IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

UNITED STATES,

Petitioner-Appellant,

—v.—

TEXTRON INC. AND SUBSIDIARIES,

Respondent-Appellee.

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ON REHEARING *EN BANC*

SUPPLEMENTAL BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND ASSOCIATION OF CORPORATE COUNSEL SUPPORTING TEXTRON INC. AND IN FAVOR OF AFFIRMANCE

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STATEMENT OF IDENTITY

The Chamber of Commerce of the United States of America (the "Chamber") is the nation's largest federation of business companies and associations, with underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. A significant number of the Chamber's members conduct business in the First Circuit. An important function of the Chamber is to represent the interests of its members by filing briefs as an *amicus curiae* in cases involving issues of national concern to American businesses.

The Association of Corporate Counsel ("ACC") is the in-house bar association with over 23,000 in-house counsel members, practicing in the legal departments of more than 10,000 corporations (public, private, for- and non-profit) in more than 80 countries. As an *amicus curiae*, ACC offers the Court the perspective of in-house lawyers who provide practical and daily corporate legal counseling as institutional members and advisers of the company's business team; the analysis and advice of these lawyers is a predicate to their clients' ability to develop appropriate financial controls and deliver accurate, robust and transparent audit and financial reports, and thus is crucial to the integrity of corporate financial processes. ACC is recognized as the standard-bearer for protecting corporate clients' right to confidential counsel (as the active and open involvement of in-

house counsel in corporate affairs promotes better corporate governance and legal health) and, as such, ACC is deeply concerned about the precedent at stake in this case, including its impact on the preparation and delivery of viable legal analysis and advice in the corporate finance context.

Both groups' members have a direct interest in the outcome of this appeal on rehearing *en banc* because the IRS's arguments, if accepted, would set a troubling precedent that could hinder in-house counsel from preparing analyses that are of the greatest importance to clients. Given the complexity and multi-faceted nature of the challenges facing modern companies, those companies must be able to rely upon counsel to evaluate these issues from all angles—ensuring corporate compliance with law while considering practical business implications of various courses of action—and the ability of attorneys to conduct these evaluations fully depends upon the certainty that the clients' adversaries will not have *carte blanche* access to the evaluations, as the IRS suggests that they should. As the Supreme Court stated in *Hickman v. Taylor*, without work product protection, "much of what is now put down in writing would remain unwritten. . . . Inefficiency, unfairness and sharp practices would inevitably develop . . . ." 329 U.S. 495, 511 (1947). The Chamber and ACC also represent the interests of corporate clients, as work product protection—while maintained by lawyers—is a long-standing right expected by corporate clients, and a precedent that limits or erodes work product

protection dramatically hinders corporations' ability to seek legal counsel without fear that their counsel's candid opinions and analyses will be disclosed to adversaries. Accordingly, the Chamber and ACC's position also protects the interests of shareholders and other stakeholders in a company and the broader financial marketplace, who are not well served when companies refrain from seeking critical legal analysis and counsel on important financial matters.

ARGUMENT

I. INTRODUCTION

The IRS is asking this Court to hold that a corporate lawyer's analysis of his client's exposure, in litigation with an adversary, must be turned over to the adversary whenever the analysis is for the client's use in preparing its financial statements and related disclosures. The District Court and a panel majority of this Court correctly recognized that application of the work product doctrine precludes this result. They properly held that Textron Inc.'s ("Textron") tax accrual workpapers prepared by its counsel to assess Textron's potential tax liabilities in challenges by the IRS, as well as backup materials reflecting counsel's evaluations (collectively, the "Workpapers"), are protected under the work product doctrine, notwithstanding the IRS's argument that Textron's counsel prepared the analysis to assist Textron in making its financial statement disclosures.

By asking this Court to adopt a contrary rule, the IRS would undermine the financial statement disclosure process, the corporate counsel/client relationship and the policies behind the work product doctrine itself. In accepting *en banc* review of this case, the Court has the opportunity to affirm that documents such as the Workpapers created by a company's lawyers to analyze litigation risks are created in anticipation of (*i.e.*, because of) litigation and thus are entitled to the strongest work product protection, even if the impetus for the analysis is a business reason.

The IRS's own arguments demonstrate the flaws in its position. The IRS contends that issuing a summons for the analyses of litigation risks prepared by a taxpayer's lawyers should be a "tool" in "the IRS's arsenal" that will "ease" its ability to attack tax returns. (IRS Petition for Rehearing *En Banc*, pp. 14-15 n.12.) The IRS thus concedes that this "important policy reason" is driving its effort to eliminate work product protection if it stands in the way of the IRS's "nationwide enforcement obligations." (*Id.* at 5.) The work product doctrine, however, *is designed to prevent exactly this type of effort by an adversary*—in this context, the IRS—to capitalize on the analysis of legal positions prepared by a party's lawyers.

Moreover, the legal argument advanced by the IRS in support of this proposed "tool"—namely, that any document created to analyze litigation risk in connection with financial reporting may never be protected as a matter of law—ignores the fact that this *is exactly the type of prudent behavior the work product doctrine is designed to protect*. Corporate lawyers today, more than ever, should be assisting their clients with complex issues that blend financial reporting obligations, legal compliance and potential litigation exposure. The work product doctrine exists to provide a zone of privacy around such analyses, and it would be a great disservice for any court to adopt the type of no-protection rule that the IRS advocates. The law should reward, not punish, companies that rely on their counsel in such situations.

This Court also has the opportunity to affirm and clarify the conclusion that Textron's disclosure of its Workpapers to its independent auditor, Ernst & Young LLP ("EY"), did not waive work product protection because EY is not Textron's adversary, potential adversary or a mere conduit to adversaries, nor would Textron reasonably expect otherwise. That holding by the panel is correct, but its order remanding the case for an *in camera* inspection of EY's files to determine if Textron's Workpapers are reflected therein is inconsistent with that conclusion. That EY might receive a summons for its own files, even if some of which may reflect the work product at issue, does not make the client's expectation of confidentiality any less reasonable. A contrary holding would discourage companies from sharing information freely and cooperatively with their auditors and run counter to the work product doctrine.

II. THE WORKPAPERS ARE WORK PRODUCT BECAUSE THEY INHERENTLY WERE CREATED IN ANTICIPATION OF LITIGATION

The IRS's proposed rule would undermine the company/counsel relationship by creating an expectation that the most sensitive legal analyses will be available to a company's adversaries, thereby depriving companies of the candid analyses of their counsel so often recognized as critical to effective corporate governance, appropriate financial reporting and compliance with law. Examining the purpose behind the work product doctrine shows that the IRS's position is unsupportable.

A. The Work Product Doctrine Historically Protects Analysis of Litigation Risks, as Opposed to the Facts Underlying Litigation

Discovery was never intended to allow for disclosure of an attorney's legal analysis of his client's positions, and certainly not unless necessary *to develop the factual record* underlying any dispute. *See Hickman v. Taylor*, 329 U.S. 495, 510 (1947) ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."). It was only when the discovery procedures of the original Federal Rules of Civil Procedure had been authorized—which for the first time provided for discovery beyond the facts presented in the pleadings and at trial—in fact, that it became necessary for the Supreme Court to protect, in addition to attorney-client communications, an attorney's legal work that is not part of the discoverable facts underlying a litigation. *See Hickman*, 329 U.S. at 514 ("When Rule 26 and the 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."); Special Project, *The Work Product Doctrine*, 68 Cornell L. Rev. 760, 765-66 (1983) (hereinafter, "*The Work Product Doctrine*"). Thus, in *Hickman*, the Court enforced what had always been the rule. *See id.* at 510 ("[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.").[1]

The work product doctrine provides lawyers with an essential zone of privacy "to work for the advancement of justice while faithfully protecting the rightful interests of [their] clients." *Hickman*, 329 U.S. at 510. To implement the doctrine, most courts—including the First Circuit—use the "because of" test, which grants protection when "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained *because of* the prospect of litigation." *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *Maine v. Dep't of Interior*, 298 F.3d 60, 68 (1st Cir. 2002).[2] When an attorney's analysis requires him to anticipate litigation and evaluate its risks for his client, even if for dual purposes, then the doctrine applies, and unless an adversary can demonstrate enough need for the analysis because of its independent factual relevance underlying the litigation, it will be protected.

As the Second Circuit has recognized when considering so-called dual purpose documents such as those at issue in this case—documents prepared or used

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[1] Indeed, "*Hickman* is only partially codified in Rule 26(b)(3) and continues to have vitality outside the parameters of the Rule," to protect even intangible work product. *See* 6 Moore's Fed. Prac. § 26.70[2][c].

[2] Only the Fifth Circuit denies protection for dual purpose documents and grants protection only if "the primary motivating purpose behind the creation of the document was to aid in possible future litigation." *See United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982) (quoting *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981)).

for business purposes but which also involve an attorney's anticipation of litigation—the key question is whether the document contains an "analysis that candidly discusses the attorney's litigation strategies, appraisal of the likelihood of success, and perhaps the feasibility of reasonable settlement;" if so, it is protected. *Adlman*, 134 F.3d at 1200. Neither *Hickman* nor Rule 26(b)(3) prohibit protection when such documents are created for business purposes. *Id*. at 1198-99.

B. Dual Purpose Documents Inherently Reflecting the Anticipation of Litigation Are Protected under *Maine* and Established Law

The IRS's argument that dual purpose documents like the Workpapers are not entitled to work product protection is based on a misreading of the "because of" test. The IRS's contention is based on the premise that Textron's attorneys created the Workpapers to comply with an independent financial audit and SEC reporting regulations. Even assuming the premise is true—something which Textron disputes—the IRS's conclusion that the Workpapers were not prepared "because of" anticipated litigation does not follow. Applicable precedent demonstrates the IRS's fallacy. When Textron's attorneys put pen to paper, their analysis inherently involved anticipating and evaluating litigation with the IRS, and thus work product protection attaches. Even if the impetus for putting pen to paper was SEC reporting regulations, this does not change the fact that the analysis is *because of* litigation.

Under the "because of" standard, dual purpose documents such as Textron's Workpapers should be "protected when the litigation purpose so 'permeates' any

non-litigation purpose that the two purposes cannot be discretely separated." 6 Moore's Fed. Prac. ¶ 26.70[b] (quoting *In re Grand Jury Subpoena*, 357 F.3d 900, 910 (9th Cir. 2004)). In this case, Textron's Workpapers include "notes and memoranda written by Textron's in-house tax attorneys reflecting their opinions" as to Textron's contingent tax liabilities in the face of an IRS challenge. *United States v. Textron, Inc.*, 507 F. Supp. 2d 138, 143 (D.R.I. 2007). The District Court found that Textron's Workpapers would not have been prepared "'but for' the fact that Textron anticipated the possibility of litigation with the IRS," a finding supported by the IRS's long history of perpetual audits of Textron and the parties' frequent litigation. *Id.* at 150. Thus, proper application of the "because of" test of *Maine* compels the conclusion that Textron's Workpapers are protected work product.

The IRS asks this Court to put aside its decision in *Maine* to avoid "a direct conflict with the Fifth Circuit's *El Paso* decision." (*See* IRS Pet. for Rehearing *En Banc*, p. 13.) Prevailing authority and logic compel otherwise. In *El Paso*, the Fifth Circuit denied protection for documents reflecting legal analysis that "concocts theories about the results of potential litigation [because] such analyses are not designed to prepare a specific case for trial or negotiation." 682 F.2d at 544. In *Adlman*, the Second Circuit rejected the Fifth Circuit's view because the ultimate goals of 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." *Adlman*, 134 F.3d at 1199. The "because of" test recognizes that corporate lawyers have diverse responsibilities and obligations and may be called upon to anticipate auditors' needs as well as potential disputes and formulate legal strategies to navigate the "vast and complicated array of regulatory legislation confronting the modern corporation." *See Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981). Almost thirty years after *Upjohn*, in the wake of the Sarbanes-Oxley Act and other dictates of corporate governance, the need to preserve that zone of privacy is even more necessary for lawyers to serve their corporate clients in previously unforeseen ways, navigating compliance with growingly complex regulatory schemes that necessarily blend questions of potential liability with important business considerations and reporting obligations.

The IRS's misreading of the "because of" test is underscored by this Court's past consideration of whether documents prepared because of expected litigation but that are intended *primarily, ultimately or even exclusively* to assist in making a business decision may be entitled to work product protection. In *Maine,* the Court answered that question squarely in the affirmative:

> [The "primary purpose" test] would potentially exclude documents containing analysis of expected litigation, if their *primary, ultimate, or exclusive* purpose is to assist in making the business decision. Others [including the test followed by the Second Circuit in *Adlman*] ask whether the documents were prepared "because of" expected litigation—*a formulation that would include such documents*, despite the fact that their purpose is not to "assist in" litigation . . . .

> In light of the decisions of the Supreme Court, we therefore agree with the formulation of the work product rule adopted in *Adlman* and by five other courts of appeals.

Maine, 298 F.3d at 68 (quoting *Adlman*, 134 F.3d at 1197-98) (emphasis added).

Therefore, when a lawyer's analysis involves anticipating and evaluating litigation for his client, the analysis is "because of" litigation and thus is work product. The IRS nonetheless makes two counter-arguments: (1) The Workpapers may not be protected because they are created in the "ordinary course of business" in light of their role in Textron's accounting disclosures; and (2) protecting the Workpapers from disclosure inappropriately involves analysis of the Workpapers' content. As discussed below, neither argument is persuasive.

C. The Exception for Documents Created in the Ordinary Course of Business Does Not Apply to the Workpapers

As this Court explained in *Maine*, following *Adlman*, work product protection does not extend to "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of litigation," and that is true "even if the documents aid in the preparation of litigation." *Id.* at 70 (quoting *Adlman*, 134 F.3d at 1202). The IRS seizes on this language, arguing that any document created to assist with SEC reporting requirements—even if it is an evaluation of litigation risks—is created "in the ordinary course of business" and thus as a matter of law is not work product. The IRS's misinterpretation of this language would render the "because of" test

meaningless by eliminating protection for dual purpose documents where it is needed the most. Under the IRS's proposed new rule, any company that turns to its lawyers for litigation analyses that have a bearing on the company's financial reporting—a prudent and necessary course of action in any time, but particularly today—would be punished for engaging in this "ordinary course of business." That is neither good policy nor, fortunately, consistent with the law.

In *Adlman*, the Second Circuit explained that documents prepared in the ordinary course of business, *i.e.*, documents that purely reflect material underlying facts, are discoverable. That a company's business records with underlying factual relevance to a litigation may not be protected work product is merely a logical application of the work product doctrine.[3] This does not mean that an analysis of the risks of litigation, if for a business purpose, loses protection. To illustrate the point, the Second Circuit explained that the following documents should be protected because they are not mere ordinary-course business facts:

> A business entity prepares financial statements to assist its executives, stockholders, prospective investors, business partners, and others in

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[3] Under *Hickman*, the work product doctrine does not protect underlying facts or other work created simply in the ordinary course of business—work that would have been conducted without anticipation of litigation but that might, in any event, aid in litigation—simply if that work is performed by an attorney. 8 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. § 2024 (discussing common law limitations on work product protection prior to the issuance of Rule 26(b)(3)); *see, e.g.*, *Natta v. Hogan*, 392 F.2d 686, 693-94 (10th Cir. 1968) (finding technical research, tests and experiments may be produced but that related notes of a named attorney were protected work product).

> evaluating future courses of action. Financial statements include reserves for projected litigation. The company's independent auditor requests a memorandum prepared by the company's attorneys estimating the likelihood of success in litigation and an accompanying analysis of the company's legal strategies to assist it in estimating what should be reserved for litigation losses.

Adlman, 134 F.3d at 1200. Under the Second Circuit's reasoning—adopted in *Maine*—a litigation analysis such as Textron's Workpapers is, in fact, work product.

Here, the IRS again is confusing the *impetus* for creating the Workpapers, which may be business-related, with the fact that the Workpapers constitute analyses of anticipated litigation. A business impetus in no way means that the Workpapers would be "created in essentially similar form irrespective of the litigation," *Maine*, 298 F.3d at 70; the Workpapers would not have been created "but for" anticipated litigation. *Textron*, 507 F. Supp. 2d at 150.[4] The IRS's interpretation conflicts with

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[4] The IRS ignores practical business interests by suggesting that because the Workpapers were created to assist in preparing financial statements, Textron could not reasonably expect such documents to be confidential. Since 1975, a "treaty" between the legal and accounting professions has guided corporate counsel's evaluations of litigation loss contingencies through agreed procedures designed to maintain attorney-client confidentiality in the course of a financial statement audit. American Bar Association, "Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information" (1975), *available at* http://www.abanet.org/buslaw/ attorneyclient/policies/aicpa.pdf. Indeed, courts have recognized that "[t]he determination of what information should be disclosed for compliance is not merely a business operation, but a legal concern." *Roth v. AON Corp.*, 254 F.R.D. 538, 541 (N.D. Ill. 2009) (drafts of Form 10-Ks communicated with corporate counsel are protected by the attorney-client privilege).

Maine and the Second, Third, Fourth, Sixth, Seventh, Eight, Ninth and D.C. Circuit Courts and the Court of Federal Claims. (*See* Chamber-ACC Br. at p. 15 n.1.)

D. The IRS Is Wrong to Argue that the Substance of the Workpapers Is Irrelevant to an Analysis of the Work Product Doctrine

The IRS points out that "work-product protection must be assessed according to the document's 'function,'" but argues that the *Textron* panel "failed to heed" this concept. (IRS Pet. for Rehearing *En Banc*, p. 8.) The IRS contends that the Workpapers' sole "function" was to assist Textron in preparing its financial statements and related disclosures, and thereby facilitate EY's independent audit, and this Court should ignore the "content" or substance of the analysis itself. Again, however, the IRS is twisting developed law regarding the work product doctrine.

The IRS cited *United States v. Roxworthy*, 457 F.3d 590, 595 (6th Cir. 2006), in its original appellate brief in this case, for the "function" vs. "content" concept. As the Sixth Circuit stated, the work product analysis considers "the function that the document serves," meaning "the circumstances surrounding the documents' creation." *Id.* This does not mean that a court should ignore substance. To the contrary, in *Roxworthy*, the IRS sought an analysis of a company's tax positions, but the court granted protection because the company "would not have obtained the opinion letters . . . but for the anticipation of federal income tax controversy proceedings . . . ." *Id.* As the court stated: "[T]he IRS would appear to obtain an unfair advantage by gaining access to [the accountant's] detailed legal analysis of

the strengths and weaknesses of Yum's position." *Id.* The Sixth Circuit applied the "because of" test, which properly considers the substance of a document—the "detailed legal analysis" of anticipated "tax controversy proceedings"—itself.

Likewise, the District Court here relied on undisputed testimony to find that Textron's Workpapers analyzed "*potential disputes or litigation* that would happen in the future.'" *Textron*, 507 F. Supp. 2d at 143 (emphasis added). Accordingly, the District Court and panel majority were correct to assess the substance of the Workpapers in concluding that they would not have been created "but for" the anticipated litigation they assess. *Id.* at 150; *see also Roxworthy*, 457 F.3d at 595.

Indeed, the IRS's argument that the substance of a document must be ignored contradicts the doctrine's requirement that an attorney's "opinions" and "mental impressions" are entitled to special protection as "classic work product." Courts are *required* to evaluate the substance of a document, because the substance of a document controls the degree of protection accorded to it. "[T]he court *shall* protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3) (emphasis added). Here, because the Workpapers reflect counsel's analysis and opinions of anticipated litigation, they are entitled to protection. *See, e.g.*, *Commissioner of Revenue v. Comcast Corp.*, 453 Mass. 293, 901 N.E.2d 1185, 1204-05 (Mass. 2009) (memoranda analyzing potential tax liabilities are entitled to

protection as opinion work product); *Regions Fin. Corp. v. United States*, No. 2:06-CV-00895-RDP, 2008 WL 2139008, at *6 (N.D. Ala. May 8, 2008) (tax accrual workpapers protected as attorneys' mental impressions).

Granting heightened protection for documents which in substance are litigation analyses, such as the Workpapers, is necessary because "[a]t its core, the work-product doctrine shelters the mental processes of the attorney," *United States v. Nobles*, 422 U.S. 225, 238 (1975), and "it would oddly undermine [the doctrine's] purposes if such documents were excluded from protection merely because they were prepared to assist in the making of a business decision . . . ." *Adlman*, 134 F.3d at 1199.[5] Indeed, refusing protection as the IRS proposes would eliminate the utility of lawyers when they could be of greatest value to their clients and the public.

E. The IRS's Desire to Simplify Its Investigations Does Not Trump the Work Product Doctrine

The IRS has acknowledged that it would like to review the Workpapers to glean the "soft spots" in Textron's tax positions. (Br. of IRS at 31-32.) This,

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[5] Some courts have held that opinion work product may *never* be subject to discovery. *See, e.g.*, *Duplan Corp. v. Moulinage et Retorderie de Chavanos*, 509 F.2d 730, 734 (4th Cir. 1974). Other courts take the view that opinion work product may be disclosed only in rare circumstances, such as where an attorney's advice is at issue. *See, e.g.*, *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (holding that opinion work product "may be discovered and admitted when mental impressions are *at issue* in a case and the need for the material is compelling") (emphasis in original). The First Circuit has not ruled on the issue, *see In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1014-16 (1st Cir. 1988) (reserving judgment on standard for overcoming protection of opinion work product), but the IRS has not attempted to make *any* such showing.

however, is precisely what the work product doctrine is intended to protect against. *See Hickman*, 329 U.S. at 516 ("Discovery was hardly intended to enable a learned profession to perform its functions without wits or on wits borrowed from the adversary.") (Jackson, J., concurring). Should the IRS get its way, Textron and its counsel will be deprived of their "zone of privacy," and *any* corporate attorney "who senses that his efforts might benefit his opponent more than his client could be deterred from conducting thorough research." *The Work Product Doctrine*, 68 Cornell L. Rev. at 785. In *Delaney, Migdail & Young, Chartered v. IRS*, for example, it was the IRS's adversary that sought disclosure of IRS work product "to make sure it does not miss anything in crafting its legal case" against the IRS. 826 F.2d 124, 127 (D.C. Cir. 1987). Rejecting this argument, the D.C. Circuit held that allowing discovery for this reason "would conflict with the well established rules of discovery." *Id.* The IRS is trying to do here exactly what it fought in *Delaney*.

The IRS contends it shows self-restraint in seeking workpapers only with respect to "abusive tax shelters." These assurances regarding the IRS's *current* policy are hollow, because a precedent that documents created for accounting purposes may not, as a matter of law, receive work product protection would be used by private plaintiffs in a wide range of civil litigation—indeed, any time a company prudently seeks legal counsel for the most effective analysis of litigation risks to support the company's financial reserves and accounting disclosures—in the

hopes of identifying and exploiting the company's "soft spots." (*See* note 4, *supra*, regarding a company's loss contingency disclosures.) There is no justification for punishing companies, and undermining the role of corporate counsel, in this fashion.

Moreover, the IRS is not seeking the Workpapers because it is missing any facts regarding Textron's tax positions; there is no dispute that the underlying facts have been produced. *See Textron*, 507 F. Supp. 2d at 154-55. Rather, the IRS is in the position of an adversary looking to mine opposing counsel's analysis to obtain a leg up in what the IRS fully expects to be hotly-contested and complicated litigation. (*See* IRS Pet. for Rehearing *En Banc*, p. 2.) Given the nature of the Workpapers, Textron's interest in protecting its attorneys' analyses is at its *highest*, and outweighs the IRS's desire to find shortcuts in its preparations for litigation.

III. TEXTRON DID NOT WAIVE WORK PRODUCT PROTECTION

For the reasons addressed in the Chamber and ACC's first *amici* brief, and as the District Court and the panel majority held, work product protection is not waived as a matter of law merely because a company discloses the work product to its independent auditor. *See* Chamber-ACC Br. at pp. 30-31 n.7 (collecting cases).[6]

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[6] Cases decided since the first *amici* brief have uniformly followed this principle. *See Regions Fin. Corp.*, 2008 WL 2139008, at *8 (finding waiver did not occur upon disclosure to auditors under *United States v. Mass. Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997)); *Westerbank Puerto Rico v. Kachkar*, No. 07-1606 (ADC/BJM), 2009 WL 530131, at *7-8 (D.P.R. Feb. 9, 2009) ("The majority of courts to consider the issue have held that disclosure of work product protected materials to outside auditors does not constitute waiver of the privilege."); *Sec.*

As the panel's decision recognizes—and which the IRS did not dispute in its Petition for Rehearing *En Banc*—a company and its auditor share a common interest with respect to the company's audited financial statements, such that disclosing work product to an auditor does not waive protection. *See, e.g.*, *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 448 (S.D.N.Y. 2004) ("A business and its auditor can and should be aligned insofar as they both seek to prevent, detect, and root out corporate fraud."). If the rule were otherwise, the public's interests in meaningful audits and accurate corporate disclosures would suffer, and corporations would be unfairly punished for cooperating with auditors. *See id.* at 448-49.

The District Court and panel rightly recognized that a waiver occurs only when a party acts inconsistently with work product protection, *i.e.*, through disclosure to an adversary, potential adversary or conduit to adversaries. *Mass. Inst. of Tech.*, 129 F.3d at 687 (finding waiver upon disclosure of work product to a potential adversary to verify the existence of claims against the disclosing party). Accordingly, there is no waiver when disclosure is made to a party under a

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Exch. Comm'n v. Roberts, 254 F.R.D. 371, 382 (N.D. Cal. 2008) ("[S]anctioning a broad waiver [upon disclosure to independent auditors] would have a chilling effect on the corporation's efforts to root out and prevent corporate fraud and disclose the results as necessary to its auditors."); *Vacco v. Harrah's Operating Co., Inc.*, No. 1:07-CV-0663 (TJM/DEP), 2008 WL 4793719, at *7 (N.D.N.Y. Oct. 29, 2008) (finding that *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113 (S.D.N.Y. 2002), the decision expressing an early view that disclosure to an outside auditor constitutes a waiver, "has been almost uniformly rejected as adopting far too restrictive of a view regarding the circumstances under which a waiver can occur").

reasonable expectation of confidentiality. *See, e.g., United States v. Gulf Oil Corp.*, 760 F.2d 292, 295-96 (Temp. Emer. Ct. App. 1985) (where company disclosed documents to party with common interest at the time, but whose interests later diverged, work product protection still applied). In this case, Textron reasonably expected that EY would maintain the confidentiality of the Workpapers, as EY is bound to do under professional standards[7] and state law. *Textron*, 507 F. Supp. at 153; R.I. Gen. Laws 1956 § 5-3.1-23.

Rather than end its consideration of waiver there, however, the panel remanded the case for an *in camera* inspection of EY's workpapers to determine if they reflect the content of the Workpapers. *See United States v. Textron Inc.*, 553 F.3d 87, 104 (1st Cir. 2009). As the panel reasoned, because the Supreme Court recognized in *United States v. Arthur Young* that an auditor's workpapers may be discoverable, *see id.*, this could suggest that client information reflected in the workpapers may be discoverable as well. While this is a true statement, it does not in any way trump application of the work product doctrine.

Arthur Young stands for the proposition that federal law should not recognize a judicially created accountant-client privilege, and thus an auditor's workpapers are not always immune from discovery. This does not mean, however, that all other

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[7] American Institute of Certified Public Accountants Code of Professional Conduct Rule 301.01 provides: "A member in public practice shall not disclose any confidential client information without the specific consent of the client."

discovery protections that may be attached to the content of the auditor's workpapers are abrogated; indeed, the Supreme Court in *Arthur Young* recognized that a summons served on an auditor is "subject to the traditional privileges and limitations." *See United States v. Arthur Young*, 465 U.S. 805, 816-17 (1984). Even if EY's audit workpapers were to reflect Textron's Workpapers, work product protection is not undermined: Textron shared common interests and reasonably expected confidentiality when sharing the documents with EY—facts not questioned by the panel. That expectation of confidentiality still exists even if EY later receives a summons for its audit workpapers. Indeed, Textron would have standing to contest such a summons. *See, e.g., Regions Fin. Corp.*, 2008 WL 2139008, at *1-8 (upholding work product protection against challenge, by the company, to IRS summons of auditor). To the extent the panel's order of remand suggests that whenever an auditor's workpapers reflect a client's work product, that fact may constitute a waiver, this Court should clarify the result as contrary to applicable law. An *in camera* inspection of the auditor's workpapers is unnecessary to the question of waiver, and holding that such an inspection is required would only undermine the well-recognized common interest shared between an auditor and its client.

CONCLUSION

ACC and the Chamber request affirmance of the District Court's decision for the reasons stated herein.

Dated: April 22, 2009

Respectfully submitted,

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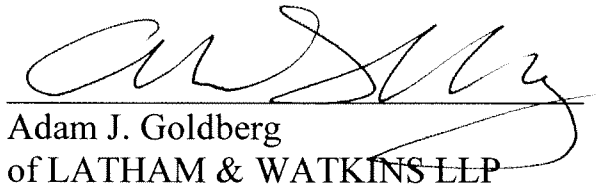
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by this Court pursuant to its Order of March 25, 2009, because this brief is 20 pages in length, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Those excluded are the Table of Contents, the Table of Authorities, Statement of Identity and Certifications of Counsel.

This brief has been prepared in proportionally spaced typeface using WordPerfect, in 14-point Times New Roman font.



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