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IN THE SUPREME COURT OF THE UNITED STATES

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BAKER BOTTS, L.L.P., ET AL., :

Petitioners : No. 14-103

v. :

ASARCO, L.L.C. :

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Washington, D.C.

Wednesday, February 25, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:19 a.m.

APPEARANCES:

AARON STREETT, ESQ., Houston, Tex.; on behalf of Petitioners.

BRIAN H. FLETCHER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioners.

JEFFREY L. OLDHAM, ESQ., Houston, Tex.; on behalf of Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	AARON STREETT, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	BRIAN H. FLETCHER, ESQ.	
7	On behalf of the United States, as amicus	
8	curiae, supporting Petitioners	18
9	ORAL ARGUMENT OF	
10	JEFFREY L. OLDHAM, ESQ.	
11	On behalf of the Respondent	29
12	REBUTTAL ARGUMENT OF	
13	AARON STREETT, ESQ.	
14	On behalf of the Petitioners	53
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:19 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next today in Case No. 14-103, Baker Botts v. ASARCO.  
5 Mr. Streett.

6 ORAL ARGUMENT OF AARON STREETT

7 ON BEHALF OF THE PETITIONERS

8 MR. STREETT: Mr. Chief Justice, and may it  
9 please the Court:

10 At the end of a bankruptcy case, a  
11 professional must file a detailed fee application.  
12 Numerous interested parties may object and the court  
13 must hold a hearing to resolve those objections and make  
14 an independent assessment of reasonable compensation.

15 Each of those steps is indispensable to  
16 accurately determining the professional's core fees and  
17 the estate's administrative expenses, allowing the  
18 trustee to close the case and ultimately pay the  
19 estate's creditors.

20 Everyone agrees that preparing the  
21 application is compensable as reflected by Section  
22 330(a)(6)'s guidance for determining the amount of that  
23 compensation. Defending the application against  
24 objections is an inseparable part of that same  
25 code-mandated process. There is no principle basis and

1 certainly no textual basis for categorically banning  
2 compensation for that next step.

3 To the contrary --

4 JUSTICE SCALIA: Well, the principle basis,  
5 as I understand it, is that when you prepare it,  
6 you're -- you're serving the -- the trustee. You're  
7 serving his needs but, you know, if he's disallowing it,  
8 you're, to the contrary, acting against the trustee's  
9 interest. Isn't that a principle distinction?

10 MR. STRETT: It would certainly not be in  
11 the vast majority of cases. For example, in the typical  
12 Chapter 7 case the trustee hires a professional, the  
13 trustee wishes to pay the professional fully for his  
14 good work, and the debtor comes in and objects.

15 By defending that application against the  
16 debtor's objections, the professional is serving the  
17 trustee. The same thing happened here where the  
18 debtor --

19 JUSTICE SCALIA: So you'd acknowledge it's  
20 okay if the trustee objects, then he doesn't have to  
21 pay, right?

22 MR. STRETT: I would not acknowledge that,  
23 Your Honor, but --

24 JUSTICE SCALIA: I didn't think you would.

25 MR. STRETT: But that is the reason there

1 should not be a categorical --

2 JUSTICE SOTOMAYOR: But the trustee is not  
3 the estate.

4 MR. STRETT: That's correct, and there's  
5 no --

6 JUSTICE SOTOMAYOR: The estate wants to keep  
7 as much money as it can to give to the creditors.  
8 That's the purpose, right?

9 MR. STRETT: Well, in this case, for  
10 example, the estate paid all of Baker Botts's core fees  
11 and wanted to pay all those fees, and you had ASARCO  
12 coming in as the reorganized company and objecting. So,  
13 again, I don't think that is true in the vast -- in  
14 many, many cases. And typically it's not the case in  
15 the Chapter 7 case. As the National Association of  
16 Bankruptcy Trustees point out as amicus, a trustee is  
17 not going to be able to retain competent and skilled  
18 counsel if the debtor is going to dilute that.

19 JUSTICE SOTOMAYOR: If you hired another law  
20 firm to fight this objection, would that other law firm  
21 have been entitled to fees too?

22 MR. STRETT: It would possibly be entitled  
23 to fees through 330(a)(1)(b). I think in your  
24 hypothetical you're assuming that the other law firm  
25 would not be approved by the trustee as an estate

1 professional. So that's the on/off switch for  
2 compensation under 330(a), a compensation as a service  
3 rendered. So the only possible way they could be  
4 compensated would be as an expense for rendering a  
5 service to the estate professional.

6 JUSTICE SOTOMAYOR: I just want to  
7 understand your rule completely. Anybody who prepares a  
8 fee application -- an accountant, an expert -- the  
9 bankruptcy court can pay all of their legal fees, if the  
10 trustee has hired their lawyer?

11 MR. STRETT: Yes.

12 JUSTICE SOTOMAYOR: Approved their lawyer?  
13 But if the trustee hasn't, then they have to assume the  
14 costs of fighting --

15 MR. STRETT: No, your Honor, that's not our  
16 position for two reasons. First of all, there's two  
17 ways to get compensated under 330(a). There's  
18 (a)(1)(a), which is compensation for services rendered  
19 by a professional hired by the estate. And then there's  
20 (a)(1)(b) which is expenses, and that's things like  
21 experts, outside contractors that the estate  
22 professionals hires to help him or her do the services.

23 So in the context of an accountant who hired  
24 a law firm to prepare and defend its fee application --  
25 it happens all the time; accountants can't do it

1 themselves -- that outside law firm would be compensable  
2 as an expense to the accountant.

3 Now, of course, ASARCO's position would  
4 categorically ban all compensation for law firms, even  
5 those retained by the trustee that defend their fee  
6 application; it would categorically ban compensation by  
7 the accountants.

8 And the problem with ASARCO's position is  
9 that everything you can say about defending a fee  
10 application is also true about preparing fee application  
11 in the context of the statute. They both are paid out  
12 of the estate. They both diminish the estate in that  
13 way. They're both something that the code requires --

14 JUSTICE KENNEDY: I take it you -- excuse  
15 me. If the trustee objects and there's a lengthy  
16 hearing, I take it you would still say that you get fees  
17 for participating in that hearing.

18 MR. STRETT: Yes, that's correct.

19 JUSTICE KENNEDY: All right. So the fact  
20 that ASARCO came in is really irrelevant to the -- to  
21 this case.

22 MR. STRETT: I don't think it's irrelevant  
23 because it shows the error of the Fifth Circuit's way in  
24 adopting a categorical rule that prohibits compensation,  
25 even when the trustee wants to pay the professional the

1 full amount. That's the only reason I really made that  
2 particular point.

3 And that's the only argument that's before  
4 this Court, is a categorical ban under the statute on  
5 compensating the professional for defending his fee  
6 application regardless of who objects.

7 And I think this Court has already rejected  
8 the distinction that Justice Scalia suggested between  
9 preparing and defending the fee application. In its  
10 opinion in *Jean*, where the Court said there's, quote, no  
11 textual or logical argument for treating so differently  
12 a party's preparation of a fee application and its  
13 ensuing efforts to support that application.

14 And the Court --

15 JUSTICE SOTOMAYOR: That was in the context  
16 of a fee splitting statute though.

17 MR. STRETT: That's correct. And the fee  
18 shifting context is the proper analogy here. Of course  
19 we don't claim 330(a) is formally a fee shifting  
20 statute. We're seeking payment from the estate for work  
21 that the code requires us to do as part of our work.

22 But the fee shifting analogy is accurate for  
23 a couple reasons. First of all, in the fee shifting  
24 statute and in the bankruptcy statute, the professional  
25 must file an application and have his fees approved by



1 the court. And as in the fee-shifting regime, the  
2 bankruptcy professional's application is opened up to a  
3 wide range of objectors who are not the professional's  
4 client. So all of this leads to, in both the  
5 fee-shifting and the bankruptcy regime, a concern that  
6 the professional's fees for his core work will be  
7 diluted by the professional being forced to defend those  
8 core fees.

9 And, in fact, those concerns are heightened  
10 much more in the bankruptcy context for a few reasons,  
11 because in bankruptcy, the fee application is far more  
12 detailed and gives far more opportunity to -- to pick  
13 and -- and object and a far greater range of objectors  
14 are available, the U.S. trustee, the court itself, the  
15 creditors, the creditors committees. All of those can  
16 come in and object that do not exist in the fee-shifting  
17 context.

18 And Congress recognized this concern in  
19 Section 330(a)(3)(f) by codifying the factor that  
20 bankruptcy officials be compensated at parity with  
21 non-bankruptcy professionals.

22 CHIEF JUSTICE ROBERTS: Well, but just -- on  
23 the parity point, if you're not doing bankruptcy work  
24 and you send the client a bill and they don't pay it, if  
25 you've got to take litigation action or whatever, you

1 don't get paid -- you don't get those fees back. We  
2 follow the normal American rule and you pay your own  
3 fees and if you win, good; if not, you don't.

4 MR. STREETT: That's right. And that would,  
5 of course, also be true of preparing the bill or the  
6 invoice which is compensable under bankruptcy. So  
7 Congress departed from that regime and, again, it gets  
8 back to the two reasons the fee-shifting cases are  
9 analogous because, outside of bankruptcy, a professional  
10 doesn't have to go to the court to have his fees  
11 approved. It's a structural parity difference. Outside  
12 of bankruptcy, the professional doesn't submit his  
13 application to -- to a gallery of potential objectors,  
14 and that's why bankruptcy is structurally different.  
15 And that's why Congress recognized in Section  
16 330(a)(4)(A)(ii) that services necessary to case  
17 administration do fall within the bankruptcy court's  
18 discretion to compensate.

19 And when you read Section 330(a)(6)'s  
20 reflection that preparing the fee application is  
21 compensable, it's clearly not authorizing compensation  
22 for preparing it, as ASARCO concedes that, it's  
23 authorized under Section 330(a)(1)(A) as a service  
24 rendered, and it's most naturally falls within  
25 Section 330(a)(4)(A)(ii) as a service necessary to case

1 administration. And that's because it assists the  
2 trustees. The trustee has to see the case all the way  
3 through to its completion. It has to make a final  
4 accounting of the case. It has to administer and close  
5 the case. And none of those things can happen until the  
6 fee application is not just prepared, but litigated.

7 Section 330(a)(1)(A) reflects that not only  
8 the application must be prepared but there may be  
9 objections by either of the parties in interest, the  
10 trustees, or the court itself, and then the court must  
11 hold a hearing. That's all -- those are all textual  
12 bases for compensating the defense of the fee  
13 application. Those are things that the code requires,  
14 and they're all compensable for the same reasons as  
15 compensating the preparation of the application.

16 JUSTICE GINSBURG: Mr. Streett, do you have  
17 a position on enhancements? If -- if the creditors say  
18 that enhancement is -- you did a good job but it's not  
19 worth the enhancement, is defending the enhancement  
20 also, under your rule, compensable?

21 MR. STREETT: We believe it would be  
22 compensable, in the sense that it passes by the minimal  
23 compensability threshold that puts it into the  
24 bankruptcy court discretion. Now, bankruptcy courts  
25 must consider the (a)(3) factors in determining whether

1 that will be actually compensated and the amount. And  
2 courts consider, for example, the nature and value of  
3 the service.

4 And a court could reasonably conclude in its  
5 discretion that the nature and value of seeking an  
6 enhancement is not the same as the nature and value of  
7 defending the core fee application. Many courts have  
8 reached that conclusion. At the end of the day, that's  
9 where the courts came out here, and we didn't -- we  
10 didn't challenge that on appeal.

11 JUSTICE BREYER: You practice in bankruptcy.  
12 I mean, you know it pretty well because what I was  
13 trying to think of, which is really balancing on the  
14 side, but the phrase "likely to benefit," it has -- it  
15 says "likely to benefit."

16 Now, it seems to me there must be instances  
17 where you, representing the -- the debtor, hire  
18 accountants or various others to do technical work,  
19 conveying and where -- where, in fact, it's quite clear  
20 that it won't mean more money for the debtor. It will  
21 mean less money for the debtor, because it will discover  
22 all kinds of assets it didn't even think the debtor had,  
23 but that's part of your job.

24 MR. STREETT: Correct.

25 JUSTICE BREYER: And you do it and it

1 benefits only the creditor. And I take it, it's rather  
2 clear, you get compensated for that.

3 MR. STRETT: Yes, and that --

4 JUSTICE BREYER: Is that right? Am I  
5 just --

6 MR. STRETT: That's absolutely correct,  
7 Your Honor, and that's why there are two prongs within  
8 Section 330(a)(4)(A)(ii). Congress recognized that not  
9 everything the professional does is going to produce an  
10 immediate, direct benefit to the estate. In the  
11 legislative history we discuss at pages 37 and 38 shows  
12 that Congress add the prong compensating tasks that were  
13 necessary to case administration.

14 JUSTICE BREYER: Well, then you're in  
15 trouble, because if -- if all those things -- I mean,  
16 there are a set of things, such that when you carry them  
17 out through accountants or conveyers or others, will in  
18 fact cost the estate a lot of money. Possibly more than  
19 they ever dreamt. And yet it's part of your job. Now,  
20 if that's not considered as being a benefit to the  
21 estate, but rather, part of the administration of the  
22 estate, then I don't see how this falls within benefit  
23 to the estate. I mean, if you're really making that  
24 distinction.

25 MR. STRETT: The way --

1 JUSTICE BREYER: That's administration of  
2 the estate, then this would have to be administration of  
3 the estate. But this isn't administration of the  
4 estate, and therefore, it's left out.

5 MR. STRETT: We agree that this is  
6 administration of the case for the --

7 JUSTICE BREYER: Oh, you're saying this is  
8 administration. In other words, you're not saying it  
9 falls within (a). You're saying it falls within (b).

10 MR. STRETT: It falls within either one.  
11 We think the most natural home for it is necessary to  
12 the administration of the case. And Congress -- the  
13 structure of section 330(a)(4)(A)(ii) reflects that the  
14 professional's service need only be necessary to the  
15 administration --

16 JUSTICE BREYER: I see.

17 MR. STRETT: -- of the case or beneficial  
18 to the estate, because Congress recognized there are  
19 going to be a lot of things that a professional has to  
20 do, as Justice Breyer said, that may cost money in the  
21 short run. But they're necessary to carry out the  
22 administration of the case. We think that's where  
23 preparing the fee application comes in, under (a)1 and  
24 (a)(4)(A)(ii), and the very next inseparable step is  
25 defending the fee application.

1 JUSTICE SOTOMAYOR: You're ignoring one  
2 important aspect of difference which is in everything  
3 else, you're acting for the estate. When you're  
4 defending fees, you're acting for yourself. There is a  
5 self-interest involved because you could just give up on  
6 the objections and walk away. The only reason you're  
7 fighting them is because it puts more money in your  
8 pocket.

9 MR. STRETT: I don't think --

10 JUSTICE SOTOMAYOR: Not because it puts more  
11 money in the estate's pocket.

12 MR. STRETT: Yes. But all of those things  
13 would be equally true of preparing the fee application.  
14 The professional could just work pro bono or could  
15 decide to discount 20 percent of its rights on the -- on  
16 the fee application. All of those things are -- ASARCO  
17 has tried to say that preparing and defending the fee  
18 application are adverse to the estate because it takes  
19 money out of the estate. Well, that cannot be the test.

20 JUSTICE KENNEDY: Well, except that  
21 preparing the fee application: A, it's specifically  
22 allowed by statute; and B, if they compensate you for  
23 that, there's -- then you'll do a very careful job, and  
24 there will be less necessity to have to defend it. So  
25 it -- so there -- there is certainly a rational reason

1 for the distinction.

2 MR. STRETT: Well, let me take that  
3 question in two parts, because I think if Congress  
4 drafted the statute to say preparing the fee application  
5 is compensable, then we would have a very different  
6 case. But it didn't say that. It said any compensation  
7 awarded for preparing the fee application shall be  
8 awarded at this rate. So it presupposed that preparing  
9 the fee application was authorized under Section  
10 330(a)(4) -- (a)(1)(A) as ASARCO even concedes on 12 --  
11 on page 12 of its brief.

12 So you can't draw any negative inference  
13 from the fact that it's mentioned for the purpose of  
14 limiting it, that defending a fee application would not  
15 also be compensable.

16 But to your second point, Your Honor, we  
17 agree Congress wanted to encourage people to do a  
18 careful job preparing the fee application. Baker Botts  
19 did that here. But that did not stop ASARCO from coming  
20 in and -- and mounting a barrage of objections that eat  
21 up professional fees. So just the careful preparation  
22 of the application doesn't solve the question. And  
23 that's why Congress codified Section 330(a)(3)(F) and  
24 the parity factor, and that's why bankruptcy courts for  
25 decades have been responsibly exercising the discretion



1 that Section 330(a)(1) gives them. Congress could have  
2 enumerated all of the tasks that are compensable in  
3 bankruptcy, but it didn't do that. It's --

4 CHIEF JUSTICE ROBERTS: But people know -- I  
5 mean, the American rule in the legal area is very  
6 fundamental, and it strikes me bankruptcy is one of  
7 those areas where they go into considerable detail  
8 telling you who pays what and when you can get it, just  
9 like you say here. You get compensation for preparing  
10 the fee at this particular level. And to say that  
11 somewhere in -- in all this, you sort of cut and paste  
12 these things together and you say, oh, there it shows  
13 that they meant fees on fees to be awarded. It seems to  
14 me that if they wanted to go against the basic American  
15 rule -- it's the American rule, patriotic -- they would  
16 have -- they would have spelled that out a little more  
17 clearly.

18 MR. STREETT: Congress certainly could have  
19 done that, but that's simply not the way it wrote  
20 330(a). You're right, Your Honor, it listed in many  
21 other statutes nine options for things, but in this, it  
22 just said, courts may award reasonable compensation for  
23 services rendered with very narrow and express  
24 prohibitions. The Fifth Circuit erred by superimposing  
25 a categorical ban on that flexible statute.

1           And if I could reserve the remainder of my  
2 time.

3           CHIEF JUSTICE ROBERTS:           Thank you, counsel.  
4           Mr. Fletcher.

5           ORAL ARGUMENT OF MR. BRIAN H. FLETCHER  
6           ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,  
7           SUPPORTING PETITIONERS

8           MR. FLETCHER:           Thank you, Mr. Chief Justice,  
9 and may it please the Court:

10           We agree with Petitioners that when a  
11 bankruptcy professional is seeking compensation under  
12 Section 330(a) successfully defends its fee application,  
13 the bankruptcy court may increase the amount of the  
14 award to compensate for the time it reasonably spent on  
15 the fee defense. But we reach that result for a  
16 somewhat different reason.

17           In our view, preparing and defending a fee  
18 application are not themselves services rendered for a  
19 client within the meaning of Section 330(a)(1)(A). And  
20 they are not independent grounds for compensation.

21           Instead, compensation for the successful  
22 defense of a fee application may be appropriate because  
23 it ensures that the professional receives the  
24 statutorily prescribed reasonable compensation for the  
25 services it rendered in the underlying bankruptcy case.

1 JUSTICE BREYER: Where does it fall within  
2 the (4) (A)?

3 MR. FLETCHER: Justice Breyer, we don't  
4 think it's viewed as being subject to the (4) (A) at all.  
5 (4) (A) --

6 JUSTICE BREYER: If it's not subject to  
7 (4) (A) at all -- I mean, (4) (A) forbids certain -- it  
8 says you can't -- cannot allow compensation for, and  
9 then, you know, it has the list there. So -- so how do  
10 you -- where do you find the authority to give this to  
11 them?

12 MR. FLETCHER: Justice Breyer, (4) --  
13 (4) (A), which appears on page 3(a) of the record of  
14 appendix, it describes limits on compensation for  
15 services. Our view is that when you are preparing and  
16 defending your own fee application, that does not fall  
17 within the category of services at all.

18 JUSTICE BREYER: So where -- where is the  
19 authorization to give it?

20 MR. FLETCHER: In the authorization in  
21 Section 330(a) (1) (A) that says you can allow reasonable  
22 compensation for the underlying service that the  
23 bankruptcy professional has rendered in the bankruptcy  
24 case.

25 So here, for example, Baker Botts prosecuted

1 the -- the fraudulent conveyance action, among many  
2 other things. And the bankruptcy court applied the  
3 lodestar method and it determined that reasonable hours  
4 times reasonable rates required a certain amount of  
5 compensation in order to make Baker Botts --

6 JUSTICE BREYER: Where does it say that you  
7 can get the money that's necessary for you to get the --  
8 the money you pay to get the reasonable compensation.  
9 Where does it say you get that?

10 MR. FLETCHER: There's no explicit  
11 provision.

12 JUSTICE BREYER: All right. Well, then, I  
13 mean, suppose that you had to go through enormous  
14 trouble to get what they paid you. They paid you and  
15 you -- you know, some kind of Voltavian bonds or  
16 something -- you know, you can imagine all kinds of  
17 circumstances where it costs a lot of money to get the  
18 money they paid you, and I just wonder where does it say  
19 you can do that.

20 MR. FLETCHER: Well, Justice Breyer, what I  
21 think is different about this is that the things that  
22 you have to do to get paid when you're a bankruptcy  
23 professional that we're here concerned with here are  
24 things that are creatures of the bankruptcy system  
25 itself and 330(a) itself. Section 330(a) says if you're

1 a professional and you want to get paid reasonable  
2 compensation, you have to submit a very detailed fee  
3 application. And then in order to ensure that that  
4 application meets the statutory requirements, we're  
5 going to open it to scrutiny by the judge, by the U.S.  
6 Trustee, and by the parties in interest, and allow them  
7 to raise objections. And all of that --

8 JUSTICE SOTOMAYOR: So why isn't that in the  
9 administration?

10 MR. FLETCHER: I'm sorry, Justice Sotomayor.

11 MR. STREETT: Well, he claims that it could  
12 be on either a service, or a benefit, or a need in the  
13 administration of the estate.

14 MR. FLETCHER: So our view is that the  
15 problem with it is that sort of Section 330(a)(1)(A) is  
16 the sort of starting point, and it says reasonable  
17 compensation for actual necessary services rendered.  
18 And then (a)(4) limits which services are compensable.  
19 It says in order to be compensable, you either have to  
20 be necessary to the administration of the case or for  
21 the benefit of the debtor.

22 We don't think that preparing and defending  
23 your own fee application is a service rendered at all.  
24 And so we don't think it's subject to the (a)(4) limits.

25 JUSTICE ALITO: Why -- I'm sorry. Go ahead.

1           MR. FLETCHER:           I was just going to say,  
2    instead, we think the question that the bankruptcy court  
3    should be asking is, do we need to provide some  
4    additional award to make the professional whole for the  
5    extra time and costs that they had to go through to  
6    vindicate their right to get their award of compensation  
7    for the underlying services that they --

8           JUSTICE SOTOMAYOR:        Sounds like a policy  
9    judgment. You're basically saying it's not in the  
10   statute, but this is how we do it and as Justice -- as  
11   the Chief Justice pointed out, normal attorneys outside  
12   the bankruptcy court don't get compensated for fee  
13   disputes.

14          MR. FLETCHER:           Well, we -- we do think it  
15   makes a good sense, the rule that we're advocating, but  
16   we also think it's grounded in the statute and in the  
17   way that this Court has addressed other statutes that  
18   also provide for awards of reasonable attorneys fees.

19          JUSTICE ALITO:           Why isn't the problem here  
20   better dealt with by sanctions? If a party like ASARCO  
21   makes frivolous objections, then they -- then sanctions  
22   can be imposed on them. And the -- the fees fall on the  
23   party that caused the problem rather than on the estate.

24          MR. FLETCHER:           I absolutely agree,  
25   Justice Alito. And we argue in our brief that if a

1 bankruptcy court is in a situation where the objections  
2 that were raised are not merely meritless, but actually  
3 sanctionable, the better course would be to impose  
4 sanctions, precisely because that puts the burden of the  
5 litigation on the party that raised the frivolous  
6 objection, rather than on the estate. But we think that  
7 there can be a broad range of objections that while not  
8 frivolous or not sanctionable are still found to be  
9 meritless, and that unless the professional is  
10 compensated for the time it has to spend in responding  
11 to those objections, it's underlying -- its award of  
12 compensation for its underlying services is going to be  
13 diluted to an unreasonable --

14 JUSTICE SCALIA: No more so than -- than  
15 the -- the lawyer who submits a bill outside of  
16 bankruptcy to a client, and the client objects, and the  
17 lawyer has to -- has to litigate. Would you say that  
18 dilutes the lawyer's recovery? No, I assume that the  
19 lawyer's fees are set at a high enough level that it --  
20 that they take into account the fact that sometimes you  
21 will have to litigate to get the fees.

22 MR. FLETCHER: That's true.

23 JUSTICE SCALIA: And why can't bankruptcy  
24 lawyers do the same thing?

25 MR. FLETCHER: Well, I think that would be

1 contrary to the policy of the -- of the bankruptcy  
2 statute and the Section 330(a) in particular.

3 JUSTICE SCALIA: Why?

4 MR. FLETCHER: Because the -- the problem  
5 that we're dealing with here is that it's true that  
6 litigation can arise between lawyers and clients over  
7 fee issues.

8 JUSTICE SCALIA: Right.

9 MR. FLETCHER: But the Section 330(a)  
10 creates a structure where it's not just your client that  
11 you have to please, and the showing that you have to  
12 make isn't just that I perform services that are within  
13 the terms of our contract. You have to satisfy the  
14 bankruptcy judge and are subject to objections, not just  
15 from your client, but also from the U.S. Trustee and  
16 from lots of other parties in interest. And they can  
17 object not just on the grounds that you didn't perform  
18 within the meaning of the contract, but also on the  
19 grounds that you didn't satisfy any of the many  
20 requirements of the Section 330(a).

21 And we think that because that imposes extra  
22 costs on bankruptcy professionals, the reasonable  
23 approach, and the approach that's consistent with the  
24 way that this Court handles and others have handled the  
25 same sorts of costs that are imposed on attorneys



1 seeking fees under fee-shifting statutes, is to say that  
2 when you successfully defend your fee application, this  
3 doesn't apply when you fail, we don't -- we very  
4 strongly believe that if you are unsuccessful in  
5 defending your fee application, you should not receive  
6 an additional award.

7 JUSTICE BREYER: What was your reason for  
8 not going with the administration of the estate? And my  
9 intuitive judgment of it, which is pretty not totally  
10 informed, of course, is there -- there are loads of  
11 things that -- that -- that lawyers do who represent a  
12 trustee -- who represent debtors, that it will cost the  
13 estate a lot of money. And you can't say all of them  
14 are for the benefit of the estate. And there are loads  
15 of things they do to help administer the estate and hire  
16 all kinds of people. And -- and paying their fees is  
17 part of the administration, I would think, normally.

18 Why don't you see the paying of the lawyer  
19 as part of the administration of the estate? And if you  
20 see the part -- that part as part of the administration  
21 of the estate, then you'd see that the administrative  
22 expenses necessary to secure that payment are part of  
23 the administration.

24 I mean, so you had some reason over there in  
25 the Justice Department of saying, no, we don't follow

1 that route, and -- and I'm not. And so that -- of  
2 course, that creates a difficulty because I think, well,  
3 if your judgment is don't follow that route, then I -- I  
4 better be careful about following it myself. And -- and  
5 you know more about it in a sense, so -- so explain that  
6 to me.

7 MR. FLETCHER: Well, Justice Breyer, we --  
8 we basically take an earlier term. In -- in our view,  
9 you don't get to (a) (4) in asking about the preparation  
10 of defense of a fee application because (a) (4) tells you  
11 which services are compensable.

12 JUSTICE BREYER: No.

13 MR. FLETCHER: Right.

14 JUSTICE BREYER: No, I understand your  
15 argument, and all know that's true about it. I just  
16 wonder you're -- you're studying this. You're trying to  
17 develop a position. And for some reason or other, you  
18 rejected what the -- what they started out with that  
19 this falls within 4(A) (ii) -- (i) or (ii), and I  
20 wondered why.

21 MR. FLETCHER: So I -- I think if you were  
22 going to -- you disagree with our position and your view  
23 is that this is a service, and so the question is, Does  
24 it fall within either of the categories under Section 4  
25 that make it compensable. We think -- agree with

1 Petitioners that the stronger basis is to say, as you  
2 say, that it's administration.

3 JUSTICE BREYER: Yes.

4 MR. FLETCHER: It's not for the benefit of  
5 the estate.

6 JUSTICE BREYER: I know that. I already  
7 knew -- can see that. I just wondered why --

8 MR. FLETCHER: Because --

9 JUSTICE BREYER: -- you -- you rejected.  
10 You had a reason for not doing what seems linguistically  
11 the simplest thing and say it is part of the  
12 administration. And you had a reason, and I want to  
13 know what the reason is, if you can tell us.

14 MR. FLETCHER: Well, it's because  
15 linguistically -- I don't want to belabor the point --  
16 but just linguistically, we don't think it's reasonable  
17 to describe this as a service rendered, and so we -- we  
18 don't get to the --

19 JUSTICE BREYER: The administration of the  
20 case.

21 MR. FLETCHER: But you only ask about  
22 administration of the case if you decide that it's a  
23 service rendered, right? Section (a)(4)(A) says, "The  
24 court shall not allow compensation for services that  
25 were not reasonably likely to benefit the estate or that

1 were not necessary to the administration of the case."

2 Our view is that defending your fee  
3 application --

4 JUSTICE BREYER: Service.

5 MR. FLETCHER: -- isn't a service that  
6 you're rendering to the client at all, and so you don't  
7 ask these questions.

8 JUSTICE BREYER: Ah.

9 MR. FLETCHER: But -- but I can also answer  
10 because if you disagree with us about that and you think  
11 it is a service and you think it is subject to the --

12 JUSTICE BREYER: Is -- is there another part  
13 that says it's service to the estate rather than service  
14 to the case or something like that?

15 MR. FLETCHER: It's -- it's -- the term is  
16 used in 330(a) -- (a)(1)(A), which describes  
17 compensation for -- reasonable compensation for actual  
18 and necessary services rendered by a trustee and  
19 examiner or a professional person.

20 JUSTICE BREYER: Render --

21 MR. FLETCHER: I think the most natural  
22 read --

23 JUSTICE BREYER: Okay. I see. Right.

24 MR. FLETCHER: But -- but just to answer  
25 the -- the question that you were posing before, you

1 know, why did we -- why are we hesitant to say that this  
2 is a service that can be compensable if it's reasonable  
3 or necessary? It's, frankly, because ordinarily,  
4 services are compensable whether the attorney wins or  
5 loses, and we are very concerned about making sure that  
6 people don't get paid for unsuccessfully defending their  
7 fee applications, and that's what's led us to this  
8 interpretation.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
10 Mr. Oldham.

11 ORAL ARGUMENT OF JEFFREY OLDHAM  
12 ON BEHALF OF THE RESPONDENT

13 MR. OLDHAM: Mr. Chief Justice, and may it  
14 please the Court:

15 Section 330(a) of the bankruptcy code  
16 compensates all types of professionals for their  
17 services rendered for the estate under Section 327(a).  
18 But when adversarial fee litigation arises and a  
19 professional either hires a lawyer or just happens to be  
20 a lawyer and engages in purely self-interested fee  
21 litigation work at the expense of the estate, that is  
22 not a service rendered on behalf of the estate within  
23 the meaning of Section 330(a). There is simply nothing  
24 in the statute that authorizes estate funds for a  
25 professional to engage in self-interested litigation,

1 particularly in light of the American Rule, which  
2 requires, and for 200 years plus, has required that  
3 Congress speak clearly when it wants to reallocate the  
4 costs of litigation.

5 And I'd like to --

6 JUSTICE SOTOMAYOR: So how does the fee fit  
7 into this?

8 MR. OLDHAM: I'm sorry?

9 JUSTICE SOTOMAYOR: The -- the fee, the  
10 fee -- the fee preparation fee.

11 MR. OLDHAM: And I want to go straight to  
12 that question. Justice Sotomayor and Justice Kennedy  
13 also put their finger on exactly the fundamental  
14 distinction between preparing a fee application and  
15 litigating over a fee application. And it's that when  
16 an accountant, for example, goes and hire -- excuse me,  
17 does accounting services and then provides an itemized  
18 bill to explain to the -- to their client why they are  
19 charging what they're charging, that is a benefit to the  
20 trustee. The -- the "please remit to" line may not be a  
21 benefit, but certainly the itemized -- itemization in  
22 that bill is a benefit to the trustee and to the estate.  
23 And at that point, they're still on the same team.

24 But when an accountant then gets into a fee  
25 dispute and has to go hire his or her own lawyer and is

1 in litigation against the estate, they're not on the  
2 same team anymore. There is no sense in which, at that  
3 point in time, the accountant is serving the estate.  
4 And I think that fundamental difference matters  
5 textually under Section 330(a), and it's very  
6 significant under the American Rule because --

7 JUSTICE GINSBURG: Mr. Oldham, why aren't  
8 they all tied together so you recognize that the  
9 application for the fee is compensable?

10 MR. OLDHAM: Correct.

11 JUSTICE GINSBURG: It's like the opening  
12 pleading. Then the objection is the answer to the  
13 application, and then the response to the objection is  
14 the -- the defense of it. It seems to me it's -- it's  
15 all one package, that it -- the application, and there's  
16 an answer to the application, and then there's a reply.

17 It -- why don't those three things go  
18 together?

19 MR. OLDHAM: Well, I don't think they go  
20 together because Congress didn't put them together.  
21 What Congress authorized under Section 330(a)(1),  
22 especially when read together with Section 327(a), is  
23 that professionals are entitled to compensation when  
24 they're working for the estate.

25 But when -- when professionals have hired

1 their own lawyers or happen to be lawyers and are  
2 litigating adverse to the estate, that is not -- they're  
3 not on the same team anymore. And so under 330(a)(1)  
4 and 327(a), Congress has just simply not allowed  
5 compensation for that, which is the same as it would be  
6 outside of bankruptcy.

7 And all we're asking for in this case is the  
8 same rule that generally applies outside of bankruptcy.  
9 Because outside of bankruptcy the American Rule controls  
10 and says that if you get into a fee litigation dispute  
11 with your client, then you pay your own way. And so the  
12 same rule should apply in bankruptcy.

13 And I want to address why Congress might  
14 have authorized compensation for preparation services  
15 inside the bankruptcy context when that also is not  
16 compensable outside of the bankruptcy context. And that  
17 is because certainly in 1994, when Congress enacted  
18 Section (a)(6), there's a vast difference in the amount  
19 of time and the amount of effort that goes into putting  
20 together a fee application in bankruptcy and putting  
21 together a bill for the client.

22 Now, certainly, it's -- as time has gone on,  
23 clients require more and more detail in bills and  
24 that -- that difference might be diminished. But there  
25 is -- because in bankruptcy a fee application is



1 required to be filed, it made perfect sense for Congress  
2 to come in in (a) (6) and say you get compensated for  
3 that.

4 But what's not different between bankruptcy  
5 practice and outside of bankruptcy practice is fee  
6 litigation. When fee litigation arises, the American  
7 Rule applies and says inside or outside of bankruptcy,  
8 you pay your own way. And so Congress did not need to  
9 say anything different about that in Section A -- in  
10 Section (A) (i).

11 CHIEF JUSTICE ROBERTS: Do lawyers these  
12 days actually charge private clients for fee  
13 preparation?

14 MR. OLDHAM: No. Well, there might be some  
15 extent to which overhead accounts for things like that,  
16 but certainly, no lawyer is going to put on a bill, you  
17 know, time spent preparing this bill, but the fact that  
18 they're not charging for it doesn't mean that it's not a  
19 benefit to the client because, again, when the -- I  
20 think most clients, when they get a bill and see that  
21 they have to pay, say, \$100,000, it's a pretty good  
22 benefit to them to know why they have to pay \$100,000,  
23 and to be able to object if they feel that there's, you  
24 know, an objection warranted to that bill for \$100,000.

25 JUSTICE KENNEDY: Well, I've -- I've been

1 out of practice for half a century, but my -- my -- my  
2 thought was that -- that -- that lawyers do -- do charge  
3 for the amount of time preparing the bill. Maybe I'm  
4 wrong about that.

5 MR. OLDHAM: Well, again, I --

6 JUSTICE KENNEDY: We can -- we can check it  
7 out.

8 MR. OLDHAM: I think the only sense in which  
9 lawyers do that is to the extent that -- that it's built  
10 into overhead. But I don't think that generally, as a  
11 practice, otherwise, of lawyers marking down their time  
12 for it, and I think that would probably be a shock to  
13 most clients to hear that you --

14 CHIEF JUSTICE ROBERTS: You ought to  
15 think -- might want to think about it.

16 (Laughter.)

17 JUSTICE KENNEDY: Is -- is there any writing  
18 that says that when lawyers, outside bankruptcy,  
19 determine their -- their fee structures, that they  
20 include reimbursement for the risk that they might have  
21 to go into court to defend it? I've never heard that.

22 MR. OLDHAM: Well -- and we -- we cite the  
23 Gibbons-Grable case in our brief, but there's -- there's  
24 a number of things that go into, you know, rate setting  
25 of for law firms and one of them certainly is a risk of

1 nonpayment. Another one is a risk of collections.

2           If you -- if you have a particular client  
3 where you're afraid of collections, you might also  
4 have -- want a retainer and things like that. But,  
5 yeah, rates account for a variety of things like risk of  
6 nonpayment and risk of collection. And I think that  
7 goes to an important point about bankruptcy practice,  
8 which is that bankruptcy lawyers use non-bankruptcy  
9 market rates. And so, to the extent that they are using  
10 a non-bankruptcy market rate, they're already getting  
11 some -- you know, some amount in their rates that  
12 accounts for the risk of dilution.

13           JUSTICE BREYER:           On that theory, if -- I  
14 mean, if -- if you're supposed to get some fees -- say,  
15 \$100,000 -- and in that fee is -- is various risks of  
16 the extra money it'll cost to collect or the extra risk  
17 of you won't get it, you'll only get half and -- and  
18 you -- you set the rate at 100,000.

19           And so now a different risk is eventuated --  
20 namely, you had to go to litigation -- and that wasn't  
21 in the 100,000. Well, then, if it's reasonable and  
22 everything, why shouldn't it be?

23           I mean, why is -- you're -- you're trying  
24 to, in that 100,000, give the employer something for  
25 their -- for their time and their effort and also

1     compensate certain risks. And here was one that wasn't  
2     in the 100,00. It turned up later. But how would you  
3     draw a line between some and the other? I think that's  
4     the government's theory.

5             MR. OLDHAM:             That's right, Your Honor. And  
6     I think the American Rule draws the line, because if --  
7     if it were the case that anytime a damages award or  
8     anytime a fee award had to be defended, therefore, we  
9     need to give them more, the American Rule wouldn't  
10    exist.

11            JUSTICE BREYER:         Well, no, of course, it  
12    doesn't exist -- you're quite right -- outside of  
13    bankruptcy.

14            But now you're saying that the 100,000 does  
15    include all kinds of -- for various payments for things  
16    that might make it more expensive to get the money. And  
17    then what I don't see is saying some and not others.

18            MR. OLDHAM:             Well, I think --

19            JUSTICE BREYER:         And this is just one of  
20    them, I mean, the -- that you have to go into court and  
21    litigate, is just one of them. You wouldn't object, for  
22    example, if the fee -- the judge says, look. We're  
23    going to give the firm 120, why not 100?

24            Well, you know, there are risks in this; and  
25    one of the risks is they're going to have to go to court

1 and somebody will sue them and they have to go litigate  
2 that. So we'll give it to them upfront to pay for the  
3 risk, just as you pay for the risk of nonpayment.

4 MR. OLDHAM: Well, I think we would object  
5 to that, Your Honor, and I --

6 JUSTICE BREYER: Because?

7 MR. OLDHAM: Because if -- if -- if the  
8 conscious decision is made that \$100,000 is reasonable  
9 compensation for the services they're about to render --

10 JUSTICE BREYER: No, no. It's -- it's not.  
11 Only -- actually, only 90 is. But it's reasonable  
12 compensation because 10 compensates for risks such as  
13 risks of nonpayment.

14 Am I being clear? Do you see where I'm  
15 going?

16 MR. OLDHAM: I do, Your Honor. If I can  
17 make two responses: The first is that, you know,  
18 building in for certain risks in a rate is one thing and  
19 the way that the bankruptcy system accounts for that is  
20 it looks to non-market --

21 JUSTICE BREYER: All right.

22 MR. OLDHAM: -- non-bankruptcy market.

23 JUSTICE BREYER: Maybe this is not worth  
24 pursuing.

25 JUSTICE KENNEDY: And that was -- that was

1 my question. Can you tell me, if -- if a distinguished  
2 law firm represents a trustee in bankruptcy, does the  
3 law firm charge its regular rate?

4 MR. OLDHAM: Yes. Generally speaking, they  
5 will -- they will -- they will --

6 JUSTICE KENNEDY: The same rate that it  
7 would charge to a -- to a non-bankruptcy client.

8 MR. OLDHAM: That's correct. I mean,  
9 Congress, you know, wanted parity in Section -- in -- in  
10 Section 330(a). And so, generally speaking, what --  
11 what Congress effected in 1978 was to make clear that  
12 bankruptcy lawyers can get the same market rates that  
13 they would get outside of bankruptcy.

14 JUSTICE SOTOMAYOR: In the papers --

15 JUSTICE KAGAN: Mr. Oldham, you -- you  
16 agree, don't you, that in this system, the court can do  
17 enhancements? Yes.

18 MR. OLDHAM: Yeah, that's correct. Well,  
19 that -- that's not been -- certainly disputed in this  
20 case. Yes, that's --

21 JUSTICE KAGAN: Yeah. So some of the things  
22 that we've said are permissible for enhancements are  
23 exceptional delays in payment, extraordinary outlays of  
24 expenses, and unusually protracted litigation -- okay?  
25 -- that those count as enhancements. We said that in

1 Perdue v. Kenny A. Why isn't this just like that?

2 MR. OLDHAM: Well, there's -- I guess  
3 there's two responses to that. One is that when you're  
4 looking at enhancements and the -- the question when  
5 that was litigated below is not whether enhancements  
6 could be authorized, but instead, what the proper test  
7 was for enhancements in the bankruptcy context.

8 Here, the whole question is under  
9 Section 330(a)(1), has Congress even authorized a  
10 district court --

11 JUSTICE KAGAN: No, no, no. But I'm  
12 proceeding on the assumption of -- on the SG's  
13 assumption that what we're trying to do is to get a  
14 reasonable rate for the services that clearly have been  
15 authorized. And the question is: What's a reasonable  
16 rate?

17 And it seems to me that what this statute  
18 does is to say "reasonable" can include, like, lots of  
19 things. It's highly discretionary. Right?

20 And then on top of that, you know, it --  
21 included in "what is reasonable" is this idea of  
22 sometimes you can do performance enhancements, but we  
23 haven't said performance enhancements are just for  
24 super-duper work. We've actually said performance  
25 enhancements are for things like unusually protracted

1 litigation and lots of expenses and exceptional delays,  
2 sort of like this.

3 You know, this is just an expense of your  
4 work, is having to go after the fees. So why doesn't  
5 that get into the mix, too?

6 MR. OLDHAM: Well, I would agree with your  
7 characterization of the government's position that it is  
8 effectively authorizing a broad scope for -- for  
9 bankruptcy courts to just give enhancements. That is  
10 effectively what they're arguing for.

11 And if I could respond to the government's  
12 position, because I think there's at least three things  
13 wrong with it. First is textually, the text simply will  
14 not permit their position.

15 JUSTICE KAGAN: No, it does, because the  
16 text just says "reasonable." And then the question is  
17 what's reasonable? And "reasonable" can include, you  
18 know, you're getting the same hourly rate as some other  
19 lawyer, but "reasonable" is, also, you had to do this  
20 over a very extended period of time and "reasonable" is,  
21 also, boy, you had to spend a lot of money in order to  
22 get them to pay you anything at all. All of those  
23 things count as what's part of "reasonable."

24 MR. OLDHAM: Well -- and if I could make one  
25 more point on the text. Section 330(a)(1), if it just



1 said "reasonable," that might be the right answer; but  
2 it says "reasonable compensation for services rendered."

3 The government agrees with us that fee  
4 litigation work is not a service rendered. So when  
5 Congress says --

6 JUSTICE KAGAN: Yeah, it's reasonable for  
7 all the other work you're doing. But then everything  
8 else goes into this question of reasonable, right?  
9 Is -- you know, I'll give you a hypothetical.

10 Suppose I hire somebody to shovel my  
11 driveway, and I say, I'm going to give you reasonable  
12 compensation. And everybody knows that it's \$10 an hour  
13 to hire my driveway, right? That's the going rate.

14 But then I say, oh, did I not tell you --  
15 did I not tell you I'm going to make you go down -- come  
16 down to the court so that I can pay you the \$10? And  
17 that costs another \$5. All right?

18 Now, it strikes me that if somebody said,  
19 what's reasonable compensation now, it would be \$15. It  
20 wouldn't be \$10. And it's the exact same thing here.  
21 It's like by the time you go through all this stuff that  
22 you have to go through to get paid, you should get paid  
23 more.

24 MR. OLDHAM: Well -- and to respond to that  
25 hypothetical, I think the difference is under -- in your

1 hypothetical, to apply to 330(a)(1), would be Congress  
2 came in and said, you're going to get -- or you -- you  
3 told your -- you know, whoever is helping you, I will  
4 not pay you for bringing it to the courthouse. That is  
5 not something I pay for, but then turning around and  
6 nonetheless saying but you can get paid for it anyway.

7 That's effectively --

8 JUSTICE KAGAN: But it doesn't say you can't  
9 get paid for it. There's no exclusion. All, you  
10 know -- you know, I think you and the SG agree, it's --  
11 we're not counting this as the service. What we're  
12 saying is you have to be reasonably paid for the obvious  
13 services that you have performed, shoveling my driveway.

14 And in my -- in my hypothetical, that means  
15 you also have to be paid for the cab fare. And  
16 similarly, here, it means you also have to be paid for  
17 the cost of, like, making them sign a check to you.

18 MR. OLDHAM: Well -- and, again,  
19 textually -- I won't belabor -- but textually, I think  
20 it disassociates reasonable compensation for services  
21 rendered. I don't think textually that that works under  
22 a fair reading of the statute. But just to go beyond  
23 the text, the argument --

24 JUSTICE KAGAN: Well, it doesn't have to go  
25 be- -- I mean, I just don't understand what that means.

1 It's this -- it's the clear service rendered, it's  
2 shoveling my driveway, it's doing the work for the  
3 estate. What counts as reasonable? What counts as  
4 reasonable is not just the hourly rate, but all the  
5 things I've put you through to get the hourly rate.

6 MR. OLDHAM: And let me give you two other  
7 responses to that. One is that that argument is really  
8 just a straight shot at the American Rule, because it's  
9 true whenever there's a damages award, that if a damages  
10 award is given for, say, \$1,000,000 and you have to  
11 spend a \$100,000 going to defend that, every damages  
12 award will be diluted by that \$100,000.

13 But this Court has said --

14 JUSTICE KAGAN: But here's the problem, I  
15 think, with that response. It's a reasonable response,  
16 but we're already out of the American rule here. I  
17 mean, the bankruptcy system puts you in a different  
18 universe than a statutory universe, and the question is  
19 what do those words of the statute say? It's not what  
20 would exist if the statute didn't exist.

21 MR. OLDHAM: Well, the American rule applies  
22 to litigation, and so obviously, in bankruptcy, you have  
23 some litigation, you have some non-litigation. But when  
24 you have a fee litigation matter arise, the American  
25 rule certainly applies, and Section 330, doesn't --

1 because it exists, doesn't mean the American rule, you  
2 know, is tossed out the window. The American rule still  
3 controls and you have to look at what Congress actually  
4 authorized.

5 And so I think, for example, the Court's  
6 decision in *Cooter & Gell* --

7 JUSTICE KAGAN: Well, the American rule  
8 can't trump the statute. The statute has to trump the  
9 American rule. And if the statute says reasonable  
10 compensation for services rendered -- the obvious  
11 services rendered, and -- and the only thing that counts  
12 as reasonable is taking into account things like how  
13 protracted the litigation is and how much risk you've  
14 had and the exceptional delay, and the fact that you've  
15 had to contest a lot, a lot, a lot of meritless  
16 objections, all of those things make for something -- go  
17 into the question of what's reasonable. They don't have  
18 to. I mean, in 90 percent of the cases, it might be  
19 that it's like, no, that's just a normal part of the  
20 process. But in that other 10 percent, where it's not a  
21 normal part of the process and you wouldn't be  
22 reasonably paid unless they were included, it seems to  
23 me the word reasonable demands that they be included.

24 MR. OLDHAM: Well, and I think if that's the  
25 rationale then this Court's decision in *Cooter & Gell*

1 would have come out the other way. That case dealt with  
2 whether, under Rule 11, an award for a reasonable  
3 attorney's fee -- or under Rule 11, whether you can get  
4 the cost for defending that on appeal. And the Court  
5 said no in determining that statute and --

6 JUSTICE SCALIA: What about other statutes?  
7 I was thinking the same thing, there are other statutes  
8 that provide -- that undo the American rule, and they  
9 say you're entitled, if you're victorious, to reasonable  
10 attorney's fees. Do they usually include fees for  
11 getting the fees?

12 MR. OLDHAM: Under -- under classics  
13 fee-shifting statutes where Congress -- the answer is  
14 yes, in a number of those cases, courts have said you  
15 get your fees on fees, but those statutes are very  
16 different textually, and, I think, in their rationale.  
17 Those statutes say that you get your reasonable  
18 attorney's fee incurred in an action. And so, fees on  
19 fees, when you have a dispute in that action fit within  
20 that express authorization by Congress, it is fees  
21 incurred in that action.

22 So textually, that's very different from  
23 Section 330, but I also think it's very, very different  
24 when you're thinking about the purpose of those  
25 fee-shifting statutes. In the fee-shifting context what

1 you have is an award to a private party who has  
2 vindicated their statutory rights. And the award is to  
3 that party, there's an award of attorney's fees on top  
4 of that, and throughout that process the award comes  
5 from the opponent. And so you never have the dynamic  
6 that you have in the bankruptcy context, where the  
7 lawyer and the -- and the client get on opposite teams.  
8 They're always on the same team. They're fighting for  
9 an award, they're fighting for fees on fees, and they  
10 both benefit by the more, you know, fees that they get.

11 That's fundamentally different from Section  
12 330, which is a very limited authorization which says,  
13 it doesn't depend on success in litigation, because  
14 that's not the rationale for compensation. The  
15 rationale for compensation is that you provide services  
16 that benefit the estate or that re on behalf of the  
17 estate. But because the estate is going to pay no  
18 matter what, you have this dynamic where, when fee  
19 litigation arises, the professional is suddenly on the  
20 opposite team of the estate, because it's always going  
21 to be at the expense of the estate. And I also want --

22 JUSTICE SOTOMAYOR: Do you practice in  
23 bankruptcy?

24 MR. OLDHAM: I'm sorry?

25 JUSTICE SOTOMAYOR: Do you practice in

1 bankruptcy?

2 MR. OLDHAM: Yes, Your Honor.

3 JUSTICE SOTOMAYOR: And do you happen to  
4 know whether fee litigation is more common in bankruptcy  
5 than in other fields?

6 MR. OLDHAM: Well, there have been some  
7 studies that have tried to address that and see --

8 JUSTICE SOTOMAYOR: Okay.

9 MR. OLDHAM: -- whether -- I mean, I think  
10 the argument that we have seen is more of a logical one,  
11 that there are more potential objectors in bankruptcy  
12 because a -- a party has to file their fee application,  
13 and theoretically more people get to review it, but I  
14 think there's a very strong argument that some courts  
15 have accepted that, outside of bankruptcy practice,  
16 there's a paying client in every single case who has the  
17 full incentive, because they're footing the bill, to  
18 study and object and litigate if they want. And I think  
19 it's the rare case outside of bankruptcy and it's  
20 probably the rare case inside of bankruptcy, where you  
21 have full-blown litigation, but it certainly happens in  
22 both contexts and outside of litigation. And all we're  
23 asking for is for the same rule to be in bankruptcy as  
24 is out of bankruptcy.

25 JUSTICE BREYER: Well, all right, but if you

1 look at the fee-shifting statutes, we looked up a lot,  
2 we found quite a few which say that the court can award  
3 a reasonable attorney's fee.

4 MR. OLDHAM: Correct.

5 JUSTICE BREYER: It's broader than here.  
6 But the words, basic active words are reasonable  
7 attorney's fees, and almost all of them have been  
8 interpreted to allow compensation for the reasonable  
9 fee. So they throw that in. And so, they're counting  
10 it as part of the reason -- they're counting it as part  
11 of a reasonable attorney's fees. And here, reasonable  
12 attorney's fee is the same. That language is the same.

13 MR. OLDHAM: Well, it's reasonable --

14 JUSTICE BREYER: A reasonable compensation.

15 MR. OLDHAM: For services rendered, Your  
16 Honor.

17 JUSTICE BREYER: There is a reasonable  
18 attorney's fee. But it's hard to make a lot out of  
19 that.

20 MR. OLDHAM: Well, when you excerpt just  
21 those parts, I agree with you, but I think you have to  
22 look at the full language --

23 JUSTICE BREYER: Yeah.

24 MR. OLDHAM: -- which is in the fee-shifting  
25 context, it is reasonable attorney's fees and then



1 usually it says, incurred, and then it talks about a  
2 civil action, like in the Jean case, the Equal Access to  
3 Justice Act. It says fees incurred in a civil action.  
4 Well, it's within the express authorization to get fees  
5 on fees there because in that civil action, if there is  
6 a fee fight, fees were incurred in that civil action.  
7 So if Congress, in Section 330, had said -- instead of  
8 what it did say, if it had said professionals shall get  
9 reasonable attorney's fees in the bankruptcy proceeding,  
10 then that might be a different case, because there  
11 you're saying anything that happens in the bankruptcy  
12 proceeding you get compensation for. Congress didn't  
13 say --

14 JUSTICE BREYER: But that happens later,  
15 everything's closed and they discover that through some  
16 odd thing they have to spend \$10,000 to get the \$90,000  
17 that was awarded to them. Any authority on that? You  
18 go back to court and say, Judge, I want \$10,000 more.  
19 He says, But the case was closed. He says, Yeah, but I  
20 but to spend the \$10,000 to get the \$90,000. If there  
21 were such a case, one of you would have found it. Or  
22 somebody would have, I guess.

23 MR. OLDHAM: Well, if you're asking -- I  
24 mean, certainly the -- the bankruptcy court maintains  
25 some jurisdiction for a party to go back.

1 JUSTICE BREYER: But there's no -- just  
2 under all these other statutes, there is so many  
3 attorney's fees statutes that --

4 MR. OLDHAM: There are, and let me just say  
5 that if we're going to, you know, sort of think about  
6 what rule might make sense, I think it's important to  
7 remember that the -- the fee-shifting statutes, just  
8 like Your Honors talked about, where it's true fee  
9 shifting, that is, there's a dispute that arises, the  
10 loser has to pay the, you know, the attorney's fees for  
11 the winner, Congress used that in the bankruptcy code.  
12 For example, if there's an automatic stay. If there's  
13 somebody that commits a willful violation of the  
14 automatic stay, Congress identified that particular  
15 dispute and said that the loser in that particular case  
16 should have to pay it to the winner.

17 And so if we're thinking about what rule  
18 makes sense, I think the government put their finger on  
19 it in their brief and talking about it today -- and this  
20 goes to a question that Justice Alito asked about  
21 sanctions -- what would make far more sense is for  
22 Congress to have come in and created a true fee shifting  
23 in which it said that if there's going to a be dispute  
24 over a -- you know, over a fee application, then maybe  
25 the, you know, the prevailing party should have to --

1 should get the attorney's fees from the loser.

2 Congress didn't do that here. There's  
3 nothing like that under Section 330 or any other  
4 statute. Instead, what Congress did is it authorized  
5 compensation to a professional for the work that they do  
6 for the estate.

7 And I just want to emphasize too, because  
8 I've -- I've heard today that -- the suggestion that our  
9 rule is a per se rule, and that's not at all true.  
10 We're not saying that professionals can never get their  
11 fees and we embrace the discretion of bankruptcy courts  
12 to authorize fees under the long-standing exceptions to  
13 the American rule for sanctions such as for frivolous  
14 conduct or for bad-faith litigation misconduct. The  
15 argument has been made that those are, you know, two  
16 exceptional, but outside of the bankruptcy context,  
17 those longstanding exceptions to the American rule have  
18 stood alone as the only exceptions to the American rule.  
19 And there's never been any suggestion at all that those  
20 are not -- those are not sufficient outside of the  
21 bankruptcy context. And so I don't think there's any  
22 reason for a special rule just in the bankruptcy  
23 context.

24 I think it's also really important to keep  
25 in mind that Section 330(a) is not just for attorneys.

1 It's for all professionals. And so in the context of,  
2 say, an accountant that has to go hire their own lawyer,  
3 this Court's decision in Lamie made very clear that you  
4 can only get compensation under Section 330(a) if you're  
5 approved under Section 327(a) for employment.

6 It would -- it would candidly just go  
7 straight through that decision if it was okay for a  
8 Section 327(a) professional, to nonetheless go hire  
9 somebody, have them do professional services, and then  
10 just count it as, you know, the accountant's own  
11 professional services, or, as was suggested today, to  
12 simply call professional services necessary expense.  
13 Which goes against what Congress said in Section  
14 330(a)(1)(A), where it -- and (B), where it made a very  
15 distinction difference between a necessary expense and a  
16 professional services.

17 And so, there -- there's -- the cases that  
18 have talked about this issue, about whether an  
19 accountant can hire a lawyer and get paid, have -- have  
20 -- more of them have said exactly what this Court said  
21 in Lamie, that you can't do that. Section 327(a) is the  
22 sole gateway to compensation for those professionals  
23 under 330(a).

24 The only exception has been -- that some  
25 courts have identified, which we think would be

1 inconsistent with Lamie and with Section 327(a), is  
2 where there's an engagement letter between the Section  
3 327(a) professional and the debtor, where the debtor has  
4 agreed that the Section 327(a) professional is allowed  
5 to go and hire others to do particular work. But that,  
6 again, we don't think is sufficient, but that is a  
7 different context than -- than this case.

8 If there's no further questions, thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Mr. Streett, four minutes.

11 REBUTTAL ARGUMENT OF AARON STREETT

12 ON BEHALF OF THE PETITIONERS

13 MR. STREETT: Thank you.

14 The bankruptcy code uses broad, open-ended  
15 language and commits these questions to bankruptcy court  
16 discretion, and that's no different than the fee  
17 shifting statutes. We've said -- we've heard from my  
18 friend on the other side that this is a direct shot --

19 JUSTICE SCALIA: Will you answer his last  
20 point? Why does it make any sense to say that the  
21 lawyer can get -- make his fee reasonable by getting his  
22 litigation expenses, but the accountant, who's also  
23 entitled to reasonable fees, cannot? If he has to sue,  
24 he has to pay his own lawyer, and you don't assert that  
25 that -- that that is compensable, do you?

1           MR. STRETT:           We -- we do assert that would  
2 be compensable, either as an expense to the accountant  
3 or it could be included as part of the accountant's  
4 reasonable compensation for his underlying services on  
5 the bankruptcy, as the government argues.

6           JUSTICE SCALIA:        Oh, you do? Okay. I  
7 didn't realize you --

8           MR. STRETT:           Yes, we --

9           JUSTICE SOTOMAYOR:     I thought you said  
10 earlier the trustee had to approve it. And I'm  
11 wondering how the trustee could approve that, because  
12 it's for the benefit of the accountant, and not the  
13 trust.

14          MR. STRETT:           The trustee would have to  
15 approve if those services were to be directly  
16 compensable, not if they were to be compensated as  
17 expenses or as part of the underlying reasonable  
18 compensation of the accountant. I think the  
19 hypothetical was, you have an accountant who is already  
20 a 327(a) professional, and it has to hire a lawyer.  
21 ASARCO wants to force that accountant to eat those  
22 costs.

23          JUSTICE KENNEDY:       Are there case authorities  
24 supporting the answers you gave?

25          JUSTICE SCALIA:        It does eat those costs.

1           MR. STRETT:           Yes, we cite one that surveys  
2 the entire case law on this point in our reply brief, I  
3 believe it's footnote 4.

4           To get back to Justice Breyer's question,  
5 you cannot read "services" in isolation. You can't read  
6 "services rendered" in isolation from the rest of the  
7 statute. (a) (4) recognizes that there are services  
8 necessary to case administration, and (a) (3) (C)  
9 recognizes there are services that are beneficial toward  
10 the completion of the case. My friend on the other side  
11 read in a word, he said "services to the estate." It  
12 doesn't say that anywhere in the statute. It could be a  
13 service to the court, it could be a service to the  
14 trustee, which must administer and finally close the  
15 case.

16           JUSTICE SOTOMAYOR:           Except -- except that in  
17 Woods, looking at the predecessor statute, which also  
18 talked about services rendered, we held that the phrase  
19 "reasonable compensation for services rendered," quote,  
20 this is us, "necessarily implies loyal and disinterested  
21 service in the interest of those for whom the claimant  
22 purported to act."

23           MR. STRETT:           And I'm glad Your Honor  
24 brought this up, because the idea that litigating a fee  
25 application is adverse to the estate, cannot be right.

1 The code requires you to litigate the fee application if  
2 it's challenged. Now, think about what happens if we  
3 file an interim fee application under Section 331. We  
4 can do that four months into the bankruptcy. The second  
5 somebody objects and we have to respond to that  
6 objection, ASARCO's position is, we're immediately  
7 adverse to the estate and we're disqualified.

8 But I did want to mention that all of the  
9 National Associations of Trustees support Baker Botts  
10 position on this point, because it's not just a small  
11 expense that can be counted as overhead. In Section --  
12 Chapter 7 and Chapter 13 cases, these National  
13 Associations of Trustees point out that the litigation  
14 costs will frequently eat up the entire core fee,  
15 because it's a modest core fee and all it takes is one  
16 debtor rendering an objection or the Chapter 13 trustee  
17 rendering an objection.

18 JUSTICE GINSBURG: How do you answer the  
19 question about suppose the objection to the fee is  
20 sustained? Does the lawyer, nonetheless, get the work?

21 MR. STREETT: It would pass the minimal  
22 compensability threshold, but courts have consistently  
23 exercised their discretion for decades to deny that  
24 compensation, because the nature and value of  
25 unsuccessful defense is very different from that of a



1 successful defense.

2 And ASARCO is the one asking this Court to  
3 make a major change from the status quo that has  
4 prevailed across this country in the overwhelming  
5 majority of jurisdictions where courts have wisely and  
6 responsibly exercised their discretion to award fees  
7 where they are necessary to make the underlying fee  
8 reasonable, and to deny fees where the defense is  
9 unsuccessful or otherwise wasteful. Baker Botts is just  
10 asking this Court to allow the status quo to continue  
11 playing out in a way that's been effective for the  
12 bankruptcy system.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 12:15 p.m., the case in the  
16 above-entitled matter was submitted.)

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<b>A</b>	<b>act</b> 49:3 55:22	22:19,25 50:20	16:4,7,9,14,18	7:8 56:6
<b>\$1,000,000</b>	<b>acting</b> 4:8 15:3,4	<b>allow</b> 19:8,21	16:22 18:12,18	<b>asked</b> 50:20
43:10	<b>action</b> 9:25 20:1	21:6 27:24	18:22 19:16	<b>asking</b> 22:3 26:9
<b>\$10</b> 41:12,16,20	45:18,19,21	48:8 57:10	21:3,4,23 25:2	32:7 47:23
<b>\$10,000</b> 49:16	49:2,3,5,6	<b>allowed</b> 15:22	25:5 26:10	49:23 57:2,10
49:18,20	<b>active</b> 48:6	32:4 53:4	28:3 30:14,15	<b>aspect</b> 15:2
<b>\$100,000</b> 33:21	<b>actual</b> 21:17	<b>allowing</b> 3:17	31:9,13,15,16	<b>assert</b> 53:24
33:22,24 35:15	28:17	<b>American</b> 10:2	32:20,25 47:12	54:1
37:8 43:11,12	<b>add</b> 13:12	17:5,14,15	50:24 55:25	<b>assessment</b> 3:14
<b>\$15</b> 41:19	<b>additional</b> 22:4	30:1 31:6 32:9	56:1,3	<b>assets</b> 12:22
<b>\$5</b> 41:17	25:6	33:6 36:6,9	<b>applications</b>	<b>Assistant</b> 1:17
<b>\$90,000</b> 49:16	<b>address</b> 32:13	43:8,16,21,24	29:7	<b>assists</b> 11:1
49:20	47:7	44:1,2,7,9 45:8	<b>applied</b> 20:2	<b>Association</b> 5:15
<b>a)1</b> 14:23	<b>addressed</b> 22:17	51:13,17,18	<b>applies</b> 32:8	<b>Associations</b>
<b>a.m</b> 1:13 3:2	<b>administer</b> 11:4	<b>amicus</b> 1:19 2:7	33:7 43:21,25	56:9,13
<b>AARON</b> 1:15	25:15 55:14	5:16 18:6	<b>apply</b> 25:3 32:12	<b>assume</b> 6:13
2:3,13 3:6	<b>administration</b>	<b>amount</b> 3:22 8:1	42:1	23:18
53:11	10:17 11:1	12:1 18:13	<b>approach</b> 24:23	<b>assuming</b> 5:24
<b>able</b> 5:17 33:23	13:13,21 14:1	20:4 32:18,19	24:23	<b>assumption</b>
<b>above-entitled</b>	14:2,3,6,8,12	34:3 35:11	<b>appropriate</b>	39:12,13
1:11 57:16	14:15,22 21:9	<b>analogous</b> 10:9	18:22	<b>attorney</b> 29:4
<b>absolutely</b> 13:6	21:13,20 25:8	<b>analogy</b> 8:18,22	<b>approve</b> 54:10	<b>attorney's</b> 45:3
22:24	25:17,19,20,23	<b>answer</b> 28:9,24	54:11,15	45:10,18 46:3
<b>accepted</b> 47:15	27:2,12,19,22	31:12,16 41:1	<b>approved</b> 5:25	48:3,7,11,12
<b>Access</b> 49:2	28:1 55:8	45:13 53:19	6:12 8:25	48:18,25 49:9
<b>account</b> 23:20	<b>administrative</b>	56:18	10:11 52:5	50:3,10 51:1
35:5 44:12	3:17 25:21	<b>answers</b> 54:24	<b>area</b> 17:5	<b>attorneys</b> 22:11
<b>accountant</b> 6:8	<b>adopting</b> 7:24	<b>Anybody</b> 6:7	<b>areas</b> 17:7	22:18 24:25
6:23 7:2 30:16	<b>adversarial</b>	<b>anymore</b> 31:2	<b>argue</b> 22:25	51:25
30:24 31:3	29:18	32:3	<b>argues</b> 54:5	<b>authorities</b>
52:2,19 53:22	<b>adverse</b> 15:18	<b>anytime</b> 36:7,8	<b>arguing</b> 40:10	54:23
54:2,12,18,19	32:2 55:25	<b>anyway</b> 42:6	<b>argument</b> 1:12	<b>authority</b> 19:10
54:21	56:7	<b>appeal</b> 12:10	2:2,5,9,12 3:3	49:17
<b>accountant's</b>	<b>advocating</b>	45:4	3:6 8:3,11 18:5	<b>authorization</b>
52:10 54:3	22:15	<b>APPEARAN...</b>	26:15 29:11	19:19,20 45:20
<b>accountants</b>	<b>afraid</b> 35:3	1:14	42:23 43:7	46:12 49:4
6:25 7:7 12:18	<b>agree</b> 14:5 16:17	<b>appears</b> 19:13	47:10,14 51:15	<b>authorize</b> 51:12
13:17	18:10 22:24	<b>appendix</b> 19:14	53:11	<b>authorized</b>
<b>accounting</b> 11:4	26:25 38:16	<b>application</b> 3:11	<b>arises</b> 29:18	10:23 16:9
30:17	40:6 42:10	3:21,23 4:15	33:6 46:19	31:21 32:14
<b>accounts</b> 33:15	48:21	6:8,24 7:6,10	50:9	39:6,9,15 44:4
35:12 37:19	<b>agreed</b> 53:4	7:10 8:6,9,12	<b>ASARCO</b> 1:6	51:4
<b>accurate</b> 8:22	<b>agrees</b> 3:20 41:3	8:13,25 9:2,11	3:4 5:11 7:20	<b>authorizes</b> 29:24
<b>accurately</b> 3:16	<b>Ah</b> 28:8	10:13,20 11:6	10:22 15:16	<b>authorizing</b>
<b>acknowledge</b>	<b>ahead</b> 21:25	11:8,13,15	16:10,19 22:20	10:21 40:8
4:19,22	<b>AL</b> 1:3	12:7 14:23,25	54:21 57:2	<b>automatic</b> 50:12
	<b>Alito</b> 21:25	15:13,16,18,21	<b>ASARCO's</b> 7:3	50:14

<p><b>available</b> 9:14  <b>award</b> 17:22  18:14 22:4,6  23:11 25:6  36:7,8 43:9,10  43:12 45:2  46:1,2,3,4,9  48:2 57:6  <b>awarded</b> 16:7,8  17:13 49:17  <b>awards</b> 22:18</p> <hr/> <p style="text-align: center;"><b>B</b></p> <p><b>b</b> 6:20 14:9  15:22 52:14  <b>back</b> 10:1,8  49:18,25 55:4  <b>bad-faith</b> 51:14  <b>Baker</b> 1:3 3:4  5:10 16:18  19:25 20:5  56:9 57:9  <b>balancing</b> 12:13  <b>ban</b> 7:4,6 8:4  17:25  <b>bankruptcy</b>  3:10 5:16 6:9  8:24 9:2,5,10  9:11,20,23  10:6,9,12,14  10:17 11:24,24  12:11 16:24  17:3,6 18:11  18:13,25 19:23  19:23 20:2,22  20:24 22:2,12  23:1,16,23  24:1,14,22  29:15 32:6,8,9  32:12,15,16,20  32:25 33:4,5,7  34:18 35:7,8  36:13 37:19  38:2,12,13  39:7 40:9  43:17,22 46:6  46:23 47:1,4</p>	<p>47:11,15,19,20  47:23,24 49:9  49:11,24 50:11  51:11,16,21,22  53:14,15 54:5  56:4 57:12  <b>banning</b> 4:1  <b>barrage</b> 16:20  <b>bases</b> 11:12  <b>basic</b> 17:14 48:6  <b>basically</b> 22:9  26:8  <b>basis</b> 3:25 4:1,4  27:1  <b>behalf</b> 1:15,19  1:21 2:4,7,11  2:14 3:7 18:6  29:12,22 46:16  53:12  <b>belabor</b> 27:15  42:19  <b>believe</b> 11:21  25:4 55:3  <b>beneficial</b> 14:17  55:9  <b>benefit</b> 12:14,15  13:10,20,22  21:12,21 25:14  27:4,25 30:19  30:21,22 33:19  33:22 46:10,16  54:12  <b>benefits</b> 13:1  <b>better</b> 22:20  23:3 26:4  <b>beyond</b> 42:22  <b>bill</b> 9:24 10:5  23:15 30:18,22  32:21 33:16,17  33:20,24 34:3  47:17  <b>bills</b> 32:23  <b>bonds</b> 20:15  <b>bono</b> 15:14  <b>Botts</b> 1:3 3:4  16:18 19:25  20:5 56:9 57:9</p>	<p><b>Botts's</b> 5:10  <b>boy</b> 40:21  <b>Breyer</b> 12:11,25  13:4,14 14:1,7  14:16,20 19:1  19:3,6,12,18  20:6,12,20  25:7 26:7,12  26:14 27:3,6,9  27:19 28:4,8  28:12,20,23  35:13 36:11,19  37:6,10,21,23  47:25 48:5,14  48:17,23 49:14  50:1  <b>Breyer's</b> 55:4  <b>BRIAN</b> 1:17 2:6  18:5  <b>brief</b> 16:11  22:25 34:23  50:19 55:2  <b>bringing</b> 42:4  <b>broad</b> 23:7 40:8  53:14  <b>broader</b> 48:5  <b>brought</b> 55:24  <b>building</b> 37:18  <b>built</b> 34:9  <b>burden</b> 23:4</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>C</b> 2:1 3:1 55:8  <b>cab</b> 42:15  <b>call</b> 52:12  <b>candidly</b> 52:6  <b>careful</b> 15:23  16:18,21 26:4  <b>carry</b> 13:16  14:21  <b>case</b> 3:4,10,18  4:12 5:9,14,15  7:21 10:16,25  11:2,4,5 13:13  14:6,12,17,22  16:6 18:25  19:24 21:20</p>	<p>27:20,22 28:1  28:14 32:7  34:23 36:7  38:20 45:1  47:16,19,20  49:2,10,19,21  50:15 53:7  54:23 55:2,8  55:10,15 57:14  57:15  <b>cases</b> 4:11 5:14  10:8 44:18  45:14 52:17  56:12  <b>categorical</b> 5:1  7:24 8:4 17:25  <b>categorically</b> 4:1  7:4,6  <b>categories</b> 26:24  <b>category</b> 19:17  <b>caused</b> 22:23  <b>century</b> 34:1  <b>certain</b> 19:7  20:4 36:1  37:18  <b>certainly</b> 4:1,10  15:25 17:18  30:21 32:17,22  33:16 34:25  38:19 43:25  47:21 49:24  <b>challenge</b> 12:10  <b>challenged</b> 56:2  <b>change</b> 57:3  <b>Chapter</b> 4:12  5:15 56:12,12  56:16  <b>characterizati...</b>  40:7  <b>charge</b> 33:12  34:2 38:3,7  <b>charging</b> 30:19  30:19 33:18  <b>check</b> 34:6  42:17  <b>Chief</b> 3:3,8 9:22  17:4 18:3,8</p>	<p>22:11 29:9,13  33:11 34:14  53:9 57:13  <b>Circuit</b> 17:24  <b>Circuit's</b> 7:23  <b>circumstances</b>  20:17  <b>cite</b> 34:22 55:1  <b>civil</b> 49:2,3,5,6  <b>claim</b> 8:19  <b>claimant</b> 55:21  <b>claims</b> 21:11  <b>classics</b> 45:12  <b>clear</b> 12:19 13:2  37:14 38:11  43:1 52:3  <b>clearly</b> 10:21  17:17 30:3  39:14  <b>client</b> 9:4,24  18:19 23:16,16  24:10,15 28:6  30:18 32:11,21  33:19 35:2  38:7 46:7  47:16  <b>clients</b> 24:6  32:23 33:12,20  34:13  <b>close</b> 3:18 11:4  55:14  <b>closed</b> 49:15,19  <b>code</b> 7:13 8:21  11:13 29:15  50:11 53:14  56:1  <b>code-mandated</b>  3:25  <b>codified</b> 16:23  <b>codifying</b> 9:19  <b>collect</b> 35:16  <b>collection</b> 35:6  <b>collections</b> 35:1  35:3  <b>come</b> 9:16 33:2  41:15 45:1  50:22</p>
---	---	--	---	--

<b>comes</b> 4:14 14:23 46:4	48:8,14 49:12 51:5 52:4,22	51:23 52:1 53:7	8:10,14 9:1,14 10:10 11:10,10	53:3,3 56:16
<b>coming</b> 5:12 16:19	54:4,18 55:19 56:24	<b>contexts</b> 47:22	11:24 12:4	<b>debtor's</b> 4:16
<b>commits</b> 50:13 53:15	<b>competent</b> 5:17	<b>continue</b> 57:10	18:9,13 20:2	<b>debtors</b> 25:12
<b>committees</b> 9:15	<b>completely</b> 6:7	<b>contract</b> 24:13 24:18	22:2,12,17	<b>decades</b> 16:25 56:23
<b>common</b> 47:4	<b>completion</b> 11:3 55:10	<b>contractors</b> 6:21	23:1 24:24	<b>decide</b> 15:15 27:22
<b>company</b> 5:12	<b>concedes</b> 10:22 16:10	<b>contrary</b> 4:3,8 24:1	27:24 29:14	<b>decision</b> 37:8 44:6,25 52:3,7
<b>compensability</b> 11:23 56:22	<b>concern</b> 9:5,18	<b>controls</b> 32:9 44:3	34:21 36:20,25 38:16 39:10	<b>defend</b> 6:24 7:5 9:7 15:24 25:2 34:21 43:11
<b>compensable</b> 3:21 7:1 10:6 10:21 11:14,20 11:22 16:5,15 17:2 21:18,19 26:11,25 29:2 29:4 31:9 32:16 53:25 54:2,16	<b>concerned</b> 20:23 29:5	<b>conveyance</b> 20:1	41:16 43:13 45:4 48:2 49:18,24 52:20 53:15 55:13 57:2,10	<b>defended</b> 36:8
<b>compensate</b> 10:18 15:22 18:14 36:1	<b>concerns</b> 9:9	<b>conveyers</b> 13:17	<b>court's</b> 10:17 44:5,25 52:3	<b>defending</b> 3:23 4:15 7:9 8:5,9 11:19 12:7 14:25 15:4,17 16:14 18:17 19:16 21:22 25:5 28:2 29:6 45:4
<b>compensated</b> 6:4,17 9:20 12:1 13:2 22:12 23:10 33:2 54:16	<b>conclude</b> 12:4	<b>conveying</b> 12:19	<b>courthouse</b> 42:4	<b>defends</b> 18:12
<b>compensates</b> 29:16 37:12	<b>conclusion</b> 12:8	<b>Cooter</b> 44:6,25	<b>courts</b> 11:24 12:2,7,9 16:24 17:22 40:9 45:14 47:14 51:11 52:25 56:22 57:5	<b>defense</b> 11:12 18:15,22 26:10 31:14 56:25 57:1,8
<b>compensating</b> 8:5 11:12,15 13:12	<b>conduct</b> 51:14	<b>core</b> 3:16 5:10 9:6,8 12:7 56:14,15	<b>created</b> 50:22	<b>delay</b> 44:14
<b>compensation</b> 3:14,23 4:2 6:2 6:2,18 7:4,6,24 10:21 16:6 17:9,22 18:11 18:20,21,24 19:8,14,22 20:5,8 21:2,17 22:6 23:12 27:24 28:17,17 31:23 32:5,14 37:9,12 41:2 41:12,19 42:20 44:10 46:14,15	<b>Congress</b> 9:18 10:7,15 13:8 13:12 14:12,18 16:3,17,23 17:1,18 30:3 31:20,21 32:4 32:13,17 33:1 33:8 38:9,11 39:9 41:5 42:1 44:3 45:13,20 49:7,12 50:11 50:14,22 51:2 51:4 52:13	<b>correct</b> 5:4 7:18 8:17 12:24 13:6 31:10 38:8,18 48:4	<b>creates</b> 24:10 26:2	<b>delays</b> 38:23 40:1
	<b>conscious</b> 37:8	<b>cost</b> 13:18 14:20 25:12 35:16 42:17 45:4	<b>creatures</b> 20:24	<b>demand</b> 44:23
	<b>consider</b> 11:25 12:2	<b>costs</b> 6:14 20:17 22:5 24:22,25 30:4 41:17 54:22,25 56:14	<b>creditor</b> 13:1	<b>deny</b> 56:23 57:8
	<b>considerable</b> 17:7	<b>counsel</b> 5:18 18:3 29:9 53:9 57:13	<b>creditors</b> 3:19 5:7 9:15,15 11:17	<b>departed</b> 10:7
	<b>considered</b> 13:20	<b>count</b> 38:25 40:23 52:10	<b>curiae</b> 1:19 2:8 18:6	<b>Department</b> 1:18 25:25
	<b>consistent</b> 24:23	<b>counted</b> 56:11	<b>cut</b> 17:11	<b>depend</b> 46:13
	<b>consistently</b> 56:22	<b>counting</b> 42:11 48:9,10	<b>D</b>	<b>describe</b> 27:17
	<b>contest</b> 44:15	<b>country</b> 57:4	<b>D</b> 3:1	<b>describes</b> 19:14 28:16
	<b>context</b> 6:23 7:11 8:15,18 9:10,17 32:15 32:16 39:7 45:25 46:6 48:25 51:16,21	<b>counts</b> 43:3,3 44:11	<b>D.C</b> 1:8,18	<b>detail</b> 17:7 32:23
		<b>couple</b> 8:23	<b>damages</b> 36:7 43:9,9,11	<b>detailed</b> 3:11 9:12 21:2
		<b>course</b> 7:3 8:18 10:5 23:3 25:10 26:2 36:11	<b>day</b> 12:8	<b>determine</b> 34:19
		<b>court</b> 1:1,12 3:9 3:12 6:9 8:4,7	<b>days</b> 33:12	<b>determined</b> 20:3
			<b>dealing</b> 24:5	<b>determining</b> 3:16,22 11:25 45:5
			<b>dealt</b> 22:20 45:1	<b>develop</b> 26:17
			<b>debtor</b> 4:14,18 5:18 12:17,20 12:21,22 21:21	

<b>difference</b> 10:11 15:2 31:4 32:18,24 41:25 52:15	<b>disqualified</b> 56:7	<b>enhancement</b> 11:18,19,19 12:6	<b>eventuated</b> 35:19	<b>extent</b> 33:15 34:9 35:9
<b>different</b> 10:14 16:5 18:16 20:21 33:4,9 35:19 43:17 45:16,22,23 46:11 49:10 53:7,16 56:25	<b>distinction</b> 4:9 8:8 13:24 16:1 30:14 52:15	<b>enhancements</b> 11:17 38:17,22 38:25 39:4,5,7 39:22,23,25 40:9	<b>everybody</b> 41:12	<b>extra</b> 22:5 24:21 35:16,16
<b>difficultly</b> 26:2	<b>distinguished</b> 38:1	<b>entire</b> 55:2 56:14	<b>everything's</b> 49:15	<b>extraordinary</b> 38:23
<b>dilute</b> 5:18	<b>district</b> 39:10	<b>entitled</b> 5:21,22 31:23 45:9 53:23	<b>exact</b> 41:20	<hr/> <b>F</b> <hr/>
<b>diluted</b> 9:7 23:13 43:12	<b>doing</b> 9:23 27:10 41:7 43:2	<b>enormous</b> 20:13	<b>exactly</b> 30:13 52:20	<b>fact</b> 7:19 9:9 12:19 13:18 16:13 23:20 33:17 44:14
<b>dilutes</b> 23:18	<b>drafted</b> 16:4	<b>ensuing</b> 8:13	<b>examiner</b> 28:19	<b>factor</b> 9:19 16:24
<b>dilution</b> 35:12	<b>draw</b> 16:12 36:3	<b>ensure</b> 21:3	<b>example</b> 4:11 5:10 12:2 19:25 30:16 36:22 44:5 50:12	<b>factors</b> 11:25
<b>diminish</b> 7:12	<b>draws</b> 36:6	<b>entire</b> 55:2 56:14	<b>exception</b> 52:24	<b>fail</b> 25:3
<b>diminished</b> 32:24	<b>dreamt</b> 13:19	<b>enumerated</b> 17:2	<b>exceptional</b> 38:23 40:1 44:14 51:16	<b>fair</b> 42:22
<b>direct</b> 13:10 53:18	<b>driveway</b> 41:11 41:13 42:13 43:2	<b>Equal</b> 49:2	<b>exceptions</b> 51:12 51:17,18	<b>fall</b> 10:17 19:1 19:16 22:22 26:24
<b>directly</b> 54:15	<hr/> <b>E</b> <hr/>	<b>equally</b> 15:13	<b>excerpt</b> 48:20	<b>falls</b> 10:24 13:22 14:9,9,10 26:19
<b>disagree</b> 26:22 28:10	<b>E</b> 2:1 3:1,1	<b>erred</b> 17:24	<b>exclusion</b> 42:9	<b>far</b> 9:11,12,13 50:21
<b>disallowing</b> 4:7	<b>earlier</b> 26:8 54:10	<b>error</b> 7:23	<b>excuse</b> 7:14 30:16	<b>fare</b> 42:15
<b>disassociates</b> 42:20	<b>eat</b> 16:20 54:21 54:25 56:14	<b>especially</b> 31:22	<b>exercised</b> 56:23 57:6	<b>February</b> 1:9
<b>discount</b> 15:15	<b>effect</b> 38:11	<b>ESQ</b> 1:15,17,21 2:3,6,10,13	<b>exercising</b> 16:25	<b>fee</b> 3:11 6:8,24 7:5,9,10 8:5,9 8:12,16,17,19 8:22,23 9:11 10:20 11:6,12 12:7 14:23,25 15:13,16,17,21 16:4,7,9,14,18 17:10 18:12,15 18:17,22 19:16 21:2,23 22:12 24:7 25:2,5 26:10 28:2 29:7,18,20 30:6,9,10,10 30:10,14,15,24 31:9 32:10,20 32:25 33:5,6 33:12 34:19 35:15 36:8,22
<b>discover</b> 12:21 49:15	<b>effective</b> 57:11	<b>estate</b> 5:3,6,10 5:25 6:5,19,21 7:12,12 8:20 13:10,18,21,22 13:23 14:2,3,4 14:18 15:3,18 15:19 21:13 22:23 23:6 25:8,13,14,15 25:19,21 27:5 27:25 28:13 29:17,21,22,24 30:22 31:1,3 31:24 32:2 43:3 46:16,17 46:17,20,21 51:6 55:11,25 56:7	<b>exists</b> 44:1	
<b>discretion</b> 10:18 11:24 12:5 16:25 51:11 53:16 56:23 57:6	<b>effectively</b> 40:8 40:10 42:7	<b>estate's</b> 3:17,19 15:11	<b>expense</b> 6:4 7:2 29:21 40:3 46:21 52:12,15 54:2 56:11	
<b>discretionary</b> 39:19	<b>effort</b> 32:19 35:25	<b>ET</b> 1:3	<b>expenses</b> 3:17 6:20 25:22 38:24 40:1 53:22 54:17	
<b>discuss</b> 13:11	<b>efforts</b> 8:13		<b>expensive</b> 36:16	
<b>disinterested</b> 55:20	<b>either</b> 11:9 14:10 21:12,19 26:24 29:19 54:2		<b>expert</b> 6:8	
<b>dispute</b> 30:25 32:10 45:19 50:9,15,23	<b>embrace</b> 51:11		<b>experts</b> 6:21	
<b>disputed</b> 38:19	<b>emphasize</b> 51:7		<b>explain</b> 26:5 30:18	
<b>disputes</b> 22:13	<b>employer</b> 35:24		<b>explicit</b> 20:10	
	<b>employment</b> 52:5		<b>express</b> 17:23 45:20 49:4	
	<b>enacted</b> 32:17		<b>extended</b> 40:20	
	<b>encourage</b> 16:17			
	<b>engage</b> 29:25			
	<b>engagement</b> 53:2			
	<b>engages</b> 29:20			

41:3 43:24 45:3,18 46:18 47:4,12 48:3,9 48:12,18 49:6 50:8,22,24 53:16,21 55:24 56:1,3,14,15 56:19 57:7 <b>fee-shifting</b> 9:1 9:5,16 10:8 25:1 45:13,25 45:25 48:1,24 50:7 <b>feel</b> 33:23 <b>fees</b> 3:16 5:10,11 5:21,23 6:9 7:16 8:25 9:6,8 10:1,3,10 15:4 16:21 17:13,13 22:18,22 23:19 23:21 25:1,16 35:14 40:4 45:10,10,11,15 45:15,18,19,20 46:3,9,9,10 48:7,11,25 49:3,4,5,6,9 50:3,10 51:1 51:11,12 53:23 57:6,8 <b>fields</b> 47:5 <b>Fifth</b> 7:23 17:24 <b>fight</b> 5:20 49:6 <b>fighting</b> 6:14 15:7 46:8,9 <b>file</b> 3:11 8:25 47:12 56:3 <b>filed</b> 33:1 <b>final</b> 11:3 <b>finally</b> 55:14 <b>find</b> 19:10 <b>finger</b> 30:13 50:18 <b>firm</b> 5:20,20,24 6:24 7:1 36:23 38:2,3 <b>firms</b> 7:4 34:25	<b>first</b> 6:16 8:23 37:17 40:13 <b>fit</b> 30:6 45:19 <b>Fletcher</b> 1:17 2:6 18:4,5,8 19:3,12,20 20:10,20 21:10 21:14 22:1,14 22:24 23:22,25 24:4,9 26:7,13 26:21 27:4,8 27:14,21 28:5 28:9,15,21,24 <b>flexible</b> 17:25 <b>follow</b> 10:2 25:25 26:3 <b>following</b> 26:4 <b>footing</b> 47:17 <b>footnote</b> 55:3 <b>forbids</b> 19:7 <b>force</b> 54:21 <b>forced</b> 9:7 <b>formally</b> 8:19 <b>found</b> 23:8 48:2 49:21 <b>four</b> 53:10 56:4 <b>frankly</b> 29:3 <b>fraudulent</b> 20:1 <b>frequently</b> 56:14 <b>friend</b> 53:18 55:10 <b>frivolous</b> 22:21 23:5,8 51:13 <b>full</b> 8:1 47:17 48:22 <b>full-blown</b> 47:21 <b>fully</b> 4:13 <b>fundamental</b> 17:6 30:13 31:4 <b>fundamentally</b> 46:11 <b>funds</b> 29:24 <b>further</b> 53:8 <hr/> <b>G</b> <b>G</b> 3:1	<b>gallery</b> 10:13 <b>gateway</b> 52:22 <b>Gell</b> 44:6,25 <b>General</b> 1:18 <b>generally</b> 32:8 34:10 38:4,10 <b>getting</b> 35:10 40:18 45:11 53:21 <b>Gibbons-Gra...</b> 34:23 <b>GINSBURG</b> 11:16 31:7,11 56:18 <b>give</b> 5:7 15:5 19:10,19 35:24 36:9,23 37:2 40:9 41:9,11 43:6 <b>given</b> 43:10 <b>gives</b> 9:12 17:1 <b>glad</b> 55:23 <b>go</b> 10:10 17:7,14 20:13 21:25 22:5 30:11,25 31:17,19 34:21 34:24 35:20 36:20,25 37:1 40:4 41:15,21 41:22 42:22,24 44:16 49:18,25 52:2,6,8 53:5 <b>goes</b> 30:16 32:19 35:7 41:8 50:20 52:13 <b>going</b> 5:17,18 13:9 14:19 21:5 22:1 23:12 25:8 26:22 33:16 36:23,25 37:15 41:11,13,15 42:2 43:11 46:17,20 50:5 50:23 <b>good</b> 4:14 10:3 11:18 22:15	33:21 <b>government</b> 41:3 50:18 54:5 <b>government's</b> 36:4 40:7,11 <b>greater</b> 9:13 <b>grounded</b> 22:16 <b>grounds</b> 18:20 24:17,19 <b>guess</b> 39:2 49:22 <b>guidance</b> 3:22 <hr/> <b>H</b> <b>H</b> 1:17 2:6 18:5 <b>half</b> 34:1 35:17 <b>handled</b> 24:24 <b>handles</b> 24:24 <b>happen</b> 11:5 32:1 47:3 <b>happened</b> 4:17 <b>happens</b> 6:25 29:19 47:21 49:11,14 56:2 <b>hard</b> 48:18 <b>hear</b> 3:3 34:13 <b>heard</b> 34:21 51:8 53:17 <b>hearing</b> 3:13 7:16,17 11:11 <b>heightened</b> 9:9 <b>held</b> 55:18 <b>help</b> 6:22 25:15 <b>helping</b> 42:3 <b>hesitant</b> 29:1 <b>high</b> 23:19 <b>highly</b> 39:19 <b>hire</b> 12:17 25:15 30:16,25 41:10 41:13 52:2,8 52:19 53:5 54:20 <b>hired</b> 5:19 6:10 6:19,23 31:25 <b>hires</b> 4:12 6:22 29:19 <b>history</b> 13:11	<b>hold</b> 3:13 11:11 <b>home</b> 14:11 <b>Honor</b> 4:23 6:15 13:7 16:16 17:20 36:5 37:5,16 47:2 48:16 55:23 <b>Honors</b> 50:8 <b>hour</b> 41:12 <b>hourly</b> 40:18 43:4,5 <b>hours</b> 20:3 <b>Houston</b> 1:15,21 <b>hypothetical</b> 5:24 41:9,25 42:1,14 54:19 <hr/> <b>I</b> <b>idea</b> 39:21 55:24 <b>identified</b> 50:14 52:25 <b>ignoring</b> 15:1 <b>ii</b> 14:24 26:19 <b>imagine</b> 20:16 <b>immediate</b> 13:10 <b>immediately</b> 56:6 <b>implies</b> 55:20 <b>important</b> 15:2 35:7 50:6 51:24 <b>impose</b> 23:3 <b>imposed</b> 22:22 24:25 <b>imposes</b> 24:21 <b>incentive</b> 47:17 <b>include</b> 34:20 36:15 39:18 40:17 45:10 <b>included</b> 39:21 44:22,23 54:3 <b>inconsistent</b> 53:1 <b>increase</b> 18:13 <b>incurred</b> 45:18 45:21 49:1,3,6
---	--	---	---	---



<b>meaning</b> 18:19 24:18 29:23	25:22 28:1,18 29:3 52:12,15 55:8 57:7	<b>objects</b> 4:14,20 7:15 8:6 23:16 56:5	<b>outside</b> 6:21 7:1 10:9,11 22:11 23:15 32:6,8,9 32:16 33:5,7 34:18 36:12 38:13 47:15,19 47:22 51:16,20	24:16 <b>parts</b> 16:3 48:21 <b>party</b> 22:20,23 23:5 46:1,3 47:12 49:25 50:25 <b>party's</b> 8:12 <b>pass</b> 56:21 <b>passes</b> 11:22 <b>paste</b> 17:11 <b>patriotic</b> 17:15 <b>pay</b> 3:18 4:13,21
<b>means</b> 42:14,16 42:25	<b>necessity</b> 15:24	<b>obvious</b> 42:12 44:10	<b>overhead</b> 33:15 34:10 56:11	5:11 6:9 7:25 9:24 10:2 20:8 32:11 33:8,21 33:22 37:2,3 40:22 41:16 42:4,5 46:17 50:10,16 53:24
<b>meant</b> 17:13	<b>need</b> 14:14 21:12 22:3 33:8 36:9	<b>obviously</b> 43:22	<b>overwhelming</b> 57:4	<b>paying</b> 25:16,18 47:16
<b>meets</b> 21:4	<b>needs</b> 4:7	<b>odd</b> 49:16	<hr/> <b>P</b> <hr/>	<b>payment</b> 8:20 25:22 38:23
<b>mention</b> 56:8	<b>negative</b> 16:12	<b>officials</b> 9:20	<b>P</b> 3:1	<b>payments</b> 36:15
<b>mentioned</b> 16:13	<b>never</b> 34:21 46:5 51:10,19	<b>oh</b> 14:7 17:12 41:14 54:6	<b>p.m</b> 57:15	<b>pays</b> 17:8
<b>merely</b> 23:2	<b>nine</b> 17:21	<b>okay</b> 4:20 28:23 38:24 47:8 52:7 54:6	<b>package</b> 31:15	<b>people</b> 16:17 17:4 25:16 29:6 47:13
<b>meritless</b> 23:2,9 44:15	<b>non-bankrupt...</b> 9:21 35:8,10 37:22 38:7	<b>Oldham</b> 1:21 2:10 29:10,11 29:13 30:8,11 31:7,10,19 33:14 34:5,8 34:22 36:5,18 37:4,7,16,22 38:4,8,15,18 39:2 40:6,24 41:24 42:18 43:6,21 44:24 45:12 46:24 47:2,6,9 48:4 48:13,15,20,24 49:23 50:4	<b>page</b> 2:2 16:11 19:13	<b>percent</b> 15:15 44:18,20
<b>method</b> 20:3	<b>non-litigation</b> 43:23		<b>pages</b> 13:11	<b>Perdue</b> 39:1
<b>mind</b> 51:25	<b>non-market</b> 37:20		<b>paid</b> 5:10 7:11 10:1 20:14,14 20:18,22 21:1 29:6 41:22,22 42:6,9,12,15 42:16 44:22 52:19	<b>perfect</b> 33:1
<b>minimal</b> 11:22 56:21	<b>nonpayment</b> 35:1,6 37:3,13		<b>papers</b> 38:14	<b>perform</b> 24:12 24:17
<b>minutes</b> 53:10	<b>normal</b> 10:2 22:11 44:19,21		<b>parity</b> 9:20,23 10:11 16:24 38:9	<b>performance</b> 39:22,23,24
<b>misconduct</b> 51:14	<b>normally</b> 25:17		<b>part</b> 3:24 8:21 12:23 13:19,21 25:17,19,20,20 25:20,22 27:11 28:12 40:23 44:19,21 48:10 48:10 54:3,17	<b>performed</b> 42:13
<b>mix</b> 40:5	<b>number</b> 34:24 45:14		<b>participating</b> 7:17	<b>period</b> 40:20
<b>modest</b> 56:15	<b>Numerous</b> 3:12		<b>particular</b> 8:2 17:10 24:2 35:2 50:14,15 53:5	<b>permissible</b> 38:22
<b>money</b> 5:7 12:20 12:21 13:18 14:20 15:7,11 15:19 20:7,8 20:17,18 25:13 35:16 36:16 40:21	<hr/> <b>O</b> <hr/>		<b>parties</b> 3:12 11:9 21:6	<b>permit</b> 40:14
<b>months</b> 56:4	<b>O</b> 2:1 3:1	<b>on/off</b> 6:1		<b>person</b> 28:19
<b>mounting</b> 16:20	<b>object</b> 3:12 9:13 9:16 24:17 33:23 36:21 37:4 47:18	<b>open</b> 21:5		<b>Petitioners</b> 1:4 1:16,20 2:4,8 2:14 3:7 18:7 18:10 27:1
<hr/> <b>N</b> <hr/>	<b>objecting</b> 5:12	<b>open-ended</b> 53:14		
<b>N</b> 2:1,1 3:1	<b>objection</b> 5:20 23:6 31:12,13 33:24 56:6,16 56:17,19	<b>opened</b> 9:2		
<b>narrow</b> 17:23	<b>objections</b> 3:13 3:24 4:16 11:9 15:6 16:20 21:7 22:21 23:1,7,11 24:14 44:16	<b>opening</b> 31:11		
<b>National</b> 5:15 56:9,12	<b>objectors</b> 9:3,13 10:13 47:11	<b>opinion</b> 8:10		
<b>natural</b> 14:11 28:21		<b>opponent</b> 46:5		
<b>naturally</b> 10:24		<b>opportunity</b> 9:12		
<b>nature</b> 12:2,5,6 56:24		<b>opposite</b> 46:7,20		
<b>necessarily</b> 55:20		<b>options</b> 17:21		
<b>necessary</b> 10:16 10:25 13:13 14:11,14,21 20:7 21:17,20		<b>oral</b> 1:11 2:2,5,9 3:6 18:5 29:11		
		<b>order</b> 20:5 21:3 21:19 40:21		
		<b>ordinarily</b> 29:3		
		<b>ought</b> 34:14		
		<b>outlays</b> 38:23		



<p>53:12  <b>phrase</b> 12:14                      55:18  <b>pick</b> 9:12  <b>playing</b> 57:11  <b>pleading</b> 31:12  <b>please</b> 3:9 18:9                      24:11 29:14                      30:20  <b>plus</b> 30:2  <b>pocket</b> 15:8,11  <b>point</b> 5:16 8:2                      9:23 16:16                      21:16 27:15                      30:23 31:3                      35:7 40:25                      53:20 55:2                      56:10,13  <b>pointed</b> 22:11  <b>policy</b> 22:8 24:1  <b>posing</b> 28:25  <b>position</b> 6:16 7:3                      7:8 11:17                      26:17,22 40:7                      40:12,14 56:6                      56:10  <b>possible</b> 6:3  <b>possibly</b> 5:22                      13:18  <b>potential</b> 10:13                      47:11  <b>practice</b> 12:11                      33:5,5 34:1,11                      35:7 46:22,25                      47:15  <b>precisely</b> 23:4  <b>predecessor</b>                      55:17  <b>preparation</b>                      8:12 11:15                      16:21 26:9                      30:10 32:14                      33:13  <b>prepare</b> 4:5 6:24  <b>prepared</b> 11:6,8  <b>prepares</b> 6:7  <b>preparing</b> 3:20</p>	<p>7:10 8:9 10:5                      10:20,22 14:23                      15:13,17,21                      16:4,7,8,18                      17:9 18:17                      19:15 21:22                      30:14 33:17                      34:3  <b>prescribed</b>                      18:24  <b>presupposed</b>                      16:8  <b>pretty</b> 12:12                      25:9 33:21  <b>prevailed</b> 57:4  <b>prevailing</b> 50:25  <b>principle</b> 3:25                      4:4,9  <b>private</b> 33:12                      46:1  <b>pro</b> 15:14  <b>probably</b> 34:12                      47:20  <b>problem</b> 7:8                      21:15 22:19,23                      24:4 43:14  <b>proceeding</b>                      39:12 49:9,12  <b>process</b> 3:25                      44:20,21 46:4  <b>produce</b> 13:9  <b>professional</b>                      3:11 4:12,13                      4:16 6:1,5,19                      7:25 8:5,24 9:7                      10:9,12 13:9                      14:19 15:14                      16:21 18:11,23                      19:23 20:23                      21:1 22:4 23:9                      28:19 29:19,25                      46:19 51:5                      52:8,9,11,12                      52:16 53:3,4                      54:20  <b>professional's</b>                      3:16 9:2,3,6</p>	<p>14:14  <b>professionals</b>                      6:22 9:21                      24:22 29:16                      31:23,25 49:8                      51:10 52:1,22  <b>prohibitions</b>                      17:24  <b>prohibits</b> 7:24  <b>prong</b> 13:12  <b>prongs</b> 13:7  <b>proper</b> 8:18                      39:6  <b>prosecuted</b>                      19:25  <b>protracted</b>                      38:24 39:25                      44:13  <b>provide</b> 22:3,18                      45:8 46:15  <b>provides</b> 30:17  <b>provision</b> 20:11  <b>purely</b> 29:20  <b>purported</b> 55:22  <b>purpose</b> 5:8                      16:13 45:24  <b>pursuing</b> 37:24  <b>put</b> 30:13 31:20                      33:16 43:5                      50:18  <b>puts</b> 11:23 15:7                      15:10 23:4                      43:17  <b>putting</b> 32:19,20</p> <hr/> <p><b>Q</b></p> <p><b>question</b> 16:3,22                      22:2 26:23                      28:25 30:12                      38:1 39:4,8,15                      40:16 41:8                      43:18 44:17                      50:20 55:4                      56:19  <b>questions</b> 28:7                      53:8,15  <b>quite</b> 12:19</p>	<p>36:12 48:2  <b>quo</b> 57:3,10  <b>quote</b> 8:10 55:19</p> <hr/> <p><b>R</b></p> <p><b>R</b> 3:1  <b>raise</b> 21:7  <b>raised</b> 23:2,5  <b>range</b> 9:3,13                      23:7  <b>rare</b> 47:19,20  <b>rate</b> 16:8 34:24                      35:10,18 37:18                      38:3,6 39:14                      39:16 40:18                      41:13 43:4,5  <b>rates</b> 20:4 35:5,9                      35:11 38:12  <b>rational</b> 15:25  <b>rationale</b> 44:25                      45:16 46:14,15  <b>reach</b> 18:15  <b>reached</b> 12:8  <b>read</b> 10:19                      28:22 31:22                      55:5,5,11  <b>reading</b> 42:22  <b>realize</b> 54:7  <b>reallocate</b> 30:3  <b>really</b> 7:20 8:1                      12:13 13:23                      43:7 51:24  <b>reason</b> 4:25 8:1                      15:6,25 18:16                      25:7,24 26:17                      27:10,12,13                      48:10 51:22  <b>reasonable</b> 3:14                      17:22 18:24                      19:21 20:3,4,8                      21:1,16 22:18                      24:22 27:16                      28:17 29:2                      35:21 37:8,11                      39:14,15,18,21                      40:16,17,17,19                      40:20,23 41:1</p>	<p>41:2,6,8,11,19                      42:20 43:3,4                      43:15 44:9,12                      44:17,23 45:2                      45:9,17 48:3,6                      48:8,11,11,13                      48:14,17,25                      49:9 53:21,23                      54:4,17 55:19                      57:8  <b>reasonably</b> 12:4                      18:14 27:25                      42:12 44:22  <b>reasons</b> 6:16                      8:23 9:10 10:8                      11:14  <b>REBUTTAL</b>                      2:12 53:11  <b>receive</b> 25:5  <b>receives</b> 18:23  <b>recognize</b> 31:8  <b>recognized</b> 9:18                      10:15 13:8                      14:18  <b>recognizes</b> 55:7                      55:9  <b>record</b> 19:13  <b>recovery</b> 23:18  <b>reflected</b> 3:21  <b>reflection</b> 10:20  <b>reflects</b> 11:7                      14:13  <b>regardless</b> 8:6  <b>regime</b> 9:1,5                      10:7  <b>regular</b> 38:3  <b>reimbursement</b>                      34:20  <b>rejected</b> 8:7                      26:18 27:9  <b>remainder</b> 18:1  <b>remember</b> 50:7  <b>remit</b> 30:20  <b>render</b> 28:20                      37:9  <b>rendered</b> 6:3,18                      10:24 17:23</p>
---	---	---	--	---

18:18,25 19:23 21:17,23 27:17 27:23 28:18 29:17,22 41:2 41:4 42:21 43:1 44:10,11 48:15 55:6,18 55:19 <b>rendering</b> 6:4 28:6 56:16,17 <b>reorganized</b> 5:12 <b>reply</b> 31:16 55:2 <b>represent</b> 25:11 25:12 <b>representing</b> 12:17 <b>represents</b> 38:2 <b>require</b> 32:23 <b>required</b> 20:4 30:2 33:1 <b>requirements</b> 21:4 24:20 <b>requires</b> 7:13 8:21 11:13 30:2 56:1 <b>reserve</b> 18:1 <b>resolve</b> 3:13 <b>respond</b> 40:11 41:24 56:5 <b>Respondent</b> 1:22 2:11 29:12 <b>responding</b> 23:10 <b>response</b> 31:13 43:15,15 <b>responses</b> 37:17 39:3 43:7 <b>responsibly</b> 16:25 57:6 <b>rest</b> 55:6 <b>result</b> 18:15 <b>retain</b> 5:17 <b>retained</b> 7:5 <b>retainer</b> 35:4 <b>review</b> 47:13	<b>right</b> 4:21 5:8 7:19 10:4 13:4 17:20 20:12 22:6 24:8 26:13 27:23 28:23 36:5,12 37:21 39:19 41:1,8,13,17 47:25 55:25 <b>rights</b> 15:15 46:2 <b>risk</b> 34:20,25 35:1,5,6,12,16 35:19 37:3,3 44:13 <b>risks</b> 35:15 36:1 36:24,25 37:12 37:13,18 <b>ROBERTS</b> 3:3 9:22 17:4 18:3 29:9 33:11 34:14 53:9 57:13 <b>route</b> 26:1,3 <b>rule</b> 6:7 7:24 10:2 11:20 17:5,15,15 22:15 30:1 31:6 32:8,9,12 33:7 36:6,9 43:8,16,21,25 44:1,2,7,9 45:2 45:3,8 47:23 50:6,17 51:9,9 51:13,17,18,22 <b>run</b> 14:21 <hr/> <b>S</b> <b>S</b> 2:1 3:1 <b>sanctionable</b> 23:3,8 <b>sanctions</b> 22:20 22:21 23:4 50:21 51:13 <b>satisfy</b> 24:13,19 <b>saying</b> 14:7,8,9 22:9 25:25	36:14,17 42:6 42:12 49:11 51:10 <b>says</b> 12:15 19:8 19:21 20:25 21:16,19 27:23 28:13 32:10 33:7 34:18 36:22 40:16 41:2,5 44:9 46:12 49:1,3 49:19,19 <b>Scalia</b> 4:4,19,24 8:8 23:14,23 24:3,8 45:6 53:19 54:6,25 <b>scope</b> 40:8 <b>scrutiny</b> 21:5 <b>se</b> 51:9 <b>second</b> 16:16 56:4 <b>section</b> 3:21 9:19 10:15,19 10:23,25 11:7 13:8 14:13 16:9,23 17:1 18:12,19 19:21 20:25 21:15 24:2,9,20 26:24 27:23 29:15,17,23 31:5,21,22 32:18 33:9,10 38:9,10 39:9 40:25 43:25 45:23 46:11 49:7 51:3,25 52:4,5,8,13,21 53:1,2,4 56:3 56:11 <b>secure</b> 25:22 <b>see</b> 11:2 13:22 14:16 25:18,20 25:21 27:7 28:23 33:20 36:17 37:14 47:7	<b>seeking</b> 8:20 12:5 18:11 25:1 <b>seen</b> 47:10 <b>self-interest</b> 15:5 <b>self-interested</b> 29:20,25 <b>send</b> 9:24 <b>sense</b> 11:22 22:15 26:5 31:2 33:1 34:8 50:6,18,21 53:20 <b>service</b> 6:2,5 10:23,25 12:3 14:14 19:22 21:12,23 26:23 27:17,23 28:4 28:5,11,13,13 29:2,22 41:4 42:11 43:1 55:13,13,21 <b>services</b> 6:18,22 10:16 17:23 18:18,25 19:15 19:17 21:17,18 22:7 23:12 24:12 26:11 27:24 28:18 29:4,17 30:17 32:14 37:9 39:14 41:2 42:13,20 44:10 44:11 46:15 48:15 52:9,11 52:12,16 54:4 54:15 55:5,6,7 55:9,11,18,19 <b>serving</b> 4:6,7,16 31:3 <b>set</b> 13:16 23:19 35:18 <b>setting</b> 34:24 <b>SG</b> 42:10 <b>SG's</b> 39:12 <b>shifting</b> 8:18,19	8:22,23 50:9 50:22 53:17 <b>shock</b> 34:12 <b>short</b> 14:21 <b>shot</b> 43:8 53:18 <b>shovel</b> 41:10 <b>shoveling</b> 42:13 43:2 <b>showing</b> 24:11 <b>shows</b> 7:23 13:11 17:12 <b>side</b> 12:14 53:18 55:10 <b>sign</b> 42:17 <b>significant</b> 31:6 <b>similarly</b> 42:16 <b>simplest</b> 27:11 <b>simply</b> 17:19 29:23 32:4 40:13 52:12 <b>single</b> 47:16 <b>situation</b> 23:1 <b>skilled</b> 5:17 <b>small</b> 56:10 <b>sole</b> 52:22 <b>Solicitor</b> 1:17 <b>solve</b> 16:22 <b>somebody</b> 37:1 41:10,18 49:22 50:13 52:9 56:5 <b>somewhat</b> 18:16 <b>sorry</b> 21:10,25 30:8 46:24 <b>sort</b> 17:11 21:15 21:16 40:2 50:5 <b>sorts</b> 24:25 <b>Sotomayor</b> 5:2,6 5:19 6:6,12 8:15 15:1,10 21:8,10 22:8 30:6,9,12 38:14 46:22,25 47:3,8 54:9 55:16 <b>Sounds</b> 22:8
---	--	--	--	---

<p><b>speak</b> 30:3  <b>speaking</b> 38:4  38:10  <b>special</b> 51:22  <b>specifically</b>  15:21  <b>spelled</b> 17:16  <b>spend</b> 23:10  40:21 43:11  49:16,20  <b>spent</b> 18:14  33:17  <b>splitting</b> 8:16  <b>started</b> 26:18  <b>starting</b> 21:16  <b>States</b> 1:1,12,19  2:7 18:6  <b>status</b> 57:3,10  <b>statute</b> 7:11 8:4  8:16,20,24,24  15:22 16:4  17:25 22:10,16  24:2 29:24  39:17 42:22  43:19,20 44:8  44:8,9 45:5  51:4 55:7,12  55:17  <b>statutes</b> 17:21  22:17 25:1  45:6,7,13,15  45:17,25 48:1  50:2,3,7 53:17  <b>statutorily</b> 18:24  <b>statutory</b> 21:4  43:18 46:2  <b>stay</b> 50:12,14  <b>step</b> 4:2 14:24  <b>steps</b> 3:15  <b>stood</b> 51:18  <b>stop</b> 16:19  <b>straight</b> 30:11  43:8 52:7  <b>Streett</b> 1:15 2:3  2:13 3:5,6,8  4:10,22,25 5:4  5:9,22 6:11,15</p>	<p>7:18,22 8:17  10:4 11:16,21  12:24 13:3,6  13:25 14:5,10  14:17 15:9,12  16:2 17:18  21:11 53:10,11  53:13 54:1,8  54:14 55:1,23  56:21  <b>strikes</b> 17:6  41:18  <b>strong</b> 47:14  <b>stronger</b> 27:1  <b>strongly</b> 25:4  <b>structural</b> 10:11  <b>structurally</b>  10:14  <b>structure</b> 14:13  24:10  <b>structures</b> 34:19  <b>studies</b> 47:7  <b>study</b> 47:18  <b>studying</b> 26:16  <b>stuff</b> 41:21  <b>subject</b> 19:4,6  21:24 24:14  28:11  <b>submit</b> 10:12  21:2  <b>submits</b> 23:15  <b>submitted</b> 57:14  57:16  <b>success</b> 46:13  <b>successful</b> 18:21  57:1  <b>successfully</b>  18:12 25:2  <b>suddenly</b> 46:19  <b>sue</b> 37:1 53:23  <b>sufficient</b> 51:20  53:6  <b>suggested</b> 8:8  52:11  <b>suggestion</b> 51:8  51:19  <b>super-duper</b></p>	<p>39:24  <b>superimposing</b>  17:24  <b>support</b> 8:13  56:9  <b>supporting</b> 1:20  2:8 18:7 54:24  <b>suppose</b> 20:13  41:10 56:19  <b>supposed</b> 35:14  <b>Supreme</b> 1:1,12  <b>sure</b> 29:5  <b>surveys</b> 55:1  <b>sustained</b> 56:20  <b>switch</b> 6:1  <b>system</b> 20:24  37:19 38:16  43:17 57:12</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>T</b> 2:1,1  <b>take</b> 7:14,16  9:25 13:1 16:2  23:20 26:8  <b>takes</b> 15:18  56:15  <b>talked</b> 50:8  52:18 55:18  <b>talking</b> 50:19  <b>talks</b> 49:1  <b>tasks</b> 13:12 17:2  <b>team</b> 30:23 31:2  32:3 46:8,20  <b>teams</b> 46:7  <b>technical</b> 12:18  <b>tell</b> 27:13 38:1  41:14,15  <b>telling</b> 17:8  <b>tells</b> 26:10  <b>term</b> 26:8 28:15  <b>terms</b> 24:13  <b>test</b> 15:19 39:6  <b>Tex</b> 1:15,21  <b>text</b> 40:13,16,25  42:23  <b>textual</b> 4:1 8:11  11:11</p>	<p><b>textually</b> 31:5  40:13 42:19,19  42:21 45:16,22  <b>thank</b> 18:3,8  29:9 53:8,9,13  57:13  <b>theoretically</b>  47:13  <b>theory</b> 35:13  36:4  <b>thing</b> 4:17 23:24  27:11 37:18  41:20 44:11  45:7 49:16  <b>things</b> 6:20 11:5  11:13 13:15,16  14:19 15:12,16  17:12,21 20:2  20:21,24 25:11  25:15 31:17  33:15 34:24  35:4,5 36:15  38:21 39:19,25  40:12,23 43:5  44:12,16  <b>think</b> 4:24 5:13  5:23 7:22 8:7  12:13,22 14:11  14:22 15:9  16:3 19:4  20:21 21:22,24  22:2,14,16  23:6,25 24:21  25:17 26:2,21  26:25 27:16  28:10,11,21  31:4,19 33:20  34:8,10,12,15  34:15 35:6  36:3,6,18 37:4  40:12 41:25  42:10,19,21  43:15 44:5,24  45:16,23 47:9  47:14,18 48:21  50:5,6,18  51:21,24 52:25</p>	<p>53:6 54:18  56:2  <b>thinking</b> 45:7,24  50:17  <b>thought</b> 34:2  54:9  <b>three</b> 31:17  40:12  <b>threshold</b> 11:23  56:22  <b>throw</b> 48:9  <b>tied</b> 31:8  <b>time</b> 6:25 18:2  18:14 22:5  23:10 31:3  32:19,22 33:17  34:3,11 35:25  40:20 41:21  <b>times</b> 20:4  <b>today</b> 3:4 50:19  51:8 52:11  <b>told</b> 42:3  <b>top</b> 39:20 46:3  <b>tossed</b> 44:2  <b>totally</b> 25:9  <b>treating</b> 8:11  <b>tried</b> 15:17 47:7  <b>trouble</b> 13:15  20:14  <b>true</b> 5:13 7:10  10:5 15:13  23:22 24:5  26:15 43:9  50:8,22 51:9  <b>trump</b> 44:8,8  <b>trust</b> 54:13  <b>trustee</b> 3:18 4:6  4:12,13,17,20  5:2,16,25 6:10  6:13 7:5,15,25  9:14 11:2 21:6  24:15 25:12  28:18 30:20,22  38:2 54:10,11  54:14 55:14  56:16  <b>trustee's</b> 4:8</p>
--	--	---	---	---

<p><b>trustees</b> 5:16 11:2,10 56:9 56:13 <b>trying</b> 12:13 26:16 35:23 39:13 <b>turned</b> 36:2 <b>turning</b> 42:5 <b>two</b> 6:16,16 10:8 13:7 16:3 37:17 39:3 43:6 51:15 <b>types</b> 29:16 <b>typical</b> 4:11 <b>typically</b> 5:14</p> <hr/> <p style="text-align: center;"><b>U</b></p> <p><b>U.S.</b> 9:14 21:5 24:15 <b>ultimately</b> 3:18 <b>underlying</b> 18:25 19:22 22:7 23:11,12 54:4,17 57:7 <b>understand</b> 4:5 6:7 26:14 42:25 <b>undo</b> 45:8 <b>United</b> 1:1,12,19 2:7 18:6 <b>universe</b> 43:18 43:18 <b>unreasonable</b> 23:13 <b>unsuccessful</b> 25:4 56:25 57:9 <b>unsuccessfully</b> 29:6 <b>unusually</b> 38:24 39:25 <b>upfront</b> 37:2 <b>use</b> 35:8 <b>uses</b> 53:14 <b>usually</b> 45:10 49:1</p>	<hr/> <p style="text-align: center;"><b>V</b></p> <p><b>v</b> 1:5 3:4 39:1 <b>value</b> 12:2,5,6 56:24 <b>variety</b> 35:5 <b>various</b> 12:18 35:15 36:15 <b>vast</b> 4:11 5:13 32:18 <b>victorious</b> 45:9 <b>view</b> 18:17 19:15 21:14 26:8,22 28:2 <b>viewed</b> 19:4 <b>vindicate</b> 22:6 <b>vindicated</b> 46:2 <b>violation</b> 50:13 <b>Voltavian</b> 20:15</p> <hr/> <p style="text-align: center;"><b>W</b></p> <p><b>walk</b> 15:6 <b>want</b> 6:6 21:1 27:12,15 30:11 32:13 34:15 35:4 46:21 47:18 49:18 51:7 56:8 <b>wanted</b> 5:11 16:17 17:14 38:9 <b>wants</b> 5:6 7:25 30:3 54:21 <b>warranted</b> 33:24 <b>Washington</b> 1:8 1:18 <b>wasn't</b> 35:20 36:1 <b>wasteful</b> 57:9 <b>way</b> 6:3 7:13,23 11:2 13:25 17:19 22:17 24:24 32:11 33:8 37:19 45:1 57:11 <b>ways</b> 6:17 <b>we'll</b> 3:3 37:2</p>	<p><b>we're</b> 8:20 20:23 21:4 22:15 24:5 32:7 36:22 39:13 42:11,11 43:16 47:22 50:5,17 51:10 56:6,7 <b>we've</b> 38:22 39:24 53:17,17 <b>Wednesday</b> 1:9 <b>wide</b> 9:3 <b>willful</b> 50:13 <b>win</b> 10:3 <b>window</b> 44:2 <b>winner</b> 50:11,16 <b>wins</b> 29:4 <b>wisely</b> 57:5 <b>wishes</b> 4:13 <b>wonder</b> 20:18 26:16 <b>wondered</b> 26:20 27:7 <b>wondering</b> 54:11 <b>Woods</b> 55:17 <b>word</b> 44:23 55:11 <b>words</b> 14:8 43:19 48:6,6 <b>work</b> 4:14 8:20 8:21 9:6,23 12:18 15:14 29:21 39:24 40:4 41:4,7 43:2 51:5 53:5 56:20 <b>working</b> 31:24 <b>works</b> 42:21 <b>worth</b> 11:19 37:23 <b>wouldn't</b> 36:9 36:21 41:20 44:21 <b>writing</b> 34:17 <b>wrong</b> 34:4 40:13 <b>wrote</b> 17:19</p>	<hr/> <p style="text-align: center;"><b>X</b></p> <p><b>x</b> 1:2,7</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <p><b>yeah</b> 35:5 38:18 38:21 41:6 48:23 49:19 <b>years</b> 30:2</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p style="text-align: center;"><b>0</b></p> <hr/> <p style="text-align: center;"><b>1</b></p> <p><b>1</b> 6:18,20 16:10 28:16 <b>10</b> 37:12 44:20 <b>100</b> 36:23 <b>100,00</b> 36:2 <b>100,000</b> 35:18 35:21,24 36:14 <b>11</b> 45:2,3 <b>11:19</b> 1:13 3:2 <b>12</b> 16:10,11 <b>12:15</b> 57:15 <b>120</b> 36:23 <b>13</b> 56:12,16 <b>14-103</b> 1:4 3:4 <b>18</b> 2:8 <b>1978</b> 38:11 <b>1994</b> 32:17</p> <hr/> <p style="text-align: center;"><b>2</b></p> <p><b>20</b> 15:15 <b>200</b> 30:2 <b>2015</b> 1:9 <b>25</b> 1:9 <b>29</b> 2:11</p> <hr/> <p style="text-align: center;"><b>3</b></p> <p><b>3</b> 2:4 11:25 55:8 <b>3(a)</b> 19:13 <b>327(a)</b> 29:17 31:22 32:4 52:5,8,21 53:1 53:3,4 54:20 <b>330</b> 43:25 45:23 46:12 49:7</p>	<p>51:3 <b>330(a)</b> 6:2,17 8:19 17:20 18:12 20:25,25 24:2,9,20 28:16 29:15,23 31:5 38:10 51:25 52:4,23 <b>330(a)(1)</b> 17:1 31:21 32:3 39:9 40:25 42:1 <b>330(a)(1)(A)</b> 10:23 11:7 18:19 19:21 21:15 52:14 <b>330(a)(1)(b)</b> 5:23 <b>330(a)(3)(f)</b> 9:19 16:23 <b>330(a)(4)</b> 16:10 <b>330(a)(4)(A)(ii)</b> 10:16,25 13:8 14:13 <b>330(a)(6)'s</b> 3:22 10:19 <b>331</b> 56:3 <b>37</b> 13:11 <b>38</b> 13:11</p> <hr/> <p style="text-align: center;"><b>4</b></p> <p><b>4</b> 14:24 19:2,4,5 19:7,7,12,13 21:18,24 26:9 26:10,24 27:23 55:3,7 <b>4(A)(ii)</b> 26:19</p> <hr/> <p style="text-align: center;"><b>5</b></p> <p><b>53</b> 2:14</p> <hr/> <p style="text-align: center;"><b>6</b></p> <p><b>6</b> 32:18 33:2</p> <hr/> <p style="text-align: center;"><b>7</b></p> <p><b>7</b> 4:12 5:15 56:12</p>
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<hr/> <b>8</b> <hr/>				
<hr/> <b>9</b> <hr/>				
<b>90 37:11 44:18</b>				