

1 MR. PHILLIPS: Okay.

2 JUSTICE KAGAN: That seems like it's a
3 bad -- that seems like a bad incentive.

4 MR. PHILLIPS: Right. Justice Kagan, the --
5 two basic points I would make to that. First of all,
6 the -- I don't remember if it's Mr. Jones or Mr. Smith,
7 but the bad actor, we'll call it -- the bad actor in
8 that circumstance obviously has to pay the full
9 compensation for the infringement, which is in some
10 instances, tens of millions of dollars, will almost
11 certainly be subject to attorneys' fees under
12 Section 285. So it's not as though you're getting a
13 pass under that -- in that situation.

14 Now, I understand the desire to -- to have
15 enhanced damages against that particular bad actor.
16 That's why I say in a lot of ways, this case comes down
17 to what do you worry about more, pirates or trolls? My
18 assessment of this, and I think it's borne out by the
19 way the Federal Circuit has looked at this problem, is
20 that there are not that -- there are not very many
21 pirates out there. And if you keep a rule that is
22 designed simply to get the one in a million pirates -- I
23 would call them unicorns -- but one in a million
24 pirates, you'd end up with a rule that will allow the
25 trolls to go after every legitimate producer of products

1 and services in this country. And that's the price
2 you'd have to pay to get at the -- at the really bad
3 actor.

4 JUSTICE BREYER: See, the question -- I know
5 this is not exactly a question that we've seen in your
6 briefs, but we see countering in your brief, is there
7 was a company. And the company made, I think, cotton
8 goods. And an individual thought that he could make a
9 lot of money by taking those cotton goods and the
10 machinery that they were used and selling it all over
11 the United States. And so he did it. I think it was
12 Alexander Hamilton.

13 (Laughter.)

14 JUSTICE BREYER: I'm not sure. And as a
15 result, New England grew rich.

16 Now, supposed he'd gotten a letter one day
17 that said, we have a patent. We have a patent. And it
18 would have cost him \$10 million to look into it, and he
19 didn't have all the money so he thought he'd run his
20 chances. Suddenly I'm not so sure which way the
21 equities would work out. That's your point. Both of
22 you have a point.

23 MR. PHILLIPS: Right.

24 JUSTICE BREYER: And that's why I'm looking
25 for is there some way we can get the real worst ones

1 without destroying what you don't want to have destroyed
2 and yet, where he's really worried about the real worst
3 ones?

4 MR. PHILLIPS: And I think the answer, at
5 the end of the day, is Congress made the choice, I
6 think --

7 JUSTICE BREYER: They just used the word
8 "willful." I'm not --

9 MR. PHILLIPS: No, no. But it did it
10 against the backdrop of the -- of the Seagate standard.
11 Because Seagate clearly made a judgment that as between
12 a raft of claims by nonpracticing entities arising out
13 of a raft of letters and everything that goes with that,
14 between that and the risk of a true pirate out there,
15 that Congress -- that it thought the better answer
16 clearly was that we should -- we should protect and --
17 and limit the -- the scope of the patents and make sure
18 that they are being properly challenged in a --

19 CHIEF JUSTICE ROBERTS: But the -- the --
20 the choice is reflected in the statute, which leaves a
21 lot of discretion to the district courts. And I
22 think -- and a lot of the arguments we've heard today
23 are the sort of arguments that can be made to the
24 district court's discretion in a particular case.
25 Saying, you know, this -- this is one of those pirates

1 or, you know, trolls, and it is a serious one or it's
2 less serious one. And you have these standards to
3 apply, and -- and the district court will exercise the
4 discretion.

5 And if it's out of the channel of
6 discretion, then the Court can review it on that basis.

7 MR. PHILLIPS: Mr. Chief Justice, I think
8 the problem with that is -- is that it -- unless you
9 come up with -- I mean, I -- you know, recklessness --
10 I -- or egregiousness -- I don't know what
11 "egregiousness" means, and I don't know how you -- how
12 you evaluate that on review.

13 I do know what it means to -- to take an
14 objectively reasonable position. More than simply
15 something that's beyond frivolous, it is a substantial
16 argument that either the patent doesn't extend to -- to
17 my particular product or the patent itself is invalid.
18 And circumstances where -- where that is true, my hope
19 would be that the Court, recognizing the extraordinary
20 importance of limiting patents and the monopolies that
21 flow from there, would drive the legal decision in this
22 context -- of the legal standard in this context exactly
23 where the -- where the Court adopted it in Seagate.

24 That's the court that has the experience and
25 expertise, and I would hope under these circumstances,

1 in this very unusual situation, because patent law in
2 this context I do think is very different than almost
3 any other tort context, I would hope in the one -- in
4 the -- in the decidedly one-sided approach that 284 is,
5 where it only gives to the plaintiffs the ability to do
6 what they can do and what they want, that the Court
7 would adopt the kind of rigorous objective standard that
8 allows both for the -- both for the determination that
9 the -- that the patent is invalid or doesn't infringe,
10 and that that's examined on an objective basis.

11 If there are no further questions, Your
12 Honors, I urge the Court to affirm.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Phillips.

15 Mr. Wall, you have four minutes remaining.

16 REBUTTAL ARGUMENT OF JEFFREY B. WALL

17 ON BEHALF OF THE PETITIONERS

18 MR. WALL: Mr. Chief Justice, I have two
19 fairly simple points.

20 The first is, as we and the PTO and many of
21 Respondents' amici recognize, the system as it currently
22 stands is out of balance. And we have tried, and I
23 believe we have succeeded, in crafting an approach that
24 balances the Court's concerns with the need to respect
25 the rights of patentees, including small companies like

1 Halo.

2 And we've done it in a couple of different
3 ways.

4 Reasonable, good-faith efforts to -- to
5 challenge patents are not going to result in enhanced
6 damages. And intent and recklessness are not going to
7 be and should not be easy to show.

8 Now, the Federal Circuit hasn't adopted a
9 contrary approach based on its expertise. It thought it
10 had to in light of this Court's decision in *Safeco*,
11 which it has misread. *Safeco* says if you adopt a
12 reasonable view of the law at the time, you're not
13 acting willfully. It doesn't say if you subjectively
14 and correctly believe that you are violating the law,
15 you are held not to be willful because you have hired a
16 good lawyer and come up with a defense later.

17 And that approach is what has skewed the
18 incentives in the patent system and taken us out of
19 balance.

20 Our approach incentivizes good, commercially
21 reasonable behavior under the full set of circumstances
22 at the discretion of the district court. Their approach
23 is incentivizing good litigation.

24 And the second point I just want to make
25 quickly is we do have the evidentiary burden and

1 standard of review in this case. I think it's clear
2 that the -- there isn't any basis for the clear and
3 convincing standard. On the standard of review, I think
4 Highmark resolves and I think Pierce v. Underwood
5 resolves it.

6 These are determinations bound up with the
7 facts, and just as the Court said in Pierce, whether a
8 litigating position is substantially justified is a
9 mixed question of fact and law. So too the questions
10 here. These should be reviewed for abuse of discretion,
11 and it's very important for the Court to say that.

12 Halo should go back to the district court
13 and be analyzed under the right standard so the
14 evidentiary burden matters.

15 In Stryker the district court actually got
16 to the discretionary way, did it, and on appeal, Zimmer
17 never challenged that as an abuse of discretion. It
18 just argued about the objective prong.

19 When this Court takes that out of the
20 analysis, as it should, there's no basis to disturb the
21 district court's discretionary ruling. As the Court
22 knows from looking at it, it's a thorough and reasonable
23 opinion. So --

24 JUSTICE ALITO: One point Mr. Phillips
25 brought up that you didn't address in your initial

1 argument, maybe you could say a word about it, is
2 Section 298 of the American -- America Invents Act.

3 Under your -- under your reading, could
4 evidence of the failure to obtain or introduce advice of
5 counsel be used to prove that the defendant infringed in
6 bad faith?

7 MR. WALL: No. The patentee cannot put that
8 at issue affirmatively. All 298 does is it dealt with
9 a -- that very narrow problem. And when the patentee
10 comes in and wants to show intent or recklessness, it
11 can point to your copying of the patent. It can point
12 to the fact that it gave you really extensive, very
13 detailed notice. It tried to license with you. You
14 didn't do anything. It cannot put at issue whether you
15 talked to counsel.

16 Now, the defendant maybe --

17 JUSTICE ALITO: How do you get to that point
18 under the language of 298?

19 MR. WALL: Because 298 just says when you're
20 proving of willfulness, whether it's a factor as it is
21 in our approach, whether it's the end-all, be-all as it
22 is in their approach, whenever the patentee is trying to
23 prove that up, you can't affirmatively put that at
24 issue.

25 And as Pulse candidly, and I think honestly,

1 concedes in its brief, you can read 298 to have effect
2 on either side's view of the -- how you ought to treat
3 the enhancement statute. So I don't think 298 cuts
4 either way.

5 And I would just stress for the Court that
6 Congress at the time looked at putting "willfully" in
7 the statute, and it looked at putting something
8 virtually identical to Seagate in the statute. It
9 didn't do either one, so I don't think it can be taken
10 to have ratified the Federal Circuit's current approach.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 The case is submitted.

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

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<p style="text-align: center;">A</p> <p>a.m 1:22 4:2 61:13 ability 28:11 39:8 57:5 able 11:20 14:6,6 14:10 16:15 17:20 18:14,15,17 39:25 above-entitled 1:20 61:14 absence 12:23 absolute 46:22 51:6 absolutely 46:19 51:12 abuse 41:12 44:20 46:10,15 59:10,17 accept 36:2 37:6 38:2 access 46:3 accommodates 24:15 account 16:22 17:13,17 accurate 25:4 accused 21:23 acquiesced 45:21 act 42:12,13 45:20 50:7 60:2 acted 9:6 51:5 acting 16:7 58:13 action 47:22 48:13 actions 31:8 activity 35:9 actor 49:13 53:7,7 53:15 54:3 actual 21:22,24 26:4 add 16:21 added 40:2 additional 50:18,19 address 59:25 adequate 41:21 admit 33:16 34:8 adopt 17:8 57:7 58:11 adopted 43:23,24 56:23 58:8</p>	<p>advice 60:4 advocating 5:12 affirm 46:24 57:12 affirmatively 23:16 60:8,23 afford 10:20 23:2 afraid 22:23 after-the-fact 6:3 aggravating 5:8 agree 5:19 19:25 23:24 24:5 26:1 28:1,5 agreed-upon 5:18 agrees 21:18 28:7 ahead 36:9 akin 20:24 AL 1:7,11,14 Alexander 54:12 Alito 6:6,21 7:20 17:20,24 18:11 47:13 59:24 60:17 allow 22:12 23:6 26:13 28:10 47:3 50:16 53:24 allowed 24:25 allowing 46:1 allows 20:6 57:8 America 42:11,13 45:19 60:2 American 60:2 amici 57:21 amicus 2:3 3:7 12:1 19:21 34:15 amount 9:20 35:9 37:7 40:21 analogy 50:10,11 analysis 23:25 25:12 39:22 48:4 49:7 59:20 analyze 32:9 analyzed 39:18 59:13 ancillary 41:24 answer 9:2 10:4,14 36:8,9 52:13 55:4 55:15</p>	<p>anticipate 37:14 anticipated 29:1 anyone's 29:2 anyway 36:9 appeal 59:16 appeals 20:19 39:18,20 APPEARANCES 1:23 application 31:14 applications 31:20 applied 27:19 apply 46:23 56:3 applying 44:6 appreciate 37:14 approach 57:4,23 58:9,17,20,22 60:21,22 61:10 appropriate 38:18 39:5 arbitrarily 19:16 arbitrary 20:6 area 11:6 21:19 41:11 arguably 29:1 argued 59:18 argument 1:21 3:2 3:5,9,12 4:3,8 11:9,16 14:8 19:20 23:3 30:9 30:14 32:4,5 41:7 50:25 52:24 56:16 57:16 60:1 arguments 55:22 55:23 arising 55:12 art 29:6 articulate 14:19 15:7 17:8 articulated 37:17 41:1 articulation 16:18 artificial 4:25 38:22 aside 4:25 35:23 asked 46:20</p>	<p>asking 6:8 13:12 23:14 52:11 aspect 42:10 asserted 35:10 assess 17:21 47:18 assessed 9:21 40:21 assessment 47:2 53:18 assistance 48:3 Assistant 2:1 assume 9:23,23 10:1 assumed 33:17 assumption 34:8 assumptions 11:17 assure 35:14 attaches 32:20 attends 48:10 attention 39:13 attorneys 17:23 48:4,5 attorneys' 20:10,13 40:13 53:11 automatic 37:24,24 automatically 8:4 avoids 27:1,4 award 20:12 awarded 6:22 aware 29:3</p> <hr/> <p style="text-align: center;">B</p> <p>B 1:24 3:3,13 4:8 57:16 back 7:17 18:8 19:10 31:11 33:18 36:7 42:11 59:12 back-end 14:16 backdrop 55:10 bad 14:17 23:18 44:11,11 49:23 52:15 53:3,3,7,7 53:15 54:2 60:6 bad-faith 4:15 25:11 balance 38:19 57:22 58:19</p>	<p>balances 57:24 bar 9:15 11:19 14:5 19:13,15 20:3 23:14,17 barrier 34:4 barriers 34:6 based 4:21 5:25 6:9 6:22 9:2 12:19 16:3 26:3 28:11 28:21 41:8 58:9 basic 53:5 basically 20:18 basis 23:20 26:19 32:14 39:21 41:13 45:1 56:6 57:10 59:2,20 be-all 60:21 bears 34:20 beginning 16:16 32:1 behalf 1:24 2:5 3:4 3:11,14 4:9 30:10 57:17 behavior 58:21 belief 8:2,10,20 12:23 13:5 24:17 25:22 belief's 25:23 believe 45:1 57:23 58:14 believes 25:18 benefit 22:5,6 benefits 52:9 best 11:15 39:24 44:5,8,15 bet 10:24 better 20:22 55:15 beyond 33:11 41:12 56:15 big 13:11 36:3 44:3 bit 15:15 24:22 34:18 52:12 body 47:11 borne 25:9 53:18 bound 59:6 bounds 33:1</p>
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<p>box 12:20 13:23 break 12:4,7 34:2 Breyer 9:10,16 11:8,11,24 12:1,8 12:15,18 13:1,4 13:16 15:8 17:18 22:10 24:4 29:16 29:24 33:5,13 34:14,16,23 35:3 35:25 36:13,14,16 36:22 37:1,8,18 49:9,12,22 50:2,4 50:6,9 54:4,14,24 55:7 brief 13:17 24:20 24:21 25:15 34:15 54:6 61:1 briefs 10:12 12:2 33:15 34:8,12,13 37:18 54:6 broader 7:6 brought 59:25 bucket 25:9,10,13 25:25 26:6 27:8 buckets 25:9 26:16 26:22 27:11 built 30:22 51:1 bulk 17:18 burden 8:22 58:25 59:14 burdens 41:1 businesses 12:4 businessman 11:4 businessmen 12:3</p> <hr/> <p style="text-align: center;">C</p> <p>C 3:1 4:1 call 9:1,3 14:10 43:9 51:19 53:7 53:23 called 39:15 calls 52:23 candidly 46:23 60:25 candle 36:20 care 8:14 46:13</p>	<p>careful 7:3 carrageware 13:3 carried 8:22 carry 11:19 CARTER 2:5 3:10 30:9 case 4:4,5 9:12 17:3 18:1,8,12,22 20:1 21:5,7,9 22:12 23:20 26:15,20 27:10 28:20 29:7 29:8 30:17 32:6,7 35:16 36:5 37:5 39:15 40:16 45:10 45:15 47:20 50:18 51:10,11 53:16 55:24 59:1 61:12 61:13 cases 4:14 5:23 7:5 7:9,10,13,14 8:13 14:7 16:1 18:20 19:10 22:18 24:10 24:12 25:9,10 26:1,7 27:15 39:11,12 41:5 45:14 46:23,25 50:13 catch 36:18 categorical 23:13 23:14,17 categorically 20:3 category 7:7 caught 51:3 century 12:9 certain 5:18 24:12 26:14 certainly 45:25 49:16 53:11 cetera 51:4,7 challenge 24:13 32:14 33:3 58:5 challenged 55:18 59:17 chances 10:21 49:17 54:20 change 42:17</p>	<p>changed 18:4 channel 41:6 56:5 characteristics 48:7 characterizations 30:15 chart 18:24 Chief 4:3,10 7:22 7:24 8:8,9 19:18 19:23 24:20 25:14 25:20 29:10 30:7 30:11 31:1,5 40:14,18,24 41:10 44:4 55:19 56:7 57:13,18 61:11 choice 55:5,20 circuit 4:12,17 6:3 7:16 9:7 11:6 13:7 19:12,25 20:3,21 21:16 22:3,22 23:14 36:1,23 39:7 40:25 42:14 46:14 47:7,11 53:19 58:8 circuit's 12:10 36:24 61:10 circumstance 53:8 circumstances 13:18 19:9 26:4 33:4 45:22,24 47:3 50:2 51:4 56:18,25 58:21 cited 6:12 civil 28:7 claim 17:6 18:23,24 39:23 claim-construction 39:23 claims 35:13,19 55:12 clarify 31:10 class 28:10 classic 32:6 clear 10:2,4 23:18 44:18 45:6,8,12 45:18 59:1,2</p>	<p>clearly 55:11,16 close 39:11 come 8:15,16 9:8 9:13 18:22 28:12 29:18 38:7 44:6 44:18 47:14 48:19 49:25 50:13 52:1 52:24 56:9 58:16 comes 32:7 36:7 42:11,13 51:21 53:16 60:10 comfortable 34:18 coming 33:15 34:24 commercially 13:19 17:15 19:8 58:20 common 13:23 communications 17:23 companies 12:6,16 33:24 36:3 57:25 company 10:18,19 10:22 13:6,11 54:7,7 company's 17:23 compensate 41:21 compensation 7:9 53:9 compensatory 26:14 competing 9:1 competitor 30:22 completely 40:10 46:2 50:20 complex 16:11 complexity 16:19 compromising 36:1 conceal 6:13 concealment 7:5 concede 43:21 concedes 61:1 concern 15:9 24:9 24:16 29:21 concerned 15:8 17:19 42:20 concerns 57:24</p>	<p>conclude 24:18 concluded 43:3 concrete 28:19 conduct 14:20 16:12 17:22 18:18 22:1 23:24 25:11 25:11,17 26:23,23 28:9 29:7 30:4,5 30:16 40:11 41:24 conducted 5:5 24:1 conducting 21:20 conducts 6:3 confines 41:6 Congress 29:22 33:20 42:11,16,22 42:24,24 43:14 45:19 55:5,15 61:6 consequence 46:3 consideration 50:17 considerations 29:23 considered 21:13 28:9 consistent 21:10 47:10 consolidated 4:5 18:1 context 12:12 23:25 24:1 40:4 46:4,5,9 47:16 56:22,22 57:2,3 continued 19:1 continuing 48:12 continuously 33:25 contractor 6:17,18 contrary 58:9 convincing 10:2 44:18 45:7,9,12 45:18 59:3 copied 8:1,3,18 30:18 copiers 4:15 copy 30:24 51:12 51:14,14,22 52:8</p>
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<p>52:19 copying 12:20,22 18:21 30:17,20 32:1,6 60:11 copyright 33:19 48:9 core 33:6 corporate 26:10 Corporation 1:11 4:6 17:2 30:18 correct 20:19,21 39:3 correctly 58:14 cost 54:18 cotton 54:7,9 counsel 10:21 19:18 30:7 42:25 60:5,15 61:11 counsels 5:9 countering 54:6 country 54:1 couple 23:9 58:2 course 34:16 court 1:1,21 4:11 4:24 5:13,20 7:15 8:14,25 9:19 11:5 11:23 14:9 17:2 18:1 19:24 20:19 23:4,19 26:20 30:12 39:12,15,17 39:20 40:8,20 42:19 43:23,24 44:12 47:9 56:3,6 56:19,23,24 57:6 57:12 58:22 59:7 59:11,12,15,19,21 61:5 court's 6:13 46:15 55:24 57:24 58:10 59:21 courts 5:5,17 7:11 9:4 14:24 17:20 19:11 21:19 41:2 55:21 courts' 5:16 covers 25:8,25</p>	<p>crafting 57:23 craw 52:12 create 11:2 23:4 created 22:23 creates 20:5 48:22 creating 33:10 criminal 28:8 critical 46:18,19,22 criticism 32:12 cry 30:14 culpability 28:4 culpable 28:3,5 29:7 curiae 2:3 3:7 19:21 current 61:10 currently 57:21 cuts 61:3</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 4:1 D.C 1:17,24 2:2,5 damages 4:13 6:9 6:22 8:17 9:20 10:9,24 18:13 20:2,4,7,8,15 21:1 21:7,12 22:12 23:21 24:19,24 26:7,14,19 28:6 29:9 30:6 31:19 36:10 37:23 38:10 40:2,10,21 41:20 41:25 42:1 45:24 46:3 47:25 50:3 50:14 53:15 58:6 day 33:10 45:11,13 54:16 55:5 daylight 15:15,20 de 44:19,22 46:14 dealing 40:19 41:3 dealt 60:8 debating 16:2 decide 6:21 36:23 decided 10:16 18:13 36:25 45:11 decidedly 57:4</p>	<p>decision 47:13 56:21 58:10 declared 32:19,21 defendant 8:21 19:3 47:3 50:15 60:5,16 defense 9:13 18:14 18:16 20:5 28:13 28:13,16 30:1,2 38:8 39:9 45:18 50:23 51:5 58:16 defenses 4:22 6:3 9:8 39:10 45:14 deferential 5:6 deferentially 45:5 define 49:8 50:19 defined 33:2 defining 27:17 definition 28:17 43:18 degree 47:23 deliberately 36:7 demonstrated 32:17 Department 2:2 depending 19:8 describe 24:25 described 30:16 describing 14:20 designed 11:2,3 53:22 desire 36:17 53:14 desperately 44:22 destroyed 26:11 55:1 destroying 55:1 detailed 60:13 determination 43:1 44:10 46:15 47:24 48:2,7,14 52:16 57:8 determinations 23:5 59:6 determinative 7:25 determine 47:17 deterrents 29:22</p>	<p>developed 4:12,22 devices 19:6,14 20:23 difference 24:22 26:12 40:5 52:10 differences 25:6,7 different 7:12 12:16 23:25 25:8 38:2 39:14 43:10 43:11,22 46:8 47:14 48:16,16 57:2 58:2 differently 38:4 39:15 direction 20:22,22 21:3 disagree 26:2 discount 14:14 discourages 32:25 discouraging 22:25 discretion 5:13,17 7:19 14:24 19:13 41:5,7,11 44:20 46:11,16 51:9 55:21,24 56:4,6 58:22 59:10,17 discretionary 41:3 59:16,21 discussing 20:9 discussion 26:18 dismantle 20:18 dispute 12:21 dissertation 28:25 district 5:5,13,16 5:17 6:12 7:11 8:25 9:4 14:9,24 17:2 46:15 47:8 55:21,24 56:3 58:22 59:12,15,21 disturb 59:20 disturbing 24:7 doing 7:17 14:3 19:11 22:4,11,11 22:15 23:7 29:13 29:17 dollars 53:10</p>	<p>doubt 18:3 52:2 downside 42:6 drive 56:21</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 3:1 4:1,1 easy 12:20 18:20 37:10 58:7 economy 42:7 edges 36:15 effect 9:14 20:11 22:25 61:1 effective 34:14,17 40:10 efforts 58:4 eggshell 49:16 50:14 egregious 14:20 20:7 25:1 26:8,23 50:18 egregiousness 56:10,11 either 9:19 45:21 47:4 56:16 61:2,4 61:9 elaborate 41:13 Electronics 1:3,6 4:4,5 element 27:10 50:18 elementary 34:7 elements 46:18,22 else's 14:4 embrace 13:17 embraces 11:17 empirical 33:13,14 35:8 employment 22:19 encompass 27:11 encourage 24:12 end-all 60:21 enforce 44:16 engineer 35:21,21 engineers 19:4 36:5 England 54:15 enhance 14:25</p>
---	--	--	--	--

<p>23:21 enhanced 4:13 6:9 6:22 15:4 18:13 20:2,7,8 21:1,7 24:19 26:7,14 28:6 29:9 30:6 31:19 37:23 38:10 40:2,10 41:24 47:25 53:15 58:5 enhancement 4:16 5:3,9,23 8:15 14:10 18:4,7,10 61:3 ensure 47:8 ensuring 29:22 entire 46:2 entirely 20:9 entities 33:9 55:12 entitled 37:25 entity 36:24 entrench 15:9 entry 34:6 envision 49:1 equally 43:20 equities 54:21 equivalence 11:1 erect 41:13 escape 20:7 espionage 26:10 ESQ 1:24 2:1,5 3:3 3:6,10,13 essential 40:9 essentially 6:19 9:5 19:12 21:5,7 22:4 26:22 28:11 44:24 48:10 establish 21:7 established 20:19 et 1:7,11,14 51:3,6 evaluate 56:12 event 9:19 35:1 everybody's 29:14 evidence 8:16,19 26:11 30:24 31:16 35:9 44:18 45:7 60:4</p>	<p>evidentiary 58:25 59:14 evolved 40:6 exactly 8:12 35:13 54:5 56:22 examined 42:6 57:10 example 6:10 10:5 26:9 32:10 35:11 47:15 excellent 10:12 excited 46:5 exclusively 41:23 Excuse 27:3 exempt 31:19 exercise 7:18 41:5,6 56:3 existence 45:19 exists 17:16 experience 56:24 experienced 39:20 expert 11:5 23:4 39:20 47:11 expertise 56:25 58:9 experts 13:13 explain 25:6 explicit 42:19 extend 56:16 extensive 60:12 extent 15:18 extraordinary 40:16 56:19</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 23:5 faced 9:1 facing 6:4 37:2 fact 8:3 14:11 23:23 29:2 32:17 32:22 36:11 44:10 48:13 52:2,4,7 59:9 60:12 factor 5:8 60:20 factors 6:15 17:2 17:16</p>	<p>facts 4:23 5:25 6:4 9:2 12:19 16:3 18:4 22:7,8 26:3 28:21 31:25 37:5 46:24 59:7 factual 46:7 failure 60:4 fair 37:7 fairly 18:20 41:13 57:19 faith 16:15 52:15 60:6 fall 12:9,10,11 26:15 fallen 12:15 far 38:7 43:7 faulty 13:10 favor 5:9 9:24 favours 15:10 fear 22:25 36:7 February 1:18 Fed 13:7 Federal 4:12,17 6:2 7:16 9:7 11:6 12:10 19:12,25 20:3,21 21:16 22:3,22 23:14 39:7 40:24 42:14 46:14 47:7,11 53:19 58:8 61:10 feel 34:18 fees 5:1 12:12 20:10,13 40:13 53:11 fight 45:16,16 figure 21:24 find 28:24 33:1 35:23 36:20 49:24 finding 30:22 finds 32:14 firm 28:23 29:4 first 4:19 21:4 23:10 25:9,10 27:22 35:8 41:18 45:18 48:2 53:5 57:20</p>	<p>flaw 10:6 36:11 flow 56:21 focus 39:13 41:19 focused 41:23 follow 13:7 footnote 44:12 forget 37:23 47:8 52:3 form 16:24 forward 35:23 39:4 39:10 45:14 46:1 49:2 50:13 found 9:20 14:15 32:22 40:21 49:23 four 19:6 57:15 framework 5:2 12:10 free 28:11 friend 25:1 35:12 50:12 friends 43:25 frivolous 38:9 39:4 56:15 front 43:16 full 13:17 53:8 58:21 fulsome 17:6 18:23 further 57:11</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 2:5 3:10 4:1 30:9 gee 49:4 General 2:2 General's 32:10 generalized 17:9 generally 18:21 47:14 German 32:13,17 Germany 28:24 getting 13:11 17:22 36:4 53:12 Ginsburg 5:11 31:13 44:14,17 45:3,6 46:10,13 46:17 give 14:24,25 15:4</p>	<p>16:19 18:10 24:6 43:2 given 35:11 41:11 gives 20:11 57:5 giving 22:5,6 36:4 36:14 go 7:17 12:15 19:10 31:11 33:11 36:9 36:20,20 39:1 46:1 47:9 52:19 52:23 53:25 59:12 goes 32:13 33:5 36:6 40:12 46:20 55:13 going 5:8 11:20 12:9,19 14:5 17:17,20 18:10,16 22:12 30:24 32:25 37:14 40:4 42:17 49:2,6,24 52:8 58:5,6 good 5:1 9:8 10:1 13:13 16:15 18:14 19:11 20:22 22:19 22:21 32:12 37:10 37:15,15 48:20 58:16,20,23 good-faith 8:2,10 24:17 25:22 30:1 38:3 58:4 goods 54:8,9 Google 11:1 gotten 54:16 government 15:16 23:4 24:23 government's 15:21 34:4 great 32:19 49:14 greater 47:20 grew 54:15 ground 10:2 guess 38:14 50:1 guidance 7:15 9:22 15:1,25 guide 5:16 27:22 guided 7:18</p>
--	--	---	---	--

<p style="text-align: center;">H</p> <p>ha 33:14,14,14 habit 36:4 half 12:9 Halo 1:3 4:4 58:1 59:12 Hamilton 54:12 Hand's 18:2 handed 6:18 35:20 happen 21:17 happened 29:15 49:15 happens 34:1 happy 11:16 43:9 hard 10:4 42:14 46:5 harder 20:25 hardest 10:3 harm 42:7 harmed 47:22 head 29:2 hear 4:3 heard 55:22 heightened 41:1 46:4 held 58:15 help 11:3 13:5 15:24 18:14 helped 42:19 high 11:19 13:24 14:2,5 17:12 19:15,16 22:1 30:4 higher 24:23 Highmark 4:25 12:11 59:4 hindsight 22:6 hire 9:8 28:12 34:3 52:23 hired 6:17 32:13 58:15 hires 28:23 historical 4:18 26:18 historically 5:17 7:18 8:13 17:25</p>	<p>19:10 37:23 41:4 history 5:3 9:24,24 21:11 23:11,16,17 25:10 27:14,20,22 40:4 41:8 hoc 28:12,15 49:7,8 holder 33:3 honestly 19:9 60:25 Honor 37:20 40:17 Honors 57:12 hook 9:9 hope 39:12 56:18 56:25 57:3 horribles 14:13 huge 42:8 hump 32:23 hundreds 12:5 33:8 hurt 11:4</p> <p style="text-align: center;">I</p> <p>idea 22:19,21 49:19 identical 61:8 identifies 35:13,13 identify 35:19 ignored 35:14 imagination 32:24 imagine 24:2 28:19 28:20 49:12 immunized 4:15 importance 56:20 important 13:22 21:3 24:10,12 39:17 40:3 43:20 59:11 impose 20:12 imposing 27:21 impossible 49:7 improve 31:3 inaction 42:23 incentive 53:3 incentives 14:12 58:18 incentivizes 58:20 incentivizing 58:23 including 13:18 57:25</p>	<p>incorporates 43:4 increase 9:20 40:20 independent 6:17 independently 42:6 indifference 45:25 individual 54:8 industry 13:20 17:15 34:2 infer 16:15 42:23 information 16:14 18:18 33:13,14 37:7 infringe 14:14 19:1 35:14 38:1 47:5 50:17 57:9 infringed 14:15 33:8 60:5 infringement 4:13 4:23 5:7,22,25 6:7 6:17,25 7:6,14,25 8:16 14:1 15:18 15:19 16:2 18:24 24:18 25:16 26:5 26:9 29:3,8 39:24 41:21,23,25 48:1 48:13 53:9 infringer 6:4 10:10 13:10 14:17 16:4 16:5 17:21 18:5 18:17,22 20:4 25:24 26:4 28:23 infringer's 17:22 infringers 4:14 20:7 28:3,10 38:3 38:4,5 infringing 8:23 25:18 inherently 30:21 initial 30:20 59:25 innovation 24:13 37:19 inquiry 5:5 6:1,2 7:11,17 16:20 21:17,18,20 48:11 insists 9:25 instance 6:16 16:23</p>	<p>instances 39:11 46:24 53:10 intense 48:4 intent 4:20 12:18 12:20 18:20 21:6 23:18 44:11 46:7 50:17 51:6 58:6 60:10 intentional 5:24 16:3 25:2,11,15 25:16,16,17,24 26:22 28:8,10,20 30:3 intentionally 9:6 interest 33:16 interesting 26:17 43:25 interpretation 11:5 interpreted 21:14 interpreting 27:23 introduce 60:4 invalid 8:24 24:17 29:6 32:18,20 47:4 56:17 57:9 invalidity 8:20 12:23 33:3 invent 23:1 inventing 34:25 invention 22:25 29:1 30:17 Invents 42:12,13 45:20 60:2 investigation 8:23 invoke 15:19 invoked 15:17 involved 6:8,24 12:17 35:16 48:5 involves 32:1 51:20 involving 26:8 ironies 27:25 irrespective 10:9 issue 6:25 22:2 29:1 36:19 37:3 44:25 46:8 60:8,14,24 issued 30:19 31:9 issues 35:6 39:21</p>	<p>39:23,24</p> <p style="text-align: center;">J</p> <p>jail 28:11 JEFFREY 1:24 3:3 3:13 4:8 57:16 Jones 51:13,20 52:3,18 53:6 judge 13:25 18:1 18:13 20:12 judged 26:1,3 judges 4:21 19:11 22:17,18 47:9 judging 17:11 judgment 8:25 9:3 14:10,25 37:25 38:2 55:11 jump 44:4 Justice 2:2 4:3,10 5:11 6:6,21 7:20 7:22,24 8:8,9 9:10 9:16 11:8,11,24 12:1,8,15,18 13:1 13:4,16 14:18 15:3,6,8,12,22,24 16:6,8,11,18 17:1 17:7,18,20,24 18:11 19:18,23 20:8,17 22:10 24:4,20 25:14,20 27:1,4,8 28:14,15 29:10,10,12,16,24 30:7,11 31:1,5,13 31:18,22 33:5,13 34:14,16,23 35:3 35:25 36:13,14,16 36:22 37:1,8,16 37:18,21 38:12,15 38:17,21,25 39:14 40:14,18,24 41:10 43:7,13,21 44:4 44:14,17 45:3,6 46:10,13,17,21 47:13 49:9,12,22 50:2,4,6,9,16 51:10,16,18 52:7</p>
---	--	--	--	--

<p>52:11,14,17 53:2 53:4 54:4,14,24 55:7,19 56:7 57:13,18 59:24 60:17 61:11 justification 27:21 justified 59:8</p> <hr/> <p style="text-align: center;">K</p> <p>Kagan 28:14 29:10 29:12 43:7,13,21 51:10,16,18 52:7 52:17 53:2,4 keep 49:2 53:21 Kennedy 20:8,17 50:16 52:11,14 key 4:18 kill 10:6 kind 12:1 13:19 17:14 23:13 30:3 30:5 34:7 35:16 41:6,24 48:11 52:1,14,24 57:7 kinds 10:8 22:20 33:21 39:23,24 knew 18:5 21:24 know 8:2,10 9:11 10:12 13:10 14:22 15:13 16:8 18:2 22:7,8 25:2 29:13 30:4,23 32:11 38:6 40:25 41:4,5 41:22 42:1 43:7 44:8 48:15,18 49:15 50:24 51:7 52:18,20 54:4 55:25 56:1,9,10 56:11,13 knowing 14:14 knowledge 31:17 34:15 51:6 known 16:4 18:6 26:4 28:22 knows 10:17 59:22</p> <hr/> <p style="text-align: center;">L</p>	<p>language 23:5 40:19 41:14,19 43:6 60:18 large 4:14 36:2 latitude 20:12 laughs 33:14 Laughter 37:12 52:6 54:13 law 13:23 20:22,25 21:19 22:20,20,20 22:21 28:7,8,23 29:4 32:25 33:11 44:25 49:10,11 57:1 58:12,14 59:9 lawyer 9:12 19:4 28:12 32:12 52:1 52:23,24 58:16 lawyers 9:8 18:15 34:3,24 lawyers' 13:12 lead 32:24 46:24 leading 10:25 42:12 Learned 18:2 leave 11:4 36:22 42:22 leaves 55:20 leaving 22:17 leeway 36:15 legal 4:22 48:2 56:21,22 legitimate 15:9 53:25 legitimately 32:15 lest 10:23 let's 35:6 51:19 letter 10:19,20,23 18:23 34:1 35:12 35:15,17 48:24,24 49:3 54:16 letters 16:24,24 17:6 23:1 35:16 36:4 42:9 55:13 liability 8:17 30:2 48:14 libraries 32:14</p>	<p>library 28:24 license 16:25 60:13 lies 51:9 life 16:9,19 light 29:6 42:17 58:10 limit 55:17 limitations 17:17 limited 19:6 26:21 limiting 56:20 limits 33:1 line 32:4 lion's 16:1 litigating 59:8 litigation 4:22 6:9 6:12,23 7:4 9:9,11 9:14 14:16 26:24 34:19 38:9 42:9 46:2 58:23 little 10:22 15:15 16:9,21 34:18 living 11:18 long 9:4 19:11 29:25,25 30:2 41:3 51:25 longer 9:5 look 12:15 18:2 19:10 23:11 33:18 34:25 39:17 40:5 42:15 49:3 54:18 looked 19:5 34:16 35:21 39:7 44:7 53:19 61:6,7 looking 7:11 14:2 22:14 27:14 39:20 48:21 49:6 54:24 59:22 looks 6:3 35:22 42:16 49:13 loophole 20:6 lot 7:12 12:21 14:7 25:1 32:7 34:24 37:17,22 41:5 43:22 52:20,21 53:16 54:9 55:21 55:22</p>	<p>lots 19:7 33:9 low 19:13 Lumley 34:21,23</p> <hr/> <p style="text-align: center;">M</p> <p>machinery 54:10 main 6:24 major 6:15 22:24 making 9:4 12:24 33:6 malicious 23:19 man 21:22,25 22:5 maps 18:24 marked 8:6,7 31:6 31:7 market 12:16 48:23 Martinez 2:1 3:6 19:19,20,23 20:16 20:20 23:8 24:8 25:5,17,21 27:3,6 27:9 28:18 29:20 43:8 matter 1:20 5:13 12:24 14:23 17:5 45:25 48:14 61:14 matters 9:6 59:14 max 51:8 mean 8:7 15:12 17:25 25:15 32:7 33:5,14 35:1 36:20 37:4 40:8 41:2 44:11 48:11 49:5,12,20 56:9 meaning 40:7 43:3 43:23,24 meanings 43:22 means 12:7 27:23 56:11,13 meant 43:10,15 mere 20:1 25:2 metes 33:1 million 49:18 53:22 53:23 54:18 millions 53:10 mind 10:10 17:21 22:14 29:22</p>	<p>mine 5:22 minor 25:5 26:13 minutes 44:1 57:15 mischaracterizat... 31:25 misconduct 6:9,12 6:23 7:4,7,10 18:7 26:8,24 28:8 misread 58:11 mistake 21:15 mistakes 21:4 mixed 59:9 modify 45:20 moment 25:15 money 34:3 52:22 54:9,19 monopolies 11:2 56:20 monopoly 11:1 32:20 moving 4:17</p> <hr/> <p style="text-align: center;">N</p> <p>N 3:1,1 4:1 narratives 9:1 narrow 60:9 national 10:25 nature 5:7,21 6:7 6:16,25 7:13,24 16:2 47:18 48:12 nearly 5:4 necessarily 28:16 43:4 need 30:3,5 36:20 46:22 47:1 57:24 needs 16:2 26:20 negligence 20:1,24 25:2 negligent 5:8,24 18:9 net 4:24 never 18:25 51:3 59:17 new 29:2 30:22 33:10,10 54:15 nice 17:7</p>
---	--	--	---	--

<p>nondeferentially 47:7 nonfrivolous 9:13 nonpracticing 55:12 normal 45:24 normally 36:6 50:7 notice 13:19 16:23 17:13,14 60:13 notion 49:5 novo 44:19,22 46:14 null 32:21 number 4:14 7:4 25:13 numbers 42:8</p> <hr/> <p style="text-align: center;">O</p> <p>O 3:1 4:1 objective 21:8,18 21:20 22:24 23:23 23:25 26:2 39:6 39:21,22 42:5 44:9,23 46:9 47:1 47:3,11 50:23 57:7,10 59:18 objectively 13:24 18:15 20:4 39:25 44:25 45:13 50:24 56:14 obtain 60:4 obvious 33:7 obviously 37:6 43:5 45:15 48:15 49:21 53:8 occurred 14:1 29:3 occurring 24:18 occurs 47:15 octane 4:25 9:11 12:11 20:10,11 odd 29:13 odds 27:17 offered 32:10 office 32:10 okay 13:1 16:12 19:3 25:20 36:2</p>	<p>49:4 51:17 53:1 older 7:4 omniscience 22:6 once 8:14 10:19 one-of-its-kind 5:1 one-sided 57:4 ones 39:22 54:25 55:3 open 18:3 opening 13:17 operate 51:1,2 opinion 6:13 18:2 23:2 44:12 59:23 opinions 13:12 42:25 opponent's 34:5 oral 1:20 3:2,5,9 4:8 19:20 30:9 order 13:8,9 30:5 43:2 47:7 ordinarily 7:23 ordinary 24:14 ought 16:22 19:15 19:16 61:2 outset 32:2 outside 47:16 51:2 outweighs 29:23 overcompensated 19:14 overreacted 50:15 owner 37:22 owning 37:25</p> <hr/> <p style="text-align: center;">P</p> <p>P 4:1 PAGE 3:2 paid 23:7,10 parade 14:12 part 5:6 10:3 16:4 48:11 49:5 participating 34:19 particular 53:15 55:24 56:17 particularly 34:14 41:1,20 45:10 parties 8:15 16:1</p>	<p>20:1 26:10 party 36:18 pass 53:13 passed 33:20 42:24 45:19 patent 4:13 8:10 9:12 10:6,8,15,16 11:2 13:13,18 14:4 17:14 18:3,6 18:25 19:5 22:13 22:18,21 24:11,13 24:17 25:19,22 29:5 30:19 31:9 31:13,17 32:15,18 32:19 33:2,2,11 33:19 34:25 36:12 37:22,25 51:6,15 51:21,22 52:8,19 52:25 54:17,17 56:16,17 57:1,9 58:18 60:11 patent's 10:18 52:2 patent-damages-... 5:2 patentability 30:23 patented 6:18 8:2,7 8:19 12:20,22 51:16 52:22 patentee 5:21 8:18 8:21 10:6 12:13 13:24 60:7,9,22 patentees 11:20 57:25 patents 12:6 28:25 30:23,24 33:3,8,9 33:21,25 35:10,17 35:19 47:4,5 48:21 52:20 55:17 56:20 58:5 path 10:25 pay 10:20,23 35:18 53:8 54:2 peel 44:17 penalties 14:25 15:4 penalty 14:16</p>	<p>pending 31:19 people 12:22 14:13 24:12 38:1 43:11 perception 25:3,3 perfectly 10:13 48:20 period 18:3 40:22 person 14:1 17:11 21:22,24 25:18 28:22 person's 21:25 52:9 Petitioner 1:4 19:22 26:13 Petitioner's 24:21 Petitioners 1:12,25 2:4 3:4,8,14 4:9 5:19 6:8 57:17 Ph.D 28:25 Phillips 2:5 3:10 30:8,9,11 31:3,7 31:15,21,23 34:13 34:21 35:2,5 36:13,16,24 37:4 37:13,16,20 38:11 38:13,16,20,24 39:2,16 40:15,23 41:9,15 43:8,12 43:16 44:15,21 45:4,8 46:12,17 48:8 49:11,20 50:1,5,7,12,21 51:14,17 52:5,13 53:1,4 54:23 55:4 55:9 56:7 57:14 59:24 piece 40:11 Pierce 59:4,7 pirate 23:19 50:24 55:14 pirates 32:8 53:17 53:21,22,24 55:25 place 27:22 plaintiff 46:1 49:21 50:14 plaintiffs 57:5 plaintiffs' 37:6</p>	<p>play 8:14 43:1 played 8:13 please 4:11 19:24 30:12 plucking 27:16 point 5:21 8:8 9:3 13:21 17:25 18:4 19:2 29:14 30:14 31:11 33:6 34:11 34:12 36:2 37:8,9 37:11,15,15 38:2 42:3 43:17,17 54:21,22 58:24 59:24 60:11,11,17 pointed 7:9 9:10 points 53:5 57:19 police 24:2,2 policy 29:13,18,21 37:24 portion 39:3 40:12 41:18,19 position 15:10,20 28:1 32:18 36:17 39:25 56:14 59:8 possible 11:16 28:18 post 7:5 28:12,15 49:7,8 practice 4:18 pre-1952 27:15 precise 35:13 preliminary 10:5 prelitigation 7:6 preparing 9:12 present 28:13 presentation 44:2 presented 26:21 presents 20:4 pretty 10:7 11:11 13:11,12 14:5 22:19 49:15 previously 22:16 price 54:1 primarily 7:13 principle 5:18 principles 5:16</p>
--	---	--	---	--

<p>7:18 prior 29:6 probability 14:15 probably 48:9 problem 27:13 42:20 48:12,22 49:2,5 53:19 56:8 60:9 process 32:2 42:12 46:2 producer 53:25 producing 35:22 product 6:18 8:19 30:18,22 31:6 35:22 48:19,20 50:25 51:12,14,16 51:20,23 52:22 56:17 products 8:6 10:17 12:21,22 33:10,11 53:25 Professor 34:21 profits 51:24 prong 59:18 proof 41:1 proper 45:15 properly 55:18 protect 55:16 protecting 37:19,22 protection 33:19 38:21 protects 15:8 prove 21:8 51:5 60:5,23 provide 7:15 23:12 23:13 27:22 47:15 proving 60:20 PTO 5:20 7:9 11:17 29:20 57:20 PTO's 14:8 public 34:15 pulls 5:22 Pulse 1:6 4:4 60:25 punish 15:18,19 punishment 29:23 punitive 20:9,14</p>	<p>21:12 22:12 24:24 40:11 45:23 50:3 50:14 Punitives 49:18 purely 26:14 32:1 40:11 purpose 21:11 purposes 5:3 15:17 26:15 put 18:15 21:22 35:23 39:4,10 40:3 45:14 48:22 48:23 60:7,14,23 puts 29:4 putting 61:6,7</p> <hr/> <p style="text-align: center;">Q</p> <p>qualify 26:7 question 6:24 9:17 18:12,18 29:11 44:24 46:20 51:7 52:10 54:4,5 59:9 questionable 24:11 questions 46:7 57:11 59:9 quickly 58:25 quite 24:22 34:23 quoted 40:20 41:18</p> <hr/> <p style="text-align: center;">R</p> <p>R 4:1 raft 55:12,13 raise 34:6 52:1 raised 29:24 ratified 45:21 61:10 reached 18:25 read 10:11 17:1 24:20 34:18 61:1 reading 28:16 60:3 real 36:19 54:25 55:2 reality 39:18 realize 29:25 30:2 really 10:18 13:13 14:11 16:1,19,24</p>	<p>17:12 20:9 22:13 36:20 43:15 44:24 46:6 54:2 55:2 60:12 reap 51:23 52:8 reason 7:8 22:15,16 22:16 23:24 24:5 24:6,6,7,9,18 39:19 reasonable 8:20 12:23 13:5,8,19 14:1 17:11,15 18:15 19:8 20:5 21:21,25 22:5 24:16 25:23 29:5 30:1 40:1 44:25 45:13 50:25 56:14 58:4,12,21 59:22 reasonableness 39:6 reasonably 18:5 47:2 50:7 reasons 29:16 REBUTTAL 3:12 57:16 recall 35:11 receive 35:12 reckless 5:24 16:3 26:23 28:9,21 30:3 47:18 49:19 recklessness 4:20 4:21 12:19 13:23 14:22 18:22 21:8 21:17,18 23:22,23 24:15 25:25 26:1 28:5 42:5 44:9 47:13 48:7 50:22 56:9 58:6 60:10 recognize 57:21 recognizing 56:19 refer 34:10 referred 6:6 reflect 16:13 reflected 37:18 55:20 refusal 36:6</p>	<p>regime 33:21 released 30:19 relevant 29:17 45:10 remaining 57:15 remains 20:10 remember 37:10 53:6 repeated 23:3 repeatedly 30:16 34:22 report 51:9 requirement 27:21 39:6 reserve 19:17 resistance 20:14 resolve 26:20 resolves 59:4,5 respect 21:16 22:21 23:22 57:24 responded 19:1 Respondents 2:6 3:11 11:22 17:18 27:13 30:10 Respondents' 11:16 28:1 57:21 response 11:14 30:15 rest 19:17 result 4:24 54:15 58:5 retroactively 22:9 return 5:12 reverse 12:10 reversed 20:23 review 5:6 44:20,22 46:14 47:10 56:6 56:12 59:1,3 reviewed 47:6 59:10 rich 54:15 right 9:2 11:13 14:23 15:5,6,14 17:4 21:2 27:6 31:15 35:2 36:5 38:16,20,23,24</p>	<p>39:16 40:23 41:9 50:1 51:18 52:13 52:17 53:4 54:23 59:13 rightly 11:21 rights 57:25 rigid 4:13 rigorous 57:7 risk 13:7,24 14:2 17:12 22:1 47:19 47:19,20,23 48:2 49:13 52:21 55:14 risks 42:7 ROBERTS 4:3 7:22,24 8:9 19:18 24:20 25:14,20 29:10 30:7 31:1,5 40:14,18,24 41:10 55:19 57:13 61:11 role 20:5 43:1 52:14 rolling 18:9 ROMAN 2:1 3:6 19:20 royalty 35:18 Rubber 18:1 rule 13:7 34:5,5 39:8 53:21,24 ruling 59:21 run 5:22 6:14 7:16 10:21 13:7 54:19 running 18:7</p> <hr/> <p style="text-align: center;">S</p> <p>S 3:1 4:1 Safeco 43:24 44:1,7 44:12 58:10,11 sanctions 8:5 satisfied 13:2 satisfy 14:6,7 39:8 saw 36:5 50:25 saying 10:22 14:21 22:7,11 49:6 52:19 55:25 says 9:7,19 18:8 40:20 42:4,16</p>
--	---	--	--	---

<p>51:12,22,25 58:11 60:19 scope 55:17 scours 28:24 se 9:15 Seagate 8:14 19:14 38:18 42:3,13,18 43:15,17,18,23 44:4 46:23 50:20 55:10,11 56:23 61:8 Seagate's 51:25 search 24:2,3 searches 32:13 second 4:21 21:15 25:25 37:9 39:15 45:23 58:24 Section 28:2 40:6,7 40:9 42:17,24,25 43:2 53:12 60:2 see 18:11,13 22:18 22:24 25:6 27:13 35:1 36:2 37:10 48:21 49:1,4 54:4 54:6 seeing 16:14 33:24 seen 39:23,23 54:5 sell 51:2,23 selling 51:21 52:22 54:10 sells 51:20 semantic 27:9 semantics 14:23 send 34:1 sends 48:24 sense 15:16 24:21 45:21 46:4 sensible 44:6 sent 18:23 42:9 separate 6:23 35:6 serious 34:4 56:1,2 seriously 12:17 services 33:10 54:1 set 4:25 47:3 58:21 severity 47:19,20 Seymour 23:20</p>	<p>SG 14:19,23 share 16:1 24:10 shares 12:16 shoes 21:23,25 show 7:10 12:13 13:8,9,9,24,25 14:9 18:17 58:7 60:10 showing 12:18 shown 8:19 shows 14:11 side 14:12 26:3 34:9 50:10,11,13 side's 41:7 61:2 sides 10:12 significant 35:9 43:3 silence 42:23 silent 23:13 similar 10:17 38:21 similarly 4:25 simple 57:19 simply 39:8 53:22 56:14 situation 33:7 47:23 48:6,18 50:22 53:13 57:1 situations 48:16 49:13 skew 46:2 skewed 14:11 58:17 skews 42:9 skull 49:16 sky 12:8 slight 36:11 slightly 33:15 small 10:19 11:4 12:3 13:6,6 49:15 57:25 smaller 47:24 Smith 51:21 52:3 53:6 software 10:16 12:5,6,17,25 softwares 12:24 solely 6:22</p>	<p>Solicitor 2:1 32:10 solve 42:20 somebody 34:1 48:24 51:11 52:22 sorry 31:4,18 40:17 46:12 sort 22:9 27:9 32:7 36:17 47:9 48:9 55:23 Sotomayor 14:18 15:3,6,12,22,24 16:6,8,11,18 17:1 17:7 27:1,4,8 28:15 31:18,22 37:16,21 38:12,15 38:17,21,25 39:14 46:21 source 44:5 sources 32:17 special 33:21 specific 35:11 48:25 49:3 specifications 19:5 squarely 37:2 stage 8:15 stand 27:12 standard 20:10,11 20:23 21:9 22:24 23:22 24:15,23 25:6,8,12 26:2 27:18,23 30:4 32:24 35:15 39:5 40:25 41:13 42:4 42:5,18,19 43:4 43:19 44:9,19,23 45:4,9 46:4,8 50:20 55:10 56:22 57:7 59:1,3,3,13 standards 41:3 56:2 stands 57:22 start 10:22 18:6 start-up 10:19 state 10:10 17:21 22:14 stated 11:8,15</p>	<p>statement 39:3 States 1:1,21 2:3 3:7 11:3 19:21 51:2,3 54:11 statute 7:16 9:18 9:19 11:2 15:17 15:19 21:11,11 23:11,16 28:2 31:19 44:16 55:20 61:3,7,8 statute's 5:3 statutory 40:19 steam-engine 10:15 11:18 step 21:2 41:16 stick 52:11 stifled 24:14 strategy 11:22,24 strength 13:18 14:8 16:23 17:13 stress 61:5 stretch 32:24 strict 48:14 stripped 9:5 19:12 strong 42:4 structure 20:18 Stryker 1:11 4:5 6:16 17:3 59:15 stuff 33:18 subject 5:6 34:22 53:11 subjective 21:6 23:18 25:12,12 44:11 46:7 50:17 52:15 subjectively 58:13 submitted 61:12,14 substance 30:13 substantial 39:9,10 42:8 56:15 substantially 59:8 succeeded 57:23 Suddenly 54:20 sued 28:22,23 sufficient 23:20 suggest 34:11</p>	<p>suggesting 31:24 suggests 10:2 43:14 suitable 8:4 summarize 10:14 supported 34:8 supporting 2:3 3:8 19:22 suppose 46:19 supposed 21:17,21 21:21 54:16 Supreme 1:1,21 sure 8:12 16:10,17 24:13 40:19 54:14 54:20 55:17 surprising 41:14 swung 38:6 system 57:21 58:18</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 3:1,1 table 24:19 44:11 take 8:7 17:13,17 21:21,23 35:7 41:16 44:22 46:22 49:20,21 51:7,10 51:11 52:21 56:13 taken 19:13 31:8 58:18 61:9 takes 8:14 42:14 49:13 59:19 talked 19:4 23:19 60:15 talking 14:19 19:4 20:14 33:6 44:23 45:23 46:1 talks 40:12 42:25 tangent 47:10 tell 14:18 35:20 tells 32:11 tens 10:16 12:5 53:10 term 40:8 terms 24:25 25:1 32:8 terrible 49:24 test 4:13,19 5:1</p>
---	--	--	--	---

<p>15:7 17:8 24:15 24:15 26:21,25 28:10 29:19 38:18 38:22 43:9,15,16 51:25 testing 46:15 tests 10:5 16:9 text 5:3 23:11,12 29:14 Thank 19:18 30:7 30:11 57:13 61:11 theory 29:5 thing 6:7,24 23:10 29:17 37:10 45:16 45:17 51:18,23 things 5:18 6:13 7:12 10:8,17 19:7 23:9 34:25 36:4 38:6 43:10 45:17 49:6 think 5:15,19 6:11 6:14,15 7:8,15,19 7:21 8:8 11:15,19 11:21 12:21 13:22 14:8,23 15:9,15 15:17,19,23 16:22 17:4,4,10,16 18:19,21 19:2,7,9 19:15,15 20:20,21 21:2,3,10,14,15 22:10 23:8,10 24:8,8,9,10,11,14 25:3,5,8,23 26:3,6 26:12,13,19,21,25 27:6,7,10,12,12 27:20,25 28:18 29:6,8,21 30:24 33:20 36:18,25 38:13,17,22 39:5 39:7,9,16,18 40:3 41:7,14,16 43:20 45:9 46:18 48:1,8 48:8,20 50:21 51:3 52:10,20 53:18 54:7,11 55:4,6,22 56:7</p>	<p>57:2 59:1,3,4 60:25 61:3,9 third 26:6 thorough 59:22 thought 8:23,24 16:13 17:12 21:25 22:11 31:1,5 32:9 34:14 49:16,23 54:8,19 55:15 58:9 thousand 48:15 thousands 10:16 12:2,3,3,6 33:8,9 three 9:20 19:7 25:8 26:16,22 27:11 40:21 48:23 51:8 tighten 20:24 time 4:23 5:25 6:5 9:4,6 12:19 16:13 17:21 18:3,12,18 19:11,17 22:7,8 26:5 28:22 29:3,8 31:8,16 41:3,10 41:17 43:17 47:21 47:21,24,25 48:4 49:14 58:12 61:6 times 9:20 40:21 51:8 today 55:22 Today's 10:15 told 43:9 tort 22:20 47:19 48:12 49:9,11 50:13 57:3 tortfeasor's 47:22 totality 5:5,20 7:11 7:17 13:17 totally 35:3 touchstone 28:3 track 5:2 traditional 6:1 traditionally 13:23 treat 24:16 61:2 treated 38:4 treble 46:3</p>	<p>tremendously 49:14 trenches 14:3 trial 6:14 20:5 22:7 22:8,17,18 28:13 47:21 49:14 tried 13:16 20:24 57:22 60:13 trigger 20:2 trolls 32:8 53:17,25 56:1 true 9:11 50:24 55:14 56:18 truth 12:2 try 23:1 trying 12:4 27:13 28:2 32:25 34:2 44:5 60:22 Tuesday 1:18 turn 35:7 turned 32:16 turns 32:22 49:22 two 4:18 21:3 24:22 30:19 31:9 35:6 45:17 46:18 47:6 48:23 53:5 57:18 twofold 36:19 types 26:8,23 typical 18:19,21 47:19</p> <hr/> <p style="text-align: center;">U</p> <p>uncertain 10:7 undermines 23:17 understand 34:17 36:16 41:15 53:14 understands 16:9 Underwater 19:14 20:23 Underwood 59:4 unenforceable 32:21 unfortunate 33:20 unicorns 53:23 United 1:1,21 2:3 3:7 11:3 19:21</p>	<p>51:1,3 54:11 unlawful 14:3 22:2 unnecessary 20:13 unreasonable 28:17 unsuccessful 18:16 unusual 57:1 urge 57:12 use 16:12 22:23 24:25 27:1,4,10 uses 25:1 Usually 47:17</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:5,13 4:4,6 59:4 valid 8:11 14:4 18:6 25:18,22 52:20,25 validity 24:11 32:15 52:2 various 15:17 34:25 vast 17:17 version 11:16 37:6 versus 20:25 32:8 view 7:25 20:21 32:9 34:5,5,20 58:12 61:2 viewed 29:15 violating 58:14 violation 28:21,21 virtually 9:13 14:16 61:8 void 32:21</p> <hr/> <p style="text-align: center;">W</p> <p>Wall 1:24 3:3,13 4:7,8,10 5:15 6:11 7:2,21,23 8:6,12 11:7,10,15,25 12:8,18 13:3,16 15:2,5,11,14,23 15:25 16:7,10,17 16:21 17:4,10,24 18:19 30:16 57:15 57:16,18 60:7,19</p>	<p>want 7:2,3 10:14 13:21 17:8 20:17 24:24 31:10,11 32:8 33:11 51:22 55:1 57:6 58:24 wanted 7:15 27:10 wanton 23:19 wants 5:21 13:7 51:12 60:10 warrant 29:9 30:6 warranted 26:19 warrants 5:23 Washington 1:17 1:24 2:2,5 wasn't 8:2,11,23 16:15 29:2 30:19 49:23 way 5:4 11:11 17:9 21:12,13 23:25 24:1 27:12,17,17 27:18 35:25 36:1 38:7 39:17 41:2,4 44:6,8,15 46:6 48:10 50:10,16,19 53:19 54:20,25 59:16 61:4 ways 4:18 32:7 35:11 46:20 48:16 53:16 58:3 we'll 4:3 23:1 53:7 we're 20:9,14 22:13 22:15,16 33:6,24 35:22 42:16 44:23 45:23 49:6 we've 54:5 55:22 58:2 weak 10:7 22:13 34:25 wears 41:6 went 35:23 52:7 whatsoever 31:16 38:8 wheels 19:6 whim 15:4,7 willful 9:25 10:24 27:15 36:10 38:4</p>
--	--	---	---	---

55:8 58:15	<hr/> Y <hr/>	30 3:11		
willfully 38:1,1	Yahoo 11:1	<hr/> 4 <hr/>		
58:13 61:6	Yeah 7:2 49:22	4 3:4		
willfulness 6:1,2	years 5:5 7:10	400 47:8		
10:9 13:8,9 14:21	30:20 31:9 48:23	475 22:17,17		
20:18,25 21:13	<hr/> Z <hr/>	<hr/> 5 <hr/>		
27:2,5,11,18,21	Zimmer 1:14 4:6	500 47:8		
27:23 32:6 42:5	6:13 9:7 14:17	57 3:14		
42:18 43:1,5,9,10	30:18 31:8,16	<hr/> 6 <hr/>		
43:15,19,22 44:6	59:16	<hr/> 7 <hr/>		
50:19 60:20	Zimmer's 30:16	<hr/> 8 <hr/>		
willing 10:21	<hr/> 0 <hr/>	<hr/> 9 <hr/>		
win 49:8	<hr/> 1 <hr/>			
withholding 16:14	10 54:18			
word 5:15 13:5	10,000 10:20,23			
27:2,5,15,16	10:59 1:22 4:2			
43:14 44:1 55:7	100,000 10:20,23			
60:1	23:2			
words 11:5 20:11	11 39:8			
25:21	11:59 61:13			
work 49:9 52:9	14-1513 1:4 4:4			
54:21	14-1520 1:12 4:5			
works 22:20 41:4	150 5:4 7:10			
world 10:15,15	19 3:8			
11:18 28:6,24	1952 27:19 29:15			
32:18 33:19,23	41:22			
worried 14:13	1985 45:19			
34:24 55:2	1998 31:9			
worry 37:17,22	<hr/> 2 <hr/>			
53:17	20 44:12			
worse 28:9	2000 31:7			
worst 4:14 54:25	2016 1:18			
55:2	23 1:18			
worth 36:10,19	25 44:1			
52:19	284 28:2 40:6 41:19			
wouldn't 27:12	41:22 42:17 43:4			
wrecking 50:20	43:18 57:4			
written 34:22	285 40:7,9 53:12			
wrong 10:8,24 20:3	298 42:24,25 43:2			
21:14 23:6,9 24:6	60:2,8,18,19 61:1			
29:5 30:21 36:8,8	61:3			
wrongdoing 21:23	<hr/> 3 <hr/>			
<hr/> X <hr/>				
x 1:2,8,10,15				