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.

Date: January 9, 2023

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8   Washington, D.C.

9   Monday, January 9, 2023

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11   The above-entitled matter came on for

12   oral argument before the Supreme Court of the

13   United States at 10:04 a.m.

14

15   APPEARANCES:

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

17   behalf of the Petitioner.

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

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

20   of the United States.

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1   P R O C E E D I N G S

2   (10:04 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument first this morning in Case 21-1397, In

5   re Grand Jury.

6   Mr. Levin.

7   ORAL ARGUMENT OF DANIEL B. LEVIN

8   ON BEHALF OF THE PETITIONER

9   MR. LEVIN: Mr. Chief Justice, and may

10   it please the Court:

11   The significant purpose test protects

12   clients' ability to seek bona fide legal advice

13   from lawyers in situation where legal and

14   non-legal purposes can't be separated. The

15   Ninth Circuit's primary purpose test denies the

16   privilege to communications that have a legal

17   purpose anytime a court later finds that the

18   non-legal purpose outweighs the legal purpose

19   even by a little bit.

20   Taken seriously, that test requires

21   parties and courts to disentangle competing

22   purposes and to identify the single most

23   important one. That is an inherently

24   impossible exercise, and it creates the kind of

25   uncertainty this Court warned against in

1   Upjohn.

2   And Upjohn is instructive for other

3   reasons here too. The investigation there

4   obviously had business implications, but the

5   Court focused on the legal purposes. The

6   government argued there, as it does here, that

7   the privilege was unnecessary for

8   communications that would have been made

9   anyways, and the Court rejected that.

10   The government argued there, like it

11   does here, the privilege would be too broad.

12   The Court rejected the government's control

13   group test because it was unpredictable and

14   frustrated full and frank communications.

15   And just like in Upjohn, reversing

16   here will not open the door to misuse of the

17   privilege. Underlying facts are never

18   privileged. If one part of a document has

19   legal communications and a different part

20   non-legal, redactions are used. The proponent

21   of the privilege still has the burden to meet

22   all of the elements, and ordinary doctrines,

23   like crime fraud, create additional guardrails.

24   This Court should reverse the Ninth

25   Circuit and adopt the significant purpose test,

1   and I'd welcome the Court's questions.

2   JUSTICE THOMAS: If you have a purpose

3   that is admittedly significant but also

4   admittedly subsidiary, then how would you

5   handle that? How would you analyze that?

6   MR. LEVIN: From our perspective, that

7   would be a privileged communication, and the

8   reason for that is there is a legal purpose, an

9   admittedly legal purpose to the communication.

10   Were you to say, even if it were undisputed,

11   the bigger purpose is non-legal and still take

12   away the privilege, you still wouldn't be

13   protecting that legal communication.

14   Now, if they're separate, if one is

15   over here in this part of a document and the

16   other is 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?

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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
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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?

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 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
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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

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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
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 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

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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
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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

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 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
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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 --

51

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 --

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 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
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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

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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
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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

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 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
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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

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 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 --

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 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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