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IN THE SUPREME COURT OF THE UNITED STATES

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ENCINO MOTORCARS, LLC, :

Petitioner, : No. 15-415

v. :

HECTOR NAVARRO, ET AL., :

Respondents. :

- - - - - x

Washington, D.C.  
Wednesday, April 20, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:27 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of Petitioner.

STEPHANOS BIBAS, ESQ., Philadelphia, Pa.; on behalf of Respondents.

ANTHONY A. YANG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Respondents.

	C O N T E N T S	
		PAGE
1		
2	ORAL ARGUMENT OF	
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	STEPHANOS BIBAS, ESQ.	
7	On behalf of the Respondents	25
8	ORAL ARGUMENT OF	
9	ANTHONY A. YANG, ESQ.	
10	For United States, as amicus curiae,	
11	supporting the Respondents	45
12	REBUTTAL ARGUMENT OF	
13	PAUL D. CLEMENT, ESQ.	
14	On behalf of the Petitioner	54
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
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7  
8  
9  
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11  
12  
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14  
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P R O C E E D I N G S

(11:27 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 15-415, Encino Motorcars v. Navarro.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

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

Service advisors are salespeople principally engaged in the servicing of automobiles. I do not think there is any realistic dispute here that service advisors are, in fact, salespeople. And it seems clear to me that service advisors, as their name suggests, are principally engaged in the servicing of automobiles.

Thus, under the plain and literal terms, of -- of the statutory overtime exemption, these individuals are exempt because the statute exempts any salesperson, mechanic, or partsman who are primarily engaged in selling or servicing an automobile, a truck, or a farm implement.

Now, my friends on the other side will essentially concede that those last three statutory nouns -- automobiles, trucks, and farm implements -- apply to every other noun-verb combination in the

1 statute. So they don't take the position, for example,  
2 that trucks and farm implements only go with servicing  
3 and automobiles only goes with selling.

4 But they do take the position that, with  
5 respect to the gerund "selling," that it goes uniquely  
6 with salesmen, and therefore, even if you accept for a  
7 minute that there is a class of people who exist who are  
8 salesmen primarily engaged in the servicing of  
9 automobiles, my friends would say they're not covered by  
10 the statute.

11 Now, I would submit that the statute has  
12 multiple textual indicators of breadth that suggests  
13 that's not the right way to interpret the statute.  
14 There are not --

15 JUSTICE GINSBURG: Mr. Clement, may I ask  
16 you, what is the significance of the position you are  
17 taking? Does it have any real consequences, given the  
18 separate exemption for people who are working on  
19 commission?

20 MR. CLEMENT: It -- it does -- it does have  
21 real-world consequences, Justice Ginsburg, principally  
22 for those service advisors who right now are not  
23 compensated on a commission basis.

24 JUSTICE GINSBURG: And what -- in -- in this  
25 field, what percentage of service advisors are not

1 commissioned rather than salaried employees?

2 MR. CLEMENT: Justice Ginsburg, I don't have  
3 a specific statistical breakdown, but I'm reliably  
4 informed that it's a significant number. So it's not  
5 that almost everybody is on a commissions basis and  
6 there's a couple of outliers who are primarily salaried.

7 I do think the -- the archetypical service  
8 advisor is paid on a commission basis, and therefore --  
9 what I take to be the import of your question -- might  
10 also qualify under the 207(i) exemption that's generally  
11 applicable across industries to commissioned  
12 individuals.

13 But there are significant numbers of  
14 individuals who are primarily compensated for salary,  
15 and they like it that way. And of course, as I think  
16 the Court is aware, these Fair Labor Standard Act rules  
17 are not waivable. So if you have a service advisor  
18 who's been paid primarily by salary and likes the  
19 stability that comes with that, they've had that --

20 JUSTICE SOTOMAYOR: That's every employee.

21 MR. CLEMENT: What's that?

22 JUSTICE SOTOMAYOR: That's every employee  
23 who's salaried. They -- if they want a job, it's a job,  
24 and unless the law protected them, no employer would pay  
25 overtime.

1 MR. CLEMENT: Well, I understand that,  
2 Justice Sotomayor. I was --

3 JUSTICE SOTOMAYOR: I don't know how I can  
4 take from the fact that service advisors accept what's  
5 given to them because they have no choice, why they  
6 prefer not to have overtime.

7 MR. CLEMENT: I don't know that I was making  
8 that strong claim; I was just trying to be responsive  
9 that this case does have real-world implications  
10 notwithstanding the 7(i) exemption.

11 JUSTICE BREYER: So what example -- what --  
12 if we're only talking about those of the -- the people  
13 who sell service who are not on commission, what basis  
14 is there for giving them an exception? Do they work  
15 regular hours? I take it if they work regular hours and  
16 if they aren't paid on commission, why wouldn't they be  
17 treated like secretaries or others?

18 I mean, apparently Congress thought that the  
19 mechanics themselves were special because they go out  
20 into agricultural areas or something in the middle of  
21 the night and fix a tractor. So -- so they work  
22 irregular hours. But these people don't work irregular  
23 hours and they're not paid on commission. So why  
24 wouldn't they be treated like a secretary or a -- you  
25 see, you've got my question.

1                   MR. CLEMENT: I get your question. I think  
2 I would try to rephrase it slightly by saying why should  
3 they be treated differently from partsmen or mechanics  
4 if they're also paid on a more salaried basis? And so  
5 they don't qualify --

6                   JUSTICE BREYER: Well, the answer would be  
7 because the partsmen and mechanics, so Congress thought,  
8 in agricultural areas, would have to go at 3:00 in the  
9 morning to fix the tractor, and that's why they get  
10 within this special treatment. And -- and whether  
11 that's still true or not, I don't know. But that's why  
12 they're there in the statute, and that isn't true of the  
13 service salesmen.

14                   MR. CLEMENT: Here, Justice Breyer --

15                   JUSTICE BREYER: Now, what about that?

16                   MR. CLEMENT: Yeah, no, I do want to be very  
17 responsive to that because I do think whatever, you  
18 know, Senator Bayh was thinking about farm implements  
19 back in the day.

20                   JUSTICE BREYER: Right.

21                   MR. CLEMENT: I think today there's a very  
22 good reason to treat the service advisors the same way  
23 as the partsmen and mechanics for purposes of the  
24 overtime exception. So the first thing to focus on here  
25 is that we are talking about an exemption under the FLSA

1 only to the overtime provisions. So however you decide  
2 this case, minimum-wage provisions are going to apply.

3 But here's the reason that all the people on  
4 the service team, the partsmen, the mechanic and the  
5 service advisors, really need this exemption. Because  
6 most customers of auto -- automobile dealerships who  
7 need service themselves work pretty regular hours, sort  
8 of 9:00 to 5:00, Monday through Friday. So the busy  
9 times at a dealership are what they call the morning  
10 rush and the afternoon discharge for the day. And then  
11 also on Saturday, over 90 percent of automobile  
12 dealerships' service departments are open on Saturdays.

13 So with respect to the partsmen, and with  
14 respect to the mechanics, they end up working a little  
15 more than 40 hours a week, because they're there a  
16 little bit earlier than most people, they leave a little  
17 bit later, and then they're there on Saturday.

18 Now, most of them in fact are paid at least  
19 partially on commission, and the way most of this works  
20 is that everybody, the partsmen, the mechanics and the  
21 sales advisors, all kind of share in the commission. So  
22 if they bring in a certain amount of sales, they all  
23 share in that.

24 So as a practical matter, it makes an awful  
25 lot of sense to exempt all of these people from the



1 overtime rules. They're all paid well. They're all  
2 paid above the minimum wage, which is -- the exemption  
3 doesn't apply to anyways -- and they all have a reason  
4 to work, like, about 50, 46 hours a week instead of 40  
5 hours a week. And it would be very, very disruptive to  
6 all of a sudden take the service advisors, who are an  
7 integral part of the team, and also happen to be the  
8 best paid on average of the three, and say we're going  
9 to pluck you out and you alone are not going to be  
10 exempt from the overtime rules.

11 I think that would be very disruptive. And  
12 the industry has understandably come upon these  
13 arrangements during the three-plus decades when my  
14 friends at the Labor Department acquiesced to this  
15 arrangement because they had an interpretive regulation.  
16 They went out and brought some enforcement actions, and  
17 even though it was the Wage and Hour Division themselves  
18 that were litigating these cases, they could not  
19 convince a single Federal judge that they were right  
20 about their interpretation of the statute.

21 Now, I think those Federal --

22 JUSTICE SOTOMAYOR: But, Mr. Clement, those  
23 courts were before Chevron.

24 MR. CLEMENT: Oh, they were, Justice  
25 Sotomayor, but --

1 JUSTICE SOTOMAYOR: So you know, I take less  
2 value in what the courts said because every one of them  
3 said the provision was ambiguous.

4 MR. CLEMENT: Well --

5 JUSTICE SOTOMAYOR: They just thought that  
6 the better argument -- this was before Chevron --  
7 favored your interpretation. So I'm -- I'm not quite  
8 sure that -- that it's accurate to point to those older  
9 cases as supporting your position unequivocally.

10 MR. CLEMENT: So Justice Sotomayor, I think  
11 it's fair to take the older cases with one grain of  
12 salt, but I wouldn't take it with two or three. And the  
13 reason is that Chevron, with all due respect, didn't  
14 invent deference to agencies. And that's why I think  
15 it's important to recognize that all those early cases,  
16 those were cases that were enforcement actions brought  
17 by the Wage and Hour Division. And they weren't just  
18 cases where a private party was coming in.

19 So I don't think the judges in that case --  
20 those cases, when they were sitting there listening to  
21 the Wage and Hour Division lawyers, didn't have some  
22 deference in mind --

23 JUSTICE SOTOMAYOR: I have a very practical  
24 question. Are these sales advisors specially trained in  
25 some way? Do they go to mechanic -- mechanic school?

1 Do they -- how are they trained?

2 MR. CLEMENT: I -- I'm -- so I'm going a  
3 little bit out of the record here, and I haven't read  
4 anything that's directly on point. My strong suspicion,  
5 though, is that there are these kind of academies that  
6 are put together, including by the National Automobile  
7 Dealers Association. And they would get some training  
8 that included both sales training but also some training  
9 in some diagnostic. But I'm -- I want to be candid that  
10 that's -- that's --

11 JUSTICE SOTOMAYOR: Because, to be candid  
12 with you, it scares me to think that every time I take  
13 my car to a dealer, that a non-mechanic is telling me  
14 what's wrong with it.

15 MR. CLEMENT: Well -- and I understand that,  
16 but I think that's actually why these people may be  
17 nonmechanics, but they're not outside the servicing  
18 lane.

19 JUSTICE SOTOMAYOR: Well --

20 MR. CLEMENT: And there are costs for -- you  
21 know, for the dealers. This is something that, you  
22 know, I'm more familiar with. There are real costs to  
23 the dealership if the original diagnostic is wrong and  
24 they end up ordering the wrong part. All of that is  
25 stuff that they do try to minimize.

1           And I do think -- to get back to the Chevron  
2 point, though -- it's also worth recognizing that two of  
3 the cases that have rejected the Labor Department's  
4 position were post-Chevron cases, both the Fourth  
5 Circuit decision in Walton --

6           JUSTICE GINSBURG: But now the Labor  
7 Department had a chance to rethink. Originally they  
8 said that these people, these salespeople are not  
9 exempt. And then there were these -- the letter, the  
10 opinion letter and the handbook. And then in -- was it  
11 2011 or 2012?

12           MR. CLEMENT: 2011.

13           JUSTICE GINSBURG: They said now we're going  
14 to rethink this, and our decision is that we were right  
15 the first time, that these people are not exempt. And  
16 that decision is made in the Chevron era when we defer  
17 to the expert, and this Department of Labor is certainly  
18 expert in this area.

19           MR. CLEMENT: Well, Justice Ginsburg, I  
20 don't think what the agency did in 2011 merits Chevron  
21 deference. And the Labor Department of course asked for  
22 deference, but they're -- they're studiously vague about  
23 what they'd like you to defer to.

24           And if you look at what they did in 2011, I  
25 don't think there's anything you can really defer to

1 there. Because up until 2011, the interpretive rights  
2 that date back to 1970 had a specific provision, (c)(4),  
3 that addressed service advisors, and it explained the  
4 rationale why service advisors weren't exempt. I don't  
5 think it was particularly persuasive to any of the  
6 courts, but at least there was something that addressed  
7 service advisors specifically.

8 Now, in 2011 in the process of this  
9 notice-and-comment rulemaking, they actually removed  
10 that entirely. So the interpretive regs no longer have  
11 anything that addresses the service advisors  
12 specifically. So they're now relying only on the  
13 language in (c)(1) that addresses salesmen and says  
14 salesman is somebody who sells a car, which we think is  
15 an incomplete recognition of what the statute actually  
16 says.

17 But what I'm making is really two points. I  
18 don't think they're really entitled to, in 2011, take  
19 something out of the regs and then all of a sudden say,  
20 well, because we took them out of the regs for  
21 notice-and-comment rulemaking, we now get Chevron  
22 deference where previously we might not have.

23 JUSTICE KAGAN: I guess I don't understand  
24 that. I mean, it's kind of the case for Chevron  
25 deference and notice-and-comment rulemaking. They

1 clearly considered exactly this question. They made a  
2 judgment on it. They have effected that judgment within  
3 a notice-and-comments setting. I mean, if that's not  
4 Chevron, what is?

5 MR. CLEMENT: Well, two things, Your Honor,  
6 and then I want to remind you that if this statute is  
7 clear, you don't get to Chevron.

8 JUSTICE KAGAN: Of course.

9 MR. CLEMENT: But two things cause Chevron.  
10 Here is the first, which is, I would agree with you if  
11 what they did is at the end of the notice-and-comment  
12 rulemaking, they came up with, say, a new definition of  
13 "servicing," and that informed why they came up with the  
14 decision that they did, but that's not what they did.  
15 They came up with a decision that took out the provision  
16 that specifically addressed service advisors, and then a  
17 single paragraph of the preamble to the notice -- to the  
18 rules, because there's nothing in the rules that really  
19 addresses it anymore.

20 So the only thing you can look to is the  
21 preamble. It's on pages C5 and C6 of the Appendix of  
22 the red brief. There is one paragraph there that is the  
23 sum total of their explanation. I think it's worth a  
24 read, Your Honor, because what it principally says is,  
25 we're doing this because we don't think the statute

1 covers it, which is not really the kind of explanation  
2 that I think ought to get them something other than what  
3 the statute means.

4 And then this is my second point --

5 JUSTICE KAGAN: Yeah. Because the first one  
6 is not so good. The first -- I mean, agencies do this  
7 all the time. They say, this is the way we read the  
8 statute. This is the way we want to read the statute.  
9 And this Court has never been in the business of saying,  
10 oh, when you think that the statute says something, you  
11 don't get deference. Whereas when you think the statute  
12 is ambiguous but you give other reasons, you do get  
13 deference. I mean, that would be a -- a completely  
14 unadministrable line to use.

15 MR. CLEMENT: Well, I don't -- I don't want  
16 to quibble too long with you on that. I don't think  
17 that would be unadministrable at all. This Court has  
18 recognized the exact same principal in the hour context,  
19 which is to say that if all you do is parrot the  
20 statute, then that doesn't really gain you any extra  
21 deference, and I think all --

22 JUSTICE KAGAN: This is not parroting the  
23 statute. This is saying we read this statute in a way  
24 which we think is better than another way.

25 MR. CLEMENT: And so I want to get to my

1 second one. I would just say, though, I do think it's  
2 worth reading that paragraph on C5 and C6, because  
3 particularly in the unique circumstance, and this is the  
4 segue to my second point, in this is a unique  
5 circumstance where every Court that has looked at the  
6 statute, since you first took the position that it meant  
7 X, has said, no, it means not X. To then, just because  
8 you had a rule -- a notice-and-comment rulemaking,  
9 which, by the way, started with the proposal to codify  
10 the rule that all the courts had adopted, just because  
11 in that process you say, well, we still think we have  
12 the better view, I don't think that's enough to get you  
13 deference. But even if you disagree with me so far, I  
14 mean, I do think Fox, and State Farm before it, say that  
15 when an agency is changing its position, it has to  
16 account for the reliance interests that have been  
17 engendered. And you'll see nothing in that paragraph  
18 about the fact that, well, for 33 years, we, the Labor  
19 Department, agree that this was clear the other way --  
20 JUSTICE KAGAN: So, I mean, the question is  
21 on the reliance interests, if you think people have been  
22 relying and will be punished for that reliance. And I  
23 guess the question to you is, well, why would that be  
24 so? Because this rule applies not retroactively but  
25 only prospectively, and there is a particular provision



1 in the Portal-to-Portal Act, which essentially says if  
2 you relied on an old interpretation, don't worry. You  
3 won't be subject to any damages with respect to that  
4 interpretation.

5 MR. CLEMENT: So two points on that, Your  
6 Honor. The first is, just to be clear, the complaint in  
7 this case was filed in September 2012. It didn't say  
8 and we hereby seek damages only after the May 2011  
9 effective date of the regulation. So in terms of what  
10 we're facing with here, I mean, you'd at least have to  
11 trim it back based on the Portal-to-Portal Act  
12 provision.

13 But here's the reason I think even that's  
14 nonresponsive to what the dynamic here is. And it's a  
15 pretty unique dynamic, I'll grant you. With this  
16 acquiescently circuit cases. I mean, my -- my clients  
17 are in the Ninth Circuit, but I think this is even  
18 clearer.

19 Think about a dealership in the Fourth and  
20 the Fifth Circuits, okay? They already have circuit  
21 precedent that says that the service advisors are  
22 exempt. Now, if all the agency does in a rulemaking is  
23 says, gosh, darn it, we still think we have the better  
24 view, what are they supposed to do? Are they really  
25 supposed to change their operations overnight and

1 conform to this, even though they have an extant circuit  
2 precedent that says they're right and the Labor  
3 Department's wrong? And that is what, at least in this  
4 narrow circumstance, makes this different. I mean, if  
5 they had come in and say, boy, we are going to come up  
6 with a whole new C4, and we are going to have a new  
7 explanation for why these guys are exempt, then maybe  
8 the auto dealers in the Fourth and Fifth Circuit would  
9 think, well, this is a whole new day. Maybe we better  
10 change our practices.

11 But I would have a hard time advising a  
12 client in the Fourth or Fifth Circuit that you ought to  
13 change your practices, notwithstanding that Walton is  
14 still on the books, notwithstanding that the Fifth  
15 Circuit decision is still on the books.

16 JUSTICE KAGAN: Well, I suspect, Mr.  
17 Clement, you would say to your clients, you know, you  
18 are taking a risk because now the agency has changed  
19 their minds. And so going forward, don't worry. You're  
20 off the hook with respect to everything you've done in  
21 the past. But going forward, given this doctrine called  
22 Chevron Deference, the agency is going to get a thumb on  
23 the scales, and it's very possible that you're going to,  
24 you know, be subject to damages if you keep doing what  
25 you're doing.

1                   MR. CLEMENT: Well, Justice Kagan, I try to  
2 be a careful lawyer. So I probably would tell my  
3 clients there is now some additional risk than there was  
4 before. But, boy, if you have a lot of workers who  
5 really like the fact that they are compensated mostly by  
6 salary and they're service advisors, I'm not sure I'd go  
7 through all of the trouble of reorienting all of them  
8 and putting them on a commission basis so we can get on  
9 to 7(i) and get the benefit of that exemption just  
10 because the Labor Department has told us that after 33  
11 years of acquiescence, that when they had an NPR that  
12 told us they were going to codify their acquiescence,  
13 that they changed their mind on no better analysis than  
14 to simply say, you know, we like our position back from  
15 1970. I would probably tell them if you want to be  
16 really, really careful, you should change your policy.  
17 But I like our chances in the courts.

18                   And I would tell them as well, that don't  
19 worry too much about Chevron, because I really don't  
20 think the statute is ambiguous at all. I think the  
21 literal reading of the statute makes it crystal clear  
22 that if you are a salesman primarily engaged in  
23 servicing automobiles, you come within the plain terms  
24 of the statute. "Or" means "or" in that context. And  
25 even if in -- in the course of advising them, I would

1 have come across the Reddendo canon last used by this  
2 Court in 1918, I would have said, well, don't worry  
3 about that either because what the Reddendo canon, all  
4 it does is it says, when you're reading a statute and it  
5 has a bunch of nouns separated by "or" and a bunch of  
6 verbs separated by "or" and you apply them all as you  
7 should, if you get to something that just is a barking  
8 cat, there is just no such thing, then all the Reddendo  
9 canon says is, don't lose a lot of sleep over it. Go on  
10 to the next noun/verb combination and continue to  
11 interpret the statute. Don't like completely reorder  
12 the way you're thinking about the statute and say now  
13 because I came across a barking cat, I could put the  
14 first noun with the first verb and the second noun with  
15 the second verb and, well, if I had two -- three nouns  
16 and two verbs, I -- I don't know what I'd do -- throw up  
17 my hands --

18 JUSTICE GINSBURG: If I may, given the  
19 grammar for a moment, just on a fact question: You said  
20 there weren't -- the parts and the partsmen and the  
21 mechanics, they -- they were -- they all work no more  
22 than a 40-hour work week, and you mentioned 46.

23 There was something in the submissions here  
24 that said the service advisors are working a  
25 6:00-a.m.-to-7:00-p.m. shift, and so it would come, on

1 average, to 15 hours more.

2 MR. CLEMENT: Yeah. Justice --

3 JUSTICE GINSBURG: Is that incorrect?

4 MR. CLEMENT: Well, I think what I recall  
5 from the complaint is it was -- is that it was 7:00 to  
6 6:00, and so that would still get you -- if you don't  
7 rotate them around, that might get you a 55-hour  
8 workday. What I was doing on the 46 hours is I think  
9 that's in the National Automobile Dealers Association  
10 amicus brief as the average kind of system-wide.

11 JUSTICE SOTOMAYOR: Were -- in 1966, were  
12 there service advisors in existence?

13 MR. CLEMENT: Yes, there were.

14 JUSTICE SOTOMAYOR: And were they paid the  
15 same way as now? Were they salaried, or commissioned?

16 MR. CLEMENT: I think there was a mix back  
17 then, as there is now.

18 JUSTICE SOTOMAYOR: I went to the Dictionary  
19 of Occupations, which was in existence in 1966, and it  
20 appears to have different entries for salesmen, service  
21 advisors, partsmen, mechanic. Do I read something from  
22 the fact that -- or should I read something, or why  
23 can't I read something -- from the fact that Congress  
24 knew that these different positions existed, they were  
25 defined in the Dictionary of Occupations differently,

1 and it decided to use only "salesmen," which under the  
2 dictionary meant a salesperson of cars; a "partsmen,"  
3 which was defined the way one would think; and a  
4 "mechanic," but it didn't include sales advisors.

5 MR. CLEMENT: Well, here's what I would say  
6 that you should read into that, Justice Sotomayor, which  
7 is you should read into the fact that Congress used the  
8 term "any" and "any salesmen," and then modified it not  
9 just by selling vehicles, but also by servicing  
10 vehicles, to think that Congress didn't need to  
11 separately add the service advisors in, because they  
12 were already covered by the language of the statute.

13 I would also --

14 JUSTICE SOTOMAYOR: But they thought it  
15 important. The partsmen could arguably service  
16 automobiles because they provide the parts for the  
17 automobile, yet Congress found the need to be explicit  
18 and to add partsmen. Why wouldn't it have -- if it's  
19 intended to include service advisors as opposed to  
20 mechanics and partsmen, why didn't it use that  
21 occupational term? It's a term of art.

22 MR. CLEMENT: Well, Justice Sotomayor, I  
23 don't think if they had omitted the partsmen, I think it  
24 would be an awfully hard argument to say that the  
25 partsmen are mechanics. I mean, you could make it, and,

1 you know, I'm not so sure I wouldn't try, but I think it  
2 would be a much harder argument than to say that the  
3 service advisors are covered by the term --

4 JUSTICE SOTOMAYOR: Except the dictionary  
5 doesn't use the words -- the functions as functions of  
6 selling a car. And -- and it doesn't use the word  
7 "service" in a traditional sense. It says it's going to  
8 evaluate cars, it's going to give the work to mechanics,  
9 but it doesn't use the word "servicing" a car.

10 MR. CLEMENT: Which doesn't, the --

11 JUSTICE SOTOMAYOR: The occupational  
12 handbook.

13 MR. CLEMENT: Well, I mean, I guess I would  
14 still say, though, the question -- I'd make two points,  
15 one I've already made, which is I do think, since they  
16 used any salesman, I think they thought that they  
17 already had it covered.

18 The second thing I would say is I think if  
19 they were going to include service advisors into the  
20 statute, I think what the statute would say is exactly  
21 what it says now, which is it would say "any salesman,  
22 service advisor, partsman, or mechanic engaged" --  
23 "primarily engaged in" -- "in selling or servicing  
24 automobiles," trucks, or farm implements.

25 And what I think that shows is that there's

1 nothing at all unnatural to say that the service  
2 advisors are primarily engaged in servicing automobiles.  
3 That is what they do. They're part of the servicing  
4 process.

5           The way I would think about this is if you  
6 imagine a very small automobile dealership and they have  
7 one person in the service department. That person is  
8 going to come out. They're going to greet the customer.  
9 They're going to work with the customer to diagnose what  
10 the problem is.

11           Once they figure out what the problem is,  
12 they'll give them an estimate. Then if they have to fix  
13 a part, they'll go in the back, they'll grab the part,  
14 then they'll take the part, and then they'll put it in  
15 the car and they'll fix the part. And then they'll go  
16 back and talk to the customer and tell them what they  
17 did.

18           Now, in a modern automobile dealership, all  
19 of that is done by three different people working as a  
20 team. And it seems to me quite clear that the service  
21 advisors are part of that servicing process.

22           Indeed, my friends on the other side I think  
23 almost give us that, which is to say -- they seem to  
24 come close to saying that if the statute said  
25 "salesman... primarily engaged in" the servicing



1 process, they would grant us that the -- that the sales  
2 advisors are covered.

3 I mean, they can quibble if they want, but  
4 that's the way I read the position. They simply say,  
5 but the statute doesn't say "process." And so what they  
6 have in mind is the statute must mean something very  
7 narrow by servicing. This is that you have to be under  
8 the hood or grease under your nails or something like  
9 that.

10 And the big problem with that is the  
11 partsmen. The partsmen are no more in the main, under  
12 the hood, or getting their nails dirty by actually  
13 servicing the automobile, but they are an integral part  
14 of the servicing process. And because they're covered,  
15 I think we know that Congress used the term "servicing"  
16 in a more capacious sense and not in some narrow sense  
17 that you have to do the servicing personally.

18 If I could reserve the balance in my time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Bibas.

21 ORAL ARGUMENT OF STEPHANOS BIBAS

22 ON BEHALF OF THE RESPONDENTS

23 MR. BIBAS: Mr. Chief Justice, and may it  
24 please the Court:

25 The FLSA exempts salesmen who sell cars and

1 partsmen and mechanics who service cars. Service  
2 advisors don't sell cars. Nor do they service cars,  
3 which requires automotive manual labor. They merely  
4 write up paperwork.

5           Petitioner's argument fails for three  
6 reasons: First, selling services is not the same thing  
7 as servicing. Petitioner's argument is an end-run  
8 around the statute's three direct objects of selling:  
9 Cars, trucks, and farm implements. Selling services is  
10 not listed.

11           Second --

12           JUSTICE ALITO: Could you pick up where  
13 Mr. Clement left off? What would be the -- what is the  
14 basis for covering partsmen?

15           MR. BIBAS: Yes, Your Honor. Several. The  
16 first one is, unlike service advisors, they're expressly  
17 named in the statute.

18           Secondly, they're working as mechanics'  
19 right-hand men or women. Some partsmen grind down parts  
20 or build them up. Some use calipers and measure how  
21 they fit on cars. Some of them remanufacture parts.  
22 They use brake drum lathes and engine head grinders and  
23 valve refacers.

24           Even those who are not are involved with --  
25 with mechanics in requisitioning and dispensing parts.

1 JUSTICE ALITO: Well, as to those who are  
2 not, as to those who obtain parts, don't change the  
3 parts, supply the correct part to the mechanic, they  
4 would still be engaged in servicing automobiles, you  
5 would say?

6 MR. BIBAS: If they are physically  
7 dispensing the parts, handing them over, and doing so in  
8 sync with the mechanic's work. So take a transmission  
9 job. If an automatic transmission is being redone, the  
10 partsman has to know that the mechanic first needs to  
11 build the clutch units. So he first dispenses the  
12 clutch disks and plates and the clutch drum bushings.

13 The mechanic is working on them. The  
14 partsman goes back, gets the remainder of the automatic  
15 transmission assembly, and goes and hands them to the  
16 mechanic. This is a back and forth. It's a  
17 mechanic-facing role, not a customer-facing role.

18 JUSTICE ALITO: Yes. They are -- they are  
19 more closely connected with the actual repairs of the  
20 car. There's no question about that. But they are not  
21 engaged in manual labor. That type of partsman is not  
22 engaged in actually doing anything physically with the  
23 car.

24 So if they are covered, if that's -- if  
25 servicing automobiles includes that, then you have to

1 explain why the line is drawn between that activity and  
2 the activity of the -- of the employees who are at issue  
3 here.

4 MR. BIBAS: I have a couple of responses.  
5 The first one is if there's a line to be drawn, that of  
6 course is for the agency.

7 Secondly, I would say that they are engaged  
8 in the dictionary definition, repairing or maintaining  
9 automobiles. And in the reply brief, at page 11,  
10 Petitioner comes very close to conceding, well, they're  
11 not repairing in the way that repairing -- servicing is  
12 used in several other statutes that we cite. But our  
13 theory is they are part of this general process, or  
14 integral on core sales and service, which they're adding  
15 to the statute.

16 The only way that Petitioner manages to add  
17 that to the statute is saying that the phrase "engaged  
18 in" somehow broadens the ordinary meaning of servicing.  
19 But it doesn't, for three reasons.

20 The dictionary definitions cited by the  
21 government engaged in means employed in or taking part.  
22 So then Petitioner falls back and says, well, the FLSA,  
23 when it uses "engaged in" means something broader. They  
24 cite a definition provision, 203(j) in the reply brief.  
25 And they say that the definition means that "engaged in"

1 includes any closely-related process.

2 So we pulled the actual subsection which  
3 says precisely the opposite of that. It does not  
4 provide separate definitions of "produced" and "engaged  
5 in producing," as Petitioner's quotation suggests. It  
6 defines "produced" equal as "engaged in the production  
7 of goods" if the subject is engaged in doing the action.

8 Now, what that section says that actually  
9 broadens it is language Petitioner doesn't quote. It  
10 says, "An employee shall" --

11 CHIEF JUSTICE ROBERTS: I'm sorry. Can you  
12 tell us where you're reading from, if this is available  
13 to us?

14 MR. BIBAS: Okay. This is 29 U.S.C. 203(j).  
15 It's the Petitioner's reply brief at page 11.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 MR. BIBAS: But the -- they don't quote the  
18 section of full. If you look at 29 U.S.C. 203(j), it  
19 says "An employee shall be deemed to have been engaged  
20 in production if employed in a related process." It is  
21 the deeming that sweeps in closely related processes.  
22 It's not the language of "engaged."

23 And then we look at this Court's case law  
24 interpreting that very provision. So this Court has  
25 interpreted that provision as contrasting the narrower

1 phrase, "actually engaged in production," with the  
2 broader phrase, "every process or occupation affecting  
3 production." That's this Court's case, Farmers  
4 Reservoir, 337 U.S. at 759 to 60.

5 So far from proving that "engaged in" opens  
6 the door to the ill-defined "process of servicing,"  
7 Section 203(j) and this Court's precedent confirm that  
8 it does not broaden the verb "servicing." And  
9 "servicing" means repairs, maintenance, and similar  
10 automotive manual labor.

11 Now --

12 CHIEF JUSTICE ROBERTS: Well, is it just --  
13 I suspect it differs from place to place and how many  
14 people they have and all that, but why is it -- I mean,  
15 are these the people that when you go in, and you know,  
16 you go and say the car's making a funny noise or  
17 something, do they go out and look at the car, listen to  
18 the noise? What's it -- I mean, that seems to me to be  
19 more like a process. And then they go to the mechanic  
20 and say, well, you need to do this, or you want to look  
21 at this or whatever.

22 MR. BIBAS: So my understanding is --

23 CHIEF JUSTICE ROBERTS: No. I'm just trying  
24 to -- you earlier said they're just doing paperwork, and  
25 I'm trying to put a finger on exactly how much they do

1 with that and how much they do the other.

2 MR. BIBAS: Right. So my understanding is  
3 that the important difference between service advisors  
4 and partsmen, to answer both questions together, the  
5 service advisor is a customer-facing role. He's  
6 advising the customer, not advising the mechanic. Goes  
7 up to the customer, has a clipboard, records whatever  
8 symptoms the customer says; it's making a squealing  
9 noise, or it's not driving well.

10 Now, only in that sense is he recording  
11 something with the automobile. He's not going under the  
12 hood. He's not taking parts apart. He's not rendering  
13 a final diagnosis on which the work will be based. He  
14 relays that information back. It's the mechanic who  
15 hooks the car up to the --

16 JUSTICE KENNEDY: No, no. You've missed --

17 JUSTICE GINSBURG: If --

18 JUSTICE KENNEDY: You've missed a process.  
19 And some of us up here are experts in having to go to  
20 auto agencies and coming back.

21 (Laughter.)

22 MR. BIBAS: Yes.

23 JUSTICE KAGAN: The first thing he does is  
24 give you an estimate.

25 MR. BIBAS: Yes.

1 JUSTICE KENNEDY: And -- both in cost and in  
2 time, and make recommendations for, well, maybe you  
3 should replace it, and it would cost you X dollars.  
4 So -- so just to say that he puts something and then  
5 it's up to the mechanic, that's incorrect.

6 MR. BIBAS: You are correct, Your Honor.  
7 The -- he's giving a preliminary estimate based on we  
8 think the squealing noise means you need a new timing  
9 belt. That's how much it would cost. Have you had your  
10 brakes done, et cetera?

11 But it goes back to the mechanic. And the  
12 mechanic may come back and say, no, actually, you need  
13 an overhaul or something else, after going under the  
14 hood.

15 CHIEF JUSTICE ROBERTS: I don't mean to be  
16 too particular, but if there's a squealing sound and it  
17 might be the fan belt, you're saying he's not going to  
18 open the hood and look at the fan belt?

19 MR. BIBAS: Well, he's not -- he's not going  
20 to be measuring the tension on the fan belt, touching  
21 the fan belt, doing any of that. That's back in the  
22 shop bay. For liability reasons, they can't do the work  
23 in the front. The insurance requires all of that be  
24 done in the back, is my understanding.

25 JUSTICE GINSBURG: What --



1 MR. BIBAS: The question --

2 JUSTICE GINSBURG: But how would you  
3 describe what this employee is engaged in? You say he's  
4 not engaged in selling cars and he's not engaged in  
5 servicing cars. So what is it, what other category is  
6 there other than selling and servicing?

7 MR. BIBAS: There are people in auto  
8 dealership who do lots of things that might be part of a  
9 general process. The Petitioner leaves the impression  
10 that there are three or four kinds of employees and  
11 you're just carving one out from an otherwise exempt  
12 unit. There are at least 20 categories of employees in  
13 the service department, as the Machinists' brief  
14 explains. There are dozens of kinds of employees in the  
15 sales Department, in parts, in used cars, in leasing.  
16 And so they may be engaged in this selling of services,  
17 but even if they are, selling services is not the same  
18 as servicing.

19 JUSTICE BREYER: Suppose you say -- you  
20 phone them up and you say, I'd like the servicing  
21 Department, please.

22 MR. BIBAS: Yes.

23 JUSTICE BREYER: Someone answers the phone,  
24 hello. Who are you? I'm -- I'm -- I'm the service --  
25 what do you call those persons?

1 MR. BIBAS: Service advisor.

2 JUSTICE BREYER: Yeah, service advisor. Are  
3 you engaged in servicing? Why would I be here if I  
4 wasn't engaged in servicing? I'd be over in the selling  
5 Department.

6 I think you read this either way, frankly.  
7 I mean, I -- I don't really -- I can't get too far with  
8 language, which is why I have a question which isn't  
9 related to language.

10 MR. BIBAS: I would say if -- if you don't  
11 think it's clear, of course Chevron deference --

12 JUSTICE BREYER: Yeah, well, that's the  
13 question. And I don't hold you responsible for knowing  
14 every word I've written in every case, but still, I did  
15 in Fox make a point of an administrative rule that I  
16 think is important, an administrative law rule, that  
17 when an agency changes its mind, it should explain it.  
18 And I probably in Fox thought that more than many of my  
19 colleagues. All right?

20 Given my position there, and here we have  
21 the agency going along and issuing a manual where they  
22 say the opposite of what you're saying now. And then we  
23 see what happened when after 30 years they changed their  
24 mind. And I -- I thought Mr. Clement was right, and if  
25 you read their reason, their reason happens to be this:

1 The Fourth Circuit says the opposite, but we think not.

2 Now, I know they didn't use those words, but  
3 I wouldn't call that or the equivalent a reason. And --  
4 and so is there somewhere in this document, C1 through,  
5 you know, 5, is there somewhere a reason why they  
6 changed their mind other than, oh, we think this is a  
7 better interpretation? Because that doesn't address the  
8 problem that I thought was at issue in Fox. And if I  
9 were to use one word to describe that problem, it is the  
10 word they've used. It's called reliance. I'm not  
11 saying it predominates, but doesn't the agency at least  
12 have to address it?

13 MR. BIBAS: Your Honor, there are about four  
14 questions in there, if I might take them in turn.

15 You asked about your own writing and your  
16 own position on reliance. I'd point to your own opinion  
17 in Long Island Care, where first of all you took the  
18 position that intermediate agency enforcement changes  
19 its set of rules, and it's -- Smiley, the Court said the  
20 same thing -- don't count as changes of position in the  
21 first place.

22 JUSTICE BREYER: I -- that's a good point,  
23 and I don't know how absolute we ought to be there.  
24 And -- and the reason this is now facing me with that  
25 problem. Of course they can't do everything for every

1 employee in the agency, and they get all kinds of  
2 informal advice. It's a practical problem.

3 But here we have a kind of extreme,  
4 30 years, manuals, noting explicitly that it's a change  
5 of position. I mean, it's not just one part of the  
6 agency can't always be consistent with every other part,  
7 so that's exactly what you put your finger on that I --  
8 why I asked the question.

9 MR. BIBAS: Okay.

10 JUSTICE BREYER: And the fact that I said it  
11 that way that time at most is going to show I'm not  
12 always perfectly consistent, which is -- I'll admit.

13 MR. BIBAS: I think Your Honor was also  
14 correct in saying in Long Island Care that the  
15 notice-and-comment rulemaking process makes any -- the  
16 potential for any unfair surprise unlikely.

17 It's also quite noteworthy in the reliance  
18 area that, as the professor's brief pointed out, in the  
19 several days after the April 2011 rule was promulgated,  
20 even before its effective date, counsel below for  
21 Petitioners and a number of other law firms and  
22 Petitioners' amicus in that were all publicizing to the  
23 members: This new rule came out. It's becoming  
24 effective in a month. You need to take account of that.

25 You also had a component in your question

1 that was about the basis for the rulemaking and for the  
2 changes in position. It's not just the paragraph at  
3 page C5 to C6 of our brief. The two pages before that,  
4 from C3 to C5, have the comments, there were seven  
5 comments that addressed this issue; five of them favored  
6 the position that the agency --

7 JUSTICE SOTOMAYOR: Could you give me the  
8 pages where it's in your brief?

9 MR. BIBAS: The back of the red brief. The  
10 pages C3 to C6 is the reasoning. So at the bottom of  
11 C5, the agency says "and as commentators point out," so  
12 it's incorporating by reference the two pages of  
13 comments discussion that preceded it. And on the  
14 previous pages, such as page C4, several of the amici --  
15 sorry, no, the commenters point out there are line  
16 drawing problems here: These are not classic mechanics  
17 or servicers. They are just coordinating. They have  
18 this administrative function. They're not -- just  
19 because they're integrated doesn't make them in fact  
20 selling or servicing. In essence --

21 JUSTICE BREYER: Why did they change? As  
22 the commentators point out, then they go on to say what  
23 it is in that sentence that the commentators point out.  
24 So I agree, other people agreed with them, sure, that's  
25 true. But the question is, why the change?

1                   And I do get this. We changed it because we  
2 think that we're more consistent than the statute than  
3 we used to think that was consistent with the statute.  
4 I'll go that far. And now I have to figure out, is that  
5 a good enough reason.

6                   MR. BIBAS: There's --

7                   JUSTICE BREYER: We didn't think it then,  
8 but we think it now.

9                   MR. BIBAS: There's more --

10                  JUSTICE BREYER: And that's -- is there  
11 anything else?

12                  MR. BIBAS: There's more, Your Honor. On  
13 page C5 NELA points out some line drawing problems. The  
14 1978 opinion letter had some -- it had drawn a line  
15 between warranty work versus non-warranty work because  
16 presumably the warranty work was sold previously and  
17 you're not selling it now. And there are administrative  
18 problems with drawing these kinds of lines. It's  
19 cleaner and simpler for the agency to revisit the issue  
20 for the first time with notice-and-comment rulemaking  
21 and say, let's just treat these people as a class and  
22 not require bookkeeping of what's warranty versus  
23 nonwarranty work.

24                  So when NELA makes the line drawing  
25 reference in there, I think that's what it's referring

1 to, and the agency is saying, just as a class, they're  
2 not selling vehicles; they're not servicing vehicles.  
3 They're selling the servicing of vehicles.

4 JUSTICE KAGAN: If I might: Mr. Clement  
5 suggested that you might be seeking damages for pre-2011  
6 conduct. Are you?

7 MR. BIBAS: Our complaint was filed in  
8 September 2012. The two-year limitations period goes  
9 back to September 2010. We have noted that as for  
10 anything before the effective date of this new  
11 regulation, May 5, 2011, the Portal-to-Portal Act could  
12 be pled and it could perhaps be proven. That's an issue  
13 for remand; it's not in this case at this stage. But  
14 Congress has dealt with this issue, and there's nothing  
15 retroactive about applying a 2011 regulation.

16 JUSTICE KENNEDY: Is that the good-faith  
17 reliance provision?

18 MR. BIBAS: Yes, that's 29 U.S.C. 259.

19 JUSTICE KENNEDY: And is that applicable --  
20 is that an open issue on remand?

21 MR. BIBAS: That's an issue -- it hasn't  
22 been pled; it's an open issue on remand.

23 JUSTICE KENNEDY: And that's both as to  
24 pre-2011 and post -- post-2011 damages?

25 MR. BIBAS: It's not -- not as to post May

1 5, 2011, because the opinion letter has no force past  
2 the effective date of the new regulation.

3 CHIEF JUSTICE ROBERTS: I'm sorry. You were  
4 about to say there's nothing retroactive about --

5 MR. BIBAS: About applying a 2011 regulation  
6 to post-2011 conduct. The only -- the government's  
7 brief deals with this. Well, that the kinds of serious  
8 reliance interest that count for these purposes are  
9 criminal penalties or civil penalties on actions that  
10 were already done before the regulation. And that's --

11 CHIEF JUSTICE ROBERTS: What about the  
12 damages you're seeking before 2011?

13 MR. BIBAS: The Portal-to-Portal Act may  
14 well be a defense in that situation if they can plead  
15 and prove reliance.

16 JUSTICE GINSBURG: May I ask --

17 JUSTICE KENNEDY: But you are seeking  
18 damages?

19 MR. BIBAS: We have a damages claim, but  
20 they have a defense.

21 CHIEF JUSTICE ROBERTS: Well, but even  
22 though the regulation took -- the regulation had changed  
23 the interpretation that took effect 2011?

24 MR. BIBAS: The notice-and-comment  
25 regulation took effect May 5th, 2011.



1 CHIEF JUSTICE ROBERTS: And that changed the  
2 Department understanding of the statute.

3 MR. BIBAS: It maintained the former  
4 regulation; it rescinded the enforcement materials that  
5 said they would not enforce during that period of time.

6 JUSTICE GINSBURG: You --

7 CHIEF JUSTICE ROBERTS: So the Department  
8 said -- I just want to get -- the Department said they  
9 would not enforce prior to 2011?

10 MR. BIBAS: Yes.

11 CHIEF JUSTICE ROBERTS: And yet you still  
12 think they should be liable for damages?

13 MR. BIBAS: No, there's the Portal-to-Portal  
14 Act --

15 CHIEF JUSTICE ROBERTS: Well, putting  
16 aside -- that's a defense. You're saying, well, you  
17 might win on that or you might not. Right?

18 MR. BIBAS: Right.

19 CHIEF JUSTICE ROBERTS: But you still think  
20 they should be liable for damages when the Department  
21 said they were not going to enforce the position that  
22 you're articulating.

23 MR. BIBAS: Our position is that the defense  
24 may indeed preclude that.

25 CHIEF JUSTICE ROBERTS: Well, I know, but

1 I'm asking -- so in other words, they may not succeed in  
2 their Portal-to-Portal Act defense, but you nonetheless  
3 think when the Department says, we're not going to  
4 enforce the view, that they're liable for damages  
5 because they didn't take the opposite view.

6 MR. BIBAS: We are willing to concede the  
7 pre-2011 damages.

8 JUSTICE KENNEDY: Is that at this point or  
9 is that clear from your -- has that been your position  
10 all along?

11 MR. BIBAS: It's never been pleaded or  
12 proved.

13 JUSTICE GINSBURG: This hasn't been  
14 litigated at all.

15 MR. BIBAS: It hasn't been litigated.

16 JUSTICE GINSBURG: We're dealing with the  
17 threshold issue of how do we categorize these people.

18 MR. BIBAS: Yes.

19 JUSTICE GINSBURG: And on that, do you  
20 know -- I had asked Mr. Clement -- what is the universe  
21 of employees we're talking about? How many of these  
22 people would not come out under the -- what is it,  
23 701(i) because they are commissioned employees?

24 MR. BIBAS: Well, there's a wide range of  
25 compensation methods; however, the -- most of the -- the

1 range of salaries we're talking about is a broad  
2 dispersion. The bottom 10 percent of service advisors,  
3 based on the figures I've seen, make less than  
4 one-and-a-half times the minimum wage. There are  
5 entry-level jobs at 22,000 a year. Those are the people  
6 who are going to be affected by this ruling. Those are  
7 the only ones who would not qualify for a 207(i) if it  
8 were restructured for commissions.

9 So we're not talking about the highly paid  
10 ones who the dealerships could exempt under 207(i) by  
11 structuring it. We're talking about people who are --  
12 who are just above the minimum wage, less than  
13 one-and-a-half times above.

14 If I might deal with a few questions this  
15 Court raised earlier, one of -- the partsmen issue, I'd  
16 like to offer an analogy on partsmen. Petitioner's  
17 position is as if you have a statute that speaks of  
18 someone, a doctor engaged in operating, that makes  
19 sense. If the statute says, doctor or nurse engaged in  
20 operating, you'd understand you don't normally think a  
21 nurse operates, but the O.R. nurse is close enough.

22 What Petitioner is saying, if you exempt the  
23 O.R. nurse, you also have to exempt the hospital intake  
24 clerk who does paperwork, maybe even the hospital intake  
25 nurse who takes vital signs. There is no reason you

1 have to expand beyond the operating room, the person who  
2 is right there handing the utensils and scalpels over to  
3 go all the way out to the front office --

4 JUSTICE ALITO: I'd feel more comfortable  
5 about this if I understood the criteria that Congress  
6 applied in choosing the employees who are covered by  
7 this provision. So take the case of the -- the  
8 salesperson who is not working on commission. Why did  
9 Congress include that employee within this category?  
10 And what is different about employees of that nature  
11 from service advisors who are not working on commission?

12 MR. BIBAS: The understanding of Congress,  
13 as discussed in our brief, was that salesmen are selling  
14 anywhere they go. Back in the '60s, they would be  
15 selling off-hours. They'd be going to people's homes  
16 and when they met people at church or clubs or wherever.  
17 And that mechanics and partsmen, just as Justice Breyer  
18 alluded to, were going out and had to work in the field,  
19 at least in some context, and it was hard to track  
20 overtime with their regular hours and off-site work.

21 In response to a few other Court problems --

22 JUSTICE SOTOMAYOR: The salesman --

23 JUSTICE ALITO: All of that was true --

24 CHIEF JUSTICE ROBERTS: I'm sorry. Justice  
25 Alito is talking.

1 JUSTICE ALITO: All of that was true in  
2 1966. That really isn't -- maybe it was. It's not  
3 consistent with my -- what I would have imagined car  
4 salesmen are doing or partsmen are doing.

5 MR. BIBAS: May I answer?

6 CHIEF JUSTICE ROBERTS: Yes, and then  
7 Justice Sotomayor has a question.

8 MR. BIBAS: Yes.

9 If the universe of employees who meet the  
10 exemption now has shrunk so it's narrower than the  
11 original purposes, that is a reason for Congress to  
12 repeal or restrict it. It is certainly not a reason for  
13 the courts to expand it.

14 JUSTICE SOTOMAYOR: It was more of Justice  
15 Alito's. When did automobile salesmen travel? When did  
16 mechanics and partsmen for automobile leave the -- the  
17 job --

18 MR. BIBAS: Congress, the Senate discussed  
19 that expressly in the '60s. I don't know when that  
20 changed.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
22 Mr. Yang.

23 ORAL ARGUMENT OF ANTHONY A. YANG  
24 FOR UNITED STATES, AS AMICUS CURIAE,  
25 SUPPORTING THE RESPONDENTS

1                   MR. YANG: Mr. Chief Justice, and may it  
2 please the Court:

3                   I'd like to address three points, as well as  
4 answer some additional questions. The first is, I'd  
5 like to discuss the text of the statute as it was  
6 enacted in 1974. Congress enacted the statute in 1974  
7 and separated salesmen from partsmen and mechanics in  
8 subsection or clause B.

9                   Second, I'd like to discuss Petitioner's  
10 argument that selling services is being primarily  
11 engaged in servicing automobiles. As a textual matter,  
12 we think that's just plain wrong.

13                   And, finally, I'd like to discuss really  
14 what's at issue here. Petitioner has made a lot of  
15 policy arguments about high-paid commission, people who  
16 are salesmen, they're incentivized to sell. Petitioner  
17 has essentially conceded in his argument that what we're  
18 really talking is people who aren't paid on commission.  
19 Those people are who Congress was concerned about,  
20 people who fall outside of 207(i), and there's no reason  
21 to expand 213(b)(1)(A) to cover them.

22                   So first, when Congress enacted the statute  
23 in 1974, and this -- you can see this on page 2A of the  
24 government's appendix, you can see the difference of  
25 what Congress did.

1           Prior to 1974, there was a single exemption,  
2     salesmen, partsmen and mechanics. And that applied to  
3     several different types of vehicles. It included  
4     applying to trailers and aircraft, as well as  
5     automobiles.

6           In 1974, Congress decided to eliminate the  
7     exemption for partsmen and mechanics for trailers and  
8     aircraft. The legislative history is quite clear on  
9     this. When they did that, they created subsection B.  
10    So they preserved the exemption for salesmen.

11           But look at subsection B, this is on top of  
12    page 3A, it says "Any salesman primarily engaged in  
13    selling trailers, boats, or aircraft."

14           That shows you that Congress was -- linked  
15    salesmen to selling and, by implication, partsmen and  
16    mechanics to servicing. Because when you look at (A),  
17    the only time servicing comes in is when partsmen and  
18    mechanics were there.

19           So I think as a textual matter, that shows  
20    you what Congress was trying to do.

21           Second, "selling" is not servicing.  
22    Petitioner says that you're engaged in the selling  
23    process or the -- and the servicing process because  
24    you're selling servicing. If you are selling plastic  
25    surgery, you're not ever thought to be engaging in

1 plastic surgery. You're selling it.

2 Maybe you might be seen to be part of the  
3 process of servicing, but it's not natural to say that  
4 you're engaged in servicing.

5 And I think it's telling that Petitioner has  
6 to rely on Section 203(j), as my brother suggested,  
7 203(j) is a definitional section. The only way  
8 Petitioner gets to the suggestion that doing things that  
9 are essential to the production is production is because  
10 the statute says, "For the purposes of this chapter, it  
11 shall be deemed production."

12 And as my brother explained, "Farmers  
13 Reservoir," and this is a quote, "explains that  
14 production in the normal sense is quite different rather  
15 than production in the special sense defined here."

16 What we're talking about is the normal sense  
17 of being engaged in servicing. That means you are  
18 actually taking part in the repairing or the providing  
19 maintenance for automobiles. Service advisors do not do  
20 that.

21 Moreover, Petitioner's reading, if we really  
22 do expand servicing to extend to people who are engaged  
23 in the process, why wouldn't you cover salesmen who only  
24 sell warranties, salesmen who only sell the antirust  
25 coating under the car, salesmen at the counter that sell



1 the key fobs and other things that are branded with the  
2 dealership's logo? They're all engaged in selling  
3 automobiles in the sense that you got to advertise, you  
4 got to sell. This promotes the sale of automobiles.  
5 That's wrong.

6 The mechanic that simply fixes the HVAC  
7 system or fixes the guts, were they engaged in servicing  
8 automobiles? Everybody at a dealership, under  
9 Petitioner's view, is essentially engaged in selling or  
10 servicing because they're engaged in the process of  
11 selling or servicing automobiles. That's just wrong.

12 Line drawing is necessary. Now, we depart a  
13 little bit from Respondents in that we think the statute  
14 is ambiguous, right? I mean, if the statute had just  
15 said, salesmen engaged in selling or servicing, you'd be  
16 forced to say, well, Congress must have meant "salesmen"  
17 instead of -- intended a distributive meaning when they  
18 included "salesmen and partsmen and mechanics." But the  
19 line drawing that has to be done here -- if you  
20 acknowledge that line drawing has to be done, salesmen,  
21 the service advisors are way down the line.

22 They rely on partsmen, but partsmen, as we  
23 explained, are working hand-in-hand with mechanics. So  
24 they're logically understood to be servicing, but a  
25 salesman is not logically understood to be servicing.

1           So what's key about the canon of Reddendo  
2 and the recognition of distributive phrasing is not that  
3 you have to read the statute that way, but what it does  
4 suggest is that there is no such basic rule of grammar  
5 that requires the use of "or" to link every antecedent  
6 noun with all antecedent gerunds. The question is  
7 whether it's ambiguous.

8           So if we get into ambiguity, the agency has  
9 construed this statute in notice-and-comment rulemaking.  
10 That is entitled to deference.

11           Now, before --

12           JUSTICE KAGAN: Mr. Yang, why was it -- I  
13 mean, for the most part this explanation seems like not  
14 the world's best explanation to me but perfectly  
15 adequate. But Mr. Clement does have a point that  
16 somehow the agency took out this more specific  
17 explanation and I -- I guess if I were just looking at  
18 the explanation itself I would say, you know, not an  
19 A-plus job, but fine. But it is a little bit perplexing  
20 as to why they took this out. Why was that?

21           MR. YANG: Well, we don't have this in the  
22 record, but I have been informed that there was an  
23 inadvertent mistake in drafting. All of these are in  
24 Subsection C of the statute.

25           JUSTICE KAGAN: Wow. I really did not

1 expect expect you to say that.

2 MR. YANG: It was inadvertent, but it  
3 doesn't make a difference, and I'll explain why.

4 The prior (c)4 -- they -- they redid (c)1,  
5 2, and 3, and they just didn't reprint 4 because it  
6 hadn't changed at all. So -- but it -- the reason it  
7 doesn't matter is what (c)4 said before --

8 JUSTICE KAGAN: Not an A-plus explanation.

9 (Laughter.)

10 MR. YANG: It's a passing grade.

11 But what I would say is in (c)4, before --  
12 this is reproduced on page 6a of the appendix to our  
13 brief. It says sales advisors aren't included unless  
14 they're primarily engaged in the work of a salesman,  
15 partsman, or mechanic as defined.

16 So what really does the work is the  
17 definition of "salesman." And the definition of  
18 salesman is what they reenacted as notice-and-comment  
19 rulemaking with some modifications to take care of  
20 changes since the 1974 amendments.

21 The definition of salesmen covered -- and  
22 they say "as used in Section 13(b)10," so they're  
23 construing the term "salesman" as used in this statutory  
24 provision. It means "someone who is engaged in making  
25 sales or obtaining orders for the sales of vehicles."

1           Service advisors don't fall under that  
2 category. So they're not salesmen within the meaning of  
3 the statute as it has been construed. They're salesmen,  
4 sure, in kind of a general sense. But they're not  
5 salesmen as construed in this provision, because they're  
6 not engaged in selling automobiles.

7           Not the perfect, but a passing grade for --  
8 for the agency.

9           JUSTICE BREYER: Now, that's -- maybe this  
10 problem in my mind will go away, but I -- I'm with you  
11 up to a large point. I think it is ambiguous. I think  
12 there is no longer any reason at all for having the  
13 mechanics exempt, but they're there. And so then, with  
14 the service people, an agency could reason, well, let's  
15 not make a bad situation worse, which is what you say.  
16 Or they could reason the opposite: These are virtually  
17 identical, why not treat them the same.

18           Now, problem. 30 years?

19           MR. YANG: Right.

20           JUSTICE BREYER: And so the real question is  
21 don't they have to address this?

22           MR. YANG: Well, they do have --

23           JUSTICE BREYER: Well, do they? I mean, you  
24 know, I guess I could -- I'll read that again and -- and  
25 try to see do they really address it, and -- but that's

1 where I'm having a problem.

2 And it isn't just -- he's quite right, your  
3 colleague, where he says this isn't just a simple  
4 reversal of a regulation. It isn't that. They never  
5 really had the regulation acquiescing. And they've had  
6 to find things in handbooks and so forth. But the  
7 practical fact is everybody thought the law was what the  
8 Court said. And so now suddenly, in the -- in --

9 MR. YANG: Well, not --

10 JUSTICE BREYER: This is the problem,  
11 because after all, different administrations have  
12 different policies. And there's some protection in the  
13 ABA from preventing too big a shift too quickly, the  
14 protection being, address it. Address it. Think about  
15 it.

16 MR. YANG: I think what's necessary is for  
17 the agency to recognize that it had a prior position,  
18 which it did here. It also has to explain what it's  
19 doing, which it did here. It explained how it  
20 understood the statute to be most appropriately read.

21 Now, to the extent you also have to --  
22 you're suggesting that the agency has to explain why its  
23 prior interpretation was wrong --

24 JUSTICE BREYER: No. No.

25 MR. YANG: I don't think --

1 JUSTICE BREYER: Because I don't think  
2 either would be wrong. But they have to explain why are  
3 we, despite 30 years of --

4 MR. YANG: Right.

5 JUSTICE BREYER: -- going long with the  
6 other, why now do we think that was a mistake?

7 MR. YANG: I think you can -- you can -- if  
8 that were a requirement, we don't think it's necessary.  
9 But if it were, you could easily see the answer by  
10 reading the -- the 1978 opinion letter in conjunction --  
11 if I can follow -- finish. Thank you.

12 The 1978 opinion letter was based on the  
13 theory that service advisors are selling, they're doing  
14 selling. And so as a result, they said, well, when  
15 you're working on service under warranty. You're no  
16 longer selling, so you don't count for the exemption.  
17 Only when you're selling nonwarranty services --

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MR. YANG: Thank you.

20 CHIEF JUSTICE ROBERTS: Mr. Clement, four  
21 minutes.

22 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

23 ON BEHALF OF THE PETITIONER

24 MR. CLEMENT: Mr. Chief Justice, and may it  
25 please the Court:

1           Just a few points in rebuttal, starting  
2 right where Justice Breyer and my friend from the SG's  
3 office left off. Which is to say, I think, you know, if  
4 you look at what they did in the preamble, they did what  
5 agencies do every day, which is first they say, we have  
6 some comments that say this; we have some comments that  
7 say that. They simply relate what the comments were.  
8 Then there's the money paragraph that explains what they  
9 actually did, what justifies their decision, and there's  
10 nothing in there about reliance interests at all. So if  
11 there's anything to your Fox position, then I think this  
12 does not get a passing grade; it gets a flunking grade.

13           And what I'd like to just offer as a  
14 potential comparison: As you may know, the agency has  
15 also revisited the issue you addressed in Long Island  
16 Care, and they did that through notice-and-comment  
17 rulemaking. And it's worth a quick look to show what  
18 night looks like and what day looks like, because that  
19 is all about the reliance interests of the fact that  
20 they treated this one way for many, many years, and  
21 there are sections of that preamble explaining when they  
22 change it how this is going to impose costs and why  
23 those costs are justified. It's -- it's -- it is a  
24 stark example of how the agency should behave when  
25 they're changing the position.

1           And here's the last thing to add about this:  
2     It also -- if they give that kind of analysis, it gives  
3     some reason for people, especially in the Fourth and the  
4     Fifth Circuit, who already have a binding circuit  
5     precedent that say that service advisors are not -- are  
6     exempt, it gives them a reason to maybe think about  
7     changing.

8           But when they do nothing to address the  
9     reliance interests and they just say, gosh, we really  
10    think we were right all along, why is anybody,  
11    especially in the Fourth and Fifth Circuit, supposed to  
12    change the way they're doing things, and that's the only  
13    way that they say that they can even possibly get within  
14    the protection against massive, retroactive damage  
15    liability.

16           So I think, in a sense, the State Farm  
17    principles or the Fox principles would work hand-in-hand  
18    with this concern about retroactivity.

19           JUSTICE SOTOMAYOR: So is it okay if we just  
20    send it back?

21           MR. CLEMENT: Sure. As long as it means  
22    that there is no retroactive liability. I mean, I --

23           JUSTICE SOTOMAYOR: They've already conceded  
24    there's not. So they're -- they're not going to claim  
25    any.



1 MR. CLEMENT: No, no. What -- no, no. What  
2 they won't concede -- we're not talking about  
3 retroactive liability. I'm talking about liability that  
4 predates when they clearly explained why they changed  
5 their position, which would be sometime in late 2016 as  
6 opposed to in 2011. So -- so in that sense, it does  
7 make a big difference.

8 Just a couple of other textual points,  
9 because I do think you actually don't even need to get  
10 to any kind of deference issue.

11 My friend on the other side -- I think we  
12 have a better reading of 203(j), if you want to look at  
13 it, because Congress specifically -- it's a definition  
14 session. Everything in there is what they deem things  
15 to mean. And then they deem "production" to mean one  
16 thing, and then they mean "engaged in production" to  
17 mean something broader.

18 But in all events, my friends concede that  
19 "engaged in" means taking part. Well, the service  
20 advisors take part in servicing, just like the partsmen  
21 take part in servicing.

22 Mr. Chief Justice, if you have any questions  
23 about what the service advisors do, a good place to look  
24 is the complaint. JA40, they tell you what they are --  
25 they evaluate the service and/or repair needs of the

1 vehicle, and they write up an estimate for the repair  
2 and services. That, to me, seems to be taking part in  
3 the servicing process. I'm not so sure that's not more  
4 integral to the servicing process than what the partsmen  
5 do.

6           The last point I'd like to make here is that  
7 there is a practical anomaly that will be created with  
8 siding with the other side, is that the best-paid people  
9 in the servicing departments will now be the only ones  
10 that are not exempt.

11           On average, the service advisors make about  
12 \$66,000 and -- a year. The average partsman makes  
13 \$51,000 a year. The average mechanic makes \$59,000 a  
14 year.

15           Now, I'd hate to be the person that has to  
16 go explain to the partsmen and the mechanics why it is  
17 that their better-paid service advisor colleagues are  
18 the only ones that aren't exempt from the FLSA overtime  
19 provisions and are going to get a windfall in litigation  
20 like this. That would be --

21           JUSTICE GINSBURG: Because they would be  
22 exempt to the extent they paid on commission which, as I  
23 understand it, most of them --

24           MR. CLEMENT: Yes, Justice Ginsburg. But to  
25 repeat my answer to you, there are people right now who

1 are service advisors who are not paid principally on a  
2 commission, and they like it that way. And the  
3 consequences of ruling in the other side's favor is that  
4 automobile dealerships are going to have to go to these  
5 people because FLSA provisions are not waivable. And  
6 they're going to have to say, look, I know you like it  
7 this way, but we've got the Supreme Court decision. We  
8 have to rejigger things. You get into this different  
9 7(i) exemption position, so you can no longer be paid  
10 the way you've been paid for the 30-plus years the way  
11 the Labor Department has been acquiescing in this, save  
12 the Ninth Circuit below, and find that service advisors  
13 are salesmen principally involved in servicing  
14 automobiles.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 The case is submitted.

18 (Whereupon, at 12:29 p.m., the case in the  
19 above-entitled matter was submitted.)

20

21

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23

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25



<b>behave</b> 55:24	<b>breadth</b> 4:12	<b>calipers</b> 26:20	27:2 36:4	<b>class</b> 4:7 38:21
<b>belief</b> 28:9	<b>breakdown</b> 5:3	<b>call</b> 8:9 33:25	37:21,25 55:22	39:1
<b>belt</b> 32:9,17,18	<b>Breyer</b> 6:11 7:6	35:3	56:12	<b>classic</b> 37:16
32:20,21	7:14,15,20	<b>called</b> 18:21	<b>changed</b> 18:18	<b>clause</b> 46:8
<b>benefit</b> 19:9	33:19,23 34:2	35:10	19:13 34:23	<b>cleaner</b> 38:19
<b>best</b> 9:8 50:14	34:12 35:22	<b>candid</b> 11:9,11	35:6 38:1	<b>clear</b> 3:13 14:7
<b>best-paid</b> 58:8	36:10 37:21	<b>canon</b> 20:1,3,9	40:22 41:1	16:19 17:6
<b>better</b> 10:6	38:7,10 44:17	50:1	45:20 51:6	19:21 24:20
15:24 16:12	52:9,20,23	<b>capacious</b> 25:16	57:4	34:11 42:9
17:23 18:9	53:10,24 54:1	<b>car</b> 11:13 13:14	<b>changes</b> 34:17	47:8
19:13 35:7	54:5 55:2	23:6,9 24:15	35:18,20 37:2	<b>clearer</b> 17:18
57:12	<b>brief</b> 14:22	27:20,23 30:17	51:20	<b>clearly</b> 14:1 57:4
<b>better-paid</b>	21:10 28:24	31:15 45:3	<b>changing</b> 16:15	<b>Clement</b> 1:16
58:17	29:15 33:13	48:25	55:25 56:7	2:3,13 3:5,6,8
<b>beyond</b> 44:1	36:18 37:3,8,9	<b>car's</b> 30:16	<b>chapter</b> 48:10	4:15,20 5:2,21
<b>Bibas</b> 1:18 2:6	40:7 44:13	<b>care</b> 35:17 36:14	<b>Chevron</b> 9:23	6:1,7 7:1,14,16
25:20,21,23	51:13	51:19 55:16	10:6,13 12:1	7:21 9:22,24
26:15 27:6	<b>bring</b> 8:22	<b>careful</b> 19:2,16	12:16,20 13:21	10:4,10 11:2
28:4 29:14,17	<b>broad</b> 43:1	<b>cars</b> 22:2 23:8	13:24 14:4,7,9	11:15,20 12:12
30:22 31:2,22	<b>broaden</b> 30:8	25:25 26:1,2,2	18:22 19:19	12:19 14:5,9
31:25 32:6,19	<b>broadens</b> 28:18	26:9,21 33:4,5	34:11	15:15,25 17:5
33:1,7,22 34:1	29:9	33:15	<b>Chief</b> 3:3,8	18:17 19:1
34:10 35:13	<b>broader</b> 28:23	<b>carving</b> 33:11	25:19,23 29:11	21:2,4,13,16
36:9,13 37:9	30:2 57:17	<b>case</b> 3:4 6:9 8:2	29:16 30:12,23	22:5,22 23:10
38:6,9,12 39:7	<b>brother</b> 48:6,12	10:19 13:24	32:15 40:3,11	23:13 26:13
39:18,21,25	<b>brought</b> 9:16	17:7 29:23	40:21 41:1,7	34:24 39:4
40:5,13,19,24	10:16	30:3 34:14	41:11,15,19,25	42:20 50:15
41:3,10,13,18	<b>build</b> 26:20	39:13 44:7	44:24 45:6,21	54:20,22,24
41:23 42:6,11	27:11	59:17,18	46:1 54:18,20	56:21 57:1
42:15,18,24	<b>bunch</b> 20:5,5	<b>cases</b> 9:18 10:9	54:24 57:22	58:24
44:12 45:5,8	<b>bushings</b> 27:12	10:11,15,16,18	59:16	<b>clerk</b> 43:24
45:18	<b>business</b> 15:9	10:20 12:3,4	<b>choice</b> 6:5	<b>client</b> 18:12
<b>big</b> 25:10 53:13	<b>busy</b> 8:8	17:16	<b>choosing</b> 44:6	<b>clients</b> 17:16
57:7		<b>cat</b> 20:8,13	<b>church</b> 44:16	18:17 19:3
<b>binding</b> 56:4	<b>C</b>	<b>categories</b> 33:12	<b>circuit</b> 12:5	<b>clipboard</b> 31:7
<b>bit</b> 8:16,17 11:3	<b>c</b> 2:1 3:1 13:2,13	<b>categorize</b> 42:17	17:16,17,20	<b>close</b> 24:24
49:13 50:19	50:24	<b>category</b> 33:5	18:1,8,12,15	28:10 43:21
<b>boats</b> 47:13	<b>c)1</b> 51:4	44:9 52:2	35:1 56:4,4,11	<b>closely</b> 27:19
<b>bookkeeping</b>	<b>c)4</b> 51:4,7,11	<b>cause</b> 14:9	59:12	29:21
38:22	<b>C1</b> 35:4	<b>certain</b> 8:22	<b>Circuits</b> 17:20	<b>closely-related</b>
<b>books</b> 18:14,15	<b>C3</b> 37:4,10	<b>certainly</b> 12:17	<b>circumstance</b>	29:1
<b>bottom</b> 37:10	<b>C4</b> 18:6 37:14	45:12	16:3,5 18:4	<b>clubs</b> 44:16
43:2	<b>C5</b> 14:21 16:2	<b>cetera</b> 32:10	<b>cite</b> 28:12,24	<b>clutch</b> 27:11,12
<b>boy</b> 18:5 19:4	37:3,4,11	<b>chance</b> 12:7	<b>cited</b> 28:20	27:12
<b>brake</b> 26:22	38:13	<b>chances</b> 19:17	<b>civil</b> 40:9	<b>coating</b> 48:25
<b>brakes</b> 32:10	<b>C6</b> 14:21 16:2	<b>change</b> 17:25	<b>claim</b> 6:8 40:19	<b>codify</b> 16:9
<b>branded</b> 49:1	37:3,10	18:10,13 19:16	56:24	19:12

<b>colleague</b> 53:3	36:25	<b>counsel</b> 25:19	<b>D</b> 1:16 2:3,13	<b>defer</b> 12:16,23
<b>colleagues</b> 34:19	<b>concede</b> 3:23	36:20 45:21	3:1,6 54:22	12:25
58:17	42:6 57:2,18	54:18 59:16	<b>D.C</b> 1:9,16,21	<b>deference</b> 10:14
<b>combination</b>	<b>conceded</b> 46:17	<b>count</b> 35:20 40:8	<b>damage</b> 56:14	10:22 12:21,22
3:25 20:10	56:23	54:16	<b>damages</b> 17:3,8	13:22,25 15:11
<b>come</b> 9:12 18:5	<b>conceding</b> 28:10	<b>counter</b> 48:25	18:24 39:5,24	15:13,21 16:13
18:5 19:23	<b>concern</b> 56:18	<b>couple</b> 5:6 28:4	40:12,18,19	18:22 34:11
20:1,25 24:8	<b>concerned</b> 46:19	57:8	41:12,20 42:4	50:10 57:10
24:24 32:12	<b>conduct</b> 39:6	<b>course</b> 5:15	42:7	<b>defined</b> 21:25
42:22	40:6	12:21 14:8	<b>darn</b> 17:23	22:3 48:15
<b>comes</b> 5:19	<b>confirm</b> 30:7	19:25 28:6	<b>date</b> 13:2 17:9	51:15
28:10 47:17	<b>conform</b> 18:1	34:11 35:25	36:20 39:10	<b>defines</b> 29:6
<b>comfortable</b>	<b>Congress</b> 6:18	<b>Court</b> 1:1,13 3:9	40:2	<b>definition</b> 14:12
44:4	7:7 21:23 22:7	5:16 15:9,17	<b>day</b> 7:19 8:10	28:8,24,25
<b>coming</b> 10:18	22:10,17 25:15	16:5 20:2	18:9 55:5,18	51:17,17,21
31:20	39:14 44:5,9	25:24 29:24	<b>days</b> 36:19	57:13
<b>commentators</b>	44:12 45:11,18	35:19 43:15	<b>deal</b> 43:14	<b>definitional</b> 48:7
37:11,22,23	46:6,19,22,25	44:21 46:2	<b>dealer</b> 11:13	<b>definitions</b>
<b>commenters</b>	47:6,14,20	53:8 54:25	<b>dealers</b> 11:7,21	28:20 29:4
37:15	49:16 57:13	59:7	18:8 21:9	<b>depart</b> 49:12
<b>comments</b> 37:4	<b>conjunction</b>	<b>Court's</b> 29:23	<b>dealership</b> 8:9	<b>department</b>
37:5,13 55:6,6	54:10	30:3,7	11:23 17:19	1:21 9:14 12:7
55:7	<b>connected</b> 27:19	<b>courts</b> 9:23 10:2	24:6,18 33:8	12:17,21 16:19
<b>commission</b>	<b>consequences</b>	13:6 16:10	49:8	19:10 24:7
4:19,23 5:8	4:17,21 59:3	19:17 45:13	<b>dealership's</b>	33:13,15,21
6:13,16,23	<b>considered</b> 14:1	<b>cover</b> 46:21	49:2	34:5 41:2,7,8
8:19,21 19:8	<b>consistent</b> 36:6	48:23	<b>dealerships</b> 8:6	41:20 42:3
44:8,11 46:15	36:12 38:2,3	<b>covered</b> 4:9	43:10 59:4	59:11
46:18 58:22	45:3	22:12 23:3,17	<b>dealerships'</b>	<b>Department's</b>
59:2	<b>construed</b> 50:9	25:2,14 27:24	8:12	12:3 18:3
<b>commissioned</b>	52:3,5	44:6 51:21	<b>dealing</b> 42:16	<b>departments</b>
5:1,11 21:15	<b>construing</b>	<b>covering</b> 26:14	<b>deals</b> 40:7	8:12 58:9
42:23	51:23	<b>covers</b> 15:1	<b>dealt</b> 39:14	<b>describe</b> 33:3
<b>commissions</b> 5:5	<b>context</b> 15:18	<b>created</b> 47:9	<b>decades</b> 9:13	35:9
43:8	19:24 44:19	58:7	<b>decide</b> 8:1	<b>despite</b> 54:3
<b>comparison</b>	<b>continue</b> 20:10	<b>criminal</b> 40:9	<b>decided</b> 22:1	<b>diagnose</b> 24:9
55:14	<b>contrasting</b>	<b>criteria</b> 44:5	47:6	<b>diagnosis</b> 31:13
<b>compensated</b>	29:25	<b>crystal</b> 19:21	<b>decision</b> 12:5,14	<b>diagnostic</b> 11:9
4:23 5:14 19:5	<b>convince</b> 9:19	<b>curiae</b> 1:22 2:10	12:16 14:14,15	11:23
<b>compensation</b>	<b>coordinating</b>	45:24	18:15 55:9	<b>dictionary</b> 21:18
42:25	37:17	<b>customer</b> 24:8,9	59:7	21:25 22:2
<b>complaint</b> 17:6	<b>core</b> 28:14	24:16 31:6,7,8	<b>deem</b> 57:14,15	23:4 28:8,20
21:5 39:7	<b>correct</b> 27:3	<b>customer-facing</b>	<b>deemed</b> 29:19	<b>difference</b> 31:3
57:24	32:6 36:14	27:17 31:5	48:11	46:24 51:3
<b>completely</b>	<b>cost</b> 32:1,3,9	<b>customers</b> 8:6	<b>deeming</b> 29:21	57:7
15:13 20:11	<b>costs</b> 11:20,22		<b>defense</b> 40:14,20	<b>different</b> 18:4
<b>component</b>	55:22,23		41:16,23 42:2	21:20,24 24:19
		<b>D</b>		

44:10 47:3 48:14 53:11,12 59:8 <b>differently</b> 7:3 21:25 <b>differs</b> 30:13 <b>direct</b> 26:8 <b>directly</b> 11:4 <b>dirty</b> 25:12 <b>disagree</b> 16:13 <b>discharge</b> 8:10 <b>discuss</b> 46:5,9 46:13 <b>discussed</b> 44:13 45:18 <b>discussion</b> 37:13 <b>disks</b> 27:12 <b>dispenses</b> 27:11 <b>dispensing</b> 26:25 27:7 <b>dispersion</b> 43:2 <b>dispute</b> 3:12 <b>disruptive</b> 9:5 9:11 <b>distributive</b> 49:17 50:2 <b>Division</b> 9:17 10:17,21 <b>doctor</b> 43:18,19 <b>doctrine</b> 18:21 <b>document</b> 35:4 <b>doing</b> 14:25 18:24,25 21:8 27:7,22 29:7 30:24 32:21 45:4,4 48:8 53:19 54:13 56:12 <b>dollars</b> 32:3 <b>door</b> 30:6 <b>dozens</b> 33:14 <b>drafting</b> 50:23 <b>drawing</b> 37:16 38:13,18,24 49:12,19,20 <b>drawn</b> 28:1,5 38:14	<b>driving</b> 31:9 <b>drum</b> 26:22 27:12 <b>due</b> 10:13 <b>dynamic</b> 17:14 17:15 <hr/> <b>E</b> <hr/> <b>E</b> 2:1 3:1,1 <b>earlier</b> 8:16 30:24 43:15 <b>early</b> 10:15 <b>easily</b> 54:9 <b>effect</b> 40:23,25 <b>effected</b> 14:2 <b>effective</b> 17:9 36:20,24 39:10 40:2 <b>either</b> 20:3 34:6 54:2 <b>eliminate</b> 47:6 <b>employed</b> 28:21 29:20 <b>employee</b> 5:20 5:22 29:10,19 33:3 36:1 44:9 <b>employees</b> 5:1 28:2 33:10,12 33:14 42:21,23 44:6,10 45:9 <b>employer</b> 5:24 <b>enacted</b> 46:6,6 46:22 <b>Encino</b> 1:3 3:4 <b>end-run</b> 26:7 <b>enforce</b> 41:5,9 41:21 42:4 <b>enforcement</b> 9:16 10:16 35:18 41:4 <b>engaged</b> 3:11,15 3:20 4:8 19:22 23:22,23 24:2 24:25 27:4,21 27:22 28:7,17 28:21,23,25 29:4,6,7,19,22	30:1,5 33:3,4,4 33:16 34:3,4 43:18,19 46:11 47:12,22 48:4 48:17,22 49:2 49:7,9,10,15 51:14,24 52:6 57:16,19 <b>engaging</b> 47:25 <b>engendered</b> 16:17 <b>engine</b> 26:22 <b>entirely</b> 13:10 <b>entitled</b> 13:18 50:10 <b>entries</b> 21:20 <b>entry-level</b> 43:5 <b>equal</b> 29:6 <b>equivalent</b> 35:3 <b>era</b> 12:16 <b>especially</b> 56:3 56:11 <b>ESQ</b> 1:16,18,20 2:3,6,9,13 <b>essence</b> 37:20 <b>essential</b> 48:9 <b>essentially</b> 3:23 17:1 46:17 49:9 <b>estimate</b> 24:12 31:24 32:7 58:1 <b>et</b> 1:6 32:10 <b>evaluate</b> 23:8 57:25 <b>events</b> 57:18 <b>everybody</b> 5:5 8:20 49:8 53:7 <b>exact</b> 15:18 <b>exactly</b> 14:1 23:20 30:25 36:7 <b>example</b> 4:1 6:11 55:24 <b>exception</b> 6:14 7:24 <b>exempt</b> 3:18	8:25 9:10 12:9 12:15 13:4 17:22 18:7 33:11 43:10,22 43:23 52:13 56:6 58:10,18 58:22 <b>exemption</b> 3:17 4:18 5:10 6:10 7:25 8:5 9:2 19:9 45:10 47:1,7,10 54:16 59:9 <b>exempts</b> 3:18 25:25 <b>exist</b> 4:7 <b>existed</b> 21:24 <b>existence</b> 21:12 21:19 <b>expand</b> 44:1 45:13 46:21 48:22 <b>expect</b> 51:1,1 <b>expert</b> 12:17,18 <b>experts</b> 31:19 <b>explain</b> 28:1 34:17 51:3 53:18,22 54:2 58:16 <b>explained</b> 13:3 48:12 49:23 53:19 57:4 <b>explaining</b> 55:21 <b>explains</b> 33:14 48:13 55:8 <b>explanation</b> 14:23 15:1 18:7 50:13,14 50:17,18 51:8 <b>explicit</b> 22:17 <b>explicitly</b> 36:4 <b>expressly</b> 26:16 45:19 <b>extant</b> 18:1 <b>extend</b> 48:22 <b>extent</b> 53:21	58:22 <b>extra</b> 15:20 <b>extreme</b> 36:3 <hr/> <b>F</b> <hr/> <b>facing</b> 17:10 35:24 <b>fact</b> 3:13 6:4 8:18 16:18 19:5 20:19 21:22,23 22:7 36:10 37:19 53:7 55:19 <b>fails</b> 26:5 <b>fair</b> 5:16 10:11 <b>fall</b> 46:20 52:1 <b>falls</b> 28:22 <b>familiar</b> 11:22 <b>fan</b> 32:17,18,20 32:21 <b>far</b> 16:13 30:5 34:7 38:4 <b>farm</b> 3:21,24 4:2 7:18 16:14 23:24 26:9 56:16 <b>Farmers</b> 30:3 48:12 <b>favor</b> 59:3 <b>favored</b> 10:7 37:5 <b>Federal</b> 9:19,21 <b>feel</b> 44:4 <b>field</b> 4:25 44:18 <b>Fifth</b> 17:20 18:8 18:12,14 56:4 56:11 <b>figure</b> 24:11 38:4 <b>figures</b> 43:3 <b>filed</b> 17:7 39:7 <b>final</b> 31:13 <b>finally</b> 46:13 <b>find</b> 53:6 59:12 <b>fine</b> 50:19 <b>finger</b> 30:25 36:7
--	---	--	--	--





17:4 35:7 40:23 53:23 <b>interpreted</b> 29:25 <b>interpreting</b> 29:24 <b>interpretive</b> 9:15 13:1,10 <b>invent</b> 10:14 <b>involved</b> 26:24 59:13 <b>irregular</b> 6:22 6:22 <b>Island</b> 35:17 36:14 55:15 <b>issue</b> 28:2 35:8 37:5 38:19 39:12,14,20,21 39:22 42:17 43:15 46:14 55:15 57:10 <b>issuing</b> 34:21	29:16 30:12,23 31:16,17,18,23 32:1,15,25 33:2,19,23 34:2,12 35:22 36:10 37:7,21 38:7,10 39:4 39:16,19,23 40:3,11,16,17 40:21 41:1,6,7 41:11,15,19,25 42:8,13,16,19 44:4,17,22,23 44:24,24 45:1 45:6,7,14,14 45:21 46:1 50:12,25 51:8 52:9,20,23 53:10,24 54:1 54:5,18,20,24 55:2 56:19,23 57:22 58:21,24 59:16 <b>justified</b> 55:23 <b>justifies</b> 55:9	<b>knew</b> 21:24 <b>know</b> 6:3,7 7:11 7:18 10:1 11:21,22 18:17 18:24 19:14 20:16 23:1 25:15 27:10 30:15 35:2,5 35:23 41:25 42:20 45:19 50:18 52:24 55:3,14 59:6 <b>knowing</b> 34:13	<b>liable</b> 41:12,20 42:4 <b>likes</b> 5:18 <b>limitations</b> 39:8 <b>line</b> 15:14 28:1,5 37:15 38:13,14 38:24 49:12,19 49:20,21 <b>lines</b> 38:18 <b>link</b> 50:5 <b>linked</b> 47:14 <b>listed</b> 26:10 <b>listen</b> 30:17 <b>listening</b> 10:20 <b>literal</b> 3:16 19:21 <b>litigated</b> 42:14 42:15 <b>litigating</b> 9:18 <b>litigation</b> 58:19 <b>little</b> 8:14,16,16 11:3 49:13 50:19 <b>LLC</b> 1:3 <b>logically</b> 49:24 49:25 <b>logo</b> 49:2 <b>long</b> 15:16 35:17 36:14 54:5 55:15 56:21 <b>longer</b> 13:10 52:12 54:16 59:9 <b>look</b> 12:24 14:20 29:18,23 30:17 30:20 32:18 47:11,16 55:4 55:17 57:12,23 59:6 <b>looked</b> 16:5 <b>looking</b> 50:17 <b>looks</b> 55:18,18 <b>lose</b> 20:9 <b>lot</b> 8:25 19:4 20:9 46:14 <b>lots</b> 33:8	<hr/> <b>M</b> <hr/> <b>Machinists'</b> 33:13 <b>main</b> 25:11 <b>maintained</b> 41:3 <b>maintaining</b> 28:8 <b>maintenance</b> 30:9 48:19 <b>making</b> 6:7 13:17 30:16 31:8 51:24 <b>manages</b> 28:16 <b>manual</b> 26:3 27:21 30:10 34:21 <b>manuals</b> 36:4 <b>massive</b> 56:14 <b>materials</b> 41:4 <b>matter</b> 1:12 8:24 46:11 47:19 51:7 59:19 <b>mean</b> 6:18 13:24 14:3 15:6,13 16:14,20 17:10 17:16 18:4 22:25 23:13 25:3,6 30:14 30:18 32:15 34:7 36:5 49:14 50:13 52:23 56:22 57:15,15,16,17 <b>meaning</b> 28:18 49:17 52:2 <b>means</b> 15:3 16:7 19:24 28:21,23 28:25 30:9 32:8 48:17 51:24 56:21 57:19 <b>meant</b> 16:6 22:2 49:16 <b>measure</b> 26:20 <b>measuring</b> 32:20
<hr/> <b>J</b> <hr/> <b>JA40</b> 57:24 <b>job</b> 5:23,23 27:9 45:17 50:19 <b>jobs</b> 43:5 <b>judge</b> 9:19 <b>judges</b> 10:19 <b>judgment</b> 14:2,2 <b>Justice</b> 1:21 3:3 3:8 4:15,21,24 5:2,20,22 6:2,3 6:11 7:6,14,15 7:20 9:22,24 10:1,5,10,23 11:11,19 12:6 12:13,19 13:23 14:8 15:5,22 16:20 18:16 19:1 20:18 21:2,3,11,14 21:18 22:6,14 22:22 23:4,11 25:19,23 26:12 27:1,18 29:11	<hr/> <b>K</b> <hr/> <b>Kagan</b> 13:23 14:8 15:5,22 16:20 18:16 19:1 31:23 39:4 50:12,25 51:8 <b>keep</b> 18:24 <b>KENNEDY</b> 31:16,18 32:1 39:16,19,23 40:17 42:8 <b>key</b> 49:1 50:1 <b>kind</b> 8:21 11:5 13:24 15:1 21:10 36:3 52:4 56:2 57:10 <b>kinds</b> 33:10,14 36:1 38:18 40:7	<hr/> <b>L</b> <hr/> <b>labor</b> 5:16 9:14 12:3,6,17,21 16:18 18:2 19:10 26:3 27:21 30:10 59:11 <b>lane</b> 11:18 <b>language</b> 13:13 22:12 29:9,22 34:8,9 <b>large</b> 52:11 <b>late</b> 57:5 <b>lathes</b> 26:22 <b>Laughter</b> 31:21 51:9 <b>law</b> 5:24 29:23 34:16 36:21 53:7 <b>lawyer</b> 19:2 <b>lawyers</b> 10:21 <b>leasing</b> 33:15 <b>leave</b> 8:16 45:16 <b>leaves</b> 33:9 <b>left</b> 26:13 55:3 <b>legislative</b> 47:8 <b>let's</b> 38:21 52:14 <b>letter</b> 12:9,10 38:14 40:1 54:10,12 <b>liability</b> 32:22 56:15,22 57:3 57:3		

<p><b>mechanic</b> 3:19 8:4 10:25,25 21:21 22:4 23:22 27:3,10 27:13,16 30:19 31:6,14 32:5 32:11,12 49:6 51:15 58:13 <b>mechanic's</b> 27:8 <b>mechanic-faci...</b> 27:17 <b>mechanics</b> 6:19 7:3,7,23 8:14 8:20 20:21 22:20,25 23:8 26:1,25 37:16 44:17 45:16 46:7 47:2,7,16 47:18 49:18,23 52:13 58:16 <b>mechanics'</b> 26:18 <b>meet</b> 45:9 <b>members</b> 36:23 <b>men</b> 26:19 <b>mentioned</b> 20:22 <b>merely</b> 26:3 <b>merits</b> 12:20 <b>met</b> 44:16 <b>methods</b> 42:25 <b>middle</b> 6:20 <b>mind</b> 10:22 19:13 25:6 34:17,24 35:6 52:10 <b>minds</b> 18:19 <b>minimize</b> 11:25 <b>minimum</b> 9:2 43:4,12 <b>minimum-wage</b> 8:2 <b>minute</b> 4:7 <b>minutes</b> 54:21 <b>missed</b> 31:16,18 <b>mistake</b> 50:23 54:6</p>	<p><b>mix</b> 21:16 <b>modern</b> 24:18 <b>modifications</b> 51:19 <b>modified</b> 22:8 <b>moment</b> 20:19 <b>Monday</b> 8:8 <b>money</b> 55:8 <b>month</b> 36:24 <b>morning</b> 7:9 8:9 <b>Motorcars</b> 1:3 3:4 <b>multiple</b> 4:12</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N</b> 2:1,1 3:1 <b>nails</b> 25:8,12 <b>name</b> 3:14 <b>named</b> 26:17 <b>narrow</b> 18:4 25:7,16 <b>narrower</b> 29:25 45:10 <b>National</b> 11:6 21:9 <b>natural</b> 48:3 <b>nature</b> 44:10 <b>Navarro</b> 1:6 3:4 <b>necessary</b> 49:12 53:16 54:8 <b>need</b> 8:5,7 22:10 22:17 30:20 32:8,12 36:24 57:9 <b>needs</b> 27:10 57:25 <b>NELA</b> 38:13,24 <b>never</b> 15:9 42:11 53:4 <b>new</b> 14:12 18:6 18:6,9 32:8 36:23 39:10 40:2 <b>night</b> 6:21 55:18 <b>Ninth</b> 17:17 59:12 <b>noise</b> 30:16,18</p>	<p>31:9 32:8 <b>non-mechanic</b> 11:13 <b>non-warranty</b> 38:15 <b>nonmechanics</b> 11:17 <b>nonresponsive</b> 17:14 <b>nonwarranty</b> 38:23 54:17 <b>normal</b> 48:14,16 <b>normally</b> 43:20 <b>noted</b> 39:9 <b>noteworthy</b> 36:17 <b>notice</b> 14:17 <b>notice-and-co...</b> 13:9,21,25 14:11 16:8 36:15 38:20 40:24 50:9 51:18 55:16 <b>notice-and-co...</b> 14:3 <b>noting</b> 36:4 <b>notwithstandi...</b> 6:10 18:13,14 <b>noun</b> 20:14,14 50:6 <b>noun-verb</b> 3:25 <b>noun/verb</b> 20:10 <b>nouns</b> 3:24 20:5 20:15 <b>NPR</b> 19:11 <b>number</b> 5:4 36:21 <b>numbers</b> 5:13 <b>nurse</b> 43:19,21 43:21,23,25</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O</b> 2:1 3:1 <b>O.R</b> 43:21,23 <b>objects</b> 26:8 <b>obtain</b> 27:2 <b>obtaining</b> 51:25</p>	<p><b>occupation</b> 30:2 <b>occupational</b> 22:21 23:11 <b>Occupations</b> 21:19,25 <b>off-hours</b> 44:15 <b>off-site</b> 44:20 <b>offer</b> 43:16 55:13 <b>office</b> 44:3 55:3 <b>oh</b> 9:24 15:10 35:6 <b>okay</b> 17:20 29:14 36:9 56:19 <b>old</b> 17:2 <b>older</b> 10:8,11 <b>omitted</b> 22:23 <b>Once</b> 24:11 <b>one-and-a-half</b> 43:4,13 <b>ones</b> 43:7,10 58:9,18 <b>open</b> 8:12 32:18 39:20,22 <b>opens</b> 30:5 <b>operates</b> 43:21 <b>operating</b> 43:18 43:20 44:1 <b>operations</b> 17:25 <b>opinion</b> 12:10 35:16 38:14 40:1 54:10,12 <b>opposed</b> 22:19 57:6 <b>opposite</b> 29:3 34:22 35:1 42:5 52:16 <b>oral</b> 1:12 2:2,5,8 3:6 25:21 45:23 <b>ordering</b> 11:24 <b>orders</b> 51:25 <b>ordinary</b> 28:18 <b>original</b> 11:23 45:11</p>	<p><b>Originally</b> 12:7 <b>ought</b> 15:2 18:12 35:23 <b>outliers</b> 5:6 <b>outside</b> 11:17 46:20 <b>overhaul</b> 32:13 <b>overnight</b> 17:25 <b>overtime</b> 3:17 5:25 6:6 7:24 8:1 9:1,10 44:20 58:18</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>P</b> 3:1 <b>p.m</b> 59:18 <b>Pa</b> 1:18 <b>page</b> 2:2 28:9 29:15 37:3,14 38:13 46:23 47:12 51:12 <b>pages</b> 14:21 37:3 37:8,10,12,14 <b>paid</b> 5:8,18 6:16 6:23 7:4 8:18 9:1,2,8 21:14 43:9 46:18 58:22 59:1,9 59:10 <b>paperwork</b> 26:4 30:24 43:24 <b>paragraph</b> 14:17,22 16:2 16:17 37:2 55:8 <b>parrot</b> 15:19 <b>parroting</b> 15:22 <b>part</b> 9:7 11:24 24:3,13,13,14 24:15,21 25:13 27:3 28:13,21 33:8 36:5,6 48:2,18 50:13 57:19,20,21 58:2 <b>partially</b> 8:19 <b>particular</b> 16:25</p>
--	--	---	---	--

<p>32:16  <b>particularly</b>                  13:5 16:3  <b>parts</b> 20:20                  22:16 26:19,21                  26:25 27:2,3,7                  31:12 33:15  <b>partsman</b> 3:19                  23:22 27:10,14                  27:21 51:15                  58:12  <b>partsmen</b> 7:3,7                  7:23 8:4,13,20                  20:20 21:21                  22:2,15,18,20                  22:23,25 25:11                  25:11 26:1,14                  26:19 31:4                  43:15,16 44:17                  45:4,16 46:7                  47:2,7,15,17                  49:18,22,22                  57:20 58:4,16  <b>party</b> 10:18  <b>passing</b> 51:10                  52:7 55:12  <b>PAUL</b> 1:16 2:3                  2:13 3:6 54:22  <b>pay</b> 5:24  <b>penalties</b> 40:9,9  <b>people</b> 4:7,18                  6:12,22 8:3,16                  8:25 11:16                  12:8,15 16:21                  24:19 30:14,15                  33:7 37:24                  38:21 42:17,22                  43:5,11 44:16                  46:15,18,19,20                  48:22 52:14                  56:3 58:8,25                  59:5  <b>people's</b> 44:15  <b>percent</b> 8:11                  43:2  <b>percentage</b> 4:25  <b>perfect</b> 52:7</p>	<p><b>perfectly</b> 36:12                  50:14  <b>period</b> 39:8 41:5  <b>perplexing</b>                  50:19  <b>person</b> 24:7,7                  44:1 58:15  <b>personally</b> 25:17  <b>persons</b> 33:25  <b>persuasive</b> 13:5  <b>Petitioner</b> 1:4,17                  2:4,14 3:7                  28:10,16,22                  29:9 33:9                  43:22 46:14,16                  47:22 48:5,8                  54:23  <b>Petitioner's</b> 26:5                  26:7 29:5,15                  43:16 46:9                  48:21 49:9  <b>Petitioners</b>                  36:21  <b>Petitioners'</b>                  36:22  <b>Philadelphia</b>                  1:18  <b>phone</b> 33:20,23  <b>phrase</b> 28:17                  30:1,2  <b>phrasing</b> 50:2  <b>physically</b> 27:6                  27:22  <b>pick</b> 26:12  <b>place</b> 30:13,13                  35:21 57:23  <b>plain</b> 3:16 19:23                  46:12  <b>plastic</b> 47:24                  48:1  <b>plates</b> 27:12  <b>plead</b> 40:14  <b>pleaded</b> 42:11  <b>please</b> 3:9 25:24                  33:21 46:2                  54:25  <b>pled</b> 39:12,22</p>	<p><b>pluck</b> 9:9  <b>point</b> 10:8 11:4                  12:2 15:4 16:4                  34:15 35:16,22                  37:11,15,22,23                  42:8 50:15                  52:11 58:6  <b>pointed</b> 36:18  <b>points</b> 13:17                  17:5 23:14                  38:13 46:3                  55:1 57:8  <b>policies</b> 53:12  <b>policy</b> 19:16                  46:15  <b>Portal-to-Portal</b>                  17:1,11 39:11                  40:13 41:13                  42:2  <b>position</b> 4:1,4,16                  10:9 12:4 16:6                  16:15 19:14                  25:4 34:20                  35:16,18,20                  36:5 37:2,6                  41:21,23 42:9                  43:17 53:17                  55:11,25 57:5                  59:9  <b>positions</b> 21:24  <b>possible</b> 18:23  <b>possibly</b> 56:13  <b>post</b> 39:24,25  <b>post-2011</b> 39:24                  40:6  <b>post-Chevron</b>                  12:4  <b>potential</b> 36:16                  55:14  <b>practical</b> 8:24                  10:23 36:2                  53:7 58:7  <b>practices</b> 18:10                  18:13  <b>pre-2011</b> 39:5                  39:24 42:7  <b>preamble</b> 14:17</p>	<p>14:21 55:4,21  <b>preceded</b> 37:13  <b>precedent</b> 17:21                  18:2 30:7 56:5  <b>precisely</b> 29:3  <b>preclude</b> 41:24  <b>predates</b> 57:4  <b>predominates</b>                  35:11  <b>prefer</b> 6:6  <b>preliminary</b>                  32:7  <b>preserved</b> 47:10  <b>presumably</b>                  38:16  <b>pretty</b> 8:7 17:15  <b>preventing</b>                  53:13  <b>previous</b> 37:14  <b>previously</b> 13:22                  38:16  <b>primarily</b> 3:19                  4:8 5:6,14,18                  19:22 23:23                  24:2,25 46:10                  47:12 51:14  <b>principal</b> 15:18  <b>principally</b> 3:10                  3:15 4:21                  14:24 59:1,13  <b>principles</b> 56:17                  56:17  <b>prior</b> 41:9 47:1                  51:4 53:17,23  <b>private</b> 10:18  <b>probably</b> 19:2                  19:15 34:18  <b>problem</b> 24:10                  24:11 25:10                  35:8,9,25 36:2                  52:10,18 53:1                  53:10  <b>problems</b> 37:16                  38:13,18 44:21  <b>process</b> 13:8                  16:11 24:4,21                  25:1,5,14</p>	<p>28:13 29:1,20                  30:2,6,19                  31:18 33:9                  36:15 47:23,23                  48:3,23 49:10                  58:3,4  <b>processes</b> 29:21  <b>produced</b> 29:4,6  <b>producing</b> 29:5  <b>production</b> 29:6                  29:20 30:1,3                  48:9,9,11,14                  48:15 57:15,16  <b>professor's</b>                  36:18  <b>promotes</b> 49:4  <b>promulgated</b>                  36:19  <b>proposal</b> 16:9  <b>prospectively</b>                  16:25  <b>protected</b> 5:24  <b>protection</b> 53:12                  53:14 56:14  <b>prove</b> 40:15  <b>proved</b> 42:12  <b>proven</b> 39:12  <b>provide</b> 22:16                  29:4  <b>providing</b> 48:18  <b>proving</b> 30:5  <b>provision</b> 10:3                  13:2 14:15                  16:25 17:12                  28:24 29:24,25                  39:17 44:7                  51:24 52:5  <b>provisions</b> 8:1,2                  58:19 59:5  <b>publicizing</b>                  36:22  <b>pulled</b> 29:2  <b>punished</b> 16:22  <b>purposes</b> 7:23                  40:8 45:11                  48:10  <b>put</b> 11:6 20:13</p>
---	--	---	---	---

24:14 30:25 36:7 <b>puts</b> 32:4 <b>putting</b> 19:8 41:15	54:10 57:12 <b>real</b> 4:17 11:22 52:20 <b>real-world</b> 4:21 6:9 <b>realistic</b> 3:12 <b>really</b> 8:5 12:25 13:17,18 14:18 15:1,20 17:24 19:5,16,16,19 34:7 45:2 46:13,18 48:21 50:25 51:16 52:25 53:5 56:9 <b>reason</b> 7:22 8:3 9:3 10:13 17:13 34:25,25 35:3,5,24 38:5 43:25 45:11,12 46:20 51:6 52:12,14,16 56:3,6 <b>reasoning</b> 37:10 <b>reasons</b> 15:12 26:6 28:19 32:22 <b>rebuttal</b> 2:12 54:22 55:1 <b>recall</b> 21:4 <b>recognition</b> 13:15 50:2 <b>recognize</b> 10:15 53:17 <b>recognized</b> 15:18 <b>recognizing</b> 12:2 <b>recommendati...</b> 32:2 <b>record</b> 11:3 50:22 <b>recording</b> 31:10 <b>records</b> 31:7 <b>red</b> 14:22 37:9 <b>Reddendo</b> 20:1 20:3,8 50:1 <b>redid</b> 51:4	<b>redone</b> 27:9 <b>reenacted</b> 51:18 <b>refacers</b> 26:23 <b>reference</b> 37:12 38:25 <b>referring</b> 38:25 <b>regs</b> 13:10,19,20 <b>regular</b> 6:15,15 8:7 44:20 <b>regulation</b> 9:15 17:9 39:11,15 40:2,5,10,22 40:22,25 41:4 53:4,5 <b>rejected</b> 12:3 <b>rejigger</b> 59:8 <b>relate</b> 55:7 <b>related</b> 29:20,21 34:9 <b>relays</b> 31:14 <b>reliably</b> 5:3 <b>reliance</b> 16:16 16:21,22 35:10 35:16 36:17 39:17 40:8,15 55:10,19 56:9 <b>relied</b> 17:2 <b>rely</b> 48:6 49:22 <b>relying</b> 13:12 16:22 <b>remainder</b> 27:14 <b>remand</b> 39:13 39:20,22 <b>remanufacture</b> 26:21 <b>remind</b> 14:6 <b>removed</b> 13:9 <b>rendering</b> 31:12 <b>reorder</b> 20:11 <b>reorienting</b> 19:7 <b>repair</b> 57:25 58:1 <b>repairing</b> 28:8 28:11,11 48:18 <b>repairs</b> 27:19 30:9	<b>repeal</b> 45:12 <b>repeat</b> 58:25 <b>rephrase</b> 7:2 <b>replace</b> 32:3 <b>reply</b> 28:9,24 29:15 <b>reprint</b> 51:5 <b>reproduced</b> 51:12 <b>require</b> 38:22 <b>requirement</b> 54:8 <b>requires</b> 26:3 32:23 50:5 <b>requisitioning</b> 26:25 <b>rescinded</b> 41:4 <b>reserve</b> 25:18 <b>Reservoir</b> 30:4 48:13 <b>respect</b> 4:5 8:13 8:14 10:13 17:3 18:20 <b>Respondents</b> 1:7 1:19,22 2:7,11 25:22 45:25 49:13 <b>response</b> 44:21 <b>responses</b> 28:4 <b>responsible</b> 34:13 <b>responsive</b> 6:8 7:17 <b>restrict</b> 45:12 <b>restructured</b> 43:8 <b>result</b> 54:14 <b>rethink</b> 12:7,14 <b>retroactive</b> 39:15 40:4 56:14,22 57:3 <b>retroactively</b> 16:24 <b>retroactivity</b> 56:18 <b>reversal</b> 53:4 <b>revisit</b> 38:19	<b>revisited</b> 55:15 <b>right</b> 4:13,22 7:20 9:19 12:14 18:2 31:2 34:19,24 41:17,18 44:2 49:14 52:19 53:2 54:4 55:2 56:10 58:25 <b>right-hand</b> 26:19 <b>rights</b> 13:1 <b>risk</b> 18:18 19:3 <b>ROBERTS</b> 3:3 25:19 29:11,16 30:12,23 32:15 40:3,11,21 41:1,7,11,15 41:19,25 44:24 45:6,21 54:18 54:20 59:16 <b>role</b> 27:17,17 31:5 <b>room</b> 44:1 <b>rotate</b> 21:7 <b>rule</b> 16:8,10,24 34:15,16 36:19 36:23 50:4 <b>rulemaking</b> 13:9 13:21,25 14:12 16:8 17:22 36:15 37:1 38:20 50:9 51:19 55:17 <b>rules</b> 5:16 9:1,10 14:18,18 35:19 <b>ruling</b> 43:6 59:3 <b>rush</b> 8:10
<hr/> <b>Q</b> <hr/> <b>qualify</b> 5:10 7:5 43:7 <b>question</b> 5:9 6:25 7:1 10:24 14:1 16:20,23 20:19 23:14 27:20 33:1 34:8,13 36:8 36:25 37:25 45:7 50:6 52:20 <b>questions</b> 31:4 35:14 43:14 46:4 57:22 <b>quibble</b> 15:16 25:3 <b>quick</b> 55:17 <b>quickly</b> 53:13 <b>quite</b> 10:7 24:20 36:17 47:8 48:14 53:2 <b>quotation</b> 29:5 <b>quote</b> 29:9,17 48:13	<hr/> <b>R</b> <hr/> <b>R</b> 3:1 <b>raised</b> 43:15 <b>range</b> 42:24 43:1 <b>rationale</b> 13:4 <b>read</b> 11:3 14:24 15:7,8,23 21:21,22,23 22:6,7 25:4 34:6,25 50:3 52:24 53:20 <b>reading</b> 16:2 19:21 20:4 29:12 48:21			<hr/> <b>S</b> <hr/> <b>S</b> 2:1 3:1 <b>salaried</b> 5:1,6,23 7:4 21:15 <b>salaries</b> 43:1 <b>salary</b> 5:14,18 19:6 <b>sale</b> 49:4

<p><b>sales</b> 8:21,22 10:24 11:8 22:4 25:1 28:14 33:15 51:13,25,25 <b>salesman</b> 13:14 19:22 23:16,21 24:25 44:22 47:12 49:25 51:14,17,18,23 <b>salesmen</b> 4:6,8 7:13 13:13 21:20 22:1,8 25:25 44:13 45:4,15 46:7 46:16 47:2,10 47:15 48:23,24 48:25 49:15,16 49:18,20 51:21 52:2,3,5 59:13 <b>salespeople</b> 3:10 3:13 12:8 <b>salesperson</b> 3:19 22:2 44:8 <b>salt</b> 10:12 <b>Saturday</b> 8:11 8:17 <b>Saturdays</b> 8:12 <b>save</b> 59:11 <b>saying</b> 7:2 15:9 15:23 24:24 28:17 32:17 34:22 35:11 36:14 39:1 41:16 43:22 <b>says</b> 13:13,16 14:24 15:10 17:1,21,23 18:2 20:4,9 23:7,21 28:22 29:3,8,10,19 31:8 35:1 37:11 42:3 43:19 47:12,22 48:10 51:13 53:3 <b>scales</b> 18:23</p>	<p><b>scalpels</b> 44:2 <b>scares</b> 11:12 <b>school</b> 10:25 <b>second</b> 15:4 16:1 16:4 20:14,15 23:18 26:11 46:9 47:21 <b>Secondly</b> 26:18 28:7 <b>secretaries</b> 6:17 <b>secretary</b> 6:24 <b>section</b> 29:8,18 30:7 48:6,7 51:22 <b>sections</b> 55:21 <b>see</b> 6:25 16:17 34:23 46:23,24 52:25 54:9 <b>seek</b> 17:8 <b>seeking</b> 39:5 40:12,17 <b>seen</b> 43:3 48:2 <b>segue</b> 16:4 <b>sell</b> 6:13 25:25 26:2 46:16 48:24,24,25 49:4 <b>selling</b> 3:20 4:3 4:5 22:9 23:6 23:23 26:6,8,9 33:4,6,16,17 34:4 37:20 38:17 39:2,3 44:13,15 46:10 47:13,15,21,22 47:24,24 48:1 49:2,9,11,15 52:6 54:13,14 54:16,17 <b>sells</b> 13:14 <b>Senate</b> 45:18 <b>Senator</b> 7:18 <b>send</b> 56:20 <b>sense</b> 8:25 23:7 25:16,16 31:10 43:19 48:14,15 48:16 49:3</p>	<p>52:4 56:16 57:6 <b>sentence</b> 37:23 <b>separate</b> 4:18 29:4 <b>separated</b> 20:5,6 46:7 <b>separately</b> 22:11 <b>September</b> 17:7 39:8,9 <b>serious</b> 40:7 <b>service</b> 3:10,12 3:14 4:22,25 5:7,17 6:4,13 7:13,22 8:4,5,7 8:12 9:6 13:3,4 13:7,11 14:16 17:21 19:6 20:24 21:12,20 22:11,15,19 23:3,7,19,22 24:1,7,20 26:1 26:1,2,16 28:14 31:3,5 33:13,24 34:1 34:2 43:2 44:11 48:19 49:21 52:1,14 54:13,15 56:5 57:19,23,25 58:11,17 59:1 59:12 <b>servicers</b> 37:17 <b>services</b> 26:6,9 33:16,17 46:10 54:17 58:2 <b>servicing</b> 3:11 3:15,20 4:2,8 11:17 14:13 19:23 22:9 23:9,23 24:2,3 24:21,25 25:7 25:13,14,15,17 26:7 27:4,25 28:11,18 30:6 30:8,9 33:5,6 33:18,20 34:3</p>	<p>34:4 37:20 39:2,3 46:11 47:16,17,21,23 47:24 48:3,4 48:17,22 49:7 49:10,11,15,24 49:25 57:20,21 58:3,4,9 59:13 <b>session</b> 57:14 <b>set</b> 35:19 <b>setting</b> 14:3 <b>seven</b> 37:4 <b>SG's</b> 55:2 <b>share</b> 8:21,23 <b>shift</b> 20:25 53:13 <b>shop</b> 32:22 <b>show</b> 36:11 55:17 <b>shows</b> 23:25 47:14,19 <b>shrunk</b> 45:10 <b>side</b> 3:22 24:22 57:11 58:8 <b>side's</b> 59:3 <b>siding</b> 58:8 <b>significance</b> 4:16 <b>significant</b> 5:4 5:13 <b>signs</b> 43:25 <b>similar</b> 30:9 <b>simple</b> 53:3 <b>simpler</b> 38:19 <b>simply</b> 19:14 25:4 49:6 55:7 <b>single</b> 9:19 14:17 47:1 <b>sitting</b> 10:20 <b>situation</b> 40:14 52:15 <b>sleep</b> 20:9 <b>slightly</b> 7:2 <b>small</b> 24:6 <b>Smiley</b> 35:19 <b>sold</b> 38:16 <b>Solicitor</b> 1:20 <b>somebody</b> 13:14</p>	<p><b>sorry</b> 29:11 37:15 40:3 44:24 <b>sort</b> 8:7 <b>Sotomayor</b> 5:20 5:22 6:2,3 9:22 9:25 10:1,5,10 10:23 11:11,19 21:11,14,18 22:6,14,22 23:4,11 37:7 44:22 45:7,14 56:19,23 <b>sound</b> 32:16 <b>speaks</b> 43:17 <b>special</b> 6:19 7:10 48:15 <b>specially</b> 10:24 <b>specific</b> 5:3 13:2 50:16 <b>specifically</b> 13:7 13:12 14:16 57:13 <b>squealing</b> 31:8 32:8,16 <b>stability</b> 5:19 <b>stage</b> 39:13 <b>Standard</b> 5:16 <b>stark</b> 55:24 <b>started</b> 16:9 <b>starting</b> 55:1 <b>State</b> 16:14 56:16 <b>States</b> 1:1,13,22 2:10 45:24 <b>statistical</b> 5:3 <b>statute</b> 3:18 4:1 4:10,11,13 7:12 9:20 13:15 14:6,25 15:3,8,8,10,11 15:20,23,23 16:6 19:20,21 19:24 20:4,11 20:12 22:12 23:20,20 24:24 25:5,6 26:17</p>
---	--	---	---	---

28:15,17 38:2 38:3 41:2 43:17,19 46:5 46:6,22 48:10 49:13,14 50:3 50:9,24 52:3 53:20 <b>statute's</b> 26:8 <b>statutes</b> 28:12 <b>statutory</b> 3:17 3:23 51:23 <b>STEPHANOS</b> 1:18 2:6 25:21 <b>strong</b> 6:8 11:4 <b>structuring</b> 43:11 <b>studiously</b> 12:22 <b>stuff</b> 11:25 <b>subject</b> 17:3 18:24 29:7 <b>submissions</b> 20:23 <b>submit</b> 4:11 <b>submitted</b> 59:17 59:19 <b>subsection</b> 29:2 46:8 47:9,11 50:24 <b>succeed</b> 42:1 <b>sudden</b> 9:6 13:19 <b>suddenly</b> 53:8 <b>suggest</b> 50:4 <b>suggested</b> 39:5 48:6 <b>suggesting</b> 53:22 <b>suggestion</b> 48:8 <b>suggests</b> 3:14 4:12 29:5 <b>sum</b> 14:23 <b>supply</b> 27:3 <b>supporting</b> 1:22 2:11 10:9 45:25 <b>Suppose</b> 33:19 <b>supposed</b> 17:24 17:25 56:11	<b>Supreme</b> 1:1,13 59:7 <b>sure</b> 10:8 19:6 23:1 37:24 52:4 56:21 58:3 <b>surgery</b> 47:25 48:1 <b>surprise</b> 36:16 <b>suspect</b> 18:16 30:13 <b>suspicion</b> 11:4 <b>sweeps</b> 29:21 <b>symptoms</b> 31:8 <b>sync</b> 27:8 <b>system</b> 49:7 <b>system-wide</b> 21:10	<b>terms</b> 3:16 17:9 19:23 <b>text</b> 46:5 <b>textual</b> 4:12 46:11 47:19 57:8 <b>Thank</b> 25:19 29:16 45:21 54:11,18,19 59:15,16 <b>theory</b> 28:13 54:13 <b>they'd</b> 12:23 44:15 <b>thing</b> 7:24 14:20 20:8 23:18 26:6 31:23 35:20 56:1 57:16 <b>things</b> 14:5,9 33:8 48:8 49:1 53:6 56:12 57:14 59:8 <b>think</b> 3:11 5:7 5:15 7:1,17,21 9:11,21 10:10 10:14,19 11:12 11:16 12:1,20 12:25 13:5,14 13:18 14:23,25 15:2,10,11,16 15:21,24 16:1 16:11,12,14,21 17:13,17,19,23 18:9 19:20,20 21:4,8,16 22:3 22:10,23,23 23:1,15,16,18 23:20,25 24:5 24:22 25:15 32:8 34:6,11 34:16 35:1,6 36:13 38:2,3,7 38:8,25 41:12 41:19 42:3 43:20 46:12 47:19 48:5	49:13 52:11,11 53:14,16,25 54:1,6,7,8 55:3 55:11 56:6,10 56:16 57:9,11 <b>thinking</b> 7:18 20:12 <b>thought</b> 6:18 7:7 10:5 22:14 23:16 34:18,24 35:8 47:25 53:7 <b>three</b> 3:23 9:8 10:12 20:15 24:19 26:5,8 28:19 33:10 46:3 <b>three-plus</b> 9:13 <b>threshold</b> 42:17 <b>throw</b> 20:16 <b>thumb</b> 18:22 <b>time</b> 11:12 12:15 15:7 18:11 25:18 32:2 36:11 38:20 41:5 47:17 <b>times</b> 8:9 43:4 43:13 <b>timing</b> 32:8 <b>today</b> 7:21 <b>told</b> 19:10,12 <b>top</b> 47:11 <b>total</b> 14:23 <b>touching</b> 32:20 <b>track</b> 44:19 <b>tractor</b> 6:21 7:9 <b>traditional</b> 23:7 <b>trailers</b> 47:4,7 47:13 <b>trained</b> 10:24 11:1 <b>training</b> 11:7,8,8 <b>transmission</b> 27:8,9,15 <b>travel</b> 45:15 <b>treat</b> 7:22 38:21 52:17	<b>treated</b> 6:17,24 7:3 55:20 <b>treatment</b> 7:10 <b>trim</b> 17:11 <b>trouble</b> 19:7 <b>truck</b> 3:20 <b>trucks</b> 3:24 4:2 23:24 26:9 <b>true</b> 7:11,12 37:25 44:23 45:1 <b>try</b> 7:2 11:25 19:1 23:1 52:25 <b>trying</b> 6:8 30:23 30:25 47:20 <b>turn</b> 35:14 <b>two</b> 10:12 12:2 13:17 14:5,9 17:5 20:15,16 23:14 37:3,12 <b>two-year</b> 39:8 <b>type</b> 27:21 <b>types</b> 47:3
	<b>T</b>			
	<b>T</b> 2:1,1 <b>take</b> 4:1,4 5:9 6:4,15 9:6 10:1 10:11,12 11:12 13:18 24:14 27:8 35:14 36:24 42:5 44:7 51:19 57:20,21 <b>takes</b> 43:25 <b>talk</b> 24:16 <b>talking</b> 6:12 7:25 42:21 43:1,9,11 44:25 46:18 48:16 57:2,3 <b>team</b> 8:4 9:7 24:20 <b>tell</b> 19:2,15,18 24:16 29:12 57:24 <b>telling</b> 11:13 48:5 <b>tension</b> 32:20 <b>term</b> 22:8,21,21 23:3 25:15 51:23			
			<b>U</b>	
			<b>U.S</b> 30:4 <b>U.S.C</b> 29:14,18 39:18 <b>unadministra...</b> 15:14,17 <b>understand</b> 6:1 11:15 13:23 43:20 58:23 <b>understandably</b> 9:12 <b>understanding</b> 30:22 31:2 32:24 41:2 44:12 <b>understood</b> 44:5 49:24,25 53:20 <b>unequivocally</b> 10:9 <b>unfair</b> 36:16 <b>unique</b> 16:3,4 17:15	

<b>uniquely</b> 4:5	<b>warranties</b>	24:9 27:8	<b>year</b> 43:5 58:12	<b>207(i)</b> 5:10 43:7
<b>unit</b> 33:12	48:24	31:13 32:22	58:13,14	43:10 46:20
<b>United</b> 1:1,13,22	<b>warranty</b> 38:15	38:15,15,16,23	<b>years</b> 16:18	<b>213(b)(1)(A)</b>
2:10 45:24	38:16,22 54:15	44:18,20 51:14	19:11 34:23	46:21
<b>units</b> 27:11	<b>Washington</b> 1:9	51:16 56:17	36:4 52:18	<b>22,000</b> 43:5
<b>universe</b> 42:20	1:16,21	<b>workday</b> 21:8	54:3 55:20	<b>25</b> 2:7
45:9	<b>wasn't</b> 34:4	<b>workers</b> 19:4	59:10	<b>259</b> 39:18
<b>unnatural</b> 24:1	<b>way</b> 4:13 5:15	<b>working</b> 4:18		<b>29</b> 29:14,18
<b>use</b> 15:14 22:1	7:22 8:19	8:14 20:24	<b>Z</b>	39:18
22:20 23:5,6,9	10:25 15:7,8	24:19 26:18		<b>2A</b> 46:23
26:20,22 35:2	15:23,24 16:9	27:13 44:8,11	<b>0</b>	
35:9 50:5	16:19 20:12	49:23 54:15		<b>3</b>
<b>uses</b> 28:23	21:15 22:3	<b>works</b> 8:19	<b>1</b>	<b>3</b> 2:4 51:5
<b>utensils</b> 44:2	24:5 25:4	<b>world's</b> 50:14	<b>1</b> 13:13	<b>3:00</b> 7:8
	28:11,16 34:6	<b>worry</b> 17:2	<b>10</b> 43:2	<b>30</b> 34:23 36:4
<b>V</b>	36:11 44:3	18:19 19:19	<b>11</b> 28:9 29:15	52:18 54:3
<b>v</b> 1:5 3:4	48:7 49:21	20:2	<b>11:27</b> 1:14 3:2	<b>30-plus</b> 59:10
<b>vague</b> 12:22	50:3 55:20	<b>worse</b> 52:15	<b>12:29</b> 59:18	<b>33</b> 16:18 19:10
<b>value</b> 10:2	56:12,13 59:2	<b>worth</b> 12:2	<b>13(b)10</b> 51:22	<b>337</b> 30:4
<b>valve</b> 26:23	59:7,10,10	14:23 16:2	<b>15</b> 21:1	<b>3A</b> 47:12
<b>vehicle</b> 58:1	<b>We'll</b> 3:3	55:17	<b>15-415</b> 1:4 3:4	
<b>vehicles</b> 22:9,10	<b>we're</b> 6:12 9:8	<b>wouldn't</b> 6:16	<b>1918</b> 20:2	<b>4</b>
39:2,2,3 47:3	12:13 14:25	6:24 10:12	<b>1966</b> 21:11,19	<b>4</b> 13:2 51:5
51:25	17:10 38:2	22:18 23:1	45:2	<b>40</b> 8:15 9:4
<b>verb</b> 20:14,15	42:3,16,21	35:3 48:23	<b>1970</b> 13:2 19:15	<b>40-hour</b> 20:22
30:8	43:1,9,11	<b>Wow</b> 50:25	<b>1974</b> 46:6,6,23	<b>45</b> 2:11
<b>verbs</b> 20:6,16	46:17 48:16	<b>write</b> 26:4 58:1	47:1,6 51:20	<b>46</b> 9:4 20:22
<b>versus</b> 38:15,22	57:2	<b>writing</b> 35:15	<b>1978</b> 38:14	21:8
<b>view</b> 16:12	<b>we've</b> 59:7	<b>written</b> 34:14	54:10,12	
17:24 42:4,5	<b>Wednesday</b> 1:10	<b>wrong</b> 11:14,23	<b>2</b>	<b>5</b>
49:9	<b>week</b> 8:15 9:4,5	11:24 18:3	<b>2</b> 51:5	<b>5</b> 35:5 39:11
<b>virtually</b> 52:16	20:22	46:12 49:5,11	<b>20</b> 1:10 33:12	40:1
<b>vital</b> 43:25	<b>went</b> 9:16 21:18	53:23 54:2	<b>2010</b> 39:9	<b>5:00</b> 8:8
	<b>weren't</b> 10:17		<b>2011</b> 12:11,12	<b>50</b> 9:4
<b>W</b>	13:4 20:20	<b>X</b>	12:20,24 13:1	<b>51,000</b> 58:13
<b>wage</b> 9:2,17	<b>wide</b> 42:24	<b>x</b> 1:2,8 16:7,7	13:8,18 17:8	<b>54</b> 2:14
10:17,21 43:4	<b>willing</b> 42:6	32:3	36:19 39:11,15	<b>55-hour</b> 21:7
43:12	<b>win</b> 41:17		40:1,5,12,23	<b>59,000</b> 58:13
<b>waivable</b> 5:17	<b>windfall</b> 58:19	<b>Y</b>	40:25 41:9	<b>5th</b> 40:25
59:5	<b>women</b> 26:19	<b>Yang</b> 1:20 2:9	57:6	
<b>Walton</b> 12:5	<b>word</b> 23:6,9	45:22,23 46:1	<b>2012</b> 12:11 17:7	<b>6</b>
18:13	34:14 35:9,10	50:12,21 51:2	39:8	<b>6:00</b> 21:6
<b>want</b> 5:23 7:16	<b>words</b> 23:5 35:2	51:10 52:19,22	<b>2016</b> 1:10 57:5	<b>6:00-a.m.-to-7...</b>
11:9 14:6 15:8	42:1	53:9,16,25	<b>203(j)</b> 28:24	20:25
15:15,25 19:15	<b>work</b> 6:14,15,21	54:4,7,19	29:14,18 30:7	<b>60</b> 30:4
25:3 30:20	6:22 8:7 9:4	<b>Yeah</b> 7:16 15:5	48:6,7 57:12	<b>60s</b> 44:14 45:19
41:8 57:12	20:21,22 23:8	21:2 34:2,12		<b>66,000</b> 58:12

<b>6a</b> 51:12				
<hr/>				
7				
<hr/>				
<b>7(i)</b> 6:10 19:9 59:9				
<b>7:00</b> 21:5				
<b>701(i)</b> 42:23				
<b>759</b> 30:4				
<hr/>				
8				
<hr/>				
9				
<hr/>				
<b>9:00</b> 8:8				
<b>90</b> 8:11				