

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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KATHERINE K. VIDAL, UNDER SECRETARY )  
OF COMMERCE FOR INTELLECTUAL PROPERTY )  
AND DIRECTOR, UNITED STATES PATENT )  
AND TRADEMARK OFFICE, )  
Petitioner, )  
v. ) No. 22-704  
STEVE ELSTER, )  
Respondent. )  
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Pages: 1 through 83  
Place: Washington, D.C.  
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5   AND DIRECTOR, UNITED STATES PATENT    )  
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7                                    Petitioner,                    )  
8                                    v.                                    ) No. 22-704  
9   STEVE ELSTER,                            )  
10                                    Respondent.                    )  
11   - - - - -

12  
13                                    Washington, D.C.  
14                                    Wednesday, November 1, 2023

15  
16           The above-entitled matter came on for  
17   oral argument before the Supreme Court of the  
18   United States at 10:05 a.m.

19  
20   APPEARANCES:  
21   MALCOLM L. STEWART, Deputy Solicitor General,  
22           Department of Justice, Washington, D.C.; on behalf  
23           of the Petitioner.  
24   JONATHAN E. TAYLOR, ESQUIRE, Washington, D.C.; on  
25           behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MALCOLM L. STEWART, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	JONATHAN E. TAYLOR, ESQ.	
7	On behalf of the Respondent	42
8	REBUTTAL ARGUMENT OF:	
9	MALCOLM L. STEWART, ESQ.	
10	On behalf of the Petitioner	79
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
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4  
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7  
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12  
13  
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17  
18  
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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-704, Vidal versus Elster.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART  
ON BEHALF OF THE PETITIONER

MR. STEWART: Thank you, Mr. Chief Justice, and may it please the Court:

The living-individual clause of 15 U.S.C. 1052(c) is consistent with the First Amendment. To begin, I'd like to emphasize three points.

First, Section 1052(c) imposes a condition on a federal benefit, not a restriction on speech. Even if Mr. Elster cannot register the mark TRUMP TOO SMALL, he can sell shirts with that slogan. He can also obtain the benefits of federal trademark registration for those shirts by choosing a different source identifier. The living-individual clause simply restricts Mr. Elster's ability to assert exclusive rights in another person's name.

1           Second, Section 1052(c) is viewpoint  
2 neutral. To apply it to any particular  
3 trademark, the PTO simply asks whether the mark  
4 refers to an identified individual and whether  
5 that individual has consented to registration.  
6 The agency need not and does not consider  
7 whether the mark is flattering, critical, or  
8 neutral with respect to the named individual.  
9 Mr. Elster's speculation about the circumstances  
10 under which identified individuals will or will  
11 not consent to registration cannot justify  
12 treating the provision as viewpoint  
13 discriminatory.

14           Third, the fact that Mr. Elster's mark  
15 conveys a message about Donald Trump does not  
16 strengthen his constitutional claim. Granting  
17 registration here would likely reduce the  
18 overall volume of political speech since federal  
19 trademark registration provides enhanced  
20 mechanisms for the mark owner to restrict the  
21 speech of his competitors.

22           The fact that this mark contains  
23 political expression is a further reason to  
24 hesitate before making those mechanisms  
25 available.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Mr. Stewart, if we  
3 agree with you, how would that affect copyright  
4 law?

5 MR. STEWART: I think -- we would say  
6 that both trademark registration and copyright  
7 registration are federal benefits, but it  
8 wouldn't have to follow that exactly the same  
9 rules that would apply in one context would need  
10 to apply in the other.

11 Clearly, that's true as a statutory  
12 matter. There are both federal trademark and  
13 copyright registration require -- programs, but  
14 the statutory requirements are very different.  
15 And the same thing could be true of the  
16 Constitution.

17 And I draw an analogy to -- a rough  
18 analogy to the Court's traditional public forum  
19 jurisprudence; that is, even on locations like  
20 streets and parks, the ability to use government  
21 property for private communication is a kind of  
22 government benefit, but the Court has recognized  
23 that with respect to some types of government  
24 property, the tradition of making those fora  
25 available is so strong, so deeply rooted, that

1 the government needs to show a good reason  
2 before it limits expression on a content basis.

3 And the Court could reach the same  
4 conclusion with respect to copyright. The Court  
5 has described copyright as the engine of free  
6 expression. Its whole purpose is to promote  
7 incentives for creative expressive endeavors.  
8 Trademark has a very different purpose.

9 And to -- to -- to point to one  
10 instance in which -- though, in which it's  
11 important to recognize that copyright  
12 registration is a government benefit, one of the  
13 requirements you have to satisfy in order to  
14 register your copyright is you need to pay a fee  
15 to the Copyright Office, and, obviously, that  
16 would raise huge First Amendment problems if it  
17 was a condition on engaging in the speech.

18 The reason we don't think of it as  
19 problematic in the copyright registration  
20 program is that it's not a condition on the  
21 speech; it's a condition on the benefits that go  
22 with federal copyright registration.

23 So the analysis would have to take  
24 into account the fact that it's a benefit  
25 program, but if the question is can Congress

1 exclude certain types of creative works from  
2 copyright protection based on their content,  
3 that would be an entirely different question.  
4 That would be something that really has no  
5 historical analogue, and the Court, in  
6 conducting the First Amendment analysis, could  
7 take into account constitutional purpose,  
8 history, and tradition.

9 JUSTICE THOMAS: Most of our benefits  
10 program cases involve money that the government  
11 gives to a particular grant or something like  
12 that. Now, in the case of trademarks, don't  
13 they -- an applicant also pay a fee as they pay  
14 in the copyright case?

15 MR. STEWART: Yes, that's correct.

16 JUSTICE THOMAS: And so it seems like  
17 an odd fit.

18 MR. STEWART: It -- it -- it is -- it  
19 is not a program in which the government  
20 advances its own money, but that's not the only  
21 context in which the Court has distinguished  
22 between government benefits and the -- the  
23 conditions on government benefits and  
24 restrictions on speech.

25 I think you could analogize this --



1     this program roughly to the union dues cases, to  
2     Cornelius, which involved access to the Combined  
3     Federal Campaign.  In -- in each of those  
4     instances, the government was not giving its own  
5     money to the participants, but it was providing  
6     logistical assistance that would aid the  
7     participants in trying to get money from other  
8     private people.

9             And you can think of trademark  
10     registration in the same way.  That is, the  
11     benefits of federal trademark registration are  
12     economic.  Your trademark is placed on the  
13     Principal Register.  Potential infringers are  
14     warned away from infringement because they  
15     understand that they -- they risk potential  
16     liability if they use the same mark or a  
17     confusingly similar mark.  If it does come to  
18     infringement litigation, then the owner of a  
19     registered trademark has certain presumptions  
20     available in litigation.

21             And all of this is -- is an economic  
22     benefit.  So it -- in -- in a very general way,  
23     it's providing the same type of assistance as in  
24     Ysursa, in Davenport, et cetera.  It is making  
25     it easier for one private party to try to get

1 money from other private parties.

2 JUSTICE JACKSON: Mr. Stewart, can I  
3 ask you, one of your three points was about  
4 viewpoint neutrality, and you say this is a  
5 viewpoint-neutral regulation. And I think, to  
6 some extent, at least facially, they agree.

7 But there is this notion of the effect  
8 potentially having a viewpoint-disparate impact.  
9 And I'm wondering whether and to what extent the  
10 government believes that there is any  
11 circumstance in which the impact could be taken  
12 into account when you're considering whether or  
13 not it's viewpoint neutral.

14 MR. STEWART: I mean, I wouldn't say  
15 that there's no circumstance in the law in which  
16 impact would be taken into account. I -- I  
17 would say it would be anomalous to treat a  
18 consent requirement as viewpoint discriminatory  
19 based on speculation as to when people will  
20 consent.

21 And copyright is another example.  
22 Copy -- as with trademark, under the copyright  
23 laws, the owner of a copyright can consent to  
24 conduct that would otherwise be infringing.  
25 That's obviously a feature of patent law as

1 well. And --

2 JUSTICE JACKSON: But is that just --  
3 is that just an argument about whether or not  
4 you believe the effect will actually occur? In  
5 other words, suppose we had data or something  
6 that indicated that they are correct that the  
7 consent only occurs in one direction. Would  
8 that be relevant? Should we take that into  
9 account or what?

10 MR. STEWART: I -- I don't think it  
11 would carry the day at the end. I mean, we  
12 don't -- we don't have the data. And I don't  
13 think there's really a reason to suppose that  
14 the -- the withholding or giving of consent will  
15 depend on the -- the nature of the message.

16 One reason that either a trademark  
17 owner or a copyright owner might withhold  
18 consent is for fear that somebody else's speech  
19 will be misattributed to him. And the risk of  
20 misattribution is greater when you have a  
21 neutral or a flattering use of the mark.

22 I mean, the -- the one thing,  
23 presumably, if Donald Trump had been asked for  
24 his consent to registration here, the one thing  
25 he wouldn't have worried about is that if people

1 saw this registered mark, they would think it  
2 reflected his own speech.

3 And so we don't think there's a basis  
4 for believing there will be any systematic skew  
5 in when people give consent. But, above and  
6 beyond that, it would really kind of distort the  
7 application of both trademark and copyright law  
8 if we thought that a facially neutral  
9 requirement like consent can be treated as  
10 constitutionally suspect simply because the mark  
11 owners are more likely to consent in some  
12 circumstances than in others.

13 And I'd point the Court's to -- to its  
14 decision last term in Jack Daniels as well.  
15 That is, the Court decided some legal issues,  
16 and it remanded for the lower courts to perform  
17 a likelihood-of-confusion analysis.

18 And the Court said in -- the -- the  
19 Jack Daniel's involved a -- a parodic mark, a  
20 mark that parodied or mocked the original Jack  
21 Daniel's mark. And the Court said, in  
22 conducting the likelihood-of-confusion analysis,  
23 the Court can take into account that commercial  
24 entities are unlikely to mock their own  
25 products, and, therefore, consumers are -- will

1 be less likely to think that a mark like this  
2 was actually produced by Jack Daniel's than they  
3 might have been if the -- the mark were more  
4 laudatory.

5 And the Court didn't suggest that  
6 because of that correlation between viewpoint  
7 and likelihood of confusion the likelihood of  
8 confusion standard had been rendered viewpoint  
9 discriminatory or was constitutionally suspect.

10 And -- and that would really  
11 introduce -- havoc is too strong a word -- but  
12 something like havoc into trademark law because  
13 likelihood of confusion is kind of the thing to  
14 be avoided in administering the trademark laws.

15 JUSTICE ALITO: Mr. Stewart, the  
16 extent of the government's authority to attach  
17 conditions to government benefits is a very  
18 difficult area of constitutional law and  
19 potentially quite a dangerous one.

20 And, as Justice Thomas pointed out,  
21 the situation here, maybe the -- you know, our  
22 -- our precedent should be extended to cover  
23 this situation, but this is quite unlike any of  
24 the other cases that we have had concerning  
25 that.

1                   So my question is, if we don't agree  
2 with you on this theory, does that mean that you  
3 lose this case?

4                   MR. STEWART: I mean, I guess -- I  
5 guess --

6                   JUSTICE ALITO: Do you have another  
7 argument?

8                   MR. STEWART: I mean, I guess it  
9 depends on what you mean, if -- if we don't  
10 agree with you. If -- if you think that this is  
11 the -- the -- the legal and constitutional  
12 equivalent of prohibiting Mr. Elster from  
13 selling shirts with the mark TRUMP TOO SMALL,  
14 then we would say it's unconstitutional at least  
15 applied in that setting because we don't think  
16 that any government, state or federal, could  
17 prohibit Mr. Elster from selling those shirts.  
18 That is constitutionally protected expression.

19                   If you think that this is meaningfully  
20 different from a prohibition on speech, it is a  
21 -- a condition on the federal benefits that go  
22 with trademark registration, but it still  
23 warrants heightened scrutiny, we would say it  
24 can satisfy heightened scrutiny under those  
25 hypotheses because, here, I mean, it's not just

1 a government benefit.

2 The particular government benefit that  
3 Elster is seeking is enhanced mechanisms for  
4 restricting the speech of his competitors. The  
5 -- the --

6 JUSTICE KAVANAUGH: Mr. Stewart, can  
7 --

8 JUSTICE GORSUCH: Mr. Stewart, I'm  
9 sorry to interrupt, but I just want to see if I  
10 understand your response to Justice Alito, and  
11 -- and I may not.

12 But, if we put aside the emphasis on  
13 whether this is a government benefit and -- and  
14 try and avoid writing a rule that might have  
15 ripple effects outside of intellectual property  
16 law, right, and -- and we've been discussing,  
17 you know, this is quite unlike a lot of  
18 government benefits, and focus instead on  
19 history and what that informs us about use of  
20 names in this context, there's a long historical  
21 tradition, right, of the living-person name,  
22 just as there is with geography and other things  
23 like that. There have always been content-based  
24 restrictions of some kind in this area.

25 Is -- is that enough for us to say, to

1 resolve this case in your favor, or -- or do we  
2 need to -- I think what Justice Alito's pressing  
3 at is, to rule in your favor, do we need to go  
4 down this government benefits route?

5 MR. STEWART: I mean, I -- I think --  
6 federal trademark registration dates back to  
7 1870, so it's -- it's been around a long time.  
8 It hasn't been around since the find --  
9 founding.

10 JUSTICE GORSUCH: Well, there's common  
11 law before that, right? It's not like this came  
12 out of the ether.

13 MR. STEWART: I mean, there certainly  
14 has been a long tradition of thinking of living  
15 individuals as having certain proprietary rights  
16 over their own names. And, here, the question  
17 is not just whether Mr. Elster can use Donald  
18 Trump's name, because he can. He can market  
19 expression that is about Donald Trump. The  
20 question is whether he can assert an exclusive  
21 right to use Donald Trump's name and prevent his  
22 competitors from doing so.

23 Now another answer I would give to  
24 Justice Alito is an important limitation on our  
25 argument here is that Mr. Elster can sell shirts



1 with the slogan TRUMP TOO SMALL and he can  
2 obtain federal trademark registration so long as  
3 he uses a different source identifier that meets  
4 the -- the statutory criteria for registration.

5 And that's an important limitation,  
6 because the Court in -- in recent decisions  
7 has -- like AOC, has cautioned against  
8 conditions on government benefits that seek to  
9 leverage --

10 JUSTICE GORSUCH: Again, I -- I -- I  
11 -- I'm -- I'm --

12 JUSTICE KAVANAUGH: But then --

13 JUSTICE GORSUCH: No. Your turn.  
14 Have at it.

15 JUSTICE KAVANAUGH: Keep going.

16 (Laughter.)

17 JUSTICE GORSUCH: I suspect we're  
18 headed in more or less the same direction.

19 The word "government benefits," again,  
20 came up. And I -- I guess I'm just asking, if I  
21 look back to the common law of trademark, okay,  
22 and if I look back to the earliest trademark  
23 statutes, I see a lot of what we now maybe  
24 describe ahistorically through our First  
25 Amendment lens as content-based. There are

1 restrictions about geography, merely descriptive  
2 things, and living persons' names. Those have  
3 always been areas where there's been some  
4 limitation on the ability to trademark.

5 And I guess I'm saying -- asking why  
6 not just look to the history here and see  
7 whether historical evidence comports with this  
8 being a First Amendment liberty or not?

9 MR. STEWART: I mean --

10 JUSTICE GORSUCH: Why do I need to go  
11 down this, you know, because the government  
12 gives it to you, it can do whatever it wants  
13 with your -- with you road?

14 And it's a very difficult and fraught  
15 road. We have unconstitutional conditions  
16 doctrines and a million other things in this  
17 area, and I'm just not sure why I need to tangle  
18 with any of that.

19 MR. STEWART: I mean, certainly, if  
20 the Court feels that the historical evidence is  
21 sufficient to decide the case in our favor, we  
22 -- we -- we won't --

23 JUSTICE GORSUCH: You don't object to  
24 that?

25 (Laughter.)

1 MR. STEWART: We -- we -- we don't  
2 object to that.

3 JUSTICE GORSUCH: Just check -- just  
4 checking. All right.

5 (Laughter.)

6 JUSTICE KAVANAUGH: The --

7 MR. STEWART: But -- yeah.

8 JUSTICE KAVANAUGH: Doctrinally, if  
9 we're looking at which box to put it in in terms  
10 of First Amendment categories, isn't it -- I  
11 mean, several of us in prior cases have said  
12 it's analogous or may be analogous to the  
13 Limited Public Forum Doctrine. I think Justice  
14 Alito's opinion with the Chief Justice and  
15 Justice Thomas and Breyer said that in the Tam  
16 case, and Justice Sotomayor said that in the  
17 Brunetti case.

18 Isn't that the -- the box that if  
19 you're going to not rely solely on the history  
20 but in terms of the doctrinal box, that's the  
21 one that's the easiest fit?

22 MR. STEWART: I mean, I think there is  
23 an analogy in that both -- both trademark  
24 registration and the provision of a public fora  
25 provide forms of government assistance that may

1 be useful for communicative activities but are  
2 not in any way essential for speakers.

3           The -- the only reason I -- I hesitate  
4 to embrace the analogy further is that the --  
5 the Principal Register, for instance, the  
6 official PTO publication on which all the  
7 registered marks are listed, it -- it's really  
8 not -- having your name put on that is not a way  
9 of communicating to the public. It is a way of  
10 warning potential infringers that they risk  
11 liability if they use the same or confusingly  
12 similar marks.

13           JUSTICE KAGAN: Well, if we wanted to  
14 go down this road -- and I -- I think that the  
15 two are related, limited public forum and  
16 government assistance, in much the way that  
17 Justice Sotomayor wrote in her dissenting  
18 opinion in Brunetti -- but, if we were to go  
19 down the limited public forum road exclusively,  
20 why wouldn't we just say the registration  
21 program is the forum? It's not the -- it's not  
22 the register, it's not the book that's the  
23 forum, but the registration program is the  
24 forum, much like, in Christian Legal Society,  
25 the student activities program was the forum, a

1 metaphorical forum, if -- if you will, but  
2 that's what we said in CLS.

3 MR. STEWART: I -- I -- I mean, I  
4 think that would produce the right result  
5 because we do think that the legal standards  
6 that apply to limited public forums are the --  
7 the same as the legal standard we would ask the  
8 Court to apply here. And, here, it's viewpoint  
9 neutral.

10 The -- the government is saying  
11 that -- that certain types of marks can't go on  
12 the register -- on the registry, but -- or the  
13 Principal Register, but it is not singling out  
14 marks based on viewpoint. It is not requiring  
15 registration in order to -- to speak the marks.

16 I guess the -- the two other points I  
17 would make are, for First Amendment purposes,  
18 the dispositive question is, is this an  
19 abridgement of speech? And so, to the extent  
20 that the Court thinks it's not an abridgement of  
21 speech, we're not quite sure what it is, then we  
22 should win on that basis.

23 JUSTICE SOTOMAYOR: Isn't -- isn't  
24 that the bottom line? I know it's almost as if  
25 we're becoming straightjacket -- jacketed by

1 labels instead of looking at this, as I do, from  
2 first principles. The question is, is this an  
3 infringement on speech? And the answer is no.  
4 He can sell as many shirts with this saying, and  
5 the government's not telling him he can't use  
6 the phrase, he can't sell it anywhere he wants.  
7 There's no limitation on him selling it. So  
8 there's no traditional infringement.

9 Government action always has to have a  
10 "rational basis." The question then in my mind  
11 becomes, is there a rational basis for the  
12 government's activity here? And, clearly, for  
13 all the reasons Justice Gorsuch pointed out,  
14 that this type of program depends on content and  
15 that these kinds of limitations have been  
16 historically accepted, there's certainly a  
17 rational basis for the Court -- for the -- the  
18 government's actions.

19 Now, to the extent that it might  
20 involve speech, one could analogize, but I don't  
21 think you have to call it a government subsidy  
22 or call it a limited public forum. They both  
23 come out, both approaches come out, to what is  
24 reasonable in this context.

25 And that's the test you -- you state

1 at page 28 of your brief. You need only have a  
2 reasonable basis for what you're doing. And we  
3 don't actually talk about it in those terms in  
4 rational -- rational basis review, but isn't  
5 that the bottom line?

6 MR. STEWART: Yes, and the -- the --  
7 the two --

8 JUSTICE SOTOMAYOR: So we don't have  
9 to analogize it to one or another. We just have  
10 to figure out is this speech and say no, it's  
11 not speech that's being restricted, and then  
12 look at it in the traditional lens of is it  
13 rational basis and is it reasonable?

14 MR. STEWART: And what I would say --  
15 and I think this is just a different way of  
16 saying -- making your same point -- is we don't  
17 think that the -- the government subsidy cases  
18 and the nonpublic forum cases and the union dues  
19 cases are kind of discrete exceptions to the  
20 First Amendment. Rather, they are illustrative  
21 of a general principle that often the  
22 withholding of government assistance to speech  
23 will not constitute an abridgement of speech.

24 JUSTICE SOTOMAYOR: Assuming --

25 CHIEF JUSTICE ROBERTS: Well, it's the

1 --

2 JUSTICE SOTOMAYOR: -- there's a  
3 reasonable basis.

4 MR. STEWART: Assuming there's a  
5 reasonable -- and -- and I'd also add the point  
6 that I was making earlier, assuming that the  
7 government is not trying to leverage the  
8 benefits of the program to coerce speech outside  
9 the program.

10 And so, if the statute said, when you  
11 sell T-shirts with the -- a mark like TRUMP TOO  
12 SMALL, you can't get any trademark for those  
13 shirts registered, even if the trademark you  
14 choose, like Elster Apparel, would otherwise  
15 meet the statutory requirements for  
16 registration. If we had --

17 CHIEF JUSTICE ROBERTS: Well, but you  
18 -- you acknowledge, I think, that there may be  
19 -- the government benefit, even if it's properly  
20 characterized as a benefit, may be so  
21 significant that your analysis would not hold?

22 MR. STEWART: I -- I -- I think there  
23 could be cases like that. And -- and the point  
24 we would make in response to -- to that concern  
25 is whatever circumstances that might arise, this



1 is not one of those because, if you imagine two  
2 T-shirts, each of them says TRUMP TOO SMALL  
3 across the front, and at the back collar, one of  
4 them has a tag that says TRUMP TOO SMALL and one  
5 of them has a tag that says Elster Apparel, the  
6 communicative value of the -- the shirts is just  
7 the same. It is not in any way essential to Mr.  
8 Elster's expressive efforts that he adopt TRUMP  
9 TOO SMALL as a source identifier, that he adopt  
10 it as a trademark.

11 As long as he can use the expression  
12 and as long as he can obtain the benefits of  
13 trademark registration by choosing a different  
14 source identifier to distinguish his goods from  
15 others, he has all he needs.

16 So I think, yes, the Court could  
17 reserve the question how would the analysis work  
18 if a particular plaintiff could show that his  
19 expression just won't -- won't be successful  
20 unless he can adopt a particular term as a  
21 source identifier because that situation isn't  
22 presented here.

23 JUSTICE BARRETT: Mr. Stewart, I'm  
24 concerned about the copyright context, so can I  
25 just ask you to revisit your conversation with

1 Justice Thomas?

2 So tell me how you think the analysis  
3 would play out. Let's imagine that there's a  
4 similar restriction for copyright and somebody  
5 wants to write a book called "Trump Too Small"  
6 that details Trump's pettiness over the years  
7 and just argues that he's not a fit public  
8 official.

9 Are you saying it would be like a  
10 rational basis standard for -- for analyzing  
11 whether that copyright restriction was  
12 permissible?

13 MR. STEWART: Well, it -- it would  
14 depend on what specific statutory restriction  
15 did the -- did "Trump Too Small" run afoul of.  
16 Clearly, if you had a provision of the Copyright  
17 Act that said you can't get a copyright on a  
18 book that is critical of a government official  
19 or former government official, that --

20 JUSTICE BARRETT: No, you just can't  
21 use a name, a living person's name. Without  
22 their consent, you can't write the book.

23 MR. STEWART: I think I --

24 JUSTICE BARRETT: Or you can write the  
25 book, but you can't get copyright protection.

1           MR. STEWART: I'm not prepared to say  
2 just what the answer would be, but I am prepared  
3 to say nothing -- nothing follows necessarily  
4 from our position in this case with respect to  
5 that hypothetical law. That is, you can  
6 recognize that both are government benefits, and  
7 I think the --

8           JUSTICE BARRETT: But what analysis  
9 would apply? If we -- if we say rational basis  
10 or reasonable basis applies to this provision,  
11 just tell me what the analysis is. I'm not  
12 asking you to say whether you think it would  
13 survive it or not. Just tell me what analysis,  
14 how would we approach it, rational basis?

15          MR. STEWART: I think you could say  
16 heightened scrutiny with respect to  
17 content-based descriptions in the copyright area  
18 on -- on the theory that the nature of the  
19 government benefit program matters. And  
20 trademark's purpose has never been to foster  
21 free expression. It has been to foster the free  
22 flow of commerce and to allow consumers to  
23 recognize which goods are manufactured by which  
24 merchants.

25                   Copyright, by contrast, has

1 historically been viewed as the engine of free  
2 expression. The stated constitutional purpose  
3 of copyright and trade -- and patent protection  
4 is to promote the progress of science.

5 JUSTICE BARRETT: But -- but, again, I  
6 -- I guess, are you saying that in that case,  
7 even though it would be a governmental -- you  
8 know, that we wouldn't -- that we would apply  
9 the governmental subsidy framework? I guess I'm  
10 still not understanding.

11 I understand all the good reasons why  
12 we wouldn't want to restrict it there.

13 MR. STEWART: I -- I think you could  
14 say or at least nothing you would say in this  
15 opinion would foreclose you from saying that  
16 copyright is more like a traditional public  
17 forum. That is, it is still a -- a mode of  
18 government assistance, but the tradition of  
19 making that assistance available is so strong,  
20 so deeply rooted, that different rules apply to  
21 the -- the withholding of benefits, particularly  
22 based on content.

23 And we would always -- all -- also say  
24 that, you know, as Justice Gorsuch has pointed  
25 out, there's a long history of content-based

1 rules governing the registrability of trademark,  
2 and there's no comparable historical tradition  
3 of the -- the sort that you postulate.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Justice Thomas, anything further?

7 Justice Alito?

8 JUSTICE ALITO: Mr. Stewart, do you  
9 think that the constitutionality of this  
10 provision could be sustained on a theory similar  
11 to the one in San Francisco Arts and Athletics  
12 versus U.S. Olympic Committee?

13 MR. STEWART: I don't really think so  
14 because I think in -- in -- that was really not  
15 a provision of general applicability. That --  
16 that was intended to protect the -- the  
17 trademark rights of a particular entity in a  
18 particular trademark, and there was a -- a  
19 unique history and a unique motivation.

20 Certainly, some of the subsidiary  
21 things that the Court said in that case would be  
22 relevant here. But the -- the other difference  
23 is that in San Francisco -- in the San Francisco  
24 case, what you were dealing with was the -- the  
25 actual imposition of a restriction on speech.

1 That is, the consequence of giving the Olympic  
2 Committee exclusive rights in particular words  
3 was that other people who wanted to -- to use  
4 the same words in their marketing activities  
5 couldn't use them.

6 And what we have here is something  
7 different. We're not -- we're not dealing with  
8 an infringement case. We're not dealing with  
9 the question can Congress passes -- pass a law  
10 that makes it -- makes it a source of liability  
11 for particular people to use particular words.  
12 Really, we have the flip side.

13 JUSTICE ALITO: All right. Then --

14 MR. STEWART: The question is, can  
15 Congress refrain from giving people exclusive  
16 rights in particular marks.

17 JUSTICE ALITO: I said what I think  
18 about the government benefits theory in Matal  
19 versus Tam, so there's no secret about that.  
20 And if your argument require -- if -- if I could  
21 not vote to sustain this without saying this is  
22 the attachment of a condition to a government  
23 benefit or that it's analogous to the attachment  
24 of a condition to a government benefit, I -- I  
25 mean, you don't need my vote to win your case.

1 (Laughter.)

2 JUSTICE ALITO: I'm trying to see if  
3 you have any argument that -- maybe you've just  
4 decided, well, Alito's a lost cause here.

5 (Laughter.)

6 JUSTICE ALITO: But whether you have  
7 any other argument that -- one that doesn't  
8 require me to accept either of those  
9 propositions.

10 MR. STEWART: I mean, I -- I'm not  
11 sure if this is fully -- fully responsive  
12 because I do think, at some level, our argument  
13 in this case depends on the proposition that  
14 there is a difference between Mr. Elster --  
15 between Mr. -- telling Mr. Elster you can't  
16 register the mark TRUMP TOO SMALL and telling  
17 him you can't sell shirts with that slogan  
18 emblazoned across it.

19 If -- if you think those two  
20 hypothetical restrictions are one and the same,  
21 they are legal equivalents, then we don't think  
22 that we can persuade you because we don't think  
23 any government could prevent him from selling  
24 the shirts.

25 I -- I would --

1                   JUSTICE ALITO: Okay. Let me just ask  
2 one -- one final question. What should one do,  
3 what should a -- a justice or a judge do in a  
4 case in which the issue is the constitutionality  
5 of the federal statute and this jurist thinks  
6 that it might be constitutional under a theory  
7 other than the one that is advanced by the  
8 government in support of the theory?

9                   Should the statute be held  
10 unconstitutional under the -- under those  
11 circumstances under the party presentation rule,  
12 or should it be held to be unconstitutional as  
13 applied in the case at hand? What should one do  
14 in that situation?

15                   MR. STEWART: I -- I mean, I guess --  
16 I guess it depends in part on whether your  
17 objection is really to the theory or to the  
18 label. That is, if you -- in the -- in the  
19 following sense.

20                   If you agreed that there is a  
21 constitutional difference between refusing to  
22 register the mark TRUMP TOO SMALL and  
23 prohibiting the use of the mark TRUMP TOO SMALL  
24 on T-shirts, if you agree that there is a legal  
25 difference between the two, but you're hesitant



1 to characterize federal trademark registration  
2 as a benefit, we may still be able to persuade  
3 you because, as I said, the -- the real question  
4 is whether this is an abridgement of speech.

5 And for those purposes at least, part  
6 of the issue is, is there a difference between  
7 refusing registration and telling you you can't  
8 market the shirts.

9 The -- the one other thing I'd say  
10 about Tam is Tam was a case, as -- as you  
11 recall, in which members of a group of -- a  
12 musical group of young Asian American musicians  
13 wanted to register the mark The Slants, and they  
14 wanted to use that mark because it  
15 had historically been used as a derogatory term  
16 for Asians. And they said, our goal is to  
17 reclaim and assert ownership of the mark. They  
18 wanted to show that they weren't cowed by  
19 derogatory treatment from others.

20 I think, in that case, they had a real  
21 argument that to express themselves fully  
22 effectively, The Slants had to be the official  
23 name of their band. It wouldn't be sufficient  
24 if they had adopted a more anodyne term as the  
25 official name and then had referred to

1 themselves colloquially as Slants.

2           And so Tam was really the rare case in  
3 which there was real expressive value in  
4 choosing a term as a source identifier rather  
5 than simply using it.

6           JUSTICE ALITO: Thank you.

7           CHIEF JUSTICE ROBERTS: Justice  
8 Sotomayor?

9           JUSTICE SOTOMAYOR: No.

10          CHIEF JUSTICE ROBERTS: Justice Kagan?

11          JUSTICE KAGAN: So, Mr. Stewart, in  
12 this context, where the question is not can the  
13 government prohibit speech but instead has to do  
14 with the government declining to support speech,  
15 whatever you want to put the -- what labels you  
16 want to put on that context, we've frequently  
17 talked about that it should be reviewable for  
18 reasonableness.

19          And I guess what I want to ask you is  
20 whether you think reasonableness is the same as  
21 standard rationality review, because, as I look  
22 at the cases, like, reasonableness is definitely  
23 not heightened scrutiny, intermediate or strict.

24          But, when the court says we look for  
25 reasonableness, it tends to do a couple of

1 things. It tends to look at the other  
2 expressive opportunities that a speaker has, and  
3 it tends to look at whether, even though  
4 something is not viewpoint-based, there's a fear  
5 that official suppression of ideas is afoot.

6           And so that doesn't seem like really  
7 rational basis scrutiny to me. It seems like,  
8 look, we understand that this is a sensitive  
9 area. We -- we're not allowing viewpoint-based  
10 discrimination. We also want to look, even if  
11 it's not facial, is it sort of lurking  
12 someplace? We want to look at other expressive  
13 opportunities.

14           So -- so that's my question.

15           MR. STEWART: I -- I -- I -- I think  
16 you are right that there is that ambiguity  
17 lurking in the Court's opinion -- opinions. I  
18 think we would say rational basis is the right  
19 test, but I think we would also be comfortable  
20 with the Court analyzing this under a -- kind of  
21 a slightly more robust standard.

22           If you think about the standard that  
23 an appellate court would apply, for instance, in  
24 asking whether a trial court's factual findings  
25 were reasonable or clearly erroneous, I think

1 that's a little bit more than minimum  
2 rationality but a lot less than heightened  
3 scrutiny, so -- so we don't have a -- a  
4 difficulty with that.

5 The -- the one thing I -- I think the  
6 Court should adhere to with respect to the --  
7 the rational basis standard is it shouldn't be  
8 trying to figure out what motivated individual  
9 members of Congress who voted to pass this  
10 legislation. It should be asking more in terms  
11 of are there reasonable justifications for this  
12 restriction.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch?

16 Justice Kavanaugh?

17 Justice Barrett?

18 JUSTICE BARRETT: Mr. Stewart, does  
19 your argument -- you know, you've talked a lot  
20 about how this doesn't actually stop him from  
21 speaking because he can still speak even though  
22 he can't register the trademark.

23 What if -- so does your argument  
24 depend on the validity of his mark under state  
25 law? Because this is where I'm going with this.

1 He can't register this, but there is a  
2 speaker-based discrimination. Could Trump come  
3 in and register that trademark, because,  
4 obviously, he can register it, he's giving his  
5 consent, and then that trademark be valid and so  
6 it stops Elster from having T-shirts or signs or  
7 anything that says it?

8 MR. STEWART: Well, I mean, the -- the  
9 limitation on Donald Trump's ability to do that  
10 is that unlike with patent and copyright  
11 protection, where you -- you can create the  
12 thing and exclude others from doing it even  
13 though you're just sitting on it, it -- it is a  
14 core requirement for continuing trade -- for  
15 initial and continuing trademark registration  
16 and trademark protection that you have to assert  
17 at least the intent to use the mark in commerce,  
18 and then the PTO does periodic checks.

19 JUSTICE BARRETT: So he does, because  
20 he wants to -- he wants to stop this and so he  
21 does do it in commerce, but he does it, you  
22 know, in a very limited way.

23 MR. STEWART: I mean, if -- if he can  
24 satisfy the requirement of use of the mark in  
25 commerce and it can -- he certainly wouldn't be

1 barred by the living-individual clause, and  
2 assuming it was perceived as a source  
3 identifier, then, yes, he -- he could accomplish  
4 that in the -- the way you suggest. But the --  
5 the crucial point would be he would have to use  
6 the mark in commerce. He couldn't just reserve  
7 it without using it.

8 JUSTICE BARRETT: Would there be a  
9 constitutional problem then?

10 MR. STEWART: I mean, I don't think so  
11 because --

12 JUSTICE BARRETT: For Elster?

13 MR. STEWART: When you say for --

14 JUSTICE BARRETT: Well, I mean, then  
15 Elster can't, you know, sell this on T-shirts  
16 or, you know, would -- would it -- would -- I  
17 guess what I'm saying is, if he then can't  
18 express the speech, put it on T-shirts, sell the  
19 T-shirts, sell mugs, whatever, is there any  
20 speech problem then because he doesn't have  
21 another mechanism even though he can't register  
22 the trademark of -- of expressing his message?

23 MR. STEWART: I -- I -- I don't --  
24 if -- if this was properly registrable as a  
25 trademark, and that would require in particular

1 that it be perceived by consumers as a source  
2 identifier, then I don't think that there would  
3 be a constitutional problem. And that's --  
4 that's something like the same problem that  
5 arises in infringement litigation generally.  
6 That is, whenever you have an infringement suit,  
7 you're seeking to hold somebody liable for  
8 expression in -- on his goods.

9           And the justification is there's no  
10 First Amendment protection for false or  
11 misleading commercial speech, and if a  
12 particular combination of words or images has  
13 acquired trademark protection, is understood to  
14 be a representation as to the source of the  
15 goods, then your putting the same words or  
16 images on your own merchandise is making an  
17 implicit representation that they were  
18 manufactured by somebody other than you.

19           Now whether there could be some  
20 as-applied constitutional claim on the -- the  
21 theory that if this was all a ruse, if Donald  
22 Trump's only motive for obtaining trademark  
23 registration and then engaging in limited sales  
24 of the goods was to prevent Mr. Elster from  
25 selling them, I -- I've never seen a case

1 raising that fact pattern.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Jackson?

4 JUSTICE JACKSON: Yeah, I have two  
5 questions. The first is I'm interested in  
6 understanding more about the government's view  
7 of rational basis scrutiny and whether or not a  
8 more granular argument about it might take care  
9 of Justice Barrett's prior concern related to  
10 copyright.

11 So, if we started with where Justice  
12 Sotomayor does, you know, this doesn't restrict  
13 speech, so we have rational basis. I guess I'm  
14 wondering whether there aren't different  
15 formulations of rational basis?

16 So, on the one hand, you have, you  
17 know, is this reasonably related to some  
18 legitimate government interest, or, I guess, in  
19 the limited public forum cases, we have  
20 reasonably related in light of the -- or  
21 reasonably related to the purposes of the  
22 regime.

23 And if we were to -- if you, the  
24 government, adopts the latter formulation, I  
25 would think that that could be a way to



1 distinguish the copyright circumstance from the  
2 trademark circumstance.

3 MR. STEWART: I mean, you could cert-  
4 -- if -- if you wanted to write a limited  
5 holding -- that kind of went down that road and  
6 that focused on the particular restriction at  
7 issue here, what you could say is part of the  
8 rational basis inquiry here would be, has  
9 Congress made a reasonable judgment that  
10 particular categories of words and images are  
11 not suitable as source identifiers?

12 And with respect to the  
13 living-individual clause, again, there's --  
14 there's not a tradition that living individuals  
15 can control what people say.

16 JUSTICE JACKSON: Right. That's the  
17 trademark regime. But, in the copyright regime,  
18 would -- would you have a different result  
19 because the purposes are different?

20 MR. STEWART: Yes. I think you would  
21 say there it is much harder to -- for the  
22 government to justify withholding copyright  
23 protection for discrete content-based categories  
24 of speech, and it's particularly difficult to  
25 link those to the purposes of copyright law.

1 JUSTICE JACKSON: So it could fail,  
2 rational basis, in the copyright world on that  
3 basis, is what I'm suggesting.

4 MR. STEWART: Yes. I mean, you --  
5 again, you -- you could --

6 JUSTICE JACKSON: Yes.

7 MR. STEWART: -- you could achieve the  
8 end result that certain restrictions that would  
9 be constitutional in the trademark context would  
10 be unconstitutional in the copyright context,  
11 either by applying a different standard of  
12 review or by applying the same standard but  
13 taking -- giving large weight to the distinct  
14 purposes of those two regimes.

15 JUSTICE JACKSON: And the second  
16 question I have is I wanted to give you an  
17 opportunity to complete your answer. You were  
18 earlier talking about, if we thought a  
19 heightened level of scrutiny did apply in this  
20 circumstance, that this would meet it.

21 So what was the full reason why this  
22 would meet a heightened level of scrutiny?

23 MR. STEWART: I -- I guess just  
24 quickly, the two reasons are, if you look at the  
25 mine run of cases in which people are just

1     trying to -- to elevate their own commercial  
2     products by linking a distinguished individual's  
3     name to them, there -- there's a strong  
4     justification for disallowing them exclusive  
5     rights in another person's name, because there  
6     has been a historical tradition of people being  
7     able to control the commercial exploitation of  
8     their own name.

9             And then the second thing is, if you  
10    look kind of at the category of marks that  
11    express ideas about the named individual and  
12    treat that as a distinct category of marks, then  
13    the First Amendment interests really weigh in  
14    favor of this provision because what Elster is  
15    trying to get is an enhanced ability to prevent  
16    his competitors from using the same slogan.

17            JUSTICE JACKSON: Thank you.

18            CHIEF JUSTICE ROBERTS: Thank you,  
19    counsel.

20            MR. STEWART: Thank you.

21            CHIEF JUSTICE ROBERTS: Mr. Taylor.

22            ORAL ARGUMENT OF JONATHAN E. TAYLOR

23                    ON BEHALF OF THE RESPONDENT

24            MR. TAYLOR: Thank you, Mr. Chief  
25    Justice, and may it please the Court:

1           The government's defense of the names  
2     clause, as the discussion so far this morning  
3     shows, begins and ends with its argument that  
4     the clause should be subjected only to rational  
5     basis review, not any form of First Amendment  
6     scrutiny.

7           That is incorrect. For three reasons,  
8     the clause should be subjected to heightened  
9     scrutiny. First, the clause withholds valuable  
10    legal protections generally available to all  
11    trademark holders who pay the fee, including  
12    presumptive validity, protection against certain  
13    defenses, and incontestability, and it does so  
14    based solely on the applicant's speech. That  
15    selective content-based withholding of generally  
16    available legal protections is a substantial  
17    burden on speech.

18           Second, the names clause leverages the  
19    registration system and its attendant rights and  
20    benefits to achieve a purpose wholly unrelated  
21    to the purposes of trademark law, unlike the  
22    separate prohibitions on false association and  
23    marks likely to confuse or mislead, both of  
24    which are tightly connected to the purposes of  
25    trademark law and trademark registration. The

1 government's interest in discouraging marks  
2 because they hurt the feelings of public figures  
3 has nothing to do with the purposes of trademark  
4 registration.

5 Third, the names clause involves  
6 express speaker-based discrimination of the kind  
7 that lends itself to viewpoint discrimination.  
8 Under the clause, public figures may use their  
9 names on registered marks to express their own  
10 presumably positive views about themselves, but  
11 no one else can, unless they get consent. And  
12 who is going to consent to a critical mark?

13 These three reasons require rejection  
14 of the government's rational basis test. And  
15 once that test is rejected, the clause cannot  
16 survive. The sole interest that it sought to  
17 serve was protecting the feelings of famous  
18 people, but that is not a legitimate reason to  
19 burden protected speech, much less one that can  
20 satisfy scrutiny.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Mr. Taylor, can your  
23 client make the shirts or mugs or whatever he  
24 wants to make now unregistered -- without  
25 registration?

1 MR. TAYLOR: He can, Justice Thomas.

2 JUSTICE THOMAS: So what -- what  
3 speech precisely is being burdened?

4 MR. TAYLOR: The burden on speech is  
5 that my client is being denied important legal  
6 rights and benefits, what this Court has  
7 recognized four cases running now are important  
8 legal rights and benefits, that are generally  
9 available to all trademark holders who pay the  
10 registration fee solely because his mark  
11 expresses a message about a public figure.

12 JUSTICE THOMAS: Is there a  
13 distinction between being able to speak and  
14 being able to register that speech in some form?

15 MR. TAYLOR: Well, Justice Thomas, I  
16 think there's no dispute -- at least I don't  
17 take my friend to argue otherwise -- that the  
18 rights and benefits here are valuable. The  
19 entire registration system is predicated on the  
20 idea that they're valuable.

21 It's why people go through the trouble  
22 of registering their marks. It's why they pay  
23 hundreds of dollars in registration fees and  
24 often many times that to -- to obtain legal  
25 counsel to help them through the process. It's

1 because they matter.

2 JUSTICE THOMAS: Well, I understand  
3 that, but if your argument is that somehow your  
4 speech is being impeded, I think it would be  
5 good to know precisely how that -- how it's  
6 being impeded or burdened.

7 MR. TAYLOR: Yeah. So the way I would  
8 characterize it, our position is that when the  
9 government withholds important generally  
10 available legal protections solely because of  
11 the content of the applicant's speech, that  
12 imposes a burden on speech because it  
13 effectively pushes them to use different words  
14 to receive equal status in the eyes of the law.

15 JUSTICE SOTOMAYOR: I --

16 MR. TAYLOR: And I think it's that  
17 kind of --

18 JUSTICE SOTOMAYOR: I -- I'm sorry,  
19 counsel, your whole answer is making me think  
20 that you're just conceding the other side's  
21 point that this is a government benefit, because  
22 you're not talking about stopping the speech.  
23 You're talking about not receiving government  
24 protection for activity that you would like to  
25 heighten protection for.

1           It doesn't stop you from selling. It  
2 doesn't stop you from selling anywhere as much  
3 as you want. You're getting the benefit of  
4 stopping others from competing with you. That's  
5 really what you're telling us.

6           MR. TAYLOR: Justice Sotomayor --

7           JUSTICE SOTOMAYOR: So then I don't  
8 know why government subsidy is not the standard  
9 of review.

10          MR. TAYLOR: Well, there's a lot in  
11 that question. I mean, what I'll say at the  
12 outset is I think this Court has recognized that  
13 these are important legal rights and benefits.  
14 And we're just using the same phrase that the  
15 Court has used.

16          Now that doesn't answer the question  
17 of what happens when those legal rights and  
18 benefits, which are concededly important, are  
19 withheld, even though they're generally  
20 available to all trademark holders who pay the  
21 fee.

22          JUSTICE SOTOMAYOR: But they all come  
23 down to money, and that's what government  
24 subsidy is. Whether it was the church receiving  
25 money for its playground, nobody was stopping it



1 from building its playground. It was just  
2 saying I shouldn't be denied the money to do it.

3 Here, I shouldn't be denied the  
4 benefit of money I can get by stopping others  
5 from using it.

6 MR. TAYLOR: Well, I think, in the  
7 example you just gave, Justice Sotomayor, if I'm  
8 remembering correctly, that's the Trinity  
9 Lutheran case. And in that --

10 JUSTICE SOTOMAYOR: In which I  
11 dissented, so be careful.

12 (Laughter.)

13 MR. TAYLOR: I think -- well, fair  
14 enough. But I -- I think, in that context, you  
15 know, it shows that -- you know, that's the Free  
16 Exercise Clause. It uses the word "prohibit."  
17 And this Court has repeatedly held that the  
18 government may not expressly discriminate  
19 against otherwise eligible recipients by  
20 disqualifying them from a public benefit, solely  
21 because of their religious character, without  
22 satisfying heightened scrutiny. And what that  
23 --

24 JUSTICE KAGAN: Mr. Taylor, what's  
25 your best case for -- that -- that would show

1 that the -- the government is -- is prohibited  
2 from declining to subsidize expressive activity  
3 in a way that is not con- -- that is not  
4 viewpoint-based? So there are many cases where  
5 we've said, even though this is a benefits case,  
6 you can't discriminate on the basis of  
7 viewpoint.

8 But I don't know of any cases where  
9 we've said, you know, all this is is a benefits  
10 case. We're just declining to subsidize certain  
11 kinds of speech. And it's not viewpoint-based.  
12 The -- the grounds for selecting the speech that  
13 you benefit and the speech that you don't has  
14 nothing to do with viewpoint.

15 I think we've always allowed that.

16 MR. TAYLOR: Well, I -- I can't point  
17 you to a case that's precisely on all fours,  
18 Justice Kagan. But I was starting to sketch out  
19 what I think is --

20 JUSTICE KAGAN: Because I can --

21 MR. TAYLOR: -- one relevant --

22 JUSTICE KAGAN: -- see, I can cite  
23 many cases. I mean, I can cite Finley and  
24 Cornelius and Ysursa and Davenport and Regan and  
25 Christian Legal Society. All those cases are

1 benefits cases where we've said, as long as it's  
2 not viewpoint-based, government can select,  
3 government can give the benefit to some and not  
4 the benefit to others.

5 And you don't have any cases that go  
6 the other way.

7 MR. TAYLOR: So I'll take those  
8 questions on -- or those cases on directly. So  
9 those cases all involved monetary subsidies,  
10 with the exception of the user fee cases, which,  
11 as you pointed out, Justice Alito, in your  
12 opinion in Tam, are really just, you know,  
13 categorically different for a number of reasons.  
14 But I think that --

15 JUSTICE KAGAN: Well, I don't think  
16 that they're categorically different. I mean,  
17 you take, let's say, Finley, where the question  
18 was monetary grants to artists. Do you think we  
19 would have come out any differently if the  
20 program was giving paint brushes to artists or  
21 if the program was giving marketing advice to  
22 artists?

23 MR. TAYLOR: No, I -- I don't think  
24 so, but I think what distinguishes Finley is  
25 that was a -- the Court called it a highly

1 selective competitive program. Money,  
2 government funds, it's a scarce resource. It's  
3 fungible. You can get private funding. Justice  
4 Scalia made that same point in his separate  
5 opinion in --

6 JUSTICE KAGAN: So it might be --

7 MR. TAYLOR: -- Finley, so --

8 JUSTICE KAGAN: -- Mr. Taylor, and  
9 I -- I don't want to, you know, badger you or  
10 anything, but that you can find things about  
11 each of these cases that might be slightly  
12 different from your case.

13 But what you can't find is a case that  
14 supports your proposition that when it's not  
15 viewpoint-based, government cannot make  
16 distinctions when government is only giving out  
17 a benefit and not restricting any speech.

18 MR. TAYLOR: Well, I -- I -- I'm  
19 certainly happy to embrace the limited public  
20 forum analogy that I think has been the subject  
21 of some of these questions because, at the end  
22 of the day, I think it ends up in the same exact  
23 place as intermediate scrutiny, and if I could  
24 try to explain why.

25 So two things are important about the

1 limited public forum reasonableness test. The  
2 first is it's not rational basis. It's --  
3 there's something more going on there. If you  
4 look at the opinions in Christian Legal Society  
5 on both sides, I don't think anyone on the Court  
6 thought that they -- they were engaging in  
7 rational basis review. So there's some  
8 assessment of whether the fit is appropriate,  
9 and some lower courts have likened that to  
10 intermediate scrutiny.

11 I know your question earlier suggested  
12 that it's different, but I actually think that  
13 the reasonableness review and intermediate  
14 scrutiny have -- are more alike than -- than  
15 they're different, and neither one is rational  
16 basis.

17 But the second point -- and I think  
18 this is critically important in this context --  
19 is there is a nexus requirement that exists in a  
20 limited public forum set of cases. There's --  
21 the -- the -- the question for the Court isn't  
22 whether the restriction at issue is reasonable  
23 in light of any purpose but in the light of the  
24 purpose of the forum.

25 And even if you want to accept the

1 idea that the forum here is not the government  
2 registrar but the government registration  
3 system, I think the problem for the government  
4 is this clause really has nothing to do with  
5 that. And -- and, you know, I want to --

6 JUSTICE JACKSON: Why are you saying  
7 that? Why -- why are you saying that? I mean,  
8 Mr. -- Mr. Stewart just made a very robust  
9 argument about why this is advancing the  
10 purposes of the trademark regime.

11 MR. TAYLOR: Well, the -- the purposes  
12 of the registration system, Justice Jackson, you  
13 can see this in McCarthy, Section 19-2, the goal  
14 of the registrar is to make registration and use  
15 as coincidental as possible. Basically --

16 JUSTICE JACKSON: No, but it -- it's  
17 not just the -- it's the trademark regime of  
18 which registration is a part. And trademark is  
19 not about expression. Trademark is not about  
20 the First Amendment and your -- and -- and  
21 people's ability to speak. Trademark is about  
22 source identifying and preventing consumer  
23 confusion.

24 MR. TAYLOR: Well --

25 JUSTICE JACKSON: And it seems to me

1     that Mr. Stewart was making the point that by  
2     having a restriction on people trademarking  
3     living people's names, the government is  
4     actually furthering the interests of the  
5     trademark system because it prevents confusion  
6     regarding whether or not this is endorsed by the  
7     living person, this is the living person's  
8     thing.

9                     You can imagine a lot of circumstances  
10    in which having a trademarked name could cause  
11    confusion in the marketplace. So why is that  
12    not a rational basis for saying we won't allow  
13    people to trademark names?

14                    MR. TAYLOR: So you're -- you're  
15    absolutely right, Justice Jackson, that the  
16    purpose of trademark law in general and the  
17    purpose of the registration system, as the --  
18    the opinion of the Court in the Jack Daniel's  
19    case from earlier this year makes clear, is to  
20    ensure that marks function as -- as trademarks,  
21    that is, that they function as source  
22    identifiers, and they don't -- they're not  
23    likely to confuse or mislead consumers as to the  
24    source.

25                    You're totally right about that.

1 That's the purpose of trademark registration  
2 and -- and the trademark system more broadly.

3 But what's so unique about this clause  
4 is there are a whole lot other -- there are  
5 other provisions of the Lanham Act in Section 2  
6 that deal with the hypothetical that you just  
7 gave --

8 JUSTICE JACKSON: So you're just  
9 saying --

10 MR. TAYLOR: -- that separately --

11 JUSTICE JACKSON: -- it's superfluous.  
12 That doesn't tell me it doesn't have a nexus to  
13 the purpose.

14 MR. TAYLOR: Well, I think, in  
15 analyzing what -- you know, whether the  
16 provision that is before the Court is  
17 constitutional, I think it's appropriate for the  
18 Court to take account of the practical effect  
19 that that clause has because, if it's  
20 invalidated, then, you know, the government is  
21 still going to have ample tools at its disposal  
22 to ensure that there's -- you know, marks are  
23 not registered if -- if they may falsely suggest  
24 a connection between a product and living  
25 persons, if they're deceptive, if they're likely



1 to confuse or mislead as to source, if they  
2 don't function as trademarks. That's --

3 JUSTICE KAVANAUGH: Well, in thinking  
4 about whether it's reasonable in light of the  
5 purpose of the forum, what Justice Gorsuch was  
6 saying earlier about the historical roots of  
7 this kind of restriction on use of a living  
8 person's name would seem relevant and it's been  
9 around in federal law for a long time as well.

10 How do we assess that? Because  
11 reasonable in light of the purpose of the forum  
12 is pretty vague. History often informs tests  
13 like that, and the history here would suggest  
14 that something like this is appropriate.

15 MR. TAYLOR: Well, I think if -- if --  
16 I'm not aware of history before the Lanham Act  
17 that would show that. So, if what Your Honor is  
18 suggesting is --

19 JUSTICE GORSUCH: Well, let -- let --  
20 let -- let me help you out.

21 MR. TAYLOR: Sure.

22 (Laughter.)

23 JUSTICE GORSUCH: Common law, there's  
24 a long and robust history about restricting  
25 names. Now sometimes they took on secondary

1 meanings, like Brooks Brothers, all right, but  
2 that was pretty rare.

3 And trademarks always had some  
4 content-based restrictions if you want to use  
5 that kind of abstract heuristic, geographic  
6 names, descriptions, functions generally, there  
7 are always exceptions, but generally not  
8 trademarkable.

9 And I guess I -- I'm kind of stuck  
10 where my friend down the bench is. You know, we  
11 can put whatever abstract labels around it,  
12 limited public fora, content-based, but, at the  
13 end of the day, it's pretty hard to argue that a  
14 tradition that's been around a long, long time,  
15 since the founding, you know, common law type  
16 stuff, is -- is -- is inconsistent with the  
17 First Amendment.

18 That might be the case, it can happen,  
19 but you've got to come up with a pretty good  
20 argument, right?

21 MR. TAYLOR: I -- I think you're  
22 right, Justice Gorsuch. And if it's true that  
23 there's a robust historical record, it hasn't  
24 been, you know, injected into this case by the  
25 government, but if it is true that that kind of

1 robust historical record exists, I do think that  
2 that could be a justification for the law.

3 I actually think it would be a  
4 justification for the law even under heightened  
5 scrutiny. And I think, you know, that same  
6 historical foundation would underlie a lot of  
7 the provisions in the Lanham Act.

8 JUSTICE GORSUCH: You agree, though,  
9 that trademark -- I mean, not just names, but  
10 other content-based things, like geography --

11 MR. TAYLOR: Yeah.

12 JUSTICE GORSUCH: -- function,  
13 description, those have always been  
14 restricted --

15 MR. TAYLOR: Yes.

16 JUSTICE GORSUCH: -- for a very long  
17 time.

18 MR. TAYLOR: I think that's right.  
19 And so, to the extent that what the registration  
20 system is doing is just tracking the substantive  
21 common law of trademarks that predated the  
22 Lanham Act that has been with us for a very long  
23 time and is still with us, then I don't think  
24 there's a problem. I don't think there's a  
25 problem under heightened scrutiny. I think

1 those are going to sail through.

2           They've got the -- the -- the  
3 historical justification, but they also  
4 ultimately are designed to facilitate the two  
5 core purposes of trademark law, which is  
6 ensuring that marks, in fact, function as marks  
7 and that marks are not likely to give rise to  
8 confusion or some risk of deception as to -- to  
9 the source of the mark.

10           And as I read all the other provisions  
11 save for maybe one --

12           JUSTICE GORSUCH: Well, and sometimes  
13 we also say, I mean, a trademark is a monopoly  
14 is what it is. It's a -- it's a state-granted  
15 patent, old-fashioned patent monopoly. And some  
16 things you're just not allowed to monopolize.

17           And -- and for whatever reason in  
18 history, you said, well, you don't get to  
19 monopolize geographic names. You don't get to  
20 monopolize descriptions. That's enough, isn't  
21 it, just in and of itself?

22           MR. TAYLOR: Well, so there -- I think  
23 there is a separate provision of Section 2 that  
24 deals with that, Justice Gorsuch. So -- so, if  
25 you look at subsection (e), I think it's the

1 fourth one, marks that are primarily merely a  
2 surname are barred from registration.

3 And if you want to overcome that --  
4 that barrier, you've got to show that it's  
5 acquired a kind of secondary meaning or  
6 distinctiveness.

7 JUSTICE GORSUCH: Mm-hmm, mm-hmm.

8 MR. TAYLOR: It's why the former --

9 JUSTICE GORSUCH: Brooks Brothers.

10 MR. TAYLOR: Exactly, exactly. And --  
11 and -- and if you can do that, then what you're  
12 showing is that that mark actually functions as  
13 a mark and it gets rid of the concern about a  
14 monopoly.

15 JUSTICE GORSUCH: And I don't mean to  
16 pick on that, but that is an old case. All  
17 right, all right. So I -- I don't mean to  
18 monopolize your time here either.

19 CHIEF JUSTICE ROBERTS: Counsel, what  
20 do you do about the government's argument that  
21 you're the one who is undermining First  
22 Amendment values because the whole point of the  
23 trademark, of course, is to prevent other people  
24 from doing the same thing?

25 So, if you win, you know, the slogan

1 TRUMP TOO SMALL or whatever, other people can't  
2 use it, right?

3 MR. TAYLOR: Other people can't use it  
4 as a source identifier of their own, which I  
5 think is perfectly --

6 CHIEF JUSTICE ROBERTS: Well, they  
7 can't use it the way you want to use it, and you  
8 say the way you want to use it is to engage in  
9 expression.

10 And so -- and then, in trademark,  
11 there are things that are kind of close to it  
12 that are also prohibited, right? So we'll have  
13 all sorts of litigation. Presumably, there will  
14 be -- there will be a race for people to  
15 trademark, you know, Trump Too this, Trump Too  
16 that, whatever, and then particularly in an area  
17 of political expression, that really cuts off a  
18 lot of expression you might -- other people  
19 might regard as important infringement on their  
20 First Amendment rights.

21 MR. TAYLOR: Yeah. So a couple of  
22 points on that, Mr. Chief Justice. I -- I take  
23 the concern. I think it's -- it's a fair one.

24 I think a lot of that concern is -- is  
25 dealt with by the requirement that a mark

1 actually function as a mark. That means it's  
2 got to bring to mind, you know, in the mind of  
3 the consuming public that it -- you know, that  
4 it functions as a source identifier. You're not  
5 just expressing a common message. It's why God  
6 Bless the United States or I Heart DC, those  
7 kinds of marks don't generally get registered.

8           And I think that in the main, many  
9 political slogans do not get registered for that  
10 very reason. And I think it addresses a lot of  
11 those concerns. So what we have to imagine is a  
12 mark that functions as a mark, and so it's kind  
13 of distinct enough and unique enough to kind of  
14 serve that purpose and satisfies all the other  
15 --

16           CHIEF JUSTICE ROBERTS: Well, but if  
17 yours -- sorry to interrupt, but if yours meets  
18 those requirements, it's hard to see what the  
19 limitation would be on all sorts of other  
20 things, except the fact that they think it's,  
21 you know, whatever they think is a parody or --  
22 or -- or a joke. And you can certainly find  
23 most adjectives and attach them to your phrase,  
24 and, you know, all those would be protected.

25           And only a limited number of people

1 would be able to make the, you know, particular  
2 comic -- comical expression about carrying First  
3 Amendment weight that -- that you want to  
4 arrogate to yourself here.

5 MR. TAYLOR: I think, to some degree,  
6 Mr. Chief Justice, that is just built into the  
7 regime. And so I understood my friend in his  
8 responses to your question, Justice Barrett, to  
9 -- to effectively concede that the reason why,  
10 if the PTO were to register this mark, had the  
11 former president sought registration of it, the  
12 reason why that wouldn't give rise to First  
13 Amendment concerns is because of what this Court  
14 said in *Jack Daniel's*, which is that the First  
15 Amendment and trademark law, when it sticks to  
16 its historical function, they play well  
17 together.

18 Now that -- I understand the -- the  
19 concern about there being some chilling effect  
20 that might exist because, you know, someone  
21 doesn't want to pick a mark if they're concerned  
22 about being subjected to -- to infringement  
23 litigation. And to some degree, that risk  
24 exists even without registration, but I -- I  
25 understand that, you know, when a mark is



1 registered, it -- it -- it gives the mark holder  
2 added benefits.

3 I think, if that is a concern that  
4 Congress wanted to identify, which we're a world  
5 from that here with this provision, which it was  
6 clear from the record that Congress was trying  
7 to make it so that no one used these marks, not  
8 that so anyone could use it as a source  
9 identifier. But, if that -- if Congress did  
10 identify that as a problem, I think it could try  
11 to achieve that narrow purpose through a more  
12 narrowly drawn statute. But that's just not the  
13 statute that we have here. And I --

14 CHIEF JUSTICE ROBERTS: I'm sorry.  
15 More narrowly drawn like what?

16 MR. TAYLOR: Well, I think, if the  
17 concern is ensuring that political speech or --  
18 you know, political speech that might not give  
19 -- really scream source identifier in any way,  
20 that that -- we don't want to register those  
21 kinds of marks because there could be some  
22 chilling effect.

23 That could be a justification once  
24 you're in heightened scrutiny for a particular  
25 prohibition, and maybe it would, you know,

1 survive. Maybe it wouldn't. I'd have to see  
2 the justification. I think that's the beauty of  
3 intermediate scrutiny. You don't just assume an  
4 exception is constitutional. You see what the  
5 government says and then you see if it stands  
6 up. But I -- I --

7 JUSTICE SOTOMAYOR: Is it possible  
8 that you can't draft it without making it  
9 viewpoint content?

10 MR. TAYLOR: I think you could  
11 probably --

12 JUSTICE SOTOMAYOR: That's what the  
13 problem I'm having with your solution, which is  
14 it hinges on being viewpoint.

15 MR. TAYLOR: Well, I think you could  
16 draft that statute in a -- I mean, it would be  
17 content-based. These are all content-based.  
18 But it wouldn't -- I don't think it would be  
19 viewpoint-based. It might be a hard line to  
20 draw, as, you know, some of this Court's  
21 decisions show, if you're trying to figure out  
22 what is a political message and what is not.  
23 You know, in -- in a voting -- a polling place,  
24 for example, that can -- that can be a hard line  
25 to draw.

1                   But I -- I think, here, you know, we  
2                   -- you know, it's really in -- in Congress's  
3                   court. If it thinks that's a problem, it can  
4                   address it. You know --

5                   JUSTICE ALITO: Mr. Taylor, suppose  
6                   Congress -- excuse me. Suppose Congress passed  
7                   this law. It says, because each living person  
8                   has a trademark right to his or her own name,  
9                   nobody can register a trademark containing the  
10                  name of another person without obtaining that  
11                  person's written consent.

12                  Would that be constitutional?

13                  MR. TAYLOR: Well, I -- it would be  
14                  content-based, and so we think it would be  
15                  subject to intermediate scrutiny. I think there  
16                  would be less a concern about leveraging if  
17                  Congress was legislating on the understanding  
18                  that someone had a trademark right in their own  
19                  name. But I -- I'd ultimately have to see the  
20                  justification to see if it could survive.

21                  I mean, if -- if we're talking about  
22                  reasonable --

23                  JUSTICE ALITO: You mean the intent of  
24                  Congress, when you talk about the justification,  
25                  the reason for the sponsor sponsoring this,

1 introducing the bill, the reason why a majority  
2 of both houses voted for it?

3 MR. TAYLOR: No, I'm --

4 JUSTICE ALITO: Is that what you're  
5 saying?

6 MR. TAYLOR: -- I'm not suggesting,  
7 Justice Alito, that -- that you would examine  
8 the, you know, legislative history to try to  
9 determine the -- the motivations of particular  
10 legislators.

11 I would -- just to respond to -- to  
12 that concern, I would just underscore that we're  
13 not here with just a couple of floor statements.  
14 We've got the text on our side.

15 JUSTICE ALITO: All right. Well,  
16 let's put the -- put the -- put the legislative  
17 history aside, and let's say we know nothing  
18 about this provision other than what it says on  
19 its face. It says each living person has a  
20 trademark right to his or her own name, and,  
21 therefore, you can't register somebody else's  
22 name without that person's consent.

23 Would that be constitutional?

24 MR. TAYLOR: If Congress were right  
25 about everyone having a trademark in their own

1 name, even if they didn't use it in commerce --

2 JUSTICE ALITO: Well, what if Congress  
3 says that they do?

4 MR. TAYLOR: I think it would present  
5 a closer question. And I think you might, if  
6 you were to analyze that under a reasonableness  
7 standard and -- and there was some real barrier  
8 on using someone else's name as a trademark  
9 regardless of whether it were registered or not,  
10 I think that would be a very different question  
11 because what's going on there is -- is Congress  
12 is now trying to leverage the benefits of the  
13 registration system to do something that it  
14 can't do directly, which is to discourage people  
15 from selecting marks that are valid marks simply  
16 because Congress doesn't like the message  
17 conveyed there.

18 And I think that is what is going on  
19 here. And, you know --

20 JUSTICE ALITO: Do you think it's --  
21 it's farfetched to think that every person has a  
22 -- an interest, almost a quasi-property  
23 interest, in his or her own name?

24 MR. TAYLOR: Not at all. And I think  
25 that that's why there's an exception --

1 JUSTICE ALITO: Can Congress then  
2 protect it by saying somebody else can't take  
3 that away in part by registering a trademark  
4 that uses another person's name?

5 MR. TAYLOR: I think that's --  
6 Congress has already tried to do that with the  
7 separate surname provision that I was mentioning  
8 earlier. It's trying to ensure that, I mean, if  
9 everyone has a -- a kind of -- there's a strong  
10 intuition we all have that we have an inherent  
11 property right in our own name and the ability  
12 to commercialize it, that you want to ensure  
13 that if some -- you know, someone's not just  
14 going to, you know, rush to the -- the -- the  
15 registration -- the registrar to register the  
16 mark, you know, Bob Smith. And then --

17 JUSTICE ALITO: Well, are you saying  
18 that this provision would be constitutional if  
19 -- that subsection (c) would be constitutional  
20 if subsection (a) didn't exist, but because (a)  
21 exists, (c) isn't constitutional?

22 MR. TAYLOR: Well, I think that you'd  
23 have a question about fit at that point. So, if  
24 2(a) didn't exist, then 2(c) in our view would  
25 extend to prohibit marks that we think could

1 properly be prohibited because they would be  
2 misleading or, you know, falsely suggesting a  
3 connection with someone that -- when that  
4 connection doesn't exist.

5           And so then the question would be just  
6 did Congress go too far to -- to deal with that  
7 problem. It would be an intermediate scrutiny  
8 question or maybe a reasonableness question that  
9 would probably filter out in the exact same  
10 place, but I think, when you're assessing a  
11 particular law, you want to look at the  
12 practical effect.

13           And so, in the -- in the HIV/AIDS  
14 case, you know, the -- the unconstitutional  
15 conditions case, there was a separate  
16 prohibition on using the money for certain  
17 purposes. And the Court said, well, assuming --  
18 because that provision already exists, we're  
19 going to look at this other provision, this  
20 loyalty oath provision, and -- and, you know,  
21 it's got to be doing something more, and then  
22 we're going to analyze that something more that  
23 it's doing to -- to see whether it's  
24 constitutional. And I think a similar analysis  
25 would be appropriate here.

1           And I think, once you recognize that  
2 even if we're in reasonableness land and most of  
3 these other provisions are going to sail through  
4 because they're consistent with the history and  
5 because they're ultimately just trying to ensure  
6 that trademarks function as trademarks and that  
7 they don't confuse or mislead consumers, then  
8 we're really just talking about one or two  
9 provisions that might have a purpose that's  
10 wholly disconnected from the purpose of  
11 trademark law.

12           And I think what's so unusual about my  
13 friend's argument on the other side is that if  
14 the test is reasonableness for restrictions that  
15 are related to trademark law and the purposes of  
16 trademark registration, it's quite anomalous  
17 that for purposes that are totally unrelated --  
18 if the test is reasonableness for that, that for  
19 -- for unrelated purposes, where Congress is  
20 trying to leverage the benefits of -- of  
21 trademark registration, you would have a lower  
22 standard, rational basis.

23           That's exactly backwards. I think, if  
24 Congress is trying to assert some justification  
25 that is outside the purpose of trademark law,



1 whether it be dignity or a concern about, you  
2 know, just people having a commercial interest  
3 in their own identity apart from whether it's a  
4 trademark or not, I think it's only -- it's only  
5 fair that the government try to show that that's  
6 a substantial interest and that the fit is  
7 reasonable. And that looks a lot like  
8 intermediate scrutiny to me. So I think --

9 JUSTICE KAVANAUGH: What -- I guess  
10 I'm --

11 MR. TAYLOR: -- it's really two ways  
12 to --

13 JUSTICE KAVANAUGH: And maybe this is  
14 a flaw in intermediate scrutiny more generally.  
15 I don't really know what that means other than  
16 is it reasonable. What's the difference?

17 MR. TAYLOR: Well, it -- this Court  
18 has used different -- has sort of put the test  
19 differently in different cases. I think it --

20 JUSTICE KAVANAUGH: Yeah. I know the  
21 -- I know the formulations.

22 (Laughter.)

23 MR. TAYLOR: Yeah.

24 JUSTICE KAVANAUGH: Yeah. Yeah.

25 MR. TAYLOR: In -- in the --

1 JUSTICE KAVANAUGH: I just -- I mean,  
2 in the end, Congress thinks it's appropriate to  
3 put a restriction on people profiting off  
4 commercially appropriating someone else's name.  
5 And as Justice Gorsuch has detailed, that's long  
6 been Congress's view. And even before this  
7 statute, it's been part of the law. And --

8 MR. TAYLOR: Yeah and --

9 JUDGE KAVANAUGH: -- that -- that --  
10 you know, we just have to make a judgment, is  
11 that reasonable.

12 I don't know if -- throwing the term  
13 "intermediate scrutiny" around does nothing for  
14 me.

15 MR. TAYLOR: I -- I think that's fair.  
16 What I would say is that whether it's  
17 reasonableness or intermediate scrutiny, I think  
18 the -- it's really the burden should be on the  
19 government to try to justify the law. I don't  
20 think, you know --

21 JUSTICE KAVANAUGH: Well, the -- I  
22 mean, I guess I've just said it, others have  
23 said it --

24 MR. TAYLOR: Yeah.

25 JUSTICE KAVANAUGH: -- so I won't

1 belabor it. But a judgment that you shouldn't  
2 be able to profit off use of someone else's  
3 name.

4 MR. TAYLOR: Yeah. I'm just saying  
5 that I think there's, you know, really a burden  
6 on the government to --

7 JUSTICE KAVANAUGH: Is it reasonable  
8 or not.

9 MR. TAYLOR: Yeah. It might -- I  
10 think what's so unusual here is the government  
11 hasn't really tried to show why -- you know,  
12 what the justification would be, what real-world  
13 harm is -- is sort of being worked by the  
14 registration here, as opposed to the use of the  
15 trademark --

16 JUSTICE KAVANAUGH: Mm-hmm.

17 MR. TAYLOR: -- which, as I understood  
18 my friend to concede, you know, this is perfect  
19 -- perfectly appropriate to be used as a mark.

20 And, you know, if -- if the former  
21 President Trump were to bring -- write a public  
22 -- publicity action against my client, that that  
23 would fail on First Amendment grounds.

24 And so what I would say is that the  
25 government doesn't have a legitimate interest in

1 facilitating the unconstitutional application of  
2 state law, and I think that's the great many,  
3 you know, sort of applications of this statute  
4 once you take into account all these other  
5 provisions that exist.

6 And so, if there is a historical  
7 foundation, I do think it's incumbent on the  
8 government to identify one. We brought this  
9 case as an as-applied challenge, so we're  
10 willing to give the government another crack at  
11 it in another case to try to -- to show that  
12 record. The only relief we've sought here is  
13 as-applied relief.

14 JUSTICE JACKSON: Can you just say a  
15 little bit more about your viewpoint argument?  
16 I mean, do -- do you have data that indicates  
17 that the proportion of marks that are rejected  
18 under names that are critical is different than,  
19 you know, those that are complimentary?

20 MR. TAYLOR: I don't have data,  
21 Justice Jackson, but what I can say is that the  
22 government has identified no example of a  
23 critical mark ever being registered. And we  
24 know, we put a few of them in our brief, we know  
25 there are positive marks that have been

1 registered. And so I --

2 JUSTICE JACKSON: But doesn't that  
3 have to do with consent? And the question is,  
4 do you have data related to people not  
5 consenting to -- or people only consenting to  
6 complimentary versus critical?

7 I mean, I thought there were a couple  
8 of examples here where even complimentary marks  
9 were rejected because people didn't consent to  
10 them.

11 MR. TAYLOR: There are certainly quite  
12 a few examples. There are a lot more than exist  
13 in the government's brief. And I think that's  
14 one --

15 JUSTICE JACKSON: So then how do we  
16 know that this is going to ultimately work a  
17 viewpoint, weeding out only critical marks? I  
18 thought that was your argument --

19 MR. TAYLOR: Oh, no. Our --

20 JUSTICE JACKSON: -- that this is  
21 going to only weed out critical marks.

22 MR. TAYLOR: To be fair, our argument  
23 is not that this is viewpoint-based in the same  
24 way that the laws in Tam and Brunetti were  
25 viewpoint-based. We're making the more modest

1 argument that this is -- the fact that this is  
2 expressly speaker-based, that it gives rise to  
3 viewpoint-based concerns, so it's the kind of  
4 speaker-based restriction that you should care  
5 about, that that is another reason, in addition  
6 to the first two reasons I gave, the kind of  
7 available-to-all-comers rationale selectively  
8 being withheld, leveraging --

9 JUSTICE JACKSON: Right, so does it  
10 actually give rise to viewpoint? That's what --  
11 my -- my question is just, what are the  
12 viewpoint-based concerns and are they real?

13 MR. TAYLOR: Well, I -- I -- I -- I  
14 think, as this Court pointed out in -- in Jack  
15 Daniel's, I mean, you know, self-mockery with  
16 trademarks is quite an unusual thing.

17 And I think it's -- it just -- it's --  
18 it's a matter of common sense whether someone  
19 would consent to a derogatory use of their name  
20 on a trademark and that that's not likely to  
21 occur. I know of no example of that occurring.

22 And on the other hand, I can point to  
23 examples of positive marks being registered.  
24 And so I think that that disparity is just part  
25 of the equation here. We're not saying that

1 it's categorically unconstitutional for that  
2 reason alone. We're just saying that is one  
3 plus factor that this Court should look to in  
4 assessing whether rational basis outside of  
5 strict viewpoint discrimination is permissible.

6 And I think, you know, in the ordinary  
7 case, this Court doesn't have to parse the  
8 distinction between a content-based law that is  
9 viewpoint-based and a content-based law that is  
10 not viewpoint-based because it gets strict  
11 scrutiny either way. And once that --

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Justice Thomas, anything further?

15 Justice Alito?

16 Justice Kagan?

17 Justice Gorsuch?

18 Justice Kavanaugh?

19 Justice Barrett?

20 Justice Jackson?

21 Okay. Thank you, counsel.

22 MR. TAYLOR: Thank you.

23 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
24 Stewart?

25

1 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

2 ON BEHALF OF THE PETITIONER

3 MR. STEWART: Thank you, Mr. Chief  
4 Justice.

5 Mr. Taylor referred to the fact that  
6 in order for words or images to be registered by  
7 the PTO, they have to function as a trademark,  
8 as a source identifier. And -- and the  
9 existence of that unchallenged requirement just  
10 highlights the fact that this is not a  
11 restriction on speech.

12 Imagine that Congress passed a law  
13 saying the only words and images that you can  
14 put on your products are words and images that  
15 function as trademarks, that identify the source  
16 of the merchandise.

17 That would raise huge First Amendment  
18 problems because it would prevent merchants from  
19 conveying a range of useful information to  
20 potential consumers.

21 The reason we don't think of that  
22 restriction as raising First Amendment concerns  
23 is we understand it doesn't prevent you from  
24 putting the words on your product. It just  
25 prevents you from getting registration.



1           Mr. Taylor also said that other  
2 provisions of the Lanham Act, restrictions on  
3 marks that falsely suggest a connection to -- to  
4 persons or to institutions and marks that are  
5 misleading as to source, that -- that those  
6 restrictions would prevent the registration of  
7 marks that falsely imply an endorsement.

8           And I'd just identify three types of  
9 scenarios in which those might be inadequate to  
10 fully protect kind of the historically rooted  
11 idea that individuals have a property-like right  
12 in their name.

13           The first is that when the PTO applies  
14 those provisions, it looks to what the average  
15 consumer would think. And cases could certainly  
16 arise in which the average consumer might think  
17 there's no message of endorsement applied, but  
18 the living individual might think some people  
19 will going to mis- -- are going to misattribute  
20 this to me and I don't want any of it.

21           The -- the second scenario and I'd use  
22 as a hypothetical, imagine a car dealer in New  
23 York uses as his slogan "the Derek Jeter of Car  
24 Dealers," and he explains I'm not claiming that  
25 there's any affiliation with Derek Jeter, all

1 I'm saying is I perform my own job with the same  
2 excellence and professionalism that New Yorkers  
3 have come to associate with Derek Jeter.

4 We -- we could accept the explanation,  
5 and Derek Jeter could still think, I -- I'm  
6 offended by the idea of someone with whom I have  
7 no connection attempting to profit by linking  
8 his own products to my name and my good  
9 reputation, and he could worry, if this person  
10 can call himself the Derek Jeter of Car Dealers,  
11 next there will be the Derek Jeter of  
12 Orthodontists and the Derek Jeter of Barbers,  
13 and the value of his name will be reduced, will  
14 be diluted.

15 And the third scenario is what I might  
16 refer to as the true suggestion scenario, where  
17 the Los Angeles Lakers describe their product as  
18 Jack Nicholson's favorite team or the Chicago  
19 Bulls describe their product as Barack Obama's  
20 favorite team or a restaurant in which a senator  
21 has had dinner uses the slogan Senator X Ate  
22 Here.

23 None of those would really be  
24 excludable based on the false suggestion clause  
25 because they would imply a connection between

1 the living individual and the product, but would  
2 -- it would be a connection that actually  
3 existed. And so, nevertheless, there is a  
4 strong tradition that individuals can exert  
5 control over their own names to -- to a degree  
6 necessary to prevent those uses from occurring.

7 Now it's true, denial of registration  
8 under the Lanham Act doesn't prevent the -- the  
9 hypothetical businesses from engaging in those  
10 marketing activities. In order to accomplish  
11 that, the plaintiffs would have to rely on state  
12 law rights of privacy and publicity. But, with  
13 respect to trademark registration, Congress did  
14 what it could. It denied any additional oomph  
15 that would be provided by federal registration  
16 to marks that disserve living individuals in  
17 that manner.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
20 Stewart. If you'll linger at the podium just  
21 for a moment. Our records reflect that this is  
22 your or was your 100th argument before the  
23 Court. You are the fourth person to reach this  
24 rare milestone this century.

25 Throughout your career, you have

1 consistently advocated positions on behalf of  
2 the United States in an exemplary manner. I  
3 recall one case in particular from my days in  
4 private practice 23 years ago in which I was  
5 counsel for petitioner and you argued in support  
6 of respondent.

7 Now, when the opinion came down, I was  
8 just nine votes short of a unanimous result --

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: -- for -- for  
11 my client.

12 On behalf of the Court, I extend to  
13 you our appreciation for your advocacy before  
14 the Court and dedicated service as an officer of  
15 this Court. We look forward to hearing from you  
16 many more times.

17 MR. STEWART: Thank you very much, Mr.  
18 Chief Justice.

19 (Whereupon, at 11:21 a.m., the case  
20 was submitted.)

21

22

23

24

25

Official

<p><b>1</b></p> <p>1 [1] 1:14  <b>10:05</b> [2] 1:18 3:2  <b>100th</b> [1] 82:22  <b>1052(c)</b> [3] 3:12,15 4:1  <b>11:21</b> [1] 83:19  <b>15</b> [1] 3:11  <b>1870</b> [1] 15:7  <b>19-2</b> [1] 53:13</p> <hr/> <p><b>2</b></p> <p>2 [2] 55:5 59:23  <b>2(a)</b> [1] 69:24  <b>2(c)</b> [1] 69:24  <b>2023</b> [1] 1:14  <b>22-704</b> [1] 3:4  <b>23</b> [1] 83:4  <b>28</b> [1] 22:1</p> <hr/> <p><b>3</b></p> <p>3 [1] 2:4</p> <hr/> <p><b>4</b></p> <p>42 [1] 2:7</p> <hr/> <p><b>7</b></p> <p>79 [1] 2:10</p> <hr/> <p><b>A</b></p> <p>a.m [3] 1:18 3:2 83:19  <b>ability</b> [7] 3:24 5:20 17:4      36:9 42:15 53:21 69:11  <b>able</b> [6] 32:2 42:7 45:13,14      63:1 74:2  <b>above</b> [1] 11:5  <b>above-entitled</b> [1] 1:16  <b>abridgement</b> [4] 20:19,20      22:23 32:4  <b>absolutely</b> [1] 54:15  <b>abstract</b> [2] 57:5,11  <b>accept</b> [3] 30:8 52:25 81:4  <b>accepted</b> [1] 21:16  <b>access</b> [1] 8:2  <b>accomplish</b> [2] 37:3 82:10  <b>account</b> [8] 6:24 7:7 9:12,      16 10:9 11:23 55:18 75:4  <b>achieve</b> [3] 41:7 43:20 64:      11  <b>acknowledge</b> [1] 23:18  <b>acquired</b> [2] 38:13 60:5  <b>across</b> [2] 24:3 30:18  <b>Act</b> [7] 25:17 55:5 56:16 58:      7,22 80:2 82:8  <b>action</b> [2] 21:9 74:22  <b>actions</b> [1] 21:18  <b>activities</b> [4] 19:1,25 29:4      82:10  <b>activity</b> [3] 21:12 46:24 49:      2  <b>actual</b> [1] 28:25  <b>actually</b> [11] 10:4 12:2 22:3      35:20 52:12 54:4 58:3 60:      12 62:1 77:10 82:2  <b>add</b> [1] 23:5  <b>added</b> [1] 64:2</p>	<p><b>addition</b> [1] 77:5  <b>additional</b> [1] 82:14  <b>address</b> [1] 66:4  <b>addresses</b> [1] 62:10  <b>adhere</b> [1] 35:6  <b>adjectives</b> [1] 62:23  <b>administering</b> [1] 12:14  <b>adopt</b> [3] 24:8,9,20  <b>adopted</b> [1] 32:24  <b>adopts</b> [1] 39:24  <b>advanced</b> [1] 31:7  <b>advances</b> [1] 7:20  <b>advancing</b> [1] 53:9  <b>advice</b> [1] 50:21  <b>advocacy</b> [1] 83:13  <b>advocated</b> [1] 83:1  <b>affect</b> [1] 5:3  <b>affiliation</b> [1] 80:25  <b>afoot</b> [1] 34:5  <b>afoul</b> [1] 25:15  <b>agency</b> [1] 4:6  <b>ago</b> [1] 83:4  <b>agree</b> [6] 5:3 9:6 13:1,10      31:24 58:8  <b>agreed</b> [1] 31:20  <b>ahistorically</b> [1] 16:24  <b>aid</b> [1] 8:6  <b>alike</b> [1] 52:14  <b>ALITO</b> [23] 12:15 13:6 14:      10 15:24 28:7,8 29:13,17      30:2,6 31:1 33:6 50:11 66:      5,23 67:4,7,15 68:2,20 69:      1,17 78:15  <b>Alito's</b> [3] 15:2 18:14 30:4  <b>allow</b> [2] 26:22 54:12  <b>allowed</b> [2] 49:15 59:16  <b>allowing</b> [1] 34:9  <b>almost</b> [2] 20:24 68:22  <b>alone</b> [1] 78:2  <b>already</b> [2] 69:6 70:18  <b>ambiguity</b> [1] 34:16  <b>Amendment</b> [21] 3:13 6:      16 7:6 16:25 17:8 18:10      20:17 22:20 38:10 42:13      43:5 53:20 57:17 60:22 61:      20 63:3,13,15 74:23 79:17,      22  <b>American</b> [1] 32:12  <b>ample</b> [1] 55:21  <b>analogize</b> [3] 7:25 21:20      22:9  <b>analogous</b> [3] 18:12,12 29:      23  <b>analogue</b> [1] 7:5  <b>analogy</b> [5] 5:17,18 18:23      19:4 51:20  <b>analysis</b> [11] 6:23 7:6 11:      17,22 23:21 24:17 25:2 26:      8,11,13 70:24  <b>analyze</b> [2] 68:6 70:22  <b>analyzing</b> [3] 25:10 34:20      55:15  <b>Angeles</b> [1] 81:17  <b>anodyne</b> [1] 32:24</p>	<p><b>anomalous</b> [2] 9:17 71:16  <b>another</b> [12] 3:25 9:21 13:6      15:23 22:9 37:21 42:5 66:      10 69:4 75:10,11 77:5  <b>answer</b> [6] 15:23 21:3 26:2      41:17 46:19 47:16  <b>AOC</b> [1] 16:7  <b>apart</b> [1] 72:3  <b>Apparel</b> [2] 23:14 24:5  <b>APPEARANCES</b> [1] 1:20  <b>appellate</b> [1] 34:23  <b>applicability</b> [1] 28:15  <b>applicant</b> [1] 7:13  <b>applicant's</b> [2] 43:14 46:      11  <b>application</b> [2] 11:7 75:1  <b>applications</b> [1] 75:3  <b>applied</b> [3] 13:15 31:13 80:      17  <b>applies</b> [2] 26:10 80:13  <b>apply</b> [10] 4:2 5:9,10 20:6,8      26:9 27:8,20 34:23 41:19  <b>applying</b> [2] 41:11,12  <b>appreciation</b> [1] 83:13  <b>approach</b> [1] 26:14  <b>approaches</b> [1] 21:23  <b>appropriate</b> [6] 52:8 55:17      56:14 70:25 73:2 74:19  <b>appropriating</b> [1] 73:4  <b>area</b> [6] 12:18 14:24 17:17      26:17 34:9 61:16  <b>areas</b> [1] 17:3  <b>aren't</b> [1] 39:14  <b>argue</b> [2] 45:17 57:13  <b>argued</b> [1] 83:5  <b>argues</b> [1] 25:7  <b>argument</b> [30] 1:17 2:2,5,8      3:4,7 10:3 13:7 15:25 29:      20 30:3,7,12 32:21 35:19,      23 39:8 42:22 43:3 46:3      53:9 57:20 60:20 71:13 75:      15 76:18,22 77:1 79:1 82:      22  <b>arise</b> [2] 23:25 80:16  <b>arises</b> [1] 38:5  <b>around</b> [6] 15:7,8 56:9 57:      11,14 73:13  <b>arrogate</b> [1] 63:4  <b>artists</b> [3] 50:18,20,22  <b>Arts</b> [1] 28:11  <b>as-applied</b> [3] 38:20 75:9,      13  <b>Asian</b> [1] 32:12  <b>Asians</b> [1] 32:16  <b>aside</b> [2] 14:12 67:17  <b>asks</b> [1] 4:3  <b>assert</b> [5] 3:24 15:20 32:17      36:16 71:24  <b>assess</b> [1] 56:10  <b>assessing</b> [2] 70:10 78:4  <b>assessment</b> [1] 52:8  <b>assistance</b> [7] 8:6,23 18:      25 19:16 22:22 27:18,19  <b>associate</b> [1] 81:3</p>	<p><b>association</b> [1] 43:22  <b>assume</b> [1] 65:3  <b>Assuming</b> [5] 22:24 23:4,6      37:2 70:17  <b>Ate</b> [1] 81:21  <b>Athletics</b> [1] 28:11  <b>attach</b> [2] 12:16 62:23  <b>attachment</b> [2] 29:22,23  <b>attempting</b> [1] 81:7  <b>attendant</b> [1] 43:19  <b>authority</b> [1] 12:16  <b>available</b> [9] 4:25 5:25 8:      20 27:19 43:10,16 45:9 46:      10 47:20  <b>available-to-all-comers</b>      [1] 77:7  <b>average</b> [2] 80:14,16  <b>avoid</b> [1] 14:14  <b>avoided</b> [1] 12:14  <b>aware</b> [1] 56:16  <b>away</b> [2] 8:14 69:3</p> <hr/> <p><b>B</b></p> <p><b>back</b> [4] 15:6 16:21,22 24:3  <b>backwards</b> [1] 71:23  <b>badger</b> [1] 51:9  <b>band</b> [1] 32:23  <b>Barack</b> [1] 81:19  <b>Barbers</b> [1] 81:12  <b>barred</b> [2] 37:1 60:2  <b>BARRETT</b> [13] 24:23 25:      20,24 26:8 27:5 35:17,18      36:19 37:8,12,14 63:8 78:      19  <b>Barrett's</b> [1] 39:9  <b>barrier</b> [2] 60:4 68:7  <b>based</b> [6] 7:2 9:19 20:14      27:22 43:14 81:24  <b>Basically</b> [1] 53:15  <b>basis</b> [32] 6:2 11:3 20:22      21:10,11,17 22:2,4,13 23:3      25:10 26:9,10,14 34:7,18      35:7 39:7,13,15 40:8 41:2,      3 43:5 44:14 49:6 52:2,7,      16 54:12 71:22 78:4  <b>beauty</b> [1] 65:2  <b>becomes</b> [1] 21:11  <b>becoming</b> [1] 20:25  <b>begin</b> [1] 3:13  <b>begins</b> [1] 43:3  <b>behalf</b> [10] 1:22,25 2:4,7,10      3:8 42:23 79:2 83:1,12  <b>belabor</b> [1] 74:1  <b>believe</b> [1] 10:4  <b>believes</b> [1] 9:10  <b>believing</b> [1] 11:4  <b>bench</b> [1] 57:10  <b>benefit</b> [22] 3:16 5:22 6:12,      24 8:22 14:1,2,13 23:19,20      26:19 29:23,24 32:2 46:21      47:3 48:4,20 49:13 50:3,4      51:17  <b>benefits</b> [30] 3:20 5:7 6:21      7:9,22,23 8:11 12:17 13:</p>	<p>21 14:18 15:4 16:8,19 23:      8 24:12 26:6 27:21 29:18  <b>43:20 45:6,8,18 47:13,18</b>  <b>49:5,9 50:1 64:2 68:12 71:      20</b>  <b>best</b> [1] 48:25  <b>between</b> [11] 7:22 12:6 30:      14,15 31:21,25 32:6 45:13      55:24 78:8 81:25  <b>beyond</b> [1] 11:6  <b>bill</b> [1] 67:1  <b>bit</b> [2] 35:1 75:15  <b>Bless</b> [1] 62:6  <b>Bob</b> [1] 69:16  <b>book</b> [5] 19:22 25:5,18,22,      25  <b>both</b> [11] 5:6,12 11:7 18:23,      23 21:22,23 26:6 43:23 52:      5 67:2  <b>bottom</b> [2] 20:24 22:5  <b>box</b> [3] 18:9,18,20  <b>Breyer</b> [1] 18:15  <b>brief</b> [3] 22:1 75:24 76:13  <b>bring</b> [2] 62:2 74:21  <b>broadly</b> [1] 55:2  <b>Brooks</b> [2] 57:1 60:9  <b>Brothers</b> [2] 57:1 60:9  <b>brought</b> [1] 75:8  <b>Brunetti</b> [3] 18:17 19:18      76:24  <b>brushes</b> [1] 50:20  <b>building</b> [1] 48:1  <b>built</b> [1] 63:6  <b>Bulls</b> [1] 81:19  <b>burden</b> [6] 43:17 44:19 45:      4 46:12 73:18 74:5  <b>burdened</b> [2] 45:3 46:6  <b>businesses</b> [1] 82:9</p> <hr/> <p><b>C</b></p> <p><b>call</b> [3] 21:21,22 81:10  <b>called</b> [2] 25:5 50:25  <b>came</b> [4] 1:16 15:11 16:20      83:7  <b>Campaign</b> [1] 8:3  <b>cannot</b> [4] 3:18 4:11 44:15      51:15  <b>car</b> [3] 80:22,23 81:10  <b>care</b> [2] 39:8 77:4  <b>career</b> [1] 82:25  <b>careful</b> [1] 48:11  <b>carry</b> [1] 10:11  <b>carrying</b> [1] 63:2  <b>Case</b> [39] 3:4 7:12,14 13:3      15:1 17:21 18:16,17 26:4      27:6 28:21,24 29:8,25 30:      13 31:4,13 32:10,20 33:2      38:25 48:9,25 49:5,10,17      51:12,13 54:19 57:18,24      60:16 70:14,15 75:9,11 78:      7 83:3,19  <b>cases</b> [25] 7:10 8:1 12:24      18:11 22:17,18,19 23:23      33:22 39:19 41:25 45:7 49:</p>
--	--	--	---	---

## Official

4,8,23,25 50:1,5,8,9,10 51:11 52:20 72:19 80:15 <b>categorically</b> [3] 50:13,16 78:1 <b>categories</b> [3] 18:10 40:10,23 <b>category</b> [2] 42:10,12 <b>cause</b> [2] 30:4 54:10 <b>cautioned</b> [1] 16:7 <b>century</b> [1] 82:24 <b>cert</b> [1] 40:3 <b>certain</b> [8] 7:1 8:19 15:15 20:11 41:8 43:12 49:10 70:16 <b>certainly</b> [9] 15:13 17:19 21:16 28:20 36:25 51:19 62:22 76:11 80:15 <b>cetera</b> [1] 8:24 <b>challenge</b> [1] 75:9 <b>character</b> [1] 48:21 <b>characterize</b> [2] 32:1 46:8 <b>characterized</b> [1] 23:20 <b>check</b> [1] 18:3 <b>checking</b> [1] 18:4 <b>checks</b> [1] 36:18 <b>Chicago</b> [1] 81:18 <b>CHIEF</b> [25] 3:3,9 18:14 22:25 23:17 28:4 33:7,10 35:14 39:2 42:18,21,24 60:19 61:6,22 62:16 63:6 64:14 78:12,23 79:3 82:19 83:10,18 <b>chilling</b> [2] 63:19 64:22 <b>choose</b> [1] 23:14 <b>choosing</b> [3] 3:21 24:13 33:4 <b>Christian</b> [3] 19:24 49:25 52:4 <b>church</b> [1] 47:24 <b>circumstance</b> [5] 9:11,15 40:1,2 41:20 <b>circumstances</b> [5] 4:9 11:12 23:25 31:11 54:9 <b>cite</b> [2] 49:22,23 <b>claim</b> [2] 4:16 38:20 <b>claiming</b> [1] 80:24 <b>clause</b> [17] 3:11,23 37:1 40:13 43:2,4,8,9,18 44:5,8,15 48:16 53:4 55:3,19 81:24 <b>clear</b> [2] 54:19 64:6 <b>Clearly</b> [4] 5:11 21:12 25:16 34:25 <b>client</b> [4] 44:23 45:5 74:22 83:11 <b>close</b> [1] 61:11 <b>closer</b> [1] 68:5 <b>CLS</b> [1] 20:2 <b>coerce</b> [1] 23:8 <b>coincidental</b> [1] 53:15 <b>collar</b> [1] 24:3 <b>colloquially</b> [1] 33:1 <b>combination</b> [1] 38:12 <b>Combined</b> [1] 8:2 <b>come</b> [8] 8:17 21:23,23 36:2 47:22 50:19 57:19 81:3	<b>comfortable</b> [1] 34:19 <b>comic</b> [1] 63:2 <b>comical</b> [1] 63:2 <b>COMMERCE</b> [7] 1:4 26:22 36:17,21,25 37:6 68:1 <b>commercial</b> [5] 11:23 38:11 42:1,7 72:2 <b>commercialize</b> [1] 69:12 <b>commercially</b> [1] 73:4 <b>Committee</b> [2] 28:12 29:2 <b>common</b> [7] 15:10 16:21 56:23 57:15 58:21 62:5 77:18 <b>communicating</b> [1] 19:9 <b>communication</b> [1] 5:21 <b>communicative</b> [2] 19:1 24:6 <b>comparable</b> [1] 28:2 <b>competing</b> [1] 47:4 <b>competitive</b> [1] 51:1 <b>competitors</b> [4] 4:21 14:4 15:22 42:16 <b>complete</b> [1] 41:17 <b>complementary</b> [3] 75:19 76:6,8 <b>comports</b> [1] 17:7 <b>con</b> [1] 49:3 <b>concede</b> [2] 63:9 74:18 <b>concededly</b> [1] 47:18 <b>conceding</b> [1] 46:20 <b>concern</b> [11] 23:24 39:9 60:13 61:23,24 63:19 64:3,17 66:16 67:12 72:1 <b>concerned</b> [2] 24:24 63:21 <b>concerning</b> [1] 12:24 <b>concerns</b> [5] 62:11 63:13 77:3,12 79:22 <b>conclusion</b> [1] 6:4 <b>condition</b> [7] 3:16 6:17,20,21 13:21 29:22,24 <b>conditions</b> [5] 7:23 12:17 16:8 17:15 70:15 <b>conduct</b> [1] 9:24 <b>conducting</b> [2] 7:6 11:22 <b>confuse</b> [4] 43:23 54:23 56:1 71:7 <b>confusingly</b> [2] 8:17 19:11 <b>confusion</b> [7] 12:7,8,13 53:23 54:5,11 59:8 <b>Congress</b> [24] 6:25 29:9,15 35:9 40:9 64:4,6,9 66:6,6,17,24 67:24 68:2,11,16 69:1,6 70:6 71:19,24 73:2 79:12 82:13 <b>Congress's</b> [2] 66:2 73:6 <b>connected</b> [1] 43:24 <b>connection</b> [7] 55:24 70:3,4 80:3 81:7,25 82:2 <b>consent</b> [20] 4:11 9:18,20,23 10:7,14,18,24 11:5,9,11 25:22 36:5 44:11,12 66:11 67:22 76:3,9 77:19 <b>consented</b> [1] 4:5	<b>consenting</b> [2] 76:5,5 <b>consequence</b> [1] 29:1 <b>consider</b> [1] 4:6 <b>considering</b> [1] 9:12 <b>consistent</b> [2] 3:12 71:4 <b>consistently</b> [1] 83:1 <b>constitute</b> [1] 22:23 <b>Constitutional</b> [1] 5:16 <b>Constitutional</b> [19] 4:16 7:7 12:18 13:11 27:2 31:6,21 37:9 38:3,20 41:9 55:17 65:4 66:12 67:23 69:18,19,21 70:24 <b>constitutionality</b> [2] 28:9 31:4 <b>constitutionally</b> [3] 11:10 12:9 13:18 <b>consumer</b> [3] 53:22 80:15,16 <b>consumers</b> [6] 11:25 26:22 38:1 54:23 71:7 79:20 <b>consuming</b> [1] 62:3 <b>containing</b> [1] 66:9 <b>contains</b> [1] 4:22 <b>content</b> [6] 6:2 7:2 21:14 27:22 46:11 65:9 <b>content-based</b> [14] 14:23 16:25 26:17 27:25 40:23 43:15 57:4,12 58:10 65:17,17 66:14 78:8,9 <b>context</b> [11] 5:9 7:21 14:20 21:24 24:24 33:12,16 41:9,10 48:14 52:18 <b>continuing</b> [2] 36:14,15 <b>contrast</b> [1] 26:25 <b>control</b> [3] 40:15 42:7 82:5 <b>conversation</b> [1] 24:25 <b>conveyed</b> [1] 68:17 <b>conveying</b> [1] 79:19 <b>conveys</b> [1] 4:15 <b>Copy</b> [1] 9:22 <b>copyright</b> [35] 5:3,6,13 6:4,5,11,14,15,19,22 7:2,14 9:21,22,23 10:17 11:7 24:24 25:4,11,16,17,25 26:17,25 27:3,16 36:10 39:10 40:1,17,22,25 41:2,10 <b>core</b> [2] 36:14 59:5 <b>Cornelius</b> [2] 8:2 49:24 <b>correct</b> [2] 7:15 10:6 <b>correctly</b> [1] 48:8 <b>correlation</b> [1] 12:6 <b>couldn't</b> [2] 29:5 37:6 <b>counsel</b> [8] 28:5 42:19 45:25 46:19 60:19 78:13,21 83:5 <b>couple</b> [4] 33:25 61:21 67:13 76:7 <b>course</b> [1] 60:23 <b>COURT</b> [46] 1:1,17 3:10 5:22 6:3,4 7:5,21 11:15,18,21,23 12:5 16:6 17:20 20:8,20 21:17 24:16 28:21 33:24 34:20,23 35:6 42:25 45:6 47:12,15 48:17 50:25 52:5,21 54:18 55:16,18 63:13 66:3 70:17 72:17 77:14 78:3,7 82:23 83:12,14,15 <b>Court's</b> [7] 5:1,18 11:13 34:17,24 44:21 65:20 <b>courts</b> [2] 11:16 52:9 <b>cover</b> [1] 12:22 <b>cowed</b> [1] 32:18 <b>crack</b> [1] 75:10 <b>create</b> [1] 36:11 <b>creative</b> [2] 6:7 7:1 <b>criteria</b> [1] 16:4 <b>critical</b> [8] 4:7 25:18 44:12 75:18,23 76:6,17,21 <b>critically</b> [1] 52:18 <b>crucial</b> [1] 37:5 <b>cuts</b> [1] 61:17	77:19 <b>describe</b> [3] 16:24 81:17,19 <b>described</b> [1] 6:5 <b>description</b> [1] 58:13 <b>descriptions</b> [3] 26:17 57:6 59:20 <b>descriptive</b> [1] 17:1 <b>designed</b> [1] 59:4 <b>detailed</b> [1] 73:5 <b>details</b> [1] 25:6 <b>determine</b> [1] 67:9 <b>difference</b> [6] 28:22 30:14 31:21,25 32:6 72:16 <b>different</b> [24] 3:22 5:14 6:8 7:3 13:20 16:3 22:15 24:13 27:20 29:7 39:14 40:18,19 41:11 46:13 50:13,16 51:12 52:12,15 68:10 72:18,19 75:18 <b>differently</b> [2] 50:19 72:19 <b>difficult</b> [3] 12:18 17:14 40:24 <b>difficulty</b> [1] 35:4 <b>dignity</b> [1] 72:1 <b>diluted</b> [1] 81:14 <b>dinner</b> [1] 81:21 <b>direction</b> [2] 10:7 16:18 <b>directly</b> [2] 50:8 68:14 <b>DIRECTOR</b> [1] 1:5 <b>disallowing</b> [1] 42:4 <b>disconnected</b> [1] 71:10 <b>discourage</b> [1] 68:14 <b>discouraging</b> [1] 44:1 <b>discrete</b> [2] 22:19 40:23 <b>discriminate</b> [2] 48:18 49:6 <b>discrimination</b> [5] 34:10 36:2 44:6,7 78:5 <b>discriminatory</b> [3] 4:13 9:18 12:9 <b>discussing</b> [1] 14:16 <b>discussion</b> [1] 43:2 <b>disparity</b> [1] 77:24 <b>disposal</b> [1] 55:21 <b>dispositive</b> [1] 20:18 <b>dispute</b> [1] 45:16 <b>disqualifying</b> [1] 48:20 <b>dissented</b> [1] 48:11 <b>dissenting</b> [1] 19:17 <b>disserve</b> [1] 82:16 <b>distinct</b> [3] 41:13 42:12 62:13 <b>distinction</b> [2] 45:13 78:8 <b>distinctions</b> [1] 51:16 <b>distinctiveness</b> [1] 60:6 <b>distinguish</b> [2] 24:14 40:1 <b>distinguished</b> [2] 7:21 42:2 <b>distinguishes</b> [1] 50:24 <b>distort</b> [1] 11:6 <b>doctrinal</b> [1] 18:20 <b>Doctrinally</b> [1] 18:8 <b>Doctrine</b> [1] 18:13
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## D

**D.C** [3] 1:13,22,24  
**dangerous** [1] 12:19  
**Daniel's** [6] 11:19,21 12:2 54:18 63:14 77:15  
**Daniels** [1] 11:14  
**data** [5] 10:5,12 75:16,20 76:4  
**dates** [1] 15:6  
**Davenport** [2] 8:24 49:24  
**day** [3] 10:11 51:22 57:13  
**days** [1] 83:3  
**DC** [1] 62:6  
**deal** [2] 55:6 70:6  
**dealer** [1] 80:22  
**Dealers** [2] 80:24 81:10  
**dealing** [3] 28:24 29:7,8  
**deals** [1] 59:24  
**dealt** [1] 61:25  
**deception** [1] 59:8  
**deceptive** [1] 55:25  
**decide** [1] 17:21  
**decided** [2] 11:15 30:4  
**decision** [1] 11:14  
**decisions** [2] 16:6 65:21  
**declining** [3] 33:14 49:2,10  
**dedicated** [1] 83:14  
**deeply** [2] 5:25 27:20  
**defense** [1] 43:1  
**defenses** [1] 43:13  
**definitely** [1] 33:22  
**degree** [3] 63:5,23 82:5  
**denial** [1] 82:7  
**denied** [4] 45:5 48:2,3 82:14  
**Department** [1] 1:22  
**depend** [3] 10:15 25:14 35:24  
**depends** [4] 13:9 21:14 30:13 31:16  
**Deputy** [1] 1:21  
**Derek** [7] 80:23,25 81:3,5,10,11,12  
**derogatory** [3] 32:15,19

## Official

<p><b>doctrines</b> <sup>[1]</sup> 17:16</p> <p><b>doing</b> <sup>[7]</sup> 15:22 22:2 36:12 58:20 60:24 70:21,23</p> <p><b>dollars</b> <sup>[1]</sup> 45:23</p> <p><b>Donald</b> <sup>[7]</sup> 4:15 10:23 15:17,19,21 36:9 38:21</p> <p><b>down</b> <sup>[8]</sup> 15:4 17:11 19:14, 19 40:5 47:23 57:10 83:7</p> <p><b>draft</b> <sup>[2]</sup> 65:8,16</p> <p><b>draw</b> <sup>[3]</sup> 5:17 65:20,25</p> <p><b>drawn</b> <sup>[2]</sup> 64:12,15</p> <p><b>dues</b> <sup>[2]</sup> 8:1 22:18</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>each</b> <sup>[5]</sup> 8:3 24:2 51:11 66:7 67:19</p> <p><b>earlier</b> <sup>[6]</sup> 23:6 41:18 52:11 54:19 56:6 69:8</p> <p><b>earliest</b> <sup>[1]</sup> 16:22</p> <p><b>easier</b> <sup>[1]</sup> 8:25</p> <p><b>easiest</b> <sup>[1]</sup> 18:21</p> <p><b>economic</b> <sup>[2]</sup> 8:12,21</p> <p><b>effect</b> <sup>[6]</sup> 9:7 10:4 55:18 63:19 64:22 70:12</p> <p><b>effectively</b> <sup>[3]</sup> 32:22 46:13 63:9</p> <p><b>effects</b> <sup>[1]</sup> 14:15</p> <p><b>efforts</b> <sup>[1]</sup> 24:8</p> <p><b>either</b> <sup>[5]</sup> 10:16 30:8 41:11 60:18 78:11</p> <p><b>elevate</b> <sup>[1]</sup> 42:1</p> <p><b>eligible</b> <sup>[1]</sup> 48:19</p> <p><b>else's</b> <sup>[5]</sup> 10:18 67:21 68:8 73:4 74:2</p> <p><b>ELSTER</b> <sup>[17]</sup> 1:9 3:5,17 13:12,17 14:3 15:17,25 23:14 24:5 30:14,15 36:6 37:12,15 38:24 42:14</p> <p><b>Elster's</b> <sup>[4]</sup> 3:24 4:9,14 24:8</p> <p><b>emblazoned</b> <sup>[1]</sup> 30:18</p> <p><b>embrace</b> <sup>[2]</sup> 19:4 51:19</p> <p><b>emphasis</b> <sup>[1]</sup> 14:12</p> <p><b>emphasize</b> <sup>[1]</sup> 3:13</p> <p><b>end</b> <sup>[5]</sup> 10:11 41:8 51:21 57:13 73:2</p> <p><b>endeavors</b> <sup>[1]</sup> 6:7</p> <p><b>endorsed</b> <sup>[1]</sup> 54:6</p> <p><b>endorsement</b> <sup>[2]</sup> 80:7,17</p> <p><b>ends</b> <sup>[2]</sup> 43:3 51:22</p> <p><b>engage</b> <sup>[1]</sup> 61:8</p> <p><b>engaging</b> <sup>[4]</sup> 6:17 38:23 52:6 82:9</p> <p><b>engine</b> <sup>[2]</sup> 6:5 27:1</p> <p><b>enhanced</b> <sup>[3]</sup> 4:19 14:3 42:15</p> <p><b>enough</b> <sup>[5]</sup> 14:25 48:14 59:20 62:13,13</p> <p><b>ensure</b> <sup>[5]</sup> 54:20 55:22 69:8,12 71:5</p> <p><b>ensuring</b> <sup>[2]</sup> 59:6 64:17</p> <p><b>entire</b> <sup>[1]</sup> 45:19</p> <p><b>entirely</b> <sup>[1]</sup> 7:3</p> <p><b>entities</b> <sup>[1]</sup> 11:24</p>	<p><b>entity</b> <sup>[1]</sup> 28:17</p> <p><b>equal</b> <sup>[1]</sup> 46:14</p> <p><b>equation</b> <sup>[1]</sup> 77:25</p> <p><b>equivalent</b> <sup>[1]</sup> 13:12</p> <p><b>equivalents</b> <sup>[1]</sup> 30:21</p> <p><b>erroneous</b> <sup>[1]</sup> 34:25</p> <p><b>ESQ</b> <sup>[3]</sup> 2:3,6,9</p> <p><b>ESQUIRE</b> <sup>[1]</sup> 1:24</p> <p><b>essential</b> <sup>[2]</sup> 19:2 24:7</p> <p><b>et</b> <sup>[1]</sup> 8:24</p> <p><b>ether</b> <sup>[1]</sup> 15:12</p> <p><b>Even</b> <sup>[19]</sup> 3:17 5:19 23:13, 19 27:7 34:3,10 35:21 36:12 37:21 47:19 49:5 52:25 58:4 63:24 68:1 71:2 73:6 76:8</p> <p><b>everyone</b> <sup>[2]</sup> 67:25 69:9</p> <p><b>evidence</b> <sup>[2]</sup> 17:7,20</p> <p><b>exact</b> <sup>[2]</sup> 51:22 70:9</p> <p><b>exactly</b> <sup>[4]</sup> 5:8 60:10,10 71:23</p> <p><b>examine</b> <sup>[1]</sup> 67:7</p> <p><b>example</b> <sup>[5]</sup> 9:21 48:7 65:24 75:22 77:21</p> <p><b>examples</b> <sup>[3]</sup> 76:8,12 77:23</p> <p><b>excellence</b> <sup>[1]</sup> 81:2</p> <p><b>except</b> <sup>[1]</sup> 62:20</p> <p><b>exception</b> <sup>[3]</sup> 50:10 65:4 68:25</p> <p><b>exceptions</b> <sup>[2]</sup> 22:19 57:7</p> <p><b>excludable</b> <sup>[1]</sup> 81:24</p> <p><b>exclude</b> <sup>[2]</sup> 7:1 36:12</p> <p><b>exclusive</b> <sup>[5]</sup> 3:24 15:20 29:2,15 42:4</p> <p><b>exclusively</b> <sup>[1]</sup> 19:19</p> <p><b>excuse</b> <sup>[1]</sup> 66:6</p> <p><b>exemplary</b> <sup>[1]</sup> 83:2</p> <p><b>Exercise</b> <sup>[1]</sup> 48:16</p> <p><b>exert</b> <sup>[1]</sup> 82:4</p> <p><b>exist</b> <sup>[6]</sup> 63:20 69:20,24 70:4 75:5 76:12</p> <p><b>existed</b> <sup>[1]</sup> 82:3</p> <p><b>existence</b> <sup>[1]</sup> 79:9</p> <p><b>exists</b> <sup>[5]</sup> 52:19 58:1 63:24 69:21 70:18</p> <p><b>explain</b> <sup>[1]</sup> 51:24</p> <p><b>explains</b> <sup>[1]</sup> 80:24</p> <p><b>explanation</b> <sup>[1]</sup> 81:4</p> <p><b>exploitation</b> <sup>[1]</sup> 42:7</p> <p><b>express</b> <sup>[5]</sup> 32:21 37:18 42:11 44:6,9</p> <p><b>expresses</b> <sup>[1]</sup> 45:11</p> <p><b>expressing</b> <sup>[2]</sup> 37:22 62:5</p> <p><b>expression</b> <sup>[15]</sup> 4:23 6:2,6 13:18 15:19 24:11,19 26:21 27:2 38:8 53:19 61:9, 17,18 63:2</p> <p><b>expressive</b> <sup>[6]</sup> 6:7 24:8 33:3 34:2,12 49:2</p> <p><b>expressly</b> <sup>[2]</sup> 48:18 77:2</p> <p><b>extend</b> <sup>[2]</sup> 69:25 83:12</p> <p><b>extended</b> <sup>[1]</sup> 12:22</p> <p><b>extent</b> <sup>[6]</sup> 9:6,9 12:16 20:</p>	<p>19 21:19 58:19</p> <p><b>eyes</b> <sup>[1]</sup> 46:14</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>face</b> <sup>[1]</sup> 67:19</p> <p><b>facial</b> <sup>[1]</sup> 34:11</p> <p><b>facially</b> <sup>[2]</sup> 9:6 11:8</p> <p><b>facilitate</b> <sup>[1]</sup> 59:4</p> <p><b>facilitating</b> <sup>[1]</sup> 75:1</p> <p><b>fact</b> <sup>[9]</sup> 4:14,22 6:24 39:1 59:6 62:20 77:1 79:5,10</p> <p><b>factor</b> <sup>[1]</sup> 78:3</p> <p><b>factual</b> <sup>[1]</sup> 34:24</p> <p><b>fail</b> <sup>[2]</sup> 41:1 74:23</p> <p><b>fair</b> <sup>[5]</sup> 48:13 61:23 72:5 73:15 76:22</p> <p><b>false</b> <sup>[3]</sup> 38:10 43:22 81:24</p> <p><b>falsely</b> <sup>[4]</sup> 55:23 70:2 80:3, 7</p> <p><b>famous</b> <sup>[1]</sup> 44:17</p> <p><b>far</b> <sup>[2]</sup> 43:2 70:6</p> <p><b>farfetched</b> <sup>[1]</sup> 68:21</p> <p><b>favor</b> <sup>[4]</sup> 15:1,3 17:21 42:14</p> <p><b>favorite</b> <sup>[2]</sup> 81:18,20</p> <p><b>fear</b> <sup>[2]</sup> 10:18 34:4</p> <p><b>feature</b> <sup>[1]</sup> 9:25</p> <p><b>federal</b> <sup>[16]</sup> 3:16,20 4:18 5:7,12 6:22 8:3,11 13:16,21 15:6 16:2 31:5 32:1 56:9 82:15</p> <p><b>fee</b> <sup>[6]</sup> 6:14 7:13 43:11 45:10 47:21 50:10</p> <p><b>feelings</b> <sup>[2]</sup> 44:2,17</p> <p><b>feels</b> <sup>[1]</sup> 17:20</p> <p><b>fees</b> <sup>[1]</sup> 45:23</p> <p><b>few</b> <sup>[2]</sup> 75:24 76:12</p> <p><b>figure</b> <sup>[4]</sup> 22:10 35:8 45:11 65:21</p> <p><b>figures</b> <sup>[2]</sup> 44:2,8</p> <p><b>filter</b> <sup>[1]</sup> 70:9</p> <p><b>final</b> <sup>[1]</sup> 31:2</p> <p><b>find</b> <sup>[4]</sup> 15:8 51:10,13 62:22</p> <p><b>findings</b> <sup>[1]</sup> 34:24</p> <p><b>Finley</b> <sup>[4]</sup> 49:23 50:17,24 51:7</p> <p><b>First</b> <sup>[28]</sup> 3:12,15 6:16 7:6 16:24 17:8 18:10 20:17 21:2 22:20 38:10 39:5 42:13 43:5,9 52:2 53:20 57:17 60:21 61:20 63:2,12,14 74:23 77:6 79:17,22 80:13</p> <p><b>fit</b> <sup>[6]</sup> 7:17 18:21 25:7 52:8 69:23 72:6</p> <p><b>flattering</b> <sup>[2]</sup> 4:7 10:21</p> <p><b>flaw</b> <sup>[1]</sup> 72:14</p> <p><b>flip</b> <sup>[1]</sup> 29:12</p> <p><b>floor</b> <sup>[1]</sup> 67:13</p> <p><b>flow</b> <sup>[1]</sup> 26:22</p> <p><b>focus</b> <sup>[1]</sup> 14:18</p> <p><b>focused</b> <sup>[1]</sup> 40:6</p> <p><b>follow</b> <sup>[1]</sup> 5:8</p> <p><b>following</b> <sup>[1]</sup> 31:19</p> <p><b>follows</b> <sup>[1]</sup> 26:3</p>	<p><b>fora</b> <sup>[3]</sup> 5:24 18:24 57:12</p> <p><b>foreclose</b> <sup>[1]</sup> 27:15</p> <p><b>form</b> <sup>[2]</sup> 43:5 45:14</p> <p><b>former</b> <sup>[4]</sup> 25:19 60:8 63:11 74:20</p> <p><b>forms</b> <sup>[1]</sup> 18:25</p> <p><b>formulation</b> <sup>[1]</sup> 39:24</p> <p><b>formulations</b> <sup>[2]</sup> 39:15 72:21</p> <p><b>forum</b> <sup>[20]</sup> 5:18 18:13 19:15,19,21,23,24,25 20:1 21:22 22:18 27:17 39:19 51:20 52:1,20,24 53:1 56:5,11</p> <p><b>forums</b> <sup>[1]</sup> 20:6</p> <p><b>forward</b> <sup>[1]</sup> 83:15</p> <p><b>foster</b> <sup>[2]</sup> 26:20,21</p> <p><b>foundation</b> <sup>[2]</sup> 58:6 75:7</p> <p><b>founding</b> <sup>[2]</sup> 15:9 57:15</p> <p><b>four</b> <sup>[1]</sup> 45:7</p> <p><b>fours</b> <sup>[1]</sup> 49:17</p> <p><b>fourth</b> <sup>[2]</sup> 60:1 82:23</p> <p><b>framework</b> <sup>[1]</sup> 27:9</p> <p><b>Francisco</b> <sup>[3]</sup> 28:11,23,23</p> <p><b>fraught</b> <sup>[1]</sup> 17:14</p> <p><b>free</b> <sup>[5]</sup> 6:5 26:21,21 27:1 48:15</p> <p><b>frequently</b> <sup>[1]</sup> 33:16</p> <p><b>friend</b> <sup>[4]</sup> 45:17 57:10 63:7 74:18</p> <p><b>friend's</b> <sup>[1]</sup> 71:13</p> <p><b>front</b> <sup>[1]</sup> 24:3</p> <p><b>full</b> <sup>[1]</sup> 41:21</p> <p><b>fully</b> <sup>[4]</sup> 30:11,11 32:21 80:10</p> <p><b>function</b> <sup>[10]</sup> 54:20,21 56:2 58:12 59:6 62:1 63:16 71:6 79:7,15</p> <p><b>functions</b> <sup>[4]</sup> 57:6 60:12 62:4,12</p> <p><b>funding</b> <sup>[1]</sup> 51:3</p> <p><b>funks</b> <sup>[1]</sup> 51:2</p> <p><b>fungible</b> <sup>[1]</sup> 51:3</p> <p><b>further</b> <sup>[4]</sup> 4:23 19:4 28:6 78:14</p> <p><b>furthering</b> <sup>[1]</sup> 54:4</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>gave</b> <sup>[3]</sup> 48:7 55:7 77:6</p> <p><b>General</b> <sup>[5]</sup> 1:21 8:22 22:21 28:15 54:16</p> <p><b>generally</b> <sup>[10]</sup> 38:5 43:10, 15 45:8 46:9 47:19 57:6,7 62:7 72:14</p> <p><b>geographic</b> <sup>[2]</sup> 57:5 59:19</p> <p><b>geography</b> <sup>[3]</sup> 14:22 17:1 58:10</p> <p><b>gets</b> <sup>[2]</sup> 60:13 78:10</p> <p><b>getting</b> <sup>[2]</sup> 47:3 79:25</p> <p><b>give</b> <sup>[9]</sup> 11:5 15:23 41:16 50:3 59:7 63:12 64:18 75:10 77:10</p> <p><b>gives</b> <sup>[4]</sup> 7:11 17:12 64:1 77:2</p> <p><b>giving</b> <sup>[9]</sup> 8:4 10:14 29:1,</p>	<p>15 36:4 41:13 50:20,21 51:16</p> <p><b>goal</b> <sup>[2]</sup> 32:16 53:13</p> <p><b>God</b> <sup>[1]</sup> 62:5</p> <p><b>goods</b> <sup>[5]</sup> 24:14 26:23 38:8, 15,24</p> <p><b>GORSUCH</b> <sup>[25]</sup> 14:8 15:10 16:10,13,17 17:10,23 18:3 21:13 27:24 35:15 56:5,19, 23 57:22 58:8,12,16 59:12, 24 60:7,9,15 73:5 78:17</p> <p><b>got</b> <sup>[6]</sup> 57:19 59:2 60:4 62:2 67:14 70:21</p> <p><b>governing</b> <sup>[1]</sup> 28:1</p> <p><b>government</b> <sup>[72]</sup> 5:20,22, 23 6:1,12 7:10,19,22,23 8:4 9:10 12:17 13:16 14:1,2, 13,18 15:4 16:8,19 17:11 18:25 19:16 20:10 21:9,21 22:17,22 23:7,19 25:18,19 26:6,19 27:18 29:18,22,24 30:23 31:8 33:13,14 39:18, 24 40:22 46:9,21,23 47:8, 23 48:18 49:1 50:2,3 51:2, 15,16 53:1,2,3 54:3 55:20 57:25 65:5 72:5 73:19 74:6,10,25 75:8,10,22</p> <p><b>government's</b> <sup>[10]</sup> 12:16 21:5,12,18 39:6 43:1 44:1, 14 60:20 76:13</p> <p><b>governmental</b> <sup>[2]</sup> 27:7,9</p> <p><b>grant</b> <sup>[1]</sup> 7:11</p> <p><b>Granting</b> <sup>[1]</sup> 4:16</p> <p><b>grants</b> <sup>[1]</sup> 50:18</p> <p><b>granular</b> <sup>[1]</sup> 39:8</p> <p><b>great</b> <sup>[1]</sup> 75:2</p> <p><b>greater</b> <sup>[1]</sup> 10:20</p> <p><b>grounds</b> <sup>[2]</sup> 49:12 74:23</p> <p><b>group</b> <sup>[2]</sup> 32:11,12</p> <p><b>guess</b> <sup>[18]</sup> 13:4,5,8 16:20 17:5 20:16 27:6,9 31:15, 16 33:19 37:17 39:13,18 41:23 57:9 72:9 73:22</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>hand</b> <sup>[3]</sup> 31:13 39:16 77:22</p> <p><b>happen</b> <sup>[1]</sup> 57:18</p> <p><b>happens</b> <sup>[1]</sup> 47:17</p> <p><b>happy</b> <sup>[1]</sup> 51:19</p> <p><b>hard</b> <sup>[4]</sup> 57:13 62:18 65:19, 24</p> <p><b>harder</b> <sup>[1]</sup> 40:21</p> <p><b>harm</b> <sup>[1]</sup> 74:13</p> <p><b>havoc</b> <sup>[2]</sup> 12:11,12</p> <p><b>headed</b> <sup>[1]</sup> 16:18</p> <p><b>hear</b> <sup>[1]</sup> 3:3</p> <p><b>hearing</b> <sup>[1]</sup> 83:15</p> <p><b>Heart</b> <sup>[1]</sup> 62:6</p> <p><b>heighten</b> <sup>[1]</sup> 46:25</p> <p><b>heightened</b> <sup>[12]</sup> 13:23,24 26:16 33:23 35:2 41:19,22 43:8 48:22 58:4,25 64:24</p> <p><b>held</b> <sup>[3]</sup> 31:9,12 48:17</p> <p><b>help</b> <sup>[2]</sup> 45:25 56:20</p>
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## Official

<p><b>hesitant</b> <sup>[1]</sup> 31:25  <b>hesitate</b> <sup>[2]</sup> 4:24 19:3  <b>heuristic</b> <sup>[1]</sup> 57:5  <b>highlights</b> <sup>[1]</sup> 79:10  <b>highly</b> <sup>[1]</sup> 50:25  <b>himself</b> <sup>[1]</sup> 81:10  <b>hinges</b> <sup>[1]</sup> 65:14  <b>historical</b> <sup>[13]</sup> 7:5 14:20  17:7,20 28:2 42:6 56:6 57:  23 58:1,6 59:3 63:16 75:6  <b>historically</b> <sup>[4]</sup> 21:16 27:1  32:15 80:10  <b>history</b> <sup>[14]</sup> 7:8 14:19 17:6  18:19 27:25 28:19 56:12,  13,16,24 59:18 67:8,17 71:  4  <b>HIV/AIDS</b> <sup>[1]</sup> 70:13  <b>hold</b> <sup>[2]</sup> 23:21 38:7  <b>holder</b> <sup>[1]</sup> 64:1  <b>holders</b> <sup>[3]</sup> 43:11 45:9 47:  20  <b>holding</b> <sup>[1]</sup> 40:5  <b>Honor</b> <sup>[1]</sup> 56:17  <b>houses</b> <sup>[1]</sup> 67:2  <b>huge</b> <sup>[2]</sup> 6:16 79:17  <b>hundreds</b> <sup>[1]</sup> 45:23  <b>hurt</b> <sup>[1]</sup> 44:2  <b>hypotheses</b> <sup>[1]</sup> 13:25  <b>hypothetical</b> <sup>[5]</sup> 26:5 30:  20 55:6 80:22 82:9</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>idea</b> <sup>[4]</sup> 45:20 53:1 80:11  81:6  <b>ideas</b> <sup>[2]</sup> 34:5 42:11  <b>identified</b> <sup>[3]</sup> 4:4,10 75:22  <b>identifier</b> <sup>[13]</sup> 3:22 16:3 24:  9,14,21 33:4 37:3 38:2 61:  4 62:4 64:9,19 79:8  <b>identifiers</b> <sup>[2]</sup> 40:11 54:22  <b>identify</b> <sup>[5]</sup> 64:4,10 75:8 79:  15 80:8  <b>identifying</b> <sup>[1]</sup> 53:22  <b>identity</b> <sup>[1]</sup> 72:3  <b>illustrative</b> <sup>[1]</sup> 22:20  <b>images</b> <sup>[6]</sup> 38:12,16 40:10  79:6,13,14  <b>imagine</b> <sup>[6]</sup> 24:1 25:3 54:9  62:11 79:12 80:22  <b>impact</b> <sup>[3]</sup> 9:8,11,16  <b>impeded</b> <sup>[2]</sup> 46:4,6  <b>implicit</b> <sup>[1]</sup> 38:17  <b>imply</b> <sup>[2]</sup> 80:7 81:25  <b>important</b> <sup>[11]</sup> 6:11 15:24  16:5 45:5,7 46:9 47:13,18  51:25 52:18 61:19  <b>imposes</b> <sup>[2]</sup> 3:15 46:12  <b>imposition</b> <sup>[1]</sup> 28:25  <b>inadequate</b> <sup>[1]</sup> 80:9  <b>incentives</b> <sup>[1]</sup> 6:7  <b>including</b> <sup>[1]</sup> 43:11  <b>inconsistent</b> <sup>[1]</sup> 57:16  <b>incontestability</b> <sup>[1]</sup> 43:13  <b>incorrect</b> <sup>[1]</sup> 43:7</p>	<p><b>incumbent</b> <sup>[1]</sup> 75:7  <b>indicated</b> <sup>[1]</sup> 10:6  <b>indicates</b> <sup>[1]</sup> 75:16  <b>individual</b> <sup>[7]</sup> 4:4,5,8 35:8  42:11 80:18 82:1  <b>individual's</b> <sup>[1]</sup> 42:2  <b>individuals</b> <sup>[6]</sup> 4:10 15:15  40:14 80:11 82:4,16  <b>information</b> <sup>[1]</sup> 79:19  <b>informs</b> <sup>[2]</sup> 14:19 56:12  <b>infringement</b> <sup>[9]</sup> 8:14,18  21:3,8 29:8 38:5,6 61:19  63:22  <b>infringers</b> <sup>[2]</sup> 8:13 19:10  <b>infringing</b> <sup>[1]</sup> 9:24  <b>inherent</b> <sup>[1]</sup> 69:10  <b>initial</b> <sup>[1]</sup> 36:15  <b>injected</b> <sup>[1]</sup> 57:24  <b>inquiry</b> <sup>[1]</sup> 40:8  <b>instance</b> <sup>[3]</sup> 6:10 19:5 34:  23  <b>instances</b> <sup>[1]</sup> 8:4  <b>instead</b> <sup>[3]</sup> 14:18 21:1 33:  13  <b>institutions</b> <sup>[1]</sup> 80:4  <b>INTELLECTUAL</b> <sup>[2]</sup> 1:4  14:15  <b>intended</b> <sup>[1]</sup> 28:16  <b>intent</b> <sup>[2]</sup> 36:17 66:23  <b>interest</b> <sup>[8]</sup> 39:18 44:1,16  68:22,23 72:2,6 74:25  <b>interested</b> <sup>[1]</sup> 39:5  <b>interests</b> <sup>[2]</sup> 42:13 54:4  <b>intermediate</b> <sup>[11]</sup> 33:23 51:  23 52:10,13 65:3 66:15 70:  7 72:8,14 73:13,17  <b>interrupt</b> <sup>[2]</sup> 14:9 62:17  <b>introduce</b> <sup>[1]</sup> 12:11  <b>introducing</b> <sup>[1]</sup> 67:1  <b>intuition</b> <sup>[1]</sup> 69:10  <b>invalidated</b> <sup>[1]</sup> 55:20  <b>involve</b> <sup>[2]</sup> 7:10 21:20  <b>involved</b> <sup>[3]</sup> 8:2 11:19 50:9  <b>involves</b> <sup>[1]</sup> 44:5  <b>isn't</b> <sup>[9]</sup> 18:10,18 20:23,23  22:4 24:21 52:21 59:20 69:  21  <b>issue</b> <sup>[4]</sup> 31:4 32:6 40:7 52:  22  <b>issues</b> <sup>[1]</sup> 11:15  <b>itself</b> <sup>[2]</sup> 44:7 59:21</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>Jack</b> <sup>[8]</sup> 11:14,19,20 12:2  54:18 63:14 77:14 81:18  <b>jacketed</b> <sup>[1]</sup> 20:25  <b>JACKSON</b> <sup>[23]</sup> 9:2 10:2 39:  3,4 40:16 41:1,6,15 42:17  53:6,12,16,25 54:15 55:8,  11 75:14,21 76:2,15,20 77:  9 78:20  <b>Jeter</b> <sup>[7]</sup> 80:23,25 81:3,5,  10,11,12  <b>job</b> <sup>[1]</sup> 81:1</p>	<p><b>joke</b> <sup>[1]</sup> 62:22  <b>JONATHAN</b> <sup>[3]</sup> 1:24 2:6  42:22  <b>judge</b> <sup>[2]</sup> 31:3 73:9  <b>judgment</b> <sup>[3]</sup> 40:9 73:10  74:1  <b>jurisprudence</b> <sup>[1]</sup> 5:19  <b>jurist</b> <sup>[1]</sup> 31:5  <b>Justice</b> <sup>[176]</sup> 1:22 3:3,10 5:  2 7:9,16 9:2 10:2 12:15,20  13:6 14:6,8,10 15:2,10,24  16:10,12,13,15,17 17:10,  23 18:3,6,8,13,14,15,16 19:  13,17 20:23 21:13 22:8,24,  25 23:2,17 24:23 25:1,20,  24 26:8 27:5,24 28:4,6,7,8  29:13,17 30:2,6 31:1,3 33:  6,7,7,9,10,10,11 35:13,14,  14,16,17,18 36:19 37:8,12,  14 39:2,2,4,9,11 40:16 41:  1,6,15 42:17,18,21,25 44:  22 45:1,2,12,15 46:2,15,18  47:6,7,22 48:7,10,24 49:18,  20,22 50:11,15 51:3,6,8 53:  6,12,16,25 54:15 55:8,11  56:3,5,19,23 57:22 58:8,12,  16 59:12,24 60:7,9,15,19  61:6,22 62:16 63:6,8 64:  14 65:7,12 66:5,23 67:4,7,  15 68:2,20 69:1,17 72:9,13,  20,24 73:1,5,21,25 74:7,16  75:14,21 76:2,15,20 77:9  78:12,14,15,16,17,18,19,  20,23 79:4 82:19 83:10,18  <b>justification</b> <sup>[11]</sup> 38:9 42:4  58:2,4 59:3 64:23 65:2 66:  20,24 71:24 74:12  <b>justifications</b> <sup>[1]</sup> 35:11  <b>justify</b> <sup>[3]</sup> 4:11 40:22 73:19</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>KAGAN</b> <sup>[12]</sup> 19:13 33:10,  11 35:13 48:24 49:18,20,  22 50:15 51:6,8 78:16  <b>KATHERINE</b> <sup>[1]</sup> 1:3  <b>KAVANAUGH</b> <sup>[18]</sup> 14:6 16:  12,15 18:6,8 35:16 56:3  72:9,13,20,24 73:1,9,21,25  74:7,16 78:18  <b>Keep</b> <sup>[1]</sup> 16:15  <b>kind</b> <sup>[22]</sup> 5:21 11:6 12:13  14:24 22:19 34:20 40:5 42:  10 44:6 46:17 56:7 57:5,9,  25 60:5 61:11 62:12,13 69:  9 77:3,6 80:10  <b>kinds</b> <sup>[4]</sup> 21:15 49:11 62:7  64:21</p> <hr/> <p style="text-align: center;"><b>L</b></p> <p><b>label</b> <sup>[1]</sup> 31:18  <b>labels</b> <sup>[3]</sup> 21:1 33:15 57:11  <b>Lakers</b> <sup>[1]</sup> 81:17  <b>land</b> <sup>[1]</sup> 71:2  <b>Lanham</b> <sup>[6]</sup> 55:5 56:16 58:  7,22 80:2 82:8  <b>large</b> <sup>[1]</sup> 41:13  <b>last</b> <sup>[1]</sup> 11:14  <b>latter</b> <sup>[1]</sup> 39:24  <b>laudatory</b> <sup>[1]</sup> 12:4  <b>Laughter</b> <sup>[9]</sup> 16:16 17:25  18:5 30:1,5 48:12 56:22  72:22 83:9  <b>law</b> <sup>[37]</sup> 5:4 9:15,25 11:7 12:  12,18 14:16 15:11 16:21  26:5 29:9 35:25 40:25 43:  21,25 46:14 54:16 56:9,23  57:15 58:2,4,21 59:5 63:  15 66:7 70:11 71:11,15,25  73:7,19 75:2 78:8,9 79:12  82:12  <b>laws</b> <sup>[3]</sup> 9:23 12:14 76:24  <b>least</b> <sup>[6]</sup> 9:6 13:14 27:14  32:5 36:17 45:16  <b>legal</b> <sup>[17]</sup> 11:15 13:11 19:  24 20:5,7 30:21 31:24 43:  10,16 45:5,8,24 46:10 47:  13,17 49:25 52:4  <b>legislating</b> <sup>[1]</sup> 66:17  <b>legislation</b> <sup>[1]</sup> 35:10  <b>legislative</b> <sup>[2]</sup> 67:8,16  <b>legislators</b> <sup>[1]</sup> 67:10  <b>legitimate</b> <sup>[3]</sup> 39:18 44:18  74:25  <b>lends</b> <sup>[1]</sup> 44:7  <b>lens</b> <sup>[2]</sup> 16:25 22:12  <b>less</b> <sup>[5]</sup> 12:1 16:18 35:2 44:  19 66:16  <b>level</b> <sup>[3]</sup> 30:12 41:19,22  <b>leverage</b> <sup>[4]</sup> 16:9 23:7 68:  12 71:20  <b>leverages</b> <sup>[1]</sup> 43:18  <b>leveraging</b> <sup>[2]</sup> 66:16 77:8  <b>liability</b> <sup>[3]</sup> 8:16 19:11 29:  10  <b>liable</b> <sup>[1]</sup> 38:7  <b>liberty</b> <sup>[1]</sup> 17:8  <b>light</b> <sup>[5]</sup> 39:20 52:23,23 56:  4,11  <b>likelihood</b> <sup>[3]</sup> 12:7,7,13  <b>likelihood-of-confusion</b>  <sup>[2]</sup> 11:17,22  <b>likely</b> <sup>[8]</sup> 4:17 11:11 12:1  43:23 54:23 55:25 59:7 77:  20  <b>likened</b> <sup>[1]</sup> 52:9  <b>limitation</b> <sup>[6]</sup> 15:24 16:5  17:4 21:7 36:9 62:19  <b>limitations</b> <sup>[1]</sup> 21:15  <b>Limited</b> <sup>[14]</sup> 18:13 19:15,  19 20:6 21:22 36:22 38:23  39:19 40:4 51:19 52:1,20  57:12 62:25  <b>limits</b> <sup>[1]</sup> 6:2  <b>line</b> <sup>[4]</sup> 20:24 22:5 65:19,24  <b>linger</b> <sup>[1]</sup> 82:20  <b>link</b> <sup>[1]</sup> 40:25  <b>linking</b> <sup>[2]</sup> 42:2 81:7  <b>listed</b> <sup>[1]</sup> 19:7</p>	<p><b>litigation</b> <sup>[5]</sup> 8:18,20 38:5  61:13 63:23  <b>little</b> <sup>[2]</sup> 35:1 75:15  <b>living</b> <sup>[14]</sup> 15:14 17:2 25:21  40:14 54:3,7,7 55:24 56:7  66:7 67:19 80:18 82:1,16  <b>living-individual</b> <sup>[4]</sup> 3:11,  23 37:1 40:13  <b>living-person</b> <sup>[1]</sup> 14:21  <b>locations</b> <sup>[1]</sup> 5:19  <b>logistical</b> <sup>[1]</sup> 8:6  <b>long</b> <sup>[15]</sup> 14:20 15:7,14 16:  2 24:11,12 27:25 50:1 56:  9,24 57:14,14 58:16,22 73:  5  <b>look</b> <sup>[19]</sup> 16:21,22 17:6 22:  12 33:21,24 34:1,3,8,10,12  41:24 42:10 52:4 59:25 70:  11,19 78:3 83:15  <b>looking</b> <sup>[2]</sup> 18:9 21:1  <b>looks</b> <sup>[2]</sup> 72:7 80:14  <b>Los</b> <sup>[1]</sup> 81:17  <b>lose</b> <sup>[1]</sup> 13:3  <b>lost</b> <sup>[1]</sup> 30:4  <b>lot</b> <sup>[13]</sup> 14:17 16:23 35:2,19  47:10 54:9 55:4 58:6 61:  18,24 62:10 72:7 76:12  <b>lower</b> <sup>[3]</sup> 11:16 52:9 71:21  <b>loyalty</b> <sup>[1]</sup> 70:20  <b>lurking</b> <sup>[2]</sup> 34:11,17  <b>Lutheran</b> <sup>[1]</sup> 48:9</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>made</b> <sup>[3]</sup> 40:9 51:4 53:8  <b>main</b> <sup>[1]</sup> 62:8  <b>majority</b> <sup>[1]</sup> 67:1  <b>MALCOLM</b> <sup>[5]</sup> 1:21 2:3,9  3:7 79:1  <b>manner</b> <sup>[2]</sup> 82:17 83:2  <b>manufactured</b> <sup>[2]</sup> 26:23  38:18  <b>many</b> <sup>[7]</sup> 21:4 45:24 49:4,  23 62:8 75:2 83:16  <b>mark</b> <sup>[44]</sup> 3:18 4:3,7,14,20,  22 8:16,17 10:21 11:1,10,  19,20,21 12:1,3 13:13 23:  11 30:16 31:22,23 32:13,  14,17 35:24 36:17,24 37:6  44:12 45:10 59:9 60:12,13  61:25 62:1,12,12 63:10,21,  25 64:1 69:16 74:19 75:23  <b>market</b> <sup>[2]</sup> 15:18 32:8  <b>marketing</b> <sup>[3]</sup> 29:4 50:21  82:10  <b>marketplace</b> <sup>[1]</sup> 54:11  <b>marks</b> <sup>[34]</sup> 19:7,12 20:11,  14,15 29:16 42:10,12 43:  23 44:1,9 45:22 54:20 55:  22 59:6,6,7 60:1 62:7 64:7,  21 68:15,15 69:25 75:17,  25 76:8,17,21 77:23 80:3,4,  7 82:16  <b>Matal</b> <sup>[1]</sup> 29:18  <b>matter</b> <sup>[4]</sup> 1:16 5:12 46:1</p>
---	--	---	--



## Official

77:18 <b>matters</b> [1] 26:19 <b>McCarthy</b> [1] 53:13 <b>mean</b> [41] 9:14 10:11,22 13:2,4,8,9,25 15:5,13 17:9,19 18:11,22 20:3 29:25 30:10 31:15 36:8,23 37:10,14 40:3 41:4 47:11 49:23 50:16 53:7 58:9 59:13 60:15,17 65:16 66:21,23 69:8 73:1, 22 75:16 76:7 77:15 <b>meaning</b> [1] 60:5 <b>meaningfully</b> [1] 13:19 <b>meanings</b> [1] 57:1 <b>means</b> [2] 62:1 72:15 <b>mechanism</b> [1] 37:21 <b>mechanisms</b> [3] 4:20,24 14:3 <b>meet</b> [3] 23:15 41:20,22 <b>meets</b> [2] 16:3 62:17 <b>members</b> [2] 32:11 35:9 <b>mentioning</b> [1] 69:7 <b>merchandise</b> [2] 38:16 79:16 <b>merchants</b> [2] 26:24 79:18 <b>merely</b> [2] 17:1 60:1 <b>message</b> [8] 4:15 10:15 37:22 45:11 62:5 65:22 68:16 80:17 <b>metaphorical</b> [1] 20:1 <b>might</b> [22] 10:17 12:3 14:14 21:19 23:25 31:6 39:8 51:6,11 57:18 61:18,19 63:20 64:18 65:19 68:5 71:9 74:9 80:9,16,18 81:15 <b>milestone</b> [1] 82:24 <b>million</b> [1] 17:16 <b>mind</b> [3] 21:10 62:2,2 <b>mine</b> [1] 41:25 <b>minimum</b> [1] 35:1 <b>mis</b> [1] 80:19 <b>misattribute</b> [1] 80:19 <b>misattributed</b> [1] 10:19 <b>misattribution</b> [1] 10:20 <b>mislead</b> [4] 43:23 54:23 56:1 71:7 <b>misleading</b> [3] 38:11 70:2 80:5 <b>Mm-hmm</b> [3] 60:7,7 74:16 <b>mock</b> [1] 11:24 <b>mocked</b> [1] 11:20 <b>mode</b> [1] 27:17 <b>modest</b> [1] 76:25 <b>moment</b> [1] 82:21 <b>monetary</b> [2] 50:9,18 <b>money</b> [11] 7:10,20 8:5,7 9:1 47:23,25 48:2,4 51:1 70:16 <b>monopolize</b> [4] 59:16,19, 20 60:18 <b>monopoly</b> [3] 59:13,15 60:14 <b>morning</b> [2] 3:4 43:2 <b>Most</b> [3] 7:9 62:23 71:2	<b>motivated</b> [1] 35:8 <b>motivation</b> [1] 28:19 <b>motivations</b> [1] 67:9 <b>motive</b> [1] 38:22 <b>much</b> [6] 19:16,24 40:21 44:19 47:2 83:17 <b>mugs</b> [2] 37:19 44:23 <b>musical</b> [1] 32:12 <b>musicians</b> [1] 32:12	<b>odd</b> [1] 7:17 <b>offended</b> [1] 81:6 <b>OFFICE</b> [2] 1:6 6:15 <b>officer</b> [1] 83:14 <b>official</b> [7] 19:6 25:8,18,19 32:22,25 34:5 <b>often</b> [3] 22:21 45:24 56:12 <b>okay</b> [3] 16:21 31:1 78:21 <b>old</b> [1] 60:16 <b>old-fashioned</b> [1] 59:15 <b>Olympic</b> [2] 28:12 29:1 <b>once</b> [5] 44:15 64:23 71:1 75:4 78:11 <b>one</b> [41] 5:9 6:9,12 8:25 9:3 10:7,16,22,24 12:19 18:21 21:20 22:9 24:1,3,4 28:11 30:7,20 31:2,2,7,13 32:9 35:5 39:16 44:11,19 49:21 52:15 59:11 60:1,21 61:23 64:7 71:8 75:8 76:14 78:2 83:3 <b>only</b> [15] 7:20 10:7 19:3 22:1 38:22 43:4 51:16 62:25 72:4,4 75:12 76:5,17,21 79:13 <b>oomph</b> [1] 82:14 <b>opinion</b> [8] 18:14 19:18 27:15 34:17 50:12 51:5 54:18 83:7 <b>opinions</b> [2] 34:17 52:4 <b>opportunities</b> [2] 34:2,13 <b>opportunity</b> [1] 41:17 <b>opposed</b> [1] 74:14 <b>oral</b> [5] 1:17 2:2,5 3:7 42:22 <b>order</b> [4] 6:13 20:15 79:6 82:10 <b>ordinary</b> [1] 78:6 <b>original</b> [1] 11:20 <b>Orthodontists</b> [1] 81:12 <b>other</b> [36] 5:10 8:7 9:1 10:5 12:24 14:22 17:16 20:16 28:22 29:3 30:7 31:7 32:9 34:1,12 38:18 46:20 50:6 55:4,5 58:10 59:10 60:23 61:1,3,18 62:14,19 67:18 70:19 71:3,13 72:15 75:4 77:22 80:1 <b>others</b> [8] 11:12 24:15 32:19 36:12 47:4 48:4 50:4 73:22 <b>otherwise</b> [4] 9:24 23:14 45:17 48:19 <b>out</b> [20] 12:20 15:12 20:13 21:13,23,23 22:10 25:3 27:25 35:8 49:18 50:11,19 51:16 56:20 65:21 70:9 76:17, 21 77:14 <b>outset</b> [1] 47:12 <b>outside</b> [4] 14:15 23:8 71:25 78:4 <b>over</b> [3] 15:16 25:6 82:5 <b>overall</b> [1] 4:18 <b>overcome</b> [1] 60:3	<b>own</b> [20] 7:20 8:4 11:2,24 15:16 38:16 42:1,8 44:9 61:4 66:8,18 67:20,25 68:23 69:11 72:3 81:1,8 82:5 <b>owner</b> [5] 4:20 8:18 9:23 10:17,17 <b>owners</b> [1] 11:11 <b>ownership</b> [1] 32:17	<b>place</b> [3] 51:23 65:23 70:10 <b>placed</b> [1] 8:12 <b>plaintiff</b> [1] 24:18 <b>plaintiffs</b> [1] 82:11 <b>play</b> [2] 25:3 63:16 <b>playground</b> [2] 47:25 48:1 <b>please</b> [2] 3:10 42:25 <b>plus</b> [1] 78:3 <b>podium</b> [1] 82:20 <b>point</b> [14] 6:9 11:13 22:16 23:5,23 37:5 46:21 49:16 51:4 52:17 54:1 60:22 69:23 77:22 <b>pointed</b> [5] 12:20 21:13 27:24 50:11 77:14 <b>points</b> [4] 3:14 9:3 20:16 61:22 <b>political</b> [7] 4:18,23 61:17 62:9 64:17,18 65:22 <b>polling</b> [1] 65:23 <b>position</b> [2] 26:4 46:8 <b>positions</b> [1] 83:1 <b>positive</b> [3] 44:10 75:25 77:23 <b>possible</b> [2] 53:15 65:7 <b>postulate</b> [1] 28:3 <b>Potential</b> [4] 8:13,15 19:10 79:20 <b>potentially</b> [2] 9:8 12:19 <b>practical</b> [2] 55:18 70:12 <b>practice</b> [1] 83:4 <b>precedent</b> [1] 12:22 <b>precisely</b> [3] 45:3 46:5 49:17 <b>predated</b> [1] 58:21 <b>predicated</b> [1] 45:19 <b>prepared</b> [2] 26:1,2 <b>present</b> [1] 68:4 <b>presentation</b> [1] 31:11 <b>presented</b> [1] 24:22 <b>president</b> [2] 63:11 74:21 <b>pressing</b> [1] 15:2 <b>presumably</b> [3] 10:23 44:10 61:13 <b>presumptions</b> [1] 8:19 <b>presumptive</b> [1] 43:12 <b>pretty</b> [4] 56:12 57:2,13,19 <b>prevent</b> [10] 15:21 30:23 38:24 42:15 60:23 79:18, 23 80:6 82:6,8 <b>preventing</b> [1] 53:22 <b>prevents</b> [2] 54:5 79:25 <b>primarily</b> [1] 60:1 <b>Principal</b> [3] 8:13 19:5 20:13 <b>principle</b> [1] 22:21 <b>principles</b> [1] 21:2 <b>prior</b> [2] 18:11 39:9 <b>privacy</b> [1] 82:12 <b>private</b> [6] 5:21 8:8,25 9:1 51:3 83:4 <b>probably</b> [2] 65:11 70:9 <b>problem</b> [11] 37:9,20 38:3, 4 53:3 58:24,25 64:10 65:
---	--	--	--	--

## Official

<p>13 66:3 70:7  <b>problematic</b> [1] 6:19  <b>problems</b> [2] 6:16 79:18  <b>process</b> [1] 45:25  <b>produce</b> [1] 20:4  <b>produced</b> [1] 12:2  <b>product</b> [5] 55:24 79:24 81:17,19 82:1  <b>products</b> [4] 11:25 42:2 79:14 81:8  <b>professionalism</b> [1] 81:2  <b>profit</b> [2] 74:2 81:7  <b>profiting</b> [1] 73:3  <b>program</b> [15] 6:20,25 7:10,19 8:1 19:21,23,25 21:14 23:8,9 26:19 50:20,21 51:1  <b>programs</b> [1] 5:13  <b>progress</b> [1] 27:4  <b>prohibit</b> [4] 13:17 33:13 48:16 69:25  <b>prohibited</b> [3] 49:1 61:12 70:1  <b>prohibiting</b> [2] 13:12 31:23  <b>prohibition</b> [3] 13:20 64:25 70:16  <b>prohibitions</b> [1] 43:22  <b>promote</b> [2] 6:6 27:4  <b>properly</b> [3] 23:19 37:24 70:1  <b>PROPERTY</b> [5] 1:4 5:21,24 14:15 69:11  <b>property-like</b> [1] 80:11  <b>proportion</b> [1] 75:17  <b>proposition</b> [2] 30:13 51:14  <b>propositions</b> [1] 30:9  <b>proprietary</b> [1] 15:15  <b>protect</b> [3] 28:16 69:2 80:10  <b>protected</b> [3] 13:18 44:19 62:24  <b>protecting</b> [1] 44:17  <b>protection</b> [11] 7:2 25:25 27:3 36:11,16 38:10,13 40:23 43:12 46:24,25  <b>protections</b> [3] 43:10,16 46:10  <b>provide</b> [1] 18:25  <b>provided</b> [1] 82:15  <b>provides</b> [1] 4:19  <b>providing</b> [2] 8:5,23  <b>provision</b> [16] 4:12 18:24 25:16 26:10 28:10,15 42:14 55:16 59:23 64:5 67:18 69:7,18 70:18,19,20  <b>provisions</b> [8] 55:5 58:7 59:10 71:3,9 75:5 80:2,14  <b>PTO</b> [6] 4:3 19:6 36:18 63:10 79:7 80:13  <b>public</b> [21] 5:18 18:13,24 19:9,15,19 20:6 21:22 25:7 27:16 39:19 44:2,8 45:</p>	<p>11 48:20 51:19 52:1,20 57:12 62:3 74:21  <b>publication</b> [1] 19:6  <b>publicity</b> [2] 74:22 82:12  <b>purpose</b> [19] 6:6,8 7:7 26:20 27:2 43:20 52:23,24 54:16,17 55:1,13 56:5,11 62:14 64:11 71:9,10,25  <b>purposes</b> [16] 20:17 32:5 39:21 40:19,25 41:14 43:21,24 44:3 53:10,11 59:5 70:17 71:15,17,19  <b>pushes</b> [1] 46:13  <b>put</b> [14] 14:12 18:9 19:8 33:15,16 37:18 57:11 67:16,16,16 72:18 73:3 75:24 79:14  <b>putting</b> [2] 38:15 79:24</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>quasi-property</b> [1] 68:22  <b>question</b> [30] 6:25 7:3 13:1 15:16,20 20:18 21:2,10 24:17 29:9,14 31:2 32:3 33:12 34:14 41:16 47:11,16 50:17 52:11,21 63:8 68:5,10 69:23 70:5,8,8 76:3 77:11  <b>questions</b> [5] 5:1 39:5 44:21 50:8 51:21  <b>quickly</b> [1] 41:24  <b>quite</b> [7] 12:19,23 14:17 20:21 71:16 76:11 77:16</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>race</b> [1] 61:14  <b>raise</b> [2] 6:16 79:17  <b>raising</b> [2] 39:1 79:22  <b>range</b> [1] 79:19  <b>rare</b> [3] 33:2 57:2 82:24  <b>Rather</b> [2] 22:20 33:4  <b>rational</b> [25] 21:10,11,17 22:4,4,13 25:10 26:9,14 34:7,18 35:7 39:7,13,15 40:8 41:2 43:4 44:14 52:2,7,15 54:12 71:22 78:4  <b>rationale</b> [1] 77:7  <b>rationality</b> [2] 33:21 35:2  <b>reach</b> [2] 6:3 82:23  <b>read</b> [1] 59:10  <b>real</b> [5] 32:3,20 33:3 68:7 77:12  <b>real-world</b> [1] 74:12  <b>really</b> [25] 7:4 10:13 11:6 12:10 19:7 28:13,14 29:12 31:17 33:2 34:6 42:13 47:5 50:12 53:4 61:17 64:19 66:2 71:8 72:11,15 73:18 74:5,11 81:23  <b>reason</b> [17] 4:23 6:1,18 10:13,16 19:3 41:21 44:18 59:17 62:10 63:9,12 66:25 67:1 77:5 78:2 79:21  <b>reasonable</b> [17] 21:24 22:</p>	<p>2,13 23:3,5 26:10 34:25 35:11 40:9 52:22 56:4,11 66:22 72:7,16 73:11 74:7  <b>reasonableness</b> [12] 33:18,20,22,25 52:1,13 68:6 70:8 71:2,14,18 73:17  <b>reasonably</b> [3] 39:17,20,21  <b>reasons</b> [7] 21:13 27:11 41:24 43:7 44:13 50:13 77:6  <b>REBUTTAL</b> [3] 2:8 78:23 79:1  <b>recall</b> [2] 32:11 83:3  <b>receive</b> [1] 46:14  <b>receiving</b> [2] 46:23 47:24  <b>recent</b> [1] 16:6  <b>recipients</b> [1] 48:19  <b>reclaim</b> [1] 32:17  <b>recognize</b> [4] 6:11 26:6,23 71:1  <b>recognized</b> [3] 5:22 45:7 47:12  <b>record</b> [4] 57:23 58:1 64:6 75:12  <b>records</b> [1] 82:21  <b>reduce</b> [1] 4:17  <b>reduced</b> [1] 81:13  <b>refer</b> [1] 81:16  <b>referred</b> [2] 32:25 79:5  <b>refers</b> [1] 4:4  <b>reflect</b> [1] 82:21  <b>reflected</b> [1] 11:2  <b>refrain</b> [1] 29:15  <b>refusing</b> [2] 31:21 32:7  <b>Regan</b> [1] 49:24  <b>regard</b> [1] 61:19  <b>regarding</b> [1] 54:6  <b>regardless</b> [1] 68:9  <b>regime</b> [6] 39:22 40:17,17 53:10,17 63:7  <b>regimes</b> [1] 41:14  <b>register</b> [21] 3:18 6:14 8:13 19:5,22 20:12,13 30:16 31:22 32:13 35:22 36:1,3,4 37:21 45:14 63:10 64:20 66:9 67:21 69:15  <b>registered</b> [14] 8:19 11:1 19:7 23:13 44:9 55:23 62:7,9 64:1 68:9 75:23 76:1 77:23 79:6  <b>registering</b> [2] 45:22 69:3  <b>registrability</b> [1] 28:1  <b>registrable</b> [1] 37:24  <b>registrar</b> [3] 53:2,14 69:15  <b>registration</b> [55] 3:21 4:5,11,17,19 5:6,7,13 6:12,19,22 8:10,11 10:24 13:22 15:6 16:2,4 18:24 19:20,23 20:15 23:16 24:13 32:1,7 36:15 38:23 43:19,25 44:4,25 45:10,19,23 53:2,12,14,18 54:17 55:1 58:19 60:2 63:11,24 68:13 69:15 71:</p>	<p>16,21 74:14 79:25 80:6 82:7,13,15  <b>registry</b> [1] 20:12  <b>regulation</b> [1] 9:5  <b>rejected</b> [3] 44:15 75:17 76:9  <b>rejection</b> [1] 44:13  <b>related</b> [7] 19:15 39:9,17,20,21 71:15 76:4  <b>relevant</b> [4] 10:8 28:22 49:21 56:8  <b>relief</b> [2] 75:12,13  <b>religious</b> [1] 48:21  <b>rely</b> [2] 18:19 82:11  <b>remanded</b> [1] 11:16  <b>remembering</b> [1] 48:8  <b>rendered</b> [1] 12:8  <b>repeatedly</b> [1] 48:17  <b>representation</b> [2] 38:14,17  <b>reputation</b> [1] 81:9  <b>require</b> [5] 5:13 29:20 30:8 37:25 44:13  <b>requirement</b> [7] 9:18 11:9 36:14,24 52:19 61:25 79:9  <b>requirements</b> [4] 5:14 6:13 23:15 62:18  <b>requiring</b> [1] 20:14  <b>reserve</b> [2] 24:17 37:6  <b>resolve</b> [1] 15:1  <b>resource</b> [1] 51:2  <b>respect</b> [8] 4:8 5:23 6:4 26:4,16 35:6 40:12 82:13  <b>respond</b> [1] 67:11  <b>Respondent</b> [5] 1:10,25 2:7 42:23 83:6  <b>response</b> [2] 14:10 23:24  <b>responses</b> [1] 63:8  <b>responsive</b> [1] 30:11  <b>restaurant</b> [1] 81:20  <b>restrict</b> [3] 4:20 27:12 39:12  <b>regimes</b> [1] 41:14  <b>restricted</b> [2] 22:11 58:14  <b>restricting</b> [3] 14:4 51:17 56:24  <b>restriction</b> [14] 3:17 25:4,11,14 28:25 35:12 40:6 52:22 54:2 56:7 73:3 77:4 79:11,22  <b>restrictions</b> [9] 7:24 14:24 17:1 30:20 41:8 57:4 71:14 80:2,6  <b>restricts</b> [1] 3:23  <b>result</b> [4] 20:4 40:18 41:8 83:8  <b>review</b> [7] 22:4 33:21 41:12 43:5 47:9 52:7,13  <b>reviewable</b> [1] 33:17  <b>revisit</b> [1] 24:25  <b>rid</b> [1] 60:13  <b>rights</b> [14] 3:24 15:15 28:17 29:2,16 42:5 43:19 45:6,8,18 47:13,17 61:20 82:12</p>	<p><b>ripple</b> [1] 14:15  <b>rise</b> [4] 59:7 63:12 77:2,10  <b>risk</b> [5] 8:15 10:19 19:10 59:8 63:23  <b>road</b> [5] 17:13,15 19:14,19 40:5  <b>ROBERTS</b> [18] 3:3 22:25 23:17 28:4 33:7,10 35:14 39:2 42:18,21 60:19 61:6 62:16 64:14 78:12,23 82:19 83:10  <b>robust</b> [5] 34:21 53:8 56:24 57:23 58:1  <b>rooted</b> [3] 5:25 27:20 80:10  <b>roots</b> [1] 56:6  <b>rough</b> [1] 5:17  <b>roughly</b> [1] 8:1  <b>route</b> [1] 15:4  <b>rule</b> [3] 14:14 15:3 31:11  <b>rules</b> [3] 5:9 27:20 28:1  <b>run</b> [2] 25:15 41:25  <b>running</b> [1] 45:7  <b>ruse</b> [1] 38:21  <b>rush</b> [1] 69:14</p> <hr/> <p style="text-align: center;"><b>S</b></p> <p><b>sail</b> [2] 59:1 71:3  <b>sales</b> [1] 38:23  <b>same</b> [26] 5:8,15 6:3 8:10,16,23 16:18 19:11 20:7 22:16 24:7 29:4 30:20 33:20 38:4,15 41:12 42:16 47:14 51:4,22 58:5 60:24 70:9 76:23 81:1  <b>San</b> [3] 28:11,23,23  <b>satisfies</b> [1] 62:14  <b>satisfy</b> [4] 6:13 13:24 36:24 44:20  <b>satisfying</b> [1] 48:22  <b>save</b> [1] 59:11  <b>saw</b> [1] 11:1  <b>saying</b> [23] 17:5 20:10 21:4 22:16 25:9 27:6,15 29:21 37:17 48:2 53:6,7 54:12 55:9 56:6 67:5 69:2,17 74:4 77:25 78:2 79:13 81:1  <b>says</b> [10] 24:2,4,5 33:24 36:7 65:5 66:7 67:18,19 68:3  <b>Scalia</b> [1] 51:4  <b>scarce</b> [1] 51:2  <b>scenario</b> [3] 80:21 81:15,16  <b>scenarios</b> [1] 80:9  <b>science</b> [1] 27:4  <b>scream</b> [1] 64:19  <b>scrutiny</b> [27] 13:23,24 26:16 33:23 34:7 35:3 39:7 41:19,22 43:6,9 44:20 48:22 51:23 52:10,14 58:5,25 64:24 65:3 66:15 70:7 72:8,14 73:13,17 78:11  <b>Second</b> [6] 4:1 41:15 42:9 43:18 52:17 80:21</p>
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## Official

<p><b>secondary</b> [2] 56:25 60:5  <b>secret</b> [1] 29:19  <b>SECRETARY</b> [1] 1:3  <b>Section</b> [5] 3:15 4:1 53:13 55:5 59:23  <b>see</b> [13] 14:9 16:23 17:6 30:2 49:22 53:13 62:18 65:1, 4,5 66:19,20 70:23  <b>seek</b> [1] 16:8  <b>seeking</b> [2] 14:3 38:7  <b>seem</b> [2] 34:6 56:8  <b>seems</b> [3] 7:16 34:7 53:25  <b>seen</b> [1] 38:25  <b>select</b> [1] 50:2  <b>selecting</b> [2] 49:12 68:15  <b>selective</b> [2] 43:15 51:1  <b>selectively</b> [1] 77:7  <b>self-mockery</b> [1] 77:15  <b>sell</b> [9] 3:19 15:25 21:4,6 23:11 30:17 37:15,18,19  <b>selling</b> [7] 13:13,17 21:7 30:23 38:25 47:1,2  <b>senator</b> [2] 81:20,21  <b>sense</b> [2] 31:19 77:18  <b>sensitive</b> [1] 34:8  <b>separate</b> [5] 43:22 51:4 59:23 69:7 70:15  <b>separately</b> [1] 55:10  <b>serve</b> [2] 44:17 62:14  <b>service</b> [1] 83:14  <b>set</b> [1] 52:20  <b>setting</b> [1] 13:15  <b>several</b> [1] 18:11  <b>shirts</b> [12] 3:19,21 13:13,17 15:25 21:4 23:13 24:6 30:17,24 32:8 44:23  <b>short</b> [1] 83:8  <b>shouldn't</b> [4] 35:7 48:2,3 74:1  <b>show</b> [10] 6:1 24:18 32:18 48:25 56:17 60:4 65:21 72:5 74:11 75:11  <b>showing</b> [1] 60:12  <b>shows</b> [2] 43:3 48:15  <b>side</b> [3] 29:12 67:14 71:13  <b>side's</b> [1] 46:20  <b>sides</b> [1] 52:5  <b>significant</b> [1] 23:21  <b>signs</b> [1] 36:6  <b>similar</b> [5] 8:17 19:12 25:4 28:10 70:24  <b>simply</b> [5] 3:23 4:3 11:10 33:5 68:15  <b>since</b> [3] 4:18 15:8 57:15  <b>singling</b> [1] 20:13  <b>sitting</b> [1] 36:13  <b>situation</b> [4] 12:21,23 24:21 31:14  <b>sketch</b> [1] 49:18  <b>skew</b> [1] 11:4  <b>Slants</b> [3] 32:13,22 33:1  <b>slightly</b> [2] 34:21 51:11  <b>slogan</b> [7] 3:19 16:1 30:17 42:16 60:25 80:23 81:21</p>	<p><b>slogans</b> [1] 62:9  <b>SMALL</b> [13] 3:18 13:13 16:1 23:12 24:2,4,9 25:5,15 30:16 31:22,23 61:1  <b>Smith</b> [1] 69:16  <b>Society</b> [3] 19:24 49:25 52:4  <b>sole</b> [1] 44:16  <b>solely</b> [5] 18:19 43:14 45:10 46:10 48:20  <b>Solicitor</b> [1] 1:21  <b>solution</b> [1] 65:13  <b>somebody</b> [6] 10:18 25:4 38:7,18 67:21 69:2  <b>somehow</b> [1] 46:3  <b>someone</b> [8] 63:20 66:18 68:8 70:3 73:4 74:2 77:18 81:6  <b>someone's</b> [1] 69:13  <b>someplace</b> [1] 34:12  <b>sometimes</b> [2] 56:25 59:12  <b>sorry</b> [4] 14:9 46:18 62:17 64:14  <b>sort</b> [5] 28:3 34:11 72:18 74:13 75:3  <b>sorts</b> [2] 61:13 62:19  <b>Sotomayor</b> [18] 18:16 19:17 20:23 22:8,24 23:2 33:8,9 39:12 46:15,18 47:6,7, 22 48:7,10 65:7,12  <b>sought</b> [3] 44:16 63:11 75:12  <b>source</b> [23] 3:22 16:3 24:9, 14,21 29:10 33:4 37:2 38:1,14 40:11 53:22 54:21,24 56:1 59:9 61:4 62:4 64:8, 19 79:8,15 80:5  <b>speaker</b> [1] 34:2  <b>speaker-based</b> [4] 36:2 44:6 77:2,4  <b>speakers</b> [1] 19:2  <b>speaking</b> [1] 35:21  <b>specific</b> [1] 25:14  <b>speculation</b> [2] 4:9 9:19  <b>speech</b> [45] 3:17 4:18,21 6:17,21 7:24 10:18 11:2 13:20 14:4 20:19,21 21:3,20 22:10,11,22,23 23:8 28:25 32:4 33:13,14 37:18,20 38:11 39:13 40:24 43:14,17 44:19 45:3,4,14 46:4,11,12, 22 49:11,12,13 51:17 64:17,18 79:11  <b>sponsor</b> [1] 66:25  <b>sponsoring</b> [1] 66:25  <b>standard</b> [12] 12:8 20:7 25:10 33:21 34:21,22 35:7 41:11,12 47:8 68:7 71:22  <b>standards</b> [1] 20:5  <b>stands</b> [1] 65:5  <b>started</b> [1] 39:11  <b>starting</b> [1] 49:18  <b>state</b> [5] 13:16 21:25 35:24</p>	<p>75:2 82:11  <b>state-granted</b> [1] 59:14  <b>stated</b> [1] 27:2  <b>statements</b> [1] 67:13  <b>STATES</b> [5] 1:1,5,18 62:6 83:2  <b>status</b> [1] 46:14  <b>statute</b> [8] 23:10 31:5,9 64:12,13 65:16 73:7 75:3  <b>statutes</b> [1] 16:23  <b>statutory</b> [5] 5:11,14 16:4 23:15 25:14  <b>STEVE</b> [1] 1:9  <b>STEWART</b> [62] 1:21 2:3,9 3:6,7,9 5:2,5 7:15,18 9:2, 14 10:10 12:15 13:4,8 14:6,8 15:5,13 17:9,19 18:1,7, 22 20:3 22:6,14 23:4,22 24:23 25:13,23 26:1,15 27:13 28:8,13 29:14 30:10 31:15 33:11 34:15 35:18 36:8, 23 37:10,13,23 40:3,20 41:4,7,23 42:20 53:8 54:1 78:24 79:1,3 82:20 83:17  <b>sticks</b> [1] 63:15  <b>still</b> [8] 13:22 27:10,17 32:2 35:21 55:21 58:23 81:5  <b>stop</b> [4] 35:20 36:20 47:1,2  <b>stopping</b> [4] 46:22 47:4,25 48:4  <b>stops</b> [1] 36:6  <b>straitjacket</b> [1] 20:25  <b>streets</b> [1] 5:20  <b>strengthen</b> [1] 4:16  <b>strict</b> [3] 33:23 78:5,10  <b>strong</b> [6] 5:25 12:11 27:19 42:3 69:9 82:4  <b>stuck</b> [1] 57:9  <b>student</b> [1] 19:25  <b>stuff</b> [1] 57:16  <b>subject</b> [2] 51:20 66:15  <b>subjected</b> [3] 43:4,8 63:22  <b>submitted</b> [1] 83:20  <b>subsection</b> [3] 59:25 69:19,20  <b>subsidiary</b> [1] 28:20  <b>subsides</b> [1] 50:9  <b>subsidize</b> [2] 49:2,10  <b>subsidy</b> [5] 21:21 22:17 27:9 47:8,24  <b>substantial</b> [2] 43:16 72:6  <b>substantive</b> [1] 58:20  <b>successful</b> [1] 24:19  <b>sufficient</b> [2] 17:21 32:23  <b>suggest</b> [5] 12:5 37:4 55:23 56:13 80:3  <b>suggested</b> [1] 52:11  <b>suggesting</b> [4] 41:3 56:18 67:6 70:2  <b>suggestion</b> [2] 81:16,24  <b>suit</b> [1] 38:6  <b>suitable</b> [1] 40:11  <b>superfluous</b> [1] 55:11  <b>support</b> [3] 31:8 33:14 83:</p>	<p>5  <b>supports</b> [1] 51:14  <b>suppose</b> [4] 10:5,13 66:5, 6  <b>suppression</b> [1] 34:5  <b>SUPREME</b> [2] 1:1,17  <b>surname</b> [2] 60:2 69:7  <b>survive</b> [4] 26:13 44:16 65:1 66:20  <b>suspect</b> [3] 11:10 12:9 16:17  <b>sustain</b> [1] 29:21  <b>sustained</b> [1] 28:10  <b>system</b> [9] 43:19 45:19 53:3,12 54:5,17 55:2 58:20 68:13  <b>systematic</b> [1] 11:4</p> <p style="text-align: center;"><b>T</b></p> <p><b>T-shirts</b> [7] 23:11 24:2 31:24 36:6 37:15,18,19  <b>tag</b> [2] 24:4,5  <b>talked</b> [2] 33:17 35:19  <b>Tam</b> [7] 18:15 29:19 32:10, 10 33:2 50:12 76:24  <b>tangle</b> [1] 17:17  <b>TAYLOR</b> [70] 1:24 2:6 42:21,22,24 44:22 45:1,4,15 46:7,16 47:6,10 48:6,13,24 49:16,21 50:7,23 51:7,8,18 53:11,24 54:14 55:10,14 56:15,21 57:21 58:11,15, 18 59:22 60:8,10 61:3,21 63:5 64:16 65:10,15 66:5, 13 67:3,6,24 68:4,24 69:5, 22 72:11,17,23,25 73:8,15, 24 74:4,9,17 75:20 76:11, 19,22 77:13 78:22 79:5 80:1  <b>team</b> [2] 81:18,20  <b>tends</b> [3] 33:25 34:1,3  <b>term</b> [6] 11:14 24:20 32:15, 24 33:4 73:12  <b>terms</b> [4] 18:9,20 22:3 35:10  <b>test</b> [8] 21:25 34:19 44:14, 15 52:1 71:14,18 72:18  <b>tests</b> [1] 56:12  <b>text</b> [1] 67:14  <b>themselves</b> [3] 32:21 33:1 44:10  <b>theory</b> [8] 13:2 26:18 28:10 29:18 31:6,8,17 38:21  <b>there's</b> [35] 9:15 10:13 11:3 14:20 15:10 17:3 21:7,8, 16 23:2,4 25:3 27:25 28:2 29:19 34:4 38:9 40:13,14 42:3 45:16 47:10 52:3,7, 20 55:22 56:23 57:23 58:24,24 68:25 69:9 74:5 80:17,25  <b>therefore</b> [2] 11:25 67:21  <b>They've</b> [1] 59:2  <b>thinking</b> [2] 15:14 56:3</p>	<p><b>thinks</b> [4] 20:20 31:5 66:3 73:2  <b>Third</b> [3] 4:14 44:5 81:15  <b>THOMAS</b> [14] 5:2 7:9,16 12:20 18:15 25:1 28:6 44:22 45:1,2,12,15 46:2 78:14  <b>though</b> [9] 6:10 27:7 34:3 35:21 36:13 37:21 47:19 49:5 58:8  <b>three</b> [5] 3:14 9:3 43:7 44:13 80:8  <b>Throughout</b> [1] 82:25  <b>throwing</b> [1] 73:12  <b>tightly</b> [1] 43:24  <b>together</b> [1] 63:17  <b>took</b> [1] 56:25  <b>tools</b> [1] 55:21  <b>totally</b> [2] 54:25 71:17  <b>tracking</b> [1] 58:20  <b>trade</b> [2] 27:3 36:14  <b>TRADEMARK</b> [84] 1:6 3:20 4:3,19 5:6,12 6:8 8:9, 11,12,19 9:22 10:16 11:7 12:12,14 13:22 15:6 16:2, 21,22 17:4 18:23 23:12,13 24:10,13 28:1,17,18 32:1 35:22 36:3,5,15,16 37:22, 25 38:13,22 40:2,17 41:9 43:11,21,25,25 44:3 45:9 47:20 53:10,17,18,19,21 54:5,13,16 55:1,2 58:9 59:5,13 60:23 61:10,15 63:15 66:8,9,18 67:20,25 68:8 69:3 71:11,15,16,21,25 72:4 74:15 77:20 79:7 82:13  <b>trademark's</b> [1] 26:20  <b>trademarkable</b> [1] 57:8  <b>trademarked</b> [1] 54:10  <b>trademarking</b> [1] 54:2  <b>trademarks</b> [9] 7:12 54:20 56:2 57:3 58:21 71:6,6 77:16 79:15  <b>tradition</b> [10] 5:24 7:8 14:21 15:14 27:18 28:2 40:14 42:6 57:14 82:4  <b>traditional</b> [4] 5:18 21:8 22:12 27:16  <b>treat</b> [2] 9:17 42:12  <b>treated</b> [1] 11:9  <b>treating</b> [1] 4:12  <b>treatment</b> [1] 32:19  <b>trial</b> [1] 34:24  <b>tried</b> [2] 69:6 74:11  <b>Trinity</b> [1] 48:8  <b>trouble</b> [1] 45:21  <b>true</b> [6] 5:11,15 57:22,25 81:16 82:7  <b>TRUMP</b> [20] 3:18 4:15 10:23 13:13 15:19 16:1 23:11 24:2,4,8 25:5,15 30:16 31:22,23 36:2 61:1,15,15 74:21  <b>Trump's</b> [5] 15:18,21 25:6 36:9 38:22</p>
--	---	---	---	--

## Official

<p><b>try</b> <sup>[8]</sup> 8:25 14:14 51:24 64:10 67:8 72:5 73:19 75:11</p> <p><b>trying</b> <sup>[13]</sup> 8:7 23:7 30:2 35:8 42:1,15 64:6 65:21 68:12 69:8 71:5,20,24</p> <p><b>turn</b> <sup>[1]</sup> 16:13</p> <p><b>two</b> <sup>[14]</sup> 19:15 20:16 22:7 24:1 30:19 31:25 39:4 41:14,24 51:25 59:4 71:8 72:11 77:6</p> <p><b>type</b> <sup>[3]</sup> 8:23 21:14 57:15</p> <p><b>types</b> <sup>[4]</sup> 5:23 7:1 20:11 80:8</p> <hr/> <p style="text-align: center;"><b>U</b></p> <p><b>U.S</b> <sup>[1]</sup> 28:12</p> <p><b>U.S.C</b> <sup>[1]</sup> 3:12</p> <p><b>ultimately</b> <sup>[4]</sup> 59:4 66:19 71:5 76:16</p> <p><b>unanimous</b> <sup>[1]</sup> 83:8</p> <p><b>unchallenged</b> <sup>[1]</sup> 79:9</p> <p><b>unconstitutional</b> <sup>[8]</sup> 13:14 17:15 31:10,12 41:10 70:14 75:1 78:1</p> <p><b>UNDER</b> <sup>[16]</sup> 1:3 4:10 9:22 13:24 31:6,10,10,11 34:20 35:24 44:8 58:4,25 68:6 75:18 82:8</p> <p><b>underlie</b> <sup>[1]</sup> 58:6</p> <p><b>undermining</b> <sup>[1]</sup> 60:21</p> <p><b>underscore</b> <sup>[1]</sup> 67:12</p> <p><b>understand</b> <sup>[8]</sup> 8:15 14:10 27:11 34:8 46:2 63:18,25 79:23</p> <p><b>understanding</b> <sup>[3]</sup> 27:10 39:6 66:17</p> <p><b>understood</b> <sup>[3]</sup> 38:13 63:7 74:17</p> <p><b>union</b> <sup>[2]</sup> 8:1 22:18</p> <p><b>unique</b> <sup>[4]</sup> 28:19,19 55:3 62:13</p> <p><b>UNITED</b> <sup>[5]</sup> 1:1,5,18 62:6 83:2</p> <p><b>unless</b> <sup>[2]</sup> 24:20 44:11</p> <p><b>unlike</b> <sup>[4]</sup> 12:23 14:17 36:10 43:21</p> <p><b>unlikely</b> <sup>[1]</sup> 11:24</p> <p><b>unregistered</b> <sup>[1]</sup> 44:24</p> <p><b>unrelated</b> <sup>[3]</sup> 43:20 71:17,19</p> <p><b>unusual</b> <sup>[3]</sup> 71:12 74:10 77:16</p> <p><b>up</b> <sup>[4]</sup> 16:20 51:22 57:19 65:6</p> <p><b>useful</b> <sup>[2]</sup> 19:1 79:19</p> <p><b>user</b> <sup>[1]</sup> 50:10</p> <p><b>uses</b> <sup>[6]</sup> 16:3 48:16 69:4 80:23 81:21 82:6</p> <p><b>using</b> <sup>[7]</sup> 33:5 37:7 42:16 47:14 48:5 68:8 70:16</p> <hr/> <p style="text-align: center;"><b>V</b></p> <p><b>vague</b> <sup>[1]</sup> 56:12</p> <p><b>valid</b> <sup>[2]</sup> 36:5 68:15</p>	<p><b>validity</b> <sup>[2]</sup> 35:24 43:12</p> <p><b>valuable</b> <sup>[3]</sup> 43:9 45:18,20</p> <p><b>value</b> <sup>[3]</sup> 24:6 33:3 81:13</p> <p><b>values</b> <sup>[1]</sup> 60:22</p> <p><b>versus</b> <sup>[4]</sup> 3:5 28:12 29:19 76:6</p> <p><b>VIDAL</b> <sup>[2]</sup> 1:3 3:4</p> <p><b>view</b> <sup>[3]</sup> 39:6 69:24 73:6</p> <p><b>viewed</b> <sup>[1]</sup> 27:1</p> <p><b>viewpoint</b> <sup>[18]</sup> 4:1,12 9:4,13,18 12:6,8 20:8,14 44:7 49:7,14 65:9,14 75:15 76:17 77:10 78:5</p> <p><b>viewpoint-based</b> <sup>[13]</sup> 34:4,9 49:4,11 50:2 51:15 65:19 76:23,25 77:3,12 78:9,10</p> <p><b>viewpoint-disparate</b> <sup>[1]</sup> 9:8</p> <p><b>viewpoint-neutral</b> <sup>[1]</sup> 9:5</p> <p><b>views</b> <sup>[1]</sup> 44:10</p> <p><b>volume</b> <sup>[1]</sup> 4:18</p> <p><b>vote</b> <sup>[2]</sup> 29:21,25</p> <p><b>voted</b> <sup>[2]</sup> 35:9 67:2</p> <p><b>votes</b> <sup>[1]</sup> 83:8</p> <p><b>voting</b> <sup>[1]</sup> 65:23</p> <hr/> <p style="text-align: center;"><b>W</b></p> <p><b>wanted</b> <sup>[8]</sup> 19:13 29:3 32:13,14,18 40:4 41:16 64:4</p> <p><b>wants</b> <sup>[6]</sup> 17:12 21:6 25:5 36:20,20 44:24</p> <p><b>warned</b> <sup>[1]</sup> 8:14</p> <p><b>warning</b> <sup>[1]</sup> 19:10</p> <p><b>warrants</b> <sup>[1]</sup> 13:23</p> <p><b>Washington</b> <sup>[3]</sup> 1:13,22,24</p> <p><b>way</b> <sup>[19]</sup> 8:10,22 19:2,8,9,16 22:15 24:7 36:22 37:4 39:25 46:7 49:3 50:6 61:7,8 64:19 76:24 78:11</p> <p><b>ways</b> <sup>[1]</sup> 72:11</p> <p><b>Wednesday</b> <sup>[1]</sup> 1:14</p> <p><b>weed</b> <sup>[1]</sup> 76:21</p> <p><b>weeding</b> <sup>[1]</sup> 76:17</p> <p><b>weigh</b> <sup>[1]</sup> 42:13</p> <p><b>weight</b> <sup>[2]</sup> 41:13 63:3</p> <p><b>welcome</b> <sup>[2]</sup> 5:1 44:21</p> <p><b>whatever</b> <sup>[10]</sup> 17:12 23:25 33:15 37:19 44:23 57:11 59:17 61:1,16 62:21</p> <p><b>whenever</b> <sup>[1]</sup> 38:6</p> <p><b>Whereupon</b> <sup>[1]</sup> 83:19</p> <p><b>whether</b> <sup>[34]</sup> 4:3,4,7 9:9,12 10:3 14:13 15:17,20 17:7 25:11 26:12 30:6 31:16 32:4 33:20 34:3,24 38:19 39:7,14 47:24 52:8,22 54:6 55:15 56:4 68:9 70:23 72:1,3 73:16 77:18 78:4</p> <p><b>whole</b> <sup>[4]</sup> 6:6 46:19 55:4 60:22</p> <p><b>wholly</b> <sup>[2]</sup> 43:20 71:10</p> <p><b>whom</b> <sup>[1]</sup> 81:6</p>	<p><b>will</b> <sup>[16]</sup> 4:10,10 9:19 10:4,14,19 11:4,25 20:1 22:23 61:13,14 80:19 81:11,13,13</p> <p><b>willing</b> <sup>[1]</sup> 75:10</p> <p><b>win</b> <sup>[3]</sup> 20:22 29:25 60:25</p> <p><b>withheld</b> <sup>[2]</sup> 47:19 77:8</p> <p><b>withhold</b> <sup>[1]</sup> 10:17</p> <p><b>withholding</b> <sup>[5]</sup> 10:14 22:22 27:21 40:22 43:15</p> <p><b>withholds</b> <sup>[2]</sup> 43:9 46:9</p> <p><b>Without</b> <sup>[9]</sup> 25:21 29:21 37:7 44:24 48:21 63:24 65:8 66:10 67:22</p> <p><b>wondering</b> <sup>[2]</sup> 9:9 39:14</p> <p><b>word</b> <sup>[3]</sup> 12:11 16:19 48:16</p> <p><b>words</b> <sup>[12]</sup> 10:5 29:2,4,11 38:12,15 40:10 46:13 79:6,13,14,24</p> <p><b>work</b> <sup>[2]</sup> 24:17 76:16</p> <p><b>worked</b> <sup>[1]</sup> 74:13</p> <p><b>works</b> <sup>[1]</sup> 7:1</p> <p><b>world</b> <sup>[2]</sup> 41:2 64:4</p> <p><b>worried</b> <sup>[1]</sup> 10:25</p> <p><b>worry</b> <sup>[1]</sup> 81:9</p> <p><b>write</b> <sup>[5]</sup> 25:5,22,24 40:4 74:21</p> <p><b>writing</b> <sup>[1]</sup> 14:14</p> <p><b>written</b> <sup>[1]</sup> 66:11</p> <p><b>wrote</b> <sup>[1]</sup> 19:17</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <p><b>year</b> <sup>[1]</sup> 54:19</p> <p><b>years</b> <sup>[2]</sup> 25:6 83:4</p> <p><b>York</b> <sup>[1]</sup> 80:23</p> <p><b>Yorkers</b> <sup>[1]</sup> 81:2</p> <p><b>young</b> <sup>[1]</sup> 32:12</p> <p><b>yourself</b> <sup>[1]</sup> 63:4</p> <p><b>Ysursa</b> <sup>[2]</sup> 8:24 49:24</p>
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