

1 and this idea that we have to show a change in the legal
2 relationship between the parties, the -- the first thing
3 that Buckhannon says is the paradigm of a -- a case
4 where there's been a prevailing party is where a
5 judgment has been entered. It only goes on to talk
6 about this other more complicated stuff about legal
7 relationships when it's talking about things plaintiffs
8 win short of a judgment. But there's nothing in
9 Buckhannon that says a judgment can't be treated as a
10 basis for a prevailing party.

11 Now, to the extent it matters what the
12 nature of the dismissal here was -- and I don't know
13 that it should, but if it does -- I'd point out that any
14 uncertainty about the nature of the dismissal here
15 arises from the fact that the government never made any
16 argument in the courts below that the distinction made
17 any difference. And, indeed, it contradicted the very
18 point it's now making. It said to the Eighth Circuit --
19 and this is on page 11 in our reply brief in the
20 footnote -- it said, quote, "The court recognized
21 dismissal as a severe remedy and acknowledged it would
22 result in dozens of potentially meritorious sexual
23 harassment claims never seeing the inside of a
24 courtroom."

25 JUSTICE GINSBURG: It said it may -- may

1 result, not would result.

2 MR. SMITH: No, no. This is -- I'm reading
3 their quote from their brief where they left out the
4 word "may" because they thought that it didn't make a
5 difference. That they knew at the time and understood,
6 or at least believed, she was referring to the fact that
7 these individual women might be able to litigate their
8 own claims. But they recognized over and over again in
9 the courts below that the "may" didn't mean that the
10 EEOC could come back and litigate, that they were
11 precluded. That's why they filed their Rule 60 motion
12 five years later.

13 Now, to the extent there was an argument
14 that we shouldn't get all these fees, we should maybe
15 get a little bit of fees because we should have raised
16 the issue early on, the problem here precisely was the
17 class action. The two are tied together, and they were
18 both, Judge Reed found, frivolous, the argument that
19 there was a pattern of practice here, and then the
20 argument that they could go on and litigate on behalf of
21 the individuals once the class action washed out.
22 They're -- they're part of a package. But until --

23 JUSTICE GINSBURG: Did she hold that they
24 would have to investigate and conciliate each individual
25 claim?

1 MR. SMITH: She said that where there is not
2 a valid pattern or practice. I don't think there's
3 anything in -- in the court's decision that suggests you
4 can never conciliate a class claim. The court so held
5 in General Telephone. She cites the case. I don't know
6 that the judge was intending to -- to second-guess this
7 Court's decision in General Telephone about how pattern
8 and practice cases are litigated. The question is where
9 you don't have any kind of a policy or -- or standard
10 operating procedure. You have a handful of individual
11 stories, or maybe a large number of individual stories.
12 How do you conciliate those? And the answer she gave
13 was you have to conciliate them one by one, just --
14 or -- or you're bypassing the statutory procedure and
15 the statutory policy.

16 JUSTICE SOTOMAYOR: What is the rule that
17 you would like us to announce? When is it right to
18 award prevailing defendants attorneys' fees?

19 MR. SMITH: When they --

20 JUSTICE SOTOMAYOR: What would be your rule?

21 MR. SMITH: When they've won a judgment and
22 prevailed, and where the --

23 JUSTICE SOTOMAYOR: It doesn't matter with
24 or without prejudice?

25 MR. SMITH: I would -- I would think that

1 that should not be in the rule, that that ought to be
2 something within the discretion of the district judge
3 for a lot of the reasons we've been discussing here.
4 And where the -- the claim that -- that was dismissed
5 was frivolous or unreasonable or without foundation
6 under Christiansburg. And that that, therefore, caused
7 costs to be incurred as occurred here. And, you know, I
8 don't see any reason why you would want to add
9 additional constraints.

10 Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

13 (Whereupon, at 11:06 a.m., the case in the
14 above-entitled matter was submitted.)

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A				
a.m 1:15 3:2 32:6 36:14 40:16 65:13	adjudicate 10:20	60:13	approach 36:19	asserted 21:12 23:2,5,8
abandoned 29:22 30:2,6 30:10	adjudication 12:9 49:7 54:8 55:13	alters 31:22 46:5	appropriate 16:20 17:7 27:5,7,15 43:10 50:17 51:5	assertion 40:19
able 63:7	administration 36:20 39:16	amount 25:20 26:14 40:17 41:7 43:4 46:9	appropriately 15:17,18	Assistant 1:19
about-face 3:24	administrative 38:25 39:7	analogized 56:15	approved 32:11	assume 13:12 43:15 45:16
above-entitled 1:13 65:14	adopt 38:19	animal 15:15	argue 30:23 52:18,19	assuming 9:16 24:24
absence 6:1	advancing 29:24	announce 64:17	argued 12:25 29:19 30:20 57:23	attached 21:3,3
absolutely 43:9 58:13	affect 27:13	announced 53:1	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	attempt 42:11
abused 19:17	affidavit 56:11	answer 7:8 29:25 31:7,25 43:15 52:14 64:12	argues 12:25 29:19 30:20 57:23	attention 28:1
abusiveness 13:25	agree 4:20 12:10 24:4 43:9 53:9 60:10	answered 7:15 7:23	argued 12:25 29:19 30:20 57:23	attorney's 30:25
academic 60:8	agreed 21:20	answering 8:9	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	attorneys 25:22
accepted 9:10	agreement 3:13 18:5 22:7 32:9 32:11	anybody 28:18	argues 12:25 29:19 30:20 57:23	attorneys' 3:15 4:2 29:17 32:23 35:22 39:5 53:3 64:18
accepting 11:14	agrees 3:25 52:16	anyway 10:21 22:15 35:22	argued 12:25 29:19 30:20 57:23	attributable 41:8
account 32:22 36:2	agreements 32:14,22	apparently 4:5	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	authorizes 16:22
accurate 8:6	agrees 3:25 52:16	appeal 19:4,21 35:6	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	available 17:16 24:13
accurately 7:24	ahead 20:12 25:15 51:5	appealed 19:19	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	award 4:2 29:11 29:17 40:16 41:6 44:20 45:23 52:11 64:18
acknowledged 19:3 62:21	aired 60:1	appealing 18:25	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	awarded 25:20 40:3 43:25
acknowledging 24:10	ALITO 29:18 29:22 30:2 34:19 45:3,12 46:7	appeals 15:8 19:20 21:11 24:7 36:11 58:12	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	awards 46:2,4 46:25
act 9:20 45:24	allegation 5:20	APPEARAN... 1:16	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	
action 53:21 55:7,9,10 63:17,21	allegations 27:25	appears 12:19 21:1	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	B
actions 4:14	alleged 27:23,24	Appendix 7:17 7:18 8:13 18:8 20:25,25 47:25 49:3 54:22	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	B 13:1
actual 26:19	alleging 6:16	applicable 44:15	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	back 17:13 18:10,20 20:7 22:11 23:15 24:1 34:14 37:7,12 38:12 38:24 44:13 45:5 50:10 52:21 53:13 56:18 59:4,23 60:4 63:10
add 26:22 65:8	allow 11:25 26:24 48:2 52:20,22	application 41:5	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	balance 28:23
additional 17:5 65:9	allows 33:21	applied 61:6,11	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	banc 57:22
address 12:6 25:6 31:15 36:8 48:21 57:9	alludes 37:18	applies 33:18	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	
addressed 31:18 60:2	alter 35:10	apply 33:3,7	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	
adequate 6:4 40:3	alteration 34:20 35:2 37:4 46:21	applying 39:9 39:19 53:11	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	
adjudged 55:6	alternative	apportion 33:1	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	
		appreciate 36:7	argument 1:14 2:2,5,8 3:4,7 12:6,23 13:9 13:16 19:24 21:22 24:13 25:2 26:14 29:2,23,25 30:3,5,15,16 30:16,20 45:22 46:19 47:3,4 47:16,17,17 48:24 49:17,19 56:22,23 57:5 57:18,19 58:1 58:11,17,24 59:2,6,8,11,12 59:14,16 61:22 62:16 63:13,18 63:20	

bar 15:4 44:12 59:15	21:7	bunch 26:21	44:25 45:1,5	35:17 37:11	
barred 3:15 16:1 19:1 39:20 43:19 44:22 48:11,12	Breyer 20:21 21:14 30:6,9 30:13,22 31:4 31:7,24 35:15 36:13,17 38:10 39:2,12 47:3 47:16 53:14 54:16,19,23 55:2,9,19,23 56:1,3	burden 46:12 bypassing 64:14	50:16 51:20,22 52:1 53:7 59:11,13 64:8	40:2 41:11,18 41:22 42:12,25 49:9,14,20 50:9,11,20,25 51:25 52:4,13 58:5 61:20,24 65:11	
barring 17:6 53:6	BRIAN 1:19 2:6 29:2	called 7:19 20:22 57:14	causal 15:4 categories 16:3 cause 8:24 10:8 14:15 16:10 39:16 42:13 51:19 56:11	chooses 45:7 Christiansburg 4:9,16 15:1 25:8 26:17 37:20 60:9,14 65:6	
bars 15:9,12	brief 3:17,24,25 4:4 12:22 13:17,18 18:25 19:21 25:9 29:18 33:16 41:7 51:16 58:22 59:3,10 60:3 62:19 63:3	candidate 47:13 care 30:22 case 3:4,14,21 5:12,25 6:13 7:1,13 9:2 10:22 11:17,18 11:18 13:18,23 14:2,11 15:6 15:20 16:23 17:6,21 18:3,4 18:6,7,12,19 19:7,16 21:12 21:24 22:13,18 22:19,20,23,23 22:25 23:1,6 24:2 26:19,20 27:12,21 28:4 29:15 31:2,10 34:6,11 35:18 35:19,20,20,24 35:25 39:3,4 40:4,10,14 41:5,12 43:15 43:16,20 44:1 44:3,20,21 45:1,4,7,8,23 47:22 48:5,6 48:13,14 49:11 49:13,16,23,24 50:1,2 52:10 53:4,23,23 57:11 62:3 64:5 65:12,13	caused 46:10,11 65:6 Cedar 26:8 celebrate 35:1 Cert 8:13 certain 35:10 certainly 3:19 5:11 10:5 12:14 17:15 22:6 24:21 26:11,13 37:2 41:2 53:5,12 59:24 60:1,3 60:23 certiorari 3:12 29:7,14 59:9 challenge 57:20 58:18 challenging 58:15 change 20:17 30:15,16 33:5 33:8 38:17 47:9,12 62:1 changed 35:8 37:9 changes 32:16 32:19 changing 20:4 charge 8:10 26:9 charges 8:15 11:22 51:18 charging 32:1 Chicago 26:9 Chief 3:3,9 28:25 29:4 32:21,25 33:25	caused 46:10,11 65:6 Cedar 26:8 celebrate 35:1 Cert 8:13 certain 35:10 certainly 3:19 5:11 10:5 12:14 17:15 22:6 24:21 26:11,13 37:2 41:2 53:5,12 59:24 60:1,3 60:23 certiorari 3:12 29:7,14 59:9 challenge 57:20 58:18 challenging 58:15 change 20:17 30:15,16 33:5 33:8 38:17 47:9,12 62:1 changed 35:8 37:9 changes 32:16 32:19 changing 20:4 charge 8:10 26:9 charges 8:15 11:22 51:18 charging 32:1 Chicago 26:9 Chief 3:3,9 28:25 29:4 32:21,25 33:25	circuit 3:18 4:7 7:10,17,22 13:21 19:4 22:3 24:7,19 24:23 29:9,19 39:11 42:1,3 56:25 57:12,13 57:21,25 58:4 58:8,20 60:5 61:10 62:18 Circuit's 4:6 5:2 30:11 58:25 circuits 33:14 39:8,8,17,18 circumstances 13:23 38:5 48:6 60:18,19 60:20 cite 33:15 34:10 cited 16:21 48:7 cites 48:5 64:5 Civil 44:8 45:24 48:19 claim 5:13,16,21 5:21 11:4,5 15:25 16:1,1,2 21:8,9 27:8 36:25 39:20 42:24 44:22 48:6 61:8 63:25 64:4 65:4 claimant 10:10
based 12:16 21:7 23:17,19 29:15 30:24 36:4	briefed 59:19 briefly 25:6 briefs 4:22 60:1 bring 5:20 16:12 35:19 38:15 39:3 45:7 51:2 bringing 5:13 15:19 44:22 50:4 56:9 brings 32:1 45:15 broader 31:17 58:1 brought 12:22 17:13 24:22 27:25 44:16 56:12 Buckhannon 31:19 32:7,8 32:15 33:14 35:12 37:3 45:14,14 46:17 46:18,23 47:6 59:7 61:25 62:3,9	case-specific 31:15 cases 6:15 10:24 12:9 28:20 32:5 34:10 35:13 39:9,25	category 15:4 categories 16:3 cause 8:24 10:8 14:15 16:10 39:16 42:13 51:19 56:11 caused 46:10,11 65:6 Cedar 26:8 celebrate 35:1 Cert 8:13 certain 35:10 certainly 3:19 5:11 10:5 12:14 17:15 22:6 24:21 26:11,13 37:2 41:2 53:5,12 59:24 60:1,3 60:23 certiorari 3:12 29:7,14 59:9 challenge 57:20 58:18 challenging 58:15 change 20:17 30:15,16 33:5 33:8 38:17 47:9,12 62:1 changed 35:8 37:9 changes 32:16 32:19 changing 20:4 charge 8:10 26:9 charges 8:15 11:22 51:18 charging 32:1 Chicago 26:9 Chief 3:3,9 28:25 29:4 32:21,25 33:25	chooses 45:7 Christiansburg 4:9,16 15:1 25:8 26:17 37:20 60:9,14 65:6 circuit 3:18 4:7 7:10,17,22 13:21 19:4 22:3 24:7,19 24:23 29:9,19 39:11 42:1,3 56:25 57:12,13 57:21,25 58:4 58:8,20 60:5 61:10 62:18 Circuit's 4:6 5:2 30:11 58:25 circuits 33:14 39:8,8,17,18 circumstances 13:23 38:5 48:6 60:18,19 60:20 cite 33:15 34:10 cited 16:21 48:7 cites 48:5 64:5 Civil 44:8 45:24 48:19 claim 5:13,16,21 5:21 11:4,5 15:25 16:1,1,2 21:8,9 27:8 36:25 39:20 42:24 44:22 48:6 61:8 63:25 64:4 65:4 claimant 10:10	
baseless 7:18 basic 23:14 basis 4:1 7:24 10:5 13:1 27:2 29:8,16 30:25 61:8 62:10 bear 37:21 behalf 1:17,21 2:4,7,10 3:8 15:24 21:8,9 25:11 29:3 49:13 61:9,23 63:20 believe 24:12 44:2,2,3 51:19 54:18 believed 63:6 bench 22:9 benighted 36:8 best 34:9 35:23 better 9:19 41:1 beyond 57:20 bifurcation 10:24 big 34:21 bill 25:22,25 billion 47:8 bio 57:2 bit 41:3 42:18 63:15 blame 59:18 bluntly 6:5 blush 36:18 bottom 5:1 21:5					

claimants 11:3	compelled 3:19	55:17 61:2	61:3	courtroom
claims 9:4 10:6	41:14	concludes 11:24	cost 14:2	18:22 19:2
10:20 11:7,13	complain 18:25	conduct 7:12	Costello 50:7	22:8 62:24
14:14,17 15:21	complainants	11:23 16:6	54:10 56:6,10	courts 12:24
15:23 16:3,9	11:15 28:17	25:17 27:24	56:15	15:12 32:10,13
17:2,3,14,23	complained 7:12	32:16 45:19	costly 44:19	36:11 43:3
18:6,21 19:2	8:2,10	confines 57:25	costs 25:23 65:7	45:22 48:22
19:11,14 21:12	complaining	58:20	counsel 28:25	54:11 59:20
23:2,5,7,10,12	10:12	conflict 4:7	61:20 65:11	62:16 63:9
23:21,24 24:8	complaint 5:10	13:21 24:23	count 23:3,4	cover 24:1
26:21 47:24	6:9 8:25 15:15	consent 32:10	35:14 54:8	creating 27:3
48:12 50:4	16:5 23:2 27:2	consequences	course 3:13 10:3	criticized 61:11
55:16 62:23	27:20 34:24,25	45:2	10:7 12:8 20:4	CRST 1:3 3:4
63:8	38:18	consider 33:17	35:10	7:1 13:1
class 5:13,20	complaints 6:9	36:2,3 39:4	court 1:1,14	CSRT 54:17
8:23 9:3 10:5	6:21 7:2 8:1	52:25	3:10,11 4:6	curable 14:9,10
11:4,8,17	9:13,24 10:2	consideration	5:25 6:17 7:10	14:23 23:19
15:17 16:11	27:25 28:5	60:5	7:16 9:3 10:19	38:4
26:19,24 27:1	51:18	considerations	12:5 14:5,16	cure 23:22
27:4,7 42:23	complete 3:13	59:9	14:24 15:7,8,9	cured 23:21
42:24 60:18	completely 7:9	considered	16:12 17:3,8	
63:17,21 64:4	7:15 14:9	16:25 17:21	19:19,21 21:10	D
classifying 11:8	19:23 24:19	36:12	23:16,23 24:20	D 3:1
classwide 61:8	complicated	considering	24:25 26:16	D.C 1:10,17,20
clear 6:12 15:2,2	60:17 62:6	58:16,17	29:5,6,13	damages 11:2
15:3 17:16	concern 38:24	consistency	31:18 32:8,9	date 57:7
20:14 34:14	38:25 40:3	36:19	32:11,13 33:16	day 19:20 34:15
40:7 42:17	conciliate 16:17	consistent 6:20	34:15 35:12	37:7,12 38:12
44:11 57:14	16:21 42:11,24	6:21 28:12	37:3,19 38:4	de 11:1
clearly 17:7	48:2 50:23,23	constitutes	42:9 43:11	deal 27:3
56:23	51:4,8,10,11	30:18	45:21 46:3,4	dealing 15:14
close 46:17	51:17 52:11	constraints 58:4	46:23 47:23	dealt 46:18
club 26:25	61:8,9 63:24	65:9	48:1,7,9,16	death 47:7
collective 5:21	64:4,12,13	contact 8:21	49:6,6 50:10	debating 43:1
come 10:17 11:3	conciliated 10:6	contexts 27:11	51:24 52:9,11	debt 25:21
17:13 34:4,14	14:16 16:10	continue 16:16	52:22,25 53:5	December 20:15
37:7,12 38:12	conciliation 10:9	33:22 37:9	53:9,22 55:4,4	decide 4:25
41:16 42:8	10:13 16:15,16	contradicted	55:16 56:6,14	24:15,19,20,22
44:13 50:10,15	16:20,23 17:11	62:17	56:24,25 58:2	24:25 25:10,10
63:10	42:21 50:18	contrary 41:12	58:12 59:21	32:3 36:15
comes 34:1	51:3,23 52:9	controlling	60:12 61:6,7	decided 19:6
coming 38:4	52:21,23 61:17	20:20	62:20 64:4	deciding 4:24
52:21	conclude 9:22	converse 47:2	court's 33:13	43:4
commission 1:7	12:1	convincing 4:5	44:8 46:19	decision 31:19
3:5 44:16 50:1	concluded 7:10	core 38:8	54:10 55:1	33:13 46:14
company 6:3 7:3	7:22 8:5,11	correct 29:9,19	56:6 59:11	53:1 54:10
9:1 10:4	9:12 16:24	44:24 47:15,18	60:4 64:3,7	55:3,5 56:6

57:13 58:9,25 64:3,7 declaration 33:11 declined 42:24 decree 32:10 default 49:4 defeated 35:6 37:24 defend 61:12 defendant 3:14 4:1 12:11 14:3 29:10 31:1,2 32:15 33:4,5,9 33:10,18,18,22 34:2,8,11,12 34:13,17,17,21 34:22,23 35:3 35:18,24 36:24 39:21,24 40:10 40:12,18 43:7 45:18 46:9,12 47:11 52:18,19 defendants 4:8 27:4 37:21 38:6 64:18 defended 3:23 58:25 defending 40:18 61:5 definitively 34:12 denaturalizati... 56:12 denying 19:18 Department 1:20 depends 32:8 deposed 14:18 deposition 14:19 depositions 9:10 9:11,17 11:11 11:21 26:1 40:13,22 designed 48:21 despite 46:24 detail 7:9	determination 42:10 develop 59:6 developed 9:9 59:6 difference 4:18 26:18 62:17 63:5 different 11:21 11:22,22,23,23 16:2 20:9 23:24 26:18 27:23,24,24 28:1 29:25 30:5,16 34:15 36:10,10 38:18 39:22 52:22 56:23 58:17 difficult 27:10 directed 35:5 directly 43:2 disagree 41:23 42:18 54:1 disagreeing 55:15 discover 38:20 discreet 41:13 42:8,13 discretion 14:6 14:23 17:8 40:6 65:2 discrimination 8:15 32:2 discriminatory 5:23 27:17 discussing 65:3 discussion 60:7 dismiss 15:22,24 20:10 22:18 23:4 48:3 dismissal 14:4,8 14:8,21 16:16 21:4,6 23:20 24:11 29:14 30:24 31:14 33:19 34:24 37:1 39:23	44:7 45:5 47:13 48:8,8 48:17 49:4,5,7 50:2,19 52:20 52:25 53:16,21 53:24 54:2,5,7 55:12,12 62:12 62:14,21 dismissed 4:19 18:7,12 19:9 19:13 21:12,15 23:7,12 24:3,8 24:10 31:10 35:18 40:4 43:17 44:21 45:8 48:5 53:12 55:8,9 55:11 65:4 dismissing 13:23 17:23 48:16 disposed 40:24 disposition 3:22 4:1,10 12:16 12:25 13:10 21:25 30:11 dispute 33:13,21 37:1,8 disregarding 6:20 dissent 61:2 distinction 12:21 62:16 district 7:9,16 7:21 13:22 15:3,11 17:8 19:7 24:20 34:15 37:8,13 38:13,17,18 40:16 43:3,11 47:23 48:1,7,9 48:16 52:25 53:5,9 55:1,16 56:24 61:6,7 65:2 do-over 18:20 22:4 docket 54:25	55:1 doctrine 41:4 doing 25:16 40:22 45:24 dollars 47:8 doubt 21:19 dozens 62:22 driven 8:20 driver 28:7 drivers 5:17 6:4 6:10 11:22 dropped 22:22 drops 48:3 duty 51:11 <hr/> E E 2:1 3:1,1 earlier 48:4,6 early 42:17 63:16 ease 36:19 easily 40:24 Easterbrook 37:6 Easterbrook's 34:10 EEOC 3:23 5:22 6:13,25 8:12 12:24 15:9,25 17:10,12 21:12 23:2,6,8,11,20 26:17,24 42:19 43:17 44:14 45:4 48:1,11 50:3,7,21 51:16 52:7 54:17 55:7 60:8 63:10 EEOC's 4:14 7:7 21:8,9 29:15 effect 27:18 53:19 55:11 efforts 10:13 16:17 eight 8:16 33:15 Eighth 3:18 4:6	5:2 7:10,17,22 19:4 22:3 24:7 24:19 29:9,19 30:10 42:1,3 57:13,20 58:8 58:20,25 60:4 61:10 62:18 either 5:22 28:6 58:19 59:6,18 eligible 46:2 employer 6:9,10 28:5 Employment 1:6 3:5 en 57:22 encourage 45:25 ended 35:16 39:3 endorsed 29:21 ends 18:3 33:12 34:12 enforceable 32:13 engage 17:10 43:11 48:22 engaged 42:22 48:23 49:21,21 ensure 48:21 entered 18:5 21:2 47:22 54:3,21 62:5 enters 48:17 entertain 25:1 entire 25:21,25 entitled 46:3 53:3 Entry 54:25 environment 27:13 equal 1:6 3:5 40:17 58:2 especially 24:14 ESQ 1:17,19 2:3 2:6,9 essentially 33:12 47:2 establish 11:9
---	--	---	--	--

established 57:13	fact 5:5 9:12,22 12:1 13:15	39:5 40:3,16 40:23 41:7	31:6,13 32:7 32:24 33:2,10	Fox 37:20
establishes 49:4	14:12 19:3	42:14 43:4,25	34:7 35:3 36:9	framed 29:12
evaluation 30:3	25:1 42:13	44:20,22 45:9	36:23 37:16	frankly 59:1
event 24:6	56:14 62:15	45:17,23 46:1	39:1,6,14 41:1	free 50:7 58:3,10
eventually 18:2	63:6	46:14 47:10	41:17,21 42:15	frivolity 5:9 41:13
evidence 6:19,23 6:24 9:7 11:25 55:17	facto 11:1	51:5,10 52:12	43:5,21,24	frivolous 4:14 5:3,4 39:4 40:9 40:18 41:24 42:4 43:18 51:2 63:18 65:5
exactly 28:15 45:20 53:15 56:5	factor 43:3	52:17 53:3	44:2,6,14,24	frivolousness 36:4
example 27:11 27:18	factual 11:20 13:15 25:3 27:2 60:17	63:14,15 64:18	45:10,13 46:16 47:15,21 49:12 49:18,25 50:10 50:14,24 51:14 52:3,6,14 53:8 53:18 54:1,18 54:20,25 55:3 55:10,22,25 56:2,5,17,20 57:1,9,17 58:13 59:24 60:6,10,22	fully 7:23
examples 9:18	factually 7:18 10:1 13:10 22:13 37:21 38:1	fighting 38:16	57:1,9,17	function 53:15
exception 28:21	failed 38:2	figure 48:24	58:13 59:24	functional 46:8 46:13
exceptions 9:18 55:20	failing 59:12	file 9:5 11:16 19:5,20 24:9 40:14 56:11 57:15	60:6,10,22	further 16:23 43:20 48:11,13
exclusively 22:4	fails 52:8	filed 6:18 8:15 8:23 35:1 57:3 63:11	focus 59:13	futile 58:7
executed 3:24	failure 6:21 13:23 16:19 23:13 29:15 30:25 37:24 50:17 54:14 55:21,23 56:8 56:11	filing 17:17	focuses 59:9	future 34:23 35:10 50:16
exercise 14:5	fair 38:1	final 53:25	follow 19:17 25:7	<hr/> G <hr/>
exist 9:13	fall 20:14	finally 8:18 43:17	followed 9:13,14 43:18 54:11	G 3:1
existed 9:25	far 33:16 36:9 51:22	find 47:7 54:24 54:25	follows 45:11,13	gander 47:5
exists 3:17	fast 9:20	finder 9:22	footnote 48:4 57:16 62:20	general 1:20 58:7 64:5,7
expect 39:17	fault 41:15 58:14	finding 8:23 10:9 16:11	forced 37:21	generally 32:14
Expedited 1:3 3:5	favor 54:17	findings 14:15 17:2,11	foreclose 43:8	getting 34:3
explain 22:18 41:7 51:15 53:11	favorable 32:4	finds 51:18 52:9	foreclosed 46:13 46:17	Ginsburg 5:8,16 6:2,8,25 7:5,25 8:6 10:11 16:13 18:9 22:17 28:3 42:2 60:6,11 62:25 63:23
explaining 30:14	Federal 44:8 48:19	fine 61:13,14	forget 51:4	give 8:19 22:10 47:8 51:12
exposure 27:3	fee 4:2 29:11 36:3 41:6 46:2 46:4,25	first 3:4 12:22 13:9,9 20:25 26:8 31:16 36:18 37:22 41:17,23 45:8 48:23 51:13 54:4 57:10 59:22 61:25 62:2	form 21:20 24:5 29:16 30:25 47:14	giving 6:4
express 5:23	fee-shifting 33:23 37:14,19	fit 41:4	forum 33:20 39:23	glaringly 25:17
expressed 34:9	fee-shipping 31:20	five 40:21 43:16 63:12	found 4:5 6:22 21:20 32:20 33:7 47:24 63:18	go 6:17 13:4 17:21 18:20 20:12 24:1
expressly 16:25 18:6 23:4 48:8 48:21	fees 3:15,21 4:8 26:4,6 29:17 31:1 32:23 35:22 38:7	Fletcher 1:19 2:6 29:1,2,4,21 29:24 30:4,8 30:10,14 31:3	foundation 4:15 5:4,5,12 25:12 65:5	
extended 44:9 59:7				
extent 15:20 62:11 63:13				
<hr/> F <hr/>				
face 28:17				
facing 21:21 23:23				

25:7,15 36:1,9 38:18 40:15 48:2 50:23 51:5,9 58:8,11 59:4 60:11 63:20 goes 15:7 23:15 45:5 48:9 62:5 going 10:20,22 10:22,24,24 11:2,9 14:11 17:22 18:19 20:17 24:1 25:6 32:25 34:25 35:1,21 37:8 38:15,24 39:15 40:16,17 48:2,3 60:11 good 14:12 19:15 28:19,19 43:11 52:2 56:11 57:19 58:16 goodbye 35:18 goose 47:5 gotten 7:2 8:1 governed 57:12 government 4:4 12:10 17:24 18:5,18,24 20:7,11 21:19 24:6 25:8 26:11 56:12 62:15 government's 12:7 25:1,7,17 granted 14:18 29:6,14 great 27:3 46:11 51:16 greater 60:2 ground 4:19 34:5,13 39:22 40:4,9,11 41:8 43:8 60:13 groundlessness 5:9	guess 14:25 15:7 25:5 39:6 43:12 46:7 57:18 <hr/> H <hr/> H 1:19 2:6 29:2 half 48:24 hand 22:11 handful 64:10 handled 15:17 15:18 happen 53:22 happened 10:17 20:7 24:2 happy 35:4,5 harass 27:19 harassed 5:17 15:16,18 harassment 6:5 7:2,14 9:24 11:2,10 16:7 27:8 42:23 62:23 hard 24:12 35:21 52:24 harm 36:6 Hatfields 38:14 head 57:7 hear 3:3 heard 38:14 47:19 55:5 hearing 28:18 55:4 heart 42:6 heavy 10:15 held 16:14,18 32:10 64:4 helpful 54:4 hold 63:23 Honor 4:17 5:11 5:20 6:7 7:4,7 10:16 13:8 16:19 18:3 20:5,13 21:16 22:7 23:8,25 25:4 26:5 27:9	28:8,24 65:10 Honor's 37:18 Honors 21:1 host 38:20 hostile 27:13 hours 40:8 huge 46:9 51:20 hundred 7:6 hypothesis 45:16 52:8 hypothesize 39:25 hypothetical 43:15 <hr/> I <hr/> idea 22:11 43:11 62:1 identified 11:19 27:17 identify 5:14 ignore 57:8 ignored 51:11 illegal 49:22 illustrate 41:4 illustration 14:12 imagine 52:24 impact 22:12 important 59:4 importantly 48:15 imposed 46:11 imposing 53:6 improper 55:20 56:1 inadequate 10:14 16:15 61:17 incentive 51:8 51:12,16 Incidentally 44:11 include 18:15 23:11 25:21 59:13 includes 54:14	56:8,22 including 23:8 26:1 31:20 inconsistent 19:23 incorporated 21:6 32:12 incorporates 23:16 32:9 incorrect 22:9 incur 41:14 incurred 65:7 incurs 45:17 individual 11:3 11:7 15:21 17:14 26:21 27:23 63:7,24 64:10,11 individuals 15:23 61:10 63:21 information 8:12,16,21 9:9 11:21 initial 10:25 17:11 38:7 initially 3:11 7:3 8:1 inquiry 43:12 48:23 inside 18:22 19:2 62:23 instance 41:5 instruct 26:17 intended 20:16 45:24 intending 64:6 interlocutory 35:14,16 interpretation 44:8 intertwined 41:19 invented 15:14 investigate 63:24 investigated	6:13,15 8:24 10:6,19 14:14 16:9 17:1 investigating 7:1 investigation 7:20,23 8:18 10:8,13 16:15 27:1,1 42:9,20 investigations 29:16 investigatory 6:14 involuntarily 55:13 involuntary 49:3,5 involving 11:22 27:23 issue 3:11,13 4:12 7:11,13 8:10 12:13,17 12:17 13:17,19 15:5 22:5 24:22 25:8,15 25:16,20,24 26:17 31:15 32:15 41:15,25 42:8,13 43:1 45:14 47:23 50:13,15 56:15 56:16 61:16 63:16 issued 21:10 issues 35:10 55:5 60:5 <hr/> J <hr/> job 9:19 28:19 join 55:21,24 Joint 18:8 20:25 20:25 54:21 Jones 21:9 23:1 judge 4:23 6:22 7:21 8:5,11 9:8 11:23 13:22 15:14 16:22,24 19:3,7,12
---	--	--	--	---

28:13 34:10 37:5 40:5,6,14 42:2 43:19 44:21 48:25,25 49:10 61:2,11 63:18 64:6 65:2 judges 7:21 15:3 judgment 6:19 9:6 14:17 18:3 18:19 20:19,20 20:22 21:1,2,7 21:20 22:11 23:15 24:1,4 31:9 32:12 35:7 47:19 48:17,18 53:25 54:17,20 55:18 61:15,18 62:5 62:8,9 64:21 judgments 47:22 judicata 5:6 44:7 judicial 33:11 judicially 37:4 47:9,12 jurisdiction 54:8 54:11,12,13 55:20 56:4,4,7 56:8 Justice 1:20 3:3 3:9 4:13,18,21 5:8,16 6:2,8,25 7:5,25 8:6 10:11 12:3 13:3,12 14:7 14:20 15:6,11 16:13 17:9,17 17:25 18:9,10 18:15 19:25 20:6,21 21:14 21:23 22:2,17 23:10,18 24:15 24:24 25:19 26:2,6 27:6 28:3,25 29:4	29:18,22 30:2 30:6,9,13,22 31:4,7,24 32:20,21,25 33:3,25 34:19 35:15,17 36:13 36:17 37:11 38:10 39:2,12 40:2 41:11,18 41:22 42:2,12 42:25 43:14,22 43:25 44:4,11 44:17 45:3,12 46:7 47:3,16 48:10 49:9,14 49:20 50:9,11 50:20,25 51:25 52:4,13,24 53:13,17,20 54:16,19,23 55:2,9,19,23 56:1,3,17,21 57:2,15 58:5 58:23 59:17 60:6,11,15 61:20,24 62:25 63:23 64:16,20 64:23 65:11 <hr/> K Kagan 13:3,12 14:7,20 17:9 17:17,25 18:10 18:15 19:25 20:6 23:10,18 27:6 56:17,21 57:2,15 58:23 59:17 60:15 Kennedy 12:3 15:6,11 25:19 26:2,6 43:14 43:22,25 44:4 44:11,17 48:11 kick 59:22 60:4 kind 6:14 9:23 9:24,25 26:22 26:25 36:2	38:24 43:12 48:22 58:7 64:9 knew 20:15 21:19 42:21 63:5 know 4:23 12:15 15:13 22:10 31:25 32:1 33:25 34:2,25 40:8,9,21,24 45:6 46:1 51:3 56:21 57:16 58:6 59:21,25 60:17,20 61:1 62:12 64:5 65:7 known 14:1,1 <hr/> L lack 54:7 55:20 56:3,4,7 language 3:19 18:16,17,23 26:25 36:19 48:10 large 9:12 28:14 64:11 late 57:7 Laughter 21:17 36:16 lead 5:17 6:4,10 25:7 leave 24:25 leaves 50:7 58:22 Leaving 13:14 led 16:12 left 22:23 24:2 46:1 63:3 legal 31:22 32:19 33:8 35:9 37:5,10 46:5,20,21 47:9 58:1 62:1 62:6 legally 37:21	38:1 length 60:2 let's 13:12 43:15 45:16 52:7 level 13:25 liability 32:22 liable 10:4,5 33:7 lifted 24:12 limitation 44:15 limitations 12:18 limited 51:21 line 5:1 22:15 34:1 list 10:18 listed 9:3 litigate 10:23,23 11:7,18 15:21 19:14 63:7,10 63:20 litigated 18:7 23:11 56:24 57:11 58:20 64:8 litigates 47:7 litigating 14:13 15:24 16:1 17:6 19:11 26:20 41:8 litigation 10:15 12:23 17:4 27:3,4 32:2,5 33:23 34:13,23 35:11,16 41:16 42:18 43:9,16 43:17 44:10 45:17 46:9 48:12,13 51:23 little 3:18 41:3,3 41:10 42:18 63:15 long 4:8 44:19 61:13 look 9:1 20:24 21:5 30:24 43:3 55:12	59:5 looked 7:9 9:8 33:14 42:19 looks 40:6 45:5 56:13 lose 61:18 lost 61:15 lot 40:12 56:13 65:3 lots 14:13,13 32:2 lower 12:24 32:10 <hr/> M M 1:17 2:3,9 3:7 61:22 Mach 16:14,18 19:6 50:12,14 50:16,22 52:10 56:14 main 25:5 43:13 majority 7:22 making 19:23 30:4 53:13 62:18 malefactors 27:24 management 16:5 28:2 management's 28:1 managers 9:19 28:19 mandate 21:10 March 1:11 Marquardt 57:14 massive 51:17 material 34:19 37:4 46:21 materially 31:22 32:19 35:8 46:5 matter 1:13 28:22 44:18,19 44:19 46:13
--	--	---	--	--

<p>54:13 64:23 65:14 matters 62:11 McCoys 38:14 mean 10:4 30:23 31:1 34:1,20 35:16 36:4,14 40:20 48:25 50:21,22 54:12 54:23 56:7 57:16 58:6,7 58:10 60:16 63:9 meaning 7:13 meaningless 10:10 means 5:22 18:21 31:21 46:20 49:1 59:8 meant 18:25 24:20 meet 4:8 31:4 members 9:4 11:8 merged 53:25 meritorious 45:16 62:22 merits 3:16,25 4:4,10,22,24 12:9,13,17,17 12:22 13:16 17:3 18:3,4 19:20 22:4 23:15 29:10 30:3,12 41:19 42:3 49:7 54:9 55:14,16 57:20 58:15 59:2 60:23 messed 19:16 million 25:20 41:6,14 mind 20:17 mine 59:22 Mining 16:14,18 19:6 50:12,15</p>	<p>50:16,22 52:10 56:14 minutes 12:8 61:21 Monday 1:11 money 14:3,13 40:13 Monika 21:10 months 10:14 morning 3:4 motion 6:18 9:6 11:16 19:6,18 19:22 20:1 24:10 35:6 55:18 61:18 63:11 Murphy 42:3 61:2,11</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:1,1 3:1 named 8:4 names 7:3 8:2 8:19 nature 62:12,14 need 12:5 15:4 30:11 60:24 needs 5:22 neglect 11:1,10 neglecting 9:23 negotiated 21:4 neither 23:21 never 5:12,13 6:13 10:6,6 12:24 14:16,18 16:4,9 24:14 33:9 62:15,23 64:4 new 25:1 57:4 non-meritorio... 9:5 11:14 non-merits 3:22 4:1,23 12:17 notion 39:15 number 15:8 51:17,20 64:11</p>	<hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objection 41:20 objective 36:7 obligation 52:9 obligations 19:17 41:25 43:18 61:4 obtains 33:18 obvious 23:6 obviously 31:8 46:17 59:1 occurred 65:7 October 10:17 Oh 26:5 35:15 51:4 okay 13:14 20:9 31:8 40:7 47:16 52:5 54:19 once 58:1,3 63:21 one-count 15:15 23:2 ones 11:12 26:1 op 59:13 opening 3:16 4:4 operates 49:6 55:13 operating 5:24 28:9 64:10 opinion 34:10 opportunity 1:6 3:5 13:17 opposite 28:15 opposition 3:24 29:18 58:23 59:11 option 60:12 oral 1:13 2:2,5 3:7 29:2 order 5:20 17:10 19:1,1 21:4,6 28:13 29:10 31:21 32:18 41:6 46:5</p>	<p>53:10,22 ordered 55:6 ordinarily 49:5 49:7 55:13 originally 54:5 ought 13:22 14:5 17:7 39:9 46:25 47:1 65:1 outset 42:18,20 overrule 58:9 overruled 58:12</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 package 63:22 page 2:2 7:18 8:12 18:8 21:1 49:2 57:5 62:19 pages 7:16 11:24 33:15 47:25 48:4,4 panel 58:9 paper 20:22 paradigm 62:3 paragraph 13:19 part 26:11 58:25 59:18 63:22 particular 8:10 32:15 41:14 56:10 particularly 48:20 parties 3:12 17:4 21:4 31:23 32:3 33:9 34:3 35:2 36:21 37:5,10 46:22 48:22,25 56:8 57:11 58:19 60:7 62:2 parties' 21:9 party 12:6,11,11 13:2 29:11</p>	<p>31:2,12,17,18 31:19,21,25 32:6,18 35:4 35:25 39:21 43:7 46:20,21 52:16 53:3,11 55:21,24 58:19 59:8,19 62:4 62:10 party's 32:19 35:9 46:5 passed 55:16 pattern 5:14,22 6:14,16,18 9:8 9:23 10:21,23 11:5,17 26:22 27:7,11,21 28:4,12 63:19 64:2,7 pattern-or-pr... 26:19 61:14,16 PAUL 1:17 2:3 2:9 3:7 61:22 pay 47:8 peculiar 15:15 people 7:12 8:2 8:3,5,9,14,16 9:3,13 10:18 11:8,12 15:17 23:3 27:19 percent 26:3 perfectly 43:10 51:5 permanently 39:20 person 54:13 persuasive 39:10 61:2 pertinent 43:2 petition 3:12 7:16,18 8:13 29:13 47:25 49:3 57:21 59:5,5 petitioner 1:4,18 2:4,10 3:8 29:12 41:5</p>
--	---	--	---	--

<p>42:16 53:2,10 61:5,12,12,23 petitions 13:24 phase 6:15 8:19 10:25 11:2 18:4 23:15 phrase 15:11 piece 20:22 place 9:14 plaintiff 13:25 31:24 32:1,4,5 32:16,17 33:4 33:19 34:14 36:25 37:6,7 38:2 39:19 44:18 45:15,17 45:20 46:10,18 47:6 55:7 plaintiffs 45:23 45:25 46:25 62:7 please 3:10 29:5 plus 36:4 pocket 46:1 point 4:24 11:6 12:4 15:20 18:23 21:16 39:7 41:14 43:5 45:18 52:6 53:13 54:6 56:21 59:6 62:13,18 pointing 53:2 policies 9:12,13 9:25 28:11 policy 3:20 5:23 6:20 10:7 11:1 11:10,19 26:20 27:16,19 28:22 45:22 46:24 64:9,15 portion 40:24 position 12:7,19 13:5 36:14 44:17,23 positions 25:11 possibility 23:22</p>	<p>38:22,23 46:14 possible 27:7 40:25 possibly 10:19 potential 52:21 potentially 62:22 power 3:21 13:22 14:5 practice 5:14,22 6:14,17,18 9:8 10:22,23 11:5 11:17 26:20,23 27:7,12,21 28:4,13 49:22 58:7 63:19 64:2,8 practicing 34:3 pre-suit 13:24 17:12,18,19 20:1,3,8,11 23:13 29:16 41:24 precede 49:10 precedent 48:7 57:13,25 58:9 58:21 precisely 63:16 precluded 24:9 39:24 63:11 precludes 34:22 precondition 34:16 37:25 39:22 50:8 54:14 56:9,10 56:13,15,16 preconditions 41:9 42:5 50:3 predicate 13:15 25:3 prejudice 4:22 12:16,21 13:1 13:11 14:4,22 14:22 15:5,5 15:25 18:1,8 18:13,23 19:13 20:10,16,16,20</p>	<p>21:13,15 22:12 22:18 23:7 24:4,8,11 31:11,14 37:1 39:24 43:22 44:5 45:9 47:14,20 48:8 48:18 49:8 52:20 53:1,12 53:24 54:9 55:14 64:24 prejudice/with 12:21 premise 51:15 present 59:2 presented 30:1 30:17 47:2 56:22 59:2,14 59:15,25 presenting 30:21 preserved 22:14 pretty 23:6 34:3 35:21 46:16 prevail 29:10 49:16 prevailed 3:16 26:11 33:22 49:22 52:19 64:22 prevailing 3:14 4:8 12:6,10,11 13:2 29:11 31:2,12,18,19 31:25 32:6,17 35:25 36:20 39:21 43:7 46:19,20 49:15 49:15 52:16 53:3,10 59:8 60:7 62:4,10 64:18 prevails 36:24 40:11 43:7 prevented 19:10 previously 23:12 principle 23:14</p>	<p>principles 44:7 prior 23:16,17 23:19 46:14 private 32:14 probably 22:15 40:15,23 problem 9:7,24 9:25 12:20 13:9 24:9 26:10 42:22 53:20 63:16 problems 39:16 procedural 37:25 38:7 procedure 5:24 28:9 44:9 48:20 64:10,14 proceed 60:18 proceeded 6:13 proceeding 43:20 56:13 process 19:17 properly 60:19 proposal 41:12 protect 37:20 protected 9:15 prove 5:15 10:25 provision 16:21 37:14 52:15,17 pull 19:21 purpose 37:18 37:23 purposes 35:25 37:14 pursuant 52:10 pursue 48:13 pursuing 39:20 put 6:4 9:2,14 17:3 36:17 37:6</p>	<p>20:6 29:6,12 29:13 30:1,7 30:17 31:17 33:8,14,17 35:17 36:17 37:18,23 38:8 42:7 43:2,6,13 52:7,12 56:22 58:1 59:14 61:25 64:8 questions 4:11 38:20 quibble 51:15 quite 10:3 20:14 37:17 quo 33:5,6,12 quote 62:20 63:3</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raise 58:10,24 raised 42:16 57:10 58:19 60:13 63:15 raising 58:14 Rapids 26:9 rates 26:9,9 ratifies 33:12 rational 9:22 11:25 rationale 46:19 rationing 3:20 reach 12:5 25:7 reaching 26:16 59:15 read 10:3 20:18 39:13 47:19 50:16 53:15 reading 4:21 63:2 reads 11:24 ready 14:2 real 53:20 really 12:13 27:4 32:4 37:1 37:9 38:8,21 45:6,22 51:21</p>
--	---	---	--	--

<p>57:5 59:5,15 59:19 60:8 reason 4:3 5:4 14:8,21,22 19:9,15 37:23 37:24 51:1 58:16 65:8 reasonable 8:24 10:8,8 14:15 16:10 36:3 51:19 61:3 reasonable-ca... 42:10 reasonableness 12:4 reasons 4:3 25:5 30:19 42:2 65:3 REBUTTAL 2:8 61:22 recedes 45:19 recognize 19:22 recognized 45:21 62:20 63:8 recommend 36:21 38:11 record 9:23 20:18 recover 38:6 47:7,10,10,11 reduced 23:23 Reed 6:22 8:5,11 9:8 11:23 16:24 19:12 28:13 63:18 referred 48:10 referring 63:6 refers 22:25 23:1 refine 58:3 regardless 59:17 rehearing 57:22 rejected 7:15,17 relationship 31:22 32:19 34:20 35:2,9</p>	<p>37:5,10 46:6 46:22 47:9 62:2 relationships 47:12 62:7 relevant 12:13 relief 15:9 48:14 49:12 remaining 61:21 remand 24:18 54:3 remarkable 21:21 Remedies 9:14 remedy 16:15,20 17:23 18:21 40:25 50:17,23 62:21 Remember 45:14 remotely 6:23 rendered 55:6 renounced 23:22 reopen 19:7 reopened 24:3 reply 13:18 60:2 62:19 requested 8:12 requirements 17:12,18,19 20:2,3,8,12 23:13 requires 37:4 res 5:6 44:7 research 40:8 resolve 3:12 4:7 51:22 60:12,23 resolved 41:25 43:6 resolves 47:23 resolving 38:7 resources 46:10 51:21 respect 10:10 16:13 21:11 23:5,7,21 27:8</p>	<p>respond 10:21 58:17 responded 28:2 57:4 Respondent 1:8 1:21 2:7 29:3 response 40:3 responses 11:23 result 62:22 63:1,1 return 16:16 reversal 35:5 reverse 4:6 22:6 24:24 review 59:22 rid 14:12 right 5:2 13:12 18:14 20:2 22:15 23:19 34:8 37:17,17 41:22 42:16 44:14 50:6 51:12 52:3,13 57:6 58:3,24 60:4 64:17 rights 45:24 57:24 ROBERTS 3:3 28:25 32:21,25 33:25 37:11 40:2 41:11,18 42:12,25 49:9 49:14,20 50:9 50:11,20,25 51:25 52:4,13 58:5 61:20 65:11 round 15:8 36:24 rule 3:17,24 4:7 19:6,22 24:10 25:15 28:21 33:17 35:23,23 39:15,19 41:2 44:8 48:19,20 49:2,4 53:14 53:14 54:7</p>	<p>55:12 56:7 57:20 58:15,18 61:5,10,11 63:11 64:16,20 65:1 ruling 4:7 5:3 22:9 23:19 rulings 23:16,17 rush 51:23</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 sanction 9:21 17:6 52:1 53:6 sanctioned 37:4 47:9,12 sanctions 51:6 satisfied 17:12 20:1,3,8,11 41:9,24 42:5 61:4 satisfy 23:13 29:15 30:25 37:25 50:3,4,7 52:8 54:14 56:9 60:9 satisfying 17:18 34:16 sauce 47:4,5 save 28:23 saying 9:6 17:10 28:4,10 38:11 38:12 39:3 46:24 49:10 58:14,15 says 11:16 15:8 15:16 16:8 18:6 20:19 21:2,7 23:4 30:24 31:9,10 31:10 32:8 40:7 42:8 44:21 45:5 47:6,19 48:1 48:12,16 49:3 49:4 55:3,12 62:3,9</p>	<p>scenario 60:17 scope 30:17 second 4:12 19:4 second-guess 64:6 secure 29:11 38:7 secured 31:21 32:18 35:5 46:4,21 50:2 secures 34:24 35:18 37:1 see 18:22 20:24 32:20 36:5 38:14,15,23 39:17 46:7,12 65:8 seeing 19:2 39:18 62:23 seek 4:8 49:12 seeking 3:15 15:9 21:25 33:4,9,11 seen 14:16 40:1 sees 45:18 segregate 25:22 25:22 sends 52:11 sense 3:18 16:25 33:23 35:7 37:2 45:12 46:8 51:8 54:12 sensible 41:2 separate 23:3 24:7 separated 25:25 26:6 separately 57:10 September 21:11 serious 10:4 32:2 36:6 seriously 6:6,11 28:6,12 serve 3:20 served 37:15,23</p>
--	---	--	---	---

serves 53:14	30:5 38:18	specifically	story 20:9	sure 35:3 37:25
set 23:21,24	small 40:24	16:22	strong 45:22	41:21 42:15
setting 27:12,14	Smith 1:17 2:3,9	specifies 49:6	46:24	survive 55:18
settle 32:3,3	3:6,7,9 4:16,20	specify 48:18	stuck 46:23	systematic 9:1,7
35:9	5:2,11,19 6:7	53:18	stuff 62:6	11:19 12:2
settled 22:19,24	6:12 7:4,7 8:4	spend 40:18,21	subject 51:10	
settlement 21:9	8:8 10:16	spent 14:3,13	52:1 54:13	T
26:12 32:9,11	12:12 13:3,8	40:12	submitted 65:12	T 2:1,1
32:14,22	13:14 14:10,25	sporadic 9:18	65:14	take 3:20 6:11
seven 16:2	15:10,13 16:18	28:21	substitute 13:6,6	12:5 18:18
severe 9:21 16:6	17:9,15,20	sprung 57:6	sue 37:7,13	27:20 28:6,16
17:22 18:21	18:2,14,17	stages 30:21	38:13,17	31:1 32:22
62:21	20:5,13,24	standard 4:9,13	sued 38:22	36:1 38:3,3
severity 15:1	21:16,18,23	4:17 5:24 15:1	49:23,25 50:1	43:5 47:4 52:6
sexual 6:5 7:2	22:1,5,17,17	28:9 31:5 33:4	sufficient 13:25	52:12 56:18
9:24 11:1,10	22:25 23:14,25	35:23 38:19	19:15	taken 26:13
16:7 27:8	24:17,18,21	60:9 64:9	suggest 4:5	28:11 44:20
42:22 62:22	25:4,24 26:5,8	Starke 7:13	39:16	takes 55:7
sexually 15:16	27:6,9 28:8	15:16 21:10	suggested 29:7	talk 30:18 31:13
15:18	29:7 30:19	22:20 25:23,24	42:2,3	31:16 54:3
short 62:8	42:19 48:23	Starke's 7:13	suggesting 14:21	62:5
show 11:12 28:9	52:18 57:4,18	8:24	38:20	talking 22:19
28:12 62:1	58:14 60:1	start 15:19	suggestion 5:9	54:2 62:7
showed 3:16	61:21,22,24	started 6:16	7:8,14	Tasmania 38:22
14:19 40:8	63:2 64:1,19	56:18	suggests 50:15	Teamster's 5:25
side 22:8	64:21,25	States 1:1,14	50:16 64:3	Telephone 64:5
significance	so-called 9:3	status 33:5,6,12	suit 14:2 23:24	64:7
26:14 50:12	solely 40:4	statute 10:7	32:1 34:16	tell 7:1 8:2 15:25
simple 35:23	Solicitor 1:19	12:18 36:7	37:24 38:2,2	33:16 36:22
simplicity 36:5	somebody 49:23	37:19 38:9	38:21 39:22	38:16
36:18 39:2	51:3	44:15	41:10 43:19	telling 6:17
simply 7:19 9:5	sorry 46:10	statutes 31:20	44:22 45:15,16	19:13
23:20 54:16	sort 8:25 36:24	33:24	51:2 56:9	tellingly 19:5
sir 15:10 31:13	39:15 41:18	statutory 3:19	suitable 13:22	tells 53:15
41:1	43:8 44:6	3:20 64:14,15	suits 37:22	tempted 25:14
situation 14:4	45:25 54:5	staunchly 3:23	44:16	term 5:25 31:20
17:5 46:15	57:6	stay 16:20,23,24	summary 6:19	37:3 46:20
47:18 48:21	sorts 35:14 38:5	17:21 18:19	9:6 14:17 35:7	terms 32:3 36:20
59:18	46:25	19:8 33:7 48:1	55:18 61:15,18	test 13:6,6 53:11
situations 14:11	SOTOMAYOR	50:18 52:19,22	support 6:23	testimony 11:24
15:3 27:4	4:13,18,21	57:24	supported 50:6	28:17
28:16	21:23 22:2	stays 52:10	suppose 32:21	Thank 28:25
six 16:2,4,6	24:15,24 32:20	Steel 34:11 37:6	43:1 58:6	29:4 30:13
19:10 25:16	33:3 52:24	step 38:3,4	supposed 11:10	61:19,20,24
slap 28:7	53:17,20 64:16	stories 11:22	22:2 28:11	65:10,11
slightest 5:9	64:20,23	27:23 28:1	38:3	theory 49:21
slightly 29:24	specific 27:16	64:11,11	Supreme 1:1,14	61:14

<p>they'd 14:14 thing 6:3 16:11 46:6 47:1,13 52:2 57:8 59:10 62:2 things 9:1 15:19 35:8 36:1 62:7 think 12:12,20 13:4,20 15:13 17:7,13,15 20:13,17 22:7 22:10 23:6,18 23:25 24:17 25:17,24 26:13 26:15 27:6,9 27:12,14,22 28:8 30:14,15 31:7,16 34:7,8 34:9,16,23 36:10,23 37:16 37:17,18,22 38:5 39:7,18 39:18,25 40:1 41:1,3 42:1,7 42:21,22 43:11 43:12 44:25 45:10,13,21 46:6,16 47:1 48:15,25 50:5 50:6,12,19 51:1,14,15 52:14,17 53:24 54:4,21 56:3 57:24 58:2,8 59:4,11,25 60:10,24,25 61:1,16 64:2 64:25 thinking 41:24 42:4 61:4 thought 6:2 16:14 20:9 32:1,5 53:5 59:20 60:16 63:4 thousands 11:24 three 27:19</p>	<p>55:19 61:21 three-strikes 27:18 threshold 10:12 throwing 40:10 thrown 34:6 tie 54:5 tied 63:17 Tillie 21:8 23:1 time 12:23 28:23 40:17 44:12,12 51:13 63:5 time-barred 5:6 times 27:19 Title 3:14 4:2 5:21 16:22 29:9,15 31:21 42:8 45:24 51:20 told 24:6 42:21 tomorrow 35:20 40:15 tough 35:22 training 6:4 10:1 treated 62:9 trial 6:18 10:25 43:19 48:14 53:7,8 55:4 tricky 41:3 tried 42:23 55:5 trier 12:1 true 8:4 10:1,2 13:10 22:13 46:6 57:17 trust 15:2 truth 9:10,16 11:14 try 51:21 trying 15:20 48:24 53:6 turned 5:12 11:13 turns 9:4 15:4 51:9 twice 24:7 two 6:15 7:3 8:3</p>	<p>8:4 22:22 24:7 30:18,21 47:21 63:17</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 20:19 48:17 54:2 unappealing 45:2 uncertainty 62:14 underlying 33:21 understand 12:7 12:14 17:9 19:25 30:19 43:14 44:25 55:11 understanding 13:3 57:12 understood 18:24 63:5 unexpressed 5:24 unfairness 36:6 unfortunately 36:14 ungrounded 38:2 United 1:1,14 unjustified 37:22 46:11 unreasonable 4:14 5:3,5 25:13,18 43:19 44:18 60:25 65:5 unreasonable... 12:4 unreasonably 52:8 use 11:9 15:12 18:17,22 26:24 usually 59:21</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:5</p>	<p>valid 64:2 value 26:16 28:17 Van 1:3 3:4 venue 40:7,19 40:21,23 41:19 55:20 56:1 verdict 35:6 version 30:20 versus 37:20 39:2 Vice 37:20 view 13:7 30:11 36:8,10,11 50:5,14 59:22 60:3,7 views 39:7,8 VII 3:14 4:2 5:21 16:22 29:9,15 31:21 42:8 45:24 51:20 violation 51:20 voluntarily 32:16 33:19 36:25 45:19</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>Wait 42:25,25 waive 59:12 waived 56:19 57:23 waiver 13:14 25:2 29:8 30:18 waiving 30:20 wall 45:19 want 25:5,10 30:23 31:15,16 33:6,6 34:4,4,5 34:5 42:17 45:20 54:3 58:12 65:8 wanted 6:17 36:2 wants 32:17 34:2,9,11,12</p>	<p>34:17 washed 9:4 63:21 Washington 1:10,17,20 wasn't 5:8 8:6,8 16:6 19:13 20:16 57:10 58:18 wasted 46:9 way 10:23 11:5 19:16 20:18 34:12,17 35:4 60:8 61:1 ways 25:14 we'll 27:20 39:4 we're 10:22,22 10:24 11:2 13:18 25:14 29:24 30:4,20 30:21 43:1 50:5 55:15 58:3 59:18,21 we've 20:1 25:16 40:1 51:3 60:13 65:3 wealth 9:9 11:20 went 16:3 weren't 58:16 whatsoever 14:23 win 34:2,4,4,5 34:11,12,18,22 35:19 62:8 wins 34:13 35:14 withdrawal 21:8 withdraws 33:19 36:25 witnesses 11:9 woman 27:14 women 5:17 8:19 9:11,15 14:18 15:7 22:21,22 25:11 42:23 49:13 63:7</p>
---	--	---	---	--

won 31:8,8,11 34:17 35:20,24 64:21	11 62:19	<hr/> 5 <hr/>		
wondering 57:7	11:06 65:13	<hr/> 6 <hr/>		
word 18:23 63:4	115 21:2	60 19:6,22 24:10 63:11		
words 26:3 35:8 40:5 41:13 51:7	116 21:2	61 2:10		
work 3:21 27:12 27:13 36:6	118 18:8	67 15:7 16:8,13 23:8 25:11 47:24 49:13 61:9		
working 27:14	118a 21:5,7	69 7:16		
worse 60:15	14 21:11 48:5	<hr/> 7 <hr/>		
wouldn't 16:25 24:4 36:9 40:2 50:25 51:1,5	14-1375 1:4 3:4	706 16:22		
wrap 54:6	15 10:17	<hr/> 8 <hr/>		
wrist 28:7	154 9:9 11:11,21 11:21 25:25 27:23	87 14:17		
writing 13:18 45:18	16 39:9	<hr/> 9 <hr/>		
wrong 13:5 22:3 32:6 33:20 39:23 40:7,21 40:22	168 7:16	92 7:18		
<hr/> X <hr/>	169 8:12	99 11:13 14:18		
x 1:2,9	17a 49:2			
<hr/> Y <hr/>	18 10:14			
yeah 42:12 50:11	<hr/> 2 <hr/>			
year 19:6 51:18 51:18	2008 10:17			
years 8:20 17:4 19:10 25:16 38:16 39:9 40:22 41:15 43:16 63:12	2009 18:10 54:5			
yields 29:25	2012 21:11			
<hr/> Z <hr/>	2013 18:5 23:23 54:3			
0	2016 1:11			
<hr/> 1 <hr/>	213 48:4			
10/1/2009 54:17	216 47:25			
10:05 1:15 3:2	217 47:25			
100 26:3	26 33:15			
100,000 41:10	270 9:3 10:18,20			
	279 54:16 55:1			
	28 1:11 33:15			
	29 2:7			
	<hr/> 3 <hr/>			
	3 2:4			
	30 38:16			
	<hr/> 4 <hr/>			
	4 25:20			
	4.6 41:6,14			
	4.7 41:6			
	41 44:9 53:14,14 54:7 55:12 56:7			
	41(b) 48:20 49:2			