No. 25-2935

In the

United States Court of Appeals

For the

Ninth Circuit

EPIC GAMES, INC.,

Plaintiff-ctr-defendant-Appellate,

v.

APPLE, INC.,

Defendant-ctr-claimant-Appellant.

Appeal from the United States District Court
for the Northern District of California
No. 4:20-cv-05640-YGR (Yvonne Gonzalez Rogers, District Judge)

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as amicus curiae in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

ALF long has had an interest in protecting the attorney-client privilege, which is critical to free enterprise, civil justice, the public

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part, and no party or party's counsel, and no person other than the *amicus curiae*, its supporters, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

interest, and the practice of law. For example, in 2005 ALF organized a conference, "The Erosion of the Attorney-Client Privilege," which featured as speakers then-Circuit Judge Samuel Alito, former Solicitor General Theodore Olson, and Professor Geoffrey Hazard.

One of the key questions presented by this appeal—the extent to which the attorney-client privilege applies to communications that have both primary legal and non-legal purposes ("multi-purpose communications")—is enormously important to in-house and outside counsel in countless circumstances. This amicus brief focuses on the reasons why the Court should adopt a reasonable, workable rule that enables private attorneys to perform their multifarious legal duties in today's corporate climate.

SUMMARY OF ARGUMENT

In myriad corporate settings, attorneys are regularly called upon to provide advice on legal questions that are inextricably intertwined with business issues and judgments. Under the "primary purpose" test established by the Ninth Circuit in *In re Grand Jury*, 23 F.4th 1088, 1091 (9th Cir. 2021), courts evaluating claims of attorney-client privilege over dual-purpose communications, *i.e.*, communications "which could have

both a non-legal purpose . . . as well as potentially a legal purpose," are directed to "look at whether the *primary purpose* of the communication is to give or receive legal advice, as opposed to business . . . advice" (emphasis added).

In the present case, the district court entered sanctions after ordering Defendant-Appellant Apple, Inc. to produce certain dual-purpose communications relating to Apple's attorney-directed efforts to comply with an injunction. The court based its order requiring production on the finding that the documents had "the predominant purpose" of serving a business function, and therefore were not privileged. 4-ER-644. The court's order did not, however, address or take into account Apple's argument that legal advice was *a* primary purpose of the documents. In other words, the court did not address whether legal advice was one of several coexisting primary purposes, even if it was not the single predominant purpose outweighing all other purposes in the communication.

In re Grand Jury explicitly elected to "[l]eave [o]pen" the question of how the primary purpose test should be applied to multi-purpose communications—that is, when the provision of legal advice is one of

multiple significant or intermingled purposes of a document, rather than the sole predominant purpose. *In re Grand Jury*,. 23 F.4th at 1094.

In so doing, the Ninth Circuit recognized the merits of then-Judge Kavanaugh's opinion in *In re Kellogg Brown & Root, Inc.* ("*Kellogg*"), 756 F.3d 754 (D.C. Cir. 2014), which held that documents may be eligible for protection if legal advice is "*a* primary purpose," even if it was not "*the* primary purpose." *In re Grand Jury*, 23 F.4th at 1094. This Court observed 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," a challenge which can otherwise "quickly become messy in practice." *Id.* Despite this dicta, the Ninth Circuit has not explicitly extended the *Kellogg* test to multi-purpose communications, nor has it clarified how the primary purpose standard should otherwise be applied when a communication has more than one primary purpose.

In the intervening years, district courts in this and other circuits applying the primary purpose test have reached differing conclusions about how to apply the *Grand Jury* standard to multi-purpose communications in a variety contexts, including internal investigations,

tax advice, and efforts to comply with court orders and injunctions. The lack of clarity in this circuit on the proper approach has also created uncertainty for practitioners and for corporations seeking to obtain the confidential advice of counsel on issues central to their businesses.

The Supreme Court has explained that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). ALF therefore urges the Court to clarify the *Grand Jury* standard by holding that in this circuit the *Kellogg* test applies to multi-purpose communications, and that the attorney-client privilege attaches whenever legal advice is "*a* primary purpose" in a document, even if overlapping or concurrent business purposes exist.

ARGUMENT

I. The Ninth Circuit has not decided how to apply the primary purpose test to communications with multiple primary purposes

Both in-house and outside counsel providing legal advice to businesses are frequently required to address practical business realities that are intertwined with legal questions. Legal advice may pertain to, for example, the investigation of alleged misconduct following an

employee's internal report or a third-party claim for money, the evaluation of legal risks resulting from the implementation of a new corporate or regulatory compliance program, or the legal and practical standards for complying with a court ordered injunction.

In those scenarios, and many others like them, "[i]t is not easy to frame a definite test for distinguishing legal from nonlegal advice." *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996) (quoting 8 John H. Wigmore, *Evidence* at 566–67 (McNaughton rev. ed. 1961) (emphasis in original)); *see also* 24 Fed. Prac. & Proc. Rules of Evid. § 5478 (1st ed. 1969) ("The distinction between what is legal advice and what is business advice is difficult indeed"). Nor is the issue so easily resolved by simply asking whether "the lawyers were 'involved in business decision-making.'" *Chen*, 99 F.3d at 1502. As this Court has recognized, "[c]alling the lawyer's advice 'legal' or 'business' advice does not help in reaching a conclusion; it *is* the conclusion." *Id*. For these and other reasons, the intermingling of business and legal purposes presents significant challenges when ascertaining the boundaries of the attorney-client privilege.

In *In re Grand Jury*, a case involving privilege assertions over communications with attorneys related to tax preparation, the Ninth Circuit resolved one area of ambiguity pertaining to the treatment of dual-purpose communications. When considering such communications, the court explained, the privilege is determined using the "primary purpose" test. Under that test, a tribunal must assess whether "the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice." *In re Grand Jury*,. 23 F.4th at 1091. In other words, courts evaluating privilege claims are directed to consider the dueling purposes of a given communication, and treat the communication as privileged only if legal advice is "the primary purpose."

The court also rejected the "because of" test, typically applicable to attorney work product, which "considers the totality of the circumstances and affords protection when it can fairly be 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." *Id.* at 1091-92 (cleaned up).

Critically, however, the court in *In re Grand Jury* elected to "leave open" the question of how to apply the primary purpose test when

it is not possible to identify a communication's single primary purpose, either because the communication has "overlapping purposes (one legal and one business, for example)," or because the privilege analysis involves a "truly close case[], like where the legal purpose is just as significant as a non-legal purpose." *Id*. at 1094-95.

This Court recognized that the D.C. Circuit has addressed such circumstances by adopting a "version of the primary-purpose test," which asks if legal advice is *a* primary purpose, rather than *the* primary purpose. *See id*. (citing *Kellogg*, 756 F.3d 754). Under the *Kellogg* test, if "one of the significant purposes of the communication" is legal, privilege attaches. *Id*. And although the court in *In re Grand Jury* declined to decide whether the *Kellogg* test applies to communications with multiple primary purposes, it recognized "the merits of the reasoning" in *Kellogg*, noting 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." *Id*. 1094. In such cases, the court noted, "[e]ven though it theoretically sounds easy to isolate 'the primary or

predominant' purpose of a communication, the exercise can quickly become messy in practice." *Id.*

II. To foster predictable application of the attorney-client privilege, the Court should clarify that the *Kellogg* test applies when evaluating communications with multiple primary purposes

In *Upjohn*, the Supreme Court held that the attorney-client privilege applies when lawyers engage in communications with the purpose of providing legal advice to corporations, just as it does when legal advice is provided to individual clients. *Upjohn*, 449 U.S at 390. Further, the Court explained that "privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.*

Corporate attorneys are thus tasked with "formulat[ing] sound advice when their client is faced with a specific legal problem" as well as "ensur[ing] their client's compliance with the law." *Id.* at 392. And by extension, when evaluating whether a communication is privileged, courts are tasked with interpreting the privilege in a way that will foster its core purpose "to encourage full and frank communication between

attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id*. at 389.

The uncertainty in the Ninth Circuit about how to apply the primary purpose standard to multi-purpose communications undermines that purpose. Without clear direction on the applicability of the *Kellogg* test in such cases, predicting the treatment of multi-purpose communications in the Ninth Circuit has indeed become "messy in practice," as this Court recognized it might. *In re Grand Jury*, 23 F.4th at 1094. In some close cases, district courts within the Ninth Circuit have held that the privilege applies only if the "single 'primary' purpose" of a communication is legal, reasoning that legal purposes must outweigh all other purposes in the balance. *See, e.g.*, *Est. of Serna by & through Gilliland v. Cnty. of San Diego*, No. 20-cv-2096, 2024 WL 942368, at *6 (S.D. Cal. Mar. 5, 2024) (upholding magistrate decision not to apply *Kellogg); In re Apple Inc. Sec. Litig.*, No. 19-cv-2033, 2022 WL 4588603, at *2 (N.D. Cal. Sept. 29, 2022) (same).

Other courts have found *Kellogg* persuasive, holding "the correct standard for dual purpose communications should be '<u>a</u> primary purpose'" rather than "<u>the</u> primary purpose.'" *Crews v. Rivian Auto., Inc.*,

No. 22-cv-1524, 2025 WL 365796, at *1 n.1 (C.D. Cal. filed Jan. 23, 2025); *see also U.S. EEOC v. Fresh Venture Foods, LLC*, No. 21-07679, 2024 WL 4875466, at *2 (C.D. Cal. filed July 25, 2024) (applying *Kellogg*); *Pitkin v. Corizon Health, Inc.*, No. 16-02235, 2017 WL 6496565, at *4 (D. Or. Dec. 18, 2017) (same, in treatment of primary purpose test before *In re Grand Jury*). *See also Greer v. Cnty. of San Diego*, 127 F.4th 1216, 1224 n.6 (9th Cir. filed Feb. 10, 2025) (declining again to decide whether the *Kellogg* test applies in this Circuit).

The "[d]isparate decisions in cases applying [the Ninth Circuit's current primary purpose] test illustrate its unpredictability." *Upjohn*, 449 U.S. at 393. That is hardly surprising. Because "legal advice concerning commercial transactions is often intimately intertwined with and difficult to distinguish from business advice," courts have no way to meaningfully disentangle the two, or to determine which one weighs more heavily. *Sedco Int'l, S. A. v. Cory*, 683 F.2d 1201, 1205 (8th Cir. 1982). As this Court recognized, and "*Kellogg* explained, 'trying to find the one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task' because, often, it is 'not

useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B.'" *In re Grand Jury*, 23 F.4th at 1094 (quoting *Kellogg*, 756 F.3d at 759); *see also* Paul Rice, *Attorney-Client Privilege in the United States,* § 7:7 (2025) ("There is considerable uncertainty . . . as to the focus of [the primary purpose] standard" (collecting cases)).

The Court should end the prevailing lack of certainty in this circuit by holding that the *Kellogg* test applies when determining whether the privilege attaches to multi-purpose communications. The Supreme Court has stated that:

> If the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Upjohn, 449 U.S. at 393. And if the primary purpose test is not interpreted to apply the *Kellogg* standard to multi-purpose communications, then this circuit's test will remain even less predictable than the control-group test that the Supreme Court struck down in *Upjohn*, which restricted privilege to those officers who played a "substantial role" in directing a corporation's legal response. *Id.*

Indeed, while the control-group test may have been difficult to apply in practice, asking courts to differentiate and weigh significant, intermingled legal and business purposes is "inherently *impossible*." *Kellogg*, 756 F. 3d at 759 (emphasis added). That is likely why a growing number of district courts within and outside the Ninth Circuit have found that the "primary purpose" or "predominant purpose" test should apply the *Kellogg* standard to multi-purpose communications.[2] This court

[2] For cases applying *Kellogg* to multi-purpose communications under the primary purpose test, *see, e.g.*, *Brogdon v. Grady Mem'l Hosp. Corp.*, No. 22-4512, 2025 WL 948338, at *3 (N.D. Ga. Mar. 28, 2025) ("'The Court asks whether obtaining or providing legal advice [was] *a* primary purpose of the communication, meaning one of the significant purposes of the communication.'" (emphasis in original)); *In re TelexFree Sec. Litig.*, No. 14-2566, 2024 WL 4843750, at *4 (D. Mass. Nov. 20, 2024) (applying *Kellogg*'s standard that "if one of the significant purposes of the internal investigation was to obtain or provide legal advice, . . . [attorney-client] privilege will apply" while also stating that "as long as the communication is primarily or predominantly of a legal character," attorney-client privilege applies); *Lee v. EUSA Pharma US LLC*, No. 22--11145, 2024 WL 250064, at *4 (E.D. Mich. Jan. 23, 2024) (holding that attorney-client privilege attached to an investigation by a law firm that otherwise had no relationship with defendant, when legal advice was "one of the significant purposes of the internal investigation"); *Aetna Inc. v. Mednax, Inc.*, No. 18-02217, 2019 WL 6467349, at *1 (E.D. Pa. filed Dec. 2, 2019) ("[i]f getting or receiving legal advice 'was one of the significant purposes of the [communication]' the privilege should apply, even if there were additional purposes"); *Smith-Brown v. Ulta Beauty, Inc.*, No. 18-610, 2019 WL 2644243, at *3 (N.D. Ill. June 27, 2019) (applying *Kellogg* test in determining whether legal advice was primary

should do the same to advance the imperative of predictability expressed in *Upjohn*.

III. The *Kellogg* test furthers the objectives of the attorney-client privilege in common corporate settings

Adopting the *Kellogg* test for multi-purpose communications would also increase corporate compliance with the law by promoting, rather than discouraging, the provision of sound legal advice by in-house and outside counsel in numerous circumstances. Although the court in *In re Grand Jury* anticipated that "the universe of documents in which the *Kellogg* test would make a difference is limited," the *Kellogg* test is important both to facilitate the resolution of "truly close cases" that result in litigation *and* to incentivize appropriate use of counsel in situations that never reach the courthouse. *In re Grand Jury*, 23 F.4th at 1095. This is because the attorney-client privilege is designed not only to protect challenged communications in litigation, but also to "encourage full and frank communication between attorneys and their clients"

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purpose of communication); *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 331 F.R.D. 218, 231 (E.D.N.Y. 2019) (same); *In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prods. Liab. Litig.*, No. 17-2775, 2019 WL 2330863, at *2-4 (D. Md. May 31, 2019) (same); *In re General Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521 (S.D.N.Y. 2015) (same).

ex ante, and to "thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.*, 449 U.S. at 389; *See also Matter of Fischel*, 557 F.2d 209, 211 (9th Cir. 1977) ("The rationale for the rule [protecting confidential attorney communications] is to encourage clients to confide fully in their attorneys without fear of future disclosure of such confidences. This in turn will enable attorneys to render more complete and competent legal advise.").

Upjohn demonstrates why endorsing the *Kellogg* test for multi-purpose communications is so crucial for both industry and government. There, the Court held that the attorney-client privilege applied to communications created during an internal investigation conducted at the direction of counsel in order to identify and correct improper payments from the corporate defendant to foreign government officials. *See Upjohn*, 449 U.S. at 386-387. As the Supreme Court observed, such counsel-directed investigations are commonplace in the modern economy: "In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law,' particularly since compliance with the law [in areas such as Sherman Act

compliance] is hardly an instinctive matter." *Id.* at 392 (internal citation omitted); *see also Kellogg*, 756 F.3d at 759 (noting that "businesses that are required by law to maintain compliance programs" now constitute "a significant swath of American industry.").

Voluntarily undertaking and conducting such internal investigations, at the direction of counsel, is also widely accepted as being beneficial for corporate compliance and highly encouraged by law enforcement. The United States Department of Justice (DOJ) has long had a formal policy "encourag[ing] corporations, as part of their compliance programs, to conduct internal investigations and to self-disclose discovered misconduct to the appropriate authorities" in exchange for Government leniency. U.S. Dep't of Just., Just. Manual § 9-28.900 (2018); *see also id.* § 9-47.120 (self-disclosure policy for DOJ Criminal Division); *id.* § 7-3.300 (DOJ Antitrust Division Leniency Policy); DOJ Voluntary Self Disclosure Policy for Business Organizations (Mar. 2024), available at https://tinyurl.com/tcbmznt7; DOJ Voluntary Self Disclosure Policy for the Tax Division (Mar. 2024), available at https://tinyurl.com/ypj6hb2f. And many entities, including government contractors, are often subject to still more stringent investigation and

disclosure requirements, further requiring the assistance of lawyers. *See, e.g.*, 48 C.F.R. § 52.203-13, Contractor Code of Business Ethics and Conduct (Nov. 2021) (requiring certain federal contractors to timely disclose to the government credible evidence of criminal or False Claims Act violations).

Such corporate investigations almost invariably entail mixed questions of law and business, from start to finish. "Rare is the case that a troubled corporation will initiate an internal investigation solely for legal, rather than business, purposes; indeed, the very prospect of legal action against a company necessarily implicates larger concerns about the company's internal procedures and controls, not to mention its bottom line." *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015) (applying the Second Circuit's "primary purpose" test and holding that "the D.C. Circuit's holding [in *Kellogg*] is consistent with—if not compelled by—the Supreme Court's logic in *Upjohn*"). To be sure, in the absence of an affirmative legal obligation to disclose, determinations about whether and what to investigate, and whether to report investigation findings to the government, are business decisions in and of themselves. And even when such obligations are

mandated by law or regulation, attorneys are routinely called upon to review operative policies and procedures, assess regulatory and contractual compliance, identify appropriate disciplinary measures to address employee malfeasance, and help corporate clients make advantageous financial decisions within the limits afforded by law. All of these tasks not only require deep involvement of counsel in business operations, but they also demand frequent and open communication between lawyers and business people on topics with both significant legal *and* business purposes.

A test that denies the privilege when legal advice is one of several primary purposes in a given communication threatens to chill the conduct of such internal investigations. That in turn subverts one of the fundamental goals of the attorney-client privilege: to encourage the flow of quality legal advice when a company's finances are at stake. Corporations, concerned that counsel's advice will be made public, may become "reluctant to confide in [their] lawyer[s]" if they "know[] that damaging information could more readily be obtained from the attorney following disclosure than from [themselves] in the absence of disclosure," and will therefore find it "difficult to obtain fully informed legal advice."

Fisher v. United States, 425 U.S. 391, 403 (1976); *see also Kellogg*, 756 F.3d 759 (D.C. Cir. 2014) (observing that if courts reject privilege when legal advice is one of several significant purposes, "businesses would be less likely to disclose facts to their attorneys and to seek legal advice"). As this Circuit has recognized, the "valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants." *Chen*, 99 F.3d at 1500.

In other cases, corporate officers may choose to ask lawyers to opine only on pure questions of law without factual context or attempt to restrict lawyers' access to the minimum factual information needed to provide legal advice, rather than risk losing the privilege should a court interpret a communication as having a less than 51% legal purpose. The Court in *Upjohn* cautioned against such outcomes, explaining that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn*, 449 U.S. at 390.

Further, "[i]t is for the *lawyer* in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant." *Id.* at 391 (citation omitted) (emphasis added). But if lawyers are denied access to information needed to make such judgments, that duty becomes impossible to fulfill and corporations may in turn act on incomplete advice or simply decide not to investigate or report allegations of wrongdoing, thereby undermining other core purposes of the privilege.

In comparison, any risks of applying the *Kellogg* test to multi-purpose communications are minimal and outweighed by the factors discussed above. The *Kellogg* test undoubtedly has the potential to expand the universe of documents eligible to be withheld in litigation, including in the "limited" number of "truly close cases" for which significant legal purposes overlap with but do not clearly predominate over other non-legal purposes. *See In re Grand Jury*, 23 F.4th 1088, 1095 (9th Cir. 2021).

But the documents captured by this principled extension of protection are already within the traditional scope of the privilege, which has long been held to apply whenever "the client consults to gain

advantage from the lawyer's legal skills and training . . . even if the client may expect to gain other benefits as well, such as business advice or the comfort of friendship." Restatement (Third) of the Law Governing Lawyers § 72 (2000) cmt. C; *see also* Restatement § 72 Reporters Note ("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."). And, on balance, any marginal risk that a court might misidentify a given document as having a "significant" legal purpose is far outweighed by the risks of error under a standard that requires courts to disentangle each legal and non-legal purpose, in each multi-purpose document considered, and then compare those purposes to find which predominates.

In *In re Grand Jury*, the Court briefly noted an additional concern that accepting *Kellogg* in the tax context could make it easier for taxpayers to improperly claim privilege over tax preparation measures "by hiring a lawyer to do the work that an accountant, or other tax preparer, or the taxpayer himself or herself, normally would do." *In re Grand Jury*, 23 F.4th at 1095 n.5. However, the mere presence of an attorney on a communication, without a qualifying legal purpose, has

never been enough to establish privilege under any standard, including the *Kellogg* test. *See United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir. 2020) (explaining the longstanding rule that "[i]f the advice sought [from a lawyer] is not legal advice, but, for example, accounting advice from an accountant, then the privilege does not exist," and citing cases); *Chen*, 99 F.3d at 1501 ("That a person is a lawyer does not, *ipso facto*, make all communications with that person privileged. The privilege applies only when legal advice is sought 'from a professional legal advisor *in his capacity as such*.'" (citation omitted)).

These restrictions on the improper invocation of the privilege apply with equal force in the tax context. As the Ninth Circuit has recognized, "[a]lthough communications made solely for tax return preparation are not privileged, communications made to acquire legal advice about what to claim on tax returns may be privileged." *United States v. Abrahams*, 905 F.2d 1276, 1284 (9th Cir. 1990). So determining whether the attorney-client privilege applies to legal advice about tax matters entails the same considerations that motivated the creation of the *Kellogg* test.

At bottom, the risk that parties will successfully claim privilege over non-legal communications with counsel is no greater under the

Kellogg test. And that risk, however it manifests, certainly is not great enough to warrant the uncertainty and negative incentives accompanying the single predominant purpose standard.

CONCLUSION

For the reasons stated above, the Court should adopt the *Kellogg* test for evaluating the applicability of the attorney-client privilege in multi-purpose communications, and should reverse the district court's contempt order and require application of the *Kellogg* standard.

June 30, 2025

Respectfully submitted,
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