UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE KELLOGG BROWN & ROOT, INC., ET AL.,

Petitioner.

On Petition for a Writ of Mandamus to the United States District Court for the District of Columbia, No. 1:05-CV-1276

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, ASSOCIATION OF CORPORATE COUNSEL, AMERICAN FOREST & PAPER ASSOCIATION, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND COALITION FOR GOVERNMENT PROCUREMENT AS AMICI CURIAE SUPPORTING PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, amici curiae certify that no amicus curiae has outstanding shares or debt securities in the hands of the public, and none has a parent company. No publicly held company has a 10% or greater ownership interest in any amicus curiae.

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INTRODUCTION

Amici curiae the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the Association of Corporate Counsel, the American Forest & Paper Association, the Pharmaceutical Research and Manufacturers of America, and the Coalition for Government Procurement represent many of the largest businesses and government contractors in the United States.[1] In an accompanying motion, amici respectfully move the Court for leave to file this brief in support of KBR's petition for a writ of mandamus.

This mandamus petition presents significant questions concerning the ability of amici's member companies to seek and obtain candid legal advice. Amici's members depend on internal investigations to identify and address allegations of mistake or wrongdoing and to ensure compliance with complex regulatory obligations. In an earlier opinion in this case, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (*KBR I*), this Court provided important guidance regarding the applicability of the attorney-client privilege in internal investigations.

[1] A statement of each amicus's organizational interest under Federal Rule of Appellate Procedure 29(c)(4) is set forth in an addendum. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici certify that no party's counsel authored this brief, in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person—other than the amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief. Petitioners have consented to the filing of this brief. Respondents do not consent and intend to oppose amici's motion for leave to file this amicus brief.

Amici are concerned that the District Court's most recent rulings will undermine that guidance, eroding their members' ability to rely on the privilege in such investigations and to dependably preserve the privilege in ensuing litigation. In particular, the District Court's December 17 privilege ruling will erode companies' reliance on expert investigators, impeding their ability to effectively find the facts in internal investigations. And the District Court's novel implied-waiver ruling will threaten corporate defendants with unforeseeable, irrevocable privilege waivers. In light of the ubiquity of internal compliance programs among amici's members and the potential negative repercussions of the District Court's orders, amici and their members have a substantial interest in the petition.

ARGUMENT

In its first decision in this case, the District Court found the privilege inapplicable to internal investigations required by regulatory law, conducted by in-house counsel, or involving non-attorney investigators. In *KBR I*, this Court vacated that order, which had "generated substantial uncertainty about the scope of the attorney-client privilege in the business setting." 756 F.3d at 756. In so doing, the Court provided clear, easy-to-follow guidance for companies who rely on, and are often obligated to maintain, internal compliance programs. On remand, the District Court again found the privilege inapplicable, holding (i) that the privilege was waived by KBR's deposition references to the investigation documents

coupled with its assertion that it did not violate the law, and (ii) as to certain documents, that the communications were between in-house counsel and KBR investigators. The District Court's latest orders are inconsistent with the holding and reasoning of *KBR I* and, if left uncorrected, threaten again to undermine compliance programs by fostering uncertainty about their privileged status.

I. THE DISTRICT COURT'S RULING THAT THE PRIVILEGE DOES NOT APPLY TO INVESTIGATORS' FACTUAL REPORTS MADE TO INFORM LEGAL ADVICE CONTRAVENES THIS COURT'S JUDGMENT AND CLEAR GUIDANCE IN *KBR I*

For the attorney-client privilege to function, "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). This Court's decision in *KBR I* provided such certainty by giving attorneys and their corporate clients clear, easy-to-follow guidance on critical privilege issues that may arise with respect to internal compliance programs. Most prominently, this Court clarified that obtaining legal advice need not have been a "but-for" cause of an internal investigation for the privilege to apply; instead, "[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies." 756 F.3d at 758-759.

In so holding, this Court unambiguously reaffirmed that attorneys can employ non-attorney investigators in internal investigations without losing the privilege. Corporate legal departments frequently rely on specialized investigators

to gather the facts underlying complex questions of regulatory compliance; as *KBR I* recognized, communications "by and to" such agents "are routinely protected by the attorney-client privilege." 756 F.3d at 758. This Court also made clear that in-house counsel stand on the same footing as outside counsel for privilege purposes. *See id.* This "general rule," *id.*, ensures that companies need not arbitrarily exclude in-house counsel—often the attorneys most familiar with their business and compliance practices—from investigations into possible wrongdoing.

Courts and commentators already have recognized the importance of the clarity *KBR I* brought to this area of privilege law. As one commentary explained, by providing "a clearer and more practical explanation of the relevant test, the D.C. Circuit's decision bears useful guidance for the increasing number of businesses that operate in regulated industries and perform internal investigations as part of corporate compliance programs."[2] That "useful guidance" has already been relied upon in a major privilege dispute in the U.S. District Court for the Southern District of New York. In that case, the court adopted and applied *KBR I*'s holding as the dispositive test, ruling that the privilege protects General Motors' internal investigatory report into ignition-switch defects. *In re General Motors LLC Ignition Switch Litig.*, 2015 WL 221057, at *1, *7 (S.D.N.Y. Jan. 15, 2015). The

[2] Danielle Pelot & Emily Crandall Harlan, *"That is not the law": D.C. Circuit Overturns Lower Court Decision That Risked Eradicating Attorney-Client Privilege In Compliance Investigations* (June 30, 2014), *at* http://www.nixonpeabody.com/files/169968_GIWC%20Alert_06_30_14.pdf.

court also noted that this Court's holding in *KBR I* was "consistent with—if not compelled by—the Supreme Court's logic in *Upjohn*." *Id.* at *7.

But even the clearest standard will not provide the needed certainty if disregarded or distorted by district courts. "An uncertain privilege, *or one which purports to be certain but results in widely varying applications by the courts*, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393 (emphasis added). After all, "prudent counsel monitor court decisions closely and adapt their practices in response," *KBR I*, 756 F.3d at 762-763, and the legal community has already taken note of the District Court's "important" decisions that followed this Court's remand in *KBR I*.[3]

Unfortunately, those decisions erode *KBR I*'s guidance in a number of important respects. As an initial matter, the District Court's December 17, 2014 privilege order is inconsistent with this Court's judgment in *KBR I*. This Court held that although the investigative reports at issue were prepared not by attorneys but by investigators working at their behest, "that fact" "is not a basis on which to distinguish *Upjohn*." *KBR I*, 756 F.3d at 758. Yet on remand the District Court *again* relied on KBR's use of investigators as a basis for holding the privilege

[3] *See, e.g.*, Jonathan Sack, *The* Barko v. KBR *Privilege Battle Continues*, Forbes, Dec. 17, 2014 ("A high-profile *qui tam* suit against Kellogg, Brown & Root and Halliburton continues to generate important case law relating to the scope of attorney-client privilege and work product protection given to internal investigations."), *at* http://www.forbes.com/sites/insider/2014/12/17/the-barko-v-kbr-privilege-battle-continues/.

inapplicable to those reports. *See* Dkt. 231 at 6-10. After *KBR I*, it simply was not open to the District Court to reconsider whether the reports at issue were unprivileged because they were prepared by non-attorney investigators.[4]

The District Court went further and also made the novel announcement that investigative reports communicated to an attorney to inform the attorney's legal advice cannot be protected by the attorney-client privilege because such communications "do not involve both attorney and client." Dkt. 231 at 7 (quoting *In re Sealed Case*, 676 F.2d 793, 808-809 (D.C. Cir. 1982) (emphasis omitted)). Again, however, this Court already held that "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege." *KBR I*, 756 F.3d at 758.[5] Remarkably, the District Court's discussion on this score does not even cite *KBR I*, *see* Dkt. 231 at 6-10, let alone explain how its analysis is consistent with this Court's opinion.

Instead, the District Court created a wholly new test, under which a court must parse whether an investigator is more like an ordinary employee or an

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[4] *See In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895) ("The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate, and either upon an application for a writ of mandamus or upon a new appeal it is for this court to construe its own mandate, and to act accordingly.").

[5] *See also, e.g.*, *Welland v. Trainer*, 2001 WL 1154666, at *2 (S.D.N.Y. Oct. 1, 2001) (where "the investigator gathered and analyzed information for the use of the attorneys in providing legal advi[c]e" to the company, "documents that relate to communications between the investigator and in-house and outside counsel are protected" by the privilege), *aff'd sub nom.*, 116 F. App'x 321 (2d Cir. 2004).

attorney's alter ego. *See* Dkt. 231 at 7. In so doing, the District Court erroneously looked to precedent that addressed a different question. The case on which the District Court relied, *In re Sealed Case*, said nothing about which persons are eligible for the attorney-client privilege; instead, it analyzed only the crime-fraud and implied-waiver doctrines. *See* 676 F.2d at 811-812. The District Court further erred in relying on Part III of *Upjohn*, which involved documents materially unlike those at issue here: portions of attorney notes that went "beyond" merely recording confidential facts provided by employees. *See* Dkt. 231 at 7-8; *Upjohn*, 449 U.S. at 397. Of perhaps greatest concern, this aspect of the District Court's holding will force attorneys to guess whether a court will find a particular investigator to be more like an ordinary employee or more like an in-house attorney's alter ego—replacing *KBR I*'s clear and predictable rule with needless uncertainty.

What matters for privilege purposes is that the investigator is often the mechanism by which the client (the company) communicates confidential facts to the attorney in order to obtain legal advice. Indeed, corporate counsel must often rely on the facts supplied by such investigators to provide "sound and informed advice" about their clients' compliance with law. *Upjohn*, 449 U.S. at 390. Many compliance investigations involve technical questions requiring expert analysis beyond the competence of attorneys; others require fact-gathering in hazardous, far-flung regions to which lawyers cannot be routinely dispatched. Denying the

privilege to factual reports prepared by attorney-directed investigators will inhibit corporate compliance efforts by preventing companies from effectively "gather[ing] facts" to "ensure compliance with the law after being informed of potential misconduct." *KBR I*, 756 F.3d at 757.

Finally, because the investigators in this case were directed by in-house lawyers at KBR, the District Court erroneously treated their factual reports as equivalent to "[c]ommunications between in-house lawyers"—which, in its view, were eligible only for work-product protection, not the attorney-client privilege.[6] Dkt. 231 at 8. Of course, this holding would disqualify only internal investigations headed by *in-house* counsel, not those run by outside counsel, undermining *KBR I*'s clear holding that a corporation's use of in-house rather than outside counsel "does not dilute the privilege." 756 F.3d at 758 (internal quotation marks omitted).

II. THE DISTRICT COURT'S UNPRECEDENTED AND PUNITIVE VIEW OF IMPLIED WAIVER WILL UNDERMINE CORPORATE COMPLIANCE PROGRAMS

The District Court's errors on remand were not limited to merely undermining this Court's decision in *KBR I*. Rather, in its November 20, 2014

[6] The District Court, in a paragraph bereft of citation, stated that inter-attorney communications are ineligible for the attorney-client privilege. Dkt. 231 at 8. That was another error—indeed, "*[i]t goes without saying* that any privilege which may attach to a communication is not lost by … being communicated among attorneys for a given client. To the contrary, the privilege also attaches to communications between attorneys that include … confidential information received from the client." Edna S. Epstein, *The Attorney-Client Privilege And The Work-Product Doctrine* 87 (5th ed. 2007) (emphasis added).

order, the District Court struck out into new territory, finding an implied waiver of the attorney-client privilege based on a standard that appears to be wholly unprecedented. Under the District Court's novel approach, a party's mere *reference* to the fact of an internal investigation, coupled with a routine denial of wrongdoing, creates an *irrevocable* waiver as to confidential communications produced in the course of that investigation. This unpredictable standard creates a substantial risk that even conscientious companies will inadvertently waive the privilege, permitting their adversaries to use the products of their internal investigations against them in litigation. That is a sobering disincentive for companies considering whether to undertake elective compliance investigations.

It is well established that "[t]o waive the attorney-client privilege by voluntarily injecting an issue in[to] the case, a defendant must do more than merely deny a plaintiff's allegations. The holder must inject a new factual or legal issue into the case." *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987). "Most often, this occurs" when the defendant raises "an affirmative defense" that necessarily implicates the content of privileged communications. *Id.* (citing cases involving good-faith, advice-of-counsel, and qualified-immunity defenses); *see also In re John Doe Co.*, 350 F.3d 299, 303 (2d Cir. 2003) (implied waiver "generally resulted from a party's *advancing a claim to a court or jury* … while relying on its privilege to withhold … materials that the adversary might

need to effectively contest or impeach the claim." (emphasis added)). Short of raising a formal defense, a defendant has been held to have "caused an implied waiver through its *repeated reliance* on an investigation report"—"'not merely as a signal of its own good faith, but as a reliable, if not authoritative, *source of data on which the court should rely*.'" Thomas E. Spahn, *The Attorney-Client Privilege: A Practitioner's Guide* 369-370 (2007) (quoting *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 472 (S.D.N.Y. 1996) (emphases added)).[7]

Consistent with these views, this Court's decision in *United States v. White*, 887 F.2d 267 (1989) (R.B. Ginsburg, J.), firmly establishes that a defendant does *not* impliedly waive the privilege by coupling a disavowal of wrongdoing with a nonspecific description of the involvement of counsel. In *White*, the Court held that the defendant had not "waived his privilege by his comment during a preliminary GSA investigation that his attorneys 'had thoroughly reviewed the decision to employ [a GSA employee as a paid consultant] after looking at the matter from nine different ways.'" *Id.* at 270-271. Under *White*, therefore, "[a]n averment that lawyers have looked into a matter does not imply an intent to reveal

[7] "[N]ormally, an implied waiver only results from *reliance on, not referral to,* legal advice or legal services." Spahn, *supra*, at 371 (emphasis added); *see also* Epstein, *supra*, at 566 (implied waiver requires "actual *defense of reliance* on the attorney's *recommendations or findings*" (emphases added)). A more suitable analogue for the statements at issue here might be a litigant's "mentioning during a deposition that they spoke with their attorney before filing the lawsuit (which in most cases does not cause a waiver)." Spahn, *supra*, at 368.

the substance of the lawyers' advice"—even if, as in *White*, that "averment" is paired with a further averment that one's conduct was proper. *Id.* at 271.

The District Court nonetheless held that a mere "reference to privileged communications" in deposition exchanges, Dkt. 205 at 18, triggers an implied waiver. In its view, KBR's tangential references to the COBC documents formed part of "a chain of reasoning" whose logical conclusion was that the documents showed nothing that would require KBR to self-report. *Id.* at 17. Amici are aware of no case (and the District Court did not cite any) in which tangential, unspecific allusions to the role of attorneys were held to have effected an implied waiver. *Cf., e.g., White*, 887 F.2d at 270-271.[8]

That no case has previously reached such a conclusion is perhaps not surprising, as such a standard would deter corporate defendants from truthfully stating in the course of litigation that they investigate allegations of wrongdoing.

[8] The cases Respondents cited below, *see* Dkt. 180 at 3-4, are inapposite. *See Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1418-1419 (11th Cir. 1994) (company "consistently" made an issue of its mental state "[in] the proceedings before the district court," going "beyond mere denial, affirmatively to assert good faith"); *United States v. Bilzerian*, 926 F.2d 1285, 1291-1294 (2d Cir. 1991) (defendant "sought to introduce" at trial testimony "regarding his good faith attempt to comply with the securities laws"); *Chevron Corp. v. Donziger*, 2013 WL 6182744, at *1-2 (S.D.N.Y. Nov. 21, 2013) (defendants sought "to offer part of the" disputed documents and rely on them to disprove an element of plaintiffs' case "while withholding the balance"). Notably, in *Bilzerian* the district court allowed the defendant to choose between offering the disputed testimony at trial and retaining his privilege (he chose the latter), 926 F.2d at 1291—a telling counterpoint to the District Court's punitive "no-takebacks" approach in this case.

As this Court is aware, government contractors and companies in many other closely regulated industries are required to maintain compliance programs and often to self-report in the event of violations. *See, e.g.*, 48 C.F.R. § 52.203-13 (contracting regulations); 12 C.F.R. § 44.20(a) (Federal Bank Act); 12 C.F.R. § 21.21 (Bank Secrecy Act); 42 C.F.R. § 423.504 (Medicare Part D providers). A corporate deponent who truthfully notes that (a) his or her company has a statutorily required compliance program that results in self-reporting in the event of a violation, but (b) that no self-report was made, could be viewed as implying that privileged reports created during the compliance investigation showed no wrongdoing. Under the District Court's approach, this implication would waive the privilege as to every document produced by the investigation. *Cf. Lorenz*, 815 F.2d at 1098 ("To waive the attorney-client privilege ... a defendant must do more than merely deny a plaintiff's allegations.").[9]

Because the District Court's standard is so vague and hard to predict, even well-meaning defendants might inadvertently stumble into an irrevocable privilege waiver, allowing adversaries to use the products of an internal investigation as a weapon against the company in litigation. "Compliance is a cost center within business organizations," Mike Koehler, *Revisiting A Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 655, and any shift that

[9] *See also John Doe Co.*, 350 F.3d at 304 (party did not forfeit privilege "merely because it told the prosecutor it believed its actions were within the law").

diminishes the value of compliance programs (or increases the litigation risk associated with them) reduces companies' incentives to create and invest in them. By contrast, federal law, recognizing self-policing's social value, generally encourages compliance programs—either by requiring them, *see supra* p. 12, or by considering them in sentencing and charging decisions, *see* United States Sentencing Guidelines Manual § 8B2.1 cmt. n.3; Department of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 52-54 (2012).

Because of the harsh consequences that may result from waiver of the privilege, the law does (and should) allow "litigants the choice of dropping the claim, defense, *or argument* if the litigants want to avoid an implied waiver." Spahn, *supra*, at 374 (emphasis added). The District Court, however, offered KBR only the Hobson's choice of *defaulting* if it wished to retract the putatively waiver-inducing statements. Dkt. 205 at 22-23.

That extreme result stemmed from the District Court's misreading of *Bittaker v. Woodford*, 331 F.3d 715 (9th Cir. 2003) (en banc). *Bittaker* focused on the abandonment of a "claim" because the implied waiver in that case was triggered by the habeas petitioner's assertion of an ineffective-assistance-of-counsel claim. *See id.* at 716. Nothing in *Bittaker* suggests that *only* claims (or defenses, which the opinion also mentions) can be disavowed; the disavowal rule's fairness rationale applies equally to implied waivers triggered by statements. *See*

id. at 720 ("The court thus gives the holder of the privilege a choice: If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it."). Implied waiver is not a punishment, as the District Court seemed to believe. *See* Dkt. 205 at 22 ("Under KBR's interpretation, a party can retract statements that create an implied waiver with virtually no consequence."). Rather, it is a rebalancing of the scales, needed only if the party persists in its reliance on the privileged materials.

The opportunity to disavow waiver-inducing statements is particularly important where, as here, a court unexpectedly and unjustifiably moves the line for what triggers the waiver. Where a waiver is based on the intentional disclosure of a privileged document, or even where it is based on the assertion of a formal claim or affirmative defense, the party at least has clear notice of what type of conduct will trigger the waiver. By contrast, where mere "statements," "arguments," or "inferences" are at issue, even the most mundane lines of argumentation can be latent waiver-traps for the unwary.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that this brief complies with the limitations of Fed. R. App. P. 21(d) and 29(d) because it is 14 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Elisebeth Collins Cook
ELISEBETH COLLINS COOK

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2015 a true and correct copy of the foregoing Brief of Amici Curiae the Chamber of Commerce of the United States of America, the National Association of Manufacturers, the Association of Corporate Counsel, the American Forest & Paper Association, the Pharmaceutical Research and Manufacturers of America, and the Coalition for Government Procurement Supporting Petitioner was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Elisebeth Collins Cook
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ADDENDUM: INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents 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. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files amicus curiae briefs in cases raising issues of concern to the Nation's business community.

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. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

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 over 33,000 members who are in-house lawyers employed by over 10,000 organizations in more than 75 countries. ACC has long sought to aid courts, legislatures, regulators, and other law or policy-making bodies in understanding the role and concerns of in-house counsel. To ensure that clients are able to turn to their in-house counsel for confidential legal advice, ACC has championed the attorney-client privilege, working to ensure that a robust privilege applies to a client's confidential communications with in-house lawyers.

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. The forest products industry accounts for approximately 4.5 percent of the total U.S. manufacturing GDP and employs nearly 900,000 men and women. The Association regularly files amicus curiae briefs in cases that raise issues of concern to the forest-products industry.

The Pharmaceutical Research and Manufacturers of America (PhRMA) represents the country's leading biopharmaceutical researchers and biotechnology companies. In 2013, PhRMA companies invested more than $51.1 billion in the discovery and development of medicines. PhRMA advocates on public policy issues critical to the discovery and development of innovative medicines. Because the biopharmaceutical industry is closely regulated, PhRMA member companies

regularly rely on in-house counsel and attorney-directed technical experts in their internal compliance programs.

The Coalition for Government Procurement is a national trade association of Federal Government contractors. Coalition members include small, medium, and large business concerns, and collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules program and about half of the commercial item solutions purchased annually by the U.S. Government. Contracts held by Coalition members are subject to many of the compliance requirements at issue in this case.