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 PETITIONER

Evan J. Davis
HOCHMAN SALKIN TOSCHER PEREZ P.C.
9100 Wilshire Blvd., Suite 900W
Beverly Hills, CA 90212
(310) 281-3200
Davis@taxlitigator.com

Daniel B. Levin
Counsel of Record
Jeffrey Y. Wu
J. Max Rosen
MUNGER, TOLLES & OLSON LLP
350 S. Grand Avenue
50th Floor
Los Angeles, CA 90071-3426
(213) 683-9135
Daniel.Levin@mto.com

Donald B. Verrilli, Jr.
Rachel G. Miller-Ziegler
Dahlia Mignouna
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001-5369
(202) 220-1100
Donald.Verrilli@mto.com

Counsel for Petitioner

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.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are identified in the Sealed Petition for a Writ of Certiorari.

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the Sealed Petition for a Writ of Certiorari remains accurate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

TREATISES

OTHER AUTHORITIES

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. 1a. The Ninth Circuit's memorandum opinion regarding other privilege issues is sealed and unpublished.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 The contempt order of the district court is sealed and unpublished.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 The redacted in-chambers order of the district court granting in part the government's motion to compel is sealed and unpublished.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 rests on 28 U.S.C. 1254(1).

FEDERAL RULE OF EVIDENCE INVOLVED

Federal Rule of Evidence 501 provides:

> 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.

---

[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 Petition Appendix combines those redactions, removing all text redacted from each version of the order. The redacted information is not relevant to the question presented.

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

INTRODUCTION

The attorney-client privilege is a cornerstone of the American legal system. Without it, clients could not freely share information with their lawyers, and lawyers could not give their clients full and frank advice. Clients, however, routinely seek advice from lawyers with multiple goals in mind. And lawyers often respond in a way where legal and non-legal advice is intertwined. Those intertwined communications are known as "dual-purpose" communications. The Ninth Circuit in this case held that courts must evaluate all of the purposes for such a communication to determine the single primary purpose, and that the communication is privileged only when that one primary purpose is legal advice.

That approach is wrong. It unduly narrows the privilege because it withdraws protection from attorney-client communications that have a significant legal purpose any time a judge makes a *post hoc* determination that the communication also had some other, more important purpose. That inquiry requires courts to engage in an *ad hoc* balancing exercise that will create unacceptable uncertainty and deter open dialogue between lawyers and their clients.

To ensure that the attorney-client privilege receives appropriate protection in the context of dual-purpose communications, courts should ask a more straightforward question: whether the communication has a significant legal purpose. If it does, the attorney-client privilege should and must apply. That test faithfully implements the core purposes that the attor-

ney-client privilege exists to serve. And it will generate clear and predictable results that clients can understand and rely upon when deciding whether to trust their lawyer with sensitive information. This Court has repeatedly rejected unpredictable or uncertain privilege tests for failing to provide adequate protection in light of the privilege's critical role in our legal and compliance systems. That consideration strongly counsels in favor of adopting the significant purpose test and rejecting the Ninth Circuit's primary purpose test.

Petitioner, a law firm specializing in tax law, obtained information from and advised its Client about the many tax law issues that arise upon expatriation and prepared the tax filings required when a U.S. citizen expatriates. The Ninth Circuit held that certain dual-purpose communications made during that work were unprivileged because the legal purpose (advice about tax law) was not as significant as the non-legal purpose (tax form preparation work). By requiring that legal advice be the single primary purpose of the communication, the Ninth Circuit's approach denied the protections of the privilege to communications that had a significant legal purpose—communications that would unquestionably be protected had they not been intertwined with communications involving tax preparation work.

Clients and lawyers, including tax lawyers, routinely engage in dual-purpose communications and need clear and predictable rules that "encourage full and frank communication between attorneys and their clients." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). Indeed, the need for a robust privilege in the tax context is particularly important given the extraordinary complexity of the tax code and the need to

encourage taxpayers' voluntary compliance. Creating separate rules for tax cases would conflict with this Court's rejection of special privilege rules in other contexts. Such tax exceptionalism is also unworkable in practice because, as in *Upjohn*, legal advice about tax compliance often overlaps with advice on other legal issues. To protect the attorney-client privilege, this Court should adopt the straightforward significant purpose test and remand for the district court to apply that test to the communications at issue in this case.

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. JA 16. Upon expatriation, most individuals are subject to an "exit tax." 26 U.S.C. 877A. All of the individual's property is treated as sold for its fair market value as of the day before the expatriation date, and the individual must pay federal taxes for "any gain arising from such sale." 26 U.S.C. 877A(a)(1) - (2). The expatriate must also certify whether he or she has satisfied all federal tax requirements for the prior five years. JA 17.

Expatriation implicates complex legal issues, and the Client's expatriation involved a particularly novel set of legal issues. JA 16; JA 32. Petitioner provided legal advice to the Client about how to determine ownership of cryptocurrency assets, appropriate methods for asset valuation, and tax filing strategies. Pet. App. 28a-29a; JA 32. Petitioner also prepared several of the Client's individual income tax returns and the Client's Form 8854, to certify compliance with expatriation tax requirements for the year of expatriation. Pet. App. 28a.

Petitioner was subsequently served with a grand jury subpoena seeking documents in connection with a criminal tax investigation of the Client. Pet. App. 23a, 31a. In response to the subpoena, Petitioner produced over 20,000 pages of records, but withheld certain documents based on attorney-client privilege and the work-product doctrine. Pet. App. 31.

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). "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389.

In the tax context, courts have routinely held that "[t]ax advice rendered by an attorney is legal advice within the ambit of the privilege." *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984); *accord, e.g.*, *United States* v. *Abrahams*, 905 F.2d 1276, 1284 (9th Cir. 1990) ("[C]ommunications made to acquire legal 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); *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). But, particularly if an attorney is preparing a client's tax returns, not all communications will necessarily fall within the attorney-client privilege.

For example, conveying the amount of a taxpayer's income on a W-2 form or names of dependents so that the attorney can list that information on a tax form would not be privileged.[2]

c. 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 how to comply with the tax laws and to facilitate Petitioner's mechanical preparation of the Client's tax returns. These "dual-purpose" communications included, for example, interpretations of unsettled statutory requirements regarding whether certain assets are subject to Treasury Department foreign reporting requirements, strategies for filing amended income tax returns, and the Client's questions about and comments on draft submissions to the IRS advocating for the abatement of a penalty assessment. See Part IV, *infra*.

The government filed a motion to compel Petitioner to produce the withheld records. Pet. App. 31a.

---

[2] Several courts have held that communications with an attorney "made *solely* for tax return preparation are not privileged." *Abrahams*, 905 F.2d at 1284. This Court need not address here precisely where the line falls between communications related to the mechanics of preparing a return or effectuating basic mathematical calculations, which would not be privileged, and communications to ensure that a filed return complies with the Internal Revenue Code, which should be privileged because they will require judgments about what the law allows or requires. See *United States* v. *Baucus*, 377 F. Supp. 468, 472-73 (D. Mont. 1974) (finding privileged the transmission of raw data to attorney "for the attorney to use his discretion to determine what portion of such information to insert on the income tax return." (citation omitted)).

2. The district court applied what it described as "the primary purpose test" to analyze the dual-purpose communications. Pet. App. 43a. The court rejected the government's assertion that legal advice could not be privileged at all if it "relate[d] to tax return preparation." *Ibid.* The court acknowledged that the D.C. Circuit had held, in an opinion written by then-Judge Kavanaugh, that the attorney-client privilege applies 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)). But the district court rejected that standard, holding instead that "the relevant consideration is whether the primary or predominate purpose of the communication was to seek legal advice, or to provide the corresponding legal advice." Pet. App. 43a.

In ruling on the specific withheld documents, the district court distinguished between communications made "for the primary purpose" of receiving or providing legal advice, Pet. App. 46a, and "communications where the primary or predominate purpose was about the procedural aspects of the preparation of [the Client's] tax return[s]," Pet. App. 54a. The court found the former to be privileged and the latter to be unprivileged. Pet App. 54a.

In addition to ordering production of communications where the "primary or predominate purpose" was non-legal, the court also found that "portions of several * * * documents" contained communications "only about tax return preparation, which is not protected by the attorney-client privilege," but that "[o]ther portions of those [same] documents concern[ed] [privileged] tax-related legal advice." Pet. App. 54a. Because these documents were "privileged in part," the

district court ordered redactions of the privileged portions. Pet. App. 54a & n.7.

In the same subsection (§ 4.A.4.c.2 of the decision) in which the district court held that the dual-purpose communications were not privileged under the "primary or predominate purpose" test, it separately found that other communications were not protected because one of Petitioner's non-lawyer accountants "provided advice as an accountant." Pet. App. 54a. The district court found, however, that this same accountant often served as an agent for the Client's attorneys, and when she acted in that agent role, communications between her and the Client for the purpose of obtaining legal advice were privileged. Pet. App. 51a; see also *United States* v. *Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) ("the privilege must include all the persons who act as the attorney's agents") (quoting 8 Wigmore, Evidence § 2301 (1961 ed.)). The district court ultimately ordered the production of 54 documents (with the court-ordered redactions) as not privileged based on this part of its decision without specifying which of the two rulings in the subsection applied to each document. Pet. App. 54a; Pet. App. 78a-138a.[3]

Petitioner declined to produce the documents. The district court subsequently held Petitioner in contempt for its non-compliance. Pet. App. 20a. The court

---

[3] Given the grouping in the district court order, Petitioner submitted a list of all 54 of those documents to the Ninth Circuit under the heading of "dual-purpose" documents. CA9 Opening Br. at 25 & n.15; *id.* at 59-60 (Ex. A). All of these 54 documents are included in the Sealed Joint Appendix, with the court-ordered redactions shown.

stayed its contempt sanction to allow Petitioner to appeal. Pet. App. 21a.

3. The Ninth Circuit affirmed. The court of appeals held "that the primary-purpose test applies to attorney-client privilege claims for dual-purpose communications." Pet. App. 6a. The court rejected the government's argument, based in part on Seventh Circuit authority, "that dual-purpose communications in the tax advice context can never be privileged." Pet. App. 5a n.2 (citing *United States* v. *Frederick*, 182 F.3d 496, 501 (7th Cir. 1999) ("a dual-purpose document—a document prepared for use in preparing tax returns and for use in litigation—is not privileged * * * .")).

The Ninth Circuit then addressed what test to adopt to determine whether a dual-purpose communication is privileged. 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).

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 court of appeals went on to read *Kellogg* as treating communications as privileged only "in truly close cases, like where the legal purpose is just as significant as a non-legal purpose." Pet. App. 12a. Because the district court had concluded that "*the* predominate purpose of the disputed communications was not to obtain legal advice," the Ninth Circuit concluded that 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).[4]

3. In response to a timely petition for rehearing, the Ninth Circuit amended its opinion to clarify that only "normal tax return preparation assistance" is generally outside of the privilege, even when the tax preparation assistance comes from a lawyer. Pet. App. 1a, 11a n.5. In doing so, it removed the suggestion in the un-amended opinion that "normal tax *advice*—even when it comes from lawyers—is generally *not* privileged." Pet. App. 1a (first emphasis added). It otherwise denied the petition. Pet. App. 1a.

SUMMARY OF THE ARGUMENT

The court of appeals adopted a test for attorney-client privilege that fails to protect the ability of clients to seek and obtain the full and frank advice of their lawyers. Every day, clients seek lawyers' advice for overlapping legal and non-legal purposes. By withdrawing the protection of the attorney-client privilege from such dual-purpose communications whenever a

[4] In addition to its published opinion, the Ninth Circuit issued a separate memorandum disposition under seal addressing Petitioner's remaining challenges to the district court's order as well as the consolidated appeal of a company owned by the Client that had also withheld documents based on attorney-client privilege but had not argued that any of its documents were dual purpose. Pet. App. 2a; Pet. App. 13a-19a.

court later makes an *ad hoc* judgment that the non-legal purpose outweighs the legal purpose, the Ninth Circuit's single primary purpose test undermines the public interest in protecting confidential communications between lawyers and clients.

The significant purpose test adopted by the D.C. Circuit in *Kellogg* appropriately protects attorney-client dual purpose communications. That test asks a single question that arises directly from the long-established test for attorney-client privilege: whether a client is seeking or obtaining confidential legal advice from his or her lawyer.

This Court is charged with interpreting the scope of the attorney-client privilege "in the light of reason and experience." Fed. R. Evid. 501. Both reason and experience support the adoption of the significant purpose test.

First, by protecting significant confidential communications relating to legal advice, regardless of whatever other purposes the communication may also serve, the test neither expands nor contracts the long-established boundaries of the privilege. Any narrower rule that withdrew the privilege from communications that also serve some other purpose would "frustrate[] the very purpose of the privilege by discouraging the communication of relevant information" between clients and their attorneys. *Upjohn*, 449 U.S. at 392.

Second, this Court has long recognized 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). Because it focuses on the legal purpose of the communication, the significant purpose test is just as predictable as the ordinary privilege test. By contrast, the Ninth Circuit's approach assigns to judges the "inherently impossible task" of

trying to separate the legal and non-legal purposes of a communication and then decide which of those purposes was more significant to the communication. *Kellogg*, 756 F.3d at 759. This Court has repeatedly "rejected [the] use of" such "a balancing test in defining the contours of the privilege," because it is unpredictable and unmanageable. *Swidler & Berlin* v. *United States,* 524 U.S. 399, 409 (1998). The unpredictability generated by the Ninth Circuit's test will leave clients uncertain about when their requests for legal advice are privileged, discourage open communications between lawyers and clients, and undermine lawyers' ability "to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392.

That the Client in this case sought legal advice about tax law is hardly a reason to adopt a narrower rule. In fact, the opposite is true. No one could seriously dispute the enormous complexity of the Internal Revenue Code and its accompanying regulations. The tax system depends on the voluntary compliance of taxpayers, and protecting attorney-client communications with tax lawyers is essential to promoting that compliance. This Court has previously refused to tailor attorney-client privilege rules to different substantive areas of law, and carving out a special privilege rule for tax advice would be particularly inappropriate because tax advice frequently overlaps with other areas of legal advice, as was true in *Upjohn* itself.

Because the Ninth Circuit erred in endorsing the single primary purpose approach for dual-purpose communications, this Court should reverse and remand for application of the significant purpose test to the communications at issue here.

ARGUMENT

I. Dual-Purpose Communications Are Entitled To Robust Attorney-Client Privilege Protection

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. Decisions about the scope of the privilege are "guided by 'the principles of the common law * * * as interpreted by the courts * * * in the light of reason and experience.'" *Swidler & Berlin*, 524 U.S. at 403 (quoting Fed. R. Evid. 501). The privilege protects from disclosure confidential communications between a client and attorney made to obtain or provide legal advice. See *Fisher*, 425 U.S. at 403; Restatement § 68; 8 Wigmore, Evidence § 2292.

This Court has long recognized that a robust attorney-client privilege safeguards vital public interests. As the Court explained in *Upjohn*, the privilege "promote[s] broader public interests in the observance of law and administration of justice." 449 U.S. at 389; see also *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888) (explaining that the attorney-client privilege is "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice"). The privilege achieves those public interests by "encourag[ing] full and frank communication between attorneys and their clients," on the understanding that such open and honest dialogue will provide attorneys with the full information they need to provide "sound legal advice" to their clients. *Upjohn*, 449 U.S. at 389.

By the same token, this Court has long understood that affording too narrow a scope to the privilege

would deter individuals from seeking out legal counsel, and limit counsel's ability "to ensure their client's compliance with the law." *Id*. at 392; *Swidler & Berlin*, 524 U.S. at 408 (without the assurance of privilege, "the client may very well not have made disclosures to his attorney at all"). Almost a century and a half ago, the Court explained the "wise and liberal policy" behind an effective attorney-client privilege: "If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance." *Connecticut Mut. Life Ins. Co.* v. *Schaefer*, 94 U.S. 457, 458 (1876); see also *United States* v. *Louisville & N. R.R. Co.*, 236 U.S. 318, 336 (1915) ("The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by textbooks and courts to need extended comment now.").

2. It is inevitable that, when clients and attorneys communicate, legal advice will be intertwined with non-legal advice. As this Court has recognized, "[c]lients consult attorneys for a wide variety of reasons." *Swidler & Berlin*, 524 U.S. at 407. Clients often seek attorneys' expertise not only as to the client's legal obligations, but also as to how best to act given those obligations and the client's other needs and interests. Indeed, in *Swidler & Berlin* this Court took as a given that "[m]any attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice." *Id*. at 407-408. And the Court recognized that "[t]he same is true of owners of small businesses, who may regularly consult their

attorneys about a variety of problems arising in the course of the business." *Id.* at 408.

Such dual-purpose communications reflect the reality that the "modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable." *United States* v. *United Shoe Mach. Corp.,* 89 F. Supp. 357, 359 (D. Mass. 1950). It is "in the public interest" for attorneys to conceive of their "duty to society" and clients as involving "many relevant social, economic, political and philosophical considerations"; "the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice." *Ibid.*

Lawyers and their clients engage in dual-purpose communications every day. Here, for example, the Client engaged Petitioner to provide legal advice about how to navigate complicated tax laws governing expatriation and to implement that advice by preparing the Client's tax returns that were necessary to effectuate the Client's expatriation. JA 17-21. Even if communications about the mechanical act of preparing the tax returns themselves would not be privileged,[5] the legal advice about tax compliance is indisputably privileged, *e.g., Upjohn*, 449 U.S. at 394 (privilege applied to attorney-employee interviews that gathered information "needed to supply a basis for legal advice concerning compliance with securities and tax laws [and other purposes]"); *In re Grand Jury Subpoena*, 731 F.2d at 1037 ("Tax advice rendered by an attorney is legal advice within the ambit of the privilege.").

Similar dual-purpose communications arise across the legal field. See generally *Swidler & Berlin*, 524

[5] See note 2, *supra*.

U.S. at 407-408. Corporate lawyers may advise clients about the rules for different legal structures and also the commercial and business risks and advantages of those structures. See *Note Funding Corp.* v. *Bobian Inv. Co.*, 1995 WL 662402, at *2-*3 (S.D.N.Y. Nov. 9, 1995). Family law attorneys may advise clients on how a divorce will affect marital property and custody, and at the same time counsel the client on the emotional and economic impacts of ending a marriage. See American Academy of Matrimonial Lawyers, Bounds of Advocacy Standard 1.2 (2012). And a probate lawyer may advise an elderly client about legal instruments in anticipation of death or disability, but in doing so, also "ask clients probing questions about medical conditions and potential treatments" and be "prepared to assist the client in identifying and evaluating moral and religious considerations." Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 Geo. J. Legal Ethics 201, 214 (2010).

As the D.C. Circuit recognized in *Kellogg*, *Upjohn* itself found the privilege applicable to dual-purpose communications. *Kellogg*, 756 F.3d at 757 ("[Kellogg's] assertion of the privilege in this case is materially indistinguishable from Upjohn's assertion of the privilege in that case"); *Upjohn*, 449 U.S. at 386-387. *Upjohn* involved an internal investigation into "questionable payments" to foreign officials that resulted in a report filed with both the Securities and Exchange Commission and the Internal Revenue Service. Such investigations often have far-reaching consequences for clients that go beyond compliance with their legal obligations, affecting relationships with shareholders, employees, and customers. Dual-purpose communications are thus inevitable in such contexts.

II. The Court Should Adopt The Significant Purpose Test For Dual-Purpose Communications

In interpreting the scope of the privilege for dual-purpose communications "in the light of reason and experience," *Swidler & Berlin*, 524 U.S. at 403 (quoting Fed. R. Evid. 501), two principles should guide this Court. First, the Court should avoid a restrictive interpretation that would "frustrate[] the very purpose of the privilege by discouraging the communication of relevant information" between clients and the attorneys seeking to advise them. *Upjohn*, 449 U.S. at 392. Second, the Court should adopt a rule that is clear and administrable because "for the attorney-client privilege to be effective, it must be predictable." *Jicarilla Apache Nation*, 564 U.S. at 183. "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." *Upjohn*, 449 U.S. at 393.

Applying these principles, this Court should adopt the significant purpose standard articulated by the D.C. Circuit in *Kellogg* and should reject the single "primary purpose" standard adopted by the Ninth Circuit in this case.

A. The Significant Purpose Test Appropriately Protects The Attorney-Client Privilege

The significant purpose test directly serves the interests at the core of the attorney-client privilege.

1. A communication that serves a significant legal purpose falls within the heartland of the attorney-client privilege. Restatement § 72 cmt. c ("the privilege applies if one of the significant purposes of a client in

communicating with a lawyer is that of obtaining legal assistance").

A communication between an attorney and client that serves a significant legal purpose satisfies every element of the "famous formulation" of the attorney-client privilege that courts, including this Court, have long relied upon: "'(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.'" *Kovel*, 296 F.2d at 921-922 (quoting 8 Wigmore, Evidence § 2292); *Fisher*, 425 U.S. at 403 ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." (citing 8 Wigmore, Evidence § 2292)); Restatement § 68 (attorney-client privilege protects confidential communications made "for the purpose of obtaining or providing legal assistance for the client").

Denying the protections of the privilege to otherwise-protected communications that serve a significant legal purpose merely because a court later concludes that the communication also served some other more significant purpose, "frustrates the very purpose of the privilege by discouraging the communication of relevant information" that a lawyer needs to render sound legal advice to the client. *Upjohn*, 449 U.S. at 392. Just as in *Upjohn*, the "narrow scope given the attorney-client privilege" by the Ninth Circuit here not only makes it difficult for attorneys to "formulate sound [legal] advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of * * * counsel to ensure their clients' compliance with the law." *Ibid*.

Of course, not every communication with a lawyer will serve a significant legal purpose. It is well established that, 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. The mere "copying or 'cc-ing' legal counsel, in and of itself" will not protect the communication from disclosure. *Jordan* v. *U.S. Dep't of Labor*, 273 F. Supp. 3d 214, 232 n.22 (D.D.C. 2017) (citation omitted). This limitation prevents parties from inappropriately cloaking non-legal communications under the privilege. But when the communication does serve a significant legal purpose, neither "reason" nor "experience" justifies ordering its disclosure merely because it also serves another purpose a court later finds more significant. See *Swidler*, 524 U.S. at 405-06 (quoting Fed. R. Evid. 501) (placing the burden on the government to show "that 'reason and experience' require" removing protection from traditionally protected communications); see also *United Shoe Mach. Corp*., 89 F. Supp. at 359 ("[T]he privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.").

By requiring that legal advice be a significant purpose of the attorney-client communication, the test neither expands nor contracts the historical bounds of the attorney-client privilege. See *Fed. Trade Comm'n* v. *Boehringer Ingelheim Pharms., Inc.,* 892 F.3d 1264, 1269 (D.C. Cir. 2018) (Pillard, J., concurring) (observing that the significant purpose rule in no way "expan[ds] * * * the attorney-client privilege" beyond what precedent dictates). The proponent of the privilege must still establish that legal advice was sought or received. *E.g.*, *United States* v. *Ruehle*, 583 F.3d 600, 608 (9th Cir. 2009) (party asserting privilege

bears the burden of establishing the privilege). That limitation recognizes, for example, that "neither a general statement that the lawyer wore both lawyer and businessperson 'hats' during the communications nor a blanket assertion of legal purpose is enough" to invoke the privilege. *Boehringer*, 892 F.3d at 1270 (Pillard, J., concurring). But as long as a proponent of the privilege can show that the communication was made or received as part of "obtain[ing] legal assistance," the privilege should apply, regardless of other purposes for the communication. *Fisher*, 425 U.S. at 403

2. a. Equally to the point, "if the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn*, 449 U.S. at 393; accord *Jicarilla Apache Nation*, 564 U.S. at 183. By focusing on whether a communication has a purpose of seeking or obtaining legal advice, and not whether the communication also serves some other nonlegal purpose, the significant purpose test requires courts to apply the same standards they apply in all privilege cases to determine whether the protections of the privilege apply. After all, a communication with a lawyer not for the purpose of legal advice would not be entitled to the privilege irrespective of the significance of the nonlegal purpose.

The significant purpose test also avoids the unpredictability of the single primary purpose test. As the D.C. Circuit explained in *Kellogg*, "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." *In re Kellogg*, 756 F.3d at 759; see also Part II.B, *infra*. Under the *Kellogg* approach,

however, a court need only determine whether a significant purpose of the communication was obtaining or providing legal advice. If so, the communication is protected. That targeted inquiry about legal significance is "clearer, more precise, and more predictable" when evaluating communications that serve multiple purposes. *Id.* at 760. By eschewing the need to engage in intractable, after-the-fact weighing of legal and non-legal purposes, the significant purpose rule "helps to reduce uncertainty regarding the attorney-client privilege." *Boehringer*, 892 F.3d at 1268.

b. District courts that must actually resolve privilege claims in the first instance have, since the *Kellogg* decision, regularly adopted the significant purpose test because of its administrability, predictability, and consistency with this Court's precedents.

For example, in *In re General Motors LLC Ignition Switch Litigation*, the court agreed that the D.C. Circuit's test is "consistent with—if not compelled by—the Supreme Court's logic in *Upjohn*." 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015). 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 because the law firm conducting the interviews was retained to conduct the investigation in the face of a pending DOJ criminal investigation and likely civil litigation. See *id.* at 530. Without having to weigh the competing legal and non-legal

purposes, the court found the challenged communications to be 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 courts have also adopted the D.C. Circuit's approach from *Kellogg*. 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 *2-*3 (N.D. Ill. June 27, 2019) (where attorney investigation involved legal and "marketing and public relations" purposes, finding communications privileged where legal advice "'was one of the significant purposes'" (quoting *Kellogg*, 756 F.3d at 759-760)); *Ramb* v. *Paramatma*, 2021 WL 5038756, at *4 (N.D. Ga. Sept. 22, 2021) (finding "little doubt" that communications between a client and his personal attorney were privileged based on D.C. Circuit's approach).

3. The significant purpose test does not shield non-legal communications that do not qualify for the privilege. When legal and non-legal portions of a communication are severable, redaction of the legal communications appropriately protects privileged material while allowing production of non-privileged material. The nature of a true dual-purpose communication, however, is that the communication is motivated by "overlapping purposes." *Kellogg*, 756 F.3d at 759.

The significant purpose test only applies when multiple purposes cannot be readily severed and addressed through redactions.

Nor does the significant purpose test shield communications, or information, that for strong policy reasons ought to be disclosed. For example, the privilege extends only to communications; "it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn*, 449 U.S. at 395.

Other doctrines similarly limit the application of the privilege. The crime fraud-exception requires disclosure of otherwise privileged communications made for the purpose of committing a fraud or crime. E.g., *United States* v. *Zolin*, 491 U.S. 554, 563 (1989); Pet. App. 70a-78a (discussing crime-fraud exception). Disclosure of privileged attorney-client communications outside the privileged relationship vitiates the privilege. *In re Martin Marietta Corp.*, 856 F.2d 619, 622-623 (4th Cir. 1988); Pet. App. 45a-48a (addressing whether the waiver doctrine requires disclosure of communications that "were initially subject to the attorney-client privilege" on the basis that certain information was ultimately included "on a tax return that is filed with the government"). And the "fiduciary exception" allows the beneficiary of a trust access to confidential communications between the trustee and the trust's lawyers. See *Jicarilla Apache Nation*, 564 U.S. at 170-173 (discussing origins of fiduciary exception).

In short, the significant purpose test is a conventional application of the privilege. It protects communications between attorneys and clients for the purpose of obtaining or providing legal advice. There is no principled basis for removing a communication from the scope of the privilege merely because it also

serves non-legal purposes, particularly given the practical reality of how clients and lawyers communicate when confronting complex issues that contain both legal and non-legal dimensions.

B. The Ninth Circuit's Single Primary Purpose Test Will Erode The Attorney-Client Privilege And Cannot Be Administered In A Fair and Predictable Manner

1. a. The Ninth Circuit's single primary purpose rule affords insufficient protection to attorney-client communications because it protects from disclosure only communications where a court later determines that the legal purpose outweighs any other purpose.

A communication that has a significant legal purpose satisfies the classic test for attorney-client privilege because it represents a confidential communication between a lawyer and client for the purpose of seeking or obtaining legal advice. Part II.A, *supra*; *Fisher*, 425 U.S. at 403; 8 Wigmore, Evidence § 2292. Yet the Ninth Circuit's rule negates the privilege that would ordinarily attach to such a communication any time the communication is later found to serve a more important non-legal purpose. That is true even if, in the trial court's estimation, the communication serves a significant legal purpose. Neither "reason [nor] experience" justifies stripping the privilege from such a communication. *Swidler & Berlin*, 524 U.S. at 406.

b. Much like the narrow "control group" test rejected in *Upjohn*, the Ninth Circuit's single primary purpose approach would chill communications between attorneys and clients and undercut the privilege's purpose of facilitating compliance. *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").

Some clients would likely respond by deciding not to seek their attorneys' legal counsel, to avoid creating a discoverable communication. See *Fisher*, 425 U.S. at 403. Other clients may try to segregate "legal" from "business" communications, engaging with their attorneys only on the former. Even if such segregation were possible, which is a dubious assumption in today's world, it would limit attorneys' ability to provide sound legal advice and frustrate the purpose of the privilege because "[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." *Upjohn*, 449 U.S. at 391 (emphasis added) (quoting Model Code of Prof. Resp. 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.

This Court should reject the single primary purpose test adopted below and hold that the significant purpose test applies to determine the privileged status of a dual-purpose communication. Any other outcome risks eroding the attorney-client privilege, with unacceptable consequences. See *Schaefer*, 94 U.S. at 458 ("If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic.")

2. Like the control-group test rejected in *Upjohn*, "[t]he very terms of the test adopted by the court below suggest the unpredictability of its application." 449 U.S. at 393. The Ninth Circuit's test requires a trial

court to identify a communication's legal purpose *and* identify the communication's non-legal purpose or purposes, and then weigh those two (or more) purposes to decide "*the* predominate purpose." Pet. App. 12a. Only if that "single, 'primary' purpose" is the legal one will the communication be protected. *City of Roseville Emps.' Retirement Sys.* v. *Apple Inc.*, 2022 WL 3083000, at *3 (N.D. Cal. Aug. 3, 2022) (applying Ninth Circuit's balancing test).

The Ninth Circuit's test thus requires a trial court to "draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other." *Kellogg*, 756 F.3d at 759. But it is the hallmark of dual-purpose communications that the legal and non-legal purposes are overlapping or intertwined. See Paul Rice, *Attorney-Client Privilege in the United States*, § 7:6 (2019) ("The distinctions drawn by the courts, whether using the 'primary' or 'sole' purpose tests, are especially difficult to identify in the business setting, where attorneys are consulted for and expected to render both legal and business opinions and the governmental setting, where officials serve in dual roles as attorneys as well as government advisors."); see also *ibid.* ("Determining the primary purpose of a communication has become increasingly difficult with the advent of e-mail. Increasingly, businesses are using e-mail to simultaneously communicate both business and legal matters.").

It thus 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 (emphasis added); 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."). Requiring trial

courts to disentangle and compare the relative weights of legal and non-legal purposes all but guarantees unpredictable and arbitrary results.

That inquiry not only requires unpredictable *post hoc* balancing, but it also requires district courts to decide the inherently subjective question of which purpose was the most important to a lawyer and client. Such an inquiry is almost certain to result in inconsistent and arbitrary answers. Cf. *Upjohn*, 449 U.S. at 393 ("Disparate decisions in cases applying [the control-group] test illustrate its unpredictability.") Indeed, the primary purpose test has been criticized for the tendency of courts to disagree as to how to apply it in any given case. Rice, *supra*, § 7:7 ("There is considerable uncertainty * * * as to the focus of [the primary purpose] standard" (collecting cases)). If court decisions are unpredictable, clients and lawyers will be unable to predict in advance whether a communication will be privileged, deterring clients from confiding in their lawyers.

This Court has repeatedly "rejected the use of a balancing test in defining the contours of the privilege" because "[b]alancing *ex post*" competing factors to determine the application of the attorney-client privilege "introduces substantial uncertainty into the privilege's application." *Swidler & Berlin*, 524 U.S. at 409; see also *Jicarilla Apache Nation*, 564 U.S. at 183 (rejecting a test for privilege when the federal government acts in its capacity as a trustee for Indian tribes that asked whether the need for disclosure was counterbalanced by a "specific competing interest"); *Jaffee* v. *Redmond*, 518 U.S. 1, 17 (1996) (rejecting test for psychotherapist-patient privilege that purported to balance the "patient's interest in privacy and the evidentiary need for disclosure").

As this Court explained, "[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, would "eviscerate the effectiveness of the privilege." *Jaffee*, 518 U.S. at 17; see also *Jicarilla Apache Nation*, 564 U.S. at 183 (because the government could not reliably "predict" what a trial court would ultimately consider a "'specific competing interest,'" such a balancing test would be "'little better than no privilege at all.'" (quoting *Upjohn*, 449 U.S. at 393)).

"The breadth of the privilege" shapes "the conduct of clients and counsel." *Mohawk Indus.* v. *Carpenter*, 558 U.S. 100, 110 (2009). The unpredictability of the Ninth Circuit's single primary purpose test will make clients "reluctant to confide in [their] lawyer[s]" and encourage responsible lawyers to limit the information they solicit from clients because of the risk a judge will ultimately find that that a dual-purpose communication is unprivileged. *Fisher*, 425 U.S. at 403. This uncertainty undermines the core protections of the attorney-client privilege. See *Upjohn*, 449 U.S. at 393 ("An uncertain privilege * * * is little better than no privilege at all."); *Jicarilla Apache Nation*, 564 U.S. at 183 ("[F]or the attorney-client privilege to be effective, it must be predictable.").

III. The Significant Purpose Test Properly Applies To Legal Advice In The Tax Context

The Ninth Circuit, in the opinion below, commented that "*Kellogg* dealt with the very specific context of corporate internal investigations, and its reasoning does not apply with equal force in the tax context." Pet. App. 11a. The government likewise argued below, and in its brief in opposition to certiorari, that "unique considerations at issue in the tax context"

warrant application of a less-protective privilege rule to the dual-purpose communications at issue here. Br. for the United States in Opp. to Certiorari, at 14. The government below relied on the Seventh Circuit's holding in *Frederick*, 182 F.3d at 501, that "a dual-purpose document—a document prepared for use in preparing tax returns and for use in litigation—is not privileged." United States 9th Cir. Br. at 23.

This Court has never embraced different attorney-client privilege rules for different substantive areas of law, and it should not do so here. Narrowing the scope of the privilege in the tax context would be a grave mistake given the extreme complexity of tax law and the strong public interest in encouraging voluntary tax compliance.

1. Adopting different attorney-client privilege standards for different areas of law would be an unprecedented approach and would engender enormous practical problems. In *Swidler*, for example, this Court rejected an invitation to apply the attorney-client privilege "differently in criminal and civil cases" as without support, and as likely to create "substantial uncertainty" about application of the privilege. *Swidler*, 524 U.S. at 408-409; see also *Kellogg*, 756 F.3d at 758 (rejecting argument that *Upjohn* should be read to create distinct privilege rules for in-house and outside counsel). In other contexts, this Court has refused to create special rules for taxes cases. *Mayo Found. for Medical Educ. & Research* v. *United States*, 562 U.S. 44, 55 (2011) ("[W]e are not inclined to carve out an approach to administrative review good for tax law only."). It should do the same in this context.

A system that applied different privilege standards for tax cases as opposed to other areas would yield precisely the "uncertain privilege" this Court warned

against in *Upjohn*, 449 U.S. at 393, and *Swidler & Berlin*, 524 U.S. at 409. In the modern era, tax lawyers rarely confine their advice to a single substantive area of the law. See, e.g., *Interview With Professor Martin D. Ginsburg*, 12 ABA Section of Taxation Newsletter, Fall 1992, at 6 ("[T]he practice of tax law for the past several years is not simply the application of Federal and state income tax laws. In transactional work it also requires a decent understanding of corporate law, securities law, financial accounting rules, fraudulent conveyance doctrine, and more. * * * At least in transactional work, a tax attorney today cannot, or at least ought not, specialize exclusively in tax law."). Indeed, the attorney in this case described his role as a tax lawyer as considering not only the tax code but also providing "planning and risk advice," based on many years of experience in international tax law. JA 17.

If differing privilege rules applied depending on the area of law, lawyers and clients would face insurmountable uncertainty in predicting whether the tax-specific rule or a general rule (or perhaps some other context-specific rule) would apply to their communications, and thus whether those communications would be deemed privileged.

The Ninth Circuit's attempt to distinguish *Kellogg* as applying to the "context of corporate internal investigations" *rather* than in the "tax context" highlights the problem. Pet. App. 11a. "Corporate internal investigations" will often arise in the "tax context." *Upjohn* itself involved a corporate internal investigation gathering information "to supply a basis for legal advice concerning compliance with securities *and tax laws*, * * * currency regulations, [and] duties to shareholders." *Upjohn*, 449 U.S. at 394 (emphasis added). Under a privilege test with different approaches for

tax cases and internal investigations, it would be entirely unclear how to apply the privilege in a case like *Upjohn* or any internal investigation that implicated tax issues—as many do.

Treating the privilege differently for different areas of law would create crippling uncertainty among lawyers and clients that would undermine the full and frank communications the privilege aims to protect.[6]

2. Whether or not subject-matter-specific privilege rules might make sense in some contexts, there is no basis for adopting a less protective privilege rule for tax cases. In *Upjohn*, this Court rejected a "narrow" approach to the attorney-client privilege for corporations, observing that such an approach would be unworkable "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation," which required the consultation of counsel to ensure "compliance with the law." 449 U.S. at 392. Modern tax law—perhaps more than any other area of the law—presents just such a "vast and complicated array" of legal requirements. *Id*. Nothing about legal advice in the tax context merits less protection for dual-purpose communications than federal common law affords to other subject areas.

a. A strong attorney-client privilege is especially critical in the tax context given the system's dependence on "self-assessment and voluntary compliance."

---

[6] To be clear, just because the same privilege test should apply to all dual-purpose communications, does not mean that specific issues unique to particular subject areas or contexts can never inform the *application* of that test. The district court, by way of example, looked to precedent in the tax law context to determine what purposes were legal, and which purposes were not. Pet. App. 44a; 53a.

See 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 privilege in the tax context serves the important public purpose of encouraging tax compliance because "[t]he greater the disclosure between the client and attorney, the more truth will ultimately be divulged to the IRS." *Ibid.*; see also *ibid.* ("Greater disclosure to the tax advisor is the key to a fairer, more efficient, and valid tax system.").

Voluntary tax compliance very often requires substantial legal advice. Modern tax law may be the *most* complicated area of public law. The federal tax code today is more than 187 times longer than it was a century ago. Jason Russell, *Look at how many pages are in the federal tax code*, Washington Examiner (April 15, 2016), https://www.washingtonexaminer.com/look-at-how-many-pages-are-in-the-federal-tax-code. The code itself spans thousands of pages, and by some accounts, understanding tax law "requires more than 73,000 additional pages of interpretative material for proper comprehension." Reid Kress Weisbord, *The Advisory Function of Law*, 90 Tul. L. Rev. 129, 130 (2015). The complexity of the tax system arises not just from its many thousands of pages of rules and regulations. The Internal Revenue Code is replete with "gray areas" that require prediction and interpretation. See *United States* v. *El Paso Co.,* 682 F.2d 530, 534 (5th Cir. 1982) ("There are many 'gray areas' in the tax world, twilight zones in which one may only dimly perceive how properly to treat a given accretion to wealth or given expenditure of funds.").

This Court has repeatedly recognized the enormous complexity of the tax code. See, *e.g. Cheek* v. *United States*, 498 U.S. 192, 199-200 (1991) (observing

that the "special treatment of criminal tax offenses is largely due to the complexity of the tax laws"); *Mayo Found. for Med. Educ. & Research,* 562 U.S. at 55-56 ("[f]illing gaps in the Internal Revenue Code plainly requires the Treasury Department to make interpretive choices for statutory implementation at least as complex as the ones other agencies must make in administering their statutes"); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 596 (1983) ("In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems."); see also *El Paso Co.*, 682 F.2d at 534 ("Written to accommodate a multitude of competing policies and differing situations, the Internal Revenue Code is a sprawling tapestry of almost infinite complexity. Its details and intricate provisions have fostered a wealth of interpretations.").

Navigating this sprawling and unwieldy set of statutes, regulations, and legal precedents requires the advice of tax lawyers, just as much, if not more so, than other areas of the law. See, *e.g.*, *United States* v. *Judson*, 322 F.2d 460, 468 (9th Cir. 1963) ("The ramifications of tax law are often a stubborn challenge to the most expert legal practitioner. The very nature of the tax laws requires taxpayers to rely upon attorneys * * * ."); see also Weisbord, 90 Tul. L. Rev. at 130 ("As U.S. law has grown in depth, coverage, and complexity, legal knowledge has become increasingly necessary to accomplish manifold important tasks, including, for example, complying with the tax code * * * ."). As one commentator observed: "How do you live under a tax law as complicated as ours if you cannot fairly rely upon [tax lawyers]?" Ginsburg, *supra*, at 8.

b. Because some courts have characterized communications about the mechanical preparation of a tax return as non-legal, legal communications in the tax context may often serve dual purposes when those communications overlap with the mechanics of return preparation. But legal advice about taxes should not be at risk of disclosure every time a lawyer and client are also communicating about preparing the client's actual returns.

This case illustrates the need to protect tax lawyers' ability to engage in privileged communications with their clients, even when the law firm also assists in the preparation of tax returns. The Client here sought Petitioner's legal advice on complex expatriation tax issues that informed the ultimate preparation of the Client's tax returns. See generally JA 16-22. Petitioner's work for the Client presented "novel legal questions including how to value assets and investments, determining legal ownership of assets, and how to characterize various transactions for legal and tax reporting purposes." JA 19. That analysis informed the preparation of the Client's exit tax returns and individual tax returns. JA 19-20.

To provide this advice about compliance with complicated tax requirements, Petitioner, like any law firm, needed to engage in confidential and open communications with its client. See JA 22 ("Confidential and fulsome communications with my clients [are] critical to [] my ability to provide them with the best possible legal advice regarding their expatriation and tax planning strategies."). Limiting the privilege any time the lawyers also discussed tax preparation, would cripple the Client's ability to receive sound legal advice. See *United States* v. *Chen,* 99 F.3d 1495, 1498-1500 (9th Cir. 1996) ("People need lawyers to guide

them through thickets of complex government requirements * * * .").

3. The government below, and in opposing certiorari, resisted protection for dual-purpose communications in the tax context because of the "need to avoid creating an accountant-client privilege or extending special protections to attorneys who are performing non-legal work." Gov't Cert. Opp. at 14 (citing *Frederick*, 182 F.3d at 501). The Ninth Circuit too noted a concern that "courts should be careful to not accidentally create an accountant's privilege where none is supposed to exist." Pet. App. 11a & n.5. These concerns are wholly misplaced.

a. It is true that this Court has rejected the existence of a common-law accountant-client privilege. See *Couch* v. *United States,* 409 U.S. 322, 335-336 (1973); *United States* v. *Arthur Young & Co.*, 465 U.S. 805 (1984) (no work product privilege for accountant workpapers). But affording a privilege to an attorney's legal advice about taxes protects the attorney-client privilege; it would not create an accountant privilege.

Although in some cases a lawyer might be giving tax compliance advice that could also have been provided by an accountant, that does not mean the lawyer's advice is unprivileged. The attorney-client privilege requires a communication be made both for the purpose of obtaining "legal advice" and to obtain that advice "from a professional legal adviser *in his capacity as such*." *Kovel*, 296 F.2d at 921-22 (quoting 8 Wigmore, Evidence § 2292) (emphasis added). The latter requirement is central to the very reason the privilege attaches. The privilege attaches, in part, because a lawyer, and not an accountant (or other professional), is engaged in providing the confidential legal advice. Rice, *supra*, at § 7:5 ("Whether the work could have

been performed by a non-lawyer or the attorney, at times, took non-legal considerations into account in rendering assistance is not persuasive evidence that the privilege should not apply"); see also *United States* v. *Summe,* 208 F. Supp. 925, 928 (E.D. Ky. 1962) ("The fact that a nonlawyer could perform whatever service the communication is related to does not mean that the communication cannot be privileged.").

As this Court explained in *Arthur Young*, the relationship of a lawyer to a client when providing legal advice is a unique one. In *Arthur Young*, this Court distinguished between a "private attorney's role as the client's confidential advisor and advocate" and a certified accountant's "different role." *Arthur Young*, 465 U.S. at 817. In rejecting a work product privilege for accountants akin to the attorney work product privilege, the Court reasoned that an accountant serves, in part, a "'public watchdog' function" and that insulating the accountant's work from disclosure "would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations." *Id.* at 818. The attorney-client privilege, on the other hand, flows from the unique relationship between a client and her lawyer, who serves "as the client's confidential advisor and advocate," helping her navigate the complex legal requirements of modern society with specialized expertise. *Id.* at 817.

Accordingly, even as this Court declined to create an accountant-client privilege, it emphasized the enduring applicability of the attorney-client privilege in the tax context. See *id.* at 815-817 (rejecting work-product protection for independent accountants' papers but affirming that the "IRS summons power" is still "'subject to the traditional privileges and limitations'" (quoting *United States* v. *Euge*, 444 U.S. 707,

714 (1980)). The privilege would be significantly eroded if the fact that a non-lawyer could opine on similar subjects affects the confidentiality of attorney-client communications that are genuinely made "by a client to an attorney * * * in order to obtain legal assistance * * * ." *Fisher*, 425 U.S. at 403. And there would be no way to limit such erosion to the tax context: accountants are not the only professionals who may provide advice that an attorney might otherwise provide in a privileged communication.

b. The government's argument below is also incompatible with the judgment of Congress. After this Court held in *Couch* and *Arthur Young* that accountants were not entitled to any confidentiality privileges, Congress extended to accountants the equivalent of the attorney-client privilege in certain non-criminal circumstances. See 26 U.S.C. 7525(a)(1) (shielding communications between federally authorized tax practitioners and clients "to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney"). It would be passing strange to limit the federal common-law attorney-client privilege for fear of endorsing an accountant-client privilege, when Congress has moved in the other direction and created a tax preparer privilege, at least in some circumstances.

IV. The Significant Purpose Test Protects The Dual-Purpose Communications In This Case

Dual-purpose communications that the district court ordered produced in this case would merit protection under the significant purpose test.

Although this Court may leave application of the proper test to the district court on remand, an exami-

nation of the dual-purpose communications here illustrates that, had the district court followed the significant purpose test, it would have found these dual-purpose communications to be protected.[7]

For example, among the withheld documents that the court ordered produced without redactions were emails containing attorney recommendations regarding whether, why, and how the Client should file Reports of Foreign Bank and Financial Accounts (FBARs) to report certain assets. JA 196-200. 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, *FBAR Penalty Assessment and Enforcement*, 28 J. Int'l Tax'n 46, 52 (2017) (noting legal complexities associated with FBAR reporting standards); *El Paso Co.*, 682 F.2d at 539 ("[W]e would be reluctant to hold that a lawyer's analysis of the soft spots in a tax return * * * are not legal advice.") Under the district court's own analysis, such communications comprised "legal advice related to what must be

[7] As noted above, Statement & note 3, *supra*, the district court's order overruling the privilege claims did not separate the dual-purpose communications that it deemed had a predominate non-legal purpose from the communications between the Client and an accountant at Petitioner law firm where the court concluded that the accountant was acting in her role as accountant and not as an agent for the lawyers. See Pet. App. 51a. Because the district court's order addressed these two separate rationales for overruling the privilege claim together without indicating which documents were the subject of which rationale, the affected documents were grouped together on appeal under the label "Dual-Purpose Documents." Because of that grouping by the district court and on appeal, all of those documents are included in the Sealed Joint Appendix.

claimed on a tax return" and, at a minimum, "tax-related legal advice." Pet. App. 53a. If the district court had asked whether such emails served a significant legal purpose—whether or not that purpose predominated—the outcome would have changed.

Other dual-purpose communications that were ordered produced involved discussions of legal strategy for tax filings. For example, some documents included emails between the Client and Petitioner's attorneys regarding persuasive submissions to the IRS aimed at mitigating tax penalties. JA 137-144. These penalty mitigation submissions would ultimately be filed on an IRS form. But far from "simply * * * mak[ing] the correct mechanical calculations," *Cote*, 456 F.2d at 144, the submissions were akin to a legal brief. See JA 139 [attorney at Petitioner explaining purpose of filings to Client]. As one would expect in correspondence about a legal brief, the communications included, for example, the Client's line edits suggesting changes to the text of the filings, JA 142, and the attorney's explanation of legal strategy and assessment of the likelihood that certain arguments would succeed, JA 144. This was classic "tax-related legal advice" that served at least a significant legal purpose. Pet. App. 53a. But the court nevertheless found that the non-legal, tax form preparation purpose predominated and ordered the communications disclosed.

Other communications conveyed advice from lawyers as to how to interpret and apply tax laws, JA 123; discussed how to report and value complex cryptocurrency assets, JA 94-95, 240; and communicated questions about tax code requirements from the Client to Petitioner's attorneys, JA 80-81. Again, such communications involved significant legal advice, even if that advice was intertwined with tax form preparation.

See *United States* v. *(Under Seal)*, 748 F.2d 871, 876 (4th Cir. 1984) ("[C]ommunications underlying the client's request for research [about tax law] must be considered confidential or else the client will be discouraged from fully informing his lawyer of his business practices * * * ."); *United States* v. *Willis*, 565 F. Supp. 1186, 1203 (S.D. Iowa 1983) ("Even assuming *arguendo* that tax return preparation is 'primarily an accounting service,' the legal services involved in such a task—the research and interpretation of the tax laws and the application of that law to the particular client/taxpayer's situation" render it privileged); *United States* v. *Baucus*, 377 F. Supp. 468, 472-473 (D. Mont. 1974) ("[W]here the taxpayer either orally, by tax records, or by workpapers transmits raw data to an attorney for the attorney to use his discretion to determine what portion of such information to insert on the income tax return, it would be difficult to argue that the taxpayer is seeking anything other than legal advice from the attorney"); see also JA 26 ("[G]iven the complicated nature of [Client's] investments * * * there were many open questions concerning methods for valuing assets and investments, ownership of assets, and how to characterize various transactions for tax purposes. When these legal questions arose, it was often an attorney * * * who provided [Client] with advice.").

Another email ordered produced[8] walked the Client through the considerations involved in whether to

[8] For this email, as with several others, the district court allowed Petitioner to redact a portion of legal advice that was severable from the rest of the communication. But the district court ordered the rest of the email produced—even though it involved not only tax return preparation, but the conveyance of clear legal advice about whether to amend state income tax returns. The email

(footnote continued)

amend their state income tax returns. JA 134-136.[9] 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. Such a decision "as to whether the taxpayer[] should file an amended return undoubtedly involved legal considerations." *Cote*, 456 F.2d at 144; *Fed. Trade Comm'n* v. *TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980) (agreeing with *Cote*). These communications reflected 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. See Pet. App. 53a (agreeing

---

thus illustrates that, although sometimes discrete legal exchanges can be separated from the rest of a communication, such separation and redaction does not solve the general problem presented by dual-purpose communications.

[9] This email, as with others, was sent by an accountant. But, as noted (see Statement, *supra*) the district court expressly found that that accountant "performed many roles at [Petitioner]," including "collecting, organizing and synthesizing information that [attorney] would use in order to provide legal advice to [the Client]" and, when she assisted the attorneys in providing or communicating legal advice, her "involvement * * * [did] not change the application of the attorney-client privilege." Pet. App. 50a-51a; see also JA 24-27; JA 18-20; JA 33. Given the significant legal advice in this communication, it is clearly an instance where the accountant was assisting in the provision of legal advice. See *Judson*, 322 F.2d at 462 (documents prepared by accountant "at the attorney's request, in the course of an attorney-client relationship, for the purpose of advising and defending his clients" were privileged).

that legal advice related to "what strategies to pursue" is protected).

Examination of these dual-purpose communications makes clear they were sent and received not just for "tax preparation by attorneys in a vacuum," but "as an integral part of the total legal services lawyers provide their clients." *Willis*, 565 F. Supp. at 1203; JA 17.

In short, many of the communications ordered disclosed under the district court's single primary purpose analysis would have been protected under the significant purpose test.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Evan J. Davis
HOCHMAN SALKIN TOSCHER PEREZ P.C.
9100 Wilshire Blvd., Suite 900W
Beverly Hills, CA 90212
(310) 281-3200
Davis@taxlitigator.com

Daniel B. Levin
Counsel of Record
Jeffrey Y. Wu
J. Max Rosen
MUNGER, TOLLES & OLSON LLP
350 S. Grand Avenue
50th Floor
Los Angeles, CA 90071-3426
(213) 683-9135
Daniel.Levin@mto.com

Donald B. Verrilli, Jr.
Rachel G. Miller-Ziegler
Dahlia Mignouna
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001-5369
(202) 220-1100
Donald.Verrilli@mto.com

Counsel for Petitioner

November 16, 2022