

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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IN RE GRAND JURY.

) No. 21-1397  
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Pages: 1 through 80

Place: Washington, D.C.

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Washington, D.C.

Monday, January 9, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

DANIEL B. LEVIN, ESQUIRE, Los Angeles, California; on behalf of the Petitioner.

MASHA G. HANSFORD, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-1397, In re Grand Jury.

Mr. Levin.

ORAL ARGUMENT OF DANIEL B. LEVIN

ON BEHALF OF THE PETITIONER

MR. LEVIN: Mr. Chief Justice, and may it please the Court:

The significant purpose test protects clients' ability to seek bona fide legal advice from lawyers in situation where legal and non-legal purposes can't be separated. The Ninth Circuit's primary purpose test denies the privilege to communications that have a legal purpose anytime a court later finds that the non-legal purpose outweighs the legal purpose even by a little bit.

Taken seriously, that test requires parties and courts to disentangle competing purposes and to identify the single most important one. That is an inherently impossible exercise, and it creates the kind of 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 over here, you can redact and just  
17 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, I don't  
25 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 level are we doing this at? I mean, I --  
20 I didn't understand us to be talking about  
21 entire documents. I thought the Court was  
22 going through and looking at particular  
23 communications, almost like the segregability  
24 requirement in the FOIA context.

25 Am I wrong about that?

1           MR. LEVIN:  You're not wrong.  It --  
2    it's -- it can be segregable at the -- all the  
3    way down to the sentence level, which is the  
4    district court in certain instances here did  
5    order redactions at the sentence level.

6           JUSTICE JACKSON:  All right.  So, if  
7    I'm right about that, I guess I'm trying to  
8    understand what is a dual-purpose communication  
9    because, if you were in a document and you're  
10   going sentence by sentence or line by line  
11   trying to assess is it legal, is it non-legal,  
12   you're doing that exercise and you seem to  
13   admit that there are going to be some that are  
14   clearly in one bucket or the other.

15           So are you just talking about the  
16   sentences or the paragraphs in which it's kind  
17   of hard to tell is it legal or non-legal?  And  
18   if that's the world of dual-purpose  
19   communication, why is it that when we're in  
20   that ambiguous circumstance it should  
21   essentially automatically be deemed legal?

22           MR. LEVIN:  So that is the world in  
23   the sense of -- now it might be at the sentence  
24   level, it might be at the document level.  It's  
25   very hard to prophylactically say it's always

1 going to be at this level or another.

2 But someone goes in and asks a lawyer  
3 should I fight for the house in the divorce.  
4 There's property as the legal part of that and  
5 there's probably emotional and personal parts  
6 of that and it's tied together. So you can  
7 have situations where it's very hard to  
8 disentangle if not impossible to disentangle.

9 JUSTICE JACKSON: But, I mean,  
10 you're -- in the document you're looking,  
11 there's a paragraph that describes the house  
12 and it's all factual, and you would -- would  
13 you agree that that would not be privileged  
14 because it's just the facts? No?

15 MR. LEVIN: Well, not necessarily. It  
16 really depends on the context because, if it --  
17 if it is -- if the purpose of describing the  
18 house is to inform the lawyers so that they  
19 have the facts in order to bring a legal  
20 judgment about is it marital property, is it  
21 not, when did you buy it, that would be really  
22 important to the question.

23 JUSTICE JACKSON: Is that really how  
24 we ordinarily do attorney-client privilege? I  
25 thought -- I thought even parts of an

1 attorney's memo that had factual information  
2 aren't covered by the privilege.

3 MR. LEVIN: Well, the underlying facts  
4 are never privileged. That is, you can always  
5 get those. But the communication of those  
6 facts, that's right out of Upjohn.

7 So, when they went and interviewed  
8 employees at Upjohn, the -- the communication  
9 of information to the lawyers was privileged.  
10 The government, of course, could go out and  
11 interview the same people and get the same  
12 information. They just -- what they couldn't  
13 get is the communication between client and  
14 lawyer if that communication was for the  
15 purpose of the lawyer then rendering legal  
16 advice.

17 So it does -- sometimes the  
18 transmission of facts by client to lawyer is  
19 privileged. That's a -- a -- a very typical  
20 situation.

21 JUSTICE JACKSON: You're saying the  
22 amount doesn't matter. So we have this memo,  
23 it's about the -- the divorce, and, you know,  
24 90 percent of it is the description of the  
25 background facts and we have a sentence, the

1 lawyer says X. You're saying that because the  
2 whole thing was created for the purpose of  
3 legal advice, it's covered under your view?

4 MR. LEVIN: If -- if the proponent can  
5 meet that burden, then yes. The problem is, if  
6 you -- if you tip the other way, you say no,  
7 it's got to be 51 percent legal, it's got to be  
8 primary, it's got to be the single -- the  
9 single biggest -- a conscientious lawyer, when  
10 you get into these mixed purposes, is going to  
11 have to advise a client, we're now in a world  
12 in which we're talking about legal and  
13 non-legal. I need to advise you, a court might  
14 later say this is not the primary purpose and,  
15 therefore, it might not be privileged.

16 So you're -- it's going to create a  
17 chill on that communication because a lawyer  
18 who takes the test seriously is going to need  
19 to say to her client, I can't be confident here  
20 that this is going to be privileged and a  
21 confidential communication.

22 JUSTICE SOTOMAYOR: Counsel, I have a  
23 slightly different problem. As I understand  
24 the situation currently, the vast majority of  
25 states use the primary purpose test. You are

1 asking us to change their common law test, I  
2 assume, just for purposes of federal law,  
3 because Federal Rule of Evidence 501 tells us  
4 that in any civil case, state law governs  
5 privilege regarding a claim or defense for  
6 which state law supplies the rule of decision.

7 So how is this going to work? In  
8 federal court, we're going to say you apply the  
9 significant -- significant test, and in state  
10 cases, you apply the primary test?

11 MR. LEVIN: Let me say two things,  
12 Your Honor. One is, when you look at the state  
13 cases, the state cases cited in the  
14 government's brief as examples of primary  
15 purpose cases, many of those, they say primary  
16 predominant purpose, but then they just look is  
17 there a legal purpose.

18 Take the Spectrum case from New York.  
19 It says primary predominant purpose is the  
20 test, and then it goes on to say the critical  
21 inquiry is whether it was made in order to  
22 render legal advice. And it quotes --

23 JUSTICE SOTOMAYOR: Well, but that's  
24 the point that Justice Thomas raised, which is  
25 how do you know that. If 1 percent according

1 to your test, if 1 percent of the -- of the  
2 purpose of this communication was to render  
3 legal advice, the whole communication is  
4 suppressed. That's what you're saying to me.  
5 There's no percentage to significant.

6 MR. LEVIN: I'm saying there it needs  
7 to be bona fide or legitimate. So I'm trying  
8 to move away from 51 or --

9 JUSTICE SOTOMAYOR: Well, but, I mean,  
10 1 percent can be -- you know, accountants every  
11 day give -- fill out forms and help you figure  
12 out numbers and tell you what to do, and a  
13 small percentage is always legal advice. I  
14 think that this is that.

15 And you may -- it may have a legal  
16 consequence. And yet we said accountants  
17 didn't have privilege. I don't know why lawyer  
18 advice that's predominantly business should be  
19 protected simply because you sneak in some  
20 minor legal consideration.

21 MR. LEVIN: Your Honor, let me talk to  
22 the accountants. Let me see what --

23 JUSTICE SOTOMAYOR: But I still want  
24 to go back to this point, the one I started  
25 with, which is you're asking us to announce one



1 test for federal cases and let the states do a  
2 different test, however they define that.  
3 They've never used the words that you're asking  
4 us to use.

5 MR. LEVIN: There are a few states  
6 that use significant purpose. Texas is one.  
7 But, Your Honor, I would point to Upjohn --

8 JUSTICE SOTOMAYOR: The vast majority  
9 don't.

10 MR. LEVIN: I don't disagree with  
11 that. I would say, in Upjohn, the control  
12 group test was widely used in federal and state  
13 courts. And after this Court decided Upjohn,  
14 almost every state has moved to the Upjohn  
15 test.

16 JUSTICE SOTOMAYOR: But that's not our  
17 business, is it?

18 MR. LEVIN: No. No. Ultimately --

19 JUSTICE SOTOMAYOR: The Federal Rules  
20 of Evidence is not to give our sense of what's  
21 appropriate for the attorney-client privilege.  
22 We are directed to look at -- in light of  
23 reason and experience, and so we should be  
24 looking at what those state courts are doing,  
25 not dictating to them what to do.

1           MR. LEVIN: Well, this Court won't  
2 bind state courts. I agree with that. And  
3 this Court does look to reason and experience,  
4 and we would say that, in fact, reason and  
5 experience support the significant purpose test  
6 because the primary purpose test, even when  
7 it's recited --

8           JUSTICE SOTOMAYOR: When? Tell me --  
9 tell me -- you -- you make this claim that it's  
10 so difficult, but I really haven't seen much to  
11 say that it's difficult to administer. I don't  
12 see a rounding number of courts in states or  
13 even federal courts saying, I can't figure this  
14 out.

15           This particular judge, I think, was  
16 meticulous in separating out documents. As you  
17 said, this judge picked out sentences and  
18 redacted them. This judge upheld your  
19 objections to a number of disclosures based on  
20 points that you raise with respect to the legal  
21 nature of the communication. So I don't see  
22 how judges are having the hard time you're  
23 talking about.

24           MR. LEVIN: Your Honor, I'd point to  
25 the Polaris case from Minnesota, which was

1 recently decided after the Ninth Circuit's  
2 decision here, and it does adopt the primary  
3 purpose test. And then you have a majority and  
4 a dissent that look at the same investigative  
5 report and they come to diametrically opposite  
6 views.

7 JUSTICE SOTOMAYOR: Counsel, that's  
8 not how --

9 JUSTICE KAGAN: I mean, you have one  
10 case, Mr. Levin, in your briefs and now you're  
11 raising it again here. But I think Justice  
12 Sotomayor's point is a bigger and broader one.

13 I mean, we've had the attorney-client  
14 privilege for a long time, and until 2014,  
15 nobody ever suggested that the test that you're  
16 proposing is the right one. Everybody instead  
17 used the primary purpose test.

18 Some used it explicitly, you know,  
19 this was one purpose, this was another purpose.  
20 Some didn't, but that was the nature of the  
21 test that they understood themselves to be  
22 applying constantly.

23 And what Justice Sotomayor is saying  
24 is there's no particular evidence of confusion,  
25 nor is there any particular evidence of chill.

1 Why would there be chill? Because, by  
2 definition, if there is a primary purpose  
3 that's non-legal driving the communication,  
4 somebody will make that communication because  
5 they have a non-legal primary purpose to do so.

6 So this is a big ask, and it's an ask  
7 that's not particularly consistent with the  
8 underlying nature of what the attorney-client  
9 privilege is supposed to be protecting.

10 MR. LEVIN: I -- I don't think it --  
11 it's a big movement. And I would say, if you  
12 look at the Restatement, it does say "primary  
13 purpose" and then it immediately moves from  
14 there to is there a significant purpose in the  
15 same comment.

16 And -- and the reporters note said  
17 American courts look to the significant  
18 purpose. I understand that's not the official  
19 view of the ALI, but it is a comment about what  
20 the courts are actually doing in the main.

21 JUSTICE KAGAN: Well, I have to say  
22 just as you have one case, so too you have one  
23 treatise or -- or -- or -- or a secondary  
24 authority, and that's the Restatement. And the  
25 Restatement is itself equivocal. It goes back

1 and forth. You have one statement, Ms.  
2 Hansford has another sentence.

3 So you have one equivocal sentence in  
4 the Restatement, and everything else points the  
5 other way, to the primary purpose test.

6 MR. LEVIN: I think the problem, Your  
7 Honor, is, if you push the primary purpose test  
8 to its serious and logical conclusion, where  
9 you require 51 percent to get there, you will  
10 be in a world in which it is very difficult ex  
11 ante to predict that, and lawyers will have to  
12 start advising clients: I don't know that this  
13 conversation will be privileged because we are  
14 talking about both, and I don't know how a  
15 court will come at it.

16 And the other thing I'd say, because  
17 you made the point about the communication  
18 would have been made anyways, that's a really  
19 important point because the government made  
20 that point in Upjohn and the Court rejected it  
21 in Footnote 2. It says it proves too much.  
22 You could say that about many, many  
23 communications to a lawyer. If someone's in  
24 legal trouble, they would have talked to the  
25 lawyer anyways because what else can they do?

1 JUSTICE BARRETT: Well --

2 MR. LEVIN: So --

3 JUSTICE BARRETT: I'm sorry. Finish,  
4 please.

5 MR. LEVIN: No, thank you.

6 JUSTICE BARRETT: Well, I mean,  
7 following up on this point, I mean, your --  
8 your big policy point is chill and your point  
9 that the lawyer would have to advise the client  
10 I'm not sure if this is going to be privileged.  
11 But isn't that the case already? I mean, you  
12 don't know whether you're going to be sued on a  
13 state claim or a federal claim, and so you  
14 might be in a state that, like most states, you  
15 know, doesn't follow the primary purpose test.

16 And so that conversation, you -- you  
17 -- you -- you could wind up in a situation  
18 where that conversation is privileged maybe for  
19 one -- in one jurisdiction but not another if  
20 you win.

21 MR. LEVIN: It's certainly  
22 theoretically possible you could have a  
23 situation where you -- you -- you have a  
24 different rule under state and federal law that  
25 certainly could happen. I don't think that's a

1 -- that's a reason to not try to come up with  
2 the best and most operable and needed rule of  
3 law.

4 JUSTICE BARRETT: But why wouldn't  
5 that chill the communication? Because it's not  
6 going to be privileged, say, if someone asserts  
7 a state law claim against the client.

8 MR. LEVIN: I -- I'd say that most of  
9 the states, and certainly true of the states  
10 that the government cites in its brief, when  
11 you look at their case law, they may say  
12 primary predominant, but then they focus in on,  
13 is there a legal purpose or not?

14 So that is, when they apply it,  
15 they're applying it the way we say it ought to  
16 be applied, which is you go back to the Wigmore  
17 test, you ask the basic questions. Are you  
18 talking to a lawyer who's acting as a lawyer?  
19 Are you communicating for the purpose of legal  
20 advice? And if you can meet those thresholds  
21 in a legitimate way, it's not pretextual, then  
22 you get the privilege. And that is, I'd  
23 submit, the way most of the states --

24 JUSTICE JACKSON: But --

25 MR. LEVIN: -- have actually been

1 applying it.

2 JUSTICE JACKSON: -- but, if they're  
3 actually doing it, then it isn't a big change.  
4 You can't have it both ways. You just said I  
5 think this is going to make a difference, and  
6 now you're saying no, it's not because they're  
7 already doing it in the way that we're asking  
8 you to adopt.

9 MR. LEVIN: Your Honor, I think it's  
10 going to make a difference because now we're  
11 here. That is, were this Court to say no, we  
12 are serious, primary purpose, 51 percent, that  
13 would send a message across federal courts and  
14 I would say state courts too because they  
15 obviously would pay attention. Were this Court  
16 to say no, we're going to anchor the test in  
17 the traditional privilege and we're going to  
18 say, if you can meet the standards and you can  
19 meet them in a real way, that is, there's no  
20 pretext, you're not trying to manufacture a  
21 privilege in some abusive way, then you have a  
22 privilege. And that is a clear and more  
23 predictable test that will appropriately  
24 protect attorney-client privilege.

25 JUSTICE ALITO: Some of the amici in



1 support of you say that communications are  
2 privileged as long as any purpose of those  
3 communications is to obtain or provide legal  
4 advice and no other well-established exception  
5 applies. Do you agree with that?

6 MR. LEVIN: I agree as long as it's --  
7 as it's legitimate and meaningful. That is, I  
8 -- I -- if it is -- if it is really a facade,  
9 no, then I don't agree with that. It has to be  
10 a legitimate bona fide legal purpose.

11 JUSTICE ALITO: Do you think there's a  
12 difference between something being significant  
13 and something being done not in good faith, not  
14 bona fide?

15 MR. LEVIN: Yes. I think the -- I  
16 think those are the flip side.

17 JUSTICE ALITO: So it's a change --  
18 you've changed your position? You're not  
19 really arguing for a significant purpose;  
20 you're arguing for any legitimate purpose?

21 MR. LEVIN: No, I don't -- I don't  
22 think -- I think that that's -- I mean, I guess  
23 what I would say is I don't think that's how I  
24 read -- I read our position as saying, if it's  
25 legitimate and bona fide, it would qualify as

1 significant. I understand the Court could say  
2 no, there's -- there's some higher quantum, and  
3 I think we'd still win under that, some higher  
4 quantum but less than 51 percent. So I think  
5 we would still win and some of the documents in  
6 this case would be privileged under that  
7 approach.

8 I think the problem with a quantum  
9 approach is then you still get into this, well,  
10 have we hit the quantum, have we hit a third,  
11 have we hit 25 percent, whatever it might be?

12 JUSTICE ALITO: Can you provide an  
13 example or two of an insignificant privilege?  
14 I'm sorry, an insignificant purpose?

15 MR. LEVIN: Sure. You -- you call a  
16 lawyer to sit in a meeting, to sit in the  
17 corner while you talk about business, you know,  
18 because, hypothetically, maybe the lawyer will  
19 spot something and say something. That I would  
20 say is pretextual.

21 You copy a lawyer on a communication  
22 or maybe you copy them --

23 JUSTICE KAGAN: And why is that  
24 pretextual? I mean, actually, you sometimes  
25 want a lawyer just to sit in and issue-spot and

1 see if he'll come up with anything. You want a  
2 lawyer on your e-mail chain just to see if the  
3 lawyer spots anything that you're not spotting  
4 about how the law relates to a particular  
5 course of conduct.

6 So, you know, that seems to me  
7 legitimate. It will also basically immunize  
8 every communication that a business has.

9 MR. LEVIN: No, Your Honor, I think  
10 courts are actually quite good at separating  
11 out real from non-real. This comes up all the  
12 time when people review documents and people  
13 look at privilege logs, that just CC'ing the  
14 Legal Department is not enough, even if,  
15 hypothetically, a lawyer might pipe up. I  
16 mean, you still have to meet your burden. You  
17 have the burden. The proponent has the burden  
18 to convince a judge, no, that there was some  
19 real legal purpose going on.

20 And courts, I think, historically --

21 JUSTICE KAGAN: But there is a real  
22 legal purpose. The real legal purpose is to  
23 make sure that the lawyer knows everything that  
24 we're doing and raise objections if and when  
25 appropriate. So that's a real legal purpose.

1 But, you know, in the meantime, we're  
2 discussing a thousand things relating to our  
3 business activities.

4 MR. LEVIN: I just don't think courts  
5 have done it that way. Without -- without  
6 falling back on it's not 51 percent -- take the  
7 Vioxx case that the government cites, where the  
8 -- the company's position was everything that  
9 we do where a lawyer is copied is privileged  
10 because we're a regulated company. The Court  
11 rejected that appropriately. But then it said  
12 it's -- it is relevant, that context that  
13 you're a highly regulated company is relevant  
14 because we want regulated companies to talk to  
15 a lawyer. It's not a bad thing to talk to a  
16 lawyer. We want the regulated company to talk  
17 to the lawyer so they can get advice about how  
18 to comply with the law.

19 I mean, that is fundamentally what the  
20 privilege is about. We want to encourage  
21 people to have open and full communications  
22 with lawyers so that we can encourage  
23 compliance.

24 And if you set a bar at you've got to  
25 get to 51 percent, that will discourage that

1 kind of communication and it will lead to less  
2 compliance.

3 JUSTICE ALITO: I think you're trying  
4 to have it both ways. Significance concerns  
5 importance. Maybe it's a lot lower perhaps  
6 than primary, but it does involve a -- a  
7 certain quantum of importance.

8 MR. LEVIN: Well, like I said, Your  
9 Honor, I do think we would win under were you  
10 to say it has to be more than just legitimate,  
11 it has to be important, because I think some of  
12 the documents -- take the one where they're  
13 talking about a reasonable cause statement, I  
14 think that would qualify as important. I think  
15 we would still win.

16 I do think the -- the more predictable  
17 test and the one that's easier to implement,  
18 even if a little bit broader at the margins, is  
19 to say it has to be meaningful and legitimate.  
20 I think that is -- that --

21 JUSTICE SOTOMAYOR: Why is that  
22 more -- why is that simpler?

23 MR. LEVIN: Because --

24 JUSTICE SOTOMAYOR: I mean, I -- I  
25 seem to think that what you're having a problem

1 with is the preponderance of the evidence  
2 standard. Is it 51 percent versus 49 percent  
3 or the 50/50 situation?

4 But I see very few courts -- and you  
5 seem to be saying this -- think that if  
6 something has almost equal importance, that  
7 they're treating it as 50/50? I seem to be  
8 seeing that if the -- if it's a very  
9 significant purpose, that they're finding it's  
10 a primary purpose.

11 MR. LEVIN: I guess what I'd say is,  
12 as I said before, we would -- we would win  
13 under importance -- significant means  
14 important. Where -- where we think the problem  
15 is to say no, you've got to find the single  
16 primary purpose, that means we've got to rank  
17 them and we've got to find the biggest. That  
18 is what the Ninth Circuit said and it's how  
19 district courts in the Ninth Circuit have  
20 applied it. And we -- we think that is where  
21 the test falls down.

22 And I would say the preponderance  
23 standard, it is -- it is -- of course, everyone  
24 understands what it is, 51 percent. It's very  
25 hard to predict. This is why lawyers don't

1 often predict to clients we're going to win at  
2 trial. I -- you -- it's very hard to predict  
3 whether something will preponderate or not in  
4 the mind of a fact-finder later.

5 JUSTICE SOTOMAYOR: Right.

6 MR. LEVIN: It's a very difficult  
7 prediction to make. Thank you.

8 CHIEF JUSTICE ROBERTS: Why don't we  
9 move on to our next stage here. How would you  
10 handle a case where an accountant sits down and  
11 goes through it, it's a very complicated form,  
12 and the accountant says, I want to have a  
13 lawyer look at this, and they bring in Lawyer  
14 X, and Lawyer X says, you know, I am the  
15 world's expert in this area, I've been doing  
16 this for 40 years; in my view, this is all very  
17 good, except these three items, you know,  
18 they're kind of iffy, and I think you should  
19 probably not make -- make those; everything  
20 else is good, here you go, sends a bill for  
21 \$200,000.

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: And -- and, in  
24 that case, is that accessible because it's  
25 looking at the actual numbers and participating

1 in the preparation of the form? Is the entire  
2 thing privileged, or can the prosecutors get  
3 that communication?

4 MR. LEVIN: Well, I think that's  
5 privileged, Your Honor. That -- the way you  
6 laid out, that sounds like the lawyer is  
7 evaluating what do the tax rules and  
8 regulations require and is making legal  
9 judgments about them. To me, that's a --  
10 that's clearly privileged.

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

18 If you're talking -- if the lawyer is  
19 bringing their legal judgment to bear on what  
20 the rules and regulations are, tax should be no  
21 different than anywhere else.

22 Those are quintessentially legal  
23 judgments. They're bringing their training and  
24 experience to bear. That's how the Restatement  
25 comes at the question. Are you -- are you --



1 are you using a lawyer as a lawyer if they're  
2 bringing their experience and their training to  
3 bear on the issue in talking about your legal  
4 obligations?

5 CHIEF JUSTICE ROBERTS: Thank you.  
6 Justice Thomas?

7 JUSTICE THOMAS: Just one brief  
8 question, Chief.

9 Is there any non-trivial role that a  
10 lawyer plays in the example the Chief gave that  
11 doesn't meet your test?

12 MR. LEVIN: The only one would be if  
13 they said: Okay, we're going to make changes  
14 to the form and I'm going to have the lawyer do  
15 it, so send the lawyer this additional data  
16 that has to go on a worksheet that's going to  
17 get sent to the IRS. So that would be  
18 mechanical tax prep.

19 But I think, for the -- in the main,  
20 if the lawyer is making legal judgments using  
21 their legal training and experience, it's  
22 privileged.

23 CHIEF JUSTICE ROBERTS: Justice Alito,  
24 anything further?

25 Justice Sotomayor?

1 JUSTICE SOTOMAYOR: It's not  
2 significant then? It's any purpose? Any legal  
3 purpose?

4 MR. LEVIN: I think it's any -- it's  
5 any bona fide meaningful legal purpose.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE KAGAN: I -- I'm wondering if  
8 you would just comment on, you know, the  
9 ancient legal principle, if it ain't broke,  
10 don't fix it.

11 (Laughter.)

12 MR. LEVIN: So here -- here's what I'd  
13 say to that, Your Honor. I think we've come to  
14 a point, once we had the D.C. Circuit identify  
15 the problem in taking really seriously primary  
16 purpose and saying you actually do need to rank  
17 them and decide which is number one, I think it  
18 pointed out that -- that you have a -- you have  
19 a test primary.

20 The courts weren't really for the most  
21 part actually trying to do and say I'm going to  
22 rank them all, I'm going to decide which is  
23 number one, and once you've set up that issue,  
24 if this Court were to say no, we're serious,  
25 you've got to rank them, you've got to pick the

1 biggest, it will create a problem where may --  
2 maybe one would have existed if everyone had  
3 just gone on the same way, but I think now the  
4 -- the issue is -- is -- is presented.

5 JUSTICE KAGAN: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Kavanaugh?

8 JUSTICE KAVANAUGH: Well, just to  
9 unpack that in your answer to Justice Sotomayor  
10 about the case law, my understanding of what  
11 you're saying is that courts have articulated  
12 primary purpose quite a bit, pretty routinely,  
13 but when you actually get into the cases and  
14 look at them, they're not actually trying to  
15 figure out -- at least some substantial portion  
16 are not trying to look at what's the 51/49  
17 purpose but are, rather, doing what you say,  
18 and so they're not really doing what the label  
19 primary purpose would say?

20 MR. LEVIN: That is our view, Your  
21 Honor.

22 JUSTICE KAVANAUGH: Yeah.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Barrett?

25 Justice Jackson?

1 JUSTICE JACKSON: So you've identified  
2 the problem of courts ranking and coming up  
3 with the -- the most significant purpose. But  
4 I wonder about the opposite problem, which  
5 seems to be what is being teed up by your now,  
6 I think, new perhaps definition of significant,  
7 which is the problem of having a legitimate,  
8 bona fide but, as Justice Thomas pointed out,  
9 clearly secondary, subsidiary purpose.

10 You know, we have a situation in which  
11 everyone would agree, even the lawyer sitting  
12 there, that the primary purpose of this  
13 communication is a business decision or  
14 discussion, but the lawyer adds a point. And  
15 you say, as long as it's a legitimate point,  
16 that is good enough to require that the entire  
17 thing be privileged.

18 And I guess I see that as problematic.  
19 Why shouldn't I worry that using your test now,  
20 we are going from one extreme to the other?

21 MR. LEVIN: I don't think it's --  
22 it's -- I don't think that's going to happen.  
23 A couple reasons. One is just look at this  
24 case. There were -- 1600 documents or so were  
25 produced without any privilege objection.

1 We're arguing about less than 50 as  
2 dual-purpose. It's not going to just --

3 JUSTICE JACKSON: Yeah, but you're  
4 arguing against the backdrop of this test.  
5 What I'm worried about is changing it. Yes, in  
6 the new world, you wouldn't be arguing. You  
7 wouldn't be arguing because you would win them  
8 all because you would say I have a lawyer there  
9 and that's all the court had to care about.

10 And that's what I'm concerned about.

11 MR. LEVIN: Well, we took this  
12 position in this Court that the -- in the lower  
13 courts that the specific purpose applies. And  
14 I think there are still -- as I started with,  
15 there are many other guardrails that prevent  
16 that kind of abuse, that kind of using lawyers  
17 as a pretext.

18 The traditional test actually requires  
19 a showing by the proponent, are you talking to  
20 the lawyer as a lawyer, are you talking for a  
21 legal purpose. If you're trying to engage in  
22 -- in tax fraud, there is a crime of fraud  
23 exception. There are lots of --

24 JUSTICE JACKSON: Not of fraud. I'm  
25 talking to the lawyer legitimately. He only

1 has, though, a very minor thing to say about  
2 this. We're sitting here for five hours, and I  
3 turn to the lawyer for 15 minutes and ask him a  
4 question.

5 MR. LEVIN: Those -- those 15 minutes  
6 are going to be a privileged conversation. It  
7 may well be the other --

8 JUSTICE JACKSON: Would the whole  
9 thing be or just the 15 minutes?

10 MR. LEVIN: No. Probably the 15  
11 minutes in what you're -- I mean, if I  
12 understand what you're saying right, I think --  
13 we're not saying that you can't -- if you can  
14 separate legal and non-legal, which sometimes  
15 you can, then, of course, you should disclose  
16 the non-legal and -- and withhold the legal.

17 So I don't think you're -- you're  
18 allowing a situation where you can bring in a  
19 lawyer in a pretextual way or in a small way at  
20 the end, at the beginning, and create a  
21 privilege that will sweep across everything. I  
22 just don't think that's the case. Courts are  
23 already quite good at policing that.

24 JUSTICE JACKSON: What you're saying  
25 is if -- so, fine, we narrow in to the 15

1 minutes of the lawyer talking as a part of this  
2 discussion, that -- the lawyers also  
3 communicating business information in his 15  
4 minutes, right now, it seems as though the test  
5 would require the court to figure out in that  
6 15 minutes what was really the primary thrust  
7 of the communication. That's what the primary  
8 purpose.

9           And I don't know that it's like  
10 51 percent. The court is not doing math.  
11 They're just sort of looking at the 15 minutes  
12 in which it could go either way and making a  
13 judgment, which is what courts do, as to what  
14 is sort of the primary thing happening here.

15           I think your test would say, don't do  
16 that. As long as we -- the lawyer was talking  
17 in that 15 minutes, it should be covered as  
18 privileged?

19           MR. LEVIN: Right. I mean, go back to  
20 the settlement context. The lawyer is  
21 talking -- and you're talking about what are  
22 the potential damages, obviously, legal, but  
23 also the benefits to the business of -- of the  
24 certainty of having litigation behind it.  
25 Maybe you want to sell the business and not

1 have a litigation overhang all of these  
2 considerations.

3           Lawyers who talk to clients about  
4 settlement, those are mixed up all the time,  
5 and the idea that you're then going to have to  
6 say to the client: Well, it sounds like this  
7 is kind of a lot of business, I'm -- I'm --  
8 this may not be a privileged communication.

9           If there's -- if there's a real legal  
10 purpose in those 15 minutes, you shouldn't be  
11 in the business of trying to figure out, okay,  
12 how do we rank them, which is going to be  
13 bigger. It's going to create more problems  
14 than it solves, much better to go with the real  
15 legal purpose.

16           CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18           MR. LEVIN: Thank you.

19           CHIEF JUSTICE ROBERTS: Ms. Hansford.

20           ORAL ARGUMENT OF MASHA G. HANSFORD  
21           ON BEHALF OF THE UNITED STATES

22           MS. HANSFORD: Mr. Chief Justice, and  
23 may it please the Court:

24           The public has a right to every man's  
25 evidence. The attorney-client privilege



1 creates an important but limited exception to  
2 that rule for communications seeking legal  
3 advice. But, outside the context of legal  
4 advice, the every man's evidence rule governs.

5 Employees send e-mails with trial data  
6 showing that a drug caused a serious side  
7 effect during trial or evidence that a new  
8 design for a car will sharply increase the rate  
9 of failure for the car's brakes. Sensitive  
10 business conversations with engineers and  
11 technical advisors and sales staff have to  
12 happen, and when they do, they can be critical  
13 evidence in subsequent court proceedings. All  
14 agree that such information is not and should  
15 not be privileged.

16 But where a client combines a business  
17 communication with a request for legal advice  
18 or just the presence of an attorney to spot  
19 issues, as Justice Kagan indicated, courts need  
20 a test to see if the communication is more the  
21 kind that is seeking legal advice or more the  
22 kind that doesn't need the protection of the  
23 privilege.

24 And reason and experience points to  
25 the primary purpose test, which has been used,

1 as the discussion this morning indicates, for  
2 decades by a huge body of state and federal  
3 cases and has been endorsed by commentators  
4 from Wigmore to Rice.

5 And I think that body of evidence  
6 powerfully rebuts Petitioner's assertion that  
7 it's too hard to apply the primary purpose test  
8 is what courts have been doing.

9 Instead, Petitioner introduces a  
10 so-called freestanding significant purpose  
11 test, which, in its reply brief and, again,  
12 repeatedly this morning, Petitioner  
13 acknowledges is merely a bona fide legal  
14 purpose test. Any non-pretextual legal  
15 purpose, no matter how minor, will do.

16 That approach would vastly expand  
17 attorney-client privilege to communications  
18 that are currently available to grand juries  
19 and to courts. Most directly relevant here, it  
20 would create an accountant-client privilege  
21 whenever a taxpayer can afford to hire an  
22 attorney to prepare his taxes, as I think the  
23 exchange with the Chief Justice indicates. And  
24 courts across the country have appropriately  
25 rejected any rule that allows a well-heeled

1 taxpayer to buy their way into a privilege.

2 I think, as the court of appeals  
3 recognized and for many of the reasons that  
4 Justice Sotomayor mentioned, for the 54  
5 documents at issue here, this really was not a  
6 close case, and Petitioner's effort to expand  
7 attorney-client privilege to capture these  
8 documents should be rejected.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: I am interested in  
11 the other end of the spectrum here, as opposed  
12 to where I was with Petitioner. What would you  
13 do if the purposes were in equipoise or if they  
14 -- the legal and the non-legal could not be  
15 disentangled?

16 MS. HANSFORD: Absolutely, Justice  
17 Thomas. So our primary submission here is the  
18 concern about the -- the end of the spectrum  
19 you were discussing earlier where there is a  
20 predominant non-legal purpose, which is the  
21 case here. In the difficult cases where the  
22 purposes are in equipoise or cannot be  
23 disentangled, we have no problem with what we  
24 view as the Kellogg court's approach to those  
25 difficult cases, which is to say courts are not

1 doing math, they don't need to try to assign  
2 52 percent/48 percent. Once there are multiple  
3 really meaningful purposes and courts can't  
4 tell what to do with that and there isn't a  
5 purpose that is clearly predominant, we are  
6 fine with kind of a tie goes to the runner rule  
7 in favor of the privilege in those cases.

8 CHIEF JUSTICE ROBERTS: Well, that's  
9 really asking courts to parse things pretty  
10 fine. Is this a 52/48 thing, or is it, in  
11 fact, you know, a tie? I think it's important  
12 to keep in mind what the judges have to do  
13 here, which is go through these documents. I  
14 mean, 1600 documents in this case, I don't  
15 think that's regarded as a big -- big  
16 collection.

17 And you get a memo and it's got --  
18 you're talking about three different legal  
19 issues, and under your test, the judge is  
20 supposed to decide, of these three, this one is  
21 the big one. That's the one that's most  
22 important. And it doesn't have anything to do  
23 with this or what -- or whatever.

24 As opposed to your friend's test,  
25 which recognizes the reality that, yeah, there

1 are three things there. They're pretty much  
2 the same. And the judge, I think, in that case  
3 can say, okay, this is privileged, rather than  
4 having to look at it much more carefully. I  
5 mean, they've got to go through a lot of these  
6 documents, you know, in -- in many cases.  
7 Rather than having to say in each instance,  
8 yeah, this one is this one, this much that, as  
9 opposed to, yeah, there are three legal issues  
10 in this case, you've got a memo on three  
11 different legal issues. It seems to me that  
12 your approach really puts a lot of work on the  
13 judge.

14 MS. HANSFORD: So, Mr. Chief Justice,  
15 three thoughts about that.

16 So, first, I was trying to say that if  
17 it's 48/52, we're not asking courts to say, is  
18 it 48/52, is it 50/50 once they're really close  
19 and you can't parse which one is the document,  
20 so --

21 CHIEF JUSTICE ROBERTS: Well, okay. I  
22 mean, you --

23 MS. HANSFORD: -- we think it's okay.

24 CHIEF JUSTICE ROBERTS: Yeah, I mean,  
25 you understand how the next question is. What

1 if it's, you know, 60/40?

2 MS. HANSFORD: So -- so, absolutely,  
3 and I recognize that there is a lot that  
4 district courts need to do to -- to assess the  
5 application of the privilege, and I guess the  
6 first answer I would give on that is that the  
7 -- the way courts have been doing this for a  
8 very long time is using the primary purpose  
9 test.

10 And I think switching to a new test  
11 would be really destabilizing and I think would  
12 actually reopen a lot of questions that courts  
13 have already resolved, and the rules of thumb  
14 that I think -- I think, because of this  
15 practical reality, I think Justice Kavanaugh is  
16 right that as a practical matter, in certain  
17 contexts, courts kind of have rules of thumb  
18 that they view a legal purpose as predominating  
19 in certain contexts because of that difficulty.  
20 And I think switching now would make things --

21 CHIEF JUSTICE ROBERTS: Well, but if  
22 it's --

23 MS. HANSFORD: -- harder for district  
24 courts.

25 CHIEF JUSTICE ROBERTS: -- but -- I'm

1     sorry, but it's -- it's -- the point that I  
2     understand -- understood Justice Kavanaugh to  
3     make is that it's not as if they've been doing  
4     this for a long time. I mean, your friend  
5     could conceivably say they've been doing what  
6     he wants for a long time because, yeah, they'll  
7     say primary, but, in fact, you know, they look  
8     at it and if there's -- you know, you're going  
9     to be focusing on one issue, I don't know that  
10    you'd say, well, you're out of luck because I'm  
11    going to say this one's primary.

12             I mean, it -- it -- to a certain  
13    extent, I -- you know, I think we're talking  
14    about labels rather than analysis.

15             MS. HANSFORD: So -- so, Mr. Chief  
16    Justice, to the extent we're talking about  
17    labels, what we care about here is the  
18    substance of the test and not diluting the --  
19    the purpose to such a low level that it's  
20    really any purpose will do. And I do think  
21    that to the extent Petitioner's rule is easier  
22    to apply, it's really because it's just a rule  
23    that everything is always privileged. And, in  
24    that sense, it's easier, but that's not how we  
25    do the privilege analysis.

1           And I think there's a good reason that  
2     Petitioner moves away from the opening brief's  
3     articulation of its test, which was important  
4     but less important, because that's actually  
5     harder to apply than a primary purpose test.  
6     That takes away the inherent measure of a  
7     primary purpose test, which is a comparison to  
8     other purposes for just some abstract inquiry.  
9     And that's why they're replacing it with a bona  
10    fide purpose test, which I think would be  
11    satisfied in virtually every situation.

12           JUSTICE ALITO: Well, I think you're  
13    walking away from your argument too. Now maybe  
14    this is artificial, but let me ask this  
15    question.

16           We're supposed to look to reason and  
17    experience. Let's put experience aside, all  
18    right? We're just on the reason part of it.  
19    If you say primary purpose and you really mean  
20    it, then, in the 51/49 case, you have to say  
21    that that is not privileged, right?

22           MS. HANSFORD: I think, if there is a  
23    portion of a communication and you can say yes,  
24    the predominant purpose was not -- was  
25    non-legal advice, that is not privileged.



1 That's correct.

2 JUSTICE ALITO: Okay.

3 MS. HANSFORD: And --

4 JUSTICE ALITO: You think that's --  
5 you think that's easy to administer?

6 MS. HANSFORD: Well, I think that what  
7 makes it easier to administer is that courts  
8 don't think of it that way. So take a look at  
9 this --

10 JUSTICE ALITO: Well, then that's not  
11 the real test. Then that's not really what  
12 you're arguing for.

13 MS. HANSFORD: I -- I -- I think it is  
14 the real test because, if you look at what the  
15 court did in this case, in this case, it was  
16 very easy for the court to say --

17 JUSTICE ALITO: No, don't tell me  
18 about this case and the facts of this case. I  
19 want to know what the test is. What's wrong  
20 with saying, if it's an important -- if there's  
21 an important legal purpose, then it's  
22 privileged?

23 MS. HANSFORD: I think that's a very  
24 difficult thing for courts to test, importance.  
25 What level of importance? Important as

1 compared to what? I think that -- I think that  
2 -- and, as I was saying, I think there's a  
3 reason Petitioner rejects that.

4 But I think the other point I would  
5 say is we're setting experience aside, but  
6 experience is critical here. If you change it  
7 to that test, it would be very destabilizing.  
8 Courts have been doing this test for years.

9 I think, if you actually look at the  
10 cases we cite, virtually every case actually  
11 does apply the primary purpose test. They  
12 don't necessarily say here are purposes A, B,  
13 C, let us weigh them, but they say this is the  
14 primary purpose test. They look at the content  
15 of the communication, at who it's sent to, and  
16 the context, and they make a finding  
17 specifically.

18 In the Spectrum case, in the  
19 Harrington case, in the Dole Food case, in the  
20 Spalding Sports Worldwide case, these are all  
21 cases that Petitioner cites as not truly  
22 applying the primary purpose, but they do, and  
23 they remand --

24 JUSTICE GORSUCH: Counsel --

25 MS. HANSFORD: -- to the lower courts

1 to the extent that hasn't been done.

2 JUSTICE GORSUCH: I'm sorry. I --  
3 please finish up.

4 MS. HANSFORD: I'm done.

5 JUSTICE GORSUCH: Tell me what I'm  
6 missing here, all right? I -- I read the  
7 briefs. I -- I thought Petitioner was arguing  
8 for a significant purpose test or a primary.  
9 There are variations on that. But perhaps a  
10 percentage less than 50. Now I learn the  
11 Petitioner wants any legitimate purpose. Okay.  
12 Got it.

13 Then you get up. I thought you were  
14 going to argue for a primary purpose test  
15 because that's what the briefs said. Instead,  
16 now I hear a significant purpose, 60/40 might  
17 do, the 40 percent could be good enough in  
18 response to the Chief Justice.

19 So can we all agree it's significant  
20 purpose?

21 MS. HANSFORD: So --

22 JUSTICE GORSUCH: What am I missing?

23 MS. HANSFORD: -- no, Justice Gorsuch.  
24 I do think the area of disagreement in the  
25 terminology may be fairly narrow, and --

1 JUSTICE GORSUCH: What is the  
2 disagreement? I mean, if 60/40 is good enough  
3 for the government, that would seem to be not a  
4 primary because everyone agrees 40 is not  
5 primary, but it's significant.

6 MS. HANSFORD: I think the key is,  
7 when there is a purpose that can be identified  
8 to be subsidiary, a legal purpose that can be  
9 identified to be subsidiary, or a non-legal  
10 purpose that can be identified to be  
11 predominant, those communications should not be  
12 protected.

13 JUSTICE GORSUCH: Well, but I thought  
14 -- what about the 60 --

15 MS. HANSFORD: I will tell you what  
16 we're worried about.

17 JUSTICE GORSUCH: Well, the 60/40,  
18 just help me out with this, okay, because I'm  
19 just struggling. I -- I'll be honest, I'm  
20 struggling this morning. Sixty/forty you say  
21 is good enough. That's primary.  
22 Forty percent's prime -- that's not primary,  
23 counsel, legal, but it's significant.

24 MS. HANSFORD: So, Justice Gorsuch,  
25 perhaps my mistake was attaching percentages to

1 this. In place of that, I would --

2 JUSTICE GORSUCH: Well, that's not  
3 your mistake. That's what -- we did that to  
4 you.

5 (Laughter.)

6 MS. HANSFORD: I -- I was trying to  
7 make the point that what judges -- that judges  
8 don't do math.

9 JUSTICE JACKSON: Correct.

10 MS. HANSFORD: I was trying to agree  
11 with Justice Jackson that's not how district  
12 courts are actually thinking about it.

13 JUSTICE GORSUCH: Well, but sometimes  
14 they do. I mean, I -- I mean, in -- we all  
15 remember cases where the judge says, eh,  
16 there's a lot of legal here, but -- but it's  
17 not the primary. I -- I'm -- we've all faced  
18 those cases.

19 But you just conceded in that case  
20 that does exist in the world that would be  
21 okay, that would be privileged, and 40 -- if  
22 40 percent the court thinks or something like  
23 that.

24 MS. HANSFORD: I think that in a case  
25 where a district court can identify a primary

1 purpose that's not legal, that that document is  
2 not privileged. In a case where --

3 JUSTICE GORSUCH: So are you --

4 MS. HANSFORD: -- the district court  
5 itself --

6 JUSTICE GORSUCH: -- are you now  
7 retracting that concession to the Chief  
8 Justice?

9 MS. HANSFORD: I -- I did not intend  
10 to make that concession. I apologize if I did.

11 JUSTICE GORSUCH: Okay. So it has to  
12 be 51 percent?

13 MS. HANSFORD: No.

14 JUSTICE JACKSON: That's not --

15 MS. HANSFORD: I --

16 JUSTICE GORSUCH: I am really confused  
17 now.

18 (Laughter.)

19 JUSTICE JACKSON: Because of that --

20 JUSTICE BARRETT: Can I -- can I maybe  
21 --

22 JUSTICE GORSUCH: But it's okay. At  
23 least I understand my -- the source of the  
24 confusion.

25 JUSTICE BARRETT: Is it that the --

1 JUSTICE KAVANAUGH: Isn't the point --

2 JUSTICE BARRETT: I just wanted to  
3 follow up on that so I can understand what  
4 you're trying to say in -- in retracting or  
5 clarifying what we thought was a concession.

6 Is what you're saying that if a  
7 district judge actually decided it was 60/40,  
8 then he would have to say that it's not a  
9 primary purpose but that district judges are  
10 not required to make those kind of fine-grained  
11 calls and put a number on it, that there's a  
12 range of discretion, and if a district judge  
13 thinks it's a primary purpose, that the legal  
14 advice was the primary purpose, I mean, well,  
15 then it's privileged, but we're not going to  
16 require that kind of explanation in order to  
17 affirm the district judge?

18 MS. HANSFORD: That's exactly right,  
19 Justice Barrett. I think we should not let the  
20 cases where it might be really hard for a  
21 district court to find a primary purpose to  
22 drive what the test should be, but I think also  
23 --

24 JUSTICE KAVANAUGH: But --

25 MS. HANSFORD: -- just stepping back

1 --

2 JUSTICE KAVANAUGH: -- before you step  
3 back, but the -- the -- if those cases where  
4 it's really hard was your term are a lot of  
5 cases, where it's impossible to disentangle the  
6 two purposes, and the question is what to do in  
7 those cases, I understand your answer to be  
8 district courts do not need to try to do some  
9 metaphysical parsing of -- of those cases where  
10 they make a judgment that they can't  
11 disentangle the two purposes.

12 MS. HANSFORD: That's right, Justice  
13 Kavanaugh. If you write an opinion saying it's  
14 the primary purpose test, it's always been the  
15 primary purpose test, there are hard cases, and  
16 here's some guidance, lower courts, what to do  
17 in a hard case, then we are entirely happy with  
18 that and we're entirely happy with adopting a  
19 lot of what the Kellogg opinion said in giving  
20 that guidance for the hard cases that --

21 JUSTICE KAVANAUGH: Including in  
22 internal investigations?

23 MS. HANSFORD: Including internal  
24 investigations, which I think is a classic  
25 situation where it's really hard to extricate



1 the purposes. But, of course, the last line of  
2 that opinion would be affirmed because this is  
3 exactly the opposite case. Here, there is a  
4 finding that there was a non-legal purpose that  
5 was predominant. And Petitioners here are  
6 saying that is a legal error.

7 JUSTICE GORSUCH: So -- so we adopt  
8 the Kellogg standard, which was significant  
9 purpose, but we call it primary purpose?

10 MS. HANSFORD: No, Justice Kavanaugh.  
11 You adopt the primary purpose test for -- you  
12 keep -- and -- and -- and so one point is I do  
13 think the label matters because of the  
14 stability of the law, and I think, as a  
15 practical matter, this is what courts have been  
16 doing.

17 When they can identify a primary  
18 purpose, which sometimes is easy, sometimes is  
19 hard, but they -- they do it in either of those  
20 situations, when they identify a primary  
21 purpose, that is the answer.

22 When they are stuck because, for  
23 instance, it's an internal investigation and  
24 how do you conceptually disentangle the two  
25 purposes, I think that what the reporters note

1 indicates is, as a practical matter, they say,  
2 look, once there's a really meaningful legal  
3 purpose that's comparable to another, we think  
4 that's predominant.

5           We have no problem with that solution.  
6 But I guess to --

7           JUSTICE SOTOMAYOR: Counsel, does that  
8 make this case, not those full 54 documents,  
9 but they could go back and argue that the court  
10 has to look at all thousand of them because, if  
11 we say what you're saying, then I don't know  
12 why we say that if it's clearly predominant,  
13 it's okay, because he's saying, if there's any  
14 purpose, if it's significant, it makes it  
15 50/50. That's what he's saying.

16           He -- he's defining significant not as  
17 those close cases. He's defining it as any  
18 percentage of legitimate reason.

19           MS. HANSFORD: And --

20           JUSTICE SOTOMAYOR: Him being your  
21 adversary. I'm sorry. And I don't mean to --  
22 to be disrespectful.

23           MS. HANSFORD: Justice Sotomayor, we  
24 disagree with the Petitioner about that. We  
25 think that there are cases where you can

1 identify that there's a primary non-legal  
2 purpose, tax return preparation, questions that  
3 are about tax --

4 JUSTICE SOTOMAYOR: Well, in fact,  
5 most of the 54 documents as I've gone through  
6 them or I had my clerk go through them and  
7 categorize them for me, all of them were  
8 communications with the accountant, weren't  
9 they?

10 MS. HANSFORD: The overwhelming  
11 majority were communications with the  
12 accountant, which I think shows just how broad  
13 Petitioners' rule is. It's not just an  
14 accountant-client privilege whenever you have a  
15 lawyer doing the work. It's whenever you have  
16 an accountant employed by a law firm. And I  
17 think that really is a sea change.

18 And, Justice Gorsuch, just to -- I --  
19 I -- I -- I'm reluctant to go back to you, but  
20 --

21 (Laughter.)

22 JUSTICE SOTOMAYOR: But -- but  
23 assuming -- but assuming we do what you do, I'm  
24 right that they could go back and say that it's  
25 not just these 54 documents, it's all thousand

1 that the court looked at, it has to go back and  
2 decide whether primary meant really clearly  
3 primary or somehow they were close enough not  
4 to count?

5 MS. HANSFORD: No, I don't think so,  
6 Justice Sotomayor. I think we're just  
7 arguing --

8 JUSTICE SOTOMAYOR: No, that's not  
9 what you want, but I'm asking you whether it's  
10 a risk.

11 MS. HANSFORD: I think it's a risk of  
12 ruling in favor of Petitioner.

13 JUSTICE SOTOMAYOR: Well, certainly,  
14 if we risk --

15 MS. HANSFORD: I don't think it's a  
16 risk of ruling in favor of --

17 JUSTICE SOTOMAYOR: -- certainly, if  
18 we say it the way he does, which is any  
19 legitimate purpose, no matter the percentage.  
20 But even if we take your situation, how would  
21 we get around not reopening the thousands of  
22 cases?

23 MS. HANSFORD: So what we're arguing  
24 for here is the primary purpose test the way  
25 it's been applied by decades, the way it's been

1 articulated for decades, the way -- exactly the  
2 way it was applied by the district court here,  
3 which I think did a very careful job,  
4 particularly with the redactions.

5 We're just saying -- and the district  
6 court did not ever say I'm stuck, these  
7 purposes, I can't separate them, they're really  
8 comparable, and so I think the legal purpose is  
9 significant.

10 It's only that last "I'm stuck"  
11 portion where we're okay with the Court  
12 offering a solution or offering guidance for  
13 that hard case, that that would --

14 JUSTICE JACKSON: And do we have a  
15 sense of how often that happens? I mean, I  
16 know part of Justice Kavanaugh's question was  
17 there -- you know, there are a lot of those  
18 cases. I -- I just don't know that that's  
19 true. It seems to me that district courts are  
20 not doing math. They have a lot of experience  
21 not only in this area but in other  
22 document-related, privilege-related contexts,  
23 where they make a judgment call, as judges do,  
24 about what this particular communication  
25 relates to, what its point was, what its

1 purpose is.

2           And it seems to me that opposing  
3 counsel already conceded that if it's clear  
4 that you go through each document and you look  
5 at the various sections and even down to the  
6 sentence level and the judge could be doing his  
7 triage back and forth, and that, really, we're  
8 only talking about "dual-purpose  
9 communications" in the context of one that is  
10 hard.

11           MS. HANSFORD: I -- I -- I -- I agree,  
12 Justice Jackson. I think that there really are  
13 not a lot of decisions that explicitly grapple  
14 with this issue, and I think it's because, as a  
15 descriptive matter, what courts have been doing  
16 in situations where you're really down and you  
17 really can't tell the difference between the  
18 two is doing a tie goes for the runner in favor  
19 of the legal purpose in the sense that we  
20 think, look, when you're really motivated by  
21 the fact that you have to do an internal  
22 investigation, but you also are really  
23 motivated by the fact that you want legal  
24 advice about these potential legal payments, we  
25 think that in reality, what's motivating you

1 more is the interest in getting legal advice.

2 I think that's --

3 JUSTICE KAVANAUGH: There are a lot --

4 JUSTICE KAGAN: But if I can just --

5 JUSTICE KAVANAUGH: -- there are a lot  
6 of internal investigations, correct?

7 MS. HANSFORD: Yes, there are, and --

8 JUSTICE KAVANAUGH: Yes.

9 MS. HANSFORD: -- and how courts, you  
10 know --

11 JUSTICE KAVANAUGH: So the issue --  
12 the issue here is important in lots of  
13 situations, not all of which might reach a  
14 district judge.

15 MS. HANSFORD: It -- it absolutely --  
16 that's absolutely correct, Justice Kavanaugh.  
17 What courts have done most of the time is set  
18 internal investigations that have a -- a  
19 meaningful legal purpose.

20 You could have one that's just purely  
21 about corporate policy, for instance, that  
22 doesn't have any legal. I think that's what  
23 courts have done in practice. I think  
24 including something in the opinion that makes  
25 it clear that that's appropriate could be

1 helpful to the courts. We're not trying to  
2 minimize that, but that is not at issue here.

3 JUSTICE KAGAN: So, if I could just  
4 understand, if we put the bona fide test to the  
5 side and -- and -- and just focus on  
6 Petitioner's original brief, which is the  
7 significant test, and you've made the case, and  
8 I think it's right, that there is a difference  
9 between the significant test and the primary  
10 purpose test because there are a category of  
11 cases where you might have a significant  
12 interest, but it is subsidiary and you know  
13 it's subsidiary.

14 But what is the -- the danger of going  
15 to the significant test and -- and -- and  
16 making all of those communications privileged?

17 MS. HANSFORD: Absolutely, Justice  
18 Kagan. And I think that's critical. What  
19 we're really worried about is the fact that  
20 most business communications and many, if not  
21 all, industries have one eye on legal  
22 implications.

23 Every time you are putting together a  
24 client -- clinical trial data about a drug or  
25 the results of a simulation about the new car,



1 you might have one eye on the legal  
2 implications and you can include a lawyer on  
3 all those communications not as a pretext but  
4 because you want the lawyer to issue spot --

5 JUSTICE KAGAN: And not just not as a  
6 pretext, but that's significant. I want a --  
7 I -- I -- I want my lawyer's eyes on this.  
8 I -- I'm not sure if it's just, you know,  
9 significance, I don't know what significance  
10 exactly means, which is what the Court said in  
11 Upjohn, it wasn't sure what substantial meant,  
12 and so too here, but, you know, eyes on to  
13 check for legal problems, that's not  
14 insignificant. I know that.

15 And -- and so all of that would be  
16 covered, wouldn't it?

17 MS. HANSFORD: Absolutely, Justice  
18 Kagan. And I think that goes both to the  
19 administrability problem but also to the  
20 sweeping sea change and how difficult it is to  
21 rein in any kind of significance test once you  
22 divorce it from the primary purpose framework.

23 You can say in those cases the  
24 predominant purpose was getting the engineers'  
25 advice or the business advice. Otherwise, the

1 kinds of communications that have to happen and  
2 that would be available to court proceedings  
3 would all become hidden.

4           And I guess just to give one  
5 real-world example of that, the one court that  
6 we view as actually adopting a freestanding  
7 significant purpose test is the D.C. Court of  
8 Appeals, and in the Moore decision, which we  
9 cite on page 30 of our brief, the D.C. Court of  
10 Appeals relied on the significant purpose test  
11 to overturn a criminal threats conviction for a  
12 criminal defendant who in a prior proceeding  
13 had told his attorney, his defense counsel  
14 that, to paraphrase, he hated the prosecutor  
15 and planned to kill her.

16           And the D.C. Court of Appeals looked  
17 at that and said, well, no, that doesn't have a  
18 primary purpose of getting legal advice, but he  
19 was talking to his defense attorney and we  
20 think that had a significant legal purpose and  
21 took that away from the courts and reversed the  
22 conviction on that basis.

23           Now, I think that just illustrates the  
24 danger of, you know, what is significant is in  
25 the eye of the beholder, and once you divorce

1 it from the primary purpose framework, you can  
2 get extremely sweeping rulings, both in the  
3 criminal context, but also in terms of sweeping  
4 in all internal -- all internal communications  
5 at companies.

6 JUSTICE ALITO: Can I ask you what you  
7 think our role is in doing this? We're  
8 supposed to look to reason and experience. So  
9 do you think that our role is different from  
10 that of a state supreme court in a state, let's  
11 hypothesize, that doesn't have any case law on  
12 this issue?

13 So that state supreme court would look  
14 to reason, and it would also look to experience  
15 in the rules that were adopted in other states,  
16 but it wouldn't be bound by those rules and it  
17 wouldn't be required to tally up how many  
18 adopted one test and how many adopted the other  
19 test. Do you think that is our role or do you  
20 think it's something different?

21 MS. HANSFORD: I -- I think that's  
22 correct, Justice Alito. I don't think there's  
23 some sort of stare decisis effect here to the  
24 body of case law such that you are bound to  
25 retain the primary purpose test. We just think

1 there's really good reason to do so based on  
2 first principles and based on the weight of  
3 that authority and the destabilizing effect of  
4 deviating from authority.

5 JUSTICE ALITO: Well --

6 MS. HANSFORD: I think --

7 JUSTICE ALITO: -- what if we thought  
8 that reason and experience pointed in different  
9 directions?

10 MS. HANSFORD: I -- I think that -- I  
11 -- I think it would be up to you what to do in  
12 that circumstance. I don't think you're bound.  
13 But I think experience should carry a little  
14 bit more weight because I think it's -- it's  
15 very easy to go down rabbit holes and think  
16 about this in an abstract way, but the reality  
17 is courts have been doing this for a very long  
18 time.

19 And I -- I think you can in theory  
20 come up with tests that sound good but might be  
21 really hard to operationalize, and the fact  
22 that courts have been doing it a certain way,  
23 that there really isn't a problem -- you know,  
24 as Justice Kagan pointed out, Petitioner points  
25 to one case that had a dissent as evidence of

1 the widespread problem. I think that's  
2 extremely different than the situation in -- in  
3 -- in Upjohn.

4 And so I think that -- you know, if  
5 you think they go in both directions, I would  
6 hope you give more weight to experience.

7 JUSTICE BARRETT: Can I ask you a  
8 question about the practicalities here of  
9 applying it? You know, the burden is going to  
10 be on the person invoking the privilege. So if  
11 the person invoking the privilege comes forward  
12 and has to make a showing that it was the  
13 primary purpose, I mean, does that help us get  
14 away from the putting a percentage on it,  
15 because then isn't the district court either  
16 buying the argument or not buying the argument,  
17 and that alleviates a little bit of this  
18 concern that we're talking about?

19 MS. HANSFORD: I -- I think that does  
20 help, Justice Barrett. It is the proponent of  
21 the privilege's burden, and if they can't meet  
22 the burden because the district court is  
23 hopelessly confused, one reasonable approach in  
24 that case would be to deny the privilege  
25 because, of course, our basic default is the

1 everyman's evidence rule, but I --

2 JUSTICE BARRETT: But you said tie  
3 goes to the runner.

4 MS. HANSFORD: It -- it's true and  
5 we're kind of cheating a little bit in favor of  
6 the privilege when we do that. And I think  
7 it's out of the recognition that there are just  
8 some contexts where it's not really the  
9 evidentiary problem but there's a conceptual  
10 problem in separating those out.

11 And so I -- I don't think there are  
12 really decisions where the -- the district  
13 court says, well, I can't tell so tie goes to  
14 the privilege. That wouldn't be correct. But  
15 I think, as a practical matter, the way  
16 district courts think about it is when we have  
17 these two purposes that are kind of in  
18 equipoise, we think what really was driving it  
19 is the legal.

20 JUSTICE BARRETT: So do you think  
21 that, in terms of what an opinion would look  
22 like if we rule in your favor, it might say  
23 something like, just to be clear, it is primary  
24 purpose, it's not significant purpose, we're  
25 not going to say really anything about what it

1 means because we're just going to let courts  
2 continue to do what they do? Because we can't  
3 really say tie goes to the runner, right, when  
4 the burden is on the person invoking the  
5 privilege? We can't get into this whole put a  
6 percentage on it for the reasons that we've  
7 already talked about. So maybe it's best to  
8 say nothing?

9 MS. HANSFORD: I --

10 JUSTICE BARRETT: Is that the  
11 government's position?

12 MS. HANSFORD: I -- I don't think  
13 there's a problem in the lower court case law,  
14 so I think the Court could say nothing. I  
15 think the Court could also say primary purpose,  
16 when there is an identifiable primary purpose,  
17 that has to be the right one in situations  
18 where it's really close. As a practical  
19 matter, courts have sometimes viewed the legal  
20 purpose as predominating, the internal  
21 investigation context being the most salient  
22 example.

23 And we do not intend to disturb that  
24 body of case law. I think it would be fine to  
25 say that too. But whether a long opinion or

1 short opinion in our favor, we don't have a  
2 very strong position on that.

3 (Laughter.)

4 MS. HANSFORD: And I guess, just to  
5 make one last point, whether to intertwine a  
6 request for business and legal advice is often  
7 in the client's control. And I think that any  
8 more expansive test that allows even a little  
9 bit of legal purpose to privilege the whole  
10 communication would really create an incentive  
11 for clients, it's not always an option clients  
12 have, but would really create an incentive  
13 where possible, to combine those two requests.

14 Where I think everybody agrees, in an  
15 ideal world, clients would make their business  
16 communications and then they would send an  
17 e-mail to the lawyers about the same issue,  
18 maybe in a little more detail because of the  
19 special legal considerations that are likely to  
20 be chilled, they don't want raised anywhere  
21 else.

22 In an ideal world, I think we have  
23 those two emails, the legal one is withheld,  
24 the business one is produced. And I think the  
25 effect of Petitioner's rule would be to take us



1 out of that world the vast majority of the  
2 time, because why not intertwine if that's  
3 going to mean you automatically get a  
4 privilege?

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 There are government attorneys also  
8 who give advice to actors in the field, whether  
9 it's an FBI agent. Can I conduct this search,  
10 or not? You write memos to lawyers, U.S.  
11 attorneys, telling them your view of the law.

12 If Mr. Levin wants to see  
13 non-privileged aspects of those, can he?

14 MS. HANSFORD: I -- I think if they're  
15 non-privileged and there's no other, you know,  
16 FOIA exemption or something that applies, yes.  
17 But I think that --

18 CHIEF JUSTICE ROBERTS: So --

19 MS. HANSFORD: But --

20 CHIEF JUSTICE ROBERTS: So he could  
21 get a copy of your memo?

22 MS. HANSFORD: No, because I think  
23 that --

24 CHIEF JUSTICE ROBERTS: In this case?

25 MS. HANSFORD: -- that would be our --

1 I think there's a primary purpose of providing  
2 legal advice. And I think when you're looking  
3 at -- it gets a little bit confusing when  
4 you're looking at the client's communications  
5 to the attorney, which is most of what we've  
6 been talking about, versus the lawyers  
7 communications back.

8 CHIEF JUSTICE ROBERTS: Well, what if  
9 there wasn't one primary purpose in your memo,  
10 but there were three, here are three points,  
11 and the judge is going to pick which one he  
12 thinks is primary? Assuming you sent it to the  
13 U.S. attorney and the U.S. attorney gives it to  
14 the FBI agent, and the FBI said, okay, I'm  
15 going to search Mr. Levin's client's files, can  
16 he get the memo because the -- the pertinent  
17 issue is significant but not primary?

18 MS. HANSFORD: Where an attorney's  
19 purpose is primarily providing business advice,  
20 not legal advice, and it does not reflect any  
21 communications conveyed in confidence by the  
22 client in the interest of getting legal advice,  
23 that would be produced.

24 I will say I don't write any memos  
25 like that. I think that that situation comes

1 up much more in a corporate setting where you  
2 have --

3 CHIEF JUSTICE ROBERTS: Well --

4 MS. HANSFORD: -- a vice president and  
5 general counsel. But I think if you're hiring  
6 an attorney to -- for a legal service, there's  
7 not really going to be anything to redact out  
8 of that. I don't think it --

9 CHIEF JUSTICE ROBERTS: Well, the  
10 government has a hierarchy too. They don't  
11 call them presidents and vice presidents, but  
12 they call them directors and assistant  
13 directors. And when you're writing a memo  
14 about how to handle a particular case, I  
15 suspect it will have ongoing effect on how they  
16 do things.

17 And -- in other words, is the  
18 government treated the same way that you want  
19 to treat Mr. Levin's clients?

20 MS. HANSFORD: Yes, the government is  
21 treated the same way as private parties. I  
22 just -- the only caution I have is I think  
23 whether it's a private party or the government,  
24 when somebody is retained for a legal service  
25 of providing advice on legal service, we --

1 those memos generally are not parsed by the  
2 courts to say, well, this is the business  
3 implication of this legal position, because the  
4 whole purpose of every portion of that document  
5 is providing legal advice. It's only if the  
6 attorney says, by the way, not based on any  
7 information you gave me, but separately I was  
8 looking at this, and here is a suggestion for  
9 how to run your business more efficiently.

10 That portion could --

11 CHIEF JUSTICE ROBERTS: Or how to --

12 MS. HANSFORD: -- conceivably be taken  
13 out.

14 CHIEF JUSTICE ROBERTS: Or how to  
15 enforce the law more efficiently?

16 MS. HANSFORD: More efficiently. If  
17 -- if it's a pure legal consideration of how to  
18 enforce the law more efficiently, yes, I don't  
19 think the attorney-client privilege would  
20 protect that portion.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Thomas?

23 Justice Alito?

24 Justice Sotomayor?

25 Justice Kagan?

1 JUSTICE KAVANAUGH: Just to follow up  
2 on Justice Barrett's question, and to go back  
3 to something we discussed earlier, internal  
4 investigations, though, are something where you  
5 think the privilege -- the purposes are often  
6 intertwined and thus it does not make sense in  
7 those circumstances for a district court to try  
8 to disaggregate; is that accurate?

9 MS. HANSFORD: That -- that's right,  
10 Justice Kavanaugh. We think that as a general  
11 matter. I don't want to say that for every --

12 JUSTICE KAVANAUGH: It's not  
13 categorical?

14 MS. HANSFORD: -- every investigation,  
15 but I do think that in the classic situation  
16 that the Court was considering in Kellogg, for  
17 example, absolutely we completely agree with  
18 the result in that case, that that is a  
19 situation that should be -- that -- that should  
20 be privileged.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Barrett?

24 Justice Jackson?

25 Thank you, counsel.

1 Rebuttal, Mr. Levin?

2 REBUTTAL ARGUMENT OF DANIEL B. LEVIN

3 ON BEHALF OF THE PETITIONER

4 MR. LEVIN: Where the Ninth Circuit  
5 went wrong is when it said you have to have a  
6 single primary purpose. That test is a mistake  
7 because it requires the kind of disentangling  
8 and ranking that is so hard to do.

9 Were this Court -- let me be clear,  
10 were the Court just to write the Kellogg and  
11 Boehringer opinion, we would win. We do think  
12 bona fide is the right way to look at  
13 significance, but were you to say significance  
14 means important, we would win under that  
15 scenario.

16 You have to reverse the Ninth Circuit  
17 because the Ninth Circuit said you need a  
18 single primary purpose. And inherent in the  
19 word "primary," it's the ordinary meaning of  
20 "primary," is first. That means something has  
21 to be first, something has to be second,  
22 something has to be third. So we think that is  
23 where the -- critically where the Ninth Circuit  
24 went wrong.

25 Second let me say very quickly on the

1 documents to Justice Sotomayor's point, the  
2 answer I think to your question, Justice, is  
3 no. It would not reopen all of the documents.  
4 1600 were produced without a privilege  
5 objection. There were 300 that were disputed  
6 and most of that dispute was resolved on other  
7 grounds, either the privilege was upheld under  
8 the predominance test or there was a -- a  
9 waiver or crime fraud issue or something else.  
10 So no, it doesn't reopen everything.

11 Let me say something about the idea  
12 that, to government's point that internal  
13 investigations may presumptively -- most of the  
14 time are going to be predominantly legal. The  
15 idea that we're going to start slicing and  
16 dicing and say, well, investigations, yeah,  
17 those are -- those are generally privileged,  
18 maybe tax stuff not so, that is a recipe for  
19 confusion. It's too hard to separate.

20 A lot of investigations have to do  
21 with tax law. Upjohn did. That, the Court  
22 rejected that approach in Swidler where it  
23 didn't want to -- even that was between  
24 criminal and civil. You shouldn't go down that  
25 road here.

1           Let me say one thing about -- the  
2 Chief Justice asked about the government being  
3 susceptible to discovery. There's 13 amici in  
4 this case. They all came down on our side.  
5 They -- these are lawyer groups and business  
6 groups who propound discovery as well as  
7 respond to discovery.

8           That is, they often have an interest  
9 in getting documents from another side. So  
10 they are not just looking for the broadest  
11 possible privilege to protect their -- their  
12 own clients' communications, they want a  
13 workable privilege so that it can be  
14 practically used in the real world of  
15 lawyering. If it weren't that way, you would  
16 have seen people coming in both directions on  
17 that.

18           And finally, let me say something to  
19 Justice Alito's question about choosing reason  
20 or experience. And -- and I -- I see the  
21 tension. And I would say in Upjohn, the Court  
22 went with reason over experience. And that has  
23 proven to have been a wise and workable  
24 decision for 40 years. And I urge the Court to  
25 approach this the same way.



1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel. The case is submitted.

3 (Whereupon, at 11:11 a.m., the case  
4 was submitted.)

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