No. 25-3006

In the United States Court of Appeals for the Sixth Circuit

IN RE EXPRESS SCRIPTS, INC., ESI MAIL PHARMACY SERVICE, INC., OPTUMRX, INC., OPTUMINSIGHT, INC., OPTUMINSIGHT LIFE SCIENCES, INC., UNITEDHEALTH GROUP INCORPORATED, OPTUM, INC., OPTUMRX DISCOUNT CARD SERVICES, LLC, OPTUM PERKS, LLC, OPTUMHEALTH CARE SOLUTIONS, LLC, OPTUMHEALTH HOLDINGS, LLC, AND OPTUM HEALTH NETWORKS, INC.

Petitioners.

On Petition for a Writ of Mandamus to the United States District Court for the Northern District of Ohio, Case No. 1:17-MD-02804
The Honorable District Judge Dan A. Polster

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 25-3006 Case Name: In re Express Scripts, Inc., et al.

Name of counsel: Robert E. Dunn

Pursuant to 6th Cir. R. 26.1, The Chamber of Commerce of the United States of America
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on January 14, 2025 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Robert E. Dunn
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a), proposed amicus curiae the Chamber of Commerce of the United States of America (the "Chamber") respectfully moves for leave to file the attached brief in support of Petitioners' Petition for Writ of Mandate.

In support of this motion, amicus states the following:

1. The Chamber is the world's largest business federation, with 300,000 direct members that include businesses of every size, in every sector, and in every State. The Chamber has consistently filed amicus briefs in cases raising pressing concerns for the business community, like this one.

2. Amicus's proposed brief will assist the Court in its disposition of this petition, which presents critical issues concerning the application of the attorney-client privilege and work-product doctrine in the corporate context. Amicus's proposed brief highlights the importance of the attorney-client privilege for corporate clients and underscores the myriad areas of the law in which corporations seek legal advice that informs business decisions.

3. The proposed brief also explains the significant role that internal investigations play in corporate practice, and the inherently legal nature of attorneys' investigative work. Finally, the proposed brief explains how the district court's decision is fundamentally at odds with the realities of corporate legal advice and the policy goals underlying the attorney-client privilege and the attorney work-product doctrine.

4. Because of its experience representing law firms and businesses, respectively, the U.S. Chamber can provide this Court with a unique perspective on the attorney-client privilege and work-product protection in the corporate context.

5. The Chamber asked all parties to consent to the filing of its amicus curiae brief, but Plaintiffs' counsel responded that Plaintiffs did not believe amicus briefs were appropriate at this time. Plaintiffs' counsel indicated that Plaintiffs would not object to an amicus brief if this Court calls for a response to the Petition for Writ of Mandate. However, one purpose of the Chamber's proposed amicus curiae brief is to explain why the Petition is sufficiently important to warrant further review, so the Chamber cannot wait for the Court to call for a response before filing its amicus curiae brief.

For the foregoing reasons, the Chamber respectfully requests the Court to grant leave to file the accompanying brief in support of Petitioners.

Dated: January 14, 2025

Respectfully Submitted,

/s/ Robert Dunn

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

1. This Motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 754 words, excluding the parts of the Motion exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b).

2. This Motion complies with all typeface requirements of Federal Rules of Appellate Procedure and 32(a)(5)–(6) and Circuit Rule 32(b), because it has been prepared in a proportionally spaced typeface using Microsoft Word version 2308 in 14-point Century Schoolbook in the body of the brief.

Dated: January 14, 2025

/s/ Robert Dunn
ROBERT DUNN

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that, on January 14, 2025, true and correct copies of the foregoing Motion were filed with the Clerk for the United States Court of Appeals for the Sixth Circuit and served on the parties through the Court's electronic CM/ECF filing system.

Dated: January 14, 2025

/s/ Robert Dunn
ROBERT DUNN

Counsel for Amicus Curiae

No. 25-3006

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BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region nationwide. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

Many of the Chamber's members operate in heavily regulated industries and require routine compliance audits and internal investigations to ensure faithful adherence to the law. The district court's rejection of attorney-client privilege over communications related to these internal

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, amicus affirms that no party's counsel authored this brief in whole or in part and that no party, party's counsel, or person other than amicus, its members, or its counsel made any monetary contributions to fund the preparation or submission of this brief.

audits and investigations undermines these members' ability to seek legal advice from in-house counsel about their compliance obligations. The Chamber thus urges this Court to grant the petition and reverse.

SUMMARY OF ARGUMENT

Today, corporations operate in a complicated regulatory system, replete with a patchwork of federal and state laws that govern aspects of every significant decision. Corporations seek legal advice from lawyers to navigate these thorny compliance issues, and they use that legal advice to make important bottom-line business decisions. This squarely legal advice should not lose its privileged status because of how it is *used* by the company.

Compliance audits and internal investigations are integral to best corporate practices. Companies routinely conduct them to detect and prevent any violations of law, and companies use these reports to identify legal obligations and liabilities. To ensure effective compliance audits and internal investigations, companies communicate with in-house counsel, who are best trained in how to navigate difficult legal issues. That communication is essential to helping corporations follow the law, an outcome that benefits society.

Yet the decision below held the privilege inapplicable to internal audits regarding regulatory compliance, because the advice was supposedly for a business purpose. R.5832, PageID # 659236; R.5767, PageID # 655981-655982. That conclusion ignores the legal nature and purpose of compliance audits and internal investigations, punishes corporations for trying to follow the law, and threatens the privilege's very existence in the context of in-house corporate practice.

The consequences of the district court's rule would be devastating. Removing the privilege from internal audits and investigations would chill attorney-client communications, reducing corporations' incentive to seek legal advice on their compliance obligations. And if they do seek such advice, they may not record any information because an adversary could simply request the compliance audit, gaining damaging information. While legal audits and internal investigations no doubt inform business decisions, that is simply because a good company *should* make business decisions based on sound legal advice. This Court should grant the petition and reverse the district court's clearly erroneous ruling.

ARGUMENT

I. THE ATTORNEY-CLIENT PRIVILEGE IS ESPECIALLY IMPORTANT IN THE CORPORATE CONTEXT.

The attorney-client privilege plays a vital role in "the proper functioning of our adversary system of justice." *United States v. Zolin*, 491 U.S. 554, 562 (1989). "[R]ooted in the imperative need for confidence and trust," *Trammel v. United States*, 445 U.S. 40, 51 (1980), the attorney-client privilege is the oldest privilege at common law, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege covers "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391, 403 (1976). This shield facilitates "full and frank communication between attorneys and their clients," *Upjohn*, 449 U.S. at 389, by incentivizing clients to "make full disclosure to their attorneys," *Fisher*, 425 U.S. at 403.

Without the privilege, clients would shy away from disclosing "damaging information," thereby precluding lawyers from providing "fully informed legal advice." *Id.* "Litigation costs would rise and judicial efficiency would fall as attorneys attempt to advise clients after receiving

only partial information."[2] The privilege thus recognizes that a lawyer must "know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out," *Trammel*, 445 U.S. at 51, implicating the ethical obligation to provide "candid advice" to clients.[3] The privilege ultimately "promote[s] broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389.

The privilege applies in full force to corporations, *CFTC v. Weintraub*, 471 U.S. 343, 348 (1985), and the privilege's policy goals—frank disclosure, well-informed advice, and legal compliance—are equally important in the corporate context, *Upjohn*, 449 U.S. at 392. In fact, "corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law,'" because complex regulations do not make "compliance with the law … an instinctive matter." *Id.* (citation omitted). The attorney-client privilege incentivizes corporations to seek legal advice by shielding these communications from disclosure.[4] This advice-seeking benefits more than just the corporation's investors—the justice system

[2] Tom Spahn, *Corporate Attorney-Client Privilege in the Digital Age: War on Two Fronts?*, 16 Stan. J.L. Bus. & Fin. 288, 291 (2011).

[3] Model Rules of Prof'l Conduct R. 2.1 (Am. Bar Ass'n 2024).

[4] *See* Spahn, *supra*, at 302.

and society likewise benefit when corporations receive and follow sound legal advice.[5] Conversely, society would be harmed by a rule discouraging corporations from disclosing negative information to their attorneys, or discouraging attorneys from communicating unwelcome advice that could be used against the corporation in litigation.

To be sure, applying the privilege in the corporate context is not without "complications." *Id.* at 389. Where a corporation seeks purely legal advice from counsel, application of the privilege is straightforward. But corporations sometimes seek business advice from counsel—both outside counsel and in-house counsel—creating line-drawing difficulties when communications include "both legal and non-legal matters." *Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558, 570 (6th Cir. 2015).

In the context of multi-purpose advice, this Court has suggested that it determines the privilege's application by "consider[ing] whether the predominant purpose of the communication is to render or solicit legal advice." *United States v. Roberts*, 84 F.4th 659, 670 (6th Cir. 2023)

[5] *See id.* at 309.

(quoting *Alomari*, 626 F. App'x at 570).[6] The "predominant purpose 'should be assessed dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting the legal authorities and advice that can be given by a non-lawyer.'" *Alomari*, 626 F. App'x at 570 (quoting *In re Cnty. of Erie*, 473 F.3d 413, 420–21 (2d Cir. 2007)). Under this test, communications having both legal and business purposes can—and often should—be protected by the privilege.

The district court clearly misapplied this Court's standard in concluding that the privilege did not apply to the documents in question. For starters, the audit documents in question were created by the legal department for the purpose of assisting the corporation's compliance with state and federal laws. (Dkt. 1, Pet. Writ. at 21). Thus, the dual-purpose

[6] In *Roberts*, this Court quoted the predominant-purpose test from its non-precedential opinion in *Alomari*, which relied on a Second Circuit case. *Roberts*, 84 F.4th at 670. This Court then held that the at-issue statements met "[n]one of the elements of privilege," arguably making the articulation of the predominant-purpose standard dictum. *Id.* The circuits are split over whether the legal purpose must be predominant or merely one significant purpose of the communication. *See* Cert. Pet. at 9-18, *In re Grand Jury*, 143 S. Ct. 543 (2023) (No. 21-1397) (cataloguing split). But even assuming that the predominant purpose test is correct, the district court misapplied that test here for reasons set forth below.

test arguably should not even apply, as the documents on their face reflect a purely legal purpose.

But even assuming that the audit documents are dual-purpose communications, the privilege nevertheless applies because their purpose is predominantly legal. Courts within and outside this circuit have repeatedly reaffirmed the privilege's application to dual-purpose communications. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 759 (D.C. Cir. 2014) (Kavanaugh, J.); *Fletcher v. AMB Bldg. Value*, 2017 WL 1536059, at *3 (S.D.N.Y. Apr. 18, 2017); *Mitchell v. Columbus Urb. League*, 2019 WL 4727378, at *3 (S.D. Ohio Sept. 27, 2019); *Abington Emerson Cap., LLC v. Landash Corp.*, 2019 WL 6167085, at *3 (S.D. Ohio Nov. 20, 2019); *Lawrence E. Jaffe Pension Plan v. Household Int'l*, 244 F.R.D. 412, 427-28 (N.D. Ill. 2006); *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 529-31 (S.D.N.Y. 2015) ("*GM Ignition Switch*"). These cases confirm that a corporation's subsequent business decision based, in part, on legal advice does not undo the legal purpose of communications with counsel.

The attorney work-product doctrine likewise applies even when legal materials were "created in order to assist with a business decision."

United States v. Roxworthy, 457 F.3d 590, 599 (6th Cir. 2006) (citation omitted); *accord Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 622 (7th Cir. 2010); *United States v. Adlman*, 134 F.3d 1194, 1202-03 (2d Cir. 1998); *Maine v. U.S. Dep't of Interior*, 298 F.3d 60, 68-70 (1st Cir. 2002). A document need not have "the primary or sole purpose" of preparing for litigation to be protected work product. *Roxworthy*, 457 F.3d at 599. The doctrine's sole touchstone is that the documents "were prepared 'in anticipation of litigation.'" *Id.* at 593 (citation omitted).

Both protections thus reflect the reality that "corporations regularly seek legal advice on how to conduct business functions," *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 329 F.R.D. 656, 664 (D. Or. 2019), ranging from "employment practices … to transactions that may have antitrust consequences," *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997). Lawyers are equipped "to assess the risks and advantages in alternative business strategies," so "the fact that an attorney's advice encompasses commercial as well as legal considerations does not vitiate the privilege." *Note Funding Corp. v. Bobian Inv. Co.*, 1995 WL 662402, at *2-3 (S.D.N.Y. Nov. 9, 1995).

II. COMPLIANCE AUDITS AND INTERNAL INVESTIGATIONS ARE PREDOMINANTLY LEGAL IN NATURE.

Compliance audits and internal investigations conducted by counsel are inherently legal engagements. Under *Upjohn*, the attorney-client privilege (and attorney work-product doctrine) applies to communications with lawyers involved in such reviews, regardless of whether those lawyers work for the company or for outside law firms. Corporations need legal advice when faced with possible misconduct, and "the first step" is "ascertaining the factual background … with an eye to the legally relevant." *Upjohn*, 449 U.S. at 390-91. Courts consistently apply *Upjohn* to protect internal-investigation materials from discovery. *See, e.g.*, *Kellogg Brown & Root*, 756 F.3d at 757-59; *Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Ariz.*, 881 F.2d 1486, 1492-93 (9th Cir. 1989); *GM Ignition Switch*, 80 F. Supp. 3d at 529-30; *Alomari v. Ohio Dep't of Pub. Safety*, 2013 WL 5180811, at *3 (S.D. Ohio Sept. 13, 2013); *Abington Emerson*, 2019 WL 6167085, at *3; *Lawrence E. Jaffe Pension Plan*, 244 F.R.D. at 427-28; *cf. Wilson v. Russo*, 2022 WL 911271, at *4-7 (N.D. Ohio Mar. 29, 2022) (work-product doctrine); *Sandra T.E.*, 600 F.3d at 622 (same).

Since the Supreme Court's landmark decision in *Upjohn*, internal investigations have become only more important as businesses become

subject to ever-increasing federal and state regulation. As a former U.S. Attorney and SEC Chair has written, internal investigations are "an essential tenet of corporate best practices," and it is now "expected that a company will conduct an investigation when it detects potential violations of law."[7] When a corporation has been accused of legal wrongdoing, it is virtually certain that the predominant purpose—if not the *sole* purpose—of any internal investigation germane to the accusation will be legal advice.[8] Clients "retain lawyers to perform investigative work because they want the benefit of a lawyer's expertise and judgment," *In re Allen*, 106 F.3d 582, 604 (4th Cir. 1997), about "the company's legal

[7] Mary Jo White, *Forward*, in *Internal Corporate Investigations* xvii (Brad D. Brian *et al.*, eds., 4th ed. 2017).

[8] Corporations accused of wrongdoing also frequently seek advice from counsel about cooperating with the government. The Department of Justice ("DOJ") "rewards cooperation," including the "[t]imely disclosure" of "facts gathered during a corporation's internal investigation," and it considers cooperation as a factor in deciding whether to prosecute. U.S. DOJ Principles of Federal Prosecution § 9-28.700. *Accord id.* §§ 9-28.300, 9-28.900. Conducting an investigation "is indispensable to gathering the facts" to share "with the government—maximizing the credit given to the corporation for cooperation." An investigation may enable a corporation to make decisions that avoid the consequences of criminal prosecution. DOJ's declinations of prosecution often mention internal investigations. CEP Declinations, DOJ, https://tinyurl.com/2j5bs255.

rights, obligations and potential liabilities."[9] Corporations expect counsel "to provide legal advice based on facts learned during the investigation,"[10] "to evaluate and draw conclusions as to the propriety of past actions[,] and to make recommendations" for future action.[11]

In-house lawyers' legal advice and legal services often relate to their company's business. Indeed, a corporation could hardly justify hiring lawyers or expending resources on legal advice if it *wasn't* business-related. Legal issues—especially ones as significant as those facing Petitioners—frequently have business ramifications and impact business decisions. In such situations, lawyers commonly advise corporate clients through compliance audits and internal investigations. The compliance questions addressed in these internal reviews are quintessentially legal in nature, as they involve analysis of governing law and the application of a particular company's facts to the law. The best people to handle these transparently legal questions are trained lawyers who have studied the

[9] Barry F. McNeil & Brad D. Brian, *Chapter 1: Overview*, in *Internal Corporate Investigations* 17.

[10] John K. Villa, 1 Corporate Counsel Guidelines § 5:11 (2023-2024).

[11] *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 610 (8th Cir. 1977) (en banc).

relevant statutes, regulations, agency interpretations, and judicial precedents. Although non-lawyers can certainly assist with compliance audits, no reasonable corporation would base a business decision on a compliance review conducted *without* the input of competent legal counsel. Compliance audits are thus different from audits of routine business practices, such as the effectiveness of marketing campaigns or returns on various investments—areas where lawyers have no special training or insight.

III. THE DECISION BELOW IGNORED THE REALITIES OF CORPORATE LEGAL ADVICE AND CREATES A DANGEROUS PRECEDENT.

The district court ignored the reality of corporate practice in endorsing the idea that advice concerning "how to structure business operations to ensure compliance with regulatory requirements" is simply business advice. R.5767, Page ID # 655981-655982; *see also* R.5832, Page ID # 659236. That conclusion is not merely wrong—it turns privilege law completely upside down by framing the purpose of attorney-client communications at far too high a level of generality. For corporations and other businesses, *all* legal advice is, at a high level, ultimately business advice. But if that ultimate business purpose were enough to render the purpose

of a lawyer-client communication "non-legal" in the sense relevant to the attorney-client privilege, then the privilege would protect nothing.

Although all legal advice carries business implications, corporations undertaking compliance audits and internal investigations do not turn to legal counsel primarily for general business advice—rather, they seek "expertise and judgment" for "legal work." *Allen*, 106 F.3d at 604. The district court's contrary conclusion conflicts with *Upjohn*'s recognition that corporations face a "vast and complicated array of regulatory legislation," and punishes corporations for seeking legal guidance on how to follow the law. 449 U.S. at 392. The district court's rule is particularly harmful for companies in heavily regulated industries, such as the pharmaceutical industry, that require almost round-the-clock legal advice to navigate a web of federal and state laws.

While companies often consider legal advice when making business decisions, a company's ultimate *use* of legal advice in its business decisionmaking cannot eliminate the specific legal *nature* and *purpose* of that advice. Only the latter, narrow purpose determines whether a communication is privileged, otherwise the privilege would protect nothing at all. After all, by definition, everything a business does—seeking legal advice

or otherwise—ultimately has a business purpose. So, for example, if an in-house lawyer advises the company that a certain proposed merger is likely to be blocked by the Department of Justice because of antitrust concerns, and the company then abandons its acquisition efforts and devotes corporate resources elsewhere, the lawyer's advice is not any less legal, in the sense relevant to privilege, just because that advice materially affected a bottom-line business decision. Likewise, many companies employ in-house product counsel to advise on potential liability for new products, including privacy issues, tort exposure, and government enforcement. Companies depend on this plainly legal advice when deciding which products to develop and which to abandon. Similarly, lawyers regularly provide advice to companies preparing annual reports, 10Ks, 10Qs, and other corporate disclosures that could be considered a "business" function. And in each scenario, the ultimate business purpose of such reports does not transform the specific legal nature of the advice, which is provided to ensure compliance with applicable securities regulations.

On the contrary, in all these examples, the business's specific use of counsel's advice for compliance purposes confirms that the initial, relevant purpose of the advice is purely legal and does not really have "mixed" legal-business purposes at all in the sense that matters to privilege doctrine. A court following the district court's erroneous analysis could find all this advice to be non-privileged—which would gut the privilege and undermine corporate decision-making. If, as the district court held, an attorney's advice to her client on how to comply with the law serves a predominantly business purpose and thus is unprivileged, the privilege will effectively cease to exist for in-house attorneys.

Such an evisceration of the privilege will have deleterious consequences for businesses, consumers, and the rule of law. To avoid a paper trail, companies confronted with the district court's novel legal rule may avoid sharing full information with their in-house or outside counsel, leading to less accurate advice and increased instances of non-compliance. Alternatively, they may opt to forego internal compliance reviews altogether. After all, no company would willfully give opposing counsel access to an internal audit that may include frank advice from counsel

highlighting potential legal risks of a proposed action. In short, the district court's rule would disincentivize companies from obtaining robust compliance audits by trained attorneys familiar with all relevant facts. That would likely lead to *less* compliance, which is not in society's interest. *In re Cincinnati Enquirer*, 85 F.3d 255, 256 (6th Cir. 1996) (this Court considers the public interest when deciding whether to grant a writ of mandamus).

Instead, the public interest favors granting the writ and protecting these communications from disclosure. As courts have recognized, it serves the public interest when corporations consult lawyers about securities laws, *In re Bank of Am. Corp. Sec. Litig.*, 270 F.3d 639, 644 (8th Cir. 2001); tax obligations, *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984); intellectual-property matters, *Chore-Tie Equip., Inc. v. Big Dutchman, Inc.*, 255 F. Supp. 1020, 1022-23 (W.D. Mich. 1966); antitrust law, *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 424 (N.D. Ill. 2006); personnel decisions, *Fletcher*, 2017 WL 1536059, at *3; contract drafting, *Muller v. Walt Disney Prods.*, 1994 WL 801529, at *1 (S.D.N.Y. Sept. 27, 1994); immigration, *Hernandez v. Creative Concepts*, 2013 WL 3864066, at *2-8 (D. Nev.

July 24, 2013); corporate restructuring, *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550-51 (10th Cir. 1995); and myriad other topics.

The district court's decision denying protection to internal audits is not in the public interest because it ignores the essential fact that legal advice *should* affect business decisions. Society benefits when companies comply with the law. And companies should be encouraged to seek out, and rely on, sound legal advice when attempting to navigate compliance.

As then-Judge Kavanaugh wrote when addressing a similar issue, to "sensibly and properly" assess the applicability of the attorney-client privilege, courts must "not draw a rigid distinction between a legal purpose on the one hand and a business purpose on the other." *Kellogg Brown & Root*, 756 F.3d at 759. Thus, in the internal-investigation context, "if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply." *Id.* at 760. The same rationale led the district court in New York to reject the notion that the purpose of a similar internal investigation was to "mak[e] business recommendations." *GM Ignition Switch* 80 F. Supp. 3d at 528. Although the investigation's purposes were not exclusively legal, the court observed that "[r]are is the case that a troubled corporation will initiate an

internal investigation solely for legal, rather than business, purposes," because "the very prospect of legal action" implicates the "bottom line." *Id.* at 530. Consequently, the privilege must account for internal investigations' "multiple and often-overlapping purposes." *Id.*

Amicus fears that the decision below will undermine its members' ability to rely on the attorney-client privilege and work-product doctrine to protect salutary efforts to comply with legal obligations. These privileges are the "principal safeguard[s]" enabling corporations to investigate and remediate problems, without "providing a detailed road map to [their] adversaries."[12] "Good corporate citizens" should not be forced to choose "between effective internal compliance and the liability risks attendant to full disclosure" of compliance audit and internal-investigation materials.[13] Diluting the privilege penalizes good-faith actors and chills corporations' ability to engage in self-examination that benefits all—other than those seeking to profit improperly based on "wits borrowed

[12] Dennis J. Block, *Chapter 2: Implications of the Attorney-Client Privilege and Work-Product Doctrine*, in *Internal Corporate Investigations* 23.

[13] Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 Vand. L. Rev. 1, 44 (1997).

from the adversary," *Hickman v. Taylor*, 329 U.S. 495, at 516. Introducing uncertainty here cannot be squared with the Supreme Court's teaching that 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. This Court should correct this result.

CONCLUSION

The Court should grant the petition and reverse the District Court's decision.

Dated: January 14, 2025

Respectfully Submitted,

/s/ Robert Dunn

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

1. This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because it contains 3,766 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This Brief complies with all typeface requirements of Federal Rules of Appellate Procedure and 32(a)(5)–(6) and Circuit Rule 32(b), because it has been prepared in a proportionally spaced typeface using Microsoft Word version 2308 in 14-point Century Schoolbook in the body and footnotes of the brief.

Dated: January 14, 2025

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CERTIFICATE OF SERVICE

I hereby certify that, on January 14, 2025, true and correct copies of the foregoing Brief of Amicus Curiae in Support of Petitioners was filed with the Clerk for the United States Court of Appeals for the Sixth Circuit and served on the parties through the Court's electronic CM/ECF filing system.

Dated: January 14, 2025

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