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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner : No. 13-1074

v. :

KWAI FUN WONG. :

- - - - - x

Washington, D.C.

Wednesday, December 10, 2014

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

ROMAN MARTINEZ, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

ERIC SCHNAPPER, ESQ., Seattle, Wash.; on behalf of Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ROMAN MARTINEZ, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ERIC SCHNAPPER, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	ROMAN MARTINEZ, ESQ.	
10	On behalf of the Petitioner	50
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 13-1074, United
5 States v. Wong.

6 Mr. Martinez.

7 ORAL ARGUMENT OF ROMAN MARTINEZ

8 ON BEHALF OF THE PETITIONER

9 MR. MARTINEZ: Mr. Chief Justice, and may it
10 please the Court:

11 Three features of the FTCA's text and
12 history make clear that Congress did not want to allow
13 equitable tolling of its time bar. First, Congress
14 drafted that bar in 1946 using jurisdictional language
15 transplanted from the parallel Tucker Act context.

16 Second --

17 JUSTICE GINSBURG: Is the -- is the word
18 "jurisdiction" used?

19 MR. MARTINEZ: The word "jurisdiction" was
20 not used in -- in that language, Your Honor, but
21 the Court had interpreted that language in the Tucker
22 Act context in six cases beginning with the --
23 the Court's decision in Kendall in 1883. And that
24 decision -- those line of cases had made very clear not
25 only that the time bar was jurisdictional, but --

1 JUSTICE GINSBURG: That's the Court.
2 Congress did not say jurisdiction. And I -- I'm sure
3 you are well aware that this Court, for some time now,
4 has been explaining that "jurisdiction" is a word of
5 many meanings, too many meanings, and has tried to
6 distinguish jurisdiction, meaning subject matter or
7 personal, from the rules, once a case fits jurisdiction,
8 how it will be processed in the Court. And it seems to
9 me a time limitation, even a very stringent time
10 limitation, is not jurisdictional.

11 MR. MARTINEZ: Your Honor, I think two
12 points on that. First of all, I think that when
13 Congress acted in 1946 and it transplanted the -- the
14 identical words of the statute that -- of the Tucker
15 Act -- the statute governing Tucker Act claims, Congress
16 understood itself to be incorporating the same settled
17 meaning, and those words had already been given a
18 jurisdictional meaning by this Court.

19 JUSTICE SCALIA: Jurisdictional in the
20 narrow sense.

21 MR. MARTINEZ: In -- in the sense that --
22 that -- that if -- that it went to the Court's ability
23 to hear the case --

24 JUSTICE SCALIA: Yes, that's what I --

25 MR. MARTINEZ: -- and the jurisdictional

1 consequences were attached to those -- to those words.
2 In other words, the -- the issue had -- could not be
3 waived by the government, and no equitable tolling was
4 available.

5 In this Court's more recent cases, I think
6 the ones that, Justice Ginsburg, you were referring to,
7 in the Henderson case, what this Court said was that --
8 was that the Court will presume that a provision is
9 jurisdictional when a long line of this Court's cases,
10 undisturbed by Congress, has treated a similar provision
11 as jurisdictional.

12 And in this case, we have a statute that had
13 been interpreted by a long line of this Court's
14 decisions, all in the Tucker Act context, very similar
15 or identical --

16 JUSTICE GINSBURG: But not the Tort Claims
17 Act. The Tucker Act, I think the -- the line that
18 the Court drew, it said if we characterize these as
19 jurisdictional in a prior case, we will stick with that.
20 But in the future, we're not doing that anymore.

21 MR. MARTINEZ: But I think what the Court
22 has said, both in the cases addressing jurisdiction and
23 in the cases -- in the Irwin line of cases addressing
24 the available of -- the availability of equitable
25 tolling is that the Court is not going to look for magic

1 words in the statute. It's going to look to the text,
2 the context, and the relevant historical treatment, and
3 that the overarching purpose of the inquiry is going to
4 be to find out what Congress understood itself to be
5 doing at the time that it enacted the statute.

6 JUSTICE KAGAN: But, Mr. Martinez, wouldn't
7 that argument suggest that Irwin was really only good as
8 to new statutes? As to statutes that were passed after
9 Irwin?

10 MR. MARTINEZ: I don't think so, Your Honor.
11 I think -- I think what the Court did in Irwin, it
12 didn't conduct a lengthy historical analysis of all
13 statutes that had ever been passed. But what it did was
14 it -- it based its -- its conclusion and -- and the
15 presumption on a kind of logical inference. The Court
16 essentially reasoned, as I understood the decision, as
17 follows: The Court said that -- that when -- we think
18 in the mine run of cases when Congress wants to take the
19 big step of waiving sovereign immunity, it's -- it's
20 reasonable to think that Congress also likely wanted to
21 take the small step of allowing equitable tolling.

22 And that -- and that may well have been true
23 in 1990, when Irwin was announced. It may have even
24 been true in 1972, when the statute that was addressed
25 in Irwin was announced. But we know for certain, and I

1 think the parties agree on this, that the rule in 1946,
2 when the FTCA was passed, was something quite different,
3 and the Court addressed that in the Soriano case just a
4 few years later in 1957.

5 JUSTICE GINSBURG: What was different about
6 1972? They were pre-Irwin. So why wouldn't 19 -- a
7 1972 statute, the extension of Title VII to federal
8 employees, why wouldn't that fall under the old regime
9 instead of the fresh look that Irwin took of it in 1990
10 as applied to a 1972 statute?

11 MR. MARTINEZ: Well, I think the -- the key
12 thing -- the -- the issue in this case is, obviously,
13 the FT -- is, of course, the FTCA. And I think there
14 are significant distinctions between the FTCA, which was
15 passed in 1946, and the provision that was passed in
16 1972 that was addressed in -- in Irwin. And we have
17 statute-specific evidence, it's very detailed and is
18 much -- much more extensive than the evidence that was
19 before the Court -- or that was available in -- with
20 respect to Title VII.

21 JUSTICE KAGAN: But, you see, I would -- I
22 guess I would have thought that really anything
23 pre-Irwin, the government could stand up and make a
24 very, very similar argument, which is, you know, in this
25 world we actually thought that a statute of limitations

1 with respect to a suit against a government was
2 jurisdictional, did not include equitable tolling, that
3 there were really no decisions the other way, that
4 Congress thought of that as the background rule. And so
5 what's to prevent this case from essentially becoming
6 everything prior to 1990 is presumed to be
7 jurisdictional contra Irwin?

8 MR. MARTINEZ: Well, we're not asking for
9 that presumption, and we don't think that the Court
10 needs to apply that presumption.

11 I think what the Court needs to do is to
12 look at the language of Irwin, which says that there's a
13 presumption. It's based on its kind of logical
14 inference about the mine run of cases. But it also says
15 that the presumption is rebuttable. And it's rebuttable
16 based on statute-specific evidence where the government
17 can come forward and overcome the presumption by showing
18 that, with respect to a particular law, Congress had a
19 different intent in mind.

20 JUSTICE SOTOMAYOR: So if there's ambiguity,
21 what breaks the tie? You've made your argument, but
22 there are some counters. The two most important are
23 that Congress took this provision out of the
24 jurisdictional section, and put it in -- in a different
25 section, number one; and, number two, it said treat the

1 government like you would treat any other party.

2 So those two counter.

3 MR. MARTINEZ: With res --

4 JUSTICE SOTOMAYOR: What -- how -- how do we
5 break the tie?

6 MR. MARTINEZ: Well, I think if there were
7 in fact a tie, I think the -- Irwin does -- does put
8 essentially the slight thumb on the scale in favor of no
9 equitable tolling. But I don't think that there's a tie
10 in this case for a number of reasons. Let me just
11 address -- I think the primary reason is the Tucker Act
12 point which I mentioned. But let me address the two
13 textual points that you raised, Your Honor.

14 The first argument about the placement of
15 the provisions, as the Court knows, the provisions were
16 separated in 1948 as part of that recodification. And
17 in the recodification law itself, in Section 33 of the
18 recodification law, Congress expressly forbade any
19 inference of legislative construction of what the
20 statutes meant based on the chapter of U.S. Code of
21 Title 28 in which it was placed. And so the argument
22 that my friend makes that the placement of the
23 provisions in different chapters, that's -- that's an
24 argument that -- that Congress expressly took off the
25 table.

1 With respect to the second textual
2 argument --

3 JUSTICE SCALIA: That was in the text of the
4 recodification?

5 MR. MARTINEZ: Yes. That was in -- in
6 Section 33 of the 1948 recodification. And not only
7 that, Your Honor, but -- but I think this Court --

8 JUSTICE SCALIA: Does legislative history
9 support that, too?

10 MR. MARTINEZ: It does. The legislative
11 history supports -- supports it. It's not just the
12 texture, Justice Scalia.

13 The -- with respect to the second argument,
14 Justice Sotomayor, that you raised, I think it's true
15 that there's language in -- elsewhere in the FTCA in
16 Section 2674 about the idea that -- that the FTCA
17 intended to create liability where a private person --
18 in circumstances where a private person would be liable
19 under State law. But what this Court recognized in
20 Richards and what -- what a lot of courts have
21 recognized, including Judge Friendly's opinion for the
22 Second Circuit in the Kosak case is that the time bar
23 provision, 2401, is an exception to that principle and
24 is essentially a circumstance in which Congress
25 specifically indicated that it didn't want the same rule

1 to apply as would apply between private parties in --
2 under State law.

3 And so we don't think that those textual
4 arguments get a lot of traction here and they certainly
5 don't overcome the strongest textual argument which is
6 on our side, which is, of course, the express and
7 deliberate incorporation of the Tucker Act language that
8 it applied to Tucker Act suits in the court of claims.

9 JUSTICE GINSBURG: Tucker Act doesn't have
10 to the same extent, in the same manner and to the same
11 extent as with respect to a private party. That's new
12 in the Tort Claims Act.

13 MR. MARTINEZ: It -- it's true that the
14 Tucker Act doesn't have that language. I don't think it
15 needed that language because the Tucker Act --
16 essentially, that language in the Tort Claims Act, I
17 think, is intended to point to the substantive -- the
18 law that's supposed to be applied, as this Court
19 recognized in Richards. And so it says, you know, look
20 to State law when you're applying the tort law.

21 The Tucker Act is a little different because
22 there you're applying Federal law. You're applying
23 Federal constitutional law, Federal statutory law or the
24 Federal common law of contracts in the Tucker Act
25 context. So it didn't need that language.

1 But what the Court has recognized in its
2 cases is, again, that that principle of -- sort of the
3 parity principle, you know, treat the government like a
4 private party, that -- that 2401(b) is really an
5 exception to that principle.

6 JUSTICE KAGAN: I take it that your argument
7 would apply not only to 2401(b), but also to 2401(a)?

8 MR. MARTINEZ: We -- the government's
9 position is that 2401(a) is -- is also jurisdictional,
10 not subject to tolling. But our argument is really that
11 the Irwin inquiry requires a statute-specific inquiry.
12 And so --

13 JUSTICE KAGAN: But it's the same language.
14 And if I understood the argument you're -- you're
15 making, it's -- your essential argument is this
16 incorporated the Tucker language, Congress knew what the
17 Tucker language meant, therefore, Congress understood
18 these to be jurisdictional as well.

19 MR. MARTINEZ: Your Honor, I don't want to
20 resist your -- your point too much, but I do want to
21 point thought that 2401(a)'s history is slightly
22 different. The language in 2401(a) actually originates
23 in the Tucker Act itself in 1887. The language from
24 2501 actually came from the 1863 statute, and that's the
25 language, the actual -- you know, the 12-word phrase

1 that's repeated in 2401(b) comes from that provision.
2 So there's some slight differences, but we're not going
3 to fight. We certainly would agree that the -- that the
4 2401(a) language is -- is jurisdictional and that's
5 being litigated in the lower courts.

6 JUSTICE KAGAN: I meant, I have to think
7 that this is just all over the U.S. Code, this kind of
8 language. There's nothing unusual about this language
9 "shall be barred." This is kind of the classic
10 language, right?

11 MR. MARTINEZ: I think that the "shall be
12 barred" or "forever barred," that language does appear
13 in a couple of places. But I think what -- what's
14 important for purposes of our argument is not just that
15 two-word phrase, but the broader phrase, because the
16 broader phrase is what shows that when -- when the human
17 being who sat down on behalf of Congress to actually
18 write this statute, it shows, I think, that he was
19 basing it -- he was essentially cut and pasting from the
20 preexisting Tucker Act provision. And so that language
21 that's relevant is not just "forever barred," but the
22 phrase "every claim against the United States cognizable
23 shall be forever barred unless." And I think that it's
24 very -- it's not just the language itself, although the
25 language is identical, but it's clear that Congress,

1 when it was drafting the FTCA, was -- its goal was to
2 fill a gap that had been left open in the Tucker Act.
3 The Tucker Act itself said that it would apply to
4 certain claims, quote, "not sounding in tort," unquote.
5 And the legislative history that -- that we've cited in
6 our briefs discussing the purposes of the FTCA makes
7 clear that Congress was looking at the -- the Tucker
8 Act, they saw that there was this hole for tort claims,
9 they wanted to plug that gap, and they wanted to give
10 tort claimants, in the language of the -- of the
11 relevant committee reports, the same right to a day in
12 court that claimants had under the Tucker Act.

13 JUSTICE KAGAN: It sounds to me like, the
14 way you're going about this inquiry, we're going to have
15 to take a case on every statute of limitations in -- in
16 the U.S. Code. Because you're saying, well, this is
17 similar enough and maybe this would be a little bit
18 different, it has a few fewer words, and then we have to
19 look at the history, and we have to stare at the
20 drafting concerns of Congress. And I thought that Irwin
21 was supposed to take us away from all that.

22 MR. MARTINEZ: I -- I don't think that -- I
23 don't think it's correct that you would have to take a
24 case on every statute of limitations, Your Honor. I
25 think that -- that in those cases where the government

1 can come forward with strong statute-specific arguments,
2 that the statute was -- was lifted, for example, from
3 the Tucker Act or from other similar statutes that had
4 been repeatedly interpreted as jurisdictional, I don't
5 think there's going to be much question about whether
6 tolling is allowed.

7 JUSTICE SCALIA: Irwin said this was just a
8 presumption, right?

9 MR. MARTINEZ: And that's exact --

10 JUSTICE SCALIA: And it said the presumption
11 could be overcome and it made clear that this is a
12 question of what was the congressional intent. When you
13 put all those three together, of course, you have to
14 look at each statute separately, don't you?

15 MR. MARTINEZ: We -- I couldn't agree more,
16 Justice Scalia. And I think that's -- that's actually
17 consistent with this Court's practice. After Irwin,
18 the Court has repeatedly looked at -- at different
19 Federal statutes and it's conducted exactly the kind of
20 statute-specific inquiry into the text, the history, the
21 precedent, trying to figure out what Congress was
22 thinking.

23 JUSTICE ALITO: Well, if you have looked at
24 the -- the statutes that could be interpreted one way or
25 the other, are there any that you have concluded are not

1 jurisdictional other than those that we have already
2 held are not jurisdictional?

3 MR. MARTINEZ: Your Honor, I confess that I
4 haven't gone through the -- the code with an effort to
5 try to figure out where ones that are not
6 jurisdictional. I think the ones that I have looked at
7 are the ones that the Court has addressed, most
8 significantly in the Brokamp case, in Beggerly, in
9 Auburn Regional, in John R. Sand & Gravel, and now in --
10 in this case. And I think what -- what those precedents
11 show is that what the Court has done with Irwin is not
12 to treat it as a conclusive presumption, but, rather, to
13 treat it as a rebuttable presumption --

14 JUSTICE KAGAN: Sure. But there are two
15 kinds of ways that you can rebut something. One is by
16 saying, here's something very distinctive about this
17 statute that shows that Congress meant for it to be
18 jurisdictional, that shows that Congress didn't mean for
19 equitable tolling to apply. But that's not the kind of
20 argument you are making here. You're making an argument
21 that basically says in this pre-Irwin world, Congress
22 understood that when it came to statutes against the
23 government, they would be jurisdictional and equitable
24 tolling would not apply, see the Tucker Act. And that
25 could be said, I think, for every statute with respect

1 to suits against the government prior to Irwin.

2 MR. MARTINEZ: With respect, Justice Kagan,
3 that's -- that's not our argument. Our argument is
4 specific to the FTCA and there I think -- I don't want
5 to give you more than three, the golden rule of three,
6 but there are five distinctions. I can just tick them
7 off.

8 One is the incorporation of the express
9 language of the Tucker Act. Two is the fact that this
10 Court addressed this -- this particular statute, or at
11 least tort claims, in the Soriano decision. It also
12 addressed this particular provision 2401(b) in Kontrick.

13 JUSTICE GINSBURG: I thought Soriano was --
14 was a Tucker Act case.

15 MR. MARTINEZ: It did, Your Honor, but --
16 but the Court expressly addressed -- it said that --
17 essentially, that the same rule that would apply in
18 Tucker Act cases would also apply to -- to statutes
19 waiving sovereign immunity for tort actions. And that
20 was a response to the point that we had made in our
21 brief --

22 JUSTICE GINSBURG: But if the sovereign
23 immunity is what drives it, then the presumption would
24 be overcome in every case against the government because
25 government --

1 MR. MARTINEZ: I think -- I think at a
2 minimum, it would -- I think what we have in this
3 statute that was not present in Irwin is the fact that
4 this Court had expressly mentioned, you know, tort
5 actions; and then not only did the Court mention it, but
6 then Congress reenacted the statute in 1966, not just
7 against the backdrop of this Court's statement in
8 Soriano, but also against the backdrop of the uniform
9 view of the lower courts, including a number of courts
10 of appeals, that it all said that this statute was
11 jurisdictional, not subject to waiver, not subject to
12 tolling. And so that's another unique feature of this
13 statute, the 1966 reenactment.

14 We also have a number of private laws, ten
15 real-life statutes that were passed by Congress that
16 seem to refer explicitly to 2401(b) as having -- as
17 being a jurisdictional statute. That's very different
18 from Irwin and it's very different from a lot of almost
19 -- I would imagine almost any other statute of
20 limitations in the U.S. Code.

21 And then finally, we have the fact that
22 Congress for 60 years, from the '20s through the 1980s,
23 repeatedly grappled with the very question that's at
24 issue in this case, which is whether equitable tolling
25 should be permitted under the FTCA. In the -- in the

1 bills that it -- that it considered before 1946, a
2 number of those bills, 9 of the 31 that had been
3 proposed, had various types of tolling provisions.
4 Those were left out of the final statute. Since --

5 JUSTICE BREYER: Is there another -- is
6 there another reason -- I think both briefs are good
7 briefs and you each have good arguments. And so if it's
8 an open question, why does the government oppose this?
9 That is to say, compared to contracts, people who are
10 suing on contracts usually have a lawyer and they have
11 had lawyers, they're dealing with the government, not
12 all. But this is about torts. And people who are hurt
13 with torts are frequently badly hurt, they could be
14 anyone in the world. The government could have treated
15 them very badly. Lots of things can happen.
16 Hurricanes. The lawyer gets deathly ill on the way to
17 the courthouse. The clerk mixes up the papers.
18 Somebody steals the lawyer's briefs and runs off to
19 Chicago.

20 I mean, all kinds of odd things can happen
21 to a victim of a tort caused by the United States. Now,
22 if in fact you throw them out on this thing, which I
23 would call a technicality, he has to go to the Senate
24 and he has to ask them for a private bill, which is a
25 drain on their time and somewhat random. So those are

1 the real choices.

2 Now, why other than, well, we read it and
3 that's what the law is -- I got that part and that is
4 not a bad argument on your part. But is there anything
5 else? Is there any sort of functional reason why the
6 government doesn't just say, look, where this person's
7 been hurt and can win his court, fine, we won't throw
8 him out on the basis of this. If the hurricane happens,
9 et cetera, then let's proceed anyway.

10 MR. MARTINEZ: Your Honor, as -- as you
11 suggested, our primary argument here is that -- that we
12 should win because the law is on our side.

13 JUSTICE BREYER: That there's nothing else?
14 That's a good reason by the way. That's a good reason,
15 yes.

16 (Laughter.)

17 MR. MARTINEZ: In addition to the law being
18 on our side --

19 JUSTICE BREYER: Yes.

20 MR. MARTINEZ: -- let me try to give a
21 little bit of context for why -- why Congress and why
22 the United States Department of Justice and the
23 Executive Branch has consistently opposed equitable
24 tolling in these circumstances. And this was heavily
25 debated before 1946 and it's been heavily debated since.

1 And at every turn, what -- what the position of the
2 Executive Branch and of Congress, the conclusion that
3 they've come to, is that this is such -- this was such a
4 revolutionary step for -- for Congress to take in 1946,
5 to create the tort remedy in the first place. And this
6 was the second great waiver of sovereign immunity. It
7 in some ways, you know, reconceptualized the -- the
8 relationship between the government to the people,
9 but -- and that was a great step. But they were very
10 cautious. They were very careful and they -- they
11 expressly treated the statute of limitations provision
12 as a safeguard to protect the government from claims
13 that could be brought years afterwards. And so they
14 wanted something that was strict and this was going to
15 -- the purpose of the limitations provision was going to
16 be to preserve evidence, and also to -- there was
17 another consideration, which was the fact that this was
18 a very controversial bill. It took 20 years for it to
19 get through in the 20th century --

20 JUSTICE GINSBURG: But, Mr. Martinez, what
21 you said, it's as though the choice were statute of
22 limitations or nothing. To get equitable tolling, it's
23 a pretty tough case. In order to get equitable tolling,
24 you must have a truly exceptional case, maybe the case
25 that we're now -- that's now before us is such a case.

1 But it is not easy to get equitable tolling. You have
2 to be especially deserving.

3 So isn't that the answer to it? Ordinarily,
4 the statute of limitations will govern, but if there are
5 equitable reasons, then there can be an exception. But
6 those reasons have to be very strong.

7 MR. MARTINEZ: Your Honor, I think that's
8 true, that's how the equitable tolling doctrine has been
9 conceived and if Congress were rewriting the statute
10 today, it may well decide -- it could well decide that
11 that would be a better approach. But the approach that
12 Congress took at the time -- and I think this is best
13 reflected in the colloquy that's cited in page -- on
14 page 41 of our brief -- Congress considered the question
15 of whether in hardship cases it would be appropriate to
16 give judges some discretion where there was a good
17 reason for a -- for a claimant to file late.

18 And that suggestion was raised by
19 Congressman Gwynn and the Department of Justice -- this
20 was 2 years after the Act. The Department of Justice
21 said look, it would just be impractical and it would
22 create too much of a burden on the government and it
23 would be impractical to have kind of a rule that was not
24 hard and fast.

25 And so Congress, in 1948, as that colloquy

1 showed, did not think that the FTCA that had been passed
2 two years earlier allowed for equitable tolling, and the
3 consistent view of Congress when it rejected proposals
4 to add tolling nine different times between 1946 and the
5 late '80s was that equitable tolling should not be
6 allowed.

7 And so in light of that statute-specific
8 evidence, I think it's -- it's eminently reasonable to
9 conclude that -- that, you know, the law is on our side.

10 JUSTICE BREYER: If you want to -- I think
11 it is quite funny, what I said. I'm sorry. Of course,
12 the question is the law, all right. I think what I said
13 before is relevant to the law. But the question here is
14 a slightly more subtle one in my mind. I agree with
15 you, the legislative history, et cetera, does show they
16 used "jurisdiction" nonstop. Those are the words. But
17 "jurisdiction" at that time did not have the Irwin
18 meaning.

19 And so later on, there comes a case, which
20 case Irwin now treats this quite differently than it did
21 before. And isn't the question -- or is the question
22 from the legislative history point of view a pretty hard
23 one to answer: Did Congress or would those who passed
24 the bill looking at the reasons wanted this statute to
25 pick up the later interpretation of jurisdiction or they

1 wanted it to have stayed the same in the face of that
2 later change in how the courts treat the word.

3 MR. MARTINEZ: I think --

4 JUSTICE SCALIA: A living Federal Tort
5 Claims Act is what we're talking about here.

6 (Laughter.)

7 JUSTICE BREYER: That's actually right.

8 MR. MARTINEZ: Justice Breyer, I think
9 that -- I think that, first of all, what this Court has
10 always said, of course, is that -- that the goal of
11 statutory construction in this context as in any other
12 is to look at the text in light of its context and its
13 historical treatment. What Irwin says is that the goal
14 is to find what the legislative intent was with respect
15 to this particular statute.

16 JUSTICE BREYER: Yes. But you see, the
17 question is -- I mean, normally, it arises in a much
18 grander context. Normally, it arises in the context of
19 changes of terms of the Constitution and so forth. This
20 is not that grand context. But still, in this minor
21 context, why isn't the question the same? How did
22 Congress -- or would because it's hypothetical -- they
23 didn't know?

24 MR. MARTINEZ: It's not hypothetical,
25 because I think Congress did actually address this exact

1 question. 31 bills were discussed between 1925 and
2 1946, were proposed in Congress, involving tort claims,
3 proposed tort claims bills. 9 of those bills --

4 JUSTICE BREYER: They didn't -- they had the
5 tolling. They didn't pass it and normally what they
6 didn't pass isn't something that's really great strong
7 evidence in light of the meaning of what they did pass.

8 MR. MARTINEZ: That -- that's normally true.
9 But what this -- what this Court said in the Muniz case
10 is that in the particular context of the FTCA, because
11 there was market reliance by each succeeding Congress
12 on -- on the bills that had been proposed earlier, that
13 the omission of a -- of a provision from the final FTCA
14 that had been there before, we should treat that as a
15 deliberate choice, not an inadvertent omission. So I
16 think it was a deliberate choice here.

17 And I think, with respect to the evolution
18 of the statute since then, as of 1966, we know that
19 Congress reexamined the time bar. At that -- at that
20 point in time, it was legislating against a backdrop
21 where this Court had suggested in Soriano that it was
22 jurisdictional, the lower courts had uniformly treated
23 it as jurisdictional, and not just by putting the label
24 on it, but by attaching jurisdictional consequences.
25 Congress reenacted the statute without any change in

1 meaning, and then even until the late '80s, it
2 repeatedly considered proposals to add forms of tolling
3 to the statute.

4 JUSTICE SCALIA: If we were to adopt the
5 position that a statute can change in light of current
6 circumstances, what would that Congress think about it
7 today, would there be any reason to limit that to the
8 Federal Tort Claims Act, that proposition?

9 MR. MARTINEZ: I think it would be hard to
10 do and, Your Honor --

11 JUSTICE SCALIA: We're into judge
12 Calebresi's manner of statutory interpretation, right?

13 MR. MARTINEZ: I think it would be hard to
14 do. But most importantly for this case, I think that
15 that approach would put -- would essentially be at odds
16 with Irwin, because Irwin says that what governs here is
17 the legislative intent and that, obviously, I think, has
18 to be ascertained at the time the statute was passed.

19 If I could reserve the balance of my time
20 for rebuttal.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.
22 Mr. Schnapper.

23 ORAL ARGUMENT OF ERIC SCHNAPPER

24 ON BEHALF OF THE RESPONDENT

25 MR. SCHNAPPER: Mr. Chief Justice, and may

1 it please the Court:

2 I think it would be helpful to start by
3 pointing out that there are two different background
4 rules at issue here. The first is the rule in Irwin,
5 which concerns the availability of equitable estoppel
6 and, as my brother has pointed out, it is a presumption
7 that statute of limitations are subject to equitable
8 estoppel, and I think he aptly characterized its
9 significant by saying it's a -- it's a thumb on the
10 scale.

11 CHIEF JUSTICE ROBERTS: But -- but not with
12 respect to governmental statutes. I mean, that was a
13 question of first impression in Irwin.

14 MR. SCHNAPPER: Yes, the presumption is --
15 it's the same presumption. But there's a second
16 background rule here which is somewhat different, and
17 that's the rule Justice Ginsburg pointed to earlier, and
18 that concerns whether a statutory requirement is
19 jurisdictional.

20 Now, there the line of cases are this
21 Court's decisions from Arbaugh to Sebelius, such as last
22 year, and the requirement there is a clear statement.
23 And that's, a clear statement requirement, is
24 considerably more demanding. It's more like a whole
25 hand on the scale. It's not a search for intent in the

1 same way that Irwin suggests.

2 This, the statutory requirement in this
3 case, truly does not satisfy the clear statement
4 requirement. The language of 1346(a) provides that if
5 six requirements are met the courts shall have
6 jurisdiction. So at this point, the burden is even
7 greater. The Federal Tort Claims Act is highly specific
8 about things like that. It -- it -- there is an express
9 carve-out for things deemed not jurisdictional for
10 pension claims. There is also a provision in Section
11 2671 defining some of the terms in 1346. Those would be
12 jurisdictional. But there is no connection between the
13 statute of limitations and the jurisdictional
14 provisions.

15 And if I might respectfully disagree with
16 the government about one historical matter, the statute
17 of limitations and the jurisdictional provision have
18 always been separate. The statute of limitations was in
19 Section 420 of the original Act, and the jurisdictional
20 provision was in Section 410. And they had their own
21 headings back in 1946, and the -- the term -- the
22 heading "Jurisdiction" was only for the jurisdictional
23 provision, not for Section 2401.

24 So the text of the statute simply doesn't
25 provide the clear statement that is needed, and --

1 CHIEF JUSTICE ROBERTS: What did the re --
2 what did the recodification do?

3 MR. SCHNAPPER: It moved things to -- to
4 different parts of 28 U.S.C., but it -- those sections
5 were separate all along.

6 The -- and in this regard we agree with the
7 government, the view advanced by the government in its
8 briefs in Zipes and Arbaugh, which is that when a -- a
9 statute of limitations and a jurisdictional provision
10 are in separate provisions of the statute, which they
11 always have been, that that gives rise to a strong
12 presumption that they are not jurisdictional.

13 JUSTICE SOTOMAYOR: So did we err in McNeil?

14 MR. SCHNAPPER: Sorry?

15 JUSTICE SOTOMAYOR: Did we err in McNeil?

16 MR. SCHNAPPER: You did not but -- but
17 McNeil does not hold that the exhaustion requirement is
18 jurisdictional. We disagree with the government about
19 that. The district court had held the requirement was
20 jurisdictional. This Court held only that the
21 requirement hadn't been satisfied.

22 If the Court had used the word
23 "jurisdiction" it wouldn't have been any consequence; it
24 would have been, as the Court's phrase goes, a drive-by
25 jurisdictional ruling. But this is less than that. The

1 government asked the Court in McNeil to label that
2 requirement jurisdictional and it didn't. So McNeil is
3 an unsuccessful solicitation of a drive-by
4 jurisdictional rule. It simply doesn't provide the
5 support that you suggest.

6 There would, in any event, have been some
7 statutory argument there, because the jurisdictional --
8 excuse me, the exhaustion requirement in Section 2675 is
9 in Chapter 171. And the jurisdictional provision does
10 contain the language "subject to Chapter 171." But the
11 statute of limitations is in sub -- is in Chapter 161.
12 There isn't that same cross-reference.

13 JUSTICE GINSBURG: Mr. Schnapper, what do
14 you do with what I take to be the government's main
15 argument? They said here are these two statutes waiving
16 the government's sovereign immunity. The Tucker Act, no
17 equitable tolling. Tort Claims Act comes later, it uses
18 a lot of the same language, it has the same object, so
19 the Tort Claims Act should be interpreted in harmony
20 with the Tucker Act.

21 MR. SCHNAPPER: We think there are a number
22 of problems with that argument. It has various
23 iterations and maybe I can separate them out.

24 One version of that is that the words "shall
25 be forever barred" are inherently jurisdictional. And

1 as we note in our brief, that language is in a number of
2 other statutes. The particular cadence of it, every act
3 shall be forever barred unless, is also in the Clayton
4 Act, which in *Rotella* this Court held was not
5 jurisdictional, and it's in the Fair Labor Standards
6 Act, which is -- where the government repeatedly
7 contends that equitable tolling is available.

8 So I think the -- and indeed --

9 JUSTICE SCALIA: It isn't just that phrase.
10 It's other language that is just lifted verbatim from
11 the two prior Acts. And you add to that the fact that
12 the purpose of this statute was to eliminate the
13 exception in the Tucker Act for torts. The --

14 MR. SCHNAPPER: But --

15 JUSTICE SCALIA: That was the obvious
16 purpose of it, so they -- they repeat the language of
17 the Tucker Act and say it applies to torts.

18 One would think that the same limitations
19 that applied to the Tucker Act continue to apply.

20 MR. SCHNAPPER: Well, we -- we think not,
21 Your Honor. The -- again, the -- the rest of the
22 language of the Tucker Act and the Federal Tort Claims
23 Act are very different. There are 24 sections of the
24 Federal Tort Claims Act, 35 sections of the Tucker Act.
25 The rest of them have almost no overlap. It's just this

1 phrase, which is the same phrase in a number of other
2 statutes.

3 But to get back to the government's
4 historical point about the meaning -- about the pre-1946
5 decisions, as we've suggested in our brief, those
6 decisions never turn on the words "shall be forever
7 barred." A series of decisions dating from the 1883
8 decision in Kendall took the position -- and that was
9 the view in the 19th century -- that any requirement
10 pertinent to a waiver of sovereign immunity was
11 jurisdictional, no matter what it was.

12 And if the Court were to look at the
13 critical paragraph in the decision in Kendall which the
14 government relies on, the first four sentences of that
15 paragraph are an exposition of that rule: Any
16 requirement, any bar, is jurisdictional.

17 Then the fifth sentence says: So what are
18 the bars in the Tucker Act, and then it notes that there
19 is a statute of limitations which has the language that
20 applies here. But if Congress had been familiar with
21 those details, and we presume that sort of thing, though
22 it's not entirely realistic, they would not have drawn
23 from those decisions the view that the language of the
24 Tucker Act was of any significant, because it wasn't to
25 that line of cases.

1 JUSTICE BREYER: I take it from what you
2 have both argued so far, that there is nothing direct in
3 terms of a report or a hearing or a statement on the
4 floor that shows that anyone in Congress, staff or
5 member, ever thought about this problem. Is that right?

6 MR. SCHNAPPER: That's our -- that's our
7 argument --

8 JUSTICE BREYER: So what we're doing then is
9 we are, however we do it, creating a number -- not
10 creating but following a number of legal rules, court
11 developed, which seek to determine what the, quote,
12 intent of Congress was on the basis of other things, not
13 necessarily what they said or what they -- that's the
14 situation?

15 MR. SCHNAPPER: I -- I think that's right.
16 And we rely on the rules and on Arbaugh in cases about
17 jurisdictional requirements, and in Irwin about -- about
18 equitable tolling.

19 If -- as I was -- just one more point about
20 Irwin. As we noted in our brief, at the oral argument
21 in Irwin counsel for the United States pointed out that
22 that language, "shall be forever barred," was not of any
23 distinctive importance and suggested it was probably
24 language from the 19th century that was just common.
25 And that's true; most States used that very language at

1 the time. It was just -- it wasn't of any particular
2 independent significance.

3 With regard to the question asked by Justice
4 Scalia about the living Federal Tort Claims Act and what
5 we're to do about the fact that the principles of
6 interpretation in Irwin and the Arbaugh line of cases
7 weren't on the table back in 1946: This issue has come
8 up in at least four cases and the Court has, although in
9 one instance over your dissent, taken the position that
10 when those rules are applied they don't have effective
11 dates. They apply to all statutes.

12 In Soriano -- excuse me, in -- excuse me,
13 in --

14 JUSTICE SCALIA: Well, it seems to me that
15 is incompatible with what I thought your position was,
16 that it depends upon congressional intent. So we can
17 just ignore everything you've argued up to here. It
18 doesn't depend upon congressional intent because we can
19 give those words meaning that the Congress did not give
20 them at the time. You have to pick one argument or the
21 other.

22 MR. SCHNAPPER: Your Honor, our view --

23 JUSTICE SCALIA: Are you -- are you going to
24 be bound by -- by what the Congress at the time believed
25 it was enacting or not?

1 MR. SCHNAPPER: We agree with Justice Breyer
2 that this -- that this -- it's not a question of -- of
3 any indication of actual intent. The Court has taken
4 the position that when new rules of this sort are
5 adopted, they are applied to laws that didn't exist that
6 were adopted before that. In your decision for the
7 Court in *Young v. United States* is a perfect example of
8 that. In the -- I'm sorry, that's wrong. Your decision
9 of the Court in *Sandoval* is an example of that. In
10 *Sandoval*, the issue was somewhat different. It was
11 whether to imply a private cause of action. And since
12 the Court's decision in *Cort v. Ash*, this Court has had
13 a somewhat more fairly demanding standard. But counsel
14 for the plaintiff in that case, myself, argued that
15 since the statute involved had been adopted under the
16 Ancien Regime back in the days of *J.I. Case v. Borak*,
17 that rule should apply. And you, the Court, unanimously
18 rejected that argument. And it made -- it made the
19 point, which is completely applicable here, the *Cort*
20 *v.* -- the statute in *Cort v. Ash* had also been enacted
21 under the Ancien Regime back before the days of *Cort v.*
22 *Ash*, but that was the way the Court was going to apply
23 it.

24 That's precisely the situation here with
25 regard to *Irwin*. *Irwin* is a statute adopted under the

1 Ancien Regime as you said. Arbaugh is a statute adopted
2 before Arbaugh. Those rules are applied to all
3 statutes. Now, if there's an affirmative demonstration
4 of actual intent, if something was discussed as Justice
5 Breyer says, that might be a different matter.

6 JUSTICE ALITO: This is -- this is spinning
7 out into degrees of abstraction that I hadn't
8 anticipated. But it's hard for me to believe that
9 Congress really had any intent whatsoever on -- on these
10 issues. I don't envision members of Congress sitting
11 around thinking about these things. But put that aside.
12 Do you -- is it your argument that we should follow
13 congressional intent or not? Or is it your argument
14 that Congress's intent was to adopt -- to say this is
15 jurisdictional and we delegate, basically, to the courts
16 the -- the determination of what is jurisdictional? So
17 if they change their mind about the difference between
18 jurisdiction and non-jurisdiction, then that's what this
19 should mean. Which -- which is it?

20 MR. SCHNAPPER: I think the Court's
21 answer -- the cases in this Court give a slightly
22 different answer to that question. With regard to
23 whether something is jurisdictional, the clear statement
24 rule is a clear statement rule. It's like any number of
25 rules like that from the Court. Something -- a

1 particularly clear expression of the views of Congress
2 would do, but it is not quite the same subjective intent
3 for a search for intent that we might otherwise have.
4 But certainly, the Court --

5 JUSTICE ALITO: So it's not what Congress
6 intended. You're saying that if they intended to -- all
7 they thought about was they had one idea about
8 jurisdiction, they couldn't conceive of another one,
9 they wanted it to be jurisdictional in accordance with
10 their idea, but that would change. If -- if others --
11 if courts begin to think of jurisdiction differently.

12 MR. SCHNAPPER: Well, I think my answer is
13 not limited to this clear statement rule. The Court has
14 articulated a number of clear statement rules. I don't
15 understand those rules to just drop from the case and
16 then lead to the usual wide-ranging search for --

17 JUSTICE GINSBURG: Mr. Schnapper, I think
18 we're getting off the track that Justice Breyer put us
19 on, and I think you agreed with him, that there's no
20 evidence that Congress ever thought anything about what
21 was going to happen in a case like Ms. Wong. They --
22 they enacted a statute, and it had a statute of
23 limitations, a firm statute of limitations, but there's
24 no indication that Congress thought about jurisdiction.
25 We all -- all that jurisdiction stuff comes from

1 decisions of this Court.

2 MR. SCHNAPPER: Yes. And I think in that
3 circumstance, the -- the Court's choice of controlling
4 background presumptions and clear statement of rules are
5 controlling.

6 CHIEF JUSTICE ROBERTS: Well, but that
7 language -- that language comes from decisions of this
8 Court, exactly. But interpreting the precise language
9 that was put into this act in the same context is the
10 Tucker Act. They were addressing a problem under the
11 Tucker Act, they used that language. And whatever
12 criticism you want to direct to the prior decisions of
13 the Court, they have issued -- they had issued rulings
14 on those when the Congress was looking at the FTCA.

15 MR. SCHNAPPER: But those rulings, we
16 contend, had nothing to do with the particular language
17 of the Tucker Act.

18 JUSTICE SCALIA: Well, that may well be,
19 but --

20 MR. SCHNAPPER: No matter what -- how the
21 statute of limitations had been phrased --

22 JUSTICE SCALIA: Look, there are a lot of
23 statutes, perhaps most statutes, that are not explicit.
24 That do not use the magic language that you insist this
25 statute have. And when that happens, we don't just sit

1 back and say, well, in that case, it's up to us. We
2 don't say that. We have certain rules that -- that
3 determine what the presumptive intent of Congress was.
4 And I don't care whether each individual member of
5 Congress or, indeed, any single one of them had that in
6 mind. They ordinarily don't. But we have rules, one of
7 which that is very strong, is that when you adopt the
8 language from another statute -- especially when it is
9 in the same area, and this is the same area as the
10 Tucker Act, it is eliminating the Tucker Act exemption
11 for torts. When you have the same language and it has
12 been -- that language has been interpreted by the courts
13 uniformly over a period of years to mean a certain
14 thing, we will presume that that is what Congress had in
15 mind when it used the language.

16 Now, if you're asking us to abandon that
17 rule and just sit back in -- in any case when the
18 legislative history doesn't say anything and -- and make
19 up what we think should be the best answer, that simply
20 is not the way we've proceeded.

21 MR. SCHNAPPER: Nor should it be, Your
22 Honor.

23 JUSTICE BREYER: Didn't -- I mean, the --
24 sorry, but I get -- I mean, what about many statutes
25 existed saying -- inferring a certain use of the word

1 about men sitting on juries. And the statutes that say
2 those things were enacted long before anyone thought a
3 woman would ever sit on a jury. But when they're
4 interpreted by the courts, by and large, they're
5 interpreted to include both genders. All right? There
6 are many instances. So certainly Justice Scalia is
7 right in my opinion that that is a rule that -- the one
8 he enunciates, but neither an absolutely firm rule nor
9 the only rule.

10 MR. SCHNAPPER: Well, I'm happy to agree
11 with all that. But -- but I think where we --

12 JUSTICE SCALIA: You think man means women,
13 right? Never mind.

14 MR. SCHNAPPER: I don't think we have to
15 address all that here. I'm sure you'll have another
16 opportunity --

17 (Laughter.)

18 JUSTICE GINSBURG: Mr. Schnapper -- Mr.
19 Schnapper, I think that I heard a disagreement between
20 you and Justice Scalia on how close the words were, and
21 you said, yes, there are some phrases in common, but
22 there are big differences, too, in the wording of the
23 Tort Claims Act. So you can pick out some words and
24 say, yes, Congress adopted that language, but in other
25 parts it didn't take the Tucker Act as the model used

1 different language.

2 MR. SCHNAPPER: That's true. And, in fact,
3 there are some fundamental differences between the
4 statutes and we think they're important here. One of
5 them is the point that was raised earlier that
6 Section 2674 says that in proceedings under the Federal
7 Tort Claims Act, defendant, the United States, would be
8 liable in the same manner and to the same extent as a
9 private defendant in a private action in State court,
10 equitable tolling would be the -- the rule. Now, there
11 are a number of specific exceptions to the language of
12 2674, but none of them apply here. And we think --

13 CHIEF JUSTICE ROBERTS: Well, but that's
14 a -- a principle that obviously doesn't cut across the
15 board.

16 In private actions in State court, for
17 example, you do not have to give the administrative
18 agency notice within two years, there are all sorts of
19 things that don't have a particular carveout that
20 don't apply --

21 MR. SCHNAPPER: No, no. That is -- that is
22 one of the carveouts, that you have to give notice.
23 It's in the --

24 CHIEF JUSTICE ROBERTS: No, no.

25 MR. SCHNAPPER: -- the Federal Torts Claims

1 Act.

2 CHIEF JUSTICE ROBERTS: No, no. You're
3 misunderstanding my point. In other words, just because
4 the law says the United States will be liable to the
5 same extent as a private party, it doesn't mean that all
6 the rules -- I mean in State court -- it doesn't mean
7 that all the rules that apply in -- that you interpret
8 them the same way across the board. There is no
9 requirement that you give a two-years notice in the
10 typical State court action. But under your theory,
11 well, there ought to be -- do you understand where I'm
12 headed?

13 MR. SCHNAPPER: I do. But -- but our view
14 is that having announced that general principle in 2674,
15 Congress then went on in the Federal Tort Claims Act and
16 spelled out a series of express areas where it
17 designated a different Federal answer. And one of them
18 is the presentment requirement, that actually went so
19 far as to say the Federal Rules of Civil Procedure are
20 going to apply. There's a whole series, though. There
21 are listed in Footnote 28 in United States v. Richards.
22 Section 2680 has 17 other exceptions --

23 CHIEF JUSTICE ROBERTS: And you think in
24 every other --

25 MR. SCHNAPPER: If Congress wanted a

1 different result, they spelled that out.

2 CHIEF JUSTICE ROBERTS: And you think in
3 every other respect, the procedure under the Federal
4 action is the same as under the State action?

5 MR. SCHNAPPER: Presumptively --

6 CHIEF JUSTICE ROBERTS: And it goes -- it
7 goes to liability, right? That's the word that's used?
8 Liability?

9 MR. SCHNAPPER: Well, it says in -- in like
10 manner. I mean --

11 CHIEF JUSTICE ROBERTS: They're not
12 procedures. I mean, the procedures are different,
13 obviously.

14 MR. SCHNAPPER: Yes, but a -- a statute of
15 limitations is a bar to liability. And it -- this isn't
16 just a question of how many depositions you -- you would
17 get --

18 JUSTICE SCALIA: You know, I don't find the
19 -- the existence of -- of those exceptions, and there
20 are a lot of exceptions, so persuasive, because unlike
21 the Tucker Act, the Tort Claims Act refers to State law,
22 so you have to make exceptions unless you're going to
23 suck in everything about State law, procedures and
24 everything else.

25 So, you know, it's sort of apples and

1 oranges. The fact that those exceptions are there are
2 explicable not because Congress didn't think
3 jurisdiction meant jurisdiction in the narrow sense,
4 but, rather, because having referred us to State law,
5 they had to make some exceptions from State law.

6 JUSTICE SOTOMAYOR: Isn't your point,
7 however, that this is a new regime, that it's not the
8 Tucker Act, that it's something created -- they may have
9 borrowed from the Tucker Act some phrases and a couple
10 of things, but they created a new statute. So to say
11 they were wholesale taking the Tucker Act or even
12 considering that they were duplicating the Tucker Act is
13 not appropriate.

14 MR. SCHNAPPER: I -- I think that's right.
15 As we said, most of the statutes are entirely different.

16 There's also another fundamental difference,
17 which is the claims recognized by the Tucker Act were
18 sent to the then newly-created Federal court of claims,
19 which only had whatever powers Congress was going to
20 give it as it created them. But --

21 JUSTICE GINSBURG: The government answered
22 -- you're saying the difference is the district court
23 has all kinds of equitable authority, claims court
24 didn't. But the government answered that argument and
25 said there's a difference between equitable doctrines,

1 which the claims court followed, it's just that the
2 claims court can't give equitable remedies like
3 injunction.

4 So the government's answer is isn't that
5 divide, that equity is part of the jurisprudence of the
6 claims court?

7 MR. SCHNAPPER: I think that argument
8 relates to the argument that's been made by the
9 Plaintiffs in June. I'm making a different point, which
10 is -- the point that would go, for example, to the
11 presumption of equitable tolling and the standards of
12 that articulated in this Court's decision in *Holland v.*
13 *Florida*.

14 The Federal district courts already existed
15 in 1946. They had the inherent power to engage in
16 equitable tolling. There were no inherent powers in the
17 court of claims in -- in 1863. It didn't exist.
18 *Holland* says that if Congress -- that the fact that
19 those powers were already there matters, and that
20 there's going to have to be a strong showing that
21 Congress, in adopting a statute, meant to take away the
22 powers that normally existed. That problem doesn't
23 exist under the Tucker Act because there -- there were
24 no powers to take away the -- the courts were just being
25 created at that time.

1 If I could turn for a second from the issue
2 of -- of jurisdiction to the issue of equitable tolling,
3 because the -- the issues there are somewhat different.
4 That is, the government suggests even if the statute is
5 not jurisdictional, whether there's equitable tolling is
6 a separate question.

7 The -- the government's argument relies
8 primarily on the fact that a number of other statutes
9 had statutory tolling provisions. They are labeled
10 exclusions in the case of Section 2416. And the
11 government argues that if there are -- there's some sort
12 of statutory exclusion, or sometimes it's called tolling
13 in this Court's decisions, that would mean Congress
14 didn't want equitable tolling.

15 Now, that issue has been litigated before
16 this Court several times. It was litigated in *Young v.*
17 *United States* where the taxpayer made the same argument
18 that since there was a statutory exclusion or tolling
19 provision, there couldn't be equitable tolling. This
20 Court rejected it there, and the Court's opinion said
21 that the -- the statutory provisions and equitable
22 tolling supplemented one another. The Court rejected it
23 as well in *Holland v. Florida*.

24 Now, there's an historical reason for all
25 that. Tolling provisions or exclusions in statutes have

1 always coexisted with equitable tolling, going back
2 hundreds of years. The original English Statute of
3 Limitations Act of 1623 had exclusions in it. In fact,
4 4 of the 5 exclusions in the Tucker Act came from that.
5 And yet despite the fact that English statute of
6 limitations always had exclusions and they're carried
7 over in colonial and -- and American State legislation,
8 there has also been equitable tolling. The two things
9 coexist and supplement one another.

10 And often, although not inherently, the
11 statutory provisions operate differently than equitable
12 tolling. Equitable tolling is an individualized, a
13 somewhat discretionary choice, and it requires a showing
14 of hardship applicable to the individual. The statutory
15 exclusions do not. The statutory exclusions are there
16 whether the -- the plaintiff had a compelling problem or
17 not.

18 So, for example, in the Tucker Act and
19 indeed in the original English statute of limitations,
20 there is a carveout for people who are beyond the seas,
21 and the statute of limitations doesn't begin to run as
22 to them until they come back. That exists even if
23 they're just across the channel in Calais and have a
24 full-time agent in London to manage their affairs.
25 There's not a requirement of -- of hardship.

1 So the government's argument, I think,
2 misapprehends the fact -- the history of all of this and
3 the fact that these two provisions have always
4 coexisted. And the government's legislative history
5 argument is -- largely fails on the same ground. What
6 Congress did not adopt in the years prior to the Federal
7 Torts Claim Act were -- were tolling -- statutory
8 tollings. They -- and I think you could make a fairly
9 good argument that Congress decided not to have
10 statutory tolling rules, but they have always been
11 separate from equitable tolling rules.

12 The government, in its argument in *Younger*,
13 made this point really well. I think it's about --

14 JUSTICE KENNEDY: Are there any Federal
15 statutes that permit equitable tolling --

16 MR. SCHNAPPER: Equitable tolling, yes, yes.

17 JUSTICE KENNEDY: -- and how are they
18 worded? Do they say -- do they say equitable tolling?

19 MR. SCHNAPPER: Oh, no. I don't know that
20 one exists. But there are in any number of Federal
21 statutes which have statutory tolling where the court
22 has held there's also equitable tolling. That was *Young*
23 and *Holland*.

24 JUSTICE KENNEDY: But based on the language
25 of the statute, there are carveouts. And -- and as you

1 actually explained --

2 MR. SCHNAPPER: The carveouts are statutory.
3 The equitable tolling was always there, but what
4 the Court said was the carveouts --

5 JUSTICE KENNEDY: But have the statutes
6 recognized, A, there are carveouts, and B, there is
7 something like equitable tolling?

8 MR. SCHNAPPER: I don't know that.

9 But -- but what the courts' decisions hold
10 is the existence of a statutory carveout does not
11 preclude --

12 JUSTICE KENNEDY: I understand.

13 MR. SCHNAPPER: -- that discretion. And the
14 -- the legislative proposals that the court -- that the
15 government refers to for a carveout may reflect, I think
16 it fairly does reflect a decision by Congress not to
17 have a statutory carveout, that doesn't mean Congress
18 was intending to bar equitable tolling. They're --
19 they've always been different and separate. And as
20 the Court said in Young, they supplement one another.

21 If the Court has no further questions.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Martinez, you have four minutes
24 remaining.

25 REBUTTAL ARGUMENT OF ROMAN MARTINEZ

1 ON BEHALF OF THE PETITIONER

2 JUSTICE SCALIA: Mr. Martinez, I hate to cut
3 into your time, but it's important to me to understand
4 why you think that if we rule for you, we will not be
5 saying that every statute which allows suit against the
6 Federal government and which uses the words "shall be
7 forever barred" will not have to come out this way.
8 What distinguishes this case from all those others?

9 MR. MARTINEZ: I think in this case it's not
10 just that phrase, it's the broader phrase that was
11 lifted verbatim from the Tucker Act. And to my
12 knowledge, there's no other statute that's been cited
13 in -- in their brief, there's no other statute that I'm
14 aware of that's currently in effect that -- that borrows
15 that same language from the Tucker Act.

16 And I think what's -- what this Court could
17 also do --

18 JUSTICE KAGAN: I'm sorry, which language
19 are you talking about?

20 MR. MARTINEZ: I'm talking about the phrase,
21 "Every claim against the United States cognizable shall
22 be forever barred unless." So I think you could
23 limit --

24 JUSTICE KAGAN: I mean, "shall be forever
25 barred" seems, to me, to be the most important part of

1 that language.

2 MR. MARTINEZ: I think that is the most
3 important part. But I think that it's the incorporation
4 of the entire phrase that can give the Court confidence
5 that what Congress was doing here was directly lifting
6 something from the Tucker Act.

7 JUSTICE SOTOMAYOR: 2401 just says, "A tort
8 claim against the United States." I don't know how else
9 you would say it, where else you would borrow it from if
10 what you're interested in is making sure that the U.S.
11 is responsible, that you're effectuating a waiver of
12 sovereign immunity.

13 MR. MARTINEZ: Justice Sotomayor, I think
14 the language that I'm referring to is the one that was
15 in the original 1946 FTCA, which tracked verbatim the
16 language from the Tucker Act. And so I think -- I think
17 that this Court can issue a narrow opinion that's
18 focused on the FTCA that emphasizes that that was --
19 that language was -- was lifted verbatim, it was
20 essentially cut and pasted from the Tucker Act, and it
21 was intended to -- to bring along with it --

22 JUSTICE SOTOMAYOR: Has the Tucker Act been
23 amended? To take that language out?

24 MR. MARTINEZ: The Tucker Act provision has
25 been amended slightly. It appears in 2501. And what

1 this Court said in *John R. Sand & Gravel* was that the
2 minor changes that had been made to -- to the Tucker Act
3 language were essentially insignificant.

4 JUSTICE KAGAN: Is there anything else you
5 would say to Justice Scalia is it's just "shall be
6 forever barred" plus a few more words? Anything else?

7 MR. MARTINEZ: Justice Kagan, I think it's
8 the same points that I made in response to your question
9 earlier. I think there are a bunch of other features of
10 this particular statute of limitations; the fact that
11 the Court had addressed it in *Soriano*, the fact that
12 the Court addressed it, although perhaps in dicta, in
13 *Kontrick*; the private laws that had expressly addressed
14 this particular statute; the fact that it was reenacted
15 in 1966 against a consistent backdrop of incorporation.
16 --

17 JUSTICE GINSBURG: As far as *Kontrick* is
18 concerned, that line of cases I thought came out with
19 *Bowles*, *Bowles v. Russell*, and *John R. Sand* that we're
20 not going to undeclare something jurisdictional that we,
21 the Court, but when it's -- we're dealing with a statute
22 that this Court has never said that about, then we don't
23 carry over that ancient regime.

24 MR. MARTINEZ: Justice Ginsburg, I think in
25 -- in footnote 8 of the *Kontrick* opinion, this Court

1 referred to 2401(b) and it said that it confined review
2 of district courts and was of a similar order to 28
3 U.S.C. 2107, which was the provision that was later at
4 issue in Bowles. And in Bowles this Court referred to
5 footnote 8 of Kontrick and used that footnote which
6 referred to 2107 and to the time bar of the FTCA and it
7 used that footnote as a reason to conclude that 2107 was
8 jurisdictional. And we think the same conclusion
9 follows here. I think the key point about this --

10 JUSTICE GINSBURG: I better take another
11 look at Kontrick.

12 MR. MARTINEZ: And Bowles, with respect,
13 Justice Ginsburg.

14 JUSTICE GINSBURG: In Bowles I was in
15 dissent.

16 MR. MARTINEZ: I -- I seem to remember that,
17 Justice Ginsburg. But I think the Court's opinion in
18 Bowles expressly addressed the meaning of that Kontrick
19 footnote.

20 I, think, stepping back a little bit from
21 the weeds here that we've been discussing, my colleague
22 and I have been getting into the details of the
23 legislative history, I think the big picture here is
24 that Congress, from the 1920s through the 1980s,
25 repeatedly engaged with the issue of equitable tolling

1 and at every turn it signaled its intent not to allow
2 equitable tolling.

3 We ask for reversal.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 The case is submitted.

6 (Whereupon, at 11:03 a.m., the case in the
7 above-entitled matter was submitted.)

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A				
abandon 39:16	24:25 40:15	42:17 45:4	12:6,10,14,15	bar 3:13,14,25
ability 4:22	addressed 6:24	answered 44:21	13:14 16:20,20	10:22 25:19
aboveentitled	7:3,16 16:7	44:24	17:3,3 20:4,11	32:16 43:15
1:11 54:7	17:10,12,16	anticipated 36:8	26:23 30:7,15	49:18 53:6
absolutely 40:8	52:11,12,13	anymore 5:20	30:22 33:7,20	barred 13:9,12
abstraction 36:7	53:18	anyway 20:9	34:20 35:18	13:12,21,23
act 3:15,22 4:15	addressing 5:22	appeals 18:10	36:12,13 44:24	30:25 31:3
4:15 5:14,17	5:23 38:10	appear 13:12	45:7,8 46:7,17	32:7 33:22
5:17 9:11 11:7	administrative	appearances	48:1,5,9,12	50:7,22,25
11:8,9,12,14	41:17	1:14	49:25	52:6
11:15,16,21,24	adopt 26:4	appears 51:25	arguments 11:4	bars 32:18
12:23 13:20	36:14 39:7	apples 43:25	15:1 19:7	based 6:14 8:13
14:2,3,8,12	48:6	applicable 35:19	arises 24:17,18	8:16 9:20
15:3 16:24	adopted 35:5,6	47:14	articulated	48:24
17:9,14,18	35:15,25 36:1	applied 7:10	37:14 45:12	basically 16:21
22:20 24:5	40:24	11:8,18 31:19	ascertained	36:15
26:8 28:7,19	adopting 45:21	34:10 35:5	26:18	basing 13:19
30:16,17,19,20	advanced 29:7	36:2	ash 35:12,20,22	basis 20:8 33:12
31:2,4,6,13,17	affairs 47:24	applies 31:17	aside 36:11	becoming 8:5
31:19,22,23,24	affirmative 36:3	32:20	asked 30:1 34:3	beggerly 16:8
31:24 32:18,24	agency 41:18	apply 8:10 11:1	asking 8:8 39:16	beginning 3:22
34:4 38:9,10	agent 47:24	11:1 12:7 14:3	assistant 1:15	behalf 1:17,18
38:11,17 39:10	agree 7:1 13:3	16:19,24 17:17	attached 5:1	2:4,7,10 3:8
39:10 40:23,25	15:15 23:14	17:18 31:19	attaching 25:24	13:17 26:24
41:7 42:1,15	29:6 35:1	34:11 35:17,22	auburn 16:9	50:1
43:21,21 44:8	40:10	41:12,20 42:7	authority 44:23	believe 36:8
44:9,11,12,17	agreed 37:19	42:20	availability 5:24	believed 34:24
45:23 47:3,4	alito 15:23 36:6	applying 11:20	27:5	best 22:12 39:19
47:18 48:7	37:5	11:22,22	available 5:4,24	better 22:11
50:11,15 51:6	allow 3:12 54:1	approach 22:11	7:19 31:7	53:10
51:16,20,22,24	allowed 15:6	22:11 26:15	aware 4:3 50:14	beyond 47:20
52:2	23:2,6	appropriate		big 6:19 40:22
acted 4:13	allowing 6:21	22:15 44:13	B	53:23
action 35:11	allows 50:5	aptly 27:8	b 12:4,7 13:1	bill 19:24 21:18
41:9 42:10	ambiguity 8:20	arbaugh 27:21	17:12 18:16	23:24
43:4,4	amended 51:23	29:8 33:16	49:6 53:1	bills 19:1,2 25:1
actions 17:19	51:25	34:6 36:1,2	back 28:21 32:3	25:3,3,12
18:5 41:16	american 47:7	area 39:9,9	34:7 35:16,21	bit 14:17 20:21
acts 31:11	analysis 6:12	areas 42:16	39:1,17 47:1	53:20
actual 12:25	ancien 35:16,21	argued 33:2	47:22 53:20	board 41:15
35:3 36:4	36:1	34:17 35:14	backdrop 18:7,8	42:8
add 23:4 26:2	ancient 52:23	argues 46:11	25:20 52:15	borak 35:16
31:11	announced 6:23	argument 1:12	background 8:4	borrow 51:9
addition 20:17	6:25 42:14	2:2,5,8 3:4,7	27:3,16 38:4	borrowed 44:9
address 9:11,12	answer 22:3	6:7 7:24 8:21	bad 20:4	borrowed 50:14
	23:23 36:21,22	9:14,21,24	badly 19:13,15	bound 34:24
	37:12 39:19	10:2,13 11:5	balance 26:19	bowles 52:19,19

53:4,4,12,14 53:18 branch 20:23 21:2 break 9:5 breaks 8:21 breyer 19:5 20:13,19 23:10 24:7,8,16 25:4 33:1,8 35:1 36:5 37:18 39:23 brief 17:21 22:14 31:1 32:5 33:20 50:13 briefs 14:6 19:6 19:7,18 29:8 bring 51:21 broader 13:15 13:16 50:10 brokamp 16:8 brother 27:6 brought 21:13 bunch 52:9 burden 22:22 28:6	5:7,12,19 7:3 7:12 8:5 9:10 10:22 14:15,24 16:8,10 17:14 17:24 18:24 21:23,24,24,25 23:19,20 25:9 26:14 28:3 35:14,16 37:15 37:21 39:1,17 46:10 50:8,9 54:5,6 cases 3:22,24 5:5 5:9,22,23,23 6:18 8:14 12:2 14:25 17:18 22:15 27:20 32:25 33:16 34:6,8 36:21 52:18 cause 35:11 caused 19:21 cautious 21:10 century 21:19 32:9 33:24 certain 6:25 14:4 39:2,13 39:25 certainly 11:4 13:3 37:4 40:6 cetera 20:9 23:15 change 24:2 25:25 26:5 36:17 37:10 changes 24:19 52:2 channel 47:23 chapter 9:20 30:9,10,11 chapters 9:23 characterize 5:18 characterized 27:8 chicago 19:19 chief 3:3,9 26:21	26:25 27:11 29:1 38:6 41:13,24 42:2 42:23 43:2,6 43:11 49:22 54:4 choice 21:21 25:15,16 38:3 47:13 choices 20:1 circuit 10:22 circumstance 10:24 38:3 circumstances 10:18 20:24 26:6 cited 14:5 22:13 50:12 civil 42:19 claim 13:22 48:7 50:21 51:8 claimant 22:17 claimants 14:10 14:12 claims 4:15 5:16 11:8,12,16 14:4,8 17:11 21:12 24:5 25:2,3 26:8 28:7,10 30:17 30:19 31:22,24 34:4 40:23 41:7,25 42:15 43:21 44:17,18 44:23 45:1,2,6 45:17 classic 13:9 clayton 31:3 clear 3:12,24 13:25 14:7 15:11 27:22,23 28:3,25 36:23 36:24 37:1,13 37:14 38:4 clerk 19:17 close 40:20 code 9:20 13:7	14:16 16:4 18:20 coexist 47:9 coexisted 47:1 48:4 cognizable 13:22 50:21 colleague 53:21 colloquy 22:13 22:25 colonial 47:7 come 8:17 15:1 21:3 34:7 47:22 50:7 comes 13:1 23:19 30:17 37:25 38:7 committee 14:11 common 11:24 33:24 40:21 compared 19:9 compelling 47:16 completely 35:19 conceive 37:8 conceived 22:9 concerned 52:18 concerns 14:20 27:5,18 conclude 23:9 53:7 concluded 15:25 conclusion 6:14 21:2 53:8 conclusive 16:12 conduct 6:12 conducted 15:19 confess 16:3 confidence 51:4 confined 53:1 congress 3:12,13 4:2,13,15 5:10 6:4,18,20 8:4 8:18,23 9:18 9:24 10:24 12:16,17 13:17	13:25 14:7,20 15:21 16:17,18 16:21 18:6,15 18:22 20:21 21:2,4 22:9,12 22:14,25 23:3 23:23 24:22,25 25:2,11,19,25 26:6 32:20 33:4,12 34:19 34:24 36:9,10 37:1,5,20,24 38:14 39:3,5 39:14 40:24 42:15,25 44:2 44:19 45:18,21 46:13 48:6,9 49:16,17 51:5 53:24 congressional 15:12 34:16,18 36:13 congressman 22:19 congresss 36:14 connection 28:12 consequence 29:23 consequences 5:1 25:24 considerably 27:24 consideration 21:17 considered 19:1 22:14 26:2 considering 44:12 consistent 15:17 23:3 52:15 consistently 20:23 constitution 24:19 constitutional 11:23
C				
c 1:8,16 2:1 3:1 29:4 53:3 cadence 31:2 calais 47:23 calebresis 26:12 call 19:23 called 46:12 cant 45:2 care 39:4 careful 21:10 carried 47:6 carry 52:23 carveout 28:9 41:19 47:20 49:10,15,17 carveouts 41:22 48:25 49:2,4,6 case 3:4 4:7,23				

construction 9:19 24:11	30:1 31:4 32:12 33:10	dating 32:7	determination 36:16	53:15
contain 30:10	34:8 35:3,7,9	day 14:11	determine 33:11	distinctions 7:14
contend 38:16	35:12,17,22	days 35:16,21	39:3	17:6
contends 31:7	36:21,25 37:4	dealing 19:11	developed 33:11	distinctive 16:16
context 3:15,22	37:13 38:1,8	52:21	dicta 52:12	33:23
5:14 6:2 11:25	38:13 41:9,16	deathly 19:16	didnt 6:12 10:25	distinguish 4:6
20:21 24:11,12	42:6,10 44:18	debated 20:25	11:25 16:18	distinguishes
24:18,18,20,21	44:22,23 45:1	20:25	24:23 25:4,5,6	50:8
25:10 38:9	45:2,6,17	december 1:9	30:2 35:5	district 29:19
continue 31:19	46:16,20,22	decide 22:10,10	39:23 40:25	44:22 45:14
contra 8:7	48:21 49:4,14	decided 48:9	44:2,24 45:17	53:2
contracts 11:24	49:20,21 50:16	decision 3:23,24	46:14	divide 45:5
19:9,10	51:4,17 52:1	6:16 17:11	difference 36:17	doctrine 22:8
controlling 38:3	52:11,12,21,22	32:8,13 35:6,8	44:16,22,25	doctrines 44:25
38:5	52:25 53:4	35:12 45:12	differences 13:2	doesnt 11:9,14
controversial	courthouse	49:16	40:22 41:3	20:6 28:24
21:18	19:17	decisions 5:14	different 7:2,5	30:4 34:18
correct 14:23	courts 3:23 4:22	8:3 27:21 32:5	8:19,24 9:23	39:18 41:14
cort 35:12,19,20	5:5,9,13 10:20	32:6,7,23 38:1	11:21 12:22	42:5,6 45:22
35:21	13:5 15:17	38:7,12 46:13	14:18 15:18	47:21 49:17
couldnt 15:15	18:7,9,9 24:2	49:9	18:17,18 23:4	doing 5:20 6:5
37:8 46:19	25:22 27:21	deemed 28:9	27:3,16 29:4	33:8 51:5
counsel 26:21	28:5 29:24	defendant 41:7	31:23 35:10	dont 6:10 8:9
33:21 35:13	35:12 36:15,20	41:9	36:5,22 41:1	9:9 11:3,5,14
49:22 54:4	37:11 38:3	defining 28:11	42:17 43:1,12	12:19 14:22,23
counter 9:2	39:12 40:4	degrees 36:7	44:15 45:9	15:4,14 17:4
counters 8:22	45:12,14,24	delegate 36:15	46:3 49:19	34:10 36:10
couple 13:13	46:13,20 49:9	deliberate 11:7	differently	37:14 38:25
44:9	53:2,17	25:15,16	23:20 37:11	39:2,4,6 40:14
course 7:13 11:6	create 10:17	demanding	47:11	41:19,20 43:18
15:13 23:11	21:5 22:22	27:24 35:13	direct 33:2	48:19 49:8
24:10	created 44:8,10	demonstration	38:12	51:8 52:22
court 1:1,12	44:20 45:25	36:3	directly 51:5	drafted 3:14
3:10,21 4:1,3,8	creating 33:9,10	department	disagree 28:15	drafting 14:1,20
4:18 5:7,8,18	critical 32:13	1:16 20:22	29:18	drain 19:25
5:21,25 6:11	criticism 38:12	22:19,20	disagreement	drawn 32:22
6:15,17 7:3,19	crossreference	depend 34:18	40:19	drew 5:18
8:9,11 9:15	30:12	depends 34:16	discretion 22:16	driveby 29:24
10:7,19 11:8	current 26:5	depositions	49:13	30:3
11:18 12:1	currently 50:14	43:16	discretionary	drives 17:23
14:12 15:18	cut 13:19 41:14	deserving 22:2	47:13	drop 37:15
16:7,11 17:10	50:2 51:20	designated	discussed 25:1	duplicating
17:16 18:4,5		42:17	36:4	44:12
20:7 24:9 25:9		despite 47:5	discussing 14:6	
25:21 27:1		detailed 7:17	53:21	
29:19,20,22		details 32:21	dissent 34:9	
		53:22		
	D			E
	d 1:8,16 3:1			e 2:1 3:1,1
	dates 34:11			earlier 23:2

25:12 27:17 41:5 52:9 easy 22:1 effect 50:14 effective 34:10 effectuating 51:11 effort 16:4 eliminate 31:12 eliminating 39:10 eminently 23:8 emphasizes 51:18 employees 7:8 enacted 6:5 35:20 37:22 40:2 enacting 34:25 engage 45:15 engaged 53:25 english 47:2,5 47:19 entire 51:4 entirely 32:22 44:15 enunciates 40:8 envision 36:10 equitable 3:13 5:3,24 6:21 8:2 9:9 16:19,23 18:24 20:23 21:22,23 22:1 22:5,8 23:2,5 27:5,7 30:17 31:7 33:18 41:10 44:23,25 45:2,11,16 46:2,5,14,19 46:21 47:1,8 47:11,12 48:11 48:15,16,18,22 49:3,7,18 53:25 54:2 equity 45:5 eric 1:18 2:6 26:23	err 29:13,15 especially 22:2 39:8 esq 1:15,18 2:3,6 2:9 essential 12:15 essentially 6:16 8:5 9:8 10:24 11:16 13:19 17:17 26:15 51:20 52:3 estoppel 27:5,8 et 20:9 23:15 event 30:6 evidence 7:17,18 8:16 21:16 23:8 25:7 37:20 evolution 25:17 exact 15:9 24:25 exactly 15:19 38:8 example 15:2 35:7,9 41:17 45:10 47:18 exception 10:23 12:5 22:5 31:13 exceptional 21:24 exceptions 41:11 42:22 43:19,20 43:22 44:1,5 exclusion 46:12 46:18 exclusions 46:10 46:25 47:3,4,6 47:15,15 excuse 30:8 34:12,12 executive 20:23 21:2 exemption 39:10 exhaustion 29:17 30:8 exist 35:5 45:17 45:23	existed 39:25 45:14,22 existence 43:19 49:10 exists 47:22 48:20 explained 49:1 explaining 4:4 explicable 44:2 explicit 38:23 explicitly 18:16 exposition 32:15 express 11:6 17:8 28:8 42:16 expression 37:1 expressly 9:18 9:24 17:16 18:4 21:11 52:13 53:18 extension 7:7 extensive 7:18 extent 11:10,11 41:8 42:5	<hr/> F <hr/> face 24:1 fact 9:7 17:9 18:3,21 19:22 21:17 31:11 34:5 41:2 44:1 45:18 46:8 47:3,5 48:2,3 52:10,11,14 fails 48:5 fair 31:5 fairly 35:13 48:8 49:16 fall 7:8 familiar 32:20 far 33:2 42:19 52:17 fast 22:24 favor 9:8 feature 18:12 features 3:11 52:9	federal 7:7 11:22,23,23,24 15:19 24:4 26:8 28:7 31:22,24 34:4 41:6,25 42:15 42:17,19 43:3 44:18 45:14 48:6,14,20 50:6 fewer 14:18 fifth 32:17 fight 13:3 figure 15:21 16:5 file 22:17 fill 14:2 final 19:4 25:13 finally 18:21 find 6:4 24:14 43:18 fine 20:7 firm 37:23 40:8 first 3:4,13 4:12 9:14 21:5 24:9 27:4,13 32:14 fits 4:7 five 17:6 floor 33:4 florida 45:13 46:23 focused 51:18 follow 36:12 followed 45:1 following 33:10 follows 6:17 53:9 footnote 42:21 52:25 53:5,5,7 53:19 forbade 9:18 forever 13:12,21 13:23 30:25 31:3 32:6 33:22 50:7,22 50:24 52:6 forms 26:2	forth 24:19 forward 8:17 15:1 four 32:14 34:8 49:23 frequently 19:13 fresh 7:9 friend 9:22 friendlys 10:21 ft 7:13 ftca 7:2,13,14 10:15,16 14:1 14:6 17:4 18:25 23:1 25:10,13 38:14 51:15,18 53:6 ftcas 3:11 fulltime 47:24 fun 1:6 functional 20:5 fundamental 41:3 44:16 funny 23:11 further 49:21 future 5:20
				<hr/> G <hr/> g 3:1 gap 14:2,9 gender 40:5 general 1:16 42:14 getting 37:18 53:22 ginsburg 3:17 4:1 5:6,16 7:5 11:9 17:13,22 21:20 27:17 30:13 37:17 40:18 44:21 52:17,24 53:10 53:13,14,17 give 14:9 17:5 20:20 22:16 34:19,19 36:21 41:17,22 42:9 44:20 45:2	

<p>51:4 given 4:17 gives 29:11 go 19:23 45:10 goal 14:1 24:10 24:13 goes 29:24 43:6 43:7 going 5:25 6:1,3 13:2 14:14,14 15:5 21:14,15 34:23 35:22 37:21 42:20 43:22 44:19 45:20 47:1 52:20 golden 17:5 good 6:7 19:6,7 20:14,14 22:16 48:9 govern 22:4 governing 4:15 government 5:3 7:23 8:1,16 9:1 12:3 14:25 16:23 17:1,24 17:25 19:8,11 19:14 20:6 21:8,12 22:22 28:16 29:7,7 29:18 30:1 31:6 32:14 44:21,24 46:4 46:11 48:12 49:15 50:6 governmental 27:12 governments 12:8 30:14,16 32:3 45:4 46:7 48:1,4 governs 26:16 grand 24:20 grander 24:18 grappled 18:23 gravel 16:9 52:1 great 21:6,9</p>	<p>25:6 greater 28:7 ground 48:5 guess 7:22 gwynn 22:19</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>hadnt 29:21 36:7 hand 27:25 happen 19:15,20 37:21 happens 20:8 38:25 happy 40:10 hard 22:24 23:22 26:9,13 36:8 hardship 22:15 47:14,25 harmony 30:19 hate 50:2 havent 16:4 headed 42:12 heading 28:22 headings 28:21 hear 3:3 4:23 heard 40:19 hearing 33:3 heavily 20:24,25 held 16:2 29:19 29:20 31:4 48:22 helpful 27:2 henderson 5:7 heres 16:16 highly 28:7 historical 6:2,12 24:13 28:16 32:4 46:24 history 3:12 10:8,11 12:21 14:5,19 15:20 23:15,22 39:18 48:2,4 53:23 hold 29:17 49:9 hole 14:8</p>	<p>holland 45:12 45:18 46:23 48:23 honor 3:20 4:11 6:10 9:13 10:7 12:19 14:24 16:3 17:15 20:10 22:7 26:10 31:21 34:22 39:22 human 13:16 hundreds 47:2 hurricane 20:8 hurricanes 19:16 hurt 19:12,13 20:7 hypothetical 24:22,24</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 10:16 37:7 37:10 identical 4:14 5:15 13:25 ignore 34:17 ill 19:16 im 4:2 23:11 35:8 40:10,15 42:11 45:9 50:13,18,20 51:14 imagine 18:19 immunity 6:19 17:19,23 21:6 30:16 32:10 51:12 imply 35:11 importance 33:23 important 8:22 13:14 41:4 50:3,25 51:3 importantly 26:14 impractical 22:21,23</p>	<p>impression 27:13 inadvertent 25:15 include 8:2 40:5 including 10:21 18:9 incompatible 34:15 incorporated 12:16 incorporating 4:16 incorporation 11:7 17:8 51:3 52:15 independent 34:2 indicated 10:25 indication 35:3 37:24 individual 39:4 47:14 individualized 47:12 inference 6:15 8:14 9:19 inferring 39:25 inherent 45:15 45:16 inherently 30:25 47:10 injunction 45:3 inquiry 6:3 12:11,11 14:14 15:20 insignificant 52:3 insist 38:24 instance 34:9 instances 40:6 intended 10:17 11:17 37:6,6 51:21 intending 49:18 intent 8:19 15:12 24:14</p>	<p>26:17 27:25 33:12 34:16,18 35:3 36:4,9,13 36:14 37:2,3 39:3 54:1 interested 51:10 interpret 42:7 interpretation 23:25 26:12 34:6 interpreted 3:21 5:13 15:4,24 30:19 39:12 40:4,5 interpreting 38:8 involved 35:15 involving 25:2 irwin 5:23 6:7,9 6:11,23,25 7:9 7:16 8:7,12 9:7 12:11 14:20 15:7,17 16:11 17:1 18:3,18 23:17,20 24:13 26:16,16 27:4 27:13 28:1 33:17,20,21 34:6 35:25,25 isnt 22:3 23:21 24:21 25:6 30:12 31:9 43:15 44:6 45:4 issue 5:2 7:12 18:24 27:4 34:7 35:10 46:1,2,15 51:17 53:4,25 issued 38:13,13 issues 36:10 46:3 iterations 30:23</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>j 35:16 john 16:9 52:1</p>
---	--	--	--	---

52:19 judge 10:21 26:11 judges 22:16 june 45:9 juries 40:1 jurisdiction 3:18 3:19 4:2,4,6,7 5:22 23:16,17 23:25 28:6,22 29:23 36:18 37:8,11,24,25 44:3,3 46:2 jurisdictional 3:14,25 4:10 4:18,19,25 5:9 5:11,19 8:2,7 8:24 12:9,18 13:4 15:4 16:1 16:2,6,18,23 18:11,17 25:22 25:23,24 27:19 28:9,12,13,17 28:19,22 29:9 29:12,18,20,25 30:2,4,7,9,25 31:5 32:11,16 33:17 36:15,16 36:23 37:9 46:5 52:20 53:8 jurisprudence 45:5 jury 40:3 justice 1:16 3:3 3:9,17 4:1,19 4:24 5:6,16 6:6 7:5,21 8:20 9:4 10:3,8,12,14 11:9 12:6,13 13:6 14:13 15:7,10,16,23 16:14 17:2,13 17:22 19:5 20:13,19,22 21:20 22:19,20 23:10 24:4,7,8	24:16 25:4 26:4,11,21,25 27:11,17 29:1 29:13,15 30:13 31:9,15 33:1,8 34:3,14,23 35:1 36:4,6 37:5,17,18 38:6,18,22 39:23 40:6,12 40:18,20 41:13 41:24 42:2,23 43:2,6,11,18 44:6,21 48:14 48:17,24 49:5 49:12,22 50:2 50:18,24 51:7 51:13,22 52:4 52:5,7,17,24 53:10,13,14,17 54:4 <hr/> K <hr/> kagan 6:6 7:21 12:6,13 13:6 14:13 16:14 17:2 50:18,24 52:4,7 kendall 3:23 32:8,13 kennedy 48:14 48:17,24 49:5 49:12 key 7:11 53:9 kind 6:15 8:13 13:7,9 15:19 16:19 22:23 kinds 16:15 19:20 44:23 knew 12:16 know 6:25 7:24 11:19 12:3,25 18:4 21:7 23:9 24:23 25:18 43:18,25 48:19 49:8 51:8 knowledge	50:12 knows 9:15 kontrick 17:12 52:13,17,25 53:5,11,18 kosak 10:22 kwai 1:6 <hr/> L <hr/> label 25:23 30:1 labeled 46:9 labor 31:5 language 3:14 3:20,21 8:12 10:15 11:7,14 11:15,16,25 12:13,16,17,22 12:23,25 13:4 13:8,8,10,12 13:20,24,25 14:10 17:9 28:4 30:10,18 31:1,10,16,22 32:19,23 33:22 33:24,25 38:7 38:7,8,11,16 38:24 39:8,11 39:12,15 40:24 41:1,11 48:24 50:15,18 51:1 51:14,16,19,23 52:3 large 40:4 largely 48:5 late 22:17 23:5 26:1 laughter 20:16 24:6 40:17 law 8:18 9:17,18 10:19 11:2,18 11:20,20,22,23 11:23,24 20:3 20:12,17 23:9 23:12,13 42:4 43:21,23 44:4 44:5 laws 18:14 35:5	52:13 lawyer 19:10,16 lawyers 19:11 19:18 lead 37:16 left 14:2 19:4 legal 33:10 legislating 25:20 legislation 47:7 legislative 9:19 10:8,10 14:5 23:15,22 24:14 26:17 39:18 48:4 49:14 53:23 lengthy 6:12 liability 10:17 43:7,8,15 liable 10:18 41:8 42:4 lifted 15:2 31:10 50:11 51:19 lifting 51:5 light 23:7 24:12 25:7 26:5 limit 26:7 50:23 limitation 4:9,10 limitations 7:25 14:15,24 18:20 21:11,15,22 22:4 27:7 28:13,17,18 29:9 30:11 31:18 32:19 37:23,23 38:21 43:15 47:3,6 47:19,21 52:10 limited 37:13 line 3:24 5:9,13 5:17,23 27:20 32:25 34:6 52:18 listed 42:21 litigated 13:5 46:15,16 little 11:21 14:17 20:21	53:20 living 24:4 34:4 logical 6:15 8:13 london 47:24 long 5:9,13 40:2 look 5:25 6:1 7:9 8:12 11:19 14:19 15:14 20:6 22:21 24:12 32:12 38:22 53:11 looked 15:18,23 16:6 looking 14:7 23:24 38:14 lot 10:20 11:4 18:18 30:18 38:22 43:20 lots 19:15 lower 13:5 18:9 25:22 <hr/> M <hr/> m 1:13 3:2 54:6 magic 5:25 38:24 main 30:14 making 12:15 16:20,20 45:9 51:10 man 40:12 manage 47:24 manner 11:10 26:12 41:8 43:10 market 25:11 martinez 1:15 2:3,9 3:6,7,9 3:19 4:11,21 4:25 5:21 6:6 6:10 7:11 8:8 9:3,6 10:5,10 11:13 12:8,19 13:11 14:22 15:9,15 16:3 17:2,15 18:1 20:10,17,20
---	--	--	---	--

<p>21:20 22:7 24:3,8,24 25:8 26:9,13 49:23 49:25 50:2,9 50:20 51:2,13 51:24 52:7,24 53:12,16 matter 1:11 4:6 28:16 32:11 36:5 38:20 54:7 matters 45:19 mcneil 29:13,15 29:17 30:1,2 mean 16:18 19:20 24:17 27:12 36:19 39:13,23,24 42:5,6,6 43:10 43:12 46:13 49:17 50:24 meaning 4:6,17 4:18 23:18 25:7 26:1 32:4 34:19 53:18 meanings 4:5,5 means 40:12 meant 9:20 12:17 13:6 16:17 44:3 45:21 member 33:5 39:4 members 36:10 men 40:1 mention 18:5 mentioned 9:12 18:4 met 28:5 mind 8:19 23:14 36:17 39:6,15 40:13 mine 6:18 8:14 minimum 18:2 minor 24:20 52:2 minutes 49:23</p>	<p>misapprehends 48:2 misunderstan... 42:3 mixes 19:17 model 40:25 morning 3:4 moved 29:3 muniz 25:9</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>n 2:1,1 3:1 narrow 4:20 44:3 51:17 necessarily 33:13 need 11:25 needed 11:15 28:25 needs 8:10,11 neither 40:8 never 32:6 40:13 52:22 new 6:8 11:11 35:4 44:7,10 newlycreated 44:18 nine 23:4 nonjurisdiction 36:18 nonstop 23:16 normally 24:17 24:18 25:5,8 45:22 note 31:1 noted 33:20 notes 32:18 notice 41:18,22 42:9 number 8:25,25 9:10 18:9,14 19:2 30:21 31:1 32:1 33:9 33:10 36:24 37:14 41:11 46:8 48:20</p>	<hr/> <p style="text-align: center;">O</p> <hr/> <p>o 2:1 3:1 object 30:18 obvious 31:15 obviously 7:12 26:17 41:14 43:13 odd 19:20 odds 26:15 oh 48:19 old 7:8 omission 25:13 25:15 once 4:7 ones 5:6 16:5,6,7 open 14:2 19:8 operate 47:11 opinion 10:21 40:7 46:20 51:17 52:25 53:17 opportunity 40:16 oppose 19:8 opposed 20:23 oral 1:11 2:2,5 3:7 26:23 33:20 oranges 44:1 order 21:23 53:2 ordinarily 22:3 39:6 original 28:19 47:2,19 51:15 originates 12:22 ought 42:11 overarching 6:3 overcome 8:17 11:5 15:11 17:24 overlap 31:25</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p 3:1 page 2:2 22:13 22:14 papers 19:17</p>	<p>paragraph 32:13,15 parallel 3:15 parity 12:3 part 9:16 20:3,4 45:5 50:25 51:3 particular 8:18 17:10,12 24:15 25:10 31:2 34:1 38:16 41:19 52:10,14 particularly 37:1 parties 7:1 11:1 parts 29:4 40:25 party 9:1 11:11 12:4 42:5 pass 25:5,6,7 passed 6:8,13 7:2,15,15 18:15 23:1,23 26:18 pasted 51:20 pasting 13:19 pension 28:10 people 19:9,12 21:8 47:20 perfect 35:7 period 39:13 permit 48:15 permitted 18:25 person 10:17,18 personal 4:7 persons 20:6 persuasive 43:20 pertinent 32:10 petitioner 1:4,17 2:4,10 3:8 50:1 phrase 12:25 13:15,15,16,22 29:24 31:9 32:1,1 50:10 50:10,20 51:4 phrased 38:21 phrases 40:21</p>	<p>44:9 pick 23:25 34:20 40:23 picture 53:23 place 21:5 placed 9:21 placement 9:14 9:22 places 13:13 plaintiff 35:14 47:16 plaintiffs 45:9 please 3:10 27:1 plug 14:9 plus 52:6 point 9:12 11:17 12:20,21 17:20 23:22 25:20 28:6 32:4 33:19 35:19 41:5 42:3 44:6 45:9,10 48:13 53:9 pointed 27:6,17 33:21 pointing 27:3 points 4:12 9:13 52:8 position 12:9 21:1 26:5 32:8 34:9,15 35:4 power 45:15 powers 44:19 45:16,19,22,24 practice 15:17 pre1946 32:4 precedent 15:21 precedents 16:10 precise 38:8 precisely 35:24 preclude 49:11 preexisting 13:20 preirwin 7:6,23 16:21 present 18:3</p>
--	--	---	---	---

presentment 42:18	proceed 20:9	questions 49:21	reexamined 25:19	28:5 33:17
preserve 21:16	proceeded 39:20	quite 7:2 23:11	refer 18:16	requires 12:11
presume 5:8	proceedings 41:6	23:20 37:2	referred 44:4	47:13
32:21 39:14	processed 4:8	quote 14:4 33:11	53:1,4,6	res 9:3
presumed 8:6	proposals 23:3	<hr/>	referring 5:6	reserve 26:19
presumption	26:2 49:14	R	51:14	resist 12:20
6:15 8:9,10,13	proposed 19:3	r 3:1 16:9 52:1	refers 43:21	respect 7:20 8:1
8:15,17 15:8	25:2,3,12	52:19	49:15	8:18 10:1,13
15:10 16:12,13	proposition 26:8	raised 9:13	reflect 49:15,16	11:11 16:25
17:23 27:6,14	protect 21:12	10:14 22:18	reflected 22:13	17:2 24:14
27:15 29:12	provide 28:25	41:5	regard 29:6 34:3	25:17 27:12
45:11	30:4	random 19:25	35:25 36:22	43:3 53:12
presumptions	provides 28:4	read 20:2	regime 7:8 35:16	respectfully
38:4	provision 5:8,10	real 20:1	35:21 36:1	28:15
presumptive	7:15 8:23	realistic 32:22	44:7 52:23	respondent 1:19
39:3	10:23 13:1,20	reallife 18:15	regional 16:9	2:7 26:24
presumptively	17:12 21:11,15	really 6:7 7:22	rejected 23:3	response 17:20
43:5	25:13 28:10,17	8:3 12:4,10	35:18 46:20,22	52:8
pretty 21:23	28:20,23 29:9	25:6 36:9	relates 45:8	responsible
23:22	30:9 46:19	48:13	relationship	51:11
prevent 8:5	51:24 53:3	reason 9:11 19:6	21:8	rest 31:21,25
primarily 46:8	provisions 9:15	20:5,14,14	relevant 6:2	result 43:1
primary 9:11	9:15,23 19:3	22:17 26:7	13:21 14:11	reversal 54:3
20:11	28:14 29:10	46:24 53:7	23:13	review 53:1
principle 10:23	46:9,21,25	reasonable 6:20	reliance 25:11	revolutionary
12:2,3,5 41:14	47:11 48:3	23:8	relies 32:14 46:7	21:4
42:14	purpose 6:3	reasoned 6:16	rely 33:16	rewriting 22:9
principles 34:5	21:15 31:12,16	reasons 9:10	remaining 49:24	richards 10:20
prior 5:19 8:6	purposes 13:14	22:5,6 23:24	remedies 45:2	11:19 42:21
17:1 31:11	14:6	rebut 16:15	remedy 21:5	right 13:10
38:12 48:6	put 8:24 9:7	rebuttable 8:15	remember 53:16	14:11 15:8
private 10:17,18	15:13 26:15	8:15 16:13	repeat 31:16	23:12 24:7
11:1,11 12:4	36:11 37:18	rebuttal 2:8	repeated 13:1	26:12 33:5,15
18:14 19:24	38:9	26:20 49:25	repeatedly 15:4	40:5,7,13 43:7
35:11 41:9,9	putting 25:23	recodification	15:18 18:23	44:14
41:16 42:5	<hr/>	9:16,17,18	26:2 31:6	rise 29:11
52:13	Q	10:4,6 29:2	53:25	roberts 3:3
probably 33:23	question 15:5,12	recognized	report 33:3	26:21 27:11
problem 33:5	18:23 19:8	10:19,21 11:19	reports 14:11	29:1 38:6
38:10 45:22	22:14 23:12,13	12:1 44:17	requirement	41:13,24 42:2
47:16	23:21,21 24:17	49:6	27:18,22,23	42:23 43:2,6
problems 30:22	24:21 25:1	reconceptuali...	28:2,4 29:17	43:11 49:22
procedure 42:19	27:13 34:3	21:7	29:19,21 30:2	54:4
43:3	35:2 36:22	reenacted 18:6	30:8 32:9,16	roman 1:15 2:3
procedures	43:16 46:6	25:25 52:14	42:9,18 47:25	2:9 3:7 49:25
43:12,12,23	52:8	reenactment	requirements	rotella 31:4
		18:13		rule 7:1 8:4

10:25 17:5,17 22:23 27:4,16 27:17 30:4 32:15 35:17 36:24,24 37:13 39:17 40:7,8,9 41:10 50:4 rules 4:7 27:4 33:10,16 34:10 35:4 36:2,25 37:14,15 38:4 39:2,6 42:6,7 42:19 48:10,11 ruling 29:25 rulings 38:13,15 run 6:18 8:14 47:21 runs 19:18 russell 52:19	scalia 4:19,24 10:3,8,12 15:7 15:10,16 24:4 26:4,11 31:9 31:15 34:4,14 34:23 38:18,22 40:6,12,20 43:18 50:2 52:5 schnapper 1:18 2:6 26:22,23 26:25 27:14 29:3,14,16 30:13,21 31:14 31:20 33:6,15 34:22 35:1 36:20 37:12,17 38:2,15,20 39:21 40:10,14 40:18,19 41:2 41:21,25 42:13 42:25 43:5,9 43:14 44:14 45:7 48:16,19 49:2,8,13 search 27:25 37:3,16 seas 47:20 seattle 1:18 sebelius 27:21 second 3:16 10:1 10:13,22 21:6 27:15 46:1 section 8:24,25 9:17 10:6,16 28:10,19,20,23 30:8 41:6 42:22 46:10 sections 29:4 31:23,24 see 7:21 16:24 24:16 seek 33:11 senate 19:23 sense 4:20,21 44:3 sent 44:18	sentence 32:17 sentences 32:14 separate 28:18 29:5,10 30:23 46:6 48:11 49:19 separated 9:16 separately 15:14 series 32:7 42:16 42:20 settled 4:16 show 16:11 23:15 showed 23:1 showing 8:17 45:20 47:13 shows 13:16,18 16:17,18 33:4 side 11:6 20:12 20:18 23:9 signaled 54:1 significance 34:2 significant 7:14 27:9 32:24 significantly 16:8 similar 5:10,14 7:24 14:17 15:3 53:2 simply 28:24 30:4 39:19 single 39:5 sit 38:25 39:17 40:3 sitting 36:10 40:1 situation 33:14 35:24 six 3:22 28:5 slight 9:8 13:2 slightly 12:21 23:14 36:21 51:25 small 6:21 solicitation 30:3 solicitor 1:15	somebody 19:18 somewhat 19:25 27:16 35:10,13 46:3 47:13 soriano 7:3 17:11,13 18:8 25:21 34:12 52:11 sorry 23:11 29:14 35:8 39:24 50:18 sort 12:2 20:5 32:21 35:4 43:25 46:11 sorts 41:18 sotomayor 8:20 9:4 10:14 29:13,15 44:6 51:7,13,22 sounding 14:4 sounds 14:13 sovereign 6:19 17:19,22 21:6 30:16 32:10 51:12 specific 17:4 28:7 41:11 specifically 10:25 spelled 42:16 43:1 spinning 36:6 staff 33:4 stand 7:23 standard 35:13 standards 31:5 45:11 stare 14:19 start 27:2 state 10:19 11:2 11:20 41:9,16 42:6,10 43:4 43:21,23 44:4 44:5 47:7 statement 18:7 27:22,23 28:3 28:25 33:3	36:23,24 37:13 37:14 38:4 states 1:1,3,12 3:5 13:22 19:21 20:22 33:21,25 35:7 41:7 42:4,21 46:17 50:21 51:8 statute 4:14,15 5:12 6:1,5,24 7:7,10,25 12:24 13:18 14:15,24 15:2 15:14 16:17,25 17:10 18:3,6 18:10,13,17,19 19:4 21:11,21 22:4,9 23:24 24:15 25:18,25 26:3,5,18 27:7 28:13,16,18,24 29:9,10 30:11 31:12 32:19 35:15,20,25 36:1 37:22,22 37:23 38:21,25 39:8 43:14 44:10 45:21 46:4 47:2,5,19 47:21 48:25 50:5,12,13 52:10,14,21 statutes 6:8,8,13 9:20 15:3,19 15:24 16:22 17:18 18:15 27:12 30:15 31:2 32:2 34:11 36:3 38:23,23 39:24 40:1 41:4 44:15 46:8,25 48:15,21 49:5 statutespecific 7:17 8:16 12:11 15:1,20
S				
s 2:1 3:1 9:20 12:21 13:7 14:16 18:20 29:4 51:10 53:3 safeguard 21:12 sand 16:9 52:1 52:19 sandoval 35:9 35:10 sat 13:17 satisfied 29:21 satisfy 28:3 saw 14:8 saying 14:16 16:16 27:9 37:6 39:25 44:22 50:5 says 8:12,14 11:19 16:21 24:13 26:16 32:17 36:5 41:6 42:4 43:9 45:18 51:7 scale 9:8 27:10 27:25				

23:7 statutory 11:23 24:11 26:12 27:18 28:2 30:7 46:9,12 46:18,21 47:11 47:14,15 48:7 48:10,21 49:2 49:10,17 stayed 24:1 steals 19:18 step 6:19,21 21:4,9 stepping 53:20 stick 5:19 strict 21:14 stringent 4:9 strong 15:1 22:6 25:6 29:11 39:7 45:20 strongest 11:5 stuff 37:25 sub 30:11 subject 4:6 12:10 18:11,11 27:7 30:10 subjective 37:2 submitted 54:5 54:7 substantive 11:17 subtle 23:14 succeeding 25:11 suck 43:23 suggest 6:7 30:5 suggested 20:11 25:21 32:5 33:23 suggestion 22:18 suggests 28:1 46:4 suing 19:10 suit 8:1 50:5 suits 11:8 17:1 supplement 47:9 49:20	supplemented 46:22 support 10:9 30:5 supports 10:11 10:11 supposed 11:18 14:21 supreme 1:1,12 sure 4:2 16:14 40:15 51:10 <hr/> T <hr/> t 2:1,1 table 9:25 34:7 take 6:18,21 12:6 14:15,21 14:23 21:4 30:14 33:1 40:25 45:21,24 51:23 53:10 taken 34:9 35:3 talking 24:5 50:19,20 taxpayer 46:17 technicality 19:23 ten 18:14 term 28:21 terms 24:19 28:11 33:3 text 3:11 6:1 10:3 15:20 24:12 28:24 textual 9:13 10:1 11:3,5 texture 10:12 thank 26:21 49:22 54:4 thats 4:1,24 9:23 9:23 11:11,18 12:24 13:1,4 13:21 15:9,16 15:16 16:19 17:3,3 18:12 18:17,23 20:3 20:14,14 21:25	22:7,8,13 24:7 25:6,8 27:17 27:23 33:6,6 33:13,15,25 35:8,24 36:18 41:2,13 43:7,7 44:14 45:8 50:12,14 51:17 theory 42:10 theres 8:12,20 9:9 10:15 13:2 13:8 15:5 20:13 27:15 36:3 37:19,23 42:20 44:16,25 45:20 46:5,11 46:24 47:25 48:22 50:12,13 theyre 19:11 40:3,4 41:4 43:11 47:6,23 49:18 theyve 21:3 49:19 thing 7:12 19:22 32:21 39:14 things 19:15,20 28:8,9 29:3 33:12 36:11 40:2 41:19 44:10 47:8 think 4:11,12 5:5,17,21 6:10 6:11,11,17,20 7:1,11,13 8:9 8:11 9:6,7,9,11 10:7,14 11:3 11:14,17 13:6 13:11,13,18,23 14:22,23,25 15:5,16 16:6 16:10,25 17:4 18:1,1,2 19:6 22:7,12 23:1,8 23:10,12 24:3 24:8,9,25 25:16,17 26:6	26:9,13,14,17 27:2,8 30:21 31:8,18,20 33:15 36:20 37:11,12,17,19 38:2 39:19 40:11,12,14,19 41:4,12 42:23 43:2 44:2,14 45:7 48:1,8,13 49:15 50:4,9 50:16,22 51:2 51:3,13,16,16 52:7,9,24 53:8 53:9,17,20,23 thinking 15:22 36:11 thought 7:22,25 8:4 12:21 14:20 17:13 33:5 34:15 37:7,20,24 40:2 52:18 three 3:11 15:13 17:5,5 throw 19:22 20:7 thumb 9:8 27:9 tick 17:6 tie 8:21 9:5,7,9 time 3:13,25 4:3 4:9,9 6:5 10:22 19:25 22:12 23:17 25:19,20 26:18,19 34:1 34:20,24 45:25 50:3 53:6 times 23:4 46:16 title 7:7,20 9:21 today 22:10 26:7 tolling 3:13 5:3 5:25 6:21 8:2 9:9 12:10 15:6 16:19,24 18:12 18:24 19:3 20:24 21:22,23 22:1,8 23:2,4,5	25:5 26:2 30:17 31:7 33:18 41:10 45:11,16 46:2 46:5,9,12,14 46:18,19,22,25 47:1,8,12,12 48:7,10,11,15 48:16,18,21,22 49:3,7,18 53:25 54:2 tollings 48:8 tort 5:16 11:12 11:16,20 14:4 14:8,10 17:11 17:19 18:4 19:21 21:5 24:4 25:2,3 26:8 28:7 30:17,19 31:22 31:24 34:4 40:23 41:7 42:15 43:21 51:7 torts 19:12,13 31:13,17 39:11 41:25 48:7 tough 21:23 track 37:18 tracked 51:15 traction 11:4 transplanted 3:15 4:13 treat 8:25 9:1 12:3 16:12,13 24:2 25:14 treated 5:10 19:14 21:11 25:22 treatment 6:2 24:13 treats 23:20 tried 4:5 true 6:22,24 10:14 11:13 22:8 25:8 33:25 41:2
--	--	--	---	---

truly 21:24 28:3	understood 4:16	51:11	5:1,2 6:1 14:18	1346 28:4,11
try 16:5 20:20	6:4,16 12:14	waiving 6:19	23:16 30:24	161 30:11
trying 15:21	12:17 16:22	17:19 30:15	32:6 34:19	1623 47:3
tucker 3:15,21	undisturbed	want 3:12 10:25	40:20,23 42:3	17 42:22
4:14,15 5:14	5:10	12:19,20 17:4	50:6 52:6	171 30:9,10
5:17 9:11 11:7	uniform 18:8	23:10 38:12	world 7:25	1863 12:24
11:8,9,14,15	uniformly 25:22	46:14	16:21 19:14	45:17
11:21,24 12:16	39:13	wanted 6:20	wouldnt 6:6 7:6	1883 3:23 32:7
12:17,23 13:20	unique 18:12	14:9,9 21:14	7:8 29:23	1887 12:23
14:2,3,7,12	united 1:1,3,12	23:24 24:1	write 13:18	19 7:6
15:3 16:24	3:4 13:22	37:9 42:25	wrong 35:8	1920s 53:24
17:9,14,18	19:21 20:22	wants 6:18		1925 25:1
30:16,20 31:13	33:21 35:7	wash 1:18	X	1946 3:14 4:13
31:17,19,22,24	41:7 42:4,21	washington 1:8	x 1:2,7	7:1,15 19:1
32:18,24 38:10	46:17 50:21	1:16		20:25 21:4
38:11,17 39:10	51:8	wasnt 32:24	Y	23:4 25:2
39:10 40:25	unquote 14:4	34:1	year 27:22	28:21 34:7
43:21 44:8,9	unsuccessful	way 8:3 14:14	years 7:4 18:22	45:15 51:15
44:11,12,17	30:3	15:24 19:16	21:13,18 22:20	1948 9:16 10:6
45:23 47:4,18	unusual 13:8	20:14 28:1	23:2 39:13	22:25
50:11,15 51:6	use 38:24 39:25	35:22 39:20	41:18 47:2	1957 7:4
51:16,20,22,24	uses 30:17 50:6	42:8 50:7	48:6	1966 18:6,13
52:2	usual 37:16	ways 16:15 21:7	youll 40:15	25:18 52:15
turn 21:1 32:6	usually 19:10	wednesday 1:9	young 35:7	1972 6:24 7:6,7
46:1 54:1		weeds 53:21	46:16 48:22	7:10,16
two 4:11 8:22,25	V	went 4:22 42:15	49:20	1980s 18:22
9:2,12 16:14	v 1:5 3:5 35:7,12	42:18	younger 48:12	53:24
17:9 23:2 27:3	35:16,20,20,21	weve 14:5 32:5	youre 11:20,22	1990 6:23 7:9
30:15 31:11	42:21 45:12	39:20 53:21	11:22 12:14,14	8:6
41:18 47:8	46:16,23 52:19	whats 8:5 13:13	14:14,16 16:20	19th 32:9 33:24
48:3	various 19:3	50:16	37:6 39:16	
twoword 13:15	30:22	whatsoever 36:9	42:2 43:22	2
twoyears 42:9	verbatim 31:10	wholesale 44:11	44:22 51:10,11	2 22:20
types 19:3	50:11 51:15,19	wideranging	youve 8:21	20 21:18
typical 42:10	version 30:24	37:16	34:17	2014 1:9
	victim 19:21	win 20:7,12		20s 18:22
U	view 18:9 23:3	woman 40:3	Z	20th 21:19
u 9:20 13:7	23:22 29:7	women 40:12	zipes 29:8	2107 53:3,6,7
14:16 18:20	32:9,23 34:22	wong 1:6 3:5		24 31:23
29:4 51:10	42:13	37:21	0	2401 10:23 12:4
53:3	views 37:1	wont 20:7	03 54:6	12:7,7,9,21,22
unanimously	vii 7:7,20	word 3:17,19	04 1:13 3:2	13:1,4 17:12
35:17		4:4 24:2 29:22		18:16 28:23
undeclare 52:20	W	39:25 43:7	1	51:7 53:1
understand	waived 5:3	worded 48:18	10 1:9,13 3:2	2416 46:10
37:15 42:11	waiver 18:11	wording 40:22	11 54:6	2501 12:24
49:12 50:3	21:6 32:10	words 4:14,17	12word 12:25	51:25
			131074 1:4 3:4	

26 2:7 2671 28:11 2674 10:16 41:6 41:12 42:14 2675 30:8 2680 42:22 28 9:21 29:4 42:21 53:2 <hr/> 3 <hr/>				
3 2:4 31 19:2 25:1 33 9:17 10:6 35 31:24 <hr/> 4 <hr/>				
4 47:4 41 22:14 410 28:20 420 28:19 <hr/> 5 <hr/>				
5 47:4 50 2:10 <hr/> 6 <hr/>				
60 18:22 <hr/> 7 <hr/>				
<hr/> 8 <hr/>				
8 52:25 53:5 80s 23:5 26:1 <hr/> 9 <hr/>				
9 19:2 25:3				