No. 09-750

IN THE
Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the First Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Daniel J. Popeo
Cory L. Andrews*
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
**Counsel of Record*

Date: January 27, 2010

QUESTION PRESENTED

Whether the work-product privilege, recognized by this Court in *Hickman v. Taylor* and codified in Federal Rule of Civil Procedure 26(b)(3), is limited solely to documents that are prepared *for use* in litigation.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Rules:

Miscellaneous:

Page(s)

BRIEF OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF regularly publishes monographs and other publications on these and related topics. In particular, WLF has regularly appeared before this and numerous other federal and state courts to advocate in favor of corporate rights of privacy and confidentiality. *See, e.g., Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981); *Estate of Frankl v. Goodyear Tire & Rubber* Co., 853 A.2d 880 (N.J. 2004).

WLF agrees with Petitioner that the appeals court's refusal below to extend work-product protection to Textron's tax accrual work papers is an error that threatens to eviscerate the venerable work-product privilege, a staple of American legal culture and practice for over 60 years. WLF is further concerned that the decision below severely undercuts the important policy goals undergirding the work-product doctrine first announced by this Court in *Hickman v. Taylor*, especially

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for Respondent with notice of intent to file.

the need to protect attorneys' work (and their thought processes) from being invaded by adverse parties. If allowed to stand, the First Circuit's *en banc* opinion will have a significant chilling effect on a corporate counsel's ability to prepare candid legal assessments of its client's position in anticipation of litigation–not only in the specific, tax-related context of this case, but well beyond.

WLF has no direct interest, financial or otherwise, in the outcome of this case. WLF submits this brief solely to further the public interest in preserving the important privacy protections afforded to corporations and other parties by the work-product privilege. All parties have consented to the fling of this brief, and written letters of consent have been lodged with the Court.

STATEMENT OF THE CASE

This case raises important issues about the continued viability of the work-product doctrine in the First Circuit, following that circuit's *en banc* reversal of the district court's finding that Petitioner's tax accrual work papers were created in anticipation of litigation and therefore protected against disclosure as confidential work product.

Petitioner Textron Inc. (Textron), based in Providence, Rhode Island, is a publicly traded corporation with several subsidiaries, including Cessna Aircraft and Bell Helicopter. With a global presence in some 39 countries, Textron employs approximately 37,000 people worldwide. As one of the nation's largest corporations, Textron's tax returns are routinely audited. In fact, it is undisputed that the IRS audits every Textron tax return in multi-year cycles. Pet. App.

at 50a. During the relevant period, the IRS permanently maintained audit staff onsite at Textron and assigned approximately 20 employees to audit Textron's tax returns. Pet. Br. at 4. In seven of its past eight audit cycles since 1980, Textron has appealed disputed tax matters to the IRS Appeals Board. Pet. App. at 91a. Three of these disputes ultimately resulted in litigation. *Id.*

In 2003, the IRS conducted an audit of Textron's corporate tax liability for the years 1998-2001. *Id.* at 4a. In connection with that audit, the IRS issued a request, followed by an administrative summons, for Textron's 2001 tax accrual work papers. *Id.* at 91a-92a. Although Textron had produced several thousand pages of documents in response to the IRS audit, it withheld as privileged work product its tax accrual papers, which were prepared by its in-house lawyers. *Id.* at 92a. Specifically, these work papers comprised: (1) a spreadsheet containing (i) a list of issues where the tax laws were vague and possibly subject to challenge by the IRS, (ii) percentage estimates of Textron's likelihood of prevailing on these issues in litigation, and (iii) the dollar amount of tax reserves needed for Textron's potential tax liabilities if its legal positions were unsuccessful; and (2) backup work papers containing draft spreadsheets, notes, and internal memoranda from in-house attorneys providing their legal opinions on uncertain items and percentage estimates. *Id.* at 92a-93a.

When Textron refused to relinquish its work papers, the government filed a petition to enforce the summons in the United States District Court for the District of Rhode Island. *Id.* at 89a. By its own admission, the government sought Textron's work papers to obtain a "roadmap" for evaluating Textron's

tax return, since such documents would "identify weak spots" and allow the government to know "exactly how much Textron should be willing to spend to settle each item." *Id.* at 31a. As it had all along, Textron contended that the documents were protected against disclosure by the work-product privilege, which was first articulated by this Court in *Hickman v. Taylor* and later partially codified as Federal Rule of Civil Procedure 26(b)(3). At an evidentiary hearing, the head of Textron's tax department testified that an important purpose of the documents was to assist Textron in making litigation or settlement decisions concerning the tax treatment of specified items. Pet. Br. at 6. No evidence was submitted to rebut this testimony.

In light of Textron's long history of audits, appeals, and repeated litigation with the IRS, the district court found Textron's anticipation of litigation to be well-founded, concluding that Textron's tax accrual work papers were protected work product under *Hickman v. Taylor* and Rule 26(b)(3). Pet. App. at 105a-118a. In denying the government's petition, the district court determined that the requested work papers "would not have been prepared at all 'but for' the fact that Textron anticipated the possibility of litigation with the IRS." *Id.* at 108a. The district court further held that the government had failed to carry its burden of demonstrating a "substantial need" for ordinary work product, let alone the heightened burden applicable to Textron's tax accrual work papers, which the court identified as opinion work product. *Id.* at 117a-118a. "While the opinions and conclusions of Textron's counsel and tax advisers might provide the IRS with insight into Textron's negotiating position and/or litigation strategy," the district court concluded, "they have little bearing on the determination of Textron's tax liability." *Id. at* 118a.

The government appealed, and a divided panel of the court of appeals initially affirmed the district court's decision, agreeing that the documents in question were protected by the work-product privilege. *Id.* at 47a-88a. Sitting *en banc*, however, the court of appeals granted the government's petition for rehearing, vacated the panel decision, and requested additional briefing from the parties. By a 3-2 majority, the *en banc* court reversed, concluding that the documents sought were not entitled to work-product protection because they had not been "prepared for use in possible litigation." *Id.* at 1a-46a.

Finding "no evidence in this case that the work papers were prepared for . . . use [in litigation] or would in fact serve any useful purpose for Textron in conducting litigation if it arose," *id.* at 18a-19a, the majority emphasized that "[f]rom the outset, the focus of work product protection has been on material prepared *for use* in litigation." *Id.* at 9a (emphasis added). Contrary to the express factual finding of the district court, the appeals court announced that Textron's work papers had been created primarily for a business purpose, not for future litigation. Insisting that "[e]very lawyer who tries cases knows the touch and feel of materials prepared for a current or possible . . . law suit," the court concluded that "[a]ny experienced litigator would describe the tax accrual work papers as tax documents and not as case preparation materials." *Id.* at 15a-17a.

In a lengthy dissent, Judge Torruella, joined by Judge Lipez, criticized the majority for "contraven[ing] m[any] of the principles underlying the work product doctrine." *Id.* at 22a. Recognizing that this case "squarely implicated" the policy rationales for the work-

product doctrine announced in *Hickman*, Judge Torruella reminded the majority that the documents in question "contain counsel's ultimate impression of the value of the case," which are "exactly the sort of mental impressions about the case that *Hickman* sought to protect." *Id.* at 31a. In light of these strong policy rationales, he saw no legal basis for imposing a rule under which an attorney's assessment of the likely outcome of litigation must become available to his adversary merely because the documents also were created for a parallel business purpose. Quoting with approval the Second Circuit's opinion in *United States v. Adlman*, which recognized work-product protection under nearly identical facts, Judge Torruella echoed that "the policies underlying the work-product doctrine suggest strongly that work-product protection should not be denied to a document that analyzes expected litigation merely because it is prepared to assist in a business decision." *Id.* at 30a. Chastising the majority for ignoring the important policy implications announced in *Hickman*, Judge Torruella concluded that "it is clear that the rationales underlying the work-product doctrine apply to documents prepared in anticipation of litigation, even if they are not also for use at trial." *Id.* at 31a.

Subsequently, the court of appeals granted a stay pending Textron's petition for certiorari to this Court. *Id.* at 119a-120a. In granting the stay request, the court of appeals acknowledged that "the work product privilege finds its origin in a Supreme Court decision that has not often been revisited by the Court." *Id.* at 120a.

REASONS FOR GRANTING THE PETITION

The Petition raises issues of great importance affecting the right of companies to protect a wide range of documents prepared and reviewed by their attorneys, in part to further the company's business interests, but also in anticipation of possible future litigation. For more than 60 years, *Hickman* has served as the touchstone for the proper scope of the work-product privilege in federal court. That landmark decision recognized that modern discovery was never intended to require or even allow for the disclosure of an attorney's legal analysis of his client's position. Textron's tax accrual work papers, which contain the mental impressions, conclusions, opinions and legal theories of its in-house attorneys, lie at the very heart of the work-product privilege.

The First Circuit's decision sets a dangerous precedent. If allowed to stand, the *en banc* opinion below will have a significant chilling effect on a corporate counsel's ability to prepare candid legal assessments of its client's position in anticipation of litigation–not only in the specific, tax-related context of this case, but well beyond. Consistent with *Hickman*, a company should be able to have its attorneys candidly assess its legal position on a business issue without fear that such legal evaluations may later be used against the company by a future legal adversary.

Further, if the appeals court's decision stands, the important policy concerns that animated the *Hickman* decision will be undermined. If the opinion work product of attorneys is no longer afforded a predictable zone of protection, it will discourage thorough preparation by attorneys and reward free riding by those who seek to

exploit their adversary's mental processes. As this Court noted in *Hickman*, if an attorney's mental processes are no longer his own, the impact on the legal profession would be demoralizing, and the interests of both the client and the cause of justice would be poorly served. Such negative consequences on American legal culture and practice warrant further review of the decision below by this Court.

Finally, the widening split of circuit authority exhaustively detailed in the Petition involves the application and interpretation of Federal Rule of Civil Procedure 26(b)(3). Under binding precedents, that rule now has inconsistent applications in the First Circuit, Fifth Circuit, and eight other federal circuits. But the entire policy behind enactment of the Federal Rules of Civil Procedure was to create a uniform standard of legal process in the federal courts. Only this Court can salvage that important policy by creating a single, uniform standard for the application of Rule 26(b)(3).

The goals of fairness, *stare decisis*, and federal uniformity were all injured in this case. WLF joins with Petitioner in urging this Court to grant the petition for a writ of certiorari.

I. THE APPEALS COURT'S DECISION IS CONTRARY TO THIS COURT'S UNANIMOUS HOLDING IN *HICKMAN*

In *Hickman v. Taylor*, this Court embraced the view that "discovery, like all matters of procedure, has ultimate and necessary boundaries." 329 U.S. 495, 507 (1947). In that landmark case, the plaintiff sued for the wrongful death of a seaman during the sinking of the defendant's tug boat. During his investigation, the

defendant's attorney interviewed and obtained statements from the survivors. The plaintiff demanded copies of these statements in discovery, but the attorney refused on grounds that the request sought "privileged matter" and constituted an improper attempt "to obtain indirectly counsel's private files." *Id*. at 499. The district court disagreed and ultimately held the attorney in contempt for refusing to release the statements. This Court unanimously reversed, holding that the materials sought were protected against discovery as the attorney's work product:

> Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollection prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims.

Id. at 510. As a result, *Hickman* recognized an established zone of privilege for materials created by counsel "in the course of his legal duties" so that he could work "without undue and needless interference." *Id*. at 511.

Only once modern discovery principles were authorized by the Federal Rules of Civil Procedure had it become necessary for this Court to protect, for the first time, an attorney's work product. "When Rule 26 and other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of

lawyers were thereby opened to the free scrutiny of adversaries." *Id.* at 514. In other words, *Hickman* did not itself create the work product privilege; rather, it acknowledged and enforced what had always been the rule, that "[a]n attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties . . . falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims." *Id.* at 510. *Hickman* thus emphasized "the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests." *Id*. at 511.

Thus, by the time *Hickman* was decided, "the general policy against invading the privacy of an attorney's course of preparation" was already "so well recognized and so essential to an orderly working of our system of legal procedure" as to be "necessarily implicit." *Id.* at 512. Indeed, as the Court explained, the policy concerns animating the work-product privilege had deep historical roots in the Anglo-American legal tradition.[2] English courts had already developed a concept of privilege to include "all documents which are called into existence for the purpose–but not necessarily the sole

[2] For a compilation of the early English cases on work-product protection that informed this Court's holding in *Hickman*, *see* J. H. Wigmore, 8 *Wigmore on Evidence* § 2319, at 618-22 (3d ed., 1940); *see also* Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. Legal Stud. 359, 383 (1990) (explaining that *Hickman* "found an analogy in the English practice of protecting from discovery all documents prepared by or for counsel with a view to litigation").

purpose–of assisting the deponent or his legal advisers in any actual or anticipated litigation." *Id.* at 510 n.9 (quoting W. Blake Odgers, *Odgers on Pleading & Practice*, at 264 (12th ed., 1939)). This privilege extended to "all papers prepared by any agent of the party bona fide for the use of his solicitor for the purposes of the action, *whether in fact so used or not*." *Id.* (emphasis added).

More than six decades later, *Hickman* remains the touchstone for the proper scope of the work-product privilege in federal court. And while Federal Rule of Civil Procedure 26(b)(3) was amended in 1970 to also provide protection for attorney work product, that rule is properly understood as only a partial codification of the protections guaranteed by *Hickman*. *See, e.g.,* Claudine Pease-Wingenter, *Prophetic or Misguided?: The Fifth Circuit's (Increasingly) Unpopular Approach to the Work Product Doctrine,* 29 Rev. Litig. 121, 134 (2009) ("Rule 26(b)(3) is considered by commentators to be only a 'partial codification' of the protections recognized in *Hickman* because there are several differences between the protection initially recognized by the Supreme Court and that offered by the Rule."); J.W. Moore, 6 *Moore's Federal Practice* § 26.70[2][c] (3d ed., 1997) ("*Hickman* is only partially codified in Rule 26(b)(3) and continues to have vitality outside the parameters of the Rule."). Indeed, "[o]ne of the most significant features of the current work product doctrine is the coexistence of *Hickman* and rule 26(b)(3)." Jeff A. Anderson et al., *Special Project: The Work Product Doctrine*, 68 Cornell L. Rev. 760, 762-63 (1983).

Thus, the adoption of Rule 26(b)(3) has not displaced *Hickman* as the primary source of authority for work-product protection; to the contrary, *Hickman* and

its progeny remain as relevant as ever. *See, e.g.,* In re *Grand Jury Subpoena*, 510 F.3d 180, 185 (2d Cir. 2007) (looking to the "common law principles" announced in *Hickman*), *cert. denied*, 128 S. Ct. 2918 (2008); In re *Seagate Tech., LLC*, 497 F.3d 1360, 1376 (Fed. Cir. 2007) (acknowledging that although "the work product doctrine was partially codified in Rule 26(b)(3)," the "[c]ourts continue to apply *Hickman*"). Accordingly, the rule should be interpreted and applied with fidelity to the concerns articulated in *Hickman*.

Rightly understood, *Hickman* was broadly interested in protecting materials prepared in anticipation of an adversarial setting. *See* Pease-Wingenter, *supra*, at 138 ("The key requirement seems to be that the materials are prepared in anticipation of an adversarial setting."); Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 504-06 (4th ed., 2001) ("The proceeding for which documents are prepared need not actually take place in a court of record, as long as the proceeding is adversarial in nature."). More importantly, *Hickman* never suggested that the work-product privilege was limited to materials prepared *for use* in litigation, much less to those prepared *for use* at trial. Recognizing that not all attorneys are litigators, this Court announced a much broader protection for an attorney's materials prepared "in the course of his legal duties." 329 U.S. at 510. And when *Hickman* did speak of "litigation," it expressed its concern for protecting materials prepared merely "with an eye towards litigation," not *for use* in litigation as curiously required by the First Circuit below. *Id.* at 511.

The core holding of *Hickman* is unequivocal and has never changed: modern discovery was never intended to require or even allow for the disclosure of an

attorney's legal analysis of his client's position, which is always unnecessary to develop the factual record underlying any dispute. Unlike ordinary work product, such opinion work product is sacrosanct. 329 U.S. at 510 ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."). And this Court has since reaffirmed, in the very context of an IRS summons, that "such work product (attorney's opinions and mental impressions) cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981). Rule 26(b)(3) further embodies this principle by requiring that a court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney." Fed. R. Civ. P. 26(b)(3).

The appeals court's decision below abandons the robust work-product protection long guaranteed by this Court in *Hickman*. First, it is undisputed that the documents sought in this case contain "nothing more than counsel's opinions regarding items that might be challenged because they involve areas in which the law is uncertain and counsel's assessment regarding Textron's chances of prevailing in any ensuring litigation." Pet. App. at 101a-102a. Such opinion work product, which consists of the mental impressions, conclusions, opinions or legal theories of in-house attorneys, lies at the very heart of the work-product privilege. *See Hickman*, 329 U.S. at 510 (establishing protection for the "written statements, private memoranda and personal recollection prepared or formed by an adverse party's counsel in the course of his legal duties."). Tellingly, the IRS has previously sought and obtained work-product protection for nearly

identical materials. *See Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (upholding IRS's assertion of work product privilege over internal "memos advising the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses to the agency, and the likely outcome"). At its core, "the work-product doctrine shelters the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). Here, as in *Hickman*, Textron's attorneys should be entitled to prepare legal theories and plan potential litigation strategy free from unnecessary intrusion by its adversaries.

Second, nothing in the appeals court's ruling refutes the fact, clearly established in the record below, that Textron prepared the relevant materials "with an eye towards" a potential tax dispute with the IRS. Prudent companies such as Textron routinely anticipate such controversies and begin legal preparation well in advance of the time an appeal or litigation is formally commenced. In this case, it is undisputed that the IRS has audited every Textron tax return since 1980. Pet. App. at 50a. In seven of its past eight audit cycles, Textron has appealed disputed tax matters to the IRS Appeals Board. *Id.* at 91a. Three of these disputes ultimately resulted in litigation. *Id.*

Contrary to the First Circuit's view, "any experienced litigator" would know that the exam and appeals stages of a tax dispute are very adversarial and, even if settled, can result in significant additional tax liability for the company. The record here is clear that the matters identified in Textron's work papers concerned issues on which the law was unclear. *Id.* at

109a. And as the district court aptly observed, "[i]f Textron had not anticipated a dispute with the IRS, there would have been no reason for it to establish any reserve or to prepare the workpapers used to calculate the reserve." *Id.* at 108a.

Third, the mere fact that such documents may also serve a separate business-related purpose is irrelevant to the question whether they are entitled to protection under *Hickman*. *See*, *e.g.*, *United States v. Adlman*, 134 F.3d 1194, 1197-98 (2d Cir. 1998) ("Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created in order to assist with a business decision."). The appeals court fails even to consider the modern reality that materials prepared in furtherance of a business purpose are frequently prepared in anticipation of litigation. As a result, the First Circuit's novel "for use in litigation" standard is contrary to more than 60 years of precedent and cannot be reconciled with this Court's longstanding work-product doctrine.

In sum, there is simply no way to square the First Circuit's opinion in this case with this Court's clear mandate in *Hickman*. Review is warranted because only this Court can now remedy the harm done to the work-product privilege by the decision below.

II. THE APPEALS COURT'S DECISION UNDERMINES THE IMPORTANT POLICY CONSIDERATIONS THIS COURT SET FORTH IN *HICKMAN*

The court of appeals' decision not only ignores the applicability for work-product protection established by

this Court in *Hickman* but, if allowed to stand, will do violence to the important policy considerations undergirding that decision and the doctrine it embraced. Namely, if the opinion work product of attorneys is no longer afforded a predictable zone of protection, it will discourage thorough preparation by attorneys and reward free riding by those who seek to exploit their adversary's mental processes.

A. The Appeals Court's Decision Will Discourage Thorough Preparation By Attorneys.

Hickman repeatedly expressed concern that the discoverability of work product would have a negative impact on attorneys' behavior. "Proper 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. One important policy consideration behind this Court's recognition of the work-product doctrine, then, is to encourage attorneys to prepare thoroughly and to investigate both favorable and unfavorable aspects of their case.

If an attorney's private preparations are freely discoverable, Justice Murphy worried, "much of what is now put down in writing would remain unwritten." *Id.* at 511. "The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.* Without a reliable zone of privacy, attorneys cannot be effective advocates for their clients. They may be tempted to abandon avenues of investigation likely to produce bad facts for their client. Or they may be tempted to destroy

documents that would later be of value in preparing for trial. This undermines the quality of representation as a whole.

The appeals court's decision below threatens to have a chilling effect on how attorneys behave. By effectively eviscerating a reliable and predictable work-product privilege, the court has given little incentive for attorneys to maintain candid written assessments of their client's position. Obviously, an in-house attorney may feel compelled not to write or record certain information if he feels his opponent can discover it. This may force him to rely solely on his memory or some other unreliable method. As the dissent observes, "if attorneys who identify good faith questions and uncertainties in their clients' tax returns know that putting such information in writing will result in discovery by the IRS, they will be more likely to avoid putting it in writing, thus diminishing the quality of representation." Pet. App. at 32a (Torruella, J. dissenting). The majority opinion does not even acknowledge, much less take into account, these very real concerns.

A lawyer investigating a legal matter does not always know in advance what his investigation will uncover. In simply thinking about a case, a lawyer often will produce insights that are more helpful to his adversary than to his own client. In today's litigious environment, virtually every significant business decision a company makes has legal ramifications that will require a sound analysis. But if the First Circuit's holding is allowed to stand, as *Hickman* predicted, "[i]nefficiency, unfairness and sharp practices [will] inevitably develop in the giving of legal advice and in the preparation of cases at trial." 329 U.S. at 511.

B. The Appeals Court's Decision Threatens To Undermine The Adversary System Of Justice By Rewarding Free Riding.

An adversary system of justice ensures that each side in a dispute works fully to advance its client's interests in pursuit of the truth. But, as *Hickman* fully appreciated, an adversary system simply cannot function without a healthy culture of candor and confidentiality. Allowing a party to gain inside knowledge of its opponent's legal strategy obviously weakens the adversary system and undermines incentives. Further, knowledge of an opponent's evaluation of the probability of success, and the amounts it is prepared to pay, seriously erodes the prospects for fair settlement before trial. Ultimately, diligent and prudent companies will be unfairly disadvantaged if forced to turn over their internal legal analyses to future litigation opponents. This concern for preserving the integrity of the adversary system was central to this Court's holding in *Hickman*.

The plaintiff's counsel in *Hickman* conceded that he sought opposing counsel's files "to help prepare himself to examine witnesses and to make sure that he has overlooked nothing." *Id.* at 513. This Court sharply dismissed those reasons as insufficient to invade another attorney's files. This aspect of the case disturbed Justice Jackson so much that he wrote a separate concurrence in part to address it. "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Id.* at 516 (Jackson, J. concurring). Further, he could "conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver

to his adversary" his account of the case. *Id.* Astonishingly, the First Circuit's decision in this case threatens to do just that.

Here, like the plaintiff in *Hickman*, the government has freely admitted that it seeks Textron's work papers to obtain a "roadmap" for evaluating Textron's tax return, since such documents would "identify weak spots" and allow the government to know "exactly how much Textron should be willing to spend to settle each item." Pet. App. at 31a. The appeals court did not question the IRS's explicit motivation for seeking the work papers, even though this is precisely the motivation that this Court so roundly rejected in *Hickman*. The implications for future targets of the IRS are clear. As this Court has previously recognized, "tax accrual workpapers pinpoint the 'soft spots' on a corporation's tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require the payment of additional taxes." *United States v. Arthur Young & Co.*, 465 U.S. 805, 813 (1984). The appeals court's decision, if allowed to stand, would provide the IRS with an unfair advantage in future litigation by granting it access to Textron's detailed legal analysis of the strengths and weaknesses of its various tax positions. *See* Pet. App. at 31a ("Revealing such impressions would have clear free-riding consequences. With this information, the IRS will be able to immediately identify weak spots and know exactly how much Textron should be willing to spend to settle each item.") (Torruella, J. dissenting).

In sum, the work-product privilege was adopted to prevent a future litigant from doing precisely what the government nakedly admits to doing here–taking a free ride on the research and thinking of an opponent's

attorneys. *See United States v. Roxworthy*, 457 F.3d 590, 595 (6th Cir. 2006) (noting that "the IRS would appear to obtain an unfair advantage by gaining access to KPMG's detailed legal analysis of the strengths and weaknesses of [the taxpayer's] position. This factor weighs in favor of recognizing the documents as privileged."). Without the vital protections of the work-product privilege, an attorney cannot be an effective advocate for his client. In the absence of a lawyer's role as an effective advocate, both the client and the adversary system suffer. The implications of the appeals court's decision below cannot be understated.

III. REVIEW IS WARRANTED TO PRESERVE THE IMPORTANT GOAL OF UNIFORMITY BEHIND THE FEDERAL RULES

Review here is warranted for the independent reason that the widening split of circuit authority on this issue concerns the application and interpretation of Federal Rule of Civil Procedure 26(b)(3). As the Petition ably demonstrates, the federal courts of appeal are hopelessly split on the issue of whether, and to what extent, materials prepared "in anticipation of litigation" are entitled to work-product protection against discovery. The First Circuit, Fifth Circuit, and eight other federal circuits have announced three different and inconsistent interpretations for Rule 26(b)(3). *See* Pet. Br. at 12-20. But Rule 26(b)(3) should mean the same thing and afford parties with the same work-product protection in Massachusetts and Rhode Island as it does in New York and Texas. The decision below only exacerbates this problem.

Importantly, it was this disparity of legal process among the states that served as the primary catalyst for

the federal rules in the first place. Indeed, the creation of federal procedural rules was bottomed entirely on the need for uniformity of procedure in the federal courts. *See Sayre v. The Musicland Group, Inc.*, 850 F.2d 350, 354 (8th Cir. 1988) (stating that the "purpose of the Federal Rules of Civil Procedure" was "to provide uniform guidelines for all federal procedural matters"); Erwin Chemerinsky & Barry Friedman, *Federal Judicial Independence Symposium: The Fragmentation of Federal Rules*, 46 Mercer L. Rev. 757, 780 (1995) (noting that the "primary justification for adopting the Federal Rules of Civil Procedure was to increase the uniformity in procedural rules in federal courts across the country").

In sum, the entire purpose of the Federal Rules of Civil Procedure was to provide a uniform and orderly process of adjudicating cases in the federal system. An ongoing circuit split, especially one that has been further complicated by the decision below, only defeats the purpose of having a system of standardized procedural rules in the federal system. It is difficult to overestimate the detrimental effect that the decision below will have on the value of uniformity that the Federal Rules of Civil Procedure were intended to foster. Only this Court can create a single uniform standard for the application of Rule 26(b)(3).

CONCLUSION

Amicus curiae requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Daniel J. Popeo
Cory L. Andrews*
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302
**Counsel of Record*

Dated: January 27, 2010