COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

DAR-27419

ATTORNEY GENERAL MAURA HEALEY,
Petitioner-Appellee,

v.

FACEBOOK, INC.,
Respondent-Appellant.

On Reservation and Report from the
Superior Court for Suffolk County

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE SUPPORTING RESPONDENT-APPELLANT FACEBOOK, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 17(c)(1) and SJC Rule 1:21, *amicus curiae* the National Association of Criminal Defense Lawyers certifies that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958, and is the only nationwide professional bar association for public defenders and private criminal defense lawyers. It has nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files numerous *amicus* briefs each year in state and federal courts across the country, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal

[1] Per Rule 17(c)(5), the undersigned declares that: (A) no party or party's counsel authored the brief in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; (C) no person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief; and (D) neither the amicus curiae nor its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

defense lawyers, and the criminal justice system as a whole. The issues presented in this case—including the proper scope and application of the attorney work product doctrine and attorney-client privilege—are of paramount importance to criminal defense lawyers and the clients they represent.

INTRODUCTION

The many rights and freedoms we enjoy depend upon the proper functioning of our adversarial legal system. Those whose rights are implicated rely on the sound advice of lawyers. "[S]ound legal advice or advocacy serves public ends and . . . such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Superior Court's decision—if left uncorrected—threatens that.

The Superior Court's decision compels Facebook to produce information that was "indisputably" generated in the course of its attorney-led investigation. *See* Order at 10. In response to actual and anticipated litigation surrounding the 2018 Cambridge Analytica incident, Facebook hired an outside law firm to design and direct an internal investigation. The purpose of that investigation was to evaluate past conduct and advise the company as to any resulting liability. Criminal defense lawyers are routinely relied upon to perform such investigations, and the attorney work product and attorney-client privilege protections are essential to the efficacy of those investigations. But here, the Superior Court failed to uphold those vital principles.

With regard to work product, the Superior Court incorrectly concluded that the information generated in the course of Facebook's attorney-led investigation was not prepared "in anticipation of litigation" because the company may have had additional business uses for the investigation information. *See* Order at 14-15. That conclusion was contrary to the standard previously endorsed by this Court. Furthermore, the Superior Court incorrectly concluded that an attorney's ordering and sifting of information is only "fact" work product that must be turned over to the government. *See* Order at 16.

With regard to the attorney-client privilege, the Superior Court incorrectly held that the confidential communications between attorney and client were not covered by the privilege because the company publicly announced the mere existence of an attorney-led investigation. *See* Order at 18.

These misinterpretations of the work product doctrine and attorney-client privilege would cause a chilling effect on the attorney-client relationship. If the Superior Court's opinion stands, attorneys' ability to conduct thorough, probing internal investigations will be severely limited, not least because clients will be reticent to provide full

information to their lawyers without the comfort of confidentiality. Direct appellate review by this Court is, therefore, necessary to clear the uncertainty created by the lower court, which has sweeping potential to undermine our adversarial legal system.

ARGUMENT

I. The questions presented in this appeal are of such public interest that direct appellate review is warranted.

This Court should grant direct appellate review in this case because the public interest in preserving work product protection and attorney-client privilege is of such importance that justice requires a final determination by this Court. *See* Mass. R. App. P. 11(a)(3). Indeed, this Court has routinely granted direct appellate review in cases involving these fundamental legal principles. *See, e.g., Chambers v. Gold Medal Bakery, Inc.*, 464 Mass. 383, 389 (2013) (granting direct appellate review to resolve issues of attorney-client privilege and work product protection).

The public interest in preserving work product protection is paramount. The work product doctrine "is intended to enhance the vitality of an adversary system of litigation by insulating counsel's work from intrusions, interferences, or borrowings by other parties as he prepares for the contest." *Ward v. Peabody*, 380 Mass. 805, 817 (1980).

"The purpose of the doctrine is to establish a 'zone of privacy for strategic litigation planning ... to prevent one party from piggybacking on the adversary's preparation.'" *Comm'r of Revenue v. Comcast Corp.*, 453 Mass. 293, 311–12 (2009) (quoting *United States v. Adlman*, 68 F.3d 1495 (2d Cir.1995)). The Supreme Court has held that this zone or privacy is essential to our legal system, and warned against the grave consequences of allowing discovery of an attorney's work product:

> 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.

Hickman v. Taylor, 329 U.S. 495, 511 (1947); *see also Upjohn*, 449 U.S. at 397–98 ("If discovery of the [attorney work product] material sought were permitted 'much of what is now put down in writing would remain unwritten.'"). Failure to uphold this doctrine—as the Superior Court failed to do here—would dramatically disrupt the ability of criminal defense attorneys to perform their necessary role in our justice system.

The public interest in protecting the attorney-client privilege is similarly significant. "The attorney-client privilege has deep roots in the common law and is firmly established as a critical component of the rule

of law in our democratic society." *Suffolk Const. Co. v. Div. of Capital Asset Mgmt.*, 449 Mass. 444, 456 (2007); *see also Upjohn*, 449 U.S. at 389 ("The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law."). The attorney-client privilege promotes full and frank disclosures from clients to their lawyers, enabling those lawyers to provide informed legal advice. *See Upjohn*, 449 U.S. at 389. "In a society that covets the rule of law, this is an essential function." *Suffolk Const. Co.*, 449 Mass. at 449. Time and again, courts have affirmed this noble purpose and, in particular, how it supersedes the public's interest in open discovery. *See, e.g., id.* ("The attorney-client privilege 'creates an inherent tension with society's need for full and complete disclosure....' But that is the price that society must pay for the availability of justice to every citizen, which is the value that the privilege is designed to secure."). Curtailing the public's ability to confide in their lawyers—as the Superior Court's decision does—would have the sort of grave consequences that decades of settled law have aimed to avoid.

Due to these strong public interests at issue—which directly affect criminal defense lawyers and their clients—NACDL urges this Court to

grant direct appellate review to reverse the Superior Court's dangerous repudiation of the attorney work product doctrine and attorney-client privilege.

II. The Superior Court's holding is in error.

Direct appellate review is necessary in this matter because the Superior Court's decision incorrectly applied settled Massachusetts law. In compelling Facebook to produce information generated in the course of its attorney-led investigation, the Superior Court failed to properly apply the work product and attorney-client privilege protections that attached to those materials. The work product doctrine protects from disclosure information generated in the course of an attorney-led investigation that is conducted "because of" anticipated litigation, and an attorney's sorting of information during a privileged investigation cannot be discoverable by his adversary. And the attorney-client privilege protects confidential communications between lawyers and their clients even if the client publicly discloses the existence of an attorney-led investigation.

In rejecting these principles, the Superior Court created dangerous uncertainty in the attorney-client relationship. This Court should

intervene to affirm the crucial protections Massachusetts law affords attorney work product and attorney-client communications.

A. The work product doctrine protects the investigation materials from disclosure.

Materials created in the course of an attorney-led investigation have long been recognized as "classic attorney work product." *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 532 (S.D.N.Y. 2015) ("Interview notes and memoranda produced in the course of similar internal investigations have long been considered classic attorney work product.").[2] In denying work product protection for the investigation materials in this case, the Superior Court was doubly wrong.

First, the Superior Court incorrectly found that Facebook's investigation materials could not have been prepared "in anticipation of litigation" because the subject matter of the investigation was also relevant to the company's ongoing enforcement program. *See* Order at

[2] The Massachusetts work product doctrine is codified in Massachusetts Rule of Civil Procedure 26(b)(3). As this Court stated in *Comcast Corp.*, the rule is "identical in all material respects to the Federal rule. It is therefore appropriate to look for guidance to Federal interpretations of our rule." *Comcast Corp.*, 453 Mass.at 317 n.25.

14-15. However, under settled case law, the threat of litigation need not be the only purpose for which documents are created in order to qualify for work product protection, and materials from an attorney-led investigation can be used for other business purposes without losing that protection.

The work product doctrine protects materials related to "litigation which, although not already on foot, is to be reasonably anticipated in the near future." *Ward*, 380 Mass. at 817. In *Comcast Corp.*, this Court held that the correct test for determining whether materials are prepared in anticipation of litigation is "whether the documents were prepared 'because of' existing or expected litigation." *Comcast Corp.*, 453 Mass. at 316.[3] In so doing, this Court expressly rejected the narrower "primary

[3] Several Federal Circuit Courts—including the First Circuit—have similarly endorsed the broader "because of" test for extending work product protection. *See, e.g., United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010) ("In short, a document can contain protected work-product material even though it serves multiple purposes, so long as the protected material was prepared because of the prospect of litigation."); *State of Maine v. U.S. Dep't of Interior*, 298 F.3d 60, 68 (1st Cir. 2002) ("In light of the decisions of the Supreme Court, we therefore agree with the ['because of'] formulation of the work-product rule adopted in *Adlman* and by five other courts of appeals."); *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) ("The formulation of the work-product rule used by the Wright & Miller treatise, and cited by the Third, Fourth, Seventh, Eighth and D.C. Circuits, is that documents

purpose" test, which "would potentially exclude documents containing analysis of expected litigation, if their primary, ultimate, or exclusive purpose is to assist in making the business decision." *Id.* As a result, under the "because of" test used by this Court and many others, attorney work product "may also be used for ordinary business purposes without losing its protected status." *United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010). The Superior Court was wrong to conclude otherwise.

Second, the Superior Court incorrectly found that, even if the work product doctrine applied, the materials at issue were only "fact" work product that the Attorney General could obtain by demonstrating a "substantial need" for those materials. *See* Order at 17-18. Yet the materials in question reflected the Facebook attorneys' sifting of facts learned during their internal investigation—a classic example of "opinion" work product that must be afforded much greater deference.

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should be deemed prepared 'in anticipation of litigation,' and thus within the scope of the Rule, if 'in light of the nature of the 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.'").

While "fact" work product protection may be overcome by a showing of "substantial need" and an inability to otherwise obtain the materials without "undue hardship," the "mental impressions, conclusions, opinions, or legal theories of an attorney" constitute "opinion" work product that is "afforded greater protection than 'fact' work product." *Comcast Corp.*, 453 Mass. at 314. Indeed, some courts have found that "opinion" work product is afforded "absolute immunity." *See Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4th Cir. 1974). But even where courts have not extended absolute protection to opinion work product, "disclosure is appropriate only in rare or 'extremely unusual' circumstances" after a "highly persuasive" showing from the party seeking disclosure. *Comcast Corp.*, 453 Mass.at 315.

An attorney's synthesis of facts—including the grouping, ordering, and sifting of facts during an investigation—is opinion work product. The Supreme Court recognized in *Hickman* that the "[p]roper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman*, 329 U.S. at 511. Such "sifting" of facts necessarily exposes the

attorney's mental impressions, thoughts, and conclusions, and therefore constitutes "opinion" work product. *See In re Grand Jury Subpoenas Dated Mar. 19, 2002 & Aug. 2, 2002*, 318 F.3d 379, 385 (2d Cir. 2003) (holding that requests that seek discrete materials selected for review by an attorney constituted "impermissible intrusions into attorneys' thought processes"); *Sporck v. Peil*, 759 F.2d 312, 315 (3d Cir. 1985) (holding that an attorney's selection or grouping of documents "represents defense counsel's mental impressions and legal opinions"). As a result, an attorney's sorting of facts during an investigation cannot be disclosed unless the party seeking disclosure makes a "highly persuasive" showing, if at all. Such a showing was not made here, and the Superior Court was wrong to allow the Attorney General to obtain Facebook's attorney work product upon a lesser showing.

B. The attorney-client privilege protects the investigation materials from disclosure.

It has long been settled that confidential communications between an attorney and client during the course of an internal investigation are covered by the attorney-client privilege. "A construction of the attorney-client privilege that would leave internal investigations wide open to third-party invasion would effectively penalize an institution for

attempting to conform its operations to legal requirements by seeking the advice of knowledgeable and informed counsel." *In re Grand Jury Investigation*, 437 Mass. 340, 351 (2002); *see also In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 756 (D.C. Cir. 2014) (Kavanaugh, J.) ("More than three decades ago, the Supreme Court held that the attorney-client privilege protects confidential employee communications made during a business's internal investigation led by company lawyers.").

Contrary to the reasoning of the Superior Court, that attorney-client privilege is not forfeited merely by disclosing the existence of an internal investigation to the public. For instance, the First Circuit has held that "the extrajudicial disclosure of attorney-client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter." *In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 24 (1st Cir. 2003). A contrary rule, such as that adopted by the Superior Court—imposing a broad waiver based on public statements outside of ongoing litigation—would create perverse incentives. *See id.* To be sure, parties often have compelling reasons to disclose the existence of an internal

investigation—particularly publicly traded companies, like Facebook, which are in many instances required by law to make such disclosures. To force such parties to thereby forfeit the attorney-client privilege they need to obtain informed legal advice would be unfair and unworkable.

Moreover, the sole case relied on by the Superior Court to find a waiver of the privilege is readily distinguishable. *See* Order at 17-18 (citing *In re Grand Jury Investigation*, 437 Mass. 340 (2002)). That case involved a private school's investigation into allegations of sexual abuse, and the school had a statutory obligation to immediately report all facts of abuse upon learning it. *See In re Grand Jury Investigation*, 437 Mass. 340, 353 (2002) ("Instead, from the inception of the internal investigation, and regardless of what was said by and to the school's attorney, the headmaster and his teachers knew, or should have known, that § 51A required them to report possible child abuse 'immediately' on learning of it."). As a result, the school *never* could have had an expectation of confidentiality in its investigation, and any attorney-client communications therefore could not meet the essential elements of the privilege. *See In re Grand Jury Investigation*, 437 Mass. 340, 352 (2002) ("A quintessential element of the attorney-client privilege—the

expectation of confidentiality in the results of the investigation—is absent in this case.") By contrast, the company in this case had every expectation of confidentiality, which was not undone by simply telling the public that it had engaged counsel to conduct an investigation.

In short, the attorney client-privilege covering confidential communications between a lawyer and client during the course of an internal investigation simply cannot be waived by disclosing the existence of the investigation to shareholders, clients, or the public at large, and the Superior Court's conclusion to the contrary was grossly incorrect.

CONCLUSION

For the reasons stated, NACDL urges this Court to grant Facebook's application for direct appellate review.

Date: May 4, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Massachusetts Rule of Appellate Procedure 17(c)(9), the undersigned states that this brief complies with Rules 17 & 20. This brief contains 3,016 non-excluded words. This brief has been prepared using a proportionally spaced font, Century Schoolbook, in size 14 font, using Microsoft Word 2016.

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