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 UNITED STATES

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QUESTION PRESENTED

Whether the district court permissibly denied petitioner's general claim of attorney-client privilege over communications, related to the preparation of a tax return, that did not have obtaining legal advice as their primary purpose, while instructing that all legal advice contained in the communications be redacted.

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OPINIONS BELOW

The amended opinion of the court of appeals regarding dual-purpose communications (Pet. App. 1a-12a) is reported at 23 F.4th 1088. The original opinion of the court of appeals is reported at 13 F.4th 710. A memorandum opinion of the court of appeals (Pet. App. 13a-19a) regarding other privilege issues is sealed and unreported. The order of the district court granting in part and denying in part the government's motion to compel production (Pet. App. 23a-138a) is sealed and unpublished.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2021. The court of appeals denied a petition for rehearing and issued an amended published opinion on January 27, 2022 (Pet. App. 1a-12a). The petition for a writ of certiorari was filed on April 1, 2022, and granted on October 3, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Evidence 501 provides:

> Privilege in General
>
> The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

STATEMENT

After petitioner refused to produce some documents responsive to a grand jury's subpoena, the district court granted in part the government's motion to compel production and ordered the disclosure of some documents and portions of additional documents. Pet. App. 23a-138a. Petitioner then refused to comply with the court's order, and the court held petitioner in civil contempt. *Id.* at 20a-22a. The court of appeals affirmed. See *id.* at 1a-12a.

1. Petitioner is a law firm that both prepares tax forms for its clients and provides clients with tax advice. See Pet. App. 2a. A federal grand jury conducting a criminal investigation of one of petitioner's clients subpoenaed petitioner for the production of certain documents, which petitioner refused to produce. See *ibid.*

The client, an early promoter of bitcoin, expatriated from the United States in early 2014. Gov't C.A. Br. 3. The client retained petitioner in 2012 to provide advice

on the expatriation process. *Ibid.* The client also retained petitioner to prepare the client's 2014 tax return, which was filed in mid-2016, along with other tax filings. *Id.* at 4.

The grand jury subpoenas sought, among other things, records related to the preparation of tax returns and forms for the client. Gov't C.A. Br. 7. Petitioner withheld some documents, invoking the attorney-client privilege and the work-product privilege. Pet. App. 2a. The government moved in the United States District Court for the Central District of California to compel production of the withheld documents, which the district court, after *in camera* review of the disputed documents, granted in part. *Id.* at 2a, 23a-138a.

The district court recognized that "although communications that are only about tax return preparation are not covered by the attorney-client privilege, communications seeking legal advice about what to claim on tax returns or other tax-related legal advice may be privileged" when "the primary purpose of the communication was to obtain or provide such legal advice." Pet. App. 44a; see *id.* at 43a. The court then explained that it would consider advice regarding potentially unsettled accounting questions to be legal rather than accounting advice. *Id.* at 52a-53a. And it took the view that "the tax treatment of cryptocurrencies was an unsettled area of the law" at the relevant time, such that advice about the treatment of cryptocurrencies was legal advice subject to privilege. *Id.* at 53a.

Applying that framework, the district court permitted petitioner to withhold in full various documents, including a memorandum analyzing tax-related legal questions for the year of the client's expatriation and all related communications. Pet. App. 48a-52a. As

relevant here, the court ordered disclosure of 54 documents "where the primary or predominate purpose [of the documents] was about the procedural aspects of the preparation of [the client's] tax return" or where a certified public accountant "provided advice as an accountant" rather than as an agent assisting the attorneys in providing legal advice. *Id.* at 54a; see *id.* at 36a.

In so doing, the district court directed petitioner to redact the portions of the documents that "concern communications about tax-related legal advice," while ordering petitioner to disclose the portions that are "only about tax return preparation." Pet. App. 54a. The court also ordered the production of certain additional documents on the ground that the crime-fraud exception applied. *Id.* at 57a-78a.

Petitioner, however, continued to refuse to produce any of the documents, redacted or otherwise. Pet. App. 3a. The government moved to hold petitioner in civil contempt. See *id.* at 3a, 20a. The district court granted the motion. *Id.* at 20a-22a.

2. Petitioner appealed the contempt order and the court of appeals affirmed. Pet. App. 1a-12a; see *id.* at 1a, 11a n.5 (noting edit of opinion on rehearing).

The court of appeals emphasized that the attorney-client privilege protects confidential communications between attorneys and clients "which are made for the purpose of giving legal advice." Pet. App. 3a (citation omitted). The court observed, however, that communications can have more than one purpose, noting in particular that in the tax-return context a communication can address both "tax compliance considerations" (a non-legal purpose) and "advice on what to do if the [Internal Revenue Service (IRS)] challenged the deduction" (a potential legal purpose). *Id.* at 4a (citation

omitted). And, consistent with what it found to be the great weight of legal authority, it agreed with the district court that, in determining whether a communication that involves both legal and non-legal analyses is wholly protected by attorney-client privilege, courts should look to the communication's "primary purpose." *Id.* at 10a; see *id.* at 6a-10a.

The court of appeals acknowledged, but found it unnecessary to address, petitioner's argument that the primary-purpose test should be satisfied whenever providing legal advice was "*a* primary purpose" of the communication—*i.e.*, "one of the significant purposes of the communication." Pet. App. 10a (citation omitted). The court "s[aw] the merits of the reasoning in" *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), cert. denied, 574 U.S. 1122 (2015), which employed such an approach, insofar as it can "save courts the trouble of having to identify a predominate purpose among two (or more) potentially equal purposes." Pet. App. 10a-11a. But "the facts here [did not] require [the court] to reach the *Kellogg* question" because this was not a "truly close case[]," unlike those in which "the legal purpose is just as significant as the non-legal purpose." *Id.* at 11a-12a.

The court of appeals emphasized the distinct features of tax-preparation cases, which *Kellogg* was not, observing that "normal tax return preparation assistance—even coming from lawyers—is generally *not* privileged" and that "courts should be careful to not accidentally create an accountant's privilege where none is supposed to exist." Pet. App. 11a n.5. And it found that in this case, the district court "did not clearly err in finding that *the* predominate purpose of the

disputed communications was not to obtain legal advice." *Id.* at 12a.

In a separate memorandum opinion, the court of appeals rejected petitioner's remaining arguments. See Pet. App. 2a n.1, 13a-19a.

SUMMARY OF ARGUMENT

The lower courts correctly determined that the communications at issue in this case, which overwhelmingly involve client discussions with a nonlawyer accountant, were not entitled to the attorney-client privilege. Unlike the many other communications that the courts allowed petitioner to withhold, these sought tax-preparation advice that did not require a lawyer's expertise rather than legal advice protected by the privilege.

A. As this Court has repeatedly explained, privileges obstruct the search for truth and demand a compelling justification. The Court has accordingly declined to create an accountant-client privilege, specifically focusing on the importance—evident from the Tax Code itself—of disclosing materials related to tax-return preparation. And the Court has repeatedly emphasized the need to construe the attorney-client privilege narrowly to closely track the privilege's rationale of ensuring unfiltered legal advice and encouraging communications that would not have been made in its absence.

As the rejection of an accountant-client privilege illustrates, that rationale does not apply to tax-preparation advice that is typically performed by accountants and is not the special domain of lawyers. The common law of privilege does not accord special status to communications about tax-return preparation simply because a taxpayer can afford to hire an attorney to help prepare his tax returns. An attorney's advice about tax-

return preparation constitutes legal advice only to the extent that it is distinct from the services of an accountant, such as where an attorney gives advice about a novel or unsettled legal question related to the tax returns.

B. It is undisputed that the need to compare legal and non-legal purposes of a communication arises only in those portions of a document that cannot be segregated out as having solely one purpose or the other. As the overwhelming majority of courts have recognized, a portion with intertwined purposes should be withheld only if its primary or predominant purpose was seeking or obtaining legal advice.

That test identifies the purpose that drove the communication, which is the best measure of whether the communication might have been chilled without the attorney-client privilege. The test thus molds the scope of the privilege to its purpose of encouraging effective legal advice, while avoiding sweeping in communications predominantly about a nonlegal matter, like business development, accounting, or filling out a tax form.

Nearly every court has adopted the predominant-purpose test and commentators from John Henry Wigmore to Paul Rice have endorsed it. And the predominant-purpose approach has served as a valuable tool for weeding out aggressive assertions of the privilege that would broadly shield a company's sensitive communications—often those most relevant to the judicial process—from view.

C. Petitioner proposes replacing the privilege inquiry that has generally governed for decades with an entirely freestanding "significant purpose" test. In doing so, petitioner envisions expanding the attorney-client privilege to predominantly business or accounting

communications that have a secondary (or tertiary) legal purpose, as long as that purpose could, in isolation, be described as "significant." Petitioner would thereby unmoor the privilege from its rationales by shielding from the judicial process communications that are unlikely to depend on the privilege for their existence.

Petitioner plays up the clarity and predictability of such a rule, but it lacks even that virtue. "Significant" is an amorphous concept subject to widely varying interpretations, as the tests proposed by petitioner's own amici illustrate. It is demonstrably easier and more predictable (as well as more doctrinally sound) to assess the relative predominance of one purpose compared to another than to try to assign a purpose some abstract weight in isolation. And petitioner all but concedes that its approach would broadly shield tax-preparation materials and resurrect an accountant-client privilege, so long as a taxpayer can afford a tax lawyer.

Further undermining petitioner's assertion of predictability, adopting its test would be destabilizing, casting into doubt the extensive body of precedent courts have developed in addressing various dual-purpose scenarios. As authority for its approach, petitioner relies almost exclusively on the D.C. Circuit's decision in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (2014), cert. denied, 574 U.S. 1122 (2015). But that decision offered a "significant" purpose articulation as a way of applying the primary-purpose test when weighty legal purposes can be treated as necessarily predominant in certain contexts, such as internal investigations. *Kellogg* does not support the standalone, supersized version of attorney-client privilege that petitioner proposes. And even if petitioner's test would be easy to apply in some contexts, embracing it as the overarching

test would come at too high a price to the truth-seeking process.

D. In any event, the disputed communications at issue here were so far from legal advice that they would not be privileged under any reasonable interpretation of a significant-purpose test. The communications address tax-return preparation and reflect the seeking and obtaining of advice that could (and in nearly all instances in fact was) provided by an accountant, such as verifying which institutions sent the client an IRS form, requests for financial data for various entries on the tax returns, and the logistics of payment. The district court allowed petitioner to redact portions of the disputed documents that concern tax-related *legal* advice, including unsettled questions related to the tax returns themselves. The lower courts' determination as to the remaining portions should be affirmed.

ARGUMENT

THE LOWER COURTS CORRECTLY REJECTED PETITIONER'S ASSERTION OF PRIVILEGE OVER THE DISPUTED DOCUMENTS

The lower courts correctly determined that the documents and portions of documents now at issue were not subject to attorney-client privilege because their predominant purpose was not legal advice, but instead tax-return preparation of the sort that could be performed by an accountant. Indeed, in the vast majority of the communications at issue, the work *was* being performed by a non-lawyer accountant employed by petitioner, who later signed petitioner's tax returns. See J.A. 23-24, 26, 45-238; Gov't C.A. Br. 6. The district court appropriately declined to apply the privilege to those communications. Its decision followed the sensible, practical, and well-reasoned approach of the overwhelming

majority of legal authorities and lower courts. That approach should not be replaced by a novel and amorphous "significant purpose" test that departs from the privilege's justification of encouraging honest communication for purposes of obtaining legal advice from an attorney; would be largely untried, underdeveloped, and difficult to administer; and would be particularly pernicious in the tax-preparation context.

A. Advice About Tax-Return Preparation Is Not Privileged Unless It Requires An Attorney's Legal Expertise

The animating principle behind the attorney-client privilege is to ensure full and frank legal advice. The privilege does not apply to tax-preparation advice within the scope of an accountant's services, simply because the client chooses to hire a lawyer in addition or instead.

1. The narrow scope of federal common-law privilege distinguishes between unprivileged accounting services and privileged legal services

Rule 501 of the Federal Rules of Evidence provides that "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege." Fed. R. Evid. 501. Like all evidentiary rules, Rule 501 must be "construed * * * to the end of ascertaining the truth and securing a just determination." Fed. R. Evid. 102. And because "privileges," which deprive the factfinder of probative evidence, "obstruct the search for truth," *Branzburg* v. *Hayes*, 408 U.S. 665, 690 n.29 (1972), they are neither "lightly created" nor "expansively construed." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974); see, *e.g.*, *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 189 (1990) ("[A]ny [evidentiary] privilege must 'be strictly

construed.'") (quoting *Trammel* v. *United States*, 445 U.S. 40, 50 (1980)). As a result, this Court has refused to create an accountant-client privilege, and has ensured that the attorney-client privilege remains closely tied to its justifications.

a. As this Court has recognized, "privileges contravene the fundamental principle that the public has a right to every man's evidence." *University of Pennsylvania*, 493 U.S. at 189 (citation, ellipsis, and internal quotation marks omitted); see also *Nias* v. *Northern & E. Ry. Co.*, (1844) 48 Eng. Rep. 557 (Rolls) 558; 2 Keen 76, 80 (Lord Langdale M.R.) ("It seems strange to say that justice can be promoted by concealing the truth, by suppressing the knowledge of any fact or any statement of the parties which bears upon the question to be decided."); 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2192, at 70 (John T. McNaughton rev. 1961) (Wigmore). Accordingly, the "general rule" in evidence law "disfavor[s]" privileges. *Jaffee* v. *Redmond*, 518 U.S. 1, 9 (1996).

"Exceptions" from that rule are only "justified * * * by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Jaffee*, 518 U.S. at 9 (quoting *Trammel*, 445 U.S. at 50). That burden is hardest to carry in the context of a public investigation. "The suppression of truth is a grievous necessity at best, more especially when * * * the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme." *McMann* v. *SEC*, 87 F.2d 377, 378 (2d Cir.) (Hand, J.), cert. denied, 301 U.S. 684 (1937).

A critical public means for ascertaining truth, which can be especially impeded by new or expanded privileges, is grand-jury proceedings, where the "longstanding

principle that the public has a right to every man's evidence * * * is particularly applicable." *Branzburg*, 408 U.S. at 688 (citations, ellipsis, and internal quotation marks omitted). In criminal cases, "[t]he very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Nixon*, 418 U.S. at 709. "When the grand jury is performing its investigatory function into a general problem area[,] society's interest is best served by a thorough and extensive investigation," which requires "every available clue [to be] run down * * * to find if a crime has been committed." *Branzburg*, 408 U.S. at 701 (citations omitted).

b. In light of those considerations, this Court has squarely refused to create an exception to the every-man's evidence rule by creating privileges in the context of accountants. Specifically, the Court held in *Couch* v. *United States*, 409 U.S. 322 (1973), that "no confidential accountant-client privilege exists under federal law." *Id.* at 335. And the Court subsequently likewise rejected "a self-styled work-product privilege" for accountants as "misplaced" in "light of *Couch*" and in "conflict[] with what [it] see[s] as the clear intent of Congress." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 817 (1984).

In doing so, the Court focused with particularity on the context of tax preparation and criminal investigation of tax crimes. As the Court recognized, "[o]ur complex * * * system of federal taxation[] rel[ies] * * * upon self-assessment and reporting," and so "demands that all taxpayers be forthright in the disclosure of relevant information to the taxing authorities" to ensure that "our national tax burden [is] fairly and equitably distributed." *Arthur Young*, 465 U.S. at 815-816.

Congress's disclosure mandate is codified at 26 U.S.C. 7602, which authorizes the IRS to, *inter alia*, "examine any * * * data which may be relevant or material" to determining or collecting internal-revenue taxes. 26 U.S.C. 7602(a)(1). Congress itself has therefore made a policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry—including obtaining workpapers a client and his accountant prepared in order to assess whether to file an amended tax return—to help the IRS determine, among other things, whether a taxpayer has "stretched a particular tax concept beyond what is allowed." *Arthur Young*, 465 U.S. at 815. And courts should not limit that authority "absent unambiguous directions from Congress." *Id.* at 816 (citation omitted).

In addition, when a client provides information to an accountant or other tax preparer, he does so knowing that "mandatory disclosure of much of the information therein is required in an income tax return." *Couch*, 409 U.S. at 335. Furthermore, "[w]hat information is not disclosed is largely in the accountant's discretion, not [the client's]." *Ibid.* A tax preparer's willful failure to disclose a "material matter" on a tax return could subject the preparer to criminal liability. See 26 U.S.C. 7206(1) and (2). Accordingly, there "can be little expectation of privacy" in communications with an accountant for purposes of tax-return preparation. *Couch*, 409 U.S. at 335. And the Court has viewed an accountant-client privilege as especially unjustified "where records relevant to income tax returns are involved in a criminal investigation or prosecution." *Ibid.*

c. The Court has also ensured that the longstanding attorney-client privilege stays moored to its foundational justifications. Even where the common law has

already recognized a privilege, it does not treat that privilege as a "large and fundamental principle[], worthy of pursuit into the remotest analogies." Wigmore § 2192, at 73. Instead, an existing privilege must be "recognized only within the narrowest limits required by principle" because "[e]very step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice." *Ibid.*

Like other evidentiary privileges, the attorney-client privilege "stands * * * as 'an obstacle to the investigation of the truth,'" and, for that reason, "'[i]t ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *In re Horowitz*, 482 F.2d 72, 81 (2d Cir.) (Friendly, J.) (quoting Wigmore § 2291, at 554), cert. denied, 414 U.S. 867 (1973). In light of those considerations, this Court has recognized that the attorney-client privilege applies only where "necessary to achieve its purpose." *United States* v. *Zolin*, 491 U.S. 554, 562 (1989) (quoting *Fisher* v. *United States*, 425 U.S. 391, 403 (1976)).

The animating principle of the attorney-client privilege is to "encourage[] clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 108 (2009) (citing *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)); see Wigmore § 2285, at 527; *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888). The privilege thus protects the communications between an attorney and client that are "necessary to obtain informed legal advice." *Fisher*, 425 U.S. at 403.

Those are limited to "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher*, 425 U.S. at 403. Communications with

an "agent[] of the attorney" are privileged only to the extent that the communication would otherwise be privileged and the agent's participation in the communication is sufficiently "important to the legal service being rendered." 1 Paul R. Rice et al., *Attorney-Client Privilege in the United States* § 3:3, at 161-162 (issued in Dec. 2021, ed. 2021-2022) (Rice); see, *e.g.*, *United States* v. *Cote*, 456 F.2d 142, 144 (8th Cir. 1972) (finding privileged communications with an accountant whose assistance "preceded the [lawyer's legal] advice" and was "an integral part" of it).

2. A lawyer's tax-preparation advice is privileged only to the extent that it is distinct from the services of an accountant

Although the work of tax lawyers extends well beyond what can be performed by an accountant, see Samuel Olchyk, *Interview with Martin D. Ginsburg, Professor of Law, Georgetown University Law Center*, 12 ABA Section of Taxation Newsletter 6 (Samuel Olchyk & Christopher H. Hanna eds., Fall 1992), much tax-preparation work involves advice that is not the special domain of lawyers, but is instead routinely performed by accountants, Rice § 7:11, at 1395-1396. While "the preparation of a tax return requires some knowledge of the law, and the manner in which a tax return is prepared can be viewed as an implicit interpretation of that law," *In re Grand Jury Investigation*, 842 F.2d 1223, 1225 (11th Cir. 1987) (*Schroeder*), that work is typically done by self-filers or accountants, not attorneys. Tax-return preparation advice that an accountant could give is therefore not legal advice for purposes of the attorney-client privilege, even when performed by an attorney.

a. While "[e]ach entry in a tax return is an interpretation of some provision of the Code, the regulations, or case law," Robert S. Steinberg, *Where Tax Accounting Ends and Tax Law Begins*, 89 Prac. Tax Strategies 244, 244 (Dec. 2012), an accountant's work product and communications on those issues are not privileged, see *Arthur Young*, 465 U.S. at 817; *Couch*, 409 U.S. at 335. Those same materials do not become privileged—*i.e.*, do not become the sort of "legal advice" that the attorney-client privilege protects—simply because they are provided by a lawyer.

Membership in the bar is unnecessary to provide such advice, and non-lawyer accountants regularly do so. Thus, unlike other aspects of tax practice, "courts generally have considered tax return preparation to be an accounting service." Rice § 7:11, at 1395-1396. And a "client may not 'buy' a privilege by retaining an attorney to do something that a non-lawyer could do just as well." *United States* v. *Under Seal (In re Grand Jury Subpoena)*, 204 F.3d 516, 523 (4th Cir. 2000) (citation omitted); see *Burden-Meeks* v. *Welch*, 319 F.3d 897, 899 (7th Cir. 2003) ("Hiring lawyers to do consultants' work does not bring a privilege into play."); *United States* v. *Hirsch (In re Grand Jury Subpoena)*, 803 F.2d 493, 496 (9th Cir. 1986) ("The privilege does not permit an attorney to conduct his client's business affairs in secret."), corrected on other grounds, 817 F.2d 64 (9th Cir. 1987).

A bar card is a license to provide specialized legal services—not a license to shield accounting services from the judicial process's truth-seeking function. American courts long ago abandoned the original view of the attorney-client privilege as based on the "honor of the barrister." Charles T. McCormick, *Handbook of the Law of Evidence* § 91, at 181 (1954) (McCormick).

The basis for the attorney-client privilege is not to give special standing to those who hold a bar membership, but instead to encourage communications seeking or obtaining legal advice; for that reason, a statement is "not privileged" where "one consults an attorney not as a lawyer but as a friend or as a business adviser or negotiator, or where the communication is to the attorney acting as a 'mere scrivener' or as an attesting witness to a will or deed, or as an executor or as agent." *Id.* at 184-185 (footnotes omitted); see Rice § 3:3, at 140-141 ("For the privilege to exist, the lawyer must not only be functioning as an advisor, but the advice given must be predominantly legal * * * in nature.").

Likewise, "[t]here is no magic in a law license that would prevent a lawyer from being required to testify to acts" akin to those performed by other professionals, like non-lawyer tax preparers. *Pollock* v. *United States*, 202 F.2d 281, 286 (5th Cir.), cert. denied, 345 U.S. 993 (1953). Among other things, "making the privilege available to those taxpayers who can afford the assistance of a lawyer might well engender resentment on the part of those who must make do with supermarket tax preparers" (assuming that they can even afford to hire any tax preparer at all). 24 Charles Alan Wright & Kenneth W. Graham, *Federal Practice and Procedure* § 5478, at 218-219 (1986) (*Federal Practice and Procedure*). And it could create a perception that "the privilege was being used to conceal massive 'tax avoidance' by well-heeled taxpayers," or that courts are "giv[ing] their professional brethren a competitive advantage over others who can perform the same service." *Ibid.*

The lower courts have thus repeatedly and consistently recognized that a "taxpayer should not be able to invoke a privilege simply because he hires an attorney

to prepare his tax returns." *Schroeder*, 842 F.2d at 1225; see, *e.g.*, *id.* at 1224-1225 (collecting cases); *United States* v. *Frederick*, 182 F.3d 496, 500 (7th Cir. 1999) (refusing to "reward lawyers for doing nonlawyers' work, and create a privileged position for lawyers in competition with other tax preparers"), cert. denied, 528 U.S. 1154 (2000); *United States* v. *Davis*, 636 F.2d 1028, 1043 (5th Cir. Unit A 1981) (declining to extend privilege to tax-preparation communications because, "although preparation of tax returns by itself may require some knowledge of the law, it is primarily an accounting service"), cert. denied, 454 U.S. 862 (1981); *United States* v. *Gurtner*, 474 F.2d 297, 299 (9th Cir. 1973); *Canaday* v. *United States*, 354 F.2d 849, 857 (8th Cir. 1966); see also, *e.g.*, 1 David M. Greenwald & Michele L. Slachetka, *Testimonial Privileges* § 1:53, at 220-221 (issued June 2021) (*Testimonial Privileges*) ("Preparation of tax returns, or other nonlegal activities such as auditing financial records and preparing financial statements, by attorneys or attorney-accountants has generally been treated as not privileged.").

b. Lower courts' treatment of tax-return preparation as an accounting service even when performed by attorneys is consistent with Congress's actions in the area. As an initial matter, "[t]he refusal to permit lawyers to cover their clients with the cloak of privilege when they are retained to prepare tax returns seems justified" in part because "Congress has consistently refused to give the legal profession a monopoly in the rendering of this service." *Federal Practice and Procedure* § 5478, at 218; see, *e.g.*, 26 U.S.C. 6694, 6695, 7701(a)(36); 26 U.S.C. 6713 (2018 & Supp. II 2020).

Even more tellingly, Congress has extended a privilege of confidentiality to accountants and tax preparers,

but that privilege applies only when they are participating in certain ways in the practice of law and not when they are simply preparing tax returns. Specifically, under 26 U.S.C. 7525, "[w]ith respect to tax advice," the "same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney * * * also apply to a communication between a taxpayer and any federally authorized tax practitioner," 26 U.S.C. 7525(a)(1)—but only in the context of either a "noncriminal tax matter before the Internal Revenue Service" or a "noncriminal tax proceeding in Federal court brought by or against the United States," 26 U.S.C. 7525(a)(2).

Section 7525 specifically defines the term "tax advice" to include only matters "within the scope of the individual's authority" under 31 U.S.C. 330. 26 U.S.C. 7525(a)(3)(B); see 26 U.S.C. 7525(a)(3)(A). In Section 330, Congress has given tax practitioners, including certified public accountants, authority to represent taxpayers in civil matters before the IRS and in federal courts, thereby permitting "the limited practice of law" by non-attorneys in those forums. Rice § 3:22, at 252. Section 330 does not, however, cover the preceding tax-return preparation process. See 31 U.S.C. 330; *Loving* v. *IRS*, 742 F.3d 1013, 1015, 1018 (D.C. Cir. 2014) (Kavanaugh, J.) (holding that Section 330 does not give the IRS authority to regulate tax-return preparers).

Indeed, in enacting Section 7525, which extended a privilege to accountants in certain contexts "to the extent" it would apply to attorneys, Congress relied on the settled understanding that "information disclosed to an attorney for the purpose of preparing a tax return is not privileged under present law," and so "would not be privileged under the provision whether it was disclosed

to an attorney, certified public accountant, enrolled agent or enrolled actuary." H.R. Conf. Rep. No. 599, 105th Cong., 2d Sess. 268-269 (1998); accord S. Rep. No. 174, 105th Cong., 2d Sess. 70 (1998). That understanding illustrates Congress's expectation about the line between accounting practice and legal practice.

This Court has been particularly "reluctant" to create a privilege where "Congress has considered the relevant competing concerns but has not provided the privilege itself." *University of Pennsylvania*, 493 U.S. at 189. Doing so would be especially unwarranted here because it would hamper investigations into potential tax evasion that Congress was careful to protect. Even as Congress has provided a statutory privilege, it has limited that privilege to "noncriminal" proceedings, and has excluded communications related to "any tax shelter," expansively defined. 26 U.S.C. 7525(a)(2) and (b)(2); see 26 U.S.C. 6662(d)(2)(C)(ii) (defining a "'tax shelter'" as an entity, plan, or arrangement that has a significant purpose "the avoidance or evasion of Federal income tax").

c. Although core tax-return preparation advice is not subject to the attorney-client privilege, legal questions beyond the expertise of an accountant can arise even in the tax-return context. Communications about such questions constitute legal advice that (if other criteria are satisfied) are subject to the privilege.

In particular, relatively novel or especially complicated questions of law would be the domain of a lawyer, not an accountant. In this case, for example, the district court took the view that the tax treatment of cryptocurrency was an unsettled area of law at the relevant time; given that determination, it concluded that communications with attorneys about how to report cryptocurren-

cies fell on the legal rather than accounting side of the line. See Pet. App. 52a-53a.

3. Petitioner's efforts to classify tax-preparation advice as legal are unsound

Petitioner contends (Br. 31) that the Court should not "adopt[] a less protective privilege rule for tax cases" given the complexity of "[m]odern tax law." But treating tax-return preparation as an accounting service, rather than a legal one, does not reflect some sort of tax exceptionalism. Even petitioner acknowledges that "specific issues unique to particular subject areas or contexts can * * * inform the application" of a privilege test. Br. 31 n.6 (emphasis omitted). This is one of them.

Petitioner emphasizes (Br. 34) the need in this case to protect the client's ability to seek "legal advice on complex expatriation tax issues," but the district court agreed that advice related to expatriation, including the client's estimated exit tax, was legal in nature and warranted protection. Pet. App. 49a, 51a-52a. To the extent that petitioner means to suggest (Br. 34) that obtaining tax-related legal advice about expatriation shields *subsequent* communications about tax returns, on the theory that the information provided to the IRS in the returns reflects steps taken in reliance on legal advice, that stretches the scope of the privilege's protection beyond recognition. Although a client may obtain legal advice in deciding what transactions to undertake, that does not shield the facts of the subsequent transactions, or any related business and accounting communications, from disclosure.

Petitioner effectively seeks (Br. 35) its own form of tax exceptionalism when it contends that even though the advice "could also have been provided by an

accountant," that "does not mean the lawyer's [provision of that] advice is unprivileged." As discussed above, that is not the law.[1] Petitioner's assertion (Br. 37) that the Court should not "fear" defining the attorney-client privilege in a way that "endors[es] an accountant-client privilege" is inconsistent with *Couch* and rests on the unsound premise that Congress itself "created a tax preparer privilege" in Section 7525. Congress in fact intended and did precisely the opposite in Section 7525, which reflects and amplifies the dichotomy between law (such as practicing before the IRS) and accounting (such as tax preparation). See pp. 18-20, *supra*.

B. The Longstanding Primary-Purpose Test For Dual-Purpose Attorney Communications Is Inherently Sound

The line between accounting and legal advice cannot readily be evaded simply by mixing a legal question or answer, even a "significant" one, into a communication that would otherwise not be privileged if sent solely to a non-lawyer accountant. Instead, the overwhelming majority of lower courts and other legal authorities have advocated and applied a test under which nonsegregable portions of a communication become legal advice only if their "primary" or "predominant" purpose was seeking legal advice. That test, which closely tracks the rationale for the privilege, is particularly apt in the tax-preparation context. And where, as here, a

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[1] Petitioner relies on the Rice treatise for the proposition that the fact that "the work could have been performed by a non-lawyer" is "not persuasive evidence that the privilege should not apply," Br. 36 (quoting Rice § 7:5, at 1339-1340), but that passage addresses "[t]he test to determine which *portions* of the communication [with an attorney] are privileged" where "the primary purpose of [a] communication is legal advice," Rice § 7:5, at 1336, 1339 (emphasis added).

court finds that "*the* predominant purpose" of a dual-purpose communication is nonlegal, Pet. App. 12a, a court can order the production of the documents without trying to assign an abstract weight to the legal purpose in isolation.

1. It is undisputed that the purpose inquiry should be conducted as to each segregable portion of a communication

"Generally when a communication contains both legal and nonlegal aspects, the privilege applies only to those parts of the communication that address legal matters," as long as the materials are "sufficiently separate" to "enable the effective redaction." *Testimonial Privileges* § 1:50, at 213-214; see, *e.g.*, *United States* v. *Ivers*, 967 F.3d 709, 717 (8th Cir. 2020) (explaining that the court will "segregate privileged and non-privileged communications in particular conversations or documents"), cert. denied, 141 S. Ct. 2727 (2021).

Thus, in assessing whether the privilege applies, most courts "grant the privilege's protection to those portions of particular communications [seeking or providing legal advice] that can be segregated according to purpose," even if the communication viewed in its entirety would not be considered legal. Rice § 7:9, at 1374; see *id.* § 7:9, at 1374 n.1 (citing cases). For example, when considering a memorandum that has four paragraphs of business advice and one paragraph of legal analysis, a court would typically order the business advice produced and the legal analysis redacted, rather than assessing whether the overall purpose of the document as a whole is business or legal.

Segregating portions of the communication is the approach most "consistent with the rationale of the privilege" because, where possible, it protects legal advice

while allowing production of non-legal content. Rice § 7.9, at 1375-1376. And it was the undisputed approach of the district court here. See Pet. App. 54a; Pet. Br. 22.

2. "Reason and experience" support treating as privileged portions of a communication with intertwined legal and non-legal purposes only when the legal purpose is predominant

The only question here is the approach that courts should take to a portion of a communication as to which segregation is not possible, such as an e-mail about contract negotiations that includes both corporate coworkers and in-house counsel. The vast majority of courts "agree[]" that the attorney-client privilege "applies only if the *primary* or *predominant purpose*" of the communication "is to seek legal advice or assistance." Rice § 7:6, at 1341-1342; see Restatement (Third) of the Law Governing Lawyers § 72 cmt. c (2000) (Restatement) (privilege applies to communications "for the purpose of obtaining legal assistance and not predominantly for another purpose"); see also Rice § 7:6, at 1341 (noting that a few courts have imposed a more demanding "sole[]"-purpose standard). The "reason and experience" that guide federal courts in the development of the common law of privilege, Fed. R. Evid. 501, strongly support that primary-purpose approach.

a. Reason shows that privileging communications with a primarily business purpose is unnecessary to promote attorney-client communications

As discussed above, the attorney-client privilege is intended to encourage clients to provide counsel with "full and frank" disclosures so that the resulting legal advice is accurate and helpful, "thereby promot[ing]

broader public interests in the observance of law and administration of justice." *Upjohn Co.*, 449 U.S. at 389. The privilege is not intended to encourage clients to seek business or accounting advice from lawyers.

i. The logic of the privilege is that without it, "[t]he tendency of the client in giving his story to his counsel" when seeking legal advice would be "to omit all that [the client] suspects will make against him." McCormick § 91, at 181. In that way, the privilege protects communications that "would very likely not have been uttered at all, absent the privilege's promise of confidentiality"—and applying the privilege does not seriously "obstruct the search for truth" if the communication would not have existed without the privilege. Rice § 2:3, at 85-86.

The calculus is different for communications primarily seeking business, accounting, or other assistance, which are unlikely to be chilled merely because they are subject to disclosure. Individuals ask consultants for business advice and accountants for tax-return preparation advice without the privilege. Those contexts do not raise the particular risk that the client will be inclined to omit "possibl[y] unfavorable facts." McCormick § 91, at 182. Thus, where those purposes, which are less likely to be chilled, are predominant, the privilege is not necessary for the communication to be made, and the cost of eliminating potentially critical information from the truth-finding process need not be incurred.

For instance, corporate employees' requests for feedback on a potential product design, discussions of negotiation or persuasion strategies towards a business partner, or proposals about supply-chain issues will necessarily occur irrespective of whether the employees include a lawyer on the e-mail for "any legal advice"

about the matter under discussion. Businesses must do their business even if they cannot consult a lawyer. Indeed, many companies, and most small businesses, would lack the resources even to hire a lawyer for ordinary business-focused matters. Neither the nature nor the necessity of the communication changes simply because it is made by a large corporation with the luxury of discretionarily including in-house or other counsel or by a wealthy individual with lawyers as well as an accountant.

ii. By definition, the primary or predominant purpose is the one that is driving the relevant portion of the communication, and it is thus the best measure of whether that particular communication would have been made absent the privilege. See Restatement § 72 cmt. c (explaining that the "limitation" that the privilege does not reach communications made "predominantly for [a nonlegal] purpose" "follows from the objective of the privilege"); 1 Edward J. Imwinkelried, *The New Wigmore: A Treatise on Evidence* § 6.11.2, at 1250 (Richard D. Friedman ed., 4th ed. 2022) (*The New Wigmore*) (explaining that if the legal "motivation was paramount in the speaker's mind" the speaker might have stayed silent absent the privilege); see also *id.* at 1246-1249 (explaining that, in light of the "complex[ity]" of human motivation, the "[p]redominant [m]otivation" test, rather than the "sole motivation" test, best identifies communications that likely would be chilled without the privilege). The predominant purpose of that portion of the communication is therefore the best measure of whether the privilege should be applied.

"The purpose of the privilege requires no broader rule." *Fisher*, 425 U.S. at 404. While petitioner asserts (Br. 25) that the primary-purpose approach will chill

clients from raising even sensitive legal considerations in the context of business discussions, the threshold steps of segregation and redaction mean that only the *portions* of the document that have a predominantly nonlegal purpose are subject to disclosure. At most, clients will be discouraged from "intertwining" a request for legal advice within a single portion of the communication. But "the intertwining" of legal and nonlegal requests by a client is often "the product of choice, rather than need." Rice § 7:3, at 1326-1328 (emphasis omitted). It is not "a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth'" that can justify extending the privilege. *Jaffee*, 518 U.S. at 9 (quoting *Trammel*, 445 U.S. at 50).

In addition, the vast majority of States rely on a predominant-purpose test, see pp. 29-30, *infra*, meaning that communications with a secondary legal purpose are already subject to disclosure in state proceedings and in diversity cases (as well as other cases where state law supplies the rule of decision) in federal court. Fed. R. Evid. 501. At bottom, petitioner cannot logically establish a "discernible chill," *Mohawk Indus.*, 558 U.S. at 110, on a client's willingness to speak freely on predominantly business or accounting topics that also have a subsidiary legal issue, when any predominantly *legal* portions can be withheld and the predominantly *nonlegal* portions are already subject to disclosure in some proceedings. Cf. *Nixon*, 418 U.S. at 712 ("[W]e cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."). And where the purpose of "encouraging

clients to speak fully with their lawyers * * * ends, so too does the protection of the privilege." *Wachtel* v. *Health Net, Inc.*, 482 F.3d 225, 231 (3d Cir. 2007) (citation omitted).

b. Experience demonstrates the practicality and administrability of the primary-purpose test

Experience bears out what reason dictates. Nearly every court has adopted the primary- or predominant-purpose test. And their application of that approach demonstrates its importance in weeding out overaggressive assertions of the attorney-client privilege that threaten to obscure the judicial system's search for truth.

i. Eighty years ago, the foundational Wigmore treatise made clear that, for the attorney-client privilege to attach, "[t]he consultation must have in view *primarily* the attorney's knowledge or skill in the law upon some aspect of the affair submitted, and not primarily some other class of knowledge or skill which the attorney happens to possess." John Henry Wigmore, *Wigmore's Code of the Rules of Evidence in Trials at Law* § 2414 (3d ed. 1942) (emphasis altered). The Restatement reflects that same rule. Restatement § 72 cmt. c (explaining that the privilege applies to communications "for the purpose of obtaining legal assistance and not predominantly for another purpose"); see *id.* § 68.

Modern commentators have likewise described the rule that way. See, *e.g.*, Rice § 2:1, at 59 (explaining that the application of the privilege requires "legal advice or assistance * * * as the primary purpose of the communication") (emphasis omitted); 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2017, at 432 (3d ed. 2010) (privilege applies to communications "for the purpose of securing *primarily* either (i) an opinion on

law or (ii) legal services or (iii) assistance in some legal proceeding") (emphasis added; citation omitted); *The New Wigmore* § 6.11.2, at 1247-1248, 1254 (describing as the "prevailing view" adopted by "most courts" that motivation of obtaining legal advice must be "the principal, primary, dominant, or predominant reason for speaking") (footnotes omitted).

The vast majority of state courts to consider the question have adopted a predominant- or primary-purpose approach. See, *e.g.*, *Buckley, LLP* v. *Series 1 of Oxford Ins. Co., NC, LLC*, 876 S.E.2d 248, 249 (N.C. 2022) (per curiam) (explaining that where legal and non-legal advice is "intertwined," courts must consider "whether the primary purpose of the communication was to seek or provide legal advice") (citation and internal quotation marks omitted); *Thompson* v. *Polaris, Inc. (In re Polaris, Inc.)*, 967 N.W.2d 397, 407-408 & n.1 (Minn. 2021) (agreeing with "the overwhelming majority of state courts that have adopted the predominant purpose test" to "conclude that legal advice must be *the* primary purpose of the communication"); *Harrington* v. *Freedom of Info. Comm'n*, 144 A.3d 405, 416 (Conn. 2016) (citing the "broad consensus" that where a legal and non-legal purposes are inextricably intertwined, the legal purpose must "'outweigh[]'" or "'predominate'" over the nonlegal purpose) (citations omitted); *Spectrum Sys. Int'l Corp.* v. *Chemical Bank*, 581 N.E.2d 1055, 1060 (N.Y. 1991) (requiring the communication to "be primarily or predominantly of a legal character"); *In re Appraisal of Dole Food Co.*, 114 A.3d 541, 561 (Del. Ch. 2014) ("When information contains both legal and business aspects, it will be considered privileged only if the legal aspects predominate.") (citation and internal quotation marks omitted). But see, *e.g.*,

Moore v. *United States*, No. 19-CF-687, 2022 WL 16985015, at *2, *15-*16 (D.C. Ct. App. Nov. 17, 2022) (applying "significant purpose" test); *In re Fairway Methanol LLC*, 515 S.W.3d 480, 489 (Tex. Ct. App. 2017) (holding that Texas law "does not require that the primary purpose of the communication be to facilitate the rendition of legal services") (emphasis omitted).

Similarly, as a matter of federal common law, see Fed. R. Evid. 501, the courts of appeals to address the question have generally adopted the primary-purpose approach. The Second Circuit, for example, has explained that, when a communication involves both legal and non-legal matters, it "consider[s] whether the predominant purpose of the communication is to render or solicit legal advice." *Pritchard* v. *County of Erie (In re County of Erie)*, 473 F.3d 413, 420 (2007). Several other courts of appeals have adopted the same rule. See *Taylor Lohmeyer Law Firm P.L.L.C.* v. *United States*, 957 F.3d 505, 510 (5th Cir. 2020) (explaining that the privilege applies to communications "made with the client's primary purpose having been securing either a legal opinion or legal services, or assistance in some legal proceeding") (citation and internal quotation marks omitted), cert. denied, 142 S. Ct. 87 (2021); *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 805 (Fed. Cir. 2000) (deeming a communication privileged "as long as" it was made "'for the purpose of securing primarily legal opinion, or legal services, or assistance in a legal proceeding'"); *Better Gov't Bureau, Inc.* v. *McGraw (In re Allen)*, 106 F.3d 582, 602 n.10 (4th Cir. 1997) (acknowledging that "attorney-created documents whose primary purpose was business negotiations rather than legal advice were not privileged") (citation and internal quotation marks omitted), cert.

denied, 522 U.S. 1047 (1998); *Diversified Indus., Inc.* v. *Meredith*, 572 F.2d 596, 601 (8th Cir. 1977) (explaining that the privilege applies "only if" the communication is made "for the purpose of securing primarily" legal advice or assistance); *Alomari* v. *Ohio Dep't of Pub. Safety*, 626 Fed. Appx. 558, 570 (6th Cir. 2015) (explaining that the test is "whether the predominant purpose of the communication is to render or solicit legal advice") (quoting *County of Erie*, 473 F.3d at 420), cert. denied, 577 U.S. 1144 (2016).

District courts applying common-law principles have also overwhelmingly adopted the same formulation. Rice § 2:1, at 56 & n.11 (explaining that the "primarily" formulation is cited in "hundreds" of cases); see also, *e.g.*, *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950). Any recent movement toward a different articulation can be traced to the D.C. Circuit's 2014 decision in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (2014), cert. denied, 574 U.S. 1122 (2015). In that case, which involved a lawyer-led internal investigation, the D.C. Circuit—in accord with the general consensus among courts of appeals—determined that the "primary purpose" inquiry should govern. *Id.* at 759. But it then "articulate[d] the test as follows: Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?" *Id.* at 759-760 (emphasis omitted). The court applied that version of the primary-purpose test to conclude that "[i]n the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply." *Id.* at 760.

Kellogg describes a sensible way of "applying the primary purpose test" in certain contexts, like internal investigations, where a significant legal purpose, like assessing past liability and ensuring future compliance, would naturally predominate. *FTC* v. *Boehringer Ingelheim Pharm., Inc.*, 892 F.3d 1264, 1267 (D.C. Cir. 2018) (Kavanaugh, J.); see also *id.* at 1270 (Pillard, J., concurring) (emphasizing the "considerable burden" the proponent of the privilege must carry to establish that the legal purpose of each communication was sufficiently weighty). But *Kellogg*'s framing as an application of the "primary purpose" test suggests that it can be harmonized with the consensus approach in contexts, like tax preparation, in which a purpose may be "significant," but nonetheless discernibly subsidiary.

ii. The primary-purpose approach has proved to be a sensible test for reining in aggressive claims of privilege. Drug manufacturers, for instance, have tried to broadly shield internal communications from disclosure on the theory that their participation in a highly regulated industry suggests that virtually everything they do "carries potential legal problems vis-à-vis government regulators." See *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 800 (E.D. La. 2007). Courts have appropriately rejected such sweeping arguments, which "would effectively immunize all internal communications of the drug industry," on the ground that even if communications have some legal value, they lack a legal "primary purpose." *Id.* at 803; see *id.* at 800-801; see also, *e.g.*, *Polaris*, 967 N.W.2d at 411 (applying the primary-purpose test to reject similar argument in vehicle industry); Rice § 7:6, at 1362-1364.

Similarly, courts have employed the primary-purpose approach to reject arguments for privilege

where entities copy counsel on a document—say, a summary of the results of a clinical trial of the product, a draft press release, a presentation on a competitor's product, or talking points for a product launch—that is sent simultaneously to legal and non-legal personnel. See Rice § 7:6, at 1359; see also *The New Wigmore* § 6.11.2, at 1253 (discussing efforts by the tobacco industry to "'camouflage'" sensitive studies and business communications by "'funneling'" them through legal counsel, which courts rejected because the primary motivation for the communication was "to create a privilege rather than to obtain any legal advice") (citations omitted). Treating a secondary purpose of legal review as a basis for privilege could have the detrimental effect of "encourag[ing] corporations to do more of what they are already inclined to do—send copies of internal communications to legal counsel in hopes of gaining a privilege protection for communications that otherwise would not be privileged." Rice § 7:6, at 1348.

iii. As reflected in the "experience" component of the "reason and experience" approach, the weight of precedent itself has force in the development of the common law of evidence. Courts had sound reasons for adopting the primary-purpose test. And they are familiar with the primary-purpose test, finding it a helpful and practical way to assess dual-purpose communications. Nothing suggests that the approach has caused problems and should be discarded. Overturning the consensus would destabilize courts, engender uncertainty in the application of a new approach, and impede the justice system's search for truth.

C. Neither Logic Nor Precedent Favors Petitioner's "Significant Purpose" Test

Petitioner nevertheless proposes a relatively novel "significant purpose" test that would extend the attorney-client privilege to predominantly business or accounting communications. Those communications, however, are unlikely to be chilled whenever—in addition to their raison d'être—they have an ancillary, albeit significant, legal purpose. Petitioner's approach has little foundation in the animating principle of the attorney-client privilege. And given "[t]he great body of th[e] case law" supporting the primary- or predominant-purpose test, petitioner has not carried its burden "to show that 'reason and experience' require a departure from th[e] rule." *Swidler & Berlin* v. *United States*, 524 U.S. 399, 405-406 (1998).

1. Petitioner's approach is unmoored from the foundations of attorney-client privilege and inescapably amorphous

Petitioner urges an expansion of the privilege to all communications, or portions thereof, with a "significant" legal purpose, no matter how overshadowed it might be by a non-legal purpose. The main effect of that test, as petitioner and its amici propose to apply it, appears to be shepherding in a vast expansion of the privilege. But petitioner and its amici fail to justify extending the privilege—which is meant to ensure full and frank attorney-client communications, *Mohawk Indus.*, 558 U.S. at 108—to communications whose primary motivation does not depend on attorney-client confidentiality. Instead, petitioner's central submission (Br. 20-22, 24-28) is that its test would provide clarity and predictability. It would in fact do the opposite.

a. "Significant" is an amorphous concept, as dictionary definitions illustrate. See, *e.g.*, *Black's Law Dictionary* 1594 (10th ed. 2014) ("[o]f special importance"); *Webster's Third New International Dictionary* 2116 (2002) ("having or likely to have influence or effect[;] deserving to be considered"); *The American Heritage Dictionary* 1630 (5th ed. 2016) ("[f]airly large in amount or quantity" or "[h]aving or likely to have a major effect"). It is unclear precisely how petitioner would define the term. See, *e.g.*, Pet. Br. 20 (referring to a communication that was "made or received as part of obtaining legal assistance") (brackets, citation, and internal quotation marks omitted). And unless "significant" is drained of meaning, any proffered definition would be unlikely to provide the concrete guidance that this context requires.

Foreshadowing the disparate standards likely to emerge under a significant-purpose test, petitioner's own amici offer a panoply of definitions. See, *e.g.*, Chamber Br. 13 (taking the view that a legal purpose is "significant" as long as it is "legitimate or genuine"); DRI Br. 17 (arguing for protection where "attorney's involvement" is "not * * * incidental"). The Court should be particularly reluctant to adopt an alternative to the primary-purpose test that "is susceptible to widely varying interpretations in a setting where more clarity and consistency is essential." Rice § 7:6, at 1348; see *United States* v. *Jicarilla Apache Nation*, 564 U.S. 162, 183 (2011).

Indeed, in *Upjohn*, this Court rejected a "substantial role" test in the specific context of attorney-client and attorney work-product privileges. See 449 U.S. at 393. Although petitioner invokes *Upjohn* repeatedly (*e.g.*, Br. 24-25), it never explains why "significant" is more

readily administrable than "substantial." And while many amici have filed briefs urging broad views of the privilege, several of them acknowledge the indeterminacy of a "significant purpose" test. See, *e.g.*, APRL Br. 13-14 (explaining that whether something is significant requires ex post, "subjective judgments susceptible to differing results"); ABA Br. 27 (observing that "a 'significance' determination * * * could likewise be difficult and unpredictable").

b. Rather than giving content to what would make a purpose "significant," petitioner instead posits "unacceptable consequences" if its test is rejected. Br. 25. But petitioner cannot explain why assessing whether the purpose of a communication was "significantly" legal is more predictable in the run of cases than whether it was "predominantly" legal. To the contrary, the predominance concept provides a touchstone by which the importance of the interest can be assessed—namely, by comparison to the other purposes in play. Cf. *Maracich* v. *Spears*, 570 U.S. 48, 72 (2013) (holding that whether an attorney is subject to civil liability under the Driver's Privacy Protection Act of 1994 turns on whether the attorney "had the predominant purpose to solicit" when obtaining certain information).

In asserting that its test is nonetheless more predictable, petitioner contends that the application of the privilege should not turn on ex post balancing, urging that where a communication "does serve a significant legal purpose," it should not be disclosed "merely because it also serves another purpose a court later finds more significant." Br. 19. But that criticism rests on a misunderstanding of the predominance inquiry. Although this Court has rejected privilege tests that require after-the-fact balancing of the client's interest (at

the time the communication was made) against the value of the communication to a (subsequent) proceeding, see, *e.g.*, *Swidler & Berlin*, 524 U.S. at 409, that is not what the predominant-purpose approach does. Instead, a court applying the predominant-purpose test—just as a court applying petitioner's significant-purpose test—is trying to discern a solely historical fact about the purposes of a communication at the time it was made.

c. In some cases, a significant-purpose test might be easier to apply. See *Kellogg*, 756 F.3d at 759-760. For example, a significant-purpose test has appeal in the context of an internal investigation that provides legal advice about past events and recommendations for future action. See *ibid.* There is typically a strong reason why internal investigations are specifically conducted by law firms, and courts already generally find such investigations to be predominantly legal. See Rice § 7:18, at 1412; see also *Upjohn*, 449 U.S. at 390-392 (describing the necessity of collecting factual information during an internal investigation in order to provide sound legal advice).

But in other contexts, applying a significant-purpose test would be more difficult than the primary-purpose test. That is clearly true of the tax-return-preparation context at issue here. Tax-return preparation involves the application of law to particular facts. See p. 16, *supra*. Because the legal categories at issue are "predesigned and defined," and the effort required principally involves "the translation and entry of financial information," accounting expertise "necessarily predominates in the advice and assistance sought and rendered." Rice § 7:25, at 1448, 1450-1451. It is far harder to explain, however, whether standard accounting

work—which, after all, requires applying provisions of the complex Internal Revenue Code—has a legal purpose that rises to the level of "significant." Tellingly, petitioner's significant-purpose test appears to encompass standard tax-return-preparation services, broadly expanding the attorney-client privilege in contravention of this Court's decisions and against the widespread agreement in the lower courts. See Br. 6 n.2; pp. 12-13, 17-18, *supra*.

Ultimately, it is the burden of the proponent of the privilege—the party trying to shield relevant evidence—to establish that the primary purpose of a communication was legal. Difficult questions for the factfinder are unavoidable under any test.

d. Even if replacing the primary-purpose test with a significant-purpose standard would increase certainty for clients and lessen privilege-related litigation (but see pp. 39-43, *infra*), "it is important that the attorney-client privilege not be downgraded in the interests of expedient results." Rice § 7:6, at 1351 (citation omitted). Expanding the privilege to predominantly nonlegal communications in the name of clarity would be "in derogation of the search for truth," *Nixon*, 418 U.S. at 710.

The "inquiry into purpose ought not be discarded in favor of a *sub silentio* preference for a finding of privilege—or a finding of no privilege—merely because the privilege inquiry is difficult." *Towne Place Condo. Ass'n* v. *Philadelphia Indem. Ins. Co.*, 284 F. Supp. 3d 889, 895 n.3 (N.D. Ill. 2018). Instead, this Court should reject petitioner's invitation to "expansively construe[]" the privilege, which would come at the expense of depriving grand juries and other factfinders of important

information to which they would otherwise be entitled. *Nixon*, 418 U.S. at 710.

2. Petitioner's test would be novel and disruptive

As detailed above, petitioner's approach has not gained much traction in the lower courts. And in disparaging the primary-purpose test, petitioner largely disregards that the Court is not choosing between two approaches on a blank slate. The predominant- purpose test has been applied for decades by the vast majority of jurisdictions. Tellingly, despite the existence of that large body of cases, petitioner has not relied on evidence of "[d]isparate decisions in cases applying th[e] test" that petitioner and its amici oppose. *Upjohn Co.*, 449 U.S. at 393.[2]

a. Although petitioner contends (Br. 19) that its version of the "significant purpose" test "neither expands nor contracts the historical bounds of the attorney-client privilege," that position is belied both by petitioner's objections to the lower courts' privilege determinations in this case and by the arguments of its flotilla of amici. See, *e.g.*, DRI Br. 8, 16 (critiquing as too narrow "[t]he primary purpose test[] as it has been

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[2] Petitioner's sole effort on that front is to cite the Rice treatise for the point that there is "considerable uncertainty" about the "focus" of the primary-purpose standard. Br. 27 (quoting Rice § 7:7, at 1364). But that passage is referring to whether the focus of the inquiry should be the "communication" or the "segregable portions of a communication." Rice § 7:7, at 1366; see *id.* §§ 7:8-7:9, at 1367-1378 (laying out both views and endorsing the latter). Notably, the treatise endorses and defends the predominant-purpose test. See, *e.g.*, *id.* § 7:3, at 1326-1327 (taking the view that it would be "unjustified, inappropriate, and dangerous" to expand the privilege to a client's communications to an attorney who "is not employed primarily for legal assistance") (emphasis omitted).

applied across the country" and urging the significant-purpose test as a way to extend the presumption that communications with outside counsel are privileged to communications with in-house counsel); ABA Br. 27 (arguing for protection even where legal purpose is "very minor").

Petitioner has not identified a broad body of decisions applying a significant-purpose test; in fact, it does not cite a single pre-2014 decision from any court applying that test. Instead, its argument for a contrary rule rests almost entirely on its interpretation of *Kellogg*. But as discussed above, see pp. 31-32, *supra*, *Kellogg* provides no basis to broadly expand the privilege by extending it even to portions of a communication where nonlegal considerations obviously predominate over legal ones.

b. In urging this Court to adopt a significant-purpose test—and to do so in lieu of, rather than as a formulation of, the established primary-purpose test—petitioner identifies (Br. 21-22) only a minimal body of experience, consisting of a handful of district court decisions.

Petitioner contends (Br. 18) that its formulation is not *inconsistent* with some sources, but its affirmative argument (Br. 17-18) turns on a sentence in a Restatement comment that unequivocally states that "[a] client must consult the lawyer for the purpose of obtaining legal assistance *and not predominantly for another purpose*." Restatement § 72 cmt. c (emphasis added). That comment later describes the test as an assessment of "[w]hether a purpose" (singular) "*is* significantly that of obtaining legal assistance or *is* for a nonlegal purpose." *Ibid.* (emphases added).

Although that particular sentence could perhaps have been more clearly worded by referring to a relative assessment of two "purpose[s]," the comment offers no support for a far-reaching approach under which a legal purpose can render a communication privileged even where the communication was made "predominantly for another purpose." Restatement § 72 cmt. c. At a minimum, such an oblique reference cannot be read as reflecting the American Law Institute's view that a significant-purpose test should replace the predominant-purpose test used by most courts. See The Am. Law Inst., *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* 3-4, 6 (rev. 2015) (*Voice of the ALI*) (explaining that Restatements generally "reflect the law as it presently stands" and "if a Restatement declines to follow the majority rule, it should say so explicitly and explain why").[3]

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[3] Petitioner does not rely on the Reporter's Note, which states that "[i]n general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." Restatement § 72, Reporter's Note 554. The note, which "furnish[s] a vehicle for the Reporter to convey views not necessarily those of the Institute," *Voice of the ALI* 45, cites no authority supporting the observation. Given the Restatement's recognition of the predominant purpose requirement and the dearth of decisions at the time of the Restatement applying a significant-purpose test, the Reporter's Note is likewise best read to convey the view that, as a descriptive matter, American courts generally find a significant legal purpose to be predominant. And even if the Reporter's Note could be viewed as the position of the Restatement and read to urge a freestanding significant-purpose test, that suggestion for a "novel extension" of the law deserves no special weight. *Kansas* v. *Nebraska*, 574 U.S. 445, 476 (2015) (Scalia, J., concurring in part and dissenting in part) (citation

Even most of the post-*Kellogg* decisions that petitioner cites have generally applied the "significant" purpose formulation as a shortcut for identifying a predominant purpose, rather than to deem a legal purpose sufficient even where it is secondary. See, *e.g.*, *In re General Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015). As a leading treatise observes, although some recent cases use the "significant purpose" language, they also reference "the primary or predominant purpose" and reach results they would have reached "under either test"; therefore, those references do not appear to "signal[] an intent to abandon or relax the primary motivation test." *The New Wigmore* § 6.11.2, at 1254 (footnotes omitted). Not a single federal court of appeals has adopted a significant-purpose test as a standalone approach. And two state courts of last resort have specifically considered and rejected the significant-purpose test as a matter of state law, viewing it as inconsistent with the principle that a privilege must be interpreted no more broadly than necessary. See *Polaris*, 967 N.W.2d at 407-408 & n.1; *Harrington*, 144 A.3d at 416 n.7. The weight of experience remains firmly in favor of the predominant-purpose test.

Given the reality of widespread regulation, see *Polaris*, 967 N.W.2d at 411, and the broad participation by in-house counsel in "regular business matters," Rice § 7:3, at 1320, petitioner's novel and expansive "significant purpose" standard would open the gates to a flood of attorney-client privilege claims colorably asserting that at least some non-insignificant purpose of a communication was related to legal advice. That approach

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omitted); see *Herrera* v. *Wyoming*, 139 S. Ct. 1686, 1710 (2019) (Alito, J., dissenting).

would require district courts to develop new tools apart from the predominant-purpose test to reject efforts by companies attempting to use the privilege as a shield for inconvenient facts. Adopting petitioner's test would therefore increase, not alleviate, the burdens on the lower courts.

c. The documents at issue here illustrate the broad sweep of the rule petitioner and its amici seek. The vast majority of the documents are communications about tax-return preparation between the client and a non-lawyer accountant employed by petitioner. See J.A. 45-238. To the extent the documents refer to legal advice, the district court directed those portions to be redacted. Pet. App. 54a; see, *e.g.*, J.A. 208-212.

Petitioner's theory therefore would extend the privilege not just to attorneys engaged in tax-return preparation—itself a significant step—but to accountants engaged in tax-return preparation if they are employed at law firms. And the theory would do so in service of shielding from the judicial process run-of-the-mill accounting documents that do not require a lawyer's expertise. See, *e.g.*, J.A. 145-150 (e-mails between accountant employed by petitioner, client, a non-lawyer employee at client's company, and a business appraiser about the results of an appraisal performed for the client's tax returns; e-mails between accountant and client about additional information needed to complete client's tax returns); J.A. 178-179 (e-mail between two non-lawyer accountants about various entries on the client's tax returns); J.A. 218-221 (e-mails between accountant and the client, copying attorney, regarding the timing of filing tax forms, late filing penalties, and the logistics of the client paying the penalties); J.A. 208 (e-mail from accountant and client about the status of the real estate

data entry and billing for petitioner's services); J.A. 209-210 (e-mails between client and accountant addressing which banks sent the client IRS Form 1099).[4]

Just as this Court has rejected an accountant-client privilege, *Couch*, 409 U.S. at 335, it should likewise reject a privilege for accounting services by non-lawyers who happen to be employed by law firms, accounting services by lawyers who happen to be functionally substituting for accountants, or accounting services by anyone on an e-mail where lawyers appear for a subsidiary purpose. The attorney-client privilege is about facilitating communications with attorneys for the purpose of legal advice, and the truth should not be obscured whenever legal advice is intermingled with a communication whose predominant purpose is to secure accounting services in connection with tax preparation.

D. The Documents At Issue Here Were Not Privileged Under Any Test

The decision below can be straightforwardly affirmed on the court of appeals' logic. But at all events, the disputed documents here, see J.A. 45-238, were so far from legal advice that even if the Court were to adopt some formulation of a "significant" purpose test, they would still not be privileged.

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[4] Petitioner tries to distance itself from the breadth of its theory by suggesting (Br. 38 n.7) that some of the documents can be withheld under the district court's "separate" ruling that the accountant who is corresponding with the client in the vast majority of the 54 documents was not acting as the attorney's agent. But below petitioner made clear that, despite the district court's second ruling, the court's application of the primary purpose rule "affects all [54] records," Pet. C.A. Br. 25 n.15; see Pet. Br. 41 n.9 (arguing that "[g]iven the significant legal advice in this communication" "the accountant was assisting [attorneys] in the provision of legal advice").

1. In resolving the privilege dispute, the district court adopted a broad view of legal advice. It stated that "legal advice about what to claim on tax returns," along with "other tax-related legal advice," was privileged. Pet. App. 44a; see *id.* at 43a-44a. It concluded that communications concerning the client's estimated tax, which were related to legal advice the client received from petitioner about the client's expatriation, were protected tax-related legal advice even in the context of tax-return preparation, and that the valuation of cryptocurrency was a sufficiently unsettled area of law at the time that it constituted legal rather than accounting advice. *Id.* at 52a-53a. And the court broadly allowed petitioner to withhold documents that "concern legal advice related to what must be claimed on a tax return, what strategies to pursue, the potential risks of taking certain positions, or other types of tax-related legal advice." *Id.* at 53a.

The district court thus ordered production only of "communications made * * * solely for the purpose of preparing a tax return." Pet. App. 53a; see *id.* at 54a (finding that "portions of several of the [54] documents * * * contain communications only about tax return preparation"). Even as to those, the court ordered disclosure only of communications in which "the primary or predominate purpose was about the procedural aspects of the preparation of [the client's] tax return, or where [the firm's accountant] provided advice as an accountant," allowing petitioner to withhold "portions of those documents [that] concern communications about tax-related legal advice." *Id.* at 54a.

2. As noted above, the vast majority of the disclosed documents are communications between the client and a nonlawyer accountant. And, in findings that

petitioner does not challenge in this Court, the district court determined that the accountant was not acting as an agent for the attorneys during those communications. Pet. App. 50a-51a, 54a, 56a; see, *e.g.*, J.A. 131 (noting that the accountant could work on one tax-return preparation project "concurrently" with "the attorneys" working on a discrete piece of the returns); see Pet. 6 n.2. Nor does petitioner challenge the district court's finding that the "predominant purpose" of the communications was "tax return preparation." Pet. App. 53a-54a; see *id.* at 12a. Petitioner's argument instead is simply that—notwithstanding the non-agent accountant's principal role—the "tax return preparation" at issue here was legal.

But the communications address core aspects of tax-return preparation, such as verifying which institutions sent the client an IRS form, requests for financial data for various entries on the tax returns, and the logistics of payment. See pp. 43-44, *supra*. No reasonable construction of "significant legal purpose" would encompass the documents, which lack any purpose of obtaining legal advice beyond what is inherent in standard tax-return preparation performed by accountants. And that is true even of the documents that petitioner has chosen to highlight. See Br. 38-41.

For instance, petitioner contends that an e-mail between an accountant and the client "walked the Client through the considerations involved in whether to amend their state income tax returns." Br. 40-41 (citing J.A. 134-136). Advice from an attorney about the legal risks or benefits of filing an amended tax return "in the face of an IRS investigation" generally constitutes legal advice. See Rice § 7:24, at 1448. But the communication here addressed purely business considerations: the

accountant described the likely cost of preparing the forms versus the likely savings from asserting nonresident status, observing that the client had no "legal requirement to amend the returns." J.A. 135; see J.A. 134-136. Transforming an accountant's cost-benefit analysis into legal advice whenever she notes the *absence* of legal considerations would all but eradicate the distinction between accountants and attorneys.

As another example, petitioner points to (Br. 38) an e-mail between the client and the accountant preparing the client's tax returns about information needed for the preparation of a Report of Foreign Bank and Financial Accounts, citing sources for the proposition that such reports *can* raise complex legal issues. But the client was not raising legal issues in this correspondence; the client was providing the accountant with financial information. See J.A. 196-200. The fact that a particular matter could have legal implications, which the communication in question does not discuss or identify, does not turn accounting advice into legal advice.[5]

Similarly, petitioner points to (Br. 39) correspondence between the client and an attorney at the firm about a portion of an IRS form describing a taxpayer's

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[5] A small portion of the communication addressed the client's question to the accountant about the required reporting period that the accountant ran by attorneys at the law firm "just to confirm" that they had the same view. J.A. 197. If the proper reporting period were an unsettled legal question outside the expertise of a typical accountant, that exchange would likely be subject to privilege. But petitioner has not identified an error in the district court's determination that the issue was not a complex and unsettled question beyond the scope of standard accounting work, see Pet. App. 53a-54a, and the accountant's reference to "confirm[ing]" her view suggests that it was not, J.A. 197. Nor, in any event, would that reference justify withholding the remainder of the communication.

reasons for not filing his taxes on time and requesting an abatement of the late-filing penalty on that basis, in which the client corrects two factual statements. See J.A. 141-144; see also Pet. App. 18a-19a (addressing this document). Petitioner contends that the communication was entitled to privilege because the narrative the attorney drafted on the IRS form was *persuasive*, but petitioner offers no support for the proposition that it was *legal*; if an attorney engages in persuasion in a non-legal role, such as a lobbyist, those communications are not privileged. And here, as the lower courts both found, see Pet. App. 18a-19a, preparing a statement describing the reasons for a late filing was a "tax service" of the type typically performed by an accountant, rather than one that constitutes the practice of law.

In short, petitioner has identified no clear error in the district court's factual findings. Nor has petitioner explained why the privilege determination as to the disputed documents would come out differently under any reasonable construction of the significant-purpose test. The grand jury is entitled to these documents in accordance with the decisions below.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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