

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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HERMAN AVERY GUNDY, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 17-6086  
 )  
 ) UNITED STATES, )  
 )  
 ) Respondent. )  
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 Respondent. )

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Washington, D.C.

Tuesday, October 2, 2018

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

APPEARANCES:

SARAH BAUMGARTEL, ESQ., New York, New York; on behalf of the Petitioner.

JEFFREY B. WALL, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; for the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	SARAH BAUMGARTEL, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	JEFFREY B. WALL, ESQ.	
7	On behalf of the Respondent	30
8	REBUTTAL ARGUMENT OF:	
9	SARAH BAUMGARTEL, ESQ.	
10	On behalf of the Petitioner	60
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



1           Unlike other delegations that this  
2 Court has approved, SORNA has no standard to  
3 guide the Attorney General's exercise of  
4 discretion.

5           CHIEF JUSTICE ROBERTS: Well, the  
6 government says that they do have a standard  
7 and it's the -- apply the prohibition or the  
8 requirements in the law to the maximum extent  
9 feasible.

10           MS. BAUMGARTEL: Your Honor, that  
11 language does not appear anywhere in the  
12 statutory text, nor can it be derived from the  
13 sources that the government cites.

14           JUSTICE GINSBURG: What about the list  
15 that's contained in, what is it, 20901, the --  
16 the list of past offenders? On your view, none  
17 of those people would be required to register?

18           MS. BAUMGARTEL: That's not correct.  
19 So one important thing about this case is that  
20 every -- every state had an existing sex  
21 offender registration system prior to SORNA's  
22 enactment, and those registration systems would  
23 remain in effect regardless of whether SORNA  
24 existed or not. And so, for example,  
25 Petitioner was required to register under

1 existing Maryland law, and so would the vast  
2 majority of sex offenders who were also then  
3 required to reregister under SORNA.

4           These state registration systems had  
5 been in existence, many of them, since the  
6 early '90s, but since 1996, every state had its  
7 own registration system.

8           JUSTICE GINSBURG: But they would  
9 be -- they would not come under the federal  
10 registration system, which was the purpose of  
11 SORNA to create. None of those examples would  
12 be covered by the federal registration  
13 requirement.

14           MS. BAUMGARTEL: Well, as -- as this  
15 Court held in Reynolds, the Congress left it to  
16 the Attorney General to determine whether SORNA  
17 would apply retroactively at all. And so  
18 Congress declined to make the initial decision  
19 as to whether any pre-Act offender should be  
20 required to register. This was consistent with  
21 how Congress had approached registration  
22 schemes in the past.

23           Congress had previously enacted  
24 registration legislation that conditioned state  
25 funding on requiring certain things from sex

1 offender registries, and in each of those prior  
2 cases, Congress had not made the law  
3 retroactive. And so there's -- there's nothing  
4 strange about Congress doing this.

5 As the Court held in Reynolds, it then  
6 gave the Attorney General full authority to  
7 decide whether the law should be applied  
8 retroactively, so the initial on/off  
9 determination, but then as well how it should  
10 apply, which offenders should be included, if  
11 it should extend all the way back to 20, 30, 40  
12 years. There was absolutely no guidance  
13 provided to the Attorney General in making --

14 JUSTICE ALITO: Well, suppose the --  
15 the statute said that the Attorney General  
16 shall have the authority to determine the  
17 application of this subchapter to pre-enactment  
18 offenders as public safety and fairness  
19 requires. Would that be a -- a violation of  
20 the Non-Delegation Doctrine?

21 MS. BAUMGARTEL: Yes, Your Honor.  
22 Given the subject matter of this delegation,  
23 Congress needs to provide more guidance than  
24 something along the lines of "in the public  
25 interest." And --

1           JUSTICE BREYER:  What about the most  
2 famous regulation, that I think people in this  
3 room would imagine, Rule 10b-5?  I mean, Rule  
4 10b-5 is promulgated under a statute that says  
5 the SEC can forbid the use of any manipulative  
6 device -- that's like the sex offender part --  
7 in contravention of such rules as are  
8 appropriate in the public interest.

9           MS. BAUMGARTEL:  So there are -- there  
10 are a few distinctions.  One is that the SEC,  
11 obviously, is a different body than the  
12 Attorney General, and so this is a point where  
13 the Court's due process and delegation concerns  
14 converge.  And it's important from the  
15 Constitution to have a separation between the  
16 body that is the regulatory lawmaker and the  
17 body that is the prosecutor.

18           JUSTICE BREYER:  Is it only the  
19 Attorney General who falls within the rule that  
20 -- falls within your argument?

21           MS. BAUMGARTEL:  That's something that  
22 exacerbates this delegation.

23           JUSTICE BREYER:  No, but -- but I'm --  
24 look, the SEC has a rule such as we know,  
25 10b-5, the word is the public interest.  The



1 Consumer Product Safety Commission has another  
2 one very similar. And we're told in one of the  
3 briefs that there are 300,000 such regulations.  
4 That may be an exaggeration, I don't know.

5 So which, in fact, fall, as you said,  
6 within your specially harsh rule? All of the  
7 300,000? We'll be busy in this Court for quite  
8 a while.

9 MS. BAUMGARTEL: Your Honor, it's not  
10 an especially harsh rule. What it would  
11 require is some more --

12 JUSTICE BREYER: Your especially  
13 strict rule.

14 MS. BAUMGARTEL: -- some more specific  
15 congressional guidance when this power is  
16 delegated. And a few things to say. First --

17 JUSTICE SOTOMAYOR: Sorry, you're  
18 answering Justice Breyer yes, that all 300,000  
19 of those -- whatever the number is, of those  
20 delegations are wrong?

21 MS. BAUMGARTEL: No, that's absolutely  
22 not our position.

23 JUSTICE SOTOMAYOR: So what  
24 distinguishes those -- that delegation or those  
25 delegations from the example that Justice Alito

1 gave you?

2 MS. BAUMGARTEL: So, in each of the  
3 prior delegations that this Court has upheld,  
4 there has actually been some standard in the  
5 delegation provision, even if it was what the  
6 Court might consider to be a broad standard.

7 JUSTICE GINSBURG: But there are  
8 standards here. I mean, it's not the Attorney  
9 General, it's the Congress that defines what  
10 crimes will require registration, where, and  
11 when the individual is required to register, of  
12 what information is necessary, and the  
13 penalties for failure to register. All that is  
14 specified by Congress. The Attorney General  
15 doesn't -- is not at liberty to prescribe when,  
16 where, how, what crimes. All that is done by  
17 Congress.

18 MS. BAUMGARTEL: But none of those  
19 very detailed provisions of SORNA that Congress  
20 set forth apply to pre-Act offenders. The  
21 Attorney General was given the power both to  
22 decide whether the law applied to pre-Act  
23 offenders and then how it should apply.

24 JUSTICE KAGAN: Well, that gets back  
25 to the question that the Chief Justice started

1 with, because it seems that there is some  
2 language in the statute that supports the  
3 government's reading, that this is a statute  
4 that basically says register all pre-Act  
5 offenders as far as possible, with some  
6 understanding that there are feasibility  
7 considerations that may make immediate  
8 registration of everybody impossible. So  
9 comprehensiveness but moderated with a  
10 feasibility understanding.

11 And I think you would point to three  
12 things. You would point to the preamble, which  
13 talks about a comprehensive national system. I  
14 think you would point then to the definition,  
15 which says that the term "sex offender" means  
16 an individual, any individual, an individual  
17 who was convicted of a sex offense. And I  
18 think, to get in the idea of feasibility, you  
19 might look to the -- the delegation provision  
20 itself, which talks about categories of sex  
21 offenders who are unable to comply with  
22 subsection (b).

23 So both comprehensiveness as moderated  
24 by some flexibility -- some -- some feasibility  
25 constraint seems in the statute as long as

1 you're taking the statute as a whole.

2 MS. BAUMGARTEL: So there -- there are  
3 a few problems with reading it that way. To  
4 start with the fact that in J.W. Hampton, the  
5 Court emphasized that the intelligible  
6 principle had to be clear from the legislative  
7 act itself. And so, to the extent that the  
8 Court is looking through other provisions --

9 JUSTICE KAGAN: From the legislative  
10 act itself meaning only from the delegation  
11 provision?

12 MS. BAUMGARTEL: From -- so from the  
13 legislative act. And so to start --

14 JUSTICE KAGAN: Well, this is the  
15 legislative act. These are all parts of the  
16 statute.

17 MS. BAUMGARTEL: That's right. And in  
18 Panama Refining, the Court rejected the idea  
19 that if there was a narrow delegation provision  
20 that did not contain any standards, that that  
21 could then be governed and given content by the  
22 general preamble to the Act, which is exactly  
23 the argument that the government is making  
24 here.

25 JUSTICE KAGAN: Well, but when we are

1 thinking about non-delegation, it's essentially  
2 a statutory interpretation question, which it  
3 seems should be governed by the same rules of  
4 statutory interpretation that we use elsewhere.

5 And we never look only to one  
6 provision. We look to one provision in a  
7 context of other provisions, including purpose  
8 provisions.

9 So we've -- if you look at Justice  
10 Scalia's -- Justice Scalia was a pretty  
11 committed textualist -- if you look at his  
12 separate opinion in Reynolds, he clearly is  
13 looking to the purpose provision of this Act  
14 and saying it demands comprehensiveness.

15 MS. BAUMGARTEL: So, Your Honor, I --  
16 I agree 100 percent with you that this could be  
17 a statutory interpretation issue, but we would  
18 prevail under that.

19 The problem with the government's  
20 statutory interpretation argument is that the  
21 delegation provision here is not ambiguous. It  
22 gives plenary authority to the Attorney  
23 General. When the Court looks to, say, the  
24 statutory context or legislative history,  
25 things to interpret that statute, that's

1 generally when the text itself is ambiguous and  
2 provides for two different plausible readings,  
3 but here that's not the situation.

4 I just note Justice Scalia was  
5 dissenting, of course, in Reynolds because --

6 JUSTICE KAGAN: He -- he was  
7 dissenting, but nine Justices in Reynolds all  
8 had the same view of this statute, which is  
9 that this statute demanded comprehensiveness in  
10 the registration of pre-Act sex offenders.

11 In other words, both in the majority  
12 and in the dissent, this was the one point in  
13 common, that they said this statute was  
14 designed for something and this statute did  
15 something, that it insisted that "sex offender"  
16 should be read broadly to include any  
17 individual who was convicted of a sex offense  
18 and that all those people should be registered,  
19 you know, with some feasibility recognition.

20 MS. BAUMGARTEL: So I'd like to  
21 address both comprehensiveness and the  
22 definition of "sex offender" while also noting  
23 that, of course, if Congress had actually  
24 wanted that construction, it would have been  
25 very easy for it to simply say that. The --

1 JUSTICE KAGAN: Well, but nine of us  
2 said it.

3 MS. BAUMGARTEL: The preamble --

4 JUSTICE KAGAN: Were we all wrong,  
5 every single one of us?

6 MS. BAUMGARTEL: Your Honor, I -- I  
7 don't believe that's what Reynolds says, but  
8 just with respect, because comprehensive is  
9 coming up so many times, the preamble states  
10 that it is a comprehensive national  
11 registration system.

12 In the same way that the National  
13 Gallery is a comprehensive art museum, that  
14 doesn't mean that it has every painting that  
15 has ever been made. Comprehensive can have  
16 different meanings.

17 In this context, SORNA is a  
18 40-something provision statute that addresses  
19 every aspect of sex offender registration, not  
20 just who should register but information  
21 sharing among jurisdictions, the Internet  
22 design of websites for public registration,  
23 civil commitment of sex offenders, the use of  
24 federal law enforcement resources to assist  
25 with state registration systems.

1           These various provisions comprise the  
2           comprehensive national registration system, and  
3           there's no indication that that general  
4           preamble meant that every pre-Act offender had  
5           to be registered.

6           There was a House bill that was  
7           rejected that was pending at the same time that  
8           would have both made it explicitly retroactive  
9           and that included a definition of "sex  
10          offender" that explicitly said offenders  
11          convicted either before or after the enactment  
12          of this Act.

13                  JUSTICE KAGAN: I guess I have --

14                  JUSTICE GORSUCH: I guess --

15                  JUSTICE KAGAN: -- two quick -- I'm  
16          sorry.

17                  JUSTICE GORSUCH: Well, I guess where  
18          I get stuck on -- on the preamble argument is  
19          that normally we -- we, when we're doing  
20          statutory interpretation, prefer the more  
21          specific statutory provision over the more  
22          general. And the specific statutory section  
23          dealing with pre-enactment offenders says  
24          unambiguously that the Attorney General decides  
25          whether, how, when, and who, even who. So you



1 don't even know if you're going to be subject  
2 to this law.

3 MS. BAUMGARTEL: Yes.

4 JUSTICE GORSUCH: How do people even  
5 know who is going to be included in this class  
6 until they hear from the Attorney General? And  
7 I -- I'm having trouble thinking of another  
8 delegation in which this Court has ever allowed  
9 the chief prosecutor of the United States to  
10 write the criminal law for those he's going to  
11 prosecute.

12 We say that vague criminal laws must  
13 be stricken. We've just repeated that last  
14 term. What's vaguer than a blank check to the  
15 Attorney General of the United States to  
16 determine who he's going to prosecute?

17 MS. BAUMGARTEL: Yes.

18 JUSTICE GINSBURG: That's your  
19 argument stated very, very concisely.

20 MS. BAUMGARTEL: I'll cede my time.

21 (Laughter.)

22 JUSTICE KAGAN: Well, then I'll take  
23 back my time.

24 (Laughter.)

25 JUSTICE ALITO: Well, suppose what

1 this was -- what was at stake here was civil  
2 liability rather than -- suppose what was at  
3 stake here was civil liability rather than  
4 criminal liability. Would you make the same  
5 argument?

6 MS. BAUMGARTEL: That would -- that  
7 would certainly be a much closer case. Our  
8 argument is that -- that SORNA would still be  
9 unconstitutional simply because of the total  
10 lack of standard.

11 Even in cases like NBC or American  
12 Power & Light where the Court has upheld  
13 arguably very broad delegations, there has been  
14 some standard in the law that, even if  
15 seemingly broad as written, drew upon an  
16 existing body of established law.

17 So, for example, in NBC, the public  
18 interest, convenience, and necessity  
19 certification for licensing was an established  
20 body of law, that it was a certification that  
21 states had made to public service industries  
22 since roughly the 1870s.

23 There's no existing body of law to  
24 give context --

25 JUSTICE ALITO: So if you compare what

1 we have before us with the statute that says --  
2 gives or authorizes the Attorney General to  
3 devise a rule to protect public safety,  
4 feasibility, and consideration of individual  
5 rights, that's the difference between a  
6 improper delegation and a proper delegation?

7 MS. BAUMGARTEL: Perhaps. Certainly  
8 --

9 JUSTICE ALITO: In the civil context.  
10 Let's start there.

11 MS. BAUMGARTEL: Certainly, the  
12 Congressional guidance is the difference. And  
13 this just comes back to the purpose of the test  
14 itself. The idea of the intelligible principle  
15 test is that it's not a delegation of  
16 legislative authority because Congress itself  
17 has made the key legislative decisions.

18 Here, with respect to pre-Act  
19 offenders, Congress has not made any of the  
20 decisions, despite the extremely detailed  
21 framework that there is for post-Act  
22 registration.

23 JUSTICE GINSBURG: Do you think the  
24 Attorney General could, in that retroactivity,  
25 have a different set of offenders than the text

1 of FORNA -- SORNA itself, have different  
2 requirements for where and when the  
3 registration is to occur?

4 MS. BAUMGARTEL: Yes. I -- and this  
5 is something the Court contemplated in  
6 Reynolds, where it noted that 20913(d), the  
7 delegation provision, essentially gave the  
8 Attorney General three different spheres of  
9 authority. He could decide whether the Act  
10 applied to pre-Act offenders, whether it  
11 applied to pre-implementation offenders, and  
12 then how it applied to those offenders.

13 And the Court recognized that he  
14 might, for example, want to set different  
15 registration rules for different classes of  
16 pre-Act offenders, and that was contemplated  
17 and permitted by the broad plenary grant of  
18 authority.

19 CHIEF JUSTICE ROBERTS: What -- what  
20 if the Act said that it applies to pre-Act  
21 offenders and there was a provision saying the  
22 Attorney General may waive the requirements of  
23 this Act when he determines that it's not  
24 feasible to apply them?

25 MS. BAUMGARTEL: Yeah --

1 CHIEF JUSTICE ROBERTS: And the  
2 Attorney General says, you know, I don't think  
3 it's feasible to apply this to pre-Act  
4 offenders, so I waive the Act with respect to  
5 pre-Act offenders. Is that okay?

6 MS. BAUMGARTEL: So if -- if the Act  
7 said this -- Congress determines that this  
8 should apply to pre-Act offenders and then gave  
9 the Attorney General a limited power to grant  
10 exemptions, something which is basically the  
11 opposite of what this as written does, that  
12 would likely be constitutional, particularly if  
13 the -- if Congress provided some guidance  
14 around where --

15 CHIEF JUSTICE ROBERTS: Even though  
16 the consequences are the same -- the  
17 consequences are the same with respect to  
18 whether or -- who's making the decision about  
19 whether the criminal laws should apply to whom?

20 MS. BAUMGARTEL: Respectfully, the --  
21 the consequences are not the same. In the  
22 first instance, Congress has made the decision.  
23 And then they have afforded the Attorney  
24 General a power that is in -- first, if there  
25 is guidance provided with respect to the

1 granting of exemptions, then it's still --

2 CHIEF JUSTICE ROBERTS: Well, let's  
3 say it isn't. The Attorney General may issue  
4 exemptions to this Act with respect to  
5 particular categories of offenders.

6 MS. BAUMGARTEL: Even -- even if, that  
7 would still be much closer to being  
8 constitutional because Congress has made the  
9 initial decision and has afforded the Attorney  
10 General a power that is something more akin to  
11 traditional prosecutorial discretion.

12 It's not the same, but this was the  
13 point that Justice Scalia, joined by Justice  
14 Ginsburg, made in dissent in Reynolds, which is  
15 that that is much -- that seems closer to being  
16 constitutional because the power that the  
17 Attorney General has is closer to a traditional  
18 clemency or prosecutorial discretion power.

19 In this case, however, the -- the  
20 statute is truly worded in the opposite  
21 fashion. It does not apply of its own force to  
22 any pre-Act offenders. And the question of  
23 whether it should apply is left to the sole  
24 discretion of the Attorney General, with --

25 JUSTICE SOTOMAYOR: Don't we routinely

1 read into statute limitations in order to save  
2 its constitutionality?

3 MS. BAUMGARTEL: Yes.

4 JUSTICE SOTOMAYOR: We do do that  
5 routinely. And we have read into delegation  
6 cases limits. So why is the reading in a  
7 feasibility here so unusual, given the three  
8 contextual signals that Justice Kagan listed  
9 previously?

10 MS. BAUMGARTEL: So there are three  
11 reasons. One is that that is essentially the  
12 interpretation that the Court rejected in  
13 Reynolds. That -- that was squarely the  
14 government's argument in Reynolds, and the  
15 Court said no, that's not a plausible  
16 construction of this statute.

17 The second reason is that, in the  
18 context of the intelligible principle, it is  
19 essential that Congress itself state the  
20 intelligible principle. The Court addressed  
21 this in American Trucking v. Whitman, where  
22 there the agency itself had tried to propose a  
23 limiting construction to the delegation. And  
24 the Court rejected that and said that the  
25 imposition of that limiting construction would

1 be the exercise of the constitutional -- the  
2 legislative power itself. And so the  
3 imposition of that limiting construction would  
4 be unconstitutional because it's exercising the  
5 legislative power.

6 JUSTICE SOTOMAYOR: Can we go back to  
7 -- mention your third. But on the first folded  
8 in, in Reynolds, we said that it would have  
9 been strange, indeed, for anyone to imagine  
10 that Congress intended the AG -- I'm trying to  
11 put it into a positive -- that Congress  
12 intended the AG to -- to apply the Act  
13 retroactively. It would have been strange for  
14 them to imagine that he or she wouldn't, that  
15 there might have been limitations because of  
16 some feasibility difficulties, but no one  
17 imagined the AG would exempt everyone.

18 MS. BAUMGARTEL: The intelligible  
19 principle cannot be the Court's speculation  
20 about what Congress thinks the Attorney General  
21 might do.

22 JUSTICE SOTOMAYOR: But we're  
23 speculating from the Act itself.

24 JUSTICE KAGAN: It's not speculating.  
25 It's interpreting. So if the -- if the best



1 interpretation -- and I realize you don't agree  
2 with this, but -- so I'm posing it as a  
3 hypothetical. If the best interpretation of  
4 the Act is the SG's interpretation, do you  
5 agree that that would not pose a delegation  
6 problem?

7 MS. BAUMGARTEL: No, I don't agree.  
8 And so if the -- my friend uses different  
9 formulations of their interpretation.  
10 Sometimes it's to the maximum extent feasible.  
11 Sometimes it's to the extent feasible.  
12 Sometimes it's to the extent practicable.

13 And I would argue that there is --  
14 there are differences there.

15 JUSTICE KAGAN: Let's -- let's call  
16 it, which is, I think, consistent with what  
17 Reynolds said, to the maximum extent feasible.  
18 In other words, what the Act is telling the AG  
19 is go register pre-Act offenders, except if you  
20 find it unfeasible.

21 MS. BAUMGARTEL: I -- again, that's --  
22 that's nowhere in the statute, and --

23 JUSTICE KAGAN: Yeah, I -- I  
24 understand that you think that. But if the  
25 statute -- if the -- if that is the best

1 interpretation of the statute, would it pose a  
2 delegation problem?

3 MS. BAUMGARTEL: That likely would be  
4 constitutional if you could read into the  
5 statute a command to the Attorney General to  
6 register pre-Act offenders to the maximum  
7 extent feasible, although, you know, as Justice  
8 Rehnquist articulated in Industrial Union, the  
9 benzene case, there is still a question about  
10 what feasibility means.

11 And in this context particularly,  
12 because these are not -- this is not a  
13 technical scientific area. This is not a  
14 question of how much air particle, at what cost  
15 can be taken from the environment. This is  
16 really the fundamental weighing of liberty  
17 versus security interests, the sorts of  
18 decisions that the people's legislative body is  
19 supposed to make and not supposed to delegate  
20 to the chief prosecutor.

21 JUSTICE BREYER: Are we supposed to do  
22 that -- are we supposed to, in your opinion,  
23 start distinguishing among the 300,000 and say,  
24 well, you have a weak standard if all that's at  
25 interest is the cost of pollution or something,

1 but you have to have a strong standard where,  
2 in fact, it's what you said, liberty and so on,  
3 and a medium standard perhaps for the SEC? I  
4 don't -- I don't know what we do about the SEC.

5 And there are 300,000, approximately.  
6 Maybe there are only 200,000. But is that what  
7 you're suggesting we ought to do? Yes? No?

8 MS. BAUMGARTEL: Yes, and the -- the  
9 Court in American --

10 JUSTICE BREYER: Yes, all right,  
11 300,000.

12 MS. BAUMGARTEL: I should -- Your  
13 Honor, I should -- I'm not conceding the  
14 300,000.

15 JUSTICE BREYER: No, I wouldn't  
16 either.

17 (Laughter.)

18 MS. BAUMGARTEL: But this is -- this  
19 is what the Court said in American Trucking v.  
20 Whitman, that the amount of guidance required  
21 depends on the scope of the delegated power.

22 JUSTICE BREYER: Okay. So, if we're  
23 supposed to go through the 200,000 or 100,000  
24 or whatever they are, what are the different  
25 categories where it's tough, not so tough, in

1 your opinion?

2 MS. BAUMGARTEL: Your Honor, the  
3 question is not a matter of tough versus --

4 JUSTICE BREYER: No, you see what I  
5 mean, categories where Congress can delegate  
6 with an SEC-type standard or the standard here  
7 in categories where Congress has to be more  
8 specific.

9 MS. BAUMGARTEL: The --

10 JUSTICE BREYER: What -- what in your  
11 opinion are the right categories?

12 MS. BAUMGARTEL: The -- so the factors  
13 about SORNA that are critical include the fact  
14 that it contemplates criminal sanctions. In  
15 Touby, this Court recognized that its  
16 precedents supported requiring greater guidance  
17 for the promulgation of regulations that  
18 contemplate criminal sanctions.

19 JUSTICE KAGAN: But are -- isn't that  
20 all over the place we have confronted  
21 delegation challenges to civil regulations  
22 whose violation will result in criminal  
23 sanctions? So, I mean, there are numerous of  
24 those cases, but I'll just give you three:  
25 Kollock is like that, Grimaud is like that,

1     Avent is like that.

2                   So these are all places where the  
3     delegation is to a civil regulation, as it is  
4     here, but if you violate that regulation that  
5     some secretary or attorney general or whatever  
6     has written, you're going to face criminal  
7     sanctions.

8                   So what's the difference between this  
9     case and all those other cases where we said  
10    that's -- you know, that's -- criminal  
11    sanctions is not what matters?

12                   MS. BAUMGARTEL: Well, Kollock is the  
13    perfect example because this is very different  
14    than oleomargarine label. This is not a  
15    question of Congress --

16                   JUSTICE KAGAN: You know, you can say  
17    that, and it's easy to make fun of  
18    oleomargarine labels, but the person who  
19    violated that provision was going to go to  
20    prison in the same way that the person who  
21    violates this provision is going to go to  
22    prison.

23                   MS. BAUMGARTEL: It's not making fun,  
24    Your Honor. It's that there are certain  
25    fundamental choices about a statutory scheme

1 that Congress itself must make. And so  
2 Congress can say that there needs to be  
3 particular packaging and a label, and then it  
4 can delegate or assign to an agency the power  
5 to design that label.

6 JUSTICE KAGAN: The point I was making  
7 is that all of these are civil regulations.  
8 The delegation is to say you write the -- we're  
9 going to give you some degree of discretion to  
10 write the civil regulation, understanding that  
11 if somebody violates that, that person is going  
12 to jail.

13 MS. BAUMGARTEL: Your Honor, may I  
14 answer your question and then reserve the  
15 remainder of my time?

16 Just the -- the question is always the  
17 nature and significance of the delegated power,  
18 and it -- it is perfectly fine for Congress to  
19 permit agencies to fill in the details or  
20 otherwise implement statutes, but not to make  
21 these sorts of fundamental policy choices.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Mr. Wall.

1 ORAL ARGUMENT OF JEFFREY B. WALL  
2 ON BEHALF OF THE RESPONDENT

3 MR. WALL: Mr. Chief Justice, and may  
4 it please the Court:

5 I wanted to start this morning where  
6 Justices Ginsburg and Kagan did, with the text  
7 of the Act, because I do think it is best  
8 interpreted in the way that we have said. It  
9 starts in the first section -- this is at 3a of  
10 the appendix of the government's brief -- with  
11 findings about existing sex victims and their  
12 offenders. It then says, "we want a  
13 comprehensive national system" to address the  
14 offenders. It broadly defines "sex offender"  
15 and the registration requirement. That's at  
16 pages 5a and 11a. And then it says -- in the  
17 913(d), it says, look, we know that translating  
18 the system that we've just crafted for  
19 offenders going forward is going to create some  
20 real practical problems.

21 For one, it's literally impossible for  
22 them to comply with the timing requirement.  
23 Unable to comply. Those are the words in the  
24 title and text of 913(d). So we are going to  
25 give to the Attorney General the authority to

1 take this scheme and implement it with respect  
2 to pre-Act offenders, recognizing that there  
3 are going to be some transitional issues.

4 That kind of implementation is a  
5 classic executive function. It is what  
6 statutes give to the executive branch all the  
7 time. And Petitioner has conceded, I think,  
8 just now, that if the statute is best read in  
9 the way I'm positing, that it's -- it's  
10 perfectly permissible under this Court's cases.

11 CHIEF JUSTICE ROBERTS: Well, let's  
12 take one of the items you just mentioned,  
13 comprehensive. The Act says that it's  
14 comprehensive -- that doesn't mean that it  
15 covers everything. It means that it has a  
16 scheme that it thinks addresses the waterfront.

17 And part of the way it -- it does that  
18 is to say we're not going to decide this  
19 significant category of cases.

20 MR. WALL: Oh --

21 CHIEF JUSTICE ROBERTS: It's  
22 comprehensive. They've told you what's going  
23 to happen there, and what they've said is the  
24 Attorney General gets to decide.

25 MR. WALL: Oh, it -- it's certainly



1 true that Congress made certain legislative  
2 judgments about what sex offenses would  
3 qualify, how long people would have to register  
4 for. They didn't say every offense that  
5 relates to sex means you've got to register for  
6 a lifetime. That is -- that is certainly true.

7 But, once they've defined the bounds  
8 of the people they want into the system going  
9 forward, then they said to the Attorney  
10 General: Your job is to get as many of the  
11 existing offenders who fall into that universe  
12 into the registries as you can, recognizing  
13 there are going to be some practical barriers.  
14 You're going to have to specify the  
15 applicability of the requirements in a way --

16 JUSTICE GORSUCH: But, Mr. Wall --

17 MR. WALL: -- to get them in. That's  
18 very narrow language.

19 JUSTICE GORSUCH: -- you didn't -- the  
20 government didn't make that argument in  
21 Reynolds. The government made the opposite  
22 argument in Reynolds. The government said that  
23 (d) is the more specific provision and the  
24 nature of the comprehensiveness, as the Chief  
25 Justice indicated, for purposes of

1 pre-enactment offenders was that the Attorney  
2 General gets to decide, and the Attorney  
3 General could decide to do nothing, the  
4 government said, the Attorney General could  
5 decide to include some offenders, none of the  
6 offenders, or all of the pre-enactment  
7 offenders.

8 The government said that it could then  
9 determine which of the Act provisions it wished  
10 to, in a Chinese menu manner, apply to these  
11 people it had chosen. The government then said  
12 the Attorney General could change his or her  
13 mind about all of this at any given time.

14 And, in fact, the Attorney General has  
15 changed his mind from time to time on these  
16 matters. So how do you square with what you've  
17 just told us with the government's prior  
18 representations in this case?

19 MR. WALL: Well, the Attorney General  
20 has never changed his or her mind with respect  
21 to the registration duty for individuals, but  
22 -- but to go squarely to the question --

23 JUSTICE GORSUCH: There have been  
24 changes in --

25 MR. WALL: Only with respect to the

1 state's obligations to go out and find  
2 offenders --

3 JUSTICE GORSUCH: All right.

4 MR. WALL: -- not with the individual  
5 duty on offenders to come forward and present  
6 themselves and register.

7 JUSTICE GORSUCH: Attorney General  
8 Holder changed the guidance provided by -- by  
9 the prior Attorney General, correct?

10 MR. WALL: He narrowed the states'  
11 obligations to give the states a little more  
12 breathing room. That's true. The individual  
13 duty to step forward and register has always  
14 been constant.

15 But, to go to your question, I really  
16 don't think that, reading our brief in  
17 Reynolds, there's any inconsistency. We came  
18 in and said as a statutory matter this says he  
19 shall have the authority to specify the  
20 applicability.

21 That clearly means, since we know that  
22 they want everybody in, that we should read  
23 that like a waiver provision. And to be sure,  
24 the Court disagreed with us on that and said  
25 the default rule was different but in the

1 process accepted exactly our argument as the  
2 premise that the default rule didn't matter  
3 because Congress wanted everybody into the  
4 system.

5 And so I think --

6 JUSTICE SOTOMAYOR: Mr. Wall --

7 MR. WALL: -- everybody was working  
8 off of that page in Reynolds.

9 JUSTICE SOTOMAYOR: -- your -- your  
10 brief in Reynolds is very important to me. If  
11 I read it the way Justice Gorsuch does, assume  
12 his hypothetical, that you, in fact, said it  
13 was an on and off button that the -- that the  
14 Attorney General could turn on and off. If  
15 that's the position you took then, what does  
16 that do to you now?

17 MR. WALL: Oh, that's -- to be clear,  
18 Justice Sotomayor, that's exactly the same  
19 position I'm taking here today. 913(d) is --

20 JUSTICE SOTOMAYOR: No, you're adding  
21 in a caveat. You're saying he can turn it on  
22 and off based only on maximum lack of  
23 feasibility.

24 MR. WALL: No. I'm addressing a  
25 question that wasn't squarely before the Court

1 in Reynolds. It is an on/off switch to the  
2 Attorney General: Specify the applicability of  
3 the requirements -- it's pretty narrow language  
4 -- and do it in such a way as to get them in.  
5 I read it as the statute --

6 JUSTICE SOTOMAYOR: Now you're reading  
7 to get them in. That's --

8 MR. WALL: Well --

9 JUSTICE SOTOMAYOR: I understand  
10 Justice Gorsuch's point that you said he could  
11 turn it on and off as he decided.

12 MR. WALL: Yes. That's the Attorney  
13 General's authority as a statutory matter.  
14 That's what the statute means. I believe the  
15 statute means the same thing we said in  
16 Reynolds, though the Court disagrees in the  
17 default rule.

18 The separate question is, is there  
19 guidance provided to the Attorney General in  
20 the statute on how he should exercise that  
21 on/off switch authority? And that question,  
22 not before the Court in Reynolds and not  
23 briefed in Reynolds, the answer to that is  
24 pretty obviously yes.

25 I mean, this falls well inside a

1 number of the delegations that the Court has  
2 looked at because, here, it's not as if there  
3 is some standard in the statute like public  
4 interest or fair and reasonable rates, where  
5 the executive is really doing the fleshing in.

6 Here, Congress set forth all the  
7 rules. It made judgments about all the  
8 requirements.

9 JUSTICE GORSUCH: What do you say --

10 MR. WALL: And all it said to the  
11 Attorney --

12 JUSTICE GORSUCH: -- about the ACLU's  
13 argument on that score that, under your view,  
14 that Congress could have simply enacted a  
15 statute with respect to post-enactment  
16 offenders that mirrored the language of (d) and  
17 said, well, it's up to the Attorney General to  
18 come up with a comprehensive and feasible  
19 registration regime in the public interest?  
20 You'd be here defending that, wouldn't you?

21 MR. WALL: Justice Gorsuch, it would  
22 be a much broader delegation. Under this  
23 Court's cases, you'd need more of a general  
24 policy. It's not at all clear why Congress  
25 wouldn't apply it going forward.

1 JUSTICE GORSUCH: Why? What's the  
2 difference? A half a million people are  
3 affected by this delegation.

4 MR. WALL: Yes, if Congress found  
5 there are real practical problems with applying  
6 it even going forward, here is our general  
7 policy to the Attorney General, I don't know  
8 that it would be importantly different from  
9 saying to the Attorney General in Touby which  
10 drugs will be controlled substances under the  
11 Act, or -- or in Union Bridge, which obstruct  
12 -- which bridges will we think obstruct the  
13 rivers, or in Grimaud, who will be allowed to  
14 graze on federal land?

15 JUSTICE GORSUCH: Could you answer my  
16 question? Would you be here defending a  
17 statute that mimicked (d) with respect to  
18 post-enactment offenders, and in -- in -- in  
19 which case why does Congress bother to  
20 legislate SORNA at all?

21 MR. WALL: It's very difficult to know  
22 in that situation, Justice Gorsuch, what the  
23 equivalent practical problems would be for why  
24 Congress didn't apply it.

25 JUSTICE GORSUCH: So you might defend

1 that statute too?

2 MR. WALL: No, I -- I -- I -- what I'm  
3 saying is I -- I don't know. I don't see any  
4 practical problems that would have required  
5 Congress to legislate in that way, so it's very  
6 difficult to imagine that that statute would  
7 pass muster.

8 But if there were similar practical  
9 problems and if they supplied a general policy,  
10 it wouldn't be importantly different from  
11 Loving or Grimaud or Fahey or Kollock or Union  
12 Bridge.

13 JUSTICE GINSBURG: Mr. Wall, can you  
14 tell me how -- how this retroactivity works?  
15 So let's take somebody who was convicted of a  
16 sex offense 30 years ago. He's had a clean  
17 record ever since.

18 How do you -- first, tell me how such  
19 a person gets notice of the registration  
20 requirement.

21 MR. WALL: So he's -- he's only  
22 required to register if he's a Tier III  
23 offender, so if he's got a really grave sex  
24 offense like Petitioner --

25 JUSTICE GINSBURG: Yes, but let's say



1 he is such an offender, but it was 30 years  
2 ago.

3 MR. WALL: Yes. So I think he's on  
4 notice from the enactment of SORNA and then the  
5 Attorney General's interim rule in 2007,  
6 carried forward in the final rule in 2010, that  
7 there's an across-the-board registration  
8 requirement.

9 JUSTICE GINSBURG: So he's a -- he has  
10 to know what the Attorney General's regulation  
11 is? There's no notice given to these people.  
12 They can be charged with -- with failure to  
13 register, even though nobody -- no one ever  
14 gave them notice that they had to register?

15 MR. WALL: I suppose you could try to  
16 bring an as-applied due process challenge. Of  
17 course, Petitioner's not going to be able to do  
18 that. Petitioner was informed in 2012 before  
19 he left the BOP's custody, both in writing and  
20 orally, that he needed to register when he  
21 moved to New York, and then he failed to do it.  
22 So I -- I take the point that there could be  
23 as-applied notice problems, but I don't think  
24 that there's one here.

25 And to get back to -- to the -- to the

1 colloquy I was having with Justice Gorsuch, I  
2 do think at the end of the day this is not a  
3 provision that just lays out a general standard  
4 and then requires all of the fleshing in.  
5 That, the Court has held, is permissible,  
6 provided you supply a general policy.

7 But it really is inside even that,  
8 because Congress set up a pretty reticulated  
9 scheme, made a lot of judgments along the way.

10 JUSTICE KAGAN: Do you think that if  
11 there were a new attorney general who came in  
12 and said, you know, I think that this  
13 registration stuff has just gone overboard, and  
14 I'm going to start making some exceptions with  
15 respect to pre-Act offenders, because I think  
16 it's just unfair to penalize them for the rest  
17 of their lives, could the attorney general do  
18 that?

19 MR. WALL: No, we don't think the  
20 attorney general could make judgments on the  
21 basis, other than feasibility, and disagree  
22 with Congress's policy judgments.

23 And if the Court had any doubt about  
24 that, it should construe the statute more  
25 narrowly, in the way I think is the most

1 reasonable interpretation, so as to avoid the  
2 constitutional problem.

3 JUSTICE KAGAN: And when you say the  
4 Attorney General could -- tell me what you  
5 think the Attorney General cannot do, given the  
6 language of this statute and given the language  
7 of Reynolds.

8 MR. WALL: So I don't think the  
9 Attorney General could say: Look, I know  
10 Congress set up three tiers with registration  
11 links of 15, 25 years, and life, but I'm going  
12 to require you to register, but only for a few  
13 years.

14 It's perfectly feasible. I could  
15 require you all to register and there would be  
16 no problem on the state registries, but I just  
17 disagree with Congress's judgment that you  
18 ought to be -- you ought to register.

19 JUSTICE BREYER: Is -- is --

20 MR. WALL: I don't think the Attorney  
21 General could do that.

22 JUSTICE BREYER: I'm -- I'm trying to  
23 think of -- I think Ms. Baumgartel was trying  
24 to make a point that in my mind is something  
25 like this: That the executive branch has many

1 different functions. They do all kinds of  
2 different things.

3 One of the things they do is prosecute  
4 people. Now it's quite different from the SEC  
5 and all these other agencies because they have  
6 other things to do.

7 And, moreover, there's a safeguard  
8 going through the Department of Justice. And  
9 there is a particular danger when you combine  
10 prosecuting a person with the writing of the  
11 law under which you prosecute.

12 And the danger is captured in the bill  
13 of attainder clause, it's captured maybe in ex  
14 post facto clause, it's captured in the word  
15 liberty, and it is that particular danger that  
16 means where you have a person whose job is  
17 prosecuting, be careful, especially careful  
18 that that person cannot also write the law  
19 under which he prosecutes, because there we  
20 risk vendetta.

21 Now I think my interpretation of what  
22 she's saying is something like that. So what  
23 is your response?

24 MR. WALL: So I do think that plays  
25 itself out in certain rules, like not deferring

1 to the executive in the interpretation of  
2 criminal statutes, but the Court's considered  
3 that argument twice in the non-delegation  
4 context and rejected it both times.

5 JUSTICE BREYER: What -- which --

6 MR. WALL: In *Touby*, they made exactly  
7 the same argument. They said, look, you can't  
8 delegate to the executive branch which  
9 substances will be controlled under the Act  
10 because they're both defining what's illegal to  
11 possess and they're prosecuting you.

12 And in *Touby*, you said, no, not for  
13 non-delegation purposes. That controls from  
14 one branch to the other. Not where the power  
15 is allocated within the executive branch.

16 And even more to the point, in *Loving*,  
17 there was the availability of the death  
18 penalty. The president was just specifying  
19 aggravating factors nowhere to be found in the  
20 statute, and this Court, where you were  
21 actually -- the executive was actually defining  
22 the criminal penalty, which is not what the  
23 executive has done here. This Court said we've  
24 upheld delegations whereby -- this is at page  
25 768 of *Loving* -- we've upheld delegations where

1 the executive defines by regulation what  
2 conduct will be criminal, so long as Congress  
3 has created the criminal offense --

4 JUSTICE BREYER: That -- those are the  
5 standards, quite right.

6 MR. WALL: -- fixed the punishment --

7 JUSTICE BREYER: But suppose you put  
8 --

9 MR. WALL: -- and given the executive  
10 the authority.

11 JUSTICE BREYER: No, I -- I see where  
12 you're going there. But -- but what we've been  
13 arguing here is basically the Non-Delegation  
14 Doctrine, informed perhaps by the need to  
15 prevent vendettas in liberty. Suppose you  
16 reverse that. Suppose you said the problem  
17 here is a due process argument. It is a  
18 liberty-protecting argument. And in  
19 interpreting that liberty-protecting argument,  
20 we should inform our thought with  
21 non-delegation principles.

22 MR. WALL: Justice Breyer, I just  
23 think the non-delegation context is a very odd  
24 one in which to try to cache that out, as  
25 opposed to -- to vagueness or -- or due

1 process, because it's asking whether Congress  
2 has made the basic policy judgments that can  
3 inform the executive's exercise of power.

4 And, boy, if -- if the executive can  
5 define the availability of the death penalty in  
6 Loving and Mistretta, here, it seems well  
7 withinside that to say, look, this is a civil  
8 requirement; yes, there are criminal penalties  
9 that could potentially attach. But that's a  
10 commonplace feature in the law. The IRS tells  
11 you what kind of tax return you've got to file.  
12 Now not filing that tax return is a criminal  
13 violation, but nobody thinks that the IRS is  
14 defining the scope of the criminal law, though  
15 in some sense it is by telling you what the  
16 civil requirement is.

17 CHIEF JUSTICE ROBERTS: Well, this  
18 is -- this is different in the sense that the  
19 Attorney General is deciding what law applies,  
20 not whether a particular act or a particular  
21 exercise in commercial activity is covered by  
22 an Act that certainly applies in a general  
23 sense.

24 I mean, it's not this -- in those  
25 instances, even in -- in -- in Touby, it's --

1 it's exercising fairly refined authority with  
2 respect to what activity is covered.

3 Here, it's just saying are you going  
4 to be -- it's not just covered by a law; does  
5 the law even apply to you?

6 MR. WALL: Well --

7 CHIEF JUSTICE ROBERTS: And it seems  
8 to me that those -- that -- that's a  
9 substantive difference.

10 MR. WALL: I don't -- I don't know,  
11 Mr. Chief Justice. I don't know why we would  
12 think that specifying whether the drug you're  
13 holding is lawful or unlawful, whether your  
14 bridge has to be taken down, whether you can  
15 graze on public land, whether your rates are  
16 unreasonable is different in kind from whether  
17 you have to register going forward and report  
18 to the federal government.

19 Either way, the executive branch tells  
20 you whether your conduct brings you within the  
21 scope of the law or it doesn't.

22 CHIEF JUSTICE ROBERTS: Well, but it's  
23 -- the bridges, yes. I mean, the executive  
24 branch has to specify what type of bridge needs  
25 to be what height or whatever and if it's this



1 or that. But there's another -- it's a  
2 different thing when the Attorney General says,  
3 okay, here's a law that covers bridges; you get  
4 to decide whether it governs at all in  
5 particular areas.

6 MR. WALL: I -- I understand if SORNA  
7 didn't have the kind of guidance that it had  
8 here, if it hadn't defined the criminal  
9 offense, if it hadn't fixed the punishment, if  
10 it hadn't set a reticulated scheme on the civil  
11 side. I understand that if it hadn't made all  
12 of those judgments, there could be more serious  
13 problems.

14 But to do all of that and then say  
15 but, look, we know that there's going to be  
16 some practical problems, it's not just the  
17 timing, the state -- SORNA requires a lot of  
18 things: Provide your motor vehicle  
19 information, provide your DNA, provide your  
20 photos, do periodic show-ups.

21 And there's no dispute, I think, that  
22 the state registries at the time SORNA was  
23 passed were not equipped to do all of that.  
24 And so Congress, looking at that, said: Look,  
25 we've got hundreds of thousands of people out

1     there we want to bring into this system. We  
2     know they can't all come in on day one.  
3     There's going to be some transitional issues  
4     that we're going to have to work out. And the  
5     person to work those out is the person who for  
6     the last 12 years has been dealing with exactly  
7     that subject and interacting with the states.

8             And at the end of the day, that's  
9     really much more about implementation than it  
10    is about policy judgment. I mean, here, it  
11    really is inside of the Grimaud, the Fahey, the  
12    outer bound, because you've got an intelligible  
13    principle that's anchored in the text of the  
14    statute, not always true in some of those  
15    cases, like Grimaud and Fahey, and you really  
16    have what's much closer to a classic executive  
17    function because it's just specifying the  
18    applicability of the requirements themselves.

19            It's not even like the Attorney  
20    General is providing the substance of those  
21    requirements. And even that, of course, the  
22    Court has said okay, but I just -- I think  
23    we're --

24            JUSTICE GORSUCH: Well, Mr. Wall, I --  
25    I want to develop a little bit what Justice

1 Breyer was after. Is there something unusual  
2 about the Attorney General's presence in this  
3 case as the chief prosecutor and kind of a  
4 conflict of interest? And what if -- what if,  
5 instead of feasibility, you were arguing just  
6 and reasonable or in the public interest, other  
7 standards that might have applied in a -- in a  
8 civil delegation context?

9           Would you think that the Attorney  
10 General of the United States could decide the  
11 applicability of a criminal law for a half a  
12 million people on the basis of his or her  
13 judgment about its public interest or whether  
14 it's just and reasonable? Or -- or would -- or  
15 do you accept the -- the suggestion of this  
16 Court in *Touby* that delegations in the criminal  
17 context involving the Attorney General may  
18 merit a heightened standard of review?

19           MR. WALL: Justice Gorsuch, I -- I --  
20 I don't think the Court needs to cross that  
21 bridge here.

22           JUSTICE GORSUCH: I understand that.  
23 I'm asking you to answer that question.

24           MR. WALL: I -- and I want to -- I  
25 want to try to. I think the Court has had

1 several cases where criminal penalties were  
2 indirectly or directly involved, from Grimaud  
3 to Yakus, to Loving, Mistretta. It's never  
4 suggested, even when faced with this exact  
5 argument in Touby, that the bar ought to be  
6 raised higher.

7 But I'll grant that in Touby, the  
8 Court said it didn't need to address that,  
9 though it had never done that in any of its  
10 previous cases, and just say, look, if this  
11 statute did that, if it did nothing more than  
12 say to the Attorney General register them, you  
13 know, as reasonable, with no requirements, no  
14 creation of the criminal offense, no fixing of  
15 the penalty --

16 JUSTICE GORSUCH: No. Just and  
17 reasonable or in the public interest. Would  
18 those be okay or not okay?

19 MR. WALL: I think, as -- as long as  
20 it's done the things it did here, it's created  
21 the crime, it's defined the elements --

22 JUSTICE GORSUCH: Those would be okay?

23 MR. WALL: -- it's fixed the penalty.  
24 And then, on the civil side, it has said, and  
25 you provided some standard like that in the

1 statute, the Court's cases indicate that's  
2 enough. But I -- I do want to say, even if you  
3 think that's not enough, this statute does come  
4 inside of that because this is not an agency  
5 just supplying all of the real content or  
6 substance to a broad standard like public  
7 interest or just and reasonable.

8 JUSTICE SOTOMAYOR: Is it a right --

9 MR. WALL: Reading the statute,  
10 Congress made a lot of those judgments for  
11 itself and left to the Attorney General a much  
12 narrower practical problem.

13 JUSTICE SOTOMAYOR: There's a lot of  
14 discussion in our case law about the propriety  
15 of the Court reading into statute words, and I  
16 think a fundamental issue that Justice Gorsuch  
17 has been aiming at is, especially in criminal  
18 law, is it just to delegate to the Attorney  
19 General a fundamental decision about who gets  
20 covered or doesn't get covered by a statute?  
21 That seems like -- it seems like at the core of  
22 what a law is, if someone does X act, you're  
23 covered or you're not.

24 And if Congress had said that, we  
25 probably wouldn't have found a retroactivity

1 problem. But what is the essence of  
2 non-delegation that we don't let the  
3 legislature define who's a criminal? And so  
4 isn't retroactivity a definition of who's a  
5 criminal or not?

6 MR. WALL: So two separate points,  
7 Justice Sotomayor.

8 JUSTICE SOTOMAYOR: Or who might be a  
9 criminal because of their acts?

10 MR. WALL: Two separate points.  
11 First, if Congress had given the same authority  
12 to the Attorney General and not otherwise  
13 expressed any intention with respect to how  
14 that authority would be exercised, I'll grant  
15 that would be --

16 JUSTICE SOTOMAYOR: There's no plain  
17 words that add maximum feasibility --

18 MR. WALL: So --

19 JUSTICE SOTOMAYOR: -- in this  
20 statute. So you're -- you're discerning words.

21 MR. WALL: I am, Justice Sotomayor.  
22 And that's my second point. I'm doing exactly  
23 what the Court did in Grimaud, Fahey, Kollock,  
24 Loving. In none of those was the intelligible  
25 principle spelled out in the statute in so many

1 words. And the Court engaged in an  
2 interpretive act. It looked at the Act as a  
3 whole, and said based on the provisions we  
4 have, would a reasonable attorney general  
5 understand or a reasonable executive official  
6 understand what policy they were meant to  
7 pursue in exercising this authority?

8           And I -- to be honest with you, I  
9 think it defies both the text of SORNA and  
10 reality to think that Congress was agnostic  
11 about whether hundreds of thousands of people  
12 who have committed very serious sex offenses,  
13 as Petitioner has, should be required to  
14 register. I think there's no way to read  
15 SORNA's text, its legislative history, and not  
16 come away with the firm and definite notion  
17 that Congress wanted as many of those offenders  
18 in the system as the Attorney General could get  
19 in --

20           JUSTICE SOTOMAYOR: If you take out --

21           MR. WALL: -- and it was just a  
22 practical problem of how to accomplish that.

23           JUSTICE SOTOMAYOR: -- if you take out  
24 legislative history and you take out policy  
25 statements, because there are some of my

1 colleagues who don't rely on either of those  
2 two things, what's left?

3 MR. WALL: I would say the findings in  
4 20901, the statement of express statutory  
5 purpose, which this Court has relied on in  
6 cases like NBC and New York Central for a  
7 comprehensive national system, the inclusive  
8 definition of "sex offender," the broad  
9 registration requirement in 2913(a), and then  
10 the text and title of 913(d), which say that  
11 this grant of authority was about addressing  
12 the inability to comply. We know on its face  
13 that what spurred this was a practical  
14 consideration, a concern by Congress about how  
15 to get these people into the system.

16 All of those things taken together, I  
17 think, far -- the -- the intelligent principle  
18 here far more anchored in the text of this  
19 statute. Then take a case like Fahey, where  
20 Justice Jackson for the Court looked at the  
21 norms of the banking industry. Or Grimaud,  
22 where the Court discerned it from a number of  
23 other statutory provisions that I don't think  
24 were as definite as what it faces here.  
25 Loving, the same thing. Kollock, the same



1 thing.

2 I think here you've got an  
3 intelligible principle, a general policy that  
4 really is anchored in the text of the Act, even  
5 apart from legislative history and policy  
6 statements and all the rest, which we -- we  
7 have not -- we have not relied on in -- in our  
8 brief.

9 JUSTICE BREYER: The part that's still  
10 gnawing at me, I mean, your basic argument is  
11 there is a standard here, that's the end of the  
12 case. All right. But, in writing it, I guess  
13 I have to think through the Non-Delegation  
14 Doctrine.

15 So I'm just interested if this strikes  
16 any thought in your mind. Let's take the  
17 Securities Act of '34. What it says is you  
18 can't use a manipulative device, that's a  
19 fraudulent device, that's the equivalent here  
20 of the sex offense. It says you cannot use  
21 them in contravention of such rules as the SEC  
22 may prescribe as appropriate in the public  
23 interest.

24 Suppose instead of that word "SEC,"  
25 everything's the same, but it doesn't say SEC,

1 it says Attorney General, so what you have is  
2 it is a crime to violate a rule, where it  
3 concerns a manipulative device, in violation of  
4 such rules as the Attorney General finds  
5 appropriate, the difference being we don't  
6 think he's an expert on securities, though the  
7 SEC is.

8 MR. WALL: Right.

9 JUSTICE BREYER: Does that matter?  
10 Should it matter? Should we suggest in the  
11 opinion that it might matter?

12 MR. WALL: So, to the extent it  
13 matters, here's what I think you could say in  
14 the opinion.

15 If the executive official, the  
16 Attorney General, were defining the elements of  
17 the offense or defining the criminal  
18 punishment, that would raise the Touby  
19 question. But where the Attorney General or  
20 the executive official is defining a civil  
21 requirement, as with the '34 Act, to which  
22 criminal consequences can possibly attach, that  
23 falls squarely inside a handful of cases where  
24 the Court has proved exactly that.

25 So I think the Court can set aside the

1 tougher case than this one where Congress  
2 hasn't defined the elements of the offense and  
3 fixed the punishment itself but left those  
4 things to the executive branch.

5 I do want to say just a word about the  
6 harms here before I sit down so that we -- we  
7 all understand what's in play. Eighteen  
8 jurisdictions have substantially implemented  
9 SORNA. Of the remaining 32 states, 26 of them  
10 have taken federal funds and are attempting to  
11 substantially implement, but they're not there  
12 yet.

13 If Petitioner prevails, I believe,  
14 though Petitioner's briefs don't say, that all  
15 of their arguments translate not just from the  
16 pre-Act offender clause but also to the  
17 pre-implementation clause. And if that's  
18 right, there will be no federal duty to  
19 register in the 32 states that haven't  
20 substantially implemented.

21 As a matter of federal law, more than  
22 half the country will be a sex offender  
23 registration-free zone. Even in the remaining  
24 18 states, they will not be picking up new  
25 pre-Act offenders who come into contact with

1 the justice system because there will no longer  
2 be a duty to register.

3 All told, our best estimate is that  
4 we'll lose a couple of thousand people out of  
5 the registries every month, and that's not even  
6 including tribal areas, where we wouldn't be  
7 able to get at non-tribal members.

8 And, of course, some substantial  
9 portion of the 4,000 convictions at issue would  
10 be in -- in -- in jeopardy of being vacated  
11 either on direct or collateral review.

12 SORNA's efficacy, if Petitioner  
13 prevails, will not just be sharply curtailed.  
14 It will arguably be thoroughly gutted as -- as  
15 a matter of how this federal law works.

16 And if it is possible, and we think it  
17 is not just possible but the most natural  
18 interpretation of the Attorney General's  
19 authority to say this is a narrow authority, to  
20 specify the applicability of requirements in an  
21 on/off way in order to get people into the  
22 system, and that interpretation avoids  
23 constitutional problems, right, it's  
24 constitutional, if we read it to say do it to  
25 the extent you can, then, as Petitioner

1       concedes, I think if that's -- if it's possible  
2       to read the statute that way, that's  
3       constitutional and that's what we would urge  
4       the Court to do.

5                If there are no further questions.

6                CHIEF JUSTICE ROBERTS: Thank you, Mr.  
7       Wall.

8                Ms. Baumgartel, you have four minutes  
9       remaining.

10               REBUTTAL ARGUMENT OF SARAH BAUMGARTEL  
11               ON BEHALF OF THE PETITIONER

12               MS. BAUMGARTEL: Thank you.

13               Just to pick up where my friend left  
14       off, I want to emphasize that prior to SORNA's  
15       enactment, every single state had an existing  
16       sex offender registry and those will continue  
17       to exist and to require the registration of  
18       offenders, regardless of what happens with  
19       SORNA.

20               Individuals like Petitioner were  
21       required to register under existing state law,  
22       and they will still be required to register.  
23       This was a law whose retroactive application  
24       was opposed by the states, which is part of the  
25       reason why only 18 states have implemented it.

1 States spoke out against the retroactive  
2 application of the law before the Attorney  
3 General made his determination.

4 And so states themselves, who are the  
5 experts in this area having run registration  
6 systems for years, don't want this Act to be  
7 fully retroactive.

8 My friend emphasized that this  
9 delegation was all about practicality, but the  
10 reality is, is that the Attorney General's  
11 promulgated rule does not account for  
12 practicality in any way, which is further  
13 evidence for this Court that to the extent  
14 feasible was not the standard of this  
15 delegation.

16 That is not the standard that exists  
17 in the text. It is not the intelligible  
18 principle that was found by any circuit court  
19 to consider this issue. And it was not even  
20 the intelligible principle that the Attorney  
21 General himself said that he was acting  
22 pursuant to when he issued his regulation.

23 In his final regulation, he said that  
24 Congress delegated to him, and I quote, "the  
25 discretion to apply SORNA's requirements to sex

1 offenders to the extent that he determines that  
2 the public benefits of doing so outweigh any  
3 adverse costs."

4 So the Attorney General believed that  
5 his discretion was to essentially undertake the  
6 fundamental policy determination as to whether  
7 the costs outweigh the benefits. He did not  
8 view this as an issue of feasibility or  
9 practicality.

10 Finally, I'd just like to emphasize  
11 the special nature of this delegation. This is  
12 not licensing. This is not civil rule-making.  
13 This is the retroactive application of criminal  
14 law penalties that affect individual liberty  
15 interests in the most profound way.

16 This is the area where the  
17 Constitution specifies that there must be a  
18 division between the law-maker and between the  
19 executive. And for that reason, this  
20 delegation is unconstitutional.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel. The case is submitted.

24 (Whereupon, at 10:59 a.m., the case  
25 was submitted.)

## Official - Subject to Review

<b>1</b>	<b>act</b> <sup>[3]</sup> 11:7,10,13,15,22 <b>12</b> :13 <b>15</b> :12 <b>12</b> <b>19</b> :9,20,23 <b>20</b> :4,6 <b>21</b> :4 <b>23</b> :12, 23 <b>24</b> :4,18 <b>30</b> :7 <b>31</b> :13 <b>33</b> :9 <b>38</b> :11 <b>44</b> :9 <b>46</b> :20,22 <b>52</b> :22 <b>54</b> :2,2 <b>56</b> :4, 17 <b>57</b> :21 <b>61</b> :6 <b>acting</b> <sup>[1]</sup> 61:21 <b>activity</b> <sup>[2]</sup> 46:21 <b>47</b> :2 <b>acts</b> <sup>[1]</sup> 53:9 <b>actually</b> <sup>[4]</sup> 9:4 <b>13</b> :23 <b>44</b> :21,21 <b>add</b> <sup>[1]</sup> 53:17 <b>adding</b> <sup>[1]</sup> 35:20 <b>address</b> <sup>[3]</sup> 13:21 <b>30</b> :13 <b>51</b> :8 <b>addressed</b> <sup>[1]</sup> 22:20 <b>addresses</b> <sup>[2]</sup> 14:18 <b>31</b> :16 <b>addressing</b> <sup>[2]</sup> 35:24 <b>55</b> :11 <b>adverse</b> <sup>[1]</sup> 62:3 <b>affect</b> <sup>[1]</sup> 62:14 <b>affected</b> <sup>[1]</sup> 38:3 <b>afforded</b> <sup>[2]</sup> 20:23 <b>21</b> :9 <b>AG</b> <sup>[4]</sup> 23:10,12,17 <b>24</b> :18 <b>agencies</b> <sup>[2]</sup> 29:19 <b>43</b> :5 <b>agency</b> <sup>[3]</sup> 22:22 <b>29</b> :4 <b>52</b> :4 <b>aggravating</b> <sup>[1]</sup> 44:19 <b>agnostic</b> <sup>[1]</sup> 54:10 <b>ago</b> <sup>[2]</sup> 39:16 <b>40</b> :2 <b>agree</b> <sup>[4]</sup> 12:16 <b>24</b> :1,5,7 <b>aiming</b> <sup>[1]</sup> 52:17 <b>air</b> <sup>[1]</sup> 25:14 <b>akin</b> <sup>[1]</sup> 21:10 <b>ALITO</b> <sup>[5]</sup> 6:14 <b>8</b> :25 <b>16</b> :25 <b>17</b> :25 18:9 <b>allocated</b> <sup>[1]</sup> 44:15 <b>allowed</b> <sup>[2]</sup> 16:8 <b>38</b> :13 <b>although</b> <sup>[1]</sup> 25:7 <b>ambiguous</b> <sup>[2]</sup> 12:21 <b>13</b> :1 <b>American</b> <sup>[4]</sup> 17:11 <b>22</b> :21 <b>26</b> :9,19 <b>among</b> <sup>[2]</sup> 14:21 <b>25</b> :23 <b>amount</b> <sup>[1]</sup> 26:20 <b>anchored</b> <sup>[3]</sup> 49:13 <b>55</b> :18 <b>56</b> :4 <b>another</b> <sup>[3]</sup> 8:1 <b>16</b> :7 <b>48</b> :1 <b>answer</b> <sup>[4]</sup> 29:14 <b>36</b> :23 <b>38</b> :15 <b>50</b> : 23 <b>answering</b> <sup>[1]</sup> 8:18 <b>apart</b> <sup>[1]</sup> 56:5 <b>appear</b> <sup>[1]</sup> 4:11 <b>APPEARANCES</b> <sup>[1]</sup> 1:17 <b>appendix</b> <sup>[1]</sup> 30:10 <b>applicability</b> <sup>[6]</sup> 32:15 <b>34</b> :20 <b>36</b> :2 <b>49</b> :18 <b>50</b> :11 <b>59</b> :20 <b>application</b> <sup>[4]</sup> 6:17 <b>60</b> :23 <b>61</b> :2 <b>62</b> :13 <b>applied</b> <sup>[6]</sup> 6:7 <b>9</b> :22 <b>19</b> :10,11,12 <b>50</b> :7 <b>applies</b> <sup>[3]</sup> 19:20 <b>46</b> :19,22 <b>apply</b> <sup>[17]</sup> 4:7 <b>5</b> :17 <b>6</b> :10 <b>9</b> :20,23 <b>19</b> : 24 <b>20</b> :3,8,19 <b>21</b> :21,23 <b>23</b> :12 <b>33</b> : 10 <b>37</b> :25 <b>38</b> :24 <b>47</b> :5 <b>61</b> :25 <b>applying</b> <sup>[1]</sup> 38:5 <b>approached</b> <sup>[1]</sup> 5:21 <b>appropriate</b> <sup>[3]</sup> 7:8 <b>56</b> :22 <b>57</b> :5 <b>approved</b> <sup>[1]</sup> 4:2 <b>approximately</b> <sup>[1]</sup> 26:5 <b>area</b> <sup>[3]</sup> 25:13 <b>61</b> :5 <b>62</b> :16 <b>areas</b> <sup>[2]</sup> 48:5 <b>59</b> :6	<b>arguably</b> <sup>[2]</sup> 17:13 <b>59</b> :14 <b>argue</b> <sup>[1]</sup> 24:13 <b>arguing</b> <sup>[2]</sup> 45:13 <b>50</b> :5 <b>argument</b> <sup>[27]</sup> 1:14 <b>2</b> :2,5,8 <b>3</b> :4,7 <b>7</b> : 20 <b>11</b> :23 <b>12</b> :20 <b>15</b> :18 <b>16</b> :19 <b>17</b> :5, 8 <b>22</b> :14 <b>30</b> :1 <b>32</b> :20,22 <b>35</b> :1 <b>37</b> :13 <b>44</b> :3,7 <b>45</b> :17,18,19 <b>51</b> :5 <b>56</b> :10 <b>60</b> : 10 <b>arguments</b> <sup>[1]</sup> 58:15 <b>around</b> <sup>[1]</sup> 20:14 <b>art</b> <sup>[1]</sup> 14:13 <b>articulated</b> <sup>[1]</sup> 25:8 <b>as-applied</b> <sup>[2]</sup> 40:16,23 <b>aside</b> <sup>[1]</sup> 57:25 <b>aspect</b> <sup>[1]</sup> 14:19 <b>assign</b> <sup>[1]</sup> 29:4 <b>assist</b> <sup>[1]</sup> 14:24 <b>assume</b> <sup>[1]</sup> 35:11 <b>attach</b> <sup>[2]</sup> 46:9 <b>57</b> :22 <b>attainder</b> <sup>[1]</sup> 43:13 <b>attempting</b> <sup>[1]</sup> 58:10 <b>Attorney</b> <sup>[77]</sup> 4:3 <b>5</b> :16 <b>6</b> :6,13,15 <b>7</b> : 12,19 <b>9</b> :8,14,21 <b>12</b> :22 <b>15</b> :24 <b>16</b> :6, 15 <b>18</b> :2,24 <b>19</b> :8,22 <b>20</b> :2,9,23 <b>21</b> :3, 9,17,24 <b>23</b> :20 <b>25</b> :5 <b>28</b> :5 <b>30</b> :25 <b>31</b> : 24 <b>32</b> :9 <b>33</b> :1,2,4,12,14,19 <b>34</b> :7,9 <b>35</b> :14 <b>36</b> :2,12,19 <b>37</b> :11,17 <b>38</b> :7,9 <b>40</b> :5,10 <b>41</b> :11,17,20 <b>42</b> :4,5,9,20 <b>46</b> :19 <b>48</b> :2 <b>49</b> :19 <b>50</b> :2,9,17 <b>51</b> :12 <b>52</b> :11,18 <b>53</b> :12 <b>54</b> :4,18 <b>57</b> :1,4,16, 19 <b>59</b> :18 <b>61</b> :2,10,20 <b>62</b> :4 <b>authority</b> <sup>[18]</sup> 6:6,16 <b>12</b> :22 <b>18</b> :16 <b>19</b> :9,18 <b>30</b> :25 <b>34</b> :19 <b>36</b> :13,21 <b>45</b> : 10 <b>47</b> :1 <b>53</b> :11,14 <b>54</b> :7 <b>55</b> :11 <b>59</b> : 19,19 <b>authorizes</b> <sup>[1]</sup> 18:2 <b>availability</b> <sup>[2]</sup> 44:17 <b>46</b> :5 <b>Avent</b> <sup>[1]</sup> 28:1 <b>AVERY</b> <sup>[1]</sup> 1:3 <b>avoid</b> <sup>[1]</sup> 42:1 <b>avoids</b> <sup>[1]</sup> 59:22 <b>away</b> <sup>[1]</sup> 54:16	<b>believed</b> <sup>[1]</sup> 62:4 <b>benefits</b> <sup>[2]</sup> 62:2,7 <b>benzene</b> <sup>[1]</sup> 25:9 <b>best</b> <sup>[6]</sup> 23:25 <b>24</b> :3,25 <b>30</b> :7 <b>31</b> :8 <b>59</b> :3 <b>between</b> <sup>[5]</sup> 7:15 <b>18</b> :5 <b>28</b> :8 <b>62</b> :18, 18 <b>bill</b> <sup>[2]</sup> 15:6 <b>43</b> :12 <b>bit</b> <sup>[1]</sup> 49:25 <b>blank</b> <sup>[1]</sup> 16:14 <b>body</b> <sup>[7]</sup> 7:11,16,17 <b>17</b> :16,20,23 <b>25</b> : 18 <b>BOP's</b> <sup>[1]</sup> 40:19 <b>both</b> <sup>[9]</sup> 9:21 <b>10</b> :23 <b>13</b> :11,21 <b>15</b> :8 <b>40</b> :19 <b>44</b> :4,10 <b>54</b> :9 <b>bother</b> <sup>[1]</sup> 38:19 <b>bound</b> <sup>[1]</sup> 49:12 <b>bounds</b> <sup>[1]</sup> 32:7 <b>boy</b> <sup>[1]</sup> 46:4 <b>branch</b> <sup>[8]</sup> 31:6 <b>42</b> :25 <b>44</b> :8,14,15 <b>47</b> :19,24 <b>58</b> :4 <b>breathing</b> <sup>[1]</sup> 34:12 <b>BREYER</b> <sup>[21]</sup> 7:1,18,23 <b>8</b> :12,18 <b>25</b> : 21 <b>26</b> :10,15,22 <b>27</b> :4,10 <b>42</b> :19,22 <b>44</b> :5 <b>45</b> :4,7,11,22 <b>50</b> :1 <b>56</b> :9 <b>57</b> :9 <b>Bridge</b> <sup>[5]</sup> 38:11 <b>39</b> :12 <b>47</b> :14,24 <b>50</b> :21 <b>bridges</b> <sup>[3]</sup> 38:12 <b>47</b> :23 <b>48</b> :3 <b>brief</b> <sup>[4]</sup> 30:10 <b>34</b> :16 <b>35</b> :10 <b>56</b> :8 <b>briefed</b> <sup>[1]</sup> 36:23 <b>briefs</b> <sup>[2]</sup> 8:3 <b>58</b> :14 <b>bring</b> <sup>[2]</sup> 40:16 <b>49</b> :1 <b>brings</b> <sup>[1]</sup> 47:20 <b>broad</b> <sup>[6]</sup> 9:6 <b>17</b> :13,15 <b>19</b> :17 <b>52</b> :6 <b>55</b> :8 <b>broader</b> <sup>[1]</sup> 37:22 <b>broadly</b> <sup>[2]</sup> 13:16 <b>30</b> :14 <b>burdensome</b> <sup>[1]</sup> 3:14 <b>busy</b> <sup>[1]</sup> 8:7 <b>button</b> <sup>[1]</sup> 35:13
<b>2</b>	<b>2</b> <sup>[1]</sup> 1:11 <b>20</b> <sup>[1]</sup> 6:11 <b>200,000</b> <sup>[2]</sup> 26:6,23 <b>2007</b> <sup>[1]</sup> 40:5 <b>2010</b> <sup>[1]</sup> 40:6 <b>2012</b> <sup>[1]</sup> 40:18 <b>2018</b> <sup>[1]</sup> 1:11 <b>20901</b> <sup>[2]</sup> 4:15 <b>55</b> :4 <b>20913(d)</b> <sup>[1]</sup> 19:6 <b>25</b> <sup>[1]</sup> 42:11 <b>26</b> <sup>[1]</sup> 58:9 <b>2913(a)</b> <sup>[1]</sup> 55:9	<b>arguing</b> <sup>[2]</sup> 45:13 <b>50</b> :5 <b>argument</b> <sup>[27]</sup> 1:14 <b>2</b> :2,5,8 <b>3</b> :4,7 <b>7</b> : 20 <b>11</b> :23 <b>12</b> :20 <b>15</b> :18 <b>16</b> :19 <b>17</b> :5, 8 <b>22</b> :14 <b>30</b> :1 <b>32</b> :20,22 <b>35</b> :1 <b>37</b> :13 <b>44</b> :3,7 <b>45</b> :17,18,19 <b>51</b> :5 <b>56</b> :10 <b>60</b> : 10 <b>arguments</b> <sup>[1]</sup> 58:15 <b>around</b> <sup>[1]</sup> 20:14 <b>art</b> <sup>[1]</sup> 14:13 <b>articulated</b> <sup>[1]</sup> 25:8 <b>as-applied</b> <sup>[2]</sup> 40:16,23 <b>aside</b> <sup>[1]</sup> 57:25 <b>aspect</b> <sup>[1]</sup> 14:19 <b>assign</b> <sup>[1]</sup> 29:4 <b>assist</b> <sup>[1]</sup> 14:24 <b>assume</b> <sup>[1]</sup> 35:11 <b>attach</b> <sup>[2]</sup> 46:9 <b>57</b> :22 <b>attainder</b> <sup>[1]</sup> 43:13 <b>attempting</b> <sup>[1]</sup> 58:10 <b>Attorney</b> <sup>[77]</sup> 4:3 <b>5</b> :16 <b>6</b> :6,13,15 <b>7</b> : 12,19 <b>9</b> :8,14,21 <b>12</b> :22 <b>15</b> :24 <b>16</b> :6, 15 <b>18</b> :2,24 <b>19</b> :8,22 <b>20</b> :2,9,23 <b>21</b> :3, 9,17,24 <b>23</b> :20 <b>25</b> :5 <b>28</b> :5 <b>30</b> :25 <b>31</b> : 24 <b>32</b> :9 <b>33</b> :1,2,4,12,14,19 <b>34</b> :7,9 <b>35</b> :14 <b>36</b> :2,12,19 <b>37</b> :11,17 <b>38</b> :7,9 <b>40</b> :5,10 <b>41</b> :11,17,20 <b>42</b> :4,5,9,20 <b>46</b> :19 <b>48</b> :2 <b>49</b> :19 <b>50</b> :2,9,17 <b>51</b> :12 <b>52</b> :11,18 <b>53</b> :12 <b>54</b> :4,18 <b>57</b> :1,4,16, 19 <b>59</b> :18 <b>61</b> :2,10,20 <b>62</b> :4 <b>authority</b> <sup>[18]</sup> 6:6,16 <b>12</b> :22 <b>18</b> :16 <b>19</b> :9,18 <b>30</b> :25 <b>34</b> :19 <b>36</b> :13,21 <b>45</b> : 10 <b>47</b> :1 <b>53</b> :11,14 <b>54</b> :7 <b>55</b> :11 <b>59</b> : 19,19 <b>authorizes</b> <sup>[1]</sup> 18:2 <b>availability</b> <sup>[2]</sup> 44:17 <b>46</b> :5 <b>Avent</b> <sup>[1]</sup> 28:1 <b>AVERY</b> <sup>[1]</sup> 1:3 <b>avoid</b> <sup>[1]</sup> 42:1 <b>avoids</b> <sup>[1]</sup> 59:22 <b>away</b> <sup>[1]</sup> 54:16	<b>both</b> <sup>[9]</sup> 9:21 <b>10</b> :23 <b>13</b> :11,21 <b>15</b> :8 <b>40</b> :19 <b>44</b> :4,10 <b>54</b> :9 <b>bother</b> <sup>[1]</sup> 38:19 <b>bound</b> <sup>[1]</sup> 49:12 <b>bounds</b> <sup>[1]</sup> 32:7 <b>boy</b> <sup>[1]</sup> 46:4 <b>branch</b> <sup>[8]</sup> 31:6 <b>42</b> :25 <b>44</b> :8,14,15 <b>47</b> :19,24 <b>58</b> :4 <b>breathing</b> <sup>[1]</sup> 34:12 <b>BREYER</b> <sup>[21]</sup> 7:1,18,23 <b>8</b> :12,18 <b>25</b> : 21 <b>26</b> :10,15,22 <b>27</b> :4,10 <b>42</b> :19,22 <b>44</b> :5 <b>45</b> :4,7,11,22 <b>50</b> :1 <b>56</b> :9 <b>57</b> :9 <b>Bridge</b> <sup>[5]</sup> 38:11 <b>39</b> :12 <b>47</b> :14,24 <b>50</b> :21 <b>bridges</b> <sup>[3]</sup> 38:12 <b>47</b> :23 <b>48</b> :3 <b>brief</b> <sup>[4]</sup> 30:10 <b>34</b> :16 <b>35</b> :10 <b>56</b> :8 <b>briefed</b> <sup>[1]</sup> 36:23 <b>briefs</b> <sup>[2]</sup> 8:3 <b>58</b> :14 <b>bring</b> <sup>[2]</sup> 40:16 <b>49</b> :1 <b>brings</b> <sup>[1]</sup> 47:20 <b>broad</b> <sup>[6]</sup> 9:6 <b>17</b> :13,15 <b>19</b> :17 <b>52</b> :6 <b>55</b> :8 <b>broader</b> <sup>[1]</sup> 37:22 <b>broadly</b> <sup>[2]</sup> 13:16 <b>30</b> :14 <b>burdensome</b> <sup>[1]</sup> 3:14 <b>busy</b> <sup>[1]</sup> 8:7 <b>button</b> <sup>[1]</sup> 35:13
<b>3</b>	<b>3</b> <sup>[1]</sup> 2:4 <b>30</b> <sup>[4]</sup> 2:7 <b>6</b> :11 <b>39</b> :16 <b>40</b> :1 <b>300,000</b> <sup>[7]</sup> 8:3,7,18 <b>25</b> :23 <b>26</b> :5,11, 14 <b>32</b> <sup>[2]</sup> 58:9,19 <b>34</b> <sup>[2]</sup> 56:17 <b>57</b> :21 <b>3a</b> <sup>[1]</sup> 30:9	<b>arguing</b> <sup>[2]</sup> 45:13 <b>50</b> :5 <b>argument</b> <sup>[27]</sup> 1:14 <b>2</b> :2,5,8 <b>3</b> :4,7 <b>7</b> : 20 <b>11</b> :23 <b>12</b> :20 <b>15</b> :18 <b>16</b> :19 <b>17</b> :5, 8 <b>22</b> :14 <b>30</b> :1 <b>32</b> :20,22 <b>35</b> :1 <b>37</b> :13 <b>44</b> :3,7 <b>45</b> :17,18,19 <b>51</b> :5 <b>56</b> :10 <b>60</b> : 10 <b>arguments</b> <sup>[1]</sup> 58:15 <b>around</b> <sup>[1]</sup> 20:14 <b>art</b> <sup>[1]</sup> 14:13 <b>articulated</b> <sup>[1]</sup> 25:8 <b>as-applied</b> <sup>[2]</sup> 40:16,23 <b>aside</b> <sup>[1]</sup> 57:25 <b>aspect</b> <sup>[1]</sup> 14:19 <b>assign</b> <sup>[1]</sup> 29:4 <b>assist</b> <sup>[1]</sup> 14:24 <b>assume</b> <sup>[1]</sup> 35:11 <b>attach</b> <sup>[2]</sup> 46:9 <b>57</b> :22 <b>attainder</b> <sup>[1]</sup> 43:13 <b>attempting</b> <sup>[1]</sup> 58:10 <b>Attorney</b> <sup>[77]</sup> 4:3 <b>5</b> :16 <b>6</b> :6,13,15 <b>7</b> : 12,19 <b>9</b> :8,14,21 <b>12</b> :22 <b>15</b> :24 <b>16</b> :6, 15 <b>18</b> :2,24 <b>19</b> :8,22 <b>20</b> :2,9,23 <b>21</b> :3, 9,17,24 <b>23</b> :20 <b>25</b> :5 <b>28</b> :5 <b>30</b> :25 <b>31</b> : 24 <b>32</b> :9 <b>33</b> :1,2,4,12,14,19 <b>34</b> :7,9 <b>35</b> :14 <b>36</b> :2,12,19 <b>37</b> :11,17 <b>38</b> :7,9 <b>40</b> :5,10 <b>41</b> :11,17,20 <b>42</b> :4,5,9,20 <b>46</b> :19 <b>48</b> :2 <b>49</b> :19 <b>50</b> :2,9,17 <b>51</b> :12 <b>52</b> :11,18 <b>53</b> :12 <b>54</b> :4,18 <b>57</b> :1,4,16, 19 <b>59</b> :18 <b>61</b> :2,10,20 <b>62</b> :4 <b>authority</b> <sup>[18]</sup> 6:6,16 <b>12</b> :22 <b>18</b> :16 <b>19</b> :9,18 <b>30</b> :25 <b>34</b> :19 <b>36</b> :13,21 <b>45</b> : 10 <b>47</b> :1 <b>53</b> :11,14 <b>54</b> :7 <b>55</b> :11 <b>59</b> : 19,19 <b>authorizes</b> <sup>[1]</sup> 18:2 <b>availability</b> <sup>[2]</sup> 44:17 <b>46</b> :5 <b>Avent</b> <sup>[1]</sup> 28:1 <b>AVERY</b> <sup>[1]</sup> 1:3 <b>avoid</b> <sup>[1]</sup> 42:1 <b>avoids</b> <sup>[1]</sup> 59:22 <b>away</b> <sup>[1]</sup> 54:16	<b>cache</b> <sup>[1]</sup> 45:24 <b>call</b> <sup>[1]</sup> 24:15 <b>came</b> <sup>[3]</sup> 1:13 <b>34</b> :17 <b>41</b> :11 <b>cannot</b> <sup>[4]</sup> 23:19 <b>42</b> :5 <b>43</b> :18 <b>56</b> :20 <b>captured</b> <sup>[3]</sup> 43:12,13,14 <b>careful</b> <sup>[2]</sup> 43:17,17 <b>carried</b> <sup>[1]</sup> 40:6 <b>Case</b> <sup>[15]</sup> 3:4 <b>4</b> :19 <b>17</b> :7 <b>21</b> :19 <b>25</b> :9 <b>28</b> :9 <b>33</b> :18 <b>38</b> :19 <b>50</b> :3 <b>52</b> :14 <b>55</b> : 19 <b>56</b> :12 <b>58</b> :1 <b>62</b> :23,24 <b>cases</b> <sup>[14]</sup> 6:2 <b>17</b> :11 <b>22</b> :6 <b>27</b> :24 <b>28</b> : 9 <b>31</b> :10,19 <b>37</b> :23 <b>49</b> :15 <b>51</b> :1,10 <b>52</b> :1 <b>55</b> :6 <b>57</b> :23 <b>categories</b> <sup>[6]</sup> 10:20 <b>21</b> :5 <b>26</b> :25 <b>27</b> :5,7,11 <b>category</b> <sup>[1]</sup> 31:19 <b>caveat</b> <sup>[1]</sup> 35:21 <b>cede</b> <sup>[1]</sup> 16:20 <b>Central</b> <sup>[1]</sup> 55:6 <b>certain</b> <sup>[4]</sup> 5:25 <b>28</b> :24 <b>32</b> :1 <b>43</b> :25 <b>certainly</b> <sup>[6]</sup> 17:7 <b>18</b> :7,11 <b>31</b> :25 <b>32</b> :6 <b>46</b> :22
<b>4</b>	<b>4,000</b> <sup>[1]</sup> 59:9 <b>40</b> <sup>[1]</sup> 6:11 <b>40-something</b> <sup>[1]</sup> 14:18	<b>arguing</b> <sup>[2]</sup> 45:13 <b>50</b> :5 <b>argument</b> <sup>[27]</sup> 1:14 <b>2</b> :2,5,8 <b>3</b> :4,7 <b>7</b> : 20 <b>11</b> :23 <b>12</b> :20 <b>15</b> :18 <b>16</b> :19 <b>17</b> :5, 8 <b>22</b> :14 <b>30</b> :1 <b>32</b> :20,22 <b>35</b> :1 <b>37</b> :13 <b>44</b> :3,7 <b>45</b> :17,18,19 <b>51</b> :5 <b>56</b> :10 <b>60</b> : 10 <b>arguments</b> <sup>[1]</sup> 58:15 <b>around</b> <sup>[1]</sup> 20:14 <b>art</b> <sup>[1]</sup> 14:13 <b>articulated</b> <sup>[1]</sup> 25:8 <b>as-applied</b> <sup>[2]</sup> 40:16,23 <b>aside</b> <sup>[1]</sup> 57:25 <b>aspect</b> <sup>[1]</sup> 14:19 <b>assign</b> <sup>[1]</sup> 29:4 <b>assist</b> <sup>[1]</sup> 14:24 <b>assume</b> <sup>[1]</sup> 35:11 <b>attach</b> <sup>[2]</sup> 46:9 <b>57</b> :22 <b>attainder</b> <sup>[1]</sup> 43:13 <b>attempting</b> <sup>[1]</sup> 58:10 <b>Attorney</b> <sup>[77]</sup> 4:3 <b>5</b> :16 <b>6</b> :6,13,15 <b>7</b> : 12,19 <b>9</b> :8,14,21 <b>12</b> :22 <b>15</b> :24 <b>16</b> :6, 15 <b>18</b> :2,24 <b>19</b> :8,22 <b>20</b> :2,9,23 <b>21</b> :3, 9,17,24 <b>23</b> :20 <b>25</b> :5 <b>28</b> :5 <b>30</b> :25 <b>31</b> : 24 <b>32</b> :9 <b>33</b> :1,2,4,12,14,19 <b>34</b> :7,9 <b>35</b> :14 <b>36</b> :2,12,19 <b>37</b> :11,17 <b>38</b> :7,9 <b>40</b> :5,10 <b>41</b> :11,17,20 <b>42</b> :4,5,9,20 <b>46</b> :19 <b>48</b> :2 <b>49</b> :19 <b>50</b> :2,9,17 <b>51</b> :12 <b>52</b> :11,18 <b>53</b> :12 <b>54</b> :4,18 <b>57</b> :1,4,16, 19 <b>59</b> :18 <b>61</b> :2,10,20 <b>62</b> :4 <b>authority</b> <sup>[18]</sup> 6:6,16 <b>12</b> :22 <b>18</b> :16 <b>19</b> :9,18 <b>30</b> :25 <b>34</b> :19 <b>36</b> :13,21 <b>45</b> : 10 <b>47</b> :1 <b>53</b> :11,14 <b>54</b> :7 <b>55</b> :11 <b>59</b> : 19,19 <b>authorizes</b> <sup>[1]</sup> 18:2 <b>availability</b> <sup>[2]</sup> 44:17 <b>46</b> :5 <b>Avent</b> <sup>[1]</sup> 28:1 <b>AVERY</b> <sup>[1]</sup> 1:3 <b>avoid</b> <sup>[1]</sup> 42:1 <b>avoids</b> <sup>[1]</sup> 59:22 <b>away</b> <sup>[1]</sup> 54:16	<b>cache</b> <sup>[1]</sup> 45:24 <b>call</b> <sup>[1]</sup> 24:15 <b>came</b> <sup>[3]</sup> 1:13 <b>34</b> :17 <b>41</b> :11 <b>cannot</b> <sup>[4]</sup> 23:19 <b>42</b> :5 <b>43</b> :18 <b>56</b> :20 <b>captured</b> <sup>[3]</sup> 43:12,13,14 <b>careful</b> <sup>[2]</sup> 43:17,17 <b>carried</b> <sup>[1]</sup> 40:6 <b>Case</b> <sup>[15]</sup> 3:4 <b>4</b> :19 <b>17</b> :7 <b>21</b> :19 <b>25</b> :9 <b>28</b> :9 <b>33</b> :18 <b>38</b> :19 <b>50</b> :3 <b>52</b> :14 <b>55</b> : 19 <b>56</b> :12 <b>58</b> :1 <b>62</b> :23,24 <b>cases</b> <sup>[14]</sup> 6:2 <b>17</b> :11 <b>22</b> :6 <b>27</b> :24 <b>28</b> : 9 <b>31</b> :10,19 <b>37</b> :23 <b>49</b> :15 <b>51</b> :1,10 <b>52</b> :1 <b>55</b> :6 <b>57</b> :23 <b>categories</b> <sup>[6]</sup> 10:20 <b>21</b> :5 <b>26</b> :25 <b>27</b> :5,7,11 <b>category</b> <sup>[1]</sup> 31:19 <b>caveat</b> <sup>[1]</sup> 35:21 <b>cede</b> <sup>[1]</sup> 16:20 <b>Central</b> <sup>[1]</sup> 55:6 <b>certain</b> <sup>[4]</sup> 5:25 <b>28</b> :24 <b>32</b> :1 <b>43</b> :25 <b>certainly</b> <sup>[6]</sup> 17:7 <b>18</b> :7,11 <b>31</b> :25 <b>32</b> :6 <b>46</b> :22
<b>5</b>	<b>5a</b> <sup>[1]</sup> 30:16	<b>back</b> <sup>[6]</sup> 6:11 <b>9</b> :24 <b>16</b> :23 <b>18</b> :13 <b>23</b> : 6 <b>40</b> :25 <b>banking</b> <sup>[1]</sup> 55:21 <b>bar</b> <sup>[1]</sup> 51:5 <b>barriers</b> <sup>[1]</sup> 32:13 <b>based</b> <sup>[2]</sup> 35:22 <b>54</b> :3 <b>basic</b> <sup>[2]</sup> 46:2 <b>56</b> :10 <b>basically</b> <sup>[3]</sup> 10:4 <b>20</b> :10 <b>45</b> :13 <b>basis</b> <sup>[2]</sup> 41:21 <b>50</b> :12 <b>BAUMGARTEL</b> <sup>[54]</sup> 1:18 <b>2</b> :3,9 <b>3</b> : 6,7,9 <b>4</b> :10,18 <b>5</b> :14 <b>6</b> :21 <b>7</b> :9,21 <b>8</b> :9, 14,21 <b>9</b> :2,18 <b>11</b> :2,12,17 <b>12</b> :15 <b>13</b> : 20 <b>14</b> :3,6 <b>16</b> :3,17,20 <b>17</b> :6 <b>18</b> :7,11 <b>19</b> :4,25 <b>20</b> :6,20 <b>21</b> :6 <b>22</b> :3,10 <b>23</b> : 18 <b>24</b> :7,21 <b>25</b> :3 <b>26</b> :8,12,18 <b>27</b> :2,9, 12 <b>28</b> :12,23 <b>29</b> :13 <b>42</b> :23 <b>60</b> :8,10, 12 <b>behalf</b> <sup>[7]</sup> 1:18 <b>2</b> :4,7,10 <b>3</b> :8 <b>30</b> :2 <b>60</b> :11 <b>believe</b> <sup>[3]</sup> 14:7 <b>36</b> :14 <b>58</b> :13	<b>cache</b> <sup>[1]</sup> 45:24 <b>call</b> <sup>[1]</sup> 24:15 <b>came</b> <sup>[3]</sup> 1:13 <b>34</b> :17 <b>41</b> :11 <b>cannot</b> <sup>[4]</sup> 23:19 <b>42</b> :5 <b>43</b> :18 <b>56</b> :20 <b>captured</b> <sup>[3]</sup> 43:12,13,14 <b>careful</b> <sup>[2]</sup> 43:17,17 <b>carried</b> <sup>[1]</sup> 40:6 <b>Case</b> <sup>[</sup>



## Official - Subject to Review

<p><b>certification</b> [2] 17:19,20  <b>challenge</b> [1] 40:16  <b>challenges</b> [1] 27:21  <b>change</b> [1] 33:12  <b>changed</b> [3] 33:15,20 34:8  <b>changes</b> [1] 33:24  <b>charged</b> [1] 40:12  <b>check</b> [1] 16:14  <b>CHIEF</b> [22] 3:3,9 4:5 9:25 16:9 19:19 20:1,15 21:2 25:20 29:23 30:3 31:11,21 32:24 46:17 47:7,11,22 50:3 60:6 62:22  <b>Chinese</b> [1] 33:10  <b>choices</b> [2] 28:25 29:21  <b>chosen</b> [1] 33:11  <b>circuit</b> [1] 61:18  <b>cites</b> [1] 4:13  <b>civil</b> [15] 14:23 17:1,3 18:9 27:21 28:3 29:7,10 46:7,16 48:10 50:8 51:24 57:20 62:12  <b>class</b> [1] 16:5  <b>classes</b> [1] 19:15  <b>classic</b> [2] 31:5 49:16  <b>clause</b> [4] 43:13,14 58:16,17  <b>clean</b> [1] 39:16  <b>clear</b> [3] 11:6 35:17 37:24  <b>clearly</b> [2] 12:12 34:21  <b>clemency</b> [1] 21:18  <b>closer</b> [5] 17:7 21:7,15,17 49:16  <b>collateral</b> [1] 59:11  <b>colleagues</b> [1] 55:1  <b>colloquy</b> [1] 41:1  <b>combination</b> [1] 3:23  <b>combine</b> [1] 43:9  <b>combines</b> [1] 3:16  <b>come</b> [7] 5:9 34:5 37:18 49:2 52:3 54:16 58:25  <b>comes</b> [1] 18:13  <b>coming</b> [1] 14:9  <b>command</b> [1] 25:5  <b>commercial</b> [1] 46:21  <b>Commission</b> [1] 8:1  <b>commitment</b> [1] 14:23  <b>committed</b> [2] 12:11 54:12  <b>common</b> [1] 13:13  <b>commonplace</b> [1] 46:10  <b>compare</b> [1] 17:25  <b>comply</b> [4] 10:21 30:22,23 55:12  <b>comprehensive</b> [12] 10:13 14:8,10,13,15 15:2 30:13 31:13,14,22 37:18 55:7  <b>comprehensiveness</b> [6] 10:9,23 12:14 13:9,21 32:24  <b>comprise</b> [1] 15:1  <b>conceded</b> [1] 31:7  <b>concedes</b> [1] 60:1  <b>conceding</b> [1] 26:13  <b>concern</b> [1] 55:14  <b>concerns</b> [2] 7:13 57:3  <b>concisely</b> [1] 16:19  <b>conditioned</b> [1] 5:24  <b>conduct</b> [2] 45:2 47:20  <b>conflict</b> [1] 50:4  <b>confronted</b> [1] 27:20</p>	<p><b>Congress</b> [50] 5:15,18,21,23 6:2,4,23 9:9,14,17,19 13:23 18:16,19 20:7,13,22 21:8 22:19 23:10,11,20 27:5,7 28:15 29:1,2,18 32:1 35:3 37:6,14,24 38:4,19,24 39:5 41:8 42:10 45:2 46:1 48:24 52:10,24 53:11 54:10,17 55:14 58:1 61:24  <b>Congress's</b> [2] 41:22 42:17  <b>congressional</b> [2] 8:15 18:12  <b>consequences</b> [4] 20:16,17,21 57:22  <b>consider</b> [2] 9:6 61:19  <b>consideration</b> [2] 18:4 55:14  <b>considerations</b> [1] 10:7  <b>considered</b> [1] 44:2  <b>consistent</b> [2] 5:20 24:16  <b>constant</b> [1] 34:14  <b>Constitution</b> [3] 3:18 7:15 62:17  <b>constitutional</b> [9] 20:12 21:8,16 23:1 25:4 42:2 59:23,24 60:3  <b>constitutionality</b> [1] 22:2  <b>constraint</b> [1] 10:25  <b>construction</b> [5] 13:24 22:16,23,25 23:3  <b>construe</b> [1] 41:24  <b>Consumer</b> [1] 8:1  <b>contact</b> [1] 58:25  <b>contain</b> [1] 11:20  <b>contained</b> [1] 4:15  <b>contemplate</b> [1] 27:18  <b>contemplated</b> [2] 19:5,16  <b>contemplates</b> [1] 27:14  <b>content</b> [2] 11:21 52:5  <b>context</b> [11] 12:7,24 14:17 17:24 18:9 22:18 25:11 44:4 45:23 50:8,17  <b>contextual</b> [1] 22:8  <b>continue</b> [1] 60:16  <b>contravention</b> [2] 7:7 56:21  <b>controlled</b> [2] 38:10 44:9  <b>controls</b> [1] 44:13  <b>convenience</b> [1] 17:18  <b>converge</b> [1] 7:14  <b>convicted</b> [4] 10:17 13:17 15:11 39:15  <b>convictions</b> [1] 59:9  <b>core</b> [1] 52:21  <b>correct</b> [2] 4:18 34:9  <b>cost</b> [2] 25:14,25  <b>costs</b> [2] 62:3,7  <b>counsel</b> [2] 29:24 62:23  <b>country</b> [1] 58:22  <b>couple</b> [1] 59:4  <b>course</b> [5] 13:5,23 40:17 49:21 59:8  <b>COURT</b> [51] 1:1,14 3:10,23 4:2 5:15 6:5 8:7 9:3,6 11:5,8,18 12:23 16:8 17:12 19:5,13 22:12,15,20,24 26:9,19 27:15 30:4 34:24 35:25 36:16,22 37:1 41:5,23 44:20,23 49:22 50:16,20,25 51:8 52:15 53:23 54:1 55:5,20,22 57:24,25 60:4 61:13,18  <b>Court's</b> [6] 7:13 23:19 31:10 37:23</p>	<p>44:2 52:1  <b>covered</b> [7] 5:12 46:21 47:2,4 52:20,20,23  <b>covers</b> [2] 31:15 48:3  <b>crafted</b> [1] 30:18  <b>create</b> [2] 5:11 30:19  <b>created</b> [2] 45:3 51:20  <b>creation</b> [1] 51:14  <b>crime</b> [2] 51:21 57:2  <b>crimes</b> [2] 9:10,16  <b>criminal</b> [30] 3:13,16 16:10,12 17:4 20:19 27:14,18,22 28:6,10 44:2,22 45:2,3 46:8,12,14 48:8 50:11,16 51:1,14 52:17 53:3,5,9 57:17,22 62:13  <b>critical</b> [1] 27:13  <b>cross</b> [1] 50:20  <b>curtailed</b> [1] 59:13  <b>custody</b> [1] 40:19</p> <hr/> <p style="text-align: center;"><b>D</b></p> <p><b>D.C</b> [2] 1:10,21  <b>danger</b> [3] 43:9,12,15  <b>day</b> [3] 41:2 49:2,8  <b>dealing</b> [2] 15:23 49:6  <b>death</b> [2] 44:17 46:5  <b>decide</b> [10] 6:7 9:22 19:9 31:18,24 33:2,3,5 48:4 50:10  <b>decided</b> [1] 36:11  <b>decides</b> [1] 15:24  <b>deciding</b> [1] 46:19  <b>decision</b> [5] 5:18 20:18,22 21:9 52:19  <b>decisions</b> [3] 18:17,20 25:18  <b>declined</b> [1] 5:18  <b>default</b> [3] 34:25 35:2 36:17  <b>defend</b> [1] 38:25  <b>defending</b> [2] 37:20 38:16  <b>deferring</b> [1] 43:25  <b>defies</b> [1] 54:9  <b>define</b> [2] 46:5 53:3  <b>defined</b> [4] 32:7 48:8 51:21 58:2  <b>defines</b> [3] 9:9 30:14 45:1  <b>defining</b> [6] 44:10,21 46:14 57:16,17,20  <b>definite</b> [2] 54:16 55:24  <b>definition</b> [5] 10:14 13:22 15:9 53:4 55:8  <b>degree</b> [1] 29:9  <b>delegate</b> [5] 25:19 27:5 29:4 44:8 52:18  <b>delegated</b> [5] 3:25 8:16 26:21 29:17 61:24  <b>delegation</b> [32] 3:11,20,21,22 6:22 7:13,22 8:24 9:5 10:19 11:10,19 12:21 16:8 18:6,6,15 19:7 22:5,23 24:5 25:2 27:21 28:3 29:8 37:22 38:3 50:8 61:9,15 62:11,20  <b>delegations</b> [9] 4:1 8:20,25 9:3 17:13 37:1 44:24,25 50:16  <b>demanded</b> [1] 13:9  <b>demands</b> [1] 12:14  <b>Department</b> [2] 1:21 43:8  <b>depends</b> [1] 26:21</p>	<p><b>Deputy</b> [1] 1:20  <b>derived</b> [1] 4:12  <b>design</b> [2] 14:22 29:5  <b>designed</b> [2] 3:18 13:14  <b>despite</b> [1] 18:20  <b>detailed</b> [2] 9:19 18:20  <b>details</b> [1] 29:19  <b>determination</b> [3] 6:9 61:3 62:6  <b>determine</b> [4] 5:16 6:16 16:16 33:9  <b>determines</b> [3] 19:23 20:7 62:1  <b>develop</b> [1] 49:25  <b>device</b> [4] 7:6 56:18,19 57:3  <b>devise</b> [1] 18:3  <b>difference</b> [6] 18:5,12 28:8 38:2 47:9 57:5  <b>differences</b> [1] 24:14  <b>different</b> [20] 7:11 13:2 14:16 18:25 19:1,8,14,15 24:8 26:24 28:13 34:25 38:8 39:10 43:1,2,4 46:18 47:16 48:2  <b>difficult</b> [2] 38:21 39:6  <b>difficulties</b> [1] 23:16  <b>direct</b> [1] 59:11  <b>directly</b> [1] 51:2  <b>disagree</b> [2] 41:21 42:17  <b>disagreed</b> [1] 34:24  <b>disagrees</b> [1] 36:16  <b>discerned</b> [1] 55:22  <b>discerning</b> [1] 53:20  <b>discretion</b> [7] 4:4 21:11,18,24 29:9 61:25 62:5  <b>discussion</b> [1] 52:14  <b>dispute</b> [1] 48:21  <b>dissent</b> [2] 13:12 21:14  <b>dissenting</b> [2] 13:5,7  <b>distinctions</b> [1] 7:10  <b>distinguished</b> [1] 3:21  <b>distinguishes</b> [1] 8:24  <b>distinguishing</b> [1] 25:23  <b>division</b> [1] 62:18  <b>DNA</b> [1] 48:19  <b>Doctrine</b> [3] 6:20 45:14 56:14  <b>doing</b> [5] 6:4 15:19 37:5 53:22 62:2  <b>done</b> [4] 9:16 44:23 51:9,20  <b>doubt</b> [1] 41:23  <b>down</b> [2] 47:14 58:6  <b>drew</b> [1] 17:15  <b>drug</b> [1] 47:12  <b>drugs</b> [1] 38:10  <b>due</b> [5] 3:23 7:13 40:16 45:17,25  <b>duty</b> [5] 33:21 34:5,13 58:18 59:2</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>each</b> [2] 6:1 9:2  <b>early</b> [1] 5:6  <b>easy</b> [2] 13:25 28:17  <b>effect</b> [1] 4:23  <b>efficacy</b> [1] 59:12  <b>Eighteen</b> [1] 58:7  <b>either</b> [5] 15:11 26:16 47:19 55:1 59:11  <b>elements</b> [3] 51:21 57:16 58:2</p>
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## Official - Subject to Review

<p><b>elsewhere</b> [1] 12:4  <b>emphasize</b> [2] 60:14 62:10  <b>emphasized</b> [2] 11:5 61:8  <b>enacted</b> [2] 5:23 37:14  <b>enactment</b> [4] 4:22 15:11 40:4 60:15  <b>end</b> [3] 41:2 49:8 56:11  <b>enforcement</b> [1] 14:24  <b>engaged</b> [1] 54:1  <b>enough</b> [2] 52:2,3  <b>environment</b> [1] 25:15  <b>equipped</b> [1] 48:23  <b>equivalent</b> [2] 38:23 56:19  <b>especially</b> [4] 8:10,12 43:17 52:17  <b>ESQ</b> [4] 1:18 2:3,6,9  <b>essence</b> [1] 53:1  <b>essential</b> [1] 22:19  <b>essentially</b> [4] 12:1 19:7 22:11 62:5  <b>established</b> [2] 17:16,19  <b>estimate</b> [1] 59:3  <b>even</b> [23] 9:5 15:25 16:1,4 17:11,14 20:15 21:6,6 38:6 40:13 41:7 44:16 46:25 47:5 49:19,21 51:4 52:2 56:4 58:23 59:5 61:19  <b>everybody</b> [4] 10:8 34:22 35:3,7  <b>everyone</b> [1] 23:17  <b>everything</b> [1] 31:15  <b>everything's</b> [1] 56:25  <b>evidence</b> [1] 61:13  <b>ex</b> [1] 43:13  <b>exacerbates</b> [1] 7:22  <b>exact</b> [1] 51:4  <b>exactly</b> [7] 11:22 35:1,18 44:6 49:6 53:22 57:24  <b>exaggeration</b> [1] 8:4  <b>example</b> [5] 4:24 8:25 17:17 19:14 28:13  <b>examples</b> [1] 5:11  <b>except</b> [1] 24:19  <b>exceptions</b> [1] 41:14  <b>executive</b> [2] 3:17 31:5,6 37:5 42:25 44:1,8,15,21,23 45:1,9 46:4 47:19,23 49:16 54:5 57:15,20 58:4 62:19  <b>executive's</b> [1] 46:3  <b>exempt</b> [1] 23:17  <b>exemptions</b> [3] 20:10 21:1,4  <b>exercise</b> [5] 4:3 23:1 36:20 46:3,21  <b>exercised</b> [1] 53:14  <b>exercising</b> [3] 23:4 47:1 54:7  <b>exist</b> [1] 60:17  <b>existed</b> [1] 4:24  <b>existence</b> [1] 5:5  <b>existing</b> [8] 4:20 5:1 17:16,23 30:11 32:11 60:15,21  <b>exists</b> [1] 61:16  <b>expand</b> [1] 3:13  <b>expert</b> [1] 57:6  <b>experts</b> [1] 61:5  <b>explicitly</b> [2] 15:8,10  <b>express</b> [1] 55:4  <b>expressed</b> [1] 53:13</p>	<p><b>extend</b> [1] 6:11  <b>extent</b> [1] 4:8 11:7 24:10,11,12,17 25:7 57:12 59:25 61:13 62:1  <b>extremely</b> [1] 18:20</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>face</b> [2] 28:6 55:12  <b>faced</b> [1] 51:4  <b>faces</b> [1] 55:24  <b>fact</b> [6] 8:5 11:4 26:2 27:13 33:14 35:12  <b>facto</b> [1] 43:14  <b>factories</b> [2] 27:12 44:19  <b>Fahey</b> [5] 39:11 49:11,15 53:23 55:19  <b>failed</b> [1] 40:21  <b>failure</b> [2] 9:13 40:12  <b>fair</b> [1] 37:4  <b>fairly</b> [1] 47:1  <b>fairness</b> [1] 6:18  <b>fall</b> [2] 8:5 32:11  <b>falls</b> [4] 7:19,20 36:25 57:23  <b>famous</b> [1] 7:2  <b>far</b> [3] 10:5 55:17,18  <b>fashion</b> [1] 21:21  <b>feasibility</b> [14] 10:6,10,18,24 13:19 18:4 22:7 23:16 25:10 35:23 41:21 50:5 53:17 62:8  <b>feasible</b> [10] 4:9 19:24 20:3 24:10,11,17 25:7 37:18 42:14 61:14  <b>feature</b> [1] 46:10  <b>federal</b> [9] 5:9,12 14:24 38:14 47:18 58:10,18,21 59:15  <b>few</b> [4] 7:10 8:16 11:3 42:12  <b>file</b> [1] 46:11  <b>filing</b> [1] 46:12  <b>fill</b> [1] 29:19  <b>final</b> [2] 40:6 61:23  <b>Finally</b> [1] 62:10  <b>find</b> [2] 24:20 34:1  <b>findings</b> [2] 30:11 55:3  <b>finds</b> [1] 57:4  <b>fine</b> [1] 29:18  <b>firm</b> [1] 54:16  <b>first</b> [8] 3:4 8:16 20:22,24 23:7 30:9 39:18 53:11  <b>fixed</b> [4] 45:6 48:9 51:23 58:3  <b>fixing</b> [1] 51:14  <b>fleshing</b> [2] 37:5 41:4  <b>flexibility</b> [1] 10:24  <b>folded</b> [1] 23:7  <b>forbid</b> [1] 7:5  <b>force</b> [1] 21:21  <b>formulations</b> [1] 24:9  <b>FORNA</b> [1] 19:1  <b>forth</b> [2] 9:20 37:6  <b>forward</b> [8] 30:19 32:9 34:5,13 37:25 38:6 40:6 47:17  <b>found</b> [4] 38:4 44:19 52:25 61:18  <b>four</b> [1] 60:8  <b>framework</b> [1] 18:21  <b>fraudulent</b> [1] 56:19  <b>friend</b> [3] 24:8 60:13 61:8  <b>full</b> [1] 6:6</p>	<p><b>fully</b> [1] 61:7  <b>fun</b> [2] 28:17,23  <b>function</b> [2] 31:5 49:17  <b>functions</b> [1] 43:1  <b>fundamental</b> [6] 25:16 28:25 29:21 52:16,19 62:6  <b>funding</b> [1] 5:25  <b>funds</b> [1] 58:10  <b>further</b> [2] 60:5 61:12</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>Gallery</b> [1] 14:13  <b>gave</b> [5] 6:6 9:1 19:7 20:8 40:14  <b>General</b> [80] 1:20 5:16 6:6,13,15 7:12,19 9:9,14,21 11:22 12:23 15:3,22,24 16:6,15 18:2,24 19:8,22 20:2,9,24 21:3,10,17,24 23:20 25:5 28:5 30:25 31:24 32:10 33:2,3,4,12,14,19 34:7,9 35:14 36:2,19 37:17,23 38:6,7,9 39:9 41:3,6,11,17,20 42:4,5,9,21 46:19,22 48:2 49:20 50:10,17 51:12 52:11,19 53:12 54:4,18 56:3 57:1,4,16,19 61:3,21 62:4  <b>General's</b> [7] 4:3 36:13 40:5,10 50:2 59:18 61:10  <b>generally</b> [1] 13:1  <b>gets</b> [5] 9:24 31:24 33:2 39:19 52:19  <b>GINSBURG</b> [10] 4:14 5:8 9:7 16:18 18:23 21:14 30:6 39:13,25 40:9  <b>give</b> [6] 17:24 27:24 29:9 30:25 31:6 34:11  <b>Given</b> [10] 6:22 9:21 11:21 22:7 33:13 40:11 42:5,6 45:9 53:11  <b>gives</b> [2] 12:22 18:2  <b>gnawing</b> [1] 56:10  <b>GORSUCH</b> [23] 15:14,17 16:4 32:16,19 33:23 34:3,7 35:11 37:9,12,21 38:1,15,22,25 41:1 49:24 50:19,22 51:16,22 52:16  <b>Gorsuch's</b> [1] 36:10  <b>got</b> [6] 32:5 39:23 46:11 48:25 49:12 56:2  <b>governed</b> [2] 11:21 12:3  <b>government</b> [10] 4:6,13 11:23 32:20,21,22 33:4,8,11 47:18  <b>government's</b> [5] 10:3 12:19 22:14 30:10 33:17  <b>governs</b> [1] 48:4  <b>grant</b> [5] 19:17 20:9 51:7 53:14 55:11  <b>granting</b> [1] 21:1  <b>grants</b> [1] 3:11  <b>grave</b> [1] 39:23  <b>graze</b> [2] 38:14 47:15  <b>greater</b> [1] 27:16  <b>Grimaud</b> [8] 27:25 38:13 39:11 49:11,15 51:2 53:23 55:21  <b>guess</b> [4] 15:13,14,17 56:12  <b>guidance</b> [1] 6:12,23 8:15 18:12 20:13,25 26:20 27:16 34:8 36:19 48:7</p>	<p><b>guide</b> [1] 4:3  <b>GUNDY</b> [2] 1:3 3:5  <b>gutted</b> [1] 59:14</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>half</b> [3] 38:2 50:11 58:22  <b>Hampton</b> [1] 11:4  <b>handful</b> [1] 57:23  <b>happen</b> [1] 31:23  <b>happens</b> [1] 60:18  <b>harms</b> [1] 58:6  <b>harsh</b> [2] 8:6,10  <b>hear</b> [2] 3:3 16:6  <b>height</b> [1] 47:25  <b>heightened</b> [1] 50:18  <b>held</b> [3] 5:15 6:5 41:5  <b>HERMAN</b> [1] 1:3  <b>higher</b> [1] 51:6  <b>himself</b> [1] 61:21  <b>history</b> [4] 12:24 54:15,24 56:5  <b>Holder</b> [1] 34:8  <b>holding</b> [1] 47:13  <b>honest</b> [1] 54:8  <b>Honor</b> [9] 4:10 6:21 8:9 12:15 14:6 26:13 27:2 28:24 29:13  <b>House</b> [1] 15:6  <b>however</b> [1] 21:19  <b>hundreds</b> [3] 3:15 48:25 54:11  <b>hypothetical</b> [2] 24:3 35:12</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> [3] 10:18 11:18 18:14  <b>Ill</b> [1] 39:22  <b>illegal</b> [1] 44:10  <b>imagine</b> [4] 7:3 23:9,14 39:6  <b>imagined</b> [1] 23:17  <b>immediate</b> [1] 10:7  <b>implement</b> [3] 29:20 31:1 58:11  <b>implementation</b> [2] 31:4 49:9  <b>implemented</b> [3] 58:8,20 60:25  <b>important</b> [3] 4:19 7:14 35:10  <b>importantly</b> [2] 38:8 39:10  <b>impose</b> [1] 3:14  <b>imposition</b> [2] 22:25 23:3  <b>impossible</b> [2] 10:8 30:21  <b>improper</b> [1] 18:6  <b>inability</b> [1] 55:12  <b>include</b> [3] 13:16 27:13 33:5  <b>included</b> [3] 6:10 15:9 16:5  <b>including</b> [2] 12:7 59:6  <b>inclusive</b> [1] 55:7  <b>inconsistency</b> [1] 34:17  <b>indeed</b> [1] 23:9  <b>indicate</b> [1] 52:1  <b>indicated</b> [1] 32:25  <b>indication</b> [1] 15:3  <b>indirectly</b> [1] 51:2  <b>individual</b> [9] 9:11 10:16,16,16 13:17 18:4 34:4,12 62:14  <b>individuals</b> [3] 3:16 33:21 60:20  <b>Industrial</b> [1] 25:8  <b>industries</b> [1] 17:21  <b>industry</b> [1] 55:21  <b>inform</b> [2] 45:20 46:3</p>
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## Official - Subject to Review

<p><b>information</b> <sup>[3]</sup> 9:12 14:20 48:19  <b>informed</b> <sup>[2]</sup> 40:18 45:14  <b>initial</b> <sup>[3]</sup> 5:18 6:8 21:9  <b>inside</b> <sup>[5]</sup> 36:25 41:7 49:11 52:4 57:23  <b>insisted</b> <sup>[1]</sup> 13:15  <b>instance</b> <sup>[1]</sup> 20:22  <b>instances</b> <sup>[1]</sup> 46:25  <b>instead</b> <sup>[2]</sup> 50:5 56:24  <b>intelligent</b> <sup>[1]</sup> 55:17  <b>intelligible</b> <sup>[10]</sup> 11:5 18:14 22:18, 20 23:18 49:12 53:24 56:3 61:17, 20  <b>intended</b> <sup>[2]</sup> 23:10,12  <b>intention</b> <sup>[1]</sup> 53:13  <b>interacting</b> <sup>[1]</sup> 49:7  <b>interest</b> <sup>[13]</sup> 6:25 7:8,25 17:18 25: 25 37:4,19 50:4,6,13 51:17 52:7 56:23  <b>interested</b> <sup>[1]</sup> 56:15  <b>interests</b> <sup>[2]</sup> 25:17 62:15  <b>interim</b> <sup>[1]</sup> 40:5  <b>Internet</b> <sup>[1]</sup> 14:21  <b>interpret</b> <sup>[1]</sup> 12:25  <b>interpretation</b> <sup>[16]</sup> 12:2,4,17,20 15:20 22:12 24:1,3,4,9 25:1 42:1 43:21 44:1 59:18,22  <b>interpreted</b> <sup>[1]</sup> 30:8  <b>interpreting</b> <sup>[2]</sup> 23:25 45:19  <b>interpretive</b> <sup>[1]</sup> 54:2  <b>involved</b> <sup>[1]</sup> 51:2  <b>involving</b> <sup>[1]</sup> 50:17  <b>IRS</b> <sup>[2]</sup> 46:10,13  <b>isn't</b> <sup>[3]</sup> 21:3 27:19 53:4  <b>issue</b> <sup>[6]</sup> 12:17 21:3 52:16 59:9 61: 19 62:8  <b>issued</b> <sup>[1]</sup> 61:22  <b>issues</b> <sup>[2]</sup> 31:3 49:3  <b>items</b> <sup>[1]</sup> 31:12  <b>itself</b> <sup>[15]</sup> 10:20 11:7,10 13:1 18:14, 16 19:1 22:19,22 23:2,23 29:1 43: 25 52:11 58:3</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>J.W</b> <sup>[1]</sup> 11:4  <b>Jackson</b> <sup>[1]</sup> 55:20  <b>jail</b> <sup>[1]</sup> 29:12  <b>JEFFREY</b> <sup>[3]</sup> 1:20 2:6 30:1  <b>jeopardy</b> <sup>[1]</sup> 59:10  <b>job</b> <sup>[2]</sup> 32:10 43:16  <b>joined</b> <sup>[1]</sup> 21:13  <b>judgment</b> <sup>[3]</sup> 42:17 49:10 50:13  <b>judgments</b> <sup>[8]</sup> 32:2 37:7 41:9,20, 22 46:2 48:12 52:10  <b>jurisdictions</b> <sup>[2]</sup> 14:21 58:8  <b>Justice</b> <sup>[127]</sup> 1:21 3:3,9 4:5,14 5:8 6:14 7:1,18,23 8:12,17,18,23,25 9: 7,24,25 11:9,14,25 12:9,10 13:4,6 14:1,4 15:13,14,15,17 16:4,18,22, 25 17:25 18:9,23 19:19 20:1,15 21:2,13,13,25 22:4,8 23:6,22,24 24:15,23 25:7,21 26:10,15,22 27: 4,10,19 28:16 29:6,23 30:3 31:11, 21 32:16,19,25 33:23 34:3,7 35:6,</p>	<p>9,11,18,20 36:6,9,10 37:9,12,21 38:1,15,22,25 39:13,25 40:9 41:1, 10 42:3,19,22 43:8 44:5 45:4,7,11, 22 46:17 47:7,11,22 49:24,25 50: 19,22 51:16,22 52:8,13,16 53:7,8, 16,19,21 54:20,23 55:20 56:9 57: 9 59:1 60:6 62:22  <b>Justices</b> <sup>[2]</sup> 13:7 30:6</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>KAGAN</b> <sup>[20]</sup> 9:24 11:9,14,25 13:6 14:1,4 15:13,15 16:22 22:8 23:24 24:15,23 27:19 28:16 29:6 30:6 41:10 42:3  <b>key</b> <sup>[1]</sup> 18:17  <b>kind</b> <sup>[5]</sup> 31:4 46:11 47:16 48:7 50: 3  <b>kinds</b> <sup>[1]</sup> 43:1  <b>Kollock</b> <sup>[5]</sup> 27:25 28:12 39:11 53: 23 55:25</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>label</b> <sup>[3]</sup> 28:14 29:3,5  <b>labels</b> <sup>[1]</sup> 28:18  <b>lack</b> <sup>[3]</sup> 3:24 17:10 35:22  <b>land</b> <sup>[2]</sup> 38:14 47:15  <b>language</b> <sup>[7]</sup> 4:11 10:2 32:18 36:3 37:16 42:6,6  <b>last</b> <sup>[2]</sup> 16:13 49:6  <b>Laughter</b> <sup>[3]</sup> 16:21,24 26:17  <b>law</b> <sup>[31]</sup> 4:8 5:1 6:2,7 9:22 14:24 16:2,10 17:14,16,20,23 43:11,18 46:10,14,19 47:4,5,21 48:3 50:11 52:14,18,22 58:21 59:15 60:21,23 61:2 62:14  <b>law-maker</b> <sup>[1]</sup> 62:18  <b>law-making</b> <sup>[1]</sup> 3:17  <b>lawful</b> <sup>[1]</sup> 47:13  <b>lawmaker</b> <sup>[1]</sup> 7:16  <b>laws</b> <sup>[3]</sup> 3:13 16:12 20:19  <b>lays</b> <sup>[1]</sup> 41:3  <b>left</b> <sup>[7]</sup> 5:15 21:23 40:19 52:11 55: 2 58:3 60:13  <b>legislate</b> <sup>[2]</sup> 38:20 39:5  <b>legislation</b> <sup>[1]</sup> 5:24  <b>legislative</b> <sup>[14]</sup> 11:6,9,13,15 12:24 18:16,17 23:2,5 25:18 32:1 54:15, 24 56:5  <b>legislature</b> <sup>[1]</sup> 53:3  <b>liability</b> <sup>[3]</sup> 17:2,3,4  <b>liberty</b> <sup>[6]</sup> 9:15 25:16 26:2 43:15 45:15 62:14  <b>liberty-protecting</b> <sup>[2]</sup> 45:18,19  <b>licensing</b> <sup>[2]</sup> 17:19 62:12  <b>life</b> <sup>[1]</sup> 42:11  <b>lifetime</b> <sup>[2]</sup> 3:14 32:6  <b>Light</b> <sup>[1]</sup> 17:12  <b>likely</b> <sup>[2]</sup> 20:12 25:3  <b>limitations</b> <sup>[2]</sup> 22:1 23:15  <b>limited</b> <sup>[1]</sup> 20:9  <b>limiting</b> <sup>[3]</sup> 22:23,25 23:3  <b>limits</b> <sup>[1]</sup> 22:6  <b>lines</b> <sup>[1]</sup> 6:24  <b>links</b> <sup>[1]</sup> 42:11</p>	<p><b>list</b> <sup>[2]</sup> 4:14,16  <b>listed</b> <sup>[1]</sup> 22:8  <b>literally</b> <sup>[1]</sup> 30:21  <b>little</b> <sup>[2]</sup> 34:11 49:25  <b>lives</b> <sup>[1]</sup> 41:17  <b>long</b> <sup>[4]</sup> 10:25 32:3 45:2 51:19  <b>longer</b> <sup>[1]</sup> 59:1  <b>look</b> <sup>[13]</sup> 7:24 10:19 12:5,6,9,11 30: 17 42:9 44:7 46:7 48:15,24 51:10  <b>looked</b> <sup>[3]</sup> 37:2 54:2 55:20  <b>looking</b> <sup>[3]</sup> 11:8 12:13 48:24  <b>looks</b> <sup>[1]</sup> 12:23  <b>lose</b> <sup>[1]</sup> 59:4  <b>lot</b> <sup>[4]</sup> 41:9 48:17 52:10,13  <b>Loving</b> <sup>[7]</sup> 39:11 44:16,25 46:6 51: 3 53:24 55:25</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>made</b> <sup>[18]</sup> 6:2 14:15 15:8 17:21 18: 17,19 20:22 21:8,14 32:1,21 37:7 41:9 44:6 46:2 48:11 52:10 61:3  <b>majority</b> <sup>[2]</sup> 5:2 13:11  <b>manipulative</b> <sup>[3]</sup> 7:5 56:18 57:3  <b>manner</b> <sup>[1]</sup> 33:10  <b>many</b> <sup>[6]</sup> 5:5 14:9 32:10 42:25 53: 25 54:17  <b>Maryland</b> <sup>[1]</sup> 5:1  <b>matter</b> <sup>[11]</sup> 1:13 6:22 27:3 34:18 35:2 36:13 57:9,10,11 58:21 59: 15  <b>matters</b> <sup>[3]</sup> 28:11 33:16 57:13  <b>maximum</b> <sup>[6]</sup> 4:8 24:10,17 25:6 35:22 53:17  <b>mean</b> <sup>[11]</sup> 7:3 9:8 14:14 27:5,23 31:14 36:25 46:24 47:23 49:10 56: 10  <b>meaning</b> <sup>[1]</sup> 11:10  <b>meanings</b> <sup>[1]</sup> 14:16  <b>means</b> <sup>[8]</sup> 10:15 25:10 31:15 32:5 34:21 36:14,15 43:16  <b>meant</b> <sup>[2]</sup> 15:4 54:6  <b>medium</b> <sup>[1]</sup> 26:3  <b>members</b> <sup>[1]</sup> 59:7  <b>mention</b> <sup>[1]</sup> 23:7  <b>mentioned</b> <sup>[1]</sup> 31:12  <b>menu</b> <sup>[1]</sup> 33:10  <b>merit</b> <sup>[1]</sup> 50:18  <b>might</b> <sup>[9]</sup> 9:6 10:19 19:14 23:15,21 38:25 50:7 53:8 57:11  <b>million</b> <sup>[2]</sup> 38:2 50:12  <b>mimicked</b> <sup>[1]</sup> 38:17  <b>mind</b> <sup>[5]</sup> 33:13,15,20 42:24 56:16  <b>minutes</b> <sup>[1]</sup> 60:8  <b>mirrored</b> <sup>[1]</sup> 37:16  <b>Mistretta</b> <sup>[2]</sup> 46:6 51:3  <b>moderated</b> <sup>[2]</sup> 10:9,23  <b>month</b> <sup>[1]</sup> 59:5  <b>moreover</b> <sup>[1]</sup> 43:7  <b>morning</b> <sup>[2]</sup> 3:4 30:5  <b>most</b> <sup>[4]</sup> 7:1 41:25 59:17 62:15  <b>motor</b> <sup>[1]</sup> 48:18  <b>moved</b> <sup>[1]</sup> 40:21  <b>Ms</b> <sup>[49]</sup> 3:6,9 4:10,18 5:14 6:21 7:9, 21 8:9,14,21 9:2,18 11:2,12,17 12:</p>	<p>15 13:20 14:3,6 16:3,17,20 17:6 18:7,11 19:4,25 20:6,20 21:6 22:3, 10 23:18 24:7,21 25:3 26:8,12,18 27:2,9,12 28:12,23 29:13 42:23 60:8,12  <b>much</b> <sup>[8]</sup> 17:7 21:7,15 25:14 37:22 49:9,16 52:11  <b>museum</b> <sup>[1]</sup> 14:13  <b>must</b> <sup>[3]</sup> 16:12 29:1 62:17  <b>muster</b> <sup>[1]</sup> 39:7</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>narrow</b> <sup>[4]</sup> 11:19 32:18 36:3 59:19  <b>narrowed</b> <sup>[1]</sup> 34:10  <b>narrower</b> <sup>[1]</sup> 52:12  <b>narrowly</b> <sup>[1]</sup> 41:25  <b>nation's</b> <sup>[1]</sup> 3:12  <b>national</b> <sup>[6]</sup> 10:13 14:10,12 15:2 30:13 55:7  <b>natural</b> <sup>[1]</sup> 59:17  <b>nature</b> <sup>[5]</sup> 3:24,25 29:17 32:24 62: 11  <b>NBC</b> <sup>[3]</sup> 17:11,17 55:6  <b>necessary</b> <sup>[1]</sup> 9:12  <b>necessity</b> <sup>[1]</sup> 17:18  <b>need</b> <sup>[3]</sup> 37:23 45:14 51:8  <b>needed</b> <sup>[1]</sup> 40:20  <b>needs</b> <sup>[4]</sup> 6:23 29:2 47:24 50:20  <b>never</b> <sup>[4]</sup> 12:5 33:20 51:3,9  <b>New</b> <sup>[6]</sup> 1:18,18 40:21 41:11 55:6 58:24  <b>nine</b> <sup>[2]</sup> 13:7 14:1  <b>nobody</b> <sup>[2]</sup> 40:13 46:13  <b>Non-Delegation</b> <sup>[9]</sup> 6:20 12:1 44: 3,13 45:13,21,23 53:2 56:13  <b>non-tribal</b> <sup>[1]</sup> 59:7  <b>none</b> <sup>[5]</sup> 4:16 5:11 9:18 33:5 53:24  <b>nor</b> <sup>[1]</sup> 4:12  <b>normally</b> <sup>[1]</sup> 15:19  <b>norms</b> <sup>[1]</sup> 55:21  <b>note</b> <sup>[1]</sup> 13:4  <b>noted</b> <sup>[1]</sup> 19:6  <b>nothing</b> <sup>[3]</sup> 6:3 33:3 51:11  <b>notice</b> <sup>[5]</sup> 39:19 40:4,11,14,23  <b>noting</b> <sup>[1]</sup> 13:22  <b>notion</b> <sup>[1]</sup> 54:16  <b>nowhere</b> <sup>[2]</sup> 24:22 44:19  <b>number</b> <sup>[3]</sup> 8:19 37:1 55:22  <b>numerous</b> <sup>[1]</sup> 27:23</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>obligations</b> <sup>[2]</sup> 34:1,11  <b>obstruct</b> <sup>[2]</sup> 38:11,12  <b>obviously</b> <sup>[2]</sup> 7:11 36:24  <b>occur</b> <sup>[1]</sup> 19:3  <b>October</b> <sup>[1]</sup> 1:11  <b>odd</b> <sup>[1]</sup> 45:23  <b>offender</b> <sup>[17]</sup> 4:21 5:19 6:1 7:6 10: 15 13:15,22 14:19 15:4,10 30:14 39:23 40:1 55:8 58:16,22 60:16  <b>offenders</b> <sup>[44]</sup> 4:16 5:2 6:10,18 9: 20,23 10:5,21 13:10 14:23 15:10, 23 18:19,25 19:10,11,12,16,21 20: 4,5,8 21:5,22 24:19 25:6 30:12,14,</p>
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## Official - Subject to Review

<p>19 31:2 32:11 33:1,5,6,7 34:2,5 37:16 38:18 41:15 54:17 58:25 60: 18 62:1 <b>offense</b> [11] 10:17 13:17 32:4 39: 16,24 45:3 48:9 51:14 56:20 57: 17 58:2 <b>offenses</b> [2] 32:2 54:12 <b>official</b> [3] 54:5 57:15,20 <b>okay</b> [7] 20:5 26:22 48:3 49:22 51: 18,18,22 <b>oleomargarine</b> [2] 28:14,18 <b>on/off</b> [4] 6:8 36:1,21 59:21 <b>once</b> [1] 32:7 <b>one</b> [19] 4:19 7:10 8:2,2 12:5,6 13: 12 14:5 22:11 23:16 30:21 31:12 40:13,24 43:3 44:14 45:24 49:2 58:1 <b>only</b> [9] 7:18 11:10 12:5 26:6 33: 25 35:22 39:21 42:12 60:25 <b>opinion</b> [6] 12:12 25:22 27:1,11 57:11,14 <b>opposed</b> [2] 45:25 60:24 <b>opposite</b> [3] 20:11 21:20 32:21 <b>oral</b> [5] 1:13 2:5 3:7 30:1 <b>orally</b> [1] 40:20 <b>order</b> [2] 22:1 59:21 <b>other</b> [12] 4:1 11:8 12:7 13:11 24: 18 28:9 41:21 43:5,6 44:14 50:6 55:23 <b>otherwise</b> [2] 29:20 53:12 <b>ought</b> [4] 26:7 42:18,18 51:5 <b>out</b> [13] 34:1 41:3 43:25 45:24 48: 25 49:4,5 53:25 54:20,23,24 59:4 61:1 <b>outer</b> [1] 49:12 <b>outweigh</b> [2] 62:2,7 <b>over</b> [2] 15:21 27:20 <b>overboard</b> [1] 41:13 <b>own</b> [2] 5:7 21:21</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>packaging</b> [1] 29:3 <b>PAGE</b> [3] 2:2 35:8 44:24 <b>pages</b> [1] 30:16 <b>painting</b> [1] 14:14 <b>Panama</b> [1] 11:18 <b>part</b> [4] 7:6 31:17 56:9 60:24 <b>particle</b> [1] 25:14 <b>particular</b> [7] 21:5 29:3 43:9,15 46:20,20 48:5 <b>particularly</b> [2] 20:12 25:11 <b>parts</b> [1] 11:15 <b>pass</b> [1] 39:7 <b>passed</b> [1] 48:23 <b>past</b> [2] 4:16 5:22 <b>penalize</b> [1] 41:16 <b>penalties</b> [4] 9:13 46:8 51:1 62:14 <b>penalty</b> [5] 44:18,22 46:5 51:15,23 <b>pending</b> [1] 15:7 <b>people</b> [16] 4:17 7:2 13:18 16:4 32: 3,8 33:11 38:2 40:11 43:4 48:25 50:12 54:11 55:15 59:4,21 <b>people's</b> [1] 25:18 <b>percent</b> [1] 12:16</p>	<p><b>perfect</b> [1] 28:13 <b>perfectly</b> [3] 29:18 31:10 42:14 <b>Perhaps</b> [3] 18:7 26:3 45:14 <b>periodic</b> [1] 48:20 <b>permissible</b> [2] 31:10 41:5 <b>permit</b> [1] 29:19 <b>permitted</b> [1] 19:17 <b>person</b> [9] 28:18,20 29:11 39:19 43:10,16,18 49:5,5 <b>Petitioner</b> [15] 1:4,19 2:4,10 3:8 4: 25 31:7 39:24 40:18 54:13 58:13 59:12,25 60:11,20 <b>Petitioner's</b> [2] 40:17 58:14 <b>photos</b> [1] 48:20 <b>pick</b> [1] 60:13 <b>picking</b> [1] 58:24 <b>place</b> [1] 27:20 <b>places</b> [1] 28:2 <b>plain</b> [1] 53:16 <b>plausible</b> [2] 13:2 22:15 <b>play</b> [1] 58:7 <b>plays</b> [1] 43:24 <b>please</b> [2] 3:10 30:4 <b>plenary</b> [2] 12:22 19:17 <b>point</b> [12] 7:12 10:11,12,14 13:12 21:13 29:6 36:10 40:22 42:24 44: 16 53:22 <b>points</b> [2] 53:6,10 <b>policy</b> [13] 29:21 37:24 38:7 39:9 41:6,22 46:2 49:10 54:6,24 56:3,5 62:6 <b>pollution</b> [1] 25:25 <b>portion</b> [1] 59:9 <b>pose</b> [2] 24:5 25:1 <b>posing</b> [1] 24:2 <b>positing</b> [1] 31:9 <b>position</b> [3] 8:22 35:15,19 <b>positive</b> [1] 23:11 <b>possess</b> [1] 44:11 <b>possible</b> [4] 10:5 59:16,17 60:1 <b>possibly</b> [1] 57:22 <b>post</b> [1] 43:14 <b>post-Act</b> [1] 18:21 <b>post-enactment</b> [2] 37:15 38:18 <b>potentially</b> [1] 46:9 <b>power</b> [19] 3:12,17,24,25 8:15 9: 21 17:12 20:9,24 21:10,16,18 23: 2,5 26:21 29:4,17 44:14 46:3 <b>practicable</b> [1] 24:12 <b>practical</b> [10] 30:20 32:13 38:5,23 39:4,8 48:16 52:12 54:22 55:13 <b>practicality</b> [3] 61:9,12 62:9 <b>pre-Act</b> [20] 5:19 9:20,22 10:4 13: 10 15:4 18:18 19:10,16,20 20:3,5, 8 21:22 24:19 25:6 31:2 41:15 58: 16,25 <b>pre-enactment</b> [4] 6:17 15:23 33: 1,6 <b>pre-implementation</b> [2] 19:11 58: 17 <b>preamble</b> [6] 10:12 11:22 14:3,9 15:4,18 <b>precedents</b> [1] 27:16 <b>precisely</b> [1] 3:17</p>	<p><b>prefer</b> [1] 15:20 <b>premise</b> [1] 35:2 <b>prescribe</b> [2] 9:15 56:22 <b>presence</b> [1] 50:2 <b>present</b> [1] 34:5 <b>president</b> [1] 44:18 <b>pretty</b> [4] 12:10 36:3,24 41:8 <b>prevails</b> [1] 12:18 <b>prevails</b> [2] 58:13 59:13 <b>prevent</b> [1] 45:15 <b>previous</b> [1] 51:10 <b>previously</b> [3] 3:22 5:23 22:9 <b>Principal</b> [1] 1:20 <b>principle</b> [11] 11:6 18:14 22:18,20 23:19 49:13 53:25 55:17 56:3 61: 18,20 <b>principles</b> [1] 45:21 <b>prior</b> [6] 4:21 6:1 9:3 33:17 34:9 60:14 <b>prison</b> [2] 28:20,22 <b>probably</b> [1] 52:25 <b>problem</b> [9] 12:19 24:6 25:2 42:2, 16 45:16 52:12 53:1 54:22 <b>problems</b> [10] 11:3 30:20 38:5,23 39:4,9 40:23 48:13,16 59:23 <b>process</b> [5] 7:13 35:1 40:16 45:17 46:1 <b>Product</b> [1] 8:1 <b>profound</b> [1] 62:15 <b>prohibit</b> [1] 3:19 <b>prohibition</b> [1] 4:7 <b>promulgated</b> [2] 7:4 61:11 <b>promulgation</b> [1] 27:17 <b>proper</b> [1] 18:6 <b>propose</b> [1] 22:22 <b>propriety</b> [1] 52:14 <b>prosecute</b> [4] 16:11,16 43:3,11 <b>prosecutes</b> [1] 43:19 <b>prosecuting</b> [3] 43:10,17 44:11 <b>prosecutor</b> [5] 3:12 7:17 16:9 25: 20 50:3 <b>prosecutorial</b> [2] 21:11,18 <b>protect</b> [1] 18:3 <b>proved</b> [1] 57:24 <b>provide</b> [4] 6:23 48:18,19,19 <b>provided</b> [7] 6:13 20:13,25 34:8 36:19 41:6 51:25 <b>provides</b> [1] 13:2 <b>providing</b> [1] 49:20 <b>provision</b> [18] 3:11 9:5 10:19 11: 11,19 12:6,6,13,21 14:18 15:21 19:7,21 28:19,21 32:23 34:23 41: 3 <b>provisions</b> [8] 9:19 11:8 12:7,8 15:1 33:9 54:3 55:23 <b>public</b> [17] 6:18,24 7:8,25 14:22 17:17,21 18:3 37:3,19 47:15 50:6, 13 51:17 52:6 56:22 62:2 <b>punishment</b> [4] 45:6 48:9 57:18 58:3 <b>purpose</b> [5] 5:10 12:7,13 18:13 55: 5 <b>purposes</b> [2] 32:25 44:13 <b>pursuant</b> [1] 61:22</p>	<p><b>pursue</b> [1] 54:7 <b>put</b> [2] 23:11 45:7</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>qualify</b> [1] 32:3 <b>question</b> [17] 9:25 12:2 21:22 25: 9,14 27:3 28:15 29:14,16 33:22 34:15 35:25 36:18,21 38:16 50:23 57:19 <b>questions</b> [1] 60:5 <b>quick</b> [1] 15:15 <b>quite</b> [3] 8:7 43:4 45:5 <b>quote</b> [1] 61:24</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>raise</b> [1] 57:18 <b>raised</b> [1] 51:6 <b>rates</b> [2] 37:4 47:15 <b>rather</b> [2] 17:2,3 <b>read</b> [11] 13:16 22:1,5 25:4 31:8 34:22 35:11 36:5 54:14 59:24 60: 2 <b>reading</b> [7] 10:3 11:3 22:6 34:16 36:6 52:9,15 <b>readings</b> [1] 13:2 <b>real</b> [3] 30:20 38:5 52:5 <b>reality</b> [2] 54:10 61:10 <b>realize</b> [1] 24:1 <b>really</b> [9] 25:16 34:15 37:5 39:23 41:7 49:9,11,15 56:4 <b>reason</b> [3] 22:17 60:25 62:19 <b>reasonable</b> [9] 37:4 42:1 50:6,14 51:13,17 52:7 54:4,5 <b>reasons</b> [1] 22:11 <b>REBUTTAL</b> [2] 2:8 60:10 <b>recognition</b> [1] 13:19 <b>recognized</b> [2] 19:13 27:15 <b>recognizing</b> [2] 31:2 32:12 <b>record</b> [1] 39:17 <b>refined</b> [1] 47:1 <b>Refining</b> [1] 11:18 <b>regardless</b> [2] 4:23 60:18 <b>regime</b> [1] 37:19 <b>register</b> [27] 4:17,25 5:20 9:11,13 10:4 14:20 24:19 25:6 32:3,5 34:6, 13 39:22 40:13,14,20 42:12,15,18 47:17 51:12 54:14 58:19 59:2 60: 21,22 <b>registered</b> [2] 13:18 15:5 <b>registration</b> [30] 3:15 4:21,22 5:4, 7,10,12,21,24 9:10 10:8 13:10 14: 11,19,22,25 15:2 18:22 19:3,15 30:15 33:21 37:19 39:19 40:7 41: 13 42:10 55:9 60:17 61:5 <b>registration-free</b> [1] 58:23 <b>registries</b> [5] 6:1 32:12 42:16 48: 22 59:5 <b>registry</b> [1] 60:16 <b>regulation</b> [8] 7:2 28:3,4 29:10 40: 10 45:1 61:22,23 <b>regulatory</b> [4] 8:3 27:17,21 29:7 <b>regulatory</b> [1] 7:16 <b>Rehnquist</b> [1] 25:8 <b>rejected</b> [5] 11:18 15:7 22:12,24</p>
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## Official - Subject to Review

<p>44:4  <b>relates</b> [1] 32:5  <b>relied</b> [2] 55:5 56:7  <b>rely</b> [1] 55:1  <b>remain</b> [1] 4:23  <b>remainder</b> [1] 29:15  <b>remaining</b> [3] 58:9,23 60:9  <b>repeated</b> [1] 16:13  <b>report</b> [1] 47:17  <b>representations</b> [1] 33:18  <b>require</b> [5] 8:11 9:10 42:12,15 60:17  <b>required</b> [11] 4:17,25 5:3,20 9:11 26:20 39:4,22 54:13 60:21,22  <b>requirement</b> [9] 5:13 30:15,22 39:20 40:8 46:8,16 55:9 57:21  <b>requirements</b> [12] 3:15 4:8 19:2, 22 32:15 36:3 37:8 49:18,21 51:13 59:20 61:25  <b>requires</b> [3] 6:19 41:4 48:17  <b>requiring</b> [2] 5:25 27:16  <b>reregister</b> [1] 5:3  <b>reserve</b> [1] 29:14  <b>resources</b> [1] 14:24  <b>respect</b> [14] 14:8 18:18 20:4,17,25 21:4 31:1 33:20,25 37:15 38:17 41:15 47:2 53:13  <b>Respectfully</b> [1] 20:20  <b>Respondent</b> [4] 1:7,22 2:7 30:2  <b>response</b> [1] 43:23  <b>rest</b> [2] 41:16 56:6  <b>result</b> [1] 27:22  <b>reticulated</b> [2] 41:8 48:10  <b>retroactive</b> [6] 6:3 15:8 60:23 61:1,7 62:13  <b>retroactively</b> [3] 5:17 6:8 23:13  <b>retroactivity</b> [4] 18:24 39:14 52:25 53:4  <b>return</b> [2] 46:11,12  <b>reverse</b> [1] 45:16  <b>review</b> [2] 50:18 59:11  <b>Reynolds</b> [22] 5:15 6:5 12:12 13:5, 7 14:7 19:6 21:14 22:13,14 23:8 24:17 32:21,22 34:17 35:8,10 36:1,16,22,23 42:7  <b>rights</b> [1] 18:5  <b>risk</b> [1] 43:20  <b>rivers</b> [1] 38:13  <b>ROBERTS</b> [14] 3:3 4:5 19:19 20:1, 15 21:2 29:23 31:11,21 46:17 47:7,22 60:6 62:22  <b>room</b> [2] 7:3 34:12  <b>roughly</b> [1] 17:22  <b>routinely</b> [2] 21:25 22:5  <b>Rule</b> [15] 7:3,3,19,24 8:6,10,13 18:3 34:25 35:2 36:17 40:5,6 57:2 61:11  <b>rule-making</b> [1] 62:12  <b>rules</b> [7] 7:7 12:3 19:15 37:7 43:25 56:21 57:4  <b>run</b> [1] 61:5</p>	<p><b>safety</b> [3] 6:18 8:1 18:3  <b>same</b> [17] 12:3 13:8 14:12 15:7 17:4 20:16,17,21 21:12 28:20 35:18 36:15 44:7 53:11 55:25,25 56:25  <b>sanctions</b> [5] 27:14,18,23 28:7,11  <b>SARAH</b> [5] 1:18 2:3,9 3:7 60:10  <b>save</b> [1] 22:1  <b>saying</b> [7] 12:14 19:21 35:21 38:9 39:3 43:22 47:3  <b>says</b> [17] 4:6 7:4 10:4,15 14:7 15:23 18:1 20:2 30:12,16,17 31:13 34:18 48:2 56:17,20 57:1  <b>Scalia</b> [3] 12:10 13:4 21:13  <b>Scalia's</b> [1] 12:10  <b>scheme</b> [5] 28:25 31:1,16 41:9 48:10  <b>schemes</b> [1] 5:22  <b>scientific</b> [1] 25:13  <b>scope</b> [4] 3:13 26:21 46:14 47:21  <b>score</b> [1] 37:13  <b>SEC</b> [10] 7:5,10,24 26:3,4 43:4 56:21,24,25 57:7  <b>SEC-type</b> [1] 27:6  <b>second</b> [2] 22:17 53:22  <b>secretary</b> [1] 28:5  <b>section</b> [2] 15:22 30:9  <b>Securities</b> [2] 56:17 57:6  <b>security</b> [1] 25:17  <b>see</b> [3] 27:4 39:3 45:11  <b>seemingly</b> [1] 17:15  <b>seems</b> [8] 10:1,25 12:3 21:15 46:6 47:7 52:21,21  <b>sense</b> [3] 46:15,18,23  <b>separate</b> [4] 12:12 36:18 53:6,10  <b>separation</b> [1] 7:15  <b>serious</b> [2] 48:12 54:12  <b>service</b> [1] 17:21  <b>set</b> [8] 9:20 18:25 19:14 37:6 41:8 42:10 48:10 57:25  <b>several</b> [1] 51:1  <b>sex</b> [26] 4:20 5:2,25 7:6 10:15,17, 20 13:10,15,17,22 14:19,23 15:9 30:11,14 32:2,5 39:16,23 54:12 55:8 56:20 58:22 60:16 61:25  <b>SG's</b> [1] 24:4  <b>shall</b> [2] 6:16 34:19  <b>sharing</b> [1] 14:21  <b>sharply</b> [1] 59:13  <b>she's</b> [1] 43:22  <b>show-ups</b> [1] 48:20  <b>side</b> [2] 48:11 51:24  <b>signals</b> [1] 22:8  <b>significance</b> [2] 3:25 29:17  <b>significant</b> [1] 31:19  <b>similar</b> [2] 8:2 39:8  <b>simply</b> [3] 13:25 17:9 37:14  <b>since</b> [5] 5:5,6 17:22 34:21 39:17  <b>single</b> [2] 14:5 60:15  <b>sit</b> [1] 58:6  <b>situation</b> [2] 13:3 38:22  <b>sole</b> [1] 21:23  <b>Solicitor</b> [1] 1:20  <b>somebody</b> [2] 29:11 39:15  <b>someone</b> [1] 52:22</p>	<p><b>sometimes</b> [4] 3:14 24:10,11,12  <b>SORNA</b> [18] 4:2,23 5:3,11,16 9:19 14:17 17:8 19:1 27:13 38:20 40:4 48:6,17,22 54:9 58:9 60:19  <b>SORNA's</b> [6] 3:11 4:21 54:15 59:12 60:14 61:25  <b>Sorry</b> [2] 8:17 15:16  <b>sorts</b> [2] 25:17 29:21  <b>SOTOMAYOR</b> [21] 8:17,23 21:25 22:4 23:6,22 35:6,9,18,20 36:6,9 52:8,13 53:7,8,16,19,21 54:20,23  <b>sources</b> [1] 4:13  <b>special</b> [1] 62:11  <b>specially</b> [1] 8:6  <b>specific</b> [5] 8:14 15:21,22 27:8 32:23  <b>specified</b> [1] 9:14  <b>specifies</b> [1] 62:17  <b>specify</b> [5] 32:14 34:19 36:2 47:24 59:20  <b>specifying</b> [3] 44:18 47:12 49:17  <b>speculating</b> [2] 23:23,24  <b>speculation</b> [1] 23:19  <b>spelled</b> [1] 53:25  <b>spheres</b> [1] 19:8  <b>spoke</b> [1] 61:1  <b>spurred</b> [1] 55:13  <b>square</b> [1] 33:16  <b>squarely</b> [4] 22:13 33:22 35:25 57:23  <b>stake</b> [2] 17:1,3  <b>standard</b> [20] 3:24 4:2,6 9:4,6 17:10,14 25:24 26:1,3 27:6,6 37:3 41:3 50:18 51:25 52:6 56:11 61:14, 16  <b>standards</b> [4] 9:8 11:20 45:5 50:7  <b>start</b> [6] 11:4,13 18:10 25:23 30:5 41:14  <b>started</b> [1] 9:25  <b>starts</b> [1] 30:9  <b>state</b> [11] 4:20 5:4,6,24 14:25 22:19 42:16 48:17,22 60:15,21  <b>state's</b> [1] 34:1  <b>stated</b> [1] 16:19  <b>statement</b> [1] 55:4  <b>statements</b> [2] 54:25 56:6  <b>STATES</b> [18] 1:1,6,14 3:5 14:9 16:9,15 17:21 34:11 49:7 50:10 58:9, 19,24 60:24,25 61:1,4  <b>states'</b> [1] 34:10  <b>statute</b> [45] 6:15 7:4 10:2,3,25 11:1,16 12:25 13:8,9,13,14 14:18 18:1 21:20 22:1,16 24:22,25 25:1,5 31:8 36:5,14,15,20 37:3,15 38:17 39:1,6 41:24 42:6 44:20 49:14 51:11 52:1,3,9,15,20 53:20,25 55:19 60:2  <b>statutes</b> [3] 29:20 31:6 44:2  <b>statutory</b> [14] 4:12 12:2,4,17,20,24 15:20,21,22 28:25 34:18 36:13 55:4,23  <b>step</b> [1] 34:13  <b>still</b> [6] 17:8 21:1,7 25:9 56:9 60:22  <b>strange</b> [3] 6:4 23:9,13</p>	<p><b>stricken</b> [1] 16:13  <b>strict</b> [1] 8:13  <b>strikes</b> [1] 56:15  <b>strong</b> [1] 26:1  <b>stuck</b> [1] 15:18  <b>stuff</b> [1] 41:13  <b>subchapter</b> [1] 6:17  <b>subject</b> [3] 6:22 16:1 49:7  <b>submitted</b> [2] 62:23,25  <b>subsection</b> [1] 10:22  <b>substance</b> [2] 49:20 52:6  <b>substances</b> [2] 38:10 44:9  <b>substantial</b> [1] 59:8  <b>substantially</b> [3] 58:8,11,20  <b>substantive</b> [1] 47:9  <b>suggest</b> [1] 57:10  <b>suggested</b> [1] 51:4  <b>suggesting</b> [1] 26:7  <b>suggestion</b> [1] 50:15  <b>supplied</b> [1] 39:9  <b>supply</b> [1] 41:6  <b>supplying</b> [1] 52:5  <b>supported</b> [1] 27:16  <b>supports</b> [1] 10:2  <b>suppose</b> [8] 6:14 16:25 17:2 40:15 45:7,15,16 56:24  <b>supposed</b> [5] 25:19,19,21,22 26:23  <b>SUPREME</b> [2] 1:1,14  <b>switch</b> [2] 36:1,21  <b>system</b> [16] 4:21 5:7,10 10:13 14:11 15:2 30:13,18 32:8 35:4 49:1 54:18 55:7,15 59:1,22  <b>systems</b> [4] 4:22 5:4 14:25 61:6</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>talks</b> [2] 10:13,20  <b>tax</b> [2] 46:11,12  <b>technical</b> [1] 25:13  <b>tells</b> [2] 46:10 47:19  <b>term</b> [2] 10:15 16:14  <b>test</b> [2] 18:13,15  <b>text</b> [12] 4:12 13:1 18:25 30:6,24 49:13 54:9,15 55:10,18 56:4 61:17  <b>textualist</b> [1] 12:11  <b>themselves</b> [3] 34:6 49:18 61:4  <b>there's</b> [16] 6:3,3 15:3 17:23 34:17 40:7,11,24 43:7 48:1,15,21 49:3 52:13 53:16 54:14  <b>They've</b> [3] 31:22,23 32:7  <b>thinking</b> [2] 12:1 16:7  <b>thinks</b> [3] 23:20 31:16 46:13  <b>third</b> [1] 23:7  <b>thoroughly</b> [1] 59:14  <b>though</b> [7] 20:15 36:16 40:13 46:14 51:9 57:6 58:14  <b>thousand</b> [1] 59:4  <b>thousands</b> [3] 3:16 48:25 54:11  <b>three</b> [6] 10:11 19:8 22:7,10 27:24 42:10  <b>Tier</b> [1] 39:22  <b>tiers</b> [1] 42:10  <b>timing</b> [2] 30:22 48:17</p>
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## Official - Subject to Review

<p><b>title</b> <sup>[2]</sup> 30:24 55:10  <b>today</b> <sup>[1]</sup> 35:19  <b>together</b> <sup>[1]</sup> 55:16  <b>took</b> <sup>[1]</sup> 35:15  <b>top</b> <sup>[1]</sup> 3:12  <b>total</b> <sup>[2]</sup> 3:23 17:9  <b>Touby</b> <sup>[9]</sup> 27:15 38:9 44:6,12 46:25 50:16 51:5,7 57:18  <b>tough</b> <sup>[3]</sup> 26:25,25 27:3  <b>tougher</b> <sup>[1]</sup> 58:1  <b>traditional</b> <sup>[2]</sup> 21:11,17  <b>transitional</b> <sup>[2]</sup> 31:3 49:3  <b>translate</b> <sup>[1]</sup> 58:15  <b>translating</b> <sup>[1]</sup> 30:17  <b>tribal</b> <sup>[1]</sup> 59:6  <b>tried</b> <sup>[1]</sup> 22:22  <b>trouble</b> <sup>[1]</sup> 16:7  <b>Trucking</b> <sup>[2]</sup> 22:21 26:19  <b>true</b> <sup>[4]</sup> 32:1,6 34:12 49:14  <b>truly</b> <sup>[1]</sup> 21:20  <b>try</b> <sup>[3]</sup> 40:15 45:24 50:25  <b>trying</b> <sup>[3]</sup> 23:10 42:22,23  <b>Tuesday</b> <sup>[1]</sup> 1:11  <b>turn</b> <sup>[3]</sup> 35:14,21 36:11  <b>twice</b> <sup>[1]</sup> 44:3  <b>two</b> <sup>[5]</sup> 13:2 15:15 53:6,10 55:2  <b>type</b> <sup>[1]</sup> 47:24</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>unable</b> <sup>[2]</sup> 10:21 30:23  <b>unambiguously</b> <sup>[1]</sup> 15:24  <b>unconstitutional</b> <sup>[4]</sup> 3:20 17:9 23:4 62:20  <b>under</b> <sup>[13]</sup> 4:25 5:3,9 7:4 12:18 31:10 37:13,22 38:10 43:11,19 44:9 60:21  <b>understand</b> <sup>[8]</sup> 24:24 36:9 48:6,11 50:22 54:5,6 58:7  <b>understanding</b> <sup>[3]</sup> 10:6,10 29:10  <b>undertake</b> <sup>[1]</sup> 62:5  <b>unfair</b> <sup>[1]</sup> 41:16  <b>unfeasible</b> <sup>[1]</sup> 24:20  <b>unguided</b> <sup>[1]</sup> 3:12  <b>Union</b> <sup>[3]</sup> 25:8 38:11 39:11  <b>UNITED</b> <sup>[7]</sup> 1:1,6,14 3:5 16:9,15 50:10  <b>universe</b> <sup>[1]</sup> 32:11  <b>unlawful</b> <sup>[1]</sup> 47:13  <b>Unlike</b> <sup>[1]</sup> 4:1  <b>unreasonable</b> <sup>[1]</sup> 47:16  <b>until</b> <sup>[1]</sup> 16:6  <b>unusual</b> <sup>[2]</sup> 22:7 50:1  <b>up</b> <sup>[7]</sup> 14:9 37:17,18 41:8 42:10 58:24 60:13  <b>upheld</b> <sup>[5]</sup> 3:22 9:3 17:12 44:24,25  <b>urge</b> <sup>[1]</sup> 60:3  <b>uses</b> <sup>[1]</sup> 24:8</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>vacated</b> <sup>[1]</sup> 59:10  <b>vague</b> <sup>[1]</sup> 16:12  <b>vagueness</b> <sup>[1]</sup> 45:25  <b>vaguer</b> <sup>[1]</sup> 16:14</p>	<p><b>various</b> <sup>[1]</sup> 15:1  <b>vast</b> <sup>[1]</sup> 5:1  <b>vehicle</b> <sup>[1]</sup> 48:18  <b>vendetta</b> <sup>[1]</sup> 43:20  <b>vendettas</b> <sup>[1]</sup> 45:15  <b>versus</b> <sup>[3]</sup> 3:5 25:17 27:3  <b>victims</b> <sup>[1]</sup> 30:11  <b>view</b> <sup>[4]</sup> 4:16 13:8 37:13 62:8  <b>violate</b> <sup>[2]</sup> 28:4 57:2  <b>violated</b> <sup>[1]</sup> 28:19  <b>violates</b> <sup>[2]</sup> 28:21 29:11  <b>violation</b> <sup>[4]</sup> 6:19 27:22 46:13 57:3</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>waive</b> <sup>[2]</sup> 19:22 20:4  <b>waiver</b> <sup>[1]</sup> 34:23  <b>WALL</b> <sup>[54]</sup> 1:20 2:6 29:25 30:1,3 31:20,25 32:16,17 33:19,25 34:4,10 35:6,7,17,24 36:8,12 37:10,21 38:4,21 39:2,13,21 40:3,15 41:19 42:8,20 43:24 44:6 45:6,9,22 47:6,10 48:6 49:24 50:19,24 51:19,23 52:9 53:6,10,18,21 54:21 55:3 57:8,12 60:7  <b>wanted</b> <sup>[4]</sup> 13:24 30:5 35:3 54:17  <b>Washington</b> <sup>[2]</sup> 1:10,21  <b>waterfront</b> <sup>[1]</sup> 31:16  <b>way</b> <sup>[20]</sup> 3:18 6:11 11:3 14:12 28:20 30:8 31:9,17 32:15 35:11 36:4 39:5 41:9,25 47:19 54:14 59:21 60:2 61:12 62:15  <b>weak</b> <sup>[1]</sup> 25:24  <b>websites</b> <sup>[1]</sup> 14:22  <b>weighing</b> <sup>[1]</sup> 25:16  <b>whatever</b> <sup>[4]</sup> 8:19 26:24 28:5 47:25  <b>whereby</b> <sup>[1]</sup> 44:24  <b>Whereupon</b> <sup>[1]</sup> 62:24  <b>whether</b> <sup>[23]</sup> 4:23 5:16,19 6:7 9:22 15:25 19:9,10 20:18,19 21:23 46:1,20 47:12,13,14,15,16,20 48:4 50:13 54:11 62:6  <b>Whitman</b> <sup>[2]</sup> 22:21 26:20  <b>who's</b> <sup>[3]</sup> 20:18 53:3,4  <b>whole</b> <sup>[2]</sup> 11:1 54:3  <b>whom</b> <sup>[1]</sup> 20:19  <b>will</b> <sup>[15]</sup> 9:10 27:22 38:10,12,13 44:9 45:2 58:18,22,24 59:1,13,14 60:16,22  <b>wished</b> <sup>[1]</sup> 33:9  <b>within</b> <sup>[5]</sup> 7:19,20 8:6 44:15 47:20  <b>withinside</b> <sup>[1]</sup> 46:7  <b>word</b> <sup>[4]</sup> 7:25 43:14 56:24 58:5  <b>worded</b> <sup>[1]</sup> 21:20  <b>words</b> <sup>[7]</sup> 13:11 24:18 30:23 52:15 53:17,20 54:1  <b>work</b> <sup>[2]</sup> 49:4,5  <b>working</b> <sup>[1]</sup> 35:7  <b>works</b> <sup>[2]</sup> 39:14 59:15  <b>write</b> <sup>[4]</sup> 16:10 29:8,10 43:18  <b>writing</b> <sup>[3]</sup> 40:19 43:10 56:12  <b>written</b> <sup>[3]</sup> 17:15 20:11 28:6</p>	<p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>Yakus</b> <sup>[1]</sup> 51:3  <b>years</b> <sup>[7]</sup> 6:12 39:16 40:1 42:11,13 49:6 61:6  <b>York</b> <sup>[4]</sup> 1:18,18 40:21 55:6</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p><b>zone</b> <sup>[1]</sup> 58:23</p>
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