No. 09-750

# In the Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

## REPLY BRIEF FOR THE PETITIONER


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**REPLY BRIEF FOR THE PETITIONER**

In its brief in opposition, the government concedes that there is a longstanding circuit conflict concerning the scope of the work-product privilege. And the government does not dispute that the scope of the privilege is an exceptionally important issue for civil litigants—nor could it, in light of the almost unprecedented number and diversity of amici who have urged this Court to resolve that issue. Instead, the government contends only that the Court should deny review because there is no circuit conflict concerning the applicability of the privilege to the specific type of documents at issue in this case. That is true, but irrelevant under the Court's familiar standards for certiorari. Instead, the salient questions are whether there is a circuit conflict concerning the legal standard for work-product protection and

whether resolution of that conflict would be outcome-dispositive here. Because the answer to each question is plainly yes, this case is an ideal vehicle for resolution of the conflict.

The government devotes the remainder of its brief to a discursive analysis on the merits. Notably, however, the government does not explicitly defend the First Circuit's novel "for use" standard. Nor does the government explain how requiring disclosure of the documents at issue here would be consistent with the policies animating the work-product privilege—and, in particular, with the need to protect an attorney's opinions and thought processes, which lie at the core of work-product protection.

If left undisturbed, the decision below will enable the IRS more aggressively to seek workpapers embodying counsel's opinions from taxpayers, as it has already declared it intends to do. The decision below will also dramatically curtail the availability of the work-product privilege in other contexts. And if the Court does not grant review here, it is far from clear when it will have the opportunity to consider the scope of the privilege in the future. Notwithstanding the government's all-out efforts to defend the outcome below, this case is an obvious candidate for further review. The petition for certiorari should therefore be granted.

### A. The Decision Below Deepens A Circuit Conflict Concerning The Scope Of The Work-Product Privilege

1. The government correctly concedes that, even before the First Circuit's decision in this case, there was a longstanding circuit conflict on the scope of the work-product privilege. See Br. in Opp. 16. As explained in the petition, the majority of circuits consider whether a document was prepared or obtained "because of" the

prospect of litigation, whereas the Fifth Circuit focuses more narrowly on the "primary purpose" for which the document was prepared. See Pet. 12-16.

The government contends only that the decision below does not deepen that conflict, purportedly because the First Circuit merely reaffirmed its previous adoption of the "because of" standard. See Br. in Opp. 10, 15. As a threshold matter, if that were really the case, one might well wonder why the decision below has generated such an enormous outcry—including from the Nation's leading bar association and other groups whose interests sweep well beyond the specific factual context in which this case arises. See, *e.g.*, ABA Br. 1-4; ACC Br. 1-2; Chamber Br. 1-4.

But in any event, the government's contention lacks merit. Although the en banc First Circuit at one point reaffirmed the result of an earlier panel decision "us[ing]" the "phrase" "because of," see Pet. App. 11a, it did not otherwise so much as refer to that standard. Instead, it repeatedly reiterated the novel requirement that a document must possess a litigation-related *use* in order to be protected, see *id.* at 14a, 15a, 18a—as the government acknowledges. See Br. in Opp. 11, 16, 19, 22, 23. As the dissent below explained at length (without response from the majority), that standard is narrower than *either* the "because of" standard *or* the Fifth Circuit's "primary purpose" standard. See Pet. App. 23a-27a (opinion of Torruella, J.). Although the government attempts to reconcile the decision below with at least some decisions applying the "because of" standard, it cites no case in which any other court has specifically considered whether a document was prepared for a litigation-related *use*. See Br. in Opp. 19-20. It is understandable, then, that virtually everyone apart from the government has understood that the First Circuit

adopted a "new test" that is "more restrictive" than the test of any other circuit. John O. Everett et al., *The Reversal in 'Textron': Anatomy of a Bad Decision*, Taxes, Feb. 2010, at 85, 87; see Pet. 28-29.

2. In opposing certiorari, the government primarily contends that further review is not warranted because there is no circuit conflict concerning whether "the work-product protection * * * cover[s] a public company's tax-accrual workpapers." Br. in Opp. 13. As the Solicitor General is well aware, however, this Court grants review to resolve conflicts on questions of federal law—not on the application of federal law to particular facts. See S. Ct. R. 10. That principle is especially apposite in this context, because there are innumerable types of documents that could potentially be subject to the privilege.[1] It would be passing strange for the Court to refrain from granting review until there is a circuit conflict on the particular question whether the work-product privilege protects a spreadsheet that listed items on a company's tax return whose treatment was uncertain—any more than the Court waited for a conflict on the particular question whether the First Amendment protects a student's right to hold up a banner reading "BONG HiTS 4 JESUS" during an Olympic torch relay. See *Morse* v. *Frederick*, 551 U.S. 393, 397-400 (2007). Because the First Circuit made no effort to cabin its "for use" standard to the specific context of "tax accrual workpapers," the government does not have the prerogative to rewrite the question presented in a way that limits it to the facts.

[1] Indeed, even describing the documents at issue here as "tax accrual workpapers" is somewhat misleading, because, as the government's own expert acknowledged, there is "no immutable definition of th[at] term" and "the documents that make up a corporation's 'tax accrual workpapers' may vary from case to case." Pet. App. 92a.

3. Instead, the key question for purposes of certiorari is whether resolution of the circuit conflict on the legal standard for work-product protection would be outcome-dispositive here. It plainly would be, and the government makes no sustained effort to suggest otherwise.

As the leading case applying the "because of" standard makes clear, the proper focus of the inquiry under that standard is whether the document at issue would not have been prepared "but for" the prospect of litigation. *United States* v. *Adlman*, 134 F.3d 1194, 1204 (2d Cir. 1998); accord, *e.g.*, *In re Grand Jury Subpoena*, 357 F.3d 900, 908 (9th Cir. 2004). Although the government at one point suggests that *Adlman* stands for the proposition that a document that was "prepared in the ordinary course of business" is not covered by the privilege, see Br. in Opp. 18, *Adlman* directly rejects that unqualified standard. See 134 F.3d at 1200 (noting that "[t]he fact that a document's purpose is business-related appears irrelevant to the question whether it should be protected under Rule 26(b)(3)"). Instead, it makes clear that the key inquiry is whether the document *would have been prepared* "irrespective of the expected litigation"—*i.e.*, "but for" the prospect of litigation. *Id.* at 1204; see *id.* at 1195.

Applying that test, both the district court and the court of appeals panel in this case correctly determined that the documents at issue would be protected by the privilege. See Pet. App. 55a-74a, 105a-110a. That conclusion ineluctably follows from the district court's finding that, absent the prospect of litigation with the IRS, the documents would not have been prepared at all. See *id.* at 108a. It is presumably for that reason that, in ruling for the government, the en banc court of appeals abandoned the "because of" standard and devised its novel, more stringent "for use" standard. See *id.* at 14a.

Because there can be no real debate that the choice of the appropriate legal standard would be outcome-dispositive here, this case is an optimal vehicle for resolution of the circuit conflict on the privilege's scope.

**B. The Court Of Appeals' Decision Is Erroneous**

The government devotes the remainder of its brief to various arguments on the merits. We make just a few points in response here, and leave fuller responses to subsequent merits briefing if certiorari is granted.

1. As a preliminary matter, it is conspicuous that the government does not explicitly defend the First Circuit's "for use" standard. The government similarly did not advocate the "for use" standard below—and, in fact, specifically abjured it. See C.A. En Banc Tr. 21 (June 2, 2009). The government's reticence is not surprising. For the reasons stated in the petition, the "for use" standard is patently flawed. See Pet. 20-24. And such a narrow interpretation of the work-product privilege would hardly be in the government's institutional interest, because the government concededly asserts the work-product privilege in litigation at least as often as it seeks to pierce it. See C.A. Panel Tr. 20 (Sept. 5, 2008).

2. The government instead offers three possible alternative standards for work-product protection that, in its view, would support affirmance. All of those alternatives are unavailing.

a. The government suggests (Br. in Opp. 15-16) that the work-product privilege protects any document that was prepared for a litigation-related purpose, even if it was prepared for another purpose as well. That test has at least some basis in cases applying the "because of" standard, see Pet. 18—although the better (and more administrable) understanding of the "because of" standard is that it focuses not on the subjective motive of the

preparer but rather on the objective causal connection between the document's preparation and the prospect of litigation. See p. 5, *supra*. But petitioner would prevail even under that test, because it presented uncontroverted testimony that the documents at issue were prepared, *inter alia*, to guide it in making litigation or settlement decisions concerning the tax treatment of the specified items. See C.A. App. 200. Although the en banc First Circuit cast aspersions on that testimony, see Pet. App. 14a, it did not determine that the testimony was not credible; instead, it ultimately concluded that the testimony was *irrelevant* under its "for use" standard. See *id.* at 11a-12a, 18a-19a. Under either a "but for" test or a "dual purpose" test, therefore, petitioner would plainly prevail here.

b. Perhaps for that reason, the government proposes two other alternative standards, both based on the language of the advisory committee note to Rule 26(b)(3). Those alternatives—which the government concedes did not serve as the basis for the decision below, see Br. in Opp. 16 n.10—also lack merit.

i. The government contends (Br. in Opp. 12-13, 18-19) that the work-product privilege does not protect any document that was "prepared in the ordinary course of business." Although some courts have noted in passing that particular documents were prepared in the ordinary course of business, see *id.* at 18-19, no court has adopted that as the governing legal standard, and for good reason. Such a standard would ignore the reality that many, if not most, documents "prepared in anticipation of litigation"—such as a memorandum prepared by in-house counsel to inform a merger partner of the potential for antitrust litigation, or an internal memorandum prepared by outside counsel to assess a particular litigation risk—could also be said to have been "prepared in the

ordinary course of business." See ACC Br. 8-15. As a result, such a standard would create an atextual exception that would threaten to swallow whole the operative provision of Rule 26(b)(3). See, *e.g.*, *United States* v. *Roxworthy*, 457 F.3d 590, 598-599 (6th Cir. 2006); *Adlman*, 134 F.3d at 1198-1199. And it would eviscerate the policies that this Court articulated in adopting the work-product privilege in *Hickman* v. *Taylor*, 329 U.S. 495 (1947)—a decision, remarkably, that the government scarcely even cites—because it would strip protection from documents embodying an attorney's "thoughts" and "mental impressions," which lie at the heart of the privilege. *Id.* at 511, 512.

ii. The government also asserts (Br. in Opp. 21, 24-25) that the work-product privilege does not protect any document that was prepared for the purpose of complying with a statutory or regulatory requirement. But the critical point is that, while the documents at issue here were prepared for the purpose, *inter alia*, of assisting petitioner's auditor in reviewing the amount set aside in reserve for potential tax liabilities, petitioner was not *required* to generate those documents. Although the government contends that legal or auditing requirements "mandate" that "tax-accrual workpapers" be created, *id.* at 21, it cites no authority for the proposition that petitioner was obligated to create *the documents at issue here*. To the contrary, petitioner could have complied with any applicable obligations simply by conveying all of the same information to its auditor orally or in less detail. See *id.* at 2-3. And one can safely predict that companies more broadly will be deterred from reducing information to writing if the court of appeals' decision is left undisturbed, with the resulting chilling effect and

"inefficiency" of which this Court has warned. See *Hickman*, 329 U.S. at 511, 514.[2]

### C. The Question Presented Is An Exceptionally Important And Recurring One That Merits The Court's Review In This Case

Finally, the government does not dispute that the scope of the privilege is an exceptionally important issue for civil litigants. That issue warrants review here.

1. To begin with, the factual context in which this case arises is important in its own right. Citing various authorities from the 1980s, the government suggests that review is not warranted because the IRS seeks to obtain "tax-accrual workpapers" "only in unusual circumstances." Br. in Opp. 4. In 2002, however, the IRS adopted a more aggressive policy giving it the discretion to seek all of a taxpayer's workpapers under specified circumstances. See I.R.S. Announcement 2002-63, 2002-2 C.B. 72. And since the decision in this case, the IRS has declared that it will pursue such workpapers even more aggressively in the future. See Pet. 26. Notwith-

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[2] As an aside, the government suggests (Br. in Opp. 26-29) that, for purposes of Rule 26(b)(3), only litigation in federal court qualifies as "litigation," and antecedent IRS administrative proceedings do not. Petitioner, however, presented evidence below that there was a reasonable prospect of federal-court litigation. See Pet. 18; Pet. App. 91a, 109a. And in any event, there is no basis for excluding from the scope of Rule 26(b)(3) either administrative proceedings more generally, see, *e.g.*, Restatement (Third) of the Law Governing Lawyers § 87, cmt. h (2000), or IRS administrative proceedings specifically, see, *e.g.*, *Roxworthy*, 457 F.3d at 600; *Hodges, Grant & Kaufmann* v. *IRS*, 768 F.2d 719, 722 (5th Cir. 1985). The government's assertion that IRS administrative proceedings are "cooperative rather than adversarial" (Br. in Opp. 27) would come as a surprise to anyone who has had dealings with the IRS.

standing the government's protestations of restraint, therefore, one can be reasonably confident that, if the decision below is allowed to stand, the IRS will be emboldened to seek workpapers as "roadmaps" to taxpayers' thinking in preparing their tax returns—as the IRS concededly did here. See Pet. 5-6.[3]

The government does not dispute that the First Circuit's standard will also have consequences in a variety of other contexts—nor could it, given its repeated concessions to that effect at oral argument below. See C.A. En Banc Tr. 4-5, 16, 19 (June 2, 2009). The petition sets out numerous examples of those contexts, see Pet. 27-28, and the various amicus briefs set out still others, see, *e.g.*, Chamber Br. 14-21. The government also does not dispute that the First Circuit's decision is already having a chilling effect on practitioners, who are taking steps to avoid the disclosure of litigation risk assessments and other documents previously thought to be privileged. See Pet. 29; PLAC Br. 17-19. In this area of the law, perception matters, because lawyers will naturally tailor their advice in accordance with what they believe to be the applicable legal standard rather than risking disclosure. See Reed Smith Br. 5-6, 13; cf. *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981) (noting that "[a]n uncertain privilege * * * is little better than no privilege at all").

2. Much has changed in the legal profession in the more than sixty years since *Hickman*. See ABA Br. 7-9. This Court, however, has not directly addressed the

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[3] Ironically, the government justifies its pursuit of workpapers by reference to the "complexity" of corporate tax returns. See, *e.g.*, Br. in Opp. 4 n.3, 29-30. Needless to say, any "complexity" is a problem of the government's own making, not petitioner's.

scope of the privilege in that time—and, because of the difficulty in obtaining interlocutory review on privilege issues, it is far from clear when it will next have the opportunity to do so. Contrary to the government's suggestion (Br. in Opp. 17 n.11), the Court recently *limited* the availability of interlocutory review for privilege rulings. See *Mohawk Indus., Inc.* v. *Carpenter*, 130 S. Ct. 599, 609 (2009). And although the government contends that "litigants regularly seek review in this Court," Br. in Opp. 17 n.11, the only petition for certiorari it cites presenting the same question was filed almost ten years ago, and we are unaware of any since then.

As the outpouring of amicus interest confirms, this is precisely the sort of practically significant case that the Court should hear. And there is good reason why the Court cannot afford to wait for another case presenting the same issue. In short, "[t]he time is ripe for [the] Court to intervene," Pet. App. 45a (Torruella, J., dissenting), and resolve the pervasive uncertainty concerning the scope of a vitally important privilege.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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