Commonwealth of Massachusetts
Supreme Judicial Court

No. SJC-12946

ATTORNEY GENERAL,

Petitioner-Appellee,

v.

FACEBOOK, INC.,

Respondent-Appellant.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NEW ENGLAND LEGAL FOUNDATION AS *AMICI CURIAE* SUPPORTING RESPONDENT-APPELLANT FACEBOOK, INC.

STEVEN P. LEHOTSKY
(BBO #665908)
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337
slehotsky@USChamber.com

KEVIN P. MARTIN
(BBO #655222)
WILLIAM E. EVANS
(BBO #706382)
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000
kmartin@goodwinlaw.com
wevans@goodwinlaw.com

Attorneys for Amici Curiae
Chamber of Commerce of the United States of America
and New England Legal Foundation
(*Additional counsel listed on inside cover.*)

November 13, 2020

BEN ROBBINS
(BBO #559918)
MARTIN J. NEWHOUSE
(BBO #544755)
NEW ENGLAND LEGAL FOUNDATION
150 Lincoln Street
Boston, MA 02111
(617) 695-3660
benrobbins@nelfonline.org
martinnewhouse@nelfonline.org

CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. App. P. 17(c)(1), Chamber of Commerce of the United States of America and New England Legal Foundation, by their undersigned counsel, hereby discloses the following:

1. Parent Corporation(s) of Chamber of Commerce of the United States of America and New England Legal Foundation: None.

2. Publicly-Held Corporation(s) Owning More Than 10% of Chamber of Commerce of the United States of America or New England Legal Foundation Stock: None.

/s/ *Kevin P. Martin*
Kevin P. Martin

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

ISSUE PRESENTED

1. Whether a company can be compelled to produce information and communications generated as part of an internal investigation that was conducted by and at the direction of counsel for purposes of assessing legal risk and providing legal advice.

2. Whether a company can be compelled to produce information created pursuant to a lawyer-developed internal investigation in anticipation of litigation, simply because that company also employs routine non-legal enforcement of its policies in other contexts.

INTEREST OF THE *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from

[1] The Chamber and NELF declare, in accordance with Mass. R. App. P. 17(c)(5), that: (1) no party, nor any party's counsel, has authored this brief in whole or in part; (2) no party, nor any party's counsel, has contributed money that was intended to fund preparing or submitting this brief; (3) no person or entity—other than the Chamber and NELF or their counsel—has contributed money that was intended to fund preparing or submitting this brief; and (4) neither the Chamber, NELF, nor their counsel represents or has represented one of the parties to this case 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.

every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The New England Legal Foundation ("NELF") is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's supporters consist of corporations, law firms, individuals, and others who believe in its mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States. NELF has appeared regularly as *amicus curiae* before this Court.

This case is significant to the Chamber and NELF because businesses regularly engage counsel to conduct internal investigations into compliance with regulatory and contractual obligations. These investigations often have some "business" purpose, even as they are intended to guide the businesses' efforts to avoid or minimize litigation risk. The Superior Court ruled below that the attorney-client privilege does not apply *at all* to attorney-client materials generated during a corporate internal investigation if they are "factual in nature," and that any privilege is waived if the corporation publicly discloses the investigation's existence and

purpose. The Court further ruled that corporate internal investigations are not protected by the work product doctrine if the investigation's "primary" purpose was something other than litigation, or if the corporation has a pre-existing compliance program addressing the same subject matter. Each of those conclusions was wrong as a matter of law. The Superior Court's decision risks discouraging America's business community from conducting internal investigations, thereby chilling corporations' efforts to comply with their statutory, regulatory, and contractual obligations, to the ultimate detriment of the public interest. For these reasons, the Chamber, NELF, and their members and supporters have a considerable interest in the Court's resolution of this appeal, and believe that this amicus brief could assist the Court in deciding the case.

INTRODUCTION

It is undisputed that Facebook's ongoing "App Developer Investigation" (or "ADI") is a "lawyer driven effort" to determine whether the personal data of Facebook users has been misused, that Facebook launched the same month that news of the Cambridge Analytica incident broke. It also is undisputed that the same controversy over Cambridge Analytica triggered numerous lawsuits against Facebook as well as the Attorney General's investigation, which was launched the same month as the ADI. The Attorney General apparently does not dispute that at least one purpose of the ADI was for Facebook's lawyers to provide legal advice to

Facebook. Yet the Superior Court held that the attorney-client privilege does not generally apply to Facebook's communications with its outside counsel in connection with the ADI, because the material communicated was "factual in nature," and because Facebook disclosed the ADI's existence and status to the public. The Superior Court also held that the work product doctrine does not apply to the ADI, because it bears resemblance to Facebook's pre-existing compliance efforts and because litigation risk was not the ADI's "primary" concern.

The Superior Court's reasoning runs afoul of this Court's precedents and the federal precedents with which this Court traditionally has aligned the Commonwealth's attorney-client privilege and work product jurisprudence. This Court and federal courts repeatedly have held that the attorney-client privilege shields factual communications with counsel made to facilitate the receipt of legal advice. The law is just as clear that the privilege is not waived merely by disclosing the existence and purpose of an investigation. And precedent conclusively establishes that an investigation does not lack protection under the work product doctrine simply because the investigation fulfills some business or compliance purpose *in addition* to a legal purpose.

If affirmed, the Superior Court's decision would make the Massachusetts attorney-client privilege and work product doctrine each an anomaly, undermining their uniform application across the country. That is particularly dangerous for

nationwide corporations, such as Facebook and many members of the Chamber and supporters of NELF, which often face litigation and investigations over the same subject matter in multiple jurisdictions. These corporations have long relied on a uniform legal regime under which the attorney-client privilege and work product doctrine both extend to internal investigations. Moreover, many government agencies encourage or require such investigations to ensure corporate compliance with statutory and regulatory requirements. Investigations that mix business, compliance, and legal objectives therefore have become commonplace, and corporations often provide high-level disclosures of such investigations' existence in their Securities and Exchange Commission ("SEC") filings and other public statements. The decision below would strip these investigations of their customary protections and thereby discourage corporations from undertaking them, imposing significant social costs.

Accordingly, for the reasons given by Facebook and herein, the Court should reverse the Superior Court's decision.

ARGUMENT

I. THE SUPERIOR COURT'S HOLDING REGARDING THE ATTORNEY-CLIENT PRIVILEGE WAS WRONG.

"The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). This Court has long recognized that "[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).

By their very nature, internal-investigation materials represent a company's effort to ensure compliance with its legal obligations and to avoid the risk of litigation or government sanction. To be meaningful, communications between a company and its counsel as part of an internal investigation *must* contain candid assessments not only of the strengths, but also the potential weaknesses, of a company's compliance efforts, and they are likely to highlight uncomfortable facts and areas of potential litigation exposure. *See Chambers v. Gold Medal Bakery, Inc.,* 464 Mass. 383, 395 (2013) (referring to "the policy rationale underlying the attorney-client privilege: it promotes candid communications between attorneys and organizational clients"). Without the "assurance" that the privilege's protections extend to communications made as part of an internal investigation, "attorneys and clients might be inhibited from engaging in the free, complete and candid exchange of information that is the cornerstone of an effective attorney-client relationship." *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 289 (D. Mass. 2000) (internal quotation marks and citation omitted). And "[t]o the extent there is any risk that [attorneys] will have to deliver to [] opponents their ideas, theories and

analyses and those of their consultants, they will be far more circumspect in what they put down or permit their consultants to put down on paper, assuming they remain willing to retain consultants at all." *Fleet Nat. Bank v. Tonneson & Co.*, 150 F.R.D. 10, 14 (D. Mass. 1993) "Without the privilege, efficiency and effectiveness will, thus, inevitably decline." *Id*.

Here, despite these established principles, the Superior Court denied the protections of the attorney-client privilege to Facebook's outside counsel-led ADI for two reasons. First, it concluded that the materials that the government seeks are "factual in nature," and so are not privileged in the first place; and second, it reasoned that Facebook had waived the privilege by "tout[ing]" the existence and scope of the investigation to the public. A2/193-95.

Under this Court's binding precedent and persuasive federal authority, neither of the Superior Court's rationales is correct. The ruling that the attorney-client privilege does not protect the communication of facts to counsel as part of an investigation directed by counsel has no basis in precedent. This Court has long recognized that the privilege protects "disclosure of the facts [of the matter] to the attorney." *In re Grand Jury Investigation*, 437 Mass. at 351. That at least one of the ADI's goals, as the Superior Court recognized, was "to gather the facts needed to provide legal advice to Facebook about litigation ... and other legal risks," A2/183, *supports*, rather than vitiates, the privilege's application.

The Superior Court's conclusion that Facebook waived any privilege over the ADI by disclosing the investigation's existence and status to the public rests on equally weak footing. As relevant here, this Court has found that the privilege is waived when a party discloses "*specific details* of an identified privileged communication," *Commonwealth v. Sealy*, 467 Mass. 617, 629 (2014) (citation and internal quotation marks omitted) (emphasis added), or when it puts the privilege at issue in litigation by "injecting certain claims or defenses into a case," *McCarthy v. Slade Assocs., Inc.*, 463 Mass. 181, 191 (2012) (citation omitted); *see also, e.g.*, *Clair v. Clair*, 464 Mass. 205, 219 (2013); *Global Inv'rs Agent Corp. v. National Fire Ins. Co. of Hartford*, 76 Mass. App. Ct. 812, 818-19 (2010). Significantly, the Attorney General does not contend, and the Superior Court did not find, that Facebook either publicly disclosed specific details of any attorney-client communications, or put attorney communications in issue while seeking to use the privilege as both a "shield and a sword." *See, e.g.*, *United States v. Desir*, 273 F.3d 39, 45 (1st Cir. 2001) (citation omitted). To the contrary, in its public statements, Facebook simply disclosed the ADI's mere existence, and provided vague, broad-brush reports as to its status, without ever disclosing the content of specific communications with counsel. *See* Facebook Br. 34-35.

The Superior Court's reasoning is contrary not only to Massachusetts precedent, but also to the federal authority with which this Court traditionally has

harmonized the Commonwealth's privilege and work product jurisprudence. *See In re Grand Jury Investigation*, 437 Mass. at 350-51 (relying on *Upjohn* to conclude that attorney-client privilege applies to corporate investigations); *Comm'r of Revenue v. Comcast Corp.*, 453 Mass. 293, 316 n.25 (2009) (Massachusetts work product doctrine mirrors federal rule). Federal courts have rejected the notion that the attorney-client privilege does not protect "factual" communications to counsel made in the course of investigations. When the Supreme Court in *Upjohn* first held that the attorney-client privilege protects internal investigations,[2] that court also recognized that, in order to be effective, the privilege must encompass the gathering and communication to counsel of pertinent facts: "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn*, 449 U.S. at 390. It warned that a contrary view would "frustrate[] the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id*. at 392; *see also, e.g.*, *Fed. Trade Comm'n v. Boehringer Ingelheim*

[2] The Attorney General's attacks on Facebook's "blanket assertion of privilege," and related assertion that Facebook may still assert privilege as to individual communications, Att'y Gen.'s Br. at 8, 24, 48-52 & n.24, insinuate that claiming privilege over an internal investigation in its entirety is impermissible—which simply ignores *Upjohn* and this Court's endorsement of its holding, *see In re Grand Jury Investigation*, 437 Mass. at 350-51.

Pharm., Inc., 180 F. Supp. 3d 1, 30 (D.D.C. 2016) (privilege shields "facts collected at counsel's request for later use in providing legal advice").

Federal opinions just as emphatically reject the Superior Court's conclusion that a company waives the attorney-client privilege simply by disclosing an investigation's existence. As one New England federal district court recently recognized, there is "no authority supporting th[at] proposition." *Martel v. Computer Scis. Corp.*, 2019 WL 2030281, at *2 (D.N.H. May 8, 2019) (discussing EEOC investigation); *see also Robinson v. Time Warner, Inc.*, 187 F.R.D. 144, 147 (S.D.N.Y. 1999) (same). For example, in *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 146 (D.C. Cir. 2015) (*KBR II*), a federal district court had held that Kellogg Brown & Root ("KBR") waived privilege with respect to an internal investigation by (among other things) representing in a footnote in a summary judgment brief that it had conducted the investigation and reported no wrongdoing from it, and that it does report wrongdoing when discovered. The district court reasoned that this was meant to create an inference that the investigation uncovered no wrongdoing. *Id*. The D.C. Circuit disagreed, concluding that because KBR "neither directly stated that the [internal] investigation had revealed no wrongdoing nor sought any specific relief because of the results of the investigation ... [it had] not based a claim or defense upon the attorney's advice." *Id.* at 146. The same logic applies here.

In short, the Superior Court's holding that Facebook's internal investigation was not protected by the attorney-client privilege was incorrect and should be reversed.

II. THE SUPERIOR COURT'S HOLDING REGARDING THE WORK PRODUCT DOCTRINE WAS WRONG.

The Superior Court also concluded that Facebook's ADI is not shielded by the work product doctrine because the ADI had an independently-sufficient business purpose, beyond addressing the risk of litigation. A2/191. Once more, as Facebook's brief shows (at 41-51), that holding was erroneous under this Court's work product precedents. This Court has required only that an investigation be conducted "because of" threatened litigation, not that litigation risk be the investigation's only or "primary" motive, or that the investigation be entirely divorced from regular corporate compliance efforts. *See Comcast*, 453 Mass. at 317 & n. 28.

The Superior Court agreed with the Attorney General that the materials could not be work product because their "primary motive" was not preparation for litigation, but instead to retain the loyalty and confidence of Facebook's users and the general public. A2/189-92. But that is not the test—indeed, it is precisely the test that this Court has *rejected*. In *Comcast*, this Court rejected a "primary, ultimate, or exclusive purpose" test for work product, and instead adopted a "because of" test. *Comcast*, 453 Mass. at 316-17 (2009). The Court reasoned that a looser, more

forgiving "because of" test was more consistent with the purpose behind the doctrine, because "work product protection should not be denied to a document that analyzes expected litigation *merely because it is prepared to assist in a business decision*." *Id.* at 316 (emphasis added) (quoting *United States v. Adlman*, 134 F.3d 1194, 1199 (2d Cir. 1998)). The decision below goes against this broad consensus.

The Superior Court's decision is inconsistent with relevant federal court decisions too. Take the predecessor case to *KBR II*. There, the D.C. Circuit unanimously granted mandamus to vacate a district court opinion that had relied, in the attorney-client-privilege context, on the same reasoning that the Superior Court employed in this case. *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) (Kavanaugh, J.) (*KBR I*). The district court had held that KBR's investigation was not privileged because, the court found, the investigation was undertaken pursuant to an internal corporate policy intended to ensure compliance with relevant Department of Defense regulations. *KBR I*, 756 F.3d at 758–59. The district court reasoned that "if there was any other purpose behind the communication [other than the provision of legal advice], the attorney-client privilege [] does not apply." *Id.* at 759. The D.C. Circuit rejected this as "the wrong legal test." *KBR I*, 756 F.3d at 759. It explained that withdrawing the protections of the privilege simply because an internal investigation also fulfills a compliance purpose would punish corporations in a variety of heavily regulated industries. *Id*. And it reasoned that

attempting to divine the *one* determining purpose of an investigation "can be an inherently impossible task." *Id*. The court held instead that:

> In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy.

Id. at 760.[3]

That holding applies with full force to the Attorney General's request for Facebook's ADI materials. That the ADI is arguably similar to Facebook's preexisting compliance efforts is not determinative. What matters is whether the ADI was initiated because of pending or reasonably anticipated litigation. To rule otherwise would render bare to the world "internal investigations conducted by

[3] The rule articulated in *KBR I* has been applied by courts across the country. *See, e.g.*, *SEC v. Navellier & Assocs., Inc.*, 2018 WL 6727057, at *3 (D. Mass. Dec. 21, 2018); *Pitkin v. Corizon Health, Inc.*, 2017 WL 6496565, at *4 (D. Or. Dec. 18, 2017); *In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Prod. Liab. Litig.*, 2019 WL 2330863, at *2 (D. Md. May 31, 2019); *Edwards v. Scripps Media, Inc.*, 2019 WL 2448654, at *1–2 (E.D. Mich. June 10, 2019); *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 529–30 (S.D.N.Y. 2015); *Todd v. STAAR Surgical Co.*, 2015 WL 13388227, at *6 (C.D. Cal. Aug. 21, 2015); *Smith-Brown v. Ulta Beauty, Inc.*, 2019 WL 2644243, at *2–3 (N.D. Ill. June 27, 2019); *Cicel (Beijing) Sci. & Tech. Co. v. Misonix, Inc.*, 331 F.R.D. 218, 231 (E.D.N.Y. 2019).

businesses that are required by law to maintain compliance programs, which is now the case in a significant swath of American industry." *KBR I*, 756 F.3d at 759.[4]

The Superior Court's and Attorney General's position requires impossible line drawing. For example, the Attorney General stresses that "since 2012 ... Facebook sought to enforce policies prohibiting app developers from misusing personal user data obtained from the Platform, and did so as part of its normal business operations." Att'y Gen. Br. at 32 (internal quotation marks and citation omitted). But any responsible corporation's "normal business operations" will include investigations into conduct that may violate the business's contractual or regulatory obligations, as well as the identification of contractual counterparties that may be violating the corporation's own rights. Where counsel directs an investigation into such issues because they require a lawyer's insight into whether, *e.g.*, personal user data has been "misused" or an app developer has violated "enforce[able] policies," the resulting materials are patently work product.

[4] *Cf. In re Cty. of Erie*, 473 F.3d 413, 420 (2d Cir. 2007) ("The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable ... the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice."); *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d at 530 ("Rare is the case that a troubled corporation will initiate an internal investigation solely for legal, rather than business, purposes; indeed, the very prospect of legal action against a company necessarily implicates larger concerns about the company's internal procedures and controls, not to mention its bottom line.").

The cases the Attorney General cites in support of the Superior Court's decision (Att'y Gen. Br. at 35-36 & n.11) are not to the contrary. Those cases stand for nothing more remarkable than the proposition that investigatory materials may not qualify for work product protection if they contain *no* mental impressions of counsel, or if they occur *years* after the events that purportedly made litigation foreseeable. *Gillespie v. Charter Commc'ns*, 133 F. Supp. 3d 1195, 1199 n.2, 1201 (E.D. Mo. 2015) (denying work product protection where corporation "d[id] not assert that the incident report contains any attorney opinions or mental impressions" and apparently asserted only attorney-client privilege in its briefing); *Banneker Ventures, LLC v. Graham*, 253 F. Supp. 3d 64, 71-73 (D.D.C. 2017) (work product protection denied where investigation of board in connection with development occurred two years after developer's attorney sent letter alleging impropriety). But Facebook's investigation is inextricably linked with counsel's evaluations of Facebook's potential legal exposure, Facebook Br. at 52-53, and it came fast on the heels of a data-privacy incident that prompted "dozens of lawsuits and regulatory inquiries across the country," *id.* at 10.

In summary, the Superior Court's reasoning with respect to the work product doctrine was, like its reasoning with respect to the attorney-client privilege, wrong and should be reversed.

III. THE SUPERIOR COURT'S DECISION SETS A DANGEROUS PRECEDENT.

If allowed to stand, the decision below would not just constitute bad law, it also would make bad policy, by discouraging the undertaking of internal investigations and frustrating the public interest in voluntary corporate compliance. And it would take Massachusetts jurisprudence far outside the mainstream, with negative consequences for both the Commonwealth and the rest of the country.

A. The Decision Undermines the Strong Public Interest in Encouraging Corporate Compliance Investigations.

Internal corporate investigations are conducted on a regular basis to ensure compliance with regulatory and contractual obligations. Corporations rely on the protections afforded by the attorney-client privilege and work product doctrine in order to ensure that they, and their counsel, may engage in candid and full discussions during the course of these investigations. Government regulators and prosecutors also depend on these investigations to ensure voluntary cooperation and compliance from corporations. The decision below would eviscerate application of the attorney-client privilege and work product doctrine in this context and discourage corporations from conducting internal investigations, and so would undermine the significant public interest in encouraging these investigations.

The reliance of corporations on the expectation that internal investigations led by counsel will be afforded the protections of the attorney-client privilege and work

product doctrine has grown over time. Today, "[i]nvestigations are a fact of life at any large corporation." Carl Jenkins & Norman Harrison, *Standard Issues in Corporate Investigations: What GCs Should Know*, in *Corporate Investigations 2018* 8 (2d ed.). Indeed, experienced practitioners in the field estimate that "a typical multinational company may have dozens of probes under way at any given time." *Id*. Regulatory and criminal agencies now commonly encourage, sometimes require, and frequently depend upon companies conducting internal investigations. Government contractors and businesses in closely regulated industries often must institute compliance programs and self-report violations to these agencies. *See, e.g.*, 48 C.F.R. § 52.203–13 (contracting regulations); 12 C.F.R. § 44.20(a) (Federal Bank Act); 12 C.F.R. § 21.21 (Bank Secrecy Act); 42 C.F.R. § 423.504 (Medicare Part D providers); Pub. L. No. 107-204 § 301, 116 Stat. 745, 775-77 (2002) (Sarbanes-Oxley requirements).[5] Similarly, prosecutors encourage and consider compliance measures in charging decisions. *See, e.g.*, United States Sentencing Guidelines Manual § 8B2.1 cmt. n.3 (2018); Dep't of Justice, Criminal Div., and Sec. & Exch. Comm'n, Enforcement Div., *A Resource Guide to the U.S. Foreign Corrupt*

[5] *See also, e.g.*, 45 C.F.R. § 75.113 (Department of Health and Human Services regulations requiring disclosure of certain criminal violations); 20 C.F.R. § 683.200(h) (similar Department of Labor rule); 22 C.F.R. § 126.1(e)(2) (regulations requiring disclosure of sale of defense articles to certain countries); 19 U.S.C. § 1592(c)(4) (merchandise exporting self-disclosure policy).

Practices Act 52–54 (Nov. 2012); Dep't of Justice, Criminal Div., *Evaluation of Corporate Compliance Programs* (Apr. 2019). These regulations and policies recognize the social value of internal compliance programs, including internal investigations.

The Superior Court's decision would radically undermine these policies. According to the Superior Court's logic, a counsel-led internal investigation cannot be privileged if it resembles some pre-existing compliance policy, *see supra* at 18-22, effectively stripping the privilege away from any regular investigation required or encouraged by a government. Likewise, under the Superior Court's reasoning, any privilege attaching to an investigation is waived if its mere existence and purpose are disclosed to an external audience. *See supra* at 15-18. But that is precisely what happens in highly regulated industries, where corporations often must certify that they have undertaken required compliance measures, and when any public company discloses an investigation's existence as a material event in an SEC filing.

At bottom, the rules articulated by the Superior Court risk eliminating the privilege for a broad swathe of internal investigations. It would discourage corporations from undertaking rigorous compliance efforts and discovering misconduct in the first instance, and it would undercut the government's significant interest in encouraging and rewarding voluntary compliance and self-reporting. This would ultimately harm the public.

Importantly, and contrary to the Attorney General's warnings, Att'y Gen. Br. 40-42, extending the attorney-client privilege and work product doctrine to internal investigation materials *does not* prevent the government from *otherwise* seeking to learn the facts underlying an investigation; it simply must learn them through some means other than a request for privileged communications and work product materials. *Upjohn*, 449 U.S. at 395. Here, for example, the Attorney General could have promulgated discovery requests that would have resulted in Facebook identifying apps based on criteria developed not by Facebook's counsel, but *by the Attorney General herself*. Indeed, Facebook apparently has produced a substantial volume of information in response to such properly formulated requests. Facebook Br. at 23-25. The Attorney General only is prohibited from taking the shortcut of asking for communications between Facebook and its outside counsel, or of asking Facebook to identify what the Attorney General herself characterizes as the "identity of, and factual information about, apps or developers *that Facebook determined to examine* for potential misuse of user data" as part of the ADI. Att'y Gen. Br. at 10 (emphasis added).

B. The Superior Court's Decision Risks Making Massachusetts Privilege and Work Product Jurisprudence an Outlier.

The Superior Court's decision, if affirmed on appeal, would take the privilege and work product laws of the Commonwealth far outside the mainstream. This would be a dramatic departure from this Court's practice of harmonizing

Massachusetts privilege and work product law with analogous federal law. It threatens the consistent application of privilege and work product law across the country, which would be an extraordinarily dangerous development.

Courts long have acknowledged that, in order to be effective, the attorney-client privilege and work product doctrine depend on clear, predictable, and uniform application. "If the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An 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*, 449 U.S. at 393.[6] This principle requires coherence and stability not only within jurisdictions, but across them—particularly for corporations such as Facebook and the Chamber's members and NELF's supporters, many of which operate throughout the United States.

Corporations across the country are focused on this case, because they understand its high stakes and the risks involved. Corporate internal investigations

[6] *See also, e.g.*, *KBR I*, 756 F.3d at 763 (observing that "uncertainty matters in the privilege context"); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) ("If we intend to serve the interests of justice by encouraging consultation with counsel free from the apprehension of disclosure, then courts must work to apply the privilege in ways that are predictable and certain."); *Ross v. City of Memphis*, 423 F.3d 596, 604 (6th Cir. 2005) (rejecting lower court's interpretation of privilege because it "renders the privilege intolerably uncertain").

such as Facebook's normally will identify the key facts and documents pertinent to the subject matter of the investigation, as determined by counsel in consultation with its client (or vice versa). Internal investigation materials might identify the names of a company's employees, or customers or contractual counterparties, who are suspected of wrongdoing—or whom the company itself might have wronged. Internal investigation materials, in other words, can serve as a roadmap for litigation against the company, identifying vulnerabilities that may never have occurred to an adversary and, in any case, greatly simplifying the adversary's task. *See Chambers*, 464 Mass. at 395 (noting the "unfair disadvantage that would result" if a party "with adverse interests, and who seeks to vindicate those interests against a corporation, could access the corporation's confidential communications with counsel"); *Fleet Nat. Bank*, 150 F.R.D. at 14 ("[T]o the extent such disclosure [of work product materials] is actually mandated, less conscientious opponents, who are unable or unwilling to invest the time or money to prepare as thoroughly, will gain a windfall."). Corporations will be less likely to create such materials if there is a significant risk that they will fall into an adversary's hands.

The Superior Court's decision risks exposing these materials to discovery not only in Massachusetts, but also in other jurisdictions. If the materials in this case were not produced subject to a protective order foreclosing their further distribution, they might be shared with other government bodies or private litigants. Enterprising

litigants in one case might submit requests for production specifically seeking materials produced in related litigation or government investigations. And production of a company's internal investigation in Massachusetts could undermine its efforts to claim privilege or work product protection elsewhere. If affirmed, the decision below would cause immediate instability nationwide.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the Superior Court's decision.

Respectfully submitted,

/s/ Kevin P. Martin

KEVIN P. MARTIN
(BBO # 655222)
WILLIAM E. EVANS
(BBO# 706382)
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210
(617) 570-1000
kmartin@goodwinlaw.com
wevans@goodwinlaw.com

STEVEN P. LEHOTSKY
(BBO # 665908)
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062
(202) 463-5337
slehotsky@USChamber.com

BEN ROBBINS
(BBO #559918)
MARTIN J. NEWHOUSE
(BBO #544755)
NEW ENGLAND LEGAL FOUNDATION
150 Lincoln Street
Boston, MA 02111
(617) 695-3660
benrobbins@nelfonline.org
martinnewhouse@nelfonline.org
Attorneys for Amici Curiae *Chamber of Commerce of the United States of America and New England Legal Foundation*

November 13, 2020

CERTIFICATE OF COMPLIANCE

I, Kevin P. Martin, counsel for *Amici Curiae*, 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 Mass. R. App. P. 17 and 20. This brief contains 5,073 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 2010.

/s/ Kevin P. Martin
Kevin P. Martin

CERTIFICATE OF SERVICE

I, Kevin P. Martin, counsel for *Amici Curiae,* hereby certify this 13th day of November, 2020, that I have served a copy of this Brief by causing it to be delivered by eFileMA.com to counsel of record who are registered users of eFileMA.com:

Jared Rinehimer, Esq.
jared.rinehimer@mass.gov
Sara E. Cable, Esq.
sara.cable@mass.gov
Peter N. Downing, Esq.
peter.downing@mass.gov

Office of the Attorney General of Massachusetts
Assistant Attorney General
Government Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 963-2583

Counsel for Petitioner-Appellee

Felicia H. Ellsworth, Esq.
felicia.ellsworth@wilmerhale.com
Rachel L. Gargiulo, Esq.
rachel.gargiulo@wilmerhale.com
Eric L. Hawkins, Esq.
eric.hawkins@wilmerhale.com
Ivan Panchenko, Esq.
ivan.panchenko@wilmerhale.com

Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Counsel for Respondent-Appellant

November 13, 2020 */s/ Kevin P. Martin*
Kevin P. Martin