SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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IN RE GRAND JURY) No. 21-1397

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8 Washington, D.C.

9 Monday, January 9, 2023

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11 The above-entitled matter came on for

12 oral argument before the Supreme Court of the

13 United States at 10:04 a.m.

14

15 APPEARANCES:

16 DANIEL B. LEVIN, ESQUIRE, Los Angeles, California; on

17 behalf of the Petitioner.

18 MASHA G. HANSFORD, Assistant to the Solicitor General,

19 Department of Justice, Washington, D.C.; on behalf

20 of the United States.

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1 P R O C E E D I N G S
2 (10:04 a.m.)
3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 21-1397, In
5 re Grand Jury.
6 Mr. Levin.
7 ORAL ARGUMENT OF DANIEL B. LEVIN
8 ON BEHALF OF THE PETITIONER
9 MR. LEVIN: Mr. Chief Justice, and may
10 it please the Court:
11 The significant purpose test protects
12 clients' ability to seek bona fide legal advice
13 from lawyers in situations where legal and
14 non-legal purposes can't be separated. The
15 Ninth Circuit's primary purpose test denies the
16 privilege to communications that have a legal
17 purpose anytime a court later finds that the
18 non-legal purpose outweighs the legal purpose
19 even by a little bit.
20 Taken seriously, that test requires
21 parties and courts to disentangle competing
22 purposes and to identify the single most
23 important one. That is an inherently
24 impossible exercise, and it creates the kind of
25 uncertainty this Court warned against in

1 Upjohn.
2 And Upjohn is instructive for other
3 reasons here too. The investigation there
4 obviously had business implications, but the
5 Court focused on the legal purposes. The
6 government argued there, as it does here, that
7 the privilege was unnecessary for
8 communications that would have been made
9 anyways, and the Court rejected that.
10 The government argued there, like it
11 does here, the privilege would be too broad.
12 The Court rejected the government's control
13 group test because it was unpredictable and
14 frustrated full and frank communications.
15 And just like in Upjohn, reversing
16 here will not open the door to misuse of the
17 privilege. Underlying facts are never
18 privileged. If one part of a document has
19 legal communications and a different part
20 non-legal, redactions are used. The proponent
21 of the privilege still has the burden to meet
22 all of the elements, and ordinary doctrines,
23 like crime fraud, create additional guardrails.
24 This Court should reverse the Ninth
25 Circuit and adopt the significant purpose test,

1 and I'd welcome the Court's questions.
2 JUSTICE THOMAS: If you have a purpose
3 that is admittedly significant but also
4 admittedly subsidiary, then how would you
5 handle that? How would you analyze that?
6 MR. LEVIN: From our perspective, that
7 would be a privileged communication, and the
8 reason for that is there is a legal purpose, an
9 admittedly legal purpose to the communication.
10 Were you to say, even if it were undisputed,
11 the bigger purpose is non-legal and still take
12 away the privilege, you still wouldn't be
13 protecting that legal communication.
14 Now, if they're separate, if one is
15 over here in this part of a document and the
16 other is -- is over here, you can redact and
17 just disclose the non-legal.
18 JUSTICE THOMAS: So how subsidiary
19 would it have to be in order not to meet your
20 test?
21 MR. LEVIN: It has to be a bona fide
22 legal purpose. It has to be real and
23 legitimate. We think that's the easiest way to
24 approach it.
25 JUSTICE THOMAS: I don't think that's

1 the -- the point I'm after. It's that it could
2 be legitimate but a very minor subsidiary
3 point, but, to you, it could be significant.
4 So would you tease that out a bit, how you
5 would analyze that under your test?
6 MR. LEVIN: Sure. Under our test, the
7 proponent would have to show that there was a
8 bona fide, that is, a legitimate legal purpose
9 to the communication. If they could show that,
10 whether how the degree of significance, whether
11 it was 25 percent legal, 33 percent legal,
12 42 percent legal, wouldn't matter. The point
13 is, once you get over the threshold of it is a
14 real and legitimate legal purpose, the
15 privilege should attach.
16 CHIEF JUSTICE ROBERTS: Well --
17 JUSTICE KAVANAUGH: Can I ask a
18 clarifying question about the difference
19 between your opening brief and your reply brief
20 on that, going to Justice Thomas's question,
21 maybe not difference but clarification in your
22 reply brief?
23 Significant, as you're understanding
24 it, is not about the size or the amount of the
25 legal purpose but, rather, is about, as I

1 understand your reply brief, whether the legal
2 purpose is legitimate, genuine, bona fide, is
3 that correct?
4 MR. LEVIN: That's correct, Your
5 Honor.
6 JUSTICE KAVANAUGH: Okay.
7 CHIEF JUSTICE ROBERTS: Well, I mean,
8 "bona fide" means good faith, right? I mean,
9 let's say you've got five different legal
10 arguments, you know, one, two, three, four,
11 five is bona fide. It's in good faith. Maybe
12 it'll work; maybe it won't. Is that document
13 privileged in that situation?
14 MR. LEVIN: It is privileged. Unless
15 you can separate out the non-legal, it is
16 privileged. And the reason for that is it's --
17 it's too hard ex ante to require people to make
18 a judgment about how important -- what is the
19 relative importance of the legal and non-legal
20 considerations here.
21 Take the settlement context like the
22 D.C. Circuit talked about in Boehringer. You
23 have someone who cares about the business
24 reasons for settlement, how much it's going to
25 cost, all of those things, and the legal

1 reasons, which is liability, risk, potential
2 damages, and so forth. You don't necessarily
3 know which is going to be more important. So
4 long as there is a bona fide legitimate legal
5 reason, the privilege should attach if the
6 legal and non-legal are mixed up together.
7 CHIEF JUSTICE ROBERTS: Well, I know,
8 but that -- yes, but you can affect how that
9 determination is going to be made, I guess, by
10 throwing in every reason you can. You know,
11 should I -- should I put -- you know, a client
12 says, should I put in this amount or that
13 amount? And you go through an analysis, well,
14 maybe this, maybe that, and then, you know,
15 just -- even if you've only got a 10 percent
16 chance of -- of prevailing, it could still be
17 bona fide. And does that cover the -- does
18 that change the communication from sort of an
19 accounting one to a legal one?
20 MR. LEVIN: So long as it's bona fide,
21 then -- then the answer -- our answer is yes.
22 And part of it is imagine a scenario where it
23 wasn't that way.
24 CHIEF JUSTICE ROBERTS: Well, look --
25 I don't mean to interrupt --

1 MR. LEVIN: Yeah.
2 CHIEF JUSTICE ROBERTS: -- but just
3 want to make sure we're using the same terms.
4 By "bona fide," you mean something that a
5 lawyer would actually think, he's not just
6 making it up, just sort of, yeah, that's -- I
7 mean, lawyers make arguments that they think
8 have a 10 percent chance of prevailing, and it
9 doesn't mean they're in bad faith. It just
10 means it's a stretch.
11 MR. LEVIN: A long shot. It has to be
12 legitimate or bona fide to guard against
13 pretext. Everybody agrees you can't just copy
14 a lawyer on a communication, you can't just
15 have a lawyer sit in the corner of a meeting
16 and say the whole thing's privileged. That's
17 what it's really guarding against.
18 JUSTICE JACKSON: But can I ask you,
19 what --
20 JUSTICE SOTOMAYOR: But --
21 JUSTICE JACKSON: -- what level are we
22 doing this at? I mean, I -- I didn't
23 understand us to be talking about entire
24 documents. I thought the Court was going
25 through and looking at particular

1 communications, almost like the segregability
2 requirement in the FOIA context.
3 Am I wrong about that?
4 MR. LEVIN: You're not wrong. It --
5 it's -- it can be segregable at the -- all the
6 way down to the sentence level, which is -- the
7 district court in certain instances here did
8 order redactions at the sentence level.
9 JUSTICE JACKSON: All right. So, if
10 I'm right about that, I guess I'm trying to
11 understand what is a dual-purpose communication
12 because, if you were in a document and you're
13 going sentence by sentence or line by line
14 trying to assess is it legal, is it non-legal,
15 you're doing that exercise and you seem to
16 admit that there are going to be some that are
17 clearly in one bucket or the other.
18 So are you just talking about the
19 sentences or the paragraphs in which it's kind
20 of hard to tell is it legal or non-legal? And
21 if that's the world of dual-purpose
22 communication, why is it that when we're in
23 that ambiguous circumstance it should
24 essentially automatically be deemed legal?
25 MR. LEVIN: So that is the world in

1 the sense of -- now it might be at the sentence
2 level, it might be at the document level. It's
3 very hard to prophylactically say it's always
4 going to be at this level or another.
5 But someone goes in and asks a lawyer
6 should I fight for the house in the divorce.
7 There's property -- there's the legal part of
8 that and there's probably emotional and
9 personal parts of that and it's tied together.
10 So you can have situations where it's very hard
11 to disentangle if not impossible to
12 disentangle.
13 JUSTICE JACKSON: But, I mean,
14 you're -- in the document you're looking,
15 there's a paragraph that describes the house
16 and it's all factual, and you would -- and
17 would you agree that that would not be
18 privileged because it's just the facts? No?
19 MR. LEVIN: Well, not necessarily. It
20 really depends on the context because, if it --
21 if it is -- if the purpose of describing the
22 house is to inform the lawyers so that they
23 have the facts in order to bring a legal
24 judgment about is it marital property, is it
25 not, when did you buy it, that would be really

1 important to the question.
2 JUSTICE JACKSON: Is that really how
3 we ordinarily do attorney-client privilege? I
4 thought -- I thought even parts of an
5 attorney's memo that had factual information
6 aren't covered by the privilege.
7 MR. LEVIN: Well, the underlying facts
8 are never privileged. That is, you can always
9 get those. But the communication of those
10 facts, that's right out of Upjohn.
11 So, when they went and interviewed
12 employees at Upjohn, the -- the communication
13 of information to the lawyers was privileged.
14 The government, of course, could go out and
15 interview the same people and get the same
16 information. They just -- what they couldn't
17 get is the communication between client and
18 lawyer if that communication was for the
19 purpose of the lawyer then rendering legal
20 advice.
21 So it does -- sometimes the
22 transmission of facts by client to lawyer is
23 privileged. That's a -- a -- a very typical
24 situation.
25 JUSTICE JACKSON: You're saying the

1 amount doesn't matter. So we have this memo,
2 it's about the -- the divorce, and, you know,
3 90 percent of it is the description of the
4 background facts, and we have a sentence, the
5 lawyer says X. You're saying that because the
6 whole thing was created for the purpose of
7 legal advice, it's covered under your view?
8 MR. LEVIN: If -- if the proponent can
9 meet that burden, then yes. The -- the problem
10 is, if you -- if you tip the other way, you say
11 no, it's got to be 51 percent legal, it's got
12 to be primary, it's got to be the -- the
13 single -- the single biggest -- a conscientious
14 lawyer, when you get into these mixed purposes,
15 is going to have to advise a client, we're now
16 in a world in which we're talking about legal
17 and non-legal. I need to advise you, a court
18 might later say this is not the primary purpose
19 and, therefore, it might not be privileged.
20 So you're -- it's going to create a
21 chill on that communication because a lawyer
22 who takes the test seriously is going to need
23 to say to her client, I can't be confident here
24 that this is going to be privileged and a
25 confidential communication.

1 JUSTICE SOTOMAYOR: Counsel, I have a
2 slightly different problem. As I understand
3 the situation currently, the vast majority of
4 states use the primary purpose test. You are
5 asking us to change their common law test, I
6 assume, just for purposes of federal law,
7 because the Federal Rule of Evidence 501 tells
8 us that in any "civil case, state law governs
9 privilege regarding a claim or defense for
10 which state law supplies the rule of decision."
11 So how is this going to work? In
12 federal court, we're going to say you apply the
13 significant -- significant test, and in state
14 cases, you apply the primary test?
15 MR. LEVIN: Let me say two things,
16 Your Honor. One is, when you look at the state
17 cases, the state cases cited in the
18 government's brief as examples of primary
19 purpose cases, many of those, they say primary
20 or predominant purpose, but then they just look
21 is there a legal purpose.
22 Take the Spectrum case from New York.
23 It says primary or predominant purpose is the
24 test, and then it goes on to say the critical
25 inquiry is whether it was made in order to

1 render legal advice. And it quotes --
2 JUSTICE SOTOMAYOR: Well, but that's
3 the point that Justice Thomas raised, which is
4 how do you know that. If 1 percent according
5 to your test, if 1 percent of the -- of the
6 purpose of this communication was to render
7 legal advice, the whole communication is
8 suppressed. That's what you're saying to me.
9 There's no percentage to significant.
10 MR. LEVIN: I'm saying there it needs
11 to be bona fide or legitimate. So I'm trying
12 to move away from 51 or --
13 JUSTICE SOTOMAYOR: Well, but, I mean,
14 1 percent can be -- you know, accountants every
15 day give -- fill out forms and help you figure
16 out numbers and tell you what to do, and a
17 small percentage is always legal advice. I
18 think that this is that.
19 And you may -- it may have a legal
20 consequence. And yet we said accountants
21 didn't have privilege. I don't know why lawyer
22 advice that's predominantly business should be
23 protected simply because you sneak in some
24 minor legal consideration.
25 MR. LEVIN: Your Honor, let me talk to

1 the accountants. Let me see what --
2 JUSTICE SOTOMAYOR: But I still want
3 to go back to this point, the one I started
4 with, which is you're asking us to announce one
5 test for federal cases and let the states do a
6 different test, however they define that.
7 They've never used the words that you're asking
8 us to use.
9 MR. LEVIN: There are a few states
10 that use significant purpose. Texas is one.
11 But, Your Honor, I would point to Upjohn --
12 JUSTICE SOTOMAYOR: The vast majority
13 don't.
14 MR. LEVIN: I don't disagree with
15 that. I would say, in Upjohn, the control
16 group test was widely used in federal and state
17 courts. And after this Court decided Upjohn,
18 almost every state has moved to the Upjohn
19 test.
20 JUSTICE SOTOMAYOR: But that's not our
21 business, is it?
22 MR. LEVIN: No. No. Ultimately
23 that's a --
24 JUSTICE SOTOMAYOR: The Federal Rules
25 of Evidence is not to give our sense of what's

1 appropriate for the attorney-client privilege.
2 We are directed to look at -- in light of
3 reason and experience, and so we should be
4 looking at what those state courts are doing,
5 not dictating to them what to do.
6 MR. LEVIN: Well, this Court won't
7 bind state courts. I agree with that. And
8 this Court does look to reason and experience,
9 and we would say that, in fact, reason and
10 experience support the significant purpose test
11 because the primary purpose test, even when
12 it's recited --
13 JUSTICE SOTOMAYOR: When? Tell me --
14 tell me -- you -- you make this claim that it's
15 so difficult, but I really haven't seen much to
16 say that it's difficult to administer. I don't
17 see a rounding number of courts in states or
18 even federal courts saying, I can't figure this
19 out.
20 This particular judge, I think, was
21 meticulous in separating out documents. As you
22 said, this judge picked out sentences and
23 redacted them. This judge upheld your
24 objections to a number of disclosures based on
25 points that you raise with respect to the legal

1 nature of the communication. So I don't see
2 how judges are having the hard time you're
3 talking about.
4 MR. LEVIN: Your Honor, I'd point to
5 the Polaris case from Minnesota, which was
6 recently decided after the Ninth Circuit's
7 decision here, and it does adopt the primary
8 purpose test. And then you have a majority in
9 a dissent that look at the same investigative
10 report and they come to diametrically opposite
11 views.
12 JUSTICE SOTOMAYOR: Counsel, that's
13 not how --
14 JUSTICE KAGAN: I mean, you have one
15 case, Mr. Levin, in your briefs and now you're
16 raising it again here. But I think Justice
17 Sotomayor's point is a bigger and broader one.
18 I mean, we've had the attorney-client
19 privilege for a long time, and until 2014,
20 nobody ever suggested that the test that you're
21 proposing is the right one. Everybody instead
22 used the primary purpose test.
23 Some used it explicitly, you know,
24 this was one purpose, this was another purpose.
25 Some didn't. But that was the nature of the

1 test that they understood themselves to be
2 applying constantly.
3 And what Justice Sotomayor is saying
4 is there's no particular evidence of confusion,
5 nor is there any particular evidence of chill.
6 Why would there be chill? Because, by
7 definition, if there is a primary purpose
8 that's non-legal driving the communication,
9 somebody will make that communication because
10 they have a non-legal primary purpose to do so.
11 So this is a big ask, and it's an ask
12 that's not particularly consistent with the
13 underlying nature of what the attorney-client
14 privilege is supposed to be protecting.
15 MR. LEVIN: I -- I don't think it --
16 it's a big movement. And I would say, if you
17 look at the Restatement, it does say "primary
18 purpose," and then it immediately moves from
19 there to "is there a significant purpose" in
20 the same comment.
21 And -- and the reporters note said
22 American courts look to the significant
23 purpose. I understand that's not the official
24 view of the ALI, but it is a comment about what
25 the courts are actually doing in the main.

1 JUSTICE KAGAN: Well, I have to say
2 just as you have one case, so too you have one
3 treatise or -- or -- or -- or a secondary
4 authority, and that's the Restatement. And the
5 Restatement is itself equivocal. It goes back
6 and forth. You have one statement, Ms.
7 Hansford has another sentence.
8 So you have one equivocal sentence in
9 the Restatement, and everything else points the
10 other way, to the primary purpose test.
11 MR. LEVIN: I think the problem, Your
12 Honor, is, if you push the primary purpose test
13 to its serious and logical conclusion, where
14 you require 51 percent to get there, you will
15 be in a world in which it is very difficult ex
16 ante to predict that, and lawyers will have to
17 start advising clients: I don't know that this
18 conversation will be privileged because we are
19 talking about both, and I don't know how a
20 court will come at it.
21 And the other thing I'd say, because
22 you made the point about the communication
23 would have been made anyways, that's a really
24 important point because the government made
25 that point in Upjohn and the Court rejected it

1 in Footnote 2. It says it proves too much.
2 You could say that about many, many
3 communications to a lawyer. If someone's in
4 legal trouble, they would have talked to the
5 lawyer anyways because what else can they do?
6 JUSTICE BARRETT: Well --
7 MR. LEVIN: So --
8 JUSTICE BARRETT: I'm sorry. Finish,
9 please.
10 MR. LEVIN: No, thank you.
11 JUSTICE BARRETT: Well, I mean,
12 following up on this point, I mean, your --
13 your big policy point is chill and your point
14 that the lawyer would have to advise the client
15 I'm not sure if this is going to be privileged.
16 But isn't that the case already? I mean, you
17 don't know whether you're going to be sued on a
18 state claim or a federal claim, and so you
19 might be in a state that, like most states, you
20 know, doesn't follow the primary purpose test.
21 And so that conversation, you -- you
22 -- you -- you could wind up in a situation
23 where that conversation is privileged maybe for
24 one -- in one jurisdiction but not another if
25 you win.

1 MR. LEVIN: It's certainly
2 theoretically possible you could have a
3 situation where you -- you -- you have a
4 different rule under state and federal law.
5 That certainly could happen. I don't think
6 that's a -- that's a reason to not try to come
7 up with the best and most operable and needed
8 rule of law.
9 JUSTICE BARRETT: But why wouldn't
10 that chill the communication? Because it's not
11 going to be privileged, say, if someone asserts
12 a state law claim against the client.
13 MR. LEVIN: I -- I'd say that most of
14 the states, and certainly true of the states
15 that the government cites in its brief, when
16 you look at their case law, they may say
17 primary or predominant, but then they focus in
18 on, is there a legal purpose or not?
19 So that is, when they apply it,
20 they're applying it in the way we say it ought
21 to be applied, which is you go back to the
22 Wigmore test, you ask the basic questions. Are
23 you talking to a lawyer who's acting as a
24 lawyer? Are you communicating for the purpose
25 of legal advice? And if you can meet those

1 thresholds in a legitimate way, it's not
2 pretextual, then you get the privilege.
3 And that is, I'd submit, the way most
4 of the states --
5 JUSTICE JACKSON: But --
6 MR. LEVIN: -- have actually been
7 applying it.
8 JUSTICE JACKSON: -- but, if they're
9 actually doing it, then it isn't a big change.
10 You can't have it both ways. You just said I
11 think this is going to make a difference, and
12 now you're saying no, it's not because they're
13 already doing it in the way that we're asking
14 you to adopt.
15 MR. LEVIN: Your Honor, I think it's
16 going to make a difference because now we're
17 here. That is, were this Court to say no, we
18 are serious, primary purpose, 51 percent, that
19 would send a message across federal courts and
20 I would say state courts too because they
21 obviously would pay attention. Were this Court
22 to say no, we're going to anchor the test in
23 the traditional privilege and we're going to
24 say, if you can meet the standards and you can
25 meet them in a real way, that is, there's no

1 pretext, you're not trying to manufacture a
2 privilege in some abusive way, then you have a
3 privilege. And that is a clear and more
4 predictable test that will appropriately
5 protect attorney-client privilege.
6 JUSTICE ALITO: Some of the amici in
7 support of you say that communications are
8 privileged as long as any purpose of those
9 communications is to obtain or provide legal
10 advice and no other well-established exception
11 applies. Do you agree with that?
12 MR. LEVIN: I agree as long as it's --
13 as it's legitimate and meaningful. That is, I
14 -- I -- if it is -- if it is really a facade,
15 no, then I don't agree with that. It has to be
16 a legitimate bona fide legal purpose.
17 JUSTICE ALITO: Do you think there's a
18 difference between something being significant
19 and something being done not in good faith, not
20 bona fide?
21 MR. LEVIN: Yes. I think the -- I
22 think those are the flip side.
23 JUSTICE ALITO: So it's a change --
24 you've changed your position? You're not
25 really arguing for a significant purpose;

1 you're arguing for any legitimate purpose?
2 MR. LEVIN: No, I don't -- I don't
3 think -- I think that that's -- I mean, I guess
4 what I would say is I don't think that's how I
5 read -- I read our position as saying, if it's
6 legitimate and bona fide, it would qualify as
7 significant. I understand the Court could say
8 no, there's -- there's some higher quantum, and
9 I think we'd still win under that, some higher
10 quantum but less than 51 percent. So I think
11 we would still win and some of the documents in
12 this case would be privileged under that
13 approach.
14 I think the problem with a quantum
15 approach is then you still get into this, well,
16 have we hit the quantum, have we hit a third,
17 have we hit 25 percent, whatever it might be.
18 JUSTICE ALITO: Can you provide an
19 example or two of an insignificant privilege?
20 I'm sorry, an insignificant purpose?
21 MR. LEVIN: Sure. You -- you call a
22 lawyer to sit in a meeting, to sit in the
23 corner while you talk about business, you know,
24 because, hypothetically, maybe the lawyer will
25 spot something and say something. That I would

1 say is pretextual.
2 You copy a lawyer on a communication
3 or maybe you copy them --
4 JUSTICE KAGAN: And why is that
5 pretextual? I mean, actually, you sometimes
6 want a lawyer just to sit in and issue-spot and
7 see if he'll come up with anything. You want a
8 lawyer on your e-mail chain just to see if the
9 lawyer spots anything that you're not spotting
10 about how the law relates to a particular
11 course of conduct.
12 So, you know, that seems to me
13 legitimate. It will also basically immunize
14 every communication that a business has.
15 MR. LEVIN: No, Your Honor, I think
16 courts are actually quite good at separating
17 out real from non-real. This comes up all the
18 time when people review documents and people
19 look at privilege logs, that just cc'ing the
20 Legal Department is not enough, even if,
21 hypothetically, a lawyer might pipe up. I
22 mean, you still have to meet your burden. You
23 have the burden. The proponent has the burden
24 to convince a judge, no, that there was some
25 real legal purpose going on.

1 And courts, I think, historically --
2 JUSTICE KAGAN: But there is a real
3 legal purpose. The real legal purpose is to
4 make sure that the lawyer knows everything that
5 we're doing and raise objections if and when
6 appropriate. So that's a real legal purpose.
7 But, you know, in the meantime, we're
8 discussing a thousand things relating to our
9 business activities.
10 MR. LEVIN: I just don't think courts
11 have done it that way. Without -- without
12 falling back on it's not 51 percent -- take the
13 Vioxx case that the government cites, where the
14 -- the company's position was everything that
15 we do where a lawyer is copied is privileged
16 because we're a regulated company. The Court
17 rejected that appropriately. But then it said
18 it's -- it is relevant, that context that
19 you're a highly regulated company is relevant
20 because we want regulated companies to talk to
21 a lawyer. It's not a bad thing to talk to a
22 lawyer. We want the regulated company to talk
23 to the lawyer so they can get advice about how
24 to comply with the law.
25 I mean, that is fundamentally what the

1 privilege is about. We want to encourage
2 people to have open and full communications
3 with lawyers so that we can encourage
4 compliance. And if you set a bar at you've got
5 to get to 51 percent, that will discourage that
6 kind of communication and it will lead to less
7 compliance.
8 JUSTICE ALITO: I think you're trying
9 to have it both ways. Significance concerns
10 importance. It's maybe -- it's a lot lower
11 perhaps than primary, but it does involve a --
12 a certain quantum of importance.
13 MR. LEVIN: Well, like I said, Your
14 Honor, I do think we would win under were you
15 to say it has to be more than just legitimate,
16 it has to be important, because I think some of
17 the documents -- take the one where they're
18 talking about a reasonable cause statement, I
19 think that would qualify as important. I think
20 we would still win.
21 I do think the -- the more predictable
22 test and the one that's easier to implement,
23 even if a little bit broader at the margins, is
24 to say it has to be meaningful and legitimate.
25 I think that is -- that --

1 JUSTICE SOTOMAYOR: Why is that
2 more -- why is that simpler?
3 MR. LEVIN: Because --
4 JUSTICE SOTOMAYOR: I mean, I -- I
5 seem to think that what you're having a problem
6 with is the preponderance of the evidence
7 standard. Is it 51 percent versus 49 percent
8 or the 50/50 situation?
9 But I see very few courts -- and you
10 seem to be saying this -- think that if
11 something has almost equal importance, that
12 they're treating it as 50/50. I seem to be
13 seeing that if the -- if it's a very
14 significant purpose, that they're finding it's
15 a primary purpose.
16 MR. LEVIN: I guess what I'd say is,
17 as I said before, we would -- we would win
18 under importance -- significant means
19 important. Where -- where we think the problem
20 is to say no, you've got to find the single
21 primary purpose, that means we've got to rank
22 them and we've got to find the biggest. That
23 is what the Ninth Circuit said and it's how
24 district courts in the Ninth Circuit have
25 applied it. And we -- we think that is where

1 the test falls down.
2 And I would say the preponderance
3 standard, it is -- it is -- of course, everyone
4 understands what it is, 51 percent. It's very
5 hard to predict. This is why lawyers don't
6 often predict to clients we're going to win at
7 trial. I'm -- you -- it's very hard to predict
8 whether something will preponderate or not in
9 the mind of a fact-finder later.
10 JUSTICE SOTOMAYOR: Okay.
11 MR. LEVIN: It's a very difficult
12 prediction to make. Thank you.
13 CHIEF JUSTICE ROBERTS: Why don't we
14 move on to our next stage here. How would you
15 handle a case where an accountant sits down and
16 goes through it, it's a very complicated form,
17 and the accountant says, I want to have a
18 lawyer look at this, and they bring in Lawyer
19 X, and Lawyer X says, you know, I am the
20 world's expert in this area, I've been doing
21 this for 40 years; in my view, this is all very
22 good, except these three items, you know,
23 they're kind of iffy, and I think you should
24 probably not make -- make those; everything
25 else is good, here you go, sends a bill for

1 $200,000.

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: And -- and, in
4 that case, is that accessible because it's
5 looking at the actual numbers and participating
6 in the preparation of the form? Is the entire
7 thing privileged, or can the prosecutors get
8 that communication?

9 MR. LEVIN: Oh, I think that's
10 privileged, Your Honor. That -- the way you
11 laid out, that sounds like the lawyer is
12 evaluating what do the tax rules and
13 regulations require and is making legal
14 judgments about them. To me, that's a --
15 that's clearly privileged.

16 When you -- when you say, as the Ninth
17 Circuit has -- did in this case, communications
18 of a lawyer solely for the purposes of return
19 preparation, we would say that is when you're
20 communicating about here is the information
21 that you're going to transcribe under the form,
22 it's -- it's -- it's much more mechanical.

23 If you're talking -- if the lawyer is
24 bringing their legal judgment to bear on what
25 the rules and regulations are, tax should be no

1 different than anywhere else.
2 Those are quintessentially legal
3 judgments. They're bringing their training and
4 experience to bear. That's how the Restatement
5 comes at the question. Are you -- are you --
6 are you using a lawyer as a lawyer if they're
7 bringing their experience and their training to
8 bear on the issue in talking about your legal
9 obligations?
10 CHIEF JUSTICE ROBERTS: Thank you.
11 Justice Thomas?
12 JUSTICE THOMAS: Just one brief
13 question, Chief.
14 Is there any non-trivial role that a
15 lawyer plays in the example the Chief gave that
16 doesn't meet your test?
17 MR. LEVIN: The only one would be if
18 they said: Okay, we're going to make changes
19 to the form and I'm going to have the lawyer do
20 it, so send the lawyer this additional data
21 that has to go on a worksheet that's going to
22 get sent to the IRS. So that would be
23 mechanical tax prep.
24 But I think, for the -- in the main,
25 if the lawyer is making legal judgments using

1 their legal training and experience, it's
2 privileged.
3 CHIEF JUSTICE ROBERTS: Justice Alito,
4 anything further?
5 Justice Sotomayor?
6 JUSTICE SOTOMAYOR: It's not
7 significant then? It's any purpose? Any legal
8 purpose?
9 MR. LEVIN: I think it's any -- it's
10 any bona fide meaningful legal purpose.
11 CHIEF JUSTICE ROBERTS: Justice Kagan?
12 JUSTICE KAGAN: I -- I'm wondering if
13 you would just comment on, you know, the
14 ancient legal principle, if -- if it ain't
15 broke, don't fix it.
16 (Laughter.)
17 MR. LEVIN: So here -- here's what I'd
18 say to that, Your Honor. I think we've come to
19 a point, once we had the D.C. Circuit identify
20 the problem in taking really seriously primary
21 purpose and saying you actually do need to rank
22 them and decide which is number one, I think it
23 pointed out that -- that you have a -- you have
24 a test primary.
25 The courts weren't really for the most

1 part actually trying to do and say I'm going to
2 rank them all, I'm going to decide which is
3 number one, and once you've set up that issue,
4 if this Court were to say no, we're serious,
5 you've got to rank them, you've got to pick the
6 biggest, it will create a problem where may --
7 maybe none would have existed if everyone had
8 just gone on the same way, but I think now the
9 -- the issue is -- is -- is presented.
10 JUSTICE KAGAN: Thank you.
11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?
13 JUSTICE KAVANAUGH: Well, just to
14 unpack that and your answer to Justice
15 Sotomayor about the case law, my understanding
16 of what you're saying is that courts have
17 articulated primary purpose quite a bit, pretty
18 routinely, but when you actually get into the
19 cases and look at them, they're not actually
20 trying to figure out -- at least some
21 substantial portion are not trying to look at
22 what's the 51/49 purpose but are, rather, doing
23 what you say, and so they're not really doing
24 what the label primary purpose would say?
25 MR. LEVIN: That is our view, Your

1 Honor.

2 JUSTICE KAVANAUGH: Yeah.

3 CHIEF JUSTICE ROBERTS: Justice

4 Barrett?

5 Justice Jackson?

6 JUSTICE JACKSON: So you've identified

7 the problem of courts ranking and coming up

8 with the -- the most significant purpose. But

9 I wonder about the opposite problem, which

10 seems to be what is being teed up by your now,

11 I think, new perhaps definition of significant,

12 which is the problem of having a legitimate,

13 bona fide but, as Justice Thomas pointed out,

14 clearly secondary, subsidiary purpose.

15 You know, we have a situation in which

16 everyone would agree, even the lawyer sitting

17 there, that the primary purpose of this

18 communication is a business decision or

19 discussion, but the lawyer adds a point. And

20 you say, as long as it's a legitimate point,

21 that is good enough to require that the entire

22 thing be privileged.

23 And I guess I see that as problematic.

24 Why shouldn't I worry that using your test now,

25 we are going from one extreme to the other?

1 MR. LEVIN: I don't think it's --
2 it's -- I don't think that's going to happen.
3 A couple reasons. One is just look at this
4 case. There were -- 1600 documents or so were
5 produced without any privilege objection.
6 We're arguing about less than 50 as dual
7 purpose. It's not going to just --
8 JUSTICE JACKSON: Yeah, but you're
9 arguing against the backdrop of this test.
10 What I'm worried about is changing it. Yes, in
11 the new world, you wouldn't be arguing. You
12 wouldn't be arguing because you would win them
13 all because you would say I have a lawyer there
14 and that's all the court had to care about.
15 And that's what I'm concerned about.
16 MR. LEVIN: Well, we took the position
17 in this Court that the -- the -- in the lower
18 courts that the specific purpose test applies.
19 And I think there are still -- as I started
20 with, there are many other guardrails that
21 prevent that kind of abuse, that kind of using
22 lawyers as a pretext.
23 The traditional test actually requires
24 a showing by the proponent, are you talking to
25 the lawyer as a lawyer, are you talking for a

1 legal purpose. If you're trying to engage in
2 -- in tax fraud, there is a crime fraud
3 exception. There are lots of --
4 JUSTICE JACKSON: Not of fraud. I'm
5 talking to the lawyer legitimately. He only
6 has, though, a very minor thing to say about
7 this. We're sitting here for five hours, and I
8 turn to the lawyer for 15 minutes and ask him a
9 question.
10 MR. LEVIN: I think those -- those 15
11 minutes are going to be a privileged
12 conversation. It may well be the other --
13 JUSTICE JACKSON: Would the whole
14 thing be or just the 15 minutes?
15 MR. LEVIN: No. Probably the 15
16 minutes in what you're -- I mean, if I
17 understand what you're saying right, I think --
18 we're not saying that you can't -- if you can
19 separate legal and non-legal, which sometimes
20 you can, then, of course, you should disclose
21 the non-legal and -- and withhold the legal.
22 So I don't think you're -- you're
23 allowing a situation where you can bring in a
24 lawyer in a pretextual way or in a small way at
25 the end, at the beginning, and create a

1 privilege that will sweep across everything. I
2 just don't think that's the case. Courts are
3 already quite good at policing that.
4 JUSTICE JACKSON: And what you're
5 saying is if -- so, fine, we narrow in to the
6 15 minutes of the lawyer talking as a part of
7 this discussion, that -- the lawyer's also
8 communicating business information in his 15
9 minutes, right now, it seems as though the test
10 would require the court to figure out in that
11 15 minutes what was really the primary thrust
12 of the communication. That's what the primary
13 purpose.
14 And I don't know that it's like
15 51 percent. The court is not doing math.
16 They're just sort of looking at the 15 minutes
17 in which it could go either way and making a
18 judgment, which is what courts do, as to what
19 is sort of the primary thing happening here.
20 I think your test would say, don't do
21 that. As long as we -- the lawyer was talking
22 in that 15 minutes, it should be covered as
23 privileged?
24 MR. LEVIN: Right. I mean, go back to
25 the settlement context. The lawyer is

1 talking -- and you're talking about what are
2 the potential damages, obviously, legal, but
3 also the benefits to the business of -- of the
4 certainty of having litigation behind it.
5 Maybe you want to sell the business and not
6 have a litigation overhang all of these
7 considerations.
8 Lawyers who talk to clients about
9 settlement, those are mixed up all the time,
10 and the idea that you're then going to have to
11 say to the client: Well, it sounds like this
12 is kind of a lot of business, I'm -- I'm --
13 this may not be a privileged communication.
14 If there's -- if there's a real legal
15 purpose in those 15 minutes, you shouldn't be
16 in the business of trying to figure out, okay,
17 how do we rank them, which is going to be
18 bigger. It's going to create more problems
19 than it solves, much better to go with the real
20 legal purpose.
21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.
23 MR. LEVIN: Thank you.
24 CHIEF JUSTICE ROBERTS: Ms. Hansford.
25

1 ORAL ARGUMENT OF MASHA G. HANSFORD
2 ON BEHALF OF THE UNITED STATES
3 MS. HANSFORD: Mr. Chief Justice, and
4 may it please the Court:
5 The public has a right to every man's
6 evidence. The attorney-client privilege
7 creates an important but limited exception to
8 that rule for communications seeking legal
9 advice. But, outside the context of legal
10 advice, the every man's evidence rule governs.
11 Employees send e-mails with trial data
12 showing that a drug caused a serious side
13 effect during trial or evidence that a new
14 design for a car will sharply increase the rate
15 of failure for the car's brakes. Sensitive
16 business conversations with engineers and
17 technical advisors and sales staff have to
18 happen, and when they do, they can be critical
19 evidence in subsequent court proceedings. All
20 agree that such information is not and should
21 not be privileged.
22 But where a client combines a business
23 communication with a request for legal advice
24 or just the presence of an attorney to spot
25 issues, as Justice Kagan indicated, courts need

1 a test to see if the communication is more the
2 kind that is seeking legal advice or more the
3 kind that doesn't need the protection of the
4 privilege.
5 And reason and experience points to
6 the primary purpose test, which has been used,
7 as the discussion this morning indicates, for
8 decades by a huge body of state and federal
9 cases and has been endorsed by commentators
10 from Wigmore to Rice.
11 And I think that body of evidence
12 powerfully rebuts Petitioner's assertion that
13 it's too hard to apply the primary purpose test
14 is what courts have been doing.
15 Instead, Petitioner introduces a
16 so-called freestanding significant purpose
17 test, which, in its reply brief and, again,
18 repeatedly this morning, Petitioner
19 acknowledges is merely a bona fide legal
20 purpose test. Any non-pretextual legal
21 purpose, no matter how minor, will do.
22 That approach would vastly expand
23 attorney-client privilege to communications
24 that are currently available to grand juries
25 and to courts. Most directly relevant here, it

1 would create an accountant-client privilege
2 whenever a taxpayer can afford to hire an
3 attorney to prepare his taxes, as I think the
4 exchange with the Chief Justice indicates. And
5 courts across the country have appropriately
6 rejected any rule that allows a well-heeled
7 taxpayer to buy their way into a privilege.
8 I think, as the court of appeals
9 recognized and for many of the reasons that
10 Justice Sotomayor mentioned, for the 54
11 documents at issue here, this really was not a
12 close case, and Petitioner's effort to expand
13 attorney-client privilege to capture these
14 documents should be rejected.
15 I welcome the Court's questions.
16 JUSTICE THOMAS: I am interested in
17 the other end of the spectrum here, as opposed
18 to where I was with the Petitioner. What would
19 you do if the purposes were in equipoise or if
20 they -- the legal and the non-legal could not
21 be disentangled?
22 MS. HANSFORD: Absolutely, Justice
23 Thomas. So our primary submission here is the
24 concern about the -- the end of the spectrum
25 you were discussing earlier where there is a

1 predominant non-legal purpose, which is the
2 case here. In the difficult cases where the
3 purposes are in equipoise or cannot be
4 disentangled, we have no problem with what we
5 view as the Kellogg court's approach to those
6 difficult cases, which is to say courts are not
7 doing math, they don't need to try to assign
8 52 percent/48 percent. Once there are multiple
9 really meaningful purposes and courts can't
10 tell what to do with that and there isn't a
11 purpose that is clearly predominant, we are
12 fine with kind of a tie goes to the runner rule
13 in favor of the privilege in those cases.
14 CHIEF JUSTICE ROBERTS: Well, that's
15 really asking courts to parse things pretty
16 fine. Is -- is this a 52/48 thing, or is it,
17 in fact, you know, a tie? I think it's
18 important to keep in mind what the judges have
19 to do here, which is go through these
20 documents. I mean, 1600 documents in this
21 case, I don't even think that's regarded as a
22 big -- a big collection.
23 And you get a memo and it's got --
24 they're talking about three different legal
25 issues, and under your test, the judge is

1 supposed to decide, of these three, this one is
2 the big one. That's the one that's most
3 important. And it doesn't have anything to do
4 with this or what -- or whatever.
5 As opposed to your friend's test,
6 which recognizes the reality that, yeah, there
7 are three things there. They're pretty much
8 the same. And the judge, I think, in that case
9 can say, okay, this is privileged, rather than
10 having to look at it much more carefully. I
11 mean, they've got to go through a lot of these
12 documents, you know, in -- in many cases.
13 Rather than having to say in each instance,
14 yeah, this one is this one, this much that, as
15 opposed to, yeah, there are three legal issues
16 in this case if you've got a memo on three
17 different legal issues.
18 It seems to me that your approach
19 really puts a lot of work on the judge.
20 MS. HANSFORD: So, Mr. Chief Justice,
21 three thoughts about that.
22 So, first, I was trying to say that if
23 it's 48/52, we're not asking courts to say, is
24 it 48/52, is it 50/50 once they're really close
25 and you can't parse which one is the document,

1 so --
2 CHIEF JUSTICE ROBERTS: Well, okay. I
3 mean, you --
4 MS. HANSFORD: -- we think it's okay.
5 CHIEF JUSTICE ROBERTS: Yeah, I mean,
6 you understand how the next question is. What
7 if it's, you know, 60/40?
8 MS. HANSFORD: So -- so, absolutely,
9 and I recognize that there is a lot that
10 district courts need to do to -- to assess the
11 application of the privilege, and I guess the
12 first answer I would give on that is that the
13 -- the way courts have been doing this for a
14 very long time is using the primary purpose
15 test.
16 And I think switching to a new test
17 would be really destabilizing and I think would
18 actually reopen a lot of questions the courts
19 have already resolved, and the rules of thumb
20 that I think -- I think, because of this
21 practical reality, I think Justice Kavanaugh is
22 right that as a practical matter, in certain
23 contexts, courts kind of have rules of thumb
24 that they view a legal purpose as predominating
25 in certain contexts because of that difficulty.

1 And I think switching now would make things --
2 CHIEF JUSTICE ROBERTS: Well, but if
3 it's --
4 MS. HANSFORD: -- harder for district
5 courts.
6 CHIEF JUSTICE ROBERTS: -- but -- I'm
7 sorry, but it's -- it's -- the point that I
8 understand -- understood Justice Kavanaugh to
9 make is that it's not as if they've been doing
10 this for a long time. I mean, your friend
11 could conceivably say they've been doing what
12 he wants for a long time because, yeah, they'll
13 say primary, but, in fact, you know, they look
14 at it and if there's -- you know, you're going
15 to be focusing on one issue, I don't know that
16 you'd say, well, you're out of luck because I'm
17 going to say this one's primary.
18 I mean, it -- it -- to a certain
19 extent, I -- you know, I think we're talking
20 about labels rather than analysis.
21 MS. HANSFORD: So -- so, Mr. Chief
22 Justice, to the extent we're talking about
23 labels, what we care about here is the
24 substance of the test and not diluting the --
25 the purpose to such a low level that it's

1 really any purpose will do. And I do think
2 that to the extent Petitioner's rule is easier
3 to apply, it's really because it's just a rule
4 that everything is always privileged. And, in
5 that sense, it's easier, but that's not how we
6 do the privilege analysis.
7 And I think there's a good reason that
8 Petitioner moves away from the opening brief's
9 articulation of its test, which was important
10 but less important, because that's actually
11 harder to apply than a primary purpose test.
12 That takes away the inherent measure of a
13 primary purpose test, which is a comparison to
14 other purposes for just some abstract inquiry.
15 And that's why they're replacing it with a bona
16 fide purpose test, which I think would be
17 satisfied in virtually every situation.
18 JUSTICE ALITO: Well, I think you're
19 walking away from your argument too. Now maybe
20 this is artificial, but let me ask this
21 question.
22 We're supposed to look to reason and
23 experience. Let's put experience aside, all
24 right? We're just on the reason part of it.
25 If you say primary purpose and you really mean

1 it, then, in the 51/49 case, you have to say
2 that that is not privileged, right?
3 MS. HANSFORD: I think, if there is a
4 portion of a communication and you can say yes,
5 the predominant purpose was not -- was
6 non-legal advice, that is not privileged.
7 That's correct.
8 JUSTICE ALITO: Okay.
9 MS. HANSFORD: And --
10 JUSTICE ALITO: You think that's --
11 you think that's easy to administer?
12 MS. HANSFORD: Well, I think that what
13 makes it easier to administer is that courts
14 don't think of it that way. So take a look at
15 this --
16 JUSTICE ALITO: Well, then that's not
17 the real test. Then that's not really what
18 you're arguing for.
19 MS. HANSFORD: I -- I -- I think it is
20 the real test because, if you look at what the
21 court did in this case, though in this case, it
22 was very easy for the court to say --
23 JUSTICE ALITO: No, don't tell me
24 about this case and the facts of this case. I
25 want to know what the test is. What's wrong

1 with saying, if it's an important -- if there's
2 an important legal purpose, then it's
3 privileged?
4 MS. HANSFORD: I think that's a very
5 difficult thing for courts to test, importance.
6 What level of importance? Important as
7 compared to what? I think that -- I think that
8 -- and, as I was saying, I think there's a
9 reason Petitioner rejects that.
10 But I think the other point I would
11 say is we're setting experience aside, but
12 experience is critical here. If you change it
13 to that test, it would be very destabilizing.
14 Courts have been doing this test for years.
15 I think, if you actually look at the
16 cases we cite, virtually every case actually
17 does apply the primary purpose test. They
18 don't necessarily say here are purposes A, B,
19 C, let us weigh them. But they say this is the
20 primary purpose test. They look at the content
21 of the communication, at who it's sent to, and
22 the context, and they make a finding
23 specifically.
24 In the Spectrum case, in the
25 Harrington case, in the Dole Food case, in the

1 Spalding Sports Worldwide case, these are all
2 cases that Petitioner cites as not truly
3 applying the primary purpose, but they do, and
4 they remand to the lower courts --
5 JUSTICE GORSUCH: Counsel --
6 MS. HANSFORD: -- to the extent that
7 hasn't been done.
8 JUSTICE GORSUCH: I'm sorry. I --
9 please finish up.
10 MS. HANSFORD: I'm done.
11 JUSTICE GORSUCH: Tell me what I'm
12 missing here, all right? I -- I read the
13 briefs. I -- I thought Petitioner was arguing
14 for a significant purpose test or a primary.
15 There are variations on that. But perhaps a
16 percentage less than 50. Now I learn the
17 Petitioner wants any legitimate purpose. Okay.
18 Got it.
19 Then you get up, and I thought you
20 were going to argue for a primary purpose test
21 because that's what the briefs said. Instead,
22 now I hear a significant purpose, 60/40 might
23 do, the 40 percent could be good enough in
24 response to the Chief Justice.
25 So can we all agree it's significant

1 purpose?
2 MS. HANSFORD: So --
3 JUSTICE GORSUCH: What am I missing?
4 MS. HANSFORD: -- no, Justice Gorsuch.
5 I do think the area of disagreement in the
6 terminology may be fairly narrow, and --
7 JUSTICE GORSUCH: What is the
8 disagreement? I mean, if 60/40 is good enough
9 for the government, that would seem to be not a
10 primary because everyone agrees 40 is not
11 primary, but it's significant.
12 MS. HANSFORD: I think the key is,
13 when there is a purpose that can be identified
14 to be subsidiary, a legal purpose that can be
15 identified to be subsidiary, or a non-legal
16 purpose that can be identified to be
17 predominant, those communications should not be
18 protected.
19 JUSTICE GORSUCH: Well, but I thought
20 -- what about the 60 --
21 MS. HANSFORD: I will tell you what
22 we're worried about.
23 JUSTICE GORSUCH: Well, the 60/40,
24 just help me out with this, okay, because I'm
25 just struggling. I -- I'll be honest, I'm

1 struggling this morning. 60/40 you say is good
2 enough. That's primary. Forty percent's
3 prime -- that's not primary, counsel, right
4 legal, but it's significant?
5 MS. HANSFORD: So, Justice Gorsuch,
6 perhaps my mistake was attaching percentages to
7 this. In place of that, I would --
8 JUSTICE GORSUCH: Well, that's not
9 your mistake. That's what -- we did that to
10 you.
11 (Laughter.)
12 MS. HANSFORD: I -- I was trying to
13 make the point that what judges -- that judges
14 don't do math.
15 JUSTICE JACKSON: Correct.
16 MS. HANSFORD: I was trying to agree
17 with Justice Jackson that's not how district
18 courts are actually thinking about it.
19 JUSTICE GORSUCH: Well, but sometimes
20 they do. I mean, I -- I mean, in -- we all
21 remember cases where the judge says, eh,
22 there's a lot of legal here, but -- but it's
23 not the primary. I -- I'm -- we've all faced
24 those cases.
25 But you just conceded in that case

1 that does exist in the world that would be
2 okay, that would be privileged in 40 -- if
3 40 percent the court thinks or something like
4 that.
5 MS. HANSFORD: I think that in a case
6 where a district court can identify a primary
7 purpose that's not legal, that that document is
8 not privileged. In a case where --
9 JUSTICE GORSUCH: So are you --
10 MS. HANSFORD: -- the district court
11 itself --
12 JUSTICE GORSUCH: -- are you now
13 retracting that concession to the Chief
14 Justice?
15 MS. HANSFORD: I -- I did not intend
16 to make that concession. I apologize if I did.
17 JUSTICE GORSUCH: Okay. So it has to
18 be 51 percent?
19 MS. HANSFORD: No.
20 JUSTICE JACKSON: No, it's not --
21 JUSTICE GORSUCH: No?
22 MS. HANSFORD: I --
23 JUSTICE GORSUCH: I am really confused
24 now.
25 (Laughter.)

1 JUSTICE JACKSON: Because of that --
2 JUSTICE BARRETT: Can I -- can I maybe
3 --
4 JUSTICE GORSUCH: But thank you, at
5 least I understand my -- the source of the
6 confusion.
7 JUSTICE BARRETT: Is -- is it that the
8 --
9 JUSTICE KAVANAUGH: Isn't the point --
10 JUSTICE BARRETT: I just wanted to
11 follow up on that so I can understand what
12 you're trying to say in -- in retracting or
13 clarifying what we thought was a concession.
14 Is what you're saying that if a
15 district judge actually decided it was 60/40,
16 then he would have to say that it's not a
17 primary purpose but that district judges are
18 not required to make those kind of fine-grained
19 calls and put a number on it, that there's a
20 range of discretion, and if a district judge
21 thinks it's a primary purpose, that the legal
22 advice was the primary purpose, I mean, well,
23 then it's privileged, but we're not going to
24 require that kind of explanation in order to
25 affirm the district judge?

1 MS. HANSFORD: That's exactly right,
2 Justice Barrett. I think we should not let the
3 cases where it might be really hard for a
4 district court to find a primary purpose to
5 drive what the test should be, but I think also
6 --
7 JUSTICE KAVANAUGH: But -- but --
8 MS. HANSFORD: -- just stepping back
9 --
10 JUSTICE KAVANAUGH: -- before you step
11 back, but the -- the -- if those cases where
12 it's really hard was your term are a lot of
13 cases, where it's impossible to disentangle the
14 two purposes, and the question is what to do in
15 those cases, and I understand your answer to be
16 district courts do not need to try to do some
17 metaphysical parsing of -- of those cases where
18 they make a judgment that they can't
19 disentangle the two purposes.
20 MS. HANSFORD: That's right, Justice
21 Kavanaugh. If you write an opinion saying it's
22 the primary purpose test, it's always been the
23 primary purpose test, there are hard cases, and
24 here's some guidance, lower courts, what to do
25 in a hard case, then we are entirely happy with

1 that and we're entirely happy with adopting a
2 lot of what the Kellogg opinion said in giving
3 that guidance for the hard cases that --
4 JUSTICE KAVANAUGH: Including in
5 internal investigations?
6 MS. HANSFORD: Including internal
7 investigations, which I think is a classic
8 situation where it's really hard to extricate
9 the purposes. But, of course, the last line of
10 that opinion would be affirmed because this is
11 exactly the opposite case. Here, there is a
12 finding that there was a non-legal purpose that
13 was predominant, and Petitioners here are
14 saying that is a legal error.
15 JUSTICE GORSUCH: So -- so we adopt
16 the Kellogg standard, which was significant
17 purpose, but we call it primary purpose?
18 JUSTICE JACKSON: No.
19 MS. HANSFORD: No, Justice Kavanaugh.
20 You adopt the primary purpose test for -- you
21 keep -- and -- and -- and so one point is I do
22 think the label matters because of the
23 stability of the law, and I think, as a
24 practical matter, this is what courts have been
25 doing.

1 When they can identify a primary
2 purpose, which sometimes is easy, sometimes is
3 hard, but they -- they do it in either of those
4 situations, when they identify a primary
5 purpose, that is the answer.
6 When they are stuck because, for
7 instance, it's an internal investigation and
8 how do you conceptually disentangle the two
9 purposes, I think that what the reporters note
10 indicates is, as a practical matter, they say,
11 look, once there's a really meaningful legal
12 purpose that's comparable to another, we think
13 that's predominant.
14 We have no problem with that solution.
15 But I guess to --
16 JUSTICE SOTOMAYOR: Counsel, does that
17 make this case, not those full 54 documents,
18 but they could go back and argue that the court
19 has to look at all thousand of them because, if
20 we say what you're saying, then I don't know
21 why we say that if it's clearly predominant,
22 it's okay, because he's saying, if there's any
23 purpose, if it's significant, it makes it
24 50/50. That's what he's saying.
25 He -- he's defining "significant" not

1 as those close cases. He's defining it as any
2 percentage of legitimate reason.
3 MS. HANSFORD: And --
4 JUSTICE SOTOMAYOR: Him being your
5 adversary. I'm sorry. And I don't mean to --
6 to be disrespectful.
7 MS. HANSFORD: Justice Sotomayor, we
8 disagree with the Petitioner about that. We
9 think that there are cases where you can
10 identify that there's a primary non-legal
11 purpose, tax return preparation, questions that
12 are about tax --
13 JUSTICE SOTOMAYOR: Well, in fact,
14 most of the 54 documents as I've gone through
15 them or I had my clerk go through them and
16 categorize them for me, all of them were
17 communications with the accountant, weren't
18 they?
19 MS. HANSFORD: The overwhelming
20 majority were communications with the
21 accountant, which I think shows just how broad
22 Petitioners' rule is. It's not just an
23 accountant-client privilege whenever you have a
24 lawyer doing the work. It's whenever you have
25 an accountant employed by a law firm. And I

1 think that really is a sea change.
2 And, Justice Gorsuch, just to -- I --
3 I -- I -- I'm reluctant to go back to you, but
4 --
5 (Laughter.)
6 JUSTICE SOTOMAYOR: But -- but
7 assuming -- but assuming we do what you do, I'm
8 right that they could go back and say that it's
9 not just these 54 documents, it's all thousand
10 that the court looked at, it has to go back and
11 decide whether primary meant really clearly
12 primary or somehow they were close enough not
13 to count?
14 MS. HANSFORD: No, I don't think so,
15 Justice Sotomayor. I think we're just
16 arguing --
17 JUSTICE SOTOMAYOR: No, that's not
18 what you want, but I'm asking you whether it's
19 a risk.
20 MS. HANSFORD: I think it's a risk of
21 ruling in favor of Petitioner.
22 JUSTICE SOTOMAYOR: Well, certainly,
23 if we risk --
24 MS. HANSFORD: I don't think it's a
25 risk of ruling in favor of --

1 JUSTICE SOTOMAYOR: -- certainly, if
2 we say it the way he does, which is any
3 legitimate purpose, no matter the percentage.
4 But even if we take your situation, how would
5 we get around not reopening the thousands of
6 cases?
7 MS. HANSFORD: So what we're arguing
8 for here is the primary purpose test the way
9 it's been applied by decades, the way it's been
10 articulated for decades, the way -- exactly the
11 way it was applied by the district court here,
12 which I think did a very careful job,
13 particularly with the redactions.
14 We're just saying -- and the district
15 court did not ever say I'm stuck, these
16 purposes, I can't separate them, they're really
17 comparable, and so I think the legal purpose is
18 significant.
19 It's only that last "I'm stuck"
20 portion where we're okay with the Court
21 offering a solution or offering guidance for
22 that hard case, that that would --
23 JUSTICE JACKSON: And do we have a
24 sense of how often that happens? I mean, I
25 know part of Justice Kavanaugh's question was

1 there are -- you know, there are a lot of those
2 cases. I -- I just don't know that that's
3 true. It seems to me that district courts are
4 not doing math. They have a lot of experience
5 not only in this area but in other
6 document-related, privilege-related contexts,
7 where they make a judgment call, as judges do,
8 about what this particular communication
9 relates to, what its point was, what its
10 purpose is.
11 And it seems to me that opposing
12 counsel already conceded that if it's clear
13 that you go through each document and you look
14 at the various sections and even down to the
15 sentence level and the judge could be doing his
16 triage back and forth, and that, really, we're
17 only talking about "dual-purpose
18 communications" in the context of one that is
19 hard.
20 MS. HANSFORD: I -- I -- I -- I agree,
21 Justice Jackson. I think that there really are
22 not a lot of decisions that explicitly grapple
23 with this issue, and I think it's because, as a
24 descriptive matter, what courts have been doing
25 in situations where you're really down and you

1 really can't tell the difference between the
2 two is doing a tie goes for the runner in favor
3 of the legal purpose in the sense that we
4 think, look, when you're really motivated by
5 the fact that you have to do an internal
6 investigation, but you also are really
7 motivated by the fact that you want legal
8 advice about these potential legal payments, we
9 think that in reality, what's motivating you
10 more is the interest in getting legal advice.
11 I think that's --
12 JUSTICE KAVANAUGH: There are a lot --
13 JUSTICE KAGAN: But if I can just --
14 JUSTICE KAVANAUGH: -- there are a lot
15 of internal investigations, correct?
16 MS. HANSFORD: Yes, there are, and --
17 JUSTICE KAVANAUGH: Yes.
18 MS. HANSFORD: -- and how courts, you
19 know --
20 JUSTICE KAVANAUGH: So the issue --
21 the issue here is important in lots of
22 situations, not all of which might reach a
23 district judge.
24 MS. HANSFORD: It -- it's absolutely
25 -- that's absolutely correct, Justice

1 Kavanaugh. What courts have done most of the
2 time is set internal investigations that have
3 a -- a meaningful legal purpose.
4 You could have one that's just purely
5 about corporate policy, for instance, that
6 doesn't have any legal. I think that's what
7 courts have done in practice. I think
8 including something in the opinion that makes
9 it clear that that's appropriate could be
10 helpful to the courts. We're not trying to
11 minimize that, but that is not at issue here.
12 JUSTICE KAGAN: So, if I could just
13 understand, if we put the bona fide test to the
14 side and -- and -- and just focus on
15 Petitioner's original brief, which is the
16 significant test, and you've made the case, and
17 I think it's right, that there is a difference
18 between the significant test and the primary
19 purpose test because there are a category of
20 cases where you might have a significant
21 interest, but it is subsidiary and you know
22 it's subsidiary.
23 But what is the -- the danger of going
24 to the significant test and -- and -- and
25 making all of those communications privileged?

1 MS. HANSFORD: Absolutely, Justice
2 Kagan. And I think that's critical. What
3 we're really worried about is the fact that
4 most business communications and many, if not
5 all, industries have one eye on legal
6 implications.
7 Every time you are putting together a
8 client -- clinical trial data about a drug or
9 the results of a simulation about the new car,
10 you might have one eye on the legal
11 implications and you can include a lawyer on
12 all those communications not as a pretext but
13 because you want the lawyer to issue-spot --
14 JUSTICE KAGAN: And not just not as a
15 pretext, but that's significant. I want a --
16 I -- I -- I want my lawyer's eyes on this.
17 I -- I'm not sure if it's just, you know,
18 significance, I don't know what significance
19 exactly means, which is what the Court said in
20 Upjohn, it wasn't sure what substantial meant,
21 and so too here, but, you know, eyes on to
22 check for legal problems, that's not
23 insignificant. I know that.
24 And -- and so all of that would be
25 covered, wouldn't it?

1 MS. HANSFORD: Absolutely, Justice
2 Kagan. And I think that goes both to the
3 administrability problem but also to the
4 sweeping sea change and how difficult it is to
5 rein in any kind of significance test once you
6 divorce it from the primary purpose framework.
7 You can say in those cases the
8 predominant purpose was getting the engineers'
9 advice or the business advice. Otherwise, the
10 kinds of communications that have to happen and
11 that would be available to court proceedings
12 would all become hidden.
13 And I guess just to give one
14 real-world example of that, the one court that
15 we view as actually adopting a freestanding
16 significant purpose test is the D.C. Court of
17 Appeals, and in the Moore decision, which we
18 cite on page 30 of our brief, the D.C. Court of
19 Appeals relied on the significant purpose test
20 to overturn a criminal threats conviction for a
21 criminal defendant who in a prior proceeding
22 had told his attorney, his defense counsel
23 that, to paraphrase, he hated the prosecutor
24 and planned to kill her.
25 And the D.C. Court of Appeals looked

1 at that and said, well, no, that doesn't have a
2 primary purpose of getting legal advice, but he
3 was talking to his defense attorney and we
4 think that had a significant legal purpose and
5 took that away from the courts and reversed the
6 conviction on that basis.
7 Now I think that just illustrates the
8 danger of, you know, what is significant is in
9 the eye of the beholder, and once you divorce
10 it from the primary purpose framework, you can
11 get extremely sweeping rulings, both in the
12 criminal context, but also in terms of sweeping
13 in all internal -- all internal communications
14 at companies.
15 JUSTICE ALITO: Can I ask you what you
16 think our role is in doing this? We're
17 supposed to look to reason and experience. So
18 do you think that our role is different from
19 that of a state supreme court in a state, let's
20 hypothesize, that doesn't have any case law on
21 this issue?
22 So that state supreme court would look
23 to reason, and it would also look to experience
24 in the rules that were adopted in other states,
25 but it wouldn't be bound by those rules and it

1 wouldn't be required to tally up how many
2 adopted one test, how many adopted the other
3 test. Do you think that is our role, or do you
4 think it's something different?
5 MS. HANSFORD: I -- I think that's
6 correct, Justice Alito. I don't think there's
7 some sort of stare decisis effect here to the
8 body of case law such that you are bound to
9 retain the primary purpose test. We just think
10 there's a really good reason to do so based on
11 first principles and based on the weight of
12 that authority and the destabilizing effect of
13 deviating from authority.
14 JUSTICE ALITO: Well --
15 MS. HANSFORD: I think --
16 JUSTICE ALITO: -- what if we thought
17 that reason and experience pointed in different
18 directions?
19 MS. HANSFORD: I -- I think that -- I
20 -- I think it would be up to you what to do in
21 that circumstance. I don't think you're bound.
22 But I think experience should carry a little
23 bit more weight because I think it's -- it's
24 very easy to go down rabbit holes and think
25 about this in an abstract way, but the reality

1 is courts have been doing this for a very long
2 time.
3 And I -- I think you can in theory
4 come up with tests that sound good but might be
5 really hard to operationalize, and the fact
6 that courts have been doing it a certain way,
7 that there really isn't a problem -- you know,
8 as Justice Kagan pointed out, Petitioner points
9 to one case that had a dissent as evidence of
10 the widespread problem. I think that's
11 extremely different than the situation in -- in
12 -- in Upjohn.
13 And so I think that, you know, if you
14 think they go in both directions, I would hope
15 you give more weight to experience.
16 JUSTICE BARRETT: Can I ask you a
17 question about the practicalities here of
18 applying it? You know, the burden is going to
19 be on the person invoking the privilege. So,
20 if the person invoking the privilege comes
21 forward and has to make a showing that it was
22 the primary purpose, I mean, does that help us
23 get away from the putting a percentage on it,
24 because then isn't the district court either
25 buying the argument or not buying the argument,

1 and that alleviates a little bit of this
2 concern that we're talking about?
3 MS. HANSFORD: I -- I think that does
4 help, Justice Barrett. It is the proponent of
5 the privilege's burden, and if they can't meet
6 the burden because the district court is
7 hopelessly confused, one reasonable approach in
8 that case would be to deny the privilege
9 because, of course, our basic default is the
10 every man's evidence rule, but I think --
11 JUSTICE BARRETT: But you said tie
12 goes to the runner.
13 MS. HANSFORD: I -- it -- it's true
14 and we're kind of cheating a little bit in
15 favor of the privilege when we do that. And I
16 think it's out of the recognition that there
17 are just some contexts where it's not really
18 the evidentiary problem, but there's a
19 conceptual problem in separating those out.
20 And so I -- I don't think there are
21 really decisions where the -- the district
22 court says, well, I can't tell, so tie goes to
23 the privilege. That wouldn't be correct. But
24 I think, as a practical matter, the way
25 district courts think about it is, when we have

1 these two purposes that are kind of in
2 equipoise, we think what really was driving it
3 is the legal one.
4 JUSTICE BARRETT: So do you think that
5 in terms of what an opinion would look like if
6 we rule in your favor, it might say something
7 like, just to be clear, it is primary purpose,
8 it's not significant purpose, we're not going
9 to say really anything about what it means
10 because we're just going to let courts continue
11 to do what they do? Because we can't really
12 say tie goes to the runner, right, when the
13 burden is on the person invoking the privilege?
14 We can't get into this whole put a percentage
15 on it for the reasons that we've already talked
16 about. So maybe it's best to say nothing?
17 MS. HANSFORD: I --
18 JUSTICE BARRETT: Is that the
19 government's position?
20 MS. HANSFORD: -- I -- I don't think
21 there's a problem in the lower court case law,
22 so I think the Court could say nothing. I
23 think the Court could also say primary purpose,
24 when there is an identifiable primary purpose,
25 that has to be the right one. In situations

1 where it's really close, as a practical matter,
2 courts have sometimes viewed the legal purpose
3 as predominating, the internal investigation
4 context being the most salient example.
5 And we do not intend to disturb that
6 body of case law. I think it would be fine to
7 say that too. But whether a long opinion or a
8 short opinion in our favor, we don't have a
9 very strong position on that.
10 (Laughter.)
11 MS. HANSFORD: And I guess, just to
12 make one last point, whether to intertwine a
13 request for business and legal advice is often
14 in the client's control. And I think that any
15 more expansive test that allows even a little
16 bit of legal purpose to privilege the whole
17 communication would really create an incentive
18 for clients, it's not always an option clients
19 have, but would really create an incentive
20 where possible to combine those two requests.
21 Where I think everybody agrees, in an
22 ideal world, clients would make their business
23 communications and then they would send an
24 e-mail to the lawyers about the same issue,
25 maybe in a little more detail because of the

1 special legal considerations that are likely to
2 be chilled, they don't want raised anywhere
3 else.
4 In an ideal world, I think we have
5 those two e-mails, the legal one is withheld,
6 the business one is produced. And I think the
7 effect of Petitioner's rule would be to take us
8 out of that world the vast majority of the
9 time, because why not intertwine if that's
10 going to mean you automatically get privilege?
11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.
13 There are government attorneys also
14 who give advice to actors in the field, whether
15 it's an FBI agent, can I conduct this search or
16 not. You write memos to lawyers, U.S.
17 Attorneys, telling them your view of the law.
18 If Mr. Levin wants to see
19 non-privileged aspects of those, can he?
20 MS. HANSFORD: I -- I think, if
21 they're non-privileged and there's no other,
22 you know, FOIA exemption or something that
23 applies, yes. But I think that --
24 CHIEF JUSTICE ROBERTS: So -- so --
25 MS. HANSFORD: But the --

1 CHIEF JUSTICE ROBERTS: -- so he could
2 get a copy of your memo --
3 MS. HANSFORD: No, because I think
4 that --
5 CHIEF JUSTICE ROBERTS: -- in this
6 case?
7 MS. HANSFORD: -- that would be a --
8 there -- I think there's a primary purpose of
9 providing legal advice. And I think, when
10 you're looking at -- it gets a little bit
11 confusing when you're looking at the client's
12 communications to the attorney, which is most
13 of what we've been talking about, versus the
14 lawyer's communications back.
15 CHIEF JUSTICE ROBERTS: Well, what if
16 there wasn't one primary purpose in your memo,
17 but there were three, here are three points,
18 and the judge is going to pick which one he
19 thinks is primary? Assuming you sent it to the
20 U.S. Attorney and the U.S. Attorney gives it to
21 the FBI agent, and the FBI then said, okay, I'm
22 going to search Mr. Levin's client's files, can
23 he get the memo because the -- the pertinent
24 issue is significant but not primary?
25 MS. HANSFORD: Where an attorney's

1 purpose is primarily providing business advice,
2 not legal advice, and it does not reflect any
3 communications conveyed in confidence by the
4 client in the interest of getting legal advice,
5 that will be produced.
6 I will say I don't write any memos
7 like that. I think that that situation comes
8 up much more in a corporate setting where you
9 have --
10 CHIEF JUSTICE ROBERTS: Well --
11 MS. HANSFORD: -- a vice president and
12 a general counsel. But I think, if you're
13 hiring an attorney to -- for a legal service,
14 there's not really going to be anything to
15 redact out of that. I don't think it --
16 CHIEF JUSTICE ROBERTS: Well, the
17 government has a hierarchy too. They don't
18 call them presidents and vice presidents, but
19 they call them directors and assistant
20 directors. And when you're writing a memo
21 about how to handle a particular case, I
22 suspect it will have a ongoing effect on how
23 they do things.
24 And -- in other words, is the
25 government treated the same way that you want

1 to treat Mr. Levin's clients?
2 MS. HANSFORD: Yes, the government is
3 treated the same way as private parties. I
4 just -- the only caution I have is I think
5 whether it's a private party or the government,
6 when somebody is retained for a legal service
7 of providing advice on legal service, we --
8 those memos generally are not parsed by the
9 courts to say, well, this is the business
10 implication of this legal position, because the
11 whole purpose of every portion of that document
12 is providing legal advice. It's only if the
13 attorney says, by the way, not based on any
14 information you gave me, but separately I was
15 looking at this, and here is a suggestion for
16 how to run your business more efficiently.
17 That portion could --
18 CHIEF JUSTICE ROBERTS: Or how to
19 enforce --
20 MS. HANSFORD: -- conceivably be taken
21 out.
22 CHIEF JUSTICE ROBERTS: -- or how to
23 enforce the law more efficiently?
24 MS. HANSFORD: More efficiently. If
25 -- if it's a pure legal consideration of how to

1 enforce the law more efficiently, yes, I don't
2 think the attorney-client privilege would
3 protect that portion.
4 CHIEF JUSTICE ROBERTS: Justice
5 Thomas?
6 Justice Alito?
7 Justice Sotomayor?
8 Justice Kagan?
9 JUSTICE KAVANAUGH: Just to follow up
10 on Justice Barrett's question and to go back to
11 something we discussed earlier, internal
12 investigations, though, are something where you
13 think the privilege -- the purposes are often
14 intertwined and, thus, it does not make sense
15 in those circumstances for a district court to
16 try to disaggregate, is that accurate?
17 MS. HANSFORD: That -- that's right,
18 Justice Kavanaugh. We think that as a general
19 matter. I don't want to say that for every --
20 JUSTICE KAVANAUGH: It's not
21 categorical?
22 MS. HANSFORD: -- every investigation,
23 but I do think that in the classic situation
24 that the Court was considering in Kellogg, for
25 example, absolutely, we completely agree with

1 the result in that case, that that is a
2 situation that should be -- that -- that should
3 be privileged.
4 JUSTICE KAVANAUGH: Thank you.
5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?
7 Justice Jackson?
8 Thank you, counsel.
9 Rebuttal, Mr. Levin?
10 REBUTTAL ARGUMENT OF DANIEL B. LEVIN
11 ON BEHALF OF THE PETITIONER
12 MR. LEVIN: Where the Ninth Circuit
13 went wrong is when it said you have to have a
14 single primary purpose. That test is a mistake
15 because it requires the kind of disentangling
16 and ranking that is so hard to do.
17 Were this Court -- let me be clear,
18 were the Court just to write the Kellogg and
19 Boehringer opinion, we would win. We do think
20 bona fide is the right way to look at
21 significance. But were you to say significance
22 means important, we would win under that
23 scenario.
24 You have to reverse the Ninth Circuit
25 because the Ninth Circuit said you need a

1 single primary purpose. And inherent in the
2 word "primary" is the ordinary meaning of
3 "primary" is first. That means something has
4 to be first, something has to be second,
5 something has to be third. So we think that is
6 where the -- critically where the Ninth Circuit
7 went wrong.
8 Second, let me say very quickly on the
9 documents to Justice Sotomayor's point, the
10 answer I think to your question, Justice, is
11 no, it would not reopen all of the documents.
12 Sixteen hundred were produced without a
13 privilege objection. There were 300 that were
14 disputed, and most of that dispute was resolved
15 on other grounds, either the privilege was
16 upheld under the predominance test or there was
17 a -- a waiver or crime fraud issue or something
18 else. So, no, it doesn't reopen everything.
19 Let me say something about the idea
20 that, to the government's point that internal
21 investigations may presumptively -- most of the
22 time are going to be predominantly legal. The
23 idea that we're going to start slicing and
24 dicing and say, well, investigations, yeah,
25 those are -- those are generally privileged,

1 maybe tax stuff not so, that is a recipe for
2 confusion. It's too hard to separate.
3 A lot of investigations have to do
4 with tax law. Upjohn did. That you should --
5 the Court rejected that approach in Swidler,
6 where it didn't want to -- even that was
7 between criminal and civil. You shouldn't go
8 down that road here.
9 Let me say one thing about -- the
10 Chief Justice asked about the government being
11 susceptible to discovery. There's 13 amici in
12 this case. They all came in on our side.
13 They -- these are lawyer groups and business
14 groups who propound discovery as well as
15 respond to discovery.
16 That is, they often have an interest
17 in getting documents from another side. So
18 they are not just looking for the broadest
19 possible privilege to protect their -- their
20 own clients' communications. They want a
21 workable privilege so that it can be
22 practically used in the real world of
23 lawyering. If it weren't that way, you would
24 have seen people coming in both directions on
25 that.

1 And, finally, let me say something to
2 Justice Alito's question about choosing reason
3 or experience. And -- and I -- I see the
4 tension. And I would say, in Upjohn, the Court
5 went with reason over experience, and that has
6 proven to have been a wise and workable
7 decision for 40 years, and I'd urge the Court
8 to approach this the same way.
9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.
11 (Whereupon, at 11:11 a.m., the case
12 was submitted.)
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