No. 15-560

IN THE

Supreme Court of the United States

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

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 OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(1) Did the D.C. Circuit err when it held, in conflict with the Second Circuit, that analyses of a proposed settlement's expected cost and value, directed by an attorney and under the framework and using the inputs provided by the attorney, were fact rather than opinion work product if they were prepared in part for a business purpose?

(2) Did the D.C. Circuit err when it held, in conflict with the Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits, that to make a showing of "substantial need" sufficient to override work product protection for fact work product, a party need not show that the requested material has any heightened relevance to the case?

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.2, the American Bar Association ("ABA") respectfully submits this brief as *amicus curiae* in support of Petitioner. The ABA urges the Court to grant the petition in this case in order to protect against the erosion of the work-product doctrine and provide the bench and bar with guidance on its scope and on the standard that is required to overcome it.

The ABA is one of the largest voluntary professional membership organizations and the leading organization of legal professionals in the United States. Its more than 400,000 members span the profession, including lawyers in private firms ranging from a single lawyer to thousands of lawyers, as well as those serving as in-house counsel in corporations, non-profit organizations, and government agencies, as prosecutors and defenders, and as judges, their staff lawyers, legislators, law professors, and law students.[2]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party and that no person or entity other than *amicus*, its members, or its counsel has made any monetary contribution to the preparation and submission of the brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* further certifies that counsel of record for both Petitioner and Respondent were provided with timely notice of intent to file this brief, and that counsel of record for all parties have consented to its filing. Copies of counsel's written consent are filed herewith.

[2] Neither the brief nor the decision to file it should be construed to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief; nor was it circulated to any member of the Judicial Division Council before filing.

Throughout its history, the ABA has dedicated itself to working with lawyers and judges to develop model codes for both, and to promote a pragmatic, efficient, and fair discovery process consistent with a lawyer's ethical obligations.[3] The current version of the ABA lawyer ethics code, the Model Rules of Professional Conduct, has been adopted in virtually identical format and content by 49 of the 50 states and the District of Columbia. As a result, those rules govern the conduct of each state's bar and their violation can result in the sanctioning of the rule-violating lawyer.

In connection with such efforts, the ABA has worked to protect both the attorney-client privilege and the work-product doctrine, limitations on the discovery process that arise from the need for a lawyer to be fully devoted to a client – in loyalty, in care, and in diligence. Erosion of these privileges necessarily interferes with the performance of those obligations, duties that may necessarily require developing and providing counsel that is not purely "legal."

The ABA has filed an *amicus* brief in a number of cases implicating the work-product doctrine and attorney-client privilege, including *Hickman v. Taylor*,

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[3] The ABA Model Rules of Professional Conduct are available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html (last visited Dec. 1, 2015). The Model Rules, like all ABA policy, have been adopted by vote of the ABA House of Delegates, which is composed of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members, and the Attorney General of the United States, among others. *See* ABA General Information, http://www.americanbar.org/groups/leadership/delegates.html (last visited Dec. 1, 2015).

329 U.S. 495 (1947),[4] the seminal decision in which this Court articulated the work-product doctrine and concluded that "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 *Swidler & Berlin v. United States*, 524 U.S. 399 (1998),[5] where the Court found that the documents were protected by the attorney-client privilege and that the obligation of confidentiality did not end with the death of the client. The Court thus did not reach the work-product issue in that case.

In 2005, the ABA formed a task force to study and educate others on the role of the attorney-client privilege and work-product doctrine, following efforts by the government to require companies to waive the attorney-client privilege and work-product protection in order to obtain cooperation credit during governmental investigations. After consideration of the task force's report, the ABA's House of Delegates adopted as ABA policy, *inter alia*, that preservation of both the attorney-client privilege and the work-product doctrine is essential to maintaining a confidential relationship between a client and lawyer that allows and encourages clients to "discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with the law through effective counseling; (2) ensure effective advocacy for the client; (3) ensure access to justice; and (4) promote the proper and efficient functioning of the American adversary

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[4] The brief of the ABA as *amicus curiae* in *Hickman* may be found at 1946 WL 62839.

[5] The brief of the ABA as *amicus curiae* in *Swidler* may be found at 1998 WL 208818.

system of justice." ABA Policy #111 (adopted Aug. 2005).[6]

The ABA is committed to advocating for a robust work-product doctrine that enables lawyers to undertake the research and analysis necessary to provide the advice and counsel that they are ethically required to provide – and that clients have a right to expect. Because of the far-reaching impact of the two circuit splits created by the Court of Appeals for the District of Columbia Circuit, the grant of *certiorari* is warranted to clarify the scope of and protections provided by the work-product doctrine.

SUMMARY OF ARGUMENT

The Petitioner has asked the Court to consider two questions, and the ABA urges the Court to hear them both. Each error is worthy of review and the work-product doctrine will be seriously undermined if either is left unaddressed. While circuit splits are often permitted to percolate in an effort to allow the law to develop, granting *certiorari* is appropriate now because the consequences of these splits are particularly grave and will be immediately and broadly felt if not addressed as soon as possible.

In representing a client, a lawyer has an obligation to render fully-informed advice – advice that incorporates more than purely legal analysis. As Rule 2.1 of the Model Rules of Professional Conduct (adopted by 49 of the 50 states) instructs, such advice will often lead a lawyer to consider moral, economic, social, and political factors. The consideration of those factors

[6] *See* http://www.americanbar.org/content/dam/aba/directories/policy/2005_am_111.authcheckdam.pdf (last visited Dec. 1, 2015).

does not automatically render such advice "fact" work product, as the Court of Appeals for the District of Columbia Circuit's decision held. In so holding, the Court created a direct conflict with the approach taken by the Court of Appeals for the Second Circuit, *particularly* when a lawyer orders analysis incorporating one or more of these factors in order to provide legal advice. Guidance such as is at issue here has been understood by courts – as the Court of Appeals for the Second Circuit had explained in *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1988) – to be *opinion* work product, and thus highly insulated from discovery. By denigrating the analysis provided at the direction of counsel as merely "factual," the Court of Appeals for the District of Columbia Circuit eroded the protection of attorney work product.

The Court of Appeals for the District of Columbia Circuit then escalated the problem by writing out one of the criteria in the Federal Rules of Civil Procedure that would otherwise protect those materials from disclosure, holding that discovery of that analysis could be had without even a showing of heightened relevance to satisfy the test of substantial need. In this regard, the Court of Appeals for the District of Columbia Circuit created a conflict with the approach taken by the Courts of Appeals for the Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits. Taken together, the decision eviscerates any protection the analysis should otherwise be afforded.

The decision is also likely to have widespread impact on attorney-client relationships and work product beyond the Court of Appeals for the District of Columbia Circuit. Clients of all kinds – plaintiffs and defendants, individuals and organizations – receive advice in anticipation of, or as part of, litigation. At

the time the advice is rendered, it may be difficult, if not impossible, to predict where a lawsuit will be brought. As a consequence, in many instances rational lawyers must advise their clients in light of the least-protective jurisdiction, which now is the Court of Appeals for the District of Columbia Circuit. The need for lawyers to protect their clients by undertaking only what will satisfy the requirements of the least-protective jurisdiction creates an indelible pressure that threatens to undermine the policies of those jurisdictions that have consistently encouraged lawyers to develop both legal and non-legal information to use in providing counsel to a client that anticipates or is embroiled in litigation. As a result, this decision will not just conflict with but supplant the current law that permits lawyers to develop or solicit information to use in counseling clients.

The ABA approaches this petition for certiorari from some fundamental principles. *First*, the ABA's primary mission is to ensure that American lawyers deliver clients the most effective services possible within the parameters set by the profession's ethical requirements. The narrow view of the scope of opinion work product that was taken by the Court of Appeals for the District of Columbia Circuit, a view that directly conflicts with the approach taken by the Court of Appeals for the Second Circuit in *Adlman*, undermines a lawyer's ability to provide competent representation and threatens the foundations of the attorney-client relationship: candor, confidentiality, and zealous representation. Left to stand, the decision will chill lawyers from investigation and acquisition of the information needed to provide wise counsel under ABA Model Rules of Professional Conduct 1.1 and 2.1. This outcome is particularly problematic in today's

increasingly complex legal and regulatory environment, where purely "legal" analysis and advice is often not sufficient to enable a client to make informed and strategic decisions.

Second, the ABA has promulgated – and the courts of America have adopted – strict standards for lawyer confidentiality, standards that impose upon lawyers a solemn obligation to maintain as confidential all that is learned from clients within the framework of candor to the tribunal and the other obligations lawyers have as officers of the court. It is critical that the contours of the attorney-client privilege and the work-product doctrine safeguard the attorney-client relationship, whether or not one of the parties is a government entity.

And yet the decision of the Court of Appeals for the District of Columbia Circuit, which is in conflict with the Courts of Appeals for the Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits, would enable "government" – to whatever entities courts ultimately determine that characterization to apply – to claim a right to work product merely by self-identifying an inconvenience in replicating relevant information, a standard that essentially writes out of Federal Rule of Civil Procedure 26(b)(3) the requirement that a party demonstrate "substantial need."

Ultimately, the cost of these two changes in the law of work product protection will be borne not by the legal profession but by the clients. As the highest court in the land, with authority over all other federal courts and those who practice before them, it is important for this Court to take this case now.

ARGUMENT

I. MISCHARACTERIZING WHAT HAS BEEN UNDERSTOOD TO BE OPINION WORK PRODUCT AS FACT WORK PRODUCT WILL CAUSE A DETERIORATION IN THE QUALITY AND SCOPE OF LAWYER-CLIENT COUNSELING AT A TIME WHEN THE NEED FOR SUCH ADVICE IS GREATER THAN EVER.

Thirty-five years ago this Court observed, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn v. United States*, 449 U.S. 383, 393 (1981). Here, the uncertainty created by the approach of the Court of Appeals for the District of Columbia Circuit will degrade client representation beyond just the immediate jurisdiction of that Court of Appeals. For this reason, although the decision created a circuit split, its effect is worse than a division in interpretations among the various courts. Rational lawyers and clients will be compelled to act in accordance with the standard of the Court of Appeals for the District of Columbia Circuit because they cannot be sure that construction will not be applied to any work product they generate. This is the same dilemma that led to the warning in Federalist 62 that prudent merchants would not undertake new commerce if they risked their work being declared unlawful. THE FEDERALIST No. 62 (James Madison). In both cases, the resultant stagnation and fear is unhealthy. The law should support the highest level of strategy – and whatever work product is needed to support it – not drive lawyers to conform to the lesser standard mandated by the decision of the Court of Appeals.

Because the work-product doctrine limits the ability of adversaries to discover documents and other tangible things that are prepared in anticipation of litigation or for trial, Fed. R. Civ. P. 26(b)(3), it of necessity extends beyond work product prepared by lawyers themselves to material prepared in anticipation of litigation or for trial by the client's "consultant, surety, indemnitor, insurer, or agent." *Id.* In that way, the work-product doctrine is distinct from, and both broader and narrower than, the attorney-client privilege. The attorney-client privilege protects communications between a lawyer and a client, or the agents of either, for the purpose of giving or receiving legal advice without regard to whether litigation is anticipated. The work-product doctrine, by contrast, protects investigations conducted and reports prepared by lawyers, interviews with third parties and witnesses, consultation with experts, factual and legal research, risk analyses, damage calculations, and many other activities that lawyers must engage in during the course of a representation – but only when litigation is anticipated.

When a party seeks the production of fact work product, the standard – set forth in Federal Rule of Civil Procedure 26(b)(3) – is more lenient than the standard for opinion work product. Here, however, the Court of Appeals for the District of Columbia Circuit mischaracterized opinion work product as fact and thereby reduced the standard for a class of material necessary to provide wise counsel. While fact work product "may encompass factual material including the result of a factual investigation. . . . opinion work product reveals the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative." *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 (2d Cir. 2007) (internal

quotations omitted). Courts have recognized (a) that "opinion" work product includes the information needed to form an opinion and (b) that the other party must establish its substantial need for access to the information – a burden that is higher than a showing of mere relevance or lack of access. *See In re Sealed Case*, 676 F.2d 793, 811 (D.C. Cir. 1982).

A clear statement of this perspective is found in the opinion of the Court of Appeals for the Second Circuit in *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1988). That case rejected a test that would result in "an attorney's assessment of the likely outcome of litigation [being] freely available to his litigation adversary merely because the document was created for a business purpose rather than for litigation assistance." 134 F.3d at 1200.

By contrast, in *FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 778 F.3d 142 (D.C. Cir. 2015) the Court of Appeals for the District of Columbia Circuit held that financial analyses created at the direction of in-house counsel in connection with a settlement were merely fact work product because counsel's requests were "general and routine," were the kind of analysis "anyone familiar with such settlements would expect a competent negotiator to request," and a "lawyer's thoughts related to financial and business decisions are [not] opinion work product when she is simply parroting the thoughts of the business managers." 778 F.3d at 152-53.

The ABA asks this Court to grant *certiorari* to ensure that lawyers understand what analysis they can undertake or request to be undertaken by others without fear that the results will be readily discoverable if they are sued in the District Court for the District of Columbia or in a jurisdiction that

follows the lead of the Court of Appeals for the District of Columbia Circuit – a fear that, as discussed above, causes lawyers to proceed as though they will be sued there. If this Court does not hear this case, both the litigation process and the development and presentation of cases to courts will be degraded in the face of an increasingly complex legal and regulatory environment.

The work-product doctrine is essential to allowing lawyers to analyze and weigh the many competing considerations at play when providing legal advice. As the Court of Appeals for the Second Circuit observed:

> The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks, or costs in terms of expense, politics, insurance, commerce, morals, and appearances.

Pritchard v. County of Erie (In re County of Erie), 473 F.3d 413, 420 (2d Cir. 2007).

The Model Rules recognize that providing competent representation requires "legal knowledge, skill, thoroughness and preparation," ABA Model Rules of Professional Conduct 1.1, and the comments to the Rule make clear that the "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem." *Id.* If clients cannot trust that analysis

prepared for the possibility of litigation and during the course of litigation will be protected, they will be less likely to seek counsel from their lawyers, which will impair "the valuable efforts of . . . counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392 (discussing the attorney-client privilege).

Lawyers do not render legal advice in a vacuum. Rather, they are required to "exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." Model Rule of Professional Conduct 2.1. As the Comments to ABA Model Rule of Professional Conduct 2.1 explain, "[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate." In other words, legal advice and representation in only the rarest of occasions are limited to "the law." Factual inquiry and analysis are key to the success of the representation, and those two activities require explanation of a dizzying array of non-law subjects, from business to science to mathematics, and beyond.

The ABA has consistently encouraged lawyers to serve their clients uncompromisingly. This Court should grant the petition so lawyers need not choose between fully-informed and cautious representation of their clients.

Even if the only concern here were the inconsistency between decisions of different circuits, this Court should still take this case because of the uncertainty it injects into the relatively straightforward analysis

under Rule 26(b)(3) that was generally applied, not only by federal courts, but by all but a few states. Elizabeth Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1520-21 (1991). If the rule were to be amended, there would be a clear effective date and advance and widespread notice, important virtues that are absent from *ad hoc* rulemaking by individual courts of appeals.

II. THIS COURT SHOULD ACCEPT THIS CASE AND ESTABLISH THAT "SUBSTANTIAL NEED" MEANS WHAT IT SAYS.

Boehringer also created a circuit split regarding the "substantial need" standard that must be met to pierce the work-product protection under Fed. R. Civ. P. 26(b)(3). According to the opinion of the Court of Appeals for the District of Columbia Circuit, the government, in the investigatory context, may overcome work product protection by showing that "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 itself." 778 F.3d at 155-57. The question presented regarding this standard, a standard which fails to require a showing of heightened relevance, would warrant the grant of *certiorari* even if it stood alone; it will otherwise jeopardize and erode the foundational requirement of substantial need necessary to overcome the protections of the work-product doctrine.

Other courts of appeals have encouraged zeal and devotion by setting a high standard for "substantial need." *See, e.g., Nevada v. J-M Mfg. Co.*, 555 F. App'x 782, 785 (10th Cir. 2014) ("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 alleged acts, or carries great probative value on contested issues.'" (quoting *Nat'l Cong. for Puerto Rican Rights v. City of New York*, 194 F.R.D. 105, 110 (S.D.N.Y. 2000))); *United Kingdom v. United States*, 238 F.3d 1312, 1332 (11th Cir. 2001) (relevant information alone "does not overcome a valid claim of work product privilege"); *Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904, 908 (4th Cir. 1978) (stating that the "substantial need" for discovery of materials prepared in anticipation of litigation requires more than a showing of relevancy).

By contrast, the Court of Appeals for the District of Columbia Circuit decided that "a heightened relevance requirement . . . would be misplaced in the investigatory context of an agency subpoena enforcement proceeding." *Boehringer*, 778 F.3d at 154, 157. This reasoning overlooks the essential nature of an agency's investigation. In that stage, the government seeks information to determine whether to bring criminal charges or a civil enforcement action. This is a critical juncture for all parties to have careful and fully-informed counsel. Indeed, because government subpoenas already provide an investigating agency with almost unfettered access to a witness's information, once a client becomes aware that it might become a target of or party of interest in an investigation, the client often will take additional protective measures. Outside counsel is often consulted; internal investigations are conducted; and information that is garnered from those investigations is analyzed and reports are produced so the clients can evaluate any matters of concern and the corresponding risks.

Clients undertake these expensive measures because government investigations can lead to criminal prosecutions, civil enforcement actions, class actions, and shareholder derivative actions. To reduce the standard for accessing the analysis generated from marshaled information to no more than a showing of relevance and a desire by the agency to see it obliterates the work-product doctrine.

In *Boehringer*, 778 F.3d at 154, 157, the Court of Appeals for the District of Columbia Circuit granted access to the information the government subpoenaed simply because it was relevant to the agency's investigation, and because "Boehringer's contemporaneous financial evaluations provide[d] unique information about Boehringer's reasons for settling in the manner that it did." At the same time, the Court of Appeals for the District of Columbia Circuit dismissed Boehringer's argument that the FTC could have conducted a similar analysis through documents already in its possession. *See id.* at 157-58. The only reason for the FTC to seek Boehringer's analysis was to understand the thought processes of the lawyer. If an agency can obtain work product whenever the agency says that it is relevant and unique, then what documents would not satisfy the standard? The approach of the Court of Appeals for the District of Columbia Circuit opens the floodgates for the disclosure of work product based on a greatly reduced showing.

Moreover, the *Boehringer* court's decision has ramifications beyond the initial investigatory stage. The term "government" can apply to any number of litigants – if there is one "governmental" standard and another "private" standard, in which category is a state agency? A turnpike authority? A local parking

authority? A state-owned, or state-related university? Amtrak? A relator suing on the government's behalf? And what if that "government" is acting as a market participant or a contractor? Or what if a civil plaintiff asks – as many do – for all documents produced to the government?

The argument that the government deserves more access than a civil litigant because it is protecting the public is especially troubling in its disregard for the power and vast resources of the government. Given the resources "government" – in all of its forms – can bring to bear in litigation, clients involved in such litigation have especial need for fully-informed counsel. But because the standard articulated in *Boehringer* weakens protection of work product when "government" asks questions, lawyers will think twice about conducting the analysis and research needed to provide competent, complete, and well-informed advice to a client at the very time the client most needs it, another instance when fully-informed representation will be threatened by the caution that this decision necessarily engenders.

Just as blurring the line between opinion and fact threatens zeal and devotion, so does weakening the showing of need that the government must make. Granting *certiorari* will allow the Court to provide guidance on (a) the proper definition of substantial need, (b) the proper balance between cautious and fully-informed representation, and (c) the fact that all litigants must be subject to the same standards when seeking to invade another's work product.

CONCLUSION

For all of the foregoing reasons, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

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