No. 15-____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"[D]ocuments . . . that are prepared in anticipation of litigation" by an attorney or an attorney's agent are protected work product. Fed. R. Civ. P. 26(b)(3). This protection is nearly absolute for materials containing the "mental impressions, conclusions, opinions, or legal theories of a party's attorney," commonly known as opinion work product. However, work product without such attorney mental impressions, commonly known as fact work product, can be discovered upon a showing of "substantial need" and "undue hardship" in obtaining the "substantial equivalent by other means." *Id.*

In this case, Petitioner's in-house attorney directed businesspeople in the creation of financial analyses under parameters and with inputs she articulated and for the purpose of rendering antitrust compliance and other legal advice to her client regarding two contemplated patent settlements. When the FTC later subpoenaed those documents as part of an investigation into whether the patent settlements were anticompetitive, Petitioner withheld them as attorney work product. The district court upheld Petitioner's claim of privilege, but the D.C. Circuit reversed in part.

The questions presented are:

(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?

PARTIES TO THE PROCEEDING

The parties in the court below were Boehringer Ingelheim Pharmaceuticals, Inc. and the Federal Trade Commission.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Boehringer Ingelheim Pharmaceuticals, Inc., discloses that it is a wholly-owned subsidiary of Boehringer Ingelheim Corporation. In turn, Boehringer Ingelheim Corporation is wholly owned, either directly or indirectly, by Boehringer Ingelheim USA Corporation. Boehringer Ingelheim USA Corporation is an indirectly wholly owned subsidiary of C.H. Boehringer Sohn AG & Co., KG. None of Boehringer Ingelheim Pharmaceuticals, Inc., Boehringer Ingelheim Corporation, Boehringer Ingelheim USA Corporation, or C.H. Boehringer Sohn AG & Co., KG issues shares or debt securities to the public, and thus no publicly held company owns more than 10% of the stock of any of those companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the District of Columbia Circuit is reported at 778 F.3d 142 and set forth at Pet. App. 1a. The opinion of the district court is reported at 286 F.R.D. 101 and set forth at Pet. App. 30a.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2015. The court of appeals denied Petitioner's timely petition for rehearing or rehearing *en banc* on June 4, 2015. This Court granted an extension of time for Petitioner to file this petition for certiorari on August 20, 2015, extending the time for application for certiorari to October 2, 2015. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Federal Rule of Civil Procedure 26(b)(3) provides:

> (A) *Documents and Tangible Things.* 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). But . . . those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

STATEMENT OF THE CASE

A. Legal Background

1. The Development of the Work-Product Doctrine

Over a half a century ago, the Court first explained that documents created by attorneys in anticipation of litigation are shielded from discovery absent exceptional circumstances—even if the documents are otherwise relevant. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). The Court emphasized that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Id.*

This work-product protection is absolutely necessary to the functioning of our modern legal system. It is "essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel" because "[p]roper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman,* 329 U.S. at 510-11. Absent work-product protection, "much of what is now put down in writing would remain unwritten," with the inevitable result that "inefficiency, unfairness and sharp practices would . . . develop in the giving of legal advice[.]" *Id.* That, in turn, would be extremely "demoralizing" for the legal profession, and "the interests of the clients and the cause of justice would be poorly served." *Id.* *See also United States v. Nobles,* 422 U.S. 225, 236 (1975) ("strong public policy" underlies work-product doctrine (internal quotation marks omitted)); *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981) (same).

The *Hickman* Court allowed a very small exception to the general rule that materials created by attorneys in anticipation of litigation are not discoverable. If facts were "essential to the preparation of [an adversary's] case" and are available only through attorney work product, for example because "the witnesses are no longer available or can be reached only with difficulty," the work product was potentially not immune from discovery. 329 U.S. at 511-12. However, because "the general policy" underpinning the work-product doctrine is "so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade [an attorney's] privacy to establish adequate reasons to justify production." *Id.* at 512. Indeed, where an attorney's mental impressions would be revealed, the

Court did "not believe that any showing of necessity can be made." *Id.*

The *Hickman* "work-product doctrine" was later enshrined in the Federal Rules of Civil Procedure. Rule 26(b)(3) provides that "[o]rdinarily, 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 attorneys and agents. Fed. R. Civ. P. 26(b)(3). Courts are required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation," known as "opinion work product." *Id.* at 26(b)(3)(B). However, the court may order otherwise protected work product not containing such mental impressions, commonly referred to as "fact work product," produced if it is "otherwise discoverable under Rule 26(b)(1)" and "the [requesting] party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." *Id.* at 26(b)(3)(A).

2. Privilege Issues Arising From Hatch Waxman Settlements

In this case, the privilege disputes arise against the backdrop of the regulatory framework of the Drug Price Competition and Patent Term Restoration Act, commonly known as the "Hatch-Waxman Act," which governs the interaction between patent protection and generic drugs. Pub. L. No. 98-417, 98 Stat. 1585, as amended, 21 U.S.C. § 355. To obtain FDA approval under Hatch-Waxman, a generic drug manufacturer must file an Abbreviated New Drug Application ("ANDA") showing that the "active ingredient of [its proposed] new drug is the same as that of the listed [or, pioneer] drug." 21 U.S.C. § 355(j)(2)(A)(ii)(I).

If the ANDA filer seeks approval prior to the expiration of any listed patent protecting the pioneer drug, it must make a "Paragraph IV" certification that the patent "is invalid or . . . will not be infringed by the manufacture, use, or sale of the [generic] drug." 21 U.S.C. § 355(j)(2)(A)(vii). An ANDA filing with a Paragraph IV certification is treated as an act of infringement under Hatch-Waxman, which then permits the pioneer drug manufacturer to file a patent infringement suit within 45 days. *See* 35 U.S.C. § 271(e)(2).

Some parties have settled patent infringement suits by pioneer drug manufacturers through agreements that included payments to the generic manufacturer and/or an agreed-upon generic entry date, often after the settlement but before the patent expired (so-called "reverse payment" settlements). *See, e.g.*, *FTC v. Actavis*, 133 S. Ct. 2223, 2229 (2013). By law, any settlement of Hatch-Waxman litigation between a branded and a generic drug manufacturer meeting certain criteria must be reported to the Department of Justice and Federal Trade Commission ("FTC"). Pub. L. No. 108-173, §§ 1112-1118, 117 Stat. 2071, 2462-64. The FTC has claimed that certain of these settlement agreements violate antitrust laws. 133 S. Ct. at 2229-2230. The Court ruled in *Actavis* that although so-called reverse payment settlements are not "presumptively unlawful," "large and unjustified" payments "can bring with [them] the risk of significant anticompetitive effects." *Id.* at 2237. Accordingly, the Court held that reverse payment settlements *can* violate antitrust laws and courts should apply a "rule of reason" analysis to determine whether any anticompetitive effects of the settlement outweigh the precompetitive benefits. *Id.*

As the dissent, authored by Chief Justice Roberts, pointed out, *Actavis's* "rule of reason" standard potentially implicates privileged information. To the extent that a party's motivations in entering a particular settlement agreement are relevant to the antitrust inquiry, "much of the evidence about the parties' motivation may be embedded in legal advice from its attorney, which would presumably be shielded from discovery." *Actavis*, 133 S. Ct. at 2245 (Roberts, C.J., dissenting). This case presents the circumstances that Chief Justice Roberts foretold, but instead of "shield[ing] from discovery" the privileged documents, the D.C. Circuit changed the "opinion work product" and "substantial need" standards to accommodate the FTC's request for them.

B. Factual Background

1. This case concerns the FTC's investigation of two Hatch-Waxman settlements that resolved two patent infringement actions brought by Boehringer against Barr. Those agreements allowed Barr to market and sell two generic pharmaceutical products many months prior to the expiration of Boehringer's patents.

In September 2005, following Barr's filing of an ANDA with a Paragraph IV certification, Boehringer filed a suit against Barr for infringement of Boehringer's patent covering the active ingredient in Mirapex, a drug that treats Parkinson's disease and restless leg syndrome.[1] That suit was consolidated with a similar suit that Boehringer filed against Mylan, another ANDA filer. *See Boehringer Ingelheim Int'l GmbH v. Barr Labs., Inc.*, Civil Action No. 05-700 (D. Del.).

In July 2007, following Barr's filing of another ANDA with a Paragraph IV certification, Boehringer filed a second suit against Barr for infringement of Boehringer's patent covering the composition of Aggrenox, a drug used to lower the risk of stroke in certain individuals. *See Boehringer Ingelheim Int'l GmbH v. Barr Labs., Inc.*, Civil Action No. 07-432 (D. Del.); Pet. App. 31a.

In June 2008, the U.S. District Court for the District of Delaware held the patent covering Mirapex invalid. *Boehringer Ingelheim Int'l GmbH v. Barr Labs., Inc.*, 562 F. Supp. 2d 619 (D. Del. 2008); Pet. App. 31a. Following this ruling, in August 2008, Boehringer and Barr settled both the Mirapex and Aggrenox lawsuits with Barr.

The Aggrenox agreement provides for at least 18 months early generic entry by Barr. *See* Pet. App. 4a. Under the Mirapex settlement, Barr launched a generic of that drug on January 4, 2010. Pet. App. 31a. Boehringer's litigation against Mylan regarding Mirapex continued, however, and Boehringer appealed the court's ruling regarding the Mirapex patent to the Federal Circuit. On January 25, 2010,

[1] Another patent was initially part of the lawsuit, but it expired and was therefore not addressed by the district court.

the Federal Circuit reversed the district court's decision and upheld the validity and enforceability of Boehringer's Mirapex patent. *Boehringer Ingelheim Int'l GmbH v. Barr Labs., Inc.*, 592 F.3d 1340, *reh'g denied*, 603 F.3d 1359 (Fed. Cir. 2010). The effect of that ruling and the prior settlement is that Barr was able to enter the market with a generic product in competition with Boehringer's Mirapex ten months before Boehringer's valid and infringed patent expired.

In connection with the Aggrenox and Mirapex settlements, Boehringer and Duramed, a subsidiary of Barr, entered into a co-promotion agreement under which Duramed would co-promote Aggrenox to women's healthcare professionals. *Id.* The co-promotion agreement requires Duramed to provide sales and marketing support for Aggrenox and market Aggrenox in person to women's healthcare professionals, as well as provide physician call lists, identify thought-leaders in the field of women's healthcare, and introduce Boehringer's sales force to were also intended to assist Boehringer with its planned launch of the drug Flibanserin, a new branded drug treating hypoactive sexual desire disorder, because Boehringer lacked any sales and marketing infrastructure or expertise in the field of women's healthcare. JA-748-750; JA 800. The co-promotion agreement required Boehringer to pay certain specified fees and royalties on Aggrenox sales. Pet. App. 4a.

2. By law, the settlement agreements, including the co-promotion agreement, would be provided to the Department of Justice and FTC for review. *See* Pub. L. No. 108-173, §§ 1112-1118, 117 Stat. 2071, 2462-64.

Thus, unremarkably, as Boehringer contemplated settling the Mirapex and Aggrenox litigation, Boehringer's in-house counsel, who was the chief negotiator of the deal, evaluated the proposed settlement terms to ensure that they were commercially reasonable on their own terms as standalone agreements and therefore could withstand antitrust scrutiny by the FTC. Pet. App. 4a-5a. To that end, Boehringer's in-house counsel directed businesspeople at Boehringer to prepare analyses relating to possible settlement options, including their potential financial impact. *See* Pet. App. 40a-41a. The record was uncontradicted that the analyses were created at the request of counsel under the frameworks and with the inputs provided by counsel for the purpose of assisting counsel in rendering legal advice. Pet. App. 42a. Specifically, Boehringer's counsel testified that she requested such analyses in her capacity as an attorney to help in her legal analysis of possible settlement, including how to settle the lawsuits on commercially reasonable terms that could withstand antitrust scrutiny. *See id.*; Pet. App. 13a n.1; JA772-777; JA-781.

C. The Proceedings Below

1. In 2009, the FTC began an antitrust investigation concerning the Mirapex and Aggrenox settlements. Pet. App. 5a. As part of that investigation, FTC issued a subpoena to Boehringer seeking various documents relating to those settlements. Pet. App. 5a.

Boehringer withheld certain responsive documents pursuant to the work-product privilege, among others.

Pet. App. 5a. For example, although Boehringer produced numerous financial analyses of the proposed settlement created by its businesspeople in the ordinary course of business, it withheld as work product the financial analyses created by Boehringer's businesspeople at the direction of in-house counsel, in the form requested by in-house counsel, for the purpose of providing her client with legal advice regarding whether the proposed settlements would withstand antitrust scrutiny. Pet. App. 42a, 12a, 13a n.1. JA772-777; JA-781.

The FTC moved to compel production of the attorney-directed financial analyses, among other documents. *See* 15 U.S.C. § 49. The dispute was heard by Magistrate Judge John Facciola, to whom the subpoena enforcement action had been referred for all purposes. Pet. App. 30a. The FTC argued that the withheld financial analyses were not work product, or in the alternative that they should be produced because they were "fact work product" for which FTC had shown substantial need and undue hardship. *See* Pet. App. 41a. The FTC argued that it had shown substantial need because the requested documents could reveal anticompetitive intent, which the FTC contended was relevant to its investigation under this Court's recent ruling in *Actavis*. Pet. App. 43a.

Magistrate Judge Facciola upheld Boehringer's claim of work-product privilege over the financial analyses (and nearly all of Boehringer's other claims of work-product privilege) after reviewing the documents *in camera*. Pet. App. 43a. First, he ruled that the analyses were work product because they provided "information [that Boehringer's in-house counsel] needed in order to provide her client . . . with legal advice regarding the potential settlement," and such information "clearly falls within the ambit of the work product doctrine." Pet. App. 42a. He further found "the factual inputs [in the analyses] cannot reasonably be segregated from the analytical outputs," such that "disclosure of any aspect of the financial analyses would necessarily reveal [Boehringer's] attorneys' thought process regarding . . . settlement." Pet. App. 43a-44a. Thus, he concluded, the analyses were "opinion work product" and were not discoverable even upon a showing of "substantial need." *Id.*

However, Magistrate Judge Facciola added that the FTC also had not shown substantial need sufficient to compel the production of fact work product. He wrote that while he was "sympathetic to the FTC's argument that the financial analyses are the only documents that could demonstrate" anticompetitive intent, his *in camera* review revealed that "they cast no light on whether that intendment existed." Pet. App. 45a. He elaborated that there were "no smoking guns contained in these documents," nor were they "in any way evidence of any conspiratorial intent to violate the law." *Id.* at 44a. Put another way, the analyses did "not cast any light on the fundamental legal issue of whether the deal was or was not anti-competitive in intendment or result." *Id.* As a result, Magistrate Judge Facciola refused to order their production. *Id.* However, in one of the few limited exceptions to his general denial of the FTC's motion to compel, the judge ordered that Boehringer produce redacted versions of the cover e-mails transmitting the financial analyses at issue "if the e-mails contain additional, factual work product that can be reasonably excised from any indication of opinion work product." Pet. App. 45a.

2. Pursuant to 28 U.S.C. § 1291, the FTC timely appealed Magistrate Judge Facciola's ruling as to the financial analyses only. Pet. App. 7a. The D.C. Circuit reversed in part.

Although the D.C. Circuit agreed that the financial analyses at issue were work product, Pet. App. 12a, the court held that they were fact work product that the district court could order produced upon a showing of "substantial need" and "undue hardship." Pet. App. 19a.

To constitute opinion work product, the D.C. Circuit wrote, a lawyer needed to have "sharply focused or weeded" the facts contained therein such that they "reveal . . . counsel's legal impressions or their views of the case." Pet. App. 16a. The court ruled that documents containing attorney mental impressions concerning "whether the [settlement] agreements made financial sense" do not reflect such "sharp focus" because such decisions were "a matter of business judgment, not legal counsel." Pet. App. 17a.

Using that standard, the panel held that some (undefined) financial analyses at issue were not opinion work product. Despite the in-house attorney's sworn and uncontradicted testimony that she had requested the analyses at issue for the purpose of giving legal advice, and some for the specific purpose of rendering antitrust compliance advice, the panel found that the "information and frameworks" underlying those analyses reflected only "the lawyer's thoughts relating to financial and business decisions," namely, the financial aspects of the co-promotion agreement. Pet. App. 17a. *See also id.* at 13a, n1 (in connection with argument that the financial analyses are work product, expressly declining to reach "Boehringer's alternative argument that the co-promotion agreement materials are protected because counsel used them to evaluate potential antitrust liability").

The D.C. Circuit did not distinguish the Second Circuit's decision in *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998). In *Adlman*, the Second Circuit ruled that all documents created by attorneys or their agents "because of" litigation were protected work product, regardless of whether they were created "primarily to assist in" a proposed business transaction. *Id.* at 1196-98, 1203. The court found that many attorney analyses—including analyses of the feasibility of settlement—are created for business purposes, but because of litigation, and should remain protected. In the course of its opinion, the *Adlman* court made clear that financial analyses containing attorney mental impressions regarding "the feasibility of reasonable settlement" are just the sort of "informal evaluation of [a lawyer's] case" that should be protected opinion work product. *Id.* at 1199-1200.

Having created a conflict with *Adlman* as to whether the financial analyses were opinion work product, the D.C. Circuit then found that the FTC had shown "substantial need" for at least some of the financial analyses under Federal Rule of Civil Procedure 26(b)(3)(A)(ii). Pet. App. 22a-26a. In doing so, the court created a new standard for "substantial need." It held that a party seeking fact work product shows "substantial need" if it "demonstrates 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." Pet. App. 23a.(quoting *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958)). Under this standard, no heightened showing of relevance is needed to show substantial need. Pet. App. 25a. Any document that was "admissible or could 'give clues as to the existence or location of relevant facts,'" was "relevant" under the new standard. *Id.* The court acknowledged that this definition of "relevance" is "remarkably similar to the relevance standard under Rule 26(b)(1)." *Id.* The court also acknowledged that its refusal to require some heightened showing of relevance before finding a "substantial" "need" for work-product documents is in direct contrast to holdings of the Seventh and Tenth Circuits, as well as a growing number of district courts. Pet. App. 20a, 26a n.4 (*citing, inter alia, Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 977 (7th Cir. 1996); *Nevada v. J-M Mfg. Co.*, 555 F. App'x 782, 785 (10th Cir. 2014)). The court did not acknowledge decisions by the Fourth, Sixth, and Eleventh Circuits that also required a heightened relevance showing to establish a "substantial" "need." *See Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904, 908 (4th Cir. 1978); *United Kingdom v. United States*, 238 F.3d 1312, 1322 (11th Cir. 2001); *Stampley v. State Farm Fire & Cas. Co.*, 23 F. App'x 467, 471 (6th Cir. 2001).

The court acknowledged that Magistrate Judge Facciola had found as fact that the documents contained "no smoking guns" and were "not in any way evidence of any conspiratorial intent to violate the law." Pet. App. 20a, Yet, it nevertheless ruled that because the FTC had shown that the financial analyses at issue were "relevant" (*i.e.* discoverable), not exactly replicated elsewhere, and created near the time of the conduct at issue (thus providing a "special circumstance" explaining why the FTC had not created the analyses itself), the FTC had shown "substantial need" for them. Pet. App. 23a-25a.

Indeed, because the dispute arose in the context of an investigatory subpoena, the D.C. Circuit went a step further. It held that in the investigatory context, the *agency itself* can determine whether a document is "relevant" such that its need to breach the target's work product protection is "substantial." Pet. App. 25a. The court reasoned that when an agency issues an investigatory subpoena, "the district court is not free to speculate about the possible charges that might be included in a future complaint, and then to determine the relevance of the subpoena requests by reference to those hypothetical charges." Pet. App. 27a (*quoting FTC v. Texaco* 555 F.2d 862 (D.C. Cir. 1976) (en banc)). Accordingly, the D.C. Circuit reasoned, whatever documents the FTC felt were relevant to its investigation were relevant, and the FTC had "substantial need" for them so long as they were "unique" and the FTC had an explanation for why it did not re-create them itself. Pet. App. 27a-29a.

Finally, the D.C. Circuit concluded that Magistrate Judge Facciola had necessarily ruled FTC had shown "undue hardship" in obtaining the substantial equivalent of at least some of the financial analyses at issue. Pet. App. 27a-29a. That conclusion was based on the single sentence in Magistrate Judge Facciola's opinion that required Boehringer to produce certain cover e-mails related to the financial analyses at issue if factual material could be separated from the opinion work product contained within them. *Id.*

Accordingly, the D.C. Circuit remanded the case to the district court to "revisit the financial documents in light of the correct legal standards, as clarified above." Pet. App. 28a-29a.

This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari in this case because it presents two separate circuit splits on privilege issues that are critically important and recur on a near-daily basis throughout the lower courts. Indeed, should the erroneously strict standard for what constitutes "opinion work product" and the erroneously lax standard for what constitutes "substantial need" espoused in the opinion below remain unaddressed, there is sure to be confusion in the lower courts regarding the proper scope of work product protection. That kind of uncertainty will inevitably lead to a general weakening of the work product protection this Court identified decades ago as critical to the legal profession. Moreover, review is important here because the decision below is erroneous and contrary to the Federal Rules of Civil Procedure and this Court's precedent.

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT AND ERRONEOUSLY NARROWS THE SCOPE OF OPINION WORK PRODUCT PROTECTION

Certiorari should be granted because the courts of appeals are split on 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. *See* Sup. Ct. R. 10(a). The D.C. Circuit has held that financial analyses of potential settlement are not opinion work product if they reflect "the lawyer's thoughts relating to financial and business decisions." Pet. App. 17a. By contrast, the Second Circuit has stated that a financial analysis that considers "the feasibility of reasonable settlement" terms is exactly the sort of analysis that work product was designed to protect, regardless of whether the "document's purpose is business-related." *Adlman*, 134 F.3d at 1200. The Second Circuit has it right: it is critical to protect attorney mental impressions regarding the feasibility and expected cost of settlement, regardless of whether those mental impressions are recorded for business purposes.

This Court's immediate intervention is warranted to remediate this conflict between two of the most often-cited circuits on privilege issues. *See, e.g.*, *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1301-02 (Fed. Cir. 2006) (citing both D.C. Circuit and *Adlman* for standards for and policy behind work product);

Baker v. Gen. Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000) (citing D.C. Circuit for standards for substantial need showing); *Maine v. U.S. Dep't of Interior*, 298 F.3d 60, 68 (1st Cir. 2002) (citing *Adlman* regarding public policy behind work product doctrine); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997) (citing both D.C. Circuit and Second Circuit for standards for waiver of work product); *Frontier Refining, Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 704 n.12 (10th Cir. 1998) (citing, *inter alia*, a D.C. Circuit case regarding justification necessary to overcome opinion work product protection).

A. The Circuits Are Split Regarding Whether Attorney Mental Impressions Concerning a Settlement's Commercial Feasibility Are Opinion Work Product

1. In *Adlman*, the Second Circuit ruled, in connection with its holding that work product protection applies to all documents created "because of" litigation, that documents that "directly or indirectly" reveal "mental impressions or opinions of the attorney who prepared them" should remain protected even if those "materials serve other functions apart from litigation," such as business functions. 134 F.3d at 1202 (*citing* Note, *The Work Product Doctrine: Why Have an Ordinary Course of Business Exception?*, 1988 Colum. Bus. L. Rev. 587, 604 (1988)). The court was specific that protected mental impressions included the attorney's analyses of "the feasibility of reasonable settlement" terms. *Adlman,* 134 F.3d at 1200. The court expressly rejected the idea that "documents assessing the . . . likelihood of settlement and its expected cost" should not be protected if "prepared for a business purpose rather than to assist in litigation," finding such result completely "unwarranted." *Adlman,* 134 F.3d at 1202. *See also NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 128 (N.D.N.Y. 2007) ("The crux being that a document which has been prepared because of the prospect of litigation will not lose its protection under the work product doctrine, even though it may assist in business decisions."); *Fair Isaac Corp. v. Experian Info. Solutions Inc.*, Case No. 06-cv-4112, Mem. Order at 15 (D. Minn. Nov. 3, 2008) (Dkt. No. 431) ("[t]he fact that the [litigation] settlement contemplated a business resolution . . . does not convert the analyses of the solution into a routine or ordinary business decision").

As the *Adlman* court explained, any rule that limited protection of attorney mental impressions regarding the expected cost of settlement simply because those impressions were recorded "to assist in a business decision rather than to assist in the conduct of the litigation" would have undesirable results. *Adlman*, 134 F.3d at 1202. For example, settlement analyses might be created to determine whether it made financial sense to undertake a transaction that could result in litigation. *Id.* at 1999-1200. If such analyses were freely discoverable, attorneys would likely "declin[e] to make such analys[e]s or scrimp[] on candor and completeness to avoid prejudicing [the client's] litigation prospects," thus exposing their clients to "ill-informed decisionmaking." *Id.* at 1200. Alternately, the attorney could request the analysis and risk "serious prejudice to the company's prospects in the litigation" if the analysis were later produced in discovery. *Id.*

The court found the choice "untenable," and noted that "nothing in the policies underlying the work-product doctrine or the text of the Rule itself" would "justify subjecting a litigant to this array of undesirable choices." *Id.* The court thus concluded, "[t]he fact that a document's purpose is business-related appears irrelevant to the question [of] whether it should be protected under Rule 26(b)(3)." *Id.*

2. In stark contrast, in the case below, although the uncontradicted testimony established that the financial analyses at issue were directed by counsel to analyze potential settlement terms and advise her client regarding the settlement, the court determined that the analyses were not protected opinion work product under Rule 26(b)(3) because the analyses reflected "business judgment, not legal counsel." Put another way, the mental impressions contained therein concerned the "counsel's general interest in the financials of" the proposed settlement and such mental impressions were not protected. Pet. App. 17a.

Although the D.C. Circuit paid lip service to the idea that the mental impressions of attorneys regarding settlement matters were generally immune from discovery, Pet. App. 14a, it found that the district court had "applied an overly broad definition of opinion work product." *Id.* According to the court, attorney mental impressions regarding "whether the [settlement] agreements made financial sense" do not receive protection as "opinion work product." Pet. App. 17a. The court found that at least some of the financial analyses at issue were "the sort of financial analyses one would expect a company exercising due diligence to prepare when contemplating settlement options" and reflected simply "the lawyer's thoughts relating to financial and business decisions."[2] Pet. App. 17a. Such analyses, the court held, should not be treated as "opinion work product." *Id.*

Accordingly, there is a sharp conflict between the D.C. Circuit and the Second Circuit regarding whether an attorney's analyses of potential settlement terms should be considered "opinion work product" if the analysis contains mental impressions concerning a litigation-related business decision, such as, in this case, whether to settle litigation in the first instance. The Second Circuit has expressly noted that such analyses would be in the heartland of mental impressions protected by *Hickman,* while the D.C. Circuit has held that they should be considered *business* analyses as opposed to *legal* analyses and protected as fact work product only. The Court should accept review to resolve this circuit split.

B. Attorney Mental Impressions Regarding the Expected Cost of a Settlement Are Opinion Work Product

1. The Second Circuit had it right in *Adlman*: under Rule 26(b)(3), attorney mental impressions regarding the financial implications of possible settlement terms should be protected regardless of whether they were related to a business decision. Both *Hickman* and Federal Rules of Civil Procedure

[2] The panel's conclusion in this regard is ironic, in that the panel had previously expressly declined to consider whether certain of the analyses at issue were "protected because counsel used them to evaluate potential antitrust liability." Pet. App. 13a n.1.

require courts to "protect against disclosure of" *all* "mental impressions . . . of a party's attorney . . . concerning the litigation," including settlement. Fed. R. Civ. P. 26(b)(3)(B); *Hickman,* 329 U.S. at 511. Neither *Hickman* nor Rule 26 qualifies that statement to exclude attorney mental impressions relevant to business purposes or decisions.

2. The policy reasons behind the *Adlman* court's decisions are also sound, and the D.C. Circuit erred by ignoring them. Evaluating potential settlement terms, whether for business reasons or otherwise, is part of each party's "informal evaluation of its case"—the very sort of evaluation that attorneys should be "encouraged to prepare independently." *Adlman,* 134 F.3d at 1999. The *Adlman* court saw that it would "oddly undermine [Rule 26(b)(3)'s] purposes if [settlement analyses] were excluded from protection merely because they were prepared to assist in the making of a business decision[.]" *Id.* Whether these mental impressions about litigation were recorded for business purposes or litigation purposes, they should remain protected, because they will not be created at all if an attorney fears that his adversary could discover them in future litigation.

The D.C. Circuit's opinion, on the other hand, holds that mental impressions gleaned from a financial analysis of a potential settlement, created at the direction of counsel and in the form requested by counsel, are not protected because they reveal only "counsel's general interest in the financials of the deal." Pet. App. 17a. That holding leaves in-house counsel with the very "untenable choice" when negotiating a settlement that *Adlman* sought to avoid. 134 F.3d at 1200. Attorneys must either provide ill-informed advice regarding business decisions or risk a substantial disadvantage if their settlement analyses are later requested in litigation.

Indeed, if allowed to stand, the opinion could have far-reaching consequences. Any rule that does not protect attorney mental impressions relating to "business" decisions will likely impede corporate compliance in the long term. That is because ideally, in-house counsel would seek out certain key financial facts and projections from businesspeople to determine if proposed transactions are compliant with any variety of laws and regulations. In-house counsel might also consider whether a transaction that is actually compliant might *appear* non-compliant to a regulator, and either take steps to dispel the appearance of impropriety or to structure the transaction in the most defensible manner possible. Yet, if in-house counsel knows that such analyses of the financial underpinnings of the transaction—which by design might reveal potential non-compliance—could be discovered and used against the company if a court later determines the analysis was made for "business" purposes, counsel will naturally be hesitant to ever ask businesspeople to memorialize or synthesize specific financial figures. In that event, the attorney's legal advice—and the company's compliance—would likely suffer. Even if an attorney did ask for such an analysis, and that analysis is later discovered by the government during an investigation, the businesspeoples' respect and trust in their legal counsel could be greatly eroded. That, in turn, would also likely lead to less compliance in the long term.

This is the problem the *Adlman* and *Hickman* courts foresaw. *See Hickman*, 329 U.S. at 511 (absent strong work-product protection, "much of what is now put down in writing would remain unwritten"). The D.C. Circuit was wrong to hold that attorney mental impressions that happen to be embedded within a financial analysis of potential settlement are not "opinion work product" worthy of protection under Rule 26(b)(3)(B).

II. THE DECISION BELOW CONFLICTS WITH SEVERAL OTHER CIRCUITS AND ERRONEOUSLY HOLDS THAT NO HEIGHTENED RELEVANCE IS REQUIRED TO SHOW "SUBSTANTIAL NEED"

A. The Circuits Are Split Regarding Whether a Party Can Demonstrate "Substantial Need" For a Document With No Heightened Relevance to the Dispute

The opinion below also created a second circuit split. The D.C. Circuit held that a party may show "substantial need" sufficient to override work product without showing that the requested document is particularly probative of the matter at hand. However, the Fourth, Sixth, Seventh, Tenth, and Eleventh Circuits, as well as a variety of district courts, have held that to establish "substantial need" for work product, a party must show that the work product has some sort of heightened probative value beyond mere relevance. *Logan*, 96 F.3d at 977; *J-M Mfg. Co.*, 555 F. App'x at 785; *United Kingdom*, 238 F.3d at 1322; *Stampley*, 23 F. App'x at 471; *Belcher*, 588 F.2d at 908.

1. The cases from several circuits are clear that fact work product cannot be discovered unless the party seeking it shows that it has some special significance to the case. That makes perfect sense. There is no true "need" for work product that is only tangentially relevant to a dispute (or at least not a "need" that is "substantial").

The D.C. Circuit acknowledged that its new "substantial need" standard is in direct conflict with *Logan*, 96 F.3d at 977. In that case, a plaintiff alleging bad faith denial of a worker's compensation claim sought discovery of the insurance company's entire claims file, but the company withheld as work product portions of the file created during litigation with plaintiff. *Id.* at 975. Plaintiff moved to compel production of the documents, arguing among other things that he had shown substantial need for them because the file was potentially the only evidence of bad faith, which was critical to his claim. *Id.* at 977. The Seventh Circuit acknowledged that documents revealing the "strategy, mental impressions and opinion of the insurer's agents considering the handling of the claim are directly at issue." *Logan*, 96 F.3d at 977 (*quoting Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 576-78 (9th Cir. 1992) (internal citations and punctuation marks omitted)). But the court ruled that the plaintiff was required to "demonstrate some likelihood or probability that the documents sought may contain evidence of bad faith" to show substantial need. *Id.* Because the district court had conducted an *in camera* review of the (admittedly relevant) documents and found that they did not support an argument of bad faith, the

Seventh Circuit held that plaintiff had not shown "substantial need" for the documents. *Id.*

The D.C. Circuit also attempted to distinguish the Tenth Circuit's unpublished opinion in *J-M Manufacturing Co.*, 555 F. App'x at 785. Pet. App. 26a n.4. In *J-M Manufacturing*, the government ordered certain tests of the defendant's allegedly defective product while determining whether it should intervene in a *qui tam* action. 555 F. App'x at 784. After the government declined to intervene, the defendant subpoenaed the laboratory that had conducted the tests for the results. *Id.* The United States opposed, asserting work-product privilege, and the district court upheld the objection on the ground that the defendant had not shown substantial need. *Id.* The appellate court affirmed. *Id.*

The Tenth Circuit agreed that the tests were directly relevant to the plaintiff's fraud theory. *Id.* at 784. However, the court noted that substantial need can only be shown 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 (*quoting Nat'l Congress For Puerto Rican Rights v. City of New York*, 194 F.R.D. 105, 110 (S.D.N.Y. 2000)). The court found that because the defendant had not carried its burden of showing that the test results had "great probative value on contested issues," it had not shown substantial need. *Id.*

The Eleventh Circuit has similarly held that fact work product must not be merely relevant, but necessary, before a party can show "substantial need" for it. In *United Kingdom v. United States*, 238 F.3d at 1322, the United Kingdom sought to compel certain documents from United States authorities for use in prosecuting suspects whose co-conspirators were being investigated by the United States. Although the court agreed that the requested documents were relevant to the British prosecution, *id.* at 1319, it nevertheless held that materials over which the United States had claimed work-product protection need not be disclosed because the United Kingdom had not shown substantial need for them. The court stated that a mere finding of relevance "does not overcome a valid claim of work product privilege," and cited *Hickman* to hold that a "party must show that production of the material is not merely relevant, but also necessary" to overcome work-product protection. *Id.* at 1322.

The Fourth and Sixth Circuits have also indicated that under Rule 26(b)(3), a document must have a heightened relevance to the case before an adversary can show "substantial need" for it. In *Belcher*, 588 F.2d at 908, the court considered an interlocutory appeal of a district court's grant of permission under Federal Rule of Civil Procedure 34 for a plaintiff's expert to inspect the defendant's plant as part of an employment discrimination lawsuit. In considering under what circumstances such an inspection would be permissible, the court analogized such requests to requests for trial preparation materials under Rule 26(b)(3). The court noted that although as a "general policy" discovery may be had by "simply showing the relevancy of the desired discovery to the cause of action," "when the desired discovery concerns materials prepared in anticipation of trial, the moving party must show that he has substantial need of the materials." *Belcher*, 588 F.2d 908. In other words, "substantial need" required more than mere relevance. *See also Stampley,* 23 F. App'x at 471 (party seeking discovery must always "show that documents are relevant," but if the materials were created in anticipation of litigation, the party must *also* show "substantial need.").

Several district courts in other circuits have reached similar conclusions. *See, e.g.*, *K.W. Muth Co. v. Bing-Lear Mfg. Group, L.L.C.*, 219 F.R.D. 554, 575 (E.D. Mich. 2003) (noting that "need" under Rule 26(b)(3) requires "some 'plus' factor" beyond relevance); *Fletcher v. Union Pac. R.R. Co.*, 194 F.R.D. 666, 672 (S.D. Cal. 2000) (to show substantial need, requesting party must show that the work product is "essential to proving [the requestor's] prima facie case"); *Gucci Am., Inc. v. Guess?, Inc.*, 271 F.R.D. 58, 74-75 (S.D.N.Y. 2010) (substantial need shown 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" (*quoting Nat'l Congress for Puerto Rican Rights*, 194 F.R.D. at 110); *Davis v. Emery Air Freight Corp.*, 212 F.R.D. 432, 436 (D. Me. 2003) ("the fact that the documents sought might be relevant to [plaintiff's] claims is not enough under Rule 26(b)(3)."); *Bradley v. Wal–Mart Stores, Inc.*, 196 F.R.D. 557, 558 (E.D. Mo. 2000) (there can be no substantial need for materials that are not essential to the requesting party's prima facie case); *Martin v. Monfort, Inc.*, 150 F.R.D. 172 (D. Colo. 1993) (finding no substantial need despite assuming relevance of requested documents);

Almaguer v. Chicago, R.I. & P. R.R. Co., 55 F.R.D. 147, 148-49 (D. Neb. 1972) ("When lawyers have prepared or obtained the materials for trial, all courts require more than relevance; so much is clearly commanded by *Hickman*[.]"); *see also* David M. Greenwald, *et al.*, *Testimonial Privileges* § 2:24 (3d ed.) ("In order to demonstrate substantial need sufficient to overcome the work product protection, a party must show more than the mere relevancy of the work product in question." (citing district court cases in support)).

2. These cases are in direct conflict with the D.C. Circuit opinion below. The D.C. Circuit attempted to distinguish *Logan, J-M Manufacturing,* and certain district court cases that required a heightened showing of relevance substantial need. Admittedly in contrast to those cases, the D.C. Circuit held that to show substantial need, no "heightened showing of a document's relevance or probative value" was required. Pet. App. 20a. All that a party is required to do to obtain its adversary's fact work product in discovery, the court held, is show "that the materials are relevant to the case [under the standard set forth in Rule 26(a)(1)], 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." Pet. App. 23a (internal quotation marks omitted).

The Court's intervention is also needed to resolve this acknowledged circuit split.

B. The D.C. Circuit's Required Showing for "Substantial Need" Is Too Lax

Although the D.C. Circuit claimed that it was stemming the tide of what it perceived to be an unnecessary "ratcheting up" of the substantial need standard in Rule 26(b)(3)(A)(ii), Pet. App. 26a n.4, in fact, the D.C. Circuit's opinion erroneously ratcheted *down* the standard, particularly in the investigative context. The Fourth, Sixth, Seventh, Tenth and Eleventh Circuits correctly followed the Federal Rules of Civil Procedure by requiring heightened relevance before finding a "substantial" "need" to discover fact work product. This Court should grant certiorari to affirm their interpretation of the "substantial need" standard and reverse the D.C. Circuit's.

1. Rule 26(b)(3) sets forth the circumstances under which fact work product may be discoverable. Subsection (i) sets a threshold requirement: a document must be "otherwise discoverable under Rule 26(b)(1)" (*i.e.* relevant). Fed. R. Civ. P. 26(b)(3)(A)(i). Subsection (ii) then provides that the requesting party must *also* show "substantial need for the materials to prepare its case" *and* that the party "cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii). If mere relevance were sufficient to establish "substantial need," Rule 26(b)(3)(A)(i) would be entirely superfluous.

Indeed, by its own terms, the substantial need standard requires a "need" that is "substantial." Thus, the Federal Rules clearly dictate that to show substantial need, a party must show that the documents it seeks have some particular significance to the case.

To the extent the rule is at all unclear, the Advisory Committee notes eliminate any doubt. When the committee first enacted Rule 26(b)(3), it specified that substantial need requires "more than relevance; so much is clearly commanded by *Hickman*." Fed. R. Civ. P. 26, 1970 advisory committee note to subdivision (b)(3). *See also Hickman*, 329 U.S. at 511 (party seeking disclosure has burden of establishing that the documents are "essential to the preparation of . . . [its] case"); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 557-58 (2d Cir. 1967) (interpreting *Hickman* prior to enactment of Rule 26(b)(3) to require showing that document is "essential to the preparation of [the requesting party's] case").

It is no surprise then, that nearly every court and commentator to consider the issue of what constitutes "substantial need" have determined that a heightened showing of relevance is required. *See, e.g.*, 8 C. WRIGHT & A. MILLER, FED. PRAC. & PROC. CIV. § 2025 (3d ed. 2014) ("substantial need" showing under Rule 26(b)(3) requires "something more than relevancy sufficient to satisfy Rule 26(b)(1)."). While the D.C. Circuit considered this as an unacceptable "ratcheting up" of the standard for substantial need, Pet. App. 26a n.4 in fact, it is the only rational interpretation of the rule.

2. By contrast, the D.C. Circuit held that a party can show "substantial need" by showing that a document is merely relevant under Rule 26(a)(1), so long as the party can also show that the document is "unique" and created under "special circumstances" that explain why the requesting party is not able to re-create the requested document itself. Pet. App. 23a. The D.C. Circuit's standard for "substantial need" is not supported by the language of Rule 26(b)(3), nor is it advisable as a policy matter. Such a relaxed standard would swallow the "substantial need" requirement whole.

The second two prongs of the D.C. Circuit's "substantial need" standard, that work product have "unique value" and be created under "special circumstances" excusing the requesting party from re-creating the document on its own, are similar to the showing required by Rule 26(b)(3)(A)'s second, purportedly distinct, requirement for discovery of fact work product: that it would cause the requesting party "undue hardship" to "obtain [the] substantial equivalent [of the requested document] by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii). Had the drafters of the Federal Rule intended fact work product to be discoverable on a showing of relevance and undue hardship, there would have been no need to create a "substantial need" requirement at all.

Indeed, as a practical matter, documents containing fact work-product are almost by definition "unique." They would not exist if an attorney had not specifically requested them or written them to assist him or her in rendering legal advice. Had a document memorializing facts been created in the ordinary course of business in the form the attorney needed, the attorney likely would not have re-created the same information. Thus, the qualification that fact work-product be "unique" before a party can show "substantial need" for it provides no meaningful additional protection for fact work product.

Moreover, a substantial amount of attorney work product created by attorneys in an effort to increase compliance would fall into the "special circumstances" category, at least as the opinion below interprets it, because it would by nature have been created before the company is being investigated (or because the company is preparing to take steps that will likely result in investigation or litigation). If such contemporaneously created fact work product is freely discoverable so long as it is "relevant" and "unique," counsel will very understandably be unwilling to create it in the first instance. In short, the D.C. Circuit's rule on fact work product will make it infinitely harder for lawyers to effectively promote compliance.

3. The D.C. Circuit compounded the negative practical effects of its error by ruling that when the government conducts investigations, it can determine for itself what documents are "relevant," and thus for which documents its "need" is "substantial." Should the D.C. Circuit's ruling stand, any investigative agency could establish substantial need for any document otherwise protected as fact work product simply by declaring that the document could provide information relevant to some unnamed aspect of its investigation and was created before the investigation started. This would be true even where, as here, the district court determined that the document *does not actually provide* the information the government claims it is seeking. Pet. App. 27a ("If the District Court is correct that the contested materials reveal an absence of conspiratorial intent, then the materials nevertheless may be helpful to the FTC in determining whether to issue a complaint in the first place.”). That would virtually eliminate the substantial need requirement in the investigative context. Work-product protection should not be so weakened, particularly not in the D.C. Circuit where federal investigative subpoenas are served every day by all manner of federal agencies. This Court’s prompt intervention is needed.

III. THE PRIVILEGE ISSUES PRESENTED BY THIS CASE ARE IMPORTANT QUESTIONS OF FEDERAL LAW THAT WILL RECUR REPEATEDLY IN THE LOWER COURTS

Certiorari should also be granted because the questions presented are “important question[s] of federal law that ha[ve] not been, but should be, settled by this Court.” Sup. Ct. R. 10(c). The privilege issues presented by this case will recur with great regularity throughout the lower courts and the Court’s guidance is necessary to ensure that disputes are resolved uniformly and fairly. Moreover, as this Court recognized decades ago, work product protection is critical to the proper functioning of the country’s legal system, and any confusion surrounding the proper scope of that privilege will inevitably lead to the sort of “sharp practices” and degradation of attorney morale and advice that work product protection was originally created to avoid. *See Hickman*, 329 U.S. 495.

1. Although the Rule 26 standards for protecting work product might seem clear in theory, applying them has proved exceptionally vexing in practice. In fact, the scope of work-product protection is often cited as "the most frequently litigated discovery issue" in federal courts. Jeff A. Anderson *et al.*, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 763 (1983) (*citing* 4 J. Moore & J. Lucas, MOORE'S FEDERAL PRACTICE ¶ 26.63 (2d ed. 1983)); 8 C. WRIGHT & A. MILLER, FED. PRAC. & PROC. CIV. § 2023 ("[A] comprehensive study in 1983 reported that 'work product protection is the most frequently litigated discovery issue.'"); Charles P. Cercone, *The War Against Work Product Abuse : Exposing the Legal Alchemy of Document Compilations As Work Product*, 64 U. PITT. L. REV. 639, 651 (2003) (citing MOORE'S FEDERAL PRACTICE ¶ 26.14 at 26-285 (2d ed. 1994)) ("Many commentators surveying discovery disputes that produce written opinions have concluded that work product claims are the most frequently litigated discovery disputes."). That claim is difficult to independently verify, but legal databases certainly lend it credence. According to the Westlaw database, *Hickman v. Taylor* has been cited more than 4,500 times in federal court opinions, and more than 14,500 times by litigants in motions, memoranda, and affidavits. According to the same database, it has been cited nearly 3,000 times by secondary sources.

Although decades have followed *Hickman* and the enactment of Rule 26(b)(3), the litigation on the subject of work-product protection shows no signs of slowing. Indeed, Edna Epstein, author of a leading privilege treatise, estimates that the volume of privilege disputes are *increasing* as time passes. She writes:

> Today, there is hardly a case litigated, at least in the federal courts, where the issue of privilege does [not] recur repeatedly, requiring untold amounts of

> lawyer resources to review for privileges and judicial time to determine whether assertions of privilege and work-product protection are correctly asserted. A LEXIS search of the federal courts reveals almost 300 opinions each month dealing with an issue that a quarter of a century ago was rare indeed.

Edna Selan Epstein, *The Attorney-Client Privilege & the Work Product Doctrine* (5th ed. 2012). Work product disputes are a large component of those privilege disputes. In the last twelve months, 229 cases cited Rule 26(b)(3), 542 cases cited Rule 26 and mention the phrase "work product," and 256 cases cited *Hickman v. Taylor*.

2. Despite (or perhaps because of) all this litigation, the standards regarding the level of protection for documents containing attorney mental impressions "continues to be hotly contested." Anderson, *supra*, 68 CORNELL L. REV. at 821. *See also* Michele D. Beardslee, *Taking the Business Out of Work Product*, 79 FORDHAM L. REV. 1869, 1873, 1922-29 (2011) (analyzing recurring disputes regarding protection for work product created in a business context, including "(the ever elusive) distinction between business and law" in work product disputes involving in-house counsel). The parameters of the "substantial need" requirement also remain largely unclear to many courts. Pet. App. 21a ("[t]he meaning of Rule 26(b)(3)'s 'substantial need' requirement is not clear from the plain language of the rule"); *A.I.A. Holdings, S.A. v. Lehman Bros.*, No. 97 Civ. 4978, 2000 WL 1639417 at *2 (S.D.N.Y. Nov. 1, 2000) ("The law is not well developed as to what constitutes 'substantial need[.]'"). In fact, at least one commentator believes that the "substantial need" requirement is the "least uniformly applied by the courts." Anderson, *supra*, 68 CORNELL L. REV. at 802.

It is inevitable that with such uncertainty surrounding the work product standards, the protection will erode, bringing about exactly the "sharp practices" and poor advice that *Hickman* sought to avoid. As this Court once put it, "[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*, 449 U.S. at 393. Accordingly, this Court's intervention is needed to provide additional guidance as to the scope of work product protection if the protection is to serve the functions the Court and drafters of the Federal Rules intended.

CONCLUSION

The petition for certiorari should be granted and the decision below reversed.

Respectfully submitted,

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