No. 24-3654

In the United States Court of Appeals for the Sixth Circuit

IN RE FIRSTENERGY CORPORATION,
Petitioner.

On Petition for a Writ of Mandamus to the U.S. District Court for the Southern District of Ohio, Nos. 20-cv-03785, 20-cv-04287 Hon. Algenon L. Marbley

BRIEF OF AMICI CURIAE ATTORNEYS' LIABILITY ASSURANCE SOCIETY LTD., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE OHIO CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER FIRSTENERGY CORP.'S PETITION FOR A WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Amici make the following disclosures under Sixth Circuit Rule 26.1:

1. Is any amicus a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation not party to the appeal or an amicus that has a financial interest in the outcome?

No.

/s/ John S. Williams
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INTEREST OF AMICI CURIAE[1]

Attorneys' Liability Assurance Society Ltd., A Risk Retention Group ("ALAS"), the Chamber of Commerce of the United States of America ("U.S. Chamber"), and the Ohio Chamber of Commerce ("Ohio Chamber") respectfully submit this *amici curiae* brief supporting the petition of Defendant-Petitioner FirstEnergy Corp. for a writ of mandamus.

ALAS is the country's leading provider of professional liability insurance, ethics training, and risk-management counseling for large law firms. Founded in 1979, ALAS is a mutual insurance company that insures 224 law firms and 79,000 lawyers across all 50 States and the District of Columbia. The ALAS membership includes nearly half of the law firms in the AmLaw 200, with 48 member firms and over 5,800 insured lawyers located in the Sixth Circuit.

Throughout its history, ALAS has filed amicus curiae briefs in cases like this one raising issues of critical importance to ALAS and its members. As a professional-liability insurer and ethics counselor, ALAS routinely advises its

[1] Pursuant to Rule 29(a)(4)(E), amici affirm that no party's counsel authored this brief in whole or in part and that no party, party's counsel, or person other than amici, their members, or their counsel made any monetary contributions to fund the preparation or submission of this brief. Amici have filed a simultaneous motion for leave to file this brief.

members on the professional standards implicated in internal investigations that ALAS members conduct on behalf of corporate clients every day.

The U.S. 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 U.S. Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

Founded in 1893, the Ohio Chamber is Ohio's largest and most diverse statewide business advocacy organization representing businesses of all sizes. It promotes and protects the interests of its more than 8,000 members while building a more favorable business climate in Ohio by advocating for the interests of Ohio's business community on matters of statewide importance. The Ohio Chamber seeks a stable and predictable legal system which fosters a business climate where enterprise and Ohioans prosper.

SUMMARY OF ARGUMENT

When corporations encounter legal issues, those issues almost always have business implications. Corporations seek advice from lawyers to address legal issues, and then typically use that advice in deciding whether to undertake business conduct. One such situation arises when corporations face allegations of criminal conduct. A corporation may hire outside counsel to conduct an internal investigation and use the investigation's results to inform both business and litigation decisions. For example, if lawyers advise, following an investigation, that employees acted illegally, then the company may take business steps—like terminating responsible employees—in response. The lawyers' advice is nevertheless legal in nature and subject to the attorney-client privilege.

Yet the decision below held the privilege inapplicable on these facts, finding the communications did not have a predominantly legal "purpose" because the corporation later made use of them to terminate employees and take other business actions. That conclusion ignored the legal purposes of internal investigations and threatens the privilege's very existence in the corporate context. This Court should correct this clearly erroneous ruling.

ARGUMENT

I. The Importance of the Attorney-Client Privilege 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). That role does not diminish in the corporate context.

"[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]

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

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). 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 the corporate regulatory milieu makes "compliance with the law … hardly an instinctive matter." *Id.* (citation omitted).

The attorney-client privilege thus 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

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

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

system and society benefit too when corporations receive and follow sound legal advice.[5]

Nonetheless, applying the privilege in the corporate context is not without "complications." *Id.* at 389. Corporations sometimes seek business advice from 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) (quoting *Alomari*, 626 F. App'x at 570), assessing "purpose" "dynamically," *Alomari*, 626 F. App'x at 570 (quoting *In re Cnty. of Erie*, 473 F.3d 413, 420-21 (2d Cir. 2007)).

The circuits are split over whether the legal purpose must be predominant or merely one significant purpose of the communication, and this Court's position is not clear. *See* Cert. Pet. at 9-18, *In re Grand Jury*, 143 S. Ct. 543 (2023) (No. 21-1397) (cataloguing split). In *Roberts*, this Court quoted

[5] *See id.* at 309.

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.* But regardless of the precise contours of this Court's test, the district court's application of the privilege here—vitiating the privilege based on later-taken business actions—is clearly erroneous and merits review.

Courts within and outside this circuit repeatedly reaffirm 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 decisions do not undo the legal purpose of communications with counsel.

The attorney work-product doctrine likewise applies even when 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).

While the standards are distinct, both protections 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).

When deciding to grant a writ of mandamus, this Court considers the public interest. *In re Cincinnati Enquirer*, 85 F.3d 255, 256 (6th Cir. 1996). And here, the public interest favors granting the writ and protecting these privileges in the corporate context. It serves the public interest for corporations to consult lawyers about, inter alia, 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. Recognizing that the attorney-client privilege applies to such communications advances the policy goals that the privilege serves.

Amici's interests underscore the public interest. ALAS members conduct internal investigations frequently, and ALAS advises its members on professional obligations in that context. The predictable application of these protections advances ALAS's salutary role and ALAS members' zealous representation of clients. Likewise, the Chambers' members often undertake internal investigations. For these investigations to serve their purpose, the Chambers' members must be able to have candid communications with outside counsel protected by both evidentiary shields.

II. The Predominantly Legal Nature of Internal Investigations

Internal investigations conducted by outside counsel are inherently legal engagements. Under *Upjohn*, the attorney-client privilege and work-product doctrine apply to internal investigations. 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 *Upjohn*, internal investigations have become only more important. 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."[6]

In cases like this one, where a corporation has been accused of legal wrongdoing, it is virtually certain that an internal investigation's predominant purpose will include legal advice. 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), on "the company's legal rights, obligations and potential liabilities."[7] Corporations expect counsel

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

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

"to provide legal advice based on facts learned during the investigation,"[8] "to evaluate and draw conclusions as to the propriety of past actions[,] and to make recommendations" for future action.[9]

In such situations, corporations 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.[10] Conducting an investigation "is indispensable to gathering the facts" to share "with the government—maximizing the credit given to the corporation for cooperation."[11] An investigation may enable a corporation to make legal decisions that avoid the consequences of criminal prosecution.[12]

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

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

[10] U.S. DOJ Principles of Federal Prosecution § 9-28.700. *Accord id.* §§ 9-28.300, 9-28.900.

[11] White, *supra*, at xviii.

[12] DOJ's declinations of prosecution often mention internal investigations. CEP Declinations, *DOJ*, https://tinyurl.com/2j5bs255.

Yet cooperating entails its own risks, making legal advice critically important. Cooperation does not always forestall penalties; in worst-case scenarios, "companies' missteps in 'cooperating' with the government" generate additional sanctions.[13] Moreover, cooperation may create "trouble in other areas," via "increased private litigation risks, added compliance burdens, and difficult legal and ethical questions" regarding employees.[14] A corporation facing these questions must exercise *legal* judgment, and it usually relies on investigation counsel's advice in doing so.

Importantly, disclosing *facts* found in an internal investigation to the government does not forfeit the protections of the attorney-client privilege and work-product doctrine for internal-investigation *materials*. DOJ states that a corporation need not waive either protection to cooperate.[15] Indeed, "the corporation need not produce … protected notes or memoranda generated by" counsels' internal-investigation interviews, and legal advice "in

[13] Joseph De Simone & Marcus A. Christian, *Cooperation in SEC and DOJ Cases*, in *Securities Investigations*, § 10.1, at 10-4 (Practicing Law Inst. 2024).

[14] *Id.*

[15] Principles of Federal Prosecution, *supra*, §§ 9-28.700(B), 9-28.710.

an internal investigation report" and other "discussions between [the corporation] and [its] attorneys" remain privileged.[16]

DOJ's policies are consistent with governing law, which distinguishes between facts on the one hand and protected attorney-client communications and work product on the other. As *GM Ignition Switch* held, it is "flawed" to conclude that disclosing facts found in an investigation means that the company did not intend to keep *communications*, including counsel's interview memoranda, confidential. 80 F. Supp. 3d at 528. "The touchstone of the analysis" is whether the corporation "intended to keep confidential the communications" in question—not the investigation's results. *Id.* at 529.

FirstEnergy's internal investigation followed the model described above. The company initiated the investigation shortly after Larry Householder's arrest and its receipt of a subpoena, and its public statements confirmed that the investigation was "related to ongoing government investigations."[17] FirstEnergy faced at least thirty-one civil actions and

[16] *Id.* § 9-28.720 & nn. 2-3.

[17] R.511-2 (Exhibits) at 10971.

government enforcement proceedings.[18] A Special Committee member testified that the investigation aimed to determine "whether there had been any wrongdoing[] of anyone within FirstEnergy."[19] The Special Committee could then use the legal advice to determine "next steps."[20]

Ultimately, FirstEnergy obtained a deferred prosecution agreement ("DPA") from DOJ. The DPA credited FirstEnergy with conducting a "thorough internal investigation" of "issues and facts that would likely be of interest" to DOJ—by definition legal issues.[21] And the DPA provided that FirstEnergy's continuing cooperation "is subject to … valid claims of attorney-client privilege … or attorney work product doctrine."[22] Amici know of no evidence that FirstEnergy's cooperation waived any privilege or provided the government with the challenged communications and materials.

[18] R.510 (Appendix) at 10930-32.

[19] R.550-2 (Johnson Dep.) at 11920.

[20] *Id.* at 11921.

[21] R.259-5 (DPA) at 6002.

[22] *Id.* at 6003.

III. The Decision Below Defied the Realities of Corporate Legal Advice and Creates a Dangerous Precedent

Corporations hire lawyers for legal advice and legal services, which often relate to the company's business. Indeed, a corporation could hardly justify expending resources on legal advice that *wasn't* business-related. Legal issues—especially ones as significant as those facing FirstEnergy—frequently have business ramifications and entail business decisions. In such situations, lawyers commonly advise corporate clients through internal investigations. These investigations are, and should be, covered by the attorney-client privilege and attorney work-product doctrine. The district court's contrary decision will have seriously detrimental consequences.

The district court defied the reality of corporate practice in supposing that the outside counsel conducting the internal investigation might have been "acting as business or human resources advisors and not as legal advisors." R.653 (Order) at 14263. Corporations facing high-profile criminal investigations do not hire outside counsel for business advice: they hire them for their "expertise and judgment," *i.e.*, for "legal work." *Allen*, 106 F.3d at 604. That "FirstEnergy acknowledges that they used the internal investigations for many purposes, including business and employment decisions," R.653 (Order) at 14263, does not change the reality that the

investigation's predominant purpose was providing legal advice, bringing any communications made during that investigation under the attorney-client privilege.

The district court's analysis was inconsistent with this Court's privilege standard, meriting mandamus review. Persuasive case law confirms its error. As then-Judge Kavanaugh wrote, when a court "sensibly and properly" applies a primary-purpose test to assess the attorney-client privilege's applicability, it 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.

And in *GM Ignition Switch*, the court rejected the notion—adopted by the district court here—that the purpose of the internal investigation in question was to "mak[e] business recommendations." 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.*

The employment decisions cited by the district court bolster this point. In the context of a criminal investigation, employment issues take on legal significance. FirstEnergy's DPA credited it with remediation steps, including enforcing "*employment consequences* for executives and employees who engaged in misconduct."[23] This follows DOJ policy, which gives credit where a corporation "appropriately discipline[s] wrongdoers" and implements necessary "personnel" changes.[24] Disciplining or terminating employees as a legal remediation measure can, however, expose the corporation to civil liability if the allegations against employees prove incorrect.[25] Thus, what the district court cast as "human resources" decisions were actually intertwined with legal issues that the internal investigation predominantly addressed.

The district court also credited the Special Master's finding that FirstEnergy's internal investigation was "prepared in the ordinary course of business pursuant to SEC public requirements." R.653 (Order) at 14262. But

[23] R.259-5 (DPA) at 6006 (emphasis added).

[24] Principles of Federal Prosecution, *supra*, § 9-28.1000.

[25] *See* McNeil & Brian, *supra*, at 20.

the government's investigation of FirstEnergy created a "situation far from the 'ordinary course of business.'" *GM Ignition Switch*, 80 F. Supp. 3d at 532. Regardless, the privilege applies "even if the investigation was mandated by regulation." *Kellogg Brown & Root*, 756 F.3d at 759.

Additionally, the district court's rejection of work-product protection defies this Court's holding in *Roxworthy* that documents created "to assist with a business decision" retain work-product status as long as they meet the doctrine's other requirements. 457 F.3d at 599. A lawyer's "assembl[ing]" of information and "sift[ing of] … the relevant from the irrelevant facts" are quintessential work product, *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), even if the client has multiple reasons for engaging the lawyer's services. When litigation is certain, as here, distinguishing "between 'anticipation of litigation' and 'business purposes' is … artificial [and] unrealistic." *In re Woolworth Corp. Sec. Class Action Litig.*, 1996 WL 306576, at *3 (S.D.N.Y. June 7, 1996).

Decisions eroding these protections, like the district court's, "diminish the attorney-client privilege in the business setting," with "destabilizing effects in an important area of law." *Kellogg Brown & Root*, 756 F.3d at 762-63. "If the confidentiality of an internal investigation is not protected," the

"broader public interest" in encouraging honest attorney-client communications suffers. *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F. Supp. 679, 685 (W.D. Mich. 1996). Allowing the privilege to give way any time an internal investigation could relate to "business decisions" would "threaten[] to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *GM Ignition Switch*, 80 F. Supp. 3d at 530 (citation omitted).

Amici fear that the decision below will undermine their 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."[26] "Good corporate citizens" should not be forced to choose "between effective internal compliance and the liability risks attendant to full disclosure" of internal-investigation materials.[27] Diluting the privilege penalizes good-faith actors and chills corporations' ability to engage in self-examination that

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

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

benefits all (other than those seeking to profit improperly based on "wits borrowed from the adversary," *Hickman*, 329 U.S. at 516).

Moreover, the district court's logic threatens to widely upend settled law. If employment-related advice is unprotected, will a company be compelled to disclose its lawyers' advice on whether it can lawfully terminate an employee? Will corporations no longer be able to protect advice they receive on myriad topics informing business decisions? 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 FirstEnergy's petition and reverse the decision of the District Court.

Dated: August 2, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 2, 2024, true and correct copies of the foregoing Brief of Amici Curiae in Support of Defendant-Petitioner FirstEnergy Corp.'s Petition for a Writ of Mandamus 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.

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