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 OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often participates in proceedings to protect the attorney-client privilege. *See, e.g.*, *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981); *In re Proposed Formal Advisory Opinion No. 20-1* (Dec. 16, 2020).

WLF also regularly publishes, through its Legal Studies Division, articles and reports about continued attacks on the attorney-client privilege. *See, e.g.*, Thomas E. Spahn, *Court Foils Attempt by Plaintiffs' Lawyers to Broaden Crime-Fraud Exception to Attorney-Client Privilege*, WLF LEGAL OPINION LETTER (Jan. 15, 2016); *Special Report: Federal Erosion of Business Civil Liberties*, WLF (2008). WLF believes that protecting businesses' right to confidential communications with their counsel is essential to ensuring a free market.

INTRODUCTION

There are few things more important in our legal system than clients' ability to communicate with their counsel without fear of having those communications later disclosed in litigation. That is why, for over 500 years, the attorney-client privilege

[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, paid for the brief's preparation or submission. All parties consented to WLF's filing this brief.

has barred the forced disclosure of these communications.

The attorney-client privilege was first recognized in the 16th century. *See* A. Kenneth Pye, *Fundamentals of the Attorney-Client Privilege*, 15 Practical Lawyer 15, 16 (1969). "Originally, the privilege seemed to be based upon the honor of the attorney and belonged to the attorney, who could waive it." *Id.* That changed around the time of the Revolutionary War. The attorney-client privilege now "belongs solely to the client" who is the only one who may waive it. *Johnson v. 27th Ave. Caraf, Inc.*, 9 F.4th 1300, 1313 (11th Cir. 2021) (cleaned up). Giving the client, rather than the lawyer, the sole ability to waive the privilege advanced the new rationale for the attorney-client privilege. Rather than being based on an attorney's honor, it became grounded in the idea that a client must be protected "from the apprehension that his confidences might be betrayed." Pye, 15 Practical Lawyer at 16.

As this Court has explained, the attorney-client privilege helps the "administration of justice" by encouraging clients to seek the advice of counsel "free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). The importance of protecting attorney-client communications has grown over the past century. "In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite." *United States v. Grand Jury Investigation*, 401 F. Supp. 361, 364 (W.D. Pa. 1975)

(quotation omitted). That statement is even truer today than it was in 1975.

The attorney-client privilege is not limited to natural persons. When a corporation "seeks legal advice from an attorney" and "communicates information relating to the advice sought," that information is protected from disclosure unless the privilege is waived. *First Wisconsin Mortg. Tr. v. First Wisconsin Corp.*, 86 F.R.D. 160, 172 (E.D. Wis. 1980) (quoting *Radiant Burners, Inc. v. Am. Gas Assoc.*, 320 F.2d 314, 324 (7th Cir. 1963)).

The right to protect corporate communications with counsel through the attorney-client privilege is key in today's corporate environment. That is why dual-purpose communications should enjoy protections as robust as single-purpose communications. The Ninth Circuit's rule, however, ignores the reality that, in today's world, attorneys "serve in many roles." *Adair v. EQT Prod. Co.*, 285 F.R.D. 376, 380 (W.D. Va. 2012). These roles may include (1) "legal adviser"; (2) corporate officer; (3) "administrator"; and (4) corporate agent. Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 Fordham L. Rev. 955, 957-58 (2005). Indeed, few corporate communications with counsel are ever solely legal advice. Communications including legal advice may therefore serve overlapping purposes.

The Ninth Circuit's rule endangers the attorney-client privilege for corporate clients. Rather than ensure that corporations receive the same protections as natural persons, the Ninth Circuit's rule limits severely the scope of communications protected by the privilege. As this will have negative

consequences across the board, the Court should reverse and announce a rule that protects all communications that include legal advice, even if they include non-legal advice too.

STATEMENT

Petitioner is a law firm specializing in tax counseling. It advises Parent, which owns Company. Parent sought tax advice from Petitioner about its impending expatriation. The government began investigating Company about its tax returns and expatriation. As part of that investigation, the government subpoenaed Petitioner, Company, and two Company employees for documents relevant to the investigation. Petitioner and Company produced over 20,000 pages of documents. But, asserting privilege, they declined to produce other documents.

The government moved to compel production of the documents. The District Court granted the motion in part. It held that some communications must be disclosed under the crime-fraud exception to the attorney-client privilege. For the remaining documents, the District Court applied "the primary purpose" test. Under this test, "courts look at whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice." Pet. App. 4a (citing *In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007)). Applying that rule, the District Court held that many documents did not have the primary purpose of providing legal advice. As the District Court also rejected Petitioner's argument that the documents were covered by the work-product privilege, it ordered Petitioner to produce the documents.

The Ninth Circuit affirmed that holding. It considered four separate tests for dual-purpose communications. First, it rejected the government's argument that no dual-purpose communication is covered by the attorney-client privilege. Pet. App. 5a n.2. It then considered the "because-of" test. Under that test, a dual-purpose document is privileged "when it can be fairly said that the document was created because of anticipated litigation and would not have been created in substantially similar form but for the prospect of that litigation." Pet. App. 7a (quoting *In re Grand Jury Subpoena (Mark Torf/TorfEnv't Mgmt.*), 357 F.3d 900, 908 (9th Cir. 2004)).

In rejecting the because-of test, the Ninth Circuit held that it is better suited for the work-product context than the attorney-client context. Pet. App. 6a-9a. According to the Ninth Circuit, the purposes behind the work-product privilege are dissimilar to the purposes for the attorney-client privilege and therefore the because-of test is not a good fit for dual-purpose communications.

Next, the Ninth Circuit spurned Petitioner's alternative argument that, if it rejected the because-of test, it should adopt the "a-primary-purpose" test. *See* Pet. App. 10a-12a. Under this test, courts ask whether "obtaining or providing legal advice [was] a primary purpose of the communication, meaning one of the significant purposes of the communication?" *Id.* at 10a (quoting *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014)).

Finally, the court settled on the District Court's "the primary purpose test." Under this rule, dual-

purpose communications are protected by the attorney-client privilege only if *the* primary purpose of preparing the document was to receive legal advice. That holding brushed aside the effects of choosing "the primary purpose" test over the "a-primary-purpose" test. *See id.* at 11a-12a. This Court must now choose from one of those four options (or formulate a new one) for deciding when a dual-purpose communication is protected by the attorney-client privilege.

SUMMARY OF ARGUMENT

I.A. Over the past several decades, both market pressures and federal law have forced companies to implement robust internal controls. Thus, companies have leaned heavily on in-house counsel when conducting internal investigations. The Ninth Circuit's rule would have a chilling effect on the free exchange of information between in-house counsel and corporate executives. There is little incentive for in-house counsel to give legal advice if communications can later be disclosed during a government investigation or civil litigation. Because many internal communications have dual purposes, this disclosure is a real threat under the Ninth Circuit's rule.

B. Outside counsel complement in-house counsel for almost every American company. This includes conducting independent investigations and litigation. But the flow of information from corporations to outside counsel will be choked if this Court affirms. Companies will learn from this case and no longer ask outside counsel for advice that later

could be used as evidence in a criminal investigation or civil case.

II.A. The Seventh Circuit created a tax-specific rule for dealing with dual-purpose communications; they are never protected. That decision is poorly reasoned as it misunderstands the intersection of tax preparation and legal advice. It treats protecting dual-purpose communications as equivalent to creating an accountant privilege. But the two are not synonymous. This Court should soundly reject the Seventh Circuit's rule so that lower courts abandon this tax exceptionalism.

B. The Ninth Circuit's rule is a different type of tax exceptionalism. It rejected the D.C. Circuit's general rule for dual-purpose communications partly because this case arises in the tax context. But there is no reason that a dual-purpose communication should be treated differently in the tax context than it is in other contexts.

C. Lawyers sometimes think that their specialty is entitled to different legal rules than other practice areas. Whether it be patent lawyers, immigration lawyers, or tax lawyers, they believe in some form of exceptionalism. In recent years, however, the Court has soundly rejected courts of appeals' decisions that announce rules that apply in only one context. Many of these cases come from the Federal Circuit, which had tried to create special rules for patent cases. But the Court has not stopped there. The Court has also rejected tax exceptionalism. It should do so again.

ARGUMENT

I. AFFIRMING WOULD UNDERMINE THE LEGAL SYSTEM.

The Ninth Circuit erred by holding that *the* primary purpose of dual-purpose communications determines whether they are protected by the attorney-client privilege. The court's decision is not limited to the tax context and will undermine corporations' ability to obtain legal advice moving forward.

A. Affirming Would Cripple Corporate Compliance Programs.

"Good corporate citizens * * * ought not be placed in the dilemma of choosing between effective internal compliance and the liability risks attendant to full disclosure" of all materials uncovered in compliance programs. Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma Of Internal Compliance Programs*, 50 Vand. L. Rev. 1, 45 (1997). But the Ninth Circuit's test forces companies to make that very choice. *See Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) ("The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.").

Companies often conduct internal-compliance investigations when deciding what legal obligations, options, and potential liabilities they may have. But

these internal-compliance investigations also have some non-legal purposes. For example, a company may be deciding whether to pursue a business opportunity based on how well its staff can comply with regulations. As part of that process, in-house counsel may give legal advice about what the regulations require while also providing business advice on whether the company's staff can meet those obligations. This is just one type of internal compliance that in-house counsel undertake daily. The Ninth Circuit's approach would penalize companies that have effective internal-compliance policies by forcing them either to risk waiving attorney-client privilege or to forgo legal advice.

The goal of many corporate policies is to provide in-house attorneys with facts relevant to complying with corporate policies. In-house counsel then use those facts to decide whether a policy violation occurred. The information may also inform in-house counsel's business advice.

Legal advice is also often intertwined with internal investigations. Establishing facts is the starting point for all legal analysis. *See Upjohn*, 449 U.S. at 390-91. In-house counsel may provide advice about whether a policy violation also violates the law based on the facts learned during an internal investigation. Protecting communications that include facts that companies learn during internal investigations is key to in-house counsel's ability to properly conduct internal investigations. But if a dual-purpose communication includes these facts and

provides legal advice, it is not protected under the Ninth Circuit's rule.

Stripping the attorney-client privilege when corporate policy encourages employees to report legally significant facts to in-house lawyers would penalize companies that have effective compliance policies. Corporations would be waiving any attorney-client privilege they may have once they adopt corporate policies aimed at uncovering and deterring legal violations. That should not be the law.

Indeed, penalizing companies with compliance policies would conflict with many legal regimes and doctrines that encourage corporations to comply with the law. For example, in *Faragher v. City of Boca Raton*, this Court held that an employer has an affirmative defense to a hostile-work-environment claim where the employer has "provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense." 524 U.S. 775, 806 (1998). The Federal Sentencing Guidelines also reward internal-compliance programs and similar efforts to "promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law." U.S.S.G. § 8B2.1(a)(2). The Ninth Circuit's holding would transform these beneficial compliance policies from an asset into a liability.

Nothing stops the Ninth Circuit's reasoning from applying to dual-purpose communications made as part of a compliance investigation required by law. That is backwards. When the law requires a corporate investigation, communications with in-house

attorneys are necessary. And many of these communications have two purposes—complying with the law and obtaining legal advice. For example, some regulated entities have "[a] mechanism, such as a hotline, by which employees may report suspected instances of improper conduct." 15 C.F.R. § 1552.203-71(c). This helps the regulated entity assess its legal compliance.

The communications that flow from a call to the compliance hotline may have the primary purpose of investigating the alleged improper conduct. But they also have a significant purpose of providing legal advice. For example, in-house counsel might need to provide executives with legal advice on whether there is a duty to report the improper conduct. Under the Ninth Circuit's rule, if the primary purpose was investigating improper conduct, the dual-purpose communication could be disclosed during litigation.

Kellogg shows that this is not a theoretical concern. There, the district court required production of the dual-purpose communications because the "internal investigation was undertaken to comply with Department of Defense regulations that require defense contractors such as [Kellogg] to maintain compliance programs and conduct internal investigations." *Kellogg*, 756 F.3d at 758. Indeed, "the purpose of [Kellogg's] internal investigation was to comply with those regulatory requirements rather than to obtain or provide legal advice." *Id.* Luckily, the D.C. Circuit recognized the absurdity of the district court's holding and granted mandamus relief.

The Ninth Circuit's rule effectively invites companies to have lax compliance programs. Why

seriously investigate potential wrongdoing if it could cause your internal attorney-client communications to be disclosed during litigation? The answer is simple: Don't bother. Companies will conduct perfunctory investigations to satisfy compliance requirements. But they will not engage in the type of compliance monitoring that benefits companies and the public at large.

"[C]orporations have come to rely more upon internal specialists and inside counsel to assess high risks and make related business judgments." Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 Stan. L. Rev. 399, 439 (1985). Because of this change, the law should "encourag[e] corporations to hire and rely upon competent in-house counsel * * * to be alert to, and preemptively keep the corporation from engaging in, unlawful activity in the first place." Alice J. Guttler et al., *Do the Thompson and McNulty Memoranda Turn Corporate Counsel into Potted Plants?*, 244 N.J. Law. 18, 21 (Feb. 2007). Yet the Ninth Circuit's decision does the opposite; it discourages corporations from relying on in-house counsel for legal advice and related business judgment. This alone is reason enough to reverse.

B. The Ninth Circuit's Rule Would Limit Communications With Outside Counsel.

Although in-house counsel are central to corporate compliance programs, outside counsel are no less vital to a corporation's legal team. Even the largest corporations rely on outside counsel to handle some internal investigations.

Two examples prove the point. Earlier this year, several professional soccer players alleged rampant abusive behavior in women's professional soccer. Rather than have in-house counsel investigate the allegations, the United States Soccer Federation hired outside counsel to handle the investigation. *See generally* Sally Q. Yates, *Report of the Independent Investigation to the U.S. Soccer Federation Concerning Allegations of Abusive Behavior and Sexual Misconduct in Women's Professional Soccer*, King & Spalding (Oct. 3, 2022). Similarly, Temple recently began investigating a toxic workplace environment at the Hope Center. But again, rather than rely on in-house employment counsel, the university hired outside counsel to handle the investigation. *See* Colleen Flaherty, *The Hope Center's Revolving Door*, Inside Higher Ed (Apr. 14, 2022), https://bit.ly/3yxC4Mf.

Investigations by outside counsel provide some benefits over those performed by in-house counsel. First, there is less risk of a conflict of interest. A colleague may be less likely to find wrongdoing if it implicates a friend or co-worker. Second, outside counsel often have more experience dealing with issues that a company only rarely confronts. A company with few government contracts might want an investigator with greater government contracting experience. Third, outside counsel bring some credibility to investigations. When the public learns of an investigation, it is more likely to believe the results of an investigation by outside counsel than it is to believe the results of an investigation by in-house counsel.

But just like with in-house counsel, companies will stop seeking outside counsel's help if this Court affirms. Companies will worry that dual-purpose communications will be disclosed during a government investigation or litigation. So rather than obtain necessary legal advice and other services from outside counsel, companies may decide to look the other way and hope for the best. This is another reason for the Court to reverse.

C. Affirming Would Ignore Rule 1.

The Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. The Ninth Circuit's decision ensures that this does not happen. Rather than use rules easy to administer, the Ninth Circuit announced a rule that will create more litigation over whether dual-purpose communications are protected by the attorney-client privilege.

True, there will be litigation over whether a document is protected no matter the test. But that does not mean that all tests will result in equal amounts of litigation. The Ninth Circuit's rule will create far more litigation than the because-of test or the a-primary-purpose test. This is another reason to reverse.

The Ninth Circuit acknowledged that "[a] test that focuses on a primary purpose instead of the primary purpose would save courts the trouble of having to identify a predominate purpose among two (or more) potentially equal purposes." Pet. App. 10a-

11a. Many dual-purpose communications have nearly equal purposes, one of which is providing legal advice. Under the a-primary-purpose test, that is the end of the inquiry, and the communication is protected by the attorney-client privilege.

The same is true for the because-of test. A court need only look at a document and determine why it was created. If one of the main purposes was to provide legal advice, it is protected by the attorney-client privilege. In other words, it is a one-step process.

But, in the Ninth Circuit, deciding whether a dual-purpose communication had a significant purpose of providing legal advice just begins the inquiry. Courts must then decide whether that was the primary purpose or whether the primary purpose was something like providing business advice. In other words, finding out whether a significant purpose of a communication was providing legal advice starts the battle—not ends it.

Lengthy and costly litigation will inevitably follow. Most of the time, it is unclear what the primary purpose of a dual-purpose communication is. But that is what the Ninth Circuit's test requires. This conflicts with Rule 1's command that courts interpret the rules to promote the efficient administration of justice. The Court should follow Rule 1's command by reversing and adopting either the because-of test or the a-primary-purpose test.

II. THE COURT SHOULD NOT ADOPT A TAX-SPECIFIC RULE.

A. The Seventh Circuit Used Poor Reasoning To Create A Tax-Specific Rule For Dual-Purpose Communications.

In its opening brief before the Ninth Circuit, the government leaned heavily on *United States v. Frederick*, 182 F.3d 496 (7th Cir. 1999), to support its claim that dual-purpose communications related to tax preparation are never privileged. The court's analysis in *Frederick*, however, was flawed and this Court should reject that argument here.

This Court has rejected the idea of an accountant privilege. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 817-19 (1984). Allowing lawyers to provide privileged tax preparation services while not providing the same privilege to other tax preparers would be unfair both to taxpayers and non-attorney tax preparers. *See, e.g.*, *In re Grand Jury Investigation*, 842 F.2d 1223, 1224-25 (11th Cir. 1987). These propositions need not be reconsidered here.

The Seventh Circuit's *Frederick* decision, however, proceeds from these legal principles to the conclusion that all tax-related dual-purpose communications are not covered by the attorney-client privilege. But the latter does not flow naturally from the former.

It is possible to not create a backdoor accountant privilege while maintaining the attorney-

client privilege for dual-purpose communications. Any attorney who receives documents solely to prepare a tax return would be unable to assert privilege if the government subpoenas those documents during a criminal investigation.

The Seventh Circuit announced a blanket rule that dual-purpose documents can never be privileged. *Frederick*, 182 F.3d at 501. There are circumstances, however, where a dual-purpose communication is made mainly for giving or receiving legal advice; the tax-preparation purpose is minor. Yet that does not matter under the Seventh Circuit's rule. In its view, it is better to throw out the baby with the bath water than to carefully examine each communication to see if it was created because of litigation or if a primary purpose was to receive legal advice. The Seventh Circuit's rule thus sweeps too broadly.

B. The Ninth Circuit's Decision Is A Different Type Of Tax Exceptionalism.

The Ninth Circuit did not adopt the Seventh Circuit's extreme position. But that does not mean that the Ninth Circuit applied a neutral rule that applies in all contexts. Rather, it too applied a form of tax exceptionalism that the Court should reject.

In the last part of its opinion, the Ninth Circuit refused to join the District of Columbia Circuit's rule that legal advice need only be a significant purpose for the attorney-client privilege to cover the dual-purpose communication. Pet. App. 10a-12a. In rejecting the D.C. Circuit's holding, the Ninth Circuit relied on tax exceptionalism. It correctly noted that

"*Kellogg* dealt with the very specific context of corporate internal investigations." *Id.* at 11a. But then it embraced tax exceptionalism by saying that *Kellogg*'s "reasoning does not apply with equal force in the tax context." *Id.* (footnote omitted). This Court should also reject that view.

C. The Court Should Reject All Forms Of Tax Exceptionalism In The Privilege Context.

One decade ago, this Court made clear that tax exceptionalism is a dead letter. As the Court said, it is "not inclined to carve out an approach to administrative review good for tax law only." *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011). In other words, the same rules apply when considering an issue in the tax context as apply in the intellectual-property or products-liability context.

The Court in *Mayo* then emphasized this point. It saw "no reason why [the Court's] review of tax regulations should not be guided by agency expertise * * * to the same extent as [its] review of other regulations." *Mayo*, 562 U.S. at 56. Rejecting two prior decisions, the Court clarified that "[t]he principles underlying" judicial review in other areas "apply with full force in the tax context." *Id.*

At first, the government did not get the message. Shortly after *Mayo*, the United States challenged a decision that invalidated a Treasury Regulation governing final partnership administrative adjustments. The government argued that despite the Court's prior interpretation of an

Internal Revenue Code provision, the Court should still defer to a contrary Treasury Regulation. *See United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 486 (2012). The Court soundly rejected this tax-exceptionalism argument. It stayed true to *Mayo* and applied the same rules that govern other areas of law. *See id.* at 486-90.

"Taken together, these cases have given tax lawyers a fresh awareness" that they must be fluent in general legal doctrines. Kristin E. Hickman, *Unpacking the Force of Law*, 66 Vand. L. Rev. 465, 466 (2013). The tax lawyer may no longer rely on tax exceptionalism to bypass general legal rules. *See* Steve R. Johnson, *Preserving Fairness in Tax Administration in the* Mayo *Era*, 32 Va. Tax. Rev. 269, 279 (2012) (*Mayo* "disposed of tax exceptionalism.").

Yet that is what the Seventh Circuit did in *Frederick* and the Ninth Circuit did here. Both courts swept aside general legal principles simply because the cases arose in the tax context.

Of course, the Court has also rejected other forms of exceptionalism. For example, the Federal Circuit often crafts rules for patent litigation that differ from general legal principles. But this Court has likewise reversed those decisions and held that patent exceptionalism is also wrong. *See, e.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-92 (2006).

This Court should reject tax exceptionalism. If the Court adopts the Seventh Circuit's or Ninth Circuit's position, parties will have to discern whether a dual-purpose communication arises in the tax

context. True, this is normally a black-and-white question. But sometimes what constitutes a tax issue is a difficult question. The Court should not brush aside *Mayo* and other decisions to create tax-specific rules that conflict with rules that govern other areas of law.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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