IN THE SUPREME COURT OF THE UNITED STATES

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ANTHONY WALDEN, :

Petitioner : No. 12-574

v. :

GINA FIORE, ET AL. :

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Washington, D.C.

Monday, November 4, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

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THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of Respondents.

C O N T E N T S

ORAL ARGUMENT OF	PAGE
JEFFREY S. BUCHOLTZ, ESQ.	
On behalf of the Petitioner	3
ORAL ARGUMENT OF	
MELISSA ARBUS SHERRY, ESQ.	
For United States, as amicus curiae,	
supporting Petitioner	18
ORAL ARGUMENT OF	
THOMAS C. GOLDSTEIN, ESQ.	
On behalf of the Respondents	27
REBUTTAL ARGUMENT OF	
JEFFREY S. BUCHOLTZ, ESQ.	
On behalf of the Petitioner	58

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 12-574, Walden v. Fiore.

Mr. Bucholtz.

ORAL ARGUMENT OF JEFFREY S. BUCHOLTZ

ON BEHALF OF THE PETITIONER

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

In holding that the -- in holding that respondents could bring this Bivens lawsuit against Officer Anthony Walden in Nevada, the Ninth Circuit made two errors that independently require a reversal.

First, as to personal jurisdiction, the Ninth Circuit held that it was sufficient that respondents have connections to Nevada, and that Officer Walden allegedly targeted his conduct at them, knowing of their contacts with Nevada. That plaintiff-centered approach is inconsistent with this Court's precedence which emphasize that the defendant himself must have meaningful contacts with the forum State.

Second, as to venue, the Ninth Circuit relied on the fact that the respondents felt in Nevada the effects of Officer Walden's alleged conduct in

Georgia. That similarly Plaintiff-centered approach is in conflict with the text of the venue statute, 1391(b)(2) which focuses on where the events or omissions giving rise to the claim occurred, not where the impact of those events or omissions may be felt.

JUSTICE SCALIA: Do you have any preference as to which of those errors you would like us to rely on?

MR. BUCHOLTZ: Well, Justice Scalia, I think for the reasons set out in the Federal Law Enforcement Officers' amicus brief, which I will try to explain, I think that it would be preferable for the Court to address personal jurisdiction and not just venue. That the reason is that venue in removed cases works differently. There really is no venue per se in removed cases.

And so if the Court only reaches venue here and holds that venue is improper, in theory, and maybe there are limitations problems with this, but in theory, the plaintiffs could refile the same lawsuit in State court in Nevada. It would be a Bivens lawsuit; it would arise under Federal law so we would remove it. But then removal would mean under 1441(a) venue would be proper per se in the district of removal, because that's the way removal works, and this Court so held in Policia

half a century ago.

And then there would be no personal jurisdiction and then the personal jurisdiction would be under the Ninth Circuit's decision and we'd be back exactly where we are now.

JUSTICE SCALIA: Of course, the venue question does not -- does not bring into the Court a constitutional question and the jurisdictional -- the jurisdictional one does.

MR. BUCHOLTZ: That's true.

JUSTICE SCALIA: And we usually try to avoid constitutional questions.

MR. BUCHOLTZ: That's true. And the avoidance canon is certainly one factor the Court could take into account in deciding which issue to reach or which issues to reach or in what order.

On the other hand, the personal jurisdiction question is -- is a constitutional question, but it's not a constitutional question in the strong sense of the term, because the only reason that the -- the personal jurisdiction question, as applied in this case, is a constitutional one is because Congress hasn't provided for nationwide service of process for Bivens claims.

And as the Court pointed out in Omni Capital that Congress has the power to do that. It's not for

the Court to do that on its own, to fill a perceived policy gap in personal jurisdiction law.

And so even though it is a constitutional question as currently configured, if Congress thought that it were a problem to apply the existing personal jurisdiction jurisprudence to Bivens claims and wanted to provide for nationwide service of process based on the idea that what counts is contacts with the U.S. as a whole as opposed to any particular State.

JUSTICE GINSBURG: It's not likely, is it, considering if the Bivens claim was created by this Court and not Congress?

MR. BUCHOLTZ: I'm not suggesting that Congress should do that. I think Congress should not do that. I think Bivens claims, for the reason that Your Honor just stated, is -- is sort of the last place that -- that anyone should start to create a more plaintiff-friendly version of personal jurisdiction. The Court has gone -- I'm sorry, Your Honor.

JUSTICE GINSBURG: You -- you would not have any problem about -- assuming we agree with you that it's -- there's no personal jurisdiction, it's the wrong venue, for the district court in Nevada to transfer the case to the Federal district court in Georgia?

MR. BUCHOLTZ: Well, I think,

Justice Ginsburg, in the ordinary course in a -- in a case starting in district court under Section 1631 or -- or the venue statute, that would be an appropriate course.

Here the district court asked respondents specifically, if I agree with Officer Walden on personal jurisdiction or venue, do you want me to transfer or do you want me to dismiss? Because the statute gives the district court discretion and -- and says in the interest of justice, transfer is -- is permissible in lieu of dismissal. The respondents said emphatically, we don't want you to transfer. We want you to dismiss. I guess they -- they decided they would rather have an appeal to the Ninth Circuit and take their -- their chances with -- with an appeal, then pursue the case in Georgia. So I think under the unusual --

CHIEF JUSTICE ROBERTS: That's probably -- it turned out to be a good -- good strategy, at least to the extent they got to the Ninth Circuit.

Isn't Calder against Jones in considerable tension with your proposition that you don't look to the plaintiff's contacts with the forum?

MR. BUCHOLTZ: I don't think so, Your Honor. I think there -- there is definitely some language in Calder that could be read in a variety of ways. I think

the key language in Calder -- excuse me -- as the Court states its conclusions, it says: "In sum, California was the focal point both of the article and of the harm suffered by the plaintiffs." And then the Court later says that -- that the defendants expressly aimed their conduct at California. It doesn't say at the plaintiff, who happened to be in California; it says at California. And I think that's not an accident that the Court used those formulations.

In all of the personal jurisdiction cases before Calder and since, and for that matter decided the same day, in Keeton, decided the same day as Calder, the Court has emphasized that random, attenuated, and fortuitous contacts with the forum State are in sufficient and that in particular contacts between the defendant and the -- and the forum that are created by the unilateral activity of the plaintiff are not sufficient.

JUSTICE ALITO: What do you think the Court meant when it said that the -- the article was aimed at California?

MR. BUCHOLTZ: I think what the Court meant, Justice Alito, is that the article was distributed in California and California was by far the largest market for the National Enquirer. The article recounted events

or -- or alleged events, that happened in California. And the article was drawn from California sources.

So it's not fortuitous that the effect of the article was felt in California. That was -- that was -- nothing about that was fortuitous because the -- the defendants knew that the article would be distributed widely in California, and that it was the largest market, and they --

JUSTICE ALITO: When it was distributed, it was distributed everywhere. It was the National Enquirer, so it was probably in every supermarket in the country.

And why does California as an abstract entity care about an article that makes allegedly defamatory statements about things that people supposedly did in California? I don't quite understand that.

MR. BUCHOLTZ: Well, let me try to answer the first part of your question first, Justice Alito. It's true that the National Enquirer was national, it was distributed throughout the country. But the Court went to pains in the opinion to emphasize that California was the largest market. And so when the Court said the brunt of the harm -- that -- this is right after the court's reference to express aiming,

where the Court says --

JUSTICE SCALIA: It's the largest market for everything, isn't it?

MR. BUCHOLTZ: Well, in particular for National Enquirer when you're talking about articles about celebrities, about actresses in particular, that allegedly injured their professional reputation and prevent them from getting future acting jobs.

CHIEF JUSTICE ROBERTS: I don't understand. Are you suggesting if this -- everything was the same except Ms. Jones was in New York, there'd be a different result in that case?

MR. BUCHOLTZ: No, I'm not suggesting that. I think that --

CHIEF JUSTICE ROBERTS: Well, I thought several times you said California was the biggest market.

MR. BUCHOLTZ: Right. I think -- I think the way that -- that Calder reads, I think that there are a number of factors. One of them is plaintiff's residence in California. That's where she was when she suffered the emotional distress from -- from reading the article about herself and where her job prospects were allegedly adversely affected.

But it's also true the Court points out that

not only is -- when the Court says the defendants expressly aimed their conduct at California, the next passage after that where the Court explains what that -- what express aiming in California means, it says California was not only where Ms. Jones suffered the brunt of the harm, but where the defendants knew that the Enquirer had its largest circulation.

So I don't think you can disentangle the fact that that's where she was, which, of course, was a relevant factor in that case because it was true, from the fact that the defendants in a broader sense, in a more -- in a sense not based on her unilateral activity, but in a sense based on their own contacts, aimed at California. They drew their --

JUSTICE KAGAN: Well, what does it mean -- what does it mean in the context of an intentional tort, which is what we're talking about here, to aim at a particular State, if it doesn't mean to aim at a person who you know to be within that State?

I mean, nobody conducts an intentional tort intending to injure California per se. You're intending to injure a person who resides in California. So what would it actually mean to aim conduct at a State irrespective of a person?

MR. BUCHOLTZ: Well, Justice Kagan, I think

the answer is that it could take a few forms. It depends on the type of case. It would be very difficult to try to come up with the single, you know, sort of comprehensive unitary answer to that question that would govern all types of cases.

I think the way that the plurality put it in J. McIntyre for intentional tort cases is that maybe you're intending to obstruct the laws of the forum State. That would be more meaningfully aimed at the forum State qua State and not just somebody who happens to be in it or have a connection to it.

Another way that conduct could be aimed at a State would be if -- if it's a species of purposeful availment or purposeful direction, where you're projecting your conduct into that State, whether that's -- whether that's physical or literal or whether it's -- it's through some indirect or technological means for --

JUSTICE KAGAN: Well, suppose -- suppose -- and I'm sorry. Please.

MR. BUCHOLTZ: -- for some benefit, for some reason, where you're projecting your conduct into that State, not just because that's where the plaintiff happens to be, which is incidental and irrelevant to you that the plaintiff is there as opposed to anywhere else,

but because you're seeking that State out. That could be -- it could be, in a case like J. McIntyre, the Court, of course, divided over whether in a -- in a very broad sense, sending your product into the stream of commerce intending that it in some sense, you know, go to the U.S. as a whole without any particular focus on a given State, was sufficient.

But at least there, at least there, you have the intent to serve the U.S. market as a whole. And so you at least are on notice that your own conduct is putting you at risk of being hailed into court in any one of the States.

JUSTICE KAGAN: Yes. I guess I just -- the -- the McIntyre example is a very different kind of example because in those cases, you really are talking about a company seeking to serve a general market in a State. But intentional tort cases don't usually have that quality. You're going after a particular person in an intentional tort case. And it's odd to think of going after an intentional -- a particular person, whether it's a defamation suit or it's a fraud suit or -- or what have you, as -- as targeting the State itself.

MR. BUCHOLTZ: Well, I think if it's a defamation suit, Justice Kagan, if you project your

defamation into the forum State, then it's fair to say that you've in a sense entered the forum State, whether that's electronic or physical as in Calder.

JUSTICE KENNEDY: But in -- in this case, it was known or should have been known that these were gamblers, they were in Nevada. That's where a lot of -- that's where their gambling takes place. They were residents of Nevada. So in that sense, they were like the plaintiff in -- in Calder. The injury was there and the defendant arguably knew or should have known that that's where its major impact would be.

I recognize your point that when you take money away, then you're inconvenienced in any State where you happen to be. But there was an argument here -- it seems to me there is an argument here that this was gambling and these people were from Nevada and so you've -- this -- this curtails their right or -- or their option to conduct -- to conduct their activities in -- in Nevada.

MR. BUCHOLTZ: Justice Kennedy, the complaint alleges that the plaintiffs had contacts with Nevada, were residents of Nevada. Of course, they showed Officer Walden California licenses. That's what the complaint alleges, not Nevada licenses. And so at the time of their actual --

JUSTICE GINSBURG: But didn't they say they were residents in both places, in both California and Nevada?

MR. BUCHOLTZ: They do say that. But there's no reason to think, and even they don't allege this, that Officer Walden knew that at the time that he actually interacted with them. And so there's no allegation that he --

JUSTICE KENNEDY: Let me ask this -- and it's probably clear in the briefs. Is -- is the gravamen of the complaint the seizure at the airport or the later false affidavit? Because to the extent it's the later false affidavit, that cuts against you marginally.

MR. BUCHOLTZ: Well, I would emphasize "marginally," Justice Kennedy, because I think the gravamen of the complaint is both. I don't think there's a way to separate them. The effect that the plaintiffs are -- the reason for their lawsuit, their claiming damages based on the allegedly false affidavit, is that it took them longer than it otherwise would have to get their money back. It's the same money that was seized in Atlanta. So it's a continuation of the effect of the seizure. You can't separate them cleanly.

And the affidavit --

JUSTICE KAGAN: Would you -- would your answer be different, suppose that the officer had said, you can keep -- you can keep your money, go on to Nevada with it, and then, once the Fiores had reached Nevada the officer said -- the officer filed a false affidavit, which, let's say, froze the Fiores' bank accounts. Would your -- would your answer be different? The affidavit was filed in Georgia, but the money was not seized in Georgia, instead, the money has gone on to Nevada. Is there personal jurisdiction in Nevada?

MR. BUCHOLTZ: Justice Kagan, I think if -- if what Officer Walden allegedly had done -- of course, that's not this case -- is freeze a bank account in Nevada, then --

JUSTICE KAGAN: Well, he did it by filing an affidavit in Georgia and then it froze a bank account.

MR. BUCHOLTZ: No, I understand that. I understand the question. But if what he had done is freeze a bank account in Nevada, then maybe it would be fair to say that he had entered into Nevada by freezing the bank account in Nevada.

But here the cash was in Atlanta. The plaintiffs brought the cash to Atlanta. Officer Walden didn't seek them out knowing that they had any connection to Nevada. They -- he didn't go to Nevada.

He didn't direct anyone in Nevada to do anything. He didn't seize a -- or freeze a bank account in Nevada or direct anyone to do anything like that. He never had any contact with Nevada at all except for the very intangible contact, if you can call it that, of -- of allegedly writing this affidavit to keep the plaintiffs from getting the money back sooner than they would have.

But the plaintiffs would have gotten the money back wherever they happened to be or really, more precisely, wherever their lawyer happened to be. The fact that they chose a lawyer in Nevada and that's where asked the government to send them their money back ultimately is the very definition of fortuitous contact between Walden and Nevada.

JUSTICE SOTOMAYOR: But you told me -- you started by saying that our personal jurisdiction and venue provisions and jurisprudence center on a defendant's action, not on the plaintiff's action or injury. Calder suggests otherwise. But how do you respond, not only to Justice -- I'll do this after, but let me just pose the question and you can answer it on your rebuttal.

MR. BUCHOLTZ: Thank you.

JUSTICE SOTOMAYOR: I'm worried about the Internet effects from somebody's account in Vermont by

someone in Illinois -- the hypothetical on page 19, who steals something from a store in California.

MR. BUCHOLTZ: Thank you, Justice Sotomayor. If I may, I'll reserve the balance of my time and, as you suggested, address that on rebuttal.

Thank you.

CHIEF JUSTICE ROBERTS: Okay. Thank you, counsel.

Ms. Sherry.

ORAL ARGUMENT OF MELISSA ARBUS SHERRY,
FOR UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE PETITIONER

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

If I could start with this Court's decision in Calder, because the facts of this case stand in stark contrast to Calder. In Calder, the article was all about the State of California. It was about the California activities of a California resident whose career was centered in California, based on California sources, and in a magazine that -- where its primary publication was in California.

Here, even if you were to focus just on the affidavit, the affidavit is in every real sense focused on the State of Georgia. According to Respondents' own

allegation, it recounts what happened in the Atlanta airport in Georgia. It was based on information that was received by Officer Walden in Georgia. It's about funds that were seized in Georgia, that remained in Georgia. It was prepared in Georgia, forwarded to an AUSA in Georgia for forfeiture proceedings in Georgia.

And so the two cases could not be more different. Just as the focal point of the tortious activity in Calder was on the State of California, here the focus of the tortious activity was on the State of Georgia.

JUSTICE SCALIA: Did the affidavit ever get to Nevada?

MS. SHERRY: It didn't get to Nevada. Based on Respondents' own allegations, it was sent to an AUSA in Georgia for forfeiture proceedings in Georgia. And, notably, had Respondents wanted to regain their property during the 6 months' period of seizure, they would have had to go to Georgia to do so.

JUSTICE KENNEDY: Do we know how much of the information, the supplemental information, that was prepared in Nevada and then was forwarded to Georgia, how much of that information was in the affidavit?

MS. SHERRY: Based on the current record, I don't know that we do. If you look at the complaint

allegations, they suggest that the excul -- what they call the exculpatory information was left out of the affidavit. The affidavit itself, if it even exists, is not in the record in this case.

And, you know, by focusing -- you asked the question, Your Honor, about what the gravamen of this case is. I think in a very real way, the gravamen of the case is the initial seizure. The Ninth Circuit focused exclusively on the affidavit and Respondents do so here as well.

But I think it's a quintessential example of the tail wagging the dog. The affidavit is, at best, a thin and artificial read. Even if you were to focus exclusively on the affidavit, as I explained --

JUSTICE GINSBURG: But it was -- it was stated as a separate claim, and I think Judge Grisholm read it that way and I don't think Petitioner has taken issue with that. That there's -- one claim is for the seizure, another claim is for the false affidavit. So the seizure stops the funds immediately and then the false affidavit keeps them there.

So I didn't think there was a -- a genuine difference between the parties on whether the affidavit -- knowingly composing a false affidavit is an independent claim.

MS. SHERRY: There isn't for purposes of -- of this case in this Court and I don't mean to suggest otherwise. But while there may be a distinct claim, there is no distinct injury. The injury that Respondents allege based on the affidavit is simply that the initial seizure continued beyond the time that it otherwise would have and for that reason the harm, the same economic harm that they were already feeling in Nevada, continued beyond a certain person point in time.

JUSTICE SOTOMAYOR: But imagine a case where everybody agreed that the initial seizure was lawful, so that that wasn't part of the complaint at all, and the only complaint was that a false affidavit had been filed, so that after making the preliminary investigation, the officer hadn't transferred the money, but had instead kept it.

MS. SHERRY: And again, obviously, that's not this case, but I don't think that case would be any different because, assuming that the affidavit looks the same as it's alleged to look in this case, it would still be focused -- that money in Georgia and everything about it would still be related to Georgia. Again, the only connection to Nevada would be the fact that Respondents felt some harm in that State. It's not a harm that's unique in any respect to Nevada. It's a

harm they would have felt no matter where they traveled. If they had gone to their other residence in California, if they had left on another --

JUSTICE ALITO: And that would be true even if the Respondents had never been in Georgia?

MS. SHERRY: No. I think it's -- I think it's significant here that the Respondents did go to Georgia. I mean, here we are talking about a traveling Plaintiff, a mobile Plaintiff, who voluntarily left their home State and traveled to other States, traveled to New Jersey, traveled to San Juan, and traveled to Walden's home State, the place where he lives and works, and brought their cash with them there.

And so I think it is significant that they did travel to the State of Georgia and I think it shows how broad the Ninth Circuit ruling really is. As far as law engagement officers, though, Federal, State or local, this is a really problematic decision because they interact with travelers from all 50 States and beyond on a daily basis.

The idea that, based on those interactions, that they can be hauled into a far-away and distant forum based on nothing more than their interaction with a traveler and finding out where that person is from, which of course, unlike this case -- the facts here are

somewhat unique in that the drivers' licenses that were showed were not from the State of Nevada. In most cases, when travelers show a driver's license, it's from their State of residence.

JUSTICE ALITO: Do you think it's relevant in a case like this whether the -- the Federal officer who is sued is represented by the Justice Department?

MS. SHERRY: I don't think it's relevant at all. I would point Your Honor to the Court's decision in Stafford v. Briggs. In that case -- it's a venue case. It's about 1391(e). In that case, the dissent made an argument that that provision should extend to personal capacity cases against government officials. And one of the arguments made is there's really not much of a burden on them because they have DOJ representation and because they have indemnification. And the majority there rejected that argument.

I think it's equally implausible here, and I think it's significant that not only did the Ninth Circuit rely on the fact of DOJ representation, which, mind you, is not a guarantee, it's a discretionary determination; but not only did they rely on it, they relied on it to say that there would be personal jurisdiction here because this is a Federal official or really a State official deputized as a Federal official.

JUSTICE KAGAN: Ms. Sherry, just to try to figure out how far your argument goes, suppose there's an IRS agent sitting in Washington, D.C., and she maliciously does something, files an affidavit, does whatever she does to impose a tax penalty on somebody in Nevada and everything that she does happens in Washington, D.C.

Does the person in Nevada, who is the victim of this malicious attempt to impose a tax penalty, have to go to Washington, D.C. to sue her?

MS. SHERRY: I think there's more difficult questions there where the individual hasn't left the State at all and where it's targeted at the State. I think that comes to Your Honor's question about what it means --

JUSTICE KAGAN: Well, she's a very mobile person. She lives in Nevada, but she goes other places, and -- and this could, you know, harm her wherever she goes. Isn't that what you said? So why should she be able to bring suit in Nevada under your view?

MS. SHERRY: That is what I said, but I think maybe it goes to Your Honor's other question earlier about what it means to expressly aim your conduct at the forum State, as opposed to just the forum resident, when we're talking about an intentional tort.

In the cases that have looked at this, they've -- they have looked for something more besides simply aiming your conduct at a forum resident, some indication that the -- that the defendant is trying to reach into the forum State. And some of the examples that have come up is when they've actually sent something into the forum State, whether it's a defamatory article or a letter, the bullet example that's in their statement and mentioned in their briefs.

In those cases, the defendant is actually sending something physically into the State or, for example, directing activity in the forum State, directing something to happen in the forum State.

Whatever the answer is to that hypothetical, the facts here are really quite different. Walden didn't do anything to reach into the State of Nevada. And as my colleague pointed out, the only connection to Nevada and the idea that the money was going to be returned there and eventually was returned there is entirely fortuitous. It's based entirely on the unilateral acts of the plaintiff, the fact that they happened to hire a Las Vegas attorney. If they hired --

JUSTICE SCALIA: Ms. Sherry, you -- would you want us to decide this case on the jurisdictional question or the venue question?

MS. SHERRY: The Court, I think, can do either. My preference would be --

JUSTICE SCALIA: I understand that. That's why I asked the question.

(Laughter.)

MS. SHERRY: My preference would be that -- the same as Petitioner's, that the Court decide it on personal jurisdiction grounds, and the reasons are the ones expressed in the Federal law enforcement officer brief.

CHIEF JUSTICE ROBERTS: What type of action would the United States have brought if they decided to bring an action? It would have been in personam or in rem against the assets?

MS. SHERRY: It would have been an in rem action against the assets. It would have been a forfeiture complaint that would have been filed in Georgia. And in those proceedings, the Respondents would have had an opportunity to contest the forfeiture.

If during either the pendency before those proceedings or even before those proceedings, if they had wanted to seek to regain control of their property, they would have had to file a motion or a petition in the State of Georgia. They wouldn't have been able to file one in their home State. And again, those are the

statutes that we cite at page 31 of our brief.

The consequence of the Ninth Circuit's decision here really is to allow personal jurisdiction as well as venue to travel with a mobile plaintiff in a way that it cannot travel with mobile chattel.

We've talked mostly about personal jurisdiction here, but could I -- if I could just take a quick moment on venue and point the Court to the Leroy decision in 1979. Nobody contests that there would be no venue in the District of Nevada under the Leroy decision. The language change in 1990 does nothing to change that and does nothing to change the result in Leroy. Respondents avoid the statutory text, and I think it resolves this case.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE RESPONDENTS

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

You are being asked by the other side to write an opinion about personal jurisdiction that is going to try and slice the salami very, very, very thin, that is going to create a huge amount of confusion about

these facts versus the facts in Calder, and that is going to be very, very difficult to reconcile with the Internet cases and the cases that the lower courts are constantly confronting about where a person in State A intentionally injures a person in State B. And that person frequently doesn't shoot a gun into the other State. They sit at their computer and they steal money under the bank account. They take the person's ID. They use their credit cards and the like.

I think in truth the way the case is most likely to be resolved --

JUSTICE SCALIA: They didn't really injure a person in State B here. I mean, these people were in Georgia when the injury occurred.

MR. GOLDSTEIN: Justice Scalia, we disagree, and so let me focus on your point and Justice Kennedy's question about which claim it is. The claim here -- the complaint states two complaints, Judge Berzon recognized. One is about the seizure. It's exactly what you are describing. The other is about the false affidavit. And those really are different as a matter of law. I have a couple of citations to give you to explain how this legal process works.

What happens is the DEA seizes the money at the Atlanta Hartsfield Airport. He takes the cash and

turns it in to a locker. Then what happens is that we have to state a claim to the money. And when we state a claim to the money, they either have to do one of two things: They have to give it back to us as a matter of law, or they have to start a forfeiture process as a matter of law.

And if you start the forfeiture process, you have to provide to the assistant U.S. attorney a factual basis for the forfeiture. And the way to look at this, I think, is the way that Justice Kagan's hypothetical asked, and that is imagine that there were two officers here, not one. Officer A -- we'll call him Walden -- is at the Atlanta Hartsfield Airport, and he seizes our money. And just assume that that's perfectly lawful. We then state a claim to the money, and then we provide factual information about why it is that the money is not subject to seizure. They have to return it to us at that point or they have to start the forfeiture process.

And when that second officer creates a false affidavit to start the forfeiture process, we are not in Georgia. We have no ongoing contacts with Georgia. And we are losing access to the money only in Nevada. That's the only place we're in --

JUSTICE ALITO: Well, suppose that the plaintiffs in this case were not professional gamblers.

Let's say they were Major League umpires or they are members of a rock group that's going on a tour of 25 cities. Where would there be personal jurisdiction there? In every place where the umpire was going to appear at a game? Every place where the group was going to perform?

MR. GOLDSTEIN: No, sir. The lower courts have tackled this question because people go visit their mother-in-law. They do travel around. It's a mobile society, and they have taken from your opinion in Calder and Jones the focus on where it is that the plaintiff lives and works. And there is a good reason for that.

Personal jurisdiction is trying to tackle the question of where does the defendant reasonably believe that he will be hailed into court. It's a fairness principle. And that is, we need to have a predictable rule that allows the would-be defendants to know, okay, if I do this --

JUSTICE ALITO: Well, here the -- here the plaintiffs apparently lived in two places, right, California and Nevada?

MR. GOLDSTEIN: That is --

JUSTICE ALITO: And suppose my hypothetical rock performer has five houses, one in California, one in Montana and so forth. He -- personal jurisdiction

everywhere?

MR. GOLDSTEIN: No, sir. The -- and let me just start with the premise of this case, all right? My friend said that this officer was shown the California -- California driver's license. That's not correct. He wasn't shown a California driver's license. The officer in San Juan, Puerto Rico was shown one. They only -- their principal residence, the complaint alleges I think in paragraph 2, is in Nevada. We do have situations -- and that's where they lived and worked. We have situations --

JUSTICE ALITO: Well, they were sufficiently residents of California to get California driver's licenses, were they not?

MR. GOLDSTEIN: That is true at one point, and they had moved. I'm going to step outside the record just so I can accurately answer your question. But it will give you a sense of how these cases actually operate.

Most often, you have the situation where they're college students. You know, you have a college student who lives at home with their parents, but they go off to college, and they may be injured where it is that they live and go to school in that case. And what the lower courts do is sensibly, they say, if you know

where the person's principal residence is -- and this case is simplified by the fact that the district court understood and assumed that the defendant knew that they lived in Nevada. It's never been contested in the case, and Judge Berzon said quite correctly, what you have to do is you have to make it a prima facie case, because there's no evidence in this case, that the principal residence was Nevada and that the defendant knew that.

JUSTICE SCALIA: So you're really arguing for a very broad principle. Whenever there is an intentional tort, you can be haled into court at the place of residence of the person against whom the tort is committed.

MR. GOLDSTEIN: No, sir. I'm sorry --

JUSTICE SCALIA: No, that's what I thought you were saying.

MR. GOLDSTEIN: Then I've misled you, and let me state our test, which I haven't done yet, and that may help you. Our rule is as follows: When the defendant intentionally targets the plaintiff for injury in State A where the injury arises -- and that's going to be the big difference. Does the injury arise there?

Justice Scalia, your impression in your earlier question was that this injury didn't arise in Nevada. But our test requires that it arise in Nevada,

and the defendant knows that it's going to arise in Nevada. I'll contrast our -- our false seizure claim, right? We were in the airport. We lose the $97,000. If we then go back to Nevada and then file suit, our injury can't travel with us. And that's the big concern.

JUSTICE BREYER: Well, I don't see how it arises in Nevada. What they're saying is that some people in Georgia didn't give back some money that they took in Georgia. To take your example, my question is this: There could -- you say there are many, many, many cases. We could get this all mixed up if we don't follow your rule. All I want you to do is cite me a few, but the few that I want you to cite me will meet certain criteria.

MR. GOLDSTEIN: Okay.

JUSTICE BREYER: For example, a college student goes into the bookstore, and it's also a pharmacy, by the way. And he breaks his finger in the door. It's his fault. He says: I am going home; send me some bandages. The store never does. "Send me some books; I just bought them." The store never does. They know his home address, all right? Injury. Now, what about those?

Cite me some lower cases where they say

there is jurisdiction in cases like that.

MR. GOLDSTEIN: I have not seen --

JUSTICE BREYER: "Oh, I lost my billfold. I lost it here in the store. When you find it, will you send it back?" They never send it back, though they found it. All right.

So just give me some lower court cases that finds jurisdiction in that kind of situation.

MR. GOLDSTEIN: In that kind of situation where the injury actually -- and you have named several situations.

JUSTICE BREYER: No, no, the injury -- my goodness, he lost his billfold. There was money in it. And by the way, when he gets home, his parents are away, and he's not going to have any money to spend on food or even, like, CDs or anything.

(Laughter.)

MR. GOLDSTEIN: So Justice Breyer, it is our position that in that situation, there is not personal jurisdiction. And let me try --

JUSTICE BREYER: There is no jurisdiction in those cases where he lost his billfold in the bookstore in the college town 1,000 miles away from home, and he's going home, and everybody knows he's never going to have any money, and they keep the money. Okay. What's the

difference? If there are no cases on those, what is the difference between that case and yours?

MR. GOLDSTEIN: Okay. The difference is that the defendant in that instance, the injury arises at the bookstore. Okay? And the fact that it has a continuing effect, as a practical matter, the lower courts uniformly treat the injury arising as in the bookstore. But there are situations that you can imagine the following: And that is he loses the billfold in the store. Okay. That injury arose there. Now, someone takes the credit card from the billfold after he has gone home, knows that he's at home, and starts spending his money with it. That injury arises where he lives.

JUSTICE BREYER: Okay. Now, give me the case that says that.

MR. GOLDSTEIN: Okay. The cases that are closest to that, two of them are at page 25a of the petition appendix. They are the Bancroft case, and that -- these are not going to be billfold cases. Okay? Billfold cases, people tend not to -- if you lose $100, people don't file a lawsuit. These are bigger cases. And it's the petition appendix. You've pulled open the red brief, so I am asking you for the cert petition. The Bancroft case at 25a is where a Georgia resident

1 writes to a Virginia registrar and the registrar
2 misappropriates the website of a California company.
3 And that is they never set foot in California. They
4 don't, you know, do anything in California at all.
5 And there, there is jurisdiction in
6 California because they know that the person's going to
7 be hurt in California.
8 The next one is Metropolitan Life. That --
9 the same page. An Alabama resident writes to an
10 insurance company and they say, "Ah, I'm entitled to the
11 insurance proceeds." But the actual proceeds belong to
12 someone in California. And they never get the money.
13 So it's like this case. The money never gets sent into
14 California.
15 And these remote injury cases --
16 JUSTICE BREYER: Is this is a case -- is
17 this a case like -- I'll look at those cases.
18 MR. GOLDSTEIN: Okay.
19 JUSTICE BREYER: But is your case a case
20 like where the credit card is used, somebody finds it in
21 a bookstore and starts spending the money and did the
22 agents here, who were outside Nevada and they were
23 keeping the money, were they going and spending it?
24 MR. GOLDSTEIN: They weren't going and
25 spending it. They were --

JUSTICE BREYER: Was there a credit card that they were using?

MR. GOLDSTEIN: No, sir. I -- I was trying to take a billfold example and -- I'm -- I'm trying to --

JUSTICE BREYER: I was trying to figure out just which cases I should read carefully and I will read those cases.

MR. GOLDSTEIN: Okay. And there's a case that's discussed in several of the briefs called Dudnikov and that involves an -- an eBay -- eBay-like auction and someone in one State blocks an auction in another State. So one of the impressions --

JUSTICE SCALIA: Was the money here in Georgia the whole time?

MR. GOLDSTEIN: The money here was --

JUSTICE SCALIA: Was it still there in that locker?

MR. GOLDSTEIN: No. Here's the thing about it. This is no longer about the cash. And this -- the actual answer to your question is he turns the money in at a locker, okay? Then it's deposited into an account. It's not about the physical money in any way, shape, or form at that point. We weren't -- when we got the money, nobody sent us a duffle bag full of cash. There

was a check, of course.

JUSTICE KAGAN: Well, if it were about them --

MR. GOLDSTEIN: Yes.

JUSTICE KAGAN: So -- so suppose they seized a gold watch --

MR. GOLDSTEIN: Okay.

JUSTICE KAGAN: -- and then they refused to return the gold watch.

MR. GOLDSTEIN: Yes.

JUSTICE KAGAN: But the gold watch really is still sitting there in Georgia.

MR. GOLDSTEIN: Yes.

JUSTICE KAGAN: Okay? Would you say that -- that then there's -- there's personal jurisdiction in Nevada?

MR. GOLDSTEIN: Okay. Okay. In same facts, and that is a false affidavit, it's not just they seized it, it's they make a false --

JUSTICE KAGAN: Yeah, they seize it and then there's a false affidavit keeping it.

MR. GOLDSTEIN: Yes, that --

JUSTICE KAGAN: And the complaint is only about the false affidavit, but it's in reference to property that is indisputably in Georgia.

MR. GOLDSTEIN: Yes. I do think, if you can prove an injury, which I think is very hard from the gold watch -- let's say a computer, just to make it a little bit more plausible, that they would be hurt in Nevada, then, yes, I do think if you can make out an injury, which isn't -- the tort doesn't arise until the injury occurs. That's why the lower courts treat these cases as the tort occurring where the victim is.

JUSTICE GINSBURG: Mr. Goldstein, can I take you back to the origins of all of this?

MR. GOLDSTEIN: Yes.

JUSTICE GINSBURG: The main move for personal jurisdiction traditionally is the plaintiff must go to where the defendant is, no matter how inconvenient that is for the plaintiff. Jurisdiction is defendant-centered. You're trying to hold a defendant, you have to go where he is.

Then the long arm age comes about, and we have specific jurisdiction, which, by the way, is what you're urging.

MR. GOLDSTEIN: Yes.

JUSTICE GINSBURG: You're still not saying they have all-purpose jurisdiction over Walden.

MR. GOLDSTEIN: No. Correct.

JUSTICE GINSBURG: And this Court, as the

McEntyre decision indicates, has been pretty careful about specific jurisdiction. And Miguel wasn't enough that machine blew up or cut somebody's fingers in New Jersey. They had to purposely avail themselves of wherever the -- the standard words are.

And here you're asking for -- really pushing this specific jurisdiction to the limit. The defendant has acted only in Georgia. He hasn't set foot outside the State.

MR. GOLDSTEIN: Okay. So, I don't think we are trying to push the bounds. Let me make one point about McEntyre and then try and correct the misimpression that I think that's been left, that there are a few contacts between Nevada and this case and hopefully prove to you that there are far more contacts between this tort and this forum than will be true in the overwhelming majority of cases that the lower courts confront.

And the point I would make, Justice Ginsburg, and it's made by the plurality in McEntyre, is that there have always been special rules for intentional tort cases. That's the distinction and that's why Calder comes out the way it does, citing restatement Section 32nd of the second -- the second restatement of the conflict of laws. And that is the

reason -- it's not just made up.

The reason there's a special rule for intentional torts is that the defendant knows he's hurting someone somewhere else, and therefore expects to be hailed into court. The view of the McEntyre plurality, of course, was that the overseas manufacturer there wasn't itself doing anything directed at the forum.

But if I could just get to the very important point about --

JUSTICE ALITO: Before you move on from that point --

MR. GOLDSTEIN: Yes.

JUSTICE ALITO: -- your argument is dependent on the fact that the officer here knew that the -- the plaintiffs were residents of Nevada; is that right?

MR. GOLDSTEIN: That they lived and worked there.

JUSTICE ALITO: Why should that make any difference? The conduct is the same; the injury is the same. What if he didn't know? Then there would be no personal jurisdiction.

MR. GOLDSTEIN: That -- that is actually generally what the lower courts hold, and their reason

is that the defendant is doing something knowing that he may be hailed into that court. It is a defendant-favoring rule that intends -- attempts to give predictability.

Now, if that's wrong, it doesn't hurt my case because as the case comes to you, it's not --

JUSTICE SCALIA: Well, you could say that about whatever rule we adopt. Once we adopt the rule, when -- the defendant will know that if he violates that rule, he's going to be hailed into court.

MR. GOLDSTEIN: Justice Scalia, there is a --

JUSTICE SCALIA: I mean, it's sort of a self-fulfilling point you're making.

MR. GOLDSTEIN: It's almost like the Fourth Amendment reasonable expectations to privacy. There is a circularity here. But it's not entirely circular because we're talking about a specific State here. It's not that he knows that the plaintiffs might be -- live in Georgia or might live anywhere in the United States, it's a very specific State and that's why it's not circular.

Now, if I could just help you understand our view that there are a lot more contacts between this tort and Nevada than in the great, great -- at least

90 percent of the cases the lower courts are confronting. So here are the points that I would make about those contexts, and there are six, and I will try and be brief.

The case involves money owned by Nevada residents, $30,000 of which originated in Nevada and all of which was on its way to Nevada.

Second, the defendant intentionally hurt the plaintiffs knowing that they would lose access to the money in Nevada, where they lived and worked.

Third, we will use documents in Nevada to prove that his action was intentional because it omitted the information that the defendant requested. This is not a uni -- us unilaterally sending money. At the Atlanta airport, he said send us the proof that the funds are legitimate, that he requested and received from the plaintiffs in Nevada, and that he learned in searching a Nevada law enforcement database, which is paragraph 79 of the complaint.

The two last points I would make is that the plaintiffs will show that they were deprived of the money in Nevada until the Nevada lawyer they had to hire used records in Nevada to persuade the government to send the money to Nevada. And the plaintiffs in their case, of course, will show, because it is the fact that

they are gamblers working in Las Vegas, that the economic injury occurred to them there.

Now, if you think that's not enough, if you conclude that's not enough, you are closing the door absolutely to all of the internet cases, because those are cases where someone sits at the computer and targets someone in another State. This --

JUSTICE ALITO: When you're talking about the internet, you're in a different world. But this is a -- the facts here are old-fashioned. Everything that happened here could have happened in 1920.

MR. GOLDSTEIN: Yes.

JUSTICE ALITO: Could have happened in -- in the 19th century.

MR. GOLDSTEIN: Yes.

JUSTICE ALITO: So I don't see what the internet has to do with this.

MR. GOLDSTEIN: Justice Alito, you always tell us that you've got to write a legal rule. And there is no special personal jurisdiction rule, and the lower courts --

JUSTICE BREYER: Yes. Well, there seems to be because it's hard to think of an internet case where a defendant wouldn't be having communications with people in the -- State, wouldn't be inviting business,

wouldn't be doing all kinds of things. So there are many kinds of internet cases, but I don't -- I don't automatically see in deciding this that we're deciding any on.

MR. GOLDSTEIN: Justice Breyer, the kinds of internet cases -- and it's wrong for me to just say internet -- the kinds of cases that I'm talking about are the fraud cases, the intentional tort cases --

JUSTICE BREYER: Like what?

MR. GOLDSTEIN: You steal -- you're sitting in Georgia -- you don't, but someone is sitting in Georgia and they steal the identity of someone who's in Nevada.

JUSTICE BREYER: I wouldn't do that.

(Laughter.)

MR. GOLDSTEIN: That's why I took it immediately back, recognizing the error.

JUSTICE SOTOMAYOR: He wouldn't know how.

(Laughter.)

MR. GOLDSTEIN: But there are bad people in the world, obviously, and those people do, with increasing and distressing frequency with these new tools of communication, they are very, very capable of causing significant harm to someone else without actually do -- setting foot in the State.

Now, I have to offer you a solution. Let me just be clear. I recognize that this can go either way, because if I say internet cases, well, then I'm opening the door to potentially a very wide-ranging set of cases going into Nevada, and we have here the special case of a law enforcement officer, and I believe that I do have the solution. And that is, this is actually a case about transfer. It is not a case about jurisdiction and venue. This is the unusual case where the defendant filed a motion to dismiss and did not file a 1404 motion to transfer.

And this case is a lot -- you should treat it like Atlantic Marine. Because what you need to do is recognize, I think, that there's the big category of jurisdiction. Where there is jurisdiction, there's a subset, there is venue. That's where you can file a lawsuit. That is not where the case is going to be litigated.

And in these cases, what defendants uniformly do, and the lower courts pay incredible attention to the fact that law enforcement officers are going to be witnesses or are the defendant. In these cases, the defendant comes in and says, okay, I recognize technically there's jurisdiction and venue, but let me tell you how disruptive it will be if I

actually have to litigate the case here.

JUSTICE ALITO: Well, I don't understand what you're saying. You're saying that we should reverse the Ninth Circuit's dismiss -- the dismissal and send it back for the district court to consider whether the case should be transferred?

MR. GOLDSTEIN: No, sir. I would not -- this is my judgment. I do not want it reversed. What I'm saying --

JUSTICE ALITO: I know that, so that's why I'm confused by what you're saying about transfer.

MR. GOLDSTEIN: I'm trying to describe an opinion that you would write and the opinion that I think you would write is this, and it says: Look, personal jurisdiction in the wake of Calder, particularly where there are contacts here, exists. Venue exists because several of these are events or omissions, including the injury that occurs in Nevada. But what we expect the lower courts to do in a case like this is to pay particular attention at the beginning of the case, as we do with qualified immunity, to have an efficient process in which the defendant can say --

JUSTICE GINSBURG: But you are asking the Court to decide a big ticket item, personal jurisdiction, and the theory that you are proposing

1 would apply not to, just to Officer Walden, but it would
2 be about as far out as any specific jurisdiction case I
3 know. So the Court shouldn't say, well, jurisdiction
4 okay; venue, okay, but consider it transferring it to
5 Georgia. That seems to me wild.
6 MR. GOLDSTEIN: Justice Ginsburg, I am not
7 trying to skip over. I have talked for this entire time
8 about why I think we are right on jurisdiction and
9 venue, and I am pleased to return to the issue. What
10 I'm suggesting to you is I recognize that we can't
11 have -- there are two ways of dealing with the prospect
12 of a broad personal jurisdiction rule. One is to narrow
13 it substantially. The second is to recognize that it
14 doesn't determine where the case is going to ultimately
15 be litigated.
16 I will tell you, Justice Ginsburg, from
17 personally reviewing all of the posy-Calder cases in the
18 Federal courts and the State courts that the contacts
19 here are much, much greater between Nevada and this tort
20 than exists in the great majority of cases that the
21 lower courts are confronting. So if you --
22 JUSTICE GINSBURG: Did Calder have something
23 to do with the notion that every defamation is -- that
24 every publication is a tort where it occurs? There is
25 something special about the libel cases. There was that

1 theory that wherever the paper that contains the
2 libelous article, wherever it is sent, in each one of
3 those places the tort occurs there.
4 MR. GOLDSTEIN: Two things about that. That
5 is the rule for torts, not specifically -- it is true of
6 libel, but it is true as well of fraud. The fraud
7 occurs where the person is defrauded. It's straight
8 from the Restatement. It's the ordinary common law
9 rule. So the tort does happen where the victim is
10 injured in libel and in a case like --
11 JUSTICE SCALIA: But you are libeled
12 wherever it is published. You don't have to be there
13 where it's published. You are libeled wherever it is
14 published.
15 MR. GOLDSTEIN: And, Justice -- that's
16 correct. And, Justice Scalia, this is exactly why --
17 you were asking the question, why is it then-
18 Justice Rehnquist's opinion in Calder has the discussion
19 that the other side is focusing on about how the article
20 was centered on California and how it came from
21 California sources. Now, none of the holding of the
22 case describes it, but you wondered, and he has
23 emphasized, my friend has, why is it in the opinion?
24 And it's for the reason you have just given. And that
25 is defamation and libel cases, when you are talking

about publication to the Internet or publication nationwide like the National Enquirer, the lower courts have rightly focused on the fact, can we say that this isn't just directed to the United States?

JUSTICE SCALIA: So -- so you could say that Calder, far from being an expansive decision, was a narrowing decision. It said, you know, there's jurisdiction not necessarily everywhere where the libel was published, which is where the injury occurs, but there is jurisdiction only in California, where these other connections exist.

MR. GOLDSTEIN: We are saying the same thing. I'm just not explaining my view of it well enough and that is --

JUSTICE SCALIA: Except it's harder for you to establish that the injury occurred in Nevada.

MR. GOLDSTEIN: I don't think so, and let me try my best. All right. The reason these defamation cases about Internet and national publications -- say the New York Times is sued for defamation. The Court was very concerned and the lower courts are very concerned that the publisher can't be sued in all 50 States. And so what the lowers courts have done in the wake of Calder is say, I know you published it to the whole country, National Enquirer, but is it fair to say

you expected to be haled into court in California because there were special features about this defamation?

Now, defamation and nationwide publication is very different from the other torts the lower courts confront, which, as was suggested in the first 30 minutes of questioning, I think, by Justice Kagan, are directed at a person. The "shoot the gun" example, the "defraud the victim" example.

JUSTICE SCALIA: But our jurisdiction cases have not been based on where you expected to be sued. You could expect to be sued anywhere if the State says you are going to be sued here.

Our cases have focused on whether the State has jurisdiction, whether the State has enough connection with it to assert its power; not the expectation of the defendant, but the power of the State. That's what's going on here.

MR. GOLDSTEIN: Justice Scalia, I agree with you, but I will say in my defense that when the Court has said, when we are trying to figure out if there are minimum contacts and whether it's consistent with fair play and substantial justice, the language the Court has used is, is it fair, because the defendant could reasonably be expected -- could reasonably expect to be

haled into the court. That's true of purposeful availment cases like McIntyre. It's true of intentional tort cases. And that is, we measure fairness and whether you are getting process that is due to you procedurally by whether this is something that you could expect to happen to you --

JUSTICE SCALIA: That's your new test, just whether you could expect this to happen?

MR. GOLDSTEIN: No, sir. No, sir. I have given you a specific test about where you have to intentional injure the person, knowing that they will be injured there and the injury has to arise there. And as I've said, the way in intentional tort cases that has to work is that the lower courts recognize that a tort has a wrong and an injury, and the injury is what makes the tort complete and the tort occurs where the victim is.

Just take the "shoot the gun" example. Right? The reason is that the person is injured there. It doesn't have to be that you shoot the gun, that the bullet travels across the State line, because the same thing can happen when money is taken out of your bank account.

JUSTICE BREYER: What is the -- what are the elements of the second tort?

MR. GOLDSTEIN: Yes. It is essentially a

fraud claim.

JUSTICE BREYER: And what is the element?

MR. GOLDSTEIN: That he knowingly submitted information that caused the government not to send us the money. False --

JUSTICE BREYER: The other element?

MR. GOLDSTEIN: Yes. That is --

JUSTICE BREYER: How do I find that? Because you see in the fraud case, the element includes the victims being misled.

MR. GOLDSTEIN: Yes. That's --

JUSTICE BREYER: But that's not necessarily true here. I wonder --

MR. GOLDSTEIN: No, it's actually not the case that the victim has to be misled in fraud, Justice Breyer, so for example --

JUSTICE BREYER: It has to be a misrepresentation --

MR. GOLDSTEIN: A knowing misrepresentation.

JUSTICE BREYER: -- material to.

MR. GOLDSTEIN: Yes.

JUSTICE BREYER: Material to?

MR. GOLDSTEIN: Here to the government's decision --

JUSTICE BREYER: Not here, but material

to -- normally it has to be material to the obtaining the, say, of property.

MR. GOLDSTEIN: Right. Or the refusal to return.

JUSTICE BREYER: Now, where do I find the elements of the tort that you are alleging here?

MR. GOLDSTEIN: The tort that we are alleging here is essentially common law fraud under Bivens. I can give you citations --

JUSTICE BREYER: I don't see anything in the complaint that says anything like that. It just says -- where do I look to see it?

MR. GOLDSTEIN: Okay. The citations to the complaint about -- it would be paragraphs 99 to 101. It's alleged to violate the Fourth Amendment and our due process rights to have submitted the false affidavit that caused the government not to send us the money.

And if you were to conclude, Justice Scalia, that this injury doesn't arise here, let me just tell you what the consequences of that are. And that is there are a large number of cases that arise constantly where people lose access to money. Where they don't have the insurance proceeds sent to them or the Social Security checks or the IRS refunds.

JUSTICE KAGAN: Mr. Goldstein, as I

1 understood what Mr. Bucholtz was saying, he was saying
2 there is a distinction between an officer who commits a
3 fraud in Georgia, when your money is in Nevada, and so
4 he commits a fraud and he freezes your bank accounts in
5 Nevada, versus he commits a fraud by filing this
6 affidavit. But it is as to money that is located where
7 he is, not where you are, but where he is in Georgia.
8 That's the distinction that I understood him to be
9 drawing.
10 MR. GOLDSTEIN: Right.
11 JUSTICE KAGAN: What do you think about
12 that?
13 MR. GOLDSTEIN: It doesn't make any
14 practical sense to me, and the money wasn't in Georgia.
15 The money was in an account in Quantico, Virginia that
16 belonged to the DEA.
17 What difference does it make as a matter of
18 personal jurisdiction between the following two cases
19 and that, the defendant is sitting in Georgia steals
20 money from my bank account in Nevada or the defendant
21 sitting in Georgia causes the government not to send me
22 the money in Nevada.
23 JUSTICE BREYER: Because one of the elements
24 of the crime in the second case, no element of the crime
25 or no element of the tort, it's only the injury which

isn't an element of the actual underlying behavior that gives rise to and in the first case it's the other. There is an element that takes place there. That's what I'm looking for.

MR. GOLDSTEIN: Okay.

JUSTICE BREYER: I'm looking for that. I'm not saying that I have it. That's why I asked you the question I did.

MR. GOLDSTEIN: I believe that the elements of the tort that Justice Kagan is describing are the same elements that I am talking about here. It's just where the money starts.

CHIEF JUSTICE ROBERTS: What if the plaintiffs in this case didn't leave Georgia?

MR. GOLDSTEIN: Yes.

CHIEF JUSTICE ROBERTS: They said, look, I'm not leaving until I get my money back. And I'm going to get my money back as soon as the lawyer sends us the receipts or whatever it is. Is that a different case?

MR. GOLDSTEIN: Yes, it is a different case, Mr. Chief Justice. And the lower courts say the real question is, where -- is this the kind of injury that will arise where the Plaintiff lives and works. And any case --

CHIEF JUSTICE ROBERTS: I thought your

arguments was basically it does arise where he lives and works because it is in Nevada. And he still lives and works in Nevada, even if he stays in Georgia and says, I'm not leaving until I get the money.

MR. GOLDSTEIN: No, I -- that is -- for example, on our seizure claim, we acknowledge that at the very least there wouldn't be venue. And there's another difference in addition to the fact that they had returned to Nevada and they had returned to living and working. And that is, in our actual case, we have the documents that are sent at his request from Nevada. We have the fact that he searches the Nevada law enforcement databases. And we have the fact that the money is going to be sent by the government to Nevada.

It's requested by their Nevada lawyer sending documents from Nevada. And so those are -- if we think of Calder as a case in which there's not merely injury in California, but a few extra factors that were in California, that's much more this case than it is any of the other cases that the lower courts are confronting.

I would just discourage the Court, if I could, from --

JUSTICE GINSBURG: Except, Mr. Goldstein --

MR. GOLDSTEIN: Yes.

JUSTICE GINSBURG: -- it -- it is of no consequence to Walden whether this person is from Alaska or Nevada. In Calder, the article was about a person in California. The sources came from California. The paper had its principal circulation in California. It seems to me there's nothing resembling that in this case.

MR. GOLDSTEIN: Justice Ginsburg, to my mind, what resembles it are the documents that go from Nevada to the defendant, and we think that's a -- specific to the fact that it was a libel and defamation case. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Bucholtz, you have four minutes remaining.

REBUTTAL ARGUMENT BY JEFFREY S. BUCHOLTZ

ON BEHALF OF THE PETITIONER

MR. BUCHOLTZ: There was a lot of talk about intentional torts being different, and -- and how there should be a different rule in intentional torts. And I want to start just by -- by emphasizing the implications of that. The other side is putting all their eggs in the basket of what's in Officer Walden's mind, triggering some different personal jurisdiction inquiry.

And my friend even referred to qualified

immunity by analogy, but I think that analogy is very important. And it shows why it would be unworkable to make personal jurisdiction turn on what's allegedly in the defendant's mind. This Court initially created qualified immunity on that model as a -- as a -- based on subjective good faith. That turned out not to work because subjective good faith --

JUSTICE SOTOMAYOR: Write a -- counsel, write a holding that takes care of your case without putting at risk the internet cases that he's talking about.

MR. BUCHOLTZ: Justice Sotomayor, I think there is absolutely no reason the Court needs to address internet cases or any other cases involving modern technology. This case is -- the most modern technology involved in this case, I think, is a dog sniff at the airport. There's just no reason for the Court to address any of those --

JUSTICE SOTOMAYOR: Counsel, your adversary is right. We write rules that get applied to different concepts.

MR. BUCHOLTZ: Right.

JUSTICE SOTOMAYOR: So write the holding for me that can't be just plaintiff -- defendant's activities, because Calder did more than just

defendant's activities. So write a different -- write the holding.

MR. BUCHOLTZ: Of course, Justice Sotomayor. I understand there has to be a rule, and the rule is here there is -- there's tangible property. This isn't a case about property with no real-world presence that only exists on a server somewhere. This is a case about cash that was in a bag, and the bag was in Atlanta, on the plaintiff's person in Atlanta. It was seized in Atlanta. And the only effect --

JUSTICE KAGAN: I'm sorry. So there'd be a difference if the bag had been shipped to Washington, D.C.? And, you know, money is -- is fungible. Money is everywhere and nowhere. So it -- it seems as though money is a bit different from a gold watch, that -- that it was -- it's only contingent that the money remained in Atlanta rather than being shipped to a bank someplace else.

MR. BUCHOLTZ: Well, I think it's not contingent. And from Officer Walden's perspective, I think it's incidental and contingent that the plaintiffs happened to be from Nevada, and that's where the effects of the seizure or the continued seizure or the delay in return were felt.

But I think to -- to try to answer, Justice

Sotomayor, your question and your question earlier about freezing a bank account in other kind of electronic cases or internet cases where different technologies are involved, maybe there's a difference between freezing a bank account in Nevada.

Maybe that can be said to be something that occurs in Nevada, that's reaching into Nevada to cause a real effect in Nevada, to cause something to happen in Nevada, which is different from seizing cash in Atlanta, knowing and failing to return it, knowing that the failure to return it is going to have an impact wherever the plaintiffs are, which presumably will include where they live, which is Nevada and California.

So maybe there's a way to draw a line between freezing a bank account in Nevada, or in Bancroft and Masters and Dudnikov, the cases that my friend relied on, there were real-world activities happening in the forum State. In Dudnikov, there were goods. There were -- there were fabric prints that existed in the real world. And they were being -- they were in Colorado, and they were to be sold in Colorado. The defendant --

JUSTICE KENNEDY: Could this record or these complaints be read to support the conclusion that the injury was substantially altered by the false affidavit,

1 based on the misuse of the information received from
2 Nevada?
3 MR. BUCHOLTZ: Well, Justice Kennedy, I
4 think the complaint -- again, we're not challenging
5 the -- the reading by the lower courts that there's a
6 claim based on the affidavit that's distinct from the
7 claim based on the seizure. On the other hand, the
8 complaint only has a Fourth Amendment claim in it.
9 That's the only source of law that the complaint relies
10 on.
11 And the Fourth Amendment injury was complete
12 upon the seizure -- upon the search and seizure which
13 occurred in Atlanta. The quantum of damages wasn't
14 known yet at that time because the plaintiffs didn't
15 know whether they'd get the money back or when or what
16 might happen in between.
17 But that Fourth Amendment injury occurred
18 then and there. And so the fact that maybe their
19 consequential damages are higher because they didn't
20 have the use of the money for longer as opposed to
21 shorter, I suppose that could increase their damages.
22 But it doesn't fundamentally change the nature of this
23 case as one that has no meaningful connection between
24 Officer Walden's conduct, all of which occurred in
25 Atlanta and -- and Nevada.

JUSTICE SCALIA: You say the affidavit wouldn't give rise to a Fourth Amendment claim.

MR. BUCHOLTZ: I think Judge Ikuda made that point below, Justice Scalia, and I would agree with that, that -- that however is what the complaint alleges, and we're here on personal jurisdiction and venue and not on the merits of the -- of the complaint. So again, the complaint alleges that there's this affidavit -- may I finish, Mr. Chief Justice?

CHIEF JUSTICE ROBERTS: You can finish your sentence.

MR. BUCHOLTZ: The complaint alleges that there is this affidavit written in Georgia for the purpose of seizing funds that were seized in Georgia that were to be forfeited in Georgia. The only connection to Nevada is the fact that the plaintiffs allegedly felt the impact there. Under any of this Court's precedents, that's not sufficient.

Thank you, Your Honors.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)

A

able 24:20 26:24
above-entitled 1:11 63:23
absolutely 44:5 59:13
abstract 9:13
access 29:22 43:9 54:22
accident 8:8
account 5:15 16:13,16,19,21 17:2,25 28:8 37:22 52:22 55:15,20 61:2,5 61:15
accounts 16:6 55:4
accurately 31:17
acknowledge 57:6
acted 40:8
acting 10:8
action 17:18,18 26:11,13,16 43:12
activities 14:18 18:19 59:25 60:1 61:17
activity 8:17 11:12 19:9,10 25:12
actresses 10:6
acts 25:21
actual 14:25 36:11 37:21 56:1 57:10
addition 57:8
address 4:13 18:5 33:23 59:13,18
adopt 42:8,8
adversary 59:19
adversely 10:24
affidavit 15:12 15:13,20,25 16:5,8,16 17:6 18:24,24 19:12 19:23 20:3,3,9 20:12,14,19,21 20:24,24 21:5 21:13,19 24:4 28:21 29:20 38:18,21,24 54:16 55:6 61:25 62:6 63:1 63:9,13
age 39:18
agent 24:3
agents 36:22
ago 5:1
agree 6:21 7:6 51:19 63:4
agreed 21:11
Ah 36:10
aim 11:17,18,23 24:23
aimed 8:5,20 11:2,13 12:9,12
aiming 9:25 11:4 25:3
airport 15:11 19:2 28:25 29:13 33:3 43:15 59:17
AL 1:6
Alabama 36:9
Alaska 58:2
Alito 8:19,23 9:9 9:19 22:4 23:5 29:24 30:19,23 31:12 41:11,14 41:20 44:8,13 44:16,18 47:2 47:10
allegation 15:8 19:1
allegations 19:15 20:1
allege 15:5 21:5
alleged 3:25 9:1 21:20 54:15
allegedly 3:18 9:14 10:7,24 15:20 16:12 17:6 59:3 63:17
alleges 14:21,24 31:9 63:6,8,12
alleging 54:6,8
allow 27:3
allows 30:17
all-purpose 39:23
altered 61:25
Amendment 42:16 54:15 62:8,11,17 63:2
amicus 1:19 2:7 4:11 18:11
amount 27:25
analogy 59:1,1
answer 9:18 12:1 12:4 16:2,7 17:21 25:14 31:17 37:21 60:25
Anthony 1:3 3:13
apparently 30:20
appeal 7:14,15
appear 30:5
APPEARANC... 1:14
appendix 35:19 35:23
applied 5:21 59:20
apply 6:5 48:1
approach 3:20 4:1
appropriate 7:3
ARBUS 1:17 2:6 18:10
arguably 14:10
arguing 32:9
argument 1:12 2:2,5,9,12 3:4,7 14:14,15 18:10 23:12,17 24:2 27:18 41:14 58:16
arguments 23:14 57:1
arises 32:21 33:8 35:4,13
arising 35:7
arm 39:18
arose 35:10
article 8:3,20,23 8:25 9:2,4,6,14 10:23 18:17 25:8 49:2,19 58:3
articles 10:5
artificial 20:13
asked 7:5 17:12 20:5 26:4 27:22 29:11 56:7
asking 35:24 40:6 47:23 49:17
assert 51:16
assets 26:14,16
assistant 1:17 29:8
assume 29:14
assumed 32:3
assuming 6:21 21:19
Atlanta 15:23 16:22,23 19:1 28:25 29:13 43:15 60:8,9,10 60:17 61:9 62:13,25
Atlantic 46:13
attempt 24:9
attempts 42:3
attention 46:21 47:20
attenuated 8:13
attorney 25:22 29:8
auction 37:12,12
AUSA 19:6,15
automatically 45:3
avail 40:4
availment 12:14 52:2
avoid 5:11 27:13
avoidance 5:14
a.m 1:13 3:2 63:22

B

B 28:5,13
back 5:4 15:22 17:7,9,12 29:4 33:4,9 34:5,5 39:10 45:17 47:5 56:17,18 62:15
bad 45:20
bag 37:25 60:8,8 60:12
balance 18:4
Bancroft 35:19 35:25 61:16
bandages 33:21
bank 16:6,13,16 16:19,21 17:2 28:8 52:21 55:4 55:20 60:17 61:2,5,15
based 6:7 11:12 11:13 15:20 18:20 19:2,14 19:24 21:5 22:21,23 25:20 51:11 59:5 62:1 62:6,7
basically 57:1
basis 22:20 29:9
basket 58:23
beginning 47:20

behalf 1:15,21 2:4,11,14 3:8 27:19 58:17
behavior 56:1
believe 30:15 46:6 56:9
belong 36:11
belonged 55:16
benefit 12:21
Berzon 28:18 32:5
best 20:12 50:18
beyond 21:6,9 22:20
big 32:22 33:5 46:14 47:24
bigger 35:22
biggest 10:16
billfold 34:3,13 34:22 35:10,11 35:20,21 37:4
bit 39:4 60:15
Bivens 3:12 4:21 5:23 6:6,11,15 54:9
blew 40:3
blocks 37:12
books 33:22
bookstore 33:18 34:22 35:5,8 36:21
bought 33:22
bounds 40:11
breaks 33:19
Breyer 33:7,17 34:3,12,18,21 35:15 36:16,19 37:1,6 44:22 45:5,9,14 52:23 53:2,6,8,12,16 53:17,20,22,25 54:5,10 55:23 56:6
brief 4:11 26:10 27:1 35:24 43:4
briefs 15:10 25:9 37:10
Briggs 23:10
bring 3:12 5:7 24:20 26:13
broad 13:4 22:16 32:10 48:12
broader 11:11
brought 16:23 22:13 26:12
brunt 9:24 11:6
Bucholtz 1:15 2:3 2:13 3:6,7,9 4:9 5:10,13 6:13,25 7:23 8:22 9:18 10:4,13,18 11:25 12:21 13:24 14:20 15:4,15 16:11 16:17 17:23 18:3 55:1 58:14 58:16,18 59:12 59:22 60:3,19 62:3 63:3,12
bullet 25:8 52:20
burden 23:15
business 44:25

C

C 1:21 2:1,10 3:1 27:18
Calder 7:20,25 8:1,11,12 10:19 14:3,9 17:19 18:16,17,17 19:9 28:1 30:10 40:23 47:15 48:22 49:18 50:6,24 57:17 58:3 59:25
California 8:2,6 8:7,7,21,24,24 9:1,2,4,7,13,16 9:23 10:16,21 11:2,4,5,14,21 11:22 14:23 15:2 18:2,18,19 18:19,20,20,22 19:9 22:2 30:21 30:24 31:5,5,6 31:13,13 36:2,3 36:4,6,7,12,14 49:20,21 50:10 51:1 57:18,19 58:4,4,5 61:13
call 17:5 20:2 29:12
called 37:10
canon 5:14
capable 45:23
capacity 23:13
Capital 5:24
card 35:11 36:20 37:1
cards 28:9
care 9:14 59:9
career 18:20
careful 40:1
carefully 37:7
case 3:4 5:21 6:24 7:2,15 10:12 11:10 12:2 13:2,19 14:4 16:13 18:16 20:4,7,8 21:2,10,18,18 21:20 22:25 23:6,10,11,11 25:24 27:14 28:10 29:25 31:3,24 32:2,4 32:6,7 35:2,16 35:19,25 36:13 36:16,17,19,19 37:9 40:14 42:6 42:6 43:5,25 44:23 46:5,7,8 46:9,12,17 47:1 47:6,19,21 48:2 48:14 49:10,22 53:9,15 55:24 56:2,14,19,20 56:24 57:10,17 57:19 58:7,12 59:9,15,16 60:6 60:7 62:23 63:21,22
cases 4:14,16 8:10 12:5,7 13:15,17 19:7 23:3,13 25:1,10 28:3,3 31:18 33:12,25 34:1,7 34:22 35:1,17 35:20,21,22 36:15,17 37:7,8 39:8 40:17,22 43:1 44:5,6 45:2,6,7,8,8 46:3,4,19,23 48:17,20,25 49:25 50:19 51:10,14 52:2,3 52:13 54:21 55:18 57:20 59:10,14,14 61:3,3,16
cash 16:22,23 22:13 28:25 37:20,25 60:8 61:9
category 46:14
cause 61:7,8
caused 53:4 54:17
causes 55:21
causing 45:24
CDs 34:16
celebrities 10:6
center 17:17
centered 18:20 49:20
century 5:1 44:14
cert 35:24
certain 21:9 33:15
certainly 5:14
challenging 62:4
chances 7:15
change 27:11,12 27:12 62:22
chattel 27:5
check 38:1
checks 54:24
Chief 3:3,9 7:17 10:9,15 18:7,13 26:11 27:16,20 56:13,16,21,25 58:13 63:9,10 63:20
chose 17:11
Circuit 3:13,16 3:23 7:14,19 20:8 22:16 23:20
Circuit's 5:4 27:2 47:4
circular 42:17,22
circularity 42:17
circulation 11:7 58:5
citations 28:22 54:9,13
cite 27:1 33:13 33:14,25
cities 30:3
citing 40:23
claim 4:4 6:11 20:16,18,19,25 21:3 28:17,17 29:2,3,15 33:2 53:1 57:6 62:6 62:7,8 63:2
claiming 15:20
claims 5:23 6:6 6:15
cleanly 15:24
clear 15:10 46:2
closest 35:18

closing 44:4
colleague 25:17
college 31:21,21 31:23 33:17 34:23
Colorado 61:21 61:21
come 12:3 25:6
comes 24:14 39:18 40:23 42:6 46:23
commerce 13:5
commits 55:2,4,5
committed 32:13
common 49:8 54:8
communication 45:23
communications 44:24
company 13:16 36:2,10
complaint 14:21 14:24 15:11,17 19:25 21:12,13 26:17 28:18 31:8 38:23 43:19 54:11,14 62:4,8,9 63:5,7 63:8,12
complaints 28:18 61:24
complete 52:16 62:11
composing 20:24
comprehensive 12:4
computer 28:7 39:3 44:6
concepts 59:21
concern 33:6
concerned 50:21 50:22
conclude 44:4 54:18
conclusion 61:24
conclusions 8:2
conduct 3:18,25 8:6 11:2,23 12:12,15,22 13:10 14:18,18 24:24 25:3 41:21 62:24
conducts 11:20
configured 6:4
conflict 4:2 40:25
confront 40:18 51:6
confronting 28:4 43:2 48:21 57:21
confused 47:11
confusion 27:25
Congress 5:22 5:25 6:4,12,14 6:14
connection 12:11 16:25 21:23 25:17 51:16 62:23 63:16
connections 3:17 50:11
consequence 27:2 58:2
consequences 54:20
consequential 62:19
consider 47:5 48:4
considerable 7:20
considering 6:11
consistent 51:22
constantly 28:4 54:21
constitutional 5:8,12,18,19 5:22 6:3
contact 17:4,5,13
contacts 3:19,22 6:8 7:22 8:14 8:15 11:13 14:21 29:21 40:14,15 42:24 47:16 48:18 51:22
contains 49:1
contest 26:19
contested 32:4
contests 27:9
context 11:16
contexts 43:3
contingent 60:16 60:20,21
continuation 15:23
continued 21:6,9 60:23
continuing 35:6
contrast 18:17 33:2
control 26:22
correct 31:6 39:24 40:12 49:16
correctly 32:5
counsel 18:8 27:16 58:13 59:8,19 63:20
country 9:12,21 50:25
counts 6:8
couple 28:22
course 5:6 7:1,4 11:9 13:3 14:22 16:12 22:25 38:1 41:6 43:25 60:3
court 1:1,12 3:10 4:12,17,21,25 5:7,14,24 6:1 6:12,19,23,24 7:2,5,9 8:1,4,8 8:13,19,22 9:21 9:24 10:1,25 11:1,3 13:3,11 18:14 21:2 26:1 26:7 27:8,21 30:15 32:2,11 34:7 39:25 41:5 42:2,10 47:5,24 48:3 50:20 51:1 51:20,23 52:1 57:22 59:4,13 59:17
courts 28:3 30:7 31:25 35:7 39:7 40:17 41:25 43:1 44:21 46:20 47:19 48:18,18,21 50:2,21,23 51:5 52:14 56:21 57:20 62:5
court's 3:20 9:25 18:15 23:9 63:18
create 6:17 27:25
created 6:11 8:16 59:4
creates 29:19
credit 28:9 35:11 36:20 37:1
crime 55:24,24
criteria 33:15
curiae 1:19 2:7 18:11
current 19:24
currently 6:4
curtails 14:17
cut 40:3
cuts 15:13

D

D 3:1
daily 22:20
damages 15:20 62:13,19,21
database 43:18
databases 57:13
day 8:12,12
DEA 28:24 55:16
dealing 48:11
decide 25:24 26:7 47:24
decided 7:13 8:11,12 26:12
deciding 5:15 45:3,3
decision 5:4 18:15 22:18 23:9 27:3,9,11 40:1 50:6,7 53:24
defamation 13:21,25 14:1 48:23 49:25 50:18,20 51:3,4 58:11
defamatory 9:15 25:8
defendant 3:21 8:16 14:10 25:4 25:10 30:14 32:3,8,20 33:1 35:4 39:14,16 40:7 41:3 42:1 42:9 43:8,13 44:24 46:9,22 46:23 47:22 51:17,24 55:19 55:20 58:10 61:22
defendants 8:5 9:6 11:1,6,11 30:17 46:19
defendant's 17:18 59:4,24 60:1
defendant-cen... 39:16
defendant-fav... 42:3

defense 51:20
definitely 7:24
definition 17:13
defraud 51:9
defrauded 49:7
delay 60:23
Department 1:18 23:7
dependent 41:15
depends 12:2
deposited 37:22
deprived 43:21
deputized 23:25
describe 47:12
describes 49:22
describing 28:20 56:10
determination 23:22
determine 48:14
difference 20:23 32:22 35:1,2,3 41:21 55:17 57:8 60:12 61:4
different 10:11 13:14 16:2,7 19:8 21:19 25:15 28:21 44:9 51:5 56:19 56:20 58:19,20 58:24 59:20 60:1,15 61:3,9
differently 4:15
difficult 12:2 24:11 28:2
direct 17:1,3
directed 41:7 50:4 51:8
directing 25:12 25:12
direction 12:14
disagree 28:15
discourage 57:22
discretion 7:9
discretionary 23:21
discussed 37:10
discussion 49:18
disentangle 11:8
dismiss 7:8,12 46:10 47:4
dismissal 7:11 47:4
disruptive 46:25
dissent 23:11
distant 22:22
distinct 21:3,4 62:6
distinction 40:22 55:2,8
distress 10:22
distressing 45:22
distributed 8:23 9:7,9,10,21
district 4:24 6:23 6:24 7:2,5,9 27:10 32:2 47:5
divided 13:3
documents 43:11 57:11,16 58:9
dog 20:12 59:16
doing 41:7 42:1 45:1
DOJ 23:15,20
door 33:20 44:4 46:4
draw 61:14
drawing 55:9
drawn 9:2
drew 11:14
drivers 23:1
driver's 23:3 31:5,6,13
Dudnikov 37:11 61:16,18
due 52:4 54:15
duffle 37:25
D.C 1:8,15,18,21 24:3,7,10 60:13

E

E 2:1 3:1,1
earlier 24:23 32:24 61:1
eBay 37:11
eBay-like 37:11
economic 21:8 44:2
effect 9:3 15:18 15:23 35:6 60:10 61:8
effects 3:25 17:25 60:22
efficient 47:22
eggs 58:22
either 26:2,20 29:3 46:2
electronic 14:3 61:2
element 53:2,6,9 55:24,25 56:1,3
elements 52:24 54:6 55:23 56:9 56:11
emotional 10:22
emphasize 3:21 9:22 15:15
emphasized 8:13 49:23
emphasizing 58:21
emphatically 7:11
enforcement 4:10 26:9 43:18 46:6,21 57:13
engagement 22:17
Enquirer 8:25 9:11,20 10:5 11:7 50:2,25
entered 14:2 16:20
entire 48:7
entirely 25:20,20 42:17
entitled 36:10
entity 9:14
equally 23:18
error 45:17
errors 3:14 4:7
ESQ 1:15,17,21 2:3,6,10,13
essentially 52:25 54:8
establish 50:16
ET 1:6
events 4:3,5 8:25 9:1 47:17
eventually 25:19
everybody 21:11 34:24
evidence 32:7
exactly 5:5 28:19 49:16
example 13:14 13:15 20:11 25:8,11 33:10 33:17 37:4 51:8 51:9 52:17 53:16 57:6
examples 25:5
exclusively 20:9 20:14
excul 20:1
exculpatory 20:2
excuse 8:1
exist 50:11
existed 61:20
existing 6:5
exists 20:3 47:16 47:17 48:20 60:7
expansive 50:6
expect 47:19 51:12,25 52:6,8
expectation 51:17
expectations 42:16
expected 51:1,11 51:25
expects 41:4
explain 4:11 28:23
explained 20:14
explaining 50:13
explains 11:3
express 9:25 11:4
expressed 26:9
expressly 8:5 11:2 24:23
extend 23:12
extent 7:19 15:12
extra 57:18

F

fabric 61:19
facie 32:6
fact 3:24 11:9,11 17:11 21:23 23:20 25:21 32:2 35:5 41:15 43:25 46:21 50:3 57:8,12,13 58:11 62:18 63:16
factor 5:14 11:10
factors 10:20 57:18
facts 18:16 22:25 25:15 28:1,1 38:17 44:10
factual 29:8,16
failing 61:10
failure 61:11
fair 14:1 16:20 50:25 51:22,24
fairness 30:16 52:3
faith 59:6,7
false 15:12,13,20 16:5 20:19,21

20:24 21:13 28:20 29:19 33:2 38:18,19 38:21,24 53:5 54:16 61:25
far 8:24 22:16 24:2 40:15 48:2 50:6
far-away 22:22
fault 33:20
features 51:2
Federal 4:10,22 6:24 22:17 23:6 23:24,25 26:9 48:18
feeling 21:8
felt 3:24 4:5 9:4 21:24 22:1 60:24 63:17
figure 24:2 37:6 51:21
file 26:23,25 33:4 35:22 46:10,16
filed 16:5,8 21:14 26:17 46:10
files 24:4
filing 16:15 55:5
fill 6:1
find 34:4 53:8 54:5
finding 22:24
finds 34:8 36:20
finger 33:19
fingers 40:3
finish 63:9,10
Fiore 1:6 3:5
Fiores 16:4,6
first 3:4,15 9:19 9:19 51:6 56:2
five 30:24
focal 8:3 19:8
focus 13:6 18:23 19:10 20:13 28:16 30:11
focused 18:24 20:9 21:21 50:3 51:14
focuses 4:3
focusing 20:5 49:19
follow 33:13
following 35:9 55:18
follows 32:19
food 34:15
foot 36:3 40:8 45:25
forfeited 63:15
forfeiture 19:6 19:16 26:17,19 29:5,7,9,18,20
form 37:24
forms 12:1
formulations 8:9
forth 30:25
fortuitous 8:14 9:3,5 17:13 25:20
forum 3:22 7:22 8:14,16 12:8,10 14:1,2 22:23 24:24,24 25:3,5 25:7,12,13 40:16 41:8 61:18
forwarded 19:5 19:22
found 34:6
four 58:14
Fourth 42:15 54:15 62:8,11 62:17 63:2
fraud 13:21 45:8 49:6,6 53:1,9 53:15 54:8 55:3 55:4,5
freeze 16:13,19 17:2
freezes 55:4
freezing 16:20 61:2,4,15
frequency 45:22
frequently 28:6
friend 31:4 49:23 58:25 61:17
froze 16:6,16
full 37:25
fundamentally 62:22
funds 19:4 20:20 43:16 63:14
fungible 60:13
future 10:8

G

G 3:1
gamblers 14:6 29:25 44:1
gambling 14:7,16
game 30:5
gap 6:2
general 1:18 13:16
generally 41:25
genuine 20:22
Georgia 4:1 6:24 7:16 16:8,9,16 18:25 19:2,3,4 19:5,5,6,6,11 19:16,16,19,22 21:21,22 22:5,8 22:15 26:18,24 28:14 29:21,21 33:9,10 35:25 37:15 38:12,25 40:8 42:20 45:11,12 48:5 55:3,7,14,19 55:21 56:14 57:3 63:13,14 63:15
getting 10:8 17:7 52:4
GINA 1:6
Ginsburg 6:10 6:20 7:1 15:1 20:15 39:9,12 39:22,25 40:20 47:23 48:6,16 48:22 57:24 58:1,8
give 28:22 29:4 31:18 33:9 34:7 35:15 42:3 54:9 63:2
given 13:7 49:24 52:10
gives 7:8 56:2
giving 4:4
go 13:5 16:3,25 19:19 22:7 24:10 30:8 31:23,24 33:4 39:14,17 46:2 58:9
goes 24:2,17,19 24:22 33:18
going 13:18,20 25:18 27:24,25 28:2 30:2,4,5 31:16 32:21 33:1,20 34:15 34:24,24 35:20 36:6,23,24 42:10 46:5,17 46:22 48:14 51:13,18 56:17 57:14 61:11
gold 38:6,9,11 39:3 60:15
Goldstein 1:21 2:10 27:17,18 27:20 28:15 30:7,22 31:2,15 32:14,17 33:16 34:2,9,18 35:3 35:17 36:18,24 37:3,9,16,19 38:4,7,10,13 38:17,22 39:1,9 39:11,21,24 40:10 41:13,18 41:24 42:11,15 44:12,15,18 45:5,10,16,20 47:7,12 48:6 49:4,15 50:12 50:17 51:19 52:9,25 53:3,7 53:11,14,19,21 53:23 54:3,7,13 54:25 55:10,13 56:5,9,15,20 57:5,24,25 58:8
good 7:18,18 30:12 59:6,7
goodness 34:13
goods 61:19
gotten 17:8
govern 12:5
government 17:12 23:13 43:23 53:4 54:17 55:21 57:14
government's 53:23
gravamen 15:11 15:17 20:6,7
great 42:25,25 48:20
greater 48:19
Grisholm 20:16
grounds 26:8
group 30:2,5
guarantee 23:21
guess 7:13 13:13
gun 28:6 51:8 52:17,19

H

hailed 13:11 30:15 41:5 42:2 42:10
haled 32:11 51:1

52:1
half 5:1
hand 5:17 62:7
happen 14:14 25:13 49:9 52:6 52:8,21 61:8 62:16
happened 8:7 9:1 17:9,10 19:1 25:22 44:11,11 44:13 60:22
happening 61:18
happens 12:10 12:24 24:6 28:24 29:1
hard 39:2 44:23
harder 50:15
harm 8:3 9:24 11:6 21:7,8,24 21:25 22:1 24:18 45:24
Hartsfield 28:25 29:13
hauled 22:22
hear 3:3
held 3:16 4:25
help 32:19 42:23
higher 62:19
hire 25:22 43:22
hired 25:22
hold 39:16 41:25
holding 3:11,11 49:21 59:9,23 60:2
holds 4:18
home 22:10,12 26:25 31:22 33:20,23 34:14 34:23,24 35:12 35:12
Honor 6:16,19 7:23 20:6 23:9
Honors 63:19
Honor's 24:14 24:22
hopefully 40:15
houses 30:24
huge 27:25
hurt 36:7 39:4 42:5 43:8
hurting 41:4
hypothetical 18:1 25:14 29:10 30:23

I

ID 28:8
idea 6:8 22:21 25:18
identity 45:12
Ikuda 63:3
Illinois 18:1
imagine 21:10 29:11 35:9
immediately 20:20 45:17
immunity 47:21 59:1,5
impact 4:5 14:11 61:11 63:17
implausible 23:18
implications 58:21
important 41:10 59:2
impose 24:5,9
impression 32:23
impressions 37:13
improper 4:18
incidental 12:24 60:21
include 61:12
includes 53:9
including 47:18
inconsistent 3:20
inconvenienced 14:13
inconvenient 39:15
increase 62:21
increasing 45:22
incredible 46:20
indemnification 23:16
independent 20:25
independently 3:14
indicates 40:1
indication 25:4
indirect 12:17
indisputably 38:25
individual 24:12
information 19:2 19:21,21,23 20:2 29:16 43:13 53:4 62:1
initial 20:8 21:6 21:11
initially 59:4
injure 11:21,22 28:12 52:11
injured 10:7 31:23 49:10 52:12,18
injures 28:5
injury 14:9 17:19 21:4,4 28:14 32:20,21,22,24 33:5,23 34:10 34:12 35:4,7,10 35:13 36:15 39:2,6,7 41:21 44:2 47:18 50:9 50:16 52:12,15 52:15 54:19 55:25 56:22 57:18 61:25 62:11,17
inquiry 58:24
instance 35:4
insurance 36:10 36:11 54:23
intangible 17:5
intending 11:21 11:21 12:8 13:5
intends 42:3
intent 13:9
intentional 11:16 11:20 12:7 13:17,19,20 24:25 32:11 40:22 41:3 43:12 45:8 52:2 52:11,13 58:19 58:20
intentionally 28:5 32:20 43:8
interact 22:19
interacted 15:7
interaction 22:23
interactions 22:21
interest 7:10
internet 17:25 28:3 44:5,9,17 44:23 45:2,6,7 46:3 50:1,19 59:10,14 61:3
investigation 21:15
inviting 44:25
involved 59:16 61:4
involves 37:11 43:5
involving 59:14
irrelevant 12:24
irrespective 11:24
IRS 24:3 54:24
issue 5:15 20:18 48:9
issues 5:16
item 47:24

J

J 12:7 13:2
JEFFREY 1:15 2:3,13 3:7 58:16
Jersey 22:11 40:4
job 10:23
jobs 10:8
Jones 7:20 10:11 11:5 30:11
Juan 22:11 31:7
Judge 20:16 28:18 32:5 63:3
judgment 47:8
jurisdiction 3:15 4:13 5:3,3,17 5:21 6:2,6,18 6:22 7:7 8:10 16:10 17:16 23:24 26:8 27:3 27:7,23 30:3,13 30:25 34:1,8,20 34:21 36:5 38:15 39:13,15 39:19,23 40:2,7 41:23 44:20 46:8,15,15,24 47:15,25 48:2,3 48:8,12 50:8,10 51:10,15 55:18 58:24 59:3 63:6
jurisdictional 5:8 5:9 25:24
jurisprudence 6:6 17:17
justice 1:18 3:3,9 4:6,9 5:6,11 6:10,20 7:1,10 7:17 8:19,23 9:9,19 10:2,9 10:15 11:15,25 12:19 13:13,25 14:4,20 15:1,9 15:16 16:1,11 16:15 17:15,20

17:24 18:3,7,13 19:12,20 20:15 21:10 22:4 23:5 23:7 24:1,16 25:23 26:3,11 27:16,20 28:12 28:15,16 29:10 29:24 30:19,23 31:12 32:9,15 32:23 33:7,17 34:3,12,18,21 35:15 36:16,19 37:1,6,14,17 38:2,5,8,11,14 38:20,23 39:9 39:12,22,25 40:19 41:11,14 41:20 42:7,11 42:13 44:8,13 44:16,18,22 45:5,9,14,18 47:2,10,23 48:6 48:16,22 49:11 49:15,16,18 50:5,15 51:7,10 51:19,23 52:7 52:23 53:2,6,8 53:12,16,17,20 53:22,25 54:5 54:10,18,25 55:11,23 56:6 56:10,13,16,21 56:25 57:24 58:1,8,13 59:8 59:12,19,23 60:3,11,25 61:23 62:3 63:1 63:4,9,10,20

K

Kagan 11:15,25 12:19 13:13,25 16:1,11,15 24:1 24:16 38:2,5,8 38:11,14,20,23 51:7 54:25 55:11 56:10 60:11
Kagan's 29:10
keep 16:3,3 17:6 34:25
keeping 36:23 38:21
keeps 20:21
Keeton 8:12
Kennedy 14:4,20 15:9,16 19:20 61:23 62:3
Kennedy's 28:16
kept 21:16
key 8:1
kind 13:14 34:8,9 56:22 61:2
kinds 45:1,2,5,7
knew 9:6 11:6 14:10 15:6 32:3 32:8 41:15
know 11:19 12:3 13:5 19:20,25 20:5 24:18 30:18 31:21,25 33:23 36:4,6 41:22 42:9 45:18 47:10 48:3 50:7,24 60:13 62:15
knowing 3:18 16:24 42:1 43:9 52:11 53:19 61:10,10
knowingly 20:24 53:3
known 14:5,5,10 62:14
knows 33:1 34:24 35:12 41:3 42:19

L

language 7:24 8:1 27:11 51:23
large 54:21
largest 8:24 9:8 9:23 10:2 11:7
Las 25:22 44:1
Laughter 26:5 34:17 45:15,19
law 4:10,22 6:2 22:17 26:9 28:22 29:5,6 43:18 46:6,21 49:8 54:8 57:12 62:9
lawful 21:11 29:14
laws 12:8 40:25
lawsuit 3:12 4:20 4:21 15:19 35:22 46:17
lawyer 17:10,11 43:22 56:18 57:15
League 30:1
learned 43:17
leave 56:14
leaving 56:17 57:4
left 20:2 22:3,9 24:12 40:13
legal 28:23 44:19
legitimate 43:16
Leroy 27:8,10,13
letter 25:8
let's 16:6 30:1 39:3
libel 48:25 49:6 49:10,25 50:8 58:11
libeled 49:11,13
libelous 49:2
license 23:3 31:5 31:6
licenses 14:23 14:24 23:1 31:14
lieu 7:11
Life 36:8
limit 40:7
limitations 4:19
line 52:20 61:14
literal 12:16
litigate 47:1
litigated 46:18 48:15
little 39:4
live 31:24 42:19 42:20 61:13
lived 30:20 31:10 32:4 41:18 43:10
lives 22:12 24:17 30:12 31:22 35:14 56:23 57:1,2
living 57:9
local 22:18
located 55:6
locker 29:1 37:18,22
long 39:18
longer 15:21 37:20 62:20
look 7:21 19:25 21:20 29:9 36:17 47:14 54:12 56:16
looked 25:1,2
looking 56:4,6
looks 21:19
lose 33:3 35:21 43:9 54:22
loses 35:9
losing 29:22
lost 34:3,4,13,22
lot 14:6 42:24 46:12 58:18
lower 28:3 30:7 31:25 33:25 34:7 35:6 39:7 40:17 41:25 43:1 44:21 46:20 47:19 48:21 50:2,21 51:5 52:14 56:21 57:20 62:5
lowers 50:23

M

machine 40:3
magazine 18:21
main 39:12
major 14:11 30:1
majority 23:16 40:17 48:20
making 21:14 42:14
malicious 24:9
maliciously 24:4
manufacturer 41:6
marginally 15:14 15:16
Marine 46:13
market 8:24 9:8 9:23 10:2,17 13:9,16
Masters 61:16
material 53:20 53:22,25 54:1
matter 1:11 8:11 22:1 28:21 29:4 29:6 35:6 39:14 55:17 63:23
McEntyre 40:1 40:12,20 41:5
McIntyre 12:7 13:2,14 52:2
mean 4:23 11:15 11:16,18,20,23 21:2 22:8 28:13 42:13
meaningful 3:22 62:23
meaningfully

12:9
means 11:4 12:18 24:15,23
meant 8:20,22
measure 52:3
meet 33:14
MELISSA 1:17 2:6 18:10
members 30:2
mentioned 25:9
merely 57:17
merits 63:7
Metropolitan 36:8
Miguel 40:2
miles 34:23
mind 23:21 58:9 58:23 59:4
minimum 51:22
minutes 51:7 58:14
misappropriates 36:2
misimpression 40:13
misled 32:17 53:10,15
misrepresenta... 53:18,19
misuse 62:1
mixed 33:12
mobile 22:9 24:16 27:4,5 30:9
model 59:5
modern 59:14,15
moment 27:8
Monday 1:9
money 14:13 15:22,22 16:3,8 16:9 17:7,9,12 21:15,21 25:18 28:7,24 29:2,3 29:14,15,16,22 33:9 34:13,15 34:25,25 35:13 36:12,13,21,23 37:14,16,21,23 37:25 43:5,10 43:14,22,24 52:21 53:5 54:17,22 55:3,6 55:14,15,20,22 56:12,17,18 57:4,14 60:13 60:13,15,16 62:15,20
Montana 30:25
months 19:18
morning 3:4
mother-in-law 30:9
motion 26:23 46:10,10
move 39:12 41:11
moved 31:16

N

N 2:1,1 3:1
named 34:10
narrow 48:12
narrowing 50:7
national 8:25 9:10,20,20 10:5 50:2,19,25
nationwide 5:23 6:7 50:2 51:4
nature 62:22
necessarily 50:8 53:12
need 30:16 46:13
needs 59:13
Nevada 3:13,17 3:19,24 4:21 6:23 14:6,8,16 14:19,22,22,24 15:3 16:3,4,10 16:10,14,19,20 16:21,25,25 17:1,2,4,11,14 19:13,14,22 21:9,23,25 23:2 24:6,8,17,20 25:16,18 27:10 29:22 30:21 31:9 32:4,8,25 32:25 33:2,4,8 36:22 38:16 39:5 40:14 41:16 42:25 43:5,6,7,10,11 43:17,18,22,22 43:23,24 45:13 46:5 47:18 48:19 50:16 55:3,5,20,22 57:2,3,9,11,12 57:14,15,16 58:3,10 60:22 61:5,7,7,8,9,13 61:15 62:2,25 63:16
never 17:3 22:5 32:4 33:21,22 34:5,24 36:3,12 36:13
new 10:11 22:11 40:3 45:22 50:20 52:7
Ninth 3:13,16,23 5:4 7:14,19 20:8 22:16 23:19 27:2 47:4
normally 54:1
notably 19:17
notice 13:10
notion 48:23
November 1:9
number 10:20 54:21

O

O 2:1 3:1
obstruct 12:8
obtaining 54:1
obviously 21:17 45:21
occurred 4:4 28:14 44:2 50:16 62:13,17 62:24
occurring 39:8
occurs 39:7 47:18 48:24 49:3,7 50:9 52:16 61:7
odd 13:19
offer 46:1
officer 3:13,17 3:25 7:6 14:23 15:6 16:2,5,5 16:12,23 19:3 21:15 23:6 26:9 29:12,19 31:4,7 41:15 46:6 48:1 55:2 58:23 60:20 62:24
officers 4:11 22:17 29:11 46:21
official 23:24,25 23:25
officials 23:13
Oh 34:3
okay 18:7 30:18 33:16 34:25 35:3,5,10,15 35:17,20 36:18 37:9,22 38:7,14 38:17,17 40:10 46:23 48:4,4 54:13 56:5
old-fashioned 44:10
omissions 4:4,5 47:18
omitted 43:12
Omni 5:24
once 16:4 42:8
ones 26:9
ongoing 29:21
open 35:23
opening 46:3
operate 31:19
opinion 9:22 27:23 30:10 47:13,13 49:18 49:23
opportunity 26:19
opposed 6:9 12:25 24:24 62:20
option 14:18
oral 1:11 2:2,5,9 3:7 18:10 27:18
order 5:16
ordinary 7:1 49:8
originated 43:6
origins 39:10
outside 31:16 36:22 40:8
overseas 41:6
overwhelming 40:17
owned 43:5

P

P 3:1
page 2:2 18:1 27:1 35:18 36:9
pains 9:22
paper 49:1 58:5
paragraph 31:9 43:19
paragraphs 54:14
parents 31:22 34:14
part 9:19 21:12
particular 6:9 8:15 10:4,6 11:18 13:6,18 13:20 47:20

particularly 47:16
parties 20:23
passage 11:3
pay 46:20 47:20
penalty 24:5,9
pendency 26:20
people 9:15 14:16 28:13 30:8 33:9 35:21 35:22 44:25 45:20,21 54:22
perceived 6:1
percent 43:1
perfectly 29:14
perform 30:6
performer 30:24
period 19:18
permissible 7:10
person 11:18,22 11:24 13:18,20 21:9 22:24 24:8 24:17 28:4,5,6 28:13 32:12 49:7 51:8 52:11 52:18 58:2,3 60:9
personal 3:15 4:13 5:2,3,17 5:20 6:2,5,18 6:22 7:6 8:10 16:10 17:16 23:13,23 26:8 27:3,6,23 30:3 30:13,25 34:19 38:15 39:13 41:23 44:20 47:15,24 48:12 55:18 58:24 59:3 63:6
personally 48:17
personam 26:13
person's 28:8 32:1 36:6
perspective 60:20
persuade 43:23
petition 26:23 35:19,23,24
Petitioner 1:4,16 1:20 2:4,8,14 3:8 18:12 20:17 58:17
Petitioner's 26:7
pharmacy 33:19
physical 12:16 14:3 37:23
physically 25:11
place 6:16 14:7 22:12 29:23 30:4,5 32:12 56:3
places 15:2 24:17 30:20 49:3
plaintiff 8:6,17 12:23,25 14:9 22:9,9 25:21 27:4 30:11 32:20 39:13,15 56:23 59:24
plaintiffs 4:20 8:4 14:21 15:19 16:23 17:6,8 29:25 30:20 41:16 42:19 43:9,17,21,24 56:14 60:21 61:12 62:14 63:16
plaintiff's 7:22 10:20 17:18 60:9
plaintiff-center... 3:19 4:1
plaintiff-friendly 6:18
plausible 39:4
play 51:23
please 3:10 12:20 18:14 27:21
pleased 48:9
plurality 12:6 40:20 41:6
point 8:3 14:12 19:8 21:9 23:9 27:8 28:16 29:18 31:15 37:24 40:11,19 41:10,12 42:14 63:4
pointed 5:24 25:17
points 10:25 43:2 43:20
Policia 4:25
policy 6:2
pose 17:21
position 34:19
posy-Calder 48:17
potentially 46:4
power 5:25 51:16 51:17
practical 35:6 55:14
precedence 3:20
precedents 63:18
precisely 17:10
predictability 42:4
predictable 30:17
preferable 4:12
preference 4:6 26:2,6
preliminary 21:14
premise 31:3
prepared 19:5,22
presence 60:6
presumably 61:12
pretty 40:1
prevent 10:8
prima 32:6
primary 18:21
principal 31:8 32:1,7 58:5
principle 30:16 32:10
prints 61:19
privacy 42:16
probably 7:17 9:11 15:10
problem 6:5,21
problematic 22:18
problems 4:19
procedurally 52:5
proceedings 19:6 19:16 26:18,21 26:21
proceeds 36:11 36:11 54:23
process 5:23 6:7 28:23 29:5,7,18 29:20 47:22 52:4 54:16
product 13:4
professional 10:7 29:25
project 13:25
projecting 12:15 12:22
proof 43:15
proper 4:23
property 19:17 26:22 38:25 54:2 60:5,6
proposing 47:25
proposition 7:21
prospect 48:11
prospects 10:23
prove 39:2 40:15 43:12
provide 6:7 29:8 29:15
provided 5:22
provision 23:12
provisions 17:17
publication 18:22 48:24 50:1,1 51:4
publications 50:19
published 49:12 49:13,14 50:9 50:24
publisher 50:22
Puerto 31:7
pulled 35:23
purpose 63:14
purposeful 12:13 12:14 52:1
purposely 40:4
purposes 21:1
pursue 7:15
push 40:11
pushing 40:6
put 12:6
putting 13:11 58:22 59:10

Q

qua 12:10
qualified 47:21 58:25 59:5
quality 13:18
Quantico 55:15
quantum 62:13
question 5:7,8,18 5:18,19,21 6:4 9:19 12:4 16:18 17:21 20:6 24:14,22 25:25 25:25 26:4 28:17 30:8,14 31:17 32:24 33:10 37:21 49:17 56:8,22 61:1,1

questioning 51:7
questions 5:12 24:12
quick 27:8
quintessential 20:11
quite 9:16 25:15 32:5

R

R 3:1
random 8:13
reach 5:15,16 25:5,16
reached 16:4
reaches 4:17
reaching 61:7
read 7:25 20:13 20:17 37:7,7 61:24
reading 10:22 62:5
reads 10:19
real 18:24 20:7 56:21 61:8,20
really 4:15 13:15 17:9 22:16,18 23:14,25 25:15 27:3 28:12,21 32:9 38:11 40:6
real-world 60:6 61:17
reason 4:14 5:20 6:15 12:22 15:5 15:19 21:7 30:12 41:1,2,25 49:24 50:18 52:18 59:13,17
reasonable 42:16
reasonably 30:14 51:25,25
reasons 4:10 26:8
rebuttal 2:12 17:22 18:5 58:16
receipts 56:19
received 19:3 43:16 62:1
recognize 14:12 46:2,14,24 48:10,13 52:14
recognized 28:19
recognizing 45:17
reconcile 28:2
record 19:24 20:4 31:17 61:23
records 43:23
recounted 8:25
recounts 19:1
red 35:24
reference 9:25 38:24
referred 58:25
refile 4:20
refunds 54:24
refusal 54:3
refused 38:8
regain 19:17 26:22
registrar 36:1,1
Rehnquist's 49:18
rejected 23:17
related 21:22
relevant 11:10 23:5,8
relied 3:24 23:23 61:17
relies 62:9
rely 4:7 23:20,22
rem 26:14,15
remained 19:4 60:16
remaining 58:15
remote 36:15
removal 4:23,24 4:25
remove 4:22
removed 4:14,15
representation 23:15,20
represented 23:7
reputation 10:7
request 57:11
requested 43:13 43:16 57:15
require 3:14
requires 32:25
resembles 58:9
resembling 58:6
reserve 18:4
residence 10:21 22:2 23:4 31:8 32:1,8,12
resident 18:19 24:25 25:3 35:25 36:9
residents 14:8 14:22 15:2 31:13 41:16 43:6
resides 11:22
resolved 28:11
resolves 27:14
respect 21:25
respond 17:20
respondents 1:22 2:11 3:12 3:17,24 7:5,11 18:25 19:15,17 20:9 21:5,24 22:5,7 26:18 27:13,19
restatement 40:24,25 49:8
result 10:12 27:12
return 29:17 38:9 48:9 54:4 60:24 61:10,11
returned 25:19 25:19 57:9,9
reversal 3:14
reverse 47:4
reversed 47:8
reviewing 48:17
Rico 31:7
right 9:25 10:18 14:17 30:20 31:3 33:3,23 34:6 41:17 48:8 50:18 52:18 54:3 55:10 59:20,22
rightly 50:3
rights 54:16
rise 4:4 56:2 63:2
risk 13:11 59:10
ROBERTS 3:3 7:17 10:9,15 18:7 26:11 27:16 56:13,16 56:25 58:13 63:10,20
rock 30:2,24
rule 30:17 32:19 33:13 41:2 42:3 42:8,8,10 44:19 44:20 48:12 49:5,9 58:20 60:4,4
rules 40:21 59:20
ruling 22:16

S

S 1:15 2:1,3,13 3:1,7 58:16
salami 27:24
San 22:11 31:7
saying 17:16 32:16 33:8 39:22 47:3,3,9 47:11 50:12 55:1,1 56:7
says 7:9 8:2,5,7 10:1 11:1,4 33:20 35:16 46:23 47:14 51:12 54:11,11 57:3
Scalia 4:6,9 5:6 5:11 10:2 19:12 25:23 26:3 28:12,15 32:9 32:15,23 37:14 37:17 42:7,11 42:13 49:11,16 50:5,15 51:10 51:19 52:7 54:18 63:1,4
school 31:24
se 4:15,24 11:21
search 62:12
searches 57:12
searching 43:18
second 3:23 29:19 40:24,24 43:8 48:13 52:24 55:24
Section 7:2 40:24
Security 54:24
see 33:7 44:16 45:3 53:9 54:10 54:12
seek 16:24 26:22
seeking 13:1,16
seen 34:2
seize 17:2 38:20
seized 15:23 16:9 19:4 38:5,18 60:9 63:14
seizes 28:24 29:13
seizing 61:9 63:14
seizure 15:11,24 19:18 20:8,19 20:20 21:6,11 28:19 29:17 33:2 57:6 60:23 60:23 62:7,12

62:12
self-fulfilling 42:14
send 17:12 33:20 33:21 34:5,5 43:15,24 47:5 53:4 54:17 55:21
sending 13:4 25:10 43:14 57:16
sends 56:18
sense 5:19 11:11 11:12,13 13:4,5 14:2,8 18:24 31:18 55:14
sensibly 31:25
sent 19:15 25:6 36:13 37:25 49:2 54:23 57:11,14
sentence 63:11
separate 15:18 15:24 20:16
serve 13:9,16
server 60:7
service 5:23 6:7
set 4:10 36:3 40:8 46:4
setting 45:25
shape 37:23
Sherry 1:17 2:6 18:9,10,13 19:14,24 21:1 21:17 22:6 23:8 24:1,11,21 25:23 26:1,6,15
shipped 60:12,17
shoot 28:6 51:8 52:17,19
shorter 62:21
show 23:3 43:21 43:25
showed 14:23 23:2
shown 31:4,6,7
shows 22:15 59:2
side 27:22 49:19 58:22
significant 22:7 22:14 23:19 45:24
similarly 4:1
simplified 32:2
simply 21:5 25:3
single 12:3
sir 30:7 31:2 32:14 37:3 47:7 52:9,9
sit 28:7
sits 44:6
sitting 24:3 38:12 45:10,11 55:19 55:21
situation 31:20 34:8,9,19
situations 31:10 31:11 34:11 35:8
six 43:3
skip 48:7
slice 27:24
sniff 59:16
Social 54:23
society 30:10
sold 61:21
Solicitor 1:17
solution 46:1,7
somebody 12:10 24:5 36:20
somebody's 17:25 40:3
someplace 60:17
somewhat 23:1
soon 56:18
sooner 17:7
sorry 6:19 12:20 32:14 60:11
sort 6:16 12:3 42:13
Sotomayor 17:15 17:24 18:3 21:10 45:18 59:8,12,19,23 60:3 61:1
source 62:9
sources 9:2 18:21 49:21 58:4
special 40:21 41:2 44:20 46:5 48:25 51:2
species 12:13
specific 39:19 40:2,7 42:18,21 48:2 52:10 58:11
specifically 7:6 49:5
spend 34:15
spending 35:13 36:21,23,25
Stafford 23:10
stand 18:16
standard 40:5
stark 18:16
start 6:17 18:15 29:5,7,18,20 31:3 58:21
started 17:16
starting 7:2
starts 35:13 36:21 56:12
state 3:22 4:20 6:9 8:14 11:18 11:19,23 12:9 12:10,10,13,15 12:23 13:1,7,17 13:22 14:1,2,13 18:18,25 19:9 19:10 21:24 22:10,12,15,17 23:2,4,25 24:13 24:13,24 25:5,7 25:11,12,13,16 26:24,25 28:4,5 28:7,13 29:2,2 29:15 32:18,21 37:12,13 40:9 42:18,21 44:7 44:25 45:25 48:18 51:12,14 51:15,18 52:20 61:18
stated 6:16 20:16
statement 25:9
statements 9:15
states 1:1,12,19 2:7 8:2 13:12 18:11 22:10,19 26:12 28:18 42:20 50:4,23
statute 4:2 7:3,8
statutes 27:1
statutory 27:13
stays 57:3
steal 28:7 45:10 45:12
steals 18:2 55:19
step 31:16
stops 20:20
store 18:2 33:21 33:22 34:4 35:10
straight 49:7
strategy 7:18
stream 13:4
strong 5:19
student 31:22 33:18
students 31:21
subject 29:17
subjective 59:6,7
submitted 53:3 54:16 63:21,23
subset 46:16
substantial 51:23
substantially 48:13 61:25
sue 24:10
sued 23:7 50:20 50:22 51:11,12 51:13
suffered 8:4 10:22 11:5
sufficient 3:16 8:15,18 13:7 63:18
sufficiently 31:12
suggest 20:1 21:2
suggested 18:5 51:6
suggesting 6:13 10:10,13 48:10
suggests 17:19
suit 13:21,21,25 24:20 33:4
sum 8:2
supermarket 9:11
supplemental 19:21
support 61:24
supporting 1:19 2:8 18:12
suppose 12:19 12:19 16:2 24:2 29:24 30:23 38:5 62:21
supposedly 9:16
Supreme 1:1,12

T

T 2:1,1
tackle 30:13
tackled 30:8
tail 20:12
take 5:15 7:14 12:1 14:12 27:7 28:8 33:10 37:4 39:9 52:17
taken 20:17 30:10 52:21

takes 14:7 28:25 35:11 56:3 59:9
talk 58:18
talked 27:6 48:7
talking 10:5 11:17 13:15 22:8 24:25 42:18 44:8 45:7 49:25 56:11 59:10
tangible 60:5
targeted 3:18 24:13
targeting 13:22
targets 32:20 44:6
tax 24:5,9
technically 46:24
technological 12:17
technologies 61:3
technology 59:15 59:15
tell 44:19 46:25 48:16 54:19
tend 35:21
tension 7:21
term 5:20
test 32:18,25 52:7,10
text 4:2 27:13
Thank 17:23 18:3,6,7 27:15 27:16 58:12,13 63:19,20
theory 4:18,19 47:25 49:1
they'd 62:15
thin 20:13 27:24
thing 37:19 50:13 52:21
things 9:15 29:4 45:1 49:4
think 4:9,12 6:14 6:15,25 7:16,23 7:24,25 8:8,19 8:22 10:14,18 10:18,19 11:8 11:25 12:6 13:19,24 15:5 15:16,17 16:11 20:7,11,16,17 20:22 21:18 22:6,6,14,15 23:5,8,18,19 24:11,14,22 26:1 27:14 28:10 29:10 31:9 39:1,2,5 40:10,13 44:3 44:23 46:14 47:14 48:8 50:17 51:7 55:11 57:17 58:10 59:1,12 59:16 60:19,21 60:25 62:4 63:3
Third 43:11
THOMAS 1:21 2:10 27:18
thought 6:4 10:15 32:15 56:25
ticket 47:24
time 14:25 15:6 18:4 21:6,9 37:15 48:7 62:14
times 10:16 50:20
told 17:15
tools 45:23
tort 11:16,20 12:7 13:17,19 24:25 32:11,12 39:6,8 40:16,22 42:25 45:8 48:19,24 49:3,9 52:3,13,14,16 52:16,24 54:6,7 55:25 56:10
tortious 19:8,10
torts 41:3 49:5 51:5 58:19,20
tour 30:2
town 34:23
traditionally 39:13
transfer 6:23 7:7 7:10,12 46:8,11 47:11
transferred 21:15 47:6
transferring 48:4
travel 22:15 27:4 27:5 30:9 33:5
traveled 22:1,10 22:10,11,11
traveler 22:24
travelers 22:19 23:3
traveling 22:8
travels 52:20
treat 35:7 39:7 46:12
triggering 58:24
true 5:10,13 9:20 10:25 11:10 22:4 31:15 40:16 49:5,6 52:1,2 53:13
truth 28:10
try 4:11 5:11 9:18 12:3 24:1 27:24 34:20 40:12 43:3 50:18 60:25
trying 25:4 30:13 37:3,4,6 39:16 40:11 47:12 48:7 51:21
turn 59:3
turned 7:18 59:6
turns 29:1 37:21
two 3:14 19:7 28:18 29:3,11 30:20 35:18 43:20 48:11 49:4 55:18
type 12:2 26:11
types 12:5

U

ultimately 17:13 48:14
umpire 30:4
umpires 30:1
underlying 56:1
understand 9:16 10:9 16:17,18 26:3 42:23 47:2 60:4
understood 32:3 55:1,8
uni 43:14
uniformly 35:7 46:20
unilateral 8:17 11:12 25:21
unilaterally 43:14
unique 21:25 23:1
unitary 12:4
United 1:1,12,19 2:7 18:11 26:12 42:20 50:4
unusual 7:16 46:9
unworkable 59:2
urging 39:20
use 28:9 43:11 62:20
usually 5:11 13:17
U.S 6:8 13:6,9 29:8

V

v 1:5 3:5 23:10
variety 7:25
Vegas 25:22 44:1
venue 3:23 4:2 4:13,14,15,17 4:18,23 5:6 6:23 7:3,7 17:17 23:10 25:25 27:4,8,10 46:9,16,24 47:17 48:4,9 57:7 63:7
Vermont 17:25
version 6:18
versus 28:1 55:5
victim 24:8 39:8 49:9 51:9 52:16 53:15
victims 53:10
view 24:20 41:5 42:24 50:13
violate 54:15
violates 42:9
Virginia 36:1 55:15
visit 30:8
voluntarily 22:9

W

wagging 20:12
wake 47:15 50:24
Walden 1:3 3:5 3:13,18 7:6 14:23 15:6 16:12,23 17:14 19:3 25:15 29:12 39:23 48:1 58:2
Walden's 3:25 22:12 58:23 60:20 62:24
want 7:7,8,12,12 25:24 33:13,14

47:8 58:21
wanted 6:6 19:17 26:22
Washington 1:8 1:15,18,21 24:3 24:7,10 60:12
wasn't 21:12 31:6 40:2 41:7 55:14 62:13
watch 38:6,9,11 39:3 60:15
way 4:25 10:19 12:6,12 15:18 20:7,17 27:5 28:10 29:9,10 33:19 34:14 37:23 39:19 40:23 43:7 46:2 52:13 61:14
ways 7:25 48:11
website 36:2
went 9:22
weren't 36:24 37:24
we'll 29:12
we're 11:17 24:25 29:23 42:18 45:3 62:4 63:6
We've 27:6
widely 9:7
wide-ranging 46:4
wild 48:5
witnesses 46:22
wonder 53:13
wondered 49:22
words 40:5
work 52:14 59:6
worked 31:11 41:18 43:10
working 44:1 57:10
works 4:14,25 22:12 28:23 30:12 56:23 57:2,3
world 44:9 45:21 61:20
worried 17:24
wouldn't 26:24 44:24,25 45:1 45:14,18 57:7 63:2
would-be 30:17
write 27:23 44:19 47:13,14 59:8,9 59:20,23 60:1,1
writes 36:1,9
writing 17:6
written 63:13
wrong 6:22 42:5 45:6 52:15

X

x 1:2,7

Y

Yeah 38:20
York 10:11 50:20

$

$100 35:21
$30,000 43:6
$97,000 33:3

1

1,000 34:23
10:03 1:13 3:2
101 54:14
11:04 63:22
12-574 1:4 3:4
1391(b)(2) 4:3
1391(e) 23:11
1404 46:10
1441(a) 4:23
1631 7:2
18 2:8
19 18:1
19th 44:14
1920 44:11
1979 27:9
1990 27:11

2

2 31:9
2013 1:9
25 30:2
25a 35:18,25
27 2:11

3

3 2:4
30 51:6
31 27:1
32nd 40:24

4

4 1:9

5

50 22:19 50:22
58 2:14

6

6 19:18

7

79 43:19

9

90 43:1
99 54:14