

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, )  
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 ) Petitioner, )  
 )  
 ) v. ) No. 17-765  
VICTOR J. STITT, II, )  
 )  
 ) Respondent. )  
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UNITED STATES, )  
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 ) Petitioner, )  
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 ) v. ) No. 17-766  
JASON DANIEL SIMS, )  
 )  
 ) Respondent. )  
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Pages: 1 through 71

Place: Washington, D.C.

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11 v. ) No. 17-766

12 JASON DANIEL SIMS, )

13 Respondent. )

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15 Washington, D.C.

16 Tuesday, October 9, 2018

17 The above-entitled matter came on for  
18 oral argument before the Supreme Court of the  
19 United States at 11:08 a.m.

20 APPEARANCES:

21 ERICA ROSS, Assistant to the Solicitor General,  
22 Department of Justice, Washington, D.C. ;  
23 on behalf of the Petitioner.

24 JEFFREY L. FISHER, ESQ., Menlo Park, California ;  
25 on behalf of the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	ERICA ROSS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	JEFFREY L. FISHER, ESQ.	
7	On behalf of the Respondents	30
8	REBUTTAL ARGUMENT OF:	
9	ERICA ROSS, ESQ.	
10	On behalf of the Petitioner	65
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 17-765, United States  
5 versus Stitt, and Case Number 17-766, United  
6 States versus Sims.

7 Ms. Ross.

8 ORAL ARGUMENT OF ERICA ROSS

9 ON BEHALF OF THE PETITIONER

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

12 The crime of burglary has always  
13 focused on dwellings. By the time Congress  
14 adopted the current version of the Armed Career  
15 Criminal Act in 1986, the vast majority of  
16 states had burglary statutes protecting all  
17 types of homes, including the non-permanent and  
18 mobile dwellings at issue in these cases.

19 In the words of Taylor versus United  
20 States, that was the generic sense in which the  
21 term "burglary" was then used in the criminal  
22 codes of most states.

23 JUSTICE GINSBURG: That wasn't the  
24 position that the government took prior --  
25 prior to Mathis, was it? I thought that prior

1 to Mathis, the government acknowledged that  
2 generic burglary did not include motor vehicles  
3 as habitations?

4 MS. ROSS: I don't think that's quite  
5 right, Your Honor. Before Mathis, this issue  
6 didn't come up as often because, obviously, the  
7 government often had two arguments it could  
8 make. It would make a divisibility argument as  
9 well as a mobile dwellings argument, but the  
10 government did, in many of the court of appeals  
11 cases going back to the '90s and the early  
12 2000s, actually make this argument.

13 Again, it's become more important  
14 following Mathis because now the divisibility  
15 analysis is harder, and so, in more cases, the  
16 outcome is actually turning on whether burglary  
17 is capacious enough to include the very types  
18 of burglaries that, as we note in the brief, at  
19 least 44 states would have counted in 1986.

20 JUSTICE SOTOMAYOR: I have little  
21 problem understanding your argument with  
22 respect to mobile homes or floating homes.  
23 Those are structures that don't have any  
24 propulsion -- self-propulsion mechanisms. If I  
25 drive by a mobile home, it's a home on land. I

1 don't think of it as a vehicle in any  
2 meaningful way. A floating home is essentially  
3 the same. It just floats, but, to move it, you  
4 need a vehicle to move it of some sort, a ship.

5 But RVs, campers, tents, these  
6 temporary things, how is some -- someone  
7 supposed to know that people are using them to  
8 sleep in at a particular moment?

9 MS. ROSS: Well, Your Honor, to answer  
10 sort of your question directly and then just  
11 take -- take a step back, I think people often  
12 will know that those are being used because  
13 those are, in fact, designed or adapted for  
14 that purpose. And so you sort of know that an  
15 RV generally has --

16 JUSTICE SOTOMAYOR: All right. But  
17 how about the -- just a car? There are plenty  
18 of homeless people, I know, in both New York  
19 and Washington, because I've seen them, sleep  
20 in their cars, but, if I'm a thief and I see a  
21 blanket or a pillow in the back of the car, I  
22 have no idea, there's no notice that it's being  
23 used to sleep in because -- or to sleep in  
24 overnight. You know, parents who take a kid on  
25 a trip will throw a pillow and a blanket in the

1 back. I've thrown one in the back if someone  
2 else is driving during the day.

3 So what are we supposed to do about  
4 the "used" part of this? "Adapted" I  
5 understand. You might be able to see that.  
6 But how would you, if you're a thief, know that  
7 a car is being used for someone to sleep in  
8 overnight?

9 MS. ROSS: So, Your Honor, I think  
10 there are a number of points sort of in that  
11 question. I want to try to get to all of them.

12 I actually don't think that the  
13 vehicle that's simply being used on the trip  
14 taking the kid to college is at all at issue in  
15 this case. That's not a sort of ordinary  
16 interpretation of either of the statutes that  
17 we have before us.

18 The Sims statute that comes closest to  
19 make this -- to making this argument, the  
20 Arkansas statute applies either to a vehicle  
21 that is customarily used for overnight  
22 accommodation or one in which a person lives.  
23 So somebody sleeping overnight would not fall  
24 in there. I also think --

25 JUSTICE SOTOMAYOR: So where any

1 person lives. The homeless person who lives in  
2 a car.

3 MS. ROSS: Right, Your Honor. And we  
4 don't think that even that interpretation is in  
5 front of this Court because that was not raised  
6 previously in the brief in opposition. And it  
7 also --

8 JUSTICE SOTOMAYOR: So define "used"  
9 for me. How is --

10 MS. ROSS: So --

11 JUSTICE SOTOMAYOR: And define it in a  
12 way that a thief is going to know or a burglar  
13 is going to know that it's being used as a  
14 home.

15 MS. ROSS: So, Your Honor, the -- I  
16 don't think Congress was focusing specifically  
17 on whether a burglar would know ahead of time.  
18 What Congress was doing was looking at how the  
19 states defined "burglary," and that is  
20 essentially the -- the central intuition of  
21 this Court's decision in Taylor, is that  
22 Congress did not itself provide a functional  
23 definition of "burglary."

24 What it did was it looked at how the  
25 states defined "burglary." And the states, by



1 and large, included vehicles used and adapted  
2 for overnight accommodation.

3 Now the specific provision that's at  
4 issue in the Sims statute, again, if you think  
5 it's properly before the Court, it requires an  
6 interpretation of the state law. That's  
7 something that this Court would ordinarily  
8 defer to the regional court of appeals on, and  
9 -- and the regional court of appeals didn't  
10 consider that here. But I think it's  
11 significant that what the statute says is  
12 "lives." And that is someplace in which  
13 someone, even in ordinary usage, makes a home.

14 And so I don't think that will  
15 necessarily be an ordinary structurally, not at  
16 all adapted or changed vehicle.

17 JUSTICE GORSUCH: Well --

18 JUSTICE SOTOMAYOR: You've gone around  
19 my question. Would someone who breaks into a  
20 car that a homeless person is using as their  
21 home -- are they encompassed by your definition  
22 or by these statutes?

23 MS. ROSS: So, Your Honor, I think  
24 they are not encompassed by these statutes.  
25 And I think that our definition turns on

1 whether most states would, in fact, have  
2 included that person.

3 So I don't think that it's encompassed  
4 by this statute because, again, I think even  
5 the homeless person that you're hypothesizing  
6 would change their vehicle in some way that  
7 might put a burglar on notice.

8 But even if you disagree with me on  
9 that, no state case -- as Respondent Sims  
10 readily admits in the brief, no state case has  
11 applied it to a vehicle in which someone  
12 happens to live. And that's not just true of  
13 Arkansas.

14 Between the Respondents' brief and our  
15 reply brief, we've come up with about 12 case  
16 -- 12 states that have language that's similar  
17 to that, and in none of those states can the  
18 government find a case in which these types of  
19 statutes were applied to a place where someone  
20 lives. And so I think --

21 JUSTICE GORSUCH: Well, counsel, I'm  
22 not sure how that helps you, because you've  
23 identified, first of all, that only 12 states  
24 are at issue, which seems to me a strike  
25 against the government here, as to suggest that

1 this was what Congress had in mind in 1984/'86.

2 Second, the -- the statute at least in  
3 Arkansas is disjunctive, right? It says a -- a  
4 place customarily used to -- to live, which  
5 might be your -- line up with the Tennessee  
6 statute and suggest some sort of customization  
7 or change. But then it uses "lives in." And  
8 that doesn't connote any changes to the vehicle  
9 itself at all. That could be sleeping in the  
10 back of -- of a car, nothing more.

11 And I wonder, under your  
12 interpretation, about this hypothetical, let's  
13 say someone breaks into such a car where  
14 someone's living, a homeless person or someone  
15 crossing the country, to steal a flip phone.  
16 That would be burglary, I -- I think you'd say,  
17 and the ACCA would kick in and 15 years might  
18 -- might follow as a sentence.

19 Compared to the person who tows away  
20 the same car without entering it and commits a  
21 theft, that would just be a common law theft  
22 and -- with no -- no attendant problem, even  
23 though maybe an arguably greater harm has  
24 occurred. What do you think about that?

25 MS. ROSS: Well, Justice Gorsuch, to

1 sort of answer your questions in reverse order  
2 perhaps, I think that's actually not  
3 particularly anomalous because what the -- what  
4 the burglar has done in the first case but  
5 hasn't done in the second case is opened up  
6 exactly the risk of a violent confrontation  
7 with which Congress was concerned in -- in  
8 enacting a statute that specifically both in  
9 1984 and 1986 --

10 JUSTICE GORSUCH: Well, if the car is  
11 empty and no one's around, it's -- it's quite  
12 unlike a home. You don't know what you're  
13 going to enter -- what you're going to find  
14 when you enter. A car, you can look in and  
15 see. So there's no risk of violent encounter  
16 in either of my hypotheticals. So I modified  
17 my hypothetical for you there. Now what?

18 MS. ROSS: You have, Your Honor. But  
19 I think at the same time what Congress was  
20 doing, again, was not creating its own -- its  
21 own definition of "burglary." It was trying to  
22 use the work that the states had already done.  
23 And that makes significant sense given that it  
24 was enacting a recidivism statute and,  
25 therefore, would want to cast its net broadly.

1           And this, I think, takes me to Your  
2 Honor's first question, which is that,  
3 actually, the numbers work in exactly the  
4 opposite way, as you suggest.

5           On Respondents' view, there would only  
6 be in 1986 -- and the numbers are similar today  
7 -- about 12 states in the entire country that  
8 would have any burglary offense whatsoever that  
9 qualified under the Armed Career Criminal Act.

10           By contrast, on our view --

11           JUSTICE GORSUCH: I'm -- I'm sure he's  
12 going to dispute that. We've been around the  
13 numbers game already this morning. I'm sure  
14 we'll be around it again.

15           But how many states in 1986 had  
16 anything like a lives-in statute? It seems to  
17 me an exceedingly small number you've cited to  
18 us.

19           MS. ROSS: No, Your Honor, I don't  
20 think it's exceedingly small. And this, I  
21 think, will get me back to your second question  
22 if the Court will bear with me.

23           So I think there are about 12 statutes  
24 that had "lived in" or some kind of similar  
25 language, but that's a subset of over 44

1 statutes that would have reached vehicles  
2 generally in which people lived that were  
3 adapted for overnight accommodation that were  
4 customarily used for overnight accommodation.

5 And so I think what you see is that  
6 the states all sort of coalesced around this  
7 notion of what is a modern-day dwelling.

8 And that makes particular sense  
9 because, as I began my presentation this  
10 morning, common law or, excuse me, burglary has  
11 always focused on dwellings. And so it is  
12 hardly surprising that a large number of states  
13 would have, over time, noticed and taken heed  
14 of the fact that people live in many different  
15 places and that burglary statutes, therefore,  
16 should protect all of those places.

17 And so I think what Congress, again,  
18 was doing was seeing where the states drew  
19 those lines. And we know that from this  
20 Court's decision in Taylor. I mean, Taylor  
21 said on no fewer than four occasions that  
22 burglary was, in fact, meant in the Armed  
23 Career Criminal Act to capture the common sense  
24 in which the states were using the term.

25 JUSTICE GINSBURG: But you are using

1 any car, that is, any car is capable of being  
2 lived in, so the burglary statute that you're  
3 -- you are envisioning, a statute that took in  
4 anything capable of being lived in would  
5 include any car?

6 MS. ROSS: No, Justice Ginsburg, I  
7 don't necessarily agree with that. I think  
8 that the Arkansas statute does not actually  
9 cover that type of any car that is lived in for  
10 the reasons I was giving earlier.

11 One, I think the -- the definition --  
12 the dictionary definition of "lived" would be  
13 to occupy as a home, and so we ordinarily would  
14 see some type of change to the structure.

15 Two, there is no state case, whether  
16 in Arkansas or in any other jurisdiction, that  
17 has similar language actually applying the  
18 statute to the home in which someone lives  
19 without any modification or really to a vehicle  
20 at all.

21 And, three, I think if you look at the  
22 two parts of the statute, as I believe Justice  
23 Gorsuch was noting earlier, one prong says  
24 "customarily used," and we think that that's  
25 something that is commonly used, perhaps

1 because it's designed for overnight  
2 accommodation, and the other is someplace where  
3 someone lives. And we think that that brings  
4 in sort of the -- the adapted in this  
5 particular case.

6 And so, when you put those two prongs  
7 together, you actually get to a place that is  
8 quite similar to the Tennessee statute. And I  
9 think that perhaps is why this --

10 JUSTICE GORSUCH: It sure sounds to me  
11 like you've turned those two prongs into one,  
12 made them superfluous.

13 MS. ROSS: I don't think so, Your  
14 Honor, because something that is customarily  
15 used would be everyone knows that you can live  
16 in that. So it's a mobile home. It's  
17 something of that nature.

18 Whereas the lived in is just sort of  
19 saying, if you actually live in your car, or  
20 not your car because no cases, again, actually  
21 cover your car, but, if you actually live in  
22 another type of structure, we're going to  
23 assume that you've adapted it in some way.

24 JUSTICE SOTOMAYOR: I'm -- I'm sorry.  
25 What is "assume"? And then what's the meaning



1 of "adapted"? Is it a structural change of  
2 some sort, or is it throwing a pillow and  
3 blanket? Is it putting a mattress in there?

4 What -- what does "adapted" mean?

5 MS. ROSS: So, again, Your Honor, I  
6 would --

7 JUSTICE SOTOMAYOR: And what's  
8 customary to understand that adaptation?

9 MS. ROSS: So I think the states have  
10 grappled with what -- what is adapted for  
11 overnight accommodation under their statutes,  
12 and, by and large, this comes up in cases  
13 involving campers, hotels, houses under  
14 renovation, and -- and the answers are not  
15 surprising.

16 Respondent cites three cases for the  
17 suggestion that maybe it's difficult to decide  
18 whether something is adapted for overnight  
19 accommodation. And all three of those involve  
20 just the types of structures --

21 JUSTICE SOTOMAYOR: But we can't just  
22 leave it in state hands. We're providing a  
23 federal definition. So what's the federal  
24 definition that we give?

25 MS. ROSS: You are providing a federal

1 definition, Your Honor, but, again, I don't  
2 think that when Congress did this it was trying  
3 to itself determine these edge cases. I think  
4 instead it was looking to the content --

5 JUSTICE SOTOMAYOR: Well, we said  
6 dwelling and structure. So now -- building and  
7 structure. Pardon me. Now we have to define  
8 "structure."

9 MS. ROSS: Yes, Your Honor.

10 JUSTICE SOTOMAYOR: Or give some  
11 understanding of what the federal meaning of it  
12 was. In our cases, we very clearly excluded  
13 vehicles. We said that.

14 And so now you want us to put a gloss  
15 on that. And I want to know how and what  
16 guidance we give on that gloss.

17 MS. ROSS: Yes, Your Honor. So --

18 JUSTICE SOTOMAYOR: So does it have to  
19 be something permanent to be adapted?

20 MS. ROSS: So I don't think that there  
21 is a -- a clear answer to that question,  
22 unfortunately. I think the -- the general  
23 answer is yes.

24 JUSTICE SOTOMAYOR: Well, the problem  
25 really is that, if it's criminal law, shouldn't

1 we be clear?

2 MS. ROSS: Well, we should be --

3 JUSTICE SOTOMAYOR: Shouldn't we give  
4 notice to people of what the consequences of  
5 their actions are, and so don't we have an  
6 obligation to be as clear as we can be?

7 MS. ROSS: Yes, Your Honor. I think  
8 specifically of the examples that you  
9 mentioned, the bed and the -- the structural  
10 change, those are clearly adaptations that  
11 would count. But even --

12 JUSTICE SOTOMAYOR: Just a bed,  
13 putting a mattress?

14 MS. ROSS: Yes, Your Honor. I mean, I  
15 --

16 JUSTICE SOTOMAYOR: How about the  
17 people who are carrying the mattress from the  
18 store to their home? I see that all the time.

19 MS. ROSS: Well, no, Your Honor,  
20 because that wouldn't be installed in a way  
21 that was actually adapted for overnight  
22 accommodation. You would just be --

23 JUSTICE SOTOMAYOR: So it has to be  
24 installed in some way?

25 MS. ROSS: I mean, you would just be

1 transporting your mattress in that case. I  
2 don't think you've installed your groceries  
3 when you bring them home, or things of that  
4 nature, or adapted them to that.

5 JUSTICE GINSBURG: Does it matter if  
6 it says sometimes, sometimes I sleep in my car,  
7 and sometimes I sleep in a home?

8 Does it have to be the regular  
9 residence? Does the car to qualify have to be  
10 what you sleep in all the time, or could it be  
11 that you have a principal residence someplace  
12 else, but many times you sleep in your car?

13 MS. ROSS: Well, Justice Ginsburg,  
14 just to back up again, I think that the vehicle  
15 in which you happen to sleep on occasion  
16 wouldn't fall in even under the broadest  
17 possible interpretation of the Arkansas statute  
18 at issue in Sims because you wouldn't live in  
19 your car in that instance. You wouldn't occupy  
20 it as a home.

21 JUSTICE BREYER: I'd like to ask you a  
22 general question, if you would answer it.  
23 You've read probably Justice Alito's opinion  
24 about the woman who was trying to go to  
25 Brussels and she ended up in Serbia.

1 MS. ROSS: Yes.

2 JUSTICE BREYER: All right. Now  
3 you've used the words -- I mean, that -- that  
4 -- I think there's a point there -- you've used  
5 words like common sense. You just heard  
6 Justice Sotomayor use somewhat similar words.  
7 How to -- generic burglary, that's the word,  
8 generic burglary.

9 I mean, Congress wrote 10 words in  
10 this statute. It thought it had a simple task.  
11 All we have to do is look to state law, and  
12 then we'll see whether it's a violent crime or  
13 not. But Congress forgot that there are  
14 thousands of state laws with variations all  
15 over the place.

16 So what this reminds me of, what we're  
17 doing, *Swift v. Tyson*, the brooding  
18 omnipresence of the law. We look up in the sky  
19 to decide what is generic burglary. So what in  
20 your opinion do we do?

21 Now Judge Posner said -- and I agreed  
22 with this -- what you should do or the  
23 Sentencing Commission should find out how these  
24 cases are actually prosecuted, which you  
25 haven't, nor has the Sentencing Commission.

1           A second possibility was to say:  
2     We'll go back and see if there was violence in  
3     this individual case, which is almost  
4     impossible because all you see is a rap sheet  
5     or something, you know, you don't know, but  
6     over time, maybe.

7           And a third possibility is that the  
8     Department of Justice asks Congress to rewrite  
9     the statute, which is exactly what Ms. Bryn  
10    said.

11           All right. Have you thought about  
12    this over at the department? You have to  
13    prepare these cases. Have you thought about  
14    it? And, if you have a better approach than --  
15    than I've just outlined, I'm -- my ears are  
16    open.

17           MS. ROSS: Well, Your Honor, I -- I  
18    certainly understand all of those concerns and  
19    I don't think anyone standing here from the  
20    Department of Justice would suggest that this  
21    is always an easy determination under the  
22    categorical approach.

23           I do think in this case it is not  
24    particularly difficult, and that is because, as  
25    I started out, burglary has always concerned

1 dwelling. So whatever the edge cases, whatever  
2 the difficult cases under the categorical  
3 approach, it's very clear that when this Court  
4 noted in Taylor that Congress had eschewed the  
5 common law and gone beyond the common law, that  
6 it should have at least captured the types of  
7 dwellings that we're talking about today  
8 because, again, 44 states capture them.

9 JUSTICE BREYER: It may be, but do you  
10 know when the last time was that I thoroughly  
11 looked into state criminal law? It was my  
12 first year of law school, and I'm not sure how  
13 -- how much I looked into it even then.

14 (Laughter.)

15 MS. ROSS: Understood, Your Honor. We  
16 have looked at it more -- more recently, and --

17 (Laughter.)

18 MS. ROSS: -- and, again, I mean, the  
19 best I can give you is that 44 states would  
20 have covered this in 1986. By contrast, on  
21 Respondents' view, you would have 12 states  
22 that have a generic burglary statute today.

23 And, as Justice Gorsuch noted, perhaps  
24 my friend will quibble with that, but I --

25 JUSTICE GORSUCH: Well, I'd like you

1 to return to Justice Breyer's original  
2 question. I know you want to run straight to  
3 this case, and I appreciate that, but -- but  
4 live with us for a moment in the unease of the  
5 more general concern that Justice Breyer  
6 raised.

7 If you survey circuit judges across  
8 the country about one gripe they have with this  
9 Court's jurisprudence, it may be the ACCA you'd  
10 hear a lot. And the -- maybe the fourth option  
11 I sometimes hear is why not do an Erie, instead  
12 of Swift versus Tyson, and say, well, if the  
13 state calls it robbery, if the state calls it  
14 burglary, then it's robbery or burglary.

15 And I'd be curious, and -- and I'm not  
16 holding you to any of it, but has the  
17 department given any thought to any of these  
18 options that Justice Breyer has outlined or  
19 that I've just added?

20 JUSTICE KAGAN: May I add a fifth?

21 (Laughter.)

22 JUSTICE GORSUCH: Please.

23 JUSTICE KAGAN: Because I know there  
24 actually is a statute in Congress right now  
25 that replaces ACCA with a statute that looks to



1 the penalties that have been given. So I guess  
2 my question is, has the department taken a  
3 position on that statute that is pending in  
4 Congress currently?

5 MS. ROSS: Your Honor, I apologize,  
6 I'm actually not aware of whether the  
7 department has taken an official position on  
8 that. I know that the Attorney General issued  
9 some sort of general remarks praising that  
10 effort, but I don't know if that's gone to the  
11 level of a real sort of department position.

12 I do think that we have thought about  
13 sort of the other ideas that Justice Breyer and  
14 Justice Gorsuch suggest, and among those, I  
15 know, Justice Gorsuch, I believe you added  
16 anything that the state calls burglary we'll  
17 call burglary.

18 I know that this Court at least  
19 rejected that in Taylor because, you know, you  
20 would have some sort of unfortunate  
21 consequences. For example, Michigan has always  
22 entitled its burglary statutes as breaking and  
23 entering, and they very clearly are burglary,  
24 but that just happens to be the nomenclature  
25 that Michigan used.

1           And what this Court said in Taylor and  
2    -- and what Congress said was that it really  
3    didn't want sort of offenders who exhibited  
4    these -- these qualities, had had these  
5    dangerous convictions previously, to escape on  
6    a technicality.

7           JUSTICE ALITO: Well, at least with  
8    respect --

9           MS. ROSS: And they do worry --

10          JUSTICE ALITO: Yeah. I mean, you're  
11   not exactly on a winning streak here in ACCA  
12   cases.

13          (Laughter.)

14          JUSTICE ALITO: You might have gotten  
15   a hint that a majority of the Court really  
16   hates ACCA and is picking it apart bit by bit  
17   by bit.

18          And at least with respect to the  
19   enumerated offenses like burglary, why not  
20   depart from this categorical approach and look  
21   at what actually happened in the particular  
22   case to the extent that you can determine it?  
23   If you can't determine that it -- it falls  
24   within generic burglary, fine. But, in a lot  
25   of cases, you're going to be able to figure

1 that out very quickly.

2           Otherwise, you're going to be at the  
3 mercy of these hypothetical -- these marginal,  
4 hypothetical cases that the -- the members of  
5 the Court and their law clerks can think of.  
6 So the car that is -- you know, has a mattress  
7 in the back and -- and, you know, things like  
8 that. Why not look at what actually happened  
9 in the real world, as opposed to these -- these  
10 hypotheticals?

11           JUSTICE GINSBURG: Because didn't this  
12 Court say you can -- couldn't do that?

13           JUSTICE ALITO: Yeah, the Court said  
14 that, but the Court isn't always right.  
15 Sometimes when we make a mess --

16           (Laughter.)

17           JUSTICE ALITO: -- which we have done  
18 in this -- in my humble opinion, in this area,  
19 we have made one royal mess. Maybe we ought to  
20 go back and correct our own mess.

21           MS. ROSS: Your Honor, again, I -- I  
22 think perhaps in some case that would be  
23 something that this Court needed to think  
24 about. I really -- I apologize for keep  
25 bringing -- for continuing to bring us back to

1 this case, but we haven't asked that the Court  
2 reconsider Taylor in this case. And that's --  
3 that's because we really don't think that we  
4 need that in order to prevail here.

5 Taylor, obviously, is where the Court  
6 first really embraced the categorical approach  
7 with respect to burglary. And in this case, it  
8 is quite clear, again, this -- this was really  
9 the way in which the states defined burglary by  
10 1984 and 1986. And in Taylor, this Court made  
11 clear that it was helping or -- or illuminating  
12 what Congress had done by looking to those same  
13 state burglary statutes.

14 And Respondents' suggestion in this  
15 case is essentially that this Court take the  
16 words that Taylor drew from the state statutes  
17 and this Court construe those words  
18 significantly more narrowly than the courts of  
19 those states actually did, and the statutes of  
20 those states actually did, and in the process  
21 eliminate more than 20 state burglary statutes  
22 from the books, essentially, for ACCA purposes,  
23 precisely because those state statutes would  
24 cover all types of dwellings.

25 And whatever the edge cases, whatever

1 the hard cases under the Armed Career Criminal  
2 Act, we just don't think that that is this  
3 case, given what -- what had been on the books  
4 in the states at that time.

5 Now I know there's been some  
6 discussion this morning about how offenders  
7 would have notice of -- of what is in and what  
8 is out, but I think we can point you to the  
9 same thing, which is that this was the commonly  
10 understood -- understanding of burglary in 1984  
11 and 1986, and so I don't think that it's too  
12 much to assume that if you're convicted of  
13 burglary under a typical burglary statute, that  
14 that will, in fact, be what Congress and what  
15 this Court considers burglary for purposes of  
16 the Armed Career Criminal Act.

17 JUSTICE BREYER: Well --

18 JUSTICE GINSBURG: Suppose we think  
19 about the consequences, the number of years  
20 that are added to a person's life by ACCA.  
21 Another approach the Court could take is to say  
22 because this is such a harsh statute that has  
23 such extreme consequences for the individual,  
24 we are going to have a clear statement rule for  
25 Congress. If you want to have these kind of

1 heavy penalties, you have to be clear. And if  
2 it's ambiguous, we will -- we will not uphold  
3 the application of ACCA.

4 The -- starting out with the premise  
5 that when the consequences are so severe,  
6 Congress has an obligation to be plain.

7 MS. ROSS: Your Honor, I -- I think  
8 Congress was very plain in this statute. I  
9 think, if you took someone in 1984 and 1986 and  
10 said burglary, you would think, hmm, burglary  
11 isn't generally a federal law or isn't  
12 generally a federal crime; I'll look to how the  
13 states define burglary. And this was how, in  
14 fact, the states defined burglary.

15 Again, 44 states would include this  
16 type of conduct. At least 31 include it in a  
17 way that's narrow enough that they would have  
18 an ACCA burglary statute on our view.

19 If you take my friend's position, that  
20 number dwindles down to 12. And I don't think  
21 that -- keeping in mind that Congress enacted a  
22 very -- a significant penalty for these  
23 offenses, I don't think Congress would have  
24 expected its work to do so little.

25 And, importantly, it's not as though

1 those 12 would actually be the most severe or  
2 the most aggravated burglary offenses in those  
3 states. It's entirely based on this question  
4 of whether they did or they didn't think about  
5 all types of places, whether elaborate or  
6 modest, where people live.

7 So you wouldn't even necessarily be  
8 getting the aggravated burglary statutes in  
9 that instance. In fact, if you look at the  
10 Tennessee case that we have before us, Stitt,  
11 that is an aggravated burglary conviction  
12 because it's burglary of a habitation because  
13 the court -- or the state very soundly made the  
14 determination that when one burgles a  
15 habitation, that is a more dangerous and a more  
16 serious offense.

17 If I could reserve the remainder of my  
18 time.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Mr. Fisher.

22 ORAL ARGUMENT OF JEFFREY L. FISHER

23 ON BEHALF OF THE RESPONDENTS

24 MR. FISHER: Mr. Chief Justice, and  
25 may it please the Court:

1           We ask the Court to affirm the  
2 judgments below for three reasons.

3           First, this Court's precedent, from  
4 Taylor on through to Mathis, make clear that  
5 when it comes to the burglary provision of  
6 ACCA, buildings and structures are in one  
7 category that are inside the statute, vehicles  
8 are in another category that are outside the  
9 statute, and this case involves quintessential  
10 vehicles.

11           Secondly, the "use" prong of the  
12 government's definition that it offers to this  
13 Court is an independent reason why Arkansas's  
14 law goes beyond any generic definition of  
15 burglary that would be acceptable.

16           And, third, if necessary, we would ask  
17 this Court to apply the Sixth Amendment rule  
18 that Justice Thomas announced in Apprendi and  
19 himself laid out in Mathis and Shepard, that  
20 ACCA itself violates the Sixth Amendment  
21 because it transgresses the jury trial right.

22           Now --

23           JUSTICE KAGAN: May I stop you on your  
24 first point, Mr. Fisher? So the Court has  
25 indeed said many times that vehicles fall



1 outside the generic definition of "burglary."  
2 But I think that when the Court said that, what  
3 it really meant was this is a way to say if --  
4 if the -- if a statute covers basic car theft,  
5 it's outside ACCA. That's not the typical  
6 burglary offense.

7 And the Court was not thinking about  
8 mobile homes or RVs. It just didn't have that  
9 in its head when it made those statements. So  
10 those statements really don't have much to do  
11 with the question in this case.

12 MR. FISHER: I think the -- the  
13 closest the Court did come to actually dealing  
14 with that question was in Mathis. Remember,  
15 the Iowa statute there didn't simply cover all  
16 vehicles; it covered vehicles that were adapted  
17 for an over -- overnight accommodation or use  
18 in a couple of other ways.

19 And the government in its brief said  
20 the mere fact that the statute covers vehicles  
21 is enough to put it outside of ACCA. And the  
22 Court said the same thing four times in its  
23 opinion.

24 And I'd hasten to add -- and I think  
25 this goes back to Justice Ginsburg's question

1 in the first part of the argument about the  
2 government's position in Mathis -- the  
3 government on page 42 in Mathis said if you  
4 adopt the divisibility rule being urged by the  
5 other side, you're going to leave many state  
6 statutes outside of burglary. And in Footnote  
7 12, the government cited many state statutes  
8 that it now is back here claiming actually do  
9 fall within burglary, even though the  
10 government's representation to this Court in  
11 Mathis is that they would fall outside.

12 So I -- I understand --

13 JUSTICE KAGAN: But I don't think -- I  
14 don't think Mathis really is -- is at odds with  
15 what I was saying. Everybody in that case  
16 agreed that this covered vehicles, broadly  
17 speaking. The government conceded it, the --  
18 the other party conceded it. All -- all -- all  
19 of the opinions viewed it that way.

20 And so nobody really ever addressed  
21 the question of, are there different kinds of  
22 vehicles in the world? Are there cars and are  
23 there mobile homes?

24 MR. FISHER: Yeah. So -- so I  
25 understand, Justice Kagan, you haven't had this

1 precise type of object in front of you. But I  
2 think the Court's opinions are still  
3 illuminating because the Court does say there's  
4 vehicles on the one hand and structures and  
5 buildings on the other.

6 And so the project here is which  
7 category do things like sleeper vans or a  
8 sailboat tied up at harbor that has a sleeping  
9 quarters underneath fit into.

10 And so, just as the Court has held in  
11 the Fourth Amendment context of California  
12 versus Carney, just as the HUD regulations that  
13 we cite at page 11 of our brief lay out, just  
14 as the state law like Tennessee lays out, just  
15 like local law, like local zoning law we cite  
16 on the same page of our brief, they all  
17 distinguish between floating homes and mobile  
18 homes, which are designed to be stationary on  
19 the one hand, and put those in the structure  
20 category, or a -- or a dwelling or a residence  
21 category.

22 On the other hand, there are things  
23 like recreational vehicles, sleeper vans, and  
24 boats that have sleeping quarters that have  
25 always been in the vehicle category, and the

1 reason why is because the principal purpose of  
2 those objects is transportation.

3           They can be used incidentally for  
4 overnight accommodation and they are  
5 occasionally used, but I want to stress to the  
6 Court it's only occasional. And I know I heard  
7 some displeasure with the categorical approach  
8 in the first part of the case, and I'm happy to  
9 engage in that, but just to take the law as it  
10 stands, and as the government is not asking you  
11 to change it, the -- the hypothetical the  
12 government has to answer for is the vacant  
13 sleeper van or boat tied up at harbor that is  
14 used only a few days a year and shows no  
15 outward signs of current habitation.

16           That's the hypothetical that both  
17 Tennessee and Arkansas sweep in. I'll turn  
18 later to the specific provision of Arkansas  
19 law, the lives-in provision, which is even  
20 broader. But that's the hypothetical the  
21 government has to answer. Justice Kagan --

22           JUSTICE ALITO: But there are a lot of  
23 -- there are a lot of vacation homes that are  
24 occupied for only a short period of time and  
25 a -- somebody contemplating a burglary can look

1 at them and determine pretty easily that place  
2 is not occupied at the -- at the present time.

3 But what about, say you have a house,  
4 and then next to it you have a self-propelled  
5 vehicle that is designed or adapted for the  
6 overnight accommodation of persons and is  
7 actually occupied at the time of the initial  
8 entry by the defendant.

9 Is there any reason why the -- the  
10 burglary of the house should be treated  
11 differently from the burglary of this vehicle?  
12 Isn't the risk exactly the same?

13 MR. FISHER: Well, Justice Alito, I'm  
14 going to answer that question, but just allow  
15 me to preface it.

16 I don't have -- I don't have to win  
17 that hypothetical because I -- the hypothetical  
18 the government has to win is the person not  
19 being in and it not being near a house. But,  
20 to answer your question directly, I would still  
21 say --

22 JUSTICE ALITO: Well, why don't you  
23 have to win that? That's the Arkansas statute.  
24 What I read you is exactly what the Arkansas  
25 statute says.

1 MR. FISHER: No, no, no, the Arkansas  
2 -- well, the Arkansas statute says --

3 JUSTICE ALITO: I'm sorry, the  
4 Tennessee statute.

5 MR. FISHER: The Tennessee statute  
6 does not require it -- it does require the  
7 person to be there, yes, Justice Alito.

8 JUSTICE ALITO: Right.

9 MR. FISHER: But it does not require  
10 it to be sitting right by a house. So it could  
11 be --

12 JUSTICE ALITO: No, no. I'm just  
13 saying, this is the contrast, why would -- why  
14 is one you would concede burglary and the  
15 other -- and the other is not? I don't see any  
16 possible reason why the law should treat those  
17 two situations differently.

18 MR. FISHER: I think because the  
19 criminal law, we've heard a lot about notice  
20 this morning, and a core concept of criminal  
21 law is providing fair notice.

22 And so, for the same reason that a  
23 vacation home is inside burglary because it is  
24 a home, it is a dwelling, and so you would  
25 expect it to be occupied as a residence, even

1 if it happens to be somebody's second home,  
2 that is in.

3 The same objective characteristics of  
4 a vehicle, even a recreational vehicle adapted  
5 for occasional overnight accommodation, fall  
6 outside. And so the criminal law has to draw  
7 lines. You can't simply do it in that  
8 fine-grained of a basis.

9 And the government's argument, Justice  
10 Alito, I would add, does not depend on the  
11 person being inside the vehicle at the time of  
12 the crime. The government doesn't make that  
13 argument. And that's the only way the  
14 government could sweep in even the -- even the  
15 customary use prong of the Arkansas statute.

16 But, Justice Kagan, you asked --

17 JUSTICE KAVANAUGH: But I notice if --  
18 if you're convicted three times of burglary for  
19 burglarizing an RV, you're on notice,  
20 presumably, if you look at the federal statutes  
21 and you then possess a firearm, that -- that  
22 those burglaries were of a structure, as Taylor  
23 said. I don't understand the notice point.

24 MR. FISHER: Well, Justice Kavanaugh,  
25 I think that, if I may, it begs the question a

1 little bit whether the RV is, in fact, a  
2 structure that's covered by --

3 JUSTICE KAVANAUGH: But you would look  
4 at Taylor and you'd see it's citing the model  
5 -- Taylor's the case, right, focus on Taylor.  
6 It's a long time ago. It talks about other  
7 structures. It doesn't limit it to the '84  
8 definition, cites the Model Penal Code, cites  
9 the LaFave Treatise, points out all the state  
10 statutes, and I think if you're convicted three  
11 separate times of breaking into an RV and look  
12 at that, those sources, you would be on some  
13 notice that you shouldn't be possessing a  
14 firearm under federal law.

15 MR. FISHER: Well, Justice -- Justice  
16 Kavanaugh, there are many, many pieces of  
17 Taylor. So there is the state law piece that  
18 my friend is focused on.

19 But Taylor also says on the very same  
20 page that Congress in 1986 intended the  
21 practical identical definition of "burglary" as  
22 in the '84 Act. Remember, the '84 Act covered  
23 only buildings.

24 JUSTICE KAVANAUGH: But Taylor --  
25 Taylor does not do that, though, when it says



1 other -- or other structures. Quite clearly,  
2 Taylor departs from the '84 statute in what it  
3 describes there, don't you agree, when it says  
4 "or other structures"?

5 MR. FISHER: I think it departs from  
6 the '84, but that's why -- that's why the court  
7 --

8 JUSTICE KAVANAUGH: Because the '84  
9 Act only says building.

10 MR. FISHER: That's right. I think  
11 that's why the court said practically identical  
12 and not identical.

13 JUSTICE KAVANAUGH: And one of the --  
14 I'm sorry to interrupt. And one of the reasons  
15 it departed, as I read the opinion, which is  
16 quite thorough, is it did a full excavation of  
17 the Model Penal Code, of the treatises, of the  
18 state statutes, and said the '84 definition  
19 does not reflect common understanding, as Judge  
20 Sutton described in detail in his opinion, of  
21 the common understanding at the time of what  
22 burglary entailed.

23 MR. FISHER: Right. The Court did  
24 look to state law in Taylor, but, as I said, it  
25 also looked to legislative intent and the

1 drafting history and the like.

2 And I think Taylor was correct insofar  
3 as it went at that time that you still would  
4 have covered a majority of the states, even if  
5 Taylor covered vehicles adapted for overnight  
6 accommodation. The switch happened in Mathis.

7 That's when the government came to the  
8 Court and said, if you have an aggressive  
9 divisibility jurisprudence, that's going to  
10 leave aside many state laws because of  
11 divisibility reasons. So the answer to the  
12 state law concern is in Mathis. And that's the  
13 bridge the Court has already crossed and that  
14 the government doesn't ask the Court to -- to  
15 -- to revisit.

16 If we're talking about Congressional  
17 intent, I think there's one other important  
18 thing to put on the table in the text of the  
19 law, and that's the residual clause. I know  
20 the Court obviously has invalidated that  
21 clause, but we think the text is relevant in  
22 terms of Congressional intent.

23 And the text of that clause, remember,  
24 reads as follows. After the enumerated crimes,  
25 it says any other crime that "otherwise

1 involves" -- I'm sorry, I'm reading at page  
2 10-A of the government's appendix -- "that  
3 otherwise involves conduct that presents a  
4 serious potential risk of physical injury."

5           And so the word "otherwise" tells us  
6 that when Congress defined "burglary" -- in  
7 fact, it didn't define it -- but when Congress  
8 used the word "burglary," it must have assumed  
9 that the version of burglary it had in mind  
10 "involved conduct that presents a serious  
11 potential risk of physical injury."

12           Now, if you look at the NAFD amicus  
13 brief -- and this is responsive also to Justice  
14 Breyer's questions about statistics -- there  
15 actually have been quite a lot of studies  
16 conducted about burglary law, and what they  
17 find is that when there's a burglary of a home  
18 or somebody's residence, there is a real  
19 possibility that you could have a violent  
20 confrontation or physical injury, something in  
21 the range of 2 to 7 percent of the time.

22           By contrast, when it's burglary of a  
23 non-residential structure, the percentage goes  
24 down to .17 percent, which translates to one  
25 out of every 700 crimes that involve what a

1 state would expansively call burglary of a  
2 non-residential structure.

3 JUSTICE BREYER: Which category does  
4 this case belong in?

5 MR. FISHER: So this case belongs in  
6 the latter.

7 JUSTICE BREYER: Why?

8 MR. FISHER: Because we're talking  
9 about things that are not primary residences.  
10 They're not --

11 JUSTICE BREYER: But they're -- I  
12 mean, they're residences, they're inhabited by  
13 people, and so I don't know why it would be a  
14 lower statistic if it's, say, a car or a  
15 trailer or -- or some kind of motorized vehicle  
16 that a person uses as his home.

17 MR. FISHER: Well, I think, Justice  
18 Breyer, the typical usage of something like a  
19 sleeper van or recreational vehicle is not as a  
20 residence. A person has a home, and then they  
21 have a second vehicle that they use for trips  
22 and weekends and vacations and the like.

23 And so, if you ask somebody that has a  
24 house and a sleeper van, where is your  
25 residence, they would point to their house, not

1 the sleeper van.

2 JUSTICE KAVANAUGH: What are you --  
3 what are you --

4 MR. FISHER: And I think that's the  
5 way the statistics work.

6 JUSTICE KAVANAUGH: What are you --  
7 what are you basing that assertion on?

8 MR. FISHER: I'm just basing it on a  
9 common sense understanding of the word  
10 "residence," Justice Kavanaugh. And I think --

11 JUSTICE KAVANAUGH: Are these  
12 assertions about RVs you're --

13 MR. FISHER: The customary usage  
14 assertion?

15 JUSTICE KAVANAUGH: Yes.

16 MR. FISHER: Well, we -- we do cite --  
17 we cite a statistic in our brief from a -- from  
18 a trade association, Justice Kavanaugh, if you  
19 want to look at that as a pretty thorough study  
20 done out of the University of Michigan, and  
21 what they found is that the typical owner of a  
22 recreational vehicle uses it only 19 nights a  
23 year. That's 5 percent of the time.

24 JUSTICE KAGAN: Your position, Mr.  
25 Fisher, is that mobile homes are included, but

1 RVs are excluded, is that correct?

2 MR. FISHER: I think -- I think it's  
3 probably correct as to mobile homes. It's not  
4 at issue in front of the Court. But I think  
5 that would be --

6 JUSTICE KAGAN: Yeah, but that's --  
7 that's what I understood you to be saying in  
8 your brief.

9 MR. FISHER: Yeah. Uh-huh.

10 JUSTICE KAGAN: Does any state make  
11 that distinction in its law?

12 MR. FISHER: Well, Tennessee does,  
13 just to start with Tennessee. Subsection (a)  
14 of the Tennessee law on page 14-A has -- covers  
15 structures, which it includes in the definition  
16 of structure a mobile home.

17 Subsection (b) talks about vehicles.  
18 And vehicles is the subsection in front of the  
19 Court, and so you don't have to look any  
20 further than the government's appendix in this  
21 case. And you find it in other state laws too.  
22 Illinois, the Smith case, which the government  
23 itself cites and, in fact, asks this Court to  
24 follow, distinguishes between motor homes on  
25 the one hand and things that are -- that are

1 less -- less commonly used for overnight  
2 accommodation on the other.

3 JUSTICE KAGAN: Could you give your  
4 view of where, if -- if we accepted your  
5 position, what that would mean in terms of how  
6 many states' laws qualified?

7 MR. FISHER: Yes. And I want to -- I  
8 think I can give you a thorough typology, if  
9 you let me, which is we -- we do agree with the  
10 government that -- that only about 12 states  
11 would be within the definition if you were to  
12 hold both Tennessee and Arkansas law fall  
13 outside of it. So the "adapted" clause would  
14 bring in -- would bring in many states.

15 But, on the other hand, the government  
16 hasn't told you that, on the back end, you have  
17 about 20 other states that are broad even under  
18 the government's -- overbroad even under the  
19 government's definition.

20 So what this -- what this case boils  
21 down to, Justice Kagan, is a delta between the  
22 parties of something about between 15 and 19  
23 state -- states. And even in those states, you  
24 have states like Tennessee --

25 JUSTICE KAGAN: I'm sorry, you said

1 that in a way that --

2 MR. FISHER: I'm sorry.

3 JUSTICE KAGAN: -- that the delta,  
4 what -- what you're fighting about --

5 MR. FISHER: Yes.

6 JUSTICE KAGAN: -- is in the high  
7 teens?

8 MR. FISHER: Yes, that's right. And  
9 even -- and even among that group of states --

10 JUSTICE KAGAN: I mean, that's  
11 significant. That's a lot.

12 MR. FISHER: I -- I don't dispute that  
13 that's somewhat significant. Even among those  
14 states, though, there are many states like  
15 Tennessee that would have a separate provision  
16 that it's divisible, that it would still  
17 qualify as -- as burglary. So it's even, I  
18 think, less than the high teens.

19 And I understand that the government  
20 keeps harping on the number of states because  
21 that is certainly the -- the strongest version  
22 of their argument. But even if this were a  
23 case about first principles and not about stare  
24 decisis where the Court had already said that  
25 vehicles are out, we think there's three



1       countervailing forces that -- that, as a matter  
2       of first principles, should leave the kind of  
3       vehicles we have at issue here out.

4                 First, we have the broader context of  
5       the law that I've described, which is the 1984  
6       Act and the -- and this Court's understanding  
7       that Congress didn't intend to significantly  
8       expand upon the definition there, as well as  
9       the residual clause and what that tells you  
10      about Congressional intent, trying to get only  
11      those burglaries that had a significant risk of  
12      violent acts or physical injury.

13                Secondly, we have the purpose of ACCA,  
14      which is laid out at great length in the Taylor  
15      opinion, where, again, the Court said, in much  
16      the same words as the residual clause, what  
17      Congress was worried about were particular  
18      crimes where there's a risk of -- inherent risk  
19      of physical injury and not only the inherent  
20      risk but a awareness on the fact of the  
21      perpetrator that that risk was present. And  
22      this -- this speaks to some of the conversation  
23      earlier.

24                And then, thirdly, we haven't yet  
25      talked about administrability. And I think the

1 Court got a preview into the difficulty in  
2 terms of administrability when you asked Ms.  
3 Ross about what the word "adapted" means.

4 Now our definition, Justice Kagan --  
5 this brings me back to the conversation we just  
6 had -- is well-grounded in federal, state, and  
7 local law. There's a definition that runs  
8 throughout every level of law that separates  
9 stationary structures that can be moved, like a  
10 mobile home or a floating home on the one hand,  
11 and things that are essentially vehicles on the  
12 other.

13 The "adapted" definition that the  
14 government gives you they readily admit is not  
15 easily defined. And I still, as I stand here,  
16 just to be candid, don't know whether a  
17 physical adaptation is required. Is a mattress  
18 in the back of a station wagon enough? Is, as  
19 the government suggests at page 18 of its  
20 brief, simply hanging a T-shirt in the window  
21 like a curtain to block a light enough?

22 Different states are going to answer  
23 that question differently. And not only does  
24 the Stitt brief point out a couple of examples,  
25 but the NACDL brief points out examples at

1 pages 13 to 15 of its brief.

2 So "adapted" is going to be a very,  
3 very difficult line to draw, and I don't know  
4 how -- how many cases the Court wants to have  
5 come back to it on that.

6 JUSTICE KAVANAUGH: But isn't that  
7 what the Model Penal Code had and some states  
8 already have? In other words, this is not  
9 something that would be created now.

10 MR. FISHER: Well, Justice Kavanaugh,  
11 it's true that many states have statutory  
12 language that says adapted for overnight  
13 accommodation. But what I'm telling you is  
14 different states will interpret that  
15 differently, which is my -- why Ms. Ross  
16 couldn't give you --

17 JUSTICE KAVANAUGH: I understand, but  
18 that's always going to be the case that there  
19 will be some slight differences, right? I  
20 mean --

21 MR. FISHER: That may be true. But I  
22 think, when you don't have a firm grounding  
23 throughout other areas of law like our rule  
24 does, you're more likely to have variation in  
25 problems. I think that's what I would tell

1 you.

2 JUSTICE KAVANAUGH: And you don't  
3 think "adapted" has a firm grounding, even  
4 though it's been around in most state statutes  
5 for -- or many state statutes?

6 MR. FISHER: Well, I don't see a  
7 definition in the government's brief, and I  
8 haven't seen a definition anywhere else. So --  
9 so I'm certainly not aware of one.

10 I would ask you also, in -- as you  
11 look sort of as a matter of first principles,  
12 if you have any doubt as to how to resolve this  
13 case, we think this is a case that really cries  
14 out for the rule of lenity.

15 Another important aspect of notice, of  
16 course, is for defendants to have fair  
17 understanding of what conduct would qualify for  
18 a given sentencing enhancement.

19 And, if nothing else, the fact that  
20 this Court has said on so many occasions that  
21 vehicles are out, without any qualifications,  
22 without any reservations, and that structures  
23 and buildings are in, would have told the  
24 ordinary person that -- that vehicles, even  
25 like sleeper vans, recreational vehicles, were

1 outside of the definition of generic burglary.

2 If I may, I'd like to spend a few  
3 minutes on the specific provision of Arkansas  
4 law that was also spoke -- talked about at the  
5 beginning of the argument.

6 As I understand the government's  
7 position, it's not disputing that an ordinary  
8 car would be outside the locational element of  
9 burglary.

10 Now the first thing the government  
11 said was they didn't think that was before the  
12 Court. But I just don't see how that could be  
13 the case, given that it's within the question  
14 presented.

15 The question presented that the  
16 government itself drafted says "adapted or  
17 used." And so "used" has to mean something  
18 different than "adapted." And we think it  
19 quite obviously covers things like the Arkansas  
20 statute, which is an ordinary vehicle in which  
21 somebody lives.

22 And the government's only answer to  
23 that statutory language is, well, every single  
24 time somebody lives in a car, it will, in fact,  
25 be adapted. Now Justice Gorsuch already

1 pointed out one problem with that, which is  
2 surplusage. If that were the case, you  
3 wouldn't need anything other than an "adapted"  
4 clause.

5 JUSTICE ALITO: But we're talking  
6 about a state statute that could well be  
7 interpreted in lots of different ways by the  
8 state courts. You want us to provide a -- a  
9 definitive interpretation of the Arkansas  
10 statute here?

11 MR. FISHER: I think if it were  
12 ambiguous, Justice Alito, that might be  
13 something you wouldn't want to do. But, when  
14 the plain language so obviously covers an  
15 ordinary car, we don't think there's any reason  
16 to flinch from that. In Mellouli --

17 JUSTICE GORSUCH: Well, this was --  
18 this was raised pretty late in the day, this  
19 argument about the Arkansas statute and "living  
20 in." And given that -- and given our decision  
21 in Duenas, why don't we do exactly what Justice  
22 Alito is suggesting and just remand it and let  
23 -- let the lower courts figure it out? Maybe  
24 they can certify it to the Arkansas Supreme  
25 Court and figure this out.

1           MR. FISHER: So for -- so for two  
2 reasons, one procedural and one substantive,  
3 Justice Gorsuch. The procedural reason is it's  
4 squarely within the government's question  
5 presented. It's within the rule the government  
6 is asking the Court to adopt. The government's  
7 header in the argument section to its rule says  
8 vehicles that are adapted or used for overnight  
9 accommodation.

10           So I don't know how you --

11           JUSTICE GORSUCH: I'll spot you all of  
12 that.

13           MR. FISHER: Okay.

14           JUSTICE GORSUCH: I'm -- I'm with you.

15           (Laughter.)

16           MR. FISHER: So --

17           JUSTICE GORSUCH: But it -- the -- the  
18 Eighth Circuit didn't have a chance to consider  
19 this particular argument about living in. And  
20 it's a -- it's a -- it's a nifty little  
21 argument, but maybe we'd benefit from being a  
22 court of review rather than first view on it.

23           MR. FISHER: Well, I'd encourage the  
24 Court to do exactly -- this is my substantive  
25 answer -- to do exactly what it did in Mellouli

1 when the -- we had a controlled substances law  
2 in front of you and the question was whether  
3 that state law from Kansas was overbroad into  
4 the categorical approach. The government  
5 argued in its brief that because there were no  
6 state court decisions actually applying that  
7 state law in the broader way, that the Court  
8 shouldn't accept that under Duenas-Alvarez.  
9 But the Court --

10 JUSTICE BREYER: The obvious -- I  
11 mean, the obvious interpretation the other way  
12 is that what they mean by "used" is used  
13 regularly or used more than once or used in  
14 some other way. And we don't know -- I mean, I  
15 can't believe that they'd mean used once --

16 MR. FISHER: No --

17 JUSTICE BREYER: -- and the person  
18 left his briefcase or something in the car.  
19 They can't mean that.

20 MR. FISHER: No, I agree it doesn't  
21 mean that, Justice Breyer. What we say it  
22 means is what Justice Sotomayor was describing  
23 earlier, which is somebody who uses the car as  
24 their home and sleeps in the car every night.

25 And -- and this is the empirical



1 answer to the government's assertion, which is  
2 just it is empirically untrue that every time  
3 somebody sleeps in a car, they will adapt it  
4 for that overnight accommodation. In fact,  
5 quite to the contrary, many people would be  
6 embarrassed to be using their car as a home.  
7 Or they would be concealing that fact because  
8 they would be looking to evade local zoning  
9 laws that would prohibit sleeping overnight in  
10 parking lots or the like.

11 So we cite in our -- in our red brief,  
12 Justice Breyer, an article from The New York  
13 Times in a footnote of a whole collection of  
14 studies and articles that explain this  
15 phenomenon. And it is just not true, as an  
16 empirical matter, that a car in which somebody  
17 lives will be necessarily adapted for overnight  
18 use.

19 JUSTICE ALITO: But if you were  
20 representing a defendant before the Arkansas  
21 Supreme Court and the person had been convicted  
22 under this statute, a person lived in the car  
23 but every morning cleaned up the car so there  
24 was no way anybody could tell that anybody had  
25 been living there, wouldn't -- would you rule

1 out the possibility of arguing to the Arkansas  
2 Supreme Court that there might -- that maybe  
3 there should be some additional requirements  
4 read into this provision?

5 MR. FISHER: Well, Justice Alito, if I  
6 were appointed to that case, I might make that  
7 argument, but I think I would have a pretty  
8 lousy argument, and the reason why is because  
9 the plain text of the law would be directly  
10 against my argument.

11 Remember, the -- there's already --  
12 there's a separate prong of Arkansas law that  
13 covers customary usage, and I think I heard Ms.  
14 Ross say that covers the kinds of vehicles that  
15 are designed for that purpose or physically  
16 adapted to that purpose.

17 So the only thing the other clause can  
18 mean under standard tools of statutory  
19 construction is the other -- is some other kind  
20 of car, in which somebody lives. And so I  
21 think, even if somebody were to make that  
22 argument to the Arkansas Supreme Court, we cite  
23 in our brief cases from the State of Arkansas  
24 that says we follow ordinary statutory  
25 construction principles. And it would just be

1 a flat loser of an argument.

2           And even if the plain text arguments  
3 weren't enough, we outline in our red brief in  
4 the Sims case the numerous other reasons why  
5 the plain language of the state statute ought  
6 to control for categorical approach purposes,  
7 and those -- and those are two general  
8 categories: first, the efficiency,  
9 predictability, and fairness that undergird the  
10 categorical approach, and, secondly, the Sixth  
11 Amendment concerns that undergird the  
12 categorical approach, all of which coalesce to  
13 amount to if the state law is clear on its face  
14 that it's broader than the federal counterpart  
15 that -- that the prior conviction under the  
16 state law simply can't be a qualifying offense.  
17 And so we think that's enough to decide the  
18 case on the Arkansas side.

19           There were some questions earlier  
20 about how the Court should think about the  
21 categorical approach more generally, and so let  
22 me say a couple words about that because I do  
23 think it is a fair observation from the Court  
24 that part of what's dwindling down the number  
25 of states covered by the government's approach

1 in -- in our case is the nature of the  
2 categorical approach.

3 Now the Court had fair notice of that.  
4 The government told you this in Mathis, and it  
5 told you even in Taylor that if you go down  
6 these roads, you're going to start to dwindle  
7 the number of states.

8 And the Court, I think, had good  
9 reasons to do that because, when you turn to  
10 the categorical approach, it's not just about  
11 Congressional intent, it's about these  
12 predictability, fairness, and Sixth Amendment  
13 constitutional concerns that have to be in  
14 play. So it's not purely a question of  
15 Congressional intent. It's also a question of  
16 workability. But -- as workability and  
17 constitutional jurisprudence.

18 But -- but regardless of how different  
19 members of the Court think about those  
20 undergirding principles, there is, in fact, as  
21 Justice Kagan mentioned, there's a -- there's a  
22 bill before Congress right now that would adopt  
23 a totally different approach. And this is  
24 something Attorney General Sessions spoke about  
25 in August. And so it is very much on the table

1 in Congress right now to take a different  
2 approach.

3 And I'd return the Court, if I may, to  
4 Taylor. In Taylor, there was actually a bill  
5 pending at the time of that decision, and the  
6 Court, for whatever reason, went ahead and  
7 issued its opinion in Taylor and has sort of  
8 owned this jurisprudence ever since.

9 And one thing that you might think  
10 about here is there's a bill pending in  
11 Congress right now. We think the safer path is  
12 for the Court to continue down its -- its prior  
13 precedent. They have good -- you have good  
14 reasons for what you've done.

15 I understand some of you are  
16 frustrated with it. And maybe Congress is  
17 frustrated with it. But the best thing the  
18 Court, I think, can do is follow its own  
19 jurisprudence in this case, which is -- which  
20 means two things:

21 One is apply the categorical approach  
22 as you've outlined it, all the way up through  
23 Mathis, and even apply it as to burglary, as  
24 you've put structures and buildings on the one  
25 hand and vehicles on the other.

1           And if Congress is dissatisfied with  
2 the outcome, it's obviously fully able to pass  
3 the law that's pending, and the department,  
4 even if it hasn't taken a firm position, can  
5 take a position and get something done.

6           But we think if the Court goes out of  
7 its way again to do something more extravagant  
8 in these cases, you're going to potentially own  
9 this jurisprudence a lot longer. And that's  
10 what -- really what's happening here.

11           The reason these cases are in front of  
12 you, you may know this already, but the reason  
13 these cases are in front of you are because  
14 after the invalidation of the residual clause  
15 the government is going around and making a  
16 bunch of arguments that it didn't make before,  
17 trying to get in various prior state  
18 convictions that it wasn't arguing for under  
19 the enumerated clauses or under the use of  
20 force clauses. That's why you have this new  
21 explosion of ACCA cases.

22           And so I think the better thing is for  
23 the Court to follow its own cases, its own  
24 precedent, leave it to Congress to adjust if it  
25 wants, but not feel like it has to solve every

1 single problem as it arises.

2 JUSTICE SOTOMAYOR: Mr. Fisher, if we  
3 accept the government's "adapted," and I  
4 understand all its problems, would the  
5 Tennessee statute survive?

6 MR. FISHER: If you --

7 JUSTICE SOTOMAYOR: And if it's not,  
8 why not?

9 MR. FISHER: If you accept the  
10 government's -- if you accept the government's  
11 definition of "adapted," then the Tennessee  
12 statute would -- would fall within it, but it  
13 would be also -- there -- there would be -- so,  
14 yeah, I think the answer to that is yes, if you  
15 accept the government's argument on "adapted,"  
16 then Tennessee is within it.

17 But we ask, for all the reasons I've  
18 asked before, not to accept the government's  
19 argument to "adapted."

20 The only thing the government has to  
21 say for itself, Justice Sotomayor, and I may be  
22 repeating myself here, is the state-by-state  
23 count. We think the state count is answered by  
24 the flow of this Court's jurisprudence and the  
25 other things in Taylor, things like adhering to

1 the '84 Congressional intent, adhering to the  
2 most important thing perhaps, which is just  
3 sweeping in violent offenders.

4 Mr. Chief Justice, you talked about  
5 people using guns. You know, that would be the  
6 quintessential case. Of course, Congress drew  
7 it a little bit more broadly, a risk of  
8 physical injury, but for all the reasons I've  
9 argued and we've shown in our briefs, the outer  
10 limits of the Tennessee law, even on its own  
11 terms, covers these kinds of cases that, as I  
12 said to Justice Breyer earlier, are a  
13 one-in-700 chance of physical injury.

14 And in those kinds of cases, we don't  
15 think Congress would have expected a state law  
16 to -- to be swept up into ACCA. And I would  
17 hasten to add that I think this is also  
18 responsive, Justice Breyer, you asked about how  
19 these cases are charged.

20 When there are the kinds of  
21 altercations that Justice Alito, for example,  
22 was -- was hypothesizing, somebody is in inside  
23 and there is a violent altercation, those cases  
24 aren't charged as burglary. They're charged as  
25 things like carjacking, robbery, assault.



1           So the burglary convictions, and this  
2           is what the Sentencing Commission found when it  
3           backed burglary out of even the crime of  
4           violence provisions in the Sentencing  
5           Guidelines, it found that when burglary is  
6           charged, it's in the cases where nothing  
7           happened but the entry.

8           And so that may well still satisfy the  
9           categorical definition of burglary under ACCA,  
10          the residential entry, because of the awareness  
11          and because of the inherent risk, but once you  
12          go beyond primary residences and talk about  
13          things that are hardly ever occupied and that  
14          people are going to target specifically because  
15          they're hardly ever occupied, walking down to  
16          the -- to the -- to the marina with a sleepy  
17          sailboat on the dock and rummaging through the  
18          contents, those are the kinds of things that  
19          Congress, I don't think, would have expected to  
20          be swept up and any sensible definition of ACCA  
21          wouldn't trigger the harsh consequences that  
22          follow.

23                 If there are no more questions, I'll  
24                 submit the case.

25                 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Five minutes, Ms. Ross.

3 REBUTTAL ARGUMENT OF ERICA ROSS

4 ON BEHALF OF PETITIONER

5 MS. ROSS: Thank you, Mr. Chief

6 Justice.

7 I just want to make a few points. The  
8 first is that Justice Gorsuch suggested that  
9 perhaps my friend on the other side would  
10 quibble with our numbers with respect to how  
11 many states would have ACCA burglary and how  
12 many wouldn't under our view and under  
13 Respondents' view.

14 And my friend has not actually  
15 quibbled with those numbers. He agrees that,  
16 at most, we're looking at 12 states with ACCA  
17 burglary under his view.

18 And I think that that is itself, if  
19 not dispositive, very close to it because,  
20 again, we -- we don't think that's a statute  
21 that Congress would have passed.

22 Now my friend has a couple of reasons  
23 why Congress might have done that. He says,  
24 well, really the delta's only 20 or so cases --  
25 or 20 or so states, but those 20 states make

1 the difference between the definition of ACCA  
2 burglary, satisfying what this Court said four  
3 times over in Taylor, that it was trying to get  
4 at the way that the states used the term  
5 "burglary," the majority of states. It said  
6 that with respect to the 1984 statute, with  
7 respect to the 1986 statute, as a reason for  
8 rejecting the common law definition, and when  
9 it introduced the categorical approach and said  
10 that a few state statutes might be broader than  
11 the definition that it was adopting.

12 So those 20 state statutes, I think,  
13 really cannot be underestimated here.

14 The other reason that my friend gave  
15 for why the numbers are so low is that Mathis  
16 changed everything, but Mathis didn't change  
17 everything. As Mathis itself would explain,  
18 Mathis interpreted this -- the ACCA as it  
19 always stood. And so I don't think that  
20 Congress when it enacted the statute in the  
21 first instance would have expected about 12  
22 state laws to come in as burglary.

23 Another thing that my friend mentioned  
24 was the residual clause. Again, I don't think  
25 that when Congress enacted a statute with the

1 word "burglary" and then with the residual  
2 clause, which we know was an attempt to expand  
3 the scope of the statute to reach other crimes,  
4 that it, in fact, would have meant for most  
5 burglary statutes or a substantial number of  
6 burglary statutes to come in through the  
7 residual clause while narrowing the point or  
8 the -- the word "burglary" to essential  
9 obsolescence.

10 So, given the way that the state  
11 statutes play out here, we think that our  
12 reading is the one that is consistent with what  
13 Congress was -- was trying to do and with  
14 Taylor itself.

15 Now, speaking in terms of Taylor, my  
16 friend mentioned that Taylor said that the  
17 definition that it was taking on was  
18 practically identical to the 1984 definition  
19 and that that definition only included  
20 buildings.

21 What I think -- I apologize, I don't  
22 remember exactly who said it -- someone had  
23 mentioned, one of the Justices had mentioned  
24 that, in fact, the practical difference may  
25 make up for the fact -- I believe it was

1 Justice Kavanaugh -- that really the difference  
2 between buildings and structures. And that  
3 might well be true.

4 I also think that Taylor itself was  
5 looking at a definition of "building." And  
6 Congress in 1984 was looking at a definition of  
7 "building" that had taken on its own very broad  
8 meaning in burglary law.

9 If you look at the appendix to our  
10 brief in this case, most, if not all, of the  
11 states that actually defined "building" did so  
12 in terms of vehicles, other structures, et  
13 cetera.

14 So they had a very broad definition  
15 that might not make sense in ordinary English  
16 but was what state burglary statutes used. And  
17 so, when this Court comes along in Taylor and  
18 says building or structure, it's really just  
19 explicating that.

20 Another way to look at this is through  
21 the LaFave treatise that we obviously rely on  
22 in the briefs, which similarly makes clear that  
23 those -- that both "building" and "structure"  
24 were often broadly construed.

25 Another point that I just wanted to

1 clear up with respect to the government's  
2 position in Mathis. I don't think it is true  
3 that the government said that all of the  
4 statutes that it noted would, in fact, be out  
5 if Mathis came out the way it did. It said it  
6 would raise some questions.

7           And many of those statutes, in fact,  
8 are broader than the statutes that we're  
9 talking about here today.

10           In closing, we heard a lot about  
11 numbers this morning both on our side and --  
12 and from my friend. I think the thing that we  
13 -- there are two things, really, at the core at  
14 this case that can't be denied:

15           One is that burglary has always  
16 protected the core of dwellings. And the  
17 second is that, on Respondents' view, ACCA  
18 burglary takes a step back from that and  
19 includes far fewer dwellings, eliminates the  
20 majority of state statutes precisely because  
21 they cover exactly what courts for centuries  
22 have thought of as the core of burglary.

23           We don't think that's what Congress  
24 intended. We don't think that's what this  
25 Court intended in Taylor. And we would,

1       therefore, ask that the decisions below be  
2       reversed.

3                   JUSTICE KAGAN:   Sorry, Ms. Ross.  Do  
4       you agree that if a statute covers just regular  
5       cars, that that falls outside?

6                   MS. ROSS:   Regular cars meaning no --  
7       nobody's living there?

8                   JUSTICE KAGAN:   Nobody's living there.  
9       Nobody's doing that.  You're just driving it.

10                  MS. ROSS:   Yes, Your Honor, I think it  
11       would be difficult in light of this Court's  
12       cases, even though actually a large number of  
13       states covered those, I think it would be very  
14       difficult in light of Mathis and -- and  
15       Duenas-Alvarez and all the other cases in which  
16       this Court said --

17                  JUSTICE KAGAN:   So -- so you're  
18       accepting that those are out?

19                  MS. ROSS:   Yes, Your Honor, you're  
20       right.

21                  JUSTICE KAGAN:   And how about the --  
22       the ones that say vehicles that are used for  
23       business activities, commercial activities, are  
24       those in or out?

25                  MS. ROSS:   So, Your Honor, we haven't

1 taken a position on that. In this Court, it's  
2 not raised in these cases. That is not sort of  
3 the considered view of the Justice Department  
4 at this point. We are not using either of  
5 those statutes at this point.

6 If the -- if the Court has no further  
7 questions, we'd ask that you reverse in both  
8 cases. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel. The case is submitted.

11 (Whereupon, at 12:08 p.m., the case  
12 was submitted.)

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## Official - Subject to Review

<b>1</b>	<b>accepted</b> <sup>[1]</sup> 46:4 <b>accepting</b> <sup>[1]</sup> 70:18 <b>accommodation</b> <sup>[17]</sup> 6:22 8:2 13:3,4 15:2 16:11,19 18:22 32:17 35:4 36:6 38:5 41:6 46:2 50:13 54:9 56:4 <b>acknowledged</b> <sup>[1]</sup> 4:1 <b>across</b> <sup>[1]</sup> 23:7 <b>Act</b> <sup>[9]</sup> 3:15 12:9 13:23 28:2,16 39:22,22 40:9 48:6 <b>actions</b> <sup>[1]</sup> 18:5 <b>activities</b> <sup>[2]</sup> 70:23,23 <b>acts</b> <sup>[1]</sup> 48:12 <b>actually</b> <sup>[29]</sup> 4:12,16 6:12 11:2 12:3 14:8,17 15:7,19,20,21 18:21 20:24 23:24 24:6 25:21 26:8 27:19,20 30:1 32:13 33:8 36:7 42:15 55:6 60:4 65:14 68:11 70:12 <b>adapt</b> <sup>[1]</sup> 56:3 <b>adaptation</b> <sup>[2]</sup> 16:8 49:17 <b>adaptations</b> <sup>[1]</sup> 18:10 <b>adapted</b> <sup>[35]</sup> 5:13 6:4 8:1,16 13:3 15:4,23 16:1,4,10,18 17:19 18:21 19:4 32:16 36:5 38:4 41:5 46:13 49:3,13 50:2,12 51:3 52:16,18,25 53:3 54:8 56:17 57:16 62:3,11,15,19 <b>add</b> <sup>[4]</sup> 23:20 32:24 38:10 63:17 <b>added</b> <sup>[3]</sup> 23:19 24:15 28:20 <b>additional</b> <sup>[1]</sup> 57:3 <b>addressed</b> <sup>[1]</sup> 33:20 <b>adhering</b> <sup>[2]</sup> 62:25 63:1 <b>adjust</b> <sup>[1]</sup> 61:24 <b>administrability</b> <sup>[2]</sup> 48:25 49:2 <b>admit</b> <sup>[1]</sup> 49:14 <b>admits</b> <sup>[1]</sup> 9:10 <b>adopt</b> <sup>[3]</sup> 33:4 54:6 59:22 <b>adopted</b> <sup>[1]</sup> 3:14 <b>adopting</b> <sup>[1]</sup> 66:11 <b>affirm</b> <sup>[1]</sup> 31:1 <b>aggravated</b> <sup>[3]</sup> 30:2,8,11 <b>aggressive</b> <sup>[1]</sup> 41:8 <b>ago</b> <sup>[1]</sup> 39:6 <b>agree</b> <sup>[5]</sup> 14:7 40:3 46:9 55:20 70:4 <b>agreed</b> <sup>[2]</sup> 20:21 33:16 <b>agrees</b> <sup>[1]</sup> 65:15 <b>ahead</b> <sup>[2]</sup> 7:17 60:6 <b>ALITO</b> <sup>[19]</sup> 25:7,10,14 26:13,17 35:22 36:13,22 37:3,7,8,12 38:10 53:5,12,22 56:19 57:5 63:21 <b>Alito's</b> <sup>[1]</sup> 19:23 <b>allow</b> <sup>[1]</sup> 36:14 <b>almost</b> <sup>[1]</sup> 21:3 <b>already</b> <sup>[8]</sup> 11:22 12:13 41:13 47:24 50:8 52:25 57:11 61:12 <b>altercation</b> <sup>[1]</sup> 63:23 <b>altercations</b> <sup>[1]</sup> 63:21 <b>ambiguous</b> <sup>[2]</sup> 29:2 53:12 <b>Amendment</b> <sup>[5]</sup> 31:17,20 34:11 58:11 59:12 <b>amicus</b> <sup>[1]</sup> 42:12 <b>among</b> <sup>[3]</sup> 24:14 47:9,13 <b>amount</b> <sup>[1]</sup> 58:13	<b>analysis</b> <sup>[1]</sup> 4:15 <b>announced</b> <sup>[1]</sup> 31:18 <b>anomalous</b> <sup>[1]</sup> 11:3 <b>another</b> <sup>[7]</sup> 15:22 28:21 31:8 51:15 66:23 68:20,25 <b>answer</b> <sup>[15]</sup> 5:9 11:1 17:21,23 19:22 35:12,21 36:14,20 41:11 49:22 52:22 54:25 56:1 62:14 <b>answered</b> <sup>[1]</sup> 62:23 <b>answers</b> <sup>[1]</sup> 16:14 <b>anybody</b> <sup>[2]</sup> 56:24,24 <b>apart</b> <sup>[1]</sup> 25:16 <b>apologize</b> <sup>[3]</sup> 24:5 26:24 67:21 <b>appeals</b> <sup>[3]</sup> 4:10 8:8,9 <b>APPEARANCES</b> <sup>[1]</sup> 1:20 <b>appendix</b> <sup>[3]</sup> 42:2 45:20 68:9 <b>application</b> <sup>[1]</sup> 29:3 <b>applied</b> <sup>[2]</sup> 9:11,19 <b>applies</b> <sup>[1]</sup> 6:20 <b>apply</b> <sup>[3]</sup> 31:17 60:21,23 <b>applying</b> <sup>[2]</sup> 14:17 55:6 <b>appointed</b> <sup>[1]</sup> 57:6 <b>appreciate</b> <sup>[1]</sup> 23:3 <b>Approdi</b> <sup>[1]</sup> 31:18 <b>approach</b> <sup>[19]</sup> 21:14,22 22:3 25:20 27:6 28:21 35:7 55:4 58:6,10,12,21,25 59:2,10,23 60:2,21 66:9 <b>area</b> <sup>[1]</sup> 26:18 <b>areas</b> <sup>[1]</sup> 50:23 <b>aren't</b> <sup>[1]</sup> 63:24 <b>arguably</b> <sup>[1]</sup> 10:23 <b>argued</b> <sup>[2]</sup> 55:5 63:9 <b>arguing</b> <sup>[2]</sup> 57:1 61:18 <b>argument</b> <sup>[29]</sup> 1:18 2:2,5,8 3:4,8 4:8,9,12,21 6:19 30:22 33:1 38:9,13 47:22 52:5 53:19 54:7,19,21 57:7,8,10,22 58:1 62:15,19 65:3 <b>arguments</b> <sup>[3]</sup> 4:7 58:2 61:16 <b>arises</b> <sup>[1]</sup> 62:1 <b>Arkansas</b> <sup>[25]</sup> 6:20 9:13 10:3 14:8,16 19:17 35:17,18 36:23,24 37:1,2 38:15 46:12 52:3,19 53:9,19,24 56:20 57:1,12,22,23 58:18 <b>Arkansas's</b> <sup>[1]</sup> 31:13 <b>Armed</b> <sup>[5]</sup> 3:14 12:9 13:22 28:1,16 <b>around</b> <sup>[7]</sup> 8:18 11:11 12:12,14 13:6 51:4 61:15 <b>article</b> <sup>[1]</sup> 56:12 <b>articles</b> <sup>[1]</sup> 56:14 <b>aside</b> <sup>[1]</sup> 41:10 <b>asks</b> <sup>[2]</sup> 21:8 45:23 <b>aspect</b> <sup>[1]</sup> 51:15 <b>assault</b> <sup>[1]</sup> 63:25 <b>assertion</b> <sup>[3]</sup> 44:7,14 56:1 <b>assertions</b> <sup>[1]</sup> 44:12 <b>Assistant</b> <sup>[1]</sup> 1:21 <b>association</b> <sup>[1]</sup> 44:18 <b>assume</b> <sup>[3]</sup> 15:23,25 28:12 <b>assumed</b> <sup>[1]</sup> 42:8 <b>attempt</b> <sup>[1]</sup> 67:2 <b>attendant</b> <sup>[1]</sup> 10:22 <b>Attorney</b> <sup>[2]</sup> 24:8 59:24 <b>August</b> <sup>[1]</sup> 59:25 <b>aware</b> <sup>[2]</sup> 24:6 51:9	<b>awareness</b> <sup>[2]</sup> 48:20 64:10 <b>away</b> <sup>[1]</sup> 10:19  <b>B</b> <b>back</b> <sup>[19]</sup> 4:11 5:11,21 6:1,1 10:10 12:21 19:14 21:2 26:7,20,25 32:25 33:8 46:16 49:5,18 50:5 69:18 <b>backed</b> <sup>[1]</sup> 64:3 <b>based</b> <sup>[1]</sup> 30:3 <b>basic</b> <sup>[1]</sup> 32:4 <b>basing</b> <sup>[2]</sup> 44:7,8 <b>basis</b> <sup>[1]</sup> 38:8 <b>bear</b> <sup>[1]</sup> 12:22 <b>become</b> <sup>[1]</sup> 4:13 <b>bed</b> <sup>[2]</sup> 18:9,12 <b>began</b> <sup>[1]</sup> 13:9 <b>beginning</b> <sup>[1]</sup> 52:5 <b>begs</b> <sup>[1]</sup> 38:25 <b>behalf</b> <sup>[8]</sup> 1:23,25 2:4,7,10 3:9 30:23 65:4 <b>believe</b> <sup>[4]</sup> 14:22 24:15 55:15 67:25 <b>belong</b> <sup>[1]</sup> 43:4 <b>belongs</b> <sup>[1]</sup> 43:5 <b>below</b> <sup>[2]</sup> 31:2 70:1 <b>benefit</b> <sup>[1]</sup> 54:21 <b>best</b> <sup>[2]</sup> 22:19 60:17 <b>better</b> <sup>[2]</sup> 21:14 61:22 <b>Between</b> <sup>[7]</sup> 9:14 34:17 45:24 46:21,22 66:1 68:2 <b>beyond</b> <sup>[3]</sup> 22:5 31:14 64:12 <b>bill</b> <sup>[3]</sup> 59:22 60:4,10 <b>bit</b> <sup>[5]</sup> 25:16,16,17 39:1 63:7 <b>blanket</b> <sup>[3]</sup> 5:21,25 16:3 <b>block</b> <sup>[1]</sup> 49:21 <b>boat</b> <sup>[1]</sup> 35:13 <b>boats</b> <sup>[1]</sup> 34:24 <b>boils</b> <sup>[1]</sup> 46:20 <b>books</b> <sup>[2]</sup> 27:22 28:3 <b>both</b> <sup>[7]</sup> 5:18 11:8 35:16 46:12 68:23 69:11 71:7 <b>breaking</b> <sup>[2]</sup> 24:22 39:11 <b>breaks</b> <sup>[2]</sup> 8:19 10:13 <b>BREYER</b> <sup>[17]</sup> 19:21 20:2 22:9 23:5,18 24:13 28:17 43:3,7,11,18 55:10,17,21 56:12 63:12,18 <b>Breyer's</b> <sup>[2]</sup> 23:1 42:14 <b>bridge</b> <sup>[1]</sup> 41:13 <b>brief</b> <sup>[2]</sup> 4:18 7:6 9:10,14,15 32:19 34:13,16 42:13 44:17 45:8 49:20,24,25 50:1 51:7 55:5 56:11 57:23 58:3 68:10 <b>briefcase</b> <sup>[1]</sup> 55:18 <b>briefs</b> <sup>[2]</sup> 63:9 68:22 <b>bring</b> <sup>[4]</sup> 19:3 26:25 46:14,14 <b>bringing</b> <sup>[1]</sup> 26:25 <b>brings</b> <sup>[2]</sup> 15:3 49:5 <b>broad</b> <sup>[3]</sup> 46:17 68:7,14 <b>broader</b> <sup>[6]</sup> 35:20 48:4 55:7 58:14 66:10 69:8 <b>broadest</b> <sup>[1]</sup> 19:16 <b>broadly</b> <sup>[4]</sup> 11:25 33:16 63:7 68:24 <b>brooding</b> <sup>[1]</sup> 20:17
<b>2</b>	<b>accepted</b> <sup>[1]</sup> 46:4 <b>accepting</b> <sup>[1]</sup> 70:18 <b>accommodation</b> <sup>[17]</sup> 6:22 8:2 13:3,4 15:2 16:11,19 18:22 32:17 35:4 36:6 38:5 41:6 46:2 50:13 54:9 56:4 <b>acknowledged</b> <sup>[1]</sup> 4:1 <b>across</b> <sup>[1]</sup> 23:7 <b>Act</b> <sup>[9]</sup> 3:15 12:9 13:23 28:2,16 39:22,22 40:9 48:6 <b>actions</b> <sup>[1]</sup> 18:5 <b>activities</b> <sup>[2]</sup> 70:23,23 <b>acts</b> <sup>[1]</sup> 48:12 <b>actually</b> <sup>[29]</sup> 4:12,16 6:12 11:2 12:3 14:8,17 15:7,19,20,21 18:21 20:24 23:24 24:6 25:21 26:8 27:19,20 30:1 32:13 33:8 36:7 42:15 55:6 60:4 65:14 68:11 70:12 <b>adapt</b> <sup>[1]</sup> 56:3 <b>adaptation</b> <sup>[2]</sup> 16:8 49:17 <b>adaptations</b> <sup>[1]</sup> 18:10 <b>adapted</b> <sup>[35]</sup> 5:13 6:4 8:1,16 13:3 15:4,23 16:1,4,10,18 17:19 18:21 19:4 32:16 36:5 38:4 41:5 46:13 49:3,13 50:2,12 51:3 52:16,18,25 53:3 54:8 56:17 57:16 62:3,11,15,19 <b>add</b> <sup>[4]</sup> 23:20 32:24 38:10 63:17 <b>added</b> <sup>[3]</sup> 23:19 24:15 28:20 <b>additional</b> <sup>[1]</sup> 57:3 <b>addressed</b> <sup>[1]</sup> 33:20 <b>adhering</b> <sup>[2]</sup> 62:25 63:1 <b>adjust</b> <sup>[1]</sup> 61:24 <b>administrability</b> <sup>[2]</sup> 48:25 49:2 <b>admit</b> <sup>[1]</sup> 49:14 <b>admits</b> <sup>[1]</sup> 9:10 <b>adopt</b> <sup>[3]</sup> 33:4 54:6 59:22 <b>adopted</b> <sup>[1]</sup> 3:14 <b>adopting</b> <sup>[1]</sup> 66:11 <b>affirm</b> <sup>[1]</sup> 31:1 <b>aggravated</b> <sup>[3]</sup> 30:2,8,11 <b>aggressive</b> <sup>[1]</sup> 41:8 <b>ago</b> <sup>[1]</sup> 39:6 <b>agree</b> <sup>[5]</sup> 14:7 40:3 46:9 55:20 70:4 <b>agreed</b> <sup>[2]</sup> 20:21 33:16 <b>agrees</b> <sup>[1]</sup> 65:15 <b>ahead</b> <sup>[2]</sup> 7:17 60:6 <b>ALITO</b> <sup>[19]</sup> 25:7,10,14 26:13,17 35:22 36:13,22 37:3,7,8,12 38:10 53:5,12,22 56:19 57:5 63:21 <b>Alito's</b> <sup>[1]</sup> 19:23 <b>allow</b> <sup>[1]</sup> 36:14 <b>almost</b> <sup>[1]</sup> 21:3 <b>already</b> <sup>[8]</sup> 11:22 12:13 41:13 47:24 50:8 52:25 57:11 61:12 <b>altercation</b> <sup>[1]</sup> 63:23 <b>altercations</b> <sup>[1]</sup> 63:21 <b>ambiguous</b> <sup>[2]</sup> 29:2 53:12 <b>Amendment</b> <sup>[5]</sup> 31:17,20 34:11 58:11 59:12 <b>amicus</b> <sup>[1]</sup> 42:12 <b>among</b> <sup>[3]</sup> 24:14 47:9,13 <b>amount</b> <sup>[1]</sup> 58:13	<b>analysis</b> <sup>[1]</sup> 4:15 <b>announced</b> <sup>[1]</sup> 31:18 <b>anomalous</b> <sup>[1]</sup> 11:3 <b>another</b> <sup>[7]</sup> 15:22 28:21 31:8 51:15 66:23 68:20,25 <b>answer</b> <sup>[15]</sup> 5:9 11:1 17:21,23 19:22 35:12,21 36:14,20 41:11 49:22 52:22 54:25 56:1 62:14 <b>answered</b> <sup>[1]</sup> 62:23 <b>answers</b> <sup>[1]</sup> 16:14 <b>anybody</b> <sup>[2]</sup> 56:24,24 <b>apart</b> <sup>[1]</sup> 25:16 <b>apologize</b> <sup>[3]</sup> 24:5 26:24 67:21 <b>appeals</b> <sup>[3]</sup> 4:10 8:8,9 <b>APPEARANCES</b> <sup>[1]</sup> 1:20 <b>appendix</b> <sup>[3]</sup> 42:2 45:20 68:9 <b>application</b> <sup>[1]</sup> 29:3 <b>applied</b> <sup>[2]</sup> 9:11,19 <b>applies</b> <sup>[1]</sup> 6:20 <b>apply</b> <sup>[3]</sup> 31:17 60:21,23 <b>applying</b> <sup>[2]</sup> 14:17 55:6 <b>appointed</b> <sup>[1]</sup> 57:6 <b>appreciate</b> <sup>[1]</sup> 23:3 <b>Approdi</b> <sup>[1]</sup> 31:18 <b>approach</b> <sup>[19]</sup> 21:14,22 22:3 25:20 27:6 28:21 35:7 55:4 58:6,10,12,21,25 59:2,10,23 60:2,21 66:9 <b>area</b> <sup>[1]</sup> 26:18 <b>areas</b> <sup>[1]</sup> 50:23 <b>aren't</b> <sup>[1]</sup> 63:24 <b>arguably</b> <sup>[1]</sup> 10:23 <b>argued</b> <sup>[2]</sup> 55:5 63:9 <b>arguing</b> <sup>[2]</sup> 57:1 61:18 <b>argument</b> <sup>[29]</sup> 1:18 2:2,5,8 3:4,8 4:8,9,12,21 6:19 30:22 33:1 38:9,13 47:22 52:5 53:19 54:7,19,21 57:7,8,10,22 58:1 62:15,19 65:3 <b>arguments</b> <sup>[3]</sup> 4:7 58:2 61:16 <b>arises</b> <sup>[1]</sup> 62:1 <b>Arkansas</b> <sup>[25]</sup> 6:20 9:13 10:3 14:8,16 19:17 35:17,18 36:23,24 37:1,2 38:15 46:12 52:3,19 53:9,19,24 56:20 57:1,12,22,23 58:18 <b>Arkansas's</b> <sup>[1]</sup> 31:13 <b>Armed</b> <sup>[5]</sup> 3:14 12:9 13:22 28:1,16 <b>around</b> <sup>[7]</sup> 8:18 11:11 12:12,14 13:6 51:4 61:15 <b>article</b> <sup>[1]</sup> 56:12 <b>articles</b> <sup>[1]</sup> 56:14 <b>aside</b> <sup>[1]</sup> 41:10 <b>asks</b> <sup>[2]</sup> 21:8 45:23 <b>aspect</b> <sup>[1]</sup> 51:15 <b>assault</b> <sup>[1]</sup> 63:25 <b>assertion</b> <sup>[3]</sup> 44:7,14 56:1 <b>assertions</b> <sup>[1]</sup> 44:12 <b>Assistant</b> <sup>[1]</sup> 1:21 <b>association</b> <sup>[1]</sup> 44:18 <b>assume</b> <sup>[3]</sup> 15:23,25 28:12 <b>assumed</b> <sup>[1]</sup> 42:8 <b>attempt</b> <sup>[1]</sup> 67:2 <b>attendant</b> <sup>[1]</sup> 10:22 <b>Attorney</b> <sup>[2]</sup> 24:8 59:24 <b>August</b> <sup>[1]</sup> 59:25 <b>aware</b> <sup>[2]</sup> 24:6 51:9	<b>awareness</b> <sup>[2]</sup> 48:20 64:10 <b>away</b> <sup>[1]</sup> 10:19  <b>B</b> <b>back</b> <sup>[19]</sup> 4:11 5:11,21 6:1,1 10:10 12:21 19:14 21:2 26:7,20,25 32:25 33:8 46:16 49:5,18 50:5 69:18 <b>backed</b> <sup>[1]</sup> 64:3 <b>based</b> <sup>[1]</sup> 30:3 <b>basic</b> <sup>[1]</sup> 32:4 <b>basing</b> <sup>[2]</sup> 44:7,8 <b>basis</b> <sup>[1]</sup> 38:8 <b>bear</b> <sup>[1]</sup> 12:22 <b>become</b> <sup>[1]</sup> 4:13 <b>bed</b> <sup>[2]</sup> 18:9,12 <b>began</b> <sup>[1]</sup> 13:9 <b>beginning</b> <sup>[1]</sup> 52:5 <b>begs</b> <sup>[1]</sup> 38:25 <b>behalf</b> <sup>[8]</sup> 1:23,25 2:4,7,10 3:9 30:23 65:4 <b>believe</b> <sup>[4]</sup> 14:22 24:15 55:15 67:25 <b>belong</b> <sup>[1]</sup> 43:4 <b>belongs</b> <sup>[1]</sup> 43:5 <b>below</b> <sup>[2]</sup> 31:2 70:1 <b>benefit</b> <sup>[1]</sup> 54:21 <b>best</b> <sup>[2]</sup> 22:19 60:17 <b>better</b> <sup>[2]</sup> 21:14 61:22 <b>Between</b> <sup>[7]</sup> 9:14 34:17 45:24 46:21,22 66:1 68:2 <b>beyond</b> <sup>[3]</sup> 22:5 31:14 64:12 <b>bill</b> <sup>[3]</sup> 59:22 60:4,10 <b>bit</b> <sup>[5]</sup> 25:16,16,17 39:1 63:7 <b>blanket</b> <sup>[3]</sup> 5:21,25 16:3 <b>block</b> <sup>[1]</sup> 49:21 <b>boat</b> <sup>[1]</sup> 35:13 <b>boats</b> <sup>[1]</sup> 34:24 <b>boils</b> <sup>[1]</sup> 46:20 <b>books</b> <sup>[2]</sup> 27:22 28:3 <b>both</b> <sup>[7]</sup> 5:18 11:8 35:16 46:12 68:23 69:11 71:7 <b>breaking</b> <sup>[2]</sup> 24:22 39:11 <b>breaks</b> <sup>[2]</sup> 8:19 10:13 <b>BREYER</b> <sup>[17]</sup> 19:21 20:2 22:9 23:5,18 24:13 28:17 43:3,7,11,18 55:10,17,21 56:12 63:12,18 <b>Breyer's</b> <sup>[2]</sup> 23:1 42:14 <b>bridge</b> <sup>[1]</sup> 41:13 <b>brief</b> <sup>[2]</sup> 4:18 7:6 9:10,14,15 32:19 34:13,16 42:13 44:17 45:8 49:20,24,25 50:1 51:7 55:5 56:11 57:23 58:3 68:10 <b>briefcase</b> <sup>[1]</sup> 55:18 <b>briefs</b> <sup>[2]</sup> 63:9 68:22 <b>bring</b> <sup>[4]</sup> 19:3 26:25 46:14,14 <b>bringing</b> <sup>[1]</sup> 26:25 <b>brings</b> <sup>[2]</sup> 15:3 49:5 <b>broad</b> <sup>[3]</sup> 46:17 68:7,14 <b>broader</b> <sup>[6]</sup> 35:20 48:4 55:7 58:14 66:10 69:8 <b>broadest</b> <sup>[1]</sup> 19:16 <b>broadly</b> <sup>[4]</sup> 11:25 33:16 63:7 68:24 <b>brooding</b> <sup>[1]</sup> 20:17
<b>3</b>	<b>accepted</b> <sup>[1]</sup> 46:4 <b>accepting</b> <sup>[1]</sup> 70:18 <b>accommodation</b> <sup>[17]</sup> 6:22 8:2 13:3,4 15:2 16:11,19 18:22 32:17 35:4 36:6 38:5 41:6 46:2 50:13 54:9 56:4 <b>acknowledged</b> <sup>[1]</sup> 4:1 <b>across</b> <sup>[1]</sup> 23:7 <b>Act</b> <sup>[9]</sup> 3:15 12:9 13:23 28:2,16 39:22,22 40:9 48:6 <b>actions</b> <sup>[1]</sup> 18:5 <b>activities</b> <sup>[2]</sup> 70:23,23 <b>acts</b> <sup>[1]</sup> 48:12 <b>actually</b> <sup>[29]</sup> 4:12,16 6:12 11:2 12:3 14:8,17 15:7,19,20,21 18:21 20:24 23:24 24:6 25:21 26:8 27:19,20 30:1 32:13 33:8 36:7 42:15 55:6 60:4 65:14 68:11 70:12 <b>adapt</b> <sup>[1]</sup> 56:3 <b>adaptation</b> <sup>[2]</sup> 16:8 49:17 <b>adaptations</b> <sup>[1]</sup> 18:10 <b>adapted</b> <sup>[35]</sup> 5:13 6:4 8:1,16 13:3 15:4,23 16:1,4,10,18 17:19 18:21 19:4 32:16 36:5 38:4 41:5 46:13 49:3,13 50:2,12 51:3 52:16,18,25 53:3 54:8 56:17 57:16 62:3,11,15,19 <b>add</b> <sup>[4]</sup> 23:20 32:24 38:10 63:17 <b>added</b> <sup>[3]</sup> 23:19 24:15 28:20 <b>additional</b> <sup>[1]</sup> 57:3 <b>addressed</b> <sup>[1]</sup> 33:20 <b>adhering</b> <sup>[2]</sup> 62:25 63:1 <b>adjust</b> <sup>[1]</sup> 61:24 <b>administrability</b> <sup>[2]</sup> 48:25 49:2 <b>admit</b> <sup>[1]</sup> 49:14 <b>admits</b> <sup>[1]</sup> 9:10 <b>adopt</b> <sup>[3]</sup> 33:4 54:6 59:22 <b>adopted</b> <sup>[1]</sup> 3:14 <b>adopting</b> <sup>[1]</sup> 66:11 <b>affirm</b> <sup>[1]</sup> 31:1 <b>aggravated</b> <sup>[3]</sup> 30:2,8,11 <b>aggressive</b> <sup>[1]</sup> 41:8 <b>ago</b> <sup>[1]</sup> 39:6 <b>agree</b> <sup>[5]</sup> 14:7 40:3 46:9 55:20 70:4 <b>agreed</b> <sup>[2]</sup> 20:21 33:16 <b>agrees</b> <sup>[1]</sup> 65:15 <b>ahead</b> <sup>[2]</sup> 7:17 60:6 <b>ALITO</b> <sup>[19]</sup> 25:7,10,14 26:13,17 35:22 36:13,22 37:3,7,8,12 38:10 53:5,12,22 56:19 57:5 63:21 <b>Alito's</b> <sup>[1]</sup> 19:23 <b>allow</b> <sup>[1]</sup> 36:14 <b>almost</b> <sup>[1]</sup> 21:3 <b>already</b> <sup>[8]</sup> 11:22 12:13 41:13 47:24 50:8 52:25 57:11 61:12 <b>altercation</b> <sup>[1]</sup> 63:23 <b>altercations</b> <sup>[1]</sup> 63:21 <b>ambiguous</b> <sup>[2]</sup> 29:2 53:12 <b>Amendment</b> <sup>[5]</sup> 31:17,20 34:11 58:11 59:12 <b>amicus</b> <sup>[1]</sup> 42:12 <b>among</b> <sup>[3]</sup> 24:14 47:9,13 <b>amount</b> <sup>[1]</sup> 58:13	<b>analysis</b> <sup>[1]</sup> 4:15 <b>announced</b> <sup>[1]</sup> 31:18 <b>anomalous</b> <sup>[1]</sup> 11:3 <b>another</b> <sup>[7]</sup> 15:22 28:21 31:8 51:15 66:23 68:20,25 <b>answer</b> <sup>[15]</sup> 5:9 11:1 17:21,23 19:22 35:12,21 36:14,20 41:11 49:22 52:22 54:25 56:1 62:14 <b>answered</b> <sup>[1]</sup> 62:23 <b>answers</b> <sup>[1]</sup> 16:14 <b>anybody</b> <sup>[2]</sup> 56:24,24 <b>apart</b> <sup>[1]</sup> 25:16 <b>apologize</b> <sup>[3]</sup> 24:5 26:24 67:21 <b>appeals</b> <sup>[3]</sup> 4:10 8:8,9 <b>APPEARANCES</b> <sup>[1]</sup> 1:20 <b>appendix</b> <sup>[3]</sup> 42:2 45:20 68:9 <b>application</b> <sup>[1]</sup> 29:3 <b>applied</b> <sup>[2]</sup> 9:11,19 <b>applies</b> <sup>[1]</sup> 6:20 <b>apply</b> <sup>[3]</sup> 31:17 60:21,23 <b>applying</b> <sup>[2]</sup> 14:17 55:6 <b>appointed</b> <sup>[1]</sup> 57:6 <b>appreciate</b> <sup>[1]</sup> 23:3 <b>Approdi</b> <sup>[1]</sup> 31:18 <b>approach</b> <sup>[19]</sup> 21:14,22 22:3 25:20 27:6 28:21 35:7 55:4 58:6,10,12,21,25 59:2,10,23 60:2,21 66:9 <b>area</b> <sup>[1]</sup> 26:18 <b>areas</b> <sup>[1]</sup> 50:23 <b>aren't</b> <sup>[1]</sup> 63:24 <b>arguably</b> <sup>[1]</sup> 10:23 <b>argued</b> <sup>[2]</sup> 55:5 63:9 <b>arguing</b> <sup>[2]</sup> 57:1 61:18 <b>argument</b> <sup>[29]&lt;/</sup>	

## Official - Subject to Review

<p><b>Brussels</b> <sup>[1]</sup> 19:25  <b>Bryn</b> <sup>[1]</sup> 21:9  <b>building</b> <sup>[7]</sup> 17:6 40:9 68:5,7,11, 18,23  <b>buildings</b> <sup>[7]</sup> 31:6 34:5 39:23 51:23 60:24 67:20 68:2  <b>bunch</b> <sup>[1]</sup> 61:16  <b>burglar</b> <sup>[4]</sup> 7:12,17 9:7 11:4  <b>burglaries</b> <sup>[3]</sup> 4:18 38:22 48:11  <b>burglarizing</b> <sup>[1]</sup> 38:19  <b>burglary</b> <sup>[89]</sup> 3:12,16,21 4:2,16 7:19,23,25 10:16 11:21 12:8 13:10, 15,22 14:2 20:7,8,19 21:25 22:22 23:14,14 24:16,17,22,23 25:19,24 27:7,9,13,21 28:10,13,13,15 29:10, 10,13,14,18 30:2,8,11,12 31:5,15 32:1,6 33:6,9 35:25 36:10,11 37:14,23 38:18 39:21 40:22 42:6,8,9, 16,17,22 43:1 47:17 52:1,9 60:23 63:24 64:1,3,5,9 65:11,17 66:2,5, 22 67:1,5,6,8 68:8,16 69:15,18,22  <b>burgles</b> <sup>[1]</sup> 30:14  <b>business</b> <sup>[1]</sup> 70:23</p>	<p><b>category</b> <sup>[7]</sup> 31:7,8 34:7,20,21,25 43:3  <b>central</b> <sup>[1]</sup> 7:20  <b>centuries</b> <sup>[1]</sup> 69:21  <b>certainly</b> <sup>[3]</sup> 21:18 47:21 51:9  <b>certify</b> <sup>[1]</sup> 53:24  <b>cetera</b> <sup>[1]</sup> 68:13  <b>chance</b> <sup>[2]</sup> 54:18 63:13  <b>change</b> <sup>[7]</sup> 9:6 10:7 14:14 16:1 18:10 35:11 66:16  <b>changed</b> <sup>[2]</sup> 8:16 66:16  <b>changes</b> <sup>[1]</sup> 10:8  <b>characteristics</b> <sup>[1]</sup> 38:3  <b>charged</b> <sup>[4]</sup> 63:19,24,24 64:6  <b>CHIEF</b> <sup>[8]</sup> 3:3,10 30:19,24 63:4 64:25 65:5 71:9  <b>circuit</b> <sup>[2]</sup> 23:7 54:18  <b>cite</b> <sup>[6]</sup> 34:13,15 44:16,17 56:11 57:22  <b>cited</b> <sup>[2]</sup> 12:17 33:7  <b>cites</b> <sup>[4]</sup> 16:16 39:8,8 45:23  <b>citing</b> <sup>[1]</sup> 39:4  <b>claiming</b> <sup>[1]</sup> 33:8  <b>clause</b> <sup>[12]</sup> 41:19,21,23 46:13 48:9, 16 53:4 57:17 61:14 66:24 67:2,7  <b>clauses</b> <sup>[2]</sup> 61:19,20  <b>cleaned</b> <sup>[1]</sup> 56:23  <b>clear</b> <sup>[12]</sup> 17:21 18:1,6 22:3 27:8, 11 28:24 29:1 31:4 58:13 68:22 69:1  <b>clearly</b> <sup>[4]</sup> 17:12 18:10 24:23 40:1  <b>clerks</b> <sup>[1]</sup> 26:5  <b>close</b> <sup>[1]</sup> 65:19  <b>closest</b> <sup>[2]</sup> 6:18 32:13  <b>closing</b> <sup>[1]</sup> 69:10  <b>coalesce</b> <sup>[1]</sup> 58:12  <b>coalesced</b> <sup>[1]</sup> 13:6  <b>Code</b> <sup>[3]</sup> 39:8 40:17 50:7  <b>codes</b> <sup>[1]</sup> 3:22  <b>collection</b> <sup>[1]</sup> 56:13  <b>college</b> <sup>[1]</sup> 6:14  <b>come</b> <sup>[6]</sup> 4:6 9:15 32:13 50:5 66:22 67:6  <b>comes</b> <sup>[4]</sup> 6:18 16:12 31:5 68:17  <b>commercial</b> <sup>[1]</sup> 70:23  <b>Commission</b> <sup>[3]</sup> 20:23,25 64:2  <b>commits</b> <sup>[1]</sup> 10:20  <b>common</b> <sup>[10]</sup> 10:21 13:10,23 20:5 22:5,5 40:19,21 44:9 66:8  <b>commonly</b> <sup>[3]</sup> 14:25 28:9 46:1  <b>Compared</b> <sup>[1]</sup> 10:19  <b>concealing</b> <sup>[1]</sup> 56:7  <b>concede</b> <sup>[1]</sup> 37:14  <b>conceded</b> <sup>[2]</sup> 33:17,18  <b>concept</b> <sup>[1]</sup> 37:20  <b>concern</b> <sup>[2]</sup> 23:5 41:12  <b>concerned</b> <sup>[2]</sup> 11:7 21:25  <b>concerns</b> <sup>[3]</sup> 21:18 58:11 59:13  <b>conduct</b> <sup>[4]</sup> 29:16 42:3,10 51:17  <b>conducted</b> <sup>[1]</sup> 42:16  <b>confrontation</b> <sup>[2]</sup> 11:6 42:20  <b>Congress</b> <sup>[44]</sup> 3:13 7:16,18,22 10:1 11:7,19 13:17 17:2 20:9,13 21:8 22:4 23:24 24:4 25:2 27:12 28:14,</p>	<p>25 29:6,8,21,23 39:20 42:6,7 48:7, 17 59:22 60:1,11,16 61:1,24 63:6, 15 64:19 65:21,23 66:20,25 67:13 68:6 69:23  <b>Congressional</b> <sup>[6]</sup> 41:16,22 48:10 59:11,15 63:1  <b>connote</b> <sup>[1]</sup> 10:8  <b>consequences</b> <sup>[6]</sup> 18:4 24:21 28:19,23 29:5 64:21  <b>consider</b> <sup>[2]</sup> 8:10 54:18  <b>considered</b> <sup>[1]</sup> 71:3  <b>considers</b> <sup>[1]</sup> 28:15  <b>consistent</b> <sup>[1]</sup> 67:12  <b>constitutional</b> <sup>[2]</sup> 59:13,17  <b>construction</b> <sup>[2]</sup> 57:19,25  <b>construe</b> <sup>[1]</sup> 27:17  <b>construed</b> <sup>[1]</sup> 68:24  <b>contemplating</b> <sup>[1]</sup> 35:25  <b>content</b> <sup>[1]</sup> 17:4  <b>contents</b> <sup>[1]</sup> 64:18  <b>context</b> <sup>[2]</sup> 34:11 48:4  <b>continue</b> <sup>[1]</sup> 60:12  <b>continuing</b> <sup>[1]</sup> 26:25  <b>contrary</b> <sup>[1]</sup> 56:5  <b>contrast</b> <sup>[4]</sup> 12:10 22:20 37:13 42:22  <b>control</b> <sup>[1]</sup> 58:6  <b>controlled</b> <sup>[1]</sup> 55:1  <b>conversation</b> <sup>[2]</sup> 48:22 49:5  <b>convicted</b> <sup>[4]</sup> 28:12 38:18 39:10 56:21  <b>conviction</b> <sup>[2]</sup> 30:11 58:15  <b>convictions</b> <sup>[3]</sup> 25:5 61:18 64:1  <b>core</b> <sup>[4]</sup> 37:20 69:13,16,22  <b>correct</b> <sup>[4]</sup> 26:20 41:2 45:1,3  <b>couldn't</b> <sup>[2]</sup> 26:12 50:16  <b>counsel</b> <sup>[4]</sup> 9:21 30:20 65:1 71:10  <b>count</b> <sup>[3]</sup> 18:11 62:23,23  <b>counted</b> <sup>[1]</sup> 4:19  <b>counterpart</b> <sup>[1]</sup> 58:14  <b>countervailing</b> <sup>[1]</sup> 48:1  <b>country</b> <sup>[3]</sup> 10:15 12:7 23:8  <b>couple</b> <sup>[4]</sup> 32:18 49:24 58:22 65:22  <b>course</b> <sup>[2]</sup> 51:16 63:6  <b>COURT</b> <sup>[83]</sup> 1:1,18 3:11 4:10 7:5 8:5,7,8,9 12:22 22:3 24:18 25:1,15 26:5,12,13,14,23 27:1,5,10,15,17 28:15,21 30:13,25 31:1,13,17,24 32:2,7,13,22 33:10 34:3,10 35:6 40:6,11,23 41:8,13,14,20 45:4,19, 23 47:24 48:15 49:1 50:4 51:20 52:12 53:25 54:6,22,24 55:6,7,9 56:21 57:2,22 58:20,23 59:3,8,19 60:3,6,12,18 61:6,23 66:2 68:17 69:25 70:16 71:1,6  <b>Court's</b> <sup>[8]</sup> 7:21 13:20 23:9 31:3 34:2 48:6 62:24 70:11  <b>courts</b> <sup>[4]</sup> 27:18 53:8,23 69:21  <b>cover</b> <sup>[5]</sup> 14:9 15:21 27:24 32:15 69:21  <b>covered</b> <sup>[9]</sup> 22:20 32:16 33:16 39:2,22 41:4,5 58:25 70:13  <b>covers</b> <sup>[9]</sup> 32:4,20 45:14 52:19 53:</p>	<p>14 57:13,14 63:11 70:4  <b>created</b> <sup>[1]</sup> 50:9  <b>creating</b> <sup>[1]</sup> 11:20  <b>cries</b> <sup>[1]</sup> 51:13  <b>crime</b> <sup>[6]</sup> 3:12 20:12 29:12 38:12 41:25 64:3  <b>crimes</b> <sup>[4]</sup> 41:24 42:25 48:18 67:3  <b>Criminal</b> <sup>[11]</sup> 3:15,21 12:9 13:23 17:25 22:11 28:1,16 37:19,20 38:6  <b>crossed</b> <sup>[1]</sup> 41:13  <b>crossing</b> <sup>[1]</sup> 10:15  <b>curious</b> <sup>[1]</sup> 23:15  <b>current</b> <sup>[2]</sup> 3:14 35:15  <b>currently</b> <sup>[1]</sup> 24:4  <b>curtain</b> <sup>[1]</sup> 49:21  <b>customarily</b> <sup>[5]</sup> 6:21 10:4 13:4 14:24 15:14  <b>customary</b> <sup>[4]</sup> 16:8 38:15 44:13 57:13  <b>customization</b> <sup>[1]</sup> 10:6</p>
<b>C</b>			
<p><b>California</b> <sup>[2]</sup> 1:24 34:11  <b>call</b> <sup>[2]</sup> 24:17 43:1  <b>calls</b> <sup>[3]</sup> 23:13,13 24:16  <b>came</b> <sup>[3]</sup> 1:17 41:7 69:5  <b>campers</b> <sup>[2]</sup> 5:5 16:13  <b>candid</b> <sup>[1]</sup> 49:16  <b>cannot</b> <sup>[1]</sup> 66:13  <b>capable</b> <sup>[2]</sup> 14:1,4  <b>capacious</b> <sup>[1]</sup> 4:17  <b>capture</b> <sup>[2]</sup> 13:23 22:8  <b>captured</b> <sup>[1]</sup> 22:6  <b>car</b> <sup>[36]</sup> 5:17,21 6:7 7:2 8:20 10:10, 13,20 11:10,14 14:1,1,5,9 15:19, 20,21 19:6,9,12,19 26:6 32:4 43:14 52:8,24 53:15 55:18,23,24 56:3,6,16,22,23 57:20  <b>Career</b> <sup>[5]</sup> 3:14 12:9 13:23 28:1,16  <b>carjacking</b> <sup>[1]</sup> 63:25  <b>Carney</b> <sup>[1]</sup> 34:12  <b>carrying</b> <sup>[1]</sup> 18:17  <b>cars</b> <sup>[4]</sup> 5:20 33:22 70:5,6  <b>Case</b> <sup>[50]</sup> 3:4,5 6:15 9:9,10,15,18 11:4,5 14:15 15:5 19:1 21:3,23 23:3 25:22 26:22 27:1,2,7,15 28:3 30:10 31:9 32:11 33:15 35:8 39:5 43:4,5 45:21,22 46:20 47:23 50:18 51:13,13 52:13 53:2 57:6 58:4,18 59:1 60:19 63:6 64:24 68:10 69:14 71:10,11  <b>cases</b> <sup>[34]</sup> 3:18 4:11,15 15:20 16:12,16 17:3,12 20:24 21:13 22:1,2 25:12,25 26:4 27:25 28:1 50:4 57:23 61:8,11,13,21,23 63:11,14,19, 23 64:6 65:24 70:12,15 71:2,8  <b>cast</b> <sup>[1]</sup> 11:25  <b>categorical</b> <sup>[15]</sup> 21:22 22:2 25:20 27:6 35:7 55:4 58:6,10,12,21 59:2, 10 60:21 64:9 66:9  <b>categories</b> <sup>[1]</sup> 58:8</p>			<p><b>D</b></p> <p><b>D.C</b> <sup>[2]</sup> 1:15,22  <b>dangerous</b> <sup>[2]</sup> 25:5 30:15  <b>DANIEL</b> <sup>[1]</sup> 1:12  <b>day</b> <sup>[2]</sup> 6:2 53:18  <b>days</b> <sup>[1]</sup> 35:14  <b>dealing</b> <sup>[1]</sup> 32:13  <b>decide</b> <sup>[3]</sup> 16:17 20:19 58:17  <b>decision</b> <sup>[4]</sup> 7:21 13:20 53:20 60:5  <b>decisions</b> <sup>[2]</sup> 55:6 70:1  <b>decisis</b> <sup>[1]</sup> 47:24  <b>defendant</b> <sup>[2]</sup> 36:8 56:20  <b>defendants</b> <sup>[1]</sup> 51:16  <b>defer</b> <sup>[1]</sup> 8:8  <b>define</b> <sup>[5]</sup> 7:8,11 17:7 29:13 42:7  <b>defined</b> <sup>[7]</sup> 7:19,25 27:9 29:14 42:6 49:15 68:11  <b>definition</b> <sup>[37]</sup> 7:23 8:21,25 11:21 14:11,12 16:23,24 17:1 31:12,14 32:1 39:8,21 40:18 45:15 46:11, 19 48:8 49:4,7,13 51:7,8 52:1 62:11 64:9,20 66:1,8,11 67:17,18,19 68:5,6,14  <b>definitive</b> <sup>[1]</sup> 53:9  <b>delta</b> <sup>[2]</sup> 46:21 47:3  <b>delta's</b> <sup>[1]</sup> 65:24  <b>denied</b> <sup>[1]</sup> 69:14  <b>depart</b> <sup>[1]</sup> 25:20  <b>departed</b> <sup>[1]</sup> 40:15  <b>Department</b> <sup>[10]</sup> 1:22 21:8,12,20 23:17 24:2,7,11 61:3 71:3  <b>departs</b> <sup>[2]</sup> 40:2,5  <b>depend</b> <sup>[1]</sup> 38:10  <b>described</b> <sup>[2]</sup> 40:20 48:5  <b>describes</b> <sup>[1]</sup> 40:3  <b>describing</b> <sup>[1]</sup> 55:22  <b>designed</b> <sup>[5]</sup> 5:13 15:1 34:18 36:5 57:15  <b>detail</b> <sup>[1]</sup> 40:20  <b>determination</b> <sup>[2]</sup> 21:21 30:14  <b>determine</b> <sup>[4]</sup> 17:3 25:22,23 36:1</p>

## Official - Subject to Review

<p><b>dictionary</b> [1] 14:12  <b>difference</b> [3] 66:1 67:24 68:1  <b>differences</b> [1] 50:19  <b>different</b> [9] 13:14 33:21 49:22 50:14 52:18 53:7 59:18,23 60:1  <b>differently</b> [4] 36:11 37:17 49:23 50:15  <b>difficult</b> [6] 16:17 21:24 22:2 50:3 70:11,14  <b>difficulty</b> [1] 49:1  <b>directly</b> [3] 5:10 36:20 57:9  <b>disagree</b> [1] 9:8  <b>discussion</b> [1] 28:6  <b>disjunctive</b> [1] 10:3  <b>displeasure</b> [1] 35:7  <b>dispositive</b> [1] 65:19  <b>dispute</b> [2] 12:12 47:12  <b>disputing</b> [1] 52:7  <b>dissatisfied</b> [1] 61:1  <b>distinction</b> [1] 45:11  <b>distinguish</b> [1] 34:17  <b>distinguishes</b> [1] 45:24  <b>divisibility</b> [5] 4:8,14 33:4 41:9,11  <b>divisible</b> [1] 47:16  <b>dock</b> [1] 64:17  <b>doing</b> [5] 7:18 11:20 13:18 20:17 70:9  <b>done</b> [9] 11:4,5,22 26:17 27:12 44:20 60:14 61:5 65:23  <b>doubt</b> [1] 51:12  <b>down</b> [7] 29:20 42:24 46:21 58:24 59:5 60:12 64:15  <b>drafted</b> [1] 52:16  <b>drafting</b> [1] 41:1  <b>draw</b> [2] 38:6 50:3  <b>drew</b> [3] 13:18 27:16 63:6  <b>drive</b> [1] 4:25  <b>driving</b> [2] 6:2 70:9  <b>Duenas</b> [1] 53:21  <b>Duenas-Alvarez</b> [2] 55:8 70:15  <b>during</b> [1] 6:2  <b>dwelling</b> [5] 13:7 17:6 22:1 34:20 37:24  <b>dwelling</b> [8] 3:13,18 4:9 13:11 22:7 27:24 69:16,19  <b>dwindle</b> [1] 59:6  <b>dwindles</b> [1] 29:20  <b>dwindling</b> [1] 58:24</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>earlier</b> [6] 14:10,23 48:23 55:23 58:19 63:12  <b>early</b> [1] 4:11  <b>ears</b> [1] 21:15  <b>easily</b> [2] 36:1 49:15  <b>easy</b> [1] 21:21  <b>edge</b> [3] 17:3 22:1 27:25  <b>efficiency</b> [1] 58:8  <b>effort</b> [1] 24:10  <b>Eighth</b> [1] 54:18  <b>either</b> [4] 6:16,20 11:16 71:4  <b>elaborate</b> [1] 30:5  <b>element</b> [1] 52:8  <b>eliminate</b> [1] 27:21</p>	<p><b>eliminates</b> [1] 69:19  <b>embarrassed</b> [1] 56:6  <b>embraced</b> [1] 27:6  <b>empirical</b> [2] 55:25 56:16  <b>empirically</b> [1] 56:2  <b>empty</b> [1] 11:11  <b>enacted</b> [3] 29:21 66:20,25  <b>enacting</b> [2] 11:8,24  <b>encompassed</b> [3] 8:21,24 9:3  <b>encounter</b> [1] 11:15  <b>encourage</b> [1] 54:23  <b>end</b> [1] 46:16  <b>ended</b> [1] 19:25  <b>engage</b> [1] 35:9  <b>English</b> [1] 68:15  <b>enhancement</b> [1] 51:18  <b>enough</b> [7] 4:17 29:17 32:21 49:18,21 58:3,17  <b>entailed</b> [1] 40:22  <b>enter</b> [2] 11:13,14  <b>entering</b> [2] 10:20 24:23  <b>entire</b> [1] 12:7  <b>entirely</b> [1] 30:3  <b>entitled</b> [1] 24:22  <b>entry</b> [3] 36:8 64:7,10  <b>enumerated</b> [3] 25:19 41:24 61:19  <b>envisioning</b> [1] 14:3  <b>ERICA</b> [5] 1:21 2:3,9 3:8 65:3  <b>Erie</b> [1] 23:11  <b>escape</b> [1] 25:5  <b>eschewed</b> [1] 22:4  <b>ESQ</b> [4] 1:24 2:3,6,9  <b>essential</b> [1] 67:8  <b>essentially</b> [5] 5:2 7:20 27:15,22 49:11  <b>et</b> [1] 68:12  <b>evade</b> [1] 56:8  <b>even</b> [34] 7:4 8:13 9:4,8 10:22 18:11 19:16 22:13 30:7 33:9 35:19 37:25 38:4,14,14 41:4 46:17,18, 23 47:9,9,13,17,22 51:3,24 57:21 58:2 59:5 60:23 61:4 63:10 64:3 70:12  <b>Everybody</b> [1] 33:15  <b>everyone</b> [1] 15:15  <b>everything</b> [2] 66:16,17  <b>exactly</b> [1] 11:6 12:3 21:9 25:11 36:12,24 53:21 54:24,25 67:22 69:21  <b>example</b> [2] 24:21 63:21  <b>examples</b> [3] 18:8 49:24,25  <b>excavation</b> [1] 40:16  <b>exceedingly</b> [2] 12:17,20  <b>excluded</b> [2] 17:12 45:1  <b>excuse</b> [1] 13:10  <b>exhibited</b> [1] 25:3  <b>expand</b> [2] 48:8 67:2  <b>expansively</b> [1] 43:1  <b>expect</b> [1] 37:25  <b>expected</b> [4] 29:24 63:15 64:19 66:21  <b>explain</b> [2] 56:14 66:17  <b>explicating</b> [1] 68:19</p>	<p><b>explosion</b> [1] 61:21  <b>extent</b> [1] 25:22  <b>extravagant</b> [1] 61:7  <b>extreme</b> [1] 28:23</p> <hr/> <p style="text-align: center;"><b>F</b></p> <p><b>face</b> [1] 58:13  <b>fact</b> [22] 5:13 9:1 13:14,22 28:14 29:14 30:9 32:20 39:1 42:7 45:23 48:20 51:19 52:24 56:4,7 59:20 67:4,24,25 69:4,7  <b>fair</b> [4] 37:21 51:16 58:23 59:3  <b>fairness</b> [2] 58:9 59:12  <b>fall</b> [8] 6:23 19:16 31:25 33:9,11 38:5 46:12 62:12  <b>falls</b> [2] 25:23 70:5  <b>far</b> [1] 69:19  <b>federal</b> [10] 16:23,23,25 17:11 29:11,12 38:20 39:14 49:6 58:14  <b>feel</b> [1] 61:25  <b>few</b> [4] 35:14 52:2 65:7 66:10  <b>fewer</b> [2] 13:21 69:19  <b>fifth</b> [1] 23:20  <b>fighting</b> [1] 47:4  <b>figure</b> [3] 25:25 53:23,25  <b>find</b> [5] 9:18 11:13 20:23 42:17 45:21  <b>fine</b> [1] 25:24  <b>fine-grained</b> [1] 38:8  <b>firearm</b> [2] 38:21 39:14  <b>firm</b> [3] 50:22 51:3 61:4  <b>first</b> [18] 9:23 11:4 12:2 22:12 27:6 31:3,24 33:1 35:8 47:23 48:2,4 51:11 52:10 54:22 58:8 65:8 66:21  <b>FISHER</b> [48] 1:24 2:6 30:21,22,24 31:24 32:12 33:24 36:13 37:1,5,9, 18 38:24 39:15 40:5,10,23 43:5,8, 17 44:4,8,13,16,25 45:2,9,12 46:7 47:2,5,8,12 50:10,21 51:6 53:11 54:1,13,16,23 55:16,20 57:5 62:2, 6,9  <b>fit</b> [1] 34:9  <b>Five</b> [1] 65:2  <b>flat</b> [1] 58:1  <b>flinch</b> [1] 53:16  <b>flip</b> [1] 10:15  <b>floating</b> [4] 4:22 5:2 34:17 49:10  <b>floats</b> [1] 5:3  <b>flow</b> [1] 62:24  <b>focus</b> [1] 39:5  <b>focused</b> [3] 3:13 13:11 39:18  <b>focusing</b> [1] 7:16  <b>follow</b> [6] 10:18 45:24 57:24 60:18 61:23 64:22  <b>following</b> [1] 4:14  <b>follows</b> [1] 41:24  <b>Footnote</b> [2] 33:6 56:13  <b>force</b> [1] 61:20  <b>forces</b> [1] 48:1  <b>forgot</b> [1] 20:13  <b>found</b> [3] 44:21 64:2,5  <b>four</b> [3] 13:21 32:22 66:2  <b>fourth</b> [2] 23:10 34:11  <b>friend</b> [9] 22:24 39:18 65:9,14,22</p>	<p>66:14,23 67:16 69:12  <b>friend's</b> [1] 29:19  <b>front</b> [7] 7:5 34:1 45:4,18 55:2 61:11,13  <b>frustrated</b> [2] 60:16,17  <b>full</b> [1] 40:16  <b>fully</b> [1] 61:2  <b>functional</b> [1] 7:22  <b>further</b> [2] 45:20 71:6</p> <hr/> <p style="text-align: center;"><b>G</b></p> <p><b>game</b> [1] 12:13  <b>gave</b> [1] 66:14  <b>General</b> [8] 1:21 17:22 19:22 23:5 24:8,9 58:7 59:24  <b>generally</b> [5] 5:15 13:2 29:11,12 58:21  <b>generic</b> [10] 3:20 4:2 20:7,8,19 22:22 25:24 31:14 32:1 52:1  <b>getting</b> [1] 30:8  <b>GINSBURG</b> [7] 3:23 13:25 14:6 19:5,13 26:11 28:18  <b>Ginsburg's</b> [1] 32:25  <b>give</b> [8] 16:24 17:10,16 18:3 22:19 46:3,8 50:16  <b>given</b> [9] 11:23 23:17 24:1 28:3 51:18 52:13 53:20,20 67:10  <b>gives</b> [1] 49:14  <b>giving</b> [1] 14:10  <b>gloss</b> [2] 17:14,16  <b>GORSUCH</b> [19] 8:17 9:21 10:25 11:10 12:11 14:23 15:10 22:23,25 23:22 24:14,15 52:25 53:17 54:3, 11,14,17 65:8  <b>got</b> [1] 49:1  <b>gotten</b> [1] 25:14  <b>government</b> [32] 3:24 4:1,7,10 9:18,25 32:19 33:3,7,17 35:10,12,21 36:18 38:12,14 41:7,14 45:22 46:10,15 47:19 49:14,19 52:10,16 54:5 55:4 59:4 61:15 62:20 69:3  <b>government's</b> [21] 31:12 33:2,10 38:9 42:2 45:20 46:18,19 51:7 52:6,22 54:4,6 56:1 58:25 62:3,10,10, 15,18 69:1  <b>grappled</b> [1] 16:10  <b>great</b> [1] 48:14  <b>greater</b> [1] 10:23  <b>gripe</b> [1] 23:8  <b>groceries</b> [1] 19:2  <b>grounding</b> [2] 50:22 51:3  <b>group</b> [1] 47:9  <b>guess</b> [1] 24:1  <b>guidance</b> [1] 17:16  <b>Guidelines</b> [1] 64:5  <b>guns</b> [1] 63:5</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>habitation</b> [3] 30:12,15 35:15  <b>habitations</b> [1] 4:3  <b>hand</b> [7] 34:4,19,22 45:25 46:15 49:10 60:25  <b>hands</b> [1] 16:22  <b>hanging</b> [1] 49:20</p>
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## Official - Subject to Review

<p><b>happen</b> <sup>[1]</sup> 19:15  <b>happened</b> <sup>[4]</sup> 25:21 26:8 41:6 64:7  <b>happening</b> <sup>[1]</sup> 61:10  <b>happens</b> <sup>[3]</sup> 9:12 24:24 38:1  <b>happy</b> <sup>[1]</sup> 35:8  <b>harbor</b> <sup>[2]</sup> 34:8 35:13  <b>hard</b> <sup>[1]</sup> 28:1  <b>harder</b> <sup>[1]</sup> 4:15  <b>hardly</b> <sup>[3]</sup> 13:12 64:13,15  <b>harm</b> <sup>[1]</sup> 10:23  <b>harping</b> <sup>[1]</sup> 47:20  <b>harsh</b> <sup>[2]</sup> 28:22 64:21  <b>hasten</b> <sup>[2]</sup> 32:24 63:17  <b>hates</b> <sup>[1]</sup> 25:16  <b>head</b> <sup>[1]</sup> 32:9  <b>header</b> <sup>[1]</sup> 54:7  <b>hear</b> <sup>[3]</sup> 3:3 23:10,11  <b>heard</b> <sup>[5]</sup> 20:5 35:6 37:19 57:13 69:10  <b>heavy</b> <sup>[1]</sup> 29:1  <b>heed</b> <sup>[1]</sup> 13:13  <b>held</b> <sup>[1]</sup> 34:10  <b>helping</b> <sup>[1]</sup> 27:11  <b>helps</b> <sup>[1]</sup> 9:22  <b>high</b> <sup>[2]</sup> 47:6,18  <b>himself</b> <sup>[1]</sup> 31:19  <b>hint</b> <sup>[1]</sup> 25:15  <b>history</b> <sup>[1]</sup> 41:1  <b>hmm</b> <sup>[1]</sup> 29:10  <b>hold</b> <sup>[1]</sup> 46:12  <b>holding</b> <sup>[1]</sup> 23:16  <b>home</b> <sup>[25]</sup> 4:25,25 5:2 7:14 8:13, 21 11:12 14:13,18 15:16 18:18 19:3,7,20 37:23,24 38:1 42:17 43:16, 20 45:16 49:10,10 55:24 56:6  <b>homeless</b> <sup>[5]</sup> 5:18 7:1 8:20 9:5 10:14  <b>homes</b> <sup>[11]</sup> 3:17 4:22,22 32:8 33:23 34:17,18 35:23 44:25 45:3,24  <b>Honor</b> <sup>[24]</sup> 4:5 5:9 6:9 7:3,15 8:23 11:18 12:19 15:14 16:5 17:1,9,17 18:7,14,19 21:17 22:15 24:5 26:21 29:7 70:10,19,25  <b>Honor's</b> <sup>[1]</sup> 12:2  <b>hotels</b> <sup>[1]</sup> 16:13  <b>house</b> <sup>[6]</sup> 36:3,10,19 37:10 43:24, 25  <b>houses</b> <sup>[1]</sup> 16:13  <b>HUD</b> <sup>[1]</sup> 34:12  <b>humble</b> <sup>[1]</sup> 26:18  <b>hypothesizing</b> <sup>[2]</sup> 9:5 63:22  <b>hypothetical</b> <sup>[9]</sup> 10:12 11:17 26:3, 4 35:11,16,20 36:17,17  <b>hypotheticals</b> <sup>[2]</sup> 11:16 26:10</p> <hr/> <p><b>I</b></p> <p><b>idea</b> <sup>[1]</sup> 5:22  <b>ideas</b> <sup>[1]</sup> 24:13  <b>identical</b> <sup>[4]</sup> 39:21 40:11,12 67:18  <b>identified</b> <sup>[1]</sup> 9:23  <b>II</b> <sup>[1]</sup> 1:6  <b>Illinois</b> <sup>[1]</sup> 45:22  <b>illuminating</b> <sup>[2]</sup> 27:11 34:3</p>	<p><b>important</b> <sup>[4]</sup> 4:13 41:17 51:15 63:2  <b>importantly</b> <sup>[1]</sup> 29:25  <b>impossible</b> <sup>[1]</sup> 21:4  <b>incidentally</b> <sup>[1]</sup> 35:3  <b>include</b> <sup>[5]</sup> 4:2,17 14:5 29:15,16  <b>included</b> <sup>[4]</sup> 8:1 9:2 44:25 67:19  <b>includes</b> <sup>[2]</sup> 45:15 69:19  <b>including</b> <sup>[1]</sup> 3:17  <b>indeed</b> <sup>[1]</sup> 31:25  <b>independent</b> <sup>[1]</sup> 31:13  <b>individual</b> <sup>[2]</sup> 21:3 28:23  <b>inhabited</b> <sup>[1]</sup> 43:12  <b>inherent</b> <sup>[3]</sup> 48:18,19 64:11  <b>inital</b> <sup>[1]</sup> 36:7  <b>injury</b> <sup>[7]</sup> 42:4,11,20 48:12,19 63:8, 13  <b>inside</b> <sup>[4]</sup> 31:7 37:23 38:11 63:22  <b>insofar</b> <sup>[1]</sup> 41:2  <b>installed</b> <sup>[3]</sup> 18:20,24 19:2  <b>instance</b> <sup>[3]</sup> 19:19 30:9 66:21  <b>instead</b> <sup>[2]</sup> 17:4 23:11  <b>intend</b> <sup>[1]</sup> 48:7  <b>intended</b> <sup>[3]</sup> 39:20 69:24,25  <b>intent</b> <sup>[7]</sup> 40:25 41:17,22 48:10 59:11,15 63:1  <b>interpret</b> <sup>[1]</sup> 50:14  <b>interpretation</b> <sup>[7]</sup> 6:16 7:4 8:6 10:12 19:17 53:9 55:11  <b>interpreted</b> <sup>[2]</sup> 53:7 66:18  <b>interrupt</b> <sup>[1]</sup> 40:14  <b>introduced</b> <sup>[1]</sup> 66:9  <b>intuition</b> <sup>[1]</sup> 7:20  <b>invalidated</b> <sup>[1]</sup> 41:20  <b>invalidation</b> <sup>[1]</sup> 61:14  <b>involve</b> <sup>[2]</sup> 16:19 42:25  <b>involved</b> <sup>[1]</sup> 42:10  <b>involves</b> <sup>[3]</sup> 31:9 42:1,3  <b>involving</b> <sup>[1]</sup> 16:13  <b>lowa</b> <sup>[1]</sup> 32:15  <b>isn't</b> <sup>[5]</sup> 26:14 29:11,11 36:12 50:6  <b>issue</b> <sup>[8]</sup> 3:18 4:5 6:14 8:4 9:24 19:18 45:4 48:3  <b>issued</b> <sup>[2]</sup> 24:8 60:7  <b>itself</b> <sup>[11]</sup> 7:22 10:9 17:3 31:20 45:23 52:16 62:21 65:18 66:17 67:14 68:4</p> <hr/> <p><b>J</b></p> <p><b>JASON</b> <sup>[1]</sup> 1:12  <b>JEFFREY</b> <sup>[3]</sup> 1:24 2:6 30:22  <b>Judge</b> <sup>[2]</sup> 20:21 40:19  <b>judges</b> <sup>[1]</sup> 23:7  <b>judgments</b> <sup>[1]</sup> 31:2  <b>jurisdiction</b> <sup>[1]</sup> 14:16  <b>jurisprudence</b> <sup>[7]</sup> 23:9 41:9 59:17 60:8,19 61:9 62:24  <b>jury</b> <sup>[1]</sup> 31:21  <b>Justice</b> <sup>[142]</sup> 1:22 3:3,10,23 4:20 5:16 6:25 7:8,11 8:17,18 9:21 10:25 11:10 12:11 13:25 14:6,22 15:10, 24 16:7,21 17:5,10,18,24 18:3,12, 16,23 19:5,13,21,23 20:2,6 21:8, 20 22:9,23,25 23:1,5,18,20,22,23</p>	<p>24:13,14,15 25:7,10,14 26:11,13, 17 28:17,18 30:19,24 31:18,23 32:25 33:13,25 35:21,22 36:13,22 37:3,7,8,12 38:9,16,17,24 39:3,15,15, 24 40:8,13 42:13 43:3,7,11,17 44:2,6,10,11,15,18,24 45:6,10 46:3, 21,25 47:3,6,10 49:4 50:6,10,17  <b>51:2 52:25 53:5,12,17,21 54:3,11, 14,17 55:10,17,21,22 56:12,19 57: 5 59:21 62:2,7,21 63:4,12,18,21 64:25 65:6,8 68:1 70:3,8,17,21 71: 3,9</b>  <b>Justices</b> <sup>[1]</sup> 67:23</p> <hr/> <p><b>K</b></p> <p><b>KAGAN</b> <sup>[22]</sup> 23:20,23 31:23 33:13, 25 35:21 38:16 44:24 45:6,10 46:3,21,25 47:3,6,10 49:4 59:21 70:3, 8,17,21  <b>Kansas</b> <sup>[1]</sup> 55:3  <b>KAVANAUGH</b> <sup>[18]</sup> 38:17,24 39:3, 16,24 40:8,13 44:2,6,10,11,15,18 50:6,10,17 51:2 68:1  <b>keep</b> <sup>[1]</sup> 26:24  <b>keeping</b> <sup>[1]</sup> 29:21  <b>keeps</b> <sup>[1]</sup> 47:20  <b>kick</b> <sup>[1]</sup> 10:17  <b>kid</b> <sup>[2]</sup> 5:24 6:14  <b>kind</b> <sup>[5]</sup> 12:24 28:25 43:15 48:2 57:19  <b>kinds</b> <sup>[6]</sup> 33:21 57:14 63:11,14,20 64:18  <b>knows</b> <sup>[1]</sup> 15:15</p> <hr/> <p><b>L</b></p> <p><b>LaFave</b> <sup>[2]</sup> 39:9 68:21  <b>laid</b> <sup>[2]</sup> 31:19 48:14  <b>land</b> <sup>[1]</sup> 4:25  <b>language</b> <sup>[7]</sup> 9:16 12:25 14:17 50:12 52:23 53:14 58:5  <b>large</b> <sup>[4]</sup> 8:1 13:12 16:12 70:12  <b>last</b> <sup>[1]</sup> 22:10  <b>late</b> <sup>[1]</sup> 53:18  <b>later</b> <sup>[1]</sup> 35:18  <b>latter</b> <sup>[1]</sup> 43:6  <b>Laughter</b> <sup>[6]</sup> 22:14,17 23:21 25:13 26:16 54:15  <b>law</b> <sup>[48]</sup> 8:6 10:21 13:10 17:25 20:11,18 22:5,5,11,12 26:5 29:11 31:14 34:14,15,15 35:9,19 37:16,19, 21 38:6 39:14,17 40:24 41:12,19 42:16 45:11,14 46:12 48:5 49:7,8 50:23 52:4 55:1,3,7 57:9,12 58:13, 16 61:3 63:10,15 66:8 68:8  <b>laws</b> <sup>[6]</sup> 20:14 41:10 45:21 46:6 56:9 66:22  <b>lay</b> <sup>[1]</sup> 34:13  <b>lays</b> <sup>[1]</sup> 34:14  <b>least</b> <sup>[7]</sup> 4:19 10:2 22:6 24:18 25:7, 18 29:16  <b>leave</b> <sup>[5]</sup> 16:22 33:5 41:10 48:2 61:24  <b>left</b> <sup>[1]</sup> 55:18  <b>legislative</b> <sup>[1]</sup> 40:25</p>	<p><b>length</b> <sup>[1]</sup> 48:14  <b>lenity</b> <sup>[1]</sup> 51:14  <b>less</b> <sup>[3]</sup> 46:1,1 47:18  <b>level</b> <sup>[2]</sup> 24:11 49:8  <b>life</b> <sup>[1]</sup> 28:20  <b>light</b> <sup>[3]</sup> 49:21 70:11,14  <b>likely</b> <sup>[1]</sup> 50:24  <b>limit</b> <sup>[1]</sup> 39:7  <b>limits</b> <sup>[1]</sup> 63:10  <b>line</b> <sup>[2]</sup> 10:5 50:3  <b>lines</b> <sup>[2]</sup> 13:19 38:7  <b>little</b> <sup>[5]</sup> 4:20 29:24 39:1 54:20 63:7  <b>live</b> <sup>[9]</sup> 9:12 10:4 13:14 15:15,19, 21 19:18 23:4 30:6  <b>lived</b> <sup>[8]</sup> 12:24 13:2 14:2,4,9,12 15:18 56:22  <b>lives</b> <sup>[12]</sup> 6:22 7:1,1 8:12 9:20 10:7 14:18 15:3 52:21,24 56:17 57:20  <b>lives-in</b> <sup>[2]</sup> 12:16 35:19  <b>living</b> <sup>[6]</sup> 10:14 53:19 54:19 56:25 70:7,8  <b>local</b> <sup>[4]</sup> 34:15,15 49:7 56:8  <b>locational</b> <sup>[1]</sup> 52:8  <b>long</b> <sup>[1]</sup> 39:6  <b>longer</b> <sup>[1]</sup> 61:9  <b>look</b> <sup>[19]</sup> 11:14 14:21 20:11,18 25:20 26:8 29:12 30:9 35:25 38:20 39:3,11 40:24 42:12 44:19 45:19 51:11 68:9,20  <b>looked</b> <sup>[5]</sup> 7:24 22:11,13,16 40:25  <b>looking</b> <sup>[7]</sup> 7:18 17:4 27:12 56:8 65:16 68:5,6  <b>looks</b> <sup>[1]</sup> 23:25  <b>loser</b> <sup>[1]</sup> 58:1  <b>lot</b> <sup>[9]</sup> 23:10 25:24 35:22,23 37:19 42:15 47:11 61:9 69:10  <b>lots</b> <sup>[2]</sup> 53:7 56:10  <b>lousy</b> <sup>[1]</sup> 57:8  <b>low</b> <sup>[1]</sup> 66:15  <b>lower</b> <sup>[2]</sup> 43:14 53:23</p> <hr/> <p><b>M</b></p> <p><b>made</b> <sup>[5]</sup> 15:12 26:19 27:10 30:13 32:9  <b>majority</b> <sup>[5]</sup> 3:15 25:15 41:4 66:5 69:20  <b>many</b> <sup>[21]</sup> 4:10 12:15 13:14 19:12 31:25 33:5,7 39:16,16 41:10 46:6, 14 47:14 50:4,11 51:5,20 56:5 65:11,12 69:7  <b>marginal</b> <sup>[1]</sup> 26:3  <b>marina</b> <sup>[1]</sup> 64:16  <b>Mathis</b> <sup>[22]</sup> 3:25 4:1,5,14 31:4,19 32:14 33:2,3,11,14 41:6,12 59:4 60:23 66:15,16,17,18 69:2,5 70:14  <b>matter</b> <sup>[5]</sup> 1:17 19:5 48:1 51:11 56:16  <b>mattress</b> <sup>[6]</sup> 16:3 18:13,17 19:1 26:6 49:17  <b>mean</b> <sup>[20]</sup> 13:20 16:4 18:14,25 20:3,9 22:18 25:10 43:12 46:5 47:10 50:20 52:17 55:11,12,14,15,19,21</p>
--	---	--	--

## Official - Subject to Review

<p>57:18  <b>meaning</b> [4] 15:25 17:11 68:8 70:6  <b>meaningful</b> [1] 5:2  <b>means</b> [3] 49:3 55:22 60:20  <b>meant</b> [3] 13:22 32:3 67:4  <b>mechanisms</b> [1] 4:24  <b>Mellouli</b> [2] 53:16 54:25  <b>members</b> [2] 26:4 59:19  <b>Menlo</b> [1] 1:24  <b>mentioned</b> [6] 18:9 59:21 66:23 67:16,23,23  <b>mercy</b> [1] 26:3  <b>mere</b> [1] 32:20  <b>mess</b> [3] 26:15,19,20  <b>Michigan</b> [3] 24:21,25 44:20  <b>might</b> [14] 6:5 9:7 10:5,17,18 25:14 53:12 57:2,6 60:9 65:23 66:10 68:3,15  <b>mind</b> [3] 10:1 29:21 42:9  <b>minutes</b> [2] 52:3 65:2  <b>mobile</b> [12] 3:18 4:9,22,25 15:16 32:8 33:23 34:17 44:25 45:3,16 49:10  <b>model</b> [4] 39:4,8 40:17 50:7  <b>modern-day</b> [1] 13:7  <b>modest</b> [1] 30:6  <b>modification</b> [1] 14:19  <b>modified</b> [1] 11:16  <b>moment</b> [2] 5:8 23:4  <b>morning</b> [6] 12:13 13:10 28:6 37:20 56:23 69:11  <b>most</b> [9] 3:22 9:1 30:1,2 51:4 63:2 65:16 67:4 68:10  <b>motor</b> [2] 4:2 45:24  <b>motorized</b> [1] 43:15  <b>move</b> [2] 5:3,4  <b>moved</b> [1] 49:9  <b>Ms</b> [45] 3:7,10 4:4 5:9 6:9 7:3,10,15 8:23 10:25 11:18 12:19 14:6 14,19,25 19:13 20:1 21:9,17 22:15,18 24:5 25:9 26:21 29:7 49:2 50:15 57:13 65:2,5 70:3,6,10,19,25  <b>much</b> [5] 22:13 28:12 32:10 48:15 59:25  <b>must</b> [1] 42:8  <b>myself</b> [1] 62:22</p>	<p><b>New</b> [3] 5:18 56:12 61:20  <b>next</b> [2] 3:4 36:4  <b>nifty</b> [1] 54:20  <b>night</b> [1] 55:24  <b>nights</b> [1] 44:22  <b>nobody</b> [1] 33:20  <b>nobody's</b> [3] 70:7,8,9  <b>nomenclature</b> [1] 24:24  <b>non-permanent</b> [1] 3:17  <b>non-residential</b> [2] 42:23 43:2  <b>none</b> [1] 9:17  <b>nor</b> [1] 20:25  <b>note</b> [1] 4:18  <b>noted</b> [3] 22:4,23 69:4  <b>nothing</b> [3] 10:10 51:19 64:6  <b>notice</b> [12] 5:22 9:7 18:4 28:7 37:19,21 38:17,19,23 39:13 51:15 59:3  <b>noticed</b> [1] 13:13  <b>noting</b> [1] 14:23  <b>notion</b> [1] 13:7  <b>Number</b> [11] 3:5 6:10 12:17 13:12 28:19 29:20 47:20 58:24 59:7 67:5 70:12  <b>numbers</b> [7] 12:3,6,13 65:10,15 66:15 69:11  <b>numerous</b> [1] 58:4</p>	<p><b>ones</b> [1] 70:22  <b>only</b> [18] 9:23 12:5 35:6,14,24 38:13 39:23 40:9 44:22 46:10 48:10,19 49:23 52:22 57:17 62:20 65:24 67:19  <b>open</b> [1] 21:16  <b>opened</b> [1] 11:5  <b>opinion</b> [8] 19:23 20:20 26:18 32:23 40:15,20 48:15 60:7  <b>opinions</b> [2] 33:19 34:2  <b>opposed</b> [1] 26:9  <b>opposite</b> [1] 12:4  <b>opposition</b> [1] 7:6  <b>option</b> [1] 23:10  <b>options</b> [1] 23:18  <b>oral</b> [5] 1:18 2:2,5 3:8 30:22  <b>order</b> [2] 11:1 27:4  <b>ordinarily</b> [2] 8:7 14:13  <b>ordinary</b> [9] 6:15 8:13,15 51:24 52:7,20 53:15 57:24 68:15  <b>original</b> [1] 23:1  <b>other</b> [37] 14:16 15:2 24:13 32:18 33:5,18 34:5,22 37:15,15 39:6 40:1,1,4 41:17,25 45:21 46:2,15,17 49:12 50:8,23 53:3 55:11,14 57:17,19,19 58:4 60:25 62:25 65:9 66:14 67:3 68:12 70:15  <b>Otherwise</b> [4] 26:2 41:25 42:3,5  <b>ought</b> [2] 26:19 58:5  <b>out</b> [29] 20:23 21:25 26:1 28:8 29:4 31:19 34:13,14 39:9 42:25 44:20 47:25 48:3,14 49:24,25 51:14,21 53:1,23,25 57:1 61:6 64:3 67:11 69:4,5 70:18,24  <b>outcome</b> [2] 4:16 61:2  <b>outer</b> [1] 63:9  <b>outline</b> [1] 58:3  <b>outlined</b> [3] 21:15 23:18 60:22  <b>outside</b> [11] 31:8 32:1,5,21 33:6,11 38:6 46:13 52:1,8 70:5  <b>outward</b> [1] 35:15  <b>over</b> [7] 12:25 13:13 20:15 21:6,12 32:17 66:3  <b>overbroad</b> [2] 46:18 55:3  <b>overnight</b> [22] 5:24 6:8,21,23 8:2 13:3,4 15:1 16:11,18 18:21 32:17 35:4 36:6 38:5 41:5 46:1 50:12 54:8 56:4,9,17  <b>own</b> [9] 11:20,21 26:20 60:18 61:8,23,23 63:10 68:7  <b>owned</b> [1] 60:8  <b>owner</b> [1] 44:21</p>	<p>48:17 54:19  <b>particularly</b> [2] 11:3 21:24  <b>parties</b> [1] 46:22  <b>parts</b> [1] 14:22  <b>party</b> [1] 33:18  <b>pass</b> [1] 61:2  <b>passed</b> [1] 65:21  <b>path</b> [1] 60:11  <b>Penal</b> [3] 39:8 40:17 50:7  <b>penalties</b> [2] 24:1 29:1  <b>penalty</b> [1] 29:22  <b>pending</b> [4] 24:3 60:5,10 61:3  <b>people</b> [12] 5:7,11,18 13:2,14 18:4,17 30:6 43:13 56:5 63:5 64:14  <b>percent</b> [3] 42:21,24 44:23  <b>percentage</b> [1] 42:23  <b>perhaps</b> [7] 11:2 14:25 15:9 22:23 26:22 63:2 65:9  <b>period</b> [1] 35:24  <b>permanent</b> [1] 17:19  <b>perpetrator</b> [1] 48:21  <b>person</b> [17] 6:22 7:1,1 8:20 9:2,5 10:14,19 36:18 37:7 38:11 43:16,20 51:24 55:17 56:21,22  <b>person's</b> [1] 28:20  <b>persons</b> [1] 36:6  <b>Petitioner</b> [7] 1:4,10,23 2:4,10 3:9 65:4  <b>phenomenon</b> [1] 56:15  <b>phone</b> [1] 10:15  <b>physical</b> [8] 42:4,11,20 48:12,19 49:17 63:8,13  <b>physically</b> [1] 57:15  <b>picking</b> [1] 25:16  <b>piece</b> [1] 39:17  <b>pieces</b> [1] 39:16  <b>pillow</b> [3] 5:21,25 16:2  <b>place</b> [5] 9:19 10:4 15:7 20:15 36:1  <b>places</b> [3] 13:15,16 30:5  <b>plain</b> [6] 29:6,8 53:14 57:9 58:2,5  <b>play</b> [2] 59:14 67:11  <b>please</b> [3] 3:11 23:22 30:25  <b>plenty</b> [1] 5:17  <b>point</b> [10] 20:4 28:8 31:24 38:23 43:25 49:24 67:7 68:25 71:4,5  <b>pointed</b> [1] 53:1  <b>points</b> [4] 6:10 39:9 49:25 65:7  <b>position</b> [13] 3:24 24:3,7,11 29:19 33:2 44:24 46:5 52:7 61:4,5 69:2 71:1  <b>Posner</b> [1] 20:21  <b>possess</b> [1] 38:21  <b>possessing</b> [1] 39:13  <b>possibility</b> [4] 21:1,7 42:19 57:1  <b>possible</b> [2] 19:17 37:16  <b>potential</b> [2] 42:4,11  <b>potentially</b> [1] 61:8  <b>practical</b> [2] 39:21 67:24  <b>practically</b> [2] 40:11 67:18  <b>praising</b> [1] 24:9  <b>precedent</b> [3] 31:3 60:13 61:24  <b>precise</b> [1] 34:1  <b>precisely</b> [2] 27:23 69:20</p>
<b>O</b>		<b>P</b>	
<p style="text-align: center;"><b>N</b></p> <p><b>NACDL</b> [1] 49:25  <b>NAFD</b> [1] 42:12  <b>narrow</b> [1] 29:17  <b>narrowing</b> [1] 67:7  <b>narrowly</b> [1] 27:18  <b>nature</b> [3] 15:17 19:4 59:1  <b>near</b> [1] 36:19  <b>necessarily</b> [4] 8:15 14:7 30:7 56:17  <b>necessary</b> [1] 31:16  <b>need</b> [3] 5:4 27:4 53:3  <b>needed</b> [1] 26:23  <b>net</b> [1] 11:25</p>	<p><b>object</b> [1] 34:1  <b>objective</b> [1] 38:3  <b>objects</b> [1] 35:2  <b>obligation</b> [2] 18:6 29:6  <b>observation</b> [1] 58:23  <b>obsolescence</b> [1] 67:9  <b>obvious</b> [2] 55:10,11  <b>obviously</b> [7] 4:6 27:5 41:20 52:19 53:14 61:2 68:21  <b>occasion</b> [1] 19:15  <b>occasional</b> [2] 35:6 38:5  <b>occasionally</b> [1] 35:5  <b>occasions</b> [2] 13:21 51:20  <b>occupied</b> [6] 35:24 36:2,7 37:25 64:13,15  <b>occupy</b> [2] 14:13 19:19  <b>occurred</b> [1] 10:24  <b>October</b> [1] 1:16  <b>odds</b> [1] 33:14  <b>offenders</b> [3] 25:3 28:6 63:3  <b>offense</b> [4] 12:8 30:16 32:6 58:16  <b>offenses</b> [3] 25:19 29:23 30:2  <b>offers</b> [1] 31:12  <b>official</b> [1] 24:7  <b>often</b> [4] 4:6,7 5:11 68:24  <b>Okay</b> [1] 54:13  <b>omnipresence</b> [1] 20:18  <b>once</b> [3] 55:13,15 64:11  <b>one</b> [28] 6:1,22 14:11,23 15:11 23:8 26:19 30:14 31:6 34:4,19 37:14 40:13,14 41:17 42:24 45:25 49:10 51:9 53:1 54:2,2 60:9,21,24 67:12,23 69:15  <b>one's</b> [1] 11:11  <b>one-in-700</b> [1] 63:13</p>	<p><b>p.m</b> [1] 71:11  <b>PAGE</b> [8] 2:2 33:3 34:13,16 39:20 42:1 45:14 49:19  <b>pages</b> [1] 50:1  <b>Pardon</b> [1] 17:7  <b>parents</b> [1] 5:24  <b>Park</b> [1] 1:24  <b>parking</b> [1] 56:10  <b>part</b> [4] 6:4 33:1 35:8 58:24  <b>particular</b> [6] 5:8 13:8 15:5 25:21</p>	

## Official - Subject to Review

<p><b>predictability</b> [2] 58:9 59:12</p> <p><b>preface</b> [1] 36:15</p> <p><b>premise</b> [1] 29:4</p> <p><b>prepare</b> [1] 21:13</p> <p><b>present</b> [2] 36:2 48:21</p> <p><b>presentation</b> [1] 13:9</p> <p><b>presented</b> [3] 52:14, 15 54:5</p> <p><b>presents</b> [2] 42:3, 10</p> <p><b>presumably</b> [1] 38:20</p> <p><b>pretty</b> [4] 36:1 44:19 53:18 57:7</p> <p><b>prevail</b> [1] 27:4</p> <p><b>preview</b> [1] 49:1</p> <p><b>previously</b> [2] 7:6 25:5</p> <p><b>primary</b> [2] 43:9 64:12</p> <p><b>principal</b> [2] 19:11 35:1</p> <p><b>principles</b> [5] 47:23 48:2 51:11 57:25 59:20</p> <p><b>prior</b> [6] 3:24, 25, 25 58:15 60:12 61:17</p> <p><b>probably</b> [2] 19:23 45:3</p> <p><b>problem</b> [5] 4:21 10:22 17:24 53:1 62:1</p> <p><b>problems</b> [2] 50:25 62:4</p> <p><b>procedural</b> [2] 54:2, 3</p> <p><b>process</b> [1] 27:20</p> <p><b>prohibit</b> [1] 56:9</p> <p><b>project</b> [1] 34:6</p> <p><b>prong</b> [4] 14:23 31:11 38:15 57:12</p> <p><b>prongs</b> [2] 15:6, 11</p> <p><b>properly</b> [1] 8:5</p> <p><b>propulsion</b> [1] 4:24</p> <p><b>prosecuted</b> [1] 20:24</p> <p><b>protect</b> [1] 13:16</p> <p><b>protected</b> [1] 69:16</p> <p><b>protecting</b> [1] 3:16</p> <p><b>provide</b> [2] 7:22 53:8</p> <p><b>providing</b> [3] 16:22, 25 37:21</p> <p><b>provision</b> [7] 8:3 31:5 35:18, 19 47:15 52:3 57:4</p> <p><b>provisions</b> [1] 64:4</p> <p><b>purely</b> [1] 59:14</p> <p><b>purpose</b> [5] 5:14 35:1 48:13 57:15, 16</p> <p><b>purposes</b> [3] 27:22 28:15 58:6</p> <p><b>put</b> [7] 9:7 15:6 17:14 32:21 34:19 41:18 60:24</p> <p><b>putting</b> [2] 16:3 18:13</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>qualifications</b> [1] 51:21</p> <p><b>qualified</b> [2] 12:9 46:6</p> <p><b>qualify</b> [3] 19:9 47:17 51:17</p> <p><b>qualifying</b> [1] 58:16</p> <p><b>qualities</b> [1] 25:4</p> <p><b>quarters</b> [2] 34:9, 24</p> <p><b>question</b> [24] 5:10 6:11 8:19 12:2, 21 17:21 19:22 23:2 24:2 30:3 32:11, 14, 25 33:21 36:14, 20 38:25 49:23 52:13, 15 54:4 55:2 59:14, 15</p> <p><b>questions</b> [6] 11:1 42:14 58:19 64:23 69:6 71:7</p> <p><b>quibble</b> [2] 22:24 65:10</p> <p><b>quibbled</b> [1] 65:15</p> <p><b>quickly</b> [1] 26:1</p>	<p><b>quintessential</b> [2] 31:9 63:6</p> <p><b>quite</b> [9] 4:4 11:11 15:8 27:8 40:1, 16 42:15 52:19 56:5</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>raise</b> [1] 69:6</p> <p><b>raised</b> [4] 7:5 23:6 53:18 71:2</p> <p><b>range</b> [1] 42:21</p> <p><b>rap</b> [1] 21:4</p> <p><b>rather</b> [1] 54:22</p> <p><b>reach</b> [1] 67:3</p> <p><b>reached</b> [1] 13:1</p> <p><b>read</b> [4] 19:23 36:24 40:15 57:4</p> <p><b>readily</b> [2] 9:10 49:14</p> <p><b>reading</b> [2] 42:1 67:12</p> <p><b>reads</b> [1] 41:24</p> <p><b>real</b> [3] 24:11 26:9 42:18</p> <p><b>really</b> [19] 14:19 17:25 25:2, 15 26:24 27:3, 6, 8 32:3, 10 33:14, 20 51:13 61:10 65:24 66:13 68:1, 18 69:13</p> <p><b>reason</b> [13] 31:13 35:1 36:9 37:16, 22 53:15 54:3 57:8 60:6 61:11, 12 66:7, 14</p> <p><b>reasons</b> [11] 14:10 31:2 40:14 41:11 54:2 58:4 59:9 60:14 62:17 63:8 65:22</p> <p><b>REBUTTAL</b> [2] 2:8 65:3</p> <p><b>recently</b> [1] 22:16</p> <p><b>recidivism</b> [1] 11:24</p> <p><b>reconsider</b> [1] 27:2</p> <p><b>recreational</b> [5] 34:23 38:4 43:19 44:22 51:25</p> <p><b>red</b> [2] 56:11 58:3</p> <p><b>reflect</b> [1] 40:19</p> <p><b>regardless</b> [1] 59:18</p> <p><b>regional</b> [2] 8:8, 9</p> <p><b>regular</b> [3] 19:8 70:4, 6</p> <p><b>regularly</b> [1] 55:13</p> <p><b>regulations</b> [1] 34:12</p> <p><b>rejected</b> [1] 24:19</p> <p><b>rejecting</b> [1] 66:8</p> <p><b>relevant</b> [1] 41:21</p> <p><b>rely</b> [1] 68:21</p> <p><b>remainder</b> [1] 30:17</p> <p><b>remand</b> [1] 53:22</p> <p><b>remarks</b> [1] 24:9</p> <p><b>Remember</b> [5] 32:14 39:22 41:23 57:11 67:22</p> <p><b>reminds</b> [1] 20:16</p> <p><b>renovation</b> [1] 16:14</p> <p><b>repeating</b> [1] 62:22</p> <p><b>replaces</b> [1] 23:25</p> <p><b>reply</b> [1] 9:15</p> <p><b>representation</b> [1] 33:10</p> <p><b>representing</b> [1] 56:20</p> <p><b>require</b> [3] 37:6, 6, 9</p> <p><b>required</b> [1] 49:17</p> <p><b>requirements</b> [1] 57:3</p> <p><b>requires</b> [1] 8:5</p> <p><b>reservations</b> [1] 51:22</p> <p><b>reserve</b> [1] 30:17</p> <p><b>residence</b> [8] 19:9, 11 34:20 37:25 42:18 43:20, 25 44:10</p>	<p><b>residences</b> [3] 43:9, 12 64:12</p> <p><b>residential</b> [1] 64:10</p> <p><b>residual</b> [7] 41:19 48:9, 16 61:14 66:24 67:1, 7</p> <p><b>resolve</b> [1] 51:12</p> <p><b>respect</b> [8] 4:22 25:8, 18 27:7 65:10 66:6, 7 69:1</p> <p><b>Respondent</b> [4] 1:7, 13 9:9 16:16</p> <p><b>Respondents</b> [3] 1:25 2:7 30:23</p> <p><b>Respondents'</b> [6] 9:14 12:5 22:21 27:14 65:13 69:17</p> <p><b>responsive</b> [2] 42:13 63:18</p> <p><b>return</b> [2] 23:1 60:3</p> <p><b>reverse</b> [2] 11:1 71:7</p> <p><b>reversed</b> [1] 70:2</p> <p><b>review</b> [1] 54:22</p> <p><b>revisit</b> [1] 41:15</p> <p><b>rewrite</b> [1] 21:8</p> <p><b>risk</b> [12] 11:6, 15 36:12 42:4, 11 48:11, 18, 18, 20, 21 63:7 64:11</p> <p><b>roads</b> [1] 59:6</p> <p><b>robbery</b> [3] 23:13, 14 63:25</p> <p><b>ROBERTS</b> [4] 3:3 30:19 64:25 71:9</p> <p><b>ROSS</b> [49] 1:21 2:3, 9 3:7, 8, 10 4:4 5:9 6:9 7:3, 10, 15 8:23 10:25 11:18 12:19 14:6 15:13 16:5, 9, 25 17:9, 17, 20 18:2, 7, 14, 19, 25 19:13 20:1 21:17 22:15, 18 24:5 25:9 26:21 29:7 49:3 50:15 57:14 65:2, 3, 5 70:3, 6, 10, 19, 25</p> <p><b>royal</b> [1] 26:19</p> <p><b>rule</b> [8] 28:24 31:17 33:4 50:23 51:14 54:5, 7 56:25</p> <p><b>rummaging</b> [1] 64:17</p> <p><b>run</b> [1] 23:2</p> <p><b>runs</b> [1] 49:7</p> <p><b>RV</b> [4] 5:15 38:19 39:1, 11</p> <p><b>RVs</b> [4] 5:5 32:8 44:12 45:1</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>safer</b> [1] 60:11</p> <p><b>sailboat</b> [2] 34:8 64:17</p> <p><b>same</b> [12] 5:3 10:20 11:19 27:12 28:9 32:22 34:16 36:12 37:22 38:3 39:19 48:16</p> <p><b>satisfy</b> [1] 64:8</p> <p><b>satisfying</b> [1] 66:2</p> <p><b>saying</b> [4] 15:19 33:15 37:13 45:7</p> <p><b>says</b> [17] 8:11 10:3 14:23 19:6 36:25 37:2 39:19, 25 40:3, 9 41:25 50:12 52:16 54:7 57:24 65:23 68:18</p> <p><b>school</b> [1] 22:12</p> <p><b>scope</b> [1] 67:3</p> <p><b>Second</b> [7] 10:2 11:5 12:21 21:1 38:1 43:21 69:17</p> <p><b>Secondly</b> [3] 31:11 48:13 58:10</p> <p><b>section</b> [1] 54:7</p> <p><b>see</b> [13] 5:20 6:5 11:15 13:5 14:14 18:18 20:12 21:2, 4 37:15 39:4 51:6 52:12</p> <p><b>seeing</b> [1] 13:18</p> <p><b>seems</b> [2] 9:24 12:16</p> <p><b>seen</b> [2] 5:19 51:8</p>	<p><b>self-propelled</b> [1] 36:4</p> <p><b>self-propulsion</b> [1] 4:24</p> <p><b>sense</b> [7] 3:20 11:23 13:8, 23 20:5 44:9 68:15</p> <p><b>sensible</b> [1] 64:20</p> <p><b>sentence</b> [1] 10:18</p> <p><b>Sentencing</b> [5] 20:23, 25 51:18 64:2, 4</p> <p><b>separate</b> [3] 39:11 47:15 57:12</p> <p><b>separates</b> [1] 49:8</p> <p><b>Serbia</b> [1] 19:25</p> <p><b>serious</b> [3] 30:16 42:4, 10</p> <p><b>Sessions</b> [1] 59:24</p> <p><b>severe</b> [2] 29:5 30:1</p> <p><b>sheet</b> [1] 21:4</p> <p><b>Shepard</b> [1] 31:19</p> <p><b>ship</b> [1] 5:4</p> <p><b>short</b> [1] 35:24</p> <p><b>shouldn't</b> [4] 17:25 18:3 39:13 55:8</p> <p><b>shown</b> [1] 63:9</p> <p><b>shows</b> [1] 35:14</p> <p><b>side</b> [4] 33:5 58:18 65:9 69:11</p> <p><b>significant</b> [6] 8:11 11:23 29:22 47:11, 13 48:11</p> <p><b>significantly</b> [2] 27:18 48:7</p> <p><b>signs</b> [1] 35:15</p> <p><b>similar</b> [6] 9:16 12:6, 24 14:17 15:8 20:6</p> <p><b>similarly</b> [1] 68:22</p> <p><b>simple</b> [1] 20:10</p> <p><b>simply</b> [5] 6:13 32:15 38:7 49:20 58:16</p> <p><b>SIMS</b> [7] 1:12 3:6 6:18 8:4 9:9 19:18 58:4</p> <p><b>since</b> [1] 60:8</p> <p><b>single</b> [2] 52:23 62:1</p> <p><b>sitting</b> [1] 37:10</p> <p><b>situations</b> [1] 37:17</p> <p><b>Sixth</b> [4] 31:17, 20 58:10 59:12</p> <p><b>sky</b> [1] 20:18</p> <p><b>sleep</b> [10] 5:8, 19, 23, 23 6:7 19:6, 7, 10, 12, 15</p> <p><b>sleeper</b> [7] 34:7, 23 35:13 43:19, 24 44:1 51:25</p> <p><b>sleeping</b> [5] 6:23 10:9 34:8, 24 56:9</p> <p><b>sleeps</b> [2] 55:24 56:3</p> <p><b>sleepy</b> [1] 64:16</p> <p><b>slight</b> [1] 50:19</p> <p><b>small</b> [2] 12:17, 20</p> <p><b>Smith</b> [1] 45:22</p> <p><b>Solicitor</b> [1] 1:21</p> <p><b>solve</b> [1] 61:25</p> <p><b>somebody</b> [11] 6:23 35:25 43:23 52:21, 24 55:23 56:3, 16 57:20, 21 63:22</p> <p><b>somebody's</b> [2] 38:1 42:18</p> <p><b>someone</b> [13] 5:6 6:1, 7 8:13, 19 9:11, 19 10:13, 14 14:18 15:3 29:9 67:22</p> <p><b>someone's</b> [1] 10:14</p> <p><b>someplace</b> [3] 8:12 15:2 19:11</p> <p><b>sometimes</b> [5] 19:6, 7 23:11 26:</p>
--	--	--	--

## Official - Subject to Review

<p>15  <b>somewhat</b> [2] 20:6 47:13  <b>sorry</b> [7] 15:24 37:3 40:14 42:1 46:25 47:2 70:3  <b>sort</b> [19] 5:4,10,14 6:10,15 10:6 11:1 13:6 15:4,18 16:2 24:9,11,13,20 25:3 51:11 60:7 71:2  <b>SOTOMAYOR</b> [22] 4:20 5:16 6:25 7:8,11 8:18 15:24 16:7,21 17:5,10,18,24 18:3,12,16,23 20:6 55:22 62:2,7,21  <b>soundly</b> [1] 30:13  <b>sounds</b> [1] 15:10  <b>sources</b> [1] 39:12  <b>speaking</b> [2] 33:17 67:15  <b>speaks</b> [1] 48:22  <b>specific</b> [8] 8:3 35:18 52:3  <b>specifically</b> [4] 7:16 11:8 18:8 64:14  <b>spend</b> [1] 52:2  <b>spoke</b> [2] 52:4 59:24  <b>spot</b> [1] 54:11  <b>squarely</b> [1] 54:4  <b>stand</b> [1] 49:15  <b>standard</b> [1] 57:18  <b>standing</b> [1] 21:19  <b>stands</b> [1] 35:10  <b>stare</b> [1] 47:23  <b>start</b> [2] 45:13 59:6  <b>started</b> [1] 21:25  <b>starting</b> [1] 29:4  <b>state</b> [50] 8:6 9:9,10 14:15 16:22 20:11,14 22:11 23:13,13 24:16 27:13,16,21,23 30:13 33:5,7 34:14 39:9,17 40:18,24 41:10,12 43:1 45:10,21 46:23 49:6 51:4,5 53:6,8 55:3,6,7 57:23 58:5,13,16 61:17 62:23 63:15 66:10,12,22 67:10 68:16 69:20  <b>state-by-state</b> [1] 62:22  <b>statement</b> [1] 28:24  <b>statements</b> [2] 32:9,10  <b>STATES</b> [61] 1:1,3,9,19 3:4,6,16,20,22 4:19 7:19,25,25 9:1,16,17,23 11:22 12:7,15 13:6,12,18,24 16:9 22:8,19,21 27:9,19,20 28:4 29:13,14,15 30:3 41:4 46:10,14,17,23,23,24 47:9,14,14,20 49:22 50:7,11,14 58:25 59:7 65:11,16,25,25 66:4,5 68:11 70:13  <b>states'</b> [1] 46:6  <b>station</b> [1] 49:18  <b>stationary</b> [2] 34:18 49:9  <b>statistic</b> [2] 43:14 44:17  <b>statistics</b> [2] 42:14 44:5  <b>statute</b> [54] 6:18,20 8:4,11 9:4 10:2,6 11:8,24 12:16 14:2,3,8,18,22 15:8 19:17 20:10 21:9 22:22 23:24,25 24:3 28:13,22 29:8,18 31:7,9 32:4,15,20 36:23,25 37:2,4,5 38:15 40:2 52:20 53:6,10,19 56:22 58:5 62:5,12 65:20 66:6,7,20,25 67:3 70:4  <b>statutes</b> [34] 3:16 6:16 8:22,24 9:</p>	<p>19 12:23 13:1,15 16:11 24:22 27:13,16,19,21,23 30:8 33:6,7 38:20 39:10 40:18 51:4,5 66:10,12 67:5,6,11 68:16 69:4,7,8,20 71:5  <b>statutory</b> [4] 50:11 52:23 57:18,24  <b>steal</b> [1] 10:15  <b>step</b> [2] 5:11 69:18  <b>still</b> [6] 34:2 36:20 41:3 47:16 49:15 64:8  <b>STITT</b> [4] 1:6 3:5 30:10 49:24  <b>stood</b> [1] 66:19  <b>stop</b> [1] 31:23  <b>store</b> [1] 18:18  <b>straight</b> [1] 23:2  <b>streak</b> [1] 25:11  <b>stress</b> [1] 35:5  <b>strike</b> [1] 9:24  <b>strongest</b> [1] 47:21  <b>structural</b> [2] 16:1 18:9  <b>structurally</b> [1] 8:15  <b>structure</b> [13] 14:14 15:22 17:6,7,8 34:19 38:22 39:2 42:23 43:2 45:16 68:18,23  <b>structures</b> [13] 4:23 16:20 31:6 34:4 39:7 40:1,4 45:15 49:9 51:22 60:24 68:2,12  <b>studies</b> [2] 42:15 56:14  <b>study</b> [1] 44:19  <b>submit</b> [1] 64:24  <b>submitted</b> [2] 71:10,12  <b>Subsection</b> [3] 45:13,17,18  <b>subset</b> [1] 12:25  <b>substances</b> [1] 55:1  <b>substantial</b> [1] 67:5  <b>substantive</b> [2] 54:2,24  <b>suggest</b> [5] 9:25 10:6 12:4 21:20 24:14  <b>suggested</b> [1] 65:8  <b>suggesting</b> [1] 53:22  <b>suggestion</b> [2] 16:17 27:14  <b>suggests</b> [1] 49:19  <b>superfluous</b> [1] 15:12  <b>Suppose</b> [1] 28:18  <b>supposed</b> [2] 5:7 6:3  <b>SUPREME</b> [6] 1:1,18 53:24 56:21 57:2,22  <b>surplusage</b> [1] 53:2  <b>surprising</b> [2] 13:12 16:15  <b>survey</b> [1] 23:7  <b>survive</b> [1] 62:5  <b>Sutton</b> [1] 40:20  <b>sweep</b> [2] 35:17 38:14  <b>sweeping</b> [1] 63:3  <b>swept</b> [2] 63:16 64:20  <b>Swift</b> [2] 20:17 23:12  <b>switch</b> [1] 41:6</p>	<p><b>Taylor</b> [36] 3:19 7:21 13:20,20 22:4 24:19 25:1 27:2,5,10,16 31:4 38:22 39:4,5,17,19,24,25 40:2,24 41:2,5 48:14 59:5 60:4,4,7 62:25 66:3 67:14,15,16 68:4,17 69:25  <b>Taylor's</b> [1] 39:5  <b>technicality</b> [1] 25:6  <b>teens</b> [2] 47:7,18  <b>tells</b> [2] 42:5 48:9  <b>temporary</b> [1] 5:6  <b>Tennessee</b> [17] 10:5 15:8 30:10 34:14 35:17 37:4,5 45:12,13,14 46:12,24 47:15 62:5,11,16 63:10  <b>tents</b> [1] 5:5  <b>term</b> [3] 3:21 13:24 66:4  <b>terms</b> [6] 41:22 46:5 49:2 63:11 67:15 68:12  <b>text</b> [5] 41:18,21,23 57:9 58:2  <b>theft</b> [3] 10:21,21 32:4  <b>there's</b> [16] 5:22 11:15 20:4 28:5 34:3 41:17 42:17 47:25 48:18 49:7 53:15 57:11,12 59:21,21 60:10  <b>therefore</b> [3] 11:25 13:15 70:1  <b>thief</b> [3] 5:20 6:6 7:12  <b>thinking</b> [1] 32:7  <b>third</b> [2] 21:7 31:16  <b>thirdly</b> [1] 48:24  <b>Thomas</b> [1] 31:18  <b>thorough</b> [3] 40:16 44:19 46:8  <b>thoroughly</b> [1] 22:10  <b>though</b> [7] 10:23 29:25 33:9 39:25 47:14 51:4 70:12  <b>throughsands</b> [1] 20:14  <b>three</b> [7] 14:21 16:16,19 31:2 38:18 39:10 47:25  <b>throughout</b> [2] 49:8 50:23  <b>throw</b> [1] 5:25  <b>throwing</b> [1] 16:2  <b>thrown</b> [1] 6:1  <b>tied</b> [2] 34:8 35:13  <b>today</b> [4] 12:6 22:7,22 69:9  <b>together</b> [1] 15:7  <b>took</b> [3] 3:24 14:3 29:9  <b>tools</b> [1] 57:18  <b>totally</b> [1] 59:23  <b>tows</b> [1] 10:19  <b>trade</b> [1] 44:18  <b>trailer</b> [1] 43:15  <b>transgresses</b> [1] 31:21  <b>translates</b> [1] 42:24  <b>transportation</b> [1] 35:2  <b>transporting</b> [1] 19:1  <b>treat</b> [1] 37:16  <b>treated</b> [1] 36:10  <b>Treatise</b> [2] 39:9 68:21  <b>treatises</b> [1] 40:17  <b>trial</b> [1] 31:21  <b>trigger</b> [1] 64:21  <b>trip</b> [2] 5:25 6:13  <b>trips</b> [1] 43:21  <b>true</b> [6] 9:12 50:11,21 56:15 68:3 69:2  <b>try</b> [1] 6:11  <b>trying</b> [7] 11:21 17:2 19:24 48:10</p>	<p>61:17 66:3 67:13  <b>Tuesday</b> [1] 1:16  <b>turn</b> [2] 35:17 59:9  <b>turned</b> [1] 15:11  <b>turning</b> [1] 4:16  <b>turns</b> [1] 8:25  <b>two</b> [10] 4:7 14:15,22 15:6,11 37:17 54:1 58:7 60:20 69:13  <b>type</b> [5] 14:9,14 15:22 29:16 34:1  <b>types</b> [7] 3:17 4:17 9:18 16:20 22:6 27:24 30:5  <b>typical</b> [4] 28:13 32:5 43:18 44:21  <b>typology</b> [1] 46:8  <b>Tyson</b> [2] 20:17 23:12</p>
<b>U</b>			
<p><b>under</b> [22] 10:11 12:9 16:11,13 19:16 21:21 22:2 28:1,13 39:14 46:17,18 55:8 56:22 57:18 58:15 61:18,19 64:9 65:12,12,17  <b>underestimated</b> [1] 66:13  <b>undergird</b> [2] 58:9,11  <b>undergirding</b> [1] 59:20  <b>underneath</b> [1] 34:9  <b>understand</b> [11] 6:5 16:8 21:18 33:12,25 38:23 47:19 50:17 52:6 60:15 62:4  <b>understanding</b> [8] 4:21 17:11 28:10 40:19,21 44:9 48:6 51:17  <b>Understood</b> [3] 22:15 28:10 45:7  <b>unease</b> [1] 23:4  <b>unfortunate</b> [1] 24:20  <b>unfortunately</b> [1] 17:22  <b>UNITED</b> [7] 1:1,3,9,19 3:4,5,19  <b>University</b> [1] 44:20  <b>unlike</b> [1] 11:12  <b>untrue</b> [1] 56:2  <b>up</b> [16] 4:6 9:15 10:5 11:5 16:12 19:14,25 20:18 34:8 35:13 56:23 60:22 63:16 64:20 67:25 69:1  <b>uphold</b> [1] 29:2  <b>urged</b> [1] 33:4  <b>usage</b> [4] 8:13 43:18 44:13 57:13  <b>uses</b> [4] 10:7 43:16 44:22 55:23  <b>using</b> [7] 5:7 8:20 13:24,25 56:6 63:5 71:4</p>			
<b>V</b>			
<p><b>vacant</b> [1] 35:12  <b>vacation</b> [2] 35:23 37:23  <b>vacations</b> [1] 43:22  <b>van</b> [4] 35:13 43:19,24 44:1  <b>vans</b> [3] 34:7,23 51:25  <b>variation</b> [1] 50:24  <b>variations</b> [1] 20:14  <b>various</b> [1] 61:17  <b>vast</b> [1] 3:15  <b>vehicle</b> [21] 5:1,4 6:13,20 8:16 9:6,11 10:8 14:19 19:14 34:25 36:5,11 38:4,4,11 43:15,19,21 44:22 52:20  <b>vehicles</b> [28] 4:2 8:1 13:1 17:13 31:7,10,25 32:16,16,20 33:16,22 34:4,23 41:5 45:17,18 47:25 48:3</p>			

## Official - Subject to Review

**49:11 51:21,24,25 54:8 57:14 60:25 68:12 70:22**  
**version** <sup>[3]</sup> **3:14 42:9 47:21**  
**versus** <sup>[5]</sup> **3:5,6,19 23:12 34:12**  
**VICTOR** <sup>[1]</sup> **1:6**  
**view** <sup>[11]</sup> **12:5,10 22:21 29:18 46:4 54:22 65:12,13,17 69:17 71:3**  
**viewed** <sup>[1]</sup> **33:19**  
**violates** <sup>[1]</sup> **31:20**  
**violence** <sup>[2]</sup> **21:2 64:4**  
**violent** <sup>[7]</sup> **11:6,15 20:12 42:19 48:12 63:3,23**

---

**W**


---

**wagon** <sup>[1]</sup> **49:18**  
**walking** <sup>[1]</sup> **64:15**  
**wanted** <sup>[1]</sup> **68:25**  
**wants** <sup>[2]</sup> **50:4 61:25**  
**Washington** <sup>[3]</sup> **1:15,22 5:19**  
**way** <sup>[24]</sup> **5:2 7:12 9:6 12:4 15:23 18:20,24 27:9 29:17 32:3 33:19 38:13 44:5 47:1 55:7,11,14 56:24 60:22 61:7 66:4 67:10 68:20 69:5**  
**ways** <sup>[2]</sup> **32:18 53:7**  
**weekends** <sup>[1]</sup> **43:22**  
**well-grounded** <sup>[1]</sup> **49:6**  
**whatever** <sup>[5]</sup> **22:1,1 27:25,25 60:6**  
**whatsoever** <sup>[1]</sup> **12:8**  
**Whereas** <sup>[1]</sup> **15:18**  
**Whereupon** <sup>[1]</sup> **71:11**  
**whether** <sup>[12]</sup> **4:16 7:17 9:1 14:15 16:18 20:12 24:6 30:4,5 39:1 49:16 55:2**  
**whole** <sup>[1]</sup> **56:13**  
**will** <sup>[14]</sup> **5:12,25 8:14 12:21,22 22:24 28:14 29:2,2 50:14,19 52:24 56:3,17**  
**win** <sup>[3]</sup> **36:16,18,23**  
**window** <sup>[1]</sup> **49:20**  
**winning** <sup>[1]</sup> **25:11**  
**within** <sup>[8]</sup> **25:24 33:9 46:11 52:13 54:4,5 62:12,16**  
**without** <sup>[4]</sup> **10:20 14:19 51:21,22**  
**woman** <sup>[1]</sup> **19:24**  
**wonder** <sup>[1]</sup> **10:11**  
**word** <sup>[7]</sup> **20:7 42:5,8 44:9 49:3 67:1,8**  
**words** <sup>[10]</sup> **3:19 20:3,5,6,9 27:16,17 48:16 50:8 58:22**  
**work** <sup>[4]</sup> **11:22 12:3 29:24 44:5**  
**workability** <sup>[2]</sup> **59:16,16**  
**world** <sup>[2]</sup> **26:9 33:22**  
**worried** <sup>[1]</sup> **48:17**  
**worry** <sup>[1]</sup> **25:9**  
**wrote** <sup>[1]</sup> **20:9**

---

**Y**


---

**year** <sup>[3]</sup> **22:12 35:14 44:23**  
**years** <sup>[2]</sup> **10:17 28:19**  
**York** <sup>[2]</sup> **5:18 56:12**

---

**Z**


---

**zoning** <sup>[2]</sup> **34:15 56:8**