





1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	ADAM G. UNIKOWSKY, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ERICA L. ROSS, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting neither party	42
9	ORAL ARGUMENT OF:	
10	KELSI B. CORKRAN, ESQ.	
11	On behalf of the Respondent	68
12	REBUTTAL ARGUMENT OF:	
13	ADAM G. UNIKOWSKY, ESQ.	
14	On behalf of the Petitioner	101
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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2  
3  
4  
5  
6  
7  
8  
9  
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11  
12  
13  
14  
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17  
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19  
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24  
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 22-429, Acheson Hotels versus Laufer.

Mr. Unikowsky.

ORAL ARGUMENT OF ADAM G. UNIKOWSKY

ON BEHALF OF THE PETITIONER

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

Respondent does not face an imminent injury from the absence of accessibility information at the website of a hotel she has no interest in visiting. Respondent faces neither an informational injury nor a stigmatic injury. She does not face an informational injury because she has no use for the information she seeks. She's not interested in going to the hotel, so she has no reason for information about whether it is accessible. Nor does she face a stigmatic injury.

This Court has held that a person is injured when she is personally subject to unequal treatment. But that requirement is not satisfied by a plaintiff who searches for hotel

1 websites on the internet to check whether they  
2 comply with her interpretation of the ADA.

3 Finally, the Court should decide the  
4 question presented in this case. The circuits  
5 are divided. The question is important. The  
6 arguments are fully aired. And if the Court  
7 doesn't decide the question here, it may not  
8 have another opportunity to do so.

9 The Court should not bless a legal  
10 strategy of filing large numbers of lawsuits,  
11 settling almost all of them, and abandoning the  
12 rare case that threatens to create adverse  
13 precedent so as to facilitate the filing of  
14 another round of lawsuits.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: But Respondent says  
17 that she has withdrawn her suits. So why  
18 should we decide this? I -- it seems as though  
19 it's -- it's finished.

20 MR. UNIKOWSKY: Well, Respondent has  
21 withdrawn her suit. I mean, she hasn't  
22 promised not to bring new suits in the future.  
23 And if she doesn't, another plaintiff  
24 presumably will.

25 Respondent's position is that any

1 person with a disability with accessibility  
2 needs in America who visits a website can bring  
3 a lawsuit, so, presumably, another plaintiff  
4 will come forward and -- and start bringing the  
5 same claims.

6 JUSTICE THOMAS: Well, do you admit,  
7 though, that it would be easier to simply moot  
8 this out and wait on a suit that is still  
9 pending for another round to discuss standing?

10 MR. UNIKOWSKY: I'm actually not  
11 really sure it would be easier because I think  
12 that even if the Court does what Respondent  
13 asked, it would still be a significant  
14 precedential decision.

15 I mean, the Court would essentially be  
16 -- be blessing the legal strategy over our  
17 objection of filing large numbers of lawsuits  
18 and -- and abandoning them at the last minute,  
19 and that, I think, would create a template  
20 for -- for future plaintiffs to rely upon.

21 So --

22 JUSTICE SOTOMAYOR: I'm sorry, I -- I  
23 don't understand. You admit that this  
24 plaintiff is not entitled to monetary relief.

25 MR. UNIKOWSKY: Yes.

1 JUSTICE SOTOMAYOR: The hotel is owned  
2 by a different entity now, correct?

3 MR. UNIKOWSKY: Correct.

4 JUSTICE SOTOMAYOR: And so you would  
5 need a new plaintiff and you would need a new  
6 defendant --

7 MR. UNIKOWSKY: Well, Your Honor --

8 JUSTICE SOTOMAYOR: -- to get a  
9 precedential -- to get a decision that's not  
10 advisory, because what you're saying to us, the  
11 issue is important. This plaintiff gets  
12 nothing. The defendant has to be different  
13 because it's a different entity running it.

14 So tell me why it's not moot and tell  
15 me why we wouldn't be just giving an advisory  
16 opinion.

17 MR. UNIKOWSKY: So, if there was ever  
18 a live controversy, it's definitely moot at  
19 this point. We're not disputing that, Your  
20 Honor.

21 What we're simply saying is that there  
22 was never a live controversy in the first place  
23 and the Court should therefore so hold. In  
24 other words, the Court should say that whether  
25 it's moot is sort of immaterial because, from

1 day one, there wasn't a case or controversy.

2 JUSTICE SOTOMAYOR: I -- I'm sorry, I  
3 don't know why you haven't answered -- haven't  
4 answered my question. Why isn't this purely  
5 advisory once there's no longer a live  
6 controversy between the parties before us?

7 MR. UNIKOWSKY: I don't think it's an  
8 advisory opinion at all, Your Honor. Both  
9 parties agree that the correct disposition of  
10 this case is to hold that there's no Article  
11 III case or controversy. We simply disagree on  
12 the reasoning for that.

13 JUSTICE SOTOMAYOR: Well, there's  
14 prudential doctrines. Standing is one of them.  
15 Mootness is another. But I'm -- I'm unaware of  
16 any case where this Court had a standing and  
17 mootness issue and decided standing rather than  
18 mootness first.

19 MR. UNIKOWSKY: Your Honor, I'm -- I'm  
20 not sure there's been a case in this particular  
21 configuration that's arrived at the Court  
22 before, but I don't think that there is a  
23 dispute in this case that the Court has the  
24 jurisdiction to decide either of the Article --

25 JUSTICE SOTOMAYOR: Well, we had a --



1 yes, we can decide either --

2 MR. UNIKOWSKY: Yes. It's -- it's --

3 JUSTICE SOTOMAYOR: -- and so I'm  
4 asking you in what case have we ever done this  
5 before, decided standing, which is a  
6 substantive question, when there's no live  
7 controversy before us?

8 MR. UNIKOWSKY: So I don't think the  
9 Court has decided on this particular  
10 constellation of facts a standing issue. But,  
11 again, both parties agree that there's no case  
12 or controversy. The only question is why.

13 CHIEF JUSTICE ROBERTS: I -- I suppose  
14 logically standing is an antecedent question to  
15 mootness, right? You can't have something moot  
16 until you have a case.

17 MR. UNIKOWSKY: That's correct, Your  
18 Honor. I think that the first question the  
19 Court should decide in the case is whether  
20 there is a case or controversy in the first  
21 place.

22 The concept of mootness almost  
23 presupposes that at some point it wasn't moot.  
24 And we think that this case -- there was no  
25 case or controversy in this case from day one.

1 That's the question the Court granted  
2 certiorari to decide.

3 JUSTICE JACKSON: Right. But we've  
4 never done that before is what I understood  
5 your answer to Justice Sotomayor to be. So, if  
6 it's sort of a logical antecedent, why -- why  
7 hasn't this Court set it up in that way?

8 It would seem to me the question is  
9 which is the easier resolution, and so, to the  
10 extent that you both agree that this is moot,  
11 why isn't that just the end of it?

12 MR. UNIKOWSKY: Well, Your Honor, in  
13 terms of have -- not having done it before,  
14 it's -- it's very unusual for a plaintiff to --  
15 for a respondent to prevail in the court of  
16 appeals to abandon her claim in the Supreme  
17 Court. That comes up very rarely.

18 And I don't think I've ever seen a  
19 case quite like this one where the seeming  
20 purpose of the abandonment of the case is to  
21 allow other plaintiffs to --

22 JUSTICE JACKSON: No, I understand  
23 that. But, when it happens -- you know, the --  
24 cases do get mooted, and when it happens, the  
25 defendants' ordinary course of affairs is to

1 argue mootness, please dismiss the case, it's  
2 over. And you're saying that, that -- that the  
3 case is moot. You agree the case is moot.

4 So I guess I -- with at least circling  
5 back to Justice Thomas's question, why doesn't  
6 that just resolve it? You're -- you're asking  
7 us to take on extra work to end a case when  
8 we've all agreed it has to be ended, and,  
9 ordinarily, that would be all.

10 MR. UNIKOWSKY: I -- I think the  
11 Court, with apologies, should take on the extra  
12 work, Your Honor.

13 (Laughter.)

14 MR. UNIKOWSKY: I think the --

15 CHIEF JUSTICE ROBERTS: What -- I'm  
16 sorry to -- well, go ahead.

17 MR. UNIKOWSKY: I -- I --

18 (Laughter.)

19 MR. UNIKOWSKY: -- I think the reason  
20 it should decide the standing question in this  
21 case is that I think the Court should have  
22 institutional concerns about the strategy of  
23 abandoning cases at the last minute, especially  
24 if it's going to set a template for future  
25 plaintiffs to do the same thing.

1 JUSTICE JACKSON: Isn't the remedy for  
2 that Munsingwear, though? I mean, shouldn't  
3 your -- shouldn't your answer be moot the case  
4 and vacate the lower court ruling to the extent  
5 there is one against us?

6 MR. UNIKOWSKY: I don't think that's  
7 good enough, Your Honor, because, first of all,  
8 the First Circuit's case is still going to be  
9 persuasive authority to all district courts in  
10 the First Circuit, who are going to know that  
11 if the case goes back up, then, presumably --

12 JUSTICE JACKSON: Yeah, but that's  
13 what the Munsingwear remedy is about, isn't it?  
14 I mean, it's -- it's -- it's so that you don't  
15 solve -- suffer any harm, we vacate the lower  
16 court opinion because, if you're right, there  
17 was some kind of tactical strategy here, and  
18 then we all go home.

19 MR. UNIKOWSKY: Well, remember that  
20 Ms. Laufer's victory in the Fourth Circuit  
21 remains binding precedent in that court. And I  
22 just think this case is different because it's  
23 part of a broader litigation program of  
24 bringing hundreds and hundreds of lawsuits.  
25 That's what I think makes this case unique.

1 JUSTICE ALITO: May I follow --

2 CHIEF JUSTICE ROBERTS: Which --

3 JUSTICE ALITO: -- up on -- I'm sorry.

4 Go ahead.

5 CHIEF JUSTICE ROBERTS: I was just  
6 going to say I'm as concerned as anybody about  
7 our workload, but --

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: -- why -- why  
10 are you sure that which one's easier?

11 I mean, on the one hand, you have the  
12 standing question. Maybe people will think  
13 that's easy or maybe not.

14 The mootness question of whether or  
15 not a plaintiff can moot a case to manipulate  
16 the jurisdiction of this Court, I mean, the  
17 mootness papers weren't filed until after the  
18 Petitioner's opening brief.

19 And we certainly have the authority  
20 under our precedent to decide, if you have two  
21 jurisdictional issues, which one to do first.  
22 And in terms of, you know, I think it's a  
23 difficult question as to whether or not  
24 somebody, particularly when you have a program  
25 of litigation like this around the country by

1 people who may or may not have standing, can  
2 manipulate the Court's jurisdiction by, after  
3 the Court's granted cert, mooting out the case.

4 MR. UNIKOWSKY: I agree with that,  
5 Your Honor. And I think that if the Court were  
6 to write a precedential decision addressing  
7 or -- or, you know, agreeing with Respondent's  
8 theory of how this case should be resolved,  
9 presumably, the Court would address our  
10 objections as well --

11 JUSTICE SOTOMAYOR: Counsel --

12 MR. UNIKOWSKY: -- and that would --

13 JUSTICE SOTOMAYOR: -- in this case,  
14 this plaintiff has dropped all her actions.  
15 The lawyer who did this strategy has suffered  
16 disciplinary proceedings. She's represented  
17 she's not going to use him anymore.

18 So, yes, there may have been a bad  
19 tactic in place, but you're ascribing a motive  
20 to other people before it's happened. And in  
21 every other case, I don't think every case  
22 suffers from this same set of failings.

23 MR. UNIKOWSKY: I -- I agree  
24 100 percent, Your Honor. We are not suggesting  
25 that all testers or all testers' counsel have

1 acted unethically. The only person who was  
2 subject to a sanctions order in this is  
3 Mr. Gillespie, who's the -- the local counsel  
4 in the District of Maryland.

5 I think that in other cases with other  
6 plaintiffs, I'm not suggesting there's going to  
7 be false statements to courts and opposing  
8 counsel, but the fundamental program here is to  
9 -- to file large numbers of lawsuits and settle  
10 almost all of them. Even, you know, ethical  
11 ADA lawyers do that.

12 And I think the Court should be  
13 concerned that whether that's permissible will  
14 not see the -- the bright lights of appellate  
15 review if the Court blesses a strategy of  
16 abandoning these cases in the rare situation  
17 where the defendant decides to litigate the  
18 case all the way up and there's a possibility  
19 of adverse precedent.

20 JUSTICE BARRETT: Mr. Unikowsky, I  
21 mean -- I'll return to our workload for a  
22 minute. I mean, often, when we're in the  
23 district court -- I mean, I see this as a  
24 prudential issue and I've thought a lot about  
25 it because, I mean, I think it's a difficult

1 prudential call.

2 But, in the district court, when you  
3 have two -- you know, if you have a more  
4 difficult issue and an easier issue -- and I'll  
5 just assume for present purposes that mootness  
6 is easier -- you know, the district court  
7 doesn't know if the issue's going to arise  
8 again.

9 You know, when, in Pearson, we got rid  
10 of the Saucier two-step, we said, well, listen,  
11 you know, he doesn't know, a higher court may  
12 be considering the issue, the district court is  
13 delving in and expending all these resources on  
14 something that may never come up.

15 But institutionally, if we're thinking  
16 about allocation of resources, it seems to me  
17 that that might be different here because I  
18 take it what you're saying is that there's an  
19 entrenched split that we're going to have to  
20 decide at some point, and significant resources  
21 have already been invested in this case, and  
22 you filed your opening brief before the  
23 suggestion of mootness was filed, thereby  
24 investigating -- yeah -- sorry, investing  
25 resources, and that we're going to have to do



1 this all over again.

2 MR. UNIKOWSKY: That is correct, Your  
3 Honor. And just to add one additional point on  
4 to the table, I mean, there's a lot of judicial  
5 resources expended just by these lawsuits. I  
6 mean, when you have, you know, 200 lawsuits  
7 being filed in federal district courts, the  
8 judges are expending resources on that. They  
9 -- they -- individual judges may be deciding  
10 the standing question on their own without  
11 guidance from this Court.

12 So it seems to me that if the goal is  
13 to save judicial resources, of course, as Your  
14 Honor said, this Court's resources might be  
15 saved if it just decides the question presented  
16 one way or another. If we think of the entire  
17 federal judiciary, I think --

18 JUSTICE KAGAN: I wonder whether --

19 JUSTICE ALITO: Well, the -- suppose  
20 that there's a case that involves an issue that  
21 has divided the courts of appeals. There is an  
22 entrenched split. It would be helpful to  
23 provide guidance on this issue and not allow  
24 the split to persist. But the case before us  
25 is dead as a doornail and is not going to arise

1 again between these parties.

2           Would you say there that for the  
3 prudential reasons that have been mentioned, it  
4 would be permissible for us to decide the  
5 issue?

6           MR. UNIKOWSKY: I don't think the  
7 Court could decide the merits. I think that  
8 under Article III, that's just flatly banned.  
9 But this case is different because the question  
10 presented is a question of Article III, so the  
11 Court has the jurisdiction to decide that  
12 jurisdictional question.

13           JUSTICE KAGAN: But --

14           JUSTICE ALITO: Well, but doesn't that  
15 look just like an advisory opinion?

16           MR. UNIKOWSKY: I don't think it's an  
17 advisory --

18           JUSTICE ALITO: I mean, we're not --  
19 we're not -- we would not be addressing  
20 anything that is of relevance to the case that  
21 is before us. We would be addressing an issue  
22 that should be resolved. It's an advisory  
23 opinion. There are arguments in favor of  
24 advisory opinions. They just happen not to be  
25 consistent with Article III of the

1 Constitution.

2 MR. UNIKOWSKY: I -- I disagree, Your  
3 Honor. I think that the judgment of this Court  
4 is going to be that there is no case or  
5 controversy. That's not an advisory opinion.  
6 That's disposing of the case in front of the  
7 Court.

8 And I think the Court is free to state  
9 the reasoning that we are advocating in this  
10 case as part -- in this case, excuse me, as  
11 part of its judgment that there isn't a case or  
12 controversy under Article III.

13 JUSTICE KAGAN: I mean, it still feels  
14 a bit unjudicial, if I may say, so that the  
15 question is not just resources but -- but  
16 something broader than that. And I take the  
17 point that each of these is a jurisdictional  
18 issue and that there's nothing jurisdictionally  
19 precluding us, that this is a matter of  
20 prudence. But, when you look at a case that's  
21 dead as a doornail several times over, you  
22 know, the -- the -- the case has been dismissed  
23 by the plaintiff. The defendant is totally  
24 different. The defendant's website, everybody  
25 agrees, is now in compliance with the ADA.

1           So this is, like, dead, dead, dead in  
2 all the ways that something can be dead. And  
3 to use that case as the vehicle for deciding an  
4 important issue, an issue that probably is  
5 going to need to be decided at some point but  
6 surely could come up in a live case, I -- I --  
7 I -- I guess it just doesn't seem like  
8 something that a court should -- should be  
9 anxious to do.

10           MR. UNIKOWSKY: Well, just to address  
11 some of the subsidiary issues Your Honor  
12 mentioned, the question of whether the updates  
13 to the website made the case dead is actually  
14 disputed among the parties. The First Circuit  
15 held and Respondent continues to argue that  
16 that didn't moot the case. So I think that  
17 that would be a difficult -- maybe not  
18 difficult, but the Court would have to --

19           JUSTICE KAGAN: Well, it's not  
20 disputed that the hotel's website is in  
21 compliance. The only thing that's in dispute  
22 is what the issue is with respect to, like,  
23 hotels.com. But the hotel is now owned by  
24 somebody else, the hotel is in compliance in  
25 terms of its own website, and, you know, most

1       importantly, the plaintiff has dropped this  
2       case.

3               MR. UNIKOWSKY: Right. So, in -- in  
4       terms of the sale of the hotel, so Acheson  
5       Hotels remains the defendant in this case. It  
6       would be the subject of any hypothetical  
7       injunction and fee award. So we don't think  
8       that moots the case unless there's a court  
9       order substituting the new defendant, which  
10      never happened. So I'm -- I'm not sure that's  
11      a reason not to decide the question presented.

12             But, look, I --

13             JUSTICE KAGAN: Yeah, I think you're  
14      avoiding the main --

15             MR. UNIKOWSKY: Okay. I understand  
16      Your -- Your Honor's argument that if they've  
17      dropped the case, why are you deciding this big  
18      question. And, yes, that is certainly a  
19      discretionary consideration that the Court  
20      should consider in deciding how to dispose of  
21      this case. It is a weight on one side of the  
22      balance.

23             And I just think that the weights are  
24      greater on the other side of the balance when  
25      you consider the institutional considerations

1 that should lead the Court to decide the  
2 question presented, such as a concern about  
3 blessing the legal strategy in this case of  
4 Respondent, which will be invoked in future  
5 cases by other litigants because the same thing  
6 is going to happen. A plaintiff is going to  
7 file a large number of lawsuits, and in the  
8 rare case that goes up, the plaintiff will  
9 abandon the case at the last minute, and if  
10 there's push-back from either the court or the  
11 defendant, the plaintiff is going to say look  
12 at what happened in the Acheson case; the  
13 Supreme Court said it was perfectly fine to  
14 adopt that legal strategy.

15 JUSTICE JACKSON: But, if it's going  
16 to happen again, why don't we wait until it  
17 happens again, and then we have the pattern  
18 you're talking about? What you're saying is  
19 resolve it now because you can foresee that  
20 that will occur, and I guess I just don't  
21 understand why that's so convincing.

22 It -- it seems to me in tension to  
23 suggest that this issue will come up again and  
24 that we should take it now --

25 MR. UNIKOWSKY: No, I -- I think --

1 JUSTICE JACKSON: -- because we should  
2 just wait until it comes up again.

3 MR. UNIKOWSKY: Well, I think what's  
4 going to happen, Justice Jackson, is that, you  
5 know, in the court of appeals, a plaintiff will  
6 drop the case, and then the plaintiff will cite  
7 this Court's decision in this case to say  
8 that's fine, and then the court of appeals will  
9 follow this Court's precedent in this case and  
10 allow the plaintiff to drop the case.

11 And then I guess, theoretically, a  
12 petition for certiorari could be filed, but  
13 it's not clear that the -- the defendant has --  
14 has standing to even file that petition for  
15 certiorari when the defendant actually won in  
16 the court of appeals. And so it's actually not  
17 clear to me this question will come back if  
18 future claims follow this -- this template.

19 And, again, in the Court -- in Your  
20 Honors' -- in this case, the Court's going to  
21 write an opinion. Even if it resolves this  
22 case on the ground Respondent has advocated, I  
23 would guess it's going to --

24 JUSTICE JACKSON: Why would --  
25 wouldn't our opinion on mootness be both

1 parties have agreed that this case is moot;  
2 therefore, we have no live controversy, period?

3 MR. UNIKOWSKY: Well, I mean, we've  
4 opposed that disposition, and so I -- I -- I  
5 don't know, but --

6 JUSTICE JACKSON: I'm sorry.

7 JUSTICE GORSUCH: Counsel --

8 JUSTICE JACKSON? Did you say it's not  
9 moot?

10 MR. UNIKOWSKY: No. We're saying it's  
11 moot. We just don't think the Court should  
12 resolve the case on that ground. And so I  
13 would -- I would guess the Court would address  
14 our arguments.

15 I'm -- I'm sorry, Your Honor.

16 JUSTICE GORSUCH: With respect to  
17 standing, would it be sufficient if a plaintiff  
18 were to allege in -- in her complaint that she  
19 does intend to visit the hotel, period?

20 MR. UNIKOWSKY: Yes, that would be  
21 enough for standing, Your Honor. Then the  
22 person -- then there's a downstream consequence  
23 from being deprived of the information. We  
24 haven't disputed that if there's a person with  
25 concrete travel plans who says, look, I want to



1 --

2 JUSTICE GORSUCH: Well, concrete  
3 travel. I'm talking about an allegation in a  
4 complaint, just I -- I -- I -- I may someday  
5 visit this hotel.

6 MR. UNIKOWSKY: I don't think "I may  
7 someday" is enough. That kind of sounds like  
8 the allegations --

9 JUSTICE GORSUCH: "I will someday."

10 MR. UNIKOWSKY: "I will" -- I think "I  
11 will" -- "someday" probably is not enough  
12 either.

13 JUSTICE GORSUCH: "Someday" not good  
14 enough?

15 MR. UNIKOWSKY: I don't think -- under  
16 Lujan case, the Court held that "someday" plans  
17 aren't good enough for standing.

18 JUSTICE GORSUCH: In the next decade?

19 (Laughter.)

20 MR. UNIKOWSKY: I think it's got to be  
21 concrete plans. If you're -- if you're going  
22 to Wells next summer and you're trying to make  
23 a reservation at Coast Village, I think that's  
24 enough for standing.

25 JUSTICE SOTOMAYOR: But that's not --

1 CHIEF JUSTICE ROBERTS: With --

2 JUSTICE SOTOMAYOR: -- the way people  
3 travel, counselor. When people travel, or at  
4 least when I do, and I think I'm not abnormal  
5 in this sense, I look at a place, I look at  
6 various sites to decide where I want to stay, I  
7 look at price points, I look at the level of  
8 accessibility, whatever. All right?

9 So what you're saying is that there's  
10 no stigmatic harm to a disabled person in their  
11 ability to do what I do, look at a place and  
12 say: I may want to visit Venice, I may want to  
13 visit Florida, I may want to visit California,  
14 and I want information about all the sites  
15 there so I can decide what suits me best.

16 And you're saying you need something  
17 much more concrete than that?

18 MR. UNIKOWSKY: So --

19 JUSTICE SOTOMAYOR: I've been deprived  
20 of my ability to make an informed choice about  
21 where to visit and I'm not harmed  
22 stigmatically?

23 MR. UNIKOWSKY: Well, so it seems to  
24 me that if the person is traveling and is  
25 checking a few hotels and is trying to decide

1 where to stay, but the person's planning to  
2 travel, then I think that there would be  
3 standing. Like, if you're saying I want to go  
4 to Ocean City and I'm looking at two or three  
5 hotels, not sure which one to stay at --

6 JUSTICE SOTOMAYOR: But the person who  
7 says, I want to find the place to visit --  
8 Ocean City, Atlantic City, whatever other city  
9 -- and now I'm doing my investigation of all  
10 three cities and I decide against your city  
11 because I couldn't find enough accessible  
12 places, I'm not harmed?

13 MR. UNIKOWSKY: No, I -- I don't -- I  
14 don't think so. I mean, I don't think that if  
15 you have no idea where you're going to go and  
16 you're just going to a hotel website for some  
17 randomly picked hotel in a city and see it's  
18 not accessible, but you don't have any --

19 JUSTICE SOTOMAYOR: But why aren't I  
20 -- I don't understand. Discrimination, I  
21 thought, meant that I'm being treated  
22 differently than other people. If I go on a  
23 drive to a place and there's a sign up that  
24 says "No disabled person is welcome," I've been  
25 discriminated against, correct?

1 MR. UNIKOWSKY: Yes.

2 JUSTICE SOTOMAYOR: What's different  
3 than my going to a website and the website  
4 saying nothing about disability, so I know I'm  
5 not welcome there?

6 MR. UNIKOWSKY: Well, Your Honor, if  
7 you see the sign that says "No disabled people  
8 welcome," I actually don't think that there's  
9 standing unless you want to enter the business.  
10 So, if you -- if you're on the internet and you  
11 see a sign of some business and --

12 JUSTICE SOTOMAYOR: So it's just --  
13 oh, so in -- the -- the people who used to go  
14 to lunch counters and wanted to just sit down,  
15 they didn't necessarily want to try the food  
16 there --

17 MR. UNIKOWSKY: No, no.

18 JUSTICE SOTOMAYOR: -- those people  
19 weren't discriminated against?

20 MR. UNIKOWSKY: They were definitely  
21 discriminated against because they were  
22 prevented from sitting at the lunch counter.  
23 That's the discrimination.

24 JUSTICE KAGAN: Could I -- could I  
25 just go back to what you think would be enough?

1 So, if a person said, I'm -- I'm checking  
2 out -- I'm trying to find a fully accessible  
3 hotel in a -- a small, great beach town.

4 MR. UNIKOWSKY: Mm-hmm.

5 JUSTICE KAGAN: So they're looking at  
6 a bunch of things, trying to find a fully  
7 accessible hotel in the kind of beach town that  
8 they want to go to.

9 That would be enough?

10 MR. UNIKOWSKY: May I answer the  
11 question, Your Honor?

12 JUSTICE KAGAN: Please.

13 MR. UNIKOWSKY: Because I -- I --

14 CHIEF JUSTICE ROBERTS: Yes.

15 JUSTICE KAGAN: Please.

16 (Laughter.)

17 MR. UNIKOWSKY: I -- I think that  
18 would be enough, Your Honor, yes.

19 JUSTICE KAGAN: Okay. So not concrete  
20 travel plans, but, you know, some indication  
21 that you're seeking this information for a  
22 purpose?

23 MR. UNIKOWSKY: Well, I think it has  
24 to be a little more just than a generalized  
25 purpose. If you're planning to travel, you

1 know, if you're not decided whether to go to  
2 Ocean City or Rehoboth or Bethany Beach, you're  
3 checking your options in all three of them,  
4 then I think that probably is enough. I don't  
5 think you have to say that you're going to this  
6 specific stretch of road in -- in Ocean City.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 If -- how many hotels did Ms. Laufer  
10 contact in how many different places?

11 MR. UNIKOWSKY: Depending on how you  
12 count, because sometimes lawsuits can count as  
13 two or one, it's definitely more than 500 and  
14 perhaps more than 600.

15 CHIEF JUSTICE ROBERTS: So, if she  
16 alleges that she may well go to this particular  
17 hotel, you would be able to challenge the  
18 veracity of that allegation, right?

19 MR. UNIKOWSKY: Yes, Your Honor.  
20 That -- that happened in this case, in fact.  
21 There's a declaration in which Respondent said  
22 she would take this long road trip to Maine and  
23 other places, and the court basically found  
24 that not plausible.

25 CHIEF JUSTICE ROBERTS: Okay. Thank

1 you.

2 Justice Thomas?

3 Justice Alito?

4 JUSTICE SOTOMAYOR: In fact, she did,  
5 however. She did take a long trip.

6 MR. UNIKOWSKY: Ultimately, the record  
7 shows that she took a road trip to Maine, yes,  
8 Your Honor.

9 JUSTICE KAGAN: You -- you have a  
10 statement a -- a couple of times in your brief,  
11 you say you're not challenging the use of  
12 testers in ADA litigation, and -- principally  
13 distinguish this case to one where there's an  
14 attempt to enter a building.

15 So I guess I'd like to hear what you  
16 mean by that, what you think would be  
17 permissible, and why it's different from this  
18 case.

19 MR. UNIKOWSKY: That's right. So  
20 we've distinguished the scenario where someone  
21 is actually trying to physically enter a  
22 building and, but for the accessibility  
23 barrier, the person couldn't enter. And that's  
24 because we understand the inability to access a  
25 building as a traditional Article III injury

1 regardless of the motive for entering the  
2 building.

3 JUSTICE KAGAN: So suppose that you  
4 were trying to enter a hotel --

5 MR. UNIKOWSKY: Mm-hmm.

6 JUSTICE KAGAN: -- but you didn't  
7 really want to stay at the hotel.

8 MR. UNIKOWSKY: I think that probably  
9 would be if you, like, were physically  
10 prevented from that.

11 JUSTICE KAGAN: But you want to -- but  
12 you want to go in.

13 MR. UNIKOWSKY: Yeah. That's right.  
14 But that --

15 JUSTICE KAGAN: Same, like you want to  
16 enter a concert venue, even though you don't  
17 want to stay for the concert.

18 MR. UNIKOWSKY: So every court of  
19 appeals to have addressed the question Your  
20 Honor just described has found standing on  
21 those facts, and so we haven't contested that  
22 in our briefing.

23 JUSTICE KAGAN: And I presume that  
24 that's similar -- I mean, tell me if you think  
25 this is wrong -- to -- let's say that there's a



1 blind person who, you know, can't access a  
2 website at all because there aren't the --  
3 there's not the appropriate technology for the  
4 visually impaired to make use of the website.

5 Would you say also that that's sort of  
6 like the person who wants to enter a building?

7 MR. UNIKOWSKY: So --

8 JUSTICE KAGAN: That, you know -- and  
9 the visually impaired person is, in fact, a  
10 tester and is just checking out different  
11 websites?

12 MR. UNIKOWSKY: So we -- we actually  
13 haven't taken that position. There's --  
14 there's three courts of appeals decisions, one  
15 of which -- one of which was written by then  
16 Judge Barrett, involving visually impaired  
17 testers who go to websites of credit unions  
18 that they weren't even statutorily eligible to  
19 join, and those courts held that the plaintiffs  
20 did not have standing, and we actually think  
21 those are correctly decided.

22 JUSTICE KAGAN: Yeah, I -- I  
23 understand that. But, if a -- if a person  
24 is -- is, you know, just, you know, checking  
25 out websites in the way that, you know, not --

1     it's not like I'm eligible to join the website  
2     of a particular company, but just in the way we  
3     all check out websites and can't do that,  
4     whether the fact that he was a tester could  
5     prevent the person from making a claim.

6             MR. UNIKOWSKY: So I don't think the  
7     person has standing, but, even if you disagree,  
8     our case is different from that. So the first  
9     part of my answer is I don't think so. I think  
10    that, as in the case with the credit unions,  
11    merely trying to seek information about a  
12    service you don't want, I don't think that's an  
13    Article III injury under TransUnion's  
14    discussion of informational harm.

15            But the second part of my answer is  
16    that even if you think I'm completely wrong on  
17    that, I think that's distinguishable because,  
18    in that case, the plaintiff was prevented from  
19    using the website.

20            In this case, we think what really  
21    happened here was that there was a bar to  
22    accessing the hotel, which doesn't become  
23    relevant until the plaintiff tries to do that.

24            JUSTICE KAGAN: Thank you.

25            CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

3 Justice Barrett?

4 JUSTICE BARRETT: I have a question  
5 about some of Justice Sotomayor and Justice  
6 Kagan's hypotheticals. I mean, it does seem  
7 like they're all meaningfully different in the  
8 injury sense, and I'm wondering whether -- I  
9 mean, I'm -- I'm thinking about a plaintiff who  
10 tries to make a reservation at Acheson Hotel  
11 and then just gets frustrated because she's  
12 disabled and she can't get the information, so  
13 she says, I'm not giving this place my  
14 business, but I want to sue. Like, I would  
15 never go say -- stay there because -- and I'm  
16 not going to go back to the website because I'm  
17 offended. You know, this isn't -- this isn't a  
18 place that I want to frequent.

19 Do you think that person suffered an  
20 Article III injury?

21 MR. UNIKOWSKY: Yes, but they couldn't  
22 sue because you can only get an injunction.

23 JUSTICE BARRETT: Injunctive relief.

24 MR. UNIKOWSKY: Yeah.

25 JUSTICE BARRETT: Okay. So that --

1 that's my question. You're not taking the  
2 position that my plaintiff hasn't suffered an  
3 Article III injury, but you're saying here that  
4 the forward-looking piece of it is because you  
5 have to show that you have standing for the  
6 relief that you seek, and the ADA only permits  
7 an injunction?

8 MR. UNIKOWSKY: Correct. The injury  
9 has to be in the future. Correct.

10 JUSTICE BARRETT: Okay. Thanks.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Jackson?

13 JUSTICE JACKSON: So I guess I'm  
14 trying to figure out the difference between  
15 your argument in saying that you want to  
16 preserve tester standing, that testers you  
17 understand are okay and Ms. Laufer is not. And  
18 I know that you say that she is a  
19 self-appointed tester.

20 Is that because -- you're trying to  
21 distinguish her from the testers that you think  
22 have standing and don't? And what's the  
23 difference?

24 MR. UNIKOWSKY: No, I -- I -- I --

25 JUSTICE JACKSON: Okay.

1           MR. UNIKOWSKY: -- I -- I'm not --  
2           that's not -- I mean, she is self-appointed in  
3           the sense --

4           JUSTICE JACKSON: Yes.

5           MR. UNIKOWSKY: -- that she doesn't  
6           work for the government. That's all I meant by  
7           that.

8           JUSTICE JACKSON: I see. I see.

9           MR. UNIKOWSKY: But I -- other testers  
10          who themselves are self-appointed would have  
11          standing. It depends on the particular facts.

12          JUSTICE JACKSON: I guess I'm trying  
13          to -- I -- I'm trying to ferret out whether  
14          there -- whether what's really hard here is  
15          drawing the distinction between a tester who  
16          actually experiences discrimination even if  
17          they don't really want the service  
18          subjectively, right?

19          So this is -- Justice Sotomayor talked  
20          about the people going to lunch counters. They  
21          aren't hungry. They're not actually there for  
22          the sandwich. They're going in because they  
23          are putting themselves into a discriminatory  
24          situation in order to be able to challenge the  
25          policy.

1           Ms. Laufer says, I'm challenging the  
2 policy. But I guess the question is, is she  
3 really experiencing discrimination? Is that  
4 what we're supposed to be kind of thinking  
5 about?

6           MR. UNIKOWSKY: Yeah. So, first of  
7 all, I just want to put on the table we  
8 definitely think the person at the lunch  
9 counter has standing, okay?

10          JUSTICE JACKSON: Okay. And that's  
11 not -- and that's because it doesn't matter  
12 that his motivation is, I didn't want the  
13 sandwich, right?

14          MR. UNIKOWSKY: That's right. That's  
15 the facts of the Havens Realty case  
16 essentially, which we haven't asked the Court  
17 to -- to overturn.

18          JUSTICE JACKSON: So it doesn't matter  
19 that she's doing this to sue. That's -- I  
20 mean, I know you keep talking about her -- her  
21 motivation, she wants to do this to sue.

22                 In the same way as it doesn't matter  
23 that the person's subjective motivation is to  
24 set up circumstances by which they can  
25 challenge the discriminatory lunch counter, it

1 doesn't matter that her subjective motivation  
2 is to sue. There must be something about  
3 whether she's actually experiencing  
4 discrimination --

5 MR. UNIKOWSKY: I --

6 JUSTICE JACKSON: -- that is the  
7 difference in your argument, right?

8 MR. UNIKOWSKY: -- I -- I -- I think  
9 that's right. I don't think that subjective  
10 intent matters when there has been a concrete  
11 Article III harm, such as, in the Cruz case,  
12 being banned from speaking --

13 JUSTICE JACKSON: Right.

14 MR. UNIKOWSKY: -- such as, in the  
15 tester case, not entering a business.

16 And I do think that being the victim  
17 of intentional racial discrimination, as in the  
18 facts of the Havens Realty case, where the  
19 hypotheticals Your Honor has described may  
20 inflict in certain circumstances an Article III  
21 stigmatic injury. We just don't think that  
22 these facts are comparable to those.

23 JUSTICE JACKSON: That she has  
24 actually been the victim of an injury and is  
25 that -- that's because you say she never -- she

1 disclaimed her interest in going to Maine?

2 MR. UNIKOWSKY: So I think there's --  
3 there's several differences between this case  
4 and the lunch counter hypothetical.

5 JUSTICE JACKSON: Hmm.

6 MR. UNIKOWSKY: So, first of all, I  
7 think this is more of a generalized grievance  
8 like in the lunch counter or Ms. Coleman in  
9 Havens Realty. Like, the person was personally  
10 the victim of racial discrimination.

11 I think that when you just go to a  
12 website to check ADA compliance, that's more of  
13 a generalized grievance.

14 There's also no intent to discriminate  
15 in this case. I do realize that the ADA  
16 considers the disparate effect of facially  
17 neutral policies to be discriminatory just as  
18 disparate treatment is discriminatory.

19 But, in this case, there's no  
20 disparate effect either because she's not using  
21 the information. So there's no -- the  
22 disrespect of intentional discrimination --

23 JUSTICE JACKSON: But that's all --

24 MR. UNIKOWSKY: -- is absent too.

25 JUSTICE JACKSON: -- on the merits.



1 I'm talking about --

2 MR. UNIKOWSKY: No, I don't --

3 JUSTICE JACKSON: -- injury, right? I  
4 mean, those that -- that's whether or not she  
5 could actually win the case. You're saying she  
6 can't even bring it.

7 MR. UNIKOWSKY: Yes.

8 JUSTICE JACKSON: And I'm trying to  
9 understand why you think she's not injured.  
10 And I think you -- I think I get it. I just  
11 wanted to be clear --

12 MR. UNIKOWSKY: Well --

13 JUSTICE JACKSON: -- on the difference  
14 between her and a tester.

15 MR. UNIKOWSKY: -- I mean, on -- on  
16 the -- on the question Your Honor described  
17 about being subject to discrimination, I do  
18 think this case is properly understood as  
19 discrimination against people who are limited  
20 from accessing the building, like the purpose  
21 of accessibility information on the website is  
22 to facilitate accessibility of the building.

23 And so not --

24 JUSTICE JACKSON: No, isn't it -- I'm  
25 sorry, isn't it -- isn't it to facilitate their

1 assessment of whether or not this building  
2 offers services that they can use?

3 MR UNIKOWSKY: Yeah, but --

4 JUSTICE JACKSON: So what she's trying  
5 -- the reason why there's discrimination is  
6 because an able-bodied person can get on the  
7 website and it shows that there are 15 rooms  
8 available at this hotel, and so they know that  
9 there are 15 rooms available and they could go  
10 there, whereas a disabled person, unless the  
11 hotel identifies that it actually has  
12 accessible rooms, can't look on the website and  
13 assess the availability of those rooms. I  
14 thought that was the discriminatory issue.

15 MR. UNIKOWSKY: Yeah, but the problem  
16 is that looking at the website is not an end in  
17 itself. I think it's a means to the end of  
18 accessing the hotel. Like the reason you want  
19 to know whether there's a wheelchair ramp is to  
20 know if you show up at the hotel whether you  
21 can enter it.

22 JUSTICE JACKSON: Maybe. I mean,  
23 there could be a lot of reasons, right? I  
24 mean, the point is you're being discriminated  
25 against because you can't -- you don't have the

1 same access to information about the status of  
2 the hotel and whether rooms are available.

3 MR. UNIKOWSKY: I guess I just don't  
4 view -- I mean, there's no argument that  
5 Respondent couldn't use the website, unlike in  
6 the hypothetical with the visually impaired  
7 plaintiff that Justice Kagan asked about. I  
8 think that her ability to use the website was  
9 not constrained. She just didn't get  
10 information that she needed to know whether she  
11 could access the building, which I just don't  
12 think is an injury, unless you're going to use  
13 that information somehow.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Ms. Ross.

18 ORAL ARGUMENT OF ERICA L. ROSS  
19 FOR THE UNITED STATES, AS AMICUS CURIAE,  
20 SUPPORTING NEITHER PARTY

21 MS. ROSS: Mr. Chief Justice, and may  
22 it please the Court:

23 As the questions this morning make  
24 clear, this is an unusual case. At the time we  
25 filed our brief, we flagged serious concerns

1 about whether the case was moot.

2 Now, as I take my friend to agree,  
3 it's clearly moot. We have not only a  
4 plaintiff who no longer seeks to litigate her  
5 claims, a defendant who no longer owns the  
6 hotel, but also a website that is no longer  
7 lacking the relevant information.

8 Rather than decide the more difficult  
9 standing question in this highly artificial  
10 posture, the Court should exercise its  
11 discretion to vacate the First Circuit's  
12 decision and dismiss the case as moot under  
13 Munsingwear.

14 At a minimum, if the Court exercises  
15 its discretion to address standing, it should  
16 hold that Respondent lacks standing for a  
17 narrow reason. Her claim to standing depends  
18 on her view that Title III and the Reservation  
19 Rule give her a freestanding right to  
20 information, akin to the right to information  
21 about housing in Havens.

22 But the ADA and the Reservation Rule  
23 are narrower. They give individuals with  
24 disabilities a right to information in  
25 connection with the equal enjoyment of a

1 hotel's reservation service. Because  
2 Ms. Laufer has not alleged that she would use  
3 that service in the future, she lacks standing.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: You're not saying  
6 that we don't have jurisdiction over the case  
7 -- as I understand you. You're simply saying  
8 that we should exercise our discretion not to  
9 decide the standing issue?

10 MS. ROSS: That's correct, Justice  
11 Thomas. When the government was on the  
12 receiving end of this type of a dismissal of a  
13 complaint in district court after the grant --  
14 Court had granted certiorari in Carnahan, we  
15 specifically laid out our -- our thoughts on  
16 this issue, specifically, that the Court does  
17 have discretion to decide either the standing  
18 or the mootness question first, but, there, we  
19 said, you know, it makes sense, given the  
20 artificial nature of the case once the  
21 plaintiff has dismissed her claims, to decide  
22 mootness while leaving on the table, you know,  
23 the possibility that in a future case you might  
24 choose to decide standing.

25 But I think for the reasons I was just

1 explaining that this is not that future case  
2 because it's not just sort of artificial in the  
3 way that any case in which a plaintiff who has  
4 dismissed her claims will be artificial. It's  
5 -- it's sort of extra-artificial for the  
6 reasons that Justice Kagan was -- was pointing  
7 out.

8 CHIEF JUSTICE ROBERTS: You -- you're  
9 confident that the mootness question is easy.  
10 Is the government at all concerned about the  
11 manipulation of this Court's jurisdiction when  
12 you have -- because Ms. -- Ms. Laufer, I  
13 gather, is not the only person doing this,  
14 bringing hundreds of cases around the country,  
15 and then, when the Court gets interested in her  
16 case, it's all gone. It's moot.

17 It doesn't stop any of the other  
18 dozens of people, however many there are, who  
19 are doing the same thing. So we may have to  
20 come up with another case as soon as this --  
21 this one, if it's -- if it's not addressed, and  
22 then they will -- that one will be mooted.

23 And, you know, we can't sort of keep  
24 granting cert and having it constantly being  
25 mooted with never a determination of whether

1       there's standing in those variety of cases.

2               I mean, you may think that that's not  
3       necessarily easier or harder than the standing  
4       question, but it's -- It's certainly not one  
5       that we can just, you know, toss off with the  
6       back of our hand, is it?

7               MS. ROSS: So I certainly understand  
8       the institutional concern, and that is why,  
9       among other reasons, we think the -- the Court  
10      can and should leave on the table this option  
11      of actually deciding the standing question  
12      rather than the mootness question in a future  
13      case should this actually become a pattern. I  
14      just think, again, that this is a particularly  
15      poor case to do it in.

16              And I think, beyond that, you know, on  
17      -- on the more specific question of whether  
18      this case will -- or a case like this will come  
19      to the Court again, I think this has already  
20      been covered, but the circuit split actually  
21      looks quite different now than it did when the  
22      Court granted certiorari. It's not just that  
23      the parties agree that under Munsingwear the  
24      First Circuit decision would have to be vacated  
25      in this case, but it's also that the Eleventh

1 Circuit decision has since been vacated, and so  
2 now there's only one circuit decision on  
3 Petitioner's side -- excuse me, Respondent's  
4 side of the split.

5 And so I think parties may -- may  
6 adjust their behavior in -- in light of this,  
7 but, again, we, for the institutional reasons  
8 you note, think the Court can reserve this  
9 option in future cases.

10 CHIEF JUSTICE ROBERTS: How -- reserve  
11 the option. How many times does this -- do we  
12 have to do this? The next case that comes up  
13 in the same posture as this, should we let that  
14 one go too because maybe it'll be the last one,  
15 or should we address it here?

16 MS. ROSS: So I certainly understand  
17 the concern, Mr. Chief Justice. Again, you  
18 know, I think it's not just that this is the  
19 first case. It's really that this is sort of  
20 moot to the third. I mean, it has a plaintiff  
21 who has dismissed her claims, a defendant who  
22 no longer owns the hotel in question, and a  
23 website that everyone agrees has been updated.

24 And if you look at the First Circuit's  
25 decision, the reason why the First Circuit



1 thought this case was not moot was this  
2 third-party issue with respect to hotels.com  
3 and other third-party websites. But, under the  
4 regulation, it's the hotel owner whose job it  
5 is to inform those third parties about  
6 accessibility information, and we don't even  
7 have that party before the Court to tell us --

8 JUSTICE KAVANAUGH: I think --

9 MS. ROSS: -- whether that has  
10 happened.

11 JUSTICE KAVANAUGH: -- I think the --  
12 I think the Chief's question was, next time, we  
13 shouldn't do this, do you agree?

14 MS. ROSS: You know, I think certainly  
15 I would have to know more about what it looks  
16 like next time, but I think the whole point,  
17 obviously, of the Court reserving this ability  
18 would be -- or recognizing this ability,  
19 really, because they're both jurisdictional  
20 questions, would be to allow you to say yes,  
21 we're going to go to standing in the next case.

22 JUSTICE BARRETT: Do you think it's  
23 relevant that the reason the split looks  
24 different too is also perhaps strategic  
25 behavior on the part of the Respondent?

1 Because didn't she go to those other circuits  
2 and then dismiss her claims and ask for the  
3 decisions to be vacated?

4 MS. ROSS: So, you know, I -- I don't  
5 want to sort of import -- or impart a motive to  
6 any of the parties on -- on either side of this  
7 case. I think the Eleventh Circuit decision is  
8 actually a little bit more complicated than  
9 that because it was actually that the defendant  
10 not only -- or had not just sold the hotel at  
11 the time of the decision, it actually had  
12 dissolved and had not told the court that at  
13 the time, and so it wasn't sort of just on  
14 Ms. Laufer's side of the v.

15 JUSTICE BARRETT: It was at her  
16 request, is all I'm saying.

17 MS. ROSS: Yes.

18 JUSTICE BARRETT: Yeah.

19 MS. ROSS: I think it was at her  
20 request. You know, again, I -- I think the  
21 question really is, given how much more  
22 difficult at least we think the standing  
23 question is than the mootness question, whether  
24 it makes sense in this case, where we have  
25 these additional complications, to go ahead and

1 decide that.

2 JUSTICE KAGAN: I'm wondering, just to  
3 turn to the standing question --

4 MS. ROSS: Certainly.

5 JUSTICE KAGAN: -- how you would  
6 distinguish your position from Mr. Unikowsky's  
7 views and why it matters.

8 MS. ROSS: Sure. So I -- I think  
9 there are sort of many differences, but I guess  
10 I'll hit three main ones.

11 The first one is that Mr. Unikowsky,  
12 in his brief and then again this morning,  
13 expressed the view that the Reservation Rule is  
14 really about access to the facility under the  
15 ADA.

16 We -- we understand it a little bit  
17 differently. There's, of course, some element  
18 of access to the facility in there, but the  
19 statute says --

20 JUSTICE KAGAN: When you say "the  
21 facility," meaning the hotel?

22 MS. ROSS: The hotel, the physical  
23 place of public accommodation. The -- the  
24 statute also guarantees people with  
25 disabilities the equal enjoyment of the

1 services of a place of public accommodation,  
2 and so I think how this cashes out is that in  
3 -- on Mr. Unikowsky's view, I think, if you  
4 have a hotel like this one that has no  
5 accessible -- no accessible rooms, then a  
6 plaintiff can never have standing based on the  
7 fact that they didn't tell you that on their  
8 website because you couldn't go there anyway.

9 We think that actually is an injury.  
10 If -- if you're trying to figure it out and you  
11 can't because they don't have the information,  
12 you're not having the equal enjoyment of the  
13 service in the way that the ADA provides.

14 JUSTICE ALITO: Is your argument  
15 really a standing argument, an Article III  
16 argument, or is it a merits argument? You're  
17 saying that when Title III and the Reservation  
18 Rule are properly interpreted, then Ms. Laufer  
19 doesn't have a claim. That's a merits  
20 argument.

21 MS. ROSS: So, Justice Alito, I  
22 appreciate that the -- the analyses sort of  
23 overlap in this area, and I think the reason  
24 why that is so is that this Court has  
25 specifically recognized that congressional --

1 what Congress does in terms of creating rights  
2 and causes of action is relevant.

3 I think the -- the phrase this Court  
4 used in TransUnion was, you know, due respect,  
5 obviously Havens, other cases. And so I do  
6 think there's some overlap. But we do think  
7 the way this comes to the Court is that  
8 discrimination is an Article III injury when  
9 somebody personally experiences it with respect  
10 to her rights. And --

11 JUSTICE ALITO: Well, let -- let me  
12 ask -- let me give you a hypothetical of the  
13 sort that our former colleague, Justice Breyer,  
14 might have asked. So --

15 (Laughter.)

16 JUSTICE ALITO: -- let -- let's say I  
17 am -- I am driving to a dog show and I am  
18 transporting my champion Saint Bernard and I  
19 want to check in to a hotel with my dog, and  
20 they ask me: Is it a service dog? I say no,  
21 it's not a service dog. Is it an emotional  
22 support dog? No, it's not an emotional support  
23 dog. Well, they say, you can't check into the  
24 hotel because either we don't allow dogs at all  
25 or we don't allow dogs that weigh more than a

1 hundred pounds. And I say, well, you're  
2 violating the ADA. And I sue under the ADA.

3 Now do I lack standing? Have I not  
4 suffered an injury in fact because I can't get  
5 this hotel room and I can't have my dog, my  
6 champion Saint Bernard, with me in my room? Or  
7 do I just lose because the dog isn't covered --  
8 having the dog with -- without it being a  
9 service dog or an emotional support dog is not  
10 covered by the ADA?

11 MS. ROSS: So I think you might just  
12 have a merits problem there if I'm following it  
13 correctly, but I think it's a little bit  
14 different because the -- the harm that you're  
15 alleging in that case is the -- just the -- the  
16 harm from -- you know, maybe the person was  
17 mean to you, you just really wanted to bring  
18 your dog, whatever it is.

19 I think the way that this case is  
20 pitched is that the right that -- that  
21 Ms. Laufer claims gives her standing is the  
22 violation of the statutory right to information  
23 or the -- the violation of the regulation. And  
24 so we sort of have to know what the statute or  
25 the regulation provide to decide whether she

1 is -- if I could just finish the -- the  
2 sentence --

3 CHIEF JUSTICE ROBERTS: Sure.

4 MS. ROSS: -- in an analogy to sort of  
5 an Allen versus Wright case, you know, we have  
6 to -- we have to know whether she is the person  
7 who's personally experiencing the  
8 discrimination or she's the person who's sort  
9 of across the country hearing about it, and to  
10 know that, we have to know what the right to  
11 the non-discrimination right is.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Justice Thomas, a question about your  
14 dog?

15 Justice Sotomayor?

16 JUSTICE SOTOMAYOR: I'm -- I'm a  
17 little confused. In your brief, you say,  
18 "Ms. Laufer has not alleged that she used,  
19 attempted to use, or planned to use the Inn's  
20 reservation service." That's your brief at  
21 page 19 to 20.

22 I don't know, and you differentiated  
23 yourself from your colleague by saying he  
24 thinks that if she wasn't going to use the  
25 place at all, she doesn't have standing, and

1 he'll answer that, okay?

2 But does that mean that you're saying  
3 no tester could ever have standing?

4 MS. ROSS: Certainly not, Justice  
5 Sotomayor. We just think that the -- you have  
6 to look at the service that's being alleged  
7 rather than the -- the -- so if I could give  
8 you a physical analogy --

9 JUSTICE SOTOMAYOR: Yes.

10 MS. ROSS: -- I do think it makes it a  
11 little bit easier.

12 Here, you know, if you had two people  
13 who drive up to a store and they find that  
14 there's only stairs, no ramp, and one of them  
15 drives away and the other says, you know, I'd  
16 really like to go into this store, but I can't,  
17 I think that first person has standing --  
18 excuse me, the -- the person who -- who says,  
19 I'd really like to go into this store, but I  
20 can't, has standing. The person who drives  
21 away does not have standing. Neither of them  
22 actually has to say, I would buy something.

23 JUSTICE SOTOMAYOR: So is -- was her  
24 problem that she didn't say, I didn't go into  
25 the website? She says, I'm surfing to see how



1 many websites I can find information in. Is  
2 that what her problem was, that she didn't try  
3 to make a reservation --

4 MS. ROSS: So I --

5 JUSTICE SOTOMAYOR: -- or that she  
6 didn't look at the reservation? I -- I don't  
7 understand. When do we get to that point?

8 MS. ROSS: Sure. So I think when we  
9 get to the point where she has an injury is  
10 when she says, just as the physical tester  
11 says, I would go inside, when she says, I would  
12 make a reservation or I would use this  
13 information to consider making a reservation,  
14 because, you know, we certainly take the points  
15 that were expressed earlier about people who  
16 are -- are considering whether they're going to  
17 go to the place and are trying to figure it  
18 out.

19 But I think the difference here is  
20 that Ms. Laufer was doing this, she -- she had  
21 no use for the reservation service itself. She  
22 had no interest in actually even completing  
23 that transaction.

24 JUSTICE SOTOMAYOR: I -- I find this  
25 so hard because I think what we're trying to do

1 is to say that the website somehow is different  
2 than the physical entry or attempted entry,  
3 because we agree in Blue Haven that the couple  
4 wasn't intending to rent, they just went and  
5 asked for information and -- not Blue Haven,  
6 I'm sorry, Haven Realty, and they got turned  
7 away, and you're saying that we shouldn't write  
8 this to overturn Haven Realty.

9 MS. ROSS: Certainly not, Justice  
10 Sotomayor.

11 JUSTICE SOTOMAYOR: All right. So  
12 what's different than my going to -- the black  
13 couple went to the door of the place, asked for  
14 information. A disabled person goes to a  
15 website, which is, in my mind, the door to the  
16 hotel or at least a telephone to the hotel, and  
17 is being told, no, you're not welcomed here  
18 because we're not -- we don't have accessible  
19 rooms here?

20 MS. ROSS: So --

21 JUSTICE SOTOMAYOR: Basically, it --  
22 it's almost a negative, which is, if you don't  
23 give me the information, you're telling me that  
24 it's not accessible to me.

25 MS. ROSS: So I -- I agree with a lot

1 of what you've said, Justice Sotomayor. I  
2 think the distinction comes between the way  
3 that the statute at issue in Havens was  
4 written, which was it is unlawful to falsely  
5 tell any person that there is no housing  
6 available for a discriminatory reason,  
7 essentially, whereas the -- the reservation --  
8 and so it doesn't matter whether you're going  
9 to -- to rent the apartment, it does not matter  
10 at all.

11 I think, here, the Reservation Rule is  
12 much narrower than that. It does provide a  
13 right to information but in connection with  
14 actually making a reservation. So, if you go  
15 to pages 9A to 10A of our statutory appendix,  
16 where the regulation is laid out in full, the  
17 title of it is "Reservations made by places of  
18 lodging." The requirements apply with respect  
19 to reservations made by any means, and all the  
20 way through to, you know, the exceptions and  
21 the effective date are based on reservations.  
22 And so I think it's not this sort of anybody in  
23 the world gets information in quite the same  
24 way that it was in Havens.

25 But, again, completely agree that

1 Havens I should not be overruled. I heard my  
2 friend to agree with that. And also that, you  
3 know, we're not suggesting that -- that the --  
4 the person who actually does want to make a  
5 reservation doesn't have standing.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE KAGAN: I -- I wanted to give  
8 you an opportunity if you hadn't completed your  
9 list of things that are different between you  
10 and Mr. Unikowsky to do that.

11 But I also want to ask whether the  
12 first difference that you mentioned, which is  
13 you're focusing on the reservation service and  
14 he's focusing on the hotel or other facility,  
15 might introduce a kind of gamesmanship with  
16 respect to tester plaintiffs, you know, that  
17 you go into the website and you make the  
18 reservation and two days later you cancel the  
19 reservation, and you said: Hey, I made a  
20 reservation, what's your problem? Of course, I  
21 have standing.

22 MS. ROSS: Sure. So I'll take those  
23 in order. I think, to finish the list -- and I  
24 appreciate the opportunity -- the second one is  
25 that I heard Mr. Unikowsky to suggest both in

1 the papers and today that there might be sort  
2 of a particularization problem simply because  
3 this is on the website.

4 We disagree with that. I mean, I  
5 think, if an individual experiences the  
6 discrimination on a website because they are  
7 actually trying to make a reservation, as this  
8 Court has said in other contexts, the fact that  
9 a -- an injury is widely shared does not mean  
10 that it's not particularized.

11 And then the third point was, again,  
12 about this question about, you know, what  
13 counts as discrimination. I think -- I -- I --  
14 more so in the brief, and so I -- I don't want  
15 to attribute too much of a difference here, but  
16 I think in -- we think it's very clear that  
17 Congress defined discrimination to include the  
18 failure to make reasonable modifications.

19 And so the fact that, you know,  
20 someone can say: Well, my website has, you  
21 know, the same information for all comers and  
22 she wasn't sort of personally picked out to  
23 have different information, I think is no  
24 answer to the idea that this is real  
25 discrimination under the ADA.

1           And I think this -- that's a concept  
2           that this Court has recognized in other areas.  
3           So, for example, in the religion context,  
4           obviously, in cases like *Abercrombie*, the Court  
5           has made clear that, you know, it's not enough  
6           to just have a neutral "no head covering"  
7           policy. You need to make an accommodation to  
8           treat people equally.

9           To the gamesmanship point, I think  
10          that our test for standing will be narrower  
11          than the one that the court of appeals adopted.  
12          I think there will be fewer testers.

13          I don't think there will be no  
14          testers, and I think that's just a -- a  
15          consequence of the fact that this statute does  
16          provide a -- a right to anyone who's trying to  
17          use the service, and we don't take a step back  
18          and look to their motive.

19          But I do think, to some of the  
20          questions that came earlier, the -- the lower  
21          courts will have ways to ferret some of that  
22          gamesmanship out. For example, you know, if  
23          you say, I would have made a reservation on  
24          this website, but it turns out that when you  
25          see compliant websites you never make a

1 reservation, then a court might say that's not  
2 a credible allegation.

3 Similarly, I think hotels will have an  
4 ability to change how difficult it is to make a  
5 reservation and then cancel it. And so it  
6 might not be credible to say, I would have made  
7 a reservation if, in fact, I would have had to  
8 put down my deposit upfront and I couldn't get  
9 it back if I canceled it later.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Gorsuch?

12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: Just in the wake  
14 of your discussion with Justice Alito, I just  
15 want to make sure I'm clear on your position  
16 under Article III and our precedents.

17 You agree that one could have a cause  
18 of action but no standing, correct?

19 MS. ROSS: I think that flows clearly  
20 from this Court's decision in TransUnion and --  
21 and Spokeo, among others.

22 JUSTICE KAVANAUGH: Okay. And you  
23 agree that one could have standing but no cause  
24 of action?

25 MS. ROSS: That's also correct.

1 JUSTICE KAVANAUGH: Okay.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Barrett?

4 JUSTICE BARRETT: So I just want to  
5 make sure that I understand your colloquy with  
6 Justice Kagan.

7 What if I am not disabled and I don't  
8 need any accommodation, but I prefer, because I  
9 care a lot about the issue, to only stay at  
10 hotels that do post the information on websites  
11 and also make accommodations?

12 So I go to the website and I try to  
13 make a reservation, and I could make a  
14 reservation at a room, you know, that's not  
15 handicapped-accessible.

16 But would I have standing then because  
17 the website -- and -- and, in fact, I do make  
18 the reservation, but would I have standing  
19 then? I used the service. I guess I'm just  
20 trying to figure out, so you're saying that  
21 it's plaintiffs who intend to use the service  
22 who would have standing.

23 And I'm trying to -- to narrow down,  
24 does that just mean anyone who would use the  
25 service, or does that just mean the subset of



1 people who would use the service and who it's  
2 actually relevant for them to know whether the  
3 room is accessible?

4 MS. ROSS: So I -- I appreciate the --  
5 the chance to clarify, and I apologize if I was  
6 unclear on this.

7 I think it is certainly true that you  
8 need to be suffering discrimination within the  
9 meaning of the ADA, and so the person who  
10 doesn't need the accessibility information, I  
11 think, would not have standing.

12 JUSTICE BARRETT: So it's tied in.  
13 It's not just -- and I -- I honestly think some  
14 of the confusion in these cases is just by  
15 using "informational injury" with no additional  
16 explanation.

17 It's -- it's not just kind of a bald  
18 informational injury. It's informational  
19 injury because -- and you're saying it's tied  
20 here to discrimination -- because she lacked  
21 information, she was discriminated against  
22 because she couldn't access the service, the  
23 reservation service online?

24 MS. ROSS: Exactly.

25 JUSTICE BARRETT: Okay.

1 MS. ROSS: I think both Havens and  
2 this case are really better understood as  
3 discrimination cases that happened to involve  
4 information rather than --

5 JUSTICE BARRETT: Yeah.

6 MS. ROSS: -- informational cases for  
7 precisely the reasons you note, Justice  
8 Barrett.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Jackson?

12 JUSTICE JACKSON: So my thought has  
13 been that we need to distinguish between the  
14 person who's getting online and they're a  
15 documentarian, a passionate observer, a person  
16 who's going there just to see, are you  
17 following the rules, Hotel X, Hotel B, et  
18 cetera, and a person who, I think you're  
19 saying, is trying to use the service.

20 Is that a -- the -- the relevant line  
21 in terms of establishing injury?

22 MS. ROSS: Yes, Justice Jackson.

23 JUSTICE JACKSON: All right. So, if  
24 the -- and so then the question becomes, what  
25 does it mean to use the service? And do I have

1 to actually make -- express an intention to  
2 make a reservation, or could I be looking at  
3 this because there's a possibility that I might  
4 want to, you know, go to this area in the way  
5 some of the hypotheticals have talked about,  
6 and I want to see could I go there? Is that  
7 enough?

8 MS. ROSS: So I think that probably is  
9 enough. I mean, I think, you know, this gets  
10 complicated because we're talking about both  
11 what's enough under the Reservation Rule but  
12 also what's enough for forward-looking relief.  
13 And so I think you sort of have to tease those  
14 things out. But it seems like, if you are, you  
15 know, comparison-shopping because you want to  
16 go either -- you're thinking about three  
17 different hotels or three different cities and  
18 you're trying to figure out, you know, is this  
19 a place that I could make a reservation, then I  
20 do think that you would have standing under our  
21 conception of the -- the rule.

22 JUSTICE JACKSON: Right. And that  
23 seems like it's a little bit different than  
24 what -- what Acheson Hotels is saying. They're  
25 saying you have to know that you're going to go

1 to that hotel or you have to have pretty  
2 imminent plans or something like that, right?

3 MS. ROSS: I think that's right. And,  
4 you know, I -- again, as I said earlier, I  
5 think this cash -- one of the ways this cashes  
6 out is the -- when the hotel actually has no  
7 accessibility information, the person --

8 JUSTICE JACKSON: Right.

9 MS. ROSS: -- is still being  
10 discriminated against because they can't use  
11 the service in the same way that somebody else  
12 can.

13 JUSTICE JACKSON: And your bottom line  
14 in this case is you put Ms. Laufer in the other  
15 bucket because she disclaims any interest in  
16 actually possibly going to this hotel?

17 MS. ROSS: So --

18 JUSTICE JACKSON: Or in Maine or  
19 whatever?

20 MS. ROSS: So -- so I think it's the  
21 disclaiming or the -- the failure to allege  
22 that she would make a reservation, because we  
23 are focused on the service, not sort of the  
24 downstream question of whether she ultimately  
25 would keep the reservation.

1           And I think the -- part of the reason  
2           for that is that, you know, when I'm travel  
3           planning, when other people who don't have  
4           disabilities are travel planning, I have an  
5           ability to look at different websites, even if  
6           I'm ultimately not going to go to that place.

7           And so I think part of the  
8           antidiscrimination -- or -- or part of the  
9           discrimination here is -- is being treated  
10          differently with respect to that ability to --  
11          to gather the information necessary to make the  
12          decision.

13                   JUSTICE JACKSON: Thank you.

14                   CHIEF JUSTICE ROBERTS: Thank you,  
15                   counsel.

16                   Ms. Corkran.

17                           ORAL ARGUMENT OF KELSI B. CORKRAN

18                                   ON BEHALF OF THE RESPONDENT

19                   MS. CORKRAN: Mr. Chief Justice, and  
20                   may it please the Court:

21                           There is no serious dispute that at  
22                           the time Ms. Laufer filed suit, Acheson  
23                           provided no accessibility information on its  
24                           reservation website, thereby excluding disabled  
25                           people from using its online reservation

1 services and engaging in unlawful  
2 discrimination under the ADA.

3           As Congress recognized, when places of  
4 public accommodation fail to take reasonable  
5 steps to make their services available to  
6 people with disabilities, they signal that  
7 disabled people are unwelcome participants in  
8 the marketplace and contribute to their  
9 day-to-day experience of being isolated,  
10 invisible, and ignored.

11           If the Court reaches the standing  
12 question presented by Acheson, it should reject  
13 Acheson's argument that a disabled person does  
14 not experience that dignitary harm when she  
15 encounters the accessibility barrier on  
16 Acheson's website, unless she also has travel  
17 plans that are thwarted by the discriminatory  
18 treatment.

19           For over six decades and most notably  
20 in *Havens Realty*, this Court has recognized  
21 that discrimination inflicts Article III injury  
22 regardless of whether the plaintiff experiences  
23 any harm beyond the unequal treatment.

24           What it means to personally experience  
25 discrimination on the internet is a novel

1 question, but whether the answer is the one  
2 we've offered or the one the government  
3 proposes, Havens requires a test that focuses  
4 on what the plaintiff experiences on the  
5 website, not her underlying motive in that  
6 experience or whether any downstream injuries  
7 result.

8           Finally, I want to return to the issue  
9 the Court started with today. Mr. Unikowsky  
10 and I are both arguing before the Court on  
11 behalf of clients that have no legal interest  
12 in the outcome of this case: Ms. Laufer  
13 because she has dismissed her complaint with  
14 prejudice and will not be bringing any more ADA  
15 suits and Acheson because it no longer owns the  
16 hotel whose reservations service the suit  
17 challenged.

18           These circumstances render the case,  
19 at minimum, a poor vehicle for reaching the  
20 standing question.

21           I welcome the Court's questions.

22           JUSTICE THOMAS: You started with the  
23 standing question, and you spoke of dignitary  
24 injury, and in your briefs, I think you focus  
25 on stigmatic injury. The government seems to

1 focus on informational injury. And there seems  
2 to be a -- a -- a difference in your  
3 characterization of the injury here.

4 Would you spend a few minutes and  
5 explain which injury are we talking about?

6 MS. CORKRAN: Here, we're talking  
7 about a discriminatory denial of information,  
8 so it's not a pure informational injury. The  
9 discrimination aspect of it is important  
10 because, as in Havens, it's not just that  
11 you're not getting the information; you're not  
12 getting the information for a reason that  
13 conveys that you have inferior status in  
14 society. So it's inflicting a dignitary harm  
15 that you wouldn't have from a purely  
16 informational injury.

17 JUSTICE THOMAS: I guess I could think  
18 of cases in which a denial of injury doesn't go  
19 to one's dignity or to -- doesn't create this  
20 sort of a stigmatic --

21 MS. CORKRAN: Yeah.

22 JUSTICE THOMAS: Deprivation.

23 And it -- but it seems as though the  
24 government doesn't make that second step to the  
25 injury that you're talking about. It simply --



1 it's talk -- it focuses more on the information  
2 that you are deprived of in order to be able to  
3 use or to make a decision about using a hotel.

4 MS. CORKRAN: I -- I -- I think the  
5 government's brief does talk about this Court's  
6 jurisprudence on dignitary harm and  
7 discrimination and the fact that the Court has  
8 never required any downstream consequence for a  
9 -- a discriminatory injury.

10 And that's certainly the approach the  
11 Eleventh Circuit took on this issue.

12 JUSTICE KAVANAUGH: I agree with you  
13 that discriminatory treatment is itself an  
14 injury under our precedents and Article III,  
15 certainly in Havens Realty.

16 The discriminatory treatment here, I  
17 think Mr. Unikowsky is saying, would have  
18 occurred at the hotel or in and that there was  
19 no discrimination in the information provided  
20 because everyone was provided the same  
21 information. I just want to give you an  
22 opportunity to respond to that.

23 MS. CORKRAN: Yeah, thank you, Your  
24 Honor. I think that's wrong for the reasons  
25 Ms. Ross said. Under 12182, places of public

1 accommodation cannot discriminate in the  
2 provision of services. So it's not just in  
3 access to their building. The service itself  
4 has to be provided in a way that allows people  
5 with disabilities to use it in the same way as  
6 non-disabled people.

7 I also think this argument, when it's  
8 framed that way, really is a merits question  
9 and, under Steel Co., isn't part of the  
10 standing inquiry. I think, under Steel Co. and  
11 Lexmark and if you combine those with  
12 TransUnion and Spokeo, the Court assumes as  
13 valid Ms. Laufer's cause of action here, so you  
14 assume that the allegations in her complaint  
15 state a claim of unlawful discrimination under  
16 12182, and then you also assume that Congress  
17 conferred a cause of action to her.

18 And then the question is, did Congress  
19 act within its constitutional authority when it  
20 provided a cause of action here?

21 JUSTICE KAVANAUGH: Well, I think the  
22 -- Mr. Unikowsky's saying, particularly in the  
23 briefs, this is an Allen versus Wright kind of  
24 case, not a Havens Realty kind of case. And  
25 the distinction between those two cases --

1 Allen versus Wright, as you know, someone in  
2 Hawaii can't complain about discrimination  
3 that's occurring in Maine. Havens Realty, you  
4 actually personally experienced the  
5 discrimination yourself when you're, as Judge  
6 Barrett, then-Judge Barrett said in Casillas,  
7 when you're lied to because of your race.

8 So why isn't this case more like what  
9 Allen versus Wright described there?

10 MS. CORKRAN: The -- the plaintiffs in  
11 Allen v. Wright were challenging the IRS's  
12 failure to enforce a provision of the Internal  
13 Revenue Code that required it -- it to withhold  
14 tax-exempt status from discriminatory schools.  
15 The plaintiffs in that case had no private  
16 right to the IRS complying with the law. They  
17 were seeking to enforce a public right. And in  
18 those circumstances, they had to show that they  
19 were personally injured by the IRS's  
20 non-compliance.

21 JUSTICE KAGAN: But I wonder whether  
22 there isn't a broader principle at stake in a  
23 case called -- like Havens. I mean, here, your  
24 client has disclaimed, has said, I'm not  
25 intending to go on vacation at all, I'm not

1 intending to go to any hotel, I'm not intending  
2 to use the reservations service at all to look  
3 for accessible hotels, to reserve accessible  
4 hotels, to go to accessible hotels. I'm not  
5 doing any of that.

6 So tell me how she is discriminated  
7 against by -- by the inaccuracies on this  
8 website.

9 MS. CORKRAN: The reason the case  
10 comes to the Court in -- in that posture is  
11 because injunctive relief is so elusive when  
12 you're talking about concrete travel plans. As  
13 was noted earlier, Ms. Laufer did amend her  
14 complaint in this case to say that she was  
15 going on this long road trip, but when the case  
16 was on appeal, she had already gone on the road  
17 trip.

18 And so that's why, when we say she's  
19 disclaimed any intent of going on a trip, it's  
20 because, by the time the case was on appeal,  
21 she had already gone on the trip --

22 JUSTICE KAGAN: Well, but that's the  
23 --

24 MS. CORKRAN: -- and it could be a  
25 basis --

1 JUSTICE KAGAN: -- case that's before  
2 us.

3 MS. CORKRAN: Right.

4 JUSTICE KAGAN: It's a case before us  
5 with a stipulation that she's not using the  
6 website for any vacation purposes --

7 MS. CORKRAN: But --

8 JUSTICE KAGAN: -- that -- that she's  
9 -- and I think that your brief reads like --  
10 like this too, that the harm is -- well, I'm  
11 not sure. You tell me. The harm is just, I'm  
12 a person with a disability, and I see that  
13 there is inaccurate information about  
14 accessibility, and that itself harms me, even  
15 if I have no plans or less than plans, I have  
16 -- I -- I'm just not thinking about vacations  
17 at all.

18 MS. CORKRAN: Yeah. So I'll start by  
19 saying the reason all of these tester cases or  
20 really any of these Reservation Rule cases are  
21 going to be in that posture is because you --  
22 you can't have concrete or even, you know,  
23 somewhat concrete travel plans and get an  
24 injunction in time. So -- so that's why these  
25 cases have been just generally litigated in

1 this way in this pure tester posture.

2 But the injury here, again, it's not  
3 just a denial of information. The day-to-day  
4 experience of being a disabled person is to --  
5 to have your world be very small because our --  
6 our marketplace, our places of public -- public  
7 accommodation, just ignore you. They don't see  
8 you. They don't recognize you as a potential  
9 customer or as a member of the marketplace.

10 And so, when -- when Ms. Laufer goes  
11 to the website and she sees that she's  
12 invisible, that they are not even acknowledging  
13 her --

14 JUSTICE KAGAN: Well, suppose she goes  
15 to --

16 MS. CORKRAN: -- as someone who might  
17 stay there --

18 JUSTICE KAGAN: -- the website and  
19 rather than look at accessibility information,  
20 she goes to the website and she looks at lots  
21 of pictures of places and -- and -- and says:  
22 Oh, this one doesn't have the required ramps.  
23 And, again, she's not going to those places,  
24 she has no intent of going to those places, but  
25 she sees that they don't have the required

1 ramps and she brings suit then.

2 Does -- does she have standing to do  
3 that?

4 MS. CORKRAN: So --

5 JUSTICE KAGAN: Because I think that  
6 that's pretty similar to what is going on in  
7 this case.

8 MS. CORKRAN: So she does not have  
9 standing based on the pictures because she's  
10 not encountering the accessibility barrier  
11 herself. She's seeing --

12 JUSTICE KAGAN: Well, I don't know,  
13 it's, like, right there. I mean, if you're  
14 saying it's how you experience discrimination,  
15 and I can understand that, but I'm experiencing  
16 that sense of being excluded when I see that  
17 all these hotels are set up to exclude me and  
18 others like me.

19 MS. CORKRAN: There might be some sort  
20 of Article III argument there, but Congress  
21 certainly hasn't provided a cause of action  
22 there, unless you actually have plans to go to  
23 the hotel.

24 And I want to go back to what Justice  
25 --

1 JUSTICE GORSUCH: Well, then -- then  
2 just to pause there for a moment, it -- it  
3 sounds to me like you're edging right up to the  
4 Solicitor General's test. Am I missing  
5 something?

6 MS. CORKRAN: I -- I see the intuitive  
7 appeal of the government's test. I think the  
8 government -- and -- and we are both asking  
9 this question of, how do you encounter  
10 discrimination on a website? And -- and this  
11 goes to the analogy Justice Sotomayor was  
12 making.

13 Our position is, well, in the physical  
14 barrier context, you experience, you encounter  
15 that accessibility barrier when you visit the  
16 hotel regardless of whether you want to stay at  
17 the hotel or what your underlying motive is.  
18 So, when we translate that into the internet  
19 context, we say you encounter the accessibility  
20 barrier when you go to the website and click  
21 around. I think --

22 JUSTICE GORSUCH: Well, I -- I -- so  
23 -- so maybe that's the difference. Just -- I  
24 just want to make sure I understand what the  
25 difference is is all I'm trying to do. The



1 government says, yes, informational -- lack of  
2 information can be a form of discrimination --

3 MS. CORKRAN: Yes.

4 JUSTICE GORSUCH: -- when you have  
5 some plans. Now how concrete that is, good  
6 luck, all right --

7 MS. CORKRAN: Yeah.

8 JUSTICE GORSUCH: -- but some interest  
9 in making a reservation.

10 And I -- I -- the -- the extreme  
11 position -- the other end of the spectrum, and  
12 I think that -- I don't know, I don't know  
13 where you are on this -- is I'm just clicking  
14 around to see and I'm -- I'm looking for an  
15 absence of information. I'm going to seek out  
16 this discrimination without any plans, without  
17 any interest. It's just what I do.

18 Is -- is that standing in your view?

19 MS. CORKRAN: Yeah. So I think that  
20 is the distinction between our position and the  
21 -- and the government's position. So the  
22 government says --

23 JUSTICE GORSUCH: Yeah. So what's  
24 wrong with the government's position?

25 MS. CORKRAN: So I -- I think -- so --

1 so just to articulate what I think the  
2 government would say about your hypothetical is  
3 --

4 JUSTICE GORSUCH: Yeah.

5 MS. CORKRAN: -- the government says  
6 you have to use --

7 JUSTICE GORSUCH: Not my hypothetical.

8 MS. CORKRAN: Yeah. The government  
9 says you have to use the website in some way.  
10 So they would, I think, say our position is  
11 akin to driving by the website, and they want  
12 you to engage with it and actually make a  
13 reservation or -- or engage with it in a way  
14 that shows you're considering making a  
15 reservation.

16 We say in our brief, I'm not sure that  
17 distinction holds as a practical matter. Judge  
18 Newsom made this point as well.

19 JUSTICE GORSUCH: No, I'm not sure  
20 that it's going to be much of a pleading  
21 barrier if you were to adopt --

22 MS. CORKRAN: Yeah.

23 JUSTICE GORSUCH: -- the government's  
24 position versus your -- your client's, I think,  
25 but I'm just trying to understand what the real

1 difference is --

2 MS. CORKRAN: Yeah.

3 JUSTICE GORSUCH: -- if there is any  
4 or whether you're comfortable with the  
5 government's position.

6 MS. CORKRAN: I'm comfortable with the  
7 government's position so long as it's  
8 understood as an inquiry into what you  
9 experience on the website and not your  
10 underlying motive for being on the website --

11 JUSTICE GORSUCH: Right. We put that  
12 aside.

13 MS. CORKRAN: -- and not whether you  
14 experience any downstream injury as a result of  
15 being on the website.

16 And I think that's the real problem  
17 with Acheson's position. They are attempting  
18 to upend, I think, how this Court has always  
19 defined discriminatory injury, which is the  
20 injury is in the dignitary harm. You don't  
21 have to show some sort of downstream  
22 consequence, like --

23 JUSTICE KAVANAUGH: So --

24 JUSTICE GORSUCH: And I appreciate --  
25 I appreciate that.

1 MS. CORKRAN: Yeah.

2 JUSTICE GORSUCH: But -- but just to  
3 -- just so I've really got it, the government  
4 doesn't -- says the motive is irrelevant. We  
5 don't care --

6 MS. CORKRAN: Yes.

7 JUSTICE GORSUCH: -- why you walk in.  
8 But -- but we have to have some further  
9 engagement rather than just I'm spending the  
10 afternoon clicking through these things for --  
11 for -- because I'm -- that's what I do.

12 MS. CORKRAN: Yes, I think that's  
13 right. They think our clicking around is  
14 equivalent to driving by --

15 JUSTICE GORSUCH: Yeah.

16 MS. CORKRAN: -- and that making the  
17 reservation is -- is visiting --

18 JUSTICE GORSUCH: Something a little  
19 bit more.

20 MS. CORKRAN: Yeah, I think that's  
21 right.

22 JUSTICE GORSUCH: Okay. And -- and --

23 JUSTICE KAVANAUGH: So --

24 JUSTICE GORSUCH: -- you're  
25 comfortable with that?

1 MS. CORKRAN: I'm comfortable -- I  
2 think it's -- I think it's compatible with  
3 Havens.

4 JUSTICE GORSUCH: Okay. Thank you.

5 MS. CORKRAN: Right?

6 JUSTICE GORSUCH: Yeah.

7 MS. CORKRAN: Yeah.

8 JUSTICE GORSUCH: Thank you.

9 CHIEF JUSTICE ROBERTS: Well, that --

10 JUSTICE KAVANAUGH: So --

11 CHIEF JUSTICE ROBERTS: -- that's what  
12 I'm wondering, and this, I think, is Mr.  
13 Unikowsky's argument, and you've said it  
14 several times, that it's the discrimination you  
15 experience when you go to the website, when you  
16 -- there's the encounter on the website.

17 And I think that distinguishes it from  
18 Havens, where the discrimination was right  
19 there. And what I understand Mr. Unikowsky and  
20 I think perhaps the government says, you can't  
21 add on, as if it made no difference, later  
22 discrimination on the website because she  
23 really doesn't need the information on the  
24 website, she's not going to use it.

25 And so, to me, that's a key

1 distinction between this case and -- and  
2 Havens.

3 MS. CORKRAN: Well, in Havens,  
4 Ms. Coleman didn't need the information either.

5 CHIEF JUSTICE ROBERTS: Well, but, I  
6 mean, the -- the actual discrimination was  
7 against her.

8 MS. CORKRAN: Yes.

9 CHIEF JUSTICE ROBERTS: Right? And  
10 that -- that's all you needed. It was the  
11 information that was given there at her  
12 request. That's the end of the case.

13 Here, there's more. It -- it -- it --  
14 it is, as you say, discrimination on the  
15 website. We don't have that when she just goes  
16 in, calls the -- the hotel. She's not on the  
17 website. And it seems to me that that takes it  
18 out of the initial -- initial encounter.

19 MS. CORKRAN: Yeah. I think the  
20 question then becomes, how do you -- how do you  
21 translate that Havens in-person encounter to  
22 the digital realm? And I think, if you -- you  
23 know, if there had been a sign on the door at  
24 the realtor that said "If you're black, we have  
25 no apartments available," we wouldn't say that

1 Ms. Coleman didn't personally experience that  
2 discrimination because it was just a sign that  
3 anyone would see if they came to the realtor's  
4 --

5 CHIEF JUSTICE ROBERTS: Yeah, but  
6 she's not on the website. She's talking to the  
7 person in the -- in the hotel, right?

8 MS. CORKRAN: Well, right. So -- so,  
9 under the -- the hypothetical I just gave with  
10 Ms. Coleman, she isn't actually talking to  
11 anyone. She's being told by a sign that there  
12 are no apartments available to her.

13 CHIEF JUSTICE ROBERTS: Right. And  
14 I'm challenging the hypothetical.

15 MS. CORKRAN: Okay.

16 CHIEF JUSTICE ROBERTS: Because I  
17 think the hypothetical would say not the sign,  
18 the sign is the website, and she's going there.  
19 But she's not going to go there because she  
20 doesn't want the information from the website.  
21 She just needs to know from the conversation  
22 that it's not there.

23 MS. CORKRAN: That -- sorry, you're  
24 talking about Ms. Coleman now just needs to  
25 know or Ms. Laufer?

1 CHIEF JUSTICE ROBERTS: Ms. Laufer.

2 MS. CORKRAN: So -- so I -- I think  
3 that -- that what Ms. Laufer experienced on the  
4 website is similar to Ms. Coleman confronting a  
5 sign that says no apartments are available.

6 In both scenarios, Ms. Coleman had no  
7 interest in -- in getting an apartment.

8 Ms. Laufer had no interest in --

9 JUSTICE JACKSON: But, Ms. --

10 MS. CORKRAN: -- staying at the hotel.

11 JUSTICE JACKSON: -- Ms. Corkran, can  
12 I give you another hypothetical that I hope  
13 will clarify things a little bit?

14 So suppose we have an African American  
15 lawyer. This is back in the '60s, segregation  
16 time, '50s, '60s, who is across the street from  
17 a restaurant, and they see, they know, that the  
18 restaurant is not serving black customers  
19 through the front window, and at this time, the  
20 law says you're supposed to be, and they're  
21 not. They're making these people go around the  
22 back. And he's obviously upset about this. He  
23 feels the dignitary harm of seeing this happen.  
24 But he somehow disclaims that he ever would  
25 have gone to the restaurant, ever wanted to go



1 to the restaurant, et cetera.

2 Is it your view that he would have  
3 standing to sue because he's aware of, he sees,  
4 this discrimination occurring, but he's also  
5 said, I would never have subjected myself to  
6 that?

7 MS. CORKRAN: And -- and he's seeking  
8 injunctive relief, not damages?

9 JUSTICE JACKSON: Yes. Yes.

10 MS. CORKRAN: Yes. So -- so, under  
11 those circumstances, if you're not going to  
12 ever go up to the counter --

13 JUSTICE JACKSON: Yes.

14 MS. CORKRAN: -- and ask for food --

15 JUSTICE JACKSON: Yes.

16 MS. CORKRAN: -- then you don't have  
17 standing.

18 JUSTICE JACKSON: So why isn't  
19 Ms. Laufer that person?

20 MS. CORKRAN: Because Ms. Laufer has  
21 alleged that -- or did allege that she would go  
22 back to the website and confront the  
23 accessibility barrier. The important thing  
24 about the --

25 JUSTICE JACKSON: But she's not

1 confronting the barrier if she's not asking for  
2 food. I mean, she sees the barrier. I think  
3 this is where the breakdown is, I think, right?

4 She's not like a tester who actually  
5 went to the counter. They didn't really want  
6 the food. They were only doing it to  
7 challenge. Motive is irrelevant. You -- we  
8 all agree that that person would have standing  
9 because they actually went there and they  
10 experienced the discrimination.

11 I want to know why she isn't the  
12 lawyer looking out the window across the street  
13 seeing this happen. And how can you say that  
14 he's confronting the barrier?

15 MS. CORKRAN: Because she went to the  
16 website and she engaged with the website and  
17 she --

18 JUSTICE JACKSON: So he goes down, he  
19 goes out across the street, he's standing  
20 there. He -- he goes. He's not just looking  
21 from across the street. He's literally right  
22 there at the counter because he wants to  
23 document this happening because he has in his  
24 mind: I really want to stop this, I'm going to  
25 sue.

1 MS. CORKRAN: Right.

2 JUSTICE JACKSON: But he never goes to  
3 the counter to ask himself for the food.

4 MS. CORKRAN: Yeah. So I think -- I  
5 think Ms. Laufer is the -- is -- in her  
6 circumstance, when she goes to the website and  
7 she engages in the reservations service, she is  
8 encountering that accessibility barrier.

9 JUSTICE JACKSON: All right.

10 MS. CORKRAN: But I think the  
11 government's position -- if that doesn't -- if  
12 that doesn't resonate, the government's  
13 position, I think, works as well, again, and is  
14 compatible with Havens.

15 JUSTICE KAVANAUGH: I think some of  
16 the amicus briefs raise the concern that  
17 everyone throughout the United States can sue  
18 every inn and hotel throughout the United  
19 States and use the phrase -- I'm not saying I  
20 agree with this, but this is the phrase in the  
21 amicus brief -- "online version of offended  
22 observers."

23 And so I want you to respond to that.  
24 Is that ultimately the effect of your position?  
25 Not saying that means your position's wrong,

1 but is that the effect of your position?

2 MS. CORKRAN: No, it isn't, and I  
3 think this goes back to our discussion about  
4 Allen v. Wright. Here, a disabled plaintiff is  
5 asserting a private right to equal treatment,  
6 and the -- the cause of action is for  
7 individuals who have experienced a violation of  
8 that private right.

9 So, one, you can't -- you don't have a  
10 cause of action under Title III unless --

11 JUSTICE KAVANAUGH: Put aside cause of  
12 action.

13 MS. CORKRAN: Right.

14 JUSTICE KAVANAUGH: This is about  
15 standing.

16 MS. CORKRAN: You don't -- you have to  
17 be both disabled so that you're actually  
18 experiencing a discriminatory denial of  
19 information and you have to have encountered  
20 the discrimination.

21 JUSTICE KAVANAUGH: So --

22 MS. CORKRAN: You can't just hear  
23 about it.

24 JUSTICE KAVANAUGH: -- I think the --  
25 some of the amicus briefs all -- also refer to

1 then could every disabled person throughout the  
2 United States sue every inn and hotel  
3 throughout the United States. Again, not  
4 saying that means your position's wrong, but  
5 following up, I guess, on Justice Gorsuch, I'm  
6 trying to figure out where that leads.

7 MS. CORKRAN: I -- I think any  
8 disabled person who goes to the website,  
9 whether they make a reservation under the  
10 government's rule, but they're engaging with it  
11 and confronting the accessibility barrier,  
12 would have experienced a violation of their  
13 private right under Title III, but that's not  
14 an -- that's not an extension of Article III  
15 standing. That's just an application of  
16 traditional Article III principles to the  
17 digital realm.

18 JUSTICE KAVANAUGH: I think --

19 MS. CORKRAN: It's just everyone's  
20 reach has been expanded for better or worse.

21 JUSTICE KAVANAUGH: Right. And I  
22 think the interesting difficult question in  
23 this case maybe on the standing side is, do you  
24 actually experience discrimination when you go  
25 to the website and you can get all the same

1 information anyone else can get, but you're  
2 experiencing discrimination because what would  
3 happen if you went to the hotel?

4 MS. CORKRAN: Well, so I don't think  
5 it's -- it's -- the discrimination is what  
6 would happen if you went to the hotel. The  
7 discrimination is -- you know, we say in our  
8 brief it's as if you went up to a reservation  
9 desk in a wheelchair and the hotel had a  
10 practice of just ignoring anyone in a  
11 wheelchair or telling them to call a number.  
12 There is a dignity harm --

13 JUSTICE KAVANAUGH: Mm-hmm.

14 MS. CORKRAN: -- in being treated as  
15 invisible and not as a potential participant in  
16 the marketplace.

17 JUSTICE KAVANAUGH: Mm-hmm. So  
18 someone who didn't go on the website but was  
19 aware of this --

20 MS. CORKRAN: Would not have  
21 experienced that discrimination.

22 JUSTICE KAVANAUGH: It's the website  
23 that's --

24 MS. CORKRAN: Yeah.

25 JUSTICE KAVANAUGH: -- in your view,

1 creating the discrimination?

2 MS. CORKRAN: Yeah.

3 JUSTICE KAVANAUGH: And then Justice  
4 Gorsuch referenced, quite correctly in my view,  
5 that pleading -- it might be easy to plead some  
6 of this to get around this, but -- but, at  
7 summary judgment, of course, the facts would  
8 have to hold up that you intended to travel  
9 somewhere, right?

10 MS. CORKRAN: Well, I don't think  
11 there should be an intent to -- to travel  
12 anywhere.

13 JUSTICE KAVANAUGH: Right. No, I  
14 know. But --

15 MS. CORKRAN: Right. If there's an  
16 intent-to-travel requirement, no one is going  
17 to ever have standing to bring these suits in  
18 any meaningful --

19 JUSTICE KAVANAUGH: Right.

20 MS. CORKRAN: -- way because the trips  
21 are going to happen before you get your relief.

22 JUSTICE KAVANAUGH: Mm-hmm. Okay.

23 MS. CORKRAN: I -- I thought maybe  
24 we'd return --

25 JUSTICE KAVANAUGH: Oh --

1 MS. CORKRAN: Oh, sorry.

2 JUSTICE KAVANAUGH: -- one other one.  
3 In the reply brief -- and I just want to make  
4 sure I have your answer on this. So U.S.  
5 v. Richardson's kind of a landmark standing  
6 case. In the reply brief, they say that U.S.  
7 v. Richardson would come out the other way  
8 under your theory if a plaintiff visited the  
9 CIA's website and observed that the information  
10 was absent.

11 Do you want to respond to that?

12 MS. CORKRAN: Yes. So I think that's  
13 wrong for two reasons. One, again, that's a  
14 public right case, and also it's a pure  
15 informational injury. It doesn't involve a  
16 discriminatory denial of information.

17 I was just going to return to the --  
18 the mootness point and Your Honor's concerns  
19 about manipulating the Court's docket. I don't  
20 think that this is one of those cases. Of  
21 course, it is well established that the Court  
22 can exercise its discretion on what to do here  
23 on a case-by-case basis.

24 Here, we don't have a respondent who  
25 waited to hear what the Court was going to do



1 about granting review and then attempted to  
2 moot out the case. Ms. Laufer acquiesced to  
3 the Court's review, and then there was this  
4 unexpected development that was deeply  
5 upsetting to her.

6 She hasn't brought any of these suits,  
7 I think, in close to two years and already  
8 wasn't planning on bringing any more. The  
9 allegations against Mr. Gillespie were pretty  
10 devastating to her and she didn't want to  
11 pursue these cases anymore, and that's why we  
12 dismissed the complaint as moot.

13 We were completely transparent with  
14 opposing counsel and the Court about the  
15 disciplinary order and about Ms. Laufer's  
16 reasoning, and we acknowledged in our  
17 suggestion of mootness that we were not  
18 manipulating the Court's jurisdiction, that  
19 it's free to reach the standing question if it  
20 thinks this case is still a good vehicle for  
21 doing so.

22 And this is a highly unusual case in  
23 that not only does Ms. Laufer not have an  
24 interest in it anymore, neither does Acheson  
25 because it doesn't own the hotel. Acheson has

1     relied on Rule 25(c), I think, in their  
2     petition for the proposition that they're still  
3     the right defendant.

4             But all that Rule 25(c) does is  
5     provide that if an injunction issues that it  
6     binds the new owners.  If anything, that makes  
7     it worse because the actual owners who are  
8     going to be bound by any injunction in this  
9     case aren't here, and we don't know what they  
10    think.

11            But that injunction wouldn't apply to  
12    Acheson in any meaningful way.  They don't own  
13    the reservations site or the hotel.  And their  
14    only alleged interest in this case at this  
15    point is that Ms. Acheson now owns a different  
16    hotel.  I think she takes the position that  
17    that hotel's reservations service is -- is in  
18    compliance, and -- and she might hypothetically  
19    get some lawsuit from someone else down the  
20    road.

21            And I think this Court's cases,  
22    Camreta v. Greene and United States  
23    v. Juvenile, make clear that that sort of  
24    hypothetical future litigation isn't enough to  
25    avoid mootness.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Thomas?

4 Justice Alito?

5 Justice Sotomayor?

6 JUSTICE SOTOMAYOR: I have one  
7 question. Some amici say that the internet, as  
8 you've been arguing, is an especially important  
9 place for disabled people because they rely on  
10 it more than -- than anything else because of  
11 the physical barriers to get to places.

12 MS. CORKRAN: Right.

13 JUSTICE SOTOMAYOR: So the internet is  
14 the way they travel to a lot of places to find  
15 information ahead of time.

16 Are there any other common ADA claims  
17 that occur largely in the context of the  
18 internet?

19 MS. CORKRAN: Yeah.

20 JUSTICE SOTOMAYOR: Outside of the  
21 Reservation Rule and the screen reader cases?

22 MS. CORKRAN: Oh, so I was going to  
23 say the screen reader cases.

24 JUSTICE SOTOMAYOR: Yeah, those are  
25 the two, aren't they?

1 MS. CORKRAN: Yeah, and the other --  
2 the other circuit split has to do whether --  
3 with whether freestanding internet services  
4 that aren't attached to a place of public  
5 accommodation are themselves places of public  
6 accommodation subject to Title III, but that's  
7 not implicated here.

8 JUSTICE SOTOMAYOR: That's sort of  
9 different.

10 MS. CORKRAN: Yes.

11 JUSTICE SOTOMAYOR: Can you tell me  
12 would or how our ruling here might have an  
13 impact on the screen reader cases? What can we  
14 say or not say that would address that split?

15 MS. CORKRAN: So I --

16 JUSTICE SOTOMAYOR: I haven't thought  
17 of -- I thought of it, but I haven't delved  
18 into whether I have an answer for that, so I'm  
19 just --

20 MS. CORKRAN: I -- I do think that the  
21 credit union cases and, in particular, Carello  
22 in the Seventh Circuit are distinguishable  
23 because, there, you had a blind plaintiff who  
24 couldn't access the website, but there was an  
25 entirely independent reason that he couldn't

1 fully enjoy it, and that was because he wasn't  
2 eligible to be a member.

3 So that's an objective reason. It  
4 didn't have to do with his subjective motive or  
5 any downstream consequences. He just -- he --  
6 he wasn't able to enjoy it anyway and therefore  
7 didn't experience the discriminatory injury  
8 under Title III. So I don't think that what  
9 the Court does here necessarily impacts what's  
10 happening there.

11 And then, I guess -- yeah, I -- I do  
12 think, if the Court adopts Acheson's position,  
13 that -- in order to allege a discriminatory  
14 injury under Title III, you have to allege some  
15 sort of downstream injury, would have an  
16 enormous consequence on the screen  
17 accessibility cases too.

18 JUSTICE SOTOMAYOR: Okay. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 Justice Gorsuch?

21 Justice Kavanaugh?

22 Justice Jackson?

23 Thank you, counsel.

24 MS. CORKRAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.

1 Unikowsky.

2 REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY  
3 ON BEHALF OF THE PETITIONER

4 MR. UNIKOWSKY: Thank you, Mr. Chief  
5 Justice.

6 I'd just like to say a few words about  
7 the mootness issue and then a few words on the  
8 standing issue on which the Court granted  
9 certiorari.

10 On the mootness issue, I just think  
11 that in deciding whether to exercise its  
12 discretion to decide the question presented,  
13 the Court should think about what's going to  
14 happen in the lower courts if it -- it doesn't  
15 do that.

16 So, first of all, in the Fourth  
17 Circuit, where Ms. Laufer's lawsuit -- or the  
18 decision finding standing is binding precedent,  
19 it's essentially going to be impossible or  
20 almost impossible for a hotel to ever challenge  
21 standing because, in the district court, the  
22 hotel would have to lose a motion to dismiss,  
23 litigate the case all the way to judgment,  
24 lose, appeal, lose based on binding circuit  
25 precedent, and then file a petition for

1 rehearing en banc or a cert petition, and, of  
2 course, if that happens, then the hotel will  
3 abandon the case and cite this case for the  
4 proposition that it's allowed to do that. So,  
5 essentially, plaintiffs within that circuit  
6 will be able to bring lawsuits forever.

7           In other circuits, like the First and  
8 the Eleventh Circuit, okay, if the Court  
9 Munsingwear's this case, it's going to be  
10 persuasive rather than binding precedent, but,  
11 of course, persuasive authority may prove  
12 influential to the district courts.

13           And even assuming that courts ignore  
14 it altogether, then you're going to have every  
15 single district court deciding this standing  
16 question in the first instance, which is going  
17 to lead to a lot of judicial resources being  
18 expended that would be saved if this case  
19 currently before the Court is decided.

20           So I think that if the Court is  
21 concerned about expending judicial resources,  
22 they would ultimately be saved at the end of  
23 the day if the Court decides the question  
24 presented.

25           On the merits, just one word. I think

1 that Justice Kagan's question about a plaintiff  
2 who observes an accessibility barrier on a  
3 website is the right way to think about this  
4 case. I think the lack of information about  
5 accessibility is an accessibility barrier in  
6 the same way as an actual architectural barrier  
7 is an accessibility barrier.

8 In both cases, the -- the plaintiff is  
9 deterred from going to the hotel. The lack of  
10 information deters the plaintiff from going to  
11 the physical building because the plaintiff  
12 doesn't know if they'll be able to get in, just  
13 as observing the accessibility barrier deters  
14 the plaintiff from going to the hotel because  
15 the plaintiff knows in that case that they  
16 can't get into the building.

17 And so we think that those two cases  
18 should be understood the same way for purposes  
19 of standing. If going into the hotel is a  
20 requirement for the actual barrier, it should  
21 also be a requirement for lacking information  
22 about the barrier.

23 So we're not seeking a far-reaching  
24 ruling abolishing tester standing or anything  
25 like that. We certainly haven't asked the



1 Court to overrule Havens Realty. We're simply  
2 trying to ally -- align the law of standing in  
3 this case with the law of standing in other --  
4 in other cases involving architectural  
5 barriers.

6 If the Court has no further questions,  
7 we'd ask the Court to reverse.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 The case is submitted.

11 (Whereupon, at 11:28 a.m., the case  
12 was submitted.)

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## Official

<b>1</b>	18,24 64:3 75:3,3,4 <b>accessing</b> [3] 33:22 40:20 41:18 <b>accommodation</b> [9] 50:23 51:1 61:7 63:8 69:4 73:1 77:7 99:5,6 <b>accommodations</b> [1] 63:11 <b>ACHESON</b> [13] 1:3 3:4 20:4 21:12 34:10 66:24 68:22 69:12 70:15 96:24,25 97:12,15 <b>Acheson's</b> [4] 69:13,16 82:17 100:12 <b>acknowledged</b> [1] 96:16 <b>acknowledging</b> [1] 77:12 <b>acquiesced</b> [1] 96:2 <b>across</b> [5] 54:9 87:16 89:12,19,21 <b>act</b> [1] 73:19 <b>acted</b> [1] 14:1 <b>action</b> [10] 52:2 62:18,24 73:13,17,20 78:21 91:6,10,12 <b>actions</b> [1] 13:14 <b>actual</b> [4] 85:6 97:7 103:6,20 <b>actually</b> [38] 5:10 19:13 22:15,16 27:8 30:21 32:12,20 36:16,21 38:3,24 40:5 41:11 46:11,13,20 49:8,9,11 51:9 55:22 56:22 58:14 59:4 60:7 64:2 66:1 67:6,16 74:4 78:22 81:12 86:10 89:4,9 91:17 92:24 <b>ADA</b> [18] 4:2 14:11 18:25 30:12 35:6 39:12,15 43:22 50:15 51:13 53:2,2,10 60:25 64:9 69:2 70:14 98:16 <b>ADAM</b> [5] 1:18 2:3,13 3:7 101:2 <b>add</b> [2] 16:3 84:21 <b>additional</b> [3] 16:3 49:25 64:15 <b>address</b> [6] 13:9 19:10 23:13 43:15 47:15 99:14 <b>addressed</b> [2] 31:19 45:21 <b>addressing</b> [3] 13:6 17:19,21 <b>adjust</b> [1] 47:6 <b>admit</b> [2] 5:6,23 <b>adopt</b> [2] 21:14 81:21 <b>adopted</b> [1] 61:11 <b>adopts</b> [1] 100:12 <b>adverse</b> [2] 4:12 14:19 <b>advisory</b> [9] 6:10,15 7:5,8 17:15,17,22,24 18:5 <b>advocated</b> [1] 22:22 <b>advocating</b> [1] 18:9 <b>affairs</b> [1] 9:25 <b>African</b> [1] 87:14 <b>afternoon</b> [1] 83:10 <b>agree</b> [18] 7:9 8:11 9:10 10:3 13:4,23 43:2 46:23 48:	13 57:3,25 58:25 59:2 62:17,23 72:12 89:8 90:20 <b>agreed</b> [2] 10:8 23:1 <b>agreeing</b> [1] 13:7 <b>agrees</b> [2] 18:25 47:23 <b>ahead</b> [4] 10:16 12:4 49:25 98:15 <b>aired</b> [1] 4:6 <b>akin</b> [2] 43:20 81:11 <b>align</b> [1] 104:2 <b>ALITO</b> [12] 12:1,3 16:19 17:14,18 30:3 51:14,21 52:11,16 62:14 98:4 <b>allegation</b> [3] 24:3 29:18 62:2 <b>allegations</b> [3] 24:8 73:14 96:9 <b>allege</b> [5] 23:18 67:21 88:21 100:13,14 <b>alleged</b> [5] 44:2 54:18 55:6 88:21 97:14 <b>alleges</b> [1] 29:16 <b>alleging</b> [1] 53:15 <b>Allen</b> [6] 54:5 73:23 74:1,9,11 91:4 <b>allocation</b> [1] 15:16 <b>allow</b> [6] 9:21 16:23 22:10 48:20 52:24,25 <b>allowed</b> [1] 102:4 <b>allows</b> [1] 73:4 <b>ally</b> [1] 104:2 <b>almost</b> [5] 4:11 8:22 14:10 57:22 101:20 <b>already</b> [5] 15:21 46:19 75:16,21 96:7 <b>altogether</b> [1] 102:14 <b>amend</b> [1] 75:13 <b>America</b> [1] 5:2 <b>American</b> [1] 87:14 <b>amici</b> [1] 98:7 <b>amicus</b> [6] 1:22 2:7 42:19 90:16,21 91:25 <b>among</b> [3] 19:14 46:9 62:21 <b>analogy</b> [3] 54:4 55:8 79:11 <b>analyses</b> [1] 51:22 <b>another</b> [9] 4:8,14,23 5:3,9 7:15 16:16 45:20 87:12 <b>answer</b> [10] 9:5 11:3 28:10 33:9,15 55:1 60:24 70:1 95:4 99:18 <b>answered</b> [2] 7:3,4 <b>antecedent</b> [2] 8:14 9:6 <b>antidiscrimination</b> [1] 68:8 <b>anxious</b> [1] 19:9 <b>anybody</b> [2] 12:6 58:22 <b>anyway</b> [2] 51:8 100:6 <b>apartment</b> [2] 58:9 87:7 <b>apartments</b> [3] 85:25 86:12 87:5 <b>apologies</b> [1] 10:11 <b>apologize</b> [1] 64:5	<b>appeal</b> [4] 75:16,20 79:7 101:24 <b>appeals</b> [8] 9:16 16:21 22:5,8,16 31:19 32:14 61:11 <b>APPEARANCES</b> [1] 1:17 <b>appellate</b> [1] 14:14 <b>appendix</b> [1] 58:15 <b>application</b> [1] 92:15 <b>apply</b> [2] 58:18 97:11 <b>appreciate</b> [5] 51:22 59:24 64:4 82:24,25 <b>approach</b> [1] 72:10 <b>appropriate</b> [1] 32:3 <b>architectural</b> [2] 103:6 104:4 <b>area</b> [2] 51:23 66:4 <b>areas</b> [1] 61:2 <b>aren't</b> [7] 24:17 26:19 32:2 36:21 97:9 98:25 99:4 <b>argue</b> [2] 10:1 19:15 <b>arguing</b> [2] 70:10 98:8 <b>argument</b> [23] 1:14 2:2,5,9,12 3:4,7 20:16 35:15 38:7 42:4,18 51:14,15,16,16,20 68:17 69:13 73:7 78:20 84:13 101:2 <b>arguments</b> [3] 4:6 17:23 23:14 <b>arise</b> [2] 15:7 16:25 <b>around</b> [7] 12:25 45:14 79:21 80:14 83:13 87:21 94:6 <b>arrived</b> [1] 7:21 <b>Article</b> [20] 7:10,24 17:8,10,25 18:12 30:25 33:13 34:20 35:3 38:11,20 51:15 52:8 62:16 69:21 72:14 78:20 92:14,16 <b>articulate</b> [1] 81:1 <b>artificial</b> [4] 43:9 44:20 45:2,4 <b>ascribing</b> [1] 13:19 <b>aside</b> [2] 82:12 91:11 <b>aspect</b> [1] 71:9 <b>asserting</b> [1] 91:5 <b>assess</b> [1] 41:13 <b>assessment</b> [1] 41:1 <b>Assistant</b> [1] 1:20 <b>assume</b> [3] 15:5 73:14,16 <b>assumes</b> [1] 73:12 <b>assuming</b> [1] 102:13 <b>Atlantic</b> [1] 26:8 <b>attached</b> [1] 99:4 <b>attempt</b> [1] 30:14 <b>attempted</b> [3] 54:19 57:2 96:1 <b>attempting</b> [1] 82:17 <b>attribute</b> [1] 60:15 <b>authority</b> [4] 11:9 12:19 73:19 102:11 <b>availability</b> [1] 41:13 <b>available</b> [8] 41:8,9 42:2 58:6 69:5 85:25 86:12 87:5 <b>avoid</b> [1] 97:25	<b>avoiding</b> [1] 20:14 <b>award</b> [1] 20:7 <b>aware</b> [2] 88:3 93:19 <b>away</b> [3] 55:15,21 57:7
<b>2</b>	<b>20</b> [1] 54:21 <b>200</b> [1] 16:6 <b>2023</b> [1] 1:11 <b>22-429</b> [1] 3:4 <b>25(c)</b> [2] 97:1,4			
<b>3</b>	<b>3</b> [1] 2:4			
<b>4</b>	<b>4</b> [1] 1:11 <b>42</b> [1] 2:8			
<b>5</b>	<b>500</b> [1] 29:13 <b>50s</b> [1] 87:16			
<b>6</b>	<b>600</b> [1] 29:14 <b>60s</b> [2] 87:15,16 <b>68</b> [1] 2:11			
<b>9</b>	<b>9A</b> [1] 58:15			
<b>A</b>	<b>a.m</b> [3] 1:15 3:2 104:11 <b>abandon</b> [3] 9:16 21:9 102:3 <b>abandoning</b> [4] 4:11 5:18 10:23 14:16 <b>abandonment</b> [1] 9:20 <b>Abercrombie</b> [1] 61:4 <b>ability</b> [8] 25:11,20 42:8 48:17,18 62:4 68:5,10 <b>able</b> [6] 29:17 36:24 72:2 100:6 102:6 103:12 <b>able-bodied</b> [1] 41:6 <b>abnormal</b> [1] 25:4 <b>abolishing</b> [1] 103:24 <b>above-entitled</b> [1] 1:13 <b>absence</b> [2] 3:12 80:15 <b>absent</b> [2] 39:24 95:10 <b>access</b> [9] 30:24 32:1 42:1,11 50:14,18 64:22 73:3 99:24 <b>accessibility</b> [25] 3:12 5:1 25:8 30:22 40:21,22 48:6 64:10 67:7 68:23 69:15 76:14 77:19 78:10 79:15,19 88:23 90:8 92:11 100:17 103:2,5,5,7,13 <b>accessible</b> [14] 3:20 26:11,18 28:2,7 41:12 51:5,5 57:			
<b>B</b>	<b>back</b> [13] 10:5 11:11 22:17 27:25 34:16 46:6 61:17 62:9 78:24 87:15,22 88:22 91:3 <b>bad</b> [1] 13:18 <b>balance</b> [2] 20:22,24 <b>bald</b> [1] 64:17 <b>banc</b> [1] 102:1 <b>banned</b> [2] 17:8 38:12 <b>bar</b> [1] 33:21 <b>BARRETT</b> [19] 14:20 32:16 34:3,4,23,25 35:10 48:22 49:15,18 63:3,4 64:12,25 65:5,8,9 74:6,6 <b>barrier</b> [20] 30:23 69:15 78:10 79:14,15,20 81:21 88:23 89:1,2,14 90:8 92:11 103:2,5,6,7,13,20,22 <b>barriers</b> [2] 98:11 104:5 <b>based</b> [4] 51:6 58:21 78:9 101:24 <b>basically</b> [2] 29:23 57:21 <b>basis</b> [2] 75:25 95:23 <b>beach</b> [3] 28:3,7 29:2 <b>become</b> [2] 33:22 46:13 <b>becomes</b> [2] 65:24 85:20 <b>behalf</b> [9] 1:19,24 2:4,11,14 3:8 68:18 70:11 101:3 <b>behavior</b> [2] 47:6 48:25 <b>Bernard</b> [2] 52:18 53:6 <b>best</b> [1] 25:15 <b>Bethany</b> [1] 29:2 <b>better</b> [2] 65:2 92:20 <b>between</b> [12] 7:6 17:1 35:14 36:15 39:3 40:14 58:2 59:9 65:13 73:25 80:20 85:1 <b>beyond</b> [2] 46:16 69:23 <b>big</b> [1] 20:17 <b>binding</b> [4] 11:21 101:18,24 102:10 <b>binds</b> [1] 97:6 <b>bit</b> [8] 18:14 49:8 50:16 53:13 55:11 66:23 83:19 87:13 <b>black</b> [3] 57:12 85:24 87:18 <b>bless</b> [1] 4:9 <b>blesses</b> [1] 14:15 <b>blessing</b> [2] 5:16 21:3 <b>blind</b> [2] 32:1 99:23 <b>Blue</b> [2] 57:3,5 <b>Both</b> [13] 7:8 8:11 9:10 22:25 48:19 59:25 65:1 66:10 70:10 79:8 87:6 91:17 103:8 <b>bottom</b> [1] 67:13 <b>bound</b> [1] 97:8 <b>breakdown</b> [1] 89:3			

## Official

<p><b>Breyer</b> <sup>[1]</sup> 52:13  <b>brief</b> <sup>[15]</sup> 12:18 15:22 30:10  42:25 50:12 54:17,20 60:14 72:5 76:9 81:16 90:21 93:8 95:3,6  <b>briefing</b> <sup>[1]</sup> 31:22  <b>briefs</b> <sup>[4]</sup> 70:24 73:23 90:16 91:25  <b>bright</b> <sup>[1]</sup> 14:14  <b>bring</b> <sup>[6]</sup> 4:22 5:2 40:6 53:17 94:17 102:6  <b>bringing</b> <sup>[5]</sup> 5:4 11:24 45:14 70:14 96:8  <b>brings</b> <sup>[1]</sup> 78:1  <b>broader</b> <sup>[3]</sup> 11:23 18:16 74:22  <b>brought</b> <sup>[1]</sup> 96:6  <b>bucket</b> <sup>[1]</sup> 67:15  <b>building</b> <sup>[12]</sup> 30:14,22,25 31:2 32:6 40:20,22 41:1 42:11 73:3 103:11,16  <b>bunch</b> <sup>[1]</sup> 28:6  <b>business</b> <sup>[4]</sup> 27:9,11 34:14 38:15  <b>buy</b> <sup>[1]</sup> 55:22</p>	<p>52:5 61:4 64:14 65:3,6 71:18 73:25 76:19,20,25 95:20 96:11 97:21 98:21,23 99:13,21 100:17 103:8,17 104:4  <b>cash</b> <sup>[1]</sup> 67:5  <b>cashes</b> <sup>[2]</sup> 51:2 67:5  <b>Casillas</b> <sup>[1]</sup> 74:6  <b>cause</b> <sup>[9]</sup> 62:17,23 73:13,17,20 78:21 91:6,10,11  <b>causes</b> <sup>[1]</sup> 52:2  <b>cert</b> <sup>[3]</sup> 13:3 45:24 102:1  <b>certain</b> <sup>[1]</sup> 38:20  <b>certainly</b> <sup>[15]</sup> 12:19 20:18 46:4,7 47:16 48:14 50:4 55:4 56:14 57:9 64:7 72:10,15 78:21 103:25  <b>certiorari</b> <sup>[6]</sup> 9:2 22:12,15 44:14 46:22 101:9  <b>cetera</b> <sup>[2]</sup> 65:18 88:1  <b>challenge</b> <sup>[5]</sup> 29:17 36:24 37:25 89:7 101:20  <b>challenged</b> <sup>[1]</sup> 70:17  <b>challenging</b> <sup>[4]</sup> 30:11 37:17 74:11 86:14  <b>champion</b> <sup>[2]</sup> 52:18 53:6  <b>chance</b> <sup>[1]</sup> 64:5  <b>change</b> <sup>[1]</sup> 62:4  <b>characterization</b> <sup>[1]</sup> 71:3  <b>check</b> <sup>[5]</sup> 4:1 33:3 39:12 52:19,23  <b>checking</b> <sup>[5]</sup> 25:25 28:1 29:3 32:10,24  <b>CHIEF</b> <sup>[40]</sup> 3:3,9 8:13 10:15 12:2,5,9 25:1 28:14 29:7,15,25 33:25 35:11 42:15,21 45:8 47:10,17 54:3,12 59:6 62:10 63:2 65:10 68:14,19 84:9,11 85:5,9 86:5,13,16 87:1 98:1 100:19,25 101:4 104:8  <b>Chief's</b> <sup>[1]</sup> 48:12  <b>choice</b> <sup>[1]</sup> 25:20  <b>choose</b> <sup>[1]</sup> 44:24  <b>CIA's</b> <sup>[1]</sup> 95:9  <b>circling</b> <sup>[1]</sup> 10:4  <b>Circuit</b> <sup>[16]</sup> 11:10,20 19:14 46:20,24 47:1,2,25 49:7 72:11 99:2,22 101:17,24 102:5,8  <b>Circuit's</b> <sup>[3]</sup> 11:8 43:11 47:24  <b>circuits</b> <sup>[3]</sup> 4:4 49:1 102:7  <b>circumstance</b> <sup>[1]</sup> 90:6  <b>circumstances</b> <sup>[5]</sup> 37:24 38:20 70:18 74:18 88:11  <b>cite</b> <sup>[2]</sup> 22:6 102:3  <b>cities</b> <sup>[2]</sup> 26:10 66:17  <b>City</b> <sup>[8]</sup> 26:4,8,8,8,10,17 29:2,6  <b>claim</b> <sup>[5]</sup> 9:16 33:5 43:17 51:19 73:15  <b>claims</b> <sup>[9]</sup> 5:5 22:18 43:5 44:21 45:4 47:21 49:2 53:</p>	<p>21 98:16  <b>clarify</b> <sup>[2]</sup> 64:5 87:13  <b>clear</b> <sup>[8]</sup> 22:13,17 40:11 42:24 60:16 61:5 62:15 97:23  <b>clearly</b> <sup>[2]</sup> 43:3 62:19  <b>click</b> <sup>[1]</sup> 79:20  <b>clicking</b> <sup>[3]</sup> 80:13 83:10,13  <b>client</b> <sup>[1]</sup> 74:24  <b>client's</b> <sup>[1]</sup> 81:24  <b>clients</b> <sup>[1]</sup> 70:11  <b>close</b> <sup>[1]</sup> 96:7  <b>Co</b> <sup>[2]</sup> 73:9,10  <b>Coast</b> <sup>[1]</sup> 24:23  <b>Code</b> <sup>[1]</sup> 74:13  <b>Coleman</b> <sup>[7]</sup> 39:8 85:4 86:1,10,24 87:4,6  <b>colleague</b> <sup>[2]</sup> 52:13 54:23  <b>colloquy</b> <sup>[1]</sup> 63:5  <b>combine</b> <sup>[1]</sup> 73:11  <b>come</b> <sup>[8]</sup> 5:4 15:14 19:6 21:23 22:17 45:20 46:18 95:7  <b>comers</b> <sup>[1]</sup> 60:21  <b>comes</b> <sup>[6]</sup> 9:17 22:2 47:12 52:7 58:2 75:10  <b>comfortable</b> <sup>[4]</sup> 82:4,6 83:25 84:1  <b>common</b> <sup>[1]</sup> 98:16  <b>company</b> <sup>[1]</sup> 33:2  <b>comparable</b> <sup>[1]</sup> 38:22  <b>comparison-shopping</b> <sup>[1]</sup> 66:15  <b>compatible</b> <sup>[2]</sup> 84:2 90:14  <b>complain</b> <sup>[1]</sup> 74:2  <b>complaint</b> <sup>[7]</sup> 23:18 24:4 44:13 70:13 73:14 75:14 96:12  <b>completed</b> <sup>[1]</sup> 59:8  <b>completely</b> <sup>[3]</sup> 33:16 58:25 96:13  <b>completing</b> <sup>[1]</sup> 56:22  <b>compliance</b> <sup>[5]</sup> 18:25 19:21,24 39:12 97:18  <b>compliant</b> <sup>[1]</sup> 61:25  <b>complicated</b> <sup>[2]</sup> 49:8 66:10  <b>complications</b> <sup>[1]</sup> 49:25  <b>comply</b> <sup>[1]</sup> 4:2  <b>complying</b> <sup>[1]</sup> 74:16  <b>concept</b> <sup>[2]</sup> 8:22 61:1  <b>conception</b> <sup>[1]</sup> 66:21  <b>concern</b> <sup>[4]</sup> 21:2 46:8 47:17 90:16  <b>concerned</b> <sup>[4]</sup> 12:6 14:13 45:10 102:21  <b>concerns</b> <sup>[3]</sup> 10:22 42:25 95:18  <b>concert</b> <sup>[2]</sup> 31:16,17  <b>concrete</b> <sup>[10]</sup> 23:25 24:2,21 25:17 28:19 38:10 75:12 76:22,23 80:5  <b>conferred</b> <sup>[1]</sup> 73:17  <b>confident</b> <sup>[1]</sup> 45:9  <b>configuration</b> <sup>[1]</sup> 7:21  <b>confront</b> <sup>[1]</sup> 88:22</p>	<p><b>confronting</b> <sup>[4]</sup> 87:4 89:1,14 92:11  <b>confused</b> <sup>[1]</sup> 54:17  <b>confusion</b> <sup>[1]</sup> 64:14  <b>Congress</b> <sup>[6]</sup> 52:1 60:17 69:3 73:16,18 78:20  <b>congressional</b> <sup>[1]</sup> 51:25  <b>connection</b> <sup>[2]</sup> 43:25 58:13  <b>consequence</b> <sup>[5]</sup> 23:22 61:15 72:8 82:22 100:16  <b>consequences</b> <sup>[1]</sup> 100:5  <b>consider</b> <sup>[3]</sup> 20:20,25 56:13  <b>consideration</b> <sup>[1]</sup> 20:19  <b>considerations</b> <sup>[1]</sup> 20:25  <b>considering</b> <sup>[3]</sup> 15:12 56:16 81:14  <b>considers</b> <sup>[1]</sup> 39:16  <b>consistent</b> <sup>[1]</sup> 17:25  <b>constantly</b> <sup>[1]</sup> 45:24  <b>constellation</b> <sup>[1]</sup> 8:10  <b>Constitution</b> <sup>[1]</sup> 18:1  <b>constitutional</b> <sup>[1]</sup> 73:19  <b>constituted</b> <sup>[1]</sup> 42:9  <b>contact</b> <sup>[1]</sup> 29:10  <b>contested</b> <sup>[1]</sup> 31:21  <b>context</b> <sup>[4]</sup> 61:3 79:14,19 98:17  <b>contexts</b> <sup>[1]</sup> 60:8  <b>continues</b> <sup>[1]</sup> 19:15  <b>contribute</b> <sup>[1]</sup> 69:8  <b>controversy</b> <sup>[12]</sup> 6:18,22 7:1,6,11 8:7,12,20,25 18:5,12 23:2  <b>conversation</b> <sup>[1]</sup> 86:21  <b>conveys</b> <sup>[1]</sup> 71:13  <b>convincing</b> <sup>[1]</sup> 21:21  <b>CORKRAN</b> <sup>[8]</sup> 1:24 2:10 68:16,17,19 71:6,21 72:4,23 74:10 75:9,24 76:3,7,18 77:16 78:4,8,19 79:6 80:3,7,19,25 81:5,8,22 82:2,6,13 83:1,6,12,16,20 84:1,5,7 85:3,8,19 86:8,15,23 87:2,10,11 88:7,10,14,16,20 89:15 90:1,4,10 91:2,13,16,22 92:7,19 93:4,14,20,24 94:2,10,15,20,23 95:1,12 98:12,19,22 99:1,10,15,20 100:24  <b>correct</b> <sup>[11]</sup> 6:2,3 7:9 8:17 16:2 26:25 35:8,9 44:10 62:18,25  <b>correctly</b> <sup>[3]</sup> 32:21 53:13 94:4  <b>couldn't</b> <sup>[9]</sup> 26:11 30:23 34:21 42:5 51:8 62:8 64:22 99:24,25  <b>Counsel</b> <sup>[12]</sup> 13:11,25 14:3,8 23:7 29:8 42:16 68:15 96:14 98:2 100:23 104:9  <b>counselor</b> <sup>[1]</sup> 25:3  <b>count</b> <sup>[2]</sup> 29:12,12</p>	<p><b>counter</b> <sup>[9]</sup> 27:22 37:9,25 39:4,8 88:12 89:5,22 90:3  <b>counters</b> <sup>[2]</sup> 27:14 36:20  <b>country</b> <sup>[3]</sup> 12:25 45:14 54:9  <b>counts</b> <sup>[1]</sup> 60:13  <b>couple</b> <sup>[3]</sup> 30:10 57:3,13  <b>course</b> <sup>[8]</sup> 9:25 16:13 50:17 59:20 94:7 95:21 102:2,11  <b>COURT</b> <sup>[105]</sup> 1:1,14 3:10,22 4:3,6,9 5:12,15 6:23,24 7:16,21,23 8:9,19 9:1,7,15,17 10:11,21 11:4,16,21 12:16 13:5,9 14:12,15,23 15:2,6,11,12 16:11 17:7,11 18:3,7,8 19:8,18 20:8,19 21:1,10,13 22:5,8,16,19 23:11,13 24:16 29:23 31:18 37:16 42:22 43:10,14 44:13,14,16 45:15 46:9,19,22 47:8 48:7,17 49:12 51:24 52:3,7 60:8 61:2,4,11 62:1 68:20 69:11,20 70:9,10 72:7 73:12 75:10 82:18 95:21,25 96:14 100:9,12 101:8,13,21 102:8,15,19,20,23 104:1,6,7  <b>Court's</b> <sup>[16]</sup> 4:15 13:2,3 16:14 22:7,9,20 44:4 45:11 62:20 70:21 72:5 95:19 96:3,18 97:21  <b>counts</b> <sup>[10]</sup> 11:9 14:7 16:7,21 32:14,19 61:21 101:14 102:12,13  <b>covered</b> <sup>[3]</sup> 46:20 53:7,10  <b>covering</b> <sup>[1]</sup> 61:6  <b>create</b> <sup>[3]</sup> 4:12 5:19 71:19  <b>creating</b> <sup>[2]</sup> 52:1 94:1  <b>credible</b> <sup>[2]</sup> 62:2,6  <b>credit</b> <sup>[3]</sup> 32:17 33:10 99:21  <b>Cruz</b> <sup>[1]</sup> 38:11  <b>curiae</b> <sup>[3]</sup> 1:22 2:8 42:19  <b>currently</b> <sup>[1]</sup> 102:19  <b>customer</b> <sup>[1]</sup> 77:9  <b>customers</b> <sup>[1]</sup> 87:18</p>
<b>C</b>				
<p><b>California</b> <sup>[1]</sup> 25:13  <b>call</b> <sup>[2]</sup> 15:1 93:11  <b>called</b> <sup>[1]</sup> 74:23  <b>calls</b> <sup>[1]</sup> 85:16  <b>came</b> <sup>[3]</sup> 1:13 61:20 86:3  <b>Camreta</b> <sup>[1]</sup> 97:22  <b>cancel</b> <sup>[2]</sup> 59:18 62:5  <b>canceled</b> <sup>[1]</sup> 62:9  <b>cannot</b> <sup>[1]</sup> 73:1  <b>care</b> <sup>[2]</sup> 63:9 83:5  <b>Carello</b> <sup>[1]</sup> 99:21  <b>Carnahan</b> <sup>[1]</sup> 44:14  <b>Case</b> <sup>[146]</sup> 3:4 4:4,12 7:1,10,11,16,20,23 8:4,11,16,19,20,24,25,25 9:19,20 10:1,3,3,7,21 11:3,8,11,22,25 12:15 13:3,8,13,21,21 14:18 15:21 16:20,24 17:9,20 18:4,6,10,10,11,20,22 19:3,6,13,16 20:2,5,8,17,21 21:3,8,9,12 22:6,7,9,10,20,22 23:1,12 24:16 29:20 30:13,18 33:8,10,18,20 37:15 38:11,15,18 39:3,15,19 40:5,18 42:24 43:1,12 44:6,20,23 45:1,3,16,20 46:13,15,18,18,25 47:12,19 48:1,21 49:7,24 53:15,19 54:5 65:2 67:14 70:12,18 73:24,24 74:8,15,23 75:9,14,15,20 76:1,4 78:7 85:1,12 92:23 95:6,14 96:2,20,22 97:9,14 101:23 102:3,3,9,18 103:4,15 104:3,10,11  <b>case-by-case</b> <sup>[1]</sup> 95:23  <b>cases</b> <sup>[29]</sup> 9:24 10:23 14:5,16 21:5 45:14 46:1 47:9</p>	<p><b>chance</b> <sup>[1]</sup> 64:5  <b>change</b> <sup>[1]</sup> 62:4  <b>characterization</b> <sup>[1]</sup> 71:3  <b>check</b> <sup>[5]</sup> 4:1 33:3 39:12 52:19,23  <b>checking</b> <sup>[5]</sup> 25:25 28:1 29:3 32:10,24  <b>CHIEF</b> <sup>[40]</sup> 3:3,9 8:13 10:15 12:2,5,9 25:1 28:14 29:7,15,25 33:25 35:11 42:15,21 45:8 47:10,17 54:3,12 59:6 62:10 63:2 65:10 68:14,19 84:9,11 85:5,9 86:5,13,16 87:1 98:1 100:19,25 101:4 104:8  <b>Chief's</b> <sup>[1]</sup> 48:12  <b>choice</b> <sup>[1]</sup> 25:20  <b>choose</b> <sup>[1]</sup> 44:24  <b>CIA's</b> <sup>[1]</sup> 95:9  <b>circling</b> <sup>[1]</sup> 10:4  <b>Circuit</b> <sup>[16]</sup> 11:10,20 19:14 46:20,24 47:1,2,25 49:7 72:11 99:2,22 101:17,24 102:5,8  <b>Circuit's</b> <sup>[3]</sup> 11:8 43:11 47:24  <b>circuits</b> <sup>[3]</sup> 4:4 49:1 102:7  <b>circumstance</b> <sup>[1]</sup> 90:6  <b>circumstances</b> <sup>[5]</sup> 37:24 38:20 70:18 74:18 88:11  <b>cite</b> <sup>[2]</sup> 22:6 102:3  <b>cities</b> <sup>[2]</sup> 26:10 66:17  <b>City</b> <sup>[8]</sup> 26:4,8,8,8,10,17 29:2,6  <b>claim</b> <sup>[5]</sup> 9:16 33:5 43:17 51:19 73:15  <b>claims</b> <sup>[9]</sup> 5:5 22:18 43:5 44:21 45:4 47:21 49:2 53:</p>	<p>21 98:16  <b>clarify</b> <sup>[2]</sup> 64:5 87:13  <b>clear</b> <sup>[8]</sup> 22:13,17 40:11 42:24 60:16 61:5 62:15 97:23  <b>clearly</b> <sup>[2]</sup> 43:3 62:19  <b>click</b> <sup>[1]</sup> 79:20  <b>clicking</b> <sup>[3]</sup> 80:13 83:10,13  <b>client</b> <sup>[1]</sup> 74:24  <b>client's</b> <sup>[1]</sup> 81:24  <b>clients</b> <sup>[1]</sup> 70:11  <b>close</b> <sup>[1]</sup> 96:7  <b>Co</b> <sup>[2]</sup> 73:9,10  <b>Coast</b> <sup>[1]</sup> 24:23  <b>Code</b> <sup>[1]</sup> 74:13  <b>Coleman</b> <sup>[7]</sup> 39:8 85:4 86:1,10,24 87:4,6  <b>colleague</b> <sup>[2]</sup> 52:13 54:23  <b>colloquy</b> <sup>[1]</sup> 63:5  <b>combine</b> <sup>[1]</sup> 73:11  <b>come</b> <sup>[8]</sup> 5:4 15:14 19:6 21:23 22:17 45:20 46:18 95:7  <b>comers</b> <sup>[1]</sup> 60:21  <b>comes</b> <sup>[6]</sup> 9:17 22:2 47:12 52:7 58:2 75:10  <b>comfortable</b> <sup>[4]</sup> 82:4,6 83:25 84:1  <b>common</b> <sup>[1]</sup> 98:16  <b>company</b> <sup>[1]</sup> 33:2  <b>comparable</b> <sup>[1]</sup> 38:22  <b>comparison-shopping</b> <sup>[1]</sup> 66:15  <b>compatible</b> <sup>[2]</sup> 84:2 90:14  <b>complain</b> <sup>[1]</sup> 74:2  <b>complaint</b> <sup>[7]</sup> 23:18 24:4 44:13 70:13 73:14 75:14 96:12  <b>completed</b> <sup>[1]</sup> 59:8  <b>completely</b> <sup>[3]</sup> 33:16 58:25 96:13  <b>completing</b> <sup>[1]</sup> 56:22  <b>compliance</b> <sup>[5]</sup> 18:25 19:21,24 39:12 97:18  <b>compliant</b> <sup>[1]</sup> 61:25  <b>complicated</b> <sup>[2]</sup> 49:8 66:10  <b>complications</b> <sup>[1]</sup> 49:25  <b>comply</b> <sup>[1]</sup> 4:2  <b>complying</b> <sup>[1]</sup> 74:16  <b>concept</b> <sup>[2]</sup> 8:22 61:1  <b>conception</b> <sup>[1]</sup> 66:21  <b>concern</b> <sup>[4]</sup> 21:2 46:8 47:17 90:16  <b>concerned</b> <sup>[4]</sup> 12:6 14:13 45:10 102:21  <b>concerns</b> <sup>[3]</sup> 10:22 42:25 95:18  <b>concert</b> <sup>[2]</sup> 31:16,17  <b>concrete</b> <sup>[10]</sup> 23:25 24:2,21 25:17 28:19 38:10 75:12 76:22,23 80:5  <b>conferred</b> <sup>[1]</sup> 73:17  <b>confident</b> <sup>[1]</sup> 45:9  <b>configuration</b> <sup>[1]</sup> 7:21  <b>confront</b> <sup>[1]</sup> 88:22</p>	<p><b>confronting</b> <sup>[4]</sup> 87:4 89:1,14 92:11  <b>confused</b> <sup>[1]</sup> 54:17  <b>confusion</b> <sup>[1]</sup> 64:14  <b>Congress</b> <sup>[6]</sup> 52:1 60:17 69:3 73:16,18 78:20  <b>congressional</b> <sup>[1]</sup> 51:25  <b>connection</b> <sup>[2]</sup> 43:25 58:13  <b>consequence</b> <sup>[5]</sup> 23:22 61:15 72:8 82:22 100:16  <b>consequences</b> <sup>[1]</sup> 100:5  <b>consider</b> <sup>[3]</sup> 20:20,25 56:13  <b>consideration</b> <sup>[1]</sup> 20:19  <b>considerations</b> <sup>[1]</sup> 20:25  <b>considering</b> <sup>[3]</sup> 15:12 56:16 81:14  <b>considers</b> <sup>[1]</sup> 39:16  <b>consistent</b> <sup>[1]</sup> 17:25  <b>constantly</b> <sup>[1]</sup> 45:24  <b>constellation</b> <sup>[1]</sup> 8:10  <b>Constitution</b> <sup>[1]</sup> 18:1  <b>constitutional</b> <sup>[1]</sup> 73:19  <b>constituted</b> <sup>[1]</sup> 42:9  <b>contact</b> <sup>[1]</sup> 29:10  <b>contested</b> <sup>[1]</sup> 31:21  <b>context</b> <sup>[4]</sup> 61:3 79:14,19 98:17  <b>contexts</b> <sup>[1]</sup> 60:8  <b>continues</b> <sup>[1]</sup> 19:15  <b>contribute</b> <sup>[1]</sup> 69:8  <b>controversy</b> <sup>[12]</sup> 6:18,22 7:1,6,11 8:7,12,20,25 18:5,12 23:2  <b>conversation</b> <sup>[1]</sup> 86:21  <b>conveys</b> <sup>[1]</sup> 71:13  <b>convincing</b> <sup>[1]</sup> 21:21  <b>CORKRAN</b> <sup>[8]</sup> 1:24 2:10 68:16,17,19 71:6,21 72:4,23 74:10 75:9,24 76:3,7,18 77:16 78:4,8,19 79:6 80:3,7,19,25 81:5,8,22 82:2,6,13 83:1,6,12,16,20 84:1,5,7 85:3,8,19 86:8,15,23 87:2,10,11 88:7,10,14,16,20 89:15 90:1,4,10 91:2,13,16,22 92:7,19 93:4,14,20,24 94:2,10,15,20,23 95:1,12 98:12,19,22 99:1,10,15,20 100:24  <b>correct</b> <sup>[11]</sup> 6:2,3 7:9 8:17 16:2 26:25 35:8,9 44:10 62:18,25  <b>correctly</b> <sup>[3]</sup> 32:21 53:13 94:4  <b>couldn't</b> <sup>[9]</sup> 26:11 30:23 34:21 42:5 51:8 62:8 64:22 99:24,25  <b>Counsel</b> <sup>[12]</sup> 13:11,25 14:3,8 23:7 29:8 42:16 68:15 96:14 98:2 100:23 104:9  <b>counselor</b> <sup>[1]</sup> 25:3  <b>count</b> <sup>[2]</sup> 29:12,12</p>	<p><b>counter</b> <sup>[9]</sup> 27:22 37:9,25 39:4,8 88:12 89:5,22 90:3  <b>counters</b> <sup>[2]</sup> 27:14 36:20  <b>country</b> <sup>[3]</sup> 12:25 45:14 54:9  <b>counts</b> <sup>[1]</sup> 60:13  <b>couple</b> <sup>[3]</sup> 30:10 57:3,13  <b>course</b> <sup>[8]</sup> 9:25 16:13 50:17 59:20 94:7 95:21 102:2,11  <b>COURT</b> <sup>[105]</sup> 1:1,14 3:10,22 4:3,6,9 5:12,15 6:23,24 7:16,21,23 8:9,19 9:1,7,15,17 10:11,21 11:4,16,21 12:16 13:5,9 14:12,15,23 15:2,6,11,12 16:11 17:7,11 18:3,7,8 19:8,18 20:8,19 21:1,10,13 22:5,8,16,19 23:11,13 24:16 29:23 31:18 37:16 42:22 43:10,14 44:13,14,16 45:15 46:9,19,22 47:8 48:7,17 49:12 51:24 52:3,7 60:8 61:2,4,11 62:1 68:20 69:11,20 70:9,10 72:7 73:12 75:10 82:18 95:21,25 96:14 100:9,12 101:8,13,21 102:8,15,19,20,23 104:1,6,7  <b>Court's</b> <sup>[16]</sup> 4:15 13:2,3 16:14 22:7,9,20 44:4 45:11 62:20 70:21 72:5 95:19 96:3,18 97:21  <b>counts</b> <sup>[10]</sup> 11:9 14:7 16:7,21 32:14,19 61:21 101:14 102:12,13  <b>covered</b> <sup>[3]</sup> 46:20 53:7,10  <b>covering</b> <sup>[1]</sup> 61:6  <b>create</b> <sup>[3]</sup> 4:12 5:19 71:19  <b>creating</b> <sup>[2]</sup> 52:1 94:1  <b>credible</b> <sup>[2]</sup> 62:2,6  <b>credit</b> <sup>[3]</sup> 32:17 33:10 99:21  <b>Cruz</b> <sup>[1]</sup> 38:11  <b>curiae</b> <sup>[3]</sup> 1:22 2:8 42:19  <b>currently</b> <sup>[1]</sup> 102:19  <b>customer</b> <sup>[1]</sup> 77:9  <b>customers</b> <sup>[1]</sup> 87:18</p>
<b>D</b>				
				<p><b>D.C</b> <sup>[4]</sup> 1:10,18,21,24  <b>damages</b> <sup>[1]</sup> 88:8  <b>date&lt;/</b></p>

## Official

9,17,21,24 50:1 53:25 101:12 <b>decided</b> [7] 7:17 8:5,9 19:5 29:1 32:21 102:19 <b>decides</b> [3] 14:17 16:15 102:23 <b>deciding</b> [7] 16:9 19:3 20:17,20 46:11 101:11 102:15 <b>decision</b> [15] 5:14 6:9 13:6 22:7 43:12 46:24 47:1,2, 25 49:7,11 62:20 68:12 72:3 101:18 <b>decisions</b> [2] 32:14 49:3 <b>declaration</b> [1] 29:21 <b>deeply</b> [1] 96:4 <b>defendant</b> [13] 6:6,12 14:17 18:23 20:5,9 21:11 22:13,15 43:5 47:21 49:9 97:3 <b>defendant's</b> [1] 18:24 <b>defendants'</b> [1] 9:25 <b>defined</b> [2] 60:17 82:19 <b>definitely</b> [4] 6:18 27:20 29:13 37:8 <b>delved</b> [1] 99:17 <b>delving</b> [1] 15:13 <b>denial</b> [5] 71:7,18 77:3 91:18 95:16 <b>Department</b> [1] 1:21 <b>Depending</b> [1] 29:11 <b>depends</b> [2] 36:11 43:17 <b>deposit</b> [1] 62:8 <b>Deprivation</b> [1] 71:22 <b>deprived</b> [3] 23:23 25:19 72:2 <b>described</b> [4] 31:20 38:19 40:16 74:9 <b>desk</b> [1] 93:9 <b>determination</b> [1] 45:25 <b>deterred</b> [1] 103:9 <b>deters</b> [2] 103:10,13 <b>devastating</b> [1] 96:10 <b>development</b> [1] 96:4 <b>difference</b> [12] 35:14,23 38:7 40:13 56:19 59:12 60:15 71:2 79:23,25 82:1 84:21 <b>differences</b> [2] 39:3 50:9 <b>different</b> [26] 6:2,12,13 11:22 15:17 17:9 18:24 27:2 29:10 30:17 32:10 33:8 34:7 46:21 48:24 53:14 57:1, 12 59:9 60:23 66:17,17,23 68:5 97:15 99:9 <b>differentiated</b> [1] 54:22 <b>differently</b> [3] 26:22 50:17 68:10 <b>difficult</b> [9] 12:23 14:25 15:4 19:17,18 43:8 49:22 62:4 92:22 <b>digital</b> [2] 85:22 92:17 <b>dignitary</b> [6] 69:14 70:23 71:14 72:6 82:20 87:23 <b>dignity</b> [2] 71:19 93:12	<b>disabilities</b> [5] 43:24 50:25 68:4 69:6 73:5 <b>disability</b> [3] 5:1 27:4 76:12 <b>disabled</b> [16] 25:10 26:24 27:7 34:12 41:10 57:14 63:7 68:24 69:7,13 77:4 91:4, 17 92:1,8 98:9 <b>disagree</b> [4] 7:11 18:2 33:7 60:4 <b>disciplinary</b> [2] 13:16 96:15 <b>disclaimed</b> [3] 39:1 74:24 75:19 <b>disclaiming</b> [1] 67:21 <b>disclaims</b> [2] 67:15 87:24 <b>discretion</b> [6] 43:11,15 44:8,17 95:22 101:12 <b>discretionary</b> [1] 20:19 <b>discriminate</b> [2] 39:14 73:1 <b>discriminated</b> [7] 26:25 27:19,21 41:24 64:21 67:10 75:6 <b>Discrimination</b> [49] 26:20 27:23 36:16 37:3 38:4,17 39:10,22 40:17,19 41:5 52:8 54:8 60:6,13,17,25 64:8, 20 65:3 68:9 69:2,21,25 71:9 72:7,19 73:15 74:2,5 78:14 79:10 80:2,16 84:14, 18,22 85:6,14 86:2 88:4 89:10 91:20 92:24 93:2,5, 7,21 94:1 <b>discriminatory</b> [17] 36:23 37:25 39:17,18 41:14 58:6 69:17 71:7 72:9,13,16 74:14 82:19 91:18 95:16 100:7,13 <b>discuss</b> [1] 5:9 <b>discussion</b> [3] 33:14 62:14 91:3 <b>dismiss</b> [4] 10:1 43:12 49:2 101:22 <b>dismissal</b> [1] 44:12 <b>dismissed</b> [6] 18:22 44:21 45:4 47:21 70:13 96:12 <b>disparate</b> [3] 39:16,18,20 <b>dispose</b> [1] 20:20 <b>disposing</b> [1] 18:6 <b>disposition</b> [2] 7:9 23:4 <b>dispute</b> [3] 7:23 19:21 68:21 <b>disputed</b> [3] 19:14,20 23:24 <b>disputing</b> [1] 6:19 <b>disrespect</b> [1] 39:22 <b>dissolved</b> [1] 49:12 <b>distinction</b> [6] 36:15 58:2 73:25 80:20 81:17 85:1 <b>distinguish</b> [4] 30:13 35:21 50:6 65:13 <b>distinguishable</b> [2] 33:17 99:22	<b>distinguished</b> [1] 30:20 <b>distinguishes</b> [1] 84:17 <b>district</b> [11] 11:9 14:4,23 15:2,6,12 16:7 44:13 101:21 102:12,15 <b>divided</b> [2] 4:5 16:21 <b>docket</b> [1] 95:19 <b>doctrines</b> [1] 7:14 <b>document</b> [1] 89:23 <b>documentarian</b> [1] 65:15 <b>dog</b> [13] 52:17,19,20,21,22, 23 53:5,7,8,9,9,18 54:14 <b>dogs</b> [2] 52:24,25 <b>doing</b> [8] 26:9 37:19 45:13, 19 56:20 75:5 89:6 96:21 <b>done</b> [3] 8:4 9:4,13 <b>door</b> [3] 57:13,15 85:23 <b>doornail</b> [2] 16:25 18:21 <b>down</b> [5] 27:14 62:8 63:23 89:18 97:19 <b>downstream</b> [8] 23:22 67:24 70:6 72:8 82:14,21 100:5,15 <b>dozens</b> [1] 45:18 <b>drawing</b> [1] 36:15 <b>drive</b> [2] 26:23 55:13 <b>drives</b> [2] 55:15,20 <b>driving</b> [3] 52:17 81:11 83:14 <b>drop</b> [2] 22:6,10 <b>dropped</b> [3] 13:14 20:1,17 <b>due</b> [1] 52:4	<b>ended</b> [1] 10:8 <b>enforce</b> [2] 74:12,17 <b>engage</b> [2] 81:12,13 <b>engaged</b> [1] 89:16 <b>engagement</b> [1] 83:9 <b>engages</b> [1] 90:7 <b>engaging</b> [2] 69:1 92:10 <b>enjoy</b> [2] 100:1,6 <b>enjoyment</b> [3] 43:25 50:25 51:12 <b>enormous</b> [1] 100:16 <b>enough</b> [18] 11:7 23:21 24:7,11,14,17,24 26:11 27:25 28:9,18 29:4 61:5 66:7,9, 11,12 97:24 <b>enter</b> [8] 27:9 30:14,21,23 31:4,16 32:6 41:21 <b>entering</b> [2] 31:1 38:15 <b>entire</b> [1] 16:16 <b>entirely</b> [1] 99:25 <b>entitled</b> [1] 5:24 <b>entity</b> [2] 6:2,13 <b>entrenched</b> [2] 15:19 16:22 <b>entry</b> [2] 57:2,2 <b>equal</b> [4] 43:25 50:25 51:12 91:5 <b>equally</b> [1] 61:8 <b>equivalent</b> [1] 83:14 <b>ERICA</b> [3] 1:20 2:6 42:18 <b>especially</b> [2] 10:23 98:8 <b>ESQ</b> [4] 2:3,6,10,13 <b>ESQUIRE</b> [2] 1:18,24 <b>essentially</b> [5] 5:15 37:16 58:7 101:19 102:5 <b>established</b> [1] 95:21 <b>establishing</b> [1] 65:21 <b>et</b> [2] 65:17 88:1 <b>ethical</b> [1] 14:10 <b>even</b> [17] 5:12 14:10 22:14, 21 31:16 32:18 33:7,16 36:16 40:6 48:6 56:22 68:5 76:14,22 77:12 102:13 <b>everybody</b> [1] 18:24 <b>everyone</b> [3] 47:23 72:20 90:17 <b>everyone's</b> [1] 92:19 <b>Exactly</b> [1] 64:24 <b>example</b> [2] 61:3,22 <b>exceptions</b> [1] 58:20 <b>exclude</b> [1] 78:17 <b>excluded</b> [1] 78:16 <b>excluding</b> [1] 68:24 <b>excuse</b> [3] 18:10 47:3 55:18 <b>exercise</b> [4] 43:10 44:8 95:22 101:11 <b>exercises</b> [1] 43:14 <b>expanded</b> [1] 92:20 <b>expended</b> [2] 16:5 102:18 <b>expending</b> [3] 15:13 16:8 102:21 <b>experience</b> [13] 69:9,14,24 70:6 77:4 78:14 79:14 82:	9,14 84:15 86:1 92:24 100:7 <b>experienced</b> [6] 74:4 87:3 89:10 91:7 92:12 93:21 <b>experiences</b> [5] 36:16 52:9 60:5 69:22 70:4 <b>experiencing</b> [6] 37:3 38:3 54:7 78:15 91:18 93:2 <b>explain</b> [1] 71:5 <b>explaining</b> [1] 45:1 <b>explanation</b> [1] 64:16 <b>express</b> [1] 66:1 <b>expressed</b> [2] 50:13 56:15 <b>extension</b> [1] 92:14 <b>extent</b> [2] 9:10 11:4 <b>extra</b> [2] 10:7,11 <b>extra-artificial</b> [1] 45:5 <b>extreme</b> [1] 80:10
<b>F</b>				
<b>face</b> [3] 3:11,16,21 <b>faces</b> [1] 3:14 <b>facially</b> [1] 39:16 <b>facilitate</b> [3] 4:13 40:22,25 <b>facility</b> [4] 50:14,18,21 59:14 <b>fact</b> [12] 29:20 30:4 32:9 33:4 51:7 53:4 60:8,19 61:15 62:7 63:17 72:7 <b>facts</b> [7] 8:10 31:21 36:11 37:15 38:18,22 94:7 <b>fail</b> [1] 69:4 <b>failings</b> [1] 13:22 <b>failure</b> [3] 60:18 67:21 74:12 <b>false</b> [1] 14:7 <b>falsely</b> [1] 58:4 <b>far-reaching</b> [1] 103:23 <b>favor</b> [1] 17:23 <b>federal</b> [2] 16:7,17 <b>fee</b> [1] 20:7 <b>feels</b> [2] 18:13 87:23 <b>ferret</b> [2] 36:13 61:21 <b>few</b> [4] 25:25 71:4 101:6,7 <b>fewer</b> [1] 61:12 <b>figure</b> [6] 35:14 51:10 56:17 63:20 66:18 92:6 <b>file</b> [4] 14:9 21:7 22:14 101:25 <b>filed</b> [7] 12:17 15:22,23 16:7 22:12 42:25 68:22 <b>filing</b> [3] 4:10,13 5:17 <b>Finally</b> [2] 4:3 70:8 <b>find</b> [8] 26:7,11 28:2,6 55:13 56:1,24 98:14 <b>finding</b> [1] 101:18 <b>fine</b> [2] 21:13 22:8 <b>finish</b> [2] 54:1 59:23 <b>finished</b> [1] 4:19 <b>first</b> [24] 6:22 7:18 8:18,20 11:7,8,10 12:21 19:14 33:8 37:6 39:6 43:11 44:18 46:24 47:19,24,25 50:11 55:17 59:12 101:16 102:7,				

## Official

<p>16  <b>flagged</b> [1] 42:25  <b>flatly</b> [1] 17:8  <b>Florida</b> [1] 25:13  <b>flows</b> [1] 62:19  <b>focus</b> [2] 70:24 71:1  <b>focused</b> [1] 67:23  <b>focuses</b> [2] 70:3 72:1  <b>focusing</b> [2] 59:13,14  <b>follow</b> [3] 12:1 22:9,18  <b>following</b> [3] 53:12 65:17 92:5  <b>food</b> [5] 27:15 88:14 89:2,6 90:3  <b>foresee</b> [1] 21:19  <b>forever</b> [1] 102:6  <b>form</b> [1] 80:2  <b>former</b> [1] 52:13  <b>forward</b> [1] 5:4  <b>forward-looking</b> [2] 35:4 66:12  <b>found</b> [2] 29:23 31:20  <b>Fourth</b> [2] 11:20 101:16  <b>framed</b> [1] 73:8  <b>free</b> [2] 18:8 96:19  <b>freestanding</b> [2] 43:19 99:3  <b>frequent</b> [1] 34:18  <b>friend</b> [2] 43:2 59:2  <b>front</b> [2] 18:6 87:19  <b>frustrated</b> [1] 34:11  <b>full</b> [1] 58:16  <b>fully</b> [4] 4:6 28:2,6 100:1  <b>fundamental</b> [1] 14:8  <b>further</b> [2] 83:8 104:6  <b>future</b> [12] 4:22 5:20 10:24 21:4 22:18 35:9 44:3,23 45:1 46:12 47:9 97:24</p> <hr/> <p style="text-align: center;"><b>G</b></p> <p><b>gamesmanship</b> [3] 59:15 61:9,22  <b>gather</b> [2] 45:13 68:11  <b>gave</b> [1] 86:9  <b>General</b> [1] 1:20  <b>General's</b> [1] 79:4  <b>generalized</b> [3] 28:24 39:7,13  <b>generally</b> [1] 76:25  <b>gets</b> [5] 6:11 34:11 45:15 58:23 66:9  <b>getting</b> [4] 65:14 71:11,12 87:7  <b>Gillespie</b> [2] 14:3 96:9  <b>give</b> [8] 43:19,23 52:12 55:7 57:23 59:7 72:21 87:12  <b>given</b> [3] 44:19 49:21 85:11  <b>gives</b> [1] 53:21  <b>giving</b> [2] 6:15 34:13  <b>goal</b> [1] 16:12  <b>GORSUCH</b> [32] 23:7,16 24:2,9,13,18 34:1 62:11 79:1,22 80:4,8,23 81:4,7,19,23</p>	<p>82:3,11,24 83:2,7,15,18,22,24 84:4,6,8 92:5 94:4 100:20  <b>got</b> [4] 15:9 24:20 57:6 83:3  <b>government</b> [14] 36:6 44:11 45:10 70:2,25 71:24 79:8 80:1,22 81:2,5,8 83:3 84:20  <b>government's</b> [10] 72:5 79:7 80:21,24 81:23 82:5,7 90:11,12 92:10  <b>grant</b> [1] 44:13  <b>granted</b> [5] 9:1 13:3 44:14 46:22 101:8  <b>granting</b> [2] 45:24 96:1  <b>great</b> [1] 28:3  <b>greater</b> [1] 20:24  <b>Greene</b> [1] 97:22  <b>grievance</b> [2] 39:7,13  <b>ground</b> [2] 22:22 23:12  <b>guarantees</b> [1] 50:24  <b>guess</b> [16] 10:4 19:7 21:20 22:11,23 23:13 30:15 35:13 36:12 37:2 42:3 50:9 63:19 71:17 92:5 100:11  <b>guidance</b> [2] 16:11,23</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>hand</b> [2] 12:11 46:6  <b>handicapped-accessible</b> [1] 63:15  <b>happen</b> [10] 17:24 21:6,16 22:4 87:23 89:13 93:3,6 94:21 101:14  <b>happened</b> [7] 13:20 20:10 21:12 29:20 33:21 48:10 65:3  <b>happening</b> [2] 89:23 100:10  <b>happens</b> [4] 9:23,24 21:17 102:2  <b>hard</b> [2] 36:14 56:25  <b>harder</b> [1] 46:3  <b>harm</b> [15] 11:15 25:10 33:14 38:11 53:14,16 69:14,23 71:14 72:6 76:10,11 82:20 87:23 93:12  <b>harmed</b> [2] 25:21 26:12  <b>harms</b> [1] 76:14  <b>Haven</b> [4] 57:3,5,6,8  <b>Havens</b> [23] 37:15 38:18 39:9 43:21 52:5 58:3,24 59:1 65:1 69:20 70:3 71:10 72:15 73:24 74:3,23 84:3,18 85:2,3,21 90:14 104:1  <b>Hawaii</b> [1] 74:2  <b>he'll</b> [1] 55:1  <b>head</b> [1] 61:6  <b>hear</b> [4] 3:3 30:15 91:22 95:25  <b>heard</b> [2] 59:1,25  <b>hearing</b> [1] 54:9  <b>held</b> [4] 3:22 19:15 24:16</p>	<p>32:19  <b>helpful</b> [1] 16:22  <b>herself</b> [1] 78:11  <b>higher</b> [1] 15:11  <b>highly</b> [2] 43:9 96:22  <b>himself</b> [1] 90:3  <b>hit</b> [1] 50:10  <b>Hmm</b> [1] 39:5  <b>hold</b> [4] 6:23 7:10 43:16 94:8  <b>holds</b> [1] 81:17  <b>home</b> [1] 11:18  <b>honestly</b> [1] 64:13  <b>Honor</b> [25] 6:7,20 7:8,19 8:18 9:12 10:12 11:7 13:5,24 16:3,14 18:3 19:11 23:15,21 27:6 28:11,18 29:19 30:8 31:20 38:19 40:16 72:24  <b>Honor's</b> [2] 20:16 95:18  <b>Honors</b> [1] 22:20  <b>hope</b> [1] 87:12  <b>hotel</b> [65] 3:13,19,25 6:1 19:23,24 20:4 23:19 24:5 26:16,17 28:3,7 29:17 31:4,7 33:22 34:10 41:8,11,18,20 42:2 43:6 47:22 48:4 49:10 50:21,22 51:4 52:19,24 53:5 57:16,16 59:14 65:17,17 67:1,6,16 70:16 72:3,18 75:1 78:23 79:16,17 85:16 86:7 87:10 90:18 92:2 93:3,6,9 96:25 97:13,16 101:20,22 102:2 103:9,14,19  <b>hotel's</b> [3] 19:20 44:1 97:17  <b>HOTELS</b> [14] 1:3 3:5 20:5 25:25 26:5 29:9 62:3 63:10 66:17,24 75:3,4,4 78:17  <b>hotels.com</b> [2] 19:23 48:2  <b>housing</b> [2] 43:21 58:5  <b>however</b> [2] 30:5 45:18  <b>hundred</b> [1] 53:1  <b>hundreds</b> [3] 11:24,24 45:14  <b>hungry</b> [1] 36:21  <b>hypothetical</b> [11] 20:6 39:4 42:6 52:12 81:2,7 86:9,14,17 87:12 97:24  <b>hypothetically</b> [1] 97:18  <b>hypotheticals</b> [3] 34:6 38:19 66:5</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>idea</b> [2] 26:15 60:24  <b>identifies</b> [1] 41:11  <b>ignore</b> [2] 77:7 102:13  <b>ignored</b> [1] 69:10  <b>ignoring</b> [1] 93:10  <b>Ill</b> [26] 7:11 17:8,10,25 18:12 30:25 33:13 34:20 35:3 38:11,20 43:18 51:15,17 52:8 62:16 69:21 72:14 78:20 91:10 92:13,14,16 99:6</p>	<p>100:8,14  <b>immaterial</b> [1] 6:25  <b>imminent</b> [2] 3:11 67:2  <b>impact</b> [1] 99:13  <b>impacts</b> [1] 100:9  <b>impaired</b> [4] 32:4,9,16 42:6  <b>impart</b> [1] 49:5  <b>implicated</b> [1] 99:7  <b>import</b> [1] 49:5  <b>important</b> [6] 4:5 6:11 19:4 71:9 88:23 98:8  <b>importantly</b> [1] 20:1  <b>impossible</b> [2] 101:19,20  <b>in-person</b> [1] 85:21  <b>inability</b> [1] 30:24  <b>inaccuracies</b> [1] 75:7  <b>inaccurate</b> [1] 76:13  <b>include</b> [1] 60:17  <b>independent</b> [1] 99:25  <b>indication</b> [1] 28:20  <b>individual</b> [2] 16:9 60:5  <b>individuals</b> [2] 43:23 91:7  <b>inferior</b> [1] 71:13  <b>inflict</b> [1] 38:20  <b>inflicting</b> [1] 71:14  <b>inflicts</b> [1] 69:21  <b>influential</b> [1] 102:12  <b>inform</b> [1] 48:5  <b>information</b> [59] 3:13,18,20 23:23 25:14 28:21 33:11 34:12 39:21 40:21 42:1,10,13 43:7,20,20,24 48:6 51:11 53:22 56:1,13 57:5,14,23 58:13,23 60:21,23 63:10 64:10,21 65:4 67:7 68:11,23 71:7,11,12 72:1,19,21 76:13 77:3,19 80:2,15 84:23 85:4,11 86:20 91:19 93:1 95:9,16 98:15 103:4,10,21  <b>informational</b> [12] 3:15,16 33:14 64:15,18,18 65:6 71:1,8,16 80:1 95:15  <b>informed</b> [1] 25:20  <b>initial</b> [2] 85:18,18  <b>injunction</b> [7] 20:7 34:22 35:7 76:24 97:5,8,11  <b>Injunctive</b> [3] 34:23 75:11 88:8  <b>injured</b> [3] 3:23 40:9 74:19  <b>injuries</b> [1] 70:6  <b>injury</b> [44] 3:12,15,16,17,21 30:25 33:13 34:8,20 35:3,8 38:21,24 40:3 42:12 51:9 52:8 53:4 56:9 60:9 64:15,18,19 65:21 69:21 70:24,25 71:1,3,5,8,16,18,25 72:9,14 77:2 82:14,19,20 95:15 100:7,14,15  <b>inn</b> [2] 90:18 92:2  <b>Inn's</b> [1] 54:19  <b>inquiry</b> [2] 73:10 82:8  <b>inside</b> [1] 56:11</p>	<p><b>instance</b> [1] 102:16  <b>institutional</b> [4] 10:22 20:25 46:8 47:7  <b>institutionally</b> [1] 15:15  <b>intend</b> [2] 23:19 63:21  <b>intended</b> [1] 94:8  <b>intending</b> [4] 57:4 74:25 75:1,1  <b>intent</b> [5] 38:10 39:14 75:19 77:24 94:11  <b>intent-to-travel</b> [1] 94:16  <b>intention</b> [1] 66:1  <b>intentional</b> [2] 38:17 39:22  <b>interest</b> [11] 3:14 39:1 56:22 67:15 70:11 80:8,17 87:7,8 96:24 97:14  <b>interested</b> [2] 3:18 45:15  <b>interesting</b> [1] 92:22  <b>Internal</b> [1] 74:12  <b>internet</b> [8] 4:1 27:10 69:25 79:18 98:7,13,18 99:3  <b>interpretation</b> [1] 4:2  <b>interpreted</b> [1] 51:18  <b>introduce</b> [1] 59:15  <b>intuitive</b> [1] 79:6  <b>invested</b> [1] 15:21  <b>investigating</b> [1] 15:24  <b>investigation</b> [1] 26:9  <b>investing</b> [1] 15:24  <b>invisible</b> [3] 69:10 77:12 93:15  <b>invoked</b> [1] 21:4  <b>involve</b> [2] 65:3 95:15  <b>involves</b> [1] 16:20  <b>involving</b> [2] 32:16 104:4  <b>irrelevant</b> [2] 83:4 89:7  <b>IRS</b> [1] 74:16  <b>IRS's</b> [2] 74:11,19  <b>isn't</b> [19] 7:4 9:11 11:1,13 18:11 34:17,17 40:24,25,25 53:7 73:9 74:8,22 86:10 88:18 89:11 91:2 97:24  <b>isolated</b> [1] 69:9  <b>issue</b> [27] 6:11 7:17 8:10 14:24 15:4,4,12 16:20,23 17:5,21 18:18 19:4,4,22 21:23 41:14 44:9,16 48:2 58:3 63:9 70:8 72:11 101:7,8,10  <b>issue's</b> [1] 15:7  <b>issues</b> [3] 12:21 19:11 97:5  <b>it'll</b> [1] 47:14  <b>itself</b> [5] 41:17 56:21 72:13 73:3 76:14</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>JACKSON</b> [51] 9:3,22 11:1,12 21:15 22:1,4,24 23:6,8 35:12,13,25 36:4,8,12 37:10,18 38:6,13,23 39:5,23,25 40:3,8,13,24 41:4,22 42:14 65:11,12,22,23 66:22 67:8,13,18 68:13 87:9,11</p>
--	--	--	---	---

## Official

<p>88:9,13,15,18,25 89:18 90:2,9 100:22  <b>job</b> [1] 48:4  <b>join</b> [2] 32:19 33:1  <b>Judge</b> [3] 32:16 74:5 81:17  <b>judges</b> [2] 16:8,9  <b>judgment</b> [4] 18:3,11 94:7 101:23  <b>judicial</b> [4] 16:4,13 102:17,21  <b>judiciary</b> [1] 16:17  <b>jurisdiction</b> [7] 7:24 12:16 13:2 17:11 44:6 45:11 96:18  <b>jurisdictional</b> [4] 12:21 17:12 18:17 48:19  <b>jurisdictionally</b> [1] 18:18  <b>jurisprudence</b> [1] 72:6  <b>Justice</b> [277] 1:21 3:3,9 4:16 5:6,22 6:1,4,8 7:2,13,25 8:3,13 9:3,5,22 10:5,15 11:1,12 12:1,2,3,5,9 13:11,13 14:20 16:18,19 17:13,14,18 18:13 19:19 20:13 21:15 22:1,4,24 23:6,7,8,16 24:2,9,13,18,25 25:1,2,19 26:6,19 27:2,12,18,24 28:5,12,14,15,19 29:7,15,25 30:2,3,4,9 31:3,6,11,15,23 32:8,22 33:24,25,25 34:2,3,4,5,5,23,25 35:10,11,11,13,25 36:4,8,12,19 37:10,18 38:6,13,23 39:5,23,25 40:3,8,13,24 41:4,22 42:7,14,15,21 44:5,10 45:6,8 47:10,17 48:8,11,22 49:15,18 50:2,5,20 51:14,21 52:11,13,16 54:3,12,13,15,16 55:4,9,23 56:5,24 57:9,11,21 58:1 59:6,6,7 62:10,10,12,13,14,22 63:1,2,2,4,6 64:12,25 65:5,7,9,10,10,12,22,23 66:22 67:8,13,18 68:13,14,19 70:22 71:17,22 72:12 73:21 74:21 75:22 76:1,4,8 77:14,18 78:5,12,24 79:1,11,22 80:4,8,23 81:4,7,19,23 82:3,11,23,24 83:2,7,15,18,22,23,24 84:4,6,8,9,10,11 85:5,9 86:5,13,16 87:1,9,11 88:9,13,15,18,25 89:18 90:2,9,15 91:11,14,21,24 92:13,19,22,25 93:13,17,22,25 94:3,13,19,22,25 95:2 100:21  <b>keep</b> [3] 37:20 45:23 67:25  <b>KELSI</b> [3] 1:24 2:10 68:17  <b>key</b> [1] 84:25  <b>kind</b> [9] 11:17 24:7 28:7 37:4 59:15 64:17 73:23,24 95:5  <b>knows</b> [1] 103:15</p>	<p>11,15,23 32:8,22 33:24 42:7 45:6 50:2,5,20 59:6,7 63:6 74:21 75:22 76:1,4,8 77:14,18 78:5,12 100:19  <b>Kagan's</b> [2] 34:6 103:1  <b>Kavanaugh</b> [30] 34:2 48:8,11 62:12,13,22 63:1 72:12 73:21 82:23 83:23 84:10 90:15 91:11,14,21,24 92:18,21 93:13,17,22,25 94:3,13,19,22,25 95:2 100:21  <b>keep</b> [3] 37:20 45:23 67:25  <b>KELSI</b> [3] 1:24 2:10 68:17  <b>key</b> [1] 84:25  <b>kind</b> [9] 11:17 24:7 28:7 37:4 59:15 64:17 73:23,24 95:5  <b>knows</b> [1] 103:15</p> <hr/> <p style="text-align: center;"><b>L</b></p> <p><b>lack</b> [4] 53:3 80:1 103:4,9  <b>lacked</b> [1] 64:20  <b>lacking</b> [2] 43:7 103:21  <b>lacks</b> [2] 43:16 44:3  <b>laid</b> [2] 44:15 58:16  <b>landmark</b> [1] 95:5  <b>large</b> [4] 4:10 5:17 14:9 21:7  <b>largely</b> [1] 98:17  <b>last</b> [4] 5:18 10:23 21:9 47:14  <b>later</b> [3] 59:18 62:9 84:21  <b>LAUFER</b> [25] 1:6 3:5 29:9 35:17 37:1 44:2 45:12 51:18 53:21 54:18 56:20 67:14 68:22 70:12 75:13 77:10 86:25 87:1,3,8 88:19,20 90:5 96:2,23  <b>Laufer's</b> [5] 11:20 49:14 73:13 96:15 101:17  <b>Laughter</b> [6] 10:13,18 12:8 24:19 28:16 52:15  <b>law</b> [4] 74:16 87:20 104:2,3  <b>lawsuit</b> [3] 5:3 97:19 101:17  <b>lawsuits</b> [10] 4:10,14 5:17 11:24 14:9 16:5,6 21:7 29:12 102:6  <b>lawyer</b> [3] 13:15 87:15 89:12  <b>lawyers</b> [1] 14:11  <b>lead</b> [2] 21:1 102:17  <b>leads</b> [1] 92:6  <b>least</b> [4] 10:4 25:4 49:22 57:16  <b>leave</b> [1] 46:10  <b>leaving</b> [1] 44:22  <b>legal</b> [5] 4:9 5:16 21:3,14 70:11  <b>less</b> [1] 76:15  <b>level</b> [1] 25:7  <b>Lexmark</b> [1] 73:11  <b>lied</b> [1] 74:7  <b>light</b> [1] 47:6</p>	<p><b>lights</b> [1] 14:14  <b>limited</b> [1] 40:19  <b>line</b> [2] 65:20 67:13  <b>list</b> [2] 59:9,23  <b>listen</b> [1] 15:10  <b>literally</b> [1] 89:21  <b>litigants</b> [1] 21:5  <b>litigate</b> [3] 14:17 43:4 101:23  <b>litigated</b> [1] 76:25  <b>litigation</b> [4] 11:23 12:25 30:12 97:24  <b>little</b> [9] 28:24 49:8 50:16 53:13 54:17 55:11 66:23 83:18 87:13  <b>live</b> [6] 6:18,22 7:5 8:6 19:6 23:2  <b>LLC</b> [1] 1:3  <b>local</b> [1] 14:3  <b>lodging</b> [1] 58:18  <b>logical</b> [1] 9:6  <b>logically</b> [1] 8:14  <b>long</b> [4] 29:22 30:5 75:15 82:7  <b>longer</b> [6] 7:5 43:4,5,6 47:22 70:15  <b>look</b> [18] 17:15 18:20 20:12 21:11 23:25 25:5,5,7,7,11 41:12 47:24 55:6 56:6 61:18 68:5 75:2 77:19  <b>looking</b> [7] 26:4 28:5 41:16 66:2 80:14 89:12,20  <b>looks</b> [4] 46:21 48:15,23 77:20  <b>lose</b> [4] 53:7 101:22,24,24  <b>lot</b> [7] 14:24 16:4 41:23 57:25 63:9 98:14 102:17  <b>lots</b> [1] 77:20  <b>lower</b> [4] 11:4,15 61:20 101:14  <b>luck</b> [1] 80:6  <b>Lujan</b> [1] 24:16  <b>lunch</b> [7] 27:14,22 36:20 37:8,25 39:4,8</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>made</b> [9] 19:13 58:17,19 59:19 61:5,23 62:6 81:18 84:21  <b>main</b> [2] 20:14 50:10  <b>Maine</b> [5] 29:22 30:7 39:1 67:18 74:3  <b>manipulate</b> [2] 12:15 13:2  <b>manipulating</b> [2] 95:19 96:18  <b>manipulation</b> [1] 45:11  <b>many</b> [6] 29:9,10 45:18 47:11 50:9 56:1  <b>marketplace</b> [4] 69:8 77:6,9 93:16  <b>Maryland</b> [1] 14:4  <b>matter</b> [9] 1:13 18:19 37:11,18,22 38:1 58:8,9 81:17  <b>matters</b> [2] 38:10 50:7</p>	<p><b>mean</b> [41] 4:21 5:15 11:2,14 12:11,16 14:21,22,23,25 16:4,6 17:18 18:13 23:3 26:14 30:16 31:24 34:6,9 36:2 37:20 40:4,15 41:22,24 42:4 46:2 47:20 53:17 55:2 60:4,9 63:24,25 65:25 66:9 74:23 78:13 85:6 89:2  <b>meaning</b> [2] 50:21 64:9  <b>meaningful</b> [2] 94:18 97:12  <b>meaningfully</b> [1] 34:7  <b>means</b> [5] 41:17 58:19 69:24 90:25 92:4  <b>meant</b> [2] 26:21 36:6  <b>member</b> [2] 77:9 100:2  <b>mentioned</b> [3] 17:3 19:12 59:12  <b>merely</b> [1] 33:11  <b>merits</b> [7] 17:7 39:25 51:16,19 53:12 73:8 102:25  <b>might</b> [15] 15:17 16:14 44:23 52:14 53:11 59:15 60:1 62:1,6 66:3 77:16 78:19 94:5 97:18 99:12  <b>mind</b> [2] 57:15 89:24  <b>minimum</b> [2] 43:14 70:19  <b>minute</b> [4] 5:18 10:23 14:22 21:9  <b>minutes</b> [1] 71:4  <b>missing</b> [1] 79:4  <b>Mm-hmm</b> [5] 28:4 31:5 93:13,17 94:22  <b>modifications</b> [1] 60:18  <b>moment</b> [1] 79:2  <b>monetary</b> [1] 5:24  <b>moot</b> [23] 5:7 6:14,18,25 8:15,23 9:10 10:3,3 11:3 12:15 19:16 23:1,9,11 43:1,3,12 45:16 47:20 48:1 96:2,12  <b>mooted</b> [3] 9:24 45:22,25  <b>mooting</b> [1] 13:3  <b>Mootness</b> [21] 7:15,17,18 8:15,22 10:1 12:14,17 15:5,23 22:25 44:18,22 45:9 46:12 49:23 95:18 96:17 97:25 101:7,10  <b>moots</b> [1] 20:8  <b>morning</b> [3] 3:4 42:23 50:12  <b>most</b> [2] 19:25 69:19  <b>motion</b> [1] 101:22  <b>motivation</b> [4] 37:12,21,23 38:1  <b> motive</b> [10] 13:19 31:1 49:5 61:18 70:5 79:17 82:10 83:4 89:7 100:4  <b>Ms</b> [153] 11:20 29:9 35:17 37:1 39:8 42:17,21 44:2,10 45:12,12 46:7 47:16 48:9,14 49:4,14,17,19 50:4,8,22 51:18,21 53:11,21 54:4,</p>	<p>18 55:4,10 56:4,8,20 57:9,20,25 59:22 62:19,25 64:4,24 65:1,6,22 66:8 67:3,9,14,17,20 68:16,19,22 70:12 71:6,21 72:4,23,25 73:13 74:10 75:9,13,24 76:3,7,18 77:10,16 78:4,8,19 79:6 80:3,7,19,25 81:5,8,22 82:2,6,13 83:1,6,12,16,20 84:1,5,7 85:3,4,8,19 86:1,8,10,15,23,24,25 87:1,2,3,4,6,8,9,10,11 88:7,10,14,16,19,20,20 89:15 90:1,4,5,10 91:2,13,16,22 92:7,19 93:4,14,20,24 94:2,10,15,20,23 95:1,12 96:2,15,23 97:15 98:12,19,22 99:1,10,15,20 100:24 101:17  <b>much</b> [5] 25:17 49:21 58:12 60:15 81:20  <b>Munsingwear</b> [4] 11:2,13 43:13 46:23  <b>Munsingwear's</b> [1] 102:9  <b>must</b> [1] 38:2  <b>myself</b> [1] 88:5</p> <hr/> <p style="text-align: center;"><b>N</b></p> <p><b>narrow</b> [2] 43:17 63:23  <b>narrower</b> [3] 43:23 58:12 61:10  <b>nature</b> [1] 44:20  <b>necessarily</b> [3] 27:15 46:3 100:9  <b>necessary</b> [1] 68:11  <b>need</b> [11] 6:5,5 19:5 25:16 61:7 63:8 64:8,10 65:13 84:23 85:4  <b>needed</b> [2] 42:10 85:10  <b>needs</b> [3] 5:2 86:21,24  <b>negative</b> [1] 57:22  <b>neither</b> [6] 1:23 2:8 3:15 42:20 55:21 96:24  <b>neutral</b> [2] 39:17 61:6  <b>never</b> [12] 6:22 9:4 15:14 20:10 34:15 38:25 45:25 51:6 61:25 72:8 88:5 90:2  <b>new</b> [5] 4:22 6:5,5 20:9 97:6  <b>Newsom</b> [1] 81:18  <b>next</b> [6] 24:18,22 47:12 48:12,16,21  <b>non-compliance</b> [1] 74:20  <b>non-disabled</b> [1] 73:6  <b>non-discrimination</b> [1] 54:11  <b>nor</b> [2] 3:15,21  <b>notably</b> [1] 69:19  <b>note</b> [2] 47:8 65:7  <b>noted</b> [1] 75:13  <b>nothing</b> [3] 6:12 18:18 27:4  <b>novel</b> [1] 69:25  <b>number</b> [2] 21:7 93:11</p>
--	---	--	--	--

## Official

<p><b>numbers</b> <sup>[3]</sup> 4:10 5:17 14:9</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>objection</b> <sup>[1]</sup> 5:17</p> <p><b>objections</b> <sup>[1]</sup> 13:10</p> <p><b>objective</b> <sup>[1]</sup> 100:3</p> <p><b>observed</b> <sup>[1]</sup> 95:9</p> <p><b>observer</b> <sup>[1]</sup> 65:15</p> <p><b>observers</b> <sup>[1]</sup> 90:22</p> <p><b>observes</b> <sup>[1]</sup> 103:2</p> <p><b>observing</b> <sup>[1]</sup> 103:13</p> <p><b>obviously</b> <sup>[4]</sup> 48:17 52:5 61:4 87:22</p> <p><b>occur</b> <sup>[2]</sup> 21:20 98:17</p> <p><b>occurred</b> <sup>[1]</sup> 72:18</p> <p><b>occurring</b> <sup>[2]</sup> 74:3 88:4</p> <p><b>Ocean</b> <sup>[4]</sup> 26:4,8 29:2,6</p> <p><b>October</b> <sup>[1]</sup> 1:11</p> <p><b>offended</b> <sup>[2]</sup> 34:17 90:21</p> <p><b>offered</b> <sup>[1]</sup> 70:2</p> <p><b>offers</b> <sup>[1]</sup> 41:2</p> <p><b>often</b> <sup>[1]</sup> 14:22</p> <p><b>Okay</b> <sup>[19]</sup> 20:15 28:19 29:25 34:25 35:10,17,25 37:9,10 55:1 62:22 63:1 64:25 83:22 84:4 86:15 94:22 100:18 102:8</p> <p><b>once</b> <sup>[2]</sup> 7:5 44:20</p> <p><b>one</b> <sup>[40]</sup> 7:1,14 8:25 9:19 11:5 12:11,21 16:3,16 20:21 26:5 29:13 30:13 32:14,15 45:21,22 46:4 47:2,14,14 50:11 51:4 55:14 59:24 61:11 62:17,23 67:5 70:1,2 77:22 91:9 94:16 95:2,2,13,20 98:6 102:25</p> <p><b>one's</b> <sup>[2]</sup> 12:10 71:19</p> <p><b>ones</b> <sup>[1]</sup> 50:10</p> <p><b>online</b> <sup>[4]</sup> 64:23 65:14 68:25 90:21</p> <p><b>only</b> <sup>[14]</sup> 8:12 14:1 19:21 34:22 35:6 43:3 45:13 47:2 49:10 55:14 63:9 89:6 96:23 97:14</p> <p><b>opening</b> <sup>[2]</sup> 12:18 15:22</p> <p><b>opinion</b> <sup>[8]</sup> 6:16 7:8 11:16 17:15,23 18:5 22:21,25</p> <p><b>opinions</b> <sup>[1]</sup> 17:24</p> <p><b>opportunity</b> <sup>[4]</sup> 4:8 59:8,24 72:22</p> <p><b>opposed</b> <sup>[1]</sup> 23:4</p> <p><b>opposing</b> <sup>[2]</sup> 14:7 96:14</p> <p><b>option</b> <sup>[3]</sup> 46:10 47:9,11</p> <p><b>options</b> <sup>[1]</sup> 29:3</p> <p><b>oral</b> <sup>[7]</sup> 1:14 2:2,5,9 3:7 42:18 68:17</p> <p><b>order</b> <sup>[7]</sup> 14:2 20:9 36:24 59:23 72:2 96:15 100:13</p> <p><b>ordinarily</b> <sup>[1]</sup> 10:9</p> <p><b>ordinary</b> <sup>[1]</sup> 9:25</p> <p><b>other</b> <sup>[32]</sup> 6:24 9:21 13:20,21 14:5,5 20:24 21:5 26:8,22 29:23 36:9 45:17 46:9</p>	<p>48:3 49:1 52:5 55:15 59:14 60:8 61:2 67:14 68:3 80:11 95:2,7 98:16 99:1,2 102:7 104:3,4</p> <p><b>others</b> <sup>[2]</sup> 62:21 78:18</p> <p><b>out</b> <sup>[28]</sup> 5:8 13:3 28:2 32:10,25 33:3 35:14 36:13 44:15 45:7 51:2,10 56:18 58:16 60:22 61:22,24 63:20 66:14,18 67:6 80:15 85:18 89:12,19 92:6 95:7 96:2</p> <p><b>outcome</b> <sup>[1]</sup> 70:12</p> <p><b>Outside</b> <sup>[1]</sup> 98:20</p> <p><b>over</b> <sup>[6]</sup> 5:16 10:2 16:1 18:21 44:6 69:19</p> <p><b>overlap</b> <sup>[2]</sup> 51:23 52:6</p> <p><b>overrule</b> <sup>[1]</sup> 104:1</p> <p><b>overruled</b> <sup>[1]</sup> 59:1</p> <p><b>overturn</b> <sup>[2]</sup> 37:17 57:8</p> <p><b>own</b> <sup>[4]</sup> 16:10 19:25 96:25 97:12</p> <p><b>owned</b> <sup>[2]</sup> 6:1 19:23</p> <p><b>owner</b> <sup>[1]</sup> 48:4</p> <p><b>owners</b> <sup>[2]</sup> 97:6,7</p> <p><b>owns</b> <sup>[4]</sup> 43:5 47:22 70:15 97:15</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>PAGE</b> <sup>[2]</sup> 2:2 54:21</p> <p><b>pages</b> <sup>[1]</sup> 58:15</p> <p><b>papers</b> <sup>[2]</sup> 12:17 60:1</p> <p><b>part</b> <sup>[10]</sup> 11:23 18:10,11 33:9,15 48:25 68:1,7,8 73:9</p> <p><b>participant</b> <sup>[1]</sup> 93:15</p> <p><b>participants</b> <sup>[1]</sup> 69:7</p> <p><b>particular</b> <sup>[6]</sup> 7:20 8:9 29:16 33:2 36:11 99:21</p> <p><b>particularization</b> <sup>[1]</sup> 60:2</p> <p><b>particularized</b> <sup>[1]</sup> 60:10</p> <p><b>particularly</b> <sup>[3]</sup> 12:24 46:14 73:22</p> <p><b>parties</b> <sup>[10]</sup> 7:6,9 8:11 17:1 19:14 23:1 46:23 47:5 48:5 49:6</p> <p><b>party</b> <sup>[4]</sup> 1:23 2:8 42:20 48:7</p> <p><b>passionate</b> <sup>[1]</sup> 65:15</p> <p><b>pattern</b> <sup>[2]</sup> 21:17 46:13</p> <p><b>pause</b> <sup>[1]</sup> 79:2</p> <p><b>Pearson</b> <sup>[1]</sup> 15:9</p> <p><b>pending</b> <sup>[1]</sup> 5:9</p> <p><b>people</b> <sup>[25]</sup> 12:12 13:1,20 25:2,3 26:22 27:7,13,18 36:20 40:19 45:18 50:24 55:12 56:15 61:8 64:1 68:3,25 69:6,7 73:4,6 87:21 98:9</p> <p><b>percent</b> <sup>[1]</sup> 13:24</p> <p><b>perfectly</b> <sup>[1]</sup> 21:13</p> <p><b>perhaps</b> <sup>[3]</sup> 29:14 48:24 84:20</p> <p><b>period</b> <sup>[2]</sup> 23:2,19</p> <p><b>permissible</b> <sup>[3]</sup> 14:13 17:4 30:17</p>	<p><b>permits</b> <sup>[1]</sup> 35:6</p> <p><b>persist</b> <sup>[1]</sup> 16:24</p> <p><b>person</b> <sup>[45]</sup> 3:22 5:1 14:1 23:22,24 25:10,24 26:6,24 28:1 30:23 32:1,6,9,23 33:5,7 34:19 37:8 39:9 41:6,10 45:13 53:16 54:6,8 55:17,18,20 57:14 58:5 59:4 64:9 65:14,15,18 67:7 69:13 76:12 77:4 86:7 88:19 89:8 92:1,8</p> <p><b>person's</b> <sup>[2]</sup> 26:1 37:23</p> <p><b>personally</b> <sup>[9]</sup> 3:23 39:9 52:9 54:7 60:22 69:24 74:4,19 86:1</p> <p><b>persuasive</b> <sup>[3]</sup> 11:9 102:10,11</p> <p><b>petition</b> <sup>[5]</sup> 22:12,14 97:2 101:25 102:1</p> <p><b>Petitioner</b> <sup>[6]</sup> 1:4,19 2:4,14 3:8 101:3</p> <p><b>Petitioner's</b> <sup>[2]</sup> 12:18 47:3</p> <p><b>phrase</b> <sup>[3]</sup> 52:3 90:19,20</p> <p><b>physical</b> <sup>[7]</sup> 50:22 55:8 56:10 57:2 79:13 98:11 103:11</p> <p><b>physically</b> <sup>[2]</sup> 30:21 31:9</p> <p><b>picked</b> <sup>[2]</sup> 26:17 60:22</p> <p><b>pictures</b> <sup>[2]</sup> 77:21 78:9</p> <p><b>piece</b> <sup>[1]</sup> 35:4</p> <p><b>pitched</b> <sup>[1]</sup> 53:20</p> <p><b>place</b> <sup>[18]</sup> 6:22 8:21 13:19 25:5,11 26:7,23 34:13,18 50:23 51:1 54:25 56:17 57:13 66:19 68:6 98:9 99:4</p> <p><b>places</b> <sup>[13]</sup> 26:12 29:10,23 58:17 69:3 72:25 77:6,21,23,24 98:11,14 99:5</p> <p><b>plaintiff</b> <sup>[39]</sup> 3:25 4:23 5:3,24 6:5,11 9:14 12:15 13:14 18:23 20:1 21:6,8,11 22:5,6,10 23:17 33:18,23 34:9 35:2 42:7 43:4 44:21 45:3 47:20 51:6 69:22 70:4 91:4 95:8 99:23 103:1,8,10,11,14,15</p> <p><b>plaintiffs</b> <sup>[10]</sup> 5:20 9:21 10:25 14:6 32:19 59:16 63:21 74:10,15 102:5</p> <p><b>planned</b> <sup>[1]</sup> 54:19</p> <p><b>planning</b> <sup>[5]</sup> 26:1 28:25 68:3,4 96:8</p> <p><b>plans</b> <sup>[13]</sup> 23:25 24:16,21 28:20 67:2 69:17 75:12 76:15,15,23 78:22 80:5,16</p> <p><b>plausible</b> <sup>[1]</sup> 29:24</p> <p><b>plead</b> <sup>[1]</sup> 94:5</p> <p><b>pleading</b> <sup>[2]</sup> 81:20 94:5</p> <p><b>please</b> <sup>[6]</sup> 3:10 10:1 28:12,15 42:22 68:20</p> <p><b>point</b> <sup>[15]</sup> 6:19 8:23 15:20 16:3 18:17 19:5 41:24 48:16 56:7,9 60:11 61:9 81:18 95:18 97:15</p>	<p><b>pointing</b> <sup>[1]</sup> 45:6</p> <p><b>points</b> <sup>[2]</sup> 25:7 56:14</p> <p><b>policies</b> <sup>[1]</sup> 39:17</p> <p><b>policy</b> <sup>[3]</sup> 36:25 37:2 61:7</p> <p><b>poor</b> <sup>[2]</sup> 46:15 70:19</p> <p><b>position</b> <sup>[21]</sup> 4:25 32:13 35:2 50:6 62:15 79:13 80:11,20,21,24 81:10,24 82:5,7,17 90:11,13,24 91:1 97:16 100:12</p> <p><b>position's</b> <sup>[2]</sup> 90:25 92:4</p> <p><b>possibility</b> <sup>[3]</sup> 14:18 44:23 66:3</p> <p><b>possibly</b> <sup>[1]</sup> 67:16</p> <p><b>post</b> <sup>[1]</sup> 63:10</p> <p><b>posture</b> <sup>[5]</sup> 43:10 47:13 75:10 76:21 77:1</p> <p><b>potential</b> <sup>[2]</sup> 77:8 93:15</p> <p><b>pounds</b> <sup>[1]</sup> 53:1</p> <p><b>practical</b> <sup>[1]</sup> 81:17</p> <p><b>practice</b> <sup>[1]</sup> 93:10</p> <p><b>precedent</b> <sup>[8]</sup> 4:13 11:21 12:20 14:19 22:9 101:18,25 102:10</p> <p><b>precedential</b> <sup>[3]</sup> 5:14 6:9 13:6</p> <p><b>precedents</b> <sup>[2]</sup> 62:16 72:14</p> <p><b>precisely</b> <sup>[1]</sup> 65:7</p> <p><b>precluding</b> <sup>[1]</sup> 18:19</p> <p><b>prefer</b> <sup>[1]</sup> 63:8</p> <p><b>prejudice</b> <sup>[1]</sup> 70:14</p> <p><b>present</b> <sup>[1]</sup> 15:5</p> <p><b>presented</b> <sup>[8]</sup> 4:4 16:15 17:10 20:11 21:2 69:12 101:12 102:24</p> <p><b>preserve</b> <sup>[1]</sup> 35:16</p> <p><b>presumably</b> <sup>[4]</sup> 4:24 5:3 11:11 13:9</p> <p><b>presume</b> <sup>[1]</sup> 31:23</p> <p><b>presupposes</b> <sup>[1]</sup> 8:23</p> <p><b>pretty</b> <sup>[3]</sup> 67:1 78:6 96:9</p> <p><b>prevail</b> <sup>[1]</sup> 9:15</p> <p><b>prevent</b> <sup>[1]</sup> 33:5</p> <p><b>prevented</b> <sup>[3]</sup> 27:22 31:10 33:18</p> <p><b>price</b> <sup>[1]</sup> 25:7</p> <p><b>principally</b> <sup>[1]</sup> 30:12</p> <p><b>principle</b> <sup>[1]</sup> 74:22</p> <p><b>principles</b> <sup>[1]</sup> 92:16</p> <p><b>private</b> <sup>[4]</sup> 74:15 91:5,8 92:13</p> <p><b>probably</b> <sup>[5]</sup> 19:4 24:11 29:4 31:8 66:8</p> <p><b>problem</b> <sup>[7]</sup> 41:15 53:12 55:24 56:2 59:20 60:2 82:16</p> <p><b>proceedings</b> <sup>[1]</sup> 13:16</p> <p><b>program</b> <sup>[3]</sup> 11:23 12:24 14:8</p> <p><b>promised</b> <sup>[1]</sup> 4:22</p> <p><b>properly</b> <sup>[2]</sup> 40:18 51:18</p> <p><b>proposes</b> <sup>[1]</sup> 70:3</p> <p><b>proposition</b> <sup>[2]</sup> 97:2 102:4</p>	<p><b>prove</b> <sup>[1]</sup> 102:11</p> <p><b>provide</b> <sup>[5]</sup> 16:23 53:25 58:12 61:16 97:5</p> <p><b>provided</b> <sup>[6]</sup> 68:23 72:19,20 73:4,20 78:21</p> <p><b>provides</b> <sup>[1]</sup> 51:13</p> <p><b>provision</b> <sup>[2]</sup> 73:2 74:12</p> <p><b>prudence</b> <sup>[1]</sup> 18:20</p> <p><b>prudential</b> <sup>[4]</sup> 7:14 14:24 15:1 17:3</p> <p><b>public</b> <sup>[10]</sup> 50:23 51:1 69:4 72:25 74:17 77:6,6 95:14 99:4,5</p> <p><b>pure</b> <sup>[3]</sup> 71:8 77:1 95:14</p> <p><b>purely</b> <sup>[2]</sup> 7:4 71:15</p> <p><b>purpose</b> <sup>[4]</sup> 9:20 28:22,25 40:20</p> <p><b>purposes</b> <sup>[3]</sup> 15:5 76:6 103:18</p> <p><b>pursue</b> <sup>[1]</sup> 96:11</p> <p><b>push-back</b> <sup>[1]</sup> 21:10</p> <p><b>put</b> <sup>[5]</sup> 37:7 62:8 67:14 82:11 91:11</p> <p><b>putting</b> <sup>[1]</sup> 36:23</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>question</b> <sup>[64]</sup> 4:4,5,7 7:4 8:6,12,14,18 9:1,8 10:5,20 12:12,14,23 16:10,15 17:9,10,12 18:15 19:12 20:11,18 21:2 22:17 28:11 31:19 34:4 35:1 37:2 40:16 43:9 44:18 45:9 46:4,11,12,17 47:22 48:12 49:21,23,23 50:3 54:13 60:12 65:24 67:24 69:12 70:1,20,23 73:8,18 79:9 85:20 92:22 96:19 98:7 101:12 102:16,23 103:1</p> <p><b>questions</b> <sup>[7]</sup> 4:15 42:23 44:4 48:20 61:20 70:21 104:6</p> <p><b>quite</b> <sup>[4]</sup> 9:19 46:21 58:23 94:4</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>race</b> <sup>[1]</sup> 74:7</p> <p><b>racial</b> <sup>[2]</sup> 38:17 39:10</p> <p><b>raise</b> <sup>[1]</sup> 90:16</p> <p><b>ramp</b> <sup>[2]</sup> 41:19 55:14</p> <p><b>ramps</b> <sup>[2]</sup> 77:22 78:1</p> <p><b>randomly</b> <sup>[1]</sup> 26:17</p> <p><b>rare</b> <sup>[3]</sup> 4:12 14:16 21:8</p> <p><b>rarely</b> <sup>[1]</sup> 9:17</p> <p><b>rather</b> <sup>[8]</sup> 7:17 43:8 46:12 55:7 65:4 77:19 83:9 102:10</p> <p><b>reach</b> <sup>[2]</sup> 92:20 96:19</p> <p><b>reaches</b> <sup>[1]</sup> 69:11</p> <p><b>reaching</b> <sup>[1]</sup> 70:19</p> <p><b>reader</b> <sup>[3]</sup> 98:21,23 99:13</p> <p><b>reads</b> <sup>[1]</sup> 76:9</p> <p><b>real</b> <sup>[3]</sup> 60:24 81:25 82:16</p> <p><b>realize</b> <sup>[1]</sup> 39:15</p>
---	---	---	---	--

## Official

<p><b>really</b> <sup>[21]</sup> 5:11 31:7 33:20 36:14,17 37:3 47:19 48:19 49:21 50:14 51:15 53:17 55:16,19 65:2 73:8 76:20 83:3 84:23 89:5,24 <b>realm</b> <sup>[2]</sup> 85:22 92:17 <b>realtor</b> <sup>[1]</sup> 85:24 <b>realtor's</b> <sup>[1]</sup> 86:3 <b>Realty</b> <sup>[10]</sup> 37:15 38:18 39: 9 57:6,8 69:20 72:15 73: 24 74:3 104:1 <b>reason</b> <sup>[16]</sup> 3:19 10:19 20: 11 41:5,18 43:17 47:25 48: 23 51:23 58:6 68:1 71:12 75:9 76:19 99:25 100:3 <b>reasonable</b> <sup>[2]</sup> 60:18 69:4 <b>reasoning</b> <sup>[3]</sup> 7:12 18:9 96: 16 <b>reasons</b> <sup>[9]</sup> 17:3 41:23 44: 25 45:6 46:9 47:7 65:7 72: 24 95:13 <b>REBUTTAL</b> <sup>[3]</sup> 2:12 100: 25 101:2 <b>receiving</b> <sup>[1]</sup> 44:12 <b>recognize</b> <sup>[1]</sup> 77:8 <b>recognized</b> <sup>[4]</sup> 51:25 61:2 69:3,20 <b>recognizing</b> <sup>[1]</sup> 48:18 <b>record</b> <sup>[1]</sup> 30:6 <b>refer</b> <sup>[1]</sup> 91:25 <b>referenced</b> <sup>[1]</sup> 94:4 <b>regardless</b> <sup>[3]</sup> 31:1 69:22 79:16 <b>regulation</b> <sup>[4]</sup> 48:4 53:23, 25 58:16 <b>rehearing</b> <sup>[1]</sup> 102:1 <b>Rehoboth</b> <sup>[1]</sup> 29:2 <b>reject</b> <sup>[1]</sup> 69:12 <b>relevance</b> <sup>[1]</sup> 17:20 <b>relevant</b> <sup>[6]</sup> 33:23 43:7 48: 23 52:2 64:2 65:20 <b>relied</b> <sup>[1]</sup> 97:1 <b>relief</b> <sup>[7]</sup> 5:24 34:23 35:6 66:12 75:11 88:8 94:21 <b>religion</b> <sup>[1]</sup> 61:3 <b>rely</b> <sup>[2]</sup> 5:20 98:9 <b>remains</b> <sup>[2]</sup> 11:21 20:5 <b>remedy</b> <sup>[2]</sup> 11:1,13 <b>remember</b> <sup>[1]</sup> 11:19 <b>render</b> <sup>[1]</sup> 70:18 <b>rent</b> <sup>[2]</sup> 57:4 58:9 <b>reply</b> <sup>[2]</sup> 95:3,6 <b>represented</b> <sup>[1]</sup> 13:16 <b>request</b> <sup>[3]</sup> 49:16,20 85:12 <b>required</b> <sup>[4]</sup> 72:8 74:13 77: 22,25 <b>requirement</b> <sup>[4]</sup> 3:24 94: 16 103:20,21 <b>requirements</b> <sup>[1]</sup> 58:18 <b>requires</b> <sup>[1]</sup> 70:3 <b>reservation</b> <sup>[45]</sup> 24:23 34: 10 43:18,22 44:1 50:13 51: 17 54:20 56:3,6,12,13,21 58:7,11,14 59:5,13,18,19,</p>	<p>20 60:7 61:23 62:1,5,7 63: 13,14,18 64:23 66:2,11,19 67:22,25 68:24,25 76:20 80:9 81:13,15 83:17 92:9 93:8 98:21 <b>Reservations</b> <sup>[8]</sup> 58:17,19, 21 70:16 75:2 90:7 97:13, 17 <b>reserve</b> <sup>[3]</sup> 47:8,10 75:3 <b>reserving</b> <sup>[1]</sup> 48:17 <b>resolution</b> <sup>[1]</sup> 9:9 <b>resolve</b> <sup>[3]</sup> 10:6 21:19 23: 12 <b>resolved</b> <sup>[2]</sup> 13:8 17:22 <b>resolves</b> <sup>[1]</sup> 22:21 <b>resonate</b> <sup>[1]</sup> 90:12 <b>resources</b> <sup>[11]</sup> 15:13,16,20, 25 16:5,8,13,14 18:15 102: 17,21 <b>respect</b> <sup>[8]</sup> 19:22 23:16 48: 2 52:4,9 58:18 59:16 68: 10 <b>respond</b> <sup>[3]</sup> 72:22 90:23 95:11 <b>Respondent</b> <sup>[18]</sup> 1:7,25 2: 11 3:11,14 4:16,20 5:12 9: 15 19:15 21:4 22:22 29:21 42:5 43:16 48:25 68:18 95: 24 <b>Respondent's</b> <sup>[3]</sup> 4:25 13: 7 47:3 <b>restaurant</b> <sup>[4]</sup> 87:17,18,25 88:1 <b>result</b> <sup>[2]</sup> 70:7 82:14 <b>return</b> <sup>[4]</sup> 14:21 70:8 94:24 95:17 <b>Revenue</b> <sup>[1]</sup> 74:13 <b>reverse</b> <sup>[1]</sup> 104:7 <b>review</b> <sup>[3]</sup> 14:15 96:1,3 <b>Richardson</b> <sup>[1]</sup> 95:7 <b>Richardson's</b> <sup>[1]</sup> 95:5 <b>rid</b> <sup>[1]</sup> 15:9 <b>rights</b> <sup>[2]</sup> 52:1,10 <b>road</b> <sup>[6]</sup> 29:6,22 30:7 75:15, 16 97:20 <b>ROBERTS</b> <sup>[35]</sup> 3:3 8:13 10: 15 12:2,5,9 25:1 28:14 29: 7,15,25 33:25 35:11 42:15 45:8 47:10 54:3,12 59:6 62:10 63:2 65:10 68:14 84: 9,11 85:5,9 86:5,13,16 87: 1 98:1 100:19,25 104:8 <b>room</b> <sup>[4]</sup> 53:5,6 63:14 64:3 <b>rooms</b> <sup>[7]</sup> 41:7,9,12,13 42: 2 51:5 57:19 <b>ROSS</b> <sup>[40]</sup> 1:20 2:6 42:17, 18,21 44:10 46:7 47:16 48: 9,14 49:4,17,19 50:4,8,22 51:21 53:11 54:4 55:4,10 56:4,8 57:9,20,25 59:22 62:19,25 64:4,24 65:1,6,22 66:8 67:3,9,17,20 72:25 <b>round</b> <sup>[2]</sup> 4:14 5:9 <b>Rule</b> <sup>[12]</sup> 43:19,22 50:13 51:</p>	<p>18 58:11 66:11,21 76:20 92:10 97:1,4 98:21 <b>rules</b> <sup>[1]</sup> 65:17 <b>ruling</b> <sup>[3]</sup> 11:4 99:12 103: 24 <b>running</b> <sup>[1]</sup> 6:13 <hr/><b>S</b><hr/><b>Saint</b> <sup>[2]</sup> 52:18 53:6 <b>sale</b> <sup>[1]</sup> 20:4 <b>same</b> <sup>[17]</sup> 5:5 10:25 13:22 21:5 31:15 37:22 42:1 45: 19 47:13 58:23 60:21 67: 11 72:20 73:5 92:25 103:6, 18 <b>sanctions</b> <sup>[1]</sup> 14:2 <b>sandwich</b> <sup>[2]</sup> 36:22 37:13 <b>satisfied</b> <sup>[1]</sup> 3:25 <b>Saucier</b> <sup>[1]</sup> 15:10 <b>save</b> <sup>[1]</sup> 16:13 <b>saved</b> <sup>[3]</sup> 16:15 102:18,22 <b>saying</b> <sup>[32]</sup> 6:10,21 10:2 15: 18 21:18 23:10 25:9,16 26: 3 27:4 35:3,15 40:5 44:5,7 49:16 51:17 54:23 55:2 57: 7 63:20 64:19 65:19 66:24, 25 72:17 73:22 76:19 78: 14 90:19,25 92:4 <b>says</b> <sup>[23]</sup> 4:16 23:25 26:7, 24 27:7 34:13 37:1 50:19 55:15,18,25 56:10,11,11 77:21 80:1,22 81:5,9 83:4 84:20 87:5,20 <b>scenario</b> <sup>[1]</sup> 30:20 <b>scenarios</b> <sup>[1]</sup> 87:6 <b>schools</b> <sup>[1]</sup> 74:14 <b>screen</b> <sup>[4]</sup> 98:21,23 99:13 100:16 <b>searches</b> <sup>[1]</sup> 3:25 <b>second</b> <sup>[3]</sup> 33:15 59:24 71: 24 <b>see</b> <sup>[18]</sup> 14:14,23 26:17 27: 7,11 36:8,8 55:25 61:25 65:16 66:6 76:12 77:7 78: 16 79:6 80:14 86:3 87:17 <b>seeing</b> <sup>[3]</sup> 78:11 87:23 89: 13 <b>seek</b> <sup>[3]</sup> 33:11 35:6 80:15 <b>seeking</b> <sup>[4]</sup> 28:21 74:17 88: 7 103:23 <b>seeks</b> <sup>[2]</sup> 3:18 43:4 <b>seem</b> <sup>[3]</sup> 9:8 19:7 34:6 <b>seeming</b> <sup>[1]</sup> 9:19 <b>seems</b> <sup>[11]</sup> 4:18 15:16 16: 12 21:22 25:23 66:14,23 70:25 71:1,23 85:17 <b>seen</b> <sup>[1]</sup> 9:18 <b>sees</b> <sup>[4]</sup> 77:11,25 88:3 89:2 <b>segregation</b> <sup>[1]</sup> 87:15 <b>self-appointed</b> <sup>[3]</sup> 35:19 36:2,10 <b>sense</b> <sup>[6]</sup> 25:5 34:8 36:3 44:19 49:24 78:16 <b>sentence</b> <sup>[1]</sup> 54:2</p>	<p><b>serious</b> <sup>[2]</sup> 42:25 68:21 <b>service</b> <sup>[28]</sup> 33:12 36:17 44: 1,3 51:13 52:20,21 53:9 54:20 55:6 56:21 59:13 61: 17 63:19,21,25 64:1,22,23 65:19,25 67:11,23 70:16 73:3 75:2 90:7 97:17 <b>services</b> <sup>[6]</sup> 41:2 51:1 69:1, 5 73:2 99:3 <b>servicing</b> <sup>[1]</sup> 87:18 <b>set</b> <sup>[5]</sup> 9:7 10:24 13:22 37: 24 78:17 <b>settle</b> <sup>[1]</sup> 14:9 <b>settling</b> <sup>[1]</sup> 4:11 <b>Seventh</b> <sup>[1]</sup> 99:22 <b>several</b> <sup>[3]</sup> 18:21 39:3 84: 14 <b>shared</b> <sup>[1]</sup> 60:9 <b>She's</b> <sup>[27]</sup> 3:18 13:16,17 34: 11 37:19 38:3 39:20 40:9 41:4 54:8 75:18 76:5,8 77: 11,23 78:9,11 84:24 85:16 86:6,6,11,18,19 88:25 89:1, 4 <b>shouldn't</b> <sup>[4]</sup> 11:2,3 48:13 57:7 <b>show</b> <sup>[5]</sup> 35:5 41:20 52:17 74:18 82:21 <b>shows</b> <sup>[3]</sup> 30:7 41:7 81:14 <b>side</b> <sup>[7]</sup> 20:21,24 47:3,4 49: 6,14 92:23 <b>sign</b> <sup>[9]</sup> 26:23 27:7,11 85: 23 86:2,11,17,18 87:5 <b>signal</b> <sup>[1]</sup> 69:6 <b>significant</b> <sup>[2]</sup> 5:13 15:20 <b>similar</b> <sup>[3]</sup> 31:24 78:6 87:4 <b>Similarly</b> <sup>[1]</sup> 62:3 <b>simply</b> <sup>[7]</sup> 5:7 6:21 7:11 44: 7 60:2 71:25 104:1 <b>since</b> <sup>[1]</sup> 47:1 <b>single</b> <sup>[1]</sup> 102:15 <b>sit</b> <sup>[1]</sup> 27:14 <b>site</b> <sup>[1]</sup> 97:13 <b>sites</b> <sup>[2]</sup> 25:6,14 <b>sitting</b> <sup>[1]</sup> 27:22 <b>situation</b> <sup>[2]</sup> 14:16 36:24 <b>six</b> <sup>[1]</sup> 69:19 <b>small</b> <sup>[2]</sup> 28:3 77:5 <b>society</b> <sup>[1]</sup> 71:14 <b>sold</b> <sup>[1]</sup> 49:10 <b>Solicitor</b> <sup>[2]</sup> 1:20 79:4 <b>solve</b> <sup>[1]</sup> 11:15 <b>somebody</b> <sup>[4]</sup> 12:24 19:24 52:9 67:11 <b>someday</b> <sup>[6]</sup> 24:4,7,9,11, 13,16 <b>somehow</b> <sup>[3]</sup> 42:13 57:1 87:24 <b>someone</b> <sup>[6]</sup> 30:20 60:20 74:1 77:16 93:18 97:19 <b>sometimes</b> <sup>[1]</sup> 29:12 <b>somewhat</b> <sup>[1]</sup> 76:23 <b>somewhere</b> <sup>[1]</sup> 94:9 <b>soon</b> <sup>[1]</sup> 45:20</p>	<p><b>sorry</b> <sup>[11]</sup> 5:22 7:2 10:16 12:3 15:24 23:6,15 40:25 57:6 86:23 95:1 <b>sort</b> <sup>[26]</sup> 6:25 9:6 32:5 45:2, 5,23 47:19 49:5,13 50:9 51:22 52:13 53:24 54:4,8 58:22 60:1,22 66:13 67:23 71:20 78:19 82:21 97:23 99:8 100:15 <b>SOTOMAYOR</b> <sup>[43]</sup> 5:22 6: 1,4,8 7:2,13,25 8:3 9:5 13: 11,13 24:25 25:2,19 26:6, 19 27:2,12,18 30:4 34:5 36:19 54:15,16 55:5,9,23 56:5,24 57:10,11,21 58:1 79:11 98:5,6,13,20,24 99:8, 11,16 100:18 <b>sounds</b> <sup>[2]</sup> 24:7 79:3 <b>speaking</b> <sup>[1]</sup> 38:12 <b>specific</b> <sup>[2]</sup> 29:6 46:17 <b>specifically</b> <sup>[3]</sup> 44:15,16 51:25 <b>spectrum</b> <sup>[1]</sup> 80:11 <b>spend</b> <sup>[1]</sup> 71:4 <b>spending</b> <sup>[1]</sup> 83:9 <b>split</b> <sup>[8]</sup> 15:19 16:22,24 46: 20 47:4 48:23 99:2,14 <b>spoke</b> <sup>[1]</sup> 70:23 <b>Spokeo</b> <sup>[2]</sup> 62:21 73:12 <b>stairs</b> <sup>[1]</sup> 55:14 <b>stake</b> <sup>[1]</sup> 74:22 <b>standing</b> <sup>[84]</sup> 5:9 7:14,16, 17 8:5,10,14 10:20 12:12 13:1 16:10 22:14 23:17,21 24:17,24 26:3 27:9 31:20 32:20 33:7 35:5,16,22 36: 11 37:9 43:9,15,16,17 44:3, 9,17,24 46:1,3,11 48:21 49: 22 50:3 51:6,15 53:3,21 54:25 55:3,17,20,21 59:5, 21 61:10 62:18,23 63:16, 18,22 64:11 66:20 69:11 70:20,23 73:10 78:2,9 80: 18 88:3,17 89:8,19 91:15 92:15,23 94:17 95:5 96:19 101:8,18,21 102:15 103:19, 24 104:2,3 <b>start</b> <sup>[2]</sup> 5:4 76:18 <b>started</b> <sup>[2]</sup> 70:9,22 <b>state</b> <sup>[2]</sup> 18:8 73:15 <b>statement</b> <sup>[1]</sup> 30:10 <b>statements</b> <sup>[1]</sup> 14:7 <b>STATES</b> <sup>[10]</sup> 1:1,15,22 2:7 42:19 90:17,19 92:2,3 97: 22 <b>status</b> <sup>[3]</sup> 42:1 71:13 74:14 <b>statute</b> <sup>[5]</sup> 50:19,24 53:24 58:3 61:15 <b>statutorily</b> <sup>[1]</sup> 32:18 <b>statutory</b> <sup>[2]</sup> 53:22 58:15 <b>stay</b> <sup>[9]</sup> 25:6 26:1,5 31:7,17 34:15 63:9 77:17 79:16 <b>staying</b> <sup>[1]</sup> 87:10 <b>Steel</b> <sup>[2]</sup> 73:9,10</p>
---	--	--	--	--



## Official

<p><b>step</b> [2] 61:17 71:24  <b>steps</b> [1] 69:5  <b>stigmatic</b> [6] 3:15,21 25:10 38:21 70:25 71:20  <b>stigmatically</b> [1] 25:22  <b>still</b> [7] 5:8,13 11:8 18:13 67:9 96:20 97:2  <b>stipulation</b> [1] 76:5  <b>stop</b> [2] 45:17 89:24  <b>store</b> [3] 55:13,16,19  <b>strategic</b> [1] 48:24  <b>strategy</b> [8] 4:10 5:16 10:22 11:17 13:15 14:15 21:3,14  <b>street</b> [4] 87:16 89:12,19,21  <b>stretch</b> [1] 29:6  <b>subject</b> [5] 3:23 14:2 20:6 40:17 99:6  <b>subjected</b> [1] 88:5  <b>subjective</b> [4] 37:23 38:1,9 100:4  <b>subjectively</b> [1] 36:18  <b>submitted</b> [2] 104:10,12  <b>subset</b> [1] 63:25  <b>subsidiary</b> [1] 19:11  <b>substantive</b> [1] 8:6  <b>substituting</b> [1] 20:9  <b>sue</b> [10] 34:14,22 37:19,21 38:2 53:2 88:3 89:25 90:17 92:2  <b>suffer</b> [1] 11:15  <b>suffered</b> [4] 13:15 34:19 35:2 53:4  <b>suffering</b> [1] 64:8  <b>suffers</b> [1] 13:22  <b>sufficient</b> [1] 23:17  <b>suggest</b> [2] 21:23 59:25  <b>suggesting</b> [3] 13:24 14:6 59:3  <b>suggestion</b> [2] 15:23 96:17  <b>suit</b> [5] 4:21 5:8 68:22 70:16 78:1  <b>suits</b> [6] 4:17,22 25:15 70:15 94:17 96:6  <b>summary</b> [1] 94:7  <b>summer</b> [1] 24:22  <b>support</b> [3] 52:22,22 53:9  <b>supporting</b> [3] 1:22 2:8 42:20  <b>suppose</b> [5] 8:13 16:19 31:3 77:14 87:14  <b>supposed</b> [2] 37:4 87:20  <b>SUPREME</b> [4] 1:1,14 9:16 21:13  <b>surely</b> [1] 19:6  <b>surfing</b> [1] 55:25</p>	<p><b>talked</b> [2] 36:19 66:5  <b>tax-exempt</b> [1] 74:14  <b>tease</b> [1] 66:13  <b>technology</b> [1] 32:3  <b>telephone</b> [1] 57:16  <b>template</b> [3] 5:19 10:24 22:18  <b>tension</b> [1] 21:22  <b>terms</b> [6] 9:13 12:22 19:25 20:4 52:1 65:21  <b>test</b> [4] 61:10 70:3 79:4,7  <b>tester</b> [14] 32:10 33:4 35:16,19 36:15 38:15 40:14 55:3 56:10 59:16 76:19 77:1 89:4 103:24  <b>testers</b> [8] 13:25 30:12 32:17 35:16,21 36:9 61:12,14  <b>testers'</b> [1] 13:25  <b>Thanks</b> [1] 35:10  <b>themselves</b> [3] 36:10,23 99:5  <b>then-Judge</b> [1] 74:6  <b>theoretically</b> [1] 22:11  <b>theory</b> [2] 13:8 95:8  <b>there's</b> [42] 7:5,10,13,20 8:6,11 14:6,18 15:18 16:4,20 18:18 20:8 21:10 23:22,24 25:9 26:23 27:8 29:21 30:13 31:25 32:3,13,14 39:2,3,14,19,21 41:5,19 42:4 46:1 47:2 50:17 52:6 55:14 66:3 84:16 85:13 94:15  <b>thereby</b> [2] 15:23 68:24  <b>therefore</b> [3] 6:23 23:2 100:6  <b>they'll</b> [1] 103:12  <b>they've</b> [1] 20:16  <b>thinking</b> [5] 15:15 34:9 37:4 66:16 76:16  <b>thinks</b> [2] 54:24 96:20  <b>third</b> [3] 47:20 48:5 60:11  <b>third-party</b> [2] 48:2,3  <b>THOMAS</b> [10] 4:16 5:6 30:2 44:5,11 54:13 70:22 71:17,22 98:3  <b>Thomas's</b> [1] 10:5  <b>though</b> [5] 4:18 5:7 11:2 31:16 71:23  <b>Thomas's</b> [1] 10:5  <b>thoughts</b> [1] 44:15  <b>threatens</b> [1] 4:12  <b>three</b> [7] 26:4,10 29:3 32:14 50:10 66:16,17  <b>throughout</b> [4] 90:17,18 92:1,3  <b>thwarted</b> [1] 69:17  <b>tied</b> [2] 64:12,19  <b>Title</b> [8] 43:18 51:17 58:17 91:10 92:13 99:6 100:8,14  <b>today</b> [2] 60:1 70:9  <b>took</b> [2] 30:7 72:11  <b>toss</b> [1] 46:5  <b>totally</b> [1] 18:23  <b>town</b> [2] 28:3,7  <b>traditional</b> [2] 30:25 92:16</p>	<p><b>transaction</b> [1] 56:23  <b>translate</b> [2] 79:18 85:21  <b>transparent</b> [1] 96:13  <b>transporting</b> [1] 52:18  <b>TransUnion</b> [3] 52:4 62:20 73:12  <b>TransUnion's</b> [1] 33:13  <b>travel</b> [15] 23:25 24:3 25:3,3 26:2 28:20,25 68:2,4 69:16 75:12 76:23 94:8,11 98:14  <b>traveling</b> [1] 25:24  <b>treat</b> [1] 61:8  <b>treated</b> [3] 26:21 68:9 93:14  <b>treatment</b> [7] 3:24 39:18 69:18,23 72:13,16 91:5  <b>tries</b> [2] 33:23 34:10  <b>trip</b> [7] 29:22 30:5,7 75:15,17,19,21  <b>trips</b> [1] 94:20  <b>true</b> [1] 64:7  <b>try</b> [3] 27:15 56:2 63:12  <b>trying</b> [26] 24:22 25:25 28:2,6 30:21 31:4 33:11 35:14,20 36:12,13 40:8 41:4 51:10 56:17,25 60:7 61:16 63:20,23 65:19 66:18 79:25 81:25 92:6 104:2  <b>turn</b> [1] 50:3  <b>turned</b> [1] 57:6  <b>turns</b> [1] 61:24  <b>two</b> [11] 12:20 15:3 26:4 29:13 55:12 59:18 73:25 95:13 96:7 98:25 103:17  <b>two-step</b> [1] 15:10  <b>type</b> [1] 44:12</p> <hr/> <p><b>U</b></p> <p><b>U.S.</b> [2] 95:4,6  <b>Ultimately</b> [5] 30:6 67:24 68:6 90:24 102:22  <b>unaware</b> [1] 7:15  <b>unclear</b> [1] 64:6  <b>under</b> [28] 12:20 17:8 18:12 24:15 33:13 43:12 46:23 48:3 50:14 53:2 60:25 62:16 66:11,20 69:2 72:14,25 73:9,10,15 86:9 88:10 91:10 92:9,13 95:8 100:8,14  <b>underlying</b> [3] 70:5 79:17 82:10  <b>understand</b> [19] 5:23 9:22 20:15 21:21 26:20 30:24 32:23 35:17 40:9 44:7 46:7 47:16 50:16 56:7 63:5 78:15 79:24 81:25 84:19  <b>understood</b> [5] 9:4 40:18 65:2 82:8 103:18  <b>unequal</b> [2] 3:24 69:23  <b>unethically</b> [1] 14:1  <b>unexpected</b> [1] 96:4  <b>UNIKOWSKY</b> [98] 1:18 2:3,</p>	<p>13 3:6,7,9 4:20 5:10,25 6:3,7,17 7:7,19 8:2,8,17 9:12 10:10,14,17,19 11:6,19 13:4,12,23 14:20 16:2 17:6,16 18:2 19:10 20:3,15 21:25 22:3 23:3,10,20 24:6,10,15,20 25:18,23 26:13 27:1,6,17,20 28:4,10,13,17,23 29:11,19 30:6,19 31:5,8,13,18 32:7,12 33:6 34:21,24 35:8,24 36:1,5,9 37:6,14 38:5,8,14 39:2,6,24 40:2,7,12,15 41:3,15 42:3 50:11 59:10,25 70:9 72:17 84:19 101:1,2,4  <b>Unikowsky's</b> [4] 50:6 51:3 73:22 84:13  <b>union</b> [1] 99:21  <b>unions</b> [2] 32:17 33:10  <b>unique</b> [1] 11:25  <b>UNITED</b> [10] 1:1,15,22 2:7 42:19 90:17,18 92:2,3 97:22  <b>unjudicial</b> [1] 18:14  <b>unlawful</b> [3] 58:4 69:1 73:15  <b>unless</b> [7] 20:8 27:9 41:10 42:12 69:16 78:22 91:10  <b>unlike</b> [1] 42:5  <b>until</b> [5] 8:16 12:17 21:16 22:2 33:23  <b>unusual</b> [3] 9:14 42:24 96:22  <b>unwelcome</b> [1] 69:7  <b>up</b> [22] 9:7,17 11:11 12:3 14:18 15:14 19:6 21:8,23 22:2 26:23 37:24 41:20 45:20 47:12 55:13 78:17 79:3 88:12 92:5 93:8 94:8  <b>updated</b> [1] 47:23  <b>updates</b> [1] 19:12  <b>upend</b> [1] 82:18  <b>upfront</b> [1] 62:8  <b>upset</b> [1] 87:22  <b>upsetting</b> [1] 96:5  <b>using</b> [6] 33:19 39:20 64:15 68:25 72:3 76:5</p> <hr/> <p><b>V</b></p> <p><b>vacate</b> [3] 11:4,15 43:11  <b>vacated</b> [3] 46:24 47:1 49:3  <b>vacation</b> [2] 74:25 76:6  <b>vacations</b> [1] 76:16  <b>valid</b> [1] 73:13  <b>variety</b> [1] 46:1  <b>various</b> [1] 25:6  <b>vehicle</b> [3] 19:3 70:19 96:20  <b>Venice</b> [1] 25:12  <b>venue</b> [1] 31:16  <b>veracity</b> [1] 29:18  <b>version</b> [1] 90:21  <b>versus</b> [6] 3:5 54:5 73:23</p>	<p>74:1,9 81:24  <b>victim</b> [3] 38:16,24 39:10  <b>victory</b> [1] 11:20  <b>view</b> [8] 42:4 43:18 50:13 51:3 80:18 88:2 93:25 94:4  <b>views</b> [1] 50:7  <b>Village</b> [1] 24:23  <b>violating</b> [1] 53:2  <b>violation</b> [4] 53:22,23 91:7 92:12  <b>visit</b> [8] 23:19 24:5 25:12,13,13,21 26:7 79:15  <b>visited</b> [1] 95:8  <b>visiting</b> [2] 3:14 83:17  <b>visits</b> [1] 5:2  <b>visually</b> [4] 32:4,9,16 42:6</p> <hr/> <p><b>W</b></p> <p><b>wait</b> [3] 5:8 21:16 22:2  <b>waited</b> [1] 95:25  <b>wake</b> [1] 62:13  <b>walk</b> [1] 83:7  <b>wanted</b> [5] 27:14 40:11 53:17 59:7 87:25  <b>wants</b> [3] 32:6 37:21 89:22  <b>Washington</b> [4] 1:10,18,21,24  <b>way</b> [30] 9:7 14:18 16:16 25:2 32:25 33:2 37:22 45:3 51:13 52:7 53:19 58:2,20,24 66:4 67:11 73:4,5,8 77:1 81:9,13 94:20 95:7 97:12 98:14 101:23 103:3,6,18  <b>ways</b> [3] 19:2 61:21 67:5  <b>website</b> [70] 3:13 5:2 18:24 19:13,20,25 26:16 27:3,3 32:2,4 33:1,19 34:16 39:3 43:6 47:23 51:8 55:25 57:1,15 59:17 60:3,6,20 61:24 63:12,17 68:24 69:16 70:5 75:8 76:6 77:11,18,20 79:10,20 81:9,11 82:9,10,15 84:15,16,22,24 85:15,17 86:6,18,20 87:4 88:22 89:16,16 90:6 92:8,25 93:18,22 95:9 99:24 103:3  <b>websites</b> [10] 4:1 32:11,17,25 33:3 48:3 56:1 61:25 63:10 68:5  <b>Wednesday</b> [1] 1:11  <b>weigh</b> [1] 52:25  <b>weight</b> [1] 20:21  <b>weights</b> [1] 20:23  <b>welcome</b> [6] 4:15 26:24 27:5,8 44:4 70:21  <b>welcomed</b> [1] 57:17  <b>Wells</b> [1] 24:22  <b>whatever</b> [4] 25:8 26:8 53:18 67:19  <b>wheelchair</b> [3] 41:19 93:9,11</p>
---	--	--	---	---

**whereas** <sup>[2]</sup> 41:10 58:7  
**Whereupon** <sup>[1]</sup> 104:11  
**whether** <sup>[45]</sup> 3:20 4:1 6:24  
 8:19 12:14,23 14:13 16:18  
 19:12 29:1 33:4 34:8 36:  
 13,14 38:3 40:4 41:1,19,20  
 42:2,10 43:1 45:25 46:17  
 48:9 49:23 53:25 54:6 56:  
 16 58:8 59:11 64:2 67:24  
 69:22 70:1,6 74:21 79:16  
 82:4,13 92:9 99:2,3,18  
 101:11  
**who's** <sup>[6]</sup> 14:3 54:7,8 61:16  
 65:14,16  
**whole** <sup>[1]</sup> 48:16  
**widely** <sup>[1]</sup> 60:9  
**will** <sup>[30]</sup> 3:3 4:24 5:4 12:12  
 14:13 21:4,8,20,23 22:5,6,  
 8,17 24:9,10,11 45:4,22,22  
 46:18,18 61:10,12,13,21  
 62:3 70:14 87:13 102:2,6  
**win** <sup>[1]</sup> 40:5  
**window** <sup>[2]</sup> 87:19 89:12  
**withdrawn** <sup>[2]</sup> 4:17,21  
**withhold** <sup>[1]</sup> 74:13  
**within** <sup>[3]</sup> 64:8 73:19 102:5  
**without** <sup>[4]</sup> 16:10 53:8 80:  
 16,16  
**won** <sup>[1]</sup> 22:15  
**wonder** <sup>[2]</sup> 16:18 74:21  
**wondering** <sup>[3]</sup> 34:8 50:2  
 84:12  
**word** <sup>[1]</sup> 102:25  
**words** <sup>[3]</sup> 6:24 101:6,7  
**work** <sup>[3]</sup> 10:7,12 36:6  
**workload** <sup>[2]</sup> 12:7 14:21  
**works** <sup>[1]</sup> 90:13  
**world** <sup>[2]</sup> 58:23 77:5  
**worse** <sup>[2]</sup> 92:20 97:7  
**Wright** <sup>[6]</sup> 54:5 73:23 74:1,  
 9,11 91:4  
**write** <sup>[3]</sup> 13:6 22:21 57:7  
**written** <sup>[2]</sup> 32:15 58:4

---

**Y**

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**years** <sup>[1]</sup> 96:7  
**yourself** <sup>[2]</sup> 54:23 74:5