No. 09-750

IN THE

Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

BRIEF FOR AMICUS CURIAE ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the work-product doctrine recognized in Federal Rule of Civil Procedure 26(b)(3), which protects documents that are "prepared in anticipation of litigation or for trial," is limited to documents that are prepared for use in litigation.

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INTEREST OF AMICUS CURIAE

The Association of Corporate Counsel is a bar association of over 25,000 "in-house" attorneys who practice in the legal departments of more than 10,000 public, private, and nonprofit corporations worldwide.[1] The As-

[1] No counsel for a party authored this brief in whole or in part, and no person or party, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief.

sociation is deeply interested in this case because it has a strong interest in ensuring that its members are able to provide their clients frank and thorough legal advice; to be able to do so, attorneys must not be chilled from thoroughly analyzing the legal problems faced by their clients. The Association offers the unique perspective of in-house lawyers, who provide corporate legal counseling to their clients on a daily basis across every industry and in-house practice setting.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for certiorari should be granted because the First Circuit's decision is deeply flawed on two grounds:

First, it derails the sensible development of the work-product doctrine. This Court, the D.C. Circuit, the Second Circuit, and other courts have recognized that modern corporations constantly rely on their attorneys for preventive legal advice—that is, an evaluation of the litigation and regulatory risks of business decisions *before* they are undertaken. To provide this advice, corporate attorneys must be able to collect facts and analyze law without the fear that their work will be later discoverable by adverse parties. These courts have thus reasonably defined the work-product doctrine to cover the legal and factual analysis that supports preventive legal advice. The First Circuit's contrary reasoning is inconsistent with the realities of the modern business world.

Second, the First Circuit's decision undermines important efforts by in-house and outside counsel to promote preventive compliance and important financial accounting and disclosure functions necessary to assure corporate responsibility, accountability, and transpar-

ency. Modern corporations are faced with countless legal risks and pitfalls. Companies rely on their lawyers both to help them comply with the law and to contribute analysis and understanding of the implications and scope of legal risk, so that companies can take those implications into account in the course of their daily business decision-making and when assessing the companies' legal, financial, and disclosure obligations.

To be effective, legal risk assessment must be based on thorough analysis. The work-product doctrine gives attorneys the confidence to be as thorough and candid as necessary. The First Circuit, however, discounted the importance of the analysis that is essential to delivering preventive legal advice and promoting accurate preparation and planning, and therefore deemed that analysis unworthy of the protections of the work-product doctrine. That decision will chill corporate lawyers from being as meticulous as they need to be, and will deprive managers of the detailed legal assessment that they need to make good decisions upon which countless other stakeholders will rely. The decision will therefore undermine efforts at improving corporate compliance, transparency, and accountability.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE WELL-ACCEPTED PRINCIPLE THAT THE WORK-PRODUCT DOCTRINE APPLIES TO ANALYSIS THAT IS NECESSARY TO DELIVERING PREVENTIVE LEGAL ADVICE

This Court and other courts of appeals have properly recognized that the work-product doctrine should not be confined to the narrow context where it was first recognized (*i.e.*, materials prepared for trial) but should also apply when lawyers analyze the litigation risks of

proposed business transactions. Because the First Circuit rejects that reasoning, this Court's review is warranted.

A. This Court And Other Courts Of Appeals Have Extended The Work-Product Doctrine To Analysis Of The Litigation Risks Of Business Transactions

The scope of work-product protection has evolved significantly since the Court first articulated it in *Hickman* v. *Taylor*, 329 U.S. 495 (1947)—as has the legal system. In the 1940s, the volume of civil litigation was much less than it is now, and criminal prosecution of corporations was rare. Many corporations were therefore fundamentally reactive in their approach to litigation, hiring outside counsel to resolve legal problems after they had arisen, rather than seeking preventive advice to avoid problems before they arose or assess the litigation risks of business decisions. *See* Liggio, Sr., *A Look at the Role of Corporate Counsel*, 44 Ariz. L. Rev. 621, 623 (2002). The work-product doctrine announced in *Hickman* understandably reflected those circumstances, and that case involved materials created "in the course of preparation for possible litigation after a claim has arisen." 329 U.S. at 497.

Hickman itself recognized, however, that work-product protections would not be static. Because the work-product doctrine is an instrument of "public policy," driven by "the interests of the clients," 329 U.S. at 510, 511, it must reflect the "background of custom and practice," *id.* at 518 (Jackson, J., concurring). And in the decades following *Hickman*, there was a dramatic change in the "custom and practice" of how corporations managed their litigation risks. Beginning in the 1960s, there was a burst of civil litigation, much of it

involving corporations. Liggio, *supra*, at 624. Simultaneously, Congress created several administrative agencies, each with its own enabling statutes, implementing regulations, and enforcement authority. *Id.* The SEC, the IRS, and the Justice Department also significantly expanded their investigation of and enforcement against questionable actions by corporations. *See* Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 St. Louis U. L.J. 989, 1011 (2007).

In response, corporations necessarily began to take a more proactive approach to litigation through preventive counseling. Before initiating any important transaction, corporations now ask their attorneys for advice about the legal risks involved. Chayes & Chayes, *Corporate Counsel and the Elite Law Firm*, 37 Stan. L. Rev. 277, 283 (1985). Counsel can provide such advice only after thoroughly investigating the facts and candidly analyzing the legal issues. This process enables companies to structure their business decisions to avoid future litigation by focusing on how to avoid legal problems (or minimize risk) in the first place.

The Court acknowledged this change by extending the work-product doctrine to the legal and factual analysis that serves as the basis for preventive legal advice. In *Upjohn Co.* v. *United States*, the Court recognized the need to protect the confidentiality of notes and memoranda prepared by Upjohn's corporate counsel during an internal investigation of questionable payments made by foreign subsidiaries. 449 U.S. 383, 401 (1981). As the Court noted, these materials were intended to "supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, *and potential litigation in each of these areas.*" *Id.* at 394

(emphasis added). The Court appreciated that corporations must plan their conduct around legal risks: "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law." *Id.* at 392 (internal quotation marks omitted). The Court therefore granted protection to "the valuable efforts of corporate counsel" that would lead to sound preventive advice and "ensure their client's compliance with the law." *Id.*

The courts of appeals—especially the Second and D.C. Circuits—followed this Court's lead. The Second Circuit held that the work-product doctrine covers documents that are "created because of the prospect of litigation, analyzing the likely outcome of that litigation." *United States* v. *Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998). As it explained, corporations will often ask counsel for legal memoranda on "whether to undertake [a] transaction and, if so, how to proceed with the transaction." *Id.* at 1199. The work done to prepare such advice falls "squarely" within work-product protections because it "candidly discusses the attorney's litigation strategies, appraisal of likelihood of success, and perhaps the feasibility of reasonable settlement." *Id.* at 1200; *see also United States* v. *Roxworthy*, 457 F.3d 590, 600 (6th Cir. 2006) (adopting *Adlman*).

Likewise, the D.C. Circuit held that the work-product doctrine applies to analysis intended "to protect the client from future litigation about a particular transaction." *In re Sealed Case*, 146 F.3d 881, 885 (D.C. Cir. 1998). A "contrary ruling" would "undermine" a "particularly critical stage of a legal representation" because "[i]t is often prior to the emergence of specific claims that lawyers are best equipped either to help cli-

ents avoid litigation or to strengthen available defenses should litigation occur." *Id.* at 886.

B. The First Circuit's Decision In This Case Departs From The Predominant Understanding Of The Work-Product Doctrine

The courts that have extended work-product protections to the analysis supporting preventive legal advice have correctly understood that *Hickman* was a fundamentally pragmatic decision: it rested on "public policy" concerns, and the scope of the privilege it recognized was bound to change as the legal system changed. In stark contrast, the First Circuit's understanding of *Hickman* adopted in the decision below is wooden and formalistic. It does not take account of the evolving nature of legal work-product in modern corporate counseling and in assessing legal risk as that risk in turn affects the company's financial posture.

The decision below went astray by focusing on Hickman's *facts* rather than its *reasoning*. The First Circuit believed that *Hickman* was about "the materials that lawyers typically prepare for the purpose of litigating cases," such as "memoranda recording witness interviews . . . , draft briefs, [and] outlines of cross-examination." Pet. App. 10a. Because the First Circuit framed *Hickman* so narrowly, it viewed the work-product doctrine as protecting only the "lawyer who tries cases." *Id.* at 15a, 17a. Under that cramped view, it concluded that the doctrine applies only to "materials prepared for use in litigation." *Id.* at 15a. The court found irrelevant the ubiquitous modern corporate practice of preventive legal analysis, because (the court believed) an "experienced litigator" would never consider such materials deserving of privilege. *See id.* at 17a, 19a.

Whatever might have been true in the 1940s, the First Circuit's view is disconnected from the realities of the modern legal system and lawyers' increasingly important role in advising companies regarding the legal risks and complexities of every aspect of corporate decision-making, ranging from daily operations to periodic financial disclosure to major transactions. As this Court and other courts of appeals have rightly concluded, the animating rationale of *Hickman* is no longer strictly limited to trial-preparation materials. Today, litigation is an ever-present fact of life permeating almost every business decision made in corporations, and it would be rash for any company not to consider litigation risks in its business planning. If work-product protections are to be adequate to serve important concerns of "public policy" and the "interests of the clients," *Hickman*, 329 U.S. at 510, 511, then they should extend to analysis of the litigation risks of planned business decisions. Because the First Circuit's flawed application of *Hickman* is so deeply at odds with the approach taken by other courts, this Court's review is warranted.

II. THE FIRST CIRCUIT'S DECISION THREATENS CORPORATE GOVERNANCE EFFORTS

The First Circuit's legal error, if allowed to stand, will lead to a significant problem of public policy: the decision will undermine diligent efforts by those seeking to promote better corporate responsibility, transparency, and accountability. Corporations in this country of every kind vitally depend on preventive legal advice and accurate risk assessment. By seeking and obtaining advice on the risks of litigation or corporate liability exposure, corporations can police themselves, comply with the law, and avoid (or at least prepare to defend against) litigation. By providing corporate lea-

ders with accurate and candid evaluations of litigation risk, corporate counsel can assist corporations in improving their performance in innumerable ways, such as setting accurate litigation reserves, understanding and complying with disclosure obligations, and assessing the implications of possible tax positions. In short, preventive legal advice is essential to fostering good corporate behavior and responsible financial decisions and reporting.

But corporations will not receive effective and candid preventive legal advice, nor will they be able to accurately assess the risks of their business decisions, unless corporate managers can be assured that their attorneys can undertake thorough legal analysis without worry that their own work product will be used against the company's interests in the future. Herein lies the fundamental flaw in the First Circuit's reasoning: it fails to recognize that, if lawyers are to serve their clients effectively, both the clients and the lawyers must not have reason to fear that the lawyers' analysis will become "Exhibit A" for their potential adversaries. By raising that prospect, the First Circuit's decision will discourage clients from seeking out and including corporate lawyers in their daily work and will deter corporate lawyers from preparing and providing thorough preventive legal advice, all of which will leave companies less informed than they should be about the legal risks of business decisions. The inevitable result will be a reduction in effective self-policing and a rise in mismanaged transactions, with litigation inevitably following. No attorney should be considering how to limit his legal advice to counter this dilemma, and no company (nor its stakeholders) should suffer the consequences of this chilled relationship—especially since

improved corporate governance is one of the central public-policy objectives of the day.[2]

A. The First Circuit Ignored the Necessity of Preventive Legal Advice In Today's Corporate World

The First Circuit attached no importance to preventive legal advice. Such advice, however, is indispensable in the modern business world.

Unlike individuals, corporations are constantly exposed to a wide range of litigation and regulatory risk. Even operational decisions made on a daily basis by small companies—*e.g.*, marketing, sales or purchases, employment policies, workplace-safety—could carry entity-threatening potential legal risks if blithely taken. And complex decisions taken by the largest companies—*e.g.*, mergers and acquisitions, stock or bond issuances, regulatory compliance (including tax treatment advice), entry into foreign markets—come with immense legal complications. When these transactions are mishandled, companies can face government investigations, civil and criminal penalties, and private lawsuits. These complexities are often amplified by legal

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[2] The attorney-client privilege is not sufficient to protect preventive legal analysis. Although the attorney-client privilege and the work-product doctrine sometimes overlap, the two are not substitutes. The work-product doctrine "actually differs dramatically from the [attorney-client] privilege in nearly every respect." 2 Spahn, *The Work Product Doctrine: A Practitioner's Guide* § 8.1, at 423 (2007). The attorney-client privilege protects *communications* between attorneys and clients, but the legal and factual analysis that supports preventive advice will often derive from a lawyer's own thinking (and not his communications). The attorney-client privilege is thus of limited benefit in this context.

uncertainty, because it may be unclear whether a certain course is legal or questionable, whether an action taken will raise new legal concerns *post hoc*, or whether subsequent developments will unfold and affect the wisdom of the approach taken in unanticipated ways. As this Court has noted, for instance, antitrust violations are "often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 440-441 (1978).

Because corporate managers act against this gray background, they must anticipate and plan to avoid litigation risks for practically every important decision they make. A deal might implicate antitrust or securities laws, a new technology might involve copyright or patent issues, an employment policy could have unintended impacts on a protected class, a new product might lead to tort liability—all of which could lead to costly litigation. *See In re Sealed Case*, 146 F.3d at 886. To account for such contingencies, it is essential for corporate managers to understand all the risks, so that they can make a well-informed decision to stop, continue, or alter a planned transaction.

The public-policy benefits of preventive legal advice and accurate financial risk assessment are substantial. They help companies follow the law, serve the stakeholders who rely on the accuracy of companies' financial reporting when making their own decisions in reliance on the company's business integrity, and promote accountability and responsibility in corporate governance. As scholars have generally observed, "legal advice provided when individuals are deciding how to act will tend to be socially beneficial" because it leads them "to behave desirably." Kaplow & Shavell, *Legal Advice About Information to Present in Litigation*,

102 Harv. L. Rev. 565, 597 (1989). This will be especially true in the corporate context, since preventive legal advice will help companies to defuse potentially serious legal consequences. Such self-policing will surely pay broad dividends across the system: the company will avoid (or be better enabled to address) litigation; its shareholders will not suffer a diminution in the value of their investments; the government will not have to launch investigations or focus on expensive remedial actions; and employees and the general public will be spared the devastating and far-reaching impact of more corporate scandals.

B. The First Circuit Failed To Understand That The Work-Product Doctrine Is Crucial To Fostering Effective Preventive Advice

To provide effective preventive legal advice, corporate lawyers must be able to undertake investigations that uncover all the facts and to conduct analysis that diagnoses all the legal risks. Contrary to the First Circuit's reasoning, the protection of that process is the proper province of the work-product doctrine.

As this Court has observed, to provide effective service to a client, a lawyer must be able to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman*, 329 U.S. at 510-511. Hence, the work-product protections recognized by this Court guard against the "[i]nefficiency, unfairness and sharp practices" that would otherwise "inevitably develop in the giving of legal advice." *Id.* at 511.

Companies that employ or retain lawyers to advise them about the litigation risks of planned business decisions need work-product protections if their lawyers'

advice is to be thorough and candid. Indeed, the need may be even greater in that context than in the trial setting because preventive lawyering presents unique challenges. There is usually no lawsuit to frame the preventive inquiry and no discovery to guide the factual investigation. Instead, when a company asks its attorney for preventive advice, the lawyer must piece together the necessary facts, laws, and issues from scratch, often under severe time and business pressure. To do this well, the lawyer needs complete confidence that he can prepare thorough analysis without jeopardizing his client's interests—in particular, he needs to be sure that his work will not later end up in the hands of an adverse party who could potentially use the analysis against his client. On the other hand, when a lawyer fears that his work product will not be protected, he will "not likely risk" being entirely candid and comprehensive, "thus severely limiting [his] ability to advise clients effectively." *In re Sealed Case*, 146 F.3d at 886.

These protections are particularly important to the work carried out by in-house attorneys, who are obligated as corporate gatekeepers to provide preventive legal advice. In-house attorneys are particularly well positioned to help their companies comply with the law. They are "intimately familiar" with the company's operations. Kim, *Dual Identities & Dueling Obligations*, 68 Tenn. L. Rev. 179, 199-200 (2001). Unlike outside counsel, who often are hired only after a crisis erupts, in-house lawyers tend to be involved in every stage of a company's decision-making process, as well as a wider range of transactions, many of which outside counsel never see or might not understand as fully because they are not integrated in the company's daily processes. *See* Duggin, *supra*, at 1006-1019. Equally important, in-house attorneys usually have a trusted rela-

tionship with corporate managers inside the company and a regular place at the table when business decisions are being made. They have access not only to information transmitted through formal channels (such as board meetings) but also to "informal, back-channel information that flows around the company water cooler." Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 Emory L.J. 1011, 1019 (1997). Thus, when they provide preventive legal advice, in-house attorneys can bring to bear their full institutional expertise and knowledge. But if their work product will be discoverable, such thoroughness will not be in the company's best interests in terms of limiting risk or liability.

C. The First Circuit's Decision Will Chill The Lawyer's Analytical Process, To The Client's Detriment

In the D.C. and Second Circuits, when corporate attorneys prepare preventive legal advice, they can be sure that their work product will not be discoverable. So unfettered, they can conduct comprehensive analysis, knowing that candid assessment of their client's risks aligns with the client's best interests. As a result, their clients will receive the optimal level of advice.

In the First Circuit, the calculus will be very different, for corporate lawyers will be chilled from being as thorough as necessary and from reducing their candid assessments to writing. Each time the lawyer considers writing a legal memorandum or jotting down notes from a factual investigation, he will have to determine whether doing so could damage the company's interests in discovery. This will discourage any reasonable lawyer from "engaging in the writing, note-taking, and communications so critical to effective legal think-

ing." *In re Sealed Case*, 146 F.3d at 886-887. And that perverse incentive will plainly disadvantage the client by diminishing its ability to make an informed decision and increasing its exposure to litigation. Deterring lawyers from reducing their thought processes and analysis to writing virtually ensures that the advice ultimately given to the client will not be as thorough as it should be. As the D.C. and Second Circuits have observed, if a company "scrimps on candor and completeness to avoid prejudicing its litigation prospects, it subjects itself ... to ill-informed decisionmaking," and will "inevitably reduce voluntary compliance with the law [and] produce more litigation." *Adlman*, 134 F.3d at 1200; *In re Sealed Case*, 146 F.3d at 887.

* * *

The damaging effects from the decision below could not come at a worse time. Ever since the fall of Enron and subsequent significant corporate failures, the government and the business community have made a concerted effort to focus on improved corporate legal compliance and to prevent future scandals and devastating losses. The lesson learned from many of these debacles was a need to prevent future "gatekeeper failure." Coffee, Jr., *Understanding Enron*, 57 Bus. Law. 1403 (2002). That is, the forces in the system that were empowered to curb or prevent corporate excess (including lawyers, accountants, and independent directors) failed to do so. Accordingly, Congress, the SEC, and professional associations have tried to reinvigorate gatekeeping functions. In particular, the "spotlight is now focused on lawyers." Coffee, Jr., *The Attorney as Gatekeeper*, 103 Colum. L. Rev. 1293, 1293 (2003). Indeed, under the Sarbanes-Oxley Act, both Congress and the SEC are increasingly counting on attorneys to steer corporations to legal compliance. Duggin, *supra*, at

1033. In this new environment, courts should support lawyers performing this important role with all the tools they need to fulfill it. Because the First Circuit's decision does precisely the opposite, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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