an amended return undoubtedly involved legal considerations"); *Federal Trade Commission v. TRW, Inc.,* 628 F.2d 207, 212 (D.C. Cir. 1980) (agreeing with *Cote).* These communications reflect Petitioner's initial legal advice, the Client's questions about and input on that approach, and Petitioner's adjustments in light of the Client's concerns-that is, at least "a" significant purpose of these communications was to allow Petitioner and the Client to discuss and develop a legal strategy. Under the D.C. Circuit's test, this email-like the other communications at issuewould be deemed privileged.

3. The Seventh Circuit has taken an even more extreme approach than the Ninth Circuit, stating that dual-purpose documents can *never* be privileged. See *Frederick,* 182 F.3d at 501; see also *Valero Energy Corp. v. United States,* 569 F.3d 626, 630 (7th Cir. 2009) (acknowledging "grey area" between "the preparation of tax returns" and "communications about legal questions raised in litigation (or in anticipation of litigation)," but holding that documents "used for both preparing tax returns and litigation * * * are not protected from the government's grasp"); *In re Grand Jury Proc.,* 220 F.3d 568, 571 (7th Cir. 2000). *Frederick* addressed accountant's worksheets used in the preparation of tax returns and equated the lawyer's work on those documents to an accountant's work, which would not be privileged. 182 F.3d at 501 ("[T]he Supreme Court has held that an accountant's worksheets are not privileged, and a lawyer's privilege * * * is no greater when he is doing accountant's work." (citing *United States v. Arthur Young & Co.,* 465 U.S. 805, 817-819 (1984))). But rather than limiting its holding to situations in which a lawyer is stepping into an accountant's tax-computation shoes rather than ***18** performing legal work, the Seventh Circuit announced a broad rule that-at least in the tax context-all dualpurpose documents are unprivileged. See *Frederick,* 182 F.3d at 501. But cf. *Smith-Brown,* 2019 WL 2644243, at *2-3 (observing, in a non-tax case, that the treatment of dual-purpose communications is an open issue in the Seventh Circuit and applying the *Kellogg* test to address privilege claims of documents from an internal investigation).

The Seventh Circuit's approach cannot be squared with that of the Ninth or D.C. Circuits. Under the D.C. Circuit's test, all the dual-purpose communications in this case are privileged because of their significant legal purpose. See pp. 15-17, *supra.* In the Ninth Circuit, as the district court found, some-but not all-of the dual-purpose communications between Petitioner and the Client are privileged. Pet. App. 53a-54a. Under the law of the Seventh Circuit, however, if the dual-purpose "communications occurred during the preparation of [the Client's] tax return," Pet. App. 53a, they would be unprotected, regardless of whether they also convey legal advice. Compare *ibid.* (deeming this fact "not material"), with *Frederick,* 182 F.3d at 501 ("document prepared for use in preparing tax returns" is unprivileged). Indeed, the Ninth Circuit recognized the conflict between its rule and the Seventh Circuit test in its decision in this case. See Pet. App. 5a (rejecting government's argument "that dual-purpose communications in the tax advice context can never be privileged" and citing *Frederick* with a "but see" signal). The Seventh Circuit's divergent approach adds to the uncertainty in an already complicated area of the law and provides even more reason for this Court's review.

***19 B. The Ninth Circuit's Decision Is Wrong.**

1. The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn,* 449 U.S. at 389. The privilege aims "to encourage full and frank communication between attorneys and their clients." *Ibid.* As this Court has recognized, lawyers need to "be[] fully informed by the client" to provide "sound legal advice or advocacy." *Ibid.;* see also *Trammel v. United States,* 445 U.S. 40, 51 (1980) ("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."). A client, however, will "be reluctant to confide in his lawyer" where "the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure." *Fisher,* 425 U.S. at 403. Similarly, a lawyer may be hesitant to provide the most comprehensive counsel where there is a risk that his communications will not remain confidential. See Restatement § 68, cmt. c. The Ninth Circuit's approach to privilege "frustrates the very purpose of the privilege" in two ways. *Upjohn,* 445 U.S. at 392.

First, the Ninth Circuit's approach creates intolerable uncertainty in attorney-client privilege determinations. This Court has made clear that "for the attorney-client privilege to be effective, it must be predictable." *United States v. Jicarilla Apache Nation,* 564 U.S. 162, 183 (2011). The Ninth Circuit's test fails that basic requirement.

To begin, the test is difficult, if not impossible, to apply. In *Upjohn,* this Court recognized that a test that was "difficult to apply in practice" would yield "unpredictability [in] its application." ***20** *Upjohn,* 449 U.S. at 393. The Ninth Circuit's test is considerably more impracticable than the control-group test rejected in *Upjohn:* Purposes are often overlapping; it makes no sense to ask "whether the purpose was A or B when the purpose was A and B." *Kellogg,* 756 F.3d at 759; see also *Sedco Int'l, S. A. v. Cory,* 683 F.2d 1201, 1205 (8th Cir. 1982) ("[L]egal advice concerning commercial transactions is often intimately intertwined with and difficult to distinguish from business advice.").

Even when it is possible to disentangle the legal from non-legal motivations behind a communication, weighing those competing purposes to determine their relative significance is an artificial and unworkable exercise. It is telling that district courts-that is, the courts tasked with actually sorting through privilege logs, reviewing documents *in camera,* and making privilege determinations-have widely cited the D.C. Circuit's test. See pp. 12-13, *supra.* Those decisions implicitly recognize the impossibility of applying the Ninth Circuit's test in practice.

And, even assuming courts *can* conduct the inquiry the Ninth Circuit requires, clients and their attorneys will have no ability to predict with any confidence the results those courts will reach. "Balancing *ex post* * * * introduces substantial uncertainty into the privilege's application" and "[f]or just that reason, [this Court has] rejected use of a balancing test in defining the contours of the privilege." *Swidler & Berlin v. United States,* 524 U.S. 399, 409 (1998). But that sort of *ex post* balancing is just what the Ninth Circuit's test demands. In "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance" of the subjective purposes that motivated a communication, the Ninth Circuit's ***21** test "eviscerate[s] the effectiveness of the privilege." *Jaffee v. Redmond,* 518 U.S. 1, 17 (1996) (addressing test for psychotherapist-patient privilege that balanced "patient's interest in privacy and the evidentiary need for disclosure"); see also *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.").

Second, the Ninth Circuit's rule will chill communications between clients and their attorneys. See *Mohawk Indus. v. Carpenter,* 558 U.S. 100, 110 (2009) (recognizing that "[t]he breadth of the privilege" shapes "the conduct of clients and counsel"); *Upjohn,* 449 U.S. at 392 (explaining that "narrow scope" of privilege would hinder corporate attorneys' ability "to formulate sound advice" and "to ensure their client's compliance with the law"). In the Ninth Circuit, a dual-purpose communication is subject to disclosure any time a court decides a non-legal motivation for the communication outweighs the legal motivation. By directing district court judges to balance competing legal and non-legal motivations *ex post,* the Ninth Circuit's approach will make clients "reluctant to confide in [their] lawyer[s]" because of the risk a judge will ultimately find that that a dual-purpose communication is unprivileged. *Fisher,* 425 U.S. at 403.

Some clients may respond to the Ninth Circuit's restrictive rule by deciding not to seek their attorneys' legal counsel, so as to avoid creating a discoverable communication. See *ibid.* Others may try to segregate "legal" from "business" communications, providing their attorneys with only the former. But "[i]t is for the *lawyer* in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant." ***22** *Upjohn,* 449 U.S. at 391 (emphasis added) (quoting Model Code of Professional Responsibility EC 4-1 (Am. Bar Ass'n 1980)). Putting a non-lawyer client in the role of "sifting through the facts" to determine "the legally relevant," *id.* at 390-391, is bound to diminish "the observance of law and administration of justice" the privilege is supposed to promote, *id.* at 389. The Court should grant certiorari, as it has done in the past, to address the Ninth Circuit's distortion of the privilege.

2. The arguments in support of the Ninth Circuit's approach are unconvincing. Below, the government asserted that the *Kellogg* approach would generate more confusion than the approach the Ninth Circuit ultimately adopted. See Ninth Circuit Gov't Br. 29 n.11. That makes no sense. Focusing, as the D.C. Circuit does, solely on the legal motivation for a communication and assessing

whether it was significant is always going to be more straightforward than trying to weigh the relative significance of two (or more) purposes. See *Kellogg,* 756 F.3d at 760 (adopting test that was "clearer, more precise, and more predictable").

The government also insisted that the D.C. Circuit's approach would create an incentive to include attorneys on non-legal matters to create a contrived privilege claim. See Ninth Circuit Gov't Br. 29 n.11. This is a red herring. To be privileged, a communication must *both* be "made between privileged persons" *and* be "for the purpose of obtaining or providing legal assistance for the client." Restatement § 68.

Contrary to the government's suggestion that courts will conflate those separate requirements, it is well-accepted (including in the D.C. Circuit) that "[m]erely copying or 'cc-ing' legal counsel, in and of it-self, ***23** is not enough to trigger the attorney-client privilege." *Jordan v. U.S. Dep't of Labor,* 273 F. Supp. 3d 214, 232 n.22 (D.D.C. 2017) (citation omitted). Adding an attorney to an email cc line does not infuse a nonlegal communication with a legal purpose. There is no reason to think that courts, familiar with the difference between the recipient of a communication and its purpose, will think differently if they are directed to inquire into whether there was *a* significant legal purpose rather than whether the *most* significant purpose was legal.

Finally, both the Ninth Circuit and the government suggested that different tests for privilege should apply in different contexts and, in particular, that there should be a more restrictive test "in the tax context" than in the "context of corporate internal investigations." Pet. App. 11a; see also Ninth Circuit Gov't Br. 29 n.11; cf. *Frederick,* 182 F.3d at 501. This Court has never embraced different attorney-client privilege rules for different substantive areas of law, and it should reject any invitation to do so.

To start, the argument rests on the false premise that legal advice about tax and legal advice about internal investigations are wholly separate. *Upjohn* itself involved a corporate internal investigation regarding "questionable payments" with potential "tax consequences," and the company's claim of privilege was made in response to a summons issued by the IRS. *Upjohn,* 449 U.S. at 387-388; see also, *e.g., Quan v. Computer Scis. Corp.,* 623 F.3d 870, 876 (9th Cir. 2010), *abrogated on other grounds by Fifth Third Bancorp v. Dudenhoeffer,* 573 U.S. 409 (2014); *Deaton Oil Co. v. United States,* 904 F.3d 634, 636 (8th Cir. 2018); *Overton v. Todman & Co., CPAs, P.C.,* 478 F.3d 479, 482 (2d Cir. 2007).

***24** Moreover, the concerns motivating privilege in the context of an internal investigation are equally applicable in the tax context. There is a "vast and complicated array of regulatory legislation confronting the modern corporation," *Upjohn,* 449 U.S. at 392, *and* the modern taxpayer (and, especially, the corporate taxpayer). See *Cheek v. United States,* 498 U.S. 192, 199-200 (1991). Compliance with the law in both areas "is hardly an instinctive matter." *Upjohn,* 449 U.S. at 392; see *Cheek,* 498 U.S. at 199-200.

A robust privilege is thus necessary in both contexts to allow attorneys "to formulate sound advice when their client is faced with a specific legal problem" (*e.g.,* how to address unlawful kickbacks or whether to file an amended return) and "to ensure their client's compliance with the law" (*e.g.,* developing corporate protocols to conform to regulatory requirements or structuring transactions to minimize taxes lawfully). *Upjohn,* 449 U.S. at 392. If anything, a strong attorney-client privilege is even more critical in the tax context, given the system's dependence on "self-assessment and voluntary compliance." William H. Volz & Theresa Ellis, *An Attorney-Client Privilege for Embattled Tax Practitioners: A Legislative Response to Uncertain Legal Counsel,* 38 Hofstra L. Rev. 213, 249 (2009) ("The greater the disclosure between the client and attorney, the more truth will ultimately be divulged to the IRS.").

More fundamentally, adopting different privilege standards in different areas of law is an unprecedented approach that would work significant mischief. Federal courts look to "[t]he common law-as interpreted by United States courts in the light of reason and experience"-in evaluating privilege. ***25** Fed. R. Evid. 501. This Court has never tried to tailor the attorney-client privilege test to particular areas of substantive law. For good reason: Because lawyers' work often spans multiple areas of law, a system that applied different standards in different substantive areas would yield precisely the "uncertain privilege" this Court has warned against. *Upjohn,* 449 U.S. at 393. This Court's review is necessary to correct the Ninth Circuit's misguided view of privilege.

C. The Petition Presents An Excellent Vehicle To Address A Recurring Question Of Tremendous Importance.

1. The question presented is critical to the legal profession and to the public, which benefits from attorneys' services. The "full and frank communication[s]," *Upjohn,* 449 U.S. at 389, the attorney-client privilege encourages are essential "if the professional mission is to be carried out," *Trammel,* 445 U.S. at 51. And, as this Court has long recognized, allowing attorneys to do their work "serves public ends." *Upjohn,* 449 U.S. at 389; see also *Hunt v. Blackburn,* 128 U.S. 464, 470 (1888). Fully informed attorneys can offer better counsel, increasing their "client's compliance with the law." *Upjohn,* 449 U.S. at 392. And, where a client is alleged to have acted unlawfully, her "free[dom] to make full disclosure to [her] attorneys of past wrongdoings" is critical to the attorneys' advocacy, "promot[ing] * * * [the] administration of justice." *United States v. Zolin,* 491 U.S. 554, 562 (1989) (citation omitted).

This case implicates an exceptionally important privilege issue. As the Ninth Circuit recognized here, "our increasingly complex regulatory landscape" means "attorneys often wear dual hats, serving as both a lawyer and trusted business advisor." Pet. App. ***26** la. Tax attorneys' work regularly implicates legal and non-legal concerns. See pp. 4-5, *supra.* And in-house counsel are now regularly "involved in all facets of the enterprises for which they work. * * * participat[ing] in and render[ing] decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues." *In re Vioxx Prods. Liab. Litig.,* 501 F. Supp. 2d 789, 797 (E.D. La. 2007); see also *RBS Citizens, N.A. v. Husain,* 291 F.R.D. 209, 217 (N.D. Ill. 2013) (acknowledging "[t]he increasing inclusion of attorneys in business discussions and decisions"). But lawyers-whether working in-house, at a firm, in government, or elsewhere-also may straddle the legal and non-legal worlds when addressing topics as wide ranging as mergers and acquisitions, [6] human ***27** resources, [7] public relations, [8] patents, [9] and licensing agreements. [10] In short, dual-purpose communications are a regular part of the practice of law.

Attorneys and their clients need clear guidance from this Court about which of those many communications are privileged. As this Court has explained, "[a]n uncertain privilege * * * is little better than no privilege at all." *Upjohn,* 449 U.S. at 393. Lawyers whose advice implicates legal and business concerns face particular uncertainty in circuits that have not yet clarified on which side of the split they fall. And, as explained, lawyers in the Ninth Circuit face the uncertainty of having to guess how a court will, after the fact, weigh competing legal and business purposes for ***28** a communication. See pp. 20-21, *supra.* This Court's intervention is needed.

2. a. This case is an ideal vehicle to address that question. Both the district court and Ninth Circuit addressed the argument. Pet. App. 10a-12a; 41a-44a.

The issue is also outcome determinative here. Neither the district court nor the Ninth Circuit suggested that the communications had *no* legal purpose or an insignificant legal purpose; rather, they rejected the privilege claim because they concluded the non-legal purpose predominated over the legal purpose. The Ninth Circuit was able to conclude that adopting the D.C. Circuit's test would not impact the outcome only because it misconstrued *Kellogg.* See pp. 14-15, *supra.* Because the communications here had a significant legal purpose, they would have been protected under the D.C. Circuit's test (properly construed), regardless of whether they also had a significant non-legal purpose and regardless of the relative weight of the two purposes.

b. This case is also an ideal vehicle because appellate decisions regarding privilege are relatively rare. District court privilege decisions are not immediately appealable. See *Mohawk,* 558 U.S. at 103. Some litigants seeking to challenge a discovery order may be able to take an interlocutory appeal under 28 U.S.C. 1292(b) or obtain mandamus review, see *id.* at 112but those review mechanisms are discretionary and reserved for unusual cases, see *Cheney v. U.S. Dist. Ct. for D.C.,* 542 U.S. 367, 380 (2004) ("[Mandamus] is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" (quoting *Ex parte Fahey,* 332 U.S. 258, 259-260 (1947))); *Union Cty., Iowa v. Piper Jaffray & Co.,* 525 F.3d 643, 646 (8th Cir. 2008) ("Permission to allow interlocutory appeals should thus be ***29** granted sparingly and with discrimination." (citation omitted)).

A party can also take an immediate appeal from a *criminal,* but not civil, contempt order. See *Fox v. Cap. Co.,* 299 U.S. 105, 107 (1936). [11] But, as the courts of appeals have recognized, disobeying a privilege order in the hopes of obtaining immediate review is an "inadequa[te]" path to relief: "because the choice of sanctions-civil or criminal-is vested in the discretion of the District Court," a litigant cannot know *ex ante* "whether the District Court would punish its disobedience with an appealable criminal sanction or an 'onerously coercive civil contempt sanction with no means of review until the perhaps far distant day of final judgment.'" *In re The City of New York,* 607 F.3d 923, 934 (2d Cir. 2010) (quoting 15B Charles Alan Wright, Arthur R. Miller & Edward C. Cooper, *Federal Practice and Procedure* § 3914.23, at 146 (2d ed.1992)); see also, *e.g., In re Sealed Case No. 98-3077,* 151 F.3d 1059, 1065 (D.C. Cir. 1998) ("The uncertainty of this means to relief bespeaks its inadequacy in this case."). Unlikely to take that risky gamble and unable to make the substantial showing required to obtain 1292(b) or mandamus review, most litigants must wait until after a final judgment to appeal an adverse privilege decision. See *Mohawk,* 558 U.S. at 109.

Waiting until appeal from final judgment means appellate courts review fairly few privilege orders. In many cases, the privilege issue drops out of the case ***30** before final judgment-for example, because the party seeking disclosure ends up not relying on the communication. Other cases will settle. Indeed, an order requiring disclosure of confidential communications may increase settlement pressure. Cf. *Tenet v. Doe,* 544 U.S. 1, 11 (2005) (recognizing possibility that government might try to "settle a case * * * out of fear that any effort to litigate the action would reveal classified information").

This is thus a noteworthy case in that the court of appeals directly addressed the rule for attorney-client privilege in an area of major practical importance on which the circuits are split. The Court may not have another opportunity to address the question presented for many years. Particularly given the need for clarity in this area of law, the Court should take up the issue now.

*31 CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Evan J. Davis

HOCHMAN SALKIN TOSCHER

PEREZ P.C.

9150 Wilshire Blvd., Suite 300

Beverly Hills, CA 90212

(310) 281-3200

Davis@taxlitigator.com

Donald B. Verrilli, Jr.

Counsel of Record

Rachel G. Miller-Ziegler

MUNGER, TOLLES & OLSON LLP

601 Massachusetts Ave. NW

Suite 500E

Washington, DC 20001-5369

(202) 220-1100

Donald.Verrilli@mto.com

Daniel B. Levin

MUNGER, TOLLES & OLSON LLP

350 S. Grand Avenue

50th Floor

Los Angeles, CA 90071-3426

(213) 683-9135

Daniel.Levin@mto.com

Counsel for Petitioner

April 1, 2022

Footnotes

1 The district court issued two versions of its order, redacting certain information from Petitioner's copy and redacting different information from the government's copy. The version of the order contained in the Appendix combines those redactions, removing all text redacted from each version of the order. The redacted information is not relevant to the question presented in this petition.

2 The district court also held communications where one of Petitioner's employees "provided advice as an accountant" were not protected dual-purpose documents. Pet. App. 54a. Petitioner does not challenge that holding here.

3 The Ninth Circuit consolidated Petitioner's appeal with an appeal by a company owned by the Client (Company) that had also received a grand jury subpoena, withheld the production of certain documents on attorney-client privilege and work-product grounds, and been held in contempt. Pet. App. 2a. Company did not argue that any of the documents it withheld were privileged dual-purpose documents, so it does not seek review here. In addition to its published opinion addressing dual-purpose communications, the Ninth Circuit issued a separate memorandum disposition under seal addressing Petitioner's remaining challenges to the district court's order as well as Company's challenges to the order. Pet. App. 2a; Pet. App. 13a-19a.

4 The Fifth Circuit has announced that "[t]he assertor of the lawyer-client privilege must prove" communications were made "for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding." *United States v. Robinson,* 121 F.3d 971, 974 (5th Cir. 1997). It has not, however, elaborated on whether "primary" means "significant" (as in the D.C. Circuit) or "most significant" (as in the Ninth Circuit).

5 The Ninth Circuit also distinguished *Kellogg* because it "dealt with the very specific context of corporate internal investigations." Pet. App. 11a. But *Kellogg* plainly is not so limited-as demonstrated by the D.C. Circuit's straightforward application of the *Kellogg* rule outside of the internal-investigation context in *Boehringer.* See *Boehringer,* 892 F.3d at 1268 (applying rule of *Kellogg* to communications with in-house counsel regarding patent negotiation settlement); see also *Kellogg,* 756 F.3d at 759-760 (explaining how test applied generally, before articulating rule statement specific to "context of an organization's internal investigation"); see also *infra* pp. 23-25.

6 *Louisiana Mun. Police Emps. Ret. Sys. v. Sealed Air Corp.,* 253 F.R.D. 300, 307-308 (D.N.J. 2008) (recognizing that "[a]lmost all corporate transactions are business based" and that in certain transactions "legal advice may overlap with business advice" (citation and alteration omitted)).

7 *Koumoulis v. Indep. Fin. Mktg. Grp., Inc.,* 29 F. Supp. 3d 142, 146 (E.D.N.Y. 2014) (acknowledging "overlapping nature of legal advice and human resources advice" and that "an employment lawyer's legal advice may well account for business concerns" (citation omitted)).

8 *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs., & Prods. Liab. Litig.,* 2021 WL 3144945, at *7 (D.N.J. July 26, 2021) (holding "'public relations' documents, including draft press releases with in-house counsel's comments" were privileged "whether the underlying document was prepared to address a specific case or threatened litigation, or if the underlying document was designed to generally foster [company's] reputation and protect its brand").

9 *Hercules, Inc. v. Exxon Corp.,* 434 F. Supp. 136, 143 (D. Del. 1977) ("Patent attorneys, particularly those employed in corporate patent departments, often serve dual functions as legal advisers and as business advisers.").

10 *Dolby Lab'ys Licensing Corp. v. Adobe Inc.,* 402 F. Supp. 3d 855, 873 (N.D. Cal. 2019) (discussing communication regarding removing licensed technology, where product manager both "sought legal advice on that topic" and addressed "business impact of removing the technology").

11 This petition presents the rare case where an immediate appeal from a civil contempt order was available because, as the recipient of a grand-jury subpoena, Petitioner was treated as a nonparty. See *Byrd v. Reno,* 180 F.3d 298, 300 (D.C. Cir. 1999) (recognizing that "recipient of a grand jury subpoena" can take an immediate appeal from a civil or criminal contempt order).

End of Document