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IN THE SUPREME COURT OF THE UNITED STATES

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LUCKY BRAND DUNGAREES, INC.,)
ET AL.,)

Petitioners,)

v.) No. 18-1086

MARCEL FASHIONS GROUP, INC.,)
Respondent.)

- - - - -

Washington, D.C.

Monday, January 13, 2020

The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 10:06 a.m.

APPEARANCES:

DALE CENDALI, New York, New York;
on behalf of the Petitioners.

MICHAEL B. KIMBERLY, Washington, D.C. ;
on behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	DALE CENDALI, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	MICHAEL B. KIMBERLY, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF:	
9	DALE CENDALI, ESQ.	
10	On behalf of the Petitioners	61
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 first this morning in Case 18-1086, Lucky Brand
5 Dungarees versus Marcel Fashions Group.

6 Ms. Cendali.

7 ORAL ARGUMENT OF DALE CENDALI

8 ON BEHALF OF THE PETITIONERS

9 MS. CENDALI: Mr. Chief Justice, and
10 may it please the Court:

11 This Court should reverse the Second
12 Circuit because it erred in holding that a
13 defense never previously litigated to judgment
14 can be barred in a case involving new claims.

15 This Court rejected that idea over a
16 hundred years ago in *Cromwell and Davis*, and as
17 this Court unanimously made clear more recently
18 in *Taylor v. Sturgell*, the preclusive effect of
19 a judgment is determined by two doctrine: Issue
20 preclusion, which forecloses relitigation of
21 issues actually litigated and resolved, and
22 claim preclusion, which forecloses successive
23 litigation of the very same claim.

24 Applying these long-established
25 principles, the proper rule is a defendant is

1 free to argue any previously unresolved defense
2 it may have to new claims. This rule is right
3 for three reasons:

4 First, it follows from this Court's
5 precedent, including *Cromwell*, *Davis*, and
6 *Taylor*.

7 Second, the rule is easy to administer
8 as courts and litigants are accustomed to
9 applying these bedrock principles of issue and
10 claim preclusion.

11 Third, it's fair and protects due
12 process interests.

13 To be clear, we are not arguing that
14 defenses may never be barred under existing law.
15 Issue preclusion could bar a previously resolved
16 defense. And previously unresolved defenses
17 cannot be raised in the context of a judgment
18 enforcement action or as a claim in an action
19 collaterally attacking a prior judgment.

20 But none of these circumstances are
21 present here. As the Second Circuit held in the
22 first appeal in this case, *Marcel I*, *Marcel* is
23 pursuing new claims as it seeks relief for
24 alleged subsequent infringement. Thus, this
25 Court should reverse, as the Second Circuit's

1 novel test precluded a never-resolved defense in
2 an action asserting new claims in conflict with
3 settled and sensible principles of claim and
4 issue preclusion.

5 Moreover, the Second Circuit's new
6 test is a bad idea.

7 JUSTICE GINSBURG: Before we get to
8 that, Ms. Cendali, could you explain why you
9 abandoned the release defense in the first
10 action? You did raise it, and then you dropped
11 it. And it's a bit of a mystery why you did.

12 MS. CENDALI: We don't know exactly
13 why it was abandoned, but it -- the most logical
14 answer is that it would not have been
15 dispositive. The amount in controversy -- the
16 -- the compensatory damages in that case was
17 only \$20,000, and we know that the release would
18 not have applied to use of "Get Lucky," which is
19 what the primary thrust of what the case was
20 about. So it may not have been worth it from a
21 cost-benefit analysis to renew a release to -- a
22 defense that would not have been dispositive of
23 the -- the issues before -- before the court.

24 JUSTICE GINSBURG: How would it have
25 -- it seems strange when that release said,

1 Lucky, you can't use "Get Lucky," but you're
2 continuing to use it. The release said you
3 can't use "Get Lucky." On the other hand, we
4 won't go after you for Lucky Brand. And the
5 first case, as you just said, concentrated on
6 "Get Lucky." And the release seemed to me to be
7 no use at all to "Lucky" as far as "Get Lucky"
8 is concerned because it agrees that it would
9 stop using "Get Lucky."

10 MS. CENDALI: That's exactly our
11 point, Your Honor. Because the release would
12 not have been helpful with regard to "Get
13 Lucky," it -- it -- it -- it wasn't going to be
14 dispositive of the case. And, therefore, it may
15 have not been worth the cost of briefing it
16 again -- again, the compensatory damages were
17 \$20,000 -- if it wasn't going to end the whole
18 case because the release would have only applied
19 to a narrow subset of the trademarks that they
20 were accusing us of using before the court. But
21 --

22 JUSTICE ALITO: I take it from your
23 introductory remarks that you do not agree with
24 the Restatement rule that, although the failure
25 to raise a defense in a prior action generally

1 does not preclude the raising of the defense in
2 a subsequent action, there is an exception where
3 prevailing on the defense in the second action
4 would nullify the initial judgment or impair
5 rights established in the initial action. Do
6 you -- do you reject that rule?

7 MS. CENDALI: No, Your Honor. And --
8 and that's a key point. As I said in my
9 introduction, if this were a judgment
10 enforcement action or if we were trying to
11 collaterally attack the prior judgment, we would
12 be barred.

13 JUSTICE ALITO: Well, I understood you
14 to say that there would be an exception if it
15 was an attack on the judgment, a collateral
16 action attacking the judgment, or if it was the
17 basis of a claim.

18 But this goes further. It says that a
19 defense may be barred in a subsequent action if
20 it would have the effects that I mentioned. So
21 do you agree with that or not?

22 MS. CENDALI: We agree with the
23 restatement, but, again, it supports us in this
24 case because, to be clear, Marcel is getting and
25 keeping all of the relief it got in the first

1 action. It got the \$300,000. It got the
2 injunction it got. It got the declaration for
3 that period of time.

4 What we're talking about is subsequent
5 conduct presenting new claims where they're
6 trying to get additional relief and a broader
7 injunction, a deprivation of property that we
8 never had a chance to defend with regard to
9 these claims.

10 JUSTICE KAGAN: But suppose the
11 subsequent conduct were identical in all ways to
12 the prior conduct. And I know you think that
13 that's not true, that there are different marks
14 involved, and that the conduct has changed.

15 But suppose that it were identical in
16 all ways. It's just that it's after the prior
17 judgment. So there was no -- there were no
18 damages collected for the subsequent conduct
19 because it hadn't happened yet.

20 In that case, could you have brought
21 the defense?

22 MS. CENDALI: No. And the reason we
23 could -- could not have brought the -- the --
24 the defense is the only thing before the court
25 in the first action, the 2005 action, was the

1 facts and circumstances at that particular
2 period of time.

3 A court could not -- it would be an
4 improper advisory opinion to say: And, well,
5 with regard to future conduct, that would be bad
6 too.

7 The way courts deal with that is via
8 injunctions. In other words, if the court
9 wanted to address and prevent the current
10 conduct, it would have issued an injunction that
11 pertained to the current conduct. Instead, the
12 injunction that it issued was limited to use of
13 "Get Lucky" or colorable imitations thereof that
14 they -- they tried to make by making a motion
15 for contempt earlier in this case in Marcel I to
16 try to have that injunction read broader, but
17 they were denied.

18 JUSTICE KAGAN: So if -- if I
19 understand what you're saying, in the case of
20 identical subsequent conduct, if it violates the
21 injunction, then you're out of luck?

22 MS. CENDALI: Correct.

23 JUSTICE KAGAN: But if it does not --
24 if there's no injunction or it does not violate
25 the injunction for some way -- in some way, then

1 you can do whatever you want; is that correct?

2 MS. CENDALI: Well, you can do
3 whatever you want subject to the fact you might
4 get -- get sued again. You'd have to have a --
5 you --

6 JUSTICE KAGAN: No, I'm sorry. I --
7 I --

8 MS. CENDALI: But you wouldn't be
9 precluded.

10 JUSTICE KAGAN: Yes.

11 MS. CENDALI: That -- that -- that is
12 -- that is right. But that's consistent with --
13 with, I think, the very unremarkable proposition
14 that new -- subsequent conduct, subsequent
15 infringing conduct, is a -- is a new claim --

16 JUSTICE ALITO: But that's --

17 MS. CENDALI: -- as -- as you all --

18 JUSTICE ALITO: -- inconsistent with
19 the restatement rule. So you really don't agree
20 with the restatement rule?

21 MS. CENDALI: Your Honor, perhaps I am
22 not fully understanding it, but -- but my
23 understanding of the restatement rule is based
24 on the idea of -- of attacking the previous
25 action or upsetting the judgment.

1 I think the proper Restatement rule to
2 be helpful here is the Restatement of Judgment
3 Section 18, which makes clear, in a section
4 titled Merger, that defenses that attempt to
5 upset the judgment rendered are barred.

6 JUSTICE ALITO: Well, that's --

7 MS. CENDALI: That's not --

8 JUSTICE ALITO: That's one -- that's
9 one section of the restatement that deals with
10 this problem. And of course, the restatement
11 might not be right. It's not -- you know, we
12 don't have to accept it, but --

13 MS. CENDALI: Well, the --

14 JUSTICE ALITO: I -- I have a question
15 about interpreting the judgment in the 2005
16 action, which I think we have to do in order to
17 come to grips with this case. It could be
18 interpreted possibly in one of two ways.

19 There is a seeming discrepancy between
20 the final judgment and in the injunction. The
21 injunction applies only to "Get Lucky" whereas
22 the -- you can read the judgment to apply to a
23 lot of other brands as well, a lot of other
24 marks as well.

25 So my -- my question is: Is there

1 a -- does the district court's -- the way
2 district court framed the injunction necessarily
3 reflect its interpretation -- let me back up.

4 Does the way the district court framed
5 the injunction necessarily indicate the way it
6 interpreted the -- the -- the -- the jury's
7 verdict or would there be grounds under
8 trademark law for the district court to issue an
9 injunction that is narrower than the jury's
10 verdict?

11 MS. CENDALI: The -- that was
12 discussed in a well-reasoned opinion, obviously
13 not binding on this court, by Judge Leval in
14 Marcel I where he said that because the
15 declaration was phrased in the conjunctive, you
16 couldn't -- it would be sheer speculation to say
17 that that meant that the jury found that it was
18 just use of "Get Lucky" by it's -- use of -- of
19 the word "Lucky," the name on our stores for 30
20 years, was -- was infringing by itself.

21 And we know that from how they tried
22 the case, which is why the -- the district court
23 and everyone understood it is they admit,
24 Respondents admit at pages 9 and 10 of their
25 brief, the focus of the case was not just on the

1 use of "Get Lucky" but on the use of "Get Lucky"
2 causing confusion with -- because of the
3 commingling of words with "Lucky" with "Get
4 Lucky."

5 JUSTICE ALITO: Well, I understand.

6 MS. CENDALI: That was --

7 JUSTICE ALITO: That was --

8 MS. CENDALI: -- the argument to the
9 jury.

10 JUSTICE ALITO: That's a -- that's a
11 plausible, maybe the best interpretation of the
12 -- the meaning of the box that the jury checked
13 on the verdict sheet. But two things. All that
14 was held, right, in Marcel I, was that there
15 wasn't a -- there wasn't enough to show that the
16 injunction had been violated and, therefore, not
17 enough to hold -- not enough for a contempt
18 holding.

19 Am I right?

20 MS. CENDALI: Well --

21 JUSTICE ALITO: That's what was held.

22 MS. CENDALI: It -- it held that, yes,
23 that the -- that the contempt ruling by the
24 district court in denying contempt to preside it
25 over the case and is in the best position to

1 know what she was intending to enjoin, and knew
2 that the closing argument to the jury was -- I
3 think it was at 852 of the trial transcript, was
4 -- was what's causing confusion is the use of
5 "Get Lucky" with these other marks.

6 JUSTICE GINSBURG: Can you explain how
7 Lucky -- I take it was represented by other
8 counsel -- allowed that strange question that
9 asked: "Get Lucky," "Lucky Brand," any other
10 use of the word "Lucky," strung them all
11 together and the jury, in order to find that
12 "Get Lucky" had been used and infringed, would
13 have to answer yes.

14 How did you -- the judge, I assume,
15 informed the attorney of the questions that
16 would be asked on the special verdict sheet,
17 right?

18 MS. CENDALI: I -- I think that they
19 all understood it because it was consistent by
20 grouping them all together like that with the
21 theory that the case was argued. They -- they
22 essentially had two claims: You can't use "Get
23 Lucky," those actual words, and -- and it's also
24 causing confusion to use "Get Lucky" with these
25 other words.

1 So actually that -- that language,
2 that instruction, that grouping was pressed not
3 by Lucky's counsel, but by Marcel's counsel,
4 because that fit their theory of the case. And
5 they should -- they can't now, having pressed
6 that theory of -- of the case, and gotten the
7 language that they wanted, now try to argue that
8 it means something else.

9 But -- but I -- but I -- I also am
10 concerned, though, that we -- we need to get
11 back to the -- the -- with -- with respect, with
12 permission, with the -- the -- the legal issue
13 of the -- the problems with this new test that
14 the Second Circuit has put forth because it is a
15 bad idea. It's a bad idea for at least four
16 reasons:

17 One, it will create uncertainty
18 because you'll never know whether you're going
19 to be excused or not from a claim being
20 released -- from failing to press a defense,
21 forgive me.

22 Second, it's going to lead to new
23 litigation. People are going to feel compelled
24 to press defenses. And I can assure you that
25 district court judges are not enamored of people

1 who come in with a laundry list of affirmative
2 defenses that need to be resolved.

3 And then, even after that happens,
4 then what happens? Then let's say you don't
5 raise a defense. Then there's an ancillary
6 motion practice and proceeding where a judge has
7 to consider what happened in the previous case
8 that they may not have been involved with. It
9 would also then lead to mischief by plaintiffs
10 who might say, let's bring a small case, which
11 arguably this case is, and then bring a bigger
12 case after that.

13 And it's also just fundamentally not
14 fair. It's not symmetrical. It's not
15 even-handed because it lets a plaintiff bring
16 new claims, but it prohibits a defendant from
17 raising all the defenses that they may have to
18 those claims.

19 Just as these new claims did not exist
20 at the time of 2005 action, so too -- and they
21 could not have brought them, well, we really
22 could not have brought the defense to those
23 claims because those claims are new.

24 And -- and I think that was the
25 reasoning of this Court way back in 1877 in

1 Cromwell.

2 JUSTICE GORSUCH: Counsel, you raise a
3 point about the lack of symmetry here that would
4 be created. I suppose we could remedy that,
5 couldn't we, and say that if a plaintiff had a
6 claim in time 2 that was available, similar to
7 the one in time 1, just as here, and could have
8 brought a cause of action but forgot to do so in
9 time 1, it should be barred from doing so in
10 time 2.

11 Would that -- would that solve the
12 asymmetry problem?

13 MS. CENDALI: I think, Your Honor, if
14 I'm understanding your correction correctly,
15 what you're really, as I hear it, talking about
16 the ordinary application of claim preclusion,
17 which means that --

18 JUSTICE GORSUCH: Well, no, it's a new
19 claim, you would say, right, because it involves
20 new -- new facts, right, and new infringements
21 but, yeah, there was a cause of action they
22 could have brought, right, you know, a breach of
23 contract claim rather than just a trademark
24 claim, but maybe they shouldn't be allowed to
25 bring that in time 2.

1 MS. CENDALI: Well, that would be a --
2 a -- another let's-litigate-everything rule so
3 that --

4 JUSTICE GORSUCH: It would -- it would
5 be quite an extension of claim -- claim
6 preclusion in another direction but it would at
7 least solve the asymmetry problem.

8 MS. CENDALI: Right, but to no good
9 end.

10 JUSTICE GORSUCH: Okay.

11 MS. CENDALI: I mean, this -- this was
12 a -- I mean, it really seemed like the court in
13 Marcel II was -- was annoyed that prior counsel
14 didn't raise this defense and I can appreciate
15 that.

16 But that doesn't mean that this Court
17 needs to reconfigure the entire law of claim and
18 issue preclusion in this case in this country.
19 But -- and there's no reason to do it, because
20 as the reasons thought in Cromwell in this Court
21 in a very thoughtful opinion by Justice Field in
22 1877, you know, the Court took the time to -- to
23 survey exhaustively all prior law of -- of -- of
24 what we now call issue and claim preclusion.

25 And while he talked about demand

1 instead of claim, he -- he -- he juxtaposed in
2 his opinion for the Court the two types of
3 preclusion that we deal with today: The idea
4 that once you have litigated a case, you
5 can't -- you're foreclosed from raising defenses
6 to undermine that case's resolution, but if it's
7 something that you haven't litigated, that would
8 not foreclose you in a subsequent case involving
9 new claims.

10 JUSTICE KAGAN: Ms. --

11 JUSTICE KAVANAUGH: Just --

12 JUSTICE KAGAN: Could I go back and
13 figure out what's going on between the parties?

14 In your reply brief, you say, even
15 disregarding the facts that these are -- that
16 we're dealing with a different time period,
17 we're actually dealing with a different set of
18 -- of -- of claims.

19 MS. CENDALI: Correct.

20 JUSTICE KAGAN: Because you have
21 stopped using the Get Lucky brand, so that the
22 claims that the Respondent now has against you
23 have nothing to do with "Get Lucky."

24 Is that what --

25 MS. CENDALI: That's correct, Justice

1 Kagan.

2 JUSTICE KAGAN: So -- I mean, that
3 would be a kind of narrow and easy way to solve
4 this case if it were true, and if it were not
5 waived in any way, but why did you only bring
6 that to our attention in your -- in -- why did
7 you only make that a central feature of your
8 argument in the reply brief?

9 MS. CENDALI: Because that was sort of
10 to our surprise the -- the focus of their -- I
11 mean, the key thing is that our friends did not
12 defend or cite any cases saying a previous court
13 has ever accepted the thinking of Marcel II
14 whereby a never-litigated defense can be
15 precluded in an action involving new claims.

16 Rather, they focused its brief on
17 saying, well, these are actually old -- old
18 claims. And that's why we addressed it then.
19 We -- the whole predicate of this case, the
20 whole opinion that -- that Marcel II, that is --
21 is -- is based on was the -- the court in Marcel
22 II acknowledging and citing the decision of
23 Judge Leval in Marcel I that this was new claims
24 because it involved a subsequent course of
25 conduct.

1 Once they raised it, we then properly
2 responded it -- to it in reply. And as we said
3 in our reply brief, there's three reasons -- I
4 mean, the key thing is to decide the issue of
5 law, but in terms of the new claim issue, I
6 think this Court can easily dispose of that for
7 three reasons.

8 One, they argued exactly the contrary,
9 arguing that these were new acts, new claims,
10 new circumstances in Marcel I, so if there is an
11 estoppel here, it's judicial estoppel to them in
12 changing their position now, having gotten to
13 court and being here because of that.

14 And then, second, Judge Leval's
15 decision, not binding on this Court, but was
16 clearly right because it stood for the
17 unremarkable proposition that subsequent acts
18 create new claims. And that's also consistent
19 with Asetek in patent law, in this Court's
20 accrual cases like MGM versus Petrella in the
21 copyright context, where each act of
22 infringement is a new claim for accrual
23 purposes.

24 And then, finally, yes, there is the
25 factual point that Your Honors have been asking

1 about, which is when the whole theory admittedly
2 of the first case was about the juxtaposition of
3 -- of "Get Lucky," the use of "Get Lucky," and
4 the juxtaposition of "Get Lucky" with other
5 things causing confusion, in a new case, in a
6 new period of time, not before the court, not
7 the possibly before the court, that admittedly
8 did not use "Get Lucky," that's a very different
9 circumstance.

10 JUSTICE KAVANAUGH: Could they --

11 JUSTICE SOTOMAYOR: Can you tell --
12 I'm sorry.

13 JUSTICE KAVANAUGH: Go ahead. Go
14 ahead.

15 JUSTICE SOTOMAYOR: Can you tell me
16 what the theory is, what you think the 2005
17 settlement -- or 2003 settlement agreement
18 means?

19 MS. CENDALI: Sure.

20 JUSTICE SOTOMAYOR: Can you sort of --
21 I can't tell whether you think it means that
22 Marcel has no claims against Lucky Brand for
23 using "Lucky Brand," but you have claims against
24 them for their using "Get Lucky"?

25 MS. CENDALI: No.

1 JUSTICE SOTOMAYOR: All right. So --

2 MS. CENDALI: It -- it doesn't mean
3 that. What it means is what the district court
4 held it to mean. If -- it's a nice summary of
5 it in its decision granting our motion to
6 dismiss, which led to the appeal in Marcel II.

7 And what it means is that in exchange
8 for \$650,000, my client, Lucky, agreed not to
9 use "Get Lucky" anymore, but that for any
10 trademarks that it had registered or used prior
11 to the date of the settlement agreement, which
12 would include "Lucky Brand," the name of our
13 store, and other kinds of things like -- other
14 enumerated things, any trademarks that used the
15 word "Lucky" prior to that date, all future
16 claims would be extinguished.

17 So, in other words, what that would
18 mean, and the benefit of the bargain that we're
19 trying to achieve is, absolutely, we can't use
20 "Get Lucky" anymore. But under the principles
21 of the policy of supporting settlement
22 agreements, we should be allowed the benefit of
23 our bargain and being able to have protection
24 for our house mark and the other pre-May 2001
25 uses and registrations that they had.

1 So the settlement agreement doesn't --
2 it's not an offensive document. They can
3 continue to use their sole registered trademark,
4 "Get Lucky," to their hearts' content. The
5 issue --

6 JUSTICE SOTOMAYOR: And so you can use
7 "Lucky Brand" and any other trademark you had
8 registered as of that date, to your heart's
9 content?

10 MS. CENDALI: Exactly, Your Honor.
11 And it's that benefit of the bargain that we're
12 being deprived of. And Lucky -- I mean Marcel
13 effectively got a partial windfall in -- in the
14 2005 action. Most of that case was about "Get
15 Lucky," but if some small piece of it involved
16 one of the released -- released marks, they got
17 -- some of that \$20,000 went for that, but now
18 they're trying to -- to get a perpetual windfall
19 and say that they get to bring, even though they
20 didn't get an injunction, additional new claims
21 when we are foreclosed from bringing a defense
22 that was never fully litigated to judgment and
23 would not be barred by issue preclusion.

24 Your Honor, were you trying to ask a
25 question?

1 JUSTICE KAVANAUGH: Yes, thank you.

2 The other side likens this case to a
3 judgment enforcement action. You've -- you've
4 alluded to that. Just so we're clear, what
5 makes something, in your view, a judgment
6 enforcement action and why doesn't this qualify?

7 MS. CENDALI: What makes something a
8 judgment enforcement action is when they're
9 trying to get the relief they had been
10 previously been awarded. And the relief that
11 they previously were awarded was the \$300,000
12 and the injunction with regard to that we can't
13 use "Get Lucky" or a colorable invitation --
14 imitation of that.

15 What this action is about is we want
16 more money, we want a -- a broader injunction;
17 we don't want you to use anything with the
18 ordinary English word "Lucky" in it. And --

19 JUSTICE KAGAN: You said before a
20 judgment enforcement action and a collateral
21 attack on a judgment. Do you view those as
22 different things?

23 MS. CENDALI: They're really --
24 technically, they're different, but they go to
25 the same thing. I mean, claim preclusion is all

1 about the concept -- as we -- as we know from
2 Taylor v. Sturgell, is the -- is the modern word
3 we use for part of -- of -- of res judicata.
4 And so what -- what that's about is the idea
5 that once the action was decided, nobody can
6 undo it. The plaintiff can't sue again and get
7 additional relief -- may I finish the -- the
8 statement?

9 CHIEF JUSTICE ROBERTS: Sure.

10 MS. CENDALI: And the -- and the
11 defendant is -- is -- cannot be -- attack a
12 judgment once obtained.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Kimberly.

16 ORAL ARGUMENT OF MICHAEL B. KIMBERLY

17 ON BEHALF OF THE RESPONDENT

18 MR. KIMBERLY: Thank you, Mr. Chief
19 Justice, and may it please the Court:

20 Imagine a dispute between two parties
21 is resolved with a final judgment on the merits.
22 Our position is that in any subsequent lawsuit
23 between the same parties, just as the plaintiff
24 is precluded from raising any claims springing
25 from the same cause of action if those claims

1 were available to it in the prior suit, so too
2 the defendant is precluded from raising any
3 defenses to that cause of action if those
4 defenses were available to it in the prior suit.

5 This rule is fair and symmetrical. It
6 preserves judicial resources by discouraging
7 repeat lawsuits, and it fosters reliance on
8 final judgments.

9 Now, Lucky's response to this, as I
10 understand it over the last 25 minutes and its
11 reply brief, is not really to deny the substance
12 of our rule but, instead, to deny that this case
13 and the prior case involved the same cause of
14 action.

15 But that can't possibly be correct.
16 Indeed, there could be no clearer example of two
17 cases involving the same cause of action than
18 one in which the second suit alleges
19 post-judgment violations of the exact same legal
20 rights that were settled by the final judgment
21 in the first lawsuit, based on a course of
22 conduct that is alleged to be a continuation of
23 the exact same conduct as before.

24 And that's exactly what Marcel alleges
25 here. Now, Lucky says that these allegations

1 are wrong and, in fact, that this case depends
2 on different facts supporting different theories
3 of trademark infringement.

4 And there are two responses to this.
5 The first is that Lucky is ignoring that this is
6 an appeal from a motion to dismiss, meaning the
7 allegations of the complaint have to be taken as
8 true. And at paragraph 25 of the complaint,
9 reproduced at JA 62, and this is one among many
10 such examples, Marcel alleges plaintiffs can be,
11 quote, "Lucky continues to this day to use the
12 Lucky Brand marks in the identical manner that
13 was found to be infringing upon plaintiffs
14 rights and interests in the first action."

15 I don't think the Court has to look
16 further than that. Now, if the Court does feel
17 that it does need to look further than that, I
18 think all it needs to do is look at the
19 judgment.

20 JUSTICE KAGAN: Mr. --

21 CHIEF JUSTICE ROBERTS: Before we --
22 go ahead.

23 Before we do that, it seems to me that
24 -- that perhaps the most serious difficulty with
25 your case that cries out for an answer before

1 getting to the judgment is that it does require
2 counsel to put forth in the first case every
3 conceivable defense that he or she might have.

4 And I can't imagine a rule that would
5 be -- would make sense. In other words, if
6 you've got five defenses and you think three are
7 really good; two, who knows; you still have to
8 put in those other two if you want to ever be
9 able to raise that defense again. And it's a
10 particular problem in this area of the law
11 because you're often dealing with ongoing
12 disputes between two parties.

13 MR. KIMBERLY: Your Honor, that would
14 be true only with respect to subsequent suits
15 involving the same nucleus of operative fact,
16 the same claims. It would not be true with
17 respect to subsequent litigation between the
18 parties on different causes of action.

19 JUSTICE GINSBURG: I don't follow -- I
20 don't follow your argument about same claim
21 because I thought everybody agrees that the
22 claim that Marcel is bringing in the second
23 action is not the same claim. It's a different
24 claim because it involves events that occurred
25 after the judgment, so there's no claim

1 preclusion. There's no claim preclusion in this
2 case. The plaintiff is the one against whom
3 claim preclusion operates.

4 And there, I think all agree, claim
5 preclusion is not an issue. There is this new
6 idea of defense preclusion, but there surely is
7 not claim preclusion. I think we can agree on
8 that.

9 The first action deals with a certain
10 period of time and certain conduct within that
11 period of time. The second action deals with
12 conduct after the first case is over and it is a
13 different claim. I thought that it -- it is
14 clear that there is no claim preclusion in this
15 case.

16 MR. KIMBERLY: Your -- Your Honor, it
17 is clear that there's no claim preclusion in
18 this case but it is not because they are
19 different causes of action. There is no
20 question that if the claims under the assertion
21 of damages, the facts underlying --

22 JUSTICE GINSBURG: The course of
23 action means a claim for relief. A course of
24 action is a claim. And if you take the federal
25 rules, federal rules refer never to cause of

1 action, the expression is claim for relief.

2 MR. KIMBERLY: So call -- call it a
3 claim, call it a cause of action, call it a
4 common nucleus of operative facts. That is, I
5 think, the unit that matters for res judicata
6 purposes.

7 There is no question that if the facts
8 giving rise to these claims had arisen
9 pre-judgment, they would be precluded precisely
10 because they are -- precisely because they do
11 arise from a common nucleus of operative fact.

12 The reason that claim preclusion does
13 not apply in this case and that Marcel may
14 prosecute its post-judgment claims is not
15 because they arise from a different nucleus of
16 operative fact. It's because these claims were
17 unavailable to it --

18 JUSTICE KAGAN: Well, how -- how do
19 they --

20 MR. KIMBERLY: -- in the prior claim.

21 JUSTICE KAGAN: -- not arise from a
22 different nucleus of operative fact? I mean,
23 there are two problems. One problem is the one
24 that Justice Ginsburg raised, it happened
25 afterwards. The facts of -- are different

1 because it's a different time period. So it's a
2 different transaction or occurrence. It's a
3 different nucleus of operative fact, however you
4 want to phrase the -- the -- the -- the test, it
5 would seem you're no longer in the same world.

6 And then even more than that, even if
7 you said, well, if everything else is identical
8 and only the timing has changed, maybe we can
9 still say it's the same claim. Here everything
10 else is not identical because Lucky has stopped
11 using "Get Lucky."

12 MR. KIMBERLY: Right.

13 JUSTICE KAGAN: It's continuing to use
14 its Lucky Brand and the -- and the -- the
15 reference you made to your complaint says it's
16 continuing to use its Lucky Brand in the same
17 way, but it's not using "Get Lucky."

18 And that was a core part of the
19 operative facts that gave rise to the first
20 claim, isn't it?

21 MR. KIMBERLY: So, yes, as to one
22 bucket of the claims. It was factually relevant
23 to the -- a second bucket of claims and it would
24 be factually relevant in this case. So let
25 me -- and there were a few parts to your point

1 there, and let me take on the first about
2 different time periods.

3 The point here is that this was a
4 continuing course of conduct. So the litigation
5 in 2005 covered a wide range of time, up to the
6 time of the final judgment in May 2010.
7 Liability in this case is alleged to commence
8 the day after the judgment in June 2010.

9 So it isn't as though this is -- this
10 is just a sort of a different point on the
11 spectrum of a continuing course of conduct. So
12 the facts now are no different than were the
13 facts between two different days within the
14 period --

15 JUSTICE GORSUCH: Well --

16 MR. KIMBERLY: -- of time that was --

17 JUSTICE GORSUCH: -- except for the
18 fact, counsel, that if it were identical, you
19 would just go enforce the judgment. But you
20 tried that and failed here. So I guess I'm
21 stuck where Justice Kagan and Justice Ginsburg
22 are in -- in that this looks like a different
23 claim.

24 And I think you've actually, candidly,
25 acknowledged that this is a different claim and

1 it isn't precluded by claim preclusion, it's got
2 to be something else.

3 And the something else you hint at
4 page 20 of your brief, you talk about a
5 defendant who loses in one lawsuit may not raise
6 in a subsequent lawsuit involving the same cause
7 of action.

8 MR. KIMBERLY: Right.

9 JUSTICE GORSUCH: Which I think of as
10 a legal theory, that's how I think of it, at
11 least, as opposed to a claim which involves the
12 facts, a defense that was available in the first
13 lawsuit. Okay?

14 So I wonder, well, you know, that's a
15 little asymmetrical, right? The defense -- the
16 defendant loses a defense. Why wouldn't the
17 plaintiff also lose the cause of action and --
18 and wouldn't we then be inviting the same sorts
19 of inefficiencies that the Chief Justice was
20 speaking of earlier requiring a plaintiff to
21 bring every cause of action in a \$20,000 lawsuit
22 involving a different set of facts that it might
23 bring in a very similar --

24 MR. KIMBERLY: Right.

25 JUSTICE GORSUCH: -- cause of action

1 later in time 2.

2 MR. KIMBERLY: I want to be sure to
3 come back to Justice Kagan -- Kagan's question.

4 JUSTICE GORSUCH: I think we're asking
5 the same sort of thing from --

6 MR. KIMBERLY: Well, let -- let me
7 answer just first as to this -- this question
8 about, well, maybe you wouldn't want to litigate
9 all your defenses in a case involving a small
10 amount in controversy. That may be true, the --

11 JUSTICE GORSUCH: So -- and the same
12 thing's true for a plaintiff, though. You might
13 not want to bring all your causes of action in a
14 first lawsuit. You might -- might keep it
15 simple one. It's a small lawsuit. You might
16 throw in more causes of action in a later
17 lawsuit that involves more money, for example,
18 right?

19 MR. KIMBERLY: Well, that's exactly
20 right. But claim -- claim preclusion recognized
21 that --

22 JUSTICE GORSUCH: Wouldn't want that
23 to be barred. That would be a bad thing if that
24 were barred, right?

25 MR. KIMBERLY: If -- if a plaintiff

1 were barred from raising claims arising from a
2 common nucleus of --

3 JUSTICE GORSUCH: Bringing a new cause
4 of action, a new legal theory in time 2 for
5 similar but different later --

6 MR. KIMBERLY: No, of course, Your
7 Honor, but, of course --

8 JUSTICE GORSUCH: You wouldn't want
9 that to be barred.

10 MR. KIMBERLY: I have to resist that
11 the -- these -- these claims don't concern a
12 common nucleus of operative fact. And so let me
13 get to that in my -- in the second part of my
14 answer to your question, Justice Kagan.

15 There were two categories of claims in
16 this case. There were claims concerning Lucky's
17 use of "Get Lucky" and there were claims
18 concerning the likelihood of confusion between
19 the "Lucky Brand" marks and Marcel's "Get Lucky"
20 mark.

21 The claims concerning "Get Lucky" were
22 the claim about the settlement agreement which
23 had -- which was supposed to prevent Lucky from
24 continuing to use "Get Lucky" and trademark
25 infringement. As to those claims, they were

1 resolved interlocutorily by the court -- the
2 district court sanctions order.

3 That order granted partial summary
4 judgment on each of Marcel's claims insofar as
5 Lucky was using the designation "Get Lucky" in
6 direct violation of the settlement agreement and
7 Marcel's trademark rights.

8 The trial in the case took place more
9 than a year after that. And the focus of the
10 trial was then whether the "Get Lucky" marks and
11 the "Lucky Brand" -- the "Lucky Brand" marks and
12 the "Get Lucky" marks were confusingly similar.
13 That was the only issue as to liability that was
14 left in the case after the district court
15 entered partial summary judgment.

16 And I would say at the same time that
17 the Court entered partial summary judgment, it
18 entered the permanent injunction on the use of
19 "Get Lucky." The permanent injunction concerned
20 only the use of "Get Lucky," which is why,
21 Justice Gorsuch, we could not have brought this
22 as a judgment enforcement action.

23 JUSTICE BREYER: Couldn't have brought
24 it, but I don't -- I don't understand what our
25 -- we're supposed to decide. I thought that we

1 took this case because, assuming that the law is
2 what it seems to have always been, that, where A
3 sues B, and the suit's over, then A sues B again
4 for identical conduct which took place after the
5 suit was over.

6 I thought in 1961, in Al Sacks'
7 procedure class -- and things may have changed
8 --

9 (Laughter.)

10 JUSTICE BREYER: -- that I learned the
11 second suit is a new suit and therefore people
12 can raise claims, that they are not collaterally
13 estopped on.

14 JUSTICE GINSBURG: And that --

15 JUSTICE BREYER: Because that -- isn't
16 that right?

17 JUSTICE GINSBURG: -- issue
18 preclusion.

19 JUSTICE BREYER: Is that right? What?

20 I mean, I thought Justice Ginsburg
21 said exactly that. And she said that and it
22 took her about a minute and it took Al Sacks, I
23 think, about an hour, because --

24 (Laughter.)

25 JUSTICE BREYER: But -- but there we

1 are. And you started by saying that, so I
2 thought well, I agree with that. But I thought
3 -- I thought that the case was about the Second
4 Circuit trying to have a new rule that even if
5 the facts are just -- even if the law is just
6 what I said it was and just what she said it
7 was, sometimes a defense is precluded when it
8 wasn't raised before, if, A, same parties, same
9 -- adjudicated before, it could have been
10 asserted before, and the district court
11 concludes that preclusion is appropriate because
12 efficiency concerns outweigh any unfairness to
13 the party.

14 So I thought we were here to decide
15 whether that was the law, and I thought that
16 they are the only ones to have ever said that
17 and I don't know where they got it from and I
18 couldn't -- my law clerk couldn't find any case
19 that ever said that. And he couldn't find
20 that the -- the -- that the restatement ever
21 said that.

22 So where have I been wrong? I mean, I
23 mean, I guess it could become the law, but --
24 but I haven't heard anyone argue that it should
25 be. I haven't heard anyone defending the Second

1 Circuit. I haven't read anyone who defended the
2 Second Circuit. Okay, you get my point.

3 MR. KIMBERLY: Yes. And -- and --
4 and, Your Honor --

5 (Laughter.)

6 MR. KIMBERLY: -- the -- I guess what
7 I would say is I think the Second Circuit's test
8 is exactly right in every particular except that
9 --

10 JUSTICE BREYER: I'm sure you do. But
11 --

12 (Laughter.)

13 MR. KIMBERLY: -- except that it could
14 have been more clear, I think that the first
15 case and second case have to involve the same --
16 a common nucleus of operative fact such that the
17 claims raised in the second --

18 JUSTICE BREYER: I am not interested
19 so much in that as I am in where did that come
20 from? Are you the first person to have made
21 that up, and you convinced the Second Circuit,
22 or are there others who have -- in the history
23 of the law have said it and -- which would help
24 me?

25 MR. KIMBERLY: Your Honor, we -- we

1 recite them at length in our brief. The idea
2 that -- that claim preclusion has a mirror image
3 that applies to preclude --

4 JUSTICE BREYER: Oh, yes, yes --

5 MR. KIMBERLY: -- defendants from
6 raising --

7 JUSTICE BREYER: -- that's true.

8 MR. KIMBERLY: -- defenses is very
9 well settled.

10 JUSTICE BREYER: That's not my point.
11 My point is I just read you what you what they
12 said, and that was in a case where there wasn't
13 claim preclusion. They're talking about cases
14 where there isn't claim -- I thought.

15 MR. KIMBERLY: But --

16 JUSTICE BREYER: If they're talking
17 about cases where there is claim preclusion, I
18 don't know what the point -- I -- I'd have to go
19 back to the whole thing, but I thought that's
20 what I read you was talking about cases where
21 there isn't claim preclusion.

22 MR. KIMBERLY: Well, defense can --

23 JUSTICE BREYER: Am I right or not?

24 MR. KIMBERLY: I think defense can --
25 preclusion could only apply in a circumstance

1 where claim preclusion didn't because if claim
2 preclusion applied, of course the case wouldn't
3 --

4 JUSTICE BREYER: So I am right.

5 MR. KIMBERLY: -- get off the ground.

6 JUSTICE BREYER: It applies only in a
7 case where there is not claim preclusion.
8 That's what --

9 MR. KIMBERLY: But -- but --

10 JUSTICE BREYER: -- we're talking
11 about. Right. Now, then give me the authority
12 that says in a case where there was no claim
13 preclusion, no claim preclusion.

14 MR. KIMBERLY: I -- I -- I think -- I
15 don't -- I don't have a case to point you
16 particular to that point, but I -- I should say
17 that the reason that claim preclusion doesn't
18 apply in the second case has to be not that it
19 is a new claim, but that the claim was simply
20 unavailable in the first --

21 JUSTICE ALITO: But isn't -- -

22 MR. KIMBERLY: -- in the first case.

23 JUSTICE ALITO: Isn't there a body of
24 law that says that the fact that the facts are
25 different is not necessarily dispositive of this

1 issue? So that if you have a series of lawsuits
2 about exactly the same thing, let's say failure
3 to pay under an installment contract or failure
4 to pay rent and it comes up month after month,
5 the failure to raise the defense in one of those
6 prior actions can bar the raising of a defense
7 in the later actions. So --

8 MR. KIMBERLY: That is precisely
9 right.

10 JUSTICE ALITO: -- the fact that it's
11 a different period of time is not necessarily
12 dispositive if -- unless we reject that body of
13 law.

14 MR. KIMBERLY: That's right, Your
15 Honor. And the reason is straightforward. In
16 the first suit, where the -- where the landlord
17 sues the tenant on the meaning and -- and
18 enforceability of the contract and it results in
19 a final judgment that settles the landlord's
20 right -- landlord's rights under that contract,
21 the landlord ought to be entitled to rely on
22 that contract --

23 JUSTICE BREYER: All I would want --

24 MR. KIMBERLY: -- on that judgment.

25 JUSTICE BREYER: -- is a couple of

1 cases that I should read -- I don't read every
2 case in the brief. Don't tell anyone I said
3 that.

4 (Laughter.)

5 JUSTICE BREYER: But the -- the -- the
6 -- what cases should I read to say that --

7 MR. KIMBERLY: I --

8 JUSTICE BREYER: Where you bring an
9 identical --

10 MR. KIMBERLY: Right. So I would
11 start with City of Beloit. This is a case from
12 1968. It predates the Davis case, on which my
13 friend on the other side relies, and it -- it
14 stands for exactly this proposition. It does so
15 in the context of a series of negotiable
16 instruments, but there was an initial suit that
17 settled the parties' rights on when later
18 negotiable instruments came due, the plaintiffs
19 sued again, the defendant raised a new defense,
20 and this Court said in City of Beloit that that
21 defense was precluded.

22 JUSTICE SOTOMAYOR: But that was
23 because it was all from the same issue.

24 MR. KIMBERLY: That --

25 JUSTICE SOTOMAYOR: Meaning that a --

1 but we have a contrary case that says when it
2 was two different issues, then you don't have
3 it.

4 MR. KIMBERLY: Not issues, Your Honor.
5 I think causes of action. And I think that's
6 exact --

7 JUSTICE SOTOMAYOR: No, no, no. Now
8 you're trying to confuse things. Beloit
9 involved bonds that were -- that came from the
10 same issuing body at the same time.

11 MR. KIMBERLY: That was Davis as well,
12 Your Honor. Davis and -- and Beloit --

13 JUSTICE SOTOMAYOR: Davis -- but it
14 was different bonds, not from the same issue.

15 MR. KIMBERLY: It was the same bonds
16 from the same issue, Your Honor.

17 JUSTICE SOTOMAYOR: But, we got two
18 different outcomes, then.

19 MR. KIMBERLY: And -- and for reasons
20 unclear to me, the Court said in Davis when
21 you're suing on two different negotiable
22 instruments, you're suing on two different
23 causes of action. The City -- the Court in
24 Beloit, in City of Beloit, said, well, when
25 you're suing on two different --

1 JUSTICE SOTOMAYOR: All right.

2 MR. KIMBERLY: -- negotiable
3 instruments --

4 JUSTICE SOTOMAYOR: So let me take it
5 to this case. You sued in 2005 for their use of
6 "Get Lucky" with "Lucky Brands." In 2011,
7 you're suing simply for using "Lucky Brands."
8 To the extent that the case turned in 2005 in
9 the combined confusion of the use of "Get Lucky
10 with "Lucky Brands" --

11 MR. KIMBERLY: Um-hum.

12 JUSTICE SOTOMAYOR: -- because I read
13 your complaint and it's always in the
14 conjunctive, both of them together, but now
15 it's, in my mind, a different cause of action
16 because you're saying it's the use of "Lucky
17 Brands" without --

18 MR. KIMBERLY: Right.

19 JUSTICE SOTOMAYOR: -- "Get Lucky."

20 MR. KIMBERLY: So this -- this is the
21 completion of my answer to Justice Kagan's
22 original question, and it's this: To understand
23 what was at issue in the first case, I think
24 you're right, Your Honor, you have to look at
25 the complaints. And, in particular, what I

1 would do is look at the -- the counts of the
2 complaints that were reduced to judgment.

3 So I'd point the Court to paragraph 2
4 on JA 206. This is where -- this is reading the
5 final judgment. That paragraph reads:
6 "Ally's," -- oh, and let me pause and first say,
7 of course, there was Lucky's complaint and
8 Marcel's counter-complaints. There were two
9 complaints. To understand what the suit was
10 about, what the nucleus of relevant facts there
11 was, you have to look at both.

12 As to Lucky's claims against Marcel,
13 the jury found as follows, and this is reduced
14 to the final judgment. It says: "Ally's use of
15 GET LUCKY as licensed from Marcel Fashion
16 constitutes willful infringement of Lucky Brand
17 Parties' trademarks," pursuant to Lucky Brand's
18 first, second, and sixth claims."

19 This is the jury saying we agree with
20 Lucky that the marks are confusingly similar.
21 The second half of that paragraph then explains
22 that Marcel is not liable because its mark is
23 the senior mark.

24 So now what did Lucky allege in its
25 first, second, and sixth claims? And it's

1 crystal clear. This is docket 77-2 in the
2 district court docket in this case.

3 The focus of all of these claims was a
4 confusing similarity between the two marks. And
5 so I'll just read as one example the sixth claim
6 for relief. This is paragraph 99 of Lucky's
7 operative complaint. It says that, "Marcel and
8 its licensees' use of marks confusingly similar
9 to the Lucky family of marks has caused and
10 continues to cause confusion as to the source of
11 Marcel's and its licensees' products; in turn,
12 permitting them to pass off their products to
13 the general public as those originating" --

14 JUSTICE SOTOMAYOR: So why did you end
15 up both with a preliminary injunction and a
16 permanent final injunction that only enjoined
17 them from using "Get Lucky"?

18 MR. KIMBERLY: We --

19 JUSTICE SOTOMAYOR: I know you --
20 there is certainly loose language in the final
21 judgment making it unclear what it was aimed at.

22 MR. KIMBERLY: Right.

23 JUSTICE SOTOMAYOR: Except for the
24 permanent injunction. It seems almost natural
25 to me that if the intent was to challenge and if

1 the district court understood you to be
2 challenging the Lucky Brand --

3 MR. KIMBERLY: Right.

4 JUSTICE SOTOMAYOR: -- trademarks,
5 that it would have enjoined the use of all of
6 them.

7 MR. KIMBERLY: And -- and the answer
8 is that the permanent -- the only permanent
9 injunction in this case was the permanent
10 injunction that was entered into
11 interlocutorily, one year before the trial in
12 this case. It was the injunction entered as a
13 sanction because Lucky had misrepresented to the
14 court in Marcel that it was no longer using "Get
15 Lucky."

16 JUSTICE SOTOMAYOR: But I don't see
17 the language in the final judgment. The only
18 thing you ended up with is an injunction against
19 the use of Get Lucky.

20 MR. KIMBERLY: And we are not here
21 enforcing the injunction. I want to be very
22 clear about that. We are here enforcing --

23 JUST GORSUCH: And --

24 MR. KIMBERLY: -- the --

25 JUSTICE GORSUCH: -- just to be clear

1 about that, I'm sorry to interrupt, but you --
2 you're not enforcing the injunction and you're
3 not seeking to enforce the final judgment in the
4 first suit either?

5 MR. KIMBERLY: In -- only in the sense
6 that one would seek to enforce a declaratory
7 judgment are we doing so. We are -- we are
8 seeking to enforce the rights and interests that
9 were settled by the --

10 JUSTICE GORSUCH: This is not a
11 judgment enforcement action, counsel, is it?

12 MR. KIMBERLY: I -- I would not call
13 it a judgment enforcement action --

14 JUSTICE GORSUCH: Okay. All right.

15 MR. KIMBERLY: -- in the sense that a
16 claim is reduced to judgment and they're not
17 paying on the judgment. That's right.

18 But as Justice Alito was explaining,
19 the restatement -- restatement recognizes that
20 really there are two categories of subsequent
21 cases. There can be subsequent cases where the
22 parties are seeking to actually enforce the
23 judgment and one where they are simply seeking
24 to seek further enforcement of the rights and
25 interests settled by and underlying the final

1 judgment in the prior case.

2 JUSTICE KAGAN: Well, how -- how does
3 this undermine the prior judgment?

4 MR. KIMBERLY: The prior -- it -- it
5 undermines the rights and interests settled by
6 the final -- the final judgment from the 2005
7 action.

8 JUSTICE ALITO: What were those --
9 what was that -- what was those rights?

10 MR. KIMBERLY: The --

11 JUSTICE ALITO: Was it a right for the
12 -- right to have them not use any brand that
13 contains -- what right was established?

14 MR. KIMBERLY: It was the 12 marks.
15 It was the parties' relationship to one another
16 with respect to the 12 Lucky Brand marks and the
17 one Marcel Fashions' mark that were at issue in
18 the case. And the jury's determination that
19 Lucky's use of those marks -- that those marks
20 were confusingly similar to Marcel's mark and,
21 therefore, that Lucky's use of those marks was
22 infringement on a reverse confusion theory of
23 liability.

24 JUSTICE ALITO: Each and every one of
25 them?

1 MR. KIMBERLY: Of the 12 marks, yes.

2 JUSTICE ALITO: Each and every one of
3 the 12. Then -- then I come back to this
4 question that I asked opposing counsel. Why --
5 how can you account for the discrepancy between
6 that understanding of the judgment and the
7 injunction? Why is the injunction so much
8 narrower than that?

9 MR. KIMBERLY: Well, rhe -- again, I
10 -- the injunction was entered by the district
11 court as a sanction. This final judgment --

12 JUSTICE GINSBURG: And why didn't you
13 ask for an injunction? If you say --

14 MR. KIMBERLY: Well, we --

15 JUSTICE GINSBURG: -- that what was --
16 what was infringing was not simply "Get Lucky,"
17 but Lucky Brand --

18 MR. KIMBERLY: Um-hum.

19 JUSTICE GINSBURG: -- anything with
20 using the word "Lucky," you should have asked
21 for an injunction.

22 MR. KIMBERLY: And, Your Honor, this
23 was an issue that came up after the jury entered
24 its verdict. The -- the final judgment that you
25 see is a jointly stipulated final judgment that

1 the parties negotiated.

2 In the course of that negotiation,
3 counsel for Marcel suggested that we ought to
4 enter a permanent injunction against Lucky's use
5 of the "Get Lucky" marks. It was clear that
6 that negotiation wasn't going to result in an
7 agreement.

8 And Marcel then agreed to drop the
9 issue. But what this Court said in Lawlor is
10 that a party's decision not to pursue a
11 permanent injunction in the face of a judgment
12 in its favor cannot operate as effectively a
13 license for the party -- the -- the -- the
14 losing defendant to continue on with what it was
15 doing before without any risk of being --

16 JUSTICE SOTOMAYOR: Point me to
17 language --

18 MR. KIMBERLY: -- sued again.

19 JUSTICE SOTOMAYOR: -- in the final
20 judgment that says you can't -- with an -- with
21 or without an injunction, you can't use Lucky
22 Brand?

23 MR. KIMBERLY: It -- it's -- as I was
24 saying, paragraph 2 where --

25 JUSTICE SOTOMAYOR: Give me a -- where

1 are you in the Joint Appendix?

2 MR. KIMBERLY: JA 206. And I will
3 read it one more time. It says, "Ally's use of
4 GET LUCKY" -- and ally is Marcel's licensee --
5 "Ally's use of GET LUCKY as licensed from Marcel
6 Fashions, constitutes willful infringement of
7 Lucky Brand parties," and then the list of the
8 12 marks at issue, "pursuant to Lucky Brand
9 parties' first, second, and sixth claims."

10 The first, second, and sixth claims
11 allege, just as I read to the Court earlier,
12 this is paragraph 74, paragraph 79, paragraph 99
13 of Lucky's complaint, where Lucky alleges
14 exactly the theory of confusion that I just
15 described that --

16 JUSTICE GORSUCH: But -- but all that
17 the judgment is reduced to is concerns "GET
18 LUCKY." That's it.

19 MR. KIMBERLY: No, that's incorrect.

20 JUSTICE GORSUCH: Okay. I mean, I'm
21 looking at -- okay, okay, I suppose I'm -- what
22 am I misreading here? "GET LUCKY" is -- is
23 capitalized and referenced three times in that
24 paragraph.

25 MR. KIMBERLY: Which paragraph are you

1 talking about?

2 JUSTICE GORSUCH: The one you were
3 just reading us, counsel.

4 MR. KIMBERLY: Well, but that's --
5 that's the -- that's the explanation of why
6 Marcel isn't liable because the "Get Lucky"
7 mark, although it's confusingly similar to
8 Marcel's marks, the "Get Lucky" mark is the
9 senior mark.

10 So the second half of that paragraph
11 simply explains why, despite the confusing
12 similarity between the marks --

13 JUSTICE GORSUCH: All right.

14 MR. KIMBERLY: -- Marcel is not --

15 JUSTICE GORSUCH: If you were right,
16 why didn't you just go seek a judgment
17 enforcement action? Why didn't you go back to
18 the court and say this defies your judgment,
19 Your Honor?

20 MR. KIMBERLY: Because a -- we -- we
21 take this judgment in this respect to take
22 basically the form of a declaratory judgment.
23 One doesn't get to return to a court upon
24 obtaining a declaratory judgment attempting to
25 convert it into a injunction.

1 JUSTICE GINSBURG: Well, you can apply
2 at the foot of a declaratory judgment for
3 further relief. Making a declaratory judgment
4 is a nice action. You're really going to deal
5 with your adversary and you're going to get the
6 declaration, but a declaratory judgment --
7 judgment can be followed up.

8 MR. KIMBERLY: It can. And more
9 typically, Your Honor, it's followed up by the
10 filing of a new lawsuit that alleges that
11 despite the declaration of rights, the defendant
12 has continued on with whatever it is the
13 declaratory judgment said they didn't have a
14 right to do. That's --

15 JUSTICE GINSBURG: Would you --

16 MR. KIMBERLY: -- precisely what we
17 have done.

18 JUSTICE GINSBURG: -- explain one
19 other aspect of this to me? I thought that this
20 settlement agreement, 2003 settlement agreement,
21 said Marcel, you can go after Lucky. Lucky has
22 undertaken not to use "Get Lucky" anymore. "Get
23 Lucky" is off the table.

24 MR. KIMBERLY: Right.

25 JUSTICE GINSBURG: On the other hand,

1 Marcel is releasing Lucky of liability for using
2 "Lucky Brand."

3 MR. KIMBERLY: Right.

4 JUSTICE GINSBURG: So "Lucky Brand" is
5 Lucky's trademark and Marcel says it's not going
6 to go after use of "Lucky Brand." And then we
7 get in this post-settlement where Marcel is
8 saying, yes, we're going to go after "Lucky
9 Brand," even though in the settlement we said we
10 wouldn't.

11 MR. KIMBERLY: And -- and, Your Honor,
12 the -- the explanation for this is twofold. The
13 first is Marcel became aware that Lucky was
14 violating the terms of the settlement agreement
15 and that it was continuing to use the "Get
16 Lucky" designation.

17 And two examples of this after the
18 settlement agreement appear on page 8 of our red
19 brief. Its theory then became -- and this is
20 where, Justice Kagan, you raised the potential
21 factual distinctions between the cases. They're
22 not actually distinctions.

23 Our theory became, one, if you're
24 going to -- first, Lucky sued Marcel on the
25 basis that was also released in the 2003 suit.

1 Lucky -- Marcel then filed counterclaims and
2 part of the theory of the counterclaims was if
3 you're mixing the two marks together then the
4 facts that underlie the settlement before are no
5 longer true, and, indeed, the public may now be
6 confused into thinking that "Get Lucky," in
7 fact, belongs to Lucky Brand. We would make
8 those same factual arguments in this case.

9 JUSTICE KAGAN: Mr. -- can I -- can I
10 go back to the law for a second? Because here's
11 where I really think we are in this case.

12 Second Circuit issues this decision. And as
13 Justice Breyer said, this decision -- we've --
14 you -- we've never really seen anything like
15 this because the Second Circuit said that there
16 was defense preclusion even in the context of
17 new claims.

18 You admitted that yourself, that the
19 Second Circuit wasn't clear enough about the
20 fact that it couldn't be a new claim. That's
21 because the Second Circuit never said it had to
22 be a new claim.

23 So the Second Circuit's ruling --

24 MR. KIMBERLY: It did hold that they
25 were --

1 JUSTICE KAGAN: -- excuse me --

2 MR. KIMBERLY: -- were the same thing.

3 JUSTICE KAGAN: -- goes far beyond
4 that and applies to new claims. So now you --
5 you think, well, that's got to be wrong. So we
6 have to limit it to old claims.

7 So I'll just -- you know, we'll say
8 that this is the old claim. It's the same
9 transaction or occurrence. But if it were the
10 same transaction or occurrence, you couldn't
11 bring your second suit.

12 Now then you say, yes, you can,
13 because I can bring a second suit even if it is
14 the same transaction or occurrence because I
15 didn't have the opportunity --

16 MR. KIMBERLY: Right.

17 JUSTICE KAGAN: -- to bring it before.
18 But nobody's ever heard of that. The reason
19 that you can bring a second suit is because this
20 is a different transaction or occurrence.

21 MR. KIMBERLY: Your Honor, in fact,
22 the arguments that you just described were at
23 the heart of our arguments in the first case.
24 And if I would, I -- I'd point the Court just to
25 two footnotes from the court's -- the Second

1 Circuit's decision in this case. It's footnote
2 7 at appendix page -- petition appendix page 18
3 to 19, where the court says that this action and
4 the prior action "surround related transactions
5 or occurrences." It's saying that this is the
6 same cause of action.

7 Footnote 10 on page --

8 JUSTICE GINSBURG: It said related.
9 Related isn't the same.

10 MR. KIMBERLY: Your Honor, that is, in
11 fact, a statement -- the -- the statement from
12 restatement section 24 is connected, but I think
13 related and connected are substantively the
14 same. And the court then at paragraph -- excuse
15 me, on petition appendix 21, in footnote 10 --
16 may I finish -- explains why its decision in the
17 first case -- in the first appeal and in this
18 appeal are consistent.

19 And it says, Your Honor, exactly what
20 you just said, that the reason that the claims
21 here are permitted is because they weren't
22 available in the first suit, not because they
23 are different claims in the sense that they
24 arise from a different nucleus of operative
25 fact, because they can't.

1 The allegations here is it's a
2 continuing course of conduct. And the only
3 reason they were permissible is because, that in
4 fact, they were unavailable. That is clear on
5 the face of the opinion and I -- we think
6 applying that opinion requires affirmance.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Five minutes, Ms. Cendali.

11 REBUTTAL ARGUMENT OF DALE CENDALI

12 ON BEHALF OF THE PETITIONERS

13 MS. CENDALI: Thank you.

14 Two series of points, one relating to
15 the question presented on the rule of law, the
16 new rule of law, and one relating to the new
17 claim argument.

18 One of the striking things about
19 Marcel's argument is that there was no defense
20 of the basic principle, as Justice Breyer was
21 saying, that -- that you can have a new -- in
22 the case where there is a new claim, a
23 previously unlitigated, unresolved defense can
24 be excluded.

25 JUSTICE BREYER: But he says -- he

1 points correctly to two cases. One was the one
2 Justice Alito mentioned, the landlord case, and
3 the other was the Bond case and in both cases --
4 you understand. You probably read those cases.

5 MS. CENDALI: Right. And so --

6 JUSTICE BREYER: And what's --

7 MS. CENDALI: -- let's talk --

8 JUSTICE BREYER: What's your answer to
9 that?

10 MS. CENDALI: Right. But let's -- but
11 let's -- let's talk about that. First, it
12 shouldn't be forgotten at page 17 of their
13 brief, they say that a preclusion of a defense
14 requires that the causes of action be the same.
15 That's basic civil procedure. I learned that in
16 professor Arthur Miller's class.

17 The case that they cited then was City
18 of Beloit. City of Beloit, as Justice Sotomayor
19 said, is our case, because that was a case when
20 there was a judgment that the city had to pay,
21 it then brought a suit in equity to try to get
22 from out of that judgment. That is not a case
23 involving the facts here of a new claim.

24 And, moreover, to the extent that
25 there's loose remarks going in that direction in

1 that case, that was specifically dealt with by
2 the majority opinion in Cromwell, which surveyed
3 all the law up to that point and, specifically,
4 while it didn't cite City of Beloit by name, it
5 specifically explained away Henderson v.
6 Henderson, which was the main case City of
7 Beloit relied on saying Henderson v. Henderson
8 was also a collateral attack case and doesn't
9 rely on it.

10 Later that term in another opinion by
11 Justice Field, Rogers v. -- excuse me, Davis
12 v. Brown, City of Beloit, excuse me, and
13 Cromwell was only cited by the defense, which is
14 telling.

15 JUSTICE BREYER: What about the --
16 what about the rent?

17 MS. CENDALI: The rent?

18 JUSTICE BREYER: The -- the landlord
19 sues the tenant for rent on a lease and wins.
20 And then later on, the tenant doesn't pay again,
21 so he -- okay, he, sues him again on the lease
22 and this time the defendant wants to say the
23 lease is invalid and the court said no, you
24 can't, because you should have said that before.

25 MS. CENDALI: Because to the extent

1 that that case is -- is a new claim, they should
2 be able to bring that. There's an ongoing
3 course of -- of conduct then -- then -- and you
4 were made whole from the first nonpayment --

5 JUSTICE BREYER: So that isn't the
6 question, because everybody agrees it's a new
7 course of conduct. But this was a defense. And
8 they said you can't raise the defense. And then
9 Wright and Miller is a little worried about
10 that. They say, well, this is a question about
11 estoppel. And -- so -- so that seemed like a
12 point on his side. What about those cases?

13 MS. CENDALI: Well, it -- well, none
14 of the cases, none of the cases cited in their
15 brief, are on -- these facts. With regard to
16 the rent case, if it's -- if it means what was
17 just said, then it's just wrong and not
18 consistent with law. And --

19 JUSTICE SOTOMAYOR: Counsel, let's
20 assume that they had actually litigated, you had
21 actually litigated whether the use of "Lucky
22 Brand" trademarks, without the use of "Get
23 Lucky," was an infringement on the superior "Get
24 Lucky" mark. Let's assume the Court had said
25 it's an infringement for you to do that. No

1 permanent injunction. We're just going to give
2 damages.

3 Then there's now a new lawsuit that
4 says you're continuing, after the old one, to
5 use the "Lucky Brand" trademarks in the same
6 way. That's how they are pitching this to us,
7 okay? Now you should be precluded because you
8 had a full and fair opportunity to raise the
9 settlement agreement as your right to use the
10 "Lucky Brands." You didn't. Why should you
11 raise it now? That -- I think that that's the
12 case that they say this is.

13 MS. CENDALI: Right.

14 JUSTICE SOTOMAYOR: And assuming that
15 were the case, you had a full and fair
16 opportunity to litigate your use of "Lucky
17 Brands" without "Get Lucky," and the jury found
18 that your use was an infringement, how could you
19 then defend this case?

20 MS. CENDALI: May I answer?

21 CHIEF JUSTICE ROBERTS: Yes.

22 MS. CENDALI: Well, you would defend
23 it because the case sought subsequent relief for
24 subsequent infringements where you would be
25 allowed to present new defenses to that

1 different period of time. In the absence of a
2 forward-looking injunction, it's a -- a new
3 case. Future facts could not have been before
4 the court. And that's the answer.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 11:07 a.m., the case
8 was submitted.)

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Official - Subject to Final Review

\$	accept ^[1] 11:12	amount ^[2] 5:15 35:10	based ^[3] 10:23 20:21 27:21
\$20,000 ^[4] 5:17 6:17 24:17 34:21	accepted ^[1] 20:13	analysis ^[1] 5:21	basic ^[2] 61:20 62:15
\$300,000 ^[2] 8:1 25:11	account ^[1] 52:5	ancillary ^[1] 16:5	basically ^[1] 55:22
\$650,000 ^[1] 23:8	accrual ^[2] 21:20,22	annoyed ^[1] 18:13	basis ^[2] 7:17 57:25
1	accusing ^[1] 6:20	another ^[4] 18:2,6 51:15 63:10	became ^[3] 57:13,19,23
1 ^[2] 17:7,9	accustomed ^[1] 4:4	answer ^[10] 5:14 14:13 28:25 35:7 36:14 46:21 49:7 62:8 65:20 66:4	become ^[1] 39:23
10 ^[3] 12:24 60:7,15	achieve ^[1] 23:19	appeal ^[5] 4:22 23:6 28:6 60:17,18	bedrock ^[1] 4:9
10:06 ^[2] 1:16 3:2	acknowledged ^[1] 33:25	appear ^[1] 57:18	behalf ^[8] 1:20,22 2:4,7,10 3:8 26: 17 61:12
11:07 ^[1] 66:7	acknowledging ^[1] 20:22	APPEARANCES ^[1] 1:18	Beloit ^[11] 44:11,20 45:8,12,24,24 62:18,18 63:4,7,12
12 ^[5] 51:14,16 52:1,3 54:8	act ^[1] 21:21	Appendix ^[4] 54:1 60:2,2,15	belongs ^[1] 58:7
13 ^[1] 1:12	action ^[6] 4:18,18 5:2,10 6:25 7:2, 3,5,10,16,19 8:1,25,25 10:25 11: 16 16:20 17:8,21 20:15 24:14 25: 3,6,8,15,20 26:5,25 27:3,14,17 28: 14 29:18,23 30:9,11,19,23,24 31:1, 3 34:7,17,21,25 35:13,16 36:4 37: 22 45:5,23 46:15 50:11,13 51:7 55:17 56:4 60:3,4,6 62:14	application ^[1] 17:16	benefit ^[3] 23:18,22 24:11
17 ^[1] 62:12	actions ^[2] 43:6,7	applied ^[3] 5:18 6:18 42:2	best ^[2] 13:11,25
18 ^[2] 11:3 60:2	acts ^[2] 21:9,17	applies ^[4] 11:21 41:3 42:6 59:4	between ^[12] 11:19 19:13 26:20, 23 29:12,17 33:13 36:18 48:4 52: 5 55:12 57:21
18-1086 ^[1] 3:4	actual ^[1] 14:23	apply ^[5] 11:22 31:13 41:25 42:18 56:1	beyond ^[1] 59:3
1877 ^[2] 16:25 18:22	actually ^[9] 3:21 15:1 19:17 20:17 33:24 50:22 57:22 64:20,21	Applying ^[3] 3:24 4:9 61:6	bigger ^[1] 16:11
19 ^[1] 60:3	additional ^[3] 8:6 24:20 26:7	appreciate ^[1] 18:14	binding ^[2] 12:13 21:15
1961 ^[1] 38:6	address ^[1] 9:9	appropriate ^[1] 39:11	bit ^[1] 5:11
1968 ^[1] 44:12	addressed ^[1] 20:18	area ^[1] 29:10	body ^[3] 42:23 43:12 45:10
2	addressing ^[1] 20:18	arguably ^[1] 16:11	Bond ^[1] 62:3
2 ^[7] 17:6,10,25 35:1 36:4 47:3 53: 24	adjudicated ^[1] 39:9	argue ^[3] 4:1 15:7 39:24	bonds ^[3] 45:9,14,15
20 ^[1] 34:4	administer ^[1] 4:7	argued ^[2] 14:21 21:8	both ^[4] 46:14 47:11 48:15 62:3
2001 ^[1] 23:24	admit ^[2] 12:23,24	arguing ^[2] 4:13 21:9	box ^[1] 13:12
2003 ^[3] 22:17 56:20 57:25	admitted ^[1] 58:18	argument ^[13] 1:15 2:2,5,8 3:7 13: 8 14:2 20:8 26:16 29:20 61:11,17, 19	BRAND ^[30] 1:3 3:4 6:4 14:9 19:21 22:22,23 23:12 24:7 28:12 32:14, 16 36:19 37:11,11 47:16 49:2 51: 12,16 52:17 53:22 54:7,8 57:2,4,6, 9 58:7 64:22 65:5
2005 ^[9] 8:25 11:15 16:20 22:16 24: 14 33:5 46:5,8 51:6	admittedly ^[2] 22:1,7	arguments ^[3] 58:8 59:22,23	Brand's ^[1] 47:17
2010 ^[2] 33:6,8	adversary ^[1] 56:5	arise ^[4] 31:11,15,21 60:24	brands ^[7] 11:23 46:6,7,10,17 65: 10,17
2011 ^[1] 46:6	advisory ^[1] 9:4	arisen ^[1] 31:8	breach ^[1] 17:22
2020 ^[1] 1:12	affirmance ^[1] 61:6	arising ^[1] 36:1	BREYER ^[27] 37:23 38:10,15,19, 25 40:10,18 41:4,7,10,16,23 42:4, 6,10 43:23,25 44:5,8 58:13 61:20, 25 62:6,8 63:15,18 64:5
206 ^[2] 47:4 54:2	affirmative ^[1] 16:1	Arthur ^[1] 62:16	brief ^[12] 12:25 19:14 20:8,16 21:3 27:11 34:4 41:1 44:2 57:19 62:13 64:15
21 ^[1] 60:15	afterwards ^[1] 31:25	Asetek ^[1] 21:19	briefing ^[1] 6:15
24 ^[1] 60:12	ago ^[1] 3:16	aspect ^[1] 56:19	bring ^[15] 16:10,11,15 17:25 20:5 24:19 34:21,23 35:13 44:8 59:11, 13,17,19 64:2
25 ^[2] 27:10 28:8	agree ^[8] 6:23 7:21,22 10:19 30:4, 7 39:2 47:19	asserted ^[1] 39:10	bringing ^[3] 24:21 29:22 36:3
26 ^[1] 2:7	agreed ^[2] 23:8 53:8	asserting ^[1] 5:2	broader ^[3] 8:6 9:16 25:16
3	agreed ^[11] 22:17 23:11 24:1 36:22 37:6 53:7 56:20,20 57:14, 18 65:9	assertion ^[1] 30:20	brought ^[9] 8:20,23 16:21,22 17:8, 22 37:21,23 62:21
3 ^[1] 2:4	agreements ^[1] 23:22	assume ^[3] 14:14 64:20,24	Brown ^[1] 63:12
30 ^[1] 12:19	agrees ^[3] 6:8 29:21 64:6	assuming ^[2] 38:1 65:14	bucket ^[2] 32:22,23
6	ahead ^[3] 22:13,14 28:22	assure ^[1] 15:24	C
61 ^[1] 2:10	aimed ^[1] 48:21	asymmetrical ^[1] 34:15	call ^[6] 18:24 31:2,2,3,3 50:12
62 ^[1] 28:9	AL ^[3] 1:4 38:6,22	asymmetry ^[2] 17:12 18:7	came ^[4] 1:14 44:18 45:9 52:23
7	ALITO ^[20] 6:22 7:13 10:16,18 11: 6,8,14 13:5,7,10,21 42:21,23 43: 10 50:18 51:8,11,24 52:2 62:2	attack ^[5] 7:11,15 25:21 26:11 63: 8	candidly ^[1] 33:24
7 ^[1] 60:2	allegations ^[3] 27:25 28:7 61:1	attacking ^[3] 4:19 7:16 10:24	cannot ^[3] 4:17 26:11 53:12
74 ^[1] 54:12	allege ^[2] 47:24 54:11	attempt ^[1] 11:4	capitalized ^[1] 54:23
77-2 ^[1] 48:1	alleged ^[3] 4:24 27:22 33:7	attempting ^[1] 55:24	Case ^[96] 3:4,14 4:22 5:16,19 6:5, 14,18 7:24 8:20 9:15,19 11:17 12: 22,25 13:25 14:21 15:4,6 16:7,10, 11,12 18:18 19:4,8 20:4,19 22:2,5 24:14 25:2 27:12,13 28:1,25 29:2
79 ^[1] 54:12	alleges ^[5] 27:18,24 28:10 54:13 56:10	attention ^[1] 20:6	
8	allowed ^[4] 14:8 17:24 23:22 65: 25	attorney ^[1] 14:15	
8 ^[1] 57:18	alluded ^[1] 25:4	authority ^[1] 42:11	
852 ^[1] 14:3	ally ^[1] 54:4	available ^[5] 17:6 27:1,4 34:12 60: 22	
9	Ally's ^[4] 47:6,14 54:3,5	awarded ^[2] 25:10,11	
9 ^[1] 12:24	almost ^[1] 48:24	aware ^[1] 57:13	
99 ^[2] 48:6 54:12	although ^[2] 6:24 55:7	away ^[1] 63:5	
A	among ^[1] 28:9	B	
a.m ^[3] 1:16 3:2 66:7		back ^[9] 12:3 15:11 16:25 19:12 35:3 41:19 52:3 55:17 58:10	
abandoned ^[2] 5:9,13		bad ^[5] 5:6 9:5 15:15,15 35:23	
able ^[3] 23:23 29:9 64:2		bar ^[2] 4:15 43:6	
above-entitled ^[1] 1:14		bargain ^[3] 23:18,23 24:11	
absence ^[1] 66:1		barred ^[11] 3:14 4:14 7:12,19 11:5 17:9 24:23 35:23,24 36:1,9	
absolutely ^[1] 23:19			

Official - Subject to Final Review

<p>30:2,12,15,18 31:13 32:24 33:7 35:9 36:16 37:8,14 38:1 39:3,18 40:15,15 41:12 42:2,7,12,15,18,22 44:2,11,12 45:1 46:5,8,23 48:2 49: 9,12 51:1,18 58:8,11 59:23 60:1, 17 61:22 62:2,3,17,19,19,22 63:1, 6,8 64:1,16 65:12,15,19,23 66:3,6, 7 case's [1] 19:6 cases [17] 20:12 21:20 27:17 41: 13,17,20 44:1,6 50:21,21 57:21 62:1,3,4 64:12,14,14 categories [2] 36:15 50:20 cause [16] 17:8,21 26:25 27:3,13, 17 30:25 31:3 34:6,17,21,25 36:3 46:15 48:10 60:6 caused [1] 48:9 causes [7] 29:18 30:19 35:13,16 45:5,23 62:14 causing [4] 13:2 14:4,24 22:5 CENDALI [52] 1:19 2:3,9 3:6,7,9 5: 8,12 6:10 7:7,22 8:22 9:22 10:2,8, 11,17,21 11:7,13 12:11 13:6,8,20, 22 14:18 17:13 18:1,8,11 19:19, 25 20:9 22:19,25 23:2 24:10 25:7, 23 26:10 61:10,11,13 62:5,7,10 63:17,25 64:13 65:13,20,22 central [1] 20:7 certain [2] 30:9,10 certainly [1] 48:20 challenge [1] 48:25 challenging [1] 49:2 chance [1] 8:8 changed [3] 8:14 32:8 38:7 changing [1] 21:12 checked [1] 13:12 CHIEF [10] 3:3,9 26:9,13,18 28:21 34:19 61:8 65:21 66:5 Circuit [11] 3:12 4:21 15:14 39:4 40:1,2,21 58:12,15,19,21 Circuit's [5] 4:25 5:5 40:7 58:23 60:1 circumstance [2] 22:9 41:25 circumstances [3] 4:20 9:1 21:10 cite [2] 20:12 63:4 cited [3] 62:17 63:13 64:14 citing [1] 20:22 City [10] 44:11,20 45:23,24 62:17, 18,20 63:4,6,12 civil [1] 62:15 claim [70] 3:22,23 4:10,18 5:3 7:17 10:15 15:19 17:6,16,19,23,24 18: 5,5,17,24 19:1 21:5,22 25:25 29: 20,22,23,24,25 30:1,3,4,7,13,14, 17,23,24 31:1,3,12,20 32:9,20 33: 23,25 34:1,11 35:20,20 36:22 41: 2,13,14,17,21 42:1,1,7,12,13,17, 19,19 48:5 50:16 58:20,22 59:8 61:17,22 62:23 64:1 claims [54] 3:14 4:2,23 5:2 8:5,9 14:22 16:16,18,19,23,23 19:9,18, 22 20:15,18,23 21:9,18 22:22,23 23:16 24:20 26:24,25 29:16 30:20 31:8,14,16 32:22,23 36:1,11,15,16,</p>	<p>17,21,25 37:4 38:12 40:17 47:12, 18,25 48:3 54:9,10 58:17 59:4,6 60:20,23 class [2] 38:7 62:16 clear [14] 3:17 4:13 7:24 11:3 25:4 30:14,17 40:14 48:1 49:22,25 53: 5 58:19 61:4 clearer [1] 27:16 clearly [1] 21:16 clerk [1] 39:18 client [1] 23:8 closing [1] 14:2 collateral [3] 7:15 25:20 63:8 collaterally [3] 4:19 7:11 38:12 collected [1] 8:18 colorable [2] 9:13 25:13 combined [1] 46:9 come [5] 11:17 16:1 35:3 40:19 52: 3 comes [1] 43:4 commence [1] 33:7 commingling [1] 13:3 common [5] 31:4,11 36:2,12 40: 16 compelled [1] 15:23 compensatory [2] 5:16 6:16 complaint [7] 28:7,8 32:15 46:13 47:7 48:7 54:13 complaints [3] 46:25 47:2,9 completion [1] 46:21 conceivable [1] 29:3 concentrated [1] 6:5 concept [1] 26:1 concern [1] 36:11 concerned [3] 6:8 15:10 37:19 concerning [3] 36:16,18,21 concerns [2] 39:12 54:17 concludes [1] 39:11 conduct [22] 8:5,11,12,14,18 9:5, 10,11,20 10:14,15 20:25 27:22,23 30:10,12 33:4,11 38:4 61:2 64:3,7 conflict [1] 5:2 confuse [1] 45:8 confused [1] 58:6 confusing [2] 48:4 55:11 confusingly [5] 37:12 47:20 48:8 51:20 55:7 confusion [9] 13:2 14:4,24 22:5 36:18 46:9 48:10 51:22 54:14 conjunctive [2] 12:15 46:14 connected [2] 60:12,13 consider [1] 16:7 consistent [5] 10:12 14:19 21:18 60:18 64:18 constitutes [2] 47:16 54:6 contains [1] 51:13 contempt [4] 9:15 13:17,23,24 content [2] 24:4,9 context [4] 4:17 21:21 44:15 58: 16 continuation [1] 27:22 continue [2] 24:3 53:14 continued [1] 56:12 continues [2] 28:11 48:10</p>	<p>continuing [9] 6:2 32:13,16 33:4, 11 36:24 57:15 61:2 65:4 contract [5] 17:23 43:3,18,20,22 contrary [2] 21:8 45:1 controversy [2] 5:15 35:10 convert [1] 55:25 convinced [1] 40:21 copyright [1] 21:21 core [1] 32:18 Correct [5] 9:22 10:1 19:19,25 27: 15 correction [1] 17:14 correctly [2] 17:14 62:1 cost [1] 6:15 cost-benefit [1] 5:21 couldn't [8] 12:16 17:5 37:23 39: 18,18,19 58:20 59:10 counsel [15] 14:8 15:3,3 17:2 18: 13 26:14 29:2 33:18 50:11 52:4 53:3 55:3 61:9 64:19 66:6 counter-complaints [1] 47:8 counterclaims [2] 58:1,2 country [1] 18:18 counts [1] 47:1 couple [1] 43:25 course [15] 11:10 20:24 27:21 30: 22,23 33:4,11 36:6,7 42:2 47:7 53: 2 61:2 64:3,7 COURT [59] 1:1,15 3:10,11,15,17 4:25 5:23 6:20 8:24 9:3,8 12:2,4,8, 13,22 13:24 15:25 16:25 18:12,16, 20,22 19:2 20:12,21 21:6,13,15 22:6,7 23:3 26:19 28:15,16 37:1,2, 14,17 39:10 44:20 45:20,23 47:3 48:2 49:1,14 52:11 53:9 54:11 55: 18,23 59:24 60:3,14 63:23 64:24 66:4 Court's [4] 4:4 12:1 21:19 59:25 courts [2] 4:8 9:7 covered [1] 33:5 create [2] 15:17 21:18 created [1] 17:4 cries [1] 28:25 Cromwell [6] 3:16 4:5 17:1 18:20 63:2,13 crystal [1] 48:1 current [2] 9:9,11</p>	<p>decision [8] 20:22 21:15 23:5 53: 10 58:12,13 60:1,16 declaration [4] 8:2 12:15 56:6,11 declaratory [7] 50:6 55:22,24 56: 2,3,6,13 defend [4] 8:8 20:12 65:19,22 defendant [10] 3:25 16:16 26:11 27:2 34:5,16 44:19 53:14 56:11 63:22 defendants [1] 41:5 defended [1] 40:1 defending [1] 39:25 defense [38] 3:13 4:1,16 5:1,9,22 6:25 7:1,3,19 8:21,24 15:20 16:5, 22 18:14 20:14 24:21 29:3,9 30:6 34:12,15,16 39:7 41:22,24 43:5,6 44:19,21 58:16 61:19,23 62:13 63: 13 64:7,8 defenses [13] 4:14,16 11:4 15:24 16:2,17 19:5 27:3,4 29:6 35:9 41: 8 65:25 defies [1] 55:18 demand [1] 18:25 denied [1] 9:17 deny [2] 27:11,12 denying [1] 13:24 depends [1] 28:1 deprivation [1] 8:7 deprived [1] 24:12 described [2] 54:15 59:22 designation [2] 37:5 57:16 despite [2] 55:11 56:11 determination [1] 51:18 determined [1] 3:19 different [39] 8:13 19:16,17 22:8 25:22,24 28:2,2 29:18,23 30:13, 19 31:15,22,25 32:1,2,3 33:2,10, 12,13,22,25 34:22 36:5 42:25 43: 11 45:2,14,18,21,22,25 46:15 59: 20 60:23,24 66:1 difficulty [1] 28:24 direct [1] 37:6 direction [2] 18:6 62:25 discouraging [1] 27:6 discrepancy [2] 11:19 52:5 discussed [1] 12:12 dismiss [2] 23:6 28:6 dispose [1] 21:6 dispositive [5] 5:15,22 6:14 42:25 43:12 dispute [1] 26:20 disputes [1] 29:12 disregarding [1] 19:15 distinctions [2] 57:21,22 district [14] 12:1,2,4,8,22 13:24 15: 25 23:3 37:2,14 39:10 48:2 49:1 52:10 docket [2] 48:1,2 doctrine [1] 3:19 document [1] 24:2 doing [3] 17:9 50:7 53:15 done [1] 56:17 drop [1] 53:8 dropped [1] 5:10</p>
---	---	--	---

D

D.C [2] 1:11,21
DALE [5] 1:19 2:3,9 3:7 61:11
damages [5] 5:16 6:16 8:18 30:21
65:2
date [3] 23:11,15 24:8
Davis [8] 3:16 4:5 44:12 45:11,12,
13,20 63:11
day [2] 28:11 33:8
days [1] 33:13
deal [3] 9:7 19:3 56:4
dealing [3] 19:16,17 29:11
deals [3] 11:9 30:9,11
dealt [1] 63:1
decide [3] 21:4 37:25 39:14
decided [1] 26:5

Official - Subject to Final Review

<p>due [2] 4:11 44:18 DUNGAREES [2] 1:3 3:5</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [4] 21:21 37:4 51:24 52:2 earlier [3] 9:15 34:20 54:11 easily [1] 21:6 easy [2] 4:7 20:3 effect [1] 3:18 effectively [2] 24:13 53:12 effects [1] 7:20 efficiency [1] 39:12 either [1] 50:4 enamored [1] 15:25 end [3] 6:17 18:9 48:14 ended [1] 49:18 enforce [5] 33:19 50:3,6,8,22 enforceability [1] 43:18 enforcement [11] 4:18 7:10 25:3, 6,8,20 37:22 50:11,13,24 55:17 enforcing [3] 49:21,22 50:2 English [1] 25:18 enjoin [1] 14:1 enjoined [2] 48:16 49:5 enough [4] 13:15,17,17 58:19 enter [1] 53:4 entered [7] 37:15,17,18 49:10,12 52:10,23 entire [1] 18:17 entitled [1] 43:21 enumerated [1] 23:14 equity [1] 62:21 erred [1] 3:12 ESQ [3] 2:3,6,9 essentially [1] 14:22 established [2] 7:5 51:13 estopped [1] 38:13 ET [1] 1:4 even [10] 16:3 19:14 24:19 32:6,6 39:4,5 57:9 58:16 59:13 even-handed [1] 16:15 events [1] 29:24 everybody [2] 29:21 64:6 everyone [1] 12:23 everything [2] 32:7,9 exact [3] 27:19,23 45:6 exactly [12] 5:12 6:10 21:8 24:10 27:24 35:19 38:21 40:8 43:2 44:14 54:14 60:19 example [3] 27:16 35:17 48:5 examples [2] 28:10 57:17 except [4] 33:17 40:8,13 48:23 exception [2] 7:2,14 exchange [1] 23:7 excluded [1] 61:24 excuse [4] 59:1 60:14 63:11,12 excused [1] 15:19 exhaustively [1] 18:23 exist [1] 16:19 existing [1] 4:14 explain [3] 5:8 14:6 56:18 explained [1] 63:5 explaining [1] 50:18</p>	<p>explains [3] 47:21 55:11 60:16 explanation [2] 55:5 57:12 expression [1] 31:1 extension [1] 18:5 extent [3] 46:8 62:24 63:25 extinguished [1] 23:16</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face [2] 53:11 61:5 fact [18] 10:3 28:1 29:15 31:11,16, 22 32:3 33:18 36:12 40:16 42:24 43:10 58:7,20 59:21 60:11,25 61:4 facts [20] 9:1 17:20 19:15 28:2 30:21 31:4,7,25 32:19 33:12,13 34:12,22 39:5 42:24 47:10 58:4 62:23 64:15 66:3 factual [3] 21:25 57:21 58:8 factually [2] 32:22,24 failed [1] 33:20 failure [1] 15:20 fail [4] 6:24 43:2,3,5 fair [5] 4:11 16:14 27:5 65:8,15 family [1] 48:9 far [2] 6:7 59:3 Fashion [1] 47:15 FASHIONS [3] 1:7 3:5 54:6 Fashions' [1] 51:17 favor [1] 53:12 feature [1] 20:7 federal [2] 30:24,25 feel [2] 15:23 28:16 few [1] 32:25 Field [2] 18:21 63:11 figure [1] 19:13 filed [1] 58:1 filing [1] 56:10 final [19] 11:20 26:21 27:8,20 33:6 43:19 47:5,14 48:16,20 49:17 50:3,25 51:6,6 52:11,24,25 53:19 finally [1] 21:24 find [3] 14:11 39:18,19 finish [2] 26:7 60:16 first [39] 3:4 4:4,22 5:9 6:5 7:25 8:25 22:2 27:21 28:5,14 29:2 30:9, 12 32:19 33:1 34:12 35:7,14 40:14,20 42:20,22 43:16 46:23 47:6, 18,25 50:4 54:9,10 57:13,24 59:23 60:17,17,22 62:11 64:4 fit [1] 15:4 five [2] 29:6 61:10 focus [4] 12:25 20:10 37:9 48:3 focused [1] 20:16 follow [2] 29:19,20 followed [2] 56:7,9 follows [2] 4:4 47:13 foot [1] 56:2 footnote [3] 60:1,7,15 footnotes [1] 59:25 foreclose [1] 19:8 foreclosed [2] 19:5 24:21 forecloses [2] 3:20,22 forgive [1] 15:21 forgot [1] 17:8</p>	<p>forgotten [1] 62:12 form [1] 55:22 forth [2] 15:14 29:2 forward-looking [1] 66:2 fosters [1] 27:7 found [4] 12:17 28:13 47:13 65:17 four [1] 15:15 framed [2] 12:2,4 free [1] 4:1 friend [1] 44:13 friends [1] 20:11 full [2] 65:8,15 fully [2] 10:22 24:22 fundamentally [1] 16:13 further [5] 7:18 28:16,17 50:24 56:3 future [3] 9:5 23:15 66:3</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gave [1] 32:19 general [1] 48:13 generally [1] 6:25 getting [2] 7:24 29:1 GINSBURG [19] 5:7,24 14:6 29:19 30:22 31:24 33:21 38:14,17,20 52:12,15,19 56:1,15,18,25 57:4 60:8 give [3] 42:11 53:25 65:1 giving [1] 31:8 GORSUCH [23] 17:2,18 18:4,10 33:15,17 34:9,25 35:4,11,22 36:3, 8 37:21 49:23,25 50:10,14 54:16, 20 55:2,13,15 got [12] 7:25 8:1,1,2,2 24:13,16 29:6 34:1 39:17 45:17 59:5 gotten [2] 15:6 21:12 granted [1] 37:3 granting [1] 23:5 grips [1] 11:17 ground [1] 42:5 grounds [1] 12:7 GROUP [2] 1:7 3:5 grouping [2] 14:20 15:2 guess [3] 33:20 39:23 40:6</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half [2] 47:21 55:10 hand [2] 6:3 56:25 happened [3] 8:19 16:7 31:24 happens [2] 16:3,4 hear [2] 3:3 17:15 heard [3] 39:24,25 59:18 heart [1] 59:23 heart's [1] 24:8 hearts' [1] 24:4 held [5] 4:21 13:14,21,22 23:4 help [1] 40:23 helpful [2] 6:12 11:2 Henderson [4] 63:5,6,7,7 hint [1] 34:3 history [1] 40:22 hold [2] 13:17 58:24 holding [2] 3:12 13:18 Honor [23] 6:11 7:7 10:21 17:13 24:10,24 29:13 30:16 36:7 40:4,</p>	<p>25 43:15 45:4,12,16 46:24 52:22 55:19 56:9 57:11 59:21 60:10,19 Honors [1] 21:25 hour [1] 38:23 house [1] 23:24 however [1] 32:3 hundred [1] 3:16</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea [9] 3:15 5:6 10:24 15:15,15 19:3 26:4 30:6 41:1 identical [9] 8:11,15 9:20 28:12 32:7,10 33:18 38:4 44:9 ignoring [1] 28:5 II [5] 18:13 20:13,20,22 23:6 image [1] 41:2 Imagine [2] 26:20 29:4 imitation [1] 25:14 imitations [1] 9:13 impair [1] 7:4 improper [1] 9:4 INC [1] 1:3,7 include [1] 23:12 including [1] 4:5 inconsistent [1] 10:18 incorrect [1] 54:19 Indeed [2] 27:16 58:5 indicate [1] 12:5 inefficiencies [1] 34:19 informed [1] 14:15 infringed [1] 14:12 infringement [10] 4:24 21:22 28:3 36:25 47:16 51:22 54:6 64:23,25 65:18 infringements [2] 17:20 65:24 infringing [4] 10:15 12:20 28:13 52:16 initial [3] 7:4,5 44:16 injudgment [1] 56:6 injunction [39] 8:2,7 9:10,12,16, 21,24,25 11:20,21 12:2,5,9 13:16 24:20 25:12,16 37:18,19 48:15,16, 24 49:9,10,12,18,21 50:2 52:7,7, 10,13,21 53:4,11,21 55:25 65:1 66:2 injunctions [1] 9:8 insofar [1] 37:4 installment [1] 43:3 Instead [3] 9:11 19:1 27:12 instruction [1] 15:2 instruments [4] 44:16,18 45:22 46:3 intending [1] 14:1 intent [1] 48:25 interested [1] 40:18 interests [5] 4:12 28:14 50:8,25 51:5 interlocutorily [2] 37:1 49:11 interpretation [2] 12:3 13:11 interpreted [2] 11:18 12:6 interpreting [1] 11:15 interrupt [1] 50:1 introduction [1] 7:9 introductory [1] 6:23</p>
--	---	--	---

Official - Subject to Final Review

<p>invalid ^[1] 63:23 invitation ^[1] 25:13 inviting ^[1] 34:18 involve ^[1] 40:15 involved ^[6] 8:14 16:8 20:24 24:15 27:13 45:9 involves ^[4] 17:19 29:24 34:11 35:17 involving ^[9] 3:14 19:8 20:15 27:17 29:15 34:6,22 35:9 62:23 isn't ^[11] 32:20 33:9 34:1 38:15 41:14,21 42:21,23 55:6 60:9 64:5 Issue ^[24] 3:19 4:9,15 5:4 12:8 15:12 18:18,24 21:4,5 24:5,23 30:5 37:13 38:17 43:1 44:23 45:14,16 46:23 51:17 52:23 53:9 54:8 issued ^[2] 9:10,12 issues ^[5] 3:21 5:23 45:2,4 58:12 issuing ^[1] 45:10 itself ^[1] 12:20</p>	<p>juxtaposition ^[2] 22:2,4</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN ^[24] 8:10 9:18,23 10:6,10 19:10,12,20 20:1,2 25:19 28:20 31:18,21 32:13 33:21 35:3 36:14 51:2 57:20 58:9 59:1,3,17 Kagan's ^[2] 35:3 46:21 KAVANAUGH ^[4] 19:11 22:10,13 25:1 keep ^[1] 35:14 keeping ^[1] 7:25 key ^[3] 7:8 20:11 21:4 KIMBERLY ^[82] 1:21 2:6 26:15,16,18 29:13 30:16 31:2,20 32:12,21 33:16 34:8,24 35:2,6,19,25 36:6,10 40:3,6,13,25 41:5,8,15,22,24 42:5,9,14,22 43:8,14,24 44:7,10,24 45:4,11,15,19 46:2,11,18,20 48:18,22 49:3,7,20,24 50:5,12,15 51:4,10,14 52:1,9,14,18,22 53:18,23 54:2,19,25 55:4,14,20 56:8,16,24 57:3,11 58:24 59:2,16,21 60:10 kind ^[1] 20:3 kinds ^[1] 23:13 knows ^[1] 29:7</p>	<p>likens ^[1] 25:2 limit ^[1] 59:6 limited ^[1] 9:12 list ^[2] 16:1 54:7 litigants ^[1] 4:8 litigate ^[2] 35:8 65:16 litigated ^[7] 3:13,21 19:4,7 24:22 64:20,21 litigation ^[4] 3:23 15:23 29:17 33:4 little ^[2] 34:15 64:9 logical ^[1] 5:13 long-established ^[1] 3:24 longer ^[3] 32:5 49:14 58:5 look ^[6] 28:15,17,18 46:24 47:1,11 looks ^[1] 33:22 loose ^[2] 48:20 62:25 lose ^[1] 34:17 loses ^[2] 34:5,16 losing ^[1] 53:14 lot ^[2] 11:23,23 luck ^[1] 9:21 lucking ^[1] 54:21 LUCKY ^[126] 1:3 3:4 5:18 6:1,1,3,4,6,7,7,9,13 9:13 11:21 12:18,19 13:1,1,3,4 14:5,7,9,9,10,12,23,24 19:21,23 22:3,3,4,8,22,23,24 23:8,9,12,15,20 24:4,7,12,15 25:13,18 27:25 28:5,11,12 32:10,11,14,16,17 36:17,19,19,21,23,24 37:5,5,10,11,11,12,19,20 46:6,6,7,9,10,16,19 47:15,16,17,20,24 48:9,17 49:2,13,15,19 51:16 52:16,17,20 53:5,21 54:4,5,7,8,13,18,22 55:6,8 56:21,21,22,23 57:1,2,4,6,8,13,16,24 58:1,6,7 64:21,23,24 65:5,10,16,17 Lucky's ^[11] 15:3 27:9 36:16 47:7,12 48:6 51:19,21 53:4 54:13 57:5</p>	<p>meaning ^[4] 13:12 28:6 43:17 44:25 means ^[8] 15:8 17:17 22:18,21 23:3,7 30:23 64:16 meant ^[1] 12:17 mentioned ^[2] 7:20 62:2 Merger ^[1] 11:4 merits ^[1] 26:21 MGM ^[1] 21:20 MICHAEL ^[3] 1:21 2:6 26:16 might ^[9] 10:3 11:11 16:10 29:3 34:22 35:12,14,14,15 Miller ^[1] 64:9 Miller's ^[1] 62:16 mind ^[1] 46:15 minute ^[1] 38:22 minutes ^[2] 27:10 61:10 mirror ^[1] 41:2 mischievous ^[1] 16:9 misreading ^[1] 54:22 misrepresented ^[1] 49:13 mixing ^[1] 58:3 modern ^[1] 26:2 Monday ^[1] 1:12 money ^[2] 25:16 35:17 month ^[2] 43:4,4 Moreover ^[2] 5:5 62:24 morning ^[1] 3:4 most ^[3] 5:13 24:14 28:24 motion ^[4] 9:14 16:6 23:5 28:6 Ms ^[48] 3:6,9 5:8,12 6:10 7:7,22 8:22 9:22 10:2,8,11,17,21 11:7,13 12:11 13:6,8,20,22 14:18 17:13 18:1,8,11 19:10,19,25 20:9 22:19,25 23:2 24:10 25:7,23 26:10 61:10,13 62:5,7,10 63:17,25 64:13 65:13,20,22 much ^[2] 40:19 52:7 mystery ^[1] 5:11</p>
<p style="text-align: center;">J</p> <hr/> <p>JA ^[3] 28:9 47:4 54:2 January ^[1] 1:12 Joint ^[1] 54:1 jointly ^[1] 52:25 Judge ^[5] 12:13 14:14 16:6 20:23 21:14 judges ^[1] 15:25 judgment ^[70] 3:13,19 4:17,19 7:4,9,11,15,16 8:17 10:25 11:2,5,15,20,22 24:22 25:3,5,8,20,21 26:12,21 27:20 28:19 29:1,25 33:6,8,19 37:4,15,17,22 43:19,24 47:2,5,14 48:21 49:17 50:3,7,11,13,16,17,23 51:1,3,6 52:6,11,24,25 53:11,20 54:17 55:16,18,21,22,24 56:2,3,7,13 62:20,22 judgments ^[1] 27:8 judicata ^[2] 26:3 31:5 judicial ^[2] 21:11 27:6 June ^[1] 33:8 jury ^[9] 12:17 13:9,12 14:2,11 47:13,19 52:23 65:17 jury's ^[3] 12:6,9 51:18 JUSTICE ^[154] 3:3,9 5:7,24 6:22 7:13 8:10 9:18,23 10:6,10,16,18 11:6,8,14 13:5,7,10,21 14:6 17:2,18 18:4,10,21 19:10,11,12,20,25 20:2 22:10,11,13,15,20 23:1 24:6 25:1,19 26:9,13,19 28:20,21 29:19 30:22 31:18,21,24 32:13 33:15,17,21,21 34:9,19,25 35:3,4,11,22 36:3,8,14 37:21,23 38:10,14,15,17,19,20,25 40:10,18 41:4,7,10,16,23 42:4,6,10,21,23 43:10,23,25 44:5,8,22,25 45:7,13,17 46:1,4,12,19,21 48:14,19,23 49:4,16,25 50:10,14,18 51:2,8,11,24 52:2,12,15,19 53:16,19,25 54:16,20 55:2,13,15 56:1,15,18,25 57:4,20 58:9,13 59:1,3,17 60:8 61:8,20,25 62:2,6,8,18 63:11,15,18 64:5,19 65:14,21 66:5 juxtaposed ^[1] 19:1</p>	<p style="text-align: center;">L</p> <hr/> <p>lack ^[1] 17:3 landlord ^[4] 43:16,21 62:2 63:18 landlord's ^[2] 43:19,20 language ^[5] 15:1,7 48:20 49:17 53:17 last ^[1] 27:10 later ^[7] 35:1,16 36:5 43:7 44:17 63:10,20 Laughter ^[5] 38:9,24 40:5,12 44:4 laundry ^[1] 16:1 law ^[20] 4:14 12:8 18:17,23 21:5,19 29:10 38:1 39:5,15,18,23 40:23 42:24 43:13 58:10 61:15,16 63:3 64:18 Lawlor ^[1] 53:9 lawsuit ^[11] 26:22 27:21 34:5,6,13,21 35:14,15,17 56:10 65:3 lawsuits ^[2] 27:7 43:1 lead ^[2] 15:22 16:9 learned ^[2] 38:10 62:15 lease ^[3] 63:19,21,23 least ^[3] 15:15 18:7 34:11 led ^[1] 23:6 left ^[1] 37:14 legal ^[4] 15:12 27:19 34:10 36:4 length ^[1] 41:1 let's-litigate-everything ^[1] 18:2 Leval ^[2] 12:13 20:23 Leval's ^[1] 21:14 Liability ^[4] 33:7 37:13 51:23 57:1 liable ^[2] 47:22 55:6 license ^[1] 53:13 licensed ^[2] 47:15 54:5 licensee ^[1] 54:4 licensees' ^[2] 48:8,11 likelihood ^[1] 36:18</p>	<p style="text-align: center;">M</p> <hr/> <p>made ^[4] 3:17 32:15 40:20 64:4 main ^[1] 63:6 majority ^[1] 63:2 manner ^[1] 28:12 many ^[1] 28:9 MARCEL ^[39] 1:7 3:5 4:22,22 7:24 9:15 12:14 13:14 18:13 20:13,20,21,23 21:10 22:22 23:6 24:12 27:24 28:10 29:22 31:13 47:12,15,22 48:7 49:14 51:17 53:3,8 54:5 55:6,14 56:21 57:1,5,7,13,24 58:1 Marcel's ^[10] 15:3 36:19 37:4,7 47:8 48:11 51:20 54:4 55:8 61:19 mark ^[10] 23:24 36:20 47:22,23 51:17,20 55:7,8,9 64:24 marks ^[24] 8:13 11:24 14:5 24:16 28:12 36:19 37:10,11,12 47:20 48:4,8,9 51:14,16,19,19,21 52:1 53:5 54:8 55:8,12 58:3 matter ^[1] 1:14 matters ^[1] 31:5 mean ^[16] 18:11,12,16 20:2,11 21:4 23:2,4,18 24:12 25:25 31:22 38:20 39:22,23 54:20</p>	<p style="text-align: center;">N</p> <hr/> <p>name ^[3] 12:19 23:12 63:4 narrow ^[2] 6:19 20:3 narrower ^[2] 12:9 52:8 natural ^[1] 48:24 necessarily ^[4] 12:2,5 42:25 43:11 need ^[3] 15:10 16:2 28:17 needs ^[2] 18:17 28:18 negotiable ^[4] 44:15,18 45:21 46:2 negotiated ^[1] 53:1 negotiation ^[2] 53:2,6 never ^[8] 3:13 4:14 8:8 15:18 24:22 30:25 58:14,21 never-litigated ^[1] 20:14 never-resolved ^[1] 5:1 New ^[53] 1:19,19 3:14 4:2,23 5:2,5 8:5 10:14,15 15:13,22 16:16,19,23 17:18,20,20,20 19:9 20:15,23 21:5,9,9,10,18,22 22:5,6 24:20 30:5 36:3,4 38:11 39:4 42:19 44:19 56:10 58:17,20,22 59:4 61:16,16,21,22 62:23 64:1,6 65:3,25 66:2</p>

Official - Subject to Final Review

<p>nice ^[2] 23:4 56:4 nobody ^[1] 26:5 nobody's ^[1] 59:18 none ^[3] 4:20 64:13,14 nonpayment ^[1] 64:4 nothing ^[1] 19:23 novel ^[1] 5:1 nucleus ^[11] 29:15 31:4,11,15,22 32:3 36:2,12 40:16 47:10 60:24 nullify ^[1] 7:4</p>	<p>62:12 pages ^[1] 12:24 paragraph ^[13] 28:8 47:3,5,21 48: 6 53:24 54:12,12,12,24,25 55:10 60:14 part ^[4] 26:3 32:18 36:13 58:2 partial ^[4] 24:13 37:3,15,17 particular ^[5] 9:1 29:10 40:8 42: 16 46:25 parties ^[9] 19:13 26:20,23 29:12, 18 39:8 50:22 53:1 54:7 parties' ^[4] 44:17 47:17 51:15 54:9 parts ^[1] 32:25 party ^[2] 39:13 53:13 party's ^[1] 53:10 pass ^[1] 48:12 patent ^[1] 21:19 pause ^[1] 47:6 pay ^[4] 43:3,4 62:20 63:20 paying ^[1] 50:17 People ^[3] 15:23,25 38:11 perhaps ^[2] 10:21 28:24 period ^[10] 8:3 9:2 19:16 22:6 30: 10,11 32:1 33:14 43:11 66:1 periods ^[1] 33:2 permanent ^[10] 37:18,19 48:16,24 49:8,8,9 53:4,11 65:1 permissible ^[1] 61:3 permission ^[1] 15:12 permitted ^[1] 60:21 permitting ^[1] 48:12 perpetual ^[1] 24:18 person ^[1] 40:20 pertained ^[1] 9:11 petition ^[2] 60:2,15 Petitioners ^[6] 1:5,20 2:4,10 3:8 61:12 Petrella ^[1] 21:20 phrase ^[1] 32:4 phrased ^[1] 12:15 piece ^[1] 24:15 pitching ^[1] 65:6 place ^[2] 37:8 38:4 plaintiff ^[9] 16:15 17:5 26:6,23 30: 2 34:17,20 35:12,25 plaintiffs ^[4] 16:9 28:10,13 44:18 plausible ^[1] 13:11 please ^[2] 3:10 26:19 point ^[18] 6:11 7:8 17:3 21:25 32: 25 33:3,10 40:2 41:10,11,18 42: 15,16 47:3 53:16 59:24 63:3 64: 12 points ^[2] 61:14 62:1 policy ^[1] 23:21 position ^[3] 13:25 21:12 26:22 possibly ^[3] 11:18 22:7 27:15 post-judgment ^[2] 27:19 31:14 post-settlement ^[1] 57:7 potential ^[1] 57:20 practice ^[1] 16:6 pre-judgment ^[1] 31:9 pre-May ^[1] 23:24 precedent ^[1] 4:5 precisely ^[4] 31:9,10 43:8 56:16</p>	<p>preclude ^[2] 7:1 41:3 precluded ^[10] 5:1 10:9 20:15 26: 24 27:2 31:9 34:1 39:7 44:21 65:7 preclusion ^[38] 3:20,22 4:10,15 5: 4 17:16 18:6,18,24 19:3 24:23 25: 25 30:1,1,3,5,6,7,14,17 31:12 34:1 35:20 38:18 39:11 41:2,13,17,21, 25 42:1,2,7,13,13,17 58:16 62:13 preclusive ^[1] 3:18 predates ^[1] 44:12 predicate ^[1] 20:19 preliminary ^[1] 48:15 present ^[2] 4:21 65:25 presented ^[1] 61:15 presenting ^[1] 8:5 preserves ^[1] 27:6 preside ^[1] 13:24 press ^[2] 15:20,24 pressed ^[2] 15:2,5 prevailing ^[1] 7:3 prevent ^[2] 9:9 36:23 previous ^[3] 10:24 16:7 20:12 previously ^[7] 3:13 4:1,15,16 25: 10,11 61:23 primary ^[1] 5:19 principle ^[1] 61:20 principles ^[4] 3:25 4:9 5:3 23:20 prior ^[18] 4:19 6:25 7:11 8:12,16 18:13,23 23:10,15 27:1,4,13 31: 20 43:6 51:1,3,4 60:4 probably ^[1] 62:4 problem ^[5] 11:10 17:12 18:7 29: 10 31:23 problems ^[2] 15:13 31:23 procedure ^[2] 38:7 62:15 proceeding ^[1] 16:6 process ^[1] 4:12 products ^[2] 48:11,12 professor ^[1] 62:16 prohibits ^[1] 16:16 proper ^[2] 3:25 11:1 properly ^[1] 21:1 property ^[1] 8:7 proposition ^[3] 10:13 21:17 44:14 prosecute ^[1] 31:14 protection ^[1] 23:23 protects ^[1] 4:11 public ^[2] 48:13 58:5 purposes ^[2] 21:23 31:6 pursuant ^[2] 47:17 54:8 pursue ^[1] 53:10 pursuing ^[1] 4:23 put ^[3] 15:14 29:2,8</p>	<p>raise ^[12] 5:10 6:25 16:5 17:2 18: 14 29:9 34:5 38:12 43:5 64:8 65:8, 11 raised ^[7] 4:17 21:1 31:24 39:8 40: 17 44:19 57:20 raising ^[8] 7:1 16:17 19:5 26:24 27:2 36:1 41:6 43:6 range ^[1] 33:5 rather ^[2] 17:23 20:16 read ^[13] 9:16 11:22 40:1 41:11,20 44:1,1,6 46:12 48:5 54:3,11 62:4 reading ^[2] 47:4 55:3 reads ^[1] 47:5 really ^[11] 10:19 16:21 17:15 18:12 25:23 27:11 29:7 50:20 56:4 58: 11,14 reason ^[8] 8:22 18:19 31:12 42:17 43:15 59:18 60:20 61:3 reasoning ^[1] 16:25 reasons ^[6] 4:3 15:16 18:20 21:3, 7 45:19 REBUTTAL ^[2] 2:8 61:11 recently ^[1] 3:17 recite ^[1] 41:1 recognized ^[1] 35:20 recognizes ^[1] 50:19 reconfigure ^[1] 18:17 red ^[1] 57:18 reduced ^[4] 47:2,13 50:16 54:17 refer ^[1] 30:25 reference ^[1] 32:15 referenced ^[1] 54:23 reflect ^[1] 12:3 regard ^[5] 6:12 8:8 9:5 25:12 64: 15 registered ^[3] 23:10 24:3,8 registrations ^[1] 23:25 reject ^[2] 7:6 43:12 rejected ^[1] 3:15 related ^[4] 60:4,8,9,13 relating ^[2] 61:14,16 relationship ^[1] 51:15 release ^[8] 5:9,17,21,25 6:2,6,11, 18 released ^[4] 15:20 24:16,16 57:25 releasing ^[1] 57:1 relevant ^[3] 32:22,24 47:10 reliance ^[1] 27:7 relied ^[1] 63:7 relief ^[11] 4:23 7:25 8:6 25:9,10 26: 7 30:23 31:1 48:6 56:3 65:23 relies ^[1] 44:13 relitigation ^[1] 3:20 rely ^[2] 43:21 63:9 remarks ^[2] 6:23 62:25 remedy ^[1] 17:4 rendered ^[1] 11:5 renew ^[1] 5:21 rent ^[5] 43:4 63:16,17,19 64:16 repeat ^[1] 27:7 reply ^[5] 19:14 20:8 21:2,3 27:11 represented ^[1] 14:7 reproduced ^[1] 28:9 require ^[1] 29:1</p>
O			
<p>obtained ^[1] 26:12 obtaining ^[1] 55:24 obviously ^[1] 12:12 occurred ^[1] 29:24 occurrence ^[5] 32:2 59:9,10,14, 20 occurrences ^[1] 60:5 offensive ^[1] 24:2 often ^[1] 29:11 Okay ^[9] 18:10 34:13 40:2 50:14 54:20,21,21 63:21 65:7 old ^[5] 20:17,17 59:6,8 65:4 once ^[4] 19:4 21:1 26:5,12 one ^[35] 11:8,9,18 15:17 17:7 21:8 24:16 27:18 28:9 30:2 31:23,23 32:21 34:5 35:15 43:5 48:5 49:11 50:6,23 51:15,17,24 52:2 54:3 55: 2,23 56:18 57:23 61:14,16,18 62: 1,1 65:4 ones ^[1] 39:16 ongoing ^[2] 29:11 64:2 only ^[19] 5:17 6:18 8:24 11:21 20:5, 7 29:14 32:8 37:13,20 39:16 41: 25 42:6 48:16 49:8,17 50:5 61:2 63:13 operate ^[1] 53:12 operates ^[1] 30:3 operative ^[11] 29:15 31:4,11,16,22 32:3,19 36:12 40:16 48:7 60:24 opinion ^[9] 9:4 12:12 18:21 19:2 20:20 61:5,6 63:2,10 opportunity ^[3] 59:15 65:8,16 opposed ^[1] 34:11 opposing ^[1] 52:4 oral ^[5] 1:15 2:2,5 3:7 26:16 order ^[4] 11:16 14:11 37:2,3 ordinary ^[2] 17:16 25:18 original ^[1] 46:22 originating ^[1] 48:13 other ^[21] 6:3 9:8 11:23,23 14:5,7, 9,25 22:4 23:13,13,17,24 24:7 25: 2 29:5,8 44:13 56:19,25 62:3 others ^[1] 40:22 ought ^[2] 43:21 53:3 out ^[4] 9:21 19:13 28:25 62:22 outcomes ^[1] 45:18 outweigh ^[1] 39:12 over ^[6] 3:15 13:25 27:10 30:12 38: 3,5</p>		Q	
P		R	
<p>PAGE ^[7] 2:2 34:4 57:18 60:2,2,7</p>			

Official - Subject to Final Review

<p>requires [2] 61:6 62:14 requiring [1] 34:20 res [2] 26:3 31:5 resist [1] 36:10 resolution [1] 19:6 resolved [5] 3:21 4:15 16:2 26:21 37:1 resources [1] 27:6 respect [5] 15:11 29:14,17 51:16 55:21 responded [1] 21:2 Respondent [5] 1:8,22 2:7 19:22 26:17 Respondents [1] 12:24 response [1] 27:9 responses [1] 28:4 Restatement [13] 6:24 7:23 10:19, 20,23 11:1,2,9,10 39:20 50:19,19 60:12 result [1] 53:6 results [1] 43:18 return [1] 55:23 reverse [3] 3:11 4:25 51:22 rhe [1] 52:9 rights [11] 7:5 27:20 28:14 37:7 43:20 44:17 50:8,24 51:5,9 56:11 rise [2] 31:8 32:19 risk [1] 53:15 ROBERTS [7] 3:3 26:9,13 28:21 61:8 65:21 66:5 Rogers [1] 63:11 rule [16] 3:25 4:2,7 6:24 7:6 10:19, 20,23 11:1 18:2 27:5,12 29:4 39:4 61:15,16 rules [2] 30:25,25 ruling [2] 13:23 58:23</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>Sacks [1] 38:22 Sacks' [1] 38:6 same [40] 3:23 25:25 26:23,25 27:13,17,19,23 29:15,16,20,23 32:5,9, 16 34:6,18 35:5,11 37:16 39:8,8 40:15 43:2 44:23 45:10,10,14,15, 16 58:8 59:2,8,10,14 60:6,9,14 62:14 65:5 sanction [2] 49:13 52:11 sanctions [1] 37:2 saying [11] 9:19 20:12,17 39:1 46:16 47:19 53:24 57:8 60:5 61:21 63:7 says [15] 7:18 27:25 32:15 42:12, 24 45:1 47:14 48:7 53:20 54:3 57:5 60:3,19 61:25 65:4 Second [39] 3:11 4:7,21,25 5:5 7:3 15:14,22 21:14 27:18 29:22 30:11 32:23 36:13 38:11 39:3,25 40:2,7, 15,17,21 42:18 47:18,21,25 54:9, 10 55:10 58:10,12,15,19,21,23 59:11,13,19,25 Section [4] 11:3,3,9 60:12 see [2] 49:16 52:25 seek [3] 50:6,24 55:16 seeking [4] 50:3,8,22,23</p>	<p>seeks [1] 4:23 seem [1] 32:5 seemed [3] 6:6 18:12 64:11 seeming [1] 11:19 seems [4] 5:25 28:23 38:2 48:24 seen [1] 58:14 senior [2] 47:23 55:9 sense [4] 29:5 50:5,15 60:23 sensible [1] 5:3 series [3] 43:1 44:15 61:14 serious [1] 28:24 set [2] 19:17 34:22 settled [7] 5:3 27:20 41:9 44:17 50:9,25 51:5 settlement [14] 22:17,17 23:11,21 24:1 36:22 37:6 56:20,20 57:9,14, 18 58:4 65:9 settles [1] 43:19 sheer [1] 12:16 sheet [2] 13:13 14:16 shouldn't [2] 17:24 62:12 show [1] 13:15 side [3] 25:2 44:13 64:12 similar [8] 17:6 34:23 36:5 37:12 47:20 48:8 51:20 55:7 similarity [2] 48:4 55:12 simple [1] 35:15 simply [5] 42:19 46:7 50:23 52:16 55:11 sixth [5] 47:18,25 48:5 54:9,10 small [4] 16:10 24:15 35:9,15 sole [1] 24:3 solve [3] 17:11 18:7 20:3 sometimes [1] 39:7 sorry [3] 10:6 22:12 50:1 sort [4] 20:9 22:20 33:10 35:5 sorts [1] 34:18 SOTOMAYOR [25] 22:11,15,20 23:1 24:6 44:22,25 45:7,13,17 46:1,4,12,19 48:14,19,23 49:4,16 53:16,19,25 62:18 64:19 65:14 sought [1] 65:23 source [1] 48:10 speaking [1] 34:20 special [1] 14:16 specifically [3] 63:1,3,5 spectrum [1] 33:11 speculation [1] 12:16 springing [1] 26:24 stands [1] 44:14 start [1] 44:11 started [1] 39:1 statement [3] 26:8 60:11,11 STATES [2] 1:1,16 still [2] 29:7 32:9 stipulated [1] 52:25 stood [1] 21:16 stop [1] 6:9 stopped [2] 19:21 32:10 store [1] 23:13 stores [1] 12:19 straightforward [1] 43:15 strange [2] 5:25 14:8 striking [1] 61:18</p>	<p>strung [1] 14:10 stuck [1] 33:21 Sturgell [2] 3:18 26:2 subject [1] 10:3 submitted [2] 66:6,8 subsequent [20] 4:24 7:2,19 8:4, 11,18 9:20 10:14,14 19:8 20:24 21:17 26:22 29:14,17 34:6 50:20, 21 65:23,24 subset [1] 6:19 substance [1] 27:11 substantively [1] 60:13 successive [1] 3:22 sue [1] 26:6 sued [5] 10:4 44:19 46:5 53:18 57:24 sues [5] 38:3,3 43:17 63:19,21 suggested [1] 53:3 suing [4] 45:21,22,25 46:7 suit [16] 27:1,4,18 38:5,11,11 43:16 44:16 47:9 50:4 57:25 59:11, 13,19 60:22 62:21 suit's [1] 38:3 suits [1] 29:14 summary [4] 23:4 37:3,15,17 superior [1] 64:23 supporting [2] 23:21 28:2 supports [1] 7:23 suppose [4] 8:10,15 17:4 54:21 supposed [2] 36:23 37:25 SUPREME [2] 1:1,15 surely [1] 30:6 surprise [1] 20:10 surround [1] 60:4 survey [1] 18:23 surveyed [1] 63:2 symmetrical [2] 16:14 27:5 symmetry [1] 17:3</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table [1] 56:23 talked [1] 18:25 Taylor [3] 3:18 4:6 26:2 technically [1] 25:24 tenant [3] 43:17 63:19,20 term [1] 63:10 terms [2] 21:5 57:14 test [5] 5:1,6 15:13 32:4 40:7 theories [1] 28:2 theory [12] 14:21 15:4,6 22:1,16 34:10 36:4 51:22 54:14 57:19,23 58:2 there's [10] 9:24 16:5 18:19 21:3 29:25 30:1,17 62:25 64:2 65:3 therefore [4] 6:14 13:16 38:11 51:21 thereof [1] 9:13 thing's [1] 35:12 thinking [2] 20:13 58:6 Third [1] 4:11 though [5] 15:10 24:19 33:9 35:12 57:9 thoughtful [1] 18:21 three [5] 4:3 21:3,7 29:6 54:23</p>	<p>throw [1] 35:16 thrust [1] 5:19 timing [1] 32:8 titled [1] 11:4 today [1] 19:3 together [4] 14:11,20 46:14 58:3 took [6] 18:22 37:8 38:1,4,22,22 trademark [8] 12:8 17:23 24:3,7 28:3 36:24 37:7 57:5 trademarks [7] 6:19 23:10,14 47:17 49:4 64:22 65:5 transaction [5] 32:2 59:9,10,14, 20 transactions [1] 60:4 transcript [1] 14:3 trial [4] 14:3 37:8,10 49:11 tried [3] 9:14 12:21 33:20 true [9] 8:13 20:4 28:8 29:14,16 35:10,12 41:7 58:5 try [3] 9:16 15:7 62:21 trying [8] 7:10 8:6 23:19 24:18,24 25:9 39:4 45:8 turn [1] 48:11 turned [1] 46:8 two [27] 3:19 11:18 13:13 14:22 19:2 26:20 27:16 28:4 29:7,8,12 31:23 33:13 36:15 45:2,17,21,22,25 47:8 48:4 50:20 57:17 58:3 59:25 61:14 62:1 twofold [1] 57:12 types [1] 19:2 typically [1] 56:9</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>Um-hum [2] 46:11 52:18 unanimously [1] 3:17 unavailable [3] 31:17 42:20 61:4 uncertainty [1] 15:17 unclear [2] 45:20 48:21 under [6] 4:14 12:7 23:20 30:20 43:3,20 underlie [1] 58:4 underlying [2] 30:21 50:25 undermine [2] 19:6 51:3 undermines [1] 51:5 understand [7] 9:19 13:5 27:10 37:24 46:22 47:9 62:4 understanding [4] 10:22,23 17:14 52:6 understood [4] 7:13 12:23 14:19 49:1 undertaken [1] 56:22 undo [1] 26:6 unfairness [1] 39:12 unit [1] 31:5 UNITED [2] 1:1,16 unless [1] 43:12 unlitigated [1] 61:23 unremarkable [2] 10:13 21:17 unresolved [3] 4:1,16 61:23 up [10] 12:3 33:5 40:21 43:4 48:15 49:18 52:23 56:7,9 63:3 upset [1] 11:5 upsetting [1] 10:25</p>
--	---	--	--

uses ^[1] 23:25
using ^[13] 6:9,20 19:21 22:23,24
 32:11,17 37:5 46:7 48:17 49:14
 52:20 57:1

V

verdict ^[5] 12:7,10 13:13 14:16 52:
 24
versus ^[2] 3:5 21:20
via ^[1] 9:7
view ^[2] 25:5,21
violate ^[1] 9:24
violated ^[1] 13:16
violates ^[1] 9:20
violating ^[1] 57:14
violation ^[1] 37:6
violations ^[1] 27:19

W

waived ^[1] 20:5
wanted ^[2] 9:9 15:7
wants ^[1] 63:22
Washington ^[2] 1:11,21
way ^[11] 9:7,25,25 12:1,4,5 16:25
 20:3,5 32:17 65:6
ways ^[3] 8:11,16 11:18
well-reasoned ^[1] 12:12
whatever ^[3] 10:1,3 56:12
whereas ^[1] 11:21
whereby ^[1] 20:14
Whereupon ^[1] 66:7
whether ^[5] 15:18 22:21 37:10 39:
 15 64:21
whole ^[6] 6:17 20:19,20 22:1 41:
 19 64:4
whom ^[1] 30:2
wide ^[1] 33:5
will ^[2] 15:17 54:2
willful ^[2] 47:16 54:6
windfall ^[2] 24:13,18
wins ^[1] 63:19
within ^[2] 30:10 33:13
without ^[5] 46:17 53:15,21 64:22
 65:17
wonder ^[1] 34:14
word ^[6] 12:19 14:10 23:15 25:18
 26:2 52:20
words ^[6] 9:8 13:3 14:23,25 23:17
 29:5
world ^[1] 32:5
worried ^[1] 64:9
worth ^[2] 5:20 6:15
Wright ^[1] 64:9

Y

year ^[2] 37:9 49:11
years ^[2] 3:16 12:20
York ^[2] 1:19,19
yourself ^[1] 58:18