

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

INTEL CORPORATION INVESTMENT)
POLICY COMMITTEE, ET AL.,)
 Petitioners,)
 v.) No. 18-1116
CHRISTOPHER M. SULYMA,)
 Respondent.)

Pages: 1 through 73
Place: Washington, D.C.
Date: December 4, 2019

HERITAGE REPORTING CORPORATION

Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
www.hrccourtreporters.com

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -

3 INTEL CORPORATION INVESTMENT)

4 POLICY COMMITTEE, ET AL.,)

5 Petitioners,)

6 v.) No. 18-1116

7 CHRISTOPHER M. SULYMA,)

8 Respondent.)

9 - - - - -

10 Washington, D.C.

11 Wednesday, December 4, 2019

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:04 a.m.

16

17 APPEARANCES:

18 DONALD B. VERRILLI, JR., ESQ., Washington, D.C.;
19 on behalf of the Petitioners.

20 MATTHEW W.H. WESSLER, ESQ., Washington, D.C.;
21 on behalf of the Respondent.

22 MATTHEW GUARNIERI, Assistant to the Solicitor
23 General, Department of Justice,
24 Washington, D.C.; for the United States, as
25 amicus curiae, supporting the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	DONALD B. VERRILLI, JR., ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	MATTHEW W.H. WESSLER, ESQ.	
7	On behalf of the Respondent	32
8	ORAL ARGUMENT OF:	
9	MATTHEW GUARNIERI, ESQ.	
10	For the United States, as amicus	
11	curiae, supporting the Respondent	56
12	REBUTTAL ARGUMENT OF:	
13	DONALD B. VERRILLI, JR., ESQ.	
14	On behalf of the Petitioners	68
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 18-1116,
5 Intel Corporation Investment Policy Committee
6 versus Sulyma.

7 Mr. Verrilli.

8 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

9 ON BEHALF OF THE PETITIONERS

10 MR. VERRILLI: Mr. Chief Justice, and
11 may it please the Court:

12 Section 1113(2) of ERISA requires that
13 claims for breach of fiduciary duty be brought
14 within three years of when the plaintiff first
15 had actual knowledge of the breach. In 2015,
16 the Respondent, Sulyma, sued, claiming that his
17 retirement plans imprudently overinvested in
18 hedge funds and commodities. But more than
19 three years before that suit was filed, Sulyma
20 received plan disclosures that apprised him of
21 the precise investment allocations he later
22 claimed were imprudent.

23 The Ninth Circuit held that those
24 disclosures would not trigger the three-year bar
25 because Sulyma testified that he had not read

1 them and Intel therefore had not established
2 that he had subjective awareness of what was
3 disclosed. The Ninth Circuit was wrong to read
4 the statute to require proof of subjective
5 awareness.

6 Under Section 1113(2), plan
7 participants have actual knowledge of facts that
8 are actually given to them in mandatory ERISA
9 disclosures. That reading respects ERISA's text
10 and the statutory emphasis on -- the structural
11 emphasis in the statute on robust disclosure by
12 plan fiduciaries and private policing by plan
13 participants.

14 The Ninth Circuit's reading upends
15 that balance. It effectively doubles from three
16 to six years the period in which plaintiffs can
17 exploit hindsight bias to second-guess
18 investments, even when plans have fully
19 disclosed the basis for those investments, and
20 it introduces arbitrariness and intractable
21 proof problems.

22 Now one way to bring the correct
23 interpretation of Section 1 -- 1113(2) into
24 focus is by considering the provision as it was
25 originally enacted in 1974, and that's

1 reproduced at pages 38 and 39 of the Blue Brief.

2 The original statute provided that the
3 three-year limitations period would be triggered
4 either when a plaintiff had actual knowledge of
5 the breach or when the plan filed with the
6 Department of Labor a report that included facts
7 from which a participant could reasonably learn
8 of the facts of the breach.

9 Now, if you read the statute in the
10 way that the Ninth Circuit read it, it doesn't
11 make any sense as it was originally enacted
12 because the three-year period would be triggered
13 in a situation in which the plan disclosed to
14 the Department of Labor the facts that establish
15 the breach but not when the -- when the plan
16 disclosed to the plan participants themselves in
17 mandatory disclosures the very same facts that
18 would trigger it if provided to the Department
19 of Labor.

20 That just doesn't make any sense of
21 the statute. Our reading, in contrast, makes
22 perfect sense of the statute. And if I could, I
23 -- I will start with the text and -- and, I
24 think, try to take a minute and explain why
25 we've got a perfectly reasonable linguistic

1 understanding of Section 1113(2).

2 And it's this: A plaintiff has actual
3 knowledge of facts actually provided to him in
4 mandatory disclosures because, when the
5 plaintiff receives the disclosure, he has, in
6 the word of the statutes past tense "had," but
7 he has in his possession a body -- the body of
8 knowledge contained in the disclosures. He
9 possesses that knowledge. And that's the
10 knowledge he actually has.

11 JUSTICE KAVANAUGH: Most people don't
12 read them.

13 MR. VERRILLI: You know, I -- I -- I
14 --

15 JUSTICE KAVANAUGH: Or many. Many
16 people don't read them. So how do you have
17 actual knowledge if you haven't read it?

18 MR. VERRILLI: So I -- you know, Your
19 Honor, I don't know that that's correct. I
20 think, actually, with respect to these kinds of
21 documents --

22 JUSTICE KAVANAUGH: Well, suppose for
23 the group of people who don't read them, how can
24 you say that they have actual knowledge if they
25 haven't read something?

1 MR. VERRILLI: So I -- I think the
2 reason is because the -- the phrase "actual
3 knowledge" in this context in particular, but,
4 frankly, in any context, isn't limited to
5 subjective awareness in the way that the Ninth
6 Circuit limited it, and I think that the willful
7 blindness doctrine demonstrates that. We --

8 JUSTICE GINSBURG: But, Mr. Verrilli,
9 we do have the six-year outer limit, and then
10 there's a special shorter limit if you have
11 actual knowledge. And it's hard to read the
12 word "actual" to mean something other than yes,
13 I, in fact, know.

14 And as Justice Kavanaugh pointed out,
15 there are many people who don't read these
16 mailings. I must say I don't read all the
17 mailings that I get about my investments.

18 (Laughter.)

19 MR. VERRILLI: So I think, with
20 respect to what actual knowledge means in this
21 statute, it's important to think about it in
22 context, and it's really -- the idea of taking
23 the phrase "actual knowledge" and treating it in
24 this context as though it means the same thing
25 in the other contexts in which it's used is a

1 mistake.

2 This is really a unicorn when it comes
3 to statutes of limitations. This is the only
4 place in the United States Code that we could
5 find the phrase "actual knowledge" used in the
6 statute of limitations. And our friends on the
7 other side haven't identified any state statute
8 of limitations that uses the phrase "actual
9 knowledge" either.

10 CHIEF JUSTICE ROBERTS: Mr. Verrilli,
11 I -- I think you were about to push back on --
12 on Justice Kavanaugh's assertion that people
13 don't read these. Do you have any -- any -- is
14 there any reason for us to assume the opposite
15 of what I gather is a common personal
16 experience?

17 MR. VERRILLI: So I -- look --
18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: I won't -- I
20 won't ask for a show of hands, but --
21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: -- do you have
23 any reason to suppose that many people or --

24 MR. VERRILLI: Yes, yes, I do. I
25 mean, this is --

1 CHIEF JUSTICE ROBERTS: What -- what
2 is that?

3 MR. VERRILLI: It's -- well, I -- I do
4 think that this is important information. For
5 many people, this information, how their
6 retirement plans are going to be -- how their
7 retirement funds are going to be invested is
8 very important. Many people's --

9 CHIEF JUSTICE ROBERTS: Well, I'm sure
10 -- I'm sure -- I mean --

11 MR. VERRILLI: -- economic security
12 depends on this.

13 CHIEF JUSTICE ROBERTS: -- the -- the
14 fact is important, but whether people think the
15 information is important, I think -- I'm just
16 not -- well, I'd be surprised.

17 I mean, it's one of those things, the
18 more and more disclosures that are required, the
19 less and less likely it is that people are going
20 to look at them. And -- and it seems to me that
21 your argument depends upon the assumption that
22 these are actually going to be read so that we
23 would dispense with the requirement of showing
24 that they were actually read because we assume
25 that they were most often actually read. And I

1 just don't think that's an accurate assumption.

2 MR. VERRILLI: I don't think I -- I
3 don't think our argument does depend on that
4 assumption. I think that the -- Congress set
5 this system up in 1974. It made clear that the
6 disclosure regime was a very important part of
7 the regulatory -- of the regulatory program.

8 And the point, as Congress said in
9 1974, of these robust disclosures was to give
10 plan participants the information they would
11 need to police their rights. And so, when
12 Congress enacted -- that's what the Senate
13 report says in 1974 repeatedly. And, of course,
14 in 1974, Congress also granted a private right
15 of action to plan participants to sue for breach
16 of fiduciary duty.

17 So I do think the system was set up on
18 the understanding that this was important
19 information and had to be conveyed to plan
20 participants according to the statute and its
21 implementing regulations in a manner that was
22 readily comprehensible so that the average plan
23 participant could understand it and could take
24 action as necessary to police his or her rights.

25 So I do think that the -- that the

1 understanding that Congress is operating under
2 here is that people do read these -- do read
3 these disclosures when they come. And if one
4 looks at the -- for example, the email that
5 Mr. Sulyma got, and you can see this at page, I
6 think, 149 of the Joint Appendix with respect to
7 the qualified default investment alternative
8 disclosure, he gets an email that says -- the
9 heading says important information about your
10 retirement plan.

11 And it contains a link. And the link
12 says -- it says you should read the document in
13 this link. And if you click on the link, it
14 takes you not to some big giant document but to
15 an eight- or ten-page document that describes
16 the investments in the various target fund
17 plans.

18 And if one looks at page 236 of the
19 Joint Appendix, one will see that for
20 Mr. Sulyma's plan, it specifically says the
21 target asset allocation in this fund is
22 10 percent bond funds and short-term
23 investments, 60 percent equity funds, 25 percent
24 hedge funds, and 5 percent commodities.

25 That's the precise thing he says is a

1 breach of fiduciary duty and -- I mean -- and
2 the precise thing that he says was a breach of
3 fiduciary duty and it's disclosed to him right
4 there in this document.

5 JUSTICE KAGAN: But, Mr. Verrilli,
6 what role does willful blindness play in your
7 argument? Are you claiming that anybody who
8 doesn't read these documents is being willfully
9 blind?

10 MR. VERRILLI: No.

11 JUSTICE KAGAN: Or is there a
12 different argument that you're making?

13 MR. VERRILLI: No. I'm -- we're
14 making a different argument, and it -- and it --
15 and it's why I said, Mr. Chief Justice, that I
16 thought our argument didn't depend on the
17 empirical assumption that people -- everyone
18 actually reads these -- these documents when
19 they get them.

20 Willful blindness is -- is not
21 constructive knowledge. Willful blindness is a
22 form of actual knowledge. And that's how this
23 Court addressed it in Global-Tech. In
24 Global-Tech, of course, the Court struggled in
25 the patent inducement context to decide first

1 whether the inducement cause of action required
2 proof of actual knowledge or proof of
3 constructive knowledge. It concluded it
4 required proof of actual knowledge.

5 And then the Court went on to say:
6 But actual knowledge can be satisfied by proof
7 of willful blindness. And what that
8 demonstrates is that there are situations in
9 which the actual knowledge standard can be
10 satisfied by imputing knowledge, even a -- in a
11 situation where it can't be proved.

12 JUSTICE KAGAN: Who would have thought
13 --

14 JUSTICE GINSBURG: But you say this is
15 not -- this is not willful, though?

16 MR. VERRILLI: No, we're not saying
17 that. We're using it by analogy to demonstrate
18 the point that the outer bound of actual
19 knowledge is not subjective awareness, which is
20 the standard that the Ninth Circuit adopted;
21 that there are circumstances in which the Court
22 as -- as -- by operation of law, will recognize
23 that something other than subjective awareness
24 can satisfy an actual knowledge standard.

25 JUSTICE KAGAN: I guess I would have

1 thought about it a little bit differently, not
2 that the willful blindness is satisfying the
3 actual knowledge inquiry but, rather, that,
4 because you've been willfully blind, because
5 you've deliberately ignored some piece of
6 evidence, we will treat it as if you actually
7 knew.

8 But -- but, still, the willful
9 blindness is a -- is a different thing. It's
10 just that given your intent, we're going to
11 treat it as one and the same.

12 MR. VERRILLI: Well, but I think the
13 -- the way I would -- the way I would give that
14 a little bit of a different nuance, Your Honor,
15 is that I think with respect to willful
16 blindness, what you're saying is, even a
17 situation where it's not possible to prove that
18 a defendant -- and it's usually a criminal
19 defendant or a defendant in some kind of
20 enforcement action -- has the subjective
21 awareness necessary to satisfy an actual
22 knowledge standard, you're going to impute that
23 subjective awareness to the defendant. It's an
24 imputation.

25 JUSTICE KAGAN: Correct, because of

1 their bad intent, shall we say.

2 MR. VERRILLI: Right. And so --

3 JUSTICE KAGAN: Because of their
4 saying I'm purposefully not going to know this.

5 MR. VERRILLI: Right.

6 JUSTICE KAGAN: But, here, you're
7 saying not everybody --

8 MR. VERRILLI: But --

9 JUSTICE KAGAN: -- who has actual
10 knowledge --

11 MR. VERRILLI: -- I think this gets --

12 JUSTICE KAGAN: -- is willfully blind
13 in that way.

14 MR. VERRILLI: That's -- that's
15 correct, but I think that -- but we're not --
16 what we're saying is that by analogy, once you
17 think here about the context, because what's
18 happened with this actual knowledge standard, as
19 I said, this is the only statute of limitations
20 we can find in which it exists.

21 It's -- the overwhelming number of
22 situations in which it exists are the one that
23 we've been talking about here, situations in
24 which you're trying to ascertain the level of
25 culpability in a criminal action or an

1 enforcement action.

2 So you're transplanting it into a
3 totally different environment here. And then
4 not only that, but normally, in statutes of
5 limitations, when -- when there's a knowledge
6 element in a statute of limitations, it's
7 something that works to the benefit of the
8 plaintiff.

9 In a typical statute of limitations,
10 you'd say the statute runs six years from a
11 certain act or occurrence, but it will be either
12 the later of that or three years after the
13 plaintiff has or should have had knowledge.

14 Here, the knowledge requirement is --
15 is operating for a totally different reason.
16 It's in the statute to protect the interests of
17 the defendant. It takes the six-year period of
18 repose and cuts it in half when a plaintiff has
19 actual knowledge.

20 And I submit that, therefore, the
21 right way to think about this is by thinking
22 about this in terms of the interest that this
23 provision is in the statute to advance. And the
24 interest that it's in the statute to advance, it
25 seems to me, are -- synch up perfectly with the

1 disclosure requirements that the -- that the
2 statute imposes on plan fiduciaries.

3 JUSTICE GINSBURG: If the statute had
4 said should have had knowledge, you would
5 plainly prevail, but it doesn't say should have
6 had knowledge. It says actual knowledge.

7 And you're reading the word "actual"
8 out of the statute.

9 MR. VERRILLI: I disagree with that
10 characterization. We think the word "actual"
11 does real and substantial work in our reading of
12 the statute. We're not arguing that you should
13 read this language as though it were a broad
14 constructive knowledge standard.

15 A broad constructive knowledge
16 standard would be a knew or should have known
17 standard. And if it were a broad constructive
18 knowledge standard, then the disclosure of the
19 information to the plan participant, even if the
20 information disclosed itself, wouldn't establish
21 the facts of a -- of a breach of fiduciary duty.

22 If it put the plan participant on
23 notice such that a -- a reasonable person would
24 inquire further, that would be a constructive
25 knowledge, a should have known standard.

1 JUSTICE ALITO: Does an entity like
2 your client have the ability to determine
3 whether someone to whom one of these emails with
4 the link is sent has opened up the link?

5 MR. VERRILLI: So we -- with respect
6 to this, you know, in this case, no. Generally,
7 it's difficult.

8 JUSTICE ALITO: But you could do that,
9 certainly Intel would have the ability to do
10 that, wouldn't it?

11 MR. VERRILLI: It could, I think, yes.
12 I think it would be very difficult and
13 time-consuming. And I don't think it would
14 change the issue because I think, even if we
15 could establish that the -- that the plan
16 participant clicked on the link, then -- then
17 the argument is going to be the same argument.

18 It's going to be, yeah, I clicked on
19 it, but I didn't read it, or I read it, but I
20 didn't remember it. And, therefore, I don't
21 have the subjective awareness that the Ninth
22 Circuit said is required.

23 And so I -- I don't think -- I mean, I
24 understand why you might think that that's a
25 solution, Your Honor, but I -- but I don't think

1 it is. I think it just shifts the problem over
2 a little bit, but it's the -- it's the exact
3 same problem.

4 And I think it points up why the right
5 way to read this statute. Now we are -- we are
6 arguing for an imputation of knowledge, not an
7 empirical assumption. We are doing that. But
8 we're doing that because we think that is the
9 most sensible way to synch up what the statute
10 has done here, which is to impose a very robust
11 disclosure, set of disclosure obligations, for
12 the purpose of giving plan participants the
13 ability to police their rights.

14 JUSTICE KAVANAUGH: Why isn't the --

15 MR. VERRILLI: And --

16 JUSTICE KAVANAUGH: -- way -- sorry --
17 why isn't the way to think about this that, as
18 you say, this is an unusual provision, and you
19 make a lot of strong policy arguments, but, for
20 whatever reason, in the amendment of the
21 statute, it just came out in -- as actual
22 knowledge, and it's an unusual statute, but we
23 stick to the words of the statute and Congress
24 can, of course, fix it to bring it in line with
25 the other constructive knowledge statutes if

1 Congress so chooses, but we shouldn't rewrite it
2 ourselves.

3 What -- what's wrong with thinking
4 about this that way?

5 MR. VERRILLI: Well, Your Honor, in --
6 in Yates, the Court concluded that Fish was not
7 a tangible object, even though, in ordinary
8 English, it's obviously a tangible object. You
9 can hold it in your hand.

10 In Brown & Williamson, the Court
11 concluded that nicotine was not a drug for
12 purposes of the -- of the Food, Drug and
13 Cosmetic Act, even though, in common
14 understanding, it can --

15 JUSTICE KAVANAUGH: But if we start
16 rewriting --

17 MR. VERRILLI: -- obviously be a drug.

18 JUSTICE KAVANAUGH: -- if --

19 MR. VERRILLI: And so I -- what I
20 guess I would say is that I don't think it is
21 rewriting the statute at all. It's taking a --
22 what it's doing is reading those words in
23 context in order to make sense of the statute as
24 a whole, which was exactly the analysis in Yates
25 and Brown & Williamson and last term in Jackson

1 with respect to what the word "defendant" means
2 and in King against Burwell. And it's that --
3 that -- all we're urging is the Court apply that
4 same weight.

5 Don't take the words in isolation and
6 just look them up in the dictionary. And
7 particularly don't do it here because this --
8 this actual knowledge standard that my friends
9 on the other side are transplanting here, what
10 they're transplanting is a body of -- of law
11 that applies in a totally different context,
12 that doesn't have anything to do with a regime
13 of disclosure on a statute of limitations.

14 It's about assessing personal
15 culpability in the criminal and enforcement
16 context. And in this context, I think that
17 you've got to read these words in conjunction
18 with --

19 JUSTICE KAVANAUGH: But, if we -- if
20 we were to say what you want us to say here,
21 actual knowledge is, in effect, a form of
22 constructive knowledge, that could open up all
23 sorts of problems in other statutes down the
24 road that we can't even foresee here where the
25 argument would be the constructive knowledge is

1 enough to satisfy a knowledge requirement.

2 MR. VERRILLI: I don't -- I don't
3 think so for two reasons, Your Honor. First,
4 we're not asking you to adopt a constructive
5 knowledge standard. We're asking you to
6 interpret the words "actual knowledge" to
7 include the information, the knowledge that is
8 transmitted to, the information that is made
9 known to the plan participants through --

10 JUSTICE KAVANAUGH: That sounds like
11 --

12 MR. VERRILLI: -- its disclosures.

13 JUSTICE KAVANAUGH: -- constructive
14 knowledge to me.

15 MR. VERRILLI: I don't think so, Your
16 Honor, in the same way that you -- you might say
17 the same thing about willful blindness being
18 constructive knowledge. But -- but I think it's
19 -- it is -- it is an imputation, to be sure, but
20 it's an imputation with -- that's legitimately
21 within the meaning of the words "actual
22 knowledge."

23 And the other thing I would point out,
24 Your Honor, is that, you know, until the Ninth
25 Circuit ruled in this case, the rule that

1 everybody's been living under, ERISA, is our
2 rule. This is the way the courts had uniformly
3 interpreted it until the Ninth Circuit in this
4 case and everybody understood that that's the
5 way the statute operated.

6 And -- and so the -- in the -- so, in
7 that sense, I don't think that the problem that
8 Your Honor -- if the problem that Your Honor has
9 identified is a problem, you would have seen it
10 already.

11 JUSTICE GINSBURG: Are you -- are you
12 relying on court -- other courts of appeals
13 decisions that says actual knowledge means you
14 had access to the information, the information
15 was available to you? Have -- what courts have
16 held that?

17 MR. VERRILLI: So the -- the -- the --
18 the Eighth Circuit decision that created the
19 conflict and -- and -- and that this case
20 created the conflict with, held that when you've
21 received the information, you have actual -- you
22 have it. I mean, the statute says had actual
23 knowledge. So --

24 JUSTICE GINSBURG: But are there other
25 -- so we have the Eighth Circuit and the Ninth

1 Circuit.

2 MR. VERRILLI: And the -- the Second
3 Circuit interpreted the language "had actual
4 knowledge" in a different context. We've
5 discussed this in our brief. So it's not a
6 precise holding on this issue. But it
7 interpreted it in a way that we've interpreted
8 it in a -- in a related ERISA statute of
9 limitations context.

10 And then you have the consensus in the
11 district courts, which actually have got to
12 grapple with this issue as a practical matter in
13 case after case after case. They've all come to
14 the conclusion that you should read the actual
15 knowledge standard to be satisfied when you can
16 demonstrate that the -- that the plan
17 participant has --

18 JUSTICE GINSBURG: How -- how many
19 district courts?

20 MR. VERRILLI: So I think there are --
21 I don't know the exact number off the top of my
22 head, but I think it's at least a half a dozen
23 or so, maybe more than that, that have grappled
24 with it and they've all come to that conclusion.

25 And so -- and I think there's a reason

1 for that because it's -- it's an understanding
2 that the way this system is supposed to work is
3 that plan par -- plan participants are supposed
4 to be apprised of the information they need to,
5 in the words of the Senate report of 1974,
6 police their rights.

7 And the way -- and they're given an
8 express private right of action in ERISA to
9 police their rights. And so --

10 JUSTICE SOTOMAYOR: It is difficult to
11 imagine a half dozen out of 98, 99 district
12 courts as establishing a firm pattern, but put
13 that aside.

14 You were -- not you, but I think
15 whoever handled this case below -- was asked
16 whether a comatose person who received an email
17 with this plan disclosure, would that person
18 have actual knowledge? Could you answer that
19 question?

20 And let's put aside the comatose
21 person. Is there an obligation on plan
22 participants to actually open emails?

23 MR. VERRILLI: There's no legal
24 obligation to do that. And with respect to some
25 --

1 JUSTICE SOTOMAYOR: So how -- I know
2 plenty of people who never open emails or only
3 open emails from certain individuals or in
4 certain situations. So, under your theory of
5 the case, those people, the knowledge is imputed
6 merely because they received the email?

7 MR. VERRILLI: So let me take the
8 comatose person first, that I think in extreme
9 cases like that, the way the law would handle it
10 is the way the law always handles it, through
11 the doctrine of equitable tolling. In a
12 situation like that, I can't imagine that
13 equitable tolling wouldn't apply in that kind of
14 an extreme case.

15 Now I will say --

16 JUSTICE SOTOMAYOR: How about -- how
17 about handling it through the language of the
18 statute, actual knowledge? That person doesn't
19 have actual knowledge.

20 MR. VERRILLI: Well, I think but then
21 the -- the problem with reading it that way is
22 you create a situation in which there can never
23 be summary judgment in one of these cases with
24 respect to the three-year statute of
25 limitations, and so you're imposing very

1 substantial burdens on --

2 JUSTICE SOTOMAYOR: No, no, no --

3 MR. VERRILLI: -- virtually everyone
4 else.

5 JUSTICE SOTOMAYOR: -- there's --
6 there's plenty of emails that I get that require
7 me to say that I've read the terms and
8 conditions.

9 MR. VERRILLI: Yes, Your Honor, but I
10 think that what the -- what the plaintiff --
11 Your Honor wouldn't do this, but what a
12 plaintiff would do in that situation, I think,
13 would say yes, I clicked on the box, but I
14 didn't actually read them, so I didn't actually
15 have knowledge.

16 And I do think that points up
17 something about the argument my friends on the
18 other side make. They do say on page 1 of their
19 brief, well, if you read it, you have actual
20 knowledge.

21 But you don't actually have -- proof
22 of you read it doesn't establish subjective
23 awareness.

24 JUSTICE BREYER: Well, there's always
25 a possibility that a plaintiff under oath will

1 tell the truth.

2 MR. VERRILLI: Of course. Of course,
3 that's right, Your Honor, but --

4 JUSTICE BREYER: And so he'll say, I
5 read it. And his attorney will say if you read
6 it and you say you didn't, you're in trouble.

7 MR. VERRILLI: That's correct, Your
8 Honor.

9 JUSTICE BREYER: All right. So what's
10 the problem?

11 MR. VERRILLI: But even in the best of
12 circumstances, the -- the -- people's ability to
13 recollect whether they read things four or five
14 and six years earlier, I think, is going to be,
15 you know, quite --

16 JUSTICE BREYER: Well, if they didn't
17 read it -- I mean, you've been -- you've heard
18 the argument. I mean, if they didn't -- if they
19 didn't read it, I mean, why should they? I
20 mean, these are ordinary workers across the
21 country. They don't read everything. And if
22 they didn't read it, then they didn't read it.
23 Then it's six years they have. Why -- why is
24 that a problem?

25 MR. VERRILLI: Well, I think it's a

1 problem for -- for -- I can think of at least
2 three reasons why it's a problem. You're going
3 to -- you're taking the period in which a plan
4 is subject to hindsight bias with respect to its
5 investment decisions and doubling it from three
6 years to six years, which means not only are the
7 plans going to be vulnerable to litigation over
8 that whole six-year period, but the amount of
9 damages could be considerably higher.

10 And I would think, if anything, in a
11 case where you're talking about breach of
12 fiduciary duty, what you'd want is an
13 intervention sooner rather than later to get to
14 -- to -- to cure the breach. So that seems to
15 me a very substantial problem and a problem that
16 inures to the detriment of plan participants, of
17 course, because those are costs to the plan and
18 those -- and that kind of excessive liability
19 can discourage the creations of plans in the
20 first place, which is why this Court has always
21 said you -- you have to approach ERISA in a
22 balanced manner. And that kind of balance is
23 what we're advocating for here.

24 Second, I think it will introduce an
25 element of randomness and inadministrability to

1 the statute because it's always -- virtually
2 always -- maybe there's going to be the rare
3 case that Your Honor hypothesized where the --
4 where the -- the plaintiff testifies yes, I did
5 read it; yes, I did remember it. But, in most
6 cases, it's going to be inferences from
7 circumstantial evidence. And I think it's going
8 to be some courts going one way based on
9 inferences from circumstantial evidence, other
10 courts going a different way based on inferences
11 -- inferences from the same kind of --

12 JUSTICE KAVANAUGH: Mr. Verrilli, you
13 seem to --

14 JUSTICE GINSBURG: What would the
15 circumstantial evidence be?

16 MR. VERRILLI: Well, I -- you know, I
17 suppose it would be evidence like we had in this
18 case, that -- that -- that the plaintiff visited
19 the website 68 times and clicked on 1,000 links
20 and -- and clicked on -- in particular on a link
21 that said that he was going to attend the
22 seminar explaining the investment options, which
23 he then said he didn't attend. I mean -- but I
24 think that's what -- you're just going to have
25 random results in district court.

1 And I think with respect to a statute
2 of limitations, one thing that one would want is
3 consistent application so that --

4 JUSTICE GORSUCH: Mr. Verrilli, we
5 have -- we have consistent application. We have
6 a backstop of six years, as Justice Ginsburg's
7 pointed out. And these are very good policy
8 arguments for maybe making that shorter, but
9 those aren't our -- that's not our province.
10 That belongs across the street.

11 So I guess I'm wondering, what -- what
12 cut do these policy arguments have? You're not
13 suggesting that an irrational Congress -- only
14 an irrational Congress could -- could come up
15 with a scheme in which six years is the
16 backstop, such that it's -- you know, it would
17 be beyond the pale to imagine a Congress --

18 MR. VERRILLI: Well, I would --

19 JUSTICE GORSUCH: -- that could come
20 up with a scheme that would require --

21 MR. VERRILLI: May I answer?

22 CHIEF JUSTICE ROBERTS: Yes.

23 MR. VERRILLI: Thank you.

24 So, Justice Gorsuch, what I -- with
25 respect to that, I think that you have to impart

1 the rationality to Congress also with respect to
2 the three years, that it's in there for a
3 reason.

4 JUSTICE GORSUCH: Uh-huh.

5 MR. VERRILLI: The reason is to
6 protect plans when they have --

7 JUSTICE GORSUCH: Well, both sides
8 agree that there's a reason for it. They just
9 disagree what that reason is.

10 MR. VERRILLI: Well, I -- but I think
11 -- respectfully, what I would suggest is --

12 JUSTICE GORSUCH: All right.

13 MR. VERRILLI: -- we're -- we're
14 suggesting a real reason that makes sense in
15 light of the disclosure obligations. They're
16 coming a hair's breadth within reading it out of
17 the statute.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Wessler.

22 ORAL ARGUMENT OF MATTHEW W.H. WESSLER

23 ON BEHALF OF THE RESPONDENT

24 MR. WESSLER: Thank you, Mr. Chief
25 Justice, and may it please the Court:

1 When Congress said that a plaintiff
2 must have actual knowledge, it meant what we all
3 understand that phrase to mean, that the
4 plaintiff himself must have real awareness. The
5 ordinary definition of "actual knowledge"
6 controls here because it accords with the
7 fundamental rule that statutory interpretation
8 begins and often ends with the plain meaning of
9 the text.

10 Congress chose to require actual
11 knowledge, not constructive knowledge, before
12 the general six-year limitations period for
13 breach of fiduciary duty claims will be cut in
14 half, and that deliberate decision must be
15 honored.

16 Now the common-sense distinction I
17 think is all that's necessary to resolve this
18 case, but there are important reasons, as I
19 think I heard just -- just now, for why Congress
20 would have made the choice to require actual
21 knowledge here.

22 Setting the bar high before the
23 six-year limitations period will be cut in half
24 reflects what I think is a basic real-world
25 fact. Most people don't read these complicated

1 financial disclosures cover to cover.

2 If you open the Joint Appendix to
3 almost any page, you can see why. These
4 documents are chock-a-block full of dense
5 financial market projections, asset allocations,
6 and other jargon. People with busy lives and
7 with little or no financial investment
8 experience or training are not poring over these
9 disclosures line by line to splice back every
10 statement on the possibility that it might
11 contain the -- the kernel of breach under ERISA.

12 I think it's actually just to the
13 contrary. Because fiduciaries owe an unyielding
14 duty to act in participants' best interests,
15 most people trust that their fiduciaries are not
16 breaching their obligations.

17 Given that real-world understanding, I
18 think it's perfectly sensible that Congress
19 decided not to start the three-year clock
20 running the moment a participant receives these
21 disclosures.

22 And -- and I want to emphasize this, I
23 think it's all the more true because a general
24 six-year period does provide a concrete cutoff
25 for most breach of fiduciary duty claims, and

1 that six-year cutoff is among the shortest
2 general limitations period in ERISA.

3 With Section 1113, Congress set an
4 important balance. Although there's a high bar
5 to trigger the three-year exception, fiduciaries
6 can count on six years being the outside limit.
7 And there's almost no other limitations
8 provision in ERISA that provides this level of
9 protection for defendants.

10 JUSTICE ALITO: Well, what would --

11 JUSTICE GINSBURG: But the problem is
12 how easy one can say I didn't read it. Is it
13 your position that that's enough? If the
14 plaintiff says, I didn't read it, the court has
15 to accept that? I mean, how -- how can the
16 veracity of that statement be tested?

17 MR. WESSLER: Well, I -- I think that
18 there are a number of ways. I do think that a
19 plaintiff -- if a plaintiff did not read a
20 statement, that is likely enough to survive
21 summary judgment and -- and -- and take this
22 question to a fact finder in the same way,
23 Justice Ginsburg, that all sorts of
24 fact-specific questions that come up in the
25 context of statutes of limitations are not

1 amenable to summary judgment.

2 But, of course, as was surfaced in the
3 first half of this argument, it is entirely
4 possible that circumstantial evidence would
5 prove that a plaintiff either read or knew of a
6 particular fact.

7 JUSTICE GINSBURG: What -- what would
8 the -- what would the circumstantial evidence
9 be?

10 MR. WESSLER: This case I think
11 provides a useful illustration. In this case,
12 there were pages of -- of -- of printouts of --
13 of websites that the plaintiff had visited.

14 Now he testified, I didn't go to the
15 specific pages that contained what you say is
16 the relevant information. And throughout the
17 entire course of this litigation, up through
18 now, the -- the defendants were never able to
19 come forward with specific page views to
20 contradict that testimony.

21 JUSTICE ALITO: But your position is,
22 even with all that evidence, your client would
23 not be subject to summary judgment, right?

24 MR. WESSLER: I -- I think there would
25 be a disputed issue of fact at that point that

1 would reach -- would have to go to a fact
2 finder, that's correct. But, again, I don't
3 think that's any different from the way fact
4 issues come up in the context of statutes of
5 limitations.

6 JUSTICE ALITO: Well, you make --
7 everything that you've said makes a good policy
8 argument for saying let's just have a six-year
9 period because people don't read these things
10 and they're -- they're hard to understand.

11 But why would Congress add to the
12 six-year statute of repose this requirement of
13 actual knowledge, which is very unusual in -- in
14 statutes of limitations, and will almost always
15 prevent summary judgment? It will almost always
16 raise a difficult factual question that requires
17 the district court to make a credibility
18 determination.

19 MR. WESSLER: Sure.

20 JUSTICE ALITO: Why would that be --

21 MR. WESSLER: Sure.

22 JUSTICE ALITO: -- why would Congress
23 think that's worthwhile?

24 MR. WESSLER: So, of course, we don't
25 know because there is no relevant legislative

1 history that cuts one way or the other on this
2 question. But, I mean, I think it's worth
3 emphasizing that this statute covers a broad
4 range of different kinds of breach of fiduciary
5 duty claims.

6 It includes, for instance,
7 co-fiduciary claims, right, a claim in which a
8 co-fiduciary knows that there has been a breach
9 of a -- of a -- of -- of another fiduciary's
10 duty of prudence to the participants or to the
11 plan.

12 And this three-year period triggers
13 and incentivizes that co-fiduciary to come
14 forward and bring a claim to minimize the losses
15 to the plan. That's an example of -- of -- of a
16 kind of claim that would be subject to this
17 three-year exception and wouldn't require any
18 kind of, you know, fact dispute about what the
19 co-fiduciary knew because they were involved in
20 the decision-making.

21 The same is true, Your Honor, for --
22 for claims that arise when one party is subject
23 to the transaction that forms the basis of the
24 breach, right? There's a whole range of
25 prohibited transactions where the transaction

1 itself is the breach and a party who is --
2 someone who is a party to that transaction has
3 knowledge.

4 JUSTICE ALITO: But in -- in all those
5 cases, the potential plaintiff would have reason
6 to know, right? So, if the test were reason to
7 know, it would be easily satisfied.

8 MR. WESSLER: Well --

9 JUSTICE ALITO: You wouldn't need to
10 require actual knowledge.

11 MR. WESSLER: -- yeah, I mean, I think
12 that -- that is entirely possible that Congress
13 could have drafted this statute in a different
14 way, but it chose to draft this -- this statute
15 in this way, and I think that deliberate choice
16 deserves and is entitled to -- to respect and it
17 must be honored by -- by -- by this Court
18 because it used the plain text actual knowledge,
19 which I think as we all sort of understand is --
20 is defined in contradistinction to a -- a rule
21 that would allow a court to imply or impute
22 knowledge to a person who does not themselves
23 personally --

24 JUSTICE KAGAN: Mr. Wessler --

25 MR. WESSLER: -- have it.

1 JUSTICE KAGAN: -- suppose a -- a
2 plaintiff says, you know, I -- I did read it. I
3 just didn't understand it. Does that always get
4 --

5 MR. WESSLER: Yes. I -- I --

6 JUSTICE KAGAN: -- past such judgment?

7 MR. WESSLER: -- don't think reading
8 is sufficient to establish knowledge.

9 Now, as this case comes to the Court,
10 though, the Petitioners have asked the Court to
11 assume that, had one just read all the relevant
12 disclosures in this case, that reading would
13 have imparted the necessary knowledge to know
14 that there was a breach.

15 And so I don't think that the Court
16 needs to reach this question of how much did you
17 need to read or how much did you need to
18 understand.

19 JUSTICE KAGAN: But your view is if --
20 if somebody said just I -- I didn't -- I didn't
21 get it?

22 MR. WESSLER: I -- I -- I think that's
23 -- that's insufficient to meet this high bar.
24 So I don't think that if -- if -- I don't think
25 that you could come in and say I just read it

1 and that would be enough. If you didn't
2 understand it, you didn't know it.

3 But, again, as -- as -- as the -- as
4 the question has been presented to the Court,
5 the only issue is whether actual knowledge means
6 you knew it or you can -- a court can conclude
7 as a matter of law that, even though someone
8 didn't read it, they, nevertheless, have actual
9 knowledge.

10 JUSTICE KAVANAUGH: Do you --

11 JUSTICE ALITO: What if they -- they
12 knew, yeah, I read it and I saw where they were
13 investing, but I didn't really understand the
14 nature of these companies they were investing
15 in? Would that be enough?

16 MR. WESSLER: I don't think so, Your
17 Honor. I think that it depends on the --

18 JUSTICE ALITO: So then this is
19 meaningless, the actual knowledge is
20 meaningless?

21 MR. WESSLER: Oh -- oh, not at all.
22 It -- it absolutely depends on the nature of the
23 -- of the kind of breach claim that is at issue
24 in the case. Again, this statute covers a broad
25 range of different kinds of claims; in addition

1 to the co-fiduciary claims I explained earlier,
2 take the fact pattern that this Court had in
3 LaRue, which was a -- which was a -- an account
4 liquidation delay breach of fiduciary duty
5 claim.

6 A participant calls up the fiduciary
7 and says: Please liquidate the assets from my
8 account tomorrow. A fiduciary fails to
9 liquidate the assets, and there's a resulting
10 loss.

11 Well, the -- the -- the participant in
12 that case has actual knowledge that there's been
13 a breach, and the three-year clock is ticking.

14 But what Congress didn't want to have
15 happen is exactly what the Petitioners are
16 asking this Court to do, which is to allow
17 fiduciaries to stick into these documents
18 sentences, paragraphs, that will never be read
19 and, as a result, have this three-year exception
20 ticking before anybody really knows --

21 JUSTICE KAGAN: How about --

22 MR. WESSLER: -- what's going on.

23 JUSTICE KAGAN: -- Mr. Wessler, just
24 coming back to the circumstances of this case or
25 -- or the context of this case, how about a

1 person who says, I read it, I thought I
2 understood it, I didn't -- what I didn't really
3 get was that it could be the foundation of an
4 ERISA claim?

5 MR. WESSLER: Right. So there is
6 this, I think, separate question that is not in
7 front of the Court right now, which is, Justice
8 Kagan, what you've identified, how much do you
9 need to know that there's been a breach of
10 ERISA.

11 Now I think the Ninth Circuit
12 articulated the correct standard in this case.
13 But this Court is not being asked in this case
14 to decide that question because as -- again, as
15 I said, as the Petitioners have framed this
16 question, they've asked the Court to assume that
17 all the relevant information was contained in
18 the disclosures and that, had a participant read
19 those disclosures, they would have the necessary
20 knowledge.

21 JUSTICE GINSBURG: You styled this
22 case a class action. How does the Court
23 determine who are the members of the court --
24 members of the class? That is, some will have
25 read the disclosures, some will have not.

1 How does the Court determine who is
2 properly within the class of non-readers? Does
3 every plan participant have to come into court
4 and -- and say, I read it or I didn't read it?

5 MR. WESSLER: Sure. So what I think
6 Your Honor is asking is a good question, which
7 is whether and when individualized issues that
8 might relate to the statute of limitations could
9 affect class certification. And I think Rule 23
10 has mechanisms that are designed precisely to
11 assist courts in making those decisions.

12 But I think that's a Rule 23 question,
13 not a question about how we interpret the plain
14 words of -- of -- of this statute.

15 JUSTICE KAGAN: It is a little bit
16 like be careful what you wish for, isn't it?

17 MR. WESSLER: I -- I -- I understand.
18 But I think you can find rafts of cases where
19 courts are struggling with individualized
20 statutes of limitations issues in all sorts of
21 contexts.

22 I mean, this -- this question, what
23 does an individual know and when, doesn't just
24 come up in this context. It comes up in all
25 sorts of limitations periods questions,

1 equitable tolling, actual knowledge in a statute
2 that says actually knew or should have known,
3 where what's at issue is an individual's actual
4 knowledge.

5 And courts have developed methods to
6 determine whether, for instance, the named
7 plaintiff is adequate or typical or whether
8 those individualized issues might affect the --

9 JUSTICE BREYER: Is there anything
10 here --

11 JUSTICE KAVANAUGH: It's not like --

12 JUSTICE BREYER: -- look, the way I
13 listen to this theory is there is nothing,
14 virtually nothing a fund can do to make certain
15 that a member, or someone who has interest in
16 it, the worker, actually does know about a bad
17 investment decision, which is a big class of
18 things, not the ones you brought up.

19 MR. WESSLER: Sure.

20 JUSTICE BREYER: Nothing. They can
21 put someone on the lawn shouting. I shudder to
22 think about the telephone calls: You must
23 listen to the -- you know, not even that will
24 work. Thank goodness.

25 But -- but, therefore, it used to be

1 that were this legislation in a Senate
2 committee, there would be a report, and the
3 report would be this particular provision is
4 likely to make a difference in the cases you
5 mentioned, but it is not likely to make much
6 difference in cases of bad investment decisions
7 and there we intend a six-year statute of
8 limitations.

9 So my question is -- you've probably
10 looked into this, maybe not any more, but I had
11 hoped you would look into it, and is there
12 anything in that history that says that that's
13 what we want, we want six-year statutes of
14 limitations for bad investment decisions, but
15 we'll take three-year statutes where he was, for
16 example, and then you have the six examples you
17 gave. Is there anything?

18 MR. WESSLER: No. We have --

19 JUSTICE BREYER: No?

20 MR. WESSLER: I mean, no one has been
21 able to find -- I mean, I --

22 JUSTICE BREYER: Yeah, yeah.

23 MR. WESSLER: -- I wish I could tell
24 you a different answer, but I can't. There --
25 there is nothing in the history that suggests

1 one way or the other what Congress had in mind
2 specifically when it adopted this framework.

3 But I will say I think that the 1987
4 amendments, which, you know, you heard a little
5 bit about during the first half of the argument,
6 indicate pretty strongly that Congress wanted to
7 remove the one mechanism it had in place in this
8 statute to start the clock running for a broader
9 set of claims, which is the constructive
10 knowledge trigger.

11 JUSTICE KAGAN: Well, what about
12 Mr. Verrilli's argument that that would have
13 seemed -- in the original version, would have
14 seemed a bit insane, right? If -- if -- if the
15 secretary knows, you can't sue, but if you have
16 gotten the disclosure --

17 MR. WESSLER: Right.

18 JUSTICE KAGAN: -- then you -- then --

19 MR. WESSLER: Right. Sorry.

20 JUSTICE KAGAN: No, go ahead. Got it.

21 MR. WESSLER: So I think that is a
22 nice and perhaps clever theory, but it's
23 demonstrably wrong, and here's why: If you look
24 at the original version of ERISA, 29 U.S.C. 1021
25 of the 1974 act, and it's this provision that

1 governed those disclosures that needed to be
2 sent to participants and those disclosures that
3 needed to be sent to the Department of Labor, it
4 was in effect all the way up through the 1987
5 amendments, those documents that were required
6 to be sent to participants, including the SPD
7 and a statement of the plan's assets and
8 liabilities, were among -- were all among the
9 documents that were also being sent to the
10 Department of Labor.

11 So, under the pre-amendment version,
12 even if you kind of think maybe Congress was
13 doing something funky with actual knowledge,
14 participants were, in fact, charged with
15 constructive knowledge of all the documents that
16 ERISA required fiduciaries to send to them in
17 exactly the same way as the Department of Labor
18 was -- had constructive knowledge of the
19 documents that were being provided to it.

20 So there's no gap between the
21 constructive knowledge trigger for those
22 documents provided to participants and those
23 that are provided to the Department of Labor.

24 And I think, you know, what we can
25 see, given that, is that, you know, although

1 there's no legislative history, we do have this
2 D.C. Circuit opinion called Fink, which the
3 court issued about a year before the 1987
4 amendments, and -- and what they said -- what
5 the court said in Fink is, look, these documents
6 that are being filed with the Department of
7 Labor, they're complex, they're complicated,
8 it's even hard for the Department to -- to -- to
9 get on top of everything that's going on here.
10 To have the clock running on this three-year
11 exception based just on the filing of these
12 documents doesn't seem to us to make very good
13 sense.

14 And shortly after that opinion, what
15 happens? Congress amends the statute to take
16 out that constructive knowledge trigger.

17 JUSTICE ALITO: Everything that was --
18 everything that was sent to the Department of
19 Labor was also sent to the participants. Was
20 anything sent to the Department of Labor that
21 wasn't sent to the participants?

22 MR. WESSLER: Yes, the universe of
23 documents that went to the Department of Labor
24 was broader than those documents that were being
25 sent to participants, but what the participants

1 were getting was also being sent to the
2 Department of Labor.

3 JUSTICE ALITO: Well, if -- if what
4 was sent to the Department of Labor was broader,
5 then I don't know what's left of your argument
6 because the participants would be out of court
7 based on things that were sent to the Department
8 of Labor but never sent to them.

9 MR. WESSLER: I -- I agree. I think
10 on the -- on the old version -- I don't agree
11 that that's the end for us, but I agree that
12 under the old version of this statute,
13 participants were -- were being charged with
14 knowledge of documents that they themselves were
15 not receiving.

16 But I don't take the Petitioners here
17 to be arguing that the fact that the Department
18 of Labor was getting more documents suggests
19 that the -- the language that Congress used when
20 it -- or what had in mind when it used "actual
21 knowledge" was something other than the ordinary
22 meaning of that term.

23 I think the argument in their view is
24 how -- how would it make sense if the
25 participants were getting documents and didn't

1 have any constructive knowledge being assessed
2 against them based on those documents. That, I
3 think, does -- is not borne out based on the
4 original version of the statute that was in
5 place up through the amendments.

6 I think just to return to -- to the
7 one kind of final point I'd like to make, which
8 is that when you boil it down, the Petitioners'
9 argument amounts to a theory that actual
10 knowledge really means implied actual knowledge.
11 A court can imply something even if an
12 individual personally doesn't have it.

13 But that's about as oxymoronic as it
14 sounds. And Section 1113 doesn't contain an
15 implied "implied." And reading that term into
16 the statute here would essentially do the exact
17 opposite of what Congress deliberately chose to
18 do when it eliminated any constructive knowledge
19 trigger in 1987.

20 JUSTICE KAGAN: What would you do with
21 cases of willful blindness? I mean, suppose
22 somebody says, you know, I am specifically not
23 going to read this because I want to keep my
24 three-year statute of limitations.

25 MR. WESSLER: Right. So, I mean, just

1 to be clear, willful blindness, all it is, is a
2 jury instruction. So it doesn't permit a court
3 to impute as a matter of law anything about an
4 individual's knowledge. It's the ostrich
5 instruction. You know, you stuck your head in
6 the sand and a jury gets to decide as a -- as
7 the fact finder -- although, here, it would be a
8 judge because we're in ERISA -- you know,
9 whether -- whose credibility -- who's credible
10 and what that actually means.

11 But I will say Congress knows how to
12 adopt willful blindness into a knowledge
13 statute. It has done so on many occasions. It
14 writes a statute, it says you either have actual
15 knowledge of a fact or you took action to avoid
16 obtaining such knowledge. There are dozens of
17 statutes that look like that.

18 Congress has not done that here.

19 JUSTICE GORSUCH: Tell me what --

20 JUSTICE KAGAN: So that person still
21 has the six-year statute?

22 MR. WESSLER: I mean, willful
23 blindness has never been imported into ERISA,
24 and -- and I don't think there's any statutory
25 basis to do so here, Justice Kagan. As yourself

1 -- as you pointed out earlier, willful blindness
2 itself is not the same as actual knowledge. And
3 I think that's what this Court said --

4 JUSTICE GORSUCH: Well, but, counsel
5 --

6 MR. WESSLER: -- in Global-Tech.

7 JUSTICE GORSUCH: -- you started this
8 by -- by acknowledging that often it is a jury
9 instruction. And -- and my understanding is
10 similar, that it's -- it can be evidence --

11 MR. WESSLER: Yes.

12 JUSTICE GORSUCH: -- of actual
13 knowledge.

14 MR. WESSLER: Yes.

15 JUSTICE GORSUCH: Right? That if
16 someone protests too much that they have
17 failed -- that they don't know anything about
18 it, I was -- I had my head stuck in the sand
19 over here, a reasonable juror can say I just
20 don't believe that and I want to -- that's
21 actually evidence that you knew what was going
22 on.

23 And -- and you're not suggesting that
24 that kind of use of willful blindness is
25 impermissible here, are you?

1 MR. WESSLER: I -- I -- I think that
2 -- just -- just to back up, since we're in
3 ERISA, you know, you're -- you wouldn't be in
4 front of a jury.

5 JUSTICE GORSUCH: Of course.

6 MR. WESSLER: You would have --

7 JUSTICE GORSUCH: Of course.

8 MR. WESSLER: -- a judge making this
9 fact-finding decision, and I think absolutely,
10 at that stage, credibility plays an enormous
11 role and -- and likely will play an enormous
12 role in whether somebody was -- was either not
13 being accurate when they said they didn't read
14 something or that they didn't understand it.

15 And I think that's precisely the way
16 that these statutes of limitations issues get
17 resolved when they pass through the summary
18 judgment stage to -- to reach a fact finder.

19 JUSTICE KAGAN: But I guess what I'd
20 -- my fault for not expressing the question
21 clearly enough, but does one get past the
22 summary judgment stage if it's clear that one
23 was being willfully blind?

24 MR. WESSLER: I -- I still think that
25 there's a -- yes, because I still think there's

1 a credibility issue in play, and willful
2 blindness itself is a fact-finding tool. It's a
3 -- it's a -- it's -- it's an instruction to the
4 fact finder to draw inferences about an
5 individual's behavior or conduct.

6 JUSTICE KAVANAUGH: Can I follow up on
7 one question Justice Ginsburg asked, which --
8 and read you something in the reply brief? The
9 reply brief says "the need for individualized
10 timing determinations should preclude class
11 certification in virtually every case." And I
12 just want to give you a chance to respond to
13 that.

14 MR. WESSLER: If I may. I mean, we --
15 we don't agree with that characterization. And
16 it may be that in certain cases individualized
17 issues will pose difficulties for certifying
18 classes. You can find that across the range of
19 statutes of limitations issues when they arise
20 at the Rule 23 stage. But to say as a -- as a
21 matter of -- that it's a categorical rule that
22 that would be true is, I think, inaccurate and
23 -- and would -- would, I think, undermine the
24 point of Rule 23 itself.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Guarnieri.

4 ORAL ARGUMENT OF MATTHEW GUARNIERI
5 FOR THE UNITED STATES, AS AMICUS CURIAE,
6 SUPPORTING THE RESPONDENT

7 MR. GUARNIERI: Thank you, Mr. Chief
8 Justice, and may it please the Court:

9 This case can begin and end with the
10 plain language of Section 1113(2). The
11 three-year limitations period in Section 1113(2)
12 begins to run only when the plaintiff has actual
13 knowledge of the breach or violation. To have
14 actual knowledge, the plaintiff's knowledge must
15 exist as a matter of fact. Knowledge that is
16 imputed or implied to the plaintiff as a matter
17 of law does not suffice. That is what "actual"
18 means in this context. If that standard is not
19 met, then the default six-year period in
20 Section 1113(1) governs the timeliness of the
21 plaintiff's claims.

22 Now Petitioners argue that in applying
23 Section 1113(2), a court should presume that the
24 plaintiff has actual knowledge of the contents
25 of the ERISA disclosures that the plaintiff

1 receives at the precise moment that the
2 plaintiff receives them, even if the plaintiff
3 indisputably never read those disclosures.

4 That approach cannot be squared with
5 the language of the statute. In ordinary
6 English, no one would say that a person has
7 actual knowledge of the contents of a document
8 that the person has never read. So too here,
9 the three-year period begins to run only when a
10 plaintiff is, in fact, aware of the relevant
11 information. Constructive knowledge is not
12 sufficient.

13 CHIEF JUSTICE ROBERTS: How far do you
14 go with the requirement of actual knowledge?
15 The question that was asked earlier, do you have
16 to understand what the words mean? Or --

17 MR. GUARNIERI: Yes, we think you do,
18 Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: So even if
20 it's in -- you'd say you have actual knowledge
21 of the significance of the information, even
22 though you don't know what a leveraged,
23 diversified, you know, hedge, whatever is?

24 MR. GUARNIERI: As a general matter,
25 the statute requires knowledge, and we think

1 knowledge connotes that there has to be some
2 degree of comprehension.

3 Now, as Mr. Wessler alluded to
4 earlier, there is a distinct question not
5 presented here, which is, you know, what do you
6 need to have actual knowledge of, what does it
7 mean to have actual knowledge of the breach or
8 violation?

9 But at least with respect to the
10 question here, I mean, the statute requires
11 actual knowledge. And we think that means you
12 have to sort of actually be aware of the
13 relevant information.

14 One can imagine, to -- to take a
15 simple example, one can imagine a circumstance
16 in which the -- the plan participant does not
17 speak English and receives disclosures that are
18 written in English.

19 And in that case I think it would be
20 silly to say that the -- the plan participant,
21 nonetheless, should be conclusively presumed to
22 have actual knowledge of the contents of
23 disclosures that, by hypothesis, that plaintiff
24 would not have understood even if she had read
25 them.

1 JUSTICE SOTOMAYOR: I -- I'd like to
2 follow through on the Justice -- Chief Justice's
3 question. I am reading it, actual knowledge of
4 the breach or violation. Let's assume someone
5 read it. Go through Justice Kagan's question,
6 earlier questions.

7 Someone read it and says: I didn't
8 understand it was a breach. I didn't understand
9 it was a violation.

10 MR. GUARNIERI: If -- if you do not
11 understand --

12 JUSTICE SOTOMAYOR: I read the facts.
13 I read it. I saw it. I saw it, exactly what
14 was here, the distribution of investment here.

15 MR. GUARNIERI: Well, if -- if you do
16 not understand the disclosures that you have
17 received, we do not think as a matter of
18 ordinary English you can be said to have actual
19 knowledge of the contents of those disclosures.

20 Now, stepping back, as a general
21 matter, with respect to that separate question
22 that I alluded to earlier, what is the breach or
23 violation, you know, what is it that you have to
24 have actual knowledge of, in -- every court to
25 examine that has concluded that you do not need

1 to have knowledge that it is a legal violation
2 of ERISA. So we don't think the standard would
3 go that far.

4 But, you know, if the -- if the
5 testimony is, if the evidence is that the
6 plaintiff says, you know, I -- I looked at that
7 disclosure but I -- I did not understand the
8 import of the terms used in that -- in it,
9 then --

10 JUSTICE SOTOMAYOR: That's a --

11 MR. GUARNIERI: -- you -- have not met
12 --

13 JUSTICE SOTOMAYOR: -- line that --

14 MR. GUARNIERI: -- the actual knowledge
15 standard.

16 JUSTICE SOTOMAYOR: I'm having -- that
17 line is what I don't understand.

18 MR. GUARNIERI: In any event, the
19 conclusive legal presumption of actual knowledge
20 that Petitioners are seeking in this case is
21 nothing like that.

22 The rule that Petitioners are
23 advocating here would impute to every plan
24 participant actual knowledge of the contents of
25 all of the mandatory ERISA disclosures that the

1 -- that the plaintiff receives.

2 JUSTICE KAGAN: Mr. Guarnieri, I mean,
3 if we're going to be a textualist, it's -- it's
4 actual knowledge of the breach or the violation.
5 It's not actual knowledge of the contents of the
6 disclosure statement.

7 So that would suggest that your
8 position has to go even further, that you have
9 to have actual knowledge of the breach, meaning
10 that you need to know that, you know, whatever
11 investment allocation it was, in fact, breached
12 ERISA.

13 MR. GUARNIERI: Well, I -- I don't
14 think that that's correct, Justice Kagan. We
15 don't think you actually have to know that it
16 was a legal violation of ERISA. We think in
17 that respect the Ninth Circuit got this
18 basically right in its articulation of the
19 standard.

20 The -- the idea is that the plaintiff
21 has to have actual knowledge of the essential
22 nature of the breach or violation.

23 JUSTICE KAGAN: So that makes sense.

24 MR. GUARNIERI: So it's general --

25 JUSTICE KAGAN: I guess I'm just

1 pointing out that that's not -- I mean, if
2 you're really taking the text seriously, I think
3 you would come out in a different place.

4 MR. GUARNIERI: Well, we are trying to
5 take the text quite seriously and we do think
6 Congress used precise language in -- in this
7 particular limitations provision, which requires
8 actual knowledge as opposed to simply knowledge.

9 But, you know, to know that there's a
10 breach, I think, in this context, for example,
11 in a -- in a duty of prudence, if the -- if the
12 claim is that the fiduciary violated the duty of
13 prudence, then the plaintiff would need to know
14 that what the fiduciary did was imprudent but
15 not necessarily that what the fiduciary did
16 violated ERISA.

17 And the same would be true for claims
18 sounding in the duty of loyalty or prohibited
19 transactions. You need to know sort of the
20 essential nature of the wrongdoing but not that
21 it violated ERISA.

22 JUSTICE ALITO: But look, you have a
23 strong textual argument. There's no question
24 about that.

25 But even putting aside the issue of

1 whether the potential plaintiff has to know that
2 it was a breach, even assuming that all the
3 plaintiff has to know are the facts constituting
4 the breach, why would Congress think it was
5 worthwhile to put this actual knowledge
6 requirement in? Why not just have the six-year
7 period in recognition of the fact that a lot of
8 people, maybe most people, maybe nearly
9 everybody, doesn't read these things, doesn't
10 understand them. Why is it worth the effort?

11 MR. GUARNIERI: Well, Justice Alito, I
12 think the statute reflects the following
13 intuition. I mean, the -- the -- the six-year
14 provision really is the backstop. So in general
15 you have six years from the breach or violation
16 in order to bring suit.

17 The three-year provision only comes
18 into play if the plaintiff acquires actual
19 knowledge of the breach or violation, in years
20 1, 2, or 3, because after that point the
21 six-year period will expire before the
22 three-year period.

23 JUSTICE ALITO: Yeah, I under --

24 MR. GUARNIERI: So basically --

25 JUSTICE ALITO: I understand that.

1 But -- but, you know, putting aside the -- the
2 -- the super honest plaintiff who is an expert
3 on investments and actually did read it and
4 actually did understand it and testifies, yeah,
5 okay, you got me, I did it, what else is this
6 going to achieve?

7 MR. GUARNIERI: The idea is that the
8 plaintiff who does happen to acquire actual
9 knowledge of the relevant information within
10 those first three years can be expected to bring
11 suit within three years and does not need the
12 full six-year period in which to bring suit.
13 And --

14 JUSTICE KAVANAUGH: I think Mr. --
15 keep going.

16 MR. GUARNIERI: There are -- there are
17 reasons that Congress would not have wanted a
18 plaintiff in those circumstances. The plaintiff
19 who really does have actual knowledge to delay
20 bringing suit, delay bringing -- many of these
21 suits are brought for the benefit of the plan as
22 a whole, and a delay of a substantial period of
23 time -- of time can rebound to the disadvantage
24 of other plan participants who would have been
25 better served had the suit been brought earlier.

1 JUSTICE KAVANAUGH: I think --

2 MR. GUARNIERI: That's the basic logic
3 of having the two standards in the statute.

4 JUSTICE KAVANAUGH: I think Mr.
5 Verrilli's point, though, is that it's
6 impossible to prove actual knowledge under the
7 answers that have been given here and,
8 therefore, you end up with a de facto six-year
9 statute of limitations, which is very unusual, a
10 long period of time, going to cause a lot of
11 negative consequences, he says, and, therefore,
12 that context means that we must be reading
13 actual knowledge wrong.

14 So how do you respond to that?

15 MR. GUARNIERI: Of course we disagree
16 with Mr. Verrilli's articulation of the policy
17 balance that's at issue here.

18 But just to take the question on
19 directly, there are many reported decisions
20 applying the actual knowledge standard to find a
21 suit as time barred, even under the correct
22 understanding of the statute, meaning the
23 knowledge must, in fact, be actual and not
24 merely imputed to the plaintiff as a matter of
25 law.

1 Now --

2 JUSTICE ALITO: Well, give me an
3 example where that could be done on summary
4 judgment, a real-world, realistic example of
5 where that could be done on summary judgment.

6 MR. GUARNIERI: Well, for example, I
7 mean, a common fact pattern is that a plan
8 participant will consult with another financial
9 professional who will explain to the plan
10 participant, you know, the investments that are
11 in your retirement fund are imprudent for
12 someone in your circumstances.

13 A conversation like that would give
14 that plaintiff actual knowledge of the breach or
15 violation, if the claim is that the investment
16 was imprudent. So -- and that's not fanciful.
17 There are cases like that.

18 So it's -- it's not the case that
19 rejecting the rule that Petitioners advocate
20 here would make the three-year limitations
21 period a nullity. It does have real force and
22 effect, and it has had real force and effect in
23 the many circuits that have adopted the correct
24 interpretation of the statute.

25 And on that point I'd like to address

1 one claim that Mr. Verrilli --

2 JUSTICE KAVANAUGH: You -- can you
3 make sure to address Justice Ginsburg's class
4 certification question before you finish?

5 MR. GUARNIERI: Sure. Well, I
6 entirely agree with Mr. Wessler's answer on that
7 question. I mean, in general, the fact that you
8 may have an individualized limitations defense
9 with respect to some members of a putative class
10 would not necessarily foreclose certification of
11 that class.

12 I mean, in the same way you might have
13 a -- a -- a release and settlement defense with
14 respect to some plaintiffs and not -- not
15 others.

16 The injuries may be different for
17 members of the class.

18 CHIEF JUSTICE ROBERTS: Well, except
19 --

20 MR. GUARNIERI: The fact that there
21 are --

22 CHIEF JUSTICE ROBERTS: -- if you
23 think that the actual knowledge issue would be
24 satisfied, or requirement, in most cases. In
25 other words, there -- there'd be few members of

1 a purported class action because most people are
2 not going to have actual knowledge.

3 MR. GUARNIERI: Well, I -- I think in
4 general the Rule 23 question would be whether
5 the -- the -- the injuries asserted by the
6 plaintiffs are amenable to class-wide treatment.
7 And the fact that there is a defense that might
8 be applicable to some but not other members of
9 their class would not necessarily preclude class
10 certification.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. Mr. Verrilli, five minutes.

13 REBUTTAL ARGUMENT OF DONALD B.
14 VERRILLI, JR. ON BEHALF OF THE PETITIONERS

15 MR. VERRILLI: Thank you, Mr. Chief
16 Justice.

17 Three points: First, I'd like to
18 return to the 1974 version of the statute and I
19 -- and in particular to the question that
20 Justice Gorsuch asked me at -- at the end of my
21 opening argument.

22 I think what we heard from my friends
23 on the other side here is that -- it is two
24 things. First, that the -- with respect to the
25 1974 statute, the extreme anomaly that I

1 identified is there, that it doesn't make any
2 sense to think that the statute -- that Congress
3 would have adopted a statute that said the
4 three-year statute of limitations is going to be
5 triggered based on the information provided to
6 DOL but not on the information --

7 JUSTICE SOTOMAYOR: I'm sorry, Mr. --

8 MR. VERRILLI: -- provided to you.

9 JUSTICE SOTOMAYOR: -- Verrilli, I
10 went back to that statute. And what it says:
11 "On which a report from which he could
12 reasonably be expected to have obtained
13 knowledge of such brief."

14 I read that as potentially excluding
15 those documents that only the secretary has. I
16 think your -- your adversary was right, that the
17 documents that the individual received could
18 give them reasonably be expected to have
19 obtained knowledge, but not necessarily those
20 that only the secretary receives.

21 MR. VERRILLI: So, Justice Sotomayor,
22 I -- I understood my friend on the other side to
23 say the opposite, which is to say that it would
24 -- it wouldn't -- there was no need to have any
25 -- any knowledge provision triggered by the

1 disclosures that went to the individual because
2 everything that went to the DOL was going to
3 trigger the three years anyway.

4 And I think, if you think about that
5 for a minute, that blows up their whole theory
6 of the statute, because what they're saying is
7 in 1974 Congress enacted a statute that was
8 actually quite harsh, that the default was going
9 to be a three-year statute of limitations if the
10 information sufficient to show breach was sent
11 to DOL whether you got it or not.

12 It would actually be the odd case,
13 that was the six years under that theory, not
14 the normal case.

15 And -- and, of course, when Congress
16 amended the statute in 1987 it did not change
17 the words "had actual knowledge." So the
18 meaning you're trying to ascertain is the
19 meaning that those words had in 1974.

20 And so I -- I just think that their
21 whole -- the whole theory, nobody reads as a,
22 you know, that's all blown up by their -- what
23 they said about what happened in 1974.

24 Now, the second point, if I could,
25 with respect to the -- the -- Justice Breyer,

1 you asked about consequences and there was a
2 robust discussion about the class action impact
3 here.

4 I -- I do think what my friends on the
5 other side are saying essentially is that --
6 they didn't put it exactly this way, they spoke
7 at a higher level of abstraction -- but
8 basically what they're saying is here's what
9 will happen in class actions. You'll just defer
10 the question of whether there's a statute of
11 limitations defense to the remedial phase. And
12 then you'll have trials at the remedial phase of
13 a class action about whether every single one of
14 the class members had this actual knowledge or
15 not based on these kinds of circumstantial proof
16 that we were talking about. Just think of what
17 a catastrophe that's going to be in the class
18 action context.

19 So in the unlikely event that this
20 Court disagrees with our position on the merits,
21 I would hope that there would be clarity here as
22 to how this -- this reading will play out in a
23 class action context because that would be a
24 staggering, enormous negative consequence.
25 After all, it does put the cart before the horse

1 because statute of limitations is a threshold
2 defense.

3 And so the idea that you would do it
4 in that manner, I think is just -- I -- it's a
5 catastrophic problem.

6 And then with respect to the
7 discussion, the colloquy on willful blindness, I
8 understand my friend's position that it's just a
9 jury instruction that allows an inference of
10 actual knowledge.

11 But, respectfully, I don't think
12 that's the way this Court described it in the
13 Global-Tech decision.

14 The Court basically said, as I read
15 Global-Tech, that -- that it's not -- that proof
16 of willful blindness, proof of the circumstances
17 that would allow you to establish willful
18 blindness, is not proof of subjective awareness,
19 but it's something that you might consider as
20 being just as culpable or that -- or -- or that
21 they, in effect, have actual knowledge, but not
22 that they actually have actual knowledge. It's
23 an imputation.

24 I -- I just think that's as clear as
25 can be from what this Court said in Global-Tech.

1 And so I think the question here is whether in
2 this very different context, where, you know, as
3 I said, these actual knowledge standards come
4 virtually exclusively from criminal enforcement
5 proceedings where you're trying to measure the
6 individual defendant's culpability.

7 And of course there should be an
8 inquiry in that situation into the specific
9 state of mind of the defendant. That's what the
10 whole culpability inquiry is about.

11 Here you're talking about a statute of
12 limitations. And in particular -- if I might
13 finish -- a statute of limitations that's
14 designed this three-year period to protect the
15 interests of defendants. And so it's important
16 to balance those interests when reading the
17 statute.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel. The case is submitted.

21 (Whereupon, at 11:06 a.m., the case
22 was submitted.)

23

24

25

Official - Subject to Final Review

1	across ^[3] 28:20 31:10 55:18 act ^[4] 16:11 20:13 34:14 47:25 action ^[14] 10:15,24 13:1 14:20 15:25 16:1 25:8 43:22 52:15 68:1 71:2,13,18,23 actions ^[1] 71:9 actual ^[101] 3:15 4:7 5:4 6:2,17,24 7:2,11,12,20,23 8:5,8 12:22 13:2,4,6,9,18,24 14:3,21 15:9,18 16:19 17:6,7,10 19:21 21:8,21 22:6,21 23:13,21,22 24:3,14 25:18 26:18,19 27:19 33:2,5,10,20 37:13 39:10,18 41:5,8,19 42:12 45:1,3 48:13 50:20 51:9,10 52:14 53:2,12 56:12,14,17,24 57:7,14,20 58:6,7,11,22 59:3,18,24 60:14,19,24 61:4,5,9,21 62:8 63:5,18 64:8,19 65:6,13,20,23 66:14 67:23 68:2 70:17 71:14 72:10,21,22 73:3 actually ^[26] 4:8 6:3,10,20 9:22,24,25 12:18 14:6 24:11 25:22 27:14,14,21 34:12 45:2,16 52:10 53:21 58:12 61:15 64:3,4 70:8,12 72:22 add ^[1] 37:11 addition ^[1] 41:25 address ^[2] 66:25 67:3 addressed ^[1] 12:23 adequate ^[1] 45:7 adopt ^[2] 22:4 52:12 adopted ^[4] 13:20 47:2 66:23 69:3 advance ^[2] 16:23,24 adversary ^[1] 69:16 advocate ^[1] 66:19 advocating ^[2] 29:23 60:23 affect ^[2] 44:9 45:8 agree ^[6] 32:8 50:9,10,11 55:15 67:6 ahead ^[1] 47:20 AL ^[1] 1:4 ALITO ^[18] 18:1,8 35:10 36:21 37:6,20,22 39:4,9 41:11,18 49:17 50:3 62:22 63:11,23,25 66:2 allocation ^[2] 11:21 61:11 allocations ^[2] 3:21 34:5 allow ^[3] 39:21 42:16 72:17 allows ^[1] 72:9 alluded ^[2] 58:3 59:22 almost ^[4] 34:3 35:7 37:14,15 already ^[1] 23:10 alternative ^[1] 11:7 Although ^[3] 35:4 48:25 52:7 amenable ^[2] 36:1 68:6 amended ^[1] 70:16 amendment ^[1] 19:20 amendments ^[4] 47:4 48:5 49:4 51:5 amends ^[1] 49:15 amicus ^[3] 1:25 2:10 56:5 among ^[3] 35:1 48:8,8 amount ^[1] 29:8 amounts ^[1] 51:9 analogy ^[2] 13:17 15:16 analysis ^[1] 20:24 anomaly ^[1] 68:25	2	another ^[2] 38:9 66:8 answer ^[4] 25:18 31:21 46:24 67:6 answers ^[1] 65:7 anybody ^[2] 12:7 42:20 anyway ^[1] 70:3 appeals ^[1] 23:12 APPEARANCES ^[1] 1:17 Appendix ^[3] 11:6,19 34:2 applicable ^[1] 68:8 application ^[2] 31:3,5 applies ^[1] 21:11 apply ^[2] 21:3 26:13 applying ^[2] 56:22 65:20 apprised ^[2] 3:20 25:4 approach ^[2] 29:21 57:4 arbitrariness ^[1] 4:20 aren't ^[1] 31:9 argue ^[1] 56:22 arguing ^[3] 17:12 19:6 50:17 argument ^[30] 1:14 2:2,5,8,12 3:4,8 9:21 10:3 12:7,12,14,16 18:17,17 21:25 27:17 28:18 32:22 36:3 37:8 47:5,12 50:5,23 51:9 56:4 62:23 68:13,21 arguments ^[3] 19:19 31:8,12 arise ^[2] 38:22 55:19 articulated ^[1] 43:12 articulation ^[2] 61:18 65:16 ascertain ^[2] 15:24 70:18 aside ^[4] 25:13,20 62:25 64:1 asserted ^[1] 68:5 assertion ^[1] 8:12 assessed ^[1] 51:1 assessing ^[1] 21:14 asset ^[2] 11:21 34:5 assets ^[3] 42:7,9 48:7 assist ^[1] 44:11 Assistant ^[1] 1:22 assume ^[5] 8:14 9:24 40:11 43:16 59:4 assuming ^[1] 63:2 assumption ^[5] 9:21 10:1,4 12:17 19:7 attend ^[2] 30:21,23 attorney ^[1] 28:5 available ^[1] 23:15 average ^[1] 10:22 avoid ^[1] 52:15 aware ^[2] 57:10 58:12 awareness ^[11] 4:2,5 7:5 13:19,23 14:21,23 18:21 27:23 33:4 72:18	3	basic ^[2] 33:24 65:2 basically ^[4] 61:18 63:24 71:8 72:14 basis ^[3] 4:19 38:23 52:25 begin ^[1] 56:9 begins ^[3] 33:8 56:12 57:9 behalf ^[8] 1:19,21 2:4,7,14 3:9 32:23 68:14 behavior ^[1] 55:5 believe ^[1] 53:20 belongs ^[1] 31:10 below ^[1] 25:15 benefit ^[2] 16:7 64:21 best ^[2] 28:11 34:14 better ^[1] 64:25 between ^[1] 48:20 beyond ^[1] 31:17 bias ^[2] 4:17 29:4 big ^[2] 11:14 45:17 bit ^[6] 14:1,14 19:2 44:15 47:5,14 blind ^[4] 12:9 14:4 15:12 54:23 blindness ^[19] 7:7 12:6,20,21 13:7 14:2,9,16 22:17 51:21 52:1,12,23 53:1,24 55:2 72:7,16,18 blown ^[1] 70:22 blows ^[1] 70:5 Blue ^[1] 5:1 body ^[3] 6:7,7 21:10 boil ^[1] 51:8 bond ^[1] 11:22 borne ^[1] 51:3 both ^[1] 32:7 bound ^[1] 13:18 box ^[1] 27:13 breach ^[38] 3:13,15 5:5,8,15 10:15 12:1,2 17:21 29:11,14 33:13 34:11,25 38:4,8,24 39:1 40:14 41:23 42:4,13 43:9 56:13 58:7 59:4,8,22 61:4,9,22 62:10 63:2,4,15,19 66:14 70:10 breached ^[1] 61:11 breaching ^[1] 34:16 breadth ^[1] 32:16 BREYER ^[10] 27:24 28:4,9,16 45:9,12,20 46:19,22 70:25 Brief ^[5] 5:1 24:5 27:19 55:8,9 69:13 bring ^[6] 4:22 19:24 38:14 63:16 64:10,12 bringing ^[2] 64:20,20 broad ^[5] 17:13,15,17 38:3 41:24 broader ^[3] 47:8 49:24 50:4 brought ^[4] 3:13 45:18 64:21,25 Brown ^[2] 20:10,25 burdens ^[1] 27:1 Burwell ^[1] 21:2 busy ^[1] 34:6	4	back ^[6] 8:11 34:9 42:24 54:2 59:20 69:10 backstop ^[3] 31:6,16 63:14 bad ^[4] 15:1 45:16 46:6,14 balance ^[5] 4:15 29:22 35:4 65:17 73:16 balanced ^[1] 29:22 bar ^[4] 3:24 33:22 35:4 40:23 barred ^[1] 65:21 based ^[8] 30:8,10 49:11 50:7 51:2,3 69:5 71:15	5	basic ^[2] 33:24 65:2 basically ^[4] 61:18 63:24 71:8 72:14 basis ^[3] 4:19 38:23 52:25 begin ^[1] 56:9 begins ^[3] 33:8 56:12 57:9 behalf ^[8] 1:19,21 2:4,7,14 3:9 32:23 68:14 behavior ^[1] 55:5 believe ^[1] 53:20 belongs ^[1] 31:10 below ^[1] 25:15 benefit ^[2] 16:7 64:21 best ^[2] 28:11 34:14 better ^[1] 64:25 between ^[1] 48:20 beyond ^[1] 31:17 bias ^[2] 4:17 29:4 big ^[2] 11:14 45:17 bit ^[6] 14:1,14 19:2 44:15 47:5,14 blind ^[4] 12:9 14:4 15:12 54:23 blindness ^[19] 7:7 12:6,20,21 13:7 14:2,9,16 22:17 51:21 52:1,12,23 53:1,24 55:2 72:7,16,18 blown ^[1] 70:22 blows ^[1] 70:5 Blue ^[1] 5:1 body ^[3] 6:7,7 21:10 boil ^[1] 51:8 bond ^[1] 11:22 borne ^[1] 51:3 both ^[1] 32:7 bound ^[1] 13:18 box ^[1] 27:13 breach ^[38] 3:13,15 5:5,8,15 10:15 12:1,2 17:21 29:11,14 33:13 34:11,25 38:4,8,24 39:1 40:14 41:23 42:4,13 43:9 56:13 58:7 59:4,8,22 61:4,9,22 62:10 63:2,4,15,19 66:14 70:10 breached ^[1] 61:11 breaching ^[1] 34:16 breadth ^[1] 32:16 BREYER ^[10] 27:24 28:4,9,16 45:9,12,20 46:19,22 70:25 Brief ^[5] 5:1 24:5 27:19 55:8,9 69:13 bring ^[6] 4:22 19:24 38:14 63:16 64:10,12 bringing ^[2] 64:20,20 broad ^[5] 17:13,15,17 38:3 41:24 broader ^[3] 47:8 49:24 50:4 brought ^[4] 3:13 45:18 64:21,25 Brown ^[2] 20:10,25 burdens ^[1] 27:1 Burwell ^[1] 21:2 busy ^[1] 34:6	6	back ^[6] 8:11 34:9 42:24 54:2 59:20 69:10 backstop ^[3] 31:6,16 63:14 bad ^[4] 15:1 45:16 46:6,14 balance ^[5] 4:15 29:22 35:4 65:17 73:16 balanced ^[1] 29:22 bar ^[4] 3:24 33:22 35:4 40:23 barred ^[1] 65:21 based ^[8] 30:8,10 49:11 50:7 51:2,3 69:5 71:15	9	breach ^[38] 3:13,15 5:5,8,15 10:15 12:1,2 17:21 29:11,14 33:13 34:11,25 38:4,8,24 39:1 40:14 41:23 42:4,13 43:9 56:13 58:7 59:4,8,22 61:4,9,22 62:10 63:2,4,15,19 66:14 70:10 breached ^[1] 61:11 breaching ^[1] 34:16 breadth ^[1] 32:16 BREYER ^[10] 27:24 28:4,9,16 45:9,12,20 46:19,22 70:25 Brief ^[5] 5:1 24:5 27:19 55:8,9 69:13 bring ^[6] 4:22 19:24 38:14 63:16 64:10,12 bringing ^[2] 64:20,20 broad ^[5] 17:13,15,17 38:3 41:24 broader ^[3] 47:8 49:24 50:4 brought ^[4] 3:13 45:18 64:21,25 Brown ^[2] 20:10,25 burdens ^[1] 27:1 Burwell ^[1] 21:2 busy ^[1] 34:6	A	a.m ^[3] 1:15 3:2 73:21 ability ^[4] 18:2,9 19:13 28:12 able ^[2] 36:18 46:21 above-entitled ^[1] 1:13 absolutely ^[2] 41:22 54:9 abstraction ^[1] 71:7 accept ^[1] 35:15 access ^[1] 23:14 according ^[1] 10:20 accords ^[1] 33:6 account ^[2] 42:3,8 accurate ^[2] 10:1 54:13 achieve ^[1] 64:6 acknowledging ^[1] 53:8 acquire ^[1] 64:8 acquires ^[1] 63:18	B	called ^[1] 49:2 calls ^[2] 42:6 45:22 came ^[2] 1:13 19:21 cannot ^[1] 57:4 careful ^[1] 44:16	C	called ^[1] 49:2 calls ^[2] 42:6 45:22 came ^[2] 1:13 19:21 cannot ^[1] 57:4 careful ^[1] 44:16
----------	--	----------	---	----------	--	----------	---	----------	--	----------	---	----------	--	----------	--	----------	--	----------	--

Official - Subject to Final Review

<p>cart ^[1] 71:25 Case ^[35] 3:4 18:6 22:25 23:4,19 24:13,13,13 25:15 26:5,14 29:11 30:3,18 33:18 36:10,11 40:9,12 41:24 42:12,24,25 43:12,13,22 55:11 56:9 58:19 60:20 66:18 70:12,14 73:20,21 cases ^[11] 26:9,23 30:6 39:5 44:18 46:4,6 51:21 55:16 66:17 67:24 catastrophe ^[1] 71:17 catastrophic ^[1] 72:5 categorical ^[1] 55:21 cause ^[2] 13:1 65:10 certain ^[5] 16:11 26:3,4 45:14 55:16 certainly ^[1] 18:9 certification ^[5] 44:9 55:11 67:4,10 68:10 certifying ^[1] 55:17 chance ^[1] 55:12 change ^[2] 18:14 70:16 characterization ^[2] 17:10 55:15 charged ^[4] 48:14 50:13 CHIEF ^[23] 3:3,10 8:10,19,22 9:1,9,13 12:15 31:22 32:19,24 56:1,7 57:13,18,19 59:2 67:18,22 68:11,15 73:19 chock-a-block ^[1] 34:4 choice ^[2] 33:20 39:15 chooses ^[1] 20:1 chose ^[3] 33:10 39:14 51:17 CHRISTOPHER ^[1] 1:7 Circuit ^[15] 3:23 4:3 5:10 7:6 13:20 18:22 22:25 23:3,18,25 24:1,3 43:11 49:2 61:17 Circuit's ^[1] 4:14 circuits ^[1] 66:23 circumstance ^[1] 58:15 circumstances ^[6] 13:21 28:12 42:24 64:18 66:12 72:16 circumstantial ^[6] 30:7,9,15 36:4,8 71:15 claim ^[9] 38:7,14,16 41:23 42:5 43:4 62:12 66:15 67:1 claimed ^[1] 3:22 claiming ^[2] 3:16 12:7 claims ^[11] 3:13 33:13 34:25 38:5,7,22 41:25 42:1 47:9 56:21 62:17 clarity ^[1] 71:21 class ^[19] 43:22,24 44:2,9 45:17 55:10 67:3,9,11,17 68:1,9,9 71:2,9,13,14,17,23 class-wide ^[1] 68:6 classes ^[1] 55:18 clear ^[4] 10:5 52:1 54:22 72:24 clearly ^[1] 54:21 clever ^[1] 47:22 click ^[1] 11:13 clicked ^[5] 18:16,18 27:13 30:19,20 client ^[2] 18:2 36:22 clock ^[4] 34:19 42:13 47:8 49:10 co-fiduciary ^[5] 38:7,8,13,19 42:1 Code ^[1] 8:4</p>	<p>colloquy ^[1] 72:7 comatose ^[3] 25:16,20 26:8 come ^[14] 11:3 24:13,24 31:14,19 35:24 36:19 37:4 38:13 40:25 44:3,24 62:3 73:3 comes ^[4] 8:2 40:9 44:24 63:17 coming ^[2] 32:16 42:24 COMMITTEE ^[3] 1:4 3:5 46:2 commodities ^[2] 3:18 11:24 common ^[3] 8:15 20:13 66:7 common-sense ^[1] 33:16 companies ^[1] 41:14 complex ^[1] 49:7 complicated ^[2] 33:25 49:7 comprehensible ^[1] 10:22 comprehension ^[1] 58:2 conclude ^[1] 41:6 concluded ^[4] 13:3 20:6,11 59:25 conclusion ^[2] 24:14,24 conclusive ^[1] 60:19 conclusively ^[1] 58:21 concrete ^[1] 34:24 conditions ^[1] 27:8 conduct ^[1] 55:5 conflict ^[2] 23:19,20 Congress ^[34] 10:4,8,12,14 11:1 19:23 20:1 31:13,14,17 32:1 33:1,10,19 34:18 35:3 37:11,22 39:12 42:14 47:1,6 48:12 49:15 50:19 51:17 52:11,18 62:6 63:4 64:17 69:2 70:7,15 conjunction ^[1] 21:17 connotes ^[1] 58:1 consensus ^[1] 24:10 consequence ^[1] 71:24 consequences ^[2] 65:11 71:1 consider ^[1] 72:19 considerably ^[1] 29:9 considering ^[1] 4:24 consistent ^[2] 31:3,5 constituting ^[1] 63:3 constructive ^[2] 12:21 13:3 17:14,15,17,24 19:25 21:22,25 22:4,13,18 33:11 47:9 48:15,18,21 49:16 51:1,18 57:11 consult ^[1] 66:8 contain ^[2] 34:11 51:14 contained ^[3] 6:8 36:15 43:17 contains ^[1] 11:11 contents ^[6] 56:24 57:7 58:22 59:19 60:24 61:5 context ^[22] 7:3,4,22,24 12:25 15:17 20:23 21:11,16,16 24:4,9 35:25 37:4 42:25 44:24 56:18 62:10 65:12 71:18,23 73:2 contexts ^[2] 7:25 44:21 contradict ^[1] 36:20 contradistinction ^[1] 39:20 contrary ^[1] 34:13 contrast ^[1] 5:21 controls ^[1] 33:6 conversation ^[1] 66:13 conveyed ^[1] 10:19 CORPORATION ^[2] 1:3 3:5</p>	<p>correct ^[10] 4:22 6:19 14:25 15:15 28:7 37:2 43:12 61:14 65:21 66:23 Cosmetic ^[1] 20:13 costs ^[1] 29:17 counsel ^[5] 32:20 53:4 56:2 68:12 73:20 count ^[1] 35:6 country ^[1] 28:21 course ^[14] 10:13 12:24 19:24 28:2,2 29:17 36:2,17 37:24 54:5,7 65:15 70:15 73:7 COURT ^[45] 1:1,14 3:11 12:23,24 13:5,21 20:6,10 21:3 23:12 29:20 30:25 32:25 35:14 37:17 39:17,21 40:9,10,15 41:4,6 42:2,16 43:7,13,16,22,23 44:1,3 49:3,5 50:6 51:11 52:2 53:3 56:8,23 59:24 71:20 72:12,14,25 courts ^[11] 23:2,12,15 24:11,19 25:12 30:8,10 44:11,19 45:5 cover ^[2] 34:1,1 covers ^[2] 38:3 41:24 create ^[1] 26:22 created ^[2] 23:18,20 creations ^[1] 29:19 credibility ^[4] 37:17 52:9 54:10 55:1 credible ^[1] 52:9 criminal ^[4] 14:18 15:25 21:15 73:4 culpability ^[4] 15:25 21:15 73:6,10 culpable ^[1] 72:20 cure ^[1] 29:14 curiae ^[3] 1:25 2:11 56:5 cut ^[3] 31:12 33:13,23 cutoff ^[2] 34:24 35:1 cuts ^[2] 16:18 38:1</p> <hr/> <p style="text-align: center;">D</p> <p>D.C ^[5] 1:10,18,20,24 49:2 damages ^[1] 29:9 de ^[1] 65:8 December ^[1] 1:11 decide ^[3] 12:25 43:14 52:6 decided ^[1] 34:19 decision ^[5] 23:18 33:14 45:17 54:9 72:13 decision-making ^[1] 38:20 decisions ^[6] 23:13 29:5 44:11 46:6,14 65:19 default ^[3] 11:7 56:19 70:8 defendant ^[7] 14:18,19,19,23 16:17 21:1 73:9 defendant's ^[1] 73:6 defendants ^[3] 35:9 36:18 73:15 defense ^[5] 67:8,13 68:7 71:11 72:2 defer ^[1] 71:9 defined ^[1] 39:20 definition ^[1] 33:5 degree ^[1] 58:2 delay ^[4] 42:4 64:19,20,22</p>	<p>deliberate ^[2] 33:14 39:15 deliberately ^[2] 14:5 51:17 demonstrably ^[1] 47:23 demonstrate ^[2] 13:17 24:16 demonstrates ^[2] 7:7 13:8 dense ^[1] 34:4 Department ^[17] 1:23 5:6,14,18 48:3,10,17,23 49:6,8,18,20,23 50:2,4,7,17 depend ^[2] 10:3 12:16 depends ^[4] 9:12,21 41:17,22 described ^[1] 72:12 describes ^[1] 11:15 deserves ^[1] 39:16 designed ^[2] 44:10 73:14 determination ^[1] 37:18 determinations ^[1] 55:10 determine ^[4] 18:2 43:23 44:1 45:6 detriment ^[1] 29:16 developed ^[1] 45:5 dictionary ^[1] 21:6 difference ^[2] 46:4,6 different ^[17] 12:12,14 14:9,14 16:3,15 21:11 24:4 30:10 37:3 38:4 39:13 41:25 46:24 62:3 67:16 73:2 differently ^[1] 14:1 difficult ^[4] 18:7,12 25:10 37:16 difficulties ^[1] 55:17 directly ^[1] 65:19 disadvantage ^[1] 64:23 disagree ^[3] 17:9 32:9 65:15 disagrees ^[1] 71:20 disclosed ^[6] 4:3,19 5:13,16 12:3 17:20 disclosure ^[14] 4:11 6:5 10:6 11:8 17:1,18 19:11,11 21:13 25:17 32:15 47:16 60:7 61:6 disclosures ^[27] 3:20,24 4:9 5:17 6:4,8 9:18 10:9 11:3 22:12 34:1,9,21 40:12 43:18,19,25 48:1,2 56:25 57:3 58:17,23 59:16,19 60:25 70:1 discourage ^[1] 29:19 discussed ^[1] 24:5 discussion ^[2] 71:2 72:7 dispense ^[1] 9:23 dispute ^[1] 38:18 disputed ^[1] 36:25 distinct ^[1] 58:4 distinction ^[1] 33:16 distribution ^[1] 59:14 district ^[5] 24:11,19 25:11 30:25 37:17 diversified ^[1] 57:23 doctrine ^[2] 7:7 26:11 document ^[5] 11:12,14,15 12:4 57:7 documents ^[20] 6:21 12:8,18 34:4 42:17 48:5,9,15,19,22 49:5,12,23,24 50:14,18,25 51:2 69:15,17 doing ^[4] 19:7,8 20:22 48:13 DOL ^[3] 69:6 70:2,11</p>
---	---	---	--

Official - Subject to Final Review

<p>DONALD [5] 1:18 2:3,13 3:8 68:13 done [5] 19:10 52:13,18 66:3,5 doubles [1] 4:15 doubling [1] 29:5 down [2] 21:23 51:8 dozen [2] 24:22 25:11 dozens [1] 52:16 draft [1] 39:14 drafted [1] 39:13 draw [1] 55:4 drug [3] 20:11,12,17 during [1] 47:5 duty [15] 3:13 10:16 12:1,3 17:21 29:12 33:13 34:14,25 38:5,10 42:4 62:11,12,18</p> <hr/> <p style="text-align: center;">E</p> <p>earlier [8] 28:14 42:1 53:1 57:15 58:4 59:6,22 64:25 easily [1] 39:7 easy [1] 35:12 economic [1] 9:11 effect [5] 21:21 48:4 66:22,22 72:21 effectively [1] 4:15 effort [1] 63:10 eight [1] 11:15 Eighth [2] 23:18,25 either [6] 5:4 8:9 16:11 36:5 52:14 54:12 element [2] 16:6 29:25 eliminated [1] 51:18 email [4] 11:4,8 25:16 26:6 emails [5] 18:3 25:22 26:2,3 27:6 emphasis [2] 4:10,11 emphasize [1] 34:22 emphasizing [1] 38:3 empirical [2] 12:17 19:7 enacted [4] 4:25 5:11 10:12 70:7 end [4] 50:11 56:9 65:8 68:20 ends [1] 33:8 enforcement [4] 14:20 16:1 21:15 73:4 English [5] 20:8 57:6 58:17,18 59:18 enormous [3] 54:10,11 71:24 enough [6] 22:1 35:13,20 41:1,15 54:21 entire [1] 36:17 entirely [3] 36:3 39:12 67:6 entitled [1] 39:16 entity [1] 18:1 environment [1] 16:3 equitable [3] 26:11,13 45:1 equity [1] 11:23 ERISA [23] 3:12 4:8 23:1 24:8 25:8 29:21 34:11 35:2,8 43:4,10 47:24 48:16 52:8,23 54:3 56:25 60:2,25 61:12,16 62:16,21 ERISA's [1] 4:9 ESQ [6] 1:18,20 2:3,6,9,13 essential [2] 61:21 62:20 essentially [2] 51:16 71:5 establish [6] 5:14 17:20 18:15 27:</p>	<p>22 40:8 72:17 established [1] 4:1 establishing [1] 25:12 ET [1] 1:4 even [23] 4:18 13:10 14:16 17:19 18:14 20:7,13 21:24 28:11 36:22 41:7 45:23 48:12 49:8 51:11 57:2, 19,21 58:24 61:8 62:25 63:2 65:21 event [2] 60:18 71:19 everybody [3] 15:7 23:4 63:9 everybody's [1] 23:1 everyone [2] 12:17 27:3 everything [6] 28:21 37:7 49:9,17, 18 70:2 evidence [11] 14:6 30:7,9,15,17 36:4,8,22 53:10,21 60:5 exact [3] 19:2 24:21 51:16 exactly [5] 20:24 42:15 48:17 59:13 71:6 examine [1] 59:25 example [8] 11:4 38:15 46:16 58:15 62:10 66:3,4,6 examples [1] 46:16 except [1] 67:18 exception [4] 35:5 38:17 42:19 49:11 excessive [1] 29:18 excluding [1] 69:14 exclusively [1] 73:4 exist [1] 56:15 exists [2] 15:20,22 expected [3] 64:10 69:12,18 experience [2] 8:16 34:8 expert [1] 64:2 expire [1] 63:21 explain [2] 5:24 66:9 explained [1] 42:1 explaining [1] 30:22 exploit [1] 4:17 express [1] 25:8 expressing [1] 54:20 extreme [3] 26:8,14 68:25</p> <hr/> <p style="text-align: center;">F</p> <p>fact [25] 7:13 9:14 33:25 35:22 36:6, 25 37:1,3 38:18 42:2 48:14 50:17 52:7,15 54:18 55:4 56:15 57:10 61:11 63:7 65:23 66:7 67:7,20 68:7 fact-finding [2] 54:9 55:2 fact-specific [1] 35:24 facto [1] 65:8 facts [9] 4:7 5:6,8,14,17 6:3 17:21 59:12 63:3 factual [1] 37:16 failed [1] 53:17 fails [1] 42:8 fanciful [1] 66:16 far [2] 57:13 60:3 fault [1] 54:20 few [1] 67:25 fiduciaries [7] 4:12 17:2 34:13,15 35:5 42:17 48:16</p>	<p>fiduciary [15] 3:13 10:16 12:1,3 17:21 29:12 33:13 34:25 38:4 42:4,6, 8 62:12,14,15 fiduciary's [1] 38:9 filed [3] 3:19 5:5 49:6 filing [1] 49:11 final [1] 51:7 financial [4] 34:1,5,7 66:8 find [6] 8:5 15:20 44:18 46:21 55:18 65:20 finder [5] 35:22 37:2 52:7 54:18 55:4 finish [2] 67:4 73:13 Fink [2] 49:2,5 firm [1] 25:12 first [11] 3:4,14 12:25 22:3 26:8 29:20 36:3 47:5 64:10 68:17,24 Fish [1] 20:6 five [2] 28:13 68:12 fix [1] 19:24 focus [1] 4:24 follow [2] 55:6 59:2 following [1] 63:12 Food [1] 20:12 force [2] 66:21,22 foreclose [1] 67:10 foresee [1] 21:24 form [2] 12:22 21:21 forms [1] 38:23 forward [2] 36:19 38:14 foundation [1] 43:3 four [1] 28:13 framed [1] 43:15 framework [1] 47:2 frankly [1] 7:4 friend [1] 69:22 friend's [1] 72:8 friends [5] 8:6 21:8 27:17 68:22 71:4 front [2] 43:7 54:4 full [2] 34:4 64:12 fully [1] 4:18 fund [4] 11:16,21 45:14 66:11 fundamental [1] 33:7 funds [3] 3:18 9:7 11:22,23,24 funky [1] 48:13 further [2] 17:24 61:8</p> <hr/> <p style="text-align: center;">G</p> <p>gap [1] 48:20 gather [1] 8:15 gave [1] 46:17 General [10] 1:23 33:12 34:23 35:2 57:24 59:20 61:24 63:14 67:7 68:4 Generally [1] 18:6 gets [3] 11:8 15:11 52:6 getting [3] 50:1,18,25 giant [1] 11:14 GINSBURG [12] 7:8 13:14 17:3 23:11, 24 24:18 30:14 35:11,23 36:7 43:21 55:7 Ginsburg's [2] 31:6 67:3 give [6] 10:9 14:13 55:12 66:2,13</p>	<p>69:18 given [6] 4:8 14:10 25:7 34:17 48:25 65:7 giving [1] 19:12 Global-Tech [6] 12:23,24 53:6 72:13, 15,25 goodness [1] 45:24 GORSUCH [14] 31:4,19,24 32:4,7, 12 52:19 53:4,7,12,15 54:5,7 68:20 got [8] 5:25 11:5 21:17 24:11 47:20 61:17 64:5 70:11 gotten [1] 47:16 governed [1] 48:1 governs [1] 56:20 granted [1] 10:14 grapple [1] 24:12 grappled [1] 24:23 group [1] 6:23 GUARNIERI [26] 1:22 2:9 56:3,4,7 57:17,24 59:10,15 60:11,14,18 61:2, 13,24 62:4 63:11,24 64:7,16 65:2, 15 66:6 67:5,20 68:3 guess [5] 13:25 20:20 31:11 54:19 61:25</p> <hr/> <p style="text-align: center;">H</p> <p>hair's [1] 32:16 half [7] 16:18 24:22 25:11 33:14,23 36:3 47:5 hand [1] 20:9 handle [1] 26:9 handled [1] 25:15 handles [1] 26:10 handling [1] 26:17 hands [1] 8:20 happen [3] 42:15 64:8 71:9 happened [2] 15:18 70:23 happens [1] 49:15 hard [3] 7:11 37:10 49:8 harsh [1] 70:8 he'll [1] 28:4 head [3] 24:22 52:5 53:18 heading [1] 11:9 hear [1] 3:3 heard [4] 28:17 33:19 47:4 68:22 held [3] 3:23 23:16,20 high [3] 33:22 35:4 40:23 higher [2] 29:9 71:7 himself [1] 33:4 hindsight [2] 4:17 29:4 history [4] 38:1 46:12,25 49:1 hold [1] 20:9 holding [1] 24:6 honest [1] 64:2 Honor [17] 6:19 14:14 18:25 20:5 22:3,16,24 23:8,8 27:9,11 28:3,8 30:3 38:21 41:17 44:6 honored [2] 33:15 39:17 hope [1] 71:21 hoped [1] 46:11 horse [1] 71:25 hypothesis [1] 58:23</p>
---	--	---	---

Official - Subject to Final Review

<p>hypothesized ^[1] 30:3</p> <hr/> <p>I</p> <p>idea ^[4] 7:22 61:20 64:7 72:3</p> <p>identified ^[4] 8:7 23:9 43:8 69:1</p> <p>ignored ^[1] 14:5</p> <p>illustration ^[1] 36:11</p> <p>imagine ^[5] 25:11 26:12 31:17 58:14,15</p> <p>impact ^[1] 71:2</p> <p>impart ^[1] 31:25</p> <p>imparted ^[1] 40:13</p> <p>impermissible ^[1] 53:25</p> <p>implementing ^[1] 10:21</p> <p>implied ^[4] 51:10,15,15 56:16</p> <p>imply ^[2] 39:21 51:11</p> <p>import ^[1] 60:8</p> <p>important ^[11] 7:21 9:4,8,14,15 10:6,18 11:9 33:18 35:4 73:15</p> <p>imported ^[1] 52:23</p> <p>impose ^[1] 19:10</p> <p>imposes ^[1] 17:2</p> <p>imposing ^[1] 26:25</p> <p>impossible ^[1] 65:6</p> <p>imprudent ^[4] 3:22 62:14 66:11,16</p> <p>imprudently ^[1] 3:17</p> <p>imputation ^[5] 14:24 19:6 22:19,20 72:23</p> <p>impute ^[4] 14:22 39:21 52:3 60:23</p> <p>imputed ^[3] 26:5 56:16 65:24</p> <p>imputing ^[1] 13:10</p> <p>inaccurate ^[1] 55:22</p> <p>inadministrability ^[1] 29:25</p> <p>incentivizes ^[1] 38:13</p> <p>include ^[1] 22:7</p> <p>included ^[1] 5:6</p> <p>includes ^[1] 38:6</p> <p>including ^[1] 48:6</p> <p>indicate ^[1] 47:6</p> <p>indisputably ^[1] 57:3</p> <p>individual ^[5] 44:23 51:12 69:17 70:1 73:6</p> <p>individual's ^[3] 45:3 52:4 55:5</p> <p>individualized ^[6] 44:7,19 45:8 55:9,16 67:8</p> <p>individuals ^[1] 26:3</p> <p>inducement ^[2] 12:25 13:1</p> <p>inference ^[1] 72:9</p> <p>inferences ^[5] 30:6,9,10,11 55:4</p> <p>information ^[23] 9:4,5,15 10:10,19 11:9 17:19,20 22:7,8 23:14,14,21 25:4 36:16 43:17 57:11,21 58:13 64:9 69:5,6 70:10</p> <p>injuries ^[2] 67:16 68:5</p> <p>inquire ^[1] 17:24</p> <p>inquiry ^[3] 14:3 73:8,10</p> <p>insane ^[1] 47:14</p> <p>instance ^[2] 38:6 45:6</p> <p>instruction ^[5] 52:2,5 53:9 55:3 72:9</p> <p>insufficient ^[1] 40:23</p> <p>INTEL ^[4] 1:3 3:5 4:1 18:9</p> <p>intend ^[1] 46:7</p>	<p>intent ^[2] 14:10 15:1</p> <p>interest ^[3] 16:22,24 45:15</p> <p>interests ^[4] 16:16 34:14 73:15,16</p> <p>interpret ^[2] 22:6 44:13</p> <p>interpretation ^[3] 4:23 33:7 66:24</p> <p>interpreted ^[4] 23:3 24:3,7,7</p> <p>intervention ^[1] 29:13</p> <p>intractable ^[1] 4:20</p> <p>introduce ^[1] 29:24</p> <p>introduces ^[1] 4:20</p> <p>intuition ^[1] 63:13</p> <p>inures ^[1] 29:16</p> <p>invested ^[1] 9:7</p> <p>investing ^[2] 41:13,14</p> <p>INVESTMENT ^[13] 1:3 3:5,21 11:7 29:5 30:22 34:7 45:17 46:6,14 59:14 61:11 66:15</p> <p>investments ^[7] 4:18,19 7:17 11:16,23 64:3 66:10</p> <p>involved ^[1] 38:19</p> <p>irrational ^[2] 31:13,14</p> <p>isn't ^[4] 7:4 19:14,17 44:16</p> <p>isolation ^[1] 21:5</p> <p>issue ^[11] 18:14 24:6,12 36:25 41:5,23 45:3 55:1 62:25 65:17 67:23</p> <p>issued ^[1] 49:3</p> <p>issues ^[7] 37:4 44:7,20 45:8 54:16 55:17,19</p> <p>itself ^[5] 17:20 39:1 53:2 55:2,24</p> <hr/> <p>J</p> <p>Jackson ^[1] 20:25</p> <p>jargon ^[1] 34:6</p> <p>Joint ^[3] 11:6,19 34:2</p> <p>JR ^[5] 1:18 2:3,13 3:8 68:14</p> <p>judge ^[2] 52:8 54:8</p> <p>judgment ^[10] 26:23 35:21 36:1,23 37:15 40:6 54:18,22 66:4,5</p> <p>juror ^[1] 53:19</p> <p>jury ^[5] 52:2,6 53:8 54:4 72:9</p> <p>Justice ^[142] 1:23 3:3,10 6:11,15,22 7:8,14 8:10,12,19,22 9:1,9,13 12:5,11,15 13:12,14,25 14:25 15:3,6,9,12 17:3 18:1,8 19:14,16 20:15,18 21:19 22:10,13 23:11,24 24:18 25:10 26:1,16 27:2,5,24 28:4,9,16 30:12,14 31:4,6,19,22,24 32:4,7,12,19,25 35:10,11,23 36:7,21 37:6,20,22 39:4,9,24 40:1,6,19 41:10,11,18 42:21,23 43:7,21 44:15 45:9,11,12,20 46:19,22 47:11,18,20 49:17 50:3 51:20 52:19,20,25 53:4,7,12,15 54:5,7,19 55:6,7 56:1,8 57:13,18,19 59:1,2,5,12 60:10,13,16 61:2,14,23,25 62:22 63:11,23,25 64:14 65:1,4 66:2 67:2,3,18,22 68:11,16,20 69:7,9,21 70:25 73:19</p> <p>Justice's ^[1] 59:2</p> <hr/> <p>K</p> <p>KAGAN ^[28] 12:5,11 13:12,25 14:25 15:3,6,9,12 39:24 40:1,6,19 42:21,23 43:8 44:15 47:11,18,20 51:</p>	<p>20 52:20,25 54:19 61:2,14,23,25</p> <p>Kagan's ^[1] 59:5</p> <p>KAVANAUGH ^[19] 6:11,15,22 7:14 19:14,16 20:15,18 21:19 22:10,13 30:12 41:10 45:11 55:6 64:14 65:1,4 67:2</p> <p>Kavanaugh's ^[1] 8:12</p> <p>keep ^[2] 51:23 64:15</p> <p>kernel ^[1] 34:11</p> <p>kind ^[11] 14:19 26:13 29:18,22 30:11 38:16,18 41:23 48:12 51:7 53:24</p> <p>kinds ^[4] 6:20 38:4 41:25 71:15</p> <p>King ^[1] 21:2</p> <p>knowledge ^[149] 3:15 4:7 5:4 6:3,8,9,10,17,24 7:3,11,20,23 8:5,9 12:21,22 13:2,3,4,6,9,10,19,24 14:3,22 15:10,18 16:5,13,14,19 17:4,6,6,14,15,18,25 19:6,22,25 21:8,21,22,25 22:1,5,6,7,14,18,22 23:13,23 24:4,15 25:18 26:5,18,19 27:15,20 33:2,5,11,11,21 37:13 39:3,10,18,22 40:8,13 41:5,9,19 42:12 43:20 45:1,4 47:10 48:13,15,18,21 49:16 50:14,21 51:1,10,10,18 52:4,12,15,16 53:2,13 56:13,14,14,15,24 57:7,11,14,20,25 58:1,6,7,11,22 59:3,19,24 60:1,14,19,24 61:4,5,9,21 62:8,8 63:5,19 64:9,19 65:6,13,20,23 66:14 67:23 68:2 69:13,19,25 70:17 71:14 72:10,21,22 73:3</p> <p>known ^[4] 17:16,25 22:9 45:2</p> <p>knows ^[4] 38:8 42:20 47:15 52:11</p> <hr/> <p>L</p> <p>Labor ^[15] 5:6,14,19 48:3,10,17,23 49:7,19,20,23 50:2,4,8,18</p> <p>language ^[7] 17:13 24:3 26:17 50:19 56:10 57:5 62:6</p> <p>LaRue ^[1] 42:3</p> <p>last ^[1] 20:25</p> <p>later ^[3] 3:21 16:12 29:13</p> <p>Laughter ^[3] 7:18 8:18,21</p> <p>law ^[8] 13:22 21:10 26:9,10 41:7 52:3 56:17 65:25</p> <p>lawn ^[1] 45:21</p> <p>learn ^[1] 5:7</p> <p>least ^[3] 24:22 29:1 58:9</p> <p>left ^[1] 50:5</p> <p>legal ^[4] 25:23 60:1,19 61:16</p> <p>legislation ^[1] 46:1</p> <p>legislative ^[2] 37:25 49:1</p> <p>legitimately ^[1] 22:20</p> <p>less ^[2] 9:19,19</p> <p>level ^[3] 15:24 35:8 71:7</p> <p>leveraged ^[1] 57:22</p> <p>liabilities ^[1] 48:8</p> <p>liability ^[1] 29:18</p> <p>light ^[1] 32:15</p> <p>likely ^[5] 9:19 35:20 46:4,5 54:11</p> <p>limit ^[3] 7:9,10 35:6</p> <p>limitations ^[38] 5:3 8:3,6,8 15:19 16:5,6,9 21:13 24:9 26:25 31:2 33:</p>	<p>12,23 35:2,7,25 37:5,14 44:8,20,25 46:8,14 51:24 54:16 55:19 56:11 62:7 65:9 66:20 67:8 69:4 70:9 71:11 72:1 73:12,13</p> <p>limited ^[2] 7:4,6</p> <p>line ^[5] 19:24 34:9,9 60:13,17</p> <p>linguistic ^[1] 5:25</p> <p>link ^[8] 11:11,11,13,13 18:4,4,16 30:20</p> <p>links ^[1] 30:19</p> <p>liquidate ^[2] 42:7,9</p> <p>liquidation ^[1] 42:4</p> <p>listen ^[2] 45:13,23</p> <p>litigation ^[2] 29:7 36:17</p> <p>little ^[6] 14:1,14 19:2 34:7 44:15 47:4</p> <p>lives ^[1] 34:6</p> <p>living ^[1] 23:1</p> <p>logic ^[1] 65:2</p> <p>long ^[1] 65:10</p> <p>look ^[9] 8:17 9:20 21:6 45:12 46:11 47:23 49:5 52:17 62:22</p> <p>looked ^[2] 46:10 60:6</p> <p>looks ^[2] 11:4,18</p> <p>loss ^[1] 42:10</p> <p>losses ^[1] 38:14</p> <p>lot ^[3] 19:19 63:7 65:10</p> <p>loyalty ^[1] 62:18</p> <hr/> <p>M</p> <p>made ^[3] 10:5 22:8 33:20</p> <p>mailings ^[2] 7:16,17</p> <p>mandatory ^[4] 4:8 5:17 6:4 60:25</p> <p>manner ^[3] 10:21 29:22 72:4</p> <p>many ^[11] 6:15,15 7:15 8:23 9:5,8 24:18 52:13 64:20 65:19 66:23</p> <p>market ^[1] 34:5</p> <p>matter ^[11] 1:13 24:12 41:7 52:3 55:21 56:15,16 57:24 59:17,21 65:24</p> <p>MATTHEW ^[6] 1:20,22 2:6,9 32:22 56:4</p> <p>mean ^[32] 7:12 8:25 9:10,17 12:1 18:23 23:22 28:17,18,19,20 30:23 33:3 35:15 38:2 39:11 44:22 46:20,21 51:21,25 52:22 55:14 57:16 58:7,10 61:2 62:1 63:13 66:7 67:7,12</p> <p>meaning ^[7] 22:21 33:8 50:22 61:9 65:22 70:18,19</p> <p>meaningless ^[2] 41:19,20</p> <p>means ^[11] 7:20,24 21:1 23:13 29:6 41:5 51:10 52:10 56:18 58:11 65:12</p> <p>meant ^[1] 33:2</p> <p>measure ^[1] 73:5</p> <p>mechanism ^[1] 47:7</p> <p>mechanisms ^[1] 44:10</p> <p>meet ^[1] 40:23</p> <p>member ^[1] 45:15</p> <p>members ^[7] 43:23,24 67:9,17,25 68:8 71:14</p> <p>mentioned ^[1] 46:5</p> <p>merely ^[2] 26:6 65:24</p>
---	--	---	--

Official - Subject to Final Review

<p>merits ^[1] 71:20 met ^[2] 56:19 60:11 methods ^[1] 45:5 might ^[9] 18:24 22:16 34:10 44:8 45:8 67:12 68:7 72:19 73:12 mind ^[3] 47:1 50:20 73:9 minimize ^[1] 38:14 minute ^[2] 5:24 70:5 minutes ^[1] 68:12 mistake ^[1] 8:1 moment ^[2] 34:20 57:1 morning ^[1] 3:4 Most ^[10] 6:11 9:25 19:9 30:5 33: 25 34:15,25 63:8 67:24 68:1 much ^[5] 40:16,17 43:8 46:5 53:16 must ^[9] 7:16 33:2,4,14 39:17 45: 22 56:14 65:12,23</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>named ^[1] 45:6 nature ^[4] 41:14,22 61:22 62:20 nearly ^[1] 63:8 necessarily ^[4] 62:15 67:10 68:9 69:19 necessary ^[5] 10:24 14:21 33:17 40:13 43:19 need ^[14] 10:11 25:4 39:9 40:17,17 43:9 55:9 58:6 59:25 61:10 62:13, 19 64:11 69:24 needed ^[2] 48:1,3 needs ^[1] 40:16 negative ^[2] 65:11 71:24 never ^[8] 26:2,22 36:18 42:18 50:8 52:23 57:3,8 nevertheless ^[1] 41:8 nice ^[1] 47:22 nicotine ^[1] 20:11 Ninth ^[12] 3:23 4:3,14 5:10 7:5 13: 20 18:21 22:24 23:3,25 43:11 61: 17 nobody ^[1] 70:21 non-readers ^[1] 44:2 nonetheless ^[1] 58:21 normal ^[1] 70:14 normally ^[1] 16:4 nothing ^[5] 45:13,14,20 46:25 60: 21 notice ^[1] 17:23 nuance ^[1] 14:14 nullity ^[1] 66:21 number ^[3] 15:21 24:21 35:18</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>oath ^[1] 27:25 object ^[2] 20:7,8 obligation ^[2] 25:21,24 obligations ^[3] 19:11 32:15 34:16 obtained ^[2] 69:12,19 obtaining ^[1] 52:16 obviously ^[2] 20:8,17 occasions ^[1] 52:13 occurrence ^[1] 16:11 odd ^[1] 70:12 often ^[3] 9:25 33:8 53:8</p>	<p>okay ^[1] 64:5 old ^[2] 50:10,12 once ^[1] 15:16 one ^[28] 4:22 9:17 11:3,18,19 14: 11 15:22 18:3 26:23 30:8 31:2,2 35:12 38:1,22 40:11 46:20 47:1,7 51:7 54:21,22 55:7 57:6 58:14,15 67:1 71:13 ones ^[1] 45:18 only ^[12] 8:3 15:19 16:4 26:2 29:6 31:13 41:5 56:12 57:9 63:17 69: 15,20 open ^[5] 21:22 25:22 26:2,3 34:2 opened ^[1] 18:4 opening ^[1] 68:21 operated ^[1] 23:5 operating ^[2] 11:1 16:15 operation ^[1] 13:22 opinion ^[2] 49:2,14 opposed ^[1] 62:8 opposite ^[8] 8:14 51:17 69:23 options ^[1] 30:22 oral ^[7] 1:14 2:2,5,8 3:8 32:22 56:4 order ^[2] 20:23 63:16 ordinary ^[6] 20:7 28:20 33:5 50:21 57:5 59:18 original ^[4] 5:2 47:13,24 51:4 originally ^[2] 4:25 5:11 ostrich ^[1] 52:4 other ^[23] 7:12,25 8:7 13:23 19:25 21:9,23 22:23 23:12,24 27:18 30: 9 34:6 35:7 38:1 47:1 50:21 64:24 67:25 68:8,23 69:22 71:5 others ^[1] 67:15 ourselves ^[1] 20:2 out ^[14] 7:14 17:8 19:21 22:23 25: 11 31:7 32:16 49:16 50:6 51:3 53: 1 62:1,3 71:22 outer ^[2] 7:9 13:18 outside ^[1] 35:6 over ^[4] 19:1 29:7 34:8 53:19 overinvested ^[1] 3:17 overwhelming ^[1] 15:21 owe ^[1] 34:13 oxymoronic ^[1] 51:13</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>PAGE ^[6] 2:2 11:5,18 27:18 34:3 36:19 pages ^[3] 5:1 36:12,15 pale ^[1] 31:17 par ^[1] 25:3 paragraphs ^[1] 42:18 part ^[1] 10:6 participant ^[16] 5:7 10:23 17:19, 22 18:16 24:17 34:20 42:6,11 43: 18 44:3 58:16,20 60:24 66:8,10 participants ^[24] 4:7,13 5:16 10: 10,15,20 19:12 22:9 25:3,22 29: 16 38:10 48:2,6,14,22 49:19,21,25, 25 50:6,13,25 64:24 participants' ^[1] 34:14 particular ^[7] 7:3 30:20 36:6 46:3 62:7 68:19 73:12</p>	<p>particularly ^[1] 21:7 party ^[3] 38:22 39:1,2 pass ^[1] 54:17 past ^[3] 6:6 40:6 54:21 patent ^[1] 12:25 pattern ^[3] 25:12 42:2 66:7 people ^[20] 6:11,16,23 7:15 8:12, 23 9:5,14,19 11:2 12:17 26:2,5 33: 25 34:6,15 37:9 63:8,8 68:1 people's ^[2] 9:8 28:12 percent ^[4] 11:22,23,23,24 perfect ^[1] 5:22 perfectly ^[3] 5:25 16:25 34:18 perhaps ^[1] 47:22 period ^[23] 4:16 5:3,12 16:17 29:3, 8 33:12,23 34:24 35:2 37:9 38:12 56:11,19 57:9 63:7,21,22 64:12, 22 65:10 66:21 73:14 periods ^[1] 44:25 permit ^[1] 52:2 person ^[11] 17:23 25:16,17,21 26: 8,18 39:22 43:1 52:20 57:6,8 personal ^[2] 8:15 21:14 personally ^[2] 39:23 51:12 Petitioners ^[14] 1:5,19 2:4,14 3:9 40:10 42:15 43:15 50:16 56:22 60: 20,22 66:19 68:14 Petitioners' ^[1] 51:8 phase ^[2] 71:11,12 phrase ^[5] 7:2,23 8:5,8 33:3 piece ^[1] 14:5 place ^[5] 8:4 29:20 47:7 51:5 62:3 plain ^[4] 33:8 39:18 44:13 56:10 plainly ^[1] 17:5 plaintiff ^[43] 3:14 5:4 6:2,5 16:8,13, 18 27:10,12,25 30:4,18 33:1,4 35: 14,19,19 36:5,13 39:5 40:2 45:7 56:12,16,24,25 57:2,2,10 58:23 60:6 61:1,20 62:13 63:1,3,18 64:2, 8,18,18 65:24 66:14 plaintiff's ^[2] 56:14,21 plaintiffs ^[3] 4:16 67:14 68:6 plan ^[38] 3:20 4:6,12,12 5:5,13,15, 16 10:10,15,19,22 11:10,20 17:2, 19,22 18:15 19:12 22:9 24:16 25: 3,3,17,21 29:3,16,17 38:11,15 44: 3 58:16,20 60:23 64:21,24 66:7,9 plan's ^[1] 48:7 plans ^[7] 3:17 4:18 9:6 11:17 29:7, 19 32:6 play ^[5] 12:6 54:11 55:1 63:18 71: 22 plays ^[1] 54:10 please ^[4] 3:11 32:25 42:7 56:8 plenty ^[2] 26:2 27:6 point ^[10] 10:8 13:18 22:23 36:25 51:7 55:24 63:20 65:5 66:25 70: 24 pointed ^[3] 7:14 31:7 53:1 pointing ^[1] 62:1 points ^[3] 19:4 27:16 68:17 police ^[5] 10:11,24 19:13 25:6,9 policing ^[1] 4:12 POLICY ^[7] 1:4 3:5 19:19 31:7,12</p>	<p>37:7 65:16 poring ^[1] 34:8 pose ^[1] 55:17 position ^[5] 35:13 36:21 61:8 71: 20 72:8 possesses ^[1] 6:9 possession ^[1] 6:7 possibility ^[2] 27:25 34:10 possible ^[3] 14:17 36:4 39:12 potential ^[2] 39:5 63:1 potentially ^[1] 69:14 practical ^[1] 24:12 pre-amendment ^[1] 48:11 precise ^[6] 3:21 11:25 12:2 24:6 57:1 62:6 precisely ^[2] 44:10 54:15 preclude ^[2] 55:10 68:9 presented ^[2] 41:4 58:5 presume ^[1] 56:23 presumed ^[1] 58:21 presumption ^[1] 60:19 pretty ^[1] 47:6 prevail ^[1] 17:5 prevent ^[1] 37:15 printouts ^[1] 36:12 private ^[3] 4:12 10:14 25:8 probably ^[1] 46:9 problem ^[14] 19:1,3 23:7,8,9 26: 21 28:10,24 29:1,2,15,15 35:11 72:5 problems ^[2] 4:21 21:23 proceedings ^[1] 73:5 professional ^[1] 66:9 program ^[1] 10:7 prohibited ^[2] 38:25 62:18 projections ^[1] 34:5 proof ^[11] 4:4,21 13:2,2,4,6 27:21 71:15 72:15,16,18 properly ^[1] 44:2 protect ^[3] 16:16 32:6 73:14 protection ^[1] 35:9 protests ^[1] 53:16 prove ^[3] 14:17 36:5 65:6 proved ^[1] 13:11 provide ^[1] 34:24 provided ^[8] 5:2,18 6:3 48:19,22, 23 69:5,8 provides ^[2] 35:8 36:11 province ^[1] 31:9 provision ^[10] 4:24 16:23 19:18 35:8 46:3 47:25 62:7 63:14,17 69: 25 prudence ^[3] 38:10 62:11,13 purported ^[1] 68:1 purpose ^[1] 19:12 purposefully ^[1] 15:4 purposes ^[1] 20:12 push ^[1] 8:11 put ^[7] 17:22 25:12,20 45:21 63:5 71:6,25 putative ^[1] 67:9 putting ^[2] 62:25 64:1</p> <hr/> <p style="text-align: center;">Q</p> <hr/>
---	---	--	--

Official - Subject to Final Review

<p>qualified ^[1] 11:7</p> <p>question ^[30] 25:19 35:22 37:16 38:2 40:16 41:4 43:6,14,16 44:6,12,13,22 46:9 54:20 55:7 57:15 58:4,10 59:3,5,21 62:23 65:18 67:4,7 68:4,19 71:10 73:1</p> <p>questions ^[3] 35:24 44:25 59:6</p> <p>quite ^[3] 28:15 62:5 70:8</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>rafts ^[1] 44:18</p> <p>raise ^[1] 37:16</p> <p>random ^[1] 30:25</p> <p>randomness ^[1] 29:25</p> <p>range ^[4] 38:4,24 41:25 55:18</p> <p>rare ^[1] 30:2</p> <p>rather ^[2] 14:3 29:13</p> <p>rationality ^[1] 32:1</p> <p>reach ^[3] 37:1 40:16 54:18</p> <p>read ^[71] 3:25 4:3 5:9,10 6:12,16,17,23,25 7:11,15,16 8:13 9:22,24,25 11:2,2,12 12:8 17:13 18:19,19 19:5 21:17 24:14 27:7,14,19,22 28:5,5,13,17,19,21,22,22 30:5 33:25 35:12,14,19 36:5 37:9 40:2,11,17,25 41:8,12 42:18 43:1,18,25 44:4,4 51:23 54:13 55:8 57:3,8 58:24 59:5,7,12,13 63:9 64:3 69:14 72:14</p> <p>readily ^[1] 10:22</p> <p>reading ^[15] 4:9,14 5:21 17:7,11 20:22 26:21 32:16 40:7,12 51:15 59:3 65:12 71:22 73:16</p> <p>reads ^[2] 12:18 70:21</p> <p>real ^[5] 17:11 32:14 33:4 66:21,22</p> <p>real-world ^[3] 33:24 34:17 66:4</p> <p>realistic ^[1] 66:4</p> <p>really ^[9] 7:22 8:2 41:13 42:20 43:2 51:10 62:2 63:14 64:19</p> <p>reason ^[13] 7:2 8:14,23 16:15 19:20 24:25 32:3,5,8,9,14 39:5,6</p> <p>reasonable ^[3] 5:25 17:23 53:19</p> <p>reasonably ^[3] 5:7 69:12,18</p> <p>reasons ^[4] 22:3 29:2 33:18 64:17</p> <p>rebound ^[1] 64:23</p> <p>REBUTTAL ^[2] 2:12 68:13</p> <p>received ^[6] 3:20 23:21 25:16 26:6 59:17 69:17</p> <p>receives ^[7] 6:5 34:20 57:1,2 58:17 61:1 69:20</p> <p>receiving ^[1] 50:15</p> <p>recognition ^[1] 63:7</p> <p>recognize ^[1] 13:22</p> <p>recollect ^[1] 28:13</p> <p>reflects ^[2] 33:24 63:12</p> <p>regime ^[2] 10:6 21:12</p> <p>regulations ^[1] 10:21</p> <p>regulatory ^[2] 10:7,7</p> <p>rejecting ^[1] 66:19</p> <p>relate ^[1] 44:8</p> <p>related ^[1] 24:8</p> <p>release ^[1] 67:13</p> <p>relevant ^[7] 36:16 37:25 40:11 43:17 57:10 58:13 64:9</p>	<p>relying ^[1] 23:12</p> <p>remedial ^[2] 71:11,12</p> <p>remember ^[2] 18:20 30:5</p> <p>remove ^[1] 47:7</p> <p>repeatedly ^[1] 10:13</p> <p>reply ^[2] 55:8,9</p> <p>report ^[6] 5:6 10:13 25:5 46:2,3 69:11</p> <p>reported ^[1] 65:19</p> <p>repose ^[2] 16:18 37:12</p> <p>reproduced ^[1] 5:1</p> <p>require ^[7] 4:4 27:6 31:20 33:10,20 38:17 39:10</p> <p>required ^[6] 9:18 13:1,4 18:22 48:5,16</p> <p>requirement ^[7] 9:23 16:14 22:1 37:12 57:14 63:6 67:24</p> <p>requirements ^[1] 17:1</p> <p>requires ^[5] 3:12 37:16 57:25 58:10 62:7</p> <p>resolve ^[1] 33:17</p> <p>resolved ^[1] 54:17</p> <p>respect ^[21] 6:20 7:20 11:6 14:15 18:5 21:1 25:24 26:24 29:4 31:1,25 32:1 39:16 58:9 59:21 61:17 67:9,14 68:24 70:25 72:6</p> <p>respectfully ^[2] 32:11 72:11</p> <p>respects ^[1] 4:9</p> <p>respond ^[2] 55:12 65:14</p> <p>Respondent ^[8] 1:8,21,25 2:7,11 3:16 32:23 56:6</p> <p>result ^[1] 42:19</p> <p>resulting ^[1] 42:9</p> <p>results ^[1] 30:25</p> <p>retirement ^[5] 3:17 9:6,7 11:10 66:11</p> <p>return ^[2] 51:6 68:18</p> <p>rewrite ^[1] 20:1</p> <p>rewriting ^[2] 20:16,21</p> <p>rights ^[5] 10:11,24 19:13 25:6,9</p> <p>road ^[1] 21:24</p> <p>ROBERTS ^[16] 3:3 8:10,19,22 9:1,9,13 31:22 32:19 56:1 57:13,19 67:18,22 68:11 73:19</p> <p>robust ^[4] 4:11 10:9 19:10 71:2</p> <p>role ^[3] 12:6 54:11,12</p> <p>rule ^[12] 22:25 23:2 33:7 39:20 44:9,12 55:20,21,24 60:22 66:19 68:4</p> <p>ruled ^[1] 22:25</p> <p>run ^[2] 56:12 57:9</p> <p>running ^[3] 34:20 47:8 49:10</p> <p>runs ^[1] 16:10</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>same ^[15] 5:17 7:24 14:11 18:17 19:3 21:4 22:16,17 30:11 35:22 38:21 48:17 53:2 62:17 67:12</p> <p>sand ^[2] 52:6 53:18</p> <p>satisfied ^[5] 13:6,10 24:15 39:7 67:24</p> <p>satisfy ^[3] 13:24 14:21 22:1</p> <p>satisfying ^[1] 14:2</p> <p>saw ^[3] 41:12 59:13,13</p>	<p>saying ^[9] 13:16 14:16 15:4,7,16 37:8 70:6 71:5,8</p> <p>says ^[24] 10:13 11:8,9,12,12,20,25 12:2 17:6 23:13,22 35:14 40:2 42:7 43:1 45:2 46:12 51:22 52:14 55:9 59:7 60:6 65:11 69:10</p> <p>scheme ^[2] 31:15,20</p> <p>Second ^[3] 24:2 29:24 70:24</p> <p>second-guess ^[1] 4:17</p> <p>secretary ^[3] 47:15 69:15,20</p> <p>Section ^[10] 3:12 4:6,23 6:1 35:3 51:14 56:10,11,20,23</p> <p>security ^[1] 9:11</p> <p>see ^[4] 11:5,19 34:3 48:25</p> <p>seeking ^[1] 60:20</p> <p>seem ^[2] 30:13 49:12</p> <p>seemed ^[2] 47:13,14</p> <p>seems ^[3] 9:20 16:25 29:14</p> <p>seen ^[1] 23:9</p> <p>seminar ^[1] 30:22</p> <p>Senate ^[3] 10:12 25:5 46:1</p> <p>send ^[1] 48:16</p> <p>sense ^[10] 5:11,20,22 20:23 23:7 32:14 49:13 50:24 61:23 69:2</p> <p>sensible ^[2] 19:9 34:18</p> <p>sent ^[15] 18:4 48:2,3,6,9 49:18,19,20,21,25 50:1,4,7,8 70:10</p> <p>sentences ^[1] 42:18</p> <p>separate ^[2] 43:6 59:21</p> <p>seriously ^[2] 62:2,5</p> <p>served ^[1] 64:25</p> <p>set ^[5] 10:4,17 19:11 35:3 47:9</p> <p>Setting ^[1] 33:22</p> <p>settlement ^[1] 67:13</p> <p>shall ^[1] 15:1</p> <p>shifts ^[1] 19:1</p> <p>short-term ^[1] 11:22</p> <p>shorter ^[2] 7:10 31:8</p> <p>shortest ^[1] 35:1</p> <p>shortly ^[1] 49:14</p> <p>shouldn't ^[1] 20:1</p> <p>shouting ^[1] 45:21</p> <p>show ^[2] 8:20 70:10</p> <p>showing ^[1] 9:23</p> <p>shudder ^[1] 45:21</p> <p>side ^[6] 8:7 21:9 27:18 68:23 69:22 71:5</p> <p>sides ^[1] 32:7</p> <p>significance ^[1] 57:21</p> <p>silly ^[1] 58:20</p> <p>similar ^[1] 53:10</p> <p>simple ^[1] 58:15</p> <p>simply ^[1] 62:8</p> <p>since ^[1] 54:2</p> <p>single ^[1] 71:13</p> <p>situation ^[7] 5:13 13:11 14:17 26:12,22 27:12 73:8</p> <p>situations ^[4] 13:8 15:22,23 26:4</p> <p>six ^[11] 4:16 16:10 28:14,23 29:6 31:6,15 35:6 46:16 63:15 70:13</p> <p>six-year ^[18] 7:9 16:17 29:8 33:12,23 34:24 35:1 37:8,12 46:7,13 52:21 56:19 63:6,13,21 64:12 65:8</p> <p>Solicitor ^[1] 1:22</p>	<p>solution ^[1] 18:25</p> <p>somebody ^[3] 40:20 51:22 54:12</p> <p>someone ^[9] 18:3 39:2 41:7 45:15,21 53:16 59:4,7 66:12</p> <p>sooner ^[1] 29:13</p> <p>sorry ^[3] 19:16 47:19 69:7</p> <p>sort ^[3] 39:19 58:12 62:19</p> <p>sorts ^[4] 21:23 35:23 44:20,25</p> <p>SOTOMAYOR ^[13] 25:10 26:1,16 27:2,5 59:1,12 60:10,13,16 69:7,9,21</p> <p>sounding ^[1] 62:18</p> <p>sounds ^[2] 22:10 51:14</p> <p>SPD ^[1] 48:6</p> <p>special ^[1] 7:10</p> <p>specific ^[3] 36:15,19 73:8</p> <p>specifically ^[3] 11:20 47:2 51:22</p> <p>splice ^[1] 34:9</p> <p>spoke ^[1] 71:6</p> <p>squared ^[1] 57:4</p> <p>stage ^[4] 54:10,18,22 55:20</p> <p>staggering ^[1] 71:24</p> <p>standard ^[19] 13:9,20,24 14:22 15:18 17:14,16,17,18,25 21:8 22:5 24:15 43:12 56:18 60:2,15 61:19 65:20</p> <p>standards ^[2] 65:3 73:3</p> <p>start ^[4] 5:23 20:15 34:19 47:8</p> <p>started ^[1] 53:7</p> <p>state ^[2] 8:7 73:9</p> <p>statement ^[5] 34:10 35:16,20 48:7 61:6</p> <p>STATES ^[6] 1:1,15,24 2:10 8:4 56:5</p> <p>statute ^[78] 4:4,11 5:2,9,21,22 7:21 8:6,7 10:20 15:19 16:6,9,10,16,23,24 17:2,3,8,12 19:5,9,21,22,23 20:21,23 21:13 23:5,22 24:8 26:18,24 30:1 31:1 32:17 37:12 38:3 39:13,14 41:24 44:8,14 45:1 46:7 47:8 49:15 50:12 51:4,16,24 52:13,14,21 57:5,25 58:10 63:12 65:3,9,22 66:24 68:18,25 69:2,3,4,10 70:6,7,9,16 71:10 72:1 73:11,13,17</p> <p>statutes ^[14] 6:6 8:3 16:4 19:25 21:23 35:25 37:4,14 44:20 46:13,15 52:17 54:16 55:19</p> <p>statutory ^[3] 4:10 33:7 52:24</p> <p>stepping ^[1] 59:20</p> <p>stick ^[2] 19:23 42:17</p> <p>still ^[4] 14:8 52:20 54:24,25</p> <p>street ^[1] 31:10</p> <p>strong ^[2] 19:19 62:23</p> <p>strongly ^[1] 47:6</p> <p>structural ^[1] 4:10</p> <p>struggled ^[1] 12:24</p> <p>struggling ^[1] 44:19</p> <p>stuck ^[2] 52:5 53:18</p> <p>styled ^[1] 43:21</p> <p>subject ^[4] 29:4 36:23 38:16,22</p> <p>subjective ^[10] 4:2,4 7:5 13:19,23 14:20,23 18:21 27:22 72:18</p> <p>submit ^[1] 16:20</p>
--	--	--	--

Official - Subject to Final Review

<p>submitted [2] 73:20,22</p> <p>substantial [4] 17:11 27:1 29:15 64:22</p> <p>sue [2] 10:15 47:15</p> <p>sued [1] 3:16</p> <p>suffice [1] 56:17</p> <p>sufficient [3] 40:8 57:12 70:10</p> <p>suggest [2] 32:11 61:7</p> <p>suggesting [3] 31:13 32:14 53:23</p> <p>suggests [2] 46:25 50:18</p> <p>suit [7] 3:19 63:16 64:11,12,20,25 65:21</p> <p>suits [1] 64:21</p> <p>SULYMA [6] 1:7 3:6,16,19,25 11:5</p> <p>Sulyma's [1] 11:20</p> <p>summary [9] 26:23 35:21 36:1,23 37:15 54:17,22 66:3,5</p> <p>super [1] 64:2</p> <p>supporting [3] 1:25 2:11 56:6</p> <p>suppose [5] 6:22 8:23 30:17 40:1 51:21</p> <p>supposed [2] 25:2,3</p> <p>SUPREME [2] 1:1,14</p> <p>surfaced [1] 36:2</p> <p>surprised [1] 9:16</p> <p>survive [1] 35:20</p> <p>synch [2] 16:25 19:9</p> <p>system [3] 10:5,17 25:2</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>tangible [2] 20:7,8</p> <p>target [2] 11:16,21</p> <p>telephone [1] 45:22</p> <p>ten-page [1] 11:15</p> <p>tense [1] 6:6</p> <p>term [3] 20:25 50:22 51:15</p> <p>terms [3] 16:22 27:7 60:8</p> <p>test [1] 39:6</p> <p>tested [1] 35:16</p> <p>testified [2] 3:25 36:14</p> <p>testifies [2] 30:4 64:4</p> <p>testimony [2] 36:20 60:5</p> <p>text [6] 4:9 5:23 33:9 39:18 62:2,5</p> <p>textual [1] 62:23</p> <p>textualist [1] 61:3</p> <p>themselves [3] 5:16 39:22 50:14</p> <p>theory [7] 26:4 45:13 47:22 51:9 70:5,13,21</p> <p>there'd [1] 67:25</p> <p>there's [23] 7:10 16:5 24:25 25:23 27:5,6,24 30:2 32:8 35:4,7 38:24 42:9,12 43:9 48:20 49:1 52:24 54:25,25 62:9,23 71:10</p> <p>therefore [6] 4:1 16:20 18:20 45:25 65:8,11</p> <p>They've [3] 24:13,24 43:16</p> <p>thinking [2] 16:21 20:3</p> <p>though [9] 7:24 13:15 17:13 20:7,13 40:10 41:7 57:22 65:5</p> <p>three [11] 3:14,19 4:15 16:12 29:2,5 32:2 64:10,11 68:17 70:3</p> <p>three-year [21] 3:24 5:3,12 26:24 34:19 35:5 38:12,17 42:13,19 46:15 49:10 51:24 56:11 57:9 63:17,</p>	<p>22 66:20 69:4 70:9 73:14</p> <p>threshold [1] 72:1</p> <p>throughout [1] 36:16</p> <p>ticking [2] 42:13,20</p> <p>time-consuming [1] 18:13</p> <p>timeliness [1] 56:20</p> <p>timing [1] 55:10</p> <p>tolling [3] 26:11,13 45:1</p> <p>tomorrow [1] 42:8</p> <p>took [1] 52:15</p> <p>tool [1] 55:2</p> <p>top [2] 24:21 49:9</p> <p>totally [3] 16:3,15 21:11</p> <p>training [1] 34:8</p> <p>transaction [3] 38:23,25 39:2</p> <p>transactions [2] 38:25 62:19</p> <p>transmitted [1] 22:8</p> <p>transplanting [3] 16:2 21:9,10</p> <p>treat [2] 14:6,11</p> <p>treating [1] 7:23</p> <p>treatment [1] 68:6</p> <p>trials [1] 71:12</p> <p>trigger [8] 3:24 5:18 35:5 47:10 48:21 49:16 51:19 70:3</p> <p>triggered [4] 5:3,12 69:5,25</p> <p>triggers [1] 38:12</p> <p>trouble [1] 28:6</p> <p>true [4] 34:23 38:21 55:22 62:17</p> <p>trust [1] 34:15</p> <p>truth [1] 28:1</p> <p>try [1] 5:24</p> <p>trying [4] 15:24 62:4 70:18 73:5</p> <p>two [3] 22:3 65:3 68:23</p> <p>typical [2] 16:9 45:7</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S.C [1] 47:24</p> <p>Under [12] 4:6 11:1 23:1 26:4 27:25 34:11 48:11 50:12 63:23 65:6,21 70:13</p> <p>undermine [1] 55:23</p> <p>understand [22] 10:23 18:24 33:3 37:10 39:19 40:3,18 41:2,13 44:17 54:14 57:16 59:8,8,11,16 60:7,17 63:10,25 64:4 72:8</p> <p>understanding [8] 6:1 10:18 11:1 20:14 25:1 34:17 53:9 65:22</p> <p>understood [4] 23:4 43:2 58:24 69:22</p> <p>unicorn [1] 8:2</p> <p>uniformly [1] 23:2</p> <p>UNITED [6] 1:1,15,24 2:10 8:4 56:5</p> <p>universe [1] 49:22</p> <p>unlikely [1] 71:19</p> <p>until [2] 22:24 23:3</p> <p>unusual [4] 19:18,22 37:13 65:9</p> <p>unyielding [1] 34:13</p> <p>up [25] 10:5,17 16:25 18:4 19:4,9 21:6,22 27:16 31:14,20 35:24 36:17 37:4 42:6 44:24,24 45:18 48:4 51:5 54:2 55:6 65:8 70:5,22</p> <p>upends [1] 4:14</p> <p>urging [1] 21:3</p>	<p>useful [1] 36:11</p> <p>uses [1] 8:8</p> <p>using [1] 13:17</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>various [1] 11:16</p> <p>veracity [1] 35:16</p> <p>VERRILLI [65] 1:18 2:3,13 3:7,8,10 6:13,18 7:1,8,19 8:10,17,24 9:3,11 10:2 12:5,10,13 13:16 14:12 15:2,5,8,11,14 17:9 18:5,11 19:15 20:5,17,19 22:2,12,15 23:17 24:2,20 25:23 26:7,20 27:3,9 28:2,7,11,25 30:12,16 31:4,18,21,23 32:5,10,13 67:1 68:12,14,15 69:8,9,21</p> <p>Verrilli's [3] 47:12 65:5,16</p> <p>version [7] 47:13,24 48:11 50:10,12 51:4 68:18</p> <p>versus [1] 3:6</p> <p>view [2] 40:19 50:23</p> <p>views [1] 36:19</p> <p>violated [3] 62:12,16,21</p> <p>violation [12] 56:13 58:8 59:4,9,23 60:1 61:4,16,22 63:15,19 66:15</p> <p>virtually [5] 27:3 30:1 45:14 55:11 73:4</p> <p>visited [2] 30:18 36:13</p> <p>vulnerable [1] 29:7</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>W.H [3] 1:20 2:6 32:22</p> <p>wanted [2] 47:6 64:17</p> <p>Washington [4] 1:10,18,20,24</p> <p>way [36] 4:22 5:10 7:5 14:13,13 15:13 16:21 19:5,9,16,17 20:4 22:16 23:2,5 24:7 25:2,7 26:9,10,21 30:8,10 35:22 37:3 38:1 39:14,15 45:12 47:1 48:4,17 54:15 67:12 71:6 72:12</p> <p>ways [1] 35:18</p> <p>website [1] 30:19</p> <p>websites [1] 36:13</p> <p>Wednesday [1] 1:11</p> <p>weight [1] 21:4</p> <p>WESSLER [45] 1:20 2:6 32:21,22,24 35:17 36:10,24 37:19,21,24 39:8,11,24,25 40:5,7,22 41:16,21 42:22,23 43:5 44:5,17 45:19 46:18,20,23 47:17,19,21 49:22 50:9 51:25 52:22 53:6,11,14 54:1,6,8,24 55:14 58:3</p> <p>Wessler's [1] 67:6</p> <p>whatever [3] 19:20 57:23 61:10</p> <p>Whereupon [1] 73:21</p> <p>whether [17] 9:14 13:1 18:3 25:16 28:13 41:5 44:7 45:6,7 52:9 54:12 63:1 68:4 70:11 71:10,13 73:1</p> <p>who's [1] 52:9</p> <p>whoever [1] 25:15</p> <p>whole [8] 20:24 29:8 38:24 64:22 70:5,21,21 73:10</p> <p>whom [1] 18:3</p> <p>will [26] 5:23 11:19 13:22 14:6 16:11 26:15 27:25 28:5 29:24 33:13,</p>	<p>23 37:14,15 42:18 43:24,25 45:23 47:3 52:11 54:11 55:17 63:21 66:8,9 71:9,22</p> <p>willful [20] 7:6 12:6,20,21 13:7,15 14:2,8,15 22:17 51:21 52:1,12,22 53:1,24 55:1 72:7,16,17</p> <p>willfully [4] 12:8 14:4 15:12 54:23</p> <p>Williamson [2] 20:10,25</p> <p>wish [2] 44:16 46:23</p> <p>within [6] 3:14 22:21 32:16 44:2 64:9,11</p> <p>wondering [1] 31:11</p> <p>word [5] 6:6 7:12 17:7,10 21:1</p> <p>words [12] 19:23 20:22 21:5,17 22:6,21 25:5 44:14 57:16 67:25 70:17,19</p> <p>work [3] 17:11 25:2 45:24</p> <p>worker [1] 45:16</p> <p>workers [1] 28:20</p> <p>works [1] 16:7</p> <p>worth [2] 38:2 63:10</p> <p>worthwhile [2] 37:23 63:5</p> <p>writes [1] 52:14</p> <p>written [1] 58:18</p> <p>wrongdoing [1] 62:20</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Yates [2] 20:6,24</p> <p>year [1] 49:3</p> <p>years [19] 3:14,19 4:16 16:10,12 28:14,23 29:6,6 31:6,15 32:2 35:6 63:15,19 64:10,11 70:3,13</p> <p>yourself [1] 52:25</p>
--	---	--	---