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 Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF NEW ENGLAND LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF NEW ENGLAND LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

New England Legal Foundation ("NELF") respectfully submits this brief as *amicus curiae* in support of petitioner Textron Inc. and Subsidiaries.[1]

STATEMENT OF INTEREST

NELF is a nonprofit, nonpartisan, public interest organization, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses, both public and private, from all parts of New England and the United States.

Because New England is made up of relatively small, contiguous States, many of NELF's members

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, *amicus curiae* states that petitioner and respondent, upon timely receipt of notice of NELF's intent to file this brief, have consented to its filing. Petitioner has filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs, and a letter reflecting the consent of respondent to the filing of this brief has been filed with the Clerk.

regularly conduct business in more than one State in the region. At the same time, the New England States fall within either the First or Second Circuits of the United States Court of Appeals. To the extent that NELF's members are exposed to the risks of litigation or become parties in actual lawsuits, they have a strong interest in consistent application of the Federal Rules of Civil Procedure across the federal jurisdictions in which they conduct business and face either potential or actual litigation.

NELF has regularly appeared as an *amicus curiae* in cases raising issues of general economic and legal significance to the New England business community.[2] For the reasons set forth below, this is such a case, and NELF believes that this brief provides an additional perspective which may aid the Court in determining whether to grant certiorari in this case.

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[2] *See, e.g.*, *Hall Street Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576 (2009); *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Rapanos* v. *United States*, 547 U.S. 715 (2006); *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Kelo* v. *New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P.* v. *San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Comm'r* v. *Banks*, 543 U.S. 426 (2005); *Commonwealth* v. *Fremont Inv. & Loan*, 452 Mass. 733, 897 N.E.2d 548 (2008); *Saab* v. *Massachusetts CVS Pharmacy, LLC*, 452 Mass. 564, 897 N.E.2d 548 (2008); *Thurdin* v. *SEI Boston, LLC*, 452 Mass. 436, 895 N.E.2d 446 (2008); *Salvas* v. *Wal-Mart Stores, Inc.*, 452 Mass. 337, 893 N.E.2d 1187 (2008); *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 888 N.E.2d 879 (2008); *Moelis* v. *Berkshire Life Ins. Co.*, 451 Mass. 483, 887 N.E.2d 214 (2008).

SUMMARY OF ARGUMENT

The language of Federal Rule of Civil Procedure 26(b)(3)(A) is unambiguous: "Ordinarily, a party may not discover documents and tangible things that are prepared *in anticipation of litigation* or for trial by or for another party or its representative . . . ." (Emphasis added.) Interpreting that rule, the First Circuit's decision below holds that a corporation's tax reserve litigation assessment documents[3] are not protectable work product because the documents were not prepared for use at trial and were created in response to regulatory requirements that the corporation support and defend its reserve estimates to the auditor. The decision ignores the rule's protection of documents prepared "in anticipation of litigation" and, in so doing, deepens an already-existing split among the courts of appeals over whether documents lawyers create "because of," but not primarily "for use in," litigation are protected work product. The divergent interpretations of Rule 26(b)(3)(A) in the federal courts of appeals described in the petition present a compelling reason for the grant of certiorari. NELF respectfully submits two additional reasons that the Court should grant this petition to resolve the split.

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[3] As the Court is no doubt aware from the both the Petition and the decision below, these documents were prepared by counsel for the petitioner to support the company's decisions regarding the amount of reserves it should maintain with respect to existing and potential litigations. *See* Pet. App. 6a. By definition, these documents consist of the analyses and mental impressions of the petitioner's attorneys. As part of the audit process, these analyses were shown to the company's auditors so that the latter could verify the reasonableness of the reserves. *See id.* 6a-8a.

First, the decision below has created substantial uncertainty that, for purely geographic reasons, is having an immediate, pronounced impact in the six States that make up New England. Maine, Massachusetts, New Hampshire, and Rhode Island are in the First Circuit, and thus federal courts in those States are bound by the decision below. By contrast, Connecticut and Vermont are in the Second Circuit, and their federal courts are bound by a conflicting rule. In addition to the First and Second Circuits' split on the scope of the work product doctrine, there is now also uncertainty regarding New England state courts' future interpretations of their cognate work product rules, since those courts generally look to federal decisions regarding work product for guidance.

Many of NELF's members conduct business in more than one, or even all, of the New England States, and because of the split, the answer to the question whether documents their attorneys have prepared in anticipation of litigation would be protected from discovery now depends entirely on the jurisdiction in which litigation opponents choose to seek them. The divergence of authority in such a compact geographic area encourages forum shopping and chills communications between clients, their attorneys, and their auditors. The Court should not allow this disruptive inconsistency in authority to continue.

Second, the decision below is inconsistent with the plain text of Rule 26(b)(3)(A) and conflicts with the policies that underlie the work product doctrine. Furthermore, because, under applicable case law, Textron's disclosure of its workpapers to its auditors

did not waive any existing work product protection, a reversal of the First Circuit's erroneous ruling would be outcome determinative in this case. The Court should grant certiorari to correct the First Circuit's error and to provide guidance and uniformity to individuals and organizations that face litigation in the federal courts both in New England and in the other parts of the nation.

ARGUMENT

I. The Decision Below Creates An Intolerable Confusion Regarding Work Product Protection In New England.

As the petition explains, the federal courts of appeals are in irreconcilable conflict over the scope of the work product doctrine. *See* Pet. 12-20. The Circuit split hits especially hard in New England, where the Connecticut River, which once served to bind New England commerce, now divides jurisdictions that protect materials prepared "in anticipation of litigation" under Rule 26 from those that disregard this plain language.

For individuals and businesses in Hanover, New Hampshire, such materials are subject to subpoena or discovery in federal court (though not in New Hampshire state courts). Across the River in White River Junction, Vermont, however, a discovery request or subpoena in federal court would not reach such materials (nor would they in Vermont state court). Downstream, however, as the river passes through Massachusetts, a Springfield manufacturer must disclose these same materials in federal court (though not if sued in state court). And still further downstream, in Connecticut, the Rule like a fickle

current reverses again, so that a Hartford employee (as described in case law below) need not disclose such materials (either in federal or state court).

This confusion is not merely inconvenient; it is intolerable. Some corporations operate in all of those locations along the River and throughout New England. Furthermore, the inconsistent and conflicting rules in courthouses separated by relatively few miles create strong incentives for forum shopping and will likely force litigants to conduct business as if the lowest degree of work product protection will prevail. Meanwhile, corporate counsel, today preparing litigation reserve estimates for *any* kind of potential or existing litigation in New England, cannot determine with certainty whether or not Rule 26(b)(3)(A) will protect such work product from disclosure to an adversary. This is because the degree of work product protection afforded such materials will depend *solely* on the jurisdiction in which the corporation is sued, and not on where it is located. *Compare United States* v. *Textron*, Pet. App. 15a (1st Cir. 2009) (en banc) (adopting the "for use in" test), *with United States* v. *Adlman*, 134 F.3d 1194, 1198 (2d Cir. 1998) (adopting the "because of" test); *Commissioner of Revenue* v. *Comcast Corp.*, 453 Mass. 293, 316, 901 N.E.2d 1185, 1203 (2009) (same); *OneBeacon Professional Partners, Inc.* v. *Ironshore Holdings (U.S.), Inc.*, No. HHDX04CV085019642S, 2009 WL 415623, at *4 (Conn. Super. Ct. Jan. 27, 2009) (same); *see also Riddle Spring Realty Co.* v. *State*, 107 N.H. 271, 274, 220 A.2d 751, 755 (1966) (finding work product protection for documents prepared "with a view to" litigation); *Killington, Ltd.* v. *Lash*, 153 Vt. 628, 647-48,

572 A.2d 1368, 1379-80 (1990) (adopting "in anticipation of litigation" standard). In other words, a defendant located in the Second Circuit must disclose materials as required by the different standard set forth in the decision below if it is sued in the First Circuit.

The practical difficulties of the current state of affairs are clear. In the First Circuit, pursuant to the decision below, documents drafted by lawyers because of potential litigation qualify for work product protection only if they are "prepared *for use* in possible litigation." Pet. App. 11a. Thus, tax reserve litigation assessment documents, which "estimate the amount potentially in dispute and the percentage chance of winning and losing," are not protectable because they are prepared "to establish and support the tax reserve figures for the audited financial statements" and not "for use in litigation." *Id.* at 14a, 6a, 15a.

The opposite result prevails in the Second Circuit. In *United States* v. *Adlman*, 134 F.3d 1194 (1998), the Second Circuit confronted a claim of work product protection over similar documents. In *Adlman*, an attorney commissioned an analysis of the tax consequences of a business transaction. Like the documents at issue in this case, the *Adlman* documents made "predictions about the likely outcome of litigation" between the corporation and the IRS. *Id.* at 1195.

According to the Second Circuit, the fact that business considerations precipitated creation of the document was "irrelevant to the question whether it should be protected under Rule 26(b)(3)." *Id.* at

1200. Moreover, the Second Circuit did not even discuss whether the document was prepared for use in litigation, much less suggest that the work product inquiry would turn on that fact. Instead, the court held that "[w]here a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation," it is protectable work product. *Id.* at 1195.

Although federal court interpretations of Rule 26(b)(3)(A) are not binding on state court interpretations of their cognate provisions,[4] it is nonetheless illustrative of the mischief created by the decision below that the Massachusetts Supreme Judicial Court, sitting less than a mile from the First Circuit courthouse, recently considered the language of the Massachusetts rule, Mass. R. Civ. P. 26(b)(3), and adopted the Second Circuit's "because of" test set out

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[4] States are of course free to craft and interpret their own procedural rules that may differ from those of federal courts, and therefore some difference in procedure between federal and state courts is to be expected. With respect to the work product doctrine, however, the New England States have adopted rules defining the scope of work product protection containing language nearly identical to that of Federal Rule of Civil Procedure 26(b)(3). *See* Conn. Practice Book § 13-3; Me. R. Civ. P. 26(b)(3); Mass. R. Civ. P. 26(b)(3); N.H. Super. Ct. R. 35(b)(2); R.I. R. Civ. P. 26(b)(3); Vt. R. Civ. P. 26(b)(3). Moreover, many of the state court decisions interpreting state rules have relied on federal court precedent precisely to achieve uniformity on this issue between the state and federal systems. *See, e.g., Comcast*, 453 Mass. at 316 n.25, 901 N.E.2d at 1203 n.25 ("Rule 26(b)(3) of the Massachusetts Rules of Civil Procedure is identical in all material respects to the Federal rule. It is therefore appropriate to look for guidance to Federal interpretations of our rule.").

in *Adlman*, rather than the First Circuit's "for use in" test in this case. *See Commissioner of Revenue* v. *Comcast Corp.*, 453 Mass. 293, 901 N.E.2d 1185 (2009). In *Comcast*, as a result of a settlement order between the United States Department of Justice and U.S. West, Inc. (a predecessor of Comcast), U.S. West was required to divest itself of certain shares of stock. In considering how to structure the sale in response to this regulatory requirement, in-house counsel commissioned "a memorandum discussing the 'pros and cons of the various planning opportunities and the attendant litigation risks.'" *Id.* at 299, 901 N.E.2d at 1191. In connection with its subsequent investigation of the transaction, the Massachusetts Department of Revenue sought the memorandum through an administrative summons. *Id.* at 294, 901 N.E.2d at 1188. Comcast argued, among other things, that the memorandum was protected work product.

In evaluating Comcast's work product claim, the Supreme Judicial Court expressly adopted the Second Circuit's "because of" test from the *Adlman* case. *Id.* at 316-17, 901 N.E.2d at 1203-04. Even though U.S. West commissioned the memorandum primarily to inform its business decision regarding how to structure its independent legal obligation to divest the stock, the Supreme Judicial Court held that the memorandum was protected work product. "[A] litigation analysis prepared so that a party can make an informed business decision is afforded the protec-

tions of the work product doctrine." *Id.* at 318, 901 N.E.2d at 1205.[5]

A simple hypothetical illustrates the problems arising from the different interpretations of Rule 26(b)(3)(A) in *Adlman*, *Comcast*, and the decision below. Consider the dilemma confronting a lawyer for a public Massachusetts corporation who is asked to help company executives to evaluate a transaction with a company in Vermont that poses novel tax issues. If he prepares a memorandum analyzing those issues, he may share the memorandum with the company's auditors. Under the decision below, the IRS will be able to obtain the memorandum by subpoenaing it in federal court in Massachusetts, and the IRS will likely seek to use the impressions and theories of the lawyer against his client.

If, however, the Massachusetts Department of Revenue decides to open a parallel audit of the state tax consequences of the transactions, the Supreme Judicial Court's decision in *Comcast* (applying a Massachusetts rule with text identical to that in Rule 26(b)(3)(A)) will prevent it from obtaining the memorandum.[6] Notwithstanding the Supreme Judicial Court's holding, a prudent lawyer would have to advise his client that, as a practical and protective measure, he must conform his conduct to the First

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[5] Maine has also adopted the "because of" test. *See Springfield Terminal Ry. Co.* v. *Department of Transp.*, 2000 ME 126, ¶17, 754 A.2d 353, 358 (Me. 2000).

[6] But the decision below might motivate the Massachusetts Department of Revenue to circumvent the Supreme Judicial Court's holding in *Comcast* by encouraging the IRS to open an audit and share the documents it receives.

Circuit's recent interpretation in the case below, since, at any point the Massachusetts court might decide to amend its view to conform to that of the First Circuit. The result may well be that the lawyer would refrain from the discipline of developing his thoughts on paper, or he may decline to share his full analysis with his client.

The problems created by the conflict are not unique to the tax context. If the Vermont company is dissatisfied with the transaction and decides to sue the Massachusetts company, its lawyer will have a professional obligation to consider and exploit the conflict in choosing a forum. As matters now stand, if the Vermont company sues in Vermont or in Massachusetts state court, the memorandum will be protected. If, however, it brings the same claims in federal court in Massachusetts, the Vermont company will be entitled to the memorandum in discovery.[7]

The split in New England, where many companies operate across state boundaries, is likely to chill communications between lawyers and clients and to encourage, indeed require, lawyers to engage in forum shopping. This Court should eliminate such gamesmanship by granting the petition to resolve the split.

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[7] Moreover, in some situations where a plaintiff prefers to remain in Massachusetts state court to protect its own work product under *Comcast*, the split may cause it to forgo meritorious federal claims to avoid a basis for removal to the United States District Court for the District of Massachusetts, which is governed by the decision below. *See* 28 U.S.C. 1441(b).

II. The Decision Below Is Inconsistent With The Text Of Rule 26(b)(3)(A) And the Policies Underlying It.

The fact that the federal courts of appeals (and, as a consequence, potentially the state courts) are in conflict over a significant issue that clients who receive legal advice regularly confront provides a compelling reason for the Court to resolve the conflict. This case provides an ideal vehicle for the Court to do so because the decision below is incorrect and the question presented is likely to be outcome determinative.

By its express terms, Rule 26(b)(3)(A) protects from discovery documents "prepared in anticipation of litigation or for trial," absent a showing of substantial need. The First Circuit's "for use" test is inconsistent with the plain text of the rule because it ignores the protection expressly afforded documents "prepared in anticipation of litigation." As the dissent below explained, "[t]here is no reason to believe 'anticipation of litigation' was meant as a synonym for 'for trial.'" Pet. App. 28a. Therefore "the term 'anticipation of litigation' should not be read out of the rule by requiring a showing that documents be prepared for trial." *Id.*

The decision below also frustrates the policies underlying work product immunity that were first articulated in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). The IRS has unfettered access to the facts necessary for it to audit Textron's return and to form its own conclusions about the propriety of Textron's reporting. The IRS, in subpoenaing Textron's litigation tax reserve estimate workpapers (spreadsheets,

supportive e-mails and notes), is instead seeking the mental impressions of its attorneys, including assessments of the likelihood and possible outcomes of litigation. These documents disclose confidential attorney judgments concerning facts, law, and adversarial priority and strategy. These judgments are the essence of what *Hickman* and Rule 26(b)(3) were designed to protect, and disclosure of these attorney judgments would give an adversary an unfair advantage in settlement negotiations, in its pre-trial budgeting, and in its own trial risk assessment. [8]

The decision below placed great weight on the fact that Textron had prepared the documents in part for disclosure to its auditors pursuant to regulatory requirements applicable to public companies. *See* Pet. App. 11a-15a. The panel's reliance on disclosure to Textron's auditors conflated two distinct inquiries: whether a document is protectable work product and whether that protection has been waived by disclosure to a third party. A recent decision from a New England state court illustrates the correct analysis of disclosure to third parties. In *OneBeacon Professional Partners, Inc.* v. *Ironshore Holdings (U.S.), Inc.*, No. HHDX04CV085019642S,

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[8] The First Circuit in the decision below relied in part on the ground that disclosure was appropriate and desirable because of the the difficulties the IRS faces in tax administration. *See* Pet App. 20a. NELF respectfully submits that any disadvantages the IRS confronts in litigation should not be remedied through judicial rewriting of Rule 26(b)(3). The work product doctrine applies to litigants contesting issues far removed from taxation, including the work of attorneys for individuals with workaday legal problems, just as it applies to the work of attorneys for large corporations seeking to minimize their tax burden.

2009 WL 415623, at *1 (Conn. Super. Ct. Jan. 27, 2009), an individual employed by an insurance business sought legal advice about claims his employer might assert against him if he joined another insurance firm, Ironshore. He received from his attorney several memoranda analyzing those claims, and he shared the memoranda with Ironshore. *See id.* at *4. His original employer sought production of the memoranda in litigation, and the employee asserted a work product claim.

The court, interpreting language identical to the federal standard, adopted the "because of" test set forth in *United States* v. *Adlman*, 134 F.3d 1194 (2d Cir. 1998), agreeing with the Second Circuit's reasoning that "[w]here a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision." *OneBeacon*, 2009 WL 415623, at *3. Applying *Adlman*, the court then held that the memoranda prepared by the employee's personal lawyer were protectable work product. *Id.* at *4.

Only in the context of then determining if the protection had been waived did the court consider the fact of disclosure to a third party, Ironshore. *Id.* at *4-*5. The court, relying on federal case law, considered whether the disclosure in this instance was inconsistent with maintaining secrecy against potential adversaries in litigation. *Id.* The court reasoned that even though the employee and prospective future employer were at arm's length regarding terms of possible employment, the employee and Ironshore "shared a common interest in assessing the potential

of, avoiding, and, if necessary, defending against, litigation" brought by OneBeacon. *Id.* at *5. Since Ironshore was not a potential adversary in those circumstances and the disclosure "did not substantially increase the opportunity for potential adversaries to obtain the information," the court held that the work product protection was not waived. *Id.*

Similar to Ironshore and its prospective employee, Textron and its auditor were not adversaries. The auditor has an interest in common with the potential litigant, while not in common with a potential adversary of the issuer. That an issuer has an independent legal obligation of disclosure to the auditor is of no consequence, as the district court below recognized when it correctly held that Textron had not waived work product protection.[9] *See* Pet. App.

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[9] At least fourteen district court opinions have held that disclosure of work product to financial auditors does not waive work product protection. *See Vacco* v. *Harrah's Operating Co.*, No. 1:07-CV-0663 (TJM/DEP), 2008 WL 4793719, at *6 (N.D.N.Y. Oct. 29, 2008); *SEC* v. *Roberts*, 254 F.R.D. 371, 381 (N.D. Cal. 2008); *Regions Financial Corp.* v. *United States*, No. 2:06-CV-895-RDP, 2008 WL 2139008, at *7-*8 (N.D. Ala. May 8, 2008), *appeal dismissed* No. 08-13866 (11th Cir. Dec. 30, 2008); *In re JDS Uniphase Corp. Sec. Litig.*, No. C-02-1486 CW (EDL), 2006 WL 2850049, at *1 (N.D. Cal. Oct. 5, 2006); *Lawrence E. Jaffe Pension Plan* v. *Household Int'l, Inc.*, 237 F.R.D. 176, 183 (N.D. Ill. 2006); *Int'l Design Concepts, Inc.* v. *Saks Inc.*, No. 05 CIV. 4754(PKC), 2006 WL 1564684, at *2 (S.D.N.Y. June 6, 2006); *American S.S. Owners Mut. Prot. & Indem. Assn.* v. *Alcoa S.S. Co.*, No. 04 Civ. 4309 LAKJCF, 2006 WL 278131, at *2 (S.D.N.Y. Feb. 2, 2006); *Frank Betz Assocs., Inc.* v. *Jim Walter Homes, Inc.*, 226 F.R.D. 533, 535 (D.S.C. 2005); *Merrill Lynch & Co.* v. *Allegheny Energy, Inc.*, 229 F.R.D. 441, 447 (S.D.N.Y. 2004); *In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 293, 300 (S.D.N.Y. 2003); *Gutter* v. *E.I. DuPont de Nemours & Co.*, No. 95-CV-2152, 1998 WL 2017926, at *3 (S.D.

112a-116a. That obligation arises from an auditor's engagement letter-agreement with the issuer, implementing the auditor's statutory obligation to obtain disclosure. Rule 26(b)(3) protects work product created by others under contractual arrangements that contain disclosure obligations similar to those imposed on issuers, such as insurers, indemnitors, and sureties.

Moreover, the fact that the auditor's own reserve calculations may be discoverable under this Court's decision in *United States* v. *Arthur Young & Co.*, 465 U.S. 805 (1984), is no reason to ignore the text of the Rule as applied to an issuer's lawyer's work product disclosed in confidence to the auditor. Indeed, the availability of auditor-created information under *Arthur Young* should negate any need for an exception to the protection of the issuer's lawyer's work product under Rule 26(b)(3)(A)(ii).

Finally, because Textron has not waived work product protection, the answer to the question presented—i.e., whether the documents at issue are protected from disclosure as work product—should determine the outcome in this case. The petition therefore presents the Court with an ideal vehicle to

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Fla. May 18, 1998); *In re Pfizer Inc. Sec. Litig.*, No. 90 Civ. 1260 (SS), 1993 WL 561125, at *6 (S.D.N.Y. Dec. 23, 1993); *Gramm* v. *Horsehead Indus., Inc.*, No. 87 Civ. 5122, 1990 WL 142404, at *5 (S.D.N.Y. Jan. 25, 1990); *Tronitech, Inc.* v. *NCR Corp.*, 108 F.R.D. 655, 657 (S.D. Ind. 1985). Only two district court opinions have held that such disclosure constitutes waiver. *See Medinol, Ltd.* v. *Boston Scientific Corp.*, 214 F.R.D. 113, 115-17 (S.D.N.Y. 2002); *In re Diasonics Sec. Litig.*, No. C-83-4584-RFP (FW), 1986 WL 53402, at *1 (N.D. Cal. Jun. 15, 1986).

correct the First Circuit's misapplication of Rule 26(b)(3).

CONCLUSION

For the foregoing reasons, and for those stated by petitioner Textron Inc. and Subsidiaries, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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