

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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EMULEX CORPORATION, ET AL.,)
 Petitioners,)
 v.) No. 18-459
GARY VARJABEDIAN, ET AL.,)
 Respondents.)
- - - - -

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9
10 Washington, D.C.
11 Monday, April 15, 2019

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:04 a.m.

16
17 APPEARANCES:

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19 on behalf of the Petitioners.
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21 Department of Justice, Washington, D.C.;
22 for the United States, as amicus curiae,
23 in support of neither party.
24 DANIEL L. GEYSER, ESQ., Dallas, Texas;
25 on behalf of the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	GREGORY G. GARRE, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	MORGAN L. RATNER, ESQ.	
7	For the United States,	
8	as amicus curiae, in support of	
9	neither party	28
10	ORAL ARGUMENT OF:	
11	DANIEL L. GEYSER, ESQ.	
12	On behalf of the Respondents	39
13	REBUTTAL ARGUMENT OF:	
14	GREGORY G. GARRE, ESQ.	
15	On behalf of the Petitioners	71
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (11:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 18-459, Emulex
5 Corporation versus Varjabedian.

6 Mr. Garre.

7 ORAL ARGUMENT OF GREGORY G. GARRE

8 ON BEHALF OF THE PETITIONERS

9 MR. GARRE: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The Ninth Circuit in this case
12 recognized an unprecedented inferred private
13 right to recover for negligent violations of
14 Section 14(e) of the Securities Exchange Act of
15 1934.

16 For two independent reasons, we would
17 ask this Court to reverse that decision.
18 First, as the government itself recognizes,
19 this Court's precedents compel the conclusion
20 that Section 14(e) does not confer any implied
21 private right at all.

22 JUSTICE GINSBURG: Mr. Garre, why
23 should we consider that when it wasn't raised
24 in this case until, what was it, the motion for
25 rehearing in the court of appeals? It went

1 through the trial court, court of appeals, not
2 a word -- everybody accepted there was a
3 private right of action. And you are now
4 making the non-existence of a private right
5 your principal argument.

6 But, as you -- as you well know, this
7 is a court of review, not of first view. If
8 we're going to take up that question, it
9 shouldn't start here.

10 MR. GARRE: Sure. Justice Ginsburg, I
11 would point you first to this Court's decision
12 in Central Bank of Denver, which -- in which
13 case this Court confronted the exact same
14 situation, except we're actually in a much
15 stronger position here.

16 There, the petition for cert was on
17 the question of whether or not the standard for
18 an implied private right of action for aiding
19 and abetting under Section 10 and Rule 10b-5
20 was recklessness or scienter. The cert
21 petition didn't raise any question about
22 whether there was an underlying implied private
23 right for aiding and abetting. This Court
24 itself raised and added that question. It
25 granted certiorari, and it resolved the case on

1 that ground.

2 Now we are in a much stronger position
3 than Central Bank because, first of all, it's
4 undisputed that we raised this at the cert
5 stage. The broader issue -- argument is fairly
6 included within -- within the question
7 presented.

8 Next, we did flag the argument below
9 in our petition for rehearing. We specifically
10 said, on page 14 of our petition for rehearing,
11 if Section 14(e)'s implied right of action to
12 -- had to sweep in negligence, that would be
13 grounds for eliminating it, not expanding it.

14 JUSTICE KAGAN: But --

15 MR. GARRE: And we cited the Ninth
16 Circuit's decision explaining why there could
17 be no private of right of action under Section
18 17(a). I'm sorry, Justice Kagan.

19 JUSTICE KAGAN: I mean, Mr. Garre,
20 that is the single sentence, right? And you
21 don't ask the Ninth Circuit to overrule its
22 decisions about private rights of action; it's
23 really more just part of your argument about
24 the negligence standard, isn't it?

25 MR. GARRE: No, I -- I would disagree

1 with that. It -- it's a separate point,
2 flagging -- we do make it on the next page as
3 well. So there's two references.

4 And I -- I agree it -- it's not a
5 free-standing argument, but the point of this
6 statement in our brief is, if you really could
7 read Section 14(e) to encompass negligence,
8 then you couldn't possibly have any private
9 right of action. Everything comes crumbling
10 down. And we --

11 JUSTICE BREYER: You're saying that,
12 but, I mean, I just want to add to what --

13 MR. GARRE: Right.

14 JUSTICE BREYER: -- Justice Kagan
15 said. You told the Ninth Circuit, I take it,
16 quote, that your client did not dispute that
17 Section 14(e) provides for a private right of
18 action.

19 MR. GARRE: That's correct. And we
20 did that --

21 JUSTICE BREYER: End quote. And then
22 later, you add this sentence that says, well,
23 if we're wrong about negligence, then there
24 wouldn't be a private right of action at all.
25 I agree, that's what the sentence basically

1 says, but go along with --

2 MR. GARRE: But to your --

3 JUSTICE BREYER: It's the same
4 question.

5 MR. GARRE: If I could address Justice
6 Breyer's point just quickly, we did say at the
7 panel stage that we did not dispute the
8 existence of the private right because, of
9 course, we couldn't; Ninth Circuit precedent
10 had recognized that right.

11 We did not, I think it's important to
12 add, concede the existence of a private right.
13 I think there's a difference between saying we
14 don't dispute it and we agree with it.

15 Now, I'm sorry, Justice Kagan.

16 JUSTICE KAGAN: Well, I think you --
17 it's the same question.

18 MR. GARRE: Right. Right. And --
19 and, of course, more broadly, under this
20 Court's precedents, we would say clearly this
21 Court has discretion to reach the broader
22 issue. I mean, Central Bank really couldn't be
23 more on point --

24 JUSTICE SOTOMAYOR: You answered --
25 you answered discretion, but you don't answer

1 why. Aren't we rewarding you -- rewarding you
2 for not raising it adequately below, rewarding
3 you for mentioning it in two sentences in your
4 cert petition and not asking us to take it as a
5 separate question presented?

6 Where should we draw the line as to
7 when we stop rewarding counsel for changing or
8 moving the ball on cert grounds?

9 MR. GARRE: Well, there was no
10 strategic gamesmanship here, Justice Sotomayor.
11 We -- the -- the broader argument, as even my
12 friend concedes, is fairly included within the
13 question presented. You look at page 20 of our
14 cert petition, it was very explicitly raised --

15 JUSTICE SOTOMAYOR: You're not dealing
16 with what I just asked, which is --

17 MR. GARRE: The -- the broader issue
18 is this Court should --

19 JUSTICE SOTOMAYOR: -- you could write
20 almost any question and throw the kitchen sink
21 if you choose. The question is -- you didn't
22 raise it as a separate part of your cert
23 petition; you didn't raise it below -- why
24 should we reward you?

25 MR. GARRE: Okay. First of all, we

1 did argue it in our cert petition. But -- but,
2 as to your broader question, Justice Sotomayor,
3 you should do just as you did in the Central
4 Bank case in order to provide for the
5 intelligent resolution of this question.

6 Whether or not --

7 JUSTICE SOTOMAYOR: I wasn't here. I
8 might have taken a different position. Why --

9 MR. GARRE: Well, and -- and the
10 dissenters obviously did.

11 JUSTICE SOTOMAYOR: Why should we
12 reward --

13 MR. GARRE: And the reason is, is
14 because this is an issue that is interdependent
15 with the question of whether or not there could
16 be inferred private right of action for
17 negligence.

18 It would be silly for this Court to
19 say there can be inferred right for negligence,
20 but -- but the -- but everybody would
21 recognize, I think, that there is no --

22 JUSTICE SOTOMAYOR: That -- that's
23 what the SE -- that's what the government says,
24 that there is.

25 MR. GARRE: Well, the government says

1 there's no private right of action at all. The
2 courts below agree with that.

3 JUSTICE SOTOMAYOR: No, no, no, no,
4 they say that the statute involves negligence.
5 So we can find that it involves negligence and
6 leave for another day whether there's a private
7 cause of action or the right only belongs to
8 the SE -- to the SEC.

9 MR. GARRE: I think where I would take
10 issue with that, Justice Sotomayor, is -- is
11 the government, in the first part of the
12 government's brief, I understand addressed the
13 question of what would be the standard in an
14 express action brought by the SEC.

15 I don't really understand the
16 government to be saying they think that in an
17 implied private right of action, if it exists,
18 you could have claims for negligence. They
19 sort of artfully dodged that question and
20 ultimately ground their brief on the broader
21 position, which we very much agree with --

22 JUSTICE SOTOMAYOR: They'll let us
23 know.

24 MR. GARRE: -- that there's simply no
25 private right of action at all. And so I -- so

1 I think, you know, again, to answer your
2 question, we would take issue with the notion
3 there was gamesmanship here. We -- we were not
4 required to raise it at the panel stage when we
5 were bound by the Ninth Circuit's precedent.
6 We did flag it in our petition for rehearing.
7 We very much --

8 JUSTICE GINSBURG: If you had -- if
9 you had made it an explicit question, there's
10 no circuit split on the question, is there?

11 MR. GARRE: There's not. And -- nor
12 was there in the Central Bank case. In that
13 case, as Justice Stevens pointed out in his
14 dissent, there were hundreds of judicial and
15 administrative decisions recognizing an implied
16 private right of action for aiding and abetting
17 under Rule 10b-5. But this Court applied its
18 precedents, including its more modern
19 precedents, looked to the language of Section
20 10(b), Rule 10b-5, and held that there could be
21 no private right of action implied for aiding
22 and abetting.

23 And the same analysis here,
24 indisputably, I think, leads to the conclusion
25 that there is no implied private right of

1 action under Section (e).

2 My -- my -- my friends over here -- I
3 -- I take page 44 of their brief as to not --
4 as to concede that they cannot point to any
5 rights-creating language in Section 14(e). And
6 that's because it's framed explicitly as a
7 prohibition on conduct, not like Title 9, for
8 example, something that is designed to -- to
9 address the benefited class.

10 JUSTICE GINSBURG: That's true --
11 that's true of 14(a) also.

12 MR. GARRE: It is.

13 JUSTICE GINSBURG: And -- and under
14 14(a), there is a private right of action.

15 MR. GARRE: Thanks to Borak. And
16 Borak, as this Court pointed out in the
17 Sandoval case emphatically, was a product of a
18 different era that this Court has disavowed.

19 JUSTICE GINSBURG: But even so,
20 it's -- it's alive for -- under 14(a). And is
21 it rational to distinguish 14(a) from 14(e) for
22 private right purposes? If you have 14(a), the
23 context of that is proxy statements?

24 MR. GARRE: Yes, Your Honor.

25 JUSTICE GINSBURG: So proxy statements

1 go one way. Tender offers go the other?

2 MR. GARRE: So we do think it's
3 rational, Your Honor. First of all, 14(e) has
4 language that could scarcely be more different
5 than 14(a). So you wouldn't look at the
6 language of 14(e) and say, oh, they must have
7 meant what Congress said in 14(a). It's
8 different.

9 Second of all, the whole argument that
10 because we've got an implied private right of
11 action under 14(a), we need to have one under
12 14(e) is exactly the argument that this Court
13 rejected in Sandoval as to Borak. The Court --
14 there's a duty upon the courts to effectuate
15 congressional purpose.

16 Congress saw a gap with respect to
17 statements in connection with tender offers in
18 1968, it filled that gap by adding additional
19 disclosure requirements under Section 14(e) for
20 tender offers. If you want to look at the
21 legislative history, Congress had in mind
22 public enforcement of that provision.

23 There's no basis for this Court to
24 essentially do the deed again as it did in
25 Borak, to do it again here, simply because

1 Borak reached that result on a completely
2 different regime than this Court applies today.

3 JUSTICE KAGAN: But Sandoval, I think,
4 makes clear, Mr. Garre, that we're not -- I
5 mean, the first question is, is there
6 rights-creating language?

7 MR. GARRE: Right.

8 JUSTICE KAGAN: But that beyond that,
9 even if there's not rights-creating language,
10 if there's legal context that indicates that
11 Congress meant to create private rights of
12 action, then we should take that legal context
13 into account.

14 And -- and, here, it seems that there
15 are at least two features of the legal context.
16 One is the one that Justice Ginsburg said,
17 which is this was meant to create a gap as to
18 treating tender offers the same way as using
19 proxy statements with respect to mergers, and
20 Congress gave no indication that it wanted to
21 treat those differently. Quite the opposite,
22 that it was gap-filling and a way to unify the
23 field.

24 And the second is that Congress uses
25 the 10b-5 language after every court has

1 decided that 10b-5 creates a private right of
2 action.

3 And I think given those two things,
4 Sandoval doesn't say, throw out the statutory
5 interpretation toolbox and just look to whether
6 there's rights-creating language. It says, be
7 a sensible statutory interpreter.

8 And a sensible statutory interpreter
9 would consider both of those two things,
10 wouldn't they?

11 MR. GARRE: Not here, Your Honor. And
12 I think what's missing from that summary, which
13 I would -- I would agree with in some respects
14 is that Congress -- or -- or this Court in
15 Sandoval said context was relevant only insofar
16 as it shed light on text.

17 And so, here, I think the most
18 important point as to that question is that the
19 text of 14(e) is --

20 JUSTICE KAVANAUGH: What about the --

21 JUSTICE SOTOMAYOR: I'm sorry,
22 don't -- aren't we looking to the text for what
23 congressional intent is? And to the extent
24 that that's the issue, what did Congress intend
25 with this language?

1 MR. GARRE: Well --

2 JUSTICE SOTOMAYOR: Is -- aren't all
3 the facts that Justice Kagan put forth more
4 meaningful in terms of Congress's intent?
5 Because, if Congress didn't agree with this, it
6 had a whole lot of years to change things
7 around. But it hasn't.

8 MR. GARRE: Well, if -- if that's
9 where you're coming from, Justice Sotomayor,
10 then you should agree with us that there's no
11 implied private right of action for negligence
12 because the status quo was courts had an
13 implied right of action under Section 14(e) for
14 scienter.

15 So, if that's where you're coming
16 from, then you should decide the case on the
17 narrower ground and --

18 JUSTICE SOTOMAYOR: They had it under
19 14(a) or --

20 MR. GARRE: -- and hold that 14 -- any
21 implied right of action requires scienter.

22 JUSTICE KAVANAUGH: Are --

23 MR. GARRE: But, as -- as to Borak and
24 the -- I'm sorry, Justice Kavanaugh.

25 JUSTICE KAVANAUGH: Keep going.

1 MR. GARRE: As to Borak and the
2 timing, again, this is the same argument that
3 was rejected in Sandoval. In Sandoval, the
4 argument was, well, wait a second. When
5 Congress was debating Title VI, this Court
6 decided Borak. So clearly Congress had in mind
7 Borak when it was passing Title VI, and that
8 context has to inform our construction of Title
9 VI and the regulations thereunder, and this
10 Court emphatically rejected that in Sandoval.
11 This is the same --

12 JUSTICE KAGAN: But Sandoval accepted
13 the Cannon principle, right, which is that if
14 Congress specifically takes language that's
15 been held to create a private right of action,
16 and replicates that language, then that counts
17 as a pretty strong indicator that Congress has
18 meant for the same result to obtain.

19 MR. GARRE: It mentioned that in the
20 context of Cannon, but here's why that doesn't
21 work here. And you referred to the text of
22 Rule 10(b). And I agree with you. Congress
23 transplanted the text from Rule 10(b) into
24 Section 14(e).

25 But the implied right of action to

1 enforce Rule 10b-5 comes from Section 10(b) of
2 the Securities and Exchange Act because, as
3 this Court said in Sandoval, regulations can't
4 create implied rights of action, statutes do.

5 When you look at Section 10(b), it's
6 completely different than Section 14(e). So
7 there's no basis to say, well, because
8 Section --

9 JUSTICE KAGAN: But 10(b) makes clear
10 that it's -- even the statutory language in
11 10(b) makes clear that it's going to take its
12 content from the rules and regulations that are
13 designed to implement it.

14 And then 10b-5 comes along and
15 essentially gives 10(b) its content, and all of
16 these courts go the exact same way, whether it
17 was right or wrong, and say private right of
18 action follows from that. And then Congress
19 replicates that language.

20 MR. GARRE: Well, this Court in 1971,
21 which was after the time that Congress passed
22 the Williams Act in Section 14(e), finally
23 acquiesced in recognizing an implied private
24 right under Section 10(b) for Rule 10b-5
25 violations. And no one is disputing that here.

1 But I -- but I think the question is
2 whether this Court --

3 JUSTICE KAGAN: But that was the
4 framework in the same way that that was the
5 Cannon framework, is that Congress is looking
6 at something, a particular set of words that
7 has been found uniformly to create a private
8 right of action, and then Congress writes those
9 same words.

10 MR. GARRE: Again, I would disagree
11 with you because the words that matter for
12 purposes of an implied right of action under
13 10(b) are 10(b). There -- and those words are
14 completely different than the words that
15 Congress used in Section 14(e).

16 JUSTICE KAGAN: I mean, that just
17 seems incredibly artificial, Mr. Garre, because
18 10b-5 had been created and everybody understood
19 that 10b-5 was the governing standard and that
20 private rights of action went along with that
21 governing standard.

22 MR. GARRE: Under -- if that's true,
23 it's under the Borak-type framework the courts
24 would supply remedies when Congress didn't, but
25 this Court was very clear about this in

1 Sandoval, and I believe other cases, where it
2 said that regulations can't create implied
3 private rights. Statutes do.

4 And this Court in Ernst & Ernst said
5 that Section 10(b) was the source of the
6 implied private right.

7 JUSTICE KAVANAUGH: So -- so, on
8 Justice Kagan's questions, to pick up on those,
9 in Sandoval, in distinguishing the prior cases,
10 it said two of those involved Congress's
11 enactment or reenactment of the verbatim
12 statutory text that courts had previously
13 interpreted to create a private right of
14 action.

15 MR. GARRE: Yes.

16 JUSTICE KAVANAUGH: Now it sounds like
17 the way you respond to that is to say statutory
18 text as compared to regulatory text. That's
19 the sole distinction?

20 MR. GARRE: Right. Because, I mean,
21 in Title 9, I mean, the Court referred to -- in
22 Sandoval to Cannon. By the way, I -- I -- I
23 understand Sandoval to be explaining Cannon,
24 not necessarily to be, you know, expanding it.

25 JUSTICE KAVANAUGH: Well, that's a --

1 that's a question of how we interpret that
2 sentence in Sandoval.

3 MR. GARRE: Right. Right. And so --

4 JUSTICE KAVANAUGH: But, if we
5 interpret that sentence in Sandoval as setting
6 a principle, which I take your point on that,
7 and I understand that, but if we do, then your
8 distinction of it is statutory text versus
9 regulatory text?

10 MR. GARRE: Right. And this case
11 would be an expansion of what the Court said in
12 Sandoval because --

13 JUSTICE KAGAN: But even though Rule
14 10(b)'s substantive scope is defined in terms
15 of regulations, by the terms of 10(b) itself.

16 MR. GARRE: I would say it's a
17 different statute. And this is important
18 because, if you look at 14(a) and 14(e), 14(a)
19 gives the SEC authority to pass rules. The SEC
20 has been very judicious in -- in -- in
21 describing situations where the violation is
22 very limited and so they've -- they've
23 established kind of a break on the sorts of
24 things that can be violations.

25 JUSTICE KAVANAUGH: Can I --

1 MR. GARRE: For -- yes.

2 JUSTICE KAVANAUGH: Go on. Sorry.

3 MR. GARRE: No, no, please.

4 JUSTICE KAVANAUGH: Can I get your
5 broader argument --

6 MR. GARRE: Sure.

7 JUSTICE KAVANAUGH: -- about why this
8 sentence in Sandoval you said --

9 MR. GARRE: Because Sandoval, if you
10 continue down to the end of that paragraph on
11 Cannon, said context is relevant, but it's only
12 relevant as it informs text. And there's
13 nothing about the context of Borak or 14(a)
14 that informs 14(e) because 14(e) is written
15 completely different than 14(a). That --

16 JUSTICE KAGAN: But -- but I guess
17 don't you think that the point of Sandoval and
18 -- and -- and it should be the point of all our
19 decisions is, yes, we want to know what
20 Congress was intending to do here, but we're
21 not going to throw out the whole statutory
22 interpretation toolbox, except for the text
23 because sometimes context matters a great deal
24 in understanding text.

25 And what we really want to know is,

1 what did those words mean when people enacted
2 those words at that time? And for us to be
3 able to answer that question, the statutory
4 context is extremely important, isn't it?

5 MR. GARRE: I think Sandoval answers
6 that by saying statutory context informs -- is
7 relevant as it informs text. But I think the
8 broader point here is that this Court has
9 been -- made very clear that when it comes to
10 recognizing implied private rights, this is a
11 very special, perilous endeavor, and so there
12 are very explicit limits on when the Court is
13 going to do it.

14 And it's not going to look at this
15 question as it might any other routine
16 statutory interpretation question. It's going
17 to look first, are -- are there rights-creating
18 language? Here, everybody agrees, not there.

19 Second, is there any indication to
20 believe that Congress intended a private
21 remedy? And if you look at that question here,
22 same answer, no. Congress clearly, in the
23 securities laws, intended public enforcement.

24 And so what are we left with? We're
25 left -- left with Borak, which is the heyday of

1 this Court saying courts have -- not only can
2 but have a duty to alert themselves to filling
3 Congress's purposes after you agree to open
4 the --

5 JUSTICE KAGAN: So tell me if I'm --
6 if I'm misinterpreting what you're saying, but
7 I thought that the -- that the line that
8 Sandoval drew was, look, before now, what
9 Congress did -- excuse me, what the courts did
10 was they just basically said: Oh, look, if a
11 -- if a -- if a private right of action kind of
12 fits with the purpose of a statute as broadly
13 defined, then we should have a private right of
14 action.

15 And this Court said: Absolutely not,
16 to that endeavor. But -- and said it has to be
17 a question of statutory interpretation, what
18 did Congress intend when it was passing that
19 act?

20 But you're suggesting something more.
21 You're suggesting that the usual tools of
22 statutory interpretation that we use sort of go
23 out the window when there's a -- a -- less
24 context, you know, all of a sudden context
25 doesn't matter; we just look mechanically at

1 the words because this is such a fraught
2 inquiry.

3 Am I -- am I reading you right?

4 MR. GARRE: No. I mean, the tools of
5 statutory construction are pertinent in
6 answering the questions under this Court's
7 decision in Sandoval. Is there rights-creating
8 language? Here, everybody agrees that there's
9 not. Is there a reason to believe that
10 Congress otherwise intended a private remedy?
11 No.

12 And -- and I would say here what's
13 unprecedented about this case is that we're not
14 aware of a single instance in which this Court
15 has ever implied or recognized an implied right
16 of action that the enforcement agency itself
17 didn't recognize.

18 And if you think of this in a Steel
19 Seizure type framework, to the extent that this
20 Court has authority to recognize implied
21 private rights at all, then surely that
22 authority is at its lowest ebb --

23 JUSTICE GINSBURG: Mister --

24 MR. GARRE: -- where the government
25 itself isn't arguing for that.

1 I'm sorry, Justice Ginsburg.

2 JUSTICE GINSBURG: Before -- your
3 white light is on, I appreciate that, but you
4 presented one question clearly, and that was
5 scienter versus negligence.

6 MR. GARRE: Yes.

7 JUSTICE GINSBURG: So I'd like you to
8 tell me, do I understand you right to say not
9 even the SEC would have a right to sue for
10 negligence under 14(e), not even the SEC?

11 MR. GARRE: That's right. And we
12 would point you to the Court's decision in
13 Ernst & Ernst, where the Court dealt with this
14 question in the context of an implied private
15 right and said that there's no basis for
16 interpreting the similar language of Rule 10b-5
17 to confer negligence.

18 And to your point, Justice Kagan, if
19 you approach this case from the standpoint that
20 Congress meant to lock in Rule 10b-5 when it
21 used -- when it transplanted language from
22 10b-5 in Section 14(e), then you should at
23 least reach the conclusion that the Ninth
24 Circuit had no basis for inferring a private
25 right of action for negligence.

1 JUSTICE BREYER: Why? Because, I mean
2 -- sorry, because your time is -- do you want
3 to answer this when you get back up? I mean,
4 look, the language of 14(e) that we're talking
5 about is the same as the language of 10b-5, and
6 10b-5 copied its language from -- what is it --

7 MR. GARRE: Section 17(a).

8 JUSTICE BREYER: Yes, 17(a). Okay?
9 So -- now we use this language to get at proxy
10 statements, don't we? And proxy statements can
11 be ways of taking over a company.

12 MR. GARRE: Well, proxy statements --

13 JUSTICE BREYER: So why would you want
14 to have one set of language meaning negligence
15 where they try to take you over by proxy
16 statements, but a different set -- but exactly
17 the same words, not negligence, when they try
18 to take you over by a tender offer?

19 MR. GARRE: Well, in here we're
20 talking about the difference between Rule 10b-5
21 and Section 14(e), and both, we would say,
22 require scienter.

23 But what I would say is that when it
24 comes into policies of negligence versus
25 scienter, there should be a real concern on the

1 part of this Court that interpreting Section
2 14(e) to go all the way to negligence, which
3 would be unprecedented in the 50-year history
4 here, would result in the dumping of
5 information, would be -- ultimately be
6 counterproductive.

7 And I would ask this Court to reserve
8 the remainder of my time.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Ms. Ratner.

12 ORAL ARGUMENT OF MORGAN L. RATNER
13 FOR THE UNITED STATES, AS AMICUS CURIAE,
14 IN SUPPORT OF NEITHER PARTY

15 MS. RATNER: Mr. Chief Justice, and
16 may it please the Court:

17 Section 14(e) does cover negligent
18 misrepresentations, but it does not authorize
19 private enforcement.

20 JUSTICE SOTOMAYOR: If we find a
21 private cause of action, Mr. Garre says that
22 you didn't answer that question in your brief.
23 So assume we were to find an implied cause of
24 action. Would you still say it covers
25 negligence?

1 MS. RATNER: We think that the text is
2 sufficiently clear that it covers negligent
3 misrepresentations. The Court could, for
4 policy-based reasons, restrict private rights
5 of action. That's something the Commission has
6 previously offered.

7 JUSTICE SOTOMAYOR: Could you answer
8 Justice Breyer's point, which is -- I -- I took
9 his point to be that since 14(e) borrows the
10 language of 10-5, and we have all along
11 interpreted 10b-5 to require scienter, why
12 shouldn't we require the same standard here?

13 MS. RATNER: Well --

14 JUSTICE SOTOMAYOR: I think that was
15 his question of Mr. Garre, so that's my
16 question to you. You're talking about it as
17 policy. I'm talking about if we're going along
18 the road of saying what does Congress intend,
19 and you look at context and history, wouldn't
20 you think they intended to take language that
21 had already been interpreted in one way to mean
22 just that in a different context?

23 MS. RATNER: No, Justice Sotomayor.
24 So the language, first of all, of 10b-5 had not
25 already been interpreted that way. The Court's

1 decision in Ernst & Ernst, which interpreted
2 10b-5, came after 14(e) was enacted. So we
3 don't have that settled meaning at the time.

4 And I think beyond that, just looking
5 to the Ernst & Ernst decision, the Court could
6 not have been clearer that the language of Rule
7 10b-5 itself would be appropriate to have a
8 negligence standard, but there was a separate
9 constraint of the language of Section 10(b).
10 That separate constraint doesn't apply here.
11 And that's why we think the better analogue is
12 Section 17(a), which the Court considered in
13 Aaron and said negligence.

14 Now I do want to address the question
15 whether there is a private right of action.

16 JUSTICE GORSUCH: But before we get to
17 that, just one more question on -- on the mens
18 rea element.

19 I understand that Ernst came later,
20 but normally we do read the same language to
21 mean the same thing, so I'd like you to address
22 that problem.

23 MS. RATNER: Well --

24 JUSTICE GORSUCH: And then, second --
25 second problem is I understand the point about

1 negligence being what we normally assume
2 Congress to use when -- when it's a civil
3 matter.

4 But the penalties here are pretty
5 significant and -- available under this
6 section, and maybe equivalent to and worse than
7 a lot of criminal offenses. I'm sure a lot of
8 people would rather be found guilty of a
9 misdemeanor than -- than this particular
10 offense.

11 So why wouldn't we use a higher mens
12 rea, given that?

13 MS. RATNER: So, on your first
14 question, the language can't always mean the
15 same thing because we already have it meaning
16 different things in 17(a) and Rule 10b-5. And
17 the answer is why did it come out differently
18 for those different provisions, Section 10(b)'s
19 separate language. So which is this more like?
20 This is more like 17(a).

21 On your second point, Congress already
22 accounted for the potential different mens rea
23 standards in the tiered system of penalties
24 here. So there are very low fines that the
25 Commission may seek for negligence. And those

1 are increased as there is scienter found. So I
2 do think Congress already considered this in
3 the enforcement section.

4 And turning to the private right of
5 action issue, I want to address the question,
6 Justice Kagan, Justice Kavanaugh, that you were
7 discussing. We don't think that the fact that
8 there was a private right of action under Rule
9 10b-5 is enough here. And there are really
10 three reasons.

11 The first is that the private right is
12 located in Section 10(b), not Rule 10b-5. And
13 that's not just a formality in this case; it's
14 only Section 10(b), like Section 14(a), that
15 actually has a textual hook for a private right
16 of action. It's Section 10(b) that discusses
17 for the protection of investors, and that's
18 something that this Court noted in Borak was
19 actually a reason for finding a private right
20 there.

21 JUSTICE KAGAN: I mean, I guess I
22 understand the distinction as a distinction but
23 not why it matters, because what we're trying
24 to find out is what Congress was doing.

25 And it seems to me that when you have

1 10(b) and it says the content of this is going
2 to be done by rules, and Congress enacts -- and
3 the agency enacts 10b-5, and everybody knows
4 that's the substantive standard, and then all
5 these courts say that, as to that substantive
6 standard, 10(b) gives a private right of
7 action, and then Congress comes back and
8 recites the substantive standard, doesn't
9 Congress think that the private right of action
10 go with it?

11 You would to have be like a
12 super-duper, super lawyer to say, oh, well,
13 it's a little bit different because the
14 substantive standard is split up from the
15 private right of action. There's just no
16 reason why Congress would have thought that.

17 MS. RATNER: Well, Justice Kagan,
18 again, the question is not just what Congress
19 expected as a matter of contemporary legal
20 context; it's what it said. And it didn't pick
21 up the words "for the protection of investors"
22 that this Court had identified in Borak as a
23 reason for a private right of action. That's
24 point number one.

25 Point number two, what it did use here

1 is common disclosure language that appears
2 throughout the securities laws. It's not a
3 case like Cannon, where there actually was
4 language directed to the victims. In that
5 case, the statute was no person shall be
6 discriminated against on the basis of sex.

7 And that statute had been then
8 interpreted to have a private right of action.
9 It made more sense to say that that meaning was
10 encompassed in those victim-focused words.

11 And then the third point is that this
12 type of provision that involves
13 misrepresentations and omissions of material
14 fact appears, as I mentioned, at a number of
15 places, and we know it often does not create a
16 private right of action.

17 It doesn't create a private right of
18 action in Section 17(a) of the Securities Act.
19 It doesn't create a private right of action in
20 Section 206 of the Investment Advisors Act.
21 That was this Court's decision in Transamerica.

22 So it's not like Congress picked up
23 some sort of clear code word and incorporated
24 it into Section 14(e). Absent that, the
25 Commission feels that the result is effectively

1 dictated.

2 JUSTICE KAVANAUGH: Those decisions
3 came after 1968, though?

4 MS. RATNER: That's correct. But --

5 JUSTICE KAVANAUGH: That's the
6 argument on the other side, right?

7 MS. RATNER: That's correct, that they
8 may not have been decided at the time, but I do
9 think they illustrate that this isn't some sort
10 of code word or some sort of term of art that
11 carries with it a private right of action.

12 Given --

13 JUSTICE ALITO: Could you explain why
14 -- could you explain why you think it's
15 appropriate for us to reach the question
16 whether there's a private right of action?

17 If you were the Respondent here, would
18 you think that that claim was properly before
19 us? Is that the precedent you want us to set?

20 MS. RATNER: So we think as an
21 ordinary mortar -- as an ordinary matter, this
22 Court does not consider questions that have
23 been neither pressed nor passed upon. The
24 reason why we think in this case it would be
25 proper to consider is really a combination of

1 three circumstances.

2 The first, at this point, it's now
3 been fully briefed and aired. The second is
4 this really is an antecedent question to the
5 scope of Section 14(e). And then the third and
6 most dispositive one is that, in Central Bank,
7 in identical circumstances, the Court found
8 that it was appropriate to consider this
9 question.

10 So in light of that combination of
11 those three circumstances --

12 JUSTICE KAVANAUGH: On your -- on your
13 antecedent point, Schreiber did something
14 similar, isn't that correct?

15 MS. RATNER: So Schreiber did go on to
16 consider the scope of Section 14(e). We think,
17 first, the question whether there was a private
18 right wasn't presented there, so it wasn't
19 necessarily antecedent in that respect.

20 And, second, the scope question in
21 that case was about whether 14(e) more or less
22 has substantive fairness provisions, which
23 wouldn't have been affected by the existence of
24 a private right.

25 I think here it's particularly correct

1 to think of this as an antecedent question
2 because most of Petitioner's arguments for why
3 there has to be a scienter standard turn on the
4 existence of a private right of action.

5 And so that's why we think that it's
6 difficult in this case to go on and assess
7 whether scienter or negligence is appropriate
8 without addressing that antecedent question.

9 That said, if the Court thinks that
10 this was both forfeited, and it doesn't want to
11 exercise its discretion, it could decide that
12 negligence is the appropriate standard here,
13 but only if it thinks that that is sufficiently
14 clear from the text without regard to whether a
15 private right of action exists.

16 JUSTICE KAVANAUGH: The right of
17 action's been recognized in the lower courts
18 for quite a while. Does the government think
19 that's caused real-world problems, recognizing
20 the private right of action?

21 MS. RATNER: We're not taking our
22 position here as a basis of policy either for
23 or against the private right of action.

24 JUSTICE KAVANAUGH: True, but -- but
25 faced with a wall of lower court precedent that

1 sometimes is considered as a factor in thinking
2 about the state of the law.

3 MS. RATNER: Yeah, I -- I would note
4 that --

5 JUSTICE KAVANAUGH: If there are no
6 real-world problems, that is one thing. If
7 there are some that the Commission sees, then
8 it's good to hear those.

9 MS. RATNER: So, first, we think the
10 most obvious real-world problem is the
11 existence of a private right of action has led
12 lower courts to create the scienter standard,
13 which we don't think is the proper scope of the
14 Commission's enforcement authority.

15 And I would just flag that, as a
16 general matter in the private rights context,
17 it is a pretty common situation in Central
18 Bank, in Sandoval, in Transamerica, that the
19 lower courts are uniform in finding a private
20 right of action that this Court then says
21 doesn't exist because they've been following
22 their earlier precedent.

23 So I -- I -- I do recognize, given, I
24 believe, Justice Ginsburg's question earlier
25 that this does create an anomaly between 14(a)

1 and 14(e) in terms of their enforceability, but
2 that's an anomaly as a result of Sandoval.
3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Geysler.

7 ORAL ARGUMENT OF DANIEL L. GEYSER

8 ON BEHALF OF THE RESPONDENTS

9 MR. GEYSER: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 Although we submit only one question
12 is properly presented, this entire dispute can
13 be resolved looking to this Court's usual tools
14 of statutory construction and the text,
15 context, purpose, and history of Section 14(e).

16 As for the culpability standard,
17 scienter is not required under the plain words
18 that Congress chose for this statute or this
19 Court's decisions construing materially
20 indistinguishable language in 17(a) in Aaron,
21 and even in Ernst & Ernst itself, where it said
22 that a standalone reading of Rule 10b-5 would,
23 in fact, support a negligence standard.

24 As for the private right of action,
25 this case presents the exceptionally rare

1 situation where Congress unmistakably intended
2 this very statute to be privately enforceable,
3 despite not including an express private
4 remedy.

5 CHIEF JUSTICE ROBERTS: Well, we -- we
6 now know that that was not the right approach,
7 right, in Borak?

8 MR. GEYSER: Well, Borak was on --

9 CHIEF JUSTICE ROBERTS: Borak would
10 not be decided the same way today.

11 MR. GEYSER: Borak may not be decided
12 the same way today, but, again, our position is
13 not rooted in Borak at all. We -- we agree
14 that Sandoval rejected Borak's method, and
15 we're not trying to revive it.

16 We're looking specifically at the
17 usual tools of construction.

18 And my friend suggested today, he
19 agrees that Congress -- this was, I believe, a
20 direct quote, Congress transplanted the text of
21 Rule 10b-5 into Section 14(e). That's
22 undisputed in this case.

23 And it's a traditional rule of
24 construction that when Congress uses words that
25 have a settled legal meaning --

1 CHIEF JUSTICE ROBERTS: Right. But, I
2 mean, the Borak basis, in other words, from
3 today's perspective, what we did back then was
4 a mistake. And it's one thing to say, well,
5 it's -- it's done, you know, don't necessarily
6 overrule it just because you view it
7 differently now, but there's certainly -- a
8 strong argument could be made that you
9 shouldn't repeat the mistake, you shouldn't
10 carry it.

11 You shouldn't expand it, even if you
12 would have made that same decision back under
13 the -- I think as Justice Scalia called it --
14 the ancien regime.

15 MR. GEYSER: Exactly, Your Honor. And
16 if our position was that you should imply the
17 exact Borak -- Borak methodology because this
18 falls in Section 14(t), then I would agree with
19 you and we should lose. That is not our
20 position at all.

21 Our position is that, if you look at
22 Congress's intent, and as Cannon confirmed, the
23 question is not whether Congress was correct.
24 It's how did they perceive the state of the law
25 at the time?

1 JUSTICE KAVANAUGH: But it wasn't the
2 statute. It was the -- the rule language and,
3 you know, this type of provision is used in
4 multiple places where it's not been recognized
5 to create a private right of action.

6 So how do you respond to those
7 arguments on the other side?

8 MR. GEYSER: So, for -- looking first
9 to the fact that this came from a rule, I don't
10 think that -- I think that is a distinction
11 without a difference. I don't know why that
12 would matter.

13 If the question is did that rule have
14 a settled legal meaning at the time that
15 Congress decided to use those exact words, and
16 looking at this Court's decision in Herman and
17 MacLean, the Court said by 1969 10 of the 11
18 courts of appeals said that Section 10(b) and
19 Rule 10b-5 were privately enforceable.

20 So Congress, understanding the
21 existing state of law in 1968, those were
22 within one year of the Williams Act passage,
23 would have understood well that the -- that
24 Rule 10b-5 was considered to be privately
25 enforced.

1 JUSTICE KAVANAUGH: Well, we usually
2 look, to pick up on the Chief Justice's point,
3 we look at the text of the statute these days.
4 And if it's not a private cause of action,
5 we're not overruling ones that recognize
6 private rights of action before, but we're not
7 expanding it either.

8 Central Bank makes that clear and
9 Sandoval and lots -- lots of other cases.

10 MR. GEYSER: We -- we fully agree,
11 Justice Kavanaugh. The question is looking at
12 the text of this statute, this is a traditional
13 tool --

14 JUSTICE KAVANAUGH: There's no -- just
15 to state the obvious, there's no private right
16 of action in the text.

17 MR. GEYSER: Exactly. And if you look
18 at United States versus Kwai Fun Wong, the
19 Court was unanimous. There was no -- there was
20 no statement anywhere whether that particular
21 language is jurisdictional or not, but, as both
22 Justice Alito's dissent and Justice Kagan's
23 majority opinion confirmed, when Congress uses
24 words that have been attributed as having
25 jurisdictional significance, then Congress is

1 understood to import that same significance,
2 have the same meaning and the same effect in
3 the new provision.

4 CHIEF JUSTICE ROBERTS: But it's not
5 just a question of Congress's words or even
6 Congress's intent. It goes to the authority of
7 the courts to engage in the sort of fundamental
8 law-making enterprise that inferring a private
9 cause of action involves.

10 In other words, the reason we do it
11 differently is not because we have any
12 different view on the tools of congressional
13 intent. It's because we have a different view
14 on the appropriate limits on our authority.

15 And I don't know why if we exceeded
16 those limits, you know, back in the -- the bad
17 old days, why -- why we should feel free to
18 exceed those limits today?

19 MR. GEYSER: Mr. Chief Justice, I
20 think exceeding the court's limit is doing
21 something Congress did not intend. The
22 ultimate lodestar for Sandoval was, what is the
23 statutory intent?

24 And I don't think that Sandoval said
25 that you throw out all tools of construction,

1 unless it's a one-way ratchet, and it says
2 don't imply right of action. The question is,
3 what did Congress intend when they used the
4 specific language in 14(e)?

5 And I don't think that is then
6 necessarily the Court stepping in and saying we
7 think this is a good idea to advance the
8 purpose of the statute even though it's not
9 what Congress had in mind. Our contention is
10 that given this highly unusual -- and this is
11 basically a perfect storm of factors that come
12 together that show that Congress in 1968
13 expected 14(e) and understood that it would be
14 privately enforceable.

15 CHIEF JUSTICE ROBERTS: And why -- why
16 didn't they do it then?

17 MR. GEYSER: They -- I -- I think for
18 the same reason there that they -- in 14(a)
19 they didn't do it and in some other statutes,
20 as the Court has said, can be privately
21 enforceable by implication.

22 JUSTICE KAVANAUGH: But the -- they
23 did do it with a number of provisions. So it
24 shows they knew how to do it and they did do
25 it.

1 MR. GEYSER: Back in 1933 and 1934,
2 but -- but -- and I think that this --

3 JUSTICE GORSUCH: So they forgot by
4 1968?

5 MR. GEYSER: No, Your Honor. It's
6 actually -- I think -- I think, if this statute
7 were passed with the original '33 and '34 Act,
8 I would submit we would probably lose this
9 case. The reason that we win this case, I -- I
10 hope, is that, by the time that Congress acted
11 in 1968, it was using words that were
12 understood to have a -- a private right of
13 action. That was the consequence of using that
14 text.

15 And, again, this is cut from the same
16 cloth that the Court uses for ordinary
17 statutory interpretation all the time.

18 JUSTICE GORSUCH: To what extent
19 should we be -- take cognizance of the
20 possibility that a lot of lower courts, having
21 created this private right of action -- I -- I
22 don't mean to say that pejoratively, of course
23 -- then, in order to counter what they perceive
24 as abuses, ratchet up the mens rea to scienter?
25 We have some indication before us that a lot of

1 these cases are filed, class actions, and then
2 immediately dropped as soon as maybe the
3 lawyers get their fees. And to maybe address
4 that, some lower courts have heightened the
5 scienter.

6 So, at the end of the day, are we
7 really doing anybody any favor by creating a
8 private right of action and then maybe
9 increasing the scienter?

10 MR. GEYSER: Well, Justice Gorsuch, to
11 be absolutely clear, the lower courts are not
12 ratcheting up the mens rea to prevent abuse.
13 But --

14 JUSTICE BREYER: How many proxy
15 statements -- sorry, continue.

16 MR. GEYSER: I was just going to say,
17 if you -- if you look at our brief in
18 opposition, we went through the lower court
19 cases and showed that these were cases that --
20 that arose under the second clause of 14(e) and
21 were premised not on negligence but on
22 scienter-based allegations.

23 And in response, my very able friend,
24 in his reply, didn't take issue empirically
25 with our description of those cases. He

1 asserted the view that Section 14(e) has a
2 uniform culpability requirement, which, of
3 course, is exactly what Aaron rejected.

4 JUSTICE BREYER: Yeah, I wondered
5 how many --

6 JUSTICE GINSBURG: But you -- you
7 cited -- you cited Aaron. You rely on that for
8 the -- the negligence standard. But -- but
9 there is -- there is no private right of action
10 under 17(a), is there?

11 MR. GEYSER: There -- there is not,
12 Justice Ginsburg, but to be very clear, at the
13 time of the Williams Act in 1968, courts said
14 that 17(a) was privately enforceable. My
15 friends haven't identified a single case until
16 more than a decade after 1968, after 14(e) was
17 enacted, where any court said it wasn't
18 privately enforceable, which I think also goes
19 back to your other question, Justice Kavanaugh.
20 The -- it's undisputed in this --

21 JUSTICE KAVANAUGH: The -- the whole
22 thing is kind of a time travel argument, oh,
23 Congress would have thought in 1968 that courts
24 create implied causes of action. That's
25 rejected in Sandoval, and I think the

1 "patterned after" argument, the precise -- is
2 really just a different form of that same
3 argument, which is, well, Congress would have
4 thought based on the state of the law. And
5 that kind of general point was rejected in
6 Sandoval --

7 MR. GEYSER: Yeah, well, I --

8 JUSTICE KAVANAUGH: -- at least as I
9 see it.

10 MR. GEYSER: -- I -- I want to be
11 extremely clear about this because I think it's
12 very important. We are not making the time
13 travel argument. We're not making the
14 contemporary legal context argument. We think
15 that --

16 JUSTICE KAVANAUGH: The "patterned
17 after" argument is -- is that, isn't it?

18 MR. GEYSER: No. The "patterned" --
19 the "patterned after" argument is very
20 different. It -- it is very different to
21 say --

22 JUSTICE KAVANAUGH: It's a -- it's a
23 -- well, why isn't it -- tell me why it's not a
24 subcategory of the --

25 MR. GEYSER: Sure.

1 JUSTICE KAVANAUGH: -- larger time
2 travel argument?

3 MR. GEYSER: The -- the time travel
4 argument says that we -- we have lots of
5 statutes that were passed during, you know, the
6 battled heyday of the implied rights
7 jurisprudence, and so we assume that Congress
8 knew that they could just say whatever they
9 wanted, courts would take all of these statutes
10 and somehow on their own differentiate between
11 ones that really deserved a private right and
12 ones that didn't.

13 That is not our argument. Our
14 argument is that looking to the specifics of
15 Section 14(e), the text that Congress uses, the
16 context in which they used it, the entire point
17 was to harmonize 14(e) with 14(a).

18 Now maybe Borak was wrongly decided,
19 but, when Congress acted in 1968, they knew
20 that 14(a) was privately enforceable. And we
21 still haven't heard a single reason that any
22 rational legislative body would expect 14(a)
23 for proxy solicitations to be privately
24 enforceable but 14(e) not.

25 JUSTICE KAGAN: So, in your perfect

1 storm, Mr. Geysler, you have the 14(e), 14(a)
2 analogy, you have the replication of 10b-5
3 language. Is there anything else that goes
4 into creating this perfect storm?

5 MR. GEYSER: I -- I think there is,
6 Justice Kagan. There -- and there's actually
7 50 years of it. There's 50 years of unbroken
8 precedent among the lower courts, including a
9 decision in 1985 by this Court in Schreiber,
10 where the Court adjudicated a private right of
11 action in a dispute over the elements of that
12 private right of action without so much as
13 hinting that it wasn't privately enforceable.

14 I don't think the Court overlooked
15 that. The Court cited Piper three times, where
16 the issue had been previously reserved.

17 CHIEF JUSTICE ROBERTS: Well, but
18 the --

19 JUSTICE KAVANAUGH: The --

20 CHIEF JUSTICE ROBERTS: -- the lower
21 courts, it seems to me, is readily explainable
22 by the fact that they were following what we
23 had said and then were to so categorically
24 reject later in the subsequent right-of-action
25 cases.

1 MR. GEYSER: Well, Mr. Chief Justice,
2 that didn't happen in the context of 17(a),
3 where courts used to say, employing the Borak
4 methodology, that this is privately
5 enforceable, and they said, uh-oh, under
6 Sandoval, now it's not.

7 But 14(e) stands on entirely different
8 footing because of the text used, and it's not
9 just the 50-year history. Congress has amended
10 the --

11 JUSTICE KAVANAUGH: This is all true
12 in Central Bank as well. Every court of
13 appeals, every single one, had rejected -- had
14 allowed aiding and abetting liability. And the
15 Court said, no, it's not in the text and
16 rejected the acquiescence argument as well.

17 MR. GEYSER: And -- and, Justice
18 Kavanaugh, if that's all we had, we -- we'd
19 probably lose this case. But -- but our point
20 is that's not all we have. Central Bank did
21 not have Congress importing the verbatim text
22 from an earlier provision that was well
23 understood at the time to be privately
24 enforceable. And Central Bank didn't have what
25 would be an incredible anomaly in the

1 securities laws, where Congress is trying to
2 harmonize 14(a) and 14(e) and would do that by
3 creating this stark discontinuity where one's
4 privately enforceable and the other isn't.

5 That was the primary means of
6 enforcing these provisions at that time. So it
7 would make little sense that Congress would do
8 that with no indication.

9 But, to go back, Congress has since
10 amended the securities laws three times since
11 14(e)'s enactment, touching directly on this
12 subject matter. It did it the first time in
13 1970, where it added the second sentence of the
14 statute. At that time, there were already two
15 courts of appeals, including an opinion by the
16 -- in the Second Circuit by Judge Friendly,
17 saying it was privately enforceable. Congress
18 did not repudiate those decisions.

19 JUSTICE KAVANAUGH: Well, the Judge
20 Friendly dissent -- opinion was relied on by a
21 dissent in a subsequent case in that --
22 rejecting that approach --

23 MR. GEYSER: Well, but, again, though,
24 if the question is what --

25 JUSTICE KAVANAUGH: -- by Justice

1 Stevens' dissent.

2 MR. GEYSER: But, again, we're --
3 we're -- we're focusing on what Congress was
4 thinking when they were looking at -- at how
5 the courts had treated these statutes. In
6 1970, if Congress thought, wait a minute, we
7 didn't want this to be privately enforceable,
8 presumably, when you have an opinion as
9 prominent as one by -- by Judge Friendly, they
10 would have said something.

11 But, even without that, we have the
12 1988 amendment where Congress added an express
13 right of action --

14 JUSTICE KAVANAUGH: But in Piper --
15 I'm just not going to let that go for --
16 respectfully. Piper rejected that reasoning
17 from the Judge Friendly opinion. Justice
18 Stevens' dissent relied on it. So that was
19 rejected --

20 MR. GEYSER: Well --

21 JUSTICE KAVANAUGH: -- that mode of
22 analysis.

23 MR. GEYSER: -- to be very clear,
24 though, there -- there were two issues in
25 Piper. One was decided; one was reserved.

1 JUSTICE KAVANAUGH: Uh-huh.

2 MR. GEYSER: The issue that was
3 decided is whether a tender offeror has a
4 private right of action. And the Court's logic
5 was that they don't because they weren't the
6 class that Congress in mind and was trying to
7 protect.

8 And in -- in reserving the question,
9 they didn't reserve it in a way of we have
10 doubts about this. They said the dissent is
11 accusing the majority of undermining the
12 statutory objective because this would leave
13 the statute not capable of private enforcement
14 by that protected class. And the majority
15 batted it out of hand by saying we're not
16 deciding that question. That only makes sense
17 if the Court assumed that those shareholders
18 would have a private right of action.

19 But, even without that, if you go to
20 1988 when Congress added the express right of
21 action for insider trading --

22 JUSTICE KAVANAUGH: Can I stop you
23 right there? The Court left open the question,
24 whereas you're saying they assumed the answer?

25 MR. GEYSER: I'm saying that their

1 response to the dissent's accusation that they
2 were undermining the practical enforcement of
3 the statute makes very little sense unless they
4 thought that it would be privately enforceable.

5 But, again, we don't even need that.
6 When you fast-forward to 1985 and Schreiber, at
7 that point, this is apparently such a settled
8 question the Court doesn't even flag for the
9 lower courts don't misread our opinion and
10 think that we're embracing this right of
11 action. There's not a hint of that.

12 And it's presumably because, at that
13 point, it was so well settled that this was
14 privately enforceable, the Court didn't even
15 think it was worth mentioning. But then, in
16 1988, only three years after Schreiber, again
17 Congress created an express prohibition on
18 insider trading. And in the -- in the key
19 legislation -- Congressional report, they said
20 that this insider trading prohibition overlaps
21 with existing rights under the securities laws
22 and the cases construing them, and it flagged
23 Section 14(e) precisely.

24 And then Congress had an express
25 reservation saying that this new express remedy

1 is not meant to take out any implied private
2 rights under the Act. So Congress understood
3 at the time that people were suing under
4 Section 14(e), it was an implied right of
5 action, and they preserved those -- those
6 causes of action.

7 And then, if you fast-forward to the
8 PSLRA in 1990 --

9 JUSTICE KAVANAUGH: They -- they said
10 it wasn't supposed to be read in either
11 direction, correct?

12 MR. GEYSER: That was the -- no -- no,
13 Justice Kavanaugh. In 1988, they said that we
14 are preserving the implied rights. I -- I take
15 that as a -- as a one-way --

16 JUSTICE KAVANAUGH: Yeah.

17 MR. GEYSER: -- in our favor.

18 Now, in the PSLRA in 1995, Congress
19 went ahead and they didn't just add pleading
20 standards; it's a very general thing to all the
21 private rights. But if you look to the
22 forward-looking statement safe harbor -- and I
23 think this is really critical -- in the
24 forward-looking statement safe harbor, they
25 said that certain statements now, if they're

1 forward-looking, will not be actionable in
2 private rights under this chapter based on
3 untrue statements and material omissions.

4 And they excluded from that safe
5 harbor statements made in connection with a
6 tender offer. That is the exact subject matter
7 of Section 14(e), and as far as I know, it is
8 only the subject matter of 14(e).

9 So Congress not only said that these
10 are private rights that are premised on untrue
11 statements and material omissions in connection
12 with a tender offer, but they said these get a
13 leg up. These aren't even -- these won't even
14 fall within the safe harbor for forward-looking
15 statements. So, if you do a forward-looking
16 statement in the context of 14(e), those
17 actions are still preserved.

18 So I think we have 50 years of
19 unbroken precedent and we have the Petitioners
20 raising an issue that they expressly conceded
21 below, which I do think distinguishes us from
22 Central Bank.

23 CHIEF JUSTICE ROBERTS: Well, they had
24 no choice in the Ninth Circuit, right?

25 MR. GEYSER: No, Mr. Chief Justice.

1 I'm not aware of any Ninth Circuit decision
2 that looked at whether this is privately
3 enforceable under the Court's modern scheme.

4 I submit if the Ninth Circuit had done
5 that, they would be -- they would be making the
6 points that we made today, and I believe they'd
7 reach the same result.

8 But that is an issue that's open to my
9 friends in the Ninth Circuit. And they did not
10 say we're bound by circuit authority. They
11 didn't drop a footnote saying we plan to
12 challenge this for further review. They waited
13 until rehearing, where they made a point that
14 did not cite a single one of this Court's
15 recent authorities, didn't say that it's been
16 undercut, didn't suggest that the Ninth Circuit
17 --

18 JUSTICE GORSUCH: Well, circuit --
19 circuit authority is -- is binding until it's
20 overturned, right?

21 MR. GEYSER: I'm sorry, Justice?

22 JUSTICE GORSUCH: Circuit authority is
23 binding until it's overturned. Just because
24 there's an intervening -- there are a lot of
25 intervening decisions from this Court and lots

1 of others, it doesn't render a circuit
2 authority ineffectual.

3 MR. GEYSER: Well, no, actually, in --
4 in the Ninth Circuit, and the Ninth Circuit has
5 a very aggressive rule on this, is that if
6 there is intervening Supreme Court authority
7 that takes the legs out from under a case --

8 JUSTICE GORSUCH: Sure, but it has to
9 be argued and it has to be so held. It doesn't
10 happen deus ex machina.

11 MR. GEYSER: But my very point that --
12 that's exactly my point, though. There is
13 absolutely nothing to stop Petitioners from
14 arguing that.

15 JUSTICE GORSUCH: They could have
16 argued it, fair, I understand that point. But
17 to say that there was no precedent on this
18 point would be incorrect too.

19 MR. GEYSER: Then I misspoke.

20 JUSTICE GORSUCH: Okay.

21 MR. GEYSER: There was precedent on
22 this point.

23 JUSTICE GORSUCH: All right.

24 MR. GEYSER: My point is there was
25 nothing that prevented the Petitioners even at

1 the panel stage from raising this argument.

2 JUSTICE KAVANAUGH: What about Central
3 Bank? I mean, one response could be, don't
4 repeat that again, but do you have any other
5 response to their -- their raising of Central
6 Bank?

7 MR. GEYSER: Well, I -- I think
8 that -- I think, though, the primary response
9 you've already said is well -- is better than I
10 could.

11 I don't think just the fact that the
12 Court can do something means that it's a
13 prudent exercise of its power, especially in a
14 context where you have 50 years of unbroken
15 authority and three amendments where Congress
16 decided not to disturb that authority.

17 CHIEF JUSTICE ROBERTS: Well, in terms
18 of the Prudential approach, though, the
19 consequence of this is going to be, with
20 respect to the private right of action, setting
21 the standard for that, a bit of a waste of
22 time. We're sort of figuring out what's going
23 to happen in an area where the argument's been
24 made.

25 You don't -- you're not going to be

1 able to -- that's not going to make a
2 difference because there's no private right of
3 action in the first place.

4 MR. GEYSER: Well, I -- I do think,
5 Mr. Chief Justice, in Schreiber et al -- let's
6 say you think this isn't privately enforceable,
7 deciding that this is a negligent standard
8 still has effect because the SEC can bring
9 those actions. But again --

10 CHIEF JUSTICE ROBERTS: Sure, I
11 understand that. But, I mean, the authority of
12 the SEC and private litigants are two
13 different --

14 MR. GEYSER: No -- well, they are.
15 And we pointed out in our brief in opposition
16 that this wasn't a good vehicle to take if the
17 Petitioners are really, genuinely serious that
18 this private right that's existed for half a
19 century suddenly doesn't exist when they can't
20 cite a single case that holds that.

21 And to -- and as a matter of simple
22 prudence, I think it would make far more sense
23 for the Court to flag that this is an open
24 question or some of these courts might think
25 about. Again, we don't even think it's open

1 given this incredible perfect storm of
2 congressional indicia saying that this is
3 privately enforceable.

4 And then at least there would be some
5 percolation where litigants can see how do
6 these arguments actually pan out. Instead,
7 this Court would be the very first court to
8 grapple with all of these arguments based on
9 the borrowed text from -- from rule 10b-5 based
10 on the history of this provision, explaining is
11 there really any basis for thinking that
12 Congress wanted this puzzling anomaly in the
13 securities scheme.

14 JUSTICE GINSBURG: The essence of
15 Central Bank is just that it was wrong and we
16 shouldn't do it again; is that it?

17 MR. GEYSER: Well, it's -- it's that
18 and I think we have one distinguishing feature,
19 and -- and I hope I'm not misstating the lower
20 proceedings in Central Bank. I don't believe
21 that the litigants in Central Bank had actually
22 conceded the point the way the Petitioners
23 conceded the issue here.

24 And it wasn't just a concession here
25 that we're bound by 14(e), it was a point

1 saying that 14(e)'s privately enforceable so
2 the Ninth Circuit should hold that 14(b)(4) is
3 not. So, it was actually an affirmative point
4 trying to gain an advantage on a different
5 issue that was presented below and is not
6 before the Court.

7 So I think, given, again, this -- this
8 perfect storm, this is not the -- the camel's,
9 you know, nose under the tent where we're
10 trying to undo Sandoval. All we're saying is
11 that don't read Sandoval the way that my friend
12 is inviting the Court to, which is this
13 mechanical after-the-fact magic words
14 requirement. That's a caricature of what
15 Sandoval actually held.

16 Sandoval is saying look to Congress's
17 intent. Use the usual statutory toolbox and
18 try to figure out what did Congress mean. And
19 looking to borrow text that has settled
20 meaning has --

21 CHIEF JUSTICE ROBERTS: Do you -- I'm
22 sorry. But do you think that if the --
23 Congress's usual tools of congressional intent
24 were set forth today and we would say well, if
25 we apply those usual tools, we think Congress

1 intended there to be a private action, but they
2 didn't say that, do you think we might even in
3 that situation say, well, we think there's a
4 private right of action because Congress wanted
5 to leave it to us to make that decision?

6 MR. GEYSER: I -- I think that today
7 this would be a far harder case for us and one
8 we'd probably lose. But -- but to be
9 absolutely clear, we still would have pretty
10 good arguments because Congress would still be
11 modeling the new statute after an old statute
12 in the model of Cannon and -- and a rule that I
13 think Sandoval supported.

14 Sandoval did not say that Cannon was
15 wrongly decided. It didn't repudiate its
16 analysis. It would require over --

17 CHIEF JUSTICE ROBERTS: What do you do
18 with Ms. Ratner's distinction of Cannon?

19 MR. GEYSER: The -- I -- I'm trying to
20 remember exactly which -- which part of it.
21 I'm sorry.

22 CHIEF JUSTICE ROBERTS: Well, the fact
23 that it was more specific in terms of rights
24 creating obligation than the statute here. In
25 other words, Cannon is not just an absolute

1 rule, well, you look at the -- the
2 chronological context, but there were
3 distinctions in Cannon that aren't present
4 here.

5 MR. GEYSER: I -- I don't think those
6 distinctions drove the analysis in Cannon.
7 Cannon did not say because there is this hint
8 of right-creating language, therefore, it's
9 privately enforceable.

10 It predominantly looked to say that
11 Title IX was modeled after Title VI. Congress
12 knew that Title VI was privately enforceable;
13 therefore, it would have understood the same
14 language would have the same effect.

15 There's no reason to look at it any
16 differently. That's exactly what we have
17 here --

18 JUSTICE KAGAN: And that's the way
19 Sandoval looked at Cannon, isn't that right?

20 MR. GEYSER: Exactly, exactly. And so
21 Sandoval -- so I -- I appreciate my friend's
22 attempt to -- to create some distinction, but I
23 just don't see how that -- how that actually
24 works in the government's favor.

25 I'd also like to point out that in

1 terms of my friend's argument that if you are
2 to recognize a private right of action, it
3 should be one only for scienter because that's
4 what courts have been saying for 50 years.

5 I don't think that that is a faithful
6 construction of the statutory text or the way
7 that this Court deals with implied rights that
8 are recognized.

9 The ultimate touchstone is still
10 Congress's intent. And Congress's intent, if
11 you look at the text of this statute, is
12 incompatible with the scienter requirement but
13 perfectly consistent with the negligence
14 requirement.

15 And I think that Congress in 1968
16 looking at this language would have known at
17 the time that there was a circuit split over
18 whether Rule 10b-5 was actionable under a
19 negligence theory or a scienter theory and they
20 would have looked at the language of the text
21 and have seen there's absolutely no hint in
22 this of a scienter requirement.

23 JUSTICE KAVANAUGH: In terms of
24 proscribing the behavior that you're concerned
25 about, do you think in -- how would you assess

1 SEC enforcement alone of a negligence standard
2 versus SEC plus private enforcement of a higher
3 mens rea standard or -- I realize that's
4 speculation, but I'm just curious to your
5 thoughts on that.

6 MR. GEYSER: I don't think the --
7 well, I -- I have a few thoughts, Justice
8 Kavanaugh.

9 One is I don't see a textual hook in
10 the statute for saying that there's a different
11 culpability standard, depending on whether it's
12 the government as a plaintiff or a private --

13 JUSTICE KAVANAUGH: No, I was asking a
14 different question.

15 In other words, the level for the
16 people who are regulated, if they know they're
17 on the hook at least to the SEC for negligence,
18 okay, that's going to scare them into certain
19 protections, versus if the -- if the standard's
20 higher, so they're not going to be on the hook
21 for just negligence, but they could be
22 enforced -- again, it could be enforced by both
23 the SEC and private, what -- which do you think
24 has a greater enforcement effect?

25 And I realize it's speculation, but

1 just your experience, I'm curious to your
2 thoughts.

3 MR. GEYSER: I think it is -- it is
4 very difficult to predict other than knowing
5 that the SEC with their limited resources, as
6 they made -- as they made the point in the
7 Piper amicus brief, and I realize some decades
8 have gone by, but I don't think the SEC's --
9 the constraints on their resources have changed
10 much.

11 I think that someone looking, knowing
12 that they only faced government enforcement, is
13 very unlikely to be as concerned about honoring
14 the full and fair disclosure.

15 JUSTICE KAVANAUGH: Do you -- are you
16 sure about that? I mean, that seems --

17 MR. GEYSER: I -- I -- I'm not,
18 because I don't -- I'm trying to predict the --

19 JUSTICE KAVANAUGH: It seems like
20 someone faced with the SEC enforcing a
21 negligence standard is going to be very
22 concerned about their actions.

23 MR. GEYSER: If, in fact, the SEC has
24 the resources available to go after them --

25 CHIEF JUSTICE ROBERTS: Well, they

1 must think they do, right, because they say
2 there is no private right of action?

3 MR. GEYSER: Well, they do, Your
4 Honor, but I -- I took their brief on that
5 point to be -- to be fairly understated. They
6 stressed the importance of the private right
7 under 14(a), and the 14(a) context is
8 absolutely indistinguishable from the 14(e)
9 context from a practical standpoint.

10 And they simply said, our hand -- our
11 hands are tied by Sandoval, based on what we
12 say is a demonstrable misreading of Sandoval.
13 So I --

14 JUSTICE KAGAN: This -- this Court,
15 Mr. Geyser, has sometimes indicated real
16 concern with abuse of private suits and
17 particularly with the opportunity for strike
18 litigation.

19 What -- what -- what's the -- what --
20 do you have an answer to that?

21 MR. GEYSER: I -- I -- I do, Your
22 Honor. May I?

23 CHIEF JUSTICE ROBERTS: Sure.

24 MR. GEYSER: Thank you. The answer is
25 that Congress has calibrated specific remedies

1 that are actually a linear response to the
2 abuse, as opposed to saying let's throw the
3 baby out with the bath water and just either
4 ratchet up a mens rea requirement that's
5 profoundly atextual or say a private right of
6 action doesn't exist.

7 The PSLRA cuts off discovery until a
8 motion to dismiss has been resolved. There are
9 heightened pleading standards. And it says
10 that there's a mandatory sanctions regime if
11 you file a baseless lawsuit.

12 There is absolutely no reason that any
13 defendant faced with a frivolous lawsuit can't
14 defend themselves just as ably as they can
15 settle. And if they do defend themselves,
16 they'll get attorneys' fees and they should, if
17 the case is, in fact, baseless.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Three minutes, Mr. Garre.

21 REBUTTAL ARGUMENT OF GREGORY G. GARRE

22 ON BEHALF OF THE PETITIONERS

23 MR. GARRE: Thank you, Mr. Chief
24 Justice.

25 Fundamentally, the threshold question

1 in this case is about the role of federal
2 courts when it comes to creating implied
3 private rights. This Court in Sandoval
4 chartered a completely different course than
5 the Court had previously taken, and there is
6 absolutely no reason for this Court to abandon
7 or backtrack in any way on that course.

8 I have heard no answer from my friend
9 today as to how Section 14(e) actually
10 satisfies the test set forth in Sandoval for
11 creating implied private rights.

12 Instead, all we've heard is arguments
13 for eroding Sandoval based on context, time
14 travel, congressional silence. There's no
15 reason for this Court to cut back on Sandoval
16 and create new exceptions that are going to
17 lead to grandfathering private rights
18 recognized under the old regime.

19 If this Court does adopt a premise
20 that because Congress adopted the regulatory
21 language in Rule 10b-5 and 14(e), then that has
22 to lead you to the conclusion that Congress
23 intended Rule 10b-5's scienter requirement. So
24 that doesn't help my friend either.

25 And, Justice Breyer, I would -- I

1 would add with respect to 14(a), 14(a) -- this
2 Court has never recognized a negligence
3 standard for 14(a). The lower courts are
4 divided on that.

5 The Adams case of the Sixth Circuit
6 says that it's a scienter standard. So our
7 view is that should be a scienter standard as
8 well.

9 Finally, with respect to the issue of
10 waiver. Central Bank resolves that issue as a
11 matter of precedent. We're in a much stronger
12 position in Central Bank in that indisputably
13 briefed it at the cert stage. We raised it in
14 our panel hearing.

15 We didn't concede the issue below. We
16 simply acknowledged circuit precedent and did
17 not dispute it.

18 JUSTICE BREYER: I'm rather curious.
19 You may know the answer to this. Where --
20 where do I look at, I'm curious how many proxy
21 solicitations each year there are in the United
22 States.

23 And I'm curious to know how many
24 tender offers there are in the United States.

25 MR. GARRE: So I can tell --

1 JUSTICE BREYER: You can tell me?

2 MR. GARRE: I can tell you.

3 JUSTICE BREYER: Good.

4 MR. GARRE: From 2013 to 2015, there
5 were 725 transactions involving U.S. public
6 companies; 118 used tender offers; 507 used
7 proxy solicitations.

8 And, of course, 14(a) isn't just
9 limited to proxy solicitations used for
10 acquiring companies.

11 JUSTICE BREYER: And how many --

12 MR. GARRE: It's proxy solicitations,
13 generally.

14 JUSTICE BREYER: So how many of those
15 do you think there are?

16 MR. GARRE: So our understanding is
17 there are --

18 JUSTICE BREYER: Millions or thousands
19 or what?

20 MR. GARRE: Of just proxy
21 solicitations?

22 JUSTICE BREYER: Yeah.

23 MR. GARRE: It's -- it's broader
24 because I don't -- I don't have a statistic on
25 that.

1 JUSTICE BREYER: It is broader. Do
2 you have a guess?

3 MR. GARRE: I don't.

4 JUSTICE BREYER: I would hold you to
5 it.

6 (Laughter.)

7 MR. GARRE: I'm not -- I'm not going
8 to guess.

9 JUSTICE BREYER: I mean, obviously
10 my --

11 MR. GARRE: It's more than 745.

12 JUSTICE BREYER: -- question is
13 related to staff.

14 MR. GARRE: Yes.

15 JUSTICE BREYER: It's one things if it
16 is tens of thousands --

17 MR. GARRE: Right.

18 JUSTICE BREYER: -- which suddenly you
19 are going to ask the SEC to go and look at or
20 whether you are talking about 50, in which case
21 I guess they could do it.

22 MR. GARRE: No one is question --

23 JUSTICE BREYER: They say they can do
24 it on this one, if we keep it to tender offers.
25 I don't know what happens if it expands to

1 proxies and other things.

2 MR. GARRE: No one has questioned the
3 existing regime under 14(a). The only question
4 is whether this Court is going to create a new
5 regime under 14(e).

6 Thank you, Your Honors.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.

9 (Whereupon, 12:06 p.m., the case was
10 submitted.)

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Official - Subject to Final Review

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1934 [2] 3:15 46:1 1968 [11] 13:18 35:3 42:21 45:12 46:4,11 48:13,16,23 50:19 67:15 1969 [1] 42:17 1970 [2] 53:13 54:6 1971 [1] 18:20 1985 [2] 51:9 56:6 1988 [4] 54:12 55:20 56:16 57:13 1990 [1] 57:8 1995 [1] 57:18</p>	<p>44 [1] 12:3</p> <p style="text-align: center;">5</p> <p>50 [6] 51:7,7 58:18 61:14 67:4 75:20 50-year [2] 28:3 52:9 507 [1] 74:6</p> <p style="text-align: center;">7</p> <p>71 [1] 2:15 725 [1] 74:5 745 [1] 75:11</p> <p style="text-align: center;">9</p> <p>9 [2] 12:7 20:21</p> <p style="text-align: center;">A</p> <p>a.m [2] 1:15 3:2 Aaron [4] 30:13 39:20 48:3,7 abandon [1] 72:6 abetting [5] 4:19,23 11:16,22 52:14 able [3] 23:3 47:23 62:1 ably [1] 71:14 above-entitled [1] 1:13 Absent [1] 34:24 absolute [1] 65:25 Absolutely [8] 24:15 47:11 60:13 65:9 67:21 70:8 71:12 72:6 abuse [3] 47:12 70:16 71:2 abuses [1] 46:24 accepted [2] 4:2 17:12 account [1] 14:13 accounted [1] 31:22 accusation [1] 56:1 accusing [1] 55:11 acknowledged [1] 73:16 acquiesced [1] 18:23 acquiescence [1] 52:16 acquiring [1] 74:10 Act [10] 3:14 18:2,22 24:19 34:18, 20 42:22 46:7 48:13 57:2 acted [2] 46:10 50:19 action [87] 4:3,18 5:11,17,22 6:9, 18,24 9:16 10:1,7,14,17,25 11:16, 21 12:1,14 13:11 14:12 15:2 16:11,13,21 17:15,25 18:4,18 19:8,12, 20 20:14 24:11,14 25:16 26:25 28:21,24 29:5 30:15 32:5,8,16 33:7,9, 15,23 34:8,16,18,19 35:11,16 37:4, 15,20,23 38:11,20 39:24 42:5 43:4,6,16 44:9 45:2 46:13,21 47:8 48:9,24 51:11,12 54:13 55:4,18,21 56:11 57:5,6 61:20 62:3 65:1,4 67:2 70:2 71:6 action's [1] 37:17 actionable [2] 58:1 67:18 actions [4] 47:1 58:17 62:9 69:22 actually [14] 4:14 32:15,19 34:3 46:6 51:6 60:3 63:6,21 64:3,15 66:23 71:1 72:9 Adams [1] 73:5 add [5] 6:12,22 7:12 57:19 73:1 added [4] 4:24 53:13 54:12 55:20 adding [1] 13:18</p>	<p>additional [1] 13:18 address [6] 7:5 12:9 30:14,21 32:5 47:3 addressed [1] 10:12 addressing [1] 37:8 adequately [1] 8:2 adjudicated [1] 51:10 administrative [1] 11:15 adopt [1] 72:19 adopted [1] 72:20 advance [1] 45:7 advantage [1] 64:4 Advisors [1] 34:20 affected [1] 36:23 affirmative [1] 64:3 after-the-fact [1] 64:13 agency [2] 25:16 33:3 aggressive [1] 60:5 agree [13] 6:4,25 7:14 10:2,21 15:13 16:5,10 17:22 24:3 40:13 41:18 43:10 agrees [3] 23:18 25:8 40:19 ahead [1] 57:19 aiding [5] 4:18,23 11:16,21 52:14 aired [1] 36:3 AL [3] 1:3,6 62:5 alert [1] 24:2 ALITO [1] 35:13 Alito's [1] 43:22 alive [1] 12:20 allegations [1] 47:22 allowed [1] 52:14 almost [1] 8:20 alone [1] 68:1 already [7] 29:21,25 31:15,21 32:2 53:14 61:9 Although [1] 39:11 amended [2] 52:9 53:10 amendment [1] 54:12 amendments [1] 61:15 amicus [4] 1:22 2:8 28:13 69:7 among [1] 51:8 analogue [1] 30:11 analogy [1] 51:2 analysis [4] 11:23 54:22 65:16 66:6 ancien [1] 41:14 anomaly [4] 38:25 39:2 52:25 63:12 another [1] 10:6 answer [13] 7:25 11:1 23:3,22 27:3 28:22 29:7 31:17 55:24 70:20, 24 72:8 73:19 answered [2] 7:24,25 answering [1] 25:6 answers [1] 23:5 antecedent [5] 36:4,13,19 37:1,8 anybody [1] 47:7 apparently [1] 56:7 appeals [5] 3:25 4:1 42:18 52:13 53:15 APPEARANCES [1] 1:17 appears [2] 34:1,14 applied [1] 11:17</p>	<p>applies [1] 14:2 apply [2] 30:10 64:25 appreciate [2] 26:3 66:21 approach [4] 26:19 40:6 53:22 61:18 appropriate [6] 30:7 35:15 36:8 37:7,12 44:14 April [1] 1:11 area [1] 61:23 Aren't [5] 8:1 15:22 16:2 58:13 66:3 argue [1] 9:1 argued [2] 60:9,16 arguing [2] 25:25 60:14 argument [37] 1:14 2:2,5,10,13 3:4,7 4:5 5:5,8,23 6:5 8:11 13:9,12 17:2,4 22:5 28:12 35:6 39:7 41:8 48:22 49:1,3,13,14,17,19 50:2,4, 13,14 52:16 61:1 67:1 71:21 argument's [1] 61:23 arguments [6] 37:2 42:7 63:6,8 65:10 72:12 arose [1] 47:20 around [1] 16:7 art [1] 35:10 artfully [1] 10:19 artificial [1] 19:17 asserted [1] 48:1 assess [2] 37:6 67:25 Assistant [1] 1:20 assume [3] 28:23 31:1 50:7 assumed [2] 55:17,24 atextual [1] 71:5 attempt [1] 66:22 attorneys' [1] 71:16 attributed [1] 43:24 authorities [1] 59:15 authority [14] 21:19 25:20,22 38:14 44:6,14 59:10,19,22 60:2,6 61:15,16 62:11 authorize [1] 28:18 available [2] 31:5 69:24 aware [2] 25:14 59:1</p> <p style="text-align: center;">B</p> <p>baby [1] 71:3 back [9] 27:3 33:7 41:3,12 44:16 46:1 48:19 53:9 72:15 backtrack [1] 72:7 bad [1] 44:16 ball [1] 8:8 Bank [19] 4:12 5:3 7:22 9:4 11:12 36:6 38:18 43:8 52:12,20,24 58:22 61:3,6 63:15,20,21 73:10,12 based [6] 49:4 58:2 63:8,9 70:11 72:13 baseless [2] 71:11,17 basically [3] 6:25 24:10 45:11 basis [8] 13:23 18:7 26:15,24 34:6 37:22 41:2 63:11 bath [1] 71:3 batted [1] 55:15 battled [1] 50:6 behalf [8] 1:19,25 2:4,12,15 3:8 39:</p>
<p style="text-align: center;">2</p> <p>20 [1] 8:13 2013 [1] 74:4 2015 [1] 74:4 2019 [1] 1:11 206 [1] 34:20 28 [1] 2:9</p> <p style="text-align: center;">3</p> <p>3 [1] 2:4 33 [1] 46:7 34 [1] 46:7 39 [1] 2:12</p> <p style="text-align: center;">4</p>			

Official - Subject to Final Review

<p>8 71:22 behavior [1] 67:24 believe [7] 20:1 23:20 25:9 38:24 40:19 59:6 63:20 belongs [1] 10:7 below [7] 5:8 8:2,23 10:2 58:21 64: 5 73:15 benefited [1] 12:9 Bethesda [1] 1:18 better [2] 30:11 61:9 between [4] 7:13 27:20 38:25 50: 10 beyond [2] 14:8 30:4 binding [2] 59:19,23 bit [2] 33:13 61:21 body [1] 50:22 Borak [23] 12:15,16 13:13,25 14:1 16:23 17:1,6,7 22:13 23:25 32:18 33:22 40:7,8,9,11,13 41:2,17,17 50:18 52:3 Borak's [1] 40:14 Borak-type [1] 19:23 borrow [1] 64:19 borrowed [1] 63:9 borrows [1] 29:9 both [5] 15:9 27:21 37:10 43:21 68: 22 bound [3] 11:5 59:10 63:25 break [1] 21:23 BREYER [24] 6:11,14,21 7:3 27:1, 8,13 47:14 48:4 72:25 73:18 74:1, 3,11,14,18,22 75:1,4,9,12,15,18, 23 Breyer's [2] 7:6 29:8 brief [9] 6:6 10:12,20 12:3 28:22 47:17 62:15 69:7 70:4 briefed [2] 36:3 73:13 bring [1] 62:8 broader [10] 5:5 7:21 8:11,17 9:2 10:20 22:5 23:8 74:23 75:1 broadly [2] 7:19 24:12 brought [1] 10:14</p>	<p>categorically [1] 51:23 cause [5] 10:7 28:21,23 43:4 44:9 caused [1] 37:19 causes [2] 48:24 57:6 Central [19] 4:12 5:3 7:22 9:3 11: 12 36:6 38:17 43:8 52:12,20,24 58:22 61:2,5 63:15,20,21 73:10, 12 century [1] 62:19 cert [9] 4:16,20 5:4 8:4,8,14,22 9:1 73:13 certain [2] 57:25 68:18 certainly [1] 41:7 certiorari [1] 4:25 challenge [1] 59:12 change [1] 16:6 changed [1] 69:9 changing [1] 8:7 chapter [1] 58:2 chartered [1] 72:4 CHIEF [29] 3:3,9 28:9,15 39:4,9 40: 5,9 41:1 43:2 44:4,19 45:15 51:17, 20 52:1 58:23,25 61:17 62:5,10 64:21 65:17,22 69:25 70:23 71:18, 23 76:7 choice [1] 58:24 choose [1] 8:21 chose [1] 39:18 chronological [1] 66:2 Circuit [23] 3:11 5:21 6:15 7:9 11: 10 26:24 53:16 58:24 59:1,4,9,10, 16,18,19,22 60:1,4,4 64:2 67:17 73:5,16 Circuit's [2] 5:16 11:5 circumstances [3] 36:1,7,11 cite [2] 59:14 62:20 cited [4] 5:15 48:7,7 51:15 civil [1] 31:2 claim [1] 35:18 claims [1] 10:18 class [4] 12:9 47:1 55:6,14 clause [1] 47:20 clear [14] 14:4 18:9,11 19:25 23:9 29:2 34:23 37:14 43:8 47:11 48: 12 49:11 54:23 65:9 clearer [1] 30:6 clearly [4] 7:20 17:6 23:22 26:4 client [1] 6:16 cloth [1] 46:16 code [2] 34:23 35:10 cognizance [1] 46:19 combination [2] 35:25 36:10 come [2] 31:17 45:11 comes [7] 6:9 18:1,14 23:9 27:24 33:7 72:2 coming [2] 16:9,15 Commission [4] 29:5 31:25 34:25 38:7 Commission's [1] 38:14 common [2] 34:1 38:17 companies [2] 74:6,10 company [1] 27:11 compared [1] 20:18 compel [1] 3:19</p>	<p>completely [5] 14:1 18:6 19:14 22: 15 72:4 concede [3] 7:12 12:4 73:15 conceded [3] 58:20 63:22,23 concedes [1] 8:12 concern [2] 27:25 70:16 concerned [3] 67:24 69:13,22 concession [1] 63:24 conclusion [4] 3:19 11:24 26:23 72:22 conduct [1] 12:7 confer [2] 3:20 26:17 confirmed [2] 41:22 43:23 confronted [1] 4:13 Congress [85] 13:7,16,21 14:11, 20,24 15:14,24 16:5 17:5,6,14,17, 22 18:18,21 19:5,8,15,24 22:20 23:20,22 24:9,18 25:10 26:20 29: 18 31:2,21 32:2,24 33:2,7,9,16,18 34:22 39:18 40:1,19,20,24 41:23 42:15,20 43:23,25 44:21 45:3,9, 12 46:10 48:23 49:3 50:7,15,19 52:9,21 53:1,7,9,17 54:3,6,12 55: 6,20 56:17,24 57:2,18 58:9 61:15 63:12 64:18,25 65:4,10 66:11 67: 15 70:25 72:20,22 Congress's [10] 16:4 20:10 24:3 41:22 44:5,6 64:16,23 67:10,10 congressional [7] 13:15 15:23 44: 12 56:19 63:2 64:23 72:14 connection [3] 13:17 58:5,11 consequence [2] 46:13 61:19 consider [6] 3:23 15:9 35:22,25 36:8,16 considered [4] 30:12 32:2 38:1 42:24 consistent [1] 67:13 constraint [2] 30:9,10 constraints [1] 69:9 construction [7] 17:8 25:5 39:14 40:17,24 44:25 67:6 construing [2] 39:19 56:22 contemporary [2] 33:19 49:14 content [3] 18:12,15 33:1 contention [1] 45:9 context [29] 12:23 14:10,12,15 15: 15 17:8,20 22:11,13,23 23:4,6 24: 24,24 26:14 29:19,22 33:20 38:16 39:15 49:14 50:16 52:2 58:16 61: 14 66:2 70:7,9 72:13 continue [2] 22:10 47:15 copied [1] 27:6 CORPORATION [2] 1:3 3:5 correct [7] 6:19 35:4,7 36:14,25 41:23 57:11 couldn't [3] 6:8 7:9,22 counsel [5] 8:7 28:10 39:5 71:19 76:8 counter [1] 46:23 counterproductive [1] 28:6 counts [1] 17:16 course [7] 7:9,19 46:22 48:3 72:4, 7 74:8 COURT [86] 1:1,14 3:10,17,25 4:1,</p>	<p>1,7,13,23 7:21 8:18 9:18 11:17 12: 16,18 13:12,13,23 14:2,25 15:14 17:5,10 18:3,20 19:2,25 20:4,21 21:11 23:8,12 24:1,15 25:14,20 26:13 28:1,7,16 29:3 30:5,12 32: 18 33:22 35:22 36:7 37:9,25 38: 20 39:10 42:17 43:19 45:6,20 46: 16 47:18 48:17 51:9,10,14,15 52: 12,15 55:17,23 56:8,14 59:25 60: 6 61:12 62:23 63:7,7 64:6,12 67:7 70:14 72:3,5,6,15,19 73:2 76:4 Court's [14] 3:19 4:11 7:20 25:6 26:12 29:25 34:21 39:13,19 42:16 44:20 55:4 59:3,14 courts [30] 10:2 13:14 16:12 18:16 19:23 20:12 24:1,9 33:5 37:17 38: 12,19 42:18 44:7 46:20 47:4,11 48:13,23 50:9 51:8,21 52:3 53:15 54:5 56:9 62:24 67:4 72:2 73:3 cover [1] 28:17 covers [2] 28:24 29:2 create [17] 14:11,17 17:15 18:4 19: 7 20:2,13 34:15,17,19 38:12,25 42:5 48:24 66:22 72:16 76:4 created [3] 19:18 46:21 56:17 creates [1] 15:1 creating [6] 47:7 51:4 53:3 65:24 72:2,11 criminal [1] 31:7 critical [1] 57:23 crumbling [1] 6:9 culpability [3] 39:16 48:2 68:11 curiae [3] 1:22 2:8 28:13 curious [5] 68:4 69:1 73:18,20,23 cut [2] 46:15 72:15 cuts [1] 71:7</p>
C		D	
<p>calibrated [1] 70:25 called [1] 41:13 came [5] 1:13 30:2,19 35:3 42:9 camel's [1] 64:8 Cannon [16] 17:13,20 19:5 20:22, 23 22:11 34:3 41:22 65:12,14,18, 25 66:3,6,7,19 cannot [1] 12:4 capable [1] 55:13 caricature [1] 64:14 carries [1] 35:11 carry [1] 41:10 Case [35] 3:4,11,24 4:13,25 9:4 11: 12,13 12:17 16:16 21:10 25:13 26: 19 32:13 34:3,5 35:24 36:21 37:6 39:25 40:22 46:9,9 48:15 52:19 53:21 60:7 62:20 65:7 71:17 72:1 73:5 75:20 76:8,9 cases [9] 20:1,9 43:9 47:1,19,19, 25 51:25 56:22</p>	<p>calibered [1] 70:25 called [1] 41:13 came [5] 1:13 30:2,19 35:3 42:9 camel's [1] 64:8 Cannon [16] 17:13,20 19:5 20:22, 23 22:11 34:3 41:22 65:12,14,18, 25 66:3,6,7,19 cannot [1] 12:4 capable [1] 55:13 caricature [1] 64:14 carries [1] 35:11 carry [1] 41:10 Case [35] 3:4,11,24 4:13,25 9:4 11: 12,13 12:17 16:16 21:10 25:13 26: 19 32:13 34:3,5 35:24 36:21 37:6 39:25 40:22 46:9,9 48:15 52:19 53:21 60:7 62:20 65:7 71:17 72:1 73:5 75:20 76:8,9 cases [9] 20:1,9 43:9 47:1,19,19, 25 51:25 56:22</p>	<p>D.C. [2] 1:10,21 Dallas [1] 1:24 DANIEL [3] 1:24 2:11 39:7 day [2] 10:6 47:6 days [2] 43:3 44:17 deal [1] 22:23 dealing [1] 8:15 deals [1] 67:7 dealt [1] 26:13 debating [1] 17:5 decade [1] 48:16 decades [1] 69:7 decide [2] 16:16 37:11 decided [11] 15:1 17:6 35:8 40:10, 11 42:15 50:18 54:25 55:3 61:16 65:15 deciding [2] 55:16 62:7 decision [13] 3:17 4:11 5:16 25:7 26:12 30:1,5 34:21 41:12 42:16 51:9 59:1 65:5 decisions [7] 5:22 11:15 22:19 35: 2 39:19 53:18 59:25 deed [1] 13:24 defend [2] 71:14,15 defendant [1] 71:13 defined [2] 21:14 24:13</p>	<p>D.C. [2] 1:10,21 Dallas [1] 1:24 DANIEL [3] 1:24 2:11 39:7 day [2] 10:6 47:6 days [2] 43:3 44:17 deal [1] 22:23 dealing [1] 8:15 deals [1] 67:7 dealt [1] 26:13 debating [1] 17:5 decade [1] 48:16 decades [1] 69:7 decide [2] 16:16 37:11 decided [11] 15:1 17:6 35:8 40:10, 11 42:15 50:18 54:25 55:3 61:16 65:15 deciding [2] 55:16 62:7 decision [13] 3:17 4:11 5:16 25:7 26:12 30:1,5 34:21 41:12 42:16 51:9 59:1 65:5 decisions [7] 5:22 11:15 22:19 35: 2 39:19 53:18 59:25 deed [1] 13:24 defend [2] 71:14,15 defendant [1] 71:13 defined [2] 21:14 24:13</p>

Official - Subject to Final Review

<p>demonstrable ^[1] 70:12 Denver ^[1] 4:12 Department ^[1] 1:21 depending ^[1] 68:11 describing ^[1] 21:21 description ^[1] 47:25 deserved ^[1] 50:11 designed ^[2] 12:8 18:13 despite ^[1] 40:3 deus ^[1] 60:10 dictated ^[1] 35:1 difference ^[4] 7:13 27:20 42:11 62:2 different ^[26] 9:8 12:18 13:4,8 14:2 18:6 19:14 21:17 22:15 27:16 29:22 31:16,18,22 33:13 44:12,13 49:2,20,20 52:7 62:13 64:4 68:10,14 72:4 differentiate ^[1] 50:10 differently ^[5] 14:21 31:17 41:7 44:11 66:16 difficult ^[2] 37:6 69:4 direct ^[1] 40:20 directed ^[1] 34:4 direction ^[1] 57:11 directly ^[1] 53:11 disagree ^[2] 5:25 19:10 disavowed ^[1] 12:18 disclosure ^[3] 13:19 34:1 69:14 discontinuity ^[1] 53:3 discovery ^[1] 71:7 discretion ^[3] 7:21,25 37:11 discriminated ^[1] 34:6 discusses ^[1] 32:16 discussing ^[1] 32:7 dismiss ^[1] 71:8 dispositive ^[1] 36:6 dispute ^[6] 6:16 7:7,14 39:12 51:11 73:17 disputing ^[1] 18:25 dissent ^[7] 11:14 43:22 53:20,21 54:1,18 55:10 dissent's ^[1] 56:1 dissenters ^[1] 9:10 distinction ^[7] 20:19 21:8 32:22,22 42:10 65:18 66:22 distinctions ^[2] 66:3,6 distinguish ^[1] 12:21 distinguishes ^[1] 58:21 distinguishing ^[2] 20:9 63:18 disturb ^[1] 61:16 divided ^[1] 73:4 dodged ^[1] 10:19 doing ^[3] 32:24 44:20 47:7 done ^[3] 33:2 41:5 59:4 doubts ^[1] 55:10 down ^[2] 6:10 22:10 draw ^[1] 8:6 drew ^[1] 24:8 drop ^[1] 59:11 dropped ^[1] 47:2 drove ^[1] 66:6 dumping ^[1] 28:4 during ^[1] 50:5</p>	<p>duty ^[2] 13:14 24:2</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[1] 73:21 earlier ^[3] 38:22,24 52:22 ebb ^[1] 25:22 effect ^[4] 44:2 62:8 66:14 68:24 effectively ^[1] 34:25 effectuate ^[1] 13:14 either ^[5] 37:22 43:7 57:10 71:3 72:24 element ^[1] 30:18 elements ^[1] 51:11 eliminating ^[1] 5:13 embracing ^[1] 56:10 emphatically ^[2] 12:17 17:10 empirically ^[1] 47:24 employing ^[1] 52:3 EMULEX ^[2] 1:3 3:4 enacted ^[3] 23:1 30:2 48:17 enactment ^[2] 20:11 53:11 enacts ^[2] 33:2,3 encompass ^[1] 6:7 encompassed ^[1] 34:10 End ^[3] 6:21 22:10 47:6 endeavor ^[2] 23:11 24:16 enforce ^[1] 18:1 enforceability ^[1] 39:1 enforceable ^[22] 40:2 42:19 45:14,21 48:14,18 50:20,24 51:13 52:5,24 53:4,17 54:7 56:4,14 59:3 62:6 63:3 64:1 66:9,12 enforced ^[3] 42:25 68:22,22 enforcement ^[12] 13:22 23:23 25:16 28:19 32:3 38:14 55:13 56:2 68:1,2,24 69:12 enforcing ^[2] 53:6 69:20 engage ^[1] 44:7 enough ^[1] 32:9 enterprise ^[1] 44:8 entire ^[2] 39:12 50:16 entirely ^[1] 52:7 equivalent ^[1] 31:6 era ^[1] 12:18 Ernst ^[11] 20:4,4 26:13,13 30:1,1,5,5,19 39:21,21 eroding ^[1] 72:13 especially ^[1] 61:13 ESQ ^[6] 1:18,24 2:3,6,11,14 essence ^[1] 63:14 essentially ^[2] 13:24 18:15 established ^[1] 21:23 ET ^[3] 1:3,6 62:5 even ^[21] 8:11 12:19 14:9 18:10 21:13 26:9,10 39:21 41:11 44:5 45:8 54:11 55:19 56:5,8,14 58:13,13 60:25 62:25 65:2 everybody ^[6] 4:2 9:20 19:18 23:18 25:8 33:3 Everything ^[1] 6:9 ex ^[1] 60:10 exact ^[5] 4:13 18:16 41:17 42:15 58:6 exactly ^[10] 13:12 27:16 41:15 43:17 48:3 60:12 65:20 66:16,20,20</p>	<p>example ^[1] 12:8 exceed ^[1] 44:18 exceeded ^[1] 44:15 exceeding ^[1] 44:20 except ^[2] 4:14 22:22 exceptionally ^[1] 39:25 exceptions ^[1] 72:16 Exchange ^[2] 3:14 18:2 excluded ^[1] 58:4 excuse ^[1] 24:9 exercise ^[2] 37:11 61:13 exist ^[3] 38:21 62:19 71:6 existed ^[1] 62:18 existence ^[5] 7:8,12 36:23 37:4 38:11 existing ^[3] 42:21 56:21 76:3 exists ^[2] 10:17 37:15 expand ^[1] 41:11 expanding ^[3] 5:13 20:24 43:7 expands ^[1] 75:25 expansion ^[1] 21:11 expect ^[1] 50:22 expected ^[2] 33:19 45:13 experience ^[1] 69:1 explain ^[2] 35:13,14 explainable ^[1] 51:21 explaining ^[3] 5:16 20:23 63:10 explicit ^[2] 11:9 23:12 explicitly ^[2] 8:14 12:6 express ^[7] 10:14 40:3 54:12 55:20 56:17,24,25 expressly ^[1] 58:20 extent ^[3] 15:23 25:19 46:18 extremely ^[2] 23:4 49:11</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>faced ^[4] 37:25 69:12,20 71:13 fact ^[9] 32:7 34:14 39:23 42:9 51:22 61:11 65:22 69:23 71:17 factor ^[1] 38:1 factors ^[1] 45:11 facts ^[1] 16:3 fair ^[2] 60:16 69:14 fairly ^[3] 5:5 8:12 70:5 fairness ^[1] 36:22 faithful ^[1] 67:5 fall ^[1] 58:14 falls ^[1] 41:18 far ^[3] 58:7 62:22 65:7 fast-forward ^[2] 56:6 57:7 favor ^[3] 47:7 57:17 66:24 feature ^[1] 63:18 features ^[1] 14:15 federal ^[1] 72:1 feel ^[1] 44:17 feels ^[1] 34:25 fees ^[2] 47:3 71:16 few ^[1] 68:7 field ^[1] 14:23 figure ^[1] 64:18 figuring ^[1] 61:22 file ^[1] 71:11 filed ^[1] 47:1</p>	<p>filled ^[1] 13:18 filling ^[1] 24:2 finally ^[2] 18:22 73:9 find ^[4] 10:5 28:20,23 32:24 finding ^[2] 32:19 38:19 fines ^[1] 31:24 First ^[19] 3:18 4:7,11 5:3 8:25 10:11 13:3 14:5 23:17 29:24 31:13 32:11 36:2,17 38:9 42:8 53:12 62:3 63:7 fits ^[1] 24:12 flag ^[5] 5:8 11:6 38:15 56:8 62:23 flagged ^[1] 56:22 flagging ^[1] 6:2 focusing ^[1] 54:3 following ^[2] 38:21 51:22 follows ^[1] 18:18 footing ^[1] 52:8 footnote ^[1] 59:11 forfeited ^[1] 37:10 forgot ^[1] 46:3 form ^[1] 49:2 formality ^[1] 32:13 forth ^[3] 16:3 64:24 72:10 forward-looking ^[5] 57:22,24 58:1,14,15 found ^[4] 19:7 31:8 32:1 36:7 framed ^[1] 12:6 framework ^[4] 19:4,5,23 25:19 fraught ^[1] 25:1 free ^[1] 44:17 free-standing ^[1] 6:5 friend ^[8] 8:12 40:18 47:23 64:11 72:8,24 friend's ^[2] 66:21 67:1 Friendly ^[4] 53:16,20 54:9,17 friends ^[3] 12:2 48:15 59:9 frivolous ^[1] 71:13 full ^[1] 69:14 fully ^[2] 36:3 43:10 Fun ^[1] 43:18 fundamental ^[1] 44:7 Fundamentally ^[1] 71:25 further ^[1] 59:12</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gain ^[1] 64:4 gamesmanship ^[2] 8:10 11:3 gap ^[3] 13:16,18 14:17 gap-filling ^[1] 14:22 GARRE ^[78] 1:18 2:3,14 3:6,7,9,22 4:10 5:15,19,25 6:13,19 7:2,5,18 8:9,17,25 9:9,13,25 10:9,24 11:11 12:12,15,24 13:2 14:4,7 15:11 16:1,8,20,23 17:1,19 18:20 19:10,17,22 20:15,20 21:3,10,16 22:1,3,6,9 23:5 25:4,24 26:6,11 27:7,12,19 28:21 29:15 71:20,21,23 73:25 74:2,4,12,16,20,23 75:3,7,11,14,17,22 76:2 GARY ^[1] 1:6 gave ^[1] 14:20 General ^[4] 1:20 38:16 49:5 57:20 generally ^[1] 74:13</p>
--	--	--	--

Official - Subject to Final Review

<p>genuinely ^[1] 62:17 GEYSER ^[58] 1:24 2:11 39:6,7,9 40:8,11 41:15 42:8 43:10,17 44: 19 45:17 46:1,5 47:10,16 48:11 49:7,10,18,25 50:3 51:1,5 52:1,17 53:23 54:2,20,23 55:2,25 57:12, 17 58:25 59:21 60:3,11,19,21,24 61:7 62:4,14 63:17 65:6,19 66:5, 20 68:6 69:3,17,23 70:3,15,21,24 GINSBURG ^[15] 3:22 4:10 11:8 12: 10,13,19,25 14:16 25:23 26:1,2,7 48:6,12 63:14 Ginsburg's ^[1] 38:24 given ^[7] 15:3 31:12 35:12 38:23 45:10 63:1 64:7 gives ^[3] 18:15 21:19 33:6 GORSUCH ^[11] 30:16,24 46:3,18 47:10 59:18,22 60:8,15,20,23 got ^[1] 13:10 governing ^[2] 19:19,21 government ^[9] 3:18 9:23,25 10: 11,16 25:24 37:18 68:12 69:12 government's ^[2] 10:12 66:24 grandfathering ^[1] 72:17 granted ^[1] 4:25 grapple ^[1] 63:8 great ^[1] 22:23 greater ^[1] 68:24 GREGORY ^[5] 1:18 2:3,14 3:7 71: 21 ground ^[3] 5:1 10:20 16:17 grounds ^[2] 5:13 8:8 guess ^[5] 22:16 32:21 75:2,8,21 guilty ^[1] 31:8</p>	<p>hook ^[4] 32:15 68:9,17,20 hope ^[2] 46:10 63:19 hundreds ^[1] 11:14</p> <hr/> <p style="text-align: center;">I</p> <p>idea ^[1] 45:7 identical ^[1] 36:7 identified ^[2] 33:22 48:15 illustrate ^[1] 35:9 immediately ^[1] 47:2 implement ^[1] 18:13 implication ^[1] 45:21 implied ^[32] 3:20 4:18,22 5:11 10: 17 11:15,21,25 13:10 16:11,13,21 17:25 18:4,23 19:12 20:2,6 23:10 25:15,15,20 26:14 28:23 48:24 50: 6 57:1,4,14 67:7 72:2,11 imply ^[2] 41:16 45:2 import ^[1] 44:1 importance ^[1] 70:6 important ^[5] 7:11 15:18 21:17 23: 4 49:12 importing ^[1] 52:21 included ^[2] 5:6 8:12 including ^[4] 11:18 40:3 51:8 53: 15 incompatible ^[1] 67:12 incorporated ^[1] 34:23 incorrect ^[1] 60:18 increased ^[1] 32:1 increasing ^[1] 47:9 incredible ^[2] 52:25 63:1 incredibly ^[1] 19:17 independent ^[1] 3:16 indicated ^[1] 70:15 indicates ^[1] 14:10 indication ^[4] 14:20 23:19 46:25 53:8 indicator ^[1] 17:17 indicia ^[1] 63:2 indisputably ^[2] 11:24 73:12 indistinguishable ^[2] 39:20 70:8 ineffectual ^[1] 60:2 inferred ^[3] 3:12 9:16,19 inferring ^[2] 26:24 44:8 inform ^[1] 17:8 information ^[1] 28:5 informs ^[4] 22:12,14 23:6,7 inquiry ^[1] 25:2 insider ^[3] 55:21 56:18,20 insofar ^[1] 15:15 instance ^[1] 25:14 Instead ^[2] 63:6 72:12 intelligent ^[1] 9:5 intend ^[5] 15:24 24:18 29:18 44:21 45:3 intended ^[7] 23:20,23 25:10 29:20 40:1 65:1 72:23 intending ^[1] 22:20 intent ^[10] 15:23 16:4 41:22 44:6, 13,23 64:17,23 67:10,10 interdependent ^[1] 9:14 interpret ^[2] 21:1,5 interpretation ^[6] 15:5 22:22 23:</p>	<p>16 24:17,22 46:17 interpreted ^[6] 20:13 29:11,21,25 30:1 34:8 interpreter ^[2] 15:7,8 interpreting ^[2] 26:16 28:1 intervening ^[3] 59:24,25 60:6 Investment ^[1] 34:20 investors ^[2] 32:17 33:21 inviting ^[1] 64:12 involved ^[1] 20:10 involves ^[4] 10:4,5 34:12 44:9 involving ^[1] 74:5 isn't ^[11] 5:24 23:4 25:25 35:9 36: 14 49:17,23 53:4 62:6 66:19 74:8 issue ^[18] 5:5 7:22 8:17 9:14 10:10 11:2 15:24 32:5 47:24 51:16 55:2 58:20 59:8 63:23 64:5 73:9,10,15 issues ^[1] 54:24 itself ^[7] 3:18 4:24 21:15 25:16,25 30:7 39:21 IX ^[1] 66:11</p>	<p>61:2 67:23 68:8,13 69:15,19 Keep ^[2] 16:25 75:24 key ^[1] 56:18 kind ^[4] 21:23 24:11 48:22 49:5 kitchen ^[1] 8:20 knowing ^[2] 69:4,11 known ^[1] 67:16 knows ^[1] 33:3 Kwai ^[1] 43:18</p> <hr/> <p style="text-align: center;">L</p> <p>language ^[42] 11:19 12:5 13:4,6 14:6,9,25 15:6,25 17:14,16 18:10, 19 23:18 25:8 26:16,21 27:4,5,6,9, 14 29:10,20,24 30:6,9,20 31:14,19 34:1,4 39:20 42:2 43:21 45:4 51:3 66:8,14 67:16,20 72:21 larger ^[1] 50:1 later ^[3] 6:22 30:19 51:24 Laughter ^[1] 75:6 law ^[4] 38:2 41:24 42:21 49:4 law-making ^[1] 44:8 laws ^[5] 23:23 34:2 53:1,10 56:21 lawsuit ^[2] 71:11,13 lawyer ^[1] 33:12 lawyers ^[1] 47:3 lead ^[2] 72:17,22 leads ^[1] 11:24 least ^[5] 14:15 26:23 49:8 63:4 68: 17 leave ^[3] 10:6 55:12 65:5 led ^[1] 38:11 left ^[4] 23:24,25,25 55:23 leg ^[1] 58:13 legal ^[7] 14:10,12,15 33:19 40:25 42:14 49:14 legislation ^[1] 56:19 legislative ^[2] 13:21 50:22 legs ^[1] 60:7 less ^[2] 24:23 36:21 level ^[1] 68:15 liability ^[1] 52:14 light ^[3] 15:16 26:3 36:10 limit ^[1] 44:20 limited ^[3] 21:22 69:5 74:9 limits ^[4] 23:12 44:14,16,18 line ^[2] 8:6 24:7 linear ^[1] 71:1 litigants ^[3] 62:12 63:5,21 litigation ^[1] 70:18 little ^[3] 33:13 53:7 56:3 located ^[1] 32:12 lock ^[1] 26:20 lodestar ^[1] 44:22 logic ^[1] 55:4 look ^[26] 8:13 13:5,20 15:5 18:5 21: 18 23:14,17,21 24:8,10,25 27:4 29:19 41:21 43:2,3,17 47:17 57: 21 64:16 66:1,15 67:11 73:20 75: 19 looked ^[5] 11:19 59:2 66:10,19 67: 20 looking ^[13] 15:22 19:5 30:4 39:13 40:16 42:8,16 43:11 50:14 54:4</p>
<hr/> <p style="text-align: center;">H</p> <p>half ^[1] 62:18 hand ^[2] 55:15 70:10 hands ^[1] 70:11 happen ^[3] 52:2 60:10 61:23 happens ^[1] 75:25 harbor ^[4] 57:22,24 58:5,14 harder ^[1] 65:7 harmonize ^[2] 50:17 53:2 hear ^[2] 3:3 38:8 heard ^[3] 50:21 72:8,12 hearing ^[1] 73:14 heightened ^[2] 47:4 71:9 held ^[4] 11:20 17:15 60:9 64:15 help ^[1] 72:24 Herman ^[1] 42:16 heyday ^[2] 23:25 50:6 higher ^[3] 31:11 68:2,20 highly ^[1] 45:10 hint ^[3] 56:11 66:7 67:21 hinting ^[1] 51:13 history ^[6] 13:21 28:3 29:19 39:15 52:9 63:10 hold ^[3] 16:20 64:2 75:4 holds ^[1] 62:20 Honor ^[7] 12:24 13:3 15:11 41:15 46:5 70:4,22 honoring ^[1] 69:13 Honors ^[1] 76:6</p>	<hr/> <p style="text-align: center;">J</p> <p>Judge ^[4] 53:16,19 54:9,17 judicial ^[1] 11:14 judicious ^[1] 21:20 jurisdictional ^[2] 43:21,25 jurisprudence ^[1] 50:7 Justice ^[182] 1:21 3:3,10,22 4:10 5: 14,18,19 6:11,14,14,21 7:3,5,15, 16,24 8:10,15,19 9:2,7,11,22 10:3, 10,22 11:8,13 12:10,13,19,25 14:3, 8,16 15:20,21 16:2,3,9,18,22,24, 25 17:12 18:9 19:3,16 20:7,8,16, 25 21:4,13,25 22:2,4,7,16 24:5 25: 23 26:1,2,7,18 27:1,8,13 28:9,15, 20 29:7,8,14,23 30:16,24 32:6,6, 21 33:17 35:2,5,13 36:12 37:16, 24 38:5,24 39:4,10 40:5,9 41:1,13 42:1 43:1,11,14,22,22 44:4,19 45: 15,22 46:3,18 47:10,14 48:4,6,12, 19,21 49:8,16,22 50:1,25 51:6,17, 19,20 52:1,11,17 53:19,25,25 54: 14,17,21 55:1,22 57:9,13,16 58:23, 25 59:18,21,22 60:8,15,20,23 61:2, 17 62:5,10 63:14 64:21 65:17,22 66:18 67:23 68:7,13 69:15,19,25 70:14,23 71:18,24 72:25 73:18 74: 1,3,11,14,18,22 75:1,4,9,12,15,18, 23 76:7 Justice's ^[1] 43:2</p>	<hr/> <p style="text-align: center;">K</p> <p>KAGAN ^[24] 5:14,18,19 6:14 7:15, 16 14:3,8 16:3 17:12 18:9 19:3,16 21:13 22:16 24:5 26:18 32:6,21 33:17 50:25 51:6 66:18 70:14 Kagan's ^[2] 20:8 43:22 KAVANAUGH ^[48] 15:20 16:22,24, 25 20:7,16,25 21:4,25 22:2,4,7 32: 6 35:2,5 36:12 37:16,24 38:5 42:1 43:1,11,14 45:22 48:19,21 49:8, 16,22 50:1 51:19 52:11,18 53:19, 25 54:14,21 55:1,22 57:9,13,16</p>	<hr/> <p style="text-align: center;">L</p>

Official - Subject to Final Review

<p>64:19 67:16 69:11 lose [4] 41:19 46:8 52:19 65:8 lot [6] 16:6 31:7,7 46:20,25 59:24 lots [4] 43:9,9 50:4 59:25 low [1] 31:24 lower [13] 37:17,25 38:12,19 46:20 47:4,11,18 51:8,20 56:9 63:19 73: 3 lowest [1] 25:22</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>machina [1] 60:10 MacLean [1] 42:17 made [11] 11:9 23:9 34:9 41:8,12 58:5 59:6,13 61:24 69:6,6 magic [1] 64:13 majority [3] 43:23 55:11,14 mandatory [1] 71:10 many [6] 47:14 48:5 73:20,23 74: 11,14 Maryland [1] 1:18 material [3] 34:13 58:3,11 materially [1] 39:19 matter [13] 1:13 19:11 24:25 31:3 33:19 35:21 38:16 42:12 53:12 58: 6,8 62:21 73:11 matters [2] 22:23 32:23 mean [22] 5:19 6:12 7:22 14:5 19: 16 20:20,21 23:1 25:4 27:1,3 29: 21 30:21 31:14 32:21 41:2 46:22 61:3 62:11 64:18 69:16 75:9 meaning [8] 27:14 30:3 31:15 34: 9 40:25 42:14 44:2 64:20 meaningful [1] 16:4 means [2] 53:5 61:12 meant [6] 13:7 14:11,17 17:18 26: 20 57:1 mechanical [1] 64:13 mechanically [1] 24:25 mens [7] 30:17 31:11,22 46:24 47: 12 68:3 71:4 mentioned [2] 17:19 34:14 mentioning [2] 8:3 56:15 mergers [1] 14:19 method [1] 40:14 methodology [2] 41:17 52:4 might [4] 9:8 23:15 62:24 65:2 Millions [1] 74:18 mind [4] 13:21 17:6 45:9 55:6 minute [1] 54:6 minutes [1] 71:20 misdemeanor [1] 31:9 misinterpreting [1] 24:6 misread [1] 56:9 misreading [1] 70:12 misrepresentations [3] 28:18 29: 3 34:13 missing [1] 15:12 misspoke [1] 60:19 misstating [1] 63:19 mistake [2] 41:4,9 Mister [1] 25:23 mode [1] 54:21 model [1] 65:12</p>	<p>modeled [1] 66:11 modeling [1] 65:11 modern [2] 11:18 59:3 Monday [1] 1:11 MORGAN [3] 1:20 2:6 28:12 mortar [1] 35:21 most [4] 15:17 36:6 37:2 38:10 motion [2] 3:24 71:8 moving [1] 8:8 Ms [16] 28:11,15 29:1,13,23 30:23 31:13 33:17 35:4,7,20 36:15 37: 21 38:3,9 65:18 much [7] 4:14 5:2 10:21 11:7 51: 12 69:10 73:11 multiple [1] 42:4 must [2] 13:6 70:1</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>narrower [1] 16:17 necessarily [4] 20:24 36:19 41:5 45:6 need [2] 13:11 56:5 negligence [35] 5:12,24 6:7,23 9: 17,19 10:4,5,18 16:11 26:5,10,17, 25 27:14,17,24 28:2,25 30:8,13 31:1,25 37:7,12 39:23 47:21 48:8 67:13,19 68:1,17,21 69:21 73:2 negligent [4] 3:13 28:17 29:2 62:7 neither [4] 1:23 2:9 28:14 35:23 never [1] 73:2 new [5] 44:3 56:25 65:11 72:16 76: 4 next [3] 3:4 5:8 6:2 Ninth [15] 3:11 5:15,21 6:15 7:9 11: 5 26:23 58:24 59:1,4,9,16 60:4,4 64:2 non-existence [1] 4:4 nor [2] 11:11 35:23 normally [2] 30:20 31:1 nose [1] 64:9 note [1] 38:3 noted [1] 32:18 nothing [3] 22:13 60:13,25 notion [1] 11:2 number [4] 33:24,25 34:14 45:23</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objective [1] 55:12 obligation [1] 65:24 obtain [1] 17:18 obvious [2] 38:10 43:15 obviously [2] 9:10 75:9 offense [1] 31:10 offenses [1] 31:7 offer [3] 27:18 58:6,12 offered [1] 29:6 offeror [1] 55:3 offers [7] 13:1,17,20 14:18 73:24 74:6 75:24 often [1] 34:15 Okay [4] 8:25 27:8 60:20 68:18 old [3] 44:17 65:11 72:18 omissions [3] 34:13 58:3,11 one [29] 13:1,11 14:16,16 18:25 26:</p>	<p>4 27:14 29:21 30:17 33:24 36:6 38:6 39:11 41:4 42:22 52:13 54:9, 25,25 59:14 61:3 63:18 65:7 67:3 68:9 75:15,22,24 76:2 one's [1] 53:3 one-way [2] 45:1 57:15 ones [3] 43:5 50:11,12 only [14] 10:7 15:15 22:11 24:1 32: 14 37:13 39:11 55:16 56:16 58:8, 9 67:3 69:12 76:3 open [5] 24:3 55:23 59:8 62:23,25 opinion [6] 43:23 53:15,20 54:8, 17 56:9 opportunity [1] 70:17 opposed [1] 71:2 opposite [1] 14:21 opposition [2] 47:18 62:15 oral [7] 1:14 2:2,5,10 3:7 28:12 39: 7 order [2] 9:4 46:23 ordinary [3] 35:21,21 46:16 original [1] 46:7 other [16] 13:1 20:1 23:15 35:6 41: 2 42:7 43:9 44:10 45:19 48:19 53: 4 61:4 65:25 68:15 69:4 76:1 others [1] 60:1 otherwise [1] 25:10 out [17] 11:13 12:16 15:4 22:21 24: 23 31:17 32:24 44:25 55:15 57:1 60:7 61:22 62:15 63:6 64:18 66: 25 71:3 over [7] 12:2 27:11,15,18 51:11 65: 16 67:17 overlaps [1] 56:20 overlooked [1] 51:14 overrule [2] 5:21 41:6 overruling [1] 43:5 overturned [2] 59:20,23 own [1] 50:10</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m [1] 76:9 PAGE [5] 2:2 5:10 6:2 8:13 12:3 pan [1] 63:6 panel [4] 7:7 11:4 61:1 73:14 paragraph [1] 22:10 part [5] 5:23 8:22 10:11 28:1 65:20 particular [3] 19:6 31:9 43:20 particularly [2] 36:25 70:17 party [3] 1:23 2:9 28:14 pass [1] 21:19 passage [1] 42:22 passed [4] 18:21 35:23 46:7 50:5 passing [2] 17:7 24:18 patterned [4] 49:1,16,18,19 pejoratively [1] 46:22 penalties [2] 31:4,23 people [4] 23:1 31:8 57:3 68:16 perceive [2] 41:24 46:23 percolation [1] 63:5 perfect [5] 45:11 50:25 51:4 63:1 64:8 perfectly [1] 67:13 perilous [1] 23:11</p>	<p>person [1] 34:5 perspective [1] 41:3 pertinent [1] 25:5 petition [9] 4:16,21 5:9,10 8:4,14, 23 9:1 11:6 Petitioner's [1] 37:2 Petitioners [11] 1:4,19 2:4,15 3:8 58:19 60:13,25 62:17 63:22 71:22 pick [3] 20:8 33:20 43:2 picked [1] 34:22 Piper [5] 51:15 54:14,16,25 69:7 place [1] 62:3 places [2] 34:15 42:4 plain [1] 39:17 plaintiff [1] 68:12 plan [1] 59:11 pleading [2] 57:19 71:9 please [4] 3:10 22:3 28:16 39:10 plus [1] 68:2 point [41] 4:11 6:1,5 7:6,23 12:4 15:18 21:6 22:17,18 23:8 26:12, 18 29:8,9 30:25 31:21 33:24,25 34:11 36:2,13 43:2 49:5 50:16 52: 19 56:7,13 59:13 60:11,12,16,18, 22,24 63:22,25 64:3 66:25 69:6 70:5 pointed [3] 11:13 12:16 62:15 points [1] 59:6 policies [1] 27:24 policy [2] 29:17 37:22 policy-based [1] 29:4 position [10] 4:15 5:2 9:8 10:21 37:22 40:12 41:16,20,21 73:12 possibility [1] 46:20 possibly [1] 6:8 potential [1] 31:22 power [1] 61:13 practical [2] 56:2 70:9 precedent [11] 7:9 11:5 35:19 37: 25 38:22 51:8 58:19 60:17,21 73: 11,16 precedents [4] 3:19 7:20 11:18, 19 precise [1] 49:1 precisely [1] 56:23 predict [2] 69:4, 18 predominantly [1] 66:10 premise [1] 72:19 premised [2] 47:21 58:10 present [1] 66:3 presented [7] 5:7 8:5,13 26:4 36: 18 39:12 64:5 presents [1] 39:25 preserved [2] 57:5 58:17 preserving [1] 57:14 pressed [1] 35:23 presumably [2] 54:8 56:12 pretty [4] 17:17 31:4 38:17 65:9 prevent [1] 47:12 prevented [1] 60:25 previously [4] 20:12 29:6 51:16 72:5 primary [2] 53:5 61:8 principal [1] 4:5</p>
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Official - Subject to Final Review

<p>principle [2] 17:13 21:6</p> <p>prior [1] 20:9</p> <p>private [109] 3:12,21 4:3,4,18,22 5:17,22 6:8,17,24 7:8,12 9:16 10:1,6,17,25 11:16,21,25 12:14,22 13:10 14:11 15:1 16:11 17:15 18:17,23 19:7,20 20:3,6,13 23:10,20,24 11,13 25:10,21 26:14,24 28:19,21 29:4 30:15 32:4,8,11,15,19 33:6,9,15,23 34:8,16,17,19 35:11,16 36:17,24 37:4,15,20,23 38:11,16,19 39:24 40:3 42:5 43:4,6,15 44:8 46:12,21 47:8 48:9 50:11 51:10,12 55:4,13,18 57:1,21 58:2,10 61:20 62:2,12,18 65:1,4 67:2 68:2,12,23 70:2,6,16 71:5 72:3,11,17</p> <p>privately [23] 40:2 42:19,24 45:14,20 48:14,18 50:20,23 51:13 52:4,23 53:4,17 54:7 56:4,14 59:2 62:6 63:3 64:1 66:9,12</p> <p>probably [3] 46:8 52:19 65:8</p> <p>problem [3] 30:22,25 38:10</p> <p>problems [2] 37:19 38:6</p> <p>proceedings [1] 63:20</p> <p>product [1] 12:17</p> <p>profoundly [1] 71:5</p> <p>prohibition [3] 12:7 56:17,20</p> <p>prominent [1] 54:9</p> <p>proper [2] 35:25 38:13</p> <p>properly [2] 35:18 39:12</p> <p>proscribing [1] 67:24</p> <p>protect [1] 55:7</p> <p>protected [1] 55:14</p> <p>protection [2] 32:17 33:21</p> <p>protections [1] 68:19</p> <p>provide [1] 9:4</p> <p>provides [1] 6:17</p> <p>provision [6] 13:22 34:12 42:3 44:3 52:22 63:10</p> <p>provisions [4] 31:18 36:22 45:23 53:6</p> <p>proxies [1] 76:1</p> <p>proxy [14] 12:23,25 14:19 27:9,10,12,15 47:14 50:23 73:20 74:7,9,12,20</p> <p>prudence [1] 62:22</p> <p>prudent [1] 61:13</p> <p>Prudential [1] 61:18</p> <p>PSLRA [3] 57:8,18 71:7</p> <p>public [3] 13:22 23:23 74:5</p> <p>purpose [4] 13:15 24:12 39:15 45:8</p> <p>purposes [3] 12:22 19:12 24:3</p> <p>put [1] 16:3</p> <p>puzzling [1] 63:12</p>	<p>45:2 48:19 53:24 55:8,16,23 56:8 62:24 68:14 71:25 75:12,22 76:3</p> <p>questioned [1] 76:2</p> <p>questions [3] 20:8 25:6 35:22</p> <p>quickly [1] 7:6</p> <p>Quite [2] 14:21 37:18</p> <p>quo [1] 16:12</p> <p>quote [3] 6:16,21 40:20</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raise [4] 4:21 8:22,23 11:4</p> <p>raised [5] 3:23 4:24 5:4 8:14 73:13</p> <p>raising [4] 8:2 58:20 61:1,5</p> <p>rare [1] 39:25</p> <p>ratchet [3] 45:1 46:24 71:4</p> <p>ratcheting [1] 47:12</p> <p>rather [2] 31:8 73:18</p> <p>rational [3] 12:21 13:3 50:22</p> <p>RATNER [18] 1:20 2:6 28:11,12,15 29:1,13,23 30:23 31:13 33:17 35:4,7,20 36:15 37:21 38:3,9</p> <p>Ratner's [1] 65:18</p> <p>rea [7] 30:18 31:12,22 46:24 47:12 68:3 71:4</p> <p>reach [4] 7:21 26:23 35:15 59:7</p> <p>reached [1] 14:1</p> <p>read [4] 6:7 30:20 57:10 64:11</p> <p>readily [1] 51:21</p> <p>reading [2] 25:3 39:22</p> <p>real [2] 27:25 70:15</p> <p>real-world [3] 37:19 38:6,10</p> <p>realize [3] 68:3,25 69:7</p> <p>really [14] 5:23 6:6 7:22 10:15 22:25 32:9 35:25 36:4 47:7 49:2 50:11 57:23 62:17 63:11</p> <p>reason [14] 9:13 25:9 32:19 33:16,23 35:24 44:10 45:18 46:9 50:21 66:15 71:12 72:6,15</p> <p>reasoning [1] 54:16</p> <p>reasons [3] 3:16 29:4 32:10</p> <p>REBUTTAL [2] 2:13 71:21</p> <p>recent [1] 59:15</p> <p>recites [1] 33:8</p> <p>recklessness [1] 4:20</p> <p>recognize [6] 9:21 25:17,20 38:23 43:5 67:2</p> <p>recognized [8] 3:12 7:10 25:15 37:17 42:4 67:8 72:18 73:2</p> <p>recognizes [1] 3:18</p> <p>recognizing [4] 11:15 18:23 23:10 37:19</p> <p>recover [1] 3:13</p> <p>reenactment [1] 20:11</p> <p>references [1] 6:3</p> <p>referred [2] 17:21 20:21</p> <p>regard [1] 37:14</p> <p>regime [6] 14:2 41:14 71:10 72:18 76:3,5</p> <p>regulated [1] 68:16</p> <p>regulations [5] 17:9 18:3,12 20:2 21:15</p> <p>regulatory [3] 20:18 21:9 72:20</p> <p>rehearing [5] 3:25 5:9,10 11:6 59:13</p>	<p>reject [1] 51:24</p> <p>rejected [11] 13:13 17:3,10 40:14 48:3,25 49:5 52:13,16 54:16,19</p> <p>rejecting [1] 53:22</p> <p>related [1] 75:13</p> <p>relevant [4] 15:15 22:11,12 23:7</p> <p>relied [2] 53:20 54:18</p> <p>rely [1] 48:7</p> <p>remainder [1] 28:8</p> <p>remedies [2] 19:24 70:25</p> <p>remedy [4] 23:21 25:10 40:4 56:25</p> <p>remember [1] 65:20</p> <p>render [1] 60:1</p> <p>repeat [2] 41:9 61:4</p> <p>replicates [2] 17:16 18:19</p> <p>replication [1] 51:2</p> <p>reply [1] 47:24</p> <p>report [1] 56:19</p> <p>repudiate [2] 53:18 65:15</p> <p>require [4] 27:22 29:11,12 65:16</p> <p>required [2] 11:4 39:17</p> <p>requirement [7] 48:2 64:14 67:12,14,22 71:4 72:23</p> <p>requirements [1] 13:19</p> <p>requires [1] 16:21</p> <p>reservation [1] 56:25</p> <p>reserve [2] 28:7 55:9</p> <p>reserved [2] 51:16 54:25</p> <p>reserving [1] 55:8</p> <p>resolution [1] 9:5</p> <p>resolved [3] 4:25 39:13 71:8</p> <p>resolves [1] 73:10</p> <p>resources [3] 69:5,9,24</p> <p>respect [6] 13:16 14:19 36:19 61:20 73:1,9</p> <p>respectfully [1] 54:16</p> <p>respects [1] 15:13</p> <p>respond [2] 20:17 42:6</p> <p>Respondent [1] 35:17</p> <p>Respondents [4] 1:7,25 2:12 39:8</p> <p>response [6] 47:23 56:1 61:3,5,8 71:1</p> <p>restrict [1] 29:4</p> <p>result [6] 14:1 17:18 28:4 34:25 39:2 59:7</p> <p>reverse [1] 3:17</p> <p>review [2] 4:7 59:12</p> <p>revive [1] 40:15</p> <p>reward [2] 8:24 9:12</p> <p>rewarding [4] 8:1,1,2,7</p> <p>right-creating [1] 66:8</p> <p>right-of-action [1] 51:24</p> <p>rights [22] 5:22 14:11 18:4 19:20 20:3 23:10 25:21 29:4 38:16 43:6 50:6 56:21 57:2,14,21 58:2,10 65:23 67:7 72:3,11,17</p> <p>rights-creating [6] 12:5 14:6,9 15:6 23:17 25:7</p> <p>road [1] 29:18</p> <p>ROBERTS [20] 3:3 28:9 39:4 40:5,9 41:1 44:4 45:15 51:17,20 58:23 61:17 62:10 64:21 65:17,22 69:25 70:23 71:18 76:7</p>	<p>role [1] 72:1</p> <p>rooted [1] 40:13</p> <p>routine [1] 23:15</p> <p>Rule [30] 4:19 11:17,20 17:22,23 18:1,24 21:13 26:16,20 27:20 30:6 31:16 32:8,12 39:22 40:21,23 42:2,9,13,19,24 60:5 63:9 65:12 66:1 67:18 72:21,23</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>safe [4] 57:22,24 58:4,14</p> <p>same [30] 4:13 7:3,17 11:23 14:18 17:2,11,18 18:16 19:4,9 23:22 27:5,17 29:12 30:20,21 31:15 40:10,12 41:12 44:1,2,2 45:18 46:15 49:2 59:7 66:13,14</p> <p>sanctions [1] 71:10</p> <p>Sandoval [46] 12:17 13:13 14:3 15:4,15 17:3,3,10,12 18:3 20:1,9,22,23 21:2,5,12 22:8,9,17 23:5 24:8 25:7 38:18 39:2 40:14 43:9 44:22,24 48:25 49:6 52:6 64:10,11,15,16 65:13,14 66:19,21 70:11,12 72:3,10,13,15</p> <p>satisfies [1] 72:10</p> <p>saw [1] 13:16</p> <p>saying [21] 6:11 7:13 10:16 23:6 24:1,6 29:18 45:6 53:17 55:15,24,25 56:25 59:11 63:2 64:1,10,16 67:4 68:10 71:2</p> <p>says [12] 6:22 7:1 9:23,25 15:6 28:21 33:1 38:20 45:1 50:4 71:9 73:6</p> <p>Scalia [1] 41:13</p> <p>scarcely [1] 13:4</p> <p>scare [1] 68:18</p> <p>scheme [2] 59:3 63:13</p> <p>Schreiber [6] 36:13,15 51:9 56:6,16 62:5</p> <p>scienter [22] 4:20 16:14,21 26:5 27:22,25 29:11 32:1 37:3,7 38:12 39:17 46:24 47:5,9 67:3,12,19,22 72:23 73:6,7</p> <p>scienter-based [1] 47:22</p> <p>scope [5] 21:14 36:5,16,20 38:13</p> <p>SE [2] 9:23 10:8</p> <p>SEC [16] 10:8,14 21:19,19 26:9,10 62:8,12 68:1,2,17,23 69:5,20,23 75:19</p> <p>SEC's [1] 69:8</p> <p>Second [12] 13:9 14:24 17:4 23:19 30:24,25 31:21 36:3,20 47:20 53:13,16</p> <p>Section [50] 3:14,20 4:19 5:11,17 6:7,17 11:19 12:1,5 13:19 16:13 17:24 18:1,5,6,8,22,24 19:15 20:5 26:22 27:7,21 28:1,17 30:9,12 31:6,18 32:3,12,14,14,16 34:18,20,24 36:5,16 39:15 40:21 41:18 42:18 48:1 50:15 56:23 57:4 58:7 72:9</p> <p>Securities [9] 3:14 18:2 23:23 34:2,18 53:1,10 56:21 63:13</p> <p>see [4] 49:9 63:5 66:23 68:9</p> <p>seek [1] 31:25</p>
<hr/> <p style="text-align: center;">Q</p> <hr/> <p>question [64] 4:8,17,21,24 5:6 7:4,17 8:5,13,20,21 9:2,5,15 10:13,19 11:2,9,10 14:5 15:18 19:1 21:1 23:3,15,16,21 24:17 26:4,14 28:22 29:15,16 30:14,17 31:14 32:5 33:18 35:15 36:4,9,17,20 37:1,8 38:24 39:11 41:23 42:13 43:11 44:5</p>			

Official - Subject to Final Review

<p>seems [6] 14:14 19:17 32:25 51:21 69:16,19</p> <p>seen [1] 67:21</p> <p>sees [1] 38:7</p> <p>Seizure [1] 25:19</p> <p>sense [5] 34:9 53:7 55:16 56:3 62:22</p> <p>sensible [2] 15:7,8</p> <p>sentence [7] 5:20 6:22,25 21:2,5 22:8 53:13</p> <p>sentences [1] 8:3</p> <p>separate [6] 6:1 8:5,22 30:8,10 31:19</p> <p>serious [1] 62:17</p> <p>set [6] 19:6 27:14,16 35:19 64:24 72:10</p> <p>setting [2] 21:5 61:20</p> <p>settle [1] 71:15</p> <p>settled [6] 30:3 40:25 42:14 56:7,13 64:19</p> <p>sex [1] 34:6</p> <p>shall [1] 34:5</p> <p>shareholders [1] 55:17</p> <p>shed [1] 15:16</p> <p>shouldn't [6] 4:9 29:12 41:9,9,11 63:16</p> <p>show [1] 45:12</p> <p>showed [1] 47:19</p> <p>shows [1] 45:24</p> <p>side [2] 35:6 42:7</p> <p>significance [2] 43:25 44:1</p> <p>significant [1] 31:5</p> <p>silence [1] 72:14</p> <p>silly [1] 9:18</p> <p>similar [2] 26:16 36:14</p> <p>simple [1] 62:21</p> <p>simply [4] 10:24 13:25 70:10 73:16</p> <p>since [3] 29:9 53:9,10</p> <p>single [7] 5:20 25:14 48:15 50:21 52:13 59:14 62:20</p> <p>sink [1] 8:20</p> <p>situation [4] 4:14 38:17 40:1 65:3</p> <p>situations [1] 21:21</p> <p>Sixth [1] 73:5</p> <p>sole [1] 20:19</p> <p>solicitations [6] 50:23 73:21 74:7,9,12,21</p> <p>Solicitor [1] 1:20</p> <p>somehow [1] 50:10</p> <p>someone [2] 69:11,20</p> <p>sometimes [3] 22:23 38:1 70:15</p> <p>soon [1] 47:2</p> <p>sorry [11] 5:18 7:15 15:21 16:24 22:2 26:1 27:2 47:15 59:21 64:22 65:21</p> <p>sort [7] 10:19 24:22 34:23 35:9,10 44:7 61:22</p> <p>sorts [1] 21:23</p> <p>SOTOMAYOR [19] 7:24 8:10,15,19 9:2,7,11,22 10:3,10,22 15:21 16:2,9,18 28:20 29:7,14,23</p> <p>sounds [1] 20:16</p> <p>source [1] 20:5</p>	<p>special [1] 23:11</p> <p>specific [3] 45:4 65:23 70:25</p> <p>specifically [3] 5:9 17:14 40:16</p> <p>specifics [1] 50:14</p> <p>speculation [2] 68:4,25</p> <p>split [3] 11:10 33:14 67:17</p> <p>staff [1] 75:13</p> <p>stage [5] 5:5 7:7 11:4 61:1 73:13</p> <p>standalone [1] 39:22</p> <p>standard [26] 4:17 5:24 10:13 19:19,21 29:12 30:8 33:4,6,8,14 37:3,12 38:12 39:16,23 48:8 61:21 62:7 68:1,3,11 69:21 73:3,6,7</p> <p>standard's [1] 68:19</p> <p>standards [3] 31:23 57:20 71:9</p> <p>standpoint [2] 26:19 70:9</p> <p>stands [1] 52:7</p> <p>stark [1] 53:3</p> <p>start [1] 4:9</p> <p>state [5] 38:2 41:24 42:21 43:15 49:4</p> <p>statement [5] 6:6 43:20 57:22,24 58:16</p> <p>statements [14] 12:23,25 13:17 14:19 27:10,10,12,16 47:15 57:25 58:3,5,11,15</p> <p>STATES [8] 1:1,15,22 2:7 28:13 43:18 73:22,24</p> <p>statistic [1] 74:24</p> <p>status [1] 16:12</p> <p>statute [20] 10:4 21:17 24:12 34:5,7 39:18 40:2 42:2 43:3,12 45:8 46:6 53:14 55:13 56:3 65:11,11,24 67:11 68:10</p> <p>statutes [6] 18:4 20:3 45:19 50:5,9 54:5</p> <p>statutory [20] 15:4,7,8 18:10 20:12,17 21:8 22:21 23:3,6,16 24:17,22 25:5 39:14 44:23 46:17 55:12 64:17 67:6</p> <p>Steel [1] 25:18</p> <p>stepping [1] 45:6</p> <p>Stevens [1] 11:13</p> <p>Stevens' [2] 54:1,18</p> <p>still [7] 28:24 50:21 58:17 62:8 65:9,10 67:9</p> <p>stop [3] 8:7 55:22 60:13</p> <p>storm [5] 45:11 51:1,4 63:1 64:8</p> <p>strategic [1] 8:10</p> <p>stressed [1] 70:6</p> <p>strike [1] 70:17</p> <p>strong [2] 17:17 41:8</p> <p>stronger [3] 4:15 5:2 73:11</p> <p>subcategory [1] 49:24</p> <p>subject [3] 53:12 58:6,8</p> <p>submit [3] 39:11 46:8 59:4</p> <p>submitted [2] 76:8,10</p> <p>subsequent [2] 51:24 53:21</p> <p>substantive [6] 21:14 33:4,5,8,14 36:22</p> <p>sudden [1] 24:24</p> <p>suddenly [2] 62:19 75:18</p> <p>sue [1] 26:9</p> <p>sufficiently [2] 29:2 37:13</p>	<p>suggest [1] 59:16</p> <p>suggested [1] 40:18</p> <p>suggesting [2] 24:20,21</p> <p>suing [1] 57:3</p> <p>suits [1] 70:16</p> <p>summary [1] 15:12</p> <p>super [1] 33:12</p> <p>super-duper [1] 33:12</p> <p>supply [1] 19:24</p> <p>support [4] 1:23 2:8 28:14 39:23</p> <p>supported [1] 65:13</p> <p>supposed [1] 57:10</p> <p>SUPREME [3] 1:1,14 60:6</p> <p>surely [1] 25:21</p> <p>sweep [1] 5:12</p> <p>system [1] 31:23</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>Tender [11] 13:1,17,20 14:18 27:18 55:3 58:6,12 73:24 74:6 75:24</p> <p>tens [1] 75:16</p> <p>tent [1] 64:9</p> <p>term [1] 35:10</p> <p>terms [8] 16:4 21:14,15 39:1 61:17 65:23 67:1,23</p> <p>test [1] 72:10</p> <p>Texas [1] 1:24</p> <p>text [31] 15:16,19,22 17:21,23 20:12,18,18 21:8,9 22:12,22,24 23:7 29:1 37:14 39:14 40:20 43:3,12,16 46:14 50:15 52:8,15,21 63:9 64:19 67:6,11,20</p> <p>textual [2] 32:15 68:9</p> <p>Thanks [1] 12:15</p> <p>themselves [3] 24:2 71:14,15</p> <p>theory [2] 67:19,19</p> <p>there's [34] 6:3 7:13 10:1,6,24 11:9,11 13:14,23 14:9,10 15:6 16:10 18:7 22:12 24:23 25:8 26:15 33:15 35:16 41:7 43:14,15 51:6,7 56:11 59:24 62:2 65:3 66:15 67:21 68:10 71:10 72:14</p> <p>therefore [2] 66:8,13</p> <p>thereunder [1] 17:9</p> <p>They'll [2] 10:22 71:16</p> <p>they've [3] 21:22,22 38:21</p> <p>thinking [3] 38:1 54:4 63:11</p> <p>thinks [2] 37:9,13</p> <p>third [2] 34:11 36:5</p> <p>though [8] 21:13 35:3 45:8 53:23 54:24 60:12 61:8,18</p> <p>thoughts [3] 68:5,7 69:2</p> <p>thousands [2] 74:18 75:16</p> <p>three [8] 32:10 36:1,11 51:15 53:10 56:16 61:15 71:20</p> <p>threshold [1] 71:25</p> <p>throughout [1] 34:2</p> <p>throw [5] 8:20 15:4 22:21 44:25 71:2</p> <p>tied [1] 70:11</p> <p>tiered [1] 31:23</p> <p>timing [1] 17:2</p> <p>Title [8] 12:7 17:5,7,8 20:21 66:11,11,12</p>	<p>today [9] 14:2 40:10,12,18 44:18 59:6 64:24 65:6 72:9</p> <p>today's [1] 41:3</p> <p>together [1] 45:12</p> <p>took [2] 29:8 70:4</p> <p>tool [1] 43:13</p> <p>toolbox [3] 15:5 22:22 64:17</p> <p>tools [8] 24:21 25:4 39:13 40:17 44:12,25 64:23,25</p> <p>touching [1] 53:11</p> <p>touchstone [1] 67:9</p> <p>trading [3] 55:21 56:18,20</p> <p>traditional [2] 40:23 43:12</p> <p>transactions [1] 74:5</p> <p>Transamerica [2] 34:21 38:18</p> <p>transplanted [3] 17:23 26:21 40:20</p> <p>travel [5] 48:22 49:13 50:2,3 72:14</p> <p>treat [1] 14:21</p> <p>treated [1] 54:5</p> <p>treating [1] 14:18</p> <p>trial [1] 4:1</p> <p>true [5] 12:10,11 19:22 37:24 52:11</p> <p>try [3] 27:15,17 64:18</p> <p>trying [8] 32:23 40:15 53:1 55:6 64:4,10 65:19 69:18</p> <p>turn [1] 37:3</p> <p>turning [1] 32:4</p> <p>two [11] 3:16 6:3 8:3 14:15 15:3,9 20:10 33:25 53:14 54:24 62:12</p> <p>type [3] 25:19 34:12 42:3</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S [1] 74:5</p> <p>uh-oh [1] 52:5</p> <p>ultimate [2] 44:22 67:9</p> <p>ultimately [2] 10:20 28:5</p> <p>unanimous [1] 43:19</p> <p>unbroken [3] 51:7 58:19 61:14</p> <p>under [37] 4:19 5:17 7:19 11:17 12:1,13,20 13:11,11,19 16:13,18 18:24 19:12,22,23 25:6 26:10 31:5 32:8 39:17 41:12 47:20 48:10 52:5 56:21 57:2,3 58:2 59:3 60:7 64:9 67:18 70:7 72:18 76:3,5</p> <p>undercut [1] 59:16</p> <p>underlying [1] 4:22</p> <p>undermining [2] 55:11 56:2</p> <p>understand [10] 10:12,15 20:23 21:7 26:8 30:19,25 32:22 60:16 62:11</p> <p>understanding [3] 22:24 42:20 74:16</p> <p>understated [1] 70:5</p> <p>understood [8] 19:18 42:23 44:1 45:13 46:12 52:23 57:2 66:13</p> <p>undisputed [3] 5:4 40:22 48:20</p> <p>undo [1] 64:10</p> <p>uniform [2] 38:19 48:2</p> <p>uniformly [1] 19:7</p> <p>unify [1] 14:22</p> <p>UNITED [8] 1:1,15,22 2:7 28:13 43:18 73:21,24</p>
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Official - Subject to Final Review

<p>unless ^[2] 45:1 56:3 unlikely ^[1] 69:13 unmistakably ^[1] 40:1 unprecedented ^[3] 3:12 25:13 28:3 until ^[6] 3:24 48:15 59:13,19,23 71:7 untrue ^[2] 58:3,10 unusual ^[1] 45:10 up ^[11] 4:8 20:8 27:3 33:14,21 34:22 43:2 46:24 47:12 58:13 71:4 uses ^[5] 14:24 40:24 43:23 46:16 50:15 using ^[3] 14:18 46:11,13 usual ^[6] 24:21 39:13 40:17 64:17,23,25</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>VARJABEDIAN ^[2] 1:6 3:5 vehicle ^[1] 62:16 verbatim ^[2] 20:11 52:21 versus ^[7] 3:5 21:8 26:5 27:24 43:18 68:2,19 VI ^[5] 17:5,7,9 66:11,12 victim-focused ^[1] 34:10 victims ^[1] 34:4 view ^[6] 4:7 41:6 44:12,13 48:1 73:7 violation ^[1] 21:21 violations ^[3] 3:13 18:25 21:24</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait ^[2] 17:4 54:6 waited ^[1] 59:12 waiver ^[1] 73:10 wall ^[1] 37:25 wanted ^[4] 14:20 50:9 63:12 65:4 Washington ^[2] 1:10,21 waste ^[1] 61:21 water ^[1] 71:3 way ^[18] 13:1 14:18,22 18:16 19:4 20:17,22 28:2 29:21,25 40:10,12 55:9 63:22 64:11 66:18 67:6 72:7 ways ^[1] 27:11 whatever ^[1] 50:8 whereas ^[1] 55:24 Whereupon ^[1] 76:9 whether ^[22] 4:17,22 9:6,15 10:6 15:5 18:16 19:2 30:15 35:16 36:17,21 37:7,14 41:23 43:20 55:3 59:2 67:18 68:11 75:20 76:4 white ^[1] 26:3 whole ^[4] 13:9 16:6 22:21 48:21 will ^[1] 58:1 Williams ^[3] 18:22 42:22 48:13 win ^[1] 46:9 window ^[1] 24:23 within ^[5] 5:6,6 8:12 42:22 58:14 without ^[6] 37:8,14 42:11 51:12 54:11 55:19 wondered ^[1] 48:4 Wong ^[1] 43:18 word ^[3] 4:2 34:23 35:10 words ^[22] 19:6,9,11,13,14 23:1,2</p>	<p>25:1 27:17 33:21 34:10 39:17 40:24 41:2 42:15 43:24 44:5,10 46:11 64:13 65:25 68:15 work ^[1] 17:21 works ^[1] 66:24 worse ^[1] 31:6 worth ^[1] 56:15 write ^[1] 8:19 writes ^[1] 19:8 written ^[1] 22:14 wrongly ^[2] 50:18 65:15</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[2] 42:22 73:21 years ^[7] 16:6 51:7,7 56:16 58:18 61:14 67:4</p>
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