SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

\- - - - - - - - - - - - - - - - - -

THOMAS PERTTU,)

Petitioner,)

v.) No. 23-1324

KYLE BRANDON RICHARDS,)

Respondent.)

\- - - - - - - - - - - - - - - - - -

Pages: 1 through 81

Place: Washington, D.C.

Date: February 25, 2025

HERITAGE REPORTING CORPORATION

Official Reporters

1220 L Street, N.W., Suite 206

Washington, D.C. 20005

(202) 628-4888

www.hrccourtreporters.com

1 IN THE SUPREME COURT OF THE UNITED STATES
2 -
3 THOMAS PERTTU,)
4 Petitioner,)
5 v.) No. 23-1324
6 KYLE BRANDON RICHARDS,)
7 Respondent.)
8 -
9
10 Washington, D.C.
11 Tuesday, February 25, 2025
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:34 a.m.
16
17 APPEARANCES:
18 ANN M. SHERMAN, Solicitor General, Lansing, Michigan;
19 on behalf of the Petitioner.
20 LORI ALVINO McGILL, ESQUIRE, Charlottesville,
21 Virginia; on behalf of the Respondent.
22
23
24
25

1 C O N T E N T S

2 ORAL ARGUMENT OF: PAGE:
3 ANN M. SHERMAN, ESQ.
4 On behalf of the Petitioner 3
5 ORAL ARGUMENT OF:
6 LORI ALVINO McGILL, ESQ.
7 On behalf of the Respondent 51
8 REBUTTAL ARGUMENT OF:
9 ANN M. SHERMAN, ESQ.
10 On behalf of the Petitioner 78
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

2 (11:34 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear

4 argument next in Case 23-1324, Perttu versus

5 Richards.

6 Ms. Sherman.

7 ORAL ARGUMENT OF ANN M. SHERMAN

8 ON BEHALF OF THE PETITIONER

9 MS. SHERMAN: Mr. Chief Justice, and

10 may it please the Court:

11 Exhaustion is the centerpiece of

12 Congress's reforms under the Prison Litigation

13 Reform Act. Yet, even with this invigorated

14 exhaustion requirement, prisoner lawsuits still

15 account for an outsize share of filings in

16 federal district courts. A rule that requires a

17 jury trial on intertwined exhaustion issues

18 would increase this burden while incentivizing

19 non-exhaustion and undermining the goals and

20 structure of the PLRA.

21 Respondent would have this Court cast

22 aside the PLRA's goals and structure merely

23 because exhaustion is an affirmative defense.

24 Focusing on this Court's holding in Jones versus

25 Bock, he contends that there's no principled

1 reason for treating PLRA exhaustion differently
2 than other affirmative defenses that are
3 routinely sent to juries when there are facts
4 intertwined with the merits.
5 Jones does not stand for this broad
6 proposition. It held only that prisoners need
7 not plead exhaustion. And there is a principled
8 reason for treating PLRA exhaustion differently
9 than other affirmative defenses. It is a
10 mandatory prerequisite to suit. So its intended
11 benefits would be entirely undercut by merits
12 discovery and a trial before its resolution.
13 PLRXA -- PLRA exhaustion must be
14 resolved by a judge at the early stages of
15 litigation. Contrary to the Sixth Circuit, this
16 does not run afoul of the Seventh Amendment even
17 when there are intertwined facts. The judge's
18 determination on exhaustion does not interfere
19 with the jury's ultimate fact-finding role
20 because dismissal is typically without prejudice
21 and the judge's determination on exhaustion
22 would not have preclusive effect.
23 Richards, like many other prisoners,
24 can exhaust, come back, and have a jury decide
25 the merits of any viable claims. For this

1 reason, this Court should reverse the Sixth
2 Circuit's decision.
3 I welcome the Court's questions.
4 JUSTICE THOMAS: Are exhaustion
5 determinations normally made by the judge?
6 MS. SHERMAN: They are. And, in fact,
7 lower courts are pretty much in agreement that
8 at least when there are no intertwined facts,
9 that judges will make those determinations.
10 JUSTICE THOMAS: So what is it about
11 the intertwining of facts that changed the --
12 changes the nature of exhaustion?
13 MS. SHERMAN: I don't think there's
14 anything that changes the nature of exhaustion.
15 I think what it does is it -- it -- it makes one
16 have to consider the Seventh Amendment now.
17 If -- if there are intertwined facts, is that an
18 implication of the Seventh Amendment? And our
19 position is that it doesn't and that --
20 JUSTICE THOMAS: So, historically, has
21 there been -- do we have any analogs to -- that
22 would suggest that this would go to a jury?
23 MS. SHERMAN: No. In fact, the -- the
24 opposite is true, that the analogs suggest that
25 this would go to a judge. We think that the

1 closest analogs -- there is no precise analog.
2 There was no exhaustion in 1791. The doctrine
3 hadn't been developed yet. It came as the
4 administrative setting was coming into -- to
5 force.
6 But we know that exhaustion has its
7 roots in equity. And we think that the most at
8 least appropriate analogs here are equitable
9 defenses and equitable defenses that would have
10 been -- their key characteristic is a deference
11 to another setting, another forum.
12 JUSTICE JACKSON: But, Ms. Sherman, do
13 we really have to get into that? I guess what I
14 was a little confused about from your briefing
15 was that I took you to concede that there's
16 intertwinement here. And if that's the case, we
17 can just assume, I guess, that exhaustion does
18 not entitle you to a jury. That's the part of
19 this that would ordinarily say you don't get a
20 jury, but it's the fact of intertwinement that
21 brings to the fore the question of whether or
22 not the Seventh Amendment has to be satisfied.
23 So we don't really have to worry or
24 think about or rule on whether or not the
25 exhaustion claim gets a jury independent of the

1 other one, right?

2 MS. SHERMAN: I don't think the Court

3 has to rule on that. I think it's a question

4 that is naturally embedded in the question

5 presented. I mean, obviously --

6 JUSTICE JACKSON: I understand, but if

7 I assume it, okay, so fine, aren't we still

8 faced with the question that you present, as a

9 matter of your question presented, is then we

10 have intertwinement of a claim that does not get

11 a jury, the exhaustion claim, with a claim that

12 does? Do you concede that the First Amendment

13 retaliation claim is one that would ordinarily

14 go to the jury?

15 MS. SHERMAN: When -- when the right

16 to a jury trial accrues and exhaustion has been

17 met, I agree that that is a claim that should go

18 to the jury. And this Court has been very clear

19 that 1983 claims are entitled to a jury trial.

20 JUSTICE JACKSON: All right. So we do

21 have the intertwinement. At least you concede

22 it in your brief. And so why wouldn't the sort

23 of standard Beacon Theatres view of how we deal

24 with that situation apply here?

25 MS. SHERMAN: Beacon Theatres doesn't

1 apply here for a number of reasons. One, Beacon
2 Theatres was driven by a concern for collateral
3 estoppel. Would there -- would there be a
4 preclusive effect that would completely cut off
5 any right to have the -- the -- the jury trial
6 on the merits?
7 JUSTICE JACKSON: I don't see that in
8 the opinion. I mean, I see that it talks about
9 preclusive effect, but that didn't necessarily
10 seem to me to be driving the analysis. And --
11 and we've had a lot of cases that have applied
12 this sort of intertwinement principle in which
13 preclusion really hasn't been the main focus.
14 MS. SHERMAN: I think Beacon Theatres
15 itself talked about preclusion, preclusive
16 effect, and that being a concern. And later on,
17 this Court in Parklane Hosiery said, when we
18 looked at Beacon Theatres, which, again, this
19 Court has said is -- collateral estoppel is only
20 a flexible, judge-made doctrine, and -- and this
21 Court said in Parkland Hosiery the concern was
22 collateral estoppel at --
23 JUSTICE JACKSON: All right. So why
24 isn't that a case here? I mean, what -- what
25 law do we have that says that an exhaustion

1 determination by a judge in this situation that
2 requires them to find all the facts about
3 whether or not there was actual retaliation --
4 why isn't that preclusive of a later jury trial
5 related --
6 MS. SHERMAN: Well, what --
7 JUSTICE JACKSON: -- to that same
8 issue?
9 MS. SHERMAN: Well, what we have here
10 is the flexible doctrine of collateral estoppel
11 and what we know about collateral estoppel and
12 why it's applied and why it doesn't get applied.
13 And one of the big issues here is that you
14 don't -- this Court has said over and over in
15 cases, and so have the lower courts, that
16 collateral estoppel is applied -- is not applied
17 when the litigants have not had a full and fair
18 opportunity to litigate.
19 And when a litigant is litigating --
20 on either side is litigating exhaustion, they
21 have not had a full and fair opportunity to
22 litigate on the merits even if there are
23 overlapping factors.
24 JUSTICE SOTOMAYOR: Why?
25 JUSTICE BARRETT: Counsel --

1 JUSTICE KAGAN: General --
2 JUSTICE SOTOMAYOR: Why? If we take
3 your starting proposition that exhaustion is a
4 judge determination and you've had a full and
5 fair opportunity to litigate it, why wouldn't
6 that -- if it's interwound with the merits, why
7 wouldn't you bound -- be bound by it? So you go
8 back later, but -- and you get exhausted and you
9 come back to court on your substantive decision,
10 like you're arguing should be done here. Why
11 wouldn't you be bound?
12 MS. SHERMAN: There may be factual
13 overlap, and we concede that there's
14 intertwinement --
15 JUSTICE SOTOMAYOR: Assume --
16 MS. SHERMAN: -- of the facts there.
17 JUSTICE SOTOMAYOR: -- assume it's
18 interwound.
19 MS. SHERMAN: Yes, it is --
20 JUSTICE SOTOMAYOR: Assume everything
21 you say. Our normal preclusion rules would say:
22 If you've had a fair and full opportunity to --
23 to litigate a case -- it doesn't mean before a
24 jury. It just means, if you were entitled to
25 litigate this issue and you had a full and fair

1 opportunity to litigate it and you lost on this
2 issue, then you go back and you exhaust and you
3 come back again. At the new trial, you would be
4 collaterally estopped.
5 MS. SHERMAN: Respectfully, Your
6 Honor, those -- neither side has had a full and
7 fair opportunity to litigate the underlying
8 merits, whether that's --
9 JUSTICE BARRETT: Counsel --
10 JUSTICE SOTOMAYOR: It has nothing to
11 do with it. It has to do with would you be
12 bound by collateral estoppel.
13 MS. SHERMAN: And they would not --
14 respectfully, they would not be bound unless
15 they'd had a full and fair opportunity to
16 argue --
17 JUSTICE SOTOMAYOR: They did.
18 JUSTICE BARRETT: But --
19 MS. SHERMAN: -- on the merits. They
20 have had a full and fair opportunity on
21 exhaustion, and that is different.
22 JUSTICE SOTOMAYOR: No, collateral --
23 JUSTICE BARRETT: But --
24 JUSTICE SOTOMAYOR: I'm sorry.
25 JUSTICE BARRETT: Sorry. I was just

1 going to say I don't understand why you're
2 talking about full and fair opportunity, because
3 preclusion requires a judgment. And for
4 exhaustion, you're dismissed with prejudice, so
5 there is no judgment.
6 So, even if you filed a later suit --
7 I mean, it is a full and fair opportunity
8 because you didn't have --
9 MS. SHERMAN: Yeah.
10 JUSTICE BARRETT: -- litigate it all
11 the way to judgment. I mean, maybe there's a
12 law-of-the-case argument to be made, but I don't
13 see how collateral estoppel applies.
14 MS. SHERMAN: Well, I -- I would agree
15 with that. That's one of the key elements of
16 the test for collateral estoppel. And the other
17 is whether the issue was litigated in the prior
18 litigation and then again in the subsequent
19 litigation.
20 JUSTICE SOTOMAYOR: Counsel, can I go
21 back to --
22 MS. SHERMAN: And, here, you have two
23 separate issues.
24 JUSTICE ALITO: Under the --
25 JUSTICE SOTOMAYOR: Can I go back --

1 I'm sorry.
2 JUSTICE ALITO: Go ahead.
3 JUSTICE SOTOMAYOR: Can I go back to
4 the floodgates argument? The Second Circuit
5 hasn't had a decision like this circuit, but it
6 has said so in dicta, and the district courts
7 have followed that dicta basically.
8 And I've gone back 12 years and had
9 our library and my clerks search Second Circuit
10 opinions, and in those 12 years, only five cases
11 has there been litigation over whether or not
12 there was exhaustion because only five cases was
13 it interwound with the merits.
14 I don't see where the floodgates have
15 come up. And if any circuit has pro se
16 litigation, it's this one.
17 And I also look at all of the other
18 barriers to litigation by -- you have to -- you
19 have screening that has to go on. You have
20 to -- the defendant has to raise an exhaustion
21 defense, the plaintiff has to counter that
22 exhaustion was unavailable, the complaint
23 survives any motion to dismiss and that you have
24 a genuine dispute of material fact unrelated to
25 exhaustion to justify.

1 I don't understand the floodgates
2 argument.
3 MS. SHERMAN: I appreciate all the
4 steps that -- that you have talked about,
5 Justice Sotomayor, but I --
6 JUSTICE SOTOMAYOR: I didn't make them
7 up. They came up from an amicus that pointed
8 them out.
9 MS. SHERMAN: Yes. But -- but our
10 Michigan data reflects something a little bit
11 different than the data that you have attempted
12 to collect.
13 Last year alone, Michigan had 574
14 cases that were opened. In 96 of those, we
15 filed motions for summary judgment. Four --
16 JUSTICE JACKSON: What kind of case,
17 I'm sorry? Just -- just someone claiming --
18 MS. SHERMAN: Well, just prisoner --
19 prisoner --
20 JUSTICE JACKSON: Okay.
21 MS. SHERMAN: -- lawsuits.
22 Ninety-six of those, we filed motions
23 for -- motion for summary judgment on
24 exhaustion. We had four Pavey hearings or
25 evidentiary hearings on exhaustion. And if

1 those -- under Richards's rule, those four Pavey
2 hearings would now be trials. And so it's --
3 JUSTICE SOTOMAYOR: All of them were
4 mixed with the merits? I -- I -- I'm --
5 MS. SHERMAN: I -- I --
6 JUSTICE SOTOMAYOR: -- hard-pressed to
7 think that. This is an unusual case because
8 this case is about not the rape necessarily but
9 the -- of the First Amendment violation.
10 MS. SHERMAN: I don't have that --
11 that granular data, but I will say that --
12 JUSTICE SOTOMAYOR: Well, that's not
13 granular. That's the whole case.
14 MS. SHERMAN: Well, but an
15 exhaustion -- a Pavey hearing would only arise
16 if there were factual disputes. And many of
17 those factual disputes are happening over
18 prisoners asserting unavailability. And if you
19 take that data that instead of five --
20 JUSTICE SOTOMAYOR: I'm sorry, I'm --
21 I'm just still confused. It has to do with
22 whether the exhaustion is interwound with the
23 merits of the claim, the underlying claim.
24 MS. SHERMAN: What I'm attempting to
25 do is to respond to Your Honor's question about

1 will the floodgates open. And the best that we
2 can tell from us doing Pavey hearings, if those
3 had to be trials -- and many of those are going
4 to be on intertwined facts because that's when
5 Pavey hearings come up. There are disputed
6 facts, and it tends to be credibility
7 determinations, a he said/she said.
8 And if you take that data from
9 Michigan and you use that even as a national
10 average and you say: Well, okay, in Michigan,
11 it's four additional jury trials, and across the
12 country, for 50 states, that's -- that's --
13 that's 200 additional jury trials.
14 That's not municipalities. That's not
15 the Federal Bureau of Prisons. That -- that is
16 a huge, overwhelming estimated number,
17 especially when you consider that last year
18 across the board with -- there were only about
19 1300 jury -- civil jury trials in all federal
20 district courts.
21 JUSTICE KAGAN: General, when --
22 JUSTICE ALITO: Can I ask you --
23 JUSTICE KAGAN: -- when you --
24 JUSTICE ALITO: May I just ask you
25 this quick question? Under the Prison Rape

1 Elimination Act and your policy, could
2 Mr. Richards go back and now exhaust
3 administrative remedies?
4 MS. SHERMAN: Absolutely. There are
5 no time constraints for him to -- or for any
6 prisoner across the country that has a Prison
7 Rape Elimination Act grievance, there are no
8 time constraints.
9 JUSTICE ALITO: So why in this case
10 should we be concerned about -- about
11 intertwinement, you know, if -- if exhaustion is
12 decided by the judge, the judge says you didn't
13 exhaust, the prisoner can go back and exhaust,
14 and then the prisoner can come back to court
15 and, if it can get by summary judgment, can have
16 a jury trial?
17 MS. SHERMAN: Well, there's --
18 JUSTICE ALITO: So what's the --
19 what -- what's -- I don't get it.
20 MS. SHERMAN: There still is a
21 question with intertwinement here whether
22 even -- for the prisoner that can come back,
23 like Mr. -- Mr. Richards, is there a problem
24 with collateral estoppel. Does it violate a
25 right to a jury --

1 JUSTICE ALITO: Well, it's not a
2 judgment and it's a flexible doctrine. And I
3 think every court of appeals but one has said
4 this is a matter for the judge.
5 And what have they said about
6 collateral estoppel? Haven't they said that --
7 that the determination that there was no
8 exhaustion would not carry over, would not have
9 an effect on the trial of the merits?
10 MS. SHERMAN: I -- I -- I agree.
11 Collateral estoppel is not a bar here, but
12 that's the reason why it's important to consider
13 this, and that's why I believe this Court
14 granted cert.
15 JUSTICE JACKSON: Ms. Sherman, would
16 the same judge who made a determination in the
17 exhaustion realm related to the facts of whether
18 or not this person exhausted be presiding over
19 the subsequent trial in which those same
20 questions about what happened go to the jury?
21 MS. SHERMAN: I don't think there's
22 any -- any rule that would require that the same
23 judge hear that. It could go to any judge --
24 JUSTICE JACKSON: I'm just asking you,
25 as a matter of practice, wouldn't it --

1 MS. SHERMAN: I don't -- I don't think
2 a --
3 JUSTICE JACKSON: -- would -- don't
4 judges -- don't judges ordinarily keep the case?
5 So you have a judge originally -- and I guess
6 I'm just sort of musing about Justice Alito's
7 question --
8 MS. SHERMAN: Mm-hmm.
9 JUSTICE JACKSON: -- of what's the
10 harm.
11 I would think that if the concern in
12 Beacon Theatres and in other cases in which the
13 Seventh Amendment right is fronted is that
14 people really have the right to a jury deciding
15 these questions and once you've had a judge
16 decide it, the same -- we have intertwinement,
17 it's the same set of factual issues -- I wonder
18 whether there wouldn't be a burden on your right
19 to make your presentation to the jury,
20 especially if the same judge has prejudged those
21 facts because they had the essential hearing and
22 heard all the evidence and whatnot and ruled
23 themselves as to whether or not they think this
24 happened in this way.
25 MS. SHERMAN: Two responses. The --

1 this is a dismissal, and whether -- it's
2 typically without prejudice, but that doesn't
3 mean that that's going to come back to the same
4 judge. It's not the same case. They're going
5 to re-file a -- a -- a federal lawsuit.
6 So I don't think there's any reason to
7 think that that's going to come back to the same
8 judge. I don't think it matters either way
9 because the key here -- and this is to my second
10 point -- is that there wouldn't be any
11 preclusive effect. So would Richards be coming
12 back --
13 JUSTICE JACKSON: Not by the judgment.
14 Not by the judgment. But you appreciate that
15 what I'm suggesting, that, you know, if it was
16 the same judge --
17 MS. SHERMAN: Mm-hmm.
18 JUSTICE JACKSON: -- who is presiding
19 then over a subsequent trial about an issue of
20 fact that he or she has already decided because
21 they heard the testimony before, they went
22 through the record, they said no, you know,
23 Mr. Richards -- Officer Perttu did not do X, Y,
24 and Z --
25 MS. SHERMAN: Mm-hmm.

1 JUSTICE JACKSON: -- and then
2 Mr. Richards goes and exhausts and says now I'd
3 like my jury trial on that same question, one
4 might be concerned at least that it would be
5 difficult for Mr. Richards to present his case
6 to the jury with the same judge presiding.
7 MS. SHERMAN: I don't think there's a
8 reason to think it would be the same judge.
9 But, even if it were, the jury is deciding that
10 anew, and they are, in that capacity, the
11 ultimate fact-finder. And so, if -- if on
12 exhaustion there was a particular fact that the
13 judge found, the jury may not even know about
14 that, probably shouldn't know about that.
15 JUSTICE JACKSON: Well, maybe. I
16 mean, the Judge --
17 MS. SHERMAN: And --
18 JUSTICE JACKSON: -- is ruling on
19 evidence, evidence objections, et cetera, et
20 cetera, right, in the context, if -- if it is
21 the same judge.
22 MS. SHERMAN: Yes, but, ultimately,
23 the jury is the fact-finder on those key facts
24 that Richards would then need for his First
25 Amendment --

1 JUSTICE GORSUCH: Ms. Sherman, who
2 bears the burden on -- on -- on the question of
3 whether the Seventh Amendment attaches?
4 MS. SHERMAN: The -- what's the
5 standard?
6 JUSTICE GORSUCH: Who bears the burden
7 of showing --
8 MS. SHERMAN: Oh, it's absolutely the
9 defendant's burden.
10 JUSTICE GORSUCH: Now that --
11 MS. SHERMAN: It's an affirmative
12 defense.
13 JUSTICE GORSUCH: Well -- well, that
14 strikes me as odd. Wright and Miller, for
15 example, says, in cases of doubt, you presume
16 the jury, and it's really incumbent upon those
17 who would displace the jury and say the Seventh
18 Amendment doesn't attach, but the default rule
19 is that you have a right to a trial by jury.
20 Do you have any authority for the
21 contrary?
22 MS. SHERMAN: I think --
23 JUSTICE GORSUCH: I didn't see it in
24 your briefs.
25 MS. SHERMAN: I think what the -- what

1 the authority is for the Seventh Amendment not
2 to attach here is that there's no --
3 JUSTICE GORSUCH: Now who -- who bears
4 the burden of showing -- I would have thought
5 you would have borne the burden of showing the
6 Seventh Amendment doesn't attach to a suit at
7 law.
8 MS. SHERMAN: I -- I don't -- I think
9 that the burden --
10 JUSTICE GORSUCH: I mean, isn't the
11 default rule in this country you have a right to
12 trial by jury?
13 MS. SHERMAN: That is the default
14 rule --
15 JUSTICE GORSUCH: Okay.
16 MS. SHERMAN: -- once the claim
17 accrues. And so, you know, before -- before the
18 claim accrues, I don't think the defendant
19 has --
20 JUSTICE GORSUCH: Well, we have a
21 claim. The claim -- claim is here. Now --
22 MS. SHERMAN: The --
23 JUSTICE GORSUCH: -- a -- a -- a case
24 has begun. And once the case begins, I would
25 have thought that you would have an assumption,

1 subject to background rules, there are lots of
2 exceptions, but, generally, you have a right to
3 a trial by jury when -- if you have some
4 contrary authority for that, I'd like to know
5 what it is.
6 MS. SHERMAN: The -- the contrary
7 authority is that this is --
8 JUSTICE GORSUCH: Authority. That
9 means a case.
10 MS. SHERMAN: Well --
11 JUSTICE GORSUCH: That means a
12 statute. That means a piece of history --
13 MS. SHERMAN: Yes.
14 JUSTICE GORSUCH: -- saying that the
15 burden is on -- on the defendant rather than
16 you.
17 MS. SHERMAN: I don't have a -- well,
18 I think -- but the --
19 JUSTICE GORSUCH: I'm not aware of one
20 either.
21 MS. SHERMAN: No, I don't have one,
22 but I think two -- two --
23 JUSTICE GORSUCH: Okay. So let --
24 MS. SHERMAN: -- pieces of authority.
25 JUSTICE GORSUCH: -- let me -- let me

1 just put a pin in it there because then we have
2 cases like Beacon, we have cases like Land
3 versus Dollar, we have cases like Smithers
4 versus Smith, where there are jurisdictional
5 issues or -- or sovereign immunity issues,
6 right, amounts in controversy and -- and
7 intertwined. Again, default rule is jury.
8 That -- that's -- and I just wonder. Now
9 Congress, maybe -- maybe it has the power to
10 displace that. May -- may -- maybe, you know,
11 question mark, but maybe, right?
12 But, if the default rule through
13 history has always been intertwined issues go to
14 the jury, and we have -- have a lot of cases,
15 why shouldn't we at least, as a matter of
16 constitutional avoidance perhaps or statutory
17 interpretation perhaps, read this statute to
18 conform with those normal background principles,
19 absent some contrary evidence from you?
20 MS. SHERMAN: I think it is the nature
21 of -- the unique nature of PLRA exhaustion.
22 And -- and we talk about --
23 JUSTICE GORSUCH: Why is exhaustion
24 different than sovereign immunity or amount in
25 controversy then? Maybe that has to be --

1 MS. SHERMAN: There --
2 JUSTICE GORSUCH: -- the nature of
3 your argument.
4 MS. SHERMAN: -- there is a
5 distinction with those jurisdictional cases in
6 general, and one is that jurisdiction generally,
7 those jurisdictional cases, they are closing the
8 courthouse door at least practically speaking to
9 that -- that litigant.
10 Also, there is a collateral estoppel
11 effect to the fact-finding on jurisdiction,
12 where that is not true here. And --
13 JUSTICE GORSUCH: It's -- it's hard to
14 see those in any of our cases, though, resting
15 on any of that. They seem to be resting on the
16 notion that you -- you have a presumptive right
17 to a jury --
18 MS. SHERMAN: In none of the
19 jurisdictional --
20 JUSTICE GORSUCH: -- in this country.
21 MS. SHERMAN: -- cases was it an issue
22 that was a prerequisite to suit. If Congress
23 can say what has to be proven in order to --
24 JUSTICE SOTOMAYOR: But it's not a
25 prerequisite to suit. We called it an

1 affirmative defense. The defendant -- the --
2 JUSTICE GORSUCH: Yeah, sovereign
3 immunity.
4 JUSTICE SOTOMAYOR: -- plaintiff
5 doesn't even have to allege it. So it's not a
6 prerequisite to suit. It's an affirmative
7 defense. And I don't know of any other
8 affirmative defense that we've said isn't
9 subject -- and I think this is --
10 JUSTICE GORSUCH: Sovereign immunity,
11 yeah.
12 JUSTICE SOTOMAYOR: Sovereign immunity
13 is an affirmative defense, and we require to go
14 to a jury.
15 MS. SHERMAN: This Court said in
16 Porter versus Nussle that PLRA exhaustion was an
17 affirm -- was a prerequisite to suit, that that
18 is the term --
19 JUSTICE SOTOMAYOR: But, when we got
20 to the issue in Jonas, we said it's an
21 affirmative defense.
22 MS. SHERMAN: It's affirmative
23 defense. It doesn't change the fact that it is
24 a prerequisite to suit.
25 JUSTICE KAGAN: Well, whatever it is,

1 right, you have conceded that it's completely
2 intertwined with the merits in this case,
3 correct?
4 MS. SHERMAN: One -- one correction.
5 I've -- we have conceded that it's intertwined.
6 I don't concede --
7 JUSTICE KAGAN: I'm --
8 MS. SHERMAN: -- that it's completely
9 entwined or --
10 JUSTICE KAGAN: Okay. Well, let's
11 just take an example, which is a prisoner says
12 he tore up my grievance papers, and that is the
13 claim. You know, that -- that's -- it's also
14 the exhaustion question, right, because, if he
15 tore up his grievous -- grievance papers, then
16 the grievance process wasn't available to him.
17 So that's the nature of the exhaustion question.
18 But it's as well the nature of the
19 substantive claim that he tore up my grievance
20 papers and in -- in some kind of retaliatory
21 act, right? So let's say that. Completely
22 intertwined?
23 MS. SHERMAN: No.
24 JUSTICE KAGAN: No?
25 MS. SHERMAN: No.

1 JUSTICE KAGAN: Why?
2 MS. SHERMAN: There is an intertwining
3 of the fact of whether the -- somebody at the
4 prison facility tore up the grievance.
5 JUSTICE KAGAN: Okay. So that's --
6 MS. SHERMAN: That's the intertwined
7 fact.
8 JUSTICE KAGAN: -- that's good enough
9 for me.
10 MS. SHERMAN: Okay.
11 JUSTICE KAGAN: So in -- the -- the
12 question of exhaustion is going to depend on
13 somebody's finding of whether the warden tore up
14 his grievance papers. And, similarly, on the
15 merits, it's going to depend on somebody's
16 finding of whether the warden tore up his
17 grievance papers.
18 MS. SHERMAN: That is the overlapping
19 fact, but exhaustion is also going to look at
20 what was the grievance process, what was the
21 system setup, were there other avenues.
22 JUSTICE KAGAN: I don't really think
23 so, General. I mean, I think, if, like, the
24 warden tears up your grievance papers, somebody
25 is going to say that the exhaustion process

1 wasn't available in the way it should be
2 according to Ross v. Blake.
3 So, in the end, the same fact is going
4 to be dispositive as to both these issues. And
5 let's just stipulate that in some cases that
6 might be --
7 MS. SHERMAN: Okay.
8 JUSTICE KAGAN: -- and that that's the
9 cases that we're talking about here. And so
10 then I think that the question that Justice
11 Gorsuch, for example, was asking is, okay, when
12 that is the fact, that's the crucial fact,
13 whether it's Beacon Theatres, whether it's
14 Beacon Theatres plus the default rule of the
15 Seventh Amendment, it should be the jury that
16 decides that question, shouldn't it?
17 MS. SHERMAN: And the jury would be
18 deciding that question here because the jury --
19 when Richards comes back, the jury is going
20 to --
21 JUSTICE KAGAN: But you see first you
22 have to convince the judge of the exact same
23 fact because, if you can't convince the judge,
24 you can't get to the jury. And so that seems as
25 though, well, if you have to convince the judge

1 before you get to the jury, the jury right
2 doesn't mean all that much.
3 MS. SHERMAN: I -- I disagree because
4 I -- you know, even Moore's Federal Practice has
5 said when there is a -- a resolution of a
6 preliminary matter, for example, something like
7 exhaustion, it's not a -- a merits decision.
8 It's not -- you are not deciding the merits.
9 JUSTICE KAGAN: So that --
10 MS. SHERMAN: What you are --
11 JUSTICE KAGAN: -- that seems right as
12 a general matter because the questions of fact
13 are not so intertwined as a general matter.
14 But where they are so intertwined so
15 that the question of fact that you're asking the
16 judge to decide is essentially the same as the
17 question of fact that you're asking the jury to
18 decide, in that context, which won't be every
19 context, but in that context, to say that you
20 have to convince the judge that you're right
21 before you get to the jury seems kind of like a
22 flipping of the usual default rule that Justice
23 Gorsuch was talk -- talking about.
24 MS. SHERMAN: You're convincing the
25 judge of exhaustion. And then, because -- what

1 saves the day is that collateral estoppel
2 wouldn't apply. And so, when you're coming
3 back, the jury is fully acting as the
4 fact-finder in that case.
5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.
7 Justice Thomas?
8 JUSTICE THOMAS: This was dismissed
9 without prejudice --
10 JUSTICE KAGAN: You're not done,
11 sorry.
12 CHIEF JUSTICE ROBERTS: You're not,
13 yeah.
14 (Laughter.)
15 MS. SHERMAN: I'm sorry.
16 JUSTICE THOMAS: This was dismissed
17 without prejudice, right?
18 MS. SHERMAN: Yes.
19 JUSTICE THOMAS: So what preclusive
20 effect would that have?
21 MS. SHERMAN: Well, it would have no
22 preclusive effect. Mr. Richards can come back
23 and he can -- he can come back. He still has to
24 convince a judge that he has exhausted. And
25 then, when it gets to a jury, there would be no

1 preclusive effect.
2 JUSTICE THOMAS: And he would have a
3 complete trial on whether or not his filings
4 were destroyed or his grievances torn up?
5 MS. SHERMAN: In -- in part. I mean,
6 he -- he would have a trial, a full trial, on
7 his First Amendment claim.
8 JUSTICE THOMAS: Exactly.
9 MS. SHERMAN: And that would include
10 not just whether a grievance was torn up or --
11 or he was threatened but the reasons for that,
12 the motives, the -- that there -- there would be
13 a more extensive inquiry appropriate to the
14 First Amendment.
15 CHIEF JUSTICE ROBERTS: Justice Alito?
16 JUSTICE ALITO: On this issue of the
17 default rule, I thought the Seventh Amendment
18 was limited to suits at common law and,
19 therefore, applies only if a particular claim is
20 a claim that could have been asserted at common
21 law or is a close analog to a claim that could
22 be asserted at common law.
23 So, in light of that, I don't know why
24 there's -- I don't know where this idea that
25 there's a default rule in favor of jury trial

1 with respect to every claim for damages, every
2 new claim at law that Congress may create. Am I
3 wrong?
4 MS. SHERMAN: I agree that there is no
5 right to a jury trial here on exhaustion, and
6 the reason is it didn't exist in 1791. The
7 closest analogs we have are equitable defenses
8 that would have been heard by judges and not by
9 injuries.
10 JUSTICE ALITO: Thank you. Thank you.
11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor?
13 JUSTICE SOTOMAYOR: Counsel, if we
14 limited the rule to your situation, meaning he's
15 not precluded because he can come back because
16 of the law that Justice Alito pointed to, the
17 rape law, I'm not sure that's true because is he
18 alleging rape or is he alleging a First
19 Amendment violation?
20 MS. SHERMAN: Under the Prison Rape
21 Elimination Act, First Amendment retaliation for
22 claims of sexual abuse --
23 JUSTICE SOTOMAYOR: All right.
24 MS. SHERMAN: -- are included in it.
25 JUSTICE SOTOMAYOR: So that's it. But

1 what happens to the ordinary prisoner? If we
2 announced the rule that you want us to announce,
3 which is exhaustion never goes to a jury, in the
4 mine-run of cases that are not rape-related,
5 prisoners are precluded, practically speaking.
6 We have an amicus brief that says that most
7 exhaustion requirements are -- half of them,
8 half the states, are 15 days or less.
9 And in the others, they are matters of
10 days more than that but no more than 30. Most
11 of the time, when you file a suit as a prisoner,
12 it takes -- the answer takes 30 days. So most
13 cases as a practical matter would be precluded
14 if we adopt your rule that exhaustion under all
15 circumstances is not preclusive.
16 MS. SHERMAN: I don't agree that in
17 most cases the prisoner would not be able to
18 return. I agree that the time frames for --
19 JUSTICE SOTOMAYOR: Why not?
20 MS. SHERMAN: -- grievances are very
21 short. Because --
22 JUSTICE SOTOMAYOR: So, if they're
23 very short, it seems to me, as a practical
24 matter, I can't see how almost any prisoner
25 could go back.

1 MS. SHERMAN: You have 31 states, the
2 District of Columbia, and the Bureau -- Federal
3 Bureau of Prisons, all that allow for some level
4 of discretion to excuse untimeliness, and --
5 JUSTICE SOTOMAYOR: Wait a minute.
6 That depends on you, meaning the prison. Why
7 would a prison ever do it? Are you aware of any
8 prison that says you failed to exhaust, but now
9 you can come back?
10 MS. SHERMAN: The reason -- I assume
11 that when they put it -- they can -- they don't
12 have to put it in their policy, so if they put
13 it in their policy, I assume that that's
14 important to them, and --
15 JUSTICE SOTOMAYOR: This is news to me
16 that there is any state that says if you fail
17 to -- you go to court, they say you failed to
18 exhaust after a factual finding, that we're now
19 going to let you come back to court after you've
20 brought it back to us.
21 MS. SHERMAN: The 30 --
22 JUSTICE SOTOMAYOR: Does your state do
23 that?
24 MS. SHERMAN: Yes. Yes. We have a
25 provision. And there are many states that have

1 provisions --

2 JUSTICE SOTOMAYOR: No, no. Point --

3 I'd like you -- I ask the Court to -- to have

4 you give us examples of that situation

5 occurring.

6 MS. SHERMAN: I -- I can't provide

7 those examples. I don't know --

8 JUSTICE SOTOMAYOR: You can't because

9 I haven't found one. The policy is

10 discretionary.

11 MS. SHERMAN: Well, I -- this policy

12 is discretionary. And I -- the reason that a

13 prison system would want to do that is because

14 everything in the PLRA is designed to encourage,

15 to allow the prison system to work out their

16 problems, and they do want to work those out.

17 JUSTICE SOTOMAYOR: Counsel, what you

18 are proposing to me is that they have an

19 exhaustion requirement that they're willing to

20 excuse every time a prisoner goes to court, the

21 court says you failed to exhaust, and now the

22 prison's going to say come back and we'll let

23 you exhaust now anyway.

24 MS. SHERMAN: It -- it -- it will

25 depend on the circumstances. There -- there --

1 and -- and a lot of these policies say there are
2 extenuating circumstances or good cause, just
3 cause --
4 JUSTICE SOTOMAYOR: It -- it -- it
5 begs the question -- it begs the question that a
6 judge has found that the prison guard didn't
7 stop you from exhausting and now the state is
8 going to permit you to come back and try again.
9 MS. SHERMAN: I think it is in the
10 best interest of the prison systems to try to
11 work out problems. And one of the things that
12 our amicus, multi-state amicus brief, led by
13 Ohio, has pointed out is that under
14 Mr. Richards's rule, if this Court adopts it,
15 there are going to be very few prison systems
16 that want to allow for any excusal of
17 untimeliness. That's going to be a disincentive
18 for them to do that because they've already gone
19 through a jury trial.
20 Now why are they going to excuse
21 untimeliness? But, if they -- a prisoner can go
22 back and, under certain circumstances, they --
23 JUSTICE SOTOMAYOR: Huh?
24 MS. SHERMAN: There -- the
25 discretion --

1 JUSTICE SOTOMAYOR: I -- I -- I'm a
2 little lost. They've gone through a jury trial.
3 They won. And the prison is going to listen to
4 the complaint again?
5 MS. SHERMAN: No. If -- if they have
6 a jury trial and they've won --
7 JUSTICE SOTOMAYOR: Why would they
8 bother?
9 MS. SHERMAN: It's --
10 JUSTICE SOTOMAYOR: Why would the
11 state bother having -- want to?
12 MS. SHERMAN: It's -- it's if --
13 JUSTICE SOTOMAYOR: What incentive
14 does it need to?
15 MS. SHERMAN: -- there's a dismissal
16 for failure to exhaust without prejudice. The
17 question is whether Richards's rule incentivizes
18 any kind of discretion.
19 JUSTICE SOTOMAYOR: All right.
20 MS. SHERMAN: If -- if --
21 JUSTICE SOTOMAYOR: Thank you,
22 counsel.
23 MS. SHERMAN: -- if the judge is
24 deciding it, yes; if a jury, no.
25 JUSTICE SOTOMAYOR: We're on different

1 pages.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: So tell me why this

4 reading of Beacon Theatres would be wrong, that

5 although it talks about preclusion, it's not

6 particularly a preclusion case, that you can

7 draw a slightly broader principle from it, not

8 at all an all-expansive principle, that the

9 principle would be if the -- in a particular

10 case, the judge and jury are -- are deciding the

11 same question, would have to decide the same

12 question and they would have to make the same

13 findings on that question in their respective

14 roles, that in that case, the jury goes first

15 and that that's necessary to protect the jury

16 right and to ensure that the judge doesn't

17 basically make that right -- you know, wipe it

18 off the table. Why -- why shouldn't -- why

19 doesn't Beacon Theatres say that?

20 MS. SHERMAN: Beacon Theatres doesn't

21 say that because Beacon Theatres was not dealing

22 with a prerequisite to suit and then a later

23 legal issue.

24 Here, we have not just --

25 JUSTICE KAGAN: So that's true. I

1 mean, that's a factual distinction. And I guess
2 the question is why should that factual
3 distinction matter if what I said was true, is
4 that the judge and jury are expected to decide
5 the same questions on the same facts.
6 Like, whether we label something a
7 prerequisite or an affirmative defense or
8 anything else under the sun, the same problem is
9 being presented, which is that in that case,
10 the -- it -- it seems as though it's not
11 protective of the Seventh Amendment right for
12 you have to convince the judge before you can
13 get to the jury.
14 MS. SHERMAN: When an equitable and a
15 legal claim arise together and those claims
16 have -- are -- are now in front of a -- a court
17 fully, that -- now Beacon Theaters matters and
18 now preclusion matters.
19 When you have -- it does matter. It's
20 everything that this is a prerequisite to suit
21 because, if they're -- the prerequisites aren't
22 met, this Court has said, if you have to meet
23 certain prerequisites in order to have your case
24 proceed and those prerequisites haven't been
25 met, then the case doesn't proceed.

1 This Court said that in Woodford
2 versus Ngo. And so it is everything that the
3 case -- the case isn't proceeding. And then,
4 when it does proceed, if there is no collateral
5 estoppel effect, preclusion isn't barring the --
6 the jury from performing full on their
7 fact-finding role. And that is what -- that is
8 what the Seventh Amendment preserves and only
9 what the Seventh Amendment preserves.
10 And, here, historically --
11 JUSTICE KAGAN: Thank you.
12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch?
14 JUSTICE GORSUCH: So, if -- if it were
15 impossible to re-file, exhaustion not possible,
16 would that change the analysis?
17 MS. SHERMAN: No.
18 JUSTICE GORSUCH: Because then there
19 would be preclusion effectively by the
20 district -- by the magistrate judge's order,
21 wouldn't there?
22 MS. SHERMAN: If for those prisoners
23 that can't come back because there has been
24 either a dismissal with prejudice or because
25 their -- their prison system doesn't allow for

1 any -- any kind of leeway, any discretion, for
2 those prisoners, there still is not a violation
3 of a Seventh Amendment right. Looking back
4 historically, there is no Seventh Amendment
5 right to be preserved and --
6 JUSTICE GORSUCH: So there's -- so
7 preclusion really has nothing to do with it then
8 on your theory.
9 MS. SHERMAN: It -- it has something
10 to do with the inquiry for those prisoners that
11 can come back because --
12 JUSTICE GORSUCH: I'm asking about
13 those who can't.
14 MS. SHERMAN: For those --
15 JUSTICE GORSUCH: You said same
16 result --
17 MS. SHERMAN: Yes.
18 JUSTICE GORSUCH: -- despite
19 preclusion. So something else has to be doing
20 the work.
21 MS. SHERMAN: What -- what --
22 JUSTICE GORSUCH: What is that
23 something else?
24 MS. SHERMAN: What's doing the work
25 for the prisoners that can't come back is that

1 their claims -- they have not met the exhaustion
2 requirements that Congress set forth. Congress
3 can set forth what they have to prove in front
4 of a jury, and Congress likewise can set forth
5 what they have to meet in order --
6 JUSTICE GORSUCH: Well, now that's
7 interesting.
8 MS. SHERMAN: -- to get their
9 claims --
10 JUSTICE GORSUCH: Okay. So that's
11 essentially saying Congress can choose to get
12 rid of the jury. And I thought just last term,
13 in Jarkesy, where Congress expressly said no
14 jury trial right, and we said no. We said nice
15 policy you have there. We've got the Seventh
16 Amendment here. No good.
17 Now why would we interpret the PLRA,
18 which is silent about juries, to have a rule
19 that you never get a jury? That -- I agree, I
20 think that has to be your argument. It can't be
21 this exhaustion thing because you want the same
22 rule whether they're precluded or not precluded.
23 It's got to be that there's a congressional
24 policy, but yet there's none embodied in the
25 PLRA.

1 MS. SHERMAN: The congressional policy
2 is in the PLRA. It doesn't -- it does --
3 JUSTICE GORSUCH: It says exhaustion,
4 but it doesn't talk about juries. Why shouldn't
5 we understand that statute as we often have
6 against the backdrop --
7 MS. SHERMAN: Mm-hmm.
8 JUSTICE GORSUCH: -- of the
9 Constitution of the United States?
10 MS. SHERMAN: It doesn't -- because it
11 doesn't implicate the Constitution. And I --
12 I -- although the PLRA did not say -- Congress
13 did not say this has to be decided by a judge
14 instead of a jury, Congress was not silent on
15 that issue either. They said "no action shall
16 be brought until."
17 Now Congress also didn't use the term
18 "proper exhaustion." But this Court said
19 everything in the PLRA, the language, the way it
20 was structured, suggested that proper exhaustion
21 was -- was -- was what had to happen. That's --
22 you can't find that --
23 JUSTICE GORSUCH: Now you're not
24 disputing at common law somebody could bring a
25 suit for sexual abuse and ask for a jury, right?

1 You don't dispute that?

2 MS. SHERMAN: I don't dispute that.

3 JUSTICE GORSUCH: Yeah. All right.

4 And, here, we have an individual who brought

5 such a claim, and instead of a -- and demanded a

6 jury of his peers and, instead, he got a

7 magistrate judge over Zoom.

8 MS. SHERMAN: Because Congress can set

9 what has to be required, what has to be met in

10 order to get your jury trial right. That is

11 not -- that leaves intact the Seventh Amendment.

12 JUSTICE GORSUCH: And it says you can

13 have sovereign immunity as a defense and there's

14 certain jurisdictional amounts and lots of other

15 things, and in all of those circumstances

16 through history, we've said, when those are

17 bound up with merits questions, the jury right

18 wins out. We're going to presume the jury.

19 We're not going to -- we're not going to go

20 against that presumption, absent something

21 clearer.

22 MS. SHERMAN: This Court has given

23 district courts even in the jurisdictional

24 context wide authority to decide the mode of how

25 to decide jurisdictional questions.

1 And this Court has said when it is
2 dependent -- and I read -- I read Land versus
3 Dollar to be pretty much wholly dependent, the
4 jurisdictional question, on get -- you can't
5 answer it until you get to the merits. And then
6 the -- the -- the Court has said, you know, it
7 should go to a jury.
8 JUSTICE GORSUCH: Yeah.
9 MS. SHERMAN: There is nothing stop --
10 in the jurisdictional context, especially
11 because the door is closing for that litigant,
12 there's -- there's nothing that stops the
13 jury -- the judge from having that discretion.
14 Here, the barrier is the language of the PLRA.
15 JUSTICE GORSUCH: Yeah. Thank you.
16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?
18 Justice Barrett?
19 Justice Jackson?
20 JUSTICE JACKSON: Can I just ask you
21 about the very last thing you said? Because I
22 think the thing that is puzzling me so much
23 about your argument is that even before we had
24 Beacon Theatres, we have the intertwinement
25 principle being articulated -- articulated in

1 cases like Land versus Dollar and Smithers.
2 And so, in Land versus Dollar, which
3 involved sovereign immunity, the Court says you
4 have to go to the jury because this is the type
5 of case where the question of jurisdiction is
6 dependent on the merits.
7 In your response to Justice Gorsuch,
8 you seem to say that the case we have before us
9 is not the same. So can -- can I -- can I
10 understand why if, as Justice Kagan points out,
11 the critical fact is did your client do what
12 he's being accused of doing that resulted in the
13 grievance not being filed -- and that's the same
14 fact in both the merits and this exhaustion
15 question -- why is this not one in which both of
16 those are so bound up that you can't separate
17 them out in the way that you would like to?
18 MS. SHERMAN: I -- I'm not going to
19 fight with the idea that they're intertwined. I
20 do disagree that they are inextricably
21 intertwined. There are things that have to be
22 decided in -- for First Amendment purposes that
23 don't need to be decided for exhaustion and vice
24 versa. But, in the end, it doesn't matter
25 because what is different here from the

1 jurisdictional context is that jurisdiction
2 itself is different.
3 This Court typically, you know,
4 because it's -- this Court is not going to be
5 acting ultra vires, is deciding that
6 logically --
7 JUSTICE JACKSON: But different in
8 what way? I mean, you say the reason why
9 exhaustion deserves this special treatment is
10 because it's a prerequisite to suit. Well, so
11 is jurisdiction. You have to convince the Court
12 that they have jurisdiction in order to allow
13 the suit to proceed.
14 So I don't understand why that's not
15 the same for the purpose of this analysis.
16 MS. SHERMAN: There are still critical
17 distinctions. This Court typically is
18 looking -- is going to try to look at
19 jurisdiction at the -- the outset of the case
20 but may not be able to. And -- but this Court
21 has the authority and the obligation to revisit
22 subject matter jurisdiction at any time in a
23 case.
24 JUSTICE JACKSON: No, I understand.
25 MS. SHERMAN: Congress has said --

1 JUSTICE JACKSON: But we're at the
2 beginning. We're at the beginning. And the
3 obligation at the beginning for all courts in
4 the federal system is to assure that you have
5 jurisdiction before you continue. So we're at
6 the beginning for both jurisdiction and
7 exhaustion, and it involves consideration of a
8 fact that you've said at least in your briefing
9 is intertwined with the fact of the merits.
10 I -- I don't understand, first of all,
11 why preclusion -- I appreciate that Beacon
12 Theatres has the preclusion language. But this
13 principle, as I'm now talking about it, predates
14 Beacon Theatres. It has nothing to do with
15 preclusion. And so help me to understand how
16 you get around the what I'll call Land versus
17 Dollar problem.
18 MS. SHERMAN: There are distinctions
19 with -- with the -- the subject matter
20 jurisdiction inquiry. The court is generally
21 deciding it at the beginning, and the judge is
22 doing it without a jury. It is the rare
23 circumstance where the judge --
24 JUSTICE JACKSON: And we said in this
25 case, when the fact is intertwined, you had

1 to --

2 MS. SHERMAN: When it's intertwined,

3 this Court still has expressed that the district

4 court has discretion to decide that but suggests

5 that when they're -- it's dependent, that it

6 should go to a jury. There's no barrier at that

7 point in terms of this Court's jurisdiction to

8 sending it to a jury.

9 JUSTICE JACKSON: Thank you.

10 MS. SHERMAN: That's not true with

11 exhaustion.

12 CHIEF JUSTICE ROBERTS: Thank you,

13 counsel.

14 MS. SHERMAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Ms. McGill.

16 ORAL ARGUMENT OF LORI ALVINO McGILL

17 ON BEHALF OF THE RESPONDENT

18 MS. McGILL: Thank you, Mr. Chief

19 Justice, and may it please the Court:

20 I just wanted to begin with two

21 clarifying points. This is the first time in

22 this five years of litigation that the State has

23 represented that the -- all of the claims might

24 be able to be exhausted. The First Amendment

25 claim that was the subject of the Sixth

1 Circuit's decision here, as far as we can tell,
2 is not protected by the PREA policy. And the
3 Sixth Circuit held that exhaustion and the
4 merits here were completely coterminous under
5 Sixth Circuit First Amendment law.
6 The State also agrees that the
7 historical facts at issue here are of the type
8 that juries decide, and I think that makes this
9 an easy case on the actual question presented
10 because, whatever else is true, this is a 1983
11 action for money damages. So the jury must
12 resolve those facts regardless of how you
13 characterize exhaustion. That is the point of
14 Beacon Theatres, which is just a specific
15 application of the general rule that even truly
16 threshold issues must be deferred to the jury
17 when they're intertwined with the merits.
18 It's no answer to say that the facts
19 could be relitigated in front of a jury maybe if
20 and only if the case proceeds. It's simply not
21 good enough that the jury trial right might
22 sometimes be preserved.
23 And the State's suggestion that
24 judicial findings would not be binding on a
25 future hypothetical fact-finder really gives the

1 game away. The only reason that would be so is
2 because of the Seventh Amendment. That was this
3 Court's unanimous holding in Lytle. And there's
4 certainly nothing in the statute or the federal
5 rules that would suggest the non-binding factual
6 findings procedure that the State suggests here.
7 The State warns that having jury
8 trials on exhaustion will undermine the goals of
9 the PLRA. Those very same arguments were
10 presented and rejected in Jones, and they're
11 even less persuasive here.
12 The State's approach would not reduce
13 the number of trials required. We're talking
14 about the cases that have survived judicial
15 screening and Rule 56, the needles in the
16 haystack as it were. Regardless, policy
17 arguments are no match for the Bill of Rights.
18 I welcome the Court's questions.
19 JUSTICE THOMAS: Are you suggesting
20 that the exhaustion -- or your exhaustion
21 argument has historical analogs?
22 MS. McGILL: I'm suggesting that this
23 Court held in Del Monte Dunes that a 1983 action
24 at law for damages is an action at law for
25 Seventh Amendment purposes.

1 And I think the State has conceded,
2 and we submit as well, that there is no precise
3 historical analog for the specific theory of the
4 affirmative defense in this case.
5 And I think Del Monte Dunes tells you
6 that when that is so, you look to the functional
7 considerations, the -- the divide between the
8 judge and jury, and, predominantly, factual
9 issues are for the jury as a default rule.
10 CHIEF JUSTICE ROBERTS: Why isn't it
11 enough for you to get the right to a jury after
12 an exhaustion determination if that
13 determination is non-binding?
14 MS. McGILL: Two things. I'm not sure
15 why it would be non-binding. But the second is,
16 in this lawsuit, Mr. Richards got past summary
17 judgment on a theory of unavailability under
18 Ross versus Blake and a First Amendment claim
19 that the Sixth Circuit said stated a prima facie
20 case for -- for First Amendment retaliation.
21 He got to the point where he should
22 have had a jury decide that. The Seventh
23 Amendment can't turn on whether, after
24 dismissal, a pro se plaintiff might be able to
25 file Lawsuit 2.0 on -- on some of these claims.

1 CHIEF JUSTICE ROBERTS: Well, why not?
2 I mean, it -- it -- if the prior determination
3 without a jury is not binding, what exactly has
4 been taken away? If you can proceed to litigate
5 before a jury with respect to exhaustion,
6 what -- what's the great loss? Time, of course,
7 but --
8 MS. McGILL: Other than five years
9 of --
10 CHIEF JUSTICE ROBERTS: -- but he's
11 got time on his hands, right?
12 MS. McGILL: -- of effort.
13 CHIEF JUSTICE ROBERTS: Yeah.
14 MS. McGILL: It's no small feat for a
15 litigant like Mr. Richards, who was representing
16 himself throughout these proceedings until the
17 Sixth Circuit appointed counsel, to even get a
18 case filed and before a court and all the way
19 past summary judgment. So I think that's a
20 significant consideration.
21 But our, you know, second point is
22 that I think, you know, the modern Restatement
23 of Judgments would say that once an issue is
24 finally decided, the words "without prejudice"
25 are not magic words that mean that nothing has

1 actually been decided.
2 And I don't think the State would take
3 the position that in this hypothetical Lawsuit
4 2.0, Mr. Richards could re-argue the very
5 thwarting facts and allegations that were the
6 basis of both the unavailability claim and the
7 First Amendment claim.
8 JUSTICE BARRETT: Counsel, can I ask
9 you a question? This is a methodological one.
10 In some ways, this case presents the problem
11 that we've seen in the Second Amendment context
12 because this is a history and tradition test,
13 but it's one that goes all the way back to
14 Justice Story in, like, 1812, right? And, you
15 know, in other cases, we've been able to draw
16 analogs based on the cause of action.
17 And I think that's a more or less
18 stable line when you're trying to find a
19 historical analog, is this more like a common
20 law or an equitable question. This defense
21 thing is a lot harder, right, especially since
22 there was no really good analog at the time of
23 the founding.
24 So I think what we have now is
25 Congress coming up with something new and then

1 how do -- what do we do in the face of
2 historical uncertainty.
3 And, you know, functional
4 considerations may guide, but I guess what I'm
5 trying to figure out -- and this is really just
6 a question -- I mean, it's true, as you say,
7 that one set of circumstances we could look at
8 in making a judgment about whether this goes to
9 a jury or has to go to a jury if he invokes the
10 Seventh Amendment right is the factual nature of
11 it.
12 Another one, though, is does Congress
13 have some room here to create new defenses that
14 are functioning more as equitable, like these
15 threshold questions.
16 And it seems to me like in Wetmore,
17 the Court did, even though jurisdiction was a
18 jury issue in the beginning, did kind of back
19 off a little bit and said: Well, you know, a
20 judge has discretion to go one way or another
21 based on the 1875 Act that didn't lock in the
22 form of pleading.
23 So, I mean, I -- I guess my question
24 is: In the face of historical uncertainty, how
25 do we weigh what Congress has to say about

1 threshold considerations? Because it is clear
2 that in the PLRA, exhaustion was designed to try
3 to weed out suits.
4 MS. McGILL: Okay. And that's --
5 JUSTICE BARRETT: I'm not saying that
6 that's determinative.
7 MS. McGILL: Right.
8 JUSTICE BARRETT: I'm just trying to
9 figure out how to think about it.
10 MS. McGILL: I think I understand the
11 question. I mean, I think most of your question
12 is sort of answered by the detailed analysis of
13 the majority opinion and Justice Scalia's
14 concurring opinion, which the majority said that
15 they agreed with in full in Del Monte Dunes.
16 And, there, I mean, history certainly
17 was the guide and -- and provided the analog,
18 which was a common law, you know, tort claim for
19 damages, was the historical analog that allowed
20 the Court to say: No question that a 1983
21 action for damages is an action at law.
22 And so the question is, you know,
23 how -- what work does the history do on the
24 specific issue question, and I think the Court
25 resolved that by simply saying: Where we don't

1 have a guide, we look to precedent and then, you
2 know, functional considerations.
3 And the Court described those
4 functional considerations as preserving the --
5 the jury's historic role as the trier of fact.
6 So I think it's sort of a well-worn path.
7 And the -- the only thing I would add
8 is that this Court last term in Jarkesy pointed
9 out that Congress can't sort of take an action
10 at law and morph it into something else by
11 tweaking its elements or adding something or
12 narrowing it in some respect and then just
13 saying: Hey, this isn't actually the common law
14 cause of action anymore.
15 JUSTICE BARRETT: Yeah. But, in
16 Jarkesy -- I agree, but in Jarkesy, we drew an
17 analogy to fraud and said, like, this is fraud,
18 it's analogous to frog and -- fraud, not frog,
19 sorry -- fraud, and that it had an analog. And,
20 here, the problem is we don't have that same
21 line.
22 And I'm not saying that -- I'm not
23 saying that you lose. I'm just saying we
24 haven't had a case quite like this where we had
25 to make that methodological choice, which does

1 make it a bit different. And I think Wetmore
2 does complicate the question -- the issue a
3 little bit for you.
4 MS. McGILL: So I think, if you -- if
5 you wanted to take a slightly more circuitous
6 route than what Justice Scalia and the majority
7 did in Del Monte Dunes, what you would say is:
8 We have this action at law. There's no specific
9 analog. But you could still look to history to
10 see, for example, well, what are the types of --
11 you know, would a jury have -- have gotten to
12 decide factual issues with respect to an
13 affirmative defense in this type of tort action
14 and common law.
15 We think that historical answer is
16 very clear. So, even though there wasn't an
17 affirmative defense called "exhaustion" in 1791,
18 there were affirmative defenses to tort
19 liability damages, including the statute of
20 limitations. And we know that juries decided
21 factual disputes with regard to an affirmative
22 defense. It's just like --
23 JUSTICE KAVANAUGH: If we --
24 JUSTICE ALITO: Well, along those
25 lines, I want to understand the implications of

1 what you are asking the Court to hold.
2 So, in Judge Posner's decision in
3 Pavey -- I know you think his logic is
4 nonsense -- he ticked off a number of other
5 questions that are threshold issues that are not
6 necessarily decided by the jury: subject matter
7 jurisdiction, personal jurisdiction, abstention,
8 forum non conveniens, venue.
9 What would be the implications of a
10 decision in your favor here on all of those?
11 MS. McGILL: Potentially very little
12 to none if you -- if --
13 JUSTICE ALITO: Well, if there's an
14 overlap between --
15 MS. McGILL: Right.
16 JUSTICE ALITO: -- the -- would the --
17 wouldn't the logic apply there? Or why would it
18 not?
19 MS. McGILL: It -- it would. It
20 would, Justice Alito. I think the general rule,
21 the rule that is applied by the federal courts
22 almost uniformly -- I think uniformly, and the
23 State doesn't really take issue with it -- is
24 where you have a common factual issue. So you
25 have real intertwinement with the merits. Even

1 so-called matters in abatement or judicial
2 administration get deferred to the jury, and
3 that is because we're preserving the -- the
4 jury's historic role to resolve factual disputes
5 on the merits.
6 JUSTICE ALITO: Well, I -- I don't
7 know that we've ever -- I don't think we've ever
8 held that, and I don't know that the lower
9 courts say that that always has to be done.
10 Well, let me ask you another question
11 about the implications of this.
12 What about other exhaustion
13 requirements that are connected with a claim
14 that may have a 1791 analog? So something that
15 occurred to me -- maybe this is completely off
16 base, but it did occur to me.
17 What about a Title -- exhaustion under
18 Title VII? So that has never been considered to
19 be a jury issue. Now there is a right to a jury
20 trial on a Title VII claim. Congress has -- has
21 extended it, but there's an -- an argument,
22 commentators have made the argument, that the
23 Seventh Amendment would also cover that because
24 a claim for unlawful termination would have some
25 1791 analog.

1 So what about that?
2 MS. McGILL: If I understand the
3 question correctly, you're asking about
4 exhaustion in the Title VII context --
5 JUSTICE ALITO: Yeah.
6 MS. McGILL: -- and whether there
7 would be a jury trial right?
8 JUSTICE ALITO: Yeah.
9 MS. McGILL: I mean, Judge Posner,
10 four years after Pavey, wrote a decision saying
11 exactly that, that because Title VII exhaustion
12 is very similar to the statute of limitations
13 and is an affirmative defense, there's no basis
14 in the statute or history to treat it
15 differently than another affirmative defense for
16 Seventh Amendment purposes. So, actually,
17 the -- at least the Seventh Circuit and several
18 other circuit decisions that we cite in our
19 brief have treated that as a jury trial issue
20 regardless of -- of overlap with the merits.
21 JUSTICE JACKSON: But do we really
22 have to take a position as to whether or not
23 exhaustion is a jury trial issue? I mean, I --
24 I -- I'm maybe confused, but I thought
25 intertwinement was really the principle that was

1 doing the work here so that we could assume for
2 the purpose of this argument that exhaustion
3 does not have a jury trial attached -- right
4 attached to it, but the -- your friend on the
5 other side has conceded that it is intertwined
6 with a claim that has a jury trial issue.
7 So, in that case -- in that situation,
8 we're not touching any of the cases that Justice
9 Alito mentioned or making a determination about
10 whether there's an analog to exhaustion. We're
11 assuming for the moment that there is no jury
12 trial right on the exhaustion issue and speaking
13 to what happens with respect to intertwinement.
14 Is that right?
15 MS. McGILL: That's right, Justice
16 Jackson. You could -- and we think in most
17 cases you would normally -- just address the
18 question presented, which is about
19 intertwinement. We did brief the broader issue,
20 but that is, you know, principally because of
21 the way the State briefed it as well.
22 JUSTICE GORSUCH: And would -- would
23 one even need to go that far? I mean, you've
24 got an amicus brief and others have pointed out
25 there's a long federal policy of -- you know,

1 background, almost federal common law, or at
2 least an interpretive of -- of the statute and
3 what constitutional avoidance concerns that say,
4 unless Congress speaks more clearly, we're not
5 going to assume it took away the jury trial
6 right in cases of intertwinement under the PLRA.
7 MS. McGILL: I think that's also
8 right. I mean, Congress didn't speak to this
9 issue, and you could hold, consistent with your
10 opinion in Jones versus Bock, that Congress's
11 silence means that the ordinary procedures
12 should apply. And in this case, the ordinary
13 situation is that disputed facts about
14 affirmative defenses that are intertwined with
15 the merits go to a jury.
16 JUSTICE KAVANAUGH: If we get to the
17 functional considerations that Justice Barrett
18 was raising, it does seem to me like you would
19 look at the policy of the PLRA. The Court has
20 said to look to statutory policies. And that
21 policy seems quite inconsistent with a jury
22 trial right on the exhaustion question because
23 the whole idea of exhaustion was to be speedy,
24 to have the prison be able to resolve things
25 quickly.

1 And it seems just -- you know -- you
2 know the argument on the other side, it just
3 seems generally inconsistent with the policy in
4 the PLRA. So you want to respond to that?
5 MS. McGILL: Sure, Justice Kavanaugh.
6 Two points. I mean, I -- the State relies, I
7 think, principally upon a 1966 case called
8 Katchen versus Landy that has some language that
9 sort of suggests that congressional policy can
10 be relevant to functional considerations.
11 I think the Court has moved
12 significantly away from that, and after cases
13 like Granfinanciera, I'm not sure about the
14 continuing viability of Katchen versus Landy.
15 But the other thing is that --
16 JUSTICE KAVANAUGH: What about
17 Markman? Markman --
18 MS. McGILL: I mean, Del Monte Dunes
19 was an application of Markman itself. And I
20 think that, you know, this case, if -- if you
21 have a spectrum from sort of pure historical
22 facts to legal issues, Markman is sort of on one
23 end and our case and Del Monte Dunes are on the
24 other. We're not talking about construing a
25 legal term of art, you know, in a -- in a legal

1 instrument.

2 JUSTICE BARRETT: Well, my --

3 JUSTICE SOTOMAYOR: One would have

4 thought that if Congress was thinking about this

5 as requiring the judge to make a determination

6 to supplant the jury trial question, the PLRA

7 does have a list of things that a court has to

8 do without objection. It has to look at the

9 complaint and decide whether any immunities

10 apply, whether -- a bunch of other things that

11 it requires. Grievance is not one of them.

12 MS. McGILL: That's right, Justice

13 Sotomayor. And that was part of the Court's

14 holding in -- in Jones --

15 JUSTICE SOTOMAYOR: Jonas.

16 MS. McGILL: -- when it determined

17 this is an affirmative defense. I mean, to be

18 clear, there are other things that Congress

19 could do but hasn't done to narrow the scope of

20 cases that can get past Rule 56 and require a

21 trial.

22 But, once an issue is made, to use the

23 language from Tellabs, once a genuine issue of

24 fact is made under whatever the requirements are

25 in the statute, it goes to the jury, and I don't

1 think Congress has anything to say on that.
2 JUSTICE BARRETT: So, on this
3 antecedent question of whether you're entitled
4 to the jury trial right in the first place,
5 because of the analog, because of the historical
6 considerations, what have you, no circuit has
7 held that, right? So we would be kind of
8 treading into new territory that's different --
9 I mean, it goes beyond the QP. It was briefed
10 that way. And -- and let's just assume, if you
11 lose on the intertwined question, you could
12 still win if we decided that the, you know,
13 defense was entitled to a jury trial regardless,
14 that it didn't depend on factual intertwinement.
15 But isn't it the case that that would
16 be going into -- that would be striking
17 significantly new ground?
18 MS. McGILL: In some sense, it would,
19 and in some sense, it wouldn't. I think the
20 problem with the -- the current state of the
21 law, frankly, is that the fist decisions on this
22 after the PLRA was enacted came about in the
23 early 2000s. I think it was a Ninth Circuit
24 case called Wyatt. And it was before this Court
25 decided Jones. And the Court just sort of

1 referred to exhaustion as a matter of abatement
2 or a rule of judicial administration without
3 really thinking through what that means. And
4 the courts have -- have not reconsidered those
5 decisions in a meaningful way after Jones.
6 JUSTICE BARRETT: So, true, I'm not --
7 I'm not saying that they've gotten it right.
8 That's kind of an argument for, hey, they've
9 done this reflexively or they all followed the
10 first court to --
11 MS. McGILL: Right.
12 JUSTICE BARRETT: -- answer the
13 question. But we don't have cases where circuit
14 courts or courts of appeals have reflected on
15 this issue and said here are, you know, the
16 historical analogs and the reasons why it comes
17 within the Seventh Amendment or here are the
18 functional reasons why it does or it doesn't.
19 We would be doing that for the first time,
20 right?
21 MS. McGILL: You would. And I don't
22 think it's that different than what you did in
23 Jones, although there were a couple circuits
24 on -- on the Court's side. But I think that
25 there's a pretty well-worn path between what

1 you've held in Jones and what we know from Del
2 Monte Dunes and other cases.
3 JUSTICE KAVANAUGH: And why -- why
4 would we do that, though? I mean, just to
5 follow up on that question, that seems like a
6 big question. A lot of the questions from my
7 colleagues have pointed out the historical
8 uncertainty.
9 MS. McGILL: Right.
10 JUSTICE KAVANAUGH: I guess I'm not
11 certain why, as a matter of prudence, we would
12 leap into something like that without lower
13 court opinions, et cetera.
14 MS. McGILL: Yeah. I mean, it would
15 be contrary to the Court's normal sort of
16 preference to decide only what must be decided.
17 I think the only reason you would do it is if
18 you thought the law is so clear that it's
19 actually the simpler path to resolution and it
20 would clarify the confusion that would, you
21 know, otherwise still exist in the courts of
22 appeals and the district courts. So that would
23 be the reason to do it.
24 JUSTICE SOTOMAYOR: Well -- well, we
25 would have to do it if we don't rule in your

1 favor on the limited Beacon -- Beacon Theatres
2 question, meaning, if we say that Beacon
3 Theatres doesn't control here for whatever set
4 of reasons we make up, then we would have to
5 reach your alternative argument that there's a
6 Seventh -- we would have to basically be saying
7 there's no --
8 MS. McGILL: You -- you would be
9 saying in effect -- I mean, it's hard for me
10 to -- to sort of figure out what the opinion
11 looks like that rules against us on
12 intertwinement but rules for us on the broader
13 opinion, to be --
14 JUSTICE SOTOMAYOR: That -- that --
15 MS. McGILL: -- honest, but I -- I
16 think you would have to be saying something
17 like -- well, I -- I'm not even going to sort of
18 guess --
19 JUSTICE SOTOMAYOR: Well, I -- I just
20 don't --
21 MS. McGILL: -- what that opinion
22 would look like.
23 JUSTICE SOTOMAYOR: -- I don't see --
24 I don't see how we get around Beacon Theatre,
25 rule against you, and not by definition answer

1 the broader question.

2 MS. McGILL: Right, I mean, because,

3 if you don't think that Mr. Richards has a right

4 to a jury on his First Amendment claim, it seems

5 unlikely to me that you're going to rule for him

6 on the broader question.

7 JUSTICE SOTOMAYOR: I -- I agree.

8 JUSTICE ALITO: Well, he has a -- he

9 has a right to a jury on his First Amendment

10 claim assuming that he does -- his suit is not

11 barred for failure to exhaust. But, if we want

12 to decide this case on the narrow ground -- on

13 narrow grounds, if, in fact, he can go back and

14 exhaust now, I think Beacon Theatres is

15 completely out of the picture.

16 Beacon Theatres is either about

17 collateral estoppel -- and -- and, in my view,

18 that's what it was about -- or it's a rule of

19 equity and has nothing to do, essentially, with

20 the right to a -- the Seventh Amendment right to

21 a jury trial.

22 If it weren't about collateral

23 estoppel, the -- the -- you could -- the judge

24 could have -- the two -- the two claims could

25 have been tried. They both could have been

1 tried. You could try the -- and it wouldn't
2 matter which order -- which order you did it in.
3 You try the -- whichever one you want to do
4 first and then you try the other one.
5 If it's a rule of equity, then that --
6 a rule of equity is different from anything
7 that's protected by the Seventh Amendment.
8 MS. McGILL: So I think, you know,
9 this Court's unanimous opinion in Lytle referred
10 to it as a constitutional mandate that the
11 Seventh Amendment -- that Lytle's Seventh
12 Amendment rights could not be protected, except
13 for a remand on a clean slate with a -- a jury
14 trial on all the issues that had already been
15 decided by the Court.
16 And it did that. It -- it sort of
17 declined to apply collateral estoppel, which is,
18 I -- I think, the solution the State is
19 proposing here, only because, otherwise, the
20 Seventh Amendment would be violated.
21 But this Court has solved that problem
22 by saying ex ante we want to avoid judicial fact
23 findings that are going to extinguish legal
24 claims, so we're going to make sure the jury
25 goes first.

1 And it doesn't mean that there's exact
2 perfect co- -- you know, a coextensive
3 intertwinement. It's enough that the judge
4 decides a fact that the jury would have to
5 decide the other way in order to prevail on the
6 merits of the claim.
7 JUSTICE ALITO: Well, as you present
8 this, this may not be just a case about the
9 right to a jury trial on the issue of exhaustion
10 under the PLRA when there's intertwinement
11 because it may have a lot of other implications.
12 And we don't know what the implications are of
13 the logic of the argument that you're presenting
14 as to all of these other threshold issues that
15 Judge Posner set out as to other statutes that
16 have exhaustion requirements.
17 You're really asking us to -- and go
18 against the consensus so far of the courts of
19 appeals. You're really asking us to take a big
20 step.
21 MS. McGILL: I think, with respect,
22 Justice Alito, it -- it would be a very small
23 step if you wrote your opinion and just affirm
24 the Sixth Circuit on the ground of decision
25 there. The -- the only appellate opinion I am

1 aware of that disagrees on the basic
2 intertwinement issue is Judge Posner's opinion
3 in Pavey.
4 And, you know, so, with respect, we --
5 we don't think it would be a sea change in the
6 law to rule on the -- the narrower question
7 presented here.
8 JUSTICE KAGAN: I think one concern is
9 that even if we rule that narrowly, it still has
10 a big effect on PLRA litigation, in other words,
11 that it's easy enough for any prisoner to
12 essentially evade the exhaustion requirement by
13 pleading his claims in the right way and
14 ensuring that the case immediately goes to a
15 jury.
16 So what do you think about that?
17 MS. McGILL: Sure. I mean, to the
18 extent there -- there are concerns about a
19 roadmap, it already exists, right?
20 This trial -- I mean, this case got
21 through Rule 56. There was going to be a trial.
22 So I'm not sure that the incentives are any
23 greater from a -- a roadmap perspective.
24 I mean, also, this Court doesn't
25 usually fashion constitutional rules assuming

1 that litigants are going to perjure themselves
2 or fabricate evidence to get past Rule 56, so I
3 don't think it should do so here.
4 And the other point I would just make
5 is that this has been the rule in the Second
6 Circuit and the First Circuit more recently for
7 more than a decade. There hasn't been a flood
8 of litigation. In fact, the data show that the
9 cases filed and the trials have gone down in
10 those districts.
11 I found one case that's actually going
12 to trial in the Southern District of New York on
13 exhaustion, an intertwined case. This -- this
14 has not been a -- a big problem in the last, you
15 know, 30 years that we've had the PLRA.
16 JUSTICE ALITO: Suppose you have a
17 prisoner who's serving a lengthy prison sentence
18 and files a -- files a grievance, and the State
19 says: Well, you didn't exhaust. So the
20 prisoner says: Well, yeah, I did exhaust. I
21 put the -- I put the grievance in the box or I
22 handed it to a guard. So, at a minimum, he gets
23 a -- he gets a trip to the courthouse. He gets
24 a trip out of the prison.
25 MS. McGILL: Well, in our client's

1 case, everything was --

2 JUSTICE ALITO: Well, I'm not

3 talking --

4 MS. McGILL: -- over Zoom, so --

5 JUSTICE ALITO: -- about your client.

6 I'm talking about -- about other -- other --

7 MS. McGILL: Understood.

8 JUSTICE ALITO: -- prisoners who may

9 want to take advantage of this.

10 MS. McGILL: I mean, I -- I don't

11 think that's a --

12 JUSTICE ALITO: So then there's a

13 genuine dispute of --

14 MS. McGILL: Right.

15 JUSTICE ALITO: -- material fact about

16 whether he -- you know, is he telling the truth?

17 Is he not telling the truth?

18 MS. McGILL: I mean --

19 JUSTICE ALITO: Is he really going to

20 fear that on top of everything else that's

21 happened they're going to bring a perjury

22 prosecution against him?

23 MS. McGILL: I -- I think this is not

24 a new problem, right, and that the rule that the

25 Sixth Circuit adopted isn't really relevant to

1 whether a case is going to pass, you know,
2 screening and -- and all of these other hurdles
3 and get past summary judgment.
4 We're talking about the very few cases
5 that -- that get there. And district courts are
6 well-equipped to decide whether there's a
7 genuine issue of material fact even in prisoner
8 litigation.
9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.
11 Justice Thomas, anything further?
12 Anything further?
13 No?
14 Thank you, counsel.
15 Rebuttal, Ms. Sherman?
16 REBUTTAL ARGUMENT OF ANN M. SHERMAN
17 ON BEHALF OF THE PETITIONER
18 MS. SHERMAN: Thank you, Mr. Chief
19 Justice.
20 All claims, including First Amendment
21 claims here, stem from the sexual harassment
22 claim. And the PREA grievance policy for the
23 MDOC includes First Amendment retaliation.
24 That's in Joint Appendix 72, 73.
25 Mr. Richards, contrary to my friend's

1 argument, can reargue facts if he exhausts and
2 gets in front of a jury again, and that is
3 crucial here to preserving the Seventh Amendment
4 even if this Court believes that the Seventh
5 Amendment is somehow otherwise implicated.
6 Addressing Justice Barrett's questions
7 about discretion, Wetmore does -- the -- the key
8 in Wetmore is the discretion that is given to
9 the district court judge. Here, that's
10 discretion that, you know, based on historical
11 considerations and based on the -- especially
12 the functional considerations here, the fact
13 that there is no precise analog, based on the
14 functional considerations and the goals of the
15 PLRA, that discretion should -- in -- in every
16 case, it would have to -- there would be no
17 discretion, whereas that is what drove the
18 jurisdictional decisions in Wetmore and other
19 cases.
20 Justice Kagan, you asked about a
21 roadmap. It would be very easy for prisoners to
22 create disputes of fact that turned on
23 credibility, a he said/she said where those
24 cases would have to go to a jury.
25 And I think, even if there aren't

1 floodgates open now, they will be open under
2 Richards's proposed rule because it is not hard
3 for a prisoner to do that. As this Court said
4 in Woodford versus Ngo, not all -- sometimes
5 prisoners file claims in bad faith, and if they
6 want to make trouble for a corrections officer
7 they don't like or they want to get out of their
8 cell and have a respite -- these are the courts'
9 words, not mine -- they -- they will file in bad
10 faith, and you are incentivizing them to add
11 facts that will get them to a jury.
12 On a final point, it is the nature of
13 exhaustion as a prerequisite that leaves the
14 Seventh Amendment intact here because the
15 Seventh Amendment doesn't guarantee that claims
16 get to a jury, they -- it applies once the
17 claims get to a jury. And, here, once the
18 claims are getting to a jury, because exhaustion
19 has been met, as Congress intended, Mr. Richards
20 and other prisoners will have their day in
21 court.
22 Thank you.
23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.
25 The case is submitted.

1 (Whereupon, at 12:51 p.m., the case
2 was submitted.)
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
11:34 [2] 1:15 3:2
12 [2] 13:8,10
12:51 [1] 81:1
1300 [1] 16:19
15 [1] 35:8
1791 [5] 6:2 34:6 60:17 62:14,25
1812 [1] 56:14
1875 [1] 57:21
1966 [1] 66:7
1983 [4] 7:19 52:10 53:23 58:20
2
2.0 [2] 54:25 56:4
200 [1] 16:13
2000s [1] 68:23
2025 [1] 1:11
23-1324 [1] 3:4
25 [1] 1:11
3
3 [1] 2:4
30 [4] 35:10,12 36:21 76:15
31 [1] 36:1
5
50 [1] 16:12
51 [1] 2:7
56 [4] 53:15 67:20 75:21 76:2
574 [1] 14:13
7
72 [1] 78:24
73 [1] 78:24
78 [1] 2:10
9
96 [1] 14:14
A
a.m [2] 1:15 3:2
abatement [2] 62:1 69:1
able [6] 35:17 49:20 51:24 54:24 56:15 65:24
above-entitled [1] 1:13
absent [2] 25:19 46:20
Absolutely [2] 17:4 22:8
abstention [1] 61:7
abuse [2] 34:22 45:25
according [1] 30:2
account [1] 3:15
accrues [3] 7:16 23:17,18
accused [1] 48:12
across [3] 16:11,18 17:6
Act [6] 3:13 17:1,7 28:21 34:21 57:21
acting [2] 32:3 49:5
action [11] 45:15 52:11 53:23,24 56:16 58:21,21 59:9,14 60:8,13
actual [2] 9:3 52:9
actually [5] 56:1 59:13 63:16 70:19 76:11
add [2] 59:7 80:10
adding [1] 59:11
additional [2] 16:11,13
address [1] 64:17
Addressing [1] 79:6
administration [2] 62:2 69:2
administrative [2] 6:4 17:3
adopt [1] 35:14
adopted [1] 77:25
adopts [1] 38:14
advantage [1] 77:9
affirm [2] 27:17 74:23
affirmative [20] 3:23 4:2,9 22:11 27:1,6,8,13,21,22 41:7 54:4 60:13,17,18,21 63:13,15 65:14 67:17
afoul [1] 4:16
agree [9] 7:17 12:14 18:10 34:4 35:16,18 44:19 59:16 72:7
agreed [1] 58:15
agreement [1] 5:7
agrees [1] 52:6
ahead [1] 13:2
ALITO [29] 12:24 13:2 16:22,24 17:9,18 18:1 33:15,16 34:10,16 60:24 61:13,16,20 62:6 63:5,8 64:9 72:8 74:7,22 76:16 77:2,5,8,12,15,19
Alito's [1] 19:6
all-expansive [1] 40:8
allegations [1] 56:5
allege [1] 27:5
alleging [2] 34:18,18
allow [5] 36:3 37:15 38:16 42:25 49:12
allowed [1] 58:19
almost [3] 35:24 61:22 65:1
alone [1] 14:13
already [4] 20:20 38:18 73:14 75:19
alternative [1] 71:5
although [3] 40:5 45:12 69:23
ALVINO [3] 1:20 2:6 51:16
Amendment [52] 4:16 5:16,18 6:22 7:12 15:9 19:13 21:25 22:3,18 23:1,6 30:15 33:7,14,17 34:19,21 41:11 42:8,9 43:3,4 44:16 46:11 48:22 51:24 52:5 53:2,25 54:18,20,23 56:7,11 57:10 62:23 63:16 69:17 72:4,9,20 73:7,11,12,20 78:20,23 79:3,5 80:14,15
amicus [5] 14:7 35:6 38:12,12 64:24
amount [1] 25:24
amounts [2] 25:6 46:14
analog [14] 6:1 33:21 54:3 56:19,22 58:17,19 59:19 60:9 62:14,25 64:10 68:5 79:13
analogous [1] 59:18
analogs [8] 5:21,24 6:1,8 34:7 53:21 56:16 69:16
analogy [1] 59:17
analysis [4] 8:10 42:16 49:15 58:12
anew [1] 21:10
ANN [5] 1:18 2:3,9 3:7 78:16
announce [1] 35:2
announced [1] 35:2
another [6] 6:11,11 57:12,20 62:10 63:15
answer [6] 35:12 47:5 52:18 60:15 69:12 71:25
answered [1] 58:12
ante [1] 73:22
antecedent [1] 68:3
anyway [1] 37:23
appeals [4] 18:3 69:14 70:22 74:19
APPEARANCES [1] 1:17
appellate [1] 74:25
Appendix [1] 78:24
application [2] 52:15 66:19
applied [6] 8:11 9:12,12,16,16 61:21
applies [3] 12:13 33:19 80:16
apply [7] 7:24 8:1 32:2 61:17 65:12 67:10 73:17
appointed [1] 55:17
appreciate [3] 14:3 20:14 50:11
approach [1] 53:12
appropriate [2] 6:8 33:13
aren't [3] 7:7 41:21 79:25
argue [1] 11:16
arguing [1] 10:10
argument [23] 1:14 2:2,5,8 3:4,7 12:12 13:4 14:2 26:3 44:20 47:23 51:16 53:21 62:21,22 64:2 66:2 69:8 71:5 74:13 78:16 79:1
arguments [2] 53:9,17
arise [2] 15:15 41:15
around [2] 50:16 71:24
art [1] 66:25
articulated [2] 47:25,25
aside [1] 3:22
asserted [2] 33:20,22
asserting [1] 15:18
assume [10] 6:17 7:7 10:15,17,20 36:10,13 64:1 65:5 68:10
assuming [3] 64:11 72:10 75:25
assumption [1] 23:25
assure [1] 50:4
attach [3] 22:18 23:2,6
attached [2] 64:3,4
attaches [1] 22:3
attempted [1] 14:11
attempting [1] 15:24
authority [8] 22:20 23:1 24:4,7,8,24 46:24 49:21
available [2] 28:16 30:1
avenues [1] 29:21
average [1] 16:10
avoid [1] 73:22
avoidance [2] 25:16 65:3
aware [3] 24:19 36:7 75:1
away [4] 53:1 55:4 65:5 66:12
B
back [35] 4:24 10:8,9 11:2,3 12:21,25 13:3,8 17:2,13,14,22 20:3,7,12 30:19 32:3,22,23 34:15 35:25 36:9,19,20 37:22 38:8,22 42:23 43:3,11,25 56:13 57:18 72:13
backdrop [1] 45:6
background [3] 24:1 25:18 65:1
bad [2] 80:5,9
bar [1] 18:11
barred [1] 72:11
BARRETT [16] 9:25 11:9,18,23,25 12:10 47:18 56:8 58:5,8 59:15 65:17 67:2 68:2 69:6,12
Barrett's [1] 79:6
barrier [2] 47:14 51:6
barriers [1] 13:18
barring [1] 42:5
base [1] 62:16
based [5] 56:16 57:21 79:10,11,13
basic [1] 75:1
basically [3] 13:7 40:17 71:6
basis [2] 56:6 63:13
Beacon [24] 7:23,25 8:1,14,18 19:12 25:2 30:13,14 40:4,19,20,21 41:17 47:24 50:11,14 52:14 71:1,1,2,24 72:14,16
bears [3] 22:2,6 23:3
begin [1] 51:20
beginning [6] 50:2,2,3,6,21 57:18
begins [1] 23:24
begs [2] 38:5,5
begun [1] 23:24
behalf [8] 1:19,21 2:4,7,10 3:8 51:17 78:17
believe [1] 18:13
believes [1] 79:4
benefits [1] 4:11
best [2] 16:1 38:10
between [3] 54:7 61:14 69:25
beyond [1] 68:9
big [5] 9:13 70:6 74:19 75:10 76:14
Bill [1] 53:17
binding [2] 52:24 55:3
bit [4] 14:10 57:19 60:1,3
Blake [2] 30:2 54:18
board [1] 16:18
Bock [2] 3:25 65:10
borne [1] 23:5
both [6] 30:4 48:14,15 50:6 56:6 72:25
bother [2] 39:8,11
bound [7] 10:7,7,11 11:12,14 46:17 48:16
box [1] 76:21
BRANDON [1] 1:6
brief [6] 7:22 35:6 38:12 63:19 64:19,24
briefed [2] 64:21 68:9
briefing [2] 6:14 50:8
briefs [1] 22:24
bring [2] 45:24 77:21
brings [1] 6:21
broad [1] 4:5
broader [5] 40:7 64:19 71:12 72:1,6
brought [3] 36:20 45:16 46:4
bunch [1] 67:10
burden [9] 3:18 19:18 22:2,6,9 23:

4,5,9 **24**:15
Bureau [3] **16**:15 **36**:2,3

C

call [1] **50**:16
called [4] **26**:25 **60**:17 **66**:7 **68**:24
came [4] **1**:13 **6**:3 **14**:7 **68**:22
capacity [1] **21**:10
carry [1] **18**:8
Case [55] **3**:4 **6**:16 **8**:24 **10**:23 **14**:16 **15**:7,8,13 **17**:9 **19**:4 **20**:4 **21**:5 **23**:23,24 **24**:9 **28**:2 **32**:4 **40**:6,10,14 **41**:9,23,25 **42**:3,3 **48**:5,8 **49**:19,23 **50**:25 **52**:9,20 **54**:4,20 **55**:18 **56**:10 **59**:24 **64**:7 **65**:12 **66**:7,20,23 **68**:15,24 **72**:12 **74**:8 **75**:14,20 **76**:11,13 **77**:1 **78**:1 **79**:16 **80**:25 **81**:1
cases [34] **8**:11 **9**:15 **13**:10,12 **14**:14 **19**:12 **22**:15 **25**:2,2,3,14 **26**:5,7,14,21 **30**:5,9 **35**:4,13,17 **48**:1 **53**:14 **56**:15 **64**:8,17 **65**:6 **66**:12 **67**:20 **69**:13 **70**:2 **76**:9 **78**:4 **79**:19,24
cast [1] **3**:21
cause [4] **38**:2,3 **56**:16 **59**:14
cell [1] **80**:8
centerpiece [1] **3**:11
cert [1] **18**:14
certain [4] **38**:22 **41**:23 **46**:14 **70**:11
certainly [2] **53**:4 **58**:16
cetera [3] **21**:19,20 **70**:13
change [3] **27**:23 **42**:16 **75**:5
changed [1] **5**:11
changes [2] **5**:12,14
characteristic [1] **6**:10
characterize [1] **52**:13
Charlottesville [1] **1**:20
CHIEF [19] **3**:3,9 **32**:5,12 **33**:15 **34**:11 **40**:2 **42**:12 **47**:16 **51**:12,15,18 **54**:10 **55**:1,10,13 **78**:9,18 **80**:23
choice [1] **59**:25
choose [1] **44**:11
Circuit [18] **4**:15 **13**:4,5,9,15 **52**:3,5 **54**:19 **55**:17 **63**:17,18 **68**:6,23 **69**:13 **74**:24 **76**:6,6 **77**:25
Circuit's [2] **5**:2 **52**:1
circuitous [1] **60**:5
circuits [1] **69**:23
circumstance [1] **50**:23
circumstances [6] **35**:15 **37**:25 **38**:2,22 **46**:15 **57**:7
cite [1] **63**:18
civil [1] **16**:19
claim [36] **6**:25 **7**:10,11,11,13,17 **15**:23,23 **23**:16,18,21,21,21 **28**:13,19 **33**:7,19,20,21 **34**:1,2 **41**:15 **46**:5 **51**:25 **54**:18 **56**:6,7 **58**:18 **62**:13,20,24 **64**:6 **72**:4,10 **74**:6 **78**:22
claiming [1] **14**:17
claims [17] **4**:25 **7**:19 **34**:22 **41**:15 **44**:1,9 **51**:23 **54**:25 **72**:24 **73**:24 **75**:13 **78**:20,21 **80**:5,15,17,18
clarify [1] **70**:20
clarifying [1] **51**:21
clean [1] **73**:13
clear [5] **7**:18 **58**:1 **60**:16 **67**:18 **70**:18
clearer [1] **46**:21
clearly [1] **65**:4
clerks [1] **13**:9
client [2] **48**:11 **77**:5
client's [1] **76**:25
close [1] **33**:21
closest [2] **6**:1 **34**:7
closing [2] **26**:7 **47**:11
co [1] **74**:2
coextensive [1] **74**:2
collateral [19] **8**:2,19,22 **9**:10,11,16 **11**:12,22 **12**:13,16 **17**:24 **18**:6,11 **26**:10 **32**:1 **42**:4 **72**:17,22 **73**:17
collaterally [1] **11**:4
colleagues [1] **70**:7
collect [1] **14**:12
Columbia [1] **36**:2
come [19] **4**:24 **10**:9 **11**:3 **13**:15 **16**:5 **17**:14,22 **20**:3,7 **32**:22,23 **34**:15 **36**:9,19 **37**:22 **38**:8 **42**:23 **43**:11,25
comes [2] **30**:19 **69**:16
coming [4] **6**:4 **20**:11 **32**:2 **56**:25
commentators [1] **62**:22
common [10] **33**:18,20,22 **45**:24 **56**:19 **58**:18 **59**:13 **60**:14 **61**:24 **65**:1
complaint [3] **13**:22 **39**:4 **67**:9
complete [1] **33**:3
completely [7] **8**:4 **28**:1,8,21 **52**:4 **62**:15 **72**:15
complicate [1] **60**:2
concede [5] **6**:15 **7**:12,21 **10**:13 **28**:6
conceded [4] **28**:1,5 **54**:1 **64**:5
concern [5] **8**:2,16,21 **19**:11 **75**:8
concerned [2] **17**:10 **21**:4
concerns [2] **65**:3 **75**:18
concurring [1] **58**:14
conform [1] **25**:18
confused [3] **6**:14 **15**:21 **63**:24
confusion [1] **70**:20
Congress [24] **25**:9 **26**:22 **34**:2 **44**:2,2,4,11,13 **45**:12,14,17 **46**:8 **49**:25 **56**:25 **57**:12,25 **59**:9 **62**:20 **65**:4,8 **67**:4,18 **68**:1 **80**:19
Congress's [2] **3**:12 **65**:10
congressional [3] **44**:23 **45**:1 **66**:9
connected [1] **62**:13
consensus [1] **74**:18
consider [3] **5**:16 **16**:17 **18**:12
consideration [2] **50**:7 **55**:20
considerations [11] **54**:7 **57**:4 **58**:1 **59**:2,4 **65**:17 **66**:10 **68**:6 **79**:11,12,14
considered [1] **62**:18
consistent [1] **65**:9
Constitution [2] **45**:9,11
constitutional [4] **25**:16 **65**:3 **73**:10 **75**:25
constraints [2] **17**:5,8
construing [1] **66**:24
contends [1] **3**:25
context [9] **21**:20 **31**:18,19,19 **46**:24 **47**:10 **49**:1 **56**:11 **63**:4
continue [1] **50**:5
continuing [1] **66**:14
Contrary [7] **4**:15 **22**:21 **24**:4,6 **25**:19 **70**:15 **78**:25
control [1] **71**:3
controversy [2] **25**:6,25
conveniens [1] **61**:8
convince [7] **30**:22,23,25 **31**:20 **32**:24 **41**:12 **49**:11
convincing [1] **31**:24
correct [1] **28**:3
correction [1] **28**:4
corrections [1] **80**:6
correctly [1] **63**:3
coterminous [1] **52**:4
Counsel [13] **9**:25 **11**:9 **12**:20 **32**:6 **34**:13 **37**:17 **39**:22 **51**:13 **55**:17 **56**:8 **78**:10,14 **80**:24
counter [1] **13**:21
country [4] **16**:12 **17**:6 **23**:11 **26**:20
couple [1] **69**:23
course [1] **55**:6
COURT [61] **1**:1,14 **3**:10,21 **5**:1 **7**:2,18 **8**:17,19,21 **9**:14 **10**:9 **17**:14 **18**:3,13 **27**:15 **36**:17,19 **37**:3,20,21 **38**:14 **41**:16,22 **42**:1 **45**:18 **46**:22 **47**:1,6 **48**:3 **49**:3,4,11,17,20 **50**:20 **51**:3,4,19 **53**:23 **55**:18 **57**:17 **58**:20,24 **59**:3,8 **61**:1 **65**:19 **66**:11 **67**:7 **68**:24,25 **69**:10 **70**:13 **73**:15,21 **75**:24 **79**:4,9 **80**:3,21
Court's [9] **3**:24 **5**:3 **51**:7 **53**:3,18 **67**:13 **69**:24 **70**:15 **73**:9
courthouse [2] **26**:8 **76**:23
courts [16] **3**:16 **5**:7 **9**:15 **13**:6 **16**:20 **46**:23 **50**:3 **61**:21 **62**:9 **69**:4,14,14 **70**:21,22 **74**:18 **78**:5
courts' [1] **80**:8
cover [1] **62**:23
create [3] **34**:2 **57**:13 **79**:22
credibility [2] **16**:6 **79**:23
critical [2] **48**:11 **49**:16
crucial [2] **30**:12 **79**:3
current [1] **68**:20
cut [1] **8**:4

D

D.C [1] **1**:10
damages [6] **34**:1 **52**:11 **53**:24 **58**:19,21 **60**:19
data [6] **14**:10,11 **15**:11,19 **16**:8 **76**:8
day [2] **32**:1 **80**:20
days [3] **35**:8,10,12
deal [1] **7**:23
dealing [1] **40**:21
decade [1] **76**:7
decide [17] **4**:24 **19**:16 **31**:16,18 **40**:11 **41**:4 **46**:24,25 **51**:4 **52**:8 **54**:22 **60**:12 **67**:9 **70**:16 **72**:12 **74**:5 **78**:6
decided [13] **17**:12 **20**:20 **45**:13 **48**:22,23 **55**:24 **56**:1 **60**:20 **61**:6 **68**:12,25 **70**:16 **73**:15
decides [2] **30**:16 **74**:4
deciding [8] **19**:14 **21**:9 **30**:18 **31**:8 **39**:24 **40**:10 **49**:5 **50**:21
decision [9] **5**:2 **10**:9 **13**:5 **31**:7 **52**:1 **61**:2,10 **63**:10 **74**:24
decisions [4] **63**:18 **68**:21 **69**:5 **79**:18
declined [1] **73**:17
default [10] **22**:18 **23**:11,13 **25**:7,12 **30**:14 **31**:22 **33**:17,25 **54**:9
defendant [4] **13**:20 **23**:18 **24**:15 **27**:1
defendant's [1] **22**:9
defense [20] **3**:23 **13**:21 **22**:12 **27**:1,7,8,13,21,23 **41**:7 **46**:13 **54**:4 **56**:20 **60**:13,17,22 **63**:13,15 **67**:17 **68**:13
defenses [8] **4**:2,9 **6**:9,9 **34**:7 **57**:13 **60**:18 **65**:14
deference [1] **6**:10
deferred [2] **52**:16 **62**:2
definition [1] **71**:25
Del [7] **53**:23 **54**:5 **58**:15 **60**:7 **66**:18,23 **70**:1
demanded [1] **46**:5
depend [4] **29**:12,15 **37**:25 **68**:14
dependent [4] **47**:2,3 **48**:6 **51**:5
depends [1] **36**:6
described [1] **59**:3
deserves [1] **49**:9
designed [2] **37**:14 **58**:2
despite [1] **43**:18
destroyed [1] **33**:4
detailed [1] **58**:12
determination [11] **4**:18,21 **9**:1 **10**:4 **18**:7,16 **54**:12,13 **55**:2 **64**:9 **67**:5
determinations [3] **5**:5,9 **16**:7
determinative [1] **58**:6
determined [1] **67**:16
developed [1] **6**:3
dicta [2] **13**:6,7
different [11] **11**:21 **14**:11 **25**:24 **39**:25 **48**:25 **49**:2,7 **60**:1 **68**:8 **69**:22 **73**:6
differently [3] **4**:1,8 **63**:15
difficult [1] **21**:5
disagree [2] **31**:3 **48**:20
disagrees [1] **75**:1
discovery [1] **4**:12
discretion [12] **36**:4 **38**:25 **39**:18 **43**:1 **47**:13 **51**:4 **57**:20 **79**:7,8,10,15,17
discretionary [2] **37**:10,12
disincentive [1] **38**:17
dismiss [1] **13**:23
dismissal [5] **4**:20 **20**:1 **39**:15 **42**:

24 **54**:24
dismissed [3] **12**:4 **32**:8,16
displace [2] **22**:17 **25**:10
dispositive [1] **30**:4
dispute [4] **13**:24 **46**:1,2 **77**:13
disputed [2] **16**:5 **65**:13
disputes [5] **15**:16,17 **60**:21 **62**:4 **79**:22
disputing [1] **45**:24
distinction [3] **26**:5 **41**:1,3
distinctions [2] **49**:17 **50**:18
district [11] **3**:16 **13**:6 **16**:20 **36**:2 **42**:20 **46**:23 **51**:3 **70**:22 **76**:12 **78**:5 **79**:9
districts [1] **76**:10
divide [1] **54**:7
doctrine [4] **6**:2 **8**:20 **9**:10 **18**:2
doing [7] **16**:2 **43**:19,24 **48**:12 **50**:22 **64**:1 **69**:19
Dollar [5] **25**:3 **47**:3 **48**:1,2 **50**:17
done [5] **10**:10 **32**:10 **62**:9 **67**:19 **69**:9
door [2] **26**:8 **47**:11
doubt [1] **22**:15
down [1] **76**:9
draw [2] **40**:7 **56**:15
drew [1] **59**:16
driven [1] **8**:2
driving [1] **8**:10
drove [1] **79**:17
Dunes [7] **53**:23 **54**:5 **58**:15 **60**:7 **66**:18,23 **70**:2

E

early [2] **4**:14 **68**:23
easy [3] **52**:9 **75**:11 **79**:21
effect [13] **4**:22 **8**:4,9,16 **18**:9 **20**:11 **26**:11 **32**:20,22 **33**:1 **42**:5 **71**:9 **75**:10
effectively [1] **42**:19
effort [1] **55**:12
either [6] **9**:20 **20**:8 **24**:20 **42**:24 **45**:15 **72**:16
elements [2] **12**:15 **59**:11
Elimination [3] **17**:1,7 **34**:21
embedded [1] **7**:4
embodied [1] **44**:24
enacted [1] **68**:22
encourage [1] **37**:14
end [3] **30**:3 **48**:24 **66**:23
enough [5] **29**:8 **52**:21 **54**:11 **74**:3 **75**:11
ensure [1] **40**:16
ensuring [1] **75**:14
entirely [1] **4**:11
entitle [1] **6**:18
entitled [4] **7**:19 **10**:24 **68**:3,13
entwined [1] **28**:9
equitable [6] **6**:8,9 **34**:7 **41**:14 **56**:20 **57**:14
equity [4] **6**:7 **72**:19 **73**:5,6
especially [5] **16**:17 **19**:20 **47**:10 **56**:21 **79**:11
ESQ [3] **2**:3,6,9
ESQUIRE [1] **1**:20
essential [1] **19**:21
essentially [4] **31**:16 **44**:11 **72**:19 **75**:12
estimated [1] **16**:16
estopped [1] **11**:4
estoppel [18] **8**:3,19,22 **9**:10,11,16 **11**:12 **12**:13,16 **17**:24 **18**:6,11 **26**:10 **32**:1 **42**:5 **72**:17,23 **73**:17
et [3] **21**:19,19 **70**:13
evade [1] **75**:12
even [24] **3**:13 **4**:16 **9**:22 **12**:6 **16**:9 **17**:22 **21**:9,13 **27**:5 **31**:4 **46**:23 **47**:23 **52**:15 **53**:11 **55**:17 **57**:17 **60**:16 **61**:25 **64**:23 **71**:17 **75**:9 **78**:7 **79**:4,25
everything [7] **10**:20 **37**:14 **41**:20 **42**:2 **45**:19 **77**:1,20
evidence [5] **19**:22 **21**:19,19 **25**:19 **76**:2
evidentiary [1] **14**:25
ex [1] **73**:22
exact [2] **30**:22 **74**:1
Exactly [3] **33**:8 **55**:3 **63**:11
example [5] **22**:15 **28**:11 **30**:11 **31**:6 **60**:10
examples [2] **37**:4,7
except [1] **73**:12
exceptions [1] **24**:2
excusal [1] **38**:16
excuse [3] **36**:4 **37**:20 **38**:20
exhaust [14] **4**:24 **11**:2 **17**:2,13,13 **36**:8,18 **37**:21,23 **39**:16 **72**:11,14 **76**:19,20
exhausted [4] **10**:8 **18**:18 **32**:24 **51**:24
exhausting [1] **38**:7
Exhaustion [88] **3**:11,14,17,23 **4**:1,7,8,13,18,21 **5**:4,12,14 **6**:2,6,17,25 **7**:11,16 **8**:25 **9**:20 **10**:3 **11**:21 **12**:4 **13**:12,20,22,25 **14**:24,25 **15**:15,22 **17**:11 **18**:8,17 **21**:12 **25**:21,23 **27**:16 **28**:14,17 **29**:12,19,25 **31**:7,25 **34**:5 **35**:3,7,14 **37**:19 **42**:15 **44**:1,21 **45**:3,18,20 **48**:14,23 **49**:9 **50**:7 **51**:11 **52**:3,13 **53**:8,20,20 **54**:12 **55**:5 **58**:2 **60**:17 **62**:12,17 **63**:4,11,23 **64**:2,10,12 **65**:22,23 **69**:1 **74**:9,16 **75**:12 **76**:13 **80**:13,18
exhausts [2] **21**:2 **79**:1
exist [2] **34**:6 **70**:21
exists [1] **75**:19
expected [1] **41**:4
expressed [1] **51**:3
expressly [1] **44**:13
extended [1] **62**:21
extensive [1] **33**:13
extent [1] **75**:18
extenuating [1] **38**:2
extinguish [1] **73**:23

F

fabricate [1] **76**:2
face [2] **57**:1,24
faced [1] **7**:8
facie [1] **54**:19
facility [1] **29**:4
fact [32] **5**:6,23 **6**:20 **13**:24 **20**:20 **21**:12 **27**:23 **29**:3,7,19 **30**:3,12,12,23 **31**:12,15,17 **48**:11,14 **50**:8,9,25 **59**:5 **67**:24 **72**:13 **73**:22 **74**:4 **76**:8 **77**:15 **78**:7 **79**:12,22
fact-finder [4] **21**:11,23 **32**:4 **52**:25
fact-finding [3] **4**:19 **26**:11 **42**:7
factors [1] **9**:23
facts [21] **4**:3,17 **5**:8,11,17 **9**:2 **10**:16 **16**:4,6 **18**:17 **19**:21 **21**:23 **41**:5 **52**:7,12,18 **56**:5 **65**:13 **66**:22 **79**:1 **80**:11
factual [15] **10**:12 **15**:16,17 **19**:17 **36**:18 **41**:1,2 **53**:5 **54**:8 **57**:10 **60**:12,21 **61**:24 **62**:4 **68**:14
fail [1] **36**:16
failed [3] **36**:8,17 **37**:21
failure [2] **39**:16 **72**:11
fair [10] **9**:17,21 **10**:5,22,25 **11**:7,15,20 **12**:2,7
faith [2] **80**:5,10
far [3] **52**:1 **64**:23 **74**:18
fashion [1] **75**:25
favor [3] **33**:25 **61**:10 **71**:1
fear [1] **77**:20
feat [1] **55**:14
February [1] **1**:11
federal [11] **3**:16 **16**:15,19 **20**:5 **31**:4 **36**:2 **50**:4 **53**:4 **61**:21 **64**:25 **65**:1
few [2] **38**:15 **78**:4
fight [1] **48**:19
figure [3] **57**:5 **58**:9 **71**:10
file [4] **35**:11 **54**:25 **80**:5,9
filed [6] **12**:6 **14**:15,22 **48**:13 **55**:18 **76**:9
files [2] **76**:18,18
filings [2] **3**:15 **33**:3
final [1] **80**:12
finally [1] **55**:24
find [3] **9**:2 **45**:22 **56**:18
finding [3] **29**:13,16 **36**:18
findings [4] **40**:13 **52**:24 **53**:6 **73**:23
fine [1] **7**:7
First [27] **7**:12 **15**:9 **21**:24 **30**:21 **33**:7,14 **34**:18,21 **40**:14 **48**:22 **50**:10 **51**:21,24 **52**:5 **54**:18,20 **56**:7 **68**:4 **69**:10,19 **72**:4,9 **73**:4,25 **76**:6 **78**:20,23
fist [1] **68**:21
five [5] **13**:10,12 **15**:19 **51**:22 **55**:8
flexible [3] **8**:20 **9**:10 **18**:2
flipping [1] **31**:22
flood [1] **76**:7
floodgates [5] **13**:4,14 **14**:1 **16**:1 **80**:1
focus [1] **8**:13
Focusing [1] **3**:24
follow [1] **70**:5
followed [2] **13**:7 **69**:9
force [1] **6**:5
fore [1] **6**:21
form [1] **57**:22
forth [3] **44**:2,3,4
forum [2] **6**:11 **61**:8
found [4] **21**:13 **37**:9 **38**:6 **76**:11
founding [1] **56**:23
Four [5] **14**:15,24 **15**:1 **16**:11 **63**:10
frames [1] **35**:18
frankly [1] **68**:21
fraud [4] **59**:17,17,18,19
friend [1] **64**:4
friend's [1] **78**:25
frog [2] **59**:18,18
front [4] **41**:16 **44**:3 **52**:19 **79**:2
fronted [1] **19**:13
full [13] **9**:17,21 **10**:4,22,25 **11**:6,15,20 **12**:2,7 **33**:6 **42**:6 **58**:15
fully [2] **32**:3 **41**:17
functional [9] **54**:6 **57**:3 **59**:2,4 **65**:17 **66**:10 **69**:18 **79**:12,14
functioning [1] **57**:14
further [2] **78**:11,12
future [1] **52**:25

G

game [1] **53**:1
General [9] **1**:18 **10**:1 **16**:21 **26**:6 **29**:23 **31**:12,13 **52**:15 **61**:20
generally [4] **24**:2 **26**:6 **50**:20 **66**:3
genuine [4] **13**:24 **67**:23 **77**:13 **78**:7
gets [6] **6**:25 **32**:25 **76**:22,23,23 **79**:2
getting [1] **80**:18
give [1] **37**:4
given [2] **46**:22 **79**:8
gives [1] **52**:25
goals [4] **3**:19,22 **53**:8 **79**:14
GORSUCH [43] **22**:1,6,10,13,23 **23**:3,10,15,20,23 **24**:8,11,14,19,23,25 **25**:23 **26**:2,13,20 **27**:2,10 **30**:11 **31**:23 **42**:13,14,18 **43**:6,12,15,18,22 **44**:6,10 **45**:3,8,23 **46**:3,12 **47**:8,15 **48**:7 **64**:22
got [9] **27**:19 **44**:15,23 **46**:6 **54**:16,21 **55**:11 **64**:24 **75**:20
gotten [2] **60**:11 **69**:7
Granfinanciera [1] **66**:13
granted [1] **18**:14
granular [2] **15**:11,13
great [1] **55**:6
greater [1] **75**:23
grievance [16] **17**:7 **28**:12,15,16,19 **29**:4,14,17,20,24 **33**:10 **48**:13 **67**:11 **76**:18,21 **78**:22
grievances [2] **33**:4 **35**:20
grievous [1] **28**:15
ground [3] **68**:17 **72**:12 **74**:24
grounds [1] **72**:13
guarantee [1] **80**:15
guard [2] **38**:6 **76**:22
guess [8] **6**:13,17 **19**:5 **41**:1 **57**:4,23 **70**:10 **71**:18

guide [3] **57**:4 **58**:17 **59**:1

H

half [2] **35**:7,8
handed [1] **76**:22
hands [1] **55**:11
happen [1] **45**:21
happened [3] **18**:20 **19**:24 **77**:21
happening [1] **15**:17
happens [2] **35**:1 **64**:13
harassment [1] **78**:21
hard [3] **26**:13 **71**:9 **80**:2
hard-pressed [1] **15**:6
harder [1] **56**:21
harm [1] **19**:10
haystack [1] **53**:16
hear [2] **3**:3 **18**:23
heard [3] **19**:22 **20**:21 **34**:8
hearing [2] **15**:15 **19**:21
hearings [5] **14**:24,25 **15**:2 **16**:2,5
held [6] **4**:6 **52**:3 **53**:23 **62**:8 **68**:7 **70**:1
help [1] **50**:15
himself [1] **55**:16
historic [2] **59**:5 **62**:4
historical [13] **52**:7 **53**:21 **54**:3 **56**:19 **57**:2,24 **58**:19 **60**:15 **66**:21 **68**:5 **69**:16 **70**:7 **79**:10
historically [3] **5**:20 **42**:10 **43**:4
history [8] **24**:12 **25**:13 **46**:16 **56**:12 **58**:16,23 **60**:9 **63**:14
hold [2] **61**:1 **65**:9
holding [3] **3**:24 **53**:3 **67**:14
honest [1] **71**:15
Honor [1] **11**:6
Honor's [1] **15**:25
Hosiery [2] **8**:17,21
huge [1] **16**:16
hurdles [1] **78**:2
hypothetical [2] **52**:25 **56**:3

I

idea [3] **33**:24 **48**:19 **65**:23
immediately [1] **75**:14
immunities [1] **67**:9
immunity [7] **25**:5,24 **27**:3,10,12 **46**:13 **48**:3
implicate [1] **45**:11
implicated [1] **79**:5
implication [1] **5**:18
implications [5] **60**:25 **61**:9 **62**:11 **74**:11,12
important [2] **18**:12 **36**:14
impossible [1] **42**:15
incentive [1] **39**:13
incentives [1] **75**:22
incentivizes [1] **39**:17
incentivizing [2] **3**:18 **80**:10
include [1] **33**:9
included [1] **34**:24
includes [1] **78**:23
including [2] **60**:19 **78**:20
inconsistent [2] **65**:21 **66**:3
increase [1] **3**:18
incumbent [1] **22**:16
independent [1] **6**:25
individual [1] **46**:4
inextricably [1] **48**:20
injuries [1] **34**:9
inquiry [3] **33**:13 **43**:10 **50**:20
instead [4] **15**:19 **45**:14 **46**:5,6
instrument [1] **67**:1
intact [2] **46**:11 **80**:14
intended [2] **4**:10 **80**:19
interest [1] **38**:10
interesting [1] **44**:7
interfere [1] **4**:18
interpret [1] **44**:17
interpretation [1] **25**:17
interpretive [1] **65**:2
intertwined [24] **3**:17 **4**:4,17 **5**:8,17 **16**:4 **25**:7,13 **28**:2,5,22 **29**:6 **31**:13,14 **48**:19,21 **50**:9,25 **51**:2 **52**:17 **64**:5 **65**:14 **68**:11 **76**:13
intertwinement [20] **6**:16,20 **7**:10,21 **8**:12 **10**:14 **17**:11,21 **19**:16 **47**:24 **61**:25 **63**:25 **64**:13,19 **65**:6 **68**:14 **71**:12 **74**:3,10 **75**:2
intertwining [2] **5**:11 **29**:2
interwound [4] **10**:6,18 **13**:13 **15**:22
invigorated [1] **3**:13
invokes [1] **57**:9
involved [1] **48**:3
involves [1] **50**:7
isn't [10] **8**:24 **9**:4 **23**:10 **27**:8 **42**:3,5 **54**:10 **59**:13 **68**:15 **77**:25
issue [30] **9**:8 **10**:25 **11**:2 **12**:17 **20**:19 **26**:21 **27**:20 **33**:16 **40**:23 **45**:15 **52**:7 **55**:23 **57**:18 **58**:24 **60**:2 **61**:23,24 **62**:19 **63**:19,23 **64**:6,12,19 **65**:9 **67**:22,23 **69**:15 **74**:9 **75**:2 **78**:7
issues [15] **3**:17 **9**:13 **12**:23 **19**:17 **25**:5,5,13 **30**:4 **52**:16 **54**:9 **60**:12 **61**:5 **66**:22 **73**:14 **74**:14
itself [3] **8**:15 **49**:2 **66**:19

J

JACKSON [26] **6**:12 **7**:6,20 **8**:7,23 **9**:7 **14**:16,20 **18**:15,24 **19**:3,9 **20**:13,18 **21**:1,15,18 **47**:19,20 **49**:7,24 **50**:1,24 **51**:9 **63**:21 **64**:16
Jarkesy [4] **44**:13 **59**:8,16,16
Joint [1] **78**:24
Jonas [2] **27**:20 **67**:15
Jones [9] **3**:24 **4**:5 **53**:10 **65**:10 **67**:14 **68**:25 **69**:5,23 **70**:1
judge [50] **4**:14 **5**:5,25 **9**:1 **10**:4 **17**:12,12 **18**:4,16,23,23 **19**:5,15,20 **20**:4,8,16 **21**:6,8,13,16,21 **30**:22,23,25 **31**:16,20,25 **32**:24 **38**:6 **39**:23 **40**:10,16 **41**:4,12 **45**:13 **46**:7 **47**:13 **50**:21,23 **54**:8 **57**:20 **61**:2 **63**:9 **67**:5 **72**:23 **74**:3,15 **75**:2 **79**:9
judge's [3] **4**:17,21 **42**:20
judge-made [1] **8**:20
judges [4] **5**:9 **19**:4,4 **34**:8
judgment [13] **12**:3,5,11 **14**:15,23 **17**:15 **18**:2 **20**:13,14 **54**:17 **55**:19 **57**:8 **78**:3
Judgments [1] **55**:23
judicial [5] **52**:24 **53**:14 **62**:1 **69**:2 **73**:22
juries [5] **4**:3 **44**:18 **45**:4 **52**:8 **60**:20
jurisdiction [15] **26**:6,11 **48**:5 **49**:1,11,12,19,22 **50**:5,6,20 **51**:7 **57**:17 **61**:7,7
jurisdictional [11] **25**:4 **26**:5,7,19 **46**:14,23,25 **47**:4,10 **49**:1 **79**:18
jury [123] **3**:17 **4**:24 **5**:22 **6**:18,20,25 **7**:11,14,16,18,19 **8**:5 **9**:4 **10**:24 **16**:11,13,19,19 **17**:16,25 **18**:20 **19**:14,19 **21**:3,6,9,13,23 **22**:16,17,19 **23**:12 **24**:3 **25**:7,14 **26**:17 **27**:14 **30**:15,17,18,19,24 **31**:1,1,17,21 **32**:3,25 **33**:25 **34**:5 **35**:3 **38**:19 **39**:2,6,24 **40**:10,14,15 **41**:4,13 **42**:6 **44**:4,12,14,19 **45**:14,25 **46**:6,10,17,18 **47**:7,13 **48**:4 **50**:22 **51**:6,8 **52**:11,16,19,21 **53**:7 **54**:8,9,11,22 **55**:3,5 **57**:9,9,18 **60**:11 **61**:6 **62**:2,19,19 **63**:7,19,23 **64**:3,6,11 **65**:5,15,21 **67**:6,25 **68**:4,13 **72**:4,9,21 **73**:13,24 **74**:4,9 **75**:15 **79**:2,24 **80**:11,16,17,18
jury's [3] **4**:19 **59**:5 **62**:4
JUSTICE [231] **3**:3,9 **5**:4,10,20 **6**:12 **7**:6,20 **8**:7,23 **9**:7,24,25 **10**:1,2,15,17,20 **11**:9,10,17,18,22,23,24,25 **12**:10,20,24,25 **13**:2,3 **14**:5,6,16,20 **15**:3,6,12,20 **16**:21,22,23,24 **17**:9,18 **18**:1,15,24 **19**:3,6,9 **20**:13,18 **21**:1,15,18 **22**:1,6,10,13,23 **23**:3,10,15,20,23 **24**:8,11,14,19,23,25 **25**:23 **26**:2,13,20,24 **27**:2,4,10,12,19,25 **28**:7,10,24 **29**:1,5,8,11,22 **30**:8,10,21 **31**:9,11,22 **32**:5,7,8,10,12,16,19 **33**:2,8,15,15,16 **34**:10,11,11,13,16,23,25 **35**:19,22 **36**:5,15,22 **37**:2,8,17 **38**:4,23 **39**:1,7,10,13,19,21,25 **40**:2,2,3,25 **42**:11,12,12,14,18 **43**:6,12,15,18,22 **44**:6,10 **45**:3,8,23 **46**:3,12 **47**:8,15,16,16,18,19,20 **48**:7,10 **49**:7,24 **50**:1,24 **51**:9,12,15,19 **53**:19 **54**:10 **55**:1,10,13 **56**:8,14 **58**:5,8,13 **59**:15 **60**:6,23,24 **61**:13,16,20 **62**:6 **63**:5,8,21 **64**:8,15,22 **65**:16,17 **66**:5,16 **67**:2,3,12,15 **68**:2 **69**:6,12 **70**:3,10,24 **71**:14,19,23 **72**:7,8 **74**:7,22 **75**:8 **76**:16 **77**:2,5,8,12,15,19 **78**:9,11,19 **79**:6,20 **80**:23
justify [1] **13**:25

K

KAGAN [24] **10**:1 **16**:21,23 **27**:25 **28**:7,10,24 **29**:1,5,8,11,22 **30**:8,21 **31**:9,11 **32**:10 **40**:2,3,25 **42**:11 **48**:10 **75**:8 **79**:20
Katchen [2] **66**:8,14
Kavanaugh [7] **47**:17 **60**:23 **65**:16 **66**:5,16 **70**:3,10
keep [1] **19**:4
key [5] **6**:10 **12**:15 **20**:9 **21**:23 **79**:7
kind [8] **14**:16 **28**:20 **31**:21 **39**:18 **43**:1 **57**:18 **68**:7 **69**:8
KYLE [1] **1**:6

L

label [1] **41**:6
Land [5] **25**:2 **47**:2 **48**:1,2 **50**:16
Landy [2] **66**:8,14
language [5] **45**:19 **47**:14 **50**:12 **66**:8 **67**:23
Lansing [1] **1**:18
Last [6] **14**:13 **16**:17 **44**:12 **47**:21 **59**:8 **76**:14
later [5] **8**:16 **9**:4 **10**:8 **12**:6 **40**:22
Laughter [1] **32**:14
law [23] **8**:25 **23**:7 **33**:18,21,22 **34**:2,16,17 **45**:24 **52**:5 **53**:24,24 **56**:20 **58**:18,21 **59**:10,13 **60**:8,14 **65**:1 **68**:21 **70**:18 **75**:6
law-of-the-case [1] **12**:12
lawsuit [4] **20**:5 **54**:16,25 **56**:3
lawsuits [2] **3**:14 **14**:21
leap [1] **70**:12
least [9] **5**:8 **6**:8 **7**:21 **21**:4 **25**:15 **26**:8 **50**:8 **63**:17 **65**:2
leaves [2] **46**:11 **80**:13
led [1] **38**:12
leeway [1] **43**:1
legal [6] **40**:23 **41**:15 **66**:22,25,25 **73**:23
lengthy [1] **76**:17
less [3] **35**:8 **53**:11 **56**:17
level [1] **36**:3
liability [1] **60**:19
library [1] **13**:9
light [1] **33**:23
likewise [1] **44**:4
limitations [2] **60**:20 **63**:12
limited [3] **33**:18 **34**:14 **71**:1
line [2] **56**:18 **59**:21
lines [1] **60**:25
list [1] **67**:7
listen [1] **39**:3
litigant [4] **9**:19 **26**:9 **47**:11 **55**:15
litigants [2] **9**:17 **76**:1
litigate [9] **9**:18,22 **10**:5,23,25 **11**:1,7 **12**:10 **55**:4
litigated [1] **12**:17
litigating [2] **9**:19,20
Litigation [11] **3**:12 **4**:15 **12**:18,19 **13**:11,16,18 **51**:22 **75**:10 **76**:8 **78**:8
little [6] **6**:14 **14**:10 **39**:2 **57**:19 **60**:3 **61**:11
lock [1] **57**:21
logic [3] **61**:3,17 **74**:13
logically [1] **49**:6
long [1] **64**:25
look [11] **13**:17 **29**:19 **49**:18 **54**:6 **57**:7 **59**:1 **60**:9 **65**:19,20 **67**:8 **71**:

22
looked [1] **8:**18
Looking [2] **43:**3 **49:**18
looks [1] **71:**11
LORI [3] **1:**20 **2:**6 **51:**16
lose [2] **59:**23 **68:**11
loss [1] **55:**6
lost [2] **11:**1 **39:**2
lot [6] **8:**11 **25:**14 **38:**1 **56:**21 **70:**6 **74:**11
lots [2] **24:**1 **46:**14
lower [4] **5:**7 **9:**15 **62:**8 **70:**12
Lytle [2] **53:**3 **73:**9
Lytle's [1] **73:**11

M

made [6] **5:**5 **12:**12 **18:**16 **62:**22 **67:** 22,24
magic [1] **55:**25
magistrate [2] **42:**20 **46:**7
main [1] **8:**13
majority [3] **58:**13,14 **60:**6
mandate [1] **73:**10
mandatory [1] **4:**10
many [4] **4:**23 **15:**16 **16:**3 **36:**25
mark [1] **25:**11
Markman [4] **66:**17,17,19,22
match [1] **53:**17
material [3] **13:**24 **77:**15 **78:**7
matter [19] **1:**13 **7:**9 **18:**4,25 **25:**15 **31:**6,12,13 **35:**13,24 **41:**3,19 **48:** 24 **49:**22 **50:**19 **61:**6 **69:**1 **70:**11 **73:**2
matters [5] **20:**8 **35:**9 **41:**17,18 **62:** 1
McGILL [45] **1:**20 **2:**6 **51:**15,16,18 **53:**22 **54:**14 **55:**8,12,14 **58:**4,7,10 **60:**4 **61:**11,15,19 **63:**2,6,9 **64:**15 **65:**7 **66:**5,18 **67:**12,16 **68:**18 **69:** 11,21 **70:**9,14 **71:**8,15,21 **72:**2 **73:** 8 **74:**21 **75:**17 **76:**25 **77:**4,7,10,14, 18,23
MDOC [1] **78:**23
mean [38] **7:**5 **8:**8,24 **10:**23 **12:**7,11 **20:**3 **21:**16 **23:**10 **29:**23 **31:**2 **33:**5 **41:**1 **49:**8 **55:**2,25 **57:**6,23 **58:**11, 16 **63:**9,23 **64:**23 **65:**8 **66:**6,18 **67:** 17 **68:**9 **70:**4,14 **71:**9 **72:**2 **74:**1 **75:** 17,20,24 **77:**10,18
meaning [3] **34:**14 **36:**6 **71:**2
meaningful [1] **69:**5
means [6] **10:**24 **24:**9,11,12 **65:**11 **69:**3
meet [2] **41:**22 **44:**5
mentioned [1] **64:**9
merely [1] **3:**22
merits [28] **4:**4,11,25 **8:**6 **9:**22 **10:**6 **11:**8,19 **13:**13 **15:**4,23 **18:**9 **28:**2 **29:**15 **31:**7,8 **46:**17 **47:**5 **48:**6,14 **50:**9 **52:**4,17 **61:**25 **62:**5 **63:**20 **65:** 15 **74:**6
met [6] **7:**17 **41:**22,25 **44:**1 **46:**9 **80:** 19
methodological [2] **56:**9 **59:**25
Michigan [5] **1:**18 **14:**10,13 **16:**9, 10
might [5] **21:**4 **30:**6 **51:**23 **52:**21 **54:** 24
Miller [1] **22:**14
mine [1] **80:**9
mine-run [1] **35:**4
minimum [1] **76:**22
minute [1] **36:**5
mixed [1] **15:**4
Mm-hmm [4] **19:**8 **20:**17,25 **45:**7
mode [1] **46:**24
modern [1] **55:**22
moment [1] **64:**11
money [1] **52:**11
Monte [7] **53:**23 **54:**5 **58:**15 **60:**7 **66:**18,23 **70:**2
Moore's [1] **31:**4
morph [1] **59:**10
most [7] **6:**7 **35:**6,10,12,17 **58:**11 **64:**16
motion [2] **13:**23 **14:**23
motions [2] **14:**15,22
motives [1] **33:**12
moved [1] **66:**11
Ms [172] **3:**6,9 **5:**6,13,23 **6:**12 **7:**2, 15,25 **8:**14 **9:**6,9 **10:**12,16,19 **11:**5, 13,19 **12:**9,14,22 **14:**3,9,18,21 **15:** 5,10,14,24 **17:**4,17,20 **18:**10,15,21 **19:**1,8,25 **20:**17,25 **21:**7,17,22 **22:** 1,4,8,11,22,25 **23:**8,13,16,22 **24:**6, 10,13,17,21,24 **25:**20 **26:**1,4,18,21 **27:**15,22 **28:**4,8,23,25 **29:**2,6,10, 18 **30:**7,17 **31:**3,10,24 **32:**15,18,21 **33:**5,9 **34:**4,20,24 **35:**16,20 **36:**1, 10,21,24 **37:**6,11,24 **38:**9,24 **39:**5, 9,12,15,20,23 **40:**20 **41:**14 **42:**17, 22 **43:**9,14,17,21,24 **44:**8 **45:**1,7, 10 **46:**2,8,22 **47:**9 **48:**18 **49:**16,25 **50:**18 **51:**2,10,14,15,18 **53:**22 **54:** 14 **55:**8,12,14 **58:**4,7,10 **60:**4 **61:** 11,15,19 **63:**2,6,9 **64:**15 **65:**7 **66:**5, 18 **67:**12,16 **68:**18 **69:**11,21 **70:**9, 14 **71:**8,15,21 **72:**2 **73:**8 **74:**21 **75:** 17 **76:**25 **77:**4,7,10,14,18,23 **78:**15, 18
much [4] **5:**7 **31:**2 **47:**3,22
multi-state [1] **38:**12
municipalities [1] **16:**14
musing [1] **19:**6
must [4] **4:**13 **52:**11,16 **70:**16

N

narrow [3] **67:**19 **72:**12,13
narrower [1] **75:**6
narrowing [1] **59:**12
narrowly [1] **75:**9
national [1] **16:**9
naturally [1] **7:**4
nature [9] **5:**12,14 **25:**20,21 **26:**2 **28:**17,18 **57:**10 **80:**12
necessarily [3] **8:**9 **15:**8 **61:**6
necessary [1] **40:**15
need [5] **4:**6 **21:**24 **39:**14 **48:**23 **64:** 23
needles [1] **53:**15
neither [1] **11:**6
never [3] **35:**3 **44:**19 **62:**18
new [8] **11:**3 **34:**2 **56:**25 **57:**13 **68:**8, 17 **76:**12 **77:**24
news [1] **36:**15
next [1] **3:**4
Ngo [2] **42:**2 **80:**4
nice [1] **44:**14
Ninety-six [1] **14:**22
Ninth [1] **68:**23
non [1] **61:**8
non-binding [3] **53:**5 **54:**13,15
non-exhaustion [1] **3:**19
none [3] **26:**18 **44:**24 **61:**12
nonsense [1] **61:**4
normal [3] **10:**21 **25:**18 **70:**15
normally [2] **5:**5 **64:**17
nothing [8] **11:**10 **43:**7 **47:**9,12 **50:** 14 **53:**4 **55:**25 **72:**19
notion [1] **26:**16
number [4] **8:**1 **16:**16 **53:**13 **61:**4
Nussle [1] **27:**16

O

objection [1] **67:**8
objections [1] **21:**19
obligation [2] **49:**21 **50:**3
obviously [1] **7:**5
occur [1] **62:**16
occurred [1] **62:**15
occurring [1] **37:**5
odd [1] **22:**14
Officer [2] **20:**23 **80:**6
often [1] **45:**5
Ohio [1] **38:**13
okay [12] **7:**7 **14:**20 **16:**10 **23:**15 **24:** 23 **28:**10 **29:**5,10 **30:**7,11 **44:**10 **58:**4
once [8] **19:**15 **23:**16,24 **55:**23 **67:** 22,23 **80:**16,17
one [30] **5:**15 **7:**1,13 **8:**1 **9:**13 **12:**15 **13:**16 **18:**3 **21:**3 **24:**19,21 **26:**6 **28:** 4,4 **37:**9 **38:**11 **48:**15 **56:**9,13 **57:**7, 12,20 **64:**23 **66:**22 **67:**3,11 **73:**3,4 **75:**8 **76:**11
only [15] **4:**6 **8:**19 **13:**10,12 **15:**15 **16:**18 **33:**19 **42:**8 **52:**20 **53:**1 **59:**7 **70:**16,17 **73:**19 **74:**25
open [3] **16:**1 **80:**1,1
opened [1] **14:**14
opinion [11] **8:**8 **58:**13,14 **65:**10 **71:** 10,13,21 **73:**9 **74:**23,25 **75:**2
opinions [2] **13:**10 **70:**13
opportunity [10] **9:**18,21 **10:**5,22 **11:**1,7,15,20 **12:**2,7
opposite [1] **5:**24
oral [5] **1:**14 **2:**2,5 **3:**7 **51:**16
order [9] **26:**23 **41:**23 **42:**20 **44:**5 **46:**10 **49:**12 **73:**2,2 **74:**5
ordinarily [3] **6:**19 **7:**13 **19:**4
ordinary [3] **35:**1 **65:**11,12
originally [1] **19:**5
other [34] **4:**2,9,23 **7:**1 **12:**16 **13:**17 **19:**12 **27:**7 **29:**21 **46:**14 **55:**8 **56:** 15 **61:**4 **62:**12 **63:**18 **64:**5 **66:**2,15, 24 **67:**10,18 **70:**2 **73:**4 **74:**5,11,14, 15 **75:**10 **76:**4 **77:**6,6 **78:**2 **79:**18 **80:**20
others [2] **35:**9 **64:**24
otherwise [3] **70:**21 **73:**19 **79:**5
out [19] **14:**8 **37:**15,16 **38:**11,13 **46:** 18 **48:**10,17 **57:**5 **58:**3,9 **59:**9 **64:** 24 **70:**7 **71:**10 **72:**15 **74:**15 **76:**24 **80:**7
outset [1] **49:**19
outsize [1] **3:**15
over [9] **9:**14,14 **13:**11 **15:**17 **18:**8, 18 **20:**19 **46:**7 **77:**4
overlap [3] **10:**13 **61:**14 **63:**20
overlapping [2] **9:**23 **29:**18
overwhelming [1] **16:**16

P

p.m [1] **81:**1
PAGE [1] **2:**2
pages [1] **40:**1
papers [6] **28:**12,15,20 **29:**14,17, 24
Parkland [1] **8:**21
Parklane [1] **8:**17
part [3] **6:**18 **33:**5 **67:**13
particular [3] **21:**12 **33:**19 **40:**9
particularly [1] **40:**6
pass [1] **78:**1
past [5] **54:**16 **55:**19 **67:**20 **76:**2 **78:** 3
path [3] **59:**6 **69:**25 **70:**19
Pavey [8] **14:**24 **15:**1,15 **16:**2,5 **61:** 3 **63:**10 **75:**3
peers [1] **46:**6
people [1] **19:**14
perfect [1] **74:**2
performing [1] **42:**6
perhaps [2] **25:**16,17
perjure [1] **76:**1
perjury [1] **77:**21
permit [1] **38:**8
person [1] **18:**18
personal [1] **61:**7
perspective [1] **75:**23
persuasive [1] **53:**11
PERTTU [3] **1:**3 **3:**4 **20:**23
Petitioner [6] **1:**4,19 **2:**4,10 **3:**8 **78:** 17
picture [1] **72:**15
piece [1] **24:**12
pieces [1] **24:**24
pin [1] **25:**1
place [1] **68:**4
plaintiff [3] **13:**21 **27:**4 **54:**24
plead [1] **4:**7
pleading [2] **57:**22 **75:**13
please [2] **3:**10 **51:**19
PLRA [24] **3:**20 **4:**1,8,13 **25:**21 **27:** 16 **37:**14 **44:**17,25 **45:**2,12,19 **47:** 14 **53:**9 **58:**2 **65:**6,19 **66:**4 **67:**6 **68:**

22 **74**:10 **75**:10 **76**:15 **79**:15
PLRA's [1] **3**:22
PLRXA [1] **4**:13
plus [1] **30**:14
point [8] **20**:10 **37**:2 **51**:7 **52**:13 **54**: 21 **55**:21 **76**:4 **80**:12
pointed [6] **14**:7 **34**:16 **38**:13 **59**:8 **64**:24 **70**:7
points [3] **48**:10 **51**:21 **66**:6
policies [2] **38**:1 **65**:20
policy [16] **17**:1 **36**:12,13 **37**:9,11 **44**:15,24 **45**:1 **52**:2 **53**:16 **64**:25 **65**:19,21 **66**:3,9 **78**:22
Porter [1] **27**:16
position [3] **5**:19 **56**:3 **63**:22
Posner [2] **63**:9 **74**:15
Posner's [2] **61**:2 **75**:2
possible [1] **42**:15
Potentially [1] **61**:11
power [1] **25**:9
practical [2] **35**:13,23
practically [2] **26**:8 **35**:5
practice [2] **18**:25 **31**:4
PREA [2] **52**:2 **78**:22
precedent [1] **59**:1
precise [3] **6**:1 **54**:2 **79**:13
precluded [5] **34**:15 **35**:5,13 **44**:22, 22
preclusion [14] **8**:13,15 **10**:21 **12**: 3 **40**:5,6 **41**:18 **42**:5,19 **43**:7,19 **50**: 11,12,15
preclusive [10] **4**:22 **8**:4,9,15 **9**:4 **20**:11 **32**:19,22 **33**:1 **35**:15
predates [1] **50**:13
predominantly [1] **54**:8
preference [1] **70**:16
prejudged [1] **19**:20
prejudice [8] **4**:20 **12**:4 **20**:2 **32**:9, 17 **39**:16 **42**:24 **55**:24
preliminary [1] **31**:6
prerequisite [11] **4**:10 **26**:22,25 **27**:6,17,24 **40**:22 **41**:7,20 **49**:10 **80**:13
prerequisites [3] **41**:21,23,24
present [3] **7**:8 **21**:5 **74**:7
presentation [1] **19**:19
presented [7] **7**:5,9 **41**:9 **52**:9 **53**: 10 **64**:18 **75**:7
presenting [1] **74**:13
presents [1] **56**:10
preserved [2] **43**:5 **52**:22
preserves [2] **42**:8,9
preserving [3] **59**:4 **62**:3 **79**:3
presiding [3] **18**:18 **20**:18 **21**:6
presume [2] **22**:15 **46**:18
presumption [1] **46**:20
presumptive [1] **26**:16
pretty [3] **5**:7 **47**:3 **69**:25
prevail [1] **74**:5
prima [1] **54**:19
principally [2] **64**:20 **66**:7
principle [7] **8**:12 **40**:7,8,9 **47**:25 **50**:13 **63**:25
principled [2] **3**:25 **4**:7
principles [1] **25**:18
prior [2] **12**:17 **55**:2
Prison [18] **3**:12 **16**:25 **17**:6 **29**:4 **34**:20 **36**:6,7,8 **37**:13,15 **38**:6,10, 15 **39**:3 **42**:25 **65**:24 **76**:17,24
prison's [1] **37**:22
prisoner [19] **3**:14 **14**:18,19 **17**:6, 13,14,22 **28**:11 **35**:1,11,17,24 **37**: 20 **38**:21 **75**:11 **76**:17,20 **78**:7 **80**: 3
prisoners [12] **4**:6,23 **15**:18 **35**:5 **42**:22 **43**:2,10,25 **77**:8 **79**:21 **80**:5, 20
Prisons [2] **16**:15 **36**:3
pro [2] **13**:15 **54**:24
probably [1] **21**:14
problem [9] **17**:23 **41**:8 **50**:17 **56**: 10 **59**:20 **68**:20 **73**:21 **76**:14 **77**:24
problems [2] **37**:16 **38**:11
procedure [1] **53**:6
procedures [1] **65**:11
proceed [5] **41**:24,25 **42**:4 **49**:13 **55**:4
proceeding [1] **42**:3
proceedings [1] **55**:16
proceeds [1] **52**:20
process [3] **28**:16 **29**:20,25
proper [2] **45**:18,20
proposed [1] **80**:2
proposing [2] **37**:18 **73**:19
proposition [2] **4**:6 **10**:3
prosecution [1] **77**:22
protect [1] **40**:15
protected [3] **52**:2 **73**:7,12
protective [1] **41**:11
prove [1] **44**:3
proven [1] **26**:23
provide [1] **37**:6
provided [1] **58**:17
provision [1] **36**:25
provisions [1] **37**:1
prudence [1] **70**:11
pure [1] **66**:21
purpose [2] **49**:15 **64**:2
purposes [3] **48**:22 **53**:25 **63**:16
put [6] **25**:1 **36**:11,12,12 **76**:21,21
puzzling [1] **47**:22

Q

QP [1] **68**:9
question [55] **6**:21 **7**:3,4,8,9 **15**:25 **16**:25 **17**:21 **19**:7 **21**:3 **22**:2 **25**:11 **28**:14,17 **29**:12 **30**:10,16,18 **31**:15, 17 **38**:5,5 **39**:17 **40**:11,12,13 **41**:2 **47**:4 **48**:5,15 **52**:9 **56**:9,20 **57**:6,23 **58**:11,11,20,22,24 **60**:2 **62**:10 **63**: 3 **64**:18 **65**:22 **67**:6 **68**:3,11 **69**:13 **70**:5,6 **71**:2 **72**:1,6 **75**:6
questions [12] **5**:3 **18**:20 **19**:15 **31**: 12 **41**:5 **46**:17,25 **53**:18 **57**:15 **61**: 5 **70**:6 **79**:6
quick [1] **16**:25
quickly [1] **65**:25
quite [2] **59**:24 **65**:21

R

raise [1] **13**:20
raising [1] **65**:18
rape [6] **15**:8 **16**:25 **17**:7 **34**:17,18, 20
rape-related [1] **35**:4
rare [1] **50**:22
rather [1] **24**:15
re-argue [1] **56**:4
re-file [2] **20**:5 **42**:15
reach [1] **71**:5
read [3] **25**:17 **47**:2,2
reading [1] **40**:4
real [1] **61**:25
really [18] **6**:13,23 **8**:13 **19**:14 **22**: 16 **29**:22 **43**:7 **52**:25 **56**:22 **57**:5 **61**:23 **63**:21,25 **69**:3 **74**:17,19 **77**: 19,25
realm [1] **18**:17
reargue [1] **79**:1
reason [13] **4**:1,8 **5**:1 **18**:12 **20**:6 **21**:8 **34**:6 **36**:10 **37**:12 **49**:8 **53**:1 **70**:17,23
reasons [5] **8**:1 **33**:11 **69**:16,18 **71**: 4
REBUTTAL [3] **2**:8 **78**:15,16
recently [1] **76**:6
reconsidered [1] **69**:4
record [1] **20**:22
reduce [1] **53**:12
referred [2] **69**:1 **73**:9
reflected [1] **69**:14
reflects [1] **14**:10
reflexively [1] **69**:9
Reform [1] **3**:13
reforms [1] **3**:12
regard [1] **60**:21
regardless [4] **52**:12 **53**:16 **63**:20 **68**:13
rejected [1] **53**:10
related [2] **9**:5 **18**:17
relevant [2] **66**:10 **77**:25
relies [1] **66**:6
relitigated [1] **52**:19
remand [1] **73**:13
remedies [1] **17**:3
represented [1] **51**:23
representing [1] **55**:15
require [3] **18**:22 **27**:13 **67**:20
required [2] **46**:9 **53**:13
requirement [3] **3**:14 **37**:19 **75**:12
requirements [5] **35**:7 **44**:2 **62**:13 **67**:24 **74**:16
requires [4] **3**:16 **9**:2 **12**:3 **67**:11
requiring [1] **67**:5
resolution [3] **4**:12 **31**:5 **70**:19
resolve [3] **52**:12 **62**:4 **65**:24
resolved [2] **4**:14 **58**:25
respect [7] **34**:1 **55**:5 **59**:12 **60**:12 **64**:13 **74**:21 **75**:4
Respectfully [2] **11**:5,14
respective [1] **40**:13
respite [1] **80**:8
respond [2] **15**:25 **66**:4
Respondent [5] **1**:7,21 **2**:7 **3**:21 **51**:17
response [1] **48**:7
responses [1] **19**:25
Restatement [1] **55**:22
resting [2] **26**:14,15
result [1] **43**:16
resulted [1] **48**:12
retaliation [5] **7**:13 **9**:3 **34**:21 **54**: 20 **78**:23
retaliatory [1] **28**:20
return [1] **35**:18
reverse [1] **5**:1
revisit [1] **49**:21
RICHARDS [18] **1**:6 **3**:5 **4**:23 **17**:2, 23 **20**:11,23 **21**:2,5,24 **30**:19 **32**: 22 **54**:16 **55**:15 **56**:4 **72**:3 **78**:25 **80**:19
Richards's [4] **15**:1 **38**:14 **39**:17 **80**:2
rid [1] **44**:12
Rights [2] **53**:17 **73**:12
roadmap [3] **75**:19,23 **79**:21
ROBERTS [16] **3**:3 **32**:5,12 **33**:15 **34**:11 **40**:2 **42**:12 **47**:16 **51**:12,15 **54**:10 **55**:1,10,13 **78**:9 **80**:23
role [4] **4**:19 **42**:7 **59**:5 **62**:4
roles [1] **40**:14
room [1] **57**:13
roots [1] **6**:7
Ross [2] **30**:2 **54**:18
route [1] **60**:6
routinely [1] **4**:3
rule [41] **3**:16 **6**:24 **7**:3 **15**:1 **18**:22 **22**:18 **23**:11,14 **25**:7,12 **30**:14 **31**: 22 **33**:17,25 **34**:14 **35**:2,14 **38**:14 **39**:17 **44**:18,22 **52**:15 **53**:15 **54**:9 **61**:20,21 **67**:20 **69**:2 **70**:25 **71**:25 **72**:5,18 **73**:5,6 **75**:6,9,21 **76**:2,5 **77**:24 **80**:2
ruled [1] **19**:22
rules [6] **10**:21 **24**:1 **53**:5 **71**:11,12 **75**:25
ruling [1] **21**:18
run [1] **4**:16

S

said/she [2] **16**:7 **79**:23
same [31] **9**:7 **18**:16,19,22 **19**:16, 17,20 **20**:3,4,7,16 **21**:3,6,8,21 **30**:3, 22 **31**:16 **40**:11,11,12 **41**:5,5,8 **43**: 15 **44**:21 **48**:9,13 **49**:15 **53**:9 **59**: 20
satisfied [1] **6**:22
saves [1] **32**:1
saying [14] **24**:14 **44**:11 **58**:5,25 **59**: 13,22,23,23 **63**:10 **69**:7 **71**:6,9,16 **73**:22
says [14] **8**:25 **17**:12 **21**:2 **22**:15 **28**: 11 **35**:6 **36**:8,16 **37**:21 **45**:3 **46**:12 **48**:3 **76**:19,20
Scalia [1] **60**:6
Scalia's [1] **58**:13

scope [1] **67:**19
screening [3] **13:**19 **53:**15 **78:**2
se [2] **13:**15 **54:**24
sea [1] **75:**5
search [1] **13:**9
Second [7] **13:**4,9 **20:**9 **54:**15 **55:** 21 **56:**11 **76:**5
see [11] **8:**7,8 **12:**13 **13:**14 **22:**23 **26:**14 **30:**21 **35:**24 **60:**10 **71:**23,24
seem [4] **8:**10 **26:**15 **48:**8 **65:**18
seems [11] **30:**24 **31:**11,21 **35:**23 **41:**10 **57:**16 **65:**21 **66:**1,3 **70:**5 **72:** 4
seen [1] **56:**11
sending [1] **51:**8
sense [2] **68:**18,19
sent [1] **4:**3
sentence [1] **76:**17
separate [2] **12:**23 **48:**16
serving [1] **76:**17
set [8] **19:**17 **44:**2,3,4 **46:**8 **57:**7 **71:** 3 **74:**15
setting [2] **6:**4,11
setup [1] **29:**21
Seventh [36] **4:**16 **5:**16,18 **6:**22 **19:** 13 **22:**3,17 **23:**1,6 **30:**15 **33:**17 **41:** 11 **42:**8,9 **43:**3,4 **44:**15 **46:**11 **53:**2, 25 **54:**22 **57:**10 **62:**23 **63:**16,17 **69:** 17 **71:**6 **72:**20 **73:**7,11,11,20 **79:**3, 4 **80:**14,15
several [1] **63:**17
sexual [3] **34:**22 **45:**25 **78:**21
shall [1] **45:**15
share [1] **3:**15
SHERMAN [135] **1:**18 **2:**3,9 **3:**6,7,9 **5:**6,13,23 **6:**12 **7:**2,15,25 **8:**14 **9:**6, 9 **10:**12,16,19 **11:**5,13,19 **12:**9,14, 22 **14:**3,9,18,21 **15:**5,10,14,24 **17:** 4,17,20 **18:**10,15,21 **19:**1,8,25 **20:** 17,25 **21:**7,17,22 **22:**1,4,8,11,22, 25 **23:**8,13,16,22 **24:**6,10,13,17,21, 24 **25:**20 **26:**1,4,18,21 **27:**15,22 **28:**4,8,23,25 **29:**2,6,10,18 **30:**7,17 **31:**3,10,24 **32:**15,18,21 **33:**5,9 **34:** 4,20,24 **35:**16,20 **36:**1,10,21,24 **37:** 6,11,24 **38:**9,24 **39:**5,9,12,15,20, 23 **40:**20 **41:**14 **42:**17,22 **43:**9,14, 17,21,24 **44:**8 **45:**1,7,10 **46:**2,8,22 **47:**9 **48:**18 **49:**16,25 **50:**18 **51:**2, 10,14 **78:**15,16,18
short [2] **35:**21,23
shouldn't [5] **21:**14 **25:**15 **30:**16 **40:**18 **45:**4
show [1] **76:**8
showing [3] **22:**7 **23:**4,5
side [5] **9:**20 **11:**6 **64:**5 **66:**2 **69:**24
significant [1] **55:**20
significantly [2] **66:**12 **68:**17
silence [1] **65:**11
silent [2] **44:**18 **45:**14
similar [1] **63:**12
similarly [1] **29:**14
simpler [1] **70:**19
simply [2] **52:**20 **58:**25
since [1] **56:**21
situation [6] **7:**24 **9:**1 **34:**14 **37:**4 **64:**7 **65:**13
Sixth [9] **4:**15 **5:**1 **51:**25 **52:**3,5 **54:** 19 **55:**17 **74:**24 **77:**25
slate [1] **73:**13
slightly [2] **40:**7 **60:**5
small [2] **55:**14 **74:**22
Smith [1] **25:**4
Smithers [2] **25:**3 **48:**1
so-called [1] **62:**1
Solicitor [1] **1:**18
solution [1] **73:**18
solved [1] **73:**21
somebody [3] **29:**3,24 **45:**24
somebody's [2] **29:**13,15
somehow [1] **79:**5
someone [1] **14:**17
sometimes [2] **52:**22 **80:**4
sorry [8] **11:**24,25 **13:**1 **14:**17 **15:** 20 **32:**11,15 **59:**19
sort [14] **7:**22 **8:**12 **19:**6 **58:**12 **59:**6, 9 **66:**9,21,22 **68:**25 **70:**15 **71:**10, 17 **73:**16
SOTOMAYOR [51] **9:**24 **10:**2,15, 17,20 **11:**10,17,22,24 **12:**20,25 **13:** 3 **14:**5,6 **15:**3,6,12,20 **26:**24 **27:**4, 12,19 **34:**12,13,23,25 **35:**19,22 **36:** 5,15,22 **37:**2,8,17 **38:**4,23 **39:**1,7, 10,13,19,21,25 **67:**3,13,15 **70:**24 **71:**14,19,23 **72:**7
Southern [1] **76:**12
sovereign [7] **25:**5,24 **27:**2,10,12 **46:**13 **48:**3
speaking [3] **26:**8 **35:**5 **64:**12
speaks [1] **65:**4
special [1] **49:**9
specific [4] **52:**14 **54:**3 **58:**24 **60:**8
spectrum [1] **66:**21
speedy [1] **65:**23
stable [1] **56:**18
stages [1] **4:**14
stand [1] **4:**5
standard [2] **7:**23 **22:**5
starting [1] **10:**3
state [16] **36:**16,22 **38:**7 **39:**11 **51:** 22 **52:**6 **53:**6,7 **54:**1 **56:**2 **61:**23 **64:** 21 **66:**6 **68:**20 **73:**18 **76:**18
State's [2] **52:**23 **53:**12
stated [1] **54:**19
STATES [7] **1:**1,15 **16:**12 **35:**8 **36:** 1,25 **45:**9
statute [9] **24:**12 **25:**17 **45:**5 **53:**4 **60:**19 **63:**12,14 **65:**2 **67:**25
statutes [1] **74:**15
statutory [2] **25:**16 **65:**20
stem [1] **78:**21
step [2] **74:**20,23
steps [1] **14:**4
still [12] **3:**14 **7:**7 **15:**21 **17:**20 **32:** 23 **43:**2 **49:**16 **51:**3 **60:**9 **68:**12 **70:** 21 **75:**9
stipulate [1] **30:**5
stop [2] **38:**7 **47:**9
stops [1] **47:**12
Story [1] **56:**14
strikes [1] **22:**14
striking [1] **68:**16
structure [2] **3:**20,22
structured [1] **45:**20
subject [6] **24:**1 **27:**9 **49:**22 **50:**19 **51:**25 **61:**6
submit [1] **54:**2
submitted [2] **80:**25 **81:**2
subsequent [3] **12:**18 **18:**19 **20:** 19
substantive [2] **10:**9 **28:**19
suggest [3] **5:**22,24 **53:**5
suggested [1] **45:**20
suggesting [3] **20:**15 **53:**19,22
suggestion [1] **52:**23
suggests [3] **51:**4 **53:**6 **66:**9
suit [15] **4:**10 **12:**6 **23:**6 **26:**22,25 **27:**6,17,24 **35:**11 **40:**22 **41:**20 **45:** 25 **49:**10,13 **72:**10
suits [2] **33:**18 **58:**3
summary [6] **14:**15,23 **17:**15 **54:** 16 **55:**19 **78:**3
sun [1] **41:**8
supplant [1] **67:**6
Suppose [1] **76:**16
SUPREME [2] **1:**1,14
survived [1] **53:**14
survives [1] **13:**23
system [5] **29:**21 **37:**13,15 **42:**25 **50:**4
systems [2] **38:**10,15

T

table [1] **40:**18
talked [2] **8:**15 **14:**4
talks [2] **8:**8 **40:**5
tears [1] **29:**24
Tellabs [1] **67:**23
tells [1] **54:**5
tends [1] **16:**6
term [5] **27:**18 **44:**12 **45:**17 **59:**8 **66:** 25
termination [1] **62:**24
terms [1] **51:**7
territory [1] **68:**8
test [2] **12:**16 **56:**12
testimony [1] **20:**21
Theaters [1] **41:**17
Theatre [1] **71:**24
Theatres [20] **7:**23,25 **8:**2,14,18 **19:** 12 **30:**13,14 **40:**4,19,20,21 **47:**24 **50:**12,14 **52:**14 **71:**1,3 **72:**14,16
themselves [2] **19:**23 **76:**1
theory [3] **43:**8 **54:**3,17
there's [34] **3:**25 **5:**13 **6:**15 **10:**13 **12:**11 **17:**17 **18:**21 **20:**6 **21:**7 **23:**2 **33:**24,25 **39:**15 **43:**6 **44:**23,24 **46:** 13 **47:**12,12 **51:**6 **53:**3 **60:**8 **61:**13 **62:**21 **63:**13 **64:**10,25 **69:**25 **71:**5, 7 **74:**1,10 **77:**12 **78:**6
therefore [1] **33:**19
they've [5] **38:**18 **39:**2,6 **69:**7,8
thinking [2] **67:**4 **69:**3
THOMAS [12] **1:**3 **5:**4,10,20 **32:**7,8, 16,19 **33:**2,8 **53:**19 **78:**11
though [7] **26:**14 **30:**25 **41:**10 **57:** 12,17 **60:**16 **70:**4
threatened [1] **33:**11
threshold [5] **52:**16 **57:**15 **58:**1 **61:** 5 **74:**14
throughout [1] **55:**16
thwarting [1] **56:**5
ticked [1] **61:**4
Title [5] **62:**17,18,20 **63:**4,11
together [1] **41:**15
took [2] **6:**15 **65:**5
top [1] **77:**20
tore [6] **28:**12,15,19 **29:**4,13,16
torn [2] **33:**4,10
tort [3] **58:**18 **60:**13,18
touching [1] **64:**8
tradition [1] **56:**12
treading [1] **68:**8
treat [1] **63:**14
treated [1] **63:**19
treating [2] **4:**1,8
treatment [1] **49:**9
trial [45] **3:**17 **4:**12 **7:**16,19 **8:**5 **9:**4 **11:**3 **17:**16 **18:**9,19 **20:**19 **21:**3 **22:** 19 **23:**12 **24:**3 **33:**3,6,6,25 **34:**5 **38:** 19 **39:**2,6 **44:**14 **46:**10 **52:**21 **62:** 20 **63:**7,19,23 **64:**3,6,12 **65:**5,22 **67:**6,21 **68:**4,13 **72:**21 **73:**14 **74:**9 **75:**20,21 **76:**12
trials [8] **15:**2 **16:**3,11,13,19 **53:**8, 13 **76:**9
tried [2] **72:**25 **73:**1
trier [1] **59:**5
trip [2] **76:**23,24
trouble [1] **80:**6
true [9] **5:**24 **26:**12 **34:**17 **40:**25 **41:** 3 **51:**10 **52:**10 **57:**6 **69:**6
truly [1] **52:**15
truth [2] **77:**16,17
try [7] **38:**8,10 **49:**18 **58:**2 **73:**1,3,4
trying [3] **56:**18 **57:**5 **58:**8
Tuesday [1] **1:**11
turn [1] **54:**23
turned [1] **79:**22
tweaking [1] **59:**11
two [9] **12:**22 **19:**25 **24:**22,22 **51:**20 **54:**14 **66:**6 **72:**24,24
type [3] **48:**4 **52:**7 **60:**13
types [1] **60:**10
typically [4] **4:**20 **20:**2 **49:**3,17

U

ultimate [2] **4:**19 **21:**11
ultimately [1] **21:**22
ultra [1] **49:**5
unanimous [2] **53:**3 **73:**9
unavailability [3] **15:**18 **54:**17 **56:** 6
unavailable [1] **13:**22
uncertainty [3] **57:**2,24 **70:**8
under [16] **3:**12 **12:**24 **15:**1 **16:**25

34:20 **35:**14 **38:**13,22 **41:**8 **52:**4 **54:**17 **62:**17 **65:**6 **67:**24 **74:**10 **80:**1
undercut [1] **4:**11
underlying [2] **11:**7 **15:**23
undermine [1] **53:**8
undermining [1] **3:**19
understand [12] **7:**6 **12:**1 **14:**1 **45:**5 **48:**10 **49:**14,24 **50:**10,15 **58:**10 **60:**25 **63:**2
Understood [1] **77:**7
uniformly [2] **61:**22,22
unique [1] **25:**21
UNITED [3] **1:**1,15 **45:**9
unlawful [1] **62:**24
unless [2] **11:**14 **65:**4
unlikely [1] **72:**5
unrelated [1] **13:**24
until [3] **45:**16 **47:**5 **55:**16
untimeliness [3] **36:**4 **38:**17,21
unusual [1] **15:**7
up [18] **13:**15 **14:**7,7 **16:**5 **28:**12,15,19 **29:**4,13,16,24 **33:**4,10 **46:**17 **48:**16 **56:**25 **70:**5 **71:**4
usual [1] **31:**22

V

venue [1] **61:**8
versa [1] **48:**24
versus [15] **3:**4,24 **25:**3,4 **27:**16 **42:**2 **47:**2 **48:**1,2 **50:**16 **54:**18 **65:**10 **66:**8,14 **80:**4
viability [1] **66:**14
viable [1] **4:**25
vice [1] **48:**23
view [2] **7:**23 **72:**17
VII [4] **62:**18,20 **63:**4,11
violate [1] **17:**24
violated [1] **73:**20
violation [3] **15:**9 **34:**19 **43:**2
vires [1] **49:**5
Virginia [1] **1:**21

W

Wait [1] **36:**5
wanted [2] **51:**20 **60:**5
warden [3] **29:**13,16,24
warns [1] **53:**7
Washington [1] **1:**10
way [15] **12:**11 **19:**24 **20:**8 **30:**1 **45:**19 **48:**17 **49:**8 **55:**18 **56:**13 **57:**20 **64:**21 **68:**10 **69:**5 **74:**5 **75:**13
ways [1] **56:**10
weed [1] **58:**3
weigh [1] **57:**25
welcome [2] **5:**3 **53:**18
well-equipped [1] **78:**6
well-worn [2] **59:**6 **69:**25
Wetmore [5] **57:**16 **60:**1 **79:**7,8,18
whatever [4] **27:**25 **52:**10 **67:**24 **71:**3
whatnot [1] **19:**22
whereas [1] **79:**17
Whereupon [1] **81:**1
whether [34] **6:**21,24 **9:**3 **11:**8 **12:**17 **13:**11 **15:**22 **17:**21 **18:**17 **19:**18,23 **20:**1 **22:**3 **29:**3,13,16 **30:**13,13 **33:**3,10 **39:**17 **41:**6 **44:**22 **54:**23 **57:**8 **63:**6,22 **64:**10 **67:**9,10 **68:**3 **77:**16 **78:**1,6
whichever [1] **73:**3
who's [1] **76:**17
whole [2] **15:**13 **65:**23
wholly [1] **47:**3
wide [1] **46:**24
will [9] **5:**9 **15:**11 **16:**1 **37:**24 **53:**8 **80:**1,9,11,20
willing [1] **37:**19
win [1] **68:**12
wins [1] **46:**18
wipe [1] **40:**17
within [1] **69:**17
without [11] **4:**20 **20:**2 **32:**9,17 **39:**16 **50:**22 **55:**3,24 **67:**8 **69:**2 **70:**12
won [2] **39:**3,6
wonder [2] **19:**17 **25:**8
Woodford [2] **42:**1 **80:**4
words [4] **55:**24,25 **75:**10 **80:**9
work [7] **37:**15,16 **38:**11 **43:**20,24 **58:**23 **64:**1
worry [1] **6:**23
Wright [1] **22:**14
wrote [2] **63:**10 **74:**23
Wyatt [1] **68:**24

Y

year [2] **14:**13 **16:**17
years [6] **13:**8,10 **51:**22 **55:**8 **63:**10 **76:**15
York [1] **76:**12

Z

Zoom [2] **46:**7 **77:**4