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Supreme Court of Texas
Shell Oil Company and Shell International, E&P, Inc.,
v.
Robert Writt
No. 13-0552
November 6, 2014

Oral Argument

Appearances:

Macey Reasoner Stokes of Baker Botts, L.L.P., Houston, TX, for Petitioners.

Robert B. Dubose of Alexander Dubose Jefferson & Townsend LLP, Houston, TX, for Respondent.

Before:

Chief Justice Nathan L. Hecht; Justices Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, Debra H. Lehrmann, Jeffrey S. Boyd, John P. Devine and Jeffrey V. Brown.

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CHIEF JUSTICE NATHAN L. HECHT: The Court is ready to hear argument 13-0552, Shell Oil Company against Writt.

MARSHAL: May it please the Court.

Ms. Stokes will present argument for the petitioners. Petitioners have preserved five minutes for rebuttal.

ORAL ARGUMENT OF MACEY REASONER STOKES ON BEHALF OF THE PETITIONER

ATTORNEY MACEY REASONER STOKES: May it please the Court.

This is an unusual case in that the Court of Appeals got it wrong on the law on the policy and on the facts. It's wrong on the law because it holds that an absolute privilege does not attach to statements solicited by the Department of Justice in an FCPA investigation unless the DOJ is on the very cusp of filing an indictment. That holding is contrary to the Texas and restatement rule that statements made in contemplation of a future judicial proceeding are absolutely privileged.

It's wrong on the policy because that holding undermines that an interest in the administration of justice by chilling the free flow of information to the DOJ at the investigative stage where it is most needed. And it's wrong on the facts to the extent that it alternatively holds that the statements in Shell's confidential report to the DOJ were not solicited by the DOJ in the course of its investigation.

The Court of Appeals requirement that the DOJ have filed, proposed, or had sufficient information to file a prosecution at the time of the statement has no support in Texas cases or the restatement. Those authorities define a communication preliminary to propose judicial proceeding as one that is made in contemplation of a future judicial proceeding. The Court of Appeals simply writes that contemplation standard out of the rule by defining propose so narrowly that it requires the judicial proceeding to be imminent.

That's contrary to the numerous Court of Appeals cases that hold that any doubt should be resolved in favor of finding a communications relation to a proposed judicial proceeding in the numerous cases that hold that the judicial proceedings privilege attaches even when no judicial proceeding is ever eventually filed.

A fundamental problem with the Court of Appeal's approach is that it focuses on the wrong party. The question is whether the judicial proceeding is contemplated by the speaker. The whole purpose of the privilege is to assure the speaker that he can speak candidly with the DOJ without fear of retaliatory defamation suits.

And the only way to do that -- excuse me.

JUSTICE EVA M. GUZMAN: Go ahead. Finish that sentence.

ATTORNEY MACEY REASONER STOKES: The only way to do that is to key the privilege to something that the speaker can know at the time of his statements. And he has no reliable way of knowing what the DOJ might be planning or thinking.

JUSTICE EVA M. GUZMAN: I left my glasses, so I can't read a thing, but the Court of Appeals seemed to start off with the concern that it would actually encourage, um you know, blame shifting and so I'm going to direct the investigation in another -- in another area to someone else and -- and that was a big, seemed to be a big concern for Jus-

tice Jennings in -- in -- in his writing.

ATTORNEY MACEY REASONER STOKES: I think that's right, Your Honor. That was the only policy rationale that the Court of Appeals provided. And I think it's wrong for a couple of reasons.

First of all, you could say -- you can make the very same policy rationale about statements made during the course of its judicial proceeding once it's filed. And this Court has definitively held than an absolute privilege attaches to those statements.

But second of all and perhaps more importantly, I think it fundamentally understood -- misunderstands the judicial proceeding's privilege which specifically contemplates that it might on occasion immunize malicious falsehood but that -- that is greatly outweighed by the benefits to the administration of justice in encouraging free and full disclosure from the vast majority of honest participants in the judicial process.

As this Court said, it's -- the privilege protects the integrity of the judicial process even though particular speakers may not deserve the privilege. Uh, the -- I think also another problem with the Court of Appeals focusing on the wrong party is that it puts the cart before the horse. It requires a prosecutor to have sufficient information to prosecute before it can freely gather information in order to support a prosecution in the first place and this was pointed out by the former attorney -- U.S. attorney generals in their amicus.

JUSTICE EVA M. GUZMAN: So the -- the term contemplation is -- is a pretty broad term even if nothing ever results, everything should -- should be privileged as long as something is -- what are the contours of the term?

ATTORNEY MACEY REASONER STOKES: Well, the -- the Texas cases and -- and this Court in James cited the restatement from the principle that it's, if it's in contemplation of a judicial proceeding the restatement itself in a comment which this Court has never cited, uh, says that it must be in good faith, serious consideration of a proceeding.

I haven't found, uh, but one Court of Appeals, the Bell case we cite in our brief that actually discusses the good faith component but it is, at a minimum it's an objective standard and the cases uniformly treat the privilege as something that is a question of law, the relationship of a communication to a proposed proceeding and a contemplation standard is a question of law that's resolvable at summary judgment.

And again, I think it has to be because a speaker needs a bright line rule in order to be encouraged to fully and freely disclose which is the whole purpose of the privilege.

I also think the Court of Appeals' opinion purported to rely on this Court's opinion in Hurlbut but its -- its file proposed or had sufficient information to file standard finds no support in that court, this Court's opinion. The court didn't even use those terms much less state that that was a predicate to application of a judicial proceedings privilege.

And in fact I don't think it can be reconciled with the facts in Hurlbut. There the Assistant Attorney General immediately filed suit according to the Court of Appeals' opinion in that case to which this Court refered for the facts, immediately filed suit after the allegedly defamatory statements were repeated at a meeting. And yet the court applied a conditional privilege.

And the Court of Appeals has no answer for -- for the fact that every case since Hurlbut has viewed Hurlbut as applying that conditional privilege because the statements instigated the investigation. And the -- and the cases recognize that in contrast statements made during an ongoing investigation are absolutely privileged.

JUSTICE EVA M. GUZMAN: And that was Justice Brown's sort of way of distinguishing Hurlbut is that it was an instigation.

ATTORNEY MACEY REASONER STOKES: It was an instigation case which is consistent with every case to view Hurlbut since 1987. And he also distinguished it on the ground that um in the corporate FCPA context the -- a company implicates itself when it implicates its employee whereas in Hurlbut, Gulf Atlantic was -- was truly attempting to deflect blame onto the agents and -- and ensure that they were prosecuted and Gulf Atlantic was not.

Our position is that the conditional privilege imposed by the Court of Appeals isn't sufficient to protect the public policy interest in the administration of justice because it's not an immunity in a way that an absolute privilege is which protects against the threat of even an unsuccessful action.

In the conditional privilege context the speaker is not protected from the risk of time-consuming and expensive trials over the question of malice which is almost always a question of fact not suitable to summary disposition. And without that protection, the speaker is not adequately encouraged to disclose information it knows to the DOJ thus offsetting the specific incentives of the DOJ and the US Citizen Commission have instituted to encourage full disclosure and undermining the DOJ's ability to enforce the FCPA.

As the Attorney General has noted in their amicus brief the full and free disclosure of information at the investigative stage is just as important to the administration of justice as it is during the actual trial stage.

Under -- under the FCPA guidelines at the -- the determination whether to prosecute and what charges to bring is based on the results of the investigation. And much of the same evidence is gathered during the investigation is used during the trial.

And really the Court of Appeals never disputes that a conditional privilege here would chill the flow of information to the justice system. Their sole policy rationale is that, that that's worth it because we discourage lying and -- and for the reasons that I discussed with Justice Guzman that's not an adequate basis.

JUSTICE DEBRA H. LEHRMANN: Are most actions resolved during nonprosecution or deferred prosecution agreements?

ATTORNEY MACEY REASONER STOKES: Yes, your Honor, they are because the -- the threat of an FCPA indictment and conviction is -- is so onerous to corporations that the vast majority of them are resolved by either an NPA or a DPA.

JUSTICE DEBRA H. LEHRMANN: It's the only thing about.

ATTORNEY MACEY REASONER STOKES: And that was the case in ours was the DPA.

JUSTICE DEBRA H. LEHRMANN: Do you know anything about the percentage generally?

ATTORNEY MACEY REASONER STOKES: You know, I'd had to check our -- I could check the Chamber of Commerce briefs. I think they do have, they might have some statistics on that. And I know certainly the secondary authorities talk about the vast majority are resolved in -- in a similar manner to this case.

You know, even where an absolute privilege applies there is still protections that reduce the risk of lying. You know, the -- the DOJ's -- the mere fact that the DOJ has itself decided to investigate significantly reduces the likelihood that a subsequent false statement will alone trigger a wrongful prosecution.

And as the Attorney General's also pointed out, the DOJ attorneys have experience and expertise in sorting fact from fiction when interviewing witnesses and potential targets. That's -- their whole job is -- is to figure that kind of -- those kind of things out. And they have criminal penalties that they can use to deter lying.

And particularly in the corporate context as I mentioned, Shell is a company here implicated itself when it implicated Writt. And indeed that the -- the record here is undisputed that the DOJ was the one who provided Writt's name as someone that they were interested in. It was not Shell. Back into July of 2007, the -- the DOJ sent a follow-up letter from an initial meeting asking for information on Writt.

Shell's witness Mr. Fredette testified that he did not give Writt's name to the DOJ during that meeting and that he assumed they got Writt's name from the fact that Vetco Gray our contractor who had pleaded guilty to FCPA violations for the exact same inter freight services in Nigeria that they had gotten his name from that investigation.

JUSTICE EVA M. GUZMAN: So they didn't reveal it during that initial 45 -- what was supposed to be a 45-minute meeting?

ATTORNEY MACEY REASONER STOKES: The meeting in DC?

JUSTICE EVA M. GUZMAN: Did Shell came back with his name? And -- and how is -- how does that fact sort of impact with it whether or not we should have appropriate literature?

ATTORNEY MACEY REASONER STOKES: Well, I just think that's -- that's not necessary to, of course, this Court's -- this Court is deciding what the general rule should be. But it's just an assurance that on these facts the --

the idea that -- that we need to impose a conditional privilege to prevent lying is not borne out by the facts of this case because there is no -- the evidence does not support any inference that Shell, you know, was finger pointing at Mr. Writt maliciously.

JUSTICE JEFFREY S. BOYD: Under your theory in the absolute immunity, is there anything that the rule would not immunize Shell from? So -- so if there is absolute immunity as opposed to conditional then they would be immune against a defamation suit. But I think I heard you say a minute ago they would not be immune against criminal penalties by the DOJ.

ATTORNEY MACEY REASONER STOKES: That's exactly right, Your Honor.

JUSTICE JEFFREY S. BOYD: And is there anything else they would not be immune against?

ATTORNEY MACEY REASONER STOKES: No, I mean, well I guess you could have -- there could be a malicious prosecution or abuse of process claim that someone could bring if Mr. Writt had ever been indicted but no charges were ever brought against him. I think in that situation that would be an additional backstop against lying.

JUSTICE JEFFREY S. BOYD: So would this absolute immunity be -- be narrowly limited to civil suits against them for defamation in similar claims?

ATTORNEY MACEY REASONER STOKES: Well, I think, your -- Your Honor, in this Court's cases they have extended that to other causes of action that -- that are basically premised on the defamatory statement even if they go by a different name like intentional infliction of emotional distress.

The Court of Appeals alternative ground is also not a basis for inferments. Their holding that -- that Shell's statements in this confidential report were more akin to an unsolicited criminal complaint is -- is completely unsupported by the record for two reasons.

First, it was not a basis for opposing the summary judgment. Mr. Writt, both in his response to the summary judgment motion below and in this Court, has always agreed that this is an ongoing investigation case. He just disagrees about what the legal rules should be for that.

And then second of all, the evidence does conclusively establish that we were responding to an active DOJ investigation. We -- we have the July 3, 2007 letter from the DOJ telling us that they suspected us at using services in Nigeria that violated the FCPA. The evidence is conclusive that at the time we received that letter we knew that Vetco Gray who had procured those services for us on the Banga Project had already plead guilty to FCPA violations in February of that year.

We were told at the meeting that they were investigating us. And so by the time that these statements were made in February of 2009, the DOJ had been actively -- actively investigating us for FCPA violations for over a year and a half and had been investigating the underlying Panalpina airfreight services for even longer.

There's simply no evidence supporting the Court of Appeals' contrary inference that somehow our $10 million exhaustive investigation that we prepared for the DOJ's benefit was somehow coincidental to the DOJ's investigation or that we were doing it so it were all in benefit.

If the Court doesn't have other questions I'll reserve the rest of my time for the rebuttal.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Ms. Stokes.

ATTORNEY MACEY REASONER STOKES: Thank you.

CHIEF JUSTICE NATHAN L. HECHT: We'll hear from the respondent.

MARSHAL: May it please the Court.

Mr. Dubose will present argument for the respondent.

ORAL ARGUMENT OF ROBERT B. DUBOSE ON BEHALF OF THE RESPONDENT

ATTORNEY ROBERT B. DUBOSE: May it please the Court.

The main point made by Shell in the amicus briefs is that cooperation is important, that cooperation is important and should be encouraged and therefore it should be privileged. We agree. The only question here is whether we're going to protect false and malicious statements during an investigation that's well before any judicial proceeding.

JUSTICE EVA M. GUZMAN: Is the focus of cooperation or candor during that initial process, I didn't...

ATTORNEY ROBERT B. DUBOSE: The -- the FCPA is about, well, it deals with both cooperation and candor. If you look at the account from the online it's the -- the -- the guidelines that the DOJ issues, their -- their guide to FCPA prosecutions at page 55. It says that one of the four factors it considers in deciding whether to prosecute and how to apply the sentencing guidelines is the candor of the speaker of the party.

JUSTICE DEBRA H. LEHRMANN: How was your condition not going to deter corporations' willingness to participate, to exhibit candor to do all of those things?

ATTORNEY ROBERT B. DUBOSE:The -- the amicus brief by the Chamber of Commerce I think makes my point here and that's that there are extremely strong incentives under the FCPA for corporations to cooperate.

One of the things the -- the amicus brief talks about is corporations can risk being ruined by -- by a prosecution. And so there are very strong incentives. As far as I know and Shell hasn't cited anything, there has never been another

case in the United States that I'm aware of, a defamation case arising out of an FCPA investigation.

JUSTICE DEBRA H. LEHRMANN: But aren't you making the corporation choose between potential civil liability for defamation and cooperating? Isn't that kind of the essence of it?

ATTORNEY ROBERT B. DUBOSE: No, not at all because the incentives under the FCPA and under the qualified privilege are the same because the FCPA rewards truthful cooperation and it penalizes untruthful cooperation or at least the -- the way the DOJ -- it's not the FCPA itself but it's the way DOG -- DOJ decides who to prosecute, how to apply the sentencing guidelines.

JUSTICE EVA M. GUZMAN: Is it necessarily something that an entity would know fully whether something was truthful or not -- or untruthful and should that really be the standard?

I mean, the point is to give as much information as you believe relevant to the inquiry and some of that may or may not be exactly accurate. It just seems logical that that would be the case. But under your standard, they would have to be very careful and that's every piece of information they put out there for fear of reprisal.

ATTORNEY ROBERT B. DUBOSE: I think that's true and that's why the qualified privilege does not -- or does protect false statements so long as they're not malicious. There also has to be the finding in maliciousness if there was some evil intent, some evil purpose and you have those two together.

JUSTICE EVA M. GUZMAN: But it still chills. It has a chilling effect, if you will, on -- on the entire investigative process to a degree.

ATTORNEY ROBERT B. DUBOSE: There -- it is possible that if -- I think it's fair to say there are some difference in the chilling effect between the absolute privilege and the traditional privilege. In the absolute, there's no chilling effect whatsoever. With the conditional privilege, I think people can be chilled more often from making false, malicious speech.

JUSTICE EVA M. GUZMAN: We have to weigh and what's more important?

ATTORNEY ROBERT B. DUBOSE: I think that's true. And -- and the restatement does that. The restatement does that. And I think it's very helpful to look at both 588 which is the conditional privilege for witnesses and 598 which is the -- the -- sorry, I've got them reversed. The 588 is the absolute privilege for witnesses and 598 is the conditional privilege.

The 5 -- Rule 588 talks about three different purposes. The first is in the adversary proceeding, it talks about full disclosure the interest of full disclosure before the tribunal.

So that's of course where we have an adversary system where both sides can tell their story and the tribunal can tell the truth. You don't necessarily have that investigation and you didn't have that in this investigation where Mr. Writt

could not speak.

There's two other aspects -- policy aspects that the restatement also talks about. One is that you have compulsory attendance in a tribunal -- in a trial-like setting. You don't have that in an investigation.

JUSTICE PHIL JOHNSON: Well, it --

ATTORNEY ROBERT B. DUBOSE: Yes.

JUSTICE PHIL JOHNSON: Let me ask a question about that. If DOJ invites you to meet with them --

ATTORNEY ROBERT B. DUBOSE: Strong incentive.

JUSTICE PHIL JOHNSON: -- given -- given the powers that they have and what it might well cost you --

ATTORNEY ROBERT B. DUBOSE: Right.

JUSTICE PHIL JOHNSON: -- they have a great deal of leverage although they don't have the authority to say you show up here and compel that but there is. They, as a practical matter, do have a lot of leverage.

ATTORNEY ROBERT B. DUBOSE: It's a strong incentive. But the -- the policy is about compulsory attendance at trial. That's what the restatement talks about and that's not what we have here.

The other aspect that it mentions is for abuse where there's an abuse of -- of testimony. The -- in the courts, you've got perjury and contempt. You don't have that necessarily in an investigation.

Now and again, there can be some level of punishment like I was talking earlier where the DOJ can -- can apply the sentencing guidelines against you if you don't cooperate well but it's not quite the same situation.

JUSTICE PHIL JOHNSON: There's no -- there's no penalty for lying to the federal people during an investigation?

ATTORNEY ROBERT B. DUBOSE: Not -- not perjury not unless there's a -- an affidavit or sworn testimony something like that.

JUSTICE PHIL JOHNSON: You can't bring that -- they can't charge you with the -- with lying during the investigation.

ATTORNEY ROBERT B. DUBOSE: I actually don't know that. I'm not sure, but it's not [inaudible] situation.

598 specifically deals with investigations, 598 -- and that's the -- the conditional privilege rule that this Court ap-

plied in Hurlbut to an ongoing investigation. 598 deals with investigations especially if you look at comment, I believe, it's (e). And the court there talks about investigations and -- and testimony I think before an investigative body or something like that.

Now, that's not exactly this case because it's not testimony but it's a very similar situation where you're dealing with an investigation that's not a quasi- judicial proceeding, in other words, where the investigative body is not making findings and -- and affecting people's rights, then in that situation the restatement would apply the conditional privilege.

The Hurlbut decision doesn't explain that much why it chooses one over the other. But if you -- if you read through all the comments to both of those two privileges, you can see why the Hurlbut court said back in the 1980s, “We think the conditional privilege is the more applicable one to this case because it does fit the investigation and it's not a proceeding.”

Now, one of the things that -- that Shell talks about repeatedly is they call this a contemplation standard and that's the -- I think they're talking about a comment to a 588.

But very importantly, 588 itself, the main text of their statement, is not a contemplation standard. It's a proposed proceeding standard preliminary to a proposed proceeding standard. Of course, Shell wasn't proposing a proceeding here.

JUSTICE EVA M. GUZMAN: But in -- in the part I can't read but I had highlighted, at some point, was in 2007, I guess, when they sent over the um-- the letter it -- so to the investigation for possible violations of -- with the part I can't read and other laws and so it is proposing this, you know, this investigation for criminal prosecution.

I mean, you can't say they were just voluntarily giving information just -- just in case something might happen. They clearly understood that there was a potential, a proposed criminal proceeding.

ATTORNEY ROBERT B. DUBOSE: Well no, no there's a difference between a proposed investigation and a proposed proceeding. If -- and that's why there's this distinction between 588 and 598. One's an investigation, one's a proceeding and -- and there's a difference where you're talking about a mere investigation, if that alone could be a proceeding, that would wipe out 598 at least that comment -- comment (e) to 598.

JUSTICE EVA M. GUZMAN: What does possible violations mean?

ATTORNEY ROBERT B. DUBOSE: Possible --

JUSTICE EVA M. GUZMAN: A violation in this context subject to criminal sanction.

ATTORNEY ROBERT B. DUBOSE: Yes, yes. And there was -- there was a -- there was no question when the DOJ said that but there was a possibility of a proceeding. Restatement 588 comment (e) addresses that. It says the mere

possibility of a judicial proceeding is not enough. It's not enough. And the dividing line needs to be closer to the proceeding than to the mere investigation.

Let me try -- give this Court -- Texas courts haven't really -- you've got Hurlbut which is the only case I know of with an ongoing investigation. There really haven't been any other cases in Texas dealing with that situation. But Texas Courts have dealt with this in the civil context where a statement is made in the context of civil litigation.

So obviously statements in the proceeding have privilege. Some statements before a proceeding are also privileged. For instance, a demand letter by one party to another saying we're going to file suit and they make a lot of defamatory statements. That's been held protected by the lower courts.

Or you have a situation where a witness is preparing an affidavit to be filed as part of a -- a probate proceeding or something like that. Before the proceeding's actually begun, that communication between the witness and the lawyer is absolutely privileged. But in both of those instances, you have a proposed proceeding. In other words, there -- there is discussion about a lawsuit. There -- someone is saying I'm going to file a lawsuit.

Here, the DOJ hasn't said that. They've only said we're investigating possible violations of the FCPA.

Now, this Court could of course ignore the restatement altogether and adopt the minority rule. Ten states have adopted a rule that all communications with officers -- police officers or anyone investigating case of privilege. But that would be inconsistent with -- with the jurisprudence of this Court and the lower courts for -- for a hundred years in Texas and with the proposed rule as well.

JUSTICE PHIL JOHNSON: Whatever -- wherever we draw the line, the question was asked earlier, is there any -- is there any proceeding that the absolute privilege would not cover? Is there any cause of action that would not be precluded by that? Malicious prosecution --

ATTORNEY ROBERT B. DUBOSE: Oh --

JUSTICE PHIL JOHNSON: -- any -- any claim for damages.

ATTORNEY ROBERT B. DUBOSE: Right. Well, the -- the -- as I understand that the -- the absolute and the qualified privilege are in the context of torts, they're in the restatement of torts.

JUSTICE PHIL JOHNSON: Right.

ATTORNEY ROBERT B. DUBOSE: So -- so yes sure there are other types of -- there are other types of prosecutions or actions, you have perjury for instance.

JUSTICE PHIL JOHNSON: Prosecutions --

ATTORNEY ROBERT B. DUBOSE: Sure, sure --

JUSTICE PHIL JOHNSON: -- but not civil damages?

ATTORNEY ROBERT B. DUBOSE: I don't think so. I never thought about that but I don't think so.

CHIEF JUSTICE NATHAN L. HECHT: The only reason for the privilege is to serve the policies that give rise to it, why isn't the amicus brief by the U.S. Attorney General fairly compelling on that regards policy.

ATTORNEY ROBERT B. DUBOSE: Yeah. The -- the amicus brief by the Attorney General really addresses the point I was talking about earlier. It talks about the need to -- to compel or to -- to encourage a free flow of information. The amicus brief says nothing about the qualified privilege and it doesn't say anything about the role of the qualified privilege in protecting that.

I'm gonna have to wonder whether the -- whether the -- the brief was even considering that this is a choice between the absolute privilege and the qualified privilege as opposed to the absolute privilege and nothing.

CHIEF JUSTICE NATHAN L. HECHT: Well, those hone in on absolute privilege. If absolute privilege is to be denied and goes on, it -- I mean, the -- certainly the implication is that a privilege is not absolute -- will not serve the policies in accordance with their argument.

ATTORNEY ROBERT B. DUBOSE: I suppose you read that as an implication but -- but the amicus brief -- you know, it's helpful to agree but it doesn't address that on the concern that the concern for Hurlbut and -- and the concern of a restatement that there are different situations, there has to be a balancing of interest. And where you have a situation that's more likely to qualify on privilege, the qualified privilege better protects the interest in that -- in that situation.

The -- the amicus brief just does -- it just talks about the one purpose and that's encouraging -- encouraging full disclosure and we think both rules encourage full disclosure but the qualified privilege -- and it talks about -- I haven't mentioned this but the comment (b) to the qualified privilege 598, talks about the balancing of interest and why courts don't apply the absolute privilege in that situation. What it says is we have to be concerned about protecting people's reputations as well as encouraging the communication itself.

Just a brief comment about the Hurlbut case. I know the parties have briefed this extensively and I -- I certainly realize this Court could overrule Hurlbut --

JUSTICE EVA M. GUZMAN: Could we distinguish it?As Justice Brown did...

ATTORNEY ROBERT B. DUBOSE: I can't see any way to distinguish Hurlbut and that's because it was an ongoing investigation. If you read the opinion, if you look, it -- it very clearly says, the investigation began. If you look at the court of appeals opinion that says, it's not clear from the record who started the investigation so it certainly was-

n't Gulf Atlantic that started the investigation.

If you read very carefully through the text of -- the facts in Hurlbut, there was a -- there was a complaint by a customer. They went to Gulf Atlantic. The customer then goes to the -- the Supreme Court says the -- the -- the customer then goes to the AG and the investigation started, the investigators go and then they meet with Gulf Atlantic at their offices. That's an ongoing investigation.

Interesting, Shell says it's different because they filed suit right after it. If anything, that's a much more compelling case for the absolute privilege because it's just before the suit. Here, we have 21 months between these statements and the beginning of any judicial proceedings, 21 months it's a big, big difference.

JUSTICE EVA M. GUZMAN: But it's a big, big investigation. I -- I don't -- I mean, it has to be relative 21 months can't just mean that's a long time because it's 21 months. How much did it cost to conduct $18 million?

ATTORNEY ROBERT B. DUBOSE: Yeah, it's a lot.

JUSTICE EVA M. GUZMAN: So can this cost $18 million for Shell to prepare its report and so 21 months does not seem unreasonable in -- in that context.

ATTORNEY ROBERT B. DUBOSE: I'm not -- I'm not sure as far as the distinction between this case and Hurlbut I'm not sure it makes any sense to distinguish it on the basis that this was a much bigger investigation than Hurlbut.

The -- the one distinction that I see this Court could make is that the FCPA is somehow -- FCPA is somehow different from what the AG was doing but I don't think there's any reason for that sort of distinction. I don't think there's any reason to say an investigation by the Texas Attorney General into insurance fraud is any different from the --the investigation by the federal government into bribery. And again, as I've said earlier, I think the incentives created by the FCPA prosecutorial scheme are consistent with -- with the qualified privilege.

Unless the Court has further questions, I will yield the rest of my time. Thank you.

CHIEF JUSTICE NATHAN L. HECHT: Any further questions? Thank you, Mr. Dubose.

Ms. Stokes, I think you have five minutes.

REBUTTAL ARGUMENT OF MACEY REASONER STOKES ON BEHALF OF THE PETITIONER

ATTORNEY MACEY REASONER STOKES: Thank you, Chief Justice.

To Mr. Dubose's point that there are adequate incentives to cooperate with the DOJ even if there's the threat of retaliatory defamation (c), I -- I submit that's -- that's not true. Even if a corporation might be compelled to cooperate to some degree, there's no question that the chilling effect to retaliatory defamation suits would shave that cooperation

in a very important ways might inhibit the full vetting of all details, might dissuade the company from discussing topics that the DOJ would not be able to discover on its own.

There are many authorities that recognize including the DOJ itself that given the complexity of large multinational corporations that operate overseas, it's nearly impossible for them to basically to ferret out all the details on themselves -- by themselves

JUSTICE JEFFREY S. BOYD: Why isn't the maliciousness standard enough though to provide a protection that supports the policy behind the privilege?

ATTORNEY MACEY REASONER STOKES: Because, again, I return to the point, Justice Boyd, that it doesn't protect you from the threat of a full-blown trial on malice. I mean, we didn't move for summary judgment on malice below because many cases from this Court and other courts say that that is an inherently a fact issue that rarely is suitable for summary disposition.

And I think, you know, the fact that we have one defamation suit filed against us in this case shouldn't distract the Court from the fact that in the FCPA criminal investigation context it could be the threat of a 100 lawsuits. These reports typically discuss tens if not a hundred people and so you've got -- you've got hanging over your head the fact that maybe all hundred will sue you because you were trying to be forthright with the DOJ.

And then you also have to consider the fact that this Court's decision is going to broadly affect the individuals that will be asked to cooperate with the DOJ. And for them, threat of a single defamation lawsuit might be sufficient to deter them from full and free disclosure to the DOJ.

JUSTICE PAUL W. GREEN: Is the -- is the DOJ -- I mean, lesser agencies, for example, EPA, Department of Labor same -- same rule?

ATTORNEY MACEY REASONER STOKES: Well, I think, yeah, in some of those context, they have -- they are clearly administrative agencies that conduct their own hearings and render their own decisions that are then appealable to the -- to the district court.

But, yes, I think if there's an ongoing government investigation that you're responding to, I think the rule should be and I think the rule is consistent with prior case law that the rule should be as a matter of law, those are statements made in good faith contemplation of a judicial proceeding.

JUSTICE JEFFREY V. BROWN: We -- we could decide the case for -- for your client by -- by distinguishing Hurlbut, but should we overrule Hurlbut to advance the public policy concerns that -- that the -- amici puts forward?

ATTORNEY MACEY REASONER STOKES: Well, I -- I don't think you need to overrule Hurlbut. I think you can consistent with every single case that discuss Hurlbut since it came out in 1987, you can say that that was an instigation case even though this Court's discussion perhaps didn't highlight that fact and -- and you can -- you can distin-

guish it in that way.

I think the brevity of the discussion of both the facts and the analysis in Hurlbut indicates that it was not trying to state a broadly applicable rule for all situations where but that it was cabin to its facts. So I think there is nothing to preclude this Court from clarifying Hurlbut and stating that the rule with absolute privilege protect statements made during an ongoing investigation.

And just -- and just a couple of points about Mr. Dubose's discussion of Hurlbut, the part of the opinion where the court of appeals opinion where they say, we don't know who -- who filed these criminal charges, that is a discussion of -- of not something that the AG did that, to whom the statements were made in that case, that was subsequent criminal prosecution by a district attorney that was later dropped.

And he continues he -- he continues to have no response to the fact that every case Shanks, Clemens, Clark, everybody -- Smith, to discuss Hurlbut has viewed it as an instigation case not an ongoing investigation case.

I think, Justice Guzman, you raised -- you raised the question of, is 21 months too long, is that too long of a -- of a -- does that break the connection between the investigation and the judicial proceeding and I would say no, these FCPA investigations take a long time. Ours -- our own investigation took a year and half because they're so complex.

And then as Justice Lehrmann pointed out, most of these are resolved by DPAs or NPAs and so the criminal information is usually that the DOJ delays filing the criminal information until it can also simultaneously file the DPA and so that builds in additional time to negotiate that. So the fact that it took 21 months to actually you know paper this thing up and get it filed has no bearing on the fact that they were actively contemplating a prosecution back in 2007.

A couple of other points, the -- the -- the idea that the DOJ is only interested in the truth, I mean, that's contrary to the Attorney General's amicus and they do have statutory remedies for lying. They're cited in our brief 18 U.S.C. 1183 and 1505 both punish lying outside of the judicial proceedings context.

If the Court doesn't have any further questions?

CHIEF JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Ms. Stokes.

ATTORNEY MACEY REASONER STOKES: Thank you.

CHIEF JUSTICE NATHAN L. HECHT: The case is submitted. That concludes the arguments on the Court scheduled today. And the Court will stand in recess.

MARSHAL: All rise.

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