No. SJC-12946

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

ATTORNEY GENERAL,

Petitioner-Appellee,

v.

FACEBOOK, INC.,

Respondent-Appellant.

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

REPLY BRIEF FOR RESPONDENT-APPELLANT FACEBOOK, INC.

ANJAN SAHNI
(admitted *pro hac vice*)
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
New York, NY 10007
(212) 230-8800
Anjan.Sahni@wilmerhale.com

ALEXANDER H. SOUTHWELL
(admitted *pro hac vice*)
AMANDA M. AYCOCK
(admitted *pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000
asouthwell@gibsondunn.com
aaycock@gibsondunn.com

FELICIA H. ELLSWORTH (BBO # 665232)
RACHEL L. GARGIULO (BBO # 690747)
ERIC L. HAWKINS (BBO # 693289)
IVAN PANCHENKO (BBO # 693552)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Felicia.Ellsworth@wilmerhale.com
Rachel.Gargiulo@wilmerhale.com
Eric.Hawkins@wilmerhale.com
Ivan.Panchenko@wilmerhale.com

October 28, 2020 *Attorneys for Respondent-Appellant Facebook, Inc.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

INTRODUCTION

Facing a storm of lawsuits, regulatory scrutiny, and other legal risks in the wake of reporting on data misuse by Cambridge Analytica in March 2018, Facebook directed its counsel to design and conduct an internal investigation to determine what, if any, other apps and developers might pose risks similar to those unearthed in connection with Cambridge Analytica. As the Superior Court found, this investigation (the App Developer Investigation ("Investigation")) was "design[ed] and direct[ed]" by counsel to "gather the facts needed to provide legal advice to Facebook about litigation, compliance, regulatory inquiries, and other legal risks facing the Company." A2/183. These undisputed facts demonstrate that what the Attorney General seeks are the fruits of a confidential, privileged internal investigation designed to identify legal risks and provide legal advice about those risks—the type of internal investigation that companies undertake all the time when confronted with legal risks of this scope and magnitude.

The Attorney General does not meaningfully dispute this record. Instead, the Attorney General's apparent position is that this otherwise-privileged investigation lost its privileged nature because Facebook had previously conducted routine enforcement efforts relating to apps and developers, and because Facebook provided general information to regulators and the public regarding the existence of the Investigation. Both arguments fail. The fact that a company conducts

routine, real-time monitoring (and, where applicable, enforcement) to protect its users does not render an entirely separate backwards-looking investigation "business as usual." To the contrary, it was precisely because Facebook's real-time monitoring and enforcement mechanisms were not designed to undertake a retrospective investigation to assess Facebook's potential legal exposure that its attorneys developed an entirely new framework for the Investigation. And a company's public statements about the mere existence of an ongoing internal investigation—statements that are routinely expected by regulators, investors, and the public when a company undertakes an investment of resources of this magnitude—cannot possibly waive privilege. The consequence of a contrary holding would be that every public company operating in the Commonwealth would essentially waive privilege any time it issued statements about high-profile matters. That is not the law. The privileges and protections over internal corporate investigations long guaranteed by this Court's and the Supreme Court's precedents apply equally here, and the Superior Court's judgment should be reversed.

ARGUMENT

I. FACEBOOK DID NOT WAIVE ITS OBJECTIONS TO THE CIVIL INVESTIGATIVE DEMAND

The Court should disregard the Attorney General's half-hearted suggestion, tacked on to the end of its brief (at 52-54), that Facebook waived its objections to

the Civil Investigative Demand ("CID"). The Attorney General expressly abandoned this argument below, and in any event, it lacks merit.

In the exact passage of the transcript cited in the Attorney General's brief for the proposition that this issue was "addressed" in the Superior Court (at 54, n.26), the court asked: "[Y]ou did make a waiver argument in your papers, are you pressing that?" in response to which the Attorney General conceded: "**I'm not pressing it**." A2/156. In the face of this record, the Attorney General's position that the issue was preserved for this Court's review strains credulity.[1]

The Attorney General's conduct on appeal leaves no doubt about this express waiver. The Attorney General did not mention waiver when opposing Facebook's motion to stay in the Appeals Court, and did not ask this Court to deny Direct Appellate Review on that ground. *See* Mass. R. App. P. 11(c) (parties should inform the Court of any "reasons why the application should or should not be granted"). If this were really the dispositive threshold issue the Attorney General now suggests, it would have been identified as a reason this Court should not hear this case directly.

[1] The Attorney General's citation to Mass. R. App. P. 22(c)(1) (at 54 n.26) ignores the facts. While a briefed argument may not be waived simply because it does not come up at a hearing, when an argument *does* come up at a hearing and a party affirmatively *abandons* it, the argument surely is waived.

In any event, the Attorney General's waiver argument does not hold water (Facebook Br. at 55-56). Facebook asserted its privilege objections and concerns in each submission and interaction with the Attorney General, who even expressed appreciation for "Facebook's willingness to engage in further discussion on this issue should such a challenge [to Facebook's assertion of privilege] become necessary." A1/463 n.1. And Facebook actively cooperated with the Attorney General from the outset, producing thousands of documents and negotiating its objections in good faith. A2/188 n.3. That is a far cry from the "passive" non-compliance this Court warned could constitute waiver under G.L. c. 93A, § 6(7). *Attorney General v. Bodimetric Profiles*, 404 Mass. 152, 155 (1989).

Now the Attorney General claims (at 28, 53, 39 n.14) that the parties' "extensive negotiations" were a "stratagem." But the only "stratagem" with which this Court should be concerned is the Attorney General participating in extensive negotiations with a CID recipient only to later claim that the recipient did so at its peril, and that the result was a categorical waiver of all privilege and work product protections. Such tactics are not condoned when employed by civil litigants, and are even less appropriate when advanced by the government. *See In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 26, 28 (1st Cir. 2003) ("Many years ago, Justice Holmes warned that those who deal with the government must turn square corners. That advice cuts both ways: those who deal

with the government have a right to expect fair treatment in return. … Refusing to hold the government to such a standard will send a signal to future litigants to negotiate with the government only at their peril. That is not a message that we wish to send—nor is it one that would serve the government's interests.").

The Attorney General's position would require all CID recipients to immediately commence litigation if they object to any aspect of a CID, even while engaging in extensive discussions and negotiations with the Attorney General about those same objections, or otherwise risk waiver.[2] The impact of this Court adopting such a position cannot be overstated—rather than engaging in the type of good-faith dialogue with the Attorney General that Facebook undertook here, CID recipients will instead rush into Superior Court. That all but guarantees the very delays that the Attorney General complains of in this case, in addition to unwarranted court congestion. This Court's decision in *Bodimetric* certainly did not endorse such a radical view, nor should the Court adopt it here.

II. THE INFORMATION THE ATTORNEY GENERAL SEEKS IS PRIVILEGED

The Attorney General advances three arguments in response to Facebook's assertion of attorney-client privilege over the Investigation, all of which fail.

[2] The Attorney General's suggestion (at 53-54) that only recipients with *convincing* objections need to sue to preserve their privilege is cold comfort. Presumably, the Attorney General would find all objections to its CIDs unconvincing—otherwise, why issue them?

First, the Attorney General doubles down on the Superior Court's erroneous reliance on *In re Grand Jury Investigation*, 437 Mass. 340 (2002), arguing (at 49-50) that Facebook's "public statements" "undercut" the attorney-client privilege because they show the privileged communications were not confidential. But quite the opposite is true. The record clearly demonstrates that the communications sought were in fact confidential—indeed, by seeking "internal" communications that it claims cannot be obtained by any other means, the Attorney General essentially concedes their confidential nature.[3] Tellingly, the Attorney General does not address the undisputed record (A2/51-52, ¶ 12) that counsel running the Investigation ensured the confidentiality of communications in the Investigation.[4]

What is more, the Attorney General fails to explain *how* Facebook's public statements "undercut" the confidentiality of internal communications responsive to her request. The marquee example the Attorney General relies upon (at 49)—that

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[3] In contrast, Facebook has already produced the *external* communications sought by the CID, as it claims no privilege over such documents.

[4] As the Attorney General notes (at 10 n.1), in light of the Superior Court's order, Facebook reviewed the responsive communications, confirming what it has been saying all along: that communications within the Investigation were confidential and made in furtherance of legal advice. The Attorney General complains (at 47) that Facebook has not proven that the privilege which attaches to the Investigation also attaches to communications made before the Investigation began. But Facebook has never claimed that the privilege derived from the Investigation attaches to pre-Investigation communications—it has only withheld pre-Investigation communications to the extent they are privileged on other grounds.

Facebook said publicly that it strives to "make sure [user] privacy is protected" and "make [its] platform safer"—certainly does no such thing; it reveals not one iota of privileged communications. If such statements allowed third parties to pierce the attorney-client privilege, no company could ever comfortably communicate with the public. Yet the Attorney General marshals (at 18-20) essentially everything Facebook has said about the Investigation, without even attempting to make the relevant showing that one of these statements reveals any details of the confidential internal communications over which Facebook claims privilege. Facebook Br. 36-37. Indeed, the Attorney General's own descriptions of those statements proves the point. The Attorney General dwells on Facebook's pledge to identify apps that "misused personal data or violated Facebook's policies" (at 50), or to "tell people [who were] affected by apps that have misused their data" (at 19). These types of general public statements do not commit to providing privileged information regarding the construction and processes of the Investigation; rather, they commit to notifying users in the specific event that the Investigation discovered evidence of an app's misuse of user data—as Facebook has done. *See also* Facebook Br. at 24-25.

Perhaps most concerning, the Attorney General misleadingly describes confidential communications with her office as "public" statements. *E.g.*, Br. 20 (citing, from the Impounded Appendix, confidential letters from Facebook to the

Attorney General detailing suspended apps as information that Facebook "released"). Every communication between Facebook and the Attorney General was made subject to statutory assurances of confidentiality—*see* G.L. c. 93A, § 6(6)—and with the Attorney General's express assurances that the communication would not be used by the Attorney General to argue waiver. *See* A1/463 n.1.[5] It is poor public policy indeed for the Attorney General to invite communications with assurances *against* waiver, only to use those communications as justifications *for* waiver. *See* AG Br. 18 (citing Facebook's communications to the Attorney General); 38 (citing Facebook's general descriptions of the Investigation to the Attorney General); 31 (citing letter to Attorney General); 31 n.7, 32 n.8 (citing impounded letters to Attorney General); 33 n.9 (same, including impounded productions); *see also In re Keeper of Records*, 348 F.3d at 26.

Finally, and inexplicably, the Attorney General claims the Superior Court did not reach the question of "at issue" waiver while simultaneously invoking that doctrine, claiming that Facebook cannot publicly "herald" the Investigation while maintaining privilege. Br. 51-52. But as Facebook explained (at 35-36), the "at

[5] The Attorney General specifically agreed "not to argue that production of this narrative response [about the Investigation] constitutes any waiver of privilege." Facebook can provide a copy of this correspondence to the Court on request.

issue" waiver doctrine has no application to extrajudicial statements at all, let alone to extrajudicial statements that do not place privileged information "at issue" in a litigation. The Attorney General ignores this argument entirely.

Second, the Attorney General complains that Facebook has not shown that "all" internal Investigative communications are privileged. Facebook's privilege log, which the Attorney General invokes (at 10 n.1), shows precisely the opposite. The very nature of the Attorney General's request—for all internal communications within a legal-driven internal investigation—calls for privileged communications. This inexorable fact notwithstanding, Facebook has now undergone the immensely burdensome exercise of reviewing these communications, which has demonstrated what Facebook told the Superior Court: "it [is] futile to require [a party to] provide a privilege log for clearly privileged communications." *First Am. Title Ins. Co. v. Rice,* 2017 U.S. Dist. LEXIS 203163, at *22 (N.D.W. Va. Dec. 11, 2017); *see also Hully Enters. Ltd. v. Baker Botts LLP*, 286 F. Supp. 3d 1, 7 (D.D.C. 2017) ("when a discovery request demands production of an attorney's records in connection with representation of a client, invocation of the protections of the attorney-client privilege and work-product doctrine may be effective without requiring a detailed privilege log.").

Finally, the Attorney General repeats (at 43-46) the Superior Court's error that the material responsive to Contested Requests 1-5 is not privileged because it

is "factual" in nature. The various categorizations of applications sought by the CID are not facts that exist independently of attorney-client communications. Rather, the categorizations of applications exist *only* because Facebook *directed* its counsel to identify apps that counsel determined pose legal risk to the company; in response to that request, counsel devised manners of categorizing and identifying these apps and communicated those categorizations and the apps that fall within them to the client, Facebook, to inform its legal strategy. A2/48-55 (¶¶ 4-23). In other words, without counsel's mental impressions, analysis, and legal advice, there would be no categorizations responsive to Contested Requests 1-5 at all. This is a quintessential example of the well-established principle that the attorney-client privilege protects "factual material compiled during a corporation's internal investigation … at counsel's request for later use in providing legal advice" and "extend[s] to communications between corporate employees who are working together to compile facts for in-house counsel to use in rendering legal advice to the company." *Federal Trade Comm'n v. Boehringer Ingelheim Pharms., Inc.*, 180 F. Supp. 3d 1, 30, 34 (D.D.C. 2016); *see also In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757, 760 (D.C. Cir. 2014) (privilege attaches to an "internal investigation" that was "initiated … to gather facts and ensure compliance with the

law[.]").[6] As this Court has explained: 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." *RFF Family P'ship v. Burns & Levinson, LLP*, 465 Mass. 702, 708 (2013) (quoting *Upjohn Co. v. United States*, 449 U.S 383, 390 (1981)).

III. THE INFORMATION THE ATTORNEY GENERAL SEEKS IS PROTECTED WORK PRODUCT

Rather than engaging with Facebook's arguments concerning the applicability of the work product doctrine, the Attorney General instead parrots the Superior Court's erroneous reasoning and, in doing so, underscores the Superior Court's missteps.

First, the Attorney General repeats the Superior Court's erroneous focus on the limited non-legal purposes of the Investigation, in a thinly veiled attempt to revive the "primary motive" analysis this Court jettisoned in *Comcast*. But this Court has rightly concluded that considerations of motive are irrelevant so long as the information in question "can be fairly said to have been prepared *because of* the prospect of litigation." *Commissioner of Revenue v. Comcast Corp.*, 453 Mass. 293, 317 (2009); *see also id.* at 316 ("[W]ork product protection should not be

[6] Unable to dispute the force of these authorities, the Attorney General relegates its discussion of *Boehringer* and *In re Kellogg* to a footnote (at 16 n.17).

denied to a document that analyzes expected litigation merely because it is prepared to assist in a business decision.").

On that issue, the record is clear and unrebutted. The Attorney General does not dispute that the key question in determining whether information was generated "because of" litigation is whether litigation was pending or reasonably anticipated. AG Br. 48-49. The Attorney General also does not dispute that, when Facebook commenced the Investigation, it ***already*** faced numerous litigations and regulatory investigations and the prospect of many more to come—all concerning the legal issues on which the Investigation focused. *Id.* 49-50. And the Attorney General also does not dispute that the Superior Court found that Facebook's in-house and outside counsel commenced the Investigation "to gather the facts needed to provide legal advice to Facebook about litigation, compliance, regulatory inquiries, and other legal risks facing the Company." A2/183. Under *Comcast*, that should end the inquiry.[7]

[7] Unsurprisingly, the Attorney General can cite no authority in support of the misguided contention (at 30-32) that Facebook's general descriptions of the ways in which the Investigation might promote good business practices undermine its work product claim. There is, of course, no requirement that Facebook publicly describe the Investigation's legal purpose to maintain the protections the work product doctrine provides. *E.g.*, *Doe 1 v. Baylor Univ.*, 320 F.R.D. 430, 441, 442 (W.D. Tex. 2017) ("[I]t is reasonable that a party would not want to announce that it anticipated litigation when engaging outside counsel for fear that doing so might encourage that very litigation."). Indeed, this Court adopted the "because of" standard precisely to avoid this type of second-guessing of motives. *See Comcast*,

Second, the Attorney General—like the Superior Court—interprets the narrow "irrespective-of-litigation" exception to the work product doctrine in a manner that renders work product protections all but meaningless. *See* AG Br. 32-36. The irrespective-of-litigation exception applies only to documents "prepared in the ordinary course of business in a form that would not vary regardless of whether litigation was expected," not to information generated to address unique, "urgent circumstances" that either have spawned (or are likely to result in) litigation. *Schaeffler v. United States*, 806 F.3d 34, 43-44 (2d Cir. 2015) (comparing unprotected documents "created in the ordinary course of annually completing appellants' federal tax returns" with protected memorandum analyzing the tax law implications of significant transaction "highly likely" to result in an "audit and subsequent litigation"). The Investigation is a clear example of the type of "urgent circumstances" contemplated by *Schaeffler*—to suggest it is "business as usual" simply misapprehends the scope, scale, and nature of the Investigation. Facebook Br. at 43-48; A2/48-51 (¶¶ 4-11). What company undertakes a massive, multi-year, retrospective investigation relating to a product that has not existed for four years and considers it "business as usual"?

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453 Mass. at 316-318.

Courts in the Commonwealth routinely find that the work product doctrine protects investigative materials prepared when litigation is pending or reasonably anticipated—even where the company might otherwise address related topics in the ordinary course of business. *See Rhodes v. AIG Domestic Claims, Inc.*, 2006 WL 307911, at *5 (Mass. Super. Jan. 27, 2006) ("Once litigation has been threatened or commenced, the factual reports of [an insurer's] investigation and the internal reports evaluating the strength of the litigation become work product."); *Raffa v. Gymnastics Learning Ctr., Inc.*, 2002 WL 389889, at *3 (Mass. Super. Jan. 2, 2002) (work product protects memorandum summarizing interview conducted by insurance company investigator after litigation was threatened); *Harris v. Steinberg*, 1997 WL 89164, at *3-4 (Mass. Super. Feb. 10, 1997) (although hospital had policy of "investigating all patient deaths," work product doctrine shielded a non-routine "investigatory memorandum containing a compilation of information"). The distinction between the routine monitoring, compliance, and enforcement mechanisms Facebook employed prior to commencing the Investigation and the extraordinary attorney-led Investigation at issue in this case fits comfortably within this settled Massachusetts law.[8]

[8] In light of this fact, perhaps unsurprisingly, the Attorney General resorts to citing cases that contradict these well-settled principles of Massachusetts law. (Br. 35, 36 n.11). Moreover, all concern easily distinguishable factual circumstances. *See In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 296 F. Supp. 3d 1230, 1245 (D. Or. 2017) (investigation conducted by consultant that was initiated by

Here, faced with unique circumstances arising from the Cambridge Analytica events—including litigation and regulatory investigations—Facebook "direct[ed] its attorney to conduct an internal investigation for the purpose of providing legal advice to the company," and had the "internal investigation conducted under the direction of that attorney." *Rhodes*, 2006 WL 307911, at *4. The Investigation did not, as the Attorney General posits, merely "*involve[]* Facebook's outside and in-house counsel." AG Br. 10 (emphasis added). Rather, Facebook's in-house and outside counsel designed, controlled, and have overseen the Investigation from its inception. A2/50-51 (¶ 8). Nor did Facebook simply "introduce[] attorneys into its program to investigate app developers." AG Br. 35. To the contrary, and as explained in the unrebutted declaration of Facebook's in-house counsel, recognizing that Facebook's ordinary, real-time investigation and enforcement mechanisms were insufficient to undertake the significant retrospective investigation necessary to assess Facebook's potential legal exposure, its attorneys developed an entirely new framework for the Investigation (A2/50-51

company *before* it hired counsel); *Banneker Ventures, LLC v. Graham*, 253 F. Supp. 3d 64, 72 (D.D.C. 2017) (interview memoranda describing interviews undertaken several years after threat of litigation was made); *Gillespie v. Charter Commc'ns*, 133 F. Supp. 3d 1195, 1201 (E.D. Mo. 2015) (only "speculative possibilit[y]" that "internal corporate complaint[] may result in litigation"); *Lumber v. PPG Indus., Inc.*, 168 F.R.D. 641, 646 (D. Minn. 1996) (no apparent dispute that investigation was undertaken in ordinary course of business).

(¶ 8)), and generated new information intended to facilitate Facebook's response to pending and reasonably anticipated litigations and regulatory investigations. A2/50-51, 56-57 (¶¶ 8, 29). The Attorney General disputes none of this.[9]

To conclude, based on this record, that Facebook would have undertaken the same unique, attorney-driven, retrospective investigation in the absence of pending and anticipated litigation blinks reality. *See Schaeffler*, 806 F.3d at 44 (the irrespective-of-litigation exception does not invite courts to manufacture "factual situation[s] at odds with reality"). Facebook does not argue, as the Attorney General suggests (at 34 n.10), that "the Superior Court could not consider whether Facebook would have investigated app developers 'irrespective of the prospect of litigation.'" Rather, the point is that if a court can simply hypothesize away the pending and anticipated litigation that served as the basis for commencing an internal investigation, the irrespective-of-litigation exception would "swallow the work-product protection." *Schaeffler*, 806 F.3d at 43. That is exactly what the Superior Court's order does.

[9] The Attorney General's sole retort (at 34) is to insinuate that the sworn declaration of Facebook's counsel should not be credited because it is "at odds with" how Facebook has publicly described the Investigation. This argument is not well taken. The unrebutted declaration of one of the attorneys who oversaw and led the Investigation, credited by the Superior Court, demonstrates how significantly it differed from Facebook's ordinary monitoring, compliance, and enforcement mechanisms. The Attorney General does not quarrel with these "largely undisputed" (at 33) facts; it simply wants to ignore them.

Finally, contrary to the Attorney General's assertion (at 37), Facebook does not accept, "implicitly" or otherwise, that the CID "seeks facts, not opinions of counsel." The information the Attorney General seeks is opinion work product that exists only because of analyses based on criteria designed by, and reflecting the legal judgment of, Facebook's counsel. *See, e.g.*, FB Br. 21-25, 52-53. To reveal that information would reveal counsel's opinions.[10] The Attorney General's superficial contention (at 37-38) that this is untrue because Facebook's routine enforcement mechanisms also use some criteria to identify potential current violations of Facebook's policies ignores that the Investigation employs *attorney*-designed criteria that are not those Facebook applied in the ordinary course. A2/50-51 (¶ 8). Specifically, the criteria used by the Investigation were designed by counsel to uncover potential violations pre-dating 2015 under then-effective policies to assess the legal risk of such historic violations. And the Attorney

[10] Facebook has not, as the Attorney General suggests (at 38), informed the Attorney General of the detailed, attorney-derived criteria used to analyze data and assess potential legal risk. Although Facebook has provided high-level descriptions of the Investigation's contours to the Attorney General—based on the Attorney General's express assurances, now reneged, that doing so would not be used to claim a waiver—it has not described the specific criteria used to analyze that data, nor how that analysis affects counsel's evaluation of potential legal risk. Facebook's decision to provide the Attorney General with copies of cease and desist letters and lists of suspended apps (AG Br. 39 n.13) does not alter the analysis—this information is not subject to a claim of privilege because it was disclosed to third parties—*i.e.*, the affected developers and apps.

General certainly has not attempted to make the "highly persuasive showing" necessary for a court to order disclosure or information that reflects counsel's opinions and legal theories. *Comcast*, 453 Mass. at 315.

Nor does the volume of information (AG Br. 30 & 39-40 n.15) matter. The scale and complexity of the Investigation does not undermine its privileged nature. If anything, the Investigation's scope reflects the substantial legal threats Facebook faced. Regardless, the point is that but for the involvement, analysis, and advice of counsel, the lists and other information the Attorney General seeks would not exist. The fact that a specific app is included on a specific list is inextricably tied to counsel's opinion as to whether and to what extent that app poses legal risk. And in such circumstances, even significant volumes of information constitute "opinion" work product. *See, e.g.*, *Sher v. Barclays Capital Inc.*, 2013 WL 3279801, at *4 (D. Md. June 26, 2013) (work product protection extends to spreadsheet reflecting "comprehensive opinion work product that evolved out of [a party's] specific choices and thought processes concerning litigation"); *Santiago v. Miles*, 121 F.R.D. 636, 638 (W.D.N.Y. 1988) (work product protections extend to spreadsheets of raw data generated by a computer program designed by counsel).

Even if the Attorney General were correct that the information sought by the CID is "fact" work product (it is not), the Attorney General has failed to demonstrate a substantial need for that information or that it cannot obtain the

substantial equivalent by other means. *See* Mass. R. Civ. P. 26(b)(3). As to the former, the Attorney General asserts (at 40) only that the information at issue "squarely bears on … central questions" related to her investigation. This *ipse dixit* explains nothing. It certainly cannot justify the Attorney General's attempt to co-opt Facebook's attorney work product by requesting information in terms that inherently call for the production of information reflecting counsel's opinions. The Attorney General's contention that the information is in Facebook's sole possession (at 41) also misses the mark. The Attorney General has made no effort to request information by permissible means—*e.g.*, by developing its own criteria for alleged data misuse and requesting factual information about apps identified based on those criteria. Having declined to even attempt permissible means to obtain the information, the Attorney General has forfeited any argument that those means are unavailable. *See* FB Br. 54 & n.19.

The Attorney General's assertion (at 39 n.14) that its requests were intended to "narrow the dispute and enable Facebook to respond" rings hollow. That it might be more convenient for the Attorney General to ask for the work product of Facebook's counsel does not render the request consistent with the law.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in Facebook's initial brief, this Court should reverse the Superior Court's Order.

Respectfully submitted,

/s/ Felicia H. Ellsworth

FELICIA H. ELLSWORTH
(BBO # 665232)
RACHEL L. GARGIULO
(BBO #690747)
ERIC L. HAWKINS
(BBO # 693289)
IVAN PANCHENKO
(BBO # 693552)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Felicia.Ellsworth@wilmerhale.com
Rachel.Gargiulo@wilmerhale.com
Eric.Hawkins@wilmerhale.com
Ivan.Panchenko@wilmerhale.com

ANJAN SAHNI
(admitted *pro hac vice*)
WILMER CUTLER PICKERING
HALE AND DORR LLP
250 Greenwich Street
New York, NY 10007
(212) 230-8800
Anjan.Sahni@wilmerhale.com

Attorneys for Respondent-Appellant Facebook, Inc.

ALEXANDER H. SOUTHWELL
(admitted *pro hac vice*)
AMANDA M. AYCOCK
(admitted *pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000
asouthwell@gibsondunn.com
aaycock@gibsondunn.com

October 28, 2020

MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K) CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure Rules 16(a)(13) (addendum), 16(e) (references to the record), Rule 20, and Rule 21, that pertain to the filing of briefs.

1. Exclusive of the exempted portions of the brief, as provided in Mass. R. App. P. 20(a)(2)(D), the brief contains 4,493 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word, version 1808, build 10730.20205 in 14 point Times New Roman font. The undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Felicia H. Ellsworth

FELICIA H. ELLSWORTH
(BBO # 665232)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Felicia.Ellsworth@wilmerhale.com

October 28, 2020

CERTIFICATE OF SERVICE

I, Felicia H. Ellsworth, hereby certify, under the penalties of perjury that on October 28, 2020, I caused a true and accurate copy of the foregoing to be filed via the Massachusetts Odyssey File & Serve site and served two copies upon the following counsel by electronic and overnight mail:

Sara E. Cable, Esq.
Peter N. Downing, Esq.
Jared Rinehimer, Esq.
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

/s/ Felicia H. Ellsworth

FELICIA H. ELLSWORTH
(BBO # 665232)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
Felicia.Ellsworth@wilmerhale.com