

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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STARBUCKS CORPORATION,)
Petitioner,)
v.) No. 23-367
M. KATHLEEN McKINNEY, REGIONAL)
DIRECTOR OF REGION 15 OF THE)
NATIONAL LABOR RELATIONS BOARD,)
FOR AND ON BEHALF OF THE NATIONAL)
LABOR RELATIONS BOARD,)
Respondent.)
- - - - -

Pages: 1 through 67
Place: Washington, D.C.
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4 Petitioner,)
5 v.) No. 23-367
6 M. KATHLEEN MCKINNEY, REGIONAL)
7 DIRECTOR OF REGION 15 OF THE)
8 NATIONAL LABOR RELATIONS BOARD,)
9 FOR AND ON BEHALF OF THE NATIONAL)
10 LABOR RELATIONS BOARD,)
11 Respondent.)
12 - - - - -

13
14 Washington, D.C.
15 Tuesday, April 23, 2024
16

17 The above-entitled matter came on for oral
18 argument before the Supreme Court of the United
19 States at 11:39 a.m.
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25

1 APPEARANCES:

2 LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of
3 the Petitioner.

4 AUSTIN RAYNOR, Assistant to the Solicitor General,
5 Department of Justice, Washington, D.C.; on behalf
6 of the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	LISA S. BLATT, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	AUSTIN RAYNOR, ESQ.	
7	On behalf of the Respondent	33
8	REBUTTAL ARGUMENT OF:	
9	LISA S. BLATT, ESQ.	
10	On behalf of the Petitioner	65
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(11:39 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-367, Starbucks Corporation versus McKinney.

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE PETITIONER

MS. BLATT: Mr. Chief Justice, and may it please the Court:

Section 10(j) authorizes district courts to grant preliminary injunctions that they deem just and proper. 10(j) thus requires district courts to apply the traditional four factors as set out in Winter versus NRDC.

This Court should reverse. The court of appeals held that Winter's four factors do not apply under Section 10(j). All that mattered below was whether any facts supported a non-frivolous legal theory and whether there was harm, not whether that harm was irreparable.

The government argues that whether a two- or four-part test governs, the statutory context compels district courts to conduct "a less exacting and more deferential inquiry into

1 the merits," "without undertaking an intensive
2 effort to resolve factual issues." But 10(j)
3 contains no language, much less clear language,
4 diluting the traditional standard.

5 Preliminary injunctions are
6 extraordinary and drastic remedies. Here, the
7 Board seeks a coercive injunction backed by
8 contempt sanctions, and the Board seeks the very
9 same injunctive relief that it would get if it
10 won the case.

11 Such relief is highly inappropriate
12 absent a clear showing under all four factors.
13 The government justifies deference because the
14 Board, not trial courts, ultimately decide the
15 merits at the back end. But Congress directed
16 trial courts, not the Board, to apply the Winter
17 factors at the front end.

18 The Board hasn't even made any factual
19 findings to defer to. Agencies have no
20 expertise whatsoever in how courts should
21 exercise their equitable discretion. Indeed,
22 the Board in its adjudication will not even
23 consider the four Winter factors. This Court
24 has never deferred to an agency's litigation
25 position, and it should not start here.

1 I welcome your questions.

2 JUSTICE THOMAS: Ms. Blatt, the
3 government says that "Petitioner's ahistorical,
4 decontextualized approach is inconsistent with
5 the statutory text, the basic premises of
6 equity, and over a century of caselaw."

7 What's your reaction to that?

8 (Laughter.)

9 MS. BLATT: No.

10 (Laughter.)

11 MS. BLATT: I don't even know where
12 they're getting that. I mean, this Court in
13 Winter and a million other cases has said that
14 these four factors are longstanding, and the
15 clear statement rule goes back to Justice Story.
16 But I just think the text on its face, you don't
17 have to get too far, says "just and proper."
18 That's obviously harks to traditional equity.
19 And, here, we have the four factors.

20 JUSTICE THOMAS: Do you think their
21 real -- their -- the government argues that
22 you're -- because they are protecting the
23 Board's jurisdiction, as opposed to the courts'
24 jurisdiction, that that's a difference.

25 MS. BLATT: Not at all. Not at all.

1 I mean, a preliminary injunction -- I mean, it's
2 assigned to the district court. It has the same
3 reasons. You have to show that there's a
4 likelihood of success on the merits. And,
5 obviously, if the harm is recoverable, you're
6 not entitled to the injunction at all in balance
7 of the equities.

8 There's no -- I don't even understand
9 the Board's jurisdiction. There are a multitude
10 of contexts where an agency has an adjudication,
11 and if it wants a preliminary injunction, it's
12 got to make the showing that every other party
13 would have to make.

14 JUSTICE JACKSON: But this is not just
15 the standard preliminary injunction that
16 district courts do on a daily basis in regular,
17 ordinary cases within their jurisdiction that
18 they control. I mean, this is an injunction
19 that is being provided for in a specific
20 paragraph of this statute, which I'm sure you
21 agree, does, the statute, require some
22 consideration of the Board's prerogatives. The
23 Board is the one that is ultimately making this
24 unfair labor practice determination in the first
25 instance. Congress is setting up a Board to

1 take care of these issues.

2 So it's -- it's not the ordinary PI
3 that the -- that district courts see, correct?

4 MS. BLATT: No, not at all. It is an
5 ordinary preliminary injunction, and this is an
6 ordinary statute with a call to just and proper
7 remedies. And we cite six statutes in the U.S.
8 Code that use the "just and proper" standard and
9 a multitude of statutes saying "necessary and
10 proper" or just "proper."

11 JUSTICE JACKSON: No, I understand,
12 but we are in a particular context, and I think
13 the context has to inform how we understand what
14 Congress intended with respect to this provision
15 of the statute providing for this kind of
16 injunction.

17 MS. BLATT: Well, maybe we should just
18 talk about what we're talking about, and that is
19 does anything in that statute or anything in
20 common sense say the Board gets to walk in and
21 get a coercive injunction on the notion that
22 they have a non-frivolous legal theory and the
23 -- district court is barred from finding facts,
24 it's barred from weighing witness credibility,
25 and all that matters is the government has not

1 presented a joke.

2 JUSTICE JACKSON: Well what -- I guess
3 what I'm -- what I'm referring to is that we
4 already have a very different context insofar as
5 the Board is assigned by Congress with the
6 requirement or duty to investigate unfair labor
7 practices and make the decision in the first
8 instance as to whether or not they occurred.

9 That doesn't happen in other PI
10 contexts. So I get that in other PI contexts
11 the district court is doing the fact finding and
12 all of the things you're talking about. This is
13 a different context.

14 MS. BLATT: So, on pages 42 and 44 of
15 our brief, we cite SEC, FTC, CPFC -- I'm going
16 to run out of the alphabet -- EEOC, a bunch of
17 cases where agencies have adjudicatory
18 processes. There's three that we cite on pages
19 23 and 42 where it involves you can go to
20 district court.

21 But, remember, neither the Board nor
22 the court of appeals on -- on reviewing of a
23 final agency will ever consent or -- consider
24 the normal standards for preliminary injunction.

25 It -- I mean, we just in terms of

1 where all this leads you is why would the Board
2 get deference when the Board doesn't deserve any
3 deference and has no expertise on how equity
4 should be -- should be weighed? And in terms of
5 -- we could talk about the four factors. At
6 most, statutory context, like every other
7 injunction, takes account of -- of the statutory
8 context. If we were here because there was
9 going to be a nuclear accident, I would think
10 that's an important statutory context too.

11 JUSTICE KAGAN: So --

12 JUSTICE SOTOMAYOR: Ms. Blatt, you've
13 used in your brief 12 times the description of
14 using the stringent version of the four-factor
15 test. Is that different than the standard
16 four-factor test?

17 MS. BLATT: This Court in the Pharma
18 versus Walsh and in Winter said "clear showing,"
19 so -- but, yes, I think that is a stringent --

20 JUSTICE SOTOMAYOR: So it's different
21 than the traditional?

22 MS. BLATT: Traditional factor test is
23 a clear showing. And what I think --

24 JUSTICE SOTOMAYOR: Well, all right.
25 Now you're doing something else.

1 MS. BLATT: Okay.

2 JUSTICE SOTOMAYOR: I understand very
3 well why you say we don't give deference to the
4 Board on the likelihood of success on the
5 merits, which -- there's some language in some
6 of the court's decisions below that they think
7 they have to, and that's the stuff about not
8 weighing credibility, et cetera.

9 I -- I do understand why that needs to
10 be corrected because, you're right, it's the
11 court that has to decide the likelihood of
12 merits.

13 But, with respect to the other three
14 prongs -- irreparable harm, balance of the
15 equities, public interest -- in Winter and Nken,
16 we talked about that there has to be a
17 recognition of the -- the public interest, the
18 Navy's interest in doing what it needs to do,
19 the -- here, I think it's in the NL -- NLRB's
20 interest in making sure that its remedial power
21 can be returned after the status quo.

22 We have to consider in the balance of
23 equities the court below, the harm both to the
24 employer but the harm to the union and the harm
25 to the NLRB. And, finally, the public interest

1 is clear in the -- the Board's requirement. So
2 it's -- I -- I don't know that either Winter or
3 Nken or anything else -- the word "deference" is
4 just misplaced here.

5 MS. BLATT: Well, so we've gotten
6 likelihood of success off the table, but on both
7 the court of appeals and the trial court refused
8 to find any facts even on the irreparable harm.
9 So all the Board cited the evidence and only one
10 cited the evidence was considered on irreparable
11 harm.

12 And in terms of irreparable harm,
13 that's something that district courts do day in
14 and day out. And what the Board has here and
15 has been arguing in all these cases and what the
16 court of appeals found is anytime there's an
17 unfair labor practice, if you can show evidence
18 of chill because people are afraid of being
19 retaliated against if they support the union,
20 then -- and I'm quoting from the NLRB -- that
21 "faith in workplace democracy can never be
22 restored."

23 And so, in their manual, their 10(j)
24 manual, it's basically a playbook and every case
25 they say fill in the blank, they're always

1 saying, if there's evidence of chill, if anyone
2 says --

3 JUSTICE SOTOMAYOR: I mean, firing all
4 eight of the union organizers, I think --

5 MS. BLATT: Well, if all eight --

6 JUSTICE SOTOMAYOR: -- it's hard to
7 see that, although I do understand that some of
8 the organizers did different things than others.

9 MS. BLATT: Right.

10 JUSTICE SOTOMAYOR: And the ALJ who's
11 made factual findings here to whom the Court
12 will have to eventually give deference found
13 that at least two of these union representatives
14 should have been fired because they did
15 something more than stay after hours.

16 MS. BLATT: Right.

17 JUSTICE SOTOMAYOR: There were
18 employees there who were staying after hours
19 that weren't fired.

20 MS. BLATT: Remember, we -- we're here
21 on the injunction. Obviously, the -- the ALJ's
22 findings don't deserve any deference. If
23 there's a final decision by the Board and that
24 goes to a court of appeals, they get substantial
25 evidence deference. But --

1 JUSTICE SOTOMAYOR: But I'm going back
2 to the point.

3 MS. BLATT: But into the injunction
4 standard, if all eight employees commit gross
5 misconduct, then there's a -- you know, that's a
6 basis for termination.

7 JUSTICE SOTOMAYOR: But there were two
8 others who didn't union organize that weren't
9 fired.

10 MS. BLATT: And one union organizer
11 didn't engage in the misconduct and wasn't
12 fired. But here's --

13 JUSTICE GORSUCH: You -- you don't
14 dispute, though, the district court could take
15 that fact that --

16 MS. BLATT: Sure.

17 JUSTICE GORSUCH: -- Justice Sotomayor
18 mentioned into account in -- in the course of
19 weighing whether an injunction's warranted?

20 MS. BLATT: Absolutely. I mean, this
21 is a classic case of burden-shifting, was there
22 anti-union animus that justified -- that -- that
23 prompted the terminations, and Starbucks'
24 managers explained that -- and the employees
25 conceded this violated company policy, so the

1 only issue is whether the policy was enforced in
2 other stores.

3 JUSTICE GORSUCH: Yeah, pretextual,
4 and a district court could make that
5 determination the way the ALJ did perhaps.

6 MS. BLATT: Exactly. The problem
7 in -- in the circuit split is, and in this case
8 in particular, both the district court and the
9 court of appeals said district courts are barred
10 from considering the evidence. And if you count
11 the -- the Board's theory that whenever you have
12 a harm to unionization, and their story is union
13 support is very fragile, whether it's before the
14 union's been voted in or after the union is
15 voted in, and any type you -- anytime you have
16 an unfair labor practice, that's irreparable
17 harm. And we're just saying no.

18 JUSTICE BARRETT: But you'd be happy
19 with weighing, right?

20 MS. BLATT: Yes.

21 JUSTICE BARRETT: You'd be happy with
22 weighing the harm to the union organizing
23 against the harm to Starbucks in retaining the
24 employees who had violated store policy by
25 staying after hours, with all the pretext

1 considerations that Justices Gorsuch and
2 Sotomayor have referred to?

3 MS. BLATT: Factor --

4 JUSTICE BARRETT: You'd be happy with
5 that, the balance?

6 MS. BLATT: Very happy for Factor 3.
7 But Factor 2 is irreparable harm.

8 JUSTICE JACKSON: But wait. Before
9 you leave Factor 3, why -- why is -- I'm sorry.
10 Is that the irreparable harm factor you're
11 talking about?

12 MS. BLATT: Balance of the equities
13 was exactly what Justice Barrett said.

14 JUSTICE JACKSON: Oh, I -- I see. All
15 right. So irreparable harm, what -- what is the
16 -- what is being addressed there? I thought it
17 was the Board's -- whether the Board's remedial
18 authority would be harmed, that that's why
19 they're seeking a preliminary injunction.

20 MS. BLATT: Yeah, and that just is
21 empty words without saying what -- what in the
22 harm is irreparable, why can't an order of
23 reinstatement matter. And the problem with the
24 Board's theory in all these cases is they're
25 always entitled to an injunction. There's

1 always irreparable harm --

2 JUSTICE JACKSON: But -- but --

3 MS. BLATT: -- by definition.

4 JUSTICE JACKSON: -- but you -- you --
5 you've said that many times and you suggest that
6 this is happening all the time. There's record
7 evidence that in the last year the Board has
8 sought 14, 14, 1-4, 10(j) injunctions. So it's
9 not as though this is happening a lot.

10 MS. BLATT: Well, totally fair, just
11 when it happens, but in terms of the --

12 JUSTICE JACKSON: Right. But what I'm
13 saying is, if -- if we're -- if we're worried
14 about an abusive Board doing things that it's
15 not supposed to be, giving undue deference, it
16 seems like the Board is pretty careful when it's
17 determining whether or not to even seek these
18 injunctions since it's only asked for it 14
19 times.

20 MS. BLATT: Well, I'd like to take
21 that on because I do think that they are relying
22 on the fact that they've done a fair
23 investigation. And no matter how much
24 investigation and how much careful
25 consideration, it's still a litigating position.

1 It's not the -- the fact finding, the
2 adjudication that Congress assigned it.

3 And second of all, the Board is asking
4 for more deference to a litigation position than
5 it would get at the back end. The Board could
6 never get this kind of deference even if it had
7 gone through the full adjudication.

8 And, third, the Board can't have it
9 both ways. Either they're spending so much time
10 investigating, maybe they should spend that time
11 adjudicating so you don't need these year-long
12 injunctions, or if they're saying, well, it
13 takes so long for us to adjudicate, maybe
14 because it's a hard question.

15 JUSTICE JACKSON: But I guess what I'm
16 saying is they're only saying that in 14 cases.
17 I mean, you're right, maybe -- maybe they should
18 be going faster. But they have only asked for
19 this kind of injunction in a very, very small
20 number of cases. Twenty thousand complaints are
21 filed with the Board. Seven hundred result in
22 Board action, and of those 700 that the Board is
23 investigating and doing and determining, they've
24 asked for this kind of injunction 14 times.

25 So, I mean, I appreciate that maybe

1 the standards we need to look at and I
2 understand four factors versus two factors, but
3 this is not sounding like a huge problem.

4 MS. BLATT: Well, restraint is not a
5 basis for deference. And whether or not it's a
6 huge problem, what Petitioner wants is just a
7 level playing field, the normal injunctive
8 factors that agencies and private parties should
9 get. So, even if the Board only sought one
10 injunction, can -- can you please hold that the
11 four factors apply? And we --

12 JUSTICE KAGAN: So, when you said the
13 normal process, so it's just the traditional
14 four-factor test applied normally? That's what
15 you want?

16 MS. BLATT: Yes. Yes. I hope I
17 didn't -- that's not a trick question.

18 JUSTICE KAGAN: Yeah. No.

19 (Laughter.)

20 JUSTICE KAGAN: It's -- it's supposed
21 to be a clarifying question.

22 MS. BLATT: Yeah, four factors with no
23 deference and to please make sure that --

24 JUSTICE KAGAN: Maybe I'll take that
25 as a compliment, that --

1 (Laughter.)

2 JUSTICE KAGAN: -- that you think I'm
3 that crafty, but, really --

4 MS. BLATT: I -- I think we -- we
5 definitely need a reversal with the four
6 factors.

7 JUSTICE KAGAN: And -- and -- and --
8 and just on -- on the -- on this -- on the
9 irreparable harm part, you say in your reply
10 brief that under that four-factor test applied
11 normally, the Court is supposed to decide
12 whether delay is going to frustrate -- I'm using
13 your words -- "frustrate the Board's ability to
14 remedy the alleged unfair labor practices." So
15 you have no problem with that?

16 MS. BLATT: Right, as long as it's --
17 it's actually irreparable, like there's some --
18 so let me just see if I can try to be -- you
19 know, help here. Chill can't be -- chill can be
20 irreparable, but it has to be chilled from
21 something that's about to happen, an event that
22 can't be unscrambled.

23 And so, when we talk about the Board's
24 remedial factors, it can't be faith in workplace
25 democracy. It has to be -- there's -- there's

1 an event, there's an election that they've
2 actually, you know, barricaded the store and
3 employees can't get into vote. Unless we get
4 this injunction, you can't recreate the
5 conditions. So that's all we're talking about.

6 And, there, the Board's remedial power
7 is being frustrated and there's irreparable
8 harm, but all the more reason you've -- you
9 know, balance of the equities, it may be that
10 the employer had to shut down the store because
11 it's not making money.

12 JUSTICE KAGAN: And on the equities
13 and the public interest, I mean, I think also in
14 your brief you acknowledge that when the -- the
15 -- a statute like this is involved and public
16 interests are involved, a court is supposed to
17 take that into account in a way that's different
18 from what it might in a statute between private
19 parties -- excuse me, in a case between private
20 parties with only private interests.

21 MS. BLATT: I -- I think that's
22 correct because, by definition, the public
23 interest is broader than a breach of contract.
24 And if you have, you know, the environment or --
25 or, I don't know, voting rights, there's public

1 interests, but the case that this originates and
2 in the Oakland Cannabis and the Virginia
3 Railway, it's public interest as deliberately
4 expressed in legislation. So where the Court
5 has been on public interest is saying district
6 courts can't reach out the confines of the
7 statute either in going too far or too little.
8 And that's -- that, I think, does go to public
9 interest.

10 But I do think our point is this
11 public interest wasn't even referenced below,
12 except for the district court saying there's a
13 public interest in the statute, is that if
14 there's not a showing under all three factors,
15 the public interest is not served by, you know,
16 putting a scarlet letter on an employer and
17 having them just live under an injunction that
18 they violated the act based on a non-frivolous
19 legal theory, with not even their side of the
20 evidence being heard. That is very damaging to
21 the public interest in my view.

22 JUSTICE BARRETT: Are you saying that
23 chill is never enough for irreparable harm?

24 MS. BLATT: No, chill can be.

25 JUSTICE BARRETT: It can be. It can

1 be.

2 MS. BLATT: Yes.

3 JUSTICE BARRETT: It's just that it
4 requires more of a showing than the Sixth
5 Circuit required here?

6 MS. BLATT: Yeah. So the Sixth
7 Circuit three times said, you know, there's
8 inherent chill, but they also pointed to
9 evidence of chill. And all we're saying is
10 evidence of chill needs to be tied to something
11 that can't be undone, like the -- we -- we can't
12 vote, now that we're chilled from voting,
13 there's about to be a vote.

14 The court said two things here in
15 terms of chill. They said no one was wearing
16 union pins because they were scared, and, two,
17 the terminated employees, although they're on
18 the bargaining unit, it's not as convenient to
19 talk to your -- the fellow employees if you're
20 not on the shift.

21 And those are harms, but they're not
22 harms that are -- they're not the harms that are
23 irreparable unless you're going to say anytime
24 that you have a allegation there's fear of
25 retaliation or an encumbrance, somehow that's

1 not -- not reparable. There was not even a
2 bargaining thing scheduled.

3 JUSTICE SOTOMAYOR: Now all you're
4 doing is --

5 MS. BLATT: The union had just won the
6 vote.

7 JUSTICE SOTOMAYOR: Now you're doing
8 -- asking us in -- in the opinion to weigh the
9 factors ourself and say what the correct
10 weighing is.

11 MS. BLATT: I wouldn't do that --

12 JUSTICE SOTOMAYOR: I thought you --

13 MS. BLATT: -- if I were you.

14 JUSTICE SOTOMAYOR: Right. All you
15 came in here and said apply the traditional
16 test, right?

17 MS. BLATT: Yeah, I -- I agree. I was
18 just trying to explain to Justice Barrett that
19 we concede that chill could definitely be
20 relevant, but what we're concerned about is the
21 Board's definition of chill automatically leads
22 to, when -- whenever there's something against
23 unionization effort, that's irreparable harm.

24 But, yeah, I don't -- if I were you, I
25 would leave this a very short opinion, but

1 please make clear --

2 JUSTICE JACKSON: But can I -- can --

3 MS. BLATT: -- that irreparable harm
4 means irreparable.

5 JUSTICE JACKSON: Can -- can I ask you
6 about likelihood of success in this situation?
7 I know others may have taken it off the table,
8 but I'm a little curious as to why the district
9 court would not at least have to put itself in
10 the shoes of the Board when making this
11 predictive judgment.

12 I mean, this is why I said context
13 matters in my view and that we're in the context
14 of a statute in which Congress has given the
15 Board the ability to determine the merits and --
16 at least in the first instance, and the ability
17 to make the investigation, to find the facts.
18 And in this context, that body has made a
19 preliminary determination in these 14 cases that
20 an injunction is warranted.

21 So -- so is that relevant to the
22 district court's determination, or it just comes
23 in and handles this as though there was no Board
24 or the Board is just one of the parties and it
25 doesn't pay any attention --

1 MS. BLATT: So --

2 JUSTICE JACKSON: -- to those
3 preliminary determinations?

4 MS. BLATT: -- it's totally irrelevant
5 because, when the Board is --

6 JUSTICE JACKSON: Irrelevant or
7 relevant?

8 MS. BLATT: Totally irrelevant because
9 the Board is a prosecuting party. It is a party
10 that -- the NLRB is the general counsel. He's
11 an adversary even before the Board.

12 JUSTICE JACKSON: But not according to
13 the statute. The statute -- it doesn't just
14 relegate the Board to prosecuting party status.
15 The statute says the Board is the one that's
16 making the initial merits determination. And
17 so, when you're asking in the context of the
18 preliminary injunction what is the likelihood of
19 success on the merits, it doesn't seem to me to
20 be irrelevant that the Board has determined
21 based on its preliminary investigation that an
22 injunction is warranted.

23 MS. BLATT: Well, it's the general
24 counsel, a separate authority under the statute.
25 But I would be embarrassed if I were the Board

1 to say, yeah, we've made up our mind and we hope
2 district courts --

3 JUSTICE JACKSON: No, it's not that
4 they've made up their mind.

5 MS. BLATT: Well, they haven't.

6 JUSTICE JACKSON: The question is --
7 the question is, given this unique statutory
8 context in which we have the Board as a fact
9 finder and a decisionmaker and also a
10 prosecutor, as you've pointed out, right, that's
11 what makes this context different than when we
12 would ordinarily apply the four factors as a
13 court.

14 MS. BLATT: And all --

15 JUSTICE JACKSON: We have an authority
16 here that has made a preliminary determination
17 that these facts are such that there's a
18 likelihood of success on the merits. So how can
19 the district court ignore that?

20 MS. BLATT: Because that, what you
21 just said, basically sums to a litigation memo
22 that a lawyer wrote to the Board and the Board
23 signs off not in its capacity as a fact finder,
24 but it's just authorizing litigation.

25 JUSTICE GORSUCH: Is your --

1 MS. BLATT: There's nothing to defer
2 to. They haven't found any facts.

3 JUSTICE GORSUCH: Is your point here
4 that the litigating arm of the Board has brought
5 this action, but the Board in its adjudicative
6 powers as the Board has not yet determined
7 anything?

8 MS. BLATT: And they better not have
9 because then they're going to look biased. But,
10 more importantly, the -- the Board -- the -- the
11 -- the litigating arm can file this injunction
12 and then turn around and change his or her
13 theory before the ALJ and the Board. It's not
14 certain --

15 JUSTICE JACKSON: I understand. But
16 we're talking about a prediction, and so I would
17 think that the litigating arm of the Board would
18 have a pretty good predictive capacity in terms
19 of assessing what the Board might do in this
20 case.

21 MS. BLATT: Well --

22 JUSTICE JACKSON: And I just want to
23 know why that's irrelevant to a district court
24 in this situation also determining likelihood of
25 success on the merits.

1 MS. BLATT: Okay. So, if you have a
2 pure legal issue, this is completely irrelevant
3 because who cares what a lawyer in NLRB thinks.
4 I mean, they -- if there's a meaning of the
5 statute, it just doesn't matter. In terms of
6 this case, which is a question of
7 burden-shifting in terms of what caused a
8 termination, that is a mixed question of law and
9 fact. And if it takes the Board two years to
10 figure it out at the back end, it can't be that
11 you would get deference when they haven't found
12 any fact. But I --

13 JUSTICE GORSUCH: I suppose otherwise
14 we -- a district court might take -- cognizance
15 of the fact that agencies almost always win --

16 MS. BLATT: Well, that's what --

17 JUSTICE GORSUCH: -- before their --

18 MS. BLATT: -- I was going to say.

19 JUSTICE GORSUCH: -- their
20 adjudicative bodies.

21 MS. BLATT: If they have a 90 percent
22 success rate, we'll always lose. I mean,
23 really, that can predict -- and the Board tells
24 courts this, you should know we're going to win
25 because we always win. That's in their manual.

1 JUSTICE SOTOMAYOR: I mean, the fact
2 is the government cites at page 39 of its brief
3 that applying the two-part test, that they --
4 that the success rate of the NLRB is only
5 61 percent. So it's not a rubber stamp.

6 MS. BLATT: So --

7 JUSTICE SOTOMAYOR: Even the two-part
8 test is not.

9 MS. BLATT: Right. And we're saying
10 that's because, in the two-part test, the
11 overwhelming cases settle. And so that takes --
12 it's pretty -- the fortitude of those employers
13 that fight on is probably because they have a
14 good case.

15 JUSTICE GORSUCH: It's kind of --
16 it's kind of --

17 MS. BLATT: But, whether or not they
18 win or lose, it should be the right test.

19 JUSTICE GORSUCH: It's kind of
20 interesting too that the government fights a
21 test that it claims it does better under.

22 MS. BLATT: I don't understand the
23 government's position except to say that --

24 JUSTICE GORSUCH: It points out it
25 does better with the four-part test than the

1 two-part test. But yet it's fighting the
2 four-part test.

3 MS. BLATT: I think the government's
4 view is we'll take the traditional test if you
5 apply it untraditionally.

6 JUSTICE JACKSON: Consistent with the
7 untraditional context in which we are operating?

8 MS. BLATT: Yes, and all I'm trying to
9 say is it's not that untraditional to have an
10 administrative agency. There's a lot of them in
11 the federal government. And the -- and the
12 Congress authorizes injunctions a lot, and when
13 it uses terms like "just and proper," Congress
14 knows how to -- and we cite examples in our
15 brief -- to give the agencies a leg up. It does
16 that -- or at least in the trademark context.
17 It does in another context where they'll presume
18 irreparable harm. I think, in the antitrust
19 context, there's also special concerns. So
20 Congress knows how to do that.

21 But the fact it went to the district
22 court, which is completely outside the normal
23 process of Board review, suggests that Congress
24 expected district courts to do what they do all
25 the time, and that is to apply -- to apply

1 Winter.

2 JUSTICE JACKSON: Isn't the history of
3 this that Congress originally took the district
4 courts completely out of it and that they just
5 kind of brought them in in this one capacity?
6 That's what I had understood.

7 MS. BLATT: Yeah, that -- that's
8 correct, that Norris-LaGuardia basically put a
9 -- almost an absolute categorical ban on
10 injunctions because courts were too aggressive
11 in stopping unions. And then it shifted in 1947
12 pro-employers. So it's a little ironic that the
13 government is relying on a statute that was
14 supposed to help employers.

15 But the district court is, you know,
16 supposed to exercise the just and proper
17 discretion. Otherwise, it's banned under the
18 stat -- Norris-LaGuardia from entering an
19 injunction.

20 CHIEF JUSTICE ROBERTS: Justice
21 Thomas?

22 Justice Alito?

23 Justice Kagan?

24 Justice Gorsuch?

25 Justice Barrett?

1 JUSTICE BARRETT: No.

2 CHIEF JUSTICE ROBERTS: And Justice
3 Jackson -- Barrett? Okay.

4 Thank you, counsel.

5 Mr. Raynor.

6 ORAL ARGUMENT OF AUSTIN RAYNOR

7 ON BEHALF OF THE RESPONDENT

8 MR. RAYNOR: Mr. Chief Justice, and
9 may it please the Court:

10 I think the question in this case has
11 narrowed considerably, so I'll just walk through
12 the factors.

13 First, on irreparable harm, in its
14 opening brief, Petitioner fought the idea that
15 the irreparable harm inquiry should focus on
16 whether the Board is going to be able to remedy
17 the harm at the end of its proceedings. At page
18 2 of its reply, it now concedes the focus is on
19 the Board's remedial power. And I understood my
20 friend to further concede that point in her
21 argument this morning.

22 Second, on harm, the question is not
23 whether there is a certainty of harm. The
24 question is whether there's a likelihood of
25 harm. The test used by the Sixth Circuit is

1 reasonably necessary. That's the Ahearn case.
2 We think that's fully consistent with this
3 Court's precedents.

4 And as to whether all discharges
5 count, we agree that not all unlawful discharges
6 necessarily show irreparable harm. The question
7 that the Board looks at and the question that we
8 think the Court should look at is whether that
9 extinguishes the momentum of the union drive or
10 impairs it in such a serious way that an order
11 from the Board a year or two down the road won't
12 be able to restart the drive.

13 Second, on public interest and the
14 equities, our basic point here is that when
15 Congress makes a judgment about what is in the
16 public interest, the court cannot override that
17 judgment in weighing the equities at that stage.
18 This is the Oakland Cannabis case. The Court
19 says, if Congress has made a judgment that
20 something is unlawful, you can't basically make
21 that thing lawful at the equities stage by
22 refusing to enforce Congress's judgment.

23 That doesn't mean that in some cases,
24 at the preliminary stage, if there's extremely
25 compelling interests on the other side or public

1 interests on the other side, that an injunction
2 will automatically be necessary. But we think
3 that in a case like this one, where Congress has
4 made a judgment in -- in a run-of-the-mine case,
5 there's only going to be purely private profit
6 -- profit motive interests on the other side,
7 injunctive relief is typically going to be
8 warranted. Again, I think Petitioner concedes
9 this basic point at page 13 of its reply. It
10 says that courts are not entitled to revise
11 Congress's judgment.

12 Third, that leaves the merits, which I
13 think has been the subject of a lot of
14 discussion this morning. We think that the
15 Court should take into account all relevant
16 context. One piece of context is the statistics
17 that Justice Jackson mentioned. The Board
18 receives 20,000 unfair labor charges every year.
19 It issues 750 complaints. Last year, it
20 authorized 14 petitions and filed seven. That's
21 seven out of 20,000.

22 We think a court can properly take
23 account of that in trying to make a predictive
24 judgment about how the Board is going to come
25 out. This ultimately is a predictive judgment.

1 How is the Board going to come out? What is the
2 likelihood of success before the Board? And
3 it's relevant that there is substantial
4 winnowing that goes on before the complaint is
5 filed in district court.

6 I think it's also relevant to note
7 that the Board has approved the Section 10(j)
8 petition. And just to clarify the separation of
9 functions within the agency here, the general
10 counsel is the prosecutorial arm to the Board.
11 The Board members themselves are the
12 adjudicative authority.

13 But the statute, Section 10(j) itself,
14 vests in the Board the power to approve a
15 Section 10(j) petition. So, before a 10(j)
16 petition is filed in court, the Board itself has
17 approved it. And that's relevant in making the
18 predictive judgment about how this claim is
19 likely to come out before the Board. The
20 adjudicator has already preliminarily signaled
21 its view of the merits.

22 That doesn't mean the Board has made
23 up its mind. It hasn't seen all the evidence.
24 But that's a relevant consideration for the
25 district court to think about in determining

1 whether there is a likelihood of success on the
2 merits.

3 CHIEF JUSTICE ROBERTS: Counsel, you
4 mentioned that it's a small number of -- I
5 forget exactly your framing -- that -- that,
6 what, reach the question in court about the
7 application of the factors?

8 MR. RAYNOR: Out of the 20,000 --

9 CHIEF JUSTICE ROBERTS: Yes.

10 MR. RAYNOR: -- there's only seven
11 that get to court, right, last year. That was
12 the -- those were the numbers.

13 CHIEF JUSTICE ROBERTS: And you said
14 therefore we should assume what?

15 MR. RAYNOR: I think -- I think what
16 the Court should do is just to think about the
17 fact that the Board has looked -- basically
18 brought the cream-of-the-crop cases before the
19 Board -- this is -- before the court. This is
20 an expert agency that has said we think these
21 are the most deserving of relief. And --

22 CHIEF JUSTICE ROBERTS: Well --

23 MR. RAYNOR: -- as Justice Jackson was
24 mentioning earlier, this isn't a case where the
25 Board has engaged in abuse or bringing all sorts

1 of claims before courts. It's been --

2 CHIEF JUSTICE ROBERTS: Well, I don't
3 know why the inference --

4 MR. RAYNOR: -- highly selective.

5 CHIEF JUSTICE ROBERTS: I don't know
6 why the inference isn't the exact opposite, that
7 these are the ones you really feel that you've
8 got to put, you know, the -- the -- the best
9 behind them because these are the ones that are
10 going to end up in -- in court, the ones that
11 are most vulnerable.

12 MR. RAYNOR: But the function of the
13 Section 10(j) petition, Mr. Chief Justice, is to
14 preserve the Board's remedial authority. So
15 these are the cases where the Board is worried
16 about irreparable harm accruing before the Board
17 can issue its decision.

18 JUSTICE GORSUCH: I thought that --

19 JUSTICE ALITO: Mr. Raynor, I'm a
20 little curious about your statistical argument.
21 So let's say that the -- that your office files
22 a motion for emergency relief, and you want to
23 try to convince us that there's a probability
24 that we're going to grant certiorari.

25 If -- if you, in making that argument,

1 you say: Look, we're very selective in the
2 solicitor general's office about when we're
3 going to petition for certiorari, we get lots of
4 requests from the litigating divisions to file
5 cert petitions, and we go along with that in a
6 tiny minority of the cases, and we have quite a
7 good record of success when we do petition for
8 cert, is that something we should consider in
9 that context?

10 MR. RAYNOR: Justice Alito, I don't
11 think there's any bar to the Court considering
12 it.

13 (Laughter.)

14 MR. RAYNOR: And just if I may?

15 JUSTICE ALITO: Seriously?

16 MR. RAYNOR: I -- I certainly don't
17 think there's a bar. This is an equitable
18 analysis. But I think the context here is
19 different in that Congress has --

20 JUSTICE ALITO: Yeah, I think it's --
21 you're going to have to tell me why it's
22 different.

23 MR. RAYNOR: The reason is that
24 Congress has set up a scheme where the agency
25 can seek 10(j) relief to protect its own

1 adjudicative authority.

2 And as Justice Jackson mentioned, the
3 history here is that initially there was pretty
4 widespread judicial intrusion into labor
5 disputes, and in 1932, Congress cut that off and
6 said we're not going to allow district courts to
7 intervene. And in 1935, it centralized
8 adjudication of disputes in the Board.

9 In 1947, it decided it had to walk
10 back its restriction a little bit, and so it
11 allowed Section 10(j) relief, but it didn't
12 allow Section 10(j) relief for district courts
13 to engage in a wide-ranging and intrusive
14 involvement in labor disputes. It allowed
15 courts to come in basically as ancillary to the
16 agency proceedings and protect the integrity of
17 those proceedings.

18 And in that context, I do think it is
19 relevant that the Board is selective about the
20 petitions that it files.

21 JUSTICE GORSUCH: I -- I appreciate
22 that point, but would you agree that the
23 likelihood of success on the merits inquiry
24 means likelihood of success on the merits in
25 this case?

1 MR. RAYNOR: As opposed to some other
2 case, Justice Gorsuch?

3 JUSTICE GORSUCH: As opposed to other
4 cases.

5 MR. RAYNOR: Correct. It's a focus on
6 this particular case.

7 JUSTICE GORSUCH: It has to -- it has
8 to be focused, and so we have to look at the
9 merits of this case, right?

10 MR. RAYNOR: Correct.

11 JUSTICE GORSUCH: And so the Sixth
12 Circuit's rule that you can't engage in fact
13 finding has to be wrong.

14 MR. RAYNOR: Justice Gorsuch, we agree
15 that some fact-finding is permissible. And I
16 think there's been a tendency to caricature what
17 the Sixth Circuit is doing. There was a two-day
18 evidentiary hearing in this case and there was
19 discovery.

20 JUSTICE GORSUCH: Well, the Sixth
21 Circuit said fact-finding is inappropriate.

22 MR. RAYNOR: Correct. It did -- it
23 did say that. And I agree that language, if
24 taken out of context --

25 JUSTICE GORSUCH: And so -- and you've

1 walked us --

2 MR. RAYNOR: -- could be read in that
3 way.

4 JUSTICE GORSUCH: Okay. So that's
5 wrong.

6 MR. RAYNOR: I -- I agree --

7 JUSTICE GORSUCH: That statement is
8 wrong.

9 MR. RAYNOR: -- that that statement on
10 its own is.

11 JUSTICE GORSUCH: Okay. Yeah. And --
12 and -- and you've walked through the four
13 factors, which seems to suggest you agree there
14 are, indeed, four factors.

15 MR. RAYNOR: We agree that all four
16 considerations from Winter are relevant to this
17 analysis.

18 JUSTICE KAVANAUGH: Do we apply the
19 test the same way we usually apply it as a
20 general matter?

21 MR. RAYNOR: I think it -- no, I --

22 JUSTICE KAVANAUGH: Or does -- does a
23 district court apply it the same way as --

24 MR. RAYNOR: I think there has to be
25 some translation to this context. And on --

1 just focusing on likelihood of the merits for a
2 moment, we think that there has to be a
3 substantial legal theory and that there has to
4 be sufficient facts that a reasonable
5 fact-finder could find for the Board. And we do
6 think that --

7 JUSTICE KAVANAUGH: That doesn't sound
8 like the -- yeah.

9 JUSTICE GORSUCH: It doesn't sound
10 like likelihood of success on the merits at all.

11 MR. RAYNOR: It -- it -- it's -- it's
12 likelihood of success of the merits in the sense
13 that you're assessing how likely is the Board to
14 succeed. And we think they have to show a
15 reasonable probability of success. That's the
16 standard that we think governs here. And we
17 think that's consistent with --

18 JUSTICE GORSUCH: Not likelihood of
19 success, reasonable? What's reasonable? What
20 -- is that -- it's obviously -- is that above
21 50 percent? Is that 30 percent?

22 MR. RAYNOR: I'm hesitant to put a
23 percentage on it, Justice Gorsuch.

24 JUSTICE GORSUCH: I'm not surprised.

25 JUSTICE KAVANAUGH: It's lower than

1 50.

2 MR. RAYNOR: I think it's consistent.
3 For example, you know, Justice Kavanaugh, your
4 opinion in Labrador says fair prospect. I think
5 that's generally along the lines of what we have
6 in mind. We don't think reasonable probability
7 necessarily needs a percentage to spell it out.

8 JUSTICE KAGAN: So, I'm sorry, are you
9 saying it's the same or it's a lower bar than
10 the usual likelihood of success standard as
11 applied in courts every day under Winter?

12 MR. RAYNOR: We think that it is a
13 lower standard, principally for the -- the
14 factual part which I mentioned, which is we
15 think, if a reasonable fact-finder can find for
16 the Board, that is sufficient.

17 We do think that that's effectively
18 the test that the Sixth Circuit has been
19 applying. I could point you to Ozburn-Hessey,
20 which is a decision where the Sixth Circuit
21 says, look, the Board has put in evidence that
22 this --

23 JUSTICE KAGAN: And is the reason for
24 this lower standard only that the Board is, you
25 know, generally restrained in asking for these

1 along the lines that you said, or is there some
2 other reason why we should apply -- why courts
3 should apply a lower standard?

4 MR. RAYNOR: I think it's a structural
5 point, which is that Congress intended the Board
6 to be the primary adjudicator here.

7 JUSTICE KAGAN: Well, it did intend
8 the Board to be the primary adjudicator, but it
9 also gave this power over injunctions to the
10 court.

11 MR. RAYNOR: Right. And -- but we
12 think that power has to be exercised cognizant
13 of the fact that the Board is going to be
14 adjudicating this dispute. The court is not
15 going to get out in front of the Board. It's
16 going to protect the Board's authority. If you
17 -- if you --

18 JUSTICE GORSUCH: I don't see -- I
19 don't see why that follows, because it's a
20 preliminary analysis. It's just a quick look.
21 And what happens in the merits happens at the
22 merits. And in all sorts of alphabet soup
23 agencies, we don't do this. District courts
24 apply the likelihood of success test as we
25 normally conceive it.

1 So why is this particular statutory
2 regime different than so many others that your
3 friend points out?

4 MR. RAYNOR: Well, Justice Gorsuch,
5 with respect to the statutes that they identify,
6 the case law in the lower courts does not
7 uniformly support them. It's actually quite
8 mixed. There's a lot of it that supports our
9 position. In --

10 JUSTICE GORSUCH: There's a lot on the
11 other side too.

12 MR. RAYNOR: I acknowledge that it is.

13 JUSTICE GORSUCH: An awful lot. And
14 -- and I -- I just struggle to understand what
15 you're asking lower courts to do and how it
16 would be unique to the NLRB context as opposed
17 to others, cognizant as well that these
18 injunctions often run against employers and for
19 the benefit of unions too, so whatever standard
20 we come up with here, you know, goose and
21 gander, or -- we have to be cognizant of that.

22 MR. RAYNOR: I think, to the extent
23 you adopt a standard in this case, its
24 generalizability will actually be fairly
25 limited. There's only a handful of statutes

1 they identify that allow injunctive relief
2 pending administrative proceedings. There's
3 three in particular: The FTC, the EEOC, the
4 Department of Labor.

5 JUSTICE GORSUCH: Right.

6 MR. RAYNOR: But other statutes, for
7 example, simply involving the federal
8 government, the authority to sue to enforce
9 federal law, we don't think it would generalize
10 because there's not the structural concerns I
11 raised with Justice Kagan.

12 JUSTICE JACKSON: Mr. Raynor, is that
13 because what we're talking about here is a
14 predictive judgment related to what the Board is
15 likely to find, that -- that there are
16 predictive judgments or there's the preliminary
17 relief determination that courts are used to
18 making, which is who's going to win, you know,
19 from my perspective as between the parties that
20 are before me, right?

21 Someone's brought a complaint.
22 Someone is defending. I'm looking at this
23 preliminarily and making a judgment as to who's
24 likely to win on the merits of the legal issue
25 that they have brought.

1 That's the ordinary course of things.
2 I think -- and maybe I'm wrong and you can --
3 that -- that the predictive judgment here is not
4 that.

5 The predictive judgment here is the
6 Board is seeking injunctive relief to protect
7 its remedial authority and what -- to the extent
8 we're applying the four factors, it's the
9 likelihood that the Board is going to decide
10 that there is an unfair labor practice in this
11 situation and reverse the stakes on the ground
12 or whatever. Is -- is -- is that right?

13 MR. RAYNOR: Yes, I do think that's
14 correct. The Board is the principal adjudicator
15 here. We're trying to predict how they're going
16 to come out.

17 JUSTICE KAGAN: I -- I don't --

18 JUSTICE KAVANAUGH: They're not the
19 final --

20 JUSTICE KAGAN: -- see how that could
21 possibly be, Mr. Raynor, that, you know, a court
22 is supposed to say, well, I have one view of the
23 law, but I'm just going to assume that the Board
24 has a different view of the law just because
25 this case was brought?

1 MR. RAYNOR: No. I -- I took the --

2 JUSTICE KAGAN: It's got to be the
3 court's view of the law, right?

4 MR. RAYNOR: Well, I took the premise
5 of Justice Jackson's question to be, for
6 example, if there's NLRB precedent that the
7 Court hasn't weighed in on yet. We -- but we
8 know that precedent is going to apply before the
9 Board. It would have to think about the fact
10 that that precedent --

11 JUSTICE KAGAN: Yes, sure, if there's
12 NLRB precedent, that -- you know, that's the
13 reigning -- that's the governing law, the court
14 is supposed to think about that.

15 MR. RAYNOR: Correct.

16 JUSTICE KAGAN: Because that's the
17 governing law.

18 MR. RAYNOR: Correct.

19 JUSTICE KAGAN: But it's just supposed
20 to think about that as a court doing what courts
21 normally do, which is applying the law as the
22 court finds it to a case.

23 MR. RAYNOR: Yes, Justice Kagan. And
24 -- and if you all were inclined just to think
25 that the likelihood of success test applies

1 exactly the same way in this case that it does
2 in others, I still would submit that it would be
3 easier for the Board to satisfy that test,
4 principally because, as I mentioned earlier, the
5 Board has already approved the petition. It has
6 signaled its preliminary view of the merits.

7 JUSTICE BARRETT: But that means we're
8 giving the Board a boost because of the
9 screening function that it's engaged in and
10 we're saying, well, you know, the Board clearly
11 thought it was meritorious when it had its
12 prosecutorial hat on, so we should assume that
13 when the Board has its adjudicatory hat on, that
14 it's going to rule in favor of itself.

15 MR. RAYNOR: Justice Barrett, I
16 acknowledge that the Board could change its mind
17 once it has all the evidence before it. It
18 doesn't have the evidence before it, the ALJ
19 hearing evidence, for example, at the time it
20 approves the petition.

21 But I would dispute the notion that
22 it's acting in a prosecutorial role at this
23 stage. It's approving the petition -- the 10(j)
24 petition to protect its adjudicative authority.
25 And Congress hasn't given it -- for example, the

1 way that district courts have the authority to
2 issue a PI to protect their own authority,
3 Congress hasn't given that to the Board and said
4 you have to ask the district court.

5 JUSTICE BARRETT: Because the district
6 court is an independent check, right? Because
7 this is a big deal --

8 MR. RAYNOR: Correct.

9 JUSTICE BARRETT: -- to have the
10 injunction in place no matter who it enjoins.
11 So the district court is an independent check,
12 so it seems like it should be just doing what
13 district courts do since it was given the
14 authority to do it.

15 MR. RAYNOR: Yes. We -- we
16 acknowledge this isn't a rubber stamp, and I
17 think the success statistics in the various
18 circuits bear that out. And we do think that
19 there has to be an inquiry into the merits.
20 Ozburn-Hessey, again, is an example where the
21 Court said the evidence is over -- overwhelming
22 against the Board. We're not going to blind
23 ourselves to that. We're not going to grant
24 relief here.

25 There is some factual weighing that

1 goes on. We're not disputing that it is a
2 check. The only question is what -- to what
3 extent it should be a check.

4 JUSTICE GORSUCH: Let me -- let me see
5 if I can put it this way. So the district
6 court's supposed to ask likelihood of success on
7 the merits. Is it supposed to ask what I think
8 are the likelihood of success on the merits
9 objectively as best I can come up with, as
10 neutral a judgment as I can muster? Or is it
11 supposed to ask, well, I don't think you're
12 likely to succeed, but I think the Board will?

13 Is that what -- is that -- is that --
14 that seems to me the delta between the positions
15 here. And, you know, I -- I -- gosh, I -- it's
16 clear to me that your -- you know, your -- your
17 friend's going to win, but the Board's going to
18 rule otherwise. Is -- is that -- you know, is
19 that really supposed to be what a district judge
20 is supposed to do?

21 MR. RAYNOR: Well, Justice Gorsuch,
22 I'm not sure, I guess, in the hypothetical what
23 would be the basis for the discrepancy.

24 JUSTICE GORSUCH: Nor would I, except
25 for maybe the statistics you keep referencing,

1 the fact that boards tend to win in front of
2 boards. They sometimes lose in later review,
3 but they win at least in front of the board.

4 And I guess, if we're going to take
5 account of statistics, why not also ask how
6 often the NLRB gets reversed? You know, I mean,
7 where -- where does it end? And -- and why,
8 again, shouldn't a district judge just ask, as
9 best they can muster, with relevant NLRB
10 precedent in mind, all of the law, all of the
11 facts? And it may have different facts before
12 it too than -- than the Board did when it
13 authorized the 10(j). It's going to hold a
14 hearing.

15 MR. RAYNOR: Right.

16 JUSTICE GORSUCH: So it's going to be
17 a different factual record. It's going to look
18 at all the law. What's wrong with the best
19 judgment a neutral magistrate can issue?

20 MR. RAYNOR: Justice Gorsuch, setting
21 aside our front-line position about how we think
22 it's a lower standard here, if you thought it
23 was the same standard, then our position is
24 simply that all contexts should be considered.
25 We're -- we're not contending that any one

1 particular characteristic should be dispositive.
2 Ours is the pro-context position.

3 JUSTICE GORSUCH: Okay. Thank you.

4 JUSTICE JACKSON: But why -- so why do
5 you think it's a lower standard?

6 MR. RAYNOR: Justice Jackson, again, I
7 think it's a couple things, but it's principally
8 structural. We think the Board is -- is the
9 adjudicator here. The role of the district
10 court is -- to protect and facilitate the
11 Board's adjudication --

12 JUSTICE JACKSON: And that's in the
13 statute from your view -- it's not your view of
14 just sort of how it should be?

15 MR. RAYNOR: Correct.

16 JUSTICE JACKSON: You -- you see --
17 you read the statute as set -- as setting up
18 this structure?

19 MR. RAYNOR: Yes, exactly. This --
20 this is the function of a Section 10(j)
21 petition. The board -- the 10(j) petition
22 expires when the Board issues its order. At
23 that point, there's a different statutory
24 authority that allows the Board to enforce its
25 order in court. And so all we're talking about

1 is a petition that's specifically designed to
2 protect the Board's adjudication.

3 And, again, the historical record
4 supports this in the sense that Congress didn't
5 want wide-ranging district court involvement in
6 labor disputes. It wanted to give a limited
7 district court authority to protect the Board's
8 adjudicative authority.

9 JUSTICE KAVANAUGH: Why do you think
10 Congress did that?

11 MR. RAYNOR: I think the reason is
12 that in 1932, when it passed the
13 Norris-LaGuardia Act, it imposed very stringent
14 restrictions on district court ability to issue
15 injunctions. And in the post-war period, there
16 was essentially a lot of labor unrest that
17 courts weren't able to step in expeditiously and
18 stop. And the court thought that was necessary.
19 And so, if you look at the legislative history,
20 Congress says, look, it sometimes takes the
21 Board a while to rule and there might be a lot
22 of harm inflicted in the meantime, so we need to
23 give district courts the authority to prevent
24 that harm while Board proceedings are ongoing.

25 JUSTICE GORSUCH: It's certainly true,

1 though, that Congress was not eager to
2 resuscitate the labor injunction and Debs,
3 right?

4 MR. RAYNOR: Correct. And --

5 JUSTICE GORSUCH: Yeah. And -- and
6 that was not a particularly glorious era for --
7 for -- for courts, and you would think,
8 therefore, maybe a more restrictive injunctive
9 test rather than a looser one might apply?

10 MR. RAYNOR: Well, Justice Gorsuch, I
11 think I would actually frame the --

12 JUSTICE GORSUCH: Traditional rules of
13 equity might -- you -- you -- you might want
14 them.

15 MR. RAYNOR: I would frame it actually
16 a little differently. I think what Congress was
17 concerned about doing was restricting the power
18 of district courts and protecting --

19 JUSTICE GORSUCH: Yes.

20 MR. RAYNOR: -- the centralized
21 adjudicative authority --

22 JUSTICE GORSUCH: And in --

23 MR. RAYNOR: -- of the Board.

24 JUSTICE GORSUCH: -- restricting the
25 power of district courts, you'd maybe want the

1 full considerations of equity brought to bear
2 rather than a looser standard that's -- results
3 in more judicial interference in labor affairs.

4 MR. RAYNOR: I -- I recognize that
5 that's one way to think about it, but our view
6 is that ours is actually a more modest
7 conception of the judicial role, which is that
8 it's protecting the Board's adjudicative
9 authority rather than engaging in its own
10 free-ranging exploration of the merits.

11 JUSTICE JACKSON: In this context,
12 consistent with the kind of injunction that
13 we're talking about here, it's not sort of
14 protecting the parties in general; it's
15 protecting this particular interest, which is
16 the Board's authority?

17 MR. RAYNOR: Exactly. And there's
18 public -- we are not suing on behalf of any
19 private parties. The Board is suing to protect
20 public rights only. And we do think, to the
21 extent this is generalizable, it's actually a
22 relatively limited set of statutes to which our
23 rule here would apply.

24 If the Court has no further questions?

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Do you agree with your friend on the
3 other side that we can dispose of this in a
4 short opinion?

5 (Laughter.)

6 MR. RAYNOR: Yeah.

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: Thank you.
9 Justice Thomas?

10 JUSTICE THOMAS: Mr. Raynor, if the
11 injunction -- the -- if the approach here is to
12 protect the interests of the Board, do you -- do
13 other agencies benefit from the same -- from
14 this approach?

15 MR. RAYNOR: Justice --

16 JUSTICE THOMAS: And if they don't,
17 why?

18 MR. RAYNOR: Justice Thomas, as I
19 acknowledged earlier, I think other agencies
20 that have a specific statutory authority to seek
21 injunctive relief pending agency proceedings
22 likely could benefit from a similar kind of
23 rule.

24 We don't think that the rule that
25 we're requesting here would reply -- would apply

1 to all the statutes that they cite where, for
2 example, the government simply has the ability
3 to sue to enforce federal law. That doesn't
4 have the same type of ancillary quality that we
5 think the injunctive relief in this case does.

6 CHIEF JUSTICE ROBERTS: Justice Alito?
7 Justice Sotomayor?

8 JUSTICE SOTOMAYOR: The ALJ ruled last
9 May. Exceptions have been filed. How -- how
10 long is this going to take?

11 MR. RAYNOR: The -- the statistics are
12 that, typically, from complaint to final Board
13 order is about two -- two years. It varies
14 somewhat every fiscal year, but about two years.
15 So we're coming up on when you might expect the
16 Board to rule on that basis.

17 The -- the complaint --

18 JUSTICE SOTOMAYOR: And the injunction
19 lasts until then or lasts until what?

20 MR. RAYNOR: It lasts until the Board
21 issues its order. At that point, there's a
22 different statutory authority in 10(e) where the
23 Board can go get preliminary relief --

24 JUSTICE SOTOMAYOR: Are we sure that
25 before we rule, the Board isn't going to have

1 issued its preliminary injunction so that this
2 case is mooted?

3 MR. RAYNOR: I'm not sure about that.
4 I'm not privy to what the Board's timing will
5 be, so I can't make any representations. If --
6 if the Board were to rule before this Court were
7 to rule, I think that there would be a question
8 of mootness because the petition would expire --
9 the injunction would expire by its own terms.
10 So we --

11 JUSTICE SOTOMAYOR: That's why I was
12 asking. Thank you.

13 MR. RAYNOR: And we would obviously
14 make a submission on that point if that were to
15 occur.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: I just want to make
18 sure I completely understand how you think that
19 this case is narrowed. You started, you said --
20 you quoted Ms. Blatt's reply brief as to
21 irreparable harm as to the equities and the
22 public interest.

23 That -- I -- I take it that you -- and
24 I don't think that Ms. Blatt at all retreated
25 from her reply brief today. So I take it that

1 that's pretty much not at issue now and that the
2 real question in dispute is whether the
3 likelihood of success inquiry is ratcheted down
4 somewhat.

5 Is that what you understand the only
6 issue in dispute to be?

7 MR. RAYNOR: I think so, Justice
8 Kagan, assuming that the way we understand
9 irreparable harm is that it focuses on the
10 Board's remedial authority and there only has to
11 be a reasonably likely showing of irreparable
12 harm. And then, on the public interest, our
13 view is simply that Congress has said what the
14 public interest here is. If you think there's
15 been a likelihood of success on the violation,
16 however you want to define that, by the time we
17 get to public interest and weighing of the
18 equities, it's going to have to be a pretty
19 compelling private interest on the other side to
20 overcome Congress's judgment that this kind of
21 conduct should be illegal.

22 JUSTICE KAGAN: And then, with respect
23 to the likelihood of success, you're not arguing
24 as I understand it that somehow the Court is
25 supposed to say, well, let's pretend I'm not a

1 court, let's pretend that I'm the Board. A
2 court is supposed to do what a court does.

3 Is that correct?

4 MR. RAYNOR: Yes, Justice Kagan.

5 JUSTICE KAGAN: Look at the law and
6 make the best decision on the law.

7 Now you have a different standard that
8 you think that the court ought to apply when the
9 court looks at the law and makes the best
10 decision on the law, and I understand that
11 difference, but this isn't something where
12 you're saying, like, the court is supposed to
13 pretend to be the Board?

14 MR. RAYNOR: Justice Kagan, I think
15 that's generally correct with a caveat we do
16 think it's relevant that the Board has approved
17 the petition. And we do think, in circumstances
18 where there may be a law or a rule that applies
19 to the Board but not to the district court, the
20 district court would have to take that into
21 account, for example, NLRB precedent.

22 JUSTICE KAGAN: Okay. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice --

24 JUSTICE KAVANAUGH: Just one thing on
25 irreparable harm. You just said reasonably

1 likely, and I think they say likelihood. Are
2 those the same things?

3 MR. RAYNOR: Yes. I -- I -- I know --
4 I -- I think, basically, what we think, it has
5 to be reasonably necessary. And --

6 JUSTICE KAVANAUGH: Okay.

7 MR. RAYNOR: -- that that's the way
8 the Sixth Circuit framed it and that's the test
9 we would stand by. I don't think there's a
10 whole lot of daylight between those different
11 formulations.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 Justice Jackson?

16 JUSTICE JACKSON: Just one final
17 thing. Why -- why is it relevant in this
18 context that the Board has approved the petition
19 when it wouldn't be in a normal -- in an
20 ordinary scenario of the -- the court just
21 making the kind of determination that Justice
22 Kagan put forward?

23 MR. RAYNOR: Justice Jackson, in a
24 normal scenario, the Board its -- excuse me, the
25 court itself is determining whether to issue a

1 preliminary injunction. So it -- it doesn't
2 have reference to another actor that may or may
3 not have approved preliminary relief.

4 In this case, we know the Board is the
5 ultimate adjudicator, and we know that it has
6 signaled its preliminary view of the merits by
7 approving the petition. That type of structural
8 relationship isn't present when the district
9 court is issuing the preliminary injunction
10 without regard to an agency request.

11 I don't want to overstate this point.
12 As I've mentioned, the Board can change its mind
13 once it hears the evidence. It hasn't
14 prejudged, but we do think this is relevant to
15 the predictive inquiry about how this case is
16 going to come out, what the likelihood of
17 success is.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. RAYNOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Rebuttal, Ms.
23 Blatt?

24

25

1 REBUTTAL ARGUMENT OF LISA S. BLATT
2 ON BEHALF OF THE PETITIONER

3 MS. BLATT: Thank you. May it please
4 the Court:

5 Just a couple things. On page 91 of
6 the district court, the district court said, in
7 terms of likelihood of success, my next inquiry
8 focuses on whether there are any facts
9 supporting each allegation without resolving
10 conflicting evidence. So there's no question
11 there was none of that.

12 And in terms of the standard that as
13 long reasonable facts support the Board's theory
14 that should be enough, if that sounds familiar,
15 it's because it's the standard for summary
16 judgment, and that obviously is not the standard
17 for an injunction.

18 And it's a little bit ironic that
19 that's the standard from summary judgment
20 because, if you can survive summary judgment, at
21 least we get a trial. So this is even worse
22 than a party would have at summary judgment. So
23 they should have to prove their case like any
24 other party.

25 In terms of -- so the likelihood of

1 success, just another thing to keep in mind, the
2 only evidence that the district court is going
3 to have is the evidence before the district
4 court.

5 In terms of the legal theory, the --
6 the Board has been very, very aggressive on some
7 of its legal theories, including in a case where
8 Starbucks sought discovery, the Board turned
9 around and called that an unfair labor practice
10 and then told the district court they had to
11 defer to it.

12 The Board also says that you have to
13 bargain with unions that have been decertified.
14 So these are very serious legal questions that
15 do come up.

16 And the other thing, if they want
17 deference on to their -- their investigative
18 decision, then why aren't they producing their
19 litigation memo? I mean, really. If they --
20 that's what you're supposed to do when you get
21 deference is show your work.

22 And this is obviously a privileged
23 document and their manual is a cookie-cutter
24 thing saying here's how you get your litigation
25 memo, here's how you get Board approval. So at

1 least disclose it.

2 In terms of getting out in front,
3 obviously, the district court's findings aren't
4 binding on the ALJ or the Board.

5 And in terms of lower courts, the only
6 thing I'll add is that almost all the cases that
7 kind of water down the standard are pre-Winter.
8 There was one post-Winter case that didn't cite
9 Winter, and then the Ninth Circuit, the
10 government relied on and cited the court said
11 this is in tension with Winter.

12 We'd ask that the judgment be
13 reversed.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 12:31 p.m., the case
17 was submitted.)

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<p>1</p> <p>1-4 [1] 17:8 10(e) [1] 59:22 10(j) [18] 4:11,13,18 5:2 12:23 17:8 36:7,13,15,15 38:13 39:25 40:11,12 50:23 53:13 54:20,21 11:39 [2] 1:19 4:2 12 [1] 10:13 12:31 [1] 67:16 13 [1] 35:9 14 [7] 17:8,8,18 18:16,24 25:19 35:20 15 [1] 1:7 1932 [2] 40:5 55:12 1935 [1] 40:7 1947 [2] 32:11 40:9</p>	<p>17 35:15,23 53:5 62:21 accruing [1] 38:16 acknowledge [4] 21:14 46:12 50:16 51:16 acknowledged [1] 58:19 act [2] 22:18 55:13 acting [1] 50:22 action [2] 18:22 28:5 actor [1] 64:2 actually [8] 20:17 21:2 46:7,24 56:11,15 57:6,21 add [1] 67:6 addressed [1] 16:16 adjudicate [1] 18:13 adjudicating [2] 18:11 45:14 adjudication [7] 5:22 7:10 18:2,7 40:8 54:11 55:2 adjudicative [8] 28:5 29:20 36:12 40:1 50:24 55:8 56:21 57:8 adjudicator [6] 36:20 45:6,8 48:14 54:9 64:5 adjudicatory [2] 9:17 50:13 administrative [2] 31:10 47:2</p>	<p>anti-union [1] 14:22 antitrust [1] 31:18 anytime [3] 12:16 15:15 23:23 appeals [6] 4:17 9:22 12:7,16 13:24 15:9 APPEARANCES [1] 2:1 application [1] 37:7 applied [3] 19:14 20:10 44:11 applies [2] 49:25 62:18 apply [20] 4:14,18 5:16 19:11 24:15 27:12 31:5,25,25 42:18,19,23 45:2,3,24 49:8 56:9 57:23 58:25 62:8 applying [4] 30:3 44:19 48:8 49:21 appreciate [2] 18:25 40:21 approach [3] 6:4 58:11,14 approval [1] 66:25 approve [1] 36:14 approved [6] 36:7,17 50:5 62:16 63:18 64:3 approves [1] 50:20 approving [2] 50:23 64:7 April [1] 1:15 aren't [2] 66:18 67:3 argues [2] 4:22 6:21 arguing [2] 12:15 61:23 argument [11] 1:18 3:2,5,8 4:4,7 33:6,21 38:20,25 65:1</p>	<p>bargain [1] 66:13 bargaining [2] 23:18 24:2 barred [3] 8:23,24 15:9 BARRETT [16] 15:18,21 16:4,13 22:22,25 23:3 24:18 32:25 33:1,3 50:7,15 51:5,9 63:14 barricaded [1] 21:2 based [2] 22:18 26:21 basic [3] 6:5 34:14 35:9 basically [7] 12:24 27:21 32:8 34:20 37:17 40:15 63:4 basis [5] 7:16 14:6 19:5 52:23 59:16 bear [2] 51:18 57:1 BEHALF [10] 1:9 2:2,5 3:4,7,10 4:8 33:7 57:18 65:2 behind [1] 38:9 below [4] 4:19 11:6,23 22:11 benefit [3] 46:19 58:13,22 best [6] 38:8 52:9 53:9,18 62:6,9 better [3] 28:8 30:21,25 between [5] 21:18,19 47:19 52:14 63:10 biased [1] 28:9 big [1] 51:7 binding [1] 67:4 bit [2] 40:10 65:18 blank [1] 12:25 BLATT [74] 2:2 3:3,9 4:6,7,9 6:2,9,11,25 8:4,17 9:14 10:12,17,22 11:1 12:5 13:5,9,16,20 14:3,10,16,20 15:6,20 16:3,6,12,20 17:3,10,20 19:4,16,22 20:4,16 21:21 22:24 23:2,6 24:5,11,13,17 25:3 26:1,4,8,23 27:5,14,20 28:1,8,21 29:1,16,18,21 30:6,9,17,22 31:3,8 32:7 60:24 64:23 65:1,3 Blatt's [1] 60:20 blind [1] 51:22 BOARD [128] 1:8,10 5:7,8,14,16,18,22 7:23,25 8:20 9:5,21 10:1,2 11:4 12:9,14 13:23 17:7,14,16 18:3,5,8,21,22,22 19:9 25:10,15,23,24 26:5,9,11,14,15,20,25 27:8,22,22 28:4,5,6,10,13,17,19 29:9,23 31:23 33:16 34:7,11 35:17,24 36:1,2,7,10,11,14,16,19,22 37:17,19,25 38:15,16 40:8,19 43:5,13 44:16,21,24 45:5,8,13,15 47:14 48:6,9,14,23 49:9 50:3,5,8,10,13,16 51:3,22 52:12 53:3,12 54:8,21,22,24 55:21,24 56:23 57:19 58:12 59:12,16,20,23,25 60:6 62:1,13,16,19 63:18,24 64:4,12 66:6,8,12,25 67:</p>	<p>4 Board's [24] 6:23 7:9,22 12:1 15:11 16:17,17,24 20:13,23 21:6 24:21 33:19 38:14 45:16 52:17 54:11 55:2,7 57:8,16 60:4 61:10 65:13 boards [2] 53:1,2 bodies [1] 29:20 body [1] 25:18 boost [1] 50:8 both [4] 11:23 12:6 15:8 18:9 breach [1] 21:23 brief [9] 9:15 10:13 20:10 21:14 30:2 31:15 33:14 60:20,25 bringing [1] 37:25 broader [1] 21:23 brought [7] 28:4 32:5 37:18 47:21,25 48:25 57:1 bunch [1] 9:16 burden-shifting [2] 14:21 29:7</p>
<p>2</p> <p>2 [2] 16:7 33:18 20,000 [3] 35:18,21 37:8 2024 [1] 1:15 23 [2] 1:15 9:19 23-367 [1] 4:4</p> <p>3</p> <p>3 [2] 16:6,9 30 [1] 43:21 33 [1] 3:7 39 [1] 30:2</p>	<p>add [1] 67:6 addressed [1] 16:16 adjudicate [1] 18:13 adjudicating [2] 18:11 45:14 adjudication [7] 5:22 7:10 18:2,7 40:8 54:11 55:2 adjudicative [8] 28:5 29:20 36:12 40:1 50:24 55:8 56:21 57:8 adjudicator [6] 36:20 45:6,8 48:14 54:9 64:5 adjudicatory [2] 9:17 50:13 administrative [2] 31:10 47:2 adopt [1] 46:23 adversary [1] 26:11 affairs [1] 57:3 afraid [1] 12:18 Agencies [8] 5:19 9:17 19:8 29:15 31:15 45:23 58:13,19 agency [9] 7:10 9:23 31:10 36:9 37:20 39:24 40:16 58:21 64:10 agency's [1] 5:24 aggressive [2] 32:10 66:6 agree [10] 7:21 24:17 34:5 40:22 41:14,23 42:6,13,15 58:2 Ahearn [1] 34:1 ahistorical [1] 6:3 Alito [6] 32:22 38:19 39:10,15,20 59:6 ALJ [6] 13:10 15:5 28:13 50:18 59:8 67:4 ALJ's [1] 13:21 allegation [2] 23:24 65:9 alleged [1] 20:14 allow [3] 40:6,12 47:1 allowed [2] 40:11,14 allows [1] 54:24 almost [3] 29:15 32:9 67:6 alphabet [2] 9:16 45:22 already [3] 9:4 36:20 50:5 although [2] 13:7 23:17 analysis [3] 39:18 42:17 45:20 ancillary [2] 40:15 59:4 animus [1] 14:22 another [3] 31:17 64:2 66:1</p>	<p>arm [4] 28:4,11,17 36:10 around [2] 28:12 66:9 aside [1] 53:21 assessing [2] 28:19 43:13 assigned [3] 7:2 9:5 18:2 Assistant [1] 2:4 assume [3] 37:14 48:23 50:12 assuming [1] 61:8 attention [1] 25:25 AUSTIN [3] 2:4 3:6 33:6 authority [23] 16:18 26:24 27:15 36:12 38:14 40:1 45:16 47:8 48:7 50:24 51:1,2,14 54:24 55:7,8,23 56:21 57:9,16 58:20 59:22 61:10 authorized [2] 35:20 53:13 authorizes [2] 4:11 31:12 authorizing [1] 27:24 automatically [2] 24:21 35:2 awful [1] 46:13</p>	<p>BLATT [74] 2:2 3:3,9 4:6,7,9 6:2,9,11,25 8:4,17 9:14 10:12,17,22 11:1 12:5 13:5,9,16,20 14:3,10,16,20 15:6,20 16:3,6,12,20 17:3,10,20 19:4,16,22 20:4,16 21:21 22:24 23:2,6 24:5,11,13,17 25:3 26:1,4,8,23 27:5,14,20 28:1,8,21 29:1,16,18,21 30:6,9,17,22 31:3,8 32:7 60:24 64:23 65:1,3 Blatt's [1] 60:20 blind [1] 51:22 BOARD [128] 1:8,10 5:7,8,14,16,18,22 7:23,25 8:20 9:5,21 10:1,2 11:4 12:9,14 13:23 17:7,14,16 18:3,5,8,21,22,22 19:9 25:10,15,23,24 26:5,9,11,14,15,20,25 27:8,22,22 28:4,5,6,10,13,17,19 29:9,23 31:23 33:16 34:7,11 35:17,24 36:1,2,7,10,11,14,16,19,22 37:17,19,25 38:15,16 40:8,19 43:5,13 44:16,21,24 45:5,8,13,15 47:14 48:6,9,14,23 49:9 50:3,5,8,10,13,16 51:3,22 52:12 53:3,12 54:8,21,22,24 55:21,24 56:23 57:19 58:12 59:12,16,20,23,25 60:6 62:1,13,16,19 63:18,24 64:4,12 66:6,8,12,25 67:</p>	<p>C</p> <p>call [1] 8:6 called [1] 66:9 came [2] 1:17 24:15 Cannabis [2] 22:2 34:18 cannot [1] 34:16 capacity [3] 27:23 28:18 32:5 care [1] 8:1 careful [2] 17:16,24 cares [1] 29:3 caricature [1] 41:16 Case [36] 4:4 5:10 12:24 14:21 15:7 21:19 22:1 28:20 29:6 30:14 33:10 34:1,18 35:3,4 37:24 40:25 41:2,6,9,18 46:6,23 48:25 49:22 50:1 59:5 60:2,19 64:4,15 65:23 66:7 67:8,15,16 caselaw [1] 6:6 cases [15] 6:13 7:17 9:17 12:15 16:24 18:16,20 25:19 30:11 34:23 37:18 38:15 39:6 41:4 67:6 categorical [1] 32:9 caused [1] 29:7 caveat [1] 62:15 centralized [2] 40:7 56:20 century [1] 6:6 cert [2] 39:5,8 certain [1] 28:14 certainly [2] 39:16 55:25 certainty [1] 33:23 certiorari [2] 38:24 39:3 cetera [1] 11:8 change [3] 28:12 50:16 64:12 characteristic [1] 54:1 charges [1] 35:18 check [4] 51:6,11 52:2,3</p>

Official

<p>CHIEF [21] 4:3,9 32:20 33:2,8 37:3,9,13,22 38:2,5,13 57:25 58:8 59:6 60:16 62:23 63:13 64:19,22 67:14</p> <p>chill [12] 12:18 13:1 20:19,19 22:23,24 23:8,9,10,15 24:19,21</p> <p>chilled [2] 20:20 23:12</p> <p>circuit [10] 15:7 23:5,7 33:25 41:17,21 44:18,20 63:8 67:9</p> <p>Circuit's [1] 41:12</p> <p>circuits [1] 51:18</p> <p>circumstances [1] 62:17</p> <p>cite [6] 8:7 9:15,18 31:14 59:1 67:8</p> <p>cited [3] 12:9,10 67:10</p> <p>cites [1] 30:2</p> <p>claim [1] 36:18</p> <p>claims [2] 30:21 38:1</p> <p>clarify [1] 36:8</p> <p>clarifying [1] 19:21</p> <p>classic [1] 14:21</p> <p>clear [8] 5:3,12 6:15 10:18,23 12:1 25:1 52:16</p> <p>clearly [1] 50:10</p> <p>Code [1] 8:8</p> <p>coercive [2] 5:7 8:21</p> <p>cognizance [1] 29:14</p> <p>cognizant [3] 45:12 46:17,21</p> <p>come [9] 35:24 36:1,19 40:15 46:20 48:16 52:9 64:16 66:15</p> <p>comes [1] 25:22</p> <p>coming [1] 59:15</p> <p>commit [1] 14:4</p> <p>common [1] 8:20</p> <p>company [1] 14:25</p> <p>compelling [2] 34:25 61:19</p> <p>compels [1] 4:24</p> <p>complaint [4] 36:4 47:21 59:12,17</p> <p>complaints [2] 18:20 35:19</p> <p>completely [4] 29:2 31:22 32:4 60:18</p> <p>compliment [1] 19:25</p> <p>concede [2] 24:19 33:20</p> <p>conceded [1] 14:25</p> <p>concedes [2] 33:18 35:8</p> <p>conceive [1] 45:25</p> <p>conception [1] 57:7</p> <p>concerned [2] 24:20 56:17</p> <p>concerns [2] 31:19 47:10</p> <p>conditions [1] 21:5</p> <p>conduct [2] 4:24 61:21</p> <p>confines [1] 22:6</p> <p>conflicting [1] 65:10</p> <p>Congress [26] 5:15 7:25 8:14 9:5 18:2 25:14 31:12,13,20,23 32:3 34:15,19 35:3 39:19,24 40:5 45:5 50:</p>	<p>25 51:3 55:4,10,20 56:1,16 61:13</p> <p>Congress's [3] 34:22 35:11 61:20</p> <p>consent [1] 9:23</p> <p>consider [4] 5:23 9:23 11:22 39:8</p> <p>considerably [1] 33:11</p> <p>consideration [3] 7:22 17:25 36:24</p> <p>considerations [3] 16:1 42:16 57:1</p> <p>considered [2] 12:10 53:24</p> <p>considering [2] 15:10 39:11</p> <p>Consistent [5] 31:6 34:2 43:17 44:2 57:12</p> <p>contains [1] 5:3</p> <p>contempt [1] 5:8</p> <p>contending [1] 53:25</p> <p>context [28] 4:24 8:12,13 9:4,13 10:6,8,10 25:12,13,18 26:17 27:8,11 31:7,16,17,19 35:16,16 39:9,18 40:18 41:24 42:25 46:16 57:11 63:18</p> <p>contexts [4] 7:10 9:10,10 53:24</p> <p>contract [1] 21:23</p> <p>control [1] 7:18</p> <p>convenient [1] 23:18</p> <p>convince [1] 38:23</p> <p>cookie-cutter [1] 66:23</p> <p>CORPORATION [2] 1:3 4:5</p> <p>correct [16] 8:3 21:22 24:9 32:8 41:5,10,22 48:14 49:15,18 51:8 54:15 56:4 62:3,15</p> <p>corrected [1] 11:10</p> <p>counsel [8] 26:10,24 33:4 36:10 37:3 58:1 64:20 67:15</p> <p>count [2] 15:10 34:5</p> <p>couple [2] 54:7 65:5</p> <p>course [2] 14:18 48:1</p> <p>COURT [90] 1:1,18 4:10,16,20,22 10:17 11:11,23 12:7,7,16 13:11,24 14:14 15:4,8,9 20:11 21:16 22:4,12 23:14 25:9 27:13,19 28:23 29:14 31:22 32:15 33:9 34:8,16,18 35:15,22 36:5,16,25 37:6,11,16,19 38:10 39:11 42:23 45:10,14 48:21 49:7,13,20,22 51:4,6,11,21 54:10,25 55:5,7,14,18 57:24 60:6 61:24 62:1,2,8,9,12,19,20 63:20,25 64:9 65:4,6,6 66:2,4,10 67:10</p> <p>court's [6] 11:6 25:22 34:3 49:3 52:6 67:3</p>	<p>courts [36] 4:12,14,24 5:14,16,20 7:16 8:3 12:13 15:9 22:6 27:2 29:24 31:24 32:4,10 35:10 38:1 40:6,12,15 44:11 45:2,23 46:6,15 47:17 49:20 51:1,13 55:17,23 56:7,18,25 67:5</p> <p>courts' [1] 6:23</p> <p>CPFC [1] 9:15</p> <p>crafty [1] 20:3</p> <p>cream-of-the-crop [1] 37:18</p> <p>credibility [2] 8:24 11:8</p> <p>curious [2] 25:8 38:20</p> <p>cut [1] 40:5</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C [3] 1:14 2:2,5</p> <p>daily [1] 7:16</p> <p>damaging [1] 22:20</p> <p>day [3] 12:13,14 44:11</p> <p>daylight [1] 63:10</p> <p>deal [1] 51:7</p> <p>Debs [1] 56:2</p> <p>decertified [1] 66:13</p> <p>decide [4] 5:14 11:11 20:11 48:9</p> <p>decided [1] 40:9</p> <p>decision [7] 9:7 13:23 38:17 44:20 62:6,10 66:18</p> <p>decisionmaker [1] 27:9</p> <p>decisions [1] 11:6</p> <p>decontextualized [1] 6:4</p> <p>deem [1] 4:13</p> <p>defending [1] 47:22</p> <p>defer [3] 5:19 28:1 66:11</p> <p>deference [16] 5:13 10:2,3 11:3 12:3 13:12,22,25 17:15 18:4,6 19:5,23 29:11 66:17,21</p> <p>deferential [1] 4:25</p> <p>deferred [1] 5:24</p> <p>define [1] 61:16</p> <p>definitely [2] 20:5 24:19</p> <p>definition [3] 17:3 21:22 24:21</p> <p>delay [1] 20:12</p> <p>deliberately [1] 22:3</p> <p>delta [1] 52:14</p> <p>democracy [2] 12:21 20:25</p> <p>Department [2] 2:5 47:4</p> <p>description [1] 10:13</p> <p>deserve [2] 10:2 13:22</p> <p>deserving [1] 37:21</p> <p>designed [1] 55:1</p> <p>determination [8] 7:24 15:5 25:19,22 26:16 27:16 47:17 63:21</p> <p>determinations [1] 26:3</p> <p>determine [1] 25:15</p> <p>determined [2] 26:20 28:6</p> <p>determining [5] 17:17 18:23 28:24 36:25 63:25</p>	<p>difference [2] 6:24 62:11</p> <p>different [17] 9:4,13 10:15,20 13:8 21:17 27:11 39:19,22 46:2 48:24 53:11,17 54:23 59:22 62:7 63:10</p> <p>differently [1] 56:16</p> <p>diluting [1] 5:4</p> <p>directed [1] 5:15</p> <p>DIRECTOR [1] 1:7</p> <p>discharges [2] 34:4,5</p> <p>disclose [1] 67:1</p> <p>discovery [2] 41:19 66:8</p> <p>discrepancy [1] 52:23</p> <p>discretion [2] 5:21 32:17</p> <p>discussion [1] 35:14</p> <p>dispose [1] 58:3</p> <p>dispositive [1] 54:1</p> <p>dispute [5] 14:14 45:14 50:21 61:2,6</p> <p>disputes [4] 40:5,8,14 55:6</p> <p>disputing [1] 52:1</p> <p>district [56] 4:11,14,24 7:2,16 8:3,23 9:11,20 12:13 14:14 15:4,8,9 22:5,12 25:8,22 27:2,19 28:23 29:14 31:21,24 32:3,15 36:5,25 40:6,12 42:23 45:23 51:1,4,5,11,13 52:5,19 53:8 54:9 55:5,7,14,23 56:18,25 62:19,20 64:8 65:6,6 66:2,3,10 67:3</p> <p>divisions [1] 39:4</p> <p>document [1] 66:23</p> <p>doing [11] 9:11 10:25 11:18 17:14 18:23 24:4,7 41:17 49:20 51:12 56:17</p> <p>done [1] 17:22</p> <p>down [4] 21:10 34:11 61:3 67:7</p> <p>drastic [1] 5:6</p> <p>drive [2] 34:9,12</p> <p>duty [1] 9:6</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [1] 65:9</p> <p>eager [1] 56:1</p> <p>earlier [3] 37:24 50:4 58:19</p> <p>easier [1] 50:3</p> <p>EEOC [2] 9:16 47:3</p> <p>effectively [1] 44:17</p> <p>effort [2] 5:2 24:23</p> <p>eight [3] 13:4,5 14:4</p> <p>either [3] 12:2 18:9 22:7</p> <p>election [1] 21:1</p> <p>embarrassed [1] 26:25</p> <p>emergency [1] 38:22</p> <p>employees [7] 13:18 14:4,24 15:24 21:3 23:17,19</p> <p>employer [3] 11:24 21:10 22:16</p> <p>employers [3] 30:12 32:14 46:18</p> <p>empty [1] 16:21</p>	<p>encumbrance [1] 23:25</p> <p>end [7] 5:15,17 18:5 29:10 33:17 38:10 53:7</p> <p>enforce [4] 34:22 47:8 54:24 59:3</p> <p>enforced [1] 15:1</p> <p>engage [3] 14:11 40:13 41:12</p> <p>engaged [2] 37:25 50:9</p> <p>engaging [1] 57:9</p> <p>enjoins [1] 51:10</p> <p>enough [2] 22:23 65:14</p> <p>entering [1] 32:18</p> <p>entitled [3] 7:6 16:25 35:10</p> <p>environment [1] 21:24</p> <p>equitable [2] 5:21 39:17</p> <p>equities [11] 7:7 11:15,23 16:12 21:9,12 34:14,17,21 60:21 61:18</p> <p>equity [5] 6:6,18 10:3 56:13 57:1</p> <p>era [1] 56:6</p> <p>ESQ [3] 3:3,6,9</p> <p>ESQUIRE [1] 2:2</p> <p>essentially [1] 55:16</p> <p>et [1] 11:8</p> <p>even [14] 5:18,22 6:11 7:8 12:8 17:17 18:6 19:9 22:11,19 24:1 26:11 30:7 65:21</p> <p>event [2] 20:21 21:1</p> <p>eventually [1] 13:12</p> <p>evidence [20] 12:9,10,17 13:1,25 15:10 17:7 22:20 23:9,10 36:23 44:21 50:17,18,19 51:21 64:13 65:10 66:2,3</p> <p>evidentiary [1] 41:18</p> <p>exact [1] 38:6</p> <p>exacting [1] 4:25</p> <p>Exactly [6] 15:6 16:13 37:5 50:1 54:19 57:17</p> <p>example [8] 44:3 47:7 49:6 50:19,25 51:20 59:2 62:21</p> <p>examples [1] 31:14</p> <p>except [3] 22:12 30:23 52:24</p> <p>Exceptions [1] 59:9</p> <p>excuse [2] 21:19 63:24</p> <p>exercise [2] 5:21 32:16</p> <p>exercised [1] 45:12</p> <p>expect [1] 59:15</p> <p>expected [1] 31:24</p> <p>expeditiously [1] 55:17</p> <p>expert [1] 37:20</p> <p>expertise [2] 5:20 10:3</p> <p>expire [2] 60:8,9</p> <p>expires [1] 54:22</p> <p>explain [1] 24:18</p> <p>explained [1] 14:24</p> <p>exploration [1] 57:10</p> <p>expressed [1] 22:4</p> <p>extent [4] 46:22 48:7 52:3 57:21</p>
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<p>extinguishes [1] 34:9 extraordinary [1] 5:6 extremely [1] 34:24</p> <hr/> <p style="text-align: center;">F</p> <p>face [1] 6:16 facilitate [1] 54:10 fact [16] 9:11 14:15 17:22 18:1 27:8,23 29:9,12,15 30:1 31:21 37:17 41:12 45: 13 49:9 53:1 fact-finder [2] 43:5 44:15 fact-finding [2] 41:15,21 factor [6] 10:22 16:3,6,7,9, 10 factors [23] 4:15,17 5:12, 17,23 6:14,19 10:5 19:2,2, 8,11,22 20:6,24 22:14 24:9 27:12 33:12 37:7 42:13,14 48:8 facts [11] 4:19 8:23 12:8 25: 17 27:17 28:2 43:4 53:11, 11 65:8,13 factual [6] 5:2,18 13:11 44: 14 51:25 53:17 fair [3] 17:10,22 44:4 fairly [1] 46:24 faith [2] 12:21 20:24 familiar [1] 65:14 far [2] 6:17 22:7 faster [1] 18:18 favor [1] 50:14 fear [1] 23:24 federal [4] 31:11 47:7,9 59: 3 feel [1] 38:7 fellow [1] 23:19 field [1] 19:7 fight [1] 30:13 fighting [1] 31:1 fight [1] 30:20 figure [1] 29:10 file [2] 28:11 39:4 filed [5] 18:21 35:20 36:5, 16 59:9 files [2] 38:21 40:20 fill [1] 12:25 final [5] 9:23 13:23 48:19 59:12 63:16 finally [1] 11:25 find [5] 12:8 25:17 43:5 44: 15 47:15 finder [2] 27:9,23 finding [4] 8:23 9:11 18:1 41:13 findings [4] 5:19 13:11,22 67:3 finds [1] 49:22 fired [4] 13:14,19 14:9,12 firing [1] 13:3 first [4] 7:24 9:7 25:16 33: 13 fiscal [1] 59:14 focus [3] 33:15,18 41:5</p>	<p>focused [1] 41:8 focuses [2] 61:9 65:8 focusing [1] 43:1 follows [1] 45:19 forget [1] 37:5 formulations [1] 63:11 fortitude [1] 30:12 forward [1] 63:22 fought [1] 33:14 found [4] 12:16 13:12 28:2 29:11 four [16] 4:14,17 5:12,23 6: 14,19 10:5 19:2,11,22 20:5 27:12 42:12,14,15 48:8 four-factor [4] 10:14,16 19: 14 20:10 four-part [3] 4:23 30:25 31: 2 fragile [1] 15:13 frame [2] 56:11,15 framed [1] 63:8 framing [1] 37:5 free-ranging [1] 57:10 friend [3] 33:20 46:3 58:2 friend's [1] 52:17 front [5] 5:17 45:15 53:1,3 67:2 front-line [1] 53:21 frustrate [2] 20:12,13 frustrated [1] 21:7 FTC [2] 9:15 47:3 full [2] 18:7 57:1 fully [1] 34:2 function [3] 38:12 50:9 54: 20 functions [1] 36:9 further [2] 33:20 57:24</p> <hr/> <p style="text-align: center;">G</p> <p>gander [1] 46:21 gave [1] 45:9 General [6] 2:4 26:10,23 36:9 42:20 57:14 general's [1] 39:2 generalizability [1] 46:24 generalizable [1] 57:21 generalize [1] 47:9 generally [3] 44:5,25 62:15 gets [2] 8:20 53:6 getting [2] 6:12 67:2 give [5] 11:3 13:12 31:15 55:6,23 given [5] 25:14 27:7 50:25 51:3,13 giving [2] 17:15 50:8 glorious [1] 56:6 goose [1] 46:20 GORSUCH [47] 14:13,17 15:3 16:1 27:25 28:3 29: 13,17,19 30:15,19,24 32: 24 38:18 40:21 41:2,3,7,11, 14,20,25 42:4,7,11 43:9,18, 23,24 45:18 46:4,10,13 47: 5 52:4,21,24 53:16,20 54:3</p>	<p>55:25 56:5,10,12,19,22,24 gosh [1] 52:15 got [3] 7:12 38:8 49:2 gotten [1] 12:5 governing [2] 49:13,17 government [12] 4:22 5:13 6:3,21 8:25 30:2,20 31:11 32:13 47:8 59:2 67:10 government's [2] 30:23 31:3 governs [2] 4:23 43:16 grant [3] 4:12 38:24 51:23 gross [1] 14:4 ground [1] 48:11 guess [4] 9:2 18:15 52:22 53:4</p> <hr/> <p style="text-align: center;">H</p> <p>handful [1] 46:25 handles [1] 25:23 happen [2] 9:9 20:21 happening [2] 17:6,9 happens [3] 17:11 45:21, 21 happy [4] 15:18,21 16:4,6 hard [2] 13:6 18:14 harks [1] 6:18 harm [39] 4:21,21 7:5 11:14, 23,24,24 12:8,11,12 15:12, 17,22,23 16:7,10,15,22 17: 1 20:9 21:8 22:23 24:23 25:3 31:18 33:13,15,17,22, 23,25 34:6 38:16 55:22,24 60:21 61:9,12 62:25 harmed [1] 16:18 harms [3] 23:21,22,22 hat [2] 50:12,13 hear [1] 4:3 heard [1] 22:20 hearing [3] 41:18 50:19 53: 14 hears [1] 64:13 held [1] 4:17 help [2] 20:19 32:14 hesitant [1] 43:22 highly [2] 5:11 38:4 historical [1] 55:3 history [3] 32:2 40:3 55:19 hold [2] 19:10 53:13 hope [2] 19:16 27:1 hours [3] 13:15,18 15:25 however [1] 61:16 huge [2] 19:3,6 hundred [1] 18:21 hypothetical [1] 52:22</p> <hr/> <p style="text-align: center;">I</p> <p>idea [1] 33:14 identify [2] 46:5 47:1 ignore [1] 27:19 illegal [1] 61:21 impairs [1] 34:10 important [1] 10:10 importantly [1] 28:10</p>	<p>imposed [1] 55:13 inappropriate [2] 5:11 41: 21 inclined [1] 49:24 including [1] 66:7 inconsistent [1] 6:4 Indeed [2] 5:21 42:14 independent [2] 51:6,11 inference [2] 38:3,6 inflicted [1] 55:22 inform [1] 8:13 inherent [1] 23:8 initial [1] 26:16 initially [1] 40:3 injunction [36] 5:7 7:1,6, 11,15,18 8:5,16,21 9:24 10: 7 13:21 14:3 16:19,25 18: 19,24 19:10 21:4 22:17 25: 20 26:18,22 28:11 32:19 35:1 51:10 56:2 57:12 58: 11 59:18 60:1,9 64:1,9 65: 17 injunction's [1] 14:19 injunctions [10] 4:12 5:5 17:8,18 18:12 31:12 32:10 45:9 46:18 55:15 injunctive [8] 5:9 19:7 35: 7 47:1 48:6 56:8 58:21 59: 5 inquiry [7] 4:25 33:15 40: 23 51:19 61:3 64:15 65:7 insofar [1] 9:4 instance [3] 7:25 9:8 25: 16 integrity [1] 40:16 intend [1] 45:7 intended [2] 8:14 45:5 intensive [1] 5:1 interest [22] 11:15,17,18, 20,25 21:13,23 22:3,5,9,11, 13,15,21 34:13,16 57:15 60:22 61:12,14,17,19 interesting [1] 30:20 interests [7] 21:16,20 22:1 34:25 35:1,6 58:12 interference [1] 57:3 intervene [1] 40:7 intrusion [1] 40:4 intrusive [1] 40:13 investigate [1] 9:6 investigating [2] 18:10,23 investigation [4] 17:23,24 25:17 26:21 investigative [1] 66:17 involved [2] 21:15,16 involvement [2] 40:14 55: 5 involves [1] 9:19 involving [1] 47:7 ironic [2] 32:12 65:18 irrelevant [6] 26:4,6,8,20 28:23 29:2 irreparable [29] 4:21 11:14 12:8,10,12 15:16 16:7,10,</p>	<p>15,22 17:1 20:9,17,20 21:7 22:23 23:23 24:23 25:3,4 31:18 33:13,15 34:6 38:16 60:21 61:9,11 62:25 Isn't [7] 32:2 37:24 38:6 51: 16 59:25 62:11 64:8 issue [10] 15:1 29:2 38:17 47:24 51:2 53:19 55:14 61: 1,6 63:25 issued [1] 60:1 issues [5] 5:2 8:1 35:19 54: 22 59:21 issuing [1] 64:9 itself [5] 25:9 36:13,16 50: 14 63:25</p> <hr/> <p style="text-align: center;">J</p> <p>JACKSON [35] 7:14 8:11 9: 2 16:8,14 17:2,4,12 18:15 25:2,5 26:2,6,12 27:3,6,15 28:15,22 31:6 32:2 33:3 35:17 37:23 40:2 47:12 54: 4,6,12,16 57:11 63:15,16, 23 64:18 Jackson's [1] 49:5 joke [1] 9:1 judge [2] 52:19 53:8 judgment [22] 25:11 34:15, 17,19,22 35:4,11,24,25 36: 18 47:14,23 48:3,5 52:10 53:19 61:20 65:16,19,20, 22 67:12 judgments [1] 47:16 judicial [3] 40:4 57:3,7 jurisdiction [4] 6:23,24 7: 9,17 Justice [196] 2:5 4:3,9 6:2, 15,20 7:14 8:11 9:2 10:11, 12,20,24 11:2 13:3,6,10,17 14:1,7,13,17,17 15:3,18,21 16:4,8,13,14 17:2,4,12 18: 15 19:12,18,20,24 20:2,7 21:12 22:22,25 23:3 24:3, 7,12,14,18 25:2,5 26:2,6, 12 27:3,6,15,25 28:3,15,22 29:13,17,19 30:1,7,15,19, 24 31:6 32:2,20,20,22,23, 24,25 33:1,2,2,8 35:17 37: 3,9,13,22,23 38:2,5,13,18, 19 39:10,15,20 40:2,21 41: 2,3,7,11,14,20,25 42:4,7, 11,18,22 43:7,9,18,23,24, 25 44:3,8,23 45:7,18 46:4, 10,13 47:5,11,12 48:17,18, 20 49:2,5,11,16,19,23 50:7, 15 51:5,9 52:4,21,24 53:16, 20 54:3,4,6,12,16 55:9,25 56:5,10,12,19,22,24 57:11, 25 58:8,9,10,15,16,18 59:6, 6,7,8,18,24 60:11,16,16,17 61:7,22 62:4,5,14,22,23,23, 24 63:6,12,13,13,15,16,21, 23 64:18,19,22 67:14 Justices [1] 16:1</p>
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<p>justified ^[1] 14:22 justifies ^[1] 5:13</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN ^[29] 10:11 19:12, 18,20,24 20:2,7 21:12 32:23 44:8,23 45:7 47:11 48:17,20 49:2,11,16,19,23 60:16,17 61:8,22 62:4,5,14,22 63:22</p> <p>KATHLEEN ^[1] 1:6 KAVANAUGH ^[10] 42:18, 22 43:7,25 44:3 48:18 55:9 62:24 63:6,12</p> <p>keep ^[2] 52:25 66:1 kind ^[13] 8:15 18:6,19,24 30:15,16,19 32:5 57:12 58:22 61:20 63:21 67:7 knows ^[2] 31:14,20</p>	<p>litigating ^[5] 17:25 28:4,11, 17 39:4 litigation ^[6] 5:24 18:4 27:21,24 66:19,24 little ^[7] 22:7 25:8 32:12 38:20 40:10 56:16 65:18 live ^[1] 22:17 long ^[4] 18:13 20:16 59:10 65:13 longstanding ^[1] 6:14 look ^[11] 19:1 28:9 34:8 39:1 41:8 44:21 45:20 53:17 55:19,20 62:5 looked ^[1] 37:17 looking ^[1] 47:22 looks ^[2] 34:7 62:9 looser ^[2] 56:9 57:2 lose ^[3] 29:22 30:18 53:2 lot ^[10] 17:9 31:10,12 35:13 46:8,10,13 55:16,21 63:10 lots ^[1] 39:3 lower ^[10] 43:25 44:9,13,24 45:3 46:6,15 53:22 54:5 67:5</p>	<p>minority ^[1] 39:6 misconduct ^[2] 14:5,11 misplaced ^[1] 12:4 mixed ^[2] 29:8 46:8 modest ^[1] 57:6 moment ^[1] 43:2 momentum ^[1] 34:9 money ^[1] 21:11 mooted ^[1] 60:2 mootness ^[1] 60:8 morning ^[2] 33:21 35:14 most ^[3] 10:6 37:21 38:11 motion ^[1] 38:22 motive ^[1] 35:6 Ms ^[70] 4:6,9 6:2,9,11,25 8:4,17 9:14 10:12,17,22 11:1 12:5 13:5,9,16,20 14:3,10,16,20 15:6,20 16:3,6,12,20 17:3,10,20 19:4,16,22 20:4,16 21:21 22:24 23:2,6 24:5,11,13,17 25:3 26:1,4,8,23 27:5,14,20 28:1,8,21 29:1,16,18,21 30:6,9,17,22 31:3,8 32:7 60:20,24 64:22 65:3 much ^[5] 5:3 17:23,24 18:9 61:1 multitude ^[2] 7:9 8:9 muster ^[2] 52:10 53:9</p>	<p>nothing ^[1] 28:1 notion ^[2] 8:21 50:21 NRDC ^[1] 4:15 nuclear ^[1] 10:9 number ^[2] 18:20 37:4 numbers ^[1] 37:12</p> <hr/> <p style="text-align: center;">O</p> <p>Oakland ^[2] 22:2 34:18 objectively ^[1] 52:9 obviously ^[8] 6:18 7:5 13:21 43:20 60:13 65:16 66:22 67:3 occur ^[1] 60:15 occurred ^[1] 9:8 office ^[2] 38:21 39:2 often ^[2] 46:18 53:6 Okay ^[8] 11:1 29:1 33:3 42:4,11 54:3 62:22 63:6 once ^[2] 50:17 64:13 one ^[17] 7:23 12:9 14:10 19:9 23:15 25:24 26:15 32:5 35:3,16 48:22 53:25 56:9 57:5 62:24 63:16 67:8 ones ^[3] 38:7,9,10 ongoing ^[1] 55:24 only ^[18] 12:9 15:1 17:18 18:16,18 19:9 21:20 30:4 35:5 37:10 44:24 46:25 52:2 57:20 61:5,10 66:2 67:5 opening ^[1] 33:14 operating ^[1] 31:7 opinion ^[4] 24:8,25 44:4 58:4 opposed ^[4] 6:23 41:1,3 46:16 opposite ^[1] 38:6 oral ^[5] 1:17 3:2,5 4:7 33:6 order ^[6] 16:22 34:10 54:22, 25 59:13,21 ordinarily ^[1] 27:12 ordinary ^[6] 7:17 8:2,5,6 48:1 63:20 organize ^[1] 14:8 organizer ^[1] 14:10 organizers ^[2] 13:4,8 organizing ^[1] 15:22 originally ^[1] 32:3 originates ^[1] 22:1 other ^[21] 6:13 7:12 9:9,10 10:6 11:13 15:2 34:25 35:1,6 41:1,3 45:2 46:11 47:6 58:3,13,19 61:19 65:24 66:16 others ^[6] 13:8 14:8 25:7 46:2,17 50:2 otherwise ^[3] 29:13 32:17 52:18 ought ^[1] 62:8 ourself ^[1] 24:9 ourselves ^[1] 51:23 out ^[21] 4:15 9:16 12:14 22:6 27:10 29:10 30:24 32:4 35:21,25 36:1,19 37:8 41:</p>	<p>24 44:7 45:15 46:3 48:16 51:18 64:16 67:2 outside ^[1] 31:22 over ^[3] 6:6 45:9 51:21 overcome ^[1] 61:20 override ^[1] 34:16 overstate ^[1] 64:11 overwhelming ^[2] 30:11 51:21 own ^[5] 39:25 42:10 51:2 57:9 60:9 Ozburn-Hessey ^[2] 44:19 51:20</p> <hr/> <p style="text-align: center;">P</p> <p>p.m ^[1] 67:16 PAGE ^[5] 3:2 30:2 33:17 35:9 65:5 pages ^[2] 9:14,18 paragraph ^[1] 7:20 part ^[2] 20:9 44:14 particular ^[7] 8:12 15:8 41:6 46:1 47:3 54:1 57:15 particularly ^[1] 56:6 parties ^[7] 19:8 21:19,20 25:24 47:19 57:14,19 party ^[6] 7:12 26:9,14 65:22,24 passed ^[1] 55:12 pay ^[1] 25:25 pending ^[2] 47:2 58:21 people ^[1] 12:18 percent ^[4] 29:21 30:5 43:21,21 percentage ^[2] 43:23 44:7 perhaps ^[1] 15:5 period ^[1] 55:15 permissible ^[1] 41:15 perspective ^[1] 47:19 petition ^[17] 36:8,15,16 38:13 39:3,7 50:5,20,23,24 54:21,21 55:1 60:8 62:17 63:18 64:7 Petitioner ^[9] 1:4 2:3 3:4, 10 4:8 19:6 33:14 35:8 65:2 Petitioner's ^[1] 6:3 petitions ^[3] 35:20 39:5 40:20 Pharma ^[1] 10:17 PI ^[4] 8:2 9:9,10 51:2 piece ^[1] 35:16 pins ^[1] 23:16 place ^[1] 51:10 playbook ^[1] 12:24 playing ^[1] 19:7 please ^[6] 4:10 19:10,23 25:1 33:9 65:3 point ^[13] 14:2 22:10 28:3 33:20 34:14 35:9 40:22 44:19 45:5 54:23 59:21 60:14 64:11 pointed ^[2] 23:8 27:10 points ^[2] 30:24 46:3</p>
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Official

<p>policy ^[3] 14:25 15:1,24 position ^[8] 5:25 17:25 18:4 30:23 46:9 53:21,23 54:2 positions ^[1] 52:14 possibly ^[1] 48:21 post-war ^[1] 55:15 post-Winter ^[1] 67:8 power ^[8] 11:20 21:6 33:19 36:14 45:9,12 56:17,25 powers ^[1] 28:6 practice ^[5] 7:24 12:17 15:16 48:10 66:9 practices ^[2] 9:7 20:14 pre-Winter ^[1] 67:7 precedent ^[6] 49:6,8,10,12 53:10 62:21 precedents ^[1] 34:3 predict ^[2] 29:23 48:15 prediction ^[1] 28:16 predictive ^[10] 25:11 28:18 35:23,25 36:18 47:14,16 48:3,5 64:15 prejudged ^[1] 64:14 preliminarily ^[2] 36:20 47:23 preliminary ^[23] 4:12 5:5 7:1,11,15 8:5 9:24 16:19 25:19 26:3,18,21 27:16 34:24 45:20 47:16 50:6 59:23 60:1 64:1,3,6,9 premise ^[1] 49:4 premises ^[1] 6:5 prerogatives ^[1] 7:22 present ^[1] 64:8 presented ^[1] 9:1 preserve ^[1] 38:14 presume ^[1] 31:17 pretend ^[3] 61:25 62:1,13 pretext ^[1] 15:25 pretextual ^[1] 15:3 pretty ^[6] 17:16 28:18 30:12 40:3 61:1,18 prevent ^[1] 55:23 primary ^[2] 45:6,8 principal ^[1] 48:14 principally ^[3] 44:13 50:4 54:7 private ^[7] 19:8 21:18,19,20 35:5 57:19 61:19 privileged ^[1] 66:22 privy ^[1] 60:4 pro-context ^[1] 54:2 pro-employers ^[1] 32:12 probability ^[3] 38:23 43:15 44:6 probably ^[1] 30:13 problem ^[5] 15:6 16:23 19:3,6 20:15 proceedings ^[6] 33:17 40:16,17 47:2 55:24 58:21 process ^[2] 19:13 31:23 processes ^[1] 9:18 producing ^[1] 66:18</p>	<p>profit ^[2] 35:5,6 prompted ^[1] 14:23 prongs ^[1] 11:14 proper ^[8] 4:13 6:17 8:6,8,10,10 31:13 32:16 properly ^[1] 35:22 prosecuting ^[2] 26:9,14 prosecutor ^[1] 27:10 prosecutorial ^[3] 36:10 50:12,22 prospect ^[1] 44:4 protect ^[11] 39:25 40:16 45:16 48:6 50:24 51:2 54:10 55:2,7 57:19 58:12 protecting ^[5] 6:22 56:18 57:8,14,15 prove ^[1] 65:23 provided ^[1] 7:19 providing ^[1] 8:15 provision ^[1] 8:14 public ^[23] 11:15,17,25 21:13,15,22,25 22:3,5,8,11,13,15,21 34:13,16,25 57:18,20 60:22 61:12,14,17 pure ^[1] 29:2 purely ^[1] 35:5 put ^[7] 25:9 32:8 38:8 43:22 44:21 52:5 63:22 putting ^[1] 22:16</p> <p style="text-align: center;">Q</p> <p>quality ^[1] 59:4 question ^[18] 18:14 19:17,21 27:6,7 29:6,8 33:10,22,24 34:6,7 37:6 49:5 52:2 60:7 61:2 65:10 questions ^[3] 6:1 57:24 66:14 quick ^[1] 45:20 quite ^[2] 39:6 46:7 quo ^[1] 11:21 quoted ^[1] 60:20 quoting ^[1] 12:20</p> <p style="text-align: center;">R</p> <p>Railway ^[1] 22:3 raised ^[1] 47:11 ratcheted ^[1] 61:3 rate ^[2] 29:22 30:4 rather ^[3] 56:9 57:2,9 RAYNOR ^[77] 2:4 3:6 33:5,6,8 37:8,10,15,23 38:4,12,19 39:10,14,16,23 41:1,5,10,14,22 42:2,6,9,15,21,24 43:11,22 44:2,12 45:4,11 46:4,12,22 47:6,12 48:13,21 49:1,4,15,18,23 50:15 51:8,15 52:21 53:15,20 54:6,15,19 55:11 56:4,10,15,20,23 57:4,17 58:6,10,15,18 59:11,20 60:3,13 61:7 62:4,14 63:3,7,23 64:21 reach ^[2] 22:6 37:6 reaction ^[1] 6:7</p>	<p>read ^[2] 42:2 54:17 real ^[2] 6:21 61:2 really ^[5] 20:3 29:23 38:7 52:19 66:19 reason ^[5] 21:8 39:23 44:23 45:2 55:11 reasonable ^[7] 43:4,15,19,19 44:6,15 65:13 reasonably ^[4] 34:1 61:11 62:25 63:5 reasons ^[1] 7:3 REBUTTAL ^[3] 3:8 64:22 65:1 receives ^[1] 35:18 recognition ^[1] 11:17 recognize ^[1] 57:4 record ^[4] 17:6 39:7 53:17 55:3 recoverable ^[1] 7:5 recreate ^[1] 21:4 reference ^[1] 64:2 referenced ^[1] 22:11 referencing ^[1] 52:25 referred ^[1] 16:2 referring ^[1] 9:3 refused ^[1] 12:7 refusing ^[1] 34:22 regard ^[1] 64:10 regime ^[1] 46:2 REGION ^[1] 1:7 REGIONAL ^[1] 1:6 regular ^[1] 7:16 reigning ^[1] 49:13 reinstatement ^[1] 16:23 related ^[1] 47:14 RELATIONS ^[2] 1:8,10 relationship ^[1] 64:8 relatively ^[1] 57:22 relegate ^[1] 26:14 relevant ^[14] 24:20 25:21 26:7 35:15 36:3,6,17,24 40:19 42:16 53:9 62:16 63:17 64:14 relied ^[1] 67:10 relief ^[16] 5:9,11 35:7 37:21 38:22 39:25 40:11,12 47:1,17 48:6 51:24 58:21 59:5,23 64:3 relying ^[2] 17:21 32:13 remedial ^[8] 11:20 16:17 20:24 21:6 33:19 38:14 48:7 61:10 remedies ^[2] 5:6 8:7 remedy ^[2] 20:14 33:16 remember ^[2] 9:21 13:20 reparable ^[1] 24:1 reply ^[6] 20:9 33:18 35:9 58:25 60:20,25 representations ^[1] 60:5 representatives ^[1] 13:13 request ^[1] 64:10 requesting ^[1] 58:25 requests ^[1] 39:4 require ^[1] 7:21</p>	<p>required ^[1] 23:5 requirement ^[2] 9:6 12:1 requires ^[2] 4:13 23:4 resolve ^[1] 5:2 resolving ^[1] 65:9 respect ^[4] 8:14 11:13 46:5 61:22 Respondent ^[4] 1:11 2:6 3:7 33:7 restart ^[1] 34:12 restored ^[1] 12:22 restrained ^[1] 44:25 restraint ^[1] 19:4 restricting ^[2] 56:17,24 restriction ^[1] 40:10 restrictions ^[1] 55:14 restrictive ^[1] 56:8 result ^[1] 18:21 results ^[1] 57:2 resuscitate ^[1] 56:2 retaining ^[1] 15:23 retaliated ^[1] 12:19 retaliation ^[1] 23:25 retreated ^[1] 60:24 returned ^[1] 11:21 reversal ^[1] 20:5 reverse ^[2] 4:16 48:11 reversed ^[2] 53:6 67:13 review ^[2] 31:23 53:2 reviewing ^[1] 9:22 revise ^[1] 35:10 rights ^[2] 21:25 57:20 road ^[1] 34:11 ROBERTS ^[18] 4:3 32:20 33:2 37:3,9,13,22 38:2,5 57:25 58:8 59:6 60:16 62:23 63:13 64:19,22 67:14 role ^[3] 50:22 54:9 57:7 rubber ^[2] 30:5 51:16 rule ^[13] 6:15 41:12 50:14 52:18 55:21 57:23 58:23,24 59:16,25 60:6,7 62:18 ruled ^[1] 59:8 rules ^[1] 56:12 run ^[2] 9:16 46:18 run-of-the-mine ^[1] 35:4</p> <p style="text-align: center;">S</p> <p>same ^[10] 5:9 7:2 42:19,23 44:9 50:1 53:23 58:13 59:4 63:2 sanctions ^[1] 5:8 satisfy ^[1] 50:3 saying ^[17] 8:9 13:1 15:17 16:21 17:13 18:12,16,16 22:5,12,22 23:9 30:9 44:9 50:10 62:12 66:24 says ^[10] 6:3,17 13:2 26:15 34:19 35:10 44:4,21 55:20 66:12 scared ^[1] 23:16 scarlet ^[1] 22:16 scenario ^[2] 63:20,24 scheduled ^[1] 24:2</p>	<p>scheme ^[1] 39:24 screening ^[1] 50:9 SEC ^[1] 9:15 second ^[3] 18:3 33:22 34:13 Section ^[9] 4:11,18 36:7,13,15 38:13 40:11,12 54:20 see ^[9] 8:3 13:7 16:14 20:18 45:18,19 48:20 52:4 54:16 seek ^[3] 17:17 39:25 58:20 seeking ^[2] 16:19 48:6 seeks ^[2] 5:7,8 seem ^[1] 26:19 seems ^[4] 17:16 42:13 51:12 52:14 seen ^[1] 36:23 selective ^[3] 38:4 39:1 40:19 sense ^[3] 8:20 43:12 55:4 separate ^[1] 26:24 separation ^[1] 36:8 serious ^[2] 34:10 66:14 Seriously ^[1] 39:15 returned ^[1] 11:21 set ^[4] 4:15 39:24 54:17 57:22 setting ^[3] 7:25 53:20 54:17 settle ^[1] 30:11 Seven ^[4] 18:21 35:20,21 37:10 shift ^[1] 23:20 shifted ^[1] 32:11 shoes ^[1] 25:10 short ^[2] 24:25 58:4 shouldn't ^[1] 53:8 show ^[5] 7:3 12:17 34:6 43:14 66:21 showing ^[7] 5:12 7:12 10:18,23 22:14 23:4 61:11 shut ^[1] 21:10 side ^[7] 22:19 34:25 35:1,6 46:11 58:3 61:19 signaled ^[3] 36:20 50:6 64:6 signs ^[1] 27:23 similar ^[1] 58:22 simply ^[4] 47:7 53:24 59:2 61:13 since ^[2] 17:18 51:13 situation ^[3] 25:6 28:24 48:11 six ^[1] 8:7 Sixth ^[9] 23:4,6 33:25 41:11,17,20 44:18,20 63:8 small ^[2] 18:19 37:4 Solicitor ^[2] 2:4 39:2 somehow ^[2] 23:25 61:24 Someone ^[1] 47:22 Someone's ^[1] 47:21 sometimes ^[2] 53:2 55:20 somewhat ^[2] 59:14 61:4 sorry ^[2] 16:9 44:8</p>
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Official

<p>sort ^[2] 54:14 57:13 sorts ^[2] 37:25 45:22 SOTOMAYOR ^[23] 10:12, 20,24 11:2 13:3,6,10,17 14:1,7,17 16:2 24:3,7,12,14 30:1,7 59:7,8,18,24 60:11 sought ^[3] 17:8 19:9 66:8 sound ^[2] 43:7,9 sounding ^[1] 19:3 sounds ^[1] 65:14 soup ^[1] 45:22 special ^[1] 31:19 specific ^[2] 7:19 58:20 specifically ^[1] 55:1 spell ^[1] 44:7 spend ^[1] 18:10 spending ^[1] 18:9 split ^[1] 15:7 stage ^[4] 34:17,21,24 50:23 stakes ^[1] 48:11 stamp ^[2] 30:5 51:16 stand ^[1] 63:9 standard ^[22] 5:4 7:15 8:8 10:15 14:4 43:16 44:10,13, 24 45:3 46:19,23 53:22,23 54:5 57:2 62:7 65:12,15, 16,19 67:7 standards ^[2] 9:24 19:1 STARBUCKS ^[4] 1:3 4:4 15:23 66:8 Starbucks' ^[1] 14:23 start ^[1] 5:25 started ^[1] 60:19 stat ^[1] 32:18 statement ^[3] 6:15 42:7,9 STATES ^[2] 1:1,19 statistical ^[1] 38:20 statistics ^[5] 35:16 51:17 52:25 53:5 59:11 status ^[2] 11:21 26:14 statute ^[19] 7:20,21 8:6,15, 19 21:15,18 22:7,13 25:14 26:13,13,15,24 29:5 32:13 36:13 54:13,17 statutes ^[7] 8:7,9 46:5,25 47:6 57:22 59:1 statutory ^[10] 4:23 6:5 10:6,7,10 27:7 46:1 54:23 58:20 59:22 stay ^[1] 13:15 staying ^[2] 13:18 15:25 step ^[1] 55:17 still ^[2] 17:25 50:2 stop ^[1] 55:18 stopping ^[1] 32:11 store ^[3] 15:24 21:2,10 stores ^[1] 15:2 Story ^[2] 6:15 15:12 stringent ^[3] 10:14,19 55:13 structural ^[4] 45:4 47:10 54:8 64:7 structure ^[1] 54:18 struggle ^[1] 46:14</p>	<p>stuff ^[1] 11:7 subject ^[1] 35:13 submission ^[1] 60:14 submit ^[1] 50:2 submitted ^[2] 67:15,17 substantial ^[3] 13:24 36:3 43:3 succeed ^[2] 43:14 52:12 success ^[30] 7:4 11:4 12:6 25:6 26:19 27:18 28:25 29:22 30:4 36:2 37:1 39:7 40:23,24 43:10,12,15,19 44:10 45:24 49:25 51:17 52:6, 8 61:3,15,23 64:17 65:7 66:1 sue ^[2] 47:8 59:3 sufficient ^[2] 43:4 44:16 suggest ^[2] 17:5 42:13 suggests ^[1] 31:23 suing ^[2] 57:18,19 summary ^[4] 65:15,19,20, 22 sums ^[1] 27:21 support ^[4] 12:19 15:13 46:7 65:13 supported ^[1] 4:19 supporting ^[1] 65:9 supports ^[2] 46:8 55:4 suppose ^[1] 29:13 supposed ^[18] 17:15 19:20 20:11 21:16 32:14,16 48:22 49:14,19 52:6,7,11,19, 20 61:25 62:2,12 66:20 SUPREME ^[2] 1:1,18 surprised ^[1] 43:24 survive ^[1] 65:20</p> <hr/> <p style="text-align: center;">T</p> <p>table ^[2] 12:6 25:7 talked ^[1] 11:16 tells ^[1] 29:23 tend ^[1] 53:1 tendency ^[1] 41:16 tension ^[1] 67:11 terminated ^[1] 23:17 termination ^[2] 14:6 29:8 terminations ^[1] 14:23 terms ^[16] 9:25 10:4 12:12 17:11 23:15 28:18 29:5,7 31:13 60:9 65:7,12,25 66:5 67:2,5 test ^[24] 4:23 10:15,16 22 19:14 20:10 24:16 30:3,8, 10,18,21,25 31:1,2,4 33:25 42:19 44:18 45:24 49:25 50:3 56:9 63:8 text ^[2] 6:5,16 themselves ^[1] 36:11 theories ^[1] 66:7 theory ^[9] 4:20 8:22 15:11 16:24 22:19 28:13 43:3 65:13 66:5 there's ^[49] 7:3,8 9:18 11:5 12:16 13:1,23 14:5 16:25</p>	<p>17:6 20:17,25,25 21:1,7,25 22:12,14 23:7,13,24 24:22 27:17 28:1 29:4 31:10,19 33:24 34:24 35:5 37:10 38:23 39:11,17 41:16 46:8,10, 25 47:2,10,16 49:6,11 54:23 57:17 59:21 61:14 63:9 65:10 therefore ^[2] 37:14 56:8 they'll ^[1] 31:17 they've ^[4] 17:22 18:23 21:1 27:4 thinks ^[1] 29:3 third ^[2] 18:8 35:12 THOMAS ^[7] 6:2,20 32:21 58:9,10,16,18 though ^[4] 14:14 17:9 25:23 56:1 thousand ^[1] 18:20 three ^[5] 9:18 11:13 22:14 23:7 47:3 tied ^[1] 23:10 timing ^[1] 60:4 tiny ^[1] 39:6 today ^[1] 60:25 took ^[3] 32:3 49:1,4 totally ^[3] 17:10 26:4,8 trademark ^[1] 31:16 traditional ^[9] 4:14 5:4 6:18 10:21,22 19:13 24:15 31:4 56:12 translation ^[1] 42:25 trial ^[4] 5:14,16 12:7 65:21 trick ^[1] 19:17 true ^[1] 55:25 try ^[2] 20:18 38:23 trying ^[4] 24:18 31:8 35:23 48:15 Tuesday ^[1] 1:15 turn ^[1] 28:12 turned ^[1] 66:8 Twenty ^[1] 18:20 two ^[11] 4:23 13:13 14:7 19:2 23:14,16 29:9 34:11 59:13,13,14 two-day ^[1] 41:17 two-part ^[4] 30:3,7,10 31:1 type ^[3] 15:15 59:4 64:7 typically ^[2] 35:7 59:12</p> <hr/> <p style="text-align: center;">U</p> <p>U.S ^[1] 8:7 ultimate ^[1] 64:5 ultimately ^[3] 5:14 7:23 35:25 under ^[9] 4:18 5:12 20:10 22:14,17 26:24 30:21 32:17 44:11 understand ^[15] 7:8 8:11, 13 11:2,9 13:7 19:2 28:15 30:22 46:14 60:18 61:5,8, 24 62:10 understood ^[2] 32:6 33:19 undertaking ^[1] 5:1</p>	<p>undone ^[1] 23:11 undue ^[1] 17:15 unfair ^[8] 7:24 9:6 12:17 15:16 20:14 35:18 48:10 66:9 uniformly ^[1] 46:7 union ^[12] 11:24 12:19 13:4,13 14:8,10 15:12,14,22 23:16 24:5 34:9 union's ^[1] 15:14 unionization ^[2] 15:12 24:23 unions ^[3] 32:11 46:19 66:13 unique ^[2] 27:7 46:16 unit ^[1] 23:18 UNITED ^[2] 1:1,18 unlawful ^[2] 34:5,20 Unless ^[2] 21:3 23:23 unrest ^[1] 55:16 unscrambled ^[1] 20:22 until ^[3] 59:19,19,20 untraditional ^[2] 31:7,9 untraditionally ^[1] 31:5 up ^[12] 7:25 27:1,4 31:15 36:23 38:10 39:24 46:20 52:9 54:17 59:15 66:15 uses ^[1] 31:13 using ^[2] 10:14 20:12 usual ^[1] 44:10</p> <hr/> <p style="text-align: center;">V</p> <p>varies ^[1] 59:13 various ^[1] 51:17 version ^[1] 10:14 versus ^[4] 4:5,15 10:18 19:2 vests ^[1] 36:14 view ^[13] 22:21 25:13 31:4 36:21 48:22,24 49:3 50:6 54:13,13 57:5 61:13 64:6 violated ^[3] 14:25 15:24 22:18 violation ^[1] 61:15 Virginia ^[1] 22:2 vote ^[4] 21:3 23:12,13 24:6 voted ^[2] 15:14,15 voting ^[2] 21:25 23:12 vulnerable ^[1] 38:11</p> <hr/> <p style="text-align: center;">W</p> <p>wait ^[1] 16:8 walk ^[3] 8:20 33:11 40:9 walked ^[2] 42:1,12 Walsh ^[1] 10:18 wanted ^[1] 55:6 wants ^[2] 7:11 19:6 warranted ^[4] 14:19 25:20 26:22 35:8 Washington ^[3] 1:14 2:2,5 water ^[1] 67:7 way ^[12] 15:5 21:17 34:10 42:3,19,23 50:1 51:1 52:5 57:5 61:8 63:7</p>	<p>ways ^[1] 18:9 wearing ^[1] 23:15 weigh ^[1] 24:8 weighed ^[2] 10:4 49:7 weighing ^[9] 8:24 11:8 14:19 15:19,22 24:10 34:17 51:25 61:17 welcome ^[1] 6:1 whatever ^[2] 46:19 48:12 whatsoever ^[1] 5:20 whenever ^[2] 15:11 24:22 Whereupon ^[1] 67:16 whether ^[22] 4:19,20,21,22 9:8 14:19 15:1,13 16:17 17:17 19:5 20:12 30:17 33:16,23,24 34:4,8 37:1 61:2 63:25 65:8 who's ^[3] 13:10 47:18,23 whole ^[1] 63:10 whom ^[1] 13:11 wide-ranging ^[2] 40:13 55:5 widespread ^[1] 40:4 will ^[7] 5:22 9:23 13:12 35:2 46:24 52:12 60:4 win ^[9] 29:15,24,25 30:18 47:18,24 52:17 53:1,3 winnowing ^[1] 36:4 Winter ^[12] 4:15 5:16,23 6:13 10:18 11:15 12:2 32:1 42:16 44:11 67:9,11 Winter's ^[1] 4:17 within ^[2] 7:17 36:9 without ^[4] 5:1 16:21 64:10 65:9 witness ^[1] 8:24 won ^[2] 5:10 24:5 word ^[1] 12:3 words ^[2] 16:21 20:13 work ^[1] 66:21 workplace ^[2] 12:21 20:24 worried ^[2] 17:13 38:15 worse ^[1] 65:21 wrote ^[1] 27:22</p> <hr/> <p style="text-align: center;">Y</p> <p>year ^[6] 17:7 34:11 35:18, 19 37:11 59:14 year-long ^[1] 18:11 years ^[3] 29:9 59:13,14</p>
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