No. SJC-12946

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

ATTORNEY GENERAL MAURA HEALEY,

Petitioner-Appellee

v.

FACEBOOK, INC.,

Respondent-Appellant.

On Appeal from a Decision of the
Superior Court for Suffolk County

BRIEF OF *AMICUS CURIAE* LAWYERS FOR CIVIL JUSTICE SUPPORTING REVERSAL IN FAVOR OF RESPONDENT-APPELLANT FACEBOOK, INC.

James M. Campbell, BBO #541882
Campbell Conroy & O'Neil, P.C.
1 Constitution Wharf, Suite 310
Boston, MA 02129
(617) 241-3000
jmcampbell@campbell-trial-lawyers.com

Counsel for Lawyers for Civil Justice as amicus curiae

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Judicial Court Rule 1:21, Lawyers for Civil Justice hereby discloses that it has no parent corporation(s), and no publicly held corporations own more than 10% of the stock of Lawyers for Civil Justice.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW

RULES

OTHER AUTHORITIES

STATEMENT OF INTEREST

Lawyers for Civil Justice ("LCJ")[1] is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. LCJ has been closely engaged in reforming the law to: (1) promote balance in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

LCJ has been especially focused on promoting a sensible and balanced approach to discovery that ensures access to needed information, while maintaining uniform and predictable application of recognized protections and privileges. LCJ has expertise on the rules, policies, and procedures currently governing issues of discovery and privileges, based on its own policymaking efforts and the research that underlies its views, and on the collective experience of its members who frequently litigate discovery issues in state and federal courts. LCJ has deep knowledge of and interest in the current status of work product protection and the

[1] Pursuant to Supreme Judicial Court Rule 17(c)(5), LCJ declares that no party, counsel, or entity other than the LCJ and its members and counsel authored or contributed money to the preparation of this Brief. The LCJ and its counsel has not represented any of the parties to this appeal in any other similar proceeding or transaction.

policies and purposes underlying the work product doctrine, which has been a subject of its study in recent years.

LCJ takes a specific interest in this case, because it believes the Superior Court's order is inconsistent with both legal precedent and the policies that the work product doctrine is intended to advance. The Superior Court has incorrectly interpreted the work product standard by determining that Facebook's attorney-led, retrospective forensic internal investigation was not entitled to work product protection because litigation was not its "primary purpose." Not only does the decision run afoul of the Massachusetts work product formulation, it also undermines sound public policy by punishing a corporation for having an existing system of internal regulation and enforcement. This case presents an opportunity for this Court to reaffirm the scope and purpose of the work product doctrine in Massachusetts and ensure that internal investigations taken in anticipation of litigation are properly protected. Accordingly, LCJ has simultaneously filed a motion for leave to file this brief along with the proposed amicus brief in support of petitioners. LCJ believes that this brief will assist the Court in resolving the issues presented.

SUMMARY OF THE ARGUMENT

Corporations' proactive efforts to investigate and prevent potential errors or wrongdoing should be encouraged and protected. The public benefits when companies investigate and analyze events, particularly when litigation is anticipated. This enables companies to assess and review events to make a determination how to change and improve as well as facilitate a response to the claims or governmental investigation. If a company were forced to disclose all of its findings and analysis in the context of an investigation, the company would simply stop investigating because of the likely prejudice that would occur if the investigation were required to be disclosed. This is the context underpinning the work product doctrine.

Nearly 75 years ago, the Supreme Court first expressly recognized that the nature of trial preparation required protection against discovery by a party's adversary. Because counsel need a level of privacy with which to analyze evidence and formulate litigation strategy, the Court created the work product doctrine to provide that privacy. This doctrine advances an important public policy goal of enabling an individual or company to engage in a full and careful review of evidence and the issues without fear that its review will be used against it in litigation. Codified in the Federal Rules of Civil Procedure 50 years ago and recognized in all 50 states, the work product doctrine is fundamental to the practice of law and privilege.

In today's litigation-centered climate, reality dictates that companies must constantly evaluate the litigation implications of their past, present, and future decisions. Many companies have established embedded processes that essentially presuppose litigation will take place when an adverse company event occurs. Consequently, divining exactly when litigation is anticipated in a specific situation can be challenging. That the majority of federal and state courts—including Massachusetts—have ceased to hinge work product protection on the "primary purpose" of a document's creation and instead acknowledge the dual nature of internally created documents, reflects this reality. The work product doctrine and the policies behind it support immunizing documents created by an attorney-driven, retrospective investigation conducted in anticipation of litigation even when a company routinely conducts in-house investigations as part of its ordinary business practices. Yet, the Superior Court essentially denied Facebook protection over its work product investigative materials *because* Facebook had voluntarily and proactively implemented a separate program to conduct such routine monitoring and enforcement. The result reached by the Superior Court and advocated by the State will result in a major chilling of corporate investigations and internal reviews—companies will rightly fear that any routine investigative efforts will jeopardize potential claims of work product protection in the future, pushing companies to

reduce beneficial monitoring and enforcement programs in order to avoid an adversary using those same programs against the company in litigation.

The fundamental question before this Court is whether to disregard the application of the work product doctrine and enable the discovery of Facebook's internal investigation materials. For the reasons discussed below, we urge the Court to uphold the principles of the work product doctrine and protect the materials from disclosure.

ARGUMENT

I. UPHOLDING THE RULING BELOW WOULD PENALIZE COMPANIES THAT ENGAGE IN INTERNAL INVESTIGATIONS

The Superior Court explicitly recognized that Facebook, prior to the App Developer Investigation ("ADI") at issue here, had separately implemented an "ongoing app enforcement program" that involved "regular and proactive monitoring" of apps in order to detect and investigate potential violations of Facebook's policies. A2/192. That program was initiated because Facebook "made a commitment, and has a corresponding obligation to protect the privacy of its users." A2/192. The courts should encourage companies to make such commitments to their customers and the public, not use a company's "commitment" as a weapon against it to erode the valid protections instilled by the work product doctrine in subsequent litigation.

Since the first recognition of the work product doctrine as protecting certain internal aspects of attorney and company file materials, both business and litigation have seen exponential growth in the United States. With the growing pains that a business is bound to encounter, the opportunity to learn from prior mistakes and avoid those mistakes in the future requires that a business be able to engage in some level of internal investigation to conduct a self-critical analysis without fear that all internal investigations will used against it by legal adversaries. Indeed, there can be no question that this type of self-critical analysis benefits everyone: the consumer

benefits from internal corporate improvements to ensure a better product or service; the company benefits from internal efficiency and increased business; the public benefits from a reduction in potential adverse company action and, thus, a reduction in litigation that affects the public through use of public and court resources. The work product doctrine advances these goals by offering express protection once litigation is anticipated, serving the valuable purpose of permitting litigants and their counsel to prepare for and respond to the litigation, including meeting with potential witnesses and review potential evidence.

These policy goals have been recognized in a number of other contexts. *E.g.*, Fed. R. Evid. 407, advisory committee note (recognizing the social policy rationale "of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety"); *Dowling v. Am. Haw. Cruises, Inc.*, 971 F.2d 423, 427 (9th Cir. 1992) (citing Fed. R. Evid. 407 and quoting advisory committee note); *In re Block Island Fishing, Inc.*, 323 F. Supp. 3d 158, 163 (D. Mass. 2018) (same). Similarly, in the context of a post-accident safety analysis, regardless of whether litigation is pending or anticipated, courts recognize the "goal of the [internal] investigative process is to promote safety and to eliminate the possibility of a similar [in]cident occurring in the future." *In re Petition of McAllister Towing & Transp. Co.*, 2004 U.S. Dist. LEXIS 9921, *1 (E.D. Pa. May 7, 2004); *Bradley v. Melroe Co.*, 141 F.R.D. 1, 3 (D.D.C. 1992) (recognizing that even if routine investigation

was not subject to work product protection, the "ultimate benefit to others from this critical analysis of the product or event far outweighs any benefits from disclosure"); *In re Block Island Fishing*, 323 F. Supp. 3d at 160-61 (disclosure of self-critical analyses would "almost inevitably . . . result in some cramping of the investigative process, simply because the incentives for any institution to engage in self-evaluative investigation pale considerably with the knowledge that the results may be used against it") (quoting *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211, 218 (D. Mass. 1980)).

When a company anticipates litigation and shifts the focus of its internal efforts in response, these same policy considerations require that the work product doctrine protect internal investigative materials, even if a company separately conducts routine inspections or evaluations. Central to the work product doctrine is the notion that each side in the adversarial legal process is able to independently determine its best evidence and arguments based on its own counsel's selection, organization, analysis, and evaluation of information—free from discovery by an adversary. Even at their best, companies take actions (or fail to take actions) that give rise to litigation; anticipating and seeking to minimize litigation-based liability is a necessary and desired component of good business practice. Successful businesses have proven to be those proactive companies that stay ahead of the industry curve and take active efforts to identify and avoid past mistakes, for

instance, by implementing their own routine investigative and/or enforcement procedures. That is precisely what Facebook had done by implementing its app monitoring and enforcement program in 2012. That a company has undertaken proactive efforts and made a "commitment" to its users unrelated to litigation does not and should not remove the work product protection that otherwise would exist when that same company conducts an independent, post-incident investigation in anticipation of litigation. This is even more strongly the case when the investigation encompasses both objectives.

II. THE WORK PRODUCT PRIVILEGE IS INTENDED TO PROTECT INTERNAL INVESTIGATIONS FROM DISCOVERY BY AN OPPONENT

In contrast with its counterpart—the attorney-client privilege—the work product privilege is a relatively new doctrine, which has evolved and continues to evolve since its inception. Indeed, work product protection is a court-created doctrine, originating less than 75 years ago in *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947), and first codified via the 1970 amendment to the Federal Rules of Civil Procedure, by adding section (b)(3) to Rule 26. In its current format, Fed. R. Civ. P. 26(b)(3)[2] provides, in relevant part, that "a party may not obtain discover documents and tangible things that are prepared in anticipation of litigation or for

[2] This Court has recognized that "Rule 26 (b)(3) of the Massachusetts Rules of Civil Procedure is identical in all material respects to the Federal rule," and that "[i]t is therefore appropriate to look for guidance to Federal interpretations of the Federal rule." *Comm'r of Revenue v. Comcast Corp.*, 453 Mass. 293, 316 n.25 (2009).

trial by or for another party or by or its representative" unless they are otherwise discoverable and "the party shows substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their equivalent by other means." Fed. R. Civ. P. 26(b)(3).

Currently, thirty-one states and the District of Columbia have rules substantially similar to Fed. R. Civ. P. 26(b)(3) regarding the protection of work product material from discovery. As its early justification for recognition of the work product privilege, the Supreme Court understood that, separate from purposes served by the attorney-client privilege, it likewise "is essential that a lawyer work with a certain degree of privacy." *Hickman*, 329 U.S. at 511. Permitting a party to discovery the work product of its adversary would create the danger that:

> "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. 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. at 511. The Supreme Court again echoed this sentiment in the context of internal corporate investigations, in *Upjohn Co. v. United States*, 449 U.S. 383, 397-98 (1981).

Even the Department of Justice regards a corporation's work product as sacrosanct, as an "essential and long recognized component[] of the American legal system." (Principles of Federal Prosecution of Business Organizations § 9-28.710),

https://www.justice.gov/sites/default/files/opa/legacy/2008/08/28/corp-charging-guidelines.pdf (last visited Nov. 12, 2020). In its guidance to federal prosecutors, the Department explains: "prosecutors should not ask for [] waivers [of the work product privilege] and are directed not to do so." *Ibid*. This guidance recognizes that even informally asking a corporation to disclose the details of its internal investigations "promote[s] an environment in which [work product] protections are [] unfairly eroded to the detriment of all." *Ibid*. Here, a court order that compels Facebook to disclose the details of its retrospective investigation to its adversary *eviscerates* the work product protection and undermines its goals. This Court should shore up the work product privilege by re-affirming the policy justifications that lead to the recognition of the privilege, namely: (1) a lawyer's need to work within a degree of privacy; (2) efficiency in giving legal advice; and (3) fairness.

In light of the paramount importance of these principles, the language of Rule 26(b)(3) itself expresses the doctrine's broad scope, protecting documents created prior to the actual filing of a lawsuit, *e.g.*, *Pacamor Bearings, Inc. v. Minebea Co.*, 918 F. Supp. 491, 513 (D.N.H. 1996) (recognizing that "[a]lthough investigations by government agencies are not 'litigation' as that term is generally understood," for work product purposes, such an investigation "provides reasonable grounds for anticipating litigation sufficient to trigger application of the work product doctrine'"); documents created for different litigation than the subject lawsuit,

Federal Trade Commission v. Grolier Inc., 462 U.S. 19, 25 (1983) ("the literal language of [Rule 26(b)(3)] protects materials prepared for any litigation or trial as long as they were prepared by or for a party to the subsequent litigation"); *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir. 2006) (observing that "[a] majority of courts have held . . . that the privilege endures after termination of the proceedings for which the documents were created."); and to documents created by non-attorneys, *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (work product doctrine "protect[s] material prepared by agents for the attorney as well as those prepared by the attorney himself").

The issue presented by this appeal does not require the Court to expand the work product doctrine beyond its express scope or engage in any creative interpretation of the doctrine to the materials at issue. Facebook's ADI falls squarely within the express scope of the Rule, and it is entitled to work product protection for all the reasons underlying the Rule itself.

III. MATERIALS CREATED AS PART OF LARGE-SCALE, ATTORNEY LED INVESTIGATIONS ARE PREPARED IN ANTICIPATION OF LITIGATION REGARDLESS OF A COMPANY'S ROUTINE REPORTING AND ENFORCEMENT PROCEDURES OR A BUSINESS-RELATED PURPOSE

The Superior Court denied work product protection based on its assessment that Facebook's ADI—a multi-phase, attorney-driven, retrospective investigation taken in direct response to a discrete event—was "fairly described as 'business as usual.'" A2/191. Such a conclusion simply cannot be correct. The Superior Court

recognized that material would fall outside of work product protection only if it "would have been created 'irrespective of the prospect of litigation.'" A2/189 (quoting *Comm'r of Revenue v. Comcast Corp.*, 453 Mass. 293, 318-19 (2009)). However, the Superior Court misapplied that standard when it decided, because Facebook had created a program for routine monitoring and regulation of apps, that the ADI was "just another iteration of that program." A2/191. While, as the Superior Court observed, Facebook's existing program and the ADI may have shared certain goals (A2/191), when litigation becomes a virtual certainty it is unrealistic to draw a distinction between documents that would have been prepared "irrespective of the litigation" and documents that were prepared "because of the prospect of litigation." *In re Woolworth Corp. Secs. Class Action Litig.*, 1996 U.S. Dist. LEXIS 7773, *9 (S.D.N.Y. June 6, 1996).

The Supreme Court has described the work product doctrine as "intensely practical, grounded in the realities of litigation in our adversary system." *Nobles*, 422 U.S. at 239. This "practical" approach requires that courts determine "whether, in light of the nature of document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1988). While protected work product materials are easily recognizable when prepared for a singular purpose, *see United States v. Torf (In re Grand Jury Subpoena)*, 357 F.3d

900, 908 (9th Cir. 2004), application of the doctrine is more complicated when the factual circumstances giving rise to the document's creation reveals that the document was created for a business purpose *and* because of the prospect of litigation. When this occurs the document will remain eligible for protection under Rule 26(b)(3) if the document's "litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." *Ibid*. The dual purpose doctrine thus recognizes the reality of the nature of both business and litigation—anticipating litigation is a necessary aspect of any successful business in the United States.

A contrary rule would lead to "[i]nefficiency, unfairness and sharp practices . . . in the giving of legal advice." This is because companies would be faced with an untenable choice:

> If the company declines to make such analysis or scrimps on candor and completeness to avoid prejudicing its litigation prospects, it subjects Itself and its co-venturers to ill-informed decision making. On the other hand, a study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation.

Adlman, 134 F.3d at 1200. As the Second Circuit aptly concluded: "We perceive nothing in the policies underlying the work-product doctrine or the text of the Rule itself that would justify subjecting a litigant to this array of undesirable choices." *Ibid*. Indeed, when companies seek legal advice, they should be confident that courts

will uphold their counsel's ability to "work within a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman*, at 511. As the Supreme Court explained: "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

Responsible companies conduct internal investigations whenever a serious incident or accident occurs. While one purpose may be to identify the cause and prevent future incidents, *see In re Petition of McAllister Towing & Transp.*, 2004 U.S. Dist. LEXIS 9921, an equally compelling purpose is to determine whether the company may be subject to a lawsuit. Moreover, "[t]he retention of an attorney is one indicia of the anticipation of litigation." *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 2000 U.S. Dist. LEXIS 7939, *36 (S.D.N.Y. June 7, 2000). This is because "the involvement of an attorney makes it more likely than not that the focus has shifted toward litigation, making materials more likely to have been prepared in anticipation of litigation." *Wikel v. Wal-Mart Stores, Inc.*, 197 F.R.D. 493, 495 (N.D. Okla. 2000). As such, "if a company deviates from its ordinary practice and engages counsel to direct an investigation, particularly where there is a background of circumstances that highlight the risk of litigation, the investigative materials are protected by the work product doctrine." *Heckman v. TransCanada USA Servs.*, 2020 U.S. Dist. LEXIS 7293, *7 (S.D. Tex. Jan. 13, 2020).

Under the dual purpose doctrine, "a document created because of anticipated litigation, which tends to reveal mental impressions, conclusions, opinions or theories concerning the litigation, does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation." *Adlman*, 134 F.3d at 1195. *See also United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010) ("material developed in anticipation of litigation can be incorporated into a document produced during an audit without ceasing to be work product"); *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1261 (3d Cir. 1993) (materials prepared after an OSHA investigation had commenced were created in anticipation of litigation); *In re GM LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 532 (S.D.N.Y. 2015) (materials prepared in light of pending Department of Justice investigation and in anticipation of litigation entitled to work product protection); *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 237 F.R.D. 176, 182 (N.D. Ill. 2006) (attorney audit letters were protected work product and not "routine investigative or evaluative reports prepared in the ordinary course of business"); *Martin v. Monfort, Inc.*, 150 F.R.D. 172, 173 (D. Colo. 1993) (studies were entitled to work product protection, because they were conducted only after corporation was contacted by Department of Labor as part of investigation, and the studies would not have occurred in the ordinary course of business); *Bituminous Cas. Corp. v. Tonka Corp.*, 140 F.R.D.

381, 390 (D. Minn. 1992) (materials prepared after a state pollution control agency began investigating a company were created in anticipation of litigation).

Moreover, the outcome does not change simply because prior to initiating the ADI Facebook had an existing program that included regular monitoring and enforcement of its policies. The ADI, in contrast, consisted of a full-scale, retroactive investigation, triggered by a discrete event and led by separately retained outside counsel. Contrary to the Superior Court's ruling, work product protection is appropriately denied only in situations when the documents at issue would, in fact, would have been created regardless of the threat or pendency of litigation, in the ordinary course of that party's business. *E.g.*, *United States v. Frederick*, 182 F.3d 496, 501-02 (7th Cir. 1999) (accountant worksheets prepared for business's tax returns not protected); *Connecticut Indem. Co. v. Carrier Haulers, Inc.*, 197 F.R.D. 564, 570 (W.D.S.C. 2000) ("Because an insurance company has a duty in the ordinary course of business to investigate and evaluate claims made by its insureds, the claims files containing such documents usually cannot be entitled to work product protection" until "after the insurance company makes a decision with respect to the claim"); *Blough v. Food Lion*, 142 F.R.D. 622 (E.D. Va. 1992) (contemporaneously prepared accident report created by grocery store employee was created in the regular course of business and not protected).

The ordinary course of Facebook's business does not include full-scale, attorney-led, retroactive forensic investigations. Circumstances that would lead to an attorney-led investigation by their nature indicate that the doctrine would be triggered. The investigation and resulting materials at issue here occurred only after a specific incident became known and it was clear that litigation and/or a governmental investigation was anticipated (and of course this anticipation was proven to be correct). These materials generated as a part of this review fall squarely within the scope of work product protection as established by Massachusetts's Rule of Civil Procedure 26(b)(3), regardless of their use for other business purposes and regardless of other, separate, routine monitoring and investigative actions undertaken by Facebook. The plain language of the Rule—and its counterparts in federal court and the majority of state courts across the country—along with the purposes underlying the work product doctrine and the policies supporting that protection require that the materials at issue be given the full protection to which they are entitled pursuant to decades of legal precedent.

CONCLUSION

The information the Attorney General seeks to discover was created in anticipation of litigation as part of a massive, attorney-led, retrospective internal investigation in direct response to a discrete event. It therefore falls squarely within the scope of work product protection as established by Massachusetts's Rule of Civil

Procedure 26(b)(3). The Rule itself and the sound policies underlying the work product doctrine require that the materials at issue be given the full protection to which they are entitled pursuant to decades of legal precedent. The Superior Court's decision, if permitted to stand, will have far-reaching effects on the attorney-client relationship and the ability of attorneys to engage in full and adequate representation of those clients. Accordingly, the Court should reverse the decision of the Superior Court and protect Facebook's work product material from production.

Respectfully Submitted,

Lawyers for Civil Justice
By its Attorneys,

Date: November 13, 2020

/s/ James M. Campbell

James M. Campbell, BBO #541882
Campbell Conroy & O'Neil, P.C.
1 Constitution Wharf, Suite 310
Boston, MA 02129
P: (617) 241-3000
F: (617) 241-5115
jmcampbell@campbell-trial-lawyers.com

CERTIFICATE OF COMPLIANCE

I, James M. Campbell, counsel for *Amicus Curiae* Lawyers for Civil Justice, certify pursuant to Rule 17(c)(9) of the Massachusetts Rules of Appellate Procedure, that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to the formatting and length requirements of Mass. R. App. P. 17 and 20. This brief contains 3,791 words, excluding the parts of the brief exempted by Mass. R. App. P. 20(a)(2)(D). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word Version 2010.

/s/ James M. Campbell
James M. Campbell

CERTIFICATE OF SERVICE

I, James M. Campbell, hereby certify on this 13th day of November, 2020, that a true and accurate copy of the within document was served to all counsel of record via the court's electronic filing system.

/s/ James M. Campbell
James M. Campbell