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IN THE SUPREME COURT OF THE UNITED STATES
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RAYMOND J. LUCIA, ET AL.,)
Petitioners,)
v.) No. 17-130
SECURITIES AND EXCHANGE COMMISSION,))
Respondent.)

Washington, D.C.

Monday, April 23, 2018

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 10:03 a.m.

APPEARANCES:

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Petitioners.

JEFFREY B. WALL, Deputy Solicitor General, Department
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Respondent, in support of the Petitioners.

ANTON METLITSKY, ESQ., New York, New York; on behalf
of the Court-appointed amicus curiae in support of
the judgment below.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MARK PERRY, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	JEFFRY B. WALL	
7	On behalf of the Respondent	
8	in support of the Petitioners	15
9	ORAL ARGUMENT OF:	
10	ANTON METLITSKY, ESQ.	
11	On behalf of the Court-appointed	
12	amicus curiae in support of the	
13	judgment below	34
14	REBUTTAL ARGUMENT OF:	
15	MARK PERRY, ESQ.	
16	On behalf of the Petitioners	63
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 the commissioners of the SEC, and that
2 relationship of director and then supervision
3 is what marks them as inferior but not as
4 employees.

5 And it's important to note that, in
6 exercising those duties under the direction of
7 the SEC, they have independence in their
8 decisional functions, their hearing functions,
9 and their evidentiary functions. These are all
10 sovereign powers that we give to judges, that
11 governments give to judges. The *puissance de*
12 *juger*, as Montesquieu put it. And that is --
13 those are powers that ordinary citizens,
14 private citizens, simply do not have, absent
15 agreement of the parties, and that governments
16 when they delegate them must do to officers.
17 All of those powers together makes one an
18 officer, as this Court quite firmly and clearly
19 recognized in *Freytag*.

20 CHIEF JUSTICE ROBERTS: Well, of
21 course, any decisions of the ALJs in every case
22 aren't operative until the Commission issues an
23 order of finality, right?

24 MR. PERRY: Well, Your Honor, the
25 Commission by regulation does issue a finality

1 order. The -- by statute, the decisions of the
2 ALJs are deemed the decision of the Commission
3 if not reviewed, and the review period by
4 regulation expires after 42 days.

5 And Congress, importantly, gave the --
6 the ALJs the power to make final decisions.
7 That's in the APA Section 557(b). And -- and
8 the right of review in the statute, in the
9 Exchange Act, is discretionary.

10 So that when Congress says here is an
11 office of the ALJ that can make a final
12 decision on behalf of the agency, unless the
13 agency chooses to review it, that officer must
14 be invested with the power to enter a final
15 decision, whether or not the -- the agency
16 actually allows that officer to exercise it.

17 There's two levels of authority here,
18 and the one that Congress gave -- because
19 tomorrow the Commission could adopt a new
20 regulation that says we're not going to --
21 we're not going to review any initial decisions
22 in investment adviser cases under our
23 discretion. Every such decision would become
24 final. And we know as a matter of fact that
25 90 percent of ALJ decisions do become final

1 with no review by the Commission. So this --
2 these -- these judgments --

3 JUSTICE SOTOMAYOR: I'm sorry, that --
4 that figure is somewhat misleading. Every
5 petition for review that has been filed has
6 been accepted for review. The only cases --
7 that 90 percent encompasses default petitions.

8 If people don't show up and nobody
9 contests what's going on, why don't we take the
10 SEC at its word that it's looking at the
11 default judgment, on its face don't see
12 anything wrong with it? Nobody's pointing out
13 that there's anything wrong with it, and
14 they're the ones who submit or adopt it as
15 final.

16 It doesn't become final except by the
17 actions of the SEC officers.

18 MR. PERRY: Two answers, Justice
19 Sotomayor: First, those defaults itself
20 recognize an exercise of sovereign power. The
21 ALJ issues a notice, a hearing notice, that
22 says appear at this time and this place or you
23 will suffer the consequences.

24 And if the person --

25 JUSTICE SOTOMAYOR: Now, most of the

1 time, I don't know of many judges -- well,
2 judges sign order to show causes. But it's
3 usually prepared by a function -- functionary
4 in the court. Why is merely issuing the order
5 to show cause a sovereign enough power to
6 designate someone a -- a officer rather than an
7 employee, when it's being done on behalf of,
8 not in the name of, on behalf of the SEC?

9 MR. PERRY: Well, first, Your Honor,
10 the -- the hearing -- the note -- the hearing
11 notice, which is different than an order to
12 show cause, is issued in the name of the ALJ
13 and goes out under the name of the ALJ, if that
14 matters, as does the subpoena, as does all the
15 document requirements, as does everything
16 related to the hearing.

17 After the order instituting
18 proceedings is issued and it is delegated to an
19 ALJ, the ALJ issues every order in the case.
20 It oversees -- he oversees or she oversees the
21 gathering of the evidence, the admission or
22 exclusion of the evidence, the hearing -- the
23 taking of the depositions, the hearing of the
24 testimony, the convening of the hearing,
25 compulsory settlement, if the settlement

1 conference -- if the ALJ chooses, and the
2 preparation of a decision. And --

3 JUSTICE GINSBURG: If -- if the
4 provision had been that the bottom line is the
5 ALJ recommends -- everything else is the same,
6 they conduct the hearing, decide what evidence
7 will be admitted, all that. The only change
8 would be that their bottom line is we recommend
9 that the Commission do so and so.

10 MR. PERRY: Yes, Your Honor.

11 JUSTICE GINSBURG: If -- if that were
12 -- if that were so, then -- then they would be
13 employees?

14 MR. PERRY: No, Your Honor. That's
15 the FDIC scenario. That's not permitted by
16 statute in the SEC, but there are agencies that
17 have that model. 557(b) of the APA provides
18 for two modes of ALJ decision-making: Initial
19 decisions and recommended decisions.

20 Both have to be functioned by 3105
21 officers because of all the hearing-related and
22 evidentiary-related powers in 556(c). Those
23 decisions, whether recommended or initial, are
24 the agency's decision. And the decisional
25 process, of course, is the capstone of the

1 adjudication, but it is not the adjudication
2 itself. And the package of powers, the
3 evidentiary powers, the hearing powers, the
4 regulation of the parties' powers, which is
5 very important in all formal proceedings, also
6 are exercised by ALJs even in purely
7 recommendatory cases.

8 But in SEC cases, the only choice by
9 statute is an initial decision, which by
10 statute becomes the decision of the agency
11 absent discretionary review.

12 JUSTICE KENNEDY: If -- if we follow
13 your theory of the case and -- and you prevail,
14 what effect, if any, will that have on ALJs in
15 other agencies, Social Security ALJs?

16 MR. PERRY: Justice Kennedy, our
17 submission is limited to ALJs who decide
18 adversarial proceedings subject to Sections 556
19 and 557 of the APA. There are approximately
20 150 ALJs who fit that definition, which is not
21 Social Security ALJs, by the way, in the
22 federal government, in 25 agencies.

23 Some of those may well have already
24 been appointed. One of the interesting things
25 about this case is, as we have all dug into it,

1 it's very obscure how these ALJs are appointed,
2 when we have a constitutional clause that is
3 designed to promote transparency and
4 accountability, not obscurity and opacity.

5 But 150 is the answer to your
6 question, and some of those may already have
7 been properly appointed, and those are the ones
8 who perform the judge-like characters that
9 Congress specified in the APA. And the
10 Exchange Act, Section 78d-1(a), explicitly
11 adopts Section 556 of the APA for the judges.

12 And I think it's important in the APA,
13 Congress said that a formal adjudication, an
14 on-the-record adjudication under the APA, can
15 be done by three people only: The agency, a
16 member of the agency, or an ALJ. And words are
17 known by the company they keep. These are all
18 officers.

19 We know the agency and its members are
20 officers and -- and -- and they didn't say the
21 agency -- a member of the agency or some random
22 person you find on the street. They said an
23 ALJ and defined that office by the duties in
24 556(c).

25 JUSTICE KAGAN: Other --

1 JUSTICE GINSBURG: Who -- who is left
2 out? You said 150 ALJs. What -- what about
3 Social Security ALJs?

4 MR. PERRY: Our understanding, Your
5 Honor, is Social Security ALJs do not conduct
6 adversarial hearings. They are not subject to
7 556(c) and 557 of the APA. They are outside
8 that under the organic statute of the Social
9 Security Administration.

10 These questions involve the
11 intersection of two statutes: The APA and the
12 organic statute of the agency. In the SEC --

13 JUSTICE SOTOMAYOR: I'm sorry, could
14 you define adversarial for me?

15 MR. PERRY: Yes, Your Honor.

16 JUSTICE SOTOMAYOR: Let's go through
17 the various agencies. Virtually all of them --
18 the SEC have -- it's adversarial because it's
19 the government versus the individual, correct?

20 MR. PERRY: Yes, Your Honor.

21 JUSTICE SOTOMAYOR: So why isn't
22 Social Security and the Veterans
23 Administration, the veterans board, and some of
24 the others are all investigations by the
25 government or benefits that the government's

1 going to give -- but they are investigating.
2 Social Security can issue subpoenas for -- for
3 documents. It can call witnesses. It could do
4 just about everything that happens in a -- in
5 -- in a hearing. So what's the difference
6 again?

7 MR. PERRY: Justice Sotomayor, the way
8 we are using the term is adversarial -- by
9 adversarial, I mean those cases -- enforcement
10 cases are a good example -- where a private
11 citizen is brought against his or her will
12 before a government body to have his or her
13 fate decided.

14 The Social Security Administration --
15 the vast majority of ALJ determinations are
16 when a citizen voluntarily goes to the agency
17 and seeks benefits from the government.

18 They are applicants and --

19 JUSTICE KAGAN: So, Mr. Perry, if I
20 asked you why is it important for purposes of
21 deciding who's an officer that the person
22 conduct an adversarial hearing, is that what
23 you would say, that the stakes are very high,
24 that a person has liberty on the line?

25 MR. PERRY: I think the stakes,

1 Justice Kagan, are important, but I would go to
2 the statute actually as the definition. I
3 think 556(c) gives us those characteristics,
4 those sovereign powers that can only be
5 exercised by an officer.

6 So that a statutory officer appointed
7 under 3105, whose organic statute permits him
8 or her to conduct a formal hearing, an
9 on-the-record adjudication, which this Court
10 has said has collateral estoppel effect, right,
11 in -- in other proceedings, those are due
12 process related. Those are sovereign --

13 JUSTICE KAGAN: See, there's something
14 that strikes me as -- as a little bit odd about
15 this argument because, if you -- if you -- if
16 we just take a step back a little bit. I mean,
17 you have some real complaints about this
18 process and how it happened and the bias that
19 you think the ALJ showed.

20 And if that's a problem, it's a hard
21 context in which to think that the solution to
22 the problem is greater -- the greater political
23 accountability that comes from the Appointments
24 Clause. In other words, this is a situation
25 where we have adjudications, where we typically

1 think we want the decisionmaker to be insulated
2 from political pressures.

3 So wouldn't putting those
4 decisionmakers even closer to the political
5 body only exacerbate the problem that you're
6 complaining of?

7 MR. PERRY: Justice Kagan, there's a
8 difference between decisional independence,
9 which is guaranteed by 554(b) of the APA and
10 the Due Process Clause, and structural
11 independence, which the Appointments Clause is
12 designed to ensure responsibility,
13 accountability, transparency, and ultimately
14 liberty, freedom. So that we know --

15 JUSTICE KENNEDY: So then you're
16 saying assume, as Justice Kagan's question
17 indicates, that it's important to the
18 perception of justice that the adjudicator be
19 independent. Which way does that cut as to
20 your argument? I think that's --

21 MR. PERRY: Your Honor, as to
22 structural independence, it's important for
23 regulated entities, the Commission, the judges,
24 and the courts that review their decisions to
25 know that they are not structurally

1 independent, that they are structurally
2 dependent even if they have statutory
3 decisional independence.

4 So that we believe tying them together
5 as the Appointments Clause requires shows the
6 lines of authority so that reviewing courts and
7 all those stakeholders in the process can
8 participate.

9 If I may reserve the remainder of my
10 time, Your Honor.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 General Wall.

14 ORAL ARGUMENT OF JEFFRY B. WALL

15 ON BEHALF OF THE RESPONDENT

16 IN SUPPORT OF THE PETITIONERS

17 MR. WALL: Mr. Chief Justice, and may
18 it please the Court:

19 If I could just start with the
20 government's test, the one that we hope the
21 Court will adopt.

22 Under Buckley and Freytag, a
23 constitutional officer occupies a continuing
24 position that's been vested by law with
25 significant discretion to do one of two things:

1 Either to bind to the government or
2 third-parties on important matters or to
3 undertake other important sovereign functions.

4 Here, the Commission's ALJs have been
5 vested by statute with both powers. They
6 adjudicate disputes that impose liability and
7 sanctions on private individuals, and they can
8 and do issue binding decisions. There is,
9 thus, no meaningful difference between this
10 case and Freytag.

11 CHIEF JUSTICE ROBERTS: How many --

12 JUSTICE BREYER: There are a lot of --
13 a lot of civil servants who have fit within
14 that definition. I -- I -- I won't give a
15 list, but I think there are.

16 And I think, frankly, I don't know how
17 to decide this case for the following reason:
18 I don't think it would make much difference but
19 for the decision in the PCAOB case, Free
20 Enterprise. When I read that decision and
21 combine it with this, then I think, if I adopt
22 your approach, good-bye to the merit civil
23 service at the higher levels and good-bye to
24 independence of ALJs.

25 But it requires both. And you propose

1 a test as to when we can get rid of the ALJs
2 on, I think it's Point 17 of your reply brief,
3 that seems to me does not guarantee them the
4 independence that the APA hoped for.

5 So how do I decide this case? If I'm
6 going to decide the PCAOB application first, I
7 would say, as I dissented, no, and at that
8 point, it doesn't matter very much and I can go
9 into the totally contradictory mess of what our
10 precedent is on this, I think.

11 But if the answer is yes, then I think
12 I have to look for new approaches as to who is
13 a civil servant and who is an officer of the
14 United States, in which Congress might play a
15 great role.

16 Now I've been very honest in
17 describing what I'm thinking at the moment,
18 which doesn't help you or hurt you.

19 (Laughter.)

20 JUSTICE BREYER: And I'm looking to
21 you for advice.

22 MR. WALL: I -- so two -- two things,
23 Justice Breyer. You said in dissent in Free
24 Enterprise Fund that all ALJs are executive
25 officers.

1 JUSTICE BREYER: I know that, but I
2 was taking the SG's test and I was going back
3 to --

4 MR. WALL: Yes.

5 JUSTICE BREYER: -- the -- the Freytag
6 and -- and --

7 MR. WALL: Right.

8 JUSTICE BREYER: -- and it was not in
9 front of us, and I was looking for the
10 horribles and listed about, you know, 4,000
11 horribles as a result of a decision that I
12 disagreed with.

13 So I -- I don't feel that those words
14 are absolutely written in stone. But maybe
15 you're right, provide that I have to know first
16 about PCAOB before I can say whether I really
17 want to say it does not appear to me now as it
18 appears to have appeared to me then.

19 (Laughter.)

20 MR. WALL: Well, here's why I don't
21 think it's a horrible. And we obviously have
22 urged the Court to address the removal issue
23 and what we've tried to say in our brief is we
24 think there's a way to read the statute that
25 avoids the constitutional concerns from the

1 PCAOB case.

2 JUSTICE BREYER: Yes, the way to read
3 the statute that you think is that you can
4 dismiss the ALJ for failing to follow policy
5 that may not be written into a rule that
6 they're legally applied, required, or -- and
7 once -- once there is a basis in the record,
8 facts, the MS -- the Systems Protection Board
9 can't even look at it.

10 Well, they're looking -- now that to
11 me is not the kind of protection that the
12 people who wrote the APA intended.

13 MR. WALL: Justice Breyer --

14 JUSTICE BREYER: That's why I say I
15 need to know about that before I can decide
16 this.

17 MR. WALL: With all respect, we -- I
18 think the Court has got to distinguish what the
19 -- what the -- the drafters of the APA were
20 worried about, and Mr. Perry got at this a
21 little bit, was decisional independence in
22 Section 554 of the APA. And we've been very
23 clear in -- in both of our briefs that we don't
24 think the agencies can impinge on the
25 decisional independence of ALJs. But Congress,

1 of course, in 3105 said the agency can appoint
2 the ALJ. So we know Congress didn't mean to
3 limit it beyond the department head.

4 JUSTICE BREYER: All right. So maybe
5 that's what you mean, maybe that. But what it
6 says is you can remove an ALJ for failure to
7 follow agency policies -- and I take it that
8 that isn't something embodied in a rule, it's
9 no problem if it's embodied in a rule, but it
10 could be beyond the rule -- and to confine the
11 Board's role to -- the Board, that's the
12 MSPB -- to determining whether a factual basis
13 exists for the agency's preferred grounds. Now
14 try that on an Article III judge.

15 I mean, you know, these -- these are
16 -- these are people with an adjudicative
17 function. Now you may be right on that, and my
18 only problem is I don't know how to decide this
19 case until I decide that one.

20 MR. WALL: Well, Justice Breyer, I
21 think the way to decide this case, if you
22 wanted to do it without getting to removal, and
23 we've urged the Court not to do that because,
24 unlike the appointments side, what we're
25 dealing with is largely executive practice, the

1 restrictions on removal are statutory, we're
2 limited in our ability to get our own house in
3 order there.

4 But if you wanted to sever the two, I
5 think what you'd say is Freytag sets up a
6 two-part test for when you're an officer of the
7 United States. ALJs satisfy both. So you
8 don't even need to decide whether one or the
9 other is sufficient or necessary.

10 JUSTICE BREYER: We can do that.

11 MR. WALL: And then --

12 JUSTICE BREYER: But -- but, again,
13 last point. One thing I'm certain of, or
14 fairly certain, moderately certain, that the
15 Constitution does not inhibit the creation of a
16 merit-based civil service and an adjudicatorily
17 merit-based system of hearing examiners, ALJs.

18 If I start with that premise and then
19 don't know quite what that sentence on page 17
20 means and don't know how PCAOB applies, you
21 see?

22 MR. WALL: I do, Justice Breyer. But,
23 one, we haven't said a word about the civil
24 service. We're talking only about ALJs who are
25 front-line adjudicators capable of imposing

1 private liability -- liability and sanctions on
2 private individuals.

3 Two, we have been very careful not to
4 touch pay or compensation or directing of
5 decisions or any of the rest. All we are
6 talking about is saying, look, 3105 says the
7 agency can appoint.

8 JUSTICE SOTOMAYOR: Mr. Wall, may I --

9 MR. WALL: That should be the
10 department head under the Appointments Clause.
11 And then removal should follow on that.

12 JUSTICE SOTOMAYOR: May I break -- may
13 I break down your answer, because there --
14 there's -- or -- or following up on what
15 Justice Breyer said, significant authority.
16 I'm having a great deal of trouble
17 understanding what significant authority means
18 outside of the ALJ context.

19 How will I then apply that test to
20 executive officers who are not serving
21 executive ALJ functions but other functions?
22 That -- that word -- it seems to me that the
23 test that you're -- the amici has proposed
24 makes sense. Do they bind the government in
25 any situation? And, secondly, are they -- are

1 they acting independently in -- in -- in any
2 situation? And that test seems to be a fairly
3 straightforward way of defining significant
4 authority.

5 But you're suggesting something more.
6 You're suggesting that that test is not
7 adequate for ALJs in some way.

8 MR. WALL: No. I -- I think the ALJs
9 issue binding decisions. They satisfy that
10 test. My problem with the test is it is --

11 JUSTICE SOTOMAYOR: Do you --

12 MR. WALL: -- it is, on the one hand,
13 under-inclusive and it is, on the other,
14 manipulable. I don't think it picks up this --

15 JUSTICE SOTOMAYOR: Everything is
16 manipulable. But -- but our -- our founding
17 fathers designated some people employees and
18 others not, serving somewhat similar functions
19 or not, so that we can't really go by the
20 founding fathers' practices because they were
21 rather mixed.

22 You know, a U.S. marshal was -- deputy
23 wasn't an officer but a -- and customs
24 inspectors weren't officers, but shipmasters
25 were. All of this seems a little bit difficult

1 to quantify, but tell me what your -- the
2 difference between -- not with ALJs but with
3 other executive officers.

4 MR. WALL: So we have tried to come up
5 with a test that I think really harmonizes the
6 Court's cases and the historical practice, and
7 it focuses on a handful of things. Do you have
8 a continuing office? Everyone agrees that that
9 -- that's present here.

10 JUSTICE SOTOMAYOR: But every office
11 is continuous.

12 MR. WALL: Exactly. So then you've
13 got to look --

14 JUSTICE SOTOMAYOR: Almost anybody who
15 works for the government works for the
16 government under some statute.

17 MR. WALL: That's right. And then
18 you've got to look at what are the powers that
19 have been vested by law in that office, and
20 you've got to ask, okay, do those powers
21 involve significant discretion over one of two
22 things: The power to bind on important matters
23 or other really important sovereign functions
24 of the kind that historically, even absent the
25 power to bind, were performed only by the

1 executive branch, generally only by
2 high-ranking members of the executive branch,
3 and that really do require the exercise of
4 significant discretion. And I --

5 JUSTICE ALITO: But when -- when you
6 say --

7 JUSTICE GINSBURG: Can I ask you about
8 thorough examination of this subject by the
9 Office of Legal Counsel? What is the
10 government's current position about the line
11 that's drawn between employees and officers in
12 that OLC study?

13 MR. WALL: Oh, we understand our
14 current line here to be a refinement of what
15 OLC said in its 2007 OLC opinion. What it said
16 was you can be an officer because you have the
17 power to bind on important matters, but you
18 historically have been an officer in other ways
19 that isn't a complete test, it's
20 under-inclusive, and there isn't any support, I
21 think, for the own name requirement, which is
22 the manipulable part I was trying to get at
23 earlier.

24 So we understand what we've been doing
25 here to try to boil down that very lengthy memo

1 and the other OLC opinions and to try to come
2 up with a test that we really do think moves
3 the ball forward from significant governmental
4 authority in Buckley.

5 JUSTICE KAGAN: Does power to bind
6 mean power to bind that can't be reversed by
7 somebody who's your boss?

8 MR. WALL: No. I mean, you can have
9 discretionary review. You had discretionary
10 review in Edmond and -- and Weiss, and you have
11 discretionary review here by the Commission.
12 The point is that the ALJs issue decisions.

13 The -- the Commission can review them
14 if it wishes. And it certainly, as the Chief
15 Justice said earlier, adopted a policy that it
16 will review virtually every one in which anyone
17 asks. There's one instance in which it didn't,
18 but --

19 JUSTICE ALITO: I don't -- I don't
20 understand this -- how this test applies. Is
21 an FBI agent an officer --

22 MR. WALL: I --

23 JUSTICE ALITO: -- or an employee?

24 MR. WALL: The Court said in Steele
25 that deputy marshals are not. I think

1 historically we have not understood line
2 attorneys, line law enforcement agents to be
3 officers of the United States because of the
4 way in which their discretion is constrained
5 and because the powers really are vested in
6 their superiors. They're vested in the
7 marshal. They're vested in the U.S. attorney.
8 They're vested in the solicitor general.

9 JUSTICE ALITO: But they can all make
10 decisions that -- that bind the United States.

11 MR. WALL: I --

12 JUSTICE ALITO: Can they -- right?

13 MR. WALL: But that's why you have to
14 focus on the vesting, I think, Justice Alito --

15 JUSTICE ALITO: Well, vesting how?

16 MR. WALL: -- and that's about the
17 office.

18 JUSTICE ALITO: Vesting by statute, by
19 regulation, by -- by some internal rules, by
20 practice?

21 MR. WALL: So that's a very hard
22 question. Here, it's statutory. So I don't
23 really think it's presented.

24 The Court has a case, Mouat, from the
25 1880s, where it suggested it could be

1 regulations. The Office of Legal Counsel --
2 and we agree -- thinks the better view is that
3 it can be more than just a statute. If you
4 have a statute that gives all the authority to
5 the attorney general and the attorney general
6 by regulation delegates all -- oversight over
7 all criminal prosecutions to the deputy
8 attorney general, I think it would be difficult
9 to say the DAG is not an officer --

10 JUSTICE GORSUCH: Mr. Wall --

11 MR. WALL: -- but, again, here, it's
12 all statutory.

13 JUSTICE ALITO: Well, our deputy
14 clerks can grant certain extensions of time.
15 Are they officers?

16 MR. WALL: I think it's unlikely that
17 they are, because I think they are really just
18 exercising power on behalf of the clerk, who is
19 vested with that power by the -- by the Court.

20 And, certainly, at least in the
21 executive branch, that is typically the way it
22 works. The statutes vest the power in the U.S.
23 attorney or in the attorney general or in the
24 deputy attorney general, not in the line agents
25 themselves. And that's why the office and the

1 vesting concept is very important, not just
2 what does somebody do on a day-to-day basis.
3 What has been established by law, in the words
4 of the Appointments Clause? What has been
5 vested in the office? And if the office is
6 vested with the power to bind or some other
7 sovereign function that historically could only
8 be performed by the executive branch, like the
9 adjudication of a dispute in which you impose
10 liability on a private individual, that renders
11 you an officer of the United States.

12 JUSTICE GORSUCH: Mr. Wall --

13 JUSTICE KENNEDY: Could you address
14 the question that Justice Kagan and I asked
15 Mr. Perry? Assume that the perception and fact
16 of fairness and -- and impartiality are
17 enhanced by independence. How does that factor
18 into what you're arguing, and is it a proper
19 consideration for us in this case?

20 MR. WALL: We -- I do think it's a
21 proper consideration. It was certainly a
22 consideration of the drafters of the APA, who
23 were moving from the hearing examiner model and
24 who were concerned about allegations of bias.
25 And we've tried to be very careful to say that

1 what the ALJ does in the performance of his
2 duties, the -- the decision itself, the
3 decisional process, pay, compensation, those
4 things are not on the table.

5 The question is, will you be appointed
6 by the department head or by the chief ALJ?

7 JUSTICE KAGAN: But all of these
8 things --

9 MR. WALL. I don't think that's a
10 meaningful --

11 JUSTICE KAGAN: Mr. Wall, all of these
12 things go to the same thing. You know, you --
13 you want to keep decisional independence as
14 something that you're not interfering with.

15 There are different ways to interfere
16 with decisional independence. One is by
17 docking somebody's pay. One is by having a
18 removal power that you hang over your head.
19 And another is by being the person who gets to
20 decide who gets the job or not.

21 And so all of these things in some
22 manner tie the adjudicator more closely to the
23 political system. And the APA came up with
24 this foundational compromise which had as a
25 very significant part of it that the hearing

1 examiners, the adjudicators, would have some
2 detachment, would have some insulation from the
3 political system. Not the way an Article III
4 judge does, but still something.

5 And you want to ratchet that down.
6 And the question is, isn't that interfering
7 with decisional independence?

8 MR. WALL: I -- Justice Kagan, what I
9 want to do is I want to take the foundational
10 compromise that is the APA and square it with
11 the foundational compromise that is the
12 Appointments Clause, which says, look, if you
13 exercise important functions on behalf of the
14 United States, you have to be appointed by the
15 department head, because it's not sufficient
16 for the Commission to say: Well, look, the
17 ALJ's decision went out the door. We didn't
18 review it, but he wasn't our guy. We didn't
19 pick him.

20 The idea behind the Appointments
21 Clause is you've got to have a clear line of
22 accountability. And this Court said in Freytag
23 and Free Enterprise, when you diffuse the
24 appointment power, you diffuse accountability.

25 JUSTICE SOTOMAYOR: So, I'm sorry,

1 doesn't the SEC have full power to overturn
2 anything the ALJ does? This is not where, by
3 statute or regulation, the ALJ's findings are
4 given conclusive effect. They're reviewed de
5 novo. So why isn't that the line? Whether the
6 ALJ's word is final or not?

7 MR. WALL: It is certainly the -- a
8 fact, Justice Sotomayor, that the Commission
9 can review everything the ALJ does and agree
10 with it or disagree with it.

11 But when you appear before the ALJ --
12 and -- and the ALJ shapes the record of that
13 proceeding -- and that's not a recommendatory
14 process, you can waive arguments, you are
15 bound, and that is the record that goes up to
16 the Commission. And the Commission can review
17 or not review, but the ALJ's decision at the
18 end of the day, if not reviewed, is what binds
19 the parties and it is what creates their
20 obligations. That makes them officers of the
21 United States, as Freytag said.

22 CHIEF JUSTICE ROBERTS: I think
23 Justice Gorsuch has been trying to get a
24 question in.

25 JUSTICE GORSUCH: Thank you, Chief.

1 Mr. Wall, suppose for the moment we
2 accept your position. What is the effect of
3 the SEC's remedial order purporting to ratify
4 the appointment of the -- of the ALJs?

5 If your argument is that the ALJs need
6 to be appointed by the SEC, does that remedial
7 order satisfy that concern, or does it just
8 repeat the problem?

9 MR. WALL: Petitioners think it
10 repeats the problem. We disagree. I think the
11 problem that Petitioners have, they don't
12 engage with any of the authorities. The
13 Circuit Court cases we cited in our reply, like
14 Gordon and Legitech, both of the restatements
15 on agency, the Meacham treatise, all of them
16 say and the courts have uniformly held, if the
17 agent does a thing that is not authorized at
18 the time, but the principal is capable of doing
19 it, though here the Commission didn't, and it's
20 capable at the time it ratifies, it can ratify.

21 And we do think that solves the
22 problem, which is one of the reasons -- to get
23 back to a couple of the questions earlier -- I
24 don't think that the kind of sky is falling
25 arguments here are very persuasive. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Metlitsky.

4 ORAL ARGUMENT OF ANTON METLITSKY ON
5 BEHALF OF THE COURT-APPOINTED AMICUS CURIAE
6 IN SUPPORT OF THE JUDGMENT BELOW

7 MR. METLITSKY: Mr. Chief Justice, and
8 may it please the Court:

9 Other than a narrow
10 historically-grounded exception concerning
11 diplomatic offices, an officer of the United
12 States is someone with power to bind the
13 government or private parties in the name of
14 his own office.

15 In contrast, someone whose acts have
16 no binding effect without the sanction of an
17 officer is not himself an officer of the United
18 States.

19 CHIEF JUSTICE ROBERTS: If I were
20 trying to figure out who an officer is, I think
21 I might have started with Freytag. And your
22 test that you just proposed doesn't seem
23 similar to what Freytag talked about, which was
24 a laundry list -- not that long perhaps -- of
25 particular -- particular authorities. And I

1 don't see, other than the contempt power, I
2 suppose, what's different here than in Freytag.

3 MR. METLITSKY: Well, the contempt
4 power, I think, is crucial. So in -- in
5 Freytag -- there are two alternative holdings
6 in Freytag. The second one is clearly
7 consistent with our rule that's about the fact
8 that special trial judges can enter final
9 decisions.

10 The first alternative holding is that
11 special trial judges are officers of the United
12 States because they can preside over trials,
13 rule on the admissibility of evidence, take
14 testimony, and enforce their own discovery
15 orders through contempt.

16 Now contempt clearly is a power that
17 can only be exercised by an officer of the
18 United States. It's a coercive power that
19 binds the parties.

20 This Court never considered a position
21 that only included one or all or some of the
22 first three authorities. But the Office of
23 Legal Counsel, the Attorney General, and
24 Congress have for more than a century all
25 concluded that, for example, commissions that

1 are set up to investigate but that don't have
2 any binding authority at the end of the
3 investigation do not set up offices of the
4 United States, even though they have the same
5 --

6 JUSTICE KAGAN: It's hard -- it's hard
7 to think, Mr. Metlitsky, that Freytag really
8 thought that that was all important. You know,
9 they don't talk about the power of contempt
10 until the second half of the opinion.

11 In the first half of the opinion,
12 they're just talking about we can respond to
13 discovery violations without necessarily
14 suggesting that they're talking about the
15 contempt power.

16 So, if you just read that first part
17 of Freytag, you'd get no sense that it's
18 crucial to the decision that there exists this
19 contempt power.

20 MR. METLITSKY: So, as we acknowledged
21 in our brief, you could read Freytag broadly,
22 obviously, much more broadly than the rule
23 we're proposing, but you don't have to read it
24 that way. I'm not making a claim about what
25 was in the Court's mind. But the Court doesn't

1 just talk about issuing discovery orders.

2 It's talking about enforcing discovery
3 orders. Discovery orders are normally enforced
4 through contempt, and special trial judges, in
5 particular, did enforce discovery orders
6 through contempt. And that was --

7 JUSTICE KAGAN: I guess what strikes
8 me, Mr. Metlitsky, is that if you had a list
9 and you said top 10 attributes of the judges
10 that were involved in Freytag and the judges
11 that are involved here, you'd pretty much say
12 that nine of them are the same and maybe one is
13 different.

14 And -- but it's just so hard to get
15 around this -- the commonalities of these
16 judges and the judges in Freytag.

17 MR. METLITSKY: It's true that ALJs
18 and the judges in Freytag share a lot of the
19 same functions. But what the judges in Freytag
20 had that the judges here do not have is the
21 thing that's always been understood to be
22 crucial for officer status, which is the power
23 to bind.

24 As I said, these commissions that have
25 been around, investigatory commissions that

1 have been around for more than a century, all
2 have -- this is the Warren Commission, for
3 example, but they're mostly similar. The
4 Warren Commission had the power to issue
5 subpoenas requiring the attendance and
6 testimony of witnesses and the production of
7 any evidence that relates to any matter under
8 investigation. They had the power to
9 administer oaths and affirmations. They had
10 the power to examine witnesses. They had the
11 power to receive evidence. And the --

12 CHIEF JUSTICE ROBERTS: Does that make
13 -- does that make Chief Justice Warren an
14 executive officer in that situation?

15 MR. METLITSKY: No. No. The Warren
16 Commission did not create an office, and it
17 couldn't have created an office because the
18 Commission included four congressmen, which
19 would have been barred by the incompatibility
20 clause, if it did create an office.

21 The reason it didn't is because all of
22 those powers are understood to be non-binding
23 powers but powers internal to a hearing that
24 allow the person that's presiding over the
25 hearing to figure out what happened, and what's

1 important for officer --

2 JUSTICE KAGAN: But why isn't it
3 different for that exact reason, that these are
4 essentially investigatory bodies who are
5 supposed to report the findings of an
6 investigation to somebody else who's actually
7 supposed to do something with them.

8 But the adjudicators here are not
9 investigators. They are deciders. That seems
10 a big difference and, again --

11 MR. METLITSKY: Well, so --

12 JUSTICE KAGAN: -- seems to separate
13 the Warren Commission type bodies from both the
14 judges here and the judges in Freytag.

15 MR. METLITSKY: I completely agree
16 with that, but that would exclude, I think, the
17 second part of the government's test, which is
18 somebody can be an officer even if they don't
19 have the power to bind.

20 So the question in this case, I think,
21 really is whether ALJs have the power to bind
22 and whether that power is vested in their
23 office. That's the -- that's the sort of
24 import of that that can be well made.

25 JUSTICE BREYER: The problem I have

1 with this, the whole thing, is I have no idea
2 of what the nature of jobs are throughout the
3 civil service, I mean, in terms of importance.
4 There are probably people in the civil service
5 who can order inspections of nuclear power
6 plants. There are probably people at OSHA who
7 can order that the company be open at 14 -- at
8 -- at 2:00 in the afternoon so we can come in
9 and see if there's a dangerous situation.

10 There are probably people in the EPA
11 who can go out and say your, whatever it is,
12 violates this or that. And in certain
13 respects, they have to have the door open.
14 They have to do this or that. But there might
15 not be.

16 But I don't -- I don't know that
17 anyone in this case has methodically gone
18 through civil service positions to tell me
19 whether or not, if we decide one way or the
20 other and on the theory, we are driving wedges
21 of dependence into what was to be since Chester
22 Alan Arthur a merit-based civil service.

23 MR. METLITSKY: I -- I --

24 JUSTICE BREYER: That's my concern,
25 and I do not know what to do next.

1 MR. METLITSKY: I -- I completely
2 agree with you, Justice Breyer, that that is a
3 concern, which is why our test doesn't turn on
4 importance.

5 I think theirs does. And then you're
6 going to have lots of problems like you just
7 identified. Our test doesn't turn on
8 importance -- importance at all. It turns on a
9 legal authority to either bind the government,
10 make the government do particular things, or
11 bind private parties. And --

12 JUSTICE ALITO: But I -- I think -- it
13 seems to me your test, maybe I don't understand
14 it, but it -- it seems to me potentially very
15 broad and also quite vague.

16 Now, the power to bind, an enormous
17 number of executive branch officials have the
18 power to bind the government in one way or
19 another. Would you disagree with that?

20 MR. METLITSKY: I don't disagree with
21 the de facto power to bind, but I agree with
22 Mr. Wall that the relevant question is whether
23 the -- where the power has been vested, which
24 is the import of our second precondition.

25 JUSTICE ALITO: Okay. So, I mean,

1 anybody -- any attorney who tries a case on
2 behalf of the government has the power to bind,
3 makes decisions during the course of the trial
4 that are not reviewed by anybody else, I won't
5 call this witness, I won't ask this question.
6 Okay. So the power to -- the -- the -- the
7 power to bind is enormous.

8 Vested by what -- and you say it has
9 to be in the name of -- of the office. How do
10 we find out whether it's in the name of the
11 office?

12 MR. METLITSKY: Well, it's whether the
13 person -- so take your example, an AUSA at a
14 trial makes a binding concession or an
15 assistant to the solicitor general makes a
16 binding concession in this Court.

17 The reason that person doesn't have to
18 be appointed by the President with the advice
19 and consent of the Senate is because he is
20 exercising the authority of the Office of the
21 Solicitor General or of the U.S. Attorney.
22 He's acting in the name of that office.

23 JUSTICE ALITO: Okay. Let's take an
24 Assistant Attorney General. I assume that that
25 person is an officer of the United States,

1 right?

2 MR. METLITSKY: An Assistant Attorney
3 General, yes.

4 JUSTICE ALITO: Yeah, and so, if the
5 Assistant Attorney General for the Civil
6 Division or the Antitrust Division does
7 something, is -- is that person exercising the
8 authority of the Civil Division or the
9 Antitrust Division or the authority of the
10 Department of Justice?

11 MR. METLITSKY: It's the -- well, if
12 he's exercising authority that has been
13 delegating -- delegated to him, he's exercising
14 the power of his own office. The -- the reason
15 you know, for example, that precise example,
16 the head of the, say, Civil Division is at the
17 top of the brief.

18 So, when the government makes a
19 decision, a litigation decision, which is a
20 decision that binds the government, the person
21 at the top of the brief is always the
22 responsible officer.

23 JUSTICE ALITO: Is that what it turns
24 on, whether -- who's listed at the top of the
25 brief? Do we look at a statute to find out

1 whether it's vested in the office? Do we look
2 at a regulation? Do we look at practice?

3 MR. METLITSKY: So it -- it doesn't
4 turn on who's at the top of the brief, but
5 who's at the top of the brief derives from the
6 existing legal authority.

7 In the Justice Department, I think
8 it's entirely -- almost all of the authority is
9 delegated from the Attorney General.

10 So one statute vests all of the powers
11 in the Justice Department to the Attorney
12 General, another statute allows the Attorney
13 General to delegate those powers, and so he'll
14 delegate --

15 JUSTICE KAGAN: Does it strike you as
16 a little bit odd that, essentially, that would
17 mean that the executive branch gets to decide
18 who's an officer and who's not an officer?
19 Right? Take the Attorney General, most of the
20 statutes just vest this in the Attorney
21 General. Then the Attorney General delegates
22 his power out to other people.

23 He can decide to, he can decide not
24 to, he can decide where it goes. And -- and
25 based on those decisions, it seems, you would

1 be saying whether a particular person is an
2 officer or not.

3 MR. METLITSKY: No. So -- so the
4 question is whether a -- a particular
5 delegation to a particular person is lawful.
6 So, if Congress has created an office -- so
7 Congress has created the office of the deputy
8 attorney general, who is appointed by the
9 President with the advice and consent of the
10 Senate. That means the attorney general is
11 authorized to delegate to that person the
12 authority to bind.

13 And so that person uses that
14 authority, for example, in the oversight of the
15 U.S. attorneys to direct U.S. attorneys about
16 how to prosecute corporations, right? That's
17 the Thompson memo. It's the McNulty memo.
18 They're issued in the name of the office of the
19 deputy attorney general.

20 If the attorney general tried to
21 delegate that authority to somebody that's not
22 an officer, then that person would be --
23 couldn't exercise the power.

24 JUSTICE KAGAN: I feel -- I feel as
25 though I'm missing something, because what you

1 just said to me seems to make everything
2 dependent on whether Congress has created an
3 office. And that can't be the only
4 requirement, can it?

5 MR. METLITSKY: No. The question is
6 just somebody's been delegated authority. If
7 they're an -- is it -- the first question is,
8 is it an officer function, right? If it is,
9 then somebody that -- only somebody that's been
10 appointed under the Appointments Clause can
11 exercise it.

12 JUSTICE ALITO: But if it's -- if it's
13 a question of -- so the -- an assistant
14 attorney general is an officer because that --
15 certain powers are delegated by the attorney
16 general?

17 MR. METLITSKY: Right.

18 JUSTICE ALITO: And the U.S. attorney,
19 the same thing, right?

20 MR. METLITSKY: The U.S. attorney
21 might have statutory authority too, but --

22 JUSTICE KAGAN: But -- but that's what
23 I was suggesting.

24 JUSTICE ALITO: Well --

25 JUSTICE KAGAN: But then everything

1 depends on whether the attorney general in fact
2 makes a delegation or does not make delegation.

3 MR. METLITSKY: Well, that's true.
4 That's how Congress set up the scheme. So the
5 -- the attorney general gets to decide which
6 officers exercise what authority.

7 JUSTICE ALITO: Well, suppose then the
8 -- the U.S. attorney or -- or the head of one
9 of the litigating divisions delegates certain
10 authorities to somebody within that office.
11 Does that make that person an officer?

12 MR. METLITSKY: No, because the --

13 JUSTICE ALITO: Why?

14 MR. METLITSKY: Because the authority
15 rests with the -- the U.S. attorney. That's --
16 that's the relevant office. The U.S. attorney
17 can delegate de facto authority, but the U.S.
18 attorney is always going to be held accountable
19 for every decision.

20 So, I mean, that happens as a matter
21 of fact in U.S. attorneys offices. As you
22 said, the assistants -- assistant United States
23 attorneys have a tremendous amount of
24 discretion. But everybody understands that
25 when they exercise that discretion, the person

1 that's going to be held accountable for -- for
2 that -- for the exercise of that discretion is
3 the U.S. attorney, which means that it doesn't
4 -- since the U.S. attorney is already
5 100 percent accountable for the decision, it
6 doesn't matter who appointed the assistant.
7 You don't have to hold the U.S. attorney or
8 anybody else accountable for the appointment.

9 JUSTICE SOTOMAYOR: I'm sorry, I --

10 CHIEF JUSTICE ROBERTS: Counsel, you
11 said on -- your -- your friend, Mr. Perry, said
12 in his reply brief, "This Court has never held
13 that an adjudicatory official is not an
14 officer."

15 Do you agree with that?

16 MR. METLITSKY: Yes, but an
17 adjudicatory official is somebody that gets to
18 decide a case, to -- to bind the parties at the
19 end of the day. That's why, for example, in
20 Stern against Marshall, what this Court was
21 concerned about, about non-Article III judges
22 adjudicating private rights, was that they
23 could issue final judgments of the United
24 States.

25 CHIEF JUSTICE ROBERTS: So -- so --

1 MR. METLITSKY: That's why Justice
2 Alito's --

3 CHIEF JUSTICE ROBERTS: I'm sorry, go
4 ahead.

5 MR. METLITSKY: Justice Alito's
6 concurrence -- your concurrence in the -- in
7 the Amtrak case identified a -- an Appointments
8 Clause problem with binding arbitration,
9 binding --

10 CHIEF JUSTICE ROBERTS: So if -- if
11 the statute said the ALJ decision -- there you
12 can seek review within 90 days; if after 90
13 days review hasn't been granted, that decision
14 is final. Would that be a different case for
15 you, or would the mere possibility of
16 discretionary review mean that the adjudicatory
17 official did not have binding authority?

18 MR. METLITSKY: So I think that's a
19 harder case than this case. So, in this case,
20 the -- the finality order grants affirmative
21 sanction to the decision. And the rule since
22 at least 1822 --

23 CHIEF JUSTICE ROBERTS: But your
24 friend says that's really just a notice, that
25 we're not going to review it.

1 MR. METLITSKY: Well, it's -- they say
2 that, but what -- what the finality orders all
3 actually say is that the orders contained in
4 the initial decision are hereby declared
5 effective.

6 It's -- it's affirmative sanction
7 granted to the decision. And since at least
8 the main Supreme Court's or Supreme Judicial
9 Court's opinion in 1822, somebody who doesn't
10 act, that can't take effect without the
11 sanction of an officer is not an officer of the
12 United States, which is precisely what's going
13 on here.

14 Now, in your hypo, there's -- there's
15 a distinction between a decision that becomes
16 effective by itself but then can be reviewed.
17 That's like what happens in the courts of
18 appeals and, you know, petitions for cert in
19 this Court. And I don't think anybody is
20 reasonably going to say that this Court is
21 fully responsible for every court of appeals
22 decision.

23 There's a different kind of order that
24 cannot take effect at all without the act of a
25 superior. The act might be plenary review or

1 it might just be denying review. Like I said,
2 I think that's a harder case, and I think the
3 question would turn on whether you could
4 reasonably hold the superior accountable for
5 the decision by virtue of the fact that he
6 decided not to engage in plenary review and
7 instead denied review.

8 CHIEF JUSTICE ROBERTS: One of the
9 principles that caused the drafters to give the
10 authority to appoint officers to the President
11 was the important one of accountability.

12 MR. METLITSKY: Exactly.

13 CHIEF JUSTICE ROBERTS: And in this
14 case, if -- if the individual were an officer,
15 he would have to be appointed by the
16 Commission, and people would know who was
17 responsible for whatever conduct or misconduct
18 or decisions he would -- he would take.

19 But in this case, you don't have that
20 accountability. The Commission can say: Don't
21 blame us. We didn't do it. The President can
22 say: Don't blame me. I didn't appoint them.
23 And, instead, it's something in the
24 administrative bureaucracy which operates as
25 insulation from the political accountability

1 that the drafters of the Constitution intended.

2 MR. METLITSKY: Right. So -- so I
3 think that is the fundamental question in the
4 case. And I -- I respectfully disagree,
5 Mr. Chief Justice, for two reasons.

6 I think the Commission is going to be
7 held 100 percent accountable for every single
8 decision, whether it's initially made by an ALJ
9 or not, for two reasons: First, they
10 affirmatively sanction it. That's why the
11 long-standing rule that if an act requires
12 affirmative sanction -- sanction, that person
13 that did that act is not an officer. That's
14 why that rule exists.

15 Second, even if you disagree that the
16 ALJ's decisions -- if you think they're
17 binding, the way that Congress set up the
18 structure here makes clear that the decision is
19 always the decision of the Commission.

20 The Commission is allowed to delegate
21 authority to an ALJ or to other delegees under
22 78d-1(a). Congress gives the Commission
23 authority under subsection (b) to engage in
24 plenary review. But Congress does not allow
25 the Commission to escape responsibility if it

1 doesn't engage in plenary review, because
2 subsection (c) says that every decision is
3 going to be deemed the decision of the
4 Commission.

5 So, if somebody comes to the
6 Commission and says that decision was -- you
7 know, was bad, was wrong, the Commission cannot
8 say, oh, I don't know, that was my ALJ. That
9 would be like me saying I don't know, that was
10 my associate, like a judge saying I don't know,
11 that was my law clerk.

12 JUSTICE SOTOMAYOR: So what's the line
13 that makes somebody an agent or not? Can we
14 speak about ALJs in this context being agents
15 of the SEC commissioners when the SEC
16 commissioners didn't pick them, don't supervise
17 them, essentially don't have anything to do
18 with their work other than reviewing it?

19 So what defines someone acting as an
20 agent of an office?

21 MR. METLITSKY: So I don't think
22 common law agency is exactly the right frame.
23 I think I agree, again, with Mr. Wall, the --
24 the initial question is where the authority,
25 the legal authority, to act is -- is vested.

1 I think that's -- the first example of
2 that is the deputy marshals that were mentioned
3 before, right? So -- so the Congress
4 establishes in Section 27 of the first
5 Judiciary Act the office of a marshal, who's an
6 inferior officer, and allows the marshal to
7 appoint deputies, who are non-officers because
8 they're not appointed by somebody who's allowed
9 to make an appointment under the Appointments
10 Clause.

11 They have all the same duties as the
12 marshal, but they're understood to be acting in
13 the name of the marshal's office. That's so
14 even though district courts, under Section 27,
15 had authority to remove the -- the deputies,
16 right?

17 So -- so I don't -- again, I don't
18 think the elements of common law agency need to
19 be satisfied. I do think that when Congress
20 demonstrates that it's vesting authority in a
21 particular office, as it did here, making clear
22 that any decision is going to be deemed the
23 decision of the Commission, I think the agency
24 has to have at least some ability to affect the
25 decision. But here, of course, the agency has

1 plenary ability to affect the decision as to
2 facts, as to law, as to everything. So the
3 fact that they can't --

4 CHIEF JUSTICE ROBERTS: So are you
5 saying that anybody whose decisions are subject
6 to review can never be an officer?

7 MR. METLITSKY: No, no, not at all.

8 CHIEF JUSTICE ROBERTS: Well, I
9 thought you were suggesting that the reason
10 that the ALJs are not officers is that the
11 Commission has the discretionary power to
12 review their decisions?

13 MR. METLITSKY: No. So --

14 CHIEF JUSTICE ROBERTS: And you -- and
15 you seem to be putting a lot of -- I'm sorry,
16 go ahead.

17 MR. METLITSKY: No. So -- so they are
18 not officers for -- for two reasons: One is
19 that they don't have, in our view, decisions to
20 make binding -- the authority to make binding
21 decisions in the first place.

22 And, second, because all the authority
23 -- if they had authority to make binding
24 decisions, that authority would be to make
25 binding decisions that are actually decisions

1 of the Commission, not the decisions of the --

2 JUSTICE KAGAN: And -- and they don't
3 have authority to make binding decisions
4 because?

5 MR. METLITSKY: Because the -- the
6 question -- so the statute applicable here,
7 78(d)(1), is an authorization of delegation.
8 Right? The Commission is allowed to delegate
9 authority to the ALJ.

10 And so the question is, what authority
11 did the Commission delegate to the ALJ? So
12 first you can look at 17 CFR 201.111(i), which
13 is on 16A of our green brief. It authorizes
14 ALJs to prepare an initial decision as provided
15 in Section 201360.

16 So, if you go to 201360(d), which is
17 on 23A of the green brief, (d)(1) says that the
18 Commission can engage in plenary review either
19 on petition or, you know, on its own
20 initiative. (d)(2) says that an order won't
21 become final and effective without the issuance
22 of a finality order.

23 So, in other words, the --

24 JUSTICE KAGAN: So everything in the
25 end depends on that?

1 MR. METLITSKY: No. We -- so there
2 are two preconditions for our test. The first
3 one depends on that. The second one is the --
4 the -- whatever the ALJ --

5 JUSTICE KAGAN: Right. But as to the
6 first one --

7 MR. METLITSKY: Yes.

8 JUSTICE KAGAN: -- as to whether they
9 have binding authority, it all comes down to
10 this finality order?

11 MR. METLITSKY: Yes. They don't have
12 bind -- well, that's why they don't have
13 binding authority, because the Commission has
14 to --

15 JUSTICE KAGAN: Even --

16 CHIEF JUSTICE ROBERTS: And it seems
17 to me, I mean, we've heard about the
18 independence of the adjudicator. You seem to
19 be suggesting that he is not an officer because
20 he doesn't have the kind of independence that
21 has been suggested the APA and other things
22 were designed to promote.

23 MR. METLITSKY: Well, no. So the APA
24 was -- was a compromise. It granted ALJs
25 structural independence, tenure, salary,

1 various ex parte rules and the like. But the
2 one thing they explicitly did not grant ALJs
3 was decision-making authority, policy-making
4 authority, in other words, the authority to
5 make binding decisions.

6 That power always rests with the
7 agency, which is the crucial question for
8 whether somebody is an officer of the United
9 States.

10 JUSTICE BREYER: If you -- did you
11 come across in your research anywhere anything
12 like this that -- because it does say an
13 officer of the United States whose appointment
14 shall be established by law. That suggests
15 Congress has a role.

16 And so, in the set of statutes that
17 doesn't say, there would be some criteria where
18 Congress, if they establish it like this, say
19 major policy-making authority, independently,
20 and maybe some instances adjudicatory authority
21 to make binding decisions, they're officers.

22 In other cases, clearly not. They're
23 agents. But there would be a middle range
24 where you'd look to the statute itself and
25 you'd see if in that statute Congress has

1 written significant parts that are not
2 consistent with appointment by the department
3 itself and/or not subject to two levels of for
4 cause removal.

5 MR. METLITSKY: Well, so I --

6 JUSTICE BREYER: Anything -- have you
7 come across anything like that?

8 MR. METLITSKY: There -- there are
9 lots of statutes dealing with how people are
10 appointed in various agencies. Sometimes it's
11 very clear that Congress did not intend people
12 to be officers of the United States. One
13 example is that there's a statute in the
14 organic -- the organic statute of the Federal
15 Aviation Administration grants the
16 administrator authority to -- to appoint
17 everyone in the agency, essentially other than
18 the deputy, and the administrator is not the
19 head of a department. The head of the
20 department is the Secretary of Transportation.
21 So anybody the administrator is appointing
22 under that statute is not going to be an
23 officer.

24 That doesn't apply here because 3105
25 actually does grant agencies the authority to

1 appoint ALJs. You know that Congress doesn't
2 think they're officers because, in 1966,
3 Congress, when it codified Title V, wrote a
4 definition of officer, wrote a definition of
5 employee. Hearing examiners before that date
6 were referred to as officers. And that 1966
7 statute switched all those references to make
8 them refer to employees.

9 JUSTICE KAGAN: Mr. Metlitsky, as --
10 as I listen to you, and especially as I compare
11 your test to some of the others on offer, you
12 know, there seems to be a good deal to be said
13 for yours, except I don't know where it's
14 coming from, honestly.

15 So you spent a lot of time in your
16 brief talking like this is a historical test,
17 this is a traditional test.

18 MR. METLITSKY: Right.

19 JUSTICE KAGAN: And I guess it seems
20 to me like the test actually, it's sort of the
21 opposite, the test you would make up if you
22 were doing everything on a blank slate. But I
23 don't really see what the source of this test
24 is. So tell me what it is.

25 MR. METLITSKY: So -- so the source

1 for the first part of the test that you need to
2 have binding authority, I really -- I think is
3 -- has been accepted at least since 1822 when
4 the main supreme judicial court explained that
5 an officer of the United States is somebody who
6 has been delegated a portion of the sovereign
7 authority of the United States, meaning the
8 authority to bind, and that somebody whose acts
9 don't take effect without the sanction of an
10 officer is not an officer.

11 That's what that opinion held and it's
12 been understood to be authoritative since then.
13 That -- that's essentially the Office of Legal
14 Counsel test from 2007.

15 The second part of the test is really
16 I think exactly what Mr. -- Mr. Wall said.
17 There's always going to be a question of where
18 the legal authority to act is, because
19 otherwise every person with discretion like
20 every AUSA is going to be considered an
21 officer, even though the U.S. Attorney is going
22 to be held 100 percent accountable for every
23 decision in his or her office.

24 I think the -- the first place where
25 you can see that -- that relationship of, you

1 know, basically agent to officer is Section 27
2 and 28 of the First Judiciary Act with the
3 marshal and the deputy marshal.

4 One of the things that under Section
5 28 the deputy marshal was authorized to do was,
6 when the marshal died, to execute writs in the
7 name of the deceased marshal until a new
8 marshal was chosen.

9 So the -- sort of the second part of
10 our test, which asks whether somebody's
11 authorized to act in the name of their own
12 office or only in the name of somebody else's
13 office, just reflects that principle, which I
14 think is, as we've talked about, ubiquitous in
15 actual government practice.

16 It's why assistants to the solicitor
17 general don't need to be appointed by the
18 President with the advice and consent of the
19 Senate since I don't think there's a statute
20 that actually authorizes the Attorney General
21 to appoint them himself.

22 If the Court has no further questions.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Three minutes, Mr. Perry.

1 REBUTTAL ARGUMENT OF MARK PERRY ON
2 BEHALF OF THE PETITIONERS

3 MR. PERRY: Thank you, Mr. Chief
4 Justice.

5 Three brief points if I may. First,
6 every official who satisfied my friend Mr.
7 Metlitsky's test would be a principal officer
8 of the United States.

9 If you can bind the government or
10 private parties in your own name with no
11 supervision, that's a principal officer. This
12 Court rejected that as a test for inferior
13 officers in Edmond, which involved judges who
14 could never make final decisions unless their
15 superiors allowed it.

16 And the Weiss case, which involved
17 trial judges in the military whose opinions
18 were never final, which my friend never
19 mentions and never cites in his briefs, because
20 they cannot meet the finality test.

21 In any event, SEC ALJs do meet the
22 finality test. 78(d)(1) gives the Commission a
23 discretionary right of review, which means it
24 has the discretion not to review, which means
25 they're statutorily authorized to enter final

1 decisions of the Commission.

2 The finality order, Your Honor, in a
3 discretionary review scenario, it's like a cert
4 denied order from this Court. It says that the
5 Commission is not reviewing, but the actual
6 decision that stands in his own name, by the
7 way, petition appendix 237A, is Cameron
8 Elliot's signature on the decision he issued in
9 his own name that to this day is on the
10 Commission's website.

11 Second, Justice Breyer and others have
12 inquired about the expansion to the civil
13 service. It is a real issue. Of course, it's
14 a real issue. But, here, we have adjudicators.

15 We have, unlike the civil service, a
16 tower of cases from this Court, Freytag, Ryder,
17 Edmond, Weiss, all dealing with adjudicators.
18 Ten out of 10, Justice Kagan, powers that they
19 have map over perfectly. And we have a
20 direction from Congress, Justice Breyer, as to
21 the limitation. It is 556(c), which specifies
22 those officials that can conduct on the record
23 adjudications that have binding effect under
24 the APA. And there are three: Agencies,
25 members, and ALJs.

1 And while the civil service is out
2 there, Congress has dealt specifically with
3 ALJs. And 3105, of course, specifically
4 designates the office of APA ALJs and it says
5 appoint.

6 Finally, Justice Gorsuch, you asked
7 about the remedy. My client had an
8 unconstitutional proceeding. Mr. Wall says I
9 ignore the authorities. I don't.

10 The authorities are from this Court.
11 In *Ryder*, this Court said the Constitution
12 requires a new proceeding in front of a
13 constitutional officer, with no validity given
14 to the prior acts.

15 In *L.A. Tucker Truck Lines*, this Court
16 said the acts of an unconstitutional officer
17 are a nullity. And then, in *Ryder*, the Court
18 went on and said you're entitled to whatever
19 relief may be appropriate. And this Court --
20 this is an APA case. This Court has never
21 actually had an APA Appointments Clause
22 violation. Section 706 of the APA says that
23 upon a finding of constitutional violation, the
24 reviewing court shall set aside all actions,
25 findings, and conclusions of the agency, which

1 means they all have to be wiped out because
2 there was a constitutional violation here,
3 start from scratch, or, as we suggest, dismiss
4 the OIP.

5 This Court said in FTC versus Standard
6 Oil that where there's an APA -- in the APA
7 review, where there's a violation, you can go
8 all the way back to the complaint, dismiss the
9 whole thing, which we submit --

10 JUSTICE SOTOMAYOR: Just so I
11 understand, what would this do with already
12 completed cases --

13 MR. PERRY: Your Honor, our --

14 JUSTICE SOTOMAYOR: -- where the
15 period of appeal has ended both before the SEC
16 and before the courts?

17 MR. PERRY: Presumably -- may I?

18 CHIEF JUSTICE ROBERTS: Please.

19 MR. PERRY: Presumably, Your Honor,
20 general principles of preservation waiver,
21 forfeiture and so forth, would kick in,
22 although, of course, in -- in Freytag and FTC
23 versus Schor, the Court put some gloss on that
24 in the context of constitutional challenges to
25 agency actions.

1 This case, of course, is here on
2 direct review. It has never gone final. And
3 there are -- we put the numbers in our brief --
4 there are 13 other similarly-situated cases in
5 the entire federal system.

6 JUSTICE SOTOMAYOR: But there are
7 hundreds where the ALJs were ratified or
8 appointed after decision-making or in the midst
9 of it, et cetera.

10 MR. PERRY: Appendix A to the
11 ratification order lists about 106 cases that
12 the agency thinks is affected. I haven't
13 looked at that.

14 JUSTICE SOTOMAYOR: Well, if we're
15 talking just about your agency. But if we're
16 talking about all the other agencies, we're --
17 we're talking in the thousands?

18 MR. PERRY: I don't know, Your Honor.
19 We know this case, however, we know the answer.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Metlitsky, this Court appointed
23 you to brief and argue this case as amicus
24 curiae in support of the judgment -- judgment
25 below. You have ably discharged that

1 responsibility, for which we are grateful.

2 Thank you.

3 The case is submitted.

4 (Whereupon, at 11:03 a.m., the case
5 was submitted.)

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Official - Subject to Final Review

1	<p>ably ^[1] 67:25 above-entitled ^[1] 1:11 absent ^[3] 4:14 9:11 24:24 absolutely ^[1] 18:14 accept ^[1] 33:2 accepted ^[2] 6:6 61:3 accountability ^[8] 10:4 13:23 14:13 31:22,24 51:11,20,25 accountable ^[7] 47:18 48:1,5,8 51:4 52:7 61:22 accurate ^[1] 3:17 acknowledged ^[1] 36:20 across ^[2] 58:11 59:7 Act ^[12] 5:9 10:10 50:10,24,25 52:11,13 53:25 54:5 61:18 62:2,11 acting ^[4] 23:1 42:22 53:19 54:12 actions ^[3] 6:17 65:24 66:25 acts ^[4] 34:15 61:8 65:14,16 actual ^[2] 62:15 64:5 actually ^[9] 5:16 13:2 39:6 50:3 55:25 59:25 60:20 62:20 65:21 address ^[2] 18:22 29:13 adequate ^[1] 23:7 adjudicate ^[1] 16:6 adjudicating ^[1] 48:22 adjudication ^[6] 9:1,1 10:13,14 13:9 29:9 adjudications ^[3] 3:14 13:25 64:23 adjudicative ^[1] 20:16 adjudicator ^[3] 14:18 30:22 57:18 adjudicatorily ^[1] 21:16 adjudicators ^[5] 21:25 31:1 39:8 64:14,17 adjudicatory ^[4] 48:13,17 49:16 58:20 administer ^[1] 38:9 Administration ^[4] 11:9,23 12:14 59:15 administrative ^[1] 51:24 administrator ^[3] 59:16,18,21 admissibility ^[1] 35:13 admission ^[1] 7:21 admitted ^[1] 8:7 adopt ^[4] 5:19 6:14 15:21 16:21 adopted ^[1] 26:15 adopts ^[1] 10:11 adversarial ^[7] 9:18 11:6,14,18 12:8,9,22 advice ^[4] 17:21 42:18 45:9 62:18 adviser ^[1] 5:22 affect ^[2] 54:24 55:1 affected ^[1] 67:12 affirmations ^[1] 38:9 affirmative ^[3] 49:20 50:6 52:12 affirmatively ^[1] 52:10 afternoon ^[1] 40:8 agencies ^[9] 8:16 9:15,22 11:17 19:24 59:10,25 64:24 67:16 agency ^[25] 5:12,13,15 9:10 10:15,16,19,21,21 11:12 12:16 20:1,7 22:7 33:15 53:22 54:18,23,25 58:</p>	<p>7 59:17 65:25 66:25 67:12,15 agency's ^[2] 8:24 20:13 agent ^[5] 26:21 33:17 53:13,20 62:1 agents ^[4] 27:2 28:24 53:14 58:23 agree ^[7] 28:2 32:9 39:15 41:2,21 48:15 53:23 agreement ^[1] 4:15 agrees ^[1] 24:8 ahead ^[2] 49:4 55:16 AL ^[1] 1:3 Alan ^[1] 40:22 ALITO ^[19] 25:5 26:19,23 27:9,12,14,15,18 28:13 41:12,25 42:23 43:4,23 46:12,18,24 47:7,13 Alito's ^[2] 49:2,5 ALJ ^[32] 5:11,25 6:21 7:12,13,19,19 8:1,5,18 10:16,23 12:15 13:19 19:4 20:2,6 22:18,21 30:1,6 32:2,9,11,12 49:11 52:8,21 53:8 56:9,11 57:4 ALJ's ^[5] 31:17 32:3,6,17 52:16 ALJs ^[41] 3:12 4:21 5:2,6 9:6,14,15,17,20,21 10:1 11:2,3,5 16:4,24 17:1,24 19:25 21:7,17,24 23:7,8 24:2 26:12 33:4,5 37:17 39:21 53:14 55:10 56:14 57:24 58:2 60:1 63:21 64:25 65:3,4 67:7 allegations ^[1] 29:24 allow ^[2] 38:24 52:24 allowed ^[4] 52:20 54:8 56:8 63:15 allows ^[3] 5:16 44:12 54:6 Almost ^[2] 24:14 44:8 already ^[4] 9:23 10:6 48:4 66:11 alternative ^[2] 35:5,10 although ^[1] 66:22 amici ^[1] 22:23 amicus ^[4] 1:22 2:12 34:5 67:23 amount ^[1] 47:23 Amtrak ^[1] 49:7 and/or ^[1] 59:3 another ^[3] 30:19 41:19 44:12 answer ^[4] 10:5 17:11 22:13 67:19 answers ^[1] 6:18 Antitrust ^[2] 43:6,9 ANTON ^[3] 1:21 2:10 34:4 anybody ^[7] 24:14 42:1,4 48:8 50:19 55:5 59:21 APA ^[26] 5:7 8:17 9:19 10:9,11,12,14 11:7,11 14:9 17:4 19:12,19,22 29:22 30:23 31:10 57:21,23 64:24 65:4,20,21,22 66:6,6 appeal ^[1] 66:15 appeals ^[2] 50:18,21 appear ^[3] 6:22 18:17 32:11 APPEARANCES ^[1] 1:15 appeared ^[1] 18:18 appears ^[1] 18:18 appendix ^[2] 64:7 67:10 applicable ^[1] 56:6 applicants ^[1] 12:18 application ^[1] 17:6</p>	<p>applied ^[1] 19:6 applies ^[2] 21:20 26:20 apply ^[2] 22:19 59:24 appoint ^[9] 20:1 22:7 51:10,22 54:7 59:16 60:1 62:21 65:5 appointed ^[17] 9:24 10:1,7 13:6 30:5 31:14 33:6 42:18 45:8 46:10 48:6 51:15 54:8 59:10 62:17 67:8,22 appointing ^[1] 59:21 appointment ^[6] 31:24 33:4 48:8 54:9 58:13 59:2 Appointments ^[13] 3:17 13:23 14:11 15:5 20:24 22:10 29:4 31:12,20 46:10 49:7 54:9 65:21 approach ^[1] 16:22 approaches ^[1] 17:12 appropriate ^[1] 65:19 approximately ^[1] 9:19 April ^[1] 1:10 arbitration ^[1] 49:8 aren't ^[1] 4:22 argue ^[1] 67:23 arguing ^[1] 29:18 argument ^[13] 1:12 2:2,5,9,14 3:4,8 13:15 14:20 15:14 33:5 34:4 63:1 arguments ^[2] 32:14 33:25 around ^[3] 37:15,25 38:1 Arthur ^[1] 40:22 Article ^[2] 20:14 31:3 aside ^[1] 65:24 asks ^[2] 26:17 62:10 assistant ^[7] 42:15,24 43:2,5 46:13 47:22 48:6 assistants ^[2] 47:22 62:16 associate ^[1] 53:10 assume ^[3] 14:16 29:15 42:24 attendance ^[1] 38:5 attorney ^[38] 27:7 28:5,5,8,23,23,24 35:23 42:1,21,24 43:2,5 44:9,11,12,19,20,21 45:8,10,19,20 46:14,15,18,20 47:1,5,8,15,16,18 48:3,4,7 61:21 62:20 attorneys ^[5] 27:2 45:15,15 47:21,23 attributes ^[1] 37:9 AUSA ^[2] 42:13 61:20 authoritative ^[1] 61:12 authorities ^[6] 33:12 34:25 35:22 47:10 65:9,10 authority ^[51] 5:17 15:6 22:15,17 23:4 26:4 28:4 36:2 41:9 42:20 43:8,9,12 44:6,8 45:12,14,21 46:6,21 47:6,14,17 49:17 51:10 52:21,23 53:24,25 54:15,20 55:20,22,23,24 56:3,9,10 57:9,13 58:3,4,4,19,20 59:16,25 61:2,7,8,18 authorization ^[1] 56:7 authorized ^[5] 33:17 45:11 62:5,11 63:25 authorizes ^[2] 56:13 62:20</p>
2	<p>2:00 ^[1] 40:8 2007 ^[2] 25:15 61:14 201.111(i) ^[1] 56:12 201360 ^[1] 56:15 201360(d) ^[1] 56:16 2018 ^[1] 1:10 23 ^[1] 1:10 237A ^[1] 64:7 23A ^[1] 56:17 25 ^[1] 9:22 27 ^[3] 54:4,14 62:1 28 ^[2] 62:2,5</p>		
3	<p>3 ^[1] 2:4 3105 ^[6] 8:20 13:7 20:1 22:6 59:24 65:3 34 ^[1] 2:13</p>		
4	<p>4,000 ^[1] 18:10 42 ^[1] 5:4</p>		
5	<p>554 ^[1] 19:22 554(b) ^[1] 14:9 556 ^[2] 9:18 10:11 556(c) ^[5] 8:22 10:24 11:7 13:3 64:21 557 ^[2] 9:19 11:7 557(b) ^[2] 5:7 8:17</p>		
6	<p>63 ^[1] 2:16</p>		
7	<p>706 ^[1] 65:22 78(d)(1) ^[2] 56:7 63:22 78d-1(a) ^[2] 10:10 52:22</p>		
9	<p>90 ^[4] 5:25 6:7 49:12,12</p>		
A	<p>a.m ^[3] 1:13 3:2 68:4 ability ^[3] 21:2 54:24 55:1</p>		

Official - Subject to Final Review

<p>Aviation ^[1] 59:15 avoids ^[1] 18:25</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back ^[4] 13:16 18:2 33:23 66:8 bad ^[1] 53:7 ball ^[1] 26:3 barred ^[1] 38:19 based ^[1] 44:25 basically ^[1] 62:1 basis ^[3] 19:7 20:12 29:2 become ^[4] 5:23,25 6:16 56:21 becomes ^[2] 9:10 50:15 behalf ^[17] 1:16,19,21 2:4,7,11,16 3:9 5:12 7:7,8 15:15 28:18 31:13 34:5 42:2 63:2 behind ^[1] 31:20 believe ^[1] 15:4 below ^[4] 1:23 2:13 34:6 67:25 benefits ^[2] 11:25 12:17 better ^[1] 28:2 between ^[5] 14:8 16:9 24:2 25:11 50:15 beyond ^[2] 20:3,10 bias ^[2] 13:18 29:24 big ^[1] 39:10 bind ^[25] 16:1 22:24 24:22,25 25:17 26:5,6 27:10 29:6 34:12 37:23 39:19,21 41:9,11,16,18,21 42:2,7 45:12 48:18 57:12 61:8 63:9 binding ^[21] 16:8 23:9 34:16 36:2 42:14,16 49:8,9,17 52:17 55:20, 20,23,25 56:3 57:9,13 58:5,21 61:2 64:23 binds ^[3] 32:18 35:19 43:20 bit ^[5] 13:14,16 19:21 23:25 44:16 blame ^[2] 51:21,22 blank ^[1] 60:22 board ^[3] 11:23 19:8 20:11 Board's ^[1] 20:11 bodies ^[2] 39:4,13 body ^[2] 12:12 14:5 boil ^[1] 25:25 boss ^[1] 26:7 Both ^[8] 8:20 16:5,25 19:23 21:7 33:14 39:13 66:15 bottom ^[2] 8:4,8 bound ^[1] 32:15 branch ^[6] 25:1,2 28:21 29:8 41:17 44:17 break ^[2] 22:12,13 BREYER ^[22] 16:12 17:20,23 18:1, 5,8 19:2,13,14 20:4,20 21:10,12, 22 22:15 39:25 40:24 41:2 58:10 59:6 64:11,20 brief ^[15] 17:2 18:23 36:21 43:17, 21,25 44:4,5 48:12 56:13,17 60:16 63:5 67:3,23 briefs ^[2] 19:23 63:19 broad ^[1] 41:15 broadly ^[2] 36:21,22 brought ^[1] 12:11 Buckley ^[2] 15:22 26:4</p>	<p>bureaucracy ^[1] 51:24</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>call ^[2] 12:3 42:5 came ^[2] 1:11 30:23 Cameron ^[1] 64:7 cannot ^[3] 50:24 53:7 63:20 capable ^[3] 21:25 33:18,20 capstone ^[1] 8:25 careful ^[2] 22:3 29:25 Case ^[34] 3:4 4:21 7:19 9:13,25 16:10,17,19 17:5 19:1 20:19,21 27:24 29:19 39:20 40:17 42:1 48:18 49:7,14,19,19,19 51:2,14,19 52:4 63:16 65:20 67:1,19,23 68:3,4 cases ^[13] 5:22 6:6 9:7,8 12:9,10 24:6 33:13 58:22 64:16 66:12 67:4,11 cause ^[3] 7:5,12 59:4 caused ^[1] 51:9 causes ^[1] 7:2 century ^[2] 35:24 38:1 cert ^[2] 50:18 64:3 certain ^[7] 21:13,14,14 28:14 40:12 46:15 47:9 certainly ^[4] 26:14 28:20 29:21 32:7 cetera ^[1] 67:9 CFR ^[1] 56:12 challenges ^[1] 66:24 change ^[1] 8:7 characteristics ^[1] 13:3 characters ^[1] 10:8 Chester ^[1] 40:21 CHIEF ^[31] 3:3,10 4:20 15:11,17 16:11 26:14 30:6 32:22,25 34:1,7, 19 38:12,13 48:10,25 49:3,10,23 51:8,13 52:5 55:4,8,14 57:16 62:23 63:3 66:18 67:20 choice ^[1] 9:8 chooses ^[2] 5:13 8:1 chosen ^[1] 62:8 Circuit ^[1] 33:13 cited ^[1] 33:13 cites ^[1] 63:19 citizen ^[2] 12:11,16 citizens ^[2] 4:13,14 civil ^[15] 16:13,22 17:13 21:16,23 40:3,4,18,22 43:5,8,16 64:12,15 65:1 claim ^[1] 36:24 Clause ^[15] 3:18 10:2 13:24 14:10, 11 15:5 22:10 29:4 31:12,21 38:20 46:10 49:8 54:10 65:21 clear ^[5] 19:23 31:21 52:18 54:21 59:11 clearly ^[4] 4:18 35:6,16 58:22 clerk ^[2] 28:18 53:11 clerks ^[1] 28:14 client ^[1] 65:7 closely ^[1] 30:22 closer ^[1] 14:4 codified ^[1] 60:3</p>	<p>coercive ^[1] 35:18 collateral ^[1] 13:10 combine ^[1] 16:21 come ^[5] 24:4 26:1 40:8 58:11 59:7 comes ^[3] 13:23 53:5 57:9 coming ^[1] 60:14 COMMISSION ^[41] 1:6 3:6 4:22, 25 5:2,19 6:1 8:9 14:23 26:11,13 31:16 32:8,16,16 33:19 38:2,4,16, 18 39:13 51:16,20 52:6,19,20,22, 25 53:4,6,7 54:23 55:11 56:1,8,11, 18 57:13 63:22 64:1,5 Commission's ^[2] 16:4 64:10 commissioners ^[3] 4:1 53:15,16 commissions ^[3] 35:25 37:24,25 common ^[2] 53:22 54:18 commonalities ^[1] 37:15 company ^[2] 10:17 40:7 compare ^[1] 60:10 compensation ^[2] 22:4 30:3 complaining ^[1] 14:6 complaint ^[1] 66:8 complaints ^[1] 13:17 complete ^[1] 25:19 completed ^[1] 66:12 completely ^[2] 39:15 41:1 compromise ^[4] 30:24 31:10,11 57:24 compulsory ^[1] 7:25 concept ^[1] 29:1 concern ^[3] 33:7 40:24 41:3 concerned ^[2] 29:24 48:21 concerning ^[1] 34:10 concerns ^[1] 18:25 concession ^[2] 42:14,16 concluded ^[1] 35:25 conclusions ^[1] 65:25 conclusive ^[1] 32:4 concurrence ^[2] 49:6,6 conduct ^[6] 8:6 11:5 12:22 13:8 51:17 64:22 conference ^[1] 8:1 confine ^[1] 20:10 Congress ^[26] 5:5,10,18 10:9,13 17:14 19:25 20:2 35:24 45:6,7 46:2 47:4 52:17,22,24 54:3,19 58:15, 18,25 59:11 60:1,3 64:20 65:2 congressmen ^[1] 38:18 consent ^[3] 42:19 45:9 62:18 consequences ^[1] 6:23 consideration ^[3] 29:19,21,22 considered ^[2] 35:20 61:20 consistent ^[2] 35:7 59:2 Constitution ^[3] 21:15 52:1 65:11 constitutional ^[7] 10:2 15:23 18:25 65:13,23 66:2,24 constrained ^[1] 27:4 construction ^[1] 3:17 contained ^[1] 50:3 contempt ^[9] 35:1,3,15,16 36:9,15, 19 37:4,6</p>	<p>contesting ^[2] 3:20,23 contests ^[1] 6:9 context ^[4] 13:21 22:18 53:14 66:24 continuing ^[2] 15:23 24:8 continuous ^[1] 24:11 contradictory ^[1] 17:9 contrast ^[1] 34:15 convening ^[1] 7:24 corporations ^[1] 45:16 correct ^[2] 3:24 11:19 couldn't ^[2] 38:17 45:23 counsel ^[9] 15:12 25:9 28:1 34:2 35:23 48:10 61:14 62:24 67:21 couple ^[1] 33:23 course ^[9] 4:21 8:25 20:1 42:3 54:25 64:13 65:3 66:22 67:1 COURT ^[40] 1:1,12 3:11 4:18 7:4 13:9 15:18,21 18:22 19:18 20:23 26:24 27:24 28:19 31:22 33:13 34:8 35:20 36:25 42:16 48:12,20 50:19,20,21 61:4 62:22 63:12 64:4, 16 65:10,11,15,17,19,20,24 66:5, 23 67:22 Court's ^[3] 3:15 24:6 36:25 50:8,9 Court-appointed ^[3] 1:22 2:11 34:5 courts ^[6] 14:24 15:6 33:16 50:17 54:14 66:16 create ^[2] 38:16,20 created ^[4] 38:17 45:6,7 46:2 creates ^[1] 32:19 creation ^[1] 21:15 criminal ^[1] 28:7 criteria ^[1] 58:17 crucial ^[4] 35:4 36:18 37:22 58:7 curiae ^[4] 1:22 2:12 34:5 67:24 current ^[2] 25:10,14 customs ^[1] 23:23 cut ^[1] 14:19</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>d)(1) ^[1] 56:17 d)(2) ^[1] 56:20 D.C ^[3] 1:9,16,19 DAG ^[1] 28:9 dangerous ^[1] 40:9 date ^[1] 60:5 day ^[3] 32:18 48:19 64:9 day-to-day ^[1] 29:2 days ^[3] 5:4 49:12,13 de ^[4] 4:11 32:4 41:21 47:17 deal ^[2] 22:16 60:12 dealing ^[3] 20:25 59:9 64:17 dealt ^[1] 65:2 deceased ^[1] 62:7 decide ^[18] 8:6 9:17 16:17 17:5,6 19:15 20:18,19,21 21:8 30:20 40:19 44:17,23,23,24 47:5 48:18 decided ^[2] 12:13 51:6 deciders ^[1] 39:9 deciding ^[1] 12:21 decision ^[42] 5:2,12,15,23 8:2,24</p>
--	--	---	---

Official - Subject to Final Review

<p>9:9,10 16:19,20 18:11 30:2 31:17 32:17 36:18 43:19,19,20 47:19 48: 5 49:11,13,21 50:4,7,15,22 51:5 52:8,18,19 53:2,3,6 54:22,23,25 55:1 56:14 61:23 64:6,8 decision-making [3] 8:18 58:3 67:8 decisional [10] 4:8 8:24 14:8 15:3 19:21,25 30:3,13,16 31:7 decisionmaker [1] 14:1 decisionmakers [1] 14:4 decisions [32] 4:21 5:1,6,21,25 8: 19,19,23 14:24 16:8 22:5 23:9 26: 12 27:10 35:9 42:3 44:25 51:18 52:16 55:5,12,19,21,24,25,25 56:1, 3 58:5,21 63:14 64:1 declared [1] 50:4 deemed [3] 5:2 53:3 54:22 default [2] 6:7,11 defaults [1] 6:19 define [1] 11:14 defined [1] 10:23 defines [1] 53:19 defining [1] 23:3 definition [5] 9:20 13:2 16:14 60:4, 4 delegate [9] 4:16 44:13,14 45:11, 21 47:17 52:20 56:8,11 delegated [6] 7:18 43:13 44:9 46: 6,15 61:6 delegates [3] 28:6 44:21 47:9 delegating [1] 43:13 delegation [4] 45:5 47:2,2 56:7 deleagees [1] 52:21 demonstrates [1] 54:20 denied [2] 51:7 64:4 denying [1] 51:1 Department [11] 1:18 20:3 22:10 30:6 31:15 43:10 44:7,11 59:2,19, 20 dependence [1] 40:21 dependent [2] 15:2 46:2 depends [3] 47:1 56:25 57:3 depositions [1] 7:23 deputies [2] 54:7,15 Deputy [12] 1:18 23:22 26:25 28:7, 13,24 45:7,19 54:2 59:18 62:3,5 derives [1] 44:5 describing [1] 17:17 designate [1] 7:6 designated [1] 23:17 designates [1] 65:4 designed [3] 10:3 14:12 57:22 detachment [1] 31:2 determinations [1] 12:15 determining [1] 20:12 died [1] 62:6 difference [6] 12:5 14:8 16:9,18 24:2 39:10 different [7] 7:11 30:15 35:2 37:13 39:3 49:14 50:23 difficult [2] 23:25 28:8</p>	<p>diffuse [2] 31:23,24 diplomatic [1] 34:11 direct [2] 45:15 67:2 directing [1] 22:4 direction [2] 4:6 64:20 director [1] 4:2 disagree [6] 32:10 33:10 41:19,20 52:4,15 disagreed [1] 18:12 discharged [1] 67:25 discovery [6] 35:14 36:13 37:1,2, 3,5 discretion [10] 5:23 15:25 24:21 25:4 27:4 47:24,25 48:2 61:19 63: 24 discretionary [9] 5:9 9:11 26:9,9, 11 49:16 55:11 63:23 64:3 dismiss [3] 19:4 66:3,8 dispute [1] 29:9 disputes [1] 16:6 dissent [1] 17:23 dissented [1] 17:7 distinction [1] 50:15 distinguish [1] 19:18 district [1] 54:14 Division [5] 43:6,6,8,9,16 divisions [1] 47:9 docking [1] 30:17 document [1] 7:15 documents [1] 12:3 doing [3] 25:24 33:18 60:22 done [2] 7:7 10:15 door [2] 31:17 40:13 down [4] 22:13 25:25 31:5 57:9 drafters [4] 19:19 29:22 51:9 52:1 drawn [1] 25:11 driving [1] 40:20 due [2] 13:11 14:10 dug [1] 9:25 during [1] 42:3 duties [4] 4:6 10:23 30:2 54:11</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>earlier [3] 25:23 26:15 33:23 Edmond [4] 3:16 26:10 63:13 64: 17 effect [9] 9:14 13:10 32:4 33:2 34: 16 50:10,24 61:9 64:23 effective [3] 50:5,16 56:21 Either [3] 16:1 41:9 56:18 elements [1] 54:18 Elliot's [1] 64:8 else's [1] 62:12 embodied [2] 20:8,9 employee [3] 7:7 26:23 60:5 employees [5] 4:4 8:13 23:17 25: 11 60:8 encompasses [1] 6:7 end [4] 32:18 36:2 48:19 56:25 ended [1] 66:15 enforce [2] 35:14 37:5 enforced [1] 37:3 enforcement [2] 12:9 27:2</p>	<p>enforcing [1] 37:2 engage [5] 33:12 51:6 52:23 53:1 56:18 enhanced [1] 29:17 enormous [2] 41:16 42:7 enough [1] 7:5 ensure [1] 14:12 enter [3] 5:14 35:8 63:25 Enterprise [3] 16:20 17:24 31:23 entire [1] 67:5 entirely [1] 44:8 entities [1] 14:23 entitled [1] 65:18 EPA [1] 40:10 escape [1] 52:25 especially [1] 60:10 ESQ [5] 1:16,21 2:3,10,15 essentially [5] 39:4 44:16 53:17 59:17 61:13 establish [1] 58:18 established [2] 29:3 58:14 establishes [1] 54:4 estoppel [1] 13:10 ET [2] 1:3 67:9 even [12] 9:6 14:4 15:2 19:9 21:8 24:24 36:4 39:18 52:15 54:14 57: 15 61:21 event [1] 63:21 everybody [1] 47:24 Everyone [2] 24:8 59:17 everything [10] 7:15 8:5 12:4 23: 15 32:9 46:1,25 55:2 56:24 60:22 evidence [6] 7:21,22 8:6 35:13 38: 7,11 evidentiary [2] 4:9 9:3 evidentiary-related [1] 8:22 ex [1] 58:1 exacerbate [1] 14:5 exact [1] 39:3 Exactly [4] 24:12 51:12 53:22 61: 16 examination [1] 25:8 examine [1] 38:10 examiner [1] 29:23 examiners [3] 21:17 31:1 60:5 example [10] 12:10 35:25 38:3 42: 13 43:15,15 45:14 48:19 54:1 59: 13 except [2] 6:16 60:13 exception [1] 34:10 EXCHANGE [4] 1:6 3:5 5:9 10:10 exclude [1] 39:16 exclusion [1] 7:22 execute [1] 62:6 executive [12] 17:24 20:25 22:20, 21 24:3 25:1,2 28:21 29:8 38:14 41:17 44:17 exercise [9] 5:16 6:20 25:3 31:13 45:23 46:11 47:6,25 48:2 exercised [3] 9:6 13:5 35:17 exercising [6] 4:6 28:18 42:20 43: 7,12,13</p>	<p>existing [1] 44:6 exists [3] 20:13 36:18 52:14 expansion [1] 64:12 expires [1] 5:4 explained [1] 61:4 explicitly [2] 10:10 58:2 extensions [1] 28:14</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face [1] 6:11 fact [8] 5:24 29:15 32:8 35:7 47:1, 21 51:5 55:3 factful [1] 20:12 facto [2] 41:21 47:17 factor [1] 29:17 facts [2] 19:8 55:2 failing [1] 19:4 failure [1] 20:6 fairly [2] 21:14 23:2 fairness [1] 29:16 falling [1] 33:24 fate [1] 12:13 fathers [1] 23:17 fathers' [1] 23:20 FBI [1] 26:21 FDIC [1] 8:15 federal [3] 9:22 59:14 67:5 feel [3] 18:13 45:24,24 figure [3] 6:4 34:20 38:25 filed [1] 6:5 final [16] 5:6,11,14,24,25 6:15,16 32:6 35:8 48:23 49:14 56:21 63: 14,18,25 67:2 finality [9] 4:23,25 49:20 50:2 56: 22 57:10 63:20,22 64:2 Finally [1] 65:6 find [3] 10:22 42:10 43:25 finding [1] 65:23 findings [3] 32:3 39:5 65:25 firmly [1] 4:18 first [21] 3:4 6:19 7:9 17:6 18:15 35:10,22 36:11,16 46:7 52:9 54:1, 4 55:21 56:12 57:2,6 61:1,24 62:2 63:5 fit [2] 9:20 16:13 focus [1] 27:14 focuses [1] 24:7 follow [4] 9:12 19:4 20:7 22:11 following [2] 16:17 22:14 forfeiture [1] 66:21 formal [4] 3:13 9:5 10:13 13:8 forth [1] 66:21 forward [1] 26:3 foundational [3] 30:24 31:9,11 founding [2] 23:16,20 four [1] 38:18 frame [1] 53:22 frankly [1] 16:16 Free [3] 16:19 17:23 31:23 freedom [1] 14:14 Freytag [23] 3:15 4:19 15:22 16:10 18:5 21:5 31:22 32:21 34:21,23 35:2,5,6 36:7,17,21 37:10,16,18,</p>
--	--	--	--

Official - Subject to Final Review

<p>19 39:14 64:16 66:22 friend [4] 48:11 49:24 63:6,18 front [2] 18:9 65:12 front-line [1] 21:25 FTC [2] 66:5,22 full [1] 32:1 fully [1] 50:21 function [4] 7:3 20:17 29:7 46:8 functionary [1] 7:3 functioned [1] 8:20 functions [10] 4:8,8,9 16:3 22:21, 21 23:18 24:23 31:13 37:19 Fund [1] 17:24 fundamental [1] 52:3 further [1] 62:22</p> <hr/> <p style="text-align: center;">G</p> <p>gathering [1] 7:21 gave [2] 5:5,18 General [3] 1:18 15:13 27:8 28:5, 5,8,23,24 35:23 42:15,21,24 43:3, 5 44:9,12,13,19,21,21 45:8,10,19, 20 46:14,16 47:1,5 62:17,20 66: 20 generally [1] 25:1 gets [5] 30:19,20 44:17 47:5 48:17 getting [1] 20:22 GINSBURG [6] 3:19,22 8:3,11 11: 1 25:7 give [5] 4:10,11 12:1 16:14 51:9 given [2] 32:4 65:13 gives [4] 13:3 28:4 52:22 63:22 gloss [1] 66:23 good-bye [2] 16:22,23 Gordon [1] 33:14 GORSUCH [5] 28:10 29:12 32:23, 25 65:6 got [6] 19:18,20 24:13,18,20 31:21 government [18] 9:22 11:19,25 12:12,17 16:1 22:24 24:15,16 34: 13 41:9,10,18 42:2 43:18,20 62: 15 63:9 government's [4] 11:25 15:20 25: 10 39:17 governmental [1] 26:3 governments [2] 4:11,15 grant [3] 28:14 58:2 59:25 granted [3] 49:13 50:7 57:24 grants [2] 49:20 59:15 grateful [1] 68:1 great [2] 17:15 22:16 greater [2] 13:22,22 green [2] 56:13,17 grounds [1] 20:13 guarantee [1] 17:3 guaranteed [1] 14:9 guess [2] 37:7 60:19 guy [1] 31:18</p> <hr/> <p style="text-align: center;">H</p> <p>half [2] 36:10,11 hand [1] 23:12 handful [1] 24:7</p>	<p>hang [1] 30:18 happened [2] 13:18 38:25 happens [3] 12:4 47:20 50:17 hard [5] 13:20 27:21 36:6,6 37:14 harder [2] 49:19 51:2 harmonizes [1] 24:5 he'll [1] 44:13 head [9] 20:3 22:10 30:6,18 31:15 43:16 47:8 59:19,19 hear [1] 3:3 heard [1] 57:17 hearing [19] 4:8 6:21 7:10,10,16, 22,23,24 8:6 9:3 12:5,22 13:8 21: 17 29:23 30:25 38:23,25 60:5 hearing-related [1] 8:21 hearings [1] 11:6 held [7] 33:16 47:18 48:1,12 52:7 61:11,22 help [1] 17:18 hereby [1] 50:4 high [1] 12:23 high-ranking [1] 25:2 higher [1] 16:23 himself [2] 34:17 62:21 historical [2] 24:6 60:16 historically [5] 3:16 24:24 25:18 27:1 29:7 historically-grounded [1] 34:10 hold [2] 48:7 51:4 holding [1] 35:10 holdings [1] 35:5 honest [1] 17:16 honestly [1] 60:14 Honor [13] 4:24 7:9 8:10,14 11:5, 15,20 14:21 15:10 64:2 66:13,19 67:18 hope [1] 15:20 hoped [1] 17:4 horrible [1] 18:21 horribles [2] 18:10,11 house [1] 21:2 however [1] 67:19 hundreds [1] 67:7 hurt [1] 17:18 hypo [1] 50:14</p> <hr/> <p style="text-align: center;">I</p> <p>idea [2] 31:20 40:1 identified [2] 41:7 49:7 ignore [1] 65:9 Ill [3] 20:14 31:3 48:21 impartiality [1] 29:16 impinge [1] 19:24 import [2] 39:24 41:24 importance [4] 40:3 41:4,8,8 important [17] 4:5 9:5 10:12 12:20 13:1 14:17,22 16:2,3 24:22,23 25: 17 29:1 31:13 36:8 39:1 51:11 importantly [1] 5:5 impose [2] 16:6 29:9 imposing [1] 21:25 included [2] 35:21 38:18 incompatibility [1] 38:19</p>	<p>independence [16] 4:7 14:8,11, 22 15:3 16:24 17:4 19:21,25 29: 17 30:13,16 31:7 57:18,20,25 independent [2] 14:19 15:1 independently [2] 23:1 58:19 indicates [1] 14:17 individual [3] 11:19 29:10 51:14 individuals [2] 16:7 22:2 Inferior [6] 3:19,21,23 4:3 54:6 63: 12 inhibit [1] 21:15 initial [7] 5:21 8:18,23 9:9 50:4 53: 24 56:14 initially [1] 52:8 initiative [1] 56:20 inquired [1] 64:12 inspections [1] 40:5 inspectors [1] 23:24 instance [1] 26:17 instances [1] 58:20 instead [2] 51:7,23 instituting [1] 7:17 insulated [1] 14:1 insulation [2] 31:2 51:25 intend [1] 59:11 intended [2] 19:12 52:1 interesting [1] 9:24 interfere [1] 30:15 interfering [2] 30:14 31:6 internal [2] 27:19 38:23 intersection [1] 11:11 invested [2] 3:12 5:14 investigate [1] 36:1 investigating [1] 12:1 investigation [3] 36:3 38:8 39:6 investigations [1] 11:24 investigators [1] 39:9 investigatory [2] 37:25 39:4 investment [1] 5:22 involve [2] 11:10 24:21 involved [4] 37:10,11 63:13,16 isn't [7] 11:21 20:8 25:19,20 31:6 32:5 39:2 issuance [1] 56:21 issue [10] 4:25 12:2 16:8 18:22 23: 9 26:12 38:4 48:23 64:13,14 issued [4] 7:12,18 45:18 64:8 issues [3] 4:22 6:21 7:19 issuing [2] 7:4 37:1 itself [6] 6:19 9:2 30:2 50:16 58:24 59:3</p> <hr/> <p style="text-align: center;">J</p> <p>JEFFREY [1] 1:18 JEFFRY [2] 2:6 15:14 job [1] 30:20 jobs [1] 40:2 judge [3] 20:14 31:4 53:10 judge-like [1] 10:8 judges [2] 4:10,11 7:1,2 10:11 14: 23 35:8,11 37:4,9,10,16,16,18,19, 20 39:14,14 48:21 63:13,17 judgment [6] 1:23 2:13 6:11 34:6</p>	<p>67:24,24 judgments [2] 6:2 48:23 Judicial [2] 50:8 61:4 Judiciary [2] 54:5 62:2 juger [1] 4:12 Justice [140] 1:19 3:3,11,19,22 4: 20 6:3,18,25 8:3,11 9:12,16 10:25 11:1,13,16,21 12:7,19 13:1,13 14: 7,15,16,18 15:11,17 16:11,12 17: 20,23 18:1,5,8 19:2,13,14 20:4,20 21:10,12,22 22:8,12,15 23:11,15 24:10,14 25:5,7 26:5,15,19,23 27: 9,12,14,15,18 28:10,13 29:12,13, 14 30:7,11 31:8,25 32:8,22,23,25 34:1,7,19 36:6 37:7 38:12,13 39:2, 12,25 40:24 41:2,12,25 42:23 43: 4,10,23 44:7,11,15 45:24 46:12,18, 22,24,25 47:7,13 48:9,10,25 49:1, 3,5,10,23 51:8,13 52:5 53:12 55:4, 8,14 56:2,24 57:5,8,15,16 58:10 59:6 60:9,19 62:23 63:4 64:11,18, 20 65:6 66:10,14,18 67:6,14,20</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN [26] 10:25 12:19 13:1,13 14:7 26:5 29:14 30:7,11 31:8 36:6 37:7 39:2,12 44:15 45:24 46:22, 25 56:2,24 57:5,8,15 60:9,19 64: 18 Kagan's [1] 14:16 keep [2] 10:17 30:13 KENNEDY [4] 9:12,16 14:15 29: 13 kick [1] 66:21 kind [5] 19:11 24:24 33:24 50:23 57:20 known [1] 10:17</p> <hr/> <p style="text-align: center;">L</p> <p>L.A [1] 65:15 largely [1] 20:25 last [1] 21:13 Laughter [2] 17:19 18:19 laundry [1] 34:24 law [9] 15:24 24:19 27:2 29:3 53: 11,22 54:18 55:2 58:14 lawful [1] 45:5 least [5] 28:20 49:22 50:7 54:24 61:3 left [1] 11:1 Legal [8] 25:9 28:1 35:23 41:9 44: 6 53:25 61:13,18 legally [1] 19:6 Legitech [1] 33:14 lengthy [1] 25:25 levels [3] 5:17 16:23 59:3 liability [4] 16:6 22:1,1 29:10 liberty [2] 12:24 14:14 limit [1] 20:3 limitation [1] 64:21 limited [2] 9:17 21:2 line [11] 8:4,8 12:24 25:10,14 27:1, 2 28:24 31:21 32:5 53:12</p>
---	--	---	---

Official - Subject to Final Review

<p>lines [2] 15:6 65:15 list [3] 16:15 34:24 37:8 listed [2] 18:10 43:24 listen [1] 60:10 lists [1] 67:11 litigating [1] 47:9 litigation [1] 43:19 little [5] 13:14,16 19:21 23:25 44:16 long [1] 34:24 long-standing [1] 52:11 look [12] 17:12 19:9 22:6 24:13,18 31:12,16 43:25 44:1,2 56:12 58:24 looked [1] 67:13 looking [4] 6:10 17:20 18:9 19:10 lot [5] 16:12,13 37:18 55:15 60:15 lots [2] 41:6 59:9 LUCIA [2] 1:3 3:5</p>	<p>11 44:3 45:3 46:5,17,20 47:3,12,14 48:16 49:1,5,18 50:1 51:12 52:2 53:21 55:7,13,17 56:5 57:1,7,11,23 59:5,8 60:9,18,25 67:22 Metlitsky's [1] 63:7 middle [1] 58:23 midst [1] 67:8 might [6] 17:14 34:21 40:14 46:21 50:25 51:1 military [1] 63:17 mind [1] 36:25 minutes [1] 62:25 misconduct [1] 51:17 misleading [1] 6:4 missing [1] 45:25 mixed [1] 23:21 model [2] 8:17 29:23 moderately [1] 21:14 modes [1] 8:18 moment [2] 17:17 33:1 Monday [1] 1:10 Montesquieu [1] 4:12 morning [1] 3:4 most [2] 6:25 44:19 mostly [1] 38:3 Mouat [1] 27:24 moves [1] 26:2 moving [1] 29:23 MS [1] 19:8 MSPB [1] 20:12 much [4] 16:18 17:8 36:22 37:11 must [2] 4:16 5:13</p>	<p style="text-align: center;">O</p> <p>oaths [1] 38:9 obligations [1] 32:20 obscure [1] 10:1 obscurity [1] 10:4 obviously [2] 18:21 36:22 occupies [1] 15:23 odd [2] 13:14 44:16 offer [1] 60:11 office [38] 5:11 10:23 24:8,10,19 25:9 27:17 28:1,25 29:5,5 34:14 35:22 38:16,17,20 39:23 42:9,11,20,22 43:14 44:1 45:6,7,18 46:3 47:10,16 53:20 54:5,13,21 61:13,23 62:12,13 65:4 officer [55] 4:18 5:13,16 7:6 12:21 13:5,6 15:23 17:13 21:6 23:23 25:16,18 26:21 28:9 29:11 34:11,17,17,20 35:17 37:22 38:14 39:1,18 42:25 43:22 44:18,18 45:2,22 46:8,14 47:11 48:14 50:11,11 51:14 52:13 54:6 55:6 57:19 58:8,13 59:23 60:4 61:5,10,10,21 62:1 63:7,11 65:13,16 officers [29] 3:14,20,21,23,24,25 4:16 6:17 8:21 10:18,20 17:25 22:20 23:24 24:3 25:11 27:3 28:15 32:20 35:11 47:6 51:10 55:10,18 58:21 59:12 60:2,6 63:13 offices [3] 34:11 36:3 47:21 official [4] 48:13,17 49:17 63:6 officials [2] 41:17 64:22 Oil [1] 66:6 OIP [1] 66:4 okay [4] 24:20 41:25 42:6,23 OLC [4] 25:12,15,15 26:1 on-the-record [2] 10:14 13:9 once [2] 19:7,7 one [32] 4:17 5:18 9:24 15:20,25 20:19 21:8,13,23 23:12 24:21 26:16,17 30:16,17 33:22 35:6,21 37:12 40:19 41:18 44:10 47:8 51:8,11 55:18 57:3,3,6 58:2 59:12 62:4 ones [2] 6:14 10:7 only [16] 6:6 8:7 9:8 10:15 13:4 14:5 20:18 21:24 24:25 25:1 29:7 35:17,21 46:3,9 62:12 opacity [1] 10:4 open [2] 40:7,13 operates [1] 51:24 operative [1] 4:22 opinion [5] 25:15 36:10,11 50:9 61:11 opinions [2] 26:1 63:17 opposite [1] 60:21 oral [7] 1:11 2:2,5,9 3:8 15:14 34:4 order [20] 4:23 5:1 7:2,4,11,17,19 21:3 33:3,7 40:5,7 49:20 50:23 56:20,22 57:10 64:2,4 67:11 orders [7] 35:15 37:1,3,3,5 50:2,3 ordinary [1] 4:13 organic [5] 11:8,12 13:7 59:14,14</p>	<p>OSHA [1] 40:6 other [26] 9:15 10:25 13:11,24 16:3 21:9 22:21 23:13 24:3,23 25:18 26:1 29:6 34:9 35:1 40:20 44:22 52:21 53:18 56:23 57:21 58:4,22 59:17 67:4,16 others [4] 11:24 23:18 60:11 64:11 otherwise [1] 61:19 out [13] 6:12 7:13 11:2 31:17 34:20 38:25 40:11 42:10 43:25 44:22 64:18 65:1 66:1 outside [2] 11:7 22:18 over [7] 3:13 24:21 28:6 30:18 35:12 38:24 64:19 oversees [3] 7:20,20,20 oversight [2] 28:6 45:14 overturn [1] 32:1 own [10] 21:2 25:21 34:14 35:14 43:14 56:19 62:11 63:10 64:6,9</p>
<p style="text-align: center;">M</p> <p>made [2] 39:24 52:8 main [2] 50:8 61:4 major [1] 58:19 majority [1] 12:15 manipulable [3] 23:14,16 25:22 manner [1] 30:22 many [2] 7:1 16:11 map [1] 64:19 MARK [5] 1:16 2:3,15 3:8 63:1 marks [1] 4:3 marshal [11] 23:22 27:7 54:5,6,12 62:3,3,5,6,7,8 marshal's [1] 54:13 Marshall [1] 48:20 marshals [2] 26:25 54:2 matter [6] 1:11 5:24 17:8 38:7 47:20 48:6 matters [4] 7:14 16:2 24:22 25:17 McNulty [1] 45:17 Meacham [1] 33:15 mean [13] 12:9 13:16 20:2,5,15 26:6,8 40:3 41:25 44:17 47:20 49:16 57:17 meaning [1] 61:7 meaningful [2] 16:9 30:10 means [7] 21:20 22:17 45:10 48:3 63:23,24 66:1 meet [2] 63:20,21 member [2] 10:16,21 members [3] 10:19 25:2 64:25 memo [3] 25:25 45:17,17 mentioned [1] 54:2 mentions [1] 63:19 mere [1] 49:15 merely [1] 7:4 merit [1] 16:22 merit-based [3] 21:16,17 40:22 mess [1] 17:9 methodically [1] 40:17 METLITSKY [49] 1:21 2:10 34:3,4,7 35:3 36:7,20 37:8,17 38:15 39:11,15 40:23 41:1,20 42:12 43:2,</p>	<p style="text-align: center;">N</p> <p>name [16] 7:8,12,13 25:21 34:13 42:9,10,22 45:18 54:13 62:7,11,12 63:10 64:6,9 narrow [1] 34:9 nature [1] 40:2 necessarily [1] 36:13 necessary [1] 21:9 need [6] 19:15 21:8 33:5 54:18 61:1 62:17 never [9] 35:20 48:12 55:6 63:14,18,18,19 65:20 67:2 New [6] 1:21,21 5:19 17:12 62:7 65:12 next [1] 40:25 nine [1] 37:12 nobody [1] 6:8 Nobody's [1] 6:12 non-Article [1] 48:21 non-binding [1] 38:22 non-officers [1] 54:7 normally [1] 37:3 note [2] 4:5 7:10 notice [4] 6:21,21 7:11 49:24 novo [1] 32:5 nuclear [1] 40:5 nullity [1] 65:17 number [1] 41:17 numbers [1] 67:3</p>	<p style="text-align: center;">P</p> <p>package [1] 9:2 PAGE [2] 2:2 21:19 part [8] 3:24 25:22 30:25 36:16 39:17 61:1,15 62:9 parte [1] 58:1 participate [1] 15:8 particular [8] 34:25,25 37:5 41:10 45:1,4,5 54:21 particularly [1] 3:15 parties [7] 4:15 32:19 34:13 35:19 41:11 48:18 63:10 parties' [1] 9:4 parts [1] 59:1 pay [3] 22:4 30:3,17 PCAOB [5] 16:19 17:6 18:16 19:1 21:20 people [12] 6:8 10:15 19:12 20:16 23:17 40:4,6,10 44:22 51:16 59:9,11 percent [5] 5:25 6:7 48:5 52:7 61:22 perception [2] 14:18 29:15 perfectly [1] 64:19 perform [1] 10:8 performance [1] 30:1 performed [2] 24:25 29:8 perhaps [1] 34:24 period [2] 5:3 66:15 permits [1] 13:7 permitted [1] 8:15 PERRY [32] 1:16 2:3,15 3:7,8,10,22 4:24 6:18 7:9 8:10,14 9:16 11:4,15,20 12:7,19,25 14:7,21 19:20 29:15 48:11 62:25 63:1,3 66:13,17,19 67:10,18 person [20] 6:24 10:22 12:21,24 30:19 38:24 42:13,17,25 43:7,20 45:1,5,11,13,22 47:11,25 52:12 61:19 persuasive [1] 33:25 petition [3] 6:5 56:19 64:7</p>	

Official - Subject to Final Review

<p>Petitioners ^[1] 1:4,17,20 2:4,8,16 3:9 15:16 33:9,11 63:2</p> <p>petitions ^[2] 6:7 50:18</p> <p>pick ^[2] 31:19 53:16</p> <p>picks ^[1] 23:14</p> <p>place ^[3] 6:22 55:21 61:24</p> <p>plants ^[1] 40:6</p> <p>play ^[1] 17:14</p> <p>please ^[4] 3:11 15:18 34:8 66:18</p> <p>plenary ^[6] 50:25 51:6 52:24 53:1 55:1 56:18</p> <p>Point ^[4] 17:2,8 21:13 26:12</p> <p>pointing ^[1] 6:12</p> <p>points ^[1] 63:5</p> <p>policies ^[1] 20:7</p> <p>policy ^[2] 19:4 26:15</p> <p>policy-making ^[2] 58:3,19</p> <p>political ^[6] 13:22 14:2,4 30:23 31:3 51:25</p> <p>portion ^[1] 61:6</p> <p>position ^[4] 15:24 25:10 33:2 35:20</p> <p>positions ^[1] 40:18</p> <p>possibility ^[1] 49:15</p> <p>potentially ^[1] 41:14</p> <p>power ^[46] 3:13 5:6,14 6:20 7:5 24:22,25 25:17 26:5,6 28:18,19,22 29:6 30:18 31:24 32:1 34:12 35:1,4,16,18 36:9,15,19 37:22 38:4,8,10,11 39:19,21,22 40:5 41:16,18,21,23 42:2,6,7 43:14 44:22 45:23 55:11 58:6</p> <p>powers ^[20] 4:10,13,17 8:22 9:2,3,3,4 13:4 16:5 24:18,20 27:5 38:22,23,23 44:10,13 46:15 64:18</p> <p>practice ^[5] 20:25 24:6 27:20 44:2 62:15</p> <p>practices ^[1] 23:20</p> <p>precedent ^[1] 17:10</p> <p>precedents ^[1] 3:15</p> <p>precise ^[1] 43:15</p> <p>precisely ^[1] 50:12</p> <p>precondition ^[1] 41:24</p> <p>preconditions ^[1] 57:2</p> <p>preferred ^[1] 20:13</p> <p>premise ^[1] 21:18</p> <p>preparation ^[1] 8:2</p> <p>prepare ^[1] 56:14</p> <p>prepared ^[1] 7:3</p> <p>present ^[1] 24:9</p> <p>presented ^[1] 27:23</p> <p>preservation ^[1] 66:20</p> <p>preside ^[2] 3:13 35:12</p> <p>President ^[5] 42:18 45:9 51:10,21 62:18</p> <p>presiding ^[1] 38:24</p> <p>pressures ^[1] 14:2</p> <p>Presumably ^[2] 66:17,19</p> <p>pretty ^[1] 37:11</p> <p>prevail ^[1] 9:13</p> <p>principal ^[5] 3:24,25 33:18 63:7,11</p>	<p>principle ^[1] 62:13</p> <p>principles ^[2] 51:9 66:20</p> <p>prior ^[1] 65:14</p> <p>private ^[10] 4:14 12:10 16:7 22:1,2 29:10 34:13 41:11 48:22 63:10</p> <p>probably ^[3] 40:4,6,10</p> <p>problem ^[12] 13:20,22 14:5 20:9,18 23:10 33:8,10,11,22 39:25 49:8</p> <p>problems ^[1] 41:6</p> <p>proceeding ^[3] 32:13 65:8,12</p> <p>proceedings ^[4] 7:18 9:5,18 13:11</p> <p>process ^[7] 8:25 13:12,18 14:10 15:7 30:3 32:14</p> <p>production ^[1] 38:6</p> <p>promote ^[2] 10:3 57:22</p> <p>proper ^[2] 29:18,21</p> <p>properly ^[1] 10:7</p> <p>propose ^[1] 16:25</p> <p>proposed ^[2] 22:23 34:22</p> <p>proposing ^[1] 36:23</p> <p>prosecute ^[1] 45:16</p> <p>prosecutions ^[1] 28:7</p> <p>Protection ^[2] 19:8,11</p> <p>provide ^[1] 18:15</p> <p>provided ^[1] 56:14</p> <p>provides ^[1] 8:17</p> <p>provision ^[1] 8:4</p> <p>puissance ^[1] 4:11</p> <p>purely ^[1] 9:6</p> <p>purporting ^[1] 33:3</p> <p>purposes ^[1] 12:20</p> <p>put ^[3] 4:12 66:23 67:3</p> <p>putting ^[2] 14:3 55:15</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quantify ^[1] 24:1</p> <p>question ^[2] 10:6 14:16 27:22 29:14 30:5 31:6 32:24 39:20 41:22 42:5 45:4 46:5,7,13 51:3 52:3 53:24 56:6,10 58:7 61:17</p> <p>questions ^[3] 11:10 33:23 62:22</p> <p>quite ^[3] 4:18 21:19 41:15</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>random ^[1] 10:21</p> <p>range ^[1] 58:23</p> <p>ratchet ^[1] 31:5</p> <p>rather ^[2] 7:6 23:21</p> <p>ratification ^[1] 67:11</p> <p>ratified ^[1] 67:7</p> <p>ratifies ^[1] 33:20</p> <p>ratify ^[2] 33:3,20</p> <p>RAYMOND ^[1] 1:3</p> <p>read ^[6] 16:20 18:24 19:2 36:16,21,23</p> <p>real ^[3] 13:17 64:13,14</p> <p>really ^[15] 18:16 23:19 24:5,23 25:3 26:2 27:5,23 28:17 36:7 39:21 49:24 60:23 61:2,15</p> <p>reason ^[6] 16:17 38:21 39:3 42:17 43:14 55:9</p>	<p>reasonably ^[2] 50:20 51:4</p> <p>reasons ^[4] 33:22 52:5,9 55:18</p> <p>REBUTTAL ^[2] 2:14 63:1</p> <p>receive ^[1] 38:11</p> <p>recognize ^[1] 6:20</p> <p>recognized ^[1] 4:19</p> <p>recommend ^[1] 8:8</p> <p>recommendatory ^[2] 9:7 32:13</p> <p>recommended ^[2] 8:19,23</p> <p>recommends ^[1] 8:5</p> <p>record ^[4] 19:7 32:12,15 64:22</p> <p>refer ^[1] 60:8</p> <p>references ^[1] 60:7</p> <p>referred ^[1] 60:6</p> <p>refinement ^[1] 25:14</p> <p>reflects ^[1] 62:13</p> <p>regulated ^[1] 14:23</p> <p>regulation ^[8] 4:25 5:4,20 9:4 27:19 28:6 32:3 44:2</p> <p>regulations ^[1] 28:1</p> <p>rejected ^[1] 63:12</p> <p>related ^[2] 7:16 13:12</p> <p>relates ^[1] 38:7</p> <p>relationship ^[2] 4:2 61:25</p> <p>relevant ^[2] 41:22 47:16</p> <p>relief ^[1] 65:19</p> <p>remainder ^[1] 15:9</p> <p>remedial ^[2] 33:3,6</p> <p>remedy ^[1] 65:7</p> <p>removal ^[6] 18:22 20:22 21:1 22:11 30:18 59:4</p> <p>remove ^[2] 20:6 54:15</p> <p>renders ^[1] 29:10</p> <p>repeat ^[1] 33:8</p> <p>repeats ^[1] 33:10</p> <p>reply ^[3] 17:2 33:13 48:12</p> <p>report ^[1] 39:5</p> <p>require ^[1] 25:3</p> <p>required ^[1] 19:6</p> <p>requirement ^[2] 25:21 46:4</p> <p>requirements ^[1] 7:15</p> <p>requires ^[4] 15:5 16:25 52:11 65:12</p> <p>requiring ^[1] 38:5</p> <p>research ^[1] 58:11</p> <p>reserve ^[1] 15:9</p> <p>respect ^[1] 19:17</p> <p>respectfully ^[1] 52:4</p> <p>respects ^[1] 40:13</p> <p>respond ^[1] 36:12</p> <p>Respondent ^[4] 1:7,20 2:7 15:15</p> <p>responsibility ^[3] 14:12 52:25 68:1</p> <p>responsible ^[3] 43:22 50:21 51:17</p> <p>rest ^[1] 22:5</p> <p>restatements ^[1] 33:14</p> <p>restrictions ^[1] 21:1</p> <p>rests ^[2] 47:15 58:6</p> <p>result ^[1] 18:11</p> <p>reversed ^[1] 26:6</p> <p>review ^[36] 5:3,8,13,21 6:1,5,6 9:</p>	<p>11 14:24 26:9,10,11,13,16 31:18 32:9,16,17 49:12,13,16,25 50:25 51:1,6,7 52:24 53:1 55:6,12 56:18 63:23,24 64:3 66:7 67:2</p> <p>reviewed ^[5] 5:3 32:4,18 42:4 50:16</p> <p>reviewing ^[4] 15:6 53:18 64:5 65:24</p> <p>rid ^[1] 17:1</p> <p>rights ^[1] 48:22</p> <p>ROBERTS ^[22] 3:3 4:20 15:11 16:11 32:22 34:1,19 38:12 48:10,25 49:3,10,23 51:8,13 55:4,8,14 57:16 62:23 66:18 67:20</p> <p>role ^[3] 17:15 20:11 58:15</p> <p>rule ^[10] 19:5 20:8,9,10 35:7,13 36:22 49:21 52:11,14</p> <p>rules ^[2] 27:19 58:1</p> <p>Ryder ^[3] 64:16 65:11,17</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>salary ^[1] 57:25</p> <p>same ^[7] 8:5 30:12 36:4 37:12,19 46:19 54:11</p> <p>sanction ^[7] 34:16 49:21 50:6,11 52:10,12 61:9</p> <p>sanctions ^[2] 16:7 22:1</p> <p>satisfied ^[2] 54:19 63:6</p> <p>satisfy ^[3] 21:7 23:9 33:7</p> <p>saying ^[6] 14:16 22:6 45:1 53:9,10 55:5</p> <p>says ^[15] 5:10,20 6:22 20:6 22:6 31:12 49:24 53:2,6 56:17,20 64:4 65:4,8,22</p> <p>scenario ^[2] 8:15 64:3</p> <p>scheme ^[1] 47:4</p> <p>Schor ^[1] 66:23</p> <p>scratch ^[1] 66:3</p> <p>SEC ^[16] 3:12 4:1,7 6:10,17 7:8 8:16 9:8 11:12,18 32:1 33:6 53:15,15 63:21 66:15</p> <p>SEC's ^[1] 33:3</p> <p>second ^[10] 35:6 36:10 39:17 41:24 52:15 55:22 57:3 61:15 62:9 64:11</p> <p>secondly ^[1] 22:25</p> <p>Secretary ^[1] 59:20</p> <p>Section ^[11] 5:7 10:10,11 19:22 52:12 54:4,14 56:15 62:1,4 65:22</p> <p>Sections ^[1] 9:18</p> <p>SECURITIES ^[2] 1:6 3:5</p> <p>Security ^[8] 9:15,21 11:3,5,9,22 12:2,14</p> <p>see ^[8] 6:11 13:13 21:21 35:1 40:9 58:25 60:23 61:25</p> <p>seek ^[1] 49:12</p> <p>seeks ^[1] 12:17</p> <p>seem ^[3] 34:22 55:15 57:18</p> <p>seems ^[13] 17:3 22:22 23:2,25 39:9,12 41:13,14 44:25 46:1 57:16 60:12,19</p> <p>Senate ^[3] 42:19 45:10 62:19</p> <p>sense ^[2] 22:24 36:17</p>
---	--	--	---

Official - Subject to Final Review

<p>sentence ^[1] 21:19 separate ^[1] 39:12 servant ^[1] 17:13 servants ^[1] 16:13 service ^[10] 16:23 21:16,24 40:3,4, 18,22 64:13,15 65:1 servicing ^[2] 22:20 23:18 set ^[6] 36:1,3 47:4 52:17 58:16 65:24 sets ^[1] 21:5 settlement ^[2] 7:25,25 sever ^[1] 21:4 SG's ^[1] 18:2 shall ^[2] 58:14 65:24 shapes ^[1] 32:12 share ^[1] 37:18 shipmasters ^[1] 23:24 show ^[4] 6:8 7:2,5,12 showed ^[1] 13:19 shows ^[1] 15:5 side ^[1] 20:24 sign ^[1] 7:2 signature ^[1] 64:8 significant ^[9] 15:25 22:15,17 23:3 24:21 25:4 26:3 30:25 59:1 similar ^[3] 23:18 34:23 38:3 similarly-situated ^[1] 67:4 simply ^[1] 4:14 since ^[7] 40:21 48:4 49:21 50:7 61:3,12 62:19 single ^[1] 52:7 situation ^[5] 13:24 22:25 23:2 38:14 40:9 sky ^[1] 33:24 slate ^[1] 60:22 Social ^[8] 9:15,21 11:3,5,8,22 12:2,14 Solicitor ^[5] 1:18 27:8 42:15,21 62:16 solution ^[1] 13:21 solves ^[1] 33:21 somebody ^[17] 26:7 29:2 39:6,18 45:21 46:9,9 47:10 48:17 50:9 53:5,13 54:8 58:8 61:5,8 62:12 somebody's ^[3] 30:17 46:6 62:10 someone ^[4] 7:6 34:12,15 53:19 Sometimes ^[1] 59:10 somewhat ^[2] 6:4 23:18 sorry ^[6] 6:3 11:13 31:25 48:9 49:3 55:15 sort ^[3] 39:23 60:20 62:9 SOTOMAYOR ^[21] 6:3,19,25 11:13,16,21 12:7 22:8,12 23:11,15 24:10,14 31:25 32:8 48:9 53:12 66:10,14 67:6,14 source ^[2] 60:23,25 sovereign ^[10] 3:13 4:10 6:20 7:5 13:4,12 16:3 24:23 29:7 61:6 special ^[3] 35:8,11 37:4 specifically ^[2] 65:2,3 specified ^[1] 10:9 specifies ^[1] 64:21</p>	<p>spent ^[1] 60:15 square ^[1] 31:10 stakeholders ^[1] 15:7 stakes ^[2] 12:23,25 Standard ^[1] 66:5 stands ^[1] 64:6 start ^[3] 15:19 21:18 66:3 started ^[1] 34:21 STATES ^[24] 1:1,13 17:14 21:7 27:3,10 29:11 31:14 32:21 34:12,18 35:12,18 36:4 42:25 47:22 48:24 50:12 58:9,13 59:12 61:5,7 63:8 status ^[1] 37:22 statute ^[29] 5:1,8 8:16 9:9,10 11:8,12 13:2,7 16:5 18:24 19:3 24:16 27:18 28:3,4 32:3 43:25 44:10,12 49:11 56:6 58:24,25 59:13,14,22 60:7 62:19 statutes ^[5] 11:11 28:22 44:20 58:16 59:9 statutorily ^[1] 63:25 statutory ^[6] 13:6 15:2 21:1 27:22 28:12 46:21 Steele ^[1] 26:24 step ^[1] 13:16 Stern ^[1] 48:20 still ^[1] 31:4 stone ^[1] 18:14 straightforward ^[1] 23:3 street ^[1] 10:22 strike ^[1] 44:15 strikes ^[2] 13:14 37:7 structural ^[3] 14:10,22 57:25 structurally ^[2] 14:25 15:1 structure ^[1] 52:18 study ^[1] 25:12 subject ^[5] 9:18 11:6 25:8 55:5 59:3 submission ^[1] 9:17 submit ^[2] 6:14 66:9 submitted ^[2] 68:3,5 subpoena ^[1] 7:14 subpoenas ^[2] 12:2 38:5 subsection ^[2] 52:23 53:2 suffer ^[1] 6:23 sufficient ^[2] 21:9 31:15 suggest ^[1] 66:3 suggested ^[2] 27:25 57:21 suggesting ^[6] 23:5,6 36:14 46:23 55:9 57:19 suggests ^[1] 58:14 superior ^[2] 50:25 51:4 superiors ^[2] 27:6 63:15 supervise ^[1] 53:16 supervised ^[1] 3:25 supervision ^[2] 4:2 63:11 support ^[8] 1:20,22 2:8,12 15:16 25:20 34:6 67:24 suppose ^[3] 33:1 35:2 47:7 supposed ^[2] 39:5,7 SUPREME ^[5] 1:1,12 50:8,8 61:4 switched ^[1] 60:7</p>	<p>system ^[4] 21:17 30:23 31:3 67:5 Systems ^[1] 19:8</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table ^[1] 30:4 talked ^[2] 34:23 62:14 Ten ^[1] 64:18 tenure ^[1] 57:25 term ^[1] 12:8 terms ^[1] 40:3 test ^[34] 15:20 17:1 18:2 21:6 22:19,23 23:2,6,10,10 24:5 25:19 26:2,20 34:22 39:17 41:3,7,13 57:2 60:11,16,17,20,21,23 61:1,14,15 62:10 63:7,12,20,22 testimony ^[3] 7:24 35:14 38:6 textually ^[1] 3:16 theirs ^[1] 41:5 themselves ^[1] 28:25 theory ^[2] 9:13 40:20 There's ^[16] 5:17 6:13 13:13 14:7 18:24 22:14 26:17 40:9 50:14,14,23 59:13 61:17 62:19 66:6,7 thinking ^[1] 17:17 thinks ^[2] 28:2 67:12 third-parties ^[1] 16:2 Thompson ^[1] 45:17 thorough ^[1] 25:8 though ^[5] 33:19 36:4 45:25 54:14 61:21 thousands ^[1] 67:17 three ^[5] 10:15 35:22 62:25 63:5 64:24 throughout ^[1] 40:2 tie ^[1] 30:22 Title ^[1] 60:3 together ^[2] 4:17 15:4 tomorrow ^[1] 5:19 top ^[6] 37:9 43:17,21,24 44:4,5 totally ^[1] 17:9 touch ^[1] 22:4 tower ^[1] 64:16 traditional ^[1] 60:17 transparency ^[2] 10:3 14:13 Transportation ^[1] 59:20 treatise ^[1] 33:15 tremendous ^[1] 47:23 trial ^[6] 35:8,11 37:4 42:3,14 63:17 trials ^[1] 35:12 tried ^[4] 18:23 24:4 29:25 45:20 tries ^[1] 42:1 trouble ^[1] 22:16 Truck ^[1] 65:15 true ^[2] 37:17 47:3 try ^[3] 20:14 25:25 26:1 trying ^[3] 25:22 32:23 34:20 Tucker ^[1] 65:15 turn ^[4] 41:3,7 44:4 51:3 turns ^[2] 41:8 43:23 two ^[16] 5:17 6:18 8:18 11:11 15:25 17:22,22 21:4 22:3 24:21 35:5 52:5,9 55:18 57:2 59:3 two-part ^[1] 21:6</p>	<p>tying ^[1] 15:4 type ^[1] 39:13 typically ^[2] 13:25 28:21</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S ^[17] 23:22 27:7 28:22 42:21 45:15,15 46:18,20 47:8,15,16,17,21 48:3,4,7 61:21 ubiquitous ^[1] 62:14 ultimately ^[1] 14:13 unconstitutional ^[2] 65:8,16 under ^[19] 3:14 4:6 5:22 7:13 10:14 11:8 13:7 15:22 22:10 24:16 38:7 46:10 52:21,23 54:9,14 59:22 62:4 64:23 under-inclusive ^[2] 23:13 25:20 understand ^[5] 25:13,24 26:20 41:13 66:11 understanding ^[2] 11:4 22:17 understands ^[1] 47:24 understood ^[5] 27:1 37:21 38:22 54:12 61:12 undertake ^[1] 16:3 uniformly ^[1] 33:16 UNITED ^[24] 1:1,12 17:14 21:7 27:3,10 29:11 31:14 32:21 34:11,17 35:11,18 36:4 42:25 47:22 48:23 50:12 58:8,13 59:12 61:5,7 63:8 unless ^[2] 5:12 63:14 unlike ^[2] 20:24 64:15 unlikely ^[1] 28:16 until ^[4] 4:22 20:19 36:10 62:7 up ^[13] 6:8 21:5 22:14 23:14 24:4 26:2 30:23 32:15 36:1,3 47:4 52:17 60:21 urged ^[2] 18:22 20:23 uses ^[1] 45:13 using ^[1] 12:8</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vague ^[1] 41:15 validity ^[1] 65:13 various ^[3] 11:17 58:1 59:10 vast ^[1] 12:15 versus ^[4] 3:5 11:19 66:5,23 vest ^[2] 28:22 44:20 vested ^[15] 15:24 16:5 24:19 27:5,6,7,8 28:19 29:5,6 39:22 41:23 42:8 44:1 53:25 vesting ^[5] 27:14,15,18 29:1 54:20 vests ^[1] 44:10 Veterans ^[2] 11:22,23 view ^[2] 28:2 55:19 violates ^[1] 40:12 violation ^[4] 65:22,23 66:2,7 violations ^[1] 36:13 Virtually ^[2] 11:17 26:16 virtue ^[1] 51:5 voluntarily ^[1] 12:16</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waive ^[1] 32:14 waiver ^[1] 66:20</p>
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Official - Subject to Final Review

WALL ^[44] 1:18 2:6 15:13,14,17 17:22 18:4,7,20 19:13,17 20:20 21:11,22 22:8,9 23:8,12 24:4,12,17 25:13 26:8,22,24 27:11,13,16,21 28:10,11,16 29:12,20 30:9,11 31:8 32:7 33:1,9 41:22 53:23 61:16 65:8

wanted ^[2] 20:22 21:4

Warren ^[5] 38:2,4,13,15 39:13

Washington ^[3] 1:9,16,19

way ^[17] 9:21 12:7 14:19 18:24 19:2 20:21 23:3,7 27:4 28:21 31:3 36:24 40:19 41:18 52:17 64:7 66:8

ways ^[2] 25:18 30:15

website ^[1] 64:10

wedges ^[1] 40:20

Weiss ^[3] 26:10 63:16 64:17

whatever ^[4] 40:11 51:17 57:4 65:18

Whereupon ^[1] 68:4

whether ^[23] 5:15 8:23 18:16 20:12 21:8 32:5 39:21,22 40:19 41:22 42:10,12 43:24 44:1 45:1,4 46:2 47:1 51:3 52:8 57:8 58:8 62:10

who's ^[10] 12:21 26:7 39:6 43:24 44:4,5,18,18 54:5,8

whole ^[2] 40:1 66:9

will ^[8] 6:23 8:7 9:14 12:11 15:21 22:19 26:16 30:5

wiped ^[1] 66:1

wishes ^[1] 26:14

within ^[3] 16:13 47:10 49:12

without ^[7] 20:22 34:16 36:13 50:10,24 56:21 61:9

witness ^[1] 42:5

witnesses ^[3] 12:3 38:6,10

word ^[4] 6:10 21:23 22:22 32:6

words ^[6] 10:16 13:24 18:13 29:3 56:23 58:4

work ^[2] 3:25 53:18

works ^[3] 24:15,15 28:22

worried ^[1] 19:20

writs ^[1] 62:6

written ^[3] 18:14 19:5 59:1

wrote ^[3] 19:12 60:3,4

Y

York ^[2] 1:21,21