

No. 15-560

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**In the Supreme Court of the United States**

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BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.,  
PETITIONER

*v.*

FEDERAL TRADE COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that documents containing business and financial information created by non-lawyers at counsel's request are entitled to protection as opinion work product, rather than fact work product, only when they reflect counsel's mental impressions.

2. Whether the court of appeals correctly held that the Federal Trade Commission had shown a substantial need for relevant fact work product that has unique value and contains otherwise unavailable information.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 778 F.3d 142. The opinion of the district court (Pet. App. 30a-54a) is reported at 286 F.R.D. 101.

**JURISDICTION**

The judgment of the court of appeals was entered on February 20, 2015. A petition for rehearing was denied on June 4, 2015 (Pet. App. 55a-56a). On August 20, 2015, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 2, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

The Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*, authorizes the Federal Trade Com-

mission (FTC or Commission) to “have access to \* \* \* any documentary evidence of any \* \* \* corporation being investigated,” and to require “production of all such documentary evidence relating to any matter under investigation.” 15 U.S.C. 49. In this case, the FTC issued a subpoena to petitioner seeking documents relevant to an FTC investigation into whether, as part of a patent-litigation settlement, petitioner had unlawfully paid Barr Pharmaceuticals, Inc. (Barr) to withhold competing generic versions of two then-patented drugs. Such a “reverse payment” can amount to an unfair method of competition, in violation of Section 5 of the FTC Act, 15 U.S.C. 45. See generally *Federal Trade Comm’n v. Actavis, Inc.*, 133 S. Ct. 2223 (2013). Petitioner withheld certain documents as attorney opinion work product, which gave rise to this discovery dispute.

1. Reverse-payment settlements arise in the context of the Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act), Pub. L. No. 98-417, 98 Stat. 1585, a regulatory framework established by Congress to encourage generic drug entry into the market. When a company seeks approval from the Food and Drug Administration to market a generic version of a brand-name drug before expiration of a patent covering that drug, it must certify that the patent in question is invalid or not infringed by the generic product (a “Paragraph IV” certification). 21 U.S.C. 355(j)(2)(A)(vii)(IV). This system encourages generic drug companies to challenge the validity of pharmaceutical patents. See *Actavis*, 133 S. Ct. at 2234. Once a generic company files a Paragraph IV certification, the patent holder may bring suit immediately, without waiting for the

generic applicant to market its product. 35 U.S.C. 271(e)(2). Paragraph IV patent challenges sometimes result in reverse-payment settlements.

In a reverse-payment settlement, the alleged patent infringer (a generic drug company) agrees not to enter the market for a period of time, and “the settlement requires the patentee [a brand-name drug company] to pay the alleged infringer, rather than the other way around.” *Actavis*, 133 S. Ct. at 2227. This form of settlement is anticompetitive if, in economic reality, the brand-name company shares its monopoly profits with the potential generic competitor to prevent the risk that the generic company will prevail in the patent litigation and introduce generic competition. *Id.* at 2236; see 12 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 2046c, at 338 (3d ed. 2012).

This Court held in *Actavis* that the antitrust analysis of reverse-payment settlements should focus on the size of the payment and its potential justifications. 133 S. Ct. at 2236-2237. A reverse payment may not raise antitrust concerns if it “amount[s] to no more than a rough approximation of the litigation expenses saved through the settlement,” or if it constitutes “compensation for other services that the generic has promised to perform.” *Id.* at 2236. Under the agreement at issue here, petitioner (the brand-name company) agreed to pay Barr (the generic company) substantial compensation. C.A. App. 13. The FTC is examining whether that payment was merely compensation for Barr’s co-promotion services or instead was made, in whole or in part, to induce Barr to forgo generic entry. *Actavis*, 133 S. Ct. at 2236.



Congress was concerned with “abuse of the Hatch-Waxman law” resulting from “pacts between big pharmaceutical firms and makers of generic versions of brand name drugs, that are intended to keep lower-cost drugs off the market.” S. Rep. No. 167, 107th Cong., 2d Sess. 4 (2002). In 2003, Congress amended the law to create a mechanism for agency review and investigation of potentially anticompetitive agreements. See Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, §§ 1111-1118, 117 Stat. 2461-2464; see also *Actavis*, 133 S. Ct. at 2234.

As part of its antitrust enforcement mandate, the FTC investigates Hatch-Waxman settlement agreements to determine whether they unlawfully restrain trade. In these investigations, the FTC often seeks companies’ contemporaneous internal financial analyses and business forecasts to determine whether the branded firm has compensated the generic firm for abandoning its patent challenge and agreeing to stay off the market. Compensation rarely takes the form of easily-traced explicit cash payments; instead, the settling firms typically bundle the payment into a separate business deal executed simultaneously with the settlement.<sup>1</sup> When that happens, the FTC must

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<sup>1</sup> Before the FTC began investigating reverse-payment settlements, payments were often made part of the settlement. Since then, parties to these agreements have often conveyed payments via side deals. See, e.g., FTC Bureau of Competition, *Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003: Summary of Agreements Filed in FY 2009*, at 4 (2011), <http://www.ftc.gov/reports/mmact/MMAreport2009.pdf> (cataloguing potential pay-for-delay agreements, including nine that included a “side deal”); see also C. Scott Hemphill, *An Aggregate Approach to*

assess whether the side deal is an independent business transaction or is instead designed, in whole or in part, to induce the generic firm to forgo entry, at least for a period of time, and thereby preserve (while sharing) the brand-name company's monopoly profits.

2. a. The investigation of petitioner involves two of its branded products: Mirapex (pramipexole), which is used to treat the symptoms of Parkinson's Disease, and Aggrenox (aspirin and extended-release dipyridamole), which is used to reduce the risk of stroke. C.A. App. 22. After Barr filed Paragraph IV certifications for Mirapex in 2005 and Aggrenox in 2007, petitioner promptly filed infringement suits. *Ibid.* In August 2008, petitioner and Barr entered simultaneous agreements settling both suits. *Id.* at 23.

Under the settlement agreements, Barr agreed not to market generic Mirapex until January 2010 and generic Aggrenox until July 2015. C.A. App. 23. At the same time, the companies entered into a co-promotion agreement in which petitioner agreed to provide substantial compensation to Barr purportedly in exchange for promoting branded Aggrenox to women's doctors. *Ibid.*

On January 15, 2009, the Commission began its inquiry into "whether [petitioner] and Barr \* \* \* ha[ve] engaged or [are] engaging in unfair methods of competition in or affecting commerce, in violation of Section 5 of the [FTC Act] \* \* \* with respect to the

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*Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 Colum. L. Rev. 629, 663 (2009) ("Today, side deals take two complementary forms: overpayment by the brand-name firm for value contributed by the generic firm, and underpayment by the generic firm for value provided by the brand-name firm.").

sale of Aggrenox or its generic equivalents and Mirapex or its generic equivalents.” C.A. App. 30. On February 5, 2009, the Commission issued the subpoena at issue in this case. *Id.* at 32-46. The subpoena requested documents related to the Mirapex and Aggrenox patent litigation; to the sales, profits, and marketing plans for Mirapex and Aggrenox (including forecasts of generic entry); and to the Aggrenox co-promotion agreement. *Id.* at 23-24. Eight months later, petitioner had not complied. *Id.* at 28. On October 23, 2009, the FTC filed a petition to enforce the subpoena in the United States District Court for the District of Columbia. *Id.* at 47-66.

b. Petitioner claimed attorney-client privilege or work-product protection with regard to 3420 documents. See C.A. App. 226, 562. Based on petitioner’s descriptions in its privilege log and the sworn testimony of petitioner’s personnel, the FTC challenged 631 of those claims. *Id.* at 147. In particular, the agency challenged petitioner’s claims of protected status for factual documents “regarding” or “prepared as a result of” patent litigation, documents analyzing the financial impact of settlement options, and business documents analyzing the Aggrenox co-promotion agreement. *Id.* at 562-569. A number of those documents post-dated the settlement. *Id.* at 562-563, 568-569. The district court ordered the parties to submit a mutually agreed-upon sample of the disputed documents for the court’s *in camera* review. *Id.* at 146-147; Pet. App. 33a-34a. There were 87 documents in that sample. C.A. App. 146-147.

On the eve of the district court’s hearing on the dispute, petitioner submitted *ex parte* affidavits from Marla Persky, its general counsel, and Pamela Taylor,

its outside counsel in the FTC investigation. Apparently relying on those affidavits,<sup>2</sup> petitioner argued that the withheld financial analyses of the settlement and the co-promotion agreement were “specifically asked for by [Persky], either directly or indirectly.” C.A. App. 90. Because petitioner did not disclose the affidavits or their content to the FTC, the FTC had no opportunity to review or respond to them. *Id.* at 75-76.

The disputed documents fell into two broad categories:

(1) *Non-legal business documents “regarding” or “prepared as a result of” patent litigation or analyzing settlement options.* The FTC objected to petitioner’s decision to withhold factual documents created by non-lawyers for business purposes (such as informing business decisions). The FTC argued that such documents are not work product at all, or at least not opinion work product. Petitioner’s privilege log listed more than 300 documents that it described as “regarding” or “prepared as a result of” the patent litigation, but that in fact were created by non-lawyers and cir-

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<sup>2</sup> The affidavits appear to have placed before the district court for *in camera* review additional documents that were not part of the parties’ agreement. The court’s September 27, 2012, decision ruled on 101 documents, not the 87 agreed upon. Of the 101 documents, 27 (Nos. 1365, 1367, 1368, 902, 2918, 2919, 2920, 1580, 1984, 2250, 233, 790, 791, 2495, 2578, 2983, 780, 1008, 1016, 1001, 3327, 1364, 2917, 3057, 616, 1308, and 2945) were not covered by the agreement, and of those 27 documents, 14 (Nos. 1580, 2250, 233, 790, 2495, 2578, 2983, 780, 1001, 3327, 2917, 3057, 1308, and 2945) were not contested by the FTC. The court also failed to rule on 13 documents (Nos. 3171, 3296, 2331, 1384, 1380, 1363, 1339, 1294, 1095, 1154, 1084, 1090, and 1029) that were jointly submitted. Pet. App. 51a-54a.

culated to business executives. The privilege log also listed 55 documents that discuss settlement options and appear to be non-legal business analyses. C.A. App. 563, 568.

These documents are primarily financial forecasts of generic entry or the financial impact of settlement options. See C.A. App. 227-228. For example, document No. 833 is a spreadsheet sent from Tom Buckley, a non-lawyer, to Paul Fonteyne, a non-lawyer senior business executive (and to many other business executives). The privilege log nevertheless describes the document as “Analyses of ’577 and ’086/’812 Patent Litigations prepared as a result of litigation.” *Id.* at 347. Document No. 992 is a PowerPoint found in the files of non-lawyer Steve Marlin and described in the privilege log as “Analysis of ’577 Patent Litigation settlement strategy prepared as a result of litigation.” *Id.* at 362.

The sworn investigative hearing testimony of petitioner’s personnel confirms that many of these factual documents consist of non-legal financial analyses. For example, Fonteyne, who is listed in the privilege log as the creator or recipient of many of the disputed documents, testified that his role was to provide “commercial input” consisting of “mostly financial analyses.” C.A. App. 599.

(2) *Non-legal business documents analyzing the Aggrenox co-promotion agreement.* The FTC also objected to petitioner’s withholding of financial documents related to the Aggrenox co-promotion agreement. The privilege log listed a number of such documents. For example, document No. 1090, sent from non-lawyer Hanbo Hu to non-lawyer Fonteyne, is a PowerPoint described as an “[a]nalysis regarding

possible Aggrenox co-promotion agreement relating to '577 Patent Litigation settlement prepared as a result of litigation.” C.A. App. 565, 569.

Testimony from petitioner’s employees again indicates that these documents focused on the financial, not legal, implications of the co-promotion agreement and thus do not reflect counsel’s mental impressions. Elizabeth Cochrane, a financial executive who created many of the analyses, testified that her role was to “quantify the Duramed [a Barr subsidiary] copromotion,” which entailed evaluating “the financial impact to [petitioner’s] P&L, profit and loss statement.” C.A. App. 242-243. Fonteyne, who was also closely involved in creating the analyses, testified that his role was to provide “commercial input” on the deal. *Id.* at 599. Some or all of these analyses appear to have been conducted in order to evaluate the financial (rather than legal) implications of the Aggrenox co-promotion agreement. *Id.* at 577.

3. The district court granted the FTC’s petition to enforce the subpoena in part and denied it in part. Pet. App. 30a-54a.<sup>3</sup> The court “credit[ed] the declarations” of Persky and Taylor, who stated that the disputed financial analyses “were prepared for the client during settlement discussions and involved discussions among the attorneys and their agents who were handling the settlement negotiations.” *Id.* at 42a. The court concluded that the co-promotion agreement was an integral part of the patent-infringement litigation against Barr, and that because Persky had provided “information and frameworks” that guided the analyses in the reports, disclosure would necessarily re-

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<sup>3</sup> The subpoena enforcement proceedings were referred to a magistrate judge for all purposes. Pet. App. 30a.

veal attorneys' thought processes and constitute opinion work product. *Id.* at 42a-44a.

The district court further concluded that the “factual inputs” provided by Persky when she requested the reports “cannot be reasonably segregated from the analytical outputs,” and that disclosing “any aspect” of the analyses therefore would shed light on the nature of Persky’s request. Pet. App. 43a-44a. Having classified all of the financial analyses as opinion work product, the court ruled that the FTC had not demonstrated an “overriding need” to discover such documents. *Id.* at 44a-45a (citing *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997)).<sup>4</sup>

The district court ordered petitioner to produce any emails transmitting the financial analyses that contained “fact[] work product that can be reasonably excised from any indication of opinion work product.” Pet. App. 45a. With respect to documents that had not yet been disclosed, the court ordered petitioner to “disclose, in redacted form, all correspondence containing factual, rather than opinion, work product, if it has not already done so.” *Id.* at 49a.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-29a. The FTC’s appeal was limited to the district court’s decision concerning

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<sup>4</sup> For some documents, petitioner made only work-product claims. For others, it claimed both work-product and attorney-client privilege. Because the district court upheld petitioner’s work-product claims, it did not rule separately on petitioner’s additional claims of attorney-client privilege. Pet. App. 7a. The court rejected the FTC’s challenge with respect to a handful of documents for which petitioner had claimed *only* attorney-client privilege. *Id.* at 47a-48a, 53a.

the financial analyses of the patent-litigation settlement and co-promotion agreement. *Id.* at 5a.

a. The court of appeals agreed with the district court's conclusions that the co-promotion agreement was an integral part of the broader patent litigation, and that the financial analysis of the co-promotion agreement therefore fell within the work-product doctrine. Pet. App. 11a-14a.<sup>5</sup> After *in camera* review of the disputed documents and the *ex parte* affidavits, however, the court of appeals reversed the district court's holding that all of those documents qualified as opinion (rather than fact) work product. *Id.* at 14a-18a. The court of appeals explained that, although a "factual document selected or requested by counsel" might qualify as opinion work product if it "exposes the attorney's thought processes and theories," *id.* at 15a (citing *Director, Office of Thrift Supervision*, 124 F.3d at 1308), "not every item which may reveal some inkling of a lawyer's mental impressions . . . is protected as opinion work product," *ibid.* (citation omitted). Rather, "[o]pinion work product protection is warranted only if the selection or request reflects the attorney's focus in a meaningful way." *Ibid.*

The court of appeals explained that "many of the documents at issue here contain only factual information requested or selected by counsel," and that "[m]uch of what the FTC seeks is factual information produced by non-lawyers that, while requested by \* \* \* Persky and other attorneys, does not reveal any insight into counsel's legal impressions or their views of the case." Pet. App. 16a. The court stated

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<sup>5</sup> The court of appeals remanded the issue of whether documents that were created after the settlement were created "in anticipation of litigation." Pet. App. 13a-14a.



that the “information and frameworks” provided by Persky in many of the documents were “simply time frames for requested financial data—for example, forecasting in x-month intervals”—and that petitioner had failed to explain how disclosing those time frames could reveal anything of legal significance. *Id.* at 18a.

The district court’s error mattered, the court of appeals explained, because “a party’s ability to discover work product often turns on whether the withheld materials are fact work product or opinion work product.” Pet. App. 19a. Opinion work product can be discovered only upon an “extraordinary showing of necessity,” *ibid.* (citation omitted), while a party seeking discovery of fact work product must 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,” *ibid.* (quoting Fed. R. Civ. P. 26(b)(3)(A)(ii)).

b. The court of appeals noted that “the customary next step” would be to remand to allow the district court to apply the legal standard that governs discovery of fact work product. Pet. App. 20a. The court of appeals determined, however, that in this case it could appropriately apply that standard itself, based on the district court’s factual findings. *Ibid.* (noting that “[e]ach party contends \* \* \* that we have what we need to decide whether the FTC has met the Rule 26(b)(3) standard”).

Petitioner argued that, in order to show a “substantial need” for the documents within the meaning of Rule 26(b)(3), the FTC was required to demonstrate that the materials “are critical to, or dispositive of, a key issue at trial.” Pet. App. 20a. The court of appeals rejected that contention. *Ibid.* Based on its

analysis of the Advisory Committee's notes on the amendments to Rule 26(b)(3) (*id.* at 20a-22a), and of the illustrative judicial decisions cited in those notes (*id.* at 22a-23a), the court concluded that a moving party's burden under Rule 26(b)(3) is generally satisfied if "the materials are relevant to the case, the materials have a unique value apart from those already in the movant's possession, and 'special circumstances' excuse the movant's failure to obtain the requested materials." *Id.* at 23a.

The court of appeals further observed that neither the interest in liberal discovery, nor the competing interest in ensuring that each side undertakes its own investigation and does not freeload on opposing counsel, is served by a standard that requires the requesting party to show "that the requested documents are critical to, or dispositive of, the issues to be litigated." Pet. App. 25a-26a. The court also noted that petitioner's preferred standard would be particularly misplaced in the context of an agency investigation. *Id.* at 27a. In that context, the agency has not yet issued a complaint that defines what is relevant, and depending on the results of the investigation, it may never do so. Accordingly, even if the disputed materials do not contain evidence of a conspiratorial intent, they "may be helpful to the FTC in determining whether to issue a complaint in the first place." *Ibid.*

The court of appeals stated that "[t]here has been a ratcheting up of the 'substantial need' standard in recent years by some courts, due at least in part to a conflation of what is sufficient and what is necessary to demonstrate need." Pet. App. 26a n.4. The court noted, for example, that in *In re International Systems & Controls Corp. Securities Litigation*, 693 F.2d

1235 (1982), the fact work product that was sought related to an “essential element” of the plaintiff’s claims, and the Fifth Circuit noted that this “could be grounds for a finding of substantial need.” Pet. App. 26a n.4 (citation omitted). The court explained that, although the Fifth Circuit had not held that such a finding was *required*, its “essential element” language had been incorporated into a treatise and has been applied by some district courts. *Ibid.*

Applying the well-established standard reflected in the case law that underlies Rule 26, the court of appeals held that the FTC had shown a “substantial need and undue hardship for materials relating to financial analyses and forecasts.” Pet. App. 28a. The district court had already directed petitioner to produce fact work product that could be separated from opinion work product in the emails that accompanied the financial analyses. *Ibid.*<sup>6</sup> That ruling “ma[de] clear that the [d]istrict [c]ourt found that the FTC had shown a substantial need and undue hardship for materials relating to financial analyses and forecasts.” *Ibid.* The district court had also concluded that the financial analyses “provide unique information about [petitioner’s] reasons for settling in the manner that it did”—information that could not be recreated by the FTC. *Ibid.*

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<sup>6</sup> In fact, two different district court orders had directed petitioner to produce fact work product. See Pet. App. 45a, 49a (order discussed above that was appealed by the FTC); C.A. App. 170 (subsequent order addressing electronic searches and stating that, “if a document contains some factual work product and some opinion work product, and the opinion work product can be excised from the rest of the document, [petitioner] should redact the privileged material and disclose the rest”). Petitioner did not appeal either order.

c. The court of appeals remanded to the district court “to revisit the financial documents in light of the correct legal standard[]” for determining what qualifies as opinion work product. Pet. App. 28a-29a. It stated that the district court “should determine which of the sampled documents may be produced, in full or in redacted form, as factual work product.” *Id.* at 29a. To the extent that any documents were withheld on the alternative basis of attorney-client privilege, the court of appeals instructed the district court to determine whether that privilege provides a separate bar to discovery. *Ibid.*

#### ARGUMENT

Petitioner challenges (Pet. 17-24) the court of appeals’ holding that information requested by an attorney does not necessarily reveal the attorney’s mental impressions about a case, and therefore may constitute fact rather than opinion work product. Petitioner’s argument rests in part on the mistaken view that the court below required the production of documents that meaningfully reveal attorneys’ mental impressions. Petitioner further contends (Pet. 24-34) that a heightened relevance standard, requiring that the materials be “critical to, or dispositive of, a key issue at trial” (Pet. App. 20a), should be applied when determining whether a party has demonstrated “substantial need” for discovery of fact work product under Federal Rule of Civil Procedure 26(b)(3). The current interlocutory posture of the case is a sufficient reason for the Court to deny a writ of certiorari. In any event, the court of appeals correctly rejected petitioner’s arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals concluded that the district court had applied an overly broad definition of opinion work product. Pet. App. 14a-18a. The court explained that “[m]uch of what the FTC seeks is factual information produced by non-lawyers that, while requested by \* \* \* attorneys, does not reveal any insight into counsel’s legal impressions or their views of the case.” *Id.* at 16a. The district court’s determination of what constitutes opinion work product had “implied that an attorney’s mere request for a document was sufficient to warrant opinion work product protection.” *Ibid.*

Although the court of appeals decided for itself (at the parties’ request) that the FTC had satisfied the Rule 26(b)(3) standard for discovery of fact work product, Pet. App. 20a-21a, it remanded to the district court to “revisit the financial documents” and determine which ones were opinion work product “in light of the correct legal standard[],” as clarified by the court of appeals. *Id.* at 28a-29a. The court further instructed the district court to determine whether the attorney-client privilege would be an independent bar to discovery of the documents where petitioner had asserted that privilege. *Id.* at 29a. Accordingly, the court of appeals’ decision is interlocutory, which by itself “furnishe[s] sufficient ground for the denial” of the petition for a writ of certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 282-283 & n.72 (10th ed. 2013).

That practice promotes judicial efficiency. If the Court were inclined to review the work-product doctrine and clarify the legal standard for determining whether documents constitute opinion work product, it would benefit from having before it the district court's determination of which documents must be produced under the standard articulated by the court of appeals, after evaluating any other privileges previously asserted by petitioner. Depending on which documents the district court ultimately orders to be produced, petitioner can present its challenge to the court of appeals' decision, along with any other objections it may have to the lower courts' further rulings, in a single petition for a writ of certiorari following final judgment. See *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting Court's "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent" judgment). Petitioners offer no reason to depart from this Court's usual practice of declining to review interlocutory petitions.

2. In any event, the court of appeals correctly articulated both the standard for determining whether documents are opinion work product, and the standard for determining whether fact work product must be produced.

a. In *Hickman v. Taylor*, 329 U.S. 495 (1947), this Court articulated the federal work-product doctrine, which protects an attorney's work, prepared with an eye towards litigation, from examination by opposing parties and their counsel. *Id.* at 510-511; see *United States v. Deloitte LLP*, 610 F.3d 129, 134-138 (D.C. Cir. 2010) (work-product doctrine protects documents

created “because of” litigation). Congress subsequently codified that doctrine in Federal Rule of Civil Procedure 26(b)(3), which distinguishes between opinion work product and fact work product. See *Hickman*, 329 U.S. at 511-512. Opinion work product consists of materials that disclose an attorney’s “mental impressions, conclusions, opinions, or legal theories.” Fed. R. Civ. P. 26(b)(3)(B); *United States v. Nobles*, 422 U.S. 225, 238 (1975); *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981). It is “virtually undiscoverable.” *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997). Fact work product does not reveal an attorney’s mental impressions and is discoverable when a party shows “substantial need” for the materials and “undue hardship” in obtaining their substantial equivalent. Fed. R. Civ. P. 26(b)(3)(A).

The court of appeals’ conclusion that at least some of the financial analyses at issue in this case were not opinion work product is faithful to those principles. See Pet. App. 16a. The court’s *in camera* review of the documents revealed that “[m]uch of what the FTC seeks is factual information” “requested or selected by counsel” that “does not reveal any insight into counsel’s legal impressions or their views of the case.” *Ibid.* The court explained that, “[i]n many documents, \* \* \* the ‘information and frameworks’ provided by counsel,” such as time frames for the requested data, “ha[d] no legal significance.” *Id.* at 18a. Many of the documents therefore did not “expose[] [an] attorney’s thought processes and theories” or “reflect[] the attorney’s focus in a meaningful way.” *Id.* at 15a.

b. Petitioner offers no criticism of the legal rule actually articulated by the court of appeals. Instead,

petitioner miscasts the court's opinion as having decided "whether financial analyses *reflecting attorney mental impressions* of the financial implications of proposed settlement terms are opinion work product if those documents were created because of litigation but in part for a business evaluation." Pet. 17 (emphasis added; internal quotation marks omitted). But the court of appeals did not question the proposition that financial analyses prepared because of litigation and reflecting attorneys' mental impressions are opinion work product. It instead held that the district court had "failed to demand \* \* \* a showing from [petitioner]" of "specifically how disclosure [of the disputed financial analyses] would reveal the attorney's legal impressions and thought processes" with respect to the specific documents at issue. Pet. App. 18a. Petitioner's formulation of the issue reflects the assumption, correctly rejected by the court of appeals, that an attorney's mere request for a document will necessarily reveal her mental impressions about the case. See *id.* at 16a.

Petitioner's contention (Pet. 21-24) that the court of appeals' decision threatens the policies underlying the work-product doctrine by making attorneys' mental impressions susceptible to discovery rests on the same misunderstanding of the court's holding. The court's decision continues to protect, as opinion work product, documents that reveal an attorney's mental impressions and thought processes about a case, while holding that factual materials that are compiled at an attorney's request but do not reflect her mental impressions in any meaningful way amount at most to fact work product. Pet. App. 16a-18a.



c. Petitioner contends (Pet. 18-21) that the decision below conflicts with the Second Circuit’s decision in *United States v. Adlman*, 134 F.3d 1194 (1998). Petitioner’s reliance on *Adlman* is misplaced.

*Adlman* did not involve the specific issue presented in this case, *i.e.*, the distinction between fact work product and opinion work product. Instead, the Second Circuit in *Adlman* addressed the antecedent question whether a particular document had been prepared “in anticipation of litigation” such that it qualified as work product at all. 134 F.3d at 1195-1203; see *id.* at 1197 (“This case involves [the] question \* \* \* whether Rule 26(b)(3) is inapplicable to a litigation analysis prepared by a party or its representative in order to inform a business decision which turns on the party’s assessment of the likely outcome of litigation expected to result from the transaction.”) (emphasis added). The court in *Adlman* specifically stated: “[A]lthough a finding \* \* \* that a document is prepared because of the prospect of litigation [under the test it adopted] warrants application of Rule 26(b)(3), this does not necessarily mean that the document will be protected against discovery. Rather, it means that a document is *eligible* for work-product privilege.” *Id.* at 1202-1203. In petitioner’s case, there is no longer any dispute that the financial analyses qualify as work product. Pet. App. 11a-14a.<sup>7</sup>

The facts of *Adlman* also differ substantially from those involved here. The document sought in *Adlman* was “a 58-page detailed legal analysis,” written by counsel, “of likely [Internal Revenue Service (IRS)]

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<sup>7</sup> On remand, the district court must determine whether a small number of post-settlement documents were prepared in anticipation of litigation. Pet. App. 13a-14a.

challenges to [a merger] and the resulting tax refund claim; it contained discussion of statutory provisions, IRS regulations, legislative history, and prior judicial and IRS rulings relevant to the claim”; “[i]t proposed possible legal theories or strategies for [the client] to adopt in response, recommended preferred methods of structuring the transaction, and made predictions about the likely outcome of litigation.” 134 F.3d at 1195. The Second Circuit observed that, if the memorandum were work product at all, it would be opinion work product. *Id.* at 1204. But it made that observation because the document was written by a lawyer and contained legal analysis. *Ibid.* Nothing in *Adlman* requires the conclusion that the financial analyses in this case qualify as opinion work product.

2. a. Petitioner further contends (Pet. 30-34) that the court of appeals adopted too lax a standard for showing the “substantial need” required for discovery of fact work product under Rule 26(b)(3). That argument lacks merit.

Petitioner characterizes (Pet. 30) the court of appeals’ standard as one that allows discovery based on a showing of “mere relevance.” But the court’s understanding of substantial need is faithful to the language of, and the case law underlying, Rule 26(b)(3). The court carefully analyzed the case law on which the Advisory Committee that proposed the Rule had relied. The court of appeals concluded that the “substantial need” and “undue hardship” requirements in Rule 26(b)(3) together require a party seeking discovery of fact work product to show not only that the materials “are relevant to the case,” but also that “the materials have a unique value apart from those already in the movant’s possession, and ‘special circum-

stances’ excuse the movant’s failure to obtain the requested materials itself.” Pet. App. 22a-23a. That articulation of the Rule 26(b)(3) standard requires much more than “mere relevance.” Pet. 30.

Indeed, both the court of appeals and the district court concluded that the withheld materials exhibit the “particular significance to the case” (Pet. 31) that petitioner claims is necessary to satisfy the substantial-need standard. See Pet. App. 28a, 44a-45a; *Federal Trade Comm’n v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013) (reasons for entering into a reverse-payment settlement are a significant focus of the antitrust inquiry); *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 602 (1957) (emphasizing evidence from “contemporaneous documents” that acquisition violated antitrust laws).

Petitioner suggests (Pet. 33) that permitting discovery of a company’s contemporaneous documents will impair attorneys’ ability to counsel clients on “compliance” matters. See Pet. 6 (suggesting that the court of appeals’ ruling will lead to disclosure of privileged attorney-client communications). But the court did not order the production of privileged communications or opinion work product. It held only that the FTC had established a substantial need for fact work product. As evidenced by the existence of Rule 26(b)(3)(A) itself, disclosure of fact work product is unlikely to interfere with an attorney’s ability to counsel her clients.

b. Petitioner further contends (Pet. 33-34) that the court of appeals improperly lowered the substantial-need standard for fact work product sought in government investigations. That is incorrect. The court emphasized the government-investigation context of

this case not to relax the showing required by Rule 26(b)(3) in such matters, but to explain why petitioner’s “smoking gun” standard is untenable. Pet. App. 27a. The court correctly observed that petitioner’s proposed standard would be inappropriate in the context of an agency investigation because, unlike in a typical civil proceeding (where a suit has actually been filed), no claims have yet been brought for which a “smoking gun” could be discovered. *Ibid.*

The value of a particular document must be assessed in light of the purpose for which it is sought. In its investigations, the FTC is “exercising its legitimate right to determine the facts’ and to decide whether a complaint should issue.” Pet. App. 27a (quoting *Federal Trade Comm’n v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977)); see 15 U.S.C. 49. Rather than casting doubt on the correctness of the court of appeals’ analysis, the court’s reliance on the special considerations raised by government investigations provides an additional reason why this case would be an inapt vehicle for resolving any generally applicable question about the “substantial need” standard.<sup>8</sup>

c. Petitioner contends (Pet. 24-29) that the standard adopted by the court of appeals for deciding whether a party has demonstrated substantial need

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<sup>8</sup> Amicus curiae the American Bar Association (Br. 7) is mistaken when it suggests that the court of appeals adopted a special, lenient substantial-need standard for government investigations. To the contrary, the court held, based on well-established precedent, that the law does not require that fact work product be essential or “critical” to the requesting party’s case. Pet. App. 26a. Its holding does not depend on whether that party is the government or a private entity.

under Rule 26(b)(3) “created a \* \* \* circuit split” with multiple courts that require “some sort of heightened probative value beyond mere relevance.” Although the court below suggested that some courts have “demanded a heightened showing” for substantial need, Pet. App. 20a; see *id.* at 26a n.4 (stating that some courts have “ratchet[ed] up” the substantial-need standard), any differences among the various circuits’ articulations of the governing standard are insufficient to warrant this Court’s review.

In *Logan v. Commercial Union Insurance Co.*, 96 F.3d 971 (1996), the Seventh Circuit held that insurance-company claim-processing documents were protected work product. The plaintiff asserted that the documents were the only available evidence of bad faith, an essential element of his claim. *Id.* at 977. The court held that “a mere allegation of bad faith is insufficient to overcome the work product privilege,” and that a plaintiff must demonstrate “some likelihood or probability that the documents sought may contain evidence of bad faith.” *Ibid.* The court explained, however, that “this required showing is not a high hurdle,” and that the plaintiff “need only show the possibility, not the certainty, that the claim documents contain evidence of bad faith.” *Ibid.* The court further noted that the district court had already examined the documents *in camera* and had concluded that they “contained no possible evidence of bad faith whatsoever.” *Ibid.* The court of appeals did not adopt any “heightened standard” for determining whether the documents were discoverable.

The court in *United Kingdom v. United States*, 238 F.3d 1312 (11th Cir.), cert. denied, 534 U.S. 891 (2001), similarly did not adopt petitioner’s proposed height-

ened standard of relevance. The court concluded that the finding of a British court that the documents were relevant to the dispute did not, without more, satisfy the requirements of Rule 26(b)(3). *Id.* at 1322. That holding is fully consistent with the court of appeals' approach here.

In *Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904 (1978), the Fourth Circuit looked to Rule 26(b)(3) to assess a plaintiff's request to inspect particular premises under Federal Rule of Civil Procedure 34. *Id.* at 908. The court explained that, in general, discovery is permitted upon a "simpl[e] showing [of] the relevancy of the desired discovery to the cause of action," but that when the desired materials qualify as work product, the moving party must show substantial need and undue hardship. *Ibid.* And in its unpublished decision in *Stampley v. State Farm Fire & Casualty Co.*, 23 Fed. Appx. 467 (2001) (per curiam), the Sixth Circuit concluded that a plaintiff had not satisfied the Rule 26(b)(3) standard where relevant information contained in work-product materials could have been discovered in other ways, including through depositions. *Id.* at 471. Those decisions are consistent with the standard adopted by the court of appeals in this case.

Finally, in an unpublished decision in *Nevada v. J-M Manufacturing Co.*, 555 Fed. Appx. 782 (2014) (*J-M*), the Tenth Circuit stated that "[a] substantial need exists where 'the information sought is essential to the party's defense, is crucial to the determination of whether the defendant could be held liable for the acts alleged, or carries great probative value on contested issues.'" *Id.* at 785 (citation omitted). As the court below explained (Pet. App. 26a n.4), the exist-

ence of that language in some decisions is “due at least in part to a conflation of what is sufficient and what is necessary to demonstrate need.” The court in *J-M* stated that “[a] substantial need exists,” *i.e.*, that the movant’s showing is *sufficient*, in the circumstances that it described. 555 Fed. Appx. at 785. That does not mean that such a showing is always *required* to demonstrate substantial need. And in any event, petitioner fails to explain how the financial analyses sought by the FTC would not meet the *J-M* standard of having “great probative value.” See Pet. App. 28a, 44a-45a.

None of the decisions petitioner cites (Pet. 24-29) conflict with the court of appeals’ holding that “[a] moving party need not show \* \* \* that the requested documents are critical to, or dispositive of, the issues to be litigated.” Pet. App. 26a. The decisions use slightly different verbal formulations to describe the showing required to obtain fact work product under Rule 26(b)(3). Petitioner identifies no sound reason to conclude, however, that any other circuit considering the facts of this case would have reached a different conclusion than did the court below. In light of the interlocutory posture of this case, and the basic consistency of approach among the courts of appeals, this Court’s review is not warranted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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