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IN THE SUPREME COURT OF THE UNITED STATES
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RAY HALUCH GRAVEL COMPANY, ET AL, :
Petitioners :
v. :
CENTRAL PENSION FUND OF THE : No. 12-992
INTERNATIONAL UNION OF OPERATING :
ENGINEERS AND PARTICIPATING :
EMPLOYERS, ET AL. :

Washington, D.C.
Monday, December 9, 2013

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:06 a.m.

APPEARANCES:
DAN HIMMELFARB, ESQ., Washington, D.C.; on behalf of
Petitioners.
JAMES A. FELDMAN, ESQ., Washington, D.C.; on behalf of
Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DAN HIMMELFARB, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	JAMES A. FELDMAN, ESQ.	
7	On behalf of the Respondents	25
8	REBUTTAL ARGUMENT OF	
9	DAN HIMMELFARB, ESQ.	
10	On behalf of the Petitioners	50
11		
12		
13		
14		
15		
16		
17		
18		
19		
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21		
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24		
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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 12-992, Ray Haluch Gravel Company v. The Central Pension Fund.

Mr. Himmelfarb.

ORAL ARGUMENT OF DAN HIMMELFARB
ON BEHALF OF THE PETITIONERS

MR. HIMMELFARB: Thank, Mr. Chief Justice, and may it please the court:

Twenty-five years ago in Budinich v. Becton Dickinson, this Court unanimously held that a decision leaving unresolved the request for attorneys' fees is a final decision subject to immediate appeal. The fee awarded in Budinich was authorized by a statute that the same rule applies to fees awarded under a contract. In concluding otherwise, the First Circuit below held that Budinich may or may not apply to contractual attorneys' fees, depending upon whether the fee award in a particular case is deemed part of the merits or not.

The First Circuit's rule is inconsistent with each of the core aspects of Budinich, which is likely why Respondents no longer defend it. Whereas Budinich held that its rule applies regardless of whether the fees are deemed merits or nonmerits, that

1 distinction is the very foundation of the First
2 Circuit's rule. And whereas Budinich emphasized the
3 need for clarity, consistency, predictability, and
4 practicality in jurisdictional rules, and thus, for a
5 uniform and bright-line rule in this context, the First
6 Circuit's rule is case-specific, fact-intensive,
7 abstract, and hard to apply; in short, the very
8 antithesis of a uniform and bright-line rule.

9 JUSTICE GINSBURG: As I understand it,
10 the -- the First Circuit position is not what's being
11 defended; instead, it's the Eleventh Circuit's position,
12 which is a bright-line.

13 MR. HIMMELFARB: Well, it's not a
14 bright-line rule, Justice Ginsburg. It's a different
15 rule, but it's still a case-specific, fact-intensive
16 rule. The line is just drawn in a different place.

17 JUSTICE GINSBURG: I thought it was that if
18 it's statutory, Budinich controls; if it's contractual,
19 then you -- you treat it as though it's a question of
20 damages.

21 MR. HIMMELFARB: Right. It's not a
22 bright-line rule in a number of respects. One of them
23 is that, like the First Circuit, it relies on a
24 distinction between merits and nonmerits fees, more
25 specifically on what Respondents call damages fees as

1 opposed to cost fees. And Budinich says it's
2 inappropriate to make this sort of case-by-case
3 determination of whether a particular fee award is
4 authorized --

5 JUSTICE KAGAN: But I think that's not
6 right, Mr. Himmelfarb. I mean, the rationale that they
7 use might have something to do with an underlying
8 merits/nonmerits determination, but the test is just
9 does the statute authorize it or is it authorized by
10 contract?

11 MR. HIMMELFARB: Right. And we would say
12 two things about that. One of them is sort of a
13 practical point, a point about administrability. The
14 one is an analytical point, a point about logic, or more
15 specifically, illogic.

16 JUSTICE KAGAN: Well, just focusing on
17 whether that's a bright-line rule or not, in other
18 words, whether it's easy to apply or not, I thought you
19 were suggesting whatever is true about whether it makes
20 any sense or whether it's conceptually justifiable, I
21 thought you were suggesting it wasn't easy to apply.

22 And it does seem to me that once you say
23 contractual provisions will be treated this way,
24 statutory provisions will be treated that way, that's
25 not a hard rule to implement.

1 MR. HIMMELFARB: We actually think it is a
2 hard rule to implement or at least there are going to be
3 cases where it's hard. And in fact this case is an
4 example. In this case, in the notice of motion for
5 attorneys' fees of cost -- this is on page 74 of the
6 Joint Appendix -- Respondents invoked only a statute,
7 ERISA. In the supporting affidavit they invoked the
8 statute and a contract.

9 The district court interpreted their
10 request, apparently, to be made under statute and
11 awarded fees invoking only the statute. Then the First
12 Circuit viewed this case as one in which fees were
13 requested and awarded under a contract, and that was the
14 basis for its jurisdictional holding that's now on
15 review before this Court.

16 So this case is an example of one where it's
17 not always clear. There are many cases where a statute
18 in some capacity and a contract in some capacity are
19 both in play, where you potentially have two competing
20 attorneys' fees provisions, one statutory and one
21 contractual. They could be identical in all relevant
22 respects, and yet in one of them the party happens to
23 invoke the statutory provision and the other party
24 happens to invoke the contractual provision. And under
25 Respondent's rule you would have two different outcomes.

1 But what we think is really fundamentally
2 wrong with Respondent's position is that at the end of
3 the day it's just the opposite of the rule that this
4 Court adopted in Budinich. Budinich recognized that
5 statutory fees can be viewed as merits or non-merits
6 depending upon the particular statute or decision law.
7 Contractual fees are precisely the same. Some
8 contractual fees, depending upon the contract's
9 provision and the relevant decisional law, could be
10 viewed as costs.

11 JUSTICE SOTOMAYOR: Wouldn't this view
12 contradict 54(d)(2)? What do we do with that? If we
13 accept your analysis that we should superimpose just a
14 flat rule that all fees are not --

15 MR. HIMMELFARB: 54(d)(2) simply requires
16 that in the case in which fees are sought by motion,
17 they have to be made, the motion has to be made, within
18 14 days unless the fees are such that they are a part of
19 the cause of action and they are submitted to a jury.
20 54(d) doesn't say that in the case where the fees are
21 made by motion, but they should have been submitted to a
22 jury, there's some other appealability rule. It simply
23 says that in a case where a fee request is made by
24 motion, it has to be made within 14 days.

25 JUSTICE SOTOMAYOR: I'm a little confused.

1 So is your rule that if a fee is made by, if a request
2 is made by motion, whether it's contractual or
3 statutory, that that then becomes a separate judgment
4 and not a part of the final merits?

5 MR. HIMMELFARB: That's absolutely right.
6 That's what Budinich says.

7 JUSTICE SOTOMAYOR: So you're not blocking a
8 party from coming in and saying, you've got a -- how
9 will a union know or a claiming party know whether or
10 not you'll come back later and say you should have given
11 it to the jury?

12 MR. HIMMELFARB: Well, our submission is
13 that it doesn't matter whether it should have been given
14 to a jury or not. What matters is whether it was given
15 to the jury. And let me just say parenthetically the
16 general practice in Federal courts, as I understand it,
17 is that fee requests are not given to juries. At the
18 very least, the amount of the fee is almost invariably
19 determined by courts, not by juries. And in fact courts
20 have held that there's no Seventh Amendment right to
21 have juries determine the amount of attorneys' fees, and
22 this makes sense when you think about it.

23 JUSTICE KENNEDY: We held that or just
24 circuit courts?

25 MR. HIMMELFARB: No, lower courts have held

1 that. This makes sense because most attorneys' fees
2 requests, very much including the fee request in this
3 case, go up to the very end of the case. And by
4 definition, when the jury still has the case, you know,
5 the meter is still going and it's quite difficult,
6 indeed, it's impossible, for a jury to decide what the
7 fee award should be when there are more fees to follow.

8 JUSTICE SOTOMAYOR: So what do we do with
9 the auditor's fees, which aren't traditional attorneys'
10 fees and those hadn't been decided in this case? So why
11 is the judgment nevertheless final, putting aside the
12 attorneys' fees question? Why is the merits final when
13 the auditor's fees weren't?

14 MR. HIMMELFARB: Our submission is that
15 auditor's fees are treated just like attorneys' fees for
16 purposes --

17 JUSTICE BREYER: Well, that's the problem.
18 I mean, put Justice Kagan and Justice Sotomayor
19 together. I don't see any problem that I can see in
20 deciding whether a case is contractual or statutory,
21 because the judge has to decide. If there's a
22 contractual part of it, if he's going to deny it, he has
23 to decide the contractual part. So if it's both, it's
24 both. It counts as contractual. Eleventh Circuit rule
25 applies.

1 On the other hand, if we don't, if we don't
2 follow the Eleventh Circuit, we get into the question of
3 well, what about auditor's fees, what about witness
4 fees, what about prelitigation attorneys' fees, what
5 about some language in the contract that seems to cover
6 attorneys' fees but we're not certain, etcetera? And
7 before you know it, that could even shade into the
8 merits. And so the simple thing to do is just say what
9 the Eleventh Circuit said. So we have one argument that
10 yours isn't really an administrative objection and you
11 have the other argument that if we follow you there's a
12 big administrative problem.

13 MR. HIMMELFARB: Well, auditor's fees or any
14 other sort of nonattorney professional fees or expert
15 fees or anything else we think are not a problem because
16 the truth of the matter is that that category of fees,
17 as a general matter, just like attorneys' fees, are fees
18 that are incurred in attempting to enforce the
19 underlying right or to defend against the enforcement of
20 the underlying right. They are not some measure of the
21 value of the underlying issue.

22 JUSTICE BREYER: All right, so all we're
23 going to have is a contract which in its discussion of
24 the merits makes some general mention of fees. And now
25 what we have is the initial notice of appeal has to be

1 within 30 days of the judgment when the fee issue is not
2 yet resolved and you're going to try to separate the
3 merits from -- I mean, some -- you see what I'm worried
4 about, what Justice Sotomayor was worried about, that
5 these things will be very messy when you get to many
6 contracts.

7 MR. HIMMELFARB: I don't -- I don't think
8 so. I mean, just think about this from a common sense
9 point of view. This was a case where there was a bench
10 trial. At the conclusion of the bench trial the
11 parties, including Respondent, submitted proposed
12 findings of fact and conclusions of law in which they
13 said: Judge, you should find Petitioners liable,
14 plaintiffs below, and you should award us damages. Then
15 a few weeks later they separately submitted something
16 that they call "Motion for Attorneys' Fees and Costs" in
17 which they requested attorneys' fees, costs and
18 auditor's fees.

19 All of those things -- I think the fact that
20 they did it that way just confirms what I said before,
21 which is that as a general proposition at least, you
22 know, expert fees, nonprofessional -- nonattorney
23 professional fees are not the sorts of things that you
24 get to enforce the underlying right --

25 JUSTICE KAGAN: What if they hadn't done it

1 that way? What if they had listed those fees in their
2 complaint and what if they had argued for them as part
3 of the bench trial? Are you saying something would
4 depend on that?

5 MR. HIMMELFARB: I'm not saying that. All
6 I'm saying is that this is the way people -- litigants
7 generally think about these two different categories of
8 things and it's understandable that this is the way they
9 did it. If they had requested auditor's fees and if
10 they had requested, you know, attorneys' fees that were
11 incurred at the very beginning, before the complaint was
12 filed, in connection with their proposed findings of
13 fact and conclusions of law, then it may well be that
14 the judge would have awarded them, you know, with the
15 ordinary damages and they wouldn't have that argument
16 available to them.

17 But they chose to include them, as I say, I
18 think because their intuition, if nothing else, was that
19 these audit fees and these attorneys' fees, even
20 attorneys' fees incurred before the litigation
21 commenced, are attorneys' fees in the same sense that
22 the kinds of things that courts decide separately from
23 the merits.

24 As far as the so-called prelitigation
25 attorneys' fees are concerned, this is the fallback

1 argument, the second argument that Respondents make in
2 their brief. And the argument is that because some of
3 the fees requested were incurred before the complaint
4 was filed or at least at some remote time before the
5 complaint was filed, what you have here is not covered
6 by Budinich because the rule articulated in Budinich is
7 that it applies to attorneys' fees for the litigation in
8 question, for the litigation at hand, fees attributable
9 to the case. And that's the language that Respondents
10 rely on in our fallback argument.

11 What we would say in response to that is
12 that what Budinich meant by that language is that its
13 rule does not apply to a case where the attorneys' fees
14 are for a prior case, as opposed to being attributable
15 to the case, meaning the case in which the fees are
16 incurred. So if you have a dispute between a lawyer and
17 a prior, a former client, over fees, the former client
18 hasn't paid fees and there's a lawsuit to recover the
19 fees, Budinich won't apply in that situation.

20 JUSTICE SCALIA: I wrote it. I don't think
21 that's what I meant.

22 (Laughter.)

23 JUSTICE SCALIA: It would be a strange,
24 strange thing to worry about, it seems to me. It's a
25 fairly infrequent situation, isn't it?

1 MR. HIMMELFARB: Well, yes, of course, it
2 is. And not only is it infrequent, the situation you
3 have here that gives rise to the question presented in
4 this case just wouldn't arise there, because if you're
5 talking about a lawsuit by a lawyer against a former
6 client to recover fees owed, by definition, the fees are
7 known and quantifiable before the suit is filed, so you
8 would imagine that, in that case, there'd be a liability
9 determination and the award of damages, which in that
10 case just happened to be attorney's fees, and the case
11 would be over, and this situation wouldn't present
12 itself.

13 CHIEF JUSTICE ROBERTS: Why would the case
14 be over? Presumably, you incurred attorney's fees,
15 seeking to recover the attorney's fees.

16 MR. HIMMELFARB: Well, it would -- it would
17 depend on what the -- you know, the contract between the
18 lawyer and the client said, Mr. Chief Justice. I
19 suppose it's possible that you could have a contractual
20 fee provision that says, we get fees for attempting to
21 recover our fees, and then, right, you would have the
22 Budinich situation, but it would be as to the fees
23 generated in attempting to enforce the underlying right,
24 which is exactly what you have here.

25 JUSTICE ALITO: Do you think the district

1 court here relied solely on the contract -- on the
2 contract and on ERISA, or just on ERISA, in awarding
3 these fees?

4 MR. HIMMELFARB: It appears to us, Justice
5 Alito, that the district court relied only on the
6 statute. That was the only -- only thing that the court
7 cited. The court didn't cite the contract. It was the
8 court of appeals that sort of reconceptualized it as a
9 case in which fees were awarded under a contract.

10 JUSTICE KENNEDY: I can see how if you're
11 talking about lawyer's fees pretrial and lawyer's fees
12 at the trial, that they would be interconnected, that it
13 would be improper for the jury to hear about either, if
14 there were a jury. But -- what about the auditor's
15 fees? Can you -- is there an argument that would
16 support your side, but I'm not sure there is the
17 argument, that auditor fees are also -- have an effect
18 on what the attorney's fees are or should be --

19 MR. HIMMELFARB: Well --

20 JUSTICE KENNEDY: Or are they really quite
21 compartmentalized?

22 MR. HIMMELFARB: No, we say auditor's fees
23 should be treated exactly the same way.

24 JUSTICE KENNEDY: No, but I'm asking if
25 there's a relation between the two.

1 MR. HIMMELFARB: Sure, there are. I mean,
2 oftentimes, auditors or any other sorts of experts are
3 retained to, you know, assist the lawyers in litigating
4 the case or investigating.

5 JUSTICE KENNEDY: And to the extent auditors
6 have done a certain amount of work, then there should be
7 no duplicative attorney's fees, so the judge considers
8 both together.

9 MR. HIMMELFARB: Right. I think that's
10 right.

11 CHIEF JUSTICE ROBERTS: Well, but I thought
12 with respect to pre-litigation attorney's fees, you said
13 you can treat those differently because they're set and
14 determined. You know what they are. It would seem to
15 me, most cases of an auditor's report, that's also true.

16 MR. HIMMELFARB: No. I want to be clear
17 about this because it's an important distinction. What
18 I was talking about was a case where a lawyer sues a
19 former client, as an example, where the fees were
20 incurred in a prior case, in a different case, involving
21 a different dispute.

22 And in the case in which the fees are
23 sought, that is the dispute, that's the case. What I
24 would distinguish from that situation is the situation
25 here, where lawyers are retained, auditors are retained,

1 to resolve an underlying dispute. The underlying
2 dispute is whether contributions are owed to union
3 benefit funds.

4 The lawyers and auditors investigate the
5 case. They prepare to litigate it. They research
6 potential claims. They draft the complaint. They file
7 a demand, write a demand letter to the other side.
8 They're unable to resolve it so they file a lawsuit.
9 It's all one case. And the fact that some of the fees,
10 whether they're attorney fees or auditor fees, were
11 incurred before the complaint was filed is neither here
12 nor there.

13 I mean, the -- the contractual provision at
14 issue here authorizes that recovery, everybody agrees
15 with that. And the truth of the matter is that even
16 under the narrowest imaginable attorney's fees
17 provision, surely, some fees incurred before the
18 complaint was filed would be recoverable unless you had
19 a really odd-ball statute or contractual provision which
20 made --

21 JUSTICE KENNEDY: And the trial court needs
22 to know the amount of the pretrial fees and what they
23 were incurred for so that he doesn't give duplicative
24 recovery when he provides for attorney's fees for the
25 course of the trial.

1 MR. HIMMELFARB: Right. But if -- if
2 Respondent's fallback position were correct, what that
3 would mean is that in literally every case, contractual
4 or statutory, you would have to -- litigants and courts
5 alike -- would have to search through the request for
6 attorney's fees, which are generally voluminous -- the
7 one in this case runs to more than a hundred pages in
8 the Joint Appendix; this was a three-day trial -- to
9 decide are there any fees here that are "nonlitigation"
10 fees? And I put nonlitigation in quotation marks. And
11 that -- that has two consequences. One is, it requires
12 sifting through this voluminous record.

13 And the second is, it requires making a very
14 difficult kind of evaluative judgment about whether this
15 particular pre-complaint fee is, you know, a "merit" --
16 I put that in quotation marks also -- fee or a
17 "nonmerits" fee. If it's drafting a complaint, maybe
18 that's a nonmerits fee, but if it's, you know, four
19 months before the complaint was filed and it doesn't
20 have to do with any drafting of a pleading, there's some
21 way to conceptualize that as a merits fee. We just
22 think it's completely --

23 JUSTICE SOTOMAYOR: So articulate, again,
24 for me your rule. Would it go something like this: To
25 the extent that a party leaves attorney's fees for after

1 trial, it then -- that's a separate judgment that will
2 not run the finality of the prior judgment?

3 MR. HIMMELFARB: That's right. I mean --

4 JUSTICE SOTOMAYOR: But you're proposing not
5 to estop parties if they choose to put this issue to a
6 jury.

7 MR. HIMMELFARB: That's right.

8 JUSTICE SOTOMAYOR: You're just saying if
9 they don't, then they have to treat it as the judgment
10 that comes out of the contract dispute as final, the
11 other aspects of it.

12 MR. HIMMELFARB: That's right. That's
13 absolutely right. If there is a decision in a case that
14 leaves unresolved everything except attorney's fees,
15 Budinich applies no matter what --

16 JUSTICE BREYER: Because now you're saying
17 not just attorney's fees, also auditor's fees.

18 MR. HIMMELFARB: That's true.

19 JUSTICE BREYER: And what about witness
20 fees? Experts?

21 MR. HIMMELFARB: Well, witness fees are
22 costs and there's no question --

23 JUSTICE BREYER: No, no. Experts, experts.
24 The payment of an expert.

25 MR. HIMMELFARB: If -- if expert witness

1 fees are recoverable under the applicable statute --

2 JUSTICE BREYER: No, no, no. It's a
3 contract.

4 MR. HIMMELFARB: Right, under the applicable
5 statute or contract, and everybody who --

6 JUSTICE BREYER: So expert witnesses are --
7 are also, so we're talking about Budinich'ing or
8 whatever, you want to do that for the attorney's fees,
9 auditor's fees, expert witness fees, experts who helped
10 the attorney but don't testify. What's the rule of what
11 we're putting in here and what we're not?

12 MR. HIMMELFARB: Well, the rule is what I
13 was suggesting before, which is that if these are fees
14 that are incurred in an effort to vindicate the
15 underlying right, then they're covered by Budinich. And
16 that's -- I think that's what Budinich is getting at.
17 But if instead, they are sort of -- it's a standalone
18 case, and Justice Scalia, I think, may disagree with me
19 about this, but if it's a standalone case where you hire
20 an auditor and you don't pay the auditor's fees and then
21 the auditor sues you for the fees, that's like the
22 example of the lawyer who didn't get his fees paid and
23 sues his former client.

24 JUSTICE KAGAN: Well, what about a different
25 kind of standalone case? I mean, suppose that the fund

1 had actually paid up what it was due prior to the
2 litigation, but -- but there was still all these
3 outstanding costs that had been incurred for auditors
4 and all of that, and -- and a suit was brought just
5 involving those?

6 MR. HIMMELFARB: I think probably Budinich
7 would not apply in that situation because it would be
8 like the case I was talking about before where a lawyer
9 sues a former client and the case is just the case about
10 fees.

11 I also think, though, as with the case of a
12 lawyer suing a former client, the situation is unlikely
13 to arise, at least under this contractual fee provision
14 because, by definition, in your hypothetical, you would
15 know what the fees were at the time you filed the case.
16 Presumably, the judgment would be, if it was a judgment
17 for the funds, yes, you're entitled to recover costs and
18 here's what the costs are, end of case.

19 You wouldn't have this separate pending
20 request for attorney's fees.

21 JUSTICE ALITO: Well, Mr. Himmelfarb, if I
22 think that we should aim for the rule that trips up the
23 fewest lawyers, what rule would that be?

24 MR. HIMMELFARB: I mean, I just think that's
25 absolutely our rule. It's the Budinich rule. The rule

1 we're advocating says, if you have a case and the -- the
2 merits of the case are decided, liability is determined,
3 damages are awarded, but there's a pending request for
4 attorney's fees, which may or may not include other
5 types of related professional fees, and you want to
6 appeal that initial decision, you have to file a notice
7 of appeal within 30 days.

8 Under either the First Circuit's Rule or the
9 Eleventh Circuit's rule, you are going to trip up a lot
10 of people because they may guess wrong, and they may
11 think, I don't have to file a notice of appeal because
12 this is a quote "merits" end quote decision and if it
13 turns out they were wrong, and it's easy to think they
14 might be because this is such a sort of, you know,
15 esoteric kind of distinction what's a merits fee and
16 what's not, you're going to get people tripped up under
17 either the First Circuit's or the Eleventh Circuit's
18 rule.

19 JUSTICE ALITO: So on auditor's fees or
20 anything that might possibly be viewed as falling into
21 the same category as attorney's fees, you can wait.
22 That would trip up the fewest lawyers; is that right?

23 MR. HIMMELFARB: You -- you can't wait if
24 you want to -- if you want to appeal the initial
25 decision, if there's a pending request --

1 JUSTICE ALITO: No, right. But if you
2 don't, you can wait and contest those things at a later
3 time when you file -- when you appeal from the attorneys
4 fees?

5 MR. HIMMELFARB: Right. You would have, in
6 effect, two separate appeals if you wanted to appeal the
7 attorneys fee decision.

8 JUSTICE SOTOMAYOR: You would argue to the
9 contrary, no, that a rule that says wait till the end of
10 everything that needs to be decided in the case. That's
11 the finality rule and that's the idea behind the
12 finality rule.

13 MR. HIMMELFARB: Right. I mean the -- the
14 relevant statutory provision is Section 1291 in Title
15 28, which speaks of final decisions. And what a final
16 decision is under that statute is a decision that either
17 leaves nothing else to be resolved or leaves other
18 things to be resolved, but the only other things that
19 are left to be resolved are collateral to the merits.

20 And the holding of Budinich is that, as a
21 general matter, attorneys fees are collateral to the
22 merits and that even when they are not as a matter of
23 the law that authorizes them, in the interests of
24 certainty and predictability and uniformity you should
25 treat them as if they are.

1 So Budinich has already held that in this
2 circumstance the final decision is entered when the
3 initial decision is entered and the attorneys fees are
4 collateral no matter how they're characterized. It
5 seems to us it would require a very compelling case to
6 have a different rule just because of the source of
7 authority.

8 JUSTICE BREYER: No, no, no. The words that
9 make your point I think not absolutely obvious were when
10 you said "which may or may not involve other kinds of
11 fees." Now, at that point I'm thinking, well, if we
12 follow your rule, there might be quite a lot of
13 litigation going on about those words, "may or may not."

14 If you follow the opposite rule, we've got a
15 clear exception for statutory attorneys fees and nothing
16 else. All right. So do you want to add anything?

17 MR. HIMMELFARB: I'm not entirely sure I'm
18 following your question, but if the concern is about the
19 presence of fees other than attorneys fees, for example
20 auditors fees or economists fees or what have you, I
21 mean, keep in mind the same -- the same problem would
22 arise under a statutory fee award. Perhaps the most
23 common statutory authorization for fees, at least in the
24 Federal system, is Section 1988 of Title 42, which is
25 sort of a catch-all. It applies to 1983 actions. It

1 authorizes an award of expert fees.

2 So if you had a straightforward Budinich
3 situation where you had a statutory fee award -- say
4 it's a 1983 action -- surely Budinich applies to 1988
5 requests for fees, and 1988 itself authorizes an award
6 of expert fees. So it seems to us you can't have a
7 different rule for contracts if you accept our -- if you
8 reject our principal submission, which is that contracts
9 should be treated differently from statutes.

10 I'd like to reserve my remaining time for
11 rebuttal.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Feldman.

14 ORAL ARGUMENT OF JAMES A. FELDMAN

15 ON BEHALF OF THE RESPONDENTS

16 MR. FELDMAN: Mr. Chief Justice, and may it
17 please the Court:

18 There are two principles that I think
19 resolve this case. The first one is that all damages
20 claims, no matter how small or large, have to be
21 resolved before a judgment is final under Section 1291.
22 Although occasionally Petitioners have suggested that
23 the size of the award somehow makes a difference, I
24 don't think the Court has any basis to depart from that
25 long-settled rule.

1 The second is that, as this Court itself
2 held in the Vaughan Distilling case -- I'm sorry, in the
3 Fleischmann Distilling case and the Vaughan v. Atkinson
4 case, attorneys fees that are sought under a contract
5 are damages. They are sought as damages. They are
6 indistinguishable from any other kind of contract
7 damages that are sought. When parties --

8 JUSTICE KENNEDY: In a case with a jury,
9 would you submit the question of the amount of attorneys
10 fees to the jury?

11 MR. FELDMAN: There -- you know, there is
12 conflicting authority on that, but I would agree with my
13 friend. The general rule is you do have to, when
14 there's a jury, submit whether you get the fees to the
15 jury or not. The amount then --

16 JUSTICE KENNEDY: Your answer was, I'm sure,
17 clear, but I didn't get it.

18 MR. FELDMAN: I'm sorry. You do submit
19 whether or not you get the fees to the jury. The amount
20 of the fees some -- frequently waits later for practical
21 reasons. It's a long history of that's the way it's
22 been litigated, that's probably the way it was done in
23 1791. It doesn't create a Seventh Amendment problem.

24 JUSTICE KENNEDY: Well, that seems to me to
25 indicate that there's a final judgment when -- when the

1 verdict is rendered.

2 MR. FELDMAN: You have to --

3 JUSTICE KENNEDY: When the fees are left
4 it's just a collateral matter as to what the fees will
5 be.

6 MR. FELDMAN: I don't think it's because
7 it's a collateral matter. What you submit -- you do
8 have to submit to the jury whether or not you get the
9 fees. That question has to go to the jury and that's
10 because it is part of the merits.

11 When people get together and make a contract
12 and they decide about their mutual obligations and the
13 consequences of somebody breaching that contract, they
14 are defining what the merits of a contract claim is that
15 will --

16 JUSTICE SCALIA: Mr. Feldman, what about --
17 what about a statute that says the plaintiff shall
18 recover, as part of his damages, attorneys fees? What
19 do we do with that for purposes of 1291?

20 MR. FELDMAN: I think what the courts have
21 dealt with that, quite clearly, in Budinich --

22 JUSTICE SCALIA: Absolutely clearly.

23 MR. FELDMAN: Right.

24 JUSTICE SCALIA: So it is clear, is it not,
25 that the criterion is not whether it is part of damages?

1 MR. FELDMAN: No, I --

2 JUSTICE SCALIA: Because if that were the
3 criterion, Budinich would have come out the other way.

4 MR. FELDMAN: I disagree. I think that what
5 Budinich said is we're going to -- Budinich was based on
6 -- the question that was asked was are these merits or
7 nonmerits determinations. And then it -- but what it
8 said is because of the particular place this comes in,
9 in litigation we have to deal with this as a categorical
10 matter, and it doesn't matter --

11 JUSTICE SCALIA: Essentially it doesn't
12 matter whether it's merits or nonmerits.

13 MR. FELDMAN: I don't -- that's actually not
14 what the Court said.

15 JUSTICE SCALIA: For purposes of this rule.

16 MR. FELDMAN: What the Court said --

17 JUSTICE SCALIA: I don't know how else you
18 can read it.

19 MR. FELDMAN: What the Court said several
20 times in Budinich, they said -- the Court said, for
21 example: It shouldn't turn upon the characterization of
22 the fees or whether the fees are deemed to be one or the
23 other, because the court had decided that it's
24 indisputable that as a general matter, statute -- and I
25 think it's only true of statutes, that statutory fees --

1 JUSTICE SCALIA: As a general matter. But
2 the case acknowledges that that's not always true, and
3 the holding says it doesn't matter when it's not true,
4 they will still be treated as -- as separate. Even
5 though they are damages, we're not going to treat them
6 as damages.

7 MR. FELDMAN: And as the -- what the Court
8 was -- it was correct with respect to statutory fees
9 that was at issue in Budinich. The Court was quite
10 correct in saying those -- it is indisputable that those
11 as a general matter are not a part of the merits. They
12 are costs, which have never been seen as part of the
13 merits. But that's not true and never has been of
14 contractual damages, and this Court itself has viewed
15 contractual damages --

16 JUSTICE KAGAN: Why isn't it true? I mean
17 assume a contract which just says if we go to
18 litigation, the prevailing party will pay fees, in much
19 the same way that a statute does. And now assume lots
20 of contracts basically have that provision as their
21 attorneys fees provision.

22 Why wouldn't we just say, you know, whether
23 the source of the law is a contract or a statute makes
24 no difference; they are essentially doing the exact same
25 thing?

1 MR. FELDMAN: I mean, I wouldn't say that --
2 they are not doing the same thing. And also, the source
3 of law is important, because the whole point is that the
4 law has always been that statutes define what court
5 costs are. Court costs are basically a narrow segment
6 of the money that people pay each other under certain
7 circumstances. They are defined by 28 U.S.C. 1920, by
8 this Court's Rule 43, and by the fee-shifting statutes,
9 now we know after Budinich.

10 Okay. But that's what statutes do. And in
11 fact the Court said in the United States v. Idaho, in
12 defining costs, costs are things that are provided for
13 by rule, and I'm sure the Court intended statute also.

14 JUSTICE SCALIA: Yes, but Budinich
15 acknowledged that some of these fees are not costs. It
16 acknowledged that.

17 MR. FELDMAN: I would actually think what
18 Court in Budinich acknowledged was that they are labeled
19 different ways. They are deemed or characterized in
20 different ways. The Court never actually said that they
21 weren't. But they did, the Court did say it was
22 operating on a categorical basis.

23 JUSTICE SCALIA: I don't understand the
24 difference between deeming and being. When the statute
25 deems it to be costs they are costs. They are costs.

1 MR. FELDMAN: The Court felt as a
2 categorical matter that statute -- and quite correctly,
3 that statutory fees are costs, but as a categorical
4 matter contractual fees are not costs. When parties
5 agree in a contract that one is going to pay another a
6 certain amount of money in the event of some --
7 something happening related to a breach, that's what
8 defines the damages that are due in a subsequent --

9 JUSTICE SCALIA: But we said in *Budinich*
10 that they are costs, even when the statute makes clear
11 that they are damages. I mean, we're saying it doesn't
12 matter what the statute says, and I don't see why it
13 should matter what the contract says.

14 MR. FELDMAN: I don't think it does matter
15 what the contract says. It just matters that it's in a
16 contract, because there's no history -- while there's a
17 history of statutes defining what costs are, there's no
18 history at all of contracts defining things that are
19 obligations between the parties but that are not part of
20 the merits of a subsequent dispute.

21 JUSTICE ALITO: If we have a different rule
22 for statutory fees and contractual fees, will we have
23 problems in some cases -- and maybe this is an
24 example -- in determining whether an award of fees was
25 based on a contract or based on the statute? Here the

1 district judge's opinion on fees says a lot about ERISA,
2 and I don't see any references to the contract in there.

3 MR. FELDMAN: I -- I don't think there'll be
4 any problem with that at all actually for about three
5 reasons. And I could start with this case. In this
6 case, our complaint talks about the contract. Our
7 motion for summary judgment talked about the contract.
8 As a base for fees I'm talking about, specifically --

9 JUSTICE ALITO: I thought also ERISA, too.

10 MR. FELDMAN: Also ERISA, also ERISA.

11 JUSTICE ALITO: Yes.

12 MR. FELDMAN: But it's -- for our purposes,
13 it's irrelevant whether there was also a statute. The
14 question is: Was there a contractual fees issue in the
15 case and was it decided? Okay.

16 JUSTICE SOTOMAYOR: Let's be a little more
17 precise. Your notice of motion referenced ERISA alone.
18 The supporting affidavit mentions both, and the district
19 court opinion mentioned only ERISA.

20 MR. FELDMAN: That's true. But --

21 JUSTICE SOTOMAYOR: So you didn't mention
22 the contract in your notice of motion.

23 MR. FELDMAN: The notice of motion actually
24 -- or what the notice of motion said -- this was the
25 sequence of events: The affidavit was put in on, I

1 believe, April 4th. The notice of motion came in the
2 next day, and I think actually the reason is because we
3 didn't actually think we needed a notice of motion and
4 later figured out that we did.

5 What the notice of motion said was
6 defendants are liable for those monies pursuant to
7 ERISA.

8 JUSTICE SOTOMAYOR: Would you tell me what
9 page you're reading from?

10 MR. FELDMAN: This is page 72.

11 JUSTICE SOTOMAYOR: Of the Joint Appendix?

12 MR. FELDMAN: Of the Joint Appendix.

13 Defendants are liable for those monies pursuant to ERISA
14 and for the reasons detailed in the accompanying Wagner
15 affidavit filed on the day before. Okay? It didn't say
16 ERISA and for the reasons given. And if you look back
17 at JA -- at the affidavit at JA 75 in paragraph 6 as
18 indicated -- no, I'm sorry. It's paragraph 3 on 74. In
19 accordance with the collective bargaining agreement, the
20 trust agreement and ERISA, the defendants are liable for
21 all auditor fees, attorney fees and so on.

22 JUSTICE GINSBURG: Mr. Feldman, before --

23 JUSTICE SCALIA: I don't want to have to go
24 through this in every case.

25 MR. FELDMAN: But there's no need to.

1 All -- the only question that you have to ask is: Was
2 the -- was there a contractual damages issue in the
3 case? And then here's the other half of it.

4 JUSTICE GINSBURG: Mr. Feldman, there's a --
5 there's a question that has not been -- that's not
6 surfaced yet, but after Budinich, however you pronounce
7 it, the rule makers changed Rule 58(e), and now 58(e)
8 provides a mechanism for deferring the finality of the
9 judgment until the fee question is decided. You didn't
10 seek an order under 58(e), did you? You didn't ask the
11 district judge, please defer the finality of the
12 judgment until the fee question is decided.

13 MR. FELDMAN: That's correct. Well --

14 JUSTICE GINSBURG: So you didn't make
15 that --

16 MR. FELDMAN: I don't -- that -- that
17 wouldn't have worked in this case because that's a
18 situation where there's already been another judgment on
19 the other merits issues in the case. At the time when
20 we put in this affidavit, this affidavit was actually --
21 I think my friend was mistaken, because this affidavit
22 was put in right at the end of the trial, actually at
23 the same time, in effect, as the trial memorandum
24 telling -- our post-trial brief telling the judge
25 everything that we wanted. It's just for this part of

1 it we then -- we originally said we're going to get it
2 in at the same time. We later said, can we get two
3 weeks extra for this?

4 JUSTICE GINSBURG: You still could have said
5 to the judge, please defer the entry of judgment until
6 you resolve the fee question, and you -- you would not
7 be entitled to that relief, but it would be in the
8 discretion of the judge. And so that's how the rule
9 makers thought this problem could be handled. You can't
10 have a judgment that does not become final until the fee
11 question is decided. But if there's -- absent that
12 specific determination, then the judgment becomes final
13 when it's final and the fees are a separate matter.

14 It seems to me that now that this mechanism
15 in the rules to handle this, we should not depart from
16 the rules, whether it's contract or statutory, it's
17 separate. It's not part of the underlying judgment.

18 MR. FELDMAN: The problem with -- I do think
19 that that rule was designed to address an issue when
20 people put in their fees' motion two weeks after there's
21 been a judgment in a case, not at the time -- at the end
22 of the trial, before there's any kind of judgment of any
23 sort in the case.

24 JUSTICE KENNEDY: I know the Petitioner
25 doesn't rely on it, but it really is supplemental to

1 Justice Ginsburg's point. There was a judgment in this
2 case, the June judgment. And it -- and it says -- it's
3 entitled Judgment in a Civil Case and it says that the
4 interest runs from this date. Now, I know there are
5 cases in which we say that the description the trial
6 judge gives to the judgment is not necessarily
7 conclusive of this final order, but it does seem to me
8 that this is what the judge thought he was doing.

9 MR. FELDMAN: I'm not sure that that's
10 right. The judge says at the end of the other order, he
11 says, "Now this case is concluded," and I have to look
12 to see when the actual -- I mean, I don't -- I think the
13 -- actually, I think the judge thought that the final
14 judgment in the case was the one doing the attorneys'
15 fees. He was maybe running the interest from the other
16 one.

17 JUSTICE KENNEDY: The interest ran -- the
18 interest ran from the June 17th judgment.

19 MR. FELDMAN: Right. That's correct. But
20 I'd like to go back to a couple of other things. One is
21 there's no sorting through things that's really a
22 problem. First of all, there's very few cases that ever
23 have both contract and statutory fees. We've looked
24 through every case cited in the papers in this Court.
25 None -- none -- actually, maybe one or two did, but in

1 those, there was no doubt at all that there were
2 contractual fees that were at issue.

3 But more importantly, unlike other kinds of
4 contract damages where if you want lost profits or if
5 you want the cost of some replacement performance, you
6 don't have to tell the judge what the legal source of
7 getting those things are. You just have to tell the
8 judge, this is what I want, I'm entitled to it, there
9 was a breach of contract. But with fees, you don't get
10 them, just as a matter of saying I want to get my fees.
11 You have to give the Court some source that authorizes
12 that and that usually, it is a statute or it's a
13 contract. And parties, I think you'll find -- I
14 couldn't find cases where there was any doubt as to
15 where a court said I have some doubt as to whether it
16 was statute or a contract.

17 JUSTICE BREYER: The -- in my own mind, what
18 matters is you have to have one clear rule one way or
19 the other.

20 MR. FELDMAN: That's right.

21 JUSTICE BREYER: And -- fine. Okay. We
22 both agree that's right, I think. The -- so the First
23 Circuit's approach is less referable. Which should it
24 be? Well, go back to Justice Alito's question. What
25 are ordinary lawyers going to think? What they normally

1 think now, I guess, is this: There's a piece of paper
2 separate. It's called a judgment. Counsel, one set
3 goes into the file. You have 30 days. If you're not
4 going to change that judgment. And the fact that you
5 want costs doesn't make a difference.

6 Now, what you want us to say is the fact
7 that you want costs sometimes makes a difference. It
8 makes a difference when it's nonstatutory. I grant you
9 that's fairly simple. But isn't it better to tell the
10 lawyers -- I mean, I think that's what they would say --
11 it's better to tell the lawyers, look, counsel, a piece
12 of paper is there. You have 30 days. And try to
13 minimize the exceptions to that.

14 MR. FELDMAN: I -- I don't think it is, and
15 there's a number of reasons. Okay? One is that the --
16 what our rule does is you file the notice of appeal
17 after the case is finished, at the end. Their -- under
18 their rule, you'll necessarily sets a trap for the
19 unwary. For lawyers who aren't sure or don't know the
20 law or whatever, for those people who aren't up on it,
21 they're going to find -- miss the earlier notice of
22 appeal and they're going to lose their right to appeal
23 altogether if you adopt Petitioner's rule. That would
24 be what would happen.

25 If you adopt our rule, then that wouldn't

1 happen. It would be true, there would be people who
2 would file a notice of appeal too early. But filing a
3 notice of appeal too early is much less of a problem.
4 Because if you file a notice of appeal too early, you
5 can cure it by just filing another notice of appeal
6 later. And under Federal Rule Appellate -- of Appellate
7 Procedure 4(a), there are times when an early notice of
8 appeal in, I think, a number of circumstances relates
9 forward to a later judgment.

10 JUSTICE GINSBURG: Mr. Feldman, going back
11 to my 58(e) question, one thing that's interesting about
12 the rule maker's response to Budinich is they didn't --
13 they didn't make any distinction between statutory and
14 contractual fee awards. You would have us divide the
15 world up that way, statutes one rule, contracts another.
16 But the -- the Rule 58(e) doesn't -- it's not confined
17 to statutory fees.

18 MR. FELDMAN: They do -- actually, they did
19 make a distinction between fees that have to be proved
20 as part of the substantive claims in the case. And
21 actually for -- you know, attorneys' fees are actually
22 very close to that.

23 I would also point out that the other fees
24 at issue here -- this is the other problem. Aside from
25 the fact that there's a trap for the unwary set up by

1 their rule but not by our rule, and that other things
2 being equal, procedural rules should be set up so they
3 don't have those kinds of traps. But even aside from
4 that, they do have to draw a distinction between
5 attorneys' fees, auditor's fees, accountant's fees,
6 architect's fees, real estate inspector's fees. There's
7 many different kinds of provisions people can put into
8 contracts and say if you breach the contract, I want a
9 right to inspect the property. I want a right to
10 inspect your books. I want a right to figure out
11 whether you've met your covenants in this bond deal or
12 in this business arrangement that we have. And you have
13 to pay for it. Or you have to pay for it if it turns
14 out that you really have breached the covenant or there
15 really is something really wrong with the building.

16 In all those cases, I don't know under -- I
17 don't know any way to figure out whether all those other
18 types of professionals that may be involved in the case,
19 they're all the same thing. They're all cases where
20 someone is saying there might be a breach here and we
21 want to figure it out.

22 JUSTICE BREYER: I believe this rule was
23 cost of litigation.

24 MR. FELDMAN: But in this case.

25 JUSTICE BREYER: In this case it's lawyers,

1 but experts, such as 1988 experts, real estate, all
2 those things the lawyer simply thinks costs of
3 litigation, if it's cost of litigation I want, that
4 doesn't make a difference, I better file it.

5 MR. FELDMAN: But these are not costs of
6 litigation. I mean, when the auditors came -- this is
7 what happened in this case, and this is not uncommon.
8 There was a suspicion that Petitioners were not paying
9 the contributions that were due. There were no
10 attorneys involved in the case. The auditors came in to
11 do what they're contractually entitled to do, which is
12 look at the books, the Petitioner's books, and figure
13 out whether they had or had not made the contribution.

14 JUSTICE SCALIA: Okay. So limit it to
15 attorney's fees as the rule does. That's a pretty clear
16 line. Attorney's fees, you know, you have to file right
17 away. Anything else, it can extend.

18 MR. FELDMAN: And we would prevail in this
19 case in that event. But even on attorney's fees --

20 JUSTICE SCALIA: I don't care about this
21 case, frankly. I care about the rule that we're going
22 to be adopting.

23 MR. FELDMAN: I think that there's no -- I
24 think that there's -- once you start parsing contractual
25 provisions out and saying some of them are merits-based

1 and some are not, even though they're all doing the same
2 thing, that is they're all saying in the event this is
3 what a damages provision --

4 JUSTICE SCALIA: I wouldn't be saying that.
5 I would be saying there's attorney's fees and there's
6 stuff other than attorney's fees. Merits doesn't
7 matter.

8 MR. FELDMAN: Even then, even in attorney's
9 fees, if I can just go back to this case for a second,
10 because I don't think this is all so unusual, when the
11 attorneys first came in they didn't come in to sue
12 Petitioners. They came in because the auditors weren't
13 getting cooperation and being given all the books that
14 they were supposed to be given. And their first thing
15 that involved a certain amount of time at that point was
16 trying to get them to give the books to the auditors,
17 which they eventually did, okay.

18 But those are costs of collection. Those
19 fees under this contract and many, many contracts that
20 are similarly worded, those are costs, costs including
21 attorney's fees of collecting money due, and those costs
22 are due and payable by Petitioners before any case is
23 brought and whether or not any case is brought.

24 If it turned out that the auditors had found
25 that there are some contributions that were not made and

1 the auditors then -- and then Respondents, the funds,
2 came to the employer and said, you owe us \$5,000 in
3 contributions that weren't made, your books were no
4 good, and we found it, and you owe us another \$5,000 for
5 the auditor's fees, they might have just paid that.
6 They should have paid it, and in many cases they will or
7 they might pay one or the other. But they're on an
8 exact par. That money is totally due and owing under a
9 provision like this. It's not a prevailing party
10 provision, which is the sort of thing that statutes
11 almost uniformly have. It's covering obligations that
12 one party has to another based on the fact that they
13 didn't comply with their contractual obligations.

14 You know, another -- another reason why it
15 is important that the Court pay close attention, I
16 think, to the rule against piecemeal appeals in a case
17 like this and the strong policy that, at the very least,
18 if there's any doubt you should avoid the piecemeal
19 appeals is that for people, again, in this kind of
20 situation, it can be very, very important to know
21 whether you're going to get your fees paid before you
22 have to file a notice of appeal.

23 CHIEF JUSTICE ROBERTS: I thought the
24 procedure was, regardless of who prevails, it's not
25 piecemeal appeals. I mean, they often combine the two

1 in the court of appeals for consideration.

2 MR. FELDMAN: They can be combined if the
3 district -- they can be, if they come along at the right
4 time and if the district court can see to it under Rule
5 58.

6 CHIEF JUSTICE ROBERTS: Well, even if
7 it's -- if you don't need Rule 58, at least the practice
8 I was familiar with, you file for attorneys' fees, they
9 calculate -- unless the appellate court is moving with
10 surprising speed, the first appeal is still pending by
11 the time the district court rules on the attorneys'
12 fees.

13 MR. FELDMAN: It can be done and there's
14 always -- of course, but that's true always when the
15 rule against -- or policy against piecemeal appeals
16 applies. It always is a case an appellate court can put
17 things together that would otherwise be apart.

18 The point of that rule, though, and what I
19 was getting at, is for people in the situation of -- of
20 Respondents here, we were -- there was, I think,
21 \$143,000 in fees at issue that we have to pay -- they
22 have to pay the attorneys in this case. And it's very
23 important to them to know whether they have to pay that
24 amount before they decide whether they want to appeal
25 the case or not.

1 It's just as important to decide whether
2 they want to appeal that amount than to decide how much
3 they're going to get for the basic contributions that
4 was -- that Petitioners also owe us.

5 JUSTICE SCALIA: Well, if they're worried
6 about it, they could always appeal and withdraw the
7 appeal later.

8 MR. FELDMAN: They can do it, but --

9 JUSTICE SCALIA: If they -- if they don't
10 get the amount, right?

11 MR. FELDMAN: They can do that, but it's --
12 the point of the rule against piecemeal appeals is these
13 kinds of decisions are much best left -- and this has
14 really long been accepted -- till the end of the
15 litigation, not to try to push it up earlier, which
16 creates traps for the unwary of the sort I was talking
17 about.

18 JUSTICE GINSBURG: That would apply to
19 statutory fees as well, the argument about piecemeal,
20 duplicative appeals.

21 MR. FELDMAN: It would apply, but -- first
22 of all, a statutory fees case are usually not as broad
23 as this. They're usually prevailing parties fees.
24 They're quite different. They look quite different.
25 But they usually involve the exercise of district court

1 discretion. The court may, in its discretion, order
2 fees. Nobody has ever written a contract, I don't
3 think, like that.

4 But more importantly, in the statutory case,
5 the court was quite correct in Budinich that it's really
6 indisputable that as a general matter, statutory fees
7 are costs, and costs have never been seen as part of the
8 merits. They're defined by statute, 28 U.S.C. 1920.
9 1988 is just another provision defining costs and
10 extending it a little bit farther.

11 JUSTICE SCALIA: Are you -- are you sure
12 that, as a general matter, contractual provisions do not
13 make attorneys' fees costs? I've seen a lot of
14 contracts that say, you know, shall recover costs
15 including, including attorneys' fees.

16 MR. FELDMAN: I think when contracts talk
17 about -- I don't think -- there's very little, if any,
18 history of contracts actually trying to allocate court
19 costs of the sort that statutes do. I do think they
20 used the word "costs." This provision here uses the
21 word "costs," but quite differently. It uses the word
22 "costs" to mean expense. Costs, including attorneys'
23 fees of collecting payments, just like costs, including
24 transportation of obtaining substitute performance if
25 there's a breach, or any provision like that. They

1 don't use it in the technical sense of referring to
2 court costs.

3 JUSTICE KAGAN: I guess I'm not quite sure
4 why the word matters. I mean, you can say attorneys'
5 fees are costs under a statute and they're damages under
6 a contract, but why should that control the analysis of
7 what we do? It's just which word we put up on it.

8 MR. FELDMAN: I don't actually think it's
9 the word. I think it's the underlying issue of what the
10 court is doing. In the contract case, the court is just
11 adjudicating another claim by one party against another
12 for some money based on their performance under the
13 contract. And the simplest way and the way you have to
14 make the least distinctions is say all of those things
15 are damages and all those things are part of the merits
16 that have been viewed as part of the merits of a case.

17 In fact, there's no authority that they are
18 not viewed as part of the merits of the case and this
19 Court in the Fleischmann Distilling and the Vaughan
20 cases viewed it as part of the merits.

21 In the statutory case, the -- where Congress
22 may right the statute, many, many of them are; the court
23 may, in its discretion, award fees to the prevailing
24 party. I think the intuition of Budinich was that
25 Congress was tying into the long tradition of taking

1 litigation costs and extending it a little bit farther,
2 and that's something Congress does. And if Congress
3 wanted to say that contractual attorneys' fees are
4 available under some circumstances or under -- however,
5 then that would probably be defining costs, too,
6 especially if they are tied to what goes on in the
7 litigation.

8 But when it's a provision like this one and
9 like many, many contractual provisions, and there's a
10 wide, wide variety of them, that just talks about what
11 happens when there's a breach, then there's going to be
12 attorneys' fees, there's auditor's fees, there's other
13 kinds of things, other kinds of expenses that the
14 nonbreaching party has, those are just the damages of
15 the case. They've always been seen as the damages of
16 the case. And it would be odd if you do start to try to
17 say, well, these have treated like they were costs, then
18 it does inevitably raise the question what else has to
19 be treated the way of costs?

20 Petitioners said that in this case there was
21 no doubt that anybody had ever in this case that we were
22 seeking contractual fees. And one reason that I think
23 is pretty conclusive on that, aside from the fact that
24 we mentioned it at every single opportunity throughout
25 the case that we were seeking contractual fees, in our

1 summary judgment motion, in our trial brief, post-trial,
2 in the complaint -- it was everywhere.

3 But the auditor's fees that we were seeking
4 probably wouldn't have been awardable under ERISA,
5 because the ERISA provision, 29 U.S.C. 1132(g) says you
6 get a reasonable attorneys' fees and costs of the action
7 to be paid by the defendant. And I'm not sure at all
8 that that would include -- I don't know any authority
9 that that includes auditor's fees.

10 But the contract was quite clear. Costs
11 including attorneys' fees of collecting payments, and
12 the auditor's fees did fit in that, in that basket. And
13 nobody doubted it throughout the litigation. There was
14 no litigation about whether we are entitled under
15 anything to auditor's fees because there's no point in
16 litigating the ERISA issue because it was clear under
17 the contract and the district court absolutely knew that
18 auditor's fees were involved in the case, because the
19 district court awarded them separately and awarded us
20 all the auditor's fees that we sought, not just -- well,
21 just actually a relatively small portion of the
22 attorneys' fees.

23 In any event, if -- our submission is that
24 the Court -- that contractual attorneys' fees have
25 always been seen as damages, should continue to be seen

1 as damages, and the easiest, simplest, and best
2 procedural rule is to say that's what happens with
3 contractual fees, that's the category that we're dealing
4 with. Budinich deals with a different category of
5 statutory fees. But even if not, I do think that in
6 this case the nonlitigation fees, the attorneys' fees
7 for a time when they were enforcing the contract which
8 ultimately got enforced and before there was litigation
9 and the auditor's fees for examining the books that were
10 sums that were due and owing entirely without regard to
11 whether there was -- to whether there was a judgment in
12 the case or whether there ever was a court case at all,
13 those things at the very least should be seen, are
14 damages in the case. They were due and owing before the
15 case was ever filed, and because those were in the case
16 at the very least the judgment wasn't final until those
17 were resolved. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Himmelfarb, four minutes.

20 REBUTTAL ARGUMENT OF DAN HIMMELFARB

21 ON BEHALF OF THE PETITIONERS

22 MR. HIMMELFARB: One rule for statutory fees
23 and one rule for contractual fees is severely flawed
24 both from the point of view of administrability and from
25 the point of view of logic. My friend Mr. Feldman

1 suggested that the fees in this case clearly were sought
2 under a contract, and all I would say about that is that
3 it seems to me the colloquy itself that that comment
4 precipitated shows how confusing it can be to make the
5 determination.

6 Mr. Feldman also suggested that there are a
7 few other examples where you might be seeking fees under
8 a contract in statute. Keep in mind that there are lots
9 of State statutes that authorize an award of fees in
10 contract cases of different kinds. Budinich itself was
11 a case involving an employment dispute, which was
12 necessarily a contractual dispute, and the Colorado
13 statute at issue there provided for the award of fees in
14 employment disputes.

15 So you can imagine the situation where you
16 have a contract and a statute that say the same thing,
17 there's an entitlement to fees, and yet, for whatever
18 reason, the party seeking fees invokes one rather than
19 the other and yet the outcome under Respondent's rule
20 would depend upon which was invoked.

21 Mr. Feldman also suggested that our rule
22 presents a trap for unwary. I have to say I'm having a
23 hard time understanding that. The consequences of our
24 rule are that you always have to file after the initial
25 decision and if you do that there won't be any risks.

1 It won't be too late, and it won't be too early.

2 The consequences of either the First
3 Circuit's rule or the Eleventh Circuit's rule are that
4 if you file after the second decision, it may be too
5 late and you won't be able to appeal the first decision,
6 but if you file after the first decision, it may be too
7 early if it's subsequently determined that these are
8 merits fees and the case isn't over and your appeal will
9 be dismissed and you have expended your resources on
10 having an appeal dismissed.

11 As to the logic, the fundamental premise of
12 respondent's position is that all statutory fees are
13 costs, all contractual fees are damages and all I'd say
14 about that is that it's just incorrect. There are
15 statutory fees that look a lot like the contractual fees
16 at issue here. There are contractual fees that are
17 straightforward prevailing party provisions, some of
18 which are bilateral, meaning that the defendants can
19 prevail. If a defendant recovers attorneys' fees under
20 a contract, whatever else that contractual provision is,
21 it can't be damages.

22 Budinich said statutory funds can be merits
23 or nonmerits. We're going to treat them as nonmerits.
24 Likewise contractual fees can be merits or nonmerits.
25 There's absolutely no reason to adopt the opposite rule

1 for that category of fees. Judgment should be reversed.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

4 (Whereupon, at 12:03 p.m., the case in the
5 above-entitled matter was submitted.)

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A				
\$143,000 44:21	agreement 33:19	44:9,16	21:20 22:4,21	51:9
\$5,000 43:2,4	33:20	Appendix 6:6	41:15,16,19	authorized 3:15
a.m 1:16 3:2	agrees 17:14	18:8 33:11,12	42:5,6,8,21	5:4,9
able 52:5	aim 21:22	applicable 20:1	attorneys 3:13	authorizes 17:14
above-entitled	AL 1:3,9	20:4	3:18 6:5,20	23:23 25:1,5
1:14 53:5	alike 18:5	applies 3:16,24	8:21 9:1,9,12	37:11
absent 35:11	Alito 14:25 15:5	9:25 13:7	9:15 10:4,6,17	available 12:16
absolutely 8:5	21:21 22:19	19:15 24:25	11:16,17 12:10	48:4
19:13 21:25	23:1 31:21	25:4 44:16	12:19,20,21,25	avoid 43:18
24:9 27:22	32:9,11	apply 3:18 4:7	13:7,13 23:3,7	award 3:19 5:3
49:17 52:25	Alito's 37:24	5:18,21 13:13	23:21 24:3,15	9:7 11:14 14:9
abstract 4:7	allocate 46:18	13:19 21:7	24:19 26:4,9	24:22 25:1,3,5
accept 7:13 25:7	altogether 38:23	45:18,21	27:18 29:21	25:23 31:24
accepted 45:14	Amendment	approach 37:23	36:14 39:21	47:23 51:9,13
accompanying	8:20 26:23	April 33:1	40:5 41:10	awardable 49:4
33:14	amount 8:18,21	architect's 40:6	42:11 44:8,11	awarded 3:15,16
accountant's	16:6 17:22	argue 23:8	44:22 46:13,15	6:11,13 12:14
40:5	26:9,15,19	argued 12:2	46:22 47:4	15:9 22:3
acknowledged	31:6 42:15	argument 1:15	48:3,12 49:6	49:19,19
30:15,16,18	44:24 45:2,10	2:2,5,8 3:4,7	49:11,22,24	awarding 15:2
acknowledges	analysis 7:13	10:9,11 12:15	50:6 52:19	awards 39:14
29:2	47:6	13:1,1,2,10		
action 7:19 25:4	analytical 5:14	15:15,17 25:14	attributable	B
49:6	answer 26:16	45:19 50:20	13:8,14	back 8:10 33:16
actions 24:25	antithesis 4:8	arrangement	audit 12:19	36:20 37:24
actual 36:12	anybody 48:21	40:12	auditor 15:17	39:10 42:9
add 24:16	apart 44:17	articulate 18:23	17:10 20:20,21	bargaining
address 35:19	apparently 6:10	articulated 13:6	33:21	33:19
adjudicating	appeal 3:14	aside 9:11 39:24	auditor's 9:9,13	base 32:8
47:11	10:25 22:6,7	40:3 48:23	9:15 10:3,13	based 28:5
administrability	22:11,24 23:3	asked 28:6	11:18 12:9	31:25,25 43:12
5:13 50:24	23:6 38:16,22	asking 15:24	15:14,22 16:15	47:12
administrative	38:22 39:2,3,4	aspects 3:22	19:17 20:9,20	basic 45:3
10:10,12	39:5,8 43:22	19:11	22:19 40:5	basically 29:20
adopt 38:23,25	44:10,24 45:2	assist 16:3	43:5 48:12	30:5
52:25	45:6,7 52:5,8	assume 29:17,19	49:3,9,12,15	basis 6:14 25:24
adopted 7:4	52:10	Atkinson 26:3	49:18,20 50:9	30:22
adopting 41:22	appealability	attempting	auditors 16:2,5	basket 49:12
advocating 22:1	7:22	10:18 14:20,23	16:25 17:4	Becton 3:11
affidavit 6:7	appeals 15:8	attention 43:15	21:3 24:20	beginning 12:11
32:18,25 33:15	23:6 43:16,19	attorney 17:10	41:6,10 42:12	behalf 1:18,20
33:17 34:20,20	43:25 44:1,15	20:10 33:21	42:16,24 43:1	2:4,7,10 3:8
34:21	45:12,20	attorney's 14:10	authority 24:7	25:15 50:21
ago 3:11	APPEARAN...	14:14,15 15:18	26:12 47:17	believe 33:1
agree 26:12 31:5	1:17	16:7,12 17:16	49:8	40:22
37:22	appears 15:4	17:24 18:6,25	authorization	bench 11:9,10
	appellate 39:6,6	19:14,17 20:8	24:23	12:3
			authorize 5:9	

<p>benefit 17:3 best 45:13 50:1 better 38:9,11 41:4 big 10:12 bilateral 52:18 bit 46:10 48:1 blocking 8:7 bond 40:11 books 40:10 41:12,12 42:13 42:16 43:3 50:9 breach 31:7 37:9 40:8,20 46:25 48:11 breached 40:14 breaching 27:13 BREYER 9:17 10:22 19:16,19 19:23 20:2,6 24:8 37:17,21 40:22,25 brief 13:2 34:24 49:1 bright-line 4:5,8 4:12,14,22 5:17 broad 45:22 brought 21:4 42:23,23 Budinich 3:11 3:15,18,22,24 4:2,18 5:1 7:4 7:4 8:6 13:6,6 13:12,19 14:22 19:15 20:15,16 21:6,25 23:20 24:1 25:2,4 27:21 28:3,5,5 28:20 29:9 30:9,14,18 31:9 34:6 39:12 46:5 47:24 50:4 51:10 52:22 Budinich'ing</p>	<p>20:7 building 40:15 business 40:12</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 calculate 44:9 call 4:25 11:16 called 38:2 capacity 6:18,18 care 41:20,21 case 3:4,20 6:3,4 6:12,16 7:16 7:20,23 9:3,3,4 9:10,20 11:9 13:9,13,14,15 13:15 14:4,8 14:10,10,13 15:9 16:4,18 16:20,20,22,23 17:5,9 18:3,7 19:13 20:18,19 20:25 21:8,9,9 21:11,15,18 22:1,2 23:10 24:5 25:19 26:2,3,4,8 29:2 32:5,6,15 33:24 34:3,17 34:19 35:21,23 36:2,3,11,14 36:24 38:17 39:20 40:18,24 40:25 41:7,10 41:19,21 42:9 42:22,23 43:16 44:16,22,25 45:22 46:4 47:10,16,18,21 48:15,16,20,21 48:25 49:18 50:6,12,12,14 50:15,15 51:1 51:11 52:8 53:3,4 case-by-case 5:2 case-specific 4:6</p>	<p>4:15 cases 6:3,17 16:15 31:23 36:5,22 37:14 40:16,19 43:6 47:20 51:10 catch-all 24:25 categorical 28:9 30:22 31:2,3 categories 12:7 category 10:16 22:21 50:3,4 53:1 cause 7:19 Central 1:6 3:5 certain 10:6 16:6 30:6 31:6 42:15 certainty 23:24 change 38:4 changed 34:7 characterizati... 28:21 characterized 24:4 30:19 Chief 3:3,9 14:13,18 16:11 25:12,16 43:23 44:6 50:18 53:2 choose 19:5 chose 12:17 circuit 3:17 4:10 4:23 6:12 8:24 9:24 10:2,9 Circuit's 3:21 4:2,6,11 22:8,9 22:17,17 37:23 52:3,3 circumstance 24:2 circumstances 30:7 39:8 48:4 cite 15:7 cited 15:7 36:24 Civil 36:3 claim 27:14</p>	<p>47:11 claiming 8:9 claims 17:6 25:20 39:20 clarity 4:3 clear 6:17 16:16 24:15 26:17 27:24 31:10 37:18 41:15 49:10,16 clearly 27:21,22 51:1 client 13:17,17 14:6,18 16:19 20:23 21:9,12 close 39:22 43:15 collateral 23:19 23:21 24:4 27:4,7 collecting 42:21 46:23 49:11 collection 42:18 collective 33:19 colloquy 51:3 Colorado 51:12 combine 43:25 combined 44:2 come 8:10 28:3 42:11 44:3 comes 19:10 28:8 coming 8:8 commenced 12:21 comment 51:3 common 11:8 24:23 Company 1:3 3:5 compartment... 15:21 compelling 24:5 competing 6:19 complaint 12:2 12:11 13:3,5 17:6,11,18</p>	<p>18:17,19 32:6 49:2 completely 18:22 comply 43:13 conceptualize 18:21 conceptually 5:20 concern 24:18 concerned 12:25 concluded 36:11 concluding 3:17 conclusion 11:10 conclusions 11:12 12:13 conclusive 36:7 48:23 confined 39:16 confirms 11:20 conflicting 26:12 confused 7:25 confusing 51:4 Congress 47:21 47:25 48:2,2 connection 12:12 consequences 18:11 27:13 51:23 52:2 consideration 44:1 considers 16:7 consistency 4:3 contest 23:2 context 4:5 continue 49:25 contract 3:16 5:10 6:8,13,18 10:5,23 14:17 15:1,2,7,9 19:10 20:3,5 26:4,6 27:11 27:13,14 29:17 29:23 31:5,13</p>
---	---	---	--	---

<p>31:15,16,25 32:2,6,7,22 35:16 36:23 37:4,9,13,16 40:8 42:19 46:2 47:6,10 47:13 49:10,17 50:7 51:2,8,10 51:16 52:20 contract's 7:8 contracts 11:6 25:7,8 29:20 31:18 39:15 40:8 42:19 46:14,16,18 contractual 3:18 4:18 5:23 6:21 6:24 7:7,8 8:2 9:20,22,23,24 14:19 17:13,19 18:3 21:13 29:14,15 31:4 31:22 32:14 34:2 37:2 39:14 41:24 43:13 46:12 48:3,9,22,25 49:24 50:3,23 51:12 52:13,15 52:16,20,24 contractually 41:11 contradict 7:12 contrary 23:9 contribution 41:13 contributions 17:2 41:9 42:25 43:3 45:3 control 47:6 controls 4:18 cooperation 42:13 core 3:22 correct 18:2 29:8,10 34:13</p>	<p>36:19 46:5 correctly 31:2 cost 5:1 6:5 37:5 40:23 41:3 costs 7:10 11:16 11:17 19:22 21:3,17,18 29:12 30:5,5 30:12,12,15,25 30:25,25 31:3 31:4,10,17 38:5,7 41:2,5 42:18,20,20,21 46:7,7,9,13,14 46:19,20,21,22 46:22,23 47:2 47:5 48:1,5,17 48:19 49:6,10 52:13 counsel 25:12 38:2,11 50:18 53:2 counts 9:24 couple 36:20 course 14:1 17:25 44:14 court 1:1,15 3:10,12 6:9,15 7:4 15:1,5,6,7 15:8 17:21 25:17,24 26:1 28:14,16,19,20 28:23 29:7,9 29:14 30:4,5 30:11,13,18,20 30:21 31:1 32:19 36:24 37:11,15 43:15 44:1,4,9,11,16 45:25 46:1,5 46:18 47:2,10 47:10,19,22 49:17,19,24 50:12 Court's 30:8 courts 8:16,19 8:19,24,25</p>	<p>12:22 18:4 27:20 covenant 40:14 covenants 40:11 cover 10:5 covered 13:5 20:15 covering 43:11 create 26:23 creates 45:16 criterion 27:25 28:3 cure 39:5</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 D.C 1:11,18,20 damages 4:20,25 11:14 12:15 14:9 22:3 25:19 26:5,5,7 27:18,25 29:5 29:6,14,15 31:8,11 34:2 37:4 42:3 47:5 47:15 48:14,15 49:25 50:1,14 52:13,21 DAN 1:18 2:3,9 3:7 50:20 date 36:4 day 7:3 33:2,15 days 7:18,24 11:1 22:7 38:3 38:12 deal 28:9 40:11 dealing 50:3 deals 50:4 dealt 27:21 December 1:12 decide 9:6,21,23 12:22 18:9 27:12 44:24 45:1,2 decided 9:10 22:2 23:10 28:23 32:15</p>	<p>34:9,12 35:11 deciding 9:20 decision 3:12,14 7:6 19:13 22:6 22:12,25 23:7 23:16,16 24:2 24:3 51:25 52:4,5,6 decisional 7:9 decisions 23:15 45:13 deemed 3:20,25 28:22 30:19 deeming 30:24 deems 30:25 defend 3:23 10:19 defendant 49:7 52:19 defendants 33:6 33:13,20 52:18 defended 4:11 defer 34:11 35:5 deferring 34:8 define 30:4 defined 30:7 46:8 defines 31:8 defining 27:14 30:12 31:17,18 46:9 48:5 definition 9:4 14:6 21:14 demand 17:7,7 deny 9:22 depart 25:24 35:15 depend 12:4 14:17 51:20 depending 3:19 7:6,8 description 36:5 designed 35:19 detailed 33:14 determination 5:3,8 14:9 35:12 51:5</p>	<p>determinations 28:7 determine 8:21 determined 8:19 16:14 22:2 52:7 determining 31:24 Dickinson 3:12 difference 25:23 29:24 30:24 38:5,7,8 41:4 different 4:14,16 6:25 12:7 16:20,21 20:24 24:6 25:7 30:19,20 31:21 40:7 45:24,24 50:4 51:10 differently 16:13 25:9 46:21 difficult 9:5 18:14 disagree 20:18 28:4 discretion 35:8 46:1,1 47:23 discussion 10:23 dismissed 52:9 52:10 dispute 13:16 16:21,23 17:1 17:2 19:10 31:20 51:11,12 disputes 51:14 Distilling 26:2,3 47:19 distinction 4:1 4:24 16:17 22:15 39:13,19 40:4 distinctions 47:14 distinguish 16:24 district 6:9 14:25 15:5</p>
--	---	---	---	---

<p>32:1,18 34:11 44:3,4,11 45:25 49:17,19 divide 39:14 doing 29:24 30:2 36:8,14 42:1 47:10 doubt 37:1,14 37:15 43:18 48:21 doubted 49:13 draft 17:6 drafting 18:17 18:20 draw 40:4 drawn 4:16 due 21:1 31:8 41:9 42:21,22 43:8 50:10,14 duplicative 16:7 17:23 45:20</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 38:21 45:15 early 39:2,3,4,7 52:1,7 easiest 50:1 easy 5:18,21 22:13 economists 24:20 effect 15:17 23:6 34:23 effort 20:14 either 15:13 22:8,17 23:16 52:2 Eleventh 4:11 9:24 10:2,9 22:9,17 52:3 emphasized 4:2 employer 43:2 EMPLOYERS 1:9 employment</p>	<p>51:11,14 enforce 10:18 11:24 14:23 enforced 50:8 enforcement 10:19 enforcing 50:7 ENGINEERS 1:8 entered 24:2,3 entirely 24:17 50:10 entitled 21:17 35:7 36:3 37:8 41:11 49:14 entitlement 51:17 entry 35:5 equal 40:2 ERISA 6:7 15:2 15:2 32:1,9,10 32:10,17,19 33:7,13,16,20 49:4,5,16 esoteric 22:15 especially 48:6 ESQ 1:18,20 2:3 2:6,9 essentially 28:11 29:24 estate 40:6 41:1 estop 19:5 ET 1:3,9 etcetera 10:6 evaluative 18:14 event 31:6 41:19 42:2 49:23 events 32:25 eventually 42:17 everybody 17:14 20:5 exact 29:24 43:8 exactly 14:24 15:23 examining 50:9 example 6:4,16 16:19 20:22</p>	<p>24:19 28:21 31:24 examples 51:7 exception 24:15 exceptions 38:13 exercise 45:25 expended 52:9 expense 46:22 expenses 48:13 expert 10:14 11:22 19:24,25 20:6,9 25:1,6 experts 16:2 19:20,23,23 20:9 41:1,1 extend 41:17 extending 46:10 48:1 extent 16:5 18:25 extra 35:3</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact 6:3 8:19 11:12,19 12:13 17:9 30:11 38:4,6 39:25 43:12 47:17 48:23 fact-intensive 4:6,15 fairly 13:25 38:9 fallback 12:25 13:10 18:2 falling 22:20 familiar 44:8 far 12:24 farther 46:10 48:1 Federal 8:16 24:24 39:6 fee 3:14,19 5:3 7:23 8:1,17,18 9:2,7 11:1 14:20 18:15,16 18:17,18,21 21:13 22:15</p>	<p>23:7 24:22 25:3 34:9,12 35:6,10 39:14 fee-shifting 30:8 fees 3:13,16,19 3:25 4:24,25 5:1 6:5,11,12 6:20 7:5,7,8,14 7:16,18,20 8:21 9:1,7,9,10 9:12,13,15,15 10:3,4,4,6,13 10:14,15,16,17 10:17,24 11:16 11:17,18,22,23 12:1,9,10,19 12:19,20,21,25 13:3,7,8,13,15 13:17,18,19 14:6,6,10,14 14:15,20,21,22 15:3,9,11,11 15:15,17,18,22 16:7,12,19,22 17:9,10,10,16 17:17,22,24 18:6,9,10,25 19:14,17,17,20 19:21 20:1,8,9 20:9,13,20,21 20:22 21:10,15 21:20 22:4,5 22:19,21 23:4 23:21 24:3,11 24:15,19,19,20 24:20,23 25:1 25:5,6 26:4,10 26:14,19,20 27:3,4,9,18 28:22,22,25 29:8,18,21 30:15 31:3,4 31:22,22,24 32:1,8,14 33:21,21 35:13 35:20 36:15,23 37:2,9,10</p>	<p>39:17,19,21,23 40:5,5,5,6,6 41:15,16,19 42:5,6,9,19,21 43:5,21 44:8 44:12,21 45:19 45:22,23 46:2 46:6,13,15,23 47:5,23 48:3 48:12,12,22,25 49:3,6,9,11,12 49:15,18,20,22 49:24 50:3,5,6 50:6,9,22,23 51:1,7,9,13,17 51:18 52:8,12 52:13,15,15,16 52:19,24 53:1 Feldman 1:20 2:6 25:13,14 25:16 26:11,18 27:2,6,16,20 27:23 28:1,4 28:13,16,19 29:7 30:1,17 31:1,14 32:3 32:10,12,20,23 33:10,12,22,25 34:4,13,16 35:18 36:9,19 37:20 38:14 39:10,18 40:24 41:5,18,23 42:8 44:2,13 45:8,11,21 46:16 47:8 50:25 51:6,21 felt 31:1 fewest 21:23 22:22 figure 40:10,17 40:21 41:12 figured 33:4 file 17:6,8 22:6 22:11 23:3 38:3,16 39:2,4 41:4,16 43:22</p>
--	--	--	---	---

<p>44:8 51:24 52:4,6 filed 12:12 13:4 13:5 14:7 17:11,18 18:19 21:15 33:15 50:15 filing 39:2,5 final 3:14 8:4 9:11,12 19:10 23:15,15 24:2 25:21 26:25 35:10,12,13 36:7,13 50:16 finality 19:2 23:11,12 34:8 34:11 find 11:13 37:13 37:14 38:21 findings 11:12 12:12 fine 37:21 finished 38:17 first 3:17,21 4:1 4:5,10,23 6:11 22:8,17 25:19 36:22 37:22 42:11,14 44:10 45:21 52:2,5,6 fit 49:12 flat 7:14 flawed 50:23 Fleischmann 26:3 47:19 focusing 5:16 follow 9:7 10:2 10:11 24:12,14 following 24:18 former 13:17,17 14:5 16:19 20:23 21:9,12 forward 39:9 found 42:24 43:4 foundation 4:1 four 18:18 50:19 frankly 41:21</p>	<p>frequently 26:20 friend 26:13 34:21 50:25 fund 1:6 3:5 20:25 fundamental 52:11 fundamentally 7:1 funds 17:3 21:17 43:1 52:22</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 general 8:16 10:17,24 11:21 23:21 26:13 28:24 29:1,11 46:6,12 generally 12:7 18:6 generated 14:23 getting 20:16 37:7 42:13 44:19 Ginsburg 4:9,14 4:17 33:22 34:4,14 35:4 39:10 45:18 Ginsburg's 36:1 give 17:23 37:11 42:16 given 8:10,13,14 8:17 33:16 42:13,14 gives 14:3 36:6 go 9:3 18:24 27:9 29:17 33:23 36:20 37:24 42:9 goes 38:3 48:6 going 6:2 9:5,22 10:23 11:2 22:9,16 24:13 28:5 29:5 31:5 35:1 37:25 38:4,21,22</p>	<p>39:10 41:21 43:21 45:3 48:11 52:23 good 43:4 grant 38:8 Gravel 1:3 3:5 guess 22:10 38:1 47:3</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 34:3 Haluch 1:3 3:4 hand 10:1 13:8 handle 35:15 handled 35:9 happen 38:24 39:1 happened 14:10 41:7 happening 31:7 happens 6:22,24 48:11 50:2 hard 4:7 5:25 6:2,3 51:23 hear 3:3 15:13 held 3:12,17,24 8:20,23,25 24:1 26:2 helped 20:9 Himmelfarb 1:18 2:3,9 3:6 3:7,9 4:13,21 5:6,11 6:1 7:15 8:5,12,25 9:14 10:13 11:7 12:5 14:1,16 15:4,19,22 16:1,9,16 18:1 19:3,7,12,18 19:21,25 20:4 20:12 21:6,21 21:24 22:23 23:5,13 24:17 50:19,20,22 hire 20:19 history 26:21 31:16,17,18</p>	<p>46:18 holding 6:14 23:20 29:3 hundred 18:7 hypothetical 21:14</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>Idaho 30:11 idea 23:11 identical 6:21 illogic 5:15 imaginable 17:16 imagine 14:8 51:15 immediate 3:14 implement 5:25 6:2 important 16:17 30:3 43:15,20 44:23 45:1 importantly 37:3 46:4 impossible 9:6 improper 15:13 inappropriate 5:2 include 12:17 22:4 49:8 includes 49:9 including 9:2 11:11 42:20 46:15,15,22,23 49:11 inconsistent 3:21 incorrect 52:14 incurred 10:18 12:11,20 13:3 13:16 14:14 16:20 17:11,17 17:23 20:14 21:3 indicate 26:25 indicated 33:18 indisputable</p>	<p>28:24 29:10 46:6 indistinguishable... 26:6 inevitably 48:18 infrequent 13:25 14:2 initial 10:25 22:6,24 24:3 51:24 inspect 40:9,10 inspector's 40:6 intended 30:13 interconnected 15:12 interest 36:4,15 36:17,18 interesting 39:11 interests 23:23 INTERNATI... 1:7 interpreted 6:9 intuition 12:18 47:24 invariably 8:18 investigate 17:4 investigating 16:4 invoke 6:24 invoked 6:6,7 51:20 invokes 6:23 51:18 invoking 6:11 involve 24:10 45:25 involved 40:18 41:10 42:15 49:18 involving 16:20 21:5 51:11 irrelevant 32:13 issue 10:21 11:1 17:14 19:5 29:9 32:14 34:2 35:19</p>
--	---	---	--	---

37:2 39:24 44:21 47:9 49:16 51:13 52:16 issues 34:19	15:10,20,24 16:5,11 17:21 18:23 19:4,8 19:16,19,23 20:2,6,18,24 21:21 22:19 23:1,8 24:8 25:12,16 26:8 26:16,24 27:3 27:16,22,24 28:2,11,15,17 29:1,16 30:14 30:23 31:9,21 32:9,11,16,21 33:8,11,22,23 34:4,14 35:4 35:24 36:1,17 37:17,21,24 39:10 40:22,25 41:14,20 42:4 43:23 44:6 45:5,9,18 46:11 47:3 50:18 53:2	know 8:9,9 9:4 10:7 11:22 12:10,14 14:17 16:3,14 17:22 18:15,18 21:15 22:14 26:11 28:17 29:22 30:9 35:24 36:4 38:19 39:21 40:16,17 41:16 43:14,20 44:23 46:14 49:8 known 14:7	liability 14:8 22:2 liable 11:13 33:6 33:13,20 Likewise 52:24 limit 41:14 line 4:16 41:16 listed 12:1 literally 18:3 litigants 12:6 18:4 litigate 17:5 litigated 26:22 litigating 16:3 49:16 litigation 12:20 13:7,8 21:2 24:13 28:9 29:18 40:23 41:3,3,6 45:15 48:1,7 49:13 49:14 50:8 little 7:25 32:16 46:10,17 48:1 logic 5:14 50:25 52:11 long 26:21 45:14 47:25 long-settled 25:25 longer 3:23 look 33:16 36:11 38:11 41:12 45:24 52:15 looked 36:23 lose 38:22 lost 37:4 lot 22:9 24:12 32:1 46:13 52:15 lots 29:19 51:8 lower 8:25	making 18:13 marks 18:10,16 matter 1:14 8:13 10:16,17 17:15 19:15 23:21,22 24:4 25:20 27:4,7 28:10 28:10,12,24 29:1,3,11 31:2 31:4,12,13,14 35:13 37:10 42:7 46:6,12 53:5 matters 8:14 31:15 37:18 47:4 mean 5:6 9:18 11:3,8 16:1 17:13 18:3 19:3 20:25 21:24 23:13 24:21 29:16 30:1 31:11 36:12 38:10 41:6 43:25 46:22 47:4 meaning 13:15 52:18 meant 13:12,21 measure 10:20 mechanism 34:8 35:14 memorandum 34:23 mention 10:24 32:21 mentioned 32:19 48:24 mentions 32:18 merit 18:15 merits 3:20,25 4:24 7:5 8:4 9:12 10:8,24 11:3 12:23 18:21 22:2,12 22:15 23:19,22 27:10,14 28:6	
J					
JA 33:17,17 JAMES 1:20 2:6 25:14 Joint 6:6 18:8 33:11,12 judge 9:21 11:13 12:14 16:7 34:11,24 35:5 35:8 36:6,8,10 36:13 37:6,8 judge's 32:1 judgment 8:3 9:11 11:1 18:14 19:1,2,9 21:16,16 25:21 26:25 32:7 34:9,12,18 35:5,10,12,17 35:21,22 36:1 36:2,3,6,14,18 38:2,4 39:9 49:1 50:11,16 53:1 June 36:2,18 juries 8:17,19,21 jurisdictional 4:4 6:14 jury 7:19,22 8:11,14,15 9:4 9:6 15:13,14 19:6 26:8,10 26:14,15,19 27:8,9 Justice 3:3,9 4:9 4:14,17 5:5,16 7:11,25 8:7,23 9:8,17,18,18 10:22 11:4,25 13:20,23 14:13 14:18,25 15:4	justifiable 5:20				
	K				
	Kagan 5:5,16 9:18 11:25 20:24 29:16 47:3 keep 24:21 51:8 KENNEDY 8:23 15:10,20 15:24 16:5 17:21 26:8,16 26:24 27:3 35:24 36:17 kind 18:14 20:25 22:15 26:6 35:22 43:19 kinds 12:22 24:10 37:3 40:3,7 45:13 48:13,13 51:10 knew 49:17	labeled 30:18 language 10:5 13:9,12 large 25:20 late 52:1,5 Laughter 13:22 law 7:6,9 11:12 12:13 23:23 29:23 30:3,4 38:20 lawsuit 13:18 14:5 17:8 lawyer 13:16 14:5,18 16:18 20:22 21:8,12 41:2 lawyer's 15:11 15:11 lawyers 16:3,25 17:4 21:23 22:22 37:25 38:10,11,19 40:25 leaves 18:25 19:14 23:17,17 leaving 3:13 left 23:19 27:3 45:13 legal 37:6 Let's 32:16 letter 17:7	L		
			M		
			maker's 39:12 makers 34:7 35:9		

<p>28:12 29:11,13 31:20 34:19 42:6 46:8 47:15,16,18,20 52:8,22,24 merits-based 41:25 merits/nonme... 5:8 messy 11:5 met 40:11 meter 9:5 mind 24:21 37:17 51:8 minimize 38:13 minutes 50:19 mistaken 34:21 Monday 1:12 money 30:6 31:6 42:21 43:8 47:12 monies 33:6,13 months 18:19 morning 3:4 motion 6:4 7:16 7:17,21,24 8:2 11:16 32:7,17 32:22,23,24 33:1,3,5 35:20 49:1 moving 44:9 mutual 27:12</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 narrow 30:5 narrowest 17:16 necessarily 36:6 38:18 51:12 need 4:3 33:25 44:7 needed 33:3 needs 17:21 23:10 neither 17:11 never 29:12,13 30:20 46:7</p>	<p>nevertheless 9:11 non-merits 7:5 nonattorney 10:14 11:22 nonbreaching 48:14 nonlitigation 18:9,10 50:6 nonmerits 3:25 4:24 18:17,18 28:7,12 52:23 52:23,24 nonprofessional 11:22 nonstatutory 38:8 normally 37:25 notice 6:4 10:25 22:6,11 32:17 32:22,23,24 33:1,3,5 38:16 38:21 39:2,3,4 39:5,7 43:22 number 4:22 38:15 39:8</p> <hr/> <p style="text-align: center;">O</p> <p>O 2:1 3:1 objection 10:10 obligations 27:12 31:19 43:11,13 obtaining 46:24 obvious 24:9 occasionally 25:22 odd 48:16 odd-ball 17:19 oftentimes 16:2 okay 30:10 32:15 33:15 37:21 38:15 41:14 42:17 once 5:22 41:24 operating 1:7 30:22</p>	<p>opinion 32:1,19 opportunity 48:24 opposed 5:1 13:14 opposite 7:3 24:14 52:25 oral 1:14 2:2,5 3:7 25:14 order 34:10 36:7 36:10 46:1 ordinary 12:15 37:25 originally 35:1 os 30:3 outcome 51:19 outcomes 6:25 outstanding 21:3 owe 43:2,4 45:4 owed 14:6 17:2 owing 43:8 50:10,14</p> <hr/> <p style="text-align: center;">P</p> <p>P 3:1 p.m 53:4 page 2:2 6:5 33:9,10 pages 18:7 paid 13:18 20:22 21:1 43:5,6,21 49:7 paper 38:1,12 papers 36:24 par 43:8 paragraph 33:17,18 parenthetically 8:15 parsing 41:24 part 3:20 7:18 8:4 9:22,23 12:2 27:10,18 27:25 29:11,12 31:19 34:25 35:17 39:20</p>	<p>46:7 47:15,16 47:18,20 PARTICIPA... 1:8 particular 3:20 5:3 7:6 18:15 28:8 parties 11:11 19:5 26:7 31:4 31:19 37:13 45:23 party 6:22,23 8:8,9 18:25 29:18 43:9,12 47:11,24 48:14 51:18 52:17 pay 20:20 29:18 30:6 31:5 40:13,13 43:7 43:15 44:21,22 44:23 payable 42:22 paying 41:8 payment 19:24 payments 46:23 49:11 pending 21:19 22:3,25 44:10 Pension 1:6 3:5 people 12:6 22:10,16 27:11 30:6 35:20 38:20 39:1 40:7 43:19 44:19 performance 37:5 46:24 47:12 Petitioner 35:24 Petitioner's 38:23 41:12 Petitioners 1:4 1:19 2:4,10 3:8 11:13 25:22 41:8 42:12,22 45:4 48:20 50:21</p>	<p>piece 38:1,11 piecemeal 43:16 43:18,25 44:15 45:12,19 place 4:16 28:8 plaintiff 27:17 plaintiffs 11:14 play 6:19 pleading 18:20 please 3:10 25:17 34:11 35:5 point 5:13,13,14 5:14 11:9 24:9 24:11 30:3 36:1 39:23 42:15 44:18 45:12 49:15 50:24,25 policy 43:17 44:15 portion 49:21 position 4:10,11 7:2 18:2 52:12 possible 14:19 possibly 22:20 post-trial 34:24 49:1 potential 17:6 potentially 6:19 practical 5:13 26:20 practicality 4:4 practice 8:16 44:7 pre-complaint 18:15 pre-litigation 16:12 precipitated 51:4 precise 32:17 precisely 7:7 predictability 4:3 23:24 prelitigation 10:4 12:24</p>
--	--	--	---	--

<p>premise 52:11 prepare 17:5 presence 24:19 present 14:11 presented 14:3 presents 51:22 Presumably 14:14 21:16 pretrial 15:11 17:22 pretty 41:15 48:23 prevail 41:18 52:19 prevailing 29:18 43:9 45:23 47:23 52:17 prevails 43:24 principal 25:8 principles 25:18 prior 13:14,17 16:20 19:2 21:1 probably 21:6 26:22 48:5 49:4 problem 9:17,19 10:12,15 24:21 26:23 32:4 35:9,18 36:22 39:3,24 problems 31:23 procedural 40:2 50:2 procedure 39:7 43:24 professional 10:14 11:23 22:5 professionals 40:18 profits 37:4 pronounce 34:6 property 40:9 proposed 11:11 12:12 proposing 19:4</p>	<p>proposition 11:21 proved 39:19 provided 30:12 51:13 provides 17:24 34:8 provision 6:23 6:24 7:9 14:20 17:13,17,19 21:13 23:14 29:20,21 42:3 43:9,10 46:9 46:20,25 48:8 49:5 52:20 provisions 5:23 5:24 6:20 40:7 41:25 46:12 48:9 52:17 purposes 9:16 27:19 28:15 32:12 pursuant 33:6 33:13 push 45:15 put 9:18 18:10 18:16 19:5 32:25 34:20,22 35:20 40:7 44:16 47:7 putting 9:11 20:11</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quantifiable 14:7 question 4:19 9:12 10:2 13:8 14:3 19:22 24:18 26:9 27:9 28:6 32:14 34:1,5,9 34:12 35:6,11 37:24 39:11 48:18 quite 9:5 15:20 24:12 27:21</p>	<p>29:9 31:2 45:24,24 46:5 46:21 47:3 49:10 quotation 18:10 18:16 quote 22:12,12</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raise 48:18 ran 36:17,18 rationale 5:6 Ray 1:3 3:4 read 28:18 reading 33:9 real 40:6 41:1 really 7:1 10:10 15:20 17:19 35:25 36:21 40:14,15,15 45:14 46:5 reason 33:2 43:14 48:22 51:18 52:25 reasonable 49:6 reasons 26:21 32:5 33:14,16 38:15 rebuttal 2:8 25:11 50:20 recognized 7:4 reconceptuali... 15:8 record 18:12 recover 13:18 14:6,15,21 21:17 27:18 46:14 recoverable 17:18 20:1 recovers 52:19 recovery 17:14 17:24 referable 37:23 referenced 32:17</p>	<p>references 32:2 referring 47:1 regard 50:10 regardless 3:24 43:24 reject 25:8 related 22:5 31:7 relates 39:8 relation 15:25 relatively 49:21 relevant 6:21 7:9 23:14 relied 15:1,5 relief 35:7 relies 4:23 rely 13:10 35:25 remaining 25:10 remote 13:4 rendered 27:1 replacement 37:5 report 16:15 request 3:13 6:10 7:23 8:1 9:2 18:5 21:20 22:3,25 requested 6:13 11:17 12:9,10 13:3 requests 8:17 9:2 25:5 require 24:5 requires 7:15 18:11,13 research 17:5 reserve 25:10 resolve 17:1,8 25:19 35:6 resolved 11:2 23:17,18,19 25:21 50:17 resources 52:9 respect 16:12 29:8 respects 4:22 6:22</p>	<p>Respondent 11:11 respondent's 6:25 7:2 18:2 51:19 52:12 Respondents 1:21 2:7 3:23 4:25 6:6 13:1,9 25:15 43:1 44:20 response 13:11 39:12 retained 16:3,25 16:25 reversed 53:1 review 6:15 right 4:21 5:6,11 8:5,20 10:19 10:20,22 11:24 14:21,23 16:9 16:10 18:1 19:3,7,12,13 20:4,15 22:22 23:1,5,13 24:16 27:23 34:22 36:10,19 37:20,22 38:22 40:9,9,10 41:16 44:3 45:10 47:22 rise 14:3 risks 51:25 ROBERTS 3:3 14:13 16:11 25:12 43:23 44:6 50:18 53:2 rule 3:16,21,24 4:2,5,6,8,14,15 4:16,22 5:17 5:25 6:2,25 7:3 7:14,22 8:1 9:24 13:6,13 18:24 20:10,12 21:22,23,25,25 21:25 22:8,9 22:18 23:9,11</p>
---	---	--	---	---

23:12 24:6,12 24:14 25:7,25 26:13 28:15 30:8,13 31:21 34:7,7 35:8,19 37:18 38:16,18 38:23,25 39:6 39:12,15,16 40:1,1,22 41:15,21 43:16 44:4,7,15,18 45:12 50:2,22 50:23 51:19,21 51:24 52:3,3 52:25 rules 4:4 35:15 35:16 40:2 44:11 run 19:2 running 36:15 runs 18:7 36:4	42:9 52:4 Section 23:14 24:24 25:21 see 9:19,19 11:3 15:10 31:12 32:2 36:12 44:4 seek 34:10 seeking 14:15 48:22,25 49:3 51:7,18 seen 29:12 46:7 46:13 48:15 49:25,25 50:13 segment 30:5 sense 5:20 8:22 9:1 11:8 12:21 47:1 separate 8:3 11:2 19:1 21:19 23:6 29:4 35:13,17 38:2 separately 11:15 12:22 49:19 sequence 32:25 set 16:13 38:2 39:25 40:2 sets 38:18 Seventh 8:20 26:23 severely 50:23 shade 10:7 short 4:7 shows 51:4 side 15:16 17:7 sifting 18:12 similarly 42:20 simple 10:8 38:9 simplest 47:13 50:1 simply 7:15,22 41:2 single 48:24 situation 13:19 13:25 14:2,11 14:22 16:24,24	21:7,12 25:3 34:18 43:20 44:19 51:15 size 25:23 small 25:20 49:21 so-called 12:24 solely 15:1 somebody 27:13 sorry 26:2,18 33:18 sort 5:2,12 10:14 15:8 20:17 22:14 24:25 35:23 43:10 45:16 46:19 sorting 36:21 sorts 11:23 16:2 Sotomayor 7:11 7:25 8:7 9:8,18 11:4 18:23 19:4,8 23:8 32:16,21 33:8 33:11 sought 7:16 16:23 26:4,5,7 49:20 51:1 source 24:6 29:23 30:2 37:6,11 speaks 23:15 specific 35:12 specifically 4:25 5:15 32:8 speed 44:10 standalone 20:17,19,25 start 32:5 41:24 48:16 State 51:9 States 1:1,15 30:11 statute 3:15 5:9 6:6,8,10,11,17 7:6 15:6 17:19 20:1,5 23:16 27:17 28:24	29:19,23 30:13 30:24 31:2,10 31:12,25 32:13 37:12,16 46:8 47:5,22 51:8 51:13,16 statutes 25:9 28:25 30:4,8 30:10 31:17 39:15 43:10 46:19 51:9 statutory 4:18 5:24 6:20,23 7:5 8:3 9:20 18:4 23:14 24:15,22,23 25:3 28:25 29:8 31:3,22 35:16 36:23 39:13,17 45:19 45:22 46:4,6 47:21 50:5,22 52:12,15,22 straightforward 25:2 52:17 strange 13:23,24 strong 43:17 stuff 42:6 subject 3:14 submission 8:12 9:14 25:8 49:23 submit 26:9,14 26:18 27:7,8 submitted 7:19 7:21 11:11,15 53:3,5 subsequent 31:8 31:20 subsequently 52:7 substantive 39:20 substitute 46:24 sue 42:11 sues 16:18 20:21 20:23 21:9	suggested 25:22 51:1,6,21 suggesting 5:19 5:21 20:13 suing 21:12 suit 14:7 21:4 summary 32:7 49:1 sums 50:10 superimpose 7:13 supplemental 35:25 support 15:16 supporting 6:7 32:18 suppose 14:19 20:25 supposed 42:14 Supreme 1:1,15 sure 15:16 16:1 24:17 26:16 30:13 36:9 38:19 46:11 47:3 49:7 surely 17:17 25:4 surfaced 34:6 surprising 44:10 suspicion 41:8 system 24:24
<hr/> S <hr/>				
S 2:1 3:1 saying 8:8 12:3 12:5,6 19:8,16 29:10 31:11 37:10 40:20 41:25 42:2,4,5 says 5:1 7:23 8:6 14:20 22:1 23:9 27:17 29:3,17 31:12 31:13,15 32:1 36:2,3,10,11 49:5 Scalia 13:20,23 20:18 27:16,22 27:24 28:2,11 28:15,17 29:1 30:14,23 31:9 33:23 41:14,20 42:4 45:5,9 46:11 search 18:5 second 13:1 18:13 26:1				
<hr/> T <hr/>				
				T 2:1,1 talk 46:16 talked 32:7 talking 14:5 15:11 16:18 20:7 21:8 32:8 45:16 talks 32:6 48:10 technical 47:1 tell 33:8 37:6,7 38:9,11 telling 34:24,24 test 5:8 testify 20:10

<p>Thank 3:9 25:12 50:17,18 53:2 thing 10:8 13:24 15:6 29:25 30:2 39:11 40:19 42:2,14 43:10 51:16 things 5:12 11:5 11:19,23 12:8 12:22 23:2,18 23:18 30:12 31:18 36:20,21 37:7 40:1 41:2 44:17 47:14,15 48:13 50:13 think 5:5 6:1 7:1 8:22 10:15 11:7,8,19 12:7 12:18 13:20 14:25 16:9 18:22 20:16,18 21:6,11,22,24 22:11,13 24:9 25:18,24 27:6 27:20 28:4,25 30:17 31:14 32:3 33:2,3 34:21 35:18 36:12,13 37:13 37:22,25 38:1 38:10,14 39:8 41:23,24 42:10 43:16 44:20 46:3,16,17,19 47:8,9,24 48:22 50:5 thinking 24:11 thinks 41:2 thought 4:17 5:18,21 16:11 32:9 35:9 36:8 36:13 43:23 three 32:4 three-day 18:8 tied 48:6 till 23:9 45:14 time 13:4 21:15</p>	<p>23:3 25:10 34:19,23 35:2 35:21 42:15 44:4,11 50:7 51:23 times 28:20 39:7 Title 23:14 24:24 totally 43:8 tradition 47:25 traditional 9:9 transportation 46:24 trap 38:18 39:25 51:22 traps 40:3 45:16 treat 4:19 16:13 19:9 23:25 29:5 52:23 treated 5:23,24 9:15 15:23 25:9 29:4 48:17,19 trial 11:10,10 12:3 15:12 17:21,25 18:8 19:1 34:22,23 35:22 36:5 49:1 trip 22:9,22 tripped 22:16 trips 21:22 true 5:19 16:15 19:18 28:25 29:2,3,13,16 32:20 39:1 44:14 trust 33:20 truth 10:16 17:15 try 11:2 38:12 45:15 48:16 trying 42:16 46:18 turn 28:21 turned 42:24 turns 22:13</p>	<p>40:13 Twenty-five 3:11 two 5:12 6:19,25 12:7 15:25 18:11 23:6 25:18 35:2,20 36:25 43:25 tying 47:25 types 22:5 40:18</p> <hr/> <p>U</p> <p>U.S.C 30:7 46:8 49:5 ultimately 50:8 unable 17:8 unanimously 3:12 uncommon 41:7 underlying 5:7 10:19,20,21 11:24 14:23 17:1,1 20:15 35:17 47:9 understand 4:9 8:16 30:23 understandable 12:8 understanding 51:23 uniform 4:5,8 uniformity 23:24 uniformly 43:11 union 1:7 8:9 17:2 United 1:1,15 30:11 unresolved 3:13 19:14 unusual 42:10 unwary 38:19 39:25 45:16 51:22 use 5:7 47:1 uses 46:20,21 usually 37:12</p>	<p>45:22,23,25</p> <hr/> <p>V</p> <p>v 1:5 3:5,11 26:3 30:11 value 10:21 variety 48:10 Vaughan 26:2,3 47:19 verdict 27:1 view 7:11 11:9 50:24,25 viewed 6:12 7:5 7:10 22:20 29:14 47:16,18 47:20 vindicate 20:14 voluminous 18:6 18:12</p> <hr/> <p>W</p> <p>Wagner 33:14 wait 22:21,23 23:2,9 waits 26:20 want 16:16 20:8 22:5,24,24 24:16 33:23 37:4,5,8,10 38:5,6,7 40:8,9 40:10,21 41:3 44:24 45:2 wanted 23:6 34:25 48:3 Washington 1:11,18,20 wasn't 5:21 50:16 way 5:23,24 11:20 12:1,6,8 15:23 18:21 26:21,22 28:3 29:19 37:18 39:15 40:17 47:13,13 48:19 ways 30:19,20 we're 10:6,22</p>	<p>20:7,11,11 22:1 28:5 29:5 31:11 35:1 41:21 50:3 52:23 we've 24:14 36:23 weeks 11:15 35:3,20 weren't 9:13 30:21 42:12 43:3 wide 48:10,10 withdraw 45:6 witness 10:3 19:19,21,25 20:9 witnesses 20:6 word 46:20,21 46:21 47:4,7,9 worded 42:20 words 5:18 24:8 24:13 work 16:6 worked 34:17 world 39:15 worried 11:3,4 45:5 worry 13:24 wouldn't 7:11 12:15 14:4,11 21:19 29:22 30:1 34:17 38:25 42:4 49:4 write 17:7 written 46:2 wrong 7:2 22:10 22:13 40:15 wrote 13:20</p> <hr/> <p>X</p> <p>x 1:2,10</p> <hr/> <p>Y</p> <p>years 3:11</p>
---	---	---	--	---

Z	7			
	72 33:10			
0	74 6:5 33:18			
	75 33:17			
1				
11:06 1:16 3:2	8			
1132(g) 49:5				
12-992 1:6 3:4	9			
12:03 53:4	9 1:12			
1291 23:14				
25:21 27:19				
14 7:18,24				
1791 26:23				
17th 36:18				
1920 30:7 46:8				
1983 24:25 25:4				
1988 24:24 25:4				
25:5 41:1 46:9				
2				
2013 1:12				
25 2:7				
28 23:15 30:7				
46:8				
29 49:5				
3				
3 2:4 33:18				
30 11:1 22:7				
38:3,12				
4				
4(a) 39:7				
42 24:24				
43 30:8				
4th 33:1				
5				
50 2:10				
54(d) 7:20				
54(d)(2) 7:12,15				
58 44:5,7				
58(e) 34:7,7,10				
39:11,16				
6				
6 33:17				