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2 holding -- imaginary -- but the Ninth Circuit's wrong.

3 Two, the second sentence does not bar this  
4 regulation.

5 Three, there are other possible arguments;  
6 we send it back for reconsideration as to whether those  
7 arguments are good or bad.

8 MS. KOVNER: I'm -- I'm not sure I  
9 understand the second sentence of the whole -- so --

10 JUSTICE BREYER: They -- they -- we're  
11 saying that the second sentence, which is what they're  
12 talking about primarily in the briefs, the second  
13 sentence of (c) --

14 MS. KOVNER: Yes.

15 JUSTICE BREYER: -- "no lands which,"  
16 et cetera, you're right about that.

17 MS. KOVNER: Right.

18 JUSTICE BREYER: You're right about -- I  
19 mean I imagine --

20 MS. KOVNER: Yes.

21 JUSTICE BREYER: Then as to this first  
22 sentence, which I -- I don't think I focused on,  
23 particularly, we say go back and argue that.

24 MS. KOVNER: Your Honor, this case could be  
25 sent back to address both that and to address the

1 question of what is public lands, which is a question  
2 that wasn't addressed below. And we think it would be  
3 sufficient to say the second sentence doesn't -- the  
4 text clearly indicates the second sentence doesn't  
5 prohibit the application of those rules that are validly  
6 written to apply to both public and private lands within  
7 the parks.

8 This regulation is a rule that's been  
9 written to apply, regardless of who owns the lands in  
10 the parks. It's an exercise of our narrow authority --

11 JUSTICE SOTOMAYOR: No. That's you winning.  
12 (Laughter.)

13 I think Justice Alito has been asking you  
14 this question from the beginning.

15 MS. KOVNER: Yes.

16 JUSTICE SOTOMAYOR: What do you think the  
17 Ninth Circuit meant? And do you agree with its  
18 interpretation? As he pointed out --

19 MS. KOVNER: Yes.

20 JUSTICE SOTOMAYOR: -- you spent 49 pages of  
21 your brief arguing other things --

22 MS. KOVNER: Yes.

23 JUSTICE SOTOMAYOR: -- putting you to the  
24 test.

25 MS. KOVNER: Yes.

1 JUSTICE SOTOMAYOR: All right. So what do  
2 you think it held?

3 MS. KOVNER: So we think there are -- we  
4 have two stronger arguments, but we think part of what  
5 the Ninth Circuit said was the second sentence only  
6 limits rules that are specific to conservation system  
7 units. And "conservation system units" is defined in  
8 the statute to be parks units in Alaska.

9 And we think, yes, the plain text of this  
10 regulation only limits those kinds of rules. We don't  
11 think the Court needs to reach that --

12 JUSTICE SOTOMAYOR: Do you think the Ninth  
13 Circuit was right?

14 MS. KOVNER: Yes.

15 JUSTICE ALITO: So if there's a rule that  
16 applies to conservation -- it applies to Alaska, and it  
17 applies to the National Mall, that would be that you  
18 can't have a Hovercraft in Alaska or in the tidal basin.  
19 Under the Ninth Circuit's -- the Ninth Circuit's  
20 rationale, that would be 107 -- 103 -- 103(c) wouldn't  
21 buy that.

22 MS. KOVNER: I don't think there's any  
23 dispute that's what the plain text says. And the reason  
24 I don't think that's ridiculous or irrational,  
25 Your Honor, is because when ANILCA was enacted, there

1 was a very well-settled regulatory regime that didn't  
2 subject private lands to any kind of plenary authority.  
3 So Congress had every reason to -- may I just finish my  
4 sentence?

5 Congress had every reason to expect that  
6 would remain the rule, nationwide. And what it was  
7 concerned about was that the Park Service would deviate  
8 from that approach in Alaska when these new lands were  
9 added.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Findley, you have two minutes remaining.

12 REBUTTAL ARGUMENT OF MATTHEW T. FINDLEY

13 ON BEHALF OF THE PETITIONER

14 JUSTICE KENNEDY: Just in the two minutes,  
15 can you address the very last point the Solicitor  
16 General made, please?

17 MR. FINDLEY: Yes. And that's -- it's  
18 simply backwards to what 103(c) was supposed to do.

19 Let's take Joe Jones' house, and let's think  
20 about it differently. Let's think about this as a  
21 native corporation's land allotment.

22 You have 40 percent of their land allotment  
23 that they were given under Native Claim Settlement Act,  
24 land that was given to them in exchange for  
25 extinguishing their entire claim for aboriginal land

1 rights. It's there for economic development.

2 It's about to be surrounded by these ANILCA  
3 parks. It's worth taking a step back. What does 1 --  
4 Section 103(c) doing? It is saying before ANILCA was  
5 passed, you're not part of the park and you're not  
6 subject to Park Service regulation. The day after  
7 ANILCA was part -- excuse me. The day after ANILCA is  
8 passed, you're still not part of the park and you're  
9 still not subject to Park Service regulation.

10 The government's position here, they keep  
11 saying their authority is limited, and Mr. Chief Justice  
12 hit the nail on the head. They're relying on the  
13 Organic Act which allows them to enact any regulations  
14 they feel necessary at any time.

15 They've already done that with the 9(b) oil  
16 and gas regulations, seeking to apply those to  
17 non-Federal land within Alaska. And the hits are going  
18 to keep on coming unless this Court stops this  
19 interpretation and goes back to what 103(c) was meant to  
20 do, which was to prevent the Park Service from taking  
21 these lands that aren't owned by the government and  
22 regulating them as though they are part of the park.

23 And the second point want -- I -- I want to  
24 make -- I imagine about 45 seconds at this point:  
25 There's a lot of discussion about whether ANILCA covers

1 navigable waters or not. The clear statement rule  
2 covers that question. And in that circumstance, it's a  
3 question of is anything in the statute clearly saying we  
4 are taking away State authority over navigable waters?

5           You will not find the term navigable waters  
6 in the statute once.

7           Let's contrast this to other park-enabling  
8 legislation. This is for Olympic National Park, and  
9 you'll find this at 16 U.S.C. 251(n). And here's what  
10 it says: "The boundary of Olympic National Park  
11 Washington is" -- if I may just finish the quote -- "is  
12 hereby revised to" -- "is hereby revised to include  
13 within the park all submerged lands and waters of Lake  
14 Ozette, Washington, and the Ozette River, Washington."

15           There's your clear statement.

16           Thank you.

17           CHIEF JUSTICE ROBERTS: Thank you, counsel.

18           Case is submitted.

19           (Whereupon, at 12:21 p.m., the case in the  
20 above-entitled matter was submitted.)

21

22

23

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25



<b>A</b>				
<b>a.m</b> 1:16 3:2	<b>ago</b> 38:15	<b>Anchorage</b> 1:18,21	60:9 63:16	42:21,23,23 43:2
<b>ability</b> 26:6 28:1,12 28:14,20 41:21 47:10	<b>agree</b> 34:15 35:21 42:22 43:1 55:9 60:17	<b>ANILCA</b> 3:10,11 3:18 5:18,20 7:20 8:1,10,11 11:8 12:19 18:3 21:19 21:20 22:2,19 24:1 27:23 30:9 31:14 36:14,15,22 40:18 47:22 58:11 61:25 63:2,4,7,7 63:25	<b>applying</b> 14:23 20:1,3 48:16	43:9,18 45:12,14 45:23 46:4,24 47:9 48:22,24 49:10,18,24 50:4 51:2,9,17 52:2,7 52:10,17 53:12,16 55:16 57:22 58:9 58:13,21 60:10 62:2 63:11 64:4
<b>able</b> 12:22 47:23 53:10 54:11	<b>agreement</b> 11:4	<b>answer</b> 7:6 17:25 29:25 46:7 55:17	<b>approach</b> 62:8	59:6,23,25 63:3 63:19
<b>aboriginal</b> 62:25	<b>Ah</b> 45:9 57:10	<b>APPEARANCES</b> 1:17	<b>appropriate</b> 9:1,1 53:10,11	<b>back</b> 6:9 20:21 55:6 59:6,23,25 63:3 63:19
<b>above-entitled</b> 1:14 64:20	<b>ahead</b> 46:6	<b>appendix</b> 33:23 45:21	<b>area</b> 5:13 26:23	<b>backwards</b> 62:18
<b>Absolutely</b> 19:10	<b>Air</b> 9:10 18:6 19:2 19:9,14	<b>applicable</b> 8:13,14 8:19 9:11 12:20 16:14 17:18 18:4 18:14,17,21 20:1 20:2 24:17 31:25 46:11 51:14 52:1 58:7	<b>areas</b> 48:11,13	<b>bad</b> 59:7
<b>Absurd</b> 10:2	<b>AL</b> 1:9	<b>application</b> 60:5	<b>argue</b> 53:2 59:23	<b>balance</b> 21:25
<b>absurd</b> 10:2	<b>Alaska</b> 1:7,18,21 1:21 2:7 3:12,16 5:4 10:7,8,9,16,22 10:24 11:2 15:11 21:12,20,24 22:3 22:5,6,11 26:3 28:10,18 29:7 30:21 31:15 33:24 40:14 41:6,11 54:20 55:1 61:8 61:16,18 62:8 63:17	<b>applies</b> 3:23 9:24 13:10 17:7 29:9 31:15 32:1 37:11 37:19,20 38:11 39:1,13,14 40:18 41:15 54:17 55:23 56:14 57:13 61:16 61:16,17	<b>arguing</b> 5:15 11:3 60:21	<b>balanced</b> 3:18 22:12
<b>accompany</b> 23:4	<b>Alaska's</b> 21:17 23:16 27:15,15 28:5,12,18,20	<b>apply</b> 5:23,24 6:6 10:13 12:4 13:6 15:5,7,10 16:1,4 16:19 17:12 23:15 29:2,4,6 31:14 32:4 37:7,11,21 38:4,18 39:23,25 40:20,21 41:2,5 41:10 46:9 52:4 56:25 57:20 60:6	<b>argument</b> 1:15 2:2 2:5,9,12 3:3,6,23 15:15,19 21:11 23:9,12,14 27:4 30:16 31:1 32:24 34:21 37:15 38:1 39:17 43:7 48:9 62:12	<b>balancing</b> 20:23
<b>achieve</b> 30:24	<b>Alaska-specific</b> 9:25 32:12 40:18 40:19		<b>arguments</b> 32:21 59:5,7 61:4	<b>bar</b> 59:3
<b>acquire</b> 20:17	<b>Alaskan</b> 25:7		<b>Army</b> 12:11	<b>bargain</b> 3:10
<b>acres</b> 21:21	<b>alcove</b> 25:13		<b>articulated</b> 35:17	<b>barred</b> 31:13 32:11
<b>Act</b> 3:13,14 7:3 8:4 9:4,10 18:6,6 19:2 19:2,3,9,14 22:6,7 25:10 42:11 46:19 49:13,18 53:14 62:23 63:13	<b>Alito</b> 9:15,20 31:4 32:8 40:10 41:5 41:10 53:19 58:14 60:13 61:15		<b>aside</b> 22:21 49:2,9 49:14 54:10	<b>barrier</b> 16:25
<b>acting</b> 40:7	<b>allotment</b> 62:21,22		<b>asking</b> 60:13	<b>based</b> 32:15
<b>activities</b> 5:21 40:17 42:4 43:21 45:24 48:1,4 54:4 55:19	<b>allow</b> 43:13 50:20 54:6		<b>assert</b> 7:11 12:4	<b>baseline</b> 22:16
<b>activity</b> 50:24	<b>allowed</b> 16:21 32:3		<b>asserting</b> 7:13 24:4 24:13	<b>basic</b> 42:14
<b>actual</b> 7:3 51:11	<b>allows</b> 42:22 53:22 63:13		<b>Assistant</b> 1:20,23	<b>basin</b> 49:7 54:12 61:18
<b>added</b> 62:9	<b>alludes</b> 32:4		<b>assume</b> 39:10	<b>basins</b> 54:13
<b>addition</b> 13:6	<b>alluding</b> 41:15		<b>assuming</b> 39:20 53:5,6	<b>basis</b> 9:15,20 10:19 23:6 36:11 40:17
<b>address</b> 25:24 59:25,25 62:15	<b>amicus</b> 1:21 2:7 21:12		<b>attached</b> 10:21,22	<b>befalls</b> 51:12
<b>addressed</b> 60:2	<b>analogy</b> 37:16		<b>attempt</b> 21:25	<b>began</b> 3:12 22:5
<b>addressing</b> 47:1	<b>Analytically</b> 30:3		<b>attempting</b> 26:14	<b>beginning</b> 60:14
<b>adequate</b> 22:10			<b>Attorney</b> 1:20	<b>behalf</b> 1:18,25 2:4 2:11,14 3:7 30:17 62:13
<b>adjoins</b> 51:1			<b>authorities</b> 12:18 30:24 31:2 55:15	<b>belief</b> 52:22
<b>adjudicated</b> 5:5			<b>authority</b> 5:16 7:9 7:10,15,21,22,23 11:18,19 13:1,2,4 20:20 22:15 24:24 25:3 36:12 37:1 38:9 40:5,8 41:19 41:23,25 42:8,14	
<b>Administration</b> 17:9,10				
<b>advantage</b> 10:7				
<b>Aeronautics</b> 17:9,9				
<b>agencies</b> 13:3 16:11 22:18				
<b>agency</b> 26:14,19				
<b>agency's</b> 28:1				

<p><b>believe</b> 24:13  <b>believed</b> 9:1  <b>bereft</b> 7:21  <b>BERT</b> 1:6  <b>best</b> 15:15 20:11  <b>beyond</b> 52:15,22  <b>boat</b> 4:7  <b>boating</b> 5:20 11:21              12:22,25 42:4              43:20 45:23 54:3              55:18 58:16  <b>books</b> 28:12  <b>Botstein</b> 1:20 2:6              21:10,11,14 23:3              23:11,24 24:9,20              25:1,8,16,25 26:9              26:13 27:13,22              30:1,14  <b>boundaries</b> 4:3              13:12,16,19 38:21              42:9 43:14 44:4,6              45:1,7,8,10 53:24              55:3,25 57:6,9,14              58:22,24  <b>boundary</b> 39:3              44:2,11,12 64:10  <b>Breyer</b> 13:8,21              14:10,15,19,22              15:20,24 16:12              17:6 26:8 28:23              29:25 32:4 37:13              37:18,23 38:7,14              38:20,23 39:1,5              39:11 41:7 43:23              44:15,22 45:3,8              53:18 55:22 56:3              56:13,16,19,21              57:1,3,10,13 59:1              59:10,15,18,21  <b>brief</b> 10:23 32:13              40:14 60:21  <b>briefing</b> 15:19  <b>briefs</b> 59:12  <b>broad</b> 35:22  <b>broader</b> 54:2  <b>broadly</b> 33:17</p>	<p>52:17,20  <b>brought</b> 15:22  <b>building</b> 12:14  <b>burn</b> 9:12  <b>buy</b> 61:21</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>c</b> 2:1 3:1 59:13  <b>C.F.R</b> 16:3  <b>call</b> 8:25 23:7  <b>called</b> 4:10 5:4              12:15  <b>camp</b> 10:8  <b>campfire</b> 37:20  <b>CAPACITY</b> 1:7  <b>care</b> 28:11  <b>carefully</b> 3:18  <b>carries</b> 8:10  <b>carved</b> 47:15  <b>carves</b> 52:1  <b>case</b> 3:4 14:16              18:19 21:16 27:23              30:5 32:1 39:14              43:25 51:8,10              53:13 57:21 59:24              64:18,19  <b>cases</b> 23:18 27:16  <b>cause</b> 50:25  <b>central</b> 23:19  <b>certain</b> 29:3  <b>certainly</b> 13:1              52:19  <b>cetera</b> 59:16  <b>challenge</b> 53:11  <b>change</b> 16:2,11              28:20  <b>Chevron</b> 51:25              52:7,8  <b>Chief</b> 3:3,8 6:20              12:10 21:8,10,14              22:25 23:5 29:23              30:1,13,15,18              34:10,17,20,25              36:5 39:21 46:5              49:21 50:7,14              51:3 52:6 62:10</p>	<p>63:11 64:17  <b>children</b> 28:12  <b>choice</b> 28:5  <b>choices</b> 28:13  <b>chose</b> 22:1 58:2  <b>Circuit</b> 5:3 7:1 9:18              9:22 10:12 31:5              31:11 32:15 51:21              60:17 61:5,13  <b>Circuit's</b> 9:16 10:6              31:10 40:13 41:13              59:2 61:19,19  <b>circumscribed</b>              49:24  <b>circumscription</b>              52:10  <b>circumstance</b> 51:1              64:2  <b>circumstances</b>              47:24 52:4  <b>cite</b> 40:14  <b>claim</b> 6:19 62:23,25  <b>claiming</b> 5:10,12              11:6,8 34:22  <b>Claims</b> 3:13 22:6  <b>clarify</b> 31:1  <b>clarifying</b> 3:21  <b>class</b> 32:2  <b>Clause</b> 27:24  <b>Clean</b> 9:10 18:6,6              19:2,2,9,14  <b>clear</b> 6:11,17 7:1,20              8:24 11:9 20:12              20:14,23 21:4              27:15,16 28:19              30:5 34:22 41:18              45:3,4 50:3 51:6              52:18,19 57:18,19              64:1,15  <b>clearly</b> 48:12,23              58:11,12 60:4              64:3  <b>client</b> 4:6  <b>coast</b> 10:24 11:1,14              13:2 24:17,20              25:6,7,8,10,13,16</p>	<p>26:10  <b>code</b> 9:5  <b>column</b> 26:5  <b>come</b> 12:15 25:7,22  <b>comes</b> 41:25  <b>coming</b> 63:18  <b>comment</b> 40:25  <b>Commerce</b> 27:24  <b>common</b> 28:9  <b>completely</b> 23:17              37:14  <b>completing</b> 22:13  <b>complicated</b> 14:17              28:24 29:20 30:2  <b>composed</b> 49:16  <b>concede</b> 32:17  <b>conceded</b> 4:25  <b>conceding</b> 43:5,6  <b>concern</b> 8:5  <b>concerned</b> 9:9 62:7  <b>concerning</b> 42:4              43:20 45:23 54:3              55:18  <b>concrete</b> 21:22  <b>conduct</b> 28:13  <b>confer</b> 58:25  <b>confirm</b> 48:24  <b>confirms</b> 47:19              48:20 49:8  <b>Congress</b> 3:11 7:14              10:3,7 16:17 18:5              19:13,17 21:20,22              22:1,2,12,17,20              23:24 24:1,9,11              26:19 27:9,16              28:4 30:20 44:25              49:2,9,14 54:10              54:10 55:1 58:1              62:3,5  <b>Congress's</b> 21:16              28:16  <b>congressional</b> 30:6  <b>conservation</b> 3:18              20:24 22:13 36:22              42:10 44:5,6              46:12 49:15 61:6</p>	<p>61:7,16  <b>conservation-spe...</b>              31:22  <b>considers</b> 50:10  <b>consistent</b> 35:25  <b>consistently</b> 58:21  <b>consists</b> 57:15  <b>construed</b> 52:14  <b>contains</b> 14:1  <b>contemplate</b> 58:11              58:12  <b>contemplates</b> 47:22  <b>contemplating</b>              48:12 49:9  <b>contested</b> 5:7,9  <b>context</b> 10:1 20:5,7              20:25  <b>continuation</b> 22:4  <b>continued</b> 3:13  <b>contrary</b> 10:1  <b>contrast</b> 64:7  <b>contravene</b> 53:3  <b>control</b> 5:13 11:13              23:18,22,25 24:2              24:10 27:14 28:21              48:3  <b>controls</b> 11:4 36:22  <b>conveyed</b> 23:1              46:10  <b>corporation</b> 8:3,3              22:22  <b>corporation's</b>              62:21  <b>corporations</b> 3:15  <b>Corps</b> 7:22 12:11              12:15 13:2  <b>correct</b> 31:16 47:17              48:20 57:4 58:3  <b>corrected</b> 32:10  <b>correctly</b> 35:17  <b>correctness</b> 31:10  <b>counsel</b> 21:8 30:13              62:10 64:17  <b>country</b> 31:15  <b>couple</b> 26:1  <b>Court</b> 1:1,15 3:9</p>
--	---	--	--	--

<p>21:15,24 27:16 28:21 30:3,19 53:1 55:10 57:23 58:5,10 61:11 63:18 <b>Court's</b> 23:18 <b>cover</b> 5:17 <b>covered</b> 4:4 31:20 41:16 <b>covers</b> 63:25 64:2 <b>created</b> 18:2 27:9 30:20 <b>creates</b> 30:4 <b>creating</b> 49:5 <b>creation</b> 28:17 <b>critical</b> 34:4 <b>crystal</b> 6:17 7:1,20 8:24 11:8 21:4 <b>CSU</b> 53:24,25 55:3 58:15,19 <b>CSU's</b> 42:5 <b>CSUs</b> 8:1 <b>curiae</b> 1:21 2:7 21:12</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b> 3:1 <b>D.C</b> 1:11,24 <b>damn</b> 12:14 <b>danger</b> 50:25 51:3 51:3 <b>day</b> 8:9 63:6,7 <b>deal</b> 43:25 53:5 <b>decided</b> 31:6 <b>decision</b> 5:4 9:16 9:21 31:10 32:15 <b>deemed</b> 14:5 42:11 44:7 55:4 <b>defend</b> 31:7 40:16 <b>deference</b> 52:7,8 <b>defined</b> 33:2 34:3,4 35:24 42:11 56:5 61:7 <b>defines</b> 33:23 <b>defining</b> 13:22 <b>definition</b> 6:10</p>	<p>33:19,21 56:4 <b>delegate</b> 24:2 <b>delegated</b> 11:18 <b>delegation</b> 25:11 <b>denied</b> 7:14 11:18 12:7 <b>Department</b> 1:24 <b>depend</b> 55:16 <b>deprive</b> 29:6 <b>describe</b> 48:1,2 <b>described</b> 52:15 <b>description</b> 48:10 <b>determining</b> 52:8 <b>development</b> 3:16 63:1 <b>deviate</b> 62:7 <b>devoted</b> 32:16 <b>difference</b> 51:25 <b>different</b> 19:25 28:6 35:10,19 <b>differently</b> 62:20 <b>difficulty</b> 39:7 <b>direct</b> 21:2 31:23 <b>DIRECTOR</b> 1:8 <b>disagree</b> 33:4 51:20 <b>disavows</b> 7:3 <b>discussing</b> 42:21 <b>discussion</b> 63:25 <b>dispute</b> 6:13 15:21 57:19 61:23 <b>disputed</b> 53:13 <b>distinction</b> 45:1,9 47:7,8 57:5 <b>distinguish</b> 19:13 19:24 <b>distinguishes</b> 19:8 <b>distinguishing</b> 23:6 <b>doctrine</b> 36:7 <b>doing</b> 12:13 20:11 50:21 63:4 <b>doubt</b> 19:4 21:3 <b>downstream</b> 58:17 <b>drafted</b> 57:16 <b>dramatically</b> 28:20 <b>draw</b> 19:11 21:1,1 44:25</p>	<p><b>drops</b> 16:17</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>E</b> 2:1 3:1,1 <b>economic</b> 3:15 22:11 28:14 63:1 <b>effect</b> 55:11 <b>either</b> 4:14 15:11 39:11,12 <b>emissions</b> 9:10 <b>enabling</b> 25:2 30:4 <b>enact</b> 25:8 42:22 43:20 45:23 46:25 58:23 63:13 <b>enacted</b> 3:11 6:19 8:10,11,22 17:14 17:24 44:25 45:22 61:25 <b>encompass</b> 28:2 <b>encroachments</b> 21:23 <b>enforcement</b> 48:4 <b>enforcing</b> 54:15 <b>Engineer</b> 7:23 <b>Engineers</b> 12:11,15 13:3 <b>ensure</b> 49:6 <b>entire</b> 49:7 54:12 62:25 <b>entirely</b> 49:16 <b>entirety</b> 36:2 <b>entitled</b> 31:7 51:24 <b>environmental</b> 12:24 51:5 <b>EPA</b> 7:22 9:9 12:21 12:23 13:2 17:8 25:22 26:9,11 <b>equates</b> 56:4 <b>ESQ</b> 1:18,20,23 2:3 2:6,10,13 <b>essentially</b> 31:25 <b>established</b> 57:7 <b>et</b> 1:9 59:16 <b>evidence</b> 10:3 <b>exactly</b> 4:19 8:24 12:17,18 32:16</p>	<p>47:8 57:3 <b>example</b> 28:6 49:4 49:12 50:23 <b>examples</b> 48:25 <b>exception</b> 11:22 <b>exchange</b> 62:24 <b>excluded</b> 10:5 <b>excludes</b> 6:7 <b>exclusive</b> 30:7 <b>exclusively</b> 18:21 <b>excuse</b> 20:15,19 63:7 <b>exempt</b> 18:5 <b>exercise</b> 7:9 24:11 53:11 60:10 <b>exercising</b> 46:4 <b>expand</b> 58:2 <b>expansive</b> 33:7 <b>expect</b> 62:5 <b>explain</b> 18:11 31:1 32:6 <b>explicit</b> 25:11 <b>explicitly</b> 22:12 <b>express</b> 30:21 40:7 43:18 <b>expressed</b> 35:3 <b>expressly</b> 7:14 11:18 45:22 47:22 <b>extending</b> 17:1 <b>extension</b> 13:1 <b>extinguishing</b> 62:25</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>face</b> 21:17 <b>fact</b> 17:2,3 22:24 23:16 30:10 <b>fall</b> 42:7 <b>far</b> 13:17 36:19 <b>fashion</b> 26:7 <b>Federal</b> 4:15,16,18 5:13,21,25 7:8,21 8:18,19 9:5 11:25 13:3 17:8,9 20:15 20:19 23:22 26:24 27:9,10,10,20</p>	<p>28:18,19 33:1,24 33:25,25 36:20,21 39:9,12,13,14 40:15 42:17 54:14 <b>Federal/State</b> 21:25 <b>federally</b> 3:25 4:8 25:20,21 <b>Federally-owned</b> 38:5,18 <b>Feds</b> 27:2 <b>feel</b> 63:14 <b>feet</b> 17:11 <b>filed</b> 32:13 <b>finally</b> 3:11 <b>find</b> 64:5,9 <b>Findley</b> 1:18 2:3,13 3:5,6,8,20 4:2,11 4:13,17,19,21,24 5:3,9,14,23 6:4,9 6:24 7:12,19 8:15 8:21 9:18,22 11:6 11:15,17 12:1,17 12:23,25 13:18 14:21 15:17,21,25 16:8,9,20 17:13 17:23 18:8,23 19:10,16,21 20:5 21:9 62:11,12,17 <b>finish</b> 62:3 64:11 <b>fire</b> 8:19 9:10 <b>fireplace</b> 29:3 37:25 39:1 <b>fires</b> 9:6,7 <b>first</b> 8:18 20:6,9 26:1 30:3 31:1 38:4 41:24 42:8 43:7,23 47:21 49:2 50:18,19 53:21,23 55:11,12 59:21 <b>fish</b> 10:9 12:14 30:22 <b>Flats</b> 28:7 <b>flow</b> 36:10 <b>fly</b> 10:10</p>
--	---	---	--	--

<p><b>focus</b> 43:11,17 48:19 <b>focused</b> 32:21 59:22 <b>focuses</b> 47:20 <b>focusing</b> 17:6 <b>following</b> 44:23,25 <b>Forest</b> 17:19,21,23 <b>forget</b> 12:14 <b>frankly</b> 10:3 <b>free-flowing</b> 30:22 <b>Frost</b> 1:6 3:4 <b>further</b> 3:15 7:17 7:20 21:6,23 <b>furthered</b> 22:7 <b>further</b> 28:14</p> <hr/> <p style="text-align: center;"><b>G</b></p> <p><b>G</b> 3:1 <b>gas</b> 40:16 63:16 <b>general</b> 1:20,24 36:11 42:23 53:14 54:16,22,23,25 55:10 58:1 62:16 <b>generally</b> 3:24 9:11 12:20 20:1,2 31:24 <b>generally-applic...</b> 19:25 <b>GINSBURG</b> 23:21 <b>give</b> 15:2 26:19 48:25 55:11 <b>given</b> 24:1,12 62:23 62:24 <b>gives</b> 25:10 47:9 51:22 <b>giving</b> 47:16 <b>go</b> 19:17 20:17 26:2 32:22 37:16 46:5 55:21 59:23 <b>goal</b> 22:12 <b>goals</b> 3:19 22:7,13 22:13 28:16 30:24 <b>goes</b> 10:10 48:14 63:19 <b>going</b> 9:10 10:4</p>	<p>12:3 14:15 16:3 26:4 33:20,25 43:15 47:23 48:2 48:3,16,24 49:10 50:24 51:11 52:14 52:23 54:11,14 58:13 63:17 <b>good</b> 22:4 28:4 59:7 <b>gotten</b> 17:3 <b>government</b> 7:8,21 15:18 20:15,19 27:20 35:13 42:17 63:21 <b>government's</b> 23:9 63:10 <b>governs</b> 54:23 55:10 <b>grand</b> 3:10 <b>grant</b> 40:7 41:20 43:18 45:11,13 <b>granted</b> 3:14 <b>grants</b> 45:22 <b>green</b> 26:23,24 <b>groceries</b> 28:11 <b>ground</b> 25:3 31:8 40:17 <b>Guard</b> 13:2 24:17 24:21 25:6,8,10 25:13,17 26:10 <b>guess</b> 18:10 26:21</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>haphazard</b> 10:25 <b>happen</b> 10:4 25:22 <b>happy</b> 19:1 <b>Harbors</b> 25:10 <b>harm</b> 50:25 51:4,11 <b>hat</b> 13:6 <b>head</b> 63:12 <b>hear</b> 3:3 15:16 24:7 <b>held</b> 23:18 31:12,17 34:1 41:21 61:2 <b>help</b> 13:14 24:25 <b>high</b> 17:11 46:20 <b>history</b> 52:25 <b>hit</b> 63:12</p>	<p><b>hits</b> 63:17 <b>hold</b> 6:12,14 34:15 34:17 35:6,22 36:2,15 <b>holding</b> 32:9 35:9 35:10,20 40:13 59:2 <b>holdings</b> 42:7 <b>holds</b> 34:9,12 35:13 35:18 42:17,18 <b>Honor</b> 15:17 23:3 23:17 24:9,20 25:1,16,25 30:3 30:14 34:7,19 35:17 37:5 38:3 38:12 39:7,10 41:13 42:21,23 43:7 48:18 53:8 55:9 56:15,20 57:7,23 58:4 59:24 61:25 <b>Honor's</b> 56:23 <b>honoring</b> 21:16 <b>house</b> 37:20 38:24 39:2,8 44:18 45:4 62:19 <b>houses</b> 29:1 <b>hovercraft</b> 4:14 5:11 8:23 12:3 13:10 15:9 16:22 29:8 31:12,14,20 32:11 37:10,18 55:23 56:13 61:18 <b>hovercrafts</b> 25:7,14 <b>hundred</b> 28:8 <b>hundreds</b> 28:9 <b>hunt</b> 10:9</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>idea</b> 8:8 28:17 48:15 52:9 <b>identical</b> 14:2 <b>identically</b> 56:6 <b>imaginary</b> 59:2 <b>imagine</b> 43:25 59:19 63:24</p>	<p><b>impacts</b> 51:5 <b>imperfect</b> 19:19 <b>important</b> 3:19 15:3 27:12,13 <b>impose</b> 55:18 <b>improper</b> 9:23 <b>in-holding</b> 19:1 <b>in-holdings</b> 56:9 <b>inadvertently</b> 18:1 <b>include</b> 23:1 34:5 64:12 <b>included</b> 8:1,2 14:5 42:12 44:7 55:4 <b>includes</b> 12:8 13:25 34:8 45:2 <b>including</b> 13:14 42:3 48:4 49:7 <b>incredibly</b> 10:2 <b>Indian</b> 44:18 <b>indicates</b> 60:4 <b>indication</b> 30:6 <b>information</b> 4:5 <b>inholders</b> 40:3 <b>inholdings</b> 4:1,9 22:21,25 23:8 27:3,5,6 37:12 40:6 49:25 50:6 51:7,10,17 <b>initial</b> 36:10 <b>inside</b> 44:2 <b>intended</b> 22:2 <b>intent</b> 53:3 <b>interest</b> 7:4 34:16 34:18 35:6,18,22 35:23,24 36:2,15 36:16 <b>interested</b> 29:24 <b>interesting</b> 43:24 <b>interests</b> 6:24 34:5 34:8,11,13 <b>interior</b> 29:2 42:1 <b>interpret</b> 52:17,20 <b>interpretation</b> 21:18 32:18 40:24 60:18 63:19 <b>interpreted</b> 50:18</p>	<p>50:20 52:25 <b>interpreting</b> 58:6 <b>irrational</b> 61:24 <b>islands</b> 10:4 26:17 <b>issuance</b> 48:4 <b>issue</b> 3:22 5:16 7:24 9:11 24:1,14 31:9 42:14 <b>issued</b> 5:4 9:4 <b>issues</b> 9:19 12:12</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>James</b> 29:11 <b>January</b> 1:12 <b>Joe</b> 44:18 45:4 62:19 <b>John</b> 1:3 37:20,24 38:8,23 39:8 <b>Jones</b> 29:11 <b>Jones'</b> 44:18 45:4 62:19 <b>Jones's</b> 37:20,24 38:8,23 39:8 <b>Judge</b> 5:5 <b>judgment</b> 8:25 31:7 <b>jurisdiction</b> 6:2 11:1,22,23,25 12:5,8 13:11,12 21:19 30:7 55:8 55:24 <b>Justice</b> 1:24 3:3,8 3:20 4:5,12,16,18 4:20,22,25 5:7,10 5:19 6:1,6,20 7:7 7:16 8:12,17 9:15 9:20 10:18 11:12 11:16,20 12:10,21 12:24 13:8,21 14:8,10,15,19,22 15:20,24 16:8,10 16:12 17:5,6,17 18:7,10 19:7,12 19:19,23 21:8,10 21:14 22:25 23:5 23:21 24:6,16,22 25:5,12,18 26:8</p>
---	---	--	---	---

<p>26:10,21 27:19 28:23 29:23,25 30:1,13,15,18 31:4 32:4,8,23 33:8,11,14,16,20 34:10,17,20,25 35:9,12,19 36:5 36:19,25 37:6,13 37:18,23 38:7,14 38:20,23 39:1,5 39:11,21 40:10 41:5,7,8,10,22 43:4,8,23 44:15 44:17,22 45:3,8 45:13,17,19,25 46:5,13,16,21 47:1,4,7 48:7 49:21 50:7,14 51:3,13,19 52:6 52:20 53:2,18,19 54:16,19,22,25 55:6,21,22 56:3,8 56:13,16,19,21 57:1,3,10,13,25 58:14 59:1,10,15 59:18,21 60:11,13 60:16,20,23 61:1 61:12,15 62:10,14 63:11 64:17</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>KAGAN</b> 3:20 4:5 4:12,16,18,20 16:8,10 18:7,10 19:7,12,19,23 25:18 26:10,21 48:7 <b>keep</b> 63:10,18 <b>Kennedy</b> 4:22,25 5:7 8:12,17 17:5 17:17 24:16,22 27:19 41:8 47:7 51:13,19 55:21 62:14 <b>key</b> 48:9 <b>kind</b> 34:21 47:15</p>	<p>51:11 62:2 <b>kinds</b> 5:24 19:25 52:15 61:10 <b>Kleinfeld</b> 5:5 <b>know</b> 12:13 14:11 15:14,18 16:17 19:1 22:2 23:7 26:22 29:1,17 36:4,8 51:20 53:6 <b>Kovner</b> 1:23 2:10 30:15,16,18 31:18 32:20 33:6,10,13 33:15,18,22 34:15 34:19,24 35:5,11 35:16,21 36:13,24 37:1,10,17,21 38:3,12,16,22,25 39:4,6,18 40:4,23 41:9,12 42:20 43:6 44:14,21,24 45:6,11,16,18,20 46:2,7,15,18,24 47:3,6 48:18 50:3 50:12,17 51:6,16 51:23 52:12,24 53:8 54:1,18,21 54:24 55:5,9 56:2 56:12,15,18,20,23 57:2,4,11,18 58:4 58:20 59:8,14,17 59:20,24 60:15,19 60:22,25 61:3,14 61:22</p> <hr/> <p style="text-align: center;"><b>L</b></p> <p><b>lacks</b> 24:23 <b>Lake</b> 64:13 <b>lakes</b> 49:8 <b>land</b> 3:11,14 4:1,15 4:18 7:25 8:3,23 9:2 10:5,13,14 12:8 15:7 16:22 16:24 17:2,14 19:9 21:21 22:13 22:18 23:8,8 26:13,23,24 27:1</p>	<p>27:7,10,25 28:25 29:6,10 34:22 36:1,17 43:2 44:1 45:1 49:3,9 53:24 56:9 57:8,15 62:21,22,24,25 63:17 <b>lands</b> 5:12,13,21,22 6:10,11,14,16 7:3 9:6,7 11:9,10,25 14:1,2,4,4 15:5,10 16:5,15,19 17:19 17:24 18:2,4,6,13 18:14,16,18,20,22 20:1,2,3,9,12,16 20:20 21:23 22:22 23:1,4,6,13,14,19 25:20,21 26:2,3,4 26:15 27:9 28:3 28:19,19 30:7,11 30:12 32:1,5 33:1 33:2,6,23,23,24 33:25,25 34:1,3,4 34:5,8 36:17,22 36:23 37:2,7,11 38:5,11,18 39:9 39:12,13,14,15,16 39:24 40:1 41:2 41:11,16,19 42:9 42:10 43:8,10 44:4,7 45:2,2,4 46:9,11 47:10,14 47:24 48:2,16 50:21,24 51:8,12 52:2,5 55:3 56:10 57:6,21 58:7 59:15 60:1,6,9 62:2,8 63:21 64:13 <b>language</b> 43:12,17 54:3 <b>Laughter</b> 14:14,18 19:22 29:22 32:19 46:23 57:17 60:12 <b>laundry</b> 13:3 <b>law</b> 12:19</p>	<p><b>lawlessness</b> 26:17 <b>leads</b> 10:2 <b>leave</b> 58:5 <b>legislation</b> 22:5,7 25:2 28:16 30:4 64:8 <b>let's</b> 8:17,17 12:21 41:22,22 58:14 62:19,19,20 64:7 <b>lightly</b> 27:17 <b>limit</b> 58:2 <b>limitation</b> 52:13 <b>limitations</b> 30:9 <b>limited</b> 9:16 32:2 40:5,13 41:18 43:3 51:4,5,18 52:3,7 55:1 63:11 <b>limits</b> 25:24 26:6 41:1 61:6,10 <b>line</b> 19:11 20:25 <b>lines</b> 55:2 <b>list</b> 10:10 13:3 <b>located</b> 43:22 54:4 55:19 <b>long-standing</b> 40:24 52:13 <b>look</b> 8:21 9:9 13:9 13:21 14:25 20:21 21:3 26:22 30:3,9 33:25 46:8 47:12 47:18,21 48:22 55:14,17 58:10 <b>looked</b> 9:23 <b>looking</b> 10:21 48:7 <b>loosened</b> 10:8 <b>lose</b> 21:21 <b>lot</b> 18:25 28:25 63:25 <b>lots</b> 16:17 <b>lower</b> 28:6</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>machines</b> 10:10 <b>making</b> 47:7 <b>Mall</b> 61:17 <b>manage</b> 6:19 8:22</p>	<p>16:24 17:14,24 30:11 <b>management</b> 5:17 22:3,18 26:13 27:25 28:2 42:3 47:21,25 48:10 <b>mandate</b> 21:17 <b>map</b> 10:21 26:22 26:23 <b>matter</b> 1:14 39:25 43:16 64:20 <b>MATTHEW</b> 1:18 2:3,13 3:6 62:12 <b>mean</b> 7:20 11:21 12:18 16:8,16,17 16:18 19:3 23:14 26:1,8 27:3,4 31:25 32:13 33:23 37:23 39:15,22 44:16,17 48:8 52:12,21 58:5,16 59:19 <b>meaning</b> 10:25 42:25 47:16 51:21 <b>means</b> 16:13 22:14 34:1 39:19 41:1 44:17,20 <b>meant</b> 12:19 21:4 60:17 63:19 <b>medical</b> 28:11 <b>mentioned</b> 49:22 <b>merely</b> 5:11 <b>methods</b> 48:2,3 <b>middle</b> 25:20,21 <b>miles</b> 28:9 58:17 <b>million</b> 21:21 <b>mind</b> 14:20 16:11 <b>minute</b> 38:15 <b>minutes</b> 62:11,14 <b>Mohawk</b> 35:7 <b>move</b> 36:13</p> <hr/> <p style="text-align: center;"><b>N</b></p> <p><b>N</b> 2:1,1 3:1 <b>nail</b> 63:12 <b>narrow</b> 50:4 52:3</p>
---	---	---	--	---

<p>60:10  <b>narrowly</b> 53:1  <b>nation</b> 5:5 51:14  <b>national</b> 1:8 10:23              10:25 13:13,17,23              13:24 15:10 22:15              22:17 24:12 25:3              28:7 29:16 38:21              55:25 56:3,5              61:17 64:8,10  <b>nationwide</b> 10:15              12:2 51:15,16              53:11 62:6  <b>native</b> 3:13,15 8:2,3              22:6,22 62:21,23  <b>navigable</b> 3:23,25              4:2 5:1,2,6,13,17              5:24 6:4,8,15,15              7:13,22 8:1 9:16              10:19 11:4,7,9,13              11:24 12:9,13              13:14 16:1,4              23:23 27:20,21,23              29:10 30:25 37:24              38:6,7,19,20 39:7              40:22 64:1,4,5  <b>navigation</b> 24:2,10              25:9 27:25  <b>navigationable</b> 7:1  <b>navigational</b> 6:22              7:4,9 11:7 23:25              24:11  <b>necessary</b> 42:2,24              50:10,21 52:9,21              52:21,22 63:14  <b>need</b> 8:19 25:24              36:8 47:25 48:10  <b>needs</b> 22:11 26:19              61:11  <b>Neither</b> 24:15  <b>never</b> 16:20 28:21              36:10 53:13 57:18              57:19 58:22  <b>new</b> 8:1 30:20 58:1              62:8  <b>Ninth</b> 5:3 6:25 9:16</p>	<p>9:18,22 10:6,12              31:5,10,11 32:15              40:12 41:13 51:21              59:2 60:17 61:5              61:12,19,19  <b>no-hovercraft</b> 37:7  <b>noise</b> 51:5  <b>non-Federal</b> 10:5              10:13,14 42:6              63:17  <b>nonfederal</b> 39:15              40:16  <b>nonpossessory</b> 6:25              7:6  <b>nonpublic</b> 5:11              12:8 17:2 20:20              37:7 39:15 41:10              53:24  <b>notice</b> 40:14,25  <b>NPS</b> 29:16  <b>numbering</b> 46:20              46:21  <b>numbers</b> 14:16</p> <hr/> <p style="text-align: center;"><b>O</b></p> <p><b>O</b> 2:1 3:1  <b>objecting</b> 16:6  <b>objection</b> 7:12              16:22  <b>obtain</b> 28:11  <b>occur</b> 9:1  <b>occurring</b> 48:1  <b>OFFICIAL</b> 1:6  <b>oh</b> 4:21 46:22  <b>oil</b> 40:16 53:3 63:15  <b>okay</b> 4:20 7:16              25:15,20 43:10,11  <b>Olympic</b> 64:8,10  <b>once</b> 14:22 64:6  <b>ones</b> 15:6  <b>opportunity</b> 22:10  <b>opposed</b> 35:4  <b>opposite</b> 38:15  <b>oral</b> 1:14 2:2,5,9              3:6 21:11 30:16  <b>orally</b> 15:14</p>	<p><b>Organic</b> 9:4 49:18              63:13  <b>outer</b> 4:3 13:18  <b>outside</b> 42:7 43:1,5              44:3,12 58:23  <b>overall</b> 20:22  <b>overcome</b> 58:1  <b>owned</b> 3:25 4:8              11:9 25:20,21              26:4 29:1,11,12              48:11 63:21  <b>owners</b> 19:1  <b>ownership</b> 3:12              16:5 54:7  <b>owns</b> 7:2 43:15,15              60:9  <b>Ozette</b> 64:14,14</p> <hr/> <p style="text-align: center;"><b>P</b></p> <p><b>P</b> 1:23 2:10 3:1              30:16  <b>p.m</b> 64:19  <b>page</b> 2:2 32:15              40:14 46:14 49:22  <b>pages</b> 60:20  <b>paragraph</b> 32:16  <b>park</b> 1:9 4:3 5:16              5:17 6:18 7:11,12              7:15,17 8:7,9,9,16              8:19,23,25 9:3,3,5              11:11,17 12:2,5,7              13:5,6,13,17,19              13:19 15:11,25              16:24 17:7,14              19:9,14 20:1,2,10              20:15,17,19 21:18              21:24 22:15,18              23:11 24:3,3,4,12              24:23 25:4,13              26:6,11,15,16,18              26:24 27:1,7,10              27:10,12,14 28:2              28:2,17 29:4,13              29:16 30:4,6,7,10              30:20,23 31:3              32:3,6 38:21</p>	<p>40:15 41:3,25              42:5,14 43:20              45:22 46:3 47:9              47:23 48:21,24              49:3,17 50:1,23              51:7,9,17 53:15              54:11 55:7,14,15              55:25 56:3,5 57:6              57:6,12 58:8,12              58:16,20,25 62:7              63:5,6,8,9,20,22              64:8,10,13  <b>park's</b> 37:3 51:12              58:13,22,22,23  <b>park-enabling</b> 12:7              64:7  <b>parks</b> 5:18 8:6,7,14              10:5,8,9,24,25              18:3 20:4 22:16              22:19,23,24 25:2              28:1 38:19 40:8              42:25 43:14,19              47:14 49:3,10,11              58:9 60:7,10 61:8              63:3  <b>part</b> 6:18 8:6,8              11:10,14 13:13,19              15:2,3 17:7 20:10              20:17 22:24 23:20              24:3 26:15,16,21              27:12,14 29:12,18              39:12 44:9,10,11              44:12,19 45:5,7,9              48:19 53:25 55:13              55:16 56:10,11              57:2 58:14,17              61:4 63:5,7,8,22  <b>particular</b> 40:6  <b>particularly</b> 59:23  <b>parties</b> 46:10  <b>parts</b> 4:8  <b>pass</b> 26:3  <b>passed</b> 58:1 63:5,8  <b>passing</b> 28:16  <b>pause</b> 36:6,6  <b>people</b> 3:17 12:13</p>	<p>22:12 28:8,15              29:2,5 53:6,9  <b>percent</b> 8:2 36:9              62:22  <b>perfect</b> 19:17  <b>period</b> 42:15  <b>permanent</b> 16:25  <b>permissible</b> 28:13  <b>permit</b> 8:19  <b>permits</b> 36:3  <b>person</b> 29:11  <b>pervasive</b> 52:16  <b>petition</b> 10:22  <b>Petitioner</b> 1:4,19              1:22 2:4,8,14 3:7              21:13 62:13  <b>Petitioner's</b> 43:16              49:20  <b>phrase</b> 51:22,25  <b>piece</b> 22:7  <b>piecemeal</b> 54:9  <b>place</b> 14:3 35:7              49:11  <b>places</b> 26:5 37:22              38:4,18 57:8  <b>plain</b> 61:9,23  <b>plan</b> 47:22,25  <b>plans</b> 48:10,15  <b>please</b> 3:9 21:15              30:19 62:16  <b>plenary</b> 41:20 62:2  <b>plenty</b> 13:4  <b>pockets</b> 7:25  <b>point</b> 16:7 22:17              56:8,17,19 62:15              63:23,24  <b>pointed</b> 60:18  <b>policeman</b> 26:18  <b>pollution</b> 25:23  <b>portion</b> 13:16 14:4              14:5,23 34:4              42:12 44:7,10              55:4  <b>portions</b> 4:7  <b>position</b> 7:14 28:1              37:8 63:10</p>
---	---	--	--	--

<p><b>possesses</b> 23:24  <b>possible</b> 59:5  <b>power</b> 22:17 24:10  24:12,21 26:19  27:17 35:8  <b>practical</b> 10:19  <b>predecessors</b> 22:8  <b>preexisting</b> 30:24  31:2 48:21 49:10  58:8  <b>preliminary</b> 4:22  <b>premise</b> 43:9  <b>prescribe</b> 42:2,24  43:2 50:9  <b>presented</b> 31:8  <b>preserve</b> 13:23,24  49:5  <b>Presumably</b> 11:3  <b>prevent</b> 63:20  <b>primarily</b> 59:12  <b>primary</b> 28:16  <b>principally</b> 50:12  <b>prior</b> 15:25  <b>private</b> 15:7 18:2  18:13,16,20 20:3  22:21 28:25 29:2  29:5,11,18 30:11  32:5 39:2 41:16  41:19 45:2,4  46:10 47:11,14,24  48:1,13,16 50:20  50:24 52:5 56:9  60:6 62:2  <b>privately</b> 41:21  48:11  <b>problem</b> 29:16  49:23 52:18,19  <b>problems</b> 29:14  <b>process</b> 3:12  <b>prohibit</b> 12:22,25  60:5  <b>prohibits</b> 46:3  <b>promulgate</b> 24:24  <b>promulgated</b> 10:15  12:2 16:23,24  <b>proper</b> 42:2 50:11</p>	<p>52:9,21,21,22  <b>property</b> 28:21  34:16 35:6 38:8  54:14  <b>proposed</b> 53:3  <b>proprietary</b> 7:4  <b>protect</b> 21:17 49:17  54:8,12 58:13  <b>protecting</b> 30:21  54:13  <b>protection</b> 21:22  40:2 42:25 49:6  50:21  <b>protections</b> 49:25  50:2,16,19  <b>prove</b> 52:25  <b>provide</b> 22:3,9  28:14 50:19  <b>provided</b> 21:20,22  <b>provides</b> 50:16  <b>provision</b> 5:20  16:13 40:25 41:17  41:20 43:11,12  46:3 49:8 50:19  51:10 53:4,20,22  54:25 58:6,24  <b>provisions</b> 47:18  48:23 49:13,13,19  58:10  <b>public</b> 4:15,18 5:21  5:22 6:10,11,16  9:2,6,7 11:10 14:1  14:2,4 15:5,10  16:15,19,21 17:19  17:24 18:4,14,17  18:21 20:3 23:14  29:1,18 30:12  32:1,5 33:6,7,23  34:8 36:16,17,23  37:11 38:11 39:15  39:23,25 41:2,16  42:10 43:8,10  44:1,5,7 46:11  47:10 51:8,11  52:2,5 55:3 56:10  57:15 58:7 60:1,6</p>	<p><b>purpose</b> 20:8,18,22  22:9 30:21  <b>purposes</b> 49:4,6  <b>purposive</b> 16:16  <b>pursuant</b> 7:4 13:20  40:7 49:18  <b>put</b> 15:15 16:18  <b>putting</b> 16:12 19:14  60:23</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>question</b> 4:23 7:17  7:20 13:5,15  16:12,13 17:25  26:22 29:21 35:21  39:23 40:11 57:21  60:1,1,14 64:2,3  <b>questions</b> 3:21 21:7  36:18  <b>quick</b> 3:21  <b>quite</b> 24:7,24 51:18  53:1  <b>quo</b> 8:10  <b>quote</b> 42:1 43:20  48:4 49:7 55:24  64:11  <b>quoted</b> 14:20  <b>quoting</b> 14:9,10,13  45:14,19</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>R</b> 3:1  <b>RACHEL</b> 1:23  2:10 30:16  <b>rapidly-expanding</b>  21:18  <b>rationale</b> 61:20  <b>reach</b> 9:19 16:21  31:9 61:11  <b>reaches</b> 9:14  <b>read</b> 9:5 15:4,8  20:5,7 28:23,23  29:15 32:14 33:8  33:16 43:23 53:23  54:3 55:6 58:15  <b>reading</b> 9:23,25</p>	<p>10:18 15:9 48:20  <b>reads</b> 10:1  <b>ready</b> 32:9  <b>real</b> 26:24  <b>really</b> 6:13 29:17  <b>reason</b> 17:15 32:14  40:5 61:23 62:3,5  <b>reasons</b> 22:4 28:4  31:22  <b>REBUTTAL</b> 2:12  62:12  <b>reconsideration</b>  59:6  <b>record</b> 4:6  <b>redefine</b> 21:25  <b>reflected</b> 34:14  <b>Refuge</b> 28:7  <b>reg</b> 29:8,9 39:1,13  39:14  <b>regard</b> 16:4 24:25  <b>regardless</b> 43:14  54:7 60:9  <b>regime</b> 62:1  <b>REGIONAL</b> 1:7  <b>Register</b> 40:15  <b>regs</b> 29:2,3  <b>regulate</b> 20:16 25:9  26:6,7,14,20  27:20,25 28:1  35:23 36:3 37:2,9  38:9 40:6,8 41:19  41:21 43:9,13,19  47:10,23 48:22,25  49:11 50:4,6,8,20  51:2,9,17 53:15  53:16 54:8 58:9  58:16  <b>regulated</b> 5:22  20:12 22:23 36:17  <b>regulates</b> 50:24  <b>regulating</b> 22:19  26:14 30:25 36:20  58:21 63:22  <b>regulation</b> 7:13 8:8  8:9,13,15,22,23  8:24 9:4,8,11,13</p>	<p>12:1 13:9,9,10  14:23 15:8,9 16:1  16:20,23,23 17:1  17:4,14 24:3,17  24:24 31:24 35:25  38:10,10 40:16,25  41:14,14 42:22  46:17 47:13,15  50:1 51:14,24  52:16 53:10,22  54:6 55:22,23  56:14 58:23 59:4  60:8 61:10 63:6,9  <b>regulations</b> 5:17  6:19 9:5,25 12:4  13:7 14:11 15:1,5  16:14 17:7,18,20  17:21,23 18:3,14  18:17,20 21:4  25:9 38:17 40:19  40:20 42:2,15  45:15 46:22 47:2  48:5,15 50:10  52:15 53:3 56:24  57:20 63:13,16  <b>regulatory</b> 36:11  62:1  <b>reject</b> 21:24  <b>relating</b> 43:21  45:24 54:4 55:19  58:18  <b>relaxed</b> 10:13  <b>rely</b> 35:1 50:15,15  <b>relying</b> 50:12 63:12  <b>remain</b> 12:19 62:6  <b>remainder</b> 21:7  <b>remaining</b> 62:11  <b>removes</b> 58:8  <b>Repeat</b> 24:6  <b>reply</b> 15:16  <b>report</b> 19:5 21:3  <b>represents</b> 26:24  <b>reproduce</b> 53:20  <b>require</b> 54:14  <b>reservation</b> 44:19  <b>reserve</b> 21:7 36:7,9</p>
---	---	---	--	--

<p><b>reserved</b> 6:22 7:5 35:1 36:1,16 37:2 <b>residual</b> 5:12 <b>resolve</b> 3:11 7:17 7:19 <b>respect</b> 10:19 12:12 25:19 27:4 <b>Respondents</b> 1:25 2:11 30:17 <b>response</b> 56:21 <b>rest</b> 26:7 29:24 <b>restrictive</b> 10:15 <b>result</b> 3:10 10:2 42:6 43:1 47:13 <b>retain</b> 21:24 58:13 <b>revised</b> 64:12,12 <b>ridiculous</b> 32:18 61:24 <b>right</b> 3:24 5:11,12 7:6 10:11 13:17 18:23 20:25 23:5 23:22,24 24:5 27:15 31:19 34:19 34:24,25 35:2,4,5 35:11 36:9,16 37:1,8,14 38:12 38:14,22,22,25 39:5,18,22,22 40:23 45:17 47:8 48:8,18 50:13 53:9 54:17 59:16 59:17,18 61:1,13 <b>rights</b> 6:22,25 7:5 12:20 19:3 35:15 37:3 63:1 <b>ring</b> 13:6 <b>river</b> 4:2 5:5 13:16 13:25 14:24 24:19 25:10,19,21,23 26:25 27:1 35:13 35:14,15 49:13 54:8,12,15 58:15 58:18 64:14 <b>River's</b> 13:23 <b>rivers</b> 3:24,25 27:5 27:6,11,11,13,14</p>	<p>28:10,14 30:22 48:22,25 49:5,16 49:16 54:11,13 <b>road</b> 28:9 <b>ROBERTS</b> 3:3 6:20 12:10 21:8 21:10 22:25 23:5 29:23 30:13,15 34:10,17,20,25 36:5 39:21 46:5 49:21 50:7,14 51:3 52:6 62:10 64:17 <b>rule</b> 31:12,14,20,21 32:11 37:7,10,18 37:19,20 41:15 54:14,15,22 60:8 61:15 62:6 64:1 <b>rules</b> 10:7,13,15 22:3 25:3 32:3 41:1 42:24 43:2 43:20 45:23 46:10 52:1,3,4 55:18 58:7 60:5 61:6,10 <b>ruling</b> 10:6,12 41:13 <b>run</b> 5:18 <b>running</b> 3:25 4:1,7 27:5,6 <b>runs</b> 26:25 27:1 <b>RUTH</b> 1:20 2:6 21:11</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 2:1 3:1 <b>sanctioned</b> 28:22 <b>sand</b> 19:11 <b>satisfaction</b> 22:10 <b>satisfied</b> 59:1 <b>saying</b> 6:7 9:6 11:12 12:2 17:20 17:22 19:7 24:23 25:1,6,19,19 26:16,17,25 31:19 31:20 35:16 46:13 47:25 57:13 59:11</p>	<p>63:4,11 64:3 <b>says</b> 5:20 6:1,2,7 9:9 11:22 13:8,9 13:23 14:3 15:4 16:7,25 17:10 18:2,13,19 20:9 25:14 29:5,7,8 30:6 36:15 38:18 41:15 43:19 44:18 46:9,22 48:9,14 49:4,17 50:9 53:23 55:2,12,22 55:23 61:23 64:10 <b>Scalia</b> 7:7,16 12:21 12:24 14:8 35:9 35:12,19 41:22 44:17 45:13,17,19 46:13,16,21 47:1 47:4 52:20 54:16 54:19,22,25 55:6 <b>Scalia's</b> 43:9 56:8 <b>scenic</b> 49:13,15,19 51:5 <b>school</b> 28:11 <b>scope</b> 42:7 <b>second</b> 15:3,4 20:11 29:16 31:13 31:20 38:5 39:16 39:24 41:23 59:3 59:9,11,12 60:3,4 61:5 63:23 <b>seconds</b> 63:24 <b>Secretary</b> 42:1 50:9 50:10,20 <b>Secretary's</b> 42:8 <b>section</b> 4:4 6:17 9:8 9:14,24 11:7,19 12:6 13:25 20:6 22:20 23:15 26:5 30:10 31:13 33:21 40:18 48:8 52:17 53:21,23 54:20 57:7,22 58:6 63:4 <b>see</b> 14:19,25 15:6 35:7 44:22 46:22 50:16</p>	<p><b>seeking</b> 63:16 <b>selections</b> 8:3 22:14 <b>self-sufficiency</b> 3:16 28:15 <b>Senate</b> 19:5 21:3 <b>send</b> 59:6 <b>sense</b> 10:17,20 20:3 28:24 31:1 54:8 <b>sent</b> 59:25 <b>sentence</b> 15:4,4 16:18 20:5,6,7,9 20:11,14,18 29:15 31:13,21 39:16,19 39:24 41:24,24 42:8 43:23 55:2 55:11,12 59:3,9 59:11,13,22 60:3 60:4 61:5 62:4 <b>separate</b> 26:9 <b>seriously</b> 19:24 <b>Service</b> 1:9 5:16 7:11,13,15,18 8:16,25 9:3,4,6 11:17 12:2,5,7 13:5,13,17 15:11 16:1 17:20,21,23 20:15,20 22:18 24:3,3,4,12,23 25:4,14 26:11,18 27:10 29:17 30:6 30:10,23 31:3 32:3 38:21 40:15 41:3,25 42:14 43:20 45:23 46:3 47:9,23 48:21,24 49:17 50:1,23 51:7,9 53:15,22 54:11 55:7 56:4,5 58:12,16,20,25 62:7 63:6,9,20 <b>Service's</b> 21:18,25 22:15 23:12 26:6 32:7 51:17 55:14 55:15 58:8 <b>Service.'</b> 56:1 <b>servitude</b> 6:22 7:2</p>	<p>7:5,10 11:4,8,13 23:25 24:11 <b>set</b> 22:21 54:10 <b>sets</b> 25:3 49:14 <b>setting</b> 49:2,9 54:14 <b>Settlement</b> 3:14 8:4 22:6 62:23 <b>shore</b> 4:13 <b>show</b> 14:12 42:16 42:18,21 <b>side</b> 4:14 <b>significant</b> 40:2 <b>simple</b> 28:24 <b>simply</b> 10:16 51:7 62:18 <b>simultaneously</b> 30:23 <b>situated</b> 33:24 <b>Skip</b> 29:20 <b>slightly</b> 33:7 54:2 <b>smack</b> 25:20 <b>small</b> 11:1 <b>smoke</b> 9:10 17:10 <b>snow</b> 10:10 <b>social</b> 22:11 <b>sole</b> 30:7 <b>solely</b> 6:19 8:22 15:5,10 16:14,16 16:18,18,19,24 17:14,15,18,24 18:1,8,21,24 19:8 19:15,21 20:25 38:11 39:23,25 41:2,5,10 46:11 47:16 51:22,25 52:2 58:7 <b>Solicitor</b> 1:23 62:15 <b>somebody</b> 7:18 <b>sorry</b> 24:7 25:6 29:19 36:6 46:5 46:18 <b>sort</b> 28:13 <b>SOTOMAYOR</b> 5:10,19 6:1,6 10:18 11:12,16,20 24:6 25:5,12</p>
--	--	---	--	--



<p>32:23 33:8,11,14 33:16,20 36:19,25 37:6 43:4 45:25 53:2 57:25 60:11 60:16,20,23 61:1 61:12 <b>sought</b> 58:23 <b>sovereign</b> 27:15 28:20 <b>sovereignty</b> 21:17 23:20 <b>special</b> 49:15 <b>specific</b> 5:15 7:24 12:7 30:4 43:18 53:15 54:20,23 55:10 57:25 61:6 <b>specifically</b> 10:8 30:9 <b>spent</b> 60:20 <b>spread</b> 10:24 <b>stack</b> 17:10 <b>stand</b> 32:9 <b>start</b> 33:1 <b>starting</b> 22:16 <b>State</b> 3:15 5:17 8:1 10:22 11:10 12:12 22:11,21 23:2,20 26:3,4 27:18 28:3 30:11 34:23 40:13 43:16 46:10 64:4 <b>stated</b> 32:10 <b>statehood</b> 3:13 22:6 23:2 <b>statement</b> 27:16 28:19 52:18,19 64:1,15 <b>statements</b> 35:25 <b>states</b> 1:1,15 5:4 6:3,11,14 7:2 8:14 9:12 11:15,23,25 13:11 22:14,15 24:18 34:2,9 35:18 36:25 49:4 55:25 <b>status</b> 8:10 <b>statute</b> 6:10 8:13</p>	<p>8:18,18 9:23 10:1 12:7 14:25 15:2 15:12 17:6,7 18:1 18:2,12 20:8,22 20:23,24,24 22:9 24:25 25:2 29:5,7 33:2,9,14 36:14 41:25 45:17,21,21 46:1,1,19 47:1,5 47:19,22 48:20,23 49:14 50:5,8 54:17 58:2,11,12 58:15 61:8 64:3,6 <b>statutes</b> 3:14 19:8,9 19:14,25 44:25 <b>statutory</b> 54:1 <b>step</b> 20:21 63:3 <b>stop</b> 15:12 <b>stopped</b> 4:14 <b>stops</b> 63:18 <b>strained</b> 9:23 <b>strange</b> 27:8 <b>stream</b> 54:12 <b>streams</b> 49:8 54:13 <b>stretch</b> 54:9,9 <b>strip</b> 11:1 30:23 <b>stripped</b> 48:21 <b>strips</b> 11:5 57:22 <b>stronger</b> 32:21 61:4 <b>stumbled</b> 34:21 <b>Sturgeon</b> 1:3 3:4 5:14 16:6 18:25 40:17 <b>subject</b> 6:18 8:7,9 10:14 13:10,12 16:14 18:3,13,17 18:20 19:2 55:24 62:2 63:6,9 <b>submerged</b> 6:14 7:3 11:9 16:5 23:1,4,6,12,13 26:2,2 34:22 64:13 <b>submitted</b> 64:18,20 <b>subsidiary</b> 34:12 <b>substantial</b> 49:25</p>	<p>52:10 <b>subtitle</b> 47:4 <b>suddenly</b> 17:4 <b>sufficient</b> 60:3 <b>suggesting</b> 6:21 56:24 <b>supporting</b> 1:22 2:8 21:13 <b>supports</b> 15:3 <b>suppose</b> 8:12,18 18:25 24:16 <b>supposed</b> 49:17 62:18 <b>Supreme</b> 1:1,15 <b>sure</b> 4:21,24 6:20 33:10,18 59:8 <b>surely</b> 18:5 <b>surround</b> 8:6 <b>surrounded</b> 4:3 7:25 22:22 63:2 <b>system</b> 42:3,5,10,25 44:5,6 46:12 49:15 50:22,25 54:5,6 56:6 57:9 61:6,7</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>T</b> 1:18 2:1,1,3,13 3:6 62:12 <b>tailored</b> 10:16 <b>take</b> 10:6 11:20 17:1,16,25 18:24 20:21 27:17 29:24 31:25 33:4 56:9 62:19 <b>takes</b> 15:1 <b>talk</b> 27:23,24 31:24 39:19 40:11 41:22 49:23 <b>talking</b> 9:8 14:1 59:12 <b>talks</b> 17:18 57:8 58:6 <b>tell</b> 19:19 30:10 32:24 33:12 45:25 50:17</p>	<p><b>telling</b> 35:13 <b>tempted</b> 14:17 <b>term</b> 42:11 64:5 <b>terrible</b> 25:23 <b>test</b> 60:24 <b>text</b> 10:2 46:8,8,9 47:12,16 60:4 61:9,23 <b>Thank</b> 3:8 4:20 15:17 21:8,9,14 30:1,13,14 62:10 64:16,17 <b>theory</b> 43:16 <b>thing</b> 13:24 27:8 29:18 48:6 <b>things</b> 12:12 16:11 26:1 31:19 39:23 40:6 60:21 <b>think</b> 7:8 11:24 13:15 16:12 19:5 24:4 30:2,25 31:18,19,21 32:20 33:1,6 36:4,13 39:6,7,8 40:4,23 42:16,18 43:8 44:21,24,24 45:6 46:2,2,8 47:6,8,13 48:6 49:22 50:8 51:6,16,23,23 52:9,12,22 53:1,8 54:1,7,24 56:23 57:4 59:22 60:2 60:13,16 61:2,3,4 61:9,11,12,22,24 62:19,20 <b>third</b> 20:7,14,18 29:15 <b>thought</b> 6:21 10:3 14:16 36:11 37:15 38:7 44:16 48:8 <b>three</b> 28:7 59:5 <b>throw</b> 13:5 <b>tidal</b> 61:18 <b>time</b> 21:7,22 63:14 <b>times</b> 49:23 <b>title</b> 6:12,14,23,24</p>	<p>7:3 33:3 34:1,9,11 34:13,14,16,17,22 35:3,6,9,10,14,18 35:20,22 36:15 42:17,18 <b>titled</b> 23:22 <b>today</b> 15:23 <b>tone</b> 43:24 <b>top</b> 13:7 <b>totally</b> 37:15 <b>tougher</b> 13:13 <b>transforms</b> 28:18 <b>travel</b> 28:11 <b>traverses</b> 44:2 <b>treat</b> 51:7 <b>treated</b> 23:10 55:12 <b>tried</b> 15:14 51:9 52:16 <b>trilogy</b> 22:5 <b>true</b> 16:11 27:19 51:13,20 <b>trumps</b> 11:7 <b>trying</b> 18:5 21:1 <b>turn</b> 6:9 <b>two</b> 3:21 19:25 29:14 31:19,21 32:20 37:21 38:4 38:18 47:19,20 48:25 59:3 61:4 62:11,14 <b>type</b> 8:24 9:7,13 49:15</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>U.S</b> 11:4,13 33:3 34:12,15 36:21 <b>U.S.C</b> 14:11 46:16 56:6 64:9 <b>Uh-huh</b> 15:24 <b>unaffected</b> 12:19 <b>unambiguously</b> 42:7 <b>understand</b> 3:21 17:5 19:12 23:9 23:11,14 24:7 25:18 27:4 31:11</p>
---	--	--	--	--

<p>32:9 40:21 46:19 59:9 <b>understanding</b> 31:16 <b>understands</b> 41:13 <b>understood</b> 36:7 43:13 54:5 58:21 58:25 <b>uniformly</b> 58:24 <b>unique</b> 22:3 <b>unit</b> 14:5,6 29:15 31:22 41:8 42:10 42:12,13 44:2,8 44:10,11,12,13,19 45:2,5,7,9,10 48:11,13,17 49:15 55:4,13,16 56:5 56:10,11,14 57:2 57:9,14,15 <b>United</b> 1:1,15 5:4 6:2,11,13 7:2 8:13 9:12 11:15,23,25 13:11 24:18 34:1 34:9 35:17 36:25 55:25 <b>units</b> 15:6,11 30:20 36:21,22 37:4 41:11 42:3,5,25 46:12 50:22,25 51:12 53:16,17,23 54:5,6 56:6 61:7,7 61:8 <b>unmistakable</b> 23:19 <b>unnavigable</b> 9:19 <b>unusually</b> 46:20 <b>use</b> 5:11 6:25 7:6 10:9 42:3 48:2,3 49:3 51:9 <b>usually</b> 36:8 <b>usufructuary</b> 35:4 35:5,14</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>v</b> 1:5 3:4 5:4 <b>vaguely</b> 27:17</p>	<p><b>valid</b> 52:11 <b>validly</b> 60:5 <b>valley</b> 44:1,1,9,10 <b>versus</b> 57:11 <b>view</b> 49:20 <b>villages</b> 28:8 <b>violates</b> 46:1 <b>voice</b> 43:24 <b>Voting</b> 19:3</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>walk</b> 32:24 42:20 <b>want</b> 8:6,7 9:6,7 15:13,16 18:15 32:8 40:10 43:11 48:15 50:3 63:23 63:23 <b>wanted</b> 19:13 25:12 <b>wants</b> 20:16,16 26:7 <b>Washington</b> 1:11 1:24 64:11,14,14 <b>wasn't</b> 6:20 60:2 <b>Watch</b> 43:25 <b>water</b> 5:21 7:5 13:11 18:6 19:2 25:9 26:5 34:8,12 34:13 35:2,10,18 35:20,22 36:2,3,7 36:8,10,16 37:2 42:17,19 49:19 55:16,23 <b>waters</b> 5:2,13,18,24 5:25 6:2,5,8,15,15 7:14,22 8:2 9:17 9:19 10:19 11:5,9 11:23,24 12:9,13 13:10,14 16:2,4 21:23 23:4,13,15 23:16,19,23 24:10 26:2,15 27:20,21 27:24 28:3,5,18 28:18 29:10 30:22 30:25 34:5 36:20 37:3,24 38:6,8,19 38:20 39:8 40:8</p>	<p>40:11,13,22 43:5 43:13,19,22 45:24 47:14 49:11 53:16 53:17,22 54:4,6 55:19,24 58:9,13 58:18 64:1,4,5,13 <b>way</b> 10:25 19:17,20 28:10,21 32:4 36:4 38:16 39:11 43:25 <b>ways</b> 28:5 47:19 <b>We'll</b> 3:3 <b>we're</b> 9:9 11:6,8 12:3 13:25 14:15 16:3 25:1,17 26:16,17 33:22,24 35:16 49:10 50:12 52:14 59:10 <b>we've</b> 5:15 51:24 <b>Wednesday</b> 1:12 <b>well-settled</b> 62:1 <b>weren't</b> 8:8,9 <b>whoa</b> 8:5 <b>wild</b> 49:13,15,18 <b>Wildlife</b> 28:7 <b>win</b> 18:25 39:12 <b>winning</b> 60:11 <b>won</b> 18:18 <b>wood</b> 9:12 <b>word</b> 4:11 16:16 17:15 18:1,8,24 19:4,8,15 29:15 47:16 <b>words</b> 3:24 11:21 16:17 34:11 35:4 <b>worth</b> 63:3 <b>wouldn't</b> 18:18 20:18 37:24 61:20 <b>write</b> 32:3 52:4 <b>written</b> 37:21 38:4 38:17 41:1 57:20 60:6,9 <b>wrong</b> 23:17 32:17 32:23,25 37:14,15 38:2 59:2</p>	<hr/> <p style="text-align: center;"><b>X</b></p> <hr/> <p><b>x</b> 1:2,10</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>Yeah</b> 54:18 <b>years</b> 17:4 40:24 51:24 <b>Yosemite</b> 28:25 29:1,3,9,10,12,17 30:5 37:16,19 38:24 39:3 <b>Yukon</b> 28:7 <b>Yukon-Charley</b> 13:23 15:7 49:5,7</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p style="text-align: center;"><b>0</b></p> <hr/> <p style="text-align: center;"><b>1</b></p> <hr/> <p><b>1</b> 63:3 <b>1.2</b> 38:17 <b>1.2(b)</b> 16:3 <b>100</b> 21:21 <b>100102</b> 56:6 <b>100501</b> 56:7 <b>100751</b> 46:17 54:16 55:7 <b>101(d)</b> 20:22 <b>103</b> 54:20 57:7,22 58:2,6 61:20 <b>103(c)</b> 4:4 6:17 7:15 9:8,14,24 11:7,19,21 12:6 16:7,25 20:6 22:20 23:15 26:5 30:10 31:13 40:18 53:21 61:20 62:18 63:4,19 <b>107</b> 46:16 61:20 <b>11:19</b> 1:16 3:2 <b>12:21</b> 64:19 <b>13.013(c)</b> 42:6 <b>14-1209</b> 1:4 3:4 <b>16</b> 64:9 <b>19-</b> 40:9 <b>1976</b> 45:22 46:19</p>	<p>53:14 58:24 <b>1979</b> 19:5 21:3 <b>1983</b> 16:23 <b>1996</b> 15:25 16:2 17:2</p> <hr/> <p style="text-align: center;"><b>2</b></p> <hr/> <p><b>20</b> 1:12 17:3 40:14 40:24 51:24 <b>20-year</b> 41:14 <b>2001</b> 5:4 <b>2016</b> 1:12 <b>21</b> 2:8 40:14 <b>24</b> 49:22 <b>24a</b> 31:23 <b>251(n)</b> 64:9 <b>26a</b> 31:23</p> <hr/> <p style="text-align: center;"><b>3</b></p> <hr/> <p><b>3</b> 2:4 <b>30</b> 2:11 <b>3101</b> 54:19 <b>36</b> 16:3 <b>3a</b> 33:22</p> <hr/> <p style="text-align: center;"><b>4</b></p> <hr/> <p><b>40</b> 8:2 36:9 62:22 <b>45</b> 63:24 <b>48</b> 28:6 <b>49</b> 32:15 60:20</p> <hr/> <p style="text-align: center;"><b>5</b></p> <hr/> <p><b>500</b> 58:17 <b>54</b> 14:11 46:16 56:6 <b>58-page</b> 32:13</p> <hr/> <p style="text-align: center;"><b>6</b></p> <hr/> <p><b>62</b> 2:14</p> <hr/> <p style="text-align: center;"><b>7</b></p> <hr/> <p><b>7a</b> 45:20 46:13,14 53:20</p> <hr/> <p style="text-align: center;"><b>8</b></p> <hr/> <p><b>800</b> 17:11</p> <hr/> <p style="text-align: center;"><b>9</b></p> <hr/> <p><b>9(b)</b> 63:15</p>
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