

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	PAUL W. CANE, JR., ESQ.	
4	On behalf of the Petitioner	3
5	GREGORY G. GARRE, ESQ.	
6	On behalf of the United States, as amicus	
7	curiae, supporting the Petitioner	22
8	DENNIS E. EGAN, ESQ.	
9	On behalf of the Respondents	33
10	REBUTTAL ARGUMENT OF	
11	PAUL W. CANE, JR., ESQ.	
12	On behalf of the Petitioner	58
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in case 06-1221, Sprint/United Management Company v. Mendelsohn.

Mr. Cane.

ORAL ARGUMENT OF PAUL W. CANE, JR.,

ON BEHALF OF THE PETITIONER

MR. CANE: Chief Justice Roberts, and may it please the Court:

Our basic principal of evidence of the need for foundation explains why the court of appeals should be reversed. An employment decision is made by the person who made it, the decision-maker. If some other person harbors bias, that's unfortunate; but it is not probative of claims by a plaintiff who is not affected by it. This Court's discrimination cases, both in the employment context and in other contexts, consistently focus on the decision maker's intent, not on the intent of other persons.

JUSTICE KENNEDY: If you were to read the district court's minute order -- and this is that short minute order -- as saying that evidence of pattern and practice simply is not admissible, that would be error, would it not? Error to -- if the -- if that had been

1 his ruling, that would have been error. In my Court,
2 you don't introduce pattern and practice. That can't be
3 --

4 MR. CANE: Yeah, if the district court had
5 held that under no circumstances could a pattern or
6 practice of discrimination be shown, I think that would
7 have been error.

8 JUSTICE KENNEDY: Is there anything in the
9 other parts of the record colloquy, comments by the
10 district judge, that you think Respondents have called
11 to our attention to indicate that he had this sweeping
12 view?

13 MR. CANE: No. I don't think that's what
14 the court was focusing on. The district court focused
15 on the nexus of the disputed witnesses to the plaintiff.
16 The district court did not hand out a cookie cutter
17 ruling at the courthouse door. The district court did
18 not say oh, this is a discrimination case, here are the
19 rules of evidence I apply in a discrimination case.
20 What the district court here did was consider Sprint's
21 motion in limine, which was grounded in the evidence
22 that had emerged in discovery in this case.

23 Plaintiff then responded to that motion in
24 limine by trying to explain why the evidence was
25 relevant given the facts of this case.

1 The plaintiff then filed a witness list,
2 which explained what each of the disputed witnesses
3 would say in this case; and the plaintiff finally made
4 an offer of proof which again collaborated on what
5 plaintiff contended the disputed witnesses would say in
6 this case.

7 JUSTICE SCALIA: We don't really know, do
8 we, what the district court's order was based on?
9 Whether it was based on 401 or 403? Did the district
10 court explain its order at all? It didn't, did it?

11 MR. CANE: The district court did not
12 specifically invoke rule 403. I think it's -- my
13 reading of it that it is grounded in both 401 and 403.

14 The motion in limine relied on both 401 and
15 403, the district court told counsel that she wanted the
16 jury to be focusing on the claims of this plaintiff and
17 not be distracted by claims of others.

18 JUSTICE SOUTER: Well, to the extent it was
19 grounded on 401, it was error, wasn't it?

20 MR. CANE: I don't think so, because I don't
21 think there's --

22 JUSTICE SOUTER: Well, if you have three
23 supervisors, and one is discriminating and another is
24 discriminating, isn't that some evidence that you're in
25 an industrial situation in which discrimination goes on,

1 and therefore doesn't it have the tendency that amounts
2 to relevance under 401?

3 MR. CANE: We have here five persons, who
4 out of 15,000 --

5 JUSTICE SOUTER: Well, what about my
6 question?

7 MR. CANE: The answer to the question is no,
8 it doesn't. As this Court taught in Teamsters --

9 JUSTICE SOUTER: No relevance at all?

10 MR. CANE: A pattern or practice is not
11 established by anecdotes. And what we have here are
12 anecdotes of 5 persons out of the 15,000 --

13 JUSTICE SOUTER: What about my question? We
14 have evidence that there are three supervisors, two of
15 them are discriminating. Isn't that some -- doesn't
16 that have some tendency to indicate that in an equivocal
17 situation, that one was -- it may not be strong
18 evidence, it may not win the case, it may not be
19 powerful, but it has the tendency that gets you over the
20 line on 401, doesn't it?

21 MR. CANE: That's why I started with the
22 importance of emphasizing foundation. To --

23 JUSTICE SOUTER: I don't want to -- I don't
24 want to emphasize my question, before we get the --

25 MR. CANE: For relevance to exist, there

1 would have to be a foundational showing.

2 JUSTICE GINSBURG: What do you mean by that?

3 You repeated several times there must be -- must lay a
4 foundation. You do recognize, I think in your reply
5 brief, that some other supervisor evidence would be
6 relevant and admissible, but you refer to the
7 foundation.

8 Tell us what you think a proper foundation
9 would be.

10 MR. CANE: The foundation, Justice Ginsburg,
11 would be some linkage between the decision making
12 supervisor and the supervisors whose acts or conduct is
13 assailed by the plaintiff. And if there's no showing of
14 nexus other than the fact that they both happen to draw
15 a paycheck from Sprint --

16 JUSTICE GINSBURG: What do you mean by
17 "nexus"? If they both work in the same physical
18 facility, is that a nexus?

19 MR. CANE: No. I think the nexus requires
20 more than a common zip code.

21 JUSTICE SOUTER: What if you've got 20
22 supervisors and you've got evidence that 19 of them have
23 discriminated after making expressly discriminatory
24 remarks. The 20th is the subject to the action. Is the
25 evidence of the 19 admissible?

1 MR. CANE: I think --

2 JUSTICE SOUTER: Is a nexus there?

3 MR. CANE: I think, in a company that was
4 not small, where a nexus could be inferred, that there
5 was consultation or that there were directions from more
6 senior management, then I think that would be an
7 appropriate foundation.

8 JUSTICE SOUTER: All right. So, if we've
9 got 19 and there's a question of 1, we've got a nexus.
10 If we've got three and there's a question, two are
11 accounted for as discriminatory, and the question is the
12 third, we don't have a nexus. Is that the way you're
13 doing the math?

14 MR. CANE: I'm sorry. Did I under your
15 question to be three supervisors in the whole company or
16 three supervisors out of this vast company that we're
17 talking about?

18 JUSTICE SOUTER: At this point, I'm saying
19 three supervisors out of a whole company. Will that do
20 it?

21 MR. CANE: Not absent some reason to believe
22 that they conferred or they received directions.

23 JUSTICE SOUTER: Three supervisors, and
24 that's all there is in the company. That consists of
25 the company. Have a nexus then?

1 MR. CANE: If there were -- if two out of
2 three, I think there might be an argument that at least
3 it was a jury question at that stage.

4 JUSTICE SOUTER: Okay.

5 MR. CANE: But here we're dealing with a
6 70,000-employee company. We have five witnesses who are
7 principally assailing two persons. So --

8 CHIEF JUSTICE ROBERTS: You agree that it
9 has to be a case-by-case determination? There's no
10 absolute rule either way?

11 MR. CANE: I think there -- there should be
12 a guiding principle. And the guiding principle was that
13 other-supervisor evidence should be presumptively
14 irrelevant, and that would be the rule in the normal run
15 of cases, at least in dealing with entities of this
16 magnitude.

17 CHIEF JUSTICE ROBERTS: So I assume it would
18 be addressed as it was here, in a motion in limine, the
19 plaintiff would say here are the witnesses we intend to
20 call; the company would say we don't think they're
21 relevant because, as you say, there's no connection
22 between them, and then the judge would decide.

23 MR. CANE: That's normally how --

24 CHIEF JUSTICE ROBERTS: That's on the issue
25 of relevance.

1 MR. CANE: That's normally how it would
2 present itself, and indeed the district court normally
3 would consider Rule 403 consideration if that's the
4 case.

5 JUSTICE KENNEDY: Excuse me. Did I hear
6 mishear you? You said it's a 7,000-person?

7 MR. CANE: 70,000. 7-0-0-0-0. Yes.

8 JUSTICE BREYER: If that's the way to do it,
9 you didn't do it that way, did you? I mean, as I read
10 it -- they put in here, on 163a, the motion that you
11 made to the district court said that you have to be
12 "similarly situated" -- "Plaintiff has to have been
13 'similarly situated' with other employees" -- and you
14 put that in quotes -- "similarly situated." And then
15 you say "employees may be 'similarly situated' only if
16 they have the same supervisor." Period. Not -- it
17 wasn't a period actually, but the rest of the sentence
18 isn't important. And then you cite Aramburu, which is
19 where the Tenth Circuit said that.

20 So I don't see how you can say this wasn't a
21 401 case. You were saying that weren't similarly
22 situated, period. And then the district judge virtually
23 quoted those words.

24 MR. CANE: The motion was grounded in both
25 Rule 401 and --

1 JUSTICE BREYER: Well, that may be, but the
2 -- I don't see -- I mean, that may be, but this is the
3 argument you made, and this was the argument the
4 district judge adopted. Is that not so or is it so?

5 MR. CANE: That is so, but what the district
6 judge adopted was grounded in the offer of proof that
7 had been made here and the evidence that was proffered
8 here. The district court was not issuing a blanket
9 ruling that would have governed any potential --

10 JUSTICE SCALIA: Excuse me --

11 JUSTICE SOUTER: How do we know?

12 JUSTICE SCALIA: Yeah. How do we know
13 that's what the district court adopted? I have -- is it
14 the order on 24a of the appendix to the petition?

15 MR. CANE: Yes.

16 JUSTICE SCALIA: It doesn't mention -- it
17 doesn't mention which of the two of your arguments the
18 district court is relying on.

19 JUSTICE KENNEDY: It doesn't mention the
20 offer of proof.

21 JUSTICE GINSBURG: And didn't the Tenth
22 Circuit read it to be an absolute prohibition? That it
23 must be the same supervisor? "'Similarly situated'
24 requires proof that Paul Reddick was the decisionmaker."
25 That seems as though that the district court thought

1 there -- it must be the same supervisor, and I thought
2 that's how the Tenth Circuit read --

3 MR. CANE: And I think --

4 JUSTICE GINSBURG: -- the district court.

5 MR. CANE: That would be the rule in the
6 normal run of cases where there is no showing of
7 connection.

8 JUSTICE SCALIA: We're not talking about the
9 rule. We're trying to find out what it was the district
10 court did.

11 Now, the court of appeals assumed the worst.
12 I mean, assumed what makes the case the hardest for you,
13 and that is the court of appeals assumed that the
14 district court relied on 401. Is it customary to assume
15 the worst?

16 MR. CANE: No. I think it would be
17 customary to assume that, particularly on an issue of
18 evidence, that the district court was presumptively
19 correct, and that --

20 JUSTICE SCALIA: If there's any basis on
21 which the district court's decision would have been
22 correct, the district court's decision is upheld.

23 MR. CANE: It could be affirmed on that
24 ground.

25 JUSTICE BREYER: That's why I don't

1 understand your answer. I'm confused here. What I
2 said, and you seemed to agree, is different from what
3 was just said, which you also seemed to agree.

4 (Laughter.)

5 I thought that you said in your brief that
6 you have to have been -- quote -- "similarly situated."
7 All right? "Employees must be similarly situated to
8 Plaintiff." That's true, isn't it? I'm quoting the
9 brief, from page 163. And then you say, "Employees may
10 be similarly situated only if they have the same
11 supervisor."

12 Then the district court says that plaintiff
13 may offer evidence who are "similarly situated" to her
14 and then -- quote -- "similarly situated employees" --
15 quote -- "for the purpose of this ruling requires proof
16 that Paul Reddick, his supervisor, was the
17 decisionmaker." That's why I thought it was fairly
18 clear, since he used the same words and substituted the
19 word "Paul Reddick" for the same supervisor, that he was
20 taking that right from your brief where you made that
21 general argument and said nothing about the particular
22 case in those sentences.

23 MR. CANE: The general rule applies because
24 there was no showing here of any relationship between
25 the decision at issue here and --

1 JUSTICE SCALIA: You -- you want to defend
2 the harder ground, I understand. But what Justice
3 Breyer has just said is not necessarily so. The
4 "similarly situated" argument applies under 403 as well.
5 If they're similarly situated, the -- the time it would
6 take to let in these other things and rebuttal of them,
7 plus the prejudicial effect on the jury, would be
8 outweighed by the fact that they're similarly situated,
9 and, therefore, that it is stronger proof. I don't see
10 that one can tell from the district court's order
11 whether the district court was relying on 401 or 403.

12 And certainly, you just don't want to defend
13 403. I think you're digging a hole for yourself.

14 MR. CANE: No, I absolutely want to defend
15 403. If there was any minimal probative value here,
16 Justice Scalia, all the countervailing 403 factors are
17 present.

18 JUSTICE ALITO: Well, don't we have to
19 address 403 in any event? Because the Tenth Circuit
20 ruled, as I understand it, ruled that the evidence could
21 not be excluded under 403. It would have been an abuse
22 of discretion --

23 MR. CANE: That is what --

24 JUSTICE ALITO: -- for the trial judge to
25 have excluded it under 403.

1 MR. CANE: That is correct. Had the "me,
2 too" evidence been admitted, then we would have had to
3 respond with what might be called "not you, either"
4 evidence. And then the plaintiff would have made a
5 rebuttal to that showing, and we would have had trials
6 within a trial on whether these couple of persons that
7 plaintiff identified as potential bad actors were, in
8 fact, bad actors.

9 CHIEF JUSTICE ROBERTS: Would that be done
10 typically at the motion in limine stage? I mean, do you
11 establish whether or not there was discrimination in the
12 "me, too" cases at trial or prior to the trial, outside
13 the jury's --

14 MR. CANE: I think it can happen both ways.
15 And really here it happened both ways, too, because
16 although it was teed up as a motion in limine, as the
17 trial evolved, the district court actually relaxed her
18 ruling and expanded it to permit attacks both on
19 Reddick, who was the direct supervisor, but also
20 decisions made by Blessing, who was Reddick's boss. And
21 the district court explained that, as she thought about
22 it further, that additional bit of latitude should be
23 given to both sides because there was evidence that
24 Blessing had consulted with Reddick. And, in other
25 words --

1 JUSTICE GINSBURG: But that didn't present
2 the other supervisor, which I think is more -- a better
3 way to comprehend this, because "me, too" could be 10
4 witnesses working under the same supervisor. But these
5 two people, as I understand it, were in the direct chain
6 of supervisory command.

7 MR. CANE: That's correct. And that to me
8 is the proper test. If the decisionmaker's supervisor
9 was demonstrated to be biased, then I think that has
10 some relevance because it raises a question as to
11 whether that bias --

12 JUSTICE GINSBURG: But that's not "other
13 supervisor." They are both supervisors of this
14 employee. She's in a unit that includes both superior
15 officers. I thought that the issue here was simply
16 other supervisors, witnesses who had worked for other
17 supervisors, people for whom the -- with whom the
18 plaintiff had no connection.

19 MR. CANE: And, more importantly, the other
20 supervisors were persons that were not shown to have any
21 connection with the decisionmaker with respect to this
22 plaintiff.

23 And so, yes, if you are going to define
24 "other supervisor" not to include the chain of command,
25 then that's the reason why I think there is no relevance

1 and a Rule 403 --

2 JUSTICE GINSBURG: But you say -- I thought
3 you said in your reply brief that other-supervisor
4 evidence could be relevant.

5 MR. CANE: It could be relevant if there
6 were a showing that the bias on the part of the other
7 supervisors somehow tainted the decision making of the
8 instant decisionmaker.

9 And in the cases that Ms. Mendelsohn cites
10 in her brief, those are all cases in which a directive
11 was given from a more senior official to the
12 decisionmaker.

13 What we have here are decisionmakers in
14 far-flung areas elsewhere within the company with no
15 showing whatsoever that there is any relationship
16 between them.

17 Each of the five disputed witnesses here
18 testified in deposition that they had no information
19 whatsoever to shed about the decisionmakers with respect
20 to Ms. Mendelsohn.

21 And so in those circumstances there's no
22 foundational showing of relationship, no foundational
23 showing of nexus.

24 JUSTICE KENNEDY: Was there an attempt by
25 the plaintiff during the discovery phase of the case to

1 show other evidence of pattern and practice, statistical
2 evidence; or was it just these five people? Was that
3 all that the plaintiff presented?

4 MR. CANE: It was just these five people.
5 The only statistics in the case were that the number of
6 persons over 50 in this particular unit, the Business
7 Development Strategy Group, actually increased; and that
8 the oldest person at any particular level within the
9 Business Development Strategy Group was retained and not
10 laid off.

11 CHIEF JUSTICE ROBERTS: What about the
12 spreadsheet evidence? I thought there was some effort
13 to show a connection through the spreadsheet showing the
14 age of the dismissed employees?

15 MR. CANE: That spreadsheet was linked to
16 some supervisor named Kennedy, who bore no relationship
17 to this department and no relationship to these
18 decisionmakers.

19 Let's assume that -- that allegation is
20 untested, but let's assume that Mr. Kennedy was
21 correctly identified as a bad actor. Again, that has no
22 relationship. It might have everything to do with any
23 layoff decision made by Kennedy or made by someone
24 Kennedy supervised. But it bears no relationship to
25 Ms. Mendelsohn's circumstances because there was no

1 showing that a similar spreadsheet was used by any of
2 her decisionmakers.

3 Let's assume that Kennedy is, like the two
4 others, Stock and Voorhees, perhaps a bad actor. That
5 just doesn't shed any meaningful light on the
6 circumstances of the plaintiff here; and even if it did
7 shed some -- some bit of light --

8 JUSTICE STEVENS: I am somewhat puzzled.
9 How many bad actors does there have to be before you can
10 draw an inference that someone superior to the bad
11 actors had a motivating part in the whole situation?

12 MR. CANE: I don't know that --

13 JUSTICE KENNEDY: The inference they are
14 trying to prove is there was somebody upstairs that told
15 everybody what to do.

16 MR. CANE: And they had full and fair
17 discovery to try and demonstrate that. But their own
18 witnesses testified that they were unaware of any
19 relationship between themselves and their decisionmaker
20 and the plaintiff and the plaintiff's decision-maker.

21 JUSTICE KENNEDY: Does the record show in
22 this 70,000-person company how many supervisors there
23 were? Do we know that?

24 MR. CANE: No. It doesn't say, Justice
25 Kennedy.

1 Let me --

2 JUSTICE STEVENS: Let me ask this, though.
3 Does it show whether the person more senior to the five
4 supervisors involved here was the same person or a
5 different person?

6 MR. CANE: It is a different person. Sure,
7 if you go far enough up the corporate ladder, eventually
8 you will end up --

9 JUSTICE KENNEDY: The next step up would be
10 --

11 MR. CANE: Not the next step up, the next
12 step after that, and not the next step after that.

13 CHIEF JUSTICE ROBERTS: Your theory doesn't
14 depend on where in the hierarchy the other supervisors
15 are located, I take it, if there's a connection? In
16 other words, if there's a lower-level supervisor who
17 discriminates and that is somehow communicated to the
18 supervisor in question, and whatever -- that you know,
19 the point is that the other one wasn't disciplined or
20 something, that would still -- under your theory that
21 would be admissible, correct?

22 MR. CANE: If a -- no matter what level, I
23 would disagree that if a discriminating supervisor is in
24 the chain of command and supervises the decisionmaker,
25 then I think there's --

1 CHIEF JUSTICE ROBERTS: No, I'm talking
2 about a situation -- let's say it is a lower-level
3 supervisor outside the chain of command who commits
4 another "me, too" act, but that is communicated to the
5 other in a way that suggests, for example, that the
6 company tolerates it or accepts it.

7 I take it that that would be potentially
8 admissible subject to 403 under your theory.

9 MR. CANE: I think that's right. If there's
10 a showing the actual decisionmaker could have been
11 tainted by it, I would agree with that.

12 JUSTICE KENNEDY: I see your -- does 404
13 bear on the case, Rule 404 of the Rules of Evidence?

14 MR. CANE: Yes, I think it does. I think
15 that if you're going to have -- what we have here is, in
16 effect, an assault on the corporate character of the
17 company and not an assault --

18 JUSTICE STEVENS: Have we said that 404
19 applies to corporations? Corporations have a character?

20 MR. CANE: I don't think the Court has ever
21 held that. I think the individual has a character, and
22 there is no character-evidence problem with showing that
23 a particular decisionmaker engaged in other
24 discriminatory conduct, because I think that falls
25 within the exception to 404. But where the

1 decisionmaker is somebody else, then what you really
2 have is an assault on the corporate character, and I
3 think that's impermissible.

4 Unless the Court has further questions, I'll
5 reserve the balance of my time.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cane.
7 Mr. Garre.

8 OPENING ARGUMENT BY GREGORY G. GARRE

9 ON BEHALF OF THE UNITED STATES

10 AS AMICUS CURIAE

11 MR. GARRE: Thank you, Mr. Chief Justice,
12 and may it please the Court:

13 Evidence of discrimination by other
14 supervisors within the company is sometimes but not
15 always admissible in a disparate-treatment case to help
16 prove discrimination by the plaintiff's own supervisor.

17 CHIEF JUSTICE ROBERTS: That's under --
18 under 401, it's not always admissible, or do you need
19 403 to reach that conclusion?

20 MR. GARRE: I think you need to look at the
21 evidence under both rules, the first question being
22 whether it meets the minimum-evidence threshold in 401.
23 And that is a very low threshold set by the Federal
24 rules. The second question being whether it may be
25 excluded under Rule 403, which would --

1 CHIEF JUSTICE ROBERTS: But do you think
2 there are situations where other-supervisor evidence is
3 not admissible under 401 itself?

4 MR. GARRE: Yes. We do think that there are
5 some instances where other-supervisor evidence is not
6 admissible under 401. For example, if you have a large
7 company and you have a plaintiff in the Chicago office
8 claiming that her supervisor had it out for her and she
9 wants to put on the testimony of an employee in the
10 Seattle office who two years ago complained that her
11 supervisor had it out for her, we think that that would
12 not be relevant under 401.

13 JUSTICE SCALIA: Well, but here you have a
14 company of 70,000 people.

15 MR. GARRE: You have a company of 70,000
16 people, but you have allegations that supervisors in the
17 same division, implementing the same company-wide
18 reduction-in-force plan in the same timeframe and giving
19 similar explanations under similar circumstances,
20 engaged in discrimination.

21 We think that the district dissenting judge
22 in the court of appeals was right to say that evidence
23 of that kind is at least marginally relevant, which
24 would then put the focus on whether this evidence could
25 be excluded under 403.

1 JUSTICE SCALIA: It is hard to see what
2 wouldn't be marginally relevant if you think that's
3 marginally relevant. It has to be a different
4 supervisor in a different time frame. I mean, sure.

5 MR. GARRE: Well, I think you've got other
6 situations as well, Justice Scalia. I think we've got a
7 situation of a general comment of discriminatory animus.
8 For example, older people just don't get it, something
9 like that. I think the -- the -- by a different
10 supervisor.

11 I think even if that's within the same
12 office, the plaintiff is going to be hard-pressed even
13 to meet the minimum-relevance threshold. But the
14 relevance threshold, as this Court has recognized in the
15 *Furnco v. Waters* case and the *Huddleston* case, this is
16 a broad threshold that allows evidence in. And then we
17 look at the other parts of Article IV of the Federal
18 Rules of Evidence to see whether it may be excluded --

19 JUSTICE ALITO: How do you articulate the
20 rule that separates these situations?

21 MR. GARRE: Well, I would point to several
22 criteria, Justice Scalia, in determining relevance.
23 First, whether you're dealing with same alleged -- same
24 kind of alleged discrimination and a common catalyst;
25 second, whether the proffered witnesses are working in

1 the same corporate vicinity; third, whether they are
2 alleging discrimination in the same time frame; four,
3 whether they are alleging a pattern or practice of
4 discrimination.

5 JUSTICE ALITO: Well, that's the relevant
6 factors, but what do you look at the factors to
7 determine -- what's the test for determining whether
8 they are sufficient?

9 MR. GARRE: Well, you would look at the
10 proffered evidence. For example, in this case you have
11 evidence that all of the proffered witnesses were
12 terminated under the same companywide reduction in
13 force. You've got a common catalyst.

14 In this case, you've got employees who
15 worked in the same geographic vicinity, the headquarters
16 of Sprint, the same office complex or at least the same
17 vicinity. You've got witnesses who were terminated on
18 the same day --

19 JUSTICE SCALIA: Why is that relevant -- the
20 same vicinity? You're -- you're --

21 MR. GARRE: I think it is more likely --

22 JUSTICE SCALIA: Opposing counsel has said
23 they are -- they are three supervisors up. What does
24 the same vicinity have anything to do with this?

25 MR. GARRE: Where you have supervisors in

1 the same division, in the same vicinity, carrying out
2 the same plan, providing the same distinct explanations
3 in similar circumstances, a reasonable juror might infer
4 that plaintiff's own --

5 JUSTICE KENNEDY: Even if those supervisors
6 RIF'd two thousands employees, and only three made this
7 complaint?

8 MR. GARRE: Yes, with respect to the minimum
9 threshold of relevance. Keep in mind, once --

10 JUSTICE KENNEDY: No matter how many
11 employees were RIF'd, only three supervisors --
12 hypothetical case, three supervisors. No matter how many
13 employees were RIF'd, the three is sufficient so that
14 these witnesses could testify?

15 MR. GARRE: Well, I think if you're talking
16 about pattern of practice, maybe doesn't -- certainly as
17 a matter of law that's not a -- going to prove a pattern
18 of practice, and the employer can make that argument to
19 the district judge, to the jury, and that evidence could
20 be limited or excluded. If you have got, for example, a
21 -- a proffered witness who's complaining that
22 supervisors in the same complex used the same
23 distinctive explanation that my supervisor gave me --
24 for example, in this case, several of the witnesses were
25 going to testify that their supervisors told them they

1 were being -- they were removed because their positions
2 were being eliminated, and then they later found out
3 that younger persons assumed their jobs.

4 JUSTICE KENNEDY: So take it in this case,
5 and in all cases, the plaintiff has the burden of laying
6 the foundation for this evidence; is that not correct?

7 MR. GARRE: The plaintiff has --

8 JUSTICE KENNEDY: And you say the foundation
9 is satisfied if they were the same supervisors in the
10 same division, I thought.

11 MR. GARRE: I --

12 JUSTICE KENNEDY: You want us to write that
13 in a case as a rule?

14 MR. GARRE: The plaintiffs --

15 JUSTICE KENNEDY: Without reference to how
16 many employees were involved?

17 MR. GARRE: The plaintiff has the burden of
18 showing that the evidence is relevant, Justice Kennedy.

19 JUSTICE GINSBURG: I think you said in your
20 brief that the plaintiff does not have to lay a
21 foundation. And that's the difference between you, I
22 thought -- with respect to Justice Kennedy's question.
23 Your brief takes the position that it is not necessary
24 to lay a foundation in order to introduce
25 other-supervisor evidence.

1 MR. GARRE: That's correct, and that's why
2 as I said the plaintiff has to show that the evidence is
3 relevant, that it has some tendency to make a fact or
4 consequence more likely.

5 This Court in the Huddleston
6 case confronted --

7 JUSTICE SCALIA: Well, one -- one would have
8 some -- some tendency --

9 MR. GARRE: And Justice Scalia --

10 JUSTICE SCALIA: What about one instead of
11 three? Would that have some tendency? I guess it
12 would.

13 MR. GARRE: It might. And that probably
14 would be a strong candidate for exclusion under 403. In
15 the Furnco case --

16 JUSTICE SCALIA: Why, by the way, do you
17 think this was excluded under -- under 401 rather than
18 403?

19 MR. GARRE: Well, we -- we acknowledge that
20 the record isn't precisely clear on that. We think that
21 --

22 JUSTICE SCALIA: Well, then why should it be
23 assumed it was done properly rather than improperly?

24 MR. GARRE: Largely because of what was said
25 in the order, and because of the way it was briefed.

1 JUSTICE SCALIA: What was said in the order?
2 I see nothing in the order that indicates it is under
3 401.

4 MR. GARRE: Well, it doesn't say 401, but
5 the reason why the evidence can't come in is because the
6 -- the proffered witnesses didn't have the same
7 supervisor. The order is on page 24.

8 JUSTICE SCALIA: But --

9 MR. GARRE: What the court excluded is any
10 evidence of the pattern --

11 JUSTICE SCALIA: That's very relevant to the
12 403 determination.

13 MR. GARRE: It's relevant, but not it's
14 certainly not determinative, and we think in a case like
15 this, where this kind of evidence is the critical
16 evidence for the trial -- in the case --

17 JUSTICE SCALIA: Picky, picky, picky on the
18 trial court. I must say.

19 MR. GARRE: Yeah --

20 JUSTICE SCALIA: It seems to me this order
21 should be -- should be given -- it should be treated as
22 if, it could be sustained, it should be sustained.

23 MR. GARRE: With respect, Justice Scalia, in
24 this case, this proffered evidence was the crux of the
25 trial, the critical issue. It came up not only in the

1 context of the motion in limine, it came up in the
2 context of the motion for a new trial. And if you look
3 at what the district court said in denying a motion for
4 a new trial, she said again -- and this is on page 436
5 of the JA -- she says, "none of the proffered evidence
6 makes it more likely that the decisionmakers in this
7 case discriminated against the plaintiff."

8 That's relevance language, and you're quite
9 right --

10 CHIEF JUSTICE ROBERTS: The determination of
11 the relevance of the "me, too" evidence -- and I assume
12 also the 403 status -- needs to be made at the motion in
13 limine stage, or is it a question for the jury?

14 MR. GARRE: Well, the district court serves
15 as a gateway. District courts have tremendous
16 discretion under the Federal rules to determine whether
17 or not evidence is relevant, and whether or not it
18 should be excluded under 403. So that determination is
19 made by the district court.

20 In some cases, as happened in the
21 Huddleston case -- that was a 404(d) case -- the court
22 acknowledged in some cases the evidence may go in and
23 then the jury may instruct that that evidence is
24 allowed.

25 CHIEF JUSTICE ROBERTS: So if it's -- if on

1 the "me, too" evidence it's a "he said/she said" type of
2 case, does that get admitted to the jury? Or is that
3 excluded at the motion in limine stage?

4 MR. GARRE: Well, if you're pointing to
5 other acts of discrimination by other supervisors that
6 are relevant, then that would be allowed in, and the
7 employer would come in and present their counter
8 evidence --

9 CHIEF JUSTICE ROBERTS: Well, they're only
10 -- it is only relevant, of course, if it is true; and if
11 the company denies that the "me, too" episode even took
12 place, don't you have to have a separate trial on that
13 before you can determine whether it's even admissible?

14 MR. GARRE: In our system we put that
15 evidence before a jury. If it is relevant under the
16 Federal rules, it is admissible. We put before a jury
17 --

18 CHIEF JUSTICE ROBERTS: Well, I get back to
19 my -- the predicate to my question. It's only relevant
20 if it happened.

21 MR. GARRE: And --

22 CHIEF JUSTICE ROBERTS: And it seems to me
23 we've had a lot of discussion whether it is relevant if
24 it happened, but we don't know how we determine whether
25 it happened or not.

1 MR. GARRE: In the Furnco case, the Court
2 said that -- that the evidence doesn't have to
3 conclusively demonstrate the fact. It simply has to be
4 relevant. We put relevant evidence before juries, we
5 instruct them on the consideration of that evidence,
6 permit the defendants to put that evidence into context,
7 and then we ask juries to draw a conclusion --

8 CHIEF JUSTICE ROBERTS: So an allegation --
9 an allegation of discrimination in a "me, too" context
10 is automatically relevant?

11 MR. GARRE: No. I think you'd look at it
12 under the relevance threshold, and I think you'd look at
13 it under 403. 403 is going to exclude a lot of this
14 evidence. It is going to exclude the barely evidence,
15 the barely relevant evidence. But it -- we would expect
16 a trial court in this kind of situation to make some
17 kind of findings as to why this evidence is excludable,
18 and we would expect the court of appeals not to
19 undertake a de novo 403 balancing in its own instance.

20 JUSTICE GINSBURG: Mr. Garre, do I
21 understand correctly that the reason the Tenth Circuit
22 thought that the district court was ruling under 401,
23 making a relevance determination, was that the court of
24 appeals had a precedent in the area of employee
25 discipline, and the Tenth Circuit said well, the

1 district court was following that precedent, but that
2 precedent doesn't apply in this situation. So that's
3 why the court of appeals, as I understand it, read the
4 district court as just applying an absolute ban.

5 MR. GARRE: That's correct, and that's the
6 way this case was litigated all the way until to the
7 reply brief in this case. If there are no further
8 questions?

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Garre.

11 Mr. Egan.

12 ORAL ARGUMENT OF DENNIS E. EGAN

13 ON BEHALF OF THE RESPONDENT

14 MR. EGAN: Mr. Chief Justice, and may it
15 please the Court:

16 If we'll turn to 3a in the white book, the
17 court of appeals properly understood that this was a
18 blanket order based on only one fact. If you weren't
19 supervised by Paul Reddick, it was not admissible. At
20 page 2a, the court said prior to trial, Sprint filed a
21 motion in limine seeking to exclude among other things
22 any evidence of Sprint's alleged discriminatory
23 treatment of other employees. Relying exclusively on
24 Aramburu, Sprint argued that any reference to alleged
25 discrimination by any supervisor other than Reddick --

1 it was irrelevant.

2 Throughout -- and let me mention here, Your
3 Honor, that the order of things was not as Mr. Cane got
4 it. He said the order was grounded on an offer of
5 proof.

6 If I may address the chronology, on December
7 15, 2004, Sprint filed its motion saying that if -- it
8 is not the same supervisor, it doesn't come in. There's
9 no mention, ever, about the facts of the proffer.
10 Never. It never came up below. We --

11 CHIEF JUSTICE ROBERTS: Counsel, what if you
12 have a situation that's been referred to earlier, where
13 you have four other supervisors that are presented as
14 "me, too" evidence. They are in the Los Angeles office.
15 The defendant's supervisor is in the Fresno office. Is
16 that evidence relevant?

17 MR. EGAN: It depends what the evidence is
18 and what it is tied to, Your Honor.

19 CHIEF JUSTICE ROBERTS: It is just that they
20 -- they are alleged to have fired people for an
21 impermissible basis under the age discrimination act as
22 well.

23 MR. EGAN: In your hypothetical was it was
24 during the same common employer initiated action, such
25 as a reduction in force?

1 CHIEF JUSTICE ROBERTS: All right, let's
2 take it and say yes.

3 MR. EGAN: Okay. What the court of appeals
4 noted here was that in this case it makes a difference
5 that we're talking about a common employer-initiated
6 event. We're not talking about --

7 CHIEF JUSTICE ROBERTS: Well, but doesn't
8 that beg the question? We don't know. This isn't a
9 pattern and practice case. You don't have evidence of a
10 company-wide policy of discrimination. Take my
11 hypothetical. There are just four people who are
12 alleged to harbor age-based bias, and they -- in the Los
13 Angeles office. No connection to the Fresno supervisor
14 at all, other than that they work for the same company.
15 Is that enough for relevance?

16 MR. EGAN: If there is no connection, it
17 might not be, Your Honor.

18 CHIEF JUSTICE ROBERTS: It might not be
19 relevant.

20 MR. EGAN: Might not be relevant. Let me
21 say that --

22 JUSTICE SCALIA: But you assert that the
23 mere fact that it is pursuant to the same reduction in
24 force is enough of a connection.

25 MR. EGAN: Yes, Your Honor, because the

1 standard arises out of Article IV, which is entitled
2 "Relevancy and Its Limits." There are no categorical
3 bars within Article IV except when -- Congress and the
4 Court have mentioned, 401 has no categorical bar. The
5 test is, does a fact have -- if evidence has any
6 tendency to make a fact of consequence more likely than
7 without it? So it depends. In rule 401, there is no
8 categorical bar. In Article IV, if there are areas
9 where there are problems, we list them. 407, 411 -- no
10 mention of liability insurance. 410.

11 CHIEF JUSTICE ROBERTS: 404.

12 MR. EGAN: 404(b), Your Honor. And in this
13 case the lower courts had used 404. We did not address
14 it. I don't think anybody really did in a brief, other
15 than the Government mentioned the Huddlestone case. The
16 Huddlestone case is important because it said that there
17 is no preliminary determination as to whether or not
18 something is relevant. What you do is the court looks
19 at all the evidence. The evidence that Ellen Mendelsohn
20 wanted to offer has connections to it.

21 JUSTICE ALITO: Well suppose you're -- if
22 you're right on 401 and 402, would -- do we not still
23 have to go on and decide whether it would have been a
24 abuse of discretion for the trial judge to exclude this
25 under 403?

1 MR. EGAN: Your Honor, I believe that --

2 JUSTICE ALITO: If we find that it would not
3 have been abuse of discretion, then how could we affirm
4 the Tenth Circuit?

5 MR. EGAN: Your Honor, I believe that what
6 you have to do is look at what the court did, because
7 what the court did was it ruled on what they presented,
8 which was not anything having to do with the weight of
9 the evidence, confusion of issues. There is nothing to
10 indicate. And the court of appeals quoted its own law
11 that says we are in no position to speculate. As a
12 superintending court, they ruled only one thing -- a
13 categorical bar of evidence that was before it, and they
14 said that's wrong. You followed the wrong case law.

15 JUSTICE GINSBURG: But I thought they said
16 that it should be admitted. I thought they went to the
17 opposite extreme.

18 MR. EGAN: I'm not sure that they went to
19 that extreme. Their language is this, Your Honor: They
20 say, "Based on what we see" -- and they have the proffer
21 in front of them at that time, and they also have the
22 full transcript, which hasn't been talked about -- how
23 Ellen Mendelsohn's case and her theory tied into these
24 people.

25 JUSTICE GINSBURG: How did they?

1 MR. EGAN: Your Honor, in several different
2 ways. Barred evidence of culture. We had evidence of
3 culture from open remarks, that someone needs to be
4 "blessed with lots of runway ahead of them" in order to
5 get a good rating. Bonnie Hoopes said being told she
6 was too old for the job right after she received that
7 memo, being told openly and repeatedly, "I'm too old for
8 the job." If there are too many --

9 CHIEF JUSTICE ROBERTS: Are these episodes
10 that were necessarily communicated to the supervisor at
11 issue here?

12 MR. EGAN: No, Your Honor, but this is on
13 the question of culture.

14 CHIEF JUSTICE ROBERTS: You don't make the
15 -- you don't suggest that he was even aware of these
16 other anecdotes.

17 MR. EGAN: We do not suggest, but what we
18 say is that what was going on in the culture -- you've
19 got a supervisor like Ted Stock, openly saying, "I can't
20 wait for RIF's, so that I can get rid of the older
21 people in my department." That supervisor's conclusion
22 is that it's okay.

23 CHIEF JUSTICE ROBERTS: But you're conceding
24 that we don't even know that that comment was
25 communicated in any way to the supervisor at issue here.

1 He may not have been aware of it. The supervisor -- he
2 may have been in Fresno and that supervisor in Los
3 Angeles.

4 MR. EGAN: Your Honor, what way do know is
5 that they attended the same meetings, the key leadership
6 meetings, that took place in January 2002 that covered
7 something very important to our case -- the
8 establishment of a forced ranking system and also a
9 discussion of the RIF's that are ongoing and continuing.
10 They're at the same meeting. It's after this meeting,
11 where Jack Welch is presented to the group, that they
12 come out with the philosophy of forced --

13 CHIEF JUSTICE ROBERTS: I assume there's no
14 dispute over any direct evidence you have that the
15 supervisor was being guided by a company policy or
16 statement or the RIF program that was discriminatory.
17 The issue here is whether or not you can bring in
18 testimony that -- which has no demonstrated connection
19 to the supervisor.

20 MR. EGAN: Your Honor, the rules of evidence
21 simply talk in terms of "not demonstrate a connection."
22 It doesn't exist. If we look at the rules of evidence,
23 the standard -- and the standard we believe applies here
24 -- is a two-step methodology. It would be, number one,
25 what is the party -- the thing the party is trying to

1 prove, such as culture -- is that a subsidiary fact of
2 consequence?

3 Something that's been missed in the
4 Petitioner's position and even in the district court, is
5 that Rule 401 says that you have three levels of
6 evidence. The ultimate issue, and the Petitioner has
7 always said this doesn't prove that Reddick
8 discriminated against Mendelsohn. That's the ultimate
9 issue. We have many intermediary facts to which the
10 evidence relates. They are facts of consequence, and
11 the evidence had a tendency to show these facts of
12 consequence. So that --

13 JUSTICE SOUTER: May I ask you to elaborate
14 on that somewhat?

15 MR. EGAN: Yes, Your Honor.

16 JUSTICE SOUTER: I went through to kind of
17 pin down what the facts of consequence were. I went
18 through the offer of proof. I don't have my notes in
19 front of me, but I think my recollection is right on
20 this. It struck me that the admissible evidence that
21 was indicated by the offer of proof boils down basically
22 to this: There were three employees who would testify
23 that, following their dismissal, some or all of their
24 work was done by a younger person.

25 MR. EGAN: Yes, sir.

1 JUSTICE SOUTER: There was one employee who
2 would testify that he received -- she saw a spreadsheet
3 in front of one supervisor that indicated age.

4 There was one employee who would testify
5 that her immediate supervisor had made
6 age-discriminatory remarks.

7 And another employee would testify that her
8 supervisor's boss had made age-discriminatory remarks.

9 Now, basically, out of this company of
10 70,000, that seems to be the sum total of the -- the
11 kind of circumstantial evidence of culture that you
12 presented in the offer of proof.

13 Am I selling your offer of proof short here?

14 MR. EGAN: No, you are not, Your Honor. The
15 -- you have hit it precisely. And we believe that with
16 culture, it's the openness of what's going on. The
17 openness. The number of events goes to weight. All the
18 weaknesses and frailties of the evidence go to weight.
19 And we never got to that portion of determining the
20 weight of the evidence. The weight --

21 JUSTICE BREYER: All right. So what should
22 we do then? Sorry. Go ahead and conclude. But I want
23 to ask this after you finish answering Justice Souter.

24 MR. EGAN: Your Honor, we believe that --

25 JUSTICE BREYER: And finish your answer to

1 Justice Souter.

2 MR. EGAN: Thank you, Your Honor. The --
3 this ties in, in several different ways, if I can take
4 them all, to culture, to modus operandi, and this
5 wouldn't require discriminatory conduct. For instance,
6 the story line that jobs have been abolished and given
7 to youngers. That's where that would be modus operandi.
8 The fact that the office shadow rating system -- they're
9 under the same rating system that's not supposed to
10 apply to employees like Ellen Mendelsohn and those who
11 we are presenting, but it was --

12 JUSTICE SCALIA: What if even one of these
13 three had existed? Only one these three?

14 MR. EGAN: One of these three what, Your
15 Honor?

16 JUSTICE SCALIA: One of these three other
17 employees who complained about age discrimination.
18 Would that have the same tendency to show it?

19 MR. EGAN: It depends what it's offered for
20 because relevance does --

21 JUSTICE SCALIA: You think one is enough?

22 MR. EGAN: If it's culture --

23 JUSTICE SCALIA: Yes.

24 MR. EGAN: -- and the CEO is saying that we
25 want to bring the average age down -- which never

1 happens -- but under --

2 JUSTICE SCALIA: No, I'm not talking about
3 somebody up at the top. I'm talking about somebody on
4 the same level as the supervisor that you're concerned
5 with. One other supervisor in this company of 70,000
6 has -- is accused of having made age-discriminatory
7 decisions.

8 MR. EGAN: Well, if they're just accused,
9 no, Your Honor. The assumption has to be --

10 JUSTICE SCALIA: Well, all of these are just
11 accused. We have -- none of this has been proven.

12 MR. EGAN: Your Honor, we have not even
13 addressed at any time the content of the decision -- I
14 mean the content of the testimony.

15 JUSTICE SCALIA: So --

16 JUSTICE SOUTER: Let's assume the testimony
17 at least shows these points that you and I agreed the
18 offer of proof offers to prove.

19 They're going to be met -- I think it's
20 reasonable to suppose, they're going to be met by
21 counter-evidence.

22 MR. EGAN: Yes, Your Honor.

23 JUSTICE SOUTER: We're going to have
24 litigation on these points, and they're going to take --
25 in effect, become subsidiary chapters in this trial.

1 And what concerns me, I guess, is that, at the end of
2 the day, it's -- it strikes me as though there is reason
3 to believe that the proof itself is not going to be
4 anything close to overwhelming. We will have had a
5 potentially confusing trial on this subsidiary
6 third-party evidence. And we seem to be very close, if
7 we have not gotten over the line, of the subsidiary
8 evidence, in effect, being substantially misleading or
9 prejudicial. And -- and basically I'm raising a
10 question of weight under 403.

11 What's your response to that?

12 MR. EGAN: My response, because I'm hearing
13 you talk about the mini-trial issues, first of all, as
14 you know, it will not happen here. We had a pretrial
15 January 29, 2007, after -- before Sprint had filed its
16 petition for cert, in which we discussed will this be a
17 longer trial. One and a half, maybe two days. The fact
18 of mini-trials, Your Honor, it just doesn't happen that
19 often. You can try joinder cases. I've tried joinder
20 cases with eight plaintiffs, and you handle that with
21 instructions. The answer isn't to keep out possibly
22 probative evidence; the answer is to let --

23 CHIEF JUSTICE ROBERTS: But what --

24 MR. EGAN: -- to let Sprint put on
25 counter-evidence --

1 CHIEF JUSTICE ROBERTS: What happens in this
2 case? Let's say there are five "me, too" situations
3 presented, and the court make a determination in each
4 one, and the jury finds for the plaintiff. And then
5 it's appealed, and the argument on appeal is, well, in
6 three of those five cases there wasn't age
7 discrimination and here's why. And that evidence is --
8 well then the court of appeals agrees, yes, those three
9 cases shouldn't have been admitted.

10 Is that reversible error?

11 MR. EGAN: Your Honor, I think that what you
12 handle that with is limiting instructions. It would be
13 the evidence of acts or statements of anyone else that
14 you've heard are relevant only to the intent of Paul
15 Reddick. Nobody would contend that Bonnie Hoopes was --

16 CHIEF JUSTICE ROBERTS: No, under my
17 hypothetical, in the three cases, the court of appeals,
18 let's say, determines that the alleged statements did
19 not occur. That's the argument. And this was admitted
20 to the jury in three of the five cases, and those
21 statements did not occur.

22 MR. EGAN: At least that's part of our
23 adversary system, Your Honor, where we have both sides
24 presenting and countering. The super- --

25 CHIEF JUSTICE ROBERTS: Is that reversible

1 error on appeal?

2 MR. EGAN: That it --

3 CHIEF JUSTICE ROBERTS: Five gets you cases
4 when the court of appeals determines that three did not
5 occur?

6 MR. EGAN: If it's determined under your
7 hypothetical --

8 JUSTICE BREYER: Well, that's exactly what's
9 sort of bothering me. You are the trial lawyer.

10 MR. EGAN: Yes, Your Honor.

11 JUSTICE BREYER: And I'm not. And what's
12 worrying me most about this is I will say something that
13 will muck up quite a lot of trials. So, therefore, the
14 sentence that jumps out the page here was where the
15 court of appeals says that Rule 403's exclusion is an
16 extraordinary remedy that should be sparingly -- used
17 sparingly.

18 Is that a general rule?

19 Because my impression was -- and this is why
20 I asked you as a trial lawyer -- is that if you take 401
21 and 402 and read them literally, we'll have trials that
22 last a thousand years.

23 And, really, the way a trial judge keeps the
24 trial under control is to say: Well, maybe there is
25 some slight tendency here to make a fact more likely

1 than not; but, even if that's so, this is a waste of
2 time.

3 And I thought that kind of decision is what
4 trial judges are there to make.

5 MR. EGAN: Yes, Your Honor.

6 JUSTICE BREYER: And, therefore, I thought
7 this court of appeals is trying to second-guess that
8 trial court judge unless that trial court judge is
9 making an absolute rule, which he may have been.

10 But as soon as we get into this case, I
11 thought we might do quite a lot of harm by trying to let
12 the court of appeals second-guess trial courts on this
13 kind of thing.

14 Now, I would appreciate your response to
15 that.

16 MR. EGAN: Yes, Your Honor. That requires,
17 under 403 requires, a balancing. And I think you must
18 have, contrary to what -- all due respect -- Justice
19 Scalia suggested, Rule 403 is the only rule that
20 expressly says "substantially outweighs." We have no
21 evidence here --

22 JUSTICE BREYER: Well, then, how are we
23 going to -- I'm not arguing about what it says so much
24 as I'm arguing about who has the right between the court
25 of appeals and the trial court to decide?

1 MR. EGAN: Your Honor --

2 JUSTICE BREYER: And all I'm worried
3 about -- and you tell me if that's the law in the Tenth
4 Circuit or elsewhere. I was an appeals court judge for
5 a quite a while. And I think we have never -- not
6 "never," but hardly ever second-guessed a trial judge on
7 that kind of question.

8 MR. EGAN: Yes, Your Honor.

9 JUSTICE BREYER: Now, you tell me if the
10 rules are different in the Tenth Circuit? Do they out
11 there second-guess trial judges on this kind of question
12 all the time?

13 MR. EGAN: No, Your Honor.

14 JUSTICE BREYER: All right. If they don't
15 normally, why should they here? If this kind of rule is
16 -- as you say, this kind of evidence is like any other
17 evidence, any other evidence at all. It may be
18 relevant, or it may not be. It depends on the case. A
19 waste of time or not depends on the case.

20 MR. EGAN: Yes, Your Honor. Is that a
21 problem, and why is it an evidentiary exclusion before
22 trial?

23 JUSTICE BREYER: I got your blanket part. I
24 got that.

25 MR. EGAN: And so once you are there, we

1 have no quarrel if the Tenth Circuit -- and I think the
2 Tenth Circuit leaves room for sending it back, remand
3 it, and then the court could still make rulings, as the
4 Tenth Circuit said, on cumulative nature of evidence,
5 hearsay objections. These haven't been addressed.

6 Sprint has been --

7 JUSTICE BREYER: Oh, no, not -- I'm
8 saying -- well, you got my point, but you're just not
9 answering my question.

10 MR. EGAN: I am sorry, Your Honor. I'm not
11 understanding --

12 JUSTICE BREYER: And I don't want to repeat
13 it. And I'm not talking about whether it is hearsay or
14 not. I'm not talking -- I'm talking about whether it
15 comes in 401, 402, 403. That's the issue.

16 MR. EGAN: Yes, Your Honor. Our -- we
17 believe that it does. Because the evidence has a
18 tendency to make more probable than without the evidence
19 facts of consequence, on culture, on impeachment, on
20 pattern, on pretext.

21 That's our standard. We have no indication
22 here that the judge ever engaged in a balancing -- none.

23 JUSTICE SCALIA: Mr. Egan, what if I think
24 that, had he engaged in a balancing, it would have been
25 an abuse of discretion not to exclude it? What if I

1 think that?

2 Then what happens with this case?

3 MR. EGAN: If you believe that it is so
4 clear, then, of course, that would be -- if you believe
5 that it is so clear that it is an abuse of discretion
6 not to exclude it, then that is the prerogative of the
7 Court to do. But it must be done under this standard,
8 Your Honor; that is, the judge looks at the evidence and
9 asks the question like he would for submissibility.

10 What would a reasonable jury say, and is
11 there room for disagreement?

12 If you have Federal judges, for instance,
13 who disagree on admissibility --

14 JUSTICE SCALIA: No, but I am worried about
15 having five trials -- you know, one trial turning into
16 six trials. I mean those are the factors that I am
17 concerned about.

18 MR. EGAN: I understand, Your Honor. And --

19 JUSTICE SCALIA: Yes.

20 MR. EGAN: But let me just say this, if I
21 might. Discrimination cases are important. In the
22 McKennon case Justice Kennedy wrote for the unanimous
23 Court in saying every time a single plaintiff advances
24 the cause and prevails in a discrimination case, it
25 serves the national public purpose.

1 So it's important. And the idea of there
2 being cases on this, the court house doors should be
3 open. The decision may be -- may be --

4 CHIEF JUSTICE ROBERTS: What if I assume
5 your rule cuts the other way?

6 Let's say in this company of 70,000 or
7 17,000, or whatever it is, there are a thousand
8 supervisors. Four or five are alleged to have
9 discriminated on the basis of age.

10 I assume the company can call the other 995
11 and say: Are there any allegations against you? Did
12 you fire people? And did you in some cases keep the
13 oldest one?

14 And then they have to -- you know, they say
15 yes. So the, "me, too" evidence works both ways, right?

16 MR. EGAN: Absolutely. And that is
17 important, because in your Court, cases and
18 jurisprudence --

19 CHIEF JUSTICE ROBERTS: So if you are
20 talking about culture, what is the culture of the
21 company if 995 supervisors don't supervise -- don't
22 discriminate in their decisions and 5 do?

23 MR. EGAN: Your Honor, the culture -- they
24 have the right to bring on evidence, but the trial court
25 retains the discretion. And I hope this answers Justice

1 Breyer's question, also. The court retains the
2 discretion to keep out marginal evidence.

3 JUSTICE ALITO: Well, maybe, just as an
4 example, you could take Mr. Borel and Mr. Hoopes and
5 explain why their testimony should not have been
6 excluded under 403? As I read Trent, the only thing I
7 have as to either one of them is that they were replaced
8 by young women in their position. That's it as far as
9 admissible evidence for either one.

10 Now, if you do that, the 403 balancing
11 there, why doesn't that lead to exclusion?

12 MR. EGAN: Because John Borel's evidence
13 goes to pretext, Your Honor. And pretext under the
14 Reeves case is something that is highly, highly
15 important, and highly important to the trial lawyer. His
16 pretext evidence is twofold.

17 He was going to get a job before he knew
18 that he was RIF'd. He goes to apply for the job after
19 the RIF, and he is told: Sorry, you've got a secret
20 adverse rating.

21 Now, mind you, the company says: We don't
22 use these ratings.

23 Now, in Ellen Mendelsohn's trial without
24 corroboration, she's isolated. That's John Borel's
25 important testimony in this case. John Hoopes -- he's

1 told by a vice president why can't you hire someone
2 younger? Why would you hire someone age 48, which
3 indicates that at Sprint, it's something that is
4 determined to be okay. So that's --

5 CHIEF JUSTICE ROBERTS: So if company can
6 admit evidence to show the opposite of your "me, too"
7 evidence by other supervisors and you say five shows the
8 culture of discrimination, how many are they allowed to
9 admit before -- to show the opposite culture? Certainly
10 more than five if they say this isn't representative.
11 You have to look at these 15 others.

12 MR. EGAN: I can't pick a number, Mr. Chief
13 Justice. And we're not saying that the five proves the
14 fact as you said of proving culture. But it is evidence
15 that is relevant to it. A reasonable juror --

16 CHIEF JUSTICE ROBERTS: Right. There are
17 15, 30, or however many is equally relevant.

18 MR. EGAN: Yes, Your Honor.

19 JUSTICE KENNEDY: You said there was going
20 to be an agreement that this would be a trial or a day,
21 a day and a half.

22 MR. EGAN: Yes, Your Honor.

23 JUSTICE KENNEDY: Was that before or after
24 the premise this testimony would not be admitted.

25 MR. EGAN: That was after the premise that

1 the testimony would not be admitted. But, Your Honor,
2 this was after remand.

3 JUSTICE KENNEDY: You told it can be done in
4 a day and a half. Because these five were excluded.

5 MR. EGAN: No, Your Honor. I'm sorry. What
6 happened here was the remand or the reversal came down.
7 We have a pretrial because we're going back to trial.
8 We have a trial on January 29, 2007. Excuse me. A
9 pretrial, and at that trial the court asked well, will
10 this be a long trial, four weeks, five weeks? We say if
11 you open up discovery, if they want to bring people to
12 refute -- Sprint said no.

13 JUSTICE KENNEDY: I don't think that has any
14 bearing on the ruling that the trial judge made that's
15 under review in the Court of Appeals for the Tenth
16 Circuit and that we're looking at here.

17 MR. EGAN: Well, Your Honor, it goes to
18 whether or not saying that there's going to be a lengthy
19 trial it is some evidence as you look at what the actual
20 experience is -- look at the cases cited by the
21 defendant. We cited them in our brief.

22 JUSTICE SCALIA: They may have just thought
23 the game isn't worth the candle. Just thought we've
24 sunk so much money into this case by now and it's just
25 not worth the risk.

1 MR. EGAN: That's fine, Your Honor. But
2 they should be not take out the legs from the plaintiffs
3 to try to prove their case.

4 JUSTICE SCALIA: And that's the problem that
5 concerns me. It is not the question of whether the
6 trial is going to last for three weeks. It is a
7 question at the prospect that the trial will last for
8 three weeks and they will have to go out and find other
9 people in their organization and depose them and bring
10 them in to show them it is not the culture. They just
11 say it is not worth the candle. Just settle the case
12 and get out. All of these things are relevant to how
13 you rule on 403 it seems to me.

14 MR. EGAN: Your Honor, we're simply asking
15 for balance, because other supervisors --

16 JUSTICE SOUTER: Doesn't that get to the
17 point, though, hasn't the last hour of questioning from
18 the court shown that what we really ought to take place
19 here is a remand to the trial court for a 403 balance?

20 MR. EGAN: Yes, Your Honor.

21 JUSTICE SOUTER: Okay.

22 MR. EGAN: If I might offer some concluding
23 thoughts because my time is running down. The district
24 court erred in categorically barring all other
25 supervisor evidence. It was a categorical bar. When

1 you get into the chronology of what happened, you will
2 see no indication otherwise. Neither Rule 401 nor Rule
3 403 support such a blanket prohibition. As I mentioned
4 under rule 401 --

5 CHIEF JUSTICE ROBERTS: So you think the
6 court of appeals erred as well in ruling that the
7 evidence was admissible? Because as I understand your
8 answer to Justice Souter, it is that there should be a
9 403 evaluation and the court of appeals didn't allow the
10 district court to undertake that.

11 MR. EGAN: Your Honor, I think that what the
12 -- my reading of the Tenth Circuit, for what it's worth,
13 is that they were looking at the exclusionary order
14 based on the wrong legal rule and said, we are going to
15 reverse that. And that we see nothing that indicates
16 that the evidence is overly prejudicial, since that's
17 basically all that they were looking at.

18 There could be, and we assume there would
19 be, new motions filed upon remand, in which case we'll
20 answer anything going to the merits because we've never
21 been allowed to talk about the content of the testimony
22 itself. Will it be cumulative? Is it overly
23 prejudicial? We've got --

24 CHIEF JUSTICE ROBERTS: And if on the remand
25 that you conceded is necessary, that will take place in

1 the context of a motion in limine and not in the context
2 of a new trial?

3 MR. EGAN: It should be in the context of
4 going back and being remanded, for the court maybe to
5 make determination, but our position is in the context
6 of a new trial the court can address any new motion that
7 hasn't been made.

8 CHIEF JUSTICE ROBERTS: So you think a new
9 trial is required for the district court to make the 403
10 determination?

11 MR. EGAN: I think that you have to get back
12 before the district court procedurally.

13 JUSTICE KENNEDY: Has this Court said that
14 403 determinations must always be made on the record?

15 MR. EGAN: No, Your Honor, you haven't said
16 that they should be on the record, but we're not asking
17 for that. We're asking for some indication of what --

18 JUSTICE KENNEDY: Well, I thought that's
19 precisely what you are saying, that that there is no
20 balancing shown, that he didn't do the balance.

21 MR. EGAN: Well, Your Honor, there should --
22 we believe, if -- as you write the opinion, there should
23 be -- the court should show there work. You know, it's
24 -- as I was taught in grade school, you your work so
25 that we know what you did rule on. They should follow

1 the rules as well.

2 JUSTICE SCALIA: It seems very strange to me
3 that we -- there's been -- the case went to the jury
4 without the evidence you wanted to get in. The jury
5 found for the company. Now if the -- if the trial court
6 is going to properly exclude the evidence under 403, we
7 should then have the very same trial with a new jury?
8 That doesn't seem proper.

9 MR. EGAN: No, Your Honor, if may I answer
10 that question.

11 CHIEF JUSTICE ROBERTS: Yes.

12 MR. EGAN: The only thing that can't happen
13 on remand -- I want to make sure this is clear -- is
14 that the judge can't exclude on the same basis that
15 caused the problem the first time; that is, well, it is
16 not Reddick; it's excluded. Not Reddick, it's excluded.
17 Any other factors would be open.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr. Egan.

19 MR. EGAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Mr. Cane, you have
21 five minutes.

22 REBUTTAL ARGUMENT OF PAUL W. CANE, JR.,

23 ON BEHALF OF THE PETITIONER

24 MR. CANE: Let me begin by addressing
25 Justice Kennedy's question about the Rule 403 issue. I

1 think there are two reasons why no remand is necessary.
2 The first, as Justice Scalia said, is that you assume
3 that the order is correct. You don't assume that it's
4 incorrect. The second --

5 JUSTICE GINSBURG: But the -- how can we
6 make that assumption when the Tenth Circuit says we know
7 why this district judge ruled as he or she did? We had
8 a precedent. It -- it dealt with employee discipline.
9 We said, categorically, it's got to be the same
10 supervisor; otherwise it's not relevant.

11 The district judge was simply applying that
12 case to this case.

13 MR. CANE: Neither --

14 JUSTICE GINSBURG: So it wasn't any 403
15 question. It was this doesn't come in.

16 MR. CANE: Neither that case nor this case
17 involved any attempt to show that foundation, the
18 linkage between these other persons, these other alleged
19 bad actors, and the decision here.

20 JUSTICE GINSBURG: But that's not -- the
21 point is that the Tenth Circuit said this judge made an
22 absolute rule: It doesn't come in. We know why he made
23 an absolute rule; that was our precedent.

24 MR. CANE: Well, I think the Tenth Circuit
25 -- it -- it applied the incorrect presumption. It

1 should have applied the presumption that an evidentiary
2 ruling is correct rather than incorrect.

3 JUSTICE BREYER: How could it have been?
4 What about the date problem he just mentioned? You said
5 -- your opponent said that when you filed this motion in
6 limine on December 15, 2004, by that time, there hadn't
7 been any fact-specific things at all brought up in the
8 trial that were relevant to this, and there's certainly
9 none in the notion that I could see.

10 MR. CANE: Well, that always will be true in
11 the case of a motion in limine. But the motion in
12 limine anticipated the specific evidence that had
13 emerged in discovery --

14 JUSTICE BREYER: But where does it say? I
15 can't find in the motion, although there is something on
16 disparate impact, anything that says well, you see, I
17 don't know about the general mine run of cases, but in
18 this particular case, it's not sufficiently material, it
19 is a waste -- it's not -- it is a waste of time. Now, I
20 just can't find that.

21 MR. CANE: I don't think district judges can
22 be expected to, you know, write opinions that are -- to
23 be affirmed to be worthy of publication in F. Supp.2d. I
24 think the district court considers the evidence thrown
25 at him or her, and in this case all --

1 JUSTICE BREYER: Did anyone argue that
2 before December 15, 2004, that we don't know about the
3 mine run of cases, but this case, in fact it's a waste
4 of time? Did anyone argue that before December 15,
5 2004?

6 MR. CANE: That's the time when --

7 JUSTICE BREYER: I'm asking yes or no; did
8 they or didn't they?

9 MR. CANE: No.

10 JUSTICE BREYER: Okay.

11 MR. CANE: Because that's when the court
12 considered notions in limine. The court was not setting
13 standards in anticipation of a trial until the trial.

14 JUSTICE KENNEDY: You said there were two
15 points about 403.

16 MR. CANE: Yes, the second is I agree with
17 Justice Alito's observation, or I think it was his
18 observation, that it would have been abuse -- an of
19 discretion to admit this evidence anyway; and so that
20 gets you easily by the 403 issue. I don't think you
21 need -- there's a lot of court of appeals cases that say
22 that where 403 factors are obvious, where they're
23 implicit, there's not any obligation on the court of
24 appeals' part -- or on the district court's part -- to
25 -- to set them forth and explicitly engage in

1 rebalancing.

2 JUSTICE GINSBURG: Do you not think that
3 there is an important value that the Tenth Circuit
4 recognized in making it clear that there is no absolute
5 bar? If we just assume in favor of the district court,
6 when we don't know that the district court didn't take
7 it as an absolute rule, that -- this is a point of law
8 that should be clarified for the benefit of district
9 courts. Either there's a categorical bar or there's
10 not.

11 MR. CANE: I think that, absent some showing
12 of relationship of nexus, then the presumptive rule in
13 the run of cases should be that this evidence should not
14 be admitted.

15 JUSTICE SCALIA: You -- you don't want that
16 clarification to be done at the expense your client, I
17 take it?

18 (Laughter.)

19 MR. CANE: Of course not. Of course not.
20 Let me respond to a couple of the Solicitor
21 General's points. The Solicitor General in his brief
22 said three things with which we agree: the plaintiff's
23 burden to lay foundation; anecdotes don't comprise --

24 JUSTICE GINSBURG: The -- the Government
25 said it was not necessary to lay a foundation.

1 Mr. Garre confirmed that point.

2 MR. CANE: He did say that, Justice
3 Ginsburg, but that's not what their brief says.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cane.
5 The case is submitted.

6 (Whereupon, at 11:07 a.m., the case in the
7 above-entitled matter was submitted.)

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A				
abolished 42:6	23:3,6 31:13	alleging 25:2,3	42:10 52:18	assumption 43:9
above-entitled	31:16 33:19	allow 56:9	applying 33:4	59:6
1:12 63:7	40:20 52:9	allowed 30:24	59:11	attacks 15:18
absent 8:21	56:7	31:6 53:8	appreciate	attempt 17:24
62:11	admit 53:6,9	56:21	47:14	59:17
absolute 9:10	61:19	allows 24:16	appropriate 8:7	attended 39:5
11:22 33:4	admitted 15:2	amicus 1:20 2:6	Aramburu	attention 4:11
47:9 59:22,23	31:2 37:16	22:10	10:18 33:24	automatically
62:4,7	45:9,19 53:24	amounts 6:1	area 32:24	32:10
absolutely 14:14	54:1 62:14	anecdotes 6:11	areas 17:14 36:8	average 42:25
51:16	adopted 11:4,6	6:12 38:16	argue 61:1,4	aware 38:15
abuse 14:21	11:13	62:23	argued 33:24	39:1
36:24 37:3	advances 50:23	Angeles 34:14	arguing 47:23	a.m 1:14 3:2
49:25 50:5	adversary 45:23	35:13 39:3	47:24	63:6
61:18	adverse 52:20	animus 24:7	argument 1:13	
accepts 21:6	affirm 37:3	answer 6:7 13:1	2:2,10 3:3,7	B
accounted 8:11	affirmed 12:23	41:25 44:21,22	9:2 11:3,3	back 31:18 49:2
accused 43:6,8	60:23	56:8,20 58:9	13:21 14:4	54:7 57:4,11
43:11	age 18:14 34:21	answering 41:23	22:8 26:18	bad 15:7,8 18:21
acknowledge	41:3 42:17,25	49:9	33:12 45:5,19	19:4,9,10
28:19	45:6 51:9 53:2	answers 51:25	58:22	59:19
acknowledged	age-based 35:12	anticipated	arguments	balance 22:5
30:22	age-discrimin...	60:12	11:17	55:15,19 57:20
act 21:4 34:21	41:6,8 43:6	anticipation	arises 36:1	balancing 32:19
action 7:24	ago 23:10	61:13	Article 24:17	47:17 49:22,24
34:24	agree 9:8 13:2,3	anybody 36:14	36:1,3,8	52:10 57:20
actor 18:21 19:4	21:11 61:16	anyway 61:19	articulate 24:19	ban 33:4
actors 15:7,8	62:22	appeal 45:5 46:1	asked 46:20	bar 36:4,8 37:13
19:9,11 59:19	agreed 43:17	appealed 45:5	54:9	55:25 62:5,9
acts 7:12 31:5	agreement	appeals 3:12	asking 55:14	barely 32:14,15
45:13	53:20	12:11,13 23:22	57:16,17 61:7	Barred 38:2
actual 21:10	agrees 45:8	32:18,24 33:3	asks 50:9	barring 55:24
54:19	ahead 38:4	33:17 35:3	assailed 7:13	bars 36:3
additional 15:22	41:22	37:10 45:8,17	assailing 9:7	based 5:8,9
address 14:19	ALITO 14:18	46:4,15 47:7	assault 21:16,17	33:18 37:20
34:6 36:13	14:24 24:19	47:12,25 48:4	22:2	56:14
57:6	25:5 36:21	54:15 56:6,9	assert 35:22	basic 3:11
addressed 9:18	37:2 52:3	61:21,24	assume 9:17	basically 40:21
43:13 49:5	Alito's 61:17	APPEARAN...	12:14,17 18:19	41:9 44:9
addressing	allegation 18:19	1:15	18:20 19:3	56:17
58:24	32:8,9	appendix 11:14	30:11 39:13	basis 12:20
admissibility	allegations	applied 59:25	43:16 51:4,10	34:21 51:9
50:13	23:16 51:11	60:1	56:18 59:2,3	58:14
admissible 3:24	alleged 24:23,24	applies 13:23	62:5	bear 21:13
7:6,25 20:21	33:22,24 34:20	14:4 21:19	assumed 12:11	bearing 54:14
21:8 22:15,18	35:12 45:18	39:23	12:12,13 27:3	bears 18:24
	51:8 59:18	apply 4:19 33:2	28:23	beg 35:8

<p>behalf 1:16,19 1:22 2:4,6,9,12 3:8 22:9 33:13 58:23 believe 8:21 37:1,5 39:23 41:15,24 44:3 49:17 50:3,4 57:22 benefit 62:8 better 16:2 bias 3:15 16:11 17:6 35:12 biased 16:9 bit 15:22 19:7 blanket 11:8 33:18 48:23 56:3 blessed 38:4 Blessing 15:20 15:24 boils 40:21 Bonnie 38:5 45:15 book 33:16 bore 18:16 Borel 52:4 Borel's 52:12,24 boss 15:20 41:8 bothering 46:9 Breyer 10:8 11:1 12:25 14:3 41:21,25 46:8,11 47:6 47:22 48:2,9 48:14,23 49:7 49:12 60:3,14 61:1,7,10 Breyer's 52:1 brief 7:5 13:5,9 13:20 17:3,10 27:20,23 33:7 36:14 54:21 62:21 63:3 briefed 28:25 bring 39:17 42:25 51:24</p>	<p>54:11 55:9 broad 24:16 brought 60:7 burden 27:5,17 62:23 Business 18:6,9</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 Cal 1:16 call 9:20 51:10 called 4:10 15:3 candidate 28:14 candle 54:23 55:11 Cane 1:16 2:3 2:11 3:6,7,9 4:4,13 5:11,20 6:3,7,10,21,25 7:10,19 8:1,3 8:14,21 9:1,5 9:11,23 10:1,7 10:24 11:5,15 12:3,5,16,23 13:23 14:14,23 15:1,14 16:7 16:19 17:5 18:4,15 19:12 19:16,24 20:6 20:11,22 21:9 21:14,20 22:6 34:3 58:20,22 58:24 59:13,16 59:24 60:10,21 61:6,9,11,16 62:11,19 63:2 63:4 carrying 26:1 case 3:4 4:18,19 4:22,25 5:3,6 6:18 10:4,21 12:12 13:22 17:25 18:5 21:13 22:15 24:15,15 25:10 25:14 26:12,24 27:4,13 28:6</p>	<p>28:15 29:14,16 29:24 30:7,21 30:21 31:2 32:1 33:6,7 35:4,9 36:13 36:15,16 37:14 37:23 39:7 45:2 47:10 48:18,19 50:2 50:22,24 52:14 52:25 54:24 55:3,11 56:19 58:3 59:12,12 59:16,16 60:11 60:18,25 61:3 63:5,6 cases 3:17 9:15 12:6 15:12 17:9,10 27:5 30:20,22 44:19 44:20 45:6,9 45:17,20 46:3 50:21 51:2,12 51:17 54:20 60:17 61:3,21 62:13 case-by-case 9:9 catalyst 24:24 25:13 categorical 36:2 36:4,8 37:13 55:25 62:9 categorically 55:24 59:9 cause 50:24 caused 58:15 CEO 42:24 cert 44:16 certainly 14:12 26:16 29:14 53:9 60:8 chain 16:5,24 20:24 21:3 chapters 43:25 character 21:16 21:19,21 22:2 character-evi...</p>	<p>21:22 Chicago 23:7 Chief 3:3,9 9:8 9:17,24 15:9 18:11 20:13 21:1 22:6,11 22:17 23:1 30:10,25 31:9 31:18,22 32:8 33:9,14 34:11 34:19 35:1,7 35:18 36:11 38:9,14,23 39:13 44:23 45:1,16,25 46:3 51:4,19 53:5,12,16 56:5,24 57:8 58:11,18,20 63:4 chronology 34:6 56:1 Circuit 10:19 11:22 12:2 14:19 32:21,25 37:4 48:4,10 49:1,2,4 54:16 56:12 59:6,21 59:24 62:3 circumstances 4:5 17:21 18:25 19:6 23:19 26:3 circumstantial 41:11 cite 10:18 cited 54:20,21 cites 17:9 City 1:22 claiming 23:8 claims 3:16 5:16 5:17 clarification 62:16 clarified 62:8 clear 13:18 28:20 50:4,5</p>	<p>58:13 62:4 client 62:16 close 44:4,6 code 7:20 collaborated 5:4 colloquy 4:9 come 29:5 31:7 34:8 39:12 59:22 comes 49:15 command 16:6 16:24 20:24 21:3 comment 24:7 38:24 comments 4:9 commits 21:3 common 7:20 24:24 25:13 34:24 35:5 communicated 20:17 21:4 38:10,25 company 1:4 3:5 8:3,15,16,19 8:24,25 9:6,20 17:14 19:22 21:6,17 22:14 23:7,14,15 31:11 35:14 39:15 41:9 43:5 51:6,10 51:21 52:21 53:5 58:5 companywide 25:12 company-wide 23:17 35:10 complained 23:10 42:17 complaining 26:21 complaint 26:7 complex 25:16 26:22 comprehend 16:3</p>
---	--	--	--	---

<p>comprise 62:23 conceded 56:25 conceding 38:23 concerned 43:4 50:17 concerns 44:1 55:5 conclude 41:22 concluding 55:22 conclusion 22:19 32:7 38:21 conclusively 32:3 conduct 7:12 21:24 42:5 conferred 8:22 confirmed 63:1 confronted 28:6 confused 13:1 confusing 44:5 confusion 37:9 Congress 36:3 connection 9:21 12:7 16:18,21 18:13 20:15 35:13,16,24 39:18,21 connections 36:20 consequence 28:4 36:6 40:2 40:10,12,17 49:19 consider 4:20 10:3 consideration 10:3 32:5 considered 61:12 considers 60:24 consistently 3:18 consists 8:24 consultation 8:5 consulted 15:24</p>	<p>contend 45:15 contended 5:5 content 43:13,14 56:21 context 3:18 30:1,2 32:6,9 57:1,1,3,5 contexts 3:18 continuing 39:9 contrary 47:18 control 46:24 cookie 4:16 corporate 20:7 21:16 22:2 25:1 corporations 21:19,19 correct 12:19,22 15:1 16:7 20:21 27:6 28:1 33:5 59:3 60:2 correctly 18:21 32:21 corroboration 52:24 counsel 5:15 25:22 34:11 counter 31:7 countering 45:24 countervailing 14:16 counter-evide... 43:21 44:25 couple 15:6 62:20 course 31:10 50:4 62:19,19 court 1:1,13 3:10,12 4:1,4 4:14,14,16,17 4:20 5:10,11 5:15 6:8 10:2 10:11 11:8,13 11:18,25 12:4 12:10,11,13,14</p>	<p>12:18 13:12 14:11 15:17,21 21:20 22:4,12 23:22 24:14 28:5 29:9,18 30:3,14,19,21 32:1,16,18,22 32:23 33:1,3,4 33:15,17,20 35:3 36:4,18 37:6,7,10,12 40:4 45:3,8,17 46:4,15 47:7,8 47:8,12,24,25 48:4 49:3 50:7 50:23 51:2,17 51:24 52:1 54:9,15 55:18 55:19,24 56:6 56:9,10 57:4,6 57:9,12,13,23 58:5 60:24 61:11,12,21,23 62:5,6 courthouse 4:17 courts 30:15 36:13 47:12 62:9 court's 3:17,22 5:8 12:21,22 14:10 61:24 covered 39:6 criteria 24:22 critical 29:15,25 crux 29:24 culture 38:2,3 38:13,18 40:1 41:11,16 42:4 42:22 49:19 51:20,20,23 53:8,9,14 55:10 cumulative 49:4 56:22 curiae 1:20 2:7 22:10 customary</p>	<p>12:14,17 cuts 51:5 cutter 4:16 <hr/> <p style="text-align: center;">D</p> <hr/> D 3:1 date 60:4 day 25:18 44:2 53:20,21 54:4 days 44:17 de 32:19 dealing 9:5,15 24:23 dealt 59:8 December 1:10 34:6 60:6 61:2 61:4 decide 9:22 36:23 47:25 decision 3:13,19 7:11 12:21,22 13:25 17:7 18:23 43:13 47:3 51:3 59:19 decisionmaker 11:24 13:17 16:21 17:8,12 19:19 20:24 21:10,23 22:1 decisionmakers 17:13,19 18:18 19:2 30:6 decisionmake... 16:8 decisions 15:20 43:7 51:22 decision-maker 3:14 19:20 defend 14:1,12 14:14 defendant 54:21 defendants 32:6 defendant's 34:15 define 16:23 demonstrate</p>	<p>19:17 32:3 39:21 demonstrated 16:9 39:18 denies 31:11 DENNIS 1:22 2:8 33:12 denying 30:3 department 1:19 18:17 38:21 depend 20:14 depends 34:17 36:7 42:19 48:18,19 depose 55:9 deposition 17:18 Deputy 1:18 determination 9:9 29:12 30:10,18 32:23 36:17 45:3 57:5,10 determinations 57:14 determinative 29:14 determine 25:7 30:16 31:13,24 determined 46:6 53:4 determines 45:18 46:4 determining 24:22 25:7 41:19 Development 18:7,9 difference 27:21 35:4 different 13:2 20:5,6 24:3,4,9 38:1 42:3 48:10 digging 14:13 direct 15:19 16:5 39:14</p>
---	--	---	---	--

<p>directions 8:5 8:22 directive 17:10 disagree 20:23 50:13 disagreement 50:11 discipline 32:25 59:8 disciplined 20:19 discovery 4:22 17:25 19:17 54:11 60:13 discretion 14:22 30:16 36:24 37:3 49:25 50:5 51:25 52:2 61:19 discriminate 51:22 discriminated 7:23 30:7 40:8 51:9 discriminates 20:17 discriminating 5:23,24 6:15 20:23 discrimination 3:17 4:6,18,19 5:25 15:11 22:13,16 23:20 24:24 25:2,4 31:5 32:9 33:25 34:21 35:10 42:17 45:7 50:21,24 53:8 discriminatory 7:23 8:11 21:24 24:7 33:22 39:16 42:5 discussed 44:16 discussion 31:23 39:9</p>	<p>dismissal 40:23 dismissed 18:14 disparate 60:16 disparate-trea... 22:15 dispute 39:14 disputed 4:15 5:2,5 17:17 dissenting 23:21 distinct 26:2 distinctive 26:23 distracted 5:17 district 3:22 4:4 4:10,14,16,17 4:20 5:8,9,11 5:15 10:2,11 10:22 11:4,5,8 11:13,18,25 12:4,9,14,18 12:21,22 13:12 14:10,11 15:17 15:21 23:21 26:19 30:3,14 30:15,19 32:22 33:1,4 40:4 55:23 56:10 57:9,12 59:7 59:11 60:21,24 61:24 62:5,6,8 division 23:17 26:1 27:10 doing 8:13 door 4:17 doors 51:2 draw 7:14 19:10 32:7 due 47:18 D.C 1:9,19</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 1:22 2:1,8 3:1 3:1 33:12 earlier 34:12 easily 61:20 effect 14:7 21:16 43:25 44:8 effort 18:12</p>	<p>Egan 1:22 2:8 33:11,12,14 34:17,23 35:3 35:16,20,25 36:12 37:1,5 37:18 38:1,12 38:17 39:4,20 40:15,25 41:14 41:24 42:2,14 42:19,22,24 43:8,12,22 44:12,24 45:11 45:22 46:2,6 46:10 47:5,16 48:1,8,13,20 48:25 49:10,16 49:23 50:3,18 50:20 51:16,23 52:12 53:12,18 53:22,25 54:5 54:17 55:1,14 55:20,22 56:11 57:3,11,15,21 58:9,12,18,19 eight 44:20 either 9:10 15:3 52:7,9 62:9 elaborate 40:13 eliminated 27:2 Ellen 1:7 36:19 37:23 42:10 52:23 emerged 4:22 60:13 emphasize 6:24 emphasizing 6:22 employee 16:14 23:9 32:24 41:1,4,7 59:8 employees 10:13 10:15 13:7,9 13:14 18:14 25:14 26:6,11 26:13 27:16 33:23 40:22 42:10,17</p>	<p>employer 26:18 31:7 34:24 employer-initi... 35:5 employment 3:13,18 engage 61:25 engaged 21:23 23:20 49:22,24 entities 9:15 entitled 36:1 episode 31:11 episodes 38:9 equally 53:17 equivocal 6:16 erred 55:24 56:6 error 3:24,25 4:1,7 5:19 45:10 46:1 ESQ 1:16,18,22 2:3,5,8,11 establish 15:11 established 6:11 establishment 39:8 evaluation 56:9 event 14:19 35:6 events 41:17 eventually 20:7 everybody 19:15 evidence 3:11,23 4:19,21,24 5:24 6:14,18 7:5,22,25 9:13 11:7 12:18 13:13 14:20 15:2,4,23 17:4 18:1,2,12 21:13 22:13,21 23:2,5,22,24 24:16,18 25:10 25:11 26:19 27:6,18,25 28:2 29:5,10 29:15,16,24 30:5,11,17,22</p>	<p>30:23 31:1,8 31:15 32:2,4,5 32:6,14,14,15 32:17 33:22 34:14,16,17 35:9 36:5,19 36:19 37:9,13 38:2,2 39:14 39:20,22 40:6 40:10,11,20 41:11,18,20 44:6,8,22 45:7 45:13 47:21 48:16,17,17 49:4,17,18 50:8 51:15,24 52:2,9,12,16 53:6,7,14 54:19 55:25 56:7,16 58:4,6 60:12,24 61:19 62:13 evidentiary 48:21 60:1 evolved 15:17 exactly 46:8 example 21:5 23:6 24:8 25:10 26:20,24 52:4 exception 21:25 excludable 32:17 exclude 32:13 32:14 33:21 36:24 49:25 50:6 58:6,14 excluded 14:21 14:25 22:25 23:25 24:18 26:20 28:17 29:9 30:18 31:3 52:6 54:4 58:16,16 exclusion 28:14 46:15 48:21 52:11</p>
---	--	---	--	---

<p>exclusionary 56:13 exclusively 33:23 Excuse 10:5 11:10 54:8 exist 6:25 39:22 existed 42:13 expanded 15:18 expect 32:15,18 expected 60:22 expense 62:16 experience 54:20 explain 4:24 5:10 52:5 explained 5:2 15:21 explains 3:12 explanation 26:23 explanations 23:19 26:2 explicitly 61:25 expressly 7:23 47:20 extent 5:18 extraordinary 46:16 extreme 37:17 37:19</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>F 60:23 facility 7:18 fact 7:14 14:8 15:8 28:3 32:3 33:18 35:23 36:5,6 40:1 42:8 44:17 46:25 53:14 61:3 factors 14:16 25:6,6 50:16 58:17 61:22 facts 4:25 34:9 40:9,10,11,17</p>	<p>49:19 fact-specific 60:7 fair 19:16 fairly 13:17 falls 21:24 far 20:7 52:8 far-flung 17:14 favor 62:5 Federal 22:23 24:17 30:16 31:16 50:12 filed 5:1 33:20 34:7 44:15 56:19 60:5 finally 5:3 find 12:9 37:2 55:8 60:15,20 findings 32:17 finds 45:4 fine 55:1 finish 41:23,25 fire 51:12 fired 34:20 first 22:21 24:23 44:13 58:15 59:2 five 6:3 9:6 17:17 18:2,4 20:3 45:2,6,20 46:3 50:15 51:8 53:7,10 53:13 54:4,10 58:21 focus 3:19 23:24 focused 4:14 focusing 4:14 5:16 follow 57:25 followed 37:14 following 33:1 40:23 force 25:13 34:25 35:24 forced 39:8,12 forth 61:25 found 27:2 58:5</p>	<p>foundation 3:12 6:22 7:4,7,8,10 8:7 27:6,8,21 27:24 59:17 62:23,25 foundational 7:1 17:22,22 four 25:2 34:13 35:11 51:8 54:10 frailties 41:18 frame 24:4 25:2 Francisco 1:16 Fresno 34:15 35:13 39:2 front 37:21 40:19 41:3 full 19:16 37:22 Furnco 24:15 28:15 32:1 further 15:22 22:4 33:7</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 1:18 2:5 3:1 22:8 game 54:23 Garre 1:18 2:5 22:7,8,11,20 23:4,15 24:5 24:21 25:9,21 25:25 26:8,15 27:7,11,14,17 28:1,9,13,19 28:24 29:4,9 29:13,19,23 30:14 31:4,14 31:21 32:1,11 32:20 33:5,10 63:1 gateway 30:15 general 1:18 13:21,23 24:7 46:18 60:17 62:21 General's 62:21 geographic</p>	<p>25:15 Ginsburg 7:2,10 7:16 11:21 12:4 16:1,12 17:2 27:19 32:20 37:15,25 59:5,14,20 62:2,24 63:3 given 4:25 15:23 17:11 29:21 42:6 giving 23:18 go 20:7 30:22 36:23 41:18,22 55:8 goes 5:25 41:17 52:13,18 54:17 going 16:23 21:15 24:12 26:17,25 32:13 32:14 38:18 41:16 43:19,20 43:23,24 44:3 47:23 52:17 53:19 54:7,18 55:6 56:14,20 57:4 58:6 good 38:5 gotten 44:7 governed 11:9 Government 36:15 62:24 grade 57:24 GREGORY 1:18 2:5 22:8 ground 12:24 14:2 grounded 4:21 5:13,19 10:24 11:6 34:4 group 18:7,9 39:11 guess 28:11 44:1 guided 39:15 guiding 9:12,12</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 44:17 53:21 54:4 hand 4:16 handle 44:20 45:12 happen 7:14 15:14 44:14,18 58:12 happened 15:15 30:20 31:20,24 31:25 54:6 56:1 happens 43:1 45:1 50:2 harbor 35:12 harbors 3:15 hard 24:1 harder 14:2 hardest 12:12 hard-pressed 24:12 harm 47:11 headquarters 25:15 hear 3:3 4:18 10:5 heard 45:14 hearing 44:12 hearsay 49:5,13 held 4:5 21:21 help 22:15 hierarchy 20:14 highly 52:14,14 52:15 hire 53:1,2 hit 41:15 hole 14:13 Honor 34:3,18 35:17,25 36:12 37:1,5,19 38:1 38:12 39:4,20 40:15 41:14,24 42:2,15 43:9 43:12,22 44:18 45:11,23 46:10 47:5,16 48:1,8 48:13,20 49:10</p>
---	---	---	--

49:16 50:8,18 51:23 52:13 53:18,22 54:1 54:5,17 55:1 55:14,20 56:11 57:15,21 58:9 Hoopes 38:5 45:15 52:4,25 hope 51:25 hour 55:17 house 51:2 Huddlestone 24:15 28:5 30:21 36:15,16 hypothetical 26:12 34:23 35:11 45:17 46:7	incorrect 59:4 59:25 60:2 increased 18:7 indicate 4:11 6:16 37:10 indicated 40:21 41:3 indicates 29:2 53:3 56:15 indication 49:21 56:2 57:17 individual 21:21 industrial 5:25 infer 26:3 inference 19:10 19:13 inferred 8:4 information 17:18 initiated 34:24 instance 32:19 42:5 50:12 instances 23:5 instant 17:8 instruct 30:23 32:5 instructions 44:21 45:12 insurance 36:10 intend 9:19 intent 3:19,19 45:14 intermediary 40:9 introduce 4:2 27:24 invoke 5:12 involved 20:4 27:16 59:17 irrelevant 9:14 34:1 isolated 52:24 issue 9:24 12:17 13:25 16:15 29:25 38:11,25 39:17 40:6,9 49:15 58:25	61:20 issues 37:9 44:13 issuing 11:8 IV 24:17 36:1,3 36:8 <hr/> J <hr/> JA 30:5 Jack 39:11 January 39:6 44:15 54:8 job 38:6,8 52:17 52:18 jobs 27:3 42:6 John 52:12,24 52:25 joinder 44:19,19 JR 1:16 2:3,11 3:7 58:22 judge 4:10 9:22 10:22 11:4,6 14:24 23:21 26:19 36:24 46:23 47:8,8 48:4,6 49:22 50:8 54:14 58:14 59:7,11 59:21 judges 47:4 48:11 50:12 60:21 jumps 46:14 juries 32:4,7 jurisprudence 51:18 juror 26:3 53:15 jury 5:16 9:3 14:7 26:19 30:13,23 31:2 31:15,16 45:4 45:20 50:10 58:3,4,7 jury's 15:13 Justice 1:19 3:3 3:9,21 4:8 5:7 5:18,22 6:5,9	6:13,23 7:2,10 7:16,21 8:2,8 8:18,23 9:4,8 9:17,24 10:5,8 11:1,10,11,12 11:16,19,21 12:4,8,20,25 14:1,2,16,18 14:24 15:9 16:1,12 17:2 17:24 18:11 19:8,13,21,24 20:2,9,13 21:1 21:12,18 22:6 22:11,17 23:1 23:13 24:1,6 24:19,22 25:5 25:19,22 26:5 26:10 27:4,8 27:12,15,18,19 27:22 28:7,9 28:10,16,22 29:1,8,11,17 29:20,23 30:10 30:25 31:9,18 31:22 32:8,20 33:9,14 34:11 34:19 35:1,7 35:18,22 36:11 36:21 37:2,15 37:25 38:9,14 38:23 39:13 40:13,16 41:1 41:21,23,25 42:1,12,16,21 42:23 43:2,10 43:15,16,23 44:23 45:1,16 45:25 46:3,8 46:11 47:6,18 47:22 48:2,9 48:14,23 49:7 49:12,23 50:14 50:19,22 51:4 51:19,25 52:3 53:5,13,16,19 53:23 54:3,13	54:22 55:4,16 55:21 56:5,8 56:24 57:8,13 57:18 58:2,11 58:18,20,25 59:2,5,14,20 60:3,14 61:1,7 61:10,14,17 62:2,15,24 63:2,4 <hr/> K <hr/> Kansas 1:22 keep 26:9 44:21 51:12 52:2 keeps 46:23 Kennedy 3:21 4:8 10:5 11:19 17:24 18:16,20 18:23,24 19:3 19:13,21,25 20:9 21:12 26:5,10 27:4,8 27:12,15,18 50:22 53:19,23 54:3,13 57:13 57:18 61:14 Kennedy's 27:22 58:25 key 39:5 kind 23:23 24:24 29:15 32:16,17 40:16 41:11 47:3,13 48:7,11,15,16 knew 52:17 know 5:7 11:11 11:12 19:12,23 20:18 31:24 35:8 38:24 39:4 44:14 50:15 51:14 57:23,25 59:6 59:22 60:17,22 61:2 62:6 <hr/> L <hr/> ladder 20:7
---	--	---	---	---

<p>laid 18:10 language 30:8 37:19 large 23:6 Largely 28:24 latitude 15:22 Laughter 13:4 62:18 law 26:17 37:10 37:14 48:3 62:7 lawyer 46:9,20 52:15 lay 7:3 27:20,24 62:23,25 laying 27:5 layoff 18:23 lead 52:11 leadership 39:5 leaves 49:2 legal 56:14 legs 55:2 lengthy 54:18 let's 18:19,20 19:3 21:2 35:1 43:16 45:2,18 51:6 level 18:8 20:22 43:4 levels 40:5 liability 36:10 light 19:5,7 limine 4:21,24 5:14 9:18 15:10,16 30:1 30:13 31:3 33:21 57:1 60:6,11,12 61:12 limited 26:20 limiting 45:12 Limits 36:2 line 6:20 42:6 44:7 linkage 7:11 59:18 linked 18:15</p>	<p>list 5:1 36:9 literally 46:21 litigated 33:6 litigation 43:24 located 20:15 long 54:10 longer 44:17 look 22:20 24:17 25:6,9 30:2 32:11,12 37:6 39:22 53:11 54:19,20 looking 54:16 56:13,17 looks 36:18 50:8 Los 34:14 35:12 39:2 lot 31:23 32:13 46:13 47:11 61:21 lots 38:4 low 22:23 lower 36:13 lower-level 20:16 21:2</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>magnitude 9:16 maker's 3:19 making 7:11,23 17:7 32:23 47:9 62:4 management 1:3 3:4 8:6 marginal 52:2 marginally 23:23 24:2,3 material 60:18 math 8:13 matter 1:12 20:22 26:10,17 63:7 McKennon 50:22 mean 7:2,16 10:9 11:2 12:12 15:10</p>	<p>24:4 43:14 50:16 meaningful 19:5 meet 24:13 meeting 39:10 39:10 meetings 39:5,6 meets 22:22 memo 38:7 Mendelsohn 1:7 3:5 17:9,20 36:19 40:8 42:10 Mendelsohn's 18:25 37:23 52:23 mention 11:16 11:17,19 34:2 34:9 36:10 mentioned 36:4 36:15 56:3 60:4 mere 35:23 merits 56:20 met 43:19,20 methodology 39:24 mind 26:9 52:21 mine 60:17 61:3 minimal 14:15 minimum 26:8 minimum-evi... 22:22 minimum-rele... 24:13 mini-trial 44:13 mini-trials 44:18 minute 3:22,23 minutes 58:21 mishear 10:6 misleading 44:8 missed 40:3 Mo 1:22 modus 42:4,7 Monday 1:10 money 54:24</p>	<p>morning 3:4 motion 4:21,23 5:14 9:18 10:10,24 15:10 15:16 30:1,2,3 30:12 31:3 33:21 34:7 57:1,6 60:5,11 60:11,15 motions 56:19 motivating 19:11 muck 46:13</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 named 18:16 national 50:25 nature 49:4 necessarily 14:3 38:10 necessary 27:23 56:25 59:1 62:25 need 3:11 22:18 22:20 61:21 needs 30:12 38:3 Neither 56:2 59:13,16 never 34:10,10 41:19 42:25 48:5,6 56:20 new 30:2,4 56:19 57:2,6,6 57:8 58:7 nexus 4:15 7:14 7:17,18,19 8:2 8:4,9,12,25 17:23 62:12 normal 9:14 12:6 normally 9:23 10:1,2 48:15 noted 35:4 notes 40:18 notion 60:9 notions 61:12</p>	<p>novo 32:19 number 18:5 39:24 41:17 53:12</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objections 49:5 obligation 61:23 observation 61:17,18 obvious 61:22 occur 45:19,21 46:5 offer 5:4 11:6,20 13:13 34:4 36:20 40:18,21 41:12,13 43:18 55:22 offered 42:19 offers 43:18 office 23:7,10 24:12 25:16 34:14,15 35:13 42:8 officers 16:15 official 17:11 oh 4:18 49:7 okay 9:4 35:3 38:22 53:4 55:21 61:10 old 38:6,7 older 24:8 38:20 oldest 18:8 51:13 once 26:9 48:25 ongoing 39:9 open 38:3 51:3 54:11 58:17 OPENING 22:8 openly 38:7,19 openness 41:16 41:17 operands 42:4,7 opinion 57:22 opinions 60:22 opponent 60:5</p>
--	--	---	--	---

<p>Opposing 25:22 opposite 37:17 53:6,9 oral 1:12 2:2 3:7 33:12 order 3:22,23 5:8,10 11:14 14:10 27:24 28:25 29:1,2,7 29:20 33:18 34:3,4 38:4 56:13 59:3 organization 55:9 other-supervi... 9:13 17:3 23:2 23:5 27:25 ought 55:18 outside 15:12 21:3 outweighed 14:8 outweighs 47:20 overly 56:16,22 overwhelming 44:4</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 13:9 29:7 30:4 33:20 46:14 part 17:6 19:11 45:22 48:23 61:24,24 particular 13:21 18:6,8 21:23 60:18 particularly 12:17 parts 4:9 24:17 party 39:25,25 pattern 3:23 4:2 4:5 6:10 18:1 25:3 26:16,17 29:10 35:9 49:20 Paul 1:16 2:3,11</p>	<p>3:7 11:24 13:16,19 33:19 45:14 58:22 paycheck 7:15 people 16:5,17 18:2,4 23:14 23:16 24:8 34:20 35:11 37:24 38:21 51:12 54:11 55:9 period 10:16,17 10:22 permit 15:18 32:6 person 3:14,15 18:8 20:3,4,5,6 40:24 persons 3:20 6:3 6:12 9:7 15:6 16:20 18:6 27:3 59:18 petition 11:14 44:16 Petitioner 1:5 1:17,21 2:4,7 2:12 3:8 40:6 58:23 Petitioner's 40:4 phase 17:25 philosophy 39:12 physical 7:17 pick 53:12 picky 29:17,17 29:17 pin 40:17 place 31:12 39:6 55:18 56:25 plaintiff 3:16 4:15,23 5:1,3,5 5:16 7:13 9:19 10:12 13:8,12 15:4,7 16:18 16:22 17:25 18:3 19:6,20 23:7 24:12</p>	<p>27:5,7,17,20 28:2 30:7 45:4 50:23 plaintiffs 27:14 44:20 55:2 plaintiff's 19:20 22:16 26:4 62:22 plan 23:18 26:2 please 3:10 22:12 33:15 plus 14:7 point 8:18 20:19 24:21 49:8 55:17 59:21 62:7 63:1 pointing 31:4 points 43:17,24 61:15 62:21 policy 35:10 39:15 portion 41:19 position 27:23 37:11 40:4 52:8 57:5 positions 27:1 possibly 44:21 potential 11:9 15:7 potentially 21:7 44:5 powerful 6:19 practice 3:24 4:2,6 6:10 18:1 25:3 26:16,18 35:9 precedent 32:24 33:1,2 59:8,23 precisely 28:20 41:15 57:19 predicate 31:19 prejudicial 14:7 44:9 56:16,23 preliminary 36:17 premise 53:24 53:25</p>	<p>prerogative 50:6 present 10:2 14:17 16:1 31:7 presented 18:3 34:13 37:7 39:11 41:12 45:3 presenting 42:11 45:24 president 53:1 presumption 59:25 60:1 presumptive 62:12 presumptively 9:13 12:18 pretext 49:20 52:13,13,16 pretrial 44:14 54:7,9 prevails 50:24 principal 3:11 principally 9:7 principle 9:12 9:12 prior 15:12 33:20 probable 49:18 probably 28:13 probative 3:16 14:15 44:22 problem 21:22 48:21 55:4 58:15 60:4 problems 36:9 procedurally 57:12 proffer 34:9 37:20 proffered 11:7 24:25 25:10,11 26:21 29:6,24 30:5 program 39:16 prohibition</p>	<p>11:22 56:3 proof 5:4 11:6 11:20,24 13:15 14:9 34:5 40:18,21 41:12 41:13 43:18 44:3 proper 7:8 16:8 58:8 properly 28:23 33:17 58:6 prospect 55:7 prove 19:14 22:16 26:17 40:1,7 43:18 55:3 proven 43:11 proves 53:13 providing 26:2 proving 53:14 public 50:25 publication 60:23 purpose 13:15 50:25 pursuant 35:23 put 10:10,14 23:9,24 31:14 31:16 32:4,6 44:24 puzzled 19:8</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quarrel 49:1 question 6:6,7 6:13,24 8:9,10 8:11,15 9:3 16:10 20:18 22:21,24 27:22 30:13 31:19 35:8 38:13 44:10 48:7,11 49:9 50:9 52:1 55:5,7 58:10 58:25 59:15 questioning 55:17</p>
---	---	--	--	---

<p>questions 22:4 33:8 quite 30:8 46:13 47:11 48:5 quote 13:6,14,15 quoted 10:23 37:10 quotes 10:14 quoting 13:8</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raises 16:10 raising 44:9 ranking 39:8 rating 38:5 42:8 42:9 52:20 ratings 52:22 reach 22:19 read 3:21 10:9 11:22 12:2 33:3 46:21 52:6 reading 5:13 56:12 really 5:7 15:15 22:1 36:14 46:23 55:18 reason 8:21 16:25 29:5 32:21 44:2 reasonable 26:3 43:20 50:10 53:15 reasons 59:1 rebalancing 62:1 rebuttal 2:10 14:6 15:5 58:22 received 8:22 38:6 41:2 recognize 7:4 recognized 24:14 62:4 recollection 40:19</p>	<p>record 4:9 19:21 28:20 57:14,16 Reddick 11:24 13:16,19 15:19 15:24 33:19,25 40:7 45:15 58:16,16 Reddick's 15:20 reduction 25:12 34:25 35:23 reduction-in-f... 23:18 Reeves 52:14 refer 7:6 reference 27:15 33:24 referred 34:12 refute 54:12 relates 40:10 relationship 13:24 17:15,22 18:16,17,22,24 19:19 62:12 relaxed 15:17 relevance 6:2,9 6:25 9:25 16:10,25 24:14 24:22 26:9 30:8,11 32:12 32:23 35:15 42:20 Relevancy 36:2 relevant 4:25 7:6 9:21 17:4,5 23:12,23 24:2 24:3 25:5,19 27:18 28:3 29:11,13 30:17 31:6,10,15,19 31:23 32:4,4 32:10,15 34:16 35:19,20 36:18 45:14 48:18 53:15,17 55:12 59:10 60:8 relied 5:14 12:14</p>	<p>relying 11:18 14:11 33:23 remand 49:2 54:2,6 55:19 56:19,24 58:13 59:1 remanded 57:4 remarks 7:24 38:3 41:6,8 remedy 46:16 removed 27:1 repeat 49:12 repeated 7:3 repeatedly 38:7 replaced 52:7 reply 7:4 17:3 33:7 representative 53:10 require 42:5 required 57:9 requires 7:19 11:24 13:15 47:16,17 reserve 22:5 respect 16:21 17:19 26:8 27:22 29:23 47:18 respond 15:3 62:20 responded 4:23 RESPONDENT 33:13 Respondents 1:23 2:9 4:10 response 44:11 44:12 47:14 rest 10:17 retained 18:9 retains 51:25 52:1 reversal 54:6 reverse 56:15 reversed 3:13 reversible 45:10 45:25</p>	<p>review 54:15 rid 38:20 RIF 39:16 52:19 RIF'd 26:6,11 26:13 52:18 RIF's 38:20 39:9 right 8:8 13:7,20 21:9 23:22 30:9 35:1 36:22 38:6 40:19 41:21 47:24 48:14 51:15,24 53:16 risk 54:25 Roberts 3:3,9 9:8,17,24 15:9 18:11 20:13 21:1 22:6,17 23:1 30:10,25 31:9,18,22 32:8 33:9 34:11,19 35:1 35:7,18 36:11 38:9,14,23 39:13 44:23 45:1,16,25 46:3 51:4,19 53:5,16 56:5 56:24 57:8 58:11,18,20 63:4 room 49:2 50:11 rule 5:12 9:10 9:14 10:3,25 12:5,9 13:23 17:1 21:13 22:25 24:20 27:13 36:7 40:5 46:15,18 47:9,19,19 48:15 51:5 55:13 56:2,2,4 56:14 57:25 58:25 59:22,23 62:7,12 ruled 14:20,20 37:7,12 59:7</p>	<p>rules 4:19 21:13 22:21,24 24:18 30:16 31:16 39:20,22 48:10 58:1 ruling 4:1,17 11:9 13:15 15:18 32:22 54:14 56:6 60:2 rulings 49:3 run 9:14 12:6 60:17 61:3 62:13 running 55:23 runway 38:4</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 said/she 31:1 San 1:16 satisfied 27:9 saw 41:2 saying 3:23 8:18 10:21 34:7 38:19 42:24 49:8 50:23 53:13 54:18 57:19 says 13:12 30:5 37:11 40:5 46:15 47:20,23 52:21 59:6 60:16 63:3 Scalia 5:7 11:10 11:12,16 12:8 12:20 14:1,16 23:13 24:1,6 24:22 25:19,22 28:7,9,10,16 28:22 29:1,8 29:11,17,20,23 35:22 42:12,16 42:21,23 43:2 43:10,15 47:19 49:23 50:14,19 54:22 55:4</p>
---	--	---	---	--

<p>58:2 59:2 62:15 school 57:24 Seattle 23:10 second 22:24 24:25 59:4 61:16 second-guess 47:7,12 48:11 second-guessed 48:6 secret 52:19 see 10:20 11:2 14:9 21:12 24:1,18 29:2 37:20 56:2,15 60:9,16 seeking 33:21 selling 41:13 sending 49:2 senior 8:6 17:11 20:3 sentence 10:17 46:14 sentences 13:22 separate 31:12 separates 24:20 serves 30:14 50:25 set 22:23 61:25 setting 61:12 settle 55:11 shadow 42:8 shed 17:19 19:5 19:7 short 3:22 41:13 show 18:1,13 19:21 20:3 28:2 40:11 42:18 53:6,9 55:10 57:23 59:17 showing 7:1,13 12:6 13:24 15:5 17:6,15 17:22,23 18:13 19:1 21:10,22</p>	<p>27:18 62:11 shown 4:6 16:20 55:18 57:20 shows 43:17 53:7 sides 15:23 45:23 similar 19:1 23:19,19 26:3 similarly 10:12 10:13,14,15,21 11:23 13:6,7 13:10,13,14 14:4,5,8 simply 3:24 16:15 32:3 39:21 55:14 59:11 single 50:23 sir 40:25 situated 10:12 10:13,14,15,22 11:23 13:6,7 13:10,13,14 14:4,5,8 situation 5:25 6:17 19:11 21:2 24:7 32:16 33:2 34:12 situations 23:2 24:6,20 45:2 six 50:16 slight 46:25 small 8:4 Solicitor 1:18 62:20,21 somebody 19:14 22:1 43:3,3 somewhat 19:8 40:14 soon 47:10 sorry 8:14 41:22 49:10 52:19 54:5 sort 46:9 Souter 5:18,22</p>	<p>6:5,9,13,23 7:21 8:2,8,18 8:23 9:4 11:11 40:13,16 41:1 41:23 42:1 43:16,23 55:16 55:21 56:8 sparingly 46:16 46:17 specific 60:12 specifically 5:12 speculate 37:11 spreadsheet 18:12,13,15 19:1 41:2 Sprint 7:15 25:16 33:20,24 34:7 44:15,24 49:6 53:3 54:12 Sprint's 4:20 33:22 Sprint/United 1:3 3:4 stage 9:3 15:10 30:13 31:3 standard 36:1 39:23,23 49:21 50:7 standards 61:13 started 6:21 statement 39:16 statements 45:13,18,21 States 1:1,13,20 2:6 22:9 statistical 18:1 statistics 18:5 status 30:12 step 20:9,11,12 20:12 STEVENS 19:8 20:2 21:18 Stock 19:4 38:19 story 42:6 strange 58:2 Strategy 18:7,9</p>	<p>strikes 44:2 strong 6:17 28:14 stronger 14:9 struck 40:20 subject 7:24 21:8 submissibility 50:9 submitted 63:5 63:7 subsidiary 40:1 43:25 44:5,7 substantially 44:8 47:20 substituted 13:18 sufficient 25:8 26:13 sufficiently 60:18 suggest 38:15,17 suggested 47:19 suggests 21:5 sum 41:10 sunk 54:24 super 45:24 superintending 37:12 superior 16:14 19:10 supervise 51:21 supervised 18:24 33:19 supervises 20:24 supervisor 7:5 7:12 10:16 11:23 12:1 13:11,16,19 15:19 16:2,4,8 16:13,24 18:16 20:16,18,23 21:3 22:16 23:8,11 24:4 24:10 26:23 29:7 33:25 34:8,15 35:13</p>	<p>38:10,19,25 39:1,2,15,19 41:3,5 43:4,5 55:25 59:10 supervisors 5:23 6:14 7:12,22 8:15,16,19,23 16:13,16,17,20 17:7 19:22 20:4,14 22:14 23:16 25:23,25 26:5,11,12,22 26:25 27:9 31:5 34:13 51:8,21 53:7 55:15 supervisory 16:6 supervisor's 38:21 41:8 support 56:3 supporting 1:20 2:7 suppose 36:21 43:20 supposed 42:9 Supp.2d 60:23 Supreme 1:1,13 sure 20:6 24:4 37:18 58:13 sustained 29:22 29:22 sweeping 4:11 system 31:14 39:8 42:8,9 45:23</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 tainted 17:7 21:11 take 14:6 20:15 21:7 27:4 35:2 35:10 42:3 43:24 46:20 52:4 55:2,18 56:25 62:6,17</p>
---	--	--	---	---

<p>takes 27:23 talk 39:21 44:13 56:21 talked 37:22 talking 8:17 12:8 21:1 26:15 35:5,6 43:2,3 49:13 49:14,14 51:20 taught 6:8 57:24 Teamsters 6:8 Ted 38:19 teed 15:16 tell 7:8 14:10 48:3,9 tendency 6:1,16 6:19 28:3,8,11 36:6 40:11 42:18 46:25 49:18 Tenth 10:19 11:21 12:2 14:19 32:21,25 37:4 48:3,10 49:1,2,4 54:15 56:12 59:6,21 59:24 62:3 terminated 25:12,17 terms 39:21 test 16:8 25:7 36:5 testified 17:18 19:18 testify 26:14,25 40:22 41:2,4,7 testimony 23:9 39:18 43:14,16 52:5,25 53:24 54:1 56:21 Thank 22:6,11 33:9 42:2 58:18,19 63:4 theory 20:13,20 21:8 37:23 thing 37:12 39:25 47:13</p>	<p>52:6 58:12 things 14:6 33:21 34:3 55:12 60:7 62:22 think 4:6,10,13 5:12,20,21 7:4 7:8,19 8:1,3,6 9:2,11,20 12:3 12:16 14:13 15:14 16:2,9 16:25 20:25 21:9,14,14,20 21:21,24 22:3 22:20 23:1,4 23:11,21 24:2 24:5,6,9,11 25:21 26:15 27:19 28:17,20 29:14 32:11,12 36:14 40:19 42:21 43:19 45:11 47:17 48:5 49:1,23 50:1 54:13 56:5,11 57:8 57:11 59:1,24 60:21,24 61:17 61:20 62:2,11 third 8:12 25:1 third-party 44:6 thought 11:25 12:1 13:5,17 15:21 16:15 17:2 18:12 27:10,22 32:22 37:15,16 47:3 47:6,11 54:22 54:23 57:18 thoughts 55:23 thousand 46:22 51:7 thousands 26:6 three 5:22 6:14 8:10,15,16,19 8:23 9:2 25:23 26:6,11,12,13</p>	<p>28:11 40:5,22 42:13,13,14,16 45:6,8,17,20 46:4 55:6,8 62:22 threshold 22:22 22:23 24:13,14 24:16 26:9 32:12 thrown 60:24 tied 34:18 37:23 ties 42:3 time 14:5 22:5 24:4 25:2 37:21 43:13 47:2 48:12,19 50:23 55:23 58:15 60:6,19 61:4,6 timeframe 23:18 times 7:3 told 5:15 19:14 26:25 38:5,7 52:19 53:1 54:3 tolerates 21:6 top 43:3 total 41:10 transcript 37:22 treated 29:21 treatment 33:23 tremendous 30:15 Trent 52:6 trial 14:24 15:6 15:12,12,17 29:16,18,25 30:2,4 31:12 32:16 33:20 36:24 43:25 44:5,17 46:9 46:20,23,24 47:4,8,8,12,25 48:6,11,22 50:15 51:24 52:15,23 53:20</p>	<p>54:7,8,9,10,14 54:19 55:6,7 55:19 57:2,6,9 58:5,7 60:8 61:13,13 trials 15:5 46:13 46:21 50:15,16 tried 44:19 true 13:8 31:10 60:10 try 19:17 44:19 55:3 trying 4:24 12:9 19:14 39:25 47:7,11 turn 33:16 turning 50:15 two 6:14 8:10 9:1,7 11:17 16:5 19:3 23:10 26:6 44:17 59:1 61:14 twofold 52:16 two-step 39:24 type 31:1 typically 15:10</p>	<p>2:6 22:9 untested 18:20 upheld 12:22 upstairs 19:14 use 52:22 ut 60:3</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:6 3:5 24:15 value 14:15 62:3 vast 8:16 vice 53:1 vicinity 25:1,15 25:17,20,24 26:1 view 4:12 virtually 10:22 Voorhees 19:4</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>W 1:16 2:3,11 3:7 58:22 wait 38:20 want 6:23,24 14:1,12,14 27:12 41:22 42:25 49:12 54:11 58:13 62:15 wanted 5:15 36:20 58:4 wants 23:9 Washington 1:9 1:19 wasn't 5:19 10:17,20 20:19 45:6 59:14 waste 47:1 48:19 60:19,19 61:3 Waters 24:15 way 8:12 9:10 10:8,9 16:3 21:5 28:16,25 33:6,6 38:25 39:4 46:23 51:5 ways 15:14,15 38:2 42:3</p>
---	--	---	---	--

<p>51:15 weaknesses 41:18 weeks 54:10,10 55:6,8 weight 37:8 41:17,18,20,20 44:10 Welch 39:11 went 37:16,18 40:16,17 58:3 weren't 10:21 33:18 we'll 3:3 33:16 46:21 56:19 we're 8:16 9:5 12:8,9 35:5,6 43:23 53:13 54:7,16 55:14 57:16,17 we've 8:8,9,10 24:6 31:23 54:23 56:20,23 whatsoever 17:15,19 white 33:16 win 6:18 witness 5:1 26:21 witnesses 4:15 5:2,5 9:6,19 16:4,16 17:17 19:18 24:25 25:11,17 26:14 26:24 29:6 women 52:8 word 13:19 words 10:23 13:18 15:25 20:16 work 7:17 35:14 40:24 57:23,24 worked 16:16 25:15 working 16:4 24:25 works 51:15</p>	<p>worried 48:2 50:14 worrying 46:12 worst 12:11,15 worth 54:23,25 55:11 56:12 worthy 60:23 wouldn't 24:2 42:5 write 27:12 57:22 60:22 wrong 37:14,14 56:14 wrote 50:22</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,8</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yeah 4:4 11:12 29:19 years 23:10 46:22 young 52:8 younger 27:3 40:24 53:2 youngers 42:7</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zip 7:20</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>06-1221 1:6 3:4</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 8:9 10 16:3 10:05 1:14 3:2 11:07 63:6 15 34:7 53:11,17 60:6 61:2,4 15,000 6:4,12 163 13:9 163a 10:10 17,000 51:7 19 7:22,25 8:9</p> <hr/> <p style="text-align: center;">2</p> <hr/>	<p>2a 33:20 20 7:21 20th 7:24 2002 39:6 2004 34:7 60:6 61:2,5 2007 1:10 44:15 54:8 22 2:7 24 29:7 24a 11:14 29 44:15 54:8</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 1:10 2:4 3a 33:16 30 53:17 33 2:9</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>401 5:9,13,14,19 6:2,20 10:21 10:25 12:14 14:11 22:18,22 23:3,6,12 28:17 29:3,4 32:22 36:4,7 36:22 40:5 46:20 49:15 56:2,4 402 36:22 46:21 49:15 403 5:9,12,13,15 10:3 14:4,11 14:13,15,16,19 14:21,25 17:1 21:8 22:19,25 23:25 28:14,18 29:12 30:12,18 32:13,13,19 36:25 44:10 47:17,19 49:15 52:6,10 55:13 55:19 56:3,9 57:9,14 58:6 58:25 59:14 61:15,20,22 403's 46:15</p>	<p>404 21:12,13,18 21:25 36:11,13 404(b) 36:12 404(d) 30:21 407 36:9 410 36:10 411 36:9 436 30:4 48 53:2</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 6:12 51:22 50 18:6 58 2:12</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7,000-person 10:6 7-0-0-0-0 10:7 70,000 10:7 23:14,15 41:10 43:5 51:6 70,000-emplo... 9:6 70,000-person 19:22</p> <hr/> <p style="text-align: center;">9</p> <hr/> <p>995 51:10,21</p>
--	---	---	---