

# SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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RETURN MAIL, INC., )
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                Petitioner, )
                        )
                    v.      ) No. 17-1594
                        )
UNITED STATES POSTAL SERVICE, )
                        )
ET AL., )
                        )
                Respondents. )
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Pages: 1 through 66

Place: Washington, D.C.

Date: February 19, 2019

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Washington, D.C.

Tuesday, February 19, 2019

The above-entitled matter came on for  
oral argument before the Supreme Court of the  
United States at 10:04 a.m.

APPEARANCES:

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on behalf of the Petitioner.

MALCOLM L. STEWART, Deputy Solicitor General,

Department of Justice, Washington, D.C.;

on behalf of the Respondents.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF:	PAGE:
3	BETH S. BRINKMANN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	MALCOLM L. STEWART, ESQ.	
7	On behalf of the Respondents	29
8	REBUTTAL ARGUMENT OF:	
9	BETH S. BRINKMANN, ESQ.	
10	On behalf of the Petitioner	61
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument this morning in Case 17-1594, Return  
5 Mail, Inc. versus the United States Postal  
6 Service.

7 Ms. Brinkmann.

8 ORAL ARGUMENT OF BETH S. BRINKMANN

9 ON BEHALF OF THE PETITIONER

10 MS. BRINKMANN: Mr. Chief Justice, and  
11 may it please the Court:

12 The term "person" in this case does  
13 not extend to include the government for three  
14 reasons. First, the other branches rely on the  
15 Dictionary Act definition of person and this  
16 Court's presumptive definition of "person" to  
17 not include the government. That is a stable  
18 framework that's critical to that communication  
19 between the branches.

20 Second, the estoppel that was enacted  
21 by Congress specifically references the  
22 jurisdiction of the district court and the  
23 International Trade Commission, not the Court  
24 of Federal Claims, where the government's  
25 patent litigation takes place, reinforcing the

1 definition of "person" not to include the  
2 government. That was a linchpin to the  
3 structure that Congress set up. It created a  
4 new adversarial administrative process, and  
5 part of that balance was to ensure that patent  
6 holders that were subject to that new  
7 adversarial process could then be protected  
8 from having to go back and relitigate in court,  
9 in district court or the International Trade  
10 Commission.

11 JUSTICE GINSBURG: Your position is  
12 that it's -- the estoppel provision is the  
13 linchpin, you just said, but your position  
14 would be the same even if there were no  
15 estoppel provision. Is that not so?

16 MS. BRINKMANN: That is correct, Your  
17 Honor. It's just the linchpin to the balance.  
18 It's a reinforcement. The Dictionary Act  
19 definition and the presumptive definition would  
20 do the work here because that is the reliance  
21 by Congress and the give-and-take before the  
22 branches so Congress knows how the word  
23 "person" is going to be interpreted when they  
24 use it.

25 So the linchpin part of the estoppel,

1     though, reinforces that because it only refers  
2     specifically to the court -- the district court  
3     and International Trade Commission.

4             And the third point I wanted to make,  
5     Your Honor, was that this does not exclude the  
6     government from going after bad patents.

7             To the contrary, the government is  
8     different, has the most powerful tools to do  
9     that. First, the Patent and Trademark Office  
10    director has the power to sua sponte initiate  
11    ex parte reexaminations and can go after  
12    patents after they've been issued.

13            JUSTICE SOTOMAYOR: What if -- would  
14    the government or the Postal Service be able to  
15    initiate ex parte reexamination? Because,  
16    under your theory, "person" doesn't include the  
17    Postal Service. How do you punish them if they  
18    send a letter saying there was this prior art,  
19    do you want to look at this?

20            MS. BRINKMANN: The statute does not  
21    preclude a communication, Section 303, that  
22    allows the sua sponte reexamination by the  
23    government through the PTO. It does not  
24    preclude someone bringing a matter to the  
25    attention of the director. In fact --

1 JUSTICE SOTOMAYOR: But someone is  
2 not -- according to you, a person is not the  
3 government.

4 MS. BRINKMANN: That's a different --

5 JUSTICE SOTOMAYOR: So where do the --  
6 where does the government get its permission?

7 MS. BRINKMANN: Under --

8 JUSTICE SOTOMAYOR: In the form -- the  
9 government in the form of the Postal Service,  
10 where does it get the permission to initiate  
11 that process?

12 MS. BRINKMANN: Well, there are two  
13 different ways that an ex parte reexamination  
14 could be initiated by a person or sua sponte by  
15 the director of the PTO. And the way Congress  
16 set up the structure for the government to go  
17 after bad patents was through the sua sponte  
18 director.

19 As far as -- that's 303. 301, where a  
20 person can bring it -- request it, the same  
21 starting point would be here under the  
22 presumptive definitions that it likely would be  
23 construed not to include the government.

24 The -- there's a different history to  
25 that provision than the three AIA provisions,

1 the America Invents Act that was enacted in  
2 2011. The reexamination provision was enacted  
3 back in 1980, and it is different because it's  
4 not an adversarial process at all. All that  
5 happens is that a person can ask that it be  
6 initiated. But that is very different, and  
7 it's much like the original issuance of a  
8 patent. It's a back-and-forth with an  
9 examiner.

10 JUSTICE ALITO: But do you think it  
11 would be proper for the Postal Service or some  
12 other federal agency to contact the PTO ex  
13 parte and say, hey, why don't you sua sponte  
14 look into the validity of this patent? Is that  
15 what you're saying? That would be proper?

16 MS. BRINKMANN: I think it is  
17 allowable, Your Honor. The statute does not  
18 prohibit that. And, in fact, that's 303, and  
19 there's a regulation, 1.520, that says that  
20 normally -- normally, the director would not  
21 institute sua sponte in response to a  
22 suggestion.

23 JUSTICE ALITO: Well, that -- I mean,  
24 that's an argument that makes me doubt your --  
25 your argument on the statutory language because



1 I think if -- if this were prevented --  
2 presented to Congress, and the issue before  
3 Congress was do we want a federal agency to be  
4 able to initiate one of these AIA proceedings  
5 in the open, in accordance with the law, or do  
6 we want to allow them to pick up the phone to  
7 the PTO and say -- Patent and Trademark Office  
8 and say, hey, why don't you sua sponte look  
9 into this? Which of those -- do you think they  
10 chose the latter?

11 MS. BRINKMANN: The sua sponte  
12 reexamination process is very different because  
13 the government would not come in then and be a  
14 litigant as they are here. There was no  
15 estoppel provision, for example. And that's  
16 why the analysis for the reexamination is  
17 different.

18 What we know here is, though, as far  
19 as the government goes, going after bad  
20 patents, there's two very forceful tools that  
21 Congress has. One, the PTO director, who  
22 Congress has vested with the expertise over  
23 patent law, is the one that sua sponte does  
24 that.

25 And then the government doesn't need

1 to go after -- they can use the patent. They  
2 -- then the person who holds the patent, the  
3 patented invention, has to come over to the  
4 Court of Federal Claims and request  
5 compensation.

6 And that shows how Congress created  
7 this different structure for the government in  
8 1498 before the Court of Federal Claims. Very  
9 different, no jury. You can't get an  
10 injunction against the government. They can  
11 use it, and then you have to come to 1498 and  
12 recover compensation from them.

13 So it's a very --

14 JUSTICE GINSBURG: But why -- why  
15 would -- why would the government -- why -- why  
16 would Congress want to leave a government  
17 agency out of this second look if the idea is  
18 to weed out patents that never should have been  
19 given in the first place?

20 MS. BRINKMANN: Because the government  
21 already has opportunities through both the  
22 reexamination and through challenging the  
23 validity. All of the grounds for validity can  
24 be challenged in the Court of Federal Claims.

25 But moreover, Your Honor, when we go

1 back to the principles in which Congress used  
2 the word "person," the question isn't whether  
3 or not why they would have excluded. The  
4 question is, is there any indication that  
5 Congress intended to extend this to include the  
6 government?

7 CHIEF JUSTICE ROBERTS: Your -- your  
8 argument on the Dictionary Act, you know, the  
9 idea that everybody knows this is what it means  
10 and so you start from common ground, that  
11 really has to be based on a legal fiction,  
12 right? Nobody would think, when Congress wrote  
13 this, that, okay, we're using "person"  
14 according to the Dictionary Act, except  
15 sometimes we're not, because you agree there  
16 are some times when it does include the  
17 government. And in those situations, we'll  
18 just leave it up to the courts to figure out,  
19 even though we don't say this, that here we're  
20 not following the Dictionary Act.

21 MS. BRINKMANN: I don't think it's  
22 leaving it up to the courts, Your Honor. I  
23 think it's that Congress has to indicate  
24 through the context that it means otherwise.

25 And it's very akin to --

1           CHIEF JUSTICE ROBERTS: Well, I know,  
2 but that's my point, is that you rely on the  
3 Dictionary Act, but then you say except when  
4 the context suggests something else. And it  
5 seems to me that if people were, in fact,  
6 looking to the Dictionary Act and they want to  
7 depart from it, they would have used something  
8 a little more clear than the context.

9           MS. BRINKMANN: Well, certainly, Your  
10 Honor, there are examples. We know that  
11 "person" is not used consistently in the  
12 America Invents Act or in the Patent Act. And  
13 that -- that's -- the government really turns  
14 that on its head when it says, oh, well, why  
15 would you exclude it?

16           Instead, the question is, is there  
17 anything affirmative to indicate that the  
18 government was included? And I think when you  
19 look at the -- the two aspects that the  
20 government invokes, oh, you know, the  
21 government gets to own patents; oh, and we get  
22 to raise this defense about intervening rights,  
23 both of those have very strong contextual  
24 affirmative statements.

25           207 makes clear that each federal

1 agency can own a patent, obtain a patent. And  
2 we know from 1498 and its predecessor statute  
3 that the government can raise all defenses. So  
4 there is nothing to suggest from that context  
5 that there was an affirmative indication to  
6 extend this to the government.

7 JUSTICE GORSUCH: Well, counsel, the  
8 argument on the other side I know we're going  
9 to hear is Section 207 allows the government to  
10 participate in a lot of aspects of the patent  
11 system affirmatively, and given that, it would  
12 be natural to extend it to IPR review as well.

13 Do you care to respond to that  
14 argument?

15 MS. BRINKMANN: Well, I think a very  
16 useful guide here would be to look at the  
17 Cooper case. The Cooper case was about whether  
18 or not the government could use another tool,  
19 like here, whether they could seek treble  
20 damages in a civil damage action under the  
21 antitrust laws.

22 There was a very similar definition  
23 there to the Dictionary Act. And this Court  
24 looked to the presumptive meaning of "person"  
25 not to include the government and said: We're

1 looking to what Congress said here and there is  
2 nothing affirmative to include it, even though  
3 it could be an additional tool.

4 And I think it's such a good example  
5 because that decision was in 1941. In 1955,  
6 Congress enacted a provision that gave Congress  
7 -- gave the government that tool to seek civil  
8 damages. Two other things, though. They  
9 didn't do it through redefining the word  
10 "person." They set up another provision  
11 governing -- to have the government bring  
12 actions, civil actions, and they did not  
13 provide for treble damages.

14 It was not until 1990 that Congress  
15 provided for treble damages.

16 JUSTICE BREYER: This is --

17 MS. BRINKMANN: This is case -- excuse  
18 me.

19 JUSTICE BREYER: Sorry. I mean,  
20 you're talking about antitrust law. Now let's  
21 think of the patent statute, and -- and you've  
22 read in their brief and elsewhere that they're  
23 -- that, one, as you said, the government's  
24 free to obtain patents, like anyone else.  
25 Agencies, et cetera.

1           Moreover, there are quite a few or  
2 several provisions in the patent law where the  
3 word "person" seems to include the government.  
4 For example, you can't get a patent if -- any  
5 person, you know, can't get a patent if there's  
6 prior art or whatever. You know, there are  
7 quite a few like that or several like that.

8           Now what are your best one or two  
9 examples of the opposite, where, in fact, the  
10 -- the patent statute uses the word "person"  
11 and it's pretty clear that "person" does not  
12 include the government? What would you -- not  
13 antitrust examples but patent examples.

14           MS. BRINKMANN: Your Honor, I can give  
15 you three examples that we discuss in our reply  
16 brief. The first one would be Section 317.  
17 It's contemporaneous with the review provisions  
18 we're talking about here.

19           That has to do with obtaining  
20 information from the agency about settlement,  
21 and it provides that the government can do it  
22 just by a request, but then it explains that  
23 persons must make more of a showing to get it.  
24 That is a distinction. So that's a clear  
25 example.

1           This -- and that's not just 317. It's  
2 also in 327 and 135 having to do with the  
3 different review provisions.

4           The second one I would refer to is  
5 292. There's subsection (a) and (b). That has  
6 to do with the remedies in false marking. It's  
7 kind of parallel to the Cooper case, in fact,  
8 because (a) provides for a penalty for the  
9 government to obtain; (b) applies for persons  
10 to seek damages. That does not include the  
11 government.

12           The third one I would point to is 257.  
13 That has to do with when the director was  
14 referring a person to the attorney general for  
15 fraud. And that clearly refers not to the  
16 government.

17           So, if there's one thing we know is  
18 that the word "person," the term "person," is  
19 not used the same throughout the Act, and  
20 that's because Congress has a backdrop and  
21 knows that it does not include the government  
22 unless it makes an affirmative showing to the  
23 contrary.

24           And I should say, in addition to the  
25 two we talked about where there was an



1 affirmative showing, 207, federal agencies can  
2 own patents, so things flow from that, and you  
3 can -- the government can raise defenses  
4 through 1498.

5           There's another provision that's very  
6 informative. It's the provision that was at  
7 issue in the Florida Prepaid case that was held  
8 unconstitutional, trying to waive the sovereign  
9 immunity for states. The other part of that  
10 provision, though, in 296 was who could sue?  
11 And it said persons could sue, including  
12 governmental entities.

13           So, again, Congress is enacting -- in  
14 this dialogue between the branches, Congress  
15 and the President, when they're enacting laws,  
16 know that if they mean to extend the term  
17 "person" to include the government, they have  
18 to provide such.

19           JUSTICE KAGAN: Ms. Brinkmann --

20           JUSTICE SOTOMAYOR: So, if the Act  
21 permits the government to sue for infringement  
22 -- to be sued for infringement, which it does,  
23 what do you think it means to take away a  
24 defense? Meaning this is a defense tool for  
25 infringers. Does it make logical sense to

1 deprive the government of the tool of being  
2 able to invoke this proceeding?

3 MS. BRINKMANN: A couple things there  
4 I'd say, Your Honor.

5 The Court did not grant cert on this  
6 and I'm not here to argue it, but we have a  
7 different view. We don't believe actions for  
8 compensation in 1498 in the Court of Federal  
9 Claims are actions for infringement. They're  
10 for use without authority, so -- but just to  
11 put a fine point on that.

12 But going back to the tool, I would  
13 also say that this is not a defense. When you  
14 raise a defense in litigation, you're  
15 litigating against your opponent and you're  
16 defending to get a judgment that you haven't  
17 infringed. This is an affirmative action to  
18 send federal agencies under the government's  
19 view into another federal agency to expand  
20 their power, and that power, to invalidate  
21 patents for all time, for everyone.

22 The government does have that power.  
23 It's in the expert Patent and Trademark Office  
24 director through reexaminations that they can  
25 do sua sponte. And regardless of what one

1 thinks of the policy undergirding that, you  
2 would think it would be quite remarkable for  
3 Congress to have set up this whole structure  
4 without saying a word, in silence. And that  
5 too reinforces the fact that we have to read  
6 the word "person" as the other branches  
7 understood it be, to not include the government  
8 here.

9 CHIEF JUSTICE ROBERTS: You --

10 JUSTICE KAGAN: Ms. Brinkmann, I -- I  
11 take it you agree that 207 does indicate that  
12 the government counts as a person for a variety  
13 of provisions, is that right? So 102, 118,  
14 119, all of those provisions. Because the Act  
15 specifically says the government can obtain a  
16 patent, it follows that those provisions apply  
17 to the government as well. Do agree with that?

18 MS. BRINKMANN: It -- what the  
19 provision -- it references each federal agency.  
20 And it was part of the Bayh-Dole Act to try and  
21 figure out how that the government could --  
22 could handle research patents. And we do think  
23 that because of that provision, the provisions  
24 that then apply to patent owners would apply to  
25 them. But many research universities and much

1 of the government get patents through  
2 assignments, for example.

3 So the government is different in many  
4 ways. That doesn't mean, though, because, in  
5 one way, Congress wanted to allow the -- the  
6 government to have this exercise of handling  
7 patents, that that gives any inference to other  
8 aspects.

9 This has nothing to --

10 JUSTICE KAGAN: Right, but I guess  
11 what I'm -- I wanted to ask was whether those  
12 provisions, the 207(a)(1) that the government  
13 can obtain a patent, 207(a)(3), which is that  
14 the government can protect its rights to  
15 inventions, whether those might also lead you  
16 to say that the -- that the -- the -- that the  
17 government is a person for means of bringing  
18 these challenges, because the idea, I think,  
19 would be something like these challenges to the  
20 PTO are a means of -- enable the government to  
21 innovate and to obtain patents itself.

22 In other words, the government is  
23 looking at an area, it says somebody is  
24 claiming a patent on this, that's preventing us  
25 from inventing, that's preventing us from

1 getting a patent, so we have to kind of clear  
2 the field in order to innovate.

3 And that's what these challenges  
4 enable the government to do, so that they are a  
5 kind of function of 207(a)(1) and 207(a)(3).  
6 What would you think of that argument?

7 MS. BRINKMANN: It might be a policy  
8 argument that someone might consider, but it's  
9 not what Congress did. There's no evidence --  
10 the backdrop at which Congress enacted it was  
11 not perceived that way.

12 The idea of going against bad patents  
13 is something that the government has robust  
14 authority to do, again, through the Patent and  
15 Trademark Office director, through  
16 reexamination, and that is a much more  
17 appropriate avenue for that, Your Honor,  
18 because that isn't litigation amongst  
19 adversaries. If you're thinking, oh, this  
20 isn't a good patent for the government, the PTO  
21 director can look at this, and then there's an  
22 examiner who goes back and forth and there's  
23 more liberal amendment procedures, for example.  
24 And that's where you really need to see if there  
25 anything here that, you know, can be patented?

1           So that is amply already covered and  
2           has been through the reexamination process.

3           CHIEF JUSTICE ROBERTS:  What -- what  
4           is the director of the PTO supposed to do when  
5           he gets one of these calls from the government  
6           and says we want you to reexamine this?  Is --  
7           is he or she supposed to make an independent  
8           determination, or is he or she supposed to  
9           salute and go ahead and do it?

10          MS. BRINKMANN:  Under the statute,  
11          under 303, it explains that the director can on  
12          his own initiative at any time, as discovered  
13          by him or cited to him, it can even rely on art  
14          that was cited in a actual request that someone  
15          filed, or the regulation provides anything  
16          that's been brought to his attention.

17          So there's a very broad area because  
18          that's only about beginning the process.  Then  
19          there are other regulations and statutes that  
20          require things to be put on the record and  
21          explained and why the reexamination is brought  
22          under.

23          And I should also say, I mean, there's  
24          nothing to preclude, in fact, the PTAB  
25          recently, for example, had amicus briefs.  It's

1 not a barrier to information being provided.  
2 It's really the authority and how -- where the  
3 government has its --

4 JUSTICE GORSUCH: Ms. Brinkmann --

5 MS. BRINKMANN: -- authority to  
6 exercise that.

7 JUSTICE GORSUCH: But, Ms. Brinkmann,  
8 I guess the question I'm struggling with, and I  
9 -- I think some of my colleagues are as well,  
10 is one could understand why a rational Congress  
11 wouldn't want the government to go before its  
12 own agency to kill private party patents. I  
13 can understand that argument.

14 What's less clear to me is why a  
15 rational Congress would allow ex parte review  
16 initiated by the government before a  
17 governmental agency, that kind of a situation,  
18 but not allow a more robust adversarial process  
19 involving the government as a party?

20 So what's the -- what's the rational  
21 line that one could draw between those two  
22 arrangements? I -- I think that's where I'm  
23 struggling.

24 MS. BRINKMANN: I would say on the  
25 reexamination, Your Honor, it's much more of a

1 consideration, the agency's own  
2 reconsideration. And it's a back-and-forth, an  
3 interaction, as very much the original  
4 interaction between the examiner and the patent  
5 applicant is.

6 And in a reexamination, often the  
7 patent comes out stronger. It's not just to  
8 challenge it. It's to figure out where the  
9 strength is. And it can be reissued as a  
10 stronger patent, in fact. And that really  
11 furthers the interests that are at the crux of  
12 the patent system in our country.

13 JUSTICE SOTOMAYOR: But one thing you  
14 haven't said is why not simply say the  
15 government can't? Meaning, if you're going to  
16 be consistent, then why do you need to give a  
17 different reading to "person" in the ex parte  
18 examination context?

19 I'm not quite sure why you're doing  
20 that, but --

21 MS. BRINKMANN: And as I --

22 JUSTICE SOTOMAYOR: -- perhaps in  
23 answering -- because --

24 MS. BRINKMANN: And let me just say,  
25 Your Honor, also, I do think that if you're --



1 the starting point for the person in the ex  
2 parte reexamination is the same. It would not  
3 normally be construed to be part of the term  
4 "person."

5 If you're looking for context and any  
6 affirmative indications from Congress, there is  
7 a different history and structure from the --  
8 for the ex parte reexam. It was from 1980.  
9 It's not adversarial. The only role the  
10 person, whether it's the government or someone  
11 else, plays in an ex parte reexam is to request  
12 the reexam.

13 There was no discovery. There was no  
14 briefing. There was no adversarial process.  
15 So it could be different, Your Honor. We don't  
16 think it need be.

17 We think that the power of the  
18 government, in the authority and the structure  
19 that was set up, in addition to the reliance on  
20 the dialogue between the branches in the use of  
21 the term "person," that really reinforces that  
22 this use in the AIA review provisions does not  
23 include "person."

24 JUSTICE ALITO: But you're one --

25 JUSTICE BREYER: A very small firm

1 would like to go ahead with an invention, but  
2 it's afraid that Google owns a patent on it,  
3 but it think Google's patent is invalid. And  
4 so they start this procedure, which is supposed  
5 to be more efficient -- I don't know if it  
6 is -- but they start it because they want  
7 Google's patent to be declared that was no  
8 good. And then they can go ahead.

9 Well, a government agency either  
10 directly or because they've hired under  
11 contract the same person owns a patent or  
12 doesn't, but would like -- doesn't own a  
13 patent, but would like this same group under  
14 contract to go ahead, but they're afraid  
15 Google's patent blocks it.

16 Now, since the agency could own a  
17 patent, it may not, it seems like it's in the  
18 same situation as that small company or  
19 medium-sized company or big company. So why  
20 would Congress not want to allow that agency to  
21 use this fairly efficient method to get rid of  
22 what they see as an invalid patent that blocks  
23 their way?

24 Now you have one reason, which is this  
25 Court of Claims or, as I take it, the

1 government in the Court of Claims would not be  
2 estopped for what it might have brought, though  
3 it probably would be estopped for what it did  
4 bring in accordance -- bring before this quick  
5 procedure. Now that's one.

6 And I've got that. And that's a  
7 point. And the reason I'm asking this  
8 complicated question is I want to be sure there  
9 aren't others.

10 MS. BRINKMANN: A couple points I'd  
11 like to respond to, Your Honor.

12 First of all, on our answer, you know,  
13 that the government can defend in the Court of  
14 Federal Claims, true, but also the government  
15 through the expert office of the Patent and  
16 Trademark Office director has the ability to  
17 sua sponte reexamine a patent, just like that.  
18 And that certainly is something that could be  
19 done.

20 The second thing I would say is --

21 JUSTICE BREYER: Yeah, but, I mean,  
22 that's equally true of Joe Smith. I mean,  
23 unless the government, let's say the FTC, the  
24 EPA, the government's a huge organization of  
25 many, many different parts. DARPA. Who knows?

1 I mean, any of these agencies can want to,  
2 under contract or not, develop something.

3 MS. BRINKMANN: But, Your Honor --

4 JUSTICE BREYER: What's the  
5 difference?

6 MS. BRINKMANN: Well, it's not true  
7 for Joe Smith. Joe Smith cannot start -- he  
8 can ask the reexamination.

9 JUSTICE BREYER: And what can the  
10 government do -- what can DARPA do that Joe  
11 Smith can't do?

12 MS. BRINKMANN: Well, if I can just  
13 flip for a moment to just explain what the AIA  
14 review provisions are because I don't think  
15 they're as broad as would be believed through  
16 that kind of scenario.

17 First of all, the covered business  
18 method patent that's at review here, no one can  
19 bring this kind of review unless they've  
20 already been sued for infringement or charged  
21 with infringement. So no one -- DARPA could  
22 not go in and bring this review procedure.

23 JUSTICE BREYER: That isn't my  
24 question. My question is, what is it that  
25 DARPA could do or not do that Joe Smith, who

1 has his company, could do or not do? And I've  
2 got one of them, which is the Court of Claims,  
3 where there is a difference.

4 Where else is there a difference?

5 MS. BRINKMANN: The other difference  
6 is that DARPA can use it. It can't get  
7 enjoined from using it. It can just use a  
8 patented invention. No one else can do that.

9 And then the burden is on the patent  
10 owner to go into the Court of Federal Claims  
11 and seek it. And the government there, very  
12 different, treated very differently. No jury.  
13 No induced infringement. No enhanced damages.  
14 No enhanced fees. Very different structure.

15 And that, again, is a very important  
16 backdrop for what Congress was doing when it  
17 used the word "person."

18 JUSTICE KAVANAUGH: I was -- I was  
19 trying to figure out the difference between ex  
20 parte reexamination and these review procedures  
21 from your perspective.

22 And I gather that the difference is  
23 that the PTO will be the final word within the  
24 executive branch if the ex parte reexamination  
25 procedure were the only avenue, whereas the

1 Postal Service could seek judicial review  
2 against the office if dissatisfied, if the  
3 government's position prevailed? Is that the  
4 difference in the two review proceedings?

5 MS. BRINKMANN: Well, there also are  
6 all the litigation that's available if there is  
7 an action against the government for using the  
8 patented invention. And, certainly, that, as I  
9 just explained, is a very robust process for  
10 the government also.

11 If I could, I'd like to save the  
12 remainder of our time -- my time for rebuttal.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 MS. BRINKMANN: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Stewart.

17 ORAL ARGUMENT OF MALCOLM L. STEWART

18 ON BEHALF OF THE RESPONDENTS

19 MR. STEWART: Mr. Chief Justice, and  
20 may it please the Court:

21 This Court has said on a variety of  
22 occasions that the term "person" does not  
23 ordinarily include governmental bodies, but  
24 it's also made clear that this is not a  
25 hard-and-fast rule. And consistent with the

1 text of the Dictionary Act, the definition of  
2 "person" as not uncover -- not including  
3 governmental units can vary depending on the  
4 context.

5           And one way -- and this is something  
6 well short of a clear statement requirement.  
7 The Dictionary Act doesn't say if a particular  
8 law expressly provides otherwise the term will  
9 be given a different meaning. It says, unless  
10 the context provides, indicates otherwise.

11           And one way in which --

12           JUSTICE SOTOMAYOR: Except this is a  
13 very different situation. The Cato Institute  
14 in their amici brief suggests that in a  
15 situation in which the government is basically  
16 two branches of the government or two agencies  
17 of the government are disputing one another or  
18 before one another, that that's a special  
19 situation that requires a closer look and a  
20 more express statement.

21           It does seem like the deck is stacked  
22 against a private citizen who is dragged into  
23 these proceedings. They've got an executive  
24 agency acting as judge with an executive  
25 director who can pick the judges, who can

1 substitute judges, can reexamine what those  
2 judges say, and change the ruling, and you've  
3 got another government agency being the  
4 prosecutor at the same time.

5 In those situations, shouldn't you  
6 have a clear and express rule?

7 MR. STEWART: I -- I guess the first  
8 thing I would say is that regardless of how  
9 this case comes out, regardless of whether  
10 governmental units, federal governmental units  
11 are thought of as persons who can invoke inter  
12 partes and CBM review, there are at least two  
13 scenarios in which governmental bodies could  
14 wind up in PTAB proceedings.

15 The first is, as Justice Kagan alluded  
16 to, Section 207 expressly authorizes each  
17 federal agency to seek a patent. And the  
18 statute doesn't say so in so many words, but  
19 everybody understands that the same substantive  
20 and procedural provisions that govern anyone  
21 else's patent application will apply when a  
22 federal agency applies for a patent.

23 So, when the federal application is  
24 considered by an examiner, the examiner applies  
25 the same substantive standards and is -- is



1 trusted to do that, is trusted not to give  
2 special weight to the representation --

3 JUSTICE GORSUCH: Well, but --

4 MR. STEWART: -- of a federal agency.

5 JUSTICE GORSUCH: -- but, Mr. Stewart,  
6 there we have the express language of 207 that  
7 does that work. And here you're asking us to  
8 imply it.

9 And I think Justice Sotomayor raises a  
10 really important question. Normally, we -- we  
11 think of the executive branch as able to  
12 resolve its own disputes and speak with one  
13 voice.

14 And as Justice Kavanaugh alluded to  
15 with ex parte communication -- ex parte review,  
16 you have the final word of the PTO director as  
17 the final word of the executive branch on the  
18 status of a patent.

19 And, here, the scenario would be that  
20 the government speaks out of both sides of its  
21 mouth potentially. The PTO director resolving  
22 a case against, say, the Postal Service and  
23 coming to Court for us to resolve that dispute  
24 about the executive department's view of the  
25 law, that's unusual. Not to say unprecedented,

1 but unusual. And shouldn't we, as Justice  
2 Sotomayor suggested, at least expect some sort  
3 of clarity from Congress when it wants that  
4 unusual arrangement to reign?

5 MR. STEWART: Let me say two things,  
6 the first of which is a continuation of what I  
7 was saying to Justice Sotomayor, that, clearly,  
8 Congress did contemplate that there would be  
9 situations in which a federal agency could come  
10 before the PTAB because, in the initial  
11 examination context, if --

12 JUSTICE GORSUCH: If you could get to  
13 my question, Mr. Stewart. We acknowledge in  
14 207 -- nobody's here disputing that the  
15 executive can come before the PTAB -- before  
16 the PTO to -- to secure a patent.

17 MR. STEWART: And --

18 JUSTICE GORSUCH: That's in the  
19 language of 207.

20 MR. STEWART: Exactly. And -- and the  
21 statute doesn't say in so many words if a  
22 federal agency as patent applicant is  
23 dissatisfied with the examiner's decision, it  
24 can appeal to the PTAB and potentially appeal  
25 to the Federal Circuit. But everybody

1 understands that those provisions apply equally  
2 to federal agencies.

3           But the second thing I would say is,  
4 although there is a theoretical possibility  
5 that a federal agency could file such a suit,  
6 on balance, on net, I think our position is  
7 very likely to reduce the incidence of  
8 executive branch agencies disagreeing in court  
9 because what you have in 1498 is a provision  
10 for the United States to be sued for  
11 unauthorized use of the patented invention, and  
12 one of the defenses we can raise is that the  
13 patent was invalid. And it's very clear that  
14 Congress intended for all the defenses,  
15 including that one, to be available to the  
16 United States.

17           Now that wouldn't involve the  
18 spectacle of the PTO actually participating as  
19 -- as a party in the 1498 proceeding because,  
20 usually, the PTO wouldn't be in the  
21 infringement suit, but it would be a case of  
22 the Postal Service asking a court to rule that  
23 the PTO was mistaken in issuing the patent.  
24 And by a --

25           JUSTICE KAVANAUGH: That's -- that's

1 the difference that Justice Gorsuch is  
2 identifying. You have agency versus agency in  
3 federal court. And, again, not unprecedented,  
4 but unusual.

5 And why should we go down that road  
6 when there's ex parte reexamination process  
7 available? And why should we think that  
8 Congress wanted us to go down that road when  
9 they didn't put the estoppel protection in the  
10 -- in the -- at the back end?

11 MR. STEWART: Well, let me -- let me  
12 address that in -- in two parts. The first is,  
13 to -- to finish the answer I was giving to  
14 Justice Gorsuch, that by invoking CBM review in  
15 this case, the -- the Postal Service was able  
16 to avoid the situation in which the Court of  
17 Federal Claims would be asked to rule on the  
18 Postal Service's assertion that a PTO patent  
19 was invalid.

20 The matter was effectively resolved  
21 within the executive branch in the sense that  
22 the Postal Service initiated -- asked that CBM  
23 review be instituted. The director agreed. At  
24 the conclusion of those proceedings, the PTAB  
25 concluded that the -- the patent was invalid.

1 At that point, Return Mail was --

2 JUSTICE GORSUCH: Mr. Stewart, I hate  
3 to interrupt you, but I -- I'd really like an  
4 answer to the -- it's the same question I asked  
5 and Justice Kavanaugh asked, and perhaps you  
6 could get to it.

7 MR. STEWART: My -- my answer is it is  
8 theoretically possible that there could be an  
9 appeal from a PTAB decision -- by a federal  
10 agency from a PTAB decision that was  
11 unfavorable to the government. It hasn't  
12 happened yet. Presumably, in deciding whether  
13 such an appeal would be taken, the government  
14 and specifically --

15 JUSTICE KAVANAUGH: And you  
16 acknowledge that's unusual?

17 MR. STEWART: I acknowledge that it's  
18 unusual, but as I --

19 JUSTICE KAVANAUGH: And you  
20 acknowledge also, I think, that ex parte  
21 reexamination is a process available to the  
22 Postal Service in this instance to ask the PTO  
23 to engage in?

24 MR. STEWART: I don't see how it would  
25 be under Petitioner's theory; that is,

1 Petitioner says that the word "person"  
2 presumptively excludes the --

3 JUSTICE KAVANAUGH: Well, can't --  
4 can't the -- I'm sorry to interrupt. Can't the  
5 executive branch agencies always communicate  
6 with one another?

7 MR. STEWART: In -- in general, that  
8 happens, but as Justice Alito's question was  
9 indicating previously, it would be -- it would  
10 be quite problematic for that to occur in -- in  
11 this context. For example --

12 JUSTICE KAVANAUGH: Well, why is that?  
13 Under Article II, I would think all components  
14 of the executive branch always are able to  
15 communicate with one another absent some rule  
16 to the contrary that Congress might try to  
17 insert.

18 MR. STEWART: Well, for example,  
19 Section 301 says that any person can bring to  
20 the PTO's attention information -- prior art  
21 that potentially bears on the validity of an  
22 issued patent. But it also says that if that  
23 person explains in writing its reasons for  
24 thinking that the new prior art is relevant,  
25 that material shall be included in the file.

1           And Section 302 says that a person may  
2 request ex parte reexamination but that any  
3 such request will be communicated to the patent  
4 holder. And so it would be peculiar to say  
5 that an executive branch agency could  
6 short-circuit those mechanisms that are  
7 designed to make the process transparent, make  
8 it a part of the official record, simply by an  
9 end run.

10           It would also be peculiar to -- to  
11 kind of make up a regime in which one federal  
12 -- a federal official from one agency will call  
13 a counterpart at the PTO and say: Don't treat  
14 this as a request for ex parte reexamination,  
15 but put it in the file, deal with it in the  
16 same ways that Congress intended requests for  
17 ex parte reexamination to be made.

18           And the other -- the point I was  
19 trying to make about the -- the two points I  
20 was trying to make about the potential for an  
21 appeal are, first, we know from the statute  
22 that Congress didn't intend to rule that out  
23 because if the PT -- if a federal agency loses  
24 its appeal at the PTAB when it's trying to get  
25 a patent initially, the statute provides any

1 disappointed patent applicant with a right of  
2 appeal to the Federal Circuit, and we'd have to  
3 decide whether it was appropriate to pursue  
4 such an appeal.

5 Second, it's entirely clear from the  
6 statute that federal agencies can own patents.  
7 And those patents are potentially subject to  
8 other parties' requests for inter partes review  
9 or CBM review.

10 So, if Return Mail felt that the  
11 Postal Service had a patent that was invalid,  
12 it could have requested inter partes review or  
13 CBM review. If that decision by -- if the PTO  
14 had -- I'm sorry, if the PTAB had instituted  
15 review and had ruled against the Postal  
16 Service, the Postal Service as a party to the  
17 proceedings would have had a statutory right to  
18 appeal.

19 Again, we would have to decide as a  
20 matter of executive branch governance whether  
21 it was appropriate to take --

22 JUSTICE KAVANAUGH: I think the --

23 JUSTICE KAGAN: Mr. --

24 JUSTICE KAVANAUGH: Go ahead.

25 JUSTICE KAGAN: I think, Mr. Stewart,



1 I'm -- I'm not really understanding your  
2 affirmative argument here. I mean, let's  
3 assume that you have a presumption running  
4 against you. And we can argue about how strong  
5 the presumption is, but there's at least some  
6 presumption coming from the Dictionary Act,  
7 coming from just our cases on this topic, which  
8 says that the government isn't a person unless  
9 we see evidence that it is a person.

10 So what would you point to in this  
11 statute to tell us that the government is a  
12 person? And -- and, you know, what text are we  
13 talking about?

14 MR. STEWART: I would say that the  
15 strongest contextual evidence is that the word  
16 "person" in the provisions that define IPR and  
17 CBM review is used to make available to the  
18 general public a procedural mechanism, an  
19 advantage. It's made available on a -- a  
20 widespread basis.

21 Second, all of the reasons for making  
22 that mechanism --

23 JUSTICE KAGAN: Well, that doesn't  
24 seem -- I mean, that just is saying everybody  
25 else gets to do this.

1 MR. STEWART: Which is basically --

2 JUSTICE KAGAN: But --

3 MR. STEWART: Which is basically what  
4 the Court said in Georgia versus Evans and  
5 in --

6 JUSTICE GORSUCH: Isn't that flipping  
7 the presumption? I mean, the presumption is  
8 that "person" doesn't include the government,  
9 and you're suggesting, well, because "person"  
10 is broad and it's a big term, it includes the  
11 government.

12 MR. STEWART: I think there are --  
13 there are at least two or three different  
14 prerequisites -- prerequisites to -- to my  
15 theory about the context. The first is that it  
16 is making available a benefit as opposed to  
17 imposing a disadvantage. And that goes all the  
18 way back to Dollar Savings Bank in the 19th  
19 Century.

20 The second is that the benefit is  
21 broadly available. And in this -- that sense,  
22 this case, for instance, is distinguishable  
23 from Primate Protection League, where -- in  
24 Primate Protection League, the agency was  
25 arguing that it was a person acting under an

1 officer of the United States.

2 And if that argument had prevailed,  
3 the agency would have gotten a benefit that no  
4 private party has, namely --

5 JUSTICE KAGAN: What's -- what's the  
6 third?

7 MR. STEWART: The third is that there  
8 is no evident reason that Congress -- that  
9 Congress would have wanted to exclude federal  
10 agencies because the rationales for creating  
11 these mechanisms in the first place apply  
12 equally when the federal agency is the  
13 requestor.

14 JUSTICE KAGAN: I mean, when I hear  
15 you say this, Mr. Stewart, I -- I -- I guess  
16 what I was hoping for was that you would have  
17 an argument from particular statutory  
18 provisions.

19 I mean, I was trying to run an  
20 argument to Ms. Brinkmann about 207(a)(1) and  
21 (a)(3) and how those might suggest that the  
22 government was a person. But -- but I don't  
23 hear you saying anything like that. I hear you  
24 just saying, look, this is a broad provision  
25 and we can't think of a reason why the

1 government shouldn't be treated like everybody  
2 else, so the government should be treated like  
3 everybody else.

4 MR. STEWART: Let -- let me make one  
5 very quick general observation, and then I'll  
6 try to go to something more specific in the  
7 statute.

8 The very general observation is that  
9 the argument I was fleshing out was basically  
10 what the Court said in Georgia versus Evans and  
11 in Pfizer. It said, yes, the word "person"  
12 would not ordinarily include a state or a  
13 foreign government, but we can't see any reason  
14 why Congress would have wanted these units  
15 almost alone among potential plaintiffs not to  
16 be able to sue under the antitrust laws.

17 But, to be more specific, Section 1498  
18 authorizes suits against the United States for  
19 unauthorized use of a patented invention. And  
20 it has been -- a previous version of the  
21 statute expressly said that the United States  
22 had all available -- all defenses available to  
23 a private party. That language was deleted as  
24 unnecessary in the 1948 revision.

25 JUSTICE KAVANAUGH: But who deleted

1 that, though? That -- that wasn't deleted by  
2 Congress, was it?

3 MR. STEWART: That was deleted as part  
4 of the 1948 recodification. And the reviser's  
5 note explained that the -- the --

6 JUSTICE KAVANAUGH: It was the reviser  
7 who did that, right?

8 MR. STEWART: Yes.

9 JUSTICE KAVANAUGH: Congress didn't do  
10 that?

11 MR. STEWART: Well, Congress reenacted  
12 the -- the statute.

13 JUSTICE BREYER: Isn't there some kind  
14 of basic statutory canon interpretation, canon  
15 of interpretation that says where the reason  
16 for the rule applies, the rule applies?

17 And, here, we have the government,  
18 NASA, which might, in fact, want to do  
19 something, and they're being sued for  
20 infringing the patent.

21 Now we have a speedy way of resolving  
22 that. What reason would there be for not  
23 applying it? And now we have two. One is the  
24 Court of Claims difference, which is  
25 undoubtedly a difference, and the other is --

1 well, I'm not sure. Okay. But I'm going to go  
2 back and look at all those provisions that were  
3 cited to me. Okay.

4 That's, I would have thought, the  
5 statutory argument. Am I right?

6 MR. STEWART: I think that's correct.  
7 And I think, to take it to 1498 specifically,  
8 because that is the provision that subjects the  
9 government --

10 JUSTICE BREYER: 1498, by the way, is  
11 when I think they invented this canon of  
12 interpretation.

13 (Laughter.)

14 MR. STEWART: 1498 is the provision of  
15 Title 28 that subjects the United States to  
16 liability for unauthorized use of a patented  
17 invention. And it's established that the  
18 United States can invoke all available  
19 defenses.

20 Now one of the defenses that we might  
21 want to invoke is that the patent is invalid.  
22 This Court has held that the invalidity of a  
23 patent has to be proved by clear and convincing  
24 evidence.

25 That was not in a case involving the

1 federal government. The Court was not  
2 construing a statutory provision that was  
3 specific to the federal government. It was  
4 construing 35 U.S.C. 282, which says that a  
5 patent has been -- is presumed valid.

6 That understanding of patent validity  
7 and the -- the standard of proof necessary to  
8 show invalidity has been understood to carry  
9 over to Section 1498 suits, even though there's  
10 nothing in 1498 that says that in so many  
11 words, because, except to the extent that  
12 Congress specifies otherwise, these suits are  
13 conducted in basically the same way as ordinary  
14 infringement suits.

15 Now one of the prime reasons that  
16 people who invoke IPR or CBM do it is to -- is  
17 because they have actually been sued or expect  
18 to be sued for infringement and would prefer  
19 not to have to overcome the hurdle of proving  
20 invalidity by clear and convincing evidence.

21 And if they can get before the PTO,  
22 they will have a de novo standard of review,  
23 they'll be before the expert agency, they  
24 perceive that their chances of establishing  
25 invalidity will be greater.

1           It's not -- and that is particularly  
2           integral to the CBM review scheme, which, as  
3           Ms. Brinkmann was pointing out, is limited by  
4           statute to people who have been sued for or  
5           charged with infringement. It is designed --

6           JUSTICE GINSBURG: What does "charged  
7           with" means?

8           MR. STEWART: I'm sorry?

9           JUSTICE GINSBURG: What does "charged  
10          with" mean?

11          MR. STEWART: "Charged with" is -- it  
12          basically means you have received a cease and  
13          desist letter. You have been informed by the  
14          patent owner that it believes you to be  
15          infringing the patent, even though you haven't  
16          yet been sued.

17          The PTO has promulgated a regulation  
18          that says, in order to establish that you've  
19          been charged with infringement, you have to  
20          demonstrate that the likelihood of an  
21          infringement suit against you is sufficiently  
22          real and immediate that you would satisfy the  
23          standards of a declaratory judgment. It's --

24          JUSTICE GINSBURG: What about Ms.  
25          Brinkmann's linchpin that the estoppel



1 provision -- that the government effectively  
2 gets two bites of the apple; everybody else  
3 gets just one?

4 MR. STEWART: I -- I think we can be  
5 estopped in subsequent PTO proceedings. So we  
6 can't file successive IPR requests or CBM  
7 requests. And that category of estoppel would  
8 apply to us in full force.

9 It's true that the estoppel provision  
10 doesn't govern proceedings in the Court of  
11 Federal Claims. We would still be subject to  
12 common law estoppel, that the primary  
13 difference between the two is that, for IPR  
14 purposes, statutory estoppel encompasses  
15 arguments that could have been made but  
16 weren't, whereas common law estoppel  
17 encompasses only arguments that were actually  
18 made --

19 JUSTICE GINSBURG: By common law  
20 estoppel, what do you mean? You mean issue  
21 preclusion?

22 MR. STEWART: Issue preclusion, that's  
23 correct.

24 JUSTICE ALITO: And what -- what would  
25 you --

1 JUSTICE SOTOMAYOR: Could you tell me  
2 why is that?

3 JUSTICE ALITO: If we -- you know, if  
4 we indulge the -- the possible fiction that  
5 Congress actually gave a second of thought to  
6 the issue that's before us --

7 (Laughter.)

8 JUSTICE ALITO: -- I -- I'm not sure  
9 Petitioner has a pretty good -- has much of an  
10 explanation as to why it would treat -- why  
11 Congress would have wanted to treat the  
12 government differently from a private party as  
13 to these AIA proceedings.

14 But, on the other side, do you have an  
15 explanation why Congress would have wanted  
16 different estoppel rules to apply to the  
17 government?

18 MR. STEWART: I mean, obviously, the  
19 government in a variety of contexts is subject  
20 to different estoppel rules, not only equitable  
21 estoppel but also regular issue preclusion;  
22 whereas non-mutual collateral estoppel could  
23 apply to most parties, the federal government  
24 is not subject to non-mutual collateral  
25 estoppel. So it could be that Congress thought

1 it through and thought common law estoppel is  
2 good enough.

3 I take the point of your question to  
4 be it may well be the case that Congress didn't  
5 think about this one way or the other, and what  
6 should we do then? And, indeed, the Court in  
7 Pfizer said it is apparent that Congress didn't  
8 consider the question whether a foreign  
9 government should be able to sue under the  
10 antitrust laws.

11 So it didn't rest its decision on any  
12 affirmative evidence that Congress considered  
13 that question and affirmatively wanted foreign  
14 governments to be able to sue.

15 JUSTICE SOTOMAYOR: Well, doesn't that  
16 counsel in favor of the presumption? Shouldn't  
17 we make the government think about this issue?

18 It could very easily decide that we  
19 were wrong, if we were to decide in your  
20 adversary's favor, it's a hypothetical, but it  
21 would then be in a position to decide what kind  
22 of estoppel should be applicable or not in the  
23 Court of Federal Claims, but if it hasn't,  
24 assuming Justice Alito's process, wouldn't we  
25 be trumping the assumption by making a policy

1 judgment to include the government because it  
2 makes sense to some of us?

3 MR. STEWART: I -- I don't think you  
4 would be making your own policy judgment. And,  
5 indeed, in Pfizer, the same presumption was at  
6 issue, the same ordinary rule that the term  
7 "person" doesn't include foreign government --  
8 doesn't include governmental bodies, and the  
9 Court acknowledged that that principle was  
10 implicated by its decision, but it -- it found  
11 the fact that everybody else or practically  
12 everybody else could sue and that nobody could  
13 think of a good reason that foreign governments  
14 should be excluded to be a sufficient basis for  
15 rejecting the ordinary rule.

16 JUSTICE SOTOMAYOR: But there is a  
17 purported good reason here. There's a  
18 different estoppel that applies to the  
19 government. And that might be okay with  
20 Congress, but we're not sure of that.

21 MR. STEWART: I think that is -- that  
22 has been identified as a disadvantage of our  
23 proposed rule, but nobody thinks that that's  
24 the chain of thinking that Congress went  
25 through.

1           That is, Congress in deciding whether  
2 the -- if Congress were thinking about whether  
3 the government should be included in these  
4 provisions, presumably, it would first decide,  
5 do we want the government to be able to invoke  
6 IPR and CBM? And if the answer to that was  
7 yes, it would decide, okay, now what should the  
8 estoppel rule be for the government?

9           Congress would never say we'll first  
10 decide in what fora should estoppel be  
11 enforceable and then, having made that  
12 decision, will decide --

13           JUSTICE GORSUCH: So --

14           MR. STEWART: -- does it make sense to  
15 --

16           JUSTICE GORSUCH: -- Mr. Stewart, does  
17 it -- does the estoppel point become just even  
18 a little odder still when we consider that in  
19 the IPR proceedings it's the government that  
20 would be the plaintiff, as it were, seeking to  
21 cancel a patent before the government as judge,  
22 so both prosecutor and judge in these  
23 proceedings, and then not be bound by its own  
24 findings brought in a case by its own  
25 prosecutor, effectively, later in a Court of

1 Claims proceeding?

2 So I understand the government's often  
3 not bound by estoppel, but it's usually in the  
4 role of a defendant in those circumstances, and  
5 certainly not before its own tribunal. Isn't  
6 it a little unseemly to say that the executive  
7 branch shouldn't be bound by its own decisions?

8 MR. STEWART: Well, our position still  
9 is that, under common law estoppel, we would be  
10 bound by whatever adverse ruling the PTAB made  
11 --

12 JUSTICE GORSUCH: I understand that.

13 MR. STEWART: -- with respect to the  
14 arguments we actually advanced.

15 JUSTICE GORSUCH: No, we understand  
16 that. That wasn't the question.

17 MR. STEWART: And I say I don't think  
18 it would be unusual for Congress to decide  
19 there will be somewhat different estoppel rules  
20 with respect to the government than with  
21 respect to private parties.

22 Again, people were alluding in earlier  
23 parts of the argument to the possible anomaly  
24 of the government appealing from an adverse  
25 PTAB decision. And the Court in United States

1 versus Mendoza said one of the reasons that the  
2 government is sometimes subject to different  
3 estoppel rules than private parties is that the  
4 government's appeal calculus is different.

5           And so, to the extent that we might  
6 deem it inappropriate or might be reluctant to  
7 pursue an appeal from an adverse PTAB decision,  
8 Congress could say: Well, they should still be  
9 bound by what the PTAB actually decided with  
10 respect to the claims, the arguments they  
11 actually made, but not with respect to  
12 additional claims they couldn't make.

13           JUSTICE KAVANAUGH: When you take a  
14 step back here and think about this case, there  
15 are provisions that specifically give the  
16 government the same rights as persons, 207 and  
17 other provisions in this statute.

18           We don't have them here, obviously.  
19 That's what raises the question. So, as  
20 Justice Sotomayor says, we have the presumption  
21 that the government is not a person.

22           And then we look at the context. And  
23 you've said the context supports you. But  
24 there are contextual points that seem to cut  
25 the other way.

1           And just to summarize them, you still  
2     have ex parte reexamination available, so it's  
3     not as if Congress would have thought the  
4     government's cut out entirely. If your  
5     position wins, you have the anomaly, which can  
6     be overcome, but it is an anomaly of government  
7     against government lawsuits in federal court.

8           And, third, even though you're trying  
9     to make the best of it, the estoppel would be  
10    very different and not part of the bargain that  
11    seems to have been part of what Congress put in  
12    place here in terms of the system.

13           So those are all contextual points  
14    that actually cut against you, it seems to me,  
15    where your burden, because we start from the  
16    baseline of the government's not a person, is  
17    you need the context to strongly support you.

18           So that's just the kind of stepping  
19    back summary of things I see as problems. You  
20    can respond to them as you see fit.

21           MR. STEWART: Let me make a couple of  
22    additional contextual points, one of which is a  
23    continuation of an answer I was giving to  
24    Justice Kagan and then another is a new one.

25           What I was saying to Justice Kagan is



1 everybody accepts that the government in  
2 litigation bears the same burden of showing  
3 patent invalidity by clear and convincing  
4 evidence.

5 Now private parties have available to  
6 them an alternative, IPR/CBM proceedings, to  
7 try to escape that burden, to try to come  
8 before a different decisionmaker who will apply  
9 a de novo standard of review.

10 You could think of it as roughly  
11 analogous to a primary jurisdiction mechanism,  
12 where one issue in the lawsuit is referred to  
13 an agency that has expertise in -- in the  
14 relevant area.

15 And the Court in applying various  
16 presumptions and clear statements rules --  
17 clear statement rules has been especially  
18 solicitous of the government as defendant; that  
19 is, resolving in the government's favor  
20 ambiguities about whether the government can be  
21 sued, what is the scope of its liability, et  
22 cetera.

23 This is not quite that. But  
24 Petitioner is still arguing that the government  
25 should be denied access to a procedural

1 mechanism in its capacity as defendant that is  
2 available to all private parties.

3           If somebody argued that the patent  
4 laws allowed any other defendant to show patent  
5 invalidity by a preponderance of the evidence  
6 but allowed -- but required a federal agency as  
7 defendant to prove it by clear and convincing  
8 evidence, I think the Court's reaction would be  
9 it's conceivable, but we would need pretty  
10 clear language that Congress intended that  
11 result.

12           This is not quite that, but the  
13 Petitioner's argument is still we don't get  
14 access to a mechanism for a more favorable  
15 burden of proof.

16           The second thing I would say is we've  
17 been looking at the case up to this point from  
18 the perspective of the Postal Service, and, in  
19 part, Congress created the IPR and CBM  
20 mechanisms with the interests of private  
21 parties in mind, the interest in mind of people  
22 who might be sued for infringement and would  
23 want an avenue for seeking invalidation of the  
24 patent. But Congress also wanted to assist the  
25 PTO in doing its job.

1           And one impetus for the AIA was the  
2 belief that ex parte reexamination simply  
3 hadn't been affected -- effective, I'm sorry,  
4 that not enough people had invoked it, and that  
5 because the people who invoked it didn't have a  
6 right to participate in the proceedings, the  
7 PTO wasn't getting enough information to do its  
8 job of not just issuing good patents in the  
9 first instance but weeding out patents that  
10 were both bad and of commercial --

11           JUSTICE KAGAN: May I ask, Mr.  
12 Stewart, just a couple factual questions? This  
13 case is about the post office, but let's say it  
14 wasn't the post office. Let's say it was just  
15 a regular executive branch agency.

16           Who would it be that would be making  
17 the decision whether to seek a proceeding like  
18 this? I mean, is there a patent officer in  
19 every agency whose -- whose -- whose job it  
20 would be to decide when this was appropriate?

21           MR. STEWART: I don't know the answer  
22 to that. I know we have a unit in the Civil  
23 Division that will sometimes defend the  
24 government in CFC litigation but also at least  
25 on some occasions will be representing the

1 interests of a federal agency in PTAB  
2 proceedings.

3 JUSTICE KAGAN: I guess what I'm  
4 trying to figure out is, to the extent that you  
5 think that maybe Congress treated the  
6 government differently here because they were  
7 afraid that the government in front of the PTAB  
8 is -- has a kind of home court advantage and  
9 that they didn't want that, I guess the  
10 question is, is that true?

11 I mean, is this a community of patent  
12 officials who talk to each other all the time  
13 across the government, who know each other, who  
14 deal with each other, or is this really  
15 stovepiped so that none of these people -- the  
16 PTAB would have no clue of who it was before  
17 them when the Department of HHS walks in?

18 MR. STEWART: I mean, I have been to  
19 the Federal Circuit bench and bar conference  
20 and there -- there is a community thought of as  
21 the patent bar, and so there probably is some  
22 form of a professional acquaintance between the  
23 -- the various types of governmental members.

24 But I think the one thing I would  
25 stress most is, in other respects, Congress

1 evidently didn't see that as a problem because,  
2 in authorizing federal agencies to apply for  
3 patents, it didn't create a special patent  
4 examination process or even a special  
5 administrative appeal process so that the  
6 government would come before people who were  
7 unusually impervious to that sort of  
8 overreaching.

9           And, similarly, Congress made  
10 federal-owned patents susceptible to potential  
11 IPR and CBM requests by private parties. And  
12 it didn't create any special mechanism out of  
13 concern that the government would have a home  
14 court advantage in those areas.

15           And so I think the overriding theme of  
16 the legislation is you have the authorization  
17 in Section 207 to apply for a patent, and  
18 everybody understands that all the statutory  
19 provisions that flesh out the details of how  
20 that system will be administered will be done  
21 the same way with respect to governmental  
22 applicants.

23           JUSTICE KAVANAUGH: If you were -- if  
24 you were not to prevail here, what would the  
25 real world problems be for the government?

1           MR. STEWART: You know, I'm told by  
2 the PTO that in the years since the AIA was  
3 enacted, federal agencies have submitted 20  
4 requests for all forms of AIA post-issuance  
5 review combined.

6           I mean, if you look at it from the  
7 standpoint of the government's overall  
8 litigation efforts across all subject matters,  
9 it's pretty small.

10           But, if you ask would the court  
11 naturally or likely construe a statute to say  
12 the government has to surmount a higher burden  
13 of proof than a private party, it seems  
14 unlikely even if it's a narrow class of suits.  
15 Thank you.

16           CHIEF JUSTICE ROBERTS: Thank you, Mr.  
17 Stewart.

18           Three minutes, Ms. Brinkmann.

19           REBUTTAL ARGUMENT OF BETH S. BRINKMANN

20           ON BEHALF OF PETITIONER

21           MS. BRINKMANN: Thank you, Your Honor.  
22 I have four points I'd like to make very  
23 quickly.

24           The first one, I just want to clarify  
25 the thing about trying to short-circuit the

1 reexam process.

2           Actually, under 301, there's a  
3 provision that says, when a person requests a  
4 reexamination, it can actually be confidential.  
5 So this idea that somehow there's going to be a  
6 secret person asking if the statute already  
7 says that doesn't have to be disclosed, I think  
8 that's 301(e).

9           The second thing I would point about,  
10 just the anomaly of the agency versus agency.  
11 Whatever anyone thinks of that, it would be  
12 extraordinary for Congress to do that through  
13 silence.

14           And to go to this question about who  
15 would represent the government, I do know that  
16 in the Civil Division, there, of course, is an  
17 office that handles the patent litigation. In  
18 fact, that is the office, the appellate  
19 division that handles amicus briefs for the PTO  
20 before the Federal Circuit, so there is  
21 significant interaction.

22           I mean, I'm not suggesting that no one  
23 would follow their roles and, you know, the law  
24 and all, but just to answer your question,  
25 Justice Kagan.

1           The other thing I would point out is  
2           that the idea of why it would be the  
3           reexamination instead of this process, the PTO  
4           is the patent expert for the government. I  
5           mean, that -- are there other people in the  
6           government who know about patents? Sure.

7           But, when the Congress is thinking and  
8           acting against these backdrop principles, and  
9           thinking, well, the PTO is the expert that  
10          would handle this.

11          The last point I would just make is  
12          about this Court's long-standing presumptive  
13          definition. It's the traditional legal  
14          definition of "person" not to include the  
15          government.

16          And in our reply brief, we have four  
17          examples of over a century where this Court has  
18          held that there were benefits that the  
19          government wanted, could have gotten but, no,  
20          that was not what the word "person" meant.

21          And they were sometimes when the  
22          government was the defendant. For example, in  
23          the International Primate case, the NIH wanted  
24          to be able to remove a case. And the court  
25          said no.



1           In Cooper, we already spoke about  
2 that, the government wanted treble -- civil  
3 damages at all and treble. No.

4           Davis versus Pringle was a case where  
5 the government wanted priority in a bankruptcy  
6 for its claims, and the presumptive definition  
7 of "person" excluded it.

8           And then it dates all the way back to  
9 the Fox case. That involved a state, a New  
10 York law, but that was the traditional legal  
11 presumption that "person" who could inherit and  
12 own land did not include the government.

13           So we submit here --

14           JUSTICE KAGAN: Does that presumption  
15 make any sense anymore, Ms. Brinkmann? I mean,  
16 the idea of a presumption like this is that  
17 it's a stable default rule against which  
18 Congress can operate.

19           But does anybody really think -- this  
20 perhaps goes back to Justice Alito's question  
21 -- does anybody really think Congress thinks  
22 about this as a default rule and legislates  
23 against it? And if not, shouldn't we just do  
24 what strikes us as the thing Congress would  
25 have wanted done with respect to any particular

1 statute?

2 MS. BRINKMANN: Your Honor, we think  
3 there's a very good reason for it. Using  
4 "person," knowing that it doesn't include the  
5 government, fine.

6 When Congress and the President enact  
7 laws that involve the government, a lot of  
8 other things come into play. Sovereign  
9 immunity, prosecutorial authority, there are  
10 all kinds of other things.

11 So, yes, it makes all kinds of sense  
12 because you just don't want to have these  
13 scenarios all of a sudden: Wow, the  
14 government's in there now, how does that play  
15 out? Rather, they're not included. That is  
16 the presumption.

17 And when they are intended to be  
18 included, they can be enacted. And Congress  
19 can change this if they want. That's what they  
20 did in Cooper. And, indeed, did it in a  
21 different way and provided, not treble damages  
22 initially, but a different remedy for the  
23 government.

24 Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:05 a.m., the case  
3 was submitted.)

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## Official - Subject to Final Review

<b>1</b>	<b>Act</b> <sup>[18]</sup> 4:15 5:18 8:1 11:8,14,20 12:3,6,12,12 13:23 16:19 17:20 19:14,20 31:1,7 41:6 <b>acting</b> <sup>[3]</sup> 31:24 42:25 64:8 <b>action</b> <sup>[3]</sup> 13:20 18:17 30:7 <b>actions</b> <sup>[4]</sup> 14:12,12 18:7,9 <b>actual</b> <sup>[1]</sup> 22:14 <b>actually</b> <sup>[10]</sup> 35:18 47:17 49:17 50:5 54:14 55:9,11 56:14 63:2,4 <b>addition</b> <sup>[2]</sup> 16:24 25:19 <b>additional</b> <sup>[3]</sup> 14:3 55:12 56:22 <b>address</b> <sup>[1]</sup> 36:12 <b>administered</b> <sup>[1]</sup> 61:20 <b>administrative</b> <sup>[2]</sup> 5:4 61:5 <b>advanced</b> <sup>[1]</sup> 54:14 <b>advantage</b> <sup>[3]</sup> 41:19 60:8 61:14 <b>adversarial</b> <sup>[6]</sup> 5:4,7 8:4 23:18 25:9,14 <b>adversaries</b> <sup>[1]</sup> 21:19 <b>adversary's</b> <sup>[1]</sup> 51:20 <b>adverse</b> <sup>[3]</sup> 54:10,24 55:7 <b>affected</b> <sup>[1]</sup> 59:3 <b>affirmative</b> <sup>[10]</sup> 12:17,24 13:5 14:2 16:22 17:1 18:17 25:6 41:2 51:12 <b>affirmatively</b> <sup>[2]</sup> 13:11 51:13 <b>afraid</b> <sup>[3]</sup> 26:2,14 60:7 <b>Agencies</b> <sup>[12]</sup> 14:25 17:1 18:18 28:1 31:16 35:2,8 38:5 40:6 43:10 61:2 62:3 <b>agency</b> <sup>[37]</sup> 8:12 9:3 10:17 13:1 15:20 18:19 19:19 23:12,17 26:9,16,20 31:24 32:3,17,22 33:4 34:9,22 35:5 36:2,2 37:10 39:5,12,23 42:24 43:3,12 47:23 57:13 58:6 59:15,19 60:1 63:10,10 <b>agency's</b> <sup>[1]</sup> 24:1 <b>agree</b> <sup>[3]</sup> 11:15 19:11,17 <b>agreed</b> <sup>[1]</sup> 36:23 <b>ahead</b> <sup>[5]</sup> 22:9 26:1,8,14 40:24 <b>AIA</b> <sup>[8]</sup> 7:25 9:4 25:22 28:13 50:13 59:1 62:2,4 <b>akin</b> <sup>[1]</sup> 11:25 <b>AL</b> <sup>[1]</sup> 1:7 <b>ALITO</b> <sup>[6]</sup> 8:10,23 25:24 49:24 50:3,8 <b>Alito's</b> <sup>[3]</sup> 38:8 51:24 65:20 <b>allow</b> <sup>[5]</sup> 9:6 20:5 23:15,18 26:20 <b>allowable</b> <sup>[1]</sup> 8:17 <b>allowed</b> <sup>[2]</sup> 58:4,6 <b>allows</b> <sup>[2]</sup> 6:22 13:9 <b>alluded</b> <sup>[2]</sup> 32:15 33:14 <b>alluding</b> <sup>[1]</sup> 54:22 <b>almost</b> <sup>[1]</sup> 44:15 <b>alone</b> <sup>[1]</sup> 44:15 <b>already</b> <sup>[5]</sup> 10:21 22:1 28:20 63:6 65:1 <b>alternative</b> <sup>[1]</sup> 57:6 <b>although</b> <sup>[1]</sup> 35:4 <b>ambiguities</b> <sup>[1]</sup> 57:20 <b>amendment</b> <sup>[1]</sup> 21:23 <b>America</b> <sup>[2]</sup> 8:1 12:12 <b>amici</b> <sup>[1]</sup> 31:14 <b>amicus</b> <sup>[2]</sup> 22:25 63:19	<b>among</b> <sup>[1]</sup> 44:15 <b>amongst</b> <sup>[1]</sup> 21:18 <b>amply</b> <sup>[1]</sup> 22:1 <b>analogous</b> <sup>[1]</sup> 57:11 <b>analysis</b> <sup>[1]</sup> 9:16 <b>anomaly</b> <sup>[4]</sup> 54:23 56:5,6 63:10 <b>another</b> <sup>[10]</sup> 13:18 14:10 17:5 18:19 31:17,18 32:3 38:6,15 56:24 <b>answer</b> <sup>[8]</sup> 27:12 36:13 37:4,7 53:6 56:23 59:21 63:24 <b>answering</b> <sup>[1]</sup> 24:23 <b>antitrust</b> <sup>[5]</sup> 13:21 14:20 15:13 44:16 51:10 <b>anybody</b> <sup>[2]</sup> 65:19,21 <b>apparent</b> <sup>[1]</sup> 51:7 <b>appeal</b> <sup>[12]</sup> 34:24,24 37:9,13 39:21,24 40:2,4,18 55:4,7 61:5 <b>appealing</b> <sup>[1]</sup> 54:24 <b>APPEARANCES</b> <sup>[1]</sup> 1:18 <b>appellate</b> <sup>[1]</sup> 63:18 <b>apple</b> <sup>[1]</sup> 49:2 <b>applicable</b> <sup>[1]</sup> 51:22 <b>applicant</b> <sup>[3]</sup> 24:5 34:22 40:1 <b>applicants</b> <sup>[1]</sup> 61:22 <b>application</b> <sup>[2]</sup> 32:21,23 <b>applies</b> <sup>[6]</sup> 16:9 32:22,24 45:16,16 52:18 <b>apply</b> <sup>[12]</sup> 19:16,24,24 32:21 35:1 43:11 49:8 50:16,23 57:8 61:2,17 <b>applying</b> <sup>[2]</sup> 45:23 57:15 <b>appropriate</b> <sup>[4]</sup> 21:17 40:3,21 59:20 <b>area</b> <sup>[3]</sup> 20:23 22:17 57:14 <b>areas</b> <sup>[1]</sup> 61:14 <b>aren't</b> <sup>[1]</sup> 27:9 <b>argue</b> <sup>[2]</sup> 18:6 41:4 <b>argued</b> <sup>[1]</sup> 58:3 <b>arguing</b> <sup>[2]</sup> 42:25 57:24 <b>argument</b> <sup>[24]</sup> 1:15 3:2,5,8 4:4,8 8:24,25 11:8 13:8,14 21:6,8 23:13 30:17 41:2 43:2,17,20 44:9 46:5 54:23 58:13 62:19 <b>arguments</b> <sup>[4]</sup> 49:15,17 54:14 55:10 <b>arrangement</b> <sup>[1]</sup> 34:4 <b>arrangements</b> <sup>[1]</sup> 23:22 <b>art</b> <sup>[5]</sup> 6:18 15:6 22:13 38:20,24 <b>Article</b> <sup>[1]</sup> 38:13 <b>aspects</b> <sup>[3]</sup> 12:19 13:10 20:8 <b>assertion</b> <sup>[1]</sup> 36:18 <b>assignments</b> <sup>[1]</sup> 20:2 <b>assist</b> <sup>[1]</sup> 58:24 <b>assume</b> <sup>[1]</sup> 41:3 <b>assuming</b> <sup>[1]</sup> 51:24 <b>assumption</b> <sup>[1]</sup> 51:25 <b>attention</b> <sup>[3]</sup> 6:25 22:16 38:20 <b>attorney</b> <sup>[1]</sup> 16:14 <b>authority</b> <sup>[6]</sup> 18:10 21:14 23:2,5 25:18 66:9 <b>authorization</b> <sup>[1]</sup> 61:16 <b>authorizes</b> <sup>[2]</sup> 32:16 44:18 <b>authorizing</b> <sup>[1]</sup> 61:2 <b>available</b> <sup>[14]</sup> 30:6 35:15 36:7 37:21 41:17,19 42:16,21 44:22,22 46:	18 56:2 57:5 58:2 <b>avenue</b> <sup>[3]</sup> 21:17 29:25 58:23 <b>avoid</b> <sup>[1]</sup> 36:16 <b>away</b> <sup>[1]</sup> 17:23
<b>2</b>	<b>20</b> <sup>[1]</sup> 62:3 <b>2011</b> <sup>[1]</sup> 8:2 <b>2019</b> <sup>[1]</sup> 1:12 <b>207</b> <sup>[10]</sup> 12:25 13:9 17:1 19:11 32:16 33:6 34:14,19 55:16 61:17 <b>207(a)(1)</b> <sup>[3]</sup> 20:12 21:5 43:20 <b>207(a)(3)</b> <sup>[2]</sup> 20:13 21:5 <b>257</b> <sup>[1]</sup> 16:12 <b>28</b> <sup>[1]</sup> 46:15 <b>282</b> <sup>[1]</sup> 47:4 <b>29</b> <sup>[1]</sup> 3:7 <b>292</b> <sup>[1]</sup> 16:5 <b>296</b> <sup>[1]</sup> 17:10	<b>among</b> <sup>[1]</sup> 44:15 <b>amongst</b> <sup>[1]</sup> 21:18 <b>amply</b> <sup>[1]</sup> 22:1 <b>analogous</b> <sup>[1]</sup> 57:11 <b>analysis</b> <sup>[1]</sup> 9:16 <b>anomaly</b> <sup>[4]</sup> 54:23 56:5,6 63:10 <b>another</b> <sup>[10]</sup> 13:18 14:10 17:5 18:19 31:17,18 32:3 38:6,15 56:24 <b>answer</b> <sup>[8]</sup> 27:12 36:13 37:4,7 53:6 56:23 59:21 63:24 <b>answering</b> <sup>[1]</sup> 24:23 <b>antitrust</b> <sup>[5]</sup> 13:21 14:20 15:13 44:16 51:10 <b>anybody</b> <sup>[2]</sup> 65:19,21 <b>apparent</b> <sup>[1]</sup> 51:7 <b>appeal</b> <sup>[12]</sup> 34:24,24 37:9,13 39:21,24 40:2,4,18 55:4,7 61:5 <b>appealing</b> <sup>[1]</sup> 54:24 <b>APPEARANCES</b> <sup>[1]</sup> 1:18 <b>appellate</b> <sup>[1]</sup> 63:18 <b>apple</b> <sup>[1]</sup> 49:2 <b>applicable</b> <sup>[1]</sup> 51:22 <b>applicant</b> <sup>[3]</sup> 24:5 34:22 40:1 <b>applicants</b> <sup>[1]</sup> 61:22 <b>application</b> <sup>[2]</sup> 32:21,23 <b>applies</b> <sup>[6]</sup> 16:9 32:22,24 45:16,16 52:18 <b>apply</b> <sup>[12]</sup> 19:16,24,24 32:21 35:1 43:11 49:8 50:16,23 57:8 61:2,17 <b>applying</b> <sup>[2]</sup> 45:23 57:15 <b>appropriate</b> <sup>[4]</sup> 21:17 40:3,21 59:20 <b>area</b> <sup>[3]</sup> 20:23 22:17 57:14 <b>areas</b> <sup>[1]</sup> 61:14 <b>aren't</b> <sup>[1]</sup> 27:9 <b>argue</b> <sup>[2]</sup> 18:6 41:4 <b>argued</b> <sup>[1]</sup> 58:3 <b>arguing</b> <sup>[2]</sup> 42:25 57:24 <b>argument</b> <sup>[24]</sup> 1:15 3:2,5,8 4:4,8 8:24,25 11:8 13:8,14 21:6,8 23:13 30:17 41:2 43:2,17,20 44:9 46:5 54:23 58:13 62:19 <b>arguments</b> <sup>[4]</sup> 49:15,17 54:14 55:10 <b>arrangement</b> <sup>[1]</sup> 34:4 <b>arrangements</b> <sup>[1]</sup> 23:22 <b>art</b> <sup>[5]</sup> 6:18 15:6 22:13 38:20,24 <b>Article</b> <sup>[1]</sup> 38:13 <b>aspects</b> <sup>[3]</sup> 12:19 13:10 20:8 <b>assertion</b> <sup>[1]</sup> 36:18 <b>assignments</b> <sup>[1]</sup> 20:2 <b>assist</b> <sup>[1]</sup> 58:24 <b>assume</b> <sup>[1]</sup> 41:3 <b>assuming</b> <sup>[1]</sup> 51:24 <b>assumption</b> <sup>[1]</sup> 51:25 <b>attention</b> <sup>[3]</sup> 6:25 22:16 38:20 <b>attorney</b> <sup>[1]</sup> 16:14 <b>authority</b> <sup>[6]</sup> 18:10 21:14 23:2,5 25:18 66:9 <b>authorization</b> <sup>[1]</sup> 61:16 <b>authorizes</b> <sup>[2]</sup> 32:16 44:18 <b>authorizing</b> <sup>[1]</sup> 61:2 <b>available</b> <sup>[14]</sup> 30:6 35:15 36:7 37:21 41:17,19 42:16,21 44:22,22 46:	<b>B</b>
<b>3</b>	<b>3</b> <sup>[1]</sup> 3:4 <b>301</b> <sup>[3]</sup> 7:19 38:19 63:2 <b>301(e)</b> <sup>[1]</sup> 63:8 <b>302</b> <sup>[1]</sup> 39:1 <b>303</b> <sup>[4]</sup> 6:21 7:19 8:18 22:11 <b>317</b> <sup>[2]</sup> 15:16 16:1 <b>327</b> <sup>[1]</sup> 16:2 <b>35</b> <sup>[1]</sup> 47:4	<b>back</b> <sup>[12]</sup> 5:8 8:3 11:1 18:12 21:22 36:10 42:18 46:2 55:14 56:19 65:8,20 <b>back-and-forth</b> <sup>[2]</sup> 8:8 24:2 <b>backdrop</b> <sup>[4]</sup> 16:20 21:10 29:16 64:8 <b>bad</b> <sup>[5]</sup> 6:6 7:17 9:19 21:12 59:10 <b>balance</b> <sup>[3]</sup> 5:5,17 35:6 <b>Bank</b> <sup>[1]</sup> 42:18 <b>bankruptcy</b> <sup>[1]</sup> 65:5 <b>bar</b> <sup>[2]</sup> 60:19,21 <b>bargain</b> <sup>[1]</sup> 56:10 <b>barrier</b> <sup>[1]</sup> 23:1 <b>based</b> <sup>[1]</sup> 11:11 <b>baseline</b> <sup>[1]</sup> 56:16 <b>basic</b> <sup>[1]</sup> 45:14 <b>basically</b> <sup>[6]</sup> 31:15 42:1,3 44:9 47:13 48:12 <b>basis</b> <sup>[2]</sup> 41:20 52:14 <b>Bayh-Dole</b> <sup>[1]</sup> 19:20 <b>bears</b> <sup>[2]</sup> 38:21 57:2 <b>become</b> <sup>[1]</sup> 53:17 <b>beginning</b> <sup>[1]</sup> 22:18 <b>behalf</b> <sup>[8]</sup> 1:20 2:23 3:4,7,10 4:9 30:18 62:20 <b>belief</b> <sup>[1]</sup> 59:2 <b>believe</b> <sup>[1]</sup> 18:7 <b>believed</b> <sup>[1]</sup> 28:15 <b>believes</b> <sup>[1]</sup> 48:14 <b>bench</b> <sup>[1]</sup> 60:19 <b>benefit</b> <sup>[3]</sup> 42:16,20 43:3 <b>benefits</b> <sup>[1]</sup> 64:18 <b>best</b> <sup>[2]</sup> 15:8 56:9 <b>BETH</b> <sup>[5]</sup> 1:19 3:3,9 4:8 62:19 <b>between</b> <sup>[8]</sup> 4:19 17:14 23:21 24:4 25:20 29:19 49:13 60:22 <b>big</b> <sup>[2]</sup> 26:19 42:10 <b>bites</b> <sup>[1]</sup> 49:2 <b>blocks</b> <sup>[2]</sup> 26:15,22 <b>bodies</b> <sup>[3]</sup> 30:23 32:13 52:8 <b>both</b> <sup>[5]</sup> 10:21 12:23 33:20 53:22 59:10 <b>bound</b> <sup>[5]</sup> 53:23 54:3,7,10 55:9 <b>branch</b> <sup>[11]</sup> 29:24 33:11,17 35:8 36:21 38:5,14 39:5 40:20 54:7 59:15 <b>branches</b> <sup>[7]</sup> 4:14,19 5:22 17:14 19:6 25:20 31:16 <b>BREYER</b> <sup>[9]</sup> 14:16,19 25:25 27:21 28:4,9,23 45:13 46:10 <b>brief</b> <sup>[4]</sup> 14:22 15:16 31:14 64:16 <b>briefing</b> <sup>[1]</sup> 25:14 <b>briefs</b> <sup>[2]</sup> 22:25 63:19 <b>bring</b> <sup>[7]</sup> 7:20 14:11 27:4,4 28:19,22 38:19 <b>bringing</b> <sup>[2]</sup> 6:24 20:17 <b>BRINKMANN</b> <sup>[45]</sup> 1:19 3:3,9 4:7,8,10 5:16 6:20 7:4,7,12 8:16 9:11	
<b>6</b>	<b>61</b> <sup>[1]</sup> 3:10		
<b>A</b>	<b>a)(3)</b> <sup>[1]</sup> 43:21 <b>a.m</b> <sup>[3]</sup> 1:16 4:2 67:2 <b>ability</b> <sup>[1]</sup> 27:16 <b>able</b> <sup>[11]</sup> 6:14 9:4 18:2 33:11 36:15 38:14 44:16 51:9,14 53:5 64:24 <b>above-entitled</b> <sup>[1]</sup> 1:14 <b>absent</b> <sup>[1]</sup> 38:15 <b>accepts</b> <sup>[1]</sup> 57:1 <b>access</b> <sup>[2]</sup> 57:25 58:14 <b>accordance</b> <sup>[2]</sup> 9:5 27:4 <b>according</b> <sup>[2]</sup> 7:2 11:14 <b>acknowledge</b> <sup>[4]</sup> 34:13 37:16,17,20 <b>acknowledged</b> <sup>[1]</sup> 52:9 <b>acquaintance</b> <sup>[1]</sup> 60:22 <b>across</b> <sup>[2]</sup> 60:13 62:8		

## Official - Subject to Final Review

<p>10:20 11:21 12:9 13:15 14:17 15:14 17:19 18:3 19:10,18 21:7 22:10 23:4,5,7,24 24:21,24 27:10 28:3,6,12 29:5 30:5,15 43:20 48:3 62:18,19,21 65:15 66:2</p> <p><b>Brinkmann's</b> [1] 48:25</p> <p><b>broad</b> [4] 22:17 28:15 42:10 43:24</p> <p><b>broadly</b> [1] 42:21</p> <p><b>brought</b> [4] 22:16,21 27:2 53:24</p> <p><b>burden</b> [6] 29:9 56:15 57:2,7 58:15 62:12</p> <p><b>business</b> [1] 28:17</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>calculus</b> [1] 55:4</p> <p><b>call</b> [1] 39:12</p> <p><b>calls</b> [1] 22:5</p> <p><b>came</b> [1] 1:14</p> <p><b>cancel</b> [1] 53:21</p> <p><b>cannot</b> [1] 28:7</p> <p><b>canon</b> [3] 45:14,14 46:11</p> <p><b>capacity</b> [1] 58:1</p> <p><b>care</b> [1] 13:13</p> <p><b>carry</b> [1] 47:8</p> <p><b>Case</b> [24] 4:4,12 13:17,17 14:17 16:7 17:7 32:9 33:22 35:21 36:15 42:22 46:25 51:4 53:24 55:14 58:17 59:13 64:23,24 65:4,9 67:1,2</p> <p><b>cases</b> [1] 41:7</p> <p><b>category</b> [1] 49:7</p> <p><b>Cato</b> [1] 31:13</p> <p><b>CBM</b> [12] 32:12 36:14,22 40:9,13 41:17 47:16 48:2 49:6 53:6 58:19 61:11</p> <p><b>cease</b> [1] 48:12</p> <p><b>Century</b> [2] 42:19 64:17</p> <p><b>cert</b> [1] 18:5</p> <p><b>certainly</b> [4] 12:9 27:18 30:8 54:5</p> <p><b>cetera</b> [2] 14:25 57:22</p> <p><b>CFC</b> [1] 59:24</p> <p><b>chain</b> [1] 52:24</p> <p><b>challenge</b> [1] 24:8</p> <p><b>challenged</b> [1] 10:24</p> <p><b>challenges</b> [3] 20:18,19 21:3</p> <p><b>challenging</b> [1] 10:22</p> <p><b>chances</b> [1] 47:24</p> <p><b>change</b> [2] 32:2 66:19</p> <p><b>charged</b> [6] 28:20 48:5,6,9,11,19</p> <p><b>CHIEF</b> [11] 4:3,10 11:7 12:1 19:9 22:3 30:13,16,19 62:16 66:25</p> <p><b>chose</b> [1] 9:10</p> <p><b>Circuit</b> [4] 34:25 40:2 60:19 63:20</p> <p><b>circumstances</b> [1] 54:4</p> <p><b>cited</b> [3] 22:13,14 46:3</p> <p><b>citizen</b> [1] 31:22</p> <p><b>civil</b> [6] 13:20 14:7,12 59:22 63:16 65:2</p> <p><b>claiming</b> [1] 20:24</p> <p><b>Claims</b> [18] 4:24 10:4,8,24 18:9 26:25 27:1,14 29:2,10 36:17 45:24 49:11 51:23 54:1 55:10,12 65:6</p> <p><b>clarify</b> [1] 62:24</p> <p><b>clarity</b> [1] 34:3</p> <p><b>class</b> [1] 62:14</p>	<p><b>clear</b> [18] 12:8,25 15:11,24 21:1 23:14 30:24 31:6 32:6 35:13 40:5 46:23 47:20 57:3,16,17 58:7,10</p> <p><b>clearly</b> [2] 16:15 34:7</p> <p><b>closer</b> [1] 31:19</p> <p><b>clue</b> [1] 60:16</p> <p><b>collateral</b> [2] 50:22,24</p> <p><b>colleagues</b> [1] 23:9</p> <p><b>combined</b> [1] 62:5</p> <p><b>come</b> [8] 9:13 10:3,11 34:9,15 57:7 61:6 66:8</p> <p><b>comes</b> [2] 24:7 32:9</p> <p><b>coming</b> [3] 33:23 41:6,7</p> <p><b>commercial</b> [1] 59:10</p> <p><b>Commission</b> [3] 4:23 5:10 6:3</p> <p><b>common</b> [6] 11:10 49:12,16,19 51:1 54:9</p> <p><b>communicate</b> [2] 38:5,15</p> <p><b>communicated</b> [1] 39:3</p> <p><b>communication</b> [3] 4:18 6:21 33:15</p> <p><b>community</b> [2] 60:11,20</p> <p><b>company</b> [4] 26:18,19,19 29:1</p> <p><b>compensation</b> [3] 10:5,12 18:8</p> <p><b>complicated</b> [1] 27:8</p> <p><b>components</b> [1] 38:13</p> <p><b>conceivable</b> [1] 58:9</p> <p><b>concern</b> [1] 61:13</p> <p><b>concluded</b> [1] 36:25</p> <p><b>conclusion</b> [1] 36:24</p> <p><b>conducted</b> [1] 47:13</p> <p><b>conference</b> [1] 60:19</p> <p><b>confidential</b> [1] 63:4</p> <p><b>Congress</b> [74] 4:21 5:3,21,22 7:15 9:2,3,21,22 10:6,16 11:1,5,12,23 14:1,6,6,14 16:20 17:13,14 19:3 20:5 21:9,10 23:10,15 25:6 26:20 29:16 34:3,8 35:14 36:8 38:16 39:16,22 43:8,9 44:14 45:2,9,11 47:12 50:5,11,15,25 51:4,7,12 52:20,24 53:1,2,9 54:18 55:8 56:3,11 58:10,19,24 60:5,25 61:9 63:12 64:7 65:18,21,24 66:6,18</p> <p><b>consider</b> [3] 21:8 51:8 53:18</p> <p><b>consideration</b> [1] 24:1</p> <p><b>considered</b> [2] 32:24 51:12</p> <p><b>consistent</b> [2] 24:16 30:25</p> <p><b>consistently</b> [1] 12:11</p> <p><b>construe</b> [1] 62:11</p> <p><b>construed</b> [2] 7:23 25:3</p> <p><b>construing</b> [2] 47:2,4</p> <p><b>contact</b> [1] 8:12</p> <p><b>contemplate</b> [1] 34:8</p> <p><b>contemporaneous</b> [1] 15:17</p> <p><b>context</b> [14] 11:24 12:4,8 13:4 24:18 25:5 31:4,10 34:11 38:11 42:15 55:22,23 56:17</p> <p><b>contexts</b> [1] 50:19</p> <p><b>contextual</b> [5] 12:23 41:15 55:24 56:13,22</p> <p><b>continuation</b> [2] 34:6 56:23</p> <p><b>contract</b> [3] 26:11,14 28:2</p> <p><b>contrary</b> [3] 6:7 16:23 38:16</p> <p><b>convincing</b> [4] 46:23 47:20 57:3</p>	<p>58:7</p> <p><b>Cooper</b> [5] 13:17,17 16:7 65:1 66:20</p> <p><b>correct</b> [3] 5:16 46:6 49:23</p> <p><b>couldn't</b> [1] 55:12</p> <p><b>counsel</b> [4] 13:7 30:14 51:16 67:1</p> <p><b>counterpart</b> [1] 39:13</p> <p><b>country</b> [1] 24:12</p> <p><b>counts</b> [1] 19:12</p> <p><b>couple</b> [4] 18:3 27:10 56:21 59:12</p> <p><b>course</b> [1] 63:16</p> <p><b>COURT</b> [45] 1:1,15 4:11,22,23 5:8,9 6:2,2 10:4,8,24 13:23 18:5,8 26:25 27:1,13 29:2,10 30:20,21 33:23 35:8,22 36:3,16 42:4 44:10 45:24 46:22 47:1 49:10 51:6,23 52:9 53:25 54:25 56:7 57:15 60:8 61:14 62:10 64:17,24</p> <p><b>Court's</b> [3] 4:16 58:8 64:12</p> <p><b>courts</b> [2] 11:18,22</p> <p><b>covered</b> [2] 22:1 28:17</p> <p><b>create</b> [2] 61:3,12</p> <p><b>created</b> [3] 5:3 10:6 58:19</p> <p><b>creating</b> [1] 43:10</p> <p><b>critical</b> [1] 4:18</p> <p><b>crux</b> [1] 24:11</p> <p><b>cut</b> [3] 55:24 56:4,14</p> <hr/> <p style="text-align: center;"><b>D</b></p> <p><b>D.C</b> [3] 1:11,19,22</p> <p><b>damage</b> [1] 13:20</p> <p><b>damages</b> [8] 13:20 14:8,13,15 16:10 29:13 65:3 66:21</p> <p><b>DARPA</b> [5] 27:25 28:10,21,25 29:6</p> <p><b>dates</b> [1] 65:8</p> <p><b>Davis</b> [1] 65:4</p> <p><b>de</b> [2] 47:22 57:9</p> <p><b>deal</b> [2] 39:15 60:14</p> <p><b>decide</b> [11] 40:3,19 51:18,19,21 53:4,7,10,12 54:18 59:20</p> <p><b>decided</b> [1] 55:9</p> <p><b>deciding</b> [2] 37:12 53:1</p> <p><b>decision</b> [11] 14:5 34:23 37:9,10 40:13 51:11 52:10 53:12 54:25 55:7 59:17</p> <p><b>decisionmaker</b> [1] 57:8</p> <p><b>decisions</b> [1] 54:7</p> <p><b>deck</b> [1] 31:21</p> <p><b>declaratory</b> [1] 48:23</p> <p><b>declared</b> [1] 26:7</p> <p><b>deem</b> [1] 55:6</p> <p><b>default</b> [2] 65:17,22</p> <p><b>defend</b> [2] 27:13 59:23</p> <p><b>defendant</b> [6] 54:4 57:18 58:1,4,7 64:22</p> <p><b>defending</b> [1] 18:16</p> <p><b>defense</b> [5] 12:22 17:24,24 18:13,14</p> <p><b>defenses</b> [7] 13:3 17:3 35:12,14 44:22 46:19,20</p> <p><b>define</b> [1] 41:16</p> <p><b>definition</b> [10] 4:15,16 5:1,19,19 13:22 31:1 64:13,14 65:6</p> <p><b>definitions</b> [1] 7:22</p>	<p><b>deleted</b> [4] 44:23,25 45:1,3</p> <p><b>demonstrate</b> [1] 48:20</p> <p><b>denied</b> [1] 57:25</p> <p><b>depart</b> [1] 12:7</p> <p><b>Department</b> [2] 1:22 60:17</p> <p><b>department's</b> [1] 33:24</p> <p><b>depending</b> [1] 31:3</p> <p><b>deprive</b> [1] 18:1</p> <p><b>Deputy</b> [1] 1:21</p> <p><b>designed</b> [2] 39:7 48:5</p> <p><b>desist</b> [1] 48:13</p> <p><b>details</b> [1] 61:19</p> <p><b>determination</b> [1] 22:8</p> <p><b>develop</b> [1] 28:2</p> <p><b>dialogue</b> [2] 17:14 25:20</p> <p><b>Dictionary</b> [11] 4:15 5:18 11:8,14,20 12:3,6 13:23 31:1,7 41:6</p> <p><b>difference</b> [11] 28:5 29:3,4,5,19,22 30:4 36:1 45:24,25 49:13</p> <p><b>different</b> [32] 6:8 7:4,13,24 8:3,6 9:12,17 10:7,9 16:3 18:7 20:3 24:17 25:7,15 27:25 29:12,14 31:9,13 42:13 50:16,20 52:18 54:19 55:2,4 56:10 57:8 66:21,22</p> <p><b>differently</b> [3] 29:12 50:12 60:6</p> <p><b>directly</b> [1] 26:10</p> <p><b>director</b> [17] 6:10,25 7:15,18 8:20 9:21 16:13 18:24 21:15,21 22:4,11 27:16 31:25 33:16,21 36:23</p> <p><b>disadvantage</b> [2] 42:17 52:22</p> <p><b>disagreeing</b> [1] 35:8</p> <p><b>disappointed</b> [1] 40:1</p> <p><b>disclosed</b> [1] 63:7</p> <p><b>discovered</b> [1] 22:12</p> <p><b>discovery</b> [1] 25:13</p> <p><b>discuss</b> [1] 15:15</p> <p><b>dispute</b> [1] 33:23</p> <p><b>disputes</b> [1] 33:12</p> <p><b>disputing</b> [2] 31:17 34:14</p> <p><b>dissatisfied</b> [2] 30:2 34:23</p> <p><b>distinction</b> [1] 15:24</p> <p><b>distinguishable</b> [1] 42:22</p> <p><b>district</b> [3] 4:22 5:9 6:2</p> <p><b>Division</b> [3] 59:23 63:16,19</p> <p><b>doing</b> [3] 24:19 29:16 58:25</p> <p><b>Dollar</b> [1] 42:18</p> <p><b>done</b> [3] 27:19 61:20 65:25</p> <p><b>doubt</b> [1] 8:24</p> <p><b>down</b> [2] 36:5,8</p> <p><b>dragged</b> [1] 31:22</p> <p><b>draw</b> [1] 23:21</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>each</b> [6] 12:25 19:19 32:16 60:12,13,14</p> <p><b>earlier</b> [1] 54:22</p> <p><b>easily</b> [1] 51:18</p> <p><b>effective</b> [1] 59:3</p> <p><b>effectively</b> [3] 36:20 49:1 53:25</p> <p><b>efficient</b> [2] 26:5,21</p> <p><b>efforts</b> [1] 62:8</p> <p><b>either</b> [1] 26:9</p> <p><b>else's</b> [1] 32:21</p> <p><b>elsewhere</b> [1] 14:22</p>
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## Official - Subject to Final Review

<p><b>enable</b> [2] 20:20 21:4  <b>enact</b> [1] 66:6  <b>enacted</b> [7] 4:20 8:1,2 14:6 21:10 62:3 66:18  <b>enacting</b> [2] 17:13,15  <b>encompasses</b> [2] 49:14,17  <b>end</b> [2] 36:10 39:9  <b>enforceable</b> [1] 53:11  <b>engage</b> [1] 37:23  <b>enhanced</b> [2] 29:13,14  <b>enjoined</b> [1] 29:7  <b>enough</b> [3] 51:2 59:4,7  <b>ensure</b> [1] 5:5  <b>entirely</b> [2] 40:5 56:4  <b>entities</b> [1] 17:12  <b>EPA</b> [1] 27:24  <b>equally</b> [3] 27:22 35:1 43:12  <b>equitable</b> [1] 50:20  <b>escape</b> [1] 57:7  <b>especially</b> [1] 57:17  <b>ESQ</b> [4] 1:19 3:3,6,9  <b>establish</b> [1] 48:18  <b>established</b> [1] 46:17  <b>establishing</b> [1] 47:24  <b>estopped</b> [3] 27:2,3 49:5  <b>estoppel</b> [29] 4:20 5:12,15,25 9:15 36:9 48:25 49:7,9,12,14,16,20 50:16,20,21,22,25 51:1,22 52:18 53:8,10,17 54:3,9,19 55:3 56:9  <b>ET</b> [3] 1:7 14:25 57:21  <b>Evans</b> [2] 42:4 44:10  <b>even</b> [10] 5:14 11:19 14:2 22:13 47:9 48:15 53:17 56:8 61:4 62:14  <b>everybody</b> [11] 11:9 32:19 34:25 41:24 44:1,3 49:2 52:11,12 57:1 61:18  <b>everyone</b> [1] 18:21  <b>evidence</b> [9] 21:9 41:9,15 46:24 47:20 51:12 57:4 58:5,8  <b>evident</b> [1] 43:8  <b>evidently</b> [1] 61:1  <b>ex</b> [20] 6:11,15 7:13 8:12 23:15 24:17 25:1,8,11 29:19,24 33:15,15 36:6 37:20 39:2,14,17 56:2 59:2  <b>Exactly</b> [1] 34:20  <b>examination</b> [3] 24:18 34:11 61:4  <b>examiner</b> [5] 8:9 21:22 24:4 32:24, 24  <b>examiner's</b> [1] 34:23  <b>example</b> [10] 9:15 14:4 15:4,25 20:2 21:23 22:25 38:11,18 64:22  <b>examples</b> [6] 12:10 15:9,13,13,15 64:17  <b>except</b> [4] 11:14 12:3 31:12 47:11  <b>exclude</b> [3] 6:5 12:15 43:9  <b>excluded</b> [3] 11:3 52:14 65:7  <b>excludes</b> [1] 38:2  <b>excuse</b> [1] 14:17  <b>executive</b> [15] 29:24 31:23,24 33:11,17,24 34:15 35:8 36:21 38:5, 14 39:5 40:20 54:6 59:15  <b>exercise</b> [2] 20:6 23:6  <b>expand</b> [1] 18:19  <b>expect</b> [2] 34:2 47:17</p>	<p><b>expert</b> [5] 18:23 27:15 47:23 64:4, 9  <b>expertise</b> [2] 9:22 57:13  <b>explain</b> [1] 28:13  <b>explained</b> [3] 22:21 30:9 45:5  <b>explains</b> [3] 15:22 22:11 38:23  <b>explanation</b> [2] 50:10,15  <b>express</b> [3] 31:20 32:6 33:6  <b>expressly</b> [3] 31:8 32:16 44:21  <b>extend</b> [5] 4:13 11:5 13:6,12 17:16  <b>extent</b> [3] 47:11 55:5 60:4  <b>extraordinary</b> [1] 63:12</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>fact</b> [11] 6:25 8:18 12:5 15:9 16:7 19:5 22:24 24:10 45:18 52:11 63:18  <b>factual</b> [1] 59:12  <b>fairly</b> [1] 26:21  <b>false</b> [1] 16:6  <b>far</b> [2] 7:19 9:18  <b>favor</b> [3] 51:16,20 57:19  <b>favorable</b> [1] 58:14  <b>February</b> [1] 1:12  <b>Federal</b> [46] 4:24 8:12 9:3 10:4,8, 24 12:25 17:1 18:8,18,19 19:19 27:14 29:10 32:10,17,22,23 33:4 34:9,22,25 35:2,5 36:3,17 37:9 39:11,12,23 40:2,6 43:9,12 47:1,3 49:11 50:23 51:23 56:7 58:6 60:1,19 61:2 62:3 63:20  <b>federal-owned</b> [1] 61:10  <b>fees</b> [1] 29:14  <b>felt</b> [1] 40:10  <b>few</b> [2] 15:1,7  <b>fiction</b> [2] 11:11 50:4  <b>field</b> [1] 21:2  <b>figure</b> [5] 11:18 19:21 24:8 29:19 60:4  <b>file</b> [4] 35:5 38:25 39:15 49:6  <b>filed</b> [1] 22:15  <b>final</b> [3] 29:23 33:16,17  <b>findings</b> [1] 53:24  <b>fine</b> [2] 18:11 66:5  <b>finish</b> [1] 36:13  <b>firm</b> [1] 25:25  <b>First</b> [17] 4:14 6:9 10:19 15:16 27:12 28:17 32:7,15 34:6 36:12 39:21 42:15 43:11 53:4,9 59:9 62:24  <b>fit</b> [1] 56:20  <b>flesh</b> [1] 61:19  <b>fleshing</b> [1] 44:9  <b>flip</b> [1] 28:13  <b>flipping</b> [1] 42:6  <b>Florida</b> [1] 17:7  <b>flow</b> [1] 17:2  <b>follow</b> [1] 63:23  <b>following</b> [1] 11:20  <b>follows</b> [1] 19:16  <b>fora</b> [1] 53:10  <b>force</b> [1] 49:8  <b>forceful</b> [1] 9:20  <b>foreign</b> [5] 44:13 51:8,13 52:7,13  <b>form</b> [3] 7:8,9 60:22</p>	<p><b>forms</b> [1] 62:4  <b>forth</b> [1] 21:22  <b>found</b> [1] 52:10  <b>four</b> [2] 62:22 64:16  <b>Fox</b> [1] 65:9  <b>framework</b> [1] 4:18  <b>fraud</b> [1] 16:15  <b>free</b> [1] 14:24  <b>front</b> [1] 60:7  <b>FTC</b> [1] 27:23  <b>full</b> [1] 49:8  <b>function</b> [1] 21:5  <b>further</b> [1] 24:11</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>gather</b> [1] 29:22  <b>gave</b> [3] 14:6,7 50:5  <b>General</b> [6] 1:21 16:14 38:7 41:18 44:5,8  <b>Georgia</b> [2] 42:4 44:10  <b>gets</b> [5] 12:21 22:5 41:25 49:2,3  <b>getting</b> [2] 21:1 59:7  <b>GINSBURG</b> [6] 5:11 10:14 48:6,9, 24 49:19  <b>give</b> [4] 15:14 24:16 33:1 55:15  <b>give-and-take</b> [1] 5:21  <b>given</b> [3] 10:19 13:11 31:9  <b>gives</b> [1] 20:7  <b>giving</b> [2] 36:13 56:23  <b>Google</b> [1] 26:2  <b>Google's</b> [3] 26:3,7,15  <b>GORSUCH</b> [15] 13:7 23:4,7 33:3,5 34:12,18 36:1,14 37:2 42:6 53:13, 16 54:12,15  <b>got</b> [4] 27:6 29:2 31:23 32:3  <b>gotten</b> [2] 43:3 64:19  <b>govern</b> [2] 32:20 49:10  <b>governance</b> [1] 40:20  <b>governing</b> [1] 14:11  <b>government</b> [143] 4:13,17 5:2 6:6, 7,14,23 7:3,6,9,16,23 9:13,19,25 10:7,10,15,16,20 11:6,17 12:13,18, 20,21 13:3,6,9,18,25 14:7,11 15:3, 12,21 16:9,11,16,21 17:3,17,21 18:1,22 19:7,12,15,17,21 20:1,3,6,12, 14,17,20,22 21:4,13,20 22:5 23:3, 11,16,19 24:15 25:10,18 26:9 27:1,13,14,23 28:10 29:11 30:7,10 31:15,16,17 32:3 33:20 37:11,13 41:8,11 42:8,11 43:22 44:1,2,13 45:17 46:9 47:1,3 49:1 50:12,17, 19,23 51:9,17 52:1,7,19 53:3,5,8, 19,21 54:20,24 55:2,16,21 56:6,7 57:1,18,20,24 59:24 60:6,7,13 61:6,13,25 62:12 63:15 64:4,6,15,19, 22 65:2,5,12 66:5,7,23  <b>government's</b> [12] 4:24 14:23 18:18 27:24 30:3 54:2 55:4 56:4,16 57:19 62:7 66:14  <b>governmental</b> [10] 17:12 23:17 30:23 31:3 32:10,10,13 52:8 60:23 61:21  <b>governments</b> [2] 51:14 52:13  <b>grant</b> [1] 18:5</p>	<p><b>greater</b> [1] 47:25  <b>ground</b> [1] 11:10  <b>grounds</b> [1] 10:23  <b>group</b> [1] 26:13  <b>guess</b> [6] 20:10 23:8 32:7 43:15 60:3,9  <b>guide</b> [1] 13:16</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>handle</b> [2] 19:22 64:10  <b>handles</b> [2] 63:17,19  <b>handling</b> [1] 20:6  <b>happened</b> [1] 37:12  <b>happens</b> [2] 8:5 38:8  <b>hard-and-fast</b> [1] 30:25  <b>hate</b> [1] 37:2  <b>head</b> [1] 12:14  <b>hear</b> [5] 4:3 13:9 43:14,23,23  <b>held</b> [3] 17:7 46:22 64:18  <b>HHS</b> [1] 60:17  <b>higher</b> [1] 62:12  <b>hired</b> [1] 26:10  <b>history</b> [2] 7:24 25:7  <b>holder</b> [1] 39:4  <b>holders</b> [1] 5:6  <b>holds</b> [1] 10:2  <b>home</b> [2] 60:8 61:13  <b>Honor</b> [17] 5:17 6:5 8:17 10:25 11:22 12:10 15:14 18:4 21:17 23:25 24:25 25:15 27:11 28:3 62:21 66:2,24  <b>hoping</b> [1] 43:16  <b>huge</b> [1] 27:24  <b>hurdle</b> [1] 47:19  <b>hypothetical</b> [1] 51:20</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> [7] 10:17 11:9 20:18 21:12 63:5 64:2 65:16  <b>identified</b> [1] 52:22  <b>identifying</b> [1] 36:2  <b>Il</b> [1] 38:13  <b>immediate</b> [1] 48:22  <b>immunity</b> [2] 17:9 66:9  <b>impervious</b> [1] 61:7  <b>impetus</b> [1] 59:1  <b>implicated</b> [1] 52:10  <b>imply</b> [1] 33:8  <b>important</b> [2] 29:15 33:10  <b>imposing</b> [1] 42:17  <b>inappropriate</b> [1] 55:6  <b>INC</b> [2] 1:3 4:5  <b>incidence</b> [1] 35:7  <b>include</b> [25] 4:13,17 5:1 6:16 7:23 11:5,16 13:25 14:2 15:3,12 16:10, 21 17:17 19:7 25:23 30:23 42:8 44:12 52:1,7,8 64:14 65:12 66:4  <b>included</b> [5] 12:18 38:25 53:3 66:15,18  <b>includes</b> [1] 42:10  <b>including</b> [3] 17:11 31:2 35:15  <b>indeed</b> [3] 51:6 52:5 66:20  <b>independent</b> [1] 22:7  <b>indicate</b> [3] 11:23 12:17 19:11</p>
--	--	--	---

## Official - Subject to Final Review

<p><b>indicates</b> <sup>[1]</sup> 31:10</p> <p><b>indicating</b> <sup>[1]</sup> 38:9</p> <p><b>indication</b> <sup>[2]</sup> 11:4 13:5</p> <p><b>indications</b> <sup>[1]</sup> 25:6</p> <p><b>induced</b> <sup>[1]</sup> 29:13</p> <p><b>indulge</b> <sup>[1]</sup> 50:4</p> <p><b>inference</b> <sup>[1]</sup> 20:7</p> <p><b>information</b> <sup>[4]</sup> 15:20 23:1 38:20 59:7</p> <p><b>informative</b> <sup>[1]</sup> 17:6</p> <p><b>informed</b> <sup>[1]</sup> 48:13</p> <p><b>infringed</b> <sup>[1]</sup> 18:17</p> <p><b>infringement</b> <sup>[13]</sup> 17:21,22 18:9 28:20,21 29:13 35:21 47:14,18 48:5,19,21 58:22</p> <p><b>infringers</b> <sup>[1]</sup> 17:25</p> <p><b>infringing</b> <sup>[2]</sup> 45:20 48:15</p> <p><b>inherit</b> <sup>[1]</sup> 65:11</p> <p><b>initial</b> <sup>[1]</sup> 34:10</p> <p><b>initially</b> <sup>[2]</sup> 39:25 66:22</p> <p><b>initiate</b> <sup>[4]</sup> 6:10,15 7:10 9:4</p> <p><b>initiated</b> <sup>[4]</sup> 7:14 8:6 23:16 36:22</p> <p><b>initiative</b> <sup>[1]</sup> 22:12</p> <p><b>injunction</b> <sup>[1]</sup> 10:10</p> <p><b>innovate</b> <sup>[2]</sup> 20:21 21:2</p> <p><b>insert</b> <sup>[1]</sup> 38:17</p> <p><b>instance</b> <sup>[3]</sup> 37:22 42:22 59:9</p> <p><b>Instead</b> <sup>[2]</sup> 12:16 64:3</p> <p><b>institute</b> <sup>[2]</sup> 8:21 31:13</p> <p><b>instituted</b> <sup>[2]</sup> 36:23 40:14</p> <p><b>integral</b> <sup>[1]</sup> 48:2</p> <p><b>intend</b> <sup>[1]</sup> 39:22</p> <p><b>intended</b> <sup>[5]</sup> 11:5 35:14 39:16 58:10 66:17</p> <p><b>inter</b> <sup>[3]</sup> 32:11 40:8,12</p> <p><b>interaction</b> <sup>[3]</sup> 24:3,4 63:21</p> <p><b>interest</b> <sup>[1]</sup> 58:21</p> <p><b>interests</b> <sup>[3]</sup> 24:11 58:20 60:1</p> <p><b>International</b> <sup>[4]</sup> 4:23 5:9 6:3 64:23</p> <p><b>interpretation</b> <sup>[3]</sup> 45:14,15 46:12</p> <p><b>interpreted</b> <sup>[1]</sup> 5:23</p> <p><b>interrupt</b> <sup>[2]</sup> 37:3 38:4</p> <p><b>intervening</b> <sup>[1]</sup> 12:22</p> <p><b>invalid</b> <sup>[7]</sup> 26:3,22 35:13 36:19,25 40:11 46:21</p> <p><b>invalidate</b> <sup>[1]</sup> 18:20</p> <p><b>invalidation</b> <sup>[1]</sup> 58:23</p> <p><b>invalidity</b> <sup>[6]</sup> 46:22 47:8,20,25 57:3 58:5</p> <p><b>invented</b> <sup>[1]</sup> 46:11</p> <p><b>inventing</b> <sup>[1]</sup> 20:25</p> <p><b>invention</b> <sup>[7]</sup> 10:3 26:1 29:8 30:8 35:11 44:19 46:17</p> <p><b>inventions</b> <sup>[1]</sup> 20:15</p> <p><b>Invents</b> <sup>[2]</sup> 8:1 12:12</p> <p><b>invoke</b> <sup>[6]</sup> 18:2 32:11 46:18,21 47:16 53:5</p> <p><b>invoked</b> <sup>[2]</sup> 59:4,5</p> <p><b>invokes</b> <sup>[1]</sup> 12:20</p> <p><b>invoking</b> <sup>[1]</sup> 36:14</p> <p><b>involve</b> <sup>[2]</sup> 35:17 66:7</p> <p><b>involved</b> <sup>[1]</sup> 65:9</p> <p><b>involving</b> <sup>[2]</sup> 23:19 46:25</p>	<p><b>IPR</b> <sup>[9]</sup> 13:12 41:16 47:16 49:6,13 53:6,19 58:19 61:11</p> <p><b>IPR/CBM</b> <sup>[1]</sup> 57:6</p> <p><b>isn't</b> <sup>[8]</sup> 11:2 21:18,20 28:23 41:8 42:6 45:13 54:5</p> <p><b>issuance</b> <sup>[1]</sup> 8:7</p> <p><b>issue</b> <sup>[9]</sup> 9:2 17:7 49:20,22 50:6,21 51:17 52:6 57:12</p> <p><b>issued</b> <sup>[2]</sup> 6:12 38:22</p> <p><b>issuing</b> <sup>[2]</sup> 35:23 59:8</p> <p><b>itself</b> <sup>[1]</sup> 20:21</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>job</b> <sup>[3]</sup> 58:25 59:8,19</p> <p><b>Joe</b> <sup>[5]</sup> 27:22 28:7,7,10,25</p> <p><b>judge</b> <sup>[3]</sup> 31:24 53:21,22</p> <p><b>judges</b> <sup>[3]</sup> 31:25 32:1,2</p> <p><b>judgment</b> <sup>[4]</sup> 18:16 48:23 52:1,4</p> <p><b>judicial</b> <sup>[1]</sup> 30:1</p> <p><b>jurisdiction</b> <sup>[2]</sup> 4:22 57:11</p> <p><b>jury</b> <sup>[2]</sup> 10:9 29:12</p> <p><b>Justice</b> <sup>[97]</sup> 1:22 4:3,10 5:11 6:13 7:1,5,8 8:10,23 10:14 11:7 12:1 13:7 14:16,19 17:19,20 19:9,10 20:10 22:3 23:4,7 24:13,22 25:24,25 27:21 28:4,9,23 29:18 30:13,16,19 31:12 32:15 33:3,5,9,14 34:1,7,12,18 35:25 36:1,14 37:2,5,15,19 38:3,8,12 40:22,23,24,25 41:23 42:2,6 43:5,14 44:25 45:6,9,13 46:10 48:6,9,24 49:19,24 50:1,3,8 51:15,24 52:16 53:13,16 54:12,15 55:13,20 56:24,25 59:11 60:3 61:23 62:16 63:25 65:14,20 66:25</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>KAGAN</b> <sup>[16]</sup> 17:19 19:10 20:10 32:15 40:23,25 41:23 42:2 43:5,14 56:24,25 59:11 60:3 63:25 65:14</p> <p><b>KAVANAUGH</b> <sup>[15]</sup> 29:18 33:14 35:25 37:5,15,19 38:3,12 40:22,24 44:25 45:6,9 55:13 61:23</p> <p><b>kill</b> <sup>[1]</sup> 23:12</p> <p><b>kind</b> <sup>[11]</sup> 16:7 21:1,5 23:17 28:16,19 39:11 45:13 51:21 56:18 60:8</p> <p><b>kinds</b> <sup>[2]</sup> 66:10,11</p> <p><b>knowing</b> <sup>[1]</sup> 66:4</p> <p><b>knows</b> <sup>[4]</sup> 5:22 11:9 16:21 27:25</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>land</b> <sup>[1]</sup> 65:12</p> <p><b>language</b> <sup>[5]</sup> 8:25 33:6 34:19 44:23 58:10</p> <p><b>last</b> <sup>[1]</sup> 64:11</p> <p><b>later</b> <sup>[1]</sup> 53:25</p> <p><b>latter</b> <sup>[1]</sup> 9:10</p> <p><b>Laughter</b> <sup>[2]</sup> 46:13 50:7</p> <p><b>law</b> <sup>[13]</sup> 9:5,23 14:20 15:2 31:8 33:25 49:12,16,19 51:1 54:9 63:23 65:10</p> <p><b>laws</b> <sup>[6]</sup> 13:21 17:15 44:16 51:10 58:4 66:7</p> <p><b>lawsuit</b> <sup>[1]</sup> 57:12</p> <p><b>lawsuits</b> <sup>[1]</sup> 56:7</p> <p><b>lead</b> <sup>[1]</sup> 20:15</p>	<p><b>League</b> <sup>[2]</sup> 42:23,24</p> <p><b>least</b> <sup>[5]</sup> 32:12 34:2 41:5 42:13 59:24</p> <p><b>leave</b> <sup>[2]</sup> 10:16 11:18</p> <p><b>leaving</b> <sup>[1]</sup> 11:22</p> <p><b>legal</b> <sup>[3]</sup> 11:11 64:13 65:10</p> <p><b>legislates</b> <sup>[1]</sup> 65:22</p> <p><b>legislation</b> <sup>[1]</sup> 61:16</p> <p><b>less</b> <sup>[1]</sup> 23:14</p> <p><b>letter</b> <sup>[2]</sup> 6:18 48:13</p> <p><b>liability</b> <sup>[2]</sup> 46:16 57:21</p> <p><b>liberal</b> <sup>[1]</sup> 21:23</p> <p><b>likelihood</b> <sup>[1]</sup> 48:20</p> <p><b>likely</b> <sup>[3]</sup> 7:22 35:7 62:11</p> <p><b>limited</b> <sup>[1]</sup> 48:3</p> <p><b>linchpin</b> <sup>[5]</sup> 5:2,13,17,25 48:25</p> <p><b>line</b> <sup>[1]</sup> 23:21</p> <p><b>litigant</b> <sup>[1]</sup> 9:14</p> <p><b>litigating</b> <sup>[1]</sup> 18:15</p> <p><b>litigation</b> <sup>[8]</sup> 4:25 18:14 21:18 30:6 57:2 59:24 62:8 63:17</p> <p><b>little</b> <sup>[3]</sup> 12:8 53:18 54:6</p> <p><b>logical</b> <sup>[1]</sup> 17:25</p> <p><b>long-standing</b> <sup>[1]</sup> 64:12</p> <p><b>look</b> <sup>[12]</sup> 6:19 8:14 9:8 10:17 12:19 13:16 21:21 31:19 43:24 46:2 55:22 62:6</p> <p><b>looked</b> <sup>[1]</sup> 13:24</p> <p><b>looking</b> <sup>[5]</sup> 12:6 14:1 20:23 25:5 58:17</p> <p><b>loses</b> <sup>[1]</sup> 39:23</p> <p><b>lot</b> <sup>[2]</sup> 13:10 66:7</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>made</b> <sup>[9]</sup> 30:24 39:17 41:19 49:15,18 53:11 54:10 55:11 61:9</p> <p><b>MAIL</b> <sup>[4]</sup> 1:3 4:5 37:1 40:10</p> <p><b>MALCOLM</b> <sup>[3]</sup> 1:21 3:6 30:17</p> <p><b>many</b> <sup>[7]</sup> 19:25 20:3 27:25,25 32:18 34:21 47:10</p> <p><b>marking</b> <sup>[1]</sup> 16:6</p> <p><b>material</b> <sup>[1]</sup> 38:25</p> <p><b>matter</b> <sup>[4]</sup> 1:14 6:24 36:20 40:20</p> <p><b>matters</b> <sup>[1]</sup> 62:8</p> <p><b>mean</b> <sup>[24]</sup> 8:23 14:19 17:16 20:4 22:23 27:21,22 28:1 41:2,24 42:7 43:14,19 48:10 49:20,20 50:18 59:18 60:11,18 62:6 63:22 64:5 65:15</p> <p><b>meaning</b> <sup>[4]</sup> 13:24 17:24 24:15 31:9</p> <p><b>means</b> <sup>[7]</sup> 11:9,24 17:23 20:17,20 48:7,12</p> <p><b>meant</b> <sup>[1]</sup> 64:20</p> <p><b>mechanism</b> <sup>[6]</sup> 41:18,22 57:11 58:1,14 61:12</p> <p><b>mechanisms</b> <sup>[3]</sup> 39:6 43:11 58:20</p> <p><b>medium-sized</b> <sup>[1]</sup> 26:19</p> <p><b>members</b> <sup>[1]</sup> 60:23</p> <p><b>Mendoza</b> <sup>[1]</sup> 55:1</p> <p><b>method</b> <sup>[2]</sup> 26:21 28:18</p> <p><b>might</b> <sup>[12]</sup> 20:15 21:7,8 27:2 38:16 43:21 45:18 46:20 52:19 55:5,6</p>	<p>58:22</p> <p><b>mind</b> <sup>[2]</sup> 58:21,21</p> <p><b>minutes</b> <sup>[1]</sup> 62:18</p> <p><b>mistaken</b> <sup>[1]</sup> 35:23</p> <p><b>moment</b> <sup>[1]</sup> 28:13</p> <p><b>moreover</b> <sup>[2]</sup> 10:25 15:1</p> <p><b>morning</b> <sup>[1]</sup> 4:4</p> <p><b>most</b> <sup>[3]</sup> 6:8 50:23 60:25</p> <p><b>mouth</b> <sup>[1]</sup> 33:21</p> <p><b>Ms</b> <sup>[41]</sup> 4:7,10 5:16 6:20 7:4,7,12 8:16 9:11 10:20 11:21 12:9 13:15 14:17 15:14 17:19 18:3 19:10,18 21:7 22:10 23:4,5,7,24 24:21,24 27:10 28:3,6,12 29:5 30:5,15 43:20 48:3,24 62:18,21 65:15 66:2</p> <p><b>much</b> <sup>[6]</sup> 8:7 19:25 21:16 23:25 24:3 50:9</p> <p><b>must</b> <sup>[1]</sup> 15:23</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>namely</b> <sup>[1]</sup> 43:4</p> <p><b>narrow</b> <sup>[1]</sup> 62:14</p> <p><b>NASA</b> <sup>[1]</sup> 45:18</p> <p><b>natural</b> <sup>[1]</sup> 13:12</p> <p><b>naturally</b> <sup>[1]</sup> 62:11</p> <p><b>necessary</b> <sup>[1]</sup> 47:7</p> <p><b>need</b> <sup>[5]</sup> 9:25 24:16 25:16 56:17 58:9</p> <p><b>net</b> <sup>[1]</sup> 35:6</p> <p><b>never</b> <sup>[2]</sup> 10:18 53:9</p> <p><b>new</b> <sup>[5]</sup> 5:4,6 38:24 56:24 65:9</p> <p><b>NIH</b> <sup>[1]</sup> 64:23</p> <p><b>Nobody</b> <sup>[3]</sup> 11:12 52:12,23</p> <p><b>nobody's</b> <sup>[1]</sup> 34:14</p> <p><b>non-mutual</b> <sup>[2]</sup> 50:22,24</p> <p><b>none</b> <sup>[1]</sup> 60:15</p> <p><b>normally</b> <sup>[4]</sup> 8:20,20 25:3 33:10</p> <p><b>note</b> <sup>[1]</sup> 45:5</p> <p><b>nothing</b> <sup>[5]</sup> 13:4 14:2 20:9 22:24 47:10</p> <p><b>novo</b> <sup>[2]</sup> 47:22 57:9</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>observation</b> <sup>[2]</sup> 44:5,8</p> <p><b>obtain</b> <sup>[6]</sup> 13:1 14:24 16:9 19:15 20:13,21</p> <p><b>obtaining</b> <sup>[1]</sup> 15:19</p> <p><b>obviously</b> <sup>[2]</sup> 50:18 55:18</p> <p><b>occasions</b> <sup>[2]</sup> 30:22 59:25</p> <p><b>occur</b> <sup>[1]</sup> 38:10</p> <p><b>odder</b> <sup>[1]</sup> 53:18</p> <p><b>Office</b> <sup>[11]</sup> 6:9 9:7 18:23 21:15 27:15,16 30:2 59:13,14 63:17,18</p> <p><b>officer</b> <sup>[2]</sup> 43:1 59:18</p> <p><b>official</b> <sup>[2]</sup> 39:8,12</p> <p><b>officials</b> <sup>[1]</sup> 60:12</p> <p><b>often</b> <sup>[2]</sup> 24:6 54:2</p> <p><b>okay</b> <sup>[5]</sup> 11:13 46:1,3 52:19 53:7</p> <p><b>one</b> <sup>[47]</sup> 9:4,21,23 14:23 15:8,16 16:4,12,17 18:25 20:5 22:5 23:10,21 24:13 25:24 26:24 27:5 28:18,21 29:2,8 31:5,11,17,18 33:12 35:12,15 38:6,15 39:11,12 44:4 45:23 46:20 47:15 49:3 51:5 55:1 56:</p>
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## Official - Subject to Final Review

22,24 57:12 59:1 60:24 62:24 63:22 only [6] 6:1 22:18 25:9 29:25 49:17 50:20 open [1] 9:5 operate [1] 65:18 opponent [1] 18:15 opportunities [1] 10:21 opposed [1] 42:16 opposite [1] 15:9 oral [5] 1:15 3:2,5 4:8 30:17 order [2] 21:2 48:18 ordinarily [2] 30:23 44:12 ordinary [3] 47:13 52:6,15 organization [1] 27:24 original [2] 8:7 24:3 other [26] 4:14 8:12 13:8 14:8 17:9 19:6 20:7,22 22:19 29:5 39:18 40:8 45:25 50:14 51:5 55:17,25 58:4 60:12,13,14,25 64:1,5 66:8,10 others [1] 27:9 otherwise [4] 11:24 31:8,10 47:12 out [19] 10:17,18 11:18 19:21 24:7, 8 29:19 32:9 33:20 39:22 44:9 48:3 56:4 59:9 60:4 61:12,19 64:1 66:15 over [4] 9:22 10:3 47:9 64:17 overall [1] 62:7 overcome [2] 47:19 56:6 overreaching [1] 61:8 overriding [1] 61:15 own [16] 12:21 13:1 17:2 22:12 23:12 24:1 26:12,16 33:12 40:6 52:4 53:23,24 54:5,7 65:12 owner [2] 29:10 48:14 owners [1] 19:24 owns [2] 26:2,11	22 35:13,23 36:18,25 38:22 39:3, 25 40:1,11 45:20 46:21,23 47:5,6 48:14,15 53:21 57:3 58:3,4,24 59:18 60:11,21 61:3,17 63:17 64:4 patented [7] 10:3 21:25 29:8 30:8 35:11 44:19 46:16 patents [22] 6:6,12 7:17 9:20 10:18 12:21 14:24 17:2 18:21 19:22 20:1,7,21 21:12 23:12 40:6,7 59:8, 9 61:3,10 64:6 peculiar [2] 39:4,10 penalty [1] 16:8 people [10] 12:5 47:16 48:4 54:22 58:21 59:4,5 60:15 61:6 64:5 perceive [1] 47:24 perceived [1] 21:11 perhaps [3] 24:22 37:5 65:20 permission [2] 7:6,10 permits [1] 17:21 person [60] 4:12,15,16 5:1,23 6:16 7:2,14,20 8:5 10:2 11:2,13 12:11 13:24 14:10 15:3,5,10,11 16:14, 18,18 17:17 19:6,12 20:17 24:17 25:1,4,10,21,23 26:11 29:17 30:22 31:2 38:1,19,23 39:1 41:8,9,12, 16 42:8,9,25 43:22 44:11 52:7 55:21 56:16 63:3,6 64:14,20 65:7,11 66:4 persons [5] 15:23 16:9 17:11 32:11 55:16 perspective [2] 29:21 58:18 Petitioner [9] 1:4,20 3:4,10 4:9 38:1 50:9 57:24 62:20 Petitioner's [2] 37:25 58:13 Pfizer [3] 44:11 51:7 52:5 phone [1] 9:6 pick [2] 9:6 31:25 place [4] 4:25 10:19 43:11 56:12 plaintiff [1] 53:20 plaintiffs [1] 44:15 play [2] 66:8,14 plays [1] 25:11 please [2] 4:11 30:20 point [16] 6:4 7:21 12:2 16:12 18:11 25:1 27:7 37:1 39:18 41:10 51:3 53:17 58:17 63:9 64:1,11 pointing [1] 48:3 points [6] 27:10 39:19 55:24 56:13, 22 62:22 policy [4] 19:1 21:7 51:25 52:4 position [7] 5:11,13 30:3 35:6 51:21 54:8 56:5 possibility [1] 35:4 possible [3] 37:8 50:4 54:23 post [2] 59:13,14 post-issuance [1] 62:4 POSTAL [17] 1:6 4:5 6:14,17 7:9 8:11 30:1 33:22 35:22 36:15,18,22 37:22 40:11,15,16 58:18 potential [3] 39:20 44:15 61:10 potentially [4] 33:21 34:24 38:21 40:7 power [5] 6:10 18:20,20,22 25:17 powerful [1] 6:8	practically [1] 52:11 preclude [3] 6:21,24 22:24 preclusion [3] 49:21,22 50:21 predecessor [1] 13:2 prefer [1] 47:18 Prepaid [1] 17:7 preponderance [1] 58:5 prerequisites [2] 42:14,14 presented [1] 9:2 President [2] 17:15 66:6 Presumably [2] 37:12 53:4 presumed [1] 47:5 presumption [12] 41:3,5,6 42:7,7 51:16 52:5 55:20 65:11,14,16 66:16 presumptions [1] 57:16 presumptive [6] 4:16 5:19 7:22 13:24 64:12 65:6 presumptively [1] 38:2 pretty [4] 15:11 50:9 58:9 62:9 prevail [1] 61:24 prevailed [2] 30:3 43:2 prevented [1] 9:1 preventing [2] 20:24,25 previous [1] 44:20 previously [1] 38:9 primary [2] 49:12 57:11 Primate [3] 42:23,24 64:23 prime [1] 47:15 principle [1] 52:9 principles [2] 11:1 64:8 Pringle [1] 65:4 prior [4] 6:18 15:6 38:20,24 priority [1] 65:5 private [12] 23:12 31:22 43:4 44:23 50:12 54:21 55:3 57:5 58:2,20 61:11 62:13 probably [2] 27:3 60:21 problem [1] 61:1 problematic [1] 38:10 problems [2] 56:19 61:25 procedural [3] 32:20 41:18 57:25 procedure [4] 26:4 27:5 28:22 29:25 procedures [2] 21:23 29:20 proceeding [4] 18:2 35:19 54:1 59:17 proceedings [14] 9:4 30:4 31:23 32:14 36:24 40:17 49:5,10 50:13 53:19,23 57:6 59:6 60:2 process [18] 5:4,7 7:11 8:4 9:12 22:2,18 23:18 25:14 30:9 36:6 37:21 39:7 51:24 61:4,5 63:1 64:3 professional [1] 60:22 prohibit [1] 8:18 promulgated [1] 48:17 proof [3] 47:7 58:15 62:13 proper [2] 8:11,15 proposed [1] 52:23 prosecutor [3] 32:4 53:22,25 prosecutorial [1] 66:9 protect [1] 20:14 protected [1] 5:7 protection [3] 36:9 42:23,24	prove [1] 58:7 proved [1] 46:23 provide [2] 14:13 17:18 provided [3] 14:15 23:1 66:21 provides [6] 15:21 16:8 22:15 31:8,10 39:25 proving [1] 47:19 provision [20] 5:12,15 7:25 8:2 9:15 14:6,10 17:5,6,10 19:19,23 35:9 43:24 46:8,14 47:2 49:1,9 63:3 provisions [20] 7:25 15:2,17 16:3 19:13,14,16,23 20:12 25:22 28:14 32:20 35:1 41:16 43:18 46:2 53:4 55:15,17 61:19 PT [1] 39:23 PTAB [17] 22:24 32:14 34:10,15,24 36:24 37:9,10 39:24 40:14 54:10, 25 55:7,9 60:1,7,16 PTO [28] 6:23 7:15 8:12 9:7,21 20:20 21:20 22:4 29:23 33:16,21 34:16 35:18,20,23 36:18 37:22 39:13 40:13 47:21 48:17 49:5 58:25 59:7 62:2 63:19 64:3,9 PTO's [1] 38:20 public [1] 41:18 punish [1] 6:17 purported [1] 52:17 purposes [1] 49:14 pursue [2] 40:3 55:7 put [5] 18:11 22:20 36:9 39:15 56:11
<b>P</b>			
PAGE [1] 3:2 parallel [1] 16:7 part [10] 5:5,25 17:9 19:20 25:3 39:8 45:3 56:10,11 58:19 parte [20] 6:11,15 7:13 8:13 23:15 24:17 25:2,8,11 29:20,24 33:15, 15 36:6 37:20 39:2,14,17 56:2 59:2 partes [3] 32:12 40:8,12 participate [2] 13:10 59:6 participating [1] 35:18 particular [3] 31:7 43:17 65:25 particularly [1] 48:1 parties [7] 50:23 54:21 55:3 57:5 58:2,21 61:11 parties' [1] 40:8 parts [3] 27:25 36:12 54:23 party [8] 23:12,19 35:19 40:16 43:4 44:23 50:12 62:13 patent [77] 4:25 5:5 6:9 8:8,14 9:7, 23 10:1,2 12:12 13:1,1,10 14:21 15:2,4,5,10,13 18:23 19:16,24 20:13,24 21:1,14,20 24:4,7,10,12 26:2,3,7,11,13,15,17,22 27:15,17 28:18 29:9 32:17,21,22 33:18 34:16,			
<b>Q</b>			
question [20] 11:2,4 12:16 23:8 27:8 28:24,24 33:10 34:13 37:4 38:8 51:3,8,13 54:16 55:19 60:10 63:14,24 65:20 questions [1] 59:12 quick [2] 27:4 44:5 quickly [1] 62:23 quite [7] 15:1,7 19:2 24:19 38:10 57:23 58:12			
<b>R</b>			
raise [5] 12:22 13:3 17:3 18:14 35:12 raises [2] 33:9 55:19 Rather [1] 66:15 rational [3] 23:10,15,20 rationales [1] 43:10 reaction [1] 58:8 read [2] 14:22 19:5 reading [1] 24:17 real [2] 48:22 61:25 really [12] 11:11 12:13 21:24 23:2 24:10 25:21 33:10 37:3 41:1 60:14 65:19,21 reason [10] 26:24 27:7 43:8,25 44:13 45:15,22 52:13,17 66:3 reasons [5] 4:14 38:23 41:21 47:15 55:1 REBUTTAL [3] 3:8 30:12 62:19 received [1] 48:12 recently [1] 22:25			



## Official - Subject to Final Review

<p><b>recodification</b> [1] 45:4  <b>reconsideration</b> [1] 24:2  <b>record</b> [2] 22:20 39:8  <b>recover</b> [1] 10:12  <b>redefining</b> [1] 14:9  <b>reduce</b> [1] 35:7  <b>reenacted</b> [1] 45:11  <b>reexam</b> [4] 25:8,11,12 63:1  <b>reexamination</b> [25] 6:15,22 7:13 8:2 9:12,16 10:22 21:16 22:2,21 23:25 24:6 25:2 28:8 29:20,24 36:6 37:21 39:2,14,17 56:2 59:2 63:4 64:3  <b>reexaminations</b> [2] 6:11 18:24  <b>reexamine</b> [3] 22:6 27:17 32:1  <b>refer</b> [1] 16:4  <b>references</b> [2] 4:21 19:19  <b>referred</b> [1] 57:12  <b>referring</b> [1] 16:14  <b>refers</b> [2] 6:1 16:15  <b>regardless</b> [3] 18:25 32:8,9  <b>regime</b> [1] 39:11  <b>regular</b> [2] 50:21 59:15  <b>regulation</b> [3] 8:19 22:15 48:17  <b>regulations</b> [1] 22:19  <b>reign</b> [1] 34:4  <b>reinforcement</b> [1] 5:18  <b>reinforces</b> [3] 6:1 19:5 25:21  <b>reinforcing</b> [1] 4:25  <b>reissued</b> [1] 24:9  <b>rejecting</b> [1] 52:15  <b>relevant</b> [2] 38:24 57:14  <b>reliance</b> [2] 5:20 25:19  <b>relitigate</b> [1] 5:8  <b>reluctant</b> [1] 55:6  <b>rely</b> [3] 4:14 12:2 22:13  <b>remainder</b> [1] 30:12  <b>remarkable</b> [1] 19:2  <b>remedies</b> [1] 16:6  <b>remedy</b> [1] 66:22  <b>remove</b> [1] 64:24  <b>reply</b> [2] 15:15 64:16  <b>represent</b> [1] 63:15  <b>representation</b> [1] 33:2  <b>representing</b> [1] 59:25  <b>request</b> [8] 7:20 10:4 15:22 22:14 25:11 39:2,3,14  <b>requested</b> [1] 40:12  <b>requestor</b> [1] 43:13  <b>requests</b> [7] 39:16 40:8 49:6,7 61:11 62:4 63:3  <b>require</b> [1] 22:20  <b>required</b> [1] 58:6  <b>requirement</b> [1] 31:6  <b>requires</b> [1] 31:19  <b>research</b> [2] 19:22,25  <b>resolve</b> [2] 33:12,23  <b>resolved</b> [1] 36:20  <b>resolving</b> [3] 33:21 45:21 57:19  <b>respect</b> [7] 54:13,20,21 55:10,11 61:21 65:25  <b>respects</b> [1] 60:25  <b>respond</b> [3] 13:13 27:11 56:20  <b>Respondents</b> [4] 1:8 2:23 3:7 30:</p>	<p>18  <b>response</b> [1] 8:21  <b>rest</b> [1] 51:11  <b>result</b> [1] 58:11  <b>RETURN</b> [4] 1:3 4:4 37:1 40:10  <b>review</b> [26] 13:12 15:17 16:3 23:15 25:22 28:14,18,19,22 29:20 30:1,4 32:12 33:15 36:14,23 40:8,9,12,13,15 41:17 47:22 48:2 57:9 62:5  <b>reviser</b> [1] 45:6  <b>reviser's</b> [1] 45:4  <b>revision</b> [1] 44:24  <b>rid</b> [1] 26:21  <b>rights</b> [3] 12:22 20:14 55:16  <b>road</b> [2] 36:5,8  <b>ROBERTS</b> [9] 4:3 11:7 12:1 19:9 22:3 30:13,16 62:16 66:25  <b>robust</b> [3] 21:13 23:18 30:9  <b>role</b> [2] 25:9 54:4  <b>roles</b> [1] 63:23  <b>roughly</b> [1] 57:10  <b>rule</b> [14] 30:25 32:6 35:22 36:17 38:15 39:22 45:16,16 52:6,15,23 53:8 65:17,22  <b>rules</b> [1] 40:15  <b>rules</b> [6] 50:16,20 54:19 55:3 57:16,17  <b>ruling</b> [2] 32:2 54:10  <b>run</b> [2] 39:9 43:19  <b>running</b> [1] 41:3</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>salute</b> [1] 22:9  <b>same</b> [18] 5:14 7:20 16:19 25:2 26:11,13,18 32:4,19,25 37:4 39:16 47:13 52:5,6 55:16 57:2 61:21  <b>satisfy</b> [1] 48:22  <b>save</b> [1] 30:11  <b>Savings</b> [1] 42:18  <b>saying</b> [8] 6:18 8:15 19:4 34:7 41:24 43:23,24 56:25  <b>says</b> [18] 8:19 12:14 19:15 20:23 22:6 31:9 38:1,19,22 39:1 41:8 45:15 47:4,10 48:18 55:20 63:3,7  <b>scenario</b> [2] 28:16 33:19  <b>scenarios</b> [2] 32:13 66:13  <b>scheme</b> [1] 48:2  <b>scope</b> [1] 57:21  <b>Second</b> [11] 4:20 10:17 16:4 27:20 35:3 40:5 41:21 42:20 50:5 58:16 63:9  <b>secret</b> [1] 63:6  <b>Section</b> [9] 6:21 13:9 15:16 32:16 38:19 39:1 44:17 47:9 61:17  <b>secure</b> [1] 34:16  <b>see</b> [7] 26:22 37:24 41:9 44:13 56:19,20 61:1  <b>seek</b> [7] 13:19 14:7 16:10 29:11 30:1 32:17 59:17  <b>seeking</b> [2] 53:20 58:23  <b>seem</b> [3] 31:21 41:24 55:24  <b>seems</b> [6] 12:5 15:3 26:17 56:11,14 62:13  <b>send</b> [2] 6:18 18:18</p>	<p><b>sense</b> [7] 17:25 36:21 42:21 52:2 53:14 65:15 66:11  <b>SERVICE</b> [16] 1:6 4:6 6:14,17 7:9 8:11 30:1 33:22 35:22 36:15,22 37:22 40:11,16,16 58:18  <b>Service's</b> [1] 36:18  <b>set</b> [5] 5:3 7:16 14:10 19:3 25:19  <b>settlement</b> [1] 15:20  <b>several</b> [2] 15:2,7  <b>shall</b> [1] 38:25  <b>short</b> [1] 31:6  <b>short-circuit</b> [2] 39:6 62:25  <b>shouldn't</b> [6] 32:5 34:1 44:1 51:16 54:7 65:23  <b>show</b> [2] 47:8 58:4  <b>showing</b> [4] 15:23 16:22 17:1 57:2  <b>shows</b> [1] 10:6  <b>side</b> [2] 13:8 50:14  <b>sides</b> [1] 33:20  <b>significant</b> [1] 63:21  <b>silence</b> [2] 19:4 63:13  <b>similar</b> [1] 13:22  <b>similarly</b> [1] 61:9  <b>simply</b> [3] 24:14 39:8 59:2  <b>since</b> [2] 26:16 62:2  <b>situation</b> [6] 23:17 26:18 31:13,15,19 36:16  <b>situations</b> [3] 11:17 32:5 34:9  <b>small</b> [3] 25:25 26:18 62:9  <b>Smith</b> [5] 27:22 28:7,7,11,25  <b>Solicitor</b> [1] 1:21  <b>solicitous</b> [1] 57:18  <b>somebody</b> [2] 20:23 58:3  <b>somehow</b> [1] 63:5  <b>someone</b> [5] 6:24 7:1 21:8 22:14 25:10  <b>sometimes</b> [4] 11:15 55:2 59:23 64:21  <b>somewhat</b> [1] 54:19  <b>Sorry</b> [5] 14:19 38:4 40:14 48:8 59:3  <b>sort</b> [2] 34:2 61:7  <b>SOTOMAYOR</b> [15] 6:13 7:1,5,8 17:20 24:13,22 31:12 33:9 34:2,7 50:1 51:15 52:16 55:20  <b>sovereign</b> [2] 17:8 66:8  <b>speaks</b> [1] 33:20  <b>special</b> [5] 31:18 33:2 61:3,4,12  <b>specific</b> [3] 44:6,17 47:3  <b>specifically</b> [6] 4:21 6:2 19:15 37:14 46:7 55:15  <b>specifies</b> [1] 47:12  <b>spectacle</b> [1] 35:18  <b>speedy</b> [1] 45:21  <b>spoke</b> [1] 65:1  <b>sponte</b> [11] 6:10,22 7:14,17 8:13,21 9:8,11,23 18:25 27:17  <b>stable</b> [2] 4:17 65:17  <b>stacked</b> [1] 31:21  <b>standard</b> [3] 47:7,22 57:9  <b>standards</b> [2] 32:25 48:23  <b>standpoint</b> [1] 62:7  <b>start</b> [5] 11:10 26:4,6 28:7 56:15</p>	<p><b>starting</b> [2] 7:21 25:1  <b>state</b> [2] 44:12 65:9  <b>statement</b> [3] 31:6,20 57:17  <b>statements</b> [2] 12:24 57:16  <b>STATES</b> [13] 1:1,6,16 4:5 17:9 35:10,16 43:1 44:18,21 46:15,18 54:25  <b>status</b> [1] 33:18  <b>statute</b> [20] 6:20 8:17 13:2 14:21 15:10 22:10 32:18 34:21 39:21,25 40:6 41:11 44:7,21 45:12 48:4 55:17 62:11 63:6 66:1  <b>statutes</b> [1] 22:19  <b>statutory</b> [8] 8:25 40:17 43:17 45:14 46:5 47:2 49:14 61:18  <b>step</b> [1] 55:14  <b>stepping</b> [1] 56:18  <b>STEWART</b> [50] 1:21 3:6 30:16,17,19 32:7 33:4,5 34:5,13,17,20 36:11 37:2,7,17,24 38:7,18 40:25 41:14 42:1,3,12 43:7,15 44:4 45:3,8,11 46:6,14 48:8,11 49:4,22 50:18 52:3,21 53:14,16 54:8,13,17 56:21 59:12,21 60:18 62:1,17  <b>still</b> [7] 49:11 53:18 54:8 55:8 56:1 57:24 58:13  <b>stovepiped</b> [1] 60:15  <b>strength</b> [1] 24:9  <b>stress</b> [1] 60:25  <b>strikes</b> [1] 65:24  <b>strong</b> [2] 12:23 41:4  <b>stronger</b> [2] 24:7,10  <b>strongest</b> [1] 41:15  <b>strongly</b> [1] 56:17  <b>structure</b> [7] 5:3 7:16 10:7 19:3 25:7,18 29:14  <b>struggling</b> [2] 23:8,23  <b>sua</b> [11] 6:10,22 7:14,17 8:13,21 9:8,11,23 18:25 27:17  <b>subject</b> [7] 5:6 40:7 49:11 50:19,24 55:2 62:8  <b>subjects</b> [2] 46:8,15  <b>submit</b> [1] 65:13  <b>submitted</b> [3] 62:3 67:1,3  <b>subsection</b> [1] 16:5  <b>subsequent</b> [1] 49:5  <b>substantive</b> [2] 32:19,25  <b>substitute</b> [1] 32:1  <b>successive</b> [1] 49:6  <b>sudden</b> [1] 66:13  <b>sue</b> [7] 17:10,11,21 44:16 51:9,14 52:12  <b>sued</b> [10] 17:22 28:20 35:10 45:19 47:17,18 48:4,16 57:21 58:22  <b>sufficient</b> [1] 52:14  <b>sufficiently</b> [1] 48:21  <b>suggest</b> [2] 13:4 43:21  <b>suggested</b> [1] 34:2  <b>suggesting</b> [2] 42:9 63:22  <b>suggestion</b> [1] 8:22  <b>suggests</b> [2] 12:4 31:14  <b>suit</b> [3] 35:5,21 48:21  <b>suits</b> [5] 44:18 47:9,12,14 62:14  <b>summarize</b> [1] 56:1</p>
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## Official - Subject to Final Review

<p>summary <sup>[1]</sup> 56:19  support <sup>[1]</sup> 56:17  supports <sup>[1]</sup> 55:23  supposed <sup>[4]</sup> 22:4,7,8 26:4  SUPREME <sup>[2]</sup> 1:1,15  surmount <sup>[1]</sup> 62:12  susceptible <sup>[1]</sup> 61:10  system <sup>[4]</sup> 13:11 24:12 56:12 61:20</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p>talked <sup>[1]</sup> 16:25  term <sup>[9]</sup> 4:12 16:18 17:16 25:3,21 30:22 31:8 42:10 52:6  terms <sup>[1]</sup> 56:12  text <sup>[2]</sup> 31:1 41:12  theme <sup>[1]</sup> 61:15  theoretical <sup>[1]</sup> 35:4  theoretically <sup>[1]</sup> 37:8  theory <sup>[3]</sup> 6:16 37:25 42:15  there's <sup>[19]</sup> 7:24 8:19 9:20 15:5 16:5,17 17:5 21:9,21,22 22:17,23 36:6 41:5 47:9 52:17 63:2,5 66:3  they'll <sup>[1]</sup> 47:23  they've <sup>[4]</sup> 6:12 26:10 28:19 31:23  thinking <sup>[6]</sup> 21:19 38:24 52:24 53:2 64:7,9  thinks <sup>[4]</sup> 19:1 52:23 63:11 65:21  third <sup>[5]</sup> 6:4 16:12 43:6,7 56:8  though <sup>[12]</sup> 6:1 9:18 11:19 14:2,8 17:10 20:4 27:2 45:1 47:9 48:15 56:8  three <sup>[5]</sup> 4:13 7:25 15:15 42:13 62:18  throughout <sup>[1]</sup> 16:19  Title <sup>[1]</sup> 46:15  tool <sup>[6]</sup> 13:18 14:3,7 17:24 18:1,12  tools <sup>[2]</sup> 6:8 9:20  topic <sup>[1]</sup> 41:7  Trade <sup>[3]</sup> 4:23 5:9 6:3  Trademark <sup>[5]</sup> 6:9 9:7 18:23 21:15 27:16  traditional <sup>[2]</sup> 64:13 65:10  transparent <sup>[1]</sup> 39:7  treat <sup>[3]</sup> 39:13 50:10,11  treated <sup>[4]</sup> 29:12 44:1,2 60:5  treble <sup>[6]</sup> 13:19 14:13,15 65:2,3 66:21  tribunal <sup>[1]</sup> 54:5  true <sup>[5]</sup> 27:14,22 28:6 49:9 60:10  trumping <sup>[1]</sup> 51:25  trusted <sup>[2]</sup> 33:1,1  try <sup>[5]</sup> 19:20 38:16 44:6 57:7,7  trying <sup>[9]</sup> 17:8 29:19 39:19,20,24 43:19 56:8 60:4 62:25  Tuesday <sup>[1]</sup> 1:12  turns <sup>[1]</sup> 12:13  two <sup>[18]</sup> 7:12 9:20 12:19 14:8 15:8 16:25 23:21 30:4 31:16,16 32:12 34:5 36:12 39:19 42:13 45:23 49:2,13  types <sup>[1]</sup> 60:23</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/>	<p>U.S.C <sup>[1]</sup> 47:4  unauthorized <sup>[3]</sup> 35:11 44:19 46:16  unconstitutional <sup>[1]</sup> 17:8  uncover <sup>[1]</sup> 31:2  under <sup>[18]</sup> 6:16 7:7,21 13:20 18:18 22:10,11,22 26:10,13 28:2 37:25 38:13 42:25 44:16 51:9 54:9 63:2  undergirding <sup>[1]</sup> 19:1  understand <sup>[5]</sup> 23:10,13 54:2,12,15  understanding <sup>[2]</sup> 41:1 47:6  understands <sup>[3]</sup> 32:19 35:1 61:18  understood <sup>[2]</sup> 19:7 47:8  undoubtedly <sup>[1]</sup> 45:25  unfavorable <sup>[1]</sup> 37:11  unit <sup>[1]</sup> 59:22  UNITED <sup>[12]</sup> 1:1,6,16 4:5 35:10,16 43:1 44:18,21 46:15,18 54:25  units <sup>[4]</sup> 31:3 32:10,10 44:14  universities <sup>[1]</sup> 19:25  unless <sup>[5]</sup> 16:22 27:23 28:19 31:9 41:8  unlikely <sup>[1]</sup> 62:14  unnecessary <sup>[1]</sup> 44:24  unprecedented <sup>[2]</sup> 33:25 36:3  unseemly <sup>[1]</sup> 54:6  until <sup>[1]</sup> 14:14  unusual <sup>[7]</sup> 33:25 34:1,4 36:4 37:16,18 54:18  unusually <sup>[1]</sup> 61:7  up <sup>[11]</sup> 5:3 7:16 9:6 11:18,22 14:10 19:3 25:19 32:14 39:11 58:17  useful <sup>[1]</sup> 13:16  uses <sup>[1]</sup> 15:10  using <sup>[4]</sup> 11:13 29:7 30:7 66:3</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p>valid <sup>[1]</sup> 47:5  validity <sup>[5]</sup> 8:14 10:23,23 38:21 47:6  variety <sup>[3]</sup> 19:12 30:21 50:19  various <sup>[2]</sup> 57:15 60:23  vary <sup>[1]</sup> 31:3  version <sup>[1]</sup> 44:20  versus <sup>[7]</sup> 4:5 36:2 42:4 44:10 55:1 63:10 65:4  vested <sup>[1]</sup> 9:22  view <sup>[3]</sup> 18:7,19 33:24  voice <sup>[1]</sup> 33:13</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p>waive <sup>[1]</sup> 17:8  walks <sup>[1]</sup> 60:17  wanted <sup>[15]</sup> 6:4 20:5,11 36:8 43:9 44:14 50:11,15 51:13 58:24 64:19,23 65:2,5,25  wants <sup>[1]</sup> 34:3  Washington <sup>[3]</sup> 1:11,19,22  way <sup>[15]</sup> 7:15 20:5 21:11 26:23 31:5,11 42:18 45:21 46:10 47:13 51:5 55:25 61:21 65:8 66:21  ways <sup>[3]</sup> 7:13 20:4 39:16  weed <sup>[2]</sup> 10:18 21:24</p>	<p>weeding <sup>[1]</sup> 59:9  weight <sup>[1]</sup> 33:2  whatever <sup>[3]</sup> 15:6 54:10 63:11  whereas <sup>[3]</sup> 29:25 49:16 50:22  Whereupon <sup>[1]</sup> 67:2  whether <sup>[15]</sup> 11:2 13:17,19 20:11,15 25:10 32:9 37:12 40:3,20 51:8 53:1,2 57:20 59:17  whole <sup>[1]</sup> 19:3  widespread <sup>[1]</sup> 41:20  will <sup>[14]</sup> 29:23 31:8 32:21 39:3,12 47:22,25 53:12 54:19 57:8 59:23,25 61:20,20  wind <sup>[1]</sup> 32:14  wins <sup>[1]</sup> 56:5  within <sup>[2]</sup> 29:23 36:21  without <sup>[2]</sup> 18:10 19:4  word <sup>[16]</sup> 5:22 11:2 14:9 15:3,10 16:18 19:4,6 29:17,23 33:16,17 38:1 41:15 44:11 64:20  words <sup>[4]</sup> 20:22 32:18 34:21 47:11  work <sup>[2]</sup> 5:20 33:7  world <sup>[1]</sup> 61:25  Wow <sup>[1]</sup> 66:13  writing <sup>[1]</sup> 38:23  wrote <sup>[1]</sup> 11:12</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p>years <sup>[1]</sup> 62:2  York <sup>[1]</sup> 65:10</p>
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