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On Petition for a Writ of Certiorari to The United States Court of Appeals for The Eighth Circuit, Brief of Law Professors Paul F. Rothstein, et. al., Office of the President v. Office of Independent Counsel

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Docket No. 96-1783 in the Supreme Court of the United States

No. 96-1783

In The
Supreme Court of the United States
OCTOBER TERM, 1996

OFFICE OF THE PRESIDENT,
Petitioner,

v.

OFFICE OF INDEPENDENT COUNSEL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF LAW PROFESSORS PAUL F. ROTHSTEIN, RONALD J. ALLEN, MARGARET A. BERGER, WILLIAM J. BRIDGE, PAUL C. GIANNELLI, STEPHEN GILLERS, LAIRD C. KIRKPATRICK, DAVID P. LEONARD, MIGUEL A. MÉNDEZ, ROGER C. PARK, MYRNA S. RAEDER, JOHN W. REED, MARK REUTLINGER, LEO M. ROMERO, STEPHEN A. SALTZBURG, AND PETER TILLERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are law professors who regularly conduct scholarly research in, publish on, and teach the subjects of evidence or professional responsibility in law schools throughout the Nation. *Amici* law professors have written extensively on issues relating to the attorney-client privilege, and several have written or edited leading textbooks and treatises on the law of evidence or professional responsibility. In addition, many *amici* have had practical experience on both sides of civil and criminal cases; experience working as attorneys in government offices or agencies; and experience teaching evidence to the bench and bar.

Amici have a professional interest in and concern for the effective workings of the courts, government, and the legal profession. In particular, *amici* have an interest in the integrity and soundness of rules of evidence and privilege as they may affect the processes by which public policy, law, and regulations are made. As teachers of law, *amici* are also students of the legal profession and the contribution it makes to our system of government. These interests are heightened when the subject is, as in this case, the application of the attorney-client privilege in the context of government agencies and attorneys.

Brief biographical statements of individual *amici* are included in an Appendix to this brief. All parties have consented to the filing of this brief.

REASONS FOR GRANTING THE WRIT

This Court should grant review not only because this is a case of national importance and prominence, but also because the decision below is a conspicuous departure from settled principles of evidence law. The panel majority concluded that communications between government lawyers and government officials are not protected by the attorney-client privilege, at least when those communications are sought by a federal grand jury. That conclusion conflicts with the predominant common-law understanding that the attorney-client privilege applies to government entities and that where the privilege applies, it is absolute (*i.e.*, it protects against disclosure in all types of legal and investigative

proceedings). In particular, the Court of Appeals' decision rests on a fundamental misunderstanding of this Court's decisions in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and *United States v. Nixon*, 418 U.S. 683 (1974).

Moreover, this case warrants further review because the decision below has profound implications beyond the parties to this dispute. The Court of Appeals' ruling, if allowed to stand, will create widespread uncertainty among federal, state, and local officials concerning the extent to which their communications with their agency lawyers, for the purpose of seeking legal advice in the conduct of governmental affairs, are protected by the attorney-client privilege. Unless this Court grants review and resolves this uncertainty, the decision below will likely have an adverse effect on the current and future operation of not only the Office of the President of the United States, but also government at all levels. At the very least, a decision of such vast implications (as in the present case) should be made by the highest court in the land. We accordingly urge the Court to grant the petition for review.[1]

I. THE DECISION BELOW CREATES AN EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE THAT IS NOT IN ACCORD WITH ACCEPTED LEGAL PRINCIPLES AND HAS IMPORTANT ADVERSE CONSEQUENCES FOR GOVERNMENT

A. It Is Well-Settled That The Attorney-Client Privilege Applies To Government Entities

Rule 501 of the Federal Rules of Evidence provides, with limited exceptions, that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed

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[1] Because this brief urges the Court merely to grant further review, *amici* do not address in this brief the question whether, assuming the attorney-client privilege applies to government entities and is absolute, the requirements for asserting the privilege have been satisfied in this case. Those questions are more appropriately addressed if and when this Court elects to grant certiorari. *Amici* also do not address in this brief the attorney work-product issue raised by petitioner.

Pursuant to Supreme Court Rule 37.6, this certifies that this brief was prepared in its entirety by *amici curiae* and their counsel. Counsel for the parties did not author this brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." As the court below recognized (Pet. App. 5a), the starting point of analysis is therefore the common law, "interpreted . . . in the light of reason and experience." Fed. R. Evid. 501.

At common law, it has long been understood that the attorney-client privilege applies to communications between government entities and government lawyers for the purpose of seeking and providing legal advice. *See, e.g.*, Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence Manual* ¶ 18.03[02][a], at 18-18 (1996) ("Artificial entities, public or private, are . . . considered clients for purposes of the attorney-client privilege."); Paul R. Rice, *Attorney-Client Privilege in the United States* § 4:28, at 4-98 (1993) ("When government agencies consult with legal counsel for the purpose of obtaining legal advice or assistance . . . the attorney-client privilege protects [their] communications to those attorneys."); 1 Scott N. Stone & Robert K. Taylor, *Testimonial Privileges* § 1.18, at 1-47 (2d ed. 1995) ("Courts agree that the client may be an . . . organization or entity, either public or private.") (footnotes omitted); Richard O. Lempert & Stephen A. Saltzburg, *A Modern Approach to Evidence* 693 (2d ed. 1982) ("The proposed federal rule and most of the rules that have been enacted by states which used it as a guideline assume that a client can be a government agency as well as a corporation.").[2]

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[2] In *SEC v. World-Wide Coin Investments, Ltd.*, 92 F.R.D. 65, 67 (N.D. Ga. 1981), for example, the court applied the principles of this Court's *Upjohn* decision to communications between SEC staff and SEC counsel. And in *Deuterium Corp. v. United States*, 19 Cl. Ct. 697, 699 (1990), the court concluded that the "same reasoning" that this Court employed in *Upjohn* applies to "Government employees at all levels." In addition to the cases cited by petitioner in its Petition for Certiorari ("Pet."), *see* Pet. 18 n.5, other cases that recognize a governmental attorney-client privilege include *Connecticut Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448, 450 (S.D.N.Y. 1955) (communications between bridge commission and its attorneys held to be privileged), *State v. Today's Bookstore, Inc.*, 621 N.E.2d 1283, 1288 (Ohio Ct. App. 1993) ("The city is like a corporation, and the same attorney-client privilege enjoyed by

Although the issue has typically arisen in the context of civil litigation, we are aware of no reported decision (prior to this one) that suggests a different rule applies in criminal or grand jury proceedings. Any such distinction would be a departure from a fundamental feature of the attorney-client privilege; namely, that the privilege protects against compelled disclosure regardless of the forum in which the privileged communication is sought. *See infra* pp. 6-9. Indeed, the few decisions that have confronted the issue in a criminal setting have recognized the existence of the privilege. *See In re Grand Jury Subpoena*, 886 F.2d 135, 138-39 (6th Cir. 1989) (vacating district court's order to enforce a federal grand jury subpoena and remanding to determine whether minutes of a city council meeting were confidential); *In re Grand Jury Subpoenas Duces Tecum Served by the Sussex County Grand Jury*, 574 A.2d 449, 454-56 (N.J. Super. Ct. App. Div. 1989) (attorney employed by a county board of freeholders cannot be required to reveal client communications to a grand jury investigating the county).[3]

Apart from judicial decisions, the Freedom of Information Act ("FOIA") expressly recognizes that an attorney-client privilege exists between government agencies and their lawyers. *See* 5 U.S.C. § 552 (1994); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975); *Mead Data Central, Inc. v. United States Dep't of Air Force*, 566 F.2d 242, 252-53 (D.C. Cir. 1977). Although the panel majority below dismissed FOIA jurisprudence as "sui

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corporations is enjoyed by the city."), and *Rowley v. Ferguson*, 48 N.E.2d 243, 248 (Ohio Ct. App. 1942) (communications between attorney and client, both of whom were public officials, held to be privileged).

[3] It should not be surprising that there are few reported judicial decisions in the criminal or grand jury context, because the decision whether to waive attorney-client privilege in the context of a criminal or grand jury proceeding is often made within the Executive Branch. *See* Pet. 20 n.6. In addition, *amici* surmise that one reason this issue is not litigated more frequently is that, in the past, lawyers, judges, and scholars had no reason not to assume — or reasonably took for granted — that government agencies, no less than other entities, could assert the attorney-client privilege in the face of a criminal or grand jury investigation.

generis," Pet. App. 10a, it would have been singularly odd for Congress, which is presumed to be well-versed in this area of the law, to recognize an attorney-client privilege in the FOIA context if the general rule were that no such privilege exists.

Furthermore, Proposed Federal Rule of Evidence 503 provides that any "organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him," is entitled to the protection of the attorney-client privilege. Proposed Fed. R. Evid. 503(a)(1), *reprinted in* 56 F.R.D. 183, 235 (1972).[4] The Advisory Committee Notes to Proposed Rule 503 confirm that "[t]he definition of 'client' includes governmental bodies." *Id.* at 237 (citations omitted). Although the panel majority's analysis began with Proposed Rule 503, it abandoned further consideration on the curious ground that the Proposed Rule announces a "broad proposition" without specifically addressing "the particular situation before us in this case." Pet. App. 6a-7a. Courts usually do not disregard plain language in a statute or rule on the basis that the text speaks in general terms.

More importantly, Proposed Rule 503 has been recognized as "a powerful and complete summary of black-letter principles of lawyer-client privilege. Perhaps more than any other privilege proposal that was contained in the draft rules presented to Congress, Standard 503 represents a convenient and logical summary of core principles in privilege doctrine." 3 *Weinstein's Federal Evidence* § 503.02, at 503-8 (McLaughlin ed., 2d ed. 1997). Because Proposed Rule 503 "is useful as a restatement of the traditional

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[4] Although Rule 503 is a proposed rule, and therefore not binding on the courts, its pedigree makes it a persuasive authority. *See, e.g.*, Weinstein's Evidence Manual ¶ 18.03[01], at 18-17 ("Standard 503 remains a useful starting point in examining the use of the attorney-client privilege in the federal courts today. It is an accurate restatement of actual practice and is cited to frequently") (footnote omitted); *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (Proposed Rule 503 is "a useful starting place" for examination of the federal common law of attorney-client privilege).

common law lawyer-client privilege that had been applied in the federal courts prior to the adoption of the federal rules," *Weinstein's Federal Evidence*, *supra*, § 503.02, at 503-8 (footnote omitted), the court below should have viewed Proposed Rule 503 as persuasive (though not dispositive) authority that federal common law, interpreted "in the light of reason and experience," Fed. R. Evid. 501, includes a governmental attorney-client privilege.[5]

B. The Purposes Served By The Attorney-Client Privilege Apply With Full Force To Communications Between Government Entities And Government Lawyers

The attorney-client privilege is a long-recognized exception to the general rule that the public has a right "to every man's evidence," *United States v. Bryan*, 339 U.S. 323, 331 (1950) (internal quotation and citation omitted). Indeed, it "is the oldest of the privileges for confidential communications known to the common law." *Upjohn*, 449 U.S. at 389 (citing 8 John H. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961)). The purpose of the privilege is to

> encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of the law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves

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[5] Other authorities also recognize a government attorney-client privilege. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 124 (Proposed Final Draft No. 1, 1996) ("The attorney-client privilege extends to a communication of a governmental organization."); Uniform Rule of Evidence 502 (defining "client" to include governmental bodies and public officers; subsection (d)(6), which restricts the scope of the privilege, has been rejected by most States, *see infra* note 10); Model Rules of Professional Conduct 1.6 comment ("The requirement of maintaining confidentiality of information relating to representation applies to government lawyers . . ."); *cf.* Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 Geo. L.J. 1781, 1841 (1994) (proposing a new Federal Rule of Evidence 501 that includes a governmental attorney-client privilege).

> public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Id. The attorney-client privilege "'rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.'" *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). Its purpose is "to encourage clients to make full disclosure to their attorneys." *Id.* at 389 (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)); *see also Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985).

In *Upjohn*, the Court rejected a narrow application of the attorney-client privilege to corporations, concluding that the narrow "control group" test "overlook[ed] the fact 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." 449 U.S. at 390 (citations omitted). The *Upjohn* Court recognized that "[t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. . . . 'It 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 390-91 (quoting ABA Code of Professional Responsibility, Ethical Consideration 4-1).

This Court in *Upjohn* also recognized 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 . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. *Upjohn* thus affirmed the central principle that the attorney-client privilege, where it exists, is absolute and cannot be overcome by a showing of need. *See, e.g.*, Rice, *supra*, § 2.2, at 2-50 ("If the protection were not absolute, it would not be predictable, and the client could not rely on it. Absent a waiver of the protection, therefore, the privilege precludes disclosure of the communications

regardless of the need that might be demonstrated for the information in them") (footnotes omitted).[6]

The purposes served by the attorney-client privilege in the corporate setting apply with equal force in the government setting. *See* Rice, *supra*, § 4:45, at 4-175 (government agencies "need legal advice and assistance, and the privilege's rationale of encouraging more open communications from the client to the attorney is no less applicable, even though these entities can only speak and act through the individuals who represent them"). Government lawyers, no less than lawyers serving private clients, need to know all relevant facts before providing legal advice. The need to promote full and frank disclosure between clients and their lawyers is no less pressing in the government context than in the private context.[7]

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[6] The focus on encouraging the communication *ex ante* means that the privilege derives its justification independently of the context in which the information is sought *ex post*. In other words, given the rationales supporting the attorney-client privilege, there is no principled basis on which to distinguish between privileged information sought later in a criminal investigation or in civil litigation. Moreover, because the focus is on encouraging communication *ex ante*, the essence of the privilege goes to the need for candor and full access to information at the time the communication is made, not to the need for the information after the communication is made. In creating an exception to the attorney-client privilege for communications sought by a federal grand jury, the court below appears to have ignored this bedrock principle of privilege law.

[7] "The United States government employs more than 22,000 lawyers to handle its legal problems (two to three percent of all U.S. lawyers). . . . The variety of legal work performed by government lawyers is nearly as broad as the breadth of legal activity generally. Lawyers for the federal government are advisors, counselors and litigators; and they deal virtually in every legal specialty, ..." Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and Government Lawyers*, 5 Geo. J. Legal Ethics 291, 292 (1991). "Recognition of the attorney-client privilege for governmental entities is said to encourage more open communication between governmental officials and their lawyers, thereby enhancing the quality of governmental decisionmaking. Denial of the privilege would put

This Court in *Upjohn* recognized that a corporation's lawyers cannot function effectively for a corporation without the information provided by employees of the corporation, and that in the absence of privilege such information might be withheld from the lawyers to the detriment of the corporation, the legal system, and the public generally. *See Upjohn*, 449 U.S. at 390-95. The same is true of lawyers for government agencies. Legal advice is just as essential to a government agency's proper functioning as it is to a corporation's. Legal advice can be key to the agency's understanding of and obedience to the law, and key to the agency's formulation of sound public policy and sound legal regulations. Legal advice for a government agency is particularly necessary in the modern world's increasingly complex and sometimes counterintuitive laws governing agencies and their officials. As this Court observed in *Upjohn*, "[i]n light of the vast and complicated array of regulatory legislation," efforts to comply with the law will require "'constantly go[ing] to lawyers to find out how to obey the law,' particularly since compliance with the law in this area is hardly an instinctive matter." 449 U.S. at 392 (citations omitted). There can be little dispute that this observation applies with at least equal force to government agencies. At bottom, just as this Court recognized in the context of corporate attorney-client communications in *Upjohn*, application of the attorney-client privilege in a governmental context promotes, rather than impedes, the fair and accurate administration of justice.

C. The "Grand Jury Exception" Created Below To The Governmental Attorney-Client Privilege Erodes The Benefits Of The Privilege So Severely That Only The Nation's Highest Court Should Make That Decision

The panel majority below rejected the proposition that "an entity of the federal government may use the attorney-client privilege to avoid complying with a subpoena [issued] by a federal grand jury." Pet. App. 5a. But just as limiting the privilege to

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public entities at an unfair disadvantage in both criminal prosecutions and civil litigation." 2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence Second* § 191, at 352 (1994).

members of a corporation's "control group" would "frustrate[] the very purpose of the privilege," *Upjohn*, 449 U.S. at 392, so too would the decision of the court below to remove communications from the governmental attorney-client privilege when they are sought in a grand jury proceeding deny the essence of the privilege for the governmental entity.

The panel majority assumed that "confidentiality will suffer only in those situations that a grand jury may later see fit to investigate." Pet. App. 19a.[8] But grand jury investigations of governmental decisionmaking and decisionmakers are (unfortunately) no longer uncommon, and there can thus be considerable uncertainty whether a future grand jury may someday be interested in otherwise privileged communications. As this Court recognized in *Upjohn*, "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." *Upjohn*, 449 U.S. at 393; *see also Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996) ("We reject the balancing component of the privilege . . . . Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the . . . evidentiary need for disclosure would eviscerate the effectiveness of the privilege."); *cf.* Paul F. Rothstein, *A Re-Evaluation of the Privilege Against Adverse Spousal Testimony in the Light of Its Purpose*, 12 Int'l & Comp. L.Q. 1189, 1194 (1963) (contrasting communications privileges, which require certainty of applicability, with other privileges, which do not). Given the broad

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[8] The court below also asserted that it did not

> foresee any likely effect of our decision on the ability of a government lawyer to advise an official who is contemplating a future course of conduct. If the attorney explains the law accurately and the official follows that advice, no harm can come from later disclosure of the advice. . . . [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.

Pet. App. 19a-20a (citation omitted).

investigative mandate of federal grand juries, the uncertainty as to whether otherwise protected communications may lose that protection will frustrate the very purpose of the privilege.

Indeed, denial of the attorney-client privilege in the grand jury context would be an unprecedented exception to the privilege. There is no "grand jury exception" to the attorney-client privilege for individuals or corporations. A grand jury exception to the attorney-client privilege in the government context would cut a gaping hole in the privilege and would have a significant chilling effect on communications. Federal grand juries can investigate a wide range of conduct or suspected conduct and are not limited by relevancy rules applicable at trial. *See, e.g., United States v. Calandra*, 414 U.S. 338, 343-44 (1974). Thus, a government employee speaking with agency counsel about matters necessary to the daily effective functioning of the agency would not necessarily know if the matter could possibly be of interest one day to a federal grand jury. The fear that it *might*, however, would undoubtedly chill communications with agency attorneys. In addition, if the attorney-client privilege did not apply to government agencies in the context of federal grand jury investigations, every agency lawyer could become a potential prosecution witness against agency officials who have sought legal advice from that lawyer or against government employees who have provided information necessary for that lawyer to offer such advice.

As a result of both these implications, government officials and employees would likely be deterred from seeking legal advice regarding the legality of their conduct, which would have several undesirable effects. First, it might encourage agency officials and employees to remain deliberately ignorant of the law. Second, it might deter some officials or employees from engaging in proper and desirable conduct for fear that it might be illegal. Also, it might cause government agencies to establish policies they might not establish had officials obtained confidential legal advice, or to engage in conduct they might have eschewed had officials consulted government counsel about their proposed course of conduct. Those government officials who do actually seek legal advice might decide to withhold crucial information or otherwise refrain from free and

frank exploratory discussions, thus undermining the quality and effectiveness of any legal advice that is ultimately given.

This uncertainty over the prospect of a future grand jury investigation that would require disclosure of otherwise privileged communications is compounded by other uncertainties raised by the decision below. For example, unless this Court grants review and announces a uniform rule, there will be uncertainty over whether other courts will follow the court below and, if so, whether a future grand jury will seek such communications in those jurisdictions. There will be uncertainty over whether the rule announced by the court below might also apply to other types of proceedings, such as criminal trials or civil proceedings. The decision below also raises substantial uncertainty as to whether the same exception would apply to state or local government agencies and officials and, if so, whether a future grand jury will seek such communications in a jurisdiction that applies the "grand jury exception" created below to state and local government agencies and officials. *Cf.* Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 Geo. L.J. 125, 130-35 (1973) (urging general conformity of privileges with state law to avoid uncertainty). These uncertainties, each of which tends to undermine the very existence of the privilege, *see Upjohn*, 449 U.S. at 393, present an independent, compelling basis on which this Court should grant review.

D. A "Grand Jury Exception" To The Governmental Attorney-Client Privilege Pays Far Fewer Dividends to Grand Jury Investigations Than The Court Below Assumed

The decision below sought to distinguish application of the privilege in a civil setting from application of the privilege in a criminal setting by advancing "the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." Pet. App. 15a (discussing *United States v. Nixon*, 418 U.S. 683 (1974)). The panel majority also cited *Nixon* to support its conclusion that "[e]ven if . . . the governmental attorney-client privilege ordinarily

applies in civil litigation," a different rule is warranted in criminal proceedings. Pet. App. 11a.

At the outset, the panel majority's conclusion rests on a fundamental misreading of *Nixon*. This Court's opinion in *Nixon* expressly distinguished the *qualified* privilege at issue in that case from *absolute* privileges, such as those that apply to military or diplomatic secrets. 418 U.S. at 706-07. *Nixon* did not suggest that the attorney-client privilege, which has long been regarded as an absolute privilege, is subject to a balancing analysis. To the contrary, the Court expressly acknowledged the existence of "common-law . . . privileges," including the privilege of "an attorney" who "may not be required to disclose what has been revealed in professional confidence." 418 U.S. at 709. Furthermore, there was a much stronger showing of need for the evidence in *Nixon*. In *Nixon*, the information at issue was not available from any other source, because the relevant individuals could not be called as witnesses in a criminal trial. In this case, by contrast, the Independent Counsel has other sources for the information he seeks. Because Mrs. Clinton has already testified before the grand jury, for example, the Independent Counsel's need for counsel's debriefing notes related to that testimony is far less pressing than the Special Prosecutor's need for the tapes in *Nixon*.

More importantly, even apart from the panel majority's misreading of *Nixon*, the decision below overestimates the potential benefits to law enforcement from denial of a governmental attorney-client privilege in the context of grand jury proceedings. First, it is well-established that "[t]he privilege only protects disclosure of *communications*; it does not protect disclosure of the underlying *facts* by those who communicated with the attorney." *Upjohn*, 449 U.S. at 395 (emphasis added). As such, recognition of the privilege in the context of a grand jury subpoena does not and would not prevent the Independent Counsel (or some future party seeking grand jury evidence) from obtaining the underlying information from sources other than attorney-client communications. *See id.* at 396 ("While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience

do not overcome the policies served by the attorney-client privilege."). In this case, for example, because Mrs. Clinton has already testified before a grand jury, the Independent Counsel presumably has had ample opportunity to question her about underlying facts relevant to his investigation. What the attorney-client privilege protects — in this as in any other context — are confidential communications where there is an overarching public benefit in "encourag[ing] full and frank communication between attorneys and their clients [to] promote broader public interests in the observance of the law and administration of justice." *Upjohn*, 449 U.S. at 389.

Second, as this Court and others have recognized, the privilege does not serve to suppress evidence; rather, the privilege serves to encourage communications from the client to the attorney that otherwise might not have been uttered. *Cf. Jaffee*, 116 S. Ct. at 1929 ("Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged").[9] Thus, even apart from the significant adverse effect on governmental operations that is likely to occur, denial of the governmental attorney-client privilege for grand jury investigations provides no commensurate benefits for the administration of justice.

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[9] The privilege "keeps from the court only sources of information that would not exist without the privilege." Rice, *supra*, § 2:3, at 56-57 (quoting *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1501, 1508 (1985)). As such, "when the attorney-client privilege is properly understood, it reaches communications that are presumed to have been made precisely because the privilege exists. . . . It is not accurate, therefore, to say that the privilege operates in derogation of the truth. . . . [I]t is important, in understanding the privilege, to focus on the time period before the communications are made." Stephen A. Saltzburg, *Corporate Attorney-Client Privilege in Shareholder Litigation and Similar Cases: Garner Revisited*, 12 Hofstra L. Rev. 817, 823-24 (1984); *see also* Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 Va. L. Rev. 597, 600 n.9 (1980) (courts should recognize the information-generating effect of a privilege).

II. THE COURT OF APPEALS' DECISION RAISES A SERIOUS ISSUE OF FEDERALISM

The panel majority's decision also raises significant federalism concerns. Federal Rule of Evidence 501 provides that state law governing attorney-client privilege does not apply in the federal courts, except in civil actions and proceedings "with respect to an element of a claim or defense as to which State law supplies the rule of decision." Fed. R. Evid. 501. Accordingly, if state law provides that communications between state government officials and state government lawyers are protected by the attorney-client privilege, that *state* law will not be applied in federal criminal or grand jury proceedings or in federal civil actions that arise under federal law. Any protection in those proceedings is entirely dependent on the shape of *federal* privilege law. *See generally* Paul F. Rothstein, *Rules of Evidence for United States Courts and Magistrates* 139-40 (2d ed. 1996).[10]

This case concerns the federal government rather than a state government, and the panel majority itself recognized that "a standoff between a federal grand jury and a city government[] implicates potentially serious federalism concerns." Pet. App. 9a. But the Court of Appeals' reasoning denying privilege to the federal government applies as well to state and local governments. Having concluded (Pet. App. 18a) as a matter of federal common law that "the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition

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[10] This Court has considered "the policy decisions of the States" in determining the scope of privileges under federal law. *Jaffee*, 116 S. Ct. at 1929. Many States recognize that the attorney-client privilege applies to government agencies. *See, e.g.*, Cal. Evid. Code § 951 comment (West 1995) ("public entities have a privilege insofar as communications made in the course of the lawyer-client relationship are concerned"). *See generally* 1 Gregory P. Joseph & Stephen A. Saltzberg, *Evidence in America: The Federal Rules in the States*, ch. 24 (1987 & Supp. 1994); Paul R. Rice, *Attorney-Client Privilege: State Law* § 4.28 (1996). Of the States that have adopted Uniform Rule of Evidence 502, most have declined to adopt subsection (d)(6) of that Rule, which restricts somewhat the government's attorney-client privilege. *Id.*

of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials," it is difficult to see how the court could reach a different result for state and local officials.

As a result of the Court of Appeals' decision, a state lawyer who serves as counsel to a Governor (or, for that matter, any other state or municipal lawyer) could find herself having to testify as to otherwise privileged communications as an adverse witness in either a federal criminal or federal grand jury proceeding. Despite the State's own determination that the benefits of the governmental attorney-client privilege outweigh its costs, state and local officials will thus be deterred from seeking legal advice, and their communications with counsel will be constrained. *Cf. Jaffee*, 116 S. Ct. at 1930 ("Denial of the federal [psychotherapist-patient] privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications."). This could well result in significant damage to the effective functioning of State governments.

CONCLUSION

For the reasons stated in this brief and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

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