

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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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 situations 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 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 or predominant purpose, but then they just look
17 is there a legal purpose.

18 Take the Spectrum case from New York.
19 It says primary or 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 in
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.
25 That certainly could happen. I don't think

1 that's a -- that's a reason to not try to come
2 up with the best and most operable and needed
3 rule of 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 or predominant, but then they focus in
13 on, is there a legal purpose or not?

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

23 And that is, I'd submit, the way most
24 of the states --

25 JUSTICE JACKSON: But --

1 MR. LEVIN: -- have actually been
2 applying it.

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

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

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

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

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

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

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

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

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

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

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

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

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

24 JUSTICE KAGAN: And why is that
25 pretextual? I mean, actually, you sometimes

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

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

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

21 And courts, I think, historically --

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

1 appropriate. So that's a real legal purpose.
2 But, you know, in the meantime, we're
3 discussing a thousand things relating to our
4 business activities.

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

20 I mean, that is fundamentally what the
21 privilege is about. We want to encourage
22 people to have open and full communications
23 with lawyers so that we can encourage
24 compliance. And if you set a bar at you've got
25 to 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: Okay.

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: Oh, 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 none 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 and your answer to Justice
10 Sotomayor about the case law, my understanding
11 of what you're saying is that courts have
12 articulated primary purpose quite a bit, pretty
13 routinely, but when you actually get into the
14 cases and look at them, they're not actually
15 trying to figure out -- at least some
16 substantial portion are not trying to look at
17 what's the 51/49 purpose but are, rather, doing
18 what you say, and so they're not really doing
19 what the label 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 dual
2 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 the position
12 in this Court that the -- in the lower courts
13 that the specific purpose test applies. And I
14 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 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 lawyer's 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 -- a big
16 collection.

17 And you get a memo and it's got --
18 they'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 if you've got a memo on three
11 different legal issues.

12 It seems to me that your approach
13 really puts a lot of work on the 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 the 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 to the lower courts --

24 JUSTICE GORSUCH: Counsel --

25 MS. HANSFORD: -- to the extent that

1 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, and I thought you
14 were 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. 60/40 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 in 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: No, it's not --

15 JUSTICE GORSUCH: No?

16 MS. HANSFORD: I --

17 JUSTICE GORSUCH: I am really confused
18 now.

19 (Laughter.)

20 JUSTICE JACKSON: Because of that --

21 JUSTICE BARRETT: Can I -- can I maybe
22 --

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

1 JUSTICE BARRETT: Is it that the --

2 JUSTICE KAVANAUGH: Isn't the point --

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

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

19 MS. HANSFORD: That's exactly right,
20 Justice Barrett. I think we should not let the
21 cases where it might be really hard for a
22 district court to find a primary purpose to
23 drive what the test should be, but I think also
24 --

25 JUSTICE KAVANAUGH: But --

1 MS. HANSFORD: -- just stepping back

2 --

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

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

22 JUSTICE KAVANAUGH: Including in
23 internal investigations?

24 MS. HANSFORD: Including internal
25 investigations, which I think is a classic

1 situation where it's really hard to extricate
2 the purposes. But, of course, the last line of
3 that opinion would be affirmed because this is
4 exactly the opposite case. Here, there is a
5 finding that there was a non-legal purpose that
6 was predominant, and Petitioners here are
7 saying that is a legal error.

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

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

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

23 When they are stuck because, for
24 instance, it's an internal investigation and
25 how do you conceptually disentangle the two

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

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

8 JUSTICE SOTOMAYOR: Counsel, does that
9 make this case, not those full 54 documents,
10 but they could go back and argue that the court
11 has to look at all thousand of them because, if
12 we say what you're saying, then I don't know
13 why we say that if it's clearly predominant,
14 it's okay, because he's saying, if there's any
15 purpose, if it's significant, it makes it
16 50/50. That's what he's saying.

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

20 MS. HANSFORD: And --

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

24 MS. HANSFORD: Justice Sotomayor, we
25 disagree with the Petitioner about that. We

1 think that there are cases where you can
2 identify that there's a primary non-legal
3 purpose, tax return preparation, questions that
4 are about tax --

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

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

19 And, Justice Gorsuch, just to -- I --
20 I -- I -- I'm reluctant to go back to you, but
21 --

22 (Laughter.)

23 JUSTICE SOTOMAYOR: But -- but
24 assuming -- but assuming we do what you do, I'm
25 right that they could go back and say that it's

1 not just these 54 documents, it's all thousand
2 that the court looked at, it has to go back and
3 decide whether primary meant really clearly
4 primary or somehow they were close enough not
5 to count?

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

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

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

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

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

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

24 MS. HANSFORD: So what we're arguing
25 for here is the primary purpose test the way

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

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

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

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

1 relates to, what its point was, what its
2 purpose is.

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

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

1 think that in reality, what's motivating you
2 more is the interest in getting legal advice.
3 I think that's --

4 JUSTICE KAVANAUGH: There are a lot --

5 JUSTICE KAGAN: But if I can just --

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

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

9 JUSTICE KAVANAUGH: Yes.

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

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

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

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

1 it clear that that's appropriate could be
2 helpful to the courts. We're not trying to
3 minimize that, but that is not at issue here.

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

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

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

24 Every time you are putting together a
25 client -- clinical trial data about a drug or

1 the results of a simulation about the new car,
2 you might have one eye on the legal
3 implications and you can include a lawyer on
4 all those communications not as a pretext but
5 because you want the lawyer to issue-spot --

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

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

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

24 You can say in those cases the
25 predominant purpose was getting the engineers'

1 advice or the business advice. Otherwise, the
2 kinds of communications that have to happen and
3 that would be available to court proceedings
4 would all become hidden.

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

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

24 Now I think that just illustrates the
25 danger of, you know, what is significant is in

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

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

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

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

1 retain the primary purpose test. We just think
2 there's a really good reason to do so based on
3 first principles and based on the weight of
4 that authority and the destabilizing effect of
5 deviating from authority.

6 JUSTICE ALITO: Well --

7 MS. HANSFORD: I think --

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

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

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

1 to one case that had a dissent as evidence of
2 the widespread problem. I think that's
3 extremely different than the situation in -- in
4 -- in Upjohn.

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

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

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

1 because, of course, our basic default is the
2 every man's evidence rule, but I think --

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

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

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

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

1 to say really anything about what it means
2 because we're just going to let courts continue
3 to do what they do? Because we can't really
4 say tie goes to the runner, right, when the
5 burden is on the person invoking the privilege?
6 We can't get into this whole put a percentage
7 on it for the reasons that we've already talked
8 about. So maybe it's best to 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 matter,
19 courts have sometimes viewed the legal purpose
20 as predominating, the internal investigation
21 context being the most salient example.

22 And we do not intend to disturb that
23 body of case law. I think it would be fine to
24 say that too. But whether a long opinion or a
25 short opinion in our favor, we don't have a

1 very strong position on that.

2 (Laughter.)

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

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

21 In an ideal world, I think we have
22 those two e-mails, the legal one is withheld,
23 the business one is produced. And I think the
24 effect of Petitioner's rule would be to take us
25 out of that world the vast majority of the

1 time, because why not intertwine if that's
2 going to mean you automatically get privilege?

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

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

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

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

16 CHIEF JUSTICE ROBERTS: So -- so --

17 MS. HANSFORD: But --

18 CHIEF JUSTICE ROBERTS: -- so he could
19 get a copy of your memo --

20 MS. HANSFORD: No, because I think
21 that --

22 CHIEF JUSTICE ROBERTS: -- in this
23 case?

24 MS. HANSFORD: -- that would be a -- I
25 think there's a primary purpose of providing

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

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

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

23 I will say I don't write any memos
24 like that. I think that that situation comes
25 up much more in a corporate setting where you

1 have --

2 CHIEF JUSTICE ROBERTS: Well --

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

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

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

19 MS. HANSFORD: Yes, the government is
20 treated the same way as private parties. I
21 just -- the only caution I have is I think
22 whether it's a private party or the government,
23 when somebody is retained for a legal service
24 of providing advice on legal service, we --
25 those memos generally are not parsed by the

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

10 CHIEF JUSTICE ROBERTS: Or how to
11 enforce --

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 to
3 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
7 in those circumstances for a district court to
8 try 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" is 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 Sixteen hundred were produced without a
5 privilege objection. There were 300 that were
6 disputed, and most of that dispute was resolved
7 on other grounds, either the privilege was
8 upheld under the predominance test or there was
9 a -- a waiver or crime fraud issue or something
10 else. So, no, it doesn't reopen everything.

11 Let me say something about the idea
12 that, to the 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 you should --
22 the Court rejected that approach in Swidler,
23 where it didn't want to -- even that was
24 between criminal and civil. You shouldn't go
25 down that 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 in 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'd urge the Court
25 to 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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