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IN THE SUPREME COURT OF THE UNITED STATES

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 MICROSOFT CORPORATION, :
 Petitioner : No. 15-457
 v. :
 SETH BAKER, ET AL., :
 Respondents. :
 - - - - - x

 Washington, D.C.
 Tuesday, March 21, 2017

The above-entitled matter came on for oral
 argument before the Supreme Court of the United States
 at 10:19 a.m.

APPEARANCES:
 JEFFREY L. FISHER, ESQ., Stanford, Cal.; on behalf of
 the Petitioner.
 PETER K. STRIS, ESQ., Los Angeles, Cal.; on behalf of
 the Respondents.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	JEFFREY L. FISHER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	PETER K. STRIS, ESQ.	
7	On behalf of the Respondents	29
8	REBUTTAL ARGUMENT OF	
9	JEFFREY L. FISHER, ESQ.	
10	On behalf of the Petitioner	56
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

(10:19 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in case 15-457, Microsoft Corporation v. Baker.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

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

Years after Livesay, the rules committee considered what options should be available to plaintiffs who find themselves in precisely the situation the plaintiffs here claim to have found themselves, having class certification denied in a case where they claim the individual claims make it impractical to litigate ahead on an individualized basis. In the system that the rules committee adopted and that this Court endorsed in Rule 23(f) in the system discretionary review, the plaintiff's theory here, with the voluntary dismissal tactic they wish to use, would upend that carefully considered rule.

JUSTICE KAGAN: Mr. Fisher --

MR. FISHER: And it would --

JUSTICE KAGAN: Please.

1 MR. FISHER: And it would also contravene
2 statutory and case law on which it is based.

3 JUSTICE KAGAN: And may I ask, a lot of your
4 briefing in this case operates on the premise that there
5 really was -- that this claim will spring back, that
6 there was some kind of reservation --

7 MR. FISHER: Yeah.

8 JUSTICE KAGAN: -- of rights such that this
9 claim would spring back. And I'm wondering why you
10 think that. Where do you get that from?

11 I mean, was this something that the parties,
12 just a general understanding in this case that they were
13 dismissing it, but that it would spring back if they won
14 the appeal?

15 MR. FISHER: No. There's no such
16 understanding, Justice Kagan, and there's two places to
17 look. And I can answer your question why we get to the
18 premise that we lead off our brief with.

19 The first is the -- the stipulation and
20 judgment itself, which are in the back of the Petition
21 Appendix, from pages 34a to 39a. And in 39a, that's the
22 order of judgment, and it simply says that the district
23 court grants the motion to dismiss with prejudice.

24 And so what the plaintiffs say is because of
25 language in the stipulation -- and here I can only

1 imagine the language in .4 on Pet. App. 36a where they
2 say: After the court has entered final order and
3 judgment, plaintiffs intend to appeal the order denying
4 class certification.

5 Because of that piece of the stipulation,
6 it's the plaintiffs who take the position -- and now I'm
7 going to read to you, sorry, one more page here. On
8 page 45 of the red brief, they say it most explicitly, I
9 think: The Respondents say: Respondents did not abandon
10 their rights. The voluntary dismissal is -- and they
11 say, unequivocal, that: The dismissal was predicated on
12 reserving the right to challenge the court's ruling and
13 to revive their claims should they prevail on appeal.

14 So I think you have two problems here,
15 Justice Kagan. The first is the actual order doesn't
16 exactly say what they claim it says, but it seems to be
17 the presumption that they are adopting and that the
18 Ninth Circuit seemed to have adopted.

19 JUSTICE KAGAN: I guess I read your brief,
20 so I have largely bought into that assumption. And if
21 that were true, it does seem to me like you have an
22 awfully good argument, but it would not be final, then,
23 under 1291. And I guess I was just asking why it was
24 that your brief essentially, you know, for two-thirds of
25 the brief or more, bought into that assumption, whether

1 there was something that I didn't see or some general
2 understanding that the parties had that -- that
3 suggested that assumption was the right one to make.

4 MR. FISHER: No. The parties had no such
5 understanding. All you have is what's in the paper.

6 We started our brief with that argument
7 because that seems to be what the Ninth Circuit
8 accepted. And so we started by accepting the premise of
9 the Ninth Circuit. But --

10 JUSTICE GINSBURG: You are not --

11 MR. FISHER: -- make no mistake --

12 JUSTICE GINSBURG: You are not embracing
13 that argument.

14 MR. FISHER: No. We are arguing in the
15 alternative, Justice Ginsburg. So what we're saying is
16 if they did somehow manage to reserve a right to revive
17 their claims, what they've really done is dismiss
18 without prejudice, and there's no finality.

19 CHIEF JUSTICE ROBERTS: Well --

20 MR. FISHER: But --

21 CHIEF JUSTICE ROBERTS: Either they were
22 talking about their original claims, which included the
23 class allegation, and they argued, not only at page 45
24 but also at page 49, that if the class certification
25 ruling is overturned, they, then, will have Article III

1 standing, for example, because they do have particular
2 injury, you know, the spreading of the costs of their
3 attorneys' fees, incentive payments they -- they might
4 receive.

5 MR. FISHER: Let me -- let me be clear,
6 Mr. Chief Justice. Two things about that.

7 The first is their defense to our mootness
8 argument is predicated on the assumption that their
9 claims spring back to life on remanded; they could
10 themselves spring them back to life. And so if that is
11 the case, we agree they are not moot, but then we go
12 back to our finality argument.

13 But just to be precise about their argument
14 in defense of mootness, they do not propound any
15 cost-spreading or attorneys'-fee-spreading argument,
16 like the one that was made in Roper. They do not make
17 that argument. The only argument they make is an
18 argument that they would have the right to an incentive
19 award if they -- if they prevailed.

20 And there's two problems with that,
21 Mr. Chief Justice. The first is that only prevailing
22 plaintiffs, according to lower courts, get an incentive
23 award. And by definition, if they're in the mootness
24 argument, they will have dismissed their claims and not
25 prevailed.

1 And even then, the idea of an incentive
2 award, which this Court has never endorsed, of course,
3 but does exist in the lower courts, is based on the
4 notion that plaintiffs shoulder the burden of
5 litigation. And here, you're talking about plaintiffs
6 who filed a complaint and now would be out of the case
7 and would show no -- no burden whatsoever. So I don't
8 think that there can be an argument that they would get
9 an incentive award, even if this case were somehow
10 allowed to proceed.

11 JUSTICE KAGAN: Well, do you think that
12 should be something? The -- the lower courts did not
13 address that question. And -- and that question seems,
14 at least in part, dependent on fact, that -- that --
15 that you would think the lower courts might have some
16 better view on than we do.

17 Would that suggest a remand on that
18 question?

19 MR. FISHER: Well, Justice Kagan, if the
20 Court held that the plaintiffs' claims cannot be
21 revived, and so, therefore, the only question is whether
22 there's a mootness problem, we think the law is clear
23 enough -- and the reasons I just described, that it's so
24 clear that they wouldn't be entitled to an incentive
25 award based on individual claims they brought and

1 immediately dismissed, but you could hold that the case
2 is flat-out moot.

3 If there were any doubt about that --

4 JUSTICE KAGAN: There was no discovery here?

5 MR. FISHER: There was no discovery because
6 what we had is motion practice that was based on the
7 earlier case where there were 16 months of discovery in
8 the earlier case. Remember, the -- the lawyers came in
9 with new plaintiffs in this case, and the parties
10 stipulated that, because of the 16-month -- month record
11 that was developed the first time around, we could just
12 go straight to motions practice about whether class
13 certification was --

14 JUSTICE SOTOMAYOR: Mr. Fisher, you've been
15 arguing this in the alternative, but what do you think
16 is the critical fact for you? Is it that they dismissed
17 their claim voluntarily? Is it that they dismissed
18 their claim voluntarily with prejudice? Is it that the
19 case is not moot?

20 What's your best argument and what's your
21 best critical fact that defines the outcome in this
22 case?

23 MR. FISHER: I think the easiest way to
24 decide the case, Justice Sotomayor, is to say when they
25 dismissed their claims with prejudice, their claims were

1 gone forever. And --

2 JUSTICE SOTOMAYOR: Does that mean --

3 MR. FISHER: -- that's been consistent.

4 JUSTICE SOTOMAYOR: -- that there's no -- I
5 mean, I personally don't like absolutes.

6 MR. FISHER: Uh-huh.

7 JUSTICE SOTOMAYOR: And so I haven't been
8 able to imagine a situation in which a case is dismissed
9 with prejudice, but where there may be some issues that
10 should survive.

11 MR. FISHER: Right.

12 JUSTICE SOTOMAYOR: And I don't -- actually
13 haven't done research on this, so I may be answering --
14 asking a question that's already been answered by our
15 case law, but let's assume an attorney sanction,
16 something of that nature.

17 If I don't buy an absolute, how do I
18 articulate it?

19 MR. FISHER: Well --

20 JUSTICE SOTOMAYOR: You dismiss with
21 prejudice all your claims, are all appeals are waived,
22 or all appeals but? How do -- how do we answer that?

23 MR. FISHER: So I think you can answer it in
24 two steps. The first is you can start with the Court's
25 Deakins case, which we cite at the beginning of our

1 mootness section of our brief, which I think says quite
2 clearly that when plaintiffs voluntarily abandon their
3 claims, they cannot be revived.

4 And so then the only question is whether
5 there's an exception to that rule. And I think that
6 there may be an exception for situations where
7 plaintiffs dismiss their claims after a ruling from the
8 trial court that decimates their claims on the merits.
9 And so as the Court put it in the old Thompson case in
10 the 1800s, when all that was left was just to make the
11 appeal more expeditious when the plaintiffs have already
12 lost on the merits, then a voluntary dismissal does not
13 necessarily preclude an appeal.

14 JUSTICE SOTOMAYOR: Isn't that the --

15 JUSTICE KENNEDY: Can you give me an example
16 of -- of what that would -- you have an antitrust case
17 and the court insist that the market be interpreted so
18 narrowly that the case doesn't make much sense, would
19 that work?

20 MR. FISHER: Well, actually, the
21 hypothetical you just said, Justice Kennedy, is quite
22 close to the Thompson case itself, which was an
23 antitrust case. And the Court issued a ruling pretrial
24 that said you're going to have to prove unreasonableness
25 of the restraint of trade. And the plaintiffs said,

1 well, all we can prove is a restraint of trade. And if
2 you're going to tell us we have to prove
3 unreasonableness, we can't do that.

4 JUSTICE KENNEDY: How about --

5 MR. FISHER: And so --

6 JUSTICE KENNEDY: -- evidentiary ruling --
7 an adverse evidentiary ruling under Daubert this expert
8 can't testify?

9 MR. FISHER: By and large, that is --

10 JUSTICE KENNEDY: And it decimates your
11 case.

12 MR. FISHER: Well, if it truly decimated
13 your case, then perhaps, at least according to some of
14 the lower courts, you could take an appeal from a
15 voluntary dismissal. But the garden variety evidentiary
16 ruling would not allow that tactic. And that's the
17 Evans case, which goes all the way back to shortly after
18 the founding where the government itself was at trial
19 and a district judge precluded one of the government's
20 witnesses from testifying. The government then
21 dismissed, tried to take an appeal to this Court, and
22 this Court dismissed the appeal.

23 JUSTICE ALITO: And what you're creating
24 with that is not just -- it's not just a small loophole.
25 What you're creating is an enormous gap, because any

1 interlocutory order could be characterized by the party
2 that loses as something that's critical to the case. So
3 any interlocutory order could then -- could then be
4 appealed.

5 MR. FISHER: Well, Justice Alito, I think
6 you could take an absolutely firm position to preclude
7 that possibility. But I think if you were to approach
8 the case like Justice Sotomayor does and say, can we at
9 least leave open for another day the possibility of a
10 pretrial ruling that truly decimated the merits allowing
11 an appeal, I think you could say that too.

12 JUSTICE ALITO: Well, what -- what --

13 MR. FISHER: If I could add --

14 JUSTICE ALITO: -- would be the definition
15 of a ruling -- well, what is decimate the merits? What
16 does that mean?

17 MR. FISHER: Well, I think that you have
18 effectively already lost on the merits. It's impossible
19 to go forward because of a ruling that goes to the
20 substance of your claims.

21 And I would just hasten to add that whatever
22 the rule might be and whether it's absolute or whether
23 there's an exception, this is the easiest case possible,
24 because the Court has said over and over again that a
25 class-certification ruling has nothing to do with the

1 merits. So that's --

2 JUSTICE BREYER: I don't understand how it
3 normally works, which I'm sure trial judges must face
4 this all the time. The plaintiff has lost a motion. He
5 has nothing left of his case. He says, Judge, I have
6 nothing really left of my case. They can move for
7 summary judgment or -- and let them move for the
8 defendant. You -- I -- it must be weird if the defendant
9 doesn't. I mean, I can't imagine such a case.

10 But if he didn't, I guess the trial court
11 would say, defendant, move for summary judgment.

12 (Laughter.)

13 JUSTICE BREYER: And then if he just refused
14 to, I don't know what would happen. I guess the
15 plaintiff could go and ask for a mandamus of the trial
16 court to insist that they move for summary judgment.
17 The case is over. How does it work.

18 MR. FISHER: Well, I think by and large,
19 Justice Breyer, in your hypothetical, the defendant, of
20 course, would move for summary judgment. Or if the
21 defendant didn't, the district judge might bring the
22 parties in for a conference and say, is there anything
23 left of this case? Should we go ahead? And of course
24 that's going to get worked out in the ordinary course of
25 business.

1 JUSTICE BREYER: It would be the defendant
2 who moves for summary judgment, and then it will be
3 entered in his favor. And then the plaintiff, of
4 course, will have an appeal.

5 MR. FISHER: That's right. And -- and
6 that's --

7 JUSTICE BREYER: I would think that was the
8 normal system.

9 MR. FISHER: Absolutely. And that's what's
10 so different than this case, is that the plaintiffs even
11 now don't claim there's anything wrong with the judgment
12 against them. They asked --

13 CHIEF JUSTICE ROBERTS: Well, but there's a
14 lot --

15 MR. FISHER: -- for the judgment against
16 them.

17 CHIEF JUSTICE ROBERTS: There's a lot left
18 of their case, but just the individual claims, not the
19 class claims; right?

20 MR. FISHER: Well, there are no class
21 claims, Mr. Chief Justice.

22 CHIEF JUSTICE ROBERTS: Right. So what's
23 left of their case are the individual claims.

24 MR. FISHER: Well, they've given up their
25 individual claims.

1 CHIEF JUSTICE ROBERTS: No, I know, but --

2 MR. FISHER: I'm sorry, Your Honor.

3 CHIEF JUSTICE ROBERTS: -- that's like any
4 appeal. When you have an issue -- a claim left and you
5 lose, you appeal. Now, the only thing that's different
6 about this case, of course, is that the -- their loss
7 was -- was entered voluntarily, and I think the critical
8 point you argue, whatever they're appealing, it isn't
9 that they shouldn't have lost.

10 MR. FISHER: Right.

11 CHIEF JUSTICE ROBERTS: But it's not as if
12 there's nothing left of the case. What's left of the
13 case is their -- their individual claims.

14 MR. FISHER: Well, their claims have been
15 given away, remember, Mr. Chief Justice. And I -- maybe
16 if I -- I don't want to miss what you're asking me.

17 JUSTICE GINSBURG: Well --

18 MR. FISHER: But either they have revived --
19 either they've reserved the right to revive their
20 claims, in which case I would agree, their individual
21 claims are still alive, but we don't have a final
22 judgment --

23 CHIEF JUSTICE ROBERTS: No, no. I --

24 MR. FISHER: -- or they've given them away.

25 CHIEF JUSTICE ROBERTS: Their -- their

1 claims are alive prior to their -- their voluntary
2 dismissal.

3 MR. FISHER: That's right.

4 CHIEF JUSTICE ROBERTS: Okay.

5 MR. FISHER: That's right. But when they
6 ask for that voluntarily -- that voluntary dismissal,
7 the district judge gave them exactly what they wanted.
8 And on appeal, they're not claim anything wrong with
9 that dismissal. They're not claiming -- so there's no
10 adversity in the way Justice Breyer --

11 JUSTICE BREYER: Can you explain to me just
12 how does it work in an ordinary case? A class action is
13 special in this respect. I bring a class action.

14 MR. FISHER: Uh-huh.

15 JUSTICE BREYER: The defendant, I say, has
16 told the biggest lie anyone has ever told and it
17 violates 19 statutes. Unfortunately, my client is
18 damaged only to the extent of 10 cents.

19 MR. FISHER: Uh-huh.

20 JUSTICE BREYER: But I'd like to bring a
21 class action. All right? Now it's going to be worth
22 it. And the judge says, no, you can't.

23 MR. FISHER: Uh-huh.

24 JUSTICE BREYER: All right. At that point,
25 what is the plaintiff supposed to do? You think the

1 judge's ruling is wrong? He doesn't want to pursue a
2 claim that's only going to be worth 10 cents, because,
3 of that, he's most likely to get no more than two cents
4 for the lawyer himself.

5 MR. FISHER: Right.

6 JUSTICE BREYER: All right. So -- so what
7 is supposed to happen?

8 MR. FISHER: Well, that's exactly the
9 problem the rules committee considered, Justice Breyer.
10 And what they held is that in that situation, the
11 plaintiffs can go to a court of appeals and ask for a
12 discretionary appeal and say -- they can argue just
13 exactly as you did, that our claim isn't worth it on an
14 individualized basis and for that reason, you should a
15 grant us a right to an interlocutory appeal.

16 If that right, however, is -- I'm sorry. If
17 that request is denied by the court of appeals, then the
18 plaintiffs are in the exact position of the plaintiffs
19 in *Livesay* --

20 JUSTICE GINSBURG: But in -- in --

21 MR. FISHER: -- where the Court unanimously
22 held --

23 JUSTICE GINSBURG: In that -- that position,
24 because this Court rejected the death-knell rule. It
25 may well be a death-knell, but then this Court said no

1 death-knell.

2 MR. FISHER: Exactly, Justice Ginsburg. And
3 the Court rejected it unanimously for many good reasons.
4 Most importantly, it rejected it because of the proper
5 balance between trial courts and courts of appeals. So
6 even if the plaintiffs say we have a death-knell
7 situation and even if it really is, there are very real
8 costs on the judicial system that it would be imposed by
9 a right to automatic appeal.

10 JUSTICE KAGAN: So just --

11 CHIEF JUSTICE ROBERTS: Do you have --

12 JUSTICE KAGAN: -- out of curiosity -- I'm
13 sorry.

14 CHIEF JUSTICE ROBERTS: Do you have any idea
15 what the statistics show about how often appellate
16 courts grant interlocutory appeals under 23(f)?

17 MR. FISHER: Yes. That's in the briefing,
18 Mr. Chief Justice. It's in a couple of footnotes. And
19 it's around 20 -- a little bit over 20 percent. And
20 it --

21 JUSTICE KAGAN: And what criteria did they
22 use?

23 MR. FISHER: Well, they're allowed under the
24 rule to use any criteria they like. One of the
25 leading --

1 JUSTICE KAGAN: But what did they really
2 use? Did they, you know, basically take a peek at the
3 merits? What did they do?

4 MR. FISHER: Yes. They -- they might take a
5 peek under the -- well, you -- if the merits of the
6 class-certification motion, of course. Sometimes a peek
7 under the rug of the merits of the case itself to see
8 whether it's worth their time, as the Ninth Circuit may
9 well have done here.

10 Also, as I was just saying, the plaintiffs
11 can argue that -- that, otherwise, it's the death-knell
12 of their case. And so the exact argument the plaintiffs
13 are making here, the exact problem they're presenting to
14 the Court is what the rules committee said in its notes
15 is a proper basis for a Rule 23(f) appeals.

16 JUSTICE GINSBURG: And we made one change, I
17 think, that would be favorable to the plaintiffs; that
18 is, 1292(b) is double discretion. You have to get
19 permission from the district court and then again from
20 the court of appeals. In 23(f), it's only the court of
21 appeals. You don't need to get permission from the
22 district court.

23 MR. FISHER: That's right, Justice Ginsburg.
24 And so there's actually two things that are important
25 here. One is, yes, plaintiffs are better off in class

1 actions than in ordinary cases for that reason.

2 And on the other hand, the cost to the
3 judicial system of allowing an automatic right to appeal
4 to be manufactured the way they would here are higher in
5 the class action realm. And that's partly because of
6 Rule 23(c), which says that denials of class
7 certification or grants, for that matter, are inherently
8 tentative and even district judge -- district judges can
9 reconsider them.

10 So a plaintiff faced with a genuine
11 death-knell situation, this Court held in Livesay,
12 should go forward. If they believe in their case, they
13 should go forward. The district judge might reconsider
14 his view. The plaintiffs might want to repackage the
15 way they're making their arguments, whether it's the
16 certification of the class or the particular claims
17 they're bringing. If that fails, they should go ahead,
18 maybe motions practice will end the case. But if they
19 believe in their case, the Court held in Livesay the
20 plaintiffs have a remedy to go forward and then take an
21 appeal at that point.

22 CHIEF JUSTICE ROBERTS: Well, but -- but as
23 a practical matter, that's not going to happen, right?
24 I mean, they have just their individual claim. It's --
25 it's worth in Justice Breyer's case 10 cents. And you

1 say, well, you can go forward with the whole litigation
2 that's premised on class allegations and something is
3 involving an enormous amount of discovery like this
4 case. I mean, you know, their point is that you win
5 because the practical reality is they're not going to go
6 forward.

7 MR. FISHER: Well, Mr. Chief Justice, first
8 of all, and maybe a 10-cent hypothetical is rather in
9 the extreme, but the --

10 CHIEF JUSTICE ROBERTS: Given the expense --
11 given the expense of litigation, it can be \$10,000 and
12 it's still not going to be worth it to go forward.

13 MR. FISHER: Well, it might well be for a
14 couple of reasons, Mr. Chief Justice. First of all, it
15 is added as an empirical matter that the 1996 study
16 that's cited in the briefs that led to Rule 23(f) cites
17 multiple instances of plaintiffs going ahead in cases
18 after they've been denied class certification. And so
19 there's a couple of reasons why they might do that; take
20 this case as an example.

21 The State laws under which they're trying to
22 prevail on -- on the merits have fee shifting
23 provisions, and so the Court is quite familiar with
24 scenarios where plaintiffs go ahead with low dollar
25 cases or, indeed, no dollar cases with the prospect of

1 fee shifting ahead. And, you know, that should not be
2 taken lightly. That's something the plaintiffs can use
3 to their advantage.

4 Also, the key is whether the plaintiffs
5 believe in their case, I think. If the plaintiffs
6 believe in their case, I think there's every reason to
7 go ahead. The difficulty is, if the plaintiffs don't so
8 much believe in their case, every incentive is to -- to
9 have litigation go the way this has, which is ten years
10 of fighting about class certification with not a single
11 motion yet on the merits. And that's the difficulty of
12 a situation like this to the judicial system, not just
13 to the cost of appellate courts, of being forced to
14 weigh in on potentially very difficult and complex class
15 certification issues that would otherwise wash out of
16 the case, but also defendants being forced to undergo a
17 tactic that it does not have when the converse is the
18 case. In other words, where there's a grant of class
19 certification, defendants have no way to manufacture an
20 automatic right to appeal.

21 JUSTICE GINSBURG: This is --

22 MR. FISHER: And that was another element --

23 JUSTICE GINSBURG: This is a case where
24 there were two Rule 23(f) motions, both denied, and
25 we're talking about the same court of appeals.

1 Was there any effort when this appeal, the
2 case that's now before us, to -- to get it to the same
3 panel? We had three different panels, didn't we, for
4 the...

5 MR. FISHER: Well, Justice Ginsburg, to be
6 precise, actually there are two different cases, so
7 there was a first case where class certification was
8 denied, and then Rule 23(f) was denied.

9 JUSTICE GINSBURG: And then you have --

10 MR. FISHER: And that case went away --

11 JUSTICE GINSBURG: -- two cases here --

12 MR. FISHER: Right. And then you had the
13 second case, which is the one we have here, and then it
14 went up to Rule 23(f), to the Ninth Circuit, and a
15 motions panel looked at that and denied review. And I
16 think the way the Ninth Circuit procedures work is that
17 motions panels are simply different than case merits
18 panels.

19 Microsoft did ask, upon the filing of the
20 appeal that is before you right now, that if the Ninth
21 Circuit to dismiss the case for lack of jurisdiction at
22 the outset. But what the Ninth Circuit did was scoot it
23 over to our regular panel, and that's how we got to
24 where we are today.

25 JUSTICE ALITO: It is odd that the panel

1 that decided the case, finally decided the case,
2 apparently thought that this -- there was a proper
3 ground for this to go forward as a class -- as a class
4 action, right?

5 MR. FISHER: No. No, Justice Alito --

6 JUSTICE ALITO: Well, they said the class --
7 the class allegations were improperly dismissed.

8 MR. FISHER: Right. So --

9 JUSTICE ALITO: Were they not?

10 MR. FISHER: Let me say two things. One is,
11 to be precise about what the Ninth Circuit panel held,
12 all they held was that the district judge abused his
13 discretion by misreading a Ninth Circuit case concerning
14 whether or not class certification was appropriate.

15 The Ninth Circuit did not consider whether
16 class certification was actually appropriate, or even
17 whether the causation argument that is at the center of
18 Microsoft's objection to class certification was
19 correct.

20 JUSTICE ALITO: Yeah, okay. Well, let me --
21 let me state it more precisely. The panel -- the -- the
22 final decision of the Ninth Circuit was that there had
23 been an error by the district court regarding --

24 MR. FISHER: Right.

25 JUSTICE ALITO: -- class action

1 certification.

2 MR. FISHER: That's correct, and I think it
3 goes to the nature and actually the benefit of
4 Rule 23(f)'s discretionary review system, which is, just
5 to use this Court as an example, it might deny
6 certiorari on a meritorious claim, thinking, though,
7 that the error would be harmless in any event or some
8 other ground. So the Ninth Circuit may well have
9 thought that ultimately, even though the district judge
10 might have misread one of its cases, ultimately class
11 certification is going to be denied anyway. Ultimately
12 the plaintiffs are going to lose on the merits anyway.
13 It's not worth their time.

14 And so what this plaintiff tactic is about
15 doing, again, is foisting onto courts of appeals,
16 appeals that often are actually directly turned down and
17 requiring them to expend significant resources --

18 JUSTICE ALITO: No. That -- I -- I
19 understand all that. But what I'm -- I'm getting at is,
20 if this -- if a 23(f) appeal had been presented to the
21 panel that decided the case that is now before us, can
22 you say that they would have refused to hear the appeal?

23 MR. FISHER: I might be able to say that. I
24 will actually tell you that just by happenstance --

25 JUSTICE ALITO: How would that --

1 MR. FISHER: -- one of the judges who was on
2 the -- one -- one of the judges who was on the motion
3 panel that denied the 23(f) petition was on the merits
4 panel that decided the case in front of you today. So
5 that -- that one judge we know, at least, voted to
6 reject the 23(f) appeal, but was forced into taking this
7 one instead.

8 JUSTICE ALITO: Well, how would that be
9 consistent with the -- the reasoning of the panel that
10 decided the case that's before us?

11 MR. FISHER: Because, remember, go back to
12 the idea why we have discretionary review in the first
13 place, Justice Alito. It's because courts of appeals,
14 even if they're confronted with a situation where the
15 district court might have made an error in an initial
16 ruling on class certification, there's a few things that
17 may cause a court of appeals nevertheless to deny 23(f)
18 appeal.

19 The first is the Ninth Circuit may say to
20 itself, this case is just in its infancy. We'd like
21 some evidence to be entered and some motions practice to
22 take place. Maybe the plaintiffs will reformulate their
23 claims. Maybe the district judge will reconsider for
24 himself his class certification motions. And maybe the
25 district court proceedings will just take care of this.

1 Ninth Circuit may also have thought, look:
2 The claims here, on the merits, look remarkably weak,
3 and so why should we expend our resources answering
4 difficult class certification issues against the
5 backdrop of a case that's going to die out anyways on
6 the merits.

7 And there are any of a number of other
8 reasons. In fact, the rules committee notes go so far
9 as to say just simply docket congestion can be a reason
10 for the court of appeals to say, look: This looks like
11 a run-of-the-mill appeal. We have other -- other more
12 important items in front of us.

13 So the -- the important point here, though,
14 is that the plaintiffs' system would completely upend
15 that regime. The rules committee thought very hard
16 about Rule 23(f), and as I said, and the committee notes
17 considered the exact problem the plaintiffs are
18 propounding to you here, and said the best we can do is
19 discretionary review.

20 Remember, the plaintiffs are actually better
21 off -- and I think this might have been
22 Justice Ginsburg's point -- post-1998, than they were
23 for 20 years after Livesay. Even in the situation that
24 the Court faced in Livesay, it unanimously held that
25 there should be no automatic immediate appeal from

1 denials of class certification. And so even in that
2 circumstance, the Court was quite firm, and I think for
3 some very good reasons.

4 If there are any other questions about what
5 I've said so far, I'm happy to answer them; otherwise,
6 I'll reserve the remainder of my time.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Mr. Stris.

9 ORAL ARGUMENT OF PETER K. STRIS

10 ON BEHALF OF THE RESPONDENTS

11 MR. STRIS: Thank you, Mr. Chief Justice,
12 and may it please the Court:

13 If a district court commits prejudicial
14 nonharmless error, our core position is that a plaintiff
15 can bet her whole case on its reversal. And so I'd like
16 to begin where Justice Kagan began and explain why, as a
17 procedural matter, the parties have been litigating this
18 case as if the claims would spring back to life, and
19 then I'd like to explain why I think that's permitted.

20 So in this case we followed a 20-year-old
21 Ninth Circuit procedure in seeking a conditional
22 dismissal with prejudice, and I -- I think I need to put
23 some meat on the bones here so we kind of understand the
24 procedure.

25 This date -- and it's not unusual for the

1 Ninth Circuit. This dates back to 1995 in a case called
2 Concha that interpreted Rule 41. And I'm going to quote
3 from that case.

4 Here's what the Ninth Circuit said: Quote,
5 "A voluntary dismissal with prejudice permits the
6 appellate court to review the action that caused him to
7 dismiss his case." In Concha it was the denial of a
8 remand motion.

9 If the plaintiff prevails on appeal and the
10 district court ruling is reversed, then the claim is
11 remanded to the district court for further proceedings.

12 So it's not a surprise that most of my
13 friend Mr. Fisher's brief is kind of under the
14 supposition that the claims would spring back to life,
15 because that's what everyone assumed in -- in the lower
16 court. We followed that procedure and --

17 JUSTICE GINSBURG: For some reason, that
18 wasn't a class action.

19 MR. STRIS: That -- that was not a class
20 action --

21 JUSTICE GINSBURG: So -- but here you
22 have -- you -- you have the individual claim. You may
23 say it's not worth a candle, but you -- you have the
24 individual claim, and that's what you have relinquished
25 in -- in order to take your appeal.

1 MR. STRIS: So I don't agree with that
2 characterization, Justice Ginsburg. I'm going to answer
3 it directly, but what I was saying a moment ago was just
4 to explain that procedurally, what we attempted to do
5 was conditionally dismiss so that everything would
6 spring back to life.

7 Now, I -- I would like to answer your
8 question --

9 JUSTICE KAGAN: Just before the --

10 MR. STRIS: Yeah.

11 JUSTICE KAGAN: So there -- there is this
12 one case that suggested that that is what would happen.
13 I mean, is this a procedure that's used in the Ninth
14 Circuit? What is it used for? Why did people think
15 that this was the governing law?

16 MR. STRIS: So, yes, it's not one case. If
17 you look at pages I think 3 to 4 of our appellate brief
18 in the Ninth Circuit, we cite many cases where this
19 happened in the Ninth Circuit. And, in fact, I -- I see
20 the look of surprise on your face, but this is the
21 procedure in many circuits.

22 JUSTICE BREYER: You didn't do that.
23 You said -- you said you -- a piece of paper I have
24 here, whether it's a little technical, but it says this
25 action you moved and would be granted, should be

1 dismissed with prejudice.

2 Then in the next paragraph you say you
3 intend to appeal. Is that a reservation?

4 MR. STRIS: It is, and let me explain.

5 JUSTICE BREYER: How do I know that it's a
6 reservation? There's a lot of case law that says you
7 can't just express a future intent, and we're being
8 technical. It says you have to make a conditional
9 dismissal. We dismiss under the condition that we
10 are -- you know, that we're going to appeal.

11 MR. STRIS: I understand, Justice Breyer.
12 I'm going to explain why it is a conditional dismissal,
13 and I definitely will get back to your question,
14 Justice Ginsburg, about why I think this is permitted in
15 the class action context.

16 So here's why, Justice Breyer. There's
17 long -- there's a long line of cases from the Ninth
18 Circuit about how you enter a conditional dismissal.
19 You have to make clear that there's no settlement.
20 That's a requirement in the Ninth Circuit. We did that
21 in paragraph 6. It's on page 36A of the Petition
22 Appendix. And then you have to make clear that after
23 final judgment, you intend to appeal a prior adverse
24 order. We did that in paragraph 4. This is Petition
25 Appendix 36A.

1 And so you don't have to take my word for
2 it. If you look at appellate brief in the Ninth Circuit
3 pages 3 to 4 where we explain what we were doing that
4 the Ninth Circuit accepted, and we cite a number of
5 cases where this is used, we followed the procedure in
6 the Ninth Circuit for doing a conditional --

7 JUSTICE SOTOMAYOR: There isn't --

8 MR. STRIS: -- dismissal with prejudice.

9 JUSTICE SOTOMAYOR: -- there isn't --

10 CHIEF JUSTICE ROBERTS: Maybe now is the
11 time for you to answer Justice Ginsburg's question.

12 (Laughter.)

13 MR. STRIS: I -- I -- I would -- I would
14 love to.

15 So the reason why I think this is permitted
16 in -- in the class action context is because there's two
17 things you need to do in -- in order to have your claim
18 spring back to life. One, you have to condition your
19 dismissal, but that is to avoid a waiver argument. And
20 then secondly, you have to show prejudicial error. And
21 let me explain why that applies here.

22 So what -- our theory is that what we have
23 are individual claims that we're entitled to litigate on
24 a class basis -- of course, if we satisfy Rule 23. And
25 so our theory is that when the class allegations were

1 stricken, we were deprived of that substantial right.

2 JUSTICE GINSBURG: Let me ask you, because
3 you mentioned Rule 23. The rule makers went through a
4 lot of work to figure out what to do with an
5 interlocutory ruling on class action status. And it
6 came up with 23(f). And this device seems to be just a
7 way to get around 23(f).

8 And -- and on your theory, would you at
9 least, before you go to this voluntary dismissal, have
10 to try the 23(f) route?

11 MR. STRIS: I -- so I think every
12 plaintiffs' lawyer certainly would, and it goes to the
13 core of why --

14 JUSTICE GINSBURG: But would you have to on
15 your theory?

16 MR. STRIS: I don't -- you would not have
17 to, but let me tell you why plaintiffs' lawyers would,
18 and -- because it points up why at why this is not an
19 end run around Rule 23.

20 So there's nothing in the balance struck by
21 Rule 23(f) that suggests, we submit, any intent to
22 either penalize or prevent plaintiffs from obtaining a
23 final judgment by betting their case. And if you look
24 at the Advisory Committee notes -- we cite this in our
25 brief -- there -- there was a circuit split at the time

1 as to whether or not this procedure was appropriate.
2 The Advisory Committee was aware of that. They -- they
3 cited the Second Circuit case from 1990 that permitted
4 this.

5 So Microsoft's position, in essence, is that
6 Rule 23(f) rewrote the definition of finality without
7 mentioning it. Now --

8 JUSTICE GINSBURG: But they could have. If
9 the rule makers wanted to have these class action
10 decisions go up on appeal as of right, they could have
11 made it, or asked Congress to make it, one of the
12 interlocutory orders that is immediately appealable,
13 like a preliminary injunction.

14 MR. STRIS: Certainly. But then the -- the
15 plaintiff would have been risking nothing. In other
16 words, to go so far as to say you have an appeal of
17 right and -- and your case continues is different than
18 what happened here.

19 Let me use Livesay as an example. I think
20 it kind of points up at the point. So in Livesay,
21 Cecil Livesay -- this -- this is at page 106 of the
22 Joint Appendix in Livesay. Cecil Livesay told the
23 Eighth Circuit that even if his certification was
24 denied, he was going to continue litigating his
25 individual claim.

1 Page 16 of the Joint Appendix in Livesay,
2 Cecil Livesay continued litigating his individual claim,
3 even after it was decertified. And as a result, that
4 case continued and it was actually settled for
5 \$1.3 million, even after the Livesays lost in this
6 Court. That's the critical difference between an
7 interlocutory mechanism and a voluntary conditional
8 dismissal.

9 If you engage in a voluntarily conditional
10 dismissal --

11 JUSTICE GINSBURG: But -- did -- did it go
12 back when it went back? Was it litigated as a class
13 action?

14 MR. STRIS: Well, it couldn't be because --

15 JUSTICE GINSBURG: Yes.

16 MR. STRIS: -- but -- but they settled as a
17 class action. And -- and that points up at the nature
18 of a true interlocutory appeal. A true interlocutory
19 appeal is not like a conditional dismissal.

20 JUSTICE GINSBURG: But you have just said, I
21 take it, that, yes, it's the plaintiff's choice. The
22 plaintiff can ignore 23(f) and say I'm going to get
23 myself in a position where I have an appeal of right and
24 not -- and not invoke through discretion of the court of
25 appeals. So for any time that a corporation -- that a

1 class action is brought against a corporation, 23(f) is
2 out the window.

3 MR. STRIS: Let me try to answer, I think I
4 can give, hopefully, a more satisfactory answer in the
5 following way.

6 Even though 23(f) exists, a plaintiff could
7 choose, after a class allegation is stricken, to
8 litigate their individual claims to final judgment and
9 then appeal. There's nothing in Rule 23(f) that -- in
10 fact, that's what Microsoft suggests you should do. So
11 there's nothing in Rule 23(f) to suggest that -- that
12 because it was an escape hatch, if you were, that it
13 intended to lock the front door. So the --

14 JUSTICE GINSBURG: They -- well, of course.
15 23(f) is about a class action. It's not about an
16 individual action.

17 MR. STRIS: No, no, no. I -- perhaps I
18 miscommunicated. What I'm saying is, if you have a
19 class that is not certified and you think that's wrong,
20 if you eventually litigate the case on the -- on the
21 merits through a trial and you win, you can appeal from
22 that final judgment, and the fact that you could have
23 taken an interlocutory appeal earlier under 23(f)
24 doesn't change that. If you tried to take interlocutory
25 appeal earlier under 23(f), it --

1 JUSTICE GINSBURG: But the --

2 MR. STRIS: -- doesn't change that.

3 JUSTICE GINSBURG: -- but any final
4 judgment, when it's all over, you can bring up
5 everything.

6 MR. STRIS: Right. And our -- our
7 principle, our theory of this case, is that any final
8 judgment means that the case is over and there's nothing
9 left for the district court to do. This is a final
10 judgment. It may be manufactured, but a manufactured
11 final judgment doesn't mean that the case isn't final.
12 It doesn't --

13 JUSTICE KAGAN: Could --

14 MR. STRIS: Underline --

15 JUSTICE KAGAN: Could I take you back,
16 sorry, just to this sort of nonreservation reservation
17 point. You said there were two things that you did that
18 fit with the Ninth Circuit's procedure. You said it
19 wasn't settled, and you said that you were going to
20 appeal; is that right?

21 MR. STRIS: We said we were going to appeal
22 a prior adverse order.

23 JUSTICE KAGAN: Right. So where -- where
24 did those requirements come from? You know, if I looked
25 at what cases would I find that that's what you have to

1 do in order to prejudice -- in order to dismiss
2 something with prejudice in such a way that it springs
3 back to life if you win the appeal?

4 MR. STRIS: So the cases -- the cases you
5 find on pages 2 to 3 or 3 to 4 of our Ninth Circuit
6 brief. Concha is the leading case. There's other Ninth
7 Circuit cases. I think Olmstead is one of them. It
8 cites a First Circuit case called Johns, I think.

9 JUSTICE BREYER: Yeah, but the problem is --
10 and it is a problem for you -- that there are other
11 circuits. And other circuits have a different rule. I
12 mean, my law clerk has one here. I guess she got it out
13 of the brief.

14 It says, "A settlement" -- let's see. Where
15 are we here? It's wright. It's called Wright. It's
16 from the Eight Circuit, or Fifth, I don't know. It
17 says, "An expression of intent is not a reservation of a
18 right to appeal."

19 So you're in a dilemma. If you say I
20 condition my dismissal upon my later appealing, you run
21 into the case, which happens to be our case rather than
22 the Ninth Circuit's called Lybrand, which says then the
23 judgment isn't final. But if you don't reserve
24 something, you're in the box you're in right now and the
25 case is over. And so you think of this thing called

1 "intent," which is perhaps an unknown creature before
2 you thought of it. I don't know.

3 And then you say, aha. We're not really
4 conditionally dismissing, so we're not out for that
5 reason, but we all are reserving an intent, and
6 therefore, we get to say that it's final and can appeal
7 the issue. The Rules Committee, having worried about
8 yours and similar problems, says here's what we'll do
9 for you. We'll give you that (f) interlocutory appeal.

10 Now, why should I not think about the case
11 just that way?

12 MR. STRIS: So I -- I think even if you do
13 think about the case that way, we're right, Justice
14 Breyer, and -- and here's why. You certainly need to
15 dismiss with conditional prejudice. If you think that
16 did not happen here, then I think the case comes to you
17 on those terms. The Ninth Circuit thought that.

18 But if you dismiss with conditional
19 prejudice, what you said is that this runs square up
20 against Livesay. That's where I disagree with you. And
21 the reason I disagree with you is Livesay was a true
22 interlocutory appeal. It was an ongoing case. And that
23 is not a formalistic distinction with no practical
24 significance. That's the whole enchilada in my view,
25 and here's why:

1 In an ongoing case, we -- we know that
2 Justice Stevens and the Court in Livesay didn't think
3 that people didn't have the right to continue, because
4 if they did, why would the various circuits have
5 developed these unbelievably complicated and difficult
6 tests where they were doing evidentiary hearings in the
7 district court and then reviewing it on appeal?

8 In an interlocutory posture, the core
9 problem with the death-knell doctrine was that it was
10 unworkable. Of course it undermined the final judgment
11 rule. But if you have a true final judgment, whether
12 it's manufactured or not, and this goes back to your
13 question, Justice Ginsburg. I -- I feel like I haven't
14 really, you know, vigorously advocated my position on
15 this.

16 I really believe that Rule 23(f) says
17 nothing on this question because it was changing things.
18 It was giving people options, but they were
19 interlocutory options. They were options where the
20 presumption was not that the case would be stayed. The
21 presumption was not that if you lost, you couldn't
22 continue litigating your individual claim. And -- and
23 the -- the response of my friend, Mr. Fisher, in the
24 briefs is: Oh, well. That argument is too cute by
25 half. Because in reality, in the death-knell setting,

1 people weren't doing that.

2 JUSTICE SOTOMAYOR: Counsel, what is the
3 circuit split on this?

4 MR. STRIS: On which issue?

5 JUSTICE SOTOMAYOR: On this very issue of
6 these conditional appeals. I'll call them without
7 consent. Because in the criminal area, I'm aware that
8 the government and the defendant can agree to -- to
9 reserve an appeal on a search issue, for example.

10 MR. STRIS: Yes.

11 JUSTICE SOTOMAYOR: But if there's no
12 agreement, then you plead guilty; you've waived. There
13 seems to be a separate procedure that you're describing.
14 What's the circuit split?

15 MR. STRIS: So I'll -- I'll -- I'm going to
16 answer that and I want to say three things.

17 The first is there's actually a series of
18 circuit splits. There's a circuit split on whether this
19 can be done in the multiclaim context where the Second
20 Circuit and Federal Circuit say you can. They say
21 they -- they embrace the same theory. And they say if
22 you have a core claim that you really -- it's your
23 primary claim and it's dismissed a 12(b)(6) summary
24 judgment, but your peripheral claim exists -- persists,
25 every circuit would say you could dismiss that without

1 prejudice forever and take your appeal. But the Second
2 Circuit and the Federal Circuit say you can dismiss the
3 peripheral claim with conditional prejudice.

4 JUSTICE ALITO: Well, that's a different
5 question. But -- and you've spoken a lot about Ninth
6 Circuit precedent.

7 But what is your best support in any case
8 from this Court for the proposition that a voluntary
9 conditional dismissal with prejudice is a final
10 decision?

11 MR. STRIS: In -- in Procter & Gamble, Your
12 Honor. And in Procter & Gamble, you have a discovery
13 order saying that the United States had to turn over a
14 grand jury transcript. If you read the briefing, if you
15 look at the oral argument, the parties conceded it had
16 no effect on the -- the -- the plaintiff's case, the
17 government's case. It was a purely --

18 JUSTICE GINSBURG: But that had everything
19 to do with the merits because the argument was secrecy.
20 If the government's position was, well, if we turn over
21 the transcript, we've -- we've lost, the whole thing is
22 about the government secrecy plea. So they were seeking
23 essentially to review a merits ruling that is rejecting
24 the secrecy plea.

25 MR. STRIS: Well, I don't think I agree,

1 Justice Ginsburg. It was an antitrust case where the
2 government had antitrust claims against the soap
3 companies. And --

4 JUSTICE GINSBURG: But they were ordered
5 to -- the government was ordered to turn over a grand
6 jury transcript; right?

7 MR. STRIS: That's correct. And the reason
8 this is important and it answers Justice Alito's
9 question is, the government -- that was a collateral
10 order that the government felt strongly that they
11 shouldn't have to obey. The -- the -- the Court did not
12 order them under Rule 37 to turn it over or we're going
13 to terminate the case.

14 The government, Justice Alito, went to the
15 Court and said: When you decide what sanction you
16 want -- because it was likely, as Procter & Gamble
17 pointed out, that they just would have imposed an
18 evidentiary sanction or an adverse-inference sanction.
19 The government said: Please don't do that. Please
20 impose a terminating sanction so we can appeal what
21 would otherwise be an interlocutory ruling.

22 JUSTICE ALITO: Well, it's one thing when a
23 party who suffered a very serious adverse ruling on an
24 interlocutory order says: Okay, we give up; go ahead
25 and enter judgment for the other side. That's one

1 thing.

2 It's quite another thing, possibly, when the
3 party that has suffered this ruling moves for a
4 voluntary dismissal. An order cannot be final unless it
5 defeats every thing that you asked for. So any
6 possibility that you would get attorney's fees or an
7 incentive award or anything else, if that -- if you are
8 keeping that still on the table, if that is still on the
9 table, then the order isn't final --

10 MR. STRIS: Well, I --

11 JUSTICE ALITO: -- I would say. And the
12 only basis for rejecting everything that you might
13 possibly get was your request -- if you read the order
14 that way, was your request that it be -- that it be
15 rejected with prejudice.

16 MR. STRIS: But -- but that's precisely what
17 happened in Procter & Gamble and that's precisely the
18 argument that Procter & Gamble made. The United States,
19 Justice Alito --

20 JUSTICE ALITO: Well, tell me what's wrong
21 with that as a matter of first principles.

22 MR. STRIS: Well, what's wrong with our
23 position, or with rejecting our position?

24 JUSTICE ALITO: No. With what I just said.

25 MR. STRIS: I think what's wrong with that

1 is it runs square up against what the long-standing
2 definition of finality has always been. This Court has
3 never held, Justice Alito, that a technical final
4 judgment for practical considerations is not final. In
5 fact, this Court has repeatedly said, and I quote, "a
6 final judgment always is a final decision."

7 And that's true because that -- the point of
8 the final judgment rule is that if there's nothing left
9 for the district court to do, you can take an appeal.
10 The -- the mere possibility of appellate reversal has no
11 bearing on whether a case is final or not; otherwise, no
12 judgment would ever be final.

13 CHIEF JUSTICE ROBERTS: No, no, no. But
14 you're -- you're -- the reversal that you're looking for
15 does not go to the merits of the judgment that you
16 voluntarily agreed to have entered against you. It's --
17 that's what raises the Article III question. Nothing
18 that you're arguing on appeal is going to change the
19 fact that you lose.

20 MR. STRIS: So I was answering a finality
21 question, and I'd like to -- I'd like to explain it and
22 then pivot back to that.

23 What I'm saying is as a matter of whether
24 this satisfies Rule 1291, the -- the fact that things
25 could spring back to life if we win on appeal is

1 irrelevant, because any judgment could spring back to
2 life if you win on appeal. Appellate reversal is not
3 relevant to the question of finality.

4 Now, you've asked a slightly different
5 question, I would submit, Mr. Chief Justice, which is:
6 Well, don't we have an adverseness problem under
7 Article III? And I think the answer there is no as
8 well. Over a hundred years ago in Ketchum, that we cite
9 this on page 29 of the red brief, the Court made clear
10 that consent -- and that was a case involving literally
11 a settlement -- doesn't undermine jurisdiction. It
12 presents a merit question of waiver.

13 Let me read you what --

14 CHIEF JUSTICE ROBERTS: Well, it's not --
15 it's not simply the fact that you consented. It is that
16 the arguments you're making do not go -- they're not a
17 reason why you should win, because you've already had
18 judgment entered against you. It's one thing -- it's
19 like a normal appeal, if you've got a judgment entered
20 against you and you have arguments why it shouldn't have
21 been. But you told the district court to enter a
22 judgment against you, so you can't argue that it
23 shouldn't have done that.

24 MR. STRIS: So I guess there's a few things
25 going on there. The reason I disagree is I think that

1 there's a question of jurisdiction, a question of
2 waiver, and then a question of appellate procedure.

3 JUSTICE GINSBURG: What about Procter &
4 Gamble, which you -- you've cited a number of times in
5 this argument? But I thought that that decision said a
6 plaintiff who voluntarily dismisses a complaint may not
7 appeal that decision.

8 MR. STRIS: Oh, no, no. So there's a long
9 line of cases that say a voluntary nonsuit, which is a
10 dismissal without prejudice, can appeal. And that's
11 obviously right, because the plaintiff could refile that
12 case at any time.

13 JUSTICE KENNEDY: But in Procter & Gamble,
14 the Court was very careful to say when the government
15 proposed dismissal for failure to obey, it had lost on
16 the merits.

17 MR. STRIS: And what --

18 JUSTICE KENNEDY: That is not your case.

19 MR. STRIS: Oh, it most certainly is,
20 because what the Court meant there was had lost on the
21 merits of the discovery ruling. If you read it in
22 context, both parties agree -- you can look at the
23 briefing; you can look at the oral argument -- both
24 sides concede that the discovery ruling saying you have
25 to turn over the grand jury transcript did not touch on

1 the claim at all. It did not make it so the government
2 couldn't win. It didn't impair the claim.

3 So back to your question, Mr. Chief Justice.
4 The three levels of analysis. For appellate
5 jurisdiction, there has to be finality and adverseness.
6 I actually think those are easy questions for us.
7 There's nothing left for the district court to do. The
8 fact that -- that it could have something to do if
9 there's an appeal has never made a judgment nonfinal.

10 On adverseness, we didn't consent to this.
11 We -- we -- we asked for a voluntary dismissal, but we
12 did it with a condition. It's exactly the same as
13 Procter & Gamble. When the Court analyzed the waiver
14 question, they said: Well, you may have consented to
15 the dismissal, but you did it so you could appeal the
16 prior adverse ruling.

17 And in oral arguments, there's an exchange
18 between Abe Fortas, who represented Procter & Gamble,
19 and Justice Frankfurter, where it's clear that that was
20 a waiver case. And what Justice Frankfurter said was:
21 Well, they may have consented to having the case
22 dismissed, but --

23 JUSTICE BREYER: Is there anything terrible
24 that would happen if, say, the precedent leaves this
25 open, and looking to try to simplify procedure, we'd

1 say: If we take the other side, we leave to people in
2 your position. Ask the Court of appeals for permission
3 under F.

4 Now, sometimes they'll wrongfully deny it.
5 Well, if they wrongly deny it, here's what you do. Go
6 litigate your case and lose, or give up and then appeal
7 that final judgment for them.

8 Now, there could be a few cases where that
9 won't work either. But they're likely to be so few and
10 far between that the simplicity of that and people
11 knowing what to do is better than having 14 different
12 cases in conflict in the different circuits and trying
13 to figure out what we're trying to figure out now.

14 What's the answer to what I've just said?

15 MR. STRIS: The answer, Justice Breyer, is I
16 think a number of terrible things happen. The first one
17 is you restrict the ability of parties to do this
18 bilaterally, which happens much more often than
19 unilaterally. We went and did research and tried to see
20 how often this procedure was used, and it was
21 interesting. It -- it's used several times a year for
22 the -- since Rule 23(f) had been passed, but in many of
23 those cases, the parties agree, and I'll tell you why.
24 Because after class certification is denied, the
25 plaintiff decides that she does want to -- she is

1 willing to continue litigating her individual claims.
2 She'd prefer to take an appeal, but she can't get one
3 under 23(f) so she's okay, I'm going to keep litigating,
4 and the defendants realize this plaintiff is going to
5 keep litigating. And you know what? It doesn't make
6 any sense, as you said earlier, to litigate a 10-cent
7 claim, or as you said, Mr. Chief Justice, even a \$10,000
8 claim. So let's agree that this claim can be dismissed
9 with conditional prejudice and then we'll go up on the
10 issue of class certification, which is really what this
11 case about anyway.

12 Under Microsoft's rule, it's not simple,
13 because it's a jurisdictional matter and that would be
14 prohibited. That's number one.

15 JUSTICE GINSBURG: Suppose we have a case
16 before the district court and the only issue, disputed
17 issue, is a pure question of law and the plaintiff says,
18 I don't want to bother with asking a district judge to
19 resolve this question of law. Judge, enter a voluntary
20 dismissal of my complaint. So the tribunal that will
21 determine the question of law is the three-judge panel
22 on the court of appeals and it skipped over the district
23 court. Your -- your theory would -- would cover that.

24 MR. STRIS: Oh, certainly not. Certainly
25 not. The -- the -- the practical backstop is 28 U.S.C.

1 2111. There's a reason why this has not been used by
2 plaintiffs frequently, and it won't. Because you have
3 to show prejudicial error. It doesn't matter -- your
4 example is an extreme one. Of course you couldn't do
5 that. But in even more run-of-the-mill examples, an
6 evidentiary ruling, a discovery ruling, you wouldn't get
7 reversal.

8 But I really want to go back to your
9 question, Justice Breyer, because at the end of the day,
10 if there's not some serious practical downside, I
11 understand the allure of basically saying you shouldn't
12 be able to manufacture finality. There are very serious
13 downsides and reasons to stick with the long settled
14 definition of the term. There's the bilateral issue
15 that I mentioned.

16 There's also the reality of what will happen
17 in class cases, and here's what I mean. Under our rule,
18 if you lose the appeal, if we lose the appeal, the case
19 is over. If we win the appeal, the stakes are better
20 known. If you reject our rule, if you say that the
21 circuits that have said this is impermissible,
22 particularly as a jurisdictional matter or right, here's
23 what's going to happen. You're going to have small
24 dollar value individual claims that are abandoned
25 without regard to merit. This case is a perfect

1 example.

2 You heard my friend Mr. Fisher. One of the
3 judges that was on the 23(f) panel was also on the
4 merits panel. Microsoft responded to our 23(f) petition
5 by saying there's no death-knell here. This isn't a --
6 a case where the plaintiffs are going to stop
7 litigating. There's five plaintiffs' firms, that's
8 probably why 23(f) was denied, and so the upshot is that
9 many small dollar claims will be abandoned.

10 Now, all large claims will be litigated, but
11 that's not good either because they'll be litigated
12 without knowing the stakes, and if some of them actually
13 go to trial, we're going to have piecemeal trials.

14 I would actually suggest that rejecting the
15 rule of the Ninth Circuit here is more inconsistent
16 with this -- the --

17 JUSTICE GINSBURG: May I ask you something
18 --

19 MR. STRIS: -- on their final judgment rule.

20 JUSTICE GINSBURG: -- before your time is
21 out about the mechanics of this.

22 So the Ninth Circuit didn't say you were
23 entitled to a class action. They said district --
24 district court, you made this mistake, now you decide
25 the question. District court decides again, no class

1 action. Then you can do this again, right?

2 MR. STRIS: I -- I --

3 JUSTICE GINSBURG: It's over 23(f) and go
4 right back --

5 MR. STRIS: So that's true as a -- as a
6 jurisdictional matter, but not really and here's why.
7 The idea that a -- an issue can come up multiple times
8 on appeal, whether it's certification or not, that's an
9 incident of a district court not deciding -- deciding an
10 issue on fewer than all of the grounds that are
11 possible. That can happen after a trial. That could
12 happen at any point.

13 The -- the -- when we talk about piecemeal
14 appeals, what we're worried about is, is there an issue
15 that would have been mooted or revisited later in the
16 litigation. I would submit that precisely that is what
17 doesn't happen in the 23(b)(3) class context --

18 JUSTICE SOTOMAYOR: Where in the briefs can
19 I find the three splits that you didn't get to? You
20 talked about the Second and the Federal Circuit. Where
21 in the brief can I go for the other two?

22 MR. STRIS: So I don't think that the splits
23 are addressed in -- in the brief. I took your question
24 to mean this principle of conditional dismissal --

25 JUSTICE SOTOMAYOR: Yes.

1 MR. STRIS. -- are there splits. I -- I --
2 we didn't have occasion to -- to brief it because we
3 were kind of addressing the direct question before the
4 Court. But I -- I think if you look at -- if you look
5 at Gabelli, if you look at Purdy, if you look at Gary
6 Plastic, that sort of the line of Second Circuit cases,
7 you'll -- you'll see the -- the strong difference of
8 opinion between the various courts.

9 Also, if you look at, I think it's footnote
10 7 of our brief, the one that refers to rulemaking, it
11 traces the history. The -- this is an issue, this issue
12 is not new. For -- for seven or eight years the rule
13 makers debated as a policy matter which side of this
14 debate was right, and they couldn't come to agreement.
15 And there's six memos, Your Honor, that are cited there
16 that the reporter of the appellate Advisory Committee
17 wrote and it chronicles the circuit splits -- I know
18 this is a very exciting topic to me, but --

19 (Laughter.)

20 MR. STRIS: -- it chronicles the circuit's
21 splits in a -- in a lot of detail, and -- and you can
22 see the policy arguments on both sides.

23 So I -- I suppose in conclusion, if I could
24 leave you with anything, it would be this: This
25 particular issue about conditional prejudice dismissals

1 and its implications not just in the class setting
2 but -- but writ large, is very complicated. And, again,
3 you can look at the -- the debate and the transfer of
4 the rules committee. It has significant implications.

5 At -- at the end of the day, although it may
6 feel counterintuitive, our view is that the policy
7 debate is -- the -- the status quo is on our side. And
8 what I mean by that is we have a technical final
9 judgment. The -- the core of Microsoft's position is
10 that practical considerations, policy arguments, I don't
11 agree with them. I'm on the other side, people who
12 think this is a good practice, but if you believe that
13 this isn't right for policy reasons, just as this Court
14 has expressed in the reverse situation, when you have a
15 nontechnical final judgment, but you're thinking about
16 using practical considerations to make it final through
17 the collateral order doctrine, et cetera, that that
18 should be done through rulemaking. We submit that this
19 sort of change in the other direction should be done
20 through rulemaking. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Fisher, six minutes.

23 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

24 ON BEHALF OF THE PETITIONER

25 MR. FISHER: Thank you. I'd like to make

1 four points.

2 First, to address the 23(f) rule and the
3 rulemaking that led to it, I'd like to say a couple of
4 things. First, my friend says that the committee that
5 adopted Rule 23(f) was aware of the circuit split and
6 some courts having allowed this procedure they'd like to
7 go forward with, and that's a rather remarkable
8 statement.

9 What you find if you look at that footnote
10 where that case is cited is you find the committee's
11 report saying that automatic appeals are not allowed in
12 citing Livesay, and there was a "but see" to the one
13 stray case that had gone the other way. And the reason
14 why the committee thought it was in the teeth of Livesay
15 was, of course, because Livesay held that denials of
16 class certification are inherently interlocutory, and
17 that -- imagine the plaintiff themselves talked a lot
18 about how Livesay itself played out. Imagine if the
19 plaintiff themselves in Livesay had gone back to
20 district court and said, now that we know from the
21 Supreme Court we're not allowed to take interlocutory
22 appeal, what we'd like to do is dismiss our claims with
23 the reservation of rights of going forward on them if we
24 prevail in the court of appeals, because otherwise it's
25 the death-knell of our case. The district judge would

1 have said that that's just the same thing. And, of
2 course, the district judge would have been right and
3 that's exactly what the rules committee thought, and
4 I'll just read --

5 JUSTICE SOTOMAYOR: But that's not quite --
6 that's not quite right. You deny 23(f) and there's a
7 choice -- or no choice. You have to --

8 MR. FISHER: Yeah.

9 JUSTICE SOTOMAYOR: -- you can go ahead with
10 your individual claim. They are betting their case.

11 MR. FISHER: All right. So --

12 JUSTICE SOTOMAYOR: If they dismiss the case
13 and they don't win on the procedural issue, that's the
14 end of the case. You --

15 MR. FISHER: But two responses, Justice
16 Sotomayor. I'm sorry to interrupt.

17 Two responses. First, remember the
18 plaintiff in *Livesay*, under the death-knell doctrine,
19 can take an appeal only if they represented and
20 persuaded the district court that otherwise their case
21 was over. So in practical terms, it's precisely the
22 same thing. And that's what the rules committee
23 thought. And I'll just read you one sentence from the
24 committee notes. They say: An order denying
25 certification may confront the plaintiff with a

1 situation in which the only sure path to appellate
2 review is to by -- proceeding to final judgment on the
3 merits of that individual's claim and then taking an
4 appeal.

5 So the rules committee considered this exact
6 question and thought the only way to get an appeal for
7 sure was to litigate the case ahead. And my friend said
8 --

9 JUSTICE SOTOMAYOR: So how do you --

10 MR. FISHER: -- this is really --

11 JUSTICE SOTOMAYOR: How do you account for
12 the circuit split?

13 MR. FISHER: Well --

14 JUSTICE SOTOMAYOR: So what -- what -- it
15 appears, and I've not studied this part of the issue
16 carefully, but that there's a lot of circuits permitting
17 these conditional appeals.

18 MR. FISHER: Well, Justice Sotomayor, I
19 think there's two levels to that question you're asking
20 me. The first is, on the exact question here as to
21 class certification decisions, there's an old Second
22 Circuit decision which has been called into doubt many
23 times and never had anything done with it.

24 And then the only other thing you have on my
25 friend's side is the Ninth Circuit case that immediately

1 preceded ours that brought this issue up to you. So
2 until the Ninth Circuit allowed this a of couple years
3 ago, no court was allowing it in the class certification
4 realm.

5 And the important thing to understand about
6 the other split, which he calls the bigger split of
7 taking it outside the class action, is all of those
8 cases are predicated on the notion that the plaintiff's
9 claim has been destroyed on the merits. And that's
10 where the Ninth Circuit made a wrong turn here.

11 Even if you accept that, as I think you were
12 calling, Justice Sotomayor, a more flexible rule, this
13 case cannot possibly satisfy it, because what the Ninth
14 Circuit missed is a denial of class certification has
15 zero to do with the merits. And this Court has said
16 that over and over and over again.

17 And so the phrase my friend used that he
18 would like to have is something that just doesn't exist:
19 A right to appeal, reserving the right on a procedural
20 claim that has nothing to do with the correctness of the
21 judgment below. The only counterpart that exists in the
22 law to that is Criminal Rule 11. And there's no
23 civil -- there's no civil counterpart.

24 And so when these are complicated questions,
25 as my friend says they are, and perhaps in some ways, I

1 don't think on the facts of this case it is, but there
2 are difficult questions about appealability and the
3 like. What the Court has said time again in Swint and
4 Mohawk, most recently, and going back further in Amcam
5 in the class action context, is the Rules Committee is
6 the place to resolve those questions. And the Rules
7 Committee carefully considered this question and came up
8 with a solution that we simply ask the Court to be
9 faithful to today.

10 So two other points, if I have time. First
11 of all, my friend talked a lot about Ninth Circuit
12 procedure and Ninth Circuit case law. But the only case
13 law from this Court that's relevant is the Deakins case,
14 which holds that if you dismiss a case voluntarily, it
15 does not spring back to life, that is, of course, unless
16 there's a problem with the entry of judgment that you
17 prove is lack of the ordinary appeal. But otherwise, it
18 does not spring back to life.

19 And that leaves him with Procter & Gamble.
20 And I think the Court is exactly right that the
21 government argued Procter & Gamble on the premise, and
22 the Court accepted the premise that the earlier order in
23 that case had caused the government to, quote, "lose on
24 the merits." And the government did not reserve a right
25 to revive its claims or anything like that, because that

1 was not the argument the government made.

2 And so as my friend describes Procter &
3 Gamble, he might have made an argument like that might
4 have been Procter & Gamble's argument, but that was not
5 the argument that this Court accepted and the government
6 made. They are trying to make a very different argument
7 than the Court accepted in Procter & Gamble.

8 And if you have any doubt about that, look
9 at the cases on which Procter & Gamble is based. The
10 Thompson case, on the one hand, and what the Court
11 called the familiar rule that a plaintiff who cannot --
12 plaintiff cannot appeal after having voluntarily
13 dismissed the claims, on the other. And what the Court
14 said is, this case is like Thompson. This is like the
15 case where your claim is decimated on the merits. And
16 so Procter & Gamble is not a problem.

17 And so let me leave you with one final
18 thought, which is I agree with my friend that this case
19 could have serious implications. We think if you rule
20 for Microsoft, all you're doing is leaving a status quo
21 in place from Livesay and Rule 23(f) and the like, but
22 their argument would apply outside of class actions to
23 any pretrial order on which the plaintiff would be
24 willing to bet their case, and that would be a very
25 serious incursion on Rule 1291 and all the case law upon

1 which it's based.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

4 (Whereupon, at 11:19 a.m., the case in the
5 above-entitled matter was submitted.)

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A				
a.m 1:14 3:2 63:4	advantage 23:3	allowing 13:10 21:3 60:3	49:15 50:6 51:2 52:18,18	9:15 46:18
abandon 5:9 11:2	adverse 12:7 32:23 38:22 44:23 49:16	allure 52:11	52:19 54:8	argument 1:13 2:2,5,8 3:3,7 5:22 6:6,13 7:8 7:12,13,15,17 7:17,18,24 8:8
abandoned 52:24 53:9	adverse-infere... 44:18	alternative 6:15 9:15	57:22 58:19 59:4,6 60:19 61:17 62:12	appealability 61:2
Abe 49:18	adverseness 47:6 49:5,10	Amcam 61:4	appealable 35:12	9:20 20:12 25:17 29:9 33:19 41:24 43:15,19 45:18 48:5,23 56:23 62:1,3,4,5,6,22
ability 50:17	adversity 17:10	amount 22:3	appealed 13:4	arguments 21:15 47:16,20 49:17 55:22 56:10
able 10:8 26:23 52:12	Advisory 34:24 35:2 55:16	analysis 49:4	appealing 16:8 39:20	Article 6:25 46:17 47:7
above-entitled 1:12 63:5	advocated 41:14	analyzed 49:13	appeals 10:21 10:22 18:11,17 19:5,16 20:15 20:20,21 23:25 26:15,16 27:13 27:17 28:10 36:25 42:6 50:2 51:22 54:14 57:11,24 59:17	articulate 10:18
absolute 10:17 13:22	ago 31:3 47:8 60:3	Angeles 1:18	APPEARAN... 1:15	asked 15:12 35:11 45:5 47:4 49:11
absolutely 13:6 15:9	agree 7:11 16:20 31:1 42:8 43:25 48:22 50:23 51:8 56:11 62:18	answer 4:17 10:22,23 29:5 31:2,7 33:11 37:3,4 42:16 47:7 50:14,15	appears 59:15	asking 5:23 10:14 16:16 51:18 59:19
absolutes 10:5	agreed 46:16	answered 10:14	appellate 19:15 23:13 30:6 31:17 33:2 46:10 47:2 48:2 49:4 55:16 59:1	assume 10:15
abused 25:12	agreement 42:12 55:14	answering 10:13 28:3 46:20	Appendix 4:21 32:22,25 35:22 36:1	assumed 30:15
accept 60:11	aha 40:3	answers 44:8	applies 33:21	assumption 5:20 5:25 6:3 7:8
accepted 6:8 33:4 61:22 62:5,7	ahead 3:17 14:23 21:17 22:17,24 23:1 23:7 44:24 58:9 59:7	antitrust 11:16 11:23 44:1,2	apply 62:22	attempted 31:4
accepting 6:8	AL 1:6	anyway 26:11 26:12 51:11	approach 13:7	attorney 10:15
account 59:11	Alito 12:23 13:5 13:12,14 24:25 25:5,6,9,20,25 26:18,25 27:8 27:13 43:4 44:14,22 45:11 45:19,20,24 46:3	anyways 28:5	appropriate 25:14,16 35:1	attorney's 45:6
action 17:12,13 17:21 21:5 25:4,25 30:6 30:18,20 31:25 32:15 33:16 34:5 35:9 36:13,17 37:1 37:15,16 53:23 54:1 60:7 61:5	Alito's 44:8	App 5:1	argue 16:8 18:12 20:11 47:22	attorneys' 7:3
actions 21:1 62:22	alive 16:21 17:1	apparently 25:2	argued 6:23 61:21	attorneys'-fee... 7:15
actual 5:15	allegation 6:23 37:7	appeal 4:14 5:3 5:13 11:11,13 12:14,21,22 13:11 15:4 16:4,5 17:8 18:12,15 19:9 21:3,21 23:20 24:1,20 26:20 26:22 27:6,18 28:11,25 30:9 30:25 32:3,10 32:23 35:10,16 36:18,19,23 37:9,21,23,25 38:20,21 39:3 39:18 40:6,9 40:22 41:7 42:9 43:1 44:20 46:9,18 46:25 47:2,19 48:7,10 49:9	arguing 6:14	attorneys'-fee... 7:15
added 22:15	allegations 22:2 25:7 33:25	answered 10:14		automatic 19:9 21:3 23:20 28:25 57:11
address 8:13 57:2	allow 12:16	answering 10:13		available 3:12
addressed 54:23	allowed 8:10 19:23 57:6,11 57:21 60:2	anyway 26:11		avoid 33:19
addressing 55:3		anyways 28:5		award 7:19,23 8:2,9,25 45:7
adopted 3:18 5:18 57:5		apparently 25:2		aware 35:2 42:7 57:5
adopting 5:17		appeal 4:14 5:3		awfully 5:22

B

back 4:5,9,13,20 7:9,10,12 12:17 27:11 29:18 30:1,14 31:6 32:13 33:18 36:12,12 38:15 39:3 41:12 46:22,25 47:1 49:3 52:8 54:4 57:19 61:4,15,18	bother 51:18 bought 5:20,25 box 39:24 Breyer 14:2,13 14:19 15:1,7 17:10,11,15,20 17:24 18:6,9 31:22 32:5,11 32:16 39:9 40:14 49:23 50:15 52:9 Breyer's 21:25 brief 4:18 5:8,19 5:24,25 6:6 11:1 30:13 31:17 33:2 34:25 39:6,13 47:9 54:21,23 55:2,10 briefing 4:4 19:17 43:14 48:23 briefs 22:16 41:24 54:18 bring 14:21 17:13,20 38:4 bringing 21:17 brought 8:25 37:1 60:1 burden 8:4,7 business 14:25 buy 10:17	case 3:4,15 4:2,4 4:12 7:11 8:6,9 9:1,7,8,9,19,22 9:24 10:8,15 10:25 11:9,16 11:18,22,23 12:11,13,17 13:2,8,23 14:5 14:6,9,17,23 15:10,18,23 16:6,12,13,20 17:12 20:7,12 21:12,18,19,25 22:4,20 23:5,6 23:8,16,18,23 24:2,7,10,13 24:17,21 25:1 25:1,13 26:21 27:4,10,20 28:5 29:15,18 29:20 30:1,3,7 31:12,16 32:6 34:23 35:3,17 36:4 37:20 38:7,8,11 39:6 39:8,21,21,25 40:10,13,16,22 41:1,20 43:7 43:16,17 44:1 44:13 46:11 47:10 48:12,18 49:20,21 50:6 51:11,15 52:18 52:25 53:6 57:10,13,25 58:10,12,14,20 59:7,25 60:13 61:1,12,12,13 61:14,23 62:10 62:14,15,18,24 62:25 63:3,4 cases 21:1 22:17 22:25,25 24:6 24:11 26:10 31:18 32:17 33:5 38:25 39:4,4,7 48:9	50:8,12,23 52:17 55:6 60:8 62:9 causation 25:17 cause 27:17 caused 30:6 61:23 Cecil 35:21,22 36:2 center 25:17 cents 17:18 18:2 18:3 21:25 certainly 34:12 35:14 40:14 48:19 51:24,24 certification 3:15 5:4 6:24 9:13 21:7,16 22:18 23:10,15 23:19 24:7 25:14,16,18 26:1,11 27:16 27:24 28:4 29:1 35:23 50:24 51:10 54:8 57:16 58:25 59:21 60:3,14 certified 37:19 certiorari 26:6 cetera 56:17 challenge 5:12 change 20:16 37:24 38:2 46:18 56:19 changing 41:17 characterizati... 31:2 characterized 13:1 Chief 3:3,9 6:19 6:21 7:6,21 15:13,17,21,22 16:1,3,11,15 16:23,25 17:4 19:11,14,18 21:22 22:7,10	22:14 29:7,11 33:10 46:13 47:5,14 49:3 51:7 56:21 63:2 choice 36:21 58:7,7 choose 37:7 chronicles 55:17 55:20 circuit 5:18 6:7 6:9 20:8 24:14 24:16,21,22 25:11,13,15,22 26:8 27:19 28:1 29:21 30:1,4 31:14 31:18,19 32:18 32:20 33:2,4,6 34:25 35:3,23 39:5,7,8,16 40:17 42:3,14 42:18,18,20,20 42:25 43:2,2,6 53:15,22 54:20 55:6,17 57:5 59:12,22,25 60:2,10,14 61:11,12 circuit's 38:18 39:22 55:20 circuits 31:21 39:11,11 41:4 50:12 52:21 59:16 circumstance 29:2 cite 10:25 31:18 33:4 34:24 47:8 cited 22:16 35:3 48:4 55:15 57:10 cites 22:16 39:8 citing 57:12 civil 60:23,23 claim 3:14,16
benefit 26:3 best 9:20,21 28:18 43:7 bet 29:15 62:24 better 8:16 20:25 28:20 50:11 52:19 betting 34:23 58:10 bigger 60:6 biggest 17:16 bilateral 52:14 bilaterally 50:18 bit 19:19 bones 29:23	<hr/> C C 2:1 3:1 Cal 1:16,18 call 42:6 called 30:1 39:8 39:15,22,25 59:22 62:11 calling 60:12 calls 60:6 candle 30:23 care 27:25 careful 48:14 carefully 3:22 59:16 61:7	51:11,15 52:18 52:25 53:6 57:10,13,25 58:10,12,14,20 59:7,25 60:13 61:1,12,12,13 61:14,23 62:10 62:14,15,18,24 62:25 63:3,4 cases 21:1 22:17 22:25,25 24:6 24:11 26:10 31:18 32:17 33:5 38:25 39:4,4,7 48:9	change 20:16 37:24 38:2 46:18 56:19 changing 41:17 characterizati... 31:2 characterized 13:1 Chief 3:3,9 6:19 6:21 7:6,21 15:13,17,21,22 16:1,3,11,15 16:23,25 17:4 19:11,14,18 21:22 22:7,10	claim 3:14,16

4:5,9 5:16 9:17 9:18 15:11 16:4 17:8 18:2 18:13 21:24 26:6 30:10,22 30:24 33:17 35:25 36:2 41:22 42:22,23 42:24 43:3 49:1,2 51:7,8,8 58:10 59:3 60:9,20 62:15 claiming 17:9 claims 3:16 5:13 6:17,22 7:9,24 8:20,25 9:25 9:25 10:21 11:3,7,8 13:20 15:18,19,21,23 15:25 16:13,14 16:20,21 17:1 21:16 27:23 28:2 29:18 30:14 33:23 37:8 44:2 51:1 52:24 53:9,10 57:22 61:25 62:13 class 3:15 5:4 6:23,24 9:12 15:19,20 17:12 17:13,21 20:25 21:5,6,16 22:2 22:18 23:10,14 23:18 24:7 25:3,3,6,7,14 25:16,18,25 26:10 27:16,24 28:4 29:1 30:18,19 32:15 33:16,24,25 34:5 35:9 36:12,17 37:1 37:7,15,19 50:24 51:10 52:17 53:23,25 54:17 56:1	57:16 59:21 60:3,7,14 61:5 62:22 class-certificat... 13:25 20:6 clear 7:5 8:22,24 32:19,22 47:9 49:19 clearly 11:2 clerk 39:12 client 17:17 close 11:22 collateral 44:9 56:17 come 38:24 54:7 55:14 comes 40:16 commits 29:13 committee 3:11 3:18 18:9 20:14 28:8,15 28:16 34:24 35:2 40:7 55:16 56:4 57:4,14 58:3 58:22,24 59:5 61:5,7 committee's 57:10 companies 44:3 complaint 8:6 48:6 51:20 completely 28:14 complex 23:14 complicated 41:5 56:2 60:24 concede 48:24 conceded 43:15 concerning 25:13 Concha 30:2,7 39:6 conclusion 55:23 condition 32:9	33:18 39:20 49:12 conditional 29:21 32:8,12 32:18 33:6 36:7,9,19 40:15,18 42:6 43:3,9 51:9 54:24 55:25 59:17 conditionally 31:5 40:4 conference 14:22 conflict 50:12 confront 58:25 confronted 27:14 congestion 28:9 Congress 35:11 consent 42:7 47:10 49:10 consented 47:15 49:14,21 consider 25:15 considerations 46:4 56:10,16 considered 3:12 3:22 18:9 28:17 59:5 61:7 consistent 10:3 27:9 context 32:15 33:16 42:19 48:22 54:17 61:5 continue 35:24 41:3,22 51:1 continued 36:2 36:4 continues 35:17 contravene 4:1 converse 23:17 core 29:14 34:13 41:8 42:22 56:9	corporation 1:3 3:4 36:25 37:1 correct 25:19 26:2 44:7 correctness 60:20 cost 21:2 23:13 cost-spreading 7:15 costs 7:2 19:8 counsel 29:7 42:2 56:21 63:2 counterintuitive 56:6 counterpart 60:21,23 couple 19:18 22:14,19 57:3 60:2 course 8:2 14:20 14:23,24 15:4 16:6 20:6 33:24 37:14 41:10 52:4 57:15 58:2 61:15 court 1:1,13 3:10,19 4:23 5:2 8:2,20 11:8 11:9,17,23 12:21,22 13:24 14:10,16 18:11 18:17,21,24,25 19:3 20:14,19 20:20,20,22 21:11,19 22:23 23:25 25:23 26:5 27:15,17 27:25 28:10,24 29:2,12,13 30:6,10,11,16 36:6,24 38:9 41:2,7 43:8 44:11,15 46:2 46:5,9 47:9,21 48:14,20 49:7	49:13 50:2 51:16,22,23 53:24,25 54:9 55:4 56:13 57:20,21,24 58:20 60:3,15 61:3,8,13,20 61:22 62:5,7 62:10,13 court's 5:12 10:24 courts 7:22 8:3 8:12,15 12:14 19:5,5,16 23:13 26:15 27:13 55:8 57:6 cover 51:23 creating 12:23 12:25 creature 40:1 criminal 42:7 60:22 criteria 19:21,24 critical 9:16,21 13:2 16:7 36:6 curiosity 19:12 cute 41:24
D				
D 3:1				
D.C 1:9				
damaged 17:18				
date 29:25				
dates 30:1				
Daubert 12:7				
day 13:9 52:9 56:5				
Deakins 10:25 61:13				
death-knell 18:24,25 19:1 19:6 20:11 21:11 41:9,25 53:5 57:25 58:18				
debate 55:14				

<p>56:3,7 debated 55:13 decertified 36:3 decide 9:24 44:15 53:24 decided 25:1,1 26:21 27:4,10 decides 50:25 53:25 deciding 54:9,9 decimate 13:15 decimated 12:12 13:10 62:15 decimates 11:8 12:10 decision 25:22 43:10 46:6 48:5,7 59:22 decisions 35:10 59:21 defeats 45:5 defendant 14:8 14:8,11,19,21 15:1 17:15 42:8 defendants 23:16,19 51:4 defense 7:7,14 defines 9:21 definitely 32:13 definition 7:23 13:14 35:6 46:2 52:14 denial 30:7 60:14 denials 21:6 29:1 57:15 denied 3:15 18:17 22:18 23:24 24:8,8 24:15 26:11 27:3 35:24 50:24 53:8 deny 26:5 27:17 50:4,5 58:6 denying 5:3 58:24</p>	<p>dependent 8:14 deprived 34:1 described 8:23 describes 62:2 describing 42:13 destroyed 60:9 detail 55:21 determine 51:21 developed 9:11 41:5 device 34:6 die 28:5 difference 36:6 55:7 different 15:10 16:5 24:3,6,17 35:17 39:11 43:4 47:4 50:11,12 62:6 difficult 23:14 28:4 41:5 61:2 difficulty 23:7 23:11 dilemma 39:19 direct 55:3 direction 56:19 directly 26:16 31:3 disagree 40:20 40:21 47:25 discovery 9:4,5 9:7 22:3 43:12 48:21,24 52:6 discretion 20:18 25:13 36:24 discretionary 3:20 18:12 26:4 27:12 28:19 dismiss 4:23 6:17 10:20 11:7 24:21 30:7 31:5 32:9 39:1 40:15,18 42:25 43:2 57:22 58:12 61:14</p>	<p>dismissal 3:21 5:10,11 11:12 12:15 17:2,6,9 29:22 30:5 32:9,12,18 33:8,19 34:9 36:8,10,19 39:20 43:9 45:4 48:10,15 49:11,15 51:20 54:24 dismissals 55:25 dismissed 7:24 9:1,16,17,25 10:8 12:21,22 25:7 32:1 42:23 49:22 51:8 62:13 dismisses 48:6 dismissing 4:13 40:4 disputed 51:16 distinction 40:23 district 4:22 12:19 14:21 17:7 20:19,22 21:8,8,13 25:12,23 26:9 27:15,23,25 29:13 30:10,11 38:9 41:7 46:9 47:21 49:7 51:16,18,22 53:23,24,25 54:9 57:20,25 58:2,20 docket 28:9 doctrine 41:9 56:17 58:18 doing 26:15 33:3 33:6 41:6 42:1 62:20 dollar 22:24,25 52:24 53:9 door 37:13 double 20:18</p>	<p>doubt 9:3 59:22 62:8 downside 52:10 downsides 52:13</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 9:7,8 37:23,25 51:6 61:22 easiest 9:23 13:23 easy 49:6 effect 43:16 effectively 13:18 effort 24:1 eight 39:16 55:12 Eighth 35:23 either 6:21 16:18,19 34:22 50:9 53:11 element 23:22 embrace 42:21 embracing 6:12 empirical 22:15 enchilada 40:24 endorsed 3:19 8:2 engage 36:9 enormous 12:25 22:3 enter 32:18 44:25 47:21 51:19 entered 5:2 15:3 16:7 27:21 46:16 47:18,19 entitled 8:24 33:23 53:23 entry 61:16 error 25:23 26:7 27:15 29:14 33:20 52:3 escape 37:12 ESQ 1:16,18 2:3 2:6,9</p>	<p>essence 35:5 essentially 5:24 43:23 et 1:6 56:17 Evans 12:17 event 26:7 eventually 37:20 evidence 27:21 evidentiary 12:6 12:7,15 41:6 44:18 52:6 exact 18:18 20:12,13 28:17 59:5,20 exactly 5:16 17:7 18:8,13 19:2 49:12 58:3 61:20 example 7:1 11:15 22:20 26:5 35:19 42:9 52:4 53:1 examples 52:5 exception 11:5,6 13:23 exchange 49:17 exciting 55:18 exist 8:3 60:18 exists 37:6 42:24 60:21 expeditious 11:11 expend 26:17 28:3 expense 22:10 22:11 expert 12:7 explain 17:11 29:16,19 31:4 32:4,12 33:3 33:21 46:21 explicitly 5:8 express 32:7 expressed 56:14 expression 39:17 extent 17:18</p>
--	--	---	--	---

<p>extreme 22:9 52:4</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>f 40:9 50:3 face 14:3 31:20 faced 21:10 28:24 fact 8:14 9:16,21 28:8 31:19 37:10,22 46:5 46:19,24 47:15 49:8 facts 61:1 fails 21:17 failure 48:15 faithful 61:9 familiar 22:23 62:11 far 28:8 29:5 35:16 50:10 favor 15:3 favorable 20:17 Federal 42:20 43:2 54:20 fee 22:22 23:1 feel 41:13 56:6 fees 7:3 45:6 felt 44:10 fewer 54:10 Fifth 39:16 fighting 23:10 figure 34:4 50:13,13 filed 8:6 filing 24:19 final 5:2,22 16:21 25:22 32:23 34:23 37:8,22 38:3,7 38:9,11,11 39:23 40:6 41:10,11 43:9 45:4,9 46:3,4,6 46:6,8,11,12 50:7 53:19 56:8,15,16</p>	<p>59:2 62:17 finality 6:18 7:12 35:6 46:2 46:20 47:3 49:5 52:12 finally 25:1 find 3:13 38:25 39:5 54:19 57:9,10 firm 13:6 29:2 firms 53:7 first 3:4 4:19 5:15 7:7,21 9:11 10:24 22:7,14 24:7 27:12,19 39:8 42:17 45:21 50:16 57:2,4 58:17 59:20 61:10 Fisher 1:16 2:3 2:9 3:6,7,9,23 3:24 4:1,7,15 6:4,11,14,20 7:5 8:19 9:5,14 9:23 10:3,6,11 10:19,23 11:20 12:5,9,12 13:5 13:13,17 14:18 15:5,9,15,20 15:24 16:2,10 16:14,18,24 17:3,5,14,19 17:23 18:5,8 18:21 19:2,17 19:23 20:4,23 22:7,13 23:22 24:5,10,12 25:5,8,10,24 26:2,23 27:1 27:11 41:23 53:2 56:22,23 56:25 58:8,11 58:15 59:10,13 59:18 Fisher's 30:13 fit 38:18</p>	<p>five 53:7 flat-out 9:2 flexible 60:12 foisting 26:15 followed 29:20 30:16 33:5 following 37:5 footnote 55:9 57:9 footnotes 19:18 forced 23:13,16 27:6 forever 10:1 43:1 formalistic 40:23 Fortas 49:18 forward 13:19 21:12,13,20 22:1,6,12 25:3 57:7,23 found 3:14 founding 12:18 four 57:1 Frankfurter 49:19,20 frequently 52:2 friend 30:13 41:23 53:2 57:4 59:7 60:17,25 61:11 62:2,18 friend's 59:25 front 27:4 28:12 37:13 further 30:11 61:4 future 32:7</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 Gabelli 55:5 Gamble 43:11 43:12 44:16 45:17,18 48:4 48:13 49:13,18 61:19,21 62:3</p>	<p>62:7,9,16 Gamble's 62:4 gap 12:25 garden 12:15 Gary 55:5 general 4:12 6:1 genuine 21:10 getting 26:19 Ginsburg 6:10 6:12,15 16:17 18:20,23 19:2 20:16,23 23:21 23:23 24:5,9 24:11 30:17,21 31:2 32:14 34:2,14 35:8 36:11,15,20 37:14 38:1,3 41:13 43:18 44:1,4 48:3 51:15 53:17,20 54:3 Ginsburg's 28:22 33:11 give 11:15 37:4 40:9 44:24 50:6 given 15:24 16:15,24 22:10 22:11 giving 41:18 go 7:11 9:12 13:19 14:15,23 18:11 21:12,13 21:17,20 22:1 22:5,12,24 23:7,9 25:3 27:11 28:8 34:9 35:10,16 36:11 44:24 46:15 47:16 50:5 51:9 52:8 53:13 54:3,21 57:7 58:9 goes 12:17 13:19 26:3 34:12 41:12</p>	<p>going 5:7 11:24 12:2 14:24 17:21 18:2 21:23 22:5,12 22:17 26:11,12 28:5 30:2 31:2 32:10,12 35:24 36:22 38:19,21 42:15 44:12 46:18 47:25 51:3,4 52:23 52:23 53:6,13 57:23 61:4 good 5:22 19:3 29:3 53:11 56:12 governing 31:15 government 12:18,20 42:8 43:22 44:2,5,9 44:10,14,19 48:14 49:1 61:21,23,24 62:1,5 government's 12:19 43:17,20 grand 43:14 44:5 48:25 grant 18:15 19:16 23:18 granted 31:25 grants 4:23 21:7 ground 25:3 26:8 grounds 54:10 guess 5:19,23 14:10,14 39:12 47:24 guilty 42:12</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 41:25 hand 21:2 62:10 happen 14:14 18:7 21:23 31:12 40:16 49:24 50:16</p>
---	---	---	---	---

52:16,23 54:11 54:12,17 happened 31:19 35:18 45:17 happens 39:21 50:18 happenstance 26:24 happy 29:5 hard 28:15 harmless 26:7 hasten 13:21 hatch 37:12 hear 3:3 26:22 heard 53:2 hearings 41:6 held 8:20 18:10 18:22 21:11,19 25:11,12 28:24 46:3 57:15 higher 21:4 history 55:11 hold 9:1 holds 61:14 Honor 16:2 43:12 55:15 hopefully 37:4 hundred 47:8 hypothetical 11:21 14:19 22:8	implications 56:1,4 62:19 important 20:24 28:12,13 44:8 60:5 importantly 19:4 impose 44:20 imposed 19:8 44:17 impossible 13:18 impractical 3:17 improperly 25:7 incentive 7:3,18 7:22 8:1,9,24 23:8 45:7 incident 54:9 included 6:22 inconsistent 53:15 incursion 62:25 individual 3:16 8:25 15:18,23 15:25 16:13,20 21:24 30:22,24 33:23 35:25 36:2 37:8,16 41:22 51:1 52:24 58:10 individual's 59:3 individualized 3:17 18:14 infancy 27:20 inherently 21:7 57:16 initial 27:15 injunction 35:13 injury 7:2 insist 11:17 14:16 instances 22:17 intend 5:3 32:3 32:23 intended 37:13 intent 32:7	34:21 39:17 40:1,5 interesting 50:21 interlocutory 13:1,3 18:15 19:16 34:5 35:12 36:7,18 36:18 37:23,24 40:9,22 41:8 41:19 44:21,24 57:16,21 interpreted 11:17 30:2 interrupt 58:16 invoke 36:24 involving 22:3 47:10 irrelevant 47:1 issue 16:4 40:7 42:4,5,9 51:10 51:16,17 52:14 54:7,10,14 55:11,11,25 58:13 59:15 60:1 issued 11:23 issues 10:9 23:15 28:4 items 28:12	14:11,16,20 15:2,11,15 16:22 32:23 34:23 37:8,22 38:4,8,10,11 39:23 41:10,11 42:24 44:25 46:4,6,8,12,15 47:1,18,19,22 49:9 50:7 53:19 56:9,15 59:2 60:21 61:16 judicial 19:8 21:3 23:12 jurisdiction 24:21 47:11 48:1 49:5 jurisdictional 51:13 52:22 54:6 jury 43:14 44:6 48:25 Justice 3:3,9,23 3:25 4:3,8,16 5:15,19 6:10 6:12,15,19,21 7:6,21 8:11,19 9:4,14,24 10:2 10:4,7,12,20 11:14,15,21 12:4,6,10,23 13:5,8,12,14 14:2,13,19 15:1,7,13,17 15:21,22 16:1 16:3,11,15,17 16:23,25 17:4 17:10,11,15,20 17:24 18:6,9 18:20,23 19:2 19:10,11,12,14 19:18,21 20:1 20:16,23 21:22 21:25 22:7,10 22:14 23:21,23 24:5,9,11,25	25:5,6,9,20,25 26:18,25 27:8 27:13 28:22 29:7,11,16 30:17,21 31:2 31:9,11,22 32:5,11,14,16 33:7,9,10,11 34:2,14 35:8 36:11,15,20 37:14 38:1,3 38:13,15,23 39:9 40:13 41:2,13 42:2,5 42:11 43:4,18 44:1,4,8,14,22 45:11,19,20,24 46:3,13 47:5 47:14 48:3,13 48:18 49:3,19 49:20,23 50:15 51:7,15 52:9 53:17,20 54:3 54:18,25 56:21 58:5,9,12,15 59:9,11,14,18 60:12 63:2
<hr/> I <hr/>		<hr/> J <hr/>		<hr/> K <hr/>
idea 8:1 19:14 27:12 54:7 ignore 36:22 III 6:25 46:17 47:7 imagine 5:1 10:8 14:9 57:17,18 immediate 28:25 immediately 9:1 35:12 59:25 impair 49:2 impermissible 52:21		JEFFREY 1:16 2:3,9 3:7 56:23 Johns 39:8 Joint 35:22 36:1 judge 12:19 14:5 14:21 17:7,22 21:8,13 25:12 26:9 27:5,23 51:18,19 57:25 58:2 judge's 18:1 judges 14:3 21:8 27:1,2 53:3 judgment 4:20 4:22 5:3 14:7	10:4,7,12,20 11:14,15,21 12:4,6,10,23 13:5,8,12,14 14:2,13,19 15:1,7,13,17 15:21,22 16:1 16:3,11,15,17 16:23,25 17:4 17:10,11,15,20 17:24 18:6,9 18:20,23 19:2 19:10,11,12,14 19:18,21 20:1 20:16,23 21:22 21:25 22:7,10 22:14 23:21,23 24:5,9,11,25	K 1:18 2:6 29:9 Kagan 3:23,25 4:3,8,16 5:15 5:19 8:11,19 9:4 19:10,12 19:21 20:1 29:16 31:9,11 38:13,15,23 keep 51:3,5 keeping 45:8 Kennedy 11:15 11:21 12:4,6 12:10 48:13,18 Ketchum 47:8 key 23:4 kind 4:6 29:23 30:13 35:20 55:3

know 5:24 7:2 14:14 16:1 20:2 22:4 23:1 27:5 32:5,10 38:24 39:16 40:2 41:1,14 51:5 55:17 57:20 knowing 50:11 53:12 known 52:20	let's 10:15 39:14 51:8 levels 49:4 59:19 lie 17:16 life 7:9,10 29:18 30:14 31:6 33:18 39:3 46:25 47:2 61:15,18 lightly 23:2 line 32:17 48:9 55:6 literally 47:10 litigate 3:17 33:23 37:8,20 50:6 51:6 59:7 litigated 36:12 53:10,11 litigating 29:17 35:24 36:2 41:22 51:1,3,5 53:7 litigation 8:5 22:1,11 23:9 54:16 little 19:19 31:24 Livesay 3:11 18:19 21:11,19 28:23,24 35:19 35:20,21,22,22 36:1,2 40:20 40:21 41:2 57:12,14,15,18 57:19 58:18 62:21 Livesays 36:5 lock 37:13 long 32:17,17 48:8 52:13 long-standing 46:1 look 4:17 28:1,2 28:10 31:17,20 33:2 34:23 43:15 48:22,23 55:4,4,5,5,9	56:3 57:9 62:8 looked 24:15 38:24 looking 46:14 49:25 looks 28:10 loophole 12:24 Los 1:18 lose 16:5 26:12 46:19 50:6 52:18,18 61:23 loses 13:2 loss 16:6 lost 11:12 13:18 14:4 16:9 36:5 41:21 43:21 48:15,20 lot 4:3 15:14,17 32:6 34:4 43:5 55:21 57:17 59:16 61:11 love 33:14 low 22:24 lower 7:22 8:3 8:12,15 12:14 30:15 Lybrand 39:22	52:3,22 54:6 55:13 63:5 mean 4:11 10:2 10:5 13:16 14:9 21:24 22:4 31:13 38:11 39:12 52:17 54:24 56:8 means 38:8 meant 48:20 meat 29:23 mechanics 53:21 mechanism 36:7 memos 55:15 mentioned 34:3 52:15 mentioning 35:7 mere 46:10 merit 47:12 52:25 meritorious 26:6 merits 11:8,12 13:10,15,18 14:1 20:3,5,7 22:22 23:11 24:17 26:12 27:3 28:2,6 37:21 43:19,23 46:15 48:16,21 53:4 59:3 60:9 60:15 61:24 62:15 Microsoft 1:3 3:4 24:19 37:10 53:4 62:20 Microsoft's 25:18 35:5 51:12 56:9 million 36:5 minutes 56:22 miscommunic... 37:18 misread 26:10 misreading	25:13 missed 60:14 mistake 6:11 53:24 Mohawk 61:4 moment 31:3 month 9:10 months 9:7 moot 7:11 9:2,19 mooted 54:15 mootness 7:7,14 7:23 8:22 11:1 morning 3:4 motion 4:23 9:6 14:4 20:6 23:11 27:2 30:8 motions 9:12 21:18 23:24 24:15,17 27:21 27:24 move 14:6,7,11 14:16,20 moved 31:25 moves 15:2 45:3 multicclaim 42:19 multiple 22:17 54:7
L				
L 1:16 2:3,9 3:7 56:23 lack 24:21 61:17 language 4:25 5:1 large 12:9 14:18 53:10 56:2 largely 5:20 Laughter 14:12 33:12 55:19 law 4:2 8:22 10:15 31:15 32:6 39:12 51:17,19,21 60:22 61:12,13 62:25 laws 22:21 lawyer 18:4 34:12 lawyers 9:8 34:17 lead 4:18 leading 19:25 39:6 leave 13:9 50:1 55:24 62:17 leaves 49:24 61:19 leaving 62:20 led 22:16 57:3 left 11:10 14:5,6 14:23 15:17,23 16:4,12,12 38:9 46:8 49:7				
		M		
		makers 34:3 35:9 55:13 making 20:13 21:15 47:16 manage 6:16 mandamus 14:15 manufacture 23:19 52:12 manufactured 21:4 38:10,10 41:12 March 1:10 market 11:17 matter 1:12 21:7 21:23 22:15 29:17 45:21 46:23 51:13		
			N	
			N 2:1,1 3:1 narrowly 11:18 nature 10:16 26:3 36:17 necessarily 11:13 need 20:21 29:22 33:17 40:14 never 8:2 46:3 49:9 59:23 nevertheless 27:17 new 9:9 55:12 Ninth 5:18 6:7,9 20:8 24:14,16	

<p>24:20,22 25:11 25:13,15,22 26:8 27:19 28:1 29:21 30:1,4 31:13 31:18,19 32:17 32:20 33:2,4,6 38:18 39:5,6 39:22 40:17 43:5 53:15,22 59:25 60:2,10 60:13 61:11,12 nonfinal 49:9 nonharmless 29:14 nonreservation 38:16 nonsuit 48:9 nontechnical 56:15 normal 15:8 47:19 normally 14:3 notes 20:14 28:8 28:16 34:24 58:24 notion 8:4 60:8 number 28:7 33:4 48:4 50:16 51:14</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 obey 44:11 48:15 objection 25:18 obtaining 34:22 obviously 48:11 occasion 55:2 odd 24:25 Oh 41:24 48:8 48:19 51:24 okay 17:4 25:20 44:24 51:3 old 11:9 59:21 Olmstead 39:7 ongoing 40:22</p>	<p>41:1 open 13:9 49:25 operates 4:4 opinion 55:8 options 3:12 41:18,19,19 oral 1:12 2:2,5 3:7 29:9 43:15 48:23 49:17 order 4:22 5:2,3 5:15 13:1,3 30:25 32:24 33:17 38:22 39:1,1 43:13 44:10,12,24 45:4,9,13 56:17 58:24 61:22 62:23 ordered 44:4,5 orders 35:12 ordinary 14:24 17:12 21:1 61:17 original 6:22 outcome 9:21 outset 24:22 outside 60:7 62:22 overturned 6:25</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 5:7,8 6:23,24 32:21 35:21 36:1 47:9 pages 4:21 31:17 33:3 39:5 panel 24:3,15,23 24:25 25:11,21 26:21 27:3,4,9 51:21 53:3,4 panels 24:3,17 24:18 paper 6:5 31:23 paragraph 32:2 32:21,24</p>	<p>part 8:14 59:15 particular 7:1 21:16 55:25 particularly 52:22 parties 4:11 6:2 6:4 9:9 14:22 29:17 43:15 48:22 50:17,23 partly 21:5 party 13:1 44:23 45:3 passed 50:22 path 59:1 payments 7:3 peek 20:2,5,6 penalize 34:22 people 31:14 41:3,18 42:1 50:1,10 56:11 percent 19:19 perfect 52:25 peripheral 42:24 43:3 permission 20:19,21 50:2 permits 30:5 permitted 29:19 32:14 33:15 35:3 permitting 59:16 persists 42:24 personally 10:5 persuaded 58:20 Pet 5:1 PETER 1:18 2:6 29:9 petition 4:20 27:3 32:21,24 53:4 Petitioner 1:4,17 2:4,10 3:8 56:24 phrase 60:17 piece 5:5 31:23 piecemeal 53:13</p>	<p>54:13 pivot 46:22 place 27:13,22 61:6 62:21 places 4:16 plaintiff 14:4,15 15:3 17:25 21:10 26:14 29:14 30:9 35:15 36:22 37:6 48:6,11 50:25 51:4,17 57:17,19 58:18 58:25 62:11,12 62:23 plaintiff's 3:20 36:21 43:16 60:8 plaintiffs 3:13 3:14 4:24 5:3,6 7:22 8:4,5 9:9 11:2,7,11,25 15:10 18:11,18 18:18 19:6 20:10,12,17,25 21:14,20 22:17 22:24 23:2,4,5 23:7 26:12 27:22 28:17,20 34:22 52:2 53:6 plaintiffs' 8:20 28:14 34:12,17 53:7 Plastic 55:6 played 57:18 plea 43:22,24 plead 42:12 please 3:10,25 29:12 44:19,19 point 16:8 17:24 21:21 22:4 28:13,22 35:20 38:17 46:7 54:12 pointed 44:17 points 34:18</p>	<p>35:20 36:17 57:1 61:10 policy 55:13,22 56:6,10,13 position 5:6 13:6 18:18,23 29:14 35:5 36:23 41:14 43:20 45:23,23 50:2 56:9 possibility 13:7 13:9 45:6 46:10 possible 13:23 54:11 possibly 45:2,13 60:13 post-1998 28:22 posture 41:8 potentially 23:14 practical 21:23 22:5 40:23 46:4 51:25 52:10 56:10,16 58:21 practice 9:6,12 21:18 27:21 56:12 preceded 60:1 precedent 43:6 49:24 precise 7:13 24:6 25:11 precisely 3:13 25:21 45:16,17 54:16 58:21 preclude 11:13 13:6 precluded 12:19 predicated 5:11 7:8 60:8 prefer 51:2 prejudice 4:23 6:18 9:18,25 10:9,21 29:22 30:5 32:1 33:8</p>
--	---	--	---	--

39:1,2 40:15 40:19 43:1,3,9 45:15 48:10 51:9 55:25 prejudicial 29:13 33:20 52:3 preliminary 35:13 premise 4:4,18 6:8 61:21,22 premised 22:2 presented 26:20 presenting 20:13 presents 47:12 presumption 5:17 41:20,21 pretrial 11:23 13:10 62:23 prevail 5:13 22:22 57:24 prevailed 7:19 7:25 prevailing 7:21 prevails 30:9 prevent 34:22 primary 42:23 principle 38:7 54:24 principles 45:21 prior 17:1 32:23 38:22 49:16 probably 53:8 problem 8:22 18:9 20:13 28:17 39:9,10 41:9 47:6 61:16 62:16 problems 5:14 7:20 40:8 procedural 29:17 58:13 60:19 procedurally 31:4 procedure 29:21	29:24 30:16 31:13,21 33:5 35:1 38:18 42:13 48:2 49:25 50:20 57:6 61:12 procedures 24:16 proceed 8:10 proceeding 59:2 proceedings 27:25 30:11 Procter 43:11,12 44:16 45:17,18 48:3,13 49:13 49:18 61:19,21 62:2,4,7,9,16 prohibited 51:14 proper 19:4 20:15 25:2 proposed 48:15 proposition 43:8 propound 7:14 propounding 28:18 prospect 22:25 prove 11:24 12:1,2 61:17 provisions 22:23 Purdy 55:5 pure 51:17 purely 43:17 pursue 18:1 put 11:9 29:22 <hr/> Q <hr/> question 4:17 8:13,13,18,21 10:14 11:4 31:8 32:13 33:11 41:13,17 43:5 44:9 46:17,21 47:3 47:5,12 48:1,1 48:2 49:3,14 51:17,19,21	52:9 53:25 54:23 55:3 59:6,19,20 61:7 questions 29:4 49:6 60:24 61:2,6 quite 11:1,21 22:23 29:2 45:2 58:5,6 quo 56:7 62:20 quote 30:2,4 46:5 61:23 <hr/> R <hr/> R 3:1 raises 46:17 read 5:7,19 43:14 45:13 47:13 48:21 58:4,23 real 19:7 reality 22:5 41:25 52:16 realize 51:4 really 4:5 6:17 14:6 19:7 20:1 40:3 41:14,16 42:22 51:10 52:8 54:6 59:10 realm 21:5 60:4 reason 18:14 21:1 23:6 28:9 30:17 33:15 40:5,21 44:7 47:17,25 52:1 57:13 reasoning 27:9 reasons 8:23 19:3 22:14,19 28:8 29:3 52:13 56:13 REBUTTAL 2:8 56:23 receive 7:4 reconsider 21:9	21:13 27:23 record 9:10 red 5:8 47:9 refers 55:10 refile 48:11 reformulate 27:22 refused 14:13 26:22 regard 52:25 regarding 25:23 regime 28:15 regular 24:23 reject 27:6 52:20 rejected 18:24 19:3,4 45:15 rejecting 43:23 45:12,23 53:14 relevant 47:3 61:13 relinquished 30:24 remainder 29:6 remand 8:17 30:8 remanded 7:9 30:11 remarkable 57:7 remarkably 28:2 remedy 21:20 remember 9:8 16:15 27:11 28:20 58:17 repackage 21:14 repeatedly 46:5 report 57:11 reporter 55:16 represented 49:18 58:19 request 18:17 45:13,14 requirement 32:20 requirements 38:24	requiring 26:17 research 10:13 50:19 reservation 4:6 32:3,6 38:16 39:17 57:23 reserve 6:16 29:6 39:23 42:9 61:24 reserved 16:19 reserving 5:12 40:5 60:19 resolve 51:19 61:6 resources 26:17 28:3 respect 17:13 responded 53:4 Respondents 1:7 1:19 2:7 5:9,9 29:10 response 41:23 responses 58:15 58:17 restraint 11:25 12:1 restrict 50:17 result 36:3 reversal 29:15 46:10,14 47:2 52:7 reverse 56:14 reversed 30:10 review 3:20 24:15 26:4 27:12 28:19 30:6 43:23 59:2 reviewing 41:7 revisited 54:15 revive 5:13 6:16 16:19 61:25 revived 8:21 11:3 16:18 rewrote 35:6 right 5:12 6:3,16 7:18 10:11
---	--	---	---	--

<p>15:5,19,22 16:10,19 17:3 17:5,21,24 18:5,6,15,16 19:9 20:23 21:3,23 23:20 24:12,20 25:4 25:8,24 34:1 35:10,17 36:23 38:6,20,23 39:18,24 40:13 41:3 44:6 48:11 52:22 54:1,4 55:14 56:13 58:2,6 58:11 60:19,19 61:20,24 rights 4:8 5:10 57:23 risking 35:15 ROBERTS 3:3 6:19,21 15:13 15:17,22 16:1 16:3,11,23,25 17:4 19:11,14 21:22 22:10 29:7 33:10 46:13 47:14 56:21 63:2 Roper 7:16 route 34:10 rug 20:7 rule 3:19,22 11:5 13:22 18:24 19:24 20:15 21:6 22:16 23:24 24:8,14 26:4 28:16 30:2 33:24 34:3,3 34:19,21 35:6 35:9 37:9,11 39:11 41:11,16 44:12 46:8,24 50:22 51:12 52:17,20 53:15 53:19 55:12</p>	<p>57:2,5 60:12 60:22 62:11,19 62:21,25 rulemaking 55:10 56:18,20 57:3 rules 3:11,18 18:9 20:14 28:8,15 40:7 56:4 58:3,22 59:5 61:5,6 ruling 5:12 6:25 11:7,23 12:6,7 12:16 13:10,15 13:19,25 18:1 27:16 30:10 34:5 43:23 44:21,23 45:3 48:21,24 49:16 52:6,6 run 34:19 39:20 run-of-the-mill 28:11 52:5 runs 40:19 46:1</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 sanction 10:15 44:15,18,18,20 satisfactory 37:4 satisfies 46:24 satisfy 33:24 60:13 saying 6:15 20:10 31:3 37:18 43:13 46:23 48:24 52:11 53:5 57:11 says 4:22 5:16 11:1 14:5 17:22 21:6 31:24 32:6,8 39:14,17,22 40:8 41:16 44:24 51:17 57:4 60:25</p>	<p>scenarios 22:24 scoot 24:22 search 42:9 second 24:13 35:3 42:19 43:1 54:20 55:6 59:21 secondly 33:20 secrecy 43:19,22 43:24 section 11:1 see 6:1 20:7 31:19 39:14 50:19 55:7,22 57:12 seeking 29:21 43:22 sense 11:18 51:6 sentence 58:23 separate 42:13 series 42:17 serious 44:23 52:10,12 62:19 62:25 SETH 1:6 setting 41:25 56:1 settled 36:4,16 38:19 52:13 settlement 32:19 39:14 47:11 seven 55:12 She'd 51:2 shifting 22:22 23:1 shortly 12:17 shoulder 8:4 show 8:7 19:15 33:20 52:3 side 44:25 50:1 55:13 56:7,11 59:25 sides 48:24 55:22 significance 40:24 significant</p>	<p>26:17 56:4 similar 40:8 simple 51:12 simplicity 50:10 simplify 49:25 simply 4:22 24:17 28:9 47:15 61:8 single 23:10 situation 3:14 10:8 18:10 19:7 21:11 23:12 27:14 28:23 56:14 59:1 situations 11:6 six 55:15 56:22 skipped 51:22 slightly 47:4 small 12:24 52:23 53:9 soap 44:2 solution 61:8 sorry 5:7 16:2 18:16 19:13 38:16 58:16 sort 38:16 55:6 56:19 Sotomayor 9:14 9:24 10:2,4,7 10:12,20 11:14 13:8 33:7,9 42:2,5,11 54:18,25 58:5 58:9,12,16 59:9,11,14,18 60:12 special 17:13 split 34:25 42:3 42:14,18 57:5 59:12 60:6,6 splits 42:18 54:19,22 55:1 55:17,21 spoken 43:5 spreading 7:2 spring 4:5,9,13</p>	<p>7:9,10 29:18 30:14 31:6 33:18 46:25 47:1 61:15,18 springs 39:2 square 40:19 46:1 stakes 52:19 53:12 standing 7:1 Stanford 1:16 start 10:24 started 6:6,8 state 22:21 25:21 statement 57:8 States 1:1,13 43:13 45:18 statistics 19:15 status 34:5 56:7 62:20 statutes 17:17 statutory 4:2 stayed 41:20 steps 10:24 Stevens 41:2 stick 52:13 stipulated 9:10 stipulation 4:19 4:25 5:5 stop 53:6 straight 9:12 stray 57:13 stricken 34:1 37:7 Stris 1:18 2:6 29:8,9,11 30:19 31:1,10 31:16 32:4,11 33:8,13 34:11 34:16 35:14 36:14,16 37:3 37:17 38:2,6 38:14,21 39:4 40:12 42:4,10 42:15 43:11,25 44:7 45:10,16</p>
--	--	---	--	--

45:22,25 46:20 47:24 48:8,17 48:19 50:15 51:24 53:19 54:2,5,22 55:1 55:20 strong 55:7 strongly 44:10 struck 34:20 studied 59:15 study 22:15 submit 34:21 47:5 54:16 56:18 submitted 63:3 63:5 substance 13:20 substantial 34:1 suffered 44:23 45:3 suggest 8:17 37:11 53:14 suggested 6:3 31:12 suggests 34:21 37:10 summary 14:7 14:11,16,20 15:2 42:23 support 43:7 suppose 51:15 55:23 supposed 17:25 18:7 supposition 30:14 Supreme 1:1,13 57:21 sure 14:3 59:1,7 surprise 30:12 31:20 survive 10:10 Swint 61:3 system 3:18,19 15:8 19:8 21:3 23:12 26:4 28:14	T	they'd 57:6 thing 16:5 39:25 43:21 44:22 45:1,2,5 47:18 58:1,22 59:24 60:5 things 7:6 20:24 25:10 27:16 33:17 38:17 41:17 42:16 46:24 47:24 50:16 57:4 think 4:10 5:9 5:14 8:8,11,15 8:22 9:15,23 10:23 11:1,5 13:5,7,11,17 14:18 15:7 16:7 17:25 20:17 23:5,6 24:16 26:2 28:21 29:2,19 29:22 31:14,17 32:14 33:15 34:11 35:19 37:3,19 39:7,8 39:25 40:10,12 40:13,15,16 41:2 43:25 45:25 47:7,25 49:6 50:16 54:22 55:4,9 56:12 59:19 60:11 61:1,20 62:19 thinking 26:6 56:15 Thompson 11:9 11:22 62:10,14 thought 25:2 26:9 28:1,15 40:2,17 48:5 57:14 58:3,23 59:6 62:18 three 24:3 42:16 49:4 54:19 three-judge	51:21 time 9:11 14:4 20:8 26:13 29:6 33:11 34:25 36:25 48:12 53:20 61:3,10 times 48:4 50:21 54:7 59:23 today 24:24 27:4 61:9 told 17:16,16 35:22 47:21 topic 55:18 touch 48:25 traces 55:11 trade 11:25 12:1 transcript 43:14 43:21 44:6 48:25 transfer 56:3 trial 11:8 12:18 14:3,10,15 19:5 37:21 53:13 54:11 trials 53:13 tribunal 51:20 tried 12:21 37:24 50:19 true 5:21 36:18 36:18 40:21 41:11 46:7 54:5 truly 12:12 13:10 try 34:10 37:3 49:25 trying 22:21 50:12,13 62:6 Tuesday 1:10 turn 43:13,20 44:5,12 48:25 60:10 turned 26:16 two 4:16 5:14 7:6,20 10:24 18:3 20:24	23:24 24:6,11 25:10 33:16 38:17 54:21 58:15,17 59:19 61:10 two-thirds 5:24
	U	U.S.C 51:25 Uh-huh 10:6 17:14,19,23 ultimately 26:9 26:10,11 unanimously 18:21 19:3 28:24 unbelievably 41:5 undergo 23:16 Underline 38:14 undermine 47:11 undermined 41:10 understand 14:2 26:19 29:23 32:11 52:11 60:5 understanding 4:12,16 6:2,5 unequivocal 5:11 Unfortunately 17:17 unilaterally 50:19 United 1:1,13 43:13 45:18 unknown 40:1 unreasonable... 11:24 12:3 unusual 29:25 unworkable 41:10 upend 3:22 28:14 upshot 53:8		

