No.

In the Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the work-product privilege 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.

CORPORATE DISCLOSURE STATEMENT

Textron Inc. has no parent corporation, and no publicly held company owns 10% or more of Textron's stock.

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Textron Inc., together with its subsidiaries, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-46a) is reported at 577 F.3d 21. The opinion of the court of appeals panel (App., *infra*, 47a-88a) is reported at 553 F.3d 87. The district court's order denying respondent's petition to enforce administrative summons (App., *infra*, 89a-118a) is reported at 507 F. Supp. 2d 138.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2009. On October 20, 2009, Justice Breyer extended the time within which to file a petition for a writ of certiorari until December 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

In relevant part, Federal Rule of Civil Procedure 26(b)(3)(A) provides:

> 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 (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).

STATEMENT

In 2003, the Internal Revenue Service (IRS) commenced an audit of petitioner's tax returns for tax years 1998 to 2001. In connection with that audit, the IRS issued an administrative summons for petitioner's workpapers relating to its potential tax liabilities for tax year 2001. Citing, *inter alia*, the work-product privilege, petitioner withheld certain documents, including a spreadsheet prepared by petitioner's lawyers that listed items on its return whose treatment was uncertain (and, as to each item, estimated the likelihood of success in the event of a dispute). The government then filed a petition to enforce the summons in the United States District Court for the District of Rhode Island. The district court denied the petition. App., *infra*, 89a-118a. A panel of the court of appeals initially affirmed. *Id.* at 47a-88a. After granting rehearing en banc, however, the court of appeals reversed. *Id.* at 1a-46a.

1. This case presents a substantial circuit conflict on an issue of immense practical importance: the scope of the work-product privilege. The Court first recognized that privilege in *Hickman* v. *Taylor*, 329 U.S. 495 (1947).[1] In the course of discovery, the plaintiff in *Hickman* had sought materials "secured by an adverse party's counsel in the course of preparation for possible litigation after a claim ha[d] arisen." *Id.* at 497. Although the then-recent Federal Rules of Civil Procedure took a "broad and liberal" approach to discovery, *id.* at 507, and by their terms seemingly permitted the plaintiff to obtain the materials in question, see *id.* at 505-506, the Court held that the "work product" privilege protected "written materials obtained or prepared by an adversary's counsel with an eye toward litigation." *Id.* at 511. The Court explained that the work-product privilege was justified by historical practice, see *id.* at 510 n.9, and that a contrary rule would lead to "[i]nefficiency, unfairness and sharp practices," with the result that "the legal profession would be demoraliz[ed]" and "the interests of the clients and the cause of justice * * * poorly served," *id.* at 511.

In 1970, the Federal Rules of Civil Procedure were amended to codify the work-product privilege. Rule 26(b)(3) provides that the work-product privilege covers "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party

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[1] *Hickman* has variously been described as giving rise to a "doctrine," "protection," or "privilege." In keeping with the terminology of the Court's more recent decisions, we refer here to the "work-product privilege." See, *e.g.*, *Department of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001); *United States* v. *Hubbell*, 530 U.S. 27, 31 (2000); *Swidler & Berlin* v. *United States*, 524 U.S. 399, 402-403 (1998).

or its representative." The privilege is qualified rather than absolute: where a party to litigation can show that it "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means," the party can obtain production of otherwise protected materials. Fed. R. Civ. P. 26(b)(3)(A)(ii). Even upon such a showing, however, the party may not obtain production of so-called "opinion work product": that is, materials that would "disclos[e] * * * the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B). This case concerns the issue of when a document has been prepared "in anticipation of litigation," and is therefore protected by the work-product privilege, under Rule 26(b)(3).

2. Textron Inc. is a multi-industry corporation whose subsidiaries and operating units include such well-known businesses as Cessna Aircraft and Bell Helicopter. Textron and its subsidiaries file consolidated tax returns; they are collectively the petitioner before this Court. Because Textron is one of the Nation's largest corporations, petitioner's tax returns are routinely audited; in fact, the IRS has audit staff permanently based onsite at Textron, and, during the relevant period, had approximately 20 employees assigned to audit petitioner's returns. In 2003, the IRS commenced a scheduled audit of petitioner's tax returns for tax years 1998 to 2001. As part of that audit, the IRS issued more than 500 formal requests for information; petitioner produced "many file cabinets" worth of material in response to those requests. App., *infra*, 4a, 90a-91a; C.A. App. 184, 194-195, 227.

In tax year 2001, one of Textron's subsidiaries had engaged in several "sale-in, lease-out" transactions in-

volving telecommunications and rail equipment. In 2002, the IRS adopted a policy under which, where a taxpayer claims benefits from two or more similar "listed transactions" (*i.e.*, transactions whose tax treatment was, in the IRS's view, open to question), the IRS would seek *all* of the taxpayer's "tax accrual workpapers" (*i.e.*, workpapers relating to potential tax liabilities) for the tax year in question, regardless whether those workpapers pertained to the transactions at issue. See I.R.S. Announcement 2002-63, 2002-2 C.B. 72. Although the "sale-in, lease-out" transactions were not classified as "listed transactions" at the time Textron's subsidiary engaged in them, they were so classified several years later, and petitioner duly informed the IRS of the transactions. See I.R.S. Notice 2005-13, 2005-1 C.B. 630; App., *infra*, 4a, 91a; C.A. App. 252-255.

Based on those transactions, and notwithstanding the fact that the subsidiary had received legal advice that its tax treatment of those transactions was appropriate, the IRS issued a request, followed by an administrative summons, for petitioner's 2001 workpapers. In response, petitioner expressed its willingness to produce documents relating to the transactions at issue. But it withheld other documents relating to its return as a whole, including, most notably, a spreadsheet prepared by its in-house lawyers that listed items on its return whose treatment was uncertain (and, as to each item, estimated the likelihood of success in the event of a dispute),[2] and background memorandums that set out the legal analysis behind those estimates. By its own admis-

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[2] A redacted version of a comparable spreadsheet from a prior tax year was introduced as an exhibit in the district court and is reproduced in the appendix to this petition at pages 121a to 122a.

sion, the IRS sought those documents in order to obtain a "roadmap" to petitioner's tax return, because those documents would "provid[e] guidance" in reviewing petitioner's tax return and "disclos[e] unidentified issues." App., *infra*, 5a, 31a, 91a-93a; Gov't C.A. Br. 7, 19; Gov't C.A. Reply Br. 16 n.7.

3. Pursuant to 26 U.S.C. 7604, the government then filed a petition to enforce the summons in the United States District Court for the District of Rhode Island. As is relevant here, petitioner contended that the withheld documents were protected by the work-product privilege. In support of that contention, petitioner submitted affidavits regarding the method by which the documents were prepared, and also presented testimony at an evidentiary hearing concerning the documents' purposes. Specifically, the head of petitioner's tax department testified that, although one purpose of the documents was to assist petitioner's independent auditor in reviewing the amount set aside in reserve for potential tax liabilities in the event of disputes, another purpose was to guide petitioner in making litigation or settlement decisions concerning the tax treatment of the specified items. See C.A. App. 200 (testimony of Norman Richter).

After the evidentiary hearing, the district court denied the government's petition. App., *infra*, 89a-118a. As is relevant here, the district court held that the documents at issue were covered by the work-product privilege. *Id.* at 105a-110a. The district court noted that, although courts had "applied * * * different tests in determining whether a document was prepared 'in anticipation of litigation,'" *id.* at 107a, "the relevant inquiry is whether the document was prepared or obtained 'because of' the prospect of litigation." *Ibid.* Applying that standard, the court determined that the documents

"would not have been prepared at all 'but for' the fact that [petitioner] anticipated the possibility of litigation with the IRS." *Id.* at 108a. The court explained that, "[i]f [petitioner] had not anticipated a dispute with the IRS, there would have been no reason for it to establish any reserve or to prepare the workpapers used to calculate the reserve." *Ibid.* The court added that, "even if the workpapers were needed to satisfy [petitioner's auditor] that [petitioner's] reserves complied with [generally accepted accounting principles], that would not alter the fact that the workpapers were prepared 'because of' anticipated litigation with the IRS." *Id.* at 109a.[3]

4. The government appealed. A divided panel of the court of appeals initially affirmed in relevant part, agreeing with the district court that the documents at issue were covered by the work-product privilege. App., *infra*, 47a-88a. After granting the government's petition for rehearing en banc, however, the court of appeals reversed by a 3-2 vote. *Id.* at 1a-46a.

a. The en banc court of appeals first noted that, under Federal Rule of Civil Procedure 26(b)(3), the work-product privilege extends to documents that are "prepared in anticipation of litigation or for trial." App., *infra*, 11a. At the same time, the court reasoned that "how far work product protection extends turns on a balancing of policy concerns rather than application of abstract logic." *Id.* at 9a. The court of appeals also observed that "the Supreme Court has not ruled on the issue before us,

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[3] The district court determined that the documents at issue were also covered by the attorney-client privilege, App., *infra*, 99a-102a, but that petitioner had waived that privilege by disclosing the documents to its auditor, *id.* at 110a-112a. Petitioner did not challenge the latter determination on appeal.

namely, one in which a document is not in any way prepared 'for' litigation but relates to a subject that might or might not occasion litigation." *Ibid.*

Although the court of appeals acknowledged that it had previously suggested that the relevant inquiry was whether the documents were prepared "because of" the prospect of litigation, App., *infra*, 9a, it ultimately held that the work-product privilege reached only documents that were "prepared *for use* in possible litigation." *Id.* at 11a. In adopting that standard, the court explained that "[i]t is not enough to trigger work product protection that the *subject matter* of a document relates to a subject that might conceivably be litigated," *id.* at 16a, "[n]or is it enough that the materials were prepared by lawyers or represent legal thinking," *id.* at 17a. The court added, without elaboration, that "[e]very lawyer who tries cases knows the touch and feel of materials prepared for a current or possible * * * law suit." *Ibid.*

Applying the "for use" standard, the court of appeals determined that the documents at issue were not covered by the work-product privilege, reasoning that "[a]ny experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials." App., *infra*, 15a. The court noted that one purpose of the documents was to assist petitioner's auditor in reviewing the amount set aside in reserve for potential tax liabilities in the event of disputed, *id.* at 11a, and summarily discounted petitioner's evidence that another purpose was to guide petitioner in making litigation or settlement decisions concerning the tax treatment of the specified items, *id.* at 14a-15a. The court concluded that "[t]here is no evidence in this case that the work papers were prepared for * * * use [in litigation] or would in fact serve any useful purpose for [petitioner] in conducting litigation if it arose." *Id.* at

18a-19a. In so concluding, the court conceded that "[o]ther circuits have not passed on tax audit work papers and some might take a different view." *Id.* at 18a.

b. Judge Torruella, joined by Judge Lipez, dissented. App., *infra*, 21a-46a. He criticized the majority for "abandon[ing] our 'because of' test"; "ignor[ing] a tome of precedents from the circuit courts"; "brush[ing] aside the actual text of Rule 26(b)(3)"; and "contraven[ing] m[any] of the principles underlying the work-product doctrine." *Id.* at 21a-22a.

At the outset, Judge Torruella noted that, while the majority had "claim[ed] allegiance" to the court of appeals' earlier decision applying the "because of" standard, App., *infra*, 22a, the majority in fact adopted a narrower standard by concluding that documents must be prepared "for use" in litigation in order to be protected by the work-product privilege. *Id.* at 23a. He explained that "no court * * * has so ruled," *id.* at 24a, and that the "for use" standard could not be reconciled either with the "because of" standard applied by the majority of the circuits or even with the narrower standard of the Fifth Circuit, which turns on whether the "primary purpose" for which the document was prepared was to assist in future litigation. *Id.* at 24a-27a. And as to the majority's application of the "for use" standard, Judge Torruella noted that "[l]ower courts deserve more guidance than a simple reassurance that a bare majority of the en banc court knows work product when it sees it." *Id.* at 27a.

Judge Torruella then contended that the majority's "for use" standard was incorrect, primarily because it was inconsistent with the language of Rule 26(b)(3), which protects not only documents prepared "for trial" but also documents prepared "in anticipation of litigation." App., *infra*, 28a. He explained that "the term 'an-

ticipation of litigation' should not be read out of the rule by requiring a showing that documents be prepared for trial." *Ibid.* Judge Torruella also contended that this case "squarely implicated" the policy rationales for the work-product privilege articulated in *Hickman*, because the documents at issue "contain counsel's ultimate impression of the value of the case" and thus "contain exactly the sort of mental impressions about the case that *Hickman* sought to protect." *Id.* at 31a. He added that, "if attorneys who identify good faith questions and uncertainties in their clients' tax returns know that putting such information in writing will result in discovery by the IRS, they will be more likely to avoid [doing so], thus diminishing the quality of representation." *Id.* at 32a. And he noted that the majority's approach would have significant ramifications beyond the specific context of this case, because it would allow parties to access documents assessing litigation risks more generally. *Id.* at 33a-34a.

Judge Torruella next determined that, under the "because of" standard, the documents at issue in this case would be covered by the work-product privilege. App., *infra*, 34a-45a. He noted that the district court had found both that "anticipation of litigation was the 'but for' cause of the documents' creation," *id.* at 36a, and that the documents were created for a litigation-related purpose as well as a business purpose, *id.* at 35a-36a. Judge Torruella contended that "[t]he majority ma[de] no effort to reject these factual findings," *id.* at 36a, but instead ignored them as irrelevant "without any finding of clear error," *id.* at 38a. Because the documents "were not prepared irrespective of the prospect of litigation," he reasoned, they would be protected under the correct standard. *Id.* at 43a (internal quotation marks omitted).

Judge Torruella concluded that the majority's decision "throw[s] the law of work-product protection into disarray," App., *infra*, 45a, and "will be viewed as a dangerous aberration in the law of a well-established and important evidentiary doctrine," *ibid.* He added that the majority's decision "further[s] the split" in the circuits concerning the meaning of Rule 26(b)(3), *ibid.*, and that "[t]he time is ripe for the Supreme Court to intervene and set the circuits straight on this issue which is essential to the daily practice of litigators across the country," *ibid.*

5. The court of appeals subsequently granted a stay pending the filing of a petition for certiorari. App., *infra*, 119a-120a. In so doing, the court of appeals acknowledged that "the work product privilege finds its origin in a Supreme Court decision that has not often been revisited by the Court," *id.* at 120a, and that "there is some difference in the interpretations adopted in different circuits," *ibid.*

REASONS FOR GRANTING THE PETITION

When measured in terms of its practical significance for civil litigants, this is one of the more important cases to come before the Court in some time. In the decision below, the en banc First Circuit adopted an unprecedentedly narrow interpretation of the work-product privilege in Federal Rule of Civil Procedure 26(b)(3), holding that the privilege is limited to documents that are prepared "for use" in litigation. That holding deepens a preexisting and longstanding circuit conflict: nine other courts of appeals have adopted inconsistent (but uniformly broader) views of the privilege's scope. The First Circuit's analysis, moreover, was deeply flawed, because its "for use" standard cannot be reconciled either with the language of Rule 26(b)(3) or with the poli-

cies underlying the work-product privilege. As the enormous amount of attention that this case has garnered reflects, the scope of the privilege is a recurring issue of obvious practical significance, and this case is an optimal vehicle in which to consider the issue. In sum, because this case is a compelling candidate for further review in every respect, certiorari should be granted.

A. The Decision Below Deepens A Circuit Conflict Concerning The Scope Of The Work-Product Privilege

1. As the First Circuit seemingly recognized, see, *e.g.*, App., *infra*, 18a, 120a, its decision conflicts with the decisions of nine other courts of appeals concerning the scope of the work-product privilege. That conflict warrants this Court's review.

a. Eight courts of appeals have held that, for purposes of determining whether a document was prepared "in anticipation of litigation" under Rule 26(b)(3), the relevant inquiry is whether the document was prepared or obtained "because of" the prospect of litigation. See, *e.g.*, *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *United States* v. *Adlman*, 134 F.3d 1194, 1202-1203 (2d Cir. 1998); *Martin* v. *Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993); *National Union Fire Ins. Co.* v. *Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *United States* v. *Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006); *Binks Mfg. Co.* v. *National Presto Indus., Inc.*, 709 F.2d 1109, 1118-1119 (7th Cir. 1983); *Simon* v. *G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), cert. denied, 484 U.S. 917 (1987); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004). That standard appears to have originated in the leading treatise on civil procedure, which states that, for purposes of the "in anticipation of litigation" requirement, "the test should be whether, in light of the nature of the document and the

factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2024, at 343 (2d ed. 1994) (Wright & Miller).

In applying the "because of" standard, courts of appeals have focused on whether the document at issue would not have been prepared but for the prospect of litigation—or whether the document was prepared for a litigation-related purpose, even if it was prepared for another purpose as well. For example, in *Adlman*—perhaps the most influential lower-court decision on the scope of the work-product privilege—the Second Circuit held that the privilege covered a document that, *inter alia*, made "predictions about the likely outcome of litigation" with the IRS that could result from a company's planned merger. 134 F.3d at 1195. The court concluded 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 falls within Rule 26(b)(3)." *Ibid.* In so concluding, the court determined that "[t]he fact that [the] document's purpose [was] business-related"—*viz.*, to assist the company in deciding whether to proceed with the merger in the first place—"appears irrelevant to the question whether it should be protected under Rule 26(b)(3)." *Id.* at 1200.

Similarly, in *Grand Jury Subpoena*, the Ninth Circuit held that the work-product privilege extended to documents that were created not only to assess a company's potential liability, but also to comply with certain regulatory requirements. 357 F.3d at 909-910. In adopting the "because of" standard, the court explained that the standard "does not consider whether litigation was a

primary or secondary motive behind the creation of a document," but rather "affords protection" when the document "would not have been created in substantially similar form but for the prospect of that litigation." *Id.* at 908 (quoting *Adlman*, 134 F.3d at 1195).

And in *Sealed Case*, the District of Columbia Circuit held that certain documents could be privileged despite the fact that no "specific claim" had arisen at the time the documents were prepared. 146 F.3d at 882. In the course of doing so, the court reaffirmed its adoption of the "because of" standard, reiterating that "the 'testing question' for the work-product privilege" is whether a document "can fairly be said to have been prepared or obtained because of the prospect of litigation." *Id.* at 884 (internal quotation marks omitted) (quoting *Senate of the Commonwealth of Puerto Rico ex rel. Judiciary Committee* v. *United States Dep't of Justice*, 823 F.2d 574, 586 n.42 (D.C. Cir. 1987) (R.B. Ginsburg, J.)). The court noted that lawyers often prepared documents "prior to the emergence of specific claims," such as when lawyers "consider whether business decisions might result in antitrust or securities lawsuits" or "assess the possibility that new products might give rise to tort actions." *Id.* at 886. The court reasoned that, if the work-product privilege were not available in those situations, lawyers "would not likely risk taking notes about such matters or communicating in writing with colleagues, thus severely limiting their ability to advise clients effectively." *Ibid.*

b. Even before the First Circuit's decision in this case, there was a longstanding circuit conflict between the foregoing circuits and the Fifth Circuit, which has repeatedly held that, for purposes of determining whether a document was prepared "in anticipation of litigation" under Rule 26(b)(3), the relevant inquiry is whether the "primary motivating purpose" for which the docu-

ment was prepared was to assist in litigation. *United States* v. *Davis*, 636 F.2d 1028, 1040 (5th Cir. Unit A Feb. 1981), cert. denied, 454 U.S. 862 (1981). Perhaps most significantly, in *United States* v. *El Paso Co.*, 682 F.2d 530 (1982), cert. denied, 466 U.S. 944 (1984), the Fifth Circuit held that the work-product privilege did not cover workpapers like those at issue in this case, on the ground that, even though the workpapers "forecast[] the ultimate likelihood of sustaining [the company's] position in court," the "primary motivating force" behind their preparation was "not to ready [the company] for litigation over its tax returns," but rather "to anticipate, for financial reporting purposes, what the impact of litigation might be on the company's tax liability." 682 F.2d at 543.

Notably, in adopting the "because of" standard, numerous courts have expressly rejected the Fifth Circuit's more stringent "primary purpose" standard. See, *e.g.*, *Adlman*, 134 F.3d at 1198-1199 (noting, after citing *Davis* and *El Paso*, that "a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of [Rule 26(b)(3)]"). Commentators have criticized the Fifth Circuit's standard as well. See, *e.g.*, Claudine Pease-Wingenter, *Prophetic or Misguided? The Fifth Circuit's (Increasingly) Unpopular Approach to the Work Product Doctrine*, 29 Rev. Litig. 121, 161 (2009) (contending that "[t]he Fifth Circuit's 'primary purpose' test is clearly at odds with the plain meaning of the text of Rule 26(b)(3) and undercuts the policy goals of the work product doctrine"). In the face of mounting criticism, however, the Fifth Circuit has adhered to its standard. See, *e.g.*, *In re Kaiser Aluminum & Chem. Co.*,

214 F.3d 586, 593 (2000), cert. denied, 532 U.S. 919 (2001).[4]

c. Although a panel of the First Circuit had previously suggested that it would follow the prevailing "because of" standard, see *Maine* v. *United States Dep't of Interior*, 298 F.3d 60, 68 (2002), the en banc First Circuit took a different approach in this case and held that, for purposes of determining whether a document was prepared "in anticipation of litigation" under Rule 26(b)(3), the relevant inquiry was whether the documents were "prepared *for use* in possible litigation." App., *infra*, 11a. While the First Circuit at one point purported to reaffirm its earlier decision in *Maine*, *id.* at 9a, it did not otherwise refer to the "because of" standard (on which the district court and the court of appeals panel had relied, see, *e.g.*, *id.* at 55a-57a, 107a-108a), but instead repeatedly reiterated the novel requirement that a document must possess a litigation-related *use* in order to be protected. See, *e.g.*, *id.* at 14a ("could be useful" in litigation); *id.* at 15a ("prepared for use in litigation"); *id.* at 18a ("prepared for potential use in litigation"). And in applying that standard to the facts of this case, the court concluded that "[t]here is no evidence in this case that

[4] The remaining three circuits—the Tenth, Eleventh, and Federal Circuits—have not addressed the issue. A district court recently predicted that the Eleventh Circuit would "align itself with the majority of the other courts of appeal[s] and adopt the 'because of litigation' test." *Regions Fin. Corp.* v. *United States*, No. 06-895, 2008 WL 2139008, at *5 (N.D. Ala. May 8, 2008), appeal dismissed, No. 08-13866 (11th Cir. Dec. 30, 2008). By contrast, several district courts in the Tenth Circuit have adopted the Fifth Circuit's "primary purpose" standard. See, *e.g.*, *United States Fire Ins. Co.* v. *Bunge North America, Inc.*, 247 F.R.D. 656, 658-659 (D. Kan. 2007); *McEwen* v. *Digitran Sys., Inc.*, 155 F.R.D. 678, 682 (D. Utah 1994); *Gottlieb* v. *Wiles*, 143 F.R.D. 241, 253 (D. Colo. 1992).

the work papers were prepared for * * * use [in litigation] or would in fact serve any useful purpose for [petitioner] in conducting litigation if it arose." *Id.* at 18a-19a. As the dissent below explained, the First Circuit thus adopted a standard that is narrower than either the "because of" standard applied by eight other circuits or the "primary purpose" standard applied by the Fifth Circuit, neither of which requires a litigation-related use. See *id.* at 23a-27a (opinion of Torruella, J.). The First Circuit thereby deepened a circuit conflict that merits this Court's review.[5]

2. This case constitutes an ideal vehicle for the Court to resolve the well-entrenched circuit conflict concerning the scope of the work-product privilege, because the choice of the appropriate standard would plainly be dispositive of whether the privilege covers the documents at issue here.

a. As the district court and the court of appeals panel correctly determined, the documents at issue would be covered under the "because of" standard. See App., *infra*, 55a-74a (court of appeals panel); *id.* at 105a-110a (district court). To begin with, as the district court

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[5] In addition, numerous States have rules codifying the work-product privilege in materially identical terms to Federal Rule 26(b)(3), and many state courts of last resort (including courts within the First Circuit) have applied the "because of" standard in determining whether a document was prepared "in anticipation of litigation" under the applicable state rule. See, *e.g.*, *Commissioner of Revenue* v. *Comcast Corp.*, 901 N.E.2d 1185, 1203-1204 (Mass. 2009); *Springfield Terminal Ry. Co.* v. *Department of Transp.*, 754 A.2d 353, 357-358 (Me. 2000); *Henderson* v. *Newport County Regional YMCA*, 966 A.2d 1242, 1247 (R.I. 2009). In many cases, therefore, the practical effect of the decision below will be to render the availability of the work-product privilege in the First Circuit dependent on whether the case is being litigated in federal or state court.

found, "it is clear" that the documents "would not have been prepared at all 'but for'" the prospect of litigation with the IRS concerning the specified items from petitioner's tax return. *Id.* at 108a; see, *e.g.*, *Adlman*, 134 F.3d at 1195. That is true for the simple reason that, "[i]f [petitioner] had not anticipated a dispute with the IRS, there would have been no reason for it to establish any reserve or to prepare the workpapers used to calculate the reserve." App., *infra*, 108a. Petitioner, moreover, presented ample evidence that there was a reasonable prospect of litigation with the IRS: all but one of its eight previous audits had resulted in at least some form of adversarial proceedings, with three resulting in litigation in federal court (including one proceeding that was still ongoing at the time the documents at issue were being prepared). See *id.* at 109a; *Textron Inc.* v. *Commissioner*, 336 F.3d 26, 28-30 (1st Cir. 2003).

In addition, to the extent that courts applying the "because of" standard have focused more specifically on whether the documents at issue were prepared for a litigation-related purpose (even if they were prepared for another purpose as well), see, *e.g.*, *Roxworthy*, 457 F.3d at 598-599; *Grand Jury Subpoena*, 357 F.3d at 907-908, it is clear that the "because of" standard would still be satisfied, because petitioner presented uncontroverted testimony to the district court that the documents were prepared not simply to assist petitioner's auditor in reviewing the amount set aside in reserve for potential tax liabilities, but also to guide petitioner in making litigation or settlement decisions concerning the tax treatment of the specified items. See C.A. App. 200. Although the en banc majority appeared to discount that testimony in applying its "for use" standard, see App., *infra*, 14a, the district court seemingly credited it in reaching a contrary result under the "because of" standard, see, *e.g.*, *id.*

at 93a-94a, and the government did not challenge the credibility of that testimony on appeal, see Gov't C.A. Br. 52 n.16. In sum, because the documents at issue would not have been prepared but for the prospect of litigation and were in fact prepared for a litigation-related purpose, they would be covered under the "because of" standard.

b. Lower-court decisions applying the "because of" standard confirm that conclusion. At least one district court has extended work-product protection to similar documents under the "because of" standard, reasoning that, "[w]ere it not for anticipated litigation, [the company] would not have to worry about contingent liabilities and would have no need to elicit opinions regarding the likely results of litigation." *Regions Fin. Corp.* v. *United States*, No. 06-895, 2008 WL 2139008, at *5-*6 (N.D. Ala. May 8, 2008), appeal dismissed, No. 08-13866 (11th Cir. Dec. 30, 2008). And although no court of appeals applying the "because of" standard has specifically considered documents provided to a company's auditor for the purpose of reviewing the amount set aside in reserve for potential tax liabilities, courts of appeals applying that standard have suggested that the privilege would reach documents that assess potential tax liabilities, see, *e.g.*, *Roxworthy*, 457 F.3d at 592; *Adlman*, 134 F.3d at 1195,[6] and documents provided to a company's auditor for the purpose of reviewing the amount set aside for potential litigation liabilities more generally, see, *e.g.*, *Adlman*, 134 F.3d at 1200. Because the documents at issue here do not meaningfully differ from the documents discussed

[6] The government contended below that the Sixth Circuit's decision in *Roxworthy* was "incorrect[]." Gov't C.A. Reply Br. 48 n.19.

in those cases, they would surely be covered under the "because of" standard applied by the majority of circuits.

By contrast, the only lower courts to hold that documents of the type at issue here would not be subject to the work-product privilege are the en banc First Circuit, applying its newly minted "for use" standard, and the Fifth Circuit, applying its distinct "primary purpose" standard. See *El Paso*, 682 F.2d at 542-544. The choice of the appropriate standard would therefore be dispositive of whether the documents at issue are covered by the privilege—and, for that reason, this case constitutes a suitable vehicle for resolution of the circuit conflict on the privilege's scope.

B. The Court Of Appeals' Decision Is Erroneous

The en banc First Circuit erred in holding that the work-product privilege in Federal Rule of Civil Procedure 26(b)(3) is limited to documents that are prepared for use in litigation.

1. Most importantly, the First Circuit's novel "for use" standard cannot be reconciled with the plain language of Rule 26(b)(3). By its terms, that provision reaches not only documents prepared "for trial," but also documents prepared "in anticipation of litigation": *i.e.*, documents prepared "in *contemplation* of litigation." *Senate of the Commonwealth of Puerto Rico*, 823 F.2d at 586 (emphasis added) (quoting *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975)). The First Circuit's standard, however, seemingly writes the "broader category" of documents prepared "in anticipation of litigation" out of the rule altogether, because a document that is prepared for use in litigation would presumably always qualify as a document prepared "for trial." *Adlman*, 134 F.3d at 1198; see *ibid.* (noting that, "[i]f the drafters of the Rule intended to limit its protection to documents

made to assist in preparation for litigation, this would have been adequately conveyed by the phrase 'prepared * * * for trial'") (second alteration in original). The First Circuit's interpretation would therefore apparently contravene the familiar canon of construction that a court should "give effect, if possible, to every word [the provision] used." *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1066 (2009) (citation omitted). And even if some independent meaning could be attributed to the phrase "in anticipation of litigation," the First Circuit's "for use" standard would at best engraft a substantial limitation on the scope of the work-product privilege that is nowhere to be found in the language of Rule 26(b)(3)—as the en banc majority implicitly acknowledged. See App., *infra*, 16a; *Adlman*, 134 F.3d at 1198 (noting that "[n]owhere does Rule 26(b)(3) state that a document must have been prepared *to aid* in the conduct of litigation in order to constitute work product").[7]

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[7] In adopting the "for use" standard, the First Circuit cited two of this Court's decisions, neither of which is apposite. The First Circuit first quoted *FTC* v. *Grolier, Inc.*, 462 U.S. 19 (1983), for the proposition that "the literal language of [Rule 26(b)(3)] protects materials *prepared for* any litigation or trial as long as they were prepared by or for a party to the subsequent litigation." App., *infra*, 16a (emphasis in First Circuit's opinion) (quoting *Grolier*, 462 U.S. at 25). In *Grolier*, however, the Court was addressing only the discrete question whether the work-product privilege "extended beyond the litigation for which the documents at issue were prepared," 462 U.S. at 24—as the original emphasis in *the Court's* opinion makes clear. See *id.* at 25 (stating that "the literal language of [Rule 26(b)(3)] protects materials prepared for *any* litigation or trial as long as they were prepared by or for a party to the subsequent litigation"). The First Circuit also cited *Sears*. App., *infra*, 17a. That opinion, however, stands only for the proposition that documents prepared "in contemplation of" litigation "fall squarely" with the definition of protected work product—a proposition that is more

2. The First Circuit's standard is irreconcilable not only with the language of Rule 26(b)(3), but also with the policies animating the work-product privilege. In first recognizing the privilege in *Hickman*, this Court explained that the privilege was necessary because "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." 329 U.S. at 510. And the Court expressed a particular solicitude for an attorney's "thoughts," "mental impressions," and "personal beliefs," which, the Court noted, had previously been viewed as "inviolate." *Id.* at 511, 512. Notwithstanding the government's contention that the work-product privilege "hamper[s] the search for the truth," Gov't C.A. Reply Br. 4, this Court has repeatedly reaffirmed the "strong public polic[ies]" underlying the privilege, *e.g.*, *United States* v. *Nobles*, 422 U.S. 225, 236 (1975) (internal quotation marks omitted), and those policies were "substantially incorporated" in Rule 26(b)(3), *Upjohn Co.* v. *United States*, 449 U.S. 383, 398 (1981).

The First Circuit's standard would strip protection from documents embodying an attorney's opinion as to the "likelihood of success in litigation," *Adlman*, 134 F.3d at 1200—documents that most directly implicate the policies underlying the work-product privilege (and therefore lie at the "core" of the privilege). See *Nobles*, 422 U.S. at 238; cf. *Hickman*, 329 U.S. at 516 (Jackson, J., concurring) (explaining that "[d]iscovery was hardly intended to enable a learned profession to perform its functions * * * on wits borrowed from the adver-

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consistent with other circuits' "because of" standard than with the First Circuit's "for use" standard. See p. 20, *supra*.

sary").[8] If such documents are not covered by the privilege, it would have a chilling effect on lawyers, who would be loath to commit their opinions to paper if the resulting documents were "open[] to the free scrutiny" of the IRS and other litigants. *Hickman*, 329 U.S. at 514. An approach that permitted discovery of such documents would therefore lead to the "inefficiency" of which *Hickman* warned, with the result that "the legal profession would be demoraliz[ed]" and "the interests of the clients and the cause of justice * * * poorly served." *Id.* at 511.

3. In support of its "for use" standard, the First Circuit cited an advisory committee note to Rule 26(b)(3), which indicates that "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes" are not protected by the privilege. Fed. R. Civ. P. 26(b)(3) advisory committee's note (1970). That note, however, speaks only to situations in which a document has *only* a non-litigation-related purpose—not, as here, a non-litigation-related purpose *and* a litigation-related purpose as well. See, *e.g.*, 8 Wright & Miller § 2024, at 346 (citing the advisory committee note for the proposition that, "even though litigation is already in prospect, there is no work-product immunity for documents prepared in the regular course of business *rather than* for purposes of litigation") (emphasis added); *id.* at 198 (Supp. 2009) (adding that "'[d]ual purpose' docu-

[8] Indeed, the government has not disputed in this case that, if the documents at issue are subject to the privilege in the first place, they would qualify as "opinion work product" and would therefore be protected from disclosure even upon a showing of substantial necessity. See Fed. R. Civ. P. 26(b)(3)(B).

ments created because of the prospect of litigation are protected even though they were also prepared for a business purpose"). As the dissent below noted, a contrary understanding of the advisory committee note would create an atextual exception to Rule 26(b)(3), by excluding documents that would otherwise fall within the scope of the rule whenever the documents possessed an additional purpose beyond a litigation-related purpose. See App., *infra*, 42a-43a (opinion of Torruella, J.).[9]

In sum, there is no valid justification for the First Circuit's novel limitation on the scope of the work-product privilege. This Court should grant review in order to eliminate the circuit conflict and correct the First Circuit's seriously flawed approach.

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[9] Before the First Circuit, the government argued that the documents at issue should not be covered by the work-product privilege because petitioner was legally required to generate them. See Gov't C.A. Supp. Br. 2-4. The First Circuit did not rely on that argument, and for good reason. That is because, at most, the law "requires that [petitioner] prepare audited financial statements reporting total reserves based on contingent tax liabilities" and does not "require the form and detail of the documents prepared here." App., *infra*, 32a (Torruella, J., dissenting). To be sure, petitioner prepared the documents for the purpose, *inter alia*, of assisting petitioner's auditor in reviewing the amount set aside in reserve for potential tax liabilities (and thus in performing its obligation to review petitioner's financial statements for compliance with generally accepted accounting principles). The salient point, however, is that, but for the prospect of litigation with the IRS, petitioner would not have needed to prepare the documents at all. See, *e.g.*, C.A. App. 200 (testimony of Norman Richter) (explaining that, if petitioner had not anticipated litigation with the IRS, the documents "would be blank" and "[w]e would have nothing there").

C. The Question Presented Is An Exceptionally Important And Recurring One That Merits The Court's Review In This Case

Finally, the question presented in this case is an exceptionally important one because it concerns the scope of the work-product privilege—an issue that is "essential to the daily practice of litigators across the country." App., *infra*, 45a (Torruella, J., dissenting). If the First Circuit's unprecedented interpretation of the work-product privilege is allowed to stand, it will have profound consequences for civil litigants in a variety of different contexts.

1. As a preliminary matter, the factual context in which this case arises—*i.e.*, whether the work-product privilege extends to documents assessing risks in tax litigation for the purpose, *inter alia*, of assisting a company's auditor in reviewing the amount set aside in reserve—is important in its own right. Because of the size and complexity of their operations, publicly held companies inevitably find themselves taking positions on their tax returns that fall into "gray areas" as to which there is legal uncertainty (because the relevant statutory or regulatory language is unclear and the IRS has provided no guidance on point). For that reason, virtually all publicly held companies generate so-called "tax accrual workpapers" in some form. If a company is required to disclose such documents to the IRS, it will give the IRS a "blueprint" to the company's thinking in preparing its tax return (as the en banc majority acknowledged, see App., *infra*, 20a); indeed, the IRS has freely admitted that it sought the documents at issue here for that reason. See pp. 5-6, *supra*. But that kind of disclosure would contravene the fundamental principle, established in *Hickman*, that a party is not entitled to an opposing attorney's "assessment of * * * legal vulnerabilities in order to

make sure it does not miss anything in crafting its legal case." *Delaney, Migdail & Young, Chartered* v. *IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987).[10]

Not surprisingly, the decision below has already emboldened the IRS—which, before 2002, had only rarely sought workpapers from taxpayers, see C.A. App. 238; *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 820-821 (1984)—to declare that it will aggressively pursue such workpapers in future. See Kim Dixon, *U.S. IRS Could Seek More in Company Audits—Official*, Reuters, Nov. 19, 2009 (quoting comments by William Wilkins, IRS Chief Counsel). And because disclosure to an adverse party waives the work-product privilege, see 8 Wright & Miller § 2024, at 369, a company that is required to disclose its workpapers to the IRS will likely be obligated to turn over those workpapers to *state* taxation authorities (even if a state court would construe the privilege more broadly, see p. 17, n.5, *supra*) and even to private litigants, thereby compounding the consequences of the First Circuit's approach.

2. The practical significance of the First Circuit's approach, however, sweeps far beyond the particular context of this case. The First Circuit's "for use" standard is in no way cabined to that context—nor could it logically be, as the government seemingly recognized at oral argument below. See C.A. En Banc Tr. 4-5, 16

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[10] Ironically, in *Delaney*, the IRS argued that the work-product privilege covered documents *it* had prepared to analyze the legal vulnerability of a particular auditing method, and the District of Columbia Circuit agreed. See 826 F.2d at 126-128; cf. C.A. Panel Tr. 20 (Sept. 5, 2008) (stating that the government "spend[s] a lot more time defending our documents from requests on the grounds of work product than we do * * * seek[ing] them [from other parties]").

(June 2, 2009) (conceding that the "work product test" adopted by the court "will apply" both "to the IRS" and "to everyone else," including "outside the tax realm").

Under the First Circuit's standard, work-product protection would no longer extend to *any* documents prepared by counsel that assess the risks of ongoing or potential litigation, because such documents could not meaningfully be said to have been prepared "for use" in litigation. For example, the work-product privilege would not cover a document that a company prepares in order to inform a potential merger partner of the litigation risks that the company faces—risks that the partner would assume in the event the merger is consummated. See, *e.g.*, *Adlman*, 134 F.3d at 1195. Nor would it cover so-called "audit response letters": that is, letters routinely prepared by outside counsel at their corporate clients' request assessing pending or threatened litigation against the company for the purpose of assisting the company's auditor in performing its duties. See, *e.g.*, *Lawrence E. Jaffe Pension Plan* v. *Household Int'l, Inc.*, 237 F.R.D. 176, 179-181 (N.D. Ill. 2006) (holding that work-product privilege covers audit response letters); *In re Honeywell Int'l, Inc., Sec. Litig.*, 230 F.R.D. 293, 300 (S.D.N.Y. 2003) (same); *Tronitech, Inc.* v. *NCR Corp.*, 108 F.R.D. 655, 656 (S.D. Ind. 1985) (same).[11] In those and other similar contexts, the documents at issue contain information that would be enormously valuable to adverse parties in litigation, and the work-product privilege would provide the only potential source of protec-

[11] The government conceded below that, if the documents at issue in this case were not protected by the work-product privilege, audit response letters would not be protected either. See C.A. En Banc Tr. 19 (June 2, 2009).

tion against disclosure (because the attorney-client privilege is waived by disclosure to *any* third party, even a potential merger partner or auditor). See 8 Wright & Miller § 2024, at 367-368.[12]

Perhaps for that reason, the First Circuit's decision has received an enormous amount of attention from the news media and commentators—and, belying the First Circuit's belief that "[n]o one with experience of law suits" would reach a contrary conclusion, App., *infra*, 17a, the decision has also been greeted with widespread consternation by practitioners. See, *e.g.*, Nancy T. Bowen, William S. Lee & Robert C. Morris, *Newly Minted 'For Use in Possible Litigation' Test of 'Textron' May Have Far-Reaching Implications for Companies*, 78 U.S.L.W. 2199, 2199 (2009) (stating that the decision below is "highly controversial"; "may have far-reaching implications, particularly for publicly traded companies"; and "adds further uncertainty to [an] already confused legal arena"); Amir Efrati, *Ruling in Tax-Auditing Case Puts Corporations on Edge*, Wall St. J., Aug. 20, 2009, at A9 (suggesting that the decision below "is causing lawyers for big companies some sleepless nights" and has been seen as "signal[ing] an attack by the courts on the 'work-product doctrine'"); Michelle M. Henkel, *'Textron' Eviscerates the 60-Year-Old Work Product Privilege*, 125 Tax Notes 237, 237 (2009) (contending that, "[b]ecause of the widespread impact of [the decision below],

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[12] In fact, relying on the decision below, the Director of the SEC's Division of Enforcement recently made the unqualified assertion that "audit documentation * * * relied on by an auditor in connection with an audit report" is not covered by the work-product privilege. See Robert Khuzami, Remarks at AICPA National Conference on Current SEC and PCAOB Developments (Dec. 8, 2009) <www.sec.gov/news/speech/2009/spch120809rsk.htm>.

the entire legal profession and all corporations should be in a state of disbelief").

In addition, in the wake of the First Circuit's decision, practitioners have already begun recommending that companies take steps to avoid the disclosure to adverse parties of their litigation risk assessments. See, *e.g.*, Scott Novick, *What In-House Tax Professionals Should Do in Light of 'Textron,'* Global Tax Blog (Aug. 31, 2009) <tinyurl.com/scottnovick> (contending that "tax departments can and should * * * [l]imit[] tax accrual work papers to numerical analysis with minimal supporting narrative"); Robert W. Pommer III, *First Circuit Reverses Course in Closely Watched Work Product Case; Establishes Broad New Standard That Could Extend Outside Tax Area*, 41 Sec. Reg. & Law Report 2050, 2053 (2009) (recommending that companies "exercise greater caution when sharing documents with the[ir] outside auditors"); cf. Stuart J. Bassin, *Managing Tax Accrual Workpapers After 'Textron,'* 123 Tax Notes 571, 580 (2009) (suggesting, while this case was still pending below, that the drafters of workpapers "should choose their words carefully"). Those recommendations amply support the prediction that the First Circuit's decision will have a broad chilling effect if it is allowed to stand.

3. Although issues concerning the applicability of the work-product privilege arise in courts around the Nation on a daily basis, this Court has not directly addressed the scope of the privilege since its decision more than sixty years ago in *Hickman*. See App., *infra*, 120a.[13] But notwithstanding the frequent recurrence in

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[13] In *Arthur Young*, the Court refused to recognize an "accountant work-product privilege" for workpapers generated by a compa-

lower courts of issues concerning the privilege, if the Court does not grant review in this case, it is far from clear when the Court will have the opportunity to do so again. In ordinary civil litigation, a party that wishes to appeal a determination that a document is not covered by the work-product privilege may not be able to do so immediately, cf. *Mohawk Indus., Inc.* v. *Carpenter*, No. 08-678 (Dec. 8, 2009), slip op. 9-10 (explaining options for appeal of denial of attorney-client privilege), and, even if it can, the party will have to bear the expense of litigating what is an inherently collateral issue all the way to this Court.

At all events, there is simply no reason for the Court to wait to address the scope of the work-product privilege. Ten circuits have now spoken on the issue, taking three different (and irreconcilable) positions on the privilege's scope. This case, moreover, is an optimal vehicle for consideration of that issue. As the dissent below observed, "[t]he time is ripe for the Supreme Court to intervene and set the circuits straight." App., *infra*, 45a (opinion of Torruella, J.). The Court should grant review in this extraordinarily important case and correct the First Circuit's excessively narrow interpretation of the work-product privilege.

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ny's *auditor*. See 465 U.S. at 815-821. In some respects, this case presents the flipside of the issue in *Arthur Young*, because it involves workpapers generated by the company's *own lawyers*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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