

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DEPARTMENT OF AGRICULTURE RURAL )  
DEVELOPMENT RURAL HOUSING SERVICE, )  
                                          Petitioner, )  
                                          v. ) No. 22-846  
REGINALD KIRTZ, )  
                                          Respondent. )  
- - - - -

Pages: 1 through 95  
Place: Washington, D.C.  
Date: November 6, 2023

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DEVELOPMENT RURAL HOUSING SERVICE, )

Petitioner, )

v. ) No. 22-846

REGINALD KIRTZ, )

Respondent. )

- - - - -

Washington, D.C.

Monday, November 6, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

BENJAMIN W. SNYDER, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

NANDAN M. JOSHI, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	BENJAMIN W. SNYDER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	NANDAN M. JOSHI, ESQ.	
7	On behalf of the Respondent	52
8	REBUTTAL ARGUMENT OF:	
9	BENJAMIN W. SNYDER, ESQ.	
10	On behalf of the Petitioner	92
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 22-846, Department of Agriculture Rural Development Rural Housing Service versus Kirtz.

Mr. Snyder.

ORAL ARGUMENT OF BENJAMIN W. SNYDER  
ON BEHALF OF THE PETITIONER

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

The question in this case is whether Congress unambiguously waived the sovereign immunity of the United States when it amended the Fair Credit Reporting Act in 1996 to provide that any person who violates FCRA's requirements is liable for money damages.

The answer to that question is no. To start, there's no basis for claiming that Congress has expressly waived sovereign immunity. For all of Respondent's emphasis on following the literal text of the statute, he ultimately has to concede that nothing in FCRA addresses sovereign immunity directly.

Instead, Respondent is asking this

1 Court to read an unwritten waiver into the  
2 statute on the theory that every time Congress  
3 creates a cause of action that applies to both  
4 sovereign and non-sovereign defendants, it must  
5 implicitly intend to eliminate sovereign  
6 immunity.

7 But that argument is wrong for two  
8 reasons. First, it's fundamentally inconsistent  
9 with the nature of sovereign immunity.  
10 Sovereign immunity is a defense that, by  
11 definition, has effect only when there is a  
12 cause of action that would otherwise impose  
13 liability. So, if every cause of action that  
14 covers a sovereign also waived that sovereign's  
15 immunity, the defense would never matter. That  
16 cannot be right.

17 This Court has therefore followed a  
18 narrower rule under which courts may infer a  
19 waiver of sovereign immunity from a cause of  
20 action only if Congress has referred to  
21 sovereign defendants in the cause of action  
22 itself using language that would be effectively  
23 negated if sovereign immunity remained available  
24 and that therefore shows Congress's intent to  
25 displace the presumptively available defense.

1           But there's nothing like that here.  
2           And as the Court's decision in *Employees* shows,  
3           the mere use of a general term defined elsewhere  
4           in the statute isn't enough to eliminate the  
5           sovereign immunity defense.

6           Second, it's in any event far from  
7           clear that these causes of action apply to the  
8           United States at all. Even the court of appeals  
9           recognized that FCRA's criminal provision uses  
10          "person" in a sense that does not include  
11          federal agencies, and it's plausible to  
12          interpret the nearby civil causes of action in  
13          the same way.

14          I welcome the Court's questions.

15          JUSTICE THOMAS: Mr. Snyder, the --  
16          putting aside sovereign immunity, the statute  
17          refers to -- defines a person as any individual,  
18          et cetera, and any government or governmental  
19          subdivision or agency. Putting aside the issue  
20          of sovereign immunity, wouldn't that suggest  
21          that it applies to the -- the U.S. Government?

22          MR. SNYDER: So we accept that that's  
23          a plausible reading.

24          JUSTICE THOMAS: So, if -- if it does  
25          that as explicitly as it does, why doesn't --

1 isn't that sufficient to waive sovereign  
2 immunity?

3 MR. SNYDER: So -- so two answers to  
4 that, Justice Thomas. We don't think that it  
5 unambiguously covers the United States. And I'd  
6 -- I'd say our argument on that front is under  
7 the Court's decision in Utility Air. I would  
8 say that's the best decision for that part of  
9 our argument.

10 You're asking, even if I assume that  
11 1681n and o use "person" in a sense that does  
12 cover the United States, does that also take the  
13 analytically distinct step of waiving sovereign  
14 immunity.

15 And so putting aside the Utility Air  
16 argument for a moment, on that argument, we  
17 would say no because all the text of the statute  
18 does is create a cause of action and it does so  
19 using a general word that, on hypothesis, covers  
20 both sovereign and non-sovereign defendants.  
21 But there's nothing necessarily implicit in that  
22 to show that Congress must have intended to  
23 waive the defenses that all defendants covered  
24 by that cause of action would have available  
25 under ordinary background principles.

1                   So I don't think anyone would think  
2                   it's strange, for example, if a defendant who's  
3                   covered by the plain text of the cause of action  
4                   but who violated FCRA more than five years ago  
5                   were to assert a statute of limitations defense.  
6                   That doesn't negate anything in the cause of  
7                   action.

8                   And similarly here, the fact that,  
9                   again, on hypothesis, some defendants covered by  
10                  the cause of action would be able to assert a  
11                  sovereign immunity defense doesn't negate  
12                  anything in the statutory language that Congress  
13                  used in adopting that cause of action.

14                  Now it is a different --

15                  JUSTICE KAGAN: I'm not sure I  
16                  understand that, Mr. Snyder. I mean, suppose  
17                  that we just take the definition and we plug it  
18                  into n and o. What would your answer be then?

19                  MR. SNYDER: So, if the Court were to  
20                  plug all of the words from the definition into n  
21                  and o specifically, then the only -- the only  
22                  purpose of those words in n and o, the words  
23                  referring to governmental entities, would be to  
24                  make clear that Congress is authorizing recovery  
25                  against sovereign defendants.



1 JUSTICE KAGAN: So your answer then  
2 would be that there is not sovereign immunity?

3 MR. SNYDER: Yes. Our answer would be  
4 that even though Congress has not directly  
5 addressed sovereign immunity that unless --

6 JUSTICE KAGAN: Yeah, I mean, it falls  
7 into the whole line of cases where Congress has  
8 authorized a cause of action against the  
9 government, and we say, well, that's  
10 inconsistent with the recognition of sovereign  
11 immunity. Sovereign immunity would negate the  
12 very cause of action that Congress has created,  
13 right? Those are the line of cases that we  
14 discussed just last year.

15 And what you're saying to me is, yes,  
16 if you plug the definition into n and o, the  
17 liability provisions, those cases would -- you  
18 know, the -- the same answer would follow?

19 MR. SNYDER: Yes, that's correct.

20 JUSTICE KAGAN: Okay. So then -- then  
21 why does it make a difference that they're not  
22 plugged in to n and o but instead -- you know,  
23 the definition has a lot, a lot, a lot of words,  
24 right? There's a person, there's a corporation,  
25 there's an association, there's an enterprise,

1 et cetera, et cetera. You can see why Congress  
2 didn't want to say that every time Congress  
3 meant to refer to a lot of different entities.

4 So -- but, you know, it's statutory  
5 interpretation 101 that we take a defined term,  
6 we plug the definition in, and that's what the  
7 meaning of the statute is. So that's what the  
8 meaning of the statute is.

9 MR. SNYDER: So, Justice Kagan, if the  
10 question here were just what the meaning of the  
11 words in the cause of action were, I -- I would  
12 agree with you. So last term, in *Lac du*  
13 *Flambeau*, for example, there was an express  
14 waiver of sovereign immunity that made  
15 absolutely clear that what Congress was  
16 intending to do was waive sovereign immunity,  
17 and it did so on behalf of governmental units  
18 and then defined governmental units elsewhere in  
19 the statute. And this sort of subbing in the --  
20 the words from the definition -- definition into  
21 the waiver of sovereign immunity would have  
22 worked perfectly there because all you were  
23 asking was what do the words that Congress used  
24 mean.

25 But, here, you're not asking just what

1 do the words mean; you're asking about the --  
2 the necessary logical implication of what  
3 Congress has done.

4 JUSTICE KAGAN: Well, the -- the  
5 necessary logical implication of what Congress  
6 has done is authorize a suit against people,  
7 persons, as defined in the definitions section.  
8 Then you go to the definitions section, and then  
9 you discover that what Congress has done is  
10 authorize a suit against natural persons,  
11 enterprises, and governments.

12 MR. SNYDER: So, respectfully, Justice  
13 Kagan, I don't think that's right. At the time  
14 that Congress adopted that definition, the one  
15 thing we know is that it wasn't doing so for  
16 purposes of allowing civil recovery against  
17 everyone covered by "persons" because the  
18 statute didn't authorize recovery against  
19 "persons" at the time.

20 JUSTICE JACKSON: Right, but then --  
21 then there was the amendment. So why -- why  
22 can't we assume from that that Congress was  
23 trying to reach all of the defined entities?

24 MR. SNYDER: I -- so I -- I think  
25 maybe that would be a plausible reading of the

1 statute, but in order to find a waiver of  
2 sovereign immunity, you have to conclude that  
3 it's the only plausible reading of the statute.  
4 So just --

5 JUSTICE JACKSON: And why -- why isn't  
6 it not the only plausible -- I mean, Congress  
7 amended the statute clearly to expand liability.  
8 Do you -- do you concede that?

9 MR. SNYDER: Yes, we agree with that.

10 JUSTICE JACKSON: All right. And  
11 it -- and it expanded liability by substituting  
12 the previous terms, which were narrower, you  
13 know, specifically referencing only "any  
14 consumer reporting agency or user of  
15 information," it expanded liability by striking  
16 that and putting in the word "person" and the --  
17 or "any person," and "any person" is elsewhere  
18 defined in the statute to include government.

19 So what is not clear about Congress's  
20 intention to expand liability to include  
21 government?

22 MR. SNYDER: So -- so we do have this  
23 other argument about whether it's clear that  
24 Congress actually intended "person" to include  
25 the government, and I -- I do eventually want to

1 get to that.

2 But just, I think you're asking me to  
3 assume that "person" takes the statutory  
4 definition in 1681n and o and why isn't that  
5 enough to show that Congress must have intended  
6 to waive sovereign immunity.

7 And my answer is that it's not unusual  
8 for Congress to create a cause of action that  
9 applies to a range of defendants, some of whom  
10 will still have defenses from other background  
11 principles of the law.

12 Now, in the cases that this Court was  
13 referring to in the Financial Oversight and  
14 Management Board --

15 JUSTICE GORSUCH: Counsel, I -- I'm  
16 sorry --

17 JUSTICE KAVANAUGH: Wouldn't --

18 JUSTICE GORSUCH: -- to interrupt, but  
19 I -- I -- I just want to understand the nature  
20 of your argument in responses to my colleagues.

21 It could be one of two things it seems  
22 to me. One -- one, it might be that n and o  
23 don't take the definition, or, two, they do take  
24 the definition and that's still insufficient.

25 Which is it?

1 MR. SNYDER: We are making both of  
2 those arguments. The -- the argument --

3 JUSTICE GORSUCH: Arguing in the  
4 alternative?

5 MR. SNYDER: Yes, we're arguing --

6 JUSTICE KAVANAUGH: Right.

7 MR. SNYDER: -- in the alternative.  
8 So, if you -- even if you accept, as the -- the  
9 questions so far have asked me to assume, that  
10 "person" covers the United States, in that  
11 circumstance, you're in exactly the same  
12 situation that --

13 JUSTICE GORSUCH: Let's deal with the  
14 first argument, just -- just that they don't  
15 take the definition. I want to understand that  
16 because this Court, as Justice Kagan has alluded  
17 to, has said that it's virtually conclusive -- I  
18 think Sturgeon a few years ago we said that --  
19 virtually conclusive that the definition  
20 applies.

21 MR. SNYDER: Yes. So we -- we accept  
22 that ordinarily, statutory definitions make a  
23 great deal of difference, but this Court has  
24 also --

25 JUSTICE GORSUCH: More than a great

1 deal of difference. We've said they're  
2 virtually conclusive.

3 MR. SNYDER: Yes. But this Court has  
4 also rejected the idea that you always just plug  
5 in the terms wherever the -- the defined term  
6 appears in the statute. I think the Court's  
7 decision in Utility Air is really significant on  
8 this and, in particular, the structure of the  
9 Court's reasoning in that decision.

10 So Utility Air involved provisions of  
11 the Clean Air Act that applied to facilities  
12 that emitted any air pollutant, and EPA had  
13 concluded that those provisions unambiguously  
14 applied to facilities that emitted greenhouse  
15 gases because the Act-wide definition of "air  
16 pollutant" include greenhouse gases.

17 JUSTICE GORSUCH: Why -- we -- we've  
18 read all that. I -- I guess I'm wondering, why  
19 isn't it virtually conclusive here?

20 MR. SNYDER: So the reason is that  
21 just as in Utility Air, there were other  
22 provisions of the Act that used "air pollutant"  
23 in a sense narrower than its defined meaning.

24 JUSTICE GORSUCH: And there may be  
25 other provisions in which it's more narrowly

1 applied here, but why does that pertain to n and  
2 o, is my question.

3 MR. SNYDER: So I'm being too slow --

4 JUSTICE GORSUCH: I'm --

5 MR. SNYDER: -- in getting to this.

6 But --

7 JUSTICE GORSUCH: You are.

8 MR. SNYDER: -- in Utility Air --

9 JUSTICE GORSUCH: Let's get to the  
10 statute before us.

11 MR. SNYDER: In -- so --

12 JUSTICE KAGAN: Utility Air -- may I?

13 JUSTICE GORSUCH: Please.

14 (Laughter.)

15 JUSTICE KAGAN: Utility Air was a very  
16 special case in which the Court decided that if  
17 you just plugged the definition in, the entire  
18 regulatory scheme would collapse.

19 MR. SNYDER: So the first part of the  
20 Court's decision --

21 JUSTICE KAGAN: So all I'm saying --

22 MR. SNYDER: -- in Utility Air --

23 JUSTICE KAGAN: -- is that that's, you  
24 know, nowhere near this case. I mean, I  
25 understand that the government likes sovereign



1 immunity and that waivers of sovereign immunity  
2 are, you know, not all that common. But this is  
3 not a Utility Air scheme where, essentially, the  
4 Court found that it was inconsistent with the  
5 entire rest of the statutory scheme.

6 Recognizing a cause of action here is  
7 not inconsistent with the entire rest of the  
8 statutory scheme.

9 I'm sorry about that, Justice Gorsuch.

10 JUSTICE GORSUCH: Well, no, that --  
11 that -- no, I appreciate that. And -- and  
12 that's -- that's my question too. So, please.

13 MR. SNYDER: So even the court of  
14 appeals recognized that 1681q does not use  
15 "person" in a sense --

16 JUSTICE GORSUCH: I -- I understand.  
17 We're talking about n and o here, though,  
18 counsel.

19 MR. SNYDER: So, if you accept that --

20 JUSTICE GORSUCH: And let me put it  
21 this way. I'm sorry to repeat the question, but  
22 this is where I get stuck.

23 It doesn't seem to me inconceivable --  
24 maybe -- maybe -- maybe you've got an argument  
25 -- that a rational Congress might, to protect

1 consumers, in FCRA, which is all about false  
2 reporting about consumers' debts and  
3 delinquencies, say that the government should  
4 turn square corners too, just like other private  
5 credit reporting agencies, and that when it  
6 falsely reports a consumer's debt, it should --  
7 it should pay that, n and o.

8           Again, let's talk about n and o.  
9 Let's not talk about q. Let's not talk about  
10 Utility Air. Let's talk about n and o. You  
11 have to come up, it seems to me, with some  
12 argument that it's inconceivable Congress would  
13 have wanted to do that sort of thing.

14           MR. SNYDER: Respectfully, Justice  
15 Gorsuch, I -- I think our task is to show that  
16 it's plausible that that's not what Congress did  
17 here. That's what the clear statement rule  
18 requires. And we think that because Congress  
19 has --

20           JUSTICE GORSUCH: Well, we're --  
21 that's the second step. We're still on the  
22 first step. What do n and o mean?

23           MR. SNYDER: So we don't think that n  
24 and o clearly cover the United States. Congress  
25 has used the word "person" in other parts of

1 the -- of the statute in ways that do not cover  
2 the United States, and we think it is therefore  
3 plausible to think that when Congress used the  
4 word "person" in n and o, it was also using n  
5 and o in a sense --

6 JUSTICE KAVANAUGH: What are your best  
7 examples of that?

8 MR. SNYDER: So we think 1681q, I know  
9 I've been asked not to talk about that, but --

10 JUSTICE KAVANAUGH: You can talk about  
11 it with me.

12 (Laughter.)

13 MR. SNYDER: We think that 1681q  
14 clearly uses "person" in a sense that does not  
15 use the Act-wide definition. Even the court of  
16 appeals recognized that it would not be  
17 reasonable to think that Congress authorized  
18 criminal prosecutions of the United States just  
19 through the bare use of the word "person" and  
20 that it must have meant something narrower  
21 there.

22 JUSTICE JACKSON: But why -- what --  
23 why is that a definitional change? I mean, I  
24 think the problem that I'm having is that A, in  
25 the definitions, the text of this statute says

1 that the definitions apply throughout the entire  
2 subchapter.

3 And I understand your point about q,  
4 but why isn't that just a carve-out? They're  
5 just saying that, you know, certain categories  
6 of persons can't have criminal prosecution, but  
7 it's not a change in the definition of "person."

8 MR. SNYDER: I -- I -- I guess that's  
9 not the way I read that provision. I think that  
10 the statutes in both Utility Air and Employees  
11 had similar provisions that said this definition  
12 applies everywhere. In Utility Air, the Court  
13 said but we know that Congress didn't always use  
14 the defined term in a sense that carried its  
15 defined meaning, and so, when it appears in the  
16 provision at issue, it's not unambiguous that --

17 JUSTICE KAVANAUGH: Counsel --

18 MR. SNYDER: -- it carries that  
19 meaning.

20 JUSTICE SOTOMAYOR: Counsel --

21 JUSTICE KAVANAUGH: -- can I --

22 JUSTICE SOTOMAYOR: -- can I --

23 JUSTICE KAVANAUGH: Go ahead.

24 JUSTICE SOTOMAYOR: -- can I go back  
25 to q? Because I was -- I don't know why it's

1 incongruous or why it suggests a problem. I  
2 went back and researched the Clean Water Act,  
3 the Safe Drinking Water Act, and the  
4 Agricultural Adjustment Act. At least three --  
5 I didn't canvass the universe -- include a  
6 criminal provision that applies to the United  
7 States that's nearly identical to this one. It  
8 says imprisonment and/or fine.

9           So I don't know why copying what has  
10 been used in other acts for which there's no  
11 question that there's a waiver of sovereign  
12 immunity, why the fact that they refer to  
13 imprisonment or -- and fine means that somehow  
14 sovereign immunity wasn't waived.

15           MR. SNYDER: So --

16           JUSTICE SOTOMAYOR: It's a common  
17 provision written exactly like this one is, and  
18 in those acts, we've never said their existence  
19 calls into question the waiver of sovereign  
20 immunity.

21           MR. SNYDER: So I -- I'm not sure, are  
22 you referring to criminal provisions in those  
23 other statutes?

24           JUSTICE SOTOMAYOR: Yes, yes.

25           MR. SNYDER: So I -- I think the

1 significant thing about the criminal provisions  
2 elsewhere in the -- the Code, my friend has  
3 pointed to just one, that when Congress has  
4 wanted to accomplish that really unusual result,  
5 it has been just crystal-clear that that's --

6 JUSTICE SOTOMAYOR: No. That's what  
7 I'm saying to you. Read the -- the best example  
8 is the Clean Air Act. It's virtually identical  
9 to this one. It basically says any person who  
10 violates the Act -- and there's no doubt that  
11 the "person" is the government -- is subject to  
12 imprisonment or a fine.

13 So it's written identically to this  
14 provision. So, if I have that as text and I see  
15 it in other statutes, I don't know why reading  
16 it here would be incongruous to me or suggest  
17 that somehow Congress didn't intend "person" to  
18 mean exactly what it means.

19 MR. SNYDER: So -- so, Justice  
20 Sotomayor, even the court of appeals recognized  
21 --

22 JUSTICE SOTOMAYOR: Well, it may --

23 MR. SNYDER: -- I mean, you're not  
24 recognizing it --

25 JUSTICE SOTOMAYOR: -- it may have

1 recognized it, but what I'm saying to you is I  
2 don't.

3 MR. SNYDER: So accepting that, let  
4 me -- let me maybe turn wisely to other -- other  
5 points of our argument.

6 (Laughter.)

7 MR. SNYDER: 1681u(j), which is the  
8 provision where Congress really did want to  
9 authorize civil actions against the federal  
10 agencies --

11 JUSTICE SOTOMAYOR: Is that the FBI  
12 one?

13 MR. SNYDER: That's the FBI one. And  
14 it refers explicitly to the FBI. Again, I'm not  
15 going to suggest --

16 JUSTICE SOTOMAYOR: Well --

17 MR. SNYDER: -- that that's absolutely  
18 --

19 JUSTICE SOTOMAYOR: -- yeah, that one  
20 is also difficult for me because that provision  
21 is an exemption from the Act, it -- basically  
22 permitting the FBI to do things and consumer  
23 agencies to do things that otherwise might  
24 violate the statute, and it's now saying, okay,  
25 we've given you an exemption, but we're going to

1 keep you liable if you step outside the terms of  
2 this exemption, and it sets forth the terms of  
3 that liability.

4 I don't know why that is the same  
5 thing -- why that's illogical or suggests  
6 incongruity with a waiver of sovereign immunity  
7 for other violations of the Act.

8 MR. SNYDER: So, Justice Sotomayor,  
9 the only -- the only point we're making about  
10 that provision is that when we -- we know that  
11 Congress wanted to address civil liability of  
12 federal agencies, it said so expressly.

13 JUSTICE ALITO: Mr. Snyder --

14 MR. SNYDER: And that's --

15 JUSTICE ALITO: I'm sorry, finish your  
16 answer.

17 MR. SNYDER: My answer is going to  
18 have three more parts.

19 JUSTICE ALITO: Sure.

20 MR. SNYDER: So --

21 JUSTICE ALITO: Go ahead.

22 (Laughter.)

23 JUSTICE ALITO: I'll wait.

24 MR. SNYDER: -- the -- if you want to  
25 jump in, but the -- the --



1 JUSTICE ALITO: I'll wait.

2 MR. SNYDER: -- the -- the next thing  
3 that I'd point to is that reading 1681n and o to  
4 use the Act-wide definition would render those  
5 provisions plainly unconstitutional as applied  
6 to unconsenting states under this Court's  
7 decision --

8 JUSTICE SOTOMAYOR: Well, that's all  
9 right. We had the same problem in the Kimel  
10 case, and in the Kimel case, we had three layers  
11 of reference to the waiver of sovereign  
12 immunity, and we didn't require magic words. We  
13 just figured out what the definition was, even  
14 though it referred to another statute and the  
15 other statute referred to a different provision.  
16 And yet, no magic words were required.

17 And in Kimel, we had exactly the same  
18 thing. The government argued that it was  
19 incongruous to permit suits against the state  
20 because the states hadn't waived their sovereign  
21 immunity. But that's a different constitutional  
22 provision.

23 MR. SNYDER: So, in Kimel, there was  
24 language in the cause of action itself that was  
25 there only for the purpose of authorizing

1 suits --

2 JUSTICE SOTOMAYOR: Well, assuming we  
3 buy your first argument that any person who is  
4 negligent doesn't mean the sovereign, if it's  
5 negligent, is responsible. We have to take that  
6 first step, right?

7 MR. SNYDER: So that -- just to be  
8 clear, that's not our first argument. Our first  
9 argument is that even if you think the cause of  
10 action covers both sovereign and non-sovereign  
11 defendants, as this Court recognized in  
12 Employees, the -- the question of whether the  
13 government -- or their -- Congress has lifted  
14 the sovereign immunity defense is analytically  
15 distinct from it. So --

16 JUSTICE SOTOMAYOR: It is analytically  
17 distinct. It can't lift state sovereignty. So  
18 it can't do it here either.

19 MR. SNYDER: So, in Employees, the  
20 Court assumed that Congress would be able to  
21 lift sovereign immunity. That was -- that was  
22 before '75.

23 JUSTICE SOTOMAYOR: Well, that was --  
24 Employees is an old case, 1973, analyzed in a  
25 very different way with a lot of different

1 issues.

2 MR. SNYDER: So, Justice Sotomayor, I  
3 -- respectfully, I disagree with that. I mean,  
4 I think this idea that Employees and Parden are  
5 sort of of a piece in the bad old days, I just  
6 don't think that's a plausible description of  
7 those cases. So, if you --

8 JUSTICE SOTOMAYOR: We'll let the  
9 other side answer that. I don't want to  
10 monopolize you. So --

11 MR. SNYDER: Just briefly on that, I  
12 mean, in College Savings Bank, the opinion for  
13 the Court by Justice Scalia said -- points out  
14 that Employees was written by one of the Parden  
15 dissenters over the solitary dissent of Parden's  
16 author and that it began the Court's retreat  
17 from Parden. So I think Employees is entirely  
18 consistent with this modern -- this Court's  
19 modern approach to sovereign immunity.

20 The -- the other two parts of the  
21 answer that I promised Justice Alito I was going  
22 to get out, we would -- we think it's  
23 significant that the 1996 amendments occurred  
24 just months after Seminole Tribe. The idea that  
25 Congress adopted this plainly unconstitutional

1 statute without saying anything at all in the  
2 statute itself or the legislative history we  
3 don't think is plausible.

4 We also think it's significant that  
5 these were adopted at different points in time,  
6 so you don't have Congress adopting a cause of  
7 action applicable to persons and then saying at  
8 the same time that for those purposes, we want  
9 this -- "persons" to include the United States.

10 And then, finally, we think there are  
11 a number of other statutes where, as with FCRA,  
12 Congress has defined "person" to include the  
13 United States, but then, in the causes of  
14 action, when it's wanted to authorize recovery  
15 against the United States, it hasn't just relied  
16 on that general definition of "person." It has  
17 said in RCRA, for example, that suit is  
18 "authorized against any person," comma,  
19 "including the United States."

20 And, Justice Kagan, to go back to  
21 where we started with why that is different from  
22 a case where Congress has just -- I realize I've  
23 -- I skipped over Justice Alito, but --

24 JUSTICE ALITO: That's okay. That's  
25 fine.

1 MR. SNYDER: -- that --

2 JUSTICE KAGAN: Long ago.

3 MR. SNYDER: -- that --

4 JUSTICE KAGAN: In fact, before you  
5 start talking to me --

6 JUSTICE ALITO: This is a --

7 JUSTICE KAGAN: -- I'd like Justice  
8 Alito to answer his question --

9 (Laughter.)

10 JUSTICE ALITO: Well, this is --

11 JUSTICE KAGAN: -- to ask his  
12 question.

13 JUSTICE ALITO: -- this may be a  
14 frolic and a detour, but I'm -- have there been  
15 real cases in which the United States has  
16 criminally prosecuted itself?

17 MR. SNYDER: I am not aware of any.

18 JUSTICE ALITO: I mean, if -- if such  
19 a case came here, what would -- it's Monday  
20 morning.

21 (Laughter.)

22 JUSTICE ALITO: I'm having trouble  
23 getting a grasp on this. How would this work?  
24 You would be arguing on one side and one of your  
25 colleagues would be on the other side, and you'd

1 be arguing against each other?

2 MR. SNYDER: I -- I think that's  
3 right. I mean, it's a pretty incongruous idea.  
4 We think that if Congress wanted that result, it  
5 would have made it much clearer than just using  
6 the word "person."

7 Again, though, the reason that it  
8 matters why Congress uses just "person" or  
9 instead addresses the -- the sovereign in the  
10 cause of action itself is that when Congress  
11 uses references to the sovereign itself in the  
12 cause of action, the only purpose those words  
13 can serve is to authorize recovery against the  
14 sovereign.

15 And so, in Financial Oversight and  
16 Management Board, the Court said that when  
17 Congress has expressly authorized suits in that  
18 way, it would effectively negate the statutory  
19 language to allow the assertion of a sovereign  
20 immunity defense. And in that circumstance, the  
21 Court has been willing to infer that Congress  
22 must have intended to waive sovereign immunity.

23 JUSTICE KAGAN: Well, it does negate  
24 the statutory language if you do the normal  
25 thing that we do in interpreting statutes, which

1 is plug in the definition into the provision  
2 that uses the defined term.

3 So, here, plug in the definition to n  
4 and o, and then it negates the statutory  
5 language in the same way that it does in all  
6 those other cases. So I've said that before.

7 Here's what I really want to ask.  
8 What does "person" mean if it doesn't mean that?

9 MR. SNYDER: So we think that, just as  
10 we think in 1681q it means its ordinary  
11 definition, so too in n and o, we think it has  
12 -- it carries its ordinary --

13 JUSTICE KAGAN: It -- its -- what is  
14 its ordinary definition? Does it include  
15 individuals?

16 MR. SNYDER: It includes individuals.

17 JUSTICE KAGAN: Does it include  
18 partnerships?

19 MR. SNYDER: It includes partnerships.

20 JUSTICE KAGAN: Corporations?

21 MR. SNYDER: Yes.

22 JUSTICE KAGAN: Trusts?

23 MR. SNYDER: Yes.

24 JUSTICE KAGAN: Estates?

25 MR. SNYDER: Yes.

1 JUSTICE KAGAN: Cooperatives?

2 MR. SNYDER: Yes.

3 JUSTICE KAGAN: Associations?

4 MR. SNYDER: Yes.

5 JUSTICE KAGAN: Other entities?

6 MR. SNYDER: Yes, but not governments.

7 JUSTICE KAGAN: Just not government.

8 I mean, that's a strange way to read a defined  
9 term, right? We'll take every part of the  
10 defined term and plug it in but not plug in this  
11 last listed thing before you get to the residual  
12 term.

13 MR. SNYDER: So that's what we think  
14 Congress did in 1861q, and we think it's  
15 plausible to think that it did the same thing in  
16 1861n and o.

17 But, to the point you made before  
18 that, I mean, yes, if we --

19 JUSTICE KAGAN: Well, but the -- but  
20 the point I'm making now?

21 MR. SNYDER: That is my answer, that  
22 -- that we think that it carries a meaning other  
23 than its defined one, just as "air pollutant" in  
24 Utility Air carried a meaning other than its  
25 defined one, just as "person" in 1681q carries a



1 meaning other than its defined one.

2 JUSTICE KAGAN: But we're taking the  
3 entire definition, except we're striking  
4 "government." We're taking the entire  
5 definition, except for one word, two words,  
6 "governmental subdivision or government," four  
7 words.

8 MR. SNYDER: Yes, because that is the  
9 ordinary meaning of "person." It is --

10 JUSTICE JACKSON: Okay. But --

11 JUSTICE KAVANAUGH: Why -- why are you  
12 doing that? I mean, why -- put aside the  
13 ordinary meaning of "person."

14 MR. SNYDER: We're doing that because  
15 we -- we think it's plausible to read the civil  
16 liability provisions in the same way that it  
17 would be plausible to read the criminal  
18 liability provisions.

19 JUSTICE KAVANAUGH: Well, I thought  
20 you were doing that because of sovereign  
21 immunity and it's important to protect the fisc  
22 of the United States against ambiguous  
23 derogations of sovereign immunity.

24 MR. SNYDER: So we're also doing it  
25 for that reason. We think that that's where

1 the -- the --

2 JUSTICE KAGAN: But Congress can waive  
3 sovereign immunity, and the question is whether  
4 Congress has done so.

5 MR. SNYDER: Yes. And nothing in the  
6 statute -- may I finish?

7 JUSTICE KAVANAUGH: Sure.

8 MR. SNYDER: Nothing in the statute  
9 says anything about sovereign immunity. You can  
10 only do that from implication. And we think,  
11 logically, the fact that Congress didn't specify  
12 sovereign defendants in the cause of action  
13 itself means that implication is not available  
14 here.

15 CHIEF JUSTICE ROBERTS: We'll afford  
16 you a couple minutes for rebuttal.

17 MR. SNYDER: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
19 Snyder.

20 JUSTICE KAGAN: Wait.

21 JUSTICE KAVANAUGH: Whoa, whoa.

22 (Laughter.)

23 CHIEF JUSTICE ROBERTS: Justice  
24 Thomas?

25 Justice Alito? No? Sure?

1 JUSTICE GORSUCH: I do have one  
2 question. So putting aside what n and o mean --  
3 we -- we've gone around that tree -- your --  
4 your -- your second argument was that Congress  
5 needs to be clearer than even that to waive  
6 sovereign immunity. Even that wouldn't be  
7 enough.

8 And I guess I -- I wonder why. I  
9 certainly understand -- this is kind of a first  
10 principles question. I certainly understand the  
11 clear statement rule this Court has developed to  
12 protect the Eleventh Amendment and state  
13 sovereign immunity, separate sovereigns.

14 But, here, we have the sovereign  
15 itself speaking, right? It's not waiving  
16 someone else's immunity. It's not purporting to  
17 strip another entity of its protections under  
18 the Constitution. It's Congress, which it has  
19 control over the federal fisc, itself deciding.  
20 And I -- so -- so I wonder why the clear  
21 statement rule would be appropriate in those  
22 circumstances.

23 MR. SNYDER: So two answers to that,  
24 Justice Gorsuch. The first is that Respondent's  
25 argument has exactly the same effect in terms of

1 Congress's meaning as to states and in terms of  
2 its effect as to Indian tribes and foreign  
3 nations. If you rule against the United States  
4 here, you will necessarily be saying that it  
5 waived sovereign immunity for them too.

6 JUSTICE GORSUCH: You're -- you're --  
7 you're just fighting my question. I'm -- I'm  
8 saying it is different. It is one thing to  
9 waive a tribe, a state, a foreign government's  
10 immunity. Congress purport to exercise that  
11 power under the Constitution, an extraordinary  
12 power. It's permissible sometimes, but,  
13 generally, we think of as inconsistent with the  
14 structure of our Constitution, and that's why we  
15 have traditionally required a clear statement  
16 rule.

17 It's less clear to me what  
18 justifications we have for requiring magic words  
19 to waive sovereign immunity when it's the  
20 sovereign itself opening itself up to suit.

21 MR. SNYDER: So we, of course, don't  
22 think it's magic words, but that's not your  
23 question. This Court has repeatedly said that  
24 it applies the same standard when evaluating --

25 JUSTICE GORSUCH: I'm -- I'm -- I'm

1 asking why.

2 MR. SNYDER: So the Court has  
3 identified a number of justifications for --

4 JUSTICE GORSUCH: What do you think  
5 it's saying?

6 MR. SNYDER: -- the clear statement.  
7 I'd combine two.

8 JUSTICE GORSUCH: Okay.

9 MR. SNYDER: First, as Federalist 81  
10 said way back at the founding, it was well  
11 established then that the sovereign could not be  
12 haled into court without its consent.

13 And, second, tracing all the way black  
14 to Blackstone, it was well settled that courts  
15 should not interpret statutes to apply to the  
16 sovereign unless that was the only permissible  
17 reading.

18 And so, by the middle of the 19th  
19 century, courts had recognized that in light of  
20 those two principles, you couldn't read a  
21 congressional enactment to waive sovereign  
22 immunity unless that was the only plausible  
23 reading, and, of course, by now, this Court has  
24 repeated that so many times that it's a  
25 well-established background principle against

1 which Congress legislates.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Kavanaugh?

5 JUSTICE KAVANAUGH: Just on the clear  
6 statement rule part of your argument, so that  
7 part, I mean, we said that sometimes the better  
8 interpretation of a statute will not necessarily  
9 prevail because of the clear statement rule.

10 So even assuming the -- the  
11 interpretation of the statute doesn't -- is  
12 against you, the better interpretation, you can  
13 still prevail under the clear statement rule?

14 MR. SNYDER: Yes, that's absolutely  
15 right. We just need a --

16 JUSTICE KAVANAUGH: Okay. So that's  
17 the starting point. And then, for the why, you  
18 know, ultimately, it's money that Congress has  
19 the power to appropriate, right? And we want to  
20 be careful about that.

21 MR. SNYDER: Yes, we think that's  
22 correct.

23 JUSTICE KAVANAUGH: Okay. And that's  
24 basic separation of powers?

25 MR. SNYDER: Yes, absolutely.

1 JUSTICE KAVANAUGH: Okay. So how much  
2 would it cost here if you were to lose this  
3 case?

4 MR. SNYDER: So we don't have a  
5 precise estimate of that, Justice Kavanaugh. I  
6 will say that there is a -- a case pending in  
7 the Seventh Circuit right now that's being held  
8 for this case in -- in which the plaintiff has  
9 attempted to assert a -- a class action.

10 We understand that the damages if they  
11 were to prevail would be in the millions of  
12 dollars. I don't know exactly what that would  
13 be, but Congress would have anticipated that the  
14 potential liability here would be significant, I  
15 think.

16 JUSTICE KAVANAUGH: And punitive  
17 damages too, right?

18 MR. SNYDER: So we, of course, don't  
19 think those would be available. But I -- I  
20 think, if you accepted that this is clear enough  
21 --

22 JUSTICE KAVANAUGH: If you accept  
23 their argument down the line, punitive damages  
24 could be available?

25 MR. SNYDER: That's correct.

1 JUSTICE KAVANAUGH: Okay. And then,  
2 on Employees, you've mentioned that case. And  
3 that case seems structurally -- I mean, I'm  
4 going to ask a lot to the other side about this  
5 -- seems structurally similar to this statute,  
6 how this one developed.

7 But the other side basically says  
8 don't pay attention to Employees, and I think  
9 Justice Sotomayor alluded to that, because it's  
10 old, a 1973 case. So I want your response to  
11 that.

12 MR. SNYDER: So, I mean, first, we  
13 don't think this is how this Court treats  
14 precedents. Again, as I said, we think that  
15 this Court has reaffirmed Employees and -- and  
16 recognized that Employees began the retreat from  
17 Parden, but even just looking at the text of  
18 Employees, I think it's consistent with the  
19 argument and the distinctions that I'm drawing  
20 today.

21 The Court there said that the cause of  
22 action by its literal terms covered state  
23 agencies, but it recognized that the relevant  
24 question was whether Congress had intend --  
25 intended to bring the states to heel by lifting



1 their immunity. So it recognized that was a  
2 distinct question, and then it said Congress  
3 wouldn't have done that silently.

4 And, in particular, it said that if  
5 Congress had intended to do that, it would have  
6 done one of two things. It -- it either would  
7 have addressed immunity expressly, or it would  
8 have amended the cause of action, and in that  
9 context, what that would have meant was adding a  
10 specific reference to state agencies to the  
11 cause of action.

12 And because Congress hadn't done  
13 either of those things, the Court in *Employees*  
14 found there wasn't a clear waiver. We think the  
15 same thing is true here.

16 JUSTICE KAVANAUGH: So then, to pick  
17 up on Justice Kagan's questions earlier, if you  
18 see *Employees* on one side of the line and you  
19 see cases like *Kimel* on the other side of the  
20 line, where the -- where the reference to the  
21 public entities is in the cause of action  
22 itself, that's slicing it pretty thin.

23 Like, what sense does that make or  
24 what principle would undergird sticking to  
25 *Employees* in the way that you're advocating?

1           MR. SNYDER: So I think, in the cases  
2 like Kimel, there's a superfluity argument that  
3 unless you hold that Congress has waived  
4 sovereign immunity, that text in the cause of  
5 action will do absolutely no work. And so the  
6 Court has said Congress wouldn't have  
7 effectively negated that and has been willing to  
8 infer a waiver of immunity.

9           But Respondent has conceded that our  
10 interpretation doesn't produce any superfluity  
11 here. So even if you think that probably  
12 members of Congress intended to waive sovereign  
13 immunity, there's no necessary implication that  
14 they must have. And under the clear statement  
15 rule and under Employees, that's enough to rule  
16 for us.

17           JUSTICE KAVANAUGH: Can you give me  
18 just one quick example of how it's not  
19 superfluous --

20           MR. SNYDER: So --

21           JUSTICE KAVANAUGH: -- if you were to  
22 prevail here?

23           MR. SNYDER: -- so "person" would  
24 cover entities other -- private parties other  
25 than credit reporting agencies that furnish

1 information to those credit reporting agencies.

2 JUSTICE KAVANAUGH: No, the coverage  
3 of government, how the coverage of government  
4 wouldn't be superfluous even if you were to  
5 prevail here.

6 MR. SNYDER: So the coverage of  
7 government ensures that the government can  
8 obtain credit reports. I mean, the -- the  
9 coverage of government was there before the  
10 cause of action, so the one thing we know is  
11 that the coverage of government is not there in  
12 order to allow recovery under the cause of  
13 action.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Barrett?

17 JUSTICE BARRETT: In Employees, are we  
18 bound as a part of the holding the methodology  
19 applied by the case? Because it seems to me  
20 like that's what you're arguing, that this is  
21 the methodology that the case employed, and so  
22 we must follow the same methodology as -- so is  
23 that part of the holding?

24 MR. SNYDER: I -- I think that is part  
25 of the holding. I mean, the -- the other thing

1 I would say here is that when you're talking  
2 about implications, the -- the cause of action  
3 doesn't expressly say anything about sovereign  
4 immunity. So you can only find a waiver by  
5 thinking that in adopting that cause of action,  
6 Congress must also have intended to create a  
7 waiver.

8 And if you were a member of Congress  
9 and you looked at Employees and you said: All  
10 right, I've got a -- a cause of action that  
11 applies to a general term, if I define that  
12 general term somewhere else in a way that it  
13 covers sovereigns, will that lead to a waiver of  
14 sovereign immunity.

15 JUSTICE BARRETT: So Employees is part  
16 of the backdrop against which Congress  
17 legislated in its methodology?

18 MR. SNYDER: So, I -- I mean, I think  
19 it makes it plausible to think that members of  
20 Congress would not have understood just the bare  
21 creation of a broad cause of action as  
22 sufficient to take the analytically distinct  
23 step of waiving sovereign immunity.

24 JUSTICE BARRETT: Okay. Second  
25 question. Q is your best argument. If it

1 wasn't in the statute, would you lose?

2 MR. SNYDER: No. If -- if it wasn't  
3 in the statute, we would still have exactly the  
4 same argument under Employees, and things like  
5 the fact that 1681n and o would be  
6 unconstitutional as applied to the states, I  
7 think, would still give us a --

8 JUSTICE BARRETT: Well, unless the  
9 states waive their sovereign immunity.

10 MR. SNYDER: Yes. I mean, of course,  
11 you could say the same thing about application  
12 to federal agencies, that there are some federal  
13 agencies as to which Congress has waived all  
14 immunity.

15 And so, if you want to just read 1681n  
16 and o as creating causes of action that apply  
17 when there's a waiver from someone else --  
18 somewhere else, you can do that with the federal  
19 government too.

20 But my understanding of Respondent's  
21 argument is that Congress was intending to  
22 eliminate sovereign immunity in 1681n and o, and  
23 if that's right, then Congress is acting  
24 blatantly unconstitutionally with respect to the  
25 states and didn't say anything at all about the

1 Seminole Tribe decision from just a few months  
2 earlier. We think that's unlikely.

3 JUSTICE BARRETT: Last question.  
4 Where are you getting the definition that you  
5 gave Justice Kagan when she asked you what  
6 "person" would mean there? Is that just kind of  
7 what ordinary people would understand? Is that  
8 the Dictionary Act?

9 MR. SNYDER: It's both. I mean, I  
10 think the Dictionary Act definition comports  
11 with how an informed legal reader would  
12 understand the word "person" in most places, and  
13 we think that that -- that understanding makes  
14 sense in 1681q, so we think it makes sense that  
15 Congress could have plausibly used it in the  
16 same sense nearby in n and o.

17 JUSTICE BARRETT: Thank you, Mr.  
18 Snyder.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Jackson?

21 JUSTICE JACKSON: So I guess I  
22 perceive Employees as being structurally  
23 dissimilar in relevant ways in light of its  
24 amendment history, and so I'm hoping that you  
25 can comment on that.

1                   I mean, it seems to me that what  
2                   happened in Employees, to the extent that there  
3                   was some uncertainty about what Congress did, it  
4                   was because Congress amended the definitions  
5                   section, right, to include governments, and that  
6                   definitions section applied to a whole host of  
7                   things in the statute, the duties, the  
8                   liabilities, or whatnot, and so there was  
9                   palpable uncertainty on the Court's part as to  
10                  whether expanding -- what was it -- employers to  
11                  include government actually affected a waiver of  
12                  liability with respect to the liability section.

13                  It seems to me here, when we have the  
14                  amendment to the liability section expanding, as  
15                  you conceded previously, the liability section  
16                  to include other entities by use of the term  
17                  "person" that had been previously defined to  
18                  include government, we're actually accomplishing  
19                  a different result.

20                  It seems to me there isn't the same  
21                  kind of uncertainty in the relevant situation of  
22                  whether or not they intended to expand  
23                  liability, which is what we need for the purpose  
24                  of a waiver.

25                  Can you comment on that?

1           MR. SNYDER: Sure. So -- so two  
2 things in response. The first is that I -- I  
3 think this Court has ordinarily said you just  
4 look at the statute as it exists. I mean,  
5 Respondent has said you should look at it as it  
6 exists today.

7           JUSTICE JACKSON: But that's not what  
8 happened in Employees. So, if we're going to go  
9 with Employees, which -- which is what you --  
10 you're saying, we're going with that  
11 methodology, they didn't just do a plain text.  
12 They were talking about what Congress's intent  
13 was, isn't it strange that Congress amended it  
14 and didn't amend the liability provision. And  
15 what I'm saying is, here, they did.

16           MR. SNYDER: So I -- I think, if you  
17 want to look at that timing, I think the timing  
18 actually cuts the other way because, in  
19 Employ -- in Employees, what Congress was doing  
20 was taking a statute that already authorized  
21 civil liability against -- against employers and  
22 saying we want state agencies to be employers  
23 for purposes of this statute. We're going to --  
24 we're going to cover them under the same  
25 definition that until now has covered all



1 employers.

2           And so, in that circumstance, it might  
3 have been reasonable to think that Congress  
4 intended state agencies to be covered in exactly  
5 the same way as all other employers because  
6 Congress was specifically focused on state  
7 agencies. And yet --

8           JUSTICE JACKSON: Yes, but it wasn't  
9 focused on liability for this purpose. That's  
10 my only point. Can I ask you another question?

11           I guess I hear you suggesting that  
12 there has to be an express mention of the  
13 "federal government" in the provision. So I'm  
14 wondering, is the government not conceding that  
15 we have said that you can satisfy the clear  
16 statement rule by implication?

17           MR. SNYDER: No, we accept that you  
18 can establish it by implication. As the Court  
19 said in College Savings Bank, it has to be  
20 "overwhelming implication."

21           JUSTICE JACKSON: Right. But -- so an  
22 implication could occur when what? In other  
23 words, it seems to me here that there is no  
24 mention of sovereign immunity, so we're  
25 operating in implication land. The implication

1 is coming from the creation of a cause of action  
2 that applies to the government. You're arguing  
3 as to whether or not it applies to the  
4 government. No, you're not?

5 MR. SNYDER: No, we're not arguing --  
6 so --

7 JUSTICE JACKSON: Okay.

8 MR. SNYDER: -- we have a different  
9 action about what whether the cause of action  
10 applies to the government.

11 JUSTICE JACKSON: I see.

12 MR. SNYDER: But this part of the  
13 argument --

14 JUSTICE JACKSON: Okay.

15 MR. SNYDER: -- we say even if you  
16 think "person" includes the government, all that  
17 does is show that the cause of action applies to  
18 the government.

19 JUSTICE JACKSON: And isn't that  
20 enough to be the implication?

21 MR. SNYDER: No.

22 JUSTICE JACKSON: Why?

23 MR. SNYDER: Because the fact that you  
24 have a cause of action that covers a particular  
25 defendant doesn't speak one way or the other to

1 whether that defendant may have particular  
2 available defenses. No one would think it's  
3 strange that this cause of action applies to  
4 private parties that violated FCRA more than  
5 five years ago. By its plain terms,.

6 It absolutely covers them.

7 JUSTICE JACKSON: I -- I don't  
8 understand that. I mean, we're -- we're talking  
9 -- we start from the standpoint of, has there  
10 been a waiver of sovereign immunity? That's the  
11 question that we're asking to begin with.  
12 That's why we're engaged in this exercise.

13 So, when we start there, I'm not sure  
14 I understand whether or not there are other  
15 defenses available doing any work with respect  
16 to us trying to determine whether sovereign  
17 immunity has been waived.

18 MR. SNYDER: So this Court said in  
19 Meyer that the question of the -- the cause of  
20 action and the question of the defense of  
21 sovereign immunity are analytically distinct.  
22 And that's the --

23 JUSTICE JACKSON: So then there's no  
24 implication on the basis of the cause of action.

25 MR. SNYDER: No, there can be

1     implication.  I -- I know that I'm drawing fine  
2     lines, but, logically, there is an implication  
3     that Congress intends to waive sovereign  
4     immunity if it creates a cause of action that  
5     applies only to sovereign defendants or that  
6     expressly names sovereign defendants.

7                   JUSTICE JACKSON:  So it has to be  
8     explicit with respect to -- it -- it -- it can't  
9     be that they do so by naming all these other  
10    entities and adding in government.  Is that your  
11    point?  It has to either be stand-alone just the  
12    word "government" in the "person" definition, or  
13    it has to be written "government" in the actual  
14    1618n?

15                   MR. SNYDER:  Yes, because that is the  
16    only circumstance in which the statutory text  
17    that -- that refers to "government" would have  
18    no effect if the government were -- were able to  
19    assert sovereign immunity.

20                   JUSTICE JACKSON:  And where have we  
21    said that before?

22                   MR. SNYDER:  So I read the Court's  
23    decision in Financial Oversight and Management  
24    Board to say that.  I think that's the only way  
25    that you can reconcile cases like Kimel on the

1 one hand and Employees on the other, is to say  
2 that Congress distinguishes in this way.

3 And if you look at statutes like RCRA  
4 and the MPRSA that we point to at pages 22 to 24  
5 of our brief, Congress has done what we've said  
6 it could have done here. Congress has said it's  
7 authorizing suit against "any person," comma,  
8 "including the United States." We agree --

9 JUSTICE JACKSON: All right.

10 MR. SNYDER: -- that that gives rise  
11 to the implication.

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Mr. Joshi.

16 ORAL ARGUMENT OF NANDAN M. JOSHI

17 ON BEHALF OF THE RESPONDENT

18 MR. JOSHI: Mr. Chief Justice, and may  
19 it please the Court:

20 The Fair Credit Reporting Act imposes  
21 civil liability on any person that negligently  
22 or willfully fails to comply with FCRA's  
23 requirements. It expressly defines "person" to  
24 include any government agency. The term  
25 "person" is equivalent to its definition, and

1 when FCRA's definition of "person" is plugged  
2 into FCRA's civil liability provisions, those  
3 provisions create causes of action against  
4 federal agencies that are clear and specific  
5 enough to waive sovereign immunity.

6 Congress was not required to state  
7 that "persons" include federal agencies a second  
8 time in the cause of action to make its intent  
9 clear. Congress knew what it was doing when it  
10 amended FCRA in 1996. When it did so, it  
11 consistently used the term "person" to describe  
12 both who would be subject to FCRA's substantive  
13 duties and who would be subject to FCRA's  
14 enforcement mechanisms.

15 Interpreting "person" to mean  
16 something different in the enforcement  
17 provisions would make FCRA's substantive duties  
18 completely unenforceable against governmental  
19 furnishers.

20 Moreover, Congress knew how to and did  
21 choose words to alter the scope of liability  
22 where it wanted to do so. Thus, where  
23 Section 1681n generally provides for damages  
24 against "any person," 1681n(a)(1)(B) creates a  
25 special remedy for certain violations by a

1 natural person. That was a -- an amendment in  
2 1996 as well.

3 Congress also expressly limited the  
4 government's liability in FCRA's sister statutes  
5 in the Consumer Credit Protection Act. It did  
6 not do so in FCRA, indicating that Congress  
7 intended no such limitation.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Counsel, the --  
10 there's much discussion about Employees, and I'd  
11 like you to address that, what the government  
12 argued, but I'd also like you to consider  
13 addressing whether or not the -- what's  
14 necessary to -- for the government to abrogate  
15 state sovereign immunity, whether that standard  
16 is the same as the standard for waiving its own  
17 sovereign immunity.

18 MR. JOSHI: Sure. So, on Employees, I  
19 think the best sort of empirical evidence of its  
20 continuing force are the five courts of appeals  
21 that have addressed this very issue, the -- the  
22 question of whether FCRA waives sovereign  
23 immunity.

24 That -- there's a 3-2 circuit split on  
25 that. The government has raised Employees in

1 each one of those cases. Not one single court,  
2 not even the two that agree with the  
3 government's position, thought *Employees* was  
4 worth discussing. It's -- it's too out -- I --  
5 I suggest that's because it's -- the analysis  
6 does not comport with how the Court reads  
7 statutes in the modern era.

8           *Employees*, as I read it, was telling  
9 Congress how to craft an amendment to make its  
10 intent clear. The -- the modern -- the -- sort  
11 of the current way the Court discerns  
12 congressional intent is to look at the  
13 provisions as a whole, the amending provisions,  
14 as well as the original provisions, and construe  
15 them together. And *Employees* is inconsistent  
16 with that.

17           The other thing to point --

18           JUSTICE KAVANAUGH: I'm sorry. I -- I  
19 -- I don't understand that, really, looking at  
20 *Employees*, because it relies on the text of the  
21 provision and says that because the addition of  
22 public employees -- employers was in a separate  
23 definitional provision, that wasn't good enough.

24           And then the dissent echoes your  
25 argument. Justice Brennan's dissent says that



1 it's the sheerest sort of ritualism to suggest  
2 that Congress excluded the states from 16(b)  
3 suits by not expressly referring to the states  
4 in 16(b). In other words, Justice Brennan was  
5 saying you're being too textualist, majority  
6 opinion, in -- in how you're going about this.  
7 And the majority said -- I read it as  
8 establishing a principle -- well, we're going to  
9 draw the line here. If it's just in the  
10 definitional section, that's not good enough for  
11 a waiver.

12 MR. JOSHI: So Employees started off  
13 by looking at the legislative history to discern  
14 what Congress wanted to do when it amended the  
15 FLSA in -- in 1966.

16 JUSTICE KAVANAUGH: The -- the  
17 principle rested on the text. I mean, I  
18 acknowledge that then it went on to the  
19 legislative history. It might have had an even  
20 looser standard for waiver of sovereign immunity  
21 than we now apply. But, even under that looser  
22 standard, the Court said no, no waiver.

23 MR. JOSHI: Well, the -- the textual  
24 part of Employees --

25 JUSTICE KAVANAUGH: And so a fortiori

1 --

2 MR. JOSHI: Yeah.

3 JUSTICE KAVANAUGH: -- you're in  
4 trouble if -- if we take Employees seriously.  
5 At least I want you to respond to that.

6 MR. JOSHI: Sure. I -- I -- I do  
7 think the text -- the textual part of Employees,  
8 which indicated the Court would find it  
9 surprising, I think that's the exact quote, if  
10 Congress chose to amend the FLSA but did not  
11 amend it in this way. Now the Court says that  
12 Congress does not have -- have to use magic  
13 words and it doesn't have to use a magic  
14 structure, I would say, doesn't have to state  
15 its intent in any particular way.

16 JUSTICE KAVANAUGH: Well, do you still  
17 agree there's a clear statement rule that can  
18 override the better reading of the text?

19 MR. JOSHI: There is a clear statement  
20 rule. We don't fight that. I don't think --

21 JUSTICE KAVANAUGH: Can it -- can it  
22 override the better reading of the text?  
23 Because that is the meaning --

24 MR. JOSHI: Yes. No, we --

25 JUSTICE KAVANAUGH: -- of a clear

1 statement rule.

2 MR. JOSHI: -- we don't question that  
3 there has to be one plausible meaning of the  
4 text in order for us to prevail.

5 JUSTICE KAVANAUGH: Okay. I think --

6 MR. JOSHI: But let me just --

7 JUSTICE KAVANAUGH: -- I interrupted  
8 you before you answered Justice Thomas's --

9 MR. JOSHI: Yeah. Well, the other --

10 JUSTICE KAVANAUGH: -- question about  
11 federal versus states, so you go ahead.

12 MR. JOSHI: Sure. Well, the other --  
13 one last thing I would point out about Employees  
14 before I turn to federal versus state is that a  
15 critical part of Employees was that the  
16 government could -- the federal government could  
17 still enforce the FLSA against the states. The  
18 government's argument here takes us a step  
19 further and says no one, not even the federal  
20 government or the state governments, can enforce  
21 Employees against any governmental furnishers  
22 because the term "person" does not apply -- the  
23 definition of "person" does not apply to 1681s,  
24 which is the administrative enforcement  
25 provision. So this would be a step beyond

1 Employees.

2           On the federal versus state issue,  
3 Congress -- I -- I don't think there's a  
4 different textual standard in this Court's cases  
5 between waiving sovereign immunity and  
6 abrogating state immunity. It's simply that  
7 what Seminole Tribe and its progeny hold is that  
8 where there's a conflict between what Congress  
9 wants and what the state wants, the state wins  
10 absent -- unless the -- it's in a few discrete  
11 areas where the Constitution abrogates state  
12 sovereign immunity or it's a Fourteenth  
13 Amendment case.

14           But, if this statute were in the  
15 Fourteenth Amendment context, I think this  
16 language would be sufficient to abrogate state  
17 sovereign immunity just as it waives federal  
18 sovereign immunity.

19           CHIEF JUSTICE ROBERTS: Counsel, it --  
20 I think it's an unavoidable consequence of your  
21 interpretation that the statute authorizes  
22 criminal prosecution of the United States.

23           Now, if there were such a prosecution  
24 and the United States were convicted, what would  
25 the pre-sentencing report look like?

1 (Laughter.)

2 MR. JOSHI: So, as a technical matter,  
3 I -- I would say the proper defendant in a FCRA  
4 action would be an agency, not the United States  
5 itself. That said, I don't think this Court has  
6 squarely held how far the federal -- the absence  
7 of criminal liability for federal -- for  
8 governmental entities extends. Last year, in  
9 Halk Bank, you -- I think you said that criminal  
10 law can apply to foreign states and their arms.  
11 I don't -- I don't think you've said that in the  
12 context of domestic agencies.

13 In Bennett versus Spear, you suggested  
14 that perhaps agencies could be criminally --  
15 criminally liable or civilly liable for failing  
16 to -- to adhere to a biological opinion.

17 CHIEF JUSTICE ROBERTS: So -- so you  
18 agree that your -- your reading of the statute  
19 leads to that result, that -- that a criminal  
20 prosecution can be brought against the United  
21 States, whether it's through a United States  
22 agency or the nation as a whole?

23 MR. JOSHI: That -- that is one  
24 reading. This -- this Court -- I mean, I can't  
25 say it's absurd since this Court has not said it

1 -- it's absurd previously. That said, I -- I --  
2 the easier path I think for this Court would be  
3 to follow what Judge Katsas said in the D.C.  
4 Circuit in the Mowrer decision, what Judge  
5 Krause said below, which is that any contextual  
6 reason you might have for disregarding an  
7 otherwise controlling statutory definition in  
8 the criminal context is unique to the criminal  
9 context.

10 JUSTICE KAGAN: Well, but how --

11 JUSTICE KAVANAUGH: Why is that?

12 JUSTICE KAGAN: -- does that work? I  
13 mean, n and o and q are all added at the same  
14 time. We can add s to that too because s raises  
15 its own anomalies. They're all -- they're all  
16 enacted at the same time. And -- and they're  
17 all different kinds of liability provisions.

18 And you're essentially saying -- and  
19 you're right that Judge Krause said this below,  
20 Judge Katsas said it, but you're saying, well,  
21 you -- you know, it fits with n and o, so we'll  
22 use one interpretation there. It doesn't fit  
23 with q, so we'll use a different interpretation  
24 there.

25 MR. JOSHI: So -- so one correction.

1 Q stems from the original 1970 act that enacted  
2 the definition of "person." The 1996 Act,  
3 Congress amended the civil liability provision  
4 and amended the administrative enforcement  
5 provision to extend -- authorize enforcement  
6 against persons. But it didn't -- it didn't add  
7 in the term "person" in 1681q in 1996. That's  
8 --

9 JUSTICE KAGAN: Okay.

10 MR. JOSHI: It enhanced the penalties  
11 in that provision. With that said, each --  
12 there's no -- I think, well, the civil -- q  
13 rests as sort of a stand-alone self-contained  
14 provision. It doesn't interact with the rest of  
15 the FC -- the rest of the FCRA in any way.

16 It contains its own substantive  
17 prohibition and its own criminal penalties,  
18 whereas you have the liability provisions and  
19 the enforcement provisions, which are designed  
20 to enforce the substantive --

21 JUSTICE KAVANAUGH: But you're --

22 MR. JOSHI: -- provisions of FCRA.

23 JUSTICE KAVANAUGH: -- to pick up on  
24 the Chief Justice's question, it's not just  
25 criminal prosecution against the United States,

1 it's punitive damages against the United States,  
2 very unusual. State and federal enforcement  
3 against the United States would be contemplated  
4 if we took your interpretation.

5 There's an express waiver in another  
6 provision that was enacted months earlier, the  
7 -- the government says that's an anomaly. The  
8 Privacy Act is a carefully reticulated scheme  
9 for imposing liability on the government for  
10 Privacy Act violations. They're saying that you  
11 would create this anomaly.

12 So there's a string of anomalies that  
13 the other -- that the government says would be  
14 created by -- by your position.

15 MR. JOSHI: Well, I think the only one  
16 that qualifies as even a debatable anomaly would  
17 be 1681q. The government -- it just doesn't --  
18 I don't think they've made any --

19 JUSTICE JACKSON: I thought your --

20 MR. JOSHI: -- case about what --

21 JUSTICE JACKSON: -- I thought the  
22 answer was that it's not that the definition is  
23 shrinking or expanding provision by provision  
24 the definition of "person," that you can have  
25 this group of entities that are defined



1       statutorily as persons and that carries  
2       throughout the whole statute.

3               But there may be various provisions in  
4       which subsets of persons are carved out because  
5       they have other defenses. I mean, just because  
6       "person" is there doesn't mean that, you know,  
7       every person will automatically and always be  
8       subject to the entirety of that separate  
9       provision.

10              As the government said, they could  
11       have separate defenses. They could have other  
12       reasons why they're not subject to criminal  
13       liability even though they're still persons for  
14       the purpose of the statute.

15              So, if that's happening, then the  
16       government's observation that in certain parts  
17       of the statute persons are not going to -- to --  
18       or governments, even though they're persons, are  
19       not going to be subject to that part of the  
20       statute, it seems to me, doesn't really help  
21       their argument because, as Justice Gorsuch said,  
22       we don't see even that happening in n and o,  
23       which is really all that is at issue here.

24              MR. JOSHI: Right. I think the  
25       government argument really tries to focus on

1 provisions away from n and o because there is no  
2 textual basis in looking at n and o for not  
3 applying the definition as written.

4 JUSTICE JACKSON: And there's no real  
5 basis for suggesting that -- that  
6 notwithstanding the statute saying that  
7 "persons" is defined at -- in this way  
8 throughout the entirety of the provision,  
9 sometimes it's not really defined this way.

10 It seems to me that is an implausible  
11 reading of the text of the statute that very  
12 clearly defines the term and says it applies  
13 everywhere.

14 So, if it's not actually operative in  
15 certain places, it's not because the definition  
16 has changed. It's because something else is  
17 going on that would prevent that consequence  
18 occurring in that particular circumstance.

19 MR. JOSHI: I think that's right. For  
20 example, in 1681g, subsection g, Congress has an  
21 expressed alternative definition of "person" for  
22 purposes of that provision. That doesn't mean  
23 somehow n and o become ambiguous in terms of  
24 where the definition applies.

25 JUSTICE KAVANAUGH: Do you -- do you

1 --

2 CHIEF JUSTICE ROBERTS: Well, it's not  
3 only --

4 JUSTICE KAVANAUGH: -- do you think --

5 CHIEF JUSTICE ROBERTS: -- that you  
6 think that it's right, but under our sovereign  
7 immunity precedent, that has to be the only way  
8 of reading it?

9 In other words, there's no other way  
10 and all these other areas where "person" doesn't  
11 actually mean person the way it's defined in the  
12 statute but means much less, and there's not  
13 just one, there's two, there's three, and you  
14 have to say that changing the reading of  
15 "person" is the only way you could read that  
16 because, if it isn't, then there is -- then  
17 sovereign immunity, it seems, is implicit in the  
18 statute in a way that other provisions may not  
19 be.

20 MR. JOSHI: Well, I -- assuming the --  
21 the hypothetical, which is that there are  
22 variations in what "person" means throughout the  
23 statute --

24 CHIEF JUSTICE ROBERTS: It's not my  
25 hypothetical, but go ahead.

1           MR. JOSHI: Yes. The -- the fact  
2 remains, if the Court's going to depart from the  
3 otherwise controlling definition, it looks to  
4 something else in the statute that provides a  
5 countervailing argument.

6           For example, Utility Air was brought  
7 up. The Court looked to provisions of the  
8 statute that said, if we apply the definition of  
9 "air pollutant" to these provisions, we have an  
10 unworkable statute.

11           And to the extent you conclude that  
12 "person" doesn't apply to 1681q because that's  
13 unworkable or improbable that Congress intended  
14 to extend criminal liability this far, that is a  
15 -- that is an argument, an interpretation that  
16 would be limited to 1681q.

17           CHIEF JUSTICE ROBERTS: Well, you say  
18 in the statute, but I guess the argument is that  
19 there can be limitations outside the statute  
20 that would apply as well.

21           And I'm thinking in particular of our  
22 decision in the Bond case, the -- the -- the  
23 chemical on the doorknob that is under one  
24 interpretation, perhaps literal interpretation  
25 of the statute would be covered by the Chemical

1 Weapons Treaty. And we said that sometimes  
2 arguments like, well, that seems pretty  
3 implausible can trump what would otherwise be a  
4 pretty precise reading of the statutory  
5 language.

6 MR. JOSHI: Well, that's right. I  
7 think Bond -- Bond is a good foil for this case.  
8 The Court found -- your -- your opinion for the  
9 Court found that the statute was ambiguous.  
10 And, I mean, I agree that if this statute is  
11 ambiguous, then the -- the sovereign immunity  
12 canon favors the government.

13 But if -- but the -- the -- there, the  
14 definition the Court called "improbably broad,"  
15 there's nothing "improbably broad" about  
16 defining "person" to include the government.  
17 The Court has said, if Congress wants to not  
18 have the ordinary meaning of "person" applied --

19 CHIEF JUSTICE ROBERTS: Well, I -- I  
20 would have thought -- sorry to interrupt, but  
21 I -- I would have thought it's -- the  
22 improbability comes from the argument that this  
23 would mean you can prosecute the United States,  
24 it can mean that you can get damages from the  
25 United States and so on and so forth.

1           MR. JOSHI: Well, even if prosecuting  
2 the United States is improbable, seek --  
3 obtaining damages from the United States is not  
4 improbable. Congress waived sovereign immunity  
5 in a number of statutes.

6           CHIEF JUSTICE ROBERTS: Well, it's  
7 pretty improbable for the statute to authorize  
8 the FTC to seek damages from the United States,  
9 which is what it does.

10          MR. JOSHI: Well, the Equal Credit  
11 Opportunity Act, I think, does the same thing.  
12 It set up the same sort of enforcement  
13 mechanism. There are other -- there are other  
14 statutory schemes that authorize  
15 intergovernmental liability, the -- our Resource  
16 Conservation Recovery Act --

17          JUSTICE KAVANAUGH: You -- keep going.

18          MR. JOSHI: No. I -- I --

19          JUSTICE KAVANAUGH: Okay. You -- you  
20 said at the beginning and I think just now that  
21 Congress knew what it was doing when it amended  
22 the Act. But I don't think it realized that it  
23 was imposing this liability. If you look at the  
24 CBO, Congressional Budget Office, reports,  
25 there's no mention of anything, any liability

1 like this.

2           And they carefully analyze how much  
3 the additional costs would be for the executive  
4 branch in enforcement and the judicial branch in  
5 handling the additional cases. So -- and the  
6 CBA -- CBO score, as you know and anyone  
7 familiar with that process knows, is very  
8 important for Congress. So I -- I don't think  
9 it's right to say Congress knew what it was  
10 doing.

11           You may -- could still win without  
12 that, but I think that's not -- not correct,  
13 unless you want to respond to that in some way.

14           MR. JOSHI: Well -- well, I don't  
15 think the CBO is itself Congress. And Congress  
16 --

17           JUSTICE KAVANAUGH: Correct.

18           MR. JOSHI: I mean, what -- what is --

19           JUSTICE KAVANAUGH: But they do -- do  
20 you challenge that Congress relies on the CBO  
21 score when it's doing legislation?

22           MR. JOSHI: No, it's -- it's -- it's  
23 part --

24           JUSTICE KAVANAUGH: Yeah.

25           MR. JOSHI: -- of the committee

1 reports.

2 JUSTICE KAVANAUGH: Yeah, I think you  
3 have to acknowledge that.

4 MR. JOSHI: I -- I -- I -- I accept  
5 the proposition that the legislative history  
6 doesn't say one thing or another about sovereign  
7 immunity.

8 The -- the -- the legislative history  
9 does talk about the purpose of the statute, and  
10 that is consistent with a conclusion that  
11 Congress wanted to hold the government liable  
12 just as any private furnisher of information  
13 would be for -- for failing to comply with their  
14 FCRA duties.

15 JUSTICE KAVANAUGH: Can I -- can I  
16 also, on a different tack, Justice Gorsuch  
17 raised an important question, I thought, about  
18 the federal versus state sovereign immunity, and  
19 you heard I -- I mentioned separation of powers.

20 My understanding was that the reason  
21 we have that is because taxpayer money is -- is  
22 valuable and we should be sure it's been  
23 appropriated before we funnel a bunch of money  
24 out of the Treasury. That's both to ensure that  
25 money can be spent on other programs because



1 it's not limitless money in the Treasury, and  
2 it's to ensure otherwise that taxes aren't  
3 raised. So we have to be very careful before we  
4 overstep, as basic separation of powers.

5 Do you dispute any of that?

6 MR. JOSHI: Not at all. You have two  
7 principles that are designed to protect that  
8 interest. One is the sovereign immunity canon.  
9 So, if the -- a statute is ambiguous, the  
10 sovereign immunity canon would say even the --  
11 the government gets the benefit of ambiguities  
12 even if that's not the best reading of the  
13 statute.

14 And the second one is the specificity  
15 requirement, so a broad statute cannot waive  
16 sovereign immunity. The -- the statute must  
17 discuss governmental entities specifically,  
18 which the definition here does.

19 JUSTICE GORSUCH: Counsel, I guess I'm  
20 a little confused why -- I mean, I -- I can  
21 understand that you don't need to make the  
22 argument to prevail in your view, but I -- I'm  
23 not sure I understand your response to Justice  
24 Kavanaugh from first principles.

25 Sovereign immunity serves many

1 important purposes in respecting other  
2 institutions, states, tribes, foreign  
3 governments. It's inherent in our  
4 constitutional design, embodied in the Tenth  
5 Amendment even, for example.

6 But, when it comes -- if -- if we're  
7 worried about protecting the federal fisc, I  
8 would have thought that the answer might be  
9 Congress is in the best position to do that.  
10 Article I gives them power over the federal  
11 fisc. And we have no license to expand or  
12 contract its instructions artificially but  
13 follow them in -- instead faithfully.

14 MR. JOSHI: I mean, that's right. At  
15 bottom, this is a policy choice for Congress to  
16 make.

17 JUSTICE GORSUCH: One would have  
18 thought.

19 JUSTICE KAVANAUGH: Why is there a  
20 clear statement rule then?

21 MR. JOSHI: Well, just as with other  
22 policy choices, the Court -- if the -- the area  
23 is a particularly sensitive one, the Court wants  
24 --

25 JUSTICE KAVANAUGH: Why -- why -- why

1 is it sensitive?

2 JUSTICE GORSUCH: What isn't  
3 sensitive?

4 JUSTICE KAVANAUGH: Why -- why is it  
5 sensitive? Focus on that if you could.

6 MR. JOSHI: Well, I -- I think the  
7 Court takes holding the government liable,  
8 especially for damages, seriously. So it wants  
9 -- doesn't want to construe ambiguous text in --  
10 in a way that may be different than Congress  
11 understood ambiguous text. But, when the text  
12 is clear, that's a different matter altogether.

13 When there's only one plausible  
14 interpretation of the text under traditional  
15 rules of statutory interpretation, the Court  
16 shouldn't be applying a different interpretation  
17 of the statute.

18 JUSTICE KAGAN: Some of our cases have  
19 suggested that the reason we have a clear  
20 statement rule is to, in this area, prevent the  
21 waiver of sovereign immunity accidentally, you  
22 know, that there has to be -- it can't be  
23 through inadvertence that Congress has waived  
24 sovereign immunity.

25 So you could look at this statute and

1 especially the q problem and so forth and say  
2 that the waiver was -- was accidental, it was  
3 inadvertent, and that's exactly what the clear  
4 statement rule tries to prevent. So what would  
5 -- what -- what would be your best counter to  
6 that?

7 MR. JOSHI: So I have two counters.  
8 One is about statutory interpretation. One is  
9 FCRA-specific.

10 The first one is I -- I -- I don't see  
11 how you have a workable principle of statutory  
12 interpretation that looks behind clear text to  
13 say, did Congress really mean this?

14 So, for example, if the 1996 Act had  
15 reenacted the definition of "person" word for  
16 word, if the committee report had said we're  
17 doing this because we want to make clear the  
18 government is liable, this -- the words of the  
19 U.S. Code would be the -- exactly the same.  
20 But, under a rule that looks behind the text,  
21 the -- the outcome would be completely  
22 different.

23 And the FCRA-specific argument is -- I  
24 mean, here, you have a situation, as I mentioned  
25 in my opening, Congress didn't just sort of make

1 a single amendment to the -- to FCRA. It  
2 amended the civil liability provision to extend  
3 to "persons" in Section 2412 of the 1996  
4 amendment. On the very next page on the very  
5 next section, 2413, it used the word "person" to  
6 extend furnisher obligations onto those who  
7 furnish information to consumer reporting  
8 agencies.

9 And I think it -- it's fairly  
10 implausible that when Congress turned the page,  
11 it somehow, using the same word, intended a  
12 different definition of the term to apply.

13 JUSTICE ALITO: Could I ask you a  
14 couple questions about Employees? First,  
15 suppose that Employees had decided the very  
16 issue that is before us now. Would you say that  
17 we should disregard it because it used an  
18 outmoded method of statutory interpretation?

19 MR. JOSHI: Well, if Employees had  
20 decided the Fair Credit Reporting Act, I -- I  
21 think there was an argument for statutory stare  
22 decisis that might still apply to the FLSA, but  
23 since -- since that doesn't apply here, I -- I  
24 would -- I think the Court should and has in the  
25 past in the case of implied causes of action,

1 has -- has rejected prior methods of  
2 interpretation that -- that had become outmoded.

3 JUSTICE ALITO: And was that a "yes"  
4 or a "no"?

5 MR. JOSHI: I --

6 JUSTICE ALITO: Or maybe?

7 MR. JOSHI: -- may have lost the  
8 thought on the original question, but I --

9 JUSTICE ALITO: Yeah. If it involved  
10 the very question that is before us now --

11 MR. JOSHI: Yeah.

12 JUSTICE ALITO: -- would -- do you  
13 think we should -- we would disregard it or we  
14 should disregard it because we disagree with the  
15 method of statutory interpretation?

16 MR. JOSHI: If it's the very question  
17 in a different statute, my answer would be the  
18 same. The Court should not follow *Employees* and  
19 should instead apply -- read the statute the way  
20 it currently reads statutes.

21 JUSTICE ALITO: Okay. That's my -- I  
22 think you -- you went into my second question.  
23 Suppose that the statute is different, but the  
24 structure -- the wording and the structure in  
25 all relevant respects is the same. Do you think

1 we should disregard it because of its method of  
2 statutory interpretation?

3 MR. JOSHI: Yes, I think you should.  
4 I -- I -- I -- when -- now, when you say the  
5 same, there are a lot of differences between the  
6 statute there and here, but just to answer your  
7 hypothetical, you shouldn't follow a method of  
8 interpretation that you had rejected previously  
9 in -- in construing a new statute.

10 JUSTICE ALITO: There are a lot of  
11 important decisions from the 1970s and the 1980s  
12 that use a method of statutory interpretation  
13 that is probably not the one that we would use  
14 if those questions came before us today. You  
15 think we -- we should just disregard all those?  
16 They're all fair game? Are they all fair game?

17 MR. JOSHI: I -- I -- I think the --  
18 it's open to certainly litigants to argue that  
19 the Court should -- the statutes say something  
20 different.

21 JUSTICE KAGAN: Well, the answer to  
22 that question has got to be no, right, Mr.  
23 Joshi?

24 (Laughter.)

25 JUSTICE KAGAN: I mean, we're not

1 going to throw out all our precedents because  
2 we've decided that there's a better way to  
3 interpret statutes.

4 MR. JOSHI: No. No, that's right. I  
5 mean, I'm not talking about an over --

6 JUSTICE KAGAN: So you have to be  
7 saying that this is a different statute, and you  
8 are saying that it has a different structure,  
9 right?

10 MR. JOSHI: I'm saying both of those  
11 things. I -- I -- maybe I misread the --  
12 misunderstood the hypothetical.

13 JUSTICE KAVANAUGH: I didn't think you  
14 said it had a different structure. I thought  
15 you said that the methodology used --

16 MR. JOSHI: No, the statute had --

17 JUSTICE KAVANAUGH: -- a methodology  
18 --

19 MR. JOSHI: Well, the statute has a  
20 different structure because, in Employees, the  
21 government could still enforce the FLSA against  
22 states. That was an important part of the  
23 Employees decision.

24 JUSTICE KAVANAUGH: What -- what do  
25 you do -- you've treated Employees as if it's



1 this one-off outlier, but then, in subsequent  
2 cases, like Union Gas, it seems like the same  
3 principles, accepted by all nine justices there,  
4 in other words, the specific reference to states  
5 in the original Act in Union Gas, the Court goes  
6 out of its way to say that alone -- in the  
7 definitional provisions, that alone would not  
8 have been good enough to do it and cites --  
9 cites Employees.

10 And then, in College Savings Bank, the  
11 Court makes a big point that Employees started  
12 the retreat from Parden, which was a much looser  
13 standard for waiver of sovereign immunity. So  
14 it's not an out -- you know, it's not just this  
15 case that has never been cited again.

16 MR. JOSHI: It hasn't been cited for  
17 the statutory interpretation point, I think,  
18 until -- in any subsequent -- in -- since the  
19 late '80s. I think, in -- in Union Gas, you're  
20 -- you're correct, the statute was written  
21 differently. There was additional language in  
22 the definitions section that -- that -- that was  
23 dispositive to the Court's analysis there.

24 So the Court didn't have to sort of  
25 reach out and, you know, try to address the

1 question the Court might have to address here,  
2 which is how viable is that sort of method of  
3 interpretation. And --

4 JUSTICE KAVANAUGH: By method of  
5 interpretation -- I just want to get back to  
6 this because I -- I -- it mentions the text and  
7 it mentions this principle we don't lightly  
8 interpret the text to waive sovereign immunity.  
9 And then there's nothing else that would suggest  
10 -- in the history of it, suggest a waiver  
11 either. I don't -- that sounds like an opinion  
12 you could write now and has been written now.

13 MR. JOSHI: Well, there's nothing in  
14 Employees that sort of grapples with why the  
15 statutory definition in that case was not --  
16 does not meet the clear statement standard.

17 JUSTICE KAVANAUGH: I -- I thought it  
18 said because the reference to government, to  
19 public employee -- employers was not in the --  
20 in the cause of action provision.

21 MR. JOSHI: Well, that -- that -- if  
22 that's how Employees is read, then that is  
23 inconsistent, I would argue that with what the  
24 Court has said since, which is that Congress can  
25 state its intent in any way it wants.

1                   And if you simply foreclose use of  
2     statutory definitions in -- in -- in Congress's  
3     ability to state -- state its intent, I think --

4                   JUSTICE KAVANAUGH:  It's a thin line,  
5     but the line has been between in the cause of  
6     action provision itself is the explicit  
7     reference and in a separate definitional  
8     provision, as in -- as in Employees and  
9     mentioned in Union Gas as well, that's  
10    different.

11                   Now that's a thin line.  I might not  
12    have come up with that if I were starting from  
13    scratch, but --

14                   JUSTICE JACKSON:  But is it -- is it  
15    really a line at all?  I mean, what if -- what  
16    if we have the definition provision in -- the  
17    definition provision next to the cause of action  
18    provision?

19                   I mean, here, it's in a, fine.  But  
20    you can imagine a world in which they write  
21    1681n and 1 is the provision that says "any  
22    person willfully," et cetera, and 2 is "person"  
23    means, and they list out the statute, list out  
24    the entities.

25                   I mean, I -- I think it's -- it's so

1 fine a line that it probably is nonexistent  
2 from -- from the standpoint of really  
3 understanding what's going on.

4 MR. JOSHI: I do think it's a fairly  
5 arbitrary line if you hold onto it, if you can  
6 say -- you try to refashion Employees into the  
7 modern era and say this is the line we're going  
8 to draw in terms of telling Congress how it  
9 needs to write a statute, do not put your --  
10 your -- your -- identify your -- the  
11 government's -- any governments in the statutory  
12 definition, put it in the cause of action, then  
13 that's -- that's -- that's one thing.

14 JUSTICE KAVANAUGH: It's a --

15 MR. JOSHI: But --

16 JUSTICE KAVANAUGH: -- it's a good  
17 point. It's exactly the Brennan dissent, but I  
18 said that before, but, yeah.

19 MR. JOSHI: But the -- I mean, once  
20 again, I would point out that none of the courts  
21 of appeals that have addressed this issue read  
22 Employees that way. They --

23 JUSTICE KAVANAUGH: Well, two of --

24 MR. JOSHI: Two of them don't even --

25 JUSTICE KAVANAUGH: -- two of the --

1 MR. JOSHI: -- cite -- cite it.

2 JUSTICE KAVANAUGH: Yeah, they don't  
3 cite it. And in at least one, D.C., it wasn't  
4 even raised. I'm not sure what happened there.

5 MR. JOSHI: It -- it was raised in the  
6 oral argument in D.C.

7 JUSTICE KAVANAUGH: Yeah, but not in  
8 the briefs. It wasn't raised.

9 MR. JOSHI: Right. That's correct.  
10 That's the only court that it wasn't in the  
11 briefs.

12 JUSTICE SOTOMAYOR: Now us setting  
13 forth a statement like that, you need to do  
14 this, would be contrary to our -- all the  
15 jurisprudence in which we say you don't need  
16 magic words, correct?

17 MR. JOSHI: I think so. I mean, the  
18 way I see it is that the Court is reluctant to  
19 tell Congress how to craft legislative language  
20 because that is inherently tied to policymaking,  
21 which is inherently an Article I type of  
22 function.

23 And so even though the Court, you  
24 know, will interpret the words Congress does  
25 use, it -- it's not going to tell Congress, for

1 example, if you list out sovereigns in a  
2 definition, you better include Indian tribes or  
3 else we're going to assume you don't mean it.

4           It's going to -- what -- what's --  
5 what the Court's going to do, as it did in Lac  
6 du Flambeau, is to say we're going to take the  
7 words Congress has given us and we're going to  
8 interpret it. If it's ambiguous, the government  
9 gets the benefit of the doubt. If it's not  
10 ambiguous, we're going to give the text its  
11 plain meaning.

12           And -- and this text is not ambiguous.

13           JUSTICE JACKSON: Do -- do you -- do  
14 you take any stock on the amendment history? I  
15 mean, you know, I -- I appreciate the plain  
16 meaning, we just look at the statute and see  
17 what it says, and maybe, in that world, it is  
18 parallel to Employees.

19           But Employees seemed to put some stock  
20 in the amendment history as it analyzed what was  
21 going on, saying that it -- it was surprised  
22 that Congress had not amended the cause of  
23 action.

24           And, here, we have an amendment  
25 history that shows that Congress was amending

1 the cause of action. And so, if our ultimate  
2 question is -- are -- how do we -- how -- how  
3 and whether we should be implying some kind of  
4 intention on Congress's part to extend the cause  
5 of action to government, is the amendment  
6 history relevant at all?

7 MR. JOSHI: Well, I think it  
8 definitely is relevant that Congress amended the  
9 cause -- cause of action. Even if you take  
10 Employees at face value, that should be  
11 sufficient. I think the other things that go  
12 along with that are the fact that Congress  
13 amended the cause of action at the same time it  
14 imposed substantive duties on governments.

15 And I think the other thing to keep in  
16 mind is that governments are not strangers to  
17 the FCRA. The -- Congress accommodates the  
18 government's interests throughout the statute,  
19 creating exemptions for them, for example, in  
20 the national security area, exemptions in terms  
21 of the adverse action response requirements that  
22 apply to persons, the government has -- in  
23 the -- in the -- in the context of national  
24 security, Congress has created an exemption for  
25 them.

1           And then I -- I would indicate again  
2     in -- in other -- other statutes in the Consumer  
3     Credit Protection Act, Congress knew how -- it  
4     showed it knows how to create exemptions for the  
5     government. TILA, the -- the Truth in Lending  
6     Act, extends liability to all creditors.  
7     Congress said we don't want -- even though the  
8     government is a creditor as defined in that  
9     statute, we don't want liability to be imposed,  
10    so we're going to create a carve-out for that  
11    for the government.

12           In the Equal Credit Opportunity Act,  
13    Congress enacted that without any exceptions for  
14    the government two years later in 1976, and --  
15    and that was an act two years -- one year after  
16    Employees.

17           In 1976, they said we don't want  
18    punitive damage to be imposed on the government,  
19    so it carved out a --

20           JUSTICE JACKSON: Thank you.

21           CHIEF JUSTICE ROBERTS: Thank you,  
22    counsel.

23           Justice Thomas?

24           Justice Alito?

25           JUSTICE ALITO: Just assume for the



1     sake of argument that "person" in q does not  
2     include the government. Could you just give me  
3     your best answer to the argument that n and o  
4     should be treated the same way?

5             MR. JOSHI: N and o deal with civil  
6     liability, which deals with the substantive  
7     provisions of the statute, all of which use  
8     "person" consistently to include the government.  
9     It's a different context entirely.

10            CHIEF JUSTICE ROBERTS: Justice  
11     Sotomayor?

12            JUSTICE SOTOMAYOR: Do you think q  
13     doesn't deal with the government because the  
14     government can't be jailed, or do you think it  
15     doesn't include the government for what other  
16     reason?

17            MR. JOSHI: We would -- if -- if  
18     that -- if the case were before me, I would say  
19     it includes the government because Congress did  
20     not create an exemption like it did in the Truth  
21     in Lending Act for governmental criminal  
22     liability.

23            JUSTICE SOTOMAYOR: Well, correct.  
24     And there's all sorts of statutes that I  
25     mentioned earlier, the Clean Water Act being the

1 primary one, where the government is included in  
2 the criminal provision, and it speaks about  
3 jailing and imprisonment.

4 MR. JOSHI: Right.

5 JUSTICE SOTOMAYOR: And we just  
6 don't imply -- we just don't apply the jailing  
7 part because you can't jail a corporate entity,  
8 correct, or a --

9 MR. JOSHI: It would be the same  
10 analysis for corporate entities and the  
11 government. The --

12 JUSTICE SOTOMAYOR: So there's -- it's  
13 not that you're reading "person" differently in  
14 q. You're just saying that some remedies can't  
15 be applied?

16 MR. JOSHI: I think -- well, I think  
17 that's right. There are a number of ways to  
18 deal with q. I don't think it's just we have  
19 arguments in the alternative, including the ones  
20 adopted below which say that q is -- does not  
21 have -- and does not speak to the civil  
22 liability provisions.

23 JUSTICE SOTOMAYOR: That --

24 MR. JOSHI: But --

25 JUSTICE SOTOMAYOR: -- that too, but

1 --

2 MR. JOSHI: But, I mean, I -- I would  
3 say the better reading is to apply the statute  
4 as written. If there are problematic  
5 applications in a particular criminal  
6 proceeding, a court can deal with that at that  
7 time. The court doesn't -- usually doesn't  
8 avoid a plain language reading of the statute to  
9 avoid -- to avoid potential pitfalls down the  
10 line if that's what the statute says.

11 JUSTICE SOTOMAYOR: All right.

12 MR. JOSHI: However, the Court doesn't  
13 have to address, I think, the complicated  
14 question of criminal liability because --  
15 because of the alternative that was adopted  
16 below, which is -- which is to say the concerns  
17 are unique to the criminal context and do not  
18 apply to civil liability or the substantive  
19 duties of FCRA.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?  
21 Justice Gorsuch?

22 Justice Kavanaugh?

23 JUSTICE KAVANAUGH: Just on that last  
24 point, I don't understand how we could not  
25 address it if the argument, as Justice Alito

1     posited, is that -- that if "person" does not  
2     include government there, that shows that  
3     there's some plausible readings of "person" that  
4     would include government elsewhere. I mean --

5             MR. JOSHI: Well, you would address it  
6     by saying, even if it doesn't include -- even if  
7     "person" doesn't include governments in 1681q,  
8     as the courts below have said, that has no  
9     bearing on 1681n and o.

10            It's not plausible to infer the  
11     absence of -- of the definition in the -- in the  
12     criminal context -- I'm sorry, the absence of  
13     the application of the definition in the  
14     criminal context to the -- to the civil context.  
15     You need a -- you need a different reason.

16            JUSTICE KAVANAUGH: And that includes  
17     punitive damages?

18            MR. JOSHI: Yes, punitive damages is  
19     also a clear statement rule requirement. So,  
20     if -- if the Court finds -- I don't think  
21     there's a different standard there for punitive  
22     damages. In fact, 1681u(j), which the  
23     government relies on, has -- has a provision for  
24     punitive damages.

25            JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett?

3 JUSTICE BARRETT: No.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Jackson?

6 JUSTICE JACKSON: No.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 MR. JOSHI: Thank you.

10 CHIEF JUSTICE ROBERTS: Mr. Snyder,  
11 we'll give you three minutes.

12 REBUTTAL ARGUMENT OF BENJAMIN W. SNYDER

13 ON BEHALF OF THE PETITIONER

14 MR. SNYDER: Thank you. A few quick  
15 points.

16 First, Justice Kagan -- as -- as  
17 Justice Kagan suggested, one of the purposes for  
18 the clear statement rule is to make sure that  
19 Congress has specifically considered the  
20 question of whether it wants to waive sovereign  
21 immunity and addressed that.

22 One of the reasons to require specific  
23 references to sovereign entities in the cause of  
24 action itself is to make sure that Congress has  
25 made that conscious decision.

1                   Now my friend acknowledged that there  
2                   is a specificity requirement. He just thinks  
3                   that it's satisfied here in the Act-wide  
4                   definition. The problem with that understanding  
5                   is that it -- it asks for specificity about the  
6                   wrong thing.

7                   The definition that Congress adopted  
8                   in 1970 does make clear that in some references,  
9                   the FCRA does cover the government, but it  
10                  doesn't make clear that Congress was  
11                  specifically focused on waiving Congress -- the  
12                  United States' sovereign immunity because it had  
13                  nothing to do with liability at the time it was  
14                  adopted.

15                  There was also a suggestion that  
16                  perhaps the word "person" means every -- or  
17                  means the same thing in all parts of the  
18                  statute, but there are just defenses that exist  
19                  under the criminal provision perhaps that would  
20                  exempt the government from liability there.

21                  We think that's right. We just think  
22                  that the same thing is true with 1681n and o,  
23                  that the fact that "person" in those provisions  
24                  might include the sovereign does not answer the  
25                  separate question of whether the sovereign has

1 defenses to civil liability any more than it  
2 answers the question of whether the sovereign  
3 might have defenses to criminal liability.

4           And, finally, my friend tried to  
5 distinguish Employees. I -- I think, as Justice  
6 Kavanaugh alluded to, his arguments sound a lot  
7 like the dissent in Employees, which accused the  
8 majority opinion of engaging in ritualism by  
9 focusing very carefully on exactly what was and  
10 was not in the statutory text. But, of course,  
11 this Court's decisions today focus the -- follow  
12 the approach that the majority took there, not  
13 the dissent.

14           And -- and one other distinction that  
15 he attempted to draw was that in Employees, the  
16 statute allowed for enforcement by the FTC.  
17 But, of course, that's Respondent's position as  
18 well. He thinks that FCRA is enforceable by the  
19 FTC.

20           So, if you decide that "person"  
21 includes the United States throughout the rest  
22 of the Act, FCRA is on all fours with Employees,  
23 and -- and we would win even on that -- that  
24 understanding.

25           Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 The case is submitted.

4 (Whereupon, at 11:22 a.m., the case  
5 was submitted.)

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## Official

<p><b>1</b></p> <p><b>1</b> [1] 82:21  <b>10:04</b> [2] 1:16 3:2  <b>101</b> [1] 9:5  <b>11:22</b> [1] 95:4  <b>16(b)</b> [2] 56:2,4  <b>1618n</b> [1] 51:14  <b>1681g</b> [1] 65:20  <b>1681n</b> [10] 6:11 12:4 24:3  44:5,15,22 53:23 82:21 91:  9 93:22  <b>1681n(a)(1)(B)</b> [1] 53:24  <b>1681q</b> [11] 16:14 18:8,13  30:10 31:25 45:14 62:7 63:  17 67:12,16 91:7  <b>1681s</b> [1] 58:23  <b>1681u(j)</b> [2] 22:7 91:22  <b>1861n</b> [1] 31:16  <b>1861q</b> [1] 31:14  <b>1966</b> [1] 56:15  <b>1970</b> [2] 62:1 93:8  <b>1970s</b> [1] 78:11  <b>1973</b> [2] 25:24 39:10  <b>1976</b> [2] 87:14,17  <b>1980s</b> [1] 78:11  <b>1996</b> [8] 3:15 26:23 53:10  54:2 62:2,7 75:14 76:3  <b>19th</b> [1] 36:18</p>	<p><b>absence</b> [3] 60:6 91:11,12  <b>absent</b> [1] 59:10  <b>absolutely</b> [6] 9:15 22:17  37:14,25 41:5 50:6  <b>absurd</b> [2] 60:25 61:1  <b>accept</b> [7] 5:22 13:8,21 16:  19 38:22 48:17 71:4  <b>accepted</b> [2] 38:20 80:3  <b>accepting</b> [1] 22:3  <b>accidental</b> [1] 75:2  <b>accidentally</b> [1] 74:21  <b>accommodates</b> [1] 86:17  <b>accomplish</b> [1] 21:4  <b>accomplishing</b> [1] 46:18  <b>accused</b> [1] 94:7  <b>acknowledge</b> [2] 56:18 71:  3  <b>acknowledged</b> [1] 93:1  <b>Act</b> [31] 3:15 14:11,22 20:2,  3,4 21:8,10 22:21 23:7 45:  8,10 52:20 54:5 62:1,2 63:  8,10 69:11,16,22 75:14 76:  20 80:5 87:3,6,12,15 88:21,  25 94:22  <b>Act-wide</b> [4] 14:15 18:15  24:4 93:3  <b>acting</b> [1] 44:23  <b>action</b> [62] 4:3,12,13,20,21  5:7,12 6:18,24 7:3,7,10,13  8:8,12 9:11 12:8 16:6 24:  24 25:10 27:7,14 29:10,12  33:12 38:9 39:22 40:8,11,  21 41:5 42:10,13 43:2,5,10,  21 44:16 49:1,9,9,17,24 50:  3,20,24 51:4 53:3,8 60:4  76:25 81:20 82:6,17 83:12  85:23 86:1,5,9,13,21 92:24  <b>actions</b> [1] 22:9  <b>acts</b> [2] 20:10,18  <b>actual</b> [1] 51:13  <b>actually</b> [6] 11:24 46:11,18  47:18 65:14 66:11  <b>add</b> [2] 61:14 62:6  <b>added</b> [1] 61:13  <b>adding</b> [2] 40:9 51:10  <b>addition</b> [1] 55:21  <b>additional</b> [3] 70:3,5 80:21  <b>address</b> [7] 23:11 54:11  80:25 81:1 90:13,25 91:5  <b>addressed</b> [5] 8:5 40:7 54:  21 83:21 92:21  <b>addresses</b> [2] 3:24 29:9  <b>addressing</b> [1] 54:13  <b>adhere</b> [1] 60:16  <b>Adjustment</b> [1] 20:4  <b>administrative</b> [2] 58:24  62:4  <b>adopted</b> [7] 10:14 26:25  27:5 89:20 90:15 93:7,14  <b>adopting</b> [3] 7:13 27:6 43:  5  <b>adverse</b> [1] 86:21  <b>advocating</b> [1] 40:25  <b>affected</b> [1] 46:11</p>	<p><b>afford</b> [1] 33:15  <b>agencies</b> [19] 5:11 17:5 22:  10,23 23:12 39:23 40:10  41:25 42:1 44:12,13 47:22  48:4,7 53:4,7 60:12,14 76:  8  <b>agency</b> [5] 5:19 11:14 52:  24 60:4,22  <b>ago</b> [4] 7:4 13:18 28:2 50:5  <b>agree</b> [7] 9:12 11:9 52:8 55:  2 57:17 60:18 68:10  <b>Agricultural</b> [1] 20:4  <b>AGRICULTURE</b> [2] 1:3 3:  5  <b>ahead</b> [4] 19:23 23:21 58:  11 66:25  <b>Air</b> [22] 6:7,15 14:7,10,11,  12,15,21,22 15:8,12,15,22  16:3 17:10 19:10,12 21:8  31:23,24 67:6,9  <b>ALITO</b> [26] 23:13,15,19,21,  23 24:1 26:21 27:23,24 28:  6,8,10,13,18,22 33:25 76:  13 77:3,6,9,12,21 78:10 87:  24,25 90:25  <b>allow</b> [2] 29:19 42:12  <b>allowed</b> [1] 94:16  <b>allowing</b> [1] 10:16  <b>alluded</b> [3] 13:16 39:9 94:6  <b>alone</b> [2] 80:6,7  <b>already</b> [1] 47:20  <b>alter</b> [1] 53:21  <b>alternative</b> [6] 13:4,7 65:  21 89:19 90:15  <b>altogether</b> [1] 74:12  <b>ambiguities</b> [1] 72:11  <b>ambiguous</b> [10] 32:22 65:  23 68:9,11 72:9 74:9,11  85:8,10,12  <b>amend</b> [3] 47:14 57:10,11  <b>amended</b> [14] 3:14 11:7 40:  8 46:4 47:13 53:10 56:14  62:3,4 69:21 76:2 85:22  86:8,13  <b>amending</b> [2] 55:13 85:25  <b>amendment</b> [15] 10:21 34:  12 45:24 46:14 54:1 55:9  59:13,15 73:5 76:1,4 85:  14,20,24 86:5  <b>amendments</b> [1] 26:23  <b>analysis</b> [3] 55:5 80:23 89:  10  <b>analytically</b> [5] 6:13 25:14,  16 43:22 50:21  <b>analyze</b> [1] 70:2  <b>analyzed</b> [2] 25:24 85:20  <b>and/or</b> [1] 20:8  <b>anomalies</b> [2] 61:15 63:12  <b>anomaly</b> [3] 63:7,11,16  <b>another</b> [5] 24:14 34:17 48:  10 63:5 71:6  <b>answer</b> [19] 3:18 7:18 8:1,  3,18 12:7 23:16,17 26:9,21  28:8 31:21 63:22 73:8 77:</p>	<p>17 78:6,21 88:3 93:24  <b>answered</b> [1] 58:8  <b>answers</b> [3] 6:3 34:23 94:2  <b>anticipated</b> [1] 38:13  <b>appeals</b> [6] 5:8 16:14 18:  16 21:20 54:20 83:21  <b>APPEARANCES</b> [1] 1:18  <b>appears</b> [2] 14:6 19:15  <b>applicable</b> [1] 27:7  <b>application</b> [2] 44:11 91:  13  <b>applications</b> [1] 90:5  <b>applied</b> [9] 14:11,14 15:1  24:5 42:19 44:6 46:6 68:  18 89:15  <b>applies</b> [16] 4:3 5:21 12:9  13:20 19:12 20:6 35:24 43:  11 49:2,3,10,17 50:3 51:5  65:12,24  <b>apply</b> [19] 5:7 19:1 36:15  44:16 56:21 58:22,23 60:  10 67:8,12,20 76:12,22,23  77:19 86:22 89:6 90:3,18  <b>applying</b> [2] 65:3 74:16  <b>appreciate</b> [2] 16:11 85:15  <b>approach</b> [2] 26:19 94:12  <b>appropriate</b> [2] 34:21 37:  19  <b>appropriated</b> [1] 71:23  <b>arbitrary</b> [1] 83:5  <b>area</b> [3] 73:22 74:20 86:20  <b>areas</b> [2] 59:11 66:10  <b>aren't</b> [1] 72:2  <b>argue</b> [2] 78:18 81:23  <b>argued</b> [2] 24:18 54:12  <b>Arguing</b> [7] 13:3,5 28:24  29:1 42:20 49:2,5  <b>argument</b> [48] 1:15 2:2,5,8  3:4,8 4:7 6:6,9,16,16 11:  23 12:20 13:2,14 16:24 17:  12 22:5 25:3,8,9 34:4,25  37:6 38:23 39:19 41:2 43:  25 44:4,21 49:13 52:16 55:  25 58:18 64:21,25 67:5,15,  18 68:22 72:22 75:23 76:  21 84:6 88:1,3 90:25 92:  12  <b>arguments</b> [4] 13:2 68:2  89:19 94:6  <b>arms</b> [1] 60:10  <b>around</b> [1] 34:3  <b>Article</b> [2] 73:10 84:21  <b>artificially</b> [1] 73:12  <b>aside</b> [5] 5:16,19 6:15 32:  12 34:2  <b>asks</b> [1] 93:5  <b>assert</b> [4] 7:5,10 38:9 51:  19  <b>assertion</b> [1] 29:19  <b>Assistant</b> [1] 1:19  <b>association</b> [1] 8:25  <b>Associations</b> [1] 31:3  <b>assume</b> [6] 6:10 10:22 12:  3 13:9 85:3 87:25</p>	<p><b>assumed</b> [1] 25:20  <b>assuming</b> [3] 25:2 37:10  66:20  <b>attempted</b> [2] 38:9 94:15  <b>attention</b> [1] 39:8  <b>author</b> [1] 26:16  <b>authorize</b> [9] 10:6,10,18  22:9 27:14 29:13 62:5 69:  7,14  <b>authorized</b> [5] 8:8 18:17  27:18 29:17 47:20  <b>authorizes</b> [1] 59:21  <b>authorizing</b> [3] 7:24 24:25  52:7  <b>automatically</b> [1] 64:7  <b>available</b> [8] 4:23,25 6:24  33:13 38:19,24 50:2,15  <b>avoid</b> [3] 90:8,9,9  <b>aware</b> [1] 28:17  <b>away</b> [1] 65:1</p> <p style="text-align: center;"><b>B</b></p> <p><b>back</b> [5] 19:24 20:2 27:20  36:10 81:5  <b>backdrop</b> [1] 43:16  <b>background</b> [3] 6:25 12:  10 36:25  <b>bad</b> [1] 26:5  <b>Bank</b> [4] 26:12 48:19 60:9  80:10  <b>bare</b> [2] 18:19 43:20  <b>Barrett</b> [9] 42:16,17 43:15,  24 44:8 45:3,17 92:2,3  <b>basic</b> [2] 37:24 72:4  <b>basically</b> [3] 21:9 22:21 39:  7  <b>basis</b> [4] 3:19 50:24 65:2,5  <b>bearing</b> [1] 91:9  <b>become</b> [2] 65:23 77:2  <b>began</b> [2] 26:16 39:16  <b>begin</b> [1] 50:11  <b>beginning</b> [1] 69:20  <b>behalf</b> [9] 1:21,22 2:4,7,10  3:9 9:17 52:17 92:13  <b>behind</b> [2] 75:12,20  <b>below</b> [5] 61:5,19 89:20 90:  16 91:8  <b>benefit</b> [2] 72:11 85:9  <b>BENJAMIN</b> [5] 1:19 2:3,9  3:8 92:12  <b>Bennett</b> [1] 60:13  <b>best</b> [9] 6:8 18:6 21:7 43:  25 54:19 72:12 73:9 75:5  88:3  <b>better</b> [7] 37:7,12 57:18,22  79:2 85:2 90:3  <b>between</b> [4] 59:5,8 78:5 82:  5  <b>beyond</b> [1] 58:25  <b>big</b> [1] 80:11  <b>biological</b> [1] 60:16  <b>black</b> [1] 36:13  <b>Blackstone</b> [1] 36:14  <b>blatantly</b> [1] 44:24</p>
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## Official

<p><b>Board</b> [3] 12:14 29:16 51:24  <b>Bond</b> [3] 67:22 68:7,7  <b>both</b> [9] 4:3 6:20 13:1 19:10 25:10 45:9 53:12 71:24 79:10  <b>bottom</b> [1] 73:15  <b>bound</b> [1] 42:18  <b>branch</b> [2] 70:4,4  <b>Brennan</b> [2] 56:4 83:17  <b>Brennan's</b> [1] 55:25  <b>brief</b> [1] 52:5  <b>briefly</b> [1] 26:11  <b>briefs</b> [2] 84:8,11  <b>bring</b> [1] 39:25  <b>broad</b> [4] 43:21 68:14,15 72:15  <b>brought</b> [2] 60:20 67:6  <b>Budget</b> [1] 69:24  <b>bunch</b> [1] 71:23  <b>buy</b> [1] 25:3</p>	<p><b>certainly</b> [3] 34:9,10 78:18  <b>cetera</b> [4] 5:18 9:1,1 82:22  <b>challenge</b> [1] 70:20  <b>change</b> [2] 18:23 19:7  <b>changed</b> [1] 65:16  <b>changing</b> [1] 66:14  <b>chemical</b> [2] 67:23,25  <b>CHIEF</b> [27] 3:3,10 33:15,18, 23 37:3 42:15 45:19 52:13, 18 59:19 60:17 62:24 66:2, 5,24 67:17 68:19 69:6 87:21 88:10 90:20 92:1,4,7,10 95:1  <b>choice</b> [1] 73:15  <b>choices</b> [1] 73:22  <b>choose</b> [1] 53:21  <b>chose</b> [1] 57:10  <b>Circuit</b> [3] 38:7 54:24 61:4  <b>circumstance</b> [5] 13:11 29:20 48:2 51:16 65:18  <b>circumstances</b> [1] 34:22  <b>cite</b> [3] 84:1,1,3  <b>cited</b> [2] 80:15,16  <b>cites</b> [2] 80:8,9  <b>civil</b> [16] 5:12 10:16 22:9 23:11 32:15 47:21 52:21 53:2 62:3,12 76:2 88:5 89:21 90:18 91:14 94:1  <b>civilly</b> [1] 60:15  <b>claiming</b> [1] 3:19  <b>class</b> [1] 38:9  <b>Clean</b> [4] 14:11 20:2 21:8 88:25  <b>clear</b> [36] 5:7 7:24 9:15 11:19,23 17:17 25:8 34:11,20 35:15,17 36:6 37:5,9,13 38:20 40:14 41:14 48:15 53:4,9 55:10 57:17,19,25 73:20 74:12,19 75:3,12,17 81:16 91:19 92:18 93:8,10  <b>clearer</b> [2] 29:5 34:5  <b>clearly</b> [4] 11:7 17:24 18:14 65:12  <b>Code</b> [2] 21:2 75:19  <b>collapse</b> [1] 15:18  <b>colleagues</b> [2] 12:20 28:25  <b>College</b> [3] 26:12 48:19 80:10  <b>combine</b> [1] 36:7  <b>come</b> [2] 17:11 82:12  <b>comes</b> [2] 68:22 73:6  <b>coming</b> [1] 49:1  <b>comma</b> [2] 27:18 52:7  <b>comment</b> [2] 45:25 46:25  <b>committee</b> [2] 70:25 75:16  <b>common</b> [2] 16:2 20:16  <b>completely</b> [2] 53:18 75:21  <b>complicated</b> [1] 90:13  <b>comply</b> [2] 52:22 71:13  <b>comport</b> [1] 55:6  <b>comports</b> [1] 45:10  <b>concede</b> [2] 3:23 11:8</p>	<p><b>conceded</b> [2] 41:9 46:15  <b>conceding</b> [1] 48:14  <b>concerns</b> [1] 90:16  <b>conclude</b> [2] 11:2 67:11  <b>concluded</b> [1] 14:13  <b>conclusion</b> [1] 71:10  <b>conclusive</b> [4] 13:17,19 14:2,19  <b>conflict</b> [1] 59:8  <b>confused</b> [1] 72:20  <b>Congress</b> [133] 3:13,20 4:2,20 6:22 7:12,24 8:4,7,12 9:1,2,15,23 10:3,5,9,14,22 11:6,24 12:5,8 16:25 17:12,16,18,24 18:3,17 19:13 21:3,17 22:8 23:11 25:13, 20 26:25 27:6,12,22 29:4,8, 10,17,21 31:14 33:2,4,11 34:4,18 35:10 37:1,18 38:13 39:24 40:2,5,12 41:3,6, 12 43:6,8,16,20 44:13,21, 23 45:15 46:3,4 47:13,19 48:3,6 51:3 52:2,5,6 53:6, 9,20 54:3,6 55:9 56:2,14 57:10,12 59:3,8 62:3 65:20 67:13 68:17 69:4,21 70:8,9,15,15,20 71:11 73:9,15 74:10,23 75:13,25 76:10 81:24 83:8 84:19,24,25 85:7,22,25 86:8,12,17,24 87:3, 7,13 88:19 92:19,24 93:7, 10,11  <b>Congress's</b> [6] 4:24 11:19 35:1 47:12 82:2 86:4  <b>congressional</b> [3] 36:21 55:12 69:24  <b>conscious</b> [1] 92:25  <b>consent</b> [1] 36:12  <b>consequence</b> [2] 59:20 65:17  <b>Conservation</b> [1] 69:16  <b>consider</b> [1] 54:12  <b>considered</b> [1] 92:19  <b>consistent</b> [3] 26:18 39:18 71:10  <b>consistently</b> [2] 53:11 88:8  <b>Constitution</b> [4] 34:18 35:11,14 59:11  <b>constitutional</b> [2] 24:21 73:4  <b>construe</b> [2] 55:14 74:9  <b>construing</b> [1] 78:9  <b>consumer</b> [5] 11:14 22:22 54:5 76:7 87:2  <b>consumer's</b> [1] 17:6  <b>consumers</b> [1] 17:1  <b>consumers'</b> [1] 17:2  <b>contains</b> [1] 62:16  <b>contemplated</b> [1] 63:3  <b>context</b> [11] 40:9 59:15 60:12 61:8,9 86:23 88:9 90:17 91:12,14,14  <b>contextual</b> [1] 61:5</p>	<p><b>continuing</b> [1] 54:20  <b>contract</b> [1] 73:12  <b>contrary</b> [1] 84:14  <b>control</b> [1] 34:19  <b>controlling</b> [2] 61:7 67:3  <b>convicted</b> [1] 59:24  <b>Cooperatives</b> [1] 31:1  <b>copying</b> [1] 20:9  <b>corners</b> [1] 17:4  <b>corporate</b> [2] 89:7,10  <b>corporation</b> [1] 8:24  <b>Corporations</b> [1] 30:20  <b>correct</b> [10] 8:19 37:22 38:25 70:12,17 80:20 84:9,16 88:23 89:8  <b>correction</b> [1] 61:25  <b>cost</b> [1] 38:2  <b>costs</b> [1] 70:3  <b>couldn't</b> [1] 36:20  <b>Counsel</b> [11] 12:15 16:18 19:17,20 52:14 54:9 59:19 72:19 87:22 92:8 95:2  <b>counter</b> [1] 75:5  <b>counters</b> [1] 75:7  <b>countervailing</b> [1] 67:5  <b>couple</b> [2] 33:16 76:14  <b>course</b> [6] 35:21 36:23 38:18 44:10 94:10,17  <b>COURT</b> [70] 1:1,15 3:11 4:1,17 5:8 7:19 12:12 13:16, 23 14:3 15:16 16:4,13 18:15 19:12 21:20 25:11,20 26:13 29:16,21 34:11 35:23 36:2,12,23 39:13,15,21 40:13 41:6 47:3 48:18 50:18 52:19 55:1,6,11 56:22 57:8,11 60:5,24,25 61:2 67:7 68:8,9,14,17 73:22,23 74:7,15 76:24 77:18 78:19 80:5,11,24 81:1,24 84:10, 18,23 90:6,7,12 91:20  <b>Court's</b> [17] 5:2,14 6:7 14:6,9 15:20 24:6 26:16,18 46:9 51:22 54:8 59:4 67:2 80:23 85:5 94:11  <b>courts</b> [6] 4:18 36:14,19 54:20 83:20 91:8  <b>cover</b> [6] 6:12 17:24 18:1 41:24 47:24 93:9  <b>coverage</b> [5] 42:2,3,6,9,11  <b>covered</b> [8] 6:23 7:3,9 10:17 39:22 47:25 48:4 67:25  <b>covers</b> [8] 4:14 6:5,19 13:10 25:10 43:13 49:24 50:6  <b>craft</b> [2] 55:9 84:19  <b>create</b> [8] 6:18 12:8 43:6 53:3 63:11 87:4,10 88:20  <b>created</b> [3] 8:12 63:14 86:24  <b>creates</b> [3] 4:3 51:4 53:24  <b>creating</b> [2] 44:16 86:19  <b>creation</b> [2] 43:21 49:1  <b>Credit</b> [11] 3:15 17:5 41:25 42:1,8 52:20 54:5 69:10</p>	<p>76:20 87:3,12  <b>creditor</b> [1] 87:8  <b>creditors</b> [1] 87:6  <b>criminal</b> [26] 5:9 18:18 19:6 20:6,22 21:1 32:17 59:22 60:7,9,19 61:8,8 62:17, 25 64:12 67:14 88:21 89:2 90:5,14,17 91:12,14 93:19 94:3  <b>criminally</b> [3] 28:16 60:14, 15  <b>critical</b> [1] 58:15  <b>crystal-clear</b> [1] 21:5  <b>current</b> [1] 55:11  <b>currently</b> [1] 77:20  <b>cuts</b> [1] 47:18</p>
<b>C</b>				
<p><b>called</b> [1] 68:14  <b>calls</b> [1] 20:19  <b>came</b> [3] 1:14 28:19 78:14  <b>cannot</b> [2] 4:16 72:15  <b>canon</b> [3] 68:12 72:8,10  <b>canvass</b> [1] 20:5  <b>careful</b> [2] 37:20 72:3  <b>carefully</b> [3] 63:8 70:2 94:9  <b>carried</b> [2] 19:14 31:24  <b>carries</b> [5] 19:18 30:12 31:22,25 64:1  <b>carve-out</b> [2] 19:4 87:10  <b>carved</b> [2] 64:4 87:19  <b>Case</b> [27] 3:4,12 15:16,24 24:10,10 25:24 27:22 28:19 38:3,6,8 39:2,3,10 42:19,21 59:13 63:20 67:22 68:7 76:25 80:15 81:15 88:18 95:3,4  <b>cases</b> [15] 8:7,13,17 12:12 26:7 28:15 30:6 40:19 41:1 51:25 55:1 59:4 70:5 74:18 80:2  <b>categories</b> [1] 19:5  <b>cause</b> [53] 4:3,12,13,19,21 6:18,24 7:3,6,10,13 8:8,12 9:11 12:8 16:6 24:24 25:9 27:6 29:10,12 33:12 39:21 40:8,11,21 41:4 42:10,12 43:2,5,10,21 49:1,9,17,24 50:3,19,24 51:4 53:8 81:20 82:5,17 83:12 85:22 86:1,4,9,9,13 92:23  <b>causes</b> [6] 5:7,12 27:13 44:16 53:3 76:25  <b>CBA</b> [1] 70:6  <b>CBO</b> [4] 69:24 70:6,15,20  <b>century</b> [1] 36:19  <b>certain</b> [4] 19:5 53:25 64:16 65:15</p>	<p><b>clean</b> [2] 14:11 20:2 21:8 88:25  <b>clear</b> [36] 5:7 7:24 9:15 11:19,23 17:17 25:8 34:11,20 35:15,17 36:6 37:5,9,13 38:20 40:14 41:14 48:15 53:4,9 55:10 57:17,19,25 73:20 74:12,19 75:3,12,17 81:16 91:19 92:18 93:8,10  <b>clearer</b> [2] 29:5 34:5  <b>clearly</b> [4] 11:7 17:24 18:14 65:12  <b>Code</b> [2] 21:2 75:19  <b>collapse</b> [1] 15:18  <b>colleagues</b> [2] 12:20 28:25  <b>College</b> [3] 26:12 48:19 80:10  <b>combine</b> [1] 36:7  <b>come</b> [2] 17:11 82:12  <b>comes</b> [2] 68:22 73:6  <b>coming</b> [1] 49:1  <b>comma</b> [2] 27:18 52:7  <b>comment</b> [2] 45:25 46:25  <b>committee</b> [2] 70:25 75:16  <b>common</b> [2] 16:2 20:16  <b>completely</b> [2] 53:18 75:21  <b>complicated</b> [1] 90:13  <b>comply</b> [2] 52:22 71:13  <b>comport</b> [1] 55:6  <b>comports</b> [1] 45:10  <b>concede</b> [2] 3:23 11:8</p>	<p><b>conceded</b> [2] 41:9 46:15  <b>conceding</b> [1] 48:14  <b>concerns</b> [1] 90:16  <b>conclude</b> [2] 11:2 67:11  <b>concluded</b> [1] 14:13  <b>conclusion</b> [1] 71:10  <b>conclusive</b> [4] 13:17,19 14:2,19  <b>conflict</b> [1] 59:8  <b>confused</b> [1] 72:20  <b>Congress</b> [133] 3:13,20 4:2,20 6:22 7:12,24 8:4,7,12 9:1,2,15,23 10:3,5,9,14,22 11:6,24 12:5,8 16:25 17:12,16,18,24 18:3,17 19:13 21:3,17 22:8 23:11 25:13, 20 26:25 27:6,12,22 29:4,8, 10,17,21 31:14 33:2,4,11 34:4,18 35:10 37:1,18 38:13 39:24 40:2,5,12 41:3,6, 12 43:6,8,16,20 44:13,21, 23 45:15 46:3,4 47:13,19 48:3,6 51:3 52:2,5,6 53:6, 9,20 54:3,6 55:9 56:2,14 57:10,12 59:3,8 62:3 65:20 67:13 68:17 69:4,21 70:8,9,15,15,20 71:11 73:9,15 74:10,23 75:13,25 76:10 81:24 83:8 84:19,24,25 85:7,22,25 86:8,12,17,24 87:3, 7,13 88:19 92:19,24 93:7, 10,11  <b>Congress's</b> [6] 4:24 11:19 35:1 47:12 82:2 86:4  <b>congressional</b> [3] 36:21 55:12 69:24  <b>conscious</b> [1] 92:25  <b>consent</b> [1] 36:12  <b>consequence</b> [2] 59:20 65:17  <b>Conservation</b> [1] 69:16  <b>consider</b> [1] 54:12  <b>considered</b> [1] 92:19  <b>consistent</b> [3] 26:18 39:18 71:10  <b>consistently</b> [2] 53:11 88:8  <b>Constitution</b> [4] 34:18 35:11,14 59:11  <b>constitutional</b> [2] 24:21 73:4  <b>construe</b> [2] 55:14 74:9  <b>construing</b> [1] 78:9  <b>consumer</b> [5] 11:14 22:22 54:5 76:7 87:2  <b>consumer's</b> [1] 17:6  <b>consumers</b> [1] 17:1  <b>consumers'</b> [1] 17:2  <b>contains</b> [1] 62:16  <b>contemplated</b> [1] 63:3  <b>context</b> [11] 40:9 59:15 60:12 61:8,9 86:23 88:9 90:17 91:12,14,14  <b>contextual</b> [1] 61:5</p>	<p><b>continuing</b> [1] 54:20  <b>contract</b> [1] 73:12  <b>contrary</b> [1] 84:14  <b>control</b> [1] 34:19  <b>controlling</b> [2] 61:7 67:3  <b>convicted</b> [1] 59:24  <b>Cooperatives</b> [1] 31:1  <b>copying</b> [1] 20:9  <b>corners</b> [1] 17:4  <b>corporate</b> [2] 89:7,10  <b>corporation</b> [1] 8:24  <b>Corporations</b> [1] 30:20  <b>correct</b> [10] 8:19 37:22 38:25 70:12,17 80:20 84:9,16 88:23 89:8  <b>correction</b> [1] 61:25  <b>cost</b> [1] 38:2  <b>costs</b> [1] 70:3  <b>couldn't</b> [1] 36:20  <b>Counsel</b> [11] 12:15 16:18 19:17,20 52:14 54:9 59:19 72:19 87:22 92:8 95:2  <b>counter</b> [1] 75:5  <b>counters</b> [1] 75:7  <b>countervailing</b> [1] 67:5  <b>couple</b> [2] 33:16 76:14  <b>course</b> [6] 35:21 36:23 38:18 44:10 94:10,17  <b>COURT</b> [70] 1:1,15 3:11 4:1,17 5:8 7:19 12:12 13:16, 23 14:3 15:16 16:4,13 18:15 19:12 21:20 25:11,20 26:13 29:16,21 34:11 35:23 36:2,12,23 39:13,15,21 40:13 41:6 47:3 48:18 50:18 52:19 55:1,6,11 56:22 57:8,11 60:5,24,25 61:2 67:7 68:8,9,14,17 73:22,23 74:7,15 76:24 77:18 78:19 80:5,11,24 81:1,24 84:10, 18,23 90:6,7,12 91:20  <b>Court's</b> [17] 5:2,14 6:7 14:6,9 15:20 24:6 26:16,18 46:9 51:22 54:8 59:4 67:2 80:23 85:5 94:11  <b>courts</b> [6] 4:18 36:14,19 54:20 83:20 91:8  <b>cover</b> [6] 6:12 17:24 18:1 41:24 47:24 93:9  <b>coverage</b> [5] 42:2,3,6,9,11  <b>covered</b> [8] 6:23 7:3,9 10:17 39:22 47:25 48:4 67:25  <b>covers</b> [8] 4:14 6:5,19 13:10 25:10 43:13 49:24 50:6  <b>craft</b> [2] 55:9 84:19  <b>create</b> [8] 6:18 12:8 43:6 53:3 63:11 87:4,10 88:20  <b>created</b> [3] 8:12 63:14 86:24  <b>creates</b> [3] 4:3 51:4 53:24  <b>creating</b> [2] 44:16 86:19  <b>creation</b> [2] 43:21 49:1  <b>Credit</b> [11] 3:15 17:5 41:25 42:1,8 52:20 54:5 69:10</p>	<p><b>D</b></p> <p><b>D.C</b> [6] 1:11,20,22 61:3 84:3,6  <b>damage</b> [1] 87:18  <b>damages</b> [14] 3:17 38:10, 17,23 53:23 63:1 68:24 69:3,8 74:8 91:17,18,22,24  <b>days</b> [1] 26:5  <b>deal</b> [7] 13:13,23 14:1 88:5, 13 89:18 90:6  <b>deals</b> [1] 88:6  <b>debatable</b> [1] 63:16  <b>debt</b> [1] 17:6  <b>debts</b> [1] 17:2  <b>decide</b> [1] 94:20  <b>decided</b> [4] 15:16 76:15,20 79:2  <b>deciding</b> [1] 34:19  <b>decision</b> [13] 5:2 6:7,8 14:7,9 15:20 24:7 45:1 51:23 61:4 67:22 79:23 92:25  <b>decisions</b> [2] 78:11 94:11  <b>decisive</b> [1] 76:22  <b>defendant</b> [4] 7:2 49:25 50:1 60:3  <b>defendants</b> [11] 4:4,21 6:20,23 7:9,25 12:9 25:11 33:12 51:5,6  <b>defense</b> [9] 4:10,15,25 5:5 7:5,11 25:14 29:20 50:20  <b>defenses</b> [9] 6:23 12:10 50:2,15 64:5,11 93:18 94:1,3  <b>define</b> [1] 43:11  <b>defined</b> [23] 5:3 9:5,18 10:7,23 11:18 14:5,23 19:14, 15 27:12 30:2 31:8,10,23, 25 32:1 46:17 63:25 65:7, 9 66:11 87:8  <b>defines</b> [3] 5:17 52:23 65:12  <b>defining</b> [1] 68:16  <b>definitely</b> [1] 86:8  <b>definition</b> [58] 4:11 7:17, 20 8:16,23 9:6,20,20 10:14 12:4,23,24 13:15,19 14:15 15:17 18:15 19:7,11 24:4,</p>

## Official

13 27:16 30:1,3,11,14 32:3, 5 45:4, 10 47:25 51:12 52: 25 53:1 58:23 61:7 62:2 63:22,24 65:3,15,21,24 67: 3,8 68:14 72:18 75:15 76: 12 81:15 82:16,17 83:12 85:2 91:11,13 93:4,7	<b>distinguishes</b> [1] 52:2 <b>doing</b> [12] 10:15 32:12,14, 20,24 47:19 50:15 53:9 69: 21 70:10,21 75:17 <b>dollars</b> [1] 38:12 <b>domestic</b> [1] 60:12 <b>done</b> [9] 10:3,6,9 33:4 40:3, 6,12 52:5,6 <b>doorknob</b> [1] 67:23 <b>doubt</b> [2] 21:10 85:9 <b>down</b> [2] 38:23 90:9 <b>draw</b> [3] 56:9 83:8 94:15 <b>drawing</b> [2] 39:19 51:1 <b>Drinking</b> [1] 20:3 <b>du</b> [2] 9:12 85:6 <b>duties</b> [6] 46:7 53:13,17 71: 14 86:14 90:19	12 70:4 94:16 <b>engaged</b> [1] 50:12 <b>engaging</b> [1] 94:8 <b>enhanced</b> [1] 62:10 <b>enough</b> [10] 5:4 12:5 34:7 38:20 41:15 49:20 53:5 55: 23 56:10 80:8 <b>ensure</b> [2] 71:24 72:2 <b>ensures</b> [1] 42:7 <b>enterprise</b> [1] 8:25 <b>enterprises</b> [1] 10:11 <b>entire</b> [6] 15:17 16:5,7 19:1 32:3,4 <b>entirely</b> [2] 26:17 88:9 <b>entirety</b> [2] 64:8 65:8 <b>entities</b> [14] 7:23 9:3 10:23 31:5 40:21 41:24 46:16 51: 10 60:8 63:25 72:17 82:24 89:10 92:23 <b>entity</b> [2] 34:17 89:7 <b>EPA</b> [1] 14:12 <b>Equal</b> [2] 69:10 87:12 <b>equivalent</b> [1] 52:25 <b>era</b> [2] 55:7 83:7 <b>especially</b> [2] 74:8 75:1 <b>ESQ</b> [3] 2:3,6,9 <b>ESQUIRE</b> [1] 1:22 <b>essentially</b> [2] 16:3 61:18 <b>establish</b> [1] 48:18 <b>established</b> [1] 36:11 <b>establishing</b> [1] 56:8 <b>Estates</b> [1] 30:24 <b>estimate</b> [1] 38:5 <b>et</b> [4] 5:18 9:1,1 82:22 <b>evaluating</b> [1] 35:24 <b>Even</b> [36] 5:8 6:10 8:4 13:8 16:13 18:15 21:20 24:13 25:9 34:5,6 37:10 39:17 41:11 42:4 49:15 55:2 56: 19,21 58:19 63:16 64:13, 18,22 69:1 72:10,12 73:5 83:24 84:4,23 86:9 87:7 91:6,6 94:23 <b>event</b> [1] 5:6 <b>eventually</b> [1] 11:25 <b>everyone</b> [1] 10:17 <b>everywhere</b> [2] 19:12 65: 13 <b>evidence</b> [1] 54:19 <b>exact</b> [1] 57:9 <b>exactly</b> [12] 13:11 20:17 21: 18 24:17 34:25 38:12 44:3 48:4 75:3,19 83:17 94:9 <b>example</b> [11] 7:2 9:13 21:7 27:17 41:18 65:20 67:6 73: 5 75:14 85:1 86:19 <b>examples</b> [1] 18:7 <b>except</b> [2] 32:3,5 <b>exceptions</b> [1] 87:13 <b>excluded</b> [1] 56:2 <b>executive</b> [1] 70:3 <b>exempt</b> [1] 93:20 <b>exemption</b> [5] 22:21,25 23: 2 86:24 88:20	<b>exemptions</b> [3] 86:19,20 87:4 <b>exercise</b> [2] 35:10 50:12 <b>exist</b> [1] 93:18 <b>existence</b> [1] 20:18 <b>exists</b> [2] 47:4,6 <b>expand</b> [4] 11:7,20 46:22 73:11 <b>expanded</b> [2] 11:11,15 <b>expanding</b> [3] 46:10,14 63: 23 <b>explicit</b> [2] 51:8 82:6 <b>explicitly</b> [2] 5:25 22:14 <b>express</b> [3] 9:13 48:12 63: 5 <b>expressed</b> [1] 65:21 <b>expressly</b> [9] 3:20 23:12 29:17 40:7 43:3 51:6 52: 23 54:3 56:3 <b>extend</b> [5] 62:5 67:14 76:2, 6 86:4 <b>extends</b> [2] 60:8 87:6 <b>extent</b> [2] 46:2 67:11 <b>extraordinary</b> [1] 35:11	<b>Financial</b> [3] 12:13 29:15 51:23 <b>find</b> [3] 11:1 43:4 57:8 <b>finds</b> [1] 91:20 <b>fine</b> [7] 20:8,13 21:12 27:25 51:1 82:19 83:1 <b>finish</b> [2] 23:15 33:6 <b>First</b> [17] 4:8 13:14 15:19 17:22 25:3,6,8,8 34:9,24 36:9 39:12 47:2 72:24 75: 10 76:14 92:16 <b>fisc</b> [4] 32:21 34:19 73:7,11 <b>fit</b> [1] 61:22 <b>fits</b> [1] 61:21 <b>five</b> [3] 7:4 50:5 54:20 <b>Flambeau</b> [2] 9:13 85:6 <b>FLSA</b> [5] 56:15 57:10 58: 17 76:22 79:21 <b>focus</b> [3] 64:25 74:5 94:11 <b>focused</b> [3] 48:6,9 93:11 <b>focusing</b> [1] 94:9 <b>foil</b> [1] 68:7 <b>follow</b> [7] 8:18 42:22 61:3 73:13 77:18 78:7 94:11 <b>followed</b> [1] 4:17 <b>following</b> [1] 3:22 <b>force</b> [1] 54:20 <b>foreclose</b> [1] 82:1 <b>foreign</b> [4] 35:2,9 60:10 73: 2 <b>forth</b> [4] 23:2 68:25 75:1 84: 13 <b>fortiori</b> [1] 56:25 <b>found</b> [4] 16:4 40:14 68:8,9 <b>founding</b> [1] 36:10 <b>four</b> [1] 32:6 <b>fours</b> [1] 94:22 <b>Fourteenth</b> [2] 59:12,15 <b>friend</b> [3] 21:2 93:1 94:4 <b>frolic</b> [1] 28:14 <b>front</b> [1] 6:6 <b>FTC</b> [3] 69:8 94:16,19 <b>function</b> [1] 84:22 <b>fundamentally</b> [1] 4:8 <b>funnel</b> [1] 71:23 <b>furnish</b> [2] 41:25 76:7 <b>furnisher</b> [2] 71:12 76:6 <b>furnishers</b> [2] 53:19 58:21 <b>further</b> [1] 58:19
	<b>E</b>		<b>F</b>	
				<b>G</b>
				<b>game</b> [2] 78:16,16 <b>Gas</b> [4] 80:2,5,19 82:9 <b>gases</b> [2] 14:15,16 <b>gave</b> [1] 45:5 <b>General</b> [6] 1:20 5:3 6:19 27:16 43:11,12 <b>generally</b> [2] 35:13 53:23 <b>gets</b> [2] 72:11 85:9 <b>getting</b> [3] 15:5 28:23 45:4 <b>give</b> [5] 41:17 44:7 85:10 88:2 92:11 <b>given</b> [2] 22:25 85:7 <b>gives</b> [2] 52:10 73:10

## Official

<p><b>GORSUCH</b> <sup>[30]</sup> 12:15,18 13:3,13,25 14:17,24 15:4,7, 9,13 16:9,10,16,20 17:15, 20 34:1,24 35:6,25 36:4,8 37:2 64:21 71:16 72:19 73: 17 74:2 90:21 <b>got</b> <sup>[3]</sup> 16:24 43:10 78:22 <b>government</b> <sup>[77]</sup> 5:18,21 8: 9 11:18,21,25 15:25 17:3 21:11 24:18 25:13 31:7 32: 4,6 42:3,3,7,9,11 44:19 46:11,18 48:13,14 49:2,4, 10,16,18 51:10,12,13,17, 18 52:24 54:11,14,25 58: 16,16,20 63:7,9,13,17 64: 10,25 68:12,16 71:11 72: 11 74:7 75:18 79:21 81:18 85:8 86:5,22 87:5,8,11,14, 18 88:2,8,13,14,15,19 89:1, 11 91:2,4,23 93:9,20 <b>government's</b> <sup>[7]</sup> 35:9 54: 4 55:3 58:18 64:16 83:11 86:18 <b>governmental</b> <sup>[10]</sup> 5:18 7: 23 9:17,18 32:6 53:18 58: 21 60:8 72:17 88:21 <b>governments</b> <sup>[10]</sup> 10:11 31:6 46:5 58:20 64:18 73: 3 83:11 86:14,16 91:7 <b>grapples</b> <sup>[1]</sup> 81:14 <b>grasp</b> <sup>[1]</sup> 28:23 <b>great</b> <sup>[2]</sup> 13:23,25 <b>greenhouse</b> <sup>[2]</sup> 14:14,16 <b>group</b> <sup>[1]</sup> 63:25 <b>guess</b> <sup>[7]</sup> 14:18 19:8 34:8 45:21 48:11 67:18 72:19</p>	<p style="text-align: center;"><b>I</b></p> <p><b>idea</b> <sup>[4]</sup> 14:4 26:4,24 29:3 <b>identical</b> <sup>[2]</sup> 20:7 21:8 <b>identically</b> <sup>[1]</sup> 21:13 <b>identified</b> <sup>[1]</sup> 36:3 <b>identify</b> <sup>[1]</sup> 83:10 <b>illogical</b> <sup>[1]</sup> 23:5 <b>imagine</b> <sup>[1]</sup> 82:20 <b>immunity</b> <sup>[91]</sup> 3:14,21,24 4: 6,9,10,15,19,23 5:5,16,20 6:2,14 7:11 8:2,5,11,11 9: 14,16,21 11:2 12:6 16:1,1 20:12,14,20 23:6 24:12,21 25:14,21 26:19 29:20,22 32:21,23 33:3,9 34:6,13,16 35:5,10,19 36:22 40:1,7 41:4,8,13 43:4,14,23 44:9, 14,22 48:24 50:10,17,21 51:4,19 53:5 54:15,17,23 56:20 59:5,6,12,17,18 66:7, 17 68:11 69:4 71:7,18 72: 8,10,16,25 74:21,24 80:13 81:8 92:21 93:12 <b>implausible</b> <sup>[3]</sup> 65:10 68:3 76:10 <b>implication</b> <sup>[16]</sup> 10:2,5 33: 10,13 41:13 48:16,18,20, 22,25,25 49:20 50:24 51:1, 2 52:11 <b>implications</b> <sup>[1]</sup> 43:2 <b>implicit</b> <sup>[2]</sup> 6:21 66:17 <b>implicitly</b> <sup>[1]</sup> 4:5 <b>implied</b> <sup>[1]</sup> 76:25 <b>imply</b> <sup>[1]</sup> 89:6 <b>implying</b> <sup>[1]</sup> 86:3 <b>important</b> <sup>[6]</sup> 32:21 70:8 71:17 73:1 78:11 79:22 <b>impose</b> <sup>[1]</sup> 4:12 <b>imposed</b> <sup>[3]</sup> 86:14 87:9,18 <b>imposes</b> <sup>[1]</sup> 52:20 <b>imposing</b> <sup>[2]</sup> 63:9 69:23 <b>imprisonment</b> <sup>[4]</sup> 20:8,13 21:12 89:3 <b>improbability</b> <sup>[1]</sup> 68:22 <b>improbable</b> <sup>[4]</sup> 67:13 69:2, 4,7 <b>improbably</b> <sup>[2]</sup> 68:14,15 <b>inadvertence</b> <sup>[1]</sup> 74:23 <b>inadvertent</b> <sup>[1]</sup> 75:3 <b>include</b> <sup>[26]</sup> 5:10 11:18,20, 24 14:16 20:5 27:9,12 30: 14,17 46:5,11,16,18 52:24 53:7 68:16 85:2 88:2,8,15 91:2,4,6,7 93:24 <b>included</b> <sup>[1]</sup> 89:1 <b>includes</b> <sup>[6]</sup> 30:16,19 49: 16 88:19 91:16 94:21 <b>including</b> <sup>[3]</sup> 27:19 52:8 89:19 <b>inconceivable</b> <sup>[2]</sup> 16:23 17:12 <b>incongruity</b> <sup>[1]</sup> 23:6 <b>incongruous</b> <sup>[4]</sup> 20:1 21:</p>	<p>16 24:19 29:3 <b>inconsistent</b> <sup>[7]</sup> 4:8 8:10 16:4,7 35:13 55:15 81:23 <b>Indian</b> <sup>[2]</sup> 35:2 85:2 <b>indicate</b> <sup>[1]</sup> 87:1 <b>indicated</b> <sup>[1]</sup> 57:8 <b>indicating</b> <sup>[1]</sup> 54:6 <b>individual</b> <sup>[1]</sup> 5:17 <b>individuals</b> <sup>[2]</sup> 30:15,16 <b>infer</b> <sup>[4]</sup> 4:18 29:21 41:8 91: 10 <b>information</b> <sup>[4]</sup> 11:15 42:1 71:12 76:7 <b>informed</b> <sup>[1]</sup> 45:11 <b>inherent</b> <sup>[1]</sup> 73:3 <b>inherently</b> <sup>[2]</sup> 84:20,21 <b>Instead</b> <sup>[5]</sup> 3:25 8:22 29:9 73:13 77:19 <b>institutions</b> <sup>[1]</sup> 73:2 <b>instructions</b> <sup>[1]</sup> 73:12 <b>insufficient</b> <sup>[1]</sup> 12:24 <b>intend</b> <sup>[3]</sup> 4:5 21:17 39:24 <b>intended</b> <sup>[13]</sup> 6:22 11:24 12:5 29:22 39:25 40:5 41: 12 43:6 46:22 48:4 54:7 67:13 76:11 <b>intending</b> <sup>[2]</sup> 9:16 44:21 <b>intends</b> <sup>[1]</sup> 51:3 <b>intent</b> <sup>[8]</sup> 4:24 47:12 53:8 55:10,12 57:15 81:25 82:3 <b>intention</b> <sup>[2]</sup> 11:20 86:4 <b>interact</b> <sup>[1]</sup> 62:14 <b>interest</b> <sup>[1]</sup> 72:8 <b>interests</b> <sup>[1]</sup> 86:18 <b>intergovernmental</b> <sup>[1]</sup> 69: 15 <b>interpret</b> <sup>[6]</sup> 5:12 36:15 79: 3 81:8 84:24 85:8 <b>interpretation</b> <sup>[26]</sup> 9:5 37: 8,11,12 41:10 59:21 61:22, 23 63:4 67:15,24,24 74:14, 15,16 75:8,12 76:18 77:2, 15 78:2,8,12 80:17 81:3,5 <b>interpreting</b> <sup>[2]</sup> 29:25 53: 15 <b>interrupt</b> <sup>[2]</sup> 12:18 68:20 <b>interrupted</b> <sup>[1]</sup> 58:7 <b>involved</b> <sup>[2]</sup> 14:10 77:9 <b>isn't</b> <sup>[11]</sup> 5:4 6:1 11:5 12:4 14:19 19:4 46:20 47:13 49: 19 66:16 74:2 <b>issue</b> <sup>[7]</sup> 5:19 19:16 54:21 59:2 64:23 76:16 83:21 <b>issues</b> <sup>[1]</sup> 26:1 <b>itself</b> <sup>[16]</sup> 4:22 24:24 27:2 28:16 29:10,11 33:13 34: 15,19 35:20,20 40:22 60:5 70:15 82:6 92:24</p>	<p>63:19,21 65:4 82:14 85:13 87:20 92:5,6 <b>jail</b> <sup>[1]</sup> 89:7 <b>jailed</b> <sup>[1]</sup> 88:14 <b>jailing</b> <sup>[2]</sup> 89:3,6 <b>JOSHI</b> <sup>[76]</sup> 1:22 2:6 52:15, 16,18 54:18 56:12,23 57:2, 6,19,24 58:2,6,9,12 60:2, 23 61:25 62:10,22 63:15, 20 64:24 65:19 66:20 67:1 68:6 69:1,10,18 70:14,18, 22,25 71:4 72:6 73:14,21 74:6 75:7 76:19 77:5,7,11, 16 78:3,17,23 79:4,10,16, 19 80:16 81:13,21 83:4,15, 19,24 84:1,5,9,17 86:7 88: 5,17 89:4,9,16,24 90:2,12 91:5,18 92:9 <b>Judge</b> <sup>[4]</sup> 61:3,4,19,20 <b>judicial</b> <sup>[1]</sup> 70:4 <b>jump</b> <sup>[1]</sup> 23:25 <b>jurisprudence</b> <sup>[1]</sup> 84:15 <b>Justice</b> <sup>[271]</sup> 1:20 3:3,10 5: 15,24 6:4 7:15 8:1,6,20 9: 9 10:4,12,20 11:5,10 12:15, 17,18 13:3,6,13,16,25 14: 17,24 15:4,7,9,12,13,15,21, 23 16:9,10,16,20 17:14,20 18:6,10,22 19:17,20,21,22, 23,24 20:16,24 21:6,19,22, 25 22:11,16,19 23:8,13,15, 19,21,23 24:1,8 25:2,16,23 26:2,8,13,21 27:20,23,24 28:2,4,6,7,7,10,11,13,18, 22 29:23 30:13,17,20,22, 24 31:1,3,5,7,19 32:2,10, 11,19 33:2,7,15,18,20,21, 23,23,25 34:1,24 35:6,25 36:4,8 37:2,3,3,5,16,23 38: 1,5,16,22 39:1,9 40:16,17 41:17,21 42:2,14,15,15,17 43:15,24 44:8 45:3,5,17,19, 19,21 47:7 48:8,21 49:7,11, 14,19,22 50:7,23 51:7,20 52:9,12,13,18 54:9 55:18, 25 56:4,16,25 57:3,16,21, 25 58:5,7,8,10 59:19 60:17 61:10,11,12 62:9,21,23 63: 19,21 64:21 65:4,25 66:2,4, 5,24 67:17 68:19 69:6,17, 19 70:17,19,24 71:2,15,16 72:19,23 73:17,19,25 74:2, 4,18 76:13 77:3,6,9,12,21 78:10,21,25 79:6,13,17,24 81:4,17 82:4,14 83:14,16, 23,25 84:2,7,12 85:13 87: 20,21,23,24,25 88:10,10, 12,23 89:5,12,23,25 90:11, 20,20,21,22,23,25 91:16, 25 92:1,1,3,4,4,6,7,10,16, 17 94:5 95:1 <b>Justice's</b> <sup>[1]</sup> 62:24 <b>justices</b> <sup>[1]</sup> 80:3 <b>justifications</b> <sup>[2]</sup> 35:18 36:</p>	<p>3  <b>K</b> <b>KAGAN</b> <sup>[42]</sup> 7:15 8:1,6,20 9:9 10:4,13 13:16 15:12, 15,21,23 27:20 28:2,4,7,11 29:23 30:13,17,20,22,24 31:1,3,5,7,19 32:2 33:2,20 45:5 61:10,12 62:9 74:18 78:21,25 79:6 90:20 92:16, 17 <b>Kagan's</b> <sup>[1]</sup> 40:17 <b>Katsas</b> <sup>[2]</sup> 61:3,20 <b>KAVANAUGH</b> <sup>[68]</sup> 12:17 13:6 18:6,10 19:17,21,23 32:11,19 33:7,21 37:4,5,16, 23 38:1,5,16,22 39:1 40:16 41:17,21 42:2,14 55:18 56: 16,25 57:3,16,21,25 58:5,7, 10 61:11 62:21,23 65:25 66:4 69:17,19 70:17,19,24 71:2,15 72:24 73:19,25 74: 4 79:13,17,24 81:4,17 82:4 83:14,16,23,25 84:2,7 90: 22,23 91:16,25 94:6 <b>keep</b> <sup>[3]</sup> 23:1 69:17 86:15 <b>Kimel</b> <sup>[7]</sup> 24:9,10,17,23 40: 19 41:2 51:25 <b>kind</b> <sup>[4]</sup> 34:9 45:6 46:21 86: 3 <b>kinds</b> <sup>[1]</sup> 61:17 <b>KIRTZ</b> <sup>[2]</sup> 1:7 3:6 <b>knows</b> <sup>[2]</sup> 70:7 87:4 <b>Krause</b> <sup>[2]</sup> 61:5,19  <b>L</b> <b>Lac</b> <sup>[2]</sup> 9:12 85:5 <b>land</b> <sup>[1]</sup> 48:25 <b>language</b> <sup>[11]</sup> 4:22 7:12 24: 24 29:19,24 30:5 59:16 68: 5 80:21 84:19 90:8 <b>last</b> <sup>[7]</sup> 8:14 9:12 31:11 45: 3 58:13 60:8 90:23 <b>late</b> <sup>[1]</sup> 80:19 <b>later</b> <sup>[1]</sup> 87:14 <b>Laughter</b> <sup>[9]</sup> 15:14 18:12 22:6 23:22 28:9,21 33:22 60:1 78:24 <b>law</b> <sup>[2]</sup> 12:11 60:10 <b>layers</b> <sup>[1]</sup> 24:10 <b>lead</b> <sup>[1]</sup> 43:13 <b>leads</b> <sup>[1]</sup> 60:19 <b>least</b> <sup>[3]</sup> 20:4 57:5 84:3 <b>legal</b> <sup>[1]</sup> 45:11 <b>legislated</b> <sup>[1]</sup> 43:17 <b>legislates</b> <sup>[1]</sup> 37:1 <b>legislation</b> <sup>[1]</sup> 70:21 <b>legislative</b> <sup>[6]</sup> 27:2 56:13, 19 71:5,8 84:19 <b>Lending</b> <sup>[2]</sup> 87:5 88:21 <b>less</b> <sup>[2]</sup> 35:17 66:12 <b>liabilities</b> <sup>[1]</sup> 46:8 <b>liability</b> <sup>[45]</sup> 4:13 8:17 11:7, 11,15,20 23:3,11 32:16,18</p>
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## Official

<p>38:14 46:12,12,14,15,23 47:14,21 48:9 52:21 53:2, 21 54:4 60:7 61:17 62:3, 18 63:9 64:13 67:14 69:15, 23,25 76:2 87:6,9 88:6,22 89:22 90:14,18 93:13,20 94:1,3</p> <p><b>liable</b> [7] 3:17 23:1 60:15, 15 71:11 74:7 75:18</p> <p><b>license</b> [1] 73:11</p> <p><b>lift</b> [2] 25:17,21</p> <p><b>lifted</b> [1] 25:13</p> <p><b>lifting</b> [1] 39:25</p> <p><b>light</b> [2] 36:19 45:23</p> <p><b>lightly</b> [1] 81:7</p> <p><b>likes</b> [1] 15:25</p> <p><b>limitation</b> [1] 54:7</p> <p><b>limitations</b> [2] 7:5 67:19</p> <p><b>limited</b> [2] 54:3 67:16</p> <p><b>limitless</b> [1] 72:1</p> <p><b>line</b> [14] 8:7,13 38:23 40:18, 20 56:9 82:4,5,11,15 83:1, 5,7 90:10</p> <p><b>lines</b> [1] 51:2</p> <p><b>list</b> [3] 82:23,23 85:1</p> <p><b>listed</b> [1] 31:11</p> <p><b>literal</b> [3] 3:22 39:22 67:24</p> <p><b>litigants</b> [1] 78:18</p> <p><b>little</b> [1] 72:20</p> <p><b>logical</b> [2] 10:2,5</p> <p><b>logically</b> [2] 33:11 51:2</p> <p><b>Long</b> [1] 28:2</p> <p><b>look</b> [9] 47:4,5,17 52:3 55: 12 59:25 69:23 74:25 85: 16</p> <p><b>looked</b> [2] 43:9 67:7</p> <p><b>looking</b> [4] 39:17 55:19 56: 13 65:2</p> <p><b>looks</b> [3] 67:3 75:12,20</p> <p><b>looser</b> [3] 56:20,21 80:12</p> <p><b>lose</b> [2] 38:2 44:1</p> <p><b>lost</b> [1] 77:7</p> <p><b>lot</b> [9] 8:23,23,23 9:3 25:25 39:4 78:5,10 94:6</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>made</b> [5] 9:14 29:5 31:17 63:18 92:25</p> <p><b>magic</b> [7] 24:12,16 35:18, 22 57:12,13 84:16</p> <p><b>majority</b> [4] 56:5,7 94:8,12</p> <p><b>Management</b> [3] 12:14 29: 16 51:23</p> <p><b>many</b> [2] 36:24 72:25</p> <p><b>matter</b> [4] 1:14 4:15 60:2 74:12</p> <p><b>matters</b> [1] 29:8</p> <p><b>mean</b> [60] 7:16 8:6 9:24 10: 1 11:6 15:24 17:22 18:23 21:18,23 25:4 26:3,12 28: 18 29:3 30:8,8 31:8,18 32: 12 34:2 37:7 39:3,12 42:8, 25 43:18 44:10 45:6,9 46: 1 47:4 50:8 53:15 56:17</p>	<p>60:24 61:13 64:5,6 65:22 66:11 68:10,23,24 70:18 72:20 73:14 75:13,24 78: 25 79:5 82:15,19,25 83:19 84:17 85:3,15 90:2 91:4 <b>meaning</b> [17] 9:7,8,10 14: 23 19:15,19 31:22,24 32:1, 9,13 35:1 57:23 58:3 68: 18 85:11,16</p> <p><b>means</b> [9] 20:13 21:18 30: 10 33:13 66:12,22 82:23 93:16,17</p> <p><b>meant</b> [3] 9:3 18:20 40:9</p> <p><b>mechanism</b> [1] 69:13</p> <p><b>mechanisms</b> [1] 53:14</p> <p><b>meet</b> [1] 81:16</p> <p><b>member</b> [1] 43:8</p> <p><b>members</b> [2] 41:12 43:19</p> <p><b>mention</b> [3] 48:12,24 69: 25</p> <p><b>mentioned</b> [5] 39:2 71:19 75:24 82:9 88:25</p> <p><b>mentions</b> [2] 81:6,7</p> <p><b>mere</b> [1] 5:3</p> <p><b>method</b> [7] 76:18 77:15 78: 1,7,12 81:2,4</p> <p><b>methodology</b> [7] 42:18,21, 22 43:17 47:11 79:15,17</p> <p><b>methods</b> [1] 77:1</p> <p><b>Meyer</b> [1] 50:19</p> <p><b>middle</b> [1] 36:18</p> <p><b>might</b> [12] 12:22 16:25 22: 23 48:2 56:19 61:6 73:8 76:22 81:1 82:11 93:24 94: 3</p> <p><b>millions</b> [1] 38:11</p> <p><b>mind</b> [1] 86:16</p> <p><b>minutes</b> [2] 33:16 92:11</p> <p><b>misread</b> [1] 79:11</p> <p><b>misunderstood</b> [1] 79:12</p> <p><b>modern</b> [5] 26:18,19 55:7, 10 83:7</p> <p><b>moment</b> [1] 6:16</p> <p><b>Monday</b> [2] 1:12 28:19</p> <p><b>money</b> [6] 3:17 37:18 71: 21,23,25 72:1</p> <p><b>monopolize</b> [1] 26:10</p> <p><b>months</b> [3] 26:24 45:1 63: 6</p> <p><b>Moreover</b> [1] 53:20</p> <p><b>morning</b> [2] 3:4 28:20</p> <p><b>most</b> [1] 45:12</p> <p><b>Mowrer</b> [1] 61:4</p> <p><b>MPRSA</b> [1] 52:4</p> <p><b>much</b> [6] 29:5 38:1 54:10 66:12 70:2 80:12</p> <p><b>must</b> [9] 4:4 6:22 12:5 18: 20 29:22 41:14 42:22 43:6 72:16</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>names</b> [1] 51:6</p> <p><b>naming</b> [1] 51:9</p> <p><b>NANDAN</b> [3] 1:22 2:6 52:</p>	<p>16</p> <p><b>narrower</b> [4] 4:18 11:12 14: 23 18:20</p> <p><b>narrowly</b> [1] 14:25</p> <p><b>nation</b> [1] 60:22</p> <p><b>national</b> [2] 86:20,23</p> <p><b>nations</b> [1] 35:3</p> <p><b>natural</b> [2] 10:10 54:1</p> <p><b>nature</b> [2] 4:9 12:19</p> <p><b>near</b> [1] 15:24</p> <p><b>nearby</b> [2] 5:12 45:16</p> <p><b>nearly</b> [1] 20:7</p> <p><b>necessarily</b> [3] 6:21 35:4 37:8</p> <p><b>necessary</b> [4] 10:2,5 41:13 54:14</p> <p><b>need</b> [7] 37:15 46:23 72:21 84:13,15 91:15,15</p> <p><b>needs</b> [2] 34:5 83:9</p> <p><b>negate</b> [5] 7:6,11 8:11 29: 18,23</p> <p><b>negated</b> [2] 4:23 41:7</p> <p><b>negates</b> [1] 30:4</p> <p><b>negligent</b> [2] 25:4,5</p> <p><b>negligently</b> [1] 52:21</p> <p><b>never</b> [3] 4:15 20:18 80:15</p> <p><b>new</b> [1] 78:9</p> <p><b>next</b> [4] 24:2 76:4,5 82:17</p> <p><b>nine</b> [1] 80:3</p> <p><b>non-sovereign</b> [3] 4:4 6: 20 25:10</p> <p><b>none</b> [1] 83:20</p> <p><b>nonexistent</b> [1] 83:1</p> <p><b>normal</b> [1] 29:24</p> <p><b>nothing</b> [9] 3:23 5:1 6:21 33:5,8 68:15 81:9,13 93: 13</p> <p><b>notwithstanding</b> [1] 65:6</p> <p><b>November</b> [1] 1:12</p> <p><b>nowhere</b> [1] 15:24</p> <p><b>number</b> [4] 27:11 36:3 69: 5 89:17</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>obligations</b> [1] 76:6</p> <p><b>observation</b> [1] 64:16</p> <p><b>obtain</b> [1] 42:8</p> <p><b>obtaining</b> [1] 69:3</p> <p><b>occur</b> [1] 48:22</p> <p><b>occurred</b> [1] 26:23</p> <p><b>occurring</b> [1] 65:18</p> <p><b>Office</b> [1] 69:24</p> <p><b>Okay</b> [16] 8:20 22:24 27:24 32:10 36:8 37:16,23 38:1 39:1 43:24 49:7,14 58:5 62:9 69:19 77:21</p> <p><b>old</b> [3] 25:24 26:5 39:10</p> <p><b>once</b> [1] 83:19</p> <p><b>one</b> [56] 10:14 12:21,22,22 20:7,17 21:3,9 22:12,13,19 26:14 28:24,24 31:23,25 32:1,5 34:1 35:8 39:6 40:6, 18 41:18 42:10 49:25 50:2 52:1 55:1,1 58:3,13,19 60:</p>	<p>23 61:22,25 63:15 66:13 67:23 71:6 72:8,14 73:17, 23 74:13 75:8,8,10 78:13 83:13 84:3 87:15 89:1 92: 17,22 94:14</p> <p><b>one-off</b> [1] 80:1</p> <p><b>ones</b> [1] 89:19</p> <p><b>only</b> [25] 4:11,20 7:21,21 11:3,6,13 23:9,9 24:25 29: 12 33:10 36:16,22 43:4 48: 10 51:5,16,24 63:15 66:3,7, 15 74:13 84:10</p> <p><b>open</b> [1] 78:18</p> <p><b>opening</b> [2] 35:20 75:25</p> <p><b>operating</b> [1] 48:25</p> <p><b>operative</b> [1] 65:14</p> <p><b>opinion</b> [6] 26:12 56:6 60: 16 68:8 81:11 94:8</p> <p><b>Opportunity</b> [2] 69:11 87: 12</p> <p><b>oral</b> [6] 1:15 2:2,5 3:8 52: 16 84:6</p> <p><b>order</b> [3] 11:1 42:12 58:4</p> <p><b>ordinarily</b> [2] 13:22 47:3</p> <p><b>ordinary</b> [8] 6:25 30:10,12, 14 32:9,13 45:7 68:18</p> <p><b>original</b> [4] 55:14 62:1 77: 8 80:5</p> <p><b>other</b> [60] 11:23 12:10 14: 21,25 17:4,25 20:10,23 21: 15 22:4,4 23:7 24:15 26:9, 20 27:11 28:25 29:1 30:6 31:5,22,24 32:1 39:4,7 40: 19 41:24,24 42:25 46:16 47:18 48:5,22 49:25 50:14 51:9 52:1 55:17 56:4 58:9, 12 63:13 64:5,11 66:9,9,10, 18 69:13,13 71:25 73:1,21 80:4 86:11,15 87:2,2 88: 15 94:14</p> <p><b>otherwise</b> [6] 4:12 22:23 61:7 67:3 68:3 72:2</p> <p><b>out</b> [16] 24:13 26:13,22 55: 4 58:13 64:4 71:24 79:1 80:6,14,25 82:23,23 83:20 85:1 87:19</p> <p><b>outcome</b> [1] 75:21</p> <p><b>outlier</b> [1] 80:1</p> <p><b>outmoded</b> [2] 76:18 77:2</p> <p><b>outside</b> [2] 23:1 67:19</p> <p><b>over</b> [5] 26:15 27:23 34:19 73:10 79:5</p> <p><b>override</b> [2] 57:18,22</p> <p><b>Oversight</b> [3] 12:13 29:15 51:23</p> <p><b>overstep</b> [1] 72:4</p> <p><b>overwhelming</b> [1] 48:20</p> <p><b>own</b> [4] 54:16 61:15 62:16, 17</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>PAGE</b> [3] 2:2 76:4,10</p> <p><b>pages</b> [1] 52:4</p> <p><b>palpable</b> [1] 46:9</p>	<p><b>parallel</b> [1] 85:18</p> <p><b>Parden</b> [5] 26:4,14,17 39: 17 80:12</p> <p><b>Parden's</b> [1] 26:15</p> <p><b>part</b> [19] 6:8 15:19 31:9 37: 6,7 42:18,23,24 43:15 46:9 49:12 56:24 57:7 58:15 64: 19 70:23 79:22 86:4 89:7</p> <p><b>particular</b> [8] 14:8 40:4 49: 24 50:1 57:15 65:18 67:21 90:5</p> <p><b>particularly</b> [1] 73:23</p> <p><b>parties</b> [2] 41:24 50:4</p> <p><b>partnerships</b> [2] 30:18,19</p> <p><b>parts</b> [5] 17:25 23:18 26:20 64:16 93:17</p> <p><b>past</b> [1] 76:25</p> <p><b>path</b> [1] 61:2</p> <p><b>pay</b> [2] 17:7 39:8</p> <p><b>penalties</b> [2] 62:10,17</p> <p><b>pending</b> [1] 38:6</p> <p><b>people</b> [2] 10:6 45:7</p> <p><b>perceive</b> [1] 45:22</p> <p><b>perfectly</b> [1] 9:22</p> <p><b>perhaps</b> [4] 60:14 67:24 93:16,19</p> <p><b>permissible</b> [2] 35:12 36: 16</p> <p><b>permit</b> [1] 24:19</p> <p><b>permitting</b> [1] 22:22</p> <p><b>person</b> [73] 3:16 5:10,17 6: 11 8:24 11:16,17,17,24 12: 3 13:10 16:15 17:25 18:4, 14,19 19:7 21:9,11,17 25:3 27:12,16,18 29:6,8 30:8 31:25 32:9,13 41:23 45:6, 12 46:17 49:16 51:12 52:7, 21,23,25 53:1,11,15,24 54: 1 58:22,23 62:2,7 63:24 64:6,7 65:21 66:10,11,15, 22 67:12 68:16,18 75:15 76:5 82:22,22 88:1,8 89: 13 91:1,3,7 93:16,23 94:20</p> <p><b>persons</b> [17] 10:7,10,17,19 19:6 27:7,9 53:7 62:6 64:1, 4,13,17,18 65:7 76:3 86:22</p> <p><b>pertain</b> [1] 15:1</p> <p><b>Petitioner</b> [6] 1:5,21 2:4, 10 3:9 92:13</p> <p><b>pick</b> [2] 40:16 62:23</p> <p><b>piece</b> [1] 26:5</p> <p><b>pitfalls</b> [1] 90:9</p> <p><b>places</b> [2] 45:12 65:15</p> <p><b>plain</b> [6] 7:3 47:11 50:5 85: 11,15 90:8</p> <p><b>plainly</b> [2] 24:5 26:25</p> <p><b>plaintiff</b> [1] 38:8</p> <p><b>plausible</b> [18] 5:11,23 10: 25 11:3,6 17:16 18:3 26:6 27:3 31:15 32:15,17 36:22 43:19 58:3 74:13 91:3,10</p> <p><b>plausibly</b> [1] 45:15</p> <p><b>please</b> [4] 3:11 15:13 16: 12 52:19</p>
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## Official

<p><b>plug</b> <sup>[9]</sup> 7:17,20 8:16 9:6 14:4 30:1,3 31:10,10 <b>plugged</b> <sup>[3]</sup> 8:22 15:17 53:1 <b>point</b> <sup>[16]</sup> 19:3 23:9 24:3 31:17,20 37:17 48:10 51:11 52:4 55:17 58:13 80:11,17 83:17,20 90:24 <b>pointed</b> <sup>[1]</sup> 21:3 <b>points</b> <sup>[4]</sup> 22:5 26:13 27:5 92:15 <b>policy</b> <sup>[2]</sup> 73:15,22 <b>policymaking</b> <sup>[1]</sup> 84:20 <b>pollutant</b> <sup>[5]</sup> 14:12,16,22 31:23 67:9 <b>posited</b> <sup>[1]</sup> 91:1 <b>position</b> <sup>[4]</sup> 55:3 63:14 73:9 94:17 <b>potential</b> <sup>[2]</sup> 38:14 90:9 <b>power</b> <sup>[4]</sup> 35:11,12 37:19 73:10 <b>powers</b> <sup>[3]</sup> 37:24 71:19 72:4 <b>pre-sentencing</b> <sup>[1]</sup> 59:25 <b>precedent</b> <sup>[1]</sup> 66:7 <b>precedents</b> <sup>[2]</sup> 39:14 79:1 <b>precise</b> <sup>[2]</sup> 38:5 68:4 <b>presumptively</b> <sup>[1]</sup> 4:25 <b>pretty</b> <sup>[5]</sup> 29:3 40:22 68:2,4 69:7 <b>prevail</b> <sup>[7]</sup> 37:9,13 38:11 41:22 42:5 58:4 72:22 <b>prevent</b> <sup>[3]</sup> 65:17 74:20 75:4 <b>previous</b> <sup>[1]</sup> 11:12 <b>previously</b> <sup>[4]</sup> 46:15,17 61:1 78:8 <b>primary</b> <sup>[1]</sup> 89:1 <b>principle</b> <sup>[6]</sup> 36:25 40:24 56:8,17 75:11 81:7 <b>principles</b> <sup>[7]</sup> 6:25 12:11 34:10 36:20 72:7,24 80:3 <b>prior</b> <sup>[1]</sup> 77:1 <b>Privacy</b> <sup>[2]</sup> 63:8,10 <b>private</b> <sup>[4]</sup> 17:4 41:24 50:4 71:12 <b>probably</b> <sup>[3]</sup> 41:11 78:13 83:1 <b>problem</b> <sup>[5]</sup> 18:24 20:1 24:9 75:1 93:4 <b>problematic</b> <sup>[1]</sup> 90:4 <b>proceeding</b> <sup>[1]</sup> 90:6 <b>process</b> <sup>[1]</sup> 70:7 <b>produce</b> <sup>[1]</sup> 41:10 <b>progeny</b> <sup>[1]</sup> 59:7 <b>programs</b> <sup>[1]</sup> 71:25 <b>prohibition</b> <sup>[1]</sup> 62:17 <b>promised</b> <sup>[1]</sup> 26:21 <b>proper</b> <sup>[1]</sup> 60:3 <b>proposition</b> <sup>[1]</sup> 71:5 <b>prosecute</b> <sup>[1]</sup> 68:23 <b>prosecuted</b> <sup>[1]</sup> 28:16 <b>prosecuting</b> <sup>[1]</sup> 69:1 <b>prosecution</b> <sup>[5]</sup> 19:6 59:</p>	<p>22,23 60:20 62:25 <b>prosecutions</b> <sup>[1]</sup> 18:18 <b>protect</b> <sup>[4]</sup> 16:25 32:21 34:12 72:7 <b>protecting</b> <sup>[1]</sup> 73:7 <b>Protection</b> <sup>[2]</sup> 54:5 87:3 <b>protections</b> <sup>[1]</sup> 34:17 <b>provide</b> <sup>[1]</sup> 3:15 <b>provides</b> <sup>[2]</sup> 53:23 67:4 <b>provision</b> <sup>[38]</sup> 5:9 19:9,16 20:6,17 21:14 22:8,20 23:10 24:15,22 30:1 47:14 48:13 55:21,23 58:25 62:3,5,11,14 63:6,23,23 64:9 65:8,22 76:2 81:20 82:6,8,16,17,18,21 89:2 91:23 93:19 <b>provisions</b> <sup>[30]</sup> 8:17 14:10,13,22,25 19:11 20:22 21:1 24:5 32:16,18 53:2,3,17 55:13,13,14 61:17 62:18,19,22 64:3 65:1 66:18 67:7,9 80:7 88:7 89:22 93:23 <b>public</b> <sup>[3]</sup> 40:21 55:22 81:19 <b>punitive</b> <sup>[8]</sup> 38:16,23 63:1 87:18 91:17,18,21,24 <b>purport</b> <sup>[1]</sup> 35:10 <b>purporting</b> <sup>[1]</sup> 34:16 <b>purpose</b> <sup>[7]</sup> 7:22 24:25 29:12 46:23 48:9 64:14 71:9 <b>purposes</b> <sup>[6]</sup> 10:16 27:8 47:23 65:22 73:1 92:17 <b>put</b> <sup>[5]</sup> 16:20 32:12 83:9,12 85:19 <b>putting</b> <sup>[5]</sup> 5:16,19 6:15 11:16 34:2</p> <p style="text-align: center;"><b>Q</b></p> <p><b>qualifies</b> <sup>[1]</sup> 63:16 <b>question</b> <sup>[40]</sup> 3:12,18 9:10 15:2 16:12,21 20:11,19 25:12 28:8,12 33:3 34:2,10 35:7,23 39:24 40:2 43:25 45:3 48:10 50:11,19,20 54:22 58:2,10 62:24 71:17 77:8,10,16,22 78:22 81:1 86:2 90:14 92:20 93:25 94:2 <b>questions</b> <sup>[6]</sup> 5:14 13:9 40:17 54:8 76:14 78:14 <b>quick</b> <sup>[2]</sup> 41:18 92:14 <b>quote</b> <sup>[1]</sup> 57:9</p> <p style="text-align: center;"><b>R</b></p> <p><b>raised</b> <sup>[6]</sup> 54:25 71:17 72:3 84:4,5,8 <b>raises</b> <sup>[1]</sup> 61:14 <b>range</b> <sup>[1]</sup> 12:9 <b>rational</b> <sup>[1]</sup> 16:25 <b>RCRA</b> <sup>[2]</sup> 27:17 52:3 <b>reach</b> <sup>[2]</sup> 10:23 80:25 <b>read</b> <sup>[16]</sup> 4:1 14:18 19:9 21:7 31:8 32:15,17 36:20 44:15 51:22 55:8 56:7 66:15 77:19 81:22 83:21</p>	<p><b>reader</b> <sup>[1]</sup> 45:11 <b>reading</b> <sup>[19]</sup> 5:23 10:25 11:3 21:15 24:3 36:17,23 57:18,22 60:18,24 65:11 66:8,14 68:4 72:12 89:13 90:3,8 <b>readings</b> <sup>[1]</sup> 91:3 <b>reads</b> <sup>[2]</sup> 55:6 77:20 <b>reaffirmed</b> <sup>[1]</sup> 39:15 <b>real</b> <sup>[2]</sup> 28:15 65:4 <b>realize</b> <sup>[1]</sup> 27:22 <b>realized</b> <sup>[1]</sup> 69:22 <b>really</b> <sup>[12]</sup> 14:7 21:4 22:8 30:7 55:19 64:20,23,25 65:9 75:13 82:15 83:2 <b>reason</b> <sup>[8]</sup> 14:20 29:7 32:25 61:6 71:20 74:19 88:16 91:15 <b>reasonable</b> <sup>[2]</sup> 18:17 48:3 <b>reasoning</b> <sup>[1]</sup> 14:9 <b>reasons</b> <sup>[3]</sup> 4:8 64:12 92:22 <b>REBUTTAL</b> <sup>[3]</sup> 2:8 33:16 92:12 <b>recognition</b> <sup>[1]</sup> 8:10 <b>recognized</b> <sup>[10]</sup> 5:9 16:14 18:16 21:20 22:1 25:11 36:19 39:16,23 40:1 <b>Recognizing</b> <sup>[2]</sup> 16:6 21:24 <b>reconcile</b> <sup>[1]</sup> 51:25 <b>recovery</b> <sup>[7]</sup> 7:24 10:16,18 27:14 29:13 42:12 69:16 <b>reenacted</b> <sup>[1]</sup> 75:15 <b>refashion</b> <sup>[1]</sup> 83:6 <b>refer</b> <sup>[2]</sup> 9:3 20:12 <b>reference</b> <sup>[6]</sup> 24:11 40:10,20 80:4 81:18 82:7 <b>references</b> <sup>[3]</sup> 29:11 92:23 93:8 <b>referencing</b> <sup>[1]</sup> 11:13 <b>referred</b> <sup>[3]</sup> 4:20 24:14,15 <b>referring</b> <sup>[4]</sup> 7:23 12:13 20:22 56:3 <b>refers</b> <sup>[3]</sup> 5:17 22:14 51:17 <b>REGINALD</b> <sup>[1]</sup> 1:7 <b>regulatory</b> <sup>[1]</sup> 15:18 <b>rejected</b> <sup>[3]</sup> 14:4 77:1 78:8 <b>relevant</b> <sup>[6]</sup> 39:23 45:23 46:21 77:25 86:6,8 <b>relied</b> <sup>[1]</sup> 27:15 <b>relies</b> <sup>[3]</sup> 55:20 70:20 91:23 <b>reluctant</b> <sup>[1]</sup> 84:18 <b>remained</b> <sup>[1]</sup> 4:23 <b>remains</b> <sup>[1]</sup> 67:2 <b>remedies</b> <sup>[1]</sup> 89:14 <b>remedy</b> <sup>[1]</sup> 53:25 <b>render</b> <sup>[1]</sup> 24:4 <b>repeat</b> <sup>[1]</sup> 16:21 <b>repeated</b> <sup>[1]</sup> 36:24 <b>repeatedly</b> <sup>[1]</sup> 35:23 <b>report</b> <sup>[2]</sup> 59:25 75:16 <b>Reporting</b> <sup>[9]</sup> 3:15 11:14</p>	<p>17:2,5 41:25 42:1 52:20 76:7,20 <b>reports</b> <sup>[4]</sup> 17:6 42:8 69:24 71:1 <b>require</b> <sup>[2]</sup> 24:12 92:22 <b>required</b> <sup>[3]</sup> 24:16 35:15 53:6 <b>requirement</b> <sup>[3]</sup> 72:15 91:19 93:2 <b>requirements</b> <sup>[3]</sup> 3:16 52:23 86:21 <b>requires</b> <sup>[1]</sup> 17:18 <b>requiring</b> <sup>[1]</sup> 35:18 <b>researched</b> <sup>[1]</sup> 20:2 <b>residual</b> <sup>[1]</sup> 31:11 <b>Resource</b> <sup>[1]</sup> 69:15 <b>respect</b> <sup>[4]</sup> 44:24 46:12 50:15 51:8 <b>respectfully</b> <sup>[3]</sup> 10:12 17:14 26:3 <b>respecting</b> <sup>[1]</sup> 73:1 <b>respects</b> <sup>[1]</sup> 77:25 <b>respond</b> <sup>[2]</sup> 57:5 70:13 <b>Respondent</b> <sup>[7]</sup> 1:8,23 2:7 3:25 41:9 47:5 52:17 <b>Respondent's</b> <sup>[4]</sup> 3:21 34:24 44:20 94:17 <b>response</b> <sup>[4]</sup> 39:10 47:2 72:23 86:21 <b>responses</b> <sup>[1]</sup> 12:20 <b>responsible</b> <sup>[1]</sup> 25:5 <b>rest</b> <sup>[5]</sup> 16:5,7 62:14,15 94:21 <b>rested</b> <sup>[1]</sup> 56:17 <b>rests</b> <sup>[1]</sup> 62:13 <b>result</b> <sup>[4]</sup> 21:4 29:4 46:19 60:19 <b>reticulated</b> <sup>[1]</sup> 63:8 <b>retreat</b> <sup>[3]</sup> 26:16 39:16 80:12 <b>rise</b> <sup>[1]</sup> 52:10 <b>ritualism</b> <sup>[2]</sup> 56:1 94:8 <b>ROBERTS</b> <sup>[24]</sup> 3:3 33:15,18,23 37:3 42:15 45:19 52:13 59:19 60:17 66:2,5,24 67:17 68:19 69:6 87:21 88:10 90:20 92:1,4,7,10 95:1 <b>rule</b> <sup>[2]</sup> 4:18 17:17 34:11,21 35:3,16 37:6,9,13 41:15,15 48:16 57:17,20 58:1 73:20 74:20 75:4,20 91:19 92:18 <b>rules</b> <sup>[1]</sup> 74:15 <b>RURAL</b> <sup>[4]</sup> 1:3,4 3:5,5</p> <p style="text-align: center;"><b>S</b></p> <p><b>Safe</b> <sup>[1]</sup> 20:3 <b>sake</b> <sup>[1]</sup> 88:1 <b>same</b> <sup>[36]</sup> 5:13 8:18 13:11 23:4 24:9,17 27:8 30:5 31:15 32:16 34:25 35:24 40:15 42:22 44:4,11 45:16 46:20 47:24 48:5 54:16 61:13,16 69:11,12 75:19 76:11</p>	<p>77:18,25 78:5 80:2 86:13 88:4 89:9 93:17,22 <b>satisfied</b> <sup>[1]</sup> 93:3 <b>satisfy</b> <sup>[1]</sup> 48:15 <b>Savings</b> <sup>[3]</sup> 26:12 48:19 80:10 <b>saying</b> <sup>[25]</sup> 8:15 15:21 19:5 21:7 22:1,24 27:1,7 35:4,8 36:5 47:10,15,22 56:5 61:18,20 63:10 65:6 79:7,8,10 85:21 89:14 91:6 <b>says</b> <sup>[15]</sup> 18:25 20:8 21:9 33:9 39:7 55:21,25 57:11 58:19 63:7,13 65:12 82:21 85:17 90:10 <b>Scalia</b> <sup>[1]</sup> 26:13 <b>scheme</b> <sup>[5]</sup> 15:18 16:3,5,8 63:8 <b>schemes</b> <sup>[1]</sup> 69:14 <b>scope</b> <sup>[1]</sup> 53:21 <b>score</b> <sup>[2]</sup> 70:6,21 <b>scratch</b> <sup>[1]</sup> 82:13 <b>Second</b> <sup>[8]</sup> 5:6 17:21 34:4 36:13 43:24 53:7 72:14 77:22 <b>section</b> <sup>[12]</sup> 10:7,8 46:5,6,12,14,15 53:23 56:10 76:3,5 80:22 <b>security</b> <sup>[2]</sup> 86:20,24 <b>see</b> <sup>[9]</sup> 9:1 21:14 40:18,19 49:11 64:22 75:10 84:18 85:16 <b>seek</b> <sup>[2]</sup> 69:2,8 <b>seem</b> <sup>[1]</sup> 16:23 <b>seemed</b> <sup>[1]</sup> 85:19 <b>seems</b> <sup>[14]</sup> 12:21 17:11 39:3,5 42:19 46:1,13,20 48:23 64:20 65:10 66:17 68:2 80:2 <b>self-contained</b> <sup>[1]</sup> 62:13 <b>Seminole</b> <sup>[3]</sup> 26:24 45:1 59:7 <b>sense</b> <sup>[11]</sup> 5:10 6:11 14:23 16:15 18:5,14 19:14 40:23 45:14,14,16 <b>sensitive</b> <sup>[4]</sup> 73:23 74:1,3,5 <b>separate</b> <sup>[6]</sup> 34:13 55:22 64:8,11 82:7 93:25 <b>separation</b> <sup>[3]</sup> 37:24 71:19 72:4 <b>seriously</b> <sup>[2]</sup> 57:4 74:8 <b>serve</b> <sup>[1]</sup> 29:13 <b>serves</b> <sup>[1]</sup> 72:25 <b>SERVICE</b> <sup>[2]</sup> 1:4 3:6 <b>set</b> <sup>[1]</sup> 69:12 <b>sets</b> <sup>[1]</sup> 23:2 <b>setting</b> <sup>[1]</sup> 84:12 <b>settled</b> <sup>[1]</sup> 36:14 <b>Seventh</b> <sup>[1]</sup> 38:7 <b>sheerest</b> <sup>[1]</sup> 56:1 <b>shouldn't</b> <sup>[2]</sup> 74:16 78:7 <b>show</b> <sup>[4]</sup> 6:22 12:5 17:15 49:17</p>
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## Official

<p><b>showed</b> <sup>[1]</sup> 87:4</p> <p><b>shows</b> <sup>[4]</sup> 4:24 5:2 85:25 91:2</p> <p><b>shrinking</b> <sup>[1]</sup> 63:23</p> <p><b>side</b> <sup>[7]</sup> 26:9 28:24,25 39:4, 7 40:18,19</p> <p><b>significant</b> <sup>[5]</sup> 14:7 21:1 26:23 27:4 38:14</p> <p><b>silently</b> <sup>[1]</sup> 40:3</p> <p><b>similar</b> <sup>[2]</sup> 19:11 39:5</p> <p><b>similarly</b> <sup>[1]</sup> 7:8</p> <p><b>simply</b> <sup>[2]</sup> 59:6 82:1</p> <p><b>since</b> <sup>[5]</sup> 60:25 76:23,23 80:18 81:24</p> <p><b>single</b> <sup>[2]</sup> 55:1 76:1</p> <p><b>sister</b> <sup>[1]</sup> 54:4</p> <p><b>situation</b> <sup>[3]</sup> 13:12 46:21 75:24</p> <p><b>skipped</b> <sup>[1]</sup> 27:23</p> <p><b>slicing</b> <sup>[1]</sup> 40:22</p> <p><b>slow</b> <sup>[1]</sup> 15:3</p> <p><b>SNYDER</b> <sup>[120]</sup> 1:19 2:3,9 3:7,8,10 5:15,22 6:3 7:16,19 8:3,19 9:9 10:12,24 11:9, 22 13:1,5,7,21 14:3,20 15:3,5,8,11,19,22 16:13,19 17:14,23 18:8,13 19:8,18 20:15,21,25 21:19,23 22:3,7, 13,17 23:8,13,14,17,20,24 24:2,23 25:7,19 26:2,11 28:1,3,17 29:2 30:9,16,19, 21,23,25 31:2,4,6,13,21 32:8,14,24 33:5,8,17,19 34:23 35:21 36:2,6,9 37:14,21,25 38:4,18,25 39:12 41:1,20, 23 42:6,24 43:18 44:2,10 45:9,18 47:1,16 48:17 49:5,8,12,15,21,23 50:18,25 51:15,22 52:10 92:10,12, 14</p> <p><b>Solicitor</b> <sup>[1]</sup> 1:19</p> <p><b>solitary</b> <sup>[1]</sup> 26:15</p> <p><b>somehow</b> <sup>[4]</sup> 20:13 21:17 65:23 76:11</p> <p><b>someone</b> <sup>[2]</sup> 34:16 44:17</p> <p><b>sometimes</b> <sup>[4]</sup> 35:12 37:7 65:9 68:1</p> <p><b>somewhere</b> <sup>[2]</sup> 43:12 44:18</p> <p><b>sorry</b> <sup>[7]</sup> 12:16 16:9,21 23:15 55:18 68:20 91:12</p> <p><b>sort</b> <sup>[12]</sup> 9:19 17:13 26:5 54:19 55:10 56:1 62:13 69:12 75:25 80:24 81:2,14</p> <p><b>sorts</b> <sup>[1]</sup> 88:24</p> <p><b>SOTOMAYOR</b> <sup>[29]</sup> 19:20, 22,24 20:16,24 21:6,20,22, 25 22:11,16,19 23:8 24:8 25:2,16,23 26:2,8 39:9 84:12 88:11,12,23 89:5,12,23, 25 90:11</p> <p><b>sound</b> <sup>[1]</sup> 94:6</p> <p><b>sounds</b> <sup>[1]</sup> 81:11</p> <p><b>sovereign</b> <sup>[104]</sup> 3:13,20,24</p>	<p>4:4,5,9,10,14,19,21,23 5:5, 16,20 6:1,13,20 7:11,25 8:2,5,10,11 9:14,16,21 11:2 12:6 15:25 16:1 20:11,14, 19 23:6 24:11,20 25:4,10, 14,21 26:19 29:9,11,14,19, 22 32:20,23 33:3,9,12 34:6, 13,14 35:5,19,20 36:11,16, 21 41:4,12 43:3,14,23 44:9, 22 48:24 50:10,16,21 51:3, 5,6,19 53:5 54:15,17,22 56:20 59:5,12,17,18 66:6,17 68:11 69:4 71:6,18 72:8, 10,16,25 74:21,24 80:13 81:8 92:20,23 93:12,24,25 94:2</p> <p><b>sovereign's</b> <sup>[1]</sup> 4:14</p> <p><b>sovereigns</b> <sup>[3]</sup> 34:13 43:13 85:1</p> <p><b>sovereignty</b> <sup>[1]</sup> 25:17</p> <p><b>speaking</b> <sup>[1]</sup> 34:15</p> <p><b>speaks</b> <sup>[1]</sup> 89:2</p> <p><b>Spear</b> <sup>[1]</sup> 60:13</p> <p><b>special</b> <sup>[2]</sup> 15:16 53:25</p> <p><b>specific</b> <sup>[4]</sup> 40:10 53:4 80:4 92:22</p> <p><b>specifically</b> <sup>[6]</sup> 7:21 11:13 48:6 72:17 92:19 93:11</p> <p><b>specificity</b> <sup>[3]</sup> 72:14 93:2,5</p> <p><b>specify</b> <sup>[1]</sup> 33:11</p> <p><b>spent</b> <sup>[1]</sup> 71:25</p> <p><b>split</b> <sup>[1]</sup> 54:24</p> <p><b>square</b> <sup>[1]</sup> 17:4</p> <p><b>squarely</b> <sup>[1]</sup> 60:6</p> <p><b>stand-alone</b> <sup>[2]</sup> 51:11 62:13</p> <p><b>standard</b> <sup>[9]</sup> 35:24 54:15, 16 56:20,22 59:4 80:13 81:16 91:21</p> <p><b>standpoint</b> <sup>[2]</sup> 50:9 83:2</p> <p><b>stare</b> <sup>[1]</sup> 76:21</p> <p><b>start</b> <sup>[4]</sup> 3:19 28:5 50:9,13</p> <p><b>started</b> <sup>[3]</sup> 27:21 56:12 80:11</p> <p><b>starting</b> <sup>[2]</sup> 37:17 82:12</p> <p><b>state</b> <sup>[25]</sup> 24:19 25:17 34:12 35:9 39:22 40:10 47:22 48:4,6 53:6 54:15 57:14 58:14,20 59:2,6,9,9,11,16 63:2 71:18 81:25 82:3,3</p> <p><b>statement</b> <sup>[20]</sup> 17:17 34:11, 21 35:15 36:6 37:6,9,13 41:14 48:16 57:17,19 58:1 73:20 74:20 75:4 81:16 84:13 91:19 92:18</p> <p><b>STATES</b> <sup>[48]</sup> 1:1,16 3:14 5:8 6:5,12 13:10 17:24 18:2, 18 20:7 24:6,20 27:9,13,15, 19 28:15 32:22 35:1,3 39:25 44:6,9,25 52:8 56:2,3 58:11,17 59:22,24 60:4,10, 21,21 62:25 63:1,3 68:23, 25 69:2,3,8 73:2 79:22 80:4 94:21</p>	<p><b>States'</b> <sup>[1]</sup> 93:12</p> <p><b>statute</b> <sup>[82]</sup> 3:22 4:2 5:4,16 6:17 7:5 9:7,8,19 10:18 11:1,3,7,18 14:6 15:10 18:1, 25 22:24 24:14,15 27:1,2 33:6,8 37:8,11 39:5 44:1,3 46:7 47:4,20,23 59:14,21 60:18 64:2,14,17,20 65:6, 11 66:12,18,23 67:4,8,10, 18,19,25 68:9,10 69:7 71:9 72:9,13,15,16 74:17,25 77:17,19,23 78:6,9 79:7,16,19 80:20 82:23 83:9 85:16 86:18 87:9 88:7 90:3,8,10 93:18 94:16</p> <p><b>statutes</b> <sup>[15]</sup> 19:10 20:23 21:15 27:11 29:25 36:15 52:3 54:4 55:7 69:5 77:20 78:19 79:3 87:2 88:24</p> <p><b>statutorily</b> <sup>[1]</sup> 64:1</p> <p><b>statutory</b> <sup>[26]</sup> 7:12 9:4 12:3 13:22 16:5,8 29:18,24 30:4 51:16 61:7 68:4 69:14 74:15 75:8,11 76:18,21 77:15 78:2,12 80:17 81:15 82:2 83:11 94:10</p> <p><b>stems</b> <sup>[1]</sup> 62:1</p> <p><b>step</b> <sup>[8]</sup> 6:13 17:21,22 23:1 25:6 43:23 58:18,25</p> <p><b>sticking</b> <sup>[1]</sup> 40:24</p> <p><b>still</b> <sup>[12]</sup> 12:10,24 17:21 37:13 44:3,7 57:16 58:17 64:13 70:11 76:22 79:21</p> <p><b>stock</b> <sup>[2]</sup> 85:14,19</p> <p><b>strange</b> <sup>[4]</sup> 7:2 31:8 47:13 50:3</p> <p><b>strangers</b> <sup>[1]</sup> 86:16</p> <p><b>striking</b> <sup>[2]</sup> 11:15 32:3</p> <p><b>string</b> <sup>[1]</sup> 63:12</p> <p><b>strip</b> <sup>[1]</sup> 34:17</p> <p><b>structurally</b> <sup>[3]</sup> 39:3,5 45:22</p> <p><b>structure</b> <sup>[8]</sup> 14:8 35:14 57:14 77:24,24 79:8,14,20</p> <p><b>stuck</b> <sup>[1]</sup> 16:22</p> <p><b>Sturgeon</b> <sup>[1]</sup> 13:18</p> <p><b>subbing</b> <sup>[1]</sup> 9:19</p> <p><b>subchapter</b> <sup>[1]</sup> 19:2</p> <p><b>subdivision</b> <sup>[2]</sup> 5:19 32:6</p> <p><b>subject</b> <sup>[6]</sup> 21:11 53:12,13 64:8,12,19</p> <p><b>submitted</b> <sup>[2]</sup> 95:3,5</p> <p><b>subsection</b> <sup>[1]</sup> 65:20</p> <p><b>subsequent</b> <sup>[2]</sup> 80:1,18</p> <p><b>subsets</b> <sup>[1]</sup> 64:4</p> <p><b>substantive</b> <sup>[7]</sup> 53:12,17 62:16,20 86:14 88:6 90:18</p> <p><b>substituting</b> <sup>[1]</sup> 11:11</p> <p><b>sufficient</b> <sup>[4]</sup> 6:1 43:22 59:16 86:11</p> <p><b>suggest</b> <sup>[7]</sup> 5:20 21:16 22:15 55:5 56:1 81:9,10</p> <p><b>suggested</b> <sup>[3]</sup> 60:13 74:19 92:17</p>	<p><b>suggesting</b> <sup>[2]</sup> 48:11 65:5</p> <p><b>suggestion</b> <sup>[1]</sup> 93:15</p> <p><b>suggests</b> <sup>[2]</sup> 20:1 23:5</p> <p><b>suit</b> <sup>[5]</sup> 10:6,10 27:17 35:20 52:7</p> <p><b>suits</b> <sup>[4]</sup> 24:19 25:1 29:17 56:3</p> <p><b>superfluity</b> <sup>[2]</sup> 41:2,10</p> <p><b>superfluous</b> <sup>[2]</sup> 41:19 42:4</p> <p><b>suppose</b> <sup>[3]</sup> 7:16 76:15 77:23</p> <p><b>SUPREME</b> <sup>[2]</sup> 1:1,15</p> <p><b>surprised</b> <sup>[1]</sup> 85:21</p> <p><b>surprising</b> <sup>[1]</sup> 57:9</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>tack</b> <sup>[1]</sup> 71:16</p> <p><b>task</b> <sup>[1]</sup> 17:15</p> <p><b>taxes</b> <sup>[1]</sup> 72:2</p> <p><b>taxpayer</b> <sup>[1]</sup> 71:21</p> <p><b>technical</b> <sup>[1]</sup> 60:2</p> <p><b>Tenth</b> <sup>[1]</sup> 73:4</p> <p><b>term</b> <sup>[18]</sup> 5:3 9:5,12 14:5 19:14 30:2 31:9,10,12 43:11,12 46:16 52:24 53:11 58:22 62:7 65:12 76:12</p> <p><b>terms</b> <sup>[11]</sup> 11:12 14:5 23:1, 2 34:25 35:1 39:22 50:5 65:23 83:8 86:20</p> <p><b>text</b> <sup>[27]</sup> 3:22 6:17 7:3 18:25 21:14 39:17 41:4 47:11 51:16 55:20 56:17 57:7,18, 22 58:4 65:11 74:9,11,11, 14 75:12,20 81:6,8 85:10, 12 94:10</p> <p><b>textual</b> <sup>[4]</sup> 56:23 57:7 59:4 65:2</p> <p><b>textualist</b> <sup>[1]</sup> 56:5</p> <p><b>theory</b> <sup>[1]</sup> 4:2</p> <p><b>there's</b> <sup>[37]</sup> 3:19 5:1 6:21 8:24,24,25,25 20:10,11 21:10 41:2,13 44:17 50:23 54:10,24 57:17 59:3,8 62:12 63:5,12 65:4 66:9,12,13,13 68:15 69:25 74:13 79:2 81:9,13 88:24 89:12 91:3,21</p> <p><b>therefore</b> <sup>[3]</sup> 4:17,24 18:2</p> <p><b>they've</b> <sup>[1]</sup> 63:18</p> <p><b>thin</b> <sup>[3]</sup> 40:22 82:4,11</p> <p><b>thinking</b> <sup>[2]</sup> 43:5 67:21</p> <p><b>thinks</b> <sup>[2]</sup> 93:2 94:18</p> <p><b>THOMAS</b> <sup>[6]</sup> 5:15,24 6:4 33:24 54:9 87:23</p> <p><b>Thomas's</b> <sup>[1]</sup> 58:8</p> <p><b>though</b> <sup>[8]</sup> 8:4 16:17 24:14 29:7 64:13,18 84:23 87:7</p> <p><b>three</b> <sup>[5]</sup> 20:4 23:18 24:10 66:13 92:11</p> <p><b>throughout</b> <sup>[6]</sup> 19:1 64:2 65:8 66:22 86:18 94:21</p> <p><b>throw</b> <sup>[1]</sup> 79:1</p> <p><b>tied</b> <sup>[1]</sup> 84:20</p> <p><b>TILA</b> <sup>[1]</sup> 87:5</p>	<p><b>timing</b> <sup>[2]</sup> 47:17,17</p> <p><b>today</b> <sup>[4]</sup> 39:20 47:6 78:14 94:11</p> <p><b>together</b> <sup>[1]</sup> 55:15</p> <p><b>took</b> <sup>[2]</sup> 63:4 94:12</p> <p><b>tracing</b> <sup>[1]</sup> 36:13</p> <p><b>traditional</b> <sup>[1]</sup> 74:14</p> <p><b>traditionally</b> <sup>[1]</sup> 35:15</p> <p><b>Treasury</b> <sup>[2]</sup> 71:24 72:1</p> <p><b>treated</b> <sup>[2]</sup> 79:25 88:4</p> <p><b>treats</b> <sup>[1]</sup> 39:13</p> <p><b>Treaty</b> <sup>[1]</sup> 68:1</p> <p><b>tree</b> <sup>[1]</sup> 34:3</p> <p><b>Tribe</b> <sup>[4]</sup> 26:24 35:9 45:1 59:7</p> <p><b>tribes</b> <sup>[3]</sup> 35:2 73:2 85:2</p> <p><b>tried</b> <sup>[1]</sup> 94:4</p> <p><b>tries</b> <sup>[2]</sup> 64:25 75:4</p> <p><b>trouble</b> <sup>[2]</sup> 28:22 57:4</p> <p><b>true</b> <sup>[2]</sup> 40:15 93:22</p> <p><b>trump</b> <sup>[1]</sup> 68:3</p> <p><b>Trusts</b> <sup>[1]</sup> 30:22</p> <p><b>Truth</b> <sup>[2]</sup> 87:5 88:20</p> <p><b>try</b> <sup>[2]</sup> 80:25 83:6</p> <p><b>trying</b> <sup>[2]</sup> 10:23 50:16</p> <p><b>turn</b> <sup>[3]</sup> 17:4 22:4 58:14</p> <p><b>turned</b> <sup>[1]</sup> 76:10</p> <p><b>two</b> <sup>[20]</sup> 4:7 6:3 12:21,23 26:20 32:5 34:23 36:7,20 40:6 47:1 55:2 66:13 72:6 75:7 83:23,24,25 87:14,15</p> <p><b>type</b> <sup>[1]</sup> 84:21</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>U.S</b> <sup>[2]</sup> 5:21 75:19</p> <p><b>ultimate</b> <sup>[1]</sup> 86:1</p> <p><b>ultimately</b> <sup>[2]</sup> 3:23 37:18</p> <p><b>unambiguous</b> <sup>[1]</sup> 19:16</p> <p><b>unambiguously</b> <sup>[3]</sup> 3:13 6:5 14:13</p> <p><b>unavoidable</b> <sup>[1]</sup> 59:20</p> <p><b>uncertainty</b> <sup>[3]</sup> 46:3,9,21</p> <p><b>unconsenting</b> <sup>[1]</sup> 24:6</p> <p><b>unconstitutional</b> <sup>[3]</sup> 24:5 26:25 44:6</p> <p><b>unconstitutionally</b> <sup>[1]</sup> 44:24</p> <p><b>under</b> <sup>[18]</sup> 4:18 6:6,25 24:6 34:17 35:11 37:13 41:14, 15 42:12 44:4 47:24 56:21 66:6 67:23 74:14 75:20 93:19</p> <p><b>undergird</b> <sup>[1]</sup> 40:24</p> <p><b>understand</b> <sup>[17]</sup> 7:16 12:19 13:15 15:25 16:16 19:3 34:9,10 38:10 45:7,12 50:8,14 55:19 72:21,23 90:24</p> <p><b>understanding</b> <sup>[6]</sup> 44:20 45:13 71:20 83:3 93:4 94:24</p> <p><b>understood</b> <sup>[2]</sup> 43:20 74:11</p> <p><b>unenforceable</b> <sup>[1]</sup> 53:18</p> <p><b>Union</b> <sup>[4]</sup> 80:2,5,19 82:9</p>
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<p><b>unique</b> <sup>[2]</sup> 61:8 90:17  <b>UNITED</b> <sup>[34]</sup> 1:1,16 3:14 5:8 6:5,12 13:10 17:24 18:2,18 20:6 27:9,13,15,19 28:15 32:22 35:3 52:8 59:22,24 60:4,20,21 62:25 63:1,3 68:23,25 69:2,3,8 93:12 94:21  <b>units</b> <sup>[2]</sup> 9:17,18  <b>universe</b> <sup>[1]</sup> 20:5  <b>unless</b> <sup>[7]</sup> 8:5 36:16,22 41:3 44:8 59:10 70:13  <b>unlikely</b> <sup>[1]</sup> 45:2  <b>until</b> <sup>[2]</sup> 47:25 80:18  <b>unusual</b> <sup>[3]</sup> 12:7 21:4 63:2  <b>unworkable</b> <sup>[2]</sup> 67:10,13  <b>unwritten</b> <sup>[1]</sup> 4:1  <b>up</b> <sup>[7]</sup> 17:11 35:20 40:17 62:23 67:7 69:12 82:12  <b>user</b> <sup>[1]</sup> 11:14  <b>uses</b> <sup>[5]</sup> 5:9 18:14 29:8,11 30:2  <b>using</b> <sup>[5]</sup> 4:22 6:19 18:4 29:5 76:11  <b>Utility</b> <sup>[15]</sup> 6:7,15 14:7,10,21 15:8,12,15,22 16:3 17:10 19:10,12 31:24 67:6</p> <hr/> <p style="text-align: center;"><b>V</b></p> <p><b>valuable</b> <sup>[1]</sup> 71:22  <b>value</b> <sup>[1]</sup> 86:10  <b>variations</b> <sup>[1]</sup> 66:22  <b>various</b> <sup>[1]</sup> 64:3  <b>versus</b> <sup>[6]</sup> 3:6 58:11,14 59:2 60:13 71:18  <b>viable</b> <sup>[1]</sup> 81:2  <b>view</b> <sup>[1]</sup> 72:22  <b>violate</b> <sup>[1]</sup> 22:24  <b>violated</b> <sup>[2]</sup> 7:4 50:4  <b>violates</b> <sup>[2]</sup> 3:16 21:10  <b>violations</b> <sup>[3]</sup> 23:7 53:25 63:10  <b>virtually</b> <sup>[5]</sup> 13:17,19 14:2,19 21:8</p> <hr/> <p style="text-align: center;"><b>W</b></p> <p><b>wait</b> <sup>[3]</sup> 23:23 24:1 33:20  <b>waive</b> <sup>[17]</sup> 6:1,23 9:16 12:6 29:22 33:2 34:5 35:9,19 36:21 41:12 44:9 51:3 53:5 72:15 81:8 92:20  <b>waived</b> <sup>[11]</sup> 3:13,20 4:14 20:14 24:20 35:5 41:3 44:13 50:17 69:4 74:23  <b>waiver</b> <sup>[26]</sup> 4:1,19 9:14,21 11:1 20:11,19 23:6 24:11 40:14 41:8 43:4,7,13 44:17 46:11,24 50:10 56:11,20,22 63:5 74:21 75:2 80:13 81:10  <b>waivers</b> <sup>[1]</sup> 16:1  <b>waives</b> <sup>[2]</sup> 54:22 59:17  <b>waiving</b> <sup>[6]</sup> 6:13 34:15 43:23 54:16 59:5 93:11</p>	<p><b>wanted</b> <sup>[8]</sup> 17:13 21:4 23:11 27:14 29:4 53:22 56:14 71:11  <b>wants</b> <sup>[7]</sup> 59:9,9 68:17 73:23 74:8 81:25 92:20  <b>Washington</b> <sup>[3]</sup> 1:11,20,22  <b>Water</b> <sup>[3]</sup> 20:2,3 88:25  <b>way</b> <sup>[37]</sup> 5:13 16:21 19:9 25:25 29:18 30:5 31:8 32:16 36:10,13 40:25 43:12 47:18 48:5 49:25 51:24 52:2 55:11 57:11,15 62:15 65:7,9 66:7,9,11,15,18 70:13 74:10 77:19 79:2 80:6 81:25 83:22 84:18 88:4  <b>ways</b> <sup>[3]</sup> 18:1 45:23 89:17  <b>Weapons</b> <sup>[1]</sup> 68:1  <b>welcome</b> <sup>[2]</sup> 5:14 54:8  <b>well-established</b> <sup>[1]</sup> 36:25  <b>whatnot</b> <sup>[1]</sup> 46:8  <b>whereas</b> <sup>[1]</sup> 62:18  <b>Whereupon</b> <sup>[1]</sup> 95:4  <b>wherever</b> <sup>[1]</sup> 14:5  <b>whether</b> <sup>[20]</sup> 3:12 11:23 25:12 33:3 39:24 46:10,22 49:3,9 50:1,14,16 54:13,15,22 60:21 86:3 92:20 93:25 94:2  <b>who's</b> <sup>[1]</sup> 7:2  <b>Whoa</b> <sup>[2]</sup> 33:21,21  <b>whole</b> <sup>[5]</sup> 8:7 46:6 55:13 60:22 64:2  <b>whom</b> <sup>[1]</sup> 12:9  <b>will</b> <sup>[8]</sup> 12:10 35:4 37:8 38:6 41:5 43:13 64:7 84:24  <b>willfully</b> <sup>[2]</sup> 52:22 82:22  <b>willing</b> <sup>[2]</sup> 29:21 41:7  <b>win</b> <sup>[2]</sup> 70:11 94:23  <b>wins</b> <sup>[1]</sup> 59:9  <b>wisely</b> <sup>[1]</sup> 22:4  <b>without</b> <sup>[4]</sup> 27:1 36:12 70:11 87:13  <b>wonder</b> <sup>[2]</sup> 34:8,20  <b>wondering</b> <sup>[2]</sup> 14:18 48:14  <b>word</b> <sup>[14]</sup> 6:19 11:16 17:25 18:4,19 29:6 32:5 45:12 51:12 75:15,16 76:5,11 93:16  <b>wording</b> <sup>[1]</sup> 77:24  <b>words</b> <sup>[25]</sup> 7:20,22,22 8:23 9:11,20,23 10:1 24:12,16 29:12 32:5,7 35:18,22 48:23 53:21 56:4 57:13 66:9 75:18 80:4 84:16,24 85:7  <b>work</b> <sup>[4]</sup> 28:23 41:5 50:15 61:12  <b>workable</b> <sup>[1]</sup> 75:11  <b>worked</b> <sup>[1]</sup> 9:22  <b>world</b> <sup>[2]</sup> 82:20 85:17  <b>worried</b> <sup>[1]</sup> 73:7  <b>worth</b> <sup>[1]</sup> 55:4  <b>write</b> <sup>[3]</sup> 81:12 82:20 83:9</p>	<p><b>written</b> <sup>[8]</sup> 20:17 21:13 26:14 51:13 65:3 80:20 81:12 90:4</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <p><b>year</b> <sup>[3]</sup> 8:14 60:8 87:15  <b>years</b> <sup>[5]</sup> 7:4 13:18 50:5 87:14,15</p>
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