

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ENVIRONMENTAL :

4 PROTECTION AGENCY, ET AL., :

5 Petitioners : No. 12-1182

6 v. :

7 EME HOMER CITY :

8 GENERATION, L.P., ET AL :

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11 AMERICAN LUNG ASSOCIATION, ET AL., :

12 Petitioners : No. 12-1183

13 v. :

14 EME HOMER CITY :

15 GENERATION, L.P., ET AL :

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17 Washington, D.C.

18 Tuesday, December 10, 2013

19

20 The above-entitled matter came on for oral  
21 argument before the Supreme Court of the United States  
22 at 10:09 a.m.

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	MALCOLM L. STEWART, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF	
6	JONATHAN F. MITCHELL, ESQ.	
7	On behalf of State and Local Respondents	37
8	ORAL ARGUMENT OF	
9	PETER KEISLER, ESQ.	
10	On behalf of Industry and Labor Respondents	56
11	REBUTTAL ARGUMENT OF	
12	MALCOLM L. STEWART, ESQ.	
13	On behalf of the Petitioners	78
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:09 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 12-1182,  
5 Environmental Protection Agency v. EME Homer City  
6 Generation and the consolidated case American Lung  
7 Association v. EME Homer City Generation.

8 Mr. Stewart.

9 ORAL ARGUMENT OF MALCOLM L. STEWART

10 ON BEHALF OF THE PETITIONERS

11 MR. STEWART: Mr. Chief Justice, and may it  
12 please the Court:

13 In promulgating the Transport Rule, EPA  
14 sought to protect the public health and to strike a fair  
15 balance between the competing interests of upwind and  
16 downwind States. EPA's analysis proceeded in three  
17 basic steps.

18 First, EPA performed a screening analysis to  
19 determine which upwind States would be covered by the  
20 Transport Rule. And in order to do that, EPA first  
21 identified the downwind receptors that were in a State  
22 of nonattainment or had maintenance difficulties, and  
23 then it determined which upwind States were linked to  
24 those receptors.

25 And in order to be linked to a downwind

1 receptor, the upwind State had -- had to contribute one  
2 percent or more of the relevant National Air Quality --  
3 Ambient Air Quality standard, or -- or NAAQS, to that  
4 downwind receptor. And any State that didn't contribute  
5 at least one percent to any of the downwind -- any of  
6 the relevant downwind receptors was determined not to  
7 contribute significantly to nonattainment at that area.

8         Second, once the States that were to be  
9 covered by the Transport Rule had been identified, EPA  
10 set a State emissions budget for each State. And to do  
11 that, it performed computer modeling to determine, in  
12 addition to whatever emission control efforts were  
13 already going on, what additional emission reductions  
14 could be achieved by implementation of control measures  
15 available at various cost thresholds.

16         And the thresholds ultimately selected were,  
17 for NAAQS, \$500 per ton. For SO<sub>2</sub>, the group 1 States  
18 were at a level of \$2,300 per ton. The group 2 States  
19 were 5 -- \$500 per ton. And the idea was let's see what  
20 emissions savings we can achieve, if additional control  
21 measures are implemented up to those cost thresholds.

22 And --

23         JUSTICE SCALIA:             Of course, those -- those  
24 savings would -- would not be evenly distributed among  
25 the upwind States, right? So some upwind States that

1 are able to make those efficient changes will be  
2 carrying more than their burden of reducing the  
3 emissions that affect downwind States, right?

4 MR. STEWART: Well, there -- there were two  
5 bases for distinguishing among the States. The first --  
6 in terms of the \$500 per ton threshold for the group 2  
7 States versus the \$2,300 per ton threshold; the way in  
8 which States were divided into those categories is that  
9 the States that were linked to the downwind receptors  
10 that had the most severe pollution problems were treated  
11 as group 1 States, and they were required to make  
12 greater pollution control efforts because they had some  
13 responsibility for the most serious problems.

14 Now, I guess the point of your question  
15 would go to -- to the fact that, even among States that  
16 were operating under constant cost control thresholds, a  
17 State that had already implemented cost measures up to  
18 that limit might have to do less in a sense because it  
19 would have already taken the -- the steps that were  
20 required, at least as compared to an air quality only  
21 threshold.

22 JUSTICE SCALIA: Well, I don't mind a State  
23 doing less. I think North Carolina said -- said that  
24 you can use those cost figures to do less, and that's  
25 not challenged here. But what the application of the

1 cost factor means is that some States that can more  
2 efficiently make the changes will be required to do more  
3 than merely account for their proportion of the downwind  
4 harm. Isn't that true?

5 MR. STEWART: Well --

6 JUSTICE SCALIA: Yes or no? I mean, I think  
7 it's an easy yes or no answer.

8 MR. STEWART: I think it is -- no, I think  
9 it is the case that, if you adopted an air quality only  
10 threshold, then it would be more likely to be the case  
11 that States that had already done a lot to control air  
12 pollution would have to take additional steps, even if  
13 it was done at a non-cost -- in a non-cost-effective  
14 way.

15 JUSTICE SCALIA: Have you answered my  
16 question? Does -- does the fact that you begin with --  
17 what the statute says is each upwind State has to  
18 account for its -- its effect on the downwind States,  
19 but once having identified that effect, you -- you then  
20 say those upwind States that can make the reductions  
21 more efficiently have to make more reductions than  
22 they -- than their mere proportion of the harm requires.  
23 Isn't that so?

24 MR. STEWART: I think it would be the case  
25 that at least as -- yes, as compared to at least some

1 air-quality-only measures, the use of cost would have  
2 the effect of distributing the burden in a somewhat  
3 different way than it would have if you considered air  
4 quality factors only.

5 JUSTICE KAGAN: Is the idea, Mr. Stewart,  
6 that the States that are required to do more are the  
7 States that haven't done much already?

8 MR. STEWART: That's correct. And that was  
9 what I was trying -- trying to get out earlier, that  
10 if -- if States have to do less in order to meet the  
11 \$500 -- in order to be in a position where they've  
12 implemented all the cost -- all the emission control  
13 measures that are available at \$500 per ton, if a  
14 particular State has to do less in order to achieve  
15 that, it's probably because that State has already  
16 implemented most of those measures on its own.

17 JUSTICE SCALIA: And what provision of the  
18 statute allows you to take that into account?

19 MR. STEWART: Well, the -- the term that  
20 we're --

21 JUSTICE SCALIA: I mean, as opposed to each  
22 State, whether it's inefficient or efficient, has to  
23 merely reduce its contribution to the downwind State  
24 pollution; right? That's what the statute says.

25 MR. STEWART: Well, the statute says that

1 each State will adopt measures that prevent sources  
2 within its borders from contributing significantly to  
3 downwind nonattainment. And the purpose of the  
4 provision is not to allocate blame for an existing state  
5 of nonattainment or for prior pollution.

6 It's a -- it's to devise a scheme that going  
7 forward will prevent nonattainment from occurring. And  
8 the idea is, if each State lives up to its obligation  
9 and if the downwind States make commensurate  
10 commitments, then the problem will be solved.

11 And in terms of the language, "contribute  
12 significantly," I think there are -- there are various  
13 reasons to think that EPA reasonably construed that term  
14 to include a component of difficulty of achievement;  
15 that is, in common parlance, we might say that dunking a  
16 basketball is a more significant achievement for  
17 somebody who is 5 feet 10 than for somebody who is 6  
18 feet 10.

19 We might say that a \$100 charitable  
20 contribution is more significant if it's made by a  
21 person who makes \$10,000 a year than a 1,000  
22 contribution by somebody who makes \$1 million a year.

23 CHIEF JUSTICE ROBERTS: That's -- I was just  
24 going to say, that just is because of, in the latter  
25 case, because contribution happens to be used in both an

1 affirmative and a negative sense. The question is, for  
2 example, whether somebody who fatally stabs somebody and  
3 someone who fatally shoots them have each significantly  
4 contributed to the bad result.

5 MR. STEWART: I think --

6 CHIEF JUSTICE ROBERTS: Or -- or not  
7 significantly contributed in -- in -- contributed in  
8 varying degrees.

9 MR. STEWART: I would say if -- if you cause  
10 death by alternative means, then both people would have  
11 contributed as significantly. But to include -- to set  
12 out a hypothetical that involves contribution to a bad  
13 result, if you had a basketball team that lost a game by  
14 one point, and the coach was asked to pinpoint the plays  
15 that contributed significantly to the defeat, the coach  
16 would be much more likely to identify a missed layup or  
17 a turnover than the missed half court shot at the  
18 buzzer.

19 It's true that the missed half-court shot at  
20 the buzzer would, in one sense, contribute  
21 significantly, in that it was a but-for cause. If the  
22 shot had been made, the outcome was -- would have been  
23 different.

24 But if you're talking about significant  
25 contributions to a bad result, you'd more likely to

1 focus on errors that could or -- and should have been  
2 avoided, not simply the failure to accomplish something  
3 that's extraordinarily difficult.

4 JUSTICE KAGAN: Can I ask a question?

5 JUSTICE KENNEDY: Is part your -- your  
6 answer to Justice Kagan's question and Justice Scalia's  
7 question that it depends on the time point, at the time  
8 at which you measure? That is to say, if you take a  
9 look at a State which, for 5 years, has been trying to  
10 ameliorate pollution, you can measure it from the point  
11 5 years ago; and if you do that, then they're not having  
12 to contribute more.

13 MR. STEWART: I --

14 JUSTICE KENNEDY: Or don't you like that  
15 answer?

16 MR. STEWART: I don't -- I don't quite want  
17 to go there. I think there's a kernel of truth in  
18 there -- in that, but that the point at which the  
19 State's significant -- the point at which the State's  
20 good neighbor obligation is triggered is by the  
21 promulgation of a new National Air -- Ambient Air  
22 Quality standard.

23 And the State is required, within 3 years of  
24 the promulgation of the NAAQS, to promulgate a State  
25 plan that includes good neighbor provisions for -- for

1 the particular --

2 JUSTICE KENNEDY: How far back -- how far  
3 back do you go for the relevant NAAQ? 2006 or --

4 MR. STEWART: In this case, there are two  
5 NAAQS that were implemented -- that were promulgated in  
6 1997.

7 JUSTICE BREYER: Oh, '97.

8 MR. STEWART: One of them for annual  
9 particulate matter and one of them for ozone; and then  
10 the 2006 NAAQS was for 24-hour particular matter --  
11 particulate matter, which is harder to achieve.

12 And -- and so when -- when we are asking  
13 what are the States supposed to do, as of the time that  
14 the new NAAQS is promulgated, the States don't exactly  
15 get credit for what they have done in the past; that is,  
16 they can't do less than they are supposed to do in the  
17 future, simply because they have done a lot in prior  
18 years to prevent pollution.

19 But the fact that sources within the State  
20 have, in the past, installed various pollution control  
21 devices or are using cleaner fuels, that may make it  
22 easier for them to prevent significant contributions to  
23 downwind nonattainment, going forward.

24 JUSTICE KAGAN: Can I ask a question?  
25 Following up on Justice Scalia about the statutory

1 language and how you read it, I think -- you know, most  
2 people, everybody, thinks that it's better to regulate  
3 with attention to costs than to regulate without  
4 attention to costs.

5 We have this -- our Trucking Association  
6 decision, where we said, well, notwithstanding that  
7 everybody agrees that regulating with attention to costs  
8 is better, when Congress says the opposite, we have to  
9 go with the opposite. And, there, we said Congress had  
10 said the opposite because it had talked about protecting  
11 the public health with an adequate margin of safety.

12 Now, I'm wondering, what does it take in a  
13 statute to make us say, look, Congress has demanded that  
14 the regulation here occur without any attention to  
15 costs? In other words, essentially, Congress has  
16 demanded that the regulation has occurred in a  
17 fundamentally silly way.

18 MR. STEWART: Well, in the case of the  
19 NAAQS, I think it was -- it was not the case that  
20 requiring EPA to establish the NAAQS without reference  
21 to cause -- to cost, would call a silly result; that is,  
22 the ambient air quality standards were supposed to be  
23 set based on public health criteria.

24 And the Court in -- in the same case, in  
25 American Trucking, said that, of course, you can

1 consider costs in deciding what is the most efficient  
2 and appropriate way to implement those NAAQS. And,  
3 here, I take your point that, in order to conclude that  
4 Congress barred consideration of costs at the  
5 implementation stage, we would have to have very clear  
6 language, and "significant contribution" doesn't do it.

7 And the other thing I would say, in addition  
8 to the examples I've given of -- in common parlance, we  
9 use "significance" to refer to ease or difficulty of  
10 achievement. It's worth emphasizing that this is a  
11 provision of law, and it's designed to help allocate the  
12 responsibility among different actors for alleviating a  
13 shared problem.

14 And, for example, suppose --

15 JUSTICE SCALIA: The problem is that that  
16 allocation among different actors is done State by  
17 State, and simply taking costs into account as  
18 determining who will do what simply eliminates the --  
19 the requirement that each State not be -- not be  
20 required to do more than its share of the pollution  
21 it's -- it's causing downstream.

22 It's the State-by-State requirement that  
23 makes it very difficult to think that all Congress  
24 wanted was the most efficient reduction of pollution, no  
25 matter where that pollution came from. That's simply

1 not what the statute envisions.

2 MR. STEWART: I guess --

3 JUSTICE SCALIA: And maybe that'd be a  
4 better statute. Maybe it shouldn't be State by State.

5 MR. STEWART: I mean, the first thing I  
6 would say is we -- we can accept the premise that each  
7 State should alleviate no more than its share, and there  
8 still may be -- that each State should do no more than  
9 its share, and yet, there still may be different ways of  
10 determining what a State's fair share is; that is, one  
11 way would be to determine which States had been the  
12 greatest polluters in the past and say that, the more  
13 pollution that had previously flowed from your borders,  
14 the greater your reduction obligation in the future.

15 But another way would be to say, in order to  
16 ensure that each of the States that have shared  
17 responsibility for the problem in the past bears its  
18 fair share, we will ask each State to undertake  
19 commensurate efforts, as measured by the cost threshold.

20 For example, if it could be shown, somehow,  
21 that the generation of electric power inherently  
22 required the emission of some level of SO<sub>2</sub> and NO<sub>x</sub>, that  
23 there was simply no way to -- to generate electricity  
24 through any technology known today, without  
25 generating -- without emitting that minimum amount, I

1 think we would certainly say, well, Congress didn't  
2 intend to bury in the good neighbor provision some  
3 prohibition against particular States generating  
4 electricity.

5 And EPA could -- and EPA or the States could  
6 reasonably determine that the unavoidable component of  
7 the emissions, the part that couldn't be avoided, even  
8 with the best possible pollution control technology,  
9 that would be regarded as legally insignificant; that  
10 the only legally significant contribution would be  
11 contribution that could have been avoided.

12 Now, clearly, EPA has gone one step farther  
13 because it hasn't just focused on emissions that  
14 couldn't be avoided at all, at least with -- without  
15 foregoing the generation of electric power. It has  
16 said, we will treat as legally significant only the  
17 extra increment of emissions that comes after we've  
18 taken what we regard to be equitable and cost-effective  
19 pollution control measures --

20 JUSTICE KENNEDY: Just one more question on  
21 cost. In -- in your answer to Justice Kagan's question,  
22 there is at least a possible argument that you, the  
23 regulator, the government, the EPA, can take cost into  
24 account, unless it's expressly prohibited from doing so.  
25 You don't go that far.

1           But you -- you even stop short of that.           You  
2 say that it might be difficult to apply the cost  
3 rationale at the implementation stage? I -- I think  
4 that's what you said, and if so, I didn't quite  
5 understand.

6           MR. STEWART:           I misspoke. What the Court  
7 said in American Trucking is that in -- in setting the  
8 NAAQS, EPA was forbidden to consider cost, not because  
9 the statute said, in so many words, cost can't be  
10 considered, but because the criteria that were set out  
11 in the statute for what the NAAQS had to achieve simply  
12 couldn't be reconciled with consideration of costs.

13           But the Court in the same decision said,  
14 although you can't consider costs in determining what  
15 the NAAQS will be -- what air quality standards have to  
16 be achieved, of course, you can and should consider  
17 costs in deciding what implementation measures should be  
18 used to determine which emissions will be reduced.

19           JUSTICE SCALIA:           If Congress wanted that,  
20 why couldn't Congress simply have said, the EPA shall  
21 prescribe minimum pollution reduction measures that have  
22 to be taken by the States? That's a quite different  
23 statute from what we have before us. But what you're  
24 saying is -- you know, you -- you reduce it this -- this  
25 much, as much as efficiency will allow, or else, you're

1 in violation of -- of the good neighbor rule.

2 And that's a very different statute from  
3 what Congress wrote. Maybe it's a good idea. Maybe EPA  
4 ought to control all -- all efficiency measures for  
5 reducing pollution, but it's certainly not the statute  
6 that Congress wrote.

7 MR. STEWART: Let me say three things in  
8 response to that. The first is that, as I mentioned  
9 before, the good neighbor provision is addressed in the  
10 first instance to the States; that is, it's the State's  
11 initial obligation to submit an implementation plan that  
12 contains good neighbor provisions.

13 And so if the Court says costs can't be  
14 considered in defining significant contribution, the  
15 effect is not simply that EPA can't consider that factor  
16 when it steps into the State's shoes. The effect is  
17 that a State can't consider cost of achievement  
18 in attempting, in good faith, to implement its own good  
19 neighbor provision.

20 The second thing I would say --

21 JUSTICE SCALIA: Excuse me. I don't  
22 understand that. Please say that again.

23 MR. STEWART: The good neighbor provision --  
24 we're dealing here with a situation where EPA was the  
25 one that promulgated Federal implementation plans, but

1 that's only because the States didn't -- the relevant  
2 upwind States did not discharge their obligation to  
3 implement State -- promulgate State implementation plans  
4 that contain good neighbor provisions.

5 But the language "contribute significantly"  
6 is in the portion of the statute that deals with what a  
7 State plan is supposed to contain. It's not dealing  
8 with -- it's not in a provision that by, its terms, is  
9 addressed directly to EPA.

10 And so if the Court said, in defining  
11 "contribute significantly," we can't take into account  
12 the cost of emission control measures, that would mean  
13 not simply that EPA can't consider that factor when it  
14 steps into the State's shoes; it would also mean that  
15 the State can't consider that factor.

16 JUSTICE KAGAN: Mr. Stewart --

17 CHIEF JUSTICE ROBERTS: Well, when you  
18 mention the fact that the States didn't address the good  
19 neighbor requirement -- of course, you hadn't come up  
20 with their budgets that they had to meet at the time  
21 that they had to promulgate their SIPs.

22 Now, at a different point in your brief, you  
23 emphasize how incredibly complicated it is for States to  
24 determine how much they must reduce their emissions to  
25 take care of the fact that they significantly

1 contributed to downwind pollution.

2 And yet, you would impose on those States  
3 the burden to issue the good neighbor program without  
4 knowing how much you expect them to -- to meet.

5 MR. STEWART: Well, it's the statute that  
6 imposes the obligation on the States. And it may help  
7 to draw the Court's attention to the relevant  
8 provisions. On page 1a of the appendix to the  
9 government's opening brief, the relevant provision is 32  
10 USC 7410.

11 And 7410(a)(1) begins by saying, "Each State  
12 shall, after reasonable notice and public hearings,  
13 adopt and submit to the administrator of EPA within 3  
14 years or such shorter period as the administrator may  
15 prescribe after the promulgation of a national primary  
16 ambient air quality standard, the NAAQS." And then it  
17 goes on to say, "A plan which provides for  
18 implementation," and so forth.

19 And then, if you look to the bottom of -- or  
20 to the top of page 2a -- I'm sorry -- subsection (2)  
21 begins, "Each implementation plan submitted by a State  
22 under this chapter shall be adopted by the State after  
23 reasonable notice and public hearing. Each such plan  
24 shall," and then if you look at the bottom of the page,  
25 it says, "contain adequate provisions prohibiting,

1 consistent with the provisions of this subchapter, any  
2 source or other type of emissions activity within the  
3 State from emitting any air pollution in amounts which  
4 will contribute significantly to nonattainment" --

5 CHIEF JUSTICE ROBERTS: So -- so if you were  
6 working for one of the upwind States and you were facing  
7 this 3-year deadline and EPA had not told anyone how it  
8 intended to interpret the State's obligations under the  
9 good neighbor policy, what would you have told the State  
10 to do?

11 MR. STEWART: Well, certainly, EPA's basic  
12 methodology of using -- using cost thresholds had been  
13 embodied in the -- the NAAQS SIP call in 1998, and in  
14 CAIR, which I believe was promulgated in 2006.

15 CHIEF JUSTICE ROBERTS: Right. So -- but  
16 the head of the State EPA comes to you and says, how  
17 much do we have to reduce our emissions to satisfy our  
18 requirements? And you would tell them what?

19 MR. STEWART: We would tell them, in all  
20 honesty, we don't know yet. But that -- that's not a  
21 fatal flaw in the argument; that is, it is inherent in  
22 any legal context in which one person acts and then a  
23 second person reviews, that the first person has to act  
24 before the second person has -- has made up his or her  
25 mind.

1           And so a district court --

2           CHIEF JUSTICE ROBERTS:           Well, but that kind  
3 of glosses over the fact that, as you say elsewhere in  
4 your brief, this is a -- is your analogy, right -- a  
5 spaghetti matrix or something? And so there's no  
6 possible way for the State to know how much of a burden  
7 you expect them to address, and yet, you're saying,  
8 well, you've got to do it, and you've got to do it  
9 within 3 years, or we're going to take over the  
10 responsibility.

11          MR. STEWART:           Well, certainly, what EPA was  
12 called upon to do was far more complicated than what any  
13 particular State was going to be called upon to do  
14 because, as a result of widespread noncompliance, EPA  
15 was promulgating Federal implementation plans for close  
16 to 30 States and plans for -- for different NAAQS.

17          The second thing I would say is that --

18          CHIEF JUSTICE ROBERTS:           But could I address  
19 the first thing first? I'm not sure that's right. I  
20 think EPA has an easier job dealing with it as a group.  
21 They say, look, here are these States, here's what you  
22 have to do. But any individual State has no idea what  
23 its particular role is going to be in your group  
24 resolution.

25          MR. STEWART:           Well, it certainly has the

1 data available to it that -- that EPA had available  
2 about how much did each State contribute to the overage  
3 at various nonattainer -- nonattainment receptors in the  
4 past.

5 It's certainly true that the States wouldn't  
6 necessarily know exactly what policy judgment EPA would  
7 ultimately make as to what the right cost threshold was.  
8 But --

9 JUSTICE SCALIA: Oh, but that's crucial. I  
10 mean, it would have no idea whether EPA would use any or  
11 would pick \$500 or would pick whatever. I mean, I don't  
12 know how it could sensibly design a -- a program without  
13 knowing that.

14 MR. STEWART: I guess the second -- the  
15 other two points I would make are, first, the State's  
16 role is to devise something, in this area, as in others,  
17 that it believes will carry out its own legal  
18 obligations, not necessarily to predict just how EPA  
19 would do it if the task fell to EPA.

20 And so, for example, when the States are  
21 undertaking a more -- the more prosaic task of devising  
22 plans that will produce attainment of the NAAQS within  
23 their own borders, they have to make a variety of policy  
24 judgments about the right mix of emission controls, what  
25 sources should be allowed to emit, in -- in what

1 amounts.

2 If a particular State just didn't do it,  
3 that task would fall to EPA. And it's very unlikely  
4 that anything the particular State would come up with  
5 would exactly match what EPA would ultimately devise.

6 JUSTICE SCALIA: Can you give us an example  
7 of when EPA has done this in the past, where a -- a  
8 crucial element of a -- of a NAAQS has not been defined  
9 by the agency, and yet, the agency, nonetheless,  
10 requires the States to -- to put together their SIPs  
11 without knowing what their target is?

12 And that's the problem here. What's your  
13 best example of another case in which the agency said,  
14 you -- you put together a SIP, and we're not going to  
15 tell you what the target is.

16 MR. STEWART: Well, the examples I would  
17 point to are in the brief filed by the -- the Respondent  
18 States that are on our side of the case, who identify  
19 examples of instances where States did successfully  
20 comply with their good neighbor obligations and -- and  
21 persuaded EPA that what they had done was enough.

22 JUSTICE SCALIA: Well, that just means it's  
23 pin the tail on the donkey. Some States got the tail.  
24 I mean -- you know, they pinned it in the right place.  
25 That doesn't prove anything.

1 I want an example of another instance in  
2 which EPA has -- has hidden the ball, has said, we're  
3 not going to tell you what the target is, it's up to you  
4 to come up -- up with a SIP, and we'll tell you after  
5 the fact whether that SIP happened to meet the target  
6 that we've invented.

7 MR. STEWART: I don't -- I wouldn't  
8 characterize what EPA is doing as hiding the ball; that  
9 is, it didn't kind of fail to divulge information that  
10 it had its -- at its disposal.

11 JUSTICE SCALIA: All right. Correct.

12 MR. STEWART: It released a great deal of  
13 information at the time that the proposed rule was  
14 announced in the -- the summer of 2010.

15 JUSTICE SCALIA: Okay.

16 MR. STEWART: But -- but I take your point  
17 that -- the two additional things I would say, though,  
18 are that, for better or worse, Congress did place this  
19 obligation on the States. It evidently thought that, at  
20 least in the mine run of -- of cases, States were  
21 capable of carrying out this task.

22 And at least to the extent that adopting a  
23 good -- a good neighbor provision requires consideration  
24 of circumstances in other States, in a sense, this is  
25 just the flip side of what the downwind States have to

1 do all the time; that is, if New York officials are  
2 trying to determine, when a new NAAQS comes out, how can  
3 we bring our own air quality into compliance? What  
4 controls do we have to place on our own sources, in  
5 order to get air quality to the desired level?

6 The New York officials have to take account  
7 of the degree of pollution that is likely to travel to  
8 their borders from other States. They can't analyze  
9 emissions within their own borders in a vacuum. They  
10 have to consider what the likely contributions of their  
11 neighbors --

12 JUSTICE SCALIA: Yes. That just means  
13 there's some facts that they don't know. Of course,  
14 there is always going to be uncertainty about certain  
15 facts. But here, there is uncertainty about the target,  
16 not just about the facts. We don't know what target  
17 we're expected to hit.

18 MR. STEWART: I guess the final thing I  
19 would say on -- on this part of the -- this particular  
20 sub-issue of the case is that, even if you reach that  
21 conclusion, even if you determine that it was just  
22 practically infeasible for any State to adopt a  
23 compliant State implementation plan with good neighbor  
24 provisions for these NAAQS until EPA acted, then the  
25 proposition of the opposing States still wouldn't

1 follow; that is, the statute in the provisions that I've  
2 pointed to says it's up to the States in the first  
3 instance to devise the State implementation plans,  
4 including good neighbor provisions.

5 And then, on page 10a of the same  
6 provision -- of the same appendix, I'm sorry -- the  
7 statute describes what happens if a State fails to  
8 satisfy that obligation.

9 And this is at the beginning of subsection  
10 (c) (1) on page 10A, it says, "The Administrator shall  
11 promulgate a Federal implementation plan at any time  
12 within 2 years after the Administrator finds that a  
13 State has failed to make a required submission or finds  
14 that the plan or plan revision submitted by the State  
15 does not satisfy the minimum criteria."

16 And --

17 JUSTICE SOTOMAYOR: Mr. Stewart, below, the  
18 government conceded that there was a theoretical  
19 possibility that some States could be overcontrolled,  
20 that they would be implementing measures that would  
21 reduce their contributions to pollution below the one  
22 percent. Assume that -- I think there's a theoretical  
23 possibility of that -- but that your approach was  
24 basically fine.

25 What would we do about that? First of all,

1 are there measures States can take to get out of the  
2 FIP, if it's inappropriate to them, because of  
3 overcontrol? And if not -- and how do they do it? I  
4 mean, what's the process?

5 If we think there's a flaw, do we vacate the  
6 rule? Do we leave it in place? What do we do? And  
7 what -- and what's our power to do it?

8 MR. STEWART: I mean, I think, in the  
9 circumstance you describe, if you reach the conclusion  
10 that there was a theoretical possibility that this could  
11 happen and that it would be a problem if it did, but  
12 that the methodology used by EPA was, on the whole,  
13 rational, I think the task for the Court at this stage  
14 of the case is to rule on the more big picture  
15 objections that are properly before it and -- and that  
16 the court of appeals ruled on.

17 Now, even if we win everything that's at  
18 issue in this Court, the case is not over. There are a  
19 variety of more specific challenges to the details of  
20 the rule that the D.C. Circuit found it unnecessary to  
21 address. And so, if we won on the issues that are  
22 before the Court, the case would be remanded, and there  
23 would be an opportunity for the court below to consider  
24 those.

25 And to the extent --

1 CHIEF JUSTICE ROBERTS: Including --  
2 including the overcontrol argument? Or would that have  
3 been done?

4 MR. STEWART: Well, to -- to the extent that  
5 any State had -- and I don't know the -- the pending  
6 as-applied challenges at this level of detail. But to  
7 the extent that any State has a properly preserved  
8 challenge to the effect that it is actually likely to be  
9 subject to overcontrol, then that could be heard by the  
10 court of appeals.

11 The court of appeals could determine both  
12 whether that is, in fact, likely to happen and whether,  
13 if it does happen, that would render the rule arbitrary  
14 and capricious as to that State.

15 But the -- the real problem with the court  
16 of appeals methodology was that it said the fact that  
17 EPA can't absolutely rule out the possibility that it  
18 might happen renders the rule invalid on its face, and  
19 in other portions of the opinion, the court faulted EPA  
20 for failing to ensure that its regime would not lead to  
21 overcontrol.

22 And I think that's an extraordinary standard  
23 for an administrative agency to deal with; that is --  
24 you know, it happens all the time that Federal agencies  
25 are given authority to regulate -- to address one

1 problem, and the regulation necessarily has spillover  
2 effects on other conduct.

3 And so, for instance, if a Federal agency  
4 was tasked with preventing the sale in interstate  
5 commerce of contaminated food, it might require  
6 inspections, it might require the recall of food after  
7 one item in a shipment had been shown to be  
8 contaminated. These measures might have spillover  
9 effects on food that was not, in fact, contaminated.

10 But that wouldn't be a flaw in the rule. Of  
11 course, an agency could go overboard and impose a regime  
12 that was so onerous in comparison to the health benefits  
13 that it was arbitrary and capricious.

14 But nobody would ever say that it's the duty  
15 of the agency to ensure that there is no other means of  
16 achieving the same health benefits at lower cost to the  
17 public.

18 The other thing that the States could do --  
19 I mentioned that one way in which a State that believed  
20 itself to be unfairly or inappropriately treated by the  
21 rule was to pursue any adequately preserved legal  
22 challenge it may have in the judicial proceedings.

23 And as your question indicated, there is  
24 also a mechanism by which a State can ask to have the  
25 Federal implementation plan replaced by a plan of its

1 own devising.

2 And so the consequence of the State's  
3 failure to achieve their good neighbor obligations in  
4 time and EPA's stepping into their shoes, that -- the  
5 consequence was not that they're forever barred from  
6 devising their own plans. The consequence was simply  
7 that the Federal implementation plan would remain in  
8 effect for a fairly limited period of time, subject to  
9 replacement by a State plan.

10 JUSTICE SOTOMAYOR: If we were to rule  
11 against you and affirm the decision below, how long do  
12 you think it would take to get a new rule in place?

13 MR. STEWART: I don't have an estimate on  
14 the time, but if the Court affirms on the ground that  
15 EPA may not consider costs -- part of the problem -- I  
16 think it would be an extraordinary undertaking for EPA  
17 to try to achieve; that is, part of the difficulty here  
18 is that nobody has identified a concrete alternative;  
19 that is, a plan that would not consider costs and  
20 that -- yet that would disperse the burdens of  
21 compliance among the States in proportion to their prior  
22 contributions and also would address the nonattainment  
23 problem at all of the downwind receptors.

24 I don't know if it could be --

25 JUSTICE KAGAN: Could you explain that to

1 me, Mr. Stewart? Because are you saying that the  
2 straight proportionality approach that was applied in  
3 the D.C. Circuit, are you saying that that's impossible?  
4 Or are you saying it's complicated and dumb?

5 MR. STEWART: What -- at least what we  
6 understand to be the straight proportionality approach  
7 is impossible; that is, it might be possible with  
8 respect to any particular downwind receptor because you  
9 could say that, if one upwind State is contributing two  
10 units and another four and another seven, the  
11 proportional solution might be to require that any  
12 necessary reduction would be in those proportions.

13 One State would do 2/13ths of the reduction,  
14 another would do 4/13ths of the reduction, and another  
15 would do 7/13ths of the reduction. That would be  
16 theoretically possible, with respect to any receptor.  
17 But with respect to another receptor, the same States  
18 might be contributing in entirely different proportions,  
19 and so there would be no way of devising a solution that  
20 would be proportionate as to both.

21 JUSTICE SCALIA: I suppose you could average  
22 them out, couldn't you?

23 MR. STEWART: You might be able to average  
24 them out.

25 JUSTICE SCALIA: I don't think that's any

1 more irrational than picking a number like 500 bucks  
2 as -- as to -- you know, what the -- who can do it more  
3 efficiently. That's sort of arbitrary.

4 MR. STEWART: Well, I mean, the purpose of  
5 the cost threshold was not to increase or decrease the  
6 total amount of reductions that would be necessary. It  
7 would be to ensure that the reductions that had to take  
8 place were done in the most cost-effective manner  
9 possible. And part of the irony --

10 JUSTICE SCALIA: I understand that, but my  
11 point is that is certainly a pretty -- pretty arbitrary  
12 number, and -- and I think averaging for all the  
13 receptors is certainly no more arbitrary.

14 MR. STEWART: Well, I think the cost  
15 methodology is one that EPA had used often in the past.  
16 Indeed, even before the term "contribute significantly"  
17 was added to the statute in 1990, EPA had interpreted  
18 the prior reading of the statute to allow relief for a  
19 downwind State, if an upwind State was contributing  
20 significantly to downwind pollution, and it had  
21 interpreted that standard as allowing consideration of  
22 cost and compliance burdens.

23 I mean, one of the ironic things about this  
24 case is that the only ill consequence of overcontrol is  
25 cost; that is, this is not a situation in which there is

1 some distinct public health benefit -- distinct public  
2 health problem -- I'm sorry -- that is caused if power  
3 plants are emitting too little NOx or SO2. The only  
4 reason that people worry about overcontrol, about  
5 reducing emissions more than they need to be, is that it  
6 costs money.

7 And if that's the problem to be avoided, it  
8 seems strange that EPA can't take account of costs in  
9 theorizing a solution.

10 JUSTICE BREYER: Sir, I don't want you to --  
11 finish your argument, if you had something to say on  
12 what you started out with in describing the plan. You  
13 said there are three aspects. The first aspect was you  
14 cut out anyone -- any State that's contributing less  
15 than one percent.

16 You said the second aspect was that you used  
17 a metric of \$500 per ton of NOx reduced, and you applied  
18 that to the States still in, and then you said there  
19 were three, and you never got to three, and I want to be  
20 sure you do, if you had that.

21 MR. STEWART: The third part of the process  
22 is that, once each State's emissions budget has been  
23 quantified, with respect to each State, the EPA  
24 essentially divides up the emissions that are allowed  
25 among the different power plants within the State's

1 borders. And the way that it does that is it gives  
2 allowances to the various power plants that add up to  
3 the total number of tons of pollutants that are allowed  
4 to be emitted.

5 And it's important to emphasize that the  
6 States have not joined the industry's argument here that  
7 cost -- even the States on the other side of the case  
8 have not joined the industry's argument here that  
9 states that costs can't be considered.

10 Those States are not quarreling with the  
11 methodology by which EPA quantified their State emission  
12 budgets. Those States are simply saying that, once  
13 those had been quantified, they should have been given  
14 an opportunity to determine, on their own, how the  
15 allowances should be allocated without EPA doing it  
16 first.

17 In some situations, that might have been a  
18 rational way for EPA to proceed; that is, the statute  
19 says that once the -- once EPA finds that a particular  
20 State has either failed to submit a good neighbor SIP or  
21 has -- or EPA has disapproved the good neighbor SIP,  
22 once that happens, the statute says that EPA, at any  
23 time within 2 years, can promulgate its own Federal  
24 implementation plan.

25 And in some circumstances, it might be

1 rational for EPA to wait the full 2 years and give  
2 additional guidance to States, in order to give them  
3 every opportunity to devise compliance plans. There  
4 were basically two reasons that EPA didn't do that here.  
5 The first is that it was subject to the D.C. Circuit's  
6 mandate in North Carolina, which said get something in  
7 place that works as soon as possible, and EPA felt  
8 constrained by that to act as quickly as it could.

9 And the second point worth emphasizing is  
10 that there are State sovereign interests on both sides  
11 of the case. It's true that, by devising a Federal  
12 plan, in the first instance, EPA has intruded to a  
13 degree on the ability of the upwind States to decide how  
14 emissions allowances should be allocated among their own  
15 sources.

16 But the downwind States are subject to their  
17 own obligations to comply with the NAAQS within their  
18 own borders, and to the extent that they can't get  
19 relief from the upwind States, their task is made more  
20 difficult.

21 JUSTICE KAGAN: I'm sure I should know this  
22 after reading all these briefs, but if we -- if we  
23 reverse the D.C. Circuit, what would happen, going  
24 forward? In other words, the States have had this time  
25 to -- to go first and to do their SIPs, then they were

1 found not to comply, so the EPA does its FIP.

2 But that's not the end of the game, is it?

3 I mean, isn't the EPA under a continuing obligation to  
4 look at, review its NAAQS, to give the States further  
5 opportunities to come back?

6 MR. STEWART: Yes. I mean, with respect to  
7 the particular NAAQS that are at issue here, the  
8 States -- it's unclear to what extent they've been  
9 working on this in the interim, but the States certainly  
10 could, even under the terms of the transport rule,  
11 propose State implementation plans to replace the FIPs.

12 Now, it's to be contemplated that there will  
13 be additional NAAQS implemented, and this Court's  
14 decision would affect the way in which both the States  
15 and EPA went about the business of determining how good  
16 neighbor obligations should be carried out with respect  
17 to those future NAAQS.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Mitchell, why don't you give us 30  
20 seconds or so?

21 Mr. Mitchell.

22 ORAL ARGUMENT OF JONATHAN F. MITCHELL

23 ON BEHALF OF THE STATE AND LOCAL RESPONDENTS

24 MR. MITCHELL: Mr. Chief Justice, and may it  
25 please the Court:

1 EPA's actions in this case have written the  
2 States out of the Clean Air Act. EPA cannot impose a  
3 good neighbor FIP on the States when EPA has left the  
4 States completely in the dark about the meaning of the  
5 phrase "contribute significantly."

6 EPA's approach requires the States to submit  
7 SIPs that can only guess at how EPA will quantify their  
8 good neighbor obligations under Section 7410(a)(2)(D).

9 CHIEF JUSTICE ROBERTS: Well, it's -- it's  
10 certainly -- it's certainly hard, but it is what the  
11 statute says; and it seems to me that, if EPA had taken  
12 a different view, it would have been contrary to the  
13 statute.

14 MR. MITCHELL: EPA's actions are unlawful  
15 for several independent reasons. The first is EPA's  
16 actions in this case represent an arbitrary and  
17 capricious change in the way that the Agency has  
18 interpreted the statute.

19 For 15 years, starting with the NAAQS SIP  
20 call in 1998, EPA told the States not to submit good  
21 neighbor State -- good neighbor SIPs before EPA had  
22 quantified the State's obligations under (a)(2)(D). And  
23 EPA repeated that stance numerous times, including in  
24 the disapproval of Nevada SIP that we cite on Pages 9  
25 and 59 of our brief, and also in the sources of the D.C.

1 Circuit cites on pages 51, 52, and 56 of the Petition  
2 Appendix.

3 EPA has now done a 180-degree shift, and  
4 they have told the States that they are required to  
5 submit good neighbor State -- SIPs before EPA has  
6 quantified their obligations under Subsection (a)(2)(D).

7 JUSTICE BREYER: Well, they don't know  
8 exactly how to do it. I mean, this is a tough problem.  
9 So it sounds as if what you're making is a procedural  
10 objection here, to which the government's point was,  
11 you're right, we'd all been talking about this. We  
12 wanted to see what the States would come up with, so we  
13 look.

14 The States haven't come up with enough, in  
15 our opinion; and so, now, we go to the Federal process,  
16 and we put out our thing, and you comment on that. And  
17 then, if you feel that their thing is no good, propose  
18 your own solutions again. That's what he's saying.

19 But it's supposed to advance the ball. So  
20 there is a procedure for the States to come in, if they  
21 can come up with a better plan, that's what you've just  
22 heard, and so do it. So what's -- what's arbitrary or  
23 capricious about such a system?

24 MR. MITCHELL: Because that's the approach  
25 EPA rejected in the NAAQS SIP call.

1 JUSTICE BREYER: Well, they objected to it  
2 once. Now, they think it works here. I mean, all the  
3 time it happens, that people change their minds about  
4 how problems are best solved, or they cite this  
5 problem's better solved one way and better another way.  
6 So if your only point is, once they did it a different  
7 way, they'll say, well, what's unreasonable about  
8 changing our way? We're trying to get the job done.

9 MR. MITCHELL: EPA is allowed to change  
10 their interpretation of the statute, but if they're  
11 going to do that, they have to acknowledge, in the  
12 transport rule, that they're abandoning the prior  
13 construction of the statute --

14 JUSTICE BREYER: Well, years and years, the  
15 neighbor board -- the labor board decided things in  
16 adjudications, rules. One day, they say, no, we think  
17 we should preside rulemaking processes, like other  
18 agencies. Does anything in the law prevent that?

19 MR. MITCHELL: No, they're not prevented  
20 from making the change, but the arbitrary and capricious  
21 standard --

22 JUSTICE SOTOMAYOR: But you're not prevented  
23 from giving a counter SIP, is what they were being told.  
24 You can -- you can counter, is what the government is  
25 saying, and so it's not clear, to me, that they've

1 estopped you from doing your own SIP.

2 MR. MITCHELL: But we can propose and submit  
3 the SIP only after the FIP has already been imposed on  
4 the States.

5 JUSTICE SOTOMAYOR: So what's the  
6 difference? If you think they're wrong, you give a  
7 counter SIP, and you duke it out with them in terms of  
8 what you think -- where you think they are wrong as  
9 applied to you.

10 But let me ask you something fundamental  
11 about this. Are you challenging the transport rule  
12 using cost? Or are you just challenging the process in  
13 which that was achieved? Because, if I understand all  
14 the amici briefs and the theory of this, not even you  
15 would want a command-and-control regulation; is that  
16 correct?

17 MR. MITCHELL: We do not have a position on  
18 the question of whether EPA can consider costs.

19 JUSTICE SOTOMAYOR: It'd be crazy if they  
20 didn't, right?

21 MR. MITCHELL: We represent a coalition of  
22 States --

23 JUSTICE SOTOMAYOR: Right. And for some of  
24 them, it would really be a bad idea, wouldn't it?

25 MR. MITCHELL: There's simply no consensus

1 among the States on that question.

2 (Laughter.)

3 MR. MITCHELL: So we are remaining agnostic  
4 on that point.

5 (Laughter.)

6 JUSTICE SCALIA: Can I ask, until you  
7 propose your SIP to replace the FIP, right, the FIP  
8 remains in effect?

9 MR. MITCHELL: Yes.

10 JUSTICE SCALIA: And you're bound by that  
11 until they approve your new SIP. How long does such a  
12 transaction normally take?

13 MR. MITCHELL: It depends. It really does.  
14 We don't know exactly what our obligations are.

15 JUSTICE SCALIA: You think that's a quick  
16 process? I mean, as soon as --

17 MR. MITCHELL: No, it takes months. And --

18 JUSTICE SCALIA: If you'll have to develop a  
19 new SIP, that'll take you some time?

20 MR. MITCHELL: Yes.

21 JUSTICE SCALIA: And then that SIP is -- is  
22 submitted to EPA, and -- and they chew on it for as long  
23 as they want, right?

24 MR. MITCHELL: Yes.

25 JUSTICE SCALIA: And then maybe they will

1 say, your SIP is good enough, and maybe they won't.

2 MR. MITCHELL: Right. We're still waiting  
3 for EPA to decide on the SIP that we submitted to  
4 implement the good neighbor obligations for the 2006  
5 particulate matter standard.

6 JUSTICE KENNEDY: But at least if you've  
7 adopted a SIP or proposed a SIP, you've given reasons,  
8 you have a -- you have a rational plan, and the EPA then  
9 must give a reasoned response to it; whereas, if the EPA  
10 is the first one, they're writing on a blank slate; and  
11 it seems to me that, in some respects, the EPA is more  
12 constrained under this process to which you object.

13 MR. MITCHELL: Well, it's still an unlawful  
14 use of the FIP authority for several reasons -- and this  
15 gets back to Justice Breyer's question, why is this  
16 unlawful? And there's several reasons.

17 The first is that EPA has changed its  
18 interpretation of the statute, and the key language from  
19 the NAAQS SIP call appears on Pages 57,368 through 370,  
20 where EPA tells the States, we don't want you to submit  
21 good neighbor SIPs that simply take a guess at what you  
22 think the good neighbor obligations are, we will  
23 quantify your obligations in a rule first and then --

24 JUSTICE SCALIA: And that means the statute  
25 doesn't require you to do that, I assume.

1 MR. MITCHELL: The statute --

2 JUSTICE SCALIA: I mean, when they say that,  
3 that -- that's an affirmation by them that the statute  
4 does not require you to do it, I assume. Is that your  
5 point?

6 MR. MITCHELL: Not only that, they said, in  
7 the NAAQS SIP calls, that they are adopting an  
8 interpretation of the statute that prohibits us from  
9 doing that, but the interpretation of the statute that  
10 EPA adopted is that EPA, and only EPA, is the  
11 institution that is charged with the responsibility of  
12 quantifying a State's good neighbor obligations.

13 The States had argued for a different  
14 approach back in 1998. We wanted to have the  
15 prerogative to decide what the good neighbor obligations  
16 mean; and EPA said, no, we are the sole entity with that  
17 prerogative, and you need to wait until we issue a rule  
18 that quantifies your obligations.

19 EPA has now changed that approach without  
20 explaining or acknowledging in the transport rule that  
21 they were abandoning their earlier interpretation of the  
22 statute.

23 JUSTICE SOTOMAYOR: But they were doing that  
24 with respect to the NAAQS. I thought that was them  
25 saying they had to quantify the NAAQS.

1           MR. MITCHELL:           What they said on a NAAQS SIP  
2 call was they have to quantify the good neighbor  
3 obligations. They have to tell the States what it means  
4 to contribute significantly to another State's air  
5 pollution.

6           And that leads to a second statutory problem  
7 with this regime in the transport rule. The States have  
8 the prerogative, under the Clean Air Act, to do what the  
9 Federal minimum requirements are for clean air and to go  
10 no further.

11          EPA's approach here requires the States,  
12 when they submit or propose SIPs, and they have to take  
13 a wild guess as to what their good neighbor obligations  
14 are, it effectively compels the States to overcontrol  
15 and overregulate because, if they want EPA to approve  
16 the SIP and they don't know what their good neighbor  
17 obligations will be, they have to overshoot and  
18 overcontrol and overregulate or risk that EPA will deny  
19 their SIP and impose a FIP on the State.

20          And what EPA is essentially doing is telling  
21 the States that, if you want to do only what the Federal  
22 floor requires and to go no further, the price of that  
23 is that you have to accept an EPA-imposed FIP that  
24 defines those obligations, rather than giving the State  
25 the opportunity to distribute regulatory burdens in a

1 SIP as it sees fits.

2 JUSTICE KAGAN: Mr. Mitchell, I might just  
3 not be understanding you, but this goes back to the  
4 Chief Justice's question. The statute says, look, after  
5 these standards are originally promulgated, the State  
6 gets 3 years to make its best pitch, and then the  
7 administrator shall promulgate a FIP at any time within  
8 two years after that.

9 Now, presumably, there are lots of  
10 conversations that can happen between the EPA and the  
11 States during those 5 years, and maybe, sometimes, more  
12 of those conversations happen and, sometimes, less of  
13 those conversations happen. But I don't see that as  
14 different constructions of the statute.

15 It seems to me, as the statute sets up its  
16 framework, you go first, do it within 3 years; then the  
17 EPA goes, it has to do it within 2 years. The EPA just  
18 has very substantial discretion under this statute as to  
19 what kinds of conversations it wants to have when,  
20 within that broad structure.

21 Why am I not reading it right?

22 MR. MITCHELL: I agree that the EPA has that  
23 discretion. The problem is that, in the NAAQS SIP Call  
24 in 1998, they asserted exclusive interpretative  
25 authority over subsection (a)(2)(D), which is the good

1 neighbor provision of the Clean Air Act. And they said  
2 that EPA is the institute might quantify the States'  
3 good neighbor obligations. Until EPA fills in the  
4 blanks and tells the States what this "contributes  
5 significantly" phrase means, it's an empty requirement.

6 EPA could have taken a different approach in  
7 the NAAQS SIP Call. They could have told the States,  
8 you can take the first crack at defining what  
9 "contributes significantly" means, and we'll review your  
10 submission and approve or disapprove it. But what they  
11 said, 15 years ago, was that the States need to wait for  
12 EPA to quantify the obligations in a rule.

13 Once EPA asserts that exclusive interpretive  
14 authority over the provision, the States have no  
15 obligation to guess at what EPA might do in the future,  
16 when they submit the SIP. And that leads to a second  
17 independent problem with EPA's transport rule because  
18 EPA had no authority to impose Federal implementation  
19 plans for the 1997 standards on the 22 States that  
20 already had EPA-approved SIPs in place for those  
21 standards.

22 EPA --

23 JUSTICE SOTOMAYOR: Haven't some States  
24 already challenged that? Isn't that pending below? Why  
25 should we be looking at that issue here, when States

1 have challenged that?

2 MR. MITCHELL: Three of the States have  
3 challenged their --

4 JUSTICE SOTOMAYOR: I don't know why the  
5 rest didn't, but three of them have. So why should we  
6 enter the fray anticipatorily? Isn't that an issue we  
7 should wait and see what EPA says below?

8 MR. MITCHELL: The United States is  
9 suggesting that we're somehow launching an improper  
10 collateral attack because the States could have  
11 challenged the earlier SIP disapprovals or earlier  
12 findings of failure to submit --

13 JUSTICE SOTOMAYOR: No, no, no. This is a  
14 very discrete question, that they've already approved  
15 some -- some SIPs. Three States have already challenged  
16 the fact that they shouldn't be required to meet a new  
17 standard because they've already had an old standard  
18 approved.

19 That seems, to me, a very discrete  
20 challenge, and three States have undertaken it.

21 MR. MITCHELL: But those judicial  
22 proceedings have been stayed, pending the outcome of  
23 this proceeding.

24 JUSTICE SOTOMAYOR: Well, I don't know why,  
25 but that's a different issue. Even though it has,

1 wouldn't it be more prudent for us to wait for that  
2 administrative process to finish before we venture into  
3 this question? That's my -- my point.

4 MR. MITCHELL: I don't think the Court  
5 should wait because the issues that we're raising are  
6 discrete from what's being challenged by those three  
7 States in their separate proceedings. The arguments  
8 we're making are that, first, EPA has no authority to  
9 impose a FIP on the States before quantifying the good  
10 neighbor obligations under (a) (2) (D); and, second, EPA  
11 improperly invokes the corrections --

12 JUSTICE GINSBURG: And that's because --  
13 because EPA did it that way -- you don't get that from  
14 the statute. You get it from what EPA did in the first  
15 round; is that right?

16 MR. MITCHELL: We're not relying solely on  
17 the statute, Justice Ginsburg, that's correct. Our  
18 argument is that EPA has changed its interpretation of  
19 the statute from the NAAQS SIP Call to the transport  
20 rule, without adequately acknowledging or explaining how  
21 its new interpretation is consistent with the statute.

22 But we're also relying on the statute as  
23 well because, as I mentioned earlier, (a) (2) (D) requires  
24 the States to eliminate pollution that contributes  
25 significantly to another State's nonattainment.

1 JUSTICE BREYER: But they may not know --  
2 you know. They may not know. There's six States that  
3 contribute to the seventh State's pollution, and how  
4 much each State can cut back depends. It depends on  
5 what it costs. It depends on how much they contribute.  
6 It depends upon what the other States will do. It  
7 depends upon where the wind blows, and that changes all  
8 the time.

9 MR. MITCHELL: Right.

10 JUSTICE BREYER: So they have a tough  
11 problem. They can't tell you exactly how much you  
12 should cut back until they know what they have in mind  
13 or what others have in mind for solving the problem. So  
14 it sounds to me as if you're asking them to do the  
15 impossible, and they had a very good reason for not  
16 doing what they did before; namely, it would be  
17 impossible here to have a -- or not actually impossible,  
18 but very tough and very expensive.

19 So that's why, I gather, they went the way  
20 they did. Now, I don't know anything in the law that  
21 tells them that this statute was meant to force them to  
22 proceed in a way that would either be hugely more  
23 expensive and perhaps impossible.

24 What's your -- what's your reaction?

25 MR. MITCHELL: EPA has done this before. I

1 mean, with the CAIR FIPS when they first quantified the  
2 States' good neighbor obligations, they gave the States  
3 an opportunity to submit SIPs before the CAIR Federal  
4 implementation plans would take effect.

5 And EPA agrees that the States have no  
6 ability to guess accurately at how EPA will quantify  
7 their good neighbor obligation. They can't --

8 JUSTICE SCALIA: Well, they have done the  
9 impossible here, haven't they? I mean, they have the  
10 transport rule. The only question is whether it should  
11 have come out sooner or later, right? The only question  
12 is whether it should have come out before the States  
13 were obliged to submit their SIPs.

14 MR. MITCHELL: It's not impossible for EPA  
15 to decide what "contribute significantly" means. That's  
16 their job. They've asserted that prerogative. They can  
17 choose any reasonable interpretation of that phrase.

18 JUSTICE SCALIA: You started to give us a  
19 second statutory reason. I was really eager to see what  
20 that was.

21 MR. MITCHELL: Yes, that's the Section  
22 7410(k)(6) issue that we mentioned in the brief. EPA  
23 had previously approved good neighbor SIPs for 22 States  
24 that implemented the 1997 standards for ozone in a  
25 particular map. Once EPA approves a State's SIP, its

1 ability to impose a FIP on the SIP -- on that State  
2 expires under the statute.

3 So EPA had a problem for those 22 States:  
4 How would they be able to impose FIPS when they had  
5 previously approved SIPs? EPA says, in the transport  
6 rule, that they are going to invoke the corrections  
7 power of (k) (6), and (k) (6) says that, if EPA determines  
8 that a prior decision approving a SIP was in error, then  
9 EPA --

10 JUSTICE SOTOMAYOR: Isn't that the issue  
11 that the three States are challenging below, just that  
12 discrete issue, about whether the EPA can call this a  
13 corrective action or not? Isn't that entire issue being  
14 determined in -- in those proceedings?

15 MR. MITCHELL: Well, it's not being  
16 determined because the proceedings have been stayed.  
17 But, yes, three States, Kansas, Georgia and Ohio, have  
18 challenged --

19 JUSTICE SOTOMAYOR: But this issue is what's  
20 at issue there, part of the --

21 JUSTICE SCALIA: Would you finish describing  
22 the issue? I really didn't hear it.

23 MR. MITCHELL: EPA invoked its corrections  
24 power under (k) (6), but (k) (6) says that a correction  
25 must be made, quote, "in the same manner as," end quote,

1 the decision being corrected. EPA's approvals of the  
2 earlier SIPs went through notice and comment.

3 Because of that, (k)(6) requires that the  
4 corrections, likewise, go through notice and comment,  
5 and the corrections here did not go through notice and  
6 comment. There's no disagreement between the  
7 Petitioners and the Respondents on that point.

8 And the United States tries to get out of  
9 this problem by saying that they can use the good cause  
10 exception to notice and comment rulemaking that's found  
11 in the Administrative Procedure Act. That doesn't help  
12 EPA at all because the requirement comes not from the  
13 Administrative Procedure Act; the requirement to use  
14 notice and comment comes from (k)(6).

15 It doesn't help EPA to rely on an exception  
16 to a statute when the statute providing that exception  
17 is not the statute that imposes the requirement.

18 JUSTICE KAGAN: Well, why can't -- this is,  
19 of course, a statute on which EPA gets substantial  
20 Chevron deference. Why couldn't we read that language  
21 to essentially mean subject to the same procedural  
22 requirements as the original?

23 MR. MITCHELL: Because that caveat does not  
24 appear in (k)(6).

25 JUSTICE KAGAN: Well, it's not a caveat.

1 It's just a different understanding of what that  
2 language means. I mean, you say it has to be in the  
3 exact same -- in the exact same way they previously  
4 acted, and I guess I'm saying it could mean subject to  
5 the exact same procedural requirements.

6 Was that not clear? Am I being unclear?

7 MR. MITCHELL: I think your argument or  
8 suggestion is that EPA could rely on the normal rule set  
9 forth in the Administrative Procedure Act --

10 JUSTICE KAGAN: Whatever procedural  
11 requirements constrained EPA when it approved the SIP,  
12 those were the same procedural requirements that  
13 constrained EPA when it's disapproved the SIP. But  
14 we're just asking, are they -- you know, both are --  
15 have to be subject to the same procedural requirements.  
16 EPA can act differently, as long as they are acting  
17 within that same set of rules.

18 MR. MITCHELL: We don't think that's a  
19 tenable construction of (k)(6). I mean, (k)(6)  
20 authorizes EPA to make corrections, but it says,  
21 specifically, the corrections must be made in the same  
22 manner as the decision being corrected. If the decision  
23 being corrected went through notice and comment, the  
24 corrections have to go through notice and comment as  
25 well. If the decision being corrected went through

1 formal adjudication, then the correction must also go  
2 through formal adjudication.

3 And EPA doesn't try to make that argument in  
4 their brief about what (k)(6) means. They are just  
5 trying to say that the good cause exception in the APA  
6 to notice and comment rulemaking should carry over here,  
7 and there's --

8 JUSTICE KAGAN: Well, I think that they are  
9 trying to make that argument. They are saying, in the  
10 initial version, we could have done it by notice and  
11 comment rulemaking, or we could have done it if we had  
12 good cause, so, too, when we reverse that initial  
13 determination.

14 MR. MITCHELL: If that's what the statute  
15 means, then (k)(6) doesn't constrain the agency much at  
16 all because --

17 JUSTICE SCALIA: Well, I think -- it think  
18 it would follow that if you did it for good cause to --  
19 to apply the rule, you can do it for good cause to  
20 abolish it, not that you can do it by rulemaking when  
21 you adopt it and then used good cause when you -- when  
22 you abolish it. It would seem, to me, to square with  
23 the text.

24 MR. MITCHELL: The text says, "in the same  
25 manner as."

1 JUSTICE SCALIA: "In the same manner"?

2 MR. MITCHELL: "In the same manner." So  
3 it's looking back to the original decision and how it  
4 was made. And that's the second reason we've provided  
5 for why the D.C. Circuit decision should be affirmed.

6 Now, if the Court were to reach the (k)(6)  
7 issue, there's also the question of whether the FIPS can  
8 be severed because the (k)(6) argument doesn't -- I see  
9 my time's expired.

10 CHIEF JUSTICE ROBERTS: You can finish your  
11 sentence.

12 MR. MITCHELL: The (k)(6) argument doesn't  
13 knock out all of the steps on -- standing alone. It  
14 would require -- announces the severability question.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 Mr. Mitchell.

18 Mr. Keisler.

19 ORAL ARGUMENT OF PETER KEISLER

20 ON BEHALF OF THE INDUSTRY AND LABOR RESPONDENTS

21 MR. KEISLER: Mr. Chief Justice, and may it  
22 please the Court:

23 The private party Respondents are focused on  
24 the statutory limitations to the EPA's authority under  
25 the good neighbor provision. And I'd like to begin by

1 addressing the issue that my friend from the government  
2 focused on a lot, which is the use of cost, and to  
3 explain not only what we think the statute requires in  
4 this regard, but why, Justice Kagan, it would be neither  
5 silly nor dumb; or, Justice Sotomayor, crazy to read the  
6 statute the way we suggest.

7         And we begin with the text of the statute,  
8 which authorizes the prohibition only of amounts that  
9 contribute significantly to nonattainment or interfere  
10 with maintenance in downwind locations. The focus of  
11 that language, we think, is quite clearly on the effects  
12 of a State's emissions on other States and not on the  
13 cost of reducing them.

14         What EPA has done here is assert that it has  
15 the power to increase a State's reduction obligations  
16 beyond what a focus on the effects of its emissions  
17 would require, simply because EPA has decided that it  
18 would be reasonably affordable for that State to bear a  
19 higher burden.

20         And what that means is that States here  
21 which are making only a very slight contribution to air  
22 quality problems in downwind States are nonetheless  
23 required to make very substantial reductions, in many  
24 cases, far more than States that are making far greater  
25 contributions to poor air quality in the same downwind

1 locations.

2           There is no relationship at all, under the  
3 EPA's methodology, between the amount a State  
4 contributes and the amount it has to reduce because the  
5 entire driver is cost. Mr. Stewart said that cost was  
6 one component. It's not one component. It is the  
7 entire driver --

8           JUSTICE BREYER:           Why is it wrong? That is,  
9 I focused on your argument here in the briefs, which is  
10 very clear and very good. And -- and the example that  
11 comes to my mind is we have an overgrazing problem in  
12 State A. All right?

13           It's caused because cows come in from State  
14 B and sheep come in from State C. The cow men and the  
15 sheep men are in different States. They're not friends.

16           (Laughter.)

17           JUSTICE BREYER:           Now, it turns out -- it  
18 turns out that EPA, which is in charge of preventing the  
19 overgrazing, discovers that, if the sheep men build a  
20 fence, that will cure the problem, even though they only  
21 contribute half or maybe less.

22           Well, if we bury it -- you know, we divide  
23 it equally, you each have to pay -- you each have to  
24 cause half the problem because that seems fair, it's  
25 going to end up that the people in State A with the

1 cows, they're going to starve to death.

2 So our choice is between taking two people,  
3 two States, each of whom cause half the problem and  
4 getting an overall plan where you solve the problem at  
5 minimal cost or just dividing it 50/50, which seems fair  
6 in mathematics, but leads to starvation, cost and death,  
7 et cetera. Do you see what I'm driving at?

8 And that's what they've done here, the  
9 second method. They -- rather the -- they're not  
10 treating each State alike, you are right. And the  
11 reason that they're not treating each State alike is  
12 they know, one, all the States are partly responsible in  
13 more than one percent, and with this plan, we get the  
14 job done at much lower cost.

15 Now, where in the statute does it say they  
16 can't do that?

17 MR. KEISLER: I'll try to respond to that --  
18 that fully, Justice Breyer. Certainly, it is the case  
19 and we would acknowledge that there are always going to  
20 be legitimate policy arguments in favor of the least  
21 cost, most efficient solution to any problem.

22 But we would also say that there are  
23 countervailing policy arguments at issue here, and we do  
24 believe the statute sides with those countervailing  
25 policy arguments. And the countervailing policy

1 arguments here are focused on the fact that, in Your  
2 Honor's hypothetical, where there's one State that it  
3 would cost more to reduce and another State it would  
4 cost less.

5 The only scenario in which you get a  
6 different result under the EPA's approach and our  
7 approach is where the State that would cost more to  
8 reduce is, in fact, contributing a lot more to the  
9 downwind State's air problem than the other State.

10 And for several reasons, we think when the  
11 statute looks at that issue and asks the question of  
12 whether EPA should have the authority to force the State  
13 which is, in fact, contributing less to nonetheless  
14 reduce more simply because it's costly, we think there  
15 are at least three reasons why the statute embodies the  
16 policy choice that says, no, the State that contributes  
17 more, reduces more; the State that contributes less,  
18 reduce less.

19 The first is the one that I mentioned at the  
20 outset, which is the statutory text, which we think  
21 quite clearly is focused on the effects. "Significantly  
22 contribute to nonattainment or interfere with  
23 maintenance in downwind locations."

24 But the second is the whole structure of --

25 JUSTICE SCALIA: Amounts significantly

1 attribute, right? It's -- it's amounts.

2 MR. KEISLER: Amounts -- great -- that  
3 significantly contribute.

4 JUSTICE SCALIA: Yes, yes. Not conduct  
5 significantly.

6 MR. KEISLER: No, that's right. And I don't  
7 think the word "significantly" can bear the weight that  
8 Mr. Stewart places on it. It modifies the words  
9 "contribute to nonattainment." So it's about the degree  
10 of causal contribution. And it doesn't modify, at all,  
11 the phrase "interference with maintenance," and they've  
12 used the same cost methodology to implement that as  
13 well.

14 But the second, beyond the text, the whole  
15 structure of the Clean Air Act is focused on treating  
16 the States as separate entities, which are responsible  
17 for the emissions that happen within their borders and  
18 the effect that those emissions have on other States.  
19 That's why this is in a SIP, rather than some general  
20 EPA regulation, and that's why the language of the  
21 statute is what it is, amounts of emissions within a  
22 State.

23 And in this regard, I think it's --it's  
24 telling that, in the reply brief, what the government  
25 said was that it believes it has the kind of authority

1 here to consider cost that would be considered by a  
2 chancellor at equity in a nuisance case. A chancellor  
3 at equity in a nuisance case had private party  
4 defendants before him or her. And so, of course, they  
5 were allocating burdens on the basis of equity and  
6 efficiency and all the kinds of things a common law  
7 chancellor can take into account.

8 The EPA has before it separate States, with  
9 separate responsibilities, who have a long, historic  
10 role and responsibility of enforcing emissions control  
11 procedures within their border, and Congress could  
12 rightly or reasonably at least have concluded that it  
13 didn't want EPA to have the same authority to shift  
14 costs and efficiency and equity around among different  
15 States to require --

16 JUSTICE BREYER: On that point -- now, you  
17 remember, please, that -- that my cow/sheep example was  
18 meant to pick up precisely the disproportion that you're  
19 talking about. And -- and keep that in mind because I  
20 found it a helpful example.

21 Now, my point is, did you find in  
22 Congress -- and I'm interested in legislative history --  
23 did you find anything in the legislative history that  
24 suggests that, where the EPA faces this kind of regional  
25 problem, and it's a regional, not just a statewide

1 problem, that people in Congress thought they had an  
2 answer or a glimmer of an answer, as opposed to taking  
3 this language, which is pretty open, and saying, we're  
4 going to leave it to -- we don't know, we don't have a  
5 clue. The EPA is there to figure this thing out, and  
6 we're giving them the broad authority here.

7 Is there anything that cuts on your side  
8 that you see, as opposed to the other side of reading  
9 this language?

10 MR. KEISLER: I think there's one thing I  
11 can cite, Your Honor, and that is that the statutory  
12 history in this case is that the predecessor version to  
13 what we currently have before us simply said that States  
14 were required to prohibit the amounts which prevent  
15 attainment or maintenance, no word "significantly," just  
16 prevent attainment or maintenance. I think, certainly,  
17 looking at that language, there's nothing in there that  
18 would suggest that costs can be taken into account.

19 What Congress said in the committee report  
20 in 1990, when it added the words "significantly  
21 contribute to nonattainment and interfere with  
22 maintenance," was that it was doing that precisely  
23 because it recognized that this was a provision that  
24 addressed causation of bad air quality effects because  
25 what it was doing was not introducing some new element

1 of cost, but relaxing the causation standard, saying it  
2 shouldn't be something like but-for causation, where the  
3 question just doesn't prevent attainment or maintenance.  
4 It's enough if it contributes significantly to  
5 nonattainment or interfere.

6 JUSTICE KAGAN: So, Mr. Keisler, I mean, you  
7 have a statute here that clearly does not have any  
8 language about no costs allowed, that also does not have  
9 what the American Trucking Association statute had,  
10 which was like public health only, sufficient margin of  
11 safety; right? So none of that. What you have is  
12 exactly what you said. You have a statute that focuses  
13 on causal contribution, right?

14 So this is a hard problem, right?  
15 Because -- I mean, let me just sort of give you a  
16 numerical example, which I'm sure is as simplistic as  
17 the other numerical examples floating around this case.  
18 But -- you know, let's say that the standard is a  
19 hundred. And there's a State that has 120, and there  
20 are two States, X and Y, that have each contributed 20.  
21 Right.

22 So we -- you know, we only need 20 of those.  
23 We have 40. And the question is how do you get from  
24 those 40 to those 20? The D.C. Circuit would just say,  
25 well, we take 10 from each. But if this -- if the

1 question is only about causal contribution and that's  
2 all that the statute talks about, there have to be other  
3 ways we can make that determination of what contribution  
4 each should be legally responsible for, right?

5 And what the EPA said here was, we're going  
6 to distinguish between -- we're going to distinguish  
7 between States that have -- have put a lot of technology  
8 and a lot of money into this already and, on the other  
9 hand, States that have lots of cheap and dirty  
10 emissions. And why isn't that a perfectly rational  
11 thing to do under this very statute?

12 MR. KEISLER: Well, first of all, I think,  
13 in the example that Your Honor gave, where you had the  
14 two States and should they be each reduced to ten, the  
15 reason in favor of doing it that way, from a statutory  
16 perspective, is that that then gives a consistent  
17 application to the same causal language in the statute,  
18 which means that the same causal effect from one upwind  
19 State on a downwind State isn't significant if it comes  
20 from Indiana to Delaware, but insignificant if it comes  
21 from Tennessee; and that, when the statute says that  
22 States must prohibit the amounts they significantly  
23 contribute, then the more they contribute, the more they  
24 reduce.

25 So we see that as fitting much more securely

1 within the statutory language than the kind of shifting  
2 that Your Honor mentioned. Certainly, one could  
3 imagine, since the policy rationales that are behind  
4 Your Honor's question are certainly legitimate and more  
5 than plausible, certainly, one could imagine a statute  
6 that Congress could have written, which would have said,  
7 treat it as national playing field, ignore the fact  
8 that there are State boundaries, think about what the  
9 most efficient way to force reductions to achieve  
10 attainment in downwind locations, locate those  
11 reductions in the least cost areas, and impose those on  
12 the States.

13 Surely, if that was what Congress had  
14 intended, it wouldn't have written the statute which  
15 directs each State to include in its SIP provisions  
16 that --

17 JUSTICE SOTOMAYOR: Do you battle  
18 Mr. Stewart's point that Congress surely didn't intend  
19 to shut down these plants if they didn't or couldn't  
20 feasibly reduce their contributions?

21 MR. KEISLER: Yes, Your Honor, but we think  
22 the statute --

23 JUSTICE SOTOMAYOR: So if they couldn't  
24 feasibly do it, doesn't the words "significantly  
25 contribute" have to take into account, in some way, the

1 cost of reducing the amount?

2 MR. KEISLER: Your Honor, I'm here on behalf  
3 of industry and labor, so certainly, we believe that  
4 there have to be mechanisms to deal with the kinds of  
5 problems that Your Honor just identified, but we don't  
6 think they come out of defining the amounts that  
7 significantly contribute to nonattainment. We think  
8 that those kinds of considerations come into play  
9 elsewhere in the process.

10 In the American Trucking case that's been  
11 referred to, the Court said that, when States are  
12 implementing the requirements of the EPA, for example,  
13 by deciding to allocate among different sources what  
14 the -- how the reduction would be distributed, they can  
15 take costs into account. And there are other mechanisms  
16 in the SIP process when that definition of what amount  
17 significantly contributes is then translated into an  
18 emission reduction obligation.

19 We do think there are occasions, and we've  
20 noted them in Note 17 of our brief, where the State in  
21 then formulating its SIP can say, okay, this is the  
22 amount we have to reduce, but we're going to do it in  
23 this way because costs have to be taken into account.

24 But that is a very different matter from  
25 saying that EPA, in defining what amounts significantly

1 contribute, can do the same thing. And the reason it's  
2 different -- the reason it's not just, oh, we're  
3 locating it in some different box what EPA wants to do  
4 in its box, is that the box that we're locating it in  
5 makes clear that it functions as the kind of break Your  
6 Honor described.

7 If something is unfeasible or economic,  
8 there are ways to soften it out at the --

9 JUSTICE SOTOMAYOR: Well, they found a way  
10 to do that with the cost tradeoff with the cap and trade  
11 system --

12 MR. KEISLER: Well --

13 JUSTICE SOTOMAYOR: -- because the industry  
14 itself can make that choice, with the State, presumably.  
15 They're not stopping a SIP that stops a State from  
16 participating.

17 MR. KEISLER: Well, the trading presents  
18 unique issues under the statute. We support trading  
19 anywhere it's appropriate, but this is a statute which  
20 is focused on providing relief to downwind States. And  
21 if -- to take my other example, if Indiana is  
22 contributing emissions into Delaware that hurt its air  
23 quality, it does no good for Delaware if Indiana  
24 purchases allowances from Tennessee, which isn't  
25 contributing to Delaware.

1 JUSTICE BREYER: Yes, but you're -- I mean,  
2 you want me to write -- look what I would have to write,  
3 if I made it very specific. Two units floats over the  
4 air from the cow State. Two units floats over the air  
5 from the sheep State -- or three.

6 It happens that, if we treat them alike,  
7 we're going to tell the cow State, your unit is the same  
8 as the sheep State's unit, both make the same  
9 significant contribution, and we have to say that, even  
10 if for you to remit your unit causes death and  
11 destruction, destroys your economy, see, and I have to  
12 write those words to accept your argument, don't I?  
13 Because --

14 MR. KEISLER: I'd like to resist the role  
15 Your Honor --

16 JUSTICE BREYER: Of course.

17 MR. KEISLER: -- has assigned me of bringing  
18 death and destruction and starvation.

19 (Laughter.)

20 JUSTICE BREYER: Well, I'm trying to use the  
21 most -- I'm trying to use the most extreme words I can,  
22 so that, then, you will either have to draw a  
23 distinction or something. That's why I'm --

24 MR. KEISLER: But in some ways, the  
25 distinction is the one I was drawing in response to

1 Justice Sotomayor's question, which is that, when you  
2 get down to the level of implementing these things, you  
3 can take into account whether death, destruction,  
4 starvation will be taken care of, when the State is  
5 doing that as part of a SIP process.

6 But that doesn't bear on how the amount of  
7 significant contribution is defined because, when EPA  
8 takes costs into account it's not simply preventing the  
9 death and destruction and starvation. It's working the  
10 other way, too.

11 It's saying that, even though a causation  
12 standard only would require you to reduce this much, we,  
13 the EPA, can shift to you an additional burden because  
14 we think another State has already done enough.

15 JUSTICE SOTOMAYOR: They say that's not a  
16 theoretical possibility, under the numbers they've  
17 worked out. So why isn't this taken care of in the  
18 process that permits individual States to challenge this  
19 as applied?

20 MR. KEISLER: Let me make a distinction in  
21 that regard, Your Honor, which is what the government  
22 says is a theoretical possibility is simply whether a  
23 State would be driven below the one percent threshold.  
24 But what I'm saying really goes back to Justice Scalia's  
25 very first question, which is, even apart from the one

1 percent threshold, every time they are allocating on the  
2 basis of cost and displacing what you would allocate on  
3 the basis of what each State actually contributes, then  
4 you are shifting burdens around, even apart from the one  
5 percent.

6 JUSTICE KENNEDY: But you're -- you're  
7 saying that "significant" must mean only measurable  
8 amounts. It can't mean -- pick your word --  
9 culpability, feasibility, responsibility, feasibility.  
10 One State finds it quite feasible, from a cost  
11 standpoint, to reduce emissions by a factor of 10. The  
12 other State is the -- Justice Breyer's example, finds  
13 that it can't do it, except if it's a factor of a  
14 hundred.

15 Can't you say that the contribution in one  
16 case is more significant than the other, based on  
17 feasibility? Maybe you can't.

18 MR. KEISLER: I don't think so, Your Honor.  
19 I don't think that is a proper definition of  
20 "significant," when it's modifying "contribution to  
21 nonattainment."

22 Mr. Stewart --

23 JUSTICE SCALIA: It isn't contributions to  
24 nonattainment. It's the word "amounts." The statute  
25 prohibits activity within the State from emitting any

1 air pollutant in amounts which will contribute  
2 significantly.

3 MR. KEISLER: We agree, Your Honor, and we  
4 would emphasize that language as well.

5 JUSTICE SCALIA: Okay. Amounts are amounts.  
6 I mean, it doesn't --

7 JUSTICE KENNEDY: But the word -- the word  
8 "significantly" does import a judgmental component. I  
9 think that's what the government is going to say. I  
10 just wanted to ask you what --

11 MR. KEISLER: It's not a -- it's not a  
12 limitless --

13 JUSTICE KENNEDY: Maybe they'll have a  
14 better answer.

15 MR. KEISLER: I don't think that  
16 "significantly" means that any factor that might be  
17 deemed relevant in a broad policy sense can be imported  
18 in. I think when you have a statute here which talks  
19 about amounts that contribute significantly to  
20 nonattainment or interfere with maintenance --

21 JUSTICE BREYER: All right. So there's an  
22 ambiguity here because, I mean, when you use the word  
23 "amounts," I think it does help you. Add the word  
24 "amounts" to "significantly," and I think that Justice  
25 Scalia's point might be -- he knows it better than I --

1 an amount is an amount. An amount is an amount. That's  
2 what you want to say.

3 JUSTICE SCALIA: That's my point exactly.

4 (Laughter.)

5 JUSTICE BREYER: Yes. Yes. It is. And  
6 then the -- the response is, well, not always because  
7 you say, an amount, you're talking about a specific  
8 amount coming out of a State, and is the one -- the cow  
9 one, as significant as the sheep one. All right?

10 And that's, I think, where -- I think you  
11 hit the nail as to what the issue is.

12 MR. KEISLER: Yes, and I guess our position  
13 is that significant may have a range of meanings, but  
14 it's not a limitless range of meanings. I think one  
15 member of the Court once said the fact that yellow is  
16 ambiguous doesn't mean it can mean purple.

17 And here -- you know, we don't think a range  
18 of meanings in the context of this provision accommodate  
19 the government's definition.

20 JUSTICE KAGAN: But, Mr. Keisler, the nature  
21 of this problem is that there's an allocation issue.  
22 It's not just everybody gets down to a certain threshold  
23 level. It's there's a level, and we have to allocate.  
24 And the question is, what are we going to allocate on  
25 the basis of?

1           And the word "amounts" doesn't tell you what  
2           you're going to allocate on the basis of. So there are  
3           lots of different choices for what we can allocate on  
4           the basis of.

5           We can just divide -- you know, and do it  
6           all proportionally. We can take into account per  
7           capita. We can take into account a State's population,  
8           if we wanted to. Or we can take into account, as the  
9           EPA did here, costs on the understanding that costs  
10          reflect how much of an investment a State has already  
11          made in pollution technology.

12          So the statute -- neither the word "amount"  
13          nor anything else says anything about those different  
14          methods of allocation, does it?

15          MR. KEISLER:           I -- I disagree with that,  
16          Your Honor. I think -- and -- you know, I don't focus  
17          exclusively on the word "amount" or the word  
18          "significantly." It's the entire phrase, "amounts that  
19          contribute significantly to nonattainment or interfere  
20          with maintenance," which I do think ten out of ten  
21          people who weren't in this courtroom and hadn't read the  
22          Clean Air Act, if you sat down and asked them, what does  
23          it mean? They're talking about what the effect the  
24          emissions in one state have on the other.

25          I don't think this is any more ambiguous in

1 referring to air quality effects as a standard than the  
2 NAAQS statute at issue in American Trucking was in  
3 talking about safety and health as a standard. It does  
4 supply a content to what the EPA has to do, and that  
5 content isn't cost. It's this air quality effect  
6 standard.

7 CHIEF JUSTICE ROBERTS: What is -- what is  
8 your answer -- do you have an answer to Mr. Stewart's  
9 basketball hypothetical? I mean, I thought that was  
10 pretty good. If you ask the coach what significantly  
11 contributed to the loss, he's going to talk about the  
12 missed layup, rather than the missed desperation throw,  
13 even though, as far as amount, each was going to count  
14 for two points.

15 Assuming one was within the --

16 (Laughter.)

17 MR. KEISLER: Well, it's very hard -- it's  
18 very hard for me to translate the -- the amount concept  
19 into performance on the basketball court, but  
20 Mr. Stewart's other example was a contribution to a  
21 charity.

22 And I certainly would accept the notion that  
23 if Bill Gates and I each contribute a hundred dollars to  
24 a charity, I've made the more significant contribution,  
25 but that's because we're using "contribution" in that

1 context to mean something else. We're using it to mean  
2 "donate" or "give."

3 We're not using it to talk about --

4 JUSTICE SCALIA: But the basketball thing  
5 is -- to make it parallel to what's at issue here, the  
6 question you should ask the coach, which -- which of  
7 the -- you lost 101 to 100. Which of the 101 points  
8 contributed most to your loss?

9 (Laughter.)

10 JUSTICE BREYER: As in the answer is that  
11 some one point --

12 JUSTICE SCALIA: It's -- it's the one that  
13 was the layup. I mean, he would not answer the one that  
14 was the layup. He'd say what do you mean? All -- all  
15 of the 101.

16 MR. KEISLER: But if there were different  
17 teams playing in the league and you had an overall  
18 result, you could actually determine -- you know, which  
19 team had contributed what to the overall result. And  
20 when we're dealing with States, we are dealing with  
21 groups that the statute conceptualizes as separate teams  
22 which are entitled to be treated separately.

23 But I would like to make just one other  
24 point because I see my white light is on. We have  
25 raised a completely separate argument. It's the first

1 argument in our brief, which is independent of how the  
2 Court decides EPA may define the amount that contributes  
3 significantly, whether cost or air quality effects or  
4 anything else, and that is that, however it's defined,  
5 EPA cannot regulate beyond the point necessary to  
6 achieve attainment or maintenance in downwind locations.

7 And here, although in the prior two good  
8 neighbor rulemakings, it specifically said it examined  
9 the issue and avoided overkill, here, it didn't say that  
10 because it didn't do that.

11 Apart from the cost versus air quality  
12 issue, we had commenters that submitted evidence that  
13 showed that EPA could achieve attainment and maintenance  
14 at virtually all the same downwind locations at lower  
15 levels of regulation.

16 And EPA's response to that, on Pet App  
17 354(a), was they weren't going to look at lower levels  
18 of regulation because, at lower levels of regulation,  
19 some sources in some States might cease operating  
20 existing controls, and that's all they said.

21 But if sources in some States could cease  
22 operating existing controls and as the commenter said,  
23 you would still achieve attainment and maintenance in  
24 all the downwind locations that they are linked to, then  
25 EPA has no authority under the good neighbor provision

1 to require those sources to continue operating their  
2 existing controls.

3 There may be authority under other  
4 provisions, but not this one. And the EPA, in this  
5 particular proceeding, said nothing else, gave no other  
6 reason for refusing to act on the evidence that  
7 commenters submitted, that lower levels of regulation at  
8 most upwind States would still achieve attainment and  
9 maintenance at downwind locations, and they had no  
10 authority to regulate beyond the point necessary to  
11 achieve attainment and maintenance.

12 If the Court has no further questions, thank  
13 you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
15 Mr. Stewart, you have 4 minutes remaining.

16 REBUTTAL ARGUMENT OF MALCOLM L. STEWART

17 ON BEHALF OF THE PETITIONERS

18 MR. STEWART: Thank you, Mr. Chief Justice.

19 As Mr. Keisler indicated, in our reply  
20 brief, we cited the -- the history of the restatement as  
21 it bears on the common law of nuisance. And as this  
22 Court indicated in *American Electric Power*, if the Clean  
23 Air Act had not been enacted, the remedy that downwind  
24 States would have in a situation like this one would be  
25 a Federal common law nuisance suit against upwind States

1 or polluters in upwind States.

2 And I think there are three lessons to draw  
3 from that fact. The first is that, as the briefs and  
4 argument in this case indicate, judicial resolution of  
5 such a suit would have been a Herculean task. And the  
6 prospect of doing that through judicial processes should  
7 reinforce the wisdom of Congress' choice to replace that  
8 mechanism with the Clean Air Act, and it counsels in  
9 favor of deference to the expert agency that has been  
10 placed in the position that a common law court would  
11 previously have been placed in.

12 The second is that, as the reply brief  
13 citation to the law of nuisance indicates, the common  
14 law court in that scenario would have been able to  
15 consider the costs necessary to achieve reduction in  
16 pollution upwind in deciding whether a particular remedy  
17 would be appropriate or how much of a reduction an  
18 upwind polluter should have to make. And there's no  
19 reason, absent extraordinarily clear statutory language,  
20 to deny EPA the same authority.

21 The third thing is, as the analogy to the  
22 common law suit indicates, there are sovereign State  
23 interests on both sides of this case. This is not a  
24 matter of EPA versus the States. It's a matter of EPA  
25 trying to act as an honest broker between the upwind and

1 downwind States.

2           The next thing I would say about the Clean  
3 Air Act is that the statute, as a whole, is replete with  
4 references to economic activity and harnessing the  
5 profit motive; that is, both the States and EPA are  
6 specifically authorized to provide for the trading of  
7 allowances, the whole purpose of which is to achieve  
8 emission reductions in the most cost-effective manner  
9 possible.

10           And I think it's worth noting in this regard  
11 that, although we talk about the transport rule as  
12 regulating the emission of -- emissions of States, what  
13 we're really regulating is emissions of power plants  
14 within the States, and the good neighbor provision,  
15 itself, talks about preventing significant contribution  
16 from emissions sources or emissions activity within the  
17 States.

18           And one of the things that the EPA said in  
19 the proposed rulemaking was that, in some circumstances,  
20 the cumulative downwind impact of a particular upwind  
21 State might be great, not because any particular power  
22 plant was poorly regulated or emitting at a high level,  
23 but because there were so many power plants in the same  
24 State.

25           And one consequence of forbidding the EPA to

1 consider costs is that a particular power plant in an  
2 upwind State might be required to install more expensive  
3 pollution control measures and make greater reductions,  
4 simply because it happened to be located in a State with  
5 a lot of other power plants.

6 And the last thing I would say is this is --  
7 the statute, as I've said before, has prospective focus.  
8 It's intended to be implemented by State officials, and  
9 if you ask how would a State official assure herself or  
10 feel confident that her own State implementation plan  
11 was satisfying good neighbor obligations, when she  
12 wasn't really sure what other States might be doing, and  
13 one way is if a State official said, if everybody else  
14 did what I'm doing, I can feel confident that the  
15 problem would be solved.

16 And that's really the approach that EPA  
17 used. It examined certain cost thresholds, and it said,  
18 at particular cost thresholds, we feel confident that if  
19 everyone, upwind and downwind States alike -- alike  
20 makes pollution control efforts at these levels, the  
21 problem will be solved or at least almost solved because  
22 there would still be slight residual nonattainment.

23 And it seems perfectly rational to say that  
24 the significant contribution is the amount over and  
25 above what would occur, if everyone adhered to an

1 approach which, if applied across the board, would solve  
2 the problem.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 Counsel.

6 The case is submitted.

7 (Whereupon, at 11:39 a.m., the case in the  
8 above-entitled matter was submitted.)

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23  
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25

A				
<b>abandoning</b> 40:12 44:21	74:22 78:6,23 79:8,25 80:3	44:7	<b>allocating</b> 62:5 71:1	<b>analyze</b> 26:8
<b>ability</b> 36:13	<b>acted</b> 26:24 54:4	<b>advance</b> 39:19	<b>allocation</b> 14:16 73:21 74:14	<b>announced</b> 25:14
51:6 52:1	<b>acting</b> 54:16	<b>affect</b> 6:3 37:14	<b>allow</b> 17:25 33:18	<b>announces</b> 56:14
<b>able</b> 6:1 32:23 52:4 79:14	<b>action</b> 52:13	<b>affirm</b> 31:11	<b>allowances</b> 35:2 35:15 36:14	<b>annual</b> 12:8
<b>abolish</b> 55:20,22	<b>actions</b> 38:1,14 38:16	<b>affirmation</b> 44:3	68:24 80:7	<b>answer</b> 7:7 11:6 11:15 16:21
<b>aboveentitled</b> 1:20 82:8	<b>activity</b> 21:2 71:25 80:4,16	<b>affirmative</b> 10:1	<b>allowed</b> 23:25 34:24 35:3	63:2,2 72:14 75:8,8 76:10
<b>absent</b> 79:19	<b>actors</b> 14:12,16	<b>affirmed</b> 56:5	40:9 64:8	76:13
<b>absolutely</b> 29:17	<b>acts</b> 21:22	<b>affirms</b> 31:14	<b>allowing</b> 33:21	<b>answered</b> 7:15
<b>accept</b> 15:6 45:23 69:12 75:22	<b>add</b> 35:2 72:23	<b>affordable</b> 57:18	<b>allows</b> 8:18	<b>anticipatorily</b> 48:6
<b>accommodate</b> 73:18	<b>added</b> 33:17 63:20	<b>agencies</b> 29:24 40:18	<b>alternative</b> 10:10 31:18	<b>apa</b> 55:5
<b>accomplish</b> 11:2	<b>addition</b> 5:12 14:7	<b>agency</b> 1:4 4:5 24:9,9,13 29:23 30:3,11 30:15 38:17 55:15 79:9	<b>ambient</b> 5:3 11:21 13:22 20:16	<b>apart</b> 70:25 71:4 77:11
<b>account</b> 7:3,18 8:18 14:17 16:24 19:11 26:6 34:8 62:7 63:18 66:25 67:15,23 70:3 70:8 74:6,7,8	<b>additional</b> 5:13 5:20 7:12 25:17 36:2 37:13 70:13	<b>agnostic</b> 42:3	<b>ambiguity</b> 72:22	<b>app</b> 77:16
<b>accurately</b> 51:6	<b>address</b> 19:18 22:7,18 28:21 29:25 31:22	<b>ago</b> 11:11 47:11	<b>ambiguous</b> 73:16 74:25	<b>appeals</b> 28:16 29:10,11,16
<b>achieve</b> 5:20 8:14 12:11 17:11 31:3,17 66:9 77:6,13 77:23 78:8,11 79:15 80:7	<b>addressed</b> 18:9 19:9 63:24	<b>agree</b> 46:22 72:3	<b>ameliorate</b> 11:10	<b>appear</b> 53:24
<b>achieved</b> 5:14 17:16 41:13	<b>addressing</b> 57:1	<b>agrees</b> 13:7 51:5	<b>american</b> 1:11 4:6 13:25 17:7 64:9 67:10 75:2 78:22	<b>appearances</b> 1:23
<b>achievement</b> 9:14,16 14:10 18:17	<b>adequate</b> 13:11 20:25	<b>air</b> 5:2,3 6:20 7:9,11 8:3 11:21,21 13:22 17:15 20:16 21:3 26:3,5 38:2 45:4,8,9 47:1 57:21,25 60:9 61:15 63:24 68:22 69:4,4 72:1 74:22 75:1,5 77:3,11 78:23 79:8 80:3	<b>amici</b> 41:14	<b>appears</b> 43:19
<b>achieving</b> 30:16	<b>adequately</b> 30:21 49:20	<b>airqualityonly</b> 8:1	<b>amount</b> 15:25 33:6 58:3,4 67:1,16,22 70:6 73:1,1,1,1 73:7,8 74:12 74:17 75:13,18 77:2 81:24	<b>appendix</b> 20:8 27:6 39:2
<b>acknowledge</b> 40:11 59:19	<b>adhered</b> 81:25	<b>al</b> 1:4,8,11,15	<b>amounts</b> 21:3 24:1 57:8 60:25 61:1,2 61:21 63:14 65:22 67:6,25 71:8,24 72:1,5 72:5,19,23,24 74:1,18	<b>application</b> 6:25 65:17
<b>acknowledging</b> 44:20 49:20	<b>adjudication</b> 55:1,2	<b>alike</b> 59:10,11 69:6 81:19,19	<b>amici</b> 41:14	<b>applied</b> 32:2 34:17 41:9 70:19 82:1
<b>act</b> 21:23 36:8 38:2 45:8 47:1 53:11,13 54:9 54:16 61:15	<b>adjudications</b> 40:16	<b>alleviate</b> 15:7	<b>amounts</b> 21:3 24:1 57:8 60:25 61:1,2 61:21 63:14 65:22 67:6,25 71:8,24 72:1,5 72:5,19,23,24 74:1,18	<b>apply</b> 17:2 55:19
	<b>administrative</b> 29:23 49:2 53:11,13 54:9	<b>alleviating</b> 14:12	<b>analogy</b> 22:4 79:21	<b>approach</b> 27:23 32:2,6 38:6 39:24 44:14,19 45:11 47:6 60:6,7 81:16 82:1
	<b>administrator</b> 20:13,14 27:10 27:12 46:7	<b>allocated</b> 35:15 36:14	<b>analysis</b> 4:16,18	<b>approvals</b> 53:1
	<b>adopt</b> 9:1 20:13 26:22 55:21			<b>approve</b> 42:11 45:15 47:10
	<b>adopted</b> 7:9 20:22 43:7 44:10			<b>approved</b> 48:14 48:18 51:23 52:5 54:11
	<b>adopting</b> 25:22			

<b>approves</b> 51:25	78:8,11	10:13 75:9,19	<b>box</b> 68:3,4,4	28:20 32:3
<b>approving</b> 52:8	<b>attempting</b>	76:4	<b>break</b> 68:5	36:5,23 38:25
<b>arbitrary</b> 29:13	18:18	<b>battle</b> 66:17	<b>breyer</b> 12:7	56:5 58:14
30:13 33:3,11	<b>attention</b> 13:3,4	<b>bear</b> 57:18 61:7	34:10 39:7	64:24
33:13 38:16	13:7,14 20:7	70:6	40:1,14 50:1	<b>cair</b> 21:14 51:1,3
39:22 40:20	<b>attribute</b> 61:1	<b>bears</b> 15:17	50:10 58:8,17	<b>call</b> 13:21 21:13
<b>area</b> 5:7 23:16	<b>austin</b> 2:2	78:21	59:18 62:16	38:20 39:25
<b>areas</b> 66:11	<b>authority</b> 29:25	<b>beginning</b> 27:9	69:1,16,20	43:19 45:2
<b>argued</b> 44:13	43:14 46:25	<b>begins</b> 20:11,21	72:21 73:5	46:23 47:7
<b>argument</b> 1:21	47:14,18 49:8	<b>behalf</b> 1:25 2:3	76:10	49:19 52:12
3:2,5,8,11 4:4	56:24 60:12	2:4 3:4,7,10,13	<b>breyers</b> 43:15	<b>called</b> 22:12,13
4:9 16:22	61:25 62:13	4:10 37:23	71:12	<b>calls</b> 44:7
21:21 29:2	63:6 77:25	56:20 67:2	<b>brief</b> 19:22 20:9	<b>cant</b> 12:16 17:9
34:11 35:6,8	78:3,10 79:20	78:17	22:4 24:17	17:14 18:13,15
37:22 49:18	<b>authorized</b> 80:6	<b>believe</b> 21:14	38:25 51:22	18:17 19:11,13
54:7 55:3,9	<b>authorizes</b> 54:20	59:24 67:3	55:4 61:24	19:15 26:8
56:8,12,19	57:8	<b>believed</b> 30:19	67:20 77:1	29:17 34:8
58:9 69:12	<b>available</b> 5:15	<b>believes</b> 23:17	78:20 79:12	35:9 36:18
76:25 77:1	8:13 23:1,1	61:25	<b>briefs</b> 36:22	50:11 51:7
78:16 79:4	<b>average</b> 32:21	<b>benefit</b> 34:1	41:14 58:9	53:18 59:16
<b>arguments</b> 49:7	32:23	<b>benefits</b> 30:12	79:3	71:8,13,15,17
59:20,23,25	<b>averaging</b> 33:12	30:16	<b>bring</b> 26:3	<b>cap</b> 68:10
60:1	<b>avoided</b> 11:2	<b>best</b> 16:8 24:13	<b>bringing</b> 69:17	<b>capable</b> 25:21
<b>asapplied</b> 29:6	16:7,11,14	40:4 46:6	<b>broad</b> 46:20	<b>capita</b> 74:7
<b>asked</b> 10:14	34:7 77:9	<b>better</b> 13:2,8	63:6 72:17	<b>capricious</b> 29:14
74:22		15:4 25:18	<b>broker</b> 79:25	30:13 38:17
<b>asking</b> 12:12	<b>B</b>	39:21 40:5,5	<b>bucks</b> 33:1	39:23 40:20
50:14 54:14	<b>b</b> 58:14	72:14,25	<b>budget</b> 5:10	<b>care</b> 19:25 70:4
<b>asks</b> 60:11	<b>back</b> 12:2,3 37:5	<b>beyond</b> 57:16	34:22	70:17
<b>aspect</b> 34:13,16	43:15 44:14	61:14 77:5	<b>budgets</b> 19:20	<b>carolina</b> 6:23
<b>aspects</b> 34:13	46:3 50:4,12	78:10	35:12	36:6
<b>assert</b> 57:14	56:3 70:24	<b>big</b> 28:14	<b>build</b> 58:19	<b>carried</b> 37:16
<b>asserted</b> 46:24	<b>bad</b> 10:4,12,25	<b>bill</b> 75:23	<b>burden</b> 6:2 8:2	<b>carry</b> 23:17 55:6
51:16	41:24 63:24	<b>blame</b> 9:4	20:3 22:6	<b>carrying</b> 6:2
<b>asserts</b> 47:13	<b>balance</b> 4:15	<b>blank</b> 43:10	57:19 70:13	25:21
<b>assigned</b> 69:17	<b>ball</b> 25:2,8 39:19	<b>blanks</b> 47:4	<b>burdens</b> 31:20	<b>case</b> 4:4,6 7:9,10
<b>association</b> 1:11	<b>barred</b> 14:4	<b>blows</b> 50:7	33:22 45:25	7:24 9:25 12:4
4:7 13:5 64:9	31:5	<b>board</b> 40:15,15	62:5 71:4	13:18,19,24
<b>assume</b> 27:22	<b>based</b> 13:23	82:1	<b>bury</b> 16:2 58:22	24:13,18 26:20
43:25 44:4	71:16	<b>border</b> 62:11	<b>business</b> 37:15	28:14,18,22
<b>assuming</b> 75:15	<b>bases</b> 6:5	<b>borders</b> 9:2	<b>butfor</b> 10:21	33:24 35:7
<b>assure</b> 81:9	<b>basic</b> 4:17 21:11	15:13 23:23	64:2	36:11 38:1,16
<b>attack</b> 48:10	<b>basically</b> 27:24	26:8,9 35:1	<b>buzzer</b> 10:18,20	59:18 62:2,3
<b>attainment</b>	36:4	36:18 61:17		63:12 64:17
23:22 63:15,16	<b>basis</b> 62:5 71:2,3	<b>bottom</b> 20:19,24	<b>C</b>	67:10 71:16
64:3 66:10	73:25 74:2,4	<b>bound</b> 42:10	<b>c</b> 1:17,25 2:4 3:1	79:4,23 82:6,7
77:6,13,23	<b>basketball</b> 9:16	<b>boundaries</b> 66:8	4:1 27:10	<b>cases</b> 25:20

<p>57:24  <b>categories</b> 6:8  <b>causal</b> 61:10          64:13 65:1,17          65:18  <b>causation</b> 63:24          64:1,2 70:11  <b>cause</b> 10:9,21          13:21 53:9          55:5,12,18,19          55:21 58:24          59:3  <b>caused</b> 34:2          58:13  <b>causes</b> 69:10  <b>causing</b> 14:21  <b>caveat</b> 53:23,25  <b>cease</b> 77:19,21  <b>certain</b> 26:14          73:22 81:17  <b>certainly</b> 16:1          18:5 21:11          22:11,25 23:5          33:11,13 37:9          38:10,10 59:18          63:16 66:2,4,5          67:3 75:22  <b>cetera</b> 59:7  <b>challenge</b> 29:8          30:22 48:20          70:18  <b>challenged</b> 6:25          47:24 48:1,3          48:11,15 49:6          52:18  <b>challenges</b> 28:19          29:6  <b>challenging</b>          41:11,12 52:11  <b>chancellor</b> 62:2          62:2,7  <b>change</b> 38:17          40:3,9,20  <b>changed</b> 43:17          44:19 49:18  <b>changes</b> 6:1 7:2          50:7</p>	<p><b>changing</b> 40:8  <b>chapter</b> 20:22  <b>characterize</b>          25:8  <b>charge</b> 58:18  <b>charged</b> 44:11  <b>charitable</b> 9:19  <b>charity</b> 75:21,24  <b>cheap</b> 65:9  <b>chevron</b> 53:20  <b>chew</b> 42:22  <b>chief</b> 4:3,11 9:23          10:6 19:17          21:5,15 22:2          22:18 29:1          37:18,24 38:9          46:4 56:10,16          56:21 75:7          78:14,18 82:4  <b>choice</b> 59:2          60:16 68:14          79:7  <b>choices</b> 74:3  <b>choose</b> 51:17  <b>circuit</b> 28:20          32:3 36:23          39:1 56:5          64:24  <b>circuits</b> 36:5  <b>circumstance</b>          28:9  <b>circumstances</b>          25:24 35:25          80:19  <b>citation</b> 79:13  <b>cite</b> 38:24 40:4          63:11  <b>cited</b> 78:20  <b>cites</b> 39:1  <b>city</b> 1:7,14 4:5,7  <b>clean</b> 38:2 45:8          45:9 47:1          61:15 74:22          78:22 79:8          80:2  <b>cleaner</b> 12:21  <b>clear</b> 14:5 40:25</p>	<p>54:6 58:10          68:5 79:19  <b>clearly</b> 16:12          57:11 60:21          64:7  <b>close</b> 22:15  <b>clue</b> 63:5  <b>coach</b> 10:14,15          75:10 76:6  <b>coalition</b> 41:21  <b>collateral</b> 48:10  <b>come</b> 19:19 24:4          25:4 37:5          39:12,14,20,21          51:11,12 58:13          58:14 67:6,8  <b>comes</b> 16:17          21:16 26:2          53:12,14 58:11          65:19,20  <b>coming</b> 73:8  <b>commandand...</b>          41:15  <b>commensurate</b>          9:9 15:19  <b>comment</b> 39:16          53:2,4,6,10,14          54:23,24 55:6          55:11  <b>commenter</b>          77:22  <b>commenters</b>          77:12 78:7  <b>commerce</b> 30:5  <b>commitments</b>          9:10  <b>committee</b> 63:19  <b>common</b> 9:15          14:8 62:6          78:21,25 79:10          79:13,22  <b>compared</b> 6:20          7:25  <b>comparison</b>          30:12  <b>compels</b> 45:14  <b>competing</b> 4:15</p>	<p><b>completely</b> 38:4          76:25  <b>compliance</b> 26:3          31:21 33:22          36:3  <b>compliant</b> 26:23  <b>complicated</b>          19:23 22:12          32:4  <b>comply</b> 24:20          36:17 37:1  <b>component</b> 9:14          16:6 58:6,6          72:8  <b>computer</b> 5:11  <b>conceded</b> 27:18  <b>concept</b> 75:18  <b>conceptualizes</b>          76:21  <b>conclude</b> 14:3  <b>concluded</b> 62:12  <b>conclusion</b>          26:21 28:9  <b>concrete</b> 31:18  <b>conduct</b> 30:2          61:4  <b>confident</b> 81:10          81:14,18  <b>Congress</b> 13:8,9          13:13,15 14:4          14:23 16:1          17:19,20 18:3          18:6 25:18          62:11,22 63:1          63:19 66:6,13          66:18 79:7  <b>consensus</b> 41:25  <b>consequence</b>          31:2,5,6 33:24          80:25  <b>consider</b> 14:1          17:8,14,16          18:15,17 19:13          19:15 26:10          28:23 31:15,19          41:18 62:1          79:15 81:1</p>	<p><b>consideration</b>          14:4 17:12          25:23 33:21  <b>considerations</b>          67:8  <b>considered</b> 8:3          17:10 18:14          35:9 62:1  <b>consistent</b> 21:1          49:21 65:16  <b>consolidated</b> 4:6  <b>constant</b> 6:16  <b>constrain</b> 55:15  <b>constrained</b>          36:8 43:12          54:11,13  <b>construction</b>          40:13 54:19  <b>constructions</b>          46:14  <b>construed</b> 9:13  <b>contain</b> 19:4,7          20:25  <b>contains</b> 18:12  <b>contaminated</b>          30:5,8,9  <b>contemplated</b>          37:12  <b>content</b> 75:4,5  <b>context</b> 21:22          73:18 76:1  <b>continue</b> 78:1  <b>continuing</b> 37:3  <b>contrary</b> 38:12  <b>contribute</b> 5:1,4          5:7 9:11 10:20          11:12 19:5,11          21:4 23:2          33:16 38:5          45:4 50:3,5          51:15 57:9          58:21 60:22          61:3,9 63:21          65:23,23 66:25          67:7 68:1 72:1          72:19 74:19          75:23</p>
--	---	--	---	---

<p><b>contributed</b> 10:4,7,7,11,15 20:1 64:20 75:11 76:8,19</p> <p><b>contributes</b> 47:4 47:9 49:24 58:4 60:16,17 64:4 67:17 71:3 77:2</p> <p><b>contributing</b> 9:2 32:9,18 33:19 34:14 60:8,13 68:22,25</p> <p><b>contribution</b> 8:23 9:20,22 9:25 10:12 14:6 16:10,11 18:14 57:21 61:10 64:13 65:1,3 69:9 70:7 71:15,20 75:20,24,25 80:15 81:24</p> <p><b>contributions</b> 10:25 12:22 26:10 27:21 31:22 57:25 66:20 71:23</p> <p><b>control</b> 5:12,14 5:20 6:12,16 7:11 8:12 12:20 16:8,19 18:4 19:12 62:10 81:3,20</p> <p><b>controls</b> 23:24 26:4 77:20,22 78:2</p> <p><b>conversations</b> 46:10,12,13,19</p> <p><b>correct</b> 8:8 25:11 41:16 49:17</p> <p><b>corrected</b> 53:1 54:22,23,25</p> <p><b>correction</b> 52:24 55:1</p> <p><b>corrections</b></p>	<p>49:11 52:6,23 53:4,5 54:20 54:21,24</p> <p><b>corrective</b> 52:13</p> <p><b>cost</b> 5:15,21 6:16 6:17,24 7:1 8:1 8:12 13:21 15:19 16:21,23 17:2,8,9 18:17 19:12 21:12 23:7 30:16 33:5,14,22,25 35:7 41:12 57:2,13 58:5,5 59:5,6,14,21 60:3,4,7 61:12 62:1 64:1 66:11 67:1 68:10 71:2,10 75:5 77:3,11 81:17,18</p> <p><b>costeffective</b> 16:18 33:8 80:8</p> <p><b>costly</b> 60:14</p> <p><b>costs</b> 13:3,4,7,15 14:1,4,17 17:12,14,17 18:13 31:15,19 34:6,8 35:9 41:18 50:5 62:14 63:18 64:8 67:15,23 70:8 74:9,9 79:15 81:1</p> <p><b>couldnt</b> 16:7,14 17:12,20 32:22 53:20 66:19,23</p> <p><b>counsel</b> 37:18 78:14 82:4,5</p> <p><b>counsels</b> 79:8</p> <p><b>count</b> 75:13</p> <p><b>counter</b> 40:23 40:24 41:7</p> <p><b>countervailing</b> 59:23,24,25</p> <p><b>course</b> 5:23</p>	<p>13:25 17:16 19:19 26:13 30:11 53:19 62:4 69:16</p> <p><b>court</b> 1:1,21 4:12 10:17 13:24 17:6,13 18:13 19:10 22:1 28:13,16 28:18,22,23 29:10,11,15,19 31:14 37:25 49:4 56:6,22 67:11 73:15 75:19 77:2 78:12,22 79:10 79:14</p> <p><b>courtroom</b> 74:21</p> <p><b>courts</b> 20:7 37:13</p> <p><b>covered</b> 4:19 5:9</p> <p><b>cow</b> 58:14 62:17 69:4,7 73:8</p> <p><b>cows</b> 58:13 59:1</p> <p><b>crack</b> 47:8</p> <p><b>crazy</b> 41:19 57:5</p> <p><b>credit</b> 12:15</p> <p><b>criteria</b> 13:23 17:10 27:15</p> <p><b>crucial</b> 23:9 24:8</p> <p><b>culpability</b> 71:9</p> <p><b>cumulative</b> 80:20</p> <p><b>cure</b> 58:20</p> <p><b>currently</b> 63:13</p> <p><b>cut</b> 34:14 50:4 50:12</p> <p><b>cuts</b> 63:7</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>d</b> 1:17,25 2:4 4:1 28:20 32:3 36:5,23 38:8 38:22,25 39:6 46:25 49:10,23</p>	<p>56:5 64:24</p> <p><b>dark</b> 38:4</p> <p><b>data</b> 23:1</p> <p><b>day</b> 40:16</p> <p><b>deadline</b> 21:7</p> <p><b>deal</b> 25:12 29:23 67:4</p> <p><b>dealing</b> 18:24 19:7 22:20 76:20,20</p> <p><b>deals</b> 19:6</p> <p><b>death</b> 10:10 59:1 59:6 69:10,18 70:3,9</p> <p><b>december</b> 1:18</p> <p><b>decide</b> 36:13 43:3 44:15 51:15</p> <p><b>decided</b> 40:15 57:17</p> <p><b>decides</b> 77:2</p> <p><b>deciding</b> 14:1 17:17 67:13 79:16</p> <p><b>decision</b> 13:6 17:13 31:11 37:14 52:8 53:1 54:22,22 54:25 56:3,5</p> <p><b>decrease</b> 33:5</p> <p><b>deemed</b> 72:17</p> <p><b>defeat</b> 10:15</p> <p><b>defendants</b> 62:4</p> <p><b>deference</b> 53:20 79:9</p> <p><b>define</b> 77:2</p> <p><b>defined</b> 24:8 70:7 77:4</p> <p><b>defines</b> 45:24</p> <p><b>defining</b> 18:14 19:10 47:8 67:6,25</p> <p><b>definition</b> 67:16 71:19 73:19</p> <p><b>degree</b> 26:7 36:13 61:9</p> <p><b>degrees</b> 10:8</p>	<p><b>delaware</b> 65:20 68:22,23,25</p> <p><b>demanded</b> 13:13 13:16</p> <p><b>deny</b> 45:18 79:20</p> <p><b>department</b> 1:25</p> <p><b>depends</b> 11:7 42:13 50:4,4,5 50:6,7</p> <p><b>deputy</b> 1:24</p> <p><b>describe</b> 28:9</p> <p><b>described</b> 68:6</p> <p><b>describes</b> 27:7</p> <p><b>describing</b> 34:12 52:21</p> <p><b>design</b> 23:12</p> <p><b>designed</b> 14:11</p> <p><b>desired</b> 26:5</p> <p><b>desperation</b> 75:12</p> <p><b>destroys</b> 69:11</p> <p><b>destruction</b> 69:11,18 70:3 70:9</p> <p><b>detail</b> 29:6</p> <p><b>details</b> 28:19</p> <p><b>determination</b> 55:13 65:3</p> <p><b>determine</b> 4:19 5:11 15:11 16:6 17:18 19:24 26:2,21 29:11 35:14 76:18</p> <p><b>determined</b> 4:23 5:6 52:14,16</p> <p><b>determines</b> 52:7</p> <p><b>determining</b> 14:18 15:10 17:14 37:15</p> <p><b>develop</b> 42:18</p> <p><b>devices</b> 12:21</p> <p><b>devise</b> 9:6 23:16 24:5 27:3 36:3</p> <p><b>devising</b> 23:21</p>
---	---	---	--	---

31:1,6 32:19 36:11 <b>didnt</b> 5:4 16:1 17:4 19:1,18 24:2 25:9 36:4 41:20 48:5 52:22 62:13 66:18,19 77:9 77:10 <b>difference</b> 41:6 <b>different</b> 8:3 10:23 14:12,16 15:9 17:22 18:2 19:22 22:16 32:18 34:25 38:12 40:6 44:13 46:14 47:6 48:25 54:1 58:15 60:6 62:14 67:13,24 68:2,3 74:3,13 76:16 <b>differently</b> 54:16 <b>difficult</b> 11:3 14:23 17:2 36:20 <b>difficulties</b> 4:22 <b>difficulty</b> 9:14 14:9 31:17 <b>directly</b> 19:9 <b>directs</b> 66:15 <b>dirty</b> 65:9 <b>disagree</b> 74:15 <b>disagreement</b> 53:6 <b>disapproval</b> 38:24 <b>disapprovals</b> 48:11 <b>disapprove</b> 47:10 <b>disapproved</b> 35:21 54:13 <b>discharge</b> 19:2 <b>discovers</b> 58:19	<b>discrete</b> 48:14 48:19 49:6 52:12 <b>discretion</b> 46:18 46:23 <b>disperse</b> 31:20 <b>displacing</b> 71:2 <b>disposal</b> 25:10 <b>disproportion</b> 62:18 <b>distinct</b> 34:1,1 <b>distinction</b> 69:23,25 70:20 <b>distinguish</b> 65:6 65:6 <b>distinguishing</b> 6:5 <b>distribute</b> 45:25 <b>distributed</b> 5:24 67:14 <b>distributing</b> 8:2 <b>district</b> 22:1 <b>divide</b> 58:22 74:5 <b>divided</b> 6:8 <b>divides</b> 34:24 <b>dividing</b> 59:5 <b>divulge</b> 25:9 <b>doesnt</b> 14:6 24:25 43:25 53:11,15 55:3 55:15 56:8,12 61:10 64:3 66:24 70:6 72:6 73:16 74:1 <b>doing</b> 6:23 16:24 25:8 35:15 41:1 44:9,23 45:20 50:16 63:22,25 65:15 70:5 79:6 81:12,14 <b>dollars</b> 75:23 <b>donate</b> 76:2 <b>donkey</b> 24:23 <b>dont</b> 6:22 11:14	11:16,16 12:14 16:25 18:21 21:20 23:11 25:7 26:13,16 29:5 31:13,24 32:25 34:10 37:19 39:7 42:14 43:20 45:16 46:13 48:4,24 49:4 49:13 50:20 54:18 61:6 63:4,4 67:5 69:12 71:18,19 72:15 73:17 74:16,25 <b>downstream</b> 14:21 <b>downwind</b> 4:16 4:21,25 5:4,5,6 6:3,9 7:3,18 8:23 9:3,9 12:23 20:1 25:25 31:23 32:8 33:19,20 36:16 57:10,22 57:25 60:9,23 65:19 66:10 68:20 77:6,14 77:24 78:9,23 80:1,20 81:19 <b>draw</b> 20:7 69:22 79:2 <b>drawing</b> 69:25 <b>driven</b> 70:23 <b>driver</b> 58:5,7 <b>driving</b> 59:7 <b>duke</b> 41:7 <b>dumb</b> 32:4 57:5 <b>dunking</b> 9:15 <b>duty</b> 30:14 <hr/> <b>E</b> <hr/> <b>e</b> 3:1 4:1,1 <b>eager</b> 51:19 <b>earlier</b> 8:9 44:21 48:11,11 49:23	53:2 <b>ease</b> 14:9 <b>easier</b> 12:22 22:20 <b>easy</b> 7:7 <b>economic</b> 68:7 80:4 <b>economy</b> 69:11 <b>effect</b> 7:18,19 8:2 18:15,16 29:8 31:8 42:8 51:4 61:18 65:18 74:23 75:5 <b>effectively</b> 45:14 <b>effects</b> 30:2,9 57:11,16 60:21 63:24 75:1 77:3 <b>efficiency</b> 17:25 18:4 62:6,14 <b>efficient</b> 6:1 8:22 14:1,24 59:21 66:9 <b>efficiently</b> 7:2 7:21 33:3 <b>efforts</b> 5:12 6:12 15:19 81:20 <b>either</b> 35:20 50:22 69:22 <b>electric</b> 15:21 16:15 78:22 <b>electricity</b> 15:23 16:4 <b>element</b> 24:8 63:25 <b>eliminate</b> 49:24 <b>eliminates</b> 14:18 <b>embodied</b> 21:13 <b>embodies</b> 60:15 <b>eme</b> 1:7,14 4:5,7 <b>emission</b> 5:12,13 8:12 15:22 19:12 23:24 35:11 67:18 80:8,12 <b>emissions</b> 5:10	5:20 6:3 16:7 16:13,17 17:18 19:24 21:2,17 26:9 34:5,22 34:24 36:14 57:12,16 61:17 61:18,21 62:10 65:10 68:22 71:11 74:24 80:12,13,16,16 <b>emit</b> 23:25 <b>emitted</b> 35:4 <b>emitting</b> 15:25 21:3 34:3 71:25 80:22 <b>emphasize</b> 19:23 35:5 72:4 <b>emphasizing</b> 14:10 36:9 <b>empty</b> 47:5 <b>enacted</b> 78:23 <b>enforcing</b> 62:10 <b>ensure</b> 15:16 29:20 30:15 33:7 <b>enter</b> 48:6 <b>entire</b> 52:13 58:5,7 74:18 <b>entirely</b> 32:18 <b>entities</b> 61:16 <b>entitled</b> 76:22 <b>entity</b> 44:16 <b>environmental</b> 1:3 4:5 <b>envisions</b> 15:1 <b>epa</b> 4:13,18,20 5:9 9:13 13:20 16:5,5,12,23 17:8,20 18:3 18:15,24 19:9 19:13 20:13 21:7,16 22:11 22:14,20 23:1 23:6,10,18,19 24:3,5,7,21 25:2,8 26:24 28:12 29:17,19
---	---	--	--	---

31:15,16 33:15 33:17 34:8,23 35:11,15,18,19 35:21,22 36:1 36:4,7,12 37:1 37:3,15 38:2,3 38:7,11,20,21 38:23 39:3,5 39:25 40:9 41:18 42:22 43:3,8,9,11,17 43:20 44:10,10 44:10,16,19 45:15,18,20 46:10,17,17,22 47:2,3,6,12,13 47:15,18,22 48:7 49:8,10 49:13,14,18 50:25 51:5,6 51:14,22,25 52:3,5,7,9,12 52:23 53:12,15 53:19 54:8,11 54:13,16,20 55:3 57:14,17 58:18 60:12 61:20 62:8,13 62:24 63:5 65:5 67:12,25 68:3 70:7,13 74:9 75:4 77:2 77:5,13,25 78:4 79:20,24 79:24 80:5,18 80:25 81:16	<b>equitable</b> 16:18 <b>equity</b> 62:2,3,5 62:14 <b>error</b> 52:8 <b>errors</b> 11:1 <b>esq</b> 1:24 2:2,4 3:3,6,9,12 <b>essentially</b> 13:15 34:24 45:20 53:21 <b>establish</b> 13:20 <b>estimate</b> 31:13 <b>estopped</b> 41:1 <b>et</b> 1:4,8,11,15 59:7 <b>evenly</b> 5:24 <b>everybody</b> 13:2 13:7 73:22 81:13 <b>evidence</b> 77:12 78:6 <b>evidently</b> 25:19 <b>exact</b> 54:3,3,5 <b>exactly</b> 12:14 23:6 24:5 39:8 42:14 50:11 64:12 73:3 <b>examined</b> 77:8 81:17 <b>example</b> 10:2 14:14 15:20 23:20 24:6,13 25:1 58:10 62:17,20 64:16 65:13 67:12 68:21 71:12 75:20 <b>examples</b> 14:8 24:16,19 64:17 <b>exception</b> 53:10 53:15,16 55:5 <b>exclusive</b> 46:24 47:13 <b>exclusively</b> 74:17 <b>excuse</b> 18:21 <b>existing</b> 9:4	77:20,22 78:2 <b>expect</b> 20:4 22:7 <b>expected</b> 26:17 <b>expensive</b> 50:18 50:23 81:2 <b>expert</b> 79:9 <b>expired</b> 56:9 <b>expires</b> 52:2 <b>explain</b> 31:25 57:3 <b>explaining</b> 44:20 49:20 <b>expressly</b> 16:24 <b>extent</b> 25:22 28:25 29:4,7 36:18 37:8 <b>extra</b> 16:17 <b>extraordinarily</b> 11:3 79:19 <b>extraordinary</b> 29:22 31:16 <b>extreme</b> 69:21	48:12 <b>fair</b> 4:14 15:10 15:18 58:24 59:5 <b>fairly</b> 31:8 <b>faith</b> 18:18 <b>fall</b> 24:3 <b>far</b> 12:2,2 16:25 22:12 57:24,24 75:13 <b>farther</b> 16:12 <b>fatal</b> 21:21 <b>fatally</b> 10:2,3 <b>faulted</b> 29:19 <b>favor</b> 59:20 65:15 79:9 <b>feasibility</b> 71:9,9 71:17 <b>feasible</b> 71:10 <b>feasibly</b> 66:20 66:24 <b>federal</b> 18:25 22:15 27:11 29:24 30:3,25 31:7 35:23 36:11 39:15 45:9,21 47:18 51:3 78:25 <b>feel</b> 39:17 81:10 81:14,18 <b>feet</b> 9:17,18 <b>fell</b> 23:19 <b>felt</b> 36:7 <b>fence</b> 58:20 <b>field</b> 66:7 <b>figure</b> 63:5 <b>figures</b> 6:24 <b>filed</b> 24:17 <b>fills</b> 47:3 <b>final</b> 26:18 <b>find</b> 62:21,23 <b>findings</b> 48:12 <b>finds</b> 27:12,13 35:19 71:10,12 <b>fine</b> 27:24 <b>finish</b> 34:11 49:2 52:21 56:10	<b>fit</b> 28:2 37:1 38:3 41:3 42:7 42:7 43:14 45:19,23 46:7 49:9 52:1 <b>fips</b> 37:11 51:1 52:4 56:7 <b>first</b> 4:4,18,20 6:5 15:5 18:8 18:10 21:23 22:19,19 23:15 27:2,25 34:13 35:16 36:5,12 36:25 38:15 43:10,17,23 46:16 47:8 49:8,14 51:1 60:19 65:12 70:25 76:25 79:3 <b>fits</b> 46:1 <b>fitting</b> 65:25 <b>flaw</b> 21:21 28:5 30:10 <b>flip</b> 25:25 <b>floating</b> 64:17 <b>floats</b> 69:3,4 <b>floor</b> 45:22 <b>flowed</b> 15:13 <b>focus</b> 11:1 57:10 57:16 74:16 81:7 <b>focused</b> 16:13 56:23 57:2 58:9 60:1,21 61:15 68:20 <b>focuses</b> 64:12 <b>follow</b> 27:1 55:18 <b>following</b> 12:25 <b>food</b> 30:5,6,9 <b>forbidden</b> 17:8 <b>forbidding</b> 80:25 <b>force</b> 50:21 60:12 66:9 <b>foregoing</b> 16:15
<b>F</b>				
<b>epaapproved</b> 47:20		<b>f</b> 2:2 3:6 37:22		
<b>epaimposed</b> 45:23		<b>face</b> 29:18		
<b>epas</b> 4:16 21:11 31:4 38:1,6,14 38:15 45:11 47:17 53:1 56:24 58:3 60:6 77:16		<b>faces</b> 62:24		
<b>equally</b> 58:23		<b>facing</b> 21:6		
		<b>fact</b> 6:15 7:16 12:19 19:18,25 22:3 25:5 29:12,16 30:9 48:16 60:1,8 60:13 66:7 73:15 79:3		
		<b>factor</b> 7:1 18:15 19:13,15 71:11 71:13 72:16		
		<b>factors</b> 8:4		
		<b>facts</b> 26:13,15 26:16		
		<b>fail</b> 25:9		
		<b>failed</b> 27:13 35:20		
		<b>failing</b> 29:20		
		<b>fails</b> 27:7		
		<b>failure</b> 11:2 31:3		

<b>forever</b> 31:5	<b>give</b> 24:6 36:1,2	51:23 53:9	27:7 29:24	66:4
<b>formal</b> 55:1,2	37:4,19 41:6	55:5,12,18,19	35:22 40:3	<b>hugely</b> 50:22
<b>formulating</b>	43:9 51:18	55:21 56:25	69:6	<b>hundred</b> 64:19
67:21	64:15 76:2	58:10 68:23	<b>hard</b> 38:10	71:14 75:23
<b>forth</b> 20:18 54:9	<b>given</b> 14:8 29:25	75:10 77:7,25	64:14 75:17,18	<b>hurt</b> 68:22
<b>forward</b> 9:7	35:13 43:7	80:14 81:11	<b>harder</b> 12:11	<b>hypothetical</b>
12:23 36:24	<b>gives</b> 35:1 65:16	<b>government</b>	<b>harm</b> 7:4,22	10:12 60:2
<b>found</b> 28:20	<b>giving</b> 40:23	16:23 27:18	<b>harnessing</b> 80:4	75:9
37:1 53:10	45:24 63:6	40:24 57:1	<b>hasnt</b> 16:13	
62:20 68:9	<b>glimmer</b> 63:2	61:24 70:21	<b>havent</b> 8:7 39:14	<b>I</b>
<b>four</b> 32:10	<b>glosses</b> 22:3	72:9	47:23 51:9	<b>id</b> 56:25 69:14
<b>framework</b>	<b>go</b> 6:15 11:17	<b>governments</b>	<b>head</b> 21:16	<b>idea</b> 5:19 8:5 9:8
46:16	12:3 13:9	20:9 39:10	<b>health</b> 4:14	18:3 22:22
<b>fray</b> 48:6	16:25 30:11	73:19	13:11,23 30:12	23:10 41:24
<b>friend</b> 57:1	36:25 39:15	<b>great</b> 25:12 61:2	30:16 34:1,2	<b>identified</b> 4:21
<b>friends</b> 58:15	45:9,22 46:16	80:21	64:10 75:3	5:9 7:19 31:18
<b>fuels</b> 12:21	53:4,5 54:24	<b>greater</b> 6:12	<b>hear</b> 4:3 52:22	67:5
<b>full</b> 36:1	55:1	15:14 57:24	<b>heard</b> 29:9	<b>identify</b> 10:16
<b>fully</b> 59:18	<b>goes</b> 20:17 46:3	81:3	39:22	24:18
<b>functions</b> 68:5	46:17 70:24	<b>greatest</b> 15:12	<b>hearing</b> 20:23	<b>ignore</b> 66:7
<b>fundamental</b>	<b>going</b> 5:13 9:6	<b>ground</b> 31:14	<b>hearings</b> 20:12	<b>ill</b> 33:24 59:17
41:10	9:24 12:23	<b>group</b> 5:17,18	<b>hed</b> 76:14	<b>im</b> 13:12 20:20
<b>fundamentally</b>	22:9,13,23	6:6,11 22:20	<b>help</b> 14:11 20:6	22:19 27:6
13:17	24:14 25:3	22:23	53:11,15 72:23	34:2 36:21
<b>further</b> 37:4	26:14 36:23	<b>groups</b> 76:21	<b>helpful</b> 62:20	54:4 59:7
45:10,22 78:12	40:11 52:6	<b>guess</b> 6:14 15:2	<b>herculean</b> 79:5	62:22 64:16
<b>future</b> 12:17	58:25 59:1,19	23:14 26:18	<b>heres</b> 22:21	67:2 69:20,21
15:14 37:17	63:4 65:5,6	38:7 43:21	<b>hes</b> 39:18 75:11	69:23 70:24
47:15	67:22 69:7	45:13 47:15	<b>hidden</b> 25:2	81:14
<b>G</b>	72:9 73:24	51:6 54:4	<b>hiding</b> 25:8	<b>imagine</b> 66:3,5
<b>g</b> 4:1	74:2 75:11,13	73:12	<b>high</b> 80:22	<b>impact</b> 80:20
<b>game</b> 10:13 37:2	77:17	<b>guidance</b> 36:2	<b>higher</b> 57:19	<b>implement</b> 14:2
<b>gates</b> 75:23	<b>good</b> 11:20,25	<b>H</b>	<b>historic</b> 62:9	18:18 19:3
<b>gather</b> 50:19	16:2 18:1,3,9	<b>hadnt</b> 19:19	<b>history</b> 62:22,23	43:4 61:12
<b>general</b> 1:24 2:2	18:12,18,18,23	74:21	63:12 78:20	<b>implementation</b>
61:19	19:4,18 20:3	<b>half</b> 10:17 58:21	<b>hit</b> 26:17 73:11	5:14 14:5 17:3
<b>generate</b> 15:23	21:9 24:20	58:24 59:3	<b>homer</b> 1:7,14	17:17 18:11,25
<b>generating</b>	25:23,23 26:23	<b>halfcourt</b> 10:19	4:5,7	19:3 20:18,21
15:25 16:3	27:4 31:3	<b>hand</b> 65:9	<b>honest</b> 79:25	22:15 26:23
<b>generation</b> 1:8	35:20,21 37:15	<b>happen</b> 28:11	<b>honesty</b> 21:20	27:3,11 30:25
1:15 4:6,7	38:3,8,20,21	29:12,13,18	<b>honor</b> 63:11	31:7 35:24
15:21 16:15	39:5,17 43:1,4	36:23 46:10,12	65:13 66:2,21	37:11 47:18
<b>georgia</b> 52:17	43:21,22 44:12	46:13 61:17	67:2,5 68:6	51:4 81:10
<b>getting</b> 59:4	44:15 45:2,13	<b>happened</b> 25:5	69:15 70:21	<b>implemented</b>
<b>ginsburg</b> 49:12	45:16 46:25	81:4	71:18 72:3	5:21 6:17 8:12
49:17	47:3 49:9	<b>happens</b> 9:25	74:16	8:16 12:5
	50:15 51:2,7		<b>honors</b> 60:2	37:13 51:24

<p>81:8  <b>implementing</b> 27:20 67:12 70:2  <b>import</b> 72:8  <b>important</b> 35:5  <b>imported</b> 72:17  <b>impose</b> 20:2 30:11 38:2 45:19 47:18 49:9 52:1,4 66:11  <b>imposed</b> 41:3  <b>imposes</b> 20:6 53:17  <b>impossible</b> 32:3 32:7 50:15,17 50:17,23 51:9 51:14  <b>improper</b> 48:9  <b>improperly</b> 49:11  <b>inappropriate</b> 28:2  <b>inappropriately</b> 30:20  <b>include</b> 9:14 10:11 66:15  <b>includes</b> 11:25  <b>including</b> 27:4 29:1,2 38:23  <b>increase</b> 33:5 57:15  <b>incredibly</b> 19:23  <b>increment</b> 16:17  <b>independent</b> 38:15 47:17 77:1  <b>indiana</b> 65:20 68:21,23  <b>indicate</b> 79:4  <b>indicated</b> 30:23 78:19,22  <b>indicates</b> 79:13 79:22  <b>individual</b> 22:22 70:18</p>	<p><b>industry</b> 2:5 3:10 56:20 67:3 68:13  <b>industrys</b> 35:6,8  <b>inefficient</b> 8:22  <b>infeasible</b> 26:22  <b>information</b> 25:9,13  <b>inherent</b> 21:21  <b>inherently</b> 15:21  <b>initial</b> 18:11 55:10,12  <b>insignificant</b> 16:9 65:20  <b>inspections</b> 30:6  <b>install</b> 81:2  <b>installed</b> 12:20  <b>instance</b> 18:10 25:1 27:3 30:3 36:12  <b>instances</b> 24:19  <b>institute</b> 47:2  <b>institution</b> 44:11  <b>intend</b> 16:2 66:18  <b>intended</b> 21:8 66:14 81:8  <b>interested</b> 62:22  <b>interests</b> 4:15 36:10 79:23  <b>interfere</b> 57:9 60:22 63:21 64:5 72:20 74:19  <b>interference</b> 61:11  <b>interim</b> 37:9  <b>interpret</b> 21:8  <b>interpretation</b> 40:10 43:18 44:8,9,21 49:18,21 51:17  <b>interpretative</b> 46:24  <b>interpreted</b> 33:17,21 38:18  <b>interpretive</b></p>	<p>47:13  <b>interstate</b> 30:4  <b>introducing</b> 63:25  <b>intruded</b> 36:12  <b>invalid</b> 29:18  <b>invented</b> 25:6  <b>investment</b> 74:10  <b>invoke</b> 52:6  <b>invoked</b> 52:23  <b>invokes</b> 49:11  <b>involves</b> 10:12  <b>ironic</b> 33:23  <b>irony</b> 33:9  <b>irrational</b> 33:1  <b>isnt</b> 7:4,23 37:3 47:24 48:6 52:10,13 65:10 65:19 68:24 70:17 71:23 75:5  <b>issue</b> 20:3 28:18 37:7 44:17 47:25 48:6,25 51:22 52:10,12 52:13,19,20,22 56:7 57:1 59:23 60:11 73:11,21 75:2 76:5 77:9,12  <b>issues</b> 28:21 49:5 68:18  <b>itd</b> 41:19  <b>item</b> 30:7  <b>ive</b> 14:8 27:1 75:24 81:7</p>	<p>23:24  <b>judicial</b> 30:22 48:21 79:4,6  <b>justice</b> 1:25 4:3 4:11 5:23 6:22 7:6,15 8:5,17 8:21 9:23 10:6 11:4,5,6,6,14 12:2,7,24,25 14:15 15:3 16:20,21 17:19 18:21 19:16,17 21:5,15 22:2 22:18 23:9 24:6,22 25:11 25:15 26:12 27:17 29:1 31:10,25 32:21 32:25 33:10 34:10 36:21 37:18,24 38:9 39:7 40:1,14 40:22 41:5,19 41:23 42:6,10 42:15,18,21,25 43:6,15,24 44:2,23 46:2 47:23 48:4,13 48:24 49:12,17 50:1,10 51:8 51:18 52:10,19 52:21 53:18,25 54:10 55:8,17 56:1,10,16,21 57:4,5 58:8,17 59:18 60:25 61:4 62:16 64:6 66:17,23 68:9,13 69:1 69:16,20 70:1 70:15,24 71:6 71:12,23 72:5 72:7,13,21,24 73:3,5,20 75:7 76:4,10,12 78:14,18 82:4  <b>justices</b> 46:4</p>	<p style="text-align: center;"><b>K</b></p> <p><b>k</b> 51:22 52:7,7 52:24,24 53:3 53:14,24 54:19 54:19 55:4,15 56:6,8,12  <b>kagan</b> 8:5 11:4 12:24 19:16 31:25 36:21 46:2 53:18,25 54:10 55:8 57:4 64:6 73:20  <b>kagans</b> 11:6 16:21  <b>kansas</b> 52:17  <b>keep</b> 62:19  <b>keisler</b> 2:4 3:9 56:18,19,21 59:17 61:2,6 63:10 64:6 65:12 66:21 67:2 68:12,17 69:14,17,24 70:20 71:18 72:3,11,15 73:12,20 74:15 75:17 76:16 78:19  <b>kennedy</b> 11:5,14 12:2 16:20 43:6 71:6 72:7 72:13  <b>kernel</b> 11:17  <b>key</b> 43:18  <b>kind</b> 22:2 25:9 61:25 62:24 66:1 68:5  <b>kinds</b> 46:19 62:6 67:4,8  <b>knock</b> 56:13  <b>know</b> 13:1 17:24 21:20 22:6 23:6,12 24:24 26:13,16 29:5 29:24 31:24</p>
		<p style="text-align: center;"><b>J</b></p> <p><b>job</b> 22:20 40:8 51:16 59:14  <b>joined</b> 35:6,8  <b>jonathan</b> 2:2 3:6 37:22  <b>judgment</b> 23:6  <b>judgmental</b> 72:8  <b>judgments</b></p>		

33:2 36:21 39:7 42:14 45:16 48:4,24 50:1,2,2,12,20 54:14 58:22 59:12 63:4 64:18,22 73:17 74:5,16 76:18 <b>knowing</b> 20:4 23:13 24:11 <b>known</b> 15:24 <b>knows</b> 72:25	16:16 65:4 <b>legislative</b> 62:22 62:23 <b>legitimate</b> 59:20 66:4 <b>lessons</b> 79:2 <b>level</b> 5:18 15:22 26:5 29:6 70:2 73:23,23 80:22 <b>levels</b> 77:15,17 77:18 78:7 81:20 <b>light</b> 76:24 <b>likewise</b> 53:4 <b>limit</b> 6:18 <b>limitations</b> 56:24 <b>limited</b> 31:8 <b>limitless</b> 72:12 73:14 <b>linked</b> 4:23,25 6:9 77:24 <b>little</b> 34:3 <b>lives</b> 9:8 <b>local</b> 2:3 3:7 37:23 <b>locate</b> 66:10 <b>located</b> 81:4 <b>locating</b> 68:3,4 <b>locations</b> 57:10 58:1 60:23 66:10 77:6,14 77:24 78:9 <b>long</b> 31:11 42:11 42:22 54:16 62:9 <b>look</b> 11:9 13:13 20:19,24 22:21 37:4 39:13 46:4 69:2 77:17 <b>looking</b> 47:25 56:3 63:17 <b>looks</b> 60:11 <b>loss</b> 75:11 76:8 <b>lost</b> 10:13 76:7 <b>lot</b> 7:11 12:17	57:2 60:8 65:7 65:8 81:5 <b>lots</b> 46:9 65:9 74:3 <b>lower</b> 30:16 59:14 77:14,17 77:18 78:7 <b>lung</b> 1:11 4:6	53:21 54:2,4 54:19 64:6,15 69:1 71:7,8 72:6,22 73:16 73:16 74:23 75:9 76:1,1,13 76:14 <b>meaning</b> 38:4 <b>meanings</b> 73:13 73:14,18 <b>means</b> 7:1 10:10 24:22 26:12 30:15 43:24 45:3 47:5,9 51:15 54:2 55:4,15 57:20 65:18 72:16 <b>meant</b> 50:21 62:18 <b>measurable</b> 71:7 <b>measure</b> 11:8,10 <b>measured</b> 15:19 <b>measures</b> 5:14 5:21 6:17 8:1 8:13,16 9:1 16:19 17:17,21 18:4 19:12 27:20 28:1 30:8 81:3 <b>mechanism</b> 30:24 79:8 <b>mechanisms</b> 67:4,15 <b>meet</b> 8:10 19:20 20:4 25:5 48:16 <b>member</b> 73:15 <b>men</b> 58:14,15,19 <b>mention</b> 19:18 <b>mentioned</b> 18:8 30:19 49:23 51:22 60:19 66:2 <b>mere</b> 7:22 <b>merely</b> 7:3 8:23 <b>method</b> 59:9 <b>methodology</b>	21:12 28:12 29:16 33:15 35:11 58:3 61:12 <b>methods</b> 74:14 <b>metric</b> 34:17 <b>million</b> 9:22 <b>mind</b> 6:22 21:25 50:12,13 58:11 62:19 <b>minds</b> 40:3 <b>mine</b> 25:20 <b>minimal</b> 59:5 <b>minimum</b> 15:25 17:21 27:15 45:9 <b>minutes</b> 78:15 <b>missed</b> 10:16,17 10:19 75:12,12 <b>misspoke</b> 17:6 <b>mitchell</b> 2:2 3:6 37:19,21,22,24 38:14 39:24 40:9,19 41:2 41:17,21,25 42:3,9,13,17 42:20,24 43:2 43:13 44:1,6 45:1 46:2,22 48:2,8,21 49:4 49:16 50:9,25 51:14,21 52:15 52:23 53:23 54:7,18 55:14 55:24 56:2,12 56:17 <b>mix</b> 23:24 <b>modeling</b> 5:11 <b>modifies</b> 61:8 <b>modify</b> 61:10 <b>modifying</b> 71:20 <b>money</b> 34:6 65:8 <b>months</b> 42:17 <b>morning</b> 4:4 <b>motive</b> 80:5
<b>L</b>		<b>M</b>		
11:8,15,24 3:3 3:12 4:9 78:16 <b>labor</b> 2:5 3:10 40:15 56:20 67:3 <b>language</b> 9:11 13:1 14:6 19:5 43:18 53:20 54:2 57:11 61:20 63:3,9 63:17 64:8 65:17 66:1 72:4 79:19 <b>laughter</b> 42:2,5 58:16 69:19 73:4 75:16 76:9 <b>launching</b> 48:9 <b>law</b> 14:11 40:18 50:20 62:6 78:21,25 79:10 79:13,14,22 <b>layup</b> 10:16 75:12 76:13,14 <b>lead</b> 29:20 <b>leads</b> 45:6 47:16 59:6 <b>league</b> 76:17 <b>leave</b> 28:6 63:4 <b>left</b> 38:3 <b>legal</b> 21:22 23:17 30:21 <b>legally</b> 16:9,10		<b>m</b> 1:22 4:2 82:7 <b>maintenance</b> 4:22 57:10 60:23 61:11 63:15,16,22 64:3 72:20 74:20 77:6,13 77:23 78:9,11 <b>making</b> 39:9 40:20 49:8 57:21,24 <b>malcolm</b> 1:24 3:3,12 4:9 78:16 <b>mandate</b> 36:6 <b>manner</b> 33:8 52:25 54:22 55:25 56:1,2 80:8 <b>map</b> 51:25 <b>margin</b> 13:11 64:10 <b>match</b> 24:5 <b>mathematics</b> 59:6 <b>matrix</b> 22:5 <b>matter</b> 1:20 12:9 12:10,11 14:25 43:5 67:24 79:24,24 82:8 <b>mean</b> 7:6 8:21 15:5 19:12,14 23:10,11 24:24 28:4,8 33:4,23 37:3,6 39:8 40:2 42:16 44:2,16 51:1,9		<b>N</b>

<b>n</b> 3:1,1 4:1	<b>neither</b> 57:4 74:12	<b>numerous</b> 38:23	<b>open</b> 63:3	<b>ozone</b> 12:9 51:24
<b>naaq</b> 12:3	<b>nevada</b> 38:24	<b>O</b>	<b>opening</b> 20:9	<b>P</b>
<b>naaqs</b> 5:3,17	<b>never</b> 34:19	<b>o</b> 3:1 4:1	<b>operating</b> 6:16 77:19,22 78:1	<b>p</b> 1:8,15 4:1
11:24 12:5,10	<b>new</b> 11:21 12:14	<b>object</b> 43:12	<b>opinion</b> 29:19 39:15	<b>page</b> 3:2 20:8,20 20:24 27:5,10
12:14 13:19,20	26:1,2,6 31:12	<b>objected</b> 40:1	<b>opportunities</b>	<b>pages</b> 38:24 39:1 43:19
14:2 17:8,11	42:11,19 48:16	<b>objection</b> 39:10	37:5	<b>parallel</b> 76:5
17:15 20:16	49:21 63:25	<b>objections</b> 28:15	<b>opportunity</b>	<b>parlance</b> 9:15 14:8
21:13 22:16	<b>nonattainer</b>	<b>obligation</b> 9:8 11:20 15:14	28:23 35:14	<b>part</b> 11:5 16:7 26:19 31:15,17
23:22 24:8	23:3	18:11 19:2	36:3 45:25	33:9 34:21
26:2,24 36:17	<b>nonattainment</b>	20:6 25:19	51:3	52:20 70:5
37:4,7,13,17	4:22 5:7 9:3,5	27:8 37:3	<b>opposed</b> 8:21 63:2,8	<b>participating</b>
38:19 39:25	9:7 12:23 21:4	47:15 51:7	<b>opposing</b> 26:25	68:16
43:19 44:7,24	23:3 31:22	67:18	<b>opposite</b> 13:8,9 13:10	<b>particular</b> 8:14 12:1,10 16:3
44:25 45:1	49:25 57:9	<b>obligations</b> 21:8 23:18 24:20	<b>oral</b> 1:20 3:2,5,8 4:9 37:22	22:13,23 24:2
46:23 47:7	60:22 61:9	31:3 36:17	56:19	24:4 26:19
49:19 75:2	63:21 64:5	37:16 38:8,22	<b>order</b> 4:20,25 8:10,11,14	32:8 35:19
<b>nail</b> 73:11	67:7 71:21,24	39:6 42:14	14:3 15:15	37:7 51:25
<b>national</b> 5:2	72:20 74:19	43:4,22,23	26:5 36:2	78:5 79:16
11:21 20:15	81:22	44:12,15,18	<b>original</b> 53:22 56:3	80:20,21 81:1 81:18
66:7	<b>noncompliance</b>	45:3,13,17,24	<b>originally</b> 46:5	<b>particulate</b> 12:9 12:11 43:5
<b>nature</b> 73:20	22:14	47:3,12 49:10	<b>ought</b> 18:4	<b>partly</b> 59:12
<b>necessarily</b> 23:6	<b>noncost</b> 7:13	51:2 57:15	<b>outcome</b> 10:22 48:22	<b>party</b> 56:23 62:3
23:18 30:1	<b>noncosteffective</b>	81:11	<b>original</b> 53:22 56:3	<b>pay</b> 58:23
<b>necessary</b> 32:12	7:13	<b>obliged</b> 51:13	<b>originally</b> 46:5	<b>pending</b> 29:5 47:24 48:22
33:6 77:5	<b>normal</b> 54:8	<b>occasions</b> 67:19	<b>ought</b> 18:4	<b>people</b> 10:10 13:2 34:4 40:3
78:10 79:15	<b>normally</b> 42:12	<b>occur</b> 13:14 81:25	<b>over</b> 10:22 48:22	58:25 59:2
<b>need</b> 34:5 44:17	<b>north</b> 6:23 36:6	<b>occurred</b> 13:16	<b>outset</b> 60:20	63:1 74:21
47:11 64:22	<b>note</b> 67:20	<b>occurring</b> 9:7	<b>overage</b> 23:2	<b>percent</b> 5:2,5 27:22 34:15
<b>negative</b> 10:1	<b>noted</b> 67:20	<b>official</b> 81:9,13	<b>overall</b> 59:4 76:17,19	59:13 70:23 71:1,5
<b>neighbor</b> 11:20	<b>notice</b> 20:12,23	<b>officials</b> 26:1,6 81:8	<b>overboard</b> 30:11	<b>perfectly</b> 65:10 81:23
11:25 16:2	53:2,4,5,10,14	<b>oh</b> 12:7 23:9 68:2	<b>overcontrol</b> 28:3 29:2,9,21	<b>performance</b>
18:1,9,12,19	54:23,24 55:6	<b>ohio</b> 52:17	33:24 34:4	75:19
18:23 19:4,19	55:10	<b>okay</b> 25:15 67:21 72:5	45:14,18	<b>performed</b> 4:18
20:3 21:9	<b>noting</b> 80:10	<b>old</b> 48:17	<b>overcontrolled</b>	
24:20 25:23	<b>notion</b> 75:22	<b>once</b> 5:8 7:19 34:22 35:12,19	27:19	
26:23 27:4	<b>notwithstandi...</b>	35:19,22 40:2	<b>overgrazing</b>	
31:3 35:20,21	13:6	40:6 47:13	58:11,19	
37:16 38:3,8	<b>nox</b> 15:22 34:3 34:17	51:25 73:15	<b>overkill</b> 77:9	
38:21,21 39:5	<b>nuisance</b> 62:2,3 78:21,25 79:13	<b>onerous</b> 30:12	<b>overregulate</b>	
40:15 43:4,21	<b>number</b> 33:1,12 35:3		45:15,18	
43:22 44:12,15	<b>numbers</b> 70:16		<b>overshoot</b> 45:17	
45:2,13,16	<b>numerical</b> 64:16 64:17			
47:1,3 49:10				
51:2,7,23				
56:25 77:8,25				
80:14 81:11				
<b>neighbors</b> 26:11				

<p>5:11  <b>period</b> 20:14                      31:8  <b>permits</b> 70:18  <b>person</b> 9:21                      21:22,23,23,24  <b>perspective</b>                      65:16  <b>persuaded</b> 24:21  <b>pet</b> 77:16  <b>peter</b> 2:4 3:9                      56:19  <b>petition</b> 39:1  <b>petitioners</b> 1:5                      1:12 2:1 3:4,13                      4:10 53:7                      78:17  <b>phrase</b> 38:5 47:5                      51:17 61:11                      74:18  <b>pick</b> 23:11,11                      62:18 71:8  <b>picking</b> 33:1  <b>picture</b> 28:14  <b>pin</b> 24:23  <b>pinned</b> 24:24  <b>pinpoint</b> 10:14  <b>pitch</b> 46:6  <b>place</b> 24:24                      25:18 26:4                      28:6 31:12                      33:8 36:7                      47:20  <b>placed</b> 79:10,11  <b>places</b> 61:8  <b>plan</b> 11:25 18:11                      19:7 20:17,21                      20:23 26:23                      27:11,14,14                      30:25,25 31:7                      31:9,19 34:12                      35:24 36:12                      39:21 43:8                      59:4,13 81:10  <b>plans</b> 18:25 19:3                      22:15,16 23:22                      27:3 31:6 36:3</p>	<p>37:11 47:19                      51:4  <b>plant</b> 80:22 81:1  <b>plants</b> 34:3,25                      35:2 66:19                      80:13,23 81:5  <b>plausible</b> 66:5  <b>play</b> 67:8  <b>playing</b> 66:7                      76:17  <b>plays</b> 10:14  <b>please</b> 4:12                      18:22 37:25                      56:22 62:17  <b>point</b> 6:14 10:14                      11:7,10,18,19                      14:3 19:22                      24:17 25:16                      33:11 36:9                      39:10 40:6                      42:4 44:5 49:3                      53:7 62:16,21                      66:18 72:25                      73:3 76:11,24                      77:5 78:10  <b>pointed</b> 27:2  <b>points</b> 23:15                      75:14 76:7  <b>policy</b> 21:9 23:6                      23:23 59:20,23                      59:25,25 60:16                      66:3 72:17  <b>pollutant</b> 72:1  <b>pollutants</b> 35:3  <b>polluter</b> 79:18  <b>polluters</b> 15:12                      79:1  <b>pollution</b> 6:10                      6:12 7:12 8:24                      9:5 11:10                      12:18,20 14:20                      14:24,25 15:13                      16:8,19 17:21                      18:5 20:1 21:3                      26:7 27:21                      33:20 45:5                      49:24 50:3</p>	<p>74:11 79:16                      81:3,20  <b>poor</b> 57:25  <b>poorly</b> 80:22  <b>population</b> 74:7  <b>portion</b> 19:6  <b>portions</b> 29:19  <b>position</b> 8:11                      41:17 73:12                      79:10  <b>possibility</b> 27:19                      27:23 28:10                      29:17 70:16,22  <b>possible</b> 16:8,22                      22:6 32:7,16                      33:9 36:7 80:9  <b>power</b> 15:21                      16:15 28:7                      34:2,25 35:2                      52:7,24 57:15                      78:22 80:13,21                      80:23 81:1,5  <b>practically</b>                      26:22  <b>precisely</b> 62:18                      63:22  <b>predecessor</b>                      63:12  <b>predict</b> 23:18  <b>premise</b> 15:6  <b>prerogative</b>                      44:15,17 45:8                      51:16  <b>prescribe</b> 17:21                      20:15  <b>presents</b> 68:17  <b>preserved</b> 29:7                      30:21  <b>preside</b> 40:17  <b>presumably</b>                      46:9 68:14  <b>pretty</b> 33:11,11                      63:3 75:10  <b>prevent</b> 9:1,7                      12:18,22 40:18                      63:14,16 64:3  <b>prevented</b> 40:19</p>	<p>40:22  <b>preventing</b> 30:4                      58:18 70:8                      80:15  <b>previously</b> 15:13                      51:23 52:5                      54:3 79:11  <b>price</b> 45:22  <b>primary</b> 20:15  <b>prior</b> 9:5 12:17                      31:21 33:18                      40:12 52:8                      77:7  <b>private</b> 56:23                      62:3  <b>probably</b> 8:15  <b>problem</b> 9:10                      14:13,15 15:17                      24:12 28:11                      29:15 30:1                      31:15,23 34:2                      34:7 39:8 45:6                      46:23 47:17                      50:11,13 52:3                      53:9 58:11,20                      58:24 59:3,4                      59:21 60:9                      62:25 63:1                      64:14 73:21                      81:15,21 82:2  <b>problems</b> 6:10                      6:13 40:4,5                      57:22 67:5  <b>procedural</b> 39:9                      53:21 54:5,10                      54:12,15  <b>procedure</b> 39:20                      53:11,13 54:9  <b>procedures</b>                      62:11  <b>proceed</b> 35:18                      50:22  <b>proceeded</b> 4:16  <b>proceeding</b>                      48:23 78:5  <b>proceedings</b>                      30:22 48:22</p>	<p>49:7 52:14,16  <b>process</b> 28:4                      34:21 39:15                      41:12 42:16                      43:12 49:2                      67:9,16 70:5                      70:18  <b>processes</b> 40:17                      79:6  <b>produce</b> 23:22  <b>profit</b> 80:5  <b>program</b> 20:3                      23:12  <b>prohibit</b> 63:14                      65:22  <b>prohibited</b>                      16:24  <b>prohibiting</b>                      20:25  <b>prohibition</b> 16:3                      57:8  <b>prohibits</b> 44:8                      71:25  <b>promulgate</b>                      11:24 19:3,21                      27:11 35:23                      46:7  <b>promulgated</b>                      12:5,14 18:25                      21:14 46:5  <b>promulgating</b>                      4:13 22:15  <b>promulgation</b>                      11:21,24 20:15  <b>proper</b> 71:19  <b>properly</b> 28:15                      29:7  <b>proportion</b> 7:3                      7:22 31:21  <b>proportional</b>                      32:11  <b>proportionality</b>                      32:2,6  <b>proportionally</b>                      74:6  <b>proportionate</b>                      32:20</p>
---	--	--	--	---

<p><b>proportions</b> 32:12,18 <b>propose</b> 37:11 39:17 41:2 42:7 45:12 <b>proposed</b> 25:13 43:7 80:19 <b>proposition</b> 26:25 <b>prosaic</b> 23:21 <b>prospect</b> 79:6 <b>prospective</b> 81:7 <b>protect</b> 4:14 <b>protecting</b> 13:10 <b>protection</b> 1:4 4:5 <b>prove</b> 24:25 <b>provide</b> 80:6 <b>provided</b> 56:4 <b>provides</b> 20:17 <b>providing</b> 53:16 68:20 <b>provision</b> 8:17 9:4 14:11 16:2 18:9,19,23 19:8 20:9 25:23 27:6 47:1,14 56:25 63:23 73:18 77:25 80:14 <b>provisions</b> 11:25 18:12 19:4 20:8,25 21:1 26:24 27:1,4 66:15 78:4 <b>prudent</b> 49:1 <b>public</b> 4:14 13:11,23 20:12 20:23 30:17 34:1,1 64:10 <b>purchases</b> 68:24 <b>purple</b> 73:16 <b>purpose</b> 9:3 33:4 80:7 <b>pursue</b> 30:21 <b>put</b> 24:10,14 39:16 65:7</p>	<p><b>Q</b></p> <hr/> <p><b>quality</b> 5:2,3 6:20 7:9 8:4 11:22 13:22 17:15 20:16 26:3,5 57:22 57:25 63:24 68:23 75:1,5 77:3,11 <b>quantified</b> 34:23 35:11,13 38:22 39:6 51:1 <b>quantifies</b> 44:18 <b>quantify</b> 38:7 43:23 44:25 45:2 47:2,12 51:6 <b>quantifying</b> 44:12 49:9 <b>quarreling</b> 35:10 <b>question</b> 6:14 7:16 10:1 11:4 11:6,7 12:24 16:20,21 30:23 41:18 42:1 43:15 46:4 48:14 49:3 51:10,11 56:7 56:14 60:11 64:3,23 65:1 66:4 70:1,25 73:24 76:6 <b>questions</b> 78:12 <b>quick</b> 42:15 <b>quickly</b> 36:8 <b>quite</b> 11:16 17:4 17:22 57:11 60:21 71:10 <b>quote</b> 52:25,25</p> <hr/> <p><b>R</b></p> <hr/> <p><b>r</b> 4:1 <b>raised</b> 76:25 <b>raising</b> 49:5 <b>range</b> 73:13,14 73:17</p>	<p><b>rational</b> 28:13 35:18 36:1 43:8 65:10 81:23 <b>rationale</b> 17:3 <b>rationales</b> 66:3 <b>reach</b> 26:20 28:9 56:6 <b>reaction</b> 50:24 <b>read</b> 13:1 53:20 57:5 74:21 <b>reading</b> 33:18 36:22 46:21 63:8 <b>real</b> 29:15 <b>really</b> 41:24 42:13 51:19 52:22 70:24 80:13 81:12,16 <b>reason</b> 34:4 50:15 51:19 56:4 59:11 65:15 68:1,2 78:6 79:19 <b>reasonable</b> 20:12,23 51:17 <b>reasonably</b> 9:13 16:6 57:18 62:12 <b>reasoned</b> 43:9 <b>reasons</b> 9:13 36:4 38:15 43:7,14,16 60:10,15 <b>rebuttal</b> 3:11 78:16 <b>recall</b> 30:6 <b>receptor</b> 5:1,4 32:8,16,17 <b>receptors</b> 4:21 4:24 5:6 6:9 23:3 31:23 33:13 <b>recognized</b> 63:23 <b>reconciled</b> 17:12 <b>reduce</b> 8:23</p>	<p>17:24 19:24 21:17 27:21 58:4 60:3,8,14 60:18 65:24 66:20 67:22 70:12 71:11 <b>reduced</b> 17:18 34:17 65:14 <b>reduces</b> 60:17 <b>reducing</b> 6:2 18:5 34:5 57:13 67:1 <b>reduction</b> 14:24 15:14 17:21 32:12,13,14,15 57:15 67:14,18 79:15,17 <b>reductions</b> 5:13 7:20,21 33:6,7 57:23 66:9,11 80:8 81:3 <b>refer</b> 14:9 <b>reference</b> 13:20 <b>references</b> 80:4 <b>referred</b> 67:11 <b>referring</b> 75:1 <b>reflect</b> 74:10 <b>refusing</b> 78:6 <b>regard</b> 16:18 57:4 61:23 70:21 80:10 <b>regarded</b> 16:9 <b>regime</b> 29:20 30:11 45:7 <b>regional</b> 62:24 62:25 <b>regulate</b> 13:2,3 29:25 77:5 78:10 <b>regulated</b> 80:22 <b>regulating</b> 13:7 80:12,13 <b>regulation</b> 13:14 13:16 30:1 41:15 61:20 77:15,18,18 78:7</p>	<p><b>regulator</b> 16:23 <b>regulatory</b> 45:25 <b>reinforce</b> 79:7 <b>rejected</b> 39:25 <b>relationship</b> 58:2 <b>relaxing</b> 64:1 <b>released</b> 25:12 <b>relevant</b> 5:2,6 12:3 19:1 20:7 20:9 72:17 <b>relief</b> 33:18 36:19 68:20 <b>rely</b> 53:15 54:8 <b>relying</b> 49:16,22 <b>remain</b> 31:7 <b>remaining</b> 42:3 78:15 <b>remains</b> 42:8 <b>remanded</b> 28:22 <b>remedy</b> 78:23 79:16 <b>remember</b> 62:17 <b>remit</b> 69:10 <b>render</b> 29:13 <b>renders</b> 29:18 <b>repeated</b> 38:23 <b>replace</b> 37:11 42:7 79:7 <b>replaced</b> 30:25 <b>replacement</b> 31:9 <b>replete</b> 80:3 <b>reply</b> 61:24 78:19 79:12 <b>report</b> 63:19 <b>represent</b> 38:16 41:21 <b>require</b> 30:5,6 32:11 43:25 44:4 56:14 57:17 62:15 70:12 78:1 <b>required</b> 6:11 6:20 7:2 8:6 11:23 14:20</p>
---	--	--	--	--

<p>15:22 27:13 39:4 48:16 57:23 63:14 81:2 <b>requirement</b> 14:19,22 19:19 47:5 53:12,13 53:17 <b>requirements</b> 21:18 45:9 53:22 54:5,11 54:12,15 67:12 <b>requires</b> 7:22 24:10 25:23 38:6 45:11,22 49:23 53:3 57:3 <b>requiring</b> 13:20 <b>residual</b> 81:22 <b>resist</b> 69:14 <b>resolution</b> 22:24 79:4 <b>respect</b> 32:8,16 32:17 34:23 37:6,16 44:24 <b>respects</b> 43:11 <b>respond</b> 59:17 <b>respondent</b> 24:17 <b>respondents</b> 2:3 2:5 3:7,10 37:23 53:7 56:20,23 <b>response</b> 18:8 43:9 69:25 73:6 77:16 <b>responsibilities</b> 62:9 <b>responsibility</b> 6:13 14:12 15:17 22:10 44:11 62:10 71:9 <b>responsible</b> 59:12 61:16 65:4 <b>rest</b> 48:5</p>	<p><b>restatement</b> 78:20 <b>result</b> 10:4,13,25 13:21 22:14 60:6 76:18,19 <b>reverse</b> 36:23 55:12 <b>review</b> 37:4 47:9 <b>reviews</b> 21:23 <b>revision</b> 27:14 <b>right</b> 5:25 6:3 8:24 21:15 22:4,19 23:7 23:24 24:24 25:11 39:11 41:20,23 42:7 42:23 43:2 46:21 49:15 50:9 51:11 58:12 59:10 61:1,6 64:11 64:13,14,21 65:4 72:21 73:9 <b>rightly</b> 62:12 <b>risk</b> 45:18 <b>roberts</b> 4:3 9:23 10:6 19:17 21:5,15 22:2 22:18 29:1 37:18 38:9 56:10,16 75:7 78:14 82:4 <b>role</b> 22:23 23:16 62:10 69:14 <b>round</b> 49:15 <b>rule</b> 4:13,20 5:9 18:1 25:13 28:6,14,20 29:13,17,18 30:10,21 31:10 31:12 37:10 40:12 41:11 43:23 44:17,20 45:7 47:12,17 49:20 51:10 52:6 54:8</p>	<p>55:19 80:11 <b>ruled</b> 28:16 <b>rulemaking</b> 40:17 53:10 55:6,11,20 80:19 <b>rulemakings</b> 77:8 <b>rules</b> 40:16 54:17 <b>run</b> 25:20</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>s</b> 3:1 4:1 <b>safety</b> 13:11 64:11 75:3 <b>sale</b> 30:4 <b>sat</b> 74:22 <b>satisfy</b> 21:17 27:8,15 <b>satisfying</b> 81:11 <b>savings</b> 5:20,24 <b>saying</b> 17:24 20:11 22:7 32:1,3,4 35:12 39:18 40:25 44:25 53:9 54:4 55:9 63:3 64:1 67:25 70:11,24 71:7 <b>says</b> 7:17 8:24 8:25 13:8 18:13 20:25 21:16 27:2,10 35:19,22 38:11 46:4 48:7 52:5 52:7,24 54:20 55:24 60:16 65:21 70:22 74:13 <b>scalia</b> 5:23 6:22 7:6,15 8:17,21 12:25 14:15 15:3 17:19 18:21 23:9 24:6,22 25:11 25:15 26:12</p>	<p>32:21,25 33:10 42:6,10,15,18 42:21,25 43:24 44:2 51:8,18 52:21 55:17 56:1 60:25 61:4 71:23 72:5 73:3 76:4 76:12 <b>scalias</b> 11:6 70:24 72:25 <b>scenario</b> 60:5 79:14 <b>scheme</b> 9:6 <b>screening</b> 4:18 <b>second</b> 5:8 18:20 21:23,24 22:17 23:14 34:16 36:9 45:6 47:16 49:10 51:19 56:4 59:9 60:24 61:14 79:12 <b>seconds</b> 37:20 <b>section</b> 38:8 51:21 <b>securely</b> 65:25 <b>see</b> 5:19 39:12 46:13 48:7 51:19 56:8 59:7 63:8 65:25 69:11 76:24 <b>sees</b> 46:1 <b>selected</b> 5:16 <b>sense</b> 6:18 10:1 10:20 25:24 72:17 <b>sensibly</b> 23:12 <b>sentence</b> 56:11 <b>separate</b> 49:7 61:16 62:8,9 76:21,25 <b>separately</b> 76:22 <b>serious</b> 6:13 <b>set</b> 5:10 10:11 13:23 17:10</p>	<p>54:8,17 <b>sets</b> 46:15 <b>setting</b> 17:7 <b>seven</b> 32:10 <b>seventh</b> 50:3 <b>severability</b> 56:14 <b>severe</b> 6:10 <b>severed</b> 56:8 <b>share</b> 14:20 15:7 15:9,10,18 <b>shared</b> 14:13 15:16 <b>sheep</b> 58:14,15 58:19 62:17 69:5,8 73:9 <b>shift</b> 39:3 62:13 70:13 <b>shifting</b> 66:1 71:4 <b>shipment</b> 30:7 <b>shoes</b> 18:16 19:14 31:4 <b>shoots</b> 10:3 <b>short</b> 17:1 <b>shorter</b> 20:14 <b>shot</b> 10:17,19,22 <b>shouldnt</b> 15:4 48:16 64:2 <b>showed</b> 77:13 <b>shown</b> 15:20 30:7 <b>shut</b> 66:19 <b>side</b> 24:18 25:25 35:7 63:7,8 <b>sides</b> 36:10 59:24 79:23 <b>significance</b> 14:9 <b>significant</b> 9:16 9:20 10:24 11:19 12:22 14:6 16:10,16 18:14 65:19 69:9 70:7 71:7 71:16,20 73:9 73:13 75:24</p>
--	--	---	---	--

80:15 81:24 <b>significantly</b> 5:7 9:2,12 10:3,7 10:11,15,21 19:5,11,25 21:4 33:16,20 38:5 45:4 47:5 47:9 49:25 51:15 57:9 60:21,25 61:3 61:5,7 63:15 63:20 64:4 65:22 66:24 67:7,17,25 72:2,8,16,19 72:24 74:18,19 75:10 77:3 <b>silly</b> 13:17,21 57:5 <b>simplistic</b> 64:16 <b>simply</b> 11:2 12:17 14:17,18 14:25 15:23 17:11,20 18:15 19:13 31:6 35:12 41:25 43:21 57:17 60:14 63:13 70:8,22 81:4 <b>sip</b> 21:13 24:14 25:4,5 35:20 35:21 38:19,24 39:25 40:23 41:1,3,7 42:7 42:11,19,21 43:1,3,7,19 44:7 45:1,16 45:19 46:1,23 47:7,16 48:11 49:19 51:25 52:1,8 54:11 54:13 61:19 66:15 67:16,21 68:15 70:5 <b>sips</b> 19:21 24:10 36:25 38:7,21 39:5 43:21	45:12 47:20 48:15 51:3,13 51:23 52:5 53:2 <b>sir</b> 34:10 <b>situation</b> 18:24 33:25 78:24 <b>situations</b> 35:17 <b>six</b> 50:2 <b>slate</b> 43:10 <b>slight</b> 57:21 81:22 <b>so2</b> 5:17 15:22 34:3 <b>soften</b> 68:8 <b>sole</b> 44:16 <b>solely</b> 49:16 <b>solicitor</b> 1:24 2:2 <b>solution</b> 32:11 32:19 34:9 59:21 <b>solutions</b> 39:18 <b>solve</b> 59:4 82:1 <b>solved</b> 9:10 40:4 40:5 81:15,21 81:21 <b>solving</b> 50:13 <b>somebody</b> 9:17 9:17,22 10:2,2 <b>somewhat</b> 8:2 <b>soon</b> 36:7 42:16 <b>sooner</b> 51:11 <b>sorry</b> 20:20 27:6 34:2 <b>sort</b> 33:3 64:15 <b>sotomayor</b> 27:17 31:10 40:22 41:5,19 41:23 44:23 47:23 48:4,13 48:24 52:10,19 57:5 66:17,23 68:9,13 70:15 <b>sotomayors</b> 70:1 <b>sought</b> 4:14 <b>sounds</b> 39:9	50:14 <b>source</b> 21:2 <b>sources</b> 9:1 12:19 23:25 26:4 36:15 38:25 67:13 77:19,21 78:1 80:16 <b>sovereign</b> 36:10 79:22 <b>spaghetti</b> 22:5 <b>specific</b> 28:19 69:3 73:7 <b>specifically</b> 54:21 77:8 80:6 <b>spillover</b> 30:1,8 <b>square</b> 55:22 <b>stabs</b> 10:2 <b>stage</b> 14:5 17:3 28:13 <b>stance</b> 38:23 <b>standard</b> 5:3 11:22 20:16 29:22 33:21 40:21 43:5 48:17,17 64:1 64:18 70:12 75:1,3,6 <b>standards</b> 13:22 17:15 46:5 47:19,21 51:24 <b>standing</b> 56:13 <b>standpoint</b> 71:11 <b>started</b> 34:12 51:18 <b>starting</b> 38:19 <b>starvation</b> 59:6 69:18 70:4,9 <b>starve</b> 59:1 <b>state</b> 2:3 3:7 4:21 5:1,4,10 5:10 6:17,22 7:17 8:14,15 8:22,23 9:1,4,8 11:9,23,24	12:19 14:16,17 14:19 15:4,4,7 15:8,18 18:17 19:3,3,7,15 20:11,21,22 21:3,9,16 22:6 22:13,22 23:2 24:2,4 26:22 26:23 27:3,7 27:13,14 29:5 29:7,14 30:19 30:24 31:9 32:9,13 33:19 33:19 34:14,23 35:11,20 36:10 37:11,23 38:21 39:5 45:19,24 46:5 50:4 52:1 57:18 58:3,12 58:13,14,25 59:10,11 60:2 60:3,7,9,12,16 60:17 61:22 64:19 65:19,19 66:8,15 67:20 68:14,15 69:4 69:5,7 70:4,14 70:23 71:3,10 71:12,25 73:8 74:10,24 79:22 80:21,24 81:2 81:4,8,9,10,13 <b>statebystate</b> 14:22 <b>states</b> 1:1,21 4:16,19,23 5:8 5:17,18,25,25 6:3,5,7,8,9,11 6:15 7:1,11,18 7:20 8:6,7,10 9:9 11:19,19 12:13,14 15:10 15:11,16 16:3 16:5 17:22 18:10,10,16 19:1,2,14,18 19:23 20:2,6	21:6,8 22:16 22:21 23:5,15 23:20 24:10,18 24:19,23 25:19 25:20,24,25 26:8,25 27:2 27:19 28:1 30:18 31:2,21 32:17 34:18,22 34:25 35:6,7,9 35:10,12 36:2 36:13,16,19,24 37:4,8,9,14 38:2,3,4,6,20 38:22 39:4,12 39:14,20 41:4 41:22 42:1 43:20 44:12,13 45:3,4,7,11,14 45:21 46:11 47:2,4,7,11,14 47:19,23,25 48:2,8,10,15 48:20 49:7,9 49:24,25 50:2 50:3,6 51:2,2,5 51:12,23,25 52:3,11,17 53:8 57:12,12 57:15,20,22,24 58:15 59:3,12 60:9 61:16,18 62:8,15 63:13 64:20 65:7,9 65:14,22 66:12 67:11 68:20 69:8 70:18 74:7 76:20 77:19,21 78:8 78:24,25 79:1 79:24 80:1,5 80:12,14,17 81:12,19 <b>statewide</b> 62:25 <b>statute</b> 7:17 8:18 8:24,25 13:13 15:1,4 17:9,11
--	--	---	---	--

17:23 18:2,5 19:6 20:5 27:1 27:7 33:17,18 35:18,22 38:11 38:13,18 40:10 40:13 43:18,24 44:1,3,8,9,22 46:4,14,15,18 49:14,17,19,21 49:22 50:21 52:2 53:16,16 53:17,19 55:14 57:3,6,7 59:15 59:24 60:11,15 61:21 64:7,9 64:12 65:2,11 65:17,21 66:5 66:14,22 68:18 68:19 71:24 72:18 74:12 75:2 76:21 80:3 81:7 <b>statutory</b> 12:25 45:6 51:19 56:24 60:20 63:11 65:15 66:1 79:19 <b>stayed</b> 48:22 52:16 <b>step</b> 16:12 <b>stepping</b> 31:4 <b>steps</b> 4:17 6:19 7:12 18:16 19:14 56:13 <b>stewart</b> 1:24 3:3 3:12 4:8,9,11 6:4 7:5,8,24 8:5,8,19,25 10:5,9 11:13 11:16 12:4,8 13:18 15:2,5 17:6 18:7,23 19:16 20:5 21:11,19 22:11 22:25 23:14 24:16 25:7,12 25:16 26:18	27:17 28:8 29:4 31:13 32:1,5,23 33:4 33:14 34:21 37:6 58:5 61:8 71:22 78:15,16 78:18 <b>stewarts</b> 66:18 75:8,20 <b>stop</b> 17:1 <b>stopping</b> 68:15 <b>stops</b> 68:15 <b>straight</b> 32:2,6 <b>strange</b> 34:8 <b>strike</b> 4:14 <b>structure</b> 46:20 60:24 61:15 <b>subchapter</b> 21:1 <b>subissue</b> 26:20 <b>subject</b> 29:9 31:8 36:5,16 53:21 54:4,15 <b>submission</b> 27:13 47:10 <b>submit</b> 18:11 20:13 35:20 38:6,20 39:5 41:2 43:20 45:12 47:16 48:12 51:3,13 <b>submitted</b> 20:21 27:14 42:22 43:3 77:12 78:7 82:6,8 <b>subsection</b> 20:20 27:9 39:6 46:25 <b>substantial</b> 46:18 53:19 57:23 <b>successfully</b> 24:19 <b>sufficient</b> 64:10 <b>suggest</b> 57:6 63:18 <b>suggesting</b> 48:9 <b>suggestion</b> 54:8	<b>suggests</b> 62:24 <b>suit</b> 78:25 79:5 79:22 <b>summer</b> 25:14 <b>supply</b> 75:4 <b>support</b> 68:18 <b>suppose</b> 14:14 32:21 <b>supposed</b> 12:13 12:16 13:22 19:7 39:19 <b>supreme</b> 1:1,21 <b>sure</b> 22:19 34:20 36:21 64:16 81:12 <b>surely</b> 66:13,18 <b>system</b> 39:23 68:11 <hr/> <b>T</b> <hr/> <b>t</b> 3:1,1 <b>tail</b> 24:23,23 <b>take</b> 7:12 8:18 11:8 13:12 14:3 16:23 19:11,25 22:9 25:16 26:6 28:1 31:12 33:7 34:8 42:12,19 43:21 45:12 47:8 51:4 62:7 64:25 66:25 67:15 68:21 70:3 74:6,7,8 <b>taken</b> 6:19 16:18 17:22 38:11 47:6 63:18 67:23 70:4,17 <b>takes</b> 42:17 70:8 <b>talk</b> 75:11 76:3 80:11 <b>talked</b> 13:10 <b>talking</b> 10:24 39:11 62:19 73:7 74:23 75:3	<b>talks</b> 65:2 72:18 80:15 <b>target</b> 24:11,15 25:3,5 26:15 26:16 <b>task</b> 23:19,21 24:3 25:21 28:13 36:19 79:5 <b>tasked</b> 30:4 <b>team</b> 10:13 76:19 <b>teams</b> 76:17,21 <b>technology</b> 15:24 16:8 65:7 74:11 <b>tell</b> 21:18,19 24:15 25:3,4 45:3 50:11 69:7 74:1 <b>telling</b> 45:20 61:24 <b>tells</b> 43:20 47:4 50:21 <b>ten</b> 65:14 74:20 74:20 <b>tenable</b> 54:19 <b>tennessee</b> 65:21 68:24 <b>term</b> 8:19 9:13 33:16 <b>terms</b> 6:6 9:11 19:8 37:10 41:7 <b>texas</b> 2:3 <b>text</b> 55:23,24 57:7 60:20 61:14 <b>thank</b> 37:18 56:15,16 78:12 78:14,18 82:3 82:4 <b>thatd</b> 15:3 <b>thatll</b> 42:19 <b>thats</b> 6:24 8:8,24 9:23 11:3 14:25 17:4,22	18:2 19:1 21:20 22:19 23:9 24:12 28:17 29:22 32:3,25 33:3 34:7,14 37:2 39:18,21,24 42:15 44:3 48:25 49:3,12 49:17 50:19 51:15,21 53:10 54:18 55:14 56:4 59:8 61:6 61:19,20 65:1 67:10 69:23 70:15 72:9 73:1,3,10 75:25 77:20 81:16 <b>theoretical</b> 27:18,22 28:10 70:16,22 <b>theoretically</b> 32:16 <b>theorizing</b> 34:9 <b>theory</b> 41:14 <b>theres</b> 11:17 22:5 26:13 27:22 28:5 41:25 43:16 50:2 53:6 55:7 56:7 60:2 63:10,17 64:19 72:21 73:21,23 79:18 <b>theyll</b> 40:7 72:13 <b>theyre</b> 11:11 31:5 40:10,12 40:19 41:6 43:10 58:15 59:1,9,11 68:15 74:23 <b>theyve</b> 8:11 37:8 40:25 48:14,17 51:16 59:8 61:11 70:16 <b>thing</b> 14:7 15:5
--	--	---	---	---

18:20 22:17,19 26:18 30:18 39:16,17 63:5 63:10 65:11 68:1 76:4 79:21 80:2 81:6 <b>things</b> 18:7 25:17 33:23 40:15 62:6 70:2 80:18 <b>think</b> 6:23 7:6,8 7:8,24 9:12,13 10:5 11:17 13:1,19 14:23 16:1 17:3 22:20 27:22 28:5,8,13 29:22 31:12,16 32:25 33:12,14 40:2,16 41:6,8 41:8 42:15 43:22 49:4 54:7,18 55:8 55:17,17 57:3 57:11 60:10,14 60:20 61:7,23 63:10,16 65:12 66:8,21 67:6,7 67:19 70:14 71:18,19 72:9 72:15,18,23,24 73:10,10,14,17 74:16,20,25 79:2 80:10 <b>thinks</b> 13:2 <b>third</b> 34:21 79:21 <b>thought</b> 25:19 44:24 63:1 75:9 <b>three</b> 4:16 18:7 34:13,19,19 48:2,5,15,20 49:6 52:11,17 60:15 69:5 79:2	<b>threshold</b> 6:6,7 6:21 7:10 15:19 23:7 33:5 70:23 71:1 73:22 <b>thresholds</b> 5:15 5:16,21 6:16 21:12 81:17,18 <b>throw</b> 75:12 <b>time</b> 11:7,7 12:13 19:20 25:13 26:1 27:11 29:24 31:4,8,14 35:23 36:24 40:3 42:19 46:7 50:8 71:1 <b>times</b> 38:23 56:9 <b>today</b> 15:24 <b>told</b> 21:7,9 38:20 39:4 40:23 47:7 <b>ton</b> 5:17,18,19 6:6,7 8:13 34:17 <b>tons</b> 35:3 <b>top</b> 20:20 <b>total</b> 33:6 35:3 <b>tough</b> 39:8 50:10,18 <b>trade</b> 68:10 <b>tradeoff</b> 68:10 <b>trading</b> 68:17,18 80:6 <b>transaction</b> 42:12 <b>translate</b> 75:18 <b>translated</b> 67:17 <b>transport</b> 4:13 4:20 5:9 37:10 40:12 41:11 44:20 45:7 47:17 49:19 51:10 52:5 80:11 <b>travel</b> 26:7 <b>treat</b> 16:16 66:7	69:6 <b>treated</b> 6:10 30:20 76:22 <b>treating</b> 59:10 59:11 61:15 <b>tries</b> 53:8 <b>triggered</b> 11:20 <b>trucking</b> 13:5,25 17:7 64:9 67:10 75:2 <b>true</b> 7:4 10:19 23:5 36:11 <b>truth</b> 11:17 <b>try</b> 31:17 55:3 59:17 <b>trying</b> 8:9,9 11:9 26:2 40:8 55:5 55:9 69:20,21 79:25 <b>tuesday</b> 1:18 <b>turnover</b> 10:17 <b>turns</b> 58:17,18 <b>two</b> 6:4 12:4 23:15 25:17 32:9 36:4 46:8 59:2,3 64:20 65:14 69:3,4 75:14 77:7 <b>type</b> 21:2	<b>undertaking</b> 23:21 31:16 <b>unfairly</b> 30:20 <b>unfeasible</b> 68:7 <b>unique</b> 68:18 <b>unit</b> 69:7,8,10 <b>united</b> 1:1,21 48:8 53:8 <b>units</b> 32:10 69:3 69:4 <b>unlawful</b> 38:14 43:13,16 <b>unnecessary</b> 28:20 <b>unreasonable</b> 40:7 <b>upwind</b> 4:15,19 4:23 5:1,25,25 7:17,20 19:2 21:6 32:9 33:19 36:13,19 65:18 78:8,25 79:1,16,18,25 80:20 81:2,19 <b>usc</b> 20:10 <b>use</b> 6:24 8:1 14:9 23:10 43:14 53:9,13 57:2 69:20,21 72:22	<b>virtually</b> 77:14 <hr/> <b>W</b> <hr/> <b>wait</b> 36:1 44:17 47:11 48:7 49:1,5 <b>waiting</b> 43:2 <b>want</b> 11:16 25:1 34:10,19 41:15 42:23 43:20 45:15,21 62:13 69:2 73:2 <b>wanted</b> 14:24 17:19 39:12 44:14 72:10 74:8 <b>wants</b> 46:19 68:3 <b>washington</b> 1:17 1:25 2:4 <b>wasnt</b> 81:12 <b>way</b> 6:7 7:14 8:3 13:17 14:2 15:11,15,23 22:6 30:19 32:19 35:1,18 37:14 38:17 40:5,5,7,8 49:13 50:19,22 54:3 57:6 65:15 66:9,25 67:23 68:9 70:10 81:13 <b>ways</b> 15:9 65:3 68:8 69:24 <b>wed</b> 39:11 <b>weight</b> 61:7 <b>went</b> 37:15 50:19 53:2 54:23,25 <b>weve</b> 16:17 25:6 56:4 67:19 <b>whats</b> 24:12 28:4,7 39:22 39:22 40:7 41:5 49:6 50:24,24 52:19
		<hr/> <b>U</b> <hr/> <b>ultimately</b> 5:16 23:7 24:5 <b>unavoidable</b> 16:6 <b>uncertainty</b> 26:14,15 <b>unclear</b> 37:8 54:6 <b>understand</b> 17:5 18:22 32:6 33:10 41:13 <b>understanding</b> 46:3 54:1 74:9 <b>undertake</b> 15:18 <b>undertaken</b> 48:20	<hr/> <b>V</b> <hr/> <b>v</b> 1:6,13 4:5,7 <b>vacate</b> 28:5 <b>vacuum</b> 26:9 <b>variety</b> 23:23 28:19 <b>various</b> 5:15 9:12 12:20 23:3 35:2 <b>varying</b> 10:8 <b>venture</b> 49:2 <b>version</b> 55:10 63:12 <b>versus</b> 6:7 77:11 79:24 <b>view</b> 38:12 <b>violation</b> 18:1	

76:5 <b>white</b> 76:24 <b>widespread</b> 22:14 <b>wild</b> 45:13 <b>win</b> 28:17 <b>wind</b> 50:7 <b>wisdom</b> 79:7 <b>won</b> 28:21 <b>wondering</b> 13:12 <b>wont</b> 43:1 <b>word</b> 61:7 63:15 71:8,24 72:7,7 72:22,23 74:1 74:12,17,17 <b>words</b> 13:15 17:9 36:24 61:8 63:20 66:24 69:12,21 <b>worked</b> 70:17 <b>working</b> 21:6 37:9 70:9 <b>works</b> 36:7 40:2 <b>worry</b> 34:4 <b>worse</b> 25:18 <b>worth</b> 14:10 36:9 80:10 <b>wouldnt</b> 23:5 25:7 26:25 30:10 41:24 49:1 66:14 <b>write</b> 69:2,2,12 <b>writing</b> 43:10 <b>written</b> 38:1 66:6,14 <b>wrong</b> 41:6,8 58:8 <b>wrote</b> 18:3,6	<b>years</b> 11:9,11,23 12:18 20:14 22:9 27:12 35:23 36:1 38:19 40:14,14 46:6,8,11,16 46:17 47:11 <b>yellow</b> 73:15 <b>york</b> 26:1,6 <b>youd</b> 10:25 <b>youll</b> 42:18 <b>youre</b> 10:24 17:23,25 22:7 39:9,11 40:22 42:10 50:14 62:18 69:1 71:6,6 73:7 74:2 <b>youve</b> 22:8,8 39:21 43:6,7	63:20 <b>1997</b> 12:6 47:19 51:24 <b>1998</b> 21:13 38:20 44:14 46:24 <b>1a</b> 20:8	<b>500</b> 5:17,19 6:6 8:11,13 23:11 33:1 34:17 <b>51</b> 39:1 <b>52</b> 39:1 <b>56</b> 3:10 39:1 <b>57</b> 43:19 <b>59</b> 38:25
<hr/> <b>X</b> <hr/>	<hr/> <b>Z</b> <hr/>	<hr/> <b>2</b> <hr/>	<hr/> <b>6</b> <hr/>
x 1:2,9,10,16 64:20	<b>000</b> 9:21,21 <b>09</b> 1:22 4:2	<b>2</b> 5:18,18 6:6,7 20:20 27:12 32:13 35:23 36:1 38:8,22 39:6 46:17,25 49:10,23 <b>20</b> 64:20,22,24 <b>2006</b> 12:3,10 21:14 43:4 <b>2010</b> 25:14 <b>2013</b> 1:18 <b>22</b> 47:19 51:23 52:3 <b>24hour</b> 12:10 <b>2a</b> 20:20	<b>6</b> 9:17 51:22 52:7,7,24,24 53:3,14,24 54:19,19 55:4 55:15 56:6,8 56:12
<hr/> <b>Y</b> <hr/>	<hr/> <b>1</b> <hr/>	<hr/> <b>3</b> <hr/>	<hr/> <b>7</b> <hr/>
y 64:20 <b>year</b> 9:21,22	<b>1</b> 5:17 6:11 9:21 9:22 20:11 27:10 <b>10</b> 1:18,22 4:2 9:17,18,21 64:25 71:11 <b>100</b> 9:19 76:7 <b>101</b> 76:7,7,15 <b>10a</b> 27:5,10 <b>11</b> 82:7 <b>120</b> 64:19 <b>121182</b> 1:5 4:4 <b>121183</b> 1:12 <b>13ths</b> 32:13,14 32:15 <b>15</b> 38:19 47:11 <b>17</b> 67:20 <b>180degree</b> 39:3 <b>1990</b> 33:17	<b>3</b> 11:23 20:13 22:9 46:6,16 <b>30</b> 22:16 37:19 <b>300</b> 5:18 6:7 <b>32</b> 20:9 <b>354</b> 77:17 <b>368</b> 43:19 <b>37</b> 3:7 <b>370</b> 43:19 <b>39</b> 82:7 <b>3year</b> 21:7	<b>7</b> 32:15 <b>7410</b> 20:10,11 38:8 51:22 <b>78</b> 3:13
	<hr/> <b>0</b> <hr/>	<hr/> <b>4</b> <hr/>	<hr/> <b>8</b> <hr/>
	<b>000</b> 9:21,21 <b>09</b> 1:22 4:2	<b>4</b> 3:4 32:14 78:15 <b>40</b> 64:23,24	<hr/> <b>9</b> <hr/>
	<hr/> <b>1</b> <hr/>	<hr/> <b>5</b> <hr/>	<b>9</b> 38:24 <b>97</b> 12:7
	<b>1</b> 5:17 6:11 9:21 9:22 20:11 27:10 <b>10</b> 1:18,22 4:2 9:17,18,21 64:25 71:11 <b>100</b> 9:19 76:7 <b>101</b> 76:7,7,15 <b>10a</b> 27:5,10 <b>11</b> 82:7 <b>120</b> 64:19 <b>121182</b> 1:5 4:4 <b>121183</b> 1:12 <b>13ths</b> 32:13,14 32:15 <b>15</b> 38:19 47:11 <b>17</b> 67:20 <b>180degree</b> 39:3 <b>1990</b> 33:17	<b>5</b> 5:19 9:17 11:9 11:11 46:11 <b>50</b> 59:5,5	