

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

SITU KAMU WILKINSON,)
)
Petitioner,)
)
v.) No. 22-666
MERRICK B. GARLAND,)
)
ATTORNEY GENERAL,)
)
Respondent.)

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Petitioner,)

v.) No. 22-666

MERRICK B. GARLAND,)

ATTORNEY GENERAL,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, November 28, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

JAIME A. SANTOS, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

COLLEEN SINZDAK, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	JAIME A. SANTOS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	COLLEEN SINZDAK, ESQ.	
7	On behalf of the Respondent	47
8	REBUTTAL ARGUMENT OF:	
9	JAIME A. SANTOS, ESQ.	
10	On behalf of the Petitioner	98
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

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 22-666, Wilkinson versus Garland.

Ms. Santos.

ORAL ARGUMENT OF JAIME A. SANTOS

ON BEHALF OF THE PETITIONER

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

Non-citizens who have lived here for 10 years, have good moral character and a clean record, can seek immigration relief if their removal will cause exceptional and extremely unusual hardship to a U.S. family member. If the agency concludes that the facts don't satisfy that standard, the question here is whether courts have the power to review that decision.

They do. The INA limits review of denials of discretionary relief, but it permits review of questions of law. And as this Court held in Guerrero-Lasprilla, the statutory term "questions of law" includes the application of legal standards to settled facts. Even the

1 Board agrees that exceptional and extremely
2 unusual hardship is a legal standard. So, under
3 Guerrero-Lasprilla, the agency's application of
4 that standard is reviewable.

5 The government argues that
6 Guerrero-Lasprilla's holding applies only to
7 common law standards and offers a different test
8 for statutory standards. And while
9 jurisdictional tests are supposed to be simple,
10 the government's fashioned an elaborate and
11 amorphous framework that won't provide clear
12 answers.

13 First, courts should see whether the
14 standard has a common law origin. If so, the
15 government suggests it's probably reviewable but
16 doesn't commit either way.

17 Next, courts should scour current and
18 prior versions of the statute for any hint that
19 Congress wanted the agency to have discretion,
20 even if it later deleted the
21 discretion-conferring language.

22 If that doesn't somehow answer the
23 question, courts should ask whether the standard
24 requires evaluation and fact-weighting. They
25 should then traipse through any version of the

1 U.S. Code that -- that has ever existed looking
2 for similarly worded standards and see if courts
3 have ever labeled those discretionary.

4 Taking these factors together, courts
5 can then deem the standard a discretionary
6 one -- a reviewable mixed question or an
7 unreviewable discretionary one. It would be bad
8 enough if the government were urging this test
9 only for cancellation, but courts would have to
10 apply it to dozens of INA standards, including
11 whether a non-citizen has been rehabilitated,
12 subjected to extreme cruelty, or violated the
13 terms of a visa. I tried making a complete list
14 last week and stopped count at 75. In other
15 words, the government's test promises a
16 never-ending supply of judicial review cases for
17 this Court's merits docket.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: We're allowed to
20 certainly review questions of law, and, of
21 course, the Court said that includes mixed
22 questions of law. But, in -- in some of these
23 cases, if we're looking at fact-finding, I think
24 we agree that's not reviewable. On the other
25 hand, if we're looking at legal standards, that

1 is reviewable as they're applied to these facts.

2 How does that work in your case? I
3 didn't understand how it was work in some --
4 worked -- how it would work in some of the
5 earlier cases. But if you could walk through
6 how it would work here, how we would separate a
7 review of a legal standard from a review of the
8 facts in a case involving mixed questions of
9 fact and law.

10 MS. SANTOS: Happy to walk you through
11 that, Your Honor. So, here, we don't think that
12 the question of whether something is a challenge
13 to a fact finding would really come up because
14 the immigration judge credited all of the
15 testimony and evidence that Mr. Wilkinson
16 provided.

17 But, in a typic -- typical case, what
18 would happen is a court would open up the blue
19 brief, see if there are any challenges to
20 findings of fact made by the IJ, and, if so, the
21 court wouldn't review any of those. And if the
22 only challenge is to the IJ's or the BIA's
23 ultimate determination that the standard wasn't
24 satisfied, that would be reviewable.

25 So, here, for example, Your Honor, our

1 submission before the Third Circuit on remand
2 would be that while the IJ credited all of the
3 facts and evidence and while the IJ recited the
4 right legal standard in a -- in a boilerplate
5 section of its decision, it then, when applying
6 the standard, disregarded all of the facts and
7 factors that render this case exceptional and
8 extremely unusual.

9 And I would point to, for example, the
10 fact that Mr. Wilkinson's son, M, has a serious
11 medical condition that places him in the
12 hospital with some frequency, that his mother
13 has depression that renders her unable to care
14 for M for days a time, that M has learning and
15 behavioral challenges that have been exacerbated
16 by Mr. Wilkinson's detention, and -- and that
17 Mr. Wilkinson is not only the sole financial
18 provider for M but also has -- is his only male
19 role model and has been a consistent support
20 emotionally and a physical presence in his life.

21 CHIEF JUSTICE ROBERTS: And how many
22 --

23 MS. SANTOS: And our --

24 CHIEF JUSTICE ROBERTS: And -- and can
25 you tell us how many people have a similar list

1 of hardships in the whole group of people who
2 are subject to the same immigration laws as this
3 individual was?

4 MS. SANTOS: I cannot, Your Honor. I
5 think, in the immigration context, as in many
6 contexts, there will be a lot of different facts
7 that will be case-specific.

8 CHIEF JUSTICE ROBERTS: Well, but the
9 -- the statutory standard is exceptional and
10 extremely unusual, not burdensome, not
11 difficult, not very unfortunate. Unusual, which
12 requires a comparative analysis.

13 And I don't see how doing the best you
14 can to determine what that number is and given
15 the size of it, I don't -- maybe it's 3 percent
16 of the whole population, maybe it's 20,000
17 people -- it seems to me that that -- it's hard
18 to determine whether something's extremely and
19 exceptionally unusual other than -- I mean, it's
20 not a purely factual question.

21 The government talks a lot about
22 discretion in determining what weight should be
23 given the factors you mentioned compared to
24 other determinations. Maybe somebody has a
25 particular physical impairment and the

1 difficulties that they have encountered are as
2 challenging as the ones here. But which one do
3 you categorize as -- does that make them both
4 unusual?

5 MS. SANTOS: Well, Your Honor, we
6 think that all of the -- the -- the points that
7 you just raised, the fact that IJs see more of
8 these cases, have more experience, all of that
9 would probably cash out in the standard-of-
10 review analysis. But it -- it just -- those
11 types of practical considerations don't have
12 anything to do with whether they are -- whether
13 the determinations are reviewable at all.

14 And I think that what courts would do
15 when reviewing these types of determinations is
16 something similar to what the -- what the Board
17 does. It -- it would interpret the language.
18 It might note, for example, that exceptional and
19 extremely unusual hardship is a different
20 standard than extreme hardship, which appears
21 elsewhere in the statute. So it would look to
22 text, it would look to precedent, it would look
23 to ordinary dictionary definitions. And that's
24 exactly what the Board did --

25 CHIEF JUSTICE ROBERTS: Well --

1 MS. SANTOS: -- in Monreal-Aguinaga.

2 CHIEF JUSTICE ROBERTS: -- putting
3 that aside, let's say they come up with a
4 particular number. I mean, what percent of
5 people with the same sort of challenging
6 circumstances that you mentioned or similar --
7 substantially similar ones are -- are there? Is
8 it 1 percent? Is it 2 percent? And what
9 constitutes extremely and exceptionally unusual?
10 Those are judgments that call for a high degree
11 of discretion on the part of the immigration
12 judges.

13 MS. SANTOS: Well, I -- I agree with
14 Your Honor that -- that they require a -- a -- a
15 degree of judgment and experience and common
16 sense. But the standard does not ask for a
17 quantitative assessment. The standard, as
18 interpreted in Monreal-Aguinaga, says that you
19 -- the -- the hardship doesn't need to be
20 overwhelming; it has to be substantially greater
21 than is kind of incident to a -- a -- a family
22 member leaving the country.

23 And so -- so those types of judgments
24 might warrant a more deferential review. But it
25 wouldn't have anything to --

1 JUSTICE KAVANAUGH: Are you
2 acknowledging -- keep going, sorry.

3 MS. SANTOS: I was just going to say
4 it wouldn't -- it has nothing to do with whether
5 this qualifies as a question of law as the INA
6 uses that term.

7 JUSTICE KAVANAUGH: Are you
8 acknowledging that it would be a more
9 deferential standard of review by the court of
10 appeals then?

11 MS. SANTOS: I think it likely would.
12 After this Court's decision in
13 Guerrero-Lasprilla, courts have generally
14 reviewed due diligence determinations for abuse
15 of discretion, and so --

16 JUSTICE KAVANAUGH: How -- how could
17 it not be a deferential standard of review? I
18 just want to --

19 MS. SANTOS: Well, I --

20 JUSTICE KAVANAUGH: -- I just want to
21 make sure, because I think you're right, that it
22 would likely be deferential, but what -- what
23 would be the circumstances under which it
24 couldn't be?

25 MS. SANTOS: So I am -- I am not going

1 to push back on the fact that I -- I'm virtually
2 certain it would be deferential. I think that
3 virtually every court on our side of the split
4 has agreed that it would be a -- a deferential
5 standard of review, and I think all of those
6 practical considerations go to that point.

7 But one thing that I think is
8 critically important is that those practical
9 considerations the Court said expressly in
10 Guerrero-Lasprilla may be relevant to standard
11 of review, but they're not relevant to whether
12 there's judicial review at all.

13 And I think the reason for that is
14 important. That's because standard of review
15 and reviewability have just totally different
16 frameworks. Reviewability looks at -- it's just
17 purely an exercise in statutory construction.
18 So you're looking at the canons of statutory
19 interpretation.

20 But, when you're looking at standard
21 of review, you use different decision-making
22 criteria. So you'll look at for one thing is
23 there a long and a consistent history of
24 appellate practice. And then you'll look at the
25 practical considerations that might warrant

1 giving more deference to one decision-maker or
2 the other. But that just doesn't enter into the
3 framework for looking at judicial review.

4 JUSTICE JACKSON: But don't we have a
5 --

6 JUSTICE BARRETT: Would you concede --

7 JUSTICE KAGAN: But another way to
8 think about the Chief Justice's question is to
9 say that what he was talking about really does
10 go to whether it's a legal question at all,
11 including a mixed question, because, in a
12 typical mixed question, you know, you look at
13 the law and you look at the facts and then you
14 look at the law again and you see how it all
15 matches up.

16 But, in this question, you're not
17 really looking at the law at all. I mean, you
18 sort of say, okay, it says unusual and
19 exceptional, but the -- the essential project is
20 to look at one factual situation and compare it
21 with many other factual situations.

22 And so, when you think of the
23 essential project as that, it starts looking not
24 like a legal question at all, not just -- so
25 separate out there are lots of legal questions

1 that involve judgment and gray areas and all of
2 that, but this, because of what it tells you to
3 look at, which is compare this factual situation
4 to many others you've seen, you -- you have --
5 where is the law in that?

6 MS. SANTOS: Well, Your Honor, I would
7 make two points to that. The first point is
8 that I think that that was essentially the
9 government's exact argument in
10 Guerrero-Lasprilla, that due diligence
11 determinations involve essentially no legal work
12 and it's just the application of the standard to
13 facts, and yet this Court still held that
14 constitutes a question of law.

15 And I think it's because -- I think
16 you might be getting caught a little -- caught
17 up a little bit in the kind of colloquial use of
18 the term "question of law." That term is kind
19 of thrown out in -- in different contexts and
20 used in different ways. But, here, we're
21 talking about the specific statutory term that
22 this Court interpreted to include the
23 application of law to fact or a mixed question.

24 Mixed questions are sometimes reviewed
25 de novo, they're sometimes reviewed for clear

1 error, they're sometimes reviewed for abuse of
2 discretion, but they're still all mixed
3 questions.

4 And I think that comparative analysis
5 that Your Honor points to is very similar to
6 extraordinary circumstances determinations under
7 -- for untimely asylum petitions and due
8 diligence. I think it's also similar to
9 exceptional case determinations under the Patent
10 Act and the Lanham Act. But that doesn't make
11 it not a mixed question and it doesn't make it
12 not reviewable.

13 JUSTICE BARRETT: Counsel --

14 JUSTICE ALITO: Isn't there this
15 difference between the -- the standard in
16 Guerrero-Lasprilla and the -- the situation
17 here?

18 If you ask -- let's say you ask a
19 person who is not a lawyer, an alien did not do
20 -- did not do something within a certain period
21 of time. Was that -- did that alien exercise
22 due diligence?

23 I mean, the ordinary person who's not
24 a lawyer would say, I can't answer that question
25 because it -- it's a legal question. It has to

1 do with legal procedures.

2 But, if you ask an ordinary person,
3 you set out a certain set of facts, so let's say
4 I'm complaining about my workplace, it's cold,
5 it's set at 63 degrees, there isn't any coffee
6 machine, the boss is unfriendly, all my
7 coworkers are obnoxious, and -- and you say am I
8 experiencing --

9 (Laughter.)

10 JUSTICE ALITO: No, I'm not --

11 (Laughter.)

12 MS. SANTOS: Okay.

13 (Laughter.)

14 JUSTICE ALITO: Any resemblance to any
15 living character is purely -- purely accidental.

16 (Laughter.)

17 JUSTICE ALITO: Is that unusual or
18 except -- am I suffering unusual and exceptional
19 hardship? An ordinary person could answer that
20 question and they could say, oh, come on, you
21 know, that's work, suck it up, right?

22 So is that a -- is -- is that a
23 difference between these two situations?

24 MS. SANTOS: Well, I think that there
25 is still, Your Honor -- first, that this is

1 still a statutory term that Congress chose,
2 right? So this is the standard that Congress
3 set. So I think you'd still have to determine
4 what Congress was intending to -- what -- what
5 Congress meant when it -- when it used these
6 specific terms. So that's still --

7 JUSTICE ALITO: It meant what the
8 terms mean. These are ordinary terms. You can
9 look them up in the dictionary.

10 MS. SANTOS: And that is --

11 JUSTICE ALITO: Some people don't even
12 need to look them up in the dictionary.

13 MS. SANTOS: And -- and -- and that's
14 essentially what the Court said in -- in other
15 cases involving similar kind of common ordinary
16 meaning terms like "exceptional case
17 determinations" or -- or even "undue hardship"
18 under Title VII, but it's still an exercise --
19 still a legal exercise to apply that standard to
20 the facts as found by the IJ.

21 JUSTICE JACKSON: But is it the type
22 of legal exercise that Congress was intending?
23 I mean, if we accept Justice Kagan's sort of
24 framing of this as the essential project is the
25 comparison of these facts to other facts, I

1 guess my question is, when we look at Congress's
2 intent in this area, you know, it -- it's about
3 the division of labor and to what extent did
4 Congress intend for the court to be the one to
5 make -- make that comparison. On what basis
6 could the court be making that comparison?

7 And can't we say, given the clear
8 jurisdiction-stripping provisions as later
9 interpreted by Patel, that really Congress
10 wanted the agency to be the one to do that kind
11 of comparison and not the court?

12 MS. SANTOS: No, Your Honor, we can't,
13 and I'll -- I'll explain why, and it has to do
14 with the way that the structure of the statute
15 works.

16 So every single determination in the
17 INA that is specified as being discretionary, it
18 all falls within the scope of Section
19 1252(a)(2)(B). So that's the
20 jurisdiction-stripping provision.

21 But what subparagraph (D) -- that's
22 the limited review provision -- does is it
23 trumps that designation. So it says nothing in
24 subparagraph (B) or (C) or any other provision
25 of -- of this chapter shall be construed to

1 preclude judicial review of questions of law.

2 JUSTICE JACKSON: I appreciate that.
3 But I understood that the enactment history was
4 such that Congress put that in in response to
5 St. Cyr and the concern that if it did what it
6 wanted to do, which was get the judiciary out of
7 this and give it to the agency, that there might
8 be constitutional problems.

9 And so Congress puts in this
10 additional language that you're talking about
11 but only to the extent that we have a
12 constitutional question or -- and I take your
13 point that it says questions of law, and we, you
14 know, suggested in or held in a subsequent
15 opinion that that includes mixed questions --
16 but, if we read mixed questions to be so broad
17 that it is essentially, you know, supplanting
18 the agency's decision-making, I find it hard to
19 make the statute make sense.

20 MS. SANTOS: Well, I think you can
21 look to what the Court said in both
22 Guerrero-Lasprilla and Patel about what would
23 remain unreviewable after you apply the limited
24 review provision and layer it on top of
25 subparagraph (B).

1 And what the Court said in
2 Guerrero-Lasprilla is that the -- the limited
3 review provision would still forbid appeals of
4 findings of fact. And in Patel, the Court said
5 the same thing. If we apply both statutes
6 together, the major remaining category of
7 determinations that are unreviewable are factual
8 findings. There was just no --

9 JUSTICE JACKSON: I understand, but
10 why would the -- why would Congress want it to
11 be that way in the statute? Why would it have a
12 statute that has the agency making the factual
13 determinations and the ultimate cancellation
14 decision, but the court swoops in to just
15 review, you know, the agency's actual function
16 with respect to determining eligibility?

17 MS. SANTOS: I think for a few
18 reasons, Your Honor. Number one is, by doing
19 so, the -- the -- by -- by enacting the limited
20 review provision the way it did, it still cut
21 out any judicial review of findings of fact,
22 which, in many cases, in many cancellation
23 cases, will completely control the -- the
24 conclusion. You won't always have cases like
25 this one where the IJ credited all of the

1 testimony and evidence that the non-citizen
2 provided.

3 And I think the second reason is that
4 by -- by enacting that provision, it got rid of
5 an entire layer of habeas review. So district
6 court habeas proceedings are still completely
7 unavailable.

8 But the typical role of an appellate
9 court to -- to review that application of the
10 legal standard to facts, whether under a
11 deferential standard or not, would still be
12 maintained.

13 JUSTICE ALITO: Would you agree that
14 --

15 JUSTICE BARRETT: Ms. Santos --

16 JUSTICE ALITO: Go ahead.

17 JUSTICE BARRETT: Ms. Santos, let me
18 try to get at the questions that you've been
19 asked in a different way.

20 What if we -- let's say that I
21 theoretically agree with you that under
22 Guerrero-Lasprilla, mixed questions, including
23 of this sort, would be subject to judicial
24 review.

25 Wouldn't you say -- and I guess I'd

1 push back a little bit on your characterization
2 of Wilkinson's claims in particular below as
3 being of that variety because, you know, I
4 looked at the record.

5 His claims, you know, the immigration
6 judge, he claimed that the immigration judge
7 wrongly speculated about the care and support
8 the child would receive if the Petitioner was
9 removed. They all read like weighing ones.

10 He found, while Wilkinson does provide
11 emotional support, removing him would result in
12 minimal emotional hardship because his son
13 clearly has lived without Wilkinson's daily
14 presence for most of his life because the mother
15 had primary custody.

16 So doesn't it seem like you're just
17 seeking or that your client was seeking a
18 reweighing of those facts and so that under
19 Patel, they really would be not subject to
20 review?

21 MS. SANTOS: So all -- the -- the
22 specific factual points that you pointed to, I
23 agree with you. Those would be unreviewable.

24 JUSTICE BARRETT: Okay.

25 MS. SANTOS: But what would be

1 reviewable is the ultimate determination of
2 whether that satisfies the statutory standard.
3 And it -- it is often the case, for example,
4 that -- that -- that, you know, when -- when
5 you're challenging -- potentially challenging
6 the weighing of -- of various factors and facts,
7 an agency or -- or a court of appeals can't just
8 supplant its view of the -- of the evidence for
9 that of the agency. But, still, the ultimate
10 question of whether those facts satisfy the
11 standard remain a question of law.

12 JUSTICE BARRETT: But it seems to me
13 -- and I've looked at some of these cases and
14 the Sixth Circuit sides with you -- but, when it
15 reviews these cases, it says that a lot of these
16 claims about, well, you just didn't understand
17 the strength of the emotional bond or you didn't
18 accurately predict what life would be like for
19 my child if I were deported or -- or removed or
20 my spouse, what the court says is those kinds of
21 things are factual.

22 And I guess that's where I'm stuck
23 because, even if I accept your argument as
24 flowing from Guerrero-Lasprilla, it's hard for
25 me to see looking at these cases very many that

1 aren't essentially factual challenges.

2 MS. SANTOS: Well, Your Honor, I -- I
3 agree with you that all of those things you just
4 pointed to, that you cited from the Sixth
5 Circuit cases, those are unreviewable. And --
6 and kind of weeding out unreviewable findings
7 and fact are things that appellate courts do all
8 the time. They have to do so in every
9 interlocutory appeal of a qualified immunity
10 decision.

11 JUSTICE BARRETT: So would you accept
12 then that there would probably be only a very
13 narrow slice of cases that a ruling in your
14 favor would make judicially reviewable and
15 including potentially even Wilkinson's own?

16 MS. SANTOS: I think it depends on
17 what the Board does in any given case. I agree
18 with Your Honor that if the IJ makes adverse
19 factual findings or if all the non- --
20 non-citizen is doing is challenging factual
21 findings on appeal, those won't be viable
22 claims. But what would be reviewable is the --
23 the ultimate determination of whether -- whether
24 those facts satisfy the standard.

25 And, here, I'll just point out

1 briefly, Your Honor, that I think the Third
2 Circuit clearly understood Mr. Wilkinson's
3 challenge as being one to that mixed question
4 because it said -- and you can see this on page
5 3a of the petition appendix -- that Mr.
6 Wilkinson argues that the hardship his son faces
7 is indeed exceptional, that's not reviewable
8 because it's discretionary. The court did not
9 say Mr. Wilkinson is challenging findings of
10 fact, and under Patel, those findings of fact
11 are unreviewable.

12 JUSTICE KAVANAUGH: Do you agree that
13 credibility determinations are factual for these
14 purposes and, therefore, unreviewable?

15 MS. SANTOS: Yes, Your Honor. We
16 don't think that credibility determinations
17 present mixed questions of law and fact, and
18 that's because -- and just to kind of make sure
19 we're all on the same page, the -- the statute
20 that the government points to is one that says,
21 considering the totality of the circumstances
22 and all relevant factors, the finder of fact
23 when determining credibility can consider -- and
24 then a non-exhaustive laundry list of factors.

25 That doesn't fall within the

1 definition of a mixed question. A mixed
2 question involves applying a standard to
3 undisputed or settled facts and -- and
4 determining whether the standard is satisfied.

5 JUSTICE SOTOMAYOR: Counsel, here, the
6 BIA doesn't review the IJ's findings on -- on
7 this being an exceptional case with deference.
8 It reviews it de novo. So the BIA believes
9 there's a legal standard, correct?

10 MS. SANTOS: Absolutely, Your Honor.
11 And, in fact, when EOIR promulgated clear error
12 review for the first time in 2002, it actually
13 used exceptional and extremely unusual hardship
14 as an example of something that wouldn't be
15 reviewed for clear error because it's not a
16 factual finding.

17 JUSTICE SOTOMAYOR: Is there any
18 question that Justice Jackson has asked you or
19 even Justice Barrett -- Justice Barrett is
20 making the point, which is, unless we can
21 distinguish Guerrero-Lasprilla, and I don't see
22 how you can unless you buy the distinction the
23 government makes between statutory and common
24 law findings, which makes no sense to me -- I
25 think your brief does a good job of that --

1 these are all arguments that were rejected in
2 Guerrero-Lasprilla, right?

3 MS. SANTOS: Yes.

4 JUSTICE SOTOMAYOR: If Justice
5 Jackson's unhappy with it, it has to overrule
6 that case.

7 (Laughter.)

8 MS. SANTOS: I don't know that I want
9 to get in the middle of that.

10 (Laughter.)

11 JUSTICE JACKSON: Well, no, can I --
12 can I have --

13 JUSTICE SOTOMAYOR: Maybe -- maybe you
14 don't want to. That was a beautiful -- that was
15 a beautiful answer, by the way.

16 JUSTICE ALITO: Well, let me take you
17 out --

18 JUSTICE JACKSON: Can I just --

19 JUSTICE ALITO: -- from the middle of
20 it.

21 JUSTICE JACKSON: -- can I -- in my
22 own defense here, can I -- can --

23 (Laughter.)

24 JUSTICE JACKSON: -- can I just ask,
25 though, whether Guerrero-Lasprilla is helping us

1 with a particular nuance that I see happening,
2 right? We've said in other scenarios that not
3 all mixed questions are the same. So, even if
4 we assume that Guerrero, as I'll call it, says
5 mixed questions count for questions of law, is
6 it possible that there are certain kinds of
7 mixed questions that Congress intended to
8 include here and other kinds that it didn't?

9 So my example is a scenario in which
10 the defendant or the -- the petitioner is
11 challenging the BIA's own rules with respect to
12 how it applies this extreme and unusual
13 hardship. So you say in your brief the BIA has
14 looked at the statute and it has come up with
15 factors that it says the IJs should be applying
16 when it does this. If someone makes the claim
17 that the BIA's factors are inconsistent with the
18 statute insofar as they're applying it in this
19 way in this case, I guess you could say that's a
20 mixed question perhaps. Maybe it's closer to
21 the question -- a pure question of law, but at
22 least you're -- you're challenging the BIA's
23 interpretation of the statute with respect to
24 the factors that it has created.

25 Justice Barrett has come up with a

1 different kind of scenario where we agree on the
2 facts of this case and we agree on the
3 standards, the factors, that everybody's saying,
4 hooray, BA -- BIA, you have it right with
5 respect to what the IJ is supposed to be looking
6 at, but the claim is that the IJ has not weighed
7 these factors appropriately, that it has put
8 more stock in a certain, you know, segment of it
9 than another, and, Court, we really think you
10 should reweigh it differently.

11 Now that might be a mixed question
12 too, but it seems to me that it's of a different
13 variety. And if we could interpret Guerrero --
14 Guerrero to be talking about the former and not
15 the latter, maybe it doesn't have to be
16 overruled.

17 MS. SANTOS: So I don't think there's
18 any way to principally read Guerrero-Lasprilla
19 that way.

20 JUSTICE JACKSON: Mm-hmm.

21 MS. SANTOS: And -- and I'll give you
22 two reasons. Number one is because of the way
23 that the case was litigated. The government's
24 view -- the government's argument in
25 Guerrero-Lasprilla was that, first, no mixed

1 question should be considered questions of law.

2 May -- may I finish, Mr. Chief
3 Justice?

4 CHIEF JUSTICE ROBERTS: Yes.

5 MS. SANTOS: And, second, that at the
6 very least, super fact questions shouldn't be
7 considered questions of law, and the Court
8 rejected that, and in doing so, its opinion did
9 not distinguish any particular mixed questions.
10 And it drew from a variety of contexts,
11 including constitutional mixed questions,
12 statutory mixed questions, and common law mixed
13 questions.

14 So I don't think there's any way to
15 read Guerrero-Lasprilla narrowly given the way
16 the Court wrote the opinion.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas?

20 Justice Alito?

21 JUSTICE ALITO: Do you agree that the
22 -- the bottom-line judgment in every decision
23 made by a court or an administrative agency
24 involves a mixed question of law and fact or
25 perhaps a question of law?

1 MS. SANTOS: Your Honor, I believe
2 that the -- that the application of any statute
3 -- any legal standard to facts qualifies as a
4 mixed question. It may sometimes be driven by a
5 particular factual finding, but the application
6 of law to fact, I think, is.

7 JUSTICE ALITO: And that's what every
8 judgment does, right? It applies the law to a
9 particular set of facts.

10 MS. SANTOS: It -- I guess it depends
11 on the way you -- you -- what you mean by the
12 term "judgment," which I know is a whole issue
13 in Patel, and I don't want to get caught up in
14 that, but -- but, yes, I think that any
15 conclusion about whether a statutory standard is
16 satisfied is the application of law to fact, and
17 that presents a mixed question.

18 JUSTICE ALITO: And 1252(a)(2)
19 precludes reviewing judgments, so your argument
20 is that although it precludes reviewing
21 judgments, in fact, every judgment is reviewable
22 because it's a mixed question of law and fact?

23 MS. SANTOS: Well, Your Honor, our
24 position is that 1252(a)(2)(B)(i) precludes
25 judicial review over any judgment regarding the

1 granting of relief, but if you look up two
2 lines, it says except as provided in
3 subparagraph (D), and if you look down a couple
4 paragraphs, it says nothing in subparagraph (B)
5 shall be construed as precluding review of
6 questions of law.

7 So, yes, I think that the plain text
8 of subparagraph (D) trumps a designation of --
9 of a -- of a judgment as discretionary --

10 JUSTICE ALITO: It swallows up the
11 exception completely.

12 MS. SANTOS: It doesn't, Your Honor,
13 because it still precludes the judicial review
14 of questions of fact, as this Court said in
15 Guerrero-Lasprilla and Patel, and it precludes
16 any -- any first-line habeas review, any habeas
17 review at all, which removed an entire layer of
18 judicial review.

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

21 JUSTICE SOTOMAYOR: Justice Thomas
22 pointed out the very same arguments that Justice
23 Alito has made, and that was one of his
24 criticisms of the majority opinion, wasn't it?

25 MS. SANTOS: It was. It was that the

1 -- the majority opinion was categorical when it
2 could have been narrow.

3 JUSTICE SOTOMAYOR: And I think
4 Justice Thomas pointed out what Justice Jackson
5 noted, that there are different kinds of mixed
6 questions of law and fact and that the majority
7 had ruled those -- that out as a reason.

8 MS. SANTOS: That's right, Your Honor.
9 I also think even beyond -- I mean, I know that
10 sometimes dissents are written broadly, but I do
11 think that's an accurate categorization or -- or
12 -- or characterization of what the majority
13 decided.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?
15 Justice Gorsuch?

16 JUSTICE GORSUCH: Can we agree that
17 the ultimate discretionary decision rests with
18 the Attorney General and is unreviewable too?

19 MS. SANTOS: It's unreviewable as a
20 question of law, absolutely, because it doesn't
21 involve the application of law to fact. It
22 still would be subject -- subjected to
23 subparagraph (D), so any constitutional claims
24 --

25 JUSTICE GORSUCH: Sure.

1 MS. SANTOS: -- that may exist.

2 JUSTICE GORSUCH: Sure. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 JUSTICE KAVANAUGH: In response to
6 Justice Jackson, when you said Guerrero rejected
7 that kind of line-splitting of a mixed question
8 from more factual mixed questions, one of the
9 reasons we did that, I think, is because there
10 would be, as your brief says, a morass trying to
11 do that across the board and it would be years,
12 if not decades, of litigation trying to resolve
13 that question when, if you just do a deferential
14 standard of review, you know, the Board's going
15 to get affirmed most of the time but not always
16 but most of the time and you don't have this
17 collateral litigation.

18 MS. SANTOS: Yes, that's right, Your
19 Honor. And -- and I think that pushing --
20 pushing this into the merits bucket doesn't mean
21 that -- that we're just kind of repeating the
22 same analysis.

23 I think standard-of-review analysis is
24 actually way simpler than the government's
25 framework. And, also, waiver rules would apply,

1 and courts can always say something like, under
2 any standard of review, I would still reverse or
3 affirm. So we think it will be much simpler and
4 more streamlined.

5 And, of course, there will be judicial
6 review, which is really important, particularly
7 in an immigration context, where an error can
8 have disastrous consequences by -- by tearing
9 apart families.

10 JUSTICE KAVANAUGH: Because I think we
11 thought about that in Guerrero and decided it's
12 not worth the candle, but, in any event, another
13 question about the limits of your argument,
14 which is -- and this follows Justice Gorsuch's
15 question.

16 If the IJ said or the Board said we're
17 going to assume arguendo eligibility, but as a
18 matter of discretion -- exercising our
19 discretion, we would deny cancellation of
20 removal in any event, that determination would
21 be unreviewable, correct?

22 MS. SANTOS: Correct, Your Honor.
23 There -- there -- this Court does have a
24 precedent on point. It's something like
25 Rumsmanabad, I can't recall, but, yes, there is

1 a specific precedent on point that says exactly
2 that.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice?

5 JUSTICE BARRETT: I too just have some
6 questions about the limits of your argument.
7 So, in our colloquy earlier, did I understand
8 you correctly to say that even if this is a
9 mixed question, even if -- even if in theory
10 Guerrero-Lasprilla applies here, permitting
11 judicial review of the application of law to
12 facts, that there's still a category of claims
13 that a non-citizen might press on review that
14 really are purely factual?

15 MS. SANTOS: I -- I don't think that's
16 what I was intending to say, Your Honor.

17 JUSTICE BARRETT: Oh.

18 MS. SANTOS: My -- my -- my argument
19 was that if in a court of appeals a non-citizen
20 presses purely factual, you know, challenges
21 findings of historical fact, those will be
22 unreviewable and a court of appeals can just say
23 we aren't reviewing that, we at scale.

24 JUSTICE BARRETT: Okay. That was my
25 question.

1 MS. SANTOS: Oh, okay. Yes.

2 JUSTICE BARRETT: So you're -- you're
3 saying --

4 MS. SANTOS: Yes.

5 JUSTICE BARRETT: Okay.

6 MS. SANTOS: My apologies if I -- if I
7 misunderstood.

8 JUSTICE BARRETT: Okay.

9 MS. SANTOS: Definitely unreviewable
10 under Patel.

11 JUSTICE BARRETT: Okay. But you are
12 saying -- and I think this kind of came out when
13 you were talking to Justice Jackson -- that
14 while that -- the hypothetical that I just
15 posed, you know, like, does your son have a
16 mental illness or not, that's an unreviewable
17 fact?

18 MS. SANTOS: Right.

19 JUSTICE BARRETT: But you have said
20 that the weighing of those facts, which one
21 might be more important than others or, listen,
22 I -- I accept that your son needs your emotional
23 support, you know, but I also accept that his
24 grandmother cares for him, say, and so I just
25 don't weigh it that heavily, is that a factual

1 question or is that a mixed question?

2 MS. SANTOS: I -- I don't think that
3 is a factual question. I think it has to go
4 into the overall analysis whether the
5 non-citizen established exceptional and
6 extremely unusual harm. So I think that that --
7 that, you know, weighing might be viewed very
8 deferentially because of the proximity of the IJ
9 to the facts and experience, but it wouldn't
10 make it unreviewable.

11 And I think, here, for example, we
12 might -- we would say, Your Honor, that the IJ
13 really erroneously boiled the entire analysis
14 down to economic detriment, which is not the way
15 that you're supposed to apply the statutory
16 provision.

17 But -- but those -- any type of
18 weighing would certainly be viewed
19 deferentially. I just don't think they'd be
20 unreviewable because, if so --

21 JUSTICE BARRETT: Well, I guess I
22 don't understand that. I mean, I agree with you
23 if -- if say the IJ said, listen, all that
24 matters is economics, and we'd say, well, that
25 was a miss -- a misunderstanding of what the

1 hardship standard requires. I mean, I can see
2 why that's a question of law.

3 But, when you're talking about the
4 weighing, I mean, let's say, yeah, I credit your
5 testimony that you have a strong emotional bond
6 with your son and vice versa. I also have
7 testimony here that I also credit that the
8 grandmother cares for him -- I'm just making
9 this up, I know it's not your case -- but that
10 the -- the grandmother cares for him and there's
11 a strong emotional support there, and so I just
12 think given those two, you know, I -- I just
13 don't think that the emotional support is
14 enough of -- that the father provides is enough
15 of a reason to say hardship.

16 But you're saying that's a legal
17 question, that kind of weighing?

18 MS. SANTOS: I'm saying that that
19 constitutes a question of law --

20 JUSTICE BARRETT: A mixed question.

21 MS. SANTOS: -- as interpreted by the
22 INA or --

23 JUSTICE BARRETT: Oh, okay.

24 MS. SANTOS: -- as -- as the INA uses
25 that term and that it would -- all of that would

1 cash out under the standard-of-review analysis.

2 JUSTICE BARRETT: Okay. And then last
3 question. You have said in response to Justice
4 Kavanaugh's questions that the standard of
5 review would be deferential, and you initially
6 said abuse of discretion.

7 And so I just want to clarify, is that
8 what your position would be?

9 MS. SANTOS: So there are various kind
10 of articulations of deferential review. We
11 haven't briefed that. And so I -- I suspect it
12 would be abuse of discretion, but yes.

13 JUSTICE BARRETT: Okay. But you're
14 not -- you're not making a commitment, you're
15 saying you suspect, but maybe it's clear error?

16 MS. SANTOS: It -- it -- it might be.
17 I mean, Your Honor, I -- I would just say that
18 -- that that would I'm sure be briefed and has
19 been briefed in other cases and we just haven't
20 here, but I -- I do believe that it would be a
21 deferential standard of review.

22 It's -- you know, when you kind of
23 layer the standard of review on to the
24 administrative law context, there's lots of ways
25 you could articulate what that standard is, but

1 due diligence has been reviewed for abuse of
2 discretion since Guerrero-Lasprilla.

3 JUSTICE BARRETT: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: So can I just go
7 back to Justice Barrett's last hypothetical
8 where we have a situation in which the IJ has
9 looked at the factors and has said, I don't --
10 you know, I understand and accept your
11 credibility about the strength of your emotional
12 bond, but I also have testimony about the
13 grandmother caring for your son, and at the end
14 of the day, my conclusion, based on weighing all
15 of these different factors and considering the
16 evidence, is not met, this particular element.
17 You, I think, say that's reviewable.

18 I'd like to know what is the legal
19 standard that I use as the court to review that
20 determination and say yes, you're right, or no,
21 you're wrong. Am I looking at what?

22 MS. SANTOS: Well, assuming that some
23 type -- like abuse of discretion-type review
24 would apply --

25 JUSTICE JACKSON: Mm-hmm.

1 MS. SANTOS: -- you -- one might
2 reverse if, for example, an IJ ignored
3 particularly salient factors that the law deems
4 relevant to the analysis.

5 JUSTICE JACKSON: What law? This is
6 not in the statute.

7 MS. SANTOS: The legal standard.
8 Sorry, the -- the legal standard in the statute,
9 exceptional and extremely unusual hardship, that
10 term has been interpreted by the --

11 JUSTICE JACKSON: By the?

12 MS. SANTOS: -- Board, by the Board --

13 JUSTICE JACKSON: Okay.

14 MS. SANTOS: -- in the precedential
15 decision, Monreal-Aguinaga, and so courts may
16 look to that precedential decision for --

17 JUSTICE JACKSON: Does it matter --
18 does it matter that this case has come to me
19 through the Board, which presumably knows its
20 own standard and has looked at this situation
21 and said we have a precedent, the one you
22 described. We don't think that it precludes the
23 IJ's determination, so we're affirming what the
24 IJ has said about applying our own precedent to
25 this circumstance?

1 MS. SANTOS: Well, Your Honor, I don't
2 think that the fact that the Board affirmed
3 makes it kind of extra special. I think
4 especially here --

5 JUSTICE JACKSON: No, no, no, I'm just
6 asking what the Court --

7 MS. SANTOS: Right.

8 JUSTICE JACKSON: -- is supposed to do
9 because we don't have a body of law that is
10 existing outside, I think, of what the BIA has
11 interpreted this to mean. And so the Court --

12 MS. SANTOS: Right.

13 JUSTICE JACKSON: -- would have to
14 say, I guess, BIA, you're wrong about your own
15 view of whether your standard applies in this
16 situation?

17 MS. SANTOS: Well, so the -- the Court
18 would be first starting with a standard that
19 Congress set, right, and then it could decide
20 whether it agrees with how the Board has
21 interpreted it.

22 JUSTICE JACKSON: But that's not the
23 challenge.

24 MS. SANTOS: Right. That's not the
25 challenge.

1 JUSTICE JACKSON: I agree with you
2 that if that was the challenge, then I'm in --

3 MS. SANTOS: Yes.

4 JUSTICE JACKSON: -- a question-of-law
5 world. We agree that the Board has interpreted
6 correctly.

7 MS. SANTOS: Yes.

8 JUSTICE JACKSON: The question is,
9 when the Board says our standard equals no
10 extreme hardship in this particular case, what
11 is the courts' basis for saying you're wrong?

12 MS. SANTOS: Well, under -- under, for
13 example, abuse-of-discretion review, a court
14 could reverse if it had the definite and firm
15 conviction that an error had been made, if it
16 thought that -- that -- that the IJ and the
17 Board had just really, really missed the mark in
18 evaluating the facts under the -- under the
19 appropriate legal standard.

20 I mean, I think that abuse of
21 discretion -- even deferential review of mixed
22 questions exists to make sure that the agency is
23 staying within the bounds of what Congress said.
24 That's what this Court said in cases like Taylor
25 versus United States, a Sentencing Act case.

1 JUSTICE JACKSON: Okay. Let me ask
2 you one more question. In terms of the --
3 Congress's intent -- and it's possible that you
4 -- that -- that this had been handled in
5 Guerrero, I wasn't on the Court at that time, so
6 I just want to be clear.

7 MS. SANTOS: Okay.

8 JUSTICE JACKSON: I'm interested in
9 the sort of idea that what is left here is
10 precluding questions of fact and habeas review,
11 and it just strikes me as a really convoluted
12 way for Congress in writing this statute to
13 achieve that result.

14 They say several times no court shall
15 have jurisdiction to review judgments in this
16 area. And if really Congress just wanted to
17 say, you can't review factual determinations of
18 the agency, it seems to me there was a lot
19 simpler way to go about that.

20 So can you just help me with my --

21 MS. SANTOS: Sure.

22 JUSTICE JACKSON: -- nagging concern
23 that maybe this is not what Congress was
24 intending?

25 MS. SANTOS: Happy to do so, Your

1 Honor, and this was specifically addressed both
2 in Guerrero-Lasprilla and Patel. And I think
3 what the Court said is a couple things. Number
4 one, that this provision, the limited review
5 provision, applies to a whole bunch of
6 provisions throughout the INA. So it applies to
7 forms of relief under subsection (B). It
8 applies to criminal alien final orders of
9 removal under (C). It says it also applies to
10 the entire rest of the INA.

11 So I think what the Court said is, you
12 know, Congress was trying to loop in a whole
13 bunch of different things and it -- and it --
14 and it did it this way because it would apply to
15 numerous different statutory provisions. And,
16 yes, perhaps, it might make more sense in some
17 situations to say we just forbid findings of
18 fact, but then it may have to kind of go
19 provision by provision and explain when that was
20 the case.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Ms. Sinzdak?

25

1 ORAL ARGUMENT OF COLLEEN SINZDAK
2 ON BEHALF OF THE RESPONDENT
3 MS. SINZDAK: Mr. Chief Justice, and

4 may it please the Court:

5 The plain text of Section
6 1252(a)(2)(B) and (D) requires courts to
7 distinguish between reviewable constitutional
8 claims and questions of law, which includes
9 mixed questions, and any other judgment
10 regarding the denial of non- -- of discretionary
11 relief. And in Patel, this Court was very clear
12 that "any" meant "any."

13 That included subjective and objective
14 determinations. That included the
15 quintessentially discretionary determination of
16 -- at the second step as to whether an eligible
17 non-citizen is -- should receive cancellation of
18 removal. But it also included credibility
19 determinations, which the Court recognized
20 required some objective fact-finding but also
21 some exercise of discretion. And it included
22 simply finding historical facts. This
23 non-citizen has been in the country for 11 years
24 and meets the continuous presence requirement.

25 Now, in order to figure out whether

1 any of those statutory determinations -- and all
2 of the examples I just gave you are statutory
3 determinations, they're made pursuant to a
4 statute. In order to figure out whether those
5 statutory determinations fall within the
6 exception that permits judicial review of
7 questions of law and constitutional claims, the
8 Court has to look at the statute and say: Okay,
9 is this a statute that's asking for a legal
10 conclusion, like fair use, or is this a statute
11 that's saying find a fact like in
12 Pullman-Standard where we had intention to
13 discriminate, pure question of fact, or is it a
14 statute where the terminology is saying make a
15 discretionary decision like in Williamsport Wire
16 Rope, where we had the term "exceptional
17 hardship" and the Court said that's requiring a
18 discretionary decision.

19 And the Court has to figure that out
20 in order to honor the plain text of Section
21 1252(a)(2)(B). It can't decide that it would be
22 easier just to say all statutory determinations
23 are reviewable because that's not what the
24 statutory text says.

25 And we think that if you apply the

1 standard tools of statutory interpretation --
2 that's text, history, and precedent, that's the
3 complicated framework that I think my friend is
4 referring to -- if you apply those tools, you'll
5 figure out that exceptional and extremely
6 unusual hardship, that is a factual
7 determination and that's an exercise of agency
8 discretion. That is not a legal conclusion.

9 I welcome the Court's questions.

10 JUSTICE SOTOMAYOR: So why does -- oh,
11 I'm sorry. Go ahead.

12 CHIEF JUSTICE ROBERTS: No, go ahead.

13 JUSTICE SOTOMAYOR: So why does the
14 BIA review it de novo?

15 MS. SINZDAK: Because the BIA reviews
16 discretionary decisions de novo, so the de novo
17 standard applies to discretionary factual
18 findings.

19 JUSTICE SOTOMAYOR: And why do they
20 set a standard at all?

21 MS. SINZDAK: Pardon?

22 JUSTICE SOTOMAYOR: Why don't they
23 just make it discretionary? They set a
24 standard. They say to the IJs use this standard
25 --

1 MS. SINZDAK: They did --

2 JUSTICE SOTOMAYOR: -- to measure the
3 decision by. So it is not saying it's purely
4 discretionary. It's saying we're setting a
5 legal standard.

6 MS. SINZDAK: No, it's not purely
7 discretionary in that the IJ could just decide
8 based on anything that it wants. And in part --

9 JUSTICE SOTOMAYOR: Like the Attorney
10 General can?

11 MS. SINZDAK: Pardon?

12 JUSTICE SOTOMAYOR: The Attorney
13 General can.

14 MS. SINZDAK: Well, there's a
15 statutory text and we freely admit that the
16 interpretation of the statutory text is a
17 question of law and that you can challenge that
18 statutory text and say the Board has
19 misunderstood the meaning of these statutory
20 terms. But, of course, that's not the challenge
21 that we have here.

22 Now that is what the Board has done.
23 It has said this is what we think the statutory
24 text means. It means make a decision about
25 whether you think this non-citizen's facts are

1 substantially beyond what you would get in an
2 ordinary case. So the BIA has said make that
3 discretionary judgment, make that predictive and
4 comparative judgment, and -- and that's it.
5 That's -- there's no legal element to that
6 conclusion.

7 So it's just a weighing of evidence.
8 It's sort of -- it really reminds me of the
9 credibility determination and the way that the
10 Court talked about it in -- in Patel recently.

11 JUSTICE KAGAN: Well, Ms. -- Ms. --
12 Ms. Sinzduk, it strikes me that everything that
13 you just said is -- is pretty much a
14 relitigation of the issue that was raised in
15 Guerrero, that the government came in, basically
16 made the same argument. The government said,
17 you know, there are mixed questions and then
18 there are mixed questions. There are mixed
19 questions that are really super factual.

20 And we accepted that distinction when
21 it came to standards of review in Lakeridge, but
22 we specifically did not accept it when it came
23 to this question. We said, you know what, we
24 don't really care if it's primarily factual. We
25 don't really care if it involves a lot of

1 judgment calls. We don't really care if you
2 have to really kind of search for the legal
3 standard in the inquiry. As long as there is
4 that legal standard and as long as all the
5 fact-finding that you do and all the
6 fact-weighting that you do eventually has to
7 satisfy that legal standard, and the question is
8 whether it does, it's a mixed question and it's
9 reviewable. That's how I read that decision.

10 You're just, you know, basically
11 saying you don't like it.

12 MS. SINZDAK: No. To be clear, we
13 accept the holding of Guerrero-Lasprilla, and we
14 are not up here saying that mixed questions are
15 unreviewable. So, if -- if we thought that the
16 exceptional and extremely unusual hardship had a
17 legal component, even if it was mixed in with
18 the facts, then it would not be reviewable.

19 But what we are here saying is just
20 because a statute is -- a term is in a statute,
21 that doesn't mean that it -- it establishes a
22 legal standard in the sense that
23 Guerrero-Lasprilla was --

24 JUSTICE KAGAN: Well, here's the --
25 here was the -- I mean, the question in Guerrero

1 was this equitable tolling question, which is
2 primarily a question of whether extraordinary
3 circumstances prevent a litigant from doing what
4 she should have done.

5 I mean, it's the exact same thing.
6 Are there extraordinary circumstances here?
7 Well, we're going to, you know, think about
8 facts a real lot. You know, what were those
9 circumstances? And how extraordinary were they
10 when they're compared to other circumstances
11 that make it difficult to -- to do what the
12 legal rules tell you you have to do?

13 I mean, I don't really see any
14 distinction in the nature of the inquiry here.

15 MS. SINZDAK: I -- I -- I disagree. I
16 first just want to point out that there was no
17 debate in Guerrero-Lasprilla that the Court was
18 dealing with a mixed question. So what -- what
19 concerns -- what constituted a mixed question
20 wasn't before the Court.

21 But I'm not here disputing that due
22 diligence is a mixed question, and the reason
23 for that is I think exactly what Justice Alito
24 was speaking about earlier, which is that due
25 diligence is a legal concept. It's a -- it's a

1 creature of the law. It's a --

2 JUSTICE KAGAN: I mean, you can say
3 that, but what it asks a -- a -- a fact -- what
4 it asks a decision-maker to do is say how
5 extraordinary were the circumstances that
6 prevented you from following the rules.

7 And that's exactly the nature of the
8 question here. How extraordinary are the
9 circumstances that -- that -- that -- that --
10 that -- that were involved in a particular case?

11 MS. SINZDAK: Now you are correct that
12 there is some overlap and there are some similar
13 things that adjudicators are being asked to do.
14 I have to say what I find a little bit
15 unsatisfying but it's just the facts here is
16 that distinguishing questions of law from
17 questions of fact and discretion is often a
18 matter of history. So one of the things that
19 the Court repeatedly has done is just said, is
20 this the type of analysis that the courts have
21 done? It is a question of law. And we see that
22 in Teva. We see that in Oracle.

23 Is this the sort of thing, question
24 that has been decided by juries or by fact
25 finders? Then it's not going to be considered a

1 question of law.

2 And I really do think that the common
3 law history of the due diligence inquiry that
4 this is something that had -- was a judge-made
5 inquiry that was always decided by judges,
6 elaborated by judges --

7 JUSTICE KAGAN: That sounds very
8 complicated. I mean, Ms. Santos says there are
9 75 of these, and we're going to do that analysis
10 as to whether each of them is reviewable or not
11 reviewable? We're going to look into the
12 history, we're going to look into the source of
13 law, we're going to look into, you know, who
14 primarily has prerogative over this issue. It
15 seems like Guerrero, when it came down to it,
16 this is what Justice Kavanaugh said, is that is
17 not worth the candle.

18 You know, of course, these are going
19 to be reviewed extremely deferentially, but if
20 there's a legal standard at issue, if the
21 conclusion that the Court comes to is in the end
22 do these set of facts as found, as weighed,
23 satisfy this legal standard, then the better
24 course is just to call it a day and say it's
25 reviewable and not have to go any further.

1 MS. SINZDAK: So I want to make a
2 couple points here. The first is that you're
3 going to have to perform what you're referring
4 to as a complicated analysis, which I would
5 refer to as simply statutory interpretation and
6 what the Court does every time it decides a
7 standard of review and -- and here's the --
8 where I'm getting to -- you're going to have to
9 perform this analysis under Petitioner's
10 framework because Petitioner is saying the
11 standard of review is going to turn on whether
12 this is an exercise of discretion. I think
13 she's saying abuse-of-discretion review. So
14 it's going to -- to -- to turn on whether it's
15 an exercise of discretion or it's a factual
16 finding or it's a question of law.

17 And what we're saying is, look, that's
18 not the right analysis because the -- the
19 statute says, no, it has to be a question of law
20 for it to be reviewable at all.

21 JUSTICE KAVANAUGH: Well --

22 MS. SINZDAK: But, if you think that,
23 oh, the government's framework is too
24 complicated, I just -- I don't think you're
25 going to avoid it. You're just going to get

1 these questions --

2 JUSTICE KAVANAUGH: Well, but --

3 MS. SINZDAK: -- in the

4 standard-of-review framework.

5 JUSTICE KAVANAUGH: -- on the -- on

6 the standard of review, there are lots of

7 different framings you can put on it. It's --

8 there are two main buckets, though, deferential

9 or de novo, and I think what she was saying is
10 it's going to be deferential.

11 MS. SINZDAK: I -- I'm not sure --

12 JUSTICE KAVANAUGH: And so I don't

13 know that, you know, you can frame it a lot of

14 different ways, but, basically, as -- as counsel

15 said, I think correctly, the usual analysis when

16 you're doing these, and we've done a lot of

17 these, is has the agency jumped the rails of

18 reasonableness in how it determined whether a

19 given set of facts constituted something

20 extremely unusual.

21 MS. SINZDAK: I -- I think the -- the

22 problem here is that questions of law are

23 reviewed de novo. That's sort of blackletter

24 law. And, in fact, the Fourth Circuit has

25 reviewed a number of these exceptional and

1 extremely unusual circumstances findings de novo
2 because they've said, well, we know the only --

3 JUSTICE KAVANAUGH: Well, that's not
4 -- I mean, that's probably not correct to do it
5 de novo in those circumstances, is what counsel
6 acknowledged and I think correctly, like Judge
7 Murphy said in the Sixth Circuit opinion, I
8 think was, okay, it's reviewable, what changes,
9 perhaps not much in terms of bottom line because
10 it's going to be deferential review, right?

11 MS. SINZDAK: We -- we think the
12 problem again is that the only thing that
13 Congress made reviewable is a question of law.
14 So, as long as you're talking about --

15 JUSTICE KAVANAUGH: Well, can I stop
16 --

17 MS. SINZDAK: Yeah.

18 JUSTICE KAVANAUGH: No, keep going
19 actually.

20 (Laughter.)

21 MS. SINZDAK: No, and -- but -- so my
22 point is that as soon as you're saying no, we're
23 reviewing something that's not a question of
24 law, so de novo review is obviously not
25 appropriate, I think you're in a little bit of

1 trouble because it seems like actually now we're
2 talking about discretion, we're talking about
3 fact-finding.

4 JUSTICE KAVANAUGH: Well, this is now
5 Groundhog Day from Guerrero because we talked
6 about the history of St. Cyr and how the
7 decision there recognized and the subsequent
8 congressional history recognized that
9 applications of law to fact would be considered
10 questions of law even though I'm with you as a
11 first principle, I might not have gone down that
12 road that Congress did, but that was, I think,
13 the clear understanding of what questions of law
14 covered, and we said as much in Guerrero, so
15 that kind of ended that discussion at least as I
16 thought about it.

17 MS. SINZDAK: No, again, what Guerrero
18 said is that when you have a mixed question, so
19 that assumes that there is a legal component,
20 but what you have to be pointing to is what is
21 the legal question, and there isn't a legal
22 question there.

23 JUSTICE KAVANAUGH: So --

24 MS. SINZDAK: And if I could just --

25 JUSTICE KAVANAUGH: So, if you -- if

1 it says the brief's due in 45 days except in
2 unusual circumstances, is the "except in unusual
3 circumstances" a -- does that not have a legal
4 component?

5 MS. SINZDAK: That's a discretionary
6 determination. I think that that is something
7 where -- I mean, there's an inter- -- you have
8 to interpret the terms that you would --

9 JUSTICE GORSUCH: But don't we hold --
10 don't we hold all the time, courts of appeals,
11 the lower court abused its discretion as a
12 matter of law when it denied -- when it -- when
13 it reaches a wrong judgment? Isn't that exactly
14 what we say?

15 MS. SINZDAK: I -- I think that
16 sometimes that is colloquially what the -- or --
17 or less colloquially --

18 JUSTICE GORSUCH: Colloquially? I
19 mean --

20 MS. SINZDAK: Yes. I think what that
21 says is that is an --

22 JUSTICE GORSUCH: -- I mean, isn't
23 that exactly --

24 MS. SINZDAK: Pardon me. No. I
25 should not have said colloquially.

1 JUSTICE GORSUCH: If I might just --

2 MS. SINZDAK: I agree.

3 JUSTICE GORSUCH: -- if I might just
4 -- if I might just finish. Yeah. Okay, you
5 agree.

6 MS. SINZDAK: No, I shouldn't have
7 said colloquially. But I will say that what I
8 should have said, which is correct, is that I
9 think that they use that in order to say -- to
10 say this is just a really unreasonable --

11 JUSTICE GORSUCH: Exact --

12 MS. SINZDAK: -- exercise of
13 discretion.

14 JUSTICE GORSUCH: Exactly. We say as
15 judges all the time that, yes, the district
16 court has ample room of discretion and discovery
17 in undue hardship, in due diligence, in lots of
18 things, but there are boundaries set by law that
19 they cannot exceed. The guardrails are wide,
20 but they're there.

21 We don't say we disagree with this
22 discretionary decision and we would have done it
23 differently. We say, when they reached those
24 boundaries, they erred as a matter of law,
25 right?

1 MS. SINZDAK: I -- yes, but I want to
2 say you have to articulate what that boundary
3 is. So, if Petitioner was to --

4 JUSTICE GORSUCH: Well, I just want to
5 make sure I -- I heard the first part of the
6 answer was yes?

7 (Laughter.)

8 MS. SINZDAK: The first part of the
9 answer is if -- yes, because we have conceded if
10 Petitioner says, as the -- the law says
11 exceptional and unusual circumstances, and
12 exceptional does not mean, for example, unique
13 and, here, the agency has said it means unique.

14 That's an error of law. That's a
15 misinterpretation of the statute. And that's a
16 guardrail, you're right, that's a boundary. An
17 agency cannot do something that the statute
18 doesn't permit it to do. And if the statute --
19 if -- if -- if they do and if a non-citizen says
20 you have transgressed the boundaries that the
21 statute sets, then that's a question of law.

22 JUSTICE BARRETT: Well --

23 MS. SINZDAK: It has to be colorable,
24 of course.

25 JUSTICE BARRETT: But wait, wait,

1 wait, like --

2 JUSTICE GORSUCH: It seems like they
3 have to get --

4 JUSTICE BARRETT: -- transgress the --
5 I'm sorry.

6 JUSTICE GORSUCH: Sorry, no, please.

7 JUSTICE BARRETT: If transgress the
8 boundary -- I mean, you're saying you put the
9 boundary in the wrong place by saying unique.
10 But transgress the boundaries is I think what
11 Justice Gorsuch is getting at, imagine the worst
12 case possible. Let's say the non-citizen has
13 one child who has cancer, there's no other
14 relative in the country, they have no support
15 network, he's the sole breadwinner. So let's
16 just posit that that's -- that's a heartland
17 case for hardship under the statute.

18 Couldn't it abuse -- couldn't the BIA
19 or the IJ abuse its discretion in a way that
20 transgresses the guardrails by saying no, that's
21 not an exceptional and unusual circumstance?

22 MS. SINZDAK: No in the sense that we
23 think that when you're asking to reweigh or to
24 redo the discretionary analysis --

25 JUSTICE BARRETT: It's not reweigh.

1 It's not reweigh.

2 MS. SINZDAK: Well, so I -- I'm not
3 sure that what you're positing is any different
4 than in Patel, where the non-citizen was saying,
5 look, this is an unreasonable determination of
6 the facts. No reasonable adjudicator could have
7 found that I wasn't credible.

8 JUSTICE BARRETT: No, in Patel, he's
9 saying -- no, no, no, no. In Patel, he's saying
10 you're wrong, you know, I was credible. That's
11 different. That was one fact. This is saying
12 here are guardrails, I'm entitled for my
13 eligibility determination to say that I'm
14 eligible if I can show hardship required by the
15 statute, and I have shown something that by any
16 measure would be extreme and unusual, and you
17 have said applying that statutory standard to my
18 circumstances, that it's not.

19 MS. SINZDAK: So I think there, if
20 you're making it a legal question, if you're
21 saying the term "exceptional and extremely
22 unusual circumstances" --

23 JUSTICE BARRETT: No, no, no, no.
24 They correctly did misstate the legal standard.
25 Let's say, you know, states the standard

1 correctly but just says this doesn't count.

2 MS. SINZDAK: Again, I think then you
3 are talking about something like the Patel
4 situation where you're saying no reasonable --
5 no reasonable adjudicator who understood the law
6 or who understood that -- that -- what
7 credibility meant could have reached this
8 conclusion.

9 And that is exactly what the
10 petitioner in Patel was saying, and the Court
11 still said no, it's a question of fact and so
12 it's not reviewable.

13 And what we're saying is it's the same
14 for questions of discretion. When the agency is
15 being asked to make a comparative or a
16 predictive judgment, that is something that was
17 put off limits by --

18 JUSTICE GORSUCH: Counsel, if I -- if
19 I might interject here, in -- in Patel, it
20 was -- Mr. Patel sought to challenge the BIA's
21 determination that he didn't intentionally
22 deceive state officials, and -- and the IJ found
23 that he had, despite a lot of evidence that he
24 hadn't, okay?

25 JUSTICE BARRETT: Hey now.

1 JUSTICE GORSUCH: Hey now. No, but
2 that was --

3 JUSTICE BARRETT: Yes, you're right.

4 JUSTICE GORSUCH: -- you won. And --
5 (Laughter.)

6 JUSTICE GORSUCH: -- I'm working with
7 it. I'm working with it, right? And -- and,
8 there, the Court said per my friend next door
9 that -- that that challenge, though -- though
10 Mr. Patel had lots of good facts suggesting he
11 hadn't intentionally deceived state officials,
12 couldn't be heard. Okay?

13 Here, in the example Justice Barrett
14 just posited, there's no dispute about the
15 facts. Okay? We have the -- the -- the child
16 who has one potential caregiver in the world,
17 okay, no one's arguing those aren't the facts.
18 We're just arguing about the application of the
19 law to those facts.

20 I think -- tell me where I'm wrong --
21 where the BIA says, hmm, that's not
22 extraordinary, can't -- can a judge say, as one
23 would with due diligence or undue hardship or
24 many other standards that we use that are
25 equally amorphous, say, yeah, there's large room

1 there, but there are guardrails and that this
2 does or does not exceed those guardrails?

3 MS. SINZDAK: No.

4 JUSTICE GORSUCH: Not challenging
5 facts, it's not Patel, it's -- it's this
6 circumstance.

7 MS. SINZDAK: It's a discretionary
8 determination. And we think that discretionary
9 determinations are equally unreviewable, and we
10 think that Petitioner concedes as much.

11 JUSTICE GORSUCH: Well, I thought we
12 just said earlier that they are -- there are
13 guardrails even for discretionary decisions
14 under the law.

15 MS. SINZDAK: I -- I will never deny
16 that there is -- if it's a question of law, if
17 you're saying you misinterpreted the law, that
18 is reviewable. But, if it is a question of
19 discretion, you think that the agency didn't
20 exercise its discretion in the way you think was
21 appropriate --

22 JUSTICE KAGAN: Well, let me try it
23 this way. Suppose that the -- the judge says --
24 recites the legal standard and then has another
25 sentence and said this means it has to be a

1 one-in-a-billion case.

2 Now you would say that that's
3 reviewable, and we could say no, the judge got
4 it wrong, correct?

5 MS. SINZDAK: Because that's the wrong
6 -- a misinterpretation of the statutory text,
7 that's correct.

8 JUSTICE KAGAN: Yeah. So I think what
9 Justice Barrett is suggesting is that the judge
10 is doing the exact same thing. The judge
11 doesn't say this -- it has to be a one-in-a-
12 billion case, but the judge is acting as though
13 it has to be a one-in-a-billion case.

14 And what Justice Barrett is suggesting
15 is, well, in that case, again, there's been a
16 legal error. The Court has looked at some set
17 of facts and reached a conclusion that is
18 utterly inconsistent with the legal standard
19 that is supposed to be applied.

20 MS. SINZDAK: So it's not a legal
21 standard. It's a --

22 JUSTICE KAGAN: The legal standard --

23 MS. SINZDAK: -- statutory
24 determination that the --

25 JUSTICE KAGAN: -- the legal standard

1 is unusual and exceptional hardship.

2 MS. SINZDAK: That is the statutory
3 terminology.

4 JUSTICE KAGAN: That's the legal
5 standard.

6 (Laughter.)

7 MS. SINZDAK: That's right. That's
8 the statutory requirement.

9 JUSTICE KAVANAUGH: She wants --

10 MS. SINZDAK: Let me not fight this.

11 JUSTICE KAVANAUGH: -- she -- she's
12 not going to say.

13 MS. SINZDAK: Let me not fight you on
14 this because I actually think --

15 JUSTICE BARRETT: Counsel, can --

16 MS. SINZDAK: -- I agree with you, and
17 I do think the courts -- the courts who have
18 appropriately recognized that this is a
19 discretionary and factual determination, they
20 say this is about substance; it's not about
21 framing. So, if there is actually a good
22 argument that there is a legal error, however
23 the Petitioner is -- is writing about it, then,
24 yes, that legal error is reviewable.

25 What is not reviewable is the sort of

1 claim that we have in this case, where the --
2 the agency articulates the correct
3 interpretation of the statute that the Board has
4 already given it and then it explains all of the
5 evidence, it explains the factual conclusions
6 it's made, it explains its discretionary
7 judgment, so it explains the predictive and
8 comparative analysis --

9 JUSTICE KAGAN: I -- I think what
10 you're -- what you're doing, Ms. Sinzduk, is
11 just basically, you know, trying to get away
12 from the question, because, of course, there are
13 all kinds of reasonable things that immigration
14 judges do every day, and they mostly do them --
15 you know, it's like, you know, lots of facts and
16 it's a hard question and it's a lot of judgment,
17 and then, when we decide something, then, of
18 course, a judge is going to leave it alone
19 because it seems pretty reasonable.

20 But Justice Barrett was suggesting
21 that there are cases where, when the court looks
22 at a set of facts and says that it does not
23 satisfy what I'm going to insist upon calling
24 the legal standard --

25 MS. SINZDUK: That's fine.

1 JUSTICE KAGAN: -- which is --

2 (Laughter.)

3 MS. SINZDAK: That's fine.

4 JUSTICE KAGAN: -- which is extremely
5 unusual hardship, that that counts as a legal
6 error because it says if the court just gets the
7 standard wrong.

8 MS. SINZDAK: And I don't want to
9 fight you on that. You're right, if it's a
10 legal error, then it is reviewable.

11 JUSTICE KAVANAUGH: Well, you're not
12 -- you are fighting it.

13 MS. SINZDAK: It has to be a legal
14 error.

15 JUSTICE JACKSON: Counsel, can I just
16 -- can -- can I just -- I think, for me at
17 least, the labels are getting confusing because
18 I kind of don't know what you mean when you say
19 discretion or legal error. So can I just focus
20 in on Justice Kagan's example to explain what I
21 see as the distinction? And you can tell me if
22 I'm wrong.

23 So, when the court -- the IJ says, I
24 look at this statute, extreme and unusual, and I
25 think that means that this has to be a

1 one-in-a-billion case, the IG has stated a rule
2 of interpretation, it's interpreting that
3 language and it's now applying this rule, I'm
4 looking for a one-in-a-billion case.

5 All right. You would agree that
6 that's a legal question. If someone is claiming
7 that that's the wrong rule, that it doesn't have
8 to be a one-in-a-billion case, that we've got a
9 legal dispute, correct?

10 MS. SINZDAK: Exactly.

11 JUSTICE JACKSON: All right. Is there
12 a difference between that and a situation in
13 which we accept that the IG is correct in his
14 rule. It has to be a one-in-a-billion case.
15 But the IG in applying that rule looks at this
16 constellation of facts that has been presented,
17 finds the facts, and we all agree on the facts,
18 but the IG says, when I look at these 10
19 different factors and things, I think this is
20 not a one-in-a-billion case, all right?

21 And then the Petitioner says: I agree
22 with his legal rule, I agree with all the 10
23 facts that he's found, but I think, Court, this
24 is a one-in-a-billion case. Decide.

25 Is that second thing the same kind of

1 legal issue, is it presenting a legal issue? I
2 hear you saying it's not. And so can you
3 explain why not?

4 MS. SINZDAK: Right. That's an
5 exercise of discretion. That's exactly our
6 point. That is an exercise of discretion. Like
7 when the -- the IJ says, you know, this
8 non-citizen has satisfied the eligibility
9 factors. Now I need to look at all of these
10 facts and exercise my discretion to decide
11 whether this is an appropriate case for
12 cancellation of removal.

13 So it's the same thing.

14 JUSTICE SOTOMAYOR: So --

15 MS. SINZDAK: They're looking at --

16 JUSTICE SOTOMAYOR: -- counsel, why
17 isn't it an -- a abuse of discretion in
18 concluding that this set of facts doesn't meet
19 the legal standard? I mean, we have three
20 critical facts: child dying of cancer, sole
21 support for, no other family.

22 Are you willing to tell me on that
23 record that that's not a one-in-a-million case?
24 Isn't that an error of applying facts to -- to a
25 legal standard? There's no discretion in that.

1 MS. SINZDAK: So --

2 JUSTICE SOTOMAYOR: Well, it's an
3 abuse.

4 MS. SINZDAK: -- I agree that if what
5 the Court says is the Board obviously
6 interpreted the statute to require a
7 one-in-a-million case and that is a legal error,
8 that's -- that's reviewable. What is not
9 reviewable is the Board's application of
10 discretion. So, when you talk about abuse of
11 discretion, that --

12 JUSTICE SOTOMAYOR: But it's still an
13 --

14 MS. SINZDAK: -- makes me nervous
15 because that's taken off -- off limits.

16 JUSTICE JACKSON: Isn't -- isn't the
17 answer to Justice Sotomayor because we don't
18 have a basis in the law to make that
19 determination? So I see, fine, one could say
20 it's an abuse of discretion, but on what basis
21 is the Court able to make that determination?
22 What I think as Justice Jackson looks abusive?
23 What am I pointing to to make that decision?

24 MS. SINZDAK: Yes. That's exactly
25 right. So the statute entrusts that

1 discretionary determination, that judgment call,
2 that prediction about how much hardship will
3 this particular non-citizen's relative likely
4 face, how does that compare? Those are judgment
5 calls. Those aren't -- those --

6 JUSTICE KAGAN: See, I just have more
7 --

8 MS. SINZDAK: -- those questions
9 aren't answered by legal principles.

10 JUSTICE KAGAN: -- confidence in
11 Justice Jackson than maybe Justice Jackson has.

12 (Laughter.)

13 JUSTICE KAGAN: I mean, just think
14 about those facts that Justice Barrett just gave
15 you, and we don't have the capacity as judges to
16 say, you know, that counts as an exception on
17 extremely unusual hardship? Of course, we're
18 not going to do it very much, but on those
19 facts, that a judge doesn't have the ability to
20 say, you know, that immigration judge, we know
21 that they're overworked, we know that they do a
22 great job on 99 percent of the cases, but that
23 judge just got it wrong.

24 MS. SINZDAK: That's the determination
25 that Congress made in 1996 when it barred review

1 of any decision --

2 JUSTICE KAGAN: The determination that
3 Congress made --

4 MS. SINZDAK: -- regardless of a
5 denial of discretionary relief.

6 JUSTICE KAGAN: -- was to give legal
7 questions to judges. And -- and this is a
8 question where -- where the -- the -- the
9 fundamental inquiry is do those facts, as found,
10 as weighed, meet the legal standard? And this
11 judge got it wrong, this judge being in not this
12 case but in Justice Barrett's hypothetical.

13 MS. SINZDAK: Again, if you can point
14 to a legal error, so if you can say looking at
15 these facts the judge must have misinterpreted
16 the statute, must have said this is a
17 one-in-a-million case, that's a legal error.
18 That's reviewable.

19 JUSTICE GORSUCH: Okay.

20 MS. SINZDAK: But when Congress --

21 JUSTICE KAVANAUGH: Do you agree --

22 JUSTICE GORSUCH: Why -- why isn't
23 that exactly Justice Barrett's case? Because
24 the BIA, for example, has said that the
25 standard, high as it is, doesn't require it to

1 be unconscionable. That's -- that's the BIA's
2 own standard. It doesn't have to be the
3 one-in-a-billion case. It's something less than
4 that. And, here, we have in Justice Barrett's
5 hypothetical basically the one-in-a-billion
6 case, right? Let's assume that, okay?

7 And why couldn't, again, a court say,
8 as Justice Kagan keeps trying to ask, in those
9 circumstances, you have effectively misread the
10 legal standard?

11 MS. SINZDAK: I think I keep trying to
12 tell Justice Kagan that it -- that that is a
13 legal error that is reviewable. So I'm not
14 trying to fight you on this. I think our -- our
15 brief is very clear --

16 JUSTICE GORSUCH: So --

17 MS. SINZDAK: -- this is Section (D)
18 -- where we say, if you can point to a legal
19 error which raises a question of law, then
20 review is permissible.

21 JUSTICE KAVANAUGH: But --

22 JUSTICE GORSUCH: So we all agree that
23 a court can say it doesn't have to be a one in a
24 billion, that this is -- this is on the nature
25 of one in a billion, and -- and when the BIA

1 denies relief, it erred.

2 MS. SINZDAK: I -- I'm a little bit
3 confused. I'm going to keep saying, if you can
4 look at the decision --

5 JUSTICE GORSUCH: Well, I don't -- I
6 don't want to be confused, so let me -- let me
7 -- let me try it again.

8 So we have Justice Barrett's case, the
9 -- the very, very unusual case, and the BIA says
10 we think it should be more, more demanding than
11 that. A court can say no. The exceptional
12 hardship standard isn't -- isn't anything, one
13 in a billion, this counts.

14 MS. SINZDAK: Oh, the -- the court can
15 interpret the statutory terms "exceptional and
16 extremely unusual hardship" --

17 JUSTICE GORSUCH: Yeah. And say --

18 MS. SINZDAK: -- and the BIA has done
19 that and no one's questioning the -- the BIA's
20 statutory interpretation. But, if there was a
21 non-citizen here saying, you know, the -- the
22 Board has consistently said substantially beyond
23 ordinary, but it should be a different
24 interpretation of the statute --

25 JUSTICE GORSUCH: No, no, no.

1 MS. SINZDAK: -- that's a legal
2 question, that's reviewable.

3 JUSTICE GORSUCH: No, no. No, no. We
4 -- we have -- we have -- I -- I'm positing we
5 have the precedent we have. Whether the BIA's
6 precedent's right is another question. But just
7 that we have this fact pattern, and the BIA
8 denies review because they're busy, they have a
9 lot of cases, and they do do great work. No
10 one's questioning -- or try to do great work.
11 No one's questioning that. But they in this
12 particular case deny relief.

13 MS. SINZDAK: If it's a factual error,
14 it's unreviewable. If it's a discretionary
15 error, it's unreviewable. If the court can say
16 yes --

17 JUSTICE KAVANAUGH: If it's a --

18 MS. SINZDAK: -- you're right, you've
19 misinterpreted the statute, then it's
20 reviewable.

21 JUSTICE KAVANAUGH: Does "questions of
22 law" in the statute include application of law
23 to fact?

24 MS. SINZDAK: It includes legal
25 errors.

1 JUSTICE KAVANAUGH: Does it include
2 application of law to fact?

3 MS. SINZDAK: Yes, and I'm explaining
4 to you what that -- what that --

5 JUSTICE KAVANAUGH: Okay.

6 MS. SINZDAK: -- what that includes.
7 It's a mixed question, right? So, if you look
8 actually to where that comes from, it's coming
9 from -- I've just forgotten the name of the
10 case, the habeas corpus case where --

11 JUSTICE KAVANAUGH: St. Cyr, yeah.

12 MS. SINZDAK: And if you look -- in
13 St. Cyr, if you look back at the application of
14 law cases, what those were were exactly sort of
15 what we've been positing here, where it was
16 clear from the facts of the case that the -- the
17 -- the court had misinterpreted the statute.
18 So, in that way, in that -- in those cases, it
19 was actually like a bankruptcy --

20 JUSTICE KAVANAUGH: No, but I think
21 what Justice Gorsuch is getting at is -- at
22 least in my administrative law experience, abuse
23 of discretion is probably a distracting term.
24 Let's call it an unreasonable application of law
25 to fact. That's something we did all the time.

1 Now unreasonable application of law to
2 fact means wide discretion, but deference is not
3 abdication is often said. And so there should
4 not be abdication. There should be deference in
5 the review of application of law to fact.

6 MS. SINZDAK: But Congress was doing
7 something when it said that denials of
8 discretionary relief, judgments involving --
9 regarding denials of discretion are off limits.
10 And if you're --

11 JUSTICE KAVANAUGH: Keep going.

12 MS. SINZDAK: If you're --

13 JUSTICE KAVANAUGH: No, don't keep
14 going.

15 (Laughter.)

16 JUSTICE KAVANAUGH: I don't want to
17 get in trouble.

18 CHIEF JUSTICE ROBERTS: Why don't you
19 finish your sentence.

20 MS. SINZDAK: Okay. What you're
21 saying, I think, is sometimes the -- the --
22 the -- an agency exercises its discretion in a
23 way that just seems totally inappropriate.
24 But -- but, again, what -- what Congress did was
25 take off the table the review of discretionary

1 determinations. It just took that wholly off
2 limits.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Alito?

7 JUSTICE ALITO: Well, I'm going to
8 restate your argument or restate an argument
9 that could perhaps work in your favor that is
10 not the kind of argument that you as an advocate
11 before the Court in the face of
12 Guerrero-Lasprilla is probably much inclined to
13 make, but one might say, look, all right, here's
14 Guerrero-Lasprilla. It involved the application
15 of a standard that only a lawyer can understand.

16 And it's not the kind of standard that
17 would be, for example, submitted to a jury
18 without elaborate instructions or perhaps would
19 not be submitted to a jury at all. And that's
20 one way to read Guerrero-Lasprilla.

21 If you read it for all it's worth, as
22 broadly as some of the questions suggest, it has
23 the effect of making everything reviewable. And
24 -- and that is a strange way to read a statute
25 that begins by saying that judgments are not

1 reviewable.

2 If -- so the test would be this, and
3 it isn't really all that complicated. If what
4 is involved in a particular case -- and, you
5 know, you could say abuse of discretion and
6 unreasonable application, but, look, anybody
7 who's litigated cases or has seen what willful
8 judges can do knows that if you allow that
9 little toe in the door, an awful lot can be done
10 with it. That might be right or wrong. Judges
11 love judicial review. Congress was less
12 enamored of it when it enacted this statute. It
13 says no, no review at all, not abuse of
14 discretion.

15 So the test could be restated as if it
16 is the sort of thing that would be submitted to
17 a jury without special instructions. Because it
18 involves ordinary terms like "exceptional and
19 unusual hardship," that is not something that
20 falls within the exception.

21 MS. SINZDAK: Yes. And I -- I think
22 that actually dovetails very neatly with what
23 the Court already said in Pullman-Standard,
24 where it said, you know, intention to
25 discriminate, right, you can -- that's a

1 statutory requirement. You might say there
2 could be questions about what that means. And
3 the Court said it could have, Congress could
4 have been trying to refer to some legal
5 presumption, some legal concept of
6 discrimination or intention to discriminate,
7 but, instead, what it said: No, look, apply
8 statutory construction. What actually Congress
9 was telling us to do here was just to find out
10 actual motive.

11 And, here, it's the same thing.
12 Congress wasn't making this new legal concept,
13 exceptional and extremely unusual hardship.
14 Congress was saying: Agency, make a judgment
15 call. Make a predictive and comparative
16 judgment call about how the circumstances of
17 this non-citizen's case compare to those of
18 other non-citizens.

19 JUSTICE ALITO: All right. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

22 JUSTICE SOTOMAYOR: Something new,
23 you're distinguishing Guerrero. That's what
24 Justice Alito is saying, because that's not what
25 Guerrero said. Guerrero said every mixed

1 question of law and fact. And you're saying:

2 No, it's not mixed at all because --

3 MS. SINZDAK: That's --

4 JUSTICE SOTOMAYOR: -- the standard is
5 lawless. Basically, that's what you're saying,
6 because you can't call a standard a standard,
7 exceptional, due diligence, undue hardship, you
8 can't put words on a piece of paper and call the
9 words meaningless. They have to set a standard.

10 And once you set a standard, you're
11 going to have to judge whether the facts fit
12 that standard. Once you do that,
13 Guerrero-Lasprilla said that's a mixed question
14 of law that's reviewable by the Court. We may
15 not like the number of cases that come up, but I
16 think your other side is right that most of them
17 fail under the abuse of discretion or clear
18 error standard.

19 Justice Barrett points out that the
20 cases are rare, but they still exist, meaning
21 that's why we have judicial review. It's rare
22 that federal convictions are overturned. I
23 think it's probably 5 percent or it was a very
24 low number of federal convictions were ever
25 overturned, yet we still permit review of them.

1 We permit review not for the majority
2 of cases. We permit review for the exceptions.
3 And so I don't know how we get to where you want
4 us to go unless we reject our precedent --

5 MS. SINZDAK: So I think --

6 JUSTICE SOTOMAYOR: -- and we invite
7 all of the complications that that precedent was
8 trying to avoid.

9 MS. SINZDAK: So I think that Pullman
10 Standard, Williamsport Wire Rope, and Duberstein
11 are all good examples of cases where you had a
12 statute and it required some subsidiary
13 fact-finding and then the adjudicator had to put
14 those subsidiary facts together to make an
15 ultimate determination that was -- that was
16 exactly the statutory text. And in each of
17 those, it was not deemed a mixed question.

18 So, in each of those, it was deemed
19 discretionary or factual. So I'm not asking the
20 Court to make new law.

21 JUSTICE SOTOMAYOR: But it was still
22 reviewable.

23 MS. SINZDAK: Pardon?

24 JUSTICE SOTOMAYOR: It was still
25 reviewable.

1 MS. SINZDAK: Well --

2 JUSTICE SOTOMAYOR: It was still
3 reviewable for whether it was unreasonable.

4 MS. SINZDAK: So, to be clear, in
5 Williamsport Wire Rope, it was not reviewable.
6 And, there, it just depends on --

7 JUSTICE SOTOMAYOR: Well --

8 MS. SINZDAK: -- whether there is a
9 statutory review bar. And let me just address
10 this. I agree that normally discretionary
11 determinations are reviewed for abuse of
12 discretion.

13 What I'm saying is that Section
14 1252(a)(2)(B) took that off the table because it
15 said discretionary determinations, they are
16 unreviewable. Any judgment regarding the denial
17 of discretionary relief is unreviewable unless
18 it involves a legal question.

19 But, when it doesn't, when it's an
20 exercise of discretion, as the Court said in
21 Williamsport Wire Rope, which is also this
22 Court's precedent, that exceptional hardship,
23 that was a discretionary question, and
24 discretionary questions we know under Patel, we
25 know under the plain text are unreviewable.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?
2 Justice Gorsuch?
3 Justice Kavanaugh?

4 JUSTICE KAVANAUGH: I do have a few
5 questions. If the Court concludes that the BIA
6 or the IJ misapplied Board precedent that
7 existed, what's -- is that reviewable or not?

8 MS. SINZDAK: So the IJ is bound to
9 follow Board precedent, so if the IJ has
10 discarded Board precedent, that's a legal error.

11 JUSTICE KAVANAUGH: Okay. And then I
12 agree with a lot of what Justice Alito said
13 about going back to the beginning, but I think
14 St. Cyr talked about what was available in
15 habeas and said specifically that it's not only
16 legal questions but the erroneous application of
17 statutes or interpretation. It distinguished
18 those two things.

19 Then Guerrero picks up on that and
20 says English cases consistently demonstrate,
21 consistent with St. Cyr, that the erroneous
22 application of statutes includes the
23 misapplication of a legal standard to the facts
24 of a particular case and then says that Congress
25 took up that suggestion and then, when it put

1 questions of law in, included erroneous
2 application of law to the facts of a particular
3 case.

4 Do you disagree with any of that?

5 MS. SINZDAK: No. Again, when there's
6 been a legal error and that all of the cases we
7 are talking about involve legal errors, then,
8 yes, it's reviewable.

9 But, unless you're saying that the
10 argument that someone was a -- the -- about
11 whether someone was continuously present for 10
12 years, that the determination that he was in the
13 country for nine years rather than 10 --

14 JUSTICE KAVANAUGH: Right.

15 MS. SINZDAK: -- is -- well, that's an
16 application of law to fact.

17 JUSTICE KAVANAUGH: No, I agree with
18 you on that.

19 MS. SINZDAK: So then we know -- then
20 --

21 JUSTICE KAVANAUGH: But I think you
22 disagree what -- what -- I'm not going do
23 belabor this part, but what a legal standard is.
24 You're -- you're saying this is not a legal
25 standard.

1 MS. SINZDAK: I -- I'm saying the
2 statutory determination, just because it's a
3 statutory determination, doesn't mean that its
4 application presents a question of law. And I
5 think that that's what this Court's precedents
6 say.

7 Now I think that -- that that means
8 that a legal standard is not synonymous with a
9 -- with a statute. And I don't think Petitioner
10 has explained to you how you can tell, once you
11 have a statutory determination, which statutory
12 determinations only require fact-finding, only
13 require discretion, only require a mix of those
14 two, and which present legal conclusions.

15 JUSTICE KAVANAUGH: Then --

16 MS. SINZDAK: It can't just be every
17 statutory determination is reviewable.

18 JUSTICE KAVANAUGH: Right. And then
19 last one, you've emphasized repeatedly, I think
20 correctly, that the statute's about discretion
21 ultimately. And I agree with that, but that
22 discretion is at the -- as I've understood it,
23 is at the second step. So, after you determine
24 whether someone's eligible for cancellation of
25 removal, then the Board has complete discretion

1 to say, you know what, you're eligible or I'll
2 assume you're eligible, but you're not getting
3 it. You're not getting it. And that is totally
4 unreviewable. So that -- there's where --
5 that's a huge amount of discretion for the
6 Board. That's where the discretion is, not in
7 doing the 10 years, extremely unusual. Those
8 parts are the eligibility requirements. That's
9 not as discretionary.

10 MS. SINZDAK: So, in Jong -- Jong Ha
11 Wang --

12 JUSTICE KAVANAUGH: Yeah.

13 MS. SINZDAK: -- this Court said that
14 when a court of appeals usurped the Board's
15 right to determine what was an extreme hardship
16 in that case -- that was before this change --
17 that that deprived the Board of a good portion
18 of the discretion that had been vested in it.
19 So I think this Court has already recognized
20 that exceptional or extreme hardship, now
21 exceptional and extremely unusual hardship,
22 that's discretionary.

23 And I would also point to -- to
24 Octane, which recognizes that "exceptional" is a
25 term that itself conveys discretion.

1 So I think just because there's
2 discretion at the second step doesn't mean
3 there's not also discretion at the first step.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: So let's posit that
8 you lose. Sorry.

9 MS. SINZDAK: That's okay.

10 JUSTICE BARRETT: Just -- just
11 hypothetically. It seems to me in looking at
12 cases in the circuits that side with Petitioner
13 that most of the challenges that come up really
14 are to facts or, you know, challenges where the
15 petitioner says, you know, he made -- the -- the
16 BIA, the IJ was wrong to conclude that there
17 would not be significant hardship -- economic
18 hardship down the road, for example. And the
19 courts of appeals have said, well, that's
20 speculation and, you know, that was within the
21 IJ's authority to find that fact.

22 So, if you lost and if we said under
23 Guerrero that mixed questions are reviewable and
24 so the application of law to fact in the kind of
25 hypothetical I gave would not be subject to the

1 jurisdictional bar, do you agree that a lot of
2 the questions will still be -- a lot of the
3 cases will still be unreviewable on appeal
4 because they will still essentially be factual
5 challenges barred under Patel?

6 MS. SINZDAK: Absolutely. And to be
7 clear, I think the government is -- is fine with
8 a ruling that says where there is a legal error
9 that is -- that is revealed through the Board's
10 determination, that's reviewable.

11 What's not reviewable is -- I mean,
12 you can call it fact-finding, you can call it
13 discretion. I think, as we make this -- this
14 point at, I believe, page 42 of our brief, that
15 a lot of times in the administrative context,
16 what counts as a fact is -- can look pretty
17 discretionary, like a credibility determination,
18 highly subjective.

19 If the Court makes clear that those --
20 those types of rulings are off limits, but legal
21 errors are on -- on, we think that's a faithful
22 application of the facts --

23 JUSTICE BARRETT: Well, I mean, no,
24 no, no. I'm saying like -- I'm saying
25 application of law to fact if, in fact, under

1 Guerrero, that is not subject to the
2 jurisdictional bar and so the claim is -- I
3 think Justice Kagan was the one who said earlier
4 we stipulate all of the facts are true, but you
5 have misapplied the legal standard to this set
6 of facts, thereby exceeding the guardrails,
7 you've abused your discretion, say, let's say
8 that that kind of a claim is reviewable. But
9 claims that are purely factual challenges, like
10 you did not appreciate the depth of my emotional
11 bond, you know, with my son, that those kinds of
12 things -- do you agree that a lot of the
13 challenges really are of that nature?

14 And I'm asking the question because,
15 in arguing all of this is discretionary, all of
16 this is discretionary, and all of it is outside
17 the bar, that raises the question of whether, if
18 you lose, does that mean that your position
19 would lead to the conclusion that a lot of this
20 stuff actually is reviewable?

21 MS. SINZDAK: I -- I agree, and I
22 think this is a really important point. I
23 think, if the Court is going to say facts are
24 unreviewable, but there's some legal component,
25 I think it's going to be very important for the

1 Court to spell out what are the facts. And I'm
2 -- I'm not sure, to be honest. I think the
3 Court is saying that -- or I -- I hear Your
4 Honor to be saying that if it's a prediction
5 about the future, that might be -- be included.
6 It has long been concluded as a fact, again,
7 like forecasts about lost earning potential.
8 That's a classic fact.

9 So I think the Court's going to need
10 to say, like, a prediction. I think the Court
11 should look at cases like Williamsport Wire Rope
12 and say a comparison where you're looking at,
13 you know, is this non-citizen more likely than
14 another to experience hardship, I think those
15 are going to be facts.

16 But I do think that the Court is going
17 to need to be very careful to give the Court the
18 -- the Board the guidance that it needs to say
19 what is a fact. And I do think that we've given
20 you sort of a framework of how the Court in the
21 past has looked at that law/facts divide, and we
22 admit the Court has said there's not one
23 principle, right? It's a framework. You've got
24 to look at the history. You've got to look at
25 different things.

1 But, yes, I mean, if the Court wants
2 to say just apply that law -- that -- that
3 law/facts divide and put all of the things like
4 predictions, like comparisons on the fact side,
5 we'd be very happy. We do think that the -- the
6 -- the Court needs to give that kind of
7 guidance.

8 JUSTICE BARRETT: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 JUSTICE JACKSON: Can you just say a
12 little bit more about why your way of handling
13 this isn't administratively terrible? Because
14 there is --

15 (Laughter.)

16 JUSTICE JACKSON: No. So there --
17 there -- there was some back and forth with your
18 friend on the other side suggesting that you've
19 -- you're going to open up a can of worms and
20 theirs is better. So can you just speak to
21 that?

22 MS. SINZDAK: So, first of all, I
23 think this is the way that most courts are
24 already handling a lot of these things. So it's
25 not going to open up a can of worms in that

1 regard.

2 The other thing that I'd say is this
3 is just a matter of statutory construction, so
4 you just need to look at whether we're dealing
5 with a question of law. And I actually think
6 courts are pretty experienced in knowing what
7 questions of law look like. This is, again, the
8 standard-of-review analysis. Every time they
9 have to say am I dealing with a question of law,
10 am I dealing with a mixed question, or am I
11 dealing with, you know, something discretionary
12 or factual? And I don't think that's a --

13 JUSTICE JACKSON: So they're going to
14 -- you're saying they're going to have to answer
15 that question anyway, even under --

16 MS. SINZDAK: Absolutely. Exactly.

17 JUSTICE JACKSON: -- the other side's
18 test?

19 MS. SINZDAK: So that's -- that's the
20 second point. And I'd also note that we've --
21 we -- sort of talking to our lawyers who
22 litigate these cases, exceptional and extremely
23 unusual hardship, that's the big one. That's
24 what comes up again and again. But, beyond
25 this, they've pointed to maybe four or five

1 things that are getting -- that are getting
2 litigated.

3 So I -- I think that maybe Petitioner
4 has kind of gone through the law books and said
5 what might I possibly make some kind of argument
6 that this is a little bit mixy, mixed, a little
7 bit legal. But that's not what's happening on
8 the ground. We're talking about maybe like a
9 few other -- other things, and I think, if this
10 Court provides enough guidance as to how you
11 distinguish between law and facts, how you
12 distinguish between a mixed question and a
13 question regarding discretion or fact, I think
14 that's going to clear up any confusion that's
15 left.

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Rebuttal?

20 REBUTTAL ARGUMENT OF JAIME A. SANTOS

21 ON BEHALF OF THE PETITIONER

22 MS. SANTOS: Thank you, Your Honor.

23 I have about 42 points I'd like to
24 address on rebuttal, but I will settle for about
25 five.

1 First, I think that my friend on the
2 other side has mistakenly focused a lot of her
3 argument on what Congress did in 1996. This
4 case is about what Congress did in 2005 when it
5 created an exception to Section 1250 --
6 1252(a)(2)(B) and it -- it amended both
7 (a)(2)(B) and (a)(2)(D) to make clear that the
8 limited review provision trumps the designation
9 of a particular determination as discretionary.

10 Second, Your Honor, I think all of my
11 friend's arguments about this not being a legal
12 standard really run smack into the Board's own
13 understanding of what the -- the hardship
14 determination is. The Board said itself no more
15 than -- no less than a dozen times in its
16 precedential decision in Monreal-Aguinaga that
17 this is a standard. It used its -- its
18 purported authority under Chevron to interpret
19 that standard using the canons of statutory
20 construction that courts use day in and day out.
21 And it said the meaning of that standard can be
22 further given -- given -- shed light on it
23 through case-by-case adjudication, which is all
24 we're asking for federal courts to have the
25 power to do.

1 I think that the -- the notion that
2 it's not a legal standard just makes no sense.
3 And I think the same is true with the notion
4 that this is discretionary. Neither IJs nor the
5 BIA understand themselves to have discretion
6 when deciding whether someone is eligible for
7 cancellation. And you can see this in cases
8 like Monreal-Aguinaga, where the Board says
9 things like, you know, if we only had
10 discretion, we would absolutely grant
11 cancellation, but Congress has put these
12 constraints on us, so we don't have the power to
13 do so.

14 Also, Your Honor, there was a -- a --
15 a fair bit of discussion about the expertise
16 that the agency has that makes it well
17 positioned to make these determinations I think
18 in both sides of the argument. But the same
19 could be said of every decision that immigration
20 judges make, that patent ALJs make, that
21 district judge make -- district judges make
22 during sentencing. But appellate review is
23 still a core and fundamentally important way
24 that -- that appellate courts make sure that
25 agencies and district courts stay within the

1 guardrails, as -- as several justices have
2 mentioned.

3 And I think that's true even where
4 appellate review involves deference. In cases
5 where court -- courts adopt deferential review
6 for mixed questions like Cooter & Gell and like
7 Village of Lakeridge, the Court still takes
8 pains to emphasize that if appellate -- if -- if
9 district courts or agencies are -- are going
10 outside the guardrails, that appellate courts
11 will be able to intervene and correct
12 misapplications of law, misunderstandings of
13 law, and inconsistent applications of law.

14 And I think, in the context of
15 immigration decisions, where the risk of error
16 could be enormous, judicial review is even more
17 critical. And I would point you to the former
18 IJ and BIA brief to talk about the -- that --
19 that talks about the enormous resource
20 constraints that the agency is under. These
21 officials are doing their best every day, but
22 when you have 3,000 backlogged cases on your
23 docket, mistakes are going to happen.

24 And the -- the government's position
25 incredibly is that as long as an IJ or the BIA

1 just recites the right standard in a boilerplate
2 section of its decision, it can go on to
3 egregiously, arbitrarily, or completely
4 inconsistently apply that decision and courts
5 are powerless to intervene. I think that
6 Guerrero-Lasprilla squarely rejected that
7 extreme result, and -- and the government has
8 pointed to no reason for a different result
9 here.

10 Last, Your Honor, I -- I would point
11 to the -- the history test that -- that my
12 friend has pointed to. The government, I -- I
13 think, spent a lot of time really praising this
14 historical test, but the point of jurisdiction
15 is that it should be decided quickly. You
16 shouldn't have to write or read a treatise to
17 decide if you have power to hear a case.

18 And even if some kind of historical
19 approach were appropriate, the government's test
20 here wouldn't be it. In the standard-of-review
21 context, courts look for a long and consistent
22 application -- appellate practice over an entire
23 genre or class of decisions.

24 They don't scour the U.S. Code to look
25 for a single statute with one or two words in

1 common and use that as a smoking gun for the way
2 the -- the government tries to use a World War I
3 era tax statute here. And even under -- and
4 under the kind of standard-of-review-type
5 analysis, the government certainly can't point
6 to any long and consistent history of appellate
7 practice.

8 At best, it has this 1919 tax statute,
9 which wasn't reviewed. That -- that was
10 exceptional circumstances. It points to
11 exceptional case determinations of the Patent
12 Act which were reviewed for abuse of discretion.
13 And, of course, we have undue hardship under
14 Title VII and under the bankruptcy code which is
15 reviewed de novo. So, even under a
16 historical-type analysis test, the -- this case
17 wouldn't even make any sense under it.

18 Finally, the -- the government's
19 argument that -- that it wouldn't make any sense
20 for the standard of review to be mismatched with
21 judicial review is exactly the argument that the
22 government made in Guerrero-Lasprilla and it's
23 exactly what the majority's opinion expressly
24 rejected. And I think that most of my friend's
25 arguments today were -- were the same arguments

1 the government made there.

2 Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 The case is submitted.

6 (Whereupon, at 12:34 p.m., the case
7 was submitted.)

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Official - Subject to Final Review

<p>1</p> <p>1 [1] 10:8 10 [6] 3:12 72:18,22 89:11, 13 91:7 11 [1] 47:23 11:04 [2] 1:17 3:2 12:34 [1] 104:6 1250 [1] 99:5 1252(a)(2) [1] 31:18 1252(a)(2)(B) [6] 18:19 47: 6 48:21 87:14 99:6 1252(a)(2)(B)(i) [1] 31:24 1919 [1] 103:8 1996 [2] 75:25 99:3</p> <hr/> <p>2</p> <p>2 [1] 10:8 20,000 [1] 8:16 2002 [1] 26:12 2005 [1] 99:4 2023 [1] 1:13 22-666 [1] 3:4 28 [1] 1:13</p> <hr/> <p>3</p> <p>3 [2] 2:4 8:15 3,000 [1] 101:22 3a [1] 25:5</p> <hr/> <p>4</p> <p>42 [2] 93:14 98:23 45 [1] 60:1 47 [1] 2:7</p> <hr/> <p>5</p> <p>5 [1] 85:23</p> <hr/> <p>6</p> <p>63 [1] 16:5</p> <hr/> <p>7</p> <p>75 [2] 5:14 55:9</p> <hr/> <p>9</p> <p>98 [1] 2:10 99 [1] 75:22</p> <hr/> <p>A</p> <p>a)(2)(B) [1] 99:7 a)(2)(D) [1] 99:7 a.m [2] 1:17 3:2 abdication [2] 81:3,4 ability [1] 75:19 able [2] 74:21 101:11 above-entitled [1] 1:15 Absolutely [5] 26:10 33:20 93:6 97:16 100:10 abuse [19] 11:14 15:1 40:6, 12 41:1,23 44:20 63:18,19 73:17 74:3,10,20 80:22 83: 5,13 85:17 87:11 103:12 abuse-of-discretion [2] 44:13 56:13 abused [2] 60:11 94:7 abusive [1] 74:22 accept [9] 17:23 23:23 24:</p>	<p>11 37:22,23 41:10 51:22 52:13 72:13 accepted [1] 51:20 accidental [1] 16:15 accurate [1] 33:11 accurately [1] 23:18 achieve [1] 45:13 acknowledged [1] 58:6 acknowledging [2] 11:2,8 across [1] 34:11 Act [4] 15:10,10 44:25 103: 12 acting [1] 68:12 actual [2] 20:15 84:10 actually [12] 26:12 34:24 58:19 59:1 69:14,21 80:8, 19 83:22 84:8 94:20 97:5 additional [1] 19:10 address [2] 87:9 98:24 addressed [1] 46:1 adjudication [1] 99:23 adjudicator [3] 64:6 65:5 86:13 adjudicators [1] 54:13 administrative [4] 30:23 40:24 80:22 93:15 administratively [1] 96:13 admit [2] 50:15 95:22 adopt [1] 101:5 adverse [1] 24:18 advocate [1] 82:10 affirm [1] 35:3 affirmed [2] 34:15 43:2 affirming [1] 42:23 agencies [2] 100:25 101:9 agency [21] 3:16 4:19 18: 10 19:7 20:12 23:7,9 30: 23 44:22 45:18 49:7 57:17 62:13,17 65:14 67:19 70:2 81:22 84:14 100:16 101: 20 agency's [3] 4:3 19:18 20: 15 agree [32] 5:24 10:13 21:13, 21 22:23 24:3,17 25:12 29: 1,2 30:21 33:16 38:22 44: 1,5 61:2,5 69:16 72:5,17, 21,22 74:4 76:21 77:22 87: 10 88:12 89:17 90:21 93:1 94:12,21 agreed [1] 12:4 agrees [2] 4:1 43:20 ahead [3] 21:16 49:11,12 alien [3] 15:19,21 46:8 ALITO [22] 15:14 16:10,14, 17 17:7,11 21:13,16 27:16, 19 30:20,21 31:7,18 32:10, 23 53:23 82:6,7 84:19,24 88:12 ALJs [1] 100:20 allow [1] 83:8 allowed [1] 5:19 alone [1] 70:18 already [4] 70:4 83:23 91:</p>	<p>19 96:24 although [1] 31:20 amended [1] 99:6 amorphous [2] 4:11 66:25 amount [1] 91:5 ample [1] 61:16 analysis [20] 8:12 9:10 15: 4 34:22,23 38:4,13 40:1 42:4 54:20 55:9 56:4,9,18 57:15 63:24 70:8 97:8 103: 5,16 another [6] 13:7 29:9 35: 12 67:24 79:6 95:14 answer [8] 4:22 15:24 16: 19 27:15 62:6,9 74:17 97: 14 answered [1] 75:9 answers [1] 4:12 anybody [1] 83:6 anyway [1] 97:15 apart [1] 35:9 apologies [1] 37:6 appeal [3] 24:9,21 93:3 appeals [8] 11:10 20:3 23: 7 36:19,22 60:10 91:14 92: 19 APPEARANCES [1] 1:19 appears [1] 9:20 appellate [10] 12:24 21:8 24:7 100:22,24 101:4,8,10 102:22 103:6 appendix [1] 25:5 application [29] 3:24 4:3 14:12,23 21:9 31:2,5,16 33:21 36:11 66:18 74:9 79: 22 80:2,13,24 81:1,5 82:14 83:6 88:16,22 89:2,16 90: 4 92:24 93:22,25 102:22 applications [2] 59:9 101: 13 applied [2] 6:1 68:19 applies [10] 4:6 28:12 31:8 36:10 43:15 46:5,6,8,9 49: 17 apply [13] 5:10 17:19 19:23 20:5 34:25 38:15 41:24 46: 14 48:25 49:4 84:7 96:2 102:4 applying [9] 7:5 26:2 28: 15,18 42:24 64:17 72:3,15 73:24 appreciate [2] 19:2 94:10 approach [1] 102:19 appropriate [5] 44:19 58: 25 67:21 73:11 102:19 appropriately [2] 29:7 69: 18 arbitrarily [1] 102:3 area [2] 18:2 45:16 areas [1] 14:1 aren't [5] 24:1 36:23 66:17 75:5,9 arguendo [1] 35:17 argues [2] 4:5 25:6</p>	<p>arguing [3] 66:17,18 94:15 argument [26] 1:16 2:2,5,8 3:4,7 14:9 23:23 29:24 31: 19 35:13 36:6,18 47:1 51: 16 69:22 82:8,8,10 89:10 98:5,20 99:3 100:18 103: 19,21 arguments [5] 27:1 32:22 99:11 103:25,25 articulate [2] 40:25 62:2 articulates [1] 70:2 articulations [1] 40:10 aside [1] 10:3 asks [2] 54:3,4 assessment [1] 10:17 Assistant [1] 1:22 assume [4] 28:4 35:17 77: 6 91:2 assumes [1] 59:19 assuming [1] 41:22 asylum [1] 15:7 ATTORNEY [4] 1:7 33:18 50:9,12 authority [2] 92:21 99:18 available [1] 88:14 avoid [2] 56:25 86:8 away [1] 70:11 awful [1] 83:9</p> <hr/> <p>B</p> <p>BA [1] 29:4 back [6] 12:1 22:1 41:7 80: 13 88:13 96:17 backlogged [1] 101:22 bad [1] 5:7 bankruptcy [2] 80:19 103: 14 bar [4] 87:9 93:1 94:2,17 barred [2] 75:25 93:5 BARRETT [45] 13:6 15:13 21:15,17 22:24 23:12 24: 11 26:19,19 28:25 36:5,17, 24 37:2,5,8,11,19 38:21 39: 20,23 40:2,13 41:3 62:22, 25 63:4,7,25 64:8,23 65:25 66:3,13 68:9,14 69:15 70: 20 75:14 85:19 92:6,7,10 93:23 96:8 Barrett's [5] 41:7 76:12,23 77:4 78:8 based [2] 41:14 50:8 basically [6] 51:15 52:10 57:14 70:11 77:5 85:5 basis [4] 18:5 44:11 74:18, 20 beautiful [2] 27:14,15 beginning [1] 88:13 begins [1] 82:25 behalf [8] 1:20,23 2:4,7,10 3:8 47:2 98:21 behavioral [1] 7:15 belabor [1] 89:23 believe [3] 31:1 40:20 93: 14</p>	<p>believes [1] 26:8 below [1] 22:2 best [3] 8:13 101:21 103:8 better [2] 55:23 96:20 between [7] 15:15 16:23 26:23 47:7 72:12 98:11,12 beyond [4] 33:9 51:1 78:22 97:24 BIA [21] 26:6,8 28:13 29:4 43:10,14 49:14,15 51:2 63: 18 66:21 76:24 77:25 78:9, 18 79:7 88:5 92:16 100:5 101:18,25 BIA's [8] 6:22 28:11,17,22 65:20 77:1 78:19 79:5 big [1] 97:23 billion [4] 68:12 77:24,25 78:13 bit [9] 14:17 22:1 54:14 58: 25 78:2 96:12 98:6,7 100: 15 blackletter [1] 57:23 blue [1] 6:18 Board [28] 4:1 9:16,24 24: 17 34:11 35:16 42:12,12, 19 43:2,20 44:5,9,17 50:18, 22 70:3 74:5 78:22 88:6,9, 10 90:25 91:6,17 95:18 99: 14 100:8 Board's [5] 34:14 74:9 91: 14 93:9 99:12 body [1] 43:9 boiled [1] 38:13 boilerplate [2] 7:4 102:1 bond [4] 23:17 39:5 41:12 94:11 books [1] 98:4 boss [1] 16:6 both [6] 9:3 19:21 20:5 46: 1 99:6 100:18 bottom [1] 58:9 bottom-line [1] 30:22 bound [1] 88:8 boundaries [4] 61:18,24 62:20 63:10 boundary [4] 62:2,16 63:8, 9 bounds [1] 44:23 breadwinner [1] 63:15 brief [7] 6:19 26:25 28:13 34:10 77:15 93:14 101:18 brief's [1] 60:1 briefed [3] 40:11,18,19 briefly [1] 25:1 broad [1] 19:16 broadly [2] 33:10 82:22 bucket [1] 34:20 buckets [1] 57:8 bunch [2] 46:5,13 burdensome [1] 8:10 busy [1] 79:8 buy [1] 26:22</p> <hr/> <p>C</p>
--	--	--	---	--

Official - Subject to Final Review

<p>call [11] 10:10 28:4 55:24 75:1 80:24 84:15,16 85:6, 8 93:12,12</p> <p>calling [1] 70:23</p> <p>calls [2] 52:1 75:5</p> <p>came [6] 1:15 37:12 51:15, 21,22 55:15</p> <p>cancellation [9] 5:9 20:13, 22 35:19 47:17 73:12 90: 24 100:7,11</p> <p>cancer [2] 63:13 73:20</p> <p>candle [2] 35:12 55:17</p> <p>cannot [3] 8:4 61:19 62:17</p> <p>canons [2] 12:18 99:19</p> <p>capacity [1] 75:15</p> <p>care [5] 7:13 22:7 51:24,25 52:1</p> <p>careful [1] 95:17</p> <p>caregiver [1] 66:16</p> <p>cares [3] 37:24 39:8,10</p> <p>caring [1] 41:13</p> <p>Case [59] 3:4 6:2,8,17 7:7 15:9 17:16 23:3 24:17 26: 7 27:6 28:19 29:2,23 39:9 42:18 44:10,25 46:20 51:2 54:10 63:12,17 68:1,12,13, 15 70:1 72:1,4,8,14,20,24 73:11,23 74:7 76:12,17,23 77:3,6 78:8,9 79:12 80:10, 10,16 83:4 84:17 88:24 89: 3 91:16 99:4 102:17 103: 11,16 104:5,6</p> <p>case-by-case [1] 99:23</p> <p>case-specific [1] 8:7</p> <p>cases [34] 5:16,23 6:5 9:8 17:15 20:22,23,24 23:13, 15,25 24:5,13 40:19 44:24 70:21 75:22 79:9 80:14,18 83:7 85:15,20 86:2,11 88: 20 89:6 92:12 93:3 95:11 97:22 100:7 101:4,22</p> <p>cash [2] 9:9 40:1</p> <p>categorical [1] 33:1</p> <p>categorization [1] 33:11</p> <p>categorize [1] 9:3</p> <p>category [2] 20:6 36:12</p> <p>caught [3] 14:16,16 31:13</p> <p>cause [1] 3:14</p> <p>certain [5] 12:2 15:20 16:3 28:6 29:8</p> <p>certainly [3] 5:20 38:18 103:5</p> <p>challenge [10] 6:12,22 25: 3 43:23,25 44:2 50:17,20 65:20 66:9</p> <p>challenges [9] 6:19 7:15 24:1 36:20 92:13,14 93:5 94:9,13</p> <p>challenging [9] 9:2 10:5 23:5,5 24:20 25:9 28:11, 22 67:4</p> <p>change [1] 91:16</p> <p>changes [1] 58:8</p> <p>chapter [1] 18:25</p>	<p>character [2] 3:12 16:15</p> <p>characterization [2] 22:1 33:12</p> <p>Chevron [1] 99:18</p> <p>CHIEF [27] 3:3,9 7:21,24 8: 8 9:25 10:2 13:8 30:2,4,17 32:19 33:14 34:3 36:4 41: 4 46:22 47:3 49:12 81:18 82:3 84:20 88:1 92:5 96:9 98:17 104:3</p> <p>child [5] 22:8 23:19 63:13 66:15 73:20</p> <p>chose [1] 17:1</p> <p>Circuit [6] 7:1 23:14 24:5 25:2 57:24 58:7</p> <p>circuits [1] 92:12</p> <p>circumstance [3] 42:25 63:21 67:6</p> <p>circumstances [20] 10:6 11:23 15:6 25:21 53:3,6,9, 10 54:5,9 58:1,5 60:2,3 62: 11 64:18,22 77:9 84:16 103:10</p> <p>cited [1] 24:4</p> <p>claim [5] 28:16 29:6 70:1 94:2,8</p> <p>claimed [1] 22:6</p> <p>claiming [1] 72:6</p> <p>claims [9] 22:2,5 23:16 24: 22 33:23 36:12 47:8 48:7 94:9</p> <p>clarify [1] 40:7</p> <p>class [1] 102:23</p> <p>classic [1] 95:8</p> <p>clean [1] 3:12</p> <p>clear [18] 4:11 14:25 18:7 26:11,15 40:15 45:6 47:11 52:12 59:13 77:15 80:16 85:17 87:4 93:7,19 98:14 99:7</p> <p>clearly [2] 22:13 25:2</p> <p>client [1] 22:17</p> <p>closer [1] 28:20</p> <p>Code [3] 5:1 102:24 103:14</p> <p>coffee [1] 16:5</p> <p>cold [1] 16:4</p> <p>collateral [1] 34:17</p> <p>COLLEEN [3] 1:22 2:6 47: 1</p> <p>colloquial [1] 14:17</p> <p>colloquially [5] 60:16,17, 18,25 61:7</p> <p>colloquy [1] 36:7</p> <p>colorable [1] 62:23</p> <p>come [8] 6:13 10:3 16:20 28:14,25 42:18 85:15 92: 13</p> <p>comes [3] 55:21 80:8 97: 24</p> <p>coming [1] 80:8</p> <p>commit [1] 4:16</p> <p>commitment [1] 40:14</p> <p>common [8] 4:7,14 10:15 17:15 26:23 30:12 55:2</p>	<p>103:1</p> <p>comparative [6] 8:12 15:4 51:4 65:15 70:8 84:15</p> <p>compare [4] 13:20 14:3 75: 4 84:17</p> <p>compared [2] 8:23 53:10</p> <p>comparison [5] 17:25 18: 5,6,11 95:12</p> <p>comparisons [1] 96:4</p> <p>complaining [1] 16:4</p> <p>complete [2] 5:13 90:25</p> <p>completely [4] 20:23 21:6 32:11 102:3</p> <p>complicated [5] 49:3 55:8 56:4,24 83:3</p> <p>complications [1] 86:7</p> <p>component [4] 52:17 59: 19 60:4 94:24</p> <p>concede [1] 13:6</p> <p>conceded [1] 62:9</p> <p>concedes [1] 67:10</p> <p>concept [3] 53:25 84:5,12</p> <p>concern [2] 19:5 45:22</p> <p>concerns [1] 53:19</p> <p>conclude [1] 92:16</p> <p>concluded [1] 95:6</p> <p>concludes [2] 3:16 88:5</p> <p>concluding [1] 73:18</p> <p>conclusion [10] 20:24 31: 15 41:14 48:10 49:8 51:6 55:21 65:8 68:17 94:19</p> <p>conclusions [2] 70:5 90: 14</p> <p>condition [1] 7:11</p> <p>confidence [1] 75:10</p> <p>confused [2] 78:3,6</p> <p>confusing [1] 71:17</p> <p>confusion [1] 98:14</p> <p>Congress [34] 4:19 17:1,2, 4,5,22 18:4,9 19:4,9 20:10 28:7 43:19 44:23 45:12,16, 23 46:12 58:13 59:12 75: 25 76:3,20 81:6,24 83:11 84:3,8,12,14 88:24 99:3,4 100:11</p> <p>Congress's [2] 18:1 45:3</p> <p>congressional [1] 59:8</p> <p>consequences [1] 35:8</p> <p>consider [1] 25:23</p> <p>considerations [4] 9:11 12:6,9,25</p> <p>considered [4] 30:1,7 54: 25 59:9</p> <p>considering [2] 25:21 41: 15</p> <p>consistent [5] 7:19 12:23 88:21 102:21 103:6</p> <p>consistently [2] 78:22 88: 20</p> <p>constellation [1] 72:16</p> <p>constituted [2] 53:19 57: 19</p> <p>constitutes [3] 10:9 14:14 39:19</p>	<p>constitutional [6] 19:8,12 30:11 33:23 47:7 48:7</p> <p>constraints [2] 100:12 101:20</p> <p>construction [4] 12:17 84: 8 97:3 99:20</p> <p>construed [2] 18:25 32:5</p> <p>context [6] 8:5 35:7 40:24 93:15 101:14 102:21</p> <p>contexts [3] 8:6 14:19 30: 10</p> <p>continuous [1] 47:24</p> <p>continuously [1] 89:11</p> <p>control [1] 20:23</p> <p>conveys [1] 91:25</p> <p>conviction [1] 44:15</p> <p>convictions [2] 85:22,24</p> <p>convoluted [1] 45:11</p> <p>Cooter [1] 101:6</p> <p>core [1] 100:23</p> <p>corpus [1] 80:10</p> <p>correct [12] 26:9 35:21,22 54:11 58:4 61:8 68:4,7 70: 2 72:9,13 101:11</p> <p>correctly [7] 36:8 44:6 57: 15 58:6 64:24 65:1 90:20</p> <p>couldn't [5] 11:24 63:18,18 66:12 77:7</p> <p>Counsel [13] 15:13 26:5 30:18 46:23 57:14 58:5 65: 18 69:15 71:15 73:16 82:4 98:18 104:4</p> <p>count [3] 5:14 28:5 65:1</p> <p>country [4] 10:22 47:23 63: 14 89:13</p> <p>counts [4] 71:5 75:16 78: 13 93:16</p> <p>couple [3] 32:3 46:3 56:2</p> <p>course [10] 5:21 35:5 50: 20 55:18,24 62:24 70:12, 18 75:17 103:13</p> <p>COURT [96] 1:1,16 3:10,22 5:21 6:18,21 11:9 12:3,9 14:13,22 17:14 18:4,6,11 19:21 20:1,4,14 21:6,9 23: 7,20 25:8 29:9 30:7,16,23 32:14 35:23 36:19,22 41: 19 43:6,11,17 44:13,24 45: 5,14 46:3,11 47:4,11,19 48: 8,17,19 51:10 53:17,20 54: 19 55:21 56:6 60:11 61:16 65:10 66:8 68:16 70:21 71: 6,23 72:23 74:5,21 77:7,23 78:11,14 79:15 80:17 82: 11 83:23 84:3 85:14 86:20 87:20 88:5 91:13,14,19 93: 19 94:23 95:1,3,10,16,17, 20,22 96:1,6 98:10 101:5,7</p> <p>Court's [7] 5:17,18 11:12 49:9 87:22 90:5 95:9</p> <p>courts [29] 3:18 4:13,17,23 5:2,4,9 9:14 11:13 24:7 35: 1 42:15 47:6 54:20 60:10 69:17,17 92:19 96:23 97:6</p>	<p>99:20,24 100:24,25 101:5, 9,10 102:4,21</p> <p>courts' [1] 44:11</p> <p>covered [1] 59:14</p> <p>coworkers [1] 16:7</p> <p>created [2] 28:24 99:5</p> <p>creature [1] 54:1</p> <p>credibility [8] 25:13,16,23 41:11 47:18 51:9 65:7 93: 17</p> <p>credible [2] 64:7,10</p> <p>credit [2] 39:4,7</p> <p>credited [3] 6:14 7:2 20:25</p> <p>criminal [1] 46:8</p> <p>criteria [1] 12:22</p> <p>critical [2] 73:20 101:17</p> <p>critically [1] 12:8</p> <p>criticisms [1] 32:24</p> <p>cruelty [1] 5:12</p> <p>current [1] 4:17</p> <p>custody [1] 22:15</p> <p>cut [1] 20:20</p> <p>Cyr [6] 19:5 59:6 80:11,13 88:14,21</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C [3] 1:12,20,23</p> <p>daily [1] 22:13</p> <p>day [7] 41:14 55:24 59:5 70: 14 99:20,20 101:21</p> <p>days [2] 7:14 60:1</p> <p>de [11] 14:25 26:8 49:14,16, 16 57:9,23 58:1,5,24 103: 15</p> <p>dealing [5] 53:18 97:4,9,10, 11</p> <p>debate [1] 53:17</p> <p>decades [1] 34:12</p> <p>deceive [1] 65:22</p> <p>deceived [1] 66:11</p> <p>decide [7] 43:19 48:21 50: 7 70:17 72:24 73:10 102: 17</p> <p>decided [5] 33:13 35:11 54: 24 55:5 102:15</p> <p>decides [1] 56:6</p> <p>deciding [1] 100:6</p> <p>decision [23] 3:19 7:5 11: 12 20:14 24:10 30:22 33: 17 42:15,16 48:15,18 50:3, 24 52:9 59:7 61:22 74:23 76:1 78:4 99:16 100:19 102:2,4</p> <p>decision-maker [2] 13:1 54:4</p> <p>decision-making [2] 12: 21 19:18</p> <p>decisions [4] 49:16 67:13 101:15 102:23</p> <p>deem [1] 5:5</p> <p>deemed [2] 86:17,18</p> <p>deems [1] 42:3</p> <p>defendant [1] 28:10</p> <p>defense [1] 27:22</p>
--	---	---	--	---

Official - Subject to Final Review

<p>deference [5] 13:1 26:7 81:2,4 101:4</p> <p>deferential [16] 10:24 11:9,17,22 12:2,4 21:11 34:13 40:5,10,21 44:21 57:8,10 58:10 101:5</p> <p>deferentially [3] 38:8,19 55:19</p> <p>definite [1] 44:14</p> <p>Definitely [1] 37:9</p> <p>definition [1] 26:1</p> <p>definitions [1] 9:23</p> <p>degree [2] 10:10,15</p> <p>degrees [1] 16:5</p> <p>deleted [1] 4:20</p> <p>demanding [1] 78:10</p> <p>demonstrate [1] 88:20</p> <p>denial [3] 47:10 76:5 87:16</p> <p>denials [3] 3:21 81:7,9</p> <p>denied [1] 60:12</p> <p>denies [2] 78:1 79:8</p> <p>deny [3] 35:19 67:15 79:12</p> <p>Department [1] 1:23</p> <p>depends [3] 24:16 31:10 87:6</p> <p>deported [1] 23:19</p> <p>depression [1] 7:13</p> <p>deprived [1] 91:17</p> <p>depth [1] 94:10</p> <p>described [1] 42:22</p> <p>designation [3] 18:23 32:8 99:8</p> <p>despite [1] 65:23</p> <p>detention [1] 7:16</p> <p>determination [32] 6:23 18:16 23:1 24:23 35:20 41:20 42:23 47:15 49:7 51:9 60:6 64:5,13 65:21 67:8 68:24 69:19 74:19,21 75:1,24 76:2 86:15 89:12 90:2,3,11,17 93:10,17 99:9,14</p> <p>determinations [26] 8:24 9:13,15 11:14 14:11 15:6,9 17:17 20:7,13 25:13,16 45:17 47:14,19 48:1,3,5,22 67:9 82:1 87:11,15 90:12 100:17 103:11</p> <p>determine [5] 8:14,18 17:3 90:23 91:15</p> <p>determined [1] 57:18</p> <p>determining [4] 8:22 20:16 25:23 26:4</p> <p>detriment [1] 38:14</p> <p>dictionary [3] 9:23 17:9,12</p> <p>difference [3] 15:15 16:23 72:12</p> <p>different [22] 4:7 8:6 9:19 12:15,21 14:19,20 21:19 29:1,12 33:5 41:15 46:13,15 57:7,14 64:3,11 72:19 78:23 95:25 102:8</p> <p>differently [2] 29:10 61:23</p> <p>difficult [2] 8:11 53:11</p> <p>difficulties [1] 9:1</p>	<p>diligence [11] 11:14 14:10 15:8,22 41:1 53:22,25 55:3 61:17 66:23 85:7</p> <p>disagree [4] 53:15 61:21 89:4,22</p> <p>disastrous [1] 35:8</p> <p>discarded [1] 88:10</p> <p>discovery [1] 61:16</p> <p>discretion [58] 4:19 8:22 10:11 11:15 15:2 35:18,19 40:6,12 41:2 44:21 47:21 49:8 54:17 56:12,15 59:2 60:11 61:13,16 63:19 65:14 67:19,20 71:19 73:5,6,10,17,25 74:10,11,20 80:23 81:2,9,22 83:5,14 85:17 87:12,20 90:13,20,22,25 91:5,6,18,25 92:2,3 93:13 94:7 98:13 100:5,10 103:12</p> <p>discretion-conferring [1] 4:21</p> <p>discretion-type [1] 41:23</p> <p>discretionary [45] 3:21 5:3,5,7 18:17 25:8 32:9 33:17 47:10,15 48:15,18 49:16,17,23 50:4,7 51:3 60:5 61:22 63:24 67:7,8,13 69:19 70:6 75:1 76:5 79:14 81:8,25 86:19 87:10,15,17,23,24 91:9,22 93:17 94:15,16 97:11 99:9 100:4</p> <p>discriminate [3] 48:13 83:25 84:6</p> <p>discrimination [1] 84:6</p> <p>discussion [2] 59:15 100:15</p> <p>dispute [2] 66:14 72:9</p> <p>disputing [1] 53:21</p> <p>disregarded [1] 7:6</p> <p>dissents [1] 33:10</p> <p>distinction [4] 26:22 51:20 53:14 71:21</p> <p>distinguish [5] 26:21 30:9 47:7 98:11,12</p> <p>distinguished [1] 88:17</p> <p>distinguishing [2] 54:16 84:23</p> <p>distracting [1] 80:23</p> <p>district [6] 21:5 61:15 100:21,21,25 101:9</p> <p>divide [2] 95:21 96:3</p> <p>division [1] 18:3</p> <p>docket [2] 5:17 101:23</p> <p>doing [11] 8:13 20:18 24:20 30:8 53:3 57:16 68:10 70:10 81:6 91:7 101:21</p> <p>done [8] 50:22 53:4 54:19,21 57:16 61:22 78:18 83:9</p> <p>door [2] 66:8 83:9</p> <p>dovetails [1] 83:22</p> <p>down [5] 32:3 38:14 55:15 59:11 92:18</p> <p>dozen [1] 99:15</p>	<p>dozens [1] 5:10</p> <p>drew [1] 30:10</p> <p>driven [1] 31:4</p> <p>Duberstein [1] 86:10</p> <p>due [12] 11:14 14:10 15:7,22 41:1 53:21,24 55:3 60:1 61:17 66:23 85:7</p> <p>during [1] 100:22</p> <p>dying [1] 73:20</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [3] 55:10 86:16,18</p> <p>earlier [5] 6:5 36:7 53:24 67:12 94:3</p> <p>earning [1] 95:7</p> <p>easier [1] 48:22</p> <p>economic [2] 38:14 92:17</p> <p>economics [1] 38:24</p> <p>effect [1] 82:23</p> <p>effectively [1] 77:9</p> <p>egregiously [1] 102:3</p> <p>either [1] 4:16</p> <p>elaborate [2] 4:10 82:18</p> <p>elaborated [1] 55:6</p> <p>element [2] 41:16 51:5</p> <p>eligibility [5] 20:16 35:17 64:13 73:8 91:8</p> <p>eligible [6] 47:16 64:14 90:24 91:1,2 100:6</p> <p>elsewhere [1] 9:21</p> <p>emotional [9] 22:11,12 23:17 37:22 39:5,11,13 41:11 94:10</p> <p>emotionally [1] 7:20</p> <p>emphasize [1] 101:8</p> <p>emphasized [1] 90:19</p> <p>enacted [1] 83:12</p> <p>enacting [2] 20:19 21:4</p> <p>enactment [1] 19:3</p> <p>enamored [1] 83:12</p> <p>encountered [1] 9:1</p> <p>end [2] 41:13 55:21</p> <p>ended [1] 59:15</p> <p>English [1] 88:20</p> <p>enormous [2] 101:16,19</p> <p>enough [4] 5:8 39:14,14 98:10</p> <p>enter [1] 13:2</p> <p>entire [5] 21:5 32:17 38:13 46:10 102:22</p> <p>entitled [1] 64:12</p> <p>entrusts [1] 74:25</p> <p>EOIR [1] 26:11</p> <p>equally [2] 66:25 67:9</p> <p>equals [1] 44:9</p> <p>equitable [1] 53:1</p> <p>era [1] 103:3</p> <p>erred [2] 61:24 78:1</p> <p>erroneous [3] 88:16,21 89:1</p> <p>erroneously [1] 38:13</p> <p>error [27] 15:1 26:11,15 35:7 40:15 44:15 62:14 68:16 69:22,24 71:6,10,14,19 73:</p>	<p>24 74:7 76:14,17 77:13,19 79:13,15 85:18 88:10 89:6 93:8 101:15</p> <p>errors [3] 79:25 89:7 93:21</p> <p>especially [1] 43:4</p> <p>ESQ [3] 2:3,6,9</p> <p>ESQUIRE [1] 1:20</p> <p>essential [3] 13:19,23 17:24</p> <p>essentially [6] 14:8,11 17:14 19:17 24:1 93:4</p> <p>established [1] 38:5</p> <p>establishes [1] 52:21</p> <p>evaluating [1] 44:18</p> <p>evaluation [1] 4:24</p> <p>Even [23] 3:25 4:20 17:11,17 23:23 24:15 26:19 28:3 33:9 36:8,9,9 44:21 52:17 59:10 67:13 97:15 101:3,16 102:18 103:3,15,17</p> <p>event [2] 35:12,20</p> <p>eventually [1] 52:6</p> <p>everybody's [1] 29:3</p> <p>everything [2] 51:12 82:23</p> <p>evidence [8] 6:15 7:3 21:1 23:8 41:16 51:7 65:23 70:5</p> <p>exacerbated [1] 7:15</p> <p>exact [4] 14:9 53:5 61:11 68:10</p> <p>exactly [17] 9:24 36:1 53:23 54:7 60:13,23 61:14 65:9 72:10 73:5 74:24 76:23 80:14 86:16 97:16 103:21,23</p> <p>example [15] 6:25 7:9 9:18 23:3 26:14 28:9 38:11 42:2 44:13 62:12 66:13 71:20 76:24 82:17 92:18</p> <p>examples [2] 48:2 86:11</p> <p>exceed [2] 61:19 67:2</p> <p>exceeding [1] 94:6</p> <p>except [4] 16:18 32:2 60:1,2</p> <p>exception [5] 32:11 48:6 75:16 83:20 99:5</p> <p>exceptional [35] 3:14 4:1 7:7 8:9 9:18 13:19 15:9 16:18 17:16 25:7 26:7,13 38:5 42:9 48:16 49:5 52:16 57:25 62:11,12 63:21 64:21 69:1 78:11,15 83:18 84:13 85:7 87:22 91:20,21,24 97:22 103:10,11</p> <p>exceptionally [2] 8:19 10:9</p> <p>exceptions [1] 86:2</p> <p>exercise [15] 12:17 15:21 17:18,19,22 47:21 49:7 56:12,15 61:12 67:20 73:5,6,10 87:20</p> <p>exercises [1] 81:22</p> <p>exercising [1] 35:18</p> <p>exist [2] 34:1 85:20</p>	<p>existed [2] 5:1 88:7</p> <p>existing [1] 43:10</p> <p>exists [1] 44:22</p> <p>experience [5] 9:8 10:15 38:9 80:22 95:14</p> <p>experienced [1] 97:6</p> <p>experiencing [1] 16:8</p> <p>expertise [1] 100:15</p> <p>explain [4] 18:13 46:19 71:20 73:3</p> <p>explained [1] 90:10</p> <p>explaining [1] 80:3</p> <p>explains [4] 70:4,5,6,7</p> <p>expressly [2] 12:9 103:23</p> <p>extent [2] 18:3 19:11</p> <p>extra [1] 43:3</p> <p>extraordinary [7] 15:6 53:2,6,9 54:5,8 66:22</p> <p>extreme [9] 5:12 9:20 28:12 44:10 64:16 71:24 91:15,20 102:7</p> <p>extremely [23] 3:14 4:1 7:8 8:10,18 9:19 10:9 26:13 38:6 42:9 49:5 52:16 55:19 57:20 58:1 64:21 71:4 75:17 78:16 84:13 91:7,21 97:22</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face [2] 75:4 82:11</p> <p>faces [1] 25:6</p> <p>fact [56] 6:9,13,20 7:10 9:7 12:1 14:23 20:4,21 24:7 25:10,10,17,22 26:11 30:6,24 31:6,16,21,22 32:14 33:6,21 36:21 37:17 43:2 45:10 46:18 48:11,13 54:3,17,24 57:24 59:9 64:11 65:11 79:7,23 80:2,25 81:2,5 85:1 89:16 92:21,24 93:16,25,25 95:6,8,19 96:4 98:13</p> <p>fact-finding [7] 5:23 47:20 52:5 59:3 86:13 90:12 93:12</p> <p>fact-weighting [2] 4:24 52:6</p> <p>factors [16] 5:4 7:7 8:23 23:6 25:22,24 28:15,17,24 29:3,7 41:9,15 42:3 72:19 73:9</p> <p>facts [67] 3:16,25 6:1,8 7:3,6 8:6 13:13 14:13 16:3 17:20,25,25 21:10 22:18 23:6,10 24:24 26:3 29:2 31:3,9 36:12 37:20 38:9 44:18 47:22 50:25 52:18 53:8 54:15 55:22 57:19 64:6 66:10,15,17,19 67:5 68:17 70:15,22 72:16,17,17,23 73:10,18,20,24 75:14,19 76:9,15 80:16 85:11 86:14 88:23 89:2 92:14 93:22 94:4,6,23 95:1,15 98:11</p> <p>factual [32] 8:20 13:20,21</p>
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Official - Subject to Final Review

<p>14:3 20:7,12 22:22 23:21 24:1,19,20 25:13 26:16 31: 5 34:8 36:14,20 37:25 38: 3 45:17 49:6,17 51:19,24 56:15 69:19 70:5 79:13 86: 19 93:4 94:9 97:12 fail ^[1] 85:17 fair ^[2] 48:10 100:15 faithful ^[1] 93:21 fall ^[2] 25:25 48:5 falls ^[2] 18:18 83:20 families ^[1] 35:9 family ^[3] 3:15 10:21 73:21 fashioned ^[1] 4:10 father ^[1] 39:14 favor ^[2] 24:14 82:9 federal ^[3] 85:22,24 99:24 few ^[3] 20:17 88:4 98:9 fight ^[4] 69:10,13 71:9 77: 14 fighting ^[1] 71:12 figure ^[4] 47:25 48:4,19 49: 5 final ^[1] 46:8 Finally ^[1] 103:18 financial ^[1] 7:17 find ^[5] 19:18 48:11 54:14 84:9 92:21 finder ^[1] 25:22 finders ^[1] 54:25 finding ^[5] 6:13 26:16 31:5 47:22 56:16 findings ^[15] 6:20 20:4,8, 21 24:6,19,21 25:9,10 26:6, 24 36:21 46:17 49:18 58:1 finds ^[1] 72:17 fine ^[4] 70:25 71:3 74:19 93: 7 finish ^[3] 30:2 61:4 81:19 firm ^[1] 44:14 First ^[14] 4:13 14:7 16:25 26:12 29:25 43:18 53:16 56:2 59:11 62:5,8 92:3 96: 22 99:1 first-line ^[1] 32:16 fit ^[1] 85:11 five ^[2] 97:25 98:25 flowing ^[1] 23:24 focus ^[1] 71:19 focused ^[1] 99:2 follow ^[1] 88:9 following ^[1] 54:6 follows ^[1] 35:14 forbid ^[2] 20:3 46:17 forecasts ^[1] 95:7 forgotten ^[1] 80:9 former ^[2] 29:14 101:17 forms ^[1] 46:7 forth ^[1] 96:17 found ^[7] 17:20 22:10 55: 22 64:7 65:22 72:23 76:9 four ^[1] 97:25 Fourth ^[1] 57:24 frame ^[1] 57:13</p>	<p>framework ^[9] 4:11 13:3 34:25 49:3 56:10,23 57:4 95:20,23 frameworks ^[1] 12:16 framing ^[2] 17:24 69:21 framings ^[1] 57:7 freely ^[1] 50:15 frequency ^[1] 7:12 friend ^[5] 49:3 66:8 96:18 99:1 102:12 friend's ^[2] 99:11 103:24 function ^[1] 20:15 fundamental ^[1] 76:9 fundamentally ^[1] 100:23 further ^[2] 55:25 99:22 future ^[1] 95:5</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>GARLAND ^[2] 1:6 3:5 gave ^[3] 48:2 75:14 92:25 Gell ^[1] 101:6 GENERAL ^[5] 1:7,22 33:18 50:10,13 generally ^[1] 11:13 genre ^[1] 102:23 gets ^[1] 71:6 getting ^[9] 14:16 56:8 63: 11 71:17 80:21 91:2,3 98: 1,1 give ^[5] 19:7 29:21 76:6 95: 17 96:6 given ^[11] 8:14,23 18:7 24: 17 30:15 39:12 57:19 70:4 95:19 99:22,22 giving ^[1] 13:1 Gorsuch ^[31] 33:15,16,25 34:2 60:9,18,22 61:1,3,11, 14 62:4 63:2,6,11 65:18 66:1,4,6 67:4,11 76:19,22 77:16,22 78:5,17,25 79:3 80:21 88:2 Gorsuch's ^[1] 35:14 got ^[7] 21:4 68:3 72:8 75: 23 76:11 95:23,24 government ^[15] 4:5,15 5: 8 8:21 25:20 26:23 51:15, 16 93:7 102:7,12 103:2,5, 22 104:1 government's ^[10] 4:10 5: 15 14:9 29:23,24 34:24 56: 23 101:24 102:19 103:18 grandmother ^[4] 37:24 39: 8,10 41:13 grant ^[1] 100:10 granting ^[1] 32:1 gray ^[1] 14:1 great ^[3] 75:22 79:9,10 greater ^[1] 10:20 ground ^[1] 98:8 Groundhog ^[1] 59:5 group ^[1] 8:1 guardrail ^[1] 62:16 guardrails ^[9] 61:19 63:20 64:12 67:1,2,13 94:6 101:</p>	<p>1,10 Guerrera ^[1] 29:13 Guerrero ^[17] 28:4 29:14 34:6 35:11 45:5 51:15 52: 25 55:15 59:5,14,17 84:23, 25,25 88:19 92:23 94:1 Guerrero-Lasprilla ^[29] 3: 23 4:3 11:13 12:10 14:10 15:16 19:22 20:2 21:22 23: 24 26:21 27:2,25 29:18,25 30:15 32:15 36:10 41:2 46: 2 52:13,23 53:17 82:12,14, 20 85:13 102:6 103:22 Guerrero-Lasprilla's ^[1] 4:6 guess ^[7] 18:1 21:25 23:22 28:19 31:10 38:21 43:14 guidance ^[3] 95:18 96:7 98:10 gun ^[1] 103:1</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>Ha ^[1] 91:10 habeas ^[7] 21:5,6 32:16,16 45:10 80:10 88:15 hand ^[1] 5:25 handled ^[1] 45:4 handling ^[2] 96:12,24 happen ^[2] 6:18 101:23 happening ^[2] 28:1 98:7 Happy ^[3] 6:10 45:25 96:5 hard ^[4] 8:17 19:18 23:24 70:16 hardship ^[41] 3:15 4:2 9: 19,20 10:19 16:19 17:17 22:12 25:6 26:13 28:13 39: 1,15 42:9 44:10 48:17 49: 6 52:16 61:17 63:17 64:14 66:23 69:1 71:5 75:2,17 78:12,16 83:19 84:13 85:7 87:22 91:15,20,21 92:17, 18 95:14 97:23 99:13 103: 13 hardships ^[1] 8:1 harm ^[1] 38:6 hear ^[4] 3:3 73:2 95:3 102: 17 heard ^[2] 62:5 66:12 heartland ^[1] 63:16 heavily ^[1] 37:25 held ^[3] 3:23 14:13 19:14 help ^[1] 45:20 helping ^[1] 27:25 high ^[2] 10:10 76:25 highly ^[1] 93:18 hint ^[1] 4:18 historical ^[4] 36:21 47:22 102:14,18 historical-type ^[1] 103:16 history ^[11] 12:23 19:3 49: 2 54:18 55:3,12 59:6,8 95: 24 102:11 103:6 hmm ^[1] 66:21 hold ^[2] 60:9,10</p>	<p>holding ^[2] 4:6 52:13 honest ^[1] 95:2 Honor ^[33] 6:11,25 8:4 9:5 10:14 14:6 15:5 16:25 18: 12 20:18 24:2,18 25:1,15 26:10 31:1,23 32:12 33:8 34:19 35:22 36:16 38:12 40:17 43:1 46:1 48:20 95: 4 98:22 99:10 100:14 102: 10 104:2 hooray ^[1] 29:4 hospital ^[1] 7:12 however ^[1] 69:22 huge ^[1] 91:5 hypothetical ^[5] 37:14 41: 7 76:12 77:5 92:25 hypothetically ^[1] 92:11</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea ^[1] 45:9 IG ^[4] 72:1,13,15,18 ignored ^[1] 42:2 IJ ^[27] 6:20 7:2,3 17:20 20: 25 24:18 29:5,6 35:16 38: 8,12,23 41:8 42:2,24 44:16 50:7 63:19 65:22 71:23 73: 7 88:6,8,9 92:16 101:18,25 IJ's ^[4] 6:22 26:6 42:23 92: 21 IJs ^[4] 9:7 28:15 49:24 100: 4 illness ^[1] 37:16 imagine ^[1] 63:11 immigration ^[12] 3:13 6: 14 8:2,5 10:11 22:5,6 35:7 70:13 75:20 100:19 101: 15 immunity ^[1] 24:9 impairment ^[1] 8:25 important ^[7] 12:8,14 35:6 37:21 94:22,25 100:23 INA ^[8] 3:20 5:10 11:5 18: 17 39:22,24 46:6,10 inappropriate ^[1] 81:23 incident ^[1] 10:21 inclined ^[1] 82:12 include ^[4] 14:22 28:8 79: 22 80:1 included ^[6] 47:13,14,18, 21 89:1 95:5 includes ^[7] 3:24 5:21 19: 15 47:8 79:24 80:6 88:22 including ^[5] 5:10 13:11 21:22 24:15 30:11 inconsistent ^[3] 28:17 68: 18 101:13 inconsistently ^[1] 102:4 incredibly ^[1] 101:25 indeed ^[1] 25:7 individual ^[1] 8:3 initially ^[1] 40:5 inquiry ^[5] 52:3 53:14 55:3, 5 76:9 insist ^[1] 70:23</p>	<p>insofar ^[1] 28:18 instead ^[1] 84:7 instructions ^[2] 82:18 83: 17 intend ^[1] 18:4 intended ^[1] 28:7 intending ^[4] 17:4,22 36: 16 45:24 intent ^[2] 18:2 45:3 intention ^[3] 48:12 83:24 84:6 intentionally ^[2] 65:21 66: 11 inter ^[1] 60:7 interested ^[1] 45:8 interject ^[1] 65:19 interlocutory ^[1] 24:9 interpret ^[5] 9:17 29:13 60: 8 78:15 99:18 interpretation ^[10] 12:19 28:23 49:1 50:16 56:5 70: 3 72:2 78:20,24 88:17 interpreted ^[9] 10:18 14: 22 18:9 39:21 42:10 43:11, 21 44:5 74:6 interpreting ^[1] 72:2 intervene ^[2] 101:11 102:5 invite ^[1] 86:6 involve ^[4] 14:1,11 33:21 89:7 involved ^[3] 54:10 82:14 83:4 involves ^[6] 26:2 30:24 51: 25 83:18 87:18 101:4 involving ^[3] 6:8 17:15 81: 8 Isn't ^[14] 15:14 16:5 59:21 60:13,22 73:17,24 74:16, 16 76:22 78:12,12 83:3 96: 13 issue ^[6] 31:12 51:14 55:14, 20 73:1,1 itself ^[2] 91:25 99:14</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>JACKSON ^[43] 13:4 17:21 19:2 20:9 26:18 27:11,18, 21,24 29:20 33:4 34:6 37: 13 41:5,6,25 42:5,11,13,17 43:5,8,13,22 44:1,4,8 45:1, 8,22 46:21 71:15 72:11 74: 16,22 75:11,11 96:10,11, 16 97:13,17 98:16 Jackson's ^[1] 27:5 JAIME ^[5] 1:20 2:3,9 3:7 98:20 job ^[2] 26:25 75:22 Jong ^[2] 91:10,10 judge ^[19] 6:14 22:6,6 58:6 66:22 67:23 68:3,9,10,12 70:18 75:19,20,23 76:11, 11,15 85:11 100:21 judge-made ^[1] 55:4 judges ^[11] 10:12 55:5,6</p>
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Official - Subject to Final Review

<p>61:15 70:14 75:15 76:7 83:8,10 100:20,21</p> <p>judgment [21] 10:15 14:1 30:22 31:8,12,21,25 32:9 47:9 51:3,4 52:1 60:13 65:16 70:7,16 75:1,4 84:14,16 87:16</p> <p>judgments [7] 10:10,23 31:19,21 45:15 81:8 82:25</p> <p>judicial [16] 5:16 12:12 13:3 19:1 20:21 21:23 31:25 32:13,18 35:5 36:11 48:6 83:11 85:21 101:16 103:21</p> <p>judicially [1] 24:14</p> <p>judiciary [1] 19:6</p> <p>jumped [1] 57:17</p> <p>juries [1] 54:24</p> <p>jurisdiction [2] 45:15 102:14</p> <p>jurisdiction-stripping [2] 18:8,20</p> <p>jurisdictional [3] 4:9 93:1 94:2</p> <p>jury [3] 82:17,19 83:17</p> <p>Justice [278] 1:23 3:3,9 5:19 7:21,24 8:8 9:25 10:2 11:1,7,16,20 13:4,6,7 15:13,14 16:10,14,17 17:7,11,21,23 19:2 20:9 21:13,15,16,17 22:24 23:12 24:11 25:12 26:5,17,18,19,19 27:4,4,11,13,16,18,19,21,24 28:25 29:20 30:3,4,17,19,20,21 31:7,18 32:10,19,19,21,21,22 33:3,4,4,14,14,15,16,25 34:2,3,3,5,6 35:10,14 36:3,4,4,5,17,24 37:2,5,8,11,13,19 38:21 39:20,23 40:2,3,13 41:3,4,4,6,7,25 42:5,11,13,17 43:5,8,13,22 44:1,4,8 45:1,8,22 46:21,22 47:3 49:10,12,13,19,22 50:2,9,12 51:11 52:24 53:23 54:2 55:7,16 56:21 57:2,5,12 58:3,15,18 59:4,23,25 60:9,18,22 61:1,3,11,14 62:4,22,25 63:2,4,6,7,11,25 64:8,23 65:18,25 66:1,3,4,6,13 67:4,11,22 68:8,9,14,22,25 69:4,9,11,15 70:9,20 71:1,4,11,15,20 72:11 73:14,16 74:2,12,16,17,22 75:6,10,11,11,13,14 76:2,6,12,19,21,22,23 77:4,8,12,16,21,22 78:5,8,17,25 79:3,17,21 80:1,5,11,20 81:11,13,16 82:3,5,6,7 84:19,20,20,22,24 85:4,19 86:6,21,24 87:2,7 88:1,1,2,3,4,11,12 89:14,17,21 90:15,23 94:3 96:8,9,9,11,16 97:13,17 98:16,17 104:3</p>	<p>Justice's [1] 13:8</p> <p>justices [1] 101:1</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN [23] 13:7 33:14 51:11 52:24 54:2 55:7 67:22 68:8,22,25 69:4 70:9 71:1,4 75:6,10,13 76:2,6 77:8,12 88:1 94:3</p> <p>Kagan's [2] 17:23 71:20</p> <p>KAMU [1] 1:3</p> <p>KAVANAUGH [44] 11:1,7,16,20 25:12 34:4,5 35:10 36:3 55:16 56:21 57:2,5,12 58:3,15,18 59:4,23,25 69:9,11 71:11 76:21 77:21 79:17,21 80:1,5,11,20 81:11,13,16 88:3,4,11 89:14,17,21 90:15,18 91:12 92:4</p> <p>Kavanaugh's [1] 40:4</p> <p>keep [6] 11:2 58:18 77:11 78:3 81:11,13</p> <p>keeps [1] 77:8</p> <p>kind [29] 10:21 14:17,18 17:15 18:10 24:6 25:18 29:1 34:7,21 37:12 39:17 40:9,22 43:3 46:18 52:2 59:15 71:18 72:25 82:10,16 92:24 94:8 96:6 98:4,5 102:18 103:4</p> <p>kinds [6] 23:20 28:6,8 33:5 70:13 94:11</p> <p>knowing [1] 97:6</p> <p>knows [2] 42:19 83:8</p> <hr/> <p style="text-align: center;">L</p> <p>labeled [1] 5:3</p> <p>labels [1] 71:17</p> <p>labor [1] 18:3</p> <p>Lakeridge [2] 51:21 101:7</p> <p>language [4] 4:21 9:17 19:10 72:3</p> <p>Lanham [1] 15:10</p> <p>large [1] 66:25</p> <p>last [5] 5:14 40:2 41:7 90:19 102:10</p> <p>later [2] 4:20 18:8</p> <p>latter [1] 29:15</p> <p>Laughter [15] 16:9,11,13,16 27:7,10,23 58:20 62:7 66:5 69:6 71:2 75:12 81:15 96:15</p> <p>laundry [1] 25:24</p> <p>law [99] 3:22,24 4:7,14 5:20,22 6:9 11:5 13:13,14,17 14:5,14,18,23 19:1,13 23:11 25:17 26:24 28:5,21 30:1,7,12,24,25 31:6,8,16,22 32:6 33:6,20,21 36:11 39:2,19 40:24 42:3,5 43:9 47:8 48:7 50:17 54:1,16,21 55:1,3,13 56:16,19 57:22,24 58:13,24 59:9,10,13 60:12 61:18,24 62:10,14,21</p>	<p>65:5 66:19 67:14,16,17 74:18 77:19 79:22,22 80:2,14,22,24 81:1,5 85:1,14 86:20 89:1,2,16 90:4 92:24 93:25 96:2 97:5,7,9 98:4,11 101:12,13,13</p> <p>law/facts [2] 95:21 96:3</p> <p>lawless [1] 85:5</p> <p>laws [1] 8:2</p> <p>lawyer [3] 15:19,24 82:15</p> <p>lawyers [1] 97:21</p> <p>layer [4] 19:24 21:5 32:17 40:23</p> <p>lead [1] 94:19</p> <p>learning [1] 7:14</p> <p>least [5] 28:22 30:6 59:15 71:17 80:22</p> <p>leave [1] 70:18</p> <p>leaving [1] 10:22</p> <p>left [2] 45:9 98:15</p> <p>legal [92] 3:25 4:2 5:25 6:7 7:4 13:10,24,25 14:11 15:25 16:1 17:19,22 21:10 26:9 31:3 39:16 41:18 42:7,8 44:19 48:9 49:8 50:5 51:5 52:2,4,7,17,22 53:12,25 55:20,23 59:19,21,21 60:3 64:20,24 67:24 68:16,18,20,22,25 69:4,22,24 70:24 71:5,10,13,19 72:6,9,22 73:1,1,19,25 74:7 75:9 76:6,10,14,17 77:10,13,18 79:1,24 84:4,5,12 87:18 88:10,16,23 89:6,7,23,24 90:8,14 93:8,20 94:5,24 98:7 99:11 100:2</p> <p>less [4] 60:17 77:3 83:11 99:15</p> <p>life [3] 7:20 22:14 23:18</p> <p>light [1] 99:22</p> <p>likely [4] 11:11,22 75:3 95:13</p> <p>limited [6] 18:22 19:23 20:2,19 46:4 99:8</p> <p>limits [8] 3:20 35:13 36:6 65:17 74:15 81:9 82:2 93:20</p> <p>line [1] 58:9</p> <p>line-splitting [1] 34:7</p> <p>lines [1] 32:2</p> <p>list [3] 5:13 7:25 25:24</p> <p>listen [2] 37:21 38:23</p> <p>litigant [1] 53:3</p> <p>litigate [1] 97:22</p> <p>litigated [3] 29:23 83:7 98:2</p> <p>litigation [2] 34:12,17</p> <p>little [10] 14:16,17 22:1 54:14 58:25 78:2 83:9 96:12 98:6,6</p> <p>lived [2] 3:11 22:13</p> <p>living [1] 16:15</p> <p>long [8] 12:23 52:3,4 58:14 95:6 101:25 102:21 103:6</p>	<p>look [41] 9:21,22,22 12:22,24 13:12,13,14,20 14:3 17:9,12 18:1 19:21 32:1,3 42:16 48:8 55:11,12,13 56:17 64:5 71:24 72:18 73:9 78:4 80:7,12,13 82:13 83:6 84:7 93:16 95:11,24,24 97:4,7 102:21,24</p> <p>looked [7] 22:4 23:13 28:14 41:9 42:20 68:16 95:21</p> <p>looking [16] 5:1,23,25 12:18,20 13:3,17,23 23:25 29:5 41:21 72:4 73:15 76:14 92:11 95:12</p> <p>looks [4] 12:16 70:21 72:15 74:22</p> <p>loop [1] 46:12</p> <p>lose [2] 92:8 94:18</p> <p>lost [2] 92:22 95:7</p> <p>lot [21] 8:6,21 23:15 45:18 51:25 53:8 57:13,16 65:23 70:16 79:9 83:9 88:12 93:1,2,15 94:12,19 96:24 99:2 102:13</p> <p>lots [6] 13:25 40:24 57:6 61:17 66:10 70:15</p> <p>love [1] 83:11</p> <p>low [1] 85:24</p> <p>lower [1] 60:11</p> <hr/> <p style="text-align: center;">M</p> <p>machine [1] 16:6</p> <p>made [13] 6:20 30:23 32:23 44:15 48:3 51:16 58:13 70:6 75:25 76:3 92:15 103:22 104:1</p> <p>main [1] 57:8</p> <p>maintained [1] 21:12</p> <p>major [1] 20:6</p> <p>majority [5] 32:24 33:1,6,12 86:1</p> <p>majority's [1] 103:23</p> <p>male [1] 7:18</p> <p>many [9] 7:21,25 8:5 13:21 14:4 20:22,22 23:25 66:24</p> <p>mark [1] 44:17</p> <p>matches [1] 13:15</p> <p>matter [8] 1:15 35:18 42:17,18 54:18 60:12 61:24 97:3</p> <p>matters [1] 38:24</p> <p>mean [36] 8:19 10:4 13:17 15:23 17:8,23 31:11 33:9 34:20 38:22 39:1,4 40:17 43:11 44:20 52:21,25 53:5,13 54:2 55:8 58:4 60:7,19,22 62:12 63:8 71:18 73:19 75:13 90:3 92:2 93:11,23 94:18 96:1</p> <p>meaning [4] 17:16 50:19 85:20 99:21</p> <p>meaningless [1] 85:9</p> <p>means [8] 50:24,24 62:13 67:25 71:25 81:2 84:2 90:7</p>	<p>meant [4] 17:5,7 47:12 65:7</p> <p>measure [2] 50:2 64:16</p> <p>medical [1] 7:11</p> <p>meet [2] 73:18 76:10</p> <p>meets [1] 47:24</p> <p>member [2] 3:15 10:22</p> <p>mental [1] 37:16</p> <p>mentioned [3] 8:23 10:6 101:2</p> <p>merits [2] 5:17 34:20</p> <p>MERRICK [1] 1:6</p> <p>met [1] 41:16</p> <p>middle [2] 27:9,19</p> <p>might [23] 9:18 10:24 12:25 14:16 19:7 29:11 36:13 37:21 38:7,12 40:16 42:1 46:16 59:11 61:1,3,4 65:19 82:13 83:10 84:1 95:5 98:5</p> <p>minimal [1] 22:12</p> <p>misapplication [1] 88:23</p> <p>misapplications [1] 101:12</p> <p>misapplied [2] 88:6 94:5</p> <p>misinterpretation [2] 62:15 68:6</p> <p>misinterpreted [4] 67:17 76:15 79:19 80:17</p> <p>mismatched [1] 103:20</p> <p>misread [1] 77:9</p> <p>miss [1] 38:25</p> <p>missed [1] 44:17</p> <p>misstate [1] 64:24</p> <p>mistakenly [1] 99:2</p> <p>mistakes [1] 101:23</p> <p>misunderstanding [1] 38:25</p> <p>misunderstandings [1] 101:12</p> <p>misunderstood [2] 37:7 50:19</p> <p>mix [1] 90:13</p> <p>mixed [58] 5:6,21 6:8 13:11,12 14:23,24 15:2,11 19:15,16 21:22 25:3,17 26:1,1 28:3,5,7,20 29:11,25 30:9,11,12,12,24 31:4,17,22 33:5 34:7,8 36:9 38:1 39:20 44:21 47:9 51:17,18,18 52:8,14,17 53:18,19,22 59:18 80:7 84:25 85:2,13 86:17 92:23 97:10 98:6,12 101:6</p> <p>mixy [1] 98:6</p> <p>Mm-hmm [2] 29:20 41:25</p> <p>model [1] 7:19</p> <p>Monreal-Aguinaga [5] 10:1,18 42:15 99:16 100:8</p> <p>moral [1] 3:12</p> <p>morass [1] 34:10</p> <p>most [7] 22:14 34:15,16 85:16 92:13 96:23 103:24</p> <p>mostly [1] 70:14</p> <p>mother [2] 7:12 22:14</p>
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Official - Subject to Final Review

<p>motive ^[1] 84:10</p> <p>Ms ^[177] 3:6,9 6:10 7:23 8:4 9:5 10:1,13 11:3,11,19,25 14:6 16:12,24 17:10,13 18:12 19:20 20:17 21:15,17 22:21,25 24:2,16 25:15 26:10 27:3,8 29:17,21 30:5 31:1,10,23 32:12,25 33:8,19 34:1,18 35:22 36:15,18 37:1,4,6,9,18 38:2 39:18,21,24 40:9,16 41:22 42:1,7,12,14 43:1,7,12,17,24 44:3,7,12 45:7,21,25 46:24 47:3 49:15,21 50:1,6,11,14 51:11,11,12 52:12 53:15 54:11 55:8 56:1,22 57:3,11,21 58:11,17,21 59:17,24 60:5,15,20,24 61:2,6,12 62:1,8,23 63:22 64:2,19 65:2 67:3,7,15 68:5,20,23 69:2,7,10,13,16 70:10,25 71:3,8,13 72:10 73:4,15 74:1,4,14,24 75:8,24 76:4,13,20 77:11,17 78:2,14,18 79:1,13,18,24 80:3,6,12 81:6,12,20 83:21 85:3 86:5,9,23 87:1,4,8 88:8 89:5,15,19 90:1,16 91:10,13 92:9 93:6 94:21 96:22 97:16,19 98:22</p> <p>much ^[8] 35:3 51:13 58:9 59:14 67:10 75:2,18 82:12</p> <p>Murphy ^[1] 58:7</p> <p>must ^[2] 76:15,16</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>ragging ^[1] 45:22</p> <p>name ^[1] 80:9</p> <p>narrow ^[2] 24:13 33:2</p> <p>narrowly ^[1] 30:15</p> <p>nature ^[4] 53:14 54:7 77:24 94:13</p> <p>neatly ^[1] 83:22</p> <p>need ^[6] 10:19 17:12 73:9 95:9,17 97:4</p> <p>needs ^[3] 37:22 95:18 96:6</p> <p>Neither ^[1] 100:4</p> <p>nervous ^[1] 74:14</p> <p>network ^[1] 63:15</p> <p>never ^[1] 67:15</p> <p>never-ending ^[1] 5:16</p> <p>new ^[3] 84:12,22 86:20</p> <p>next ^[3] 3:4 4:17 66:8</p> <p>nine ^[1] 89:13</p> <p>non ^[2] 24:19 47:10</p> <p>non-citizen ^[14] 5:11 21:1 24:20 36:13,19 38:5 47:17,23 62:19 63:12 64:4 73:8 78:21 95:13</p> <p>non-citizen's ^[3] 50:25 75:3 84:17</p> <p>Non-citizens ^[2] 3:11 84:18</p> <p>non-exhaustive ^[1] 25:24</p> <p>nor ^[1] 100:4</p>	<p>normally ^[1] 87:10</p> <p>note ^[2] 9:18 97:20</p> <p>noted ^[1] 33:5</p> <p>nothing ^[3] 11:4 18:23 32:4</p> <p>notion ^[2] 100:1,3</p> <p>November ^[1] 1:13</p> <p>novo ^[11] 14:25 26:8 49:14,16,16 57:9,23 58:1,5,24 103:15</p> <p>nuance ^[1] 28:1</p> <p>number ^[8] 8:14 10:4 20:18 29:22 46:3 57:25 85:15,24</p> <p>numerous ^[1] 46:15</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objective ^[2] 47:13,20</p> <p>obnoxious ^[1] 16:7</p> <p>obviously ^[2] 58:24 74:5</p> <p>Octane ^[1] 91:24</p> <p>offers ^[1] 4:7</p> <p>officials ^[3] 65:22 66:11 101:21</p> <p>often ^[3] 23:3 54:17 81:3</p> <p>okay ^[27] 13:18 16:12 22:24 36:24 37:1,5,8,11 39:23 40:2,13 42:13 45:1,7 48:8 58:8 61:4 65:24 66:12,15,17 76:19 77:6 80:5 81:20 88:11 92:9</p> <p>once ^[3] 85:10,12 90:10</p> <p>one ^[37] 5:6,7 9:2 12:7,22 13:1,20 18:4,10 20:18,25 25:3,20 29:22 32:23 34:8 37:20 42:1,21 45:2 46:4 54:18 63:13 64:11 66:16,22 74:19 77:23,25 78:12 82:13,20 90:19 94:3 95:22 97:23 102:25</p> <p>one's ^[4] 66:17 78:19 79:10,11</p> <p>one-in-a ^[1] 68:11</p> <p>one-in-a-billion ^[10] 68:1,13 72:1,4,8,14,20,24 77:3,5</p> <p>one-in-a-million ^[3] 73:23 74:7 76:17</p> <p>ones ^[3] 9:2 10:7 22:9</p> <p>only ^[15] 4:6 5:9 6:22 7:17,18 19:11 24:12 58:2,12 82:15 88:15 90:12,12,13 100:9</p> <p>open ^[3] 6:18 96:19,25</p> <p>opinion ^[7] 19:15 30:8,16 32:24 33:1 58:7 103:23</p> <p>Oracle ^[1] 54:22</p> <p>oral ^[5] 1:16 2:2,5 3:7 47:1</p> <p>order ^[4] 47:25 48:4,20 61:9</p> <p>orders ^[1] 46:8</p> <p>ordinary ^[9] 9:23 15:23 16:2,19 17:8,15 51:2 78:23 83:18</p>	<p>origin ^[1] 4:14</p> <p>other ^[25] 5:14,24 8:19,24 13:2,21 17:14,25 18:24 28:2,8 40:19 47:9 53:10 63:13 66:24 73:21 84:18 85:16 96:18 97:2,17 98:9,9 99:2</p> <p>others ^[2] 14:4 37:21</p> <p>out ^[23] 9:9 13:25 14:19 16:3 19:6 20:21 24:6,25 27:17 32:22 33:4,7 37:12 40:1 47:25 48:4,19 49:5 53:16 84:9 85:19 95:1 99:20</p> <p>outside ^[3] 43:10 94:16 101:10</p> <p>over ^[3] 31:25 55:14 102:22</p> <p>overall ^[1] 38:4</p> <p>overlap ^[1] 54:12</p> <p>overrule ^[1] 27:5</p> <p>overruled ^[1] 29:16</p> <p>overturned ^[2] 85:22,25</p> <p>overwhelming ^[1] 10:20</p> <p>overworked ^[1] 75:21</p> <p>own ^[8] 24:15 27:22 28:11 42:20,24 43:14 77:2 99:12</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m ^[1] 104:6</p> <p>PAGE ^[4] 2:2 25:4,19 93:14</p> <p>pains ^[1] 101:8</p> <p>paper ^[1] 85:8</p> <p>paragraphs ^[1] 32:4</p> <p>Pardon ^[4] 49:21 50:11 60:24 86:23</p> <p>part ^[5] 10:11 50:8 62:5,8 89:23</p> <p>particular ^[16] 8:25 10:4 22:2 28:1 30:9 31:5,9 41:16 44:10 54:10 75:3 79:12 83:4 88:24 89:2 99:9</p> <p>particularly ^[2] 35:6 42:3</p> <p>parts ^[1] 91:8</p> <p>past ^[1] 95:21</p> <p>Patel ^[22] 18:9 19:22 20:4 22:19 25:10 31:13 32:15 37:10 46:2 47:11 51:10 64:4,8,9 65:3,10,19,20 66:10 67:5 87:24 93:5</p> <p>Patent ^[3] 15:9 100:20 103:11</p> <p>pattern ^[1] 79:7</p> <p>people ^[5] 7:25 8:1,17 10:5 17:11</p> <p>per ^[1] 66:8</p> <p>percent ^[6] 8:15 10:4,8,8 75:22 85:23</p> <p>perform ^[2] 56:3,9</p> <p>perhaps ^[6] 28:20 30:25 46:16 58:9 82:9,18</p> <p>period ^[1] 15:20</p> <p>permissible ^[1] 77:20</p> <p>permit ^[4] 62:18 85:25 86:1,2</p>	<p>permits ^[2] 3:21 48:6</p> <p>permitting ^[1] 36:10</p> <p>person ^[4] 15:19,23 16:2,19</p> <p>petition ^[1] 25:5</p> <p>Petitioner ^[19] 1:4,21 2:4,10 3:8 22:8 28:10 56:10 62:3,10 65:10 67:10 69:23 72:21 90:9 92:12,15 98:3,21</p> <p>Petitioner's ^[1] 56:9</p> <p>petitions ^[1] 15:7</p> <p>physical ^[2] 7:20 8:25</p> <p>picks ^[1] 88:19</p> <p>piece ^[1] 85:8</p> <p>place ^[1] 63:9</p> <p>places ^[1] 7:11</p> <p>plain ^[4] 32:7 47:5 48:20 87:25</p> <p>please ^[3] 3:10 47:4 63:6</p> <p>point ^[21] 7:9 12:6 14:7 19:13 24:25 26:20 35:24 36:1 53:16 58:22 73:6 76:13 77:18 91:23 93:14 94:22 97:20 101:17 102:10,14 103:5</p> <p>pointed ^[7] 22:22 24:4 32:22 33:4 97:25 102:8,12</p> <p>pointing ^[2] 59:20 74:23</p> <p>points ^[9] 9:6 14:7 15:5 22:22 25:20 56:2 85:19 98:23 103:10</p> <p>population ^[1] 8:16</p> <p>portion ^[1] 91:17</p> <p>posed ^[1] 37:15</p> <p>posit ^[2] 63:16 92:7</p> <p>posited ^[1] 66:14</p> <p>positing ^[3] 64:3 79:4 80:15</p> <p>position ^[4] 31:24 40:8 94:18 101:24</p> <p>positioned ^[1] 100:17</p> <p>possible ^[3] 28:6 45:3 63:12</p> <p>possibly ^[1] 98:5</p> <p>potential ^[2] 66:16 95:7</p> <p>potentially ^[2] 23:5 24:15</p> <p>power ^[4] 3:18 99:25 100:12 102:17</p> <p>powerless ^[1] 102:5</p> <p>practical ^[4] 9:11 12:6,8,25</p> <p>practice ^[3] 12:24 102:22 103:7</p> <p>praising ^[1] 102:13</p> <p>precedent ^[13] 9:22 35:24 36:1 42:21,24 49:2 79:5 86:4,7 87:22 88:6,9,10</p> <p>precedent's ^[1] 79:6</p> <p>precedential ^[3] 42:14,16 99:16</p> <p>precedents ^[1] 90:5</p> <p>preclude ^[1] 19:1</p> <p>precludes ^[6] 31:19,20,24 32:13,15 42:22</p>	<p>precluding ^[2] 32:5 45:10</p> <p>predict ^[1] 23:18</p> <p>prediction ^[3] 75:2 95:4,10</p> <p>predictions ^[1] 96:4</p> <p>predictive ^[4] 51:3 65:16 70:7 84:15</p> <p>prerogative ^[1] 55:14</p> <p>presence ^[3] 7:20 22:14 47:24</p> <p>present ^[3] 25:17 89:11 90:14</p> <p>presented ^[1] 72:16</p> <p>presenting ^[1] 73:1</p> <p>presents ^[2] 31:17 90:4</p> <p>press ^[1] 36:13</p> <p>presses ^[1] 36:20</p> <p>presumably ^[1] 42:19</p> <p>presumption ^[1] 84:5</p> <p>pretty ^[4] 51:13 70:19 93:16 97:6</p> <p>prevent ^[1] 53:3</p> <p>prevented ^[1] 54:6</p> <p>primarily ^[3] 51:24 53:2 55:14</p> <p>primary ^[1] 22:15</p> <p>principally ^[1] 29:18</p> <p>principle ^[2] 59:11 95:23</p> <p>principles ^[1] 75:9</p> <p>prior ^[1] 4:18</p> <p>probably ^[7] 4:15 9:9 24:12 58:4 80:23 82:12 85:23</p> <p>problem ^[2] 57:22 58:12</p> <p>problems ^[1] 19:8</p> <p>procedures ^[1] 16:1</p> <p>proceedings ^[1] 21:6</p> <p>project ^[3] 13:19,23 17:24</p> <p>promises ^[1] 5:15</p> <p>promulgated ^[1] 26:11</p> <p>provide ^[2] 4:11 22:10</p> <p>provided ^[3] 6:16 21:2 32:2</p> <p>provider ^[1] 7:18</p> <p>provides ^[2] 39:14 98:10</p> <p>provision ^[13] 18:20,22,24 19:24 20:3,20 21:4 38:16 46:4,5,19,19 99:8</p> <p>provisions ^[3] 18:8 46:6,15</p> <p>proximity ^[1] 38:8</p> <p>Pullman ^[1] 86:9</p> <p>Pullman-Standard ^[2] 48:12 83:23</p> <p>pure ^[2] 28:21 48:13</p> <p>purely ^[9] 8:20 12:17 16:15,15 36:14,20 50:3,6 94:9</p> <p>purported ^[1] 99:18</p> <p>purposes ^[1] 25:14</p> <p>pursuant ^[1] 48:3</p> <p>push ^[2] 12:1 22:1</p> <p>pushing ^[2] 34:19,20</p> <p>put ^[10] 19:4 29:7 57:7 63:8 65:17 85:8 86:13 88:25 96:3 100:11</p> <p>puts ^[1] 19:9</p>
--	---	--	--	---

Official - Subject to Final Review

<p>putting ^[1] 10:2</p> <hr/> <p style="text-align: center;">Q</p> <p>qualified ^[1] 24:9</p> <p>qualifies ^[2] 11:5 31:3</p> <p>quantitative ^[1] 10:17</p> <p>question ^[103] 3:17 4:23 5:6 6:12 8:20 11:5 13:8,10,11,12,16,24 14:14,18,23 15:11,24,25 16:20 18:1 19:12 23:10,11 25:3 26:1,2,18 28:20,21,21 29:11 30:1,24,25 31:4,17,22 33:20 34:7,13 35:13,15 36:9,25 38:1,1,3 39:2,17,19,20 40:3 44:8 45:2 48:13 50:17 51:23 52:7,8,25 53:1,2,18,19,22 54:8,21,23 55:1 56:16,19 58:13,23 59:18,21,22 62:21 64:20 65:11 67:16,18 70:12,16 72:6 76:8 77:19 79:2,6 80:7 85:1,13 86:17 87:18,23 90:4 94:14,17 97:5,9,10,15 98:12,13</p> <p>question-of-law ^[1] 44:4</p> <p>questioning ^[3] 78:19 79:10,11</p> <p>questions ^[63] 3:22,24 5:18,20,22 6:8 13:25 14:24 15:3 19:1,13,15,16 21:18,22 25:17 28:3,5,7 30:1,6,7,9,11,12,13 32:6,14 33:6 34:8 36:6 40:4 44:22 45:10 47:8,9 48:7 49:9 51:17,18,19 52:14 54:16,17 57:1,22 59:10,13 65:14 75:8 76:7 79:21 82:22 84:2 87:24 88:5,16 89:1 92:23 93:2 97:7 101:6</p> <p>quickly ^[1] 102:15</p> <p>quintessentially ^[1] 47:15</p>	<p>70:13,19</p> <p>reasonableness ^[1] 57:18</p> <p>reasons ^[3] 20:18 29:22 34:9</p> <p>REBUTTAL ^[4] 2:8 98:19,20,24</p> <p>recall ^[1] 35:25</p> <p>receive ^[2] 22:8 47:17</p> <p>recently ^[1] 51:10</p> <p>recited ^[1] 7:3</p> <p>recites ^[2] 67:24 102:1</p> <p>recognized ^[5] 47:19 59:7,8 69:18 91:19</p> <p>recognizes ^[1] 91:24</p> <p>record ^[3] 3:13 22:4 73:23</p> <p>redo ^[1] 63:24</p> <p>refer ^[2] 56:5 84:4</p> <p>referring ^[2] 49:4 56:3</p> <p>regard ^[1] 97:1</p> <p>regarding ^[5] 31:25 47:10 81:9 87:16 98:13</p> <p>regardless ^[1] 76:4</p> <p>rehabilitated ^[1] 5:11</p> <p>reject ^[1] 86:4</p> <p>rejected ^[5] 27:1 30:8 34:6 102:6 103:24</p> <p>relative ^[2] 63:14 75:3</p> <p>relevant ^[4] 12:10,11 25:22 42:4</p> <p>relief ^[10] 3:13,21 32:1 46:7 47:11 76:5 78:1 79:12 81:8 87:17</p> <p>relitigation ^[1] 51:14</p> <p>remain ^[2] 19:23 23:11</p> <p>remaining ^[1] 20:6</p> <p>remand ^[1] 7:1</p> <p>reminds ^[1] 51:8</p> <p>removal ^[6] 3:14 35:20 46:9 47:18 73:12 90:25</p> <p>removed ^[3] 22:9 23:19 32:17</p> <p>removing ^[1] 22:11</p> <p>render ^[1] 7:7</p> <p>renders ^[1] 7:13</p> <p>repeatedly ^[2] 54:19 90:19</p> <p>repeating ^[1] 34:21</p> <p>require ^[6] 10:14 74:6 76:25 90:12,13,13</p> <p>required ^[3] 47:20 64:14 86:12</p> <p>requirement ^[3] 47:24 69:8 84:1</p> <p>requirements ^[1] 91:8</p> <p>requires ^[4] 4:24 8:12 39:1 47:6</p> <p>requiring ^[1] 48:17</p> <p>resemblance ^[1] 16:14</p> <p>resolve ^[1] 34:12</p> <p>resource ^[1] 101:19</p> <p>respect ^[4] 20:16 28:11,23 29:5</p> <p>Respondent ^[4] 1:8,24 2:7 47:2</p> <p>response ^[3] 19:4 34:5 40:</p>	<p>3</p> <p>rest ^[1] 46:10</p> <p>restate ^[2] 82:8,8</p> <p>restated ^[1] 83:15</p> <p>rests ^[1] 33:17</p> <p>result ^[4] 22:11 45:13 102:7,8</p> <p>revealed ^[1] 93:9</p> <p>reverse ^[3] 35:2 42:2 44:14</p> <p>review ^[82] 3:18,20,22 5:16,20 6:7,7,21 9:10 10:24 11:9,17 12:5,11,12,14,21 13:3 18:22 19:1,24 20:3,15,20,21 21:5,9,24 22:20 26:6,12 31:25 32:5,13,16,17,18 34:14 35:2,6 36:11,13 40:5,10,21,23 41:19,23 44:13,21 45:10,15,17 46:4 48:6 49:14 51:21 56:7,11,13 57:6 58:10,24 75:25 77:20 79:8 81:5,25 83:11,13 85:21,25 86:1,2 87:9 99:8 100:22 101:4,5,16 103:20,21</p> <p>reviewability ^[2] 12:15,16</p> <p>reviewable ^[51] 4:4,15 5:6,24 6:1,24 9:13 15:12 23:1 24:14,22 25:7 31:21 41:17 47:7 48:23 52:9,18 55:10,11,25 56:20 58:8,13 65:12 67:18 68:3 69:24,25 71:10 74:8,9 76:18 77:13 79:2,20 82:23 83:1 85:14 86:22,25 87:3,5 88:7 89:8 90:17 92:23 93:10,11 94:8,20</p> <p>reviewed ^[13] 11:14 14:24,25 15:1 26:15 41:1 55:19 57:23,25 87:11 103:9,12,15</p> <p>reviewing ^[5] 9:15 31:19,20 36:23 58:23</p> <p>reviews ^[3] 23:15 26:8 49:15</p> <p>reweigh ^[4] 29:10 63:23,25 64:1</p> <p>reweighing ^[1] 22:18</p> <p>rid ^[1] 21:4</p> <p>risk ^[1] 101:15</p> <p>road ^[2] 59:12 92:18</p> <p>ROBERTS ^[23] 3:3 7:21,24 8:8 9:25 10:2 30:4,17 32:19 33:14 34:3 36:4 41:4 46:22 49:12 81:18 82:3 84:20 88:1 92:5 96:9 98:17 104:3</p> <p>role ^[2] 7:19 21:8</p> <p>room ^[2] 61:16 66:25</p> <p>Rope ^[5] 48:16 86:10 87:5,21 95:11</p> <p>rule ^[6] 72:1,3,7,14,15,22</p> <p>ruled ^[1] 33:7</p> <p>rules ^[4] 28:11 34:25 53:12 54:6</p> <p>ruling ^[2] 24:13 93:8</p> <p>rulings ^[1] 93:20</p>	<p>Rumsmanabad ^[1] 35:25</p> <p>run ^[1] 99:12</p> <hr/> <p style="text-align: center;">S</p> <p>salient ^[1] 42:3</p> <p>same ^[17] 8:2 10:5 20:5 25:19 28:3 32:22 34:22 51:16 53:5 65:13 68:10 72:25 73:13 84:11 100:3,18 103:25</p> <p>SANTOS ^[79] 1:20 2:3,9 3:6,7,9 6:10 7:23 8:4 9:5 10:1,13 11:3,11,19,25 14:6 16:12,24 17:10,13 18:12 19:20 20:17 21:15,17 22:21,25 24:2,16 25:15 26:10 27:3,8 29:17,21 30:5 31:1,10,23 32:12,25 33:8,19 34:1,18 35:22 36:15,18 37:1,4,6,9,18 38:2 39:18,21,24 40:9,16 41:22 42:1,7,12,14 43:1,7,12,17,24 44:3,7,12 45:7,21,25 55:8 98:20,22</p> <p>satisfied ^[4] 6:24 26:4 31:16 73:8</p> <p>satisfies ^[1] 23:2</p> <p>satisfy ^[6] 3:17 23:10 24:24 52:7 55:23 70:23</p> <p>saying ^[49] 29:3 37:3,12 39:16,18 40:15 44:11 48:11,14 50:3,4 52:11,14,19 56:10,13,17 57:9 58:22 63:8,9,20 64:4,9,9,11,21 65:4,10,13 67:17 73:2 78:3,21 81:21 82:25 84:14,24 85:1,5 87:13 89:9,24 90:1 93:24,24 95:3,4 97:14</p> <p>says ^[40] 10:18 13:18 18:23 19:13 23:15,20 25:20 28:4,15 32:2,4 34:10 36:1 44:9 46:9 48:24 55:8 56:19 60:1,21 62:10,10,19 65:1 66:21 67:23 70:22 71:6,23 72:18,21 73:7 74:5 78:9 83:13 88:20,24 92:15 93:8 100:8</p> <p>scale ^[1] 36:23</p> <p>scenario ^[2] 28:9 29:1</p> <p>scenarios ^[1] 28:2</p> <p>scope ^[1] 18:18</p> <p>scour ^[2] 4:17 102:24</p> <p>search ^[1] 52:2</p> <p>second ^[8] 21:3 30:5 47:16 72:25 90:23 92:2 97:20 99:10</p> <p>section ^[8] 7:5 18:18 47:5 48:20 77:17 87:13 99:5 102:2</p> <p>see ^[18] 4:13 5:2 6:19 8:13 9:7 13:14 23:25 25:4 26:21 28:1 39:1 53:13 54:21,22 71:21 74:19 75:6 100:7</p> <p>seek ^[1] 3:13</p> <p>seeking ^[2] 22:17,17</p> <p>seem ^[1] 22:16</p>	<p>seems ^[10] 8:17 23:12 29:12 45:18 55:15 59:1 63:2 70:19 81:23 92:11</p> <p>seen ^[2] 14:4 83:7</p> <p>segment ^[1] 29:8</p> <p>sense ^[9] 10:16 19:19 26:24 46:16 52:22 63:22 100:2 103:17,19</p> <p>sentence ^[2] 67:25 81:19</p> <p>Sentencing ^[2] 44:25 100:22</p> <p>separate ^[2] 6:6 13:25</p> <p>serious ^[1] 7:10</p> <p>set ^[17] 16:3,3,5 17:3 31:9 43:19 49:20,23 55:22 57:19 61:18 68:16 70:22 73:18 85:9,10 94:5</p> <p>sets ^[1] 62:21</p> <p>setting ^[1] 50:4</p> <p>settle ^[1] 98:24</p> <p>settled ^[2] 3:25 26:3</p> <p>several ^[2] 45:14 101:1</p> <p>shall ^[3] 18:25 32:5 45:14</p> <p>she's ^[2] 56:13 69:11</p> <p>shed ^[1] 99:22</p> <p>shouldn't ^[3] 30:6 61:6 102:16</p> <p>show ^[1] 64:14</p> <p>shown ^[1] 64:15</p> <p>side ^[6] 12:3 85:16 92:12 96:4,18 99:2</p> <p>side's ^[1] 97:17</p> <p>sides ^[2] 23:14 100:18</p> <p>significant ^[1] 92:17</p> <p>similar ^[8] 7:25 9:16 10:6,7 15:5,8 17:15 54:12</p> <p>similarly ^[1] 5:2</p> <p>simple ^[1] 4:9</p> <p>simpler ^[3] 34:24 35:3 45:19</p> <p>simply ^[2] 47:22 56:5</p> <p>since ^[1] 41:2</p> <p>single ^[2] 18:16 102:25</p> <p>SINZDAK ^[104] 1:22 2:6 46:24 47:1,3 49:15,21 50:1,6,11,14 51:12 52:12 53:15 54:11 56:1,22 57:3,11,21 58:11,17,21 59:17,24 60:5,15,20,24 61:2,6,12 62:1,8,23 63:22 64:2,19 65:2 67:3,7,15 68:5,20,23 69:2,7,10,13,16 70:10,25 71:3,8,13 72:10 73:4,15 74:1,4,14,24 75:8,24 76:4,13,20 77:11,17 78:2,14,18 79:1,13,18,24 80:3,6,12 81:6,12,20 83:21 85:3 86:5,9,23 87:1,4,8 88:8 89:5,15,19 90:1,16 91:10,13 92:9 93:6 94:21 96:22 97:16,19</p> <p>SITU ^[1] 1:3</p> <p>situation ^[8] 13:20 14:3 15:16 41:8 42:20 43:16 65:4 72:12</p>
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Official - Subject to Final Review

<p>situations ^[3] 13:21 16:23 46:17</p> <p>Sixth ^[3] 23:14 24:4 58:7</p> <p>size ^[1] 8:15</p> <p>slice ^[1] 24:13</p> <p>smack ^[1] 99:12</p> <p>smoking ^[1] 103:1</p> <p>sole ^[3] 7:17 63:15 73:20</p> <p>Solicitor ^[1] 1:22</p> <p>somebody ^[1] 8:24</p> <p>somehow ^[1] 4:22</p> <p>someone ^[5] 28:16 72:6 89:10,11 100:6</p> <p>someone's ^[1] 90:24</p> <p>something's ^[1] 8:18</p> <p>sometimes ^[7] 14:24,25 15:1 31:4 33:10 60:16 81:21</p> <p>son ^[8] 7:10 22:12 25:6 37:15,22 39:6 41:13 94:11</p> <p>soon ^[1] 58:22</p> <p>sorry ^[6] 11:2 42:8 49:11 63:5,6 92:8</p> <p>sort ^[13] 10:5 13:18 17:23 21:23 45:9 51:8 54:23 57:23 69:25 80:14 83:16 95:20 97:21</p> <p>SOTOMAYOR ^[27] 26:5,17 27:4,13 32:20,21 33:3 49:10,13,19,22 50:2,9,12 73:14,16 74:2,12,17 84:21,22 85:4 86:6,21,24 87:2,7</p> <p>sought ^[1] 65:20</p> <p>sounds ^[1] 55:7</p> <p>source ^[1] 55:12</p> <p>speaking ^[1] 53:24</p> <p>special ^[2] 43:3 83:17</p> <p>specific ^[4] 14:21 17:6 22:22 36:1</p> <p>specifically ^[3] 46:1 51:22 88:15</p> <p>specified ^[1] 18:17</p> <p>speculated ^[1] 22:7</p> <p>speculation ^[1] 92:20</p> <p>spell ^[1] 95:1</p> <p>spent ^[1] 102:13</p> <p>split ^[1] 12:3</p> <p>spouse ^[1] 23:20</p> <p>squarely ^[1] 102:6</p> <p>St ^[6] 19:5 59:6 80:11,13 88:14,21</p> <p>standard ^[104] 3:17 4:2,4,14,23 5:5 6:7,23 7:4,6 8:9 9:20 10:16,17 11:9,17 12:5,10,14,20 14:12 15:15 17:2,19 21:10,11 23:2,11 24:24 26:2,4,9 31:3,15 34:14 35:2 39:1 40:4,21,23,25 41:19 42:7,8,20 43:15,18 44:9,19 49:1,17,20,24,24 50:5 52:3,4,7,22 55:20,23 56:7,11 57:6 64:17,24,25 67:24 68:18,21,22,25 69:5 70:24 71:7 73:19,25 76:10,</p>	<p>25 77:2,10 78:12 82:15,16 85:4,6,6,9,10,12,18 86:10 88:23 89:23,25 90:8 94:5 99:12,17,19,21 100:2 102:1 103:20</p> <p>standard-of ^[1] 9:9</p> <p>standard-of-review ^[5] 34:23 40:1 57:4 97:8 102:20</p> <p>standard-of-review-type ^[1] 103:4</p> <p>standards ^[9] 3:25 4:7,8 5:2,10,25 29:3 51:21 66:24</p> <p>starting ^[1] 43:18</p> <p>starts ^[1] 13:23</p> <p>state ^[2] 65:22 66:11</p> <p>stated ^[1] 72:1</p> <p>STATES ^[4] 1:1,17 44:25 64:25</p> <p>statute ^[44] 4:18 9:21 18:14 19:19 20:11,12 25:19 28:14,18,23 31:2 42:6,8 45:12 48:4,8,9,10,14 52:20,20 56:19 62:15,17,18,21 63:17 64:15 70:3 71:24 74:6,25 76:16 78:24 79:19,22 80:17 82:24 83:12 86:12 90:9 102:25 103:3,8</p> <p>statute's ^[1] 90:20</p> <p>statutes ^[3] 20:5 88:17,22</p> <p>statutory ^[43] 3:23 4:8 8:9 12:17,18 14:21 17:1 23:2 26:23 30:12 31:15 38:15 46:15 48:1,2,5,22,24 49:1 50:15,16,18,19,23 56:5 64:17 68:6,23 69:2,8 78:15,20 84:1,8 86:16 87:9 90:2,3,11,11,17 97:3 99:19</p> <p>stay ^[1] 100:25</p> <p>staying ^[1] 44:23</p> <p>step ^[4] 47:16 90:23 92:2,3</p> <p>still ^[29] 14:13 15:2 16:25 17:1,3,6,18,19 20:3,20 21:6,11 23:9 32:13 33:22 35:2 36:12 65:11 74:12 85:20,25 86:21,24 87:2 93:2,3,4 100:23 101:7</p> <p>stipulate ^[1] 94:4</p> <p>stock ^[1] 29:8</p> <p>stop ^[1] 58:15</p> <p>stopped ^[1] 5:14</p> <p>strange ^[1] 82:24</p> <p>streamlined ^[1] 35:4</p> <p>strength ^[2] 23:17 41:11</p> <p>strikes ^[2] 45:11 51:12</p> <p>strong ^[2] 39:5,11</p> <p>structure ^[1] 18:14</p> <p>stuck ^[1] 23:22</p> <p>stuff ^[1] 94:20</p> <p>subject ^[6] 8:2 21:23 22:19 33:22 92:25 94:1</p> <p>subjected ^[2] 5:12 33:22</p> <p>subjective ^[2] 47:13 93:18</p> <p>submission ^[1] 7:1</p>	<p>submitted ^[5] 82:17,19 83:16 104:5,7</p> <p>subparagraph ^[7] 18:21,24 19:25 32:3,4,8 33:23</p> <p>subsection ^[1] 46:7</p> <p>subsequent ^[2] 19:14 59:7</p> <p>subsidiary ^[2] 86:12,14</p> <p>substance ^[1] 69:20</p> <p>substantially ^[4] 10:7,20 51:1 78:22</p> <p>suck ^[1] 16:21</p> <p>suffering ^[1] 16:18</p> <p>suggest ^[1] 82:22</p> <p>suggested ^[1] 19:14</p> <p>suggesting ^[5] 66:10 68:9,14 70:20 96:18</p> <p>suggestion ^[1] 88:25</p> <p>suggests ^[1] 4:15</p> <p>super ^[2] 30:6 51:19</p> <p>supplant ^[1] 23:8</p> <p>supplanting ^[1] 19:17</p> <p>supply ^[1] 5:16</p> <p>support ^[8] 7:19 22:7,11 37:23 39:11,13 63:14 73:21</p> <p>Suppose ^[1] 67:23</p> <p>supposed ^[5] 4:9 29:5 38:15 43:8 68:19</p> <p>SUPREME ^[2] 1:1,16</p> <p>suspect ^[2] 40:11,15</p> <p>swallows ^[1] 32:10</p> <p>swoops ^[1] 20:14</p> <p>synonymous ^[1] 90:8</p>	<p>theoretically ^[1] 21:21</p> <p>theory ^[1] 36:9</p> <p>there's ^[22] 12:12 26:9 29:17 30:14 36:12 39:10 40:24 50:14 51:5 55:20 60:7 63:13 66:14,25 68:15 73:25 89:5 91:4 92:1,3 94:24 95:22</p> <p>thereby ^[1] 94:6</p> <p>therefore ^[1] 25:14</p> <p>they've ^[2] 58:2 97:25</p> <p>Third ^[2] 7:1 25:1</p> <p>THOMAS ^[5] 5:19 30:19 32:21 33:4 82:5</p> <p>though ^[6] 27:25 57:8 59:10 66:9,9 68:12</p> <p>three ^[1] 73:19</p> <p>throughout ^[1] 46:6</p> <p>thrown ^[1] 14:19</p> <p>Title ^[2] 17:18 103:14</p> <p>today ^[1] 103:25</p> <p>toe ^[1] 83:9</p> <p>together ^[3] 5:4 20:6 86:14</p> <p>tolling ^[1] 53:1</p> <p>took ^[3] 82:1 87:14 88:25</p> <p>tools ^[2] 49:1,4</p> <p>top ^[1] 19:24</p> <p>totality ^[1] 25:21</p> <p>totally ^[3] 12:15 81:23 91:3</p> <p>traipse ^[1] 4:25</p> <p>transgress ^[3] 63:4,7,10</p> <p>transgressed ^[1] 62:20</p> <p>transgresses ^[1] 63:20</p> <p>treatise ^[1] 102:16</p> <p>tried ^[1] 5:13</p> <p>tries ^[1] 103:2</p> <p>trouble ^[2] 59:1 81:17</p> <p>true ^[3] 94:4 100:3 101:3</p> <p>trumps ^[3] 18:23 32:8 99:8</p> <p>try ^[4] 21:18 67:22 78:7 79:10</p> <p>trying ^[9] 34:10,12 46:12 70:11 77:8,11,14 84:4 86:8</p> <p>Tuesday ^[1] 1:13</p> <p>turn ^[2] 56:11,14</p> <p>two ^[9] 14:7 16:23 29:22 32:1 39:12 57:8 88:18 90:14 102:25</p> <p>type ^[4] 17:21 38:17 41:23 54:20</p> <p>types ^[4] 9:11,15 10:23 93:20</p> <p>typic ^[1] 6:17</p> <p>typical ^[3] 6:17 13:12 21:8</p>	<p>under ^[36] 4:2 11:23 15:6,9 17:18 21:10,21 22:18 25:10 35:1 37:10 40:1 44:12,12,18,18 46:7,9 56:9 63:17 67:14 85:17 87:24,25 92:22 93:5,25 97:15 99:18 101:20 103:3,4,13,14,15,17</p> <p>understand ^[8] 6:3 20:9 23:16 36:7 38:22 41:10 82:15 100:5</p> <p>understanding ^[2] 59:13 99:13</p> <p>understood ^[5] 19:3 25:2 65:5,6 90:22</p> <p>undisputed ^[1] 26:3</p> <p>undue ^[5] 17:17 61:17 66:23 85:7 103:13</p> <p>unfortunate ^[1] 8:11</p> <p>unfriendly ^[1] 16:6</p> <p>unhappy ^[1] 27:5</p> <p>unique ^[3] 62:12,13 63:9</p> <p>UNITED ^[3] 1:1,17 44:25</p> <p>unless ^[5] 26:20,22 86:4 87:17 89:9</p> <p>unreasonable ^[6] 61:10 64:5 80:24 81:1 83:6 87:3</p> <p>unreviewable ^[26] 5:7 19:23 20:7 22:23 24:5,6 25:11,14 33:18,19 35:21 36:22 37:9,16 38:10,20 52:15 67:9 79:14,15 87:16,17,25 91:4 93:3 94:24</p> <p>unsatisfying ^[1] 54:15</p> <p>untimely ^[1] 15:7</p> <p>unusual ^[37] 3:15 4:2 7:8 8:10,11,19 9:4,19 10:9 13:18 16:17,18 26:13 28:12 38:6 42:9 49:6 52:16 57:20 58:1 60:2,2 62:11 63:21 64:16,22 69:1 71:5,24 75:17 78:9,16 83:19 84:13 91:7,21 97:23</p> <p>up ^[23] 6:13,18 10:3 13:15 14:17 16:21 17:9,12 28:14,25 31:13 32:1,10 39:9 52:14 85:15 88:19,25 92:13 96:19,25 97:24 98:14</p> <p>urging ^[1] 5:8</p> <p>uses ^[2] 11:6 39:24</p> <p>using ^[1] 99:19</p> <p>usual ^[1] 57:15</p> <p>usurped ^[1] 91:14</p> <p>utterly ^[1] 68:18</p>
T				
<p>table ^[2] 81:25 87:14</p> <p>talked ^[3] 51:10 59:5 88:14</p> <p>talks ^[2] 8:21 101:19</p> <p>tax ^[2] 103:3,8</p> <p>Taylor ^[1] 44:24</p> <p>tearing ^[1] 35:8</p> <p>tells ^[1] 14:2</p> <p>term ^[14] 3:23 11:6 14:18,18,21 17:1 31:12 39:25 42:10 48:16 52:20 64:21 80:23 91:25</p> <p>terminology ^[2] 48:14 69:3</p> <p>terms ^[11] 5:13 17:6,8,8,16 45:2 50:20 58:9 60:8 78:15 83:18</p> <p>terrible ^[1] 96:13</p> <p>test ^[10] 4:7 5:8,15 83:2,15 97:18 102:11,14,19 103:16</p> <p>testimony ^[5] 6:15 21:1 39:5,7 41:12</p> <p>tests ^[1] 4:9</p> <p>Teva ^[1] 54:22</p> <p>text ^[13] 9:22 32:7 47:5 48:20,24 49:2 50:15,16,18,24 68:6 86:16 87:25</p> <p>theirs ^[1] 96:20</p> <p>themselves ^[1] 100:5</p>				
U				
<p>U.S ^[3] 3:15 5:1 102:24</p> <p>ultimate ^[7] 6:23 20:13 23:1,9 24:23 33:17 86:15</p> <p>ultimately ^[1] 90:21</p> <p>unable ^[1] 7:13</p> <p>unavailable ^[1] 21:7</p> <p>unconscionable ^[1] 77:1</p>				
V				
<p>variety ^[3] 22:3 29:13 30:10</p> <p>various ^[2] 23:6 40:9</p> <p>versa ^[1] 39:6</p> <p>version ^[1] 4:25</p> <p>versions ^[1] 4:18</p> <p>versus ^[2] 3:4 44:25</p> <p>vested ^[1] 91:18</p>				

Official - Subject to Final Review

<p>viable ^[1] 24:21 vice ^[1] 39:6 view ^[3] 23:8 29:24 43:15 viewed ^[2] 38:7,18 VII ^[2] 17:18 103:14 Village ^[1] 101:7 violated ^[1] 5:12 virtually ^[2] 12:1,3 visa ^[1] 5:13</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait ^[3] 62:25,25 63:1 waiver ^[1] 34:25 walk ^[2] 6:5,10 Wang ^[1] 91:11 wanted ^[4] 4:19 18:10 19:6 45:16 wants ^[3] 50:8 69:9 96:1 War ^[1] 103:2 warrant ^[2] 10:24 12:25 Washington ^[3] 1:12,20, 23 way ^[31] 4:16 13:7 18:14 20:11,20 21:19 27:15 28:19 29:18,19,22 30:14,15 31:11 34:24 38:14 45:12,19 46:14 51:9 63:19 67:20,23 80:18 81:23 82:20,24 96:12,23 100:23 103:1 ways ^[3] 14:20 40:24 57:14 weeding ^[1] 24:6 week ^[1] 5:14 weigh ^[1] 37:25 weighed ^[3] 29:6 55:22 76:10 weighing ^[9] 22:9 23:6 37:20 38:7,18 39:4,17 41:14 51:7 weight ^[1] 8:22 welcome ^[2] 5:18 49:9 Whereupon ^[1] 104:6 whether ^[42] 3:18 4:13,23 5:11 6:12 8:18 9:12,12 11:4 12:11 13:10 21:10 23:2,10 24:23,23 26:4 27:25 31:15 38:4 43:15,20 47:16,25 48:4 50:25 52:8 53:2 55:10 56:11,14 57:18 73:11 79:5 85:11 87:3,8 89:11 90:24 94:17 97:4 100:6 who's ^[2] 15:23 83:7 whole ^[5] 8:1,16 31:12 46:5,12 wholly ^[1] 82:1 wide ^[2] 61:19 81:2 WILKINSON ^[7] 1:3 3:4 6:15 7:17 22:10 25:6,9 Wilkinson's ^[6] 7:10,16 22:2,13 24:15 25:2 will ^[16] 3:3,14 8:6,7 20:23 35:3,5 36:21 61:7 67:15 75:2 93:2,3,4 98:24 101:11 willful ^[1] 83:7</p>	<p>Williamsport ^[5] 48:15 86:10 87:5,21 95:11 willing ^[1] 73:22 Wire ^[5] 48:15 86:10 87:5, 21 95:11 within ^[8] 15:20 18:18 25:25 44:23 48:5 83:20 92:20 100:25 without ^[3] 22:13 82:18 83:17 won ^[1] 66:4 worded ^[1] 5:2 words ^[4] 5:15 85:8,9 102:25 work ^[9] 6:2,3,4,6 14:11 16:21 79:9,10 82:9 worked ^[1] 6:4 working ^[2] 66:6,7 workplace ^[1] 16:4 works ^[1] 18:15 world ^[3] 44:5 66:16 103:2 worms ^[2] 96:19,25 worst ^[1] 63:11 worth ^[3] 35:12 55:17 82:21 write ^[1] 102:16 writing ^[2] 45:12 69:23 written ^[1] 33:10 wrongly ^[1] 22:7 wrote ^[1] 30:16</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>years ^[6] 3:12 34:11 47:23 89:12,13 91:7</p>
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