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IN THE SUPREME COURT OF THE UNITED STATES

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OLIVEA MARX, :

Petitioner : No. 11-1175

v. :

GENERAL REVENUE CORPORATION :

- - - - - x

Washington, D.C.

Wednesday, November 7, 2012

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

APPEARANCES:

ALLISON M. ZIEVE, ESQ., Washington, D.C.; on behalf of Petitioner.

ERIC J. FEIGIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

LISA S. BLATT, ESQ., Washington, D.C.; on behalf of Respondent.

| | C O N T E N T S | |
|----|--------------------------------------|------|
| 1 | | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | ALLISON M. ZIEVE, ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | ORAL ARGUMENT OF | |
| 6 | ERIC J. FEIGIN, ESQ. | |
| 7 | For United States, as amicus curiae, | 13 |
| 8 | supporting Petitioner | |
| 9 | ORAL ARGUMENT OF | |
| 10 | LISA S. BLATT, ESQ. | |
| 11 | On behalf of the Respondent | 24 |
| 12 | REBUTTAL ARGUMENT OF | |
| 13 | ALLISON M. ZIEVE, ESQ. | |
| 14 | On behalf of the Petitioner | 48 |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 11-1175, Marx v. General Revenue Corporation.

Ms. Zieve.

ORAL ARGUMENT OF ALLISON M. ZIEVE

ON BEHALF OF THE PETITIONER

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

Rule 54(d) provides a standard for an award of costs to a prevailing party that, by the Rule's express terms, does not apply where Federal statute provides otherwise. The Fair Debt Collection Practices Act provides otherwise because it states a different rule for awarding costs than does Rule 54(d). Whereas Rule 54(d) gives district courts wide discretion toward cost-prevailing defendants, the FDCPA limits courts' discretion to cases brought in bad faith and for the purpose of harassment.

The text of the Act provides that, on a finding that action was brought in bad faith and for the purpose of harassment, the court may award attorneys' fees of reasonable relation to the work expended and costs. That's a matter of grammar. The unmistakable

1 meaning of that sentence is that an award of costs, like
2 an award of attorney's fees, is subject to the condition
3 that the plaintiff's suit be brought --

4 JUSTICE SCALIA: Under -- under that
5 provision, that's certainly true. You can't -- you
6 can't get costs under that provision unless there has
7 been that prerequisite. But it's -- you know, it's
8 ancient law that repeals by implication are not favored.
9 And what you're arguing here is that that provision
10 effectively repeals another provision which allows costs
11 in all cases, whether or not there has been misbehavior.

12 Now, why -- why is this an exception to our
13 general rule? I just don't -- this doesn't seem to me
14 like a clear repealer.

15 MS. ZIEVE: Well, there's no need to
16 consider repeal by implication in this case, Your Honor,
17 because Rule 54(d) expressly states that its presumption
18 does not apply for a Federal --

19 JUSTICE GINSBURG: Yes, indeed, but -- but
20 you are assuming a conflict. You're saying either
21 the -- the statute applies or Rule 54(d) applies, but
22 the statute can be read to say, we're describing one
23 category of case, we are describing the worst case, the
24 bad-faith harassing plaintiff, and the statute deals
25 with that category of person and no other.

1 So if you're not a bad-faith harassing
2 plaintiff, but you, nonetheless, lost, then you're under
3 54(d).

4 MS. ZIEVE: Well, Your Honor, if you look at
5 Section k(a)(3), as a whole, the two sentences together
6 confirm that this is not a provision about bad-faith
7 plaintiffs, that rather, the provision is addressing
8 both fees and costs to -- to plaintiffs and defendants.
9 And if -- if the Congress merely wanted to state in that
10 second sentence that fees were available and didn't mean
11 to say anything about costs to defendants, there would
12 have been no reason for Congress to have put costs in
13 that sentence.

14 If --

15 JUSTICE GINSBURG: Well, there are a number
16 of reasons. One is symmetry because they have costs in
17 the part about defendants. And the concern that, well,
18 if we leave out costs for the bad-faith harassing
19 plaintiff, then it -- it may be assumed that they get
20 only attorney's fees and not costs.

21 So the statute's provisions like this may be
22 redundant, but one can see that a drafter might very
23 well want to say, well, we said we're dealing with the
24 defendant costs, we want to put the same thing in with a
25 plaintiff.

1 MS. ZIEVE: Well, you've made a few points,
2 and I'll try to address each of them.

3 First, there -- there would be no reason to
4 include costs in the second sentence, just because it
5 was in the first sentence, because the first and second
6 sentences are not parallel. The first sentence makes an
7 award of costs mandatory, and, therefore, it does do
8 some work beyond 54(d). It clearly has -- has a
9 function in that sentence. Whereas the second sentence,
10 the award is subject to the "may," that is, that it's
11 not mandatory that the court award them.

12 If -- if Congress was -- Congress would have
13 no need to be concerned that if it left costs out of the
14 second sentence there would be some negative implication
15 because there are several statutes that mention fees
16 without costs. And GRC has cited no instance in which a
17 court has read a negative implication into that.

18 We, in our reply brief, cited a couple cases
19 that do the opposite. If -- so, therefore, if
20 Congress had omitted costs, left it out of the sentence,
21 then Rule 54(d) would have continued to apply in cases
22 where the defendants.

23 One more example --

24 JUSTICE SOTOMAYOR: Didn't -- don't district
25 courts always have the authority to award costs for

1 sanctionable behavior like bad faith? So this provision
2 is duplicate, no matter how we read it. It's either
3 duplicative of a power the court already had to award
4 costs for bad faith, or it's duplicate of Rule 54.

5 MS. ZIEVE: Well, if you read this sentence
6 as a misconduct provision, then it does repeat the
7 Court's inherent authority; although, as this Court has
8 mentioned in a couple cases, sometimes, statutes want to
9 reiterate authority that exists elsewhere.

10 If you read it our way, however, the
11 statute -- this provision does actually do some work
12 that it wouldn't otherwise do; that is, it limits cost
13 awards to prevailing defendants of these circumstances.

14 JUSTICE SOTOMAYOR: It limits Rule 54.

15 MS. ZIEVE: Right.

16 JUSTICE SOTOMAYOR: I think your -- your
17 answer is always that Rule 54 obligates courts to give
18 costs. And this rule, as you read it, is a permissive
19 grant only. Even in bad faith litigations, the court
20 could choose not to give costs.

21 MS. ZIEVE: Well, Rule 54 doesn't obligate a
22 court to give costs. It establishes a presumption --

23 JUSTICE SOTOMAYOR: True.

24 MS. ZIEVE: -- and this says the presumption
25 is limited to cases brought in bad faith and for

1 purposes of harassment. There are other statutes that
2 do -- similarly, do what we've -- what's done here.
3 Congress could have omitted -- if GRC is correct,
4 Congress could have just omitted the words, "and costs,"
5 leaving the costs to be determined under Rule 54.

6 An example of that is 15 U.S.C. 15c(d)(2),
7 which is actions by state attorneys general and provides
8 that the court may award attorney's fees to a prevailing
9 defendant upon a finding that the action was in bad
10 faith.

11 JUSTICE GINSBURG: Ms. Zieve, if we look at
12 other statutes, it seems to me we would want to look at
13 statutes involving lenders, so we would look at the --
14 the Truth in Lending Act and the -- what is it, the
15 Credit Organizations Act --

16 MS. ZIEVE: Fair Credit?

17 JUSTICE GINSBURG: -- and those do not
18 provide for attorney's fees. They are covered only
19 under 54(d), which is costs, not fees. Why should we
20 read this Act in a way that -- so -- so that a defendant
21 under this Act who can get attorney's fees is worse off
22 with respect to costs than defendants under the other
23 lending legislation, the ones that have only 54(d)?

24 Congress gave defendants something more
25 here. Why -- why would -- why should it be that 54(d)

1 would apply to the lender under the Truth in Lending
2 Act, but not to the lender under -- under this Act?

3 MS. ZIEVE: Well, first, Your Honor, the --
4 Congress' purpose was not simply to -- this isn't just a
5 defendant-friendly provision. Congress had dual
6 purposes in enacting k(a)(3). On the one hand, Congress
7 wanted to deter nuisance suits. But on the other hand,
8 Congress wanted to ensure that meritorious suits by
9 impecunious debtors were not deterred by the prospect
10 that an award of costs would exceed the value of the
11 damage that could be recovered in a successful suit.
12 And the two provisions of k(a)(3) show the line Congress
13 drew -- drew and how it balanced those two objectives.

14 As to the other statutes, the Truth in
15 Lending Act, the Credit Repair Organizations Act, they
16 were enacted at different times by different Congresses.
17 They have different sorts of provisions, some better for
18 plaintiffs, some better for defendants.

19 And -- but this category -- in -- in
20 enacting this statute, Congress emphasized that the
21 widespread and national serious problem of collection
22 abuse that Congress said inflicts substantial suffering
23 and anguish, and noted specifically in the Senate report
24 this Court has cited to in the Jerman case, that
25 consumers, the impecunious -- the people who can't even

1 afford to pay their debts, are the primary enforcers of
2 the statute.

3 The FTC got about 120,000 complaints from
4 consumers about debt collectors last year, more than any
5 other industry. So Congress may reasonably have decided
6 that the primary enforcers of this statute weren't going
7 to be doing that work if they were -- if they were at
8 risk of significant cost awards in cases that have
9 frequently small value.

10 There are other ways, if Congress wanted to
11 preserve Rule 54(d), that it could have done it, that
12 did not happen here. For instance, in 49 U.S.C.
13 14707(c), Congress has a similar provision about
14 attorney's fees to prevailing -- attorney's fees to
15 prevailing parties, and then states expressly that fee
16 is in addition to costs allowable under the Federal
17 Rules of Civil Procedure. Congress didn't do that here.

18 Or Congress could have made it clear that it
19 was not displacing Rule 54(d) as to cost awards by
20 stating that the Court could award attorney's fees as
21 part of the cost, therefore, distinguishing fees and
22 costs. Congress has done that sort of thing frequently,
23 including in a statute that provides for an award in
24 cases of bad faith.

25 I'm looking at 28 U.S.C. 1875, that provides

1 the courts may award fees as part of costs if an action
2 was frivolous or in bad faith.

3 So -- but Congress did none of those things
4 here. Instead, what it did was draft a sentence that
5 links the term "cost" to the term "attorney's fees" with
6 the conjunction "and" and subjects both of those objects
7 of the sentence to the same condition, the condition
8 that the plaintiff suit was brought in bad faith and for
9 purpose of harassment.

10 GRC suggests that the reading -- that the
11 statute the Justice mentioned -- benefits plaintiffs.
12 But what Congress wanted to do here -- I mean, would
13 benefit plaintiff -- what Congress wanted to do was to
14 help defendants. There's actually no legislative
15 history about why this provision was put in there.

16 What we have instead, for what it's worth,
17 is a markup later where this provision is discussed in
18 response to concerns that frivolous suits -- suits
19 should be deterred, and this provision, which is now
20 already in the statute, is discussed as one means of
21 deterring frivolous suits.

22 But the bad faith and harassment standard is
23 the dividing line that Congress drew between nuisance
24 suits and other suits. This case is clearly on the
25 non-nuisance side of the line, and cases on that side of

1 the line are not subject to an award of costs.

2 If the Court has no further questions?

3 JUSTICE SOTOMAYOR: I would assume that, if
4 Rule 54, instead of saying what it currently does, said
5 something like, "except as expressly repealed in another
6 statute," would what happened here meet that express
7 requirement of repeal? It was Justice Scalia's question
8 to you, but reformulated in a different way.

9 MS. ZIEVE: If Rule 54(d) incorporated a
10 requirement that a statute expressly referred to Rule
11 54(d)?

12 JUSTICE SOTOMAYOR: Expressly repealed
13 54(d).

14 MS. ZIEVE: That would be a very different
15 case. But of course, Rule 54(d) doesn't do that.
16 Instead, when Rule 54(d) was adopted, the Rules
17 Committee actually -- the advisory committee notes list
18 25 statutes that it says will not be affected by the
19 rule.

20 Those are statutes that allow fees, forbid
21 fees, condition fees, allow fees in a broader scope of
22 cases than Rule 54(d) does. And, of course, none of
23 those would have mentioned Rule 54(d) because they
24 preceded adoption of the rule.

25 I would reserve the balance of my time.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Feigin.

3 ORAL ARGUMENT OF ERIC J. FEIGIN,
4 FOR UNITED STATES, AS AMICUS CURIAE,
5 SUPPORTING THE PETITIONER

6 MR. FEIGIN: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 Rule 54(d) expressly codifies in absolute
9 form the well-established principle that a specific
10 provision displaces a more general one. And I think
11 that principle is very helpful here in answering a
12 couple of the questions that have come up.

13 First of all, it makes clear that no express
14 textual conflict is necessary. This Court's never
15 required one, and the specific governs the general
16 cases.

17 That's made even clearer, if you look at the
18 pre-2007 version of the rule, which is meant to be
19 substantively identical to the current version of the
20 rule -- this is at page 12 of the government's brief --
21 and the original version of the rule said, "Except when
22 express provision therefore is made either in a statute
23 of the United States or in these rules, costs shall be
24 allowed as of course to the prevailing party, unless the
25 Court otherwise directs."

1 I think that makes quite clear that
2 when, as the FDCPA does, there is a specific statutory
3 provision that addresses an award of costs incident to
4 the judgment, that specific statutory provision prevails
5 over the default rule that Rule 54(d) contains.

6 Another point about the specific governs
7 the general principle is it would apply here, even if
8 the Court believed that Section 1692k(a)(3) covered some
9 type of circumstances that Rule 54(d) and other things
10 don't.

11 And that's made quite clear by this Court's
12 recent eight-Justice unanimous opinion in RadLAX Gateway
13 Hotel v. Amalgamated Bank, in which the Court said --
14 and I quote -- "We know of no authority for the
15 proposition that the canon," -- they're talking about
16 the specific governs, the general canon -- "is
17 confined to situations in which the entirety of the
18 specific provision is a" -- quote -- "'subset' of the
19 general one."

20 JUSTICE BREYER: I mean, my problem with
21 this is I don't -- I mean, I read the whole statute, and
22 they have a good claim until I think you read the whole
23 statute. And I don't know what to say, other than the
24 impression -- the impression is that subsection 3, which
25 is what's at issue, the whole thing is meant to say that

1 the winner, when it's the plaintiff, is going to get
2 attorney's fees.

3 You know, it mentions costs, but that's the
4 background rule. And then when you get to the second
5 sentence of that, it means, and if you're in bad faith,
6 the plaintiff, then the defendant gets attorney's fees.
7 It doesn't really mention costs. That's the background
8 rule.

9 So -- and I look at the legislative history,
10 there's some staffer, at least, who's tried to find that
11 interesting; the -- they're talking about what the point
12 of this is, and say the whole point of this section is
13 to help prevent frivolous suits.

14 Well, so there we are. That's -- that's
15 where I am at this moment.

16 MR. FEIGIN: Well, Justice Breyer, I think
17 it does expressly mention costs, both in the first and
18 the second sentence.

19 JUSTICE BREYER: I didn't say, on some
20 technical linguistic basis, it may do that, that's
21 correct. But perhaps I'm unique in this, but I don't
22 just look at the language, I look at the context, I look
23 at the purpose, and -- and I don't see anything in the
24 language that gets rid of the background rule, and I
25 don't see anything in the purpose that gets rid of the

1 background rule, and I don't see anything in the history
2 that gets rid of the background rule.

3 MR. FEIGIN: Well, Your Honor --

4 JUSTICE BREYER: I don't see anything in the
5 consequences that suggests that you get rid of the
6 background rule. I don't see anything in our traditions
7 that says you should get rid of the background rule.

8 So what -- what do you do with some
9 obstreperous judge who doesn't just look at the
10 language? I mean, I know who uses it, but that's not
11 the only thing.

12 MR. FEIGIN: Well, Your Honor, if Congress
13 were satisfied with the background rule, then I think
14 it's strange that they added the words "and costs" to a
15 sentence that is expressly --

16 JUSTICE BREYER: Oh, why? A person who is a
17 drafter says -- you know, you get your costs and you
18 also get the attorney's fees. They don't -- they don't
19 know every statute, the people who draft this. They --
20 they -- they just say, Senator, what are we trying to
21 do? He says, we're trying to give them attorney's fees.
22 They say, okay, we'll give them the costs and the
23 attorney's fees.

24 MR. FEIGIN: Your Honor, I think that gets
25 back to Justice Ginsburg's question of why weren't they

1 just saying "and costs" here, just to make clear that
2 not only fees would be available, but also costs. And I
3 think that's an implausible hypothesis of what Congress
4 was trying do for the following reason: A
5 congressperson who is concerned that a reference to fees
6 alone in the second sentence of Section 1692k(a)(3)
7 would preclude application of the default rule in -- in
8 Rule 54(d), couldn't possibly have thought that the way
9 to make clear that Rule 54(d) applies in full was to add
10 the words "and costs" in a sentence that's expressly --

11 JUSTICE BREYER: And that's if you had been
12 drafting it, perhaps. But the people who actually draft
13 these things are a whole section over in Congress, they
14 don't know every statute, and you give them a general
15 instruction.

16 MR. FEIGIN: Well, Your Honor --

17 JUSTICE BREYER: And the -- the general
18 instruction would be add attorney's fees on the
19 plaintiffs and add attorney -- Alright. You
20 understand the point.

21 JUSTICE SCALIA: We -- we have to assume
22 ignorance of the drafter.

23 JUSTICE BREYER: Yes, ignorance of other
24 laws.

25 JUSTICE SCALIA: As a general principle.

1 JUSTICE BREYER: That's right, general
2 ignorance.

3 (Laughter.)

4 MR. FEIGIN: Let me -- Your Honor, let me --
5 let me address that directly. If we're presume that
6 Congress is aware of Rule 54(d), then I think it's quite
7 peculiar and, in fact, quite counterproductive to have
8 added the words "and costs" to a sentence that's
9 expressly conditioned on a finding of bad faith and
10 purpose of harassment.

11 But if I accept your hypothesis that
12 Congress was not aware of Rule 54(d). Again, it's quite
13 strange that, when thinking about the cost-shifting rule
14 that should apply in FDCPA cases, what Congress decided
15 to do was put the words "and costs" into a sentence
16 that's expressly --

17 JUSTICE BREYER: Well, then they shouldn't
18 have put those words in. But we're talking about the next
19 sentence. And the next sentence doesn't put the words
20 in. So you're -- you're -- you're assuming from that
21 fact that, in a pro defendant -- this is a pro-defendant
22 provision they put in, that was their whole point
23 apparently reading it -- that what they decided to do is
24 take away from defendant's costs, which they normally
25 get, without saying anything about it.

1 I mean, that's -- you understand the
2 problem.

3 MR. FEIGIN: Your Honor, the words "and
4 costs" appear in both sentences. I agree with Ms.
5 Zieve, that the legislative history does not indicate
6 that this is a uniquely pro-defendant division --
7 provision, and that's what the Court found in Jerman.

8 JUSTICE BREYER: It doesn't -- where does it
9 say that? Where was the --

10 MR. FEIGIN: Your Honor, first of all --

11 JUSTICE BREYER: -- I would like to read it.

12 MR. FEIGIN: -- you can look at -- there is
13 no legislative history directly addressing the sentence
14 we're trying to interpret today. But I think, if you
15 look at the Court's opinion in Jerman and the hearing
16 cited at page 31 of the red brief, it reflects that
17 Congress was trying to balance deterrence of nuisance
18 suits and incentivizing good-faith consumer enforcement.

19 If I could, I would like to address the
20 policy reasons why Congress would have found it
21 particularly useful not to have plaintiffs pay costs in
22 these circumstances.

23 CHIEF JUSTICE ROBERTS: Well, that's a
24 pretty odd way to balance. I mean, if you're -- if
25 you're trying to balance, then you say, well, here's an

1 idea, let's give them attorney's fees, but let's not
2 give them costs.

3 MR. FEIGIN: Well, the reason not to give --

4 CHIEF JUSTICE ROBERTS: That's a very
5 curious way to dilute what was otherwise a
6 defendant-friendly provision.

7 MR. FEIGIN: Well, Your Honor, I don't think
8 the provision is uniquely defendant-friendly. I think
9 it draws a dividing line between nuisance suits and
10 non-nuisance suits, premised on a finding of the suit
11 being brought in bad faith and the purpose of
12 harassment.

13 And the reason why Congress thought it was
14 necessary to shield good-faith plaintiffs from costs
15 here in order to incentivize enforcement, is, first of
16 all, these are particularly low-value suits, especially
17 when compared to other statutes in the CCPA. They're
18 the kind of suits that can be incentivized by a mere
19 \$1,000 in statutory damages. And as this case
20 demonstrates, the cost of a suit, if taxed against the
21 plaintiff, can do much more than 1,000 --

22 JUSTICE BREYER: Did you look up -- did you
23 try to do any sampling on that? Because I did,
24 actually, and -- and I discovered something that I think
25 is not as strong for you, but it isn't too much against

1 you.

2 We just did a random sample of 28 successful
3 cases, and I think the average recovery -- except for
4 one outlier, where it was very high, -it was around
5 \$4,000 -- 3 to 4, and the average costs on the ones that
6 the defendants won, I guess, was around a thousand. So
7 you have a point --

8 MR. FEIGIN: Your Honor --

9 JUSTICE BREYER: But it isn't quite as good
10 a point, as you seem to suggest. That is, it's a not so
11 low value and the costs are not so high --

12 MR. FEIGIN: Well, Your Honor, plaintiffs --

13 JUSTICE BREYER: -- in order to make it.

14 MR. FEIGIN: Plaintiffs here are uniquely likely to
15 be deterred because they're the kind of people who have
16 been pursued by debt collectors. They're going to be in
17 debt themselves. They're not going to be able to pay
18 costs. That's why attorneys -- and that's why the
19 statute provides for attorneys generally to take these
20 cases on contingency, on the hope that they'll recover
21 fees when the plaintiff is successful.

22 Now, if plaintiff's looking to bring this
23 kind of case, the only out-of-pocket expense the
24 plaintiff is facing is the potential that if it loses
25 the case for some reason that it can't be aware of

1 initially, such as a bona fide good-faith defense or the
2 law being interpreted against them in an area where the
3 law is unclear, they're going to have to pay out of
4 pocket against the plaintiff himself, not the
5 plaintiff's attorney, who are the people the defendant
6 claims is -- are responsible for the abuses they allege
7 in FDCPA cases. This is going to come out via judgment
8 directly against the plaintiff.

9 It's difficult to believe that Congress
10 enacted a provision specifically because it believed
11 the -- the debt collection industry was forcing, among
12 other things, personal bankruptcies and wanted the kind
13 of plaintiffs who were going to be in a position to
14 enforce the FDCPA to have to face the risk of incurring
15 thousands of dollars in costs if they lose a suit that
16 they bring in good faith.

17 And the reason --

18 JUSTICE SOTOMAYOR: Am I to understand your
19 simple position to be that what Rule 54(d) does -- says
20 is if another provision deals with costs, you're
21 relegated to that other provision?

22 MR. FEIGIN: Well, Your Honor --

23 JUSTICE SOTOMAYOR: Unless, and this --
24 you're inverting the express -- unless that provision
25 refers you back to 54?

1 MR. FEIGIN: Well, no, Your Honor, I'd
2 qualify that a little bit. I think what -- we just
3 think it codifies an absolute form of the
4 specific governs the general principles.

5 So the first question you asked is whether
6 they're covering the same territory, and they are here.
7 Both 1692k(a)(3) and 54(d) cover awards of costs
8 incident to the judgment.

9 The second question you asked is the scope
10 of the displacement. So it's possible that you might
11 have a provision, as the first sentence of 1692k(a)(3)
12 does, that only governs in certain circumstances and
13 mandates an award of costs in those circumstances.

14 We don't think a sentence like that,
15 standing alone, would displace a court's discretionary
16 authority under Rule 54(d) to award costs in other
17 circumstances. But we don't think there's any need --
18 may I finish the sentence, Your Honor?

19 CHIEF JUSTICE ROBERTS: Finish that
20 sentence.

21 MR. FEIGIN: We don't think there's any need
22 to adopt some new special rule for Rule 54(d) that's
23 different from how this Court normally applies the specific
24 governs the general principle.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Ms. Blatt.

3 ORAL ARGUMENT OF LISA S. BLATT
4 ON BEHALF OF THE RESPONDENT

5 MS. BLATT: Thank you, Mr. Chief Justice,
6 and may it please the Court:

7 Our position is that the second sentence of
8 section 1692k(a)(3) is a pro-defendant provision that
9 does not strip courts of their discretion under Rule 54
10 to award costs to prevailing defendants. We think that
11 first because of the text and structure and, second,
12 because of the statutory history and purpose.

13 As to the text, the second sentence states
14 that a court may award an affirmative grant of power,
15 rather than the court may award attorney's fees and
16 costs if a plaintiff files a lawsuit in bad faith. The
17 text doesn't say that a court may not award costs in the
18 absence of bad faith. The text doesn't say or even
19 address a court's discretion to award costs to
20 prevailing defendants as an ordinary incident of defeat.

21 JUSTICE KAGAN: Ms. Blatt, it -- it seems to
22 me that the -- the most natural way to read this
23 statute, and it's not -- it's not your way, it's, look,
24 we have this Federal Rule of Civil Procedure that --
25 that contemplates that Congress sometimes doesn't

1 write -- it writes statutes authorizing lawsuits without
2 providing a cost provision.

3 And because we know that about Congress, we
4 provide a default rule. And the default rule is what's
5 laid out in subsection (d) as to costs and then also
6 later as to attorney's fees.

7 But, we know that Congress sometimes does
8 address costs and fees, and where Congress in a
9 particular statute has addressed costs and fees, we look
10 to whatever Congress has said -- you know, unless
11 Congress has otherwise provided. And here, this is --
12 1692k is a provision that addresses costs and fees. It
13 addresses them comprehensively and specifically.

14 MS. BLATT: Yes. I disagree with everything
15 you said for the following reasons --

16 JUSTICE KAGAN: I expected you might.

17 (Laughter.)

18 MS. BLATT: This is not a field preemption
19 case. Rule --

20 JUSTICE KAGAN: It's not a question of field
21 preemption.

22 MS. BLATT: Yes, it is. You're saying that
23 if it addresses costs, that it trumps it. And it is
24 a -- you would never think -- this -- Rule 54 doesn't
25 say, don't award costs if a statute can be plausibly

1 read to address it. It says, unless it provides
2 otherwise, which means Congress actually intended to
3 displace.

4 And unless you actually think that this
5 provision intends to take away a cost authority --

6 JUSTICE KAGAN: Maybe I'm --

7 MS. BLATT: -- you don't get there.

8 JUSTICE KAGAN: -- not in the business of
9 trying to figure out what Congress's intent is. All I'm
10 trying to figure out is whether this Federal statute
11 provides otherwise, and this Federal statute does
12 provide otherwise.

13 MS. BLATT: Okay. Here's why it doesn't:
14 It doesn't displace it. It doesn't in terms of the
15 plain text. It just doesn't. It doesn't say any --
16 there's no disabling aspect about it. It's an
17 affirmative grant to protect a defendant. And when you
18 say to a court it has sanctioning power to award
19 attorney's fees and costs, that doesn't say anything
20 about what happens in the ordinary case, where the
21 defendant has prevailed at trial and been found to be
22 completely innocent.

23 There --

24 JUSTICE SCALIA: In -- in that respect, it
25 is different from RadLAX, in which the two provisions --

1 where we held the specific covers the general -- but we
2 held that because the two provisions contradicted each
3 other.

4 MS. BLATT: Not only do they not contradict,
5 this is not a specific -- when you said -- the other
6 thing I disagreed with, when you said this
7 comprehensively addresses costs, no, this
8 comprehensively is about attorney's fees.

9 JUSTICE KAGAN: It's both, you know?

10 MS. BLATT: It is --

11 JUSTICE KAGAN: And if I might say, I mean,
12 you object to this statute; it's perfectly reasonable to
13 say Congress should have written a separate provision
14 about costs and attorney's fees, but for whatever bad,
15 good, or indifferent reason, Congress didn't, and so
16 this statute basically says, here's what prevailing
17 plaintiffs get as to both costs and fees, here is what
18 prevailing defendants get --

19 MS. BLATT: That's not correct. It doesn't
20 mention prevailing --

21 JUSTICE KAGAN: -- under what circumstances,
22 as to both costs and fees, and those are the rules.

23 MS. BLATT: Yes. Unlike -- unlike the whole
24 statute that talks about prevailing plaintiffs, this
25 doesn't. What is fascinating about this case is, in all

1 50 titles of the U.S. Code, there are specific
2 provisions that say, plaintiffs shall not be liable for
3 costs, or a plaintiff shall not be liable for costs
4 unless a certain condition occurs.

5 There's only one statute -- we looked at all
6 50 titles -- there is one statute that says, a court may
7 award costs if a certain condition occurs. That's
8 the --

9 CHIEF JUSTICE ROBERTS: By all 50 titles,
10 you don't mean each title, do you?

11 MS. BLATT: We've -- we've looked for all,
12 we've looked at all the cost provisions.

13 CHIEF JUSTICE ROBERTS: You mean, like in
14 Title IX --

15 MS. BLATT: Yes.

16 CHIEF JUSTICE ROBERTS: And Title XI?

17 MS. BLATT: Yes. That's what's so funny
18 about this. Nothing in this -- this case -- I don't
19 mean to trivialize it, but there's only one other
20 statute, that Electronic Fund Transfers Act, that talks
21 about the court shall award attorney's fees and costs if
22 there is bad faith.

23 And there is one other statute that says,
24 for a prevailing defendant, the court may award costs if
25 the lawsuit is frivolous. And in those three

1 significant ways, I think it shows why we win, and
2 that's a statute they relied on to say it's just like
3 our statute, on page 18 of their brief, page 29 of our
4 brief.

5 First, it only refers to costs. The statute
6 is about costs. Our statute is about attorney's fees
7 being the main event upon a finding of bad faith.

8 Second, it mentions prevailing defendants;
9 ours doesn't.

10 And, third, which I think is missing from
11 the entire 30 minutes that you heard, their argument is
12 plaintiff -- Congress sat down and wanted to incentivize
13 frivolous suits and nonfrivolous -- nonfrivolous suits
14 alike. At least in the Pipeline Safety Act, Congress
15 said, if it's frivolous, the defendant gets its costs.

16 Here --

17 JUSTICE KAGAN: This statute is very -- is
18 very normal if it were just about fees, right? It would
19 be just like the civil rights fees statutes, where it
20 said prevailing plaintiffs get fees, but prevailing
21 defendants only get fees upon some higher standard,
22 here, bad faith. What makes this statute different --
23 and it is different -- is that this statute twice says
24 not only fees, but also costs.

25 MS. BLATT: Right.

1 JUSTICE KAGAN: Now, you might say that's
2 very uncommon, but in both sentences, it says, we want
3 the same rule for costs as we do for fees.

4 MS. BLATT: Well, I mean, a couple things
5 about that, it's both very common -- fee shifting
6 provisions routinely refer to both fees and costs, just
7 like salt and pepper, peanut butter and jelly, they go
8 together as a set.

9 JUSTICE SOTOMAYOR: And with that, is that
10 there are some statutes that don't?

11 MS. BLATT: Yes. Yes.

12 JUSTICE SOTOMAYOR: So it's not always
13 peanut butter and jelly.

14 MS. BLATT: Okay.

15 JUSTICE SOTOMAYOR: It's peanut butter and
16 honey sometimes.

17 (Laughter.)

18 MS. BLATT: Yes. And here --

19 JUSTICE SCALIA: Love and marriage.

20 (Laughter.)

21 MS. BLATT: I don't know about that one.

22 But here -- here, I think Congress -- first
23 of all, it's just wrong that the reference to "and
24 costs" is grammatically inexplicable and devoid of
25 practical function; and that is the fundamental point of

1 the blue brief, that this is just grammatically
2 inexplicable, and that's just not true.

3 What "and costs" does is it -- basically,
4 the word "and" is being used to mean "in addition to."
5 "And" means "in addition to." And so what Congress is
6 saying is, when courts fee shift -- attorney's fee shift
7 upon a finding of bad faith, courts additionally may award
8 costs in addition to and over and above the attorney's
9 fees that were measured in relationship to the work
10 performed.

11 JUSTICE BREYER: Suppose you're right. What
12 about their policy argument here, that you're a --
13 you're a potential plaintiff, you've borrowed a lot of
14 money, you don't have a lot of money, and the deal is
15 this, under your interpretation, if you win, you're
16 going to get 2 or \$3,000; if you lose, it will cost you
17 about a thousand.

18 That's -- that's under your interpretation.

19 MS. BLATT: Right.

20 JUSTICE BREYER: And under theirs, it's if
21 you win, you get 2 or \$3,000, and if you lose, at least
22 you don't lose anything.

23 MS. BLATT: Yes. I think their policy
24 argument is -- I mean, it could not be worse. A
25 homeless person --

1 JUSTICE BREYER: Oh, it could be worse.

2 MS. BLATT: No, it couldn't be worse, and
3 here's why: A homeless person filing a civil rights
4 case has to pay costs, and at least that person has to
5 pay -- has to prove damages. This plaintiff gets \$1,000
6 for free. Second of all, the plaintiff in this case
7 never asks for relief. Well, 54 is discretionary. If
8 this woman was in pain and suffering, why didn't she
9 say, district court, I can't afford this?

10 It is the law in every circuit that the
11 district courts don't have to award costs. It's just
12 discretionary. So Rule 54 has a built-in safety valve;
13 it accommodates all the policy concerns on the other
14 side, and every other informal paupers litigant, every other
15 consumer protection plaintiff, every civil rights plaintiff,
16 every plaintiff in the country faces the risk of a cost
17 award, but doesn't get \$1,000 thrown in for free.

18 JUSTICE GINSBURG: Ms. Blatt, we do have in
19 this case the views of the government regulators, the
20 FTC and the Consumer Finance Protection Bureau, and we
21 have heard the government's position on the relationship
22 between these two provisions. Should we give any weight
23 to the interpretation of the government administrators?

24 MS. BLATT: Obviously not. I don't even
25 know where they would get a basis for deference. I'm

1 sorry --

2 JUSTICE SCALIA: We have a lot of cases that
3 say that -- that the agency's views about what courts
4 should do are not entitled to deference. This is --
5 this is a matter --

6 MS. BLATT: Yeah, but that would be
7 Ledbetter, and I don't want to cite that to Justice
8 Ginsburg.

9 (Laughter.)

10 MS. BLATT: So I think the better answer is
11 what's so mystifying about their policy argument is that
12 they enforce -- they enforce 20 consumer protection
13 statutes, and all of them, their -- their plaintiffs
14 have to pay costs.

15 JUSTICE BREYER: Now, what about the -- how
16 does this work, the canon? I'm very interested.

17 MS. BLATT: They're --

18 JUSTICE KAGAN: Sorry. I'm sorry.

19 JUSTICE BREYER: I'm very interested in
20 canons, and I want to know on the canon, the traditional
21 thing, which you've probably looked up, what about the
22 specific governs the general? Is it -- how is that --
23 that's an old canon that's been around a long time, and
24 people are aware of it. And that's --

25 MS. BLATT: Well, I'm happy to go canon to

1 canon.

2 JUSTICE BREYER: This is -- it seems to be
3 the one they feel is very important.

4 MS. BLATT: That's the government. The --

5 JUSTICE BREYER: Yes. Well, that's what I'm
6 interested in.

7 MS. BLATT: Okay. Well, I don't think --
8 canons -- you know, don't trump common sense, context,
9 history --

10 JUSTICE BREYER: Well, that -- that's a
11 different matter.

12 MS. BLATT: But let's go to canons. Let's
13 go to canons, specific versus the general. It's all
14 word games. It turns on what you think "specific"
15 means. This is not specific to the question presented
16 about prevailing parties and costs. This is about
17 attorney's fees. That -- and costs are on top of
18 attorney's fees, is essentially how --

19 JUSTICE KAGAN: Well, you say that, but it
20 says to both. It says the costs, together with the
21 reasonable attorney's fees, and then the next sentence,
22 it says fees and costs. So you might wish that they
23 were a different statute, and it might be good policy to
24 have a different statute --

25 MS. BLATT: I don't wish for a different

1 statute. I think what you're saying is that Congress
2 passed a firewall. Congress said, we need to encourage
3 frivolous suits and nonfrivolous, but let's put a
4 firewall in and give them fees and costs, that, God
5 forbid, there is bad faith and harassment.

6 JUSTICE KAGAN: I'm not in the business --
7 I'm not in the business of trying to figure out exactly
8 what Congress is doing. I'm in the business of just
9 reading what Congress did. And what Congress did is it
10 created a set of rules that applies to attorney's fees
11 and costs at the same time.

12 MS. BLATT: It -- it affirmatively gives
13 district courts emboldening power to sanction. So --

14 JUSTICE KAGAN: Well, that sounds very
15 terrible.

16 MS. BLATT: But not if you file a lawsuit in
17 bad faith and for purposes of harassment. So, I mean --
18 I think even -- I think the history is obvious; this was
19 trying to make defendants better off than the
20 defendant's suit under the Truth in Lending Act, which
21 is part of the same umbrella Consumer Credit Protection
22 Act.

23 And they're -- inexplicably, somehow, by
24 trying to make them better off, made them worse than
25 every other creditor that they serve and immunized these

1 plaintiffs from the universal risk of cost shifting that
2 every other litigant has to face. And so -- and you
3 don't get there from -- all they have is a negative
4 inference.

5 JUSTICE KAGAN: Well, Ms. Blatt, you say
6 it -- it's supposed to make defendants better off by
7 focusing on just part of the provision, but the
8 provision is -- as a whole, it does a set of things. It
9 treats plaintiffs and prevailing plaintiffs in a certain
10 set of ways. And it treats prevailing defendants in a
11 certain set of ways.

12 MS. BLATT: It doesn't speak to prevailing
13 defendants.

14 JUSTICE KAGAN: Prevailing defendants, but
15 when -- prevailing defendants are treated worse than
16 prevailing plaintiffs because they have to show that
17 there is a bad-faith lawsuit.

18 MS. BLATT: Yeah, I'm going -- I'm going to
19 keep repeating it because it's my position. This
20 doesn't -- the fact that this doesn't refer to
21 prevailing defendants speaks volumes that what was not
22 on Congress' mind, was Rule 54. What was on Congress'
23 mind is victimized debt collectors who were sued in bad
24 faith.

25 Now, I understand this is a pro-plaintiff

1 statute, but this would be extraordinary to think that
2 they gave them attorney's fees when they -- but it's
3 basically saying -- this is a -- this is a defendant who
4 went to trial and won, was law-abiding, didn't do
5 anything wrong, and Congress in that situation said, not
6 only might -- might not the suit be -- be -- have merit
7 or good faith, it might have even been frivolous.

8 When under Rule 54 -- again, this is what I
9 find so mystifying about this case. If the petitioner
10 thought, oh, I had a really hard case in the law, or,
11 oh, I'm really poor, she could have asked for
12 discretionary relief. Instead, the lawyer went into
13 court and said, I have a recent Ninth Circuit decision,
14 and I don't have to pay costs at all.

15 JUSTICE KAGAN: Ms. Blatt, let me try it a
16 different way.

17 MS. BLATT: Okay.

18 JUSTICE KAGAN: Let's just suppose that
19 54(k) didn't exist at all. Okay?

20 MS. BLATT: 54(d)?

21 JUSTICE KAGAN: 54(d) didn't exist.

22 MS. BLATT: Okay.

23 JUSTICE KAGAN: And all you had was this
24 provision. Okay?

25 MS. BLATT: Uh-huh.

1 JUSTICE KAGAN: So this provision says, on a
2 finding by the court that it's brought in bad faith, the
3 court may award to the defendant attorney's fees and
4 costs. So suppose a defendant wins, but there's not a
5 finding that it was made in bad faith, would then the
6 person be entitled to either attorney's fees or costs?

7 MS. BLATT: Well, we wouldn't -- certainly,
8 we sought costs here under Rule 54.

9 JUSTICE KAGAN: So I'm saying that --

10 MS. BLATT: I know. Okay. And you've took
11 it up. So that takes out my route seeking for costs
12 under Rule 54, it doesn't exist in your world.

13 JUSTICE KAGAN: In my world, you would not
14 get fees or costs.

15 MS. BLATT: Now, we would -- I'm imagining
16 then the world in 1936, and we rely on 1920 or 1919 or
17 the long-standing practice of courts awarding costs.
18 Now, a court might --

19 JUSTICE KAGAN: I'm just asking you a simple
20 question.

21 MS. BLATT: We would not get costs under
22 this provision, you're correct.

23 JUSTICE KAGAN: You would not get costs
24 under that provision.

25 MS. BLATT: Because this -- in that sense, I

1 think this was a question that another Justice asked.
2 If you just look at this provision, the only basis for
3 costs and fees in this provision is the bad faith and
4 finding of harassment.

5 JUSTICE KAGAN: Okay. So if you would not
6 get costs under that provision --

7 MS. BLATT: Under 1692.

8 JUSTICE KAGAN: -- under 1692, a provision
9 that talks about fees and costs, generally, as to both
10 plaintiffs and defendants, then how does a rule that
11 says what -- where you would get costs unless a Federal
12 statute provides otherwise change matters?

13 MS. BLATT: Because -- because, again,
14 Rule 54 is not preemption -- a field preemption. It's
15 saying if Congress intended to displace -- the proviso,
16 unless otherwise provided, it was recognition that other
17 statutes might displace Rule 54. And if you look at all
18 the statutes that we cite on pages 19 and 20, they
19 actually do prohibit costs.

20 And then if you look at the statutes on
21 pages 24 and 25, where, time and time again, Congress
22 has said, a prevailing party may recover attorney's fees
23 and costs. Well, the "and costs," in their view, I
24 guess those statutes are inexplicable. I mean, it's
25 clearly they're redundant, and they overlap with Rule

1 54. They don't displace it.

2 And even the practice guides that we cite on
3 page 22, which is basically Wright and Miller and Moore,
4 say something that merely overlaps with Rule 54 doesn't
5 displace the court's discretion.

6 And again, I think you have to ask yourself,
7 what was Congress doing? To me, this is -- this is a --
8 the attorney's fees are the main show, it goes with bad
9 faith. Congress was not thinking about Rule 54, and I
10 think you can be quite confident Congress was not
11 thinking, we want plaintiff lawyers to go around saying,
12 not only Congress, but the government wanted us to file
13 frivolous suits.

14 JUSTICE KAGAN: You might be right, but
15 suppose Congress wasn't thinking about Rule 54. Suppose
16 it didn't occur to the drafters what Rule 54 said or
17 what the default provision was. They just wrote a
18 statute about fees and costs. And then -- it doesn't
19 really matter whether they were thinking about Rule 54
20 or not.

21 MS. BLATT: Yes, if you -- right. And so
22 there's like that Oncale case, with same-sex harassment,
23 Congress can write a very -- can write a plain language
24 provision, and regardless of what Congress intended, if
25 the language covers it, that's tough, we're going to

1 construe it. That's your law.

2 This is not that. This -- this doesn't say
3 anything about prevailing parties. This is talking
4 about bad faith and attorney's fees. It doesn't say a
5 court can't act in the absence of bad faith. It doesn't
6 say anything about prevailing parties. It doesn't
7 reveal any intent to displace it, especially when you
8 compare it with all the other statutes, you look at the
9 history -- sorry.

10 JUSTICE SOTOMAYOR: Counsel, it was thinking
11 about prevailing parties because the predecessor
12 sentence --

13 MS. BLATT: Prevailing defendants -- I
14 agree, sorry.

15 JUSTICE SOTOMAYOR: But it was talking --
16 no, prevailing parties. The provision is geared towards
17 prevailing parties in some form. The first sentence
18 says, "a prevailing plaintiff," not whether it's on a
19 substantial basis or any exception.

20 MS. BLATT: Yeah.

21 JUSTICE SOTOMAYOR: It says you get fees or
22 you can get fees and costs.

23 MS. BLATT: Right.

24 JUSTICE SOTOMAYOR: So it then decides to
25 limit what a prevailing defendant can do. Isn't that

1 the natural reading?

2 MS. BLATT: No, because it says expressly,
3 in a case of successful action, it talks about
4 prevailing plaintiffs. And then it says if there's --
5 to me, it's just -- it's natural when you just read it
6 in light of sort of common sense in context in what
7 Congress was doing. If a plaintiff files in bad faith,
8 the court is empowered and emboldened -- it's like a
9 neon light -- courts, you have authority to award
10 attorney's fees and costs.

11 JUSTICE KAGAN: Well, that's -- that's just
12 a different way of saying the following: The first
13 sentence says, when you're a prevailing plaintiff, you
14 get costs and fees. How about defendants? Well,
15 prevailing is not enough for defendants. Defendants
16 have to show --

17 MS. BLATT: Yeah.

18 JUSTICE KAGAN: -- that the suit was filed
19 in bad faith --

20 MS. BLATT: Yeah. And I think --

21 JUSTICE KAGAN: -- and then they get costs
22 and fees.

23 MS. BLATT: Right. But I think you have to
24 keep this in mind, that there are completely
25 diametrically opposed background presumptions in our

1 legal system. It's an extraordinary event to get
2 attorney's fees, and it's an extraordinary event not to
3 get costs.

4 And so the court -- the Congress has to use
5 explicit language to over -- overturn the American rule.
6 And so what Congress did here, that is the most natural,
7 even if I drew you to a tie --

8 JUSTICE KAGAN: I completely agree with
9 that. But that's what it comes down to, that if you
10 think that Congress has to use super extraordinary
11 language to over -- to -- to get out of 54(d), then
12 you're right. But 54(d) doesn't say that. It just
13 says --

14 MS. BLATT: Right. And --

15 JUSTICE KAGAN: -- unless the Federal
16 statute provides otherwise.

17 MS. BLATT: And I think you can look -- the
18 Petitioner did -- did a valiant job of trying to drudge
19 up as many statutes as they can. All the statutes on
20 point are explicit. Now, there's one statute that might
21 not be, the pipeline safety one.

22 And so the question is: Do we think that
23 Congress actually tried to displace a court's authority
24 under that statute? And that's a statute that just says
25 a court may award costs if a lawsuit is frivolous. This

1 one just doesn't say that.

2 You at least -- even if you don't think of
3 it as magic language or an explicit statement, the fact
4 that Congress repeatedly has used explicit language
5 casts considerable doubt that this was done by mere
6 implication.

7 And then you look at the fact that it
8 doesn't mention prevailing parties. It's talking about
9 bad faith, it has attorney's fees, what was Congress
10 doing, you look at the legislative history. It shows
11 that it was -- it was trying to make them, better, off
12 than a class of defendants, but their view inexplicably
13 makes them worse off.

14 And then you look at the result that they're
15 actually advocating, that the government thinks it's a
16 good idea that plaintiffs can file lawsuits cost-free
17 that are frivolous. I mean --

18 JUSTICE SCALIA: I guess, in the first
19 sentence of 3, the phrase "the costs of the action" is
20 really superfluous in light of 54(d)(1). You really
21 don't know that. I mean, that would have been the case
22 anyway.

23 So there's no reason to think that it isn't
24 frivolous in the second sentence -- or superfluous in
25 the second sentence, right? Why did they have to say

1 the costs of the action in the case of a successful
2 action?

3 MS. BLATT: Successful action to enforce it.

4 JUSTICE SCALIA: The costs of the action,
5 together with a reasonable -- as determined by the
6 court.

7 MS. BLATT: Why isn't --

8 JUSTICE SCALIA: They -- they have the costs
9 anyway, if Congress didn't write anything, right?

10 MS. BLATT: I mean, I think that -- again --
11 I mean --

12 JUSTICE SCALIA: I'm trying to help you.

13 (Laughter.)

14 MS. BLATT: Yeah, I know. And I was going
15 to say there's so much is superfluity in here, I don't
16 know where to begin. It's all over the place. The
17 whole thing, obviously, overlaps with the Court's
18 inherent authority.

19 JUSTICE SOTOMAYOR: You don't think that
20 there's a serious argument that the first sentence does
21 away with the discretionary nature?

22 MS. BLATT: No, it's clear, "shall." It's
23 clear "shall," obviously. The first sentence does --

24 JUSTICE SOTOMAYOR: So it's a command.

25 54(d) is permissive, according to your earlier argument?

1 MS. BLATT: Oh, yes, that's right. Yes.

2 JUSTICE SOTOMAYOR: And so this does -- it's
3 not superfluous because it went to mandatory?

4 JUSTICE SCALIA: Gotcha.

5 MS. BLATT: That's true.

6 JUSTICE SCALIA: Well-taken.

7 MS. BLATT: Yeah. The question, though,
8 was, in the case of any successful action when,
9 obviously, they prevailed to begin with, so the question
10 is whether that's superfluous. But the whole provision
11 overlaps with the Court's inherent authority. And I
12 know it hasn't come up, but I just think it's strange
13 that it says, for the purposes of bad faith and
14 harassment, Congress was obviously using belt and
15 suspenders there, so it's not surprising that Congress
16 added "and costs" here.

17 If you look at Rule 54 -- let me just say
18 one other thing, Justice Kagan -- if you look at Rule
19 54, it also says, "unless the statute provides
20 otherwise, costs other than attorney's fees." So why --
21 they didn't have to say that because, in the next
22 provision, it talks about attorney's fees. They just --
23 they wanted to make clear for whatever reason or maybe
24 they just wrote some really excess, redundant, silly
25 language, but they said costs, meaning anything that's

1 not costs -- it's just that Congress sometimes uses
2 these.

3 And I guess this was the honey and peanut
4 butter thing, is that a lot of fee-shifting statutes
5 talk about both attorney's fees and costs. And so they
6 went together and -- they also mentioned it. Obviously,
7 it's different. I agree that there's a verb in the
8 first sentence that's mandatory, so it trumps Rule 54.

9 But with respect to the two objects,
10 Congress was already thinking about attorney's fees and
11 costs anyway, and so there's nothing wrong with them
12 saying, in addition to the attorney's fees that you can
13 get in bad faith, once you calculate the attorney's fees
14 reasonable in relation to the work performed, you also
15 get costs.

16 And the only thing I would say is -- when we
17 define "and" as in addition to, they seem to think that
18 that was an extraordinary reading of the word "and,"
19 citing something -- from something called
20 dictionary.com, and if you just went to dictionary.com,
21 which I had not done before, and you type in "and," the
22 first definition is "in addition to."

23 If there are no further questions --

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Ms. Zieve, you have six minutes remaining.

1 REBUTTAL ARGUMENT OF ALLISON M. ZIEVE
2 ON BEHALF OF THE PETITIONER

3 MS. ZIEVE: Thank you.

4 First, the FDCPA doesn't just encourage
5 frivolous suits. Ms. Blatt repeatedly referred to
6 plaintiffs getting a free \$1,000. If the -- if the
7 plaintiffs win their suits, that means both that they're
8 not frivolous and they're not in bad faith.

9 In cases that are frivolous, but a court
10 makes a finding that it's not in bad faith, defendants
11 have other means of recovering fees and costs using
12 Rule 11 or Section 1927. And there are cases in which
13 courts have denied fees and costs under the FDCPA and
14 granted them under Rule 11 or 1927.

15 Ms. Blatt suggested that --

16 JUSTICE GINSBERG: Would you explain why we
17 would look to other rules? You wouldn't look at the
18 Rule 54(d), but we might look at Rule 11 and we might
19 look at something else? I thought your -- your position
20 was that this statute governs all requests for fees and
21 costs under this particular Act.

22 MS. ZIEVE: Our position is that this
23 provision, k(a)(3), discusses the allocation of fees and
24 costs that come at the end of the case, based on who won
25 and who lost. And if you read it as a whole, as I think

1 Justice Kagan suggested, that's what Congress was doing.
2 It was carefully calibrating the allocation of fees and
3 costs at the end of the case. And, in fact, in
4 instances in which -- which defendants have asked for
5 fees and costs in FDCPA cases based on bad faith, they
6 do always come at the end of the case, which also shows
7 this is not a misconduct provision.

8 If it were a misconduct provision, it
9 wouldn't just be about bad faith in bringing the action.
10 The Fair Credit Reporting Act, for example, has a
11 provision that provides for fees, but not costs, that
12 speaks to conduct throughout the case, but with respect
13 to bad faith filings of pleadings, motions, or other
14 papers, that's a misconduct provision; this one isn't.

15 The main --

16 JUSTICE SCALIA: Isn't it -- isn't it the
17 case that, in order to appeal to the proposition that
18 the specific governs the general, you -- you have to
19 read the second sentence of 3 as containing a
20 negative -- a negative implication? As saying --

21 MS. ZIEVE: Yeah. We do read the "court may
22 award" to mean "and, in other circumstances, it may
23 not."

24 JUSTICE SCALIA: It may not. So you are
25 reading in a negative --

1 MS. ZIEVE: Just as this Court -- just as
2 this Court read "may" in Cooper Industries or Crawford
3 Fittings and said, "If you don't read 'may' to define
4 the scope of what Congress is authorizing the Court to
5 do, then that provision has no meaning."

6 JUSTICE KAGAN: I understood Ms. Blatt to
7 actually agree with that, that if you put Rule 54 aside,
8 this does say, you may, under a certain set of
9 conditions, which implies you may not, under -- if those
10 conditions are not met.

11 MS. ZIEVE: Right. She did agree that,
12 without Rule 54, this provision -- that -- that no costs
13 could be awarded to a defendant, unless they had acted
14 in bad faith.

15 I mean, I think, at some points, GRC and
16 Ms. Blatt here today asked you to just ignore that "and
17 costs" exists in the sentence at all, although the fact
18 that this sentence is not replicated numerous times
19 throughout the U.S. Code doesn't seem to me reason for
20 ignoring it, but, rather, for giving effect to it.

21 Congress obviously thought it was doing
22 something when it enacted this sentence and when it
23 added these words to the statute. It does not say, "The
24 court may award fees in addition to costs" or "as part
25 of costs" or "together with costs."

1 Again, grammatically, it treats the two
2 terms, "fees and costs," on a par --

3 JUSTICE SCALIA: Suppose -- suppose the
4 words "and costs" were left out in the second sentence?
5 Would not the argument be made that you cannot award
6 costs even in an action brought in bad faith?
7 Wouldn't -- that this sum argument you're making --

8 MS. ZIEVE: No, I don't think so. There
9 are -- no. There are statutes that provide for fee
10 awards and don't -- don't say anything about costs, and
11 these cases are --

12 JUSTICE SCALIA: But you're saying "negative
13 implication." If it -- if it says only "attorney's fees
14 in reasonable relation to the work expended," the
15 implication would be you --

16 MS. ZIEVE: Justice Scalia, other --

17 JUSTICE SCALIA: -- you cannot -- you
18 cannot, even in the case of a frivolous action, award
19 costs. Wouldn't that be the reading of it?

20 MS. ZIEVE: In other cases, under other
21 statutes, that argument has been made occasionally and
22 rejected. It's also rejected in the treatises that we
23 cite, that if you don't mention costs --

24 JUSTICE SCALIA: Yes, but I'm suggesting if
25 that argument is rejected, so should yours be.

1 MS. ZIEVE: No, because --

2 JUSTICE SCALIA: Because it seems the two
3 are parallel.

4 MS. ZIEVE: If the -- if the statute does
5 not mention costs, then it doesn't provide otherwise
6 with respect to costs.

7 JUSTICE BREYER: So she says if I -- if I
8 tease -- if you tease your sister, I'm going to give
9 you -- give her your allowance and her allowance, that
10 that doesn't mean that the sister loses her allowance if
11 you don't tease her.

12 I mean, there are a lot of instances --

13 MS. ZIEVE: Well --

14 JUSTICE BREYER: -- where you put the "and"
15 in and it doesn't mean that that's the exclusive place
16 for giving it. Sometimes, it does; sometimes, it
17 doesn't. That's her point.

18 MS. ZIEVE: Well, put -- well, putting aside
19 that I hope that Congress drafts a little more carefully
20 than a mother may threaten her child --

21 (Laughter.)

22 JUSTICE BREYER: Well, I doubt that it does.
23 I'm sorry. I mean, they're human beings over there;
24 they're not necessarily all --

25 MS. ZIEVE: But they're -- the presumption

1 behind that hypothetical is that the one child is going
2 to get their allowance no matter what. The presumption
3 here is that Rule 54(d) will apply unless a statute
4 provides otherwise. This statute doesn't.

5 Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 11:59 a.m., the case in the
9 above-entitled matter was submitted.)

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| A | | | | |
|--|---|--|---|---|
| able 21:17 | affirmative 24:14 26:17 | 24:3 29:11 31:12 31:24 33:11 45:20 | 24:15,17,19 25:25 26:18 28:7,21,24 | behavior 7:1 |
| above-entitled 1:11 53:9 | affirmatively 35:12 | 45:25 48:1 51:5,7 51:21,25 | 31:7 32:11,17 38:3 42:9 43:25 49:22 | beings 52:23 |
| absence 24:18 41:5 | afford 10:1 32:9 | aside 50:7 52:18 | 50:24 51:5,18 | believe 22:9 |
| absolute 13:8 23:3 | agency's 33:3 | asked 23:5,9 37:11 39:1 49:4 50:16 | awarded 50:13 | believed 14:8 22:10 |
| abuse 9:22 | agree 19:4 41:14 43:8 47:7 50:7,11 | asking 38:19 | awarding 3:16 38:17 | belt 46:14 |
| abuses 22:6 | alike 29:14 | asks 32:7 | awards 7:13 10:8,19 23:7 51:10 | benefit 11:13 |
| accept 18:11 | allege 22:6 | aspect 26:16 | aware 18:6,12 21:25 33:24 | benefits 11:11 |
| accommodates 32:13 | ALLISON 1:15 2:3 2:13 3:7 48:1 | Assistant 1:17 | a.m 1:13 3:2 53:8 | better 9:17,18 33:10 35:19,24 36:6 44:11 |
| act 3:15,21 8:14,15 8:20,21 9:2,2,15 9:15 28:20 29:14 35:20,22 41:5 48:21 49:10 | allocation 48:23 49:2 | assume 12:3 17:21 | | beyond 6:8 |
| acted 50:13 | allow 12:20,21 | assumed 5:19 | B | bit 23:2 |
| action 3:22 8:9 11:1 42:3 44:19 45:1,2 45:3,4 46:8 49:9 51:6,18 | allowable 10:16 | assuming 4:20 18:20 | back 16:25 22:25 | Blatt 1:21 2:10 24:2 24:3,5,21 25:14,18 25:22 26:7,13 27:4 27:10,19,23 28:11 28:15,17 29:25 30:4,11,14,18,21 31:19,23 32:2,18 32:24 33:6,10,17 33:25 34:4,7,12,25 35:12,16 36:5,12 36:18 37:15,17,20 37:22,25 38:7,10 38:15,21,25 39:7 39:13 40:21 41:13 41:20,23 42:2,17 42:20,23 43:14,17 45:3,7,10,14,22 46:1,5,7 48:5,15 50:6,16 |
| actions 8:7 | allowance 52:9,9,10 53:2 | attorney 17:19 22:5 | background 15:4,7 15:24 16:1,2,6,7 16:13 42:25 | 31:19,23 32:2,18 32:24 33:6,10,17 33:25 34:4,7,12,25 35:12,16 36:5,12 36:18 37:15,17,20 37:22,25 38:7,10 38:15,21,25 39:7 39:13 40:21 41:13 41:20,23 42:2,17 42:20,23 43:14,17 45:3,7,10,14,22 46:1,5,7 48:5,15 50:6,16 |
| add 17:9,18,19 | allowed 13:24 | attorneys 3:23 8:7 21:18,19 | bad 3:19,22 7:1,4,19 7:25 8:9 10:24 11:2,8,22 15:5 18:9 20:11 24:16 24:18 27:14 28:22 29:7,22 31:7 35:5 35:17 36:23 38:2,5 39:3 40:8 41:4,5 42:7,19 44:9 46:13 47:13 48:8,10 49:5 49:9,13 50:14 51:6 | 41:20,23 42:2,17 42:20,23 43:14,17 45:3,7,10,14,22 46:1,5,7 48:5,15 50:6,16 |
| added 16:14 18:8 46:16 50:23 | allows 4:10 | attorney's 4:2 5:20 8:8,18,21 10:14,14 10:20 11:5 15:2,6 16:18,21,23 17:18 20:1 24:15 25:6 26:19 27:8,14 28:21 29:6 31:6,8 34:17,18,21 35:10 37:2 38:3,6 39:22 40:8 41:4 42:10 43:2 44:9 46:20,22 47:5,10,12,13 51:13 | bad-faith 4:24 5:1,6 5:18 36:17 | 50:6,16 |
| addition 10:16 31:4 31:5,8 47:12,17,22 50:24 | Alright 17:19 | authority 6:25 7:7,9 14:14 23:16 26:5 42:9 43:23 45:18 46:11 | balance 12:25 19:17 19:24,25 | blue 31:1 |
| additionally 31:7 | Amalgamated 14:13 | authorizing 25:1 50:4 | balanced 9:13 | bona 22:1 |
| address 6:2 18:5 19:19 24:19 25:8 26:1 | American 43:5 | available 5:10 17:2 | Bank 14:13 | borrowed 31:13 |
| addressed 25:9 | amicus 1:19 2:7 13:4 | average 21:3,5 | bankruptcies 22:12 | Breyer 14:20 15:16 15:19 16:4,16 17:11,17,23 18:1 18:17 19:8,11 20:22 21:9,13 31:11,20 32:1 33:15,19 34:2,5,10 52:7,14,22 |
| addresses 14:3 25:12,13,23 27:7 | ancient 4:8 | award 3:11,23 4:1,2 6:7,10,11,25 7:3 8:8 9:10 10:20,23 11:1 12:1 14:3 23:13,16 24:10,14 | based 48:24 49:5 | 31:11,20 32:1 33:15,19 34:2,5,10 52:7,14,22 |
| addressing 5:7 19:13 | anguish 9:23 | | basically 27:16 31:3 37:3 40:3 | brief 6:18 13:20 19:16 29:3,4 31:1 |
| administrators 32:23 | answer 7:17 33:10 | | basis 15:20 32:25 39:2 41:19 | |
| adopt 23:22 | answering 13:11 | | behalf 1:15,21 2:4 2:11,14 3:8 24:4 48:2 | |
| adopted 12:16 | anyway 44:22 45:9 47:11 | | | |
| adoption 12:24 | apparently 18:23 | | | |
| advisory 12:17 | appeal 49:17 | | | |
| advocating 44:15 | appear 19:4 | | | |
| | APPEARANCES 1:14 | | | |
| | application 17:7 | | | |
| | applies 4:21,21 17:9 23:23 35:10 | | | |
| | apply 3:13 4:18 6:21 9:1 14:7 18:14 53:3 | | | |
| | area 22:2 | | | |
| | arguing 4:9 | | | |
| | argument 1:12 2:2,5 2:9,12 3:4,7 13:3 | | | |

| | | | | |
|--|--|--|--|--|
| <p>bring 21:22 22:16 bringing 49:9 broader 12:21 brought 3:19,22 4:3 7:25 11:8 20:11 38:2 51:6 built-in 32:12 Bureau 32:20 business 26:8 35:6,7 35:8 butter 30:7,13,15 47:4</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 calculate 47:13 calibrating 49:2 called 47:19 canon 14:15,16 33:16,20,23,25 34:1 canons 33:20 34:8 34:12,13 carefully 49:2 52:19 case 3:4 4:16,23,23 9:24 11:24 12:15 20:19 21:23,25 25:19 26:20 27:25 28:18 32:4,6,19 37:9,10 40:22 42:3 44:21 45:1 46:8 48:24 49:3,6,12,17 51:18 53:7,8 cases 3:19 4:11 6:18 6:21 7:8,25 10:8 10:24 11:25 12:22 13:16 18:14 21:3 21:20 22:7 33:2 48:9,12 49:5 51:11 51:20 casts 44:5 category 4:23,25 9:19 CCPA 20:17</p> | <p>certain 23:12 28:4,7 36:9,11 50:8 certainly 4:5 38:7 change 39:12 Chief 3:3,9 13:1,6 19:23 20:4 23:19 24:1,5 28:9,13,16 47:24 53:6 child 52:20 53:1 choose 7:20 circuit 32:10 37:13 circumstances 7:13 14:9 19:22 23:12 23:13,17 27:21 49:22 cite 33:7 39:18 40:2 51:23 cited 6:16,18 9:24 19:16 citing 47:19 civil 10:17 24:24 29:19 32:3,15 claim 14:22 claims 22:6 class 44:12 clear 4:14 10:18 13:13 14:1,11 17:1 17:9 45:22,23 46:23 clearer 13:17 clearly 6:8 11:24 39:25 Code 28:1 50:19 codifies 13:8 23:3 collection 3:14 9:21 22:11 collectors 10:4 21:16 36:23 come 13:12 22:7 46:12 48:24 49:6 comes 43:9 command 45:24 committee 12:17,17 common 30:5 34:8</p> | <p>42:6 compare 41:8 compared 20:17 complaints 10:3 completely 26:22 42:24 43:8 comprehensively 25:13 27:7,8 concern 5:17 concerned 6:13 17:5 concerns 11:18 32:13 condition 4:2 11:7,7 12:21 28:4,7 conditioned 18:9 conditions 50:9,10 conduct 49:12 confident 40:10 confined 14:17 confirm 5:6 conflict 4:20 13:14 Congress 5:9,12 6:12,12,20 8:3,4 8:24 9:4,5,6,8,12 9:20,22 10:5,10,13 10:17,18,22 11:3 11:12,13,23 16:12 17:3,13 18:6,12,14 19:17,20 20:13 22:9 24:25 25:3,7 25:8,10,11 26:2 27:13,15 29:12,14 30:22 31:5 35:1,2 35:8,9,9 36:22,22 37:5 39:15,21 40:7 40:9,10,12,15,23 40:24 42:7 43:4,6 43:10,23 44:4,9 45:9 46:14,15 47:1 47:10 49:1 50:4,21 52:19 Congresses 9:16 congressperson 17:5</p> | <p>Congress's 26:9 conjunction 11:6 consequences 16:5 consider 4:16 considerable 44:5 construe 41:1 consumer 19:18 32:15,20 33:12 35:21 consumers 9:25 10:4 containing 49:19 contains 14:5 contemplates 24:25 context 15:22 34:8 42:6 contingency 21:20 continued 6:21 contradict 27:4 contradicted 27:2 Cooper 50:2 Corporation 1:6 3:5 correct 8:3 15:21 27:19 38:22 cost 7:12 10:8,19,21 11:5 20:20 25:2 26:5 28:12 31:16 32:16 36:1 cost-free 44:16 cost-prevailing 3:18 cost-shifting 18:13 counsel 13:1 24:1 41:10 47:24 53:6 counterproductive 18:7 country 32:16 couple 6:18 7:8 13:12 30:4 course 12:15,22 13:24 court 1:1,12 3:10,23 6:11,17 7:3,7,19 7:22 8:8 9:24 10:20 12:2 13:7,25</p> | <p>14:8,13 19:7 23:23 24:6,14,15,17 26:18 28:6,21,24 32:9 37:13 38:2,3 38:18 41:5 42:8 43:4,25 45:6 48:9 49:21 50:1,2,4,24 courts 3:17,18 6:25 7:17 11:1 24:9 31:6,7 32:11 33:3 35:13 38:17 42:9 48:13 court's 7:7 13:14 14:11 19:15 23:15 24:19 40:5 43:23 45:17 46:11 cover 23:7 covered 8:18 14:8 covering 23:6 covers 27:1 40:25 Crawford 50:2 created 35:10 Credit 8:15,16 9:15 35:21 49:10 creditor 35:25 curiae 1:19 2:7 13:4 curious 20:5 current 13:19 currently 12:4</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>d 3:1 25:5 damage 9:11 damages 20:19 32:5 deal 31:14 dealing 5:23 deals 4:24 22:20 debt 3:14 10:4 21:16 21:17 22:11 36:23 debtors 9:9 debts 10:1 decided 10:5 18:14 18:23 decides 41:24</p> |
|--|--|--|--|--|

| | | | | |
|---|--|---|---|--|
| <p>decision 37:13 default 14:5 17:7 25:4,4 40:17 defeat 24:20 defendant 5:24 8:9 8:20 15:6 18:21 22:5 26:17,21 28:24 29:15 37:3 38:3,4 41:25 50:13 defendants 3:18 5:8 5:11,17 6:22 7:13 8:22,24 9:18 11:14 21:6 24:10,20 27:18 29:8,21 35:19 36:6,10,13 36:14,15,21 39:10 41:13 42:14,15,15 44:12 48:10 49:4 defendant's 18:24 35:20 defendant-friendly 9:5 20:6,8 defense 22:1 deference 32:25 33:4 define 47:17 50:3 definition 47:22 demonstrates 20:20 denied 48:13 Department 1:18 describing 4:22,23 deter 9:7 determined 8:5 45:5 deterred 9:9 11:19 21:15 deterrence 19:17 deterring 11:21 devoid 30:24 diametrically 42:25 dictionary.com 47:20,20 different 3:15 9:16 9:16,17 12:8,14 23:23 26:25 29:22</p> | <p>29:23 34:11,23,24 34:25 37:16 42:12 47:7 difficult 22:9 dilute 20:5 directly 18:5 19:13 22:8 directs 13:25 disabling 26:16 disagree 25:14 disagreed 27:6 discovered 20:24 discretion 3:17,19 24:9,19 40:5 discretionary 23:15 32:7,12 37:12 45:21 discussed 11:17,20 discusses 48:23 displace 23:15 26:3 26:14 39:15,17 40:1,5 41:7 43:23 displacement 23:10 displaces 13:10 displacing 10:19 distinguishing 10:21 district 3:17 6:24 32:9,11 35:13 dividing 11:23 20:9 division 19:6 doing 10:7 35:8 40:7 42:7 44:10 49:1 50:21 dollars 22:15 doubt 44:5 52:22 draft 11:4 16:19 17:12 drafter 5:22 16:17 17:22 drafters 40:16 drafting 17:12 drafts 52:19 draws 20:9 drew 9:13,13 11:23</p> | <p>43:7 drudge 43:18 dual 9:5 duplicate 7:2,4 uplicative 7:3 D.C 1:8,15,18,21</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 45:25 effect 50:20 effectively 4:10 eight-Justice 14:12 either 4:20 7:2 13:22 38:6 Electronic 28:20 emboldened 42:8 emboldening 35:13 emphasized 9:20 empowered 42:8 enacted 9:16 22:10 50:22 enacting 9:6,20 encourage 35:2 48:4 enforce 22:14 33:12 33:12 45:3 enforcement 19:18 20:15 enforcers 10:1,6 ensure 9:8 entire 29:11 entirety 14:17 entitled 33:4 38:6 ERIC 1:17 2:6 13:3 especially 20:16 41:7 ESQ 1:15,17,21 2:3 2:6,10,13 essentially 34:18 establishes 7:22 event 29:7 43:1,2 exactly 35:7 example 6:23 8:6 49:10</p> | <p>exceed 9:10 exception 4:12 41:19 excess 46:24 exclusive 52:15 exist 37:19,21 38:12 exists 7:9 50:17 expected 25:16 expended 3:24 51:14 expense 21:23 explain 48:16 explicit 43:5,20 44:3 44:4 express 3:13 12:6 13:13,22 22:24 expressly 4:17 10:15 12:5,10,12 13:8 15:17 16:15 17:10 18:9,16 42:2 extraordinary 37:1 43:1,2,10 47:18</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 22:14 36:2 faces 32:16 facing 21:24 fact 18:7,21 36:20 44:3,7 49:3 50:17 Fair 3:14 8:16 49:10 faith 3:19,22 7:1,4 7:19,25 8:10 10:24 11:2,8,22 15:5 18:9 20:11 22:16 24:16,18 28:22 29:7,22 31:7 35:5 35:17 36:24 37:7 38:2,5 39:3 40:9 41:4,5 42:7,19 44:9 46:13 47:13 48:8,10 49:5,9,13 50:14 51:6 fascinating 27:25 favored 4:8</p> | <p>FDCPA 3:18 14:2 18:14 22:7,14 48:4 48:13 49:5 Federal 3:13 4:18 10:16 24:24 26:10 26:11 39:11 43:15 fee 10:15 30:5 31:6 31:6 51:9 feel 34:3 fees 3:24 4:2 5:8,10 5:20 6:15 8:8,18 8:19,21 10:14,14 10:20,21 11:1,5 12:20,21,21,21 15:2,6 16:18,21,23 17:2,5,18 20:1 21:21 24:15 25:6,8 25:9,12 26:19 27:8 27:14,17,22 28:21 29:6,18,19,20,21 29:24 30:3,6 31:9 34:17,18,21,22 35:4,10 37:2 38:3 38:6,14 39:3,9,22 40:8,18 41:4,21,22 42:10,14,22 43:2 44:9 46:20,22 47:5 47:10,12,13 48:11 48:13,20,23 49:2,5 49:11 50:24 51:2 51:13 fee-shifting 47:4 Feigin 1:17 2:6 13:2 13:3,6 15:16 16:3 16:12,24 17:16 18:4 19:3,10,12 20:3,7 21:8,12,14 22:22 23:1,21 fide 22:1 field 25:18,20 39:14 figure 26:9,10 35:7 file 35:16 40:12 44:16 filed 42:18</p> |
|---|--|---|---|--|

| | | | | |
|---|---|---|--|---|
| <p>files 24:16 42:7 filing 32:3 filings 49:13 Finance 32:20 find 15:10 37:9 finding 3:22 8:9 18:9 20:10 29:7 31:7 38:2,5 39:4 48:10 finish 23:18,19 firewall 35:2,4 first 6:3,5,5,6 9:3 13:13 15:17 19:10 20:15 23:5,11 24:11 29:5 30:22 41:17 42:12 44:18 45:20,23 47:8,22 48:4 Fittings 50:3 focusing 36:7 following 17:4 25:15 42:12 forbid 12:20 35:5 forcing 22:11 form 13:9 23:3 41:17 found 19:7,20 26:21 free 32:6,17 48:6 frequently 10:9,22 frivolous 11:2,18,21 15:13 28:25 29:13 29:15 35:3 37:7 40:13 43:25 44:17 44:24 48:5,8,9 51:18 FTC 10:3 32:20 full 17:9 function 6:9 30:25 Fund 28:20 fundamental 30:25 funny 28:17 further 12:2 47:23</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1</p> | <p>games 34:14 Gateway 14:12 geared 41:16 general 1:6,18 3:4 4:13 8:7 13:10,15 14:7,16,19 17:14 17:17,25 18:1 23:4 23:24 27:1 33:22 34:13 49:18 generally 21:19 39:9 getting 48:6 GINSBERG 48:16 Ginsburg 4:19 5:15 8:11,17 32:18 33:8 Ginsburg's 16:25 give 7:17,20,22 16:21,22 17:14 20:1,2,3 32:22 35:4 52:8,9 gives 3:17 35:12 giving 50:20 52:16 go 30:7 33:25 34:12 34:13 40:11 God 35:4 goes 40:8 going 10:6 15:1 21:16,17 22:3,7,13 31:16 36:18,18 40:25 45:14 52:8 53:1 good 14:22 21:9 22:16 27:15 34:23 37:7 44:16 good-faith 19:18 20:14 22:1 Gotcha 46:4 government 32:19 32:23 34:4 40:12 44:15 government's 13:20 32:21 governs 13:15 14:6 14:16 23:4,12,24</p> | <p>33:22 48:20 49:18 grammar 3:25 grammatically 30:24 31:1 51:1 grant 7:19 24:14 26:17 granted 48:14 GRC 6:16 8:3 11:10 50:15 guess 21:6 39:24 44:18 47:3 guides 40:2</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>hand 9:6,7 happen 10:12 happened 12:6 happens 26:20 happy 33:25 harassing 4:24 5:1 5:18 harassment 3:20,23 8:1 11:9,22 18:10 20:12 35:5,17 39:4 40:22 46:14 hard 37:10 hear 3:3 heard 29:11 32:21 hearing 19:15 held 27:1,2 help 11:14 15:13 45:12 helpful 13:11 high 21:4,11 higher 29:21 history 11:15 15:9 16:1 19:5,13 24:12 34:9 35:18 41:9 44:10 homeless 31:25 32:3 honey 30:16 47:3 Honor 4:16 5:4 9:3 16:3,12,24 17:16</p> | <p>18:4 19:3,10 20:7 21:8,12 22:22 23:1 23:18 53:5 hope 21:20 52:19 Hotel 14:13 human 52:23 hypothesis 17:3 18:11 hypothetical 53:1</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 20:1 44:16 identical 13:19 ignorance 17:22,23 18:2 ignore 50:16 ignoring 50:20 imagining 38:15 immunized 35:25 impecunious 9:9,25 implausible 17:3 implication 4:8,16 6:14,17 44:6 49:20 51:13,15 implies 50:9 important 34:3 impression 14:24,24 incentivize 20:15 29:12 incentivized 20:18 incentivizing 19:18 incident 14:3 23:8 24:20 include 6:4 including 10:23 incorporated 12:9 incurring 22:14 indicate 19:5 indifferent 27:15 Industries 50:2 industry 10:5 22:11 inexplicable 30:24 31:2 39:24 inexplicably 35:23</p> | <p>44:12 inference 36:4 inflicts 9:22 informal 32:14 inherent 7:7 45:18 46:11 initially 22:1 innocent 26:22 instance 6:16 10:12 instances 49:4 52:12 instruction 17:15,18 intended 26:2 39:15 40:24 intends 26:5 intent 26:9 41:7 interested 33:16,19 34:6 interesting 15:11 interpret 19:14 interpretation 31:15 31:18 32:23 interpreted 22:2 inverting 22:24 involving 8:13 issue 14:25 IX 28:14</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>J 1:17 2:6 13:3 jelly 30:7,13 Jerman 9:24 19:7 19:15 job 43:18 judge 16:9 judgment 14:4 22:7 23:8</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan 24:21 25:16 25:20 26:6,8 27:9 27:11,21 29:17 30:1 33:18 34:19 35:6,14 36:5,14</p> |
|---|---|---|--|---|

| | | | | |
|---|---|---|--|--|
| <p>37:15,18,21,23 38:1,9,13,19,23 39:5,8 40:14 42:11 42:18,21 43:8,15 46:18 49:1 50:6 keep 36:19 42:24 kind 20:18 21:15,23 22:12 know4:7 14:14,23 15:3 16:10,17,19 17:14 25:3,7,10 27:9 30:21 32:25 33:20 34:8 38:10 44:21 45:14,16 46:12 k(a)(3) 5:5 9:6,12 48:23</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>laid 25:5 language 15:22,24 16:10 40:23,25 43:5,11 44:3,4 46:25 Laughter 18:3 25:17 30:17,20 33:9 45:13 52:21 law4:8 22:2,3 32:10 37:10 41:1 laws 17:24 lawsuit 24:16 28:25 35:16 36:17 43:25 lawsuits 25:1 44:16 lawyer37:12 lawyers 40:11 law-abiding 37:4 leave 5:18 leaving 8:5 Ledbetter33:7 left 6:13,20 51:4 legal 43:1 legislation 8:23 legislative 11:14 15:9 19:5,13 44:10</p> | <p>lender9:1,2 lenders 8:13 lending 8:14,23 9:1 9:15 35:20 let's 20:1,1 34:12,12 35:3 37:18 liable 28:2,3 light 42:6,9 44:20 limit 41:25 limited 7:25 limits 3:18 7:12,14 line 9:12 11:23,25 12:1 20:9 linguistic 15:20 links 11:5 LISA 1:21 2:10 24:3 list 12:17 litigant 32:14 36:2 litigations 7:19 little 23:2 52:19 long 33:23 long-standing 38:17 look 5:4 8:11,12,13 13:17 15:9,22,22 15:22 16:9 19:12 19:15 20:22 24:23 25:9 39:2,17,20 41:8 43:17 44:7,10 44:14 46:17,18 48:17,17,18,19 looked 28:5,11,12 33:21 looking 10:25 21:22 lose 22:15 31:16,21 31:22 loses 21:24 52:10 lost 5:2 48:25 lot 31:13,14 33:2 47:4 52:12 Love 30:19 low21:11 low-value 20:16</p> <hr/> <p style="text-align: center;">M</p> <hr/> | <p>M 1:15 2:3,13 3:7 48:1 magic 44:3 main 29:7 40:8 49:15 making 51:7 mandates 23:13 mandatory 6:7,11 46:3 47:8 markup 11:17 marriage 30:19 Marx 1:3 3:4 matter 1:11 3:25 7:2 33:5 34:11 40:19 53:2,9 matters 39:12 mean 5:10 11:12 14:20,21 16:10 19:1,24 27:11 28:10,13,19 30:4 31:4,24 35:17 39:24 44:17,21 45:10,11 49:22 50:15 52:10,12,15 52:23 meaning 4:1 46:25 50:5 means 11:20 15:5 26:2 31:5 34:15 48:7,11 meant 13:18 14:25 measured31:9 meet 12:6 mention 6:15 15:7 15:17 27:20 44:8 51:23 52:5 mentioned7:8 11:11 12:23 47:6 mentions 15:3 29:8 mere 20:18 44:5 merely 5:9 40:4 merit 37:6 meritorious 9:8 met 50:10</p> | <p>Miller40:3 mind 36:22,23 42:24 minutes 29:11 47:25 misbehavior 4:11 misconduct 7:6 49:7 49:8,14 missing 29:10 moment 15:15 money 31:14,14 Moore 40:3 mother52:20 motions 49:13 mystifying 33:11 37:9</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 national 9:21 natural 24:22 42:1,5 43:6 nature 45:21 necessarily 52:24 necessary 13:14 20:14 need4:15 6:13 23:17,21 35:2 negative 6:14,17 36:3 49:20,20,25 51:12 neon42:9 never 13:14 25:24 32:7 new23:22 Ninth37:13 nonfrivolous 29:13 29:13 35:3 non-nuisance 11:25 20:10 normal 29:18 normally 18:24 23:23 noted9:23 notes 12:17 November 1:9</p> | <p>nuisance 9:7 11:23 19:17 20:9 number5:15 numerous 50:18</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 object 27:12 objectives 9:13 objects 11:6 47:9 obligate 7:21 obligates 7:17 obstreperous 16:9 obvious 35:18 obviously 32:24 45:17,23 46:9,14 47:6 50:21 occasionally 51:21 occur 40:16 occurs 28:4,7 odd 19:24 oh 16:16 32:1 37:10 37:11 46:1 okay 16:22 26:13 30:14 34:7 37:17 37:19,22,24 38:10 39:5 old 33:23 OLIVEA 1:3 omitted6:20 8:3,4 Oncale 40:22 once 47:13 ones 8:23 21:5 opinion 14:12 19:15 opposed42:25 opposite 6:19 oral 1:11 2:2,5,9 3:7 13:3 24:3 order20:15 21:13 49:17 ordinary 24:20 26:20 Organizations 8:15 9:15</p> |
|---|---|---|--|--|

| | | | | |
|---|---|--|--|--|
| <p>original 13:21 outlier 21:4 out-of-pocket 21:23 overlap 39:25 overlaps 40:4 45:17 46:11 overturn 43:5</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 13:20 19:16 29:3,3 40:3 pages 39:18,21 pain 32:8 papers 49:14 par 51:2 parallel 6:6 52:3 part 5:17 10:21 11:1 35:21 36:7 50:24 particular 25:9 48:21 particularly 19:21 20:16 parties 10:15 34:16 41:3,6,11,16,17 44:8 party 3:12 13:24 39:22 passed 35:2 paupers 32:14 pay 10:1 19:21 21:17 22:3 32:4,5 33:14 37:14 peanut 30:7,13,15 47:3 peculiar 18:7 people 9:25 16:19 17:12 21:15 22:5 33:24 pepper 30:7 perfectly 27:12 performed 31:10 47:14 permissive 7:18</p> | <p>45:25 person 4:25 16:16 31:25 32:3,4 38:6 personal 22:12 petitioner 1:4,16,20 2:4,8,14 3:8 13:5 37:9 43:18 48:2 phrase 44:19 pipeline 29:14 43:21 place 45:16 52:15 plain 26:15 40:23 plaintiff 4:24 5:2,19 5:25 11:8,13 15:1 15:6 20:21 21:21 21:24 22:4,8 24:16 28:3 29:12 31:13 32:5,6,15,15,16 40:11 41:18 42:7 42:13 plaintiffs 5:7,8 9:18 11:11 17:19 19:21 20:14 21:12,14 22:13 27:17,24 28:2 29:20 33:13 36:1,9,9,16 39:10 42:4 44:16 48:6,7 plaintiff's 4:3 21:22 22:5 plausibly 25:25 pleadings 49:13 please 3:10 13:7 24:6 pocket 22:4 point 14:6 15:11,12 17:20 18:22 21:7 21:10 30:25 43:20 52:17 points 6:1 50:15 policy 19:20 31:12 31:23 32:13 33:11 34:23 poor 37:11 position 22:13,19 24:7 32:21 36:19</p> | <p>48:19,22 possible 23:10 possibly 17:8 potential 21:24 31:13 power 7:3 24:14 26:18 35:13 practical 30:25 practice 38:17 40:2 Practices 3:14 preceded 12:24 preclude 17:7 predecessor 41:11 preemption 25:18 25:21 39:14,14 premised 20:10 prerequisite 4:7 presented 34:15 preserve 10:11 presume 18:5 presumption 4:17 7:22,24 52:25 53:2 presumptions 42:25 pretty 19:24 prevailed 26:21 46:9 prevailing 3:12 7:13 8:8 10:14,15 13:24 24:10,20 27:16,18 27:20,24 28:24 29:8,20,20 34:16 36:9,10,12,14,15 36:16,21 39:22 41:3,6,11,13,16 41:17,18,25 42:4 42:13,15 44:8 prevails 14:4 prevent 15:13 pre-2007 13:18 primary 10:1,6 principle 13:9,11 14:7 17:25 23:24 principles 23:4 pro 18:21</p> | <p>probably 33:21 problem 9:21 14:20 19:2 Procedure 10:17 24:24 prohibit 39:19 proposition 14:15 49:17 prospect 9:9 protect 26:17 protection 32:15,20 33:12 35:21 prove 32:5 provide 8:18 25:4 26:12 51:9 52:5 provided 25:11 39:16 provides 3:11,14,15 3:21 8:7 10:23,25 21:19 26:1,11 39:12 43:16 46:19 49:11 53:4 providing 25:2 provision 4:5,6,9,10 5:6,7 7:1,6,11 9:5 10:13 11:15,17,19 13:10,22 14:3,4,18 18:22 19:7 20:6,8 22:10,20,21,24 23:11 24:8 25:2,12 26:5 27:13 36:7,8 37:24 38:1,22,24 39:2,3,6,8 40:17 40:24 41:16 46:10 46:22 48:23 49:7,8 49:11,14 50:5,12 provisions 5:21 9:12 9:17 26:25 27:2 28:2,12 30:6 32:22 proviso 39:15 pro-defendant 18:21 19:6 24:8 pro-plaintiff 36:25 purpose 3:20,23 9:4</p> | <p>11:9 15:23,25 18:10 20:11 24:12 purposes 8:1 9:6 35:17 46:13 pursued 21:16 put 5:12,24 11:15 18:15,18,19,22 35:3 50:7 52:14,18 putting 52:18</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify 23:2 question 12:7 16:25 23:5,9 25:20 34:15 38:20 39:1 43:22 46:7,9 questions 12:2 13:12 47:23 quite 14:1,11 18:6,7 18:12 21:9 40:10 quote 14:14,18</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 RadLAX 14:12 26:25 random 21:2 read 4:22 6:17 7:2,5 7:10,18 8:20 14:21 14:22 19:11 24:22 26:1 42:5 48:25 49:19,21 50:2,3 reading 11:10 18:23 35:9 42:1 47:18 49:25 51:19 really 15:7 37:10,11 40:19 44:20,20 46:24 reason 5:12 6:3 17:4 20:3,13 21:25 22:17 27:15 44:23 46:23 50:19 reasonable 3:24 27:12 34:21 45:5</p> |
|---|---|--|--|--|

| | | | | |
|--|--|--|---|---|
| <p>47:14 51:14 reasonably 10:5 reasons 5:16 19:20 25:15 REBUTTAL 2:12 48:1 recognition 39:16 recover 21:20 39:22 recovered 9:11 recovering 48:11 recovery 21:3 red 19:16 redundant 5:22 39:25 46:24 refer 30:6 36:20 reference 17:5 30:23 referred 12:10 48:5 refers 22:25 29:5 reflects 19:16 reformulated 12:8 regardless 40:24 regulators 32:19 reiterate 7:9 rejected 51:22,22 51:25 relation 3:24 47:14 51:14 relationship 31:9 32:21 relegated 22:21 relied 29:2 relief 32:7 37:12 rely 38:16 remaining 47:25 Repair 9:15 repeal 4:16 12:7 repealed 12:5,12 repealer 4:14 repeals 4:8,10 repeat 7:6 repeatedly 44:4 48:5 repeating 36:19</p> | <p>replicated 50:18 reply 6:18 report 9:23 Reporting 49:10 requests 48:20 required 13:15 requirement 12:7 12:10 reserve 12:25 respect 8:22 26:24 47:9 49:12 52:6 Respondent 1:22 2:11 24:4 response 11:18 responsible 22:6 result 44:14 reveal 41:7 Revenue 1:6 3:4 rid 15:24,25 16:2,5 16:7 right 7:15 18:1 29:18,25 31:11,19 40:14,21 41:23 42:23 43:12,14 44:25 45:9 46:1 50:11 rights 29:19 32:3,15 risk 10:8 22:14 32:16 36:1 ROBERTS 3:3 13:1 19:23 20:4 23:19 24:1 28:9,13,16 47:24 53:6 route 38:11 routinely 30:6 rule 3:11,16,16,17 4:13,17,21 6:21 7:4,14,17,18,21 8:5 10:11,19 12:4 12:9,10,15,16,19 12:22,23,24 13:8 13:18,20,21 14:5,5 14:9 15:4,8,24 16:1,2,6,7,13 17:7</p> | <p>17:8,9 18:6,12,13 22:19 23:16,22,22 24:9,24 25:4,4,19 25:24 30:3 32:12 36:22 37:8 38:8,12 39:10,14,17,25 40:4,9,15,16,19 43:5 46:17,18 47:8 48:12,14,18,18 50:7,12 53:3 rules 10:17 12:16 13:23 27:22 35:10 48:17 Rule's 3:12</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 1:21 2:1,10 3:1 24:3 safety 29:14 32:12 43:21 salt 30:7 same-sex 40:22 sample 21:2 sampling 20:23 sanction 35:13 sanctionable 7:1 sanctioning 26:18 sat 29:12 satisfied 16:13 saying 4:20 12:4 17:1 18:25 25:22 31:6 35:1 37:3 38:9 39:15 40:11 42:12 47:12 49:20 51:12 says 7:24 12:18 16:7 16:17,21 22:19 26:1 27:16 28:6,23 29:23 30:2 34:20 34:20,22 38:1 39:11 41:18,21 42:2,4,13 43:13,24 46:13,19 51:13 52:7</p> | <p>Scalia 4:4 17:21,25 26:24 30:19 33:2 44:18 45:4,8,12 46:4,6 49:16,24 51:3,12,16,17,24 52:2 Scalia's 12:7 scope 12:21 23:9 50:4 second 5:10 6:4,5,9 6:14 15:4,18 17:6 23:9 24:7,11,13 29:8 32:6 44:24,25 49:19 51:4 section 5:5 14:8 15:12 17:6,13 24:8 48:12 see 5:22 15:23,25 16:1,4,6 seeking 38:11 Senate 9:23 Senator 16:20 sense 34:8 38:25 42:6 sentence 4:1 5:10 5:13 6:4,5,6,9,9,14 6:20 7:5 11:4,7 15:5,18 16:15 17:6 17:10 18:8,15,19 18:19 19:13 23:11 23:14,18,20 24:7 24:13 34:21 41:12 41:17 42:13 44:19 44:24,25 45:20,23 47:8 49:19 50:17 50:18,22 51:4 sentences 5:5 6:6 19:4 30:2 separate 27:13 serious 9:21 45:20 serve 35:25 set 30:8 35:10 36:8 36:10,11 50:8 shield 20:14</p> | <p>shift 31:6,6 shifting 30:5 36:1 show 9:12 36:16 40:8 42:16 shows 29:1 44:10 49:6 side 11:25,25 32:14 significant 10:8 29:1 silly 46:24 similar 10:13 similarly 8:2 simple 22:19 38:19 simply 9:4 sister 52:8,10 situation 37:5 situations 14:17 six 47:25 small 10:9 Solicitor 1:17 sorry 33:1,18,18 41:9,14 52:23 sort 10:22 42:6 sorts 9:17 SOTOMAYOR 6:24 7:14,16,23 12:3,12 22:18,23 30:9,12,15 41:10 41:15,21,24 45:19 45:24 46:2 sought 38:8 sounds 35:14 speak 36:12 speaks 36:21 49:12 special 23:22 specific 13:9,15 14:2,4,6,16,18 23:4,23 27:1,5 28:1 33:22 34:13 34:14,15 49:18 specifically 9:23 22:10 25:13 staffer 15:10 standard 3:11 11:22 29:21</p> |
|--|--|--|---|---|

| | | | | |
|---|---|--|--|---|
| <p>standing 23:15 state 5:9 8:7 statement 44:3 states 1:1,12,19 2:7 3:15 4:17 10:15 13:4,23 24:13 stating 10:20 statute 3:13 4:21,22 4:24 7:11 9:20 10:2,6,23 11:11,20 12:6,10 13:22 14:21,23 16:19 17:14 21:19 24:23 25:9,25 26:10,11 27:12,16,24 28:5,6 28:20,23 29:2,3,5 29:6,17,22,23 34:23,24 35:1 37:1 39:12 40:18 43:16 43:20,24,24 46:19 48:20 50:23 52:4 53:3,4 statutes 6:15 7:8 8:1 8:12,13 9:14 12:18 12:20 20:17 25:1 29:19 30:10 33:13 39:17,18,20,24 41:8 43:19,19 47:4 51:9,21 statute's 5:21 statutory 14:2,4 20:19 24:12 strange 16:14 18:13 46:12 strip 24:9 strong 20:25 structure 24:11 subject 4:2 6:10 12:1 subjects 11:6 submitted 53:7,9 subsection 14:24 25:5 subset 14:18</p> | <p>substantial 9:22 41:19 substantively 13:19 successful 9:11 21:2 21:21 42:3 45:1,3 46:8 sued 36:23 suffering 9:22 32:8 suggest 21:10 suggested 48:15 49:1 suggesting 51:24 suggests 11:10 16:5 suit 4:3 9:11 11:8 20:10,20 22:15 35:20 37:6 42:18 suits 9:7,8 11:18,18 11:21,24,24 15:13 19:18 20:9,10,16 20:18 29:13,13 35:3 40:13 48:5,7 sum 51:7 super 43:10 superfluity 45:15 superfluous 44:20 44:24 46:3,10 supporting 1:19 2:8 13:5 suppose 31:11 37:18 38:4 40:15 40:15 51:3,3 supposed 36:6 Supreme 1:1,12 surprising 46:15 suspenders 46:15 symmetry 5:16 system 43:1</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 take 18:24 21:19 26:5 takes 38:11 talk 47:5</p> | <p>talking 14:15 15:11 18:18 41:3,15 44:8 talks 27:24 28:20 39:9 42:3 46:22 taxed 20:20 tease 52:8,8,11 technical 15:20 term 11:5,5 terms 3:13 26:14 51:2 terrible 35:15 territory 23:6 text 3:21 24:11,13 24:17,18 26:15 textual 13:14 Thank 13:1,6 23:25 24:1,5 47:24 48:3 53:5,6 theirs 31:20 thing 5:24 10:22 14:25 16:11 27:6 33:21 45:17 46:18 47:4,16 things 11:3 14:9 17:13 22:12 30:4 36:8 think 7:16 13:10 14:1,22 15:16 16:13,24 17:3 18:6 19:14 20:7,8,24 21:3 23:2,3,14,17 23:21 24:10 25:24 26:4 29:1,10 30:22 31:23 33:10 34:7 34:14 35:1,18,18 37:1 39:1 40:6,10 42:20,23 43:10,17 43:22 44:2,23 45:10,19 46:12 47:17 48:25 50:15 51:8 thinking 18:13 40:9 40:11,15,19 41:10 47:10</p> | <p>thinks 44:15 third 29:10 thought 17:8 20:13 37:10 48:19 50:21 thousand 21:6 31:17 thousands 22:15 threaten 52:20 three 28:25 thrown 32:17 tie 43:7 time 12:25 33:23 35:11 39:21,21 times 9:16 50:18 title 28:10,14,16 titles 28:1,6,9 today 19:14 50:16 top 34:17 tough 40:25 traditional 33:20 traditions 16:6 Transfers 28:20 treated 36:15 treatises 51:22 treats 36:9,10 51:1 trial 26:21 37:4 tried 15:10 43:23 trivialize 28:19 true 4:5 7:23 31:2 46:5 trump 34:8 trumps 25:23 47:8 Truth 8:14 9:1,14 35:20 try 6:2 20:23 37:15 trying 16:20,21 17:4 19:14,17,25 26:9 26:10 35:7,19,24 43:18 44:11 45:12 turns 34:14 twice 29:23 two 5:5 9:12,13 26:25 27:2 32:22 47:9 51:1 52:2 type 14:9 47:21</p> | <hr/> <p style="text-align: center;">U</p> <hr/> <p>Uh-huh 37:25 umbrella 35:21 unanimous 14:12 unclear 22:3 uncommon 30:2 understand 17:20 19:1 22:18 36:25 understood 50:6 unique 15:21 uniquely 19:6 20:8 21:14 United 1:1,12,19 2:7 13:4,23 universal 36:1 unmistakable 3:25 use 43:4,10 useful 19:21 uses 16:10 47:1 U.S 28:1 50:19 U.S.C 8:6 10:12,25</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 14:13 valiant 43:18 value 9:10 10:9 21:11 valve 32:12 verb 47:7 version 13:18,19,21 versus 34:13 victimized 36:23 view 39:23 44:12 views 32:19 33:3 volumes 36:21</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>want 5:23,24 7:8 8:12 30:2 33:7,20 40:11 wanted 5:9 9:7,8 10:10 11:12,13 22:12 29:12 40:12 46:23</p> |
|---|---|--|--|---|

| | | | |
|--|--|--|---|
| <p>Washington 1:8,15 1:18,21 wasn't 40:15 way 7:10 8:20 12:8 17:8 19:24 20:5 24:22,23 37:16 42:12 ways 10:10 29:1 36:10,11 Wednesday 1:9 weight 32:22 well-established 13:9 Well-taken46:6 went 37:4,12 46:3 47:6,20 weren't 10:6 16:25 we'll 16:22 we're 4:22 5:23 16:21 18:5,18 19:14 40:25 we've 8:2 28:11,11 28:12 wide 3:17 widespread9:21 win 29:1 31:15,21 48:7 winner 15:1 wins 38:4 wish34:22,25 woman 32:8 won 21:6 37:4 48:24 word 31:4 34:14 47:18 words 8:4 16:14 17:10 18:8,15,18 18:19 19:3 50:23 51:4 work 3:24 6:8 7:11 10:7 31:9 33:16 47:14 51:14 world 38:12,13,16 worse 8:21 31:24 32:1,2 35:24 36:15</p> | <p>44:13 worst4:23 worth 11:16 wouldn't 7:12 38:7 48:17 49:9 51:7,19 Wright 40:3 write 25:1 40:23,23 45:9 writes 25:1 written27:13 wrong 30:23 37:5 47:11 wrote 40:17 46:24</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,7 XI 28:16</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yeah 33:6 36:18 41:20 42:17,20 45:14 46:7 49:21 year 10:4</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>Zieve 1:15 2:3,13 3:6,7,9 4:15 5:4 6:1 7:5,15,21,24 8:11,16 9:3 12:9 12:14 19:5 47:25 48:1,3,22 49:21 50:1,11 51:8,16,20 52:1,4,13,18,25</p> <hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$1,000 20:19 32:5 32:17 48:6 \$3,000 31:16,21 \$4,000 21:5</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1,000 20:21 11 48:12,14,18 11-1175 1:4 3:4 11:06 1:13 3:2</p> | <p>11:59 53:8 12 13:20 120,000 10:3 13 2:7 14707(c) 10:13 15 8:6 15c(d)(2) 8:6 1692 39:7,8 1692k 25:12 1692k(a)(3) 14:8 17:6 23:7,11 24:8 18 29:3 1875 10:25 19 39:18 1919 38:16 1920 38:16 1927 48:12,14 1936 38:16</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 31:16,21 20 33:12 39:18 2012 1:9 22 40:3 24 2:11 39:21 25 12:18 39:21 28 10:25 21:2 29 29:3</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 14:24 21:5 44:19 49:19 30 29:11 31 19:16</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 21:5 48 2:14 49 10:12</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>50 28:1,6,9 54 7:4,14,17,21 8:5 12:4 22:25 24:9 25:24 32:7,12</p> | <p>36:22 37:8 38:8,12 39:14,17 40:1,4,9 40:15,16,19 46:17 46:19 47:8 50:7,12 54(d) 3:11,16,17 4:17,21 5:3 6:8,21 8:19,23,25 10:11 10:19 12:9,11,13 12:15,16,22,23 13:8 14:5,9 17:8,9 18:6,12 22:19 23:7 23:16,22 37:20,21 43:11,12 45:25 48:18 53:3 54(d)(1) 44:20 54(k) 37:19</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>7 1:9</p> |
|--|--|--|---|