# **SUPREME COURT OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ NUCLEAR REGULATORY COMMISSION, ) ET AL., ) Petitioners, ) ) No. 23-1300 v. TEXAS, ET AL., ) Respondents. ) \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ INTERIM STORAGE PARTNERS, LLC, ) Petitioner, ) ) No. 23-1312 v. TEXAS, ET AL., ) Respondents. ) \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ Pages: 1 through 108 Place: Washington, D.C. Date: March 5, 2025

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1 IN THE SUPREME COURT OF THE UNITED STATES 2 3 NUCLEAR REGULATORY COMMISSION, ) 4 ET AL., ) 5 Petitioners, ) ) No. 23-1300 6 v. 7 TEXAS, ET AL., ) 8 Respondents. ) \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ \_ 9 10 INTERIM STORAGE PARTNERS, LLC, ) 11 Petitioner, ) 12 ) No. 23-1312 v. 13 TEXAS, ET AL., ) 14 Respondents. ) 15 16 Washington, D.C. 17 Wednesday, March 5, 2025 18 19 The above-entitled matter came on for 20 oral argument before the Supreme Court of the 21 United States at 10:07 a.m. 22 23 24 25

## 1 APPEARANCES:

2	MALCOLM L. STEWART, Deputy Solicitor General,
3	Department of Justice, Washington, D.C.; on behalf
4	of the Petitioners in Case 23-1300.
5	BRAD FAGG, ESQUIRE, Washington, D.C.; on behalf of the
6	Petitioner in Case 23-1312.
7	DAVID C. FREDERICK, ESQUIRE, Washington, D.C.; on
8	behalf of Respondent Fasken Land and Minerals,
9	Ltd.
10	AARON L. NIELSON, Solicitor General, Austin, Texas; on
11	behalf of Respondents Texas, et al.
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1	CONTENTS	
2	ORAL ARGUMENT OF:	PAGE:
3	MALCOLM L. STEWART, ESQ.	
4	On behalf of the Petitioners in	
5	Case 23-1300	3
6	ORAL ARGUMENT OF:	
7	BRAD FAGG, ESQ.	
8	On behalf of the Petitioner in	
9	Case 23-1312	42
10	ORAL ARGUMENT OF:	
11	DAVID C. FREDERICK, ESQ.	
12	On behalf of Respondent Fasken Land	
13	and Minerals, Ltd.	58
14	ORAL ARGUMENT OF:	
15	AARON L. NIELSON, ESQ.	
16	On behalf of Respondents Texas,	
17	et al.	85
18	REBUTTAL ARGUMENT OF:	
19	MALCOLM L. STEWART, ESQ.	
20	On behalf of the Petitioners in	
21	Case 23-1300	104
22		
23		
24		
25		

1 PROCEEDINGS 2 (10:07 a.m.) 3 CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 23-1300, Nuclear 4 Regulatory Commission versus Texas, and the 5 consolidated case. 6 7 Mr. Stewart. ORAL ARGUMENT OF MALCOLM L. STEWART 8 ON BEHALF OF THE PETITIONERS IN CASE 23-1300 9 10 MR. STEWART: Thank you, Mr. Chief 11 Justice, and may it please the Court: 12 First, the petitions for review should 13 be dismissed because neither Texas nor Fasken 14 was a party to the NRC licensing proceedings. 15 Texas did not try to intervene in the agency 16 adjudication. Fasken moved to intervene, but 17 its request was denied, and the D.C. Circuit 18 affirmed the denial. And there is no sound 19 basis for the Fifth Circuit's ultra vires 20 exception to the Hobbs Act's "party aggrieved" 21 requirement. 2.2 If the Court reaches the merits, it 23 should reverse the court of appeals' judgment. The Atomic Energy Act prohibits the unlicensed 24 25 possession of spent nuclear fuel's constituent

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1 parts while authorizing the Commission to 2 license private interim storage of those 3 substances. The Nuclear Waste Policy Act left that scheme intact. And, since 1980, the NRC's 4 regulations have provided for both onsite and 5 6 offsite storage. That system allows a 7 substantial role for private market responses to 8 the country's nuclear waste storage issues, 9 subject to Commission oversight to ensure that 10 storage is safe and consistent with statutory 11 requirements. 12 I welcome the Court's questions. 13 JUSTICE THOMAS: Mr. Stewart, what 14 does it take to be a party in these proceedings? 15 MR. STEWART: In an adjudication, you 16 would need to intervene, and the Commission's 17 rules set out the process for intervention. 18 JUSTICE THOMAS: So when can a 19 party -- when can an interested person 20 intervene? 21 The -- the Commission's MR. STEWART: 2.2 rules set out two requirements. One is that --23 basically, a standing requirement, and that is, 24 essentially, that you be an interested person, 25 that your interests be affected by the outcome.

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1 And, second, the Commission's rules require 2 what's called an admissible contention. 3 And the rules were changed in 1990. The changes were upheld by the D.C. Circuit. 4 And, basically, the problem the Commission had 5 6 confronted was that it would get requests to 7 intervene accompanied by very vague assertions. JUSTICE THOMAS: But -- so, aside from 8 9 the substance, when can you intervene? When can 10 an interested person intervene? 11 MR. STEWART: Essentially, the 12 Commission will issue notice that a licensing proceeding is -- is under way or will soon be 13 14 under way, and then it will give a certain 15 amount of time for part --16 JUSTICE THOMAS: How much? How much 17 time? 18 MR. STEWART: I think it was 60 or 90 days to give notice of your intent to intervene. 19 And then there were written submissions. 20 The 21 Atomic Safety and Licensing Board passed in the 2.2 first instance on various requests to intervene. 23 And then there was an appeal available to the full Commission. And then Fasken sought 24 25 judicial review of the Commission's denial of

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1 its request to intervene. 2 JUSTICE KAGAN: The regulation that 3 you cited, how is that supported by the statutory language? 4 MR. STEWART: The D.C. Circuit in the 5 case Union of Concerned Scientists that I 6 7 referred to a moment ago, I think it's in 920 F.2d, said that this was an aspect of agencies' 8 9 traditional broad authority to regulate their 10 own procedures. And as -- as I --11 JUSTICE KAGAN: Because it goes -- it 12 seems to go beyond the statutory language 13 itself. Is that correct? Do you agree with 14 that? 15 MR. STEWART: I -- I agree that the 16 statutory language in itself would not impose 17 this requirement. And -- and the Commission's 18 prior rules had not done so. The -- the --19 JUSTICE GORSUCH: And in looking at 20 the statutory language, Mr. Stewart, it says that any person who requests a hearing and their 21 2.2 interests are affected shall be admitted. 23 That's a mandatory obligation as I read it. 24 MR. STEWART: Yeah. 25 JUSTICE GORSUCH: And Fasken, their

1 interest is affected and they requested a 2 hearing. Those -- those things are undisputed, 3 right? 4 MR. STEWART: Yes. JUSTICE GORSUCH: So --5 MR. STEWART: I -- I --6 7 JUSTICE GORSUCH: -- help me with 8 Justice Kagan's question. 9 MR. STEWART: -- I guess I would --10 I -- the two things I would say were, first, 11 when Fasken appealed to the D.C. Circuit from 12 the denial of its request to intervene, it 13 didn't make the argument that the Commission's 14 rules were invalid or it had a statutory right 15 to --16 JUSTICE GORSUCH: Well, it said it had 17 a statutory right to intervene. And I -- I read the D.C. Circuit opinion. It didn't address 18 19 that argument at all. 20 MR. STEWART: It -- it has said that 21 it has a right to intervene, but it was 22 asserting that right under the Commission's own 23 rules. And I guess the second thing I would say 24 is, at most, the argument you're suggesting 25 would imply that Commission -- that Fasken ought

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      to have been allowed to intervene, it ought to
 2
     have been made a party.
                But the fact is it wasn't --
 3
                JUSTICE KAGAN: He could have thought
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      it was futile given the D.C. Circuit precedent
 5
 6
      on the question, yes?
 7
                MR. STEWART: It -- well, it -- it
      could have thought -- the -- the arguments that
 8
 9
     Fasken made were actually that it was entitled
      to intervene under the Commission's own rules.
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11
      It was not arguing that the rules imposed an
12
      invalid extra-statutory requirement. So it had
     no reason to think that --
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                JUSTICE GORSUCH: Well --
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                MR. STEWART: -- that that was
16
      invalid, but --
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                JUSTICE GORSUCH: -- actually, I --
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      I -- I've got it before me, and it says that
19
      they're entitled -- that they act -- NRC abused
20
      its discretion and acted arbitrarily and
21
      capriciously in an excess of statutory
2.2
      jurisdiction by not admitting them. It -- and
23
      it goes on to talk about the policies and
     regulations, but it cites the statute in its
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      petition for review. And, again, the D.C.
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Circuit didn't address it. 1 2 MR. STEWART: I quess the other thing 3 I would say is they could have sought en banc 4 review. They could have sought certiorari 5 review. And what they are in essence doing --6 JUSTICE GORSUCH: Is your argument 7 essentially one from issue preclusion then? Is that -- is that the nature of your argument, 8 9 that -- that that was litigated in another forum 10 and, therefore, that they're bound by it? 11 MR. STEWART: I think yes in the sense 12 that --13 JUSTICE GORSUCH: Okay. If it is 14 issue preclusion then, you didn't argue issue 15 preclusion below. 16 MR. STEWART: Well, what -- what we 17 have argued --18 JUSTICE GORSUCH: And you haven't 19 argued it here. MR. STEWART: Well, what -- we have 20 21 not put the issue preclusion label on it. We 22 did say in our reply brief they can't 23 collaterally attack the D.C. Circuit's decision 24 upholding the denial of intervention. But we --25 JUSTICE GORSUCH: Isn't it your burden

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1 to show that issue preclusion applies? MR. STEWART: Well, we -- I mean, I 2 think it would be our -- our burden --3 JUSTICE GORSUCH: Isn't that normally 4 the case, that -- that the party seeking issue 5 6 preclusion has to bear the burden of proving it? 7 MR. STEWART: I think what -- what they have -- our focus has always been on the 8 9 fact that they did not, in fact, become parties. And Fasken has never contested that. 10 JUSTICE GORSUCH: Yeah. But can you 11 12 ask -- answer my question, though, that a 13 party -- a party seeking issue preclusion bears 14 the burden of proving it? 15 MR. STEWART: Yes, typically so. 16 JUSTICE JACKSON: Mr. Stewart, can you 17 explain this issue preclusion? What is your understanding of Justice Gorsuch's question? 18 Because I -- I'm not sure I -- I see it as issue 19 20 preclusion, so help me to figure that out. 21 MR. STEWART: Well, I think the 2.2 question -- if the question is -- first, our 23 position would be the question should be, did 24 Fasken, in fact, intervene in the proceedings 25 and become a party? And it didn't. But, even

1 if the question is should Fasken have been 2 allowed to intervene, did Fasken -- was Fasken improperly denied a right to intervene that it 3 had under the statute, the D.C. Circuit resolved 4 that issue against it, and it didn't seek direct 5 review of that determination either before the 6 7 en banc D.C. Circuit or before this Court. 8 JUSTICE JACKSON: And I quess, for us to consider that to be issue preclusion that has 9 some bearing on this proceeding, we would be 10 11 suggesting that a party could make some sort of 12 a collateral challenge to their party status 13 through this route? 14 In other words, you're -- you're --15 you're saying, procedurally, the D.C. Circuit 16 made a ruling about whether or not Fasken was 17 entitled to intervene. They did not -- they, 18 Fasken, did not seek rehearing en banc, did not 19 seek cert, but I suppose, to the extent now that 20 we are considering their party status, I guess, 21 there's a suggestion that maybe they should be 2.2 able to raise that issue in this proceeding? 23 MR. STEWART: Yes, and I -- I think that's not the way it would work in -- in 24 district court litigation. For instance, if a 25

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1	party moved to intervene in a district court
2	proceeding and was denied intervention, if it
3	wanted to become a party, it would need to
4	appeal from the denial of intervention.
5	And if it appealed from the denial of
б	intervention and lost again in the court of
7	appeals, it couldn't simply take an appeal from
8	the district court's ultimate merits ruling and
9	ask the court on that appeal to hold that the
10	prior decision denying it leave to intervene had
11	had been erroneous.
12	JUSTICE JACKSON: Thank you.
13	CHIEF JUSTICE ROBERTS: Counsel, we
14	don't normally require parties to seek en banc
15	review or seek cert before and and forfeit
16	rights at the expense of not doing so. I would
17	hate to say the rule is you've got to seek cert
18	every time you want this type of thing to be
19	applied.
20	MR. STEWART: Well, I think what
21	they what Fasken is essentially attempting to
22	do here at least in part is to ask the Court in
23	this proceeding to rule on the question of
24	whether it had a statutory right to intervene
25	and whether it was wrongly denied a review.

1 And if Fasken thinks that's the sort 2 of issue that warrants the -- this Court's 3 attention, then it should have sought --4 CHIEF JUSTICE ROBERTS: Well, I 5 mean --6 MR. STEWART: -- this Court's review 7 directly. 8 CHIEF JUSTICE ROBERTS: Well, I mean, maybe it doesn't think it warrants this Court's 9 10 attention because there's no split or the usual 11 criteria that we have for cert, but I -- I don't 12 think it's part of an exhaustion requirement 13 that you've got to seek en banc review and 14 certiorari. That's pretty -- I mean -- I mean, 15 I think that's unusual. Those remedies are 16 strictly limited and may not at all be 17 applicable to what is nonetheless a perfectly 18 valid legal claim. 19 MR. STEWART: Well, I think, in -- in 20 general, if -- if you have a court of appeals 21 decision that come outs -- comes out against you 2.2 and you want the court in some future proceeding 23 to kind of behave on the assumption that that 24 decision was wrong, you really need to seek 25 whatever form of review is available at that

1 time rather than ask the court in the subsequent 2 proceeding to -- to hold that the former court 3 got it wrong. JUSTICE SOTOMAYOR: What happens in a 4 5 normal --6 JUSTICE ALITO: Why should --7 JUSTICE SOTOMAYOR: I'm sorry. JUSTICE ALITO: Go ahead. 8 9 JUSTICE SOTOMAYOR: What happens in a normal litigation? Let's assume it's not an 10 11 agency. There's a motion to intervene by a 12 party. Are they required to appeal? 13 MR. STEWART: Yes. If they -- if they 14 want to become parties, they -- if they are 15 denied intervention, then -- and they want to 16 have the rights and obligations that go with 17 party status in the underlying litigation, they 18 would need to appeal from the denial of 19 intervention. 20 And if they lost there, they couldn't 21 take an appeal from the merits judgment in the 2.2 case and essentially ask for a second bite at 23 the apple, ask the court of appeals in the 24 merits appeal to revisit the question of whether 25 intervention should be granted.

1 JUSTICE SOTOMAYOR: We would never --2 JUSTICE ALITO: Why should --3 JUSTICE SOTOMAYOR: -- have any ending to litigation if parties who want to intervene 4 could come in at any point in time, even after 5 6 judgment, raising new issues, when they weren't 7 parties below? MR. STEWART: Yes. 8 9 JUSTICE ALITO: Why shouldn't Fasken have been allowed to intervene? If this had 10 been a civil proceeding, he certainly would have 11 12 met the requirements for intervention, would 13 he -- would it not? 14 MR. STEWART: Yes. 15 JUSTICE ALITO: If this was a -- if 16 this --17 MR. STEWART: Yes. 18 JUSTICE ALITO: He meets -- he would 19 meet Rule 24, right? 20 MR. STEWART: Yes. He --21 JUSTICE ALITO: So why -- why was he 22 kept out of this? 23 MR. STEWART: Basically, because the -- the Commission or the -- yeah, the --24 25 first, the Atomic Safety and Licensing Board and

then the Commission found that he had -- found 1 that Fasken had failed to raise a genuine issue 2 3 of law or fact. And it's important to realize that the 4 issues that Fasken was trying to raise as an 5 intervenor were very different from the one that 6 7 is at issue now. 8 Fasken was not arguing at that stage 9 that the NRC lacked statutory authority to 10 license offsite storage. It was making much 11 more fact-specific environmental objection --12 asserting much more fact-specific environmental objections to the project. 13 JUSTICE SOTOMAYOR: Did the State 14 15 raise the issue it's raising today in any of the 16 proceedings below? 17 MR. STEWART: Not -- not in the agency 18 proceedings. It raised the -- the statutory 19 argument in the court of appeals but not the 20 end --21 JUSTICE SOTOMAYOR: Not before the 22 agency? 23 MR. STEWART: And the -- the -- the State didn't even attempt to intervene in the 24 25 agency licensing proceeding.

1	JUSTICE SOTOMAYOR: And they have an
2	absolute right to intervene?
3	MR. STEWART: They don't have an
4	absolute right to intervene. They they
5	have there are more, I would say, forgiving
б	or more hospitable standing requirements for the
7	State, but the State still has to identify an
8	admissible contention under the NRC's
9	intervention rules.
10	JUSTICE JACKSON: Would you say that
11	one of the purposes of the party requirement in
12	the Hobbs Act is to ensure that issues are
13	raised before the agency?
14	MR. STEWART: It would say that as a
15	purpose. I would also have to concede that the
16	purpose is achieved imperfectly because the
17	Hobbs Act doesn't have what is sometimes
18	referred to as an issue-exhaustion requirement.
19	That is, the Hobbs Act requires that you be a
20	party, but at least under the terms of the
21	statute, there is no requirement that, as a
22	party, you raise the same issue that you want to
23	raise in court.
24	JUSTICE GORSUCH: Mr Mr. Stewart,
25	I understand your argument to be that the "party

1 aggrieved" language in the Hobbs Act is narrower 2 than the "person adversely affected" language in 3 the APA, is that right? 4 MR. STEWART: Yes. JUSTICE GORSUCH: Would anything 5 6 prohibit Fasken or Texas from bringing an APA 7 challenge in district court under -- as -- as 8 persons aggrieved? 9 MR. STEWART: I -- I think the 10 exclusive review scheme of the Hobbs Act 11 would -- would do that, unless the Court 12 concluded for some reason that the Hobbs Act 13 review scheme was inadequate and that the 14 exclusivity of the -- the court of appeals 15 review scheme should be accepted for that --16 made an exception to for that reason. 17 JUSTICE GORSUCH: Okay. The -- the 18 ultra vires argument perhaps could be brought there, you think? 19 I -- I don't think ultra 20 MR. STEWART: 21 vires really maps on to what the Court has 2.2 looked to at least recently because the ultra 23 vires exception turns on kind of how -- how bad 24 is the agency error alleged to be or did it 25 represent a -- an exercise of authority that the

1 agency doesn't have. 2 Whether that is so or not doesn't 3 really speak to the question whether the Hobbs Act review mechanism would be adequate to 4 address the sort of error. 5 6 If I may, I'd like to address the 7 merits. 8 JUSTICE KAGAN: If I could ask you one 9 more, Mr. Stewart? 10 MR. STEWART: Sure. 11 JUSTICE KAGAN: I mean, I take your 12 point that the issue before us is not whether 13 there was proper intervention here, whether the 14 intervention should have been given. 15 But still, isn't it a little bit odd 16 to say that the agency whose -- whose action is 17 being challenged in court has so much control by 18 virtue of its regulatory -- its -- its -- its 19 regulations on intervention to dictate who gets 20 to challenge the action? MR. STEWART: Well, I think the 21 2.2 agencies will always have some control. So, for 23 instance, if you need -- if you have to comply with agency rules in notice-and-comment 24 25 proceedings in order to file suit in court, the

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1 agency may say: Submit comments within 90 days 2 and submit them to the following e-mail address. And if you try to submit comments, but they're 3 untimely or they go to someone else, that may 4 affect the court's review authority. 5 6 The other thing I would say in this 7 particular setting is there was an alternative route available that didn't -- for judicial 8 9 review of the current statutory claim that 10 didn't require intervention in the licensing 11 proceedings. 12 Fasken or Texas could have filed a petition for rulemaking, and it could have asked 13 14 under the Commission's rules that the licensing 15 proceeding be set -- be held in abeyance. 16 And that's not just a theoretical 17 option if the papers are -- on the merits are 18 full of references to the D.C. Circuit's 19 decision in Bullcreek, which about 20 years ago 20 upheld the Commission's statutory authority to license offsite storage of spent nuclear fuel. 21 2.2 And that was the procedural route that 23 the State of Utah took to get to the -- the D.C. Circuit. It filed a petition for rulemaking 24 25 asking that the Commission rules that authorize

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1	offsite storage be modified because they were
2	inconsistent with the statute. The Commission
3	denied that petition. And Utah filed a petition
4	for review of that denial in the D.C. Circuit.
5	And they didn't get the merits outcome
6	they want wanted, but they got plenary
7	judicial review of the merits question: Did the
8	Commission have the statutory authority that it
9	claimed? And I
10	JUSTICE GORSUCH: Mr. Stewart, on the
11	merits, I do have a question for you.
12	So Yucca Mountain was supposed to be
13	the permanent solution. Congress so ordained
14	I think it said it had to be done by 1998. No
15	president has complied with that in all the
16	years since. We've spent something like \$15
17	billion on it. It's a hole in the ground. And
18	you parties seem to think the Yucca Mountain
19	project is dead.
20	And if that's true and there's no
21	different permanent repository, how is this
22	interim storage that the government is
23	authorizing here in any meaningful sense and
24	especially when I think ISP is given a 40-year
25	license? That doesn't sound very interim to me.

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now.

too apparently.

MR. STEWART: Well --JUSTICE GORSUCH: And it's renewable MR. STEWART: It -- it is renewable. If -- if they applied for a renewal of the license, there would be a new Commission adjudication. And to the extent that --JUSTICE GORSUCH: Forty years from MR. STEWART: Forty years from now. And to the extent there were changed circumstances that cast doubt on the -- the

propriety of this arrangement, the Commission 13 14 would be able to -- to speak to that. 15 I -- I don't mean to seem glib, but 16 the -- the repository is intended to keep 17 nuclear waste stored safely for a temp --18 JUSTICE GORSUCH: Yeah. On -- on a --19 on a concrete platform in the Permian Basin, 20 where we get our oil and gas from. So, 21 hopefully, we won't have radiated oil and gas. 2.2 MR. STEWART: And, of course, that was 23 an objection that the -- the State and Fasken 24 made. But that -- that's not the question that

25 is before the Court today.

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1 The -- the other -- the other point I 2 would make about kind of who bears 3 responsibility for the delay and what we should do about it is that the -- the people who 4 absolutely don't bear responsibility for the 5 6 delay are people like ISP, people -- private 7 enterprises who are trying to come up with interim solutions to the -- the nuclear waste 8 9 storage dilemma. 10 And it's -- it's not that the 11 Commission decided itself that this facility 12 would be located in west Texas. ISP came up with a proposal. It filed a license 13 14 application. And even if the -- the license is 15 upheld, ISP will actually be able to store spent 16 nuclear fuel only if it can work out contracts 17 with the people who control the waste now and 18 they work out a -- what is for both parties an 19 economically beneficial arrangement. And so the Commission's role is to 20 21 decide whether this is safe and consistent with 2.2 the statute, but the Respondents' position would 23 place roadblocks in the way of people like ISP 24 and people like those who currently control the 25 nuclear waste trying to devise market-oriented

1 solutions to the problem. 2 CHIEF JUSTICE ROBERTS: Thank you, 3 counsel. Justice Thomas? 4 JUSTICE THOMAS: Mr. Stewart, I do 5 6 think it's somewhat strange that the NRC gets to 7 choose who -- which parties are able to 8 challenge it later on. 9 But that aside, what's your argument 10 that the Nuclear Regulatory Commission has the 11 authority to establish -- to store nuclear waste 12 off the -- offsite by a private party? MR. STEWART: Well, there are -- there 13 14 are three -- there are really, in a sense, six 15 stat -- five pertinent statutory provisions 16 here. The -- the relevant constituent parts of 17 spent nuclear fuel are source material, special nuclear material, and by-product material, and 18 19 for each of those constituents, there is a 20 statutory provision that says the unlicensed 21 receipt, use, or possession of this substance is 22 illegal. 23 But then there's -- for each of those, 24 there's a cognate provision that says: But the 25 Commission can issue a license for private

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1 storage. And -- if certain criteria are 2 satisfied. And if the Commission issues a license for private storage of each of the three 3 constituent parts, it can do it in the same 4 license, and that adds up to a license to 5 6 possess spent nuclear fuel. But --7 JUSTICE THOMAS: Does it say permanent, offsite by a private person --8 9 MR. STEWART: This is not permanent --JUSTICE THOMAS: -- who is not a --10 11 who's not a nuclear power plant, for example, 12 but simply storage? It is -- it is not 13 MR. STEWART: 14 permanent. It is still interim, but, yes, it 15 is -- there are really three categories. There 16 is at the site of an operating nuclear reactor, 17 and then at the other extreme is a facility 18 like -- like ISP's, which would be at a location 19 where no nuclear reactor has ever operated. And then there are also -- we -- we've 20 counted eight facilities where the Commission 21 2.2 has licensed storage of spent nuclear fuel at 23 locations where a nuclear reactor once operated but where the reactor has been decommissioned. 24 25 And, in three of those instances, the NRC

1 renewed the facility -- I'm sorry, the materials 2 license after the facilities license for the 3 reactor itself had expired. And so, for relevant purposes, they 4 seem to us similarly situated to the ISP 5 6 facility. They are now stand-alone storage 7 facilities even though they are at locations 8 where reactors once operated. JUSTICE THOMAS: Well, I mean, that's 9 in part because the facilities closed down and 10 11 you -- the material is left where the facility 12 used to be. But is there any comparator for a 13 large amount -- I forget how many metric tons 14 we're talking about here -- is transported to a 15 separate private facility for virtually 16 permanent storage? 17 MR. STEWART: Well, I quess the -- the 18 GE Morris facility has been in -- is a 19 standalone facility that's has been in operation 20 since, you know, I think around 1980 or before. 21 So I -- I don't think the volumes are the same 2.2 as the ones that ISP contemplates. 23 But the -- the two things I would say are, first, the -- the volume of waste is not 24 25 going to -- in the United States, is not going

to change depending on whether licenses like these are granted. Granting license to possess the spent nuclear fuel in a storage facility is not going to increase the volume of nuclear waste. It's just going to change where in the country it would be stored.

7 And with respect to permanence versus 8 temporary status, the -- there's no reason to 9 think that if the Court rules against us and the 10 waste has to stay at the site of the 11 decommissioned reactors, it will stay there for 12 any shorter period of time. It's still going to 13 stay somewhere until a permanent repository is 14 opened up.

15 And the third thing -- and this goes 16 to the point I was making before about 17 market-based solutions and ISP's motivation --18 part -- part of the suboptimal character of 19 continued storage at the decommissioned sites is that you have a bunch of places around the 20 21 country that now serve no other purpose but to 2.2 store spent nuclear fuel when once they were 23 operating reactors. And, clearly, ISP and some 24 of its potential contracting parties think that 25 it would be better to centralize the fuel at one

location so that the other locations could be 1 2 returned to what's been referred to as 3 greenfield status. 4 CHIEF JUSTICE ROBERTS: Thank you. MR. STEWART: They can be put to 5 6 alternative uses. 7 CHIEF JUSTICE ROBERTS: Thank you. Justice Alito? 8 JUSTICE ALITO: Is there more --9 excuse me. Is there more security around 10 11 facilities that are owned by the federal 12 government than around these private facilities? 13 MR. STEWART: I -- I don't know the 14 answer to that. I mean, certainly, the 15 Commission, in determining whether the -- the 16 licensee has met the requirements, wants to 17 be -- wants to verify that there will be what 18 the Commission views as adequate security 19 arrangements. 20 JUSTICE ALITO: Suppose this is allowed and 40 years go by, and then there's an 21 22 application to renew the license. Would it be 23 permanent at that time, or what if it's renewed 24 and it's another 40 years? 25 MR. STEWART: It would still not --

1 JUSTICE ALITO: It will never become 2 permanent? MR. STEWART: It would still not be 3 permanent. And, again, you would have the same 4 dilemma if the waste is left at the 5 6 decommissioned nuclear reactor sites. That is, 7 at some point, the storage -- the -- the materials license will expire. The Commission 8 will have to decide whether a new license should 9 10 be issued. We're going to confront that --11 until a repository is made available, we're 12 going to confront that dilemma at some locations within the country. It's just a question of 13 where those locations will be. 14 15 And the other point I would make about 16 security at federal versus private, the -- the 17 decommissioned reactor sites I'm referring to 18 are also private sites. They -- they would be 19 governed by the same arrangements that would 20 qovern ISP. 21 JUSTICE ALITO: Which statutory 2.2 provision -- I know you cite a number of them. 23 Which one do you think provides the strongest 24 support for your argument? 25 MR. STEWART: Well, I think -- I would

1 say two things. The first -- first, I would 2 point the Court to the licensing procedure -provisions in the Atomic Energy Act, which are 3 42 U.S.C. 2073(a), which deals with special 4 nuclear material; 2093, which deals with source 5 material; and 2111, which deals with by-product 6 7 material. And the Commission, from 1980, has regarded those -- has had published regulations 8 9 that treat those as authority to license private 10 storage of spent nuclear fuel. 11 The other thing I would point the 12 Court to in the Policy Act is that the Policy Act was enacted in 1982, two years after the 13 14 Commission's rules had been promulgated. 15 Congress clearly expressed its approval of 16 private storage, focusing on onsite storage, but 17 it didn't create new licensing mechanisms for 18 that to occur. And --19 JUSTICE ALITO: And -- thank you, Mr. 20 Stewart. One other -- one final question. 21 2073(a) refers to special nuclear material, not 2.2 to spent nuclear waste, and special nuclear 23 material has a -- a specific narrow definition. 24 MR. STEWART: Yes, and there is also a 25 provision -- I think it's 2201(h) -- that says

32

1 various authorizations can be combined in a 2 single license. And the -- the -- the three constituent parts of spent nuclear fuel that 3 require a license are special nuclear material, 4 source material, and by-product material. And 5 6 so the Commission has always believed that a 7 license that covers each of those will be 8 sufficient to cover spent nuclear fuel because 9 there's nothing else that needs to be licensed. 10 And then the other point I would make 11 is, if that were not true, the Commission would 12 be equally unable to license onsite storage 13 because these are the same provisions it relies 14 on to license storage at the site of a nuclear 15 reactor. 16 CHIEF JUSTICE ROBERTS: Justice 17 Sotomayor? 18 JUSTICE SOTOMAYOR: Counsel, these --19 the onsite storage requires security to watch 20 this product -- inert product and make sure that 21 nobody breaks in. So what we're talking about 2.2 is that there is a danger to the community by 23 these inactive facilities holding on to the 24 spent nuclear waste because the degree of 25 storage -- the -- the cost associated with the

1 storage in terms of security is greater, isn't 2 it? 3 MR. STEWART: Yes. And that was one of the justifications that ISP gave, that it 4 was -- it was more economical to have security 5 for one centralized facility than to have 6 7 separate security for different facilities 8 around the country. 9 JUSTICE SOTOMAYOR: 2201 basically 10 authorizes the agency "to establish by rule, 11 regulation, or order such standards and 12 instructions to govern the possession and use of special nuclear material, including all the 13 14 by-product materials, as the Commission may deem 15 necessary or desirable to promote the common 16 defense and security or to protect health or to 17 minimize danger to life or property." MR. STEWART: Yeah. And so the 18 Commission did --19 JUSTICE SOTOMAYOR: I look at that as 20 21 the direct authorization to set forth the terms 2.2 of possession and license, correct? 23 MR. STEWART: Yes. And I -- I think 24 the Commission was on solid ground when it

25 promulgated the rules in 1980, but when Congress

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1 stepped in two years later and enacted some new 2 provisions but without disturbing the 3 preexisting licensing scheme, that was an 4 effective ratification. JUSTICE SOTOMAYOR: You know, I --5 6 I -- I'm finding it curious that in a country 7 that's celebrating its 250th year that some of 8 my colleagues think that 40 years can't be 9 temporary. I hope that we make it another 250, 10 but if it takes 40 or 80 years for a solution to 11 come, it would still be temporary, correct? 12 MR. STEWART: Yes. And as I say, 13 the -- it -- it -- whether you want to think of 14 it as temporary or permanent or quasi-permanent, 15 it's going to be the same length of time 16 regardless of whether the waste is at an ISP 17 facility or at the site of a decommissioned 18 reactor. 19 JUSTICE SOTOMAYOR: And in a time in 20 which the danger to the community continues to 21 exist? 2.2 MR. STEWART: Yes. 23 JUSTICE SOTOMAYOR: If we keep going 24 on something that can't -- that -- if we keep 25 permitting storage in facilities that have had

1 to shut down. I mean, I -- the 2 MR. STEWART: Yes. Commission believes that its criteria can make 3 storage at these facilities safe, but at the 4 same time, the -- the perception that the risk 5 6 is not zero is what has led people to -- to want 7 a permanent repository. 8 JUSTICE SOTOMAYOR: Thank you. 9 CHIEF JUSTICE ROBERTS: Justice Kagan? Justice Gorsuch? 10 11 JUSTICE GORSUCH: I quess I'm 12 struggling with that. I -- I -- I understand 13 your argument before Congress acted the NWPA. 14 But, afterwards, it specifically said that it 15 declined to authorize any storage facility 16 located away from a site of any civilian nuclear 17 reactor and not owned by the federal government. 18 That was its judgment about the security that would be required for this 19 20 material. 21 MR. STEWART: Well, what it said was 22 that nothing in the Policy Act itself 23 authorized, encouraged, or required store --24 storage. 25 JUSTICE GORSUCH: Yeah, exactly,

36

1 because -- because it thought that these were 2 the places that were going to be safest. That 3 was Congress's judgment, whatever ours might be. And I would have thought that the more specific 4 and more recent-in-time statute would --5 would -- would govern over the general. Isn't 6 7 that our usual interpretive understanding? I mean, certainly, if 8 MR. STEWART: 9 the Policy Act had said offsite storage is 10 prohibited or the Commission may not license 11 offsite storage, that would trump the 12 preexisting author -- authorization in the 13 Atomic Energy Act. 14 But Congress was very careful not to 15 write the statute that way. It basically said: 16 With respect to offsite storage, we will leave 17 the law as it found it. It said nothing in the 18 Policy Act itself --19 JUSTICE GORSUCH: So that's -- so your 20 argument does hinge on the idea that Congress has later enacted a more specific statute didn't 21 2.2 trump the preexisting statute? 23 MR. STEWART: It -- it didn't trump it 24 because there was no inconsistency, because 25 saying --

37

1 JUSTICE GORSUCH: And if we disagree with that, then --2 3 MR. STEWART: If -- if you read 4 Section 11 --5 JUSTICE GORSUCH: 10155 --MR. STEWART: -- 10155(h) --6 7 JUSTICE GORSUCH: Yeah. MR. STEWART: -- if you read it to --8 9 to -- to be a prohibition on offsite storage of 10 spent nuclear fuel, then, yes, that would trump 11 the Atomic Energy Act's authorization. 12 But, as I say, Congress was aware that 13 the Commission had asserted this authority in 14 regulations two years earlier, and it wrote 15 the -- the language very carefully. 16 JUSTICE GORSUCH: Yeah. And it --17 it -- its judgment about safety, not ours, 18 controls? 19 MR. STEWART: Yes. 20 JUSTICE KAVANAUGH: But Congress didn't explicitly endorse the existing rules, 21 22 correct, as relevant here? MR. STEWART: It -- it didn't 23 endorse -- it didn't endorse the practice of 24 25 licensing offsite storage. It clearly endorsed

1 the idea that onsite storage was not only 2 permissible but was to be encouraged. 3 And so there are findings to the effect that the owners and operators of nuclear 4 power plants shall be encouraged to use their 5 6 existing storage capacity and expand their 7 storage capacity. Federal officials are 8 supposed to encourage that as well. But what -- not only did Congress not 9 bar offsite storage, it also didn't enact any 10 11 new licensing provisions or, for that matter, 12 any new prohibitions on unlicensed possession. 13 And so Congress clearly contemplated 14 that licensing would continue to be done under 15 the preexisting Atomic Energy Act provisions, 16 and those provisions don't distinguish between onsite and offsite storage. 17 18 JUSTICE KAVANAUGH: But it still seems 19 a little odd, to pick up on Justice Gorsuch's 20 questions, that Congress would write that provision in 10155(h) in that way without 21 2.2 something clearer, because anyone reading that 23 would think, okay, well, onsite storage or

25 Congress is clearly contemplating in that 1982

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federal offsite are the two options that

38

1 act. 2 MR. STEWART: You know, the D.C. 3 Circuit in Bullcreek did discuss the legislative history of this provision. And part of the 4 history was prior versions of the bill would 5 6 have encouraged offsite storage. And Congress 7 wanted to make clear that it wasn't doing that. But I think, even without looking to 8 9 the history and just looking to the text, it's 10 not conceivable that Congress would have chosen 11 this language if its intent was to prohibit the 12 Commission from doing something that it knew the 13 Commission had just asserted the authority to 14 do. 15 It could have said: Nothing in this 16 title, i.e., Title 42, which encompasses both 17 the Atomic Energy Act and the Policy Act, shall be construed to authorize, require, or 18 19 encourage. 20 Instead, it limited that language to 21 the Policy Act itself. The -- the clear intent, 2.2 we think, was to leave the Commission's pre --23 with its preexisting authority over offsite 24 storage but not to expand it or affirmatively 25 encourage it.

1 JUSTICE KAVANAUGH: One -- and one The -- the -- the other side responds 2 more. 3 that the Atomic Energy Act itself does not expressly authorize private offsite storage. 4 I just want to get your succinct 5 6 answer to that argument. 7 MR. STEWART: It doesn't -- it doesn't speak in so many words of offsite or onsite, but 8 9 it would be -- it would be equally apt to say 10 that the Atomic Energy Act doesn't expressly 11 authorize onsite storage. That is, it says: 12 People can be authorized to receive and possess 13 the following substances for the following 14 purposes, which include a residual. But it 15 doesn't talk about -- in one way or another 16 about the location where that may occur. 17 JUSTICE KAVANAUGH: Thank you. 18 CHIEF JUSTICE ROBERTS: Justice 19 Barrett? 20 Justice Jackson? 21 JUSTICE JACKSON: I don't hear you 2.2 disputing that Congress in the Policy Act was 23 expressing its perhaps preference for onsite 24 storage. But I quess the question is: How is 25 that objective best accomplished?

1 And it seems to me that Congress, in 2 this statute, was doing so by incentivizing 3 onsite storage, which appears to be a different thing than prohibiting offsite storage. 4 MR. STEWART: Yes, I think that's 5 6 right. And -- and one of the ways it 7 incentivized onsite storage was the -- the 8 federal storage program ultimately never got off 9 the ground, but during the period when it was potentially in effect, one requirement that you 10 11 needed to satisfy in order to have access to 12 federal storage was show that onsite storage was not available. And there was no similar 13 14 requirement with respect to -- to offsite 15 storage. So you could say in that respect 16 Congress put a thumb on the scale in the 17 direction of onsite storage. 18 JUSTICE JACKSON: Encouraging people 19 to do onsite. 20 MR. STEWART: Yes. 21 JUSTICE JACKSON: And -- and I know 2.2 sometimes the Court is interested in clear 23 statements. So, to the extent that the agency 24 had previously exerted its licensing authority 25 in this way, would one have expected Congress to

1 have made clearly a prohibition statement if it 2 was attempting to preclude offsite storage? 3 MR. STEWART: Yes. JUSTICE JACKSON: Thank you. 4 CHIEF JUSTICE ROBERTS: Thank you, 5 6 counsel. 7 Mr. Fagg. ORAL ARGUMENT OF BRAD FAGG 8 ON BEHALF OF THE PETITIONER IN CASE 23-1312 9 10 MR. FAGG: Thank you, Mr. Chief 11 Justice, and may it please the Court: 12 With respect to the Hobbs Act, if you 13 seek intervention under the agency's rules and 14 that's denied, that's a final order you get to 15 appeal. So I guess I would resist the notion a 16 little bit that there's no judicial review of 17 that. 18 You do have to appeal that within 60 19 days. Fasken did to the D.C. Circuit, like we 20 talked about. That played out the way it did. 21 Fasken did not appeal to the Fifth 22 Circuit within 60 days. It did not appeal until six or seven months later. And I think that's a 23 24 real problem with looking at what Fasken did at 25 the agency to try to justify the Fifth Circuit's

43

1 exercise of jurisdiction here. 2 With respect to merits and the Atomic 3 Energy Act, the primary argument of the 4 Respondents here is that the words "spent 5 nuclear fuel" are not separately defined. If they're right, then the Atomic 6 7 Energy Act does not prohibit the possession of spent nuclear fuel. My client, ISP, never 8 needed a license if they're right. They could 9 10 have just built this facility. 11 With all due respect, I would suggest 12 that's not a credible interpretation of the 13 Atomic Energy Act. 14 With respect to the Nuclear Waste 15 Policy Act and the references to encouraging of 16 onsite storage, I think it's important to 17 understand the context in which those statements 18 appear. 19 Those are all in subpart (b) of the 20 Policy Act. Subpart(a), I would argue, is the 21 guts of the Act. That's the permanent 2.2 repository underground for hundreds of thousands 23 of years. 24 Subpart (b) was a very limited, 25 now-expired program involving access to 1900

44

1 MTUs of federal interim storage. And the 2 context of that makes clear it's self-contained. 3 If you look at the legislative history, it also sheds light on the fact in the 4 sausage making of -- of that bill, there was a 5 lot of back-and-forth about whether the industry 6 7 would have to exercise and exhaust off-site storage before they could access this 1900 MTUs 8 of federal storage. The industry didn't want 9 that. Some legislators did want that. Some 10 11 drafts required them to do that. 12 But that context is how these 13 references to a preference for on-site storage, 14 which are only in subpart (b), came to be. And 15 I would respectfully suggest further confirm 16 that it's error to say that there are locational 17 restrictions. Certainly no locational restrictions appear within the Atomic Energy 18 19 Act. JUSTICE THOMAS: Well, could you give 20 21 us a -- a straightforward argument for the 2.2 authorization for off-site storage at a private 23 facility? MR. FAGG: It's under the Atomic 24 25 Energy Act. It's 2201(b). It is 2073, 2093 --

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1 JUSTICE THOMAS: And so what would 2 your argument be with those recitations? 3 MR. FAGG: They authorize the NRC to license the possession and storage of the 4 constituent elements, spent nuclear fuel, 5 without any locational restriction. You're 6 7 reading -- if you say "on-site," you're reading a term into the Atomic Energy Act that is not 8 9 there. 10 JUSTICE THOMAS: So there's no --11 there's no language that you could use to say 12 that spent fuel shall be or is permitted to be stored off-site? You're stitching together, 13 14 it's seeming, just constituent parts, not just 15 spent fuel. And I'm just looking at, asking, 16 whether or not there's anything you can rely on 17 that speaks to spent fuel in the aggregate being

18 able to be stored off-site at a private

19 facility.

20 MR. FAGG: I -- I do rely upon the 21 three constituent elements adding up to spent 22 fuel, in the same way you have to rely upon the 23 three constituent elements adding up to spent 24 fuel to prohibit the possession of it. Because 25 if you don't buy that proposition, you can't

1	have one without the other. You can't say the
2	Atomic Energy Act prohibits the possession of
3	these three items, but it doesn't allow the
4	licensing of these three items.
5	Either it's either one or the
6	other. And if the three constituent elements
7	don't add up to spent nuclear fuel for licensing
8	purposes, they can't add up to the prohibition
9	on possession. And I go back to what I said
10	earlier. My client never needed a license. We
11	should have just built this thing. We why
12	are we here?
13	JUSTICE SOTOMAYOR: What you're saying
14	I think I understand, which is if you read the
15	Act, it doesn't say you have to possess it where
16	it's created.
17	MR. FAGG: That that is certainly
18	true.
19	JUSTICE SOTOMAYOR: There's nothing
20	there that says possession in any particular
21	place.
22	MR. FAGG: I think that's true. And I
23	think it's also important to to keep in mind
24	there was always going to be spent nuclear fuel,
25	okay? Whether reprocessing played out the way

1 people thought it was going to back in the '50s, 2 '60s, '70s, whether Yucca had gotten -- gotten 3 up and running like it was supposed to, you were always going to have spent nuclear fuel 4 discharged from a reactor, stored for some 5 period of time -- even if you're going to 6 7 reprocess it, you got to ship it off to a 8 reprocessing site. And -- and -- and it still doesn't get 9 10 rid of all of it. There's still something. 11 It's not 100 percent. Even with reprocessing, 12 there's still residual spent nuclear fuel left. 13 So the notion that the Atomic Energy 14 Act wasn't intended by Congress to cover all of 15 those different parts of what might happen or 16 not happen to spent nuclear fuel, again, I would 17 suggest is -- is -- is not a credible 18 interpretation of the Atomic Energy Act. 19 With respect to -- sticking --20 sticking with the merits --21 JUSTICE JACKSON: Can I just ask you, 2.2 is there any different between your argument and 23 the government's in this case? MR. FAGG: Substantively, I'm -- I'm 24 25 not aware of a difference. I think we

1 articulate things a little bit differently, but 2 no. 3 JUSTICE JACKSON: Thank you. MR. FAGG: With respect to the Nuclear 4 Waste Policy Act, I -- I want to emphasize, 5 because I think it's a really important fact, 6 7 that the -- the 10 C.F.R. Part 72 regulations that were formally, after notice-and-comment 8 9 rulemaking, acted on and on the books at the 10 time of the Nuclear Waste Policy Act, and, you 11 know, this wasn't a sort of secret, 12 in-the-pocket exercise of authority. Massive notice and comment over 13 14 multiple years, a big, thick chunk of the 15 Federal Register with all the comments, including debates about on-site versus off-site 16 17 storage. Is it a good idea, a bad idea? Not a 18 whisper of the notion that the Atomic Energy Act 19 didn't cover storage of -- of spent nuclear fuel on-site or off-site. 20 21 And all of that was enacted in 1980. 2.2 All of that was demonstrably known by Congress 23 when it undertook the comprehensive Nuclear 24 Waste Policy Act legislation ultimately at the 25 end of -- of 1982 and '83.

1 And so to just underscore the fact 2 that in discerning Congress's intent here with 3 these two statutes, I would say that the -- the chronology and the facts confirm that the 4 Nuclear Waste Policy Act, considered with the 5 6 Atomic Energy Act, underscores and supports our 7 position. 8 JUSTICE KAVANAUGH: Meaning, given 9 what was known -- this is what you're saying, I think -- Congress would have explicitly 10

prohibited private off-site had it -- had it

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12 wanted to do so? Is that what you're saying? 13 Yes. Yes. And, again, if MR. FAGG: 14 you go back to what I referred to earlier, the 15 limited sort of provisions within subpart (b), 16 the access to the federal interim storage 17 program, and 10155(h) that we've talked about, 18 "nothing in this chapter shall authorize or 19 encourage," I -- I would suggest and, again, commend the Bullcreek decision, both at the 20 21 agency level and the D.C. Circuit, for addressing the -- the real role of that 2.2 23 language. You -- it wouldn't make sense, if it 24

25 was not already allowed, to say nothing in this

1 statute shall authorize or encourage. Right? I 2 mean, because if it -- if it's not allowed, it's 3 not allowed. And that's the position of Respondents in this case. 4 And -- and so I think read in context, 5 6 read -- read correctly within the Nuclear Waste 7 Policy Act and referring to the known, documented history of the Atomic Energy Act, 8 9 those provisions, again, support -- support --10 JUSTICE SOTOMAYOR: What's the source 11 I should go to to get the history you referred 12 to earlier about the various drafts that were being fought on -- about in subpart (b)? 13 14 MR. FAGG: We -- we cite a couple of 15 them in our reply brief. And, apologies, I 16 don't have them handy here right now. But I --17 I would refer to our reply brief, and I would particularly refer to the agency's decision 18 19 below, which we cite, again, in our reply brief, 20 that goes through exhaustively that legislative history. We cite it in a footnote in our reply 21 2.2 brief and -- and -- and refer to the specific 23 footnotes within that agency decision that refer -- refer back to the various debates. 24 There were draft bills. There was a lot. It was a 25

1 lot.

2 JUSTICE SOTOMAYOR: All right. Thank
3 you.

JUSTICE GORSUCH: Mr. Fagg, what do 4 you say to your friends on the other side's 5 6 argument that spent nuclear fuel is not simply 7 the combination of source, special nuclear, and by-product materials under the AEA, but it 8 requires other things, like it must have been 9 10 withdrawn from the nuclear reactor, it must have 11 undergone -- not have undergone reprocessing? 12 And that's reflected both in the statute -- in 13 the -- in the NWPA and also in the NRC's own 14 regulations.

15 MR. FAGG: I -- I think I would -- I 16 would say factually it's just not the case that 17 when you pull one of these spent nuclear fuel 18 assemblies, which are, you know, 15-foot metal 19 with all the uranium rods inside, that there's 20 anything at all in there other than special 21 nuclear material, source material, or by-product 2.2 material. There's metal sheaths and -- and 23 things that hold this all together. They've 24 become irradiated through the exposure and the 25 -- and the process. And -- and that falls

52

1 squarely within --2 JUSTICE GORSUCH: I -- I --3 MR. FAGG: -- the definition of by-product. 4 JUSTICE GORSUCH: I appreciate that. 5 6 But spent nuclear fuel is defined in the later 7 statute as being withdrawn from a reactor, which doesn't necessarily pertain to the three 8 constituent parts. And it must not have 9 10 undergone reprocessing. 11 Those are two conditions, at least, 12 that seem to me to differentiate the two. And I'm -- I'm struggling for an answer. 13 14 MR. FAGG: May I respond? 15 CHIEF JUSTICE ROBERTS: Certainly. 16 MR. FAGG: The -- the -- the answer to 17 that, I guess I would say is, well, which way 18 does that cut? So when Congress added the 19 definition of spent nuclear fuel in 1988 20 incorporating the five-year-old definition from 21 the Nuclear Waste Policy Act --2.2 JUSTICE GORSUCH: Right. MR. FAGG: -- again, decades and 23 decades and decades of practice have been 24 25 treating the three constituent elements as spent

53

1 nuclear fuel for purposes of prohibiting 2 possession and -- and -- and licensing. 3 So I -- I think, again, just factually and looking at the statutory definitions of the 4 three elements, a spent nuclear fuel assembly is 5 6 those three and nothing else. 7 JUSTICE GORSUCH: Thank you. CHIEF JUSTICE ROBERTS: Justice 8 9 Thomas? 10 Justice Alito? 11 JUSTICE ALITO: If Congress wanted to 12 authorize temporary off-site storage of spent 13 nuclear waste, why did it use the term "special 14 nuclear material"? 15 MR. FAGG: Well, special nuclear 16 material is one of the three elements --17 JUSTICE ALITO: Yeah, I understand that, but why choose just that? Why not refer 18 19 to the whole thing? MR. FAGG: Well, in 1954, there wasn't 20 21 yet a nuclear power plant, okay? When the 22 Atomic Energy Act was passed, the first online 23 commercial plant wasn't going to come on until about 1958 or so. 24 25 So I -- I think the -- the logical and

54

1 -- and probable reason why Congress did this is 2 -- is to reduce it to the -- the most 3 pernicious, if you will, elements of it, okay? So, if you -- if you can't do it with 4 special nuclear material, you can't do it with 5 6 spent nuclear fuel. 7 And so rather than -- you know, there's all kinds of additional things that may 8 9 or may not have these elements in them, but --10 but a -- an efficient and effective way to 11 safequard the public health and safety, to 12 promote, you know, all the things that the 13 Atomic Energy Act was -- was to promote, was to 14 do it the way it did it, which is reduce it to 15 the minimal elements, if you will, and -- and --16 and -- and invest the agency with the authority 17 under the provisions we've talked about to 18 regulate those. 19 JUSTICE ALITO: Do you -- would you agree that the State of Texas and those with an 20 21 interest in the Permian Basin have a 2.2 reasonable -- that it's reasonable for them to 23 be concerned about the storage in this location? 24 MR. FAGG: I have no reason to -- to 25 doubt that they care. I -- I -- I question why

55

they didn't intervene, like lots of states do 1 2 and like the regulations specifically allow. 3 I do -- I do -- I would also observe, and it's in the record, Texas originally 4 supported this project and then reversed itself 5 and opposed it. But I -- I don't doubt their --6 7 JUSTICE ALITO: Well, why was this location chosen? 8 MR. FAGG: It -- you know, there --9 there's -- there's reams of environmental 10 aspects of this. One of the things is looking 11 12 at, you know, the potential alternatives. 13 And -- and, you know, no -- nobody 14 close to a location chosen, including the 15 nuclear plants in Oregon and -- and -- and New 16 England, want it there or like it there. But, 17 you know, it was a place that was deemed 18 ultimately, after a lot of study, to have been 19 somewhere where it could be safe, safely stored. 20 JUSTICE ALITO: Do you have a prediction about when there may -- there might 21 22 be a permanent storage facility? 23 MR. FAGG: I -- I -- I've been in -in this stew for a lot of years, and there's a 24 25 lot of -- there are a lot of talks. There's a

1 lot of energy. But I think I'd be -- as I sit 2 here today, I think, you know, I -- I'd be 3 kidding myself and every -- and the Court if I said I -- I have a date. 4 But, you know, it -- it's still the 5 6 law of the land as -- as we sit here today. 7 JUSTICE ALITO: Well, if it is decided that the material can be stored offsite 8 9 temporarily, and "temporary" means more than 40 10 years, maybe more than 80 years, maybe it means 11 250 years, may it -- may it mean -- maybe it 12 means 500 years, what -- where is the incentive 13 to go forward to do what Congress wanted to have 14 done, which is to establish a permanent 15 facility? 16 MR. FAGG: Well, the -- the incentive 17 is what it is, whether the fuel is at the facility my client wants to build it or is 18 19 scattered across 40, you know, sites all across 20 the country. 21 So, you know, the incent -- the 2.2 incentives -- and, again, this is an industry 23 that is harmed by DOE's failure. Trying to 24 mitigate it through my client's actions and to 25 sort of punish the industry doubly for DOE's

57

1	failure and then not allow them to save tens of
2	millions of dollars to mitigate I would suggest
3	is is is not not furthering the
4	incentives that we want in terms of a of a
5	a critical part of a fifth of our nation's
6	power.
7	CHIEF JUSTICE ROBERTS: Justice
8	Sotomayor?
9	Justice Kagan?
10	Justice Gorsuch?
11	Justice Kavanaugh?
12	Justice Barrett?
13	Justice Jackson?
14	JUSTICE JACKSON: Can I just ask you
15	to speak quickly about the party issue? Does it
16	matter whether the intervention motion was
17	wrongly denied at this stage, at this point?
18	MR. FAGG: In in this case, I would
19	say no because that was all litigated at the
20	D.C. Circuit level. It wasn't timely challenged
21	in the Fifth Circuit level.
22	Again, I resist the notion that
23	there's no judicial review. If you're denied
24	and and to echo something Mr government
25	counsel said, the the there's all kinds of

58

1 ways you could say these rules are too 2 restrictive, these rules are -- are -- are -are too much. You -- you can challenge them in 3 a proceeding, you can get a waiver to challenge 4 them in a proceeding, or you can do, as in the 5 6 Bullcreek proceedings and as Mr. Stewart pointed 7 out, a petition for rulemaking. So that's kind of a long-winded way of 8 9 saying it's not before this Court in this case 10 about whether Fasken's attempt to become a party 11 was rightly or wrongly decided. The D.C. 12 Circuit said it was rightly decided, and here we 13 are. 14 JUSTICE JACKSON: Thank you. 15 CHIEF JUSTICE ROBERTS: Thank you, 16 counsel. 17 Mr. Frederick. 18 ORAL ARGUMENT OF DAVID C. FREDERICK 19 ON BEHALF OF RESPONDENT FASKEN LAND AND MINERALS, LTD. 20 21 MR. FREDERICK: Thank you, Mr. Chief Justice, and may it please the Court: 22 23 The 1982 Nuclear Waste Policy Act 24 created a comprehensive program that addressed where and how to store spent nuclear fuel. That 25

59

program does not include private offsite
 storage, which Congress specifically ruled out
 in Section 10155(h).

As the later-enacted, more specific
act, the Policy Act controls, and the NRC cannot
administratively override it.

7 The Atomic Energy Act itself authorizes only onsite storage, not offsite 8 storage. Sections 2133 and 2134 allow the 9 Commission to impose conditions, including 10 safety requirements, on utilization and 11 production facilities' licenses. Reactors are 12 utilization facilities. So licenses cover 13 14 onsite storage of spent fuel.

Because that material is so hot, it takes years to cool, and it can only be done safely onsite by removing the reactor core and moving it immediately into water. And that's why more than about 50 percent of all spent nuclear fuel is in cooling pools around the country.

22 Section 2136, which is not cited in 23 the briefs, says the NRC "may define the various 24 activities at each such facility." And we think 25 that clearly means regulating the safety

1 characteristics of dealing with spent nuclear 2 fuel when it comes immediately out of the 3 reactor core. The Commission's efforts to derive 4 authority from the AEA's material license 5 6 provisions don't work because storage is not 7 use. As the 1982 Policy Act defines it, storage 8 is "retention for subsequent use, processing, or 9 disposal." 10 I welcome the Court's questions. 11 JUSTICE THOMAS: Why are you a party 12 now? 13 MR. FREDERICK: We're a party now 14 because, under the plain language of the Atomic 15 Energy Act 2339(a)(1)(A), we are affected by the 16 proceeding, we shall be admitted as a party, and 17 we requested a hearing. Those are all 18 indisputed facts. 19 JUSTICE THOMAS: So what do we do with 20 the D.C. Circuit opinion? 21 MR. FREDERICK: I think what you say 2.2 is that there were two purposes that Fasken wanted to advance as a party. One was to be 23 24 able to intervene for the purposes of putting in 25 expert testimony and other facts. We were

denied that, Justice Thomas, and we're not

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61

2 appealing that now. 3 But the second purpose, which is satisfied by the plain language of the Atomic 4 Energy Act, is to be able to challenge that the 5 6 NRC approved this license without statutory 7 authority. And the NRC's intervention rules, 8 which are set forth at 2.309 and 2.335, make it 9 very clear that the NRC itself is going to serve 10 11 as a gatekeeper and does not allow parties to 12 come in and challenge their statutory authority 13 in the licensing proceeding itself. 14 JUSTICE JACKSON: But why isn't this a 15 collateral attack on the intervention decision? 16 I quess I don't understand. 17 MR. FREDERICK: Because, as I said, 18 Justice Jackson, the intervention which we sought was to be able to put in expert testimony 19 20 and to participate in an -- what was effectively 21 a proceeding to gather evidence. 2.2 Here, we're bringing a pure legal 23 facial challenge, and we --JUSTICE SOTOMAYOR: Mr. Frederick, it 24 25 makes no sense to me. What you're saying is,

1	instead of bringing that argument to the agency
2	first, you get, at any point in time that you
3	want to, the right to intervene and argue that
4	they don't have the power.
5	Don't you think the normal course
б	of of agency proceeding and we've already
7	said that even though agencies sometimes can't
8	decide constitutional questions, there's no
9	question that the agency could have listened to
10	the argument that it statutorily wasn't in power
11	to do so.
12	MR. FREDERICK: Except that their
13	rules say you can't. And so it would have been
14	utterly futile to go to the Commission and say:
15	You're acting ultra vires beyond your statutory
16	authority because the regulations of the NRC
17	say: We are not going to accept that at that
18	contention.
19	JUSTICE SOTOMAYOR: And then you could
20	have brought it to the Fifth Circuit.
21	MR. FREDERICK: That's what we did.
22	JUSTICE SOTOMAYOR: Well
23	MR. FREDERICK: We did argue
24	JUSTICE SOTOMAYOR: yeah, but you
25	didn't argue it at the time when you you

63

1 didn't bring it. You didn't argue it at the 2 time that you moved to intervene. 3 JUSTICE JACKSON: Did you --MR. FREDERICK: That's incorrect. 4 5 That is --6 JUSTICE JACKSON: Did you -- did you 7 say --MR. FREDERICK: I would like to set 8 the record straight. That's not correct. 9 10 JUSTICE JACKSON: Go ahead. Go ahead. 11 MR. FREDERICK: Yeah. We moved to 12 dismiss. The very first motion we filed said: This is not within your statutory authority. We 13 14 moved to intervene for multiple purposes. 15 JUSTICE SOTOMAYOR: And then you 16 didn't take it up to the Fifth Circuit. 17 MR. FREDERICK: We argued to the Fifth 18 Circuit that the --JUSTICE SOTOMAYOR: At the second --19 20 at the second --21 MR. FREDERICK: Because that was the 22 final order, Your Honor. We challenged the 23 final order as being outside the scope of the 24 authority --25 JUSTICE SOTOMAYOR: But you didn't do

1 it at the first motion to --MR. FREDERICK: No, because the first 2 3 motion only go -- went to could we intervene for purposes of bringing in evidence to the 4 5 Commission. 6 And -- and the point here is: Are you 7 going to allow agencies to manipulate their rules so that they can decide who gets to 8 9 challenge them? 10 JUSTICE SOTOMAYOR: I'm sorry --11 JUSTICE JACKSON: Quite frankly, I'm 12 worried about party manipulation. 13 I'm trying to understand what basis 14 you now have to say that we should be revisiting 15 the D.C. Circuit's determination that you cannot 16 intervene. 17 MR. FREDERICK: I'm not asking you to 18 do that. 19 JUSTICE JACKSON: Okay. So, if we 20 believe that the law is such that you had to be 21 a party, do you concede that you were not a 22 party at the lower court proceeding? 23 MR. FREDERICK: No. 24 JUSTICE JACKSON: You do not concede? 25 MR. FREDERICK: We do not concede

1 that. 2 JUSTICE JACKSON: Okay. 3 MR. FREDERICK: The Atomic --JUSTICE JACKSON: And the basis for 4 your part -- your party participation is what? 5 6 MR. FREDERICK: The Atomic Energy Act 7 says that if we are affected by the proceedings and we ask for a hearing, the NRC "shall admit" 8 9 us as a party. 10 JUSTICE KAGAN: Well, that -- that 11 says, Mr. Frederick, why you have a argument 12 that you should have been a party. And maybe 13 you do have a good argument that you should have 14 been a party. 15 But it -- it's not to say that you 16 were a party. In fact, you were not a party. 17 MR. FREDERICK: No, I think that we 18 were not a party in the sense that we were permitted to do the full evidentiary exposition 19 20 that we might have liked to have done. And I'm 21 not arguing that we should have -- that that 2.2 should be revisited. 23 But we are a party under the 24 meaning -- the plain language of the Atomic 25 Energy Act, which says we shall be a party and

66

1 we shall have an opportunity to say in a 2 judicial review setting --3 JUSTICE KAGAN: But then you're saying 4 that -- that -- I mean, you know, when I look at this, your only participation in the agency 5 6 proceeding was to be excluded from it. But then 7 you're saying: Well, if I was excluded wrongly, 8 I'm a party. 9 I mean, how could that be? I mean, 10 that's -- that's -- that's very much against the 11 way we think of this in a judicial context, 12 right, where we look at somebody and they've 13 tried to intervene, and maybe they've been 14 wronged, maybe the court was wrong to say that 15 they can't intervene, but we don't say: Oh, the 16 court was wrong. They really should have been 17 there, and so we're going to give them an 18 opportunity to come in at some later point in 19 time and attack the judgment.

It just doesn't work that way.
MR. FREDERICK: Well, I would say this
is not the normal agency proceeding. The
Pacific Legal Foundation says that they have
looked at the various agencies. This is the
only agency that serves as a gatekeeper to its

1 own proceedings. That's point one. 2 Point two, there are different scopes 3 of party participation. One is that you participate as a full party, bring depositions, 4 5 bring other evidence. That is not what we are 6 challenging here. 7 What we are saying is that the plain 8 language of the Act gives us the right to say 9 for the first time in court, because the agency won't allow us to say it in the proceedings, you 10 11 don't have the statutory authority for what you 12 did. 13 JUSTICE JACKSON: But, Mr. Frederick, 14 if we disagree with you, if we think that as a 15 matter of law, what counts as being a party is 16 having the level of participation that you 17 called Category 1, do you concede that you did 18 not have that in this case? 19 MR. FREDERICK: Well, we were foreclosed from having it. 20 21 JUSTICE JACKSON: All right. So, if 2.2 we think that in order to be a party for the purpose of the Hobbs Act, you have to have that 23 status, what difference does it make what 24 25 arguments you're making or whatever? You didn't

1 have that status. 2 MR. FREDERICK: Because the Hobbs Act 3 itself incorporates the Atomic Energy 2339 provision that I quoted to you about being a 4 person affected by the license, requesting a 5 6 hearing, that we shall be admitted. 7 So the Hobbs Act party --8 JUSTICE JACKSON: Did you make that 9 argument before the court in your 10 intervention -- wasn't that the basis by which 11 you went to the court and said: I need to 12 intervene, look at the Hobbs Act provision that 13 says these things? 14 MR. FREDERICK: No. What we did in 15 the D.C. Circuit was we talked -- and -- and the 16 D.C. Circuit, by the way --17 JUSTICE JACKSON: I'm sorry, that's 18 not the statutory basis for your claiming the right to intervene? 19 20 MR. FREDERICK: It is. It is. 21 JUSTICE JACKSON: It was, right? So 2.2 you said to the court: Look at the Hobbs Act. Here are these criteria we need to be able to 23 intervene. And the court disagreed. 24 25 MR. FREDERICK: I think you're

69

1 misreading what happened in the D.C. Circuit, 2 Your Honor, with respect. We didn't have an 3 opportunity to challenge the final order in the D.C. Circuit. That could only be done after the 4 final order was made. 5 6 So what we did challenge was the 7 limited application of the Commission's intervention rules to say they had not been 8 9 applied correctly. 10 JUSTICE SOTOMAYOR: Mr. Frederick --11 MR. FREDERICK: That's a much more 12 limited question. JUSTICE SOTOMAYOR: -- it makes little 13 14 sense. The rule at issue that you wanted to 15 intervene in was a rule that was citing a -- a 16 storage area that you now say they didn't have 17 the authority to do. 18 So, if you were an aggrieved person 19 under the Act, you could have gone to the D.C. Circuit on your first round of appeal and said 20 21 just that. I can intervene because I have an 2.2 argument that they've exceeded their statutory 23 authority. MR. FREDERICK: And the D.C. Circuit 24 25 20 years before had rejected that argument.

1 There was no circuit split. 2 JUSTICE SOTOMAYOR: So then you could 3 have sought cert here. MR. FREDERICK: And there was no 4 circuit split, Your Honor. 5 JUSTICE SOTOMAYOR: You didn't have 6 7 to, but you -- but the Hobbs Act requires you to be a party aggrieved, not a person aggrieved. 8 9 MR. FREDERICK: Let me just say, 10 Justice Sotomayor, if the Court adopts that line 11 of reasoning, the NRC is effectively immune from 12 judicial review because they set the rules for determining what can be a "admissible 13 14 contention" which has to meet -- surpass the 15 summary judgment standard. 16 JUSTICE KAGAN: Well, I take that 17 point, Mr. Frederick, and it might very well be 18 that this D.C. Circuit decision is wrong. Ι 19 mean, it -- it -- it looks to me as though it 20 goes beyond the statute. So I -- I'm pretty 21 sympathetic to that view. 2.2 And yet I'm still sort of hung up on 23 the idea that in this proceeding, at this moment 24 in time, that's not before us. Only whether you 25 were a party is before us. And any way I sort

of think about it, you weren't a party. MR. FREDERICK: Well, I would ask you to reread the language of 2339 of the Atomic Energy Act, which says we are a party. And -and if you're going to apply normal textual canons of strict construction, you would say we are a party.

JUSTICE KAGAN: I think that language 8 9 says you should have been included as a party. 10 I think that language gives you a good reason 11 for saying that -- that the regulation is invalid and a good reason for saying that the 12 D.C. Circuit is wrong. But I don't think that 13 14 language gives you a good reason for sort of 15 just, you know, making X not X, that you weren't 16 there.

17 MR. FREDERICK: Your Honor, I don't 18 think that the Fifth Circuit's ruling that we 19 were a party that should be allowed to challenge 20 the statutory authority of the agency would deny 21 us party status now.

And I -- I do want to emphasize the time point. As Justice Alito pointed out, this license can have this storage for up to 80 years. And under the reasoning of that line, no

one would ever be able to say, well, you know
 that -- that nuclear stuff in the west Texas
 area was done illegally because no one had the
 appropriate party status because the
 intervention rules of the NRC said you don't get
 to intervene.

7 That would be a very crazy way to think about limitations on agency authority that 8 exceed what the statute allows. And I think 9 10 that if you consider the other side's argument, 11 onsite storage has to be done for safety 12 reasons. The -- the nuclear material that is burned, it is very, very hot. It has to stay 13 14 onsite.

And that's why the facilities license provisions are the easiest way to understand the practical reality that, for 70 years, this material has stayed onsite. When Congress considered in the Policy Act what to do with it, it said, you know --

JUSTICE JACKSON: Mr. Frederick, what do we do about the fact --MR. FREDERICK: -- keep it onsite --JUSTICE JACKSON: What do -- what do we -- you've said over and over that it's hot

73

1 and it's hard and all of that. But I would 2 assume that in 70 years, technology changes, 3 that, you know, things happen and people figure out ways to store and move. What -- what --4 what do we do with that? 5 MR. FREDERICK: Well, the technology 6 7 hasn't speeded up the cooling process of material that is radioactive. 8 9 JUSTICE JACKSON: No, I understand, but we have -- we have ISP here saying that they 10 11 can receive this material. 12 MR. FREDERICK: This -- this material, Justice Jackson, is so hot when it comes out of 13 14 the core, no human being can get anywhere close 15 to it, which is why it -- the design of the 16 facility that is done by the Commission is to 17 have the spent rods taken down into pools of 18 water. 19 JUSTICE JACKSON: No, I understand. Ι 20 guess I just don't -- I -- I'm not fully understanding why it matters that the material 21 2.2 is so hot and that it's difficult to do in a situation like this in which the Commission has 23 24 apparently licensed -- that's what you're 25 challenging -- this transfer. So someone thinks

74

1 it can be done because they've given a license 2 to do it. MR. FREDERICK: And it hadn't been 3 done before this situation. No facility's ever 4 been constructed. The Morris facility that Mr. 5 Stewart adverts to --6 7 JUSTICE JACKSON: But why doesn't that fit into the statutory authorization for the 8 Commission to make the determination about 9 10 whether or not this can be done consistent with safety, et cetera, et cetera? 11 12 MR. FREDERICK: Because the Policy Act 13 says in five provisions the NRC shall maximize 14 onsite storage. It shall increase technology 15 for onsite storage. It shall, if it has to go 16 offsite, go to a federal facility. 17 JUSTICE JACKSON: And does it say it 18 cannot --19 MR. FREDERICK: Yes. 101 --20 JUSTICE JACKSON: -- authorize -- it 21 cannot authorize offsite storage? 2.2 MR. FREDERICK: 10155(h) says it shall 23 not do private offsite storage. 24 JUSTICE JACKSON: 101 --25 MR. FREDERICK: 55 --

1 JUSTICE JACKSON: -- 55 --2 MR. FREDERICK: -- (h). 3 JUSTICE JACKSON: -- (h). JUSTICE KAVANAUGH: What --4 MR. FREDERICK: Yes. And -- and I 5 6 think, Justice Jackson, what -- what's very 7 clear from these provisions is that the NRC is 8 seeking to use a rulemaking to override a 9 statute. 10 CHIEF JUSTICE ROBERTS: Thank you, 11 counsel. 12 Justice Thomas, anything further? 13 Justice Alito? 14 JUSTICE SOTOMAYOR: Perhaps, in reply, I'll get an answer to this or you can. 15 16 I had understood that the pooling --17 the cooling pools, that many of them are 18 offsite? 19 MR. FREDERICK: No, that's not 20 correct. 21 JUSTICE SOTOMAYOR: All right. Then I 2.2 misunderstood. MR. FREDERICK: And -- and I --23 24 and I can point you to the Blue --25 JUSTICE SOTOMAYOR: I thought Mr. Fagg

1 had said that, but --2 MR. FREDERICK: Right. There was a 3 Blue Ribbon Commission report that the President's Blue Ribbon Commission put together 4 that goes through all of this material. It goes 5 6 through the nuclear process, the history at the 7 storage site. It was published, I think, in 2012 or 2013. It answers many of the questions 8 9 about the practicalities of the nuclear process. 10 JUSTICE SOTOMAYOR: Thank you. 11 CHIEF JUSTICE ROBERTS: Justice Kagan? 12 Justice Gorsuch? JUSTICE GORSUCH: A couple quick 13 14 questions, Mr. Frederick. 15 First, with respect to your ultra 16 vires argument, it sure sounds to me a lot like 17 an APA challenge beyond statutory authority that 18 would normally be brought in district court in 19 the first instance. Help me with that. MR. FREDERICK: Well, what I would say 20 21 is that we have not found a case on all fours 2.2 with the one that we have where the ultra vires 23 argument was brought directly to the court of 24 appeals. 25 What I would say is that the

77

1 jurisdiction, the exclusive jurisdiction provision of the Hobbs Act, 2342(4) --2 JUSTICE GORSUCH: I understand. 3 Τf you get in the Hobbs Act, you're in the Hobbs 4 Act. But assume we're not in the Hobbs Act. 5 MR. FREDERICK: Right. But what I'm 6 7 saying is that 2342 says all final orders, the exclusive jurisdiction --8 9 JUSTICE GORSUCH: I see. 10 MR. FREDERICK: -- shall be in the 11 courts of appeals. And so our reading of that 12 is that that answers the question of where you 13 can bring the argument. It doesn't say --14 JUSTICE GORSUCH: Got you. 15 MR. FREDERICK: -- how or what the 16 argument is. 17 JUSTICE GORSUCH: I follow you. 18 And then, with respect to the struggle 19 over the D.C. Circuit order, I didn't see 20 anything in the opinion addressing the statutory 21 question, so -- and I didn't see anybody below 22 arguing that that -- that -- normally, for issue 23 preclusion to have an effect, you have to have a 24 ruling on -- on the question at hand. 25 MR. FREDERICK: Correct.

1 JUSTICE GORSUCH: And somebody has the 2 burden to show that it applies. And I didn't 3 see either ruling on this question in the D.C. 4 Circuit. MR. FREDERICK: That's correct. And 5 6 that's --7 JUSTICE GORSUCH: And I didn't see the 8 government suggest or ISP suggesting that you 9 were precluded as a matter of collateral 10 estoppel. 11 MR. FREDERICK: That's correct. 12 They've not made that oral waiver argument. And 13 that's why it's important to understand the 14 difference between an intervenor party and just 15 a party to be able to say under the plain 16 language of the Act you violated the Act. 17 You've gone beyond the Act in approving this 18 license. 19 JUSTICE GORSUCH: All right. Thank 20 you. 21 CHIEF JUSTICE ROBERTS: Justice 22 Kavanauqh? 23 JUSTICE KAVANAUGH: One of the arguments on the other side is the Commission's 24 25 interpreted the statutory scheme the same way

1 for, you know, five decades and that that 2 consistent, longstanding interpretation has 3 itself significant weight as we interpret the 4 statute. Do you want to respond that? 5 6 MR. FREDERICK: Yes. Thank you for 7 asking that question, Justice Kavanaugh. If you look at the Federal Register 8 for the 1980 rules, there are two paragraphs on 9 10 the question of does the agency have the 11 authority to do offsite storage. One paragraph 12 says many commenters think it's a bad idea to do 13 it anywhere but onsite. The second paragraph 14 says some commentators think that it's okay to 15 do it offsite. 16 So we think it should be -- we should 17 have the authority to choose. They don't cite any provisions of the Atomic Energy Act. 18 They 19 don't ground that policy in any particular 20 statutory language. 21 It was the Commission's decision to do 2.2 this simply on the basis of what they thought 23 was a good idea. And then two years later, when 24 Congress comprehensively addressed the subject 25 in the Policy Act, the agency should have gone

1 back and redone its rules. It didn't do that. 2 And that's why Mr. Stewart has to make a rather convoluted statutory argument deriving 3 from these provisions in the Atomic Energy Act 4 that don't speak to the question. 5 JUSTICE KAVANAUGH: Well, is it really 6 7 that convoluted? It's basically that the Act was understood to authorize this, that the 8 9 Commission recognized that authority, that 10 Congress in 1982 had a chance to, was well aware 11 of this issue and did not expressly preclude 12 this, and then that's been the way it's been 13 for, you know, 50 years. 14 MR. FREDERICK: Well, it is not how it 15 has been. The only example they have is a 16 former reprocessing facility. That is a 17 production facility as defined in the Atomic 18 Energy Act. That's the Morris plant. 19 When reprocessing failed, they had to 20 do something with the spent nuclear fuel that 21 had been sent to the Morris plant. And so what 2.2 they did was kind of a jerry-rigged approach and said: It's here, we don't want to move it, 23 let's just keep it here, and we'll store it 24 25 onsite.

1	And that has become the exemplar of
2	their longstanding interpretation for offsite
3	storage. It it is really a stretch and makes
4	no relation to the statutory test at all.
5	JUSTICE KAVANAUGH: One of the reasons
6	longstanding interpretations matter, of course,
7	is that private parties rely on those, and the
8	amicus brief, for example, of the Nuclear Energy
9	Institute makes makes clear that a lot of
10	investment has happened based on what appeared
11	to be a settled understanding of the authority.
12	Do you want to respond to that?
13	MR. FREDERICK: Yeah. There
14	there's been no actual construction of an
15	offsite facility ever. There have only been
16	three approvals. One, the Bullcreek example was
17	never built. So that license was approved, no
18	facility. The only two other ones are before
19	this Court. It's Holtec in New Mexico, ISP in
20	Texas.
21	JUSTICE KAVANAUGH: And then last
22	question. Petitioners' counsel said, if your
23	statutory argument is correct, they never needed
24	a license to begin with.
25	You want to respond to that?

82

1	MR. FREDERICK: Yeah. What I started
2	with on the material on the facilities
3	license is that in order to ensure the safe
4	operation of the facility under 2133, 2134, and
5	2136, the Commission has always asserted the
6	authority to make sure safe operations occur
7	onsite, but that's part of the facilities
8	license, which means you don't move it off the
9	facility, which is the whole argument that
10	they're trying to make here by saying it's
11	lawful to take what is a materials license
12	and and contort what authority that they were
13	really asserting under the facilities license
14	provision.
15	JUSTICE KAVANAUGH: Thank you.
16	CHIEF JUSTICE ROBERTS: Justice
17	Barrett?
18	Justice Jackson?
19	JUSTICE JACKSON: Do you concede that
20	the "party aggrieved" language is
21	jurisdictional?
22	MR. FREDERICK: I think that if it's
23	jurisdictional, it can't be waived. And so
24	JUSTICE JACKSON: No, I understand.
25	I'm just asking you, is it a jurisdictional

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1 provision?
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2	MR. FREDERICK: I'm not sure. I think
3	courts of appeals have treated the 60-day
4	provision as jurisdictional for appeal. I'm not
5	sure that they've treated who constitutes a
6	party as being jurisdictional, but what I would
7	say to that, Justice Jackson, is that in all of
8	those Hobbs Act conditions, you should look at
9	the organic statute for the Commission first
10	because the FCC has two different appellate
11	mechanisms. One is a Hobbs Act provision and
12	the other is not a Hobbs Act provision.
13	JUSTICE JACKSON: All right. Well,
14	I I'm just trying to understand the argument
15	that I think you're now making, which is that
16	there's a difference between being an intervenor
17	party for the purpose of any party aggrieved and
18	being a party who wants to make the particular
19	claim of ultra vires.
20	MR. FREDERICK: Well
21	JUSTICE JACKSON: You say you're the
22	latter, but you admit you're not the former.
23	MR. FREDERICK: Well, what I'm I
24	think we were the former. I think the
25	language

1 JUSTICE JACKSON: Well, you didn't --2 you didn't get intervenor -- intervenor status. 3 MR. FREDERICK: I'm not challenging that, Justice Jackson, but I'm not saying we're 4 not aggrieved. We clearly are aggrieved. And 5 6 we are aggrieved under any --7 JUSTICE JACKSON: I didn't ask you 8 whether you were aggrieved. I'm trying to 9 figure out whether you're a party. 10 MR. FREDERICK: Yes. 11 JUSTICE JACKSON: And -- and -- and --12 and the distinction that you've now made is the difference between parties who were intervenors 13 14 and parties who would like to claim ultra vires. 15 I don't see any statutory basis for that 16 distinction, but I'm just trying to even 17 understand where it comes from. 18 MR. FREDERICK: What I'm saying, 19 Justice Jackson, is there are two routes for us to assert our party status, okay? One is under 20 the Atomic Energy Act, which we clearly satisfy. 21 2.2 The other is under the Commission's rules for 23 intervention, which the Commission ruled against 24 us on.

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I acknowledge we lost the second one

1 and it's not before this Court. But that 2 doesn't mean we don't satisfy the statutory 3 requirements that would be --JUSTICE JACKSON: Thank you. I 4 5 understand your argument. 6 CHIEF JUSTICE ROBERTS: Thank you, 7 counsel. Mr. Nielson. 8 ORAL ARGUMENT OF AARON LLOYD NIELSON 9 10 ON BEHALF OF RESPONDENTS TEXAS, ET AL. 11 MR. NIELSON: Mr. Chief Justice, and 12 may it please the Court: 13 I hope to make several additional 14 points, but I want to start with three quick 15 ones. 16 First, Justice Kavanaugh was right in 17 PDR Network that the Hobbs Act covers a wide variety of orders. Under Clark -- Clark 18 19 v. Martinez, where one provision has multiple 20 applications, the Court applies a lowest common 21 denominator interpretation to all of them. Even 22 in the D.C. Circuit, if you file comments, 23 that's enough to challenge a rule and a 24 declaratory ruling in adjudication. 25 Second, Congress added to the A -- to

86

1 the AEA the NWPA's definition of "spent nuclear 2 fuel." The Court needs to interpret today's AEA 3 and address Petitioners' obvious superfluity. And, finally, you know, if anyone 4 thinks this is temporary, I have a bridge to 5 6 sell you. 7 There's no way that we're going to move 140,000 tons of nuclear waste in 60 years. 8 9 What the Commission has just done is put a 10 permanent terrorist bulls-eye on the most 11 productive oil field in America. 12 I welcome the Court's questions. JUSTICE THOMAS: You did not 13 14 intervene, so why are you a party now? 15 MR. NIELSON: Correct, Your Honor. 16 So, I mean, listen, effectively, we did 17 intervene, but I would say this goes back to 18 understanding of the Hobbs Act. 19 The Hobbs Act does not just apply to 20 this agency. It applies to a whole bunch of agencies and a whole bunch of different types of 21 2.2 orders. So, if you file a comment in an FCC 23 rulemaking, you're good. Or, even at the D.C. 24 Circuit, if you file a declaratory ruling, which is a form of adjudication, you discussed this in 25

87

1 McKesson, that's also -- it's enough to file a 2 comment. So that's what Texas did here. And T 3 4 think it's important to understand kind of what 5 happened. 6 JUSTICE KAGAN: But, General --MR. NIELSON: Yes. 7 JUSTICE KAGAN: -- I mean, this was an 8 9 adjudicatory proceeding. So the way people 10 understand who parties are in an adjudicative 11 proceeding, it's -- it's not enough to send in a 12 letter. 13 MR. NIELSON: Well, a couple 14 responses. One, so is a declaratory ruling. 15 And in the D.C. Circuit, declaratory rulings, 16 it's enough to send a comment. So their 17 distinction doesn't work on its own terms. And 18 I would point the Court there to Petition Appendix 18a. That is where the Fifth Circuit 19 discusses the D.C. Circuit precedent on that 20 21 point. 2.2 But, second, this is a very strange 23 type of adjudication. By statute, Congress has 24 said that if they're going to do this type of 25 license, they need to open up to NEPA, which is

1 a -- a notice-and-comment process, in the middle 2 of the adjudication. This is not a normal 3 adjudication. JUSTICE KAGAN: Do you think it's 4 enough for anybody to send in a letter, or does 5 6 it have to be the governor of a state? 7 MR. NIELSON: I think it certainly helps that it was a governor of a state. 8 JUSTICE KAGAN: Well, I don't see 9 really how it does help under the statute. I 10 11 mean, it's nice that he was the governor of the 12 state, but I don't see how you can make a legal 13 argument on that basis. If somebody is a party 14 by virtue of sending in a letter under this 15 statutory scheme, anybody is a party by virtue 16 of sending in a letter. 17 MR. NIELSON: So, again, we think that 18 if you file a comment -- and it wasn't just a 19 letter; it's comments -- as part of the 20 notice-and-comment process, but if they solicit 21 you, which is what happened here -- I'd point 2.2 the Court to the record on this one. This was 23 JA 292. They asked us, they solicited our 24 comments, and then we responded to that. 25 Even under their -- their best case,

89

1 this Water Transport case from the D.C. Circuit that they rely on, if the agency solicits your 2 3 participation and you respond to that, that counts in the D.C. Circuit, their case. 4 That's -- and, again, that's their best case. 5 6 So this isn't an ordinary enforcement 7 action or something like that. Even then, I don't think their argument holds up, but --8 9 JUSTICE KAGAN: I mean, the question, 10 General, is what does "party" mean? And it 11 seems to me "party" means somebody who has 12 participated in an agency proceeding with the degree of formality required for that 13 14 proceeding. 15 So, if you're in a rulemaking, being a 16 party may very well mean I submitted a comment 17 in a notice-and-comment process. But-- but that's not the degree of formality that's 18 19 associated with a proceeding of this kind. And, you know, you didn't intervene. 20 You didn't even try to intervene, unlike 21 2.2 Mr. Frederick's client. I -- I don't see how we 23 can say that you were a party. MR. NIELSON: Well, I mean, the word 24 25 "party," it's the same word in the Hobbs Act

1 that applies to all of these things. So we have 2 to say that the word "party" is a chameleon. 3 JUSTICE KAGAN: It's not a chameleon. It's like different proceedings might understand 4 who parties are differently. I mean, that's --5 6 that's -- that's not anything weird. 7 There are three separate processes, 8 and the way you participate in those three separate processes are -- are different because 9 10 different rules apply, because the processes are 11 understood to -- parties in -- in adjudications 12 are different from parties in rulemakings. 13 MR. NIELSON: Okay. So I quess a 14 couple of responses. One, I don't agree under 15 the Hobbs Act that you're going to 16 distinguish -- it's -- it's one word that has to 17 apply to both. But say I'm wrong about that. 18 JUSTICE KAGAN: It -- it -- it is one 19 word. 20 MR. NIELSON: Yeah. 21 JUSTICE KAGAN: It means have you 22 participated with the degree of formality that's 23 necessary for the kind of proceeding it is? And 24 if you are, you're a party. It's one

90

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definition.

1 MR. NIELSON: Okay. So say I'm wrong 2 about it. So I'm agreeing with you for -- for 3 purposes of this answer. I would still say what we're talking about here is a lot closer to a 4 hybrid between a rulemaking and an adjudication 5 6 than a pure adjudication. This is a licensing 7 which Congress said by statute they have to take our comments. And then we filed those comments 8 9 in response.

10 And the argument that we are making 11 today was presented to the agency by Sierra 12 Club, and the agency said no, we're not going to 13 even consider that. We're not going to take 14 that contention.

15 So we're in the position here where 16 they've asked for our comments, we've responded 17 to their comments the arguments we want to make, 18 they've already said they're not going to hear. 19 It seems very strange to say that the State of Texas is not a party. We're obviously 20 21 aggrieved. And, by their own regulations, they 2.2 asked for our participation and we participated. 23 JUSTICE SOTOMAYOR: Are you defending the Fifth Circuit's ultra vires holding? You're 24 25 saying, even if you weren't a party aggrieved,

1 we could hear your appeal under the theory of 2 ultra vires? I didn't see you or Fasken spending a whole lot of ink on that in your 3 4 briefs. MR. NIELSON: Well, I mean, I think 5 6 the more straightforward point is that we are a 7 party under the Hobbs Act. Or, if not, if Fasken is truly a party, and then this is all 8 academic for us. 9 10 JUSTICE SOTOMAYOR: Okay. 11 MR. NIELSON: But --12 JUSTICE SOTOMAYOR: So you're not. 13 Thank you. 14 MR. NIELSON: But, no, I certainly am. 15 I certainly am, and here's why. If I am wrong 16 about the Hobbs Act, then we really are in a 17 situation where we don't have meaningful 18 judicial review. If they can really cut us out by saying we're not going to take your 19 20 contentions because we think you're wrong on the 21 merits and that's somehow okay, then we are in 2.2 the world of ultra vires review. 23 I don't think we're there. That's why 24 our front-line answer is just look to the Hobbs Act; we're a party there. 25

1 JUSTICE JACKSON: Could you have moved 2 to intervene? Is there -- was there something 3 precluding the State of Texas from moving to 4 intervene in this case? MR. NIELSON: Well, other than, Your 5 6 Honor, they asked for our participation, and --7 JUSTICE JACKSON: No, I understand. I understand what you actually did. 8 9 MR. NIELSON: Yeah. 10 JUSTICE JACKSON: I'm just saying, you 11 say there's no meaningful judicial review. And 12 I'm just wondering, if there is an avenue for 13 you to become a party with the requisite degree 14 of formality, say, by requesting intervention, 15 was there a reason why you couldn't have done 16 that? 17 MR. NIELSON: Yeah. So I would go 18 back to what Mr. Stewart said earlier, which is, 19 even for states, you have to have an admissible 20 contention. And the argument that we were 21 making was the exact same argument Sierra Club 2.2 made, and they said that's not an admissible 23 contention. I would point the Court to 10 C.F.R. 24 25 2.335, which is their procedure if they wanted

94

1 to screen out these types of things, which essentially says, if you think you're operating 2 3 outside of -- if we were operating outside of the law, well, then you have to file a petition 4 for rulemaking. That is not meaningful judicial 5 6 review. That is not how judicial review works. 7 JUSTICE GORSUCH: General, I take your point that if this were a rulemaking, you'd be a 8 9 party. I get that. I also understand the 10 instinct that adjudications are sometimes 11 different, though I know this Court has held 12 that objecting shareholders in a class action 13 suit are parties for purposes of appeal even 14 though they haven't intervened. 15 Where should we look to understand 16 what the Hobbs Act meant by the term "party?" 17 MR. NIELSON: Sure. I mean, one, I 18 would say let's look at the dictionary. Both parties point the Court to the 1951 Black's Law 19 20 Dictionary. Look at the big text, not the 21 little text underneath that they rely on. Look 2.2 at the big front-line text that he uses in the 23 1951 Black's Law Dictionary. I would say there. But I'd also say whatever you say "party" means 24 for Hobbs Act purposes, it has to be big enough 25

95

1 to include rulemaking because it's the very same 2 word. 3 JUSTICE GORSUCH: Yeah, we've never said that you have to intervene to be a party. 4 And that was not the case at common law. 5 6 MR. NIELSON: Correct, Your Honor. 7 And I would also -- again, this is back on the Tenth Circuit days, you wrote a decision in In 8 9 re Woolsey --10 JUSTICE GORSUCH: Oh, gosh. 11 MR. NIELSON: -- where the court --12 where -- I thought it was a wonderful opinion. 13 (Laughter.) 14 MR. NIELSON: And the court 15 explained --16 JUSTICE GORSUCH: I wish I could 17 remember it. 18 (Laughter.) 19 MR. NIELSON: And the court explained 20 the Clark v. Martinez point, which it says is tied to the rule of law itself. You can't have 21 2.2 a word that means different things in different 23 applications. If it's the same word, it means 24 the same thing. You have to have the lowest 25 common denominator to capture them all.

But, if I -- if I may, I'd like to
 turn to the merits, though I'm happy to keep
 discussing jurisdiction.

I think that, for me, the most kind of straightforward way to understand the problem with their argument is Congress amended this statute. Congress amended this statute and took the definition of "spent nuclear fuel" from the Nuclear Waste Policy Act and placed it in the AEA.

11 So there are provisions of the AEA 12 that make no sense at all under their interpretation. I'd point the Court to 42 13 U.S.C. 2210(i), which lists all of these terms 14 15 in the same sentence. So, if spent nuclear fuel 16 is just the same thing as the other three 17 constituent parts, that sentence is -- it's --18 is nonsense. That cannot possibly be the 19 correct reading of the statute.

I would also point the Court if I may to where did Congress say they didn't want this? One is 10155(h), which we've been talking about, which is inexplicable under their theory, but also 10131(a)(3), where Congress said in its findings -- paraphrasing here -- we are unhappy

with what has happened before. You don't see 1 2 that very often from Congress, but Congress said 3 we are displeased with what has happened before. And then you go on to 10155(h), which says keep 4 5 it onsite. 6 JUSTICE JACKSON: Mr. Nielson, if 7 spent nuclear fuel is not the same as the three constituent parts, why did ISP need a license at 8 all? 9 10 MR. NIELSON: Yeah. So I think this 11 is where -- a couple answers. One, I agree 12 with -- with Mr. Frederick that the answer is the licensing of the facility. You have to have 13 14 a safe facility, so you have to have some way to 15 keep the very, very, very hot nuclear waste 16 safe. 17 But the other is -- is physics. Ιf 18 you have a license to take some sort of product 19 or -- or material onto a facility and you have a 20 license to use that facility, but you have no 21 license to take it off the facility, you know, per Newton, it stays where it is. 22 23 JUSTICE JACKSON: No, I'm just asking 24 about --25 MR. NIELSON: And that --

1 JUSTICE JACKSON: -- I'm asking about 2 the statutory possession requirement. I thought 3 you had to have a license to possess this kind of material and its -- the constituent parts, 4 and everybody has believed that that equals 5 6 spent nuclear fuel. 7 MR. NIELSON: Yeah. JUSTICE JACKSON: If you're saying 8 9 that spent nuclear fuel is something different, then isn't it outside of all of this licensing? 10 11 MR. NIELSON: No, Your Honor. And I'd 12 point the Court back to Pacific Gas and also the 13 first line of ISP's brief and the first line of 14 Paul Clement's brief. 15 The -- the way you start with nuclear power, going back to 1946, is right after 16 17 Hiroshima. There is a federal monopoly on all 18 of this. No private ownership of any of this 19 stuff. Congress then, in 1954, opens it up 20 21 for the first time and says: We're going to 2.2 allow some private ownership or possession of 23 these things. And said: These are the three 24 types of things that we are going to allow. 25 They did not allow spent nuclear fuel.

1 So if you start with the baseline of 2 there's a federal monopoly and no one can do any 3 of this, and then you have three exceptions, you can't have a fourth exception. 4 JUSTICE KAVANAUGH: What about the 5 idea that the 1954 Act arguably authorizes this; 6 7 when you get down to 1980, the Commission says it does; 1982, Congress is very aware of this 8 9 issue, and certainly aware of the Commission --10 where the Commission is on this, and yet does 11 not preclude it, and that's remained the settled 12 understanding ever since? 13 The basic same argument I asked 14 Mr. Frederick. 15 MR. NIELSON: Yeah. 16 JUSTICE KAVANAUGH: But that seems 17 kind of unusual step by Congress. They -- they might not have had the votes to prohibit it in 18 19 1982, might be one -- one interpretation --20 big-picture interpretation of what happened 21 there. 2.2 Do you just want to respond to all 23 that? 24 MR. NIELSON: Sure. So, one, again, I 25 would point the Court to 10155(h) and

100

1 10131(a)(3). 2 JUSTICE KAVANAUGH: Yeah. And if 3 10155(h) does not prohibit. MR. NIELSON: Okay. But it is 4 inexplicable under their view. 5 6 But I would also point the Court to 7 the congressional brief, where they explain the 8 early statements of the agency after the passage of the Policy Act, which I don't think are 9 consistent with what we're hearing now. 10 11 There is also the time. What strikes 12 me is: If we've always had this power, then why didn't -- why wasn't it until after the agency 13 14 gave up on Yucca Mountain that suddenly you 15 started getting these applications? 16 It's very bizarre, it seems to me, 17 that if there's always been this power and 18 everybody understood this power exists, it 19 wasn't until the agency said, oh, actually, 20 we're not going to do Yucca Mountain, that 21 suddenly they said, oh, let's go back to this 2.2 power that's already existed. JUSTICE SOTOMAYOR: Wait a minute. 23 24 Because it was told it had to try everything 25 else.

1 MR. NIELSON: Well --2 JUSTICE SOTOMAYOR: It was told, in 3 the 1982 Act, that it wanted to encourage on-site -- the federal government to take it, et 4 cetera. So it couldn't run to do something that 5 6 Congress said: Try everything else. 7 MR. NIELSON: Yeah. And the fallback --8 9 JUSTICE SOTOMAYOR: We've run out of 10 everything else. MR. NIELSON: Well, I disagree with 11 12 that, Your Honor. But the fallback that Congress said was federal facilities. Federal 13 14 facilities. 15 And this goes back to the point that I 16 think Justice Alito was making. What are the 17 incentives for Congress here? 18 If New Mexico and Texas are left holding the bag, every other state will be 19 20 happy. They will be pleased because this waste 21 will stay in Texas forever. 2.2 The only way we're going to get a 23 national solution to this problem is by Congress 24 to get everybody there and figure it out. They 25 tried to do that with Yucca Mountain, and it

1 didn't work. 2 But the answer isn't: Well, I guess 3 we're just going to put it on Texas now. No, 4 Congress needs to go back and fix the law. If 5 the law is broken, it's on Congress, Congress to fix it. It's not this Court's job, and it's not 6 7 the agency's job. 8 CHIEF JUSTICE ROBERTS: Thank you, 9 counsel. 10 MR. NIELSON: My time's expired. 11 CHIEF JUSTICE ROBERTS: Justice 12 Thomas? 13 Justice Alito? 14 Justice Sotomayor? 15 JUSTICE SOTOMAYOR: When are we in the 16 business of giving Congress incentives? 17 MR. NIELSON: No, Congress gave the 18 agency incentives. Congress said: Do this, 19 Agency. 20 JUSTICE SOTOMAYOR: All right. Thank 21 you, counsel. 2.2 CHIEF JUSTICE ROBERTS: Justice Kagan? 23 Justice Gorsuch? 24 JUSTICE KAVANAUGH: In your opening 25 you used the phrase "terrorist bull's-eye,"

1 which is obviously distinct language. 2 We've known of that at least since 3 September 11th, 2001. Yet Texas supported this project, as I understand it -- correct me if I'm 4 5 wrong -- for several years. Can you -- in the mid-2010s. 6 7 MR. NIELSON: Yeah -- yeah -- yeah --8 JUSTICE KAVANAUGH: Can you explain 9 that, if it was a terrorist bull's-eye? 10 MR. NIELSON: Yeah, I would like to 11 correct it. 12 So I would urge the Court to go back 13 and look at JA 1 through 3, the very first pages 14 of the JA. This is Governor Perry's letter. I 15 don't read that letter as saying, oh, yeah, this 16 is a great idea. 17 He is saying: The federal government 18 has failed its obligations and has not done what 19 Congress said. You're not going to have an answer for this for decades. And now Texas is 20 21 in the spot of what are we supposed to do? 2.2 They're going to build it across the border in 23 New Mexico. Texas needs to have some sort of 24 ability to have some say in this. 25 That is how I would urge the Court.

1 Read pages 1 through 3 of the JA. That is not a 2 ringing endorsement by Governor Perry. He was 3 just going to say this is the best of the bad 4 options. Governor Abbott comes in, before this 5 6 license, and he says: No, essentially over my 7 dead body, are you going to do this. Citing the terrorist concerns that we are identifying. 8 Also look at the brief from the 9 congressional brief, which does this as well. 10 11 JUSTICE KAVANAUGH: Thank you. 12 CHIEF JUSTICE ROBERTS: Justice 13 Barrett? 14 Justice Jackson? 15 Thank you, counsel. 16 Mr. Stewart. 17 REBUTTAL ARGUMENT OF MALCOLM L. STEWART 18 ON BEHALF OF THE PETITIONERS IN CASE 23-1300 19 MR. STEWART: Thank you, Mr. Chief 20 Justice. Just a few quick points. 21 First, Mr. Frederick referred to 42 22 U.S.C. 2239(a), which refers to -- deals with 23 the Commission adjudications, but that provision 24 doesn't say if a person satisfies certain 25 requirements, that person becomes a party or is

1 a party. 2 What it says is under certain 3 circumstances, the Commission "shall admit any such person as a party to such proceedings. 4 It's a directive to the Commission. 5 6 And it's indisputable here that the 7 Commission didn't admit either Texas or ISP as a party -- I -- I'm -- I'm sorry, Fasken or Texas 8 9 as a party. Fasken's argument is simply that it should have been admitted. 10 11 Second, Mr. Frederick said that when 12 spent nuclear fuel comes out of the reactor, it's too hot to handle, or too hot to move. 13 And 14 there is an initial period of at least five 15 years when it has to be placed in a pool, and 16 I'm told that it's rare, though not 17 unprecedented, that the -- the pool is moved. 18 But after that time, even when the 19 waste is stored at the site of a nuclear reactor, it's often moved into cask storage. 20 21 It's in the same containers where it would be 2.2 stored at ISP's facility. 23 Third, Mr. Frederick referred to the 1980 Federal Register notice. 24 There was a two-paragraph discussion, I think it's Heading 25

1 Number 18, off-site versus on-site storage. 2 But it was all about policy. Some commenters said on-site storage is better as a 3 policy matter, some commenters said off-site 4 storage is better as a policy matter. No 5 6 commenter at that time questioned the 7 Commission's statutory authority to choose one or the other or both, and the Commission chose 8 both. 9 The next thing I'd refer to is there 10 11 was a reference to the facilities license. That. 12 Justice Kavanaugh, I think you asked: How would 13 the ISP facility be illegal if your view of the 14 materials licensing provisions is correct? And 15 the answer was: They would still need a 16 facilities license. 17 That's not correct. 18 The facilities licensing provisions 19 apply only to production or utilization 20 facilities. If you operate a nuclear reactor, you need both a facilities license to operate 21 2.2 the reactor and a materials license to possess 23 the -- the relevant stuff. 24 But an ISP -- ISP's proposed facility 25 is not either a production or utilization

107

facility. All it needs is the materials
 license.

3 And it's true that in determining whether to grant the materials license the 4 Commission will examine the nature of the 5 facility, is it safe, is it secure, but that 6 7 doesn't convert it into a facilities license. 8 And Justice Kavanaugh, you laid out the sequence of events that led to the current 9 understanding or the until-recent understanding 10 11 that off-site storage is permissible. And I'd 12 add only one, and that's the D.C. Circuit's decision in Bullcreek, which was a little over 13 14 20 years ago. 15 And that was when the question whether 16 the Policy Act had superseded the Atomic Energy

17 Act's licensing provisions and precluded off-site storage. It was teed up then. And the 18 D.C. Circuit decided that, no, the Commission's 19 20 off-site licensing authority remained intact. And we've been another 20 years since then. 21 2.2 Thank you. 23 CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted. 24

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\$ \$15 [1] 22:16 1 1 [3] 67:17 103:13 104:1 **10** [2] **48**:7 **93**:24 10:07 [2] 1:21 4:2 100 [1] 47:11 101 [2] 74:19,24 10131(a)(3 [2] 96:24 100:1 **10155** [1] **37:**5 10155(h [9] 37:6 38:21 49:17 59:3 74:22 96:22 97:4 99:25 100:3 104 [1] 3:21 **11** <sup>[1]</sup> **37**:4 11:43 [1] 108:1 11th [1] 103:3 140.000 [1] 86:8 15-foot [1] 51:18 18 [1] 106:1 18a [1] 87:19 1900 [2] 43:25 44:8 **1946** [1] **98:**16 **1951** [2] **94:**19,23 **1954** [3] **53:**20 **98:**20 **99:**6 1958 [1] 53:24 **1980** [8] 5:4 27:20 31:7 33:25 48: 21 79:9 99:7 105:24 **1982** [9] **31:**13 **38:**25 **48:**25 **58:**23 60:7 80:10 99:8.19 101:3 **1988** [1] **52:**19 **1990** [1] 6:3 **1998** [1] **22:**14 2 2.309 [1] 61:9 2.335 [2] 61:9 93:25 20 [4] 21:19 69:25 107:14,21 2001 [1] 103:3 2012 [1] 76:8 2013 [1] 76:8 2025 [1] 1:17 2073 [1] 44:25 78:15 2073(a [2] 31:4,21 2093 [2] 31:5 44:25 2111 [1] 31:6 2133 [2] 59:9 82:4 2134 [2] 59:9 82:4 2136 [2] 59:22 82:5 2201 [1] 33:9 2201(b [1] 44:25 2201(h [1] 31:25 2210(i [1] 96:14 2239(a [1] 104:22 **23-1300** [6] **2:**4 **3:**5,21 **4:**4,9 **104:** 18 23-1312 [3] 2:6 3:9 42:9 **2339** [2] **68:**3 **71:**3 2339(a)(1)(A [1] 60:15 2342 [1] 77:7 2342(4 [1] 77:2 **24** [1] **16:**19 **250** [2] **34:**9 **56:**11 250th [1] 34:7

292 [1] 88:23 3 3 [3] 3:5 103:13 104:1 4 **40** [6] **29**:21,24 **34**:8,10 **56**:9,19 3 107:16 40-vear [1] 22:24 42 [5] 3:9 31:4 39:16 96:13 104:21 acted [3] 9:20 35:13 48:9 5 acting [1] 62:15 5 [1] 1:17 actions [1] 56:24 50 [2] 59:19 80:13 activities [1] 59:24 **500** [1] **56:**12 actual [1] 81:14 50s [1] 47:1 **55** [2] **74:**25 **75:**1 19 58 [1] 3:13 add [3] 46:7,8 107:12 6 added [2] 52:18 85:25 **60** [4] **6:**18 **42:**18,22 **86:**8 adding [2] 45:21,23 60-day [1] 83:3 additional [2] 54:8 85:13 60s [1] 47:2 7 86:3 70 [2] 72:17 73:2 70s [1] 47:2 adds [1] 26:5 **72** [1] **48:**7 adequate [2] 20:4 29:18 8 80 [3] 34:10 56:10 71:24 83 [1] 48:25 104:23 85 [1] 3:17 adjudicative [1] 87:10 9 adjudicatory [1] 87:9 90 [2] 6:18 21:1 administratively [1] 59:6 920 [1] 7:7 19 22 Δ a.m [3] 1:21 4:2 108:1 AARON [3] 2:10 3:15 85:9 10 Abbott [1] 104:5 admitting [1] 9:22 abeyance [1] 21:15 adopts [1] 70:10 ability [1] 103:24 advance [1] 60:23 able [11] 12:22 23:14 24:15 25:7 adversely [1] 19:2 45:18 60:24 61:5,19 68:23 72:1 adverts [1] 74:6 above-entitled [1] 1:19 AEA's [1] 60:5 absolute [2] 18:2,4 affect [1] 21:5 absolutely [1] 24:5 abused [1] 9:19 15 65:7 68:5 academic [1] 92:9 affirmatively [1] 39:24 accept [1] 62:17 affirmed [1] 4:18 accepted [1] 19:15 afterwards [1] 35:14 access [4] 41:11 43:25 44:8 49:16 accompanied [1] 6:7 24 86.21 accomplished [1] 40:25 agencies' [1] 7:8 achieved [1] 18:16 acknowledge [1] 84:25 across [3] 56:19,19 103:22 Act [101] 4:24 5:3 9:19 18:12,17,19 **19:**1,10,12 **20:**4 **31:**3,12,13 **35:**22 36:9,13,18 38:15 39:1,17,17,21 40:3,10,22 42:12 43:3,7,13,15,20, 21 44:19,25 45:8 46:2,15 47:14, aggregate [1] 45:17 18 48:5,10,18,24 49:5,6 50:7,8 52: 21 53:22 54:13 58:23 59:5,5,7 60: **70:**8,8 **82:**20 **83:**17 **84:**5,5,6,8 **91:** 

7,15 61:5 65:6,25 67:8,23 68:2,7, 21.25 12,22 69:19 70:7 71:4 72:19 74: 12 77:2,4,5,5 78:16,16,17 79:18, 25 80:4,7,18 83:8,11,12 84:21 85: 17 86:18,19 89:25 90:15 92:7,16, 25 94:16,25 96:9 99:6 100:9 101: Act's [3] 4:20 37:11 107:17 action [4] 20:16.20 89:7 94:12 actually [5] 9:9,17 24:15 93:8 100: address [6] 8:18 10:1 20:5.6 21:2 addressed [2] 58:24 79:24 addressing [2] 49:22 77:20 adjudication [10] 4:16 5:15 23:7 85:24 86:25 87:23 88:2,3 91:5,6 adjudications [3] 90:11 94:10 admissible [5] 6:2 18:8 70:13 93: admit [4] 65:8 83:22 105:3.7 admitted [4] 7:22 60:16 68:6 105: AEA [5] 51:8 86:1,2 96:10,11 affected [7] 5:25 7:22 8:1 19:2 60: agencies [5] 20:22 62:7 64:7 66: agency [38] 4:15 15:11 17:17,22, 25 18:13 19:24 20:1,16,24 21:1 33:10 41:23 42:25 49:21 50:23 54: 16 62:1,6,9 66:5,22,25 67:9 71:20 72:8 79:10.25 86:20 89:2.12 91: 11.12 100:8.13.19 102:18.19 agency's [3] 42:13 50:18 102:7 aggrieved [14] 4:20 19:1,8 69:18

ago [3] 7:7 21:19 107:14 agree [5] 7:13,15 54:20 90:14 97: 11 agreeing [1] 91:2 ahead [3] 15:8 63:10,10 AL [6] 1:4,7,13 2:11 3:17 85:10 ALITO [24] 15:6.8 16:2.9.15.18.21 **29:**8.9.20 **30:**1.21 **31:**19 **53:**10.11. 17 54:19 55:7.20 56:7 71:23 75: 13 101:16 102:13 alleged [1] 19:24 allow [10] 46:3 55:2 57:1 59:9 61: 11 64:7 67:10 98:22.24.25 allowed [8] 9:1 12:2 16:10 29:21 **49:**25 **50:**2.3 **71:**19 allows [2] 5:6 72:9 already [4] 49:25 62:6 91:18 100: 22 alternative [2] 21:7 29:6 alternatives [1] 55:12 amended [2] 96:6 7 America [1] 86:11 amicus [1] 81:8 amount [2] 6:15 27:13 another [5] 10:9 29:24 34:9 40:15 **107:**21 answer [12] 11:12 29:14 40:6 52: 13,16 75:15 91:3 92:24 97:12 102: 2 103:20 106:15 answers [3] 76:8 77:12 97:11 anybody [3] 77:21 88:5,15 APA [3] 19:3,6 76:17 apologies [1] 50:15 apparently [2] 23:3 73:24 appeal [16] 6:23 13:4,7,9 15:12,18, 21.24 42:15.18.21.22 69:20 83:4 92:1 94:13 appealed [2] 8:11 13:5 appealing [1] 61:2 appeals [8] 13:7 14:20 15:23 17: 19 19:14 76:24 77:11 83:3 appeals' [1] 4:23 appear [2] 43:18 44:18 APPEARANCES [1] 2:1 appeared [1] 81:10 appears [1] 41:3 appellate [1] 83:10 Appendix [1] 87:19 apple [1] 15:23 applicable [1] 14:17 application [3] 24:14 29:22 69:7 applications [3] 85:20 95:23 100: 15 applied [3] 13:19 23:5 69:9 applies [5] 11:1 78:2 85:20 86:20 90.1 apply [5] 71:5 86:19 90:10,17 106: 19 appreciate [1] 52:5 approach [1] 80:22 appropriate [1] 72:4 approval [1] 31:15 approvals [1] 81:16

Official - Subject to Final Review			
approved [2] 61:6 81:17	authorizing [2] 5:1 22:23	12 90:17 94:18 106:8,9,21	chameleon [2] 90:2,3
approving [1] 78:17	available 5 6:23 14:25 21:8 30:	bound [1] 10:10	chance [1] 80:10
apt [1] 40:9	11 <b>41:</b> 13	BRAD [3] 2:5 3:7 42:8	change [2] 28:1,5
arbitrarily [1] 9:20	avenue [1] 93:12	breaks [1] 32:21	changed [2] 6:3 23:11
area [2] 69:16 72:3	aware [5] 37:12 47:25 80:10 99:8,	bridge [1] 86:5	changes [2] 6:4 73:2
arguably [1] 99:6	9	brief [11] 10:22 50:15,17,19,22 81:	chapter [1] 49:18
argue [6] 10:14 43:20 62:3,23,25	away [1] 35:16	8 <b>98:</b> 13,14 <b>100:</b> 7 <b>104:</b> 9,10	character [1] 28:18
63:1	B	briefs [2] 59:23 92:4	characteristics [1] 60:1
argued [3] 10:17,19 63:17		bring [4] 63:1 67:4,5 77:13	CHIEF [30] 4:3,10 13:13 14:4,8 25:
arguing [4] 9:11 17:8 65:21 77:22	back [14] 46:9 47:1 49:14 50:24 80:	bringing [4] 19:6 61:22 62:1 64:4	2 29:4,7 32:16 35:9 40:18 42:5,10
argument [56] 1:20 3:2,6,10,14,18	1 86:17 93:18 95:7 98:12,16 100:	broad [1] 7:9	52:15 53:8 57:7 58:15,21 75:10
<b>4</b> :4,8 <b>8</b> :13,19,24 <b>10</b> :6,8 <b>17</b> :19 <b>18</b> :	21 <b>101</b> :15 <b>102</b> :4 <b>103</b> :12	broken [1] 102:5	76:11 78:21 82:16 85:6,11 102:8,
25 <b>19</b> :18 <b>25</b> :9 <b>30</b> :24 <b>35</b> :13 <b>36</b> :20	back-and-forth [1] 44:6	brought [4] 19:18 62:20 76:18,23	11,22 <b>104:</b> 12,19 <b>107:</b> 23
<b>40</b> :6 <b>42</b> :8 <b>43</b> :3 <b>44</b> :21 <b>45</b> :2 <b>47</b> :22	bad [4] 19:23 48:17 79:12 104:3	build [2] 56:18 103:22	choose [4] 25:7 53:18 79:17 106:7
<b>51</b> :6 <b>58</b> :18 <b>62</b> :1,10 <b>65</b> :11,13 <b>68</b> :9	bag [1] 101:19	built [3] 43:10 46:11 81:17	chose [1] 106:8
<b>69:</b> 22,25 <b>72:</b> 10 <b>76:</b> 16,23 <b>77:</b> 13,16	banc 5 10:3 12:7,18 13:14 14:13	bull's-eye [2] 102:25 103:9	chosen [3] 39:10 55:8,14
<b>78</b> :12 <b>80</b> :3 <b>81</b> :23 <b>82</b> :9 <b>83</b> :14 <b>85</b> :5,	bar [1] 38:10	Bullcreek [6] 21:19 39:3 49:20 58:	chronology [1] 49:4
9 88:13 89:8 91:10 93:20,21 96:6	Barrett [4] 40:19 57:12 82:17 104:	6 <b>81</b> :16 <b>107</b> :13	chunk [1] 48:14
99:13 104:17 105:9	13	bulls-eye [1] 86:10	Circuit [44] 4:17 6:4 7:5 8:11,18 9:
arguments [4] 9:8 67:25 78:24 91:	based [1] 81:10	bunch [3] 28:20 86:20,21	5 <b>10:</b> 1 <b>12:</b> 4,7,15 <b>21:</b> 24 <b>22:</b> 4 <b>39:</b> 3
17	baseline [1] 99:1	burden [5] 10:25 11:3,6,14 78:2	<b>42</b> :19,22 <b>49</b> :21 <b>57</b> :20,21 <b>58</b> :12 <b>60</b> :
around [6] 27:20 28:20 29:10,12	basic [1] 99:13	burned [1] 72:13	20 <b>62:</b> 20 <b>63:</b> 16,18 <b>68:</b> 15,16 <b>69:</b> 1,
<b>33</b> :8 <b>59</b> :20	basically [6] 5:23 6:5 16:23 33:9	business [1] 102:16	4,20,24 <b>70:</b> 1,5,18 <b>71:</b> 13 <b>77:</b> 19 <b>78:</b>
arrangement [2] 23:13 24:19	<b>36</b> :15 <b>80</b> :7	buy [1] 45:25	4 <b>85:</b> 22 <b>86:</b> 24 <b>87:</b> 15,19,20 <b>89:</b> 1,4
arrangements [2] 29:19 30:19	Basin [2] 23:19 54:21	by-product [7] 25:18 31:6 32:5 33:	<b>95</b> :8 <b>107</b> :19
articulate [1] 48:1	basis <sup>[8]</sup> 4:19 64:13 65:4 68:10,18	14 <b>51:</b> 8,21 <b>52:</b> 4	Circuit's [8] 4:19 10:23 21:18 42:
aside [2] 6:8 25:9	<b>79</b> :22 <b>84</b> :15 <b>88</b> :13	C	25 <b>64:</b> 15 <b>71:</b> 18 <b>91:</b> 24 <b>107:</b> 12
aspect [1] 7:8	bear [2] 11:6 24:5	C.F.R [2] 48:7 93:24	circumstances [2] 23:12 105:3
aspects [1] 55:11	bearing [1] 12:10		cite [5] 30:22 50:14,19,21 79:17
assemblies [1] 51:18	bears [2] 11:13 24:2	called [2] 6:2 67:17	cited [2] 7:3 59:22
assembly [1] 53:5	<b>become</b> [9] <b>11</b> :9,25 <b>13</b> :3 <b>15</b> :14 <b>30</b> :	came [3] 1:19 24:12 44:14	cites [1] 9:24
assert [1] 84:20	1 <b>51</b> :24 <b>58</b> :10 <b>81</b> :1 <b>93</b> :13	cannot [5] 59:5 64:15 74:18,21 96:	citing [2] 69:15 104:7
asserted [3] 37:13 39:13 82:5	becomes [1] 104:25	18	<b>civil</b> [1] <b>16:</b> 11
asserting [3] 8:22 17:12 82:13	begin [1] 81:24	canons [1] 71:6	civilian [1] 35:16
assertions [1] 6:7	<b>behalf</b> [14] <b>2:</b> 3,5,8,11 <b>3:</b> 4,8,12,16,	capacity [2] 38:6,7	claim [4] 14:18 21:9 83:19 84:14
associated [2] 32:25 89:19	20 4:9 42:9 58:19 85:10 104:18 behave [1] 14:23	capriciously [1] 9:21 capture [1] 95:25	claimed [1] 22:9
assume [3] 15:10 73:2 77:5	believe [1] 64:20	capture (1) <b>55</b> :25	claiming [1] 68:18
assumption [1] 14:23	believed [2] 32:6 98:5	careful [1] 36:14	Clark [3] 85:18,18 95:20
Atomic [37] 4:24 6:21 16:25 31:3	believes [1] 35:3	carefully <sup>[1]</sup> 37:15	class [1] 94:12
<b>36:</b> 13 <b>37:</b> 11 <b>38:</b> 15 <b>39:</b> 17 <b>40:</b> 3,10	below [5] 10:15 16:7 17:16 50:19	Case [28] 2:4,6 3:5,9,21 4:4,6,9 7:	clear [7] 39:7,21 41:22 44:2 61:10
<b>43</b> :2,6,13 <b>44</b> :18,24 <b>45</b> :8 <b>46</b> :2 <b>47</b> :	<b>77</b> ·21	6 11:5 15:22 42:9 47:23 50:4 51:	<b>75</b> :7 <b>81</b> :9
13,18 <b>48</b> :18 <b>49</b> :6 <b>50</b> :8 <b>53</b> :22 <b>54</b> :	beneficial [1] 24:19	16 <b>57</b> :18 <b>58</b> :9 <b>67</b> :18 <b>76</b> :21 <b>88</b> :25	clearer [1] 38:22
13 <b>59</b> :7 <b>60</b> :14 <b>61</b> :4 <b>65</b> :3,6,24 <b>68</b> :3	best [4] 40:25 88:25 89:5 104:3	89:1,4,5 93:4 95:5 104:18 107:24	clearly [9] 28:23 31:15 37:25 38:
<b>71</b> :3 <b>79</b> :18 <b>80</b> :4,17 <b>84</b> :21 <b>107</b> :16	better [3] 28:25 106:3,5	<b>108</b> :1	13,25 <b>42</b> :1 <b>59</b> :25 <b>84</b> :5,21
attack [3] 10:23 61:15 66:19	between [6] 38:16 47:22 78:14 83:	cask [1] 105:20	Clement's [1] 98:14
attempt [2] 17:24 58:10	16 <b>84</b> :13 <b>91</b> :5	cast [1] 23:12	client [4] 43:8 46:10 56:18 89:22
attempting [2] 13:21 42:2	beyond [5] 7:12 62:15 70:20 76:17	categories [1] 26:15	client's [1] 56:24
attention [2] 14:3,10	<b>78</b> :17	Category [1] 67:17	close [2] 55:14 73:14
Austin [1] 2:10	big <sup>[4]</sup> 48:14 94:20,22,25	celebrating [1] 34:7	closed [1] 27:10
author [1] 36:12	big-picture [1] 99:20	centralize [1] 28:25	closer [1] 91:4 Club [2] 91:12 93:21
authority [34] 7:9 17:9 19:25 21:5, 20 22:8 25:11 31:9 37:13 39:13,	bill [2] 39:5 44:5	centralized [1] 33:6	
20 <b>22:</b> 8 <b>25:</b> 11 <b>31:</b> 9 <b>37:</b> 13 <b>39:</b> 13, 23 <b>41:</b> 24 <b>48:</b> 12 <b>54:</b> 16 <b>60:</b> 5 <b>61:</b> 7.	billion [1] 22:17	cert [5] 12:19 13:15,17 14:11 70:3	cognate [1] 25:24 collateral [3] 12:12 61:15 78:9
12 <b>62</b> :16 <b>63</b> :13,24 <b>67</b> :11 <b>69</b> :17,23	bills [1] 50:25	certain [4] 6:14 26:1 104:24 105:2	collaterally [1] 10:23
<b>71</b> :20 <b>72</b> :8 <b>76</b> :17 <b>79</b> :11,17 <b>80</b> :9	bit [3] 20:15 42:16 48:1	certainly [10] 16:11 29:14 36:8 44:	colleagues [1] 34:8
<b>81</b> :11 <b>82</b> :6,12 <b>106</b> :7 <b>107</b> :20	bite [1] 15:22	17 46:17 52:15 88:7 92:14,15 99:	combination [1] 51:7
authorization [5] 33:21 36:12 37:	bizarre [1] 100:16	9	combined [1] 32:1
11 <b>44</b> :22 <b>74</b> :8	Black's [2] 94:19,23	certiorari [2] 10:4 14:14	come [7] 14:21 16:5 24:7 34:11 53:
authorizations [1] 32:1	Blue [3] 75:24 76:3,4	cetera 3 74:11,11 101:5	23 <b>61</b> :12 <b>66</b> :18
authorize [12] 21:25 35:15 39:18	Board [2] 6:21 16:25	challenge [15] 12:12 19:7 20:20	comes [6] 14:21 60:2 73:13 84:17
<b>40</b> :4,11 <b>45</b> :3 <b>49</b> :18 <b>50</b> :1 <b>53</b> :12 <b>74</b> :	body [1] 104:7	<b>25</b> :8 <b>58</b> :3,4 <b>61</b> :5,12,23 <b>64</b> :9 <b>69</b> :3,	<b>104:5 105:</b> 12
20,21 <b>80</b> :8	books [1] 48:9	6 <b>71</b> :19 <b>76</b> :17 <b>85</b> :23	commend [1] 49:20
authorized [2] 35:23 40:12	border [1] 103:22	challenged [3] 20:17 57:20 63:22	comment [6] 48:13 86:22 87:2,16
	both [10] 5:5 24:18 39:16 49:20 51:	challenging [3] 67:6 73:25 84:3	<b>88</b> :18 <b>89</b> :16
authorizes [3] 33:10 59:8 99:6			

commentators III 75-14         contemplates III 27-22         contemplates III 27-22         contemplates III 27-22         distance III 24-25           comments III 75-14         contemplates III 27-22         contemplates		Official - Subjec		
commenters III 73:12 498:34         contention // fizz 168 42:16 70: 14 91:14 22:35.7 41:7 647.55         difference IP 47:25 87:7 41:7 647.55           commercial III 23:23         contations III 92:20         contations III 92:20         difference IP 47:25 87:7 41:7 647.55           COMMISSION IP0 13:45 5:19 6: 51:24 62:25 64:24 71:125:02 762:         contations III 92:20         difference IP 47:25 22:13 37:41: 0:11 66:20 64:15 66:15.16 66           2:6 2:63:03 24:11 25:10.25 762:         11         contact III 91:10 22:13 74:10         20:85:11 66:20 64:15 66:15.16 66           1:3 9:41 02:12 44:13 83:12         contact III 91:10 22:13 74:10         contact III 91:10 22:13 74:10         20:85:14 60:20 64:15 66:15.16 66           1:3 9:41 02:12 43:12 50:10 27:02 76:17:13 39:12         contact III 91:10 22:14         contact III 91:12 24:14         20:85:14 60:20 64:15 66:15.16 66:15           2:7 0:7 15:12 25:16 26:16 27:17 62:17:17:10 70:17         contact III 91:17 22:17:15         contact III 91:17:22 49:17.41         different III 97:17 22:17:15           comprehensively III 79:24         contact III 91:17:22 49:17:04:12         contrust III 90:17:11         discussed III 86:16           2:7 0:7 17:22 10:72         contrust III 91:72         contrust III 91:72         discussed III 86:16           2:7 0:7 12:22 10:10:10:11         contrust III 91:72         contrust III 91:72         discussed III 86:16           1:7 22:10:10:10:11         contrust III 91:72:12:23:31:15	commentators [1] 79:14	contemplates [1] 27:22	cut [2] 52:18 92:18	devise [1] 24:25
commenters III 73:12 498:34         contention // fizz 168 42:16 70: 14 91:14 22:35.7 41:7 647.55         difference IP 47:25 87:7 41:7 647.55           commercial III 23:23         contations III 92:20         contations III 92:20         difference IP 47:25 87:7 41:7 647.55           COMMISSION IP0 13:45 5:19 6: 51:24 62:25 64:24 71:125:02 762:         contations III 92:20         difference IP 47:25 22:13 37:41: 0:11 66:20 64:15 66:15.16 66           2:6 2:63:03 24:11 25:10.25 762:         11         contact III 91:10 22:13 74:10         20:85:11 66:20 64:15 66:15.16 66           1:3 9:41 02:12 44:13 83:12         contact III 91:10 22:13 74:10         contact III 91:10 22:13 74:10         20:85:14 60:20 64:15 66:15.16 66           1:3 9:41 02:12 43:12 50:10 27:02 76:17:13 39:12         contact III 91:10 22:14         contact III 91:12 24:14         20:85:14 60:20 64:15 66:15.16 66:15           2:7 0:7 15:12 25:16 26:16 27:17 62:17:17:10 70:17         contact III 91:17 22:17:15         contact III 91:17:22 49:17.41         different III 97:17 22:17:15           comprehensively III 79:24         contact III 91:17:22 49:17:04:12         contrust III 90:17:11         discussed III 86:16           2:7 0:7 17:22 10:72         contrust III 91:72         contrust III 91:72         discussed III 86:16           2:7 0:7 12:22 10:10:10:11         contrust III 91:72         contrust III 91:72         discussed III 86:16           1:7 22:10:10:10:11         contrust III 91:72:12:23:31:15	commenter [1] 106:6	contemplating [1] 38:25	D	dictate [1] 20:19
comments (19 21:13 48:16 88: 2 88:10 24 91 48:16 88: contentions (19 22:0 contested (11 11:10 contested (11 12:12 contested	commenters [3] 79:12 106:3.4		D	dictionary [3] 94:18.20.23
22         81:10 24 91:83:33         contentions [19:220         11:10 9:5.55 10:23 12:47,15 21: 13:32 22:43,247,15 21: 13:32 22:43,247,15 21: 13:32 22:43,247,15 21: 13:32 22:43,247,15 21: 13:32 22:43,247,15 21: 13:32 22:43,247,15 21: 13:32 22:43,15 24:11 25:10 25:382; 14:10 24:34 65:33 36:10 37:13 39:12, 12:10 50:10 24:16 46:37 31:23 74; 12:10 50:10 24:14:20 25:28; 13:10 50:10 24:14:20 25:28; 14:10 24:21 30:28 26:32 37:15 20:39; 14:10 24:21 30:28 26:32 37:15 20:39; 14:10 24:21 30:28 26:32 37:15 20:39; 14:10 24:34 50:33,72 10; 15:10 27:17 3:13 22:10 10:17 22:17 22:10 10:17 22:17			D.C [43] 1:16 2:3,5,7 4:17 6:4 7:5 8:	
communicial (19.8):23         consteted (1) 11:10         15.23 22:4 39:2 42:19 49:21 57:         337.41:           COMMISSION (MI 34.36.517 12:12:52):         11         20.83:16.30:26.315:50.89:14.10         37:15.20.89:14.10         47:15.23.72:13.01.08:21 90.45:           2 28:26:16.28:47:12:21:22:         11         11         39:23.85:15.20.89:14.10         37:15.20.89:14.10         47:15.23.72:13.01.08:21 90.45:           2 39:51:00:21:46:45.73:16:23:74:         continued (128:19         continued (128:19         17:17:32:22:23:17         42:01         darager (19.22:23:17) 34:20         darager (19.22:23:17) 34:20         differential (19.61:         37:12:38:23:14:30:22:38:10         darager (19.22:23:17) 34:20:         darager (19.22:33:17) 34:20:		,	11,18 9:5,25 10:23 12:4,7,15 21:	
COMMISSION 36113 43 5:13 6         Community 14:3:17 44:2,12 505 66         23 28:11 62:02 47:12 31:22 47:2 43:05 82:22 39:05         71 71 72 71:13 72 77 28:07 82:12 37:12 28:05 82:19 0:12           2 23 25:13 25:24 77 22:13 25:13 28:12 23:07 82:72 37:25 77:13 28:12 23:15 28:15 28:15 28:15 28:15 28:17 28:11 28:15 22 28:15 2				
Community 32:10         Community				
0         0				
21       22.15/16.8306.837/326.511.33:       comtinued ID 22:19       12.19         13       68:10       22.15/16.8306.810.971.382.12       comtinued ID 22:19         13       58:10       22.15.16.8306.810.971.382.12       comtinued ID 22:19         9763.4.809.92:5.810.92.14.40.75.1066       comtracting ID 22:417.24       comtrol IV 22:19       differently ID 48:19.22.13         25       717.81.12.22.10.21.14.20.92       comtrol IV 20:17.22.12.22.10.21.14.20.92       directing ID 48:15         20       comtrol IV 20:17.22.12.10.21.14.20.92       comtrol IV 20:17.22.12.10.14.21.14.27.15.22       directing ID 48:17.61.13.12.22.11.21.14.27.14.27.19.22.95.13         20       commont IV 33:12.82.22.01.22.11.42.02.42.27.07.11.10.22.12.10.14.21.14.27.14.27.11.10.22.14.10.17.11       discorring ID 48:22.14.17.11.10.11.11       discorring ID 48:22.14.17.11.10.11.11       discorring ID 48:22.14.17.11.10.11.11       discorring ID 48:22.14.17.11.10.11.11       discussion ID 48:22.14.17.11.10.11.11				
1       1				
10       5:10       1:10       1:10       1:10       1:10       1:10       1:10       1:10       1:10       1:10       1:10       1:10       1:10       1:10       1:10       <	21 <b>29:</b> 15,18 <b>30:</b> 8 <b>31:</b> 7 <b>32:</b> 6,11 <b>33:</b>	continued [1] 28:19		
D3/51/02.1/8 42:03/02.1/8 42:03/02.1/2       Ontot 11192.1/2       DAVID 192.7 3:11 58:18       dimention 192.53 3:00.1/2         9 997/8,0 10 44:23 1042.31 43:24       contracts 10 24:16       contracts 10 24:16       direction 104:11:7         2 717 8:13,822 90.26       contracts 10 24:16       controls 19 37:16 59:56       direction 104:11:7         2 717 8:13,22 91.02:11.42,22 91.02       controls 19 37:16 59:56       controls 19 37:16 59:56       direction 104:11:7         2 311 4 39:22 91.02 1:14,22 32:00       controls 19 37:16 59:56       controls 19 37:16 59:56       direction 104:12         2 0 comprohensively 112:15       controls 19 39:10 55:17 69:37:37:57:17       controls 19 39:10 59:17 69:37:18:17       discussed 19 86:22       discussed 19 86:22         2 0 comprohensively 112:15       correctly 113:06 69:9       correctly 113:06 69:9       correctly 113:06 69:9       discussed 19 86:22       discussed 19 86:25       discuss	14,19,24 <b>35:</b> 3 <b>36:</b> 10 <b>37:</b> 13 <b>39:</b> 12,	continues [1] 34:20	-	
b) 50.500 005 005 005 005 005 005 005 005	13 <b>59</b> :10 <b>62</b> :14 <b>64</b> :5 <b>73</b> :16,23 <b>74</b> :	contort [1] 82:12		dilemma [3] 24:9 30:5,12
a 307.5         Commusion (Pails) (Pai	9 <b>76</b> :3,4 <b>80</b> :9 <b>82</b> :5 <b>83</b> :9 <b>84</b> :23 <b>86</b> :	contracting [1] 28:24		direct [2] 12:5 33:21
8 107:5         common (1) 2017:2 22:417.24         dead [19 22:19 104:7         directive (1) 105:5           25 7:17 8:13.22 9:10 21:14 22:2         common (1) 23:15 85:20 98:5,25         comvert (1) 107:7         dead [19 22:19 104:7         directive (1) 105:5           20 31:14 39:22 204:49:7 72:10         comvert (1) 107:7         comvert (1) 107:7         dead [19 21:19 104:7         dead [19 21:19 104:7         dead [10 21:10 10:17           common (1) 33:15 85:20 98:55,25         coming (1) 89:17 60:3 73:14         coming (1) 89:20 73:7 75:17         doc (1) 89:16         decide (1) 42:13 09:62:8 4:11 37:         discuss (1) 99:20           comprehensively (1) 27:22         23 86:15 98:0 96:19 103:4,11 106:         correct (1) 71:13 33:22 4:11 37:         discuss (1) 99:20         discuss (1) 99:20           concred (1) 79:24         23 86:15 98:0 96:19 103:4,11 106:         correct (1) 71:13 32:53 3:10 4:21         discuss (1) 99:20         discuss (1) 99:20           concred (1) 79:24         couldn't (1) 13:17 52:0 93:15 10:11         discuss (1) 99:23         discuss (1) 99:23         discuss (1) 99:24           concred (1) 71:04:15 4:24; 24:25         couldn't (1) 13:17 53:22 8:15:101:12         decide (1) 93:15         discuss (1) 99:23         discuss (1) 99:24:12         discuss (1) 10:24:12         discuss (1) 99:24:12 <t< td=""><td></td><td>contracts [1] 24:16</td><td>days [5] 6:19 21:1 42:19,22 95:8</td><td>direction [1] 41:17</td></t<>		contracts [1] 24:16	days [5] 6:19 21:1 42:19,22 95:8	direction [1] 41:17
Commission's R08.16.21.6:1.         controls R03.7.18 68:5         dealing 116.0:1         directly 10.4:7.76:23           25 71.78.12.92.91.02.11.42.02         convoluted R03.3.7         convoluted R03.7.         document R13.15.6.109:22         discretion R14.7.76:23           20 311.43.93.22.80.20         convoluted R03.7.         convoluted R03.7.         document R14.7.5.6.109:22         discretion R14.7.76:23         discretion R14.7.76:23           Commanity R03.22.23.42.79:11.05:10         corre R14.7.15.7.82:23.22.3.1.13.7:         20         discretion R14.2.3.68:2.6         discretion R14.2.68:2.6         discretion R14.2.6:2.6:			dead [2] 22:19 104:7	directive [1] 105:5
25       217:178:13.229:102:114:22       0.00000000000000000000000000000000000			dealing [1] 60:1	
20       31:14       39:22       60:24       60:37:14       39:21       64:21       60:22       60:37:14 <td< td=""><td></td><td></td><td>deals [4] 31:4,5,6 104:22</td><td>-</td></td<>			deals [4] 31:4,5,6 104:22	-
20 31:1 33:22 80:493/176:24       Conformed (P) 33:15 83:20 86:2,5       cooling (P) 59:16       cooling (P) 19:20       cooling (P				
common [933:15 85:20 05:5.25 community [132:22 34:20 comparison [127:16]         cooling [9] 59:20 73:7 75:17 core [89:17 60:3 73:14 core [89:17 60:3 73:14         20 decide [124:21 30:9 62:8 64:8 decided [124:21 30:9 62:8 64:8 decided [124:11 56:7 58:11,12 107:19         discharged [147:5 discharged [1				
community 3/8 is 3/2				
Comparation         Color Brass, Press,		-		
completed 112:15         correctly 0130:25 57:25 77:25 77:85,11 81:         107:19         discussed 118:25           comprehensive [14:25:35:24         correctly 0150:6 69:9         correctly 0150:6 69:9         discussed 018:25           concered 018:15 64:21,24,25 67:         correctly 0150:6 69:9         couldn't (413:7 15:20 93:15 101:         5           concered 018:15 64:21,24,25 67:         couldn't (413:7 15:20 93:15 101:         5         discussed 018:25:48:24         displeased 119:7:3           concerved 107:65:25 86:16 75:11 81:22 85:7         counted 113:15 107:24         counted 113:15 13:25:32:18:42:1         11,19 30:6,17 34:17         displeased 119:7:3           confirm (214:15 49:4         6 56:20 59:21         counted 112:6:17         defined 113:16         distinguish 103:16           confirm (214:15 49:4         6 56:20 59:21         country 17 28:6;21 30:13 33:83:4;         country 17 28:6;21 30:13 33:83:4;         defined 113:16         distinguish 103:16           confirm (214:15 49:24 20:71:22 30:11,54:         country 17 28:6;21 30:13 33:83:4;         defines 116:6:7         defines 116:6:7         distinguish 103:16           20:25 39:6:10 40:22 41:1,16;25         country 107 28:6;21 30:13 38:42;         defines 116:6:7         distinguish 103:16         documented 105:0;           20:25 39:6:10 40:22 41:1,16;25         country 107 28:6;21 30:13 38:13;         defines 116:6:7         defines 116:6:7 <td>-</td> <td></td> <td></td> <td></td>	-			
Complete (1) 22.13         22.63.97.62.07.23.76.07.131         22.63.97.62.07.23.76.07.131         discussed (1) 60.25           comprehensive (1) 48.23.25.62.2         14.17         24.21.19.49.20.00.12.25.01.13         discusses (1) 87.20           comprehensive (1) 48.23.25.62.2         couldn't (4) 13.71.52.09.32.15.101.15         24.21.19.49.20.00.12.26         discusses (1) 87.20           concervad (1) 76.64.23         couldn't (4) 13.71.52.09.32.15.101.15         for concervad (1) 76.54.23         couldn't (4) 13.71.52.09.32.16.42.11.19         discusse (1) 87.20           concervad (1) 76.64.23         6.57.25.86.16.75.11.81.22.28.77         country (1) 72.65.21.30.13.33.8.34.14         dispease (1) 97.3         dispease (1) 97.3           concervad (1) 16.12         country (1) 28.62.13.02.13.33.8.34.14         definition (10.55.14         definition (10.55.14         dispease (1) 97.3           confront (2) 30.10, 12         country (1) 28.62.13.03.13.8.34.14         definition (10.51.74         distinct (10.03.14           confront (2) 30.10, 12         country (1) 28.62.13.03.13.8.94.77.14         definition (10.13.17.25         distinct (10.12.16.97.12.41.12.27.14           confront (2) 30.12, 20.25.25.81.15         country (10.25.25.81.15.81.14.25.25.81.14.25.14.25.14.25.13.8.14.25	-	correct [17] 7:13 33:22 34:11 37:		
comprehensive [N 48:23 58:24         12:03:03:03:03:03:03:03:03:03:03:03:03:03:	complied [1] 22:15	22 63:9 75:20 77:25 78:5,11 81:		discussed [1] 86:25
comprehensively (17):2:4         (n):1         (n)	comply [1] 20:23	23 86:15 95:6 96:19 103:4,11 106:		discusses [1] 87:20
comprehensively IP 79:24         correctly [250:6.69:9]         18 79:21 95:8 107:13         discussion [10:105:25]           conceivable [11:39:10         couldn't [41:37:15:20:93:15:101:5]         5         declined [13:36:15:16]         dismissed [19:7:3]           concervs [11:10:12]         counted [11:13:13:25:33:16:82:16]         5         declined [13:36:15:16]         dismissed [19:7:3]           concervs [11:10:12]         counted [11:16:12]         counted [11:16:12]         declined [10:36:16]         declined [10:36:16]           confirm [21:15:10:10:38:         6 57:25:58:16 75:11 81:12 286:7         11:19:30:6;17:34:17         distinct [10:103:16]           confirm [21:3:10:12]         country [17:28:6;21:30:13:33:8:34:16]         define [10:19:23]         define [10:19:24]         documented [11:10:12]	comprehensive [2] 48:23 58:24	14,17	24 21:19 49:20 50:18,23 61:15 70:	discussing [1] 96:3
concade (#) 18:15 64:21,24,25 67: 17 82:19         cost (11) 32:25 couldn't (#) 13:7 15:20 93:15 101: 5         declaratory (#) 85:24 86:24 87:14, 15         dismiss (116:3:12 dismissed (114:3)           concerved (#) 76: 64:23         Counsel (119:13: 13: 25: 33:2:18 42: concerves (1123:19)         15         disposal (116:0:)         disposal (116:0:)           concerved (#) 76: 64:23         Counsel (119:13: 15: 32: 26: 7: concluded (11:19:12)         102:9,21 104:15 107:24         disposal (116:0:)         disposal (116:0:)           concrete (1123:19)         country (712:6;21: 30:13 33:8: 34: confirm (#) 44:15 49:4         country (712:6;21: 30:13 33:8: 34: country (712:6; 15: 88:4)         defines (116:10:10:3:1         distinct (110:10:1)           confirm (#) 44:15 49:4         country (712:6; 88:4)         country (712:6; 88:4)         defines (116:3:16         defines (116:2:2:4)         distinct (11:10:2:14:10:1)           20:25 39:6:10 40:22 41:11.16:25         course (19:23:22 62:5 81:6)         course (19:23:22 62:5 81:6)         defines (116:1)         distinct (11:10:1)         defines (11:10:1)         define:10:10:1)         defines (11:10:1)	-	<i>i</i>	18 <b>79:</b> 21 <b>95:</b> 8 <b>107:</b> 13	
17 82:19       couldn't (#13:7 15:20 93:15 101:       15       displased [19:7:3]         concervable (17:6 54:23)       Counsel (19:13:13 25:3 32:18 42:       decimed (10:35:15)       displased (19:97:3)         concervable (17:6 54:23)       6 57:25 58:16 75:11 81:22 85:7       11,19 30:6,17 743:17       decimed (10:55:17)       displased (19:97:3)         concervable (17:6 34:23)       counted (10:62:1)       counted (10:62:1)       decimed (10:55:17)       distinct (10:10:1)         confirm (17:44:15 49:4)       6 56:20 59:21       country's (19:58)       country's (19:58)       defines (19:94:31:55:26:80:17)       distinct (10:10:25:13:16):14:97:14         conformed (17:66:12:24 91:10 52:14 53:115 54:       country's (19:58)       country's (19:58)       defines (19:94:31:55:26:80:17)       distinct (10:10:25:13:16):14:12:0:14:7:13:90:         35:13 36:14,20 37:12,20 38:91,3)       14 97:11       course (19:22:24:25:61:6)       defines (19:04:25:25:68:0):17       distinct (10:10:25:66:80:17)         15:22 49:10 52:14 59:15       course (19:22:14:62:14:6:13:99:22:49:10:51:16:80:14       defines (19:04:25:52:68:0):17       distinct (10:10:14:22:14:12:14:22:14:22:14:12:14:14:14:14:12:22:15:5:16         15:22 39:20 99:8,17 101:6,13:17,23       17:25:22:25:8:9:31:14:22:24:22:14:12:24:14:14:14:14:12:24:14:14:14:14:12:24:14:14:14:14:14:14:14:14:14:14:14:14:14		-	declaratory [4] 85:24 86:24 87:14,	
conceivable (1) 39:10         5         counsel (1) 13:13 25:3 32:18 42;         declined (1) 35:15         displased (1) 97:3           concerne (1) 104:8         6 57:25 58:16 75:11 81:22 85:7         102:9,21 104:15 107:24         deem (1) 35:17         deem (1) 35:17         deem (1) 35:17         defined (1) 35:17         displased (1) 97:3           concrete (1) 23:19         country (7) 26:0;21 30:13 33:8 34;         6 56:20 59:21         country (7) 26:0;21 30:13 33:8 34;         defined (1) 91:23         define (1) 91:23         distinction (1) 84:12 (16 87:17           confront (2) 30:10,12         country (7) 26:0;21 30:13 33:8 34;         6 56:20 59:21         country (7) 26:0;21 33:15 33:25         define (1) 91:23         distinction (1) 84:12 (16 87:17           confront (2) 10:6         country (7) 26:0;21 47:6:13 87:13 90;         18         districtin (1) 10:2;         districtin (1) 10:2; <td></td> <td></td> <td>15</td> <td></td>			15	
Concerned [2] 7:6 54:23 concerns [1] 104:8         Counsel [19] 13:13 25:3 32:18 42: concerns [1] 104:8         decommissioned [6] 26:24 28: 11,19 30:6,17 34:17         disposal [16:9] disposal [16:9]           concerns [1] 104:8         6 57:25 58:16 75:11 81:22 85:7         11,19 30:6,17 34:17         deeme [1] 35:14         deeme [1] 35:14         disposal [1] 60:9           concrete [12:3:19         counted [1] 26:24         11,19 30:6,17 34:17         deeme [1] 35:14         deeme [1] 35:17         define [1] 55:17         distinct [1] 03:1         distinct [1] 03:1           confirm [2] 44:15 49:4         6 56:20 59:21         country [7] 25:6,21 30:13 33:8 34;         define [1] 55:17         define [1] 55:23         define [1] 55:24         18           20,25 39:6,10 40:22 44:11,16,25         counte [1] 21:22 62:5 81:6         19 97:11         course [1] 22:32:22 62:5 81:6         19 97:12         definition [1] 31:23 52:3,19:20 86:           11 22:2 49:10 52:11 85:3:11 54:         COURT [1] 11:2,20 41:1,22,23 12:         definition [1] 31:24 8:24         definition [1] 31:25 51:10 31:16 39:7,12 41:2           22 98:20 99:8:17 101:6;13,17.23         17:25 33:25 28:9 31:2;1 21:41:22         definition [1] 84:12 0:22         dollars [1] 15:7:2           102:4,5,5,16;17,18 103:19         consider [2] 12:29 42:3 45:14 57:17,23 61:1         definition [1] 14:12 22:3 13:14 5			declined [1] 35:15	
Concerns (1) 104:8         Concerns (1) 105:1         Concern		-		•
concluded [119:12]       concrete [1123:19]       counted [1126:21]       deem [1133:14]       deem [1133:14]       distinction [104:12,16 87:17]         conditions [1052:1]       counted [1126:21]       counted [1126:21]       countery [1128:6,21 30:13 33:8 34]       defending [1091:23]       distinction [1084:12,16 87:17]         confront [2130:10,12]       country's [115:8]       country's [115:8]       define [1169:12]       define [1169:12]         confront [2130:10,12]       country's [115:8]       country's [115:8]       define [1169:12]       define [1169:12]         confront [2130:10,12]       country's [115:8]       country's [115:8]       define [1169:12]       disturbing [11912]         20:25 39:6,10 40:22 41:1,16,25       country [2131:16]       definitions [1153:4]       definitions [1153:4]       definitions [1153:4]         15:13 59:27 22:18 79:24 80:10       7,25 13:1,6,9,22 14:20,22 15:1,2,       39:13       39:13       39:13       59:16 65:20 69:4,72:3,11 73:16]         2,2 98:20 99:8,17 101:6,13,17,23       7,25 23:25 68:9,31:2,12 41:22       7,25 13:1,6,9,22 14:20,22 15:1,2,3,6]       definitions [1152:2]       doing [10] 105: 13:16 39:7,712 41:22         considered [2149:5 72:10 91:13]       considering [112:0]       18 88:22 93:24 94:11,19 95:11,124, 41:12 64:12 52:16       denominator [216:21 91:25 51]       denominator [216:21 91:25 51]         considering [1112:2]       10				•
concluded [1] 23:19       counted [1] 23:19       counted [1] 25:17       deemed [1] 55:17       distinction [3] 84:12,16 87:17         confront [2] 30:10,12       country [7] 28:6,21 30:13 33:834.       6 56:20 59:21       defines [1] 33:16       distinction [3] 84:12,16 87:17         confront [2] 10:12,20 38:9,13.       country [7] 28:6,21 30:13 33:834.       6 56:20 59:21       defines [1] 33:16       distinction [3] 84:12,16 87:17         confront [2] 10:12,20 38:9,13.       country [7] 28:6,21 30:13 33:834.       6 56:20 59:21       defines [1] 43:5 52:6 80:17       defines [1] 65:17       defines [1] 65:17       distinction [3] 84:12,16 87:17         confront [2] 11:2,20 38:9,13.       country [7] 28:6,21 30:13 33:834.       6 56:20 59:21       defines [1] 65:17       distinction [3] 84:12,16 87:17         confront [2] 11:2,22 33:15 33:15 33:25       country [7] 28:6,21 30:13 33:84.       6 for:16 89:41       defines [1] 65:23       defines [1] 65:23       defines [1] 65:23       defines [1] 65:23       distinction [3] 84:12,16 87:17       decimes [1] 65:23       doing [3] 10:5 13:16 39:7,12 41:22         20:25 39:6,10 40:22 41:11,6,25       courts [3] 69:22 42:23 11;2;2       definitions [1] 53:4       defines [1] 53:13:18 90:22       going [3] 12:22:14 38:14 56:14       59:16 56:20 69:47 23:31:7;2       doing [3] 10:5 13:16 39:7,12 41:2         20:25 39:6,17 40:6,13 87:19 99:6;33:29 93:12;12 24:15:25       deeinititions [1] 63:1       deeinonitarion				
Condition (9) 12:1,15       Country (9) 12:6,21 30:13 33:8 34: confront (2) 30:10,12       defending (1) 91:23 defines (1) 33:16 defines (1) 33:12 defines (1) 43:12 documented (1) 50:8 DOE's (2) 456:23,25 doing (5) 10:5 13:16 39:7,12 41:2 documented (1) 50:8 DOE's (2) 456:23,25 doing (5) 10:5 13:16 39:7,12 41:2 documented (1) 50:8 DOE's (2) 456:23,25 doing (5) 10:5 13:16 39:7,12 41:2 documented (1) 50:8 DOE's (2) 456:23,25 doing (5) 10:5 13:16 39:7,12 41:2 doilars (1) 57:2 doilars (1) 57:2 doilars (1) 57:2 doilars (1) 57:2 doilars (1) 57:2 doilars (1) 57:2 doilars (1) 57:2 draft (1) 50:25 draft (1) 52:1 33:17 39:7 draft (1) 50:25 draft (2) 42:13 57:17:27 99:7 draft (2) 42:14 57:17:23 61:1 derive (1) 60:4 derive (1) 60:4		<i>'</i>		
confirm [2] 44:15 49:4       country [1] 24:15 49:4       country [1] 24:15 49:4       country [1] 24:15 49:4       country [1] 24:15 49:4       defense [1] 33:16       district [5] 12:25 13:1,8 19:7 76:         confront [2] 34:15 49:4       country [3] 15 33:25       country [3] 15 33:25       country [3] 15 33:25       country [3] 15 33:25       defense [1] 33:16       district [5] 12:25 13:1,8 19:7 76:         35:13 36:14,20 37:12,20 38:9,13,       course [3] 23:22 62:5 81:6       course [3] 23:22 62:5 81:6       definition [7] 31:23 52:3,19,20 86:       DOE's [2] 56:23,25         47:14 48:22 49:10 52:18 53:11 54:       COURT [64] 11:2,20 41:12,22 31:2:       7,25 13:1,6,9,22 14:20,22 15:1.2       definitions [1] 53:4       defense [1] 33:16       district [5] 12:2: 5 13:1,6 19:7 76:         85:25 87:23 91:7 96:6,7,21,24 97:       23 17:19 18:23 19:7,11,14,21 20:       r.25 13:1,6,9,22 14:20,22 15:1.2       definitions [1] 53:4       definition [7] 31:23 52:3,19,20 86:       DOE's [2] 56:23,25         102:4,5,5,16,17,18 103:19       r.25 13:1,6,9,22 14:20,22 15:1.2       definition [7] 14:2:3 13:2,25 15:       definition [7] 14:2:3 13:2,25 15:       doing [6] 10:5 13:16 39:7,12 41:2         consider [9] 12:20       r.33:3 45:5,14,21,23 48:5 12 9:25       definit [9] 12:2:13:8 14:2,6,9 21:5       definit [9] 12:2:13:8 14:2,6,9 21:5       definit [9] 13:10       definit [9] 12:2:14 57:17,23 61:1         consistent [6] 12:2:19       rcray [1] 72:7       rcray [1] 72:7	concrete [1] 23:19			
Confinities 44: 1944: 1942: 1945: 194	conditions [3] 52:11 59:10 83:8	country [7] 28:6,21 30:13 33:8 34:		distinguish [2] 38:16 90:16
confront (a) 30.10, 12       country (a) 30.10, 12       country (a) 30.10, 12       country (a) 30.10, 12         confront (a) 30.10, 12       country (a) 67.15 89.4       couple (b) 50:14 76:13 87:13 90:1       defined (b) 43:5 52:6 80:17       disturbing (b) 34:2         35:13 36:14.20 37:12.20 38:9.13,       couple (b) 50:14 76:13 87:13 90:1       definition (b) 31:23 52:3,19,20 86:1       disturbing (b) 34:2         20:25 39:6,10 40:22 41:1,16,25       course (b) 23:22 62:5 81:6       course (b) 23:22 62:5 81:6       definition (b) 33:4       definition (b) 33:4         1 56:13 59:2 72:18 79:24 80:10       22 98:20 99:8,17 101:6,13,17.23       17.25 23:25 28:9 31:2,12 41:22       definition (b) 43:18 90:22       definition (b) 43:18 90:22         2,2 98:20 99:8,17 101:6,13,17,23       17.25 23:25 28:9 31:2,12 41:22       definition (b) 42:18 62:8 8:12 10:24 13:       definition (b) 42:18 62:8 8:12 10:24 13:         102:4,5,5,16,17,18 103:19       definitos (b) 42:24       demostrably (b) 48:22       denied (b) 42:16 62:2 65:16       doubly (b) 56:25         congressional (2) 100:7 104:10       18.8322 93:24 94:11,19 95:11,14       19 96:13,20 98:12 92:52 100:6       103:12,25       denominator (2) 85:21 95:25       denominator (2) 85:21 95:25       denominator (2) 85:21 95:25         considering (b) 12:20       courts (a) 77:11 83:3       courts (a) 77:11 83:3       courts (a) 77:11 83:3       depending (b) 28:1       deponting (b) 12:2       de	confirm [2] 44:15 49:4	6 <b>56:</b> 20 <b>59:</b> 21		district [5] 12:25 13:1,8 19:7 76:
Control field (1)       Courses (2) 22:13 31:15 33:25       Course (1) 50:17 37:13 87:13 90:         35:13 36:14,20 37:12,20 38:9,13,       course (1) 50:17 37:14 76:13 87:13 90:       14 97:11       Course (1) 21:22 22:22 62:5 81:6       Course (1) 21:22 23:22 62:2 81:9 11:22:21 41:22       Course (1) 21:22 23:25 23:25 23:9 31:2; 21:22 22:22 89:13,18 90:22       Course (1) 21:16 50: 85:92:25 90: 31:2; 21:22:22       Si:13 36:14 50:17 37:17 91:5 31:16 39:7,12 41:2         45:15 50:22 99:20 99:8,17 101:6,13,17,23       17,25 23:25 23:9 31:2; 21:2 41:22       33:13       definitions (1) 53:4       definitions (1) 48:22       doing (1) 01:6 13:16 39:7,12 41:2         Congressional (2) 100:7 104:10       18,23 81:19 85:1,12,20 86: 87:       16 67:9 68:9,11,22,24 70:10 76:       65:10 24:21 74:10       18 8:22 93:22 44:11,19 95:11,14,       definitions (1) 51:12 23:12 52:5       doub (1) 23:12 32:12 52:5       doub (1) 23:12 52:5       doub (1) 12:2       definitions (1) 13:10       Department (1) 2:3       definitions (1) 67:4       Eemail (1) 21:2       definitions (1) 67:4       Eemail (1) 21:2       definitions (1) 63:31       definition (2) 12:2       definition (2) 12:2	confront [2] 30:10,12	country's [1] 5:8		18
Congress (\$2 2:13 31:15 33:25 35:13 36:14,20 37:12,20 38:9,13, 20,25 39:6,10 40:22 41:1,16,25 47:14 46:22 49:10 52:18 53:11 54: 156:13 59:2 72:18 79:24 80:10 2,2 98:20 99:8,17 96:6,7,21,24 97: 2,2 98:20 99:8,17 101:6,13,17,23 102:4,55,16,17,18 103:19 Congress's (2) 36:3 49:2 consider d[2] 49:5 72:19 consider d[2] 49:5 72:19 constituent f[1] 2:20 constituent f[1] 2:20 constituent f[1] 2:20 constituent f[1] 2:21 constituent f[1] 2:21 constituent f[1] 2:21 constituent f[1] 2:19 constituent f[1] 2:16 constituent f[2] 2:16 constituent f[2] 2:16 constituent f[2] 2:16	confronted [1] 6:6	counts [2] 67:15 89:4		disturbing [1] 34:2
35:13       36:14,20       37:12,20       38:9,13,       14       97:11         20,25       39:6,10       40:22       41:11,16,25       course       13:23:22       62:5       81:6         47:14       48:22       49:10       52:18       53:11       54:13       56:13       59:27       72:18       72:18       72:13:16,9,22       14:20;21       19:25       96:8       definitions       19:32:96:8       definitions       19:25       96:8       definitions       19:25       96:13       22:24       89:13,18       90:22       93:13       10:21:43:6       39:13       10:21:43:6       49:11       20:13:16       93:13       10:21:43:6       49:11       <	Congress [52] 22:13 31:15 33:25	couple [5] 50:14 76:13 87:13 90:		
20,25 39:6,10 40:22 41:1,16,25       course i3 23:22 62:5 81:6       1 90:25 96:8         47:14 48:22 49:10 52:18 53:11 54:       COURT [64] 1:1,20 4:11,22,23 12:       definitions (1) 53:4         1 56:13 59:2 72:18 79:24 80:10       7,25 13:1,6,9,22 14:20,22 15:1,2,       33:13         85:25 87:23 91:7 96:6,7,21,24 97:       23 17:19 18:23 19:7,11,14,21 20:       23 17:19 18:23 19:7,11,14,21 20:         2,2 98:20 99:8,17 101:6,13,17,23       17,25 23:25 28:9 31:2,12 41:22       delay [2] 24:3,6       demonstrably [1] 48:22         102:4,5,5,16,17,18 103:19       42:11 56:3 58:9,22 64:22 66:14,       demonstrably [1] 48:22       demonstrably [1] 48:22         congressional [2] 100:7 104:10       18,23 81:19 98:1,12,20 86: 28 7:       denied [10] 4:17 12:3 13:2,25 15:       down [4] 27:10 35:1 73:17 99:7         consider [3] 12:9 72:10 91:13       18 88:22 93:24 94:11,19 95:11,14,       denominator [2] 85:21 95:25       deny [10] 71:20         consider [4] 44:5 25:16 26:4       court's [9] 5:12 13:8 14:2,69 21:5       fepending [1] 13:10       Department [10] 2:3         gepending [1] 22:0       covers [2] 27:7 85:17       crazy [1] 72:7       crazy [1] 72:7       crazy [1] 72:7         genet [1] 31:17       create [1] 31:17       create [1] 41:11 26:1 35:3 68:23       deriving [1] 80:3       derive [1] 60:4         constituent [1] 85:5       createl [2] 46:16 58:24       createl [2] 43:12 47:17 <t< td=""><td>-</td><td>-</td><td>definition [7] 31:23 52:3,19,20 86:</td><td>DOE's [2] 56:23.25</td></t<>	-	-	definition [7] 31:23 52:3,19,20 86:	DOE's [2] 56:23.25
47:14 48:22 49:10 52:18 53:11 54:       COURT [84]1:1,20 4:11,22,23 12:       definitions [11 53:4]       dollars [11 57:2]         1 56:13 59:2 72:18 79:24 80:10       7,25 13:1,6,9,22 14:20,22 15:1,2,       23 17:19 18:23 19:7,11,14,21 20:       33:13       degree [9] 32:24 89:13,18 90:22       39:13         2,2 98:20 99:8,17 101:6,13,17,23       17,25 23:25 28:9 31:2,12 14:22       66:14,       17,25 23:25 28:9 31:2,12 41:22       31:3       doubly [1] 48:22         Congress's [2] 36:3 49:2       16 67:9 68:9,11,22,24 70:10 76:       18,23 81:19 85:1,12,20 86:2 87:       doubly [1] 48:22       doubly [1] 52:15 5:6       doubly [1] 52:15 5:6         consider [3] 12:9 72:10 91:13       18 88:22 93:24 94:11,19 95:11,14       15 22:3 42:14 57:17,23 13:2,25 15:       doubly [1] 00:25       doubly [1] 00:25         considering [1] 12:20       103:12,25       Court's [9] 5:12 13:8 14:2,6,9 21:5       denominator [2] 85:21 95:25       deny [1] 71:20       deny [1] 13:10       Department [1] 23:         72: 100:10       covers [2] 32:7 85:17       crazy [1] 72:7       crazy [1] 72:7       crast [1] 31:17       derive [1] 60:3       derive [1] 80:3       derive		-	1 <b>90:</b> 25 <b>96:</b> 8	
1 56:13 59:2 72:18 79:24 80:10       7,25 13:1,6,9,22 14:20,22 15:1,2,       degree [5] 32:24 89:13,18 90:22       done [16] 7:18 22:14 38:14 56:14         85:25 87:23 91:7 96:6,7,21,24 97:       23 17:19 18:23 19:7,11,14,21 20:       33:13       delay [2] 24:3,6         2,2 98:20 99:8,17 101:6,13,17,23       17,25 23:25 28:9 31:2,12 44:22       delay [2] 24:3,6       delay [2] 24:3,6         Congress's [2] 36:3 49:2       42:11 56:3 58:9,22 64:22 66:14,       demonstrably [1] 48:22       denial [8] 4:18 6:25 8:12 10:24 13:         consider [3] 12:9 72:10 91:13       16 67:9 68:9,11,22,24 70:10 76:       denial [8] 4:18 6:25 8:12 10:24 13:       doubly [1] 56:25         considering [1] 12:20       18,8322 93:24 94:11,19 95:11,14,       19 96:13,20 98:12 99:25 100:6       103:12,25       denominator [2] 85:21 95:25         Court's [9] 5:12 13:8 14:2,6,9 21:5       60:10 86:12 102:6       court's [9] 77:11 83:3       cover [4] 32:8 47:14 48:19 59:13       depending [1] 28:1         constituent [14] 4:25 25:16 26:4       cover [4] 32:8 47:14 48:19 59:13       cover [4] 32:8 47:14 48:19 59:13       depending [1] 28:1       depending [1] 28:1         32:3 45:5,14,21,23 46:6 52:9,25       96:17 97:8 98:4       cover [2] 32:7 85:17       derivin [1] 60:4       derivin [1] 67:4       Deputy [1] 2:2       each [5] 25:19,23 26:3 32:7 59:24         96:17 97:8 98:4       create [1] 31:17       create [1] 41:11 26:1 35:3 68:23       derivin [1] 6			definitions [1] 53:4	-
1       1			degree [5] 32:24 89:13,18 90:22	-
b::0:50:71:29:17:90:0,7,12,124:97:1       23:17:19:10:23:17:19:10:17:14:12:27       delay [2] 24:3,6       35:10:61:77:18:10:10:10         2,2:98:20:99:8,17:101:6,13,17,23       17,25:23:25:28:9:31:2,12:41:22       delay [2] 24:3,6       demonstrably [1] 48:22         Congress's [2] 36:3 49:2       16:67:9:68:9,11,22,24:70:10:76:       18,23:81:19:85:1,12,20:86:28:75:       demonstrably [1] 48:22       demonstrably [1] 48:22         consider [3] 12:9:72:10:91:13       18:88:22:93:24:94:11,19:95:11,14,       19:96:13,20:98:12:99:25:100:6       45:15:18:22:4       doubly [1] 50:25         considering [1] 12:20       103:12:25       Court's [9] 5:12:13:8:14:2,6,9:21:5       deny [1] 71:20       deny [1] 71:20       deny [1] 13:10         79:2:100:10       Court's [9] 5:12 13:8:14:2,6,9:21:5       depending [1] 12:0       depending [1] 13:10       Department [1] 2:3         32:3:45:5,14,21,23:46:6:52:9,25       Gover [4] 32:8:47:14:48:19:59:13       depending [1] 28:1       depositions [1] 67:4       each [5] 25:19,23:26:3:32:7:59:24         96:17:97:8:98:4       created [1] 41:17       created [2] 43:12:47:17       created [2] 44:11:26:1:35:3:68:23       deriving [1] 80:3       easiest [1] 72:16         constitutes [1] 81:14       created [2] 43:12:47:17       critical [1] 57:5       design [1] 73:15       design [1] 73:15       easiest [1] 72:16         constitution [2] 71:6:81:14       critical [1] 57:5 <t< td=""><td></td><td></td><td>-</td><td></td></t<>			-	
102:4,55,16,17,18 103;19       42:11 56:3 58:9,22 66:22 66:14,       demonstrably [1] 48:22       doubly [1] 56:25 constrably [1] 48:22         congressional [2] 100;7 104:10       16 67:9 68:9,11,22,24 70:10 76:       demionstrably [1] 48:22       doubly [1] 56:25 constrably [1] 48:22         consider [3] 12:9 72:10 91:13       18 88:22 93:24 94:11,19 95:11,14,       18 88:22 93:24 94:11,19 95:11,14,       denied [10] 4:17 12:3 13:2,25 15:       doubly [1] 56:25         considered [2] 49:5 72:19       19 96:13,20 98:12 99:25 100:6       103:12,25       denominator [2] 85:21 95:25       deny [1] 71:20         considered [1] 4:6       court's [9] 5:12 13:8 14:2,6,9 21:5       60:10 86:12 102:6       deny [1] 71:20       deny [1] 71:20         constituent [14] 4:25 25:16 26:4       covers [2] 32:7 75:17       covers [2] 32:7 85:17       deponding [1] 28:1       depositions [1] 67:4         gent [1] 51:5       covers [2] 32:7 85:17       create [1] 31:17       create [1] 31:17       deriving [1] 80:3       earlier [5] 37:14 46:10 49:14 50:1         constituents [1] 25:19       create [1] 31:17       create [1] 31:17       deriving [1] 80:3       earlier [1] 37:15       earlier [1] 37:16         constituets [1] 74:5       create [1] 41:12 26:1 35:3 68:23       create [1] 157:5       determination [3] 12:6 64:15 77:       economical [1] 33:5				
102.14,0,5,16,17,10,101,100,100,100,100,100,100,100,1			-	
congressional [2] 100:7 104:10       18,23 81:19 85:1,12,20 86:2 87:       4,5 15:18 22:4       down [4] 27:10 35:1 73:17 99:7         consider [3] 12:9 72:10 91:13       18 82:2 93:24 94:11,19 95:11,14,       19 96:13,20 98:12 99:25 100:6       down [4] 27:10 35:1 73:17 99:7         considering [1] 12:20       103:12,25       100:15 00:42:1 74:10       Court's [9] 5:12 13:8 14:2,6,9 21:5       denied [10] 4:17 12:3 13:2,25 15:       drafts [2] 44:11 50:12         considering [1] 12:20       considering [1] 12:20       Court's [9] 5:12 13:8 14:2,6,9 21:5       denying [1] 71:20       during [1] 41:9         79:2 100:10       courts [2] 77:11 83:3       cover [4] 32:8 47:14 48:19 59:13       depending [1] 28:1       depending [1] 28:1         32:3 45:5,14,21,23 46:6 52:9,25       covers [2] 32:7 85:17       crazy [1] 72:7       depositions [1] 67:4       Deputy [1] 2:2         96:17 97:8 98:4       create [1] 31:17       create [1] 31:17       create [2] 46:16 58:24       deriving [1] 80:3       earlier [5] 37:14 46:10 49:14 50:1         constitutes [1] 83:5       create [2] 43:12 47:17       critical [1] 57:5       design [1] 73:15       easiest [1] 72:16         constructed [1] 74:5       critical [1] 57:5       critical [1] 57:5       design [1] 73:16       economical [1] 33:5			-	
congressional (2) 100:7 104:10       16,23 61:19 85:1,12,20 86:2 67:       denied (10) 4:17 12:3 13:2,25 15:       15 22:3 42:14 57:17,23 61:1         consider (2) 49:5 72:19       19 96:13,20 98:12 99:25 100:6       103:12,25       15 22:3 42:14 57:17,23 61:1       daraft (1) 50:25       daraft (1) 50:25         consistent [5] 5:10 24:21 74:10       103:12,25       Court's (9) 5:12 13:8 14:2,6,9 21:5       denominator (2) 85:21 95:25       deny (1) 71:20       during (1) 4:19         79:2 100:10       courts (2) 77:11 83:3       depending (1) 28:1       depending (1) 28:1       depending (1) 28:1         32:3 45:5, 14, 21, 23 46:6 52:9, 25       96:17 97:8 98:4       create (1) 31:17       create (1) 31:17       create (1) 31:17       derive (1) 60:4       earlier (5) 37:14 46:10 49:14 50:1         constitutes (1) 83:5       created (2) 46:16 58:24       created (2) 46:16 58:24       deriving (1) 80:3       easiest (1) 72:16         constructed (1) 74:5       critical (1) 57:5       critical (1) 57:5       design (1) 73:15       easiest (1) 72:16				
consider (i) 12.9 72.10 91.13       10 80.22 93.24 94.11,19 95.11,14, 19 96:13,20 98:12 99:25 100:6       15 22:3 42:14 57:17,23 61:1       draft (i) 50.23         considering (ii) 12:20       103:12,25       Court's (ii) 5:10 24:21 74:10       fo 86:12 102:6       denying (ii) 71:20       denying (ii) 13:10         79:2 100:10       60:10 86:12 102:6       courts (ii) 77:11 83:3       depending (ii) 28:1       depending (ii) 28:1       deriving (ii) 13:10         32:3 45:5,14,21,23 46:6 52:9,25       cover (ii) 32:7 85:17       covers (ii) 32:7 85:17       depositions (ii) 67:4       depositions (ii) 67:4       depositions (ii) 67:4         96:17 97:8 98:4       create (ii) 31:17       create (ii) 31:17       create (ii) 31:17       deriving (ii) 80:3       earlier (5) 37:14 46:10 49:14 50:1         constitutional (ii) 62:8       credible (2i) 43:12 47:17       critical (ii) 57:5       desirable (ii) 33:15       easiest (ii) 72:16         construction (2i) 71:6 81:14       critical (ii) 57:5       determination (ii) 12:6 64:15 74:       determination (ii) 12:6 64:15 74:       economical (ii) 33:5			,	
considered [2] 43.572.15       19 30.15,20 30.12 33.25 100.0       denominator [2] 85:21 95:25         considered [2] 43.12 44.11 30.12       103:12,25         consistent [5] 5:10 24:21 74:10       Court's [9] 5:12 13:8 14:2,6,9 21:5       denominator [2] 85:21 95:25         denominator [2] 85:21 95:25       denominator [2] 85:21 95:25       due [1] 43:11         79:2 100:10       60:10 86:12 102:6       Department [1] 2:3         constituent [14] 4:25 25:16 26:4       cover [4] 32:8 47:14 48:19 59:13       Department [1] 2:3         32:3 45:5,14,21,23 46:6 52:9,25       g6:17 97:8 98:4       covers [2] 32:7 85:17       Deputy [1] 22:         96:17 97:8 98:4       create [1] 31:17       create [1] 31:17       deriving [1] 80:3       deriving [1] 80:3         constitutional [1] 62:8       credible [2] 43:12 47:17       credible [2] 43:12 47:17       design [1] 73:15       easiest [1] 72:16         constructed [1] 74:5       critical [1] 57:5       critical [1] 57:5       determination [3] 12:6 64:15 74:       economical [1] 33:5	consider [3] 12:9 72:10 91:13	18 88:22 93:24 94:11,19 95:11,14,		
considering (i) 12.20       103.12,23         considering (i) 12.20       103.12,23         consistent (5) 5:10 24:21 74:10       Court's (9) 5:12 13:8 14:2,6,9 21:5         form of the rest of	considered [2] 49:5 72:19	19 <b>96:</b> 13,20 <b>98:</b> 12 <b>99:</b> 25 <b>100:</b> 6		drafts [2] 44:11 50:12
consistent [5] 5:10 24:21 74:10       Court's [9] 5:12 13:8 14:2,6,9 21:5       deny [1] 71:20         79:2 100:10       60:10 86:12 102:6       denying [1] 13:10         consolidated [1] 4:6       courts [2] 77:11 83:3       depending [1] 28:1         constituent [14] 4:25 25:16 26:4       cover [4] 32:8 47:14 48:19 59:13       depending [1] 28:1         32:3 45:5,14,21,23 46:6 52:9,25       g6:17 97:8 98:4       covers [2] 32:7 85:17       depositions [1] 67:4         96:17 97:8 98:4       create [1] 31:17       derive [1] 60:4       derive [1] 60:4         constitutes [1] 83:5       create [1] 31:17       deriving [1] 80:3       design [1] 73:15         constructed [1] 74:5       credible [2] 43:12 47:17       desirable [1] 33:15       easiest [1] 72:16         construction [2] 71:6 81:14       critical [1] 57:5       detrimation [3] 12:6 64:15 74:       economical [1] 33:5	considering [1] 12:20	<b>103:</b> 12,25		due [1] 43:11
79:2 100:10       60:10 86:12 102:6       denying [1] 13:10         consolidated [1] 4:6       courts [2] 77:11 83:3       Department [1] 2:3         constituent [14] 4:25 25:16 26:4       cover [4] 32:8 47:14 48:19 59:13       depending [1] 28:1         32:3 45:5,14,21,23 46:6 52:9,25       ge:17 97:8 98:4       covers [2] 32:7 85:17       depositions [1] 67:4         96:17 97:8 98:4       create [1] 31:17       create [1] 31:17       derive [1] 60:4         constitutes [1] 83:5       create [1] 31:17       deriving [1] 80:3       earlier [5] 37:14 46:10 49:14 50:1         constitutional [1] 62:8       credible [2] 43:12 47:17       design [1] 73:15       easiest [1] 72:16         constructed [1] 74:5       critical [1] 57:5       critical [1] 57:5       desirable [1] 33:15       economical [1] 33:5	-	Court's [9] 5:12 13:8 14:2,6,9 21:5	-	during [1] 41:9
consolidated [1] 4:6       courts [2] 77:11 83:3       Department [1] 2:3         constituent [14] 4:25 25:16 26:4       cover [4] 32:8 47:14 48:19 59:13       depending [1] 28:1         32:3 45:5, 14, 21, 23 46:6 52:9, 25       cover [2] 32:7 85:17       depositions [1] 67:4       e-mail [1] 21:2         96:17 97:8 98:4       crazy [1] 72:7       derive [1] 60:4       93:18         constitutes [1] 83:5       create [1] 31:17       derive [1] 60:4       93:18         constitutional [1] 62:8       credible [2] 43:12 47:17       design [1] 73:15       easiest [1] 72:16         constructed [1] 74:5       critical [1] 57:5       critical [1] 57:5       desirable [1] 33:15			denying [1] 13:10	
constituent [14] 4:25 25:16 26:4       cover [4] 32:8 47:14 48:19 59:13       depending [1] 28:1       e-mail [1] 21:2         32:3 45:5,14,21,23 46:6 52:9,25       covers [2] 32:7 85:17       depositions [1] 67:4       each [5] 25:19,23 26:3 32:7 59:24         96:17 97:8 98:4       crazy [1] 72:7       Deputy [1] 2:2       each [5] 25:19,23 26:3 32:7 59:24         constituents [1] 25:19       create [1] 31:17       derive [1] 60:4       93:18         constitutional [1] 62:8       credible [2] 43:12 47:17       design [1] 73:15       easiest [1] 72:16         constructed [1] 74:5       critical [1] 57:5       critical [1] 57:5       design [1] 33:15       echo [1] 33:15			Department [1] 2:3	E
constitutent (%)4.2.3 23.10 20.4       covers (2.3.2.7 47.14 40.19 35.15)       depositions (1) 67:4       each (5) 25:19,23 26:3 32:7 59:24         32:3 45:5,14,21,23 46:6 52:9,25       covers (2.3.2:7 85:17)       creaty (1) 72:7       Deputy (1) 2:2       each (5) 25:19,23 26:3 32:7 59:24         96:17 97:8 98:4       creaty (1) 72:7       create (1) 31:17       derive (1) 60:4       93:18         constitutes (1) 83:5       created (2) 46:16 58:24       deriving (1) 80:3       early (1) 100:8         constructed (1) 74:5       criteria (4) 14:11 26:1 35:3 68:23       design (1) 73:15       easiest (1) 72:16         construction (2) 71:6 81:14       critical (1) 57:5       critical (1) 57:5       deriving (3) 12:6 64:15 74:       economical (1) 33:5	-		depending [1] 28:1	e-mail [1] 21:2
96:17 97:8 98:4       crazy [1] 72:7       Deputy [1] 2:2       earlier [5] 37:14 46:10 49:14 50:1         96:17 97:8 98:4       crazy [1] 72:7       derive [1] 60:4       93:18         constituents [1] 25:19       create [1] 31:17       derive [1] 60:4       93:18         constitutional [1] 62:8       credible [2] 43:12 47:17       design [1] 73:15       easiest [1] 72:16         constructed [1] 74:5       criteria [4] 14:11 26:1 35:3 68:23       desirable [1] 33:15       echo [1] 57:24         construction [2] 71:6 81:14       critical [1] 57:5       ortical [1] 57:5       ortical [1] 26:4:15 74:       economical [1] 33:5				
constituents [1] 25:19       create [1] 31:17       derive [1] 60:4       93:18         constitutes [1] 83:5       created [2] 46:16 58:24       derive [1] 80:3       early [1] 100:8         constitutional [1] 62:8       credible [2] 43:12 47:17       design [1] 73:15       easiest [1] 72:16         constructed [1] 74:5       criteria [4] 14:11 26:1 35:3 68:23       desirable [1] 33:15       echo [1] 57:24         construction [2] 71:6 81:14       critical [1] 57:5       construction [3] 12:6 64:15 74:       economical [1] 33:5			-	
constitutes (1) 83:5       created (2) 46:16 58:24       deriving (1) 80:3       early (1) 100:8         constitutional (1) 62:8       credible (2) 43:12 47:17       design (1) 73:15       easiest (1) 72:16         constructed (1) 74:5       criteria (4) 14:11 26:1 35:3 68:23       desirable (1) 33:15       echo (1) 57:24         construction (2) 71:6 81:14       critical (1) 57:5       critical (1) 57:5       comparison (3) 12:6 64:15 74:       economical (1) 33:5	-	-		
constitutional (1) 62:8         credible (2) 43:12 47:17         design (1) 73:15         easiest (1) 72:16           constructed (1) 74:5         criteria (4) 14:11 26:1 35:3 68:23         design (1) 73:15         echo (1) 57:24           construction (2) 71:6 81:14         critical (1) 57:5         critical (1) 57:5         determination (3) 12:6 64:15 74:         economical (1) 33:5				
constructed [1] 74:5         criteria [4] 14:11 26:1 35:3 68:23         desirable [1] 33:15         echo [1] 57:24           construction [2] 71:6 81:14         critical [1] 57:5         determination [3] 12:6 64:15 74:         economical [1] 33:5				2
construction [2] 71:6 81:14         critical [1] 57:5         determination [3] 12:6 64:15 74:         economical [1] 33:5				
construction <sup>[2]</sup> 71:6 81:14 critical <sup>[1]</sup> 57:5 determination <sup>[3]</sup> 12:6 64:15 74: economical <sup>[1]</sup> 33:5	constructed [1] 74:5	criteria [4] 14:11 26:1 35:3 68:23		
	construction [2] 71:6 81:14			
		curious [1] 34:6	9	economically [1] 24:19
containers [1] 105:21         current [2] 21:9 107:9         determining [3] 29:15 70:13 107:         effect [3] 38:4 41:10 77:23			determining 3 29:15 70:13 107:	effect [3] 38:4 41:10 77:23
contemplated [1] 38:13         currently [1] 24:24         3         effective [2] 34:4 54:10			3	effective [2] 34:4 54:10
Haritage Departing Corporation		-		

Official - Subject to Final Review

	• · ·
effectively [3] 61:20 70:11 86:16	exceed [1] 72:9
efficient [1] 54:10	exceeded [1] 69:22
efforts [1] 60:4	Except [1] 62:12
eight [1] 26:21	exception [4] 4:20 19:16,23
either [6] 12:6 46:5,5 78:3 105:7	exceptions [1] 99:3
<b>106:</b> 25	excess [1] 9:21
elements [10] 45:5,21,23 46:6 52:	excluded [2] 66:6,7
25 <b>53:</b> 5,16 <b>54:</b> 3,9,15	exclusive [3] 19:10 77:1,8
emphasize <sup>[2]</sup> 48:5 71:22	exclusivity [1] 19:14
en [5] 10:3 12:7,18 13:14 14:13	excuse [1] 29:10
enact [1] 38:10	exemplar [1] 81:1
enacted [4] 31:13 34:1 36:21 48:	exercise [4] 19:25 43:1 44:
21	exerted [1] 41:24
encompasses [1] 39:16	exhaust [1] 44:7
encourage [6] 38:8 39:19,25 49:	exhaustion [1] 14:12
19 <b>50</b> :1 <b>101</b> :3	exhaustively [1] 50:20
encouraged [4] 35:23 38:2,5 39:6	exist [1] 34:21
Encouraging [2] 41:18 43:15	existed [1] 100:22
end [2] 17:20 48:25	existing [2] 37:21 38:6
ending [1] 16:3	exists [1] 100:18
endorse [3] 37:21,24,24	expand [2] 38:6 39:24
endorsed [1] 37:25	expected [1] 41:25
endorsement [1] 104:2	expense [1] 13:16
Energy [36] 4:24 31:3 36:13 37:11	expert [2] 60:25 61:19
<b>38</b> :15 <b>39</b> :17 <b>40</b> :3,10 <b>43</b> :3,7,13 <b>44</b> :	expire [1] 30:8
18,25 <b>45</b> :8 <b>46</b> :2 <b>47</b> :13,18 <b>48</b> :18	expired [2] 27:3 102:10
<b>49:6 50:8 53:</b> 22 <b>54:</b> 13 <b>56:</b> 1 <b>59:</b> 7	explain [3] 11:17 100:7 103
	explained [2] 95:15,19
<b>60</b> :15 <b>61</b> :5 <b>65</b> :6,25 <b>68</b> :3 <b>71</b> :4 <b>79</b> :	
18 80:4,18 81:8 84:21 107:16	explicitly [2] 37:21 49:10
enforcement [1] 89:6	exposition [1] 65:19
England [1] 55:16	exposure [1] 51:24
enough [6] 85:23 87:1,11,16 88:5	expressed [1] 31:15
<b>94</b> :25	expressing [1] 40:23
ensure <sup>[3]</sup> 5:9 18:12 82:3	expressly [3] 40:4,10 80:11
• ···=•	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41:
ensure <sup>[3]</sup> 5:9 18:12 82:3 enterprises <sup>[1]</sup> 24:7 entitled <sup>[3]</sup> 9:9,19 12:17	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41:
ensure <sup>[3]</sup> 5:9 18:12 82:3 enterprises <sup>[1]</sup> 24:7 entitled <sup>[3]</sup> 9:9,19 12:17	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12 extreme <sup>[1]</sup> 26:17
ensure <sup>[3]</sup> 5:9 18:12 82:3 enterprises <sup>[1]</sup> 24:7 entitled <sup>[3]</sup> 9:9,19 12:17 environmental <sup>[3]</sup> 17:11,12 55:10	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12 extreme <sup>[1]</sup> 26:17 F
ensure <sup>[3]</sup> 5:9 18:12 82:3 enterprises <sup>[1]</sup> 24:7 entitled <sup>[3]</sup> 9:9,19 12:17 environmental <sup>[3]</sup> 17:11,12 55:10 equally <sup>[2]</sup> 32:12 40:9	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12 extreme <sup>[1]</sup> 26:17 F.2d <sup>[1]</sup> 7:8
ensure <sup>[3]</sup> 5:9 18:12 82:3 enterprises <sup>[1]</sup> 24:7 entitled <sup>[3]</sup> 9:9,19 12:17 environmental <sup>[3]</sup> 17:11,12 55:10 equally <sup>[2]</sup> 32:12 40:9 equals <sup>[1]</sup> 98:5	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12 extreme <sup>[1]</sup> 26:17 F.2d <sup>[1]</sup> 7:8 facial <sup>[1]</sup> 61:23
ensure <sup>[3]</sup> 5:9 18:12 82:3 enterprises <sup>[1]</sup> 24:7 entitled <sup>[3]</sup> 9:9,19 12:17 environmental <sup>[3]</sup> 17:11,12 55:10 equally <sup>[2]</sup> 32:12 40:9 equals <sup>[1]</sup> 98:5 erroneous <sup>[1]</sup> 13:11 error <sup>[3]</sup> 19:24 20:5 44:16	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12 extreme <sup>[1]</sup> 26:17 F.2d <sup>[1]</sup> 7:8 facial <sup>[1]</sup> 61:23 facilities <sup>[23]</sup> 26:21 27:2,7,7
ensure <sup>[3]</sup> 5:9 18:12 82:3 enterprises <sup>[1]</sup> 24:7 entitled <sup>[3]</sup> 9:9,19 12:17 environmental <sup>[3]</sup> 17:11,12 55:10 equally <sup>[2]</sup> 32:12 40:9 equals <sup>[1]</sup> 98:5 erroneous <sup>[1]</sup> 13:11 error <sup>[3]</sup> 19:24 20:5 44:16 especially <sup>[1]</sup> 22:24	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12 extreme <sup>[1]</sup> 26:17 F.2d <sup>[1]</sup> 7:8 facial <sup>[1]</sup> 61:23
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12 extreme <sup>[1]</sup> 26:17 F.2d <sup>[1]</sup> 7:8 facial <sup>[1]</sup> 61:23 facilities <sup>[23]</sup> 26:21 27:2,7,7
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12 extreme <sup>[1]</sup> 26:17 F.2d <sup>[1]</sup> 7:8 facial <sup>[1]</sup> 61:23 facilities <sup>[23]</sup> 26:21 27:2,7,7 11,12 32:23 33:7 34:25 35:
ensure <sup>[3]</sup> 5:9 18:12 82:3 enterprises <sup>[1]</sup> 24:7 entitled <sup>[3]</sup> 9:9,19 12:17 environmental <sup>[3]</sup> 17:11,12 55:10 equally <sup>[2]</sup> 32:12 40:9 equals <sup>[1]</sup> 98:5 erroneous <sup>[1]</sup> 13:11 error <sup>[3]</sup> 19:24 20:5 44:16 especially <sup>[1]</sup> 22:24 ESQ <sup>[5]</sup> 3:3,7,11,15,19 ESQUIRE <sup>[2]</sup> 2:5,7 essence <sup>[1]</sup> 10:5	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12 extreme <sup>[1]</sup> 26:17 F.2d <sup>[1]</sup> 7:8 facial <sup>[1]</sup> 61:23 facilities <sup>[23]</sup> 26:21 27:2,7,7 11,12 32:23 33:7 34:25 35: 13 72:15 82:2,7,13 101:13,
ensure <sup>[3]</sup> 5:9 18:12 82:3 enterprises <sup>[1]</sup> 24:7 entitled <sup>[3]</sup> 9:9,19 12:17 environmental <sup>[3]</sup> 17:11,12 55:10 equally <sup>[2]</sup> 32:12 40:9 equals <sup>[1]</sup> 98:5 erroneous <sup>[1]</sup> 13:11 error <sup>[3]</sup> 19:24 20:5 44:16 especially <sup>[1]</sup> 22:24 ESQ <sup>[5]</sup> 3:3,7,11,15,19 ESQUIRE <sup>[2]</sup> 2:5,7 essence <sup>[1]</sup> 10:5 essentially <sup>[7]</sup> 5:24 6:11 10:7 13:	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12 extreme <sup>[1]</sup> 26:17 F.2d <sup>[1]</sup> 7:8 facial <sup>[1]</sup> 61:23 facilities <sup>[23]</sup> 26:21 27:2,7,7 11,12 32:23 33:7 34:25 35: 13 72:15 82:2,7,13 101:13, 11,16,18,20,21 107:7 facilities' <sup>[1]</sup> 59:12
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essence [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12 extreme <sup>[1]</sup> 26:17 F.2d <sup>[1]</sup> 7:8 facial <sup>[1]</sup> 61:23 facilities <sup>[23]</sup> 26:21 27:2,7,7 11,12 32:23 33:7 34:25 35: 13 72:15 82:2,7,13 101:13, 11,16,18,20,21 107:7
ensure <sup>[3]</sup> 5:9 18:12 82:3 enterprises <sup>[1]</sup> 24:7 entitled <sup>[3]</sup> 9:9,19 12:17 environmental <sup>[3]</sup> 17:11,12 55:10 equally <sup>[2]</sup> 32:12 40:9 equals <sup>[1]</sup> 98:5 erroneous <sup>[1]</sup> 13:11 error <sup>[3]</sup> 19:24 20:5 44:16 especially <sup>[1]</sup> 22:24 ESQ <sup>[5]</sup> 3:3,7,11,15,19 ESQUIRE <sup>[2]</sup> 2:5,7 essence <sup>[1]</sup> 10:5 essentially <sup>[7]</sup> 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish <sup>[3]</sup> 25:11 33:10 56:14	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essence [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 estoppel [1] 78:10	expressly <sup>[3]</sup> 40:4,10 80:11 extent <sup>[4]</sup> 12:19 23:7,11 41: extra-statutory <sup>[1]</sup> 9:12 extreme <sup>[1]</sup> 26:17 F.2d <sup>[1]</sup> 7:8 facial <sup>[1]</sup> 61:23 facilities <sup>[23]</sup> 26:21 27:2,7,7 11,12 32:23 33:7 34:25 35: 13 72:15 82:2,7,13 101:13, 11,16,18,20,21 107:7 facilities' <sup>[1]</sup> 59:12 facility <sup>[38]</sup> 24:11 26:17 27: 15,18,19 28:3 33:6 34:17 3 43:10 44:23 45:19 55:22 56
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essence [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 estoppel [1] 78:10 ET [9] 1:4,7,13 2:11 3:17 74:11,11	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essence [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 estoppel [1] 78:10 ET [9] 1:4,7,13 2:11 3:17 74:11,11 85:10 101:4	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essence [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 estoppel [1] 78:10 ET [9] 1:4,7,13 2:11 3:17 74:11,11 85:10 101:4 even [20] 11:25 16:5 17:24 24:14	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essence [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 estoppel [1] 78:10 ET [9] 1:4,7,13 2:11 3:17 74:11,11 85:10 101:4 even [20] 11:25 16:5 17:24 24:14 27:7 39:8 47:6,11 62:7 84:16 85:	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essence [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 estoppel [1] 78:10 ET [9] 1:4,7,13 2:11 3:17 74:11,11 85:10 101:4 even [20] 11:25 16:5 17:24 24:14	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essente [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 estoppel [1] 78:10 ET [9] 1:4,7,13 2:11 3:17 74:11,11 85:10 101:4 even [20] 11:25 16:5 17:24 24:14 27:7 39:8 47:6,11 62:7 84:16 85: 21 86:23 88:25 89:7,21 91:13,25 93:19 94:13 105:18	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essente [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 estoppel [1] 78:10 ET [9] 1:4,7,13 2:11 3:17 74:11,11 85:10 101:4 even [20] 11:25 16:5 17:24 24:14 27:7 39:8 47:6,11 62:7 84:16 85: 21 86:23 88:25 89:7,21 91:13,25	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essente [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 estoppel [1] 78:10 ET [9] 1:4,7,13 2:11 3:17 74:11,11 85:10 101:4 even [20] 11:25 16:5 17:24 24:14 27:7 39:8 47:6,11 62:7 84:16 85: 21 86:23 88:25 89:7,21 91:13,25 93:19 94:13 105:18	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essente [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 estoppel [1] 78:10 ET [9] 1:4,7,13 2:11 3:17 74:11,11 85:10 101:4 even [20] 11:25 16:5 17:24 24:14 27:7 39:8 47:6,11 62:7 84:16 85: 21 86:23 88:25 89:7,21 91:13,25 93:19 94:13 105:18 events [1] 107:9	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essente [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 estoppel [1] 78:10 ET [9] 1:4,7,13 2:11 3:17 74:11,11 85:10 101:4 even [20] 11:25 16:5 17:24 24:14 27:7 39:8 47:6,11 62:7 84:16 85: 21 86:23 88:25 89:7,21 91:13,25 93:19 94:13 105:18 events [1] 107:9 everybody [3] 98:5 100:18 101:24	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essente [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 estoppel [1] 78:10 ET [9] 1:4,7,13 2:11 3:17 74:11,11 85:10 101:4 even [20] 11:25 16:5 17:24 24:14 27:7 39:8 47:6,11 62:7 84:16 85: 21 86:23 88:25 89:7,21 91:13,25 93:19 94:13 105:18 events [1] 107:9 everybody [3] 98:5 100:18 101:24 everything [3] 100:24 101:6,10 evidence [3] 61:21 64:4 67:5	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essente [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 establish [3] 25:11 32:10 56:14 establish [3] 25:11 32:10 56:14 establish [3] 25:11 32:10 56:14 establish [3] 25:11 32:10 56:14 even [20] 11:25 16:5 17:24 24:14 27:7 39:8 47:6,11 62:7 84:16 85: 21 86:23 88:25 89:7,21 91:13,25 93:19 94:13 105:18 events [1] 107:9 everybody [3] 98:5 100:18 101:24 everything [3] 100:24 101:6,10 evidence [3] 61:21 64:4 67:5 evidentiary [1] 65:19	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essence [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 establish [3] 25:11 33:10 56:14 even [20] 11:25 16:5 17:24 24:14 27:7 39:8 47:6,11 62:7 84:16 85: 21 86:23 88:25 89:7,21 91:13,25 93:19 94:13 105:18 events [1] 107:9 everybody [3] 98:5 100:18 101:24 everything [3] 100:24 101:6,10 evidence [3] 61:21 64:4 67:5 evidentiary [1] 65:19 exact [1] 93:21	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$
ensure [3] 5:9 18:12 82:3 enterprises [1] 24:7 entitled [3] 9:9,19 12:17 environmental [3] 17:11,12 55:10 equally [2] 32:12 40:9 equals [1] 98:5 erroneous [1] 13:11 error [3] 19:24 20:5 44:16 especially [1] 22:24 ESQ [5] 3:3,7,11,15,19 ESQUIRE [2] 2:5,7 essente [1] 10:5 essentially [7] 5:24 6:11 10:7 13: 21 15:22 94:2 104:6 establish [3] 25:11 33:10 56:14 establish [3] 25:11 32:10 56:14 establish [3] 25:11 32:10 56:14 establish [3] 25:11 32:10 56:14 establish [3] 25:11 32:10 56:14 even [20] 11:25 16:5 17:24 24:14 27:7 39:8 47:6,11 62:7 84:16 85: 21 86:23 88:25 89:7,21 91:13,25 93:19 94:13 105:18 events [1] 107:9 everybody [3] 98:5 100:18 101:24 everything [3] 100:24 101:6,10 evidence [3] 61:21 64:4 67:5 evidentiary [1] 65:19	$\begin{array}{c} \text{expressly} \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \$

failure [2] 56:23 57:1 fallback [2] 101:8.12 falls [1] 51:25 on [4] 4:20 19:16,23 99:4 Fasken [33] 2:8 3:12 4:13,16 6:24 7:25 8:11,25 9:9 11:10,24 12:1,2, 2,16,18 13:21 14:1 16:9 17:2,5,8 **19:6 21:**12 **23:**23 **42:**19,21,24 **58:** 19 60:22 92:2.8 105:8 Fasken's [2] 58:10 105:9 FCC [2] 83:10 86:22 federal [20] 29:11 30:16 35:17 38: e [4] 19:25 43:1 44:7 48:12 7.24 41:8.12 44:1.9 48:15 49:16 **74:**16 **79:**8 **98:**17 **99:**2 **101:**4.13. 13 103:17 105:24 few [1] 104:20 field [1] 86:11 Fifth [11] 4:19 42:21,25 57:5,21 62: 20 63:16,17 71:18 87:19 91:24 figure [4] 11:20 73:3 84:9 101:24 file [7] 20:25 85:22 86:22,24 87:1 88:18 94:4 filed [6] 21:12.24 22:3 24:13 63:12 **91**:8 final [7] 31:20 42:14 63:22.23 69:3. 5 77:7 finally [1] 86:4 finding [1] 34:6 <sup>[3]</sup> **11:**17 **100:**7 **103:**8 findings [2] 38:3 96:25 First [24] 4:12 6:22 8:10 11:22 16: 25 **27**:24 **31**:1,1 **53**:22 **62**:2 **63**:12 **64:**1,2 **67:**9 **69:**20 **76:**15,19 **83:**9 **85:**16 **98:**13,13,21 **103:**13 **104:**21 fit [1] 74.8 five [4] 25:15 74:13 79:1 105:14 sly [3] 40:4,10 80:11 <sup>4]</sup> **12**:19 **23**:7,11 **41**:23 five-vear-old [1] 52:20 fix [2] 102:4.6 focus [1] 11:8 focusing [1] 31:16 follow [1] 77:17 following [3] 21:2 40:13,13 footnote [1] 50:21 s [23] 26:21 27:2.7.10 29: footnotes [1] 50:23 2:23 33:7 34:25 35:4 59: foreclosed [1] 67:20 5 82:2,7,13 101:13,14 106: forever [1] 101:21 forfeit [1] 13:15 forget [1] 27:13 [38] **24:**11 **26:**17 **27:**1,6,11, forgiving [1] 18:5 9 28:3 33:6 34:17 35:15 form [2] 14:25 86:25 4:23 45:19 55:22 56:15,18 formality [4] 89:13,18 90:22 93:14 3:16 74:5.16 80:16.17 81: formally [1] 48:8 2:4.9 97:13.14.19.20.21 former [4] 15:2 80:16 83:22,24 forth [2] 33:21 61:9 Forty [2] 23:8,10 9:3 11:9.9.24 17:3 44:4 48: forum [1] 10:9 forward [1] 56:13 fought [1] 50:13 found [4] 17:1.1 36:17 76:21 Foundation [1] 66:23 28] 2:5 3:7 42:7,8,10 44:24 fours [1] 76:21 **46**:17,22 **47**:24 **48**:4 **49**: fourth [1] 99:4 4 51:4,15 52:3,14,16,23 frankly [1] 64:11 0 54:24 55:9,23 56:16 57: FREDERICK [78] 2:7 3:11 58:17. 18,21 60:13,21 61:17,24 62:12,21, 23 63:4,8,11,17,21 64:2,17,23,25

65:3,6,11,17 66:21 67:13,19 68:2, 14,20,25 69:10,11,24 70:4,9,17 71: 2,17 72:21,23 73:6,12 74:3,12,19, 22,25 75:2,5,19,23 76:2,14,20 77: 6,10,15,25 78:5,11 79:6 80:14 81: 13 82:1,22 83:2,20,23 84:3,10,18 97:12 99:14 104:21 105:11.23 Frederick's [1] 89:22 friends [1] 51:5 front-line [2] 92:24 94:22 fuel [47] 21:21 24:16 25:17 26:6.22 28:3.22.25 31:10 32:3.8 37:10 43: 5,8 45:5,12,15,17,22,24 46:7,24 **47:**4,12,16 **48:**19 **51:**6,17 **52:**6,19 **53:**1,5 **54:**6 **56:**17 **58:**25 **59:**14,20 60:2 80:20 86:2 96:8,15 97:7 98:6, 9.25 105:12 fuel's [1] 4:25 full [4] 6:24 21:18 65:19 67:4 fully [1] 73:20 further [2] 44:15 75:12 furthering [1] 57:3 futile [2] 9:5 62:14 future [1] 14:22 G gas [3] 23:20,21 98:12 gatekeeper [2] 61:11 66:25 gather [1] 61:21 gave [3] 33:4 100:14 102:17 GE [1] 27:18 General [7] 2:2,10 14:20 36:6 87:6 89:10 94:7 genuine [1] 17:2 gets [3] 20:19 25:6 64:8 getting [1] 100:15 give [4] 6:14,19 44:20 66:17 given [5] 9:5 20:14 22:24 49:8 74: gives [3] 67:8 71:10,14 giving [1] 102:16 glib [1] 23:15 GORSUCH [48] 7:19,25 8:5,7,16 9: 14,17 10:6,13,18,25 11:4,11 18:24 **19:**5,17 **22:**10 **23:**2,8,18 **35:**10,11, 25 36:19 37:1,5,7,16 51:4 52:2,5, 22 53:7 57:10 76:12,13 77:3,9,14, 17 78:1,7,19 94:7 95:3,10,16 102: 23 Gorsuch's [2] 11:18 38:19 gosh [1] 95:10 got [8] 9:18 13:17 14:13 15:3 22:6 **41:8 47:7 77:**14 gotten [2] 47:2,2 govern [3] 30:20 33:12 36:6 governed [1] 30:19 government [7] 22:22 29:12 35: 17 57:24 78:8 101:4 103:17 government's [1] 47:23 governor [6] 88:6,8,11 103:14 104: 25 grant [1] 107:4 granted [2] 15:25 28:2 Granting [1] 28:2

	Official - Subjec	t to Final Review	
great [1] 103:16	immune [1] 70:11	intervenor [5] 17:6 78:14 83:16	25 <b>36</b> :19 <b>37</b> :1,5,7,16,20 <b>38</b> :18,19
greater [1] 33:1	imperfectly [1] 18:16	<b>84:</b> 2,2	<b>40</b> :1,17,18,18,20,21 <b>41</b> :18,21 <b>42</b> :4,
greenfield [1] 29:3	imply [1] 8:25	intervenors [1] 84:13	5,11 <b>44:</b> 20 <b>45:</b> 1,10 <b>46:</b> 13,19 <b>47:</b>
ground <sup>[4]</sup> 22:17 33:24 41:9 79:19	important [6] 17:4 43:16 46:23 48:	intervention [24] 5:17 10:24 13:2,	21 <b>48</b> :3 <b>49</b> :8 <b>50</b> :10 <b>51</b> :2,4 <b>52</b> :2,5,
guess [14] 8:9,23 10:2 12:8,20 27:	6 <b>78</b> :13 <b>87</b> :4	4,6 <b>15</b> :15,19,25 <b>16</b> :12 <b>18</b> :9 <b>20</b> :13,	15,22 <b>53:</b> 7,8,8,10,11,17 <b>54:</b> 19 <b>55:</b>
17 <b>35</b> :11 <b>40</b> :24 <b>42</b> :15 <b>52</b> :17 <b>61</b> :16	impose [2] 7:16 59:10	14,19 <b>21</b> :10 <b>42</b> :13 <b>57</b> :16 <b>61</b> :8,15,	7,20 <b>56</b> :7 <b>57</b> :7,7,9,10,11,12,13,14
<b>73</b> :20 <b>90</b> :13 <b>102</b> :2	imposed [1] 9:11	18 <b>68</b> :10 <b>69</b> :8 <b>72</b> :5 <b>84</b> :23 <b>93</b> :14	<b>58</b> :14,15,22 <b>60</b> :11,19 <b>61</b> :1,14,18,
guts [1] 43:21	improperly [1] 12:3	invalid [4] 8:14 9:12,16 71:12	24 <b>62</b> :19,22,24 <b>63</b> :3,6,10,15,19,25
H	in-the-pocket [1] 48:12	invest [1] 54:16	<b>64</b> :10,11,19,24 <b>65</b> :2,4,10 <b>66</b> :3 <b>67</b> :
hand [1] 77:24	inactive [1] 32:23	investment [1] 81:10	13,21 <b>68</b> :8,17,21 <b>69</b> :10,13 <b>70</b> :2,6,
handle [1] 105:13	inadequate [1] 19:13	involving [1] 43:25	10,16 <b>71:</b> 8,23 <b>72:</b> 21,24 <b>73:</b> 9,13,19
handy [1] 50:16	incent [1] 56:21	irradiated [1] 51:24	<b>74</b> :7,17,20,24 <b>75</b> :1,3,4,6,10,12,13,
happen [3] 47:15,16 73:3	incentive [2] 56:12,16	Isn't [9] 10:25 11:4 20:15 33:1 36:	14,21,25 <b>76:</b> 10,11,11,12,13 <b>77:</b> 3,9,
happened [7] 69:1 81:10 87:5 88:	incentives [5] 56:22 57:4 101:17	6 <b>61</b> :14 <b>89</b> :6 <b>98</b> :10 <b>102</b> :2	14,17 <b>78:</b> 1,7,19,21,21,23 <b>79:</b> 7 <b>80:</b>
21 <b>97</b> :1,3 <b>99</b> :20	<b>102:</b> 16,18	ISP [19] 22:24 24:6,12,15,23 27:5,	6 <b>81:</b> 5,21 <b>82:</b> 15,16,16,18,19,24 <b>83:</b>
	incentivized [1] 41:7	22 28:23 30:20 33:4 34:16 43:8	7,13,21 <b>84:</b> 1,4,7,11,19 <b>85:</b> 4,6,11,
happens [2] 15:4,9	incentivizing [1] 41:2	73:10 78:8 81:19 97:8 105:7 106:	16 <b>86:</b> 13 <b>87:</b> 6,8 <b>88:</b> 4,9 <b>89:</b> 9 <b>90:</b> 3,
happy [2] 96:2 101:20	include [3] 40:14 59:1 95:1	13,24	18,21 <b>91:</b> 23 <b>92:</b> 10,12 <b>93:</b> 1,7,10
hard [1] 73:1	included [1] 71:9	ISP's [5] 26:18 28:17 98:13 105:22	94:7 95:3,10,16 97:6,23 98:1,8 99:
harmed [1] 56:23	including [4] 33:13 48:16 55:14	<b>106</b> :24	5,16 <b>100:</b> 2,23 <b>101:</b> 2,9,16 <b>102:</b> 8,11,
hate [1] 13:17	<b>59</b> :10	issue [25] 6:12 10:7,14,14,21 11:1,	11,13,14,15,20,22,22,23,24 <b>103:</b> 8
Heading [1] 105:25	inconsistency [1] 36:24	5,13,17,19 <b>12:</b> 5,9,22 <b>14:</b> 2 <b>17:</b> 2,7,	<b>104:</b> 11,12,12,14,20 <b>106:</b> 12 <b>107:</b> 8,
health [2] 33:16 54:11	inconsistent [1] 22:2	15 <b>18</b> :22 <b>20</b> :12 <b>25</b> :25 <b>57</b> :15 <b>69</b> :14	23
hear [4] 4:3 40:21 91:18 92:1	incorporates [1] 68:3	<b>77:</b> 22 <b>80:</b> 11 <b>99:</b> 9	justifications [1] 33:4
hearing [6] 7:21 8:2 60:17 65:8 68:	incorporating [1] 52:20	issue-exhaustion [1] 18:18	justify [1] 42:25
6 <b>100</b> :10	incorrect [1] 63:4	issued [1] 30:10	
held [2] 21:15 94:11	increase [2] 28:4 74:14	issues [5] 5:8 16:6 17:5 18:12 26:	K
help [4] 8:7 11:20 76:19 88:10	indisputable [1] 105:6	2	KAGAN [21] 7:2,11 9:4 20:8,11 35:
helps [1] 88:8	indisputed [1] 60:18	items [2] 46:3,4	9 57:9 65:10 66:3 70:16 71:8 76:
hinge [1] 36:20	industry [4] 44:6,9 56:22,25	itself [15] 7:13,16 24:11 27:3 35:22	11 <b>87:</b> 6,8 <b>88:</b> 4,9 <b>89:</b> 9 <b>90:</b> 3,18,21
Hiroshima [1] 98:17	inert [1] 32:20		<b>102:</b> 22
history [8] 39:4,5,9 44:4 50:8,11,		<b>36</b> :18 <b>39</b> :21 <b>40</b> :3 <b>55</b> :5 <b>59</b> :7 <b>61</b> :10,	Kagan's [1] 8:8
21 <b>76</b> :6	inexplicable [2] 96:23 100:5	13 <b>68</b> :3 <b>79</b> :3 <b>95</b> :21	KAVANAUGH [23] 37:20 38:18 40:
Hobbs [32] 4:20 18:12,17,19 19:1,	initial [1] 105:14	J	1,17 <b>49</b> :8 <b>57</b> :11 <b>75</b> :4 <b>78</b> :22,23 <b>79</b> :
10,12 <b>20</b> :3 <b>42</b> :12 <b>67</b> :23 <b>68</b> :2,7,12,	ink [1] 92:3	JA [4] 88:23 103:13,14 104:1	7 <b>80</b> :6 <b>81</b> :5,21 <b>82</b> :15 <b>85</b> :16 <b>99</b> :5,
22 <b>70</b> :7 <b>77</b> :2,4,4,5 <b>83</b> :8,11,12 <b>85</b> :	inside [1] 51:19	JACKSON [61] 11:16 12:8 13:12	16 <b>100</b> :2 <b>102</b> :24 <b>103</b> :8 <b>104</b> :11
17 <b>86</b> :18,19 <b>89</b> :25 <b>90</b> :15 <b>92</b> :7,16,	instance [4] 6:22 12:25 20:23 76:	<b>18:</b> 10 <b>40:</b> 20,21 <b>41:</b> 18,21 <b>42:</b> 4 <b>47:</b>	<b>106</b> :12 <b>107</b> :8
	19		
24 <b>94:</b> 16,25	instances [1] 26:25	21 <b>48:3 57:</b> 13,14 <b>58:</b> 14 <b>61:</b> 14,18	keep [9] 23:16 34:23,24 46:23 72:
hold [3] 13:9 15:2 51:23	Instead [2] 39:20 62:1	<b>63:</b> 3,6,10 <b>64:</b> 11,19,24 <b>65:</b> 2,4 <b>67:</b>	23 80:24 96:2 97:4,15
holding [3] 32:23 91:24 101:19	instinct [1] 94:10	13,21 <b>68</b> :8,17,21 <b>72</b> :21,24 <b>73</b> :9,13,	kept [1] 16:22
holds [1] 89:8	Institute [1] 81:9	19 <b>74:</b> 7,17,20,24 <b>75:</b> 1,3,6 <b>82:</b> 18,	kidding [1] 56:3
hole [1] 22:17	instructions [1] 33:12	19,24 <b>83:</b> 7,13,21 <b>84:</b> 1,4,7,11,19	kind [11] 14:23 19:23 24:2 58:8 80:
Holtec [1] 81:19	intact [2] 5:4 107:20	<b>85:</b> 4 <b>93:</b> 1,7,10 <b>97:</b> 6,23 <b>98:</b> 1,8 <b>104:</b>	22 87:4 89:19 90:23 96:4 98:3 99:
Honor [9] 63:22 69:2 70:5 71:17	intended [2] 23:16 47:14	14	17
86:15 93:6 95:6 98:11 101:12	intent [4] 6:19 39:11,21 49:2	jerry-rigged [1] 80:22	kinds [2] 54:8 57:25
hope [2] 34:9 85:13	interest [2] 8:1 54:21	job [2] 102:6,7	known [4] 48:22 49:9 50:7 103:2
hopefully [1] 23:21	interested [4] 5:19,24 6:10 41:22	judgment [8] 4:23 15:21 16:6 35:	L
hospitable [1] 18:6	interests [2] 5:25 7:22	18 <b>36:</b> 3 <b>37:</b> 17 <b>66:</b> 19 <b>70:</b> 15	
hot [8] 59:15 72:13,25 73:13,22 97:	INTERIM [8] 1:10 5:2 22:22,25 24:	judicial [12] 6:25 21:8 22:7 42:16	
15 <b>105:</b> 13,13	8 <b>26</b> :14 <b>44</b> :1 <b>49</b> :16	57:23 66:2,11 70:12 92:18 93:11	lacked [1] 17:9
human [1] <b>73</b> :14	interpret [2] 79:3 86:2	<b>94:</b> 5,6	laid [1] 107:8
hundreds [1] 43:22	interpretation <sup>[8]</sup> 43:12 47:18 79:	jurisdiction [6] 9:22 43:1 77:1,1,8	Land [4] 2:8 3:12 56:6 58:19
hung [1] 70:22	2 81:2 85:21 96:13 99:19,20	<b>96</b> :3	language [24] 7:4,12,16,20 19:1,2
hybrid [1] 91:5	interpretations [1] 81:6	jurisdictional [5] 82:21,23,25 83:	<b>37</b> :15 <b>39</b> :11,20 <b>45</b> :11 <b>49</b> :23 <b>60</b> :14
	interpreted [1] 78:25	4,6	<b>61:4 65:</b> 24 <b>67:</b> 8 <b>71:</b> 3,8,10,14 <b>78:</b>
	-	Justice [281] 2:3 4:3,11 5:13,18 6:	16 <b>79:</b> 20 <b>82:</b> 20 <b>83:</b> 25 <b>103</b> :1
i.e [1] 39:16	interpretive [1] 36:7	8,16 <b>7:</b> 2,11,19,25 <b>8:</b> 5,7,8,16 <b>9:</b> 4,	large [1] 27:13
idea [9] 36:20 38:1 48:17,17 70:23	intervene [50] 4:15,16 5:16,20 6:7,	14,17 <b>10:</b> 6,13,18,25 <b>11:</b> 4,11,16,18	last [1] 81:21
<b>79:</b> 12,23 <b>99:</b> 6 <b>103:</b> 16	9,10,19,22 <b>7</b> :1 <b>8</b> :12,17,21 <b>9</b> :1,10	<b>12:</b> 8 <b>13:</b> 12,13 <b>14:</b> 4,8 <b>15:</b> 4,6,7,8,9	later [7] 25:8 34:1 36:21 42:23 52:
identify [1] 18:7	<b>11</b> :24 <b>12</b> :2,3,17 <b>13</b> :1,10,24 <b>15</b> :11	<b>16:</b> 1,2,3,9,15,18,21 <b>17:</b> 14,21 <b>18:</b> 1,	6 <b>66</b> :18 <b>79</b> :23
identifying [1] 104:8	<b>16:</b> 4,10 <b>17:</b> 24 <b>18:</b> 2,4 <b>55:</b> 1 <b>60:</b> 24		later-enacted [1] 59:4
illegal [2] 25:22 106:13	<b>62</b> :3 <b>63</b> :2,14 <b>64</b> :3,16 <b>66</b> :13,15 <b>68</b> :	10,24 <b>19:</b> 5,17 <b>20:</b> 8,11 <b>22:</b> 10 <b>23:</b> 2,	latter [1] 83:22
illegally [1] 72:3	12,19,24 <b>69:</b> 15,21 <b>72:</b> 6 <b>86:</b> 14,17	8,18 <b>25</b> :2,4,5 <b>26</b> :7,10 <b>27</b> :9 <b>29</b> :4,7,	Laughter [2] 95:13,18
immediately [2] 59:18 60:2	<b>89:</b> 20,21 <b>93:</b> 2,4 <b>95:</b> 4	8,9,20 <b>30</b> :1,21 <b>31</b> :19 <b>32</b> :16,16,18	law [12] 17:3 36:17 56:6 64:20 67:
	intervened [1] 94:14	<b>33:</b> 9,20 <b>34:</b> 5,19,23 <b>35:</b> 8,9,9,10,11,	

15 94:4,19,23 95:5,21 102:4,5 lawful [1] 82:11	<b>lo</b> t 25
least [6] 13:22 18:20 19:22 52:11	lot
<b>103:2 105:</b> 14	lo
leave [3] 13:10 36:16 39:22 led [2] 35:6 107:9	lov Lt
left 5 5:3 27:11 30:5 47:12 101:	
	m
legal [4] 14:18 61:22 66:23 88:12 legislation [1] 48:24	30
legislative [3] 39:3 44:3 50:20	22
legislators [1] 44:10	<b>M</b> / 17
length [1] 34:15 letter [7] 87:12 88:5,14,16,19 103:	m
14,15	m
level [4] 49:21 57:20,21 67:16	ma ma
license [55] 5:2 17:10 21:21 22:25 23:6 24:13,14 25:25 26:3,5,5 27:2,	12
2 <b>28</b> :2 <b>29</b> :22 <b>30</b> :8,9 <b>31</b> :9 <b>32</b> :2,4,7,	m
12,14 <b>33:</b> 22 <b>36:</b> 10 <b>43:</b> 9 <b>45:</b> 4 <b>46:</b>	Ma
10 60:5 61:6 68:5 71:24 72:15 74: 1 78:18 81:17,24 82:3,8,11,13 87:	ma ma
25 <b>97</b> :8,18,20,21 <b>98</b> :3 <b>104</b> :6 <b>106</b> :	m
11,16,21,22 <b>107:</b> 2,4,7	Ma
licensed [3] 26:22 32:9 73:24 licensee [1] 29:16	Ma ma
licenses [3] 28:1 59:12,13	5,
licensing [25] 4:14 6:12,21 16:25	51
<b>17:</b> 25 <b>21:</b> 10,14 <b>31:</b> 2,17 <b>34:</b> 3 <b>37:</b>	<b>5</b> 9 21
25 <b>38</b> :11,14 <b>41</b> :24 <b>46</b> :4,7 <b>53</b> :2 <b>61</b> : 13 <b>91</b> :6 <b>97</b> :13 <b>98</b> :10 <b>106</b> :14,18	m
<b>107:</b> 17,20	82
life [1] 33:17	ma 78
light [1] 44:4 limitations [1] 72:8	m
limited [6] 14:16 39:20 43:24 49:	ma
15 <b>69</b> :7,12	Mo
line [4] 70:10 71:25 98:13,13 listen [1] 86:16	23
listened [1] 62:9	56
lists [1] 96:14	87 5
litigated [2] 10:9 57:19 litigation [4] 12:25 15:10,17 16:4	Me
little [7] 20:15 38:19 42:16 48:1 69:	m
13 <b>94:</b> 21 <b>107</b> :13	94 me
LLC [1] 1:10 LLOYD [1] 85:9	89
located [2] 24:12 35:16	m
location [6] 26:18 29:1 40:16 54:	m
23 <b>55:</b> 8,14 locational [3] <b>44:</b> 16,17 <b>45:</b> 6	me me
locations [5] 26:23 27:7 29:1 30:	m
12,14	me 7
logical [1] 53:25 long-winded [1] 58:8	2
longstanding [3] 79:2 81:2,6	m
look [15] 33:20 44:3 66:4,12 68:12,	m
22 <b>79:</b> 8 <b>83:</b> 8 <b>92:</b> 24 <b>94:</b> 15,18,20, 21 <b>103:</b> 13 <b>104:</b> 9	me Me
looked [2] 19:22 66:24	mi
looking [7] 7:19 39:8,9 42:24 45:	mi
15 <b>53:4 55:</b> 11 <b>looks</b> [1] <b>70:</b> 19	mi 70
locks [1] 70: 19	mi

Official Subjec	ιu
t [12] 44:6 50:25 51:1 55:18,24,	m
5,25 <b>56</b> :1 <b>76</b> :16 <b>81</b> :9 <b>91</b> :4 <b>92</b> :3	Μ
ts [1] 55:1	
	m
wer [1] 64:22	m
west [2] 85:20 95:24	m
d [3] 2:9 3:13 58:20	m
	m
Μ	m
ade [11] 9:2,9 12:16 19:16 23:24	
<b>0</b> :11 <b>42</b> :1 <b>69</b> :5 <b>78</b> :12 <b>84</b> :12 <b>93</b> :	m
	m
2	m
ALCOLM [5] 2:2 3:3,19 4:8 104:	m
7	m
andatory [1] 7:23	M
anipulate [1] 64:7	
anipulation [1] 64:12	m
•	m
any [5] 27:13 40:8 75:17 76:8 79:	3
2	m
aps [1] 19:21	Μ
arch [1] 1:17	
arket [1] 5:7	1
	m
arket-based [1] 28:17	1
arket-oriented [1] 24:25	m
artinez [2] 85:19 95:20	1
assive [1] 48:13	m
aterial [33] 25:17,18,18 27:11 31:	
,6,7,21,23 <b>32:</b> 4,5,5 <b>33:</b> 13 <b>35:</b> 20	M
	m
<b>1</b> :21,21,22 <b>53</b> :14,16 <b>54</b> :5 <b>56</b> :8	5
9:15 60:5 72:12,18 73:8,11,12,	m
1 <b>76</b> :5 <b>82</b> :2 <b>97</b> :19 <b>98</b> :4	m
aterials [9] 27:1 30:8 33:14 51:8	
<b>2:</b> 11 <b>106:</b> 14,22 <b>107:</b> 1,4	m
, ,	
atter [8] 1:19 38:11 57:16 67:15	-
<b>8:</b> 9 <b>81:</b> 6 <b>106:</b> 4,5	na
atters [1] 73:21	na
aximize [1] 74:13	na
cKesson [1] 87:1	na
ean [28] 11:2 14:5,8,14,14 20:11	na
<b>3</b> :15 <b>27</b> :9 <b>29</b> :14 <b>35</b> :2 <b>36</b> :8 <b>50</b> :2	ne
<b>6:</b> 11 <b>66:</b> 4,9,9 <b>70:</b> 19 <b>85:</b> 2 <b>86:</b> 16	ne
7:8 88:11 89:9,10,16,24 90:5 92:	n
<b>94:</b> 17	2
eaning [2] 49:8 65:24	n
eaningful [4] 22:23 92:17 93:11	n
4:5	1
eans [10] 56:9,10,12 59:25 82:8	n
9:11 90:21 94:24 95:22,23	Ν
eant [1] 94:16	N
echanism [1] 20:4	n
echanisms [2] 31:17 83:11	
	8
eet [2] 16:19 70:14	ne
eets [1] 16:18	3
erits [13] 4:22 13:8 15:21,24 20:	2
<b>21:</b> 17 <b>22:</b> 5,7,11 <b>43:</b> 2 <b>47:</b> 20 <b>92:</b>	N
1 <b>96:</b> 2	ne
et [2] 16:12 29:16	ni
etal [2] 51:18,22	Ν
etric [1] 27:13	8
exico [3] 81:19 101:18 103:23	1
id-2010s [1] 103:6	9
iddle [1] 88:1	9
	1
ight [8] 36:3 47:15 55:21 65:20	
<b>0</b> :17 <b>90</b> :4 <b>99</b> :18,19	n
illions [1] 57:2	n

nind [1] 46:23 nonsense [1] 96:18 linerals [3] 2:8 3:13 58:20 ninimal [1] 54:15 ninimize [1] 33:17 ninute [1] 100:23 nisreading [1] 69:1 nisunderstood [1] 75:22 nitigate [2] 56:24 57:2 nodified [1] 22:1 noment [2] 7:7 70:23 1000001v [2] 98:17 99:2 nonths [1] 42:23 norning [1] 4:4 lorris [4] 27:18 74:5 80:18,21 nost [4] 8:24 54:2 86:10 96:4 notion [5] 15:11 57:16 63:12 64:1, notivation [1] 28:17 lountain [5] 22:12,18 100:14,20 01:25 10ve [5] 73:4 80:23 82:8 86:8 105: 13 noved [8] 4:16 13:1 63:2.11.14 93: 105:17.20 noving [2] 59:18 93:3 ITUs [2] 44:1,8 nuch [8] 6:16,16 17:10,12 20:17 58:3 66:10 69:11 nultiple [3] 48:14 63:14 85:19 nust [3] 51:9,10 52:9 nyself [1] 56:3 Ν arrow [1] 31:23 arrower [1] 19:1 ation's [1] 57:5 ational [1] 101:23 ature [2] 10:8 107:5 ecessarily [1] 52:8 ecessary [2] 33:15 90:23 eed [11] 5:16 13:3 14:24 15:18 20: 23 68:11.23 87:25 97:8 106:15.21 eeded [4] 41:11 43:9 46:10 81:23 eeds [5] 32:9 86:2 102:4 103:23 **07:**1 either [1] 4:13 IEPA [1] 87:25 letwork [1] 85:17 ever [9] 11:10 16:1 30:1 41:8 43: 3 46:10 81:17.23 95:3 ew [11] 16:6 23:6 30:9 31:17 34:1 38:11.12 55:15 81:19 101:18 103: lewton [1] 97:22 ext [1] 106:10 ice [1] 88:11 **IIELSON** [40] 2:10 3:15 85:8,9,11 **36:**15 **87:**7,13 **88:**7,17 **89:**24 **90:** 3,20 91:1 92:5,11,14 93:5,9,17 **94:**17 **95:**6,11,14,19 **97:**6,10,25 98:7,11 99:15,24 100:4 101:1,7, 1 102:10,17 103:7,10 obody [2] 32:21 55:13 nonetheless [1] 14:17 One [51] 5:22 10:7 17:6 18:11 20:8

nor [1] 4:13 normal [6] 15:5,10 62:5 66:22 71: 5 88.2 normally [4] 11:4 13:14 76:18 77: 22 nothing [8] 32:9 35:22 36:17 39: 15 46:19 49:18.25 53:6 notice [4] 6:12.19 48:13 105:24 notice-and-comment [5] 20:24 48:8 88:1.20 89:17 notion [4] 42:15 47:13 48:18 57: 22 now-expired [1] 43:25 NRC [16] 4:14 9:19 17:9 25:6 26: 25 45:3 59:5,23 61:6,10 62:16 65: 8 70:11 72:5 74:13 75:7 NRC's [4] 5:4 18:8 51:13 61:8 NUCLEAR [94] 1:3 4:4,25 5:3,8 21: 21 23:17 24:8,16,25 25:10,11,17, 18 **26**:6,11,16,19,22,23 **28**:3,4,22 30:6 31:5,10,21,22,22 32:3,4,8,14, 24 33:13 35:16 37:10 38:4 43:5,8, 14 45:5 46:7,24 47:4,12,16 48:4, 10,19,23 49:5 50:6 51:6,7,10,17, 21 52:6,19,21 53:1,5,13,14,15,21 54:5,6 55:15 58:23,25 59:20 60:1 72:2,12 76:6,9 80:20 81:8 86:1,8 96:8,9,15 97:7,15 98:6,9,15,25 105:12,19 106:20 number [2] 30:22 106:1 NWPA [2] 35:13 51:13 NWPA's [1] 86:1 Ο objecting [1] 94:12 objection [2] 17:11 23:23 objections [1] 17:13 objective [1] 40:25 obligation [1] 7:23

obligations [2] 15:16 103:18 observe [1] 55:3 obvious [1] 86:3 obviously [2] 91:20 103:1 occur [3] 31:18 40:16 82:6 odd [2] 20:15 38:19 off-site [13] 44:7,22 45:13,18 48: 16,20 49:11 53:12 106:1,4 107:11, 18,20 officials [1] 38:7 offsite [32] 5:6 17:10 21:21 22:1 25:12 26:8 36:9.11.16 37:9.25 38: 10.17.24 39:6.23 40:4.8 41:4.14 42:2 56:8 59:1.8 74:16.21.23 75: 18 79:11,15 81:2,15 often [2] 97:2 105:20 oil [3] 23:20,21 86:11 Okay [15] 10:13 19:17 38:23 46:25 **53**:21 **54**:3 **64**:19 **65**:2 **79**:14 **84**: 20 90:13 91:1 92:10,21 100:4 on-site [7] 44:13 45:7 48:16,20 101:4 106:1.3 once [3] 26:23 27:8 28:22

28:25 30:23 31:20:23 33:20:23 31:20:23 33:20         ownership [0:98:10:22]         105:4         10:5:13:20:20         10:5:13:20:22           16 66:11 60:26 67:13 27:13 76: 27:27 27:14 16:20:80:11 48:22         Pact [1:05:23         10:5:13:22:23:31         prediction 10:5:2:13:22         prediction 10:5:2:13:22           20:25 66:19 67:14 48:22:80:10         Pact [1:05:23         Pages [1:02:12]         Pages [1:0		Official - Subjec	t to Final Review	
1:10       1:10	28:25 30:23 31:20,20 33:3,6 40:1,	ownership [2] 98:18,22	<b>105</b> :4	1,6,13,17,20 <b>12:</b> 9 <b>77:</b> 23
16         65:11         90:23         97:33         97:34         97:35         97			nersons [1] 19.8	
22 78:27 79:11 815; 66 83:11 84:         PacE (1):82:2         partial (1):82:2         part		Р	-	
D2.58 (10 g7:44 (8):22 09:14 (6); (22 94:17 92:22 97:11 92:14); (32 94:17 92:11 88:15         PAGE [11:22 15; (32 94:17 92:11 88:15         Presented [11:91:14]; (32 94:17 92:11 88:15         Presented [11:91:14]; (32 94:17 92:11 92:15; (32 94:17 92:12 92:15; (32 94:12 9		Pacific [2] 66:23 98:12	•	
20.26 8(19 67)         20.25 8(19 67)         20.25 8(19 67)         20.25 27)<				
10.24 (bc.7 407:12         papers 11/21:17         paragraph 11/22:16         Petitioner 11:12:23 0.9.42:0         Provident 11/22:16           0.010 (11/22:16 0.907:12)         paragraph 11/29:10         paragraph 11/29:10         Petitioner 11:12:23 0.9.42:0         Provident 11/22:16           11/22:06.01 (11/22:10:18)         paragraph 11/29:10         paragraph 11/29:10         Petitioner 11:12:23 0.9.42:0         provident 11/22:16           11/22:06.01 (11/22:10:18)         paragraph 11/29:10         paragraph 11/29:10         paragraph 11/29:10         provident 11/22:16           11/22:06.01 (11/22:10:18)         paraticipate IP 61:20 67:40 0.9.1         provident 11/22:16         provi	20,25 <b>85:</b> 19 <b>87:</b> 14 <b>88:</b> 22 <b>90:</b> 14,16,		petition [8] 9:25 21:13,24 22:3,3	preference [2] 40:23 44:13
Bits         Description         Description <thdescription< th=""> <thde< td=""><td>18,24 94:17 96:22 97:11 99:2,19,</td><td></td><td>58:7 87:18 94:4</td><td>presented [1] 91:11</td></thde<></thdescription<>	18,24 94:17 96:22 97:11 99:2,19,		58:7 87:18 94:4	presented [1] 91:11
ones 01/12 2/2 81/18 81:5 onlig 01/22/16 81:9 84:1 498:8, 10 423 682 29         paragraph (179:9) paragraph (179:9) paratroph (179:9) paratroph (179:9) paratroph (179:9) paratroph (179:9) part (198:151 29:12 41:12 7)         Pettioners (19:12 3:3,42.0.9) pettioners (19:12 43:42.0) pettioners (19:12 42:3,42.0) pettioners (19:12 42:3,42.0) physics (19:12 42:3,42.0) physics (19:12 42:3,42.0) physics (19:12 42:3,42.0) physics (19:12 42:2,44.0) physics (19:12 42:44.0) physics (19:12 42:44.0) p			Petitioner [4] 1:11 2:6 3:8 42:9	president [1] 22:15
nnline il 53:22         paraphrasing 178:92         10:413 <td></td> <td>paragraph [2] 79:11,13</td> <td></td> <td>-</td>		paragraph [2] 79:11,13		-
only im 24+16 38+10 44:14 69:6.         part igness to 1322 41:14 69:6.           11722 40:6.1122 41:14 69:7.         38:19         part igness to 1322 41:12 51:14 32:14 11:12 32:14 11:14 11:14 11:				
Disc 36:02.20         Participate III 19:22:13:22:00:00         Participate III 19:22:13:20:00         Participate III 19:22:20:20:13:20:00         Participate III 19:22:13:20:00:10:30:50:16:10:10:30:50:16:10:10:30:50:16:10:10:30:50:16:10:10:30:50:10:10:10:10:10:10:10:10:10:10:10:10:10				
10         10<				
onsite ord is 5 31:16 32:12:10 32:         B8:19         Physics (107:77         Physics (107:777         Physics (107:777 <th< td=""><td>16 64:3 66:5,25 69:4 70:24 80:15</td><td>•</td><td>petitions [1] 4:12</td><td>primary [1] 43:3</td></th<>	16 64:3 66:5,25 69:4 70:24 80:15	•	petitions [1] 4:12	primary [1] 43:3
onsite @i6.5 31:16 32:12 10 38:         88:19         participate IN 61:20 67:4 90:5         participate IN 61:20 67:4 90:5           19 43:16 59:6.14,17 22:11,14.16         22         participate IN 61:20 67:4 90:5         pick IN 38:19         participate IN 61:20 67:4 90:5           23 74:14,16 79:13 69:05 82:7 97:5         5         participate IN 61:20 72:40         participate IN 61:20 72:40         pick IN 38:19         pick IN 38:19           popen IN 87:25         participate IN 61:20 72:40         participate IN 61:20 72:40         pick IN 38:19         pick IN 38:19           popen IN 92:20         participate IN 19:31:41 51:14         pick IN 38:24 50:11         pick IN 38:24 50:11         pick IN 19:32:14         pick IN 38:25         pick IN 19:11 10:11:14         pick IN 19:11:12:13:11:14:14:14:14:14:14:14:14:14:14:14:14:	81:15.18 101:22 106:19 107:12	28:18,18 39:4 48:7 57:5 65:5 82:7	phrase [1] 102:25	prior [3] 7:18 13:10 39:5
1.17.23 40:8.11.23 41.23.11.23.71.21.7.         Participate III 61:0 67:4 90:8         Pick IV 38:19         38.27/15 29:12 30:10.16 31:0.16           1.9 43:16 59:8 41.77 22:11.41, 41 77:21.11.41, 41 77:21.09.22 91:         23         23         87.75 29:12 30:10.16 31:0.16           1.9 43:16 59:8 41.77 22:11.41, 41 77:21.11.41, 77.11.91.25         Participation III 65:5 66:56 73.         10         912.22 93:6.         problem III 65:26 52:14 22:24 96:5.         10           0 pone III 98:20         Participate III 141:14 15:14         15         913.14 15:14 14:14 14:14         13         13         12:10.22 13:         11:12         procedure III 31:20.22 13:         11:22         10         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:12         11:14:12:13         11:14:12:13         11:14:14:14:14         11:14:12:13:14:14:14:14:14         11:14:14:14:14:14:14:14:14         11:14:14:14:14:14:14:14:14:14:14:14:14:1		<b>88:</b> 19		-
10       93:16       93		participate [3] 61:20 67:4 90:8		-
22         22         24<				
25         3         17         25         17         25         17         25         17         25         17         25         17         25         17         25         17         25         17         25         17         25         17         25         17         25         17         25         25         17         25         25         17         25         17         25         25         25         17         25         25         17         25         25         25         17         25         25         25         17         25         25         25         17         25         25         25         17         25         25         26         17         25         25         17         25         27         25         26         26         26         26         26         26         26         26         26         26         27 </td <td></td> <td></td> <td></td> <td></td>				
Open H187:25         16 88:3 91:22 93:6         partice UP (12:14)         partice UP (1	23 74:14,15 79:13 80:25 82:7 97:		placed [2] 96:9 105:15	23 <b>81:</b> 7 <b>98:</b> 18,22
Opened (1) 22:14         particular (4) 21:7 46:20 79:19 83:         particular (4) 21:7 47:10 90:511,12         particular (4) 22:16 51:8         particular (4) 21:7 10:9 22:16         particular (4) 21:7 10:9 10:9 22:16         particular (4) 21:7 10:9 10:9 11:20:16         particular (4) 21:7 10:9 10:9 11:20:16         particular (4) 22:16:17:16:17         particular (4) 22:16:17:16:17         particular (4) 22:16:17:16:18:16:17         particular (4) 22:16:17:16:18:17         particular (4) 21:14:12:14:12:14:12:14:12:14:12:14:12:14:12:14:12:14:12:14:12:14:12:14:12:14:12:14:12:14:14:14:14:14:14:14:14:14:14:14:14:14:	5		places [2] 28:20 36:2	probable [1] 54:1
opened (II) 10:22:14         particular (II) 17:46:20 79:16 83:1         16         17:123           opens (II) 98:20         particularly (II) 16:18         particularly (II) 16:18         particularly (III) 17:22         particularly (IIII) 17:22         particularly (IIII) 17:22	open [1] 87:25	16 <b>89:</b> 3 <b>91:</b> 22 <b>93</b> :6	plain [5] 60:14 61:4 65:24 67:7 78:	problem [5] 6:5 25:1 42:24 96:5
Opening in 102:24         The         Data is 26:12:23:80:18:21         Discretion         Discretion <thdiscretion< th=""></thdiscretion<>		particular [4] 21:7 46:20 79:19 83:	-	-
Opens (1)         mark (2)	-	-	-	
Operate IP 196::20 21         Operate IP 196::20 21         Operate IP 196::20 21         Operate IP 196::20 21:         Operate IP 196::20 21:         Operate IP 106::20 41:         Operate IP 106::20 41::20 41::20 41::20 41::20 41::20 41::20 41::2		-		
Operated P182:19.22 27:8         7 22:16 24:18 257 28:24 61:11         paged 14:2:20 46:25         paged 14:2:20 46:25         procedures 10:17:10           operating P126:10 28:13 48:7:10 90:51.11/2         94:13,19         paged 14:2:20 46:25         paged 14:2:20 46:25         procedures 10:17:10           operating P126:10 28:14         94:13,19         parts P126:20         paged 14:2:20 46:25         procedures 10:17:10           operating P126:10 28:16         94:13,14 27:10 96:11         94:13,14 27:10 96:12         94:13,14 27:10 96:12         94:13,14 27:10 96:12         94:13,14 27:10 96:12         94:13,14 27:10 96:12         94:13,14 27:10 96:12         94:13,14 27:10 96:12         94:13,14 27:10 96:12         94:13,14 27:10 96:12         94:14 20:14 14:12         14:19 96:22         96:12         96:12         96:12         96:12         96:12         96:12         96:12         96:17         14:19 96:22         96:12         96:12         96:17         14:19 96:22         96:12         96:17         17:16         96:17         14:19 96:22         96:12         96:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         16:17         <			•	
operation         proceeding         proceedi	operate [2] 106:20,21	-	platform [1] 23:19	procedure [2] 31:2 93:25
operation W126:16 28:23 94:23 operations W182:6         81:7 84:13,14 87:10 90:5,11,12 94:13,19         please W14:11 42:11 42:12 82:22 85:12 please W101:20         proceeding 108:13 12:10,22 13: 12 23 14:22 15: 16:11 71:12:25 1: 15 58:4,5 60:16 61:13,21 62:6 64: 22 66:6,22 70:23 87:9,11 89:12, 14 71:15 52:9 96:17 97:8 98:4           opportunity W166:1,18 69:3 opportunity W166:1,18 69:3 opportunity W162:11 7 opportunity W162:11 23: 12:11,22 12:11;12:10 97:17 62:2; 14 71:13,123 22 12:11;12:10 97:17 62:3; 14 71:13,123 22 12:11;12:10 97:17 62:3; 14 71:13,123 22 12:11;12:10 97:17 62:3; 17 71:11;13,163 22 55:11 47:15 58: 90:11 97:12 25:3:11 41:14:14 17:16,12 22:25 21:15 81:16 66:7         17:16 12:0:22 24:12 24:12 17:16,12 20:25 24:11 58:16 66:7           ordined W122:13 order W10:22 33:11 41:11 42:14 63:10 71:11,16:23 25:26 71:14,70; 90:112 65:3 31:12,11 42:16 63:22 22:36 77:22 69:3:5 77:16 82:3 0rder W10:22 33:11 41:14 22:14 63:16 77:12 27:15 33:11 41:14 22:14 63:16 77:12 27:15 33:11 41:14 22:14 63:16 77:12 78:15 86:22 0rdinary W18:6: 0rder W10:22 33:11 41:14 22:14 63:16 77:12 78:10 86:22 0rdinary W18:6: 0rder W10:22 33:11 41:14 22:14 63:16 77:12 78:10 86:22 0rdinary W18:6: 0rder W10:22 12:15 13:14, 49:22 0rdinary W18:6: 0rder W10:22 12:15 13:14, 49:21 0rdinary W18:6: 0rdinary	operated [3] 26:19.23 27:8	7 <b>22</b> :18 <b>24</b> :18 <b>25</b> :7 <b>28</b> :24 <b>61</b> :11	plaved [2] 42:20 46:25	procedures [1] 7:10
operation         PA:13,19         Perspection         PA:13,19         pleased         Plant PI 12           operators         103:26         parts         100:10         15:84:40         15:84:40         15:84:40         15:84:40         15:84:40         16:80:11:20:22         15:84:40         16:80:11:20:22         15:84:40         16:80:11:20:22         15:84:40         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:20:22         16:80:11:10:20:25         16:11:10:22:25:20:11:10:80:66:7         17:10:10:10:20:25:21:11:10:80:66:7         17:10:10:10:20:25:21:11:10:80:66:7         17:10:10:10:20:25:21:11:10:80:66:7         17:10:10:10:10:10:10:10:10:10:10:10:10:10:	· ·	81:7 84:13,14 87:10 90:5,11,12		
Operation         PARTNERS         Parts		<b>94:</b> 13.19		
Appendix in the intervent interintervent intervent intervent intervent intervent intervent inter	-			,
1       14 4715 52:9 96:17 97:8 96:4       16.3 C.J. 24:12.13       16.3 C.J. 24:12.13       17.4 5:3 C.J. 24:12       17.4 5:4 11:2.2       17.4 5:2 11:2:1       17.4 5:2 11:2:1:1:2:1:1:2:1:1:2:1:1:2:1:1:2:1:1:2:1:1:2:1:1:				
aparty IR9 4:14.20 5:14.19 9:2115         bproved in the intervent interve	operators [1] 38:4	•	point [32] 16:5 20:12 24:1 28:16	22 66:6,22 70:23 87:9,11 89:12,
12       party [iii] 4:14,20 5:14,19:22 115:12, 20 13:13 13:25 12:11:12:20 13:13 13:25 12:11:12:20 13:13 13:25 12:11:12:20 13:13 13:25 12:11:12:20 13:13 13:25 12:11:12:20 13:13 13:25 12:11:12:20 13:13 13:25 12:11:12:20 13:13 13:25 12:11:12:20 13:13 13:25 12:11:12:20 13:13 13:25 12:11:12:20 13:13 13:25 12:11:12:20 13:13 13:12 12:12:12:12:12:13:13 10:0:0:0:0:0:0:0:0:0:0:0:0:0:0:0:0:0:0:	opinion [4] 8:18 60:20 77:20 95:		30:7,15 31:2,11 32:10 57:17 62:2	14,19 <b>90:</b> 23
opportunity III 66:1, 18 69:3         13, 13, 25 12:11, 12, 20, 13, 13, 15:12, 17         24 87:16, 21 80:26 93:24 94: 67:1, 10 90:4 105:4         67:1, 10 90:4 105:4           option II 21:17         10 60:11, 13, 16, 23, 25 66:8 67: 67:1, 0 90:13, 20 98:12, 90:15         67:1, 10 90:4 105:4         67:1, 10 90:4 105:4           option II 22:32, 61, 0, 14 4:8 42:8         5, 9, 12, 14, 16, 16, 18, 23, 25 66:8 67: 10:115         process III 51:7 51:25 73:7 76:6.         98:1, 20, 89:17         97:18 12, 20, 22, 20 97:18           ordarined II 22:13         17, 71, 84 94:9, 20 84:14, 88:13, 15         17, 17, 18 44:9, 20, 82:19, 23, 25 90:2, 24 91:1         points III 85:14 104:20         processing III 60:8           ordarined III 22:13         17, 71, 84 94:9, 20 86:14 88:13, 15         17, 17, 18 44:9, 20 80:12, 90:12, 20, 20, 97:18         production III 52:20, 20, 97:18           order IIII 20:25 33:11 41:11 42:14         160:11, 13, 16, 23         25 92:7, 82 25 93:13, 94:9, 16, 24 95:1         100:24 49:5 50:7 52:21 58:23 59:5         policy III 66:12, 45 106:15, 17         production III 52:20, 20, 97:18           ordiginally III 55:4         passed III 100:8         posses III 11:21, 22:24 95:5 105; 44:15         pool III 106:15, 17         production III 12:32 42:24 97:5 10:3           ordiginally III 55:1         prosention III 19:112         prohibit III 19:12         prohibit III 19:19         prohibit III 19:19           21:14 20:24 21:15 15:17         perfear III 20:11         prohibit II	-	party [88] 4:14,20 5:14,19 9:2 11:5,		proceedings [13] 4:14 5:14 11:24
opposed [155:6]       17 18:11.20.22.52 52:12 57:15 58:       8,1995:20.96:13.20.98:12 99:13       171:10.90:4.105:4         options [12:3:3:20.6:10.14.4:8 42:8]       10.6:11.13.16.23.64:12.21.22.66       50:10:11.10:10:11       98:12.09.81:12       98:12.09.81:12       98:12.09.81:12       98:12.09.81:12       98:12.09.81:12       98:12.09.81:12       98:12.09.81:12       98:12.09.81:12       98:12.09.81:12       98:12.09.81:12       98:12.09.81:12       99:12.09.12:11       10:0:10:11:15       99:12.09.12:11       90:11:10:10:11       99:12.09.12:11       99:12.09.12:11       10:0:10:11:15       99:12.09.12:11       10:0:10:11:12       99:12.09.12:11       10:0:10:11:12       99:12.09.12:11       10:0:11:13       10:11:13       10:0:11:13       10:0:11:13       10:0:11:13       10:0:11:13       10:0:11:13       10:0:11:13       10:0:11:13       10:0:11:13       10:0:11:13       10:0:11		13,13,25 12:11,12,20 13:1,3 15:12,		
b) point (1) 21:17         10         60:11:13:16:23 64:12:21:22 65:         0;0:0:10:15:10:0:17:10:15:0:0:17:11:10:11:10:15:0:17:17:17:10:15:0:0:17:11:10:11:10:15:15:17:17:11:10:11				
options [2] 38:24 104:4       5,9,12,14,16,16,18,23,25 66:8 67:       000160 [2] 85:6 71:23       9 88:1,20 80:17         oral ind [1:23:32,24 61,0,14 4:8 42:8       5,9,12,14,16,16,18,23,25 66:8 67:       000160 [2] 85:6 71:23       9 88:1,20 80:17         site 378:12 85:9       0717:8 51:8 6:22       90105 [2] 17:27 87:14,15 82:23 80:17       901012 [2] 33:24 104:14       901012 [2] 33:21 41:11 42:14         site 377:7 85:18 86:22       977:7 85:18 86:22       927:7,32 59:31 394:9,16,24 95:       18 39:17,21 40:22 43:15,20 48:5;       900101 [2] 32:20,20 97:18         orders [9] 77:7 85:18 86:22       passage [10:100:8       product [9] 32:20,20 97:18       product [9] 32:20,20 97:18         ordiginally [10 55:15       passage [10:100:8       10:24 49:5 50:7 52:21 58:23 59:5       19,25         originally [10 55:4       pool [12 12:14,21:6 24:1,1]       pool [12 12:44,6,6,17,23,24 35:6       pool [12 105:15,17       product [19 39:3 31:1 43:7 45:24         originally [10 55:4       pool [12 12:44,16,6,17,23,24 35:6       pool [12 105:16,17       pool [11 105:16,17       pool [11 105:16,17         originally [12 8:26 9:1       portecnt [2] 47:11 59:19       percent [2] 47:11 59:19       percent [2] 47:11 59:19       percent [2] 47:11 59:19       pool [2] 10:15:17       prohibition [13 79 42:1 46:8         originally [12] 8:25 9:1       point [13 8:12 21:22 13:21 24:19 47:6 105:14       poonting [14:12 12:12:12 14:18 47:1 73:3 87:9 </td <td></td> <td></td> <td></td> <td></td>				
Applicing 1: 320 32:2,6,10,14 4:84 22:8       3,4,15,22 68:7 70:8,25 71:1,4,7.9       pointer 128 36:14 104:20       grocesses 19 90:7,9,10         S8:18 78:12 85:9       19,21 72:4 78:14,15 82:20 83:6,       processes 19 90:7,9,10       processes 19 90:7,9,10         S6:18 70:22 33:11 41:11 42:14       9:21 72:4 78:14,15 82:20 83:6,       processes 19 90:7,9,10       processes 19 90:7,9,10         S6:22 36:72 68:3,5 77:19 82:3       9:25 92:7,9,25 93:13 94:9,16,24 95:       10:24 91:55,20 46:5,       product 18 32:20 97:18         ordinary 11 89:6       9:10:11 16:23 25 90:1,4,29 84:14 83:15,20 46:5,       product 18 32:20 97:18       product 18 32:20 97:18         orginally 10 55:4       passag [2] 6:21 53:22       product 14 32:20 97:18       product 18 32:20 97:18         orginally 10 55:4       passag [2] 6:21 53:22       product 14 32:25 49:17 50:       10:24 49:15 507 52:21 50:23       product 18 32:20 97:18         other 100 10:2 12:14 21:6 24:1,1       perople 112 24:4,6,6,17,23;24 35:6       fo:16 97:17 10:19       prohibit [0] 11:23 24:24 97:50:3       prohibit [0] 11:3:14 32:14 45:11         out curg 5:7 22:10 78:25 48:13 83:12 42:14       percent [2] 47:14 63:1       percent [2] 47:16 45:1       prohibit [0] 11:23 24:24 24:55:12       prohibit [0] 13:16 54:12,13         out curg 5:17,22 11:20 14:21 41:24       percent [2] 47:16 10:11       percent [2] 41:14 47:17 39:12       percent [2] 41:14 45:12       percent [2] 41:14 45:11				process [8] 5:17 51:25 73:7 76:6,
101       1	options [2] 38:24 104:4		pointed [2] 58:6 71:23	9 <b>88:</b> 1,20 <b>89:</b> 17
58:18 78:12 85:9 ordianed [11 22:13 order [11 02:25 33:11 41:11 42:14 63:22,23 67:22 69:3,5 77:19 82:3 orders [3] 77:7 85:18 86:22 ordiars [3] 77:7 85:18 86:22 organic [10 83:9 ordiars [3] 10:22 12:14 21:6 24:1,1 originally [10 56:4 organic [10 83:9 ordiars [3] 10:22 12:14 21:6 24:1,1 originally [10 56:4 organic [10 83:9 ordiars [3] 10:22 12:14 21:6 24:1,1 25:17 28:21 29:1 30:15 31:11,20 32:10 40:2 46:16 51:5,9:20 60:25 organic [10 83:12 84: 22 93:5 96:16 97:17 101:19 106:8 orger [10 7:22 percent [2] 47:11 59:19 perception [11 35:5 perfectly [11 44:7] out [2] 8:17,22 11:20 14:21 16:22 percent [2] 47:11 59:19 perception [11 35:5 permanence [10 22:13,21 26:8,9, 0utcome [2] 5:25 22:5 outs [11 44:21 0uts [2] 46:32 94:13 72:25,25 fouts [11 44:21 outs [2] 46:32 94:13 72:25,25 fouts [11 44:21 over [3] 36:6 39:23 48:13 72:25,25 fouts [11 44:21 over [3] 36:6 39:23 48:13 72:25,25 fouts [11 44:21 over [3] 36:6 39:23 48:13 72:25,25 fouts [11 44:21 fouts [2] 46:6 17:23 fouts [11 45:19 formiastic [2] 43:14 35:7 fouts [11 42:14 fouts [2] 46:6 17:23 48:13 72:25,25 fouts [11 44:21 fouts [2] 46:6 17:23 48:13 72:25,25 fouts [11 42:21 fouts [2] 46:6 17:23 48:13 72:25,25 fouts [11 44:21 fouts [2] 46:6 17:23 48:13 72:25,25 fouts [11 44:21 fouts [2] 46:6 17:23 48:13 72:25,25 formicous [11 54:2] fouts [2] 49:6 15:13 27:14 fouts [2] 40:6 15:15 fouts [11 45:9 fouts [2] 49:6 15:13 27:14 fouts [2] 40:6 15:15 fouts [11 45:9 fouts [2] 42:14 45:14 fouts [2] 42:14 45:14 fouts [2] 42:14 45:14 fouts [2] 41:15 45:12 fouts [2] 42:14 45:15 fouts [2] 42:14 45:14 fouts [2] 42:14 45:145 fouts [2] 42:14 45:14 fouts [2] 42:14 45:14 fouts [2] 42:14 45:1	oral [10] 1:20 3:2.6.10.14 4:8 42:8		points [2] 85:14 104:20	processes [3] 90:7.9.10
ordained [1] 22:13       17, 71, 18 84:9.20 86:14 88:13, 15       Policy [30] 5:3 31:12,12 35:22 36:9       product [3] 32:20,20 97:18         order [11] 20:25 33:11 41:11 42:14       89:10,11,16,23,25 90:2,24 91:20,       18 39:17,21 40:22 43:16,20 48:5,       product [3] 32:20,20 97:18         orders [3] 77:78 85:18 86:22       93:20,23 67:22 69:3,5 77:19 82:3       4 104:25 105:1,4,8,9       passed [10:0:8]         ordinary [1] 89:6       passed [16:21 53:22       passed [16:21 53:22       product [3] 32:20,20 97:18         originally [1] 55:15       passed [16:21 53:22       pool [2] 105:16,17       24 95: 51         originally [1] 55:4       people [12] 24:4,6,6,17,23,24 35: 6       pool [2] 105:16,17       prolibit [6] 19:6 39:11 43:7 45:24         26:17 82:12 29:13 05:15 31:12,21 29:13 05:15 31:12,21 29:13 05:15 31:12,21 29:13 05:15 31:14,21       pool [2] 105:2,4 5:10:14       prolibit [6] 19:6 39:11 43:7 45:24         21:1 42:12 29:13 05:15 31:12,21       per [19:72]       per [19:72]       per [19:72]       per [19:72]         22 9:35 96:16 97:17 101:19 106:8       per [2] 47:11 59:19       per [2] 32:10 40:2 43:15 31:12,21       poil [11:32 24:22 49:7 50:3]       prolibiting [2] 41:4 53:11         21 29:55 96:16 97:17 101:19 106:8       perf [2] 47:11 47:17 33 87:9       peri [2] 41:4 45:12       prolibiting [2] 31:14 32: 2       prolibiting [2] 31:14 32: 2       prolibiting [2] 31:14 32: 2         22 93:5 96:16 97:17 101:1		19,21 <b>72:</b> 4 <b>78:</b> 14,15 <b>82:</b> 20 <b>83:</b> 6,		
Border (in 22:13)       B9:10,11,16,23,25 90:2,24 91:20, 25 92:7,8,25 93:13 94:9,16,24 95: 0rders (i) 72:22 69:3,5 77:19 82:3       B9:10,11,16,23,25 90:2,24 91:20, 25 92:7,8,25 93:13 94:9,16,24 95: 02 92:7,8,25 93:13 94:9,16,24 95: 02 40:25 43:15 20 48:5, 10,24 49:5 50:7 52:21 58:23 59:5 00;7 92:11 70:12 50:22 43:15 20 48:5, 10,24 49:5 50:7 52:21 58:23 59:5 00;7 92:11 70:12 50:22 43:15 20 48:5, 10,24 49:5 50:7 52:21 58:23 59:5 00;7 92:11 70:12 50:22 43:15 20 48:5, 10,24 49:5 50:7 52:21 58:23 59:5 00;7 92:19 74:12 79:19,25 96:9 production (i) 55:17 project (i) 100:9 project (i) 100:9 project (i) 100:9 prolibiting (i) 44:4 43:25 49:17 58: 24 59:1 prolibiting (i) 44:4 43:25 49:17 58: 24 59:1 prolibiting (i) 41:43 43:25 49:17 prolibiting (i) 41:43 51:1 prolibiting (i) 41:43 31:1 prolibiting (i) 41:43 31:1 propert (i) 33:17 proposal (i) 104:22 project (i) 17:1 proposal (i) 104:23 proposal (i) 104:24 proposal (i) 104:24 proposal (i) 104:24 proposal (i) 104:24 proposal (i) 104:24 proposal (i) 104:24 proposal (i) 104:24 provided (i) 35:5 propert (i) 33:16 proposal (i) 104:24 provided (i) 35:5 propert (i) 33:17 protect (i) 33:16 provided (i) 35:5 propert (i) 33:16 provided (i) 35:5 propert (i) 33:16 provided (i) 35:5 propert (i) 33:16 provided (i) 35:5 proposal (i) 106:24 provided (i) 35:5 provided (i) 35:5 provided (i) 35:5 provided (i) 35:5 provided (i) 35:5 provided (i) 35:5 provided (		17.17.18 <b>84:</b> 9.20 <b>86:</b> 14 <b>88:</b> 13.15		
63:22,23 67:22 69:35 77:19 82:3       25 92:7,8,25 93:13 94:9,16,24 95:       10,24 49:5 60:7 52:21 85:23 59:5       19,25         orders [9] 77:7 85:18 86:22       assage 10 100:8       passage 10 100:8       pool [21 05:1,4]       productive [1] 86:11         originally [1] 55:4       becase [2] 6:21 53:22       pool [21 05:1,5] 7       pool [21 05:1,5] 7       pool [21 05:1,5] 7       pool [21 05:1,5] 7         originally [1] 55:4       originally [1] 55:4       oo:15 21 11 20:12 12:14 21:6 24:1,1       oo:15 17       24 59:1         22 93:5 96:16 97:17 101:19 106:2       pool [21 05:1,5] 7       pool [31 05:22 45:12       pool [31 05:22 13:12       pool [31 05:22 13:12       pool [31 05:22 13:12       pool [31 05:22 45:12       pool [31 05:22 13:12       pool [31 05:22 13:12       pool [31 05:22 13:12       pool [31 05:22 13:12       pool [31 05:22 14:4:4:53:11       pool [33 1:15 41:4:3:25 49:12       pool [33 1:16 41:4:25 25:13:12       prohibition [1] 37:9 42:1 46:8       pool [21 05:1:7 13:12       pool [33 1:16 41:4:25 25:13:12       prohibition [1] 33:15 51:12       poossition [1] 12:1:4:4:25 46:2.2       pool [21 05:1:7 13:12:19:22:13:15:12       prohibition [1] 33:15 51:12       pool [21 05:1:13:12 32:19 55:5: 10:3:4       pool [21 05:1:13:12:13:12:12:12:12:12:12:12:12:12:12:12:12:12:				
00:12:10:01:12:00:10:01:01				-
ordinary (1) 89:6       passage (1) 100:8       passage (2) 6:21 53:22       program [6] 41:8 43:25 49:17 58:         orginally (1) 85:6       passage (2) 6:21 53:22       paul (1) 88:14       program [6] 41:8 43:25 49:17 58:         orginally (1) 55:4       policy (1) 55:4       policy (1) 55:4       program [6] 41:8 43:25 49:17 58:         other (30) (1) 21 2:14 21:6 24:1,1       pool (2) 105:15,17       pool (2) 105:15,17       prohibit (6] 19:6 39:11 43:7 45:24         26:17 28:21 29:1 30:15 31:11,20       40:12 41:18 47:1 73:3 87:9       pool (2) 105:12,17       pool (2) 105:12,17         92:13 59:6:16 97:17 101:19 106:5       perception (1) 35:5       perception (1) 35:5       perception (1) 35:5         0ut (2) 15:12 107:8       perfecty (1) 14:17       perfacty (1) 14:17       perfacty (1) 14:17         101:9,24 105:12 107:8       permanence (1) 28:7       possition (14] 4:25 25:21 33:12       prohibits (2) 4:24 46:2         pool (2) 12:23 73:4,13 84:9 92:18 94:       permanence (1) 28:7       permanence (1) 28:7       possition (14] 4:25 25:21 33:12       prohibits (2) 31:14 33:25         0ut (2) 16:23 94:3,3 98:10       permit (1) 62:13 23:12 55:22 56:14 86:10       permitsible (2) 38:2 107:11       probert (1) 26:11 38:5 53:21 57:6       proposition (1) 45:25         0ver (12) 36:6 39:23 48:13 72:25.25       permitted (2) 45:3       permitted (2) 45:3       permitited (2) 45:3       perotic (2) 37	<b>63</b> :22,23 <b>67</b> :22 <b>69</b> :3,5 <b>77</b> :19 <b>82</b> :3		10,24 <b>49:</b> 5 <b>50:</b> 7 <b>52:</b> 21 <b>58:</b> 23 <b>59:</b> 5	19,25
ordinary (1) 89:6 Oregon (1) 55:15 organic (1) 83:9 ordinary (1) 89:6 Dregon (1) 55:15 organic (1) 83:9 ordinary (1) 98:6 Dregon (1) 55:15 organic (1) 83:9 ordinary (1) 98:14 PDR (1) 98:14 PDR (1) 98:14 PDR (1) 98:14 PDR (1) 85:17 people (12) 24:46.6,6,17,23.24 35:6 40:12 41:18 47:1 73:3 87:9 per (11) 97:22 percent (2) 47:11 59:19 per (1) 97:22 percent (2) 47:11 59:19 per fettly (1) 41:17 out (2) 51:7, 22 11:20 14:21 42:16 24:1 1 101:9, 24 105: 12 107:8 out (14:21 out (2) 52:55 out (14:22 0ut (2) 52:55 out (14:22) 0ut (2) 52:55 22:5 out (2) 40:2 4 1:3 87:12 f7:19 104:6 107:13 out (2) 52:25 oversight (1) 5:9 ower (2) 23:10 51:13 67:1 87:17 91:21         passage (1) 100:8 passage (2) 100:2 passage (2) 100:2 partial 84:22 33:24 46:12 postion (5) 11:23 24:22 49:7 50:3 postion (5) 11:23 24:22 49:7 50:3 prohibitide (2) 36:10 49:11 prohibiting (2) 41:4 453:1 prohibition (3) 37:9 42:14 46:8 prohibition (3) 37:9 42:14 46:8 prohibition (3) 37:9 42:14 46:8 prohibition (3) 37:9 42:14 46:8 prohibition (3) 37:9 42:14 66:8 perfectly (1) 14:17 permanence (1) 28:7 permanence (1) 28:7 permanence (1) 28:7 perminet (6) 22:13, 21 26:8,9, perminet (6) 22:13, 21 26:8,9, perminet (6) 22:13, 21 26:8,9, permanence (1) 28:7 permanence (1) 28:7 permanence (1) 28:7 perminet (2) 23:19 54:21 perminet (2) 23:19 54:21 permitted (2) 38:12 26:19 permitted (2) 38:12 66:19 permitted (2) 38:12 26:19 permitted (2) 38:10 permitted (2) 38:12 26:19 permitted (2) 38:12 26:19 permitted (2) 38:19 24 6:10 7:21 19:2 percelude (2) 39:9 107:17 percolude (2) 39:9 107:17 perclude (2) 39:10 57:11 perclude (2) 39:10 57:11 perclude (2) 39:9 107:17 perclu	orders [3] 77:7 85:18 86:22		60:7 72:19 74:12 79:19,25 96:9	productive [1] 86:11
Oregon [1] 55:15 organic [1] 83:9 originally [1] 55:4 other [30] 10:2 12:14 21:6 24:1,1 26:17 28:21 29:1 30:15 31:11,20 32:10 40:2 46:1,6 51:5,9,20 60:25 67:5 72:10 78:24 81:18 83:12 84: 22 93:5 96:16 97:17 101:9 106:8 ought [2] 8:25 9:1 out [2] 52:7,22 11:20 14:21 62:25 24:16,18 42:20 46:25 58:7 59:2 60:27 11:23 73:4,13 84:9 92:18 94: 1 101:9,24 105:12 107:8 outs [1] 14:21 outs [1] 14:22 over sight [1] 5:9 own [7] 7:10 8:22 9:10 51:13 67:13 permitted [2] 45:12 65:19 permitted [2] 45:12 45:12 over sight [1] 35:2 permitted [2] 45:12 45:12 over sight [1] 35:2 permitted [2] 45:12 45:12 over sight [1] 35:2 permitted [2] 45:19,22 permitted [2] 45:19,22 pervided [1] 45:13 pervided [1] 45:19 pervided [2] 45:19,20 pervided [2] 55:10,20;43 30:23 pervided [2] 55:10,20;43 30:23 pervided [2] 55:10,20;43 30:22 provided [2] 55:10,20;43 30:23 pervided [2] 55:10,20;4	ordinary [1] 89.6	passage [1] 100:8	<b>100</b> .9 <b>106</b> .2 4 5 <b>107</b> .16	
Originic [11:83:9       paul [11:98:14       pool [11:12:3:24:22 49:15:6]       prohibit [01:19:6:39:11 43:7 45:24         Originic [11:12:3:24:22 49:15:6]       pool [11:12:3:24:22 49:7 50:3]       prohibit [01:19:6:39:11 43:7 45:24         26:17:28:21:29:1:30:15:31:11.20       40:12:41:18:47:17:33:87:9       pert [19:72:2       possess [01:26:6:28:2:40:12:46:15       prohibiti [01:19:37:9:42:1:46:8         32:10:40:2:46:1,6:51:5,9,20:60:25       percent [21:47:11:59:19       percent [21:47:11:59:19       perception [10:35:5       perception [10:35:5         perfectly [11:41:17       perfectly [11:41:16       perfectly [11:41:17       per		passed [2] 6:21 53:22		
Originally (1) 55:4       PDR (1) 85:17       pools (1) 85:10       pools (1) 85:17       pools (1) 85:17       pools (1) 85:17       pools (1) 85:17       poil (1) 85:17       poil (1) 85:17       poil (1) 85:17       pools (1) 85:17       poil (1) 12 21:14 21:6 24:1,1       duit (2) 41:14 847:1 73:3 87:9       poil (1) 12 21:14 21:16 22:1       poil (1) 12 21:14 21:16 22:1       poil (1) 12 21:14 21:15 21:11       pool (1) 12 21:14 21:15 21:11       pool (1) 12 21:14 21:15 21:11       pool (1) 13 21:9 22:14 45:12       pool (1) 13 21:9 42:14 45:2       pool (1) 13 21:9 55:5 103:4       promule (1) 13 21:9 42:14 45:2       pool (1) 13 21:9 42:14 45:2       pool (1) 13 21:9 55:5 103:4       pool (1) 13 21:14 33:125       pool (1) 13 21:14 33:125       pootential (2) 128:14 45:12 65:19 <td< td=""><td></td><td>-</td><td></td><td></td></td<>		-		
other (@) 10:2 12:14 21:6 24:1,1       people (12) 24:4,6,6,17,23,24 35:6       postion (B) 11:23 24:22 49:7 50:3       postion (B) 11:23 24:22 49:7 50:3         32:10 40:2 46:1,6 51:5,9,20 60:25       per (11) 97:22       peote (12) 47:11 59:19       pesses (B) 26:6 28:2 40:12 46:15       prohibited (2) 36:10 49:11         22 39:5 96:16 97:17 101:19 106:8       percent (2) 47:11 59:19       percent (2) 47:11 59:19       pesses (B) 26:6 28:2 40:12 46:15       prohibited (2) 36:10 49:11         22 39:5 96:16 97:17 101:19 106:8       percent (2) 47:11 59:19       percent (2) 47:11 59:19       pesses (B) 26:6 28:2 40:12 46:15       prohibited (2) 36:10 49:11         0ut [2] 5:17,22 11:20 14:21 16:22       percent (2) 47:11 59:19       percent (2) 47:11 59:19       pesses (B) 26:6 28:2 40:12 46:15       prohibited (2) 36:10 49:11         0ut [2] 5:17,22 11:20 14:21 16:22       percent (2) 47:11 59:19       percent (2) 47:14 27:16 28:13 29:13 51:14       percent (2) 47:14 27:16 28:13 29:13 51:25 51:12       prohibited (2) 36:10 49:11         0ut [2] 5:25 22:5       permanence (1) 28:7       permanence (1) 28:7       permini (2) 23:19 54:21       possibly (1) 96:18       propert (1) 20:13       propert (1) 20:13       proposed (1) 106:24         0ut come [2] 5:25 22:5       14 27:16 28:13 29:23 30:2,4 34:       permissible [2] 38:2 107:11       permissible [2] 38:2 107:11       permissible [2] 38:2 107:11       permissible [2] 38:2 107:11       perotical (1) 72:17       proposed (1				-
Outree 100 1024 12, 112 14, 112 14, 113 112 14       40:12 41:18 47:1 73:3 87:9       per (1) 97:22       possess (6) 26:6 28:2 40:12 46:15       prohibiting [2] 41:4 53:1         32:10 40:2 46:1,6 51:5,9,20 60:25       for (1) 97:22       per (1) 97:22       per (1) 97:22       prohibiting [2] 41:4 53:1         60:2 71:23 73:4,13 83:9 92:18 94:       per factly (1) 14:17       per foot (4] 28:12 41:9 47:6 105:14       possess (6) 26:6 28:2 40:12 46:15       prohibiting [2] 41:4 53:1         60:2 71:23 73:4,13 84:9 92:18 94:       per factly (1) 14:17       per foot (4] 28:12 41:9 47:6 105:14       possess (6) 26:6 28:2 40:12 46:15       prohibitis [2] 41:4 45:1         60:2 71:23 73:4,13 84:9 92:18 94:       permanence (1) 28:7       permanence (1) 28:7       permanence (1) 28:7       permanence (1) 28:7       possibly (1) 96:18       proper (1) 20:13         0ut (2) 51:2 252 52:5       14 25:12 32:13 51:22 56:14 86:10       permint [2] 23:12 54:23 51:24 35:       propost [1] 24:13       propost [1] 24:13         0ver [8] 36:6 39:23 48:13 72:25,25       permitting [1] 34:25       permitting [1] 34:25       proiting [1] 24:13       propost [1] 106:24         0ver [8] 36:6 29:2 9:10 51:13 67:1       permy (1) 104:2       permy (1) 104:2       provided [1] 5:5       provided [1] 5:5         0ver [8] 36:2 9:10 51:13 67:1       perry (1) 104:2       perry (1) 103:14       perv (1) 30:23       provided [1] 5:5       provided [1] 5:5			pools [3] 59:20 73:17 75:17	<b>99</b> :18 <b>100</b> :3
26:17 28:21 29:1 30:15 31:11,20       40:12 41:18 47:1 73:3 87:9       91:15       prohibiting [2] 41:4 53:1         32:10 40:2 46:1,6 51:5,9,20 60:25       per [1] 97:22       per (1] 97:22       per (1] 97:22       per (1] 97:22         93:15 72:10 78:24 81:18 83:12 84:       per (1] 97:22       per (1] 47:11 59:19       per (1] 97:22       per (1] 97:22       per (1] 97:22         92:15 77:10 78:24 81:18 83:12 84:       per (1] 97:22       per (1] 14:17       per (1] 14:17       per (1] 14:17       per (1] 14:17       per (1] 97:22       possession [14] 4:25 25:21 33:12,       prohibitions [1] 38:12       prohibits [2] 4:24 46:2       per (1] 17:13 22:19 55:5 103:4         0ut [2] 5:17,22 11:20 14:21 16:22       per anence [1] 28:7       per anence [1] 28:7       per anence [1] 28:7       possess [6] 26:6 28:2 40:12 46:2,9,20       project [4] 17:13 22:19 55:5 103:4         0ut [2] 5:17,22 11:20 14:21 16:22       per manence [1] 28:7       per anence [1] 28:7       per anence [1] 28:7       possibly [1] 96:18       promulgated [2] 31:14 33:25         0uts [1] 14:21       per anence [1] 23:19 54:21       per missible [2] 38:2 107:11       per mitting [1] 34:25       proposition [1] 45:5       proposition [1] 45:5       provide [1] 06:24       proposition [1] 45:5       provide [1] 06:24 <t< td=""><td>other [30] 10:2 12:14 21:6 24:1,1</td><td></td><td>position 5 11:23 24:22 49:7 50:3</td><td>prohibited [2] 36:10 49:11</td></t<>	other [30] 10:2 12:14 21:6 24:1,1		position 5 11:23 24:22 49:7 50:3	prohibited [2] 36:10 49:11
32:10 40:2 46:1,6 51:5,9,20 60:25       per (1) 97:22       possess (6) 26:6 28:2 40:12 46:15       prohibition (3) 37:9 42:1 46:8         22 93:5 96:16 97:17 101:19 106:8       perception (1) 35:5       perception (1) 35:5       perfectly (1) 14:17       persession (14) 4:25 25:21 33:12,       prohibition (3) 37:9 42:1 46:8         0ut [2] 5:17,22 11:20 14:21 16:22       perfectly (1) 14:17       possession (14) 4:25 25:21 33:12,       prohibition (3) 37:9 42:1 46:8         0ut [2] 5:17,22 11:20 14:21 16:22       perfectly (1) 14:17       permanence (1) 28:7       permanence (1) 28:7       permanent (16) 22:13,21 26:8,9,       possibly (1) 96:18       promulgated [2] 31:14 33:25         0ut (1) 14:21       permissible (2) 32:13 29:23 30:2,4 34:       14 35:7 43:21 55:22 56:14 86:10       power (11) 26:11 38:5 53:21 57:6       property (1) 33:17         0utside (4) 63:23 94:33 98:10       Permissible (2) 38:2 107:11       permissible (2) 38:2 107:11       permissible (2) 38:2 107:11       permitting (1) 34:25       provide (1) 72:17       proposed (1) 106:24         0ver (8) 36:6 39:23 48:13 72:25,255       perriting (1) 34:25       perriting (1) 34:25       percentice (2) 37:24 52:24       protect (1) 33:16         0ver (8) 36:22 9:10 51:13 67:1       perriting (1) 34:25       percentice (2) 37:24 52:24       provided (1) 5:5 <td><b>26</b>:17 <b>28</b>:21 <b>29</b>:1 <b>30</b>:15 <b>31</b>:11.20</td> <td><b>40</b>:12 <b>41</b>:18 <b>47</b>:1 <b>73</b>:3 <b>87</b>:9</td> <td><b>91</b>:15</td> <td>prohibiting [2] <b>41</b>:4 <b>53</b>:1</td>	<b>26</b> :17 <b>28</b> :21 <b>29</b> :1 <b>30</b> :15 <b>31</b> :11.20	<b>40</b> :12 <b>41</b> :18 <b>47</b> :1 <b>73</b> :3 <b>87</b> :9	<b>91</b> :15	prohibiting [2] <b>41</b> :4 <b>53</b> :1
67:5 72:10 78:24 81:18 83:12 84: 22 93:5 96:16 97:17 101:19 106:8 ought [2] 8:25 9:1percent [2] 47:11 59:19 perception [1] 35:5 perfectly [1] 14:1798:3 106:22 possession [14] 4:25 25:21 33:12, possession [14] 4:25 25:21 33:12, prohibits [2] 4:24 46:2 proint [3] 32:15 54:12,130ut [2] 5:17,22 11:20 14:21 16:22 24:16,18 42:20 46:25 98:7 59:2 60:2 71:23 73:4,13 84:9 92:18 94: 1 101:9,24 105:12 107:8 outs [1] 14:21 outside [4] 63:23 94:3,3 98:10 over [8] 36:6 39:23 48:13 72:25,25 77:19 104:6 107:13 over [8] 36:6 39:23 48:13 72:25,25 77:19 104:6 107:13 over ride [2] 59:6 75:8 oversight [1] 5:9 over sight [1] 5:9 over [2] 29:11 35:17percent [2] 47:11 59:19 percent [2] 47:11 59:19 percent [2] 42:12 6:10 7:21 19:298:3 106:22 possibl [14] 4:25 25:21 33:12, possibly [19 6:18 possibly [19 6:18 potential [2] 28:24 55:12 potential [2] 28:24 55:12 potential [2] 28:24 55:12 potential [2] 28:24 55:12 proposed [1] 24:13 proposed [1] 24:13promulgated [2] 31:14 33:25 proper [1] 20:13 propery [1] 23:170ut come [2] 5:25 22:5 outs [1] 14:21 over [8] 36:6 39:23 48:13 72:25,25 permited [2] 39:6 75:8 over sight [1] 5:9 over [8] 36:6 39:23 48:13 72:25,25permina [2] 23:19 54:21 permited [2] 45:12 65:19 permited [2] 45:13 67:1 permy's [1] 103:14 person [1] 45:25 permy's [1] 103:14 person [12] 519,24 6:10 7:21 19:2protice [2		per [1] 97:22		
22 93:5 96:16 97:17 101:19 106:24       perception [1] 35:5       possession [14] 4:25 25:21 33:12,       prohibits [2] 4:24 46:2         0ut [2] 5:17,22 11:20 14:21 16:22       perhaps [3] 19:18 40:23 75:14       persective [1] 28:12       possession [14] 4:25 25:21 33:12,       prohibits [2] 4:24 46:2         24:16,18 42:20 46:25 58:7 59:2       period [4] 28:12 41:9 47:6 105:14       period [4] 28:12 41:9 47:6 105:14       possession [14] 4:25 25:21 33:12,       prohibits [2] 4:24 46:2         60:2 71:23 73:4,13 84:9 92:18 94:       permanence [1] 28:7       permanent [16] 22:13,21 26:8,9,       possession [14] 4:10       propert [1] 20:13         0uts [1] 14:21       permanent [16] 22:13,21 26:8,9,       permanent [16] 22:13,21 26:8,9,       potential [2] 28:24 55:12       proposed [1] 24:13         0uts [1] 14:21       permins [2] 23:19 54:21       permins [2] 23:19 54:21       pover [11] 26:11 38:5 53:21 57:6       proposed [1] 24:13         0uts [1] 14:21       Permins [2] 23:19 54:21       permissible [2] 38:2 107:11       proposed [1] 106:24       proposed [1] 106:24         permitting [1] 34:25       permitting [1] 34:25       per [1] 39:22       provide [1] 39:13       provide [1] 30:23         over [8] 36:6 39:23 48:13 72:25,25       permitting [1] 34:25       per [1] 39:22       provide [1] 30:23       provide [1] 30:23         override [2] 59:6 75:8       perry [1] 104:2       perid 34:22 80:11 99:11		percent [2] 47:11 59:19	-	•
22 93:5 96:10 97:17 101:19 106:3       perfectly [1] 14:17       perfectly [1] 14:17       perfectly [1] 14:17       possession (14:23 23:2:13.12, promote [3] 33:15 54:12, 13         0ut [22] 5:17,22 11:20 14:21 16:22       periaps [3] 19:18 40:23 75:14       periaps [3] 19:18 40:23 75:14       promote [3] 33:15 54:12, 13         24:16,18 42:20 46:25 58:7 59:2       period [4] 28:12 41:9 47:6 105:14       perianence [1] 28:7       promulgated [2] 31:14 33:25         60:2 71:23 73:4,13 84:9 92:18 94:       permanent [16] 22:13,21 26:8,9,       14 27:16 28:13 29:23 30:2,4 34:       potential [2] 28:24 55:12       proper [1] 20:13         0uts ide [4] 63:23 94:3,3 98:10       over [8] 36:6 39:23 48:13 72:25,25       permian [2] 23:19 54:21       permissible [2] 38:2 107:11       permitting [1] 34:25       proposition [1] 45:25         77:19 104:6 107:13       permiting [1] 34:25       permitting [1] 34:25       procedent [2] 9:5 87:20       provided [1] 33:16         over sight [1] 5:9       permiting [1] 34:25       permiting [1] 34:25       precedent [2] 9:5 87:20       provide [1] 30:23         permiting [1] 24:13       permy [1] 104:2       perculde [3] 42:2 80:11 99:11       provide [1] 30:23         person [12] 5:19,24 6:10 7:21 19:2       preclude [2] 78:9 107:17       provides [1] 30:23       provides [1] 30:22         provide [1] 25:20,24 30:22 31:       person [12] 5:19,24 6:10 7:21 19:2       preclude [2] 78:9 107:17       pr		-		•
out [22] 5:17,22 11:20 14:21 16:22       perhaps [3] 19:18 40:23 75:14       perhaps [3] 19:18 40:23 75:14       perhaps [3] 19:18 40:23 75:14       promote [3] 33:15 54:12,13         0ut [22] 5:17,22 11:20 14:21 16:22       perhaps [3] 19:18 40:23 75:14       period [4] 28:12 41:9 47:6 105:14       promote [3] 33:15 54:12,13         60:2 71:23 73:4,13 84:9 92:18 94:       period [4] 28:12 41:9 47:6 105:14       permanence [1] 28:7       promote [3] 33:15 54:12,13         0utcome [2] 5:25 22:5       i4 27:16 28:13 29:23 30:2,4 34:       i4 35:7 43:21 55:22 56:14 86:10       power [11] 26:11 38:5 53:21 57:6       proposel [1] 106:24         0uts [1] 14:21       permian [2] 23:19 54:21       permian [2] 23:19 54:21       proposel [1] 106:24       proposel [1] 106:24         0ver [8] 36:6 39:23 48:13 72:25,25       remissible [2] 38:2 107:11       permitted [2] 45:12 65:19       protect [4] 33:16         override [2] 59:6 75:8       permiting [1] 34:25       permitting [1] 34:25       procedent [2] 9:5 87:20       provided [1] 5:5         own [7] 7:10 8:22 9:10 51:13 67:1       Perry [1] 104:2       Perry [1] 103:14       perclude [2] 78:9 107:17       provides [1] 30:23         owned [2] 29:11 35:17       person [14] 5:9,9,24 6:10 7:21 19:2       preclude [2] 78:9 107:17       provides [1] 30:22 31:			-	
24:16,18 42:20 46:25 58:7 59:2       period [4] 28:12 41:9 47:6 105:14       period [4] 28:12 41:9 47:6 105:14       possibly [1] 96:18       promulgated [2] 31:14 33:25         60:2 71:23 73:4,13 84:9 92:18 94:       permanence [1] 28:7       permanent [16] 22:13,21 26:8,9,       possibly [1] 96:18       proper [1] 20:13         0utcome [2] 5:25 22:5       14 27:16 28:13 29:23 30:2,4 34:       14 35:7 43:21 55:22 56:14 86:10       permian [2] 23:19 54:21       potential [2] 28:24 55:12       proper [1] 20:13         0utside [4] 63:23 94:3,3 98:10       Permian [2] 23:19 54:21       permissible [2] 38:2 107:11       permitted [2] 45:12 65:19       proposed [1] 106:24         0ver [8] 36:6 39:23 48:13 72:25,25       permitted [2] 45:12 65:19       permitted [2] 45:12 65:19       protect [2] 37:24 52:24       proposed [1] 106:24         0ver sight [1] 5:9       permitting [1] 34:25       permitting [1] 34:25       protect [2] 37:24 52:24       provided [1] 5:5         0wn [7] 7:10 8:22 9:10 51:13 67:1       Perry [1] 104:2       perry [1] 104:2       provides [1] 39:22       provides [1] 30:23         0wned [2] 29:11 35:17       person [12] 5:19,24 6:10 7:21 19:2       preclude [2] 78:9 107:17       provides [1] 30:23       provides [1] 30:23         0wned [2] 29:11 35:17       person [12] 5:19,24 6:10 7:21 19:2       perclude [2] 78:9 107:17       provision [16] 25:20,24 30:22 31:         0wned [2] 29:11 35:17       person [1	•	. ,	22 <b>38:</b> 12 <b>43:</b> 7 <b>45:</b> 4,24 <b>46:</b> 2,9,20	
24:16,18 42:20 46:25 58:7 59:2 60:2 71:23 73:4,13 84:9 92:18 94: 1 101:9,24 105:12 107:8period [4] 28:12 41:9 47:6 105:14 permanence [1] 28:7 permanence [1] 28:7 permanent [16] 22:13,21 26:8,9, 14 27:16 28:13 29:23 30:2,4 34: 14 35:7 43:21 55:22 56:14 86:10possibly [1] 96:18 potential [2] 28:24 55:12 potential [2] 28:24 55:12 potential [2] 28:24 55:12 potential [2] 28:24 55:12 potential [2] 28:24 55:12 proper [1] 20:13 property [1] 33:17outcome [2] 5:25 22:5 outs [1] 14:21 outside [4] 63:23 94:3,3 98:10 over [8] 36:6 39:23 48:13 72:25,25 77:19 104:6 107:13 over [8] 36:6 39:23 48:13 72:25,25 77:19 104:6 107:13 override [2] 59:6 75:8 oversight [1] 5:9 owne [7] 7:10 8:22 9:10 51:13 67:1 87:17 91:21 owned [2] 29:11 35:17period [4] 28:12 41:9 47:6 105:14 permistible [2] 38:2 107:11 permitting [1] 34:25 permicious [1] 54:3 Perry [1] 104:2possibly [1] 96:18 potential [2] 28:24 55:12 potential [2] 28:24 55:12 potential [2] 28:24 55:12 property [1] 23:13 proposed [1] 106:24proposed [1] 16:24 permissible [2] 38:2 107:11 permitted [2] 45:12 65:19 permiting [1] 34:25 permicious [1] 54:3 Perry [1] 104:2protect [1] 76:9 provided [1] 76:9 provided [1] 5:5 provided [1] 5:5provide [1] 5:9 owned [2] 29:11 35:17permiting [1] 34:25 person [12] 5:19,24 6:10 7:21 19:2 preclude [2] 78:9 107:17provides [1] 30:23 provides [1] 30:23 provides [1] 30:23 provides [1] 30:23 provides [1] 30:23	out [22] 5:17,22 11:20 14:21 16:22		<b>53:</b> 2 <b>98:</b> 2,22	
60:2 71:23 73:4,13 84:9 92:18 94: 1 101:9,24 105:12 107:8       permanence [1] 28:7 permanent [16] 22:13,21 26:8,9, 14 27:16 28:13 29:23 30:2,4 34: 14 35:7 43:21 55:22 56:14 86:10       potential [2] 28:24 55:12 potentially [1] 41:10       proper [1] 20:13 property [1] 33:17         outs [1] 14:21       14 35:7 43:21 55:22 56:14 86:10       permian [2] 23:19 54:21 permissible [2] 38:2 107:11 permitted [2] 45:12 65:19 permitted [2] 45:12 65:19       potential [1] 28:24 55:12       proper [1] 20:13 proposal [1] 24:13         over [8] 36:6 39:23 48:13 72:25,25       Permian [2] 23:19 54:21 permissible [2] 38:2 107:11 permitted [2] 45:12 65:19 permitting [1] 34:25 permicious [1] 54:3       proposet [1] 76:9 propriety [1] 23:13       proposet [1] 106:24 proposed [1] 106:24         over sight [1] 5:9       permitting [1] 34:25 permicious [1] 54:3       protect [1] 37:24 52:24 permitting [1] 34:25       provided [1] 5:5 permicious [1] 54:3         owned [2] 29:11 35:17       Perry's [1] 103:14 person [12] 5:19,24 6:10 7:21 19:2       preclude [2] 78:9 107:17 precluding [1] 93:3       provision [16] 25:20,24 30:22 31:		period [4] 28:12 41:9 47:6 105:14	possibly [1] 96.18	-
1 101:9,24 105:12 107:8       permanent [16] 22:13,21 26:8,9,       potentially [1] 41:10       property [1] 33:17         outcome [2] 5:25 22:5       14 27:16 28:13 29:23 30:2,4 34:       power [11] 26:11 38:5 53:21 57:6       proposal [1] 24:13         outside [4] 63:23 94:3,3 98:10       Permian [2] 23:19 54:21       permissible [2] 38:2 107:11       permitted [2] 45:12 65:19       proposed [1] 106:24         over [8] 36:6 39:23 48:13 72:25,25       permitted [2] 45:12 65:19       permitted [2] 45:12 65:19       proposition [1] 45:25         over sight [1] 5:9       permicious [1] 54:3       permicious [1] 54:3       provide [2] 9:5 87:20       provides [1] 30:23         owne [2] 29:11 35:17       Perry's [1] 103:14       person [12] 5:19,24 6:10 7:21 19:2       preclude [2] 78:9 107:17       provision [16] 25:20,24 30:22 31:         owned [2] 29:11 35:17       person [12] 5:19,24 6:10 7:21 19:2       precluding [1] 93:3       25 38:21 39:4 68:4,12 77:2 82:14		permanence [1] 28:7		
14 27:16 28:13 29:23 30:2,4 34:         outcome [2] 5:25 22:5         outs [1] 14:21         outside [4] 63:23 94:3,3 98:10         over [8] 36:6 39:23 48:13 72:25,25         77:19 104:6 107:13         override [2] 59:6 75:8         oversight [1] 5:9         own [7] 7:10 8:22 9:10 51:13 67:1         87:17 91:21         owned [2] 29:11 35:17		•		
outs [1] 14:21       14 35:7 43:21 55:22 56:14 86:10       power [19:20, 11:30:33, 21:37, 10]       proposal [11:24, 13]         outs [11] 14:21       permian [2] 23:19 54:21       permissible [2] 38:2 107:11       permitted [2] 45:12 65:19       proposition [1] 45:25         over [8] 36:6 39:23 48:13 72:25,25       permitted [2] 45:12 65:19       permitted [2] 45:12 65:19       practical [1] 72:17       proposition [1] 45:25         oversight [1] 5:9       permitting [1] 34:25       permitting [1] 34:25       pre [1] 39:22       provided [1] 5:5         owne [2] 29:10 51:13 67:1       perry [1] 104:2       percedent [2] 9:5 87:20       provides [1] 30:23         perry's [1] 103:14       person [12] 5:19,24 6:10 7:21 19:2       preclude [2] 78:9 107:17       provision [16] 25:20,24 30:22 31:         owned [2] 29:11 35:17       person [12] 5:19,24 6:10 7:21 19:2       precluding [1] 93:3       25 38:21 39:4 68:4,12 77:2 82:14		-		
Outsi (i) 14.21       Permian [2] 23:19 54:21       proposed (i) 160.24         outside [4] 63:23 94:3,3 98:10       permian [2] 23:19 54:21       practical [1] 72:17       proposition [1] 45:25         over [8] 36:6 39:23 48:13 72:25,25       permissible [2] 38:2 107:11       permitted [2] 45:12 65:19       practical [1] 72:17       proposition [1] 45:25         over ride [2] 59:6 75:8       permitting [1] 34:25       permitting [1] 34:25       pre [1] 39:22       provided [1] 5:5         owne [7] 7:10 8:22 9:10 51:13 67:1       Perry [1] 104:2       precedent [2] 9:5 87:20       provides [1] 30:23         perny's [1] 103:14       person [12] 5:19,24 6:10 7:21 19:2       preclude [3] 42:2 80:11 99:11       provision [16] 25:20,24 30:22 31:         owned [2] 29:11 35:17       person [12] 5:19,24 6:10 7:21 19:2       precluding [1] 93:3       25 38:21 39:4 68:4,12 77:2 82:14	outcome [2] 5:25 22:5		power [11] 26:11 38:5 53:21 57:6	proposal [1] 24:13
outside [4] 63:23 94:3,3 98:10       Permian [2] 23:19 54:21       practical [1] 72:17       proposition [1] 45:25         over [8] 36:6 39:23 48:13 72:25,25       permissible [2] 38:2 107:11       practical [1] 72:17       proposition [1] 45:25         77:19 104:6 107:13       permitted [2] 45:12 65:19       practice [2] 37:24 52:24       protect [1] 33:16         override [2] 59:6 75:8       permitting [1] 34:25       permitting [1] 34:25       provided [1] 5:5         oversight [1] 5:9       perny [1] 104:2       precedent [2] 9:5 87:20       provides [1] 30:23         own [7] 7:10 8:22 9:10 51:13 67:1       Perry [1] 104:2       preclude [3] 42:2 80:11 99:11       proving [2] 11:6,14         87:17 91:21       owned [2] 29:11 35:17       person [12] 5:19,24 6:10 7:21 19:2       preclude [3] 42:3 9:107:17       provision [16] 25:20,24 30:22 31:	outs [1] 14:21		62:4,10 98:16 100:12,17,18,22	proposed [1] 106:24
over [8] 36:6 39:23 48:13 72:25,25         permissible [2] 38:2 107:11         practicalities [1] 76:9         propriety [1] 23:13           77:19 104:6 107:13         permitted [2] 45:12 65:19         practicalities [1] 76:9         propriety [1] 23:13           override [2] 59:6 75:8         permitting [1] 34:25         permitting [1] 34:25         pre [1] 39:22         provided [1] 5:5           oversight [1] 5:9         perny [1] 104:2         precedent [2] 9:5 87:20         provides [1] 30:23           own [7] 7:10 8:22 9:10 51:13 67:1         Perry [1] 104:2         preclude [3] 42:2 80:11 99:11         proving [2] 11:6,14           87:17 91:21         person [12] 5:19,24 6:10 7:21 19:2         preclude [2] 78:9 107:17         provision [16] 25:20,24 30:22 31:           owned [2] 29:11 35:17         person [12] 5:19,24 6:10 7:21 19:2         precluding [1] 93:3         25 38:21 39:4 68:4,12 77:2 82:14	outside [4] 63:23 94:3.3 98:10			
77:19       104:6       107:13       permitted       [2] 45:12       65:19       practice       [2] 37:24       52:24       protect       [1] 33:16         override       [2] 59:6       75:8       permitting       [1] 34:25       permitting       [1] 34:25       precidentics       [2] 9:5       87:20       provided       [1] 5:5         owne       [7] 7:10       8:22       9:10       51:13       67:1       Perry       [1] 104:2       preclude       [3] 42:2       80:11       99:11       provides       [1] 30:23         owned       [2] 29:11       35:17       person       [12] 5:19,24       6:10       7:21       19:2       preclude       [2] 78:9       107:17       provision       [16] 25:20,24       30:22       31:2         owned       [2] 29:11       35:17       person       [12] 5:19,24       6:10       7:21       19:2		permissible [2] 38:2 107:11	-	
nr.15       104.5       107.15       permitting [1] 34:25       preticte [1] 39:22       provided [1] 5:5         oversight [1] 5:9       pernicious [1] 54:3       precedent [2] 9:5 87:20       provides [1] 30:23         own [7] 7:10 8:22 9:10 51:13 67:1       Perry [1] 104:2       preclude [3] 42:2 80:11 99:11       proving [2] 11:6,14         87:17 91:21       owned [2] 29:11 35:17       person [12] 5:19,24 6:10 7:21 19:2       preclude [2] 78:9 107:17       provision [16] 25:20,24 30:22 31:         owned [2] 29:11 35:17       person [12] 5:19,24 6:10 7:21 19:2       precluding [1] 93:3       25 38:21 39:4 68:4,12 77:2 82:14		-		
oversight [1] 5:9       pernicious [1] 54:3       precedent [2] 9:5 87:20       provides [1] 30:23         own [7] 7:10 8:22 9:10 51:13 67:1       Perry [1] 104:2       preclude [3] 42:2 80:11 99:11       provides [1] 30:23         owned [2] 29:11 35:17       person [12] 5:19,24 6:10 7:21 19:2       precluding [1] 93:3       25 38:21 39:4 68:4,12 77:2 82:14		-		-
Own [7] 7:10 8:22 9:10 51:13 67:1         Perry [1] 104:2         preclude [3] 42:2 80:11 99:11         proving [2] 11:6,14           87:17 91:21         person [12] 5:19,24 6:10 7:21 19:2         preclude [3] 42:3 107:17         proving [2] 11:6,14           owned [2] 29:11 35:17         person [12] 5:19,24 6:10 7:21 19:2         precluding [1] 93:3         25 38:21 39:4 68:4,12 77:2 82:14			•	•
own [7] 7:10 8:22 9:10 51:13 67:1         Perry [1] 104:2         preclude [3] 42:2 80:11 99:11         proving [2] 11:6,14           87:17 91:21         Perry's [1] 103:14         precluded [2] 78:9 107:17         provision [16] 25:20,24 30:22 31:           owned [2] 29:11 35:17         person [12] 5:19,24 6:10 7:21 19:2         precluding [1] 93:3         25 38:21 39:4 68:4,12 77:2 82:14	oversight [1] 5:9	-	precedent [2] 9:5 87:20	provides [1] 30:23
87:17 91:21         Perry's [1] 103:14         precluded [2] 78:9 107:17         provision [16] 25:20,24 30:22 31:           owned [2] 29:11 35:17         person [12] 5:19,24 6:10 7:21 19:2         precluding [1] 93:3         25 38:21 39:4 68:4,12 77:2 82:14	-		-	-
owned [2] 29:11 35:17         person [12] 5:19,24 6:10 7:21 19:2         precluding [1] 93:3         25 38:21 39:4 68:4,12 77:2 82:14		Perry's [1] 103:14	-	
		-		-
owners 11 38:4 [ 20:0 00:0 00:10 10:0 10:12:1,20 ] preciusion [11] 10:7,14,15,21 11: 83:1,4,11,12 85:19 104:23		-		-
	owners [1] 38:4		preciusion (11) 10:7,14,15,21 11:	83:1,4,11,12 85:19 <b>104</b> :23

One - provision

provisions [20] 25:15 31:3 32:13	reasons [2] 72:12 81:5	requirement [11] 4:21 5:23 7:17 9:	rulemakings [1] 90:12
<b>34:</b> 2 <b>38:</b> 11,15,16 <b>49:</b> 15 <b>50:</b> 9 <b>54:</b>	REBUTTAL [2] 3:18 104:17	12 <b>14:</b> 12 <b>18:</b> 11,18,21 <b>41:</b> 10,14 <b>98:</b>	rules [30] 5:17,22 6:1,3 7:18 8:14,
17 <b>60</b> :6 <b>72</b> :16 <b>74</b> :13 <b>75</b> :7 <b>79</b> :18	receipt [1] 25:21	2	23 <b>9</b> :10,11 <b>18</b> :9 <b>20</b> :24 <b>21</b> :14,25
80:4 96:11 106:14,18 107:17	receive [2] 40:12 73:11	requirements [8] 5:11,22 16:12	<b>28</b> :9 <b>31</b> :14 <b>33</b> :25 <b>37</b> :21 <b>42</b> :13 <b>58</b> :
public [1] 54:11	recent-in-time [1] 36:5	18:6 29:16 59:11 85:3 104:25	1,2 61:8 62:13 64:8 69:8 70:12 72:
published [2] 31:8 76:7	recently [1] 19:22	requires [4] 18:19 32:19 51:9 70:7	5 <b>79</b> :9 <b>80</b> :1 <b>84</b> :22 <b>90</b> :10
pull [1] 51:17	recitations [1] 45:2	requisite [1] 93:13	ruling [8] 12:16 13:8 71:18 77:24
punish [1] 56:25	recognized [1] 80:9	reread [1] 71:3	78:3 85:24 86:24 87:14
pure [2] 61:22 91:6	record [3] 55:4 63:9 88:22	residual [2] 40:14 47:12	rulings [1] 87:15
purpose [6] 18:15,16 28:21 61:3	redone [1] 80:1	resist [2] 42:15 57:22	run [2] 101:5,9
<b>67</b> :23 <b>83</b> :17	reduce [2] 54:2,14	resolved [1] 12:4	running [1] 47:3
purposes [12] 18:11 27:4 40:14	refer [7] 50:17,18,22,23,24 53:18	respect [13] 28:7 36:16 41:14,15	S
<b>46:</b> 8 <b>53:</b> 1 <b>60:</b> 22,24 <b>63:</b> 14 <b>64:</b> 4 <b>91:</b>	<b>106:</b> 10	<b>42:</b> 12 <b>43:</b> 2,11,14 <b>47:</b> 19 <b>48:</b> 4 <b>69:</b> 2	
3 <b>94:</b> 13,25	reference [1] 106:11	<b>76:</b> 15 <b>77:</b> 18	safe [9] 5:10 24:21 35:4 55:19 82:
put [7] 10:21 29:5 41:16 61:19 76:	references [3] 21:18 43:15 44:13	respectfully [1] 44:15	3,6 <b>97</b> :14,16 <b>107</b> :6
4 <b>86</b> :9 <b>102</b> :3	referred [7] 7:7 18:18 29:2 49:14	respond [6] 52:14 79:5 81:12,25	safeguard [1] 54:11
putting [1] 60:24	50:11 104:21 105:23	<b>89:</b> 3 <b>99:</b> 22	safely [3] 23:17 55:19 59:17
Q	referring [2] 30:17 50:7	responded [2] 88:24 91:16	safest [1] 36:2
	refers [2] 31:21 104:22	Respondent [3] 2:8 3:12 58:19	Safety [8] 6:21 16:25 37:17 54:11
quasi-permanent [1] 34:14	reflected [1] 51:12	Respondents [7] 1:8,14 2:11 3:	<b>59</b> :11,25 <b>72</b> :11 <b>74</b> :11
question [30] 8:8 9:6 11:12,18,22,	regarded [1] 31:8	16 <b>43:</b> 4 <b>50:</b> 4 <b>85:</b> 10	same [20] 18:22 26:4 27:21 30:4,
22,23 <b>12</b> :1 <b>13</b> :23 <b>15</b> :24 <b>20</b> :3 <b>22</b> :7,	regardless [1] 34:16	Respondents' [1] 24:22	19 <b>32:</b> 13 <b>34:</b> 15 <b>35:</b> 5 <b>45:</b> 22 <b>78:</b> 25
11 <b>23</b> :24 <b>30</b> :13 <b>31</b> :20 <b>40</b> :24 <b>54</b> :25	Register 3 48:15 79:8 105:24	responds [1] 40:2	<b>89:</b> 25 <b>93:</b> 21 <b>95:</b> 1,23,24 <b>96:</b> 15,16
<b>62</b> :9 <b>69</b> :12 <b>77</b> :12,21,24 <b>78</b> :3 <b>79</b> :7,	regulate [2] 7:9 54:18	response [1] 91:9	97:7 99:13 105:21
10 <b>80:5 81:</b> 22 <b>89:</b> 9 <b>107:</b> 15	regulating [1] 59:25	responses [3] 5:7 87:14 90:14	satisfied [2] 26:2 61:4
questioned [1] 106:6	regulation [3] 7:2 33:11 71:11	responsibility [2] 24:3,5	satisfies [1] 104:24
questions [7] 5:12 38:20 60:10 62:	regulations [10] 5:5 9:24 20:19	restriction [1] 45:6	satisfy [3] 41:11 84:21 85:2
8 <b>76:</b> 8,14 <b>86:</b> 12	<b>31</b> :8 <b>37</b> :14 <b>48</b> :7 <b>51</b> :14 <b>55</b> :2 <b>62</b> :16	restrictions [2] 44:17,18	sausage [1] 44:5
quick [3] 76:13 85:14 104:20	<b>91:</b> 21	restrictive [1] 58:2	save [1] 57:1
quickly [1] 57:15	REGULATORY [4] 1:3 4:5 20:18	retention [1] 60:8	saying [23] 12:15 36:25 46:13 49:9,
Quite [1] 64:11	<b>25</b> :10	returned [1] 29:2	12 <b>58:</b> 9 <b>61:</b> 25 <b>66:</b> 3,7 <b>67:</b> 7 <b>71:</b> 11,
quoted [1] 68:4	rehearing [1] 12:18	reverse [1] 4:23	12 <b>73:</b> 10 <b>77:</b> 7 <b>82:</b> 10 <b>84:</b> 4,18 <b>91:</b>
			05 00.40 00.40 00.0 400.4F 47
I R	rejected [1] 69:25	reversed [1] 55:5	25 92:19 93:10 98:8 103:15,17
R R	rejected [1] 69:25 relation [1] 81:4		says [27] 7:20 9:18 25:20,24 31:25
radiated [1] 23:21	relation [1] 81:4	review [28] 4:12 6:25 9:25 10:4,5	<b>says</b> [27] <b>7:</b> 20 <b>9:</b> 18 <b>25:</b> 20,24 <b>31:</b> 25 <b>40:</b> 11 <b>46:</b> 20 <b>59:</b> 23 <b>65:</b> 7,11,25 <b>66:</b>
radiated <sup>[1]</sup> 23:21 radioactive <sup>[1]</sup> 73:8		review [28] 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10,	says [27] 7:20 9:18 25:20,24 31:25
radiated <sup>[1]</sup> 23:21 radioactive <sup>[1]</sup> 73:8 raise <sup>[6]</sup> 12:22 17:2,5,15 18:22,23	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106:	<b>review</b> <sup>[28]</sup> <b>4</b> :12 <b>6</b> :25 <b>9</b> :25 <b>10</b> :4,5 <b>12</b> :6 <b>13</b> :15,25 <b>14</b> :6,13,25 <b>19</b> :10, 13,15 <b>20</b> :4 <b>21</b> :5,9 <b>22</b> :4,7 <b>42</b> :16 <b>57</b> :	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66:
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94:	<b>says</b> [27] <b>7</b> :20 <b>9</b> :18 <b>25</b> :20,24 <b>31</b> :25 <b>40</b> :11 <b>46</b> :20 <b>59</b> :23 <b>65</b> :7,11,25 <b>66</b> : 23 <b>68</b> :13 <b>71</b> :4,9 <b>74</b> :13,22 <b>77</b> :7 <b>79</b> :
radiated <sup>[1]</sup> 23:21 radioactive <sup>[1]</sup> 73:8 raise <sup>[6]</sup> 12:22 17:2,5,15 18:22,23 raised <sup>[2]</sup> 17:18 18:13 raising <sup>[2]</sup> 16:6 17:15	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23	<b>review</b> <sup>[28]</sup> <b>4</b> :12 <b>6</b> :25 <b>9</b> :25 <b>10</b> :4,5 <b>12</b> :6 <b>13</b> :15,25 <b>14</b> :6,13,25 <b>19</b> :10, 13,15 <b>20</b> :4 <b>21</b> :5,9 <b>22</b> :4,7 <b>42</b> :16 <b>57</b> : 23 <b>66</b> :2 <b>70</b> :12 <b>92</b> :18,22 <b>93</b> :11 <b>94</b> : 6,6	<b>says</b> [27] <b>7</b> :20 <b>9</b> :18 <b>25</b> :20,24 <b>31</b> :25 <b>40</b> :11 <b>46</b> :20 <b>59</b> :23 <b>65</b> :7,11,25 <b>66</b> : 23 <b>68</b> :13 <b>71</b> :4,9 <b>74</b> :13,22 <b>77</b> :7 <b>79</b> : 12,14 <b>94</b> :2 <b>95</b> :20 <b>97</b> :4 <b>98</b> :21 <b>99</b> :7
radiated <sup>[1]</sup> 23:21 radioactive <sup>[1]</sup> 73:8 raise <sup>[6]</sup> 12:22 17:2,5,15 18:22,23 raised <sup>[2]</sup> 17:18 18:13 raising <sup>[2]</sup> 16:6 17:15 rare <sup>[1]</sup> 105:16	relation (1) 81:4 relevant (4) 25:16 27:4 37:22 106: 23 relies (1) 32:13 rely (6) 45:16,20,22 81:7 89:2 94: 21	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94:	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3	relation (1) 81:4 relevant (4) 25:16 27:4 37:22 106: 23 relies (1) 32:13 rely (6) 45:16,20,22 81:7 89:2 94: 21 remained (2) 99:11 107:20	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit <sup>[1]</sup> 15:24 revisited <sup>[1]</sup> 65:22	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited <sup>[1]</sup> 65:22 revisiting <sup>[1]</sup> 64:14	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit <sup>[1]</sup> 15:24 revisited <sup>[1]</sup> 65:22 revisiting <sup>[1]</sup> 64:14 Ribbon <sup>[2]</sup> 76:3,4 rid <sup>[1]</sup> 47:10	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit <sup>[1]</sup> 15:24 revisited <sup>[1]</sup> 65:22 revisiting <sup>[1]</sup> 64:14 Ribbon <sup>[2]</sup> 76:3,4 rid <sup>[1]</sup> 47:10 rightly <sup>[2]</sup> 58:11,12	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit <sup>[1]</sup> 15:24 revisited <sup>[1]</sup> 65:22 revisiting <sup>[1]</sup> 64:14 Ribbon <sup>[2]</sup> 76:3,4 rid <sup>[1]</sup> 47:10 rightly <sup>[2]</sup> 58:11,12 rights <sup>[2]</sup> 13:16 15:16	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit <sup>[1]</sup> 15:24 revisited <sup>[1]</sup> 65:22 revisiting <sup>[1]</sup> 64:14 Ribbon <sup>[2]</sup> 76:3,4 rid <sup>[1]</sup> 47:10 rightly <sup>[2]</sup> 58:11,12 rights <sup>[2]</sup> 13:16 15:16 ringing <sup>[1]</sup> 104:2	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renowing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75:	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewable [2] 23:2,4 renewable [2] 23:2,4 renewable [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96:	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76:	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96: 19	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13 30:11 35:7 43:22	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76: 11 78:21 82:16 85:6 102:8,11,22	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11 Section [3] 37:4 59:3,22
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96: 19 real [2] 42:24 49:22	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13 30:11 35:7 43:22 represent [1] 19:25	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76: 11 78:21 82:16 85:6 102:8,11,22 104:12 107:23	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11 Section [3] 37:4 59:3,22 Sections [1] 59:9
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96: 19 real [2] 42:24 49:22 reality [1] 72:17	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13 30:11 35:7 43:22 represent [1] 19:25 reprocess [1] 47:7	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76: 11 78:21 82:16 85:6 102:8,11,22	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11 Section [3] 37:4 59:3,22 Sections [1] 59:9 secure [1] 107:6
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96: 19 real [2] 42:24 49:22 reality [1] 72:17 realize [1] 17:4	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13 30:11 35:7 43:22 represent [1] 19:25 reprocess [1] 47:7 reprocessing [7] 46:25 47:8,11	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76: 11 78:21 82:16 85:6 102:8,11,22 104:12 107:23 rods [2] 51:19 73:17	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11 Section [3] 37:4 59:3,22 Sections [1] 59:9 secure [1] 107:6 security [9] 29:10,18 30:16 32:19
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96: 19 real [2] 42:24 49:22 reality [1] 72:17 realize [1] 17:4 really [13] 14:24 19:21 20:3 25:14	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13 30:11 35:7 43:22 represent [1] 19:25 reprocess [1] 47:7 reprocessing [7] 46:25 47:8,11 51:11 52:10 80:16,19	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76: 11 78:21 82:16 85:6 102:8,11,22 104:12 107:23 rods [2] 51:19 73:17 role [3] 5:7 24:20 49:22 round [1] 69:20	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11 Section [3] 37:4 59:3,22 Sections [1] 59:9 secure [1] 107:6 security [9] 29:10,18 30:16 32:19 33:1,5,7,16 35:19 see [12] 11:19 77:9,19,21 78:3,7 84:15 88:9,12 89:22 92:2 97:1
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96: 19 real [2] 42:24 49:22 reality [1] 72:17 realize [1] 17:4 really [13] 14:24 19:21 20:3 25:14 26:15 48:6 66:16 80:6 81:3 82:13	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13 30:11 35:7 43:22 represent [1] 19:25 reprocess [1] 47:7 reprocessing [7] 46:25 47:8,11 51:11 52:10 80:16,19 request [3] 4:17 7:1 8:12	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76: 11 78:21 82:16 85:6 102:8,11,22 104:12 107:23 rods [2] 51:19 73:17 role [3] 5:7 24:20 49:22 round [1] 69:20 route [3] 12:13 21:8,22	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 61:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11 Section [3] 37:4 59:3,22 Sections [1] 59:9 secure [1] 107:6 security [9] 29:10,18 30:16 32:19 33:1,5,7,16 35:19 see [12] 11:19 77:9,19,21 78:3,7
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96: 19 real [2] 42:24 49:22 reality [1] 72:17 realize [1] 17:4 really [13] 14:24 19:21 20:3 25:14 26:15 48:6 66:16 80:6 81:3 82:13 88:10 92:16,18	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13 30:11 35:7 43:22 represent [1] 19:25 reprocess [1] 47:7 reprocessing [7] 46:25 47:8,11 51:11 52:10 80:16,19 request [3] 4:17 7:1 8:12 requested [2] 8:1 60:17	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76: 11 78:21 82:16 85:6 102:8,11,22 104:12 107:23 rods [2] 51:19 73:17 role [3] 5:7 24:20 49:22 round [1] 69:20 route [3] 12:13 21:8,22 routes [1] 84:19	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11 Section [3] 37:4 59:3,22 Sections [1] 59:9 secure [1] 107:6 security [9] 29:10,18 30:16 32:19 33:1,5,7,16 35:19 see [12] 11:19 77:9,19,21 78:3,7 84:15 88:9,12 89:22 92:2 97:1
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96: 19 real [2] 42:24 49:22 reality [1] 72:17 realize [1] 17:4 realing [13] 14:24 19:21 20:3 25:14 26:15 48:6 66:16 80:6 81:3 82:13 88:10 92:16,18 reams [1] 55:10	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13 30:11 35:7 43:22 represent [1] 19:25 reprocess [1] 47:7 reprocessing [7] 46:25 47:8,11 51:11 52:10 80:16,19 request [3] 4:17 7:1 8:12 requested [2] 8:1 60:17 requesting [2] 68:5 93:14	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76: 11 78:21 82:16 85:6 102:8,11,22 104:12 107:23 rods [2] 51:19 73:17 role [3] 5:7 24:20 49:22 round [1] 69:20 route [3] 12:13 21:8,22 routes [1] 84:19 rule [8] 13:17,23 16:19 33:10 69:	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11 Section [3] 37:4 59:3,22 Sections [1] 59:9 secure [1] 107:6 security [9] 29:10,18 30:16 32:19 33:1,5,7,16 35:19 see [12] 11:19 77:9,19,21 78:3,7 84:15 88:9,12 89:22 92:2 97:1 seek [9] 12:5,18,19 13:14,15,17 14:
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96: 19 real [2] 42:24 49:22 reality [1] 72:17 realize [1] 17:4 realing [13] 14:24 19:21 20:3 25:14 26:15 48:6 66:16 80:6 81:3 82:13 88:10 92:16,18 reams [1] 55:10 reason [10] 9:13 19:12,16 28:8 54:	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13 30:11 35:7 43:22 represent [1] 19:25 reprocess [1] 47:7 reprocessing [7] 46:25 47:8,11 51:11 52:10 80:16,19 request [3] 4:17 7:1 8:12 requested [2] 8:1 60:17 requests [3] 6:6,22 7:21	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76: 11 78:21 82:16 85:6 102:8,11,22 104:12 107:23 rods [2] 51:19 73:17 role [3] 5:7 24:20 49:22 round [1] 69:20 route [3] 12:13 21:8,22 routes [1] 84:19 rule [8] 13:17,23 16:19 33:10 69: 14,15 85:23 95:21	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11 Section [3] 37:4 59:3,22 Sections [1] 59:9 secure [1] 107:6 security [9] 29:10,18 30:16 32:19 33:1,5,7,16 35:19 see [12] 11:19 77:9,19,21 78:3,7 84:15 88:9,12 89:22 92:2 97:1 seek [9] 12:5,18,19 13:14,15,17 14: 13,24 42:13
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96: 19 real [2] 42:24 49:22 reality [1] 72:17 realize [1] 17:4 realig [13] 14:24 19:21 20:3 25:14 26:15 48:6 66:16 80:6 81:3 82:13 88:10 92:16,18 reams [1] 55:10 reason [10] 9:13 19:12,16 28:8 54: 1,24 71:10,12,14 93:15	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13 30:11 35:7 43:22 represent [1] 19:25 reprocess [1] 47:7 reprocess [1] 47:7 reprocess [1] 47:7 request [3] 4:17 7:1 8:12 request [3] 6:6,22 7:21 requests [3] 6:6,22 7:21 require [5] 6:1 13:14 21:10 32:4	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76: 11 78:21 82:16 85:6 102:8,11,22 104:12 107:23 rods [2] 51:19 73:17 role [3] 5:7 24:20 49:22 round [1] 69:20 route [3] 12:13 21:8,22 routes [1] 84:19 rule [8] 13:17,23 16:19 33:10 69: 14,15 85:23 95:21 ruled [2] 59:2 84:23	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11 Section [3] 37:4 59:3,22 Sections [1] 59:9 secure [1] 107:6 security [9] 29:10,18 30:16 32:19 33:1,5,7,16 35:19 see [12] 11:19 77:9,19,21 78:3,7 84:15 88:9,12 89:22 92:2 97:1 seek [9] 12:5,18,19 13:14,15,17 14: 13,24 42:13 seeking [3] 11:5,13 75:8
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96: 19 real [2] 42:24 49:22 reality [1] 72:17 realize [1] 17:4 really [13] 14:24 19:21 20:3 25:14 26:15 48:6 66:16 80:6 81:3 82:13 88:10 92:16,18 reason [10] 9:13 19:12,16 28:8 54: 1,24 71:10,12,14 93:15 reasonable [2] 54:22,22	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13 30:11 35:7 43:22 represent [1] 19:25 reprocess [1] 47:7 reprocessing [7] 46:25 47:8,11 51:11 52:10 80:16,19 request [3] 4:17 7:1 8:12 requested [2] 8:1 60:17 requests [3] 6:6,22 7:21 require [5] 6:1 13:14 21:10 32:4 39:18	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76: 11 78:21 82:16 85:6 102:8,11,22 104:12 107:23 rods [2] 51:19 73:17 role [3] 5:7 24:20 49:22 round [1] 69:20 route [3] 12:13 21:8,22 routes [1] 84:19 rule [8] 13:17,23 16:19 33:10 69: 14,15 85:23 95:21 ruled [2] 59:2 84:23 rulemaking [11] 21:13,24 48:9 58:	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11 Section [3] 37:4 59:3,22 Sections [1] 59:9 secure [1] 107:6 security [9] 29:10,18 30:16 32:19 33:1,5,7,16 35:19 see [12] 11:19 77:9,19,21 78:3,7 84:15 88:9,12 89:22 92:2 97:1 seek [9] 12:5,18,19 13:14,15,17 14: 13,24 42:13 seeking [3] 11:5,13 75:8 seem [4] 22:18 23:15 27:5 52:12
radiated [1] 23:21 radioactive [1] 73:8 raise [6] 12:22 17:2,5,15 18:22,23 raised [2] 17:18 18:13 raising [2] 16:6 17:15 rare [1] 105:16 rather [3] 15:1 54:7 80:3 ratification [1] 34:4 re [1] 95:9 reaches [1] 4:22 reactor [19] 26:16,19,23,24 27:3 30:6,17 32:15 34:18 35:17 47:5 51:10 52:7 59:17 60:3 105:12,20 106:20,22 reactors [4] 27:8 28:11,23 59:12 read [10] 7:23 8:17 37:3,8 46:14 50:5,6,6 103:15 104:1 reading [5] 38:22 45:7,7 77:11 96: 19 real [2] 42:24 49:22 reality [1] 72:17 realize [1] 17:4 realig [13] 14:24 19:21 20:3 25:14 26:15 48:6 66:16 80:6 81:3 82:13 88:10 92:16,18 reams [1] 55:10 reason [10] 9:13 19:12,16 28:8 54: 1,24 71:10,12,14 93:15	relation [1] 81:4 relevant [4] 25:16 27:4 37:22 106: 23 relies [1] 32:13 rely [6] 45:16,20,22 81:7 89:2 94: 21 remained [2] 99:11 107:20 remedies [1] 14:15 remember [1] 95:17 removing [1] 59:17 renew [1] 29:22 renewable [2] 23:2,4 renewal [1] 23:5 renewed [2] 27:1 29:23 reply [6] 10:22 50:15,17,19,21 75: 14 report [1] 76:3 repository [6] 22:21 23:16 28:13 30:11 35:7 43:22 represent [1] 19:25 reprocess [1] 47:7 reprocess [1] 47:7 reprocess [1] 47:7 request [3] 4:17 7:1 8:12 request [3] 6:6,22 7:21 requests [3] 6:6,22 7:21 require [5] 6:1 13:14 21:10 32:4	review <sup>[28]</sup> 4:12 6:25 9:25 10:4,5 12:6 13:15,25 14:6,13,25 19:10, 13,15 20:4 21:5,9 22:4,7 42:16 57: 23 66:2 70:12 92:18,22 93:11 94: 6,6 revisit [1] 15:24 revisited [1] 65:22 revisiting [1] 64:14 Ribbon [2] 76:3,4 rid [1] 47:10 rightly [2] 58:11,12 rights [2] 13:16 15:16 ringing [1] 104:2 risk [1] 35:5 roadblocks [1] 24:23 ROBERTS [25] 4:3 13:13 14:4,8 25:2 29:4,7 32:16 35:9 40:18 42:5 52:15 53:8 57:7 58:15 75:10 76: 11 78:21 82:16 85:6 102:8,11,22 104:12 107:23 rods [2] 51:19 73:17 role [3] 5:7 24:20 49:22 round [1] 69:20 route [3] 12:13 21:8,22 routes [1] 84:19 rule [8] 13:17,23 16:19 33:10 69: 14,15 85:23 95:21 ruled [2] 59:2 84:23	says [27] 7:20 9:18 25:20,24 31:25 40:11 46:20 59:23 65:7,11,25 66: 23 68:13 71:4,9 74:13,22 77:7 79: 12,14 94:2 95:20 97:4 98:21 99:7 104:6 105:2 scale [1] 41:16 scattered [1] 56:19 scheme [7] 5:4 19:10,13,15 34:3 78:25 88:15 Scientists [1] 7:6 scope [1] 63:23 scopes [1] 67:2 screen [1] 94:1 second [11] 6:1 8:23 15:22 61:3 63:19,20 79:13 84:25 85:25 87:22 105:11 secret [1] 48:11 Section [3] 37:4 59:3,22 Sections [1] 59:9 secure [1] 107:6 security [9] 29:10,18 30:16 32:19 33:1,5,7,16 35:19 see [12] 11:19 77:9,19,21 78:3,7 84:15 88:9,12 89:22 92:2 97:1 seek [9] 12:5,18,19 13:14,15,17 14: 13,24 42:13 seeking [3] 11:5,13 75:8 seem [4] 22:18 23:15 27:5 52:12 seeming [1] 45:14

Official - Subject to Final Review					
soon [1] 6:13	22:8 25:15,20 30:21 53:4 61:6,12	Subpart(a [1] 43:20			
sorry [5] 15:7 27:1 64:10 68:17	62:15 63:13 67:11 68:18 69:22 71:				
105:8	20 74:8 76:17 77:20 78:25 79:20	substance [2] 6:9 25:21			
sort [11] 12:11 14:1 20:5 48:11 49:	80:3 81:4,23 84:15 85:2 88:15 98:	substances [2] 5:3 40:13			
15 56:25 70:22,25 71:14 97:18	2 106:7	substantial [1] 5:7			
<b>103:</b> 23	stay [5] 28:10,11,13 72:13 101:21	Substantively [1] 47:24			
<b>SOTOMAYOR</b> [47] <b>15</b> :4,7,9 <b>16</b> :1,	stayed [1] 72:18	succinct [1] 40:5			
3 <b>17</b> :14,21 <b>18</b> :1 <b>32</b> :17,18 <b>33</b> :9,20	stays [1] 97:22	suddenly <sup>[2]</sup> 100:14,21			
<b>34:</b> 5,19,23 <b>35:</b> 8 <b>46:</b> 13,19 <b>50:</b> 10	step [1] 99:17	sufficient [1] 32:8			
<b>51</b> :2 <b>57</b> :8 <b>61</b> :24 <b>62</b> :19,22,24 <b>63</b> :	stepped [1] 34:1	suggest [6] 43:11 44:15 47:17 49:			
15,19,25 <b>64</b> :10 <b>69</b> :10,13 <b>70</b> :2,6,10	stew [1] 55:24	19 <b>57</b> :2 <b>78</b> :8			
<b>75</b> :14,21,25 <b>76</b> :10 <b>91</b> :23 <b>92</b> :10,12	STEWART [94] 2:2 3:3,19 4:7,8,10	suggesting [3] 8:24 12:11 78:8			
<b>100:</b> 23 <b>101:</b> 2,9 <b>102:</b> 14,15,20	<b>5</b> :13,15,21 <b>6</b> :11,18 <b>7</b> :5,15,20,24 <b>8</b> :	suggestion [1] 12:21			
sought [6] 6:24 10:3,4 14:3 61:19		suit [2] 20:25 94:13			
<b>70:</b> 3	4,6,9,20 <b>9</b> :7,15 <b>10</b> :2,11,16,20 <b>11</b> :2,				
	7,15,16,21 <b>12:</b> 23 <b>13:</b> 20 <b>14:</b> 6,19	summary [1] 70:15			
sound [2] 4:18 22:25	<b>15</b> :13 <b>16</b> :8,14,17,20,23 <b>17</b> :17,23	superfluity [1] 86:3			
sounds [1] 76:16	<b>18:</b> 3,14,24 <b>19:</b> 4,9,20 <b>20:</b> 9,10,21	superseded [1] 107:16			
source [6] 25:17 31:5 32:5 50:10	<b>22:</b> 10 <b>23:</b> 1,4,10,22 <b>25:</b> 5,13 <b>26:</b> 9,	support [3] 30:24 50:9,9			
<b>51</b> :7,21	13 <b>27</b> :17 <b>29</b> :5,13,25 <b>30</b> :3,25 <b>31</b> :	supported [3] 7:3 55:5 103:3			
speaks [1] 45:17	20,24 <b>33:</b> 3,18,23 <b>34:</b> 12,22 <b>35:</b> 2,21	supports [1] 49:6			
special [11] 25:17 31:4,21,22 32:4	<b>36</b> :8,23 <b>37</b> :3,6,8,19,23 <b>39</b> :2 <b>40</b> :7	suppose [2] 12:19 29:20			
<b>33</b> :13 <b>51</b> :7,20 <b>53</b> :13,15 <b>54</b> :5	<b>41</b> :5,20 <b>42</b> :3 <b>58</b> :6 <b>74</b> :6 <b>80</b> :2 <b>93</b> :18	supposed [4] 22:12 38:8 47:3 103:			
specific [5] 31:23 36:4,21 50:22	<b>104:</b> 16,17,19	21			
<b>59</b> :4	sticking [2] 47:19,20	SUPREME [2] 1:1,20			
specifically [3] 35:14 55:2 59:2	still [15] 18:7 20:15 26:14 28:12 29:	surpass [1] 70:14			
speeded [1] 73:7	25 30:3 34:11 38:18 47:9,10,12	sympathetic [1] 70:21			
spending [1] 92:3	56:5 70:22 91:3 106:15	system [1] 5:6			
spent [51] 4:25 21:21 22:16 24:15	stitching [1] 45:13	T			
<b>25:</b> 17 <b>26:</b> 6,22 <b>28:</b> 3,22 <b>31:</b> 10,22	STORAGE [91] 1:10 5:2,6,8,10 17:	·			
<b>32:</b> 3,8,24 <b>37:</b> 10 <b>43:</b> 4,8 <b>45:</b> 5,12,15,	10 <b>21:</b> 21 <b>22:</b> 1,22 <b>24:</b> 9 <b>26:</b> 1,3,12,	talked [4] 42:20 49:17 54:17 68:15			
17,21,23 <b>46:</b> 7,24 <b>47:</b> 4,12,16 <b>48:</b> 19	22 <b>27:</b> 6,16 <b>28:</b> 3,19 <b>30:</b> 7 <b>31:</b> 10,16,	talks [1] 55:25			
<b>51</b> :6,17 <b>52</b> :6,19,25 <b>53</b> :5,12 <b>54</b> :6	16 <b>32:</b> 12,14,19,25 <b>33:</b> 1 <b>34:</b> 25 <b>35:</b>	technology <sup>[3]</sup> 73:2,6 74:14			
<b>58</b> :25 <b>59</b> :14,19 <b>60</b> :1 <b>73</b> :17 <b>80</b> :20	4,15,24 <b>36:</b> 9,11,16 <b>37:</b> 9,25 <b>38:</b> 1,6,	teed [1] 107:18			
86:1 96:8,15 97:7 98:6,9,25 105:	7,10,17,23 <b>39:</b> 6,24 <b>40:</b> 4,11,24 <b>41:</b>	temp [1] 23:17			
12	3,4,7,8,12,12,15,17 <b>42:</b> 2 <b>43:</b> 16 <b>44:</b>	temporarily [1] 56:9			
split [3] 14:10 70:1,5	1,8,9,13,22 <b>45:</b> 4 <b>48:</b> 17,19 <b>49:</b> 16	temporary [7] 28:8 34:9,11,14 53:			
spot [1] 103:21	53:12 54:23 55:22 59:2,8,9,14 60:	12 <b>56:</b> 9 <b>86:</b> 5			
squarely [1] 52:1	6,7 <b>69:</b> 16 <b>71:</b> 24 <b>72:</b> 11 <b>74:</b> 14,15,	tens [1] 57:1			
stage [2] 17:8 57:17	21,23 76:7 79:11 81:3 105:20 106:	Tenth [1] 95:8			
stand-alone [1] 27:6	1,3,5 <b>107:</b> 11,18	term [3] 45:8 53:13 94:16			
standalone [1] 27:19	store [7] 24:15 25:11 28:22 35:23	terms [6] 18:20 33:1,21 57:4 87:17			
standard [1] 70:15	58:25 73:4 80:24	<b>96:</b> 14			
standards [1] 33:11	stored [9] 23:17 28:6 45:13,18 47:	terrorist [4] 86:10 102:25 103:9			
standing [2] 5:23 18:6	5 55:19 56:8 105:19,22	<b>104</b> :8			
start [3] 85:14 98:15 99:1	straight [1] 63:9	test [1] 81:4			
started [2] 82:1 100:15	straightforward [3] 44:21 92:6	testimony [2] 60:25 61:19			
stat [1] 25:15	<b>96</b> :5	TEXAS [27] 1:7,13 2:10,11 3:16 4:			
State [13] 17:14,24 18:7,7 21:23	strange [3] 25:6 87:22 91:19	5,13,15 <b>19:</b> 6 <b>21:</b> 12 <b>24:</b> 12 <b>54:</b> 20			
<b>23</b> :23 <b>54</b> :20 <b>88</b> :6,8,12 <b>91</b> :19 <b>93</b> :3	stretch [1] 81:3	<b>55</b> :4 <b>72</b> :2 <b>81</b> :20 <b>85</b> :10 <b>87</b> :3 <b>91</b> :20			
<b>101</b> :19	strict [1] 71:6	93:3 101:18,21 102:3 103:3,20,23			
statement [1] 42:1	strictly [1] 14:16	<b>105:</b> 7,8			
statements [3] 41:23 43:17 100:8	strikes [1] 100:11	text [4] 39:9 94:20,21,22			
STATES [5] 1:1,21 27:25 55:1 93:	strongest [1] 30:23	textual [1] 71:5			
19	struggle [1] 77:18	theoretical [1] 21:16			
status [11] 12:12,20 15:17 28:8 29:	struggling [2] 35:12 52:13	theory [2] 92:1 96:23			
3 67:24 68:1 71:21 72:4 84:2,20	study [1] 55:18	there's [32] 12:21 14:10 15:11 22:			
	-	20 <b>25</b> :23,24 <b>28</b> :8 <b>29</b> :21 <b>32</b> :9 <b>42</b> :			
statute [24] 9:24 12:4 18:21 22:2	stuff [3] 72:2 98:19 106:23	16 <b>45</b> :10,11,16 <b>46</b> :19 <b>47</b> :10,12 <b>51</b> :			
<b>24</b> :22 <b>36</b> :5,15,21,22 <b>41</b> :2 <b>50</b> :1 <b>51</b> :	subject [2] 5:9 79:24	19,22 <b>54</b> :8 <b>55</b> :10,10,24,25 <b>57</b> :23,			
12 <b>52</b> :7 <b>70</b> :20 <b>72</b> :9 <b>75</b> :9 <b>79</b> :4 <b>83</b> :9	submissions [1] 6:20	25 <b>62</b> :8 <b>81</b> :14 <b>83</b> :16 <b>86</b> :7 <b>93</b> :11			
87:23 88:10 91:7 96:7,7,19	Submit [3] 21:1,2,3	<b>99:</b> 2 <b>100</b> :17			
statutes [1] 49:3	submitted [3] 89:16 107:24 108:2	therefore [1] 10:10			
statutorily [1] 62:10	suboptimal [1] 28:18	<b>They've</b> [9] <b>51</b> :23 <b>66</b> :12,13 <b>69</b> :22			
<b>statutory</b> <sup>[39]</sup> <b>5</b> :10 <b>7</b> :4,12,16,20 <b>8</b> :	subpart 5 43:19,24 44:14 49:15	<b>74:1 78:12 83:5 91:</b> 16,18			

**50**:13

Sell [1] 86:0	SOFFY 1915:7 27:1 64:10 68:17
send [3] 87:11,16 88:5	<b>105</b> :8
sending [2] 88:14,16	sort [11] 12:11 14:1 20:5 48:11 49:
sense [8] 10:11 22:23 25:14 49:24	15 <b>56:</b> 25 <b>70:</b> 22,25 <b>71:</b> 14 <b>97:</b> 18
61:25 65:18 69:14 96:12	<b>103</b> :23
sent [1] 80:21	<b>SOTOMAYOR</b> [47] <b>15:</b> 4,7,9 <b>16:</b> 1,
sentence [2] 96:15,17	3 <b>17:</b> 14,21 <b>18:</b> 1 <b>32:</b> 17,18 <b>33:</b> 9,20
separate [4] 27:15 33:7 90:7,9	<b>34:</b> 5,19,23 <b>35:</b> 8 <b>46:</b> 13,19 <b>50:</b> 10
separately [1] 43:5	<b>51</b> :2 <b>57</b> :8 <b>61</b> :24 <b>62</b> :19,22,24 <b>63</b> :
September [1] 103:3	15,19,25 64:10 69:10,13 70:2,6,10
sequence [1] 107:9	75:14,21,25 76:10 91:23 92:10,12
serve [2] 28:21 61:10	<b>100:</b> 23 <b>101:</b> 2,9 <b>102:</b> 14,15,20
serves [1] 66:25	sought [6] 6:24 10:3,4 14:3 61:19
set [7] 5:17,22 21:15 33:21 61:9 63:	-
8 <b>70</b> :12	sound [2] 4:18 22:25
setting [2] 21:7 66:2	sounds [1] 76:16
settled [2] 81:11 99:11	source [6] 25:17 31:5 32:5 50:10
seven [1] 42:23	<b>51:</b> 7.21
several [2] 85:13 103:5	speaks [1] 45:17
shall [17] 7:22 38:5 39:17 45:12 49:	special [11] 25:17 31:4,21,22 32:4
18 <b>50</b> :1 <b>60</b> :16 <b>65</b> :8.25 <b>66</b> :1 <b>68</b> :6	<b>33</b> :13 <b>51</b> :7,20 <b>53</b> :13,15 <b>54</b> :5
<b>74</b> :13,14,15,22 <b>77</b> :10 <b>105</b> :3	specific [5] 31:23 36:4,21 50:22
shareholders [1] 94:12	<b>59:</b> 4
sheaths [1] 51:22	specifically [3] 35:14 55:2 59:2
sheds [1] 44:4	
	speeded [1] 73:7
ship [1] 47:7 shorter [1] 28:12	spending [1] 92:3
	spent [51] 4:25 21:21 22:16 24:15
shouldn't [1] 16:9	<b>25</b> :17 <b>26</b> :6,22 <b>28</b> :3,22 <b>31</b> :10,22
show [3] 11:1 41:12 78:2	<b>32</b> :3,8,24 <b>37</b> :10 <b>43</b> :4,8 <b>45</b> :5,12,15
shut [1] 35:1	17,21,23 <b>46</b> :7,24 <b>47:</b> 4,12,16 <b>48</b> :19
side [2] 40:2 78:24	<b>51</b> :6,17 <b>52</b> :6,19,25 <b>53</b> :5,12 <b>54</b> :6
side's [2] 51:5 72:10	<b>58</b> :25 <b>59</b> :14,19 <b>60</b> :1 <b>73</b> :17 <b>80</b> :20
Sierra [2] 91:11 93:21	<b>86</b> :1 <b>96</b> :8,15 <b>97</b> :7 <b>98</b> :6,9,25 <b>105</b> :
significant [1] 79:3	12
similar [1] 41:13	split [3] 14:10 70:1,5
similarly [1] 27:5	spot [1] 103:21
simply [5] 13:7 26:12 51:6 79:22	squarely [1] 52:1
105:9	stage [2] 17:8 57:17
since [6] 5:4 22:16 27:20 99:12	stand-alone [1] 27:6
<b>103</b> :2 <b>107</b> :21	standalone [1] 27:19
single [1] 32:2	standard [1] 70:15
sit [2] 56:1,6	standards [1] 33:11
site [8] 26:16 28:10 32:14 34:17 35:	•
16 <b>47</b> :8 <b>76</b> :7 <b>105</b> :19	start [3] 85:14 98:15 99:1
sites [5] 28:19 30:6,17,18 56:19	started [2] 82:1 100:15
situated [1] 27:5	stat [1] 25:15
situation [3] 73:23 74:4 92:17	State [13] 17:14,24 18:7,7 21:23
six [2] 25:14 42:23	<b>23</b> :23 <b>54</b> :20 <b>88</b> :6,8,12 <b>91</b> :19 <b>93</b> :3
solicit [1] 88:20	<b>101</b> :19
solicited [1] 88:23	statement [1] 42:1
Solicitor [2] 2:2,10	statements [3] 41:23 43:17 100:8
solicits [1] 89:2	STATES [5] 1:1,21 27:25 55:1 93:
solid [1] 33:24	19
solution [3] 22:13 34:10 101:23	status [11] 12:12,20 15:17 28:8 29
solutions [3] 24:8 25:1 28:17	3 67:24 68:1 71:21 72:4 84:2,20
somebody [4] 66:12 78:1 88:13	statute [24] 9:24 12:4 18:21 22:2
89:11	24:22 36:5,15,21,22 41:2 50:1 51:
somehow [1] 92:21	12 52:7 70:20 72:9 75:9 79:4 83:9
someone [2] 21:4 73:25	87:23 88:10 91:7 96:7,7,19
sometimes [4] 18:17 41:22 62:7	statutes [1] 49:3
<b>94</b> :10	statutorily [1] 62:10
somewhat [1] 25:6	statutory [39] 5:10 7:4,12,16,20 8:
somewhere [2] 28:13 55:19	14,17 9:21 13:24 17:9,18 21:9,20
1	I ,,

self-contained [1] 44:2

sell [1] 86:6

	Official - Subjec		
thick [1] 48:14	undergone [3] 51:11,11 52:10	W	written [1] 6:20
thinks [3] 14:1 73:25 86:5	underground [1] 43:22		wronged [1] 66:14
third [2] 28:15 105:23	underlying [1] 15:17	Wait [1] 100:23	wrongly [4] 13:25 57:17 58:11 66:
<b>THOMAS</b> <sup>[19]</sup> <b>5</b> :13,18 <b>6</b> :8,16 <b>25</b> :4,	underneath [1] 94:21	waived [1] 82:23	7
5 <b>26</b> :7,10 <b>27</b> :9 <b>44</b> :20 <b>45</b> :1,10 <b>53</b> :9	underscore [1] 49:1	waiver [2] 58:4 78:12	wrote [2] 37:14 95:8
<b>60</b> :11,19 <b>61</b> :1 <b>75</b> :12 <b>86</b> :13 <b>102</b> :12	underscores [1] 49:6	wanted [10] 13:3 22:6 39:7 49:12	Y
though [8] 11:12 27:7 62:7 70:19	understand [25] 18:25 35:12 43:	53:11 56:13 60:23 69:14 93:25	I
<b>94</b> :11,14 <b>96</b> :2 <b>105</b> :16	17 <b>46</b> :14 <b>53</b> :17 <b>61</b> :16 <b>64</b> :13 <b>72</b> :16	<b>101:</b> 3	<b>year</b> [1] <b>34:</b> 7
thousands [1] 43:22	<b>73</b> :9,19 <b>77</b> :3 <b>78</b> :13 <b>82</b> :24 <b>83</b> :14	wants [4] 29:16,17 56:18 83:18	years [30] 21:19 22:16 23:8,10 29:
three [23] 25:14 26:3,15,25 32:2	<b>84</b> :17 <b>85</b> :5 <b>87</b> :4,10 <b>90</b> :4 <b>93</b> :7,8 <b>94</b> :	warrants [2] 14:2,9	21,24 <b>31</b> :13 <b>34:</b> 1,8,10 <b>37</b> :14 <b>43</b> :
<b>45:</b> 21,23 <b>46:</b> 3,4,6 <b>52:</b> 8,25 <b>53:</b> 5,6,	9,15 <b>96</b> :5 <b>103</b> :4	Washington [4] 1:16 2:3,5,7	23 <b>48:</b> 14 <b>55:</b> 24 <b>56:</b> 10,10,11,12 <b>59:</b>
16 <b>81</b> :16 <b>85</b> :14 <b>90</b> :7,8 <b>96</b> :16 <b>97</b> :7	understanding [8] 11:18 36:7 73:	Waste [28] 5:3,8 23:17 24:8,17,25	16 69:25 71:25 72:17 73:2 79:23
<b>98:</b> 23 <b>99:</b> 3	21 <b>81</b> :11 <b>86</b> :18 <b>99</b> :12 <b>107</b> :10,10	25:11 27:24 28:5,10 30:5 31:22	80:13 86:8 103:5 105:15 107:14,
thumb [1] 41:16	understood [4] 75:16 80:8 90:11	<b>32</b> :24 <b>34</b> :16 <b>43</b> :14 <b>48</b> :5,10,24 <b>49</b> :	21
tied [1] 95:21		5 50:6 52:21 53:13 58:23 86:8 96:	Yucca [6] 22:12,18 47:2 100:14,20
	100:18	9 <b>97</b> :15 <b>101</b> :20 <b>105</b> :19	101:25
time's [1] 102:10	undertook [1] 48:23	watch [1] 32:19	
timely [1] 57:20	undisputed [1] 8:2	water [3] 59:18 73:18 89:1	Z
title [2] 39:16,16	unhappy [1] 96:25	way [30] 6:13,14 12:24 24:23 36:15	zero [1] 35:6
today [5] 17:15 23:25 56:2,6 91:11	Union [1] 7:6	<b>38</b> :21 <b>40</b> :15 <b>41</b> :25 <b>42</b> :20 <b>45</b> :22 <b>46</b> :	
today's [1] 86:2	UNITED [3] 1:1,21 27:25	25 <b>52</b> :17 <b>54</b> :10,14 <b>58</b> :8 <b>66</b> :11,20	
together [3] 45:13 51:23 76:4	unless [1] 19:11	, , ,	
tons [2] 27:13 86:8	unlicensed [3] 4:24 25:20 38:12	68:16 70:25 72:7,16 78:25 80:12 86:7 87:9 90:8 96:5 97:14 98:15	
took [2] 21:23 96:7	unlike [1] 89:21		
traditional [1] 7:9	unprecedented [1] 105:17		
transfer [1] 73:25	until [6] 28:13 30:11 42:22 53:23	ways [3] 41:6 58:1 73:4	
Transport [1] 89:1	<b>100:</b> 13,19	Wednesday [1] 1:17	
transported [1] 27:14	until-recent [1] 107:10	weight [1] 79:3	
treat [1] 31:9	untimely [1] 21:4	weird [1] 90:6	
treated [2] 83:3,5	unusual [2] 14:15 99:17	welcome [3] 5:12 60:10 86:12	
treating [1] 52:25	up [19] 24:7,12 26:5 28:14 38:19	west [2] 24:12 72:2	
tried [2] 66:13 101:25	45:21,23 46:7,8 47:3 63:16 70:22	whatever [4] 14:25 36:3 67:25 94:	
true [5] 22:20 32:11 46:18,22 107:	<b>71</b> :24 <b>73</b> :7 <b>87</b> :25 <b>89</b> :8 <b>98</b> :20 <b>100</b> :	24	
3	14 <b>107</b> :18	Whereupon [1] 108:1	
truly [1] 92:8	upheld <sup>[3]</sup> 6:4 21:20 24:15	whether [27] 12:16 13:24,25 15:24	
trump [4] 36:11,22,23 37:10	upholding [1] 10:24	20:2,3,12,13 24:21 28:1 29:15 30:	
try [6] 4:15 21:3 42:25 89:21 100:	uranium [1] 51:19	9 <b>34</b> :13,16 <b>44</b> :6 <b>45</b> :16 <b>46</b> :25 <b>47</b> :2	
24 <b>101</b> :6	urge [2] 103:12,25	56:17 57:16 58:10 70:24 74:10 84:	
	J I	8,9 <b>107:</b> 4,15	
trying [9] 17:5 24:7,25 56:23 64:13	uses [2] 29:6 94:22	whisper [1] <b>48:</b> 18	
82:10 83:14 84:8,16	usual [2] 14:10 36:7	who's [1] 26:11	
turn [1] 96:2	Utah [2] 21:23 22:3	whole [5] 53:19 82:9 86:20,21 92:	
turns [1] 19:23	utilization [4] 59:11,13 106:19,25	3	
two [18] 5:22 8:10 27:23 31:1,13	utterly [1] 62:14	wide [1] 85:17	
<b>34</b> :1 <b>37</b> :14 <b>38</b> :24 <b>49</b> :3 <b>52</b> :11,12	V	will [20] 4:3 6:12,13,14 20:22 24:15	
<b>60</b> :22 <b>67</b> :2 <b>79</b> :9,23 <b>81</b> :18 <b>83</b> :10			
<b>84:</b> 19	vague <sup>[1]</sup> 6:7	<b>28:</b> 11 <b>29:</b> 17 <b>30:</b> 1,8,9,14 <b>32:</b> 7 <b>36:</b>	
two-paragraph [1] 105:25	valid [1] 14:18	16 <b>54</b> :3,15 <b>101</b> :19,20,21 <b>107</b> :5	
type [3] 13:18 87:23,24	variety [1] 85:18	wish [1] 95:16	
types [3] 86:21 94:1 98:24	various [6] 6:22 32:1 50:12,24 59:	withdrawn [2] 51:10 52:7	
typically [1] 11:15	23 66:24	within [10] 21:1 30:13 42:18,22 44:	
U	verify [1] 29:17	18 <b>49</b> :15 <b>50</b> :6,23 <b>52</b> :1 <b>63</b> :13	
	versions [1] 39:5	without [6] 34:2 38:21 39:8 45:6	
U.S.C [3] 31:4 96:14 104:22	versus [5] 4:5 28:7 30:16 48:16	<b>46</b> :1 <b>61</b> :6	
ultimate [1] 13:8	<b>106:</b> 1	wonderful [1] 95:12	
ultimately [3] 41:8 48:24 55:18	view [3] 70:21 100:5 106:13	wondering [1] 93:12	
ultra [12] 4:19 19:18,20,22 62:15	views [1] 29:18	Woolsey [1] 95:9	
<b>76:</b> 15,22 <b>83:</b> 19 <b>84:</b> 14 <b>91:</b> 24 <b>92:</b> 2,	violated [1] 78:16	word [8] 89:24,25 90:2,16,19 95:2,	
22	vires [12] 4:19 19:18,21,23 62:15	22,23	
unable [1] 32:12	76:16,22 83:19 84:14 91:24 92:2,	words [3] 12:14 40:8 43:4	
under [35] 6:13,14 8:22 9:10 12:4	22	work [7] 12:24 24:16,18 60:6 66:	
<b>18</b> :8,20 <b>19</b> :7 <b>21</b> :14 <b>38</b> :14 <b>42</b> :13	virtually [1] 27:15	20 <b>87</b> :17 <b>102</b> :1	
<b>44</b> :24 <b>51</b> :8 <b>54</b> :17 <b>60</b> :14 <b>65</b> :23 <b>69</b> :	virtue [3] 20:18 88:14,15	works [1] 94:6	
19 <b>71</b> :25 <b>78</b> :15 <b>82</b> :4,13 <b>84</b> :6,20,	volume [2] 27:24 28:4	world [1] 92:22	
22 <b>85</b> :18 <b>88</b> :10,14,25 <b>90</b> :14 <b>92</b> :1,	volumes [1] 27:21	worried [1] 64:12	
7 <b>96</b> :12,23 <b>100</b> :5 <b>105</b> :2	votes [1] 99:18	write [2] 36:15 38:20	