ORAL ARGUMENT NOT YET SCHEDULED

No. 20-5052

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re RPM International, Inc.,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court
for the District of Columbia (Case No. 16-1803)
The Honorable Amy Berman Jackson, United States District Judge, Presiding

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ASSOCIATION OF CORPORATE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amici curiae* the Chamber of Commerce of the United States of America and the Association of Corporate Counsel (together, "*amici*") submit this certificate as to parties, rulings, and related cases.

A. PARTIES AND *AMICI*

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the certificate filed by Petitioner RPM International, Inc.

The Chamber of Commerce of the United States of America and the Association of Corporate Counsel are submitting this brief as *amici curiae* in support of Petitioner.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the certificate filed by Petitioner.

C. RELATED CASES

Related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C) are listed in the certificate filed by Petitioner. *Amici* are not aware of any additional related cases.

Date: March 19, 2020

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amici curiae* make the following disclosures:

The Chamber of Commerce of the United States (the "Chamber") is a nonprofit corporation representing the interest of more than three million businesses of all sizes, sectors, and regions. The Chamber has no parent corporation, and no publicly held company owns 10% or more of its stock.

The Association of Corporate Counsel ("ACC") is the leading global bar association that promotes the common professional and business interests of in-house counsel. ACC has no parent corporation, and no publicly held company owns 10% or more of its stock.

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CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE AND SEPARATE BRIEFING

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici* state that all parties have consented to the filing of this brief.[*]

Pursuant to D.C. Circuit Rule 29(d), counsel for *amici curiae* hereby certify that no other non-government *amicus* brief of which they are aware focuses on the subjects addressed herein, *i.e.*, the potential effects of the District Court's erroneous decision on the American business community, and the broader significance of that decision to a wide range of regulatory regimes and circumstances, including but not limited to the relationship between public companies and their outside auditors, in connection with disclosures regulated by the Securities and Exchange Commission. In their capacity as nationwide business and trade associations whose members operate in every sector of the U.S. economy and frequently encounter questions related to attorney-client privilege and attorney work product in the context of corporate internal investigations, *amici* are well-suited to provide the Court important context on these subjects that will assist it in resolving this case. *Amici* have endeavored to avoid duplication in briefing.

[*] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

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GLOSSARY

As used herein,

ACC refers to *amicus curiae* the Association of Corporate Counsel

Amici refers to the Chamber of Commerce of the United States of America and the Association of Corporate Counsel

Appendix or **App.** refers to the Appendix to the Petition

Chamber refers to *amicus curiae* the Chamber of Commerce of the United States of America

Dkt. refers to the District Court's docket in the case below (D.D.C. No. 16-1803)

E&Y refers to Ernst & Young

Interview Memoranda refers to the nineteen interview memoranda created by Jones Day that the District Court ordered RPM to produce to the SEC

Petition or **Pet.** means the Petition for Writ of Mandamus (Doc. 1833317)

RPM refers to Petitioner RPM International, Inc.

SEC refers to the Securities and Exchange Commission, the plaintiff below

Transcript or **Tr.** refers to the transcript of the February 12, 2020 status conference before the District Court, which is available as Appendix H to the Petition

IDENTITY AND INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. The Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community, including issues related to how businesses structure and conduct internal investigations, and how the attorney-client privilege and work product protections apply to communications and materials prepared during such investigations.

The Association of Corporate Counsel ("ACC") is the leading global bar association that promotes the common professional and business interests of in-house counsel. ACC has more than 45,000 members who practice in the legal departments of corporations, associations, and other organizations in the United States and abroad. For over 35 years, ACC has sought to aid courts, legislatures, regulators, and other law- or policy-making bodies in understanding the role and

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

concerns of in-house counsel. A frequent topic of ACC's advocacy is the attorney-client privilege in the corporate context.

INTRODUCTION AND SUMMARY OF ARGUMENT

Every day, American businesses depend on attorneys, auditors, and other advisors to provide effective counsel on a broad range of legal and regulatory matters—from preparing routine securities disclosures or analyzing potential loss contingencies, to conducting internal investigations to identify and address misconduct. The attorney-client privilege and work product doctrines play a critical role in ensuring that companies can gather information and share it with their advisors in a confidential manner that facilitates securing effective, timely advice. In these and other contexts, the attorney-client privilege promotes "broader public interests in the observance of law and administration of justice" by "encourag[ing] full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Similarly, the "privacy" afforded lawyers by the work product doctrine is critical to the "[p]roper preparation of a client's case" and is therefore "necessary . . . to promote justice and to protect [a] clients' interests." *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). "[N]arrow[ing]" the scope of these protections "threatens to limit the valuable efforts of corporate counsel to ensure their [clients'] compliance with the law." *Upjohn*, 449 U.S. at 392.

The District Court's decision turns these principles on their head. The District Court held that (1) a lawyer's memoranda memorializing client interviews are ineligible for work product protection if the lawyer was originally retained for a "purpose" other than preparing for litigation, even when the lawyer expressly stated that he anticipated litigation when preparing the memoranda due to a known, pending investigation by the Securities and Exchange Commission ("SEC"); (2) a company waives work product protection for an entire document if a nonprivileged fact contained in that document is disclosed, even if the document itself was not revealed—and indeed did not even exist—at the time of the disclosure; and (3) a company waives attorney-client privilege when counsel relays any facts uncovered during an internal investigation to the company's outside auditor, and that auditor subsequently discloses to the government the auditor's own memoranda memorializing those facts.

Each of those holdings is novel, wrong, and in urgent need of correction. If left undisturbed, the District Court's rules will hamper the ability of attorneys, auditors, and other professional advisors to provide effective counsel to a wide range of American businesses. So too will the decision chill the development of corporate compliance programs and disincentivize companies from undertaking internal investigations. Because the District Court's decision departs from this Court's cases and "generate[s] substantial uncertainty about the scope of the attorney-client

privilege" and work product protections, mandamus is warranted. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 756 (D.C. Cir. 2014) (Kavanaugh, J.) ("*KBR I*").

ARGUMENT

I. The District Court's Holding that the Interview Memoranda Are Ineligible for Work Product Protection Is a Clear Legal Error with Far-Reaching Implications.

The District Court held that the Interview Memoranda are not eligible for work product protection because Jones Day "was hired for a different specific purpose" than assisting with litigation. Tr. 8:6-7. The Court so held even though the SEC was known to be investigating the company at the time, as to the same disclosures Jones Day was hired to consider, creating the distinct prospect of future litigation with the government or shareholders. According to the District Court, however, whether a document "was [prepared] in anticipation of litigation" depends on "why the [law firm's] investigation was undertaken" in the first instance. *Id.* at 8:3-5. Because, in the District Court's view, Jones Day "was hired to investigate the timing of [RPM's] disclosures" rather than as litigation or "SEC reporting" counsel (*id.* at 10:1-2, 9:5), Jones Day's Interview Memoranda were not prepared in anticipation of litigation and thus ineligible for work product protection.

The District Court erred by inferring a single "purpose" to the initial engagement of Jones Day and then attributing talismanic significance to that purpose. Eligibility for work product protection depends on "whether, in light of the

nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Nat'l Ass'n of Crim. Def. Lawyers* v. *U.S. Dep't of Justice Office for U.S. Attys.*, 844 F.3d 246, 251 (D.C. Cir. 2016) ("*NACDL*"). A document may be protected work-product "even though it serves multiple purposes" so long as "the prospect of litigation" was *a* reason for its preparation. *Id.* at 255. Thus, a document is work product where, as here, it was prepared to assist with an internal investigation *and* anticipated litigation.

The District Court's focus on the purpose for which Jones Day was initially retained is at odds not only with the record here, *see* Pet. 16-20, but also with the practical realities of how American businesses—including *amici*'s many members—engage and interact with their legal counsel. Companies often hire attorneys for multiple or overlapping purposes—particularly any public company that is subject to an active and known SEC investigation at the time counsel is engaged. So too can counsel's role shift or expand during a representation due to factual developments, exogenous events, or evolving legal strategy. The District Court's rule unrealistically freezes lawyers to one "purpose" defined at the time of initial engagement.

Although the District Court insisted that its decision would have "no implications for ordinary internal investigations" (Dkt. 86 at 5), just the opposite is

true. Under the District Court's ruling, lawyers retained for a particular non-litigation "purpose" would have to presume that their work product will be discoverable—even documents expressly prepared in anticipation of litigation. In turn, that will strip away the degree of privacy needed for counsel to provide candid, complete advice. *See Hickman*, 329 U.S. at 510.

More fundamentally, it is often impracticable and self-defeating to try to isolate a singular "purpose" for which an attorney was hired, or to attempt to select among the multiple reasons a company may have for retaining counsel—particularly where, as in this case, counsel is engaged after the SEC has initiated an investigation into a public company's past disclosures, and the company's auditors have raised questions related to those very same disclosures. *See KBR I*, 756 F.3d at 759 (noting that a lawyer's work may have "overlapping purposes (one legal and one business, for example)" and that it is "often not useful or even feasible to try to determine whether the purpose was A or B when the purpose was A and B"). Nor could this inquiry typically be accomplished without invading the company's privilege in the first place.

For these reasons, the operative question is whether counsel anticipated litigation at the time she prepared a particular document. *See NACDL*, 844 F.3d at 251. Under that test, the Interview Memoranda are clearly work product. As is often the case in disputes involving public company internal investigations, counsel was

hired to conduct an internal investigation into RPM's securities filings after and "*because of* the already pending SEC investigation." Pet. 18. The Jones Day partner overseeing the investigation (unsurprisingly) anticipated litigation at the time the Interview Memoranda were prepared. Pet. App. E ¶¶ 3, 4, 9. It is unrealistic to suggest that experienced corporate counsel would or could have prepared memoranda of witness interviews without *any consideration* for the government or shareholder litigation a company might face, especially when the SEC was known to be actively investigating the company's securities filings.

The District Court's ruling finds no support in *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, in which this Court held that, "[w]here a document would have been created in substantially similar form regardless of the litigation, work product [protection] is not available." Tr. 6:2-7 (quoting *Boehringer*, 778 F.3d 142, 149 (D.C. Cir. 2015)). *Boehringer*'s "substantially similar form" test means only that, if an attorney prepares a document in connection with "an ordinary (non-litigation) business transaction" that is independent from any contemplated legal proceedings, it may not qualify for work product protection. 778 F.3d at 150. But *Boehringer* confirms that documents are protected work product if the prospect of litigation was *one purpose* for their creation, as was the case here. *See id.*

The Interview Memoranda easily qualify for work product protection under this standard—as will often be true for materials prepared for an internal

investigation conducted in the shadow of an SEC or other government investigation. Where a public-company issuer retains counsel to conduct an investigation that implicates the issuer's federal securities filings, that investigation will often (if not *always*) be conducted against the background possibility that the SEC or investors may initiate litigation. That conclusion is particularly apt where (as here) the SEC is already actively investigating at the time counsel is retained. Public companies and their audit committees do not conduct internal investigations on issues like accounting and reporting for their own sake, but rather because the company has reason to investigate and is aware that litigation may be forthcoming. *See* Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. Rev. 73, 90-91 (2013) (internal investigations "typical[]" when "a corporation learns of possible wrongdoing"; such investigations "are the prelude to forthcoming criminal prosecutions and negotiations with the government").

The same is true for other kinds of common internal investigations. Take, for instance, a manufacturer's investigation into a potential product defect or a food company's investigation into potential product contamination. While one purpose of such investigations may be to determine the need for a product recall or to identify an appropriate business response to a problem, counsel will often operate under the reasonable expectation that the company will face litigation premised on the same

underlying facts—particularly where a potential adversary has already commenced an investigation. *See* Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 Colum. Bus. L. Rev. 859, 884-85 (2003) ("Internal investigations often are undertaken when corporate officials learn of pending investigations or legal actions instituted against the company and seek to evaluate risk . . . or take action to mitigate legal exposure for the entity and its constituents"). Similarly, a company may initiate an investigation for a non-litigation purpose (*e.g.*, considering an employee for a promotion), but uncover information during that investigation raising the prospect of litigation (*e.g.*, evidence of misconduct).

II. The District Court's Ruling Concerning Waiver of Work Product Protection Is Erroneous and Will Have Dramatic Real-World Effects.

The District Court also held that, even if the Interview Memoranda were work product, that protection was waived when Jones Day disclosed certain information regarding the witness interviews to Ernst & Young ("E&Y"), which in turn disclosed that information to the SEC. *See* Tr. 10:21-11:6. The District Court so held even though (1) Jones Day did not share the actual Interview Memoranda with RPM or its audit committee until well after they were written and (2) the Interview Memoranda did not even *exist* at the time that Jones Day briefed E&Y. Put differently, the District Court effectively held that disclosing to an auditor nonprivileged facts about an internal investigation waives work product protection

over documents that have not been shared—and indeed do not even exist—at the time of the disclosure. That is not, and cannot be, the law. *See Trs. of Elec. Workers Local No. 26 Pension Tr. Fund v. Tr. Fund Advisors, Inc.*, 266 F.R.D. 1, 16 (D.D.C. 2010); *see also Nice v. City of Akron*, No. 18-CV-1565, 2019 WL 6771156, at *5 (N.D. Ohio Dec. 12, 2019) ("Waiver applies when the work product *itself* has been inserted into the case").[2]

Under the District Court's approach, corporate counsel would be incentivized not to commit their work or analysis to paper, lest entire documents be ordered disclosed if some fact contained in the writing is revealed to an adversary. The "freedom of thought essential to carefully reasoned trial preparation would be inhibited" if attorneys are not guaranteed sufficient privacy to develop and "feel free to commit to writing the[ir] mental processes." *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 593 (3d Cir. 1984). And without writings, the client company will have no records to guide or document its business and legal decisions. Moreover, denying protection to interview memoranda will reduce the utility of conducting interviews

[2] It is no answer to suggest—as the District Court did here—that no "actual work product" was ordered disclosed because the memos consist only of "a recitation of the factual statements." Tr. 11:7-11. Once litigation is anticipated—as here—it often "prove[s] difficult, if not impossible, for a court to discern which nuances in documents" or sifting of facts reflect "strategic considerations" that implicate counsel's analysis or opinion. *Shapiro v. U.S. Dep't of Justice*, 153 F. Supp. 3d 253, 290-91 (D.D.C. 2016). Regardless, work product protection covers both facts and legal opinions expressed in the protected document.

in the first instance, thus making internal investigations less attractive and less frequently undertaken. Given that "both the corporate community and the public will benefit in the long term" from a scheme that "reward[s] effective self-regulation" and compliance programs, the District Court's rule makes even less sense as a practical matter than it does as a matter of law. Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save Its Soul?*, 47 Rutgers L. Rev. 605, 608 (1995).

III. The District Court's Unprecedented Holding Concerning Privilege Waiver Threatens a Vast Range of Regulated Industries.

The District Court compounded its errors by finding that attorney-client privilege "was waived when RPM disclosed the contents of the interviews to Ernst & Young, which also, thereafter, [disclosed them] to the SEC." Tr. 13:19-22. This unprecedented ruling departs from *Upjohn*'s admonition that mere facts are not privileged, 449 U.S. at 395-96, and in so doing undermines the incentive companies may have to cooperate with government disclosure regimes or to develop in-house compliance programs.

To begin, the District Court's holding means that a company risks waiver whenever it makes routine factual disclosures to its auditors. *See* Tr. 13:19-22. That rule would have sweeping consequences. The District Court's holding will certainly chill companies' legal communications with auditors about topics such as loss contingencies—especially given that legal counsel are frequently asked to brief

auditors about facts relevant to potential future litigation. If firms' counsel cannot freely communicate with auditors, tax practitioners, and other professional advisors regarding underlying facts, the chilling effect will make it more difficult for companies to ensure that securities filings and tax returns are timely, complete, and accurate. A regime encouraging candid, private exchanges between issuer and auditor ultimately serves the interests of the company, the government, and the public. Indeed, "[e]ncouraging management to be completely candid with its auditor about difficult accounting issues may be just as desirable as encouraging management to consult candidly with outside lawyers, and for similar reasons." *Checkosky v. SEC*, 23 F.3d 452, 485 (D.C. Cir. 1994) (opinion of Randolph, J.).

More generally, if the District Court were correct that anodyne, mine-run factual statements effect a broad waiver of attorney-client privilege, then many beneficial and well-functioning regulatory-disclosure schemes would be upended. Indeed, given the "dozens, possibly hundreds, of regulatory schemes that use disclosure in whole or in part to accomplish their purposes," the practical effects of the District Court's new rule on privilege law and the conduct of internal investigations are difficult to overstate. Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 Fla. St. U. L. Rev. 1089, 1092 (2007).

Many regulatory-disclosure regimes *require* corporations to make statements to the government. For example, the Mandatory Disclosure Regulation requires all

government contractors to disclose to the government any "credible evidence" that an employee has violated the False Claims Act or certain criminal-law provisions. *See* 48 C.F.R. § 52.203-13(b)(3) (2015). Similarly, regulations promulgated by the Department of Health and Human Services require federal-grant applicants and awardees to disclose to that agency certain criminal-law violations which may affect the award. *See* 45 C.F.R. § 75.113; *see also* 20 C.F.R. § 683.200(h) (similar Department of Labor rule). And under the International Traffic in Arms Regulations, anyone with knowledge of a sale of defense articles to prohibited countries must disclose such sales to the government. *See* 22 C.F.R. § 126.1(e)(2).

In other contexts, voluntary self-reporting regimes function as a use-it-or-lose-it mechanism to encourage disclosure, whereby failure to disclose will preclude the availability of lesser sanctions for corporate wrongdoing. To take just a few examples, businesses cannot receive "cooperation credit" under the Principles of Federal Prosecution of Business Organizations unless they disclose to the Department of Justice the facts relating to an employee's malfeasance[3]; individuals and firms cannot receive a non-prosecution agreement or deferred prosecution agreement for Foreign Corrupt Practices Act ("FCPA") violations unless they

[3] Memorandum from Sally Yates, Deputy Att'y Gen., to the Assistant Att'y Gen., Antitrust Div., et al., *Individual Accountability for Corporate Wrongdoing* 2 (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.

disclose the underlying violations to the SEC[4]; and criminal defendants cannot receive certain sentence reductions under the Sentencing Guidelines unless they self-disclose their wrongdoing.[5] In still other contexts—including merchandise exporting,[6] environmental protection,[7] and antitrust,[8] to name a few—self-disclosures are encouraged by federal law and may result in mitigation of otherwise-applicable penalties. To similar effect, a litany of federal laws require internal compliance systems for banks,[9] Medicare providers,[10] and public companies,[11] among others. In addition to these schemes, a variety of disclosures have been mandated by the SEC itself. For example, the SEC's rules governing Forms 10-Q and 10-K require public companies to periodically disclose both "legal proceedings"

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[4] *See* Jeffrey R. Boles, *The Dilemma of FCPA Self-Reporting*, 67 Fla. L. Rev. F. 214, 216 & n.8 (2016). The Justice Department considers the existence of a compliance program and any self-reporting when deciding whether to charge FCPA violations. U.S. Dep't of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 52-54 (2012).

[5] U.S. Sentencing Guidelines Manual § 8C2.5(g)(1) (U.S. Sentencing Comm'n 2018).

[6] 19 U.S.C. § 1592(c)(4).

[7] 65 Fed. Reg. 19,618 (Apr. 11, 2000) (EPA Audit Policy).

[8] U.S. Dep't of Justice, *Leniency Program* (Feb. 20, 2020), https://www.justice.gov/atr/leniency-program.

[9] 12 C.F.R. §§ 21.21, 44.20(a).

[10] 42 C.F.R. §§ 422.503, 423.504.

[11] The Sarbanes-Oxley Act requires companies to establish procedures for resolving complaints concerning accounting and auditing. Pub. L. No. 107-204 § 301, 116 Stat. 745, 775-77 (2002). *See AMCO Ins. Co. v. Madera Quality Nut LLC*, No. 1:04-CV-06456-SMS, 2006 WL 931437, at *8 (E.D. Cal. Apr. 11, 2006).

and "risk factors"—including facts learned via an internal investigation that may expose the company to future liabilities. *See* 17 C.F.R. §§ 229.103, 229.105.

Under the District Court's decision, factual disclosures made pursuant to any of the regimes listed above could waive privilege. That follows from the District Court's rule that "report[ing] the preliminary findings and conclusions" of an internal investigation to a third party waives privilege. Tr. 14:10-11.

IV. The District Court's Waiver Holdings Would Chill the Development of Compliance Programs and Cooperation with the Government.

Amici's members devote substantial time and resources to complying with the wide range of legal and regulatory obligations that apply to their operations, including working with auditors to comply with SEC disclosure regimes. Their aim is to cooperate with the government in appropriate circumstances, while also preserving the confidentiality necessary to the effective functioning of the attorney-client relationship and work product protection. For these reasons, *amici* support rules that promote information-sharing, reward the development of in-house compliance programs, and allow the government and regulated parties to work together to meet common ends.

The District Court's decision does just the opposite. Holding that a disclosure of facts uncovered during an internal investigation waives the attorney-client privilege and work product protection will create a perverse incentive for companies

to limit the scope of their investigations and ultimate disclosures, thus undermining the beneficial purpose of disclosure requirements.

More importantly, the District Court's ruling creates an untenable dilemma for companies subject to disclosure regimes.[12] Those companies may attempt to preserve the privilege and work product protection by declining to make fulsome disclosures, thus risking a later determination that a disclosure was insufficient (which may in turn trigger civil or criminal penalties). Or companies can continue to make the kinds of robust disclosures that regulatory agencies encourage and expect, thus jeopardizing privilege over the statement's entire subject-matter or a lawyer's investigatory files. Federal law does not force this choice on companies, and the District Court should not have done so either.

The District Court's rule will also disincentivize internal investigations from occurring. If a business waives privilege and work product protection merely by disclosing an investigation's factual findings, then there may be little justification for spending time and money developing compliance systems or conducting investigations at all. As then-Judge Kavanaugh recognized in *KBR I*, "prudent counsel monitor court decisions closely and adapt" their investigation "practices in

[12] Indeed, in this case, the SEC has alleged simultaneously that RPM did not make adequate disclosures to its auditors (*see* Dkt. 1 ¶¶ 29, 34, 53, 68), and that RPM waived privilege by disclosing too much.

response." 756 F.3d at 762-63. The District Court's ruling may force corporate counsel to "adapt" by curtailing investigations or limiting their scope, thus undermining counsel's ability to assess risk, offer guidance, and help promptly identify and correct misconduct. *See Upjohn*, 449 U.S. at 392. Similarly, companies will face a strong incentive to narrow the content of once-robust disclosures. These are exactly the results that regulatory agencies—which have carefully crafted compliance programs to "permit[a company] to retain privilege as to the contents of its investigations"—wish to avoid. *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 147 (D.C. Cir. 2015).

CONCLUSION

The mandamus petition should be granted.

Date: March 19, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 21(d)(1) because this brief contains 3,893 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on March 19, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the D.C. Circuit using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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