

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD ALLEN CULBERTSON,)
)
 Petitioner,)
)
 v.) No. 17-773
)
 NANCY A. BERRYHILL, ACTING)
)
 COMMISSIONER OF SOCIAL SECURITY,)
)
 Respondent.)

Pages: 1 through 64

Place: Washington, D.C.

Date: November 7, 2018

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7 COMMISSIONER OF SOCIAL SECURITY,)

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10 Washington, D.C.

11 Wednesday, November 7, 2018

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:06 a.m.

16

17 APPEARANCES:

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19 on behalf of the Petitioner.

20 ANTHONY YANG, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf
22 of the Respondent, in support of reversal and
23 remand.

24 AMY L. WEIL, ESQ., Atlanta, Georgia; Court-appointed
25 amicus curiae, in support of the judgment below.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	DANIEL R. ORTIZ, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ANTHONY YANG, ESQ.	
7	On behalf of the Respondent,	
8	in support of reversal and remand	16
9	ORAL ARGUMENT OF:	
10	AMY L. WEIL, ESQ.	
11	Court-appointed amicus curiae,	
12	in support of the judgment below	33
13	REBUTTAL ARGUMENT OF:	
14	DANIEL R. ORTIZ, ESQ.	
15	On behalf of the Petitioner	63
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 17-773, Culbertson versus
5 Berryhill.

6 Mr. Ortiz.

7 ORAL ARGUMENT OF DANIEL R. ORTIZ

8 ON BEHALF OF THE PETITIONER

9 MR. ORTIZ: Mr. Chief Justice, and may
10 it please the Court:

11 This case turns on the meaning of two
12 words in Section 406(b), "such representation."
13 Do they refer to work done only before the
14 court, the only representation discussed in
15 Section 406(b) itself, or do they also include
16 work done before the agency, which is subject
17 to a separate award mechanism in Section
18 406(a)?

19 In this case, Your Honors, the
20 statute's text, its structure, its purposes,
21 and its history all confirm that Section
22 406(b)'s cap applies only to work done in
23 court.

24 First, the text: Section 406(b)
25 references explicitly and only work done in the

1 court. It's a single sentence. It says
2 whenever a court renders a judgment favorable
3 to a claimant who is represented before the
4 court by an attorney, the court may allow a
5 reasonable fee for such representation.

6 The dictionary meaning of the word
7 "such," of the sort previously mentioned,
8 confirms what is commonsensical. So does the
9 doctrine of the canon of *expressio unius*.
10 Section 406(a), by contrast, speaks of work
11 done before the commissioner. Section 406(b)
12 speaks only of work done before the court.

13 Congress also, Your Honor, knew how to
14 create an aggregate cap if it wanted to. In
15 Section 406(a)(2)(C), it creates an aggregate
16 cap for claims in cases involving both claims
17 under Title 2 and Title 16, and it uses the
18 words "in the aggregate."

19 Congress likewise knew how to create
20 offsets, as it did in the Equal Access to
21 Justice Act.

22 Also, Your Honors, the structure of
23 the Act makes this clear. In *Gisbrecht*, this
24 Court defined -- said that the statute handles
25 discretely claims for work before the agency

1 and claims before the court.

2 JUSTICE GINSBURG: Can I ask you a
3 question about the -- the cap? You're saying
4 there's a cap in (b) and that applies to court
5 services, not to services before the agency.

6 But is there a -- a cap on the amount
7 that can be taken from the plaintiff's
8 recovery? That is, let's say that we -- we
9 agree with you that the (b) cap is for court
10 only. It doesn't apply to administrative
11 services. Can more be taken from the
12 plaintiff's recovery than, what is it,
13 25 percent?

14 MR. ORTIZ: No, Justice Ginsburg. The
15 agency has taken the position, which is not
16 contested in this litigation, that there's a
17 separate 25 percent pay cap which applied.
18 They will set aside the amount of past-due
19 benefits and withhold the 25 percent for the
20 payment of attorney's fees under both 406(b)
21 and 406(a).

22 So that is an upward limit in this
23 case. This case --

24 JUSTICE SOTOMAYOR: I do have a
25 question about that. I'm troubled by the idea

1 of attorneys attempting to collect fees
2 directly from their clients.

3 Now I understand from the briefing
4 that you can't garnish disability benefits, so
5 if you don't get paid your percentage, you
6 can't garnish disability benefits. But how can
7 you collect otherwise? You don't collect over
8 the fund that Justice Ginsburg is describing.

9 MR. ORTIZ: No, Your Honor --

10 JUSTICE SOTOMAYOR: The retained
11 amount. Don't you think that Congress wouldn't
12 have wanted Social Security recipients to be
13 hounded by collection efforts?

14 MR. ORTIZ: Well, Your Honor, first, I
15 want to correct what may be a misconception.
16 It is not the case that when the 25 percent
17 authorization cap is used up, that attorneys,
18 if they want to recover fees beyond that, would
19 -- beyond the amount withheld, would actually
20 have to go against the claimant directly.

21 In any case, when there is an EAJA
22 award, as there are in over 40 percent of these
23 cases, and the EAJA award is equal to or
24 exceeds the 406(a) award, the attorney can
25 actually get the money from the amount that the

1 agency is still withholding.

2 JUSTICE SOTOMAYOR: I understood here
3 there was some EAJA money that you could have
4 received.

5 MR. ORTIZ: Yeah. So in this --

6 JUSTICE SOTOMAYOR: But I'm talking
7 about the extreme possibility --

8 MR. ORTIZ: Yeah. In this --

9 JUSTICE SOTOMAYOR: -- where there's a
10 small EAJA award, but you get 50 percent of the
11 recovery. Are we going to have people
12 garnishing something or attaching something
13 that belongs to clients?

14 MR. ORTIZ: Not in most cases, Your
15 Honor. In most cases, it makes no economic
16 sense.

17 JUSTICE SOTOMAYOR: I'm not asking
18 about most cases. I'm asking about exceptions.

19 MR. ORTIZ: Well, there would be an --

20 JUSTICE SOTOMAYOR: When --

21 MR. ORTIZ: There would be an
22 exception, Your Honor, if I were representing
23 Bill Gates, say. It would -- I could go after
24 him for payment of the remaining fee.

25 JUSTICE KAVANAUGH: But most of the

1 claimants are, of course -- do not have much
2 money, and the statute, as Justice Ginsburg
3 says, puts a 25 percent cap on what -- on how
4 it's going to -- the pool, I guess, is the --
5 from which it's going to be paid by the agency.

6 Doesn't that suggest that Congress
7 thought that there would be an aggregate cap
8 because, A, there is the pool cap, and then, as
9 Justice Sotomayor says, we don't expect lawyers
10 to go after claimants who, by definition, often
11 can't work and often don't have much money?

12 MR. ORTIZ: Well, Justice Kavanaugh,
13 the pool cap is a matter -- is a creature of
14 agency work, not actually an artifact of what
15 Congress has done. So it's -- you cannot
16 impute that actually to what Congress -- what
17 Congress's feeling here was.

18 As you mentioned, in most cases -- in
19 many of these cases, the claimant will be
20 judgment-proof beyond the amount that the
21 agency has set aside. And in those
22 circumstances, it makes no sense for the
23 attorney to go after the claimant.

24 The claimant -- the attorney --

25 JUSTICE BREYER: The -- the answer --

1 the answer is, am I right, that, look, for what
2 -- in an EAJA case, where you collect the money
3 from the government, the lawyer gets money
4 from -- he takes the fee out of that, is that
5 right?

6 MR. ORTIZ: The -- the attorney has to
7 effectively return the lesser of the EAJA fee
8 or the 406(b) --

9 JUSTICE BREYER: Okay. So if -- if
10 the amount from the client is less than the
11 EAJA award, the attorney gets the -- the
12 greater amount and returns the other to the
13 client, so the client doesn't pay, okay,
14 anything perhaps. If there's no EAJA award, so
15 take that out of the picture, and you win this
16 case, there's yet another check that has to be
17 a reasonable fee, and the -- the judge is in
18 charge of that.

19 MR. ORTIZ: Yes, Your Honor.

20 JUSTICE BREYER: All right. Okay. So
21 it has to escape that. But, if it does escape
22 that, then the lawyer can get up to 50 percent.
23 That's the answer, is that right?

24 MR. ORTIZ: The lawyer can be
25 authorized for 50 percent.

1 JUSTICE BREYER: Yeah, yeah, yeah.

2 MR. ORTIZ: That's possible.

3 JUSTICE BREYER: Look, the lawyer can
4 be authorized -- I mean, I'm not trying to --
5 I'm just trying to find -- get the thing
6 straight in my mind.

7 MR. ORTIZ: Yes, it's possible.

8 JUSTICE BREYER: No EAJA fee of a
9 greater amount. The judge doesn't say it's an
10 unreasonable thing to do. And the client has
11 the money. And then you could bring it up to
12 50 percent?

13 MR. ORTIZ: Yes, Your Honor.

14 JUSTICE BREYER: And your argument
15 against that is that's like the null set,
16 unless Gates happens to be on welfare, which I
17 think he isn't.

18 MR. ORTIZ: Yes. Well, it would make
19 no sense for an attorney to waste his or her
20 time pursuing such claimants, go -- go after
21 people who are essentially judgment-proof, Your
22 Honor. And I -- it's my understanding that's
23 actually how the work -- the world works in
24 practice.

25 The amicus's brief --

1 JUSTICE SOTOMAYOR: I have a question
2 that bothers me greatly about this whole
3 litigation. It seems like your interests are
4 contrary to your client's interests, meaning
5 your client under no circumstance should want
6 the danger of paying more than the 25 percent
7 aggregate. So shouldn't you have gotten a
8 different lawyer for her in some point in this
9 litigation earlier than here?

10 MR. ORTIZ: No, Your Honor. Our
11 client has actually been notified every step
12 along the way about what --

13 JUSTICE SOTOMAYOR: That's not true
14 consent. At least when I was a district court
15 judge, you had to not only advise her but
16 advise her of the potential conflict and advise
17 her to seek separate counsel. Was that done?

18 MR. ORTIZ: I don't believe that that
19 was done in this case.

20 JUSTICE SOTOMAYOR: I -- I am troubled
21 by these fee disputes because I want -- often
22 wonder if clients are being adequately
23 represented once the dispute moves from the
24 main case and into how much you're entitled to.

25 MR. ORTIZ: But, in this case, Your

1 Honor, not only was Ms. Wood informed of what
2 was happening, but she had consented to it.

3 JUSTICE SOTOMAYOR: Not without being
4 told of the potential conflict.

5 MR. ORTIZ: I don't know in-depth how
6 much it was explained to her.

7 JUSTICE GINSBURG: Practically --
8 practically, where would you -- you can't get
9 money out of the Social Security benefits, if
10 -- if they've been exhausted under -- under (b)
11 for the court work. So where would you go to
12 get -- to get that -- to get more than
13 25 percent, not from Social Security benefits,
14 but some other source?

15 MR. ORTIZ: Your Honor, if there are
16 no EAJA fees in the picture, which would
17 increase the size, effectively increase the
18 size of the pot, and the claimant can't pay any
19 more money, you would take your lumps and
20 leave. The lawyer at that point would swallow
21 the loss in fees, is typically what happens.

22 There's no sense in wasting time
23 trying to squeeze blood from a turnip.

24 JUSTICE GINSBURG: Well, wouldn't that
25 -- if that's the general case, then what are

1 the practical consequences of our agreeing with
2 your position when you can't get more than
3 25 percent out of the Social Security benefits
4 themselves?

5 MR. ORTIZ: Well, the practical
6 implications of the aggregate cap rule, Your
7 Honor, is that attorneys will be less willing
8 to take on these cases ex-ante because they
9 will understand that in many cases they will
10 not be getting fees for work in court because
11 that pool will have been expanded -- expended.

12 JUSTICE SOTOMAYOR: How many cases
13 have EAJA awards?

14 MR. ORTIZ: In *Gisbrecht*, Your Honor,
15 the concurrence mentioned that it was
16 41 percent. It's our understanding that more
17 up-to-date statistics are above 40 percent to
18 50 percent, somewhere in there.

19 JUSTICE SOTOMAYOR: So in about 40 to
20 50 percent of the cases there will always be a
21 pot bigger than the 25 percent?

22 MR. ORTIZ: Yes, Your Honor. But --

23 JUSTICE SOTOMAYOR: That's what you're
24 fighting for, is that 25 percent that -- that
25 --

1 MR. ORTIZ: Yes, but the aggregate
2 rule does not allow the attorney access to any
3 of that. The non-aggregate approach which
4 we're advocating does.

5 JUSTICE SOTOMAYOR: Does.

6 MR. ORTIZ: So even under -- so under
7 the aggregate rule, that extra money under EAJA
8 is simply unavailable to the attorney. It goes
9 straight -- all of it would go straight to the
10 client.

11 Under our approach, that attorney --
12 that -- the EAJA award is effectively split and
13 divided between the claimant and the attorney.

14 JUSTICE KAVANAUGH: (a)(4), I thought,
15 established a 25 percent cap on the pool, the
16 statute itself. You said it didn't come from
17 the statute. Maybe I'm misreading something.

18 MR. ORTIZ: No, (a)(4) is a little bit
19 unclear, Your Honor. (a)(4) talks about the --

20 JUSTICE KAVANAUGH: Well, it seems
21 very clear. It says 25 percent.

22 MR. ORTIZ: No, it does say
23 25 percent. But it also says the maximum fee,
24 which is -- is a technical term for the agency
25 award. The maximum fee is not a term from

1 406(b). It's from 406(a).

2 JUSTICE KAVANAUGH: But that -- that
3 pool established under (a)(4) is the only pool,
4 that Justice Ginsburg has been referencing,
5 that's the only pool, correct?

6 MR. ORTIZ: That is the only pool.
7 The agency doesn't --

8 JUSTICE KAVANAUGH: That's capped, the
9 pool is capped by statute at 25 percent?

10 MR. ORTIZ: No, Your Honor. The pool
11 -- the pool is capped with respect to 406(b)
12 awards at overall -- at an overall of
13 25 percent by the agency. I believe my friend
14 Mr. Yang can perhaps answer this better.

15 JUSTICE KAVANAUGH: The regulations
16 interpreting that do cap the pool then at
17 25 percent as well?

18 MR. ORTIZ: They do. But I believe
19 that the -- the -- the support in the statute
20 that they point to for that is not anything in
21 406(a) but is actually 406(b)'s language where
22 it says that a -- that the commissioner may
23 award -- it's in 406, it's on page 8(a) of the
24 government's opening merits brief. About
25 halfway down (b) it says: And the Commissioner

1 of Social Security may, notwithstanding --
2 there's a Section 401(i) that's titled but
3 subject to subsection D -- certify the amount
4 of such fee for -- for payment to such attorney
5 out of and not in addition to the amount of
6 such past-due benefits.

7 And the agency has taken the view that
8 that gives it the authority, discretionary
9 authority to cap the overall pool that's
10 available for 406(b) awards as well.

11 Your Honors, the -- the -- if I may,
12 Your Honors, I would like to reserve my
13 remaining time for rebuttal.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 MR. ORTIZ: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Yang.

18 ORAL ARGUMENT OF ANTHONY YANG ON
19 BEHALF OF THE RESPONDENT, IN SUPPORT OF
20 REVERSAL AND REMAND

21 MR. YANG: Mr. Chief Justice, and may
22 it please the Court:

23 There is one and only one operative
24 provision in this case, and it's Section
25 406(b)(1)(A). That provision applies when a

1 claimant is represented, "represented before
2 the court by an attorney," and it authorizes a
3 reasonable fee for such representation.

4 That provision clearly governs fees
5 only for representations before the court, and
6 its 25 percent past-due benefits cap likewise
7 only applies to fees for work done before the
8 court. That text fully resolves this case.

9 The Court has had a series of
10 questions about kind of some of the
11 practicalities. I'd like to address first
12 Justice Kavanaugh's question about the pot.

13 There's actually two statutory
14 provisions. The first is at (a)(4). (a)(4) is
15 at page 7a of our brief. That says that the
16 Secretary shall certify for payment out of
17 past-due benefits so much of the maximum fee as
18 does not exceed 25 percent. The maximum fee,
19 if you look throughout the prior provisions of
20 (a), talk about the maximum fee that the
21 commissioner approves for work before the
22 agency.

23 So that (a)(4) provision mandates that
24 so much of that maximum fee, that is, the
25 agency fee, as does not exceed 25 percent shall

1 be paid. It's mandatory.

2 Now I think there's two things. First
3 is the mandatory. The pot must be 25 percent,
4 at least, if the agency fee is that large.

5 And, two, the language "so much of the
6 agency fee as does not exceed" emphasizes that
7 Congress understood that the agency fee could
8 and would sometimes exceed 25 percent of
9 past-due benefits, which itself is incompatible
10 with an aggregate 25 percent.

11 JUSTICE KAVANAUGH: A different
12 argument, but --

13 MR. YANG: Different argument, but
14 while we're on (a)(4) I thought I'd touch upon
15 it.

16 The second provision is in (b)(1).
17 That's on page 8a. It's in the latter half of
18 the main paragraph, that the Secretary shall
19 certify the amount of such fee, referring back
20 to the court-approved fee for court work, as
21 does not -- out of and not in addition to the
22 amount of past-due benefits.

23 That is in the permissive. It is may
24 certify. So the -- the agency has interpreted
25 the mandatory obligation to set aside

1 25 percent for agency fees, and the permissive
2 obligation or the permissive authority to set
3 aside money for the court fee, which itself is
4 capped at 25 percent, as allowing it to only
5 pay out 25 percent --

6 JUSTICE KAVANAUGH: Right.

7 MR. YANG: -- total.

8 JUSTICE KAVANAUGH: Right. I
9 understand that. And it comes ultimately from
10 an interpretation of the statute. Maybe you're
11 saying it's not mandated by the statute.

12 MR. YANG: Well, it's an -- an
13 interpretation of the permissive part of the
14 statute.

15 JUSTICE KAVANAUGH: Right, that's what
16 I mean by saying it's not -- maybe it's not
17 mandated by the statute, is your point.

18 MR. YANG: So it's not -- so -- but
19 when Congress was enacting these provisions and
20 any cap that might exist, Congress understood
21 that it was authorizing the agency to withhold
22 more than 25 percent with the operation of
23 these two.

24 There's another point to be made that
25 I think we haven't focused on, is that we've

1 only been talking about attorney fees because
2 this case involves an attorney, but Congress
3 has authorized non-attorneys to represent
4 agency -- clients before the agency, and in
5 subsection (e) of 406, specifically directs the
6 agency to extend the fee payment provisions,
7 the direct payment provisions that we're
8 talking about in (a)(4), to non-attorneys.

9 But in doing so, Congress in (e)(2) --
10 unfortunately, we didn't reproduce this in our
11 brief, but it's in (e)(2) -- set forth
12 prerequisites for these non-attorney
13 representatives to be eligible for this direct
14 payment. Not all of them meet those
15 eligible -- eligibility requirements.

16 So there is a category of cases that
17 (a)(4) never comes into play because there's no
18 authority to provide direct payment to the --
19 to the representative. Now those
20 representatives are still representing clients
21 before the Social Security Administration, and
22 they have to collect their fees or they
23 wouldn't be doing it.

24 And I think that addresses, Justice
25 Sotomayor, your concern. It's baked into the

1 system that these representatives are going to
2 collect sometimes the fees from the client.
3 Now these -- in Social Security Title 2 cases,
4 there's no -- there's no means testing. So you
5 can have a rich client; you can have a poor
6 client. But the important point is that
7 Congress intended not only sometimes to get
8 25 percent pot --

9 JUSTICE KAVANAUGH: But we're told by
10 the amicus brief of the disability attorneys
11 that that almost never happens.

12 MR. YANG: Almost never happens --
13 which --

14 JUSTICE KAVANAUGH: That they try to
15 get the money directly from the client. Now
16 maybe that's not correct, but that's what --

17 MR. YANG: That -- that cannot be
18 correct for the set of non-attorney
19 representatives that are not eligible for
20 direct payment under (a)(4).

21 JUSTICE KAVANAUGH: Right.

22 MR. YANG: The only way they can get
23 their money is from the client.

24 Also, if you look at the criminal
25 prohibitions in --

1 JUSTICE SOTOMAYOR: Counsel, how often
2 are those people family members or -- or --

3 MR. YANG: That I -- I don't know, but
4 I do know that there are -- the criteria that
5 Congress has specified under (e)(2) does not
6 contemplate that we're talking familial
7 relationships.

8 JUSTICE SOTOMAYOR: All right. You
9 say there's no danger or little danger of
10 garnishment of future benefits. But you also
11 say that sometimes the government permits
12 garnishing to help attorneys satisfy awards
13 under 25 percent when they have missed out on
14 withholding. Where do you get that authority
15 from, to permit garnishing or to permit
16 garnishing above the 25 percent?

17 I can understand if --

18 MR. YANG: It's not above the
19 25 percent. I think what you're talking about
20 is in the circumstance that the agency for some
21 reason has erroneously failed to withhold --

22 JUSTICE SOTOMAYOR: Right.

23 MR. YANG: -- 25 percent of past-due
24 benefits, it recovers as an overpayment of
25 past-due benefits from the -- from -- from the

1 future stream. And this is not an uncommon
2 event.

3 For instance, sometimes there are
4 overpayments in either the Title 2 or the Title
5 16 context to the claimant, and the -- the
6 government will then offset from future
7 payments to -- to recoup that money. This is
8 just another illustration of that. And it
9 doesn't, I think --

10 JUSTICE SOTOMAYOR: To the -- to the
11 poor recipient, it doesn't really sound like
12 they were responsible for your failure to
13 withhold. I'm not sure what gives you the
14 authority. Basically, you're garnishing their
15 benefits.

16 MR. YANG: Well, I don't think that --
17 first of all, no one has questioned the
18 government's authority where the government has
19 already paid the money that should not have
20 been repaid. In -- in most contexts, the
21 government can recover money that is overpaid
22 from individuals. I -- I don't find that to be
23 particularly telling, and there are regulatory
24 provisions that govern that to make sure that
25 the recoupment of this overpayment is not

1 onerous.

2 But, again, getting back to the
3 question presented in this case, I think it's
4 -- it's clear that Congress contemplated, if
5 you look at (a)(5), which is the criminal
6 prohibition for collecting in excess of the
7 maximum fee authorized by the Commissioner, or
8 (b)(2), which is the criminal prohibition
9 prohibiting collection of the fee beyond that
10 authorized by the court, by setting a criminal
11 prohibition and setting the threshold beyond
12 what's authorized, Congress contemplated that,
13 if it's under that authorization limit, you
14 could collect it.

15 And it's not an abusive collection
16 because the fees have been approved either by
17 the agency under 406(a) or under the court
18 under 406(b).

19 JUSTICE KAVANAUGH: You -- you
20 obviously have a good textual argument. I
21 think the point is your brief then goes to
22 great lengths to say don't worry about taking
23 50 percent from disability claimants because
24 district courts won't allow that under the
25 reasonableness prong. And the -- the amicus

1 brief of disability attorneys say don't worry
2 about that seemingly extreme 50 percent fee
3 because that never really happens in practice.
4 Both of which suggest that this system was not
5 designed to be one where you're getting
6 50 percent.

7 MR. YANG: I don't think that's
8 entirely true. The thing is we -- we --

9 JUSTICE KAVANAUGH: You still have a
10 strong textual argument. I'm not --

11 MR. YANG: No, no, I -- I think we win
12 on the text regardless of the policy.

13 JUSTICE KAVANAUGH: Right. I
14 understand -- I understand that.

15 MR. YANG: But -- but the -- I think
16 on the policy, there are going to be cases
17 where you're going to get greater than
18 25 percent. For instance, there are cases
19 where there's representation in an overpayment
20 case, as we were just discussing.

21 Well, maybe you get -- and as a result
22 of an overpayment case, you don't get past-due
23 benefits, but the agency and the court may well
24 approve a reasonable fee for payment in such
25 cases.

1 There are other cases where
2 disability -- the onset date is sufficiently
3 late. For instance, new evidence came in on
4 remand. There's a five-month waiting period
5 before your eligibility -- eligible for
6 benefits. So it may be that even if you're
7 found disabled in the proceeding --

8 JUSTICE KAGAN: But I think the import
9 of Justice Kavanaugh's question is that in the
10 usual case in which there are proceedings both
11 at the Commission and at a district court, and
12 there are two 25 percent caps, it -- it's --
13 it's not the government's position that in that
14 usual case where lawyers can say, well, I won
15 here and I won there, that both of them are
16 entitled to 25 percent fees or that both of
17 them should get 25 percent fees.

18 MR. YANG: In a normal case where
19 you've got a substantial amount of past-due
20 benefits, we think that's not the case. When
21 there are smaller amounts of past-due benefits,
22 if there's only, say, \$5,000 of past-due
23 benefits, we're only -- we're talking about
24 very small amounts of compensation for
25 attorneys.

1 And it's important to recognize also
2 that we're only talking about the past-due
3 benefits.

4 JUSTICE ALITO: What --

5 MR. YANG: For a disability complaint
6 --

7 JUSTICE KAGAN: I don't -- I think,
8 you know, what strikes me as -- as, you know,
9 troublesome about this, and then you could add
10 a court of appeals proceeding to it and the
11 possibility of 75 percent fees. So, you know,
12 could that possibly have been what Congress
13 wanted?

14 MR. YANG: Well, I guess there's two
15 points. One, Congress was concerned not only
16 about past-due benefits, but Congress would
17 have understood that for a disabled person and
18 particularly one who is permanently disabled,
19 ongoing future benefits, which are untouched by
20 this cap, are protected. And, in fact, they
21 protected them under 407.

22 The second point is I think you raised
23 the question of 75 percent. The government's
24 view is that the cap in (b), 406(b), is
25 25 percent for all of the court proceedings,

1 including appeals.

2 And there's multiple reasons for that.
3 We think the text, when read in light of the
4 Dictionary Act, is amenable to that reading.
5 But, if you took the opposite reading, you
6 could have four, five, six proceedings with
7 multiple remands, coming up to this Court
8 perhaps, there's no way you can get more than
9 100 percent of past-due benefits if there are
10 five proceedings.

11 So that anomaly suggests that our
12 reading of a 25 percent aggregate cap for the
13 judicial proceedings is what was intended by
14 Congress in 406(b), which would then suggest
15 that normally, although there's not always --
16 it's not always the case because sometimes
17 agency fees can exceed 25 percent of past-due
18 benefits, normally, it should not exceed
19 50 percent, and in many cases, where the courts
20 -- where you've got a lot of benefits, as the
21 Court recognized in *Gisbrecht*, the
22 reasonableness criterion allows courts to
23 police for windfall --

24 JUSTICE KAVANAUGH: Well, what's your
25 definition of "smaller" versus "more

1 substantial" that you used in response to
2 Justice Kagan's question?

3 MR. YANG: Well, I -- I think it will
4 depend on the amount of time and litigation
5 spent on the case, but what is --

6 JUSTICE KAVANAUGH: The money's coming
7 right out of the claimant's pocket.

8 MR. YANG: It's coming out of the
9 past-due benefits. That's -- that's correct.

10 JUSTICE KAVANAUGH: Right.

11 MR. YANG: And so for -- in this case,
12 you know, in this case, I think we would
13 have -- it falls somewhere in the middle. At
14 page, you know, 12, we have kind of a chart
15 with all the -- the sums, and we're talking
16 about a past-due benefit award --

17 JUSTICE KAVANAUGH: Right.

18 MR. YANG: -- of about \$35,000.

19 JUSTICE KAVANAUGH: It comes right out
20 of the claimant's pocket, and it -- and it's
21 unusual to have a 50 percent chunk out of a
22 claimant's -- out of a party's pocket.

23 MR. YANG: That -- that is true for
24 many tort cases, although I don't believe it's
25 unheard of. The -- there are, depending on the

1 risk --

2 JUSTICE KAVANAUGH: Yeah, I said
3 unusual, yeah.

4 MR. YANG: Yeah, and in a lot of these
5 cases, you must understand these are all
6 generally taken on contingency. So -- and
7 we're talking about low stakes, and there's
8 uncertainty about how many, if any, past-due
9 benefits, even if you prevail --

10 JUSTICE KAVANAUGH: Well, it's low
11 stakes for the attorney, but it's high stakes
12 for the claimant.

13 MR. YANG: That is true, but, again,
14 there are two countervailing interests that
15 Congress was trying to address here. One was
16 excessive fees, which I think will depend on
17 the circumstances of the case, what is
18 excessive. But the other is assuring adequate
19 representation for claimants. That's an
20 important element of this.

21 And if you -- if the cap is too --

22 JUSTICE KAVANAUGH: That's -- that's
23 where -- I'm sorry to belabor this, but that's
24 where the amicus briefs of the disabled --
25 disability attorneys comes in because they say

1 they usually agree not to take more than
2 25 percent. So I'm not sure how your point
3 about the incentive structure actually fits
4 what's going on in those areas --

5 MR. YANG: Well, I think attorneys --
6 the fee --

7 JUSTICE KAVANAUGH: -- where there's
8 not a cap.

9 MR. YANG: -- the typical fee
10 agreement that exists caps out at 25 percent of
11 past-due benefits, both for the agency and for
12 the --

13 JUSTICE KAVANAUGH: Exactly. So you
14 don't need 50 percent to incentivize.

15 MR. YANG: Well, there are different
16 fee agreements, both for the agency at 25 and
17 for the court at 25. That -- that's what was
18 at issue here.

19 So, if you were to look at the fee
20 agreements that were signed by Mr. Culbertson
21 and the claimant in this case, it actually
22 would be a 50 percent fee that was agreed to.

23 So I think the -- what you may be
24 referring to in the agency or in the amicus
25 brief was fee agreements are 25 percent, but

1 there's a fee agreement for agency proceedings
2 and there's a separate one for court
3 proceedings.

4 JUSTICE KAGAN: So, if I understand
5 what you're saying to us, Mr. Yang, there have
6 been -- one could respond to some of these
7 qualms about a 50 percent fee by saying don't
8 worry, it will never happen.

9 But you're specifically not saying
10 that. You're saying in a case where there are
11 proceedings at two different levels, 50 percent
12 fees is going to happen, and it's going to
13 happen in order to ensure representation at
14 both of those levels.

15 MR. YANG: It -- it -- it may well
16 happen. Those fees would have to be determined
17 to be reasonable, but -- and there is a
18 judicial as well as an administrative check on
19 that.

20 But, yes, if it is a reasonable fee in
21 those circumstances, sometimes it may well be
22 50 percent. And that is a necessary
23 consequence of the -- of providing sufficient
24 incentives that Congress thought were
25 appropriate in this context to incentivize

1 counsel both at the agency level and before the
2 court.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. YANG: Thank you.

6 CHIEF JUSTICE ROBERTS: Ms. Weil.

7 ORAL ARGUMENT OF AMY L. WEIL,

8 COURT-APPOINTED AMICUS CURIAE,

9 IN SUPPORT OF THE JUDGMENT BELOW

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

12 Section 406 is not a model of clarity.
13 It's a piecemeal statute that was enacted over
14 a series of amendments over a course of 50
15 years.

16 But the best interpretation of its
17 provisions, one that the agency has adopted and
18 -- and argued in favor of in the courts for
19 half a century, up until April of this year, is
20 that it imposes a 25 percent aggregate cap on
21 agency and court fees.

22 There are three primary reasons why
23 this is the best interpretation of the statute.
24 First, it is the most plausible reading. When
25 you take all of the amendments as a whole, when

1 you read it, and in order -- in the order in
2 the enactment of the amendments, and if you
3 look at the multiple references within them to
4 a 25 percent cap, and if you look at the fact
5 that the eye toward the purpose of the statute
6 is to regulate attorney's fees in a fair
7 manner, to protect the benefits of the disabled
8 with one 25 percent withholding, it is a
9 reasonable, plausible interpretation.

10 And it is one, second, which the
11 agency agreed with and devised a framework for
12 the payment of fees and the representation of
13 claimants in the -- before the agency and
14 before the court.

15 And they created this framework with,
16 as its most notable feature, this one
17 25 percent cap, which would make little sense
18 if there was not an aggregate 25 percent cap on
19 fees. There's one 25 percent withholding.

20 And, also, third, the capping of these
21 fees by 25 percent balances what we know to be
22 Congress's intent. It was stated in 1965 in
23 enacting the first 25 percent cap.

24 They were concerned about the
25 inordinate attorney's fees that were being

1 collected when -- when the court fees were not
2 being regulated. At the time, the agency fees
3 were regulated to \$20 or \$30 if you had to go
4 before the Appeals Council also, but there was
5 no cap on court fees.

6 And they were concerned by just
7 33 percent, but a third to a half of fees being
8 paid to attorneys for having to take these
9 cases to court.

10 If the claimants had been successful
11 originally and the agency hadn't wrongfully
12 withheld the benefits, the claimants would have
13 had 100 percent of their past-due benefits.

14 JUSTICE GORSUCH: Counsel, on that on
15 the incentive structure point, I -- I -- I can
16 surely understand the impulse, and I feel that
17 the 25 percent's quite a lot, even if past-due
18 benefits, I know future benefits are untouched,
19 and that's a sympathetic position.

20 But couldn't a rational Congress also
21 think that there are some extraordinary cases
22 that are hard and in order to incentivize
23 attorneys more might be appropriate, in order
24 -- I mean, if you overregulate, you create
25 scarcity, right? And if you overregulate the

1 availability of attorneys, nobody's going to
2 take the case.

3 MS. WEIL: That is the --

4 JUSTICE GORSUCH: And so, here, isn't
5 it at least conceivable that a rational
6 Congress might think there would be an odd case
7 where you need above 25 percent, up to 50, but
8 we're going to put in special checks, a
9 reasonableness inquiry at the administrative
10 level and a reasonableness inquiry at the
11 district court, all of which is subject to
12 further review, I'm sure.

13 So why -- why -- why is that an
14 irrational scheme to provide incentive
15 structures so that people do have
16 representation and that there isn't artificial
17 scarcity?

18 MS. WEIL: See, it's not an irrational
19 scheme to say they would have done it some
20 other way. They did it this way because this
21 is the way that balanced.

22 JUSTICE GORSUCH: Okay. So your
23 argument is that on the text you win --

24 MS. WEIL: Well --

25 JUSTICE GORSUCH: -- but as a matter

1 of policy you admit it's a draw?

2 MS. WEIL: -- as a matter of policy,
3 there's never been any showing by anyone that
4 there's a disincentive to taking cases because
5 of a cumulative 25 percent.

6 JUSTICE GORSUCH: You admit a
7 reasonable Congress could worry about that
8 scenario?

9 MS. WEIL: This Congress did worry
10 about the scenario of their getting more than
11 25 percent. And they had to balance because
12 they wanted to make sure people were going to
13 take these cases. And, as it turned out, they
14 do.

15 There's a very healthy Social Security
16 bar. We also have the EAJA fees to help
17 protect attorneys. And if you --

18 JUSTICE BREYER: The only -- the only
19 -- does this example, an example of where they
20 might get more, they work very hard, long
21 hours, and they get the client, disabled, and
22 as a result of that, the client gets \$5,000,
23 but the client also gets up to as long as he
24 lives, and that's all future.

25 So the client eventually will get half

1 a million dollars. And so the lawyer says:
2 Look, I -- I worked for four months, and I know
3 the past amount's only \$5,000, but when you
4 look at what I got for my client, it was half a
5 million, and I spent hours. So, please, give
6 me not just \$1250 but \$2500.

7 MS. WEIL: Well, Your --

8 JUSTICE BREYER: Okay? Now -- but
9 have I -- have I -- see, I'm using that as an
10 example in my mind as an example of where,
11 well, this could be justified.

12 Now do I have it right? That's what
13 I'm not certain about.

14 MS. WEIL: Well, if you look at the
15 way the --

16 JUSTICE BREYER: Is my example right?

17 MS. WEIL: Well, your example probably
18 isn't going to come out that there's four
19 months. The way this really works is, if you
20 go before the agency and you win, you get
21 agency fees. You can get up to 25 percent.
22 You're probably not going to have been there
23 for more than four or six months, maybe a year,
24 but you get the benefits that are accumulating
25 over time. It's sort of like passive money.

1 It's accumulating over time. So as those
2 benefits --

3 JUSTICE BREYER: It all adds up to
4 \$50,000 because of the accumulation --

5 MS. WEIL: So it could add up.

6 JUSTICE BREYER: -- so now we get
7 \$12,500 and he would like \$12,000 more because
8 he had to go to court, and that took another
9 two years, and, besides, the client will not
10 get \$50,000. He will get half a million
11 because he's going to live for about 90 more
12 years.

13 MS. WEIL: But what you have to take
14 into account, Your Honor, is the fact that --

15 JUSTICE BREYER: I just need -- I need
16 to know first and foremost --

17 MS. WEIL: Right.

18 JUSTICE BREYER: -- is -- is -- is
19 what I say -- this is a tough statute for me --
20 I mean, is -- is this -- have I got the example
21 right?

22 MS. WEIL: Well, the example's right
23 in terms of, if you go before the agency and
24 you -- you lose, you have to go to court.
25 That's what happens in all of these cases.

1 JUSTICE GORSUCH: But, counsel, I
2 think what Justice Breyer's getting at, and I
3 think it's a premise of my question too, is,
4 isn't it fair to say that in a -- in a
5 significant number of cases that future
6 benefits are larger than past benefits?

7 MS. WEIL: They're -- yes, future
8 benefits are, but I disagree with the concept
9 that you won't be hounded. I do believe that
10 there is definitely leeway in the statute and
11 leeway in 407 for claimants to be hounded after
12 these past-due benefits, because 407 only
13 allows -- only says you can't go after future
14 benefits, but 406(a) --

15 JUSTICE BREYER: Can't go after --

16 MS. WEIL: Cannot go after future
17 benefits. But --

18 JUSTICE BREYER: But can't -- can't --

19 MS. WEIL: These are past-due
20 benefits.

21 JUSTICE BREYER: I -- see, that's what
22 I was worried about. In other words, the
23 client -- the lawyer cannot ask for a fee
24 resting on the fact that he got the client a
25 million dollars, but most of it's in the

1 future?

2 MS. WEIL: He got the client -- who
3 knows what's going to go. Something could
4 happen and the client doesn't end up getting
5 it.

6 JUSTICE BREYER: No, I know, I know.

7 MS. WEIL: He did what he did for him
8 then. And the --

9 JUSTICE SOTOMAYOR: Well, I think
10 maybe we should just be practical, okay? Let's
11 assume that there's 25 percent of the judgment
12 that wasn't paid out. What do you think the
13 lawyer can do to get that 25 percent?

14 MS. WEIL: If there were --

15 JUSTICE SOTOMAYOR: He can't go after
16 the future benefits, correct?

17 MS. WEIL: I don't believe that's
18 necessarily true, because the future benefits
19 cannot be gone after, but these are past-due
20 benefits. So --

21 JUSTICE SOTOMAYOR: So let's -- let's
22 stop there. So you're saying, yes, he could
23 potentially go after the pot of past-due
24 benefits up to the excess that he wants, is
25 that --

1 MS. WEIL: Right. There's a
2 25 percent withholding and that will be paid
3 out. If there's an additional 25 percent
4 that's awarded to an attorney, the client will
5 already have received the 75 percent, but he
6 will -- as the cases in the Ninth and Tenth
7 circuits have suggested about going after the
8 fees when they're over the 25 percent
9 withholding, they have to find other ways to
10 get them.

11 One way you can get them is saying
12 they are past-due benefits, and they might have
13 been put into your bank account, they might
14 have been put into your house, but you can
15 attach that because you certified -- a court or
16 the agency certified them as past-due benefits.
17 So they're available.

18 And, number two, they could be
19 considered to be wrongfully not withheld.
20 That's what happens when the agency allows you
21 to go after future benefits. Now, right now,
22 there's 25 percent withholding.

23 So if you -- if the agency --

24 JUSTICE SOTOMAYOR: I -- I -- I think
25 that may be wrong on your part because the

1 agency is only authorized to withhold
2 25 percent.

3 MS. WEIL: Right.

4 JUSTICE SOTOMAYOR: So I don't think
5 you can claim that they wrongfully didn't
6 withhold an additional 25 percent. So I don't
7 think --

8 MS. WEIL: That's because the agency's
9 framework is set up for a 25 percent aggregate
10 cap. Remember, they've been --

11 JUSTICE SOTOMAYOR: But that's
12 legislatively imposed.

13 MS. WEIL: Correct.

14 JUSTICE SOTOMAYOR: I -- I -- I take
15 your point that there could be garnishment on
16 the past-due amounts, is what you're saying.
17 I'm presuming also that that attorney could
18 withhold documents from the client, could do
19 anything else a lawyer does when they're not
20 paid, correct?

21 MS. WEIL: Right. And these are not
22 typical clients. These are clients who are
23 only in this position because they were
24 wrongfully withheld their benefits in the first
25 place. They should have been paid.

1 CHIEF JUSTICE ROBERTS: Well, but your
2 -- your friend on the other side says that this
3 just doesn't happen, that these lawyers do not
4 go after the recipients. And -- and you say
5 that it's a real danger. Is there any -- how
6 do we tell? How do we tell who's right?

7 I mean, I understand your point of
8 view that theoretically this could happen, but
9 in the real world, they said it doesn't.

10 MS. WEIL: Well, and the -- well,
11 they're asking now to be able to be paid more
12 than 25 percent for a purpose. It's not like
13 they're saying, we're going to settle in every
14 single case for just the 25 percent that's
15 withheld.

16 Obviously, they're asking for the
17 extra 25 to be able to get it from the client.
18 Sometimes the client will pay it. We -- I have
19 presented the Court with cases in the Tenth and
20 Ninth Circuit where 47 percent of the past-due
21 benefits were awarded. There was still just a
22 25 percent withholding.

23 And they're not asking for a Pyrrhic
24 victory. They're asking for the money.

25 JUSTICE KAGAN: But, Ms. Weil, I take

1 -- I take the point, and, indeed, Mr. Yang
2 suggested, that this happens and that it was
3 meant to happen. But -- so -- so that's
4 troublesome. But I'm -- I'm struggling with
5 your textual argument.

6 MS. WEIL: Well --

7 JUSTICE KAGAN: Where does it come
8 from?

9 MS. WEIL: -- let's discuss that
10 because both the Petitioner and the Claimant
11 have said that the two words -- it's -- there
12 -- there are two words in this entire statute
13 that just make their position correct and that
14 say that you get up to 50 percent of benefits,
15 and those two words are "such representation"
16 in section (b).

17 And I suggest to Your Honors that
18 actually --

19 JUSTICE SOTOMAYOR: There's -- there's
20 such representation before the court --

21 MS. WEIL: Yes.

22 JUSTICE SOTOMAYOR: -- in (b), and
23 before -- in (a), before the commissioner?

24 MS. WEIL: Well, their argument really
25 has been pointing to the (b) language of "such

1 representation" before the court, and they
2 claim that that shows that you can get up to
3 50 percent of the past-due benefits. But I
4 would suggest to Your Honors that actually
5 supports a 25 percent aggregate rule, because
6 what the statute provides is only -- that you
7 can get up to 25 percent of past-due, up to,
8 not to definitely get 25, but up to 25 percent
9 of past-due benefits for a court representation
10 if you're successful.

11 You cannot be successful unless there
12 has been attorney representation. Somebody had
13 to present the case before the agency. They
14 might have originally lost, but if that case is
15 later won before the court, two things happen.

16 Number one, the agency attorney who
17 first represented them is going to get fees for
18 what they did by presenting the case because
19 all the evidence has to be presented to the
20 agency. It's not presented in court.

21 And, number two, most cases are sent
22 back by the district court -- even a win is
23 sent back by the district court on a remand for
24 more evidence. In this case, for example, they
25 had looked at the -- the district court judge

1 or magistrate judge in this case said that the
2 ALJ didn't really consider the --

3 JUSTICE KAGAN: I guess I -- I don't
4 quite get the argument. You know, the "such
5 representation" language says 25 percent for
6 court representation.

7 MS. WEIL: Right.

8 JUSTICE KAGAN: And then you're saying
9 that there's some kind of implicit exclusion as
10 to another 25 percent, or however much it is,
11 for agency representation. Where does the
12 exclusion come from?

13 MS. WEIL: I'm not actually arguing
14 exclusion. What I'm arguing is, in order to
15 get a court fee, you have to have an agency
16 also.

17 So it's not as if this court fee
18 controls what happens with the agency. The --
19 I tried to put it in terms of a timeline in my
20 brief. I suggested to the court that while the
21 case was pending before the agency, these
22 past-due benefits were accruing. The court
23 attorney can't take credit or have some sort of
24 responsibility for those fees. It's a -- it's
25 sort of a fiction, a legal fiction. Those are

1 -- benefits were accruing while --

2 JUSTICE KAGAN: But the statute is set
3 up so that there are very specific sections
4 governing agency proceedings and court
5 proceedings. So the statute is set up in a way
6 that is not really consistent with that
7 argument. It seems to treat these as two
8 different proceedings, and it seems to treat
9 fees for those two different proceedings as
10 discrete inquiries.

11 MS. WEIL: Yes, Your Honor. And they
12 are because of the way it works. You can go
13 before the agency, and if you win, you can get
14 up to 25 percent of the past-due benefits and
15 you go home. It's over. If you go before the
16 agency and you lose, you don't get paid a fee.
17 You go before the court and you can get up to
18 25 percent if you win.

19 There may -- the agency attorney might
20 also be awarded a fee too or not. It could be
21 that they represented pro bono. It could be
22 that they were represented by themselves pro
23 se. It could be that the legal aid represented
24 them. You might only have a court fee. So you
25 have to have up to 25 percent there too.

1 That's how it started. There was already --
2 agency's fee was taken care of.

3 So both of them have the up to
4 25 percent because there only might be in the
5 end one attorney, either the court attorney or
6 the agency attorney, getting the fee. But the
7 question is, what do you do when they both get
8 fees?

9 And I tried to illustrate in the brief
10 in terms of a timeline that these fees are
11 accruing over time. The court attorney
12 shouldn't be getting the fees that were
13 accruing while it was before the agency, and
14 the agency attorney has no reason to be
15 receiving the fees as they were accruing before
16 the court. It makes sense that they split
17 them. That is the only argument that that is
18 not -- and actually -- that is not what was
19 anticipated.

20 JUSTICE KAGAN: It -- it makes sense
21 that they split them, but -- but you're not
22 suggesting that there's any place in the
23 statute that you can point to and say: Look,
24 that provision is the provision where Congress
25 indicates that it makes sense that they split

1 them.

2 MS. WEIL: You -- I -- I really have
3 two arguments on that. Number one, their plain
4 text argument is wrong. And, number two, you
5 can kind of get to -- to our position about the
6 aggregate by reading the statute together with
7 the amendments and the fact that there's one
8 pool from which these -- the benefits are
9 withheld.

10 But, to get to their plain reading,
11 their literal text, they argue that the plain
12 reading of the statute is: Well, there are
13 two, two 25 percents, and they both get them
14 and they can get up to 50 percent.

15 If you actually literally read the
16 statute, and you don't know anything about the
17 background, you don't know how it works, you've
18 never read the regulations, you would actually
19 read (a), and (a) would say: If you go before
20 the agency and you lose, you don't get a fee.
21 If you go before the agency and you win, you
22 get paid a fee. It's over with. And they get
23 benefits, and you get paid a fee out of the
24 benefits.

25 Or, other option, two, you go before

1 the court, and if you get a favorable judgment,
2 you win. And that was the view that was
3 adopted. That is actually the literal reading.
4 And it was the view that made -- formed the
5 basis of the single tribunal rule.

6 That was the Sixth Circuit's rule.
7 They said, well, whichever forum you win in,
8 that's where you get paid a fee, that you can
9 look and see if there's any work done in the
10 other forum, but whatever forum you win in, you
11 get a fee. Well, nobody thinks that's right,
12 but that actually is the literal reading of the
13 statute: One or the other.

14 The only reason we're here is that we
15 know that that's not how you read it, that you
16 have to read the regulations that are
17 incorporated into the statute, and the way they
18 work, the fact that they both collect fees, the
19 fact that there's one withholding, which really
20 would make no sense. Congress -- Congress,
21 when they gave the delegation to the -- first
22 the Board, then the Secretary, then the
23 Commissioner to establish regulations, set up
24 this framework.

25 And when they set up the framework, it

1 was all centered around a 25 percent aggregate.
2 The -- they argued in -- constantly in cases
3 before the courts in favor -- and I've -- I
4 presented some of the language to Your Honors
5 in my brief. They've suggested, however, that,
6 in 1993, they backtracked and said, oh,
7 actually, they've been flip-flopping. No,
8 they've never flip-flopped over this.

9 The Horenstein case that they cite in
10 their brief about saying set different
11 statutory maximum allowable fees in (a) and (b)
12 was talking about this single tribunal rule.
13 And --

14 JUSTICE KAVANAUGH: Congress used the
15 phrase "in the aggregate" in one place that
16 they rely on as well as part of the textual
17 argument, which is the title -- the subchapter,
18 the 2 and the 16 benefits they use "in the
19 aggregate" there and don't use it here.

20 Do you have a --

21 MS. WEIL: That is unfortunate. This
22 is not the best written statute.

23 (Laughter.)

24 MS. WEIL: If it had been more clear,
25 we certainly wouldn't have been here. That --

1 JUSTICE KAVANAUGH: It sounds like
2 you're saying they didn't -- Congress didn't
3 think through --

4 MS. WEIL: Well --

5 JUSTICE KAVANAUGH: -- in its language
6 the exact situation on the ground. But I don't
7 know what we're supposed to necessarily do with
8 that.

9 MS. WEIL: What you do with that is,
10 well, you say, why did that happen? Because
11 this is a piecemeal statute. They started out
12 with Section (b) when the (a) fees were pretty
13 small, and they came to (b) and they said we're
14 having a problem here, inordinately large fees.
15 We need to be able to rein those things in and
16 we're going to balance the interests of the
17 claimant not having excessive fees of 33 to
18 50 percent of their benefits being paid out to
19 attorney's fees, but then paying them enough
20 and making sure they get paid.

21 See, that's key. You can't make sure
22 they're paid if you have one 25 percent
23 withholding, but you're allowing 30, 40,
24 50 percent. That's no assurance there. In
25 fact, those --

1 JUSTICE KAVANAUGH: I mean, it seems
2 -- to support your point, it seems almost
3 absurd that Congress would have wanted
4 litigation or actions by disability attorneys
5 against disability claimants.

6 MS. WEIL: Congress would not want --

7 JUSTICE KAVANAUGH: That --

8 MS. WEIL: -- any of this.

9 JUSTICE KAVANAUGH: -- that said, the
10 "in the aggregate" is missing and the text is a
11 problem, as -- as you acknowledge.

12 MS. WEIL: But it might be possible
13 that they didn't think they needed it because
14 of the way they put forth all these statutes
15 and the way they kept putting in the 25 percent
16 cap and the way the agency had read it. I
17 mean, the --

18 JUSTICE KAGAN: What about the
19 language -- I'm sorry.

20 MS. WEIL: From the -- from the very
21 beginning, they had had the 25 percent
22 withholding and 25 percent cap.

23 JUSTICE KAGAN: What -- what about the
24 language that Mr. Yang referred to in (a)(4)?
25 This is the language about payment in an amount

1 equal to so much of the maximum fee as doesn't
2 exceed 25 percent of past-due benefits, which
3 suggests that the maximum fee could be more
4 than 25 percent.

5 MS. WEIL: I actually think that that
6 language came from a 1990 conference report.
7 And trying to understand what all this is, you
8 have to read all this legislative history.

9 And part of the legislative history
10 was there was a discussion going on in the 1990
11 Senate conference report when they were
12 discussing the fact that the way the system was
13 set up, you would determine past-due benefits.

14 First, you would, if you got -- if you
15 had a disability and SSI claim, you had to
16 determine past-due benefits by first backing
17 out, reducing it by the amount of the SSI
18 before you determined the attorney fee.

19 And the reason they were doing that is
20 they were saying that the person ended up
21 really not needing the SSI, they were made
22 effectively poor by the fact that we weren't
23 paying them the disability originally.

24 So when we're -- going to determine
25 attorneys' fees, we're going to reduce the

1 amount of the past-due benefit pool to be paid
2 from. We're going to back out the SSI payment.
3 And then we're going to take 25 percent of
4 that. That was the way the setup was.

5 And then they put in the new (a)(4)
6 and the new amendments for the fee agreement
7 process. And in that, they put in a section
8 saying, well, the way we're going to do it now
9 is we're going to let them determine the
10 past-due benefits out of the disability
11 benefits without reducing it, but they're
12 still -- when we're going to pay them, we still
13 are withholding only the 25 percent.

14 So they're only going to be able to be
15 paid that, even though they're going to be able
16 to get an award now of the disability benefits
17 without the SSI backed out, when it comes to
18 being paid, they're going to have to only get
19 from us the 25 percent after the SSI reduction.

20 JUSTICE SOTOMAYOR: Ms. Weil, I
21 believe it helps you, doesn't it, that the
22 probability of there being an award over
23 25 percent of the past-due amounts is when no
24 past-due amounts are awarded, correct? Because
25 an attorney can receive a reasonable fee.

1 MS. WEIL: Correct, in a overpayment
2 or a termination case?

3 JUSTICE SOTOMAYOR: Exactly. And so
4 in those -- in those cases, it's always going
5 to be 25 percent -- more than 25 percent.

6 MS. WEIL: Well, there -- yeah, there
7 won't be any past-due benefits.

8 JUSTICE SOTOMAYOR: Exactly. Are
9 there any other situations in which the
10 25 percent -- over 25 percent could be, in
11 fact, calculated?

12 MS. WEIL: Calculated?

13 JUSTICE SOTOMAYOR: Because the
14 government's making much of this, that Congress
15 contemplated it, and I thought your brief said
16 they contemplated it only in the two
17 circumstances of where there's no past-due
18 amounts.

19 MS. WEIL: Well, that's correct. I
20 mean, the only time you would be getting
21 benefits, you'd either -- the only time these
22 cases would come before without two past --
23 without past-due benefits being available to
24 determine the 25 percent out of would be
25 overpayment and termination cases.

1 I think it's very important to keep in
2 mind when we are looking at this as a whole to
3 determine what Congress had intended in terms
4 of who we're talking about. Again, these are
5 claimants who, had they originally gone before
6 the agency and been awarded -- awarded their
7 benefits, they wouldn't have had anything out
8 of them. They would have had 100 percent of
9 their benefits awarded.

10 But now agency wrongfully, and it
11 turns out they agree, wrongfully denied them
12 the benefits. So the -- over a course of
13 years, these past-due benefits are accruing,
14 this isn't nothing. This isn't a small --

15 JUSTICE GORSUCH: But isn't that
16 exactly the hardest cases where you maybe are
17 most in need of good legal services and lawyers
18 might be least likely to participate?

19 MS. WEIL: Well, that's the fortunate
20 thing about (a), the 25 percent does satisfy
21 the attorneys and, (b), the EAJA award can be
22 in excess of that. You can make the claimant
23 whole and the attorney can --

24 JUSTICE GORSUCH: But you would agree
25 with the premise that -- that these are the

1 cases, these are the hardest cases where
2 attorneys are most useful perhaps?

3 MS. WEIL: Well, I think they're
4 necessary to go into court.

5 JUSTICE GORSUCH: Yeah.

6 MS. WEIL: I don't know necessarily
7 the hardest cases, but definitely --

8 JUSTICE GORSUCH: They've lost below.

9 MS. WEIL: And that's the only --

10 JUSTICE GORSUCH: They've lost below.

11 MS. WEIL: They lost below.

12 JUSTICE GORSUCH: And now they're
13 going to court?

14 MS. WEIL: And now they're going to
15 court. And my point being that had they not
16 had to go to court, had they not had to go to
17 court and had they been rightfully paid, then
18 they wouldn't be paying any attorneys' fees.

19 So a lot of people might think: Well,
20 maybe the government ought to be paying their
21 fees.

22 JUSTICE GORSUCH: Sure. That would be
23 a reasonable judgment too.

24 MS. WEIL: But, instead, this is
25 coming out of past-due benefits. So you have

1 to determine, and Your Honors have to
2 determine, what did Congress intend when they
3 were doing this.

4 When they put the statute out, when we
5 know they thought 33 percent to 50 percent was
6 inordinately high, what did they actually
7 intend to have happen with the agency? And the
8 agency determined that 25 percent was the
9 maximum. And the agency determined that that
10 25 percent aggregate was what they would
11 advocate in favor of.

12 And, in fact, if I could, Your Honors,
13 I found the brief where they wrote in Dawson to
14 explain their position, which has been
15 maintained for 50 years, for half a century:

16 "The most of the benefits provided for
17 by the Act are intended to supply a means of
18 livelihood to persons who have been deprived of
19 their ability to support themselves, e.g., old
20 age benefits for retirees and disability
21 benefits for the disabled.

22 "The majority of the claimants for
23 benefits, therefore, depend upon them for
24 subsistence, part of their livelihood. And for
25 most, many of the benefits are their sole means

1 of support. Often, by the time past-due
2 benefits are recovered from the Secretary, the
3 claimant is in dire financial need. Deduction
4 of a third to a half of these benefits,
5 whatever the purpose, can impose serious
6 financial hardship on the claimant.

7 "Congress has sought to balance these
8 needs against that of the attorney by giving
9 the court authority to fix a fee for the
10 attorney when the court renders a judgment
11 favorable to the claimant and by limiting the
12 amount of that fee to a maximum of 25 percent
13 of the past-due benefits.

14 "It's plain, therefore, that the
15 Court's allowance of a fee in a Social Security
16 case larger than an overall 25 percent of
17 past-due benefits recovered would be contrary
18 to Congress's will."

19 That was -- that was --

20 CHIEF JUSTICE ROBERTS: I'm sorry,
21 counsel, what are you -- what are you reading
22 from?

23 MS. WEIL: I'm reading from the brief
24 of the government in Dawson. So that was in
25 1970.

1 Then, in *Gisbrecht*, the solicitor said
2 that "the statute's primary goal is ensuring
3 the claimant keeps as much of the back-due
4 award as possible."

5 And then later said -- quoted an
6 Eleventh Circuit case, *Kay versus Apfel*, in the
7 same brief in this Court, that "406(b) is
8 designed to protect a particularly vulnerable
9 class of claimants. Many claimants in Social
10 Security benefit cases are minors or
11 incompetent to manage their affairs, or
12 disadvantaged by lack of education or physical
13 or mental impairment."

14 So I think that this Court in looking
15 at what Congress intended needs to look at what
16 the Commission had said for years, because they
17 were the implementing body. They were the ones
18 who were reading these statutory changes, the
19 amendments as they came along, and they made it
20 consistent, always were consistently taking the
21 position that 25 percent of the past-due
22 benefits that had been accruing over the time
23 the case was in court or before the agency was
24 what would be Congress's intent.

25 Congress, the agency, and the courts

1 have knitted together a system with a
2 25 percent aggregate cap that has been working
3 since 1965. Petitioner and Respondents have
4 urged this Court to pull a thread on that
5 system and to begin to unravel it.

6 I would urge this Court not to do
7 that. The judgment of the Eleventh Circuit, we
8 ask, be affirmed.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Ortiz, you have a minute left.

12 REBUTTAL ARGUMENT OF DANIEL R. ORTIZ

13 ON BEHALF OF THE PETITIONER

14 MR. ORTIZ: Thank you, Mr. Chief
15 Justice.

16 Might I make quickly three points:

17 It's not the case that overpayment and
18 termination are the only situations where you
19 can get in a situation of having over
20 25 percent. You can also have those cases
21 under the petition fee process where the agency
22 sets a reasonable fee, there's no restriction
23 on that.

24 The timeline problem that my friend
25 mentions is really no problem at all because,

1 in *Gisbrecht*, this Court instructed the lower
2 court to take exactly that consideration into
3 account in setting reasonable fees under 406.

4 And, finally, in *Horenstein*, although
5 that was primarily a single tribunal case, the
6 Sixth Circuit en banc made clear that the
7 single tribunal rule and the aggregate cap rule
8 had to stand or fall together.

9 We ask this Court to reverse the
10 judgment of the Eleventh Circuit and remand for
11 further proceedings.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Ms. Weil, this Court appointed you to
15 brief and argue this case as an *amicus curiae*
16 in support of the judgment below. You have
17 ably discharged that responsibility, for which
18 we are grateful.

19 MS. WEIL: Thank you.

20 CHIEF JUSTICE ROBERTS: The case is
21 submitted.

22 (Whereupon, 12:05 p.m., the case was
23 submitted.)

24

25

Official - Subject to Final Review

\$	46:3 50:14 53:18,24 60:5,15	25 18:4,6,7,24 19:1,21 20:4,4,6	argue [2] 50:11 64:15
\$12,000 [1] 39:7	6	22:20 24:17 25:23 28:17 31:11,16,	argued [2] 33:18 52:2
\$12,500 [1] 39:7	63 [1] 2:15	24 32:1 33:1,17,21 34:11,13 35:2,	arguing [2] 47:13,14
\$1250 [1] 38:6	7	11 38:20,21 39:23 42:16,20,23 43:	argument [23] 1:14 2:2,5,9,13 3:4,
\$20 [1] 35:3	7 [1] 1:11	1 46:13,16,20 47:11,15,18,21 48:4,	7 10:14 16:18 18:12,13 24:20 25:
\$2500 [1] 38:6	75 [3] 27:11,23 42:5	13,16,19 49:6,13,14 50:20,21 54:	10 33:7 36:23 45:5,24 47:4 48:7
\$30 [1] 35:3	7a [1] 17:15	16 58:6,10 60:7,8,9 62:23,25 63:	49:17 50:4 52:17 63:12
\$35,000 [1] 29:18	8	21	arguments [1] 50:3
\$5,000 [3] 26:22 37:22 38:3	8(a) [1] 15:23	agency's [2] 43:8 49:2	around [1] 52:1
\$50,000 [2] 39:4,10	8a [1] 18:17	aggregate [22] 4:14,15,18 8:7 11:	artifact [1] 8:14
1	9	7 13:6 14:1,7 18:10 28:12 33:20	artificial [1] 36:16
100 [3] 28:9 35:13 58:8	90 [1] 39:11	34:18 43:9 46:5 50:6 52:1,15,19	aside [4] 5:18 8:21 18:25 19:3
11:06 [2] 1:15 3:2	A	54:10 60:10 63:2 64:7	Assistant [1] 1:20
12 [1] 29:14	a)(4) [13] 14:14,18,19 15:3 17:14,14,	agree [4] 5:9 31:1 58:11,24	assume [1] 41:11
12:05 [1] 64:22	23 18:14 20:8,17 21:20 54:24 56:	agreed [2] 31:22 34:11	assurance [1] 53:24
16 [4] 2:8 4:17 23:5 52:18	5	agreeing [1] 13:1	assuring [1] 30:18
17-773 [1] 3:4	a)(5) [1] 24:5	agreement [3] 31:10 32:1 56:6	Atlanta [1] 1:24
1965 [2] 34:22 63:3	a.m [2] 1:15 3:2	agreements [3] 31:16,20,25	attach [1] 42:15
1970 [1] 61:25	ability [1] 60:19	aid [1] 48:23	attaching [1] 7:12
1990 [2] 55:6,10	able [5] 44:11,17 53:15 56:14,15	ALITO [1] 27:4	attempting [1] 6:1
1993 [1] 52:6	ably [1] 64:17	ALJ [1] 47:2	attorney [32] 4:4 6:24 8:23,24 9:6,
2	above [4] 13:17 22:16,18 36:7	ALLEN [1] 1:3	11 10:19 14:2,8,11,13 16:4 17:2
2 [4] 4:17 21:3 23:4 52:18	above-entitled [1] 1:13	allow [3] 4:4 14:2 24:24	20:1,2 30:11 42:4 43:17 46:12,16
2018 [1] 1:11	absurd [1] 54:3	allowable [1] 52:11	47:23 48:19 49:5,5,6,11,14 55:18
25 [104] 5:13,17,19 6:16 8:3 11:6	abusive [1] 24:15	allowance [1] 61:15	56:25 58:23 61:8,10
12:13 13:3,21,24 14:15,21,23 15:	Access [2] 4:20 14:2	allowing [2] 19:4 53:23	attorney's [4] 5:20 34:6,25 53:19
9,13,17 17:6,18,25 18:3,8,10 19:1,	account [3] 39:14 42:13 64:3	allows [3] 28:22 40:13 42:20	attorneys [16] 6:1,17 13:7 21:10
4,5,22 21:8 22:13,16,19,23 25:18	accruing [7] 47:22 48:1 49:11,13,	almost [3] 21:11,12 54:2	22:12 25:1 26:25 30:25 31:5 35:8,
26:12,16,17 27:25 28:12,17 31:2,	15 58:13 62:22	already [3] 23:19 42:5 49:1	23 36:1 37:17 54:4 58:21 59:2
10,16,17,25 33:20 34:4,8,17,18,19,	accumulating [2] 38:24 39:1	although [3] 28:15 29:24 64:4	attorneys' [2] 55:25 59:18
21,23 35:17 36:7 37:5,11 38:21	accumulation [1] 39:4	amenable [1] 28:4	authority [8] 16:8,9 19:2 20:18 22:
41:11,13 42:2,3,8,22 43:2,6,9 44:	acknowledge [1] 54:11	amendments [6] 33:14,25 34:2	14 23:14,18 61:9
12,14,17,22 46:5,7,8,8 47:5,10 48:	Act [4] 4:21,23 28:4 60:17	50:7 56:6 62:19	authorization [2] 6:17 24:13
14,18,25 49:4 50:13 52:1 53:22	ACTING [1] 1:6	amicus [8] 1:25 2:11 21:10 24:25	authorized [7] 9:25 10:4 20:3 24:
54:15,21,22 55:2,4 56:3,13,19,23	actions [1] 54:4	30:24 31:24 33:8 64:15	7,10,12 43:1
57:5,5,10,10,24 58:20 60:8,10 61:	actually [21] 6:19,25 8:14,16 10:23	amicus's [1] 10:25	authorizes [1] 17:2
12,16 62:21 63:2,20	11:11 15:21 17:13 31:3,21 45:18	amount [19] 5:6,18 6:11,19,25 8:	authorizing [1] 19:21
3	46:4 47:13 49:18 50:15,18 51:3,	20 9:10,12 10:9 16:3,5 18:19,22	availability [1] 36:1
3 [1] 2:4	12 52:7 55:5 60:6	26:19 29:4 54:25 55:17 56:1 61:	available [3] 16:10 42:17 57:23
30 [1] 53:23	add [2] 27:9 39:5	12	award [15] 3:17 6:22,23,24 7:10 9:
33 [4] 2:12 35:7 53:17 60:5	addition [2] 16:5 18:21	amount's [1] 38:3	11,14 14:12,25 15:23 29:16 56:16,
4	additional [2] 42:3 43:6	amounts [6] 26:21,24 43:16 56:23,	22 58:21 62:4
40 [4] 6:22 13:17,19 53:23	address [2] 17:11 30:15	24 57:18	awarded [7] 42:4 44:21 48:20 56:
401(i) [1] 16:2	addresses [1] 20:24	AMY [3] 1:24 2:10 33:7	24 58:6,6,9
406 [4] 15:23 20:5 33:12 64:3	adds [1] 39:3	anomaly [1] 28:11	awards [4] 13:13 15:12 16:10 22:
406(a) [8] 3:18 4:10 5:21 6:24 15:1,	adequate [1] 30:18	another [5] 9:16 19:24 23:8 39:8	12
21 24:17 40:14	adequately [1] 11:22	47:10	B
406(a)(2)(C) [1] 4:15	Administration [1] 20:21	answer [4] 8:25 9:1,23 15:14	b)(1) [1] 18:16
406(b) [13] 3:12,15,24 4:11 5:20 9:8	administrative [3] 5:10 32:18 36:	ANTHONY [3] 1:20 2:6 16:18	b)(2) [1] 24:8
15:1,11 16:10 24:18 27:24 28:14	9	anticipated [1] 49:19	back [5] 18:19 24:2 46:22,23 56:2
62:7	admit [2] 37:1,6	Apfel [1] 62:6	back-due [1] 62:3
406(b)'s [2] 3:22 15:21	adopted [2] 33:17 51:3	appeals [3] 27:10 28:1 35:4	backed [1] 56:17
406(b)(1)(A) [1] 16:25	advise [3] 11:15,16,16	APPEARANCES [1] 1:17	background [1] 50:17
407 [3] 27:21 40:11,12	advocate [1] 60:11	applied [1] 5:17	backing [1] 55:16
41 [1] 13:16	advocating [1] 14:4	applies [4] 3:22 5:4 16:25 17:7	backtracked [1] 52:6
47 [1] 44:20	affairs [1] 62:11	apply [1] 5:10	baked [1] 20:25
5	affirmed [1] 63:8	appointed [1] 64:14	balance [3] 37:11 53:16 61:7
50 [25] 7:10 9:22,25 10:12 13:18,20	age [1] 60:20	approach [2] 14:3,11	balanced [1] 36:21
24:23 25:2,6 28:19 29:21 31:14,	agency [70] 3:16 4:25 5:5,15 7:1 8:	appropriate [2] 32:25 35:23	balances [1] 34:21
22 32:7,11,22 33:14 36:7 45:14	5,14,21 14:24 15:7,13 16:7 17:22,	approve [1] 25:24	banc [1] 64:6
		approved [1] 24:16	bank [1] 42:13
		approves [1] 17:21	bar [1] 37:16
		April [1] 33:19	Basically [1] 23:14
		areas [1] 31:4	

Official - Subject to Final Review

<p>basis ^[1] 51:5 begin ^[1] 63:5 beginning ^[1] 54:21 behalf ^[8] 1:19,21 2:4,7,15 3:8 16:19 63:13 belabor ^[1] 30:23 believe ^[7] 11:18 15:13,18 29:24 40:9 41:17 56:21 belongs ^[1] 7:13 below ^[7] 1:25 2:12 33:9 59:8,10,11 64:16 benefit ^[3] 29:16 56:1 62:10 benefits ^[87] 5:19 6:4,6 12:9,13 13:3 16:6 17:6,17 18:9,22 22:10,24,25 23:15 25:23 26:6,20,21,23 27:3,16,19 28:9,18,20 29:9 30:9 31:11 34:7 35:12,13,18,18 38:24 39:2 40:6,6,8,12,14,17,20 41:16,18,20,24 42:12,16,21 43:24 44:21 45:14 46:3,9 47:22 48:1,14 50:8,23,24 52:18 53:18 55:2,13,16 56:10,11,16 57:7,21,23 58:7,9,12,13 59:25 60:16,20,21,23,25 61:2,4,13,17 62:22 BERRYHILL ^[2] 1:6 3:5 besides ^[1] 39:9 best ^[3] 33:16,23 52:22 better ^[1] 15:14 between ^[1] 14:13 beyond ^[5] 6:18,19 8:20 24:9,11 bigger ^[1] 13:21 Bill ^[1] 7:23 bit ^[1] 14:18 blood ^[1] 12:23 Board ^[1] 51:22 body ^[1] 62:17 bono ^[1] 48:21 both ^[15] 4:16 5:20 25:4 26:10,15,16 31:11,16 32:14 33:1 45:10 49:3,7 50:13 51:18 bothers ^[1] 11:2 BREYER ^[18] 8:25 9:9,20 10:1,3,8,14 37:18 38:8,16 39:3,6,15,18 40:15,18,21 41:6 Breyer's ^[1] 40:2 brief ^[17] 10:25 15:24 17:15 20:11 21:10 24:21 25:1 31:25 47:20 49:9 52:5,10 57:15 60:13 61:23 62:7 64:15 briefing ^[1] 6:3 briefs ^[1] 30:24 bring ^[1] 10:11</p>	<p>35:5 43:10 54:16,22 63:2 64:7 capped ^[4] 15:8,9,11 19:4 capping ^[1] 34:20 caps ^[2] 26:12 31:10 care ^[1] 49:2 Case ^[49] 3:4,11,19 5:23,23 6:16,21 9:2,16 11:19,24,25 12:25 16:24 17:8 20:2 24:3 25:20,22 26:10,14,18,20 28:16 29:5,11,12 30:17 31:21 32:10 36:2,6 44:14 46:13,14,18,24 47:1,21 52:9 57:2 61:16 62:6,23 63:17 64:5,15,20,22 cases ^[39] 4:16 6:23 7:14,15,18 8:18,19 13:8,9,12,20 20:16 21:3 25:16,18,25 26:1 28:19 29:24 30:5 35:9,21 37:4,13 39:25 40:5 42:6 44:19 46:21 52:2 57:4,22,25 58:16 59:1,1,7 62:10 63:20 category ^[1] 20:16 centered ^[1] 52:1 century ^[2] 33:19 60:15 certain ^[1] 38:13 certainly ^[1] 52:25 certified ^[2] 42:15,16 certify ^[4] 16:3 17:16 18:19,24 changes ^[1] 62:18 charge ^[1] 9:18 Charlottesville ^[1] 1:18 chart ^[1] 29:14 check ^[2] 9:16 32:18 checks ^[1] 36:8 CHIEF ^[14] 3:3,9 16:14,17,21 33:3,6,10 44:1 61:20 63:9,14 64:12,20 chunk ^[1] 29:21 Circuit ^[5] 44:20 62:6 63:7 64:6,10 Circuit's ^[1] 51:6 circuits ^[1] 42:7 circumstance ^[2] 11:5 22:20 circumstances ^[4] 8:22 30:17 32:21 57:17 cite ^[1] 52:9 claim ^[3] 43:5 46:2 55:15 claimant ^[18] 4:3 6:20 8:19,23,24 12:18 14:13 17:1 23:5 30:12 31:21 45:10 53:17 58:22 61:3,6,11 62:3 claimant's ^[3] 29:7,20,22 claimants ^[14] 8:1,10 10:20 24:23 30:19 34:13 35:10,12 40:11 54:5 58:5 60:22 62:9,9 claims ^[4] 4:16,16,25 5:1 clarity ^[1] 33:12 class ^[1] 62:9 clear ^[5] 4:23 14:21 24:4 52:24 64:6 clearly ^[1] 17:4 client ^[26] 9:10,13,13 10:10 11:5,11 14:10 21:2,5,6,15,23 37:21,22,23,25 38:4 39:9 40:23,24 41:2,4 42:4 43:18 44:17,18 client's ^[1] 11:4 clients ^[7] 6:2 7:13 11:22 20:4,20 43:22,22 collect ^[8] 6:1,7,7 9:2 20:22 21:2</p>	<p>24:14 51:18 collected ^[1] 35:1 collecting ^[1] 24:6 collection ^[3] 6:13 24:9,15 come ^[5] 14:16 38:18 45:7 47:12 57:22 comes ^[5] 19:9 20:17 29:19 30:25 56:17 coming ^[4] 28:7 29:6,8 59:25 Commission ^[2] 26:11 62:16 COMMISSIONER ^[8] 1:7 4:11 15:22,25 17:21 24:7 45:23 51:23 commonsensical ^[1] 4:8 compensation ^[1] 26:24 complaint ^[1] 27:5 conceivable ^[1] 36:5 concept ^[1] 40:8 concern ^[1] 20:25 concerned ^[3] 27:15 34:24 35:6 concurrence ^[1] 13:15 conference ^[2] 55:6,11 confirm ^[1] 3:21 confirms ^[1] 4:8 conflict ^[2] 11:16 12:4 Congress ^[38] 4:13,19 6:11 8:6,15,16 18:7 19:19,20 20:2,9 21:7 22:5 24:4,12 27:12,15,16 28:14 30:15 32:24 35:20 36:6 37:7,9 49:24 51:20,20 52:14 53:2 54:3,6 57:14 58:3 60:2 61:7 62:15,25 Congress's ^[4] 8:17 34:22 61:18 62:24 consent ^[1] 11:14 consented ^[1] 12:2 consequence ^[1] 32:23 consequences ^[1] 13:1 consider ^[1] 47:2 consideration ^[1] 64:2 considered ^[1] 42:19 consistent ^[2] 48:6 62:20 consistently ^[1] 62:20 constantly ^[1] 52:2 contemplate ^[1] 22:6 contemplated ^[4] 24:4,12 57:15,16 contested ^[1] 5:16 context ^[2] 23:5 32:25 contexts ^[1] 23:20 contingency ^[1] 30:6 contrary ^[2] 11:4 61:17 contrast ^[1] 4:10 controls ^[1] 47:18 correct ^[12] 6:15 15:5 21:16,18 29:9 41:16 43:13,20 45:13 56:24 57:1,19 couldn't ^[1] 35:20 Council ^[1] 35:4 counsel ^[10] 11:17 16:15 22:1 33:1,4 35:14 40:1 61:21 63:10 64:13 countervailing ^[1] 30:14 course ^[3] 8:1 33:14 58:12 COURT ^[82] 1:1,14 3:10,14,23 4:1,2,4,4,12,24 5:1,4,9 11:14 12:11 13:10 16:22 17:2,5,8,9 18:20 19:3</p>	<p>24:10,17 25:23 26:11 27:10,25 28:7,21 31:17 32:2 33:2,11,21 34:14 35:1,5,9 36:11 39:8,24 42:15 44:19 45:20 46:1,9,15,20,22,23,25 47:6,15,17,20,22 48:4,17,24 49:5,11,16 51:1 59:4,13,15,16,17 61:9,10 62:7,14,23 63:4,6 64:1,2,9,14 Court's ^[1] 61:15 Court-appointed ^[3] 1:24 2:11 33:8 court-approved ^[1] 18:20 courts ^[6] 24:24 28:19,22 33:18 52:3 62:25 create ^[3] 4:14,19 35:24 created ^[1] 34:15 creates ^[1] 4:15 creature ^[1] 8:13 credit ^[1] 47:23 criminal ^[4] 21:24 24:5,8,10 criteria ^[1] 22:4 criterion ^[1] 28:22 CULBERTSON ^[3] 1:3 3:4 31:20 cumulative ^[1] 37:5 curiae ^[4] 1:25 2:11 33:8 64:15</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C. ^[2] 1:10,21 danger ^[4] 11:6 22:9,9 44:5 DANIEL ^[5] 1:18 2:3,14 3:7 63:12 date ^[1] 26:2 Dawson ^[2] 60:13 61:24 Deduction ^[1] 61:3 defined ^[1] 4:24 definitely ^[3] 40:10 46:8 59:7 definition ^[2] 8:10 28:25 delegation ^[1] 51:21 denied ^[1] 58:11 Department ^[1] 1:21 depend ^[3] 29:4 30:16 60:23 depending ^[1] 29:25 deprived ^[1] 60:18 describing ^[1] 6:8 designed ^[2] 25:5 62:8 determine ^[8] 55:13,16,24 56:9 57:24 58:3 60:1,2 determined ^[4] 32:16 55:18 60:8,9 devised ^[1] 34:11 dictionary ^[2] 4:6 28:4 different ^[8] 11:8 18:11,13 31:15 32:11 48:8,9 52:10 dire ^[1] 61:3 direct ^[4] 20:7,13,18 21:20 directly ^[3] 6:2,20 21:15 directs ^[1] 20:5 disability ^[15] 6:4,6 21:10 24:23 25:1 26:2 27:5 30:25 54:4,5 55:15,23 56:10,16 60:20 disabled ^[7] 26:7 27:17,18 30:24 34:7 37:21 60:21 disadvantaged ^[1] 62:12 disagree ^[1] 40:8 discharged ^[1] 64:17 discrete ^[1] 48:10</p>
--	--	---	---

Official - Subject to Final Review

<p>discretely ^[1] 4:25 discretionary ^[1] 16:8 discuss ^[1] 45:9 discussed ^[1] 3:14 discussing ^[2] 25:20 55:12 discussion ^[1] 55:10 disincentive ^[1] 37:4 dispute ^[1] 11:23 disputes ^[1] 11:21 district ^[7] 11:14 24:24 26:11 36:11 46:22,23,25 divided ^[1] 14:13 doctrine ^[1] 4:9 documents ^[1] 43:18 doing ^[4] 20:9,23 55:19 60:3 dollars ^[2] 38:1 40:25 done ^[12] 3:13,16,22,25 4:11,12 8:15 11:17,19 17:7 36:19 51:9 down ^[1] 15:25 draw ^[1] 37:1</p>	<p>exact ^[1] 53:6 Exactly ^[5] 31:13 57:3,8 58:16 64:2 example ^[8] 37:19,19 38:10,10,16,17 39:20 46:24 example's ^[1] 39:22 exceed ^[7] 17:18,25 18:6,8 28:17,18 55:2 exceeds ^[1] 6:24 exception ^[1] 7:22 exceptions ^[1] 7:18 excess ^[3] 24:6 41:24 58:22 excessive ^[3] 30:16,18 53:17 exclusion ^[3] 47:9,12,14 exhausted ^[1] 12:10 exist ^[1] 19:20 exists ^[1] 31:10 expanded ^[1] 13:11 expect ^[1] 8:9 expended ^[1] 13:11 explain ^[1] 60:14 explained ^[1] 12:6 explicitly ^[1] 3:25 expressio ^[1] 4:9 extend ^[1] 20:6 extra ^[2] 14:7 44:17 extraordinary ^[1] 35:21 extreme ^[2] 7:7 25:2 eye ^[1] 34:5</p>	<p>financial ^[2] 61:3,6 find ^[3] 10:5 23:22 42:9 First ^[14] 3:24 6:14 17:11,14 18:2 23:17 33:24 34:23 39:16 43:24 46:17 51:21 55:14,16 fits ^[1] 31:3 five ^[2] 28:6,10 five-month ^[1] 26:4 fix ^[1] 61:9 flip-flopped ^[1] 52:8 flip-flopping ^[1] 52:7 focused ^[1] 19:25 foremost ^[1] 39:16 formed ^[1] 51:4 forth ^[2] 20:11 54:14 fortunate ^[1] 58:19 forum ^[3] 51:7,10,10 found ^[2] 26:7 60:13 four ^[4] 28:6 38:2,18,23 framework ^[5] 34:11,15 43:9 51:24,25 friend ^[3] 15:13 44:2 63:24 fully ^[1] 17:8 fund ^[1] 6:8 further ^[2] 36:12 64:11 future ^[14] 22:10 23:1,6 27:19 35:18 37:24 40:5,7,13,16 41:1,16,18 42:21</p>	<p>great ^[1] 24:22 greater ^[3] 9:12 10:9 25:17 greatly ^[1] 11:2 ground ^[1] 53:6 guess ^[3] 8:4 27:14 47:3</p>
E		G	
<p>e(2) ^[3] 20:9,11 22:5 e.g ^[1] 60:19 EAJA ^[15] 6:21,23 7:3,10 9:2,7,11,14 10:8 12:16 13:13 14:7,12 37:16 58:21 earlier ^[1] 11:9 economic ^[1] 7:15 education ^[1] 62:12 effectively ^[4] 9:7 12:17 14:12 55:22 efforts ^[1] 6:13 either ^[4] 23:4 24:16 49:5 57:21 element ^[1] 30:20 Eleventh ^[3] 62:6 63:7 64:10 eligibility ^[2] 20:15 26:5 eligible ^[4] 20:13,15 21:19 26:5 emphasizes ^[1] 18:6 en ^[1] 64:6 enacted ^[1] 33:13 enacting ^[2] 19:19 34:23 enactment ^[1] 34:2 end ^[2] 41:4 49:5 ended ^[1] 55:20 enough ^[1] 53:19 ensure ^[1] 32:13 ensuring ^[1] 62:2 entire ^[1] 45:12 entirely ^[1] 25:8 entitled ^[2] 11:24 26:16 Equal ^[3] 4:20 6:23 55:1 erroneously ^[1] 22:21 escape ^[2] 9:21,21 ESQ ^[6] 1:18,24 2:3,6,10,14 essentially ^[1] 10:21 establish ^[1] 51:23 established ^[2] 14:15 15:3 even ^[6] 14:6 26:6 30:9 35:17 46:22 56:15 event ^[1] 23:2 eventually ^[1] 37:25 evidence ^[3] 26:3 46:19,24 ex-ante ^[1] 13:8</p>	<p style="text-align: center;">F</p> <p>fact ^[12] 27:20 34:4 39:14 40:24 50:7 51:18,19 53:25 55:12,22 57:11 60:12 failed ^[1] 22:21 failure ^[1] 23:12 fair ^[2] 34:6 40:4 fall ^[1] 64:8 falls ^[1] 29:13 familial ^[1] 22:6 family ^[1] 22:2 favor ^[3] 33:18 52:3 60:11 favorable ^[3] 4:2 51:1 61:11 feature ^[1] 34:16 fee ^[59] 4:5 7:24 9:4,7,17 10:8 11:21 14:23,25 16:4 17:3,17,18,20,24,25 18:4,6,7,19,20 19:3 20:6 24:7,9 25:2,24 31:6,9,16,19,22,25 32:1,7,20 40:23 47:15,17 48:16,20,24 49:2,6 50:20,22,23 51:8,11 55:1,3,18 56:6,25 61:9,12,15 63:21,22 feel ^[1] 35:16 feeling ^[1] 8:17 fees ^[50] 5:20 6:1,18 12:16,21 13:10 17:4,7 19:1 20:1,22 21:2 24:16 26:16,17 27:11 28:17 30:16 32:12,16 33:21 34:6,12,19,21,25 35:1,2,5,7 37:16 38:21 42:8 46:17 47:24 48:9 49:8,10,12,15 51:18 52:11 53:12,14,17,19 55:25 59:18,21 64:3 fiction ^[2] 47:25,25 fighting ^[1] 13:24 finally ^[1] 64:4</p>	<p>garnish ^[2] 6:4,6 garnishing ^[5] 7:12 22:12,15,16 23:14 garnishment ^[2] 22:10 43:15 Gates ^[2] 7:23 10:16 gave ^[1] 51:21 General ^[2] 1:20 12:25 generally ^[1] 30:6 Georgia ^[1] 1:24 gets ^[4] 9:3,11 37:22,23 getting ^[9] 13:10 24:2 25:5 37:10 40:2 41:4 49:6,12 57:20 GINSBURG ^[7] 5:2,14 6:8 8:2 12:7,24 15:4 Gisbrecht ^[5] 4:23 13:14 28:21 62:1 64:1 give ^[1] 38:5 gives ^[2] 16:8 23:13 giving ^[1] 61:8 goal ^[1] 62:2 GORSUCH ^[13] 35:14 36:4,22,25 37:6 40:1 58:15,24 59:5,8,10,12,22 got ^[7] 26:19 28:20 38:4 39:20 40:24 41:2 55:14 gotten ^[1] 11:7 govern ^[1] 23:24 governing ^[1] 48:4 government ^[7] 9:3 22:11 23:6,18,21 59:20 61:24 government's ^[5] 15:24 23:18 26:13 27:23 57:14 governs ^[1] 17:4 grateful ^[1] 64:18</p>	<p style="text-align: center;">H</p> <p>half ^[8] 18:17 33:19 35:7 37:25 38:4 39:10 60:15 61:4 halfway ^[1] 15:25 handles ^[1] 4:24 happen ^[11] 32:8,12,13,16 41:4 44:3,8 45:3 46:15 53:10 60:7 happening ^[1] 12:2 happens ^[9] 10:16 12:21 21:11,12 25:3 39:25 42:20 45:2 47:18 hard ^[2] 35:22 37:20 hardest ^[3] 58:16 59:1,7 hardship ^[1] 61:6 healthy ^[1] 37:15 hear ^[1] 3:3 help ^[2] 22:12 37:16 helps ^[1] 56:21 high ^[2] 30:11 60:6 history ^[3] 3:21 55:8,9 home ^[1] 48:15 Honor ^[18] 4:13 6:9,14 7:15,22 9:19 10:13,22 11:10 12:1,15 13:7,14,22 14:19 15:10 39:14 48:11 Honors ^[9] 3:19 4:22 16:11,12 45:17 46:4 52:4 60:1,12 Horenstein ^[2] 52:9 64:4 hounded ^[3] 6:13 40:9,11 hours ^[2] 37:21 38:5 house ^[1] 42:14 however ^[2] 47:10 52:5</p>
E		I	
			<p>idea ^[1] 5:25 illustrate ^[1] 49:9 illustration ^[1] 23:8 impairment ^[1] 62:13 implementing ^[1] 62:17 implications ^[1] 13:6 implicit ^[1] 47:9 import ^[1] 26:8 important ^[4] 21:6 27:1 30:20 58:1 impose ^[1] 61:5 imposed ^[1] 43:12 imposes ^[1] 33:20 impulse ^[1] 35:16 impute ^[1] 8:16 in-depth ^[1] 12:5 incentive ^[3] 31:3 35:15 36:14 incentives ^[1] 32:24 incentivize ^[3] 31:14 32:25 35:22 include ^[1] 3:15 including ^[1] 28:1 incompatible ^[1] 18:9 incompetent ^[1] 62:11 incorporated ^[1] 51:17 increase ^[2] 12:17,17 indeed ^[1] 45:1</p>

Official - Subject to Final Review

<p>indicates ^[1] 49:25 individuals ^[1] 23:22 informed ^[1] 12:1 inordinate ^[1] 34:25 inordinately ^[2] 53:14 60:6 inquiries ^[1] 48:10 inquiry ^[2] 36:9,10 instance ^[3] 23:3 25:18 26:3 instead ^[1] 59:24 instructed ^[1] 64:1 intend ^[2] 60:2,7 intended ^[5] 21:7 28:13 58:3 60:17 62:15 intent ^[2] 34:22 62:24 interests ^[4] 11:3,4 30:14 53:16 interpretation ^[5] 19:10,13 33:16,23 34:9 interpreted ^[1] 18:24 interpreting ^[1] 15:16 involves ^[1] 20:2 involving ^[1] 4:16 irrational ^[2] 36:14,18 isn't ^[8] 10:17 36:4,16 38:18 40:4 58:14,14,15 issue ^[1] 31:18 itself ^[4] 3:15 14:16 18:9 19:3</p>	<p>keep ^[1] 58:1 keeps ^[1] 62:3 kept ^[1] 54:15 key ^[1] 53:21 kind ^[4] 17:10 29:14 47:9 50:5 knitted ^[1] 63:1 knows ^[1] 41:3</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack ^[1] 62:12 language ^[10] 15:21 18:5 45:25 47:5 52:4 53:5 54:19,24,25 55:6 large ^[2] 18:4 53:14 larger ^[2] 40:6 61:16 late ^[1] 26:3 later ^[2] 46:15 62:5 latter ^[1] 18:17 Laughter ^[1] 52:23 lawyer ^[10] 9:3,22,24 10:3 11:8 12:20 38:1 40:23 41:13 43:19 lawyers ^[4] 8:9 26:14 44:3 58:17 least ^[4] 11:14 18:4 36:5 58:18 leave ^[1] 12:20 leeway ^[2] 40:10,11 left ^[1] 63:11 legal ^[3] 47:25 48:23 58:17 legislative ^[2] 55:8,9 legislatively ^[1] 43:12 lengths ^[1] 24:22 less ^[2] 9:10 13:7 lesser ^[1] 9:7 level ^[2] 33:1 36:10 levels ^[2] 32:11,14 light ^[1] 28:3 likely ^[1] 58:18 likewise ^[2] 4:19 17:6 limit ^[2] 5:22 24:13 limiting ^[1] 61:11 literal ^[3] 50:11 51:3,12 literally ^[1] 50:15 litigation ^[5] 5:16 11:3,9 29:4 54:4 little ^[3] 14:18 22:9 34:17 live ^[1] 39:11 livelihood ^[2] 60:18,24 lives ^[1] 37:24 long ^[2] 37:20,23 look ^[14] 9:1 10:3 17:19 21:24 24:5 31:19 34:3,4 38:2,4,14 49:23 51:9 62:15 looked ^[1] 46:25 looking ^[2] 58:2 62:14 lose ^[3] 39:24 48:16 50:20 loss ^[1] 12:21 lost ^[4] 46:14 59:8,10,11 lot ^[4] 28:20 30:4 35:17 59:19 low ^[2] 30:7,10 lower ^[1] 64:1 lumps ^[1] 12:19</p>	<p>maintained ^[1] 60:15 majority ^[1] 60:22 manage ^[1] 62:11 mandated ^[2] 19:11,17 mandates ^[1] 17:23 mandatory ^[3] 18:1,3,25 manner ^[1] 34:7 many ^[8] 8:19 13:9,12 28:19 29:24 30:8 60:25 62:9 matter ^[4] 1:13 8:13 36:25 37:2 maximum ^[12] 14:23,25 17:17,18,20,24 24:7 52:11 55:1,3 60:9 61:12 mean ^[8] 10:4 19:16 35:24 39:20 44:7 54:1,17 57:20 meaning ^[3] 3:11 4:6 11:4 means ^[3] 21:4 60:17,25 meant ^[1] 45:3 mechanism ^[1] 3:17 meet ^[1] 20:14 members ^[1] 22:2 mental ^[1] 62:13 mentioned ^[3] 4:7 8:18 13:15 mentions ^[1] 63:25 merits ^[1] 15:24 middle ^[1] 29:13 might ^[14] 19:20 35:23 36:6 37:20 42:12,13 46:14 48:19,24 49:4 54:12 58:18 59:19 63:16 million ^[4] 38:1,5 39:10 40:25 mind ^[3] 10:6 38:10 58:2 minutes ^[1] 62:10 minute ^[1] 63:11 misconception ^[1] 6:15 misreading ^[1] 14:17 missed ^[1] 22:13 missing ^[1] 54:10 model ^[1] 33:12 money ^[18] 6:25 7:3 8:2,11 9:2,3 10:11 12:9,19 14:7 19:3 21:15,23 23:7,19,21 38:25 44:24 money's ^[1] 29:6 months ^[3] 38:2,19,23 most ^[14] 7:14,15,18,25 8:18 23:20 33:24 34:16 40:25 46:21 58:17 59:2 60:16,25 moves ^[1] 11:23 Ms ^[6] 12:1 33:6,10 36:3,18,24 37:2,9 38:7,14,17 39:5,13,17,22 40:7,16,19 41:2,7,14,17 42:1 43:3,8,13,21 44:10,25 45:6,9,21,24 47:7,13 48:11 50:2 52:21,24 53:4,9 54:6,8,12,20 55:5 56:20 57:1,6,12,19 58:19 59:3,6,9,11,14,24 61:23 64:14,19 much ^[11] 8:1,11 11:24 12:6 17:17,24 18:5 47:10 55:1 57:14 62:3 multiple ^[3] 28:2,7 34:3 must ^[2] 18:3 30:5</p>	<p>need ^[7] 31:14 36:7 39:15,15 53:15 58:17 61:3 needed ^[1] 54:13 needing ^[1] 55:21 needs ^[2] 61:8 62:15 never ^[8] 20:17 21:11,12 25:3 32:8 37:3 50:18 52:8 new ^[3] 26:3 56:5,6 next ^[1] 3:4 Ninth ^[2] 42:6 44:20 nobody ^[1] 51:11 nobody's ^[1] 36:1 non-aggregate ^[1] 14:3 non-attorney ^[2] 20:12 21:18 non-attorneys ^[2] 20:3,8 normal ^[1] 26:18 normally ^[2] 28:15,18 notable ^[1] 34:16 nothing ^[1] 58:14 notified ^[1] 11:11 notwithstanding ^[1] 16:1 November ^[1] 1:11 null ^[1] 10:15 number ^[6] 40:5 42:18 46:16,21 50:3,4</p>
<p style="text-align: center;">J</p> <hr/> <p>judge ^[5] 9:17 10:9 11:15 46:25 47:1 judgment ^[11] 1:25 2:12 4:2 33:9 41:11 51:1 59:23 61:10 63:7 64:10,16 judgment-proof ^[2] 8:20 10:21 judicial ^[2] 28:13 32:18 Justice ^[137] 1:21 3:3,9 4:21 5:2,14,24 6:8,10 7:2,6,9,17,20,25 8:2,9,12,25 9:9,20 10:1,3,8,14 11:1,13,20 12:3,7,24 13:12,19,23 14:5,14,20 15:2,4,8,15 16:14,17,21 17:12 18:11 19:6,8,15 20:24 21:9,14,21 22:1,8,22 23:10 24:19 25:9,13 26:8,9 27:4,7 28:24 29:2,6,10,17,19 30:2,10,22 31:7,13 32:4 33:3,6,10 35:14 36:4,22,25 37:6,18 38:8,16 39:3,6,15,18 40:1,2,15,18,21 41:6,9,15,21 42:24 43:4,11,14 44:1,25 45:7,19,22 47:3,8 48:2 49:20 52:14 53:1,5 54:1,7,9,18,23 56:20 57:3,8,13 58:15,24 59:5,8,10,12,22 61:20 63:9,15 64:12,20 justified ^[1] 38:11</p>	<p style="text-align: center;">K</p> <hr/> <p>KAGAN ^[11] 26:8 27:7 32:4 44:25 45:7 47:3,8 48:2 49:20 54:18,23 Kagan's ^[1] 29:2 KAVANAUGH ^[33] 7:25 8:12 14:14,20 15:2,8,15 18:11 19:6,8,15 21:9,14,21 24:19 25:9,13 28:24 29:6,10,17,19 30:2,10,22 31:7,13 52:14 53:1,5 54:1,7,9 Kavanaugh's ^[2] 17:12 26:9 Kay ^[1] 62:6</p>	<p style="text-align: center;">M</p> <hr/> <p>made ^[5] 19:24 51:4 55:21 62:19 64:6 magistrate ^[1] 47:1 main ^[2] 11:24 18:18</p>	<p style="text-align: center;">O</p> <hr/> <p>obligation ^[2] 18:25 19:2 obviously ^[2] 24:20 44:16 odd ^[1] 36:6 offset ^[1] 23:6 offsets ^[1] 4:20 often ^[5] 8:10,11 11:21 22:1 61:1 Okay ^[6] 9:9,13,20 36:22 38:8 41:10 old ^[1] 60:19 once ^[1] 11:23 one ^[23] 16:23,23 23:17 25:5 27:15,18 30:15 32:2,6 33:17 34:8,10,16,19 42:11 46:16 49:5 50:3,7 51:13,19 52:15 53:22 onerous ^[1] 24:1 ones ^[1] 62:17 ongoing ^[1] 27:19 only ^[42] 3:13,14,22,25 4:12 5:10 11:15 12:1 15:3,5,6 16:23 17:5,7 19:4 20:1 21:7,22 26:22,23 27:2,15 37:18,18 38:3 40:12,13 43:1,23 46:6 48:24 49:4,17 51:14 56:13,14,18 57:16,20,21 59:9 63:18 onset ^[1] 26:2 opening ^[1] 15:24 operation ^[1] 19:22 operative ^[1] 16:23 opposite ^[1] 28:5 option ^[1] 50:25 oral ^[7] 1:14 2:2,5,9 3:7 16:18 33:7 order ^[6] 32:13 34:1,1 35:22,23 47:14 originally ^[4] 35:11 46:14 55:23 58:5 ORTIZ ^[41] 1:18 2:3,14 3:6,7,9 5:14 6:9,14 7:5,8,14,19,21 8:12 9:6,19,24 10:2,7,13,18 11:10,18,25 12:12</p>
Sheet 4	Heritage Reporting Corporation		indicates - ORTIZ

Official - Subject to Final Review

<p>5,15 13:5,14,22 14:1,6,18,22 15:6,10,18 16:16 63:11,12,14 other ^[12] 9:12 12:14 26:1 30:18 36:20 40:22 42:9 44:2 50:25 51:10,13 57:9 otherwise ^[1] 6:7 ought ^[1] 59:20 out ^[31] 9:4,15 12:9 13:3 16:5 17:16 18:21 19:5 22:13 29:7,8,19,21,22 31:10 37:13 38:18 41:12 42:3 50:23 53:11,18 55:17 56:2,10,17 57:24 58:7,11 59:25 60:4 over ^[16] 6:7,22 33:13,14 38:25 39:1 42:8 48:15 49:11 50:22 52:8 56:22 57:10 58:12 62:22 63:19 overall ^[4] 15:12,12 16:9 61:16 overpaid ^[1] 23:21 overpayment ^[7] 22:24 23:25 25:19,22 57:1,25 63:17 overpayments ^[1] 23:4 overregulate ^[2] 35:24,25</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m ^[1] 64:22 PAGE ^[5] 2:2 15:23 17:15 18:17 29:14 paid ^[21] 6:5 8:5 18:1 23:19 35:8 41:12 42:2 43:20,25 44:11 48:16 50:22,23 51:8 53:18,20,22 56:1,15,18 59:17 paragraph ^[1] 18:18 part ^[5] 19:13 42:25 52:16 55:9 60:24 participate ^[1] 58:18 particularly ^[3] 23:23 27:18 62:8 party's ^[1] 29:22 passive ^[1] 38:25 past ^[3] 38:3 40:6 57:22 past-due ^[51] 5:18 16:6 17:6,17 18:9,22 22:23,25 25:22 26:19,21,22 27:2,16 28:9,17 29:9,16 30:8 31:11 35:13,17 40:12,19 41:19,23 42:12,16 43:16 44:20 46:3,7,9 47:22 48:14 55:2,13,16 56:1,10,23,24 57:7,17,23 58:13 59:25 61:1,13,17 62:21 pay ^[6] 5:17 9:13 12:18 19:5 44:18 56:12 paying ^[5] 11:6 53:19 55:23 59:18,20 payment ^[13] 5:20 7:24 16:4 17:16 20:6,7,14,18 21:20 25:24 34:12 54:25 56:2 payments ^[1] 23:7 pending ^[1] 47:21 people ^[6] 7:11 10:21 22:2 36:15 37:12 59:19 percent ^[132] 5:13,17,19 6:16,22 7:10 8:3 9:22,25 10:12 11:6 12:13 13:3,16,17,18,20,21,24 14:15,21,23 15:9,13,17 17:6,18,25 18:3,8,10 19:1,4,5,22 21:8 22:13,16,19,23 24:23 25:2,6,18 26:12,16,17 27:11,23,25 28:9,12,17,19 29:21</p>	<p>31:2,10,14,22,25 32:7,11,22 33:20 34:4,8,17,18,19,21,23 35:7,13 36:7 37:5,11 38:21 41:11,13 42:2,3,5,8,22 43:2,6,9 44:12,14,20,22 45:14 46:3,5,7,8 47:5,10 48:14,18,25 49:4 50:14 52:1 53:18,22,24 54:15,21,22 55:2,4 56:3,13,19,23 57:5,5,10,10,24 58:8,20 60:5,5,8,10 61:12,16 62:21 63:2,20 percent's ^[1] 35:17 percentage ^[1] 6:5 percents ^[1] 50:13 perhaps ^[4] 9:14 15:14 28:8 59:2 period ^[1] 26:4 permanently ^[1] 27:18 permissive ^[4] 18:23 19:1,2,13 permit ^[2] 22:15,15 permits ^[1] 22:11 person ^[2] 27:17 55:20 persons ^[1] 60:18 petition ^[1] 63:21 Petitioner ^[8] 1:4,19 2:4,15 3:8 45:10 63:3,13 phrase ^[1] 52:15 physical ^[1] 62:12 picture ^[2] 9:15 12:16 piecemeal ^[2] 33:13 53:11 place ^[3] 43:25 49:22 52:15 plain ^[4] 50:3,10,11 61:14 plaintiff's ^[2] 5:7,12 plausible ^[2] 33:24 34:9 play ^[1] 20:17 please ^[4] 3:10 16:22 33:11 38:5 pocket ^[3] 29:7,20,22 point ^[16] 11:8 12:20 15:20 19:17,24 21:6 24:21 27:22 31:2 35:15 43:15 44:7 45:1 49:23 54:2 59:15 pointing ^[1] 45:25 points ^[2] 27:15 63:16 police ^[1] 28:23 policy ^[4] 25:12,16 37:1,2 pool ^[16] 8:4,8,13 13:11 14:15 15:3,3,5,6,9,10,11,16 16:9 50:8 56:1 poor ^[3] 21:5 23:11 55:22 position ^[9] 5:15 13:2 26:13 35:19 43:23 45:13 50:5 60:14 62:21 possibility ^[2] 7:7 27:11 possible ^[4] 10:2,7 54:12 62:4 possibly ^[1] 27:12 pot ^[6] 12:18 13:21 17:12 18:3 21:8 41:23 potential ^[2] 11:16 12:4 potentially ^[1] 41:23 practical ^[3] 13:1,5 41:10 practicalities ^[1] 17:11 Practically ^[2] 12:7,8 practice ^[2] 10:24 25:3 premise ^[2] 40:3 58:25 prerequisites ^[1] 20:12 present ^[1] 46:13 presented ^[5] 24:3 44:19 46:19,20 52:4 presenting ^[1] 46:18 presuming ^[1] 43:17</p>	<p>pretty ^[1] 53:12 prevail ^[1] 30:9 previously ^[1] 4:7 primarily ^[1] 64:5 primary ^[2] 33:22 62:2 prior ^[1] 17:19 pro ^[2] 48:21,22 probability ^[1] 56:22 probably ^[2] 38:17,22 problem ^[4] 53:14 54:11 63:24,25 proceeding ^[2] 26:7 27:10 proceedings ^[13] 26:10 27:25 28:6,10,13 32:1,3,11 48:4,5,8,9 64:11 process ^[2] 56:7 63:21 prohibiting ^[1] 24:9 prohibition ^[3] 24:6,8,11 prohibitions ^[1] 21:25 prong ^[1] 24:25 protect ^[3] 34:7 37:17 62:8 protected ^[2] 27:20,21 provide ^[2] 20:18 36:14 provided ^[1] 60:16 provides ^[1] 46:6 providing ^[1] 32:23 provision ^[7] 16:24,25 17:4,23 18:16 49:24,24 provisions ^[7] 17:14,19 19:19 20:6,7 23:24 33:17 pull ^[1] 63:4 purpose ^[3] 34:5 44:12 61:5 purposes ^[1] 3:20 pursuing ^[1] 10:20 put ^[8] 36:8 42:13,14 47:19 54:14 56:5,7 60:4 puts ^[1] 8:3 putting ^[1] 54:15 Pyrrhic ^[1] 44:23</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualms ^[1] 32:7 question ^[10] 5:3,25 11:1 17:12 24:3 26:9 27:23 29:2 40:3 49:7 questioned ^[1] 23:17 questions ^[1] 17:10 quickly ^[1] 63:16 quite ^[2] 35:17 47:4 quoted ^[1] 62:5</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raised ^[1] 27:22 rational ^[2] 35:20 36:5 read ^[9] 28:3 34:1 50:15,18,19 51:15,16 54:16 55:8 reading ^[12] 28:4,5,12 33:24 50:6,10,12 51:3,12 61:21,23 62:18 real ^[2] 44:5,9 really ^[10] 23:11 25:3 38:19 45:24 47:2 48:6 50:2 51:19 55:21 63:25 reason ^[4] 22:21 49:14 51:14 55:19 reasonable ^[12] 4:5 9:17 17:3 25:24 32:17,20 34:9 37:7 56:25 59:23 63:22 64:3 reasonableness ^[4] 24:25 28:22</p>	<p>36:9,10 reasons ^[2] 28:2 33:22 REBUTTAL ^[3] 2:13 16:13 63:12 receive ^[1] 56:25 received ^[2] 7:4 42:5 receiving ^[1] 49:15 recipient ^[1] 23:11 recipients ^[2] 6:12 44:4 recognize ^[1] 27:1 recognized ^[1] 28:21 recoup ^[1] 23:7 recoupment ^[1] 23:25 recover ^[2] 6:18 23:21 recovered ^[2] 61:2,17 recovers ^[1] 22:24 recovery ^[3] 5:8,12 7:11 reduce ^[1] 55:25 reducing ^[2] 55:17 56:11 reduction ^[1] 56:19 refer ^[1] 3:13 references ^[2] 3:25 34:3 referencing ^[1] 15:4 referred ^[1] 54:24 referring ^[2] 18:19 31:24 regardless ^[1] 25:12 regulate ^[1] 34:6 regulated ^[2] 35:2,3 regulations ^[4] 15:15 50:18 51:16,23 regulatory ^[1] 23:23 rein ^[1] 53:15 relationships ^[1] 22:7 rely ^[1] 52:16 remaining ^[2] 7:24 16:13 remand ^[6] 1:23 2:8 16:20 26:4 46:23 64:10 remands ^[1] 28:7 Remember ^[1] 43:10 renders ^[2] 4:2 61:10 repaid ^[1] 23:20 report ^[2] 55:6,11 represent ^[1] 20:3 representation ^[17] 3:12,14 4:5 17:3 25:19 30:19 32:13 34:12 36:16 45:15,20 46:1,9,12 47:5,6,11 representations ^[1] 17:5 representative ^[1] 20:19 representatives ^[4] 20:13,20 21:1,19 represented ^[8] 4:3 11:23 17:1,14 46:17 48:21,22,23 representing ^[2] 7:22 20:20 reproduce ^[1] 20:10 requirements ^[1] 20:15 reserve ^[1] 16:12 resolves ^[1] 17:8 respect ^[1] 15:11 respond ^[1] 32:6 Respondent ^[4] 1:8,22 2:7 16:19 Respondents ^[1] 63:3 response ^[1] 29:1 responsibility ^[2] 47:24 64:17 responsible ^[1] 23:12 resting ^[1] 40:24</p>
--	---	--	--

Official - Subject to Final Review

<p>restriction ^[1] 63:22 result ^[2] 25:21 37:22 retained ^[1] 6:10 retirees ^[1] 60:20 return ^[1] 9:7 returns ^[1] 9:12 reverse ^[3] 1:22 2:8 16:20 reverse ^[1] 64:9 review ^[1] 36:12 rich ^[1] 21:5 RICHARD ^[1] 1:3 rightfully ^[1] 59:17 risk ^[1] 30:1 ROBERTS ^[10] 3:3 16:14,17 33:3, 6 44:1 61:20 63:9 64:12,20 rule ^[9] 13:6 14:2,7 46:5 51:5,6 52:12 64:7,7</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>same ^[1] 62:7 satisfy ^[2] 22:12 58:20 saying ^[16] 5:3 19:11,16 32:5,7,9, 10 41:22 42:11 43:16 44:13 47:8 52:10 53:2 55:20 56:8 says ^[12] 4:1 8:3,9 14:21,23 15:22, 25 17:15 38:1 40:13 44:2 47:5 scarcity ^[2] 35:25 36:17 scenario ^[2] 37:8,10 scheme ^[2] 36:14,19 se ^[1] 48:23 second ^[3] 18:16 27:22 34:10 Secretary ^[4] 17:16 18:18 51:22 61:2 Section ^[14] 3:12,15,17,21,24 4:10, 11,15 16:2,24 33:12 45:16 53:12 56:7 sections ^[1] 48:3 SECURITY ^[11] 1:7 6:12 12:9,13 13:3 16:1 20:21 21:3 37:15 61:15 62:10 See ^[5] 36:18 38:9 40:21 51:9 53:21 seek ^[1] 11:17 seemingly ^[1] 25:2 seems ^[6] 11:3 14:20 48:7,8 54:1, 2 Senate ^[1] 55:11 sense ^[9] 7:16 8:22 10:19 12:22 34:17 49:16,20,25 51:20 sent ^[2] 46:21,23 sentence ^[1] 4:1 separate ^[4] 3:17 5:17 11:17 32:2 series ^[2] 17:9 33:14 serious ^[1] 61:5 services ^[4] 5:5,5,11 58:17 set ^[14] 5:18 8:21 10:15 18:25 19:2 20:11 21:18 43:9 48:2,5 51:23,25 52:10 55:13 sets ^[1] 63:22 setting ^[3] 24:10,11 64:3 settle ^[1] 44:13 setup ^[1] 56:4 shall ^[3] 17:16,25 18:18 shouldn't ^[2] 11:7 49:12</p>	<p>showing ^[1] 37:3 shows ^[1] 46:2 side ^[1] 44:2 signed ^[1] 31:20 significant ^[1] 40:5 simply ^[1] 14:8 since ^[1] 63:3 single ^[6] 4:1 44:14 51:5 52:12 64:5,7 situation ^[2] 53:6 63:19 situations ^[2] 57:9 63:18 six ^[2] 28:6 38:23 Sixth ^[2] 51:6 64:6 size ^[2] 12:17,18 small ^[4] 7:10 26:24 53:13 58:14 smaller ^[2] 26:21 28:25 SOCIAL ^[11] 1:7 6:12 12:9,13 13:3 16:1 20:21 21:3 37:15 61:15 62:9 sole ^[1] 60:25 Solicitor ^[2] 1:20 62:1 Somebody ^[1] 46:12 sometimes ^[8] 18:8 21:2,7 22:11 23:3 28:16 32:21 44:18 somewhere ^[2] 13:18 29:13 sorry ^[3] 30:23 54:19 61:20 sort ^[4] 4:7 38:25 47:23,25 SOTOMAYOR ^[34] 5:24 6:10 7:2, 6,9,17,20 8:9 11:1,13,20 12:3 13:12,19,23 14:5 20:25 22:1,8,22 23:10 41:9,15,21 42:24 43:4,11,14 45:19,22 56:20 57:3,8,13 sought ^[1] 61:7 sound ^[1] 23:11 sounds ^[1] 53:1 source ^[1] 12:14 speaks ^[2] 4:10,12 special ^[1] 36:8 specific ^[1] 48:3 specifically ^[2] 20:5 32:9 specified ^[1] 22:5 spent ^[2] 29:5 38:5 split ^[4] 14:12 49:16,21,25 squeeze ^[1] 12:23 SSI ^[6] 55:15,17,21 56:2,17,19 stakes ^[3] 30:7,11,11 stand ^[1] 64:8 started ^[2] 49:1 53:11 stated ^[1] 34:22 STATES ^[2] 1:1,15 statistics ^[1] 13:17 statute ^[28] 4:24 8:2 14:16,17 15:9, 19 19:10,11,14,17 33:13,23 34:5 39:19 40:10 45:12 46:6 48:2,5 49:23 50:6,12,16 51:13,17 52:22 53:11 60:4 statute's ^[2] 3:20 62:2 statutes ^[1] 54:14 statutory ^[3] 17:13 52:11 62:18 step ^[1] 11:11 still ^[6] 7:1 20:20 25:9 44:21 56:12, 12 stop ^[1] 41:22 straight ^[3] 10:6 14:9,9 stream ^[1] 23:1</p>	<p>strikes ^[1] 27:8 strong ^[1] 25:10 structure ^[4] 3:20 4:22 31:3 35:15 structures ^[1] 36:15 struggling ^[1] 45:4 subchapter ^[1] 52:17 subject ^[3] 3:16 16:3 36:11 submitted ^[2] 64:21,23 subsection ^[2] 16:3 20:5 subsistence ^[1] 60:24 substantial ^[2] 26:19 29:1 successful ^[3] 35:10 46:10,11 sufficient ^[1] 32:23 sufficiently ^[1] 26:2 suggest ^[5] 8:6 25:4 28:14 45:17 46:4 suggested ^[4] 42:7 45:2 47:20 52:5 suggesting ^[1] 49:22 suggests ^[2] 28:11 55:3 sums ^[1] 29:15 supply ^[1] 60:17 support ^[11] 1:22,25 2:8,12 15:19 16:19 33:9 54:2 60:19 61:1 64:16 supports ^[1] 46:5 supposed ^[1] 53:7 SUPREME ^[2] 1:1,14 surely ^[1] 35:16 swallow ^[1] 12:20 sympathetic ^[1] 35:19 system ^[5] 21:1 25:4 55:12 63:1,5</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>talks ^[1] 14:19 technical ^[1] 14:24 Tenth ^[2] 42:6 44:19 term ^[2] 14:24,25 termination ^[3] 57:2,25 63:18 terms ^[4] 39:23 47:19 49:10 58:3 testing ^[1] 21:4 text ^[9] 3:20,24 17:8 25:12 28:3 36:23 50:4,11 54:10 textual ^[4] 24:20 25:10 45:5 52:16 themselves ^[3] 13:4 48:22 60:19 theoretically ^[1] 44:8 there's ^[43] 5:4,16 7:9 9:14,16 12:22 16:2 17:13 18:2 19:24 20:17 21:4,4 22:9 25:19 26:4,22 27:14 28:2,8,15 30:7 31:7 32:1,2 34:19 37:3,4,15 38:18 41:11 42:1,3,22 45:19,19 47:9 49:22 50:7 51:9,19 57:17 63:22 therefore ^[2] 60:23 61:14 they've ^[7] 12:10 43:10 52:5,7,8 59:8,10 thinks ^[1] 51:11 third ^[3] 34:20 35:7 61:4 though ^[1] 56:15 thread ^[1] 63:4 three ^[2] 33:22 63:16 threshold ^[1] 24:11 throughout ^[1] 17:19 timeline ^[3] 47:19 49:10 63:24 Title ^[6] 4:17,17 21:3 23:4,4 52:17</p>	<p>titled ^[1] 16:2 together ^[3] 50:6 63:1 64:8 took ^[2] 28:5 39:8 tort ^[1] 29:24 total ^[1] 19:7 touch ^[1] 18:14 tough ^[1] 39:19 toward ^[1] 34:5 treat ^[2] 48:7,8 tribunal ^[4] 51:5 52:12 64:5,7 tried ^[2] 47:19 49:9 troubled ^[2] 5:25 11:20 troublesome ^[2] 27:9 45:4 true ^[5] 11:13 25:8 29:23 30:13 41:18 try ^[1] 21:14 trying ^[5] 10:4,5 12:23 30:15 55:7 turned ^[1] 37:13 turnip ^[1] 12:23 turns ^[2] 3:11 58:11 two ^[25] 3:11 17:13 18:2,5 19:23 26:12 27:14 30:14 32:11 39:9 42:18 45:11,12,15 46:15,21 48:7,9 50:3,4,13,13,25 57:16,22 typical ^[2] 31:9 43:22 typically ^[1] 12:21</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately ^[1] 19:9 unavailable ^[1] 14:8 uncertainty ^[1] 30:8 unclear ^[1] 14:19 uncommon ^[1] 23:1 under ^[21] 4:17 5:20 11:5 12:10,10 14:6,6,7,11 15:3 21:20 22:5,13 24:13,17,17,18,24 27:21 63:21 64:3 understand ^[11] 6:3 13:9 19:9 22:17 25:14,14 30:5 32:4 35:16 44:7 55:7 understanding ^[2] 10:22 13:16 understood ^[4] 7:2 18:7 19:20 27:17 unfortunate ^[1] 52:21 unfortunately ^[1] 20:10 unheard ^[1] 29:25 UNITED ^[2] 1:1,15 unius ^[1] 4:9 unless ^[2] 10:16 46:11 unravel ^[1] 63:5 unreasonable ^[1] 10:10 until ^[1] 33:19 untouched ^[2] 27:19 35:18 unusual ^[2] 29:21 30:3 up ^[29] 6:17 9:22 10:11 28:7 33:19 36:7 37:23 38:21 39:3,5 41:4,24 43:9 45:14 46:2,7,7,8 48:3,5,14, 17,25 49:3 50:14 51:23,25 55:13, 20 up-to-date ^[1] 13:17 upward ^[1] 5:22 urge ^[1] 63:6 urged ^[1] 63:4 useful ^[1] 59:2 uses ^[1] 4:17</p>
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Official - Subject to Final Review

<p>using ^[1] 38:9 usual ^[2] 26:10,14</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>versus ^[3] 3:4 28:25 62:6 victory ^[1] 44:24 view ^[5] 16:7 27:24 44:8 51:2,4 Virginia ^[1] 1:18 vulnerable ^[1] 62:8</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waiting ^[1] 26:4 wanted ^[5] 4:14 6:12 27:13 37:12 54:3 wants ^[1] 41:24 Washington ^[2] 1:10,21 waste ^[1] 10:19 wasting ^[1] 12:22 way ^[18] 11:12 21:22 28:8 36:20,20, 21 38:15,19 42:11 48:5,12 51:17 54:14,15,16 55:12 56:4,8 ways ^[1] 42:9 Wednesday ^[1] 1:11 WEIL ^[63] 1:24 2:10 33:6,7,10 36:3, 18,24 37:2,9 38:7,14,17 39:5,13, 17,22 40:7,16,19 41:2,7,14,17 42: 1 43:3,8,13,21 44:10,25 45:6,9,21, 24 47:7,13 48:11 50:2 52:21,24 53:4,9 54:6,8,12,20 55:5 56:20 57: 1,6,12,19 58:19 59:3,6,9,11,14,24 61:23 64:14,19 welfare ^[1] 10:16 whatever ^[2] 51:10 61:5 whenever ^[1] 4:2 Whereupon ^[1] 64:22 whichever ^[1] 51:7 who's ^[1] 44:6 whole ^[4] 11:2 33:25 58:2,23 will ^[19] 5:18 8:19 13:7,9,9,11,20 23:6 29:3 30:16 32:8 37:25 39:9, 10 42:2,4,6 44:18 61:18 willing ^[1] 13:7 win ^[11] 9:15 25:11 36:23 38:20 46: 22 48:13,18 50:21 51:2,7,10 windfall ^[1] 28:23 withheld ^[6] 6:19 35:12 42:19 43: 24 44:15 50:9 withhold ^[7] 5:19 19:21 22:21 23: 13 43:1,6,18 withholding ^[12] 7:1 22:14 34:8, 19 42:2,9,22 44:22 51:19 53:23 54:22 56:13 within ^[1] 34:3 without ^[5] 12:3 56:11,17 57:22,23 won ^[3] 26:14,15 46:15 wonder ^[1] 11:22 Wood ^[1] 12:1 word ^[1] 4:6 words ^[6] 3:12 4:18 40:22 45:11, 12,15 work ^[18] 3:13,16,22,25 4:10,12,25 8:11,14 10:23 12:11 13:10 17:7, 21 18:20 37:20 51:9,18 worked ^[1] 38:2</p>	<p>working ^[1] 63:2 works ^[4] 10:23 38:19 48:12 50:17 world ^[2] 10:23 44:9 worried ^[1] 40:22 worry ^[5] 24:22 25:1 32:8 37:7,9 written ^[1] 52:22 wrongfully ^[6] 35:11 42:19 43:5, 24 58:10,11 wrote ^[1] 60:13</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>YANG ^[38] 1:20 2:6 15:14 16:17,18, 21 18:13 19:7,12,18 21:12,17,22 22:3,18,23 23:16 25:7,11,15 26: 18 27:5,14 29:3,8,11,18,23 30:4, 13 31:5,9,15 32:5,15 33:5 45:1 54: 24 year ^[2] 33:19 38:23 years ^[6] 33:15 39:9,12 58:13 60: 15 62:16</p>
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