No. 20-1241

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re Fluor Intercontinental, Inc., Fluor Federal Global Projects, Inc., and Fluor Federal Services, LLC,

Petitioners.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Virginia (Case No. 1:19-cv-00289)
The Honorable Liam O'Grady, United States District Judge, Presiding

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND ASSOCIATION OF CORPORATE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Steven P. Lehotsky
Jonathan Urick
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
Phone: 202.659.6000

Counsel for the Chamber of Commerce of the United States of America

Jeremy C. Marwell
Joshua S. Johnson
James T. Dawson
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Phone: 202.639.6507
Email: jmarwell@velaw.com

Counsel for Amici Curiae

March 6, 2020

Additional Counsel Listed on Inside Cover

Patrick Hedren
Erica Klenicki
Manufacturers' Center for
Legal Action
733 10th Street NW, Suite 700
Washington, DC 20001
Phone: 202.637.3100

Counsel for the National Association of Manufacturers

Susanna McDonald
Mary Blatch
Association of Corporate Counsel
1001 G Street NW, Suite 300W
Washington, DC 20001
Phone: 202.293.4103

Counsel for Association of Corporate Counsel

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1241 Caption: In re Fluor Intercontinental, Inc., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

the Chamber of Commerce of the United States of America
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

Petitioners' disclosure statement reports that Fluor Corporation, Inc., as the ultimate parent corporation of all three petitioners, has a direct financial interest in the outcome of the litigation.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐ YES ☑ NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Jeremy C. Marwell Date: March 6, 2020

Counsel for: Chamber of Commerce of the United States of America

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-1241 Caption: In re Fluor Intercontinental, Inc., et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

the National Association of Manufacturers
(name of party/amicus)

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Counsel for: National Ass'n of Manufacturers

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Counsel for: Association of Corporate Counsel

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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 National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* 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. Petitioners have consented to this filing, but plaintiff Steven M. Anderson does not consent. Pursuant to Federal Rule of Appellate Procedure 29(a), this brief is accompanied by a motion for leave to file.

helps manufacturers compete in the global economy and create jobs across the United States.

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 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

In *Upjohn Co. v. United States*, the Supreme Court recognized that the attorney-client privilege—"the oldest of the privileges for confidential communications known to the common law"—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." 449 U.S. 383, 389 (1981). The Court cautioned, moreover, that "narrow[ing]" that privilege's scope in the business context "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Id.* at 392. The District Court's unprecedented Orders turn these longstanding principles on their head.

Under the District Court's Orders, any statement made by a client concerning the findings of an internal investigation conducted or advised by counsel waives privilege over all communications regarding that subject matter. If permitted to stand, this rule would create significant adverse consequences for U.S. businesses in numerous regulated industries. By the District Court's logic, companies would waive privilege by making routine regulatory disclosures; clients would waive privilege by speaking on a range of legal topics, including the decision to file a lawsuit or perception of legal risks; and businesses would waive privilege merely by disclosing facts uncovered after an inquiry or internal investigation into potential misconduct. The District Court's approach would immediately chill the development of corporate compliance programs and, ultimately, participation in voluntary and mandatory disclosure and compliance programs.

Because the District Court's Orders "generate substantial uncertainty about the scope of the attorney-client privilege," mandamus is urgently 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 Erroneous and Unprecedented Waiver Orders Threaten a Vast Range of Regulated Industries.

The District Court's Orders rest on a novel and sweeping rule: If a company makes a regulatory disclosure or other statement following an internal inquiry or

investigation, and if that statement even implicitly suggests that the company conferred with counsel before speaking, then the statement constitutes a privilege waiver for all attorney-client communications related to the subject matter. According to the District Court, disclosing the findings of an internal investigation *indirectly* reveals privileged communications because such disclosures are purportedly premised on "conclusions which only a lawyer is qualified to make." Dkt. No. 113 at 10.[2] Phrased differently, any disclosure concerning a topic on which a company would have consulted a lawyer constitutes a subject-matter waiver because, in the District Court's view, the conclusions underlying that disclosure were "necessarily communicated to [the company] by counsel" and thus "reveal[] attorney-client communications." Dkt. No. 161 at 11; Dkt. No. 113 at 10.

That is not the law. This Court has held that the touchstone inquiry in any waiver case is whether there has been a "disclosure of a communication [made] in confidence between a lawyer and a client" and that relays "legal advice." *Sky Angel U.S., LLC v. Discovery Commc'ns, LLC*, 885 F.3d 271, 276 (4th Cir. 2018). If a client discloses a conclusion (factual or legal) reached after an investigation but not any communication itself, there is no waiver. To hold otherwise would improperly infer that privileged information was disclosed "merely because [the company]

[2] "Dkt." refers to the District Court's docket (E.D. Va. No. 1:19-cv-00289). "ECF" refers to this Court's docket (No. 20-1241).

sought legal advice on the same topic" on which it later spoke. *Id.* The governing rule here follows from *Upjohn* itself. The Supreme Court held there that "[t]he privilege only protects disclosure of communications," 449 U.S. at 395; thus, disclosing "details" about an investigation did not effect a waiver, even where those details catalogued potential legal liabilities based on line-drawing that "only a lawyer" would typically perform. *See id.* at 395-97; *see also United States v. Upjohn Co.*, 600 F.2d 1223, 1225 (6th Cir. 1979) (discussing "details" Upjohn provided the government).

The new rule adopted by the District Court—which has jurisdiction over northern and eastern Virginia, where many government contractors do business—will have immediate and adverse consequences not only for government contractors, but for a staggering array of American companies more broadly.[3]

A. The District Court's Rule Would Trigger a Subject-Matter Waiver from Routine Regulatory Disclosures.

Under the District Court's approach, any statement made under the scores of regulatory disclosure regimes that apply to American businesses today—no matter how anodyne or routine—would risk a waiver over the entire subject matter of the

[3] For simplicity, this brief focuses on the attorney-client privilege. However, the District Court's analysis fails for similar reasons when applied to the work-product doctrine. *See, e.g., Restatement (Third) of the Law Governing Lawyers* § 87 (2000) (work-product doctrine protects "tangible material or its intangible equivalent in unwritten or oral form," but not "underlying facts").

statement. That is so because, under the District Court's flawed rationale, such communications (whether voluntary or not) necessarily reveal a conclusion reached after an investigation with which counsel is likely to have assisted. 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 (2007); *see also id.* at 1092 n.7 (collecting examples of disclosure schemes).

One prominent disclosure regime is the one central to this case—the Mandatory Disclosure Regulation ("MDR")—which requires all government contractors to disclose "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). But other examples abound. For example, under regulations recently promulgated by the Department of Health and Human Services, federal-grant applicants and awardees must 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 certain

prohibited countries must disclose such sales to the government. *See* 22 C.F.R. § 126.1(e)(2).[4]

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[5]; individuals and firms cannot receive a non-prosecution agreement or deferred prosecution agreement for Foreign Corrupt Practices Act ("FCPA") violations unless they disclose the underlying violations to the Securities and Exchange Commission ("SEC")[6]; and criminal defendants cannot receive certain sentence reductions under the Sentencing Guidelines unless they self-disclose their wrongdoing.[7] In still other

[4] Companies subject to deferred prosecution or corporate integrity agreements with the federal government may be contractually obligated to disclose criminal or civil wrongdoing. *See, e.g.*, Lillian V. Blageff, *Bribery Provisions of the Foreign Corrupt Practices Act*, 261 Corp. Counsel Int'l Adviser 1 (Feb. 1, 2007).

[5] 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.

[6] *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. Department of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices* Act 52-54 (2012).

[7] U.S.S.G. § 8C2.5(g)(1).

contexts—including merchandise exporting,[8] environmental protection,[9] and arms trafficking,[10] 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,[11] Medicare providers,[12] and public companies,[13] among others.

The reporting that occurred in this case—*i.e.*, statements that a disclosing corporation's employee acted "inappropriately" or "improperly," Dkt. No. 113 at 9-10—involves precisely the type of disclosures that would occur under the disclosure regimes discussed above. In each case, the predicate conclusion triggering a reporting obligation (for mandatory disclosures) or making the disclosure attractive (for voluntary disclosure) would likely have been reached following an inquiry directed by, or conducted with the assistance of, counsel. Thus, under the District Court's rule, disclosures made pursuant to the regimes listed above would likely

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[8] 19 U.S.C. § 1592(c)(4).
[9] 65 Fed. Reg. 19,618 (Apr. 11, 2000) (EPA Audit Policy).
[10] 22 C.F.R. § 127.12(c)(1)(i).
[11] 12 C.F.R. § 44.20(a) (Federal Bank Act); *id.* § 21.21 (Bank Secrecy Act).
[12] 42 C.F.R. §§ 422.503, 423.504.
[13] 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) (upholding privilege claim where disclosing party "state[d] that one purpose of [its] report was to comply with obligations under various statutes," including "the Sarbanes-Oxley Act").

waive privilege. That result would chill many disclosures that the government seeks to encourage or require, *see supra* at 14-15; would cripple well-functioning and beneficial internal compliance programs, *see supra* at 15-16; and disserve the public interest in facilitating corporate compliance and encouraging prompt reporting of potential corporate wrongdoing.

B. The District Court's Rule is Unworkable and Upsets Long-Settled Privilege Law.

At bottom, the District Court held that any statement by a client concerning a "conclusion[] which only a lawyer is qualified to make" waives the client's privilege over all communications related to the subject-matter of the statement. Dkt. No. 113 at 10. If carried to its logical end, this rule would upend decades of privilege precedent and disrupt numerous areas of the law.

The scope of the District Court's waiver rule is vast. To begin, consider lawyers. The American legal system vests lawyers with the responsibility to reach a variety of "conclusions," such as whether a civil complaint is sufficiently meritorious to file, *see* Fed. R. Civ. P. 11(b); whether an appeal is sufficiently meritorious to pursue, *see Anders v. California*, 386 U.S. 738 (1967); and how to handle various "trial management" issues, including "the objections to make [and] the witnesses to call," *McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018) (citation omitted). It strains credulity to imagine that a client would waive privilege over the subject-matter of any of these decisions by merely speaking about them (without

disclosing any actual communications). *See In re Grand Jury*, 341 F.3d 331, 336 (4th Cir. 2003) (rejecting notion that "attorney-client communications relating to the preparation of publicly filed legal documents—such as court pleadings—[are] unprotected" by the privilege).

Under federal securities laws, public companies must make disclosures reflecting tentative conclusions that prudent corporate officers generally would not reach without consulting counsel. For example, the SEC's rules governing Forms 10-Q and 10-K require all public companies to periodically disclose both "legal proceedings" and "risk factors"—including *legal* risk factors and potential litigation that may expose the company to future liabilities. *See* 17 C.F.R. §§ 229.103, 229.105. A statement that a particular issue affecting a company may pose legal risks necessarily reflects a determination reached in consultation with counsel, and publicly disclosing that information would—under the District Court's rationale—effect a subject-matter waiver. The same is true for the myriad and routine disclosures that public companies make to auditors, financial authorities, or industry-specific regulators. Here too, the District Court would apparently hold—contrary to decades of settled practice and law—that these quotidian disclosures effect a sweeping subject-matter waiver.

The outer boundaries of the District Court's rule are difficult to discern. Suppose, for example, that a defendant exercises her Sixth Amendment right to

provide testimony in her own defense at her criminal trial. Most criminal defendants would not provide such testimony without first discussing the substance of the testimony with counsel. Under the District Court's rule, then, criminal defendants would presumably waive privilege over the entire subject-matter of their testimony—including communications with counsel regarding that testimony—just by making the statement in court. *Contra Matter of Feldberg*, 862 F.2d 622, 629 (7th Cir. 1988) (noting that it is a "[r]are" case in which "attorney-client conversations do not lead to some public disclosure" and rejecting notion that such disclosures create waiver).

C. The District Court's Rule Would Disrupt Corporate Compliance Programs by Waiving Privilege for Routine Disclosures of Facts.

The District Court's Orders will also sow significant uncertainty concerning routine, *factual* statements about an internal investigation's findings. In this case, the District Court zeroed in on four specific statements—the facts that (1) General Anderson "appears to have inappropriately assisted" another firm, (2) "Fluor considers [that] a violation," (3) General Anderson used his position "to pursue [improper opportunities]" and to "improperly disclose nonpublic information," and (4) that "Fluor estimates that there may have been a financial impact" because of this "improper conduct." Dkt. No. 113 at 9-10. The District Court concluded that these four statements were "legal conclusions" rather than factual disclosures and

that they therefore created a subject-matter waiver. *See id.* at 10; Dkt. No. 161 at 11.

To begin, the statements at issue did not disclose any privileged *communications*. *See infra* at 17. Thus, the District Court's waiver finding was incorrect regardless of whether the statements are viewed as legal or factual.

In any event, these statements are precisely the type of generic, innocuous declarations of fact that one would expect from any company making a disclosure to the government. The suggestion that these statements are somehow "legal" in nature cannot be squared with *Upjohn*. The Supreme Court treated the disclosures at issue in that case—which were similar to those here—as factual. 449 U.S. at 395-397. Thus, even if the factual-versus-legal distinction matters, Fluor's disclosure must be construed as a disclosure of facts. And disclosing facts cannot waive privilege. *See id.* at 395-96.

The District Court attempted to distinguish *Upjohn* on the ground that the company in that case "merely disclose[d] facts" whereas Fluor purportedly disclosed its "conclusions as to past events, and fruits of internal investigation which were necessarily communicated to Defendants by counsel." Dkt. No. 161 at 10-11. This argument starts from an incorrect premise because the *Upjohn* Petitioner *did* disclose both "conclusions as to past events" and "fruits" from its investigation, including details of that investigation and its opinion concerning what misconduct may have

exposed the company to different types of legal liability. *See* Br. of Petitioners, *Upjohn v. United States*, No. 79-886 (U.S. June 20, 1990), 1980 WL 339279, at *6-7.

The District Court's argument is also legally wrong. The critical portion of its rationale—comprising two sentences without citation to legal authority, Dkt. No. 161 at 10-11—appears to embrace the view that any disclosure of conclusions reached following an internal investigation waives privilege because those conclusions "were necessarily communicated to defendants by counsel." But this Court taught in *Sky Angel* that courts should not presume that privileged communications were disclosed simply because the company had previously "sought legal advice on the same topic" on which it later spoke. 885 F.3d at 276. Such a presumption would be perilous, given the reality that corporations do not always accept (or publicly reiterate) their attorney's advice in all respects. In many cases, lawyers do not advise their client to take one particular course of action; instead, they might inform their client of the legal risks associated with a range of options, leaving the client to choose a path. Even when attorneys advise a particular course of action, businesses may disagree, or tailor their statements to their understanding of the facts and law. Thus, there is no basis for the District Court's sweeping and apparently conclusive presumption that the contents of Fluor's disclosure "were necessarily communicated to [Fluor] by counsel."

D. The District Court's Rule Would Chill Compliance Programs' Development and Cooperation with the Government.

The District Court's rule would impair cooperation with the government and impede the development of voluntary corporate compliance programs. *Amici*'s members devote substantial time and resources to complying with the dizzying array of legal and regulatory obligations that apply to their operations, and to cooperating with the government in appropriate circumstances, while preserving the confidentiality necessary to the effective functioning of the attorney-client relationship. For *amici*'s many government-contractor members, the government is not just a regulator but also a customer, owed contractual duties of performance and information. For these reasons, *amici* support reasonable rules that promote information-sharing and allow the government and regulated parties to work together to meet common ends.

The District Court's rule does just the opposite. Its holding that the applicable regulations do not "contain[] a requirement that the disclosure be comprehensive" creates a perverse incentive for companies to limit disclosures in a manner that will be less useful to the government, undermining the beneficial purpose of disclosure requirements. Dkt. No. 161 at 7.

More importantly, the District Court's ruling subjects government contractors—and other companies subject to a host of modern disclosure regimes—to a Catch-22. Such companies may attempt to preserve the privilege by declining

to make fulsome disclosures, thus risking a later determination that a disclosure was insufficient (which may in turn trigger debarment from eligibility for government contracts, further investigation, findings of implicit admission of fault, or civil or criminal penalties). Or companies can continue to make the kinds of disclosures the government encourages and expects, jeopardizing privilege over statement's the entire subject-matter. The Federal Acquisition Regulation does not force this choice on companies, and the District Court should not have done so either. *See* Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 Vand. L. Rev. 1, 44 (1997). If left to stand, the District Court's rule will have an immediate chilling effect on the frequency and fulsomeness of disclosures, thus undermining good governance and the government's regulatory and law-enforcement capabilities.

The District Court's rule will also disincentivize internal investigations from occurring in the first place. If a business waives privilege merely by disclosing conclusions reached following an internal investigation, then there may be little warrant to justify spending time and money on developing compliance systems or conducting investigations at all.

As then-Judge Kavanaugh has recognized, "prudent counsel monitor court decisions closely and adapt" their privilege and investigation "practices in response." *KBR I*, 756 F.3d at 762-63. The District Court's Orders here will chill

the conduct of internal investigations, 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) ("*KBR II*").

II. Whether Treated as Voluntary or Mandatory, Fluor's Disclosure Effected No Privilege Waiver.

The parties have sharply debated whether Fluor's disclosure was voluntary or mandatory. The District Court ultimately held that it was voluntary because Fluor purportedly made a judicial admission of voluntariness (Dkt. No. 161 at 4-6). On this score, the District Court was clearly wrong, and its refusal to allow Fluor to amend its papers violated Federal Rule of Civil Procedure 15(a). The District Court should not have let a plaintiff's game of "gotcha" trump longstanding privilege rights.

But this Court need not reach that issue to grant the writ, because under well-settled law, the relevant inquiry for present purposes is whether the statement at issue—*even if deemed voluntary*—revealed a privileged communication. *See Sky Angel*, 885 F.3d at 276; *United States v. O'Malley*, 786 F.2d 786, 794 (7th Cir. 1986) ("[A] client does not waive his attorney-client privilege merely by disclosing a

subject which he had discussed with his attorney" (internal quotation marks omitted)). "[U]nderlying communications" thus remain privileged even if "those communications may have assisted [with crafting statements made] in a public document." *In re Grand Jury*, 341 F.3d at 336.

Although the District Court recognized that "privilege protects only the disclosure of communications" (Dkt. No. 113 at 9), it did not—and could not—explain why the statements here disclosed communications. The District Court's apparent theory was that Fluor's disclosures to the government *implicitly* revealed the "legal conclusions" that Fluor's lawyers communicated to the company after Fluor's internal investigation. Dkt. No. 113 at 10. That theory, however, is untenable. As explained above, *see supra* at 11-14, Fluor did not actually disclose "communications" from counsel; instead, its disclosure merely included the facts of the conclusions that the company reached following consultation with counsel and after an internal investigation. To conclusively presume that any statement by a client made after privileged communications with counsel necessarily discloses the communications themselves, as the District Court did here, runs contrary to the Supreme Court's admonition that "[a]n uncertain privilege . . . is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

CONCLUSION

The mandamus petition should be granted.

Date: March 6, 2020

Respectfully submitted,

/s/ Jeremy C. Marwell

Steven P. Lehotsky
Jonathan Urick
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
Phone: 202.659.6000

Counsel for the Chamber of Commerce of the United States

Jeremy C. Marwell
Joshua S. Johnson
James T. Dawson
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Phone: 202.639.6507
Email: jmarwell@velaw.com

Counsel for Amici Curiae

Patrick Hedren
Erica Klenicki
Manufacturers' Center
for Legal Action
733 10th Street NW, Suite 700
Washington, DC 20001
Phone: 202.637.3100

Counsel for the National Association of Manufacturers

Susanna McDonald
Mary Blatch
Association of Corporate Counsel
1001 G Street NW, Suite 300W
Washington, DC 20001
Phone: 202.293.4103

Counsel for Association of Corporate Counsel

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 3,890 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.

Date: March 6, 2020

/s/ Jeremy C. Marwell

Jeremy C. Marwell
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Phone: 202.639.6507
Email: jmarwell@velaw.com

Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on March 6, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth 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.

/s/ Jeremy C. Marwell
Jeremy C. Marwell
Vinson & Elkins LLP
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
Phone: 202.639.6507
Email: jmarwell@velaw.com

Counsel for *Amici Curiae*