

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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BLOM BANK SAL,)
Petitioner,)
v.) No. 23-1259
MICHAL HONICKMAN, ET AL.,)
Respondents.)
- - - - -

Pages: 1 through 61
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v.) No. 23-1259

MICHAL HONICKMAN, ET AL.,)

Respondents.)

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Washington, D.C.

Monday, March 3, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:56 a.m.

APPEARANCES:

MICHAEL H. MCGINLEY, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

MICHAEL J. RADINE, ESQUIRE, Hackensack, New Jersey; on behalf of the Respondents.

| | | |
|----|------------------------------|-------|
| 1 | C O N T E N T S | |
| 2 | ORAL ARGUMENT OF: | PAGE: |
| 3 | MICHAEL H. MCGINLEY, ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | ORAL ARGUMENT OF: | |
| 6 | MICHAEL J. RADINE, ESQ. | |
| 7 | On behalf of the Respondents | 33 |
| 8 | REBUTTAL ARGUMENT OF: | |
| 9 | MICHAEL H. MCGINLEY, ESQ. | |
| 10 | On behalf of the Petitioner | 58 |
| 11 | | |
| 12 | | |
| 13 | | |
| 14 | | |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
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| 23 | | |
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P R O C E E D I N G S

(10:56 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 23-1259, BLOM Bank versus Michal Honickman.

Mr. McGinley.

ORAL ARGUMENT OF MICHAEL H. MCGINLEY
ON BEHALF OF THE PETITIONER

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

This Court has long held that Rule 60(b)(6) requires extraordinary circumstances to reopen a final judgment and those circumstances cannot be the result of the movant's own strategic choices.

The Second Circuit has diluted that stringent standard. In its view, courts must also give effect to Rule 15(a)'s liberal repleading policy when considering a 60(b)(6) motion seeking to replead.

That outlier view is wrong. It has no basis in law or logic. Rather than blurring the two rules, the proper approach is to keep them separate. If this Court's well-settled test for 60(b)(6) is met, then Rule 15 comes into play.

1 Collapsing the two steps undermines
2 finality. It creates inherently -- an
3 inherently contradictory test. It invites
4 inefficient, repetitive, and costly litigation
5 that is at odds with the Federal Rules'
6 overriding objectives.

7 Here, Respondents do not qualify for
8 Rule 60(b)(6) relief. They declined multiple
9 opportunities to amend their complaint in both
10 the trial court and on appeal. Instead, they
11 made the tactical choice to stand on their
12 pleadings even when the Second Circuit ordered
13 supplemental briefing after the Kaplan decision.
14 As a result, they received a final judgment that
15 was affirmed on appeal.

16 Now they seek to restart that process
17 all over again. Doing so would effectively
18 treat the Second Circuit's original decision as
19 an advisory opinion. And Respondents have
20 offered no justification other than that they
21 mistakenly believed that their -- that their
22 original complaint was sufficient. That hardly
23 qualifies as extraordinary circumstances.

24 It is litigator's remorse, and that is
25 not enough for Rule 60(b)(6) relief. This Court

1 should reverse and bring this case to an end.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Respondent seems to
4 have premised its argument on its view of the
5 earlier Second Circuit opinion that it announced
6 a new rule. What do you think of that?

7 MR. MCGINLEY: That's not true, Your
8 Honor. There's no change in law here. Instead,
9 I would point you to my friend's brief on page
10 12, where they admit that it was just the
11 application of controlling law to their set of
12 facts.

13 I would also mention, Your Honor, that
14 what happened in this case is this case and
15 Kaplan were decided in close proximity to each
16 other both in the district court and in the
17 Second Circuit. When we went to oral argument
18 in the Second Circuit in this case, Kaplan had
19 already been argued.

20 I would point you to page 300 of the
21 JA, where the court in our case said to my
22 friend on the other side: You're aware that
23 Kaplan is sub judice before this court. You're
24 also aware, I believe, that the detailed
25 allegations in Kaplan are quite different than

1 what are at issue here in -- in Honickman. What
2 are we to do?

3 What the court ended up doing is
4 holding Honickman in abeyance until Kaplan was
5 decided. At that point, my friend on the other
6 side was fully aware that at least one member of
7 that court thought that their allegations were
8 lacking under -- as compared to Kaplan.

9 The court ordered supplemental
10 briefing. At that time, they were fully
11 capable -- and they admit this on page 40 of
12 their brief -- of asking the court to -- to
13 simply remand for them to replead if they -- if
14 the court thought that their pleadings in this
15 case weren't sufficient under the rule that was
16 announced in Kaplan.

17 In fact, that's what happened in the
18 last ATA/JASTA case that was in front of this
19 Court. This Court might remember that in the
20 Twitter case, it also had a companion case
21 called Gonzalez versus Google.

22 And at oral argument in the Google
23 case, Justice Barrett asked the plaintiff's
24 attorney: If we were to rule against your
25 client in the Twitter case, what would we --

1 what would you want us to do in this case? And
2 the attorney in that case said: We would ask
3 you to remand so that we could attempt to
4 replead.

5 The Court ended up doing that in the
6 Google case. It, of course, pointed out that
7 even in that case, the plaintiff had -- had
8 possibly waived their ability to amend because
9 they -- they sought review rather than amending
10 when the court gave them the opportunity to.
11 But that shows that they could have done that in
12 this case.

13 There was no controlling law. It was
14 a mere application. If they had wanted an --
15 another opportunity in the most efficient way
16 that would have made sense, they could have done
17 exactly what the attorney in Google did. And
18 they -- not only could they have done that at
19 oral argument, when Judge Wesley, at page 300 of
20 the JA, pointed out that their pleadings came
21 nowhere close to Kaplan, they had a brief that
22 they could have filed in -- in the case or
23 that -- that they did file where they didn't ask
24 to replead. Instead, they said exactly what
25 they said in the district court, which is:

1 We're happy to go forward on our pleadings.

2 Please render a judgment in our case.

3 Having done that, that is their
4 tactical choice. Under Ackermann and a number
5 of other cases from this Court, it's clearly not
6 enough to come in and say, under Rule 60(b)(6),
7 oops, I made a mistake, I want a chance to -- to
8 replead now.

9 That makes sense with the structure of
10 the rules. In Liljeberg and a number of other
11 cases, including Crosby, this Court said the
12 reason you can't have a mistake or excuse,
13 excusable neglect, or some inadvertence that
14 justifies 60(b)(6) relief is because all of
15 those things are available under (b)(1) and
16 (b)(1) has a very strict one-year limitations
17 period.

18 JUSTICE SOTOMAYOR: Counsel, you're
19 addressing a question that wasn't the question
20 presented. The question presented was, does
21 15(b) get folded into 60(b) the way the Second
22 Circuit said? And the answer to that, you're
23 asking us to say, is no. But you were asked --
24 in answering Justice Thomas, you want us to go a
25 step further and actually look at the facts here

1 and say they weren't extraordinary
2 circumstances, correct?

3 MR. MCGINLEY: I'd say a few things on
4 that, Your Honor. So, in -- in our petition and
5 in the merits papers here, we fully raised the
6 merits question of whether or not they're
7 entitled to relief. I'd point you to page 13
8 and 26 of our cert papers.

9 JUSTICE SOTOMAYOR: But that wasn't
10 addressed below. The court below did not say
11 whether or not it thought 60(b) was met.

12 MR. MCGINLEY: I actually disagree
13 with that, Your Honor. So, certainly, in the --
14 starting in the district court, what the
15 district court did was it correctly said -- and
16 this is consistent --

17 JUSTICE SOTOMAYOR: I know what it
18 did. It did what you think is right. It
19 applied 60(b).

20 MR. MCGINLEY: Correct.

21 JUSTICE SOTOMAYOR: When it got to the
22 Second Circuit, the Second Circuit says you
23 apply 60(b) by looking at 15(b), correct?

24 MR. MCGINLEY: That's correct.

25 JUSTICE SOTOMAYOR: And what you're

1 saying is no, they shouldn't have. Did they
2 look at this without the 15(b) lens? Did the
3 Second Circuit look at it?

4 MR. MCGINLEY: So that's how it was
5 presented and argued in the Second Circuit
6 because Mandala had not yet been decided. So it
7 was fully aired in the Second Circuit. When the
8 Second Circuit rendered its decision in this
9 case, the only error that it pointed out was
10 what it perceived to be the legal error of not
11 considering 15(a).

12 And I want to point you to -- there's
13 a footnote in the Second Circuit's decision that
14 I think is quite telling on this. The Second
15 Circuit couldn't even bring itself to say there
16 was an abuse of discretion here. What the
17 Second Circuit said is: We're not saying
18 there's an abuse of discretion; we're saying
19 that the district court exceeded its discretion
20 because -- solely because it made this legal --
21 legal error.

22 And I think that's because the Second
23 Circuit realized there's nothing that remotely
24 approaches extraordinary circumstances here.

25 I would also --

1 JUSTICE GORSUCH: Mr. McGinley, I'd
2 like to point you in a little different
3 direction.

4 MR. MCGINLEY: Sure.

5 JUSTICE GORSUCH: So I understand your
6 argument that 60(b) doesn't require
7 consideration of Rule 15. Does it preclude it?
8 I mean, could a district court in its discretion
9 take into account a possible need -- or leave --
10 leave to amend might be appropriate? I mean,
11 60(b)(6) says something like any other reason
12 that justifies relief.

13 And you can imagine a district court
14 who perhaps sua sponte got a little fast out of
15 the gate and dismissed a case with prejudice.
16 Thirty days passes, so 59's out the door.
17 Plaintiff comes in and says: I've got a good --
18 I've got a good amended complaint here.

19 Could -- couldn't a district court in
20 its discretion take into account the policies of
21 15 in those circumstances?

22 MR. MCGINLEY: So a few answers on
23 that, Your Honor. The first --

24 JUSTICE GORSUCH: How about pick your
25 best one.

1 MR. MCGINLEY: Okay. So my best one
2 is: No if it's under 60(b)(6), because what
3 60(b)(6) says is that it has to be something
4 other than what's available under the other
5 subsections of 60(b).

6 The -- the hypothetical that you posit
7 there seems to me like maybe there's an argument
8 under (b)(1). Maybe there's an argument that
9 somebody made a mistake, there was inadvertence,
10 there was surprise. If that's brought within
11 the one-year limitation for (b)(1), then it
12 might be available.

13 And I think that's what you see in
14 these 59(e) cases under Foman, is that the court
15 is saying very close in time, before there's
16 been an appeal.

17 In 59(e), of course, the Court points
18 out in Banister what happens is the judgment is
19 actually suspended for a period of time. And so
20 it's entirely appropriate in that circumstance
21 and efficient in that set of -- in that
22 circumstance to say: Okay, if somebody thinks
23 there's been a mistake, we'll consider that. We
24 might give opportunity to replead there.

25 I do think you still have to satisfy

1 the actual standard. This Court in -- in
2 Waetzig last week dealt with a 60(b) issue where
3 there was also a motion to vacate an arbitral
4 award. And at pages 5 and 6 of the slip op, the
5 Court makes it very clear that you don't blend
6 the two analyses. Instead, you take 60(b)
7 straight on. There, I think it was a mixed
8 (b)(1) and (b)(6) motion.

9 And so you decide whether 60(b) relief
10 is warranted. If so, then you can start looking
11 at liberal repleading --

12 JUSTICE JACKSON: But, Mr. McGinley --

13 JUSTICE KAGAN: Well --

14 JUSTICE JACKSON: Oh. Mr. McGinley, I
15 guess what I'm a little worried about is this
16 notion of whether or not parties are being
17 punished for exercising their right to appeal if
18 we accept the rule that you are positing.

19 And the -- the way it comes up for
20 me -- and I understand the facts of this
21 particular case, but I'm -- I'm just thinking
22 about the normal, ordinary case in which a
23 district court dismisses a complaint for
24 insufficient pleading.

25 And I guess, at that point, the

1 plaintiff has a choice, especially if the
2 district court gives them leave to amend or
3 says: Hey, you can amend before I dismiss your
4 complaint. You could follow the district
5 court's recommendation and amend your complaint.
6 Or you can choose to appeal. You can say: No,
7 I actually think my complaint is sufficient and
8 I would like a court of appeals to weigh in on
9 that.

10 What I worry about is, if the district
11 court enters their judgment -- with or without
12 prejudice, I guess. I'm not sure it matters.
13 But, if they enter a judgment, they dismiss the
14 appeal, you -- I mean, excuse me, they dismiss
15 the complaint, you exercise your right to appeal
16 and you lose, the court of appeals disagrees
17 with you, says the district court was correct, I
18 hear you saying that the part -- this particular
19 party should not necessarily have a chance to
20 amend, to cure, because they chose to appeal,
21 and I'm worried about that.

22 MR. MCGINLEY: So it's not quite what
23 I'm saying. I think what I'm actually trying to
24 say might assuage your concerns because what I'm
25 saying is what a party can't do is say: I want

1 to stand on my pleadings no matter what --
2 whatever the decision is, and then file a Rule
3 60(b)(6) after --

4 JUSTICE JACKSON: Why not? If the --
5 they're not -- what they're saying is: I
6 disagree with you, district court, that my
7 pleading is insufficient, and I have a right to
8 go to the court of appeals to have them weigh
9 in.

10 Once the court of appeals weighs in,
11 then, obviously, they can do whatever is
12 necessary to cure, I think.

13 MR. MCGINLEY: Right.

14 JUSTICE JACKSON: And I'm worried that
15 they -- you're saying they can't.

16 MR. MCGINLEY: No. What I'm saying
17 is, if they think there's some ambiguity as to
18 whether or not the facts that they've alleged
19 meet the standard that they think is the correct
20 one, then they have two options.

21 They can replead whatever facts they
22 think might clearly meet that standard. That's
23 the most efficient course.

24 But the other option they have is
25 exactly what happened in this Court in Google

1 versus Gonzalez, where they can say: If you --
2 we think the law is such, and we think our facts
3 map -- meet that. But, if you disagree with us
4 on whether our facts meet that law, then please
5 give us a chance to go back and replead.

6 The efficient way to do that is the
7 Court then says: Okay, fine, I'm going to
8 decide the case, but --

9 JUSTICE JACKSON: But I guess I don't
10 understand why that's not basically the same
11 thing. They just don't have that second
12 request. What they want to do is come back
13 after the -- we've cleared up what the standards
14 are and amend their complaint.

15 MR. MCGINLEY: No, the difference is
16 there's a final judgment at that point. And the
17 Court has always recognized and Rule 60(b)(6)
18 makes it very clear that a final judgment
19 changes things. And once there's a final
20 judgment, then you have to satisfy one of --

21 JUSTICE JACKSON: But your -- your --
22 I guess what I'm -- what I'm -- it's a final
23 judgment only insofar as the -- the district
24 court at the beginning, when it issues the
25 judgment, understands that this is about

1 pleading. Most district courts say: I -- you
2 know, you -- you're going to have leave to amend
3 this complaint. It's not final in the sense of
4 you lose -- you forfeit your ability to bring
5 this claim.

6 And -- and I guess what I'm worried
7 about is that you are making the ability to
8 bring the claim contingent on whether or not you
9 pursue your right to appeal. You're saying:
10 It's okay to amend if you don't appeal. But, if
11 you appeal and you lose, you're not going to be
12 able to amend anymore.

13 And I think that burdens the right to
14 appeal in a way that is not exactly the -- the
15 way these rules should be read.

16 MR. MCGINLEY: Yeah. Respectfully, I
17 disagree because, you know, I think what -- what
18 we're really saying is, when you have
19 opportunities to ask, you have to ask, at a bare
20 minimum, to satisfy 60(b)(6).

21 Remember what happened in Crosby,
22 where this Court said even an actual change in
23 law that changed the statute of limitations,
24 that opened the window for the -- for the
25 petitioner there to take advantage of the

1 statute of limitations, the Court said: No
2 60(b)(6) relief because you could have asked a
3 court to overrule the Artuz decision and you
4 didn't. You could have filed a cert petition at
5 this Court, which, of course, is always
6 discretionary for the Court to grant it. But
7 that was the basis on which the Court said: No
8 extraordinary circumstances.

9 So I don't think we're burdening the
10 right to appeal. Instead, what we're doing is
11 saying that a party doesn't get a -- get an
12 opportunity at a dress rehearsal, where they can
13 say: We're going to plead the bare minimum set
14 of facts that we think can satisfy the law as we
15 see it, take it all -- take a defendant all the
16 way through motion to dismiss or summary
17 judgment or trial or whatever it might be, go up
18 to the court of appeals, tell the court of
19 appeals we want it to decide the question on the
20 set of facts that we've pled.

21 JUSTICE JACKSON: No, but doesn't it
22 matter if it's just the motion to dismiss? If
23 the judgment comes after the motion to dismiss,
24 we haven't had full litigation of the claim.
25 We're in a situation in which, really, the core

1 dispute is over whether or not they have pled
2 sufficient facts to meet whatever standard it
3 is. And the court of appeals says: No, you
4 haven't.

5 It's weird to me that after a ruling
6 of the court of appeals saying your pleading is
7 insufficient, the party goes back to the
8 district court to say: Okay, we have this
9 ruling now, we're ready to amend. I don't
10 understand why they forfeit their claims
11 ultimately in that situation.

12 MR. MCGINLEY: Because, if they
13 have -- I apologize, Your Honor.

14 JUSTICE JACKSON: Yeah.

15 MR. MCGINLEY: Because they haven't
16 diligently pursued it in the -- in the forum
17 where they could have, which is the court of
18 appeals. They can say to the court of appeals:
19 Here's what we think the rule is. Here -- we
20 think our facts satisfy the rule.

21 In this case, they had supplemental
22 briefing that allowed them to do it. I'd also
23 point out the same counsel in Kaplan as in this
24 case. In Kaplan, they ended up surviving a
25 motion to dismiss because they pled facts that

1 survived it. So the notion that they had no
2 clue how to plead some set of facts that could
3 satisfy the standard they were advocating is
4 just fanciful.

5 But also, there's no -- there's no
6 suggestion here that the facts that they claim
7 that they want to now inject into the case
8 weren't available to them. And so allowing them
9 to do it now not only puts 60(b)(6) at odds with
10 (b)(1), but it puts it at odds with (b)(2).

11 What (b)(2) says is that you can,
12 within a year, seek to reopen for facts that
13 were not previously available to you despite
14 diligent efforts.

15 Here, they admit the facts were
16 available to them. They admit that they didn't
17 plead them. They didn't raise them to the
18 Second Circuit when they had a chance to do it
19 after Kaplan.

20 And so I just don't think that they
21 can then come in and say: How could we have
22 known? Now we need the extraordinary medicine
23 of 60(b)(6) relief, and, you know --

24 JUSTICE KAGAN: Mr. McGinley, can I
25 just make this more abstract --

1 MR. MCGINLEY: Sure.

2 JUSTICE KAGAN: -- take it out of the
3 facts of this case and go back to the question
4 that Justice Gorsuch asked, which I understood
5 to be something like the following: Look, get
6 your -- your principal argument that Rule 60 is
7 Rule 60 and Rule 15 is Rule 15 and there's not,
8 like, some strange combination in the way that
9 the -- that the Second Circuit thought here.

10 But, you know, does -- is Rule
11 60(b)(6) flexible enough so that a court can, in
12 appropriate circumstances -- and maybe this case
13 is not one of those, but I really want to think
14 about this in the abstract -- in appropriate
15 circumstances, take into account matters
16 relating to amendment, like whether the party
17 has had a sufficient opportunity to amend?

18 And I understood you to say to Justice
19 Gorsuch: Well, they couldn't do it in a way
20 that evades 60(b)(1) or other of the year-long
21 provisions. And that seems totally right,
22 blackletter law.

23 But, if we put that aside, say that
24 this isn't something that falls neatly into
25 another 60(b) provision, why is it that -- that

1 your -- you seem to be saying you can't even
2 think about amendment in the 60(b)(6) inquiry.

3 And that seems wrong the other way.
4 Like, why -- why not think -- you -- it's a high
5 bar, extraordinary circumstances. But there's
6 also a lot of latitude in what you can consider,
7 or so I thought, and that latitude maybe should
8 include things relating to amendments in
9 appropriate cases.

10 MR. MCGINLEY: So, yeah, and I don't
11 want to overstate our position because --
12 because I -- I don't think it's quite that you
13 can never consider the fact that it's a 60(b)(6)
14 in order to amend. What the Court has said is
15 that the extraordinary circumstances that are
16 required must match the thing that you're trying
17 to do.

18 And so, if somebody comes in and says:
19 I want to amend and I want to have that
20 opportunity through 60(b)(6), they have to show
21 extraordinary circumstances that justify that
22 desire to amend. You don't let liberality bleed
23 into the analysis because that's just not
24 appropriate at that stage.

25 But what you could say -- and this may

1 sound like an extreme example, but it comes from
2 the facts of the first case to ever apply
3 60(b)(6). Imagine a circumstance like
4 Klapprott. What happened in Klapprott, which
5 was decided one year, I believe, after 60(b)(6)
6 was adopted, is that the petitioner in that case
7 was someone who had his citizenship rights
8 stripped through a default judgment during a
9 period of time in which the U.S. Government, who
10 was his adversary in the default judgment case,
11 was detaining him and he was ill. And the Court
12 said that's enough for extraordinary
13 circumstances.

14 So you could imagine a scenario where
15 somebody files a case, there's a motion to
16 dismiss filed, maybe they even oppose that
17 motion to dismiss, they go abroad, they fall
18 ill, they are -- they never find out that the
19 court has granted the motion to dismiss but
20 granted them leave to replead. They don't do
21 anything in time. The court enters a default
22 judgment. That becomes final.

23 Maybe, in that set of circumstances,
24 the person could come in and say: I had no idea
25 that this was entered against me. You gave me

1 the opportunity to replead. I had no ability to
2 take advantage of it, the same way that
3 Mr. Klapprott had no ability to oppose the
4 circumstances in his -- or the default judgment
5 in his case.

6 There, I would say I -- I think that
7 that may be appropriate under 60(b)(6).

8 JUSTICE KAGAN: So you're not saying
9 that a court has to blind itself to anything
10 remotely relating to amendments?

11 MR. MCGINLEY: No.

12 JUSTICE KAGAN: You're saying the
13 60(b) standard, the extraordinary
14 circumstances --

15 MR. MCGINLEY: Right.

16 JUSTICE KAGAN: -- is the right
17 standard to use.

18 MR. MCGINLEY: Right.

19 JUSTICE KAGAN: And, of course, you
20 can't try to evade 60(b)(1), et cetera, but
21 there's -- there's -- there's -- there's no
22 greater requirement or -- or strictures that
23 you're asking for.

24 MR. MCGINLEY: No. All we're asking
25 you to do is apply 60(b)(6) as you do in every

1 other circumstance that always takes into
2 account what the request is for.

3 JUSTICE GORSUCH: I appreciate that
4 acknowledgment in Justice Kagan's question
5 because I think -- I do think it's one thing to
6 say the district court abuses its discretion in
7 60(b)(6) by not looking at Rule 15 and quite
8 another to say the district court abuses its
9 discretion to look at Rule 15 in some 60(b)(6)
10 cases.

11 MR. MCGINLEY: Right. And I just want
12 to be clear that I'm not now overselling in the
13 other direction. We -- we want --

14 JUSTICE GORSUCH: Oh, I think -- I
15 think you were selling really well just a moment
16 ago.

17 (Laughter.)

18 MR. MCGINLEY: Okay. Good. Yeah.
19 All I want to say is --

20 JUSTICE GORSUCH: You might leave it.

21 MR. MCGINLEY: Yeah. Okay. That's
22 fine, Your Honor.

23 (Laughter.)

24 JUSTICE KAVANAUGH: Well, what are
25 you -- what were you going to say?

1 (Laughter.)

2 MR. MCGINLEY: I was just going to
3 say -- I was just going to say that we want to
4 be absolutely clear that doesn't mean liberality
5 creeps into the equation. All it means is that
6 the extraordinary circumstances that are cited
7 must match the request --

8 JUSTICE GORSUCH: Yeah, some
9 extraordinary circumstances in which somebody
10 was denied the right to replead, and, at that
11 point, one might take a look at -- at our
12 general presumption, you can call it Rule 15,
13 you can call it whatever, that somebody should
14 have their day in court and a -- and a fair
15 opportunity to do so. No?

16 MR. MCGINLEY: I want to be careful
17 because I -- I just -- I think that --

18 JUSTICE GORSUCH: They're blameless.
19 They meet all the 60(b) standards.

20 MR. MCGINLEY: If they're blameless,
21 it's truly extraordinary circumstances, that, of
22 course, means that they didn't waive
23 opportunities, that they were diligent in their
24 pursuit, I don't know what the liberality would
25 add to the equation at that point. I think that

1 60(b)(6) just gives them the opportunity to do
2 what they want to do. So --

3 JUSTICE GORSUCH: But, if a district
4 court judge cited Rule 15 in a 60(b)(6) order,
5 that would not be an abuse of discretion --

6 MR. MCGINLEY: Oh.

7 JUSTICE GORSUCH: -- would it?

8 MR. MCGINLEY: No. If all they did
9 was cite it, no. If there's evidence that they
10 let the liberality creep in in a way that
11 changed the analysis that they were applying --

12 JUSTICE GORSUCH: I understand that.

13 MR. MCGINLEY: -- then yes. But --
14 but, no, if all they did was cite it. I also
15 would say that I think that a district court
16 could say -- if they thought it was more
17 efficient, they could say: I don't think
18 there's any chance that you could possibly meet
19 Rule 15's standard, so I'm going to deny this
20 because, no extraordinary circumstances, it
21 would be futile.

22 I think that's fine for them to do
23 that. What they can't do is grant it by
24 diluting 60(b)(6).

25 JUSTICE GORSUCH: I -- I appreciate

1 that.

2 JUSTICE BARRETT: So is one way to say
3 what you're saying that when you're in 60(b)
4 land with a 60(b) motion, the standard is always
5 extraordinary circumstances, not the liberality
6 under Rule 15, and just say no more?

7 MR. MCGINLEY: For 60(b)(6)?

8 JUSTICE BARRETT: Yes.

9 MR. MCGINLEY: Yes, that's correct.

10 JUSTICE BARRETT: Okay.

11 MR. MCGINLEY: And -- and then, of
12 course, we believe that it's fully briefed here
13 as to whether they -- or not they meet it.

14 I wanted to say one more thing. I
15 think it was Justice Sotomayor asked why you
16 should decide it. It's what you did in
17 Crosby -- or -- yeah, in Crosby. There -- there
18 was not a separate QP on whether 60(b)(6) relief
19 should be granted or not. The Court decided the
20 AEDPA issue, which was whether it's a second or
21 successive petition, and then it said: But he
22 can't meet 60(b)(6) here because there's no
23 extraordinary circumstances. He wasn't diligent
24 in pursuing his effort to -- to do what he
25 wanted to do.

1 That's precisely what has happened
2 here, and we would ask the Court to therefore
3 reverse.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice -- Justice Sotomayor, anything
7 further?

8 JUSTICE JACKSON: I have a question.

9 CHIEF JUSTICE ROBERTS: Sure.

10 JUSTICE JACKSON: Yes. I guess what
11 I'm still a little worried about is that you are
12 characterizing the choice to appeal the district
13 court's determination about the sufficiency of
14 your pleading as a tactical waiver of your
15 ability to amend if the court of appeals
16 disagrees with you. And I'm worried about that.

17 MR. MCGINLEY: Yeah.

18 JUSTICE JACKSON: So let me give you a
19 hypo. So you have a plaintiff who files a
20 complaint that he thinks is sufficient. The
21 district court signals no, I actually think it's
22 not. The law is such and you haven't pled
23 enough facts, but I'll give you the ability to
24 amend. And the plaintiff says: No. With --
25 with respect, Your Honor, I really do think it's

1 sufficient. I have a right to appeal your
2 ruling. If you'd like to rule that my complaint
3 is dismissed, do so, and we'll go to the court
4 of appeals to get a ruling on that.

5 MR. MCGINLEY: Yeah.

6 JUSTICE JACKSON: They go to the court
7 of appeals and the court of appeals agrees with
8 the district court.

9 What I don't understand is a rule,
10 whether it's Rule 60(b) or 15 or whatever, that
11 prevents under those circumstances the plaintiff
12 from curing by pleading the facts that he
13 originally thought and mistakenly thought were
14 not necessary. I don't know why he forfeits
15 then the opportunity to proceed with his
16 litigation having gotten now a clear ruling from
17 the court of appeals about what is required.

18 MR. MCGINLEY: So I'd say, in that
19 circumstance where there's never a request to
20 replead either in the trial court or in the
21 court of appeals, I think that's Ackermann,
22 which says that if you make a tactical decision
23 to induce the court to do something or -- or you
24 make a tactical decision not to do something in
25 that --

1 JUSTICE JACKSON: But why -- is -- is
2 the tactical decision choosing to appeal the
3 district court's ruling?

4 MR. MCGINLEY: No.

5 JUSTICE JACKSON: That's my question.

6 MR. MCGINLEY: No, no. It's choosing
7 not to plead the facts that you think might have
8 satisfied even the rule that you're advocating.
9 That's what happened here.

10 I would also point out here -- and I'd
11 point you to JA 171 through 185 -- we raised all
12 of the issues that they say that they now
13 want --

14 JUSTICE JACKSON: No, I -- I don't
15 want this case. I'm just trying to understand
16 what --

17 MR. MCGINLEY: Well --

18 JUSTICE JACKSON: Can I just change
19 the hypo a little bit?

20 MR. MCGINLEY: That's fine.

21 JUSTICE JACKSON: What if the court of
22 appeals actually partially agrees with the
23 plaintiff and changes and says neither of you is
24 right, the district court said you needed to do
25 a whole lot more, we don't think that's the

1 case, you only need to plead some subset of
2 facts?

3 MR. MCGINLEY: Right.

4 JUSTICE JACKSON: In those -- in that
5 situation, does the plaintiff get to go back and
6 do what the court of appeals says is now
7 required?

8 MR. MCGINLEY: They can ask to do so.
9 They admit this on page 40, I believe, of their
10 brief, that they could have asked the Second
11 Circuit to do that. They -- that's what
12 happened in the Google case. It's what happened
13 in the Schwab case that they cite.

14 JUSTICE JACKSON: But, if they don't,
15 you're saying they can't go to the district
16 court and ask?

17 MR. MCGINLEY: Not on a 60(b)(6).
18 Now, I mean, the other thing they could have
19 done here -- and this -- and I'm not just trying
20 to make this about this case. I'm saying a
21 plaintiff even in this -- the --

22 JUSTICE JACKSON: Yes.

23 MR. MCGINLEY: -- circumstances that
24 you're positing. Say they -- they mistakenly
25 think that they can meet even the standard that

1 the Second Circuit or the court of appeals is
2 advocating, but the court rules against them.
3 They could file a rehearing motion and they
4 could say: Your Honors, we're sorry, we should
5 have asked you at the outset, but we're asking
6 you now, we think there might be facts that
7 could replead.

8 Obviously, they're going to have to
9 labor under the rehearing standard at that
10 point, but that's still better than a 60(b)(6),
11 which is an attack on a final judgment that's
12 already been affirmed on appeal.

13 JUSTICE JACKSON: Thank you.

14 MR. MCGINLEY: Thank you. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Radine.

18 ORAL ARGUMENT OF MICHAEL J. RADINE

19 ON BEHALF OF THE RESPONDENTS

20 MR. RADINE: Mr. Chief Justice, and
21 may it please the Court:

22 The answer to the question presented
23 is that Rule 60(b)(6)'s standard does apply
24 here, and the circumstances of this case clearly
25 meet that standard. The plaintiffs here did

1 everything you'd want litigants to do. They
2 didn't waste the district court's time with
3 futile amendments given the district court's
4 erroneous standards. They appealed an incorrect
5 decision, secured a corrected pleading standard
6 and substantive legal standards from the
7 circuit, and then, armed with those
8 clarifications, promptly sought an opportunity
9 to amend from the court tasked with making those
10 decisions, the district court.

11 The circuit acknowledged that
12 plaintiffs faced an impossible situation,
13 including the district court's soup-to-nuts
14 incorrect standards, from every one of the
15 relevant JASTA standards to the direct evidence
16 knowledge pleading standard, which most
17 plaintiffs could not hope to meet.

18 And it acknowledged that the district
19 court was confused given ambiguous circuit law
20 on JASTA. It's fundamentally unfair to lay the
21 consequences of that confusion at plaintiffs'
22 doorstep.

23 But, when presented with a motion for
24 vacatur, the district court exalted finality
25 without balancing that principle against the

1 Federal Rules' preference for deciding cases on
2 their merits, a preference which is at its peak
3 at the initial stages of litigation where
4 discovery has not even begun.

5 The circuit recognized that the fair
6 thing to do was to give plaintiffs a chance to
7 meet the corrected standards in a first amended
8 complaint. The panel then issued the summary
9 order below, which included the author of the
10 prior affirmance on other grounds, effectively
11 undoing that affirmance, and attempting to clean
12 up a very strange and unfair situation.

13 That's why Petitioner was forced to
14 manufacture waivers by plaintiffs that the
15 circuit simply never found. Like many cases
16 involving extraordinary circumstances under Rule
17 60(b)(6), crafting a universal rule from unusual
18 facts of this case is very difficult, but we
19 know that Rule 60(b)(6) makes an exception to
20 finality intended for unusual cases like this
21 one.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: Wouldn't you be in a
24 stronger position had you taken up the district
25 court's offer to amend your complaint?

1 MR. RADINE: The offer from the
2 district court was to meet the standards urged
3 by defendant, which were entirely incorrect,
4 and, as of oral argument, included the Kaplan I
5 standard for pleading knowledge that the
6 defendant read or was aware of the sources cited
7 to convey knowledge. That's something that we
8 couldn't prove -- allege, much less plead to.

9 JUSTICE THOMAS: But, even if -- if
10 you look at the first opinion by the court of
11 appeals, didn't it affirm the district court?

12 MR. RADINE: On other grounds, Your
13 Honor.

14 JUSTICE THOMAS: I know, but is -- but
15 the point was that your complaint as it stood
16 did not even meet that standard even if it
17 wasn't the correct standard.

18 MR. RADINE: It didn't meet the
19 clarified standard that the district court --
20 sorry, the circuit court provided. The circuit
21 court provided a standard that -- in what Judge
22 Wesley called a law that was recasting itself in
23 an ambiguous and evolving legal situation that
24 gave us, among other things, a new knowledge
25 pleading standard as near as we can tell. This

1 is the public sources versus publicly available
2 evidence distinction. And it identified
3 specific and I'd add non-intuitive defects in
4 the complaint, defects that we can remedy but
5 not defects that necessarily should have been
6 obvious to us before.

7 JUSTICE KAVANAUGH: The other side
8 says that once you have an affirmance of the
9 dismissal, though, that you should have sought
10 rehearing or asked the Second Circuit to modify
11 the decision to remand and to permit the -- you
12 all to amend the complaint.

13 Why didn't you do that? And why isn't
14 that the answer?

15 MR. RADINE: There's no obligation to
16 do that. And, in fact, in the Second Circuit,
17 there's not only no obligation, but it appears
18 to be a regular enough practice to go back to
19 the district court.

20 So, for example, in the *Mandala en*
21 *banc* dissent, four of the judges of that court
22 encouraged the plaintiffs to go back to the
23 district court and seek vacatur under Rule
24 60(b)(6) and amendment, the same thing we did
25 here.

1 The Ninth Circuit in *Nguyen v. United*
2 *States*, relying on this Court's decision in
3 *Rogers v. Hill*, said that so long as the mandate
4 from the circuit doesn't say you can't amend,
5 then you are free to go back and ask the
6 district court for leave to do so under Rule 60.

7 And then the Tenth Circuit also
8 commented this in *Pierce v. Cook*, telling the
9 district court I understand you might have been
10 unsure if you could grant that relief, you can.

11 JUSTICE KAGAN: Mr. Radine --

12 JUSTICE GORSUCH: Counsel --

13 JUSTICE KAGAN: -- if I understood
14 your introduction, you said the right standard
15 is the 60(b)(6), extraordinary circumstances,
16 and, here, it's met. That's not what the Second
17 Circuit said, is it?

18 MR. RADINE: The summary order below I
19 don't think is a picture of clarity.

20 JUSTICE KAGAN: Well, it's kind of
21 clear. It just doesn't say what you say it
22 says. It says the district court erred
23 because -- and I'm quoting here -- "it evaluated
24 Plaintiff's motion under only Rule 60(b)'s
25 standard." And then it says: What was it

1 required to do instead? It was -- and I'm
2 quoting again -- "required to consider Rule
3 60(b) finality and Rule 15(a) liberality in
4 tandem."

5 So that's to say it's not just the
6 Rule 60(b) standard where the plaintiff comes in
7 and says it wants to amend, you know, that
8 there's some kind of mishmash of a standard,
9 which is part 60(b) and part 15(a). And as I
10 understood your introduction, you have given up
11 on that. And, I mean, we seem to have a lot of
12 people giving up on things, properly so, because
13 we seem to have a lot of outlier positions
14 today. And if it's an outlier position, why
15 don't we just say the outlier position is wrong,
16 go back and try it again?

17 MR. RADINE: Well, I think all that
18 the circuit meant about considering the rules in
19 tandem was balancing finality against Rule 15's
20 preference for hearing cases on their merits.
21 The -- I don't think that's contrary to Rule 60.

22 Rule 60(b) doesn't have the word
23 "finality" in it. It doesn't have the word
24 "extraordinary circumstances" in it.

25 JUSTICE KAGAN: Well, it -- it says --

1 and this goes back to Justice Gorsuch's question
2 to Mr. McGinley. I mean, it says: You are
3 required to consider what 15(b) tells you about
4 amendments. And you're -- and -- and -- and --
5 and, you know, that -- that provision, it really
6 does set forth a standard, which is like
7 60(b)(6), high bar; 15(b), low bar. Put them
8 together, medium bar. That's -- that's
9 different from what even you are saying is the
10 right way to look at this.

11 MR. RADINE: Yeah, I think that Rule
12 15 here helps illustrate what might be
13 extraordinary, as in denying the opportunity to
14 amend. I think that Rule 15(a) also gives us
15 some insight at the importance of the stage this
16 happens at.

17 At an early stage, amendment is freely
18 given. We're not asking for amendment to be
19 freely given here, simply saying it reflects an
20 understanding that the court should be more
21 permissive at the early stages of litigation,
22 but, ultimately, those are all built in to Rule
23 60, as this Court --

24 JUSTICE GORSUCH: Ah. So, if they're
25 all built in, Mr. Radine, what objection would

1 you have to a -- a -- a short opinion from this
2 Court saying simply that the Rule 60(b) standard
3 applies, there isn't this mishmash, as Justice
4 Kagan, I think, referred to it, between 15 and
5 60, go back and try again? Because I hear most
6 of your argument saying we can meet 60(b).

7 MR. RADINE: Yes. I think this Court
8 could issue a ruling saying that 60(b) governs;
9 Rule 15 is not governing here. But, if I can
10 help with the opinion --

11 JUSTICE GORSUCH: Period. Well, how
12 about putting a period there?

13 MR. RADINE: Sure. I think so. I
14 mean, I think that, as this Court held in
15 Waetzig just the other day, that Rule 60
16 balances finality in the interest of justice.

17 JUSTICE GORSUCH: It's already in
18 there. It's baked in.

19 MR. RADINE: It's already in there,
20 Your Honor.

21 JUSTICE GORSUCH: Okay. Thank you.

22 JUSTICE JACKSON: Can I have you speak
23 to the genesis of the extraordinary
24 circumstances? I mean, that language doesn't
25 appear in (a)(6). Any other reason that

1 justifies relief says the actual provision.

2 So I know we came up with it, I think.

3 MR. RADINE: Yeah.

4 JUSTICE JACKSON: Can you just talk
5 about that a little bit?

6 MR. RADINE: Yes. As my friend
7 mentioned, it's from the case, Klapprott, where
8 a plaintiff essentially misses a summons because
9 he's in jail and ill, and the -- the reason why
10 the Court identified the extraordinary nature of
11 that was to point out the lack of fault.

12 So it was extraordinary in that he
13 wasn't just sitting around ignoring a court
14 order. There was a lack of fault issue.

15 It's not -- to be clear, the
16 extraordinary circumstances test is not a
17 frequency test. It's not that, oh, this is
18 very, very rare. I don't think being sick or
19 being in jail really necessarily is that rare.

20 JUSTICE JACKSON: I see. So it's more
21 like akin to you say lack of fault?

22 MR. RADINE: Yes.

23 JUSTICE JACKSON: Now counsel on the
24 other side kind of points the finger at you all
25 and says --

1 MR. RADINE: Absolutely.

2 JUSTICE JACKSON: -- in this case, you
3 were at fault.

4 MR. RADINE: Right.

5 JUSTICE JACKSON: So why -- why is he
6 wrong about that?

7 MR. RADINE: Well, the two invitations
8 we get from the district court are, as Judge
9 Wesley said, impossible for us to meet. They're
10 premised on incorrect standards. The correct
11 thing to do there is to appeal.

12 Rule 60, for example, is not a
13 substitution for appeal. We -- moreover, I
14 think it's -- it would be needless to go back to
15 the district court and say: Oh, I think you
16 made a mistake and got every single thing wrong.

17 The thing to do in that situation is
18 to appeal. When we get to the circuit, why
19 didn't we ask the circuit to amend? Naturally,
20 we think we're right. We don't think we're --
21 that we have failed to meet some standard that
22 we're advocating for.

23 And, indeed, where we fall down in the
24 Second Circuit is in what appears to be a new
25 knowledge pleading standard, but also, it's not

1 the Second Circuit's job to grant us leave to
2 amend.

3 JUSTICE JACKSON: Was there an
4 opportunity for you to, as Justice Kavanaugh
5 pointed out, ask the circuit even after they
6 clarified? I mean, I know that there's a --
7 there's a point at which --

8 MR. RADINE: Yeah.

9 JUSTICE JACKSON: -- you come to the
10 circuit and you could have said or, in the
11 alternative, you know, let us amend to begin
12 with, but then, once the Second Circuit
13 clarified, okay, so this is the standard, was
14 that the moment at which you were supposed to
15 ask about --

16 MR. RADINE: We could have petitioned
17 for --

18 JUSTICE JACKSON: -- amendment?

19 MR. RADINE: -- a panel rehearing,
20 but, as I mentioned, it seemed to be the
21 practice in the circuit to take that back to the
22 district court. And I don't see that there's
23 any rule that suggests that we should be
24 essentially punished for making a reasonable
25 choice of who to bring that issue to.

1 JUSTICE GORSUCH: Well, I think
2 Mr. McGinley would -- would probably object to
3 that on the grounds that we have a final
4 judgment. You know, you -- you didn't ask the
5 circuit for leave. Now I'm not sure we need to
6 get into any of this for reasons we've already
7 discussed, but if we were to, not having asked
8 the circuit for any further relief beyond we win
9 or we lose, why wouldn't that normally be the
10 end of the case?

11 MR. RADINE: Well, I think -- first of
12 all, I think that just to note that in any
13 appeal where you think the standards are wrong,
14 I suppose it's implicit that the appellant --

15 JUSTICE GORSUCH: You have a final
16 judgment in the district court on appeal --

17 MR. RADINE: Right.

18 JUSTICE GORSUCH: -- yes or no, not
19 asking for further proceedings, court says no.
20 That's usually it, right?

21 MR. RADINE: I think it's the Second
22 Circuit practice, as expressed in Mandala, to
23 take that back to the district court. It
24 certainly was something we reasonably relied on
25 as an understanding of how the Second Circuit

1 operates.

2 If the Court were to -- this Court
3 were to make a rule --

4 JUSTICE GORSUCH: I understand that
5 you think that's how -- I'm just struggling to
6 understand how that -- how that might operate
7 given you have a final judgment that's been --

8 MR. RADINE: Well, this is the
9 purpose --

10 JUSTICE GORSUCH: -- you know,
11 affirmed.

12 MR. RADINE: -- of -- of Rule 60(b).

13 JUSTICE GORSUCH: Oh, that's
14 different. I'm asking about you didn't -- the
15 absence of leave to amend being requested in the
16 appeal. The appeal is over. It's done. Case
17 closed.

18 MR. RADINE: Right. The only time --
19 the way to -- right. It's closed. We didn't
20 ask for an amendment because we didn't think we
21 needed one. Why would we?

22 JUSTICE GORSUCH: No, I appreciate
23 that the circumstances here might lead to a
24 60(b), but I think that would be the recourse,
25 right? I mean, it's -- you did not --

1 MR. RADINE: Oh, to ask the --

2 JUSTICE GORSUCH: Yeah. You didn't --

3 MR. RADINE: -- the panel?

4 JUSTICE GORSUCH: Yeah, in --
5 otherwise, you're stuck with 60(b), right?

6 MR. RADINE: Yes, but I don't -- but
7 60(b)(6), I don't think, is -- is quite the
8 mountain that my friend wants it to be.

9 JUSTICE GORSUCH: I appreciate that.
10 I appreciate that.

11 JUSTICE BARRETT: So, speaking of
12 mountain, let me just ask you a follow-up
13 question about that which goes to some of your
14 responses to Justice Jackson.

15 Do you think the extraordinary
16 circumstances test is wrong?

17 MR. RADINE: No, Your Honor.

18 JUSTICE BARRETT: So you think the
19 extraordinary circumstances test is right, but
20 maybe it's just a lower mountain?

21 MR. RADINE: Yes, Your Honor.

22 JUSTICE BARRETT: Lower altitude?

23 MR. RADINE: A lower altitude
24 mountain, yes.

25 JUSTICE BARRETT: Okay. Well, our

1 precedent hasn't treated it that way, and pretty
2 much the uniform practice in the court of
3 appeals so far as I'm aware is to say
4 extraordinary circumstances really are
5 extraordinary because we do have a preference in
6 favor of letting final judgments be final.

7 MR. RADINE: Yes, Your Honor, but the
8 extraordinary circumstances show up more often
9 than just someone being ill and in jail. I
10 think they happen here, where a plaintiff has
11 not had an opportunity to amend his or her
12 complaint even once on the actual defects
13 identified in that case.

14 As my friend mentioned, you know, it's
15 not so extraordinary to have the law change over
16 time. That's true. But, when it happens in
17 that case and then the same circuit essentially
18 takes back the affirmance in the summary order,
19 as they did here --

20 JUSTICE BARRETT: So is your argument
21 then that if you went back to the Second
22 Circuit, you would be able to satisfy the
23 extraordinary circumstances test? You don't
24 really need the liberality standard from Rule
25 15?

1 MR. RADINE: I think it's -- it's
2 built into Rule 60, which, as this Court says,
3 balances finality against the interests of
4 justice.

5 JUSTICE BARRETT: So you're not giving
6 up that Rule 15's liberality standard is
7 peppered in in this circumstance?

8 MR. RADINE: I -- I -- I think -- like
9 this Court said in Krupski, I think that it,
10 along with the rest of the Federal Rules, helps
11 express a preference for trying cases on
12 their -- on their preferences. Whether this
13 Court says that you get there by invoking the
14 words "Rule 15" or not I don't think changes
15 that analysis, though.

16 JUSTICE KAVANAUGH: Are you arguing
17 that you were misled in some respects -- maybe
18 "misled" is a little strong -- but by the Second
19 Circuit's practice?

20 MR. RADINE: Well, I think that the
21 normal case for a circuit in its position would
22 be to remand. So for -- on -- on its own. We
23 see this in Marranzano, for example. The D.C.
24 Circuit says nobody's right here, go back and
25 try again. And I think that's what the circuit

1 should have done here. I think that's where,
2 once we get --

3 JUSTICE KAVANAUGH: But, once they
4 affirm, you said --

5 MR. RADINE: Once they affirm.

6 JUSTICE KAVANAUGH: -- you didn't ask
7 for rehearing because you thought -- and maybe
8 fill in the blank there -- you thought?

9 MR. RADINE: That that is a decision
10 for the district court in the first instance,
11 which the circuit agreed with. When we went
12 back on -- on the summary order below, the
13 circuit doesn't say: I don't know why you
14 bothered the district court with that. You
15 should have come to us.

16 The circuit, which is in charge of its
17 own, you know, docket and rules and so on, said:
18 You're right, you should probably get another
19 crack at that or at least a district court
20 should think further about it.

21 JUSTICE JACKSON: And, in Mandala,
22 that's what --

23 MR. RADINE: That's what four judges
24 of the court recommended.

25 JUSTICE JACKSON: -- that's what four

1 judges of the court of appeals said.

2 MR. RADINE: That's right.

3 JUSTICE JACKSON: You should go back
4 to the district court, so --

5 MR. RADINE: That's right.

6 JUSTICE KAVANAUGH: So the answer, I
7 think, is you feel like you were a bit misled by
8 the practice?

9 MR. RADINE: To the -- if that were to
10 be impermissible, then yes. I think we were
11 following the circuit instructions as shown in
12 the summary order itself.

13 JUSTICE ALITO: Under (b)(4) and (5),
14 the circumstances are such that allowing the
15 judgment to stand would arguably work a -- a --
16 a really serious injustice. The judgment is
17 void. The judgment has been satisfied, et
18 cetera.

19 So do you think it would be fair to
20 infer that the reason under (6) has to be of
21 comparable magnitude?

22 MR. RADINE: Well, no, because, if it
23 were, then why not just be comparable magnitude
24 of (1), which excusable neglect does --

25 JUSTICE ALITO: Well, because (1) has

1 the one-year limitation.

2 MR. RADINE: I see. I don't think
3 that -- I think that what (6) is appreciating is
4 that cases can be strange and unusual, to quote
5 Judge Wesley, unusual and quirky, as they were
6 here.

7 I don't think that it means that it
8 has to be on a severity of (4) and (5). The
9 rule, 60(b)(6), still has a reasonable time
10 limitation, for example. Courts have rejected
11 this sort of relief in shorter periods of time
12 because the plaintiff didn't jump to seek the
13 amendment. We did. In 11 days, we were back
14 before the district court seeking relief.

15 JUSTICE ALITO: Well, I thought you
16 said that extraordinary doesn't mean infrequent.
17 And then you said, well, it could be
18 extraordinary if it's quirky. So what is the
19 difference?

20 MR. RADINE: Well, I just mean that
21 it's hard to fashion a rule about situations
22 like this. It's hard to say that extraordinary
23 circumstances are met when you were given
24 incorrect standards and you appealed it and you
25 were largely vindicated, but then the circuit

1 adopted a new knowledge standard and identified
2 some defects, and you promptly went back, but
3 they had affirmed. They didn't -- they undid
4 the affirmation essentially. You know, it's
5 a -- it's, to me, a textbook situation for the
6 circuit monitoring its own cases.

7 JUSTICE JACKSON: Mr. McGinley says
8 that you should have at least pled the facts
9 that you thought, you know -- under these other
10 hypothetical or potential standards. Like, why
11 didn't you do that?

12 MR. RADINE: Well, we did under the
13 standards that we understood to be the case.
14 The -- the allegations we pled were similar to
15 allegations that had survived motions to dismiss
16 in other cases, like Weiss, as we point out in
17 our -- in our brief.

18 The -- the circuit court's
19 distinction, for example, about publicly
20 available evidence versus public sources, that
21 was not just new. I read it as, in fact,
22 contrary to their Nomura decision that says
23 publicly available information is sufficient to
24 show circumstantial knowledge.

25 Or take the cash as untraceable. The

1 circuit said we had to specifically plead that
2 cash was untraceable. We didn't think that that
3 was necessary. We thought that was an inherent
4 part of cash, but, fine, we can amend to meet
5 that.

6 I think what we don't want is a rule
7 where plaintiffs have to load up dockets with
8 amended complaints trying every which
9 combination of facts. For example, what if the
10 circuit had said, you know, you say that Hamas
11 operates openly in Lebanon? How do you know?
12 What are the -- how does Lebanon react
13 historically to terrorist groups?

14 We could have written 30 pages on
15 that. We are going to lose short and plain
16 statements if we have a rule that makes
17 plaintiffs try to essentially guess at every
18 future ruling or lose their right to amend
19 forever.

20 JUSTICE SOTOMAYOR: I'm sorry, I --
21 I -- I understood here that you came in in your
22 initial complaint and said basically, they knew
23 that these people were tied to Hamas, the people
24 who were on their board of directors --

25 MR. RADINE: Right.

1 JUSTICE SOTOMAYOR: -- the money that
2 was given. The district court, I agree, said
3 that's not enough. Public information is not
4 enough to give knowledge. But, even if it
5 was -- this was their alternative reason --
6 there's no reason to know that this information
7 was in their possession at the time of -- of the
8 attack that occurred here for which you're
9 seeking recompense.

10 I understood when you went up to the
11 Second Circuit, the Second Circuit agreed with
12 you that public information would be enough to
13 give knowledge, but its alternative ground for
14 affirming was: But the district court was
15 right, none of the information was clearly
16 present at the time the alleged aid to this
17 attack occurred.

18 So you could have cured that below on
19 the first round. Nothing about that was a
20 surprise either in the district court or the
21 court of appeals. But you chose not to.

22 MR. RADINE: Well, when the district
23 court told us that we had to plead that BLOM --
24 or, you know, acts or statements from BLOM or
25 BLOM employees that they had read or were

1 aware -- aware of sources, I don't think there's
2 any benefit to us saying, well, we don't have
3 that, but here are just some more allegations
4 that are going to fail to meet your standard.
5 It's a frivolous amendment at that point.

6 We had what we thought were
7 sufficient. And if you look at the actual
8 defects identified by this circuit, I -- I think
9 they're really quite narrow. For example, the
10 cash one or making clear at what time people
11 knew that Sheikh Qaradawi was the chair of the
12 Union of Good, which we took to be clear --

13 JUSTICE SOTOMAYOR: Those are not
14 inconsequential facts. Those are the very
15 essence of the case.

16 MR. RADINE: I -- I -- for example, in
17 Weiss, a case where -- that said it is
18 reasonable to assume that a bank -- and banks
19 have know-your-customer obligations and so on --
20 that a bank would look to foreign designations
21 of their customers or perhaps their
22 counterparties, and that's why these role
23 designations --

24 JUSTICE SOTOMAYOR: But your complaint
25 never said they had been identified at the time

1 at issue.

2 MR. RADINE: Oh, no, no. The -- the
3 complaint says that the Union of Good was -- was
4 designated by Israel in 2002 and that the
5 counterparties, which were sending millions of
6 dollars that BLOM was converting into cash for
7 these entities, were designated already by
8 Israel.

9 The AAF, the Al-Aqsa Foundation, had
10 been shuttered by Germany in its own
11 headquarters in 2002, during the relevant
12 period. HLF was a known Hamas financier that
13 would soon get shut down during the relevant
14 period, shut down at the beginning of the
15 relevant period.

16 And -- and when that's shut down by
17 the U.S., there's -- the bank doesn't then say:
18 You know, my goodness, I can't believe we've
19 been receiving millions of dollars from this
20 terrorist organization. What account is that
21 going into? Who are these people?

22 They just move right over to the next
23 transferor, KindHearts, until that one's
24 eventually shut down years later.

25 JUSTICE SOTOMAYOR: Thank you,

1 counsel.

2 MR. RADINE: Sure.

3 CHIEF JUSTICE ROBERTS: Justice
4 Thomas, anything further? No?

5 Thank you, counsel.

6 MR. RADINE: Thank you, Court.

7 CHIEF JUSTICE ROBERTS: Rebuttal,
8 Mr. McGinley?

9 REBUTTAL ARGUMENT OF MICHAEL H. MCGINLEY
10 ON BEHALF OF THE PETITIONER

11 MR. MCGINLEY: I think my friend on
12 the other side has all but conceded the Rule
13 60(b)(6) question, and I think his very first
14 line standing before you today invited you to
15 rule on the merits of whether 60(b)(6) relief is
16 warranted here. I think everything he said
17 shows that it's not. There are not
18 extraordinary circumstances here.

19 I want to point out something that
20 didn't come up, I don't think, in either side of
21 the arguments, but it's really worth
22 emphasizing. The denial of 60(b)(6) is deny --
23 is reviewed for abuse of discretion, and I think
24 that's why this Court can very easily cut
25 through and -- and reverse entirely in this

1 case, because there's no abuse of discretion
2 here whatsoever.

3 Even if my friend is right that they
4 mistakenly thought that they didn't need to
5 plead the facts that turned out to be necessary
6 under the very standard that they claim that
7 they were advocating, that's at most a mistake,
8 it's inadvertence, it's excusable neglect under
9 (b)(1).

10 I would also point out that it's just
11 simply not true that they had no notice that
12 those defects existed before the district court
13 issued her decision. On pages 171 and -- to 185
14 of the JA -- this is our motion to dismiss.
15 This is before the district court has issued any
16 ruling -- we point out every single defect that
17 the Second Circuit ended up affirming based on.

18 And I think, if you look at that and
19 you match it up to pages 49 through 52 of the
20 JA, you'll see that everything the Second
21 Circuit said was a problem we said was a
22 problem. At that point, they had the
23 opportunity to amend.

24 I also would say that the notion that
25 somehow their case is the one that changed the

1 law is fanciful not only because there's no
2 change of law, but, really, what they're saying
3 is Kaplan was some kind of new decision that
4 they needed a chance to address.

5 They had a chance to address it. That
6 was the entire point of the supplemental
7 briefing. At page 300 of the JA, Judge Wesley
8 said to them -- the same counsel as in Kaplan --
9 he said: You recognize that your facts pled
10 here are nowhere close to what's in Kaplan.

11 We agree they're nowhere close to
12 what's pled in Kaplan. Even the proposed
13 amended complaint is nowhere close to Kaplan.
14 As my friend's own argument shows today, all of
15 the allegations they want to make are about
16 non-customers, not about BLOM's customers but
17 about third parties.

18 And I would point you to page -- to
19 Footnote 20 in the Second Circuit's decision,
20 which points out that even if they fixed the
21 defects that they think the Second Circuit was
22 talking about, they still lose because, when all
23 you're doing is talking about non-customers with
24 nothing more, that's not enough to plead general
25 awareness.

1 I'd also point out just to make you
2 feel a little more comfortable, I think, that we
3 also won on substantial assistance in the
4 district court. The Second Circuit didn't
5 address it because it affirmed on general
6 awareness. I think, if you look at what was
7 alleged even in the amend -- the proposed
8 amended complaint, it's nowhere close to what
9 this Court required in Twitter.

10 The problem with their case is that it
11 simply does not meet the standards for JASTA.
12 And we won dismissal -- the case was filed in
13 2019. It's about events that occurred 25 years
14 ago. We won dismissal in 2021, we won
15 affirmance in 2022, and somehow we're here three
16 years later talking about a zombie case that
17 should have been over years ago.

18 They simply do not meet 60(b)(6), and
19 we would ask the Court to reverse and render
20 judgment in our favor. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 The case is submitted.

24 (Whereupon, at 11:49 a.m., the case
25 was submitted.)

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| 1 | A | B | |
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| <p>1 [2] 51:24,25 10:56 [2] 1:15 3:2 11 [1] 52:13 11:49 [1] 61:24 12 [1] 5:10 13 [1] 9:7 15 [16] 3:25 11:7,21 21:7,7 25:7,9 26:12 27:4 28:6 30:10 40:12 41:4, 9 48:25 49:14 15's [3] 27:19 39:19 49:6 15(a) [4] 10:11 39:3,9 40:14 15(a)'s [1] 3:18 15(b) [5] 8:21 9:23 10:2 40:3,7 171 [2] 31:11 59:13 185 [2] 31:11 59:13</p> <hr/> <p style="text-align: center;">2</p> <p>20 [1] 60:19 2002 [2] 57:4,11 2019 [1] 61:13 2021 [1] 61:14 2022 [1] 61:15 2025 [1] 1:11 23-1259 [1] 3:4 25 [1] 61:13 26 [1] 9:8</p> <hr/> <p style="text-align: center;">3</p> <p>3 [2] 1:11 2:4 30 [1] 54:14 300 [3] 5:20 7:19 60:7 33 [1] 2:7</p> <hr/> <p style="text-align: center;">4</p> <p>4 [1] 52:8 40 [2] 6:11 32:9 49 [1] 59:19</p> <hr/> <p style="text-align: center;">5</p> <p>5 [3] 13:4 51:13 52:8 52 [1] 59:19 58 [1] 2:10 59's [1] 11:16 59(e) [2] 12:14,17</p> <hr/> <p style="text-align: center;">6</p> <p>6 [3] 13:4 51:20 52:3 60 [9] 21:6,7 38:6 39:21 40:23 41:5, 15 43:12 49:2 60(b) [25] 8:21 9:11,19,23 11:6 12:5 13:2,6,9 21:25 24:13 26:19 28:3,4 30:10 39:3,6,9,22 41:2,6,8 46:12, 24 47:5 60(b)'s [1] 38:24 60(b)(1) [2] 21:20 24:20 60(b)(6) [45] 3:12,19,25 4:8,25 8:6, 14 11:11 12:2,3 15:3 16:17 17:20 18:2 20:9,23 21:11 22:2,13,20 23: 3,5 24:7,25 25:7,9 27:1,4,24 28:7, 18,22 32:17 33:10 35:17,19 37:24 38:15 40:7 47:7 52:9 58:13,15,22 61:18 60(b)(6)'s [1] 33:23</p> | <p>a)(6) [1] 41:25 a.m [3] 1:15 3:2 61:24 AAF [1] 57:9 abeyance [1] 6:4 ability [7] 7:8 17:4,7 24:1,3 29:15, 23 able [2] 17:12 48:22 above-entitled [1] 1:13 abroad [1] 23:17 absence [1] 46:15 absolutely [2] 26:4 43:1 abstract [2] 20:25 21:14 abuse [5] 10:16,18 27:5 58:23 59: 1 abuses [2] 25:6,8 accept [1] 13:18 account [5] 11:9,20 21:15 25:2 57: 20 Ackermann [2] 8:4 30:21 acknowledged [2] 34:11,18 acknowledgment [1] 25:4 acts [1] 55:24 actual [5] 13:1 17:22 42:1 48:12 56:7 actually [7] 8:25 9:12 12:19 14:7, 23 29:21 31:22 add [2] 26:25 37:3 address [3] 60:4,5 61:5 addressed [1] 9:10 addressing [1] 8:19 admit [5] 5:10 6:11 20:15,16 32:9 adopted [2] 23:6 53:1 advantage [2] 17:25 24:2 adversary [1] 23:10 advisory [1] 4:19 advocating [5] 20:3 31:8 33:2 43: 22 59:7 AEDPA [1] 28:20 affirm [3] 36:11 50:4,5 affirmance [5] 35:10,11 37:8 48: 18 61:15 affirmation [1] 53:4 affirmed [5] 4:15 33:12 46:11 53:3 61:5 affirming [2] 55:14 59:17 ago [3] 25:16 61:14,17 agree [2] 55:2 60:11 agreed [2] 50:11 55:11 agrees [2] 30:7 31:22 Ah [1] 40:24 aid [1] 55:16 aired [1] 10:7 akin [1] 42:21 AL [1] 1:6 Al-Aqsa [1] 57:9 ALITO [3] 51:13,25 52:15 allegations [6] 5:25 6:7 53:14,15 56:3 60:15 allege [1] 36:8 alleged [3] 15:18 55:16 61:7 allowed [1] 19:22 allowing [2] 20:8 51:14</p> | <p>already [6] 5:19 33:12 41:17,19 45: 6 57:7 alternative [3] 44:11 55:5,13 altitude [2] 47:22,23 ambiguity [1] 15:17 ambiguous [2] 34:19 36:23 amend [33] 4:9 7:8 11:10 14:2,3,5, 20 16:14 17:2,10,12 19:9 21:17 22:14,19,22 29:15,24 34:9 35:25 37:12 38:4 39:7 40:14 43:19 44:2, 11 46:15 48:11 54:4,18 59:23 61: 7 amended [5] 11:18 35:7 54:8 60: 13 61:8 amending [1] 7:9 amendment [9] 21:16 22:2 37:24 40:17,18 44:18 46:20 52:13 56:5 amendments [4] 22:8 24:10 34:3 40:4 among [1] 36:24 analyses [1] 13:6 analysis [3] 22:23 27:11 49:15 announced [2] 5:5 6:16 another [4] 7:15 21:25 25:8 50:18 answer [4] 8:22 33:22 37:14 51:6 answering [1] 8:24 answers [1] 11:22 apologize [1] 19:13 appeal [24] 4:10,15 12:16 13:17 14:6,14,15,20 17:9,10,11,14 18:10 29:12 30:1 31:2 33:12 43:11,13, 18 45:13,16 46:16,16 appealed [2] 34:4 52:24 appeals [23] 14:8,16 15:8,10 18: 18,19 19:3,6,18,18 29:15 30:4,7,7, 17,21 31:22 32:6 33:1 36:11 48:3 51:1 55:21 appear [1] 41:25 APPEARANCES [1] 1:17 appears [2] 37:17 43:24 appellant [1] 45:14 application [2] 5:11 7:14 applied [1] 9:19 applies [1] 41:3 apply [4] 9:23 23:2 24:25 33:23 applying [1] 27:11 appreciate [5] 25:3 27:25 46:22 47:9,10 appreciating [1] 52:3 approach [1] 3:23 approaches [1] 10:24 appropriate [7] 11:10 12:20 21:12, 14 22:9,24 24:7 arbitral [1] 13:3 arguably [1] 51:15 argued [2] 5:19 10:5 arguing [1] 49:16 argument [20] 1:14 2:2,5,8 3:4,7 5: 4,17 6:22 7:19 11:6 12:7,8 21:6 33:18 36:4 41:6 48:20 58:9 60:14 arguments [1] 58:21 armed [1] 34:7 around [1] 42:13 Artuz [1] 18:3</p> | <p>aside [1] 21:23 assistance [1] 61:3 assuage [1] 14:24 assume [1] 56:18 ATA/JASTA [1] 6:18 attack [3] 33:11 55:8,17 attempt [1] 7:3 attempting [1] 35:11 attorney [3] 6:24 7:2,17 author [1] 35:9 available [9] 8:15 12:4,12 20:8,13, 16 37:1 53:20,23 award [1] 13:4 aware [7] 5:22,24 6:6 36:6 48:3 56: 1,1 awareness [2] 60:25 61:6</p> <hr/> <p style="text-align: center;">B</p> <p>b)(1) [7] 8:15,16 12:8,11 13:8 20:10 59:9 b)(2) [2] 20:10,11 b)(4) [1] 51:13 b)(6) [1] 13:8 back [21] 16:5,12 19:7 21:3 32:5 37:18,22 38:5 39:16 40:1 41:5 43: 14 44:21 45:23 48:18,21 49:24 50: 12 51:3 52:13 53:2 baked [1] 41:18 balances [2] 41:16 49:3 balancing [2] 34:25 39:19 banc [1] 37:21 Banister [1] 12:18 BANK [5] 1:3 3:5 56:18,20 57:17 banks [1] 56:18 bar [4] 22:5 40:7,7,8 bare [2] 17:19 18:13 Barrett [10] 6:23 28:2,8,10 47:11, 18,22,25 48:20 49:5 based [1] 59:17 basically [2] 16:10 54:22 basis [2] 3:22 18:7 becomes [1] 23:22 begin [1] 44:11 beginning [2] 16:24 57:14 begun [1] 35:4 behalf [8] 1:19,21 2:4,7,10 3:8 33: 19 58:10 believe [5] 5:24 23:5 28:12 32:9 57:18 believed [1] 4:21 below [6] 9:10,10 35:9 38:18 50: 12 55:18 benefit [1] 56:2 best [2] 11:25 12:1 better [1] 33:10 between [1] 41:4 beyond [1] 45:8 bit [3] 31:19 42:5 51:7 blackletter [1] 21:22 blameless [2] 26:18,20 blank [1] 50:8 bleed [1] 22:22 blend [1] 13:5 blind [1] 24:9</p> |

Official - Subject to Final Review

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|---|--|--|---|
| <p>BLOM [6] 1:3 3:4 55:23,24,25 57:6 BLOM's [1] 60:16 blurring [1] 3:22 board [1] 54:24 both [2] 4:9 5:16 bothered [1] 50:14 brief [5] 5:9 6:12 7:21 32:10 53:17 briefed [1] 28:12 briefing [4] 4:13 6:10 19:22 60:7 bring [5] 5:1 10:15 17:4,8 44:25 brought [1] 12:10 built [3] 40:22,25 49:2 burdening [1] 18:9 burdens [1] 17:13</p> | <p>60:19 circumstance [6] 12:20,22 23:3 25:1 30:19 49:7 circumstances [39] 3:12,13 4:23 9:2 10:24 11:21 18:8 21:12,15 22: 5,15,21 23:13,23 24:4,14 26:6,9, 21 27:20 28:5,23 30:11 32:23 33: 24 35:16 38:15 39:24 41:24 42:16 46:23 47:16,19 48:4,8,23 51:14 52:23 58:18 circumstantial [1] 53:24 cite [3] 27:9,14 32:13 cited [3] 26:6 27:4 36:6 citizenship [1] 23:7 claim [5] 17:5,8 18:24 20:6 59:6 claims [1] 19:10 clarifications [1] 34:8 clarified [3] 36:19 44:6,13 clarity [1] 38:19 clean [1] 35:11 clear [9] 13:5 16:18 25:12 26:4 30: 16 38:21 42:15 56:10,12 cleared [1] 16:13 clearly [4] 8:5 15:22 33:24 55:15 client [1] 6:25 close [7] 5:15 7:21 12:15 60:10,11, 13 61:8 closed [2] 46:17,19 clue [1] 20:2 Collapsing [1] 4:1 combination [2] 21:8 54:9 come [7] 8:6 16:12 20:21 23:24 44: 9 50:15 58:20 comes [7] 3:25 11:17 13:19 18:23 22:18 23:1 39:6 comfortable [1] 61:2 commented [1] 38:8 companion [1] 6:20 comparable [2] 51:21,23 compared [1] 6:8 complaint [23] 4:9,22 11:18 13:23 14:4,5,7,15 16:14 17:3 29:20 30:2 35:8,25 36:15 37:4,12 48:12 54: 22 56:24 57:3 60:13 61:8 complaints [1] 54:8 conceded [1] 58:12 concerns [1] 14:24 confused [1] 34:19 confusion [1] 34:21 consequences [1] 34:21 consider [5] 12:23 22:6,13 39:2 40:3 consideration [1] 11:7 considering [3] 3:19 10:11 39:18 consistent [1] 9:16 contingent [1] 17:8 contradictory [1] 4:3 contrary [2] 39:21 53:22 controlling [2] 5:11 7:13 converting [1] 57:6 convey [1] 36:7 Cook [1] 38:8 core [1] 18:25 correct [9] 9:2,20,23,24 14:17 15:</p> | <p>19 28:9 36:17 43:10 corrected [2] 34:5 35:7 correctly [1] 9:15 costly [1] 4:4 couldn't [4] 10:15 11:19 21:19 36: 8 Counsel [10] 8:18 19:23 29:5 33: 16 38:12 42:23 58:1,5 60:8 61:22 counterparties [2] 56:22 57:5 course [7] 7:6 12:17 15:23 18:5 24:19 26:22 28:12 COURT [142] 1:1,14 3:10,11 4:10, 25 5:16,21,23 6:3,7,9,12,14,19,19 7:5,10,25 8:5,11 9:10,14,15 10:19 11:8,13,19 12:14,17 13:1,5,23 14: 2,8,11,16,17 15:6,8,10,25 16:7,17, 24 17:22 18:1,3,5,6,7,18,18 19:3,6, 8,17,18 21:11 22:14 23:11,19,21 24:9 25:6,8 26:14 27:4,15 28:19 29:2,15,21 30:3,6,7,8,17,20,21,23 31:21,24 32:6,16 33:1,2,21 34:9, 10,19,24 36:2,10,11,19,20,21 37: 19,21,23 38:6,9,22 40:20,23 41:2, 7,14 42:10,13 43:8,15 44:22 45: 16,19,23 46:2,2 48:2 49:2,9,13 50: 10,14,19,24 51:1,4 52:14 55:2,14, 20,21,23 58:6,24 59:12,15 61:4,9, 19 Court's [12] 3:24 5:2 14:5 29:13 31:3 34:2,3,13 35:22,25 38:2 53: 18 courts [3] 3:17 17:1 52:10 crack [1] 50:19 crafting [1] 35:17 creates [1] 4:2 creep [1] 27:10 creeps [1] 26:5 Crosby [4] 8:11 17:21 28:17,17 cure [2] 14:20 15:12 cured [1] 55:18 curing [1] 30:12 customers [2] 56:21 60:16 cut [1] 58:24</p> | <p>denied [1] 26:10 deny [2] 27:19 58:22 denying [1] 40:13 designated [2] 57:4,7 designations [2] 56:20,23 desire [1] 22:22 despite [1] 20:13 detailed [1] 5:24 detaining [1] 23:11 determination [1] 29:13 difference [2] 16:15 52:19 different [4] 5:25 11:2 40:9 46:14 difficult [1] 35:18 diligent [3] 20:14 26:23 28:23 diligently [1] 19:16 diluted [1] 3:16 diluting [1] 27:24 direct [1] 34:15 direction [2] 11:3 25:13 directors [1] 54:24 disagree [4] 9:12 15:6 16:3 17:17 disagrees [2] 14:16 29:16 discovery [1] 35:4 discretion [10] 10:16,18,19 11:8, 20 25:6,9 27:5 58:23 59:1 discretionary [1] 18:6 discussed [1] 45:7 dismiss [12] 14:3,13,14 18:16,22, 23 19:25 23:16,17,19 53:15 59:14 dismissal [3] 37:9 61:12,14 dismissed [2] 11:15 30:3 dismisses [1] 13:23 dispute [1] 19:1 dissent [1] 37:21 distinction [2] 37:2 53:19 district [59] 5:16 7:25 9:14,15 10: 19 11:8,13,19 13:23 14:2,4,10,17 15:6 16:23 17:1 19:8 25:6,8 27:3, 15 29:12,21 30:8 31:3,24 32:15 34:2,3,10,13,18,24 35:24 36:2,11, 19 37:19,23 38:6,9,22 43:8,15 44: 22 45:16,23 50:10,14,19 51:4 52: 14 55:2,14,20,22 59:12,15 61:4 docket [1] 50:17 dockets [1] 54:7 Doing [5] 4:17 6:3 7:5 18:10 60:23 dollars [2] 57:6,19 done [7] 7:11,16,18 8:3 32:19 46: 16 50:1 door [1] 11:16 doorstep [1] 34:22 down [5] 43:23 57:13,14,16,24 dress [1] 18:12 during [3] 23:8 57:11,13</p> |
| C | | | |
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Official - Subject to Final Review

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|--|--|--|--|
| <p>effort [1] 28:24 efforts [1] 20:14 either [3] 30:20 55:20 58:20 emphasizing [1] 58:22 employees [1] 55:25 en [1] 37:20 encouraged [1] 37:22 end [2] 5:1 45:10 ended [4] 6:3 7:5 19:24 59:17 enough [10] 4:25 8:6 21:11 23:12 29:23 37:18 55:3,4,12 60:24 enter [1] 14:13 entered [1] 23:25 enters [2] 14:11 23:21 entire [1] 60:6 entirely [3] 12:20 36:3 58:25 entities [1] 57:7 entitled [1] 9:7 equation [2] 26:5,25 erred [1] 38:22 erroneous [1] 34:4 error [3] 10:9,10,21 especially [1] 14:1 ESQ [3] 2:3,6,9 ESQUIRE [2] 1:18,20 essence [1] 56:15 essentially [5] 42:8 44:24 48:17 53:4 54:17 ET [3] 1:6 24:20 51:17 evade [1] 24:20 evades [1] 21:20 evaluated [1] 38:23 even [21] 4:12 7:7 10:15 17:22 22: 1 23:16 31:8 32:21,25 35:4 36:9, 16,16 40:9 44:5 48:12 55:4 59:3 60:12,20 61:7 events [1] 61:13 eventually [1] 57:24 everything [3] 34:1 58:16 59:20 evidence [4] 27:9 34:15 37:2 53: 20 evolving [1] 36:23 exactly [4] 7:17,24 15:25 17:14 exalted [1] 34:24 example [9] 23:1 37:20 43:12 49: 23 52:10 53:19 54:9 56:9,16 exceeded [1] 10:19 exception [1] 35:19 excusable [3] 8:13 51:24 59:8 excuse [2] 8:12 14:14 exercise [1] 14:15 exercising [1] 13:17 existed [1] 59:12 express [1] 49:11 expressed [1] 45:22 extraordinary [36] 3:12 4:23 9:1 10:24 18:8 20:22 22:5,15,21 23: 12 24:13 26:6,9,21 27:20 28:5,23 35:16 38:15 39:24 40:13 41:23 42: 10,12,16 47:15,19 48:4,5,8,15,23 52:16,18,22 58:18 extreme [1] 23:1</p> <hr/> <p style="text-align: center;">F</p> | <p>faced [1] 34:12 fact [4] 6:17 22:13 37:16 53:21 facts [29] 5:12 8:25 13:20 15:18,21 16:2,4 18:14,20 19:2,20,25 20:2,6, 12,15 21:3 23:2 29:23 30:12 31:7 32:2 33:6 35:18 53:8 54:9 56:14 59:5 60:9 fail [1] 56:4 failed [1] 43:21 fair [3] 26:14 35:5 51:19 fall [2] 23:17 43:23 falls [1] 21:24 fanciful [2] 20:4 60:1 far [1] 48:3 fashion [1] 52:21 fast [1] 11:14 fault [4] 42:11,14,21 43:3 favor [2] 48:6 61:20 Federal [3] 4:5 35:1 49:10 feel [2] 51:7 61:2 few [2] 9:3 11:22 file [3] 7:23 15:2 33:3 filed [4] 7:22 18:4 23:16 61:12 files [2] 23:15 29:19 fill [1] 50:8 final [14] 3:13 4:14 16:16,18,19,22 17:3 23:22 33:11 45:3,15 46:7 48: 6,6 finality [8] 4:2 34:24 35:20 39:3,19, 23 41:16 49:3 financier [1] 57:12 find [1] 23:18 find [5] 16:7 25:22 27:22 31:20 54: 4 finger [1] 42:24 first [8] 11:23 23:2 35:7 36:10 45: 11 50:10 55:19 58:13 fixed [1] 60:20 flexible [1] 21:11 folded [1] 8:21 follow [1] 14:4 follow-up [1] 47:12 following [2] 21:5 51:11 Foman [1] 12:14 footnote [2] 10:13 60:19 forced [1] 35:13 foreign [1] 56:20 forever [1] 54:19 forfeit [2] 17:4 19:10 forfeits [1] 30:14 forth [1] 40:6 forum [1] 19:16 forward [1] 8:1 found [1] 35:15 Foundation [1] 57:9 four [3] 37:21 50:23,25 free [1] 38:5 freely [2] 40:17,19 frequency [1] 42:17 friend [7] 5:22 6:5 42:6 47:8 48:14 58:11 59:3 friend's [2] 5:9 60:14 frivolous [1] 56:5 front [1] 6:18</p> | <p>full [1] 18:24 fully [5] 6:6,10 9:5 10:7 28:12 fundamentally [1] 34:20 further [6] 8:25 29:7 45:8,19 50:20 58:4 futile [2] 27:21 34:3 future [1] 54:18</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gate [1] 11:15 gave [3] 7:10 23:25 36:24 general [3] 26:12 60:24 61:5 genesis [1] 41:23 Germany [1] 57:10 give [8] 3:18 12:24 16:5 29:18,23 35:6 55:4,13 given [8] 34:3,19 39:10 40:18,19 46:7 52:23 55:2 gives [3] 14:2 27:1 40:14 giving [2] 39:12 49:5 Gonzalez [2] 6:21 16:1 goodness [1] 57:18 Google [6] 6:21,22 7:6,17 15:25 32:12 GORSUCH [29] 11:1,5,24 21:4,19 25:3,14,20 26:8,18 27:3,7,12,25 38:12 40:24 41:11,17,21 45:1,15, 18 46:4,10,13,22 47:2,4,9 Gorsuch's [1] 40:1 got [5] 9:21 11:14,17,18 43:16 gotten [1] 30:16 governing [1] 41:9 Government [1] 23:9 governs [1] 41:8 grant [4] 18:6 27:23 38:10 44:1 granted [3] 23:19,20 28:19 greater [1] 24:22 ground [1] 55:13 grounds [3] 35:10 36:12 45:3 groups [1] 54:13 guess [8] 13:15,25 14:12 16:9,22 17:6 29:10 54:17</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>Hackensack [1] 1:20 Hamas [3] 54:10,23 57:12 happen [1] 48:10 happened [9] 5:14 6:17 15:25 17: 21 23:4 29:1 31:9 32:12,12 happens [3] 12:18 40:16 48:16 happy [1] 8:1 hard [2] 52:21,22 hardly [1] 4:22 headquarters [1] 57:11 hear [3] 3:3 14:18 41:5 hearing [1] 39:20 held [2] 3:11 41:14 help [1] 41:10 helps [2] 40:12 49:10 high [2] 22:4 40:7 Hill [1] 38:3 historically [1] 54:13 HLF [1] 57:12 holding [1] 6:4</p> | <p>HONICKMAN [4] 1:6 3:5 6:1,4 Honor [13] 5:8,13 9:4,13 11:23 19: 13 25:22 29:25 36:13 41:20 47:17, 21 48:7 Honors [1] 33:4 hope [1] 34:17 hypo [2] 29:19 31:19 hypothetical [2] 12:6 53:10</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea [1] 23:24 identified [6] 37:2 42:10 48:13 53: 1 56:8,25 ignoring [1] 42:13 ill [4] 23:11,18 42:9 48:9 illustrate [1] 40:12 imagine [3] 11:13 23:3,14 impermissible [1] 51:10 implicit [1] 45:14 importance [1] 40:15 impossible [2] 34:12 43:9 inadvertence [3] 8:13 12:9 59:8 include [1] 22:8 included [2] 35:9 36:4 including [2] 8:11 34:13 inconsequential [1] 56:14 incorrect [5] 34:4,14 36:3 43:10 52:24 indeed [1] 43:23 induce [1] 30:23 inefficient [1] 4:4 infer [1] 51:20 information [5] 53:23 55:3,6,12, 15 infrequent [1] 52:16 inherent [1] 54:3 inherently [2] 4:2,3 initial [2] 35:3 54:22 inject [1] 20:7 injustice [1] 51:16 inquiry [1] 22:2 insight [1] 40:15 insofar [1] 16:23 instance [1] 50:10 Instead [6] 4:10 5:8 7:24 13:6 18: 10 39:1 instructions [1] 51:11 insufficient [3] 13:24 15:7 19:7 intended [1] 35:20 interest [1] 41:16 interests [1] 49:3 introduction [2] 38:14 39:10 invitations [1] 43:7 invited [1] 58:14 invites [1] 4:3 invoking [1] 49:13 involving [1] 35:16 isn't [3] 21:24 37:13 41:3 Israel [2] 57:4,8 issue [7] 6:1 13:2 28:20 41:8 42: 14 44:25 57:1 issued [3] 35:8 59:13,15 issues [2] 16:24 31:12 itself [4] 10:15 24:9 36:22 51:12</p> |
|--|--|--|--|

Official - Subject to Final Review

| | | | |
|---|--|--|--|
| <p>12 21:17 22:20 24:1 26:15 27:1 30:15 34:8 40:13 44:4 48:11 59: 23 oppose [2] 23:16 24:3 option [1] 15:24 options [1] 15:20 oral [9] 1:14 2:2,5 3:7 5:17 6:22 7: 19 33:18 36:4 order [8] 22:14 27:4 35:9 38:18 42: 14 48:18 50:12 51:12 ordered [2] 4:12 6:9 ordinary [1] 13:22 organization [1] 57:20 original [2] 4:18,22 originally [1] 30:13 other [25] 4:20 5:16,22 6:5 8:5,10 11:11 12:4,4 15:24 21:20 22:3 25: 1,13 32:18 35:10 36:12,24 37:7 41:15,25 42:24 53:9,16 58:12 otherwise [1] 47:5 out [19] 7:6,20 10:9 11:14,16 12:18 19:23 21:2 23:18 31:10 42:11 44: 5 53:16 58:19 59:5,10,16 60:20 61:1 outlier [4] 3:21 39:13,14,15 outset [1] 33:5 over [6] 4:17 19:1 46:16 48:15 57: 22 61:17 overriding [1] 4:6 overrule [1] 18:3 overselling [1] 25:12 overstate [1] 22:11 own [6] 3:14 49:22 50:17 53:6 57: 10 60:14</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>PAGE [9] 2:2 5:9,20 6:11 7:19 9:7 32:9 60:7,18 pages [4] 13:4 54:14 59:13,19 panel [3] 35:8 44:19 47:3 papers [2] 9:5,8 part [4] 14:18 39:9,9 54:4 partially [1] 31:22 particular [2] 13:21 14:18 parties [2] 13:16 60:17 party [5] 14:19,25 18:11 19:7 21: 16 passes [1] 11:16 peak [1] 35:2 people [5] 39:12 54:23,23 56:10 57:21 peppered [1] 49:7 perceived [1] 10:10 perhaps [2] 11:14 56:21 period [8] 8:17 12:19 23:9 41:11, 12 57:12,14,15 periods [1] 52:11 permissive [1] 40:21 permit [1] 37:11 person [1] 23:24 petition [3] 9:4 18:4 28:21 petitioned [1] 44:16 Petitioner [9] 1:4,19 2:4,10 3:8 17: 25 23:6 35:13 58:10</p> | <p>pick [1] 11:24 picture [1] 38:19 Pierce [1] 38:8 plain [1] 54:15 plaintiff [13] 7:7 11:17 14:1 29:19, 24 30:11 31:23 32:5,21 39:6 42:8 48:10 52:12 plaintiff's [2] 6:23 38:24 plaintiffs [8] 33:25 34:12,17 35:6, 14 37:22 54:7,17 plaintiffs' [1] 34:21 play [1] 3:25 plead [10] 18:13 20:2,17 31:7 32:1 36:8 54:1 55:23 59:5 60:24 pleading [11] 13:24 15:7 17:1 19:6 29:14 30:12 34:5,16 36:5,25 43: 25 pleadings [5] 4:12 6:14 7:20 8:1 15:1 please [4] 3:10 8:2 16:4 33:21 pled [8] 18:20 19:1,25 29:22 53:8, 14 60:9,12 point [26] 5:9,20 6:5 9:7 10:12 11: 2 13:25 16:16 19:23 26:11,25 31: 10,11 33:10 36:15 42:11 44:7 53: 16 56:5 58:19 59:10,16,22 60:6, 18 61:1 pointed [4] 7:6,20 10:9 44:5 points [3] 12:17 42:24 60:20 policies [1] 11:20 policy [1] 3:19 posit [1] 12:6 positing [2] 13:18 32:24 position [5] 22:11 35:24 39:14,15 49:21 positions [1] 39:13 possession [1] 55:7 possible [1] 11:9 possibly [2] 7:8 27:18 potential [1] 53:10 practice [6] 37:18 44:21 45:22 48: 2 49:19 51:8 precedent [1] 48:1 precisely [1] 29:1 preclude [1] 11:7 preference [5] 35:1,2 39:20 48:5 49:11 preferences [1] 49:12 prejudice [2] 11:15 14:12 premissed [2] 5:4 43:10 present [1] 55:16 presented [5] 8:20,20 10:5 33:22 34:23 presumption [1] 26:12 pretty [1] 48:1 prevents [1] 30:11 previously [1] 20:13 principal [1] 21:6 principle [1] 34:25 prior [1] 35:10 probably [2] 45:2 50:18 problem [3] 59:21,22 61:10 proceed [1] 30:15 proceedings [1] 45:19</p> | <p>process [1] 4:16 promptly [2] 34:8 53:2 proper [1] 3:23 properly [1] 39:12 proposed [2] 60:12 61:7 prove [1] 36:8 provided [2] 36:20,21 provision [3] 21:25 40:5 42:1 provisions [1] 21:21 proximity [1] 5:15 public [4] 37:1 53:20 55:3,12 publicly [3] 37:1 53:19,23 punished [2] 13:17 44:24 purpose [1] 46:9 pursue [1] 17:9 pursued [1] 19:16 pursuing [1] 28:24 pursuit [1] 26:24 put [2] 21:23 40:7 puts [2] 20:9,10 putting [1] 41:12</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>Qaradawi [1] 56:11 QP [1] 28:18 qualifies [1] 4:23 qualify [1] 4:7 question [13] 8:19,19,20 9:6 18:19 21:3 25:4 29:8 31:5 33:22 40:1 47: 13 58:13 questions [2] 5:2 35:22 quirky [2] 52:5,18 quite [7] 5:25 10:14 14:22 22:12 25:7 47:7 56:9 quote [1] 52:4 quoting [2] 38:23 39:2</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>RADINE [58] 1:20 2:6 33:17,18,20 36:1,12,18 37:15 38:11,18 39:17 40:11,25 41:7,13,19 42:3,6,22 43: 1,4,7 44:8,16,19 45:11,17,21 46:8, 12,18 47:1,3,6,17,21,23 48:7 49:1, 8,20 50:5,9,23 51:2,5,9,22 52:2,20 53:12 54:25 55:22 56:16 57:2 58: 2,6 raise [1] 20:17 raised [2] 9:5 31:11 rare [2] 42:18,19 Rather [2] 3:22 7:9 react [1] 54:12 read [4] 17:15 36:6 53:21 55:25 ready [1] 19:9 realized [1] 10:23 really [13] 17:18 18:25 21:13 25:15 29:25 40:5 42:19 48:4,24 51:16 56:9 58:21 60:2 reason [7] 8:12 11:11 41:25 42:9 51:20 55:5,6 reasonable [3] 44:24 52:9 56:18 reasonably [1] 45:24 reasons [1] 45:6 REBUTTAL [3] 2:8 58:7,9 recasting [1] 36:22</p> | <p>received [1] 4:14 receiving [1] 57:19 recognize [1] 60:9 recognized [2] 16:17 35:5 recommendation [1] 14:5 recommended [1] 50:24 recompense [1] 55:9 recourse [1] 46:24 referred [1] 41:4 reflects [1] 40:19 regular [1] 37:18 rehearing [5] 33:3,9 37:10 44:19 50:7 rehearsal [1] 18:12 rejected [1] 52:10 relating [3] 21:16 22:8 24:10 relevant [4] 34:15 57:11,13,15 relied [1] 45:24 relief [15] 4:8,25 8:14 9:7 11:12 13: 9 18:2 20:23 28:18 38:10 42:1 45: 8 52:11,14 58:15 relying [1] 38:2 remand [4] 6:13 7:3 37:11 49:22 remedy [1] 37:4 remember [2] 6:19 17:21 remorse [1] 4:24 remotely [2] 10:23 24:10 render [2] 8:2 61:19 rendered [1] 10:8 reopen [2] 3:13 20:12 repetitive [1] 4:4 replead [13] 3:20 6:13 7:4,24 8:8 12:24 15:21 16:5 23:20 24:1 26: 10 30:20 33:7 repleading [2] 3:19 13:11 request [4] 16:12 25:2 26:7 30:19 requested [1] 46:15 require [1] 11:6 required [7] 22:16 30:17 32:7 39:1, 2 40:3 61:9 requirement [1] 24:22 requires [1] 3:12 respect [1] 29:25 Respectfully [1] 17:16 respects [1] 49:17 Respondent [1] 5:3 Respondents [6] 1:7,21 2:7 4:7, 19 33:19 responses [1] 47:14 rest [1] 49:10 restart [1] 4:16 result [2] 3:14 4:14 reverse [4] 5:1 29:3 58:25 61:19 review [1] 7:9 reviewed [1] 58:23 rights [1] 23:7 ROBERTS [7] 3:3 29:4,9 33:15 58: 3,7 61:21 Rogers [1] 38:3 role [1] 56:22 round [1] 55:19 Rule [63] 3:11,18,25 4:8,25 5:6 6: 15,24 8:6 11:7 13:18 15:2 16:17 19:19,20 21:6,7,7,10 25:7,9 26:</p> |
|---|--|--|--|

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| | | | |
|--|---|---|--|
| <p>12 27:4,19 28:6 30:2,9,10 31:8 33:23 35:16,17,19 37:23 38:6,24 39:2,3,6,19,21,22 40:11,14,22 41:2,9,15 43:12 44:23 46:3,12 48:24 49:2,6,14 52:9,21 54:6,16 58:12,15</p> <p>rules [7] 3:23 8:10 17:15 33:2 39:18 49:10 50:17</p> <p>Rules' [2] 4:5 35:1</p> <p>ruling [9] 19:5,9 30:2,4,16 31:3 41:8 54:18 59:16</p> <hr/> <p style="text-align:center">S</p> <hr/> <p>SAL [1] 1:3</p> <p>same [6] 16:10 19:23 24:2 37:24 48:17 60:8</p> <p>satisfied [2] 31:8 51:17</p> <p>satisfy [7] 12:25 16:20 17:20 18:14 19:20 20:3 48:22</p> <p>saying [27] 10:1,17,18 12:15 14:18,23,25 15:5,15,16 17:9,18 18:11 19:6 22:1 24:8,12 28:3 32:15,20 40:9,19 41:2,6,8 56:2 60:2</p> <p>says [30] 9:22 11:11,17 12:3 14:3,17 16:7 19:3 20:11 22:18 29:24 30:22 31:23 32:6 37:8 38:22,22,25 39:7,25 40:2 42:1,25 45:19 49:2,13,24 53:7,22 57:3</p> <p>scenario [1] 23:14</p> <p>Schwab [1] 32:13</p> <p>Second [40] 3:16 4:12,18 5:5,17,18 8:21 9:22,22 10:3,5,7,8,13,14,17,22 16:11 20:18 21:9 28:20 32:10 33:1 37:10,16 38:16 43:24 44:1,12 45:21,25 48:21 49:18 55:11,11 59:17,20 60:19,21 61:4</p> <p>secured [1] 34:5</p> <p>see [7] 12:13 18:15 42:20 44:22 49:23 52:2 59:20</p> <p>seek [4] 4:16 20:10 37:23 52:12</p> <p>seeking [3] 3:20 52:14 55:9</p> <p>seem [3] 22:1 39:11,13</p> <p>seemed [1] 44:20</p> <p>seems [4] 5:3 12:7 21:21 22:3</p> <p>selling [1] 25:15</p> <p>sending [1] 57:5</p> <p>sense [3] 7:16 8:9 17:3</p> <p>separate [2] 3:24 28:18</p> <p>serious [1] 51:16</p> <p>set [7] 5:11 12:21 18:13,20 20:2 23:23 40:6</p> <p>severity [1] 52:8</p> <p>Sheikh [1] 56:11</p> <p>short [2] 41:1 54:15</p> <p>shorter [1] 52:11</p> <p>shouldn't [1] 10:1</p> <p>show [3] 22:20 48:8 53:24</p> <p>shown [1] 51:11</p> <p>shows [3] 7:11 58:17 60:14</p> <p>shut [4] 57:13,14,16,24</p> <p>shuttered [1] 57:10</p> <p>sick [1] 42:18</p> <p>side [6] 5:22 6:6 37:7 42:24 58:12,20</p> <p>signals [1] 29:21</p> | <p>similar [1] 53:14</p> <p>simply [7] 6:13 35:15 40:19 41:2 59:11 61:11,18</p> <p>single [2] 43:16 59:16</p> <p>sitting [1] 42:13</p> <p>situation [8] 18:25 19:11 32:5 34:12 35:12 36:23 43:17 53:5</p> <p>situations [1] 52:21</p> <p>slip [1] 13:4</p> <p>solely [1] 10:20</p> <p>somebody [6] 12:9,22 22:18 23:15 26:9,13</p> <p>somehow [2] 59:25 61:15</p> <p>someone [2] 23:7 48:9</p> <p>soon [1] 57:13</p> <p>sorry [3] 33:4 36:20 54:20</p> <p>sort [1] 52:11</p> <p>SOTOMAYOR [12] 8:18 9:9,17,21,25 28:15 29:6 54:20 55:1 56:13,24 57:25</p> <p>sought [3] 7:9 34:8 37:9</p> <p>sound [1] 23:1</p> <p>soup-to-nuts [1] 34:13</p> <p>sources [4] 36:6 37:1 53:20 56:1</p> <p>speaking [1] 47:11</p> <p>specific [1] 37:3</p> <p>specifically [1] 54:1</p> <p>sponte [1] 11:14</p> <p>stage [3] 22:24 40:15,17</p> <p>stages [2] 35:3 40:21</p> <p>stand [3] 4:11 15:1 51:15</p> <p>standard [36] 3:17 13:1 15:19,22 19:2 20:3 24:13,17 27:19 28:4 32:25 33:9,23,25 34:5,16 36:5,16,17,19,21,25 38:14,25 39:6,8 40:6 41:2 43:21,25 44:13 48:24 49:6 53:1 56:4 59:6</p> <p>standards [14] 16:13 26:19 34:4,6,14,15 35:7 36:2 43:10 45:13 52:24 53:10,13 61:11</p> <p>standing [1] 58:14</p> <p>start [1] 13:10</p> <p>starting [1] 9:14</p> <p>statements [2] 54:16 55:24</p> <p>STATES [3] 1:1,15 38:2</p> <p>statute [2] 17:23 18:1</p> <p>step [1] 8:25</p> <p>steps [1] 4:1</p> <p>still [5] 12:25 29:11 33:10 52:9 60:22</p> <p>stood [1] 36:15</p> <p>straight [1] 13:7</p> <p>strange [3] 21:8 35:12 52:4</p> <p>strategic [1] 3:15</p> <p>strict [1] 8:16</p> <p>strictures [1] 24:22</p> <p>stringent [1] 3:17</p> <p>stripped [1] 23:8</p> <p>strong [1] 49:18</p> <p>stronger [1] 35:24</p> <p>structure [1] 8:9</p> <p>struggling [1] 46:5</p> <p>stuck [1] 47:5</p> <p>sua [1] 11:14</p> | <p>sub [1] 5:23</p> <p>submitted [2] 61:23,25</p> <p>subsections [1] 12:5</p> <p>subset [1] 32:1</p> <p>substantial [1] 61:3</p> <p>substantive [1] 34:6</p> <p>substitution [1] 43:13</p> <p>successive [1] 28:21</p> <p>sufficiency [1] 29:13</p> <p>sufficient [9] 4:22 6:15 14:7 19:2 21:17 29:20 30:1 53:23 56:7</p> <p>suggestion [1] 20:6</p> <p>suggests [1] 44:23</p> <p>summary [6] 18:16 35:8 38:18 48:18 50:12 51:12</p> <p>summons [1] 42:8</p> <p>supplemental [4] 4:13 6:9 19:21 60:6</p> <p>suppose [1] 45:14</p> <p>supposed [1] 44:14</p> <p>SUPREME [2] 1:1,14</p> <p>surprise [2] 12:10 55:20</p> <p>survived [2] 20:1 53:15</p> <p>surviving [1] 19:24</p> <p>suspended [1] 12:19</p> <hr/> <p style="text-align:center">T</p> <hr/> <p>tactical [6] 4:11 8:4 29:14 30:22,24 31:2</p> <p>tandem [2] 39:4,19</p> <p>tasked [1] 34:9</p> <p>tells [1] 40:3</p> <p>Tenth [1] 38:7</p> <p>terrorist [2] 54:13 57:20</p> <p>test [7] 3:24 4:3 42:16,17 47:16,19 48:23</p> <p>textbook [1] 53:5</p> <p>There's [35] 5:8 10:10,12,18,23 12:7,8,15,23 15:17 16:16,19 20:5,5 21:7 22:5 23:15 24:21,21,21 27:9,18 28:22 30:19 37:15,17 39:8 44:6,7,22 55:6 56:1 57:17 59:1 60:1</p> <p>therefore [1] 29:2</p> <p>they've [1] 15:18</p> <p>thinking [1] 13:21</p> <p>thinks [2] 12:22 29:20</p> <p>third [1] 60:17</p> <p>Thirty [1] 11:16</p> <p>THOMAS [6] 5:3 8:24 35:23 36:9,14 58:4</p> <p>though [2] 37:9 49:15</p> <p>three [1] 61:15</p> <p>tied [1] 54:23</p> <p>today [3] 39:14 58:14 60:14</p> <p>together [1] 40:8</p> <p>took [1] 56:12</p> <p>totally [1] 21:21</p> <p>transferor [1] 57:23</p> <p>treat [1] 4:18</p> <p>treated [1] 48:1</p> <p>trial [3] 4:10 18:17 30:20</p> <p>true [3] 5:7 48:16 59:11</p> <p>truly [1] 26:21</p> <p>try [5] 24:20 39:16 41:5 49:25 54:</p> | <p>17</p> <p>trying [6] 14:23 22:16 31:15 32:19 49:11 54:8</p> <p>turned [1] 59:5</p> <p>Twitter [3] 6:20,25 61:9</p> <p>two [5] 3:23 4:1 13:6 15:20 43:7</p> <hr/> <p style="text-align:center">U</p> <hr/> <p>U.S [2] 23:9 57:17</p> <p>ultimately [2] 19:11 40:22</p> <p>under [23] 6:8,15 8:4,6,15 12:2,4,8,14 24:7 28:6 30:11 33:9 35:16 37:23 38:6,24 51:13,20 53:9,12 59:6,8</p> <p>undermines [1] 4:1</p> <p>understand [10] 11:5 13:20 16:10 19:10 27:12 30:9 31:15 38:9 46:4,6</p> <p>understanding [2] 40:20 45:25</p> <p>understands [1] 16:25</p> <p>understood [7] 21:4,18 38:13 39:10 53:13 54:21 55:10</p> <p>undid [1] 53:3</p> <p>undoing [1] 35:11</p> <p>unfair [2] 34:20 35:12</p> <p>uniform [1] 48:2</p> <p>Union [2] 56:12 57:3</p> <p>UNITED [3] 1:1,15 38:1</p> <p>universal [1] 35:17</p> <p>unsure [1] 38:10</p> <p>until [2] 6:4 57:23</p> <p>untraceable [2] 53:25 54:2</p> <p>unusual [4] 35:17,20 52:4,5</p> <p>up [18] 6:3 7:5 13:19 16:13 18:17 19:24 35:12,24 39:10,12 42:2 48:8 49:6 54:7 55:10 58:20 59:17,19</p> <p>urged [1] 36:2</p> <hr/> <p style="text-align:center">V</p> <hr/> <p>vacate [1] 13:3</p> <p>vacatur [2] 34:24 37:23</p> <p>versus [5] 3:5 6:21 16:1 37:1 53:20</p> <p>view [3] 3:17,21 5:4</p> <p>vindicated [1] 52:25</p> <p>void [1] 51:17</p> <hr/> <p style="text-align:center">W</p> <hr/> <p>Waetzig [2] 13:2 41:15</p> <p>waive [1] 26:22</p> <p>waived [1] 7:8</p> <p>waiver [1] 29:14</p> <p>waivers [1] 35:14</p> <p>wanted [3] 7:14 28:14,25</p> <p>wants [2] 39:7 47:8</p> <p>warranted [2] 13:10 58:16</p> <p>Washington [2] 1:10,18</p> <p>waste [1] 34:2</p> <p>way [16] 7:15 8:21 13:19 16:6 17:14,15 18:16 21:8,19 22:3 24:2 27:10 28:2 40:10 46:19 48:1</p> <p>week [1] 13:2</p> <p>weigh [2] 14:8 15:8</p> <p>weighs [1] 15:10</p> <p>weird [1] 19:5</p> |
|--|---|---|--|

Weiss ^[2] 53:16 56:17
welcome ^[2] 5:2 35:22
well-settled ^[1] 3:24
Wesley ^[5] 7:19 36:22 43:9 52:5
 60:7
whatever ^[7] 15:2,11,21 18:17 19:
 2 26:13 30:10
whatsoever ^[1] 59:2
Whereupon ^[1] 61:24
whether ^[15] 9:6,11 13:9,16 15:18
 16:4 17:8 19:1 21:16 28:13,18,20
 30:10 49:12 58:15
whole ^[1] 31:25
win ^[1] 45:8
window ^[1] 17:24
within ^[2] 12:10 20:12
without ^[3] 10:2 14:11 34:25
won ^[4] 61:3,12,14,14
word ^[2] 39:22,23
words ^[1] 49:14
work ^[1] 51:15
worried ^[6] 13:15 14:21 15:14 17:
 6 29:11,16
worry ^[1] 14:10
worth ^[1] 58:21
written ^[1] 54:14

Y

year ^[2] 20:12 23:5
year-long ^[1] 21:20
years ^[4] 57:24 61:13,16,17

Z

zombie ^[1] 61:16