

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

SERGIO FERNANDO LAGOS,)
)
) Petitioner,)
)
) v.) No. 16-1519
)
) UNITED STATES,)
)
) Respondent.)
)

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SERGIO FERNANDO LAGOS,)
 Petitioner,)
 v.) No. 16-1519
 UNITED STATES,)
 Respondent.)

Washington, D.C.

Wednesday, April 18, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

DANIEL L. GEYSER, ESQ., Dallas, Texas; on behalf of the Petitioner.

MICHAEL R. HUSTON, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	DANIEL L. GEYSER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	MICHAEL R. HUSTON	
7	On behalf of the Respondent	32
8	REBUTTAL ARGUMENT OF:	
9	DANIEL L. GEYSER, ESQ.	
10	On behalf of the Petitioner	64
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 16-1519,
5 Lagos versus United States.

6 Mr. Geysler.

7 ORAL ARGUMENT OF DANIEL L. GEYSER

8 ON BEHALF OF THE PETITIONER

9 MR. GEYSER: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The Mandatory Victims Restitution Act
12 covers the cost of lost income and necessary
13 child care, transportation, and other expenses,
14 while participating in the investigation or
15 prosecution of the offense or attending
16 proceedings related to that offense.

17 That language does not cover the cost
18 of hiring four law firms, a consulting firm,
19 and forensic experts for a private
20 investigation in bankruptcy litigation. The
21 government's theory does not fit Section
22 3663A's plain text, and it cannot explain the
23 clear and obvious differences between this
24 statute and other restitution provisions,
25 which, unlike here -- where, unlike here,

1 Congress did provide make-whole relief.

2 The government tries to make up for
3 these deficiencies by citing statements in the
4 legislative history, broad declarations of
5 Congress's purpose, and the ordinary definition
6 of restitution. None of these appear anywhere
7 in the statute.

8 The government looks everywhere but
9 the statutory text because the language and
10 logic of the provision is directly at odds with
11 the government's reading. For multiple --

12 JUSTICE GINSBURG: If we -- if we
13 accept your view, wouldn't there be a perverse
14 incentive? We would be telling creditors don't
15 -- don't investigate immediately.

16 MR. GEYSER: No, Your Honor. The --
17 first, companies have incentives independent of
18 the possibility of getting a restitution award
19 to investigate potential misconduct. And this
20 is not saying even if it's not covered as
21 restitution, that it's the only mechanism to
22 re- -- to get recompensed. They can file civil
23 actions.

24 The key here is what Congress had in
25 mind when it detailed four specific provisions

1 in subsection (b) of the Mandatory Victims
2 Restitution Act. And the term there that's
3 very important is "mandatory." Congress
4 realized it was requiring restitution in these
5 cases, and there are tens of thousands of
6 sentencing proceedings each year under this
7 provision.

8 JUSTICE KENNEDY: Is there a
9 difference -- excuse me. Is there a difference
10 under -- under the bankruptcy law? I -- I
11 assume that if the government's correct in this
12 case, it's not dischargeable in bankruptcy. I
13 just assume that.

14 MR. GEYSER: I -- I think Section 523
15 of Title 11 may make a civil order
16 non-dischargeable. The restitution amount
17 itself is non-dischargeable. That's true.

18 JUSTICE KENNEDY: Do -- do you know if
19 the costs incurred in this case would be also
20 non-dischargeable in a civil action filed by
21 the employer?

22 MR. GEYSER: I think under Section 523
23 of -- of the Bankruptcy Code, it may not be
24 dischargeable. I think it is a close question.
25 It depends on the nature of the offense and --

1 and the underlying basis of the civil judgment.

2 CHIEF JUSTICE ROBERTS: What -- what
3 if the government approached GE and said, look,
4 this is a very complicated financial fraud,
5 we're busy with some other stuff, we'd like you
6 to go ahead and investigate it to the extent
7 you can; and they used the results of their
8 investigation in their prosecution?

9 MR. GEYSER: That's still not covered,
10 Mr. Chief Justice, because, if you look at the
11 specific enumeration of expenses, Congress here
12 invoked the classic ejusdem generis
13 formulation. It has specific expenses, child
14 care and transportation, followed by a general
15 residual clause that looks absolutely nothing
16 like attorneys' fees. Where Congress wanted to
17 include attorneys' fees and investigation
18 expenses, it did that, as we see in Sections
19 2248 and Sections 2259.

20 CHIEF JUSTICE ROBERTS: It's a pretty
21 open phrase, "other expenses incurred during
22 participation in the investigation." I don't
23 know why, if the government's essentially
24 delegating its responsibility, that those
25 expenses wouldn't be covered.

1 MR. GEYSER: Well, two reasons, Your
2 Honor. Again, under -- under ejusdem generis,
3 you don't simply say look at the -- the
4 capacious residual phrase. It's necessary we
5 limit it to like expenses. Attorneys' fees and
6 private investigation expenses don't look like
7 child care and transportation. When Congress
8 wanted it to --

9 JUSTICE KAGAN: How would you define
10 the common denominator of those expenses?

11 MR. GEYSER: I think the common
12 denominator is clear from both the context and
13 the terms used. It shows this is exactly what
14 happens when a victim is dislodged from their
15 daily life and they have to go and meet with
16 the government or testify at a hearing.

17 If they miss work, they have lost
18 income. They have to get from wherever they
19 are to the hearing or to meet with the FBI
20 agents. That's transportation. If they leave
21 home, they might have child care expenses.
22 These are the indirect incidental out-of-pocket
23 expenses that someone incurs when they're
24 meeting with the government.

25 JUSTICE GORSUCH: Well, what about

1 hiring a lawyer to be a witness in a
2 governmental investigation? Would that be
3 covered in your view?

4 MR. GEYSER: We don't think it is
5 under our broader argument, Justice Gorsuch,
6 because, again, hiring a lawyer is not like
7 child care, transportation. And Congress,
8 again, when it wanted to include attorneys'
9 fees, it said so expressly as it did in Section
10 2259.

11 JUSTICE KENNEDY: Well, maybe this is
12 the same question as Justice Gorsuch had, but
13 suppose the FBI -- they're a federal
14 investigating agency -- say we're coming in and
15 we want statements from all of your of officers
16 and we're going to be questioning all of your
17 officers; and the company then hires an
18 attorney to assist. Would those be covered?

19 MR. GEYSER: Again, Your Honor, under
20 our broad --

21 JUSTICE KENNEDY: I mean, it -- it
22 sounds to me like this is another expense
23 incurred during participation in the
24 investigation.

25 MR. GEYSER: Again, under our broader

1 theory, no, because it's not the kind of
2 expense that Congress had in mind. But we do
3 have the alternative theory that, at least in
4 that case, you have someone who is incurring an
5 expense during the participation of the
6 government's investigation.

7 That's very different than a private
8 investigation operated entirely apart from the
9 government's investigation; indeed, one that
10 occurs before the government has even started
11 its investigation. No one thinks of an expense
12 that is occurring before as an expense that's
13 happening during an investigation that hasn't
14 yet started. And --

15 JUSTICE BREYER: Well, does it --
16 that's the -- I think it's difficult. Think of
17 a simple example. A small company thinks the
18 bookkeeper is taking money off the top, hires
19 Sam Spade, a private eye, and says I'd like you
20 to look into this. He does look into it. He
21 says it's the bookkeeper, all right. And then
22 they go to the police, and the police says,
23 thank you, that's very helpful, Sam. And they
24 investigate further; arrest him. That's the
25 facts, all right?

1 MR. GEYSER: Sure.

2 JUSTICE BREYER: Okay. Now,
3 previously, there was a statute called the
4 discretionary restitution statute, and it
5 allowed -- discretionary -- expenses related to
6 participation in the investigation. Well, I
7 would have said that, quite likely, Sam's
8 pre-investigation expense was related to the
9 necessary -- the later.

10 Now they've changed the wording of the
11 statute to what you read. Did Congress intend
12 to change that?

13 MR. GEYSER: I -- I believe Congress
14 did because --

15 JUSTICE BREYER: Why?

16 MR. GEYSER: Well, they -- they didn't
17 just stumble across the language in subsection
18 (4). They --

19 JUSTICE BREYER: No, no, no, but I'm
20 asking you why would someone, taking a statute
21 that previously allowed restitution to Sam for
22 Sam's expense, want to stop that in a statutory
23 change, by the way, that was meant to expand
24 the scope of restitution?

25 MR. GEYSER: A -- a few points, Your

1 Honor. First, it's expanding it by making it
2 mandatory. It's not expanding it by making it
3 make-whole relief. Congress knew how to do
4 that. They have other examples where they did
5 do that.

6 In this case too, I think once you
7 have expenses incurred during the
8 investigation, you get the government's input.
9 They can cooperate with the company. They can
10 give them direction. They can prevent
11 duplicative redundant expenses.

12 JUSTICE BREYER: Is there anything --
13 since I'm interested in history, is there
14 anything in the legislative history that
15 suggests that this change of language was
16 intended to diminish the scope of the
17 restitution?

18 MR. GEYSER: The -- I don't think
19 there's anything either way on that particular
20 point, but what there is, and I do think this
21 is important, Congress specifically raised
22 concerns about things like attorneys' fees that
23 would end up leading to protracted,
24 complicated, fact-intensive disputes that would
25 slow the efficiency of sentencing proceedings.

1 This statute, because it's mandatory,
2 applies in tens of thousands of proceedings
3 every year. And if you look at subsection
4 (c)(3)(B) of the Act, Congress specifically
5 said that restitution is not authorized where
6 it would delay the sentencing proceeding.

7 And that makes perfectly good sense
8 that Congress then would limit the expenses to
9 the kind of incidental out-of-pocket expenses
10 that are very easy to calculate.

11 Fee disputes are notoriously difficult
12 to calculate. When you have people operating,
13 especially independently of the government,
14 they're conducting their own resource --
15 they're conducting their own investigation,
16 hiring whoever they wish to hire, and that's
17 perfectly fine, and there might be other
18 mechanisms that Congress would have deferred to
19 in the civil venue to resolve those sorts of
20 disputes.

21 But that's very different than saying
22 in a mandatory statute that these -- that
23 sentencing judges, and, again, tens of
24 thousands of proceedings every year, have to go
25 through and entertain, you know, disputes about

1 how much was actually necessary, was it proper
2 to hire four law firms, were the expenses
3 devoted just to proving innocence and guilt or
4 were they also devoted for business reasons or
5 economic reasons.

6 Most internal investigations, as Judge
7 Kavanaugh pointed out in his opinion in
8 Papagno, they extend far beyond just
9 identifying the guilty party. They --

10 JUSTICE ALITO: Suppose the -- suppose
11 the statute did not refer to lost income and
12 necessary child care, transportation expenses,
13 and simply authorized restitution for "other
14 expenses incurred during participation in the
15 investigation."

16 Would you still have this -- would you
17 still win?

18 MR. GEYSER: We -- in this case, we
19 would, Your Honor, because GE Capital's
20 expenses predated the government investigation.
21 So any expenses were not incurred during
22 participation in the government's
23 investigation.

24 JUSTICE ALITO: Well, how -- you're
25 reading a word into that text, in the

1 government's investigation.

2 MR. GEYSER: I think that that word is
3 apparent by the context, Your Honor. The --
4 the phrase is "the investigation or prosecution
5 of the offense." There are lots of textual
6 cues there that what Congress had in mind was
7 the government's investigation.

8 They didn't have to say government,
9 just as they didn't have to say the
10 government's prosecution.

11 CHIEF JUSTICE ROBERTS: You seem to
12 suggest that there's a very sharp line where
13 you can tell the precise point at which the
14 government is beginning investigation and the
15 prior -- prior times when they hadn't.

16 I mean, it's more of a fluid
17 situation, right? The government gets a
18 report. They put it in the file. They'll
19 start investigating as soon as they finish up
20 these three more serious offenses.

21 I mean, isn't it going to be a
22 difficult determination of when precisely the
23 government investigation began?

24 MR. GEYSER: I --

25 CHIEF JUSTICE ROBERTS: I mean, does

1 it begin when they get a complaint?

2 MR. GEYSER: Well, again, Your Honor,
3 under our broader theory, I think that actually
4 would avoid those problems because it wouldn't
5 include things like private investigation and
6 private investigatory work. It would simply
7 include witnesses who are going to meet with
8 the FBI and they incur out-of-pocket incidental
9 expenses.

10 CHIEF JUSTICE ROBERTS: Right. But
11 I'm talking about your other theory --

12 MR. GEYSER: Sure.

13 CHIEF JUSTICE ROBERTS: -- which is it
14 has to be during the government investigation.

15 MR. GEYSER: Well, it -- it still has
16 to be during the -- at a minimum, you think an
17 investigation has to be opened. In this case,
18 it's -- it's quite clear this happened before
19 the government even knew about this offense.

20 CHIEF JUSTICE ROBERTS: Well, why do
21 they --

22 JUSTICE ALITO: Why does it have to be
23 the government, the federal government? What
24 if the offense is initially investigated by
25 state authorities and then, at a later point,

1 it's determined that it will be prosecuted by
2 the federal government? Would you say that the
3 expenses incurred during the participation in
4 the state investigation are not covered?

5 MR. GEYSER: We would say that, Your
6 Honor. And, again, this is a -- this is a
7 provision of Title 18. It's a federal
8 provision. It's talking about federal offenses
9 of conviction.

10 The investigation is of the offense.
11 The offense, if you look back to Subsection A
12 of 3663A, is talking about a conviction under
13 federal law.

14 And it is in the singular: The
15 investigation or prosecution of the offense.
16 The entire contextual clue here goes back to
17 the federal government.

18 Now, granted, the --

19 JUSTICE ALITO: The investigation.
20 But you're -- I mean, you're reading a lot out
21 of this statute and you're reading a lot into
22 it --

23 MR. GEYSER: Well --

24 JUSTICE ALITO: -- the investigation.
25 What -- what -- suppose it's initially

1 investigated by one U.S. Attorney's Office and
2 then it's taken over by another U.S. Attorney's
3 Office. Does it apply only to the -- the
4 latter office that actually prosecutes the
5 case?

6 MR. GEYSER: In -- in that case, I
7 don't think so, Your Honor. There -- there's a
8 unitary executive theory and I think that it's
9 the same federal government doing the same
10 federal investigation. How they divide it up
11 is up to them.

12 What's quite clear, though, is they're
13 talking about a governmental investigation here
14 because, again, this is investigation of the
15 offense. Private parties don't conduct
16 criminal investigations. If a corporate --

17 JUSTICE GINSBURG: But did --

18 JUSTICE ALITO: State, federal.

19 JUSTICE GINSBURG: -- did I understand
20 your response correctly that, if this were a
21 case where the government did request an
22 internal investigation, if it came -- it was
23 done at the government's request, then the
24 attorneys' fees would be included?

25 MR. GEYSER: No, Your Honor, because,

1 again, under ejusdem generis, we don't think
2 that Congress meant for attorneys' fees to be
3 included in this provision.

4 If you reject that proposition, then,
5 in this case, at least it would be closer to an
6 expense incurred during participation in the
7 government's investigation. But there still is
8 a problem even there.

9 Participation does not simply mean to
10 help or support. It's not aid and abet. This
11 is what the Court said in the Reves case,
12 construing a provision of RICO. Participating
13 means taking part in someone's work.

14 And you don't participate in your own
15 investigation. That's not how people talk.
16 You investigate -- you participate in someone
17 else's investigation.

18 So Congress clearly -- and if you take
19 a step back and read the section holistically
20 as the government suggests, and you should,
21 this statute lines up perfectly if what you
22 have in mind is what it naturally suggests.

23 If Congress was thinking of victims
24 who had to go and meet with the FBI agents and
25 go and testify at the criminal hearing,

1 everything here makes perfect sense.

2 The expenses they'll incur will be the
3 incidental out-of-pocket expenses of traveling
4 to meet with the government and having the
5 opportunity costs of doing whatever else they'd
6 ordinarily be doing. The expenses, of course,
7 are during participation in the investigation,
8 because they're meeting with an active, ongoing
9 investigation.

10 JUSTICE ALITO: Suppose the federal --
11 the -- the -- the federal investigators request
12 the company to bring officers or employees who
13 are located in other parts of the country to a
14 particular office to be questioned, or suppose
15 they ask them to go through the company's
16 records to find certain documents, and the
17 company does that and incurs expenses.

18 Is that covered?

19 MR. GEYSER: The -- the former would
20 be covered. If they had other employees of the
21 company come in, that's under transportation.
22 They'd be coming in to meet with the
23 government.

24 If they have professional fees going
25 into identifying documents, again, I don't

1 think that's what Congress had in mind. And we
2 know that Congress knew the difference between
3 the narrow provision it authorized in 3663A and
4 broader provisions because, in those broader
5 offense-specific provisions, Congress
6 specifically referenced the MVRA. It said that
7 those broader terms apply notwithstanding
8 3663A.

9 JUSTICE ALITO: I -- I don't quite
10 understand that answer, that if someone at the
11 request of the FBI goes through company records
12 and incurs perhaps quite an expense in doing
13 that, that is not participation in the
14 government's investigation?

15 MR. GEYSER: Well, again, Your Honor,
16 there it would be participation during the
17 government's investigation. I'm referring now
18 to our broader theory that professional fees
19 simply aren't covered.

20 But, again, if you reject that
21 proposition, then maybe that type of work would
22 be covered, but only in the case of the
23 government telling or asking someone to do it.

24 In this case, you have a private
25 investigation where no one was told or asked to

1 do it by the government. The government wasn't
2 even aware of the potential crime.

3 And so, in our case, this clearly fits
4 outside the natural language of 3663A. And
5 since we've been talking about the
6 investigation, I do want to make clear that
7 there are actually two pockets of expenses
8 here.

9 And one was the pocket for the
10 bankruptcy litigation. The bankruptcy
11 litigation is simply exactly like every other
12 ordinary civil litigation designed to recoup
13 damages for a crime.

14 And I don't see any way that that
15 falls within the phrase "attendance at
16 proceedings" related to the offense. I think
17 there are two reasons --

18 JUSTICE SOTOMAYOR: Why not? Meaning,
19 it is a proceeding, bankruptcy. It's related
20 to the offense. The bankruptcy was caused by
21 the offense essentially. And they attended
22 through a representative. So why aren't those
23 recoverable?

24 MR. GEYSER: Well, I -- I have two
25 responses to that, Your Honor.

1 The -- the first is that the fees here
2 were not just for attending hearings, attending
3 the proceedings. These were for participating
4 in the proceedings.

5 Surely, when Congress said attendance,
6 they're -- they're thinking of physical
7 attendance. And, again, we know that because,
8 if you read the -- the sentence in its
9 entirety, they're talking about things like
10 lost income because you're not physically at
11 your job, you're somewhere else, or they're
12 talking about child care because you're not
13 watching your child, you're at the hearing, or
14 transportation.

15 So I think it's too much to read
16 attendance out of the statute. That reading
17 would make more sense if it said any losses
18 incurred during proceedings related to the
19 offense. But attendance is right there. And I
20 don't see any plausible reading that says
21 attendance includes the entirety of litigating
22 a case.

23 JUSTICE SOTOMAYOR: Is there something
24 --

25 JUSTICE GINSBURG: What about the

1 government's alternative theory that -- that
2 is, that the professional fees fit under the
3 3663A(b)(1) category, property lost as a result
4 of the offense?

5 MR. GEYSER: A -- a -- a few responses
6 there, Your Honor. First, we don't think it's
7 really properly before the Court. This was not
8 pressed or passed upon below. The government
9 did not try to preserve the authority to uphold
10 the restitution award on an entirely different
11 statutory provision.

12 This isn't just saying that there's an
13 alternative rationale that supports an award
14 under (b)(4). This is saying that we will
15 enforce part of a criminal sentence on a
16 statutory ground that wasn't even raised below.

17 But if the Court does choose to reach
18 it, I don't think the government's theory
19 works. It suggests that it -- it's really
20 reading (b)(1) not to say an offense resulting
21 in damage to or loss or destruction of property
22 but an offense resulting in any damage or loss.

23 It's true that property can be money,
24 but I think it stretches it too far to say that
25 money is property, so any offense that causes

1 me in some future, you know, proceeding or
2 event to spend money is then spending property
3 and, therefore, I've lost property as a result
4 of the offense.

5 If you look at the actual language and
6 progression of (b) (1), it's quite clearly
7 thinking of property. First, it's really the
8 target of the offense, because the very first
9 step is, if you've taken the property, you have
10 to return the property. Money spent on things
11 like bankruptcy litigation doesn't remotely fit
12 within the -- the confines of (b) (1).

13 And under the government's view, this
14 also would read out of the statute subsections
15 (b) (2) through (b) (4), because anytime that
16 someone, say, is injured by a physical crime,
17 they have to go get healthcare; then they're
18 spending money, which is property, on the
19 healthcare, and that would be a result of the
20 offense. So (b) (2) is gone. If there's an
21 offense resulting in death, then the money
22 spent on the funeral would be property lost as
23 a result of the offense. So (b) (3) is
24 unnecessary. And the same would fall for
25 (b) (4).

1 So I don't think (b)(1) is a grounds
2 for upholding the award generally or, in this
3 case, specifically, where this is separate
4 collateral civil litigation trying to seek
5 damages for the offense, and that's -- I'm not
6 even sure that's proximately caused by the
7 crime. But, again, going --

8 JUSTICE SOTOMAYOR: Are the expenses
9 for bankruptcy here related to the work of the
10 attorneys or the attendance of corporate
11 officers at the hearing?

12 MR. GEYSER: Oh, Your Honor, if you
13 look at pages 28 and 29 of the Joint Appendix,
14 you'll see that these are the professional
15 fees, including pretty hefty charges, in the
16 millions, for providing consulting advice on
17 whether they think Dry Van, the company that
18 was the -- the subject of the fraud -- whether
19 they could survive as a going concern.

20 This is trying to decide how to
21 litigate and recover the case in bankruptcy.
22 It's not even clear that there were hearings
23 that people attended. And, surely, it wouldn't
24 run, you know, in the millions of dollars to
25 show up for a single hearing.

1 JUSTICE KAGAN: Well, what about that
2 small subset of fees, if there were any like
3 that, the fees that we charge because we sat in
4 a -- a courtroom during a proceeding?

5 MR. GEYSER: That -- that would at
6 least satisfy the term "attendance," but I was
7 -- my second reason that -- that I didn't get
8 to is that it's still attendance, we think, at
9 criminal proceedings. And I think that's
10 clear, again, from the context of the statute.

11 JUSTICE KAGAN: But why isn't a
12 bankruptcy related to the criminal -- I mean,
13 it's -- it's related to the offense, right? So
14 why is it related to the offense?

15 MR. GEYSER: Well, I -- I think if you
16 read the statute as a whole and you look at
17 (b) (4) with all of its terms, and this is a
18 point that Judge Higginson made below under
19 noscitur a sociis, all the terms here are
20 talking about proceedings related to the
21 criminal action. So you have the investigation
22 and prosecution of the offense. You have
23 attendance at proceedings related to the
24 offense. It wouldn't make -- make much sense
25 to cover civil proceedings, and this is why.

1 If Congress wanted to re- -- have
2 recovery for victims just for showing up at a
3 civil hearing, presumably, they would also want
4 to cover the fees for the hearing, the filing
5 fee for the case, or maybe the attorneys' fees
6 or expert fees, all the normal expenses that
7 people incur in civil proceedings.

8 It would be passing strange to say
9 that Congress thought, you know what, when the
10 victim has to show up to testify, that we'll --
11 we'll cover, but we're not going to cover
12 anything else.

13 And it does make sense, though, if you
14 look at this as proceedings related to the
15 criminal action. When a victim has to testify
16 at a criminal proceeding, the only expenses
17 they incur are those out-of-pocket expenses.
18 The government bears everything else because
19 it's their case. They're the ones paying for
20 the prosecutors. They're the ones that -- that
21 have spent the time in court. So it really all
22 lines up.

23 It's only when you try to shoehorn the
24 government's attempt to get these private
25 investigation fees in these civil proceedings

1 into the statute that you see any anomalies.
2 When you read the statute and think what did
3 Congress have in mind here in this narrow
4 provision -- which, again, is not a provision
5 for make-whole relief. Congress knew how to do
6 that. This is not an attempt to cover every
7 single expense that a victim unfortunately
8 suffers, you know, regrettably from crime.
9 This is a --

10 JUSTICE ALITO: What are -- what are
11 proceedings related to the offense, other than
12 proceedings in the prosecution of the offense?

13 MR. GEYSER: I think, Your Honor, that
14 the proceedings could be things like a grand
15 jury hearing before they've, say, had -- issued
16 an indictment. It could be any of the other
17 proceedings for like a bail hearing.

18 JUSTICE ALITO: Well, those -- those
19 would be proceedings in the prosecution.

20 MR. GEYSER: Well, it -- it could be
21 in the prosecution, but I think Congress there
22 was trying to make sure that any proceeding
23 related to the criminal prosecution would be
24 covered. And --

25 JUSTICE ALITO: Well, they used the

1 term "prosecution" earlier in the provision.
2 If they wanted to limit it to proceedings in
3 the prosecution, why wouldn't they use the same
4 term again? Why would they use this broader
5 formulation, "related to the offense"?

6 MR. GEYSER: Well, again, Your Honor,
7 I -- I could see someone thinking there's a
8 distinction between a hearing that is
9 determining if there's sufficient evidence to
10 issue an indictment, so the prosecution hasn't
11 yet commenced, and proceedings after the
12 indictment, where it has commenced.

13 JUSTICE ALITO: Okay. So you -- maybe
14 you've got the grand jury proceeding, but you
15 have nothing else, right? That's it?

16 MR. GEYSER: There -- there could be,
17 depending on the offense, other types of
18 proceedings, but, again, I think this is
19 Congress trying to make sure that if a witness
20 has to show up and testify to advance the
21 government's work, then their expenses are
22 covered when they're those incidental
23 out-of-pocket expenses.

24 If Congress wanted to, again, cover
25 things like attorneys' fees or provide a full

1 amount of restitution, they knew exactly how to
2 do it. They did --

3 JUSTICE KENNEDY: At the outset, you
4 said that there are -- I forget if you said
5 tens of thousands or thousands of these
6 proceedings a year?

7 MR. GEYSER: If you look to page 17 of
8 the government's brief, they say there are tens
9 of thousands of proceedings under the MVRA
10 every year, which is exactly a reason that
11 Congress would not want to burden district
12 judges and burden the sentencing process with
13 these fact-intensive disputes.

14 CHIEF JUSTICE ROBERTS: The -- one of
15 the items that you're entitled to recover as
16 the victim is lost income. Here, the victim
17 was a corporate entity. How -- how do you
18 measure lost income in that context?

19 MR. GEYSER: In that, I think it would
20 depend on the situation and what exactly the
21 corporation is doing in the proceeding. I
22 assume that if you had a corporate officer, say
23 it's a -- an employee who has to testify who
24 otherwise would be out selling something, and
25 you know that the employee would -- would get a

1 certain amount of profit that day had they not
2 had to show up in court, I presume that would
3 be the lost income.

4 JUSTICE BREYER: Can you say
5 participation includes participation where the
6 government investigation doesn't start until
7 after you've finished, but they incorporate
8 everything you've done? Sam Spade puts on his
9 resume: I participated in their -- in their
10 investigation, the government's. What? They
11 didn't start until November; you finished in
12 October. But I participated. All my findings,
13 all my witness reports were taken over by the
14 government and used. Perhaps you can.

15 MR. GEYSER: I don't think that's -- I
16 don't think that's an expense incurred during
17 participation. And I still don't think that's
18 participating.

19 JUSTICE BREYER: Oh --

20 MR. GEYSER: It might be very useful.
21 Sam Spade's work could have saved the
22 government a lot of time. It could have aided
23 the government or abetted the government or
24 supported them, but those aren't the phrases
25 that Congress used. Participation means

1 working in someone else's job. It's helping
2 the government.

3 If I could reserve the balance of my
4 time.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Huston.

8 ORAL ARGUMENT OF MICHAEL R. HUSTON
9 ON BEHALF OF THE RESPONDENT

10 MR. HUSTON: Mr. Chief Justice, and
11 may it please the Court:

12 The Mandatory Victims Restitution Act
13 enables the victim of a crime to recover for
14 its participation in the investigation of the
15 defendant's offense. The statute is not
16 limited to participation in the government's
17 investigation of the offense.

18 Most of petition --

19 JUSTICE SOTOMAYOR: You have to read
20 the investigation or prosecution -- you have to
21 read them together, not singularly.

22 MR. HUSTON: Well, I think, Your
23 Honor, the statute reflects the fact that from
24 the standpoint of a victim, it encompasses the
25 ordinary chronology of events in which a victim

1 would be expected to participate. There's
2 going to be an investigation of offense,
3 there's going to be a prosecution, there might
4 be proceedings in --

5 JUSTICE SOTOMAYOR: Actually, that
6 does happen the reverse way. There are times
7 the police get information and they go to the
8 company.

9 MR. HUSTON: I --

10 JUSTICE SOTOMAYOR: I think it's a
11 closer call on whether in that situation -- and
12 if they ask the company to look into something
13 it wasn't aware of, whether that's
14 participation.

15 Putting that aside, it doesn't
16 necessarily follow that an investigation by a
17 company always precedes the prosecution.

18 MR. HUSTON: It doesn't always
19 precede. That's true, Your Honor, but I think,
20 again, the statute is just thinking about the
21 typical way in which a victim --

22 JUSTICE SOTOMAYOR: The typical way is
23 the government prosecutes -- investigates.

24 MR. HUSTON: I think -- well, I --
25 it's true, but it's not always true, Your

1 Honor. And I think the cases that we
2 demonstrate in our brief reveal what Justice
3 Breyer's example -- example earlier this
4 morning illustrated, which is that it is
5 extremely common, and Congress would have
6 understood, that victims routinely play an
7 indispensable role in the investigation.

8 JUSTICE BREYER: That's why I don't
9 understand the statute, because you have a big
10 problem, I think, with the language of the
11 statute. If, in fact, it's an investigation by
12 the company before the police investigation
13 begins, do they get child care? I mean, child
14 care, transportation? I mean, hmm, what do you
15 do about that? And -- and so I'm stuck.

16 Now, you're, of course, going to get
17 me out of being stuck.

18 (Laughter.)

19 MR. HUSTON: Your Honor, I think that
20 what the statute reflects, again, is the fact
21 that victims routinely incur expenses in
22 internal investigations that uncover invaluable
23 evidence of crimes. It -- it is very common --
24 most rest -- fraud cases make up a larger
25 category of restitution awards than any other

1 type of offense. And Congress would understand
2 that in fraud cases, the way that frauds are
3 discovered very often is internal
4 investigations of the company.

5 JUSTICE KENNEDY: Is it --

6 JUSTICE KAGAN: Mr. Huston --

7 JUSTICE KENNEDY: -- is it your
8 contention all of the \$4 million spent on this
9 internal investigation was necessary for the
10 prosecution of the case or just part of it?

11 MR. HUSTON: Well, necessary for the
12 investigation or prosecution or proceedings
13 related to the offense, Your Honor. All three.
14 Some of the expenses were for various portions
15 of the case; some of it was for the
16 investigation.

17 JUSTICE KENNEDY: Well, if that's so,
18 what's there to limit extreme expenditures?

19 MR. HUSTON: The word --

20 JUSTICE KENNEDY: You want to say,
21 well, let's -- let's -- let's -- let's hire two
22 law firms, this is a big case.

23 MR. HUSTON: Certainly, Your Honor.
24 The word "necessary" is also in the statute.
25 The expenses have to be necessary. Sentencing

1 courts discuss -- discuss all the time
2 restitution awards that are cut or adjusted in
3 various ways because they make exactly those
4 sort of determinations.

5 JUSTICE GORSUCH: Counsel, you say
6 that the bankruptcy was a proceeding related to
7 the offense because fraud was at issue there
8 too.

9 And -- and maybe this is a clearer-cut
10 case, but there are going to be plenty where
11 the reasons for the bankruptcy are going to be
12 in dispute, and we're going to invite district
13 judges to engage in long collateral proceedings
14 over whether something is or isn't related
15 enough to the offense.

16 What do we do about that? And,
17 relatedly, you know, this statute covers a lot
18 of different kinds of crimes, including violent
19 crimes. So I -- I can imagine someone saying:
20 My divorce proceedings are related to the crime
21 of violence, and I should get my attorneys'
22 fees for my divorce proceeding too, and -- and
23 child care and all the other things Justice
24 Breyer enumerated.

25 Where -- where is the stopping point

1 here?

2 MR. HUSTON: Justice Gorsuch, I think
3 that we expect the proceedings related to the
4 offense clause of this statute to be narrow,
5 outside the context of criminal proceedings.
6 That is certainly the mine-run placeholder --

7 JUSTICE GORSUCH: Well, I mean, this
8 is a civil bankruptcy proceeding. That's not
9 very narrow. And I don't see how it's any
10 different than my divorce hypothetical.

11 MR. HUSTON: It's -- it's different in
12 this respect, Your Honor: GE Capital was
13 really dragged into these bankruptcy
14 proceedings. This is not equivalent to a civil
15 proceeding that is initiated --

16 JUSTICE GORSUCH: What if they
17 initiated involuntary bankruptcy proceedings
18 for the very same reason? Same result, I
19 assume, in the government's view because you --
20 you take such a purposivist account of the
21 statute, you know, and let's make sure
22 everybody gets everything.

23 MR. HUSTON: Well, I -- I -- Your
24 Honor, I think the statute reflects that that
25 is its purpose. And, as the Court described in

1 Dolan, the statute is express that its
2 substantive purpose is --

3 JUSTICE GORSUCH: I understand that.
4 But I was kind of surprised to see a brief from
5 the government of the United States go on for
6 so many pages about purpose and very generic
7 terms before actually getting to the terms of
8 the statute, the language.

9 And I -- I -- I -- I -- again, why --
10 why wouldn't my divorce case or the involuntary
11 bankruptcy meet the same purpose test you've
12 articulated here?

13 MR. HUSTON: I don't think the test is
14 strictly purposivist, Your Honor. The question
15 is, were the expenses incurred as a direct and
16 proximate result of the crime? And I think
17 that sentencing courts are very accustomed to
18 making those sorts of determinations. I am
19 happy --

20 JUSTICE SOTOMAYOR: So what do I do
21 with the fact that statutes of restitution
22 passed at an identical time to this statute
23 used your words, used the words the victim's
24 entitled to the damages proximately caused by
25 the offense, yet Congress here, instead of

1 using those very simple and direct words that
2 would cover everything that's happened here,
3 decided to break it up into four categories and
4 very specifically told courts what those
5 categories encompass.

6 There's a recent proposal that's being
7 considered now, I think it's by either the
8 Sentencing Commission or some congressional
9 committee, that's saying should we change this
10 statute and all the others to simply say "make
11 the victim whole." They would get to where
12 you're going very directly.

13 So what do I do with those
14 differences?

15 MR. HUSTON: Your Honor, I want to be
16 very --

17 JUSTICE SOTOMAYOR: I have -- I think
18 I have to give different meaning to different
19 statutory terms that were passed at the
20 identical time.

21 MR. HUSTON: We agree, Your Honor. I
22 want to be very clear about our position,
23 because this is in some respect a
24 misrepresentation by my friend about what --
25 what our position is.

1 Our position is not that, for example,
2 in the case of child pornography victims who
3 are entitled to recover all of the losses that
4 are proximately caused by the offense. Our
5 submission is not that a victim like GE Capital
6 gets everything that's proximately caused. A
7 victim does need to fit within one of the
8 categories in Section B.

9 What we do think, though, is that
10 Congress borrowed the key term from those
11 offense-specific restitution statutes and said
12 the full amount of the losses is what is to be
13 awarded. And so I think it is absolutely true
14 --

15 JUSTICE SOTOMAYOR: That's what those
16 other statutes said.

17 MR. HUSTON: They -- well -- that's --
18 they say that, Your Honor, but in the MVRA,
19 Congress incorporated the exact same text,
20 Section 3664F(1)(a), which is incorporated into
21 this statute, the MVRA, by Section 3663A(d).

22 Those -- that -- that provision of
23 Section 3664 is what expresses that in each
24 case of restitution, restitution is to be
25 awarded for the full amount of the victim's

1 losses.

2 Now, again, it's not the case that
3 it's the full amount, full stop. You have to
4 fit into one of the categories in B.

5 JUSTICE SOTOMAYOR: All right.

6 JUSTICE GINSBURG: But what about the
7 -- the general premise of our system that
8 expenses doesn't include attorneys' fees, that
9 people who incur attorneys' fees, that's their
10 expense, that doesn't get shifted away.

11 There is the general presumption that
12 if Congress wants attorneys' fees to be
13 awarded, it will not say something like
14 expenses; it will be specific that attorneys'
15 fees are covered.

16 MR. HUSTON: If I might make two
17 points about that, Your Honor.

18 The first is that I don't really think
19 the American rule of attorneys' fees has much
20 bearing on this case because that's a rule
21 about structuring correct incentives in civil
22 litigation. And that just doesn't translate to
23 the criminal context where Petitioner is the
24 wrongdoer.

25 And the second point is that the Crime

1 Victims' Rights Act, which is cited in our --
2 in our brief at Section -- at page 14A of the
3 gray brief, makes it explicit that Congress
4 contemplated victims would have a right to the
5 assistance of counsel in order to do things
6 like participate in a crime -- a criminal
7 defendant's sentencing proceeding.

8 If you think, for example, about the
9 case of -- if my accountant calls me up and
10 says that I owe \$5,000 to the IRS, but,
11 actually, I only owe \$1,000 and he just pockets
12 the whole amount, when that crime is
13 discovered, I'm going to need the assistance of
14 a second accountant in order to figure out how
15 much I'm defrauded, in order to be able to do
16 things like participate in the criminal
17 defendant's sentencing proceeding, file a
18 victim impact statement, and seek restitution.

19 JUSTICE BREYER: You're also going to
20 get all of the child care and transportation.
21 Is that your opinion?

22 MR. HUSTON: Yes, Your Honor, if I
23 incurred those expenses, I would have those.
24 And I think -- but I think that actually
25 illustrates --

1 JUSTICE BREYER: Well, it seems odd
2 that this investigation could go on for quite a
3 while, and during that time, it's the company's
4 investigation, it goes on for several months,
5 and child care, hmm, child care for, I guess,
6 anybody called up, and transportation. That is
7 all -- all covered?

8 MR. HUSTON: It is, Your Honor. But,
9 again, that's because of the breadth of this
10 statute. It covers a great deal of crimes.
11 And I think the apparent oddity is explained by
12 the fact that Congress wanted to make sure that
13 even the stuff that wouldn't readily come to
14 your mind is covered.

15 But Congress would have understood
16 that in fraud offenses --

17 JUSTICE BREYER: Lunches?

18 MR. HUSTON: I think, Your Honor,
19 perhaps, yes, absolutely. I think that that
20 would, if it -- you know, if you can make the
21 case that they're proximately caused.

22 JUSTICE KAGAN: Mr. Huston, one of the
23 things that strikes me about the statute, and
24 it's -- it's -- it's I think the thing that is
25 giving you problems on several dimensions, is

1 that this statute is pretty clearly written
2 with an individual victim in mind.

3 And I don't know exactly how that
4 cuts. But everything that's giving you a
5 problem with the language of this statute is --
6 is because it's thinking about individuals who
7 have necessary child care, who have lost
8 income, who participate in only a single
9 investigation, which is the government's
10 investigation, who actually attend proceedings.

11 You know, all these things make sense
12 when you're talking about an individual, and
13 make no sense when you're talking about a
14 corporation. And I'm -- I'm just wondering
15 which way that cuts and what we're supposed to
16 do with that.

17 MR. HUSTON: Well, I think I would say
18 this, Your Honor: It's clear -- there's no
19 dispute that a company that's a victim of a
20 fraud, as in this case, can be a victim for
21 purposes of the MVRA. That's acknowledged.

22 I think you're right that that's what
23 Congress had in mind when it wrote this
24 statute, but, again, I think that that's
25 because it would have been concerned that, you

1 know, a child -- child care expenses are not
2 the sort of thing that come to your mind when
3 you think most naturally about restitution.
4 But Congress wanted to express the breadth of
5 this provision by making --

6 JUSTICE GORSUCH: Well, if that's the
7 case, if you agree that the purpose here is all
8 about individual victims, doesn't that really
9 pose a serious problem for you? Because it
10 seems that the government's effort here is
11 really to externalize the costs of its own
12 investigations in corporate -- in corporate
13 situations.

14 MR. HUSTON: Your Honor, I -- I
15 respectfully disagree for this reason: Again,
16 Congress would have been aware of the many,
17 many cases that illustrate the principle that
18 we -- that we discuss in our brief, which is it
19 is very common in fraud cases against
20 corporations for the fraud to be discovered
21 through an internal investigation.

22 So this is really the heartland of an
23 investigation. This is exactly the sort of
24 thing that Congress would --

25 JUSTICE GORSUCH: I understand that.

1 You -- you conceded, I believe, to Justice
2 Kagan that Congress's purpose here had to do
3 with individual victims. And if that's the
4 case, it certainly had nothing to do with the
5 government leveraging private internal
6 investigations in -- in -- in corporate --

7 MR. HUSTON: Your Honor --

8 JUSTICE GORSUCH: -- cases, right?

9 MR. HUSTON: Your Honor, I did not
10 mean to suggest that only --

11 JUSTICE GORSUCH: Ah.

12 MR. HUSTON: -- individual victims are
13 covered. I agree that, certainly, when you're
14 thinking about child care expenses, Congress
15 has individual victims in mind. Again, I think
16 -- my response to Justice Kagan was meant to
17 say that that's -- the sort of -- those types
18 of situations, even those less obvious things,
19 are what Congress would have wanted to cover.

20 JUSTICE SOTOMAYOR: Let -- let's say
21 we --

22 CHIEF JUSTICE ROBERTS: We have talked
23 --

24 JUSTICE SOTOMAYOR: I'm sorry. Go
25 ahead.

1 CHIEF JUSTICE ROBERTS: We have talked
2 about two investigations: GE's investigation
3 and the government's investigation. The
4 statute talks about participation in the
5 investigation, only one.

6 And it seems to me if you're talking
7 about only one, it obviously has to be the
8 government's.

9 MR. HUSTON: I respectfully disagree,
10 Your Honor, for this reason: I think that if
11 you were to describe all of GE Capital's
12 efforts in this case, the hiring of forensic
13 experts that preserved crucial evidence to the
14 prosecution, the time that they spent with
15 financial consultants unraveling Petitioner's
16 two years of fraudulent accounting practices,
17 if you went to a person on the street and
18 described everything that GE Capital did in
19 this case and then asked did GE Capital
20 participate in the investigation of this
21 offense, we think the answer would absolutely
22 be yes.

23 And that --

24 JUSTICE KAGAN: I think we wouldn't
25 use the word "participate," would we? We would

1 say GE conducted the investigation.

2 MR. HUSTON: Well, I think that the --
3 that "participation" is a very sensible term
4 here because it reflects the fact that the
5 amount -- the victim's participation is going
6 to vary at various times.

7 The investigation of a crime happens
8 ordinarily in phases. Sometimes it starts with
9 a state-level admin- -- investigation.
10 Sometimes it starts, for example, in the SEC,
11 in a civil administrative proceeding. And then
12 that is what discovers a federal fraud, and
13 it's passed over to the government.

14 And sometimes victims are the ones who
15 conduct an internal investigation, as in
16 Justice Breyer's example about the bookkeeper,
17 that reveals the fraud and then the victim is
18 the one that hands the investigation over.

19 JUSTICE BREYER: That's all true, but
20 what I'm thinking is, I look back, now this is
21 expenses related to participation. That seems
22 to me intuitively, as a judge, excellent
23 because there are vast numbers of circumstances
24 and the trial judge will figure out what's
25 appropriate. Now Congress is going to change

1 that, and instead of it being discretionary, it
2 becomes mandatory.

3 Well, if you're going to make
4 something mandatory, you say we better narrow
5 it and be specific. And then that would
6 explain why this is limited to the government's
7 investigation, particularly when you think of
8 hundreds of billions of dollars in restitution
9 that is owed by people who commit crimes that
10 is not dischargeable in bankruptcy, which is
11 never collected and throughout the rest of
12 their lives is simply there as uncollected
13 debt, really causing a problem.

14 So, if Congress was aware of all this
15 and really thought let's narrow it, well, that
16 would explain the differences. But the problem
17 for me is it doesn't say a word, does it? So
18 do you have a view?

19 MR. HUSTON: Your Honor, we do. And
20 if I could just take those two points, I think,
21 in your question, in reverse order.

22 The first is that it's -- to the
23 extent that much restitution was awarded in
24 this case and that restitution -- there are
25 many unpaid restitution awards in this country,

1 that's a fact of Congress's explicit deliberate
2 choice in Section 3664(f)(1)(A) to award
3 restitution without regard to the economic
4 circumstances of the defendant. That's the one
5 thing that everyone agrees on, is that that
6 shouldn't be taken into account.

7 Now we don't quibble with Your Honor's
8 point that it has to be incurred during the
9 investigation of the offense, but as I was
10 saying earlier, we think that the investigation
11 of a criminal offense is ordinarily understood
12 to include phases. And some of those phases
13 take place before the government gets involved
14 because that's --

15 JUSTICE ALITO: If the -- if Congress
16 intended to cover an investigation conducted by
17 a company, wouldn't it -- wouldn't it use a
18 term like "reasonable," reasonable expenses
19 incurred?

20 MR. HUSTON: Your Honor, I think that
21 the word "necessary" in this statute functions
22 in -- in a -- in a similar way.

23 JUSTICE ALITO: Well, there's a big
24 difference between necessary -- well, how would
25 you determine whether the scope of an internal

1 investigation is necessary? What does that
2 mean? It would make much more sense to ask
3 whether it was reasonable in scope.

4 MR. HUSTON: I think, Your Honor, that
5 "necessary" in this statute plays a function
6 similar to the word "necessary" in the statute
7 that the Court recently considered in *Ayestas*.
8 It means ordinary, reasonable, expected.

9 And I want to stress that district
10 courts make those sort of determinations all
11 the time. They cut down restitution orders or
12 requested restitution orders because they find
13 that the expenses requested were
14 disproportionate to the task or that they
15 weren't actually focused on the specific
16 offense of conviction and that they were
17 looking into something else.

18 Petitioner's rule is categorical. He
19 wants to say that even in a circumstance where
20 it's undisputed that the victim's investigation
21 is extremely helpful to the government, even
22 where it's a perfectly reasonable
23 investigation, even where the victim takes
24 steps to minimize its expenses, they still
25 cannot get restitution in those cases if it's

1 -- the investigation happens to occur before
2 the government kicks off its case.

3 CHIEF JUSTICE ROBERTS: Well, I'm not
4 sure that GE took steps to limit its expenses.
5 I mean, it hired very expensive law firms to
6 conduct the investigation. And -- and you're
7 going to have the district judge in all of
8 these cases being asked to do that, did they
9 really have to, you know, have partners work on
10 this as opposed to associates? Did they have
11 to hire this law firm? Couldn't they have done
12 this?

13 And it's not clear to me that the
14 Congress would want the district courts to
15 spend a lot of time on that sort of restitution
16 litigation.

17 MR. HUSTON: So -- so two -- Your
18 Honor, I think that the statute equips district
19 courts to make exactly those type of
20 determinations in Section 3664F. The probation
21 office will prepare a report summarizing the
22 expenses. That report is subject to
23 adversarial testing. The government bears the
24 burden of proof to demonstrate that the amount
25 of the losses were caused and by a

1 preponderance of the evidence. And in cases
2 where necessary, district courts can refer
3 disputed issues out to a magistrate judge.

4 So district courts simply have not had
5 trouble, in the 22 years that this statute has
6 been on the books, making those sort of
7 determinations. I --

8 JUSTICE GORSUCH: Well, here's another
9 tricky one, for me, along the lines of what the
10 Chief Justice was just asking. It seems to me
11 you're making the case.

12 How do we determine whether an
13 internal investigation is even necessary for
14 the government's work? I mean, presumably, the
15 government can do its own investigation too.
16 So how is an internal investigation that
17 precedes the government's ever necessary in
18 that -- in any sense? And don't companies also
19 conduct internal investigations for their own
20 reasons? They have to worry about shareholder
21 derivative suits, they have to worry about
22 class action suits, they have to worry about
23 compliance with SEC regulations, among many
24 other things.

25 How is a district judge ever going to

1 be able to determine whether an internal
2 investigation was necessary for the criminal
3 investigation by the government?

4 MR. HUSTON: Your Honor, you're
5 absolutely right that companies conduct those
6 sort of investigations all the time. But it's
7 those kinds of investigations that discover
8 frauds and that reveal the evidence that we use
9 to prosecute people every day.

10 JUSTICE GORSUCH: You're not answering
11 my question, counsel.

12 How is -- how is a district judge, the
13 poor district judge, supposed to make a
14 determination which one's necessary for the
15 government's investigation and which one's not?
16 I don't doubt they help the government. I
17 don't doubt the government's happy to receive
18 that information and use the resources, the
19 private resources, to conduct its public
20 business. But how is a district judge supposed
21 to decide what was necessary?

22 MR. HUSTON: Well, Your Honor, we
23 don't think that the investigation of the
24 offense in this statute refers to the
25 government's work. And we think that the

1 reason why Congress would not have so limited
2 it is for exactly the reason that I just gave,
3 because of the value that internal
4 investigations add.

5 What we think "necessary" does in this
6 statute is exclude the sort of unreasonable
7 investigations that -- that everyone would
8 think ought to be outside the realm of
9 possibility. And to the extent --

10 JUSTICE GINSBURG: What do you do with
11 the argument that the -- in the end, all that
12 this does is to assure that the wrongdoer's
13 life will be miserable after he finishes his
14 prison sentence because he will never be able
15 to pay these huge attorney fee restitution
16 awards and you're not going to help the victim
17 because the award will be uncollectible?

18 MR. HUSTON: Your Honor, to the extent
19 that the restitution award in this case is
20 large, it is large because Petitioner conducted
21 a massive fraud. He stole \$25 million in less
22 than two years. And so I think he really has
23 nobody to blame but himself for the amount of
24 the award.

25 But to your point about the fact that

1 restitution awards often go uncollected, again,
2 I think that really is just a function of
3 Congress's deliberate choice in the MVRA to say
4 that restitution should be focused exclusively
5 on the losses that the victim incurred without
6 regard to the economic circumstances of the
7 defendant.

8 JUSTICE SOTOMAYOR: I'm sorry --

9 CHIEF JUSTICE ROBERTS: But he --

10 JUSTICE SOTOMAYOR: -- the fraud here
11 was \$25 million? And how much was spent that
12 was awarded by the court below in restitution?
13 Was it 10 or \$15 million?

14 MR. HUSTON: Eleven million dollars
15 was the amount of restitution that was
16 remaining that GE Capital was not able to
17 collect. And Petitioner does not dispute
18 restitution for that amount.

19 What we're talking --

20 JUSTICE SOTOMAYOR: But the full
21 amount was, to collect 25, they spent 15.

22 MR. HUSTON: No --

23 JUSTICE SOTOMAYOR: Does the judge
24 decide what's necessary at what point?

25 MR. HUSTON: I'm sorry, Your Honor. I

1 just want to just be clear about this. The
2 \$11 million is the amount of unpaid loans that
3 GE Capital was not able to recover. And,
4 again, that's not disputed.

5 JUSTICE SOTOMAYOR: I see, okay.

6 MR. HUSTON: What -- what we're
7 talking about here this morning are the
8 investigation and bankruptcy expenses.

9 JUSTICE SOTOMAYOR: Which were how
10 much?

11 MR. HUSTON: That was a little less
12 than \$5 million, \$4.9 million.

13 JUSTICE SOTOMAYOR: Together --

14 MR. HUSTON: Combined.

15 JUSTICE SOTOMAYOR: -- it's more than
16 that. Maybe my memory has them --

17 MR. HUSTON: The total restitution
18 award is -- is just a shade under \$16 million,
19 Your Honor --

20 JUSTICE SOTOMAYOR: That's right.

21 MR. HUSTON: -- but, again,
22 \$11 million of that is not disputed. What
23 we're talking about today is about
24 \$4.9 million.

25 CHIEF JUSTICE ROBERTS: And it seems

1 pretty clear the government would never have
2 done that on its own, try to figure out whether
3 the restitution ought to be \$4 million or
4 \$8 million from a guy who's never going to pay
5 any of it. They would have said, I think,
6 instead we'll spend a little time on the mass
7 murder down the street.

8 And I'm just wondering if you're
9 talking about expenses that the private party
10 incurred for its own purposes to find out how
11 to adjust its books, what it had lost, why
12 should the victim be compelled to pay that or,
13 as Justice Ginsburg suggests, just carry it on
14 -- on his own back, when it's something that
15 the government would never have done on its
16 own?

17 MR. HUSTON: Congress was aware, Your
18 Honor, and what the legislative history of the
19 MVRA says is that it recognizes that frauds
20 like this one impose costs on victims that are
21 more than just the property that's taken.

22 Although the award in this case is
23 substantial, again, that's just a function of
24 the complexity of the investigation that was
25 necessary. And that's not been challenged in

1 this case. So we're really not -- it's far too
2 late for Petitioner to go in and claim that any
3 of these particular expenses were too much and
4 they should have hired a less -- a law firm
5 with less expensive fees, although when
6 district courts do make those -- or, excuse me,
7 when -- when defendants do make those sort of
8 challenges, courts hear them all the time.

9 Both the Cuti case and the Amato case,
10 that are discussed in our brief, involve
11 examples of restitution awards being challenged
12 and then adjusted by district courts in those
13 ways.

14 CHIEF JUSTICE ROBERTS: Well, I'm not
15 sure if that --

16 JUSTICE SOTOMAYOR: Is the criminal --
17 I'm sorry.

18 CHIEF JUSTICE ROBERTS: I'm not sure
19 if that helps you. I mean, then your -- your
20 answer seems to be, well, they can always
21 litigate these things. So now, not only is the
22 government going to be conducting an
23 investigation over money that nobody's ever
24 going to pay, but they're going to be
25 litigating about it, taking the district court

1 time to figure out whether the attorneys' fees
2 should be \$2 million or \$1.5 million, again,
3 when no one's going to get the money anyway.

4 MR. HUSTON: Your -- Your -- Your
5 Honor, that is because Congress made a very
6 deliberate choice in the MVRA to say that
7 restitution should be focused exclusively on
8 the amount of loss that the victim incurred.

9 And even in a case where everyone
10 realizes that the defendant is never going to
11 be able to pay it back, which I think, to be
12 fair, is not this case, Petitioner was quite a
13 wealthy man before this -- before his crime,
14 and there's reason to believe that, you know,
15 the government is -- believes that he has
16 assets that we'll -- that we will attempt to
17 collect afterwards.

18 So it's not the case that nothing will
19 ever be collected. But, in any event, I think
20 that even in cases where restitution goes
21 uncollected, it's just a function of Congress's
22 deliberate choice that the restitution system
23 we have should measure the amount of the
24 victim's loss. And the amount of the victim's
25 loss in this case includes these -- these

1 expenses. If you were --

2 JUSTICE SOTOMAYOR: May I ask you a
3 question about the criminal conviction? Can it
4 be used to prove liability in the -- in a civil
5 suit?

6 MR. HUSTON: Yes, Your Honor, there's
7 an estoppel provision in -- in the MVRA that
8 functions that way.

9 JUSTICE SOTOMAYOR: All right. So
10 that means that a corporation, which, as
11 Justice Kagan pointed out, corporate losses of
12 these kind are not specified anywhere in this
13 provision. They can go into civil court.
14 Liability is taken as a given. All they have
15 to do is prove their restitution amount.
16 Correct?

17 MR. HUSTON: That's basically correct,
18 Your Honor.

19 JUSTICE SOTOMAYOR: So tell me why
20 Congress would have been worried about that
21 when it seemed more worried about the
22 individual expenses that people are unlikely to
23 go to civil court for.

24 MR. HUSTON: Well, again, there's
25 really no dispute at all that corporations are

1 victims of frauds and that they are entitled to
2 recover.

3 JUSTICE SOTOMAYOR: They're entitled
4 to their losses, but you're asking for
5 something more than what's specified here,
6 according to your adversary.

7 MR. HUSTON: Well -- well, I think
8 what we're asking for, they are a victim, and
9 the statute says that victims who incur
10 expenses during the investigation or
11 prosecution of the offense are entitled to
12 recover. And the other --

13 JUSTICE SOTOMAYOR: Yes, except that
14 Congress, unlike other provisions that
15 specified attorneys' fees, putting the victim
16 whole, proximate causation, Congress instead
17 chose very specific categories here.

18 MR. HUSTON: And we -- I think we fit
19 into this category, Your Honor. We fit into
20 (b) (4). But the -- the other thing I want to
21 say about the civil lawsuits is that's really
22 not an effective remedy because the action
23 moment is not about getting the judgment; it's
24 about collection.

25 And offering -- getting a criminal

1 restitution award offers substantial advantages
2 as against attempting to pursue civil
3 litigation in terms of the ability to recover.
4 The government has all sorts of tools that we
5 use to attempt to recover criminal restitution
6 awards that are not available to judgment
7 holders.

8 JUSTICE SOTOMAYOR: This company you
9 told me earlier got \$15 million back without
10 the government.

11 MR. HUSTON: In the bankruptcy --
12 well, they got -- in the bankruptcy proceeding,
13 Your Honor.

14 JUSTICE SOTOMAYOR: It wasn't the
15 government who helped them do that. It was
16 themselves.

17 MR. HUSTON: That's right, Your Honor,
18 but I think that only illustrates Congress's
19 wisdom in allowing these -- these restitution
20 expenses. If you were to pay back GE Capital
21 the \$11 million that Petitioner does not
22 contest, it would not be made whole because, in
23 order to get to this point, GE Capital had to
24 incur substantial investigation expenses, and
25 participating in the bankruptcy proceedings,

1 those are losses that are real to this company,
2 which is a victim of the fraud within the
3 meaning of the MVRA.

4 And they were proximately caused by
5 the defendant's offense, which is the
6 definition of victim that's in Section
7 3663A(a).

8 So I think for all of these reasons it
9 makes sense that Congress would design a
10 restitution system that would focus on
11 restoring the victim to its position before the
12 offense. As the Court said in Dolan, the
13 substantive purpose of this statute is to award
14 full restitution.

15 Unless there are further questions,
16 we'd ask that the judgment be affirmed.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Four minutes, Mr. Geysler.

20 REBUTTAL ARGUMENT OF DANIEL L. GEYSER

21 ON BEHALF OF THE PETITIONER

22 MR. GEYSER: Thank you, Mr. Chief
23 Justice. A few quick points.

24 My very able friend has referred
25 repeatedly to a statute providing for

1 make-whole relief to provide the full amount of
2 restitution.

3 Of course, that is not what Subsection
4 (b) (4) says, as Justice Sotomayor pointed out.
5 That's what other statutes say. The
6 offense-specific provisions provide that kind
7 of relief when Congress wanted to.

8 If Congress were concerned about
9 overlooking expenses like child care and
10 transportation, it would have phrased this
11 entirely differently. It would have said that
12 you can recover necessary expenses, including
13 child care and transportation. And that, in
14 fact, is what Congress did in the
15 offense-specific statutes.

16 It said you get the full amount of
17 recovery, and the full amount includes the
18 following categories, including their
19 attorneys' fees and the kind of expenses
20 provided here. Congress chose the polar
21 opposite formulation here, invoking the classic
22 *ejusdem generis* formulation.

23 My friend has suggested that
24 3664(f) (1) (A) somehow controls the amount of
25 restitution here. This Court rejected the

1 identical proposition in Huey when it looked at
2 the Victim and Witness Protection Act. It said
3 that (f)(1)(a) is a procedural statute. It
4 does not dictate the outer bounds of a
5 permissible restitution award. You have to
6 look to Subsection B in this case in order to
7 do that.

8 Mr. Chief Justice, you were absolutely
9 correct that trying to figure out what expenses
10 are necessary here is an incredibly difficult
11 task. The government may not think this is
12 imposing a burden on district judges. It's
13 interesting that the judges themselves
14 disagree.

15 Judge Higginson in his concurrence
16 cited different articles and studies showing
17 the -- the incredible burden and the complexity
18 of determining exactly these sorts of
19 restitution amounts.

20 And if you look at the record here, we
21 have a great example of how difficult this is
22 to parse out. Page 28 of the Joint Appendix
23 shows that one of the expenses that Winston &
24 Strawn incurred -- incurred, was looking at
25 potential third-party liability against Dry

1 Van's auditors. That, of course, has nothing
2 to do with investigating the Petitioner's
3 offense.

4 These are exactly the kinds of
5 expenses that a corporation reasonably incurs
6 in an internal investigation, and it's
7 incredibly hard to disaggregate those expenses
8 from the expenses that would be necessary for
9 the government to incur or that the government
10 even would have bothered to do in the first
11 place.

12 JUSTICE SOTOMAYOR: Did your client
13 point that out to the district court judge
14 here?

15 MR. GEYSER: No, Your Honor. And to
16 be clear, we're not challenging the -- that
17 specific line item, where it just illustrates
18 the difficulty of engaging in these sorts of
19 inquiries in the first place.

20 In terms of private investigations, a
21 private investigation that starts before the
22 government's investigation begins, if that's
23 fully covered, it leads to deep anomalies in
24 the statute.

25 It would mean that the private

1 investigation could occur and they don't -- the
2 corporation doesn't even have to disclose
3 results to the government because it would be
4 an expense incurred during participation in
5 that private investigation.

6 There is no statutory hook even
7 requiring the corporation to turn over what
8 they found. Surely, Congress did not have that
9 in mind in a statute that's talking about the
10 investigation and prosecution of the offense
11 with those terms in the singular.

12 A final point is for the bankruptcy
13 litigation. Again, my -- my friend, who is a
14 very able advocate, repeatedly referred to it
15 as expenses in the proceedings related to the
16 -- to the offense. Never once did it -- did my
17 friend use the term attendance at proceedings
18 related to the offense because there is simply
19 no plausible construction of this statute that
20 would include in the term attendance the
21 entirety of expenses of litigating a bankruptcy
22 case.

23 If the Court has no further questions.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, at 11:05 a.m., the case
2 was submitted.)
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Official - Subject to Final Review

\$			
\$1,000 [1] 42:11	47:21 54:5 66:8	APPEARANCES [1] 1:16	12 36:6,11 37:8,13,17 38:11 49:
\$1.5 [1] 60:2	accept [1] 4:13	Appendix [2] 25:13 66:22	10 57:8 63:11,12,25 68:12,21
\$11 [3] 57:2,22 63:21	according [1] 62:6	applies [1] 12:2	basically [1] 61:17
\$15 [2] 56:13 63:9	account [2] 37:20 50:6	apply [2] 17:3 20:7	basis [1] 6:1
\$16 [1] 57:18	accountant [2] 42:9,14	approached [1] 6:3	bearing [1] 41:20
\$2 [1] 60:2	accounting [1] 47:16	appropriate [1] 48:25	bears [2] 27:18 52:23
\$25 [2] 55:21 56:11	accustomed [1] 38:17	April [1] 1:10	becomes [1] 49:2
\$4 [2] 35:8 58:3	acknowledged [1] 44:21	aren't [3] 20:19 21:22 31:24	begin [1] 14:23
\$4.9 [2] 57:12,24	across [1] 10:17	argument [10] 1:13 2:2,5,8 3:4,7 8:	beginning [1] 14:14
\$5 [1] 57:12	Act [6] 3:11 5:2 12:4 32:12 42:1 66:	5 32:8 55:11 64:20	begins [2] 34:13 67:22
\$5,000 [1] 42:10	2	arrest [1] 9:24	behalf [8] 1:17,21 2:4,7,10 3:8 32:
\$8 [1] 58:4	action [5] 5:20 26:21 27:15 53:22	articles [1] 66:16	9 64:21
1	62:22	articulated [1] 38:12	believe [3] 10:13 46:1 60:14
10 [1] 56:13	actions [1] 4:23	aside [1] 33:15	believes [1] 60:15
10:07 [2] 1:14 3:2	active [1] 19:8	assets [1] 60:16	below [4] 23:8,16 26:18 56:12
11 [1] 5:15	actual [1] 24:5	assist [1] 8:18	better [1] 49:4
11:05 [1] 69:1	actually [10] 13:1 15:3 17:4 21:7	assistance [2] 42:5,13	between [4] 3:23 20:2 29:8 50:24
14A [1] 42:2	33:5 38:7 42:11,24 44:10 51:15	Assistant [1] 1:19	beyond [1] 13:8
15 [1] 56:21	add [1] 55:4	associates [1] 52:10	big [3] 34:9 35:22 50:23
16-1519 [1] 3:4	adjust [1] 58:11	assume [4] 5:11,13 30:22 37:19	billions [1] 49:8
17 [1] 30:7	adjusted [2] 36:2 59:12	assure [1] 55:12	blame [1] 55:23
18 [2] 1:10 16:7	admin [1] 48:9	attempt [4] 27:24 28:6 60:16 63:5	bookkeeper [3] 9:18,21 48:16
2	administrative [1] 48:11	attempting [1] 63:2	books [2] 53:6 58:11
2018 [1] 1:10	advance [1] 29:20	attend [1] 44:10	borrowed [1] 40:10
22 [1] 53:5	advantages [1] 63:1	attendance [12] 21:15 22:5,7,16,	both [2] 7:12 59:9
2248 [1] 6:19	adversarial [1] 52:23	19,21 25:10 26:6,8,23 68:17,20	bothered [1] 67:10
2259 [2] 6:19 8:10	adversary [1] 62:6	attended [2] 21:21 25:23	bounds [1] 66:4
25 [1] 56:21	advice [1] 25:16	attending [3] 3:15 22:2,2	breadth [2] 43:9 45:4
28 [2] 25:13 66:22	advocate [1] 68:14	attorney [2] 8:18 55:15	break [1] 39:3
29 [1] 25:13	affirmed [1] 64:16	Attorney's [2] 17:1,2	BREYER [13] 9:15 10:2,15,19 11:
3	afterwards [1] 60:17	attorneys [1] 25:10	12 31:4,19 34:8 36:24 42:19 43:1,
3 [1] 2:4	agency [1] 8:14	attorneys' [18] 6:16,17 7:5 8:8 11:	17 48:19
32 [1] 2:7	agents [2] 7:20 18:24	22 17:24 18:2 27:5 29:25 36:21	Breyer's [2] 34:3 48:16
3663A [4] 16:12 20:3,8 21:4	agree [3] 39:21 45:7 46:13	41:8,9,12,14,19 60:1 62:15 65:19	brief [7] 30:8 34:2 38:4 42:2,3 45:
3663A's [1] 3:22	agrees [1] 50:5	auditors [1] 67:1	18 59:10
3663A(a) [1] 64:7	Ah [1] 46:11	authorities [1] 15:25	bring [1] 19:12
3663A(b)(1) [1] 23:3	ahead [2] 6:6 46:25	authority [1] 23:9	broad [2] 4:4 8:20
3663A(d) [1] 40:21	aid [1] 18:10	authorized [3] 12:5 13:13 20:3	broader [8] 8:5,25 15:3 20:4,4,7,
3664 [1] 40:23	aided [1] 31:22	available [1] 63:6	18 29:4
3664(f)(1)(A) [2] 50:2 65:24	ALITO [14] 13:10,24 15:22 16:19,	avoid [1] 15:4	burden [5] 30:11,12 52:24 66:12,
3664F [1] 52:20	24 17:18 19:10 20:9 28:10,18,25	award [13] 4:18 23:10,13 25:2 50:	17
3664F(1)(a) [1] 40:20	29:13 50:15,23	64:13 66:5	business [2] 13:4 54:20
4	allowed [2] 10:5,21	awarded [5] 40:13,25 41:13 49:23	busy [1] 6:5
4 [1] 10:18	allowing [1] 63:19	56:12	C
5	alternative [3] 9:3 23:1,13	awards [7] 34:25 36:2 49:25 55:16	c(3)(B) [1] 12:4
523 [2] 5:14,22	Although [2] 58:22 59:5	56:1 59:11 63:6	calculate [2] 12:10,12
6	Amato [1] 59:9	aware [5] 21:2 33:13 45:16 49:14	call [1] 33:11
64 [1] 2:10	American [1] 41:19	58:17	called [2] 10:3 43:6
A	among [1] 53:23	away [1] 41:10	calls [1] 42:9
a.m [3] 1:14 3:2 69:1	amount [22] 5:16 30:1 31:1 40:12,	Ayestas [1] 51:7	came [2] 1:12 17:22
abet [1] 18:10	25 41:3 42:12 48:5 52:24 55:23	B	cannot [2] 3:22 51:25
abetted [1] 31:23	56:15,18,21 57:2 60:8,23,24 61:	b)(1) [4] 23:20 24:6,12 25:1	capacious [1] 7:4
ability [1] 63:3	15 65:1,16,17,24	b)(2) [2] 24:15,20	Capital [8] 37:12 40:5 47:18,19 56:
able [8] 42:15 54:1 55:14 56:16 57:	amounts [1] 66:19	b)(3) [1] 24:23	16 57:3 63:20,23
3 60:11 64:24 68:14	anomalies [2] 28:1 67:23	b)(4) [6] 23:14 24:15,25 26:17 62:	Capital's [2] 13:19 47:11
above-entitled [1] 1:12	another [3] 8:22 17:2 53:8	20 65:4	care [18] 3:13 6:14 7:7,21 8:7 13:
absolutely [6] 6:15 40:13 43:19	answer [3] 20:10 47:21 59:20	back [8] 16:11,16 18:19 48:20 58:	12 22:12 34:13,14 36:23 42:20 43:
	answering [1] 54:10	14 60:11 63:9,20	5,5 44:7 45:1 46:14 65:9,13
	anybody [1] 43:6	bail [1] 28:17	carry [1] 58:13
	anytime [1] 24:15	balance [1] 32:3	Case [52] 3:4 5:12,19 9:4 11:6 13:
	anyway [1] 60:3	bankruptcy [25] 3:20 5:10,12,23	18 15:17 17:5,6,21 18:5,11 20:22,
	apart [1] 9:8	21:10,10,19,20 24:11 25:9,21 26:	24 21:3 22:22 25:3,21 27:5,19 35:
	apparent [2] 14:3 43:11		
	appear [1] 4:6		

Official - Subject to Final Review

<p>10,15,22 36:10 38:10 40:2,24 41:2,20 42:9 43:21 44:20 45:7 46:4 47:12,19 49:24 52:2 53:11 55:19 58:22 59:1,9,9 60:9,12,18,25 66:6 68:22,25 69:1</p> <p>cases [11] 5:5 34:1,24 35:2 45:17,19 46:8 51:25 52:8 53:1 60:20</p> <p>categorical [1] 51:18</p> <p>categories [6] 39:3,5 40:8 41:4 62:17 65:18</p> <p>category [3] 23:3 34:25 62:19</p> <p>causation [1] 62:16</p> <p>caused [8] 21:20 25:6 38:24 40:4,6 43:21 52:25 64:4</p> <p>causes [1] 23:25</p> <p>causing [1] 49:13</p> <p>certain [2] 19:16 31:1</p> <p>Certainly [4] 35:23 37:6 46:4,13</p> <p>challenged [2] 58:25 59:11</p> <p>challenges [1] 59:8</p> <p>challenging [1] 67:16</p> <p>change [5] 10:12,23 11:15 39:9 48:25</p> <p>changed [1] 10:10</p> <p>charge [1] 26:3</p> <p>charges [1] 25:15</p> <p>CHIEF [25] 3:3,9 6:2,10,20 14:11,25 15:10,13,20 30:14 32:5,10 46:22 47:1 52:3 53:10 56:9 57:25 59:14,18 64:17,22 66:8 68:24</p> <p>child [21] 3:13 6:13 7:7,21 8:7 13:12 22:12,13 34:13,13 36:23 40:2 42:20 43:5,5 44:7 45:1,1 46:14 65:9,13</p> <p>choice [4] 50:2 56:3 60:6,22</p> <p>choose [1] 23:17</p> <p>chose [2] 62:17 65:20</p> <p>chronology [1] 32:25</p> <p>circumstance [1] 51:19</p> <p>circumstances [3] 48:23 50:4 56:6</p> <p>cited [2] 42:1 66:16</p> <p>citing [1] 4:3</p> <p>civil [20] 4:22 5:15,20 6:1 12:19 21:12 25:4 26:25 27:3,7,25 37:8,14 41:21 48:11 61:4,13,23 62:21 63:2</p> <p>claim [1] 59:2</p> <p>class [1] 53:22</p> <p>classic [2] 6:12 65:21</p> <p>clause [2] 6:15 37:4</p> <p>clear [13] 3:23 7:12 15:18 17:12 21:6 25:22 26:10 39:22 44:18 52:13 57:1 58:1 67:16</p> <p>clearer-cut [1] 36:9</p> <p>clearly [4] 18:18 21:3 24:6 44:1</p> <p>client [1] 67:12</p> <p>close [1] 5:24</p> <p>closer [2] 18:5 33:11</p> <p>clue [1] 16:16</p> <p>Code [1] 5:23</p> <p>collateral [2] 25:4 36:13</p> <p>collect [3] 56:17,21 60:17</p> <p>collected [2] 49:11 60:19</p>	<p>collection [1] 62:24</p> <p>Combined [1] 57:14</p> <p>come [3] 19:21 43:13 45:2</p> <p>coming [2] 8:14 19:22</p> <p>commenced [2] 29:11,12</p> <p>Commission [1] 39:8</p> <p>commit [1] 49:9</p> <p>committee [1] 39:9</p> <p>common [5] 7:10,11 34:5,23 45:19</p> <p>companies [3] 4:17 53:18 54:5</p> <p>company [17] 8:17 9:17 11:9 19:12,17,21 20:11 25:17 33:8,12,17 34:12 35:4 44:19 50:17 63:8 64:1</p> <p>company's [2] 19:15 43:3</p> <p>compelled [1] 58:12</p> <p>complaint [1] 15:1</p> <p>complexity [2] 58:24 66:17</p> <p>compliance [1] 53:23</p> <p>complicated [2] 6:4 11:24</p> <p>conceded [1] 46:1</p> <p>concern [1] 25:19</p> <p>concerned [2] 44:25 65:8</p> <p>concerns [1] 11:22</p> <p>concurrency [1] 66:15</p> <p>conduct [6] 17:15 48:15 52:6 53:19 54:5,19</p> <p>conducted [3] 48:1 50:16 55:20</p> <p>conducting [3] 12:14,15 59:22</p> <p>confines [1] 24:12</p> <p>Congress [63] 4:1,24 5:3 6:11,16 7:7 8:7 9:2 10:11,13 11:3,21 12:4,8,18 14:6 18:2,18,23 20:1,2,5 22:5 27:1,9 28:3,5,21 29:19,24 30:11 31:25 34:5 35:1 38:25 40:10,19 41:12 42:3 43:12,15 44:23 45:4,16,24 46:14,19 48:25 49:14 50:15 52:14 55:1 58:17 60:5 61:20 62:14,16 64:9 65:7,8,14,20 68:8</p> <p>Congress's [6] 4:5 46:2 50:1 56:3 60:21 63:18</p> <p>congressional [1] 39:8</p> <p>considered [2] 39:7 51:7</p> <p>construction [1] 68:19</p> <p>construing [1] 18:12</p> <p>consultants [1] 47:15</p> <p>consulting [2] 3:18 25:16</p> <p>contemplated [1] 42:4</p> <p>contention [1] 35:8</p> <p>contest [1] 63:22</p> <p>context [6] 7:12 14:3 26:10 30:18 37:5 41:23</p> <p>contextual [1] 16:16</p> <p>controls [1] 65:24</p> <p>conviction [4] 16:9,12 51:16 61:3</p> <p>cooperate [1] 11:9</p> <p>corporate [8] 17:16 25:10 30:17,22 45:12,12 46:6 61:11</p> <p>corporation [6] 30:21 44:14 61:10 67:5 68:2,7</p> <p>corporations [2] 45:20 61:25</p> <p>correct [5] 5:11 41:21 61:16,17 66:9</p> <p>correctly [1] 17:20</p>	<p>cost [2] 3:12,17</p> <p>costs [4] 5:19 19:5 45:11 58:20</p> <p>Couldn't [1] 52:11</p> <p>counsel [6] 32:6 36:5 42:5 54:11 64:18 68:25</p> <p>country [2] 19:13 49:25</p> <p>course [4] 19:6 34:16 65:3 67:1</p> <p>COURT [19] 1:1,13 3:10 18:11 23:7,17 27:21 31:2 32:11 37:25 51:7 56:12 59:25 61:13,23 64:12 65:25 67:13 68:23</p> <p>courtroom [1] 26:4</p> <p>courts [11] 36:1 38:17 39:4 51:10 52:14,19 53:2,4 59:6,8,12</p> <p>cover [10] 3:17 26:25 27:4,11,11 28:6 29:24 39:2 46:19 50:16</p> <p>covered [17] 4:20 6:9,25 8:3,18 16:4 19:18,20 20:19,22 28:24 29:22 41:15 43:7,14 46:13 67:23</p> <p>covers [3] 3:12 36:17 43:10</p> <p>creditors [1] 4:14</p> <p>crime [13] 21:2,13 24:16 25:7 28:8 32:13 36:20 38:16 41:25 42:6,12 48:7 60:13</p> <p>crimes [5] 34:23 36:18,19 43:10 49:9</p> <p>criminal [19] 17:16 18:25 23:15 26:9,12,21 27:15,16 28:23 37:5 41:23 42:6,16 50:11 54:2 59:16 61:3 62:25 63:5</p> <p>crucial [1] 47:13</p> <p>cues [1] 14:6</p> <p>cut [2] 36:2 51:11</p> <p>Cuti [1] 59:9</p> <p>cuts [2] 44:4,15</p>	<p>denominator [2] 7:10,12</p> <p>Department [1] 1:20</p> <p>depend [1] 30:20</p> <p>depending [1] 29:17</p> <p>depends [1] 5:25</p> <p>derivative [1] 53:21</p> <p>describe [1] 47:11</p> <p>described [2] 37:25 47:18</p> <p>design [1] 64:9</p> <p>designed [1] 21:12</p> <p>destruction [1] 23:21</p> <p>detailed [1] 4:25</p> <p>determination [2] 14:22 54:14</p> <p>determinations [5] 36:4 38:18 51:10 52:20 53:7</p> <p>determine [3] 50:25 53:12 54:1</p> <p>determined [1] 16:1</p> <p>determining [2] 29:9 66:18</p> <p>devoted [2] 13:3,4</p> <p>dictate [1] 66:4</p> <p>difference [4] 5:9,9 20:2 50:24</p> <p>differences [3] 3:23 39:14 49:16</p> <p>different [9] 9:7 12:21 23:10 36:18 37:10,11 39:18,18 66:16</p> <p>differently [1] 65:11</p> <p>difficult [5] 9:16 12:11 14:22 66:10,21</p> <p>difficulty [1] 67:18</p> <p>dimensions [1] 43:25</p> <p>diminish [1] 11:16</p> <p>direct [2] 38:15 39:1</p> <p>direction [1] 11:10</p> <p>directly [2] 4:10 39:12</p> <p>disaggregate [1] 67:7</p> <p>disagree [3] 45:15 47:9 66:14</p> <p>dischargeable [3] 5:12,24 49:10</p> <p>disclose [1] 68:2</p> <p>discover [1] 54:7</p> <p>discovered [3] 35:3 42:13 45:20</p> <p>discovers [1] 48:12</p> <p>discretionary [3] 10:4,5 49:1</p> <p>discuss [3] 36:1,1 45:18</p> <p>discussed [1] 59:10</p> <p>dislodged [1] 7:14</p> <p>disproportionate [1] 51:14</p> <p>dispute [4] 36:12 44:19 56:17 61:25</p> <p>disputed [3] 53:3 57:4,22</p> <p>disputes [5] 11:24 12:11,20,25 30:13</p> <p>distinction [1] 29:8</p> <p>district [17] 30:11 36:12 51:9 52:7,14,18 53:2,4,25 54:12,13,20 59:6,12,25 66:12 67:13</p> <p>divide [1] 17:10</p> <p>divorce [4] 36:20,22 37:10 38:10</p> <p>documents [2] 19:16,25</p> <p>doing [5] 17:9 19:5,6 20:12 30:21</p> <p>Dolan [2] 38:1 64:12</p> <p>dollars [3] 25:24 49:8 56:14</p> <p>done [5] 17:23 31:8 52:11 58:2,15</p> <p>doubt [2] 54:16,17</p> <p>down [2] 51:11 58:7</p> <p>dragged [1] 37:13</p>
D			
	<p>D.C [2] 1:9,20</p> <p>daily [1] 7:15</p> <p>Dallas [1] 1:17</p> <p>damage [2] 23:21,22</p> <p>damages [3] 21:13 25:5 38:24</p> <p>DANIEL [5] 1:17 2:3,9 3:7 64:20</p> <p>day [2] 31:1 54:9</p> <p>deal [1] 43:10</p> <p>death [1] 24:21</p> <p>debt [1] 49:13</p> <p>decide [3] 25:20 54:21 56:24</p> <p>decided [1] 39:3</p> <p>declarations [1] 4:4</p> <p>deep [1] 67:23</p> <p>defendant [3] 50:4 56:7 60:10</p> <p>defendant's [4] 32:15 42:7,17 64:5</p> <p>defendants [1] 59:7</p> <p>deferred [1] 12:18</p> <p>deficiencies [1] 4:3</p> <p>define [1] 7:9</p> <p>definition [2] 4:5 64:6</p> <p>defrauded [1] 42:15</p> <p>delay [1] 12:6</p> <p>delegating [1] 6:24</p> <p>deliberate [4] 50:1 56:3 60:6,22</p> <p>demonstrate [2] 34:2 52:24</p>		

Official - Subject to Final Review

<p>Dry [2] 25:17 66:25 duplicative [1] 11:11 during [20] 6:21 8:23 9:5,13 11:7 13:14,21 15:14,16 16:3 18:6 19:7 20:16 22:18 26:4 31:16 43:3 50:8 62:10 68:4</p> <hr/> <p style="text-align: center;">E</p> <p>each [2] 5:6 40:23 earlier [4] 29:1 34:3 50:10 63:9 easy [1] 12:10 economic [3] 13:5 50:3 56:6 effective [1] 62:22 efficiency [1] 11:25 effort [1] 45:10 efforts [1] 47:12 either [2] 11:19 39:7 ejusdem [4] 6:12 7:2 18:1 65:22 Eleven [1] 56:14 else's [2] 18:17 32:1 employee [2] 30:23,25 employees [2] 19:12,20 employer [1] 5:21 enables [1] 32:13 encompass [1] 39:5 encompasses [1] 32:24 end [2] 11:23 55:11 enforce [1] 23:15 engage [1] 36:13 engaging [1] 67:18 enough [1] 36:15 entertain [1] 12:25 entire [1] 16:16 entirely [3] 9:8 23:10 65:11 entirety [3] 22:9,21 68:21 entitled [6] 30:15 38:24 40:3 62:1, 3,11 entity [1] 30:17 enumerated [1] 36:24 enumeration [1] 6:11 equips [1] 52:18 equivalent [1] 37:14 especially [1] 12:13 ESQ [3] 1:17 2:3,9 essentially [2] 6:23 21:21 estoppel [1] 61:7 even [19] 4:20 9:10 15:19 18:8 21:2 23:16 25:6,22 43:13 46:18 51:19,21,23 53:13 60:9,20 67:10 68:2,6 event [2] 24:2 60:19 events [1] 32:25 everybody [1] 37:22 everyone [3] 50:5 55:7 60:9 everything [8] 19:1 27:18 31:8 37:22 39:2 40:6 44:4 47:18 everywhere [1] 4:8 evidence [5] 29:9 34:23 47:13 53:1 54:8 exact [1] 40:19 exactly [12] 7:13 21:11 30:1,10,20 36:3 44:3 45:23 52:19 55:2 66:18 67:4 example [8] 9:17 34:3,3 40:1 42:8</p>	<p>48:10,16 66:21 examples [2] 11:4 59:11 excellent [1] 48:22 except [1] 62:13 exclude [1] 55:6 exclusively [2] 56:4 60:7 excuse [2] 5:9 59:6 executive [1] 17:8 expand [1] 10:23 expanding [2] 11:1,2 expect [1] 37:3 expected [2] 33:1 51:8 expenditures [1] 35:18 expense [13] 8:22 9:2,5,11,12 10:8,22 18:6 20:12 28:7 31:16 41:10 68:4 expenses [67] 3:13 6:11,13,18,21, 25 7:5,6,10,21,23 10:5 11:7,11 12:8,9 13:2,12,14,20,21 15:9 16:3 19:2,3,6,17 21:7 25:8 27:6,16,17 29:21,23 34:21 35:14,25 38:15 41:8, 14 42:23 45:1 46:14 48:21 50:18 51:13,24 52:4,22 57:8 58:9 59:3 61:1,22 62:10 63:20,24 65:9,12, 19 66:9,23 67:5,7,8 68:15,21 expensive [2] 52:5 59:5 expert [1] 27:6 experts [2] 3:19 47:13 explain [3] 3:22 49:6,16 explained [1] 43:11 explicit [2] 42:3 50:1 express [2] 38:1 45:4 expresses [1] 40:23 expressly [1] 8:9 extend [1] 13:8 extent [4] 6:6 49:23 55:9,18 externalize [1] 45:11 extreme [1] 35:18 extremely [2] 34:5 51:21 eye [1] 9:19</p> <hr/> <p style="text-align: center;">F</p> <p>f)(1)(a) [1] 66:3 fact [9] 32:23 34:11,20 38:21 43:12 48:4 50:1 55:25 65:14 fact-intensive [2] 11:24 30:13 facts [1] 9:25 fair [1] 60:12 fall [1] 24:24 falls [1] 21:15 far [3] 13:8 23:24 59:1 FBI [5] 7:19 8:13 15:8 18:24 20:11 federal [13] 8:13 15:23 16:2,7,8,13, 17 17:9,10,18 19:10,11 48:12 Fee [3] 12:11 27:5 55:15 fees [29] 6:16,17 7:5 8:9 11:22 17:24 18:2 19:24 20:18 22:1 23:2 25:15 26:2,3 27:4,5,6,25 29:25 36:22 41:8,9,12,15,19 59:5 60:1 62:15 65:19 FERNANDO [1] 1:3 few [3] 10:25 23:5 64:23 figure [5] 42:14 48:24 58:2 60:1 66:9</p>	<p>file [3] 4:22 14:18 42:17 filed [1] 5:20 filing [1] 27:4 final [1] 68:12 financial [2] 6:4 47:15 find [3] 19:16 51:12 58:10 findings [1] 31:12 fine [1] 12:17 finish [1] 14:19 finished [2] 31:7,11 finishes [1] 55:13 firm [3] 3:18 52:11 59:4 firms [4] 3:18 13:2 35:22 52:5 first [11] 3:4 4:17 11:1 22:1 23:6 24:7,8 41:18 49:22 67:10,19 fit [7] 3:21 23:2 24:11 40:7 41:4 62:18,19 fits [1] 21:3 fluid [1] 14:16 focus [1] 64:10 focused [3] 51:15 56:4 60:7 follow [1] 33:16 followed [1] 6:14 following [1] 65:18 forensic [2] 3:19 47:12 forget [1] 30:4 former [1] 19:19 formulation [4] 6:13 29:5 65:21, 22 found [1] 68:8 four [5] 3:18 4:25 13:2 39:3 64:19 fraud [14] 6:4 25:18 34:24 35:2 36:7 43:16 44:20 45:19,20 48:12,17 55:21 56:10 64:2 frauds [4] 35:2 54:8 58:19 62:1 fraudulent [1] 47:16 friend [5] 39:24 64:24 65:23 68:13, 17 full [10] 29:25 40:12,25 41:3,3 56:20 64:14 65:1,16,17 fully [1] 67:23 function [4] 51:5 56:2 58:23 60:21 functions [2] 50:21 61:8 funeral [1] 24:22 further [3] 9:24 64:15 68:23 future [1] 24:1</p> <hr/> <p style="text-align: center;">G</p> <p>gave [1] 55:2 GE [13] 6:3 13:19 37:12 40:5 47:11, 18,19 48:1 52:4 56:16 57:3 63:20, 23 GE's [1] 47:2 General [4] 1:20 6:14 41:7,11 generally [1] 25:2 generic [1] 38:6 generis [4] 6:12 7:2 18:1 65:22 gets [4] 14:17 37:22 40:6 50:13 getting [4] 4:18 38:7 62:23,25 GEYSER [49] 1:17 2:3,9 3:6,7,9 4:16 5:14,22 6:9 7:1,11 8:4,19,25 10:1,13,16,25 11:18 13:18 14:2, 24 15:2,12,15 16:5,23 17:6,25 19:19 20:15 21:24 23:5 25:12 26:5,</p>	<p>15 28:13,20 29:6,16 30:7,19 31:15,20 64:19,20,22 67:15 GINSBURG [7] 4:12 17:17,19 22:25 41:6 55:10 58:13 give [2] 11:10 39:18 given [1] 61:14 giving [2] 43:25 44:4 GORSUCH [14] 7:25 8:5,12 36:5 37:2,7,16 38:3 45:6,25 46:8,11 53:8 54:10 got [3] 29:14 63:9,12 government [56] 4:2,8 6:3 7:16, 24 9:10 12:13 13:20 14:8,14,17, 23 15:14,19,23,23 16:2,17 17:9,21 18:20 19:4,23 20:23 21:1,1 23:8 27:18 31:6,14,22,23,23 32:2 33:23 38:5 46:5 48:13 50:13 51:21 52:2,23 53:15 54:3,16 58:1,15 59:22 60:15 63:4,10,15 66:11 67:9,9 68:3 government's [35] 3:21 4:11 5:11 6:23 9:6,9 11:8 13:22 14:1,7,10 17:23 18:7 20:14,17 23:1,18 24:13 27:24 29:21 30:8 31:10 32:16 37:19 44:9 45:10 47:3,8 49:6 53:14,17 54:15,17,25 67:22 governmental [2] 8:2 17:13 grand [2] 28:14 29:14 granted [1] 16:18 gray [1] 42:3 great [2] 43:10 66:21 ground [1] 23:16 grounds [1] 25:1 guess [1] 43:5 guilt [1] 13:3 guilty [1] 13:9 guy [1] 58:4</p> <hr/> <p style="text-align: center;">H</p> <p>hands [1] 48:18 happen [1] 33:6 happened [2] 15:18 39:2 happening [1] 9:13 happens [3] 7:14 48:7 52:1 happy [2] 38:19 54:17 hard [1] 67:7 healthcare [2] 24:17,19 hear [2] 3:3 59:8 hearing [11] 7:16,19 18:25 22:13 25:11,25 27:3,4 28:15,17 29:8 hearings [2] 22:2 25:22 heartland [1] 45:22 hefty [1] 25:15 help [3] 18:10 54:16 55:16 helped [1] 63:15 helpful [2] 9:23 51:21 helping [1] 32:1 helps [1] 59:19 Higginson [2] 26:18 66:15 himself [1] 55:23 hire [4] 12:16 13:2 35:21 52:11 hired [2] 52:5 59:4 hires [2] 8:17 9:18 hiring [5] 3:18 8:1,6 12:16 47:12</p>
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Official - Subject to Final Review

<p>history [4] 4:4 11:13,14 58:18 hmm [2] 34:14 43:5 holders [1] 63:7 holistically [1] 18:19 home [1] 7:21 Honor [54] 4:16 7:2 8:19 11:1 13:19 14:3 15:2 16:6 17:7,25 20:15 21:25 23:6 25:12 28:13 29:6 32:23 33:19 34:1,19 35:13,23 37:12,24 38:14 39:15,21 40:18 41:17 42:22 43:8,18 44:18 45:14 46:7,9 47:10 49:19 50:20 51:4 52:18 54:4,22 55:18 56:25 57:19 58:18 60:5 61:6,18 62:19 63:13,17 67:15 Honor's [1] 50:7 hook [1] 68:6 Huey [1] 66:1 huge [1] 55:15 hundreds [1] 49:8 HUSTON [57] 1:19 2:6 32:7,8,10,22 33:9,18,24 34:19 35:6,11,19,23 37:2,11,23 38:13 39:15,21 40:17 41:16 42:22 43:8,18,22 44:17 45:14 46:7,9,12 47:9 48:2 49:19 50:20 51:4 52:17 54:4,22 55:18 56:14,22,25 57:6,11,14,17,21 58:17 60:4 61:6,17,24 62:7,18 63:11,17 hypothetical [1] 37:10</p>	<p>incurring [1] 9:4 incurs [4] 7:23 19:17 20:12 67:5 indeed [1] 9:9 independent [1] 4:17 independently [1] 12:13 indictment [3] 28:16 29:10,12 indirect [1] 7:22 indispensable [1] 34:7 individual [7] 44:2,12 45:8 46:3,12,15 61:22 individuals [1] 44:6 information [2] 33:7 54:18 initially [2] 15:24 16:25 initiated [2] 37:15,17 injured [1] 24:16 innocence [1] 13:3 input [1] 11:8 inquiries [1] 67:19 instead [4] 38:25 49:1 58:6 62:16 intend [1] 10:11 intended [2] 11:16 50:16 interested [1] 11:13 interesting [1] 66:13 internal [15] 13:6 17:22 34:22 35:3,9 45:21 46:5 48:15 50:25 53:13,16,19 54:1 55:3 67:6 intuitively [1] 48:22 invaluable [1] 34:22 investigate [5] 4:15,19 6:6 9:24 18:16 investigated [2] 15:24 17:1 investigates [1] 33:23 investigating [3] 8:14 14:19 67:2 investigation [102] 3:14,20 6:8,17,22 7:6 8:2,24 9:6,8,9,11,13 10:6 11:8 12:15 13:15,20,23 14:1,4,7,14,23 15:5,14,17 16:4,10,15,19,24 17:10,13,14,22 18:7,15,17 19:7,9 20:14,17,25 21:6 26:21 27:25 31:6,10 32:14,17,20 33:2,16 34:7,11,12 35:9,12,16 43:2,4 44:9,10 45:21,23 47:2,3,5,20 48:1,7,9,15,18 49:7 50:9,10,16 51:1,20,23 52:1,6 53:13,15,16 54:2,3,15,23 57:8 58:24 59:23 62:10 63:24 67:6,21,22 68:1,5,10 investigations [13] 13:6 17:16 34:22 35:4 45:12 46:6 47:2 53:19 54:6,7 55:4,7 67:20 investigators [1] 19:11 investigatory [1] 15:6 invite [1] 36:12 invoked [1] 6:12 invoking [1] 65:21 involuntary [2] 37:17 38:10 involve [1] 59:10 involved [1] 50:13 IRS [1] 42:10 isn't [4] 14:21 23:12 26:11 36:14 issue [2] 29:10 36:7 issued [1] 28:15 issues [1] 53:3 item [1] 67:17 items [1] 30:15</p>	<p>itself [1] 5:17</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>job [2] 22:11 32:1 Joint [2] 25:13 66:22 Judge [13] 13:6 26:18 48:22,24 52:7 53:3,25 54:12,13,20 56:23 66:15 67:13 judges [5] 12:23 30:12 36:13 66:12,13 judgment [4] 6:1 62:23 63:6 64:16 jury [2] 28:15 29:14 Justice [126] 1:20 3:3,10 4:12 5:8,18 6:2,10,20 7:9,25 8:5,11,12,21 9:15 10:2,15,19 11:12 13:10,24 14:11,25 15:10,13,20,22 16:19,24 17:17,18,19 19:10 20:9 21:18 22:23,25 25:8 26:1,11 28:10,18,25 29:13 30:3,14 31:4,19 32:5,10,19 33:5,10,22 34:2,8 35:5,6,7,17,20 36:5,23 37:2,7,16 38:3,20 39:17 40:15 41:5,6 42:19 43:1,17,22 45:6,25 46:1,8,11,16,20,22,24 47:1,24 48:16,19 50:15,23 52:3 53:8,10 54:10 55:10 56:8,9,10,20,23 57:5,9,13,15,20,25 58:13 59:14,16,18 61:2,9,11,19 62:3,13 63:8,14 64:17,23 65:4 66:8 67:12 68:24</p>	<p>limit [5] 7:5 12:8 29:2 35:18 52:4 limited [3] 32:16 49:6 55:1 line [2] 14:12 67:17 lines [3] 18:21 27:22 53:9 litigate [2] 25:21 59:21 litigating [3] 22:21 59:25 68:21 litigation [10] 3:20 21:10,11,12 24:11 25:4 41:22 52:16 63:3 68:13 little [2] 57:11 58:6 lives [1] 49:12 loans [1] 57:2 located [1] 19:13 logic [1] 4:10 long [1] 36:13 look [17] 6:3,10 7:3,6 9:20,20 12:3 16:11 24:5 25:13 26:16 27:14 30:7 33:12 48:20 66:6,20 looked [1] 66:1 looking [2] 51:17 66:24 looks [2] 4:8 6:15 loss [5] 23:21,22 60:8,24,25 losses [9] 22:17 40:3,12 41:1 52:25 56:5 61:11 62:4 64:1 lost [12] 3:12 7:17 13:11 22:10 23:3 24:3,22 30:16,18 31:3 44:7 58:11 lot [5] 16:20,21 31:22 36:17 52:15 lots [1] 14:5 Lunches [1] 43:17</p>
<p style="text-align: center;">I</p> <hr/> <p>identical [3] 38:22 39:20 66:1 identifying [2] 13:9 19:25 illustrate [1] 45:17 illustrated [1] 34:4 illustrates [3] 42:25 63:18 67:17 imagine [1] 36:19 immediately [1] 4:15 impact [1] 42:18 important [2] 5:3 11:21 impose [1] 58:20 imposing [1] 66:12 incentive [1] 4:14 incentives [2] 4:17 41:21 incidental [5] 7:22 12:9 15:8 19:3 29:22 include [7] 6:17 8:8 15:5,7 41:8 50:12 68:20 included [2] 17:24 18:3 includes [4] 22:21 31:5 60:25 65:17 including [4] 25:15 36:18 65:12,18 income [8] 3:12 7:18 13:11 22:10 30:16,18 31:3 44:8 incorporate [1] 31:7 incorporated [2] 40:19,20 incredible [1] 66:17 incredibly [2] 66:10 67:7 incur [9] 15:8 19:2 27:7,17 34:21 41:9 62:9 63:24 67:9 incurred [20] 5:19 6:21 8:23 11:7 13:14,21 16:3 18:6 22:18 31:16 38:15 42:23 50:8,19 56:5 58:10 60:8 66:24,24 68:4</p>	<p style="text-align: center;">K</p> <hr/> <p>KAGAN [9] 7:9 26:1,11 35:6 43:22 46:2,16 47:24 61:11 Kavanaugh [1] 13:7 KENNEDY [9] 5:8,18 8:11,21 30:3 35:5,7,17,20 key [2] 4:24 40:10 kicks [1] 52:2 kind [6] 9:1 12:9 38:4 61:12 65:6,19 kinds [3] 36:18 54:7 67:4</p>	<p style="text-align: center;">L</p> <hr/> <p>LAGOS [2] 1:3 3:5 language [9] 3:17 4:9 10:17 11:15 21:4 24:5 34:10 38:8 44:5 large [2] 55:20,20 larger [1] 34:24 late [1] 59:2 later [2] 10:9 15:25 latter [1] 17:4 Laughter [1] 34:18 law [8] 3:18 5:10 13:2 16:13 35:22 52:5,11 59:4 lawsuits [1] 62:21 lawyer [2] 8:1,6 leading [1] 11:23 leads [1] 67:23 least [3] 9:3 18:5 26:6 leave [1] 7:20 legislative [3] 4:4 11:14 58:18 less [5] 46:18 55:21 57:11 59:4,5 leveraging [1] 46:5 liability [3] 61:4,14 66:25 life [2] 7:15 55:13 likely [1] 10:7</p>	<p style="text-align: center;">M</p> <hr/> <p>made [3] 26:18 60:5 63:22 magistrate [1] 53:3 make-whole [4] 4:1 11:3 28:5 65:1 man [1] 60:13 Mandatory [9] 3:11 5:1,3 11:2 12:1,22 32:12 49:2,4 many [5] 38:6 45:16,17 49:25 53:23 mass [1] 58:6 massive [1] 55:21 matter [1] 1:12 mean [16] 8:21 14:16,21,25 16:20 18:9 26:12 34:13,14 37:7 46:10 51:2 52:5 53:14 59:19 67:25 Meaning [3] 21:18 39:18 64:3 means [4] 18:13 31:25 51:8 61:10 meant [3] 10:23 18:2 46:16 measure [2] 30:18 60:23 mechanism [1] 4:21 mechanisms [1] 12:18 meet [7] 7:15,19 15:7 18:24 19:4,22 38:11 meeting [2] 7:24 19:8 memory [1] 57:16 MICHAEL [3] 1:19 2:6 32:8 might [5] 7:21 12:17 31:20 33:3 41:16 million [17] 35:8 55:21 56:11,13,14 57:2,12,12,18,22,24 58:3,4 60:2,2 63:9,21 millions [2] 25:16,24 mind [12] 4:25 9:2 14:6 18:22 20:1</p>

Official - Subject to Final Review

<p>28:3 43:14 44:2,23 45:2 46:15 68:9</p> <p>mine-run ^[1] 37:6</p> <p>minimize ^[1] 51:24</p> <p>minimum ^[1] 15:16</p> <p>minutes ^[1] 64:19</p> <p>misconduct ^[1] 4:19</p> <p>miserable ^[1] 55:13</p> <p>misrepresentation ^[1] 39:24</p> <p>miss ^[1] 7:17</p> <p>moment ^[1] 62:23</p> <p>money ^[9] 9:18 23:23,25 24:2,10, 18,21 59:23 60:3</p> <p>months ^[1] 43:4</p> <p>morning ^[3] 3:4 34:4 57:7</p> <p>Most ^[4] 13:6 32:18 34:24 45:3</p> <p>much ^[10] 13:1 22:15 26:24 41:19 42:15 49:23 51:2 56:11 57:10 59:3</p> <p>multiple ^[1] 4:11</p> <p>murder ^[1] 58:7</p> <p>MVRA ^[10] 20:6 30:9 40:18,21 44:21 56:3 58:19 60:6 61:7 64:3</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>narrow ^[6] 20:3 28:3 37:4,9 49:4, 15</p> <p>natural ^[1] 21:4</p> <p>naturally ^[2] 18:22 45:3</p> <p>nature ^[1] 5:25</p> <p>necessarily ^[1] 33:16</p> <p>necessary ^[27] 3:12 7:4 10:9 13:1, 12 35:9,11,24,25 44:7 50:21,24 51:1,5,6 53:2,13,17 54:2,14,21 55:5 56:24 58:25 65:12 66:10 67:8</p> <p>need ^[2] 40:7 42:13</p> <p>never ^[7] 49:11 55:14 58:1,4,15 60:10 68:16</p> <p>nobody ^[1] 55:23</p> <p>nobody's ^[1] 59:23</p> <p>non-dischargeable ^[3] 5:16,17, 20</p> <p>None ^[1] 4:6</p> <p>normal ^[1] 27:6</p> <p>noscitur ^[1] 26:19</p> <p>nothing ^[5] 6:15 29:15 46:4 60:18 67:1</p> <p>notoriously ^[1] 12:11</p> <p>notwithstanding ^[1] 20:7</p> <p>November ^[1] 31:11</p> <p>numbers ^[1] 48:23</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>obvious ^[2] 3:23 46:18</p> <p>obviously ^[1] 47:7</p> <p>occur ^[2] 52:1 68:1</p> <p>occurring ^[1] 9:12</p> <p>occurs ^[1] 9:10</p> <p>October ^[1] 31:12</p> <p>odd ^[1] 43:1</p> <p>oddity ^[1] 43:11</p> <p>odds ^[1] 4:10</p> <p>offense ^[54] 3:15,16 5:25 14:5 15:19,24 16:10,11,15 17:15 21:16,20,</p>	<p>21 22:19 23:4,20,22,25 24:4,8,20, 21,23 25:5 26:13,14,22,24 28:11, 12 29:5,17 32:15,17 33:2 35:1,13 36:7,15 37:4 38:25 40:4 47:21 50:9,11 51:16 54:24 62:11 64:5,12 67:3 68:10,16,18</p> <p>offense-specific ^[4] 20:5 40:11 65:6,15</p> <p>offenses ^[3] 14:20 16:8 43:16</p> <p>offering ^[1] 62:25</p> <p>offers ^[1] 63:1</p> <p>Office ^[5] 17:1,3,4 19:14 52:21</p> <p>officer ^[1] 30:22</p> <p>officers ^[4] 8:15,17 19:12 25:11</p> <p>often ^[2] 35:3 56:1</p> <p>Okay ^[3] 10:2 29:13 57:5</p> <p>once ^[2] 11:6 68:16</p> <p>one ^[16] 9:9,11 17:1 20:25 21:9 30:14 40:7 41:4 43:22 47:5,7 48:18 50:4 53:9 58:20 66:23</p> <p>one's ^[3] 54:14,15 60:3</p> <p>ones ^[3] 27:19,20 48:14</p> <p>ongoing ^[1] 19:8</p> <p>only ^[12] 4:21 17:3 20:22 27:16,23 42:11 44:8 46:10 47:5,7 59:21 63:18</p> <p>open ^[1] 6:21</p> <p>opened ^[1] 15:17</p> <p>operated ^[1] 9:8</p> <p>operating ^[1] 12:12</p> <p>opinion ^[2] 13:7 42:21</p> <p>opportunity ^[1] 19:5</p> <p>opposed ^[1] 52:10</p> <p>opposite ^[1] 65:21</p> <p>oral ^[5] 1:12 2:2,5 3:7 32:8</p> <p>order ^[7] 5:15 42:5,14,15 49:21 63:23 66:6</p> <p>orders ^[2] 51:11,12</p> <p>ordinarily ^[3] 19:6 48:8 50:11</p> <p>ordinary ^[4] 4:5 21:12 32:25 51:8</p> <p>other ^[22] 3:13,24 6:5,21 11:4 12:17 13:13 15:11 19:13,20 21:11 28:11,16 29:17 34:25 36:23 40:16 53:24 62:12,14,20 65:5</p> <p>others ^[1] 39:10</p> <p>otherwise ^[1] 30:24</p> <p>ought ^[2] 55:8 58:3</p> <p>out ^[17] 13:7 16:20 22:16 24:14 30:24 34:17 42:14 48:24 53:3 58:2, 10 60:1 61:11 65:4 66:9,22 67:13</p> <p>out-of-pocket ^[6] 7:22 12:9 15:8 19:3 27:17 29:23</p> <p>outer ^[1] 66:4</p> <p>outset ^[1] 30:3</p> <p>outside ^[3] 21:4 37:5 55:8</p> <p>over ^[7] 17:2 31:13 36:14 48:13,18 59:23 68:7</p> <p>overlooking ^[1] 65:9</p> <p>owe ^[2] 42:10,11</p> <p>owed ^[1] 49:9</p> <p>own ^[10] 12:14,15 18:14 45:11 53:15,19 58:2,10,14,16</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>PAGE ^[4] 2:2 30:7 42:2 66:22</p> <p>pages ^[2] 25:13 38:6</p> <p>Papagno ^[1] 13:8</p> <p>parse ^[1] 66:22</p> <p>part ^[3] 18:13 23:15 35:10</p> <p>participate ^[8] 18:14,16 33:1 42:6, 16 44:8 47:20,25</p> <p>participated ^[2] 31:9,12</p> <p>participating ^[5] 3:14 18:12 22:3 31:18 63:25</p> <p>participation ^[24] 6:22 8:23 9:5 10:6 13:14,22 16:3 18:6,9 19:7 20:13,16 31:5,5,17,25 32:14,16 33:14 47:4 48:3,5,21 68:4</p> <p>particular ^[3] 11:19 19:14 59:3</p> <p>particularly ^[1] 49:7</p> <p>parties ^[1] 17:15</p> <p>partners ^[1] 52:9</p> <p>parts ^[1] 19:13</p> <p>party ^[2] 13:9 58:9</p> <p>passed ^[4] 23:8 38:22 39:19 48:13</p> <p>passing ^[1] 27:8</p> <p>pay ^[6] 55:15 58:4,12 59:24 60:11 63:20</p> <p>paying ^[1] 27:19</p> <p>people ^[8] 12:12 18:15 25:23 27:7 41:9 49:9 54:9 61:22</p> <p>perfect ^[1] 19:1</p> <p>perfectly ^[4] 12:7,17 18:21 51:22</p> <p>perhaps ^[3] 20:12 31:14 43:19</p> <p>permissible ^[1] 66:5</p> <p>person ^[1] 47:17</p> <p>perverse ^[1] 4:13</p> <p>petition ^[1] 32:18</p> <p>Petitioner ^[12] 1:4,18 2:4,10 3:8 41:23 55:20 56:17 59:2 60:12 63:21 64:21</p> <p>Petitioner's ^[3] 47:15 51:18 67:2</p> <p>phases ^[3] 48:8 50:12,12</p> <p>phrase ^[4] 6:21 7:4 14:4 21:15</p> <p>phrased ^[1] 65:10</p> <p>phrases ^[1] 31:24</p> <p>physical ^[2] 22:6 24:16</p> <p>physically ^[1] 22:10</p> <p>place ^[3] 50:13 67:11,19</p> <p>placeholder ^[1] 37:6</p> <p>plain ^[1] 3:22</p> <p>plausible ^[2] 22:20 68:19</p> <p>play ^[1] 34:6</p> <p>plays ^[1] 51:5</p> <p>please ^[2] 3:10 32:11</p> <p>plenty ^[1] 36:10</p> <p>pocket ^[1] 21:9</p> <p>pockets ^[2] 21:7 42:11</p> <p>point ^[12] 11:20 14:13 15:25 26:18 36:25 41:25 50:8 55:25 56:24 63:23 67:13 68:12</p> <p>pointed ^[3] 13:7 61:11 65:4</p> <p>points ^[4] 10:25 41:17 49:20 64:23</p> <p>polar ^[1] 65:20</p> <p>police ^[4] 9:22,22 33:7 34:12</p> <p>poor ^[1] 54:13</p> <p>pornography ^[1] 40:2</p> <p>portions ^[1] 35:14</p>	<p>pose ^[1] 45:9</p> <p>position ^[4] 39:22,25 40:1 64:11</p> <p>possibility ^[2] 4:18 55:9</p> <p>potential ^[3] 4:19 21:2 66:25</p> <p>practices ^[1] 47:16</p> <p>pre-investigation ^[1] 10:8</p> <p>precede ^[1] 33:19</p> <p>precedes ^[2] 33:17 53:17</p> <p>precise ^[1] 14:13</p> <p>precisely ^[1] 14:22</p> <p>predated ^[1] 13:20</p> <p>premise ^[1] 41:7</p> <p>prepare ^[1] 52:21</p> <p>preponderance ^[1] 53:1</p> <p>preserve ^[1] 23:9</p> <p>preserved ^[1] 47:13</p> <p>pressed ^[1] 23:8</p> <p>presumably ^[2] 27:3 53:14</p> <p>presume ^[1] 31:2</p> <p>presumption ^[1] 41:11</p> <p>pretty ^[4] 6:20 25:15 44:1 58:1</p> <p>prevent ^[1] 11:10</p> <p>previously ^[2] 10:3,21</p> <p>principle ^[1] 45:17</p> <p>prior ^[2] 14:15,15</p> <p>prison ^[1] 55:14</p> <p>private ^[16] 3:19 7:6 9:7,19 15:5,6 17:15 20:24 27:24 46:5 54:19 58:9 67:20,21,25 68:5</p> <p>probation ^[1] 52:20</p> <p>problem ^[6] 18:8 34:10 44:5 45:9 49:13,16</p> <p>problems ^[2] 15:4 43:25</p> <p>procedural ^[1] 66:3</p> <p>proceeding ^[16] 12:6 21:19 24:1 26:4 27:16 28:22 29:14 30:21 36:6,22 37:8,15 42:7,17 48:11 63:12</p> <p>proceedings ^[38] 3:16 5:6 11:25 12:2,24 21:16 22:3,4,18 26:9,20, 23,25 27:7,14,25 28:11,12,14,17, 19 29:2,11,18 30:6,9 33:4 35:12 36:13,20 37:3,5,14,17 44:10 63:25 68:15,17</p> <p>process ^[1] 30:12</p> <p>professional ^[4] 19:24 20:18 23:2 25:14</p> <p>profit ^[1] 31:1</p> <p>progression ^[1] 24:6</p> <p>proof ^[1] 52:24</p> <p>proper ^[1] 13:1</p> <p>properly ^[1] 23:7</p> <p>property ^[12] 23:3,21,23,25 24:2,3, 7,9,10,18,22 58:21</p> <p>proposal ^[1] 39:6</p> <p>proposition ^[3] 18:4 20:21 66:1</p> <p>prosecute ^[1] 54:9</p> <p>prosecuted ^[1] 16:1</p> <p>prosecutes ^[2] 17:4 33:23</p> <p>prosecution ^[2] 3:15 6:8 14:4,10 16:15 26:22 28:12,19,21,23 29:1, 3,10 32:20 33:3,17 35:10,12 47:14 62:11 68:10</p> <p>prosecutors ^[1] 27:20</p> <p>Protection ^[1] 66:2</p>
--	---	--

Official - Subject to Final Review

<p>protracted ^[1] 11:23 prove ^[2] 61:4,15 provide ^[4] 4:1 29:25 65:1,6 provided ^[1] 65:20 providing ^[2] 25:16 64:25 proving ^[1] 13:3 provision ^[15] 4:10 5:7 16:7,8 18:3,12 20:3 23:11 28:4,4 29:1 40:22 45:5 61:7,13 provisions ^[6] 3:24 4:25 20:4,5 62:14 65:6 proximate ^[2] 38:16 62:16 proximately ^[6] 25:6 38:24 40:4,6 43:21 64:4 public ^[1] 54:19 purpose ^[8] 4:5 37:25 38:2,6,11 45:7 46:2 64:13 purposes ^[2] 44:21 58:10 purposivist ^[2] 37:20 38:14 pursue ^[1] 63:2 put ^[1] 14:18 puts ^[1] 31:8 Putting ^[2] 33:15 62:15</p> <hr/> <p style="text-align: center;">Q</p> <p>question ^[6] 5:24 8:12 38:14 49:21 54:11 61:3 questioned ^[1] 19:14 questioning ^[1] 8:16 questions ^[2] 64:15 68:23 quibble ^[1] 50:7 quick ^[1] 64:23 quite ^[8] 10:7 15:18 17:12 20:9,12 24:6 43:2 60:12</p> <hr/> <p style="text-align: center;">R</p> <p>raised ^[2] 11:21 23:16 rationale ^[1] 23:13 re ^[2] 4:22 27:1 reach ^[1] 23:17 read ^[9] 10:11 18:19 22:8,15 24:14 26:16 28:2 32:19,21 readily ^[1] 43:13 reading ^[7] 4:11 13:25 16:20,21 22:16,20 23:20 real ^[1] 64:1 realized ^[1] 5:4 realizes ^[1] 60:10 really ^[17] 23:7,19 24:7 27:21 37:13 41:18 45:8,11,22 49:13,15 52:9 55:22 56:2 59:1 61:25 62:21 realm ^[1] 55:8 reason ^[8] 26:7 30:10 37:18 45:15 47:10 55:1,2 60:14 reasonable ^[5] 50:18,18 51:3,8,22 reasonably ^[1] 67:5 reasons ^[7] 7:1 13:4,5 21:17 36:11 53:20 64:8 REBUTTAL ^[2] 2:8 64:20 receive ^[1] 54:17 recent ^[1] 39:6 recently ^[1] 51:7 recognizes ^[1] 58:19 recompensed ^[1] 4:22</p>	<p>record ^[1] 66:20 records ^[2] 19:16 20:11 recoup ^[1] 21:12 recover ^[10] 25:21 30:15 32:13 40:3 57:3 62:2,12 63:3,5 65:12 recoverable ^[1] 21:23 recovery ^[2] 27:2 65:17 redundant ^[1] 11:11 refer ^[2] 13:11 53:2 referenced ^[1] 20:6 referred ^[2] 64:24 68:14 referring ^[1] 20:17 refers ^[1] 54:24 reflects ^[4] 32:23 34:20 37:24 48:4 regard ^[2] 50:3 56:6 regrettably ^[1] 28:8 regulations ^[1] 53:23 reject ^[2] 18:4 20:20 rejected ^[1] 65:25 related ^[24] 3:16 10:5,8 21:16,19 22:18 25:9 26:12,13,14,20,23 27:14 28:11,23 29:5 35:13 36:6,14,20 37:3 48:21 68:15,18 relatedly ^[1] 36:17 relief ^[5] 4:1 11:3 28:5 65:1,7 remaining ^[1] 56:16 remedy ^[1] 62:22 remotely ^[1] 24:11 repeatedly ^[2] 64:25 68:14 report ^[3] 14:18 52:21,22 reports ^[1] 31:13 representative ^[1] 21:22 request ^[4] 17:21,23 19:11 20:11 requested ^[2] 51:12,13 requiring ^[2] 5:4 68:7 reserve ^[1] 32:3 residual ^[2] 6:15 7:4 resolve ^[1] 12:19 resource ^[1] 12:14 resources ^[2] 54:18,19 respect ^[2] 37:12 39:23 respectfully ^[2] 45:15 47:9 Respondent ^[4] 1:7,21 2:7 32:9 response ^[2] 17:20 46:16 responses ^[2] 21:25 23:5 responsibility ^[1] 6:24 rest ^[2] 34:24 49:11 Restitution ^[57] 3:11,24 4:6,18,21 5:2,4,16 10:4,21,24 11:17 12:5 13:13 23:10 30:1 32:12 34:25 36:2 38:21 40:11,24,24 42:18 45:3 49:8,23,24,25 50:3 51:11,12,25 52:15 55:15,19 56:1,4,12,15,18 57:17 58:3 59:11 60:7,20,22 61:15 63:1,5,19 64:10,14 65:2,25 66:5,19 restoring ^[1] 64:11 result ^[6] 23:3 24:3,19,23 37:18 38:16 resulting ^[3] 23:20,22 24:21 results ^[2] 6:7 68:3 resume ^[1] 31:9 return ^[1] 24:10 reveal ^[2] 34:2 54:8</p>	<p>reveals ^[1] 48:17 reverse ^[2] 33:6 49:21 Reves ^[1] 18:11 RICO ^[1] 18:12 Rights ^[1] 42:1 ROBERTS ^[19] 3:3 6:2,20 14:11,25 15:10,13,20 30:14 32:5 46:22 47:1 52:3 56:9 57:25 59:14,18 64:17 68:24 role ^[1] 34:7 routinely ^[2] 34:6,21 rule ^[3] 41:19,20 51:18 run ^[1] 25:24</p> <hr/> <p style="text-align: center;">S</p> <p>Sam ^[5] 9:19,23 10:21 31:8,21 Sam's ^[2] 10:7,22 same ^[9] 8:12 17:9,9 24:24 29:3 37:18,18 38:11 40:19 sat ^[1] 26:3 satisfy ^[1] 26:6 saved ^[1] 31:21 saying ^[7] 4:20 12:21 23:12,14 36:19 39:9 50:10 says ^[8] 9:19,21,22 22:20 42:10 58:19 62:9 65:4 scope ^[4] 10:24 11:16 50:25 51:3 SEC ^[2] 48:10 53:23 second ^[3] 26:7 41:25 42:14 Section ^[13] 3:21 5:14,22 8:9 18:19 40:8,20,21,23 42:2 50:2 52:20 64:6 Sections ^[2] 6:18,19 see ^[9] 6:18 21:14 22:20 25:14 28:1 29:7 37:9 38:4 57:5 seek ^[2] 25:4 42:18 seem ^[1] 14:11 seemed ^[1] 61:21 seems ^[7] 43:1 45:10 47:6 48:21 53:10 57:25 59:20 selling ^[1] 30:24 sense ^[10] 12:7 19:1 22:17 26:24 27:13 44:11,13 51:2 53:18 64:9 sensible ^[1] 48:3 sentence ^[3] 22:8 23:15 55:14 sentencing ^[10] 5:6 11:25 12:6,23 30:12 35:25 38:17 39:8 42:7,17 separate ^[1] 25:3 SERGIO ^[1] 1:3 serious ^[2] 14:20 45:9 several ^[2] 43:4,25 shade ^[1] 57:18 shareholder ^[1] 53:20 sharp ^[1] 14:12 shifted ^[1] 41:10 shoehorn ^[1] 27:23 shouldn't ^[1] 50:6 show ^[4] 25:25 27:10 29:20 31:2 showing ^[2] 27:2 66:16 shows ^[2] 7:13 66:23 similar ^[2] 50:22 51:6 simple ^[2] 9:17 39:1 simply ^[10] 7:3 13:13 15:6 18:9 20:19 21:11 39:10 49:12 53:4 68:18</p>	<p>since ^[2] 11:13 21:5 single ^[3] 25:25 28:7 44:8 singular ^[2] 16:14 68:11 singularly ^[1] 32:21 situation ^[3] 14:17 30:20 33:11 situations ^[2] 45:13 46:18 slow ^[1] 11:25 small ^[2] 9:17 26:2 sociis ^[1] 26:19 Solicitor ^[1] 1:19 somehow ^[1] 65:24 someone ^[10] 7:23 9:4 10:20 18:16 20:10,23 24:16 29:7 32:1 36:19 someone's ^[1] 18:13 Sometimes ^[3] 48:8,10,14 somewhere ^[1] 22:11 soon ^[1] 14:19 sorry ^[4] 46:24 56:8,25 59:17 sort ^[10] 36:4 45:2,23 46:17 51:10 52:15 53:6 54:6 55:6 59:7 sorts ^[5] 12:19 38:18 63:4 66:18 67:18 SOTOMAYOR ^[32] 21:18 22:23 25:8 32:19 33:5,10,22 38:20 39:17 40:15 41:5 46:20,24 56:8,10,20,23 57:5,9,13,15,20 59:16 61:2,9,19 62:3,13 63:8,14 65:4 67:12 sounds ^[1] 8:22 Spade ^[2] 9:19 31:8 Spade's ^[1] 31:21 specific ^[8] 4:25 6:11,13 41:14 49:5 51:15 62:17 67:17 specifically ^[5] 11:21 12:4 20:6 25:3 39:4 specified ^[3] 61:12 62:5,15 spend ^[3] 24:2 52:15 58:6 spending ^[2] 24:2,18 spent ^[7] 24:10,22 27:21 35:8 47:14 56:11,21 standpoint ^[1] 32:24 start ^[3] 14:19 31:6,11 started ^[2] 9:10,14 starts ^[3] 48:8,10 67:21 state ^[3] 15:25 16:4 17:18 state-level ^[1] 48:9 statement ^[1] 42:18 statements ^[2] 4:3 8:15 STATES ^[5] 1:1,6,14 3:5 38:5 statute ^[53] 3:24 4:7 10:3,4,11,20 12:1,22 13:11 16:21 18:21 22:16 24:14 26:10,16 28:1,2 32:15,23 33:20 34:9,11,20 35:24 36:17 37:4,21,24 38:1,8,22 39:10 40:21 43:10,23 44:1,5,24 47:4 50:21 51:5,6 52:18 53:5 54:24 55:6 62:9 64:13,25 66:3 67:24 68:9,19 statutes ^[5] 38:21 40:11,16 65:5,15 statutory ^[6] 4:9 10:22 23:11,16 39:19 68:6 step ^[2] 18:19 24:9 steps ^[2] 51:24 52:4 still ^[8] 6:9 13:16,17 15:15 18:7 26:</p>
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Official - Subject to Final Review

<p>8 31:17 51:24 stole ^[1] 55:21 stop ^[2] 10:22 41:3 stopping ^[1] 36:25 strange ^[1] 27:8 Strawn ^[1] 66:24 street ^[2] 47:17 58:7 stress ^[1] 51:9 stretches ^[1] 23:24 strictly ^[1] 38:14 strikes ^[1] 43:23 structuring ^[1] 41:21 stuck ^[2] 34:15,17 studies ^[1] 66:16 stuff ^[2] 6:5 43:13 stumble ^[1] 10:17 subject ^[2] 25:18 52:22 submission ^[1] 40:5 submitted ^[2] 68:25 69:2 subsection ^[6] 5:1 10:17 12:3 16:11 65:3 66:6 subsections ^[1] 24:14 subset ^[1] 26:2 substantial ^[3] 58:23 63:1,24 substantive ^[2] 38:2 64:13 suffers ^[1] 28:8 sufficient ^[1] 29:9 suggest ^[2] 14:12 46:10 suggested ^[1] 65:23 suggests ^[5] 11:15 18:20,22 23:19 58:13 suit ^[1] 61:5 suits ^[2] 53:21,22 summarizing ^[1] 52:21 support ^[1] 18:10 supported ^[1] 31:24 supports ^[1] 23:13 suppose ^[6] 8:13 13:10,10 16:25 19:10,14 supposed ^[3] 44:15 54:13,20 SUPREME ^[2] 1:1,13 Surely ^[3] 22:5 25:23 68:8 surprised ^[1] 38:4 survive ^[1] 25:19 system ^[3] 41:7 60:22 64:10</p>	<p>theory ^[9] 3:21 9:1,3 15:3,11 17:8 20:18 23:1,18 there's ^[15] 11:19 14:12 17:7 23:12 24:20 29:7,9 33:1,3 39:6 44:18 50:23 60:14 61:6,24 therefore ^[1] 24:3 They'll ^[2] 14:18 19:2 they've ^[2] 10:10 28:15 thinking ^[8] 18:23 22:6 24:7 29:7 33:20 44:6 46:14 48:20 thinks ^[2] 9:11,17 third-party ^[1] 66:25 though ^[3] 17:12 27:13 40:9 thousands ^[6] 5:5 12:2,24 30:5,5,9 three ^[2] 14:20 35:13 throughout ^[1] 49:11 Title ^[2] 5:15 16:7 today ^[1] 57:23 together ^[2] 32:21 57:13 took ^[1] 52:4 tools ^[1] 63:4 top ^[1] 9:18 total ^[1] 57:17 translate ^[1] 41:22 transportation ^[13] 3:13 6:14 7:7,20 8:7 13:12 19:21 22:14 34:14 42:20 43:6 65:10,13 traveling ^[1] 19:3 trial ^[1] 48:24 tricky ^[1] 53:9 tries ^[1] 4:2 trouble ^[1] 53:5 true ^[7] 5:17 23:23 33:19,25,25 40:13 48:19 try ^[3] 23:9 27:23 58:2 trying ^[5] 25:4,20 28:22 29:19 66:9 turn ^[1] 68:7 two ^[11] 7:1 21:7,17,24 35:21 41:16 47:2,16 49:20 52:17 55:22 type ^[3] 20:21 35:1 52:19 types ^[2] 29:17 46:17 typical ^[2] 33:21,22</p>	<p>unpaid ^[2] 49:25 57:2 unraveling ^[1] 47:15 unreasonable ^[1] 55:6 until ^[2] 31:6,11 up ^[16] 4:2 11:23 14:19 17:10,11 18:21 25:25 27:2,10,22 29:20 31:2 34:24 39:3 42:9 43:6 uphold ^[1] 23:9 upholding ^[1] 25:2 useful ^[1] 31:20 using ^[1] 39:1</p> <hr/> <p style="text-align: center;">V</p> <p>value ^[1] 55:3 Van ^[1] 25:17 Van's ^[1] 67:1 various ^[3] 35:14 36:3 48:6 vary ^[1] 48:6 vast ^[1] 48:23 venue ^[1] 12:19 versus ^[1] 3:5 victim ^[29] 7:14 27:10,15 28:7 30:16,16 32:13,24,25 33:21 39:11 40:5,7 42:18 44:2,19,20 48:17 51:23 55:16 56:5 58:12 60:8 62:8,15 64:2,6,11 66:2 victim's ^[6] 38:23 40:25 48:5 51:20 60:24,24 Victims ^[17] 3:11 5:1 18:23 27:2 32:12 34:6,21 40:2 42:4 45:8 46:3,12,15 48:14 58:20 62:1,9 Victims' ^[1] 42:1 view ^[5] 4:13 8:3 24:13 37:19 49:18 violence ^[1] 36:21 violent ^[1] 36:18</p> <hr/> <p style="text-align: center;">W</p> <p>wanted ^[10] 6:16 7:8 8:8 27:1 29:2,24 43:12 45:4 46:19 65:7 wants ^[2] 41:12 51:19 Washington ^[2] 1:9,20 watching ^[1] 22:13 way ^[10] 10:23 11:19 21:14 33:6,21,22 35:2 44:15 50:22 61:8 ways ^[2] 36:3 59:13 wealthy ^[1] 60:13 Wednesday ^[1] 1:10 whatever ^[1] 19:5 Whereupon ^[1] 69:1 wherever ^[1] 7:18 whether ^[11] 25:17,18 33:11,13 36:14 50:25 51:3 53:12 54:1 58:2 60:1 who's ^[1] 58:4 whoever ^[1] 12:16 whole ^[5] 26:16 39:11 42:12 62:16 63:22 will ^[12] 16:1 19:2 23:14 41:13,14 48:24 52:21 55:13,14,17 60:16,18 win ^[1] 13:17 Winston ^[1] 66:23 wisdom ^[1] 63:19 wish ^[1] 12:16</p>	<p>within ^[4] 21:15 24:12 40:7 64:2 without ^[3] 50:3 56:5 63:9 witness ^[4] 8:1 29:19 31:13 66:2 witnesses ^[1] 15:7 wondering ^[2] 44:14 58:8 word ^[8] 13:25 14:2 35:19,24 47:25 49:17 50:21 51:6 wording ^[1] 10:10 words ^[3] 38:23,23 39:1 work ^[10] 7:17 15:6 18:13 20:21 25:9 29:21 31:21 52:9 53:14 54:25 working ^[1] 32:1 works ^[1] 23:19 worried ^[2] 61:20,21 worry ^[3] 53:20,21,22 written ^[1] 44:1 wrongdoer ^[1] 41:24 wrongdoer's ^[1] 55:12 wrote ^[1] 44:23</p> <hr/> <p style="text-align: center;">Y</p> <p>year ^[5] 5:6 12:3,24 30:6,10 years ^[3] 47:16 53:5 55:22</p>
<p style="text-align: center;">T</p> <p>talked ^[2] 46:22 47:1 talks ^[1] 47:4 target ^[1] 24:8 task ^[2] 51:14 66:11 tens ^[5] 5:5 12:2,23 30:5,8 term ^[9] 5:2 26:6 29:1,4 40:10 48:3 50:18 68:17,20 terms ^[10] 7:13 20:7 26:17,19 38:7,7 39:19 63:3 67:20 68:11 test ^[2] 38:11,13 testify ^[6] 7:16 18:25 27:10,15 29:20 30:23 testing ^[1] 52:23 Texas ^[1] 1:17 text ^[4] 3:22 4:9 13:25 40:19 textual ^[1] 14:5 themselves ^[2] 63:16 66:13</p>	<p style="text-align: center;">U</p> <p>U.S ^[2] 17:1,2 uncollected ^[3] 49:12 56:1 60:21 uncollectible ^[1] 55:17 uncover ^[1] 34:22 under ^[19] 5:6,10,10,22 7:2,2 8:5,19,25 15:3 16:12 18:1 19:21 23:2,14 24:13 26:18 30:9 57:18 underlying ^[1] 6:1 understand ^[6] 17:19 20:10 34:9 35:1 38:3 45:25 understood ^[3] 34:6 43:15 50:11 undisputed ^[1] 51:20 unfortunately ^[1] 28:7 unitary ^[1] 17:8 UNITED ^[5] 1:1,6,13 3:5 38:5 Unless ^[1] 64:15 unlike ^[3] 3:25,25 62:14 unlikely ^[1] 61:22 unnecessary ^[1] 24:24</p>		