No. 26-OA-0001

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

IN RE META PLATFORMS, INC. AND INSTAGRAM, LLC,
Petitioners

ON PETITION FOR A WRIT OF MANDAMUS TO THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
(YVONNE M. WILLIAMS, J.)

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS AND GRANTING THE PETITION FOR WRIT OF MANDAMUS

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INTEREST OF AMICUS CURIAE

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") represents thousands of advocates across the United States who are committed to advancing the interests and protecting the rights of persons accused of crimes. NACDL is a nonprofit voluntary professional association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL files numerous amicus briefs each year in the Supreme Court and other federal and state courts in cases that present issues of broad importance to the criminally accused, criminal defense lawyers, and the criminal legal system as a whole.

This case directly implicates two of amicus's core concerns: protecting the Sixth Amendment right to counsel and the Fifth Amendment privilege against self-incrimination. Amicus's participation in this case will offer the Court the perspective of criminal defense practitioners who must regularly counsel clients facing investigation and prosecution about how to mitigate their legal exposure. Although amicus takes no position on the merits of the underlying civil litigation,

amicus is concerned that the Superior Court's ruling—which appears to exempt from privilege routine legal advice regarding mitigating litigation risk and threatens to chill open communication between the criminally accused and their attorneys—could threaten the rights of NACDL's members' clients if allowed to stand.

INTRODUCTION

It is axiomatic that the attorney-client privilege is one of the bedrock principles of the American legal system. It benefits not only litigants, whose fates often hinge upon their ability to communicate openly and honestly with their attorneys, but also the attorneys themselves, who, charged with providing zealous advocacy, rely on their ability to advise their clients freely on how to manage legal risk. And while this is important in the context of high-stakes civil litigation—especially given the litigious nature of today's corporate world—it is even more crucial for the criminally accused, whose very freedom is at stake. It is for this reason that exceptions to the attorney-client privilege have historically been narrowly construed by this Court and courts around the country.

The Superior Court's decision here regarding the applicability of the crime-fraud exception is out of step with that consensus and threatens to create a ripple effect beyond this dispute. By expanding that formerly narrowly construed exception and applying it to advice about how to mitigate legal exposure, the Superior Court's decision not only disrupts in-house and external corporate counsel's ability to communicate with their clients regarding litigation risk, but also has troubling implications for the criminal defense bar, whose obligation to provide counsel is rooted in the Constitution. Criminal defense attorneys must be able to consult with their clients about what is or is not (or what may be) legal or illegal and

advise them against making statements that could potentially be used against them by a prosecutor. Similarly, the criminally accused must feel comfortable being completely forthcoming in their communications with their attorneys without fear that those communications will one day fall into the hands of the prosecution. For these reasons, and those outlined by Petitioners and fellow amici, this Court should grant mandamus relief.

ARGUMENT

I. The Attorney-Client Privilege Is Necessary to the Constitutional Rights to Counsel and Against Self-Incrimination

The issues presented here, though arising in the civil context, implicate fundamental constitutional freedoms at the heart of our criminal justice system. By expanding and misapplying the crime-fraud exception, the Superior Court's decision threatens to erode not only the attorney-client privilege for large corporations but also the right to counsel and the privilege against self-incrimination for ordinary people accused of crimes.

The attorney-client privilege has been described as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also In re Pub. Def. Serv.*, 831 A.2d 890, 900 (D.C. 2003). The privilege "derives from the recognition that 'sound legal advice or advocacy serves public ends.'" *In re Pub. Def. Serv.*, 831 A.2d at 900 (quoting *In re Ti.B.*, 762 A.2d 20, 28 (D.C. 2000)) (alteration omitted). By

"encouraging full and frank discussions between attorneys and their clients," the privilege "promotes broader public interests in the observance of law and the administration of justice." *Id.* (quoting *In re Ti.B.*, 762 A.2d at 27-28) (alteration omitted). On a practical level, "[l]awyers cannot give sound legal advice without being apprised of 'all pertinent facts, no matter how embarrassing or inculpating these facts may be.'" *Id.* (quoting *Wesp v. Everson*, 33 P.3d 191, 196 (Colo. 2001)). For these reasons, the privilege has "'traditionally [been] deemed worthy of maximum legal protection.'" *Id.* (quoting *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992)).

In addition to serving public and practical ends, the attorney-client privilege has long been understood to have constitutional significance in criminal cases. As one leading treatise explains, "at least so far as the criminal defendant is concerned, the attorney-client privilege is a necessary concomitant of his Fifth Amendment right not to incriminate himself and his Sixth Amendment right to the assistance of counsel." 24 Wright & Miller, *Federal Practice and Procedure* § 5472 (1st ed.). Multiple courts, including this one, have drawn the connection between the attorney-client privilege and the constitutional rights of the accused. *See In re Pub. Def. Serv.*, 831 A.2d at 900 ("'In the criminal context . . . the privilege acquires Sixth Amendment protection.'" (quoting *Neku v. United States*, 620 A.2d 259, 262 (D.C. 1993) (in turn citing *Gunther v. United States*, 230 F.2d 222, 223–24 (D.C. Cir.

1956))); *see also, e.g.*, *Ehrlich v. Grove*, 914 A.2d 783, 797 n.13 (Md. 2007) ("[The attorney-client privilege] is so basic to the relationship of trust between an attorney and client that, although it is not given express constitutional protection, it is essential to a defendant's exercise of the constitutional guarantees of counsel and freedom from self-incrimination."); *State v. Kociolek*, 129 A.2d 417, 424 (N.J. 1957) (describing attorney-client privilege as "indispensable to the fulfillment of the constitutional security against self-incrimination and the right to make defense with the aid of counsel skilled in the law").

The significance of the attorney-client privilege to the Sixth Amendment right to counsel is straightforward. "It has long been recognized that the right to counsel is the right to the *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added). An attorney cannot give effective assistance and advice if her client withholds critical information out of fear that it will be shared with the prosecution. *See In re Pub. Def. Serv.*, 831 A.2d at 900. More fundamentally, the attorney-client relationship is built on trust—a foundation that would crumble in the absence of the privilege. "Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer." *Von Moltke v. Gillies*, 332 U.S. 708, 725–26 (1948). A lawyer who reveals client confidences, much like an attorney operating under a conflict of interest, "breaches the duty of loyalty, perhaps the most basic of counsel's duties," *Strickland v. Washington*, 466

U.S. 668, 692 (1984).

In addition to the Sixth Amendment right to counsel, the attorney-client privilege also safeguards the Fifth Amendment privilege against self-incrimination. To obtain the effective assistance of counsel to which she is constitutionally entitled, the accused must be free to disclose all pertinent facts—including incriminating ones—to her lawyer. Without the attorney-client privilege, "an accused in a criminal case could not explain his version of the matter to his lawyer without its being transmitted to the prosecution. Defense counsel would become a medium of confession, a result that would substantially impair both the accused's right to counsel and the privilege against self-incrimination." Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1062 (1978). Put differently, in the absence of the privilege, the accused would face an impossible choice: "If the prosecutor could call defense counsel to testify what her client told her in preparing a defense . . . , then the client would have to choose between the right to the assistance of counsel and the right not to incriminate himself." Wright & Miller, *supra*, § 5472.

To put the criminally accused to such a choice would be intolerable in our constitutional order. The right to counsel and the privilege against self-incrimination are cornerstones of the American legal system. *See Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (describing the right to counsel as "the essential mainstay of our

adversary system"); *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (explaining that "the American system of criminal prosecution is accusatorial, not inquisitorial," and that "the Fifth Amendment privilege is its essential mainstay"). Indeed, the Framers pointedly rejected earlier English practices that had failed to safeguard these two rights. *See Powell v. Alabama*, 287 U.S. 45, 61 (1932) (explaining that the English rule denying counsel for accused felons except as to narrow legal questions "was rejected by the colonies" by the time of independence); *Miranda*, 384 U.S. at 442–43, 459–60 (observing that public objections to traditional inquisitorial means of extracting confessions in England "worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights" in the form of the privilege against self-incrimination). In the criminal context, thus, the attorney-client privilege is a vital bulwark against the very abuses of individual liberties that inspired the Bill of Rights.

Of course, the privilege is not without its exceptions. But given the importance of the privilege for the criminally accused, any exceptions must be carefully and clearly limited. "A 'no harm in one more exception' rationale could contribute to the general erosion of the privilege," *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998), to the detriment of individual rights for everyone. The same goes for vague and ambiguous rules, like the one announced by the Superior Court, which stretch existing exceptions beyond their traditional limits and threaten

to chill attorney-client communications. "An individual facing serious criminal charges . . . has little but the Constitution and his attorney standing between him and prison." *Kaley v. United States*, 571 U.S. 320, 341 (2014) (Roberts, C.J., dissenting). "In many ways, [the right to counsel] is the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendant enjoys." *Id.* at 344. If a person accused of a crime must worry about waiving the privilege whenever he speaks to his lawyer about mitigating his exposure, that fundamental protection an attorney provides will be all but illusory.

II. The Superior Court's Orders, Left Untouched, Will Have Harmful Consequences for the Criminally Accused and Their Attorneys

It is precisely because the attorney-client privilege is so critical to an individual's Fifth and Sixth Amendment rights that the Superior Court's October 23, 2025 order finding no privilege (the "October Order") and January 5, 2026 order denying Meta's motion for reconsideration (the "January Order," and collectively, the "Orders") deeply concern amicus and its members. Not only do the Orders threaten to apply the crime-fraud exception to routine, ethically sound, and critical communications between criminal defense attorneys and their clients about mitigating legal risk, they also cloud the breadth and applicability of the crime-fraud exception, thereby chilling the open and honest client-attorney communication that is crucial to a zealous and effective defense.

In finding that the relevant privileged documents were subject to the crime-fraud exception, the Superior Court described the communications therein as reflecting "legal advice" from Petitioners' in-house counsel "to 'remove,' 'block,' 'button[] up,' 'limit,' and 'update' their research . . . . to specifically limit Meta's potential liability, while Meta was already the subject of a related multidistrict litigation." App. 138. In other words, the Superior Court found that the advice described, apparently secondhand, in the documents was legal advice regarding how to avoid creating a record that could be harmful to the client amidst pending litigation, but held that such advice is subject to the crime-fraud exception.

Amicus, of course, has not seen the documents and is unaware of the specifics of their content or context. But even assuming the Superior Court's characterization of the relevant documents is correct (a dispute on which amicus takes no position), that characterization does not suggest counsel was doing anything improper, much less engaging in a crime or fraud. Directing a client against the creation of evidence that could be used against the client in a criminal proceeding is a core function of a criminal defense attorney. Indeed, criminal defense attorneys are constantly advising their clients what *not* to say, to whom they should *not* speak, and what they *shouldn't* put in writing. Criminal defense attorneys rightfully scrutinize language regarding or written by their clients to ensure that it cannot be construed as evidence of their guilt. Based on the Superior Court's description of the communications in

the October Order, at worst, Meta's in-house counsel appeared to be doing precisely what all defense attorneys routinely do, and *need* to do, to protect their clients. Far from being "'fundamentally inconsistent with the basic premises of the adversary system,'" App. 139 (quoting *In re Sealed Case*, 676 F.2d 793 (D.C. Cir 1982)), offering legal advice to limit a client's liability following the initiation of litigation against that client is consistent with a standard practice of the criminal defense bar that *upholds* the basic premises of our adversary system.

Amicus acknowledges that an attorney's advice to destroy evidence could be subject to the crime-fraud exception, and no ethical lawyer would give that advice. But that is very different from an attorney's advice to avoid *creation* of evidence that could be used against the client. The Superior Court concluded that any "'reasonable and prudent person'" would, "[b]y any interpretation," believe that "'the attorney-client communications in question were [made] in furtherance of an ongoing crime[,] [] fraud[, or misconduct].'" App. 138–39 (quoting *In re Public Defender Serv.*, 831 A.2d at 904). But that is wrong. To the contrary, two other trial courts, faced with the same four documents, found that the crime-fraud exception did not apply. *See* Order, *In re: Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.*, No. 22-md-3047 (N.D. Cal. Jan. 12, 2026), ECF No. 2630 ("N.D. Cal. Order"); Ruling, *Social Media Cases*, No. JCCP5255 (Cal. Sup. Ct., Los Angeles Cnty. Jan. 15, 2026) ("Cal. Sup. Order").

III. Mandamus Relief Is Warranted Based on the Stakes for the Criminal Bar

The Court should grant the mandamus relief Petitioners seek here because, despite the Superior Court and the District's attempts to downplay them, the consequences of denying that relief could be severe and widespread.

The Superior Court ruled that the October Order should not be subject to interlocutory review because: (1) Meta failed to show that post-judgment appeal would "fail to protect its rights and 'ensure the vitality of the attorney-client privilege,'" and (2) "it is not clear at this juncture" that the October Order will be "'particularly injurious' to Meta in this action or elsewhere." App. 404–05 (quoting *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 109 (2009)). These statements fail to appreciate the potential consequences of the Superior Court's ruling for the criminal legal system writ large. While Meta may, one day, find partial relief in a post-judgment appeal, the underlying lawsuit is high profile, complex, and related to an even more complex multidistrict litigation; a final judgment may not issue for several years. And even if the Superior Court were correct that the October Order may not be "particularly injurious" to Meta, the criminally accused could face far greater injury if their privileged communications are subjected to the Superior Court's articulation of the crime-fraud exception.

The District's arguments similarly fail to account for the stakes here. In its Answer to Meta's petition, the District urges this Court to deny the requested relief

because "[t]he challenged rulings are the unpublished, nonprecedential opinions of a single trial-court judge about four specific documents" and "neither [Order] purport[s] to announce important new legal principles nor do so in fact." Ans. 28-29. The District's suggestion that the Orders will not be widely circulated because they are "unpublished, nonprecedential opinions" ignores the highly public nature of the underlying action. Not only have the Orders already been covered by national news outlets,[1] but plaintiffs in other cases have already cited them, asking the judges in those actions to make similar findings. *See* N.D. Cal. Order; Cal. Sup. Order; State Mot. to Suppl., Case No. A-24-886110-B (Nev. Dist. Ct., Clark Cnty. Oct. 30, 2025); Pl.'s Mot. to Compel, No. D-101-CV-2023-02838 (N.M. 1st Jud. Dist. Ct., Cnty. Santa Fe Dec. 4, 2025); Mot. Requesting In Camera Review and for Order Finding No Privilege, Case No. 23-1364-IV (Tenn. Ch. Oct. 31, 2025). And contrary to the District's strained interpretation of the Orders, for the reasons stated above,

[1] *See, e.g.*, Emily Field, *No Crime-Fraud Exception For Meta Docs in Discovery Row*, LAW360, Jan. 14, 2026, https://www.law360.com/technology/articles/2430179/no-crime-fraud-exception-for-meta-docs-in-discovery-row; Steve Dent, *Meta lawyers tried to block internal research showing teen harm, judge rules,* ENGADGET, Oct., 24 2025, https://www.engadget.com/social-media/meta-lawyers-tried-to-block-internal-research-showing-teen-harm-judge-rules-120015673.html; Kat Black, *D.C. Superior Court Judge Rules Meta's Counsel Advised It to Block Research on Teen User Safety,* THE NAT'L L.J., Oct. 24 2025, https://www.law.com/nationallawjournal/2025/10/24/dc-superior-court-judge-rules-metas-counsel-advised-it-to-block-research-on-teen-user-safety-.

those rulings do, in fact, push the bounds of the crime-fraud exception beyond recognition and create an opportunity for the criminally accused's privileged communications to be weaponized against them by prosecutors. Because the Orders pose serious consequences for the criminal legal system, the mandamus relief Petitioners seek is urgent, warranted, and necessary.

CONCLUSION

The Court should issue a writ of mandamus providing the relief requested by Petitioners.

Respectfully submitted,

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