

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

RETIREMENT PLANS COMMITTEE OF IBM,)
ET AL.,)
 Petitioners,)
 v.) No. 18-1165
LARRY W. JANDER, ET AL.,)
 Respondents.)

Pages: 1 through 68
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6 v.) No. 18-1165

7 LARRY W. JANDER, ET AL.,)

8 Respondents.)

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10 Washington, D.C.

11 Wednesday, November 6, 2019

12

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

16

17 APPEARANCES:

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19 on behalf of the Petitioners.

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21 General, Department of Justice,

22 Washington, D.C.; for the United States,

23 as amicus curiae, supporting neither party.

24 SAMUEL BONDEROFF, ESQ., New York, New York;

25 on behalf of the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	JONATHAN Y. ELLIS, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting neither party	27
9	ORAL ARGUMENT OF:	
10	SAMUEL BONDEROFF, ESQ.	
11	On behalf of the Respondents	38
12	REBUTTAL ARGUMENT OF:	
13	PAUL D. CLEMENT, ESQ.	
14	On behalf of the Petitioners	64
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
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10
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12
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14
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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-1165, the Retirement Plans Committee of IBM versus Jander.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

In Dudenhoeffer, this Court articulated a pleading standard that recognized that disclosure of negative inside information by insider fiduciaries could harm the plan and plan participants by immediately reducing the value of the fund. This Court thus required the plaintiffs to identify a specific alternative course of conduct that could not do more harm than good to the fund as a whole.

Here, Respondents alleged that insider fiduciaries should have taken inside corporate information, disclosed it through the regular corporate disclosure channels because disclosure was inevitable and the harms from concealment only grow over time.

1 There are two basic problems with that
2 submission. First, Respondents' allegations
3 face a insurmountable PEGRAM problem. ESOP
4 fiduciaries do not have a fiduciary obligation
5 to use information gained in a corporate
6 capacity or to use the regular corporate
7 channels of disclosure for the benefit of plan
8 participants.

9 It's particularly true with respect to
10 the use of regular corporate disclosure
11 channels. The use of those channels is
12 something that is inherently done wearing a
13 corporate hat, and, indeed, the insiders only
14 have access to the regular corporate disclosure
15 channels because of their corporate roles.

16 It requires no extension of PEGRAM
17 whatsoever to say that the use of those
18 corporate disclosure channels is a corporate act
19 and that corporate act is already pervasively
20 regulated by the securities law.

21 But, second, even if there were a
22 fiduciary obligation to use insider information
23 gained in a corporate capacity or to use
24 corporate disclosure channels, the allegations
25 here would still be insufficient.

1 The allegations that no fraud lasts
2 forever, disclosure's inevitable, and the harms
3 of concealment only grow over time, so it is
4 prudent to disclose early could be made in every
5 case. Those generic allegations by definition
6 could not separate goats from sheep. They could
7 be made every single time.

8 The premise of --

9 JUSTICE SOTOMAYOR: Well --

10 MR. CLEMENT: -- Respondents'
11 allegation is also fundamentally inconsistent
12 with the premise of the third consideration in
13 Dudenhoeffer. The third consideration in --
14 Dudenhoeffer is premised on the objective
15 reality that if you disclose negative inside
16 information to the market, it's going to have a
17 negative impact on the value of the stock, which
18 is all an ESOP holds.

19 And so this Court said, we need
20 something very specific, very different from the
21 normal course that would allow the fiduciary to
22 say no disclosing this and committing this
23 immediate harm is nonetheless prudent.

24 JUSTICE KAVANAUGH: So, in your second
25 argument, is it your point that there are always

1 going to be different classes of beneficiaries,
2 some of whom would be harmed, some of whom would
3 be helped by earlier disclosure, and, therefore,
4 the duty of prudence cannot be violated in those
5 circumstances?

6 MR. CLEMENT: I think that's
7 absolutely part of it. I mean, I think there --
8 there are multiple prongs --

9 JUSTICE KAVANAUGH: What -- what --
10 what more, because that seems to come out of
11 your -- the second argument as close to a bright
12 line. You have the exception for the newly --
13 the new plan, but it seems close to a bright
14 line.

15 I'm wondering if there is any wiggle
16 room there or is that pretty much a bright line?

17 MR. CLEMENT: I -- I think it ends up
18 being pretty close to a bright line, which is --
19 I mean, the reason you can have an exception for
20 the situation where it's a newly created ESOP is
21 because, in that situation, you don't have to
22 trade off the interests of net buyers and net
23 sellers, short-term holders, long-term holders.

24 JUSTICE KAVANAUGH: Can you imagine a
25 circumstance where you have different classes of

1 beneficiaries where there would still be a -- a
2 claim that could be made that earlier
3 disclosures should have been made in a stock
4 price drop case?

5 MR. CLEMENT: I have a -- I have
6 trouble coming up with one of those. Now I
7 don't think that means you can't have duty of
8 prudence claims in this context. I mean, the
9 classic duty of prudence claim which has the
10 virtue of not trading off different
11 beneficiaries' interests would be a duty of
12 prudence claim that says that when the company
13 set up this ESOP, they didn't set it up in the
14 right way or, when they're buying or selling,
15 they're paying above market commissions.

16 Those kind of duty of prudence claims
17 could be, you know, pled and they don't create
18 this kind of tradeoff of the interests of one
19 group versus another. So I definitely think
20 that's an important feature of this.

21 But I also think it's worth
22 recognizing that the premise of the Respondents'
23 claim is really directly contrary to the premise
24 of the third Dudenhoeffer consideration because
25 the premise of their claim is that no fraud

1 lasts forever, not this fraud in particular, but
2 no fraud lasts forever. The costs of
3 concealment always increase over time.

4 They cite a 1990 Law Review and a 2008
5 Financial Journal in their second amended
6 complaint to buttress that claim, and so early
7 disclosure is always going to be the prudent
8 course if --

9 JUSTICE SOTOMAYOR: Not necessarily.
10 There's a -- there's time for investigation,
11 proper investigation. There's time for
12 corrective measures that could reduce the loss.
13 The economic principle, however, is both logical
14 and supported by the literature.

15 So I -- I'm not sure what you think is
16 missing from the specifics, other than your
17 answer that the economic principle shouldn't
18 exist at all. That -- that -- that seems to --
19 but that -- isn't that a matter of fact for the
20 jury -- the trier of fact? It'll be a battle of
21 competing experts, but, certainly, shouldn't
22 they be entitled on a motion to dismiss to rely
23 on what is well-founded economic theory?

24 MR. CLEMENT: Well, I -- I hope not,
25 which is to say I --

1 JUSTICE SOTOMAYOR: Well, why not?

2 MR. CLEMENT: Because I think, in a
3 situation like this, a fiduciary that's facing
4 these competing obligations among different
5 members of the plan and is also confronted with
6 a 2000 --

7 JUSTICE SOTOMAYOR: Well, you can't --
8 you can't really be saying that it's a fiduciary
9 duty to help sellers promote fraudulent conduct
10 by avoiding losses for people. That seems
11 contrary to what we would want in -- of a
12 fiduciary or of a securities law, that
13 sellers -- that you're going to take sellers
14 into account.

15 MR. CLEMENT: So --

16 JUSTICE SOTOMAYOR: Because they're
17 going to avoid the fraud, the effects of a
18 fraud. They're going to benefit from it. Not
19 very logical, is it?

20 MR. CLEMENT: So --

21 JUSTICE SOTOMAYOR: It seems to me you
22 have to look at what holders are experiencing
23 and what potential buyers are experiencing. And
24 by that measure, both of them will be harmed by
25 delay.

1 MR. CLEMENT: So, Justice Sotomayor, I
2 think there's two points there. There's what
3 you expect the fiduciary to be doing and then
4 what you expect the corporation and the
5 corporate officers to be doing.

6 With respect to the fiduciaries, when
7 it comes to an ESOP, what you really expect them
8 to be doing is not much, because, if they do
9 anything with inside information to try to
10 benefit the plan participants and not the market
11 as a whole, they run --

12 JUSTICE SOTOMAYOR: No, there, they're
13 wearing their corporate hat. As an ESOP, they
14 are charged with exercising due diligence and
15 care for -- as a fiduciary. Wherever they
16 secure the knowledge from, there's no case that
17 says where you secure the knowledge from defines
18 your duty. How you act may define your duty in
19 your corporate hat or in your ESOP hat, but not
20 where your knowledge comes from.

21 MR. CLEMENT: Well, Justice Sotomayor,
22 it would require an extension of Pegram to say
23 that there's no obligation to use the inside
24 information gained in a corporate capacity in a
25 fiduciary capacity. I admit that. I think that

1 would be a wise extension of Pegram, and I think
2 it would reflect the reality that in practice,
3 on a day-to-day basis, no ESOP that is being
4 managed by insiders is using inside information
5 in an active way to trade.

6 All of these programs are essentially
7 set up to prevent that from happening in order
8 to comply with the securities law. But it
9 doesn't --

10 JUSTICE SOTOMAYOR: But that's
11 different from disclosure.

12 MR. CLEMENT: You're right.

13 JUSTICE SOTOMAYOR: And it's much
14 different from what you're obligated to do. The
15 securities laws are not the self -- contrary to
16 the government's position -- the securities laws
17 don't purport to govern your fiduciary duties.

18 MR. CLEMENT: Exactly. And so, when
19 you have a case like this where Respondents have
20 alleged that the specific course of conduct
21 that's going to not do more harm than good is to
22 disclose through the regular securities
23 channels, that is a clear sign to you that that
24 is a Pegram problem, because the regular
25 securities channels of IBM, the disclosures that

1 are made through those channels, are made by IBM
2 officials wearing their corporate hats to
3 disclose on behalf of the corporation.

4 And if you look at the complaint here,
5 there's nothing about this complaint that's
6 specific to these fiduciaries did something as a
7 fiduciary that you expect a fiduciary normally
8 to do that was wrong. This is a securities law
9 complaint.

10 And it's perfectly fine to have it
11 brought as a securities law complaint when the
12 basic beef is that insiders at the corporation
13 used corporate disclosure channels to not give
14 enough information to the market as a whole.
15 But that's what this case is, is a securities
16 case.

17 And I would respectfully submit it
18 should be pled under the securities law. It
19 should be subject to the limits of the PSLRA.
20 It should be subject to the limit that this
21 Court has put on securities actions over the
22 years, in cases like Blue Chip Stamps and
23 Central Bank of Denver. You know, we don't have
24 holder claims under the securities law, we don't
25 have aiding and abetting claims under the

1 securities law, but you can have all of that as
2 an ERISA come securities action where you don't
3 even have a scienter requirement.

4 And I think if you think about the way
5 that this case was treated as a security case,
6 it's very -- you know, the underlying securities
7 allegations is that IBM miscalculated and
8 misapplied the GAAP regulations and didn't make
9 an early disclosure of the losses of the
10 microelectronics unit.

11 Now, in order to figure out whether
12 that's a securities violation, you have to
13 figure out whether the microelectronics unit is
14 sufficiently separate from the broader reporting
15 unit that it's part of.

16 Now the district court, when it heard
17 this case, a securities case, said I'll -- I'll
18 give you just over the line on that allegation.
19 It seems kind of complicated, but it'll get you
20 just over the line.

21 But then, under the securities law, I
22 get to scienter, and I have to see a strong
23 inference of scienter. And I don't see anything
24 close to a strong inference of scienter here.
25 This is like a debatable principle of

1 accounting, so I'm going to dismiss this claim.

2 JUSTICE GORSUCH: Mr. Clement, if we
3 could just back up for a minute. I have, I
4 guess, an antecedent question.

5 And I -- I understand that a great
6 deal of your brief is devoted to arguing that --
7 that liability under ERISA should be coextensive
8 with the Securities Act for insiders, and I
9 suppose some of that may follow from the idea
10 that Congress has approved insiders as
11 fiduciaries for ESOPs.

12 But I guess I'm less clear why this
13 Court should be in the business of accommodating
14 that decision. It's a choice. It's not an
15 inevitability that insiders would serve as
16 trustees. And I guess I'm not clear exactly
17 what employees gain from having insiders as
18 trustees if, at the end of the day, they wind up
19 being know-nothings, because they can't do
20 anything. As you've kind of indicated, they
21 just can't do anything.

22 An outsider might in these
23 circumstances be able to make a reasoned
24 judgment of some kind about whether to sell or
25 buy or act differently in a way that an insider

1 is, as you point out, disabled from doing.

2 So can you help me with that?

3 MR. CLEMENT: I'll try to, Justice
4 Gorsuch. So, first, I -- I don't think it's
5 right to say that the outsider is going to be in
6 a better position to do something with this
7 information because the outsider by definition
8 isn't going to get the inside information that
9 you're only getting because --

10 JUSTICE GORSUCH: Well --

11 MR. CLEMENT: -- you're a corporate
12 insider.

13 JUSTICE GORSUCH: -- you know, these
14 things leak. You know, it's possible. Maybe --
15 maybe not. But at least there's a metaphysical
16 possibility they can do something other than be
17 a know-nothing.

18 And so, again, can you help me
19 understand why we would want to encourage
20 insider trustees and provide special rules for
21 them? What -- what's gained by employees?

22 I didn't see any real account in the
23 briefs, I'll be honest, as to what -- what
24 Congress was getting at here, why it's a good
25 idea, why we should -- why we should underwrite

1 it?

2 MR. CLEMENT: So, you know, I don't
3 want to quibble too much on the premise. I
4 mean, if it leaks, it's public information, so
5 you're in a different box. But I want to be
6 responsive, and here's what I would say.

7 What employees gain is two things.
8 One is they do gain some cost savings because it
9 costs less -- okay, you're shaking your head, so
10 let me go to --

11 JUSTICE GORSUCH: I'm not shaking my
12 head. I'm just like "ehh," you know, maybe,
13 okay.

14 MR. CLEMENT: Well, okay, but the cost
15 savings do directly benefit the plan
16 participants --

17 JUSTICE GORSUCH: Ehh.

18 MR. CLEMENT: -- if the costs of
19 running -- I mean, if you go out and get
20 Vanguard, you know, the company --

21 JUSTICE GORSUCH: It costs something.

22 MR. CLEMENT: -- is not going to pay
23 for that. The plan participants are.

24 JUSTICE GORSUCH: Yeah.

25 MR. CLEMENT: But here's -- here's the

1 real thing you gain, which is you incentivize
2 companies to have the pension plans in the first
3 place and you incentivize them to have pension
4 plans.

5 You've got to take a step back, and
6 this is what the Court did in Pegram, and --

7 JUSTICE GORSUCH: Yeah, no --

8 MR. CLEMENT: -- which is, you know,
9 this is an unusual regime, right, because
10 there's a lot of responsibilities that come with
11 having an ERISA plan, and no company is forced
12 to have an ERISA plan.

13 JUSTICE GORSUCH: Right.

14 MR. CLEMENT: So, in part, to
15 incentivize companies to have them, they said,
16 we're going to deviate from the common law rule,
17 where you couldn't have an insider serve as a
18 fiduciary, and we're going to deliberately
19 deviate from the common law rule, and we're
20 going to set this up. It'll be easier to do it.

21 Now what companies like IBM have done,
22 and I think it's important to understand this,
23 is they have not said, oh, well, you know, for
24 everything else, we offer 201 funds in our plan,
25 and for everything else we're going to use

1 Vanguard, but for this ESOP we're going to use
2 just our inside guys.

3 That's not how they do it. They set
4 up all 200 plans. They have very senior
5 corporate officials run that. They think
6 they're doing their employees a favor not only
7 by saving the cost but by having very
8 sophisticated individuals run these various
9 funds.

10 Now, if you tell them that they are
11 going to uniquely face these kind of securities
12 actions without the protections of the PLSRA, if
13 they have the fiduciaries, the insiders run the
14 ESOP, because the real risk here is with the
15 ESOP.

16 JUSTICE GORSUCH: Right.

17 MR. CLEMENT: The easiest thing for
18 IBM to do is to say let's get rid of the ESOP.

19 JUSTICE GORSUCH: ESOP.

20 MR. CLEMENT: We're not going to --
21 we're not -- and that's clearly contrary to
22 Congress's intent. But they're not going to
23 change the way they run 200 funds in order to
24 accommodate the ESOP. They'll just get rid of
25 the ESOP.

1 JUSTICE KAVANAUGH: So that I have the
2 road map clear, if we were to agree with you on
3 your second argument, which the one we discussed
4 earlier, we don't get into the Pegram issue or
5 some of the issues raised by Justice Gorsuch and
6 some of Justice Sotomayor's questions, right?

7 MR. CLEMENT: I -- I -- I think that's
8 right. And then I may be back here in another
9 three years, and I think the advantage of the
10 Pegram issue, I mean, and -- and part of the
11 reason we thought we should present it for the
12 Court's benefit, is that that really I think
13 would be a more complete solution to this
14 because I think we've had --

15 JUSTICE SOTOMAYOR: That's not what
16 you asked for cert on. You have a -- I -- I
17 read the question, whether the more harm than
18 good pleading consideration from Fifth Third
19 Bancorp can be satisfied by generalized
20 allegations that the harm of an inevitable
21 discovery of an alleged fraud generally
22 increases over time.

23 Now I -- I -- what do you imagine or
24 do you imagine that there's any particular
25 disclosure that could meet that standard? Later

1 -- what's missing from what they say?

2 MR. CLEMENT: What's missing is any
3 kind of detail about the nature of this plan,
4 the precise circumstances, they either just set
5 up the plan or it was, you know, a new growth
6 company, so they would have known that
7 98 percent of the people were -- were net
8 buyers.

9 I mean, may -- may -- maybe you could
10 imagine that, but -- but, honestly, this is
11 where I was getting with this, is I think, you
12 know, the courts have had five years of
13 experience or whatever it is with the
14 Dudenhoeffer considerations. And I think, as
15 the cases have matured, what you've seen is that
16 the claims of the prudent alternative course
17 have migrated. They started with things that
18 actually were fiduciary actions.

19 They were actions like let's just stop
20 trading, I mean, that would be a fiduciary
21 action, or let's make an extraordinary
22 disclosure, not within the normal security
23 channels, make an extraordinary disclosure.

24 But, when courts were confronted with
25 those courses, what they concluded is, ah, a

1 prudent fiduciary could say that's crazy. And
2 so those claims didn't get off the ground. So,
3 as these claims have matured, the plaintiffs
4 have said, ah, we know the right way to do this
5 is a very subtle disclosure through the regular
6 corporate channels and that'll solve the problem
7 because it won't spook the market.

8 But the problem is really twofold.
9 Once you do that, first of all, you've said that
10 they really have to put on their corporate hat,
11 and they have to make the disclosure through the
12 regular corporate channels.

13 And part of the reason it's less
14 spooky for the market is because we're used to
15 corporate officials making disclosures through
16 regular corporate channels. We're not used to
17 fiduciaries coming in and blowing the top off of
18 the whole thing in some extraordinary way. And
19 so they really do plead themselves into a Pegram
20 problem.

21 But the second thing, and I think this
22 is very important, is, as the cases mature, my
23 friend on the other side points out quite
24 correctly that you can't make any disclosure
25 just to the plan participants.

1 So you have these special
2 responsibilities as a fiduciary to the plan
3 participants, but you can't make a special
4 disclosure to them. You have to disclose to the
5 entire market.

6 But once these cases have matured to
7 the point where the -- even the plaintiffs are
8 saying what you need to do is you need to make a
9 disclosure to the entire market and you need to
10 do it through the regular corporate disclosure
11 channels, boy, we have a body of law that is
12 precisely attuned to regulating the adequacy of
13 disclosures by corporate officials through
14 corporate channels --

15 JUSTICE BREYER: I -- I --

16 MR. CLEMENT: -- to the market as a
17 whole.

18 JUSTICE BREYER: Your argument now and
19 the government and most of the briefs here seem,
20 as Justice Sotomayor pointed out, to be
21 addressing a different issue than what we
22 granted cert on.

23 And the -- they seem to be dealing
24 with what I've called the second part of the
25 three considerations, and that is how the

1 relation between securities laws and ERISA law
2 ought to be when the last sentence there was
3 absolutely deliberate; namely, we didn't have
4 the views of the government.

5 All right. So now we have the views
6 of the government on that question. But, in
7 reading them, I realize, one, I don't know what
8 the lower courts think about those views. I
9 don't know what the securities community and all
10 the others think about those views.

11 Therefore, why don't we just stick to
12 the question on which we granted cert? Namely,
13 the third question. And as to that, in their
14 amended complaint, from 106 through, I think,
15 111, they have allegations in -- in those
16 paragraphs that, when I read them, seem fairly
17 specific. Rather -- well, we know what they are
18 and you know what they are.

19 So, one, why don't we simply address
20 that, leaving the other questions you raised to
21 be developed in lower courts, and then, having
22 addressed that, we look at what they say here in
23 the complaint? And at the moment, I'm thinking
24 it seems adequate. What's wrong with it?

25 MR. CLEMENT: So, Justice Breyer, I

1 think that it is -- I mean, we're happy to win
2 this case under the third factor or the second
3 factor. Obviously, if you tell me you're going
4 to vote against us on the third factor, I'd
5 really like you to look at the second factor.

6 (Laughter.)

7 MR. CLEMENT: But, in all events, I
8 don't think we should lose under the third
9 factor.

10 JUSTICE BREYER: Because?

11 MR. CLEMENT: If you look at the
12 allegations here, most of them could be made in
13 every single --

14 JUSTICE BREYER: Not this one.

15 MR. CLEMENT: -- one of these cases
16 which --

17 JUSTICE BREYER: During the class
18 period, the plan was a net buyer of stock.

19 MR. CLEMENT: They walked away from
20 that because it turns out, although they alleged
21 it, it was wrong. And the district court --

22 JUSTICE BREYER: Well, that's for the
23 answer.

24 MR. CLEMENT: No, no, no.

25 JUSTICE BREYER: The answer says --

1 MR. CLEMENT: No, no. When you --

2 JUSTICE BREYER: -- the complaint
3 alleges such and such, it's wrong. And now
4 we'll have some discussion about that.

5 MR. CLEMENT: With all due respect --

6 JUSTICE BREYER: Yeah.

7 MR. CLEMENT: -- what happened here is
8 they made that allegation based on publicly
9 available documents. It was pointed out to the
10 district court, and the district court in
11 dismissing this case said that's wrong, it's a
12 net seller, I'm not going to decide this case --

13 JUSTICE BREYER: On that basis?

14 MR. CLEMENT: -- on a mistaken fact.
15 And so he said, it's publicly available to me.
16 It is -- I'm going to take judicial notice of
17 it. They were a net seller by a couple of
18 hundred million dollars, which, of course, is
19 exactly what you'd expect with a mature plan
20 from somebody like IBM as opposed to a new
21 startup where you might think they'd be a net
22 buyer if you think about it long enough.

23 So, in any event --

24 JUSTICE BREYER: You say alleged if
25 they'd alleged that the -- the trustee didn't

1 know that they would be a net seller, would that
2 then be sufficient?

3 MR. CLEMENT: I don't think so because
4 I think particularly --

5 JUSTICE BREYER: Right.

6 MR. CLEMENT: -- the fiduciary of a
7 long-established plan could say, I don't know it
8 for a fact, but I think we're very likely to be
9 a net seller.

10 If I could advert you to another one
11 of their specific allegations --

12 CHIEF JUSTICE ROBERTS: Do you want to
13 just give a reference?

14 MR. CLEMENT: Yeah, it's at page 29.
15 This is their so-called inevitability
16 allegations, which are case-specific. But, of
17 course, they say that the sale is more likely
18 than not and that if there were a sale, it would
19 be likely that they -- that the results would be
20 disclosed.

21 So more likely than not and likely
22 does not equal inevitability. So, if you want
23 to look at the very specific allegations here, I
24 don't think it gets it done.

25 Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Ellis.

4 ORAL ARGUMENT OF JONATHAN Y. ELLIS
5 FOR THE UNITED STATES, AS AMICUS CURIAE,
6 SUPPORTING NEITHER PARTY

7 MR. ELLIS: Mr. Chief Justice, and may
8 it please the Court:

9 In Dudenhoeffer, this Court recognized
10 that an ESOP fiduciary would sometimes have an
11 ERISA-based obligation to take action based on
12 inside information. The Court, however, didn't
13 define the precise circumstances but identified
14 certain relevant considerations for future
15 cases.

16 Here, we consider just one possible
17 response to inside information, namely, to
18 disclose it to the entire market. But there's a
19 well-developed body of federal law about when
20 such disclosures are necessary and appropriate
21 for the protection of investors.

22 In the views of the SEC and the
23 Department of Labor, while a prudent fiduciary
24 may be required to take a number of actions
25 based on inside information, ERISA should

1 rarely, if ever, require a fiduciary to effect
2 an unplanned market-wide disclosure that the
3 federal security laws --

4 JUSTICE SOTOMAYOR: Why --

5 MR. ELLIS: -- do not require --

6 JUSTICE SOTOMAYOR: Why?

7 MR. ELLIS: -- of that fiduciary.

8 JUSTICE SOTOMAYOR: I'm sorry.

9 MR. ELLIS: I think for two reasons,
10 Your Honor. That's okay. I -- that leads quite
11 next to what I was going to say. We think it
12 would undermine the objectives of the securities
13 laws to impose an additional disclosure regime
14 based on the ad hoc balancing of a single ERISA
15 fiduciary.

16 And, importantly, to your point,
17 Justice Breyer, we think that a prudent
18 fiduciary could conclude that making such an
19 unnecessary disclosure would do more harm than
20 good to the ESOP participants.

21 JUSTICE GINSBURG: May I ask you a
22 question about this -- this theory of yours I
23 saw nowhere aired below? And then you come in
24 with a brief and you seem not to focus on the
25 more harm than good standard, but you say that

1 an insider has a duty to disclose nonpublic
2 information under the Securities Act, so we're
3 going to use the Securities Act. But I didn't
4 see that in the -- in the district court or the
5 court of appeals.

6 MR. ELLIS: So we -- when the court
7 came -- or the case came to our office, we
8 looked at this case afresh and we decided what
9 can we add, what can we -- how can we be useful
10 to the Court? We think we can be useful to the
11 Court by discussing the objectives of the
12 securities laws, but I -- importantly, as I just
13 noted, I think our -- all of our analysis is
14 just as relevant to the third prong, to the more
15 harm than good standard as well, because I think
16 a prudent fiduciary in this position that's --
17 that faces the confines of the securities laws
18 where they can't do what it is that everybody
19 would agree is the best thing for the
20 participants, right, they should trade on the
21 inside information or they should disclose it
22 selectively to those participants -- they can't
23 do that. The securities laws make that illegal.

24 And so the question is, should I make
25 a public disclosure? And when you get -- when

1 you're talking about doing that, I think it's
2 prudent. And I think at least a reasonable
3 fiduciary could conclude it's prudent to not --
4 to look to the balance that Congress has struck
5 and that the Commission has struck into deciding
6 when such disclosures are necessary and
7 appropriate for the protection of all investors,
8 including the very investors that are
9 participating in this ESOP.

10 JUSTICE ALITO: Do you think it's --

11 JUSTICE SOTOMAYOR: As I've always
12 understood the securities law, it only controls
13 disclosure to the extent that something you say
14 is misleading, is fraudulent. You have to have
15 a statement that is misleading or fraudulent.

16 Let's assume it's a new company. And
17 you don't have to make a statement, but you
18 know, as is alleged here, that a fraud is going
19 on, that it's going to be inevitably caught, and
20 it's going to be caught before you can -- have
21 to make a disclosure.

22 You're suggesting that in that
23 situation, there is no duty to the -- to -- as a
24 fiduciary, to make a disclosure that is not
25 required by the SEC?

1 MR. ELLIS: So a couple points, Your
2 Honor. On the first -- on the premise of the
3 question, it's just not accurate that the
4 securities laws only govern things that you say.
5 A lot of the securities laws and antifraud
6 provisions are based on misstatements and
7 corrections of the misstatements, but there's an
8 entirely addition -- additional disclosure
9 regime, where certain events that are major
10 events, like material impairments or like
11 changes in the control or definite agreements,
12 have to be disclosed within four days --

13 JUSTICE SOTOMAYOR: But not every --

14 MR. ELLIS: -- regardless of what you
15 said before. And then there's 10-Q and there's
16 10-K. I would also point out that this very
17 case is, in fact, based on allegations that the
18 company had made a misstatement before and
19 needed to correct that misstatement.

20 So this is a 10 -- a fraud case, a
21 10(b) case -- a 10(b) case. It's just that no
22 one has evaluated whether the allegations are
23 sufficient to state that.

24 JUSTICE ALITO: Do you think that it
25 is workable, practical, to require an insider

1 fiduciary to determine whether the disclosure of
2 information -- inside information to the public
3 at a particular point in time will do more harm
4 than good? Does -- is that inherently a
5 workable standard, or -- or is it your argument
6 that it is not and that's why you reached the
7 position that you reached?

8 It seems to me, in that situation, the
9 fiduciary has to make a very complicated
10 calculation. But maybe -- maybe it's more
11 doable than it seems to me, like whether the --
12 are the participants net buy -- are they net
13 buyers or sellers? What will the situation be
14 at some point in the future when the information
15 will inevitably come out?

16 MR. ELLIS: So I think it is workable
17 in the sense that if you -- a prudent fiduciary
18 in that position would not be ignorant, would
19 not close its eyes to the entire body of law
20 that's intended to balance those interests.

21 I agree that it's not a workable
22 solution to have an ad hoc balancing, and I
23 don't think it would be -- as I said, I think it
24 would be inconsistent with the securities laws
25 to impose this sort of ad hoc disclosure regime

1 on every company, public company, that's got an
2 ESOP, with insider fiduciaries, but not on the
3 rest of the market.

4 But I think what a prudent fiduciary
5 would do, it's our position, is that they would
6 look to that body of law and they would
7 reasonably conclude or at least they could
8 reasonably conclude -- which I take to be,
9 everyone agrees, is the standard here -- that --
10 that making a disclosure that the company has
11 decided is not in the best interests of the
12 shareholders and the federal securities laws,
13 the expert -- and the expert commission has
14 decided is not necessary and appropriate for the
15 --

16 JUSTICE BREYER: That's --

17 JUSTICE KAGAN: That does sound --

18 JUSTICE BREYER: Well, where we are,
19 it seemed to me, is you're trying to argue both,
20 but are there things in the securities laws that
21 mean that the fiduciary should not disclose
22 information that will drive the price of the
23 share down, such as -- that's what you're
24 saying.

25 Okay. That's not what we granted cert

1 on. And the reason that I stress that is
2 because my reaction to what you say is I don't
3 know. And I would like a lot of argument in a
4 lot of courts.

5 So I assume that in this case the --
6 he should have, he should have, a prudent
7 trustee would have disclosed the information to
8 the market through the channels that they are
9 suggesting.

10 Next question. Is there a special
11 reason why he shouldn't disclose it anyway,
12 because disclosing it will hurt the plan and its
13 participants? Answer, they say, no, there's
14 nothing special here. As a general matter,
15 disclose it sooner rather than later if, as the
16 court of appeals said, disclosure is inevitable.

17 So they allege it was inevitable.
18 They allege that loads of information that shows
19 if it's inevitable, do it fast, that will not
20 hurt the plan, it will help it. And there we
21 are, criterion 3 is satisfied.

22 So I've sketched out -- they'll put
23 their position better than I did -- but -- but
24 -- but still, if that's roughly their position,
25 why don't -- if we narrow the question to what

1 we granted on, why don't they win?

2 MR. ELLIS: I think because a prudent
3 fiduciary can't narrow. It's -- it's artificial
4 to say that a prudent fiduciary would -- should
5 -- would or could or should ignore the body of
6 law that speaks to this precise question, that
7 speaks to precisely when a company should've
8 made, not a selective disclosure, to just the
9 participants that they can benefit on, but a
10 public one, a market-wide one for all -- for all
11 investors.

12 That's what the Commission -- the
13 Securities Commission has set out to do in its
14 disclosure regime, and we think it would be
15 unhelpful and artificial to -- to assume in this
16 case that a prudent fiduciary would just ignore
17 that body of law.

18 And I'd point out that it's not always
19 true that you would disclose -- that disclosing
20 information that will come out sooner would be
21 better. It may be in the case of negative
22 information, but positive information would come
23 -- would go through the same analysis.

24 JUSTICE KAGAN: Mr. -- please. I
25 mean, it does sound like you want us to scrap

1 Dudenhoefter and -- and start all over again.

2 MR. ELLIS: So I don't think that's --
3 I don't think that's right. I think our
4 position is fully consistent with Dudenhoefter
5 and -- and all three factors are still relevant.

6 It's just that in this precise
7 circumstance, the first two factors do all -- do
8 a lot of the work. So take, for example, a case
9 where the -- where the complaint was you should
10 take -- the alternative action you should take
11 was to trade on this information or -- or was to
12 selectively disclose it to the participants.

13 I think we'd say no, and indeed
14 Dudenhoefter says no, because that's illegal.
15 And prudent fiduciaries don't take illegal acts.
16 That doesn't mean that you're somehow writing
17 out the second and third fact considerations in
18 Dudenhoefter.

19 JUSTICE KAGAN: But those factors were
20 in service of a particular test that said, you
21 know, we want to ask whether a reasonable
22 fiduciary would look at this and say that
23 there's a course of action that would or
24 wouldn't do more harm than good.

25 I mean, that is what I think Justice

1 Alito called a balancing test. And that's what
2 Dudenhoeffer said we should do.

3 Now there are reasons against
4 balancing tests, but that's what it says.

5 MR. ELLIS: Sure, but before you get
6 to that factor, the Court said, you should also
7 consider whether a ERISA-based obligation to
8 disclose in that scenario would be inconsistent
9 with the objectives of the -- of the securities
10 laws.

11 We think in almost every case it would
12 be, and so you don't have to get to that third
13 factor. But, even if you do, we think a
14 reasonable, prudent fiduciary could conclude
15 that making a disclosure that's not required by
16 the securities laws, the Commission that
17 balances what -- how much disclosure is too
18 much, and the timing for those disclosures,
19 would do more harm than good to the -- to the
20 investors in the ESOP.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Bonderoff.

24

25

1 ORAL ARGUMENT OF SAMUEL BONDEROFF

2 ON BEHALF OF THE RESPONDENTS

3 MR. BONDEROFF: Mr. Chief Justice, and
4 may it please the Court:

5 Dudenhoeffer said that ESOP
6 fiduciaries owed the same duty of prudence as
7 every other ERISA fiduciary, except they don't
8 need to diversify the fund's assets. And this
9 is meaningful as a pleading matter and also as a
10 substantive matter.

11 We forget sometimes Dudenhoeffer was
12 about a circuit split where a presumption of
13 prudence in favor of ESOP fiduciaries was either
14 to be applied at the pleadings stage or at the
15 evidentiary stage. And this Court found that
16 notwithstanding all the policy concerns about
17 the need to encourage ESOPs and all the
18 difficulties caused by the intersection of the
19 -- of the ERISA and the securities laws, it was
20 still not appropriate to have that presumption
21 in place.

22 It's not in the statute. The statute
23 says the duty of prudence here is basically the
24 same as would apply to a non-ERISA investment.
25 And, in fact, a lot of the issues we're

1 discussing today about administrability and how
2 difficult it might be to apply this test come up
3 in the non-ESOP context all the time.

4 When you have an investment that is
5 alleged to be imprudent, a mutual fund that's
6 alleged to be imprudent, you will have people in
7 the plan who are different stakeholders
8 differently situated.

9 Some of them are long-term investors;
10 some of them are short-term investors. And
11 whether the plan in that case isn't deciding not
12 -- whether or not to disclose, but they're
13 deciding whether or not to sell the investment
14 or take it off the menu, they have to balance
15 those interests of those different shareholders
16 all the time.

17 And they have to make a lot of very
18 difficult decisions. And they do, in fact, if
19 they're doing their job right, a lot of very
20 difficult analysis in monitoring those
21 investments.

22 And the way courts have been dealing
23 with those kinds of cases for decades is on a
24 case-by-case, context-specific basis,
25 essentially asking the same kind of question

1 that the Court asked here in Dudenhoeffer. Is
2 the decision that you're examining -- would it
3 have done more harm than good to the people
4 whose interests you're supposed to be
5 protecting?

6 JUSTICE BREYER: On that particular
7 point, if you take paragraph 106 out of your
8 amended complaint, then it seems to me what
9 they're saying is all you've left is you just
10 have an allegation that, well, it always causes
11 more harm -- it always -- it never causes more
12 harm than good to sell -- to reveal quickly.

13 And they say that couldn't be enough.
14 All you did was take the sentence from
15 Dudenhoeffer and just write it in slightly
16 different words. And they're saying that that
17 wasn't good enough to satisfy it, you should
18 have been more specific.

19 You should have listed a few of those
20 shareholder interests. You should have -- which
21 you tried to do on 106, but they said that was
22 wrong, okay, so what about that?

23 MR. BONDEROFF: Well, actually, 106 is
24 not the only place where we talk about those
25 interests. This case here is -- is actually not

1 -- does not turn on that general allegation,
2 that economic principle about disclose sooner
3 rather than later because it is not always going
4 to be the case, if you are looking at it from
5 the perspective of an ERISA fiduciary, better to
6 disclose sooner than later, but here it was,
7 because here you have a year of trying to sell
8 the company and hiring Goldman Sachs to do it, a
9 year of that before we even say the class period
10 begins.

11 We didn't say they should be sued as
12 of 2013 when they start looking. We say a year
13 later, when they've been trying to do this for
14 the year, when they've invested considerable
15 resources in it, it's more likely than not
16 inevitably going to be disclosed.

17 JUSTICE KAVANAUGH: But isn't the
18 problem, as the Fifth and Sixth Circuit said in
19 similar circumstances, that you have different
20 classes of beneficiaries, some of whom would be
21 harmed, some of whom would be benefitted? And
22 when that's the circumstance, it's a little hard
23 to hold the fiduciary liable for violating the
24 duty of prudence, given the different interests
25 of the different classes of beneficiaries?

1 What's wrong with that -- that conclusion?

2 MR. BONDEROFF: Well, there are a
3 couple things that I would take issue with. I
4 -- I'm not necessarily with the Fifth and Sixth
5 Circuit's rulings, but they came to those
6 conclusions based on different underlying facts.

7 You can't know in real time if you're
8 going to have more buyers than sellers. You
9 can't know this kind of information until after
10 the fact. And ERISA has always looked at, even
11 going back to before ERISA, we've always looked
12 at what they knew at the time.

13 But what you can know and what you can
14 think about and put at the fore is the long-term
15 interest of the investment because the long-term
16 interest of the investment --

17 JUSTICE GORSUCH: Can I -- can I
18 interrupt you there? I'm sorry. But how -- how
19 -- how is it that an ERISA fiduciary wouldn't
20 know at the time whether the fund is a net buyer
21 or seller? I would have thought that
22 information would have been available.

23 You're -- you're positing that it's
24 not available, and I guess I'm just a little
25 confused -- I'm sorry for interrupting -- but

1 that -- that's just not obvious to me.

2 MR. BONDEROFF: Well, it depends on
3 the way the plan is operated. And, frankly --
4 and I'm speaking from experience here, having
5 litigated on both sides of many ERISA cases --
6 you generally are not going to know that
7 information about what the fiduciaries knew
8 until you get to discovery.

9 JUSTICE GORSUCH: Oh, I understand
10 that the plaintiff might not know at the time
11 he's pleading his case, but the ERISA fiduciary
12 would know, I would think, whether the fund is a
13 net buyer or a net seller, wouldn't -- wouldn't
14 -- wouldn't -- wouldn't the fiduciary know that?

15 MR. BONDEROFF: Perhaps. It depends.
16 Again, it depends on the plan.

17 JUSTICE GORSUCH: Okay.

18 MR. BONDEROFF: Some do --

19 JUSTICE GORSUCH: Some don't.

20 MR. BONDEROFF: -- some don't.

21 JUSTICE KAVANAUGH: Okay. But if the
22 fiduciary does not know, doesn't that hurt your
23 case?

24 MR. BONDEROFF: Not necessarily,
25 because --

1 JUSTICE KAVANAUGH: If there's more --
2 even more uncertainty about how the different
3 classes of beneficiaries would be affected, if
4 you really don't know the precise circumstance.
5 Am I missing something there?

6 MR. BONDEROFF: Well, even if you know
7 that it has been a net buyer for the past year,
8 you don't know -- and I think even the Fifth
9 Circuit pointed this out in Martone, where it
10 was alleged to be a net buyer. You don't know
11 that that's going to continue for the
12 foreseeable future. And you're not required as
13 a fiduciary to predict the future about that.

14 JUSTICE KAGAN: But what --

15 MR. BONDEROFF: -- but what you can --

16 JUSTICE KAGAN: -- what do you think a
17 reasonable fiduciary is supposed to do if the
18 fiduciary doesn't know?

19 MR. BONDEROFF: Well, the one thing
20 you do know for sure is that if you make a
21 disclosure, the stock price will drop. We
22 concede that.

23 And that harm, both the drop and the
24 timeline of the recovery, that's going to affect
25 the holders. And for the vast majority of ERISA

1 plans, including this one, most people are
2 neither buyers nor sellers. Most people are
3 holders. Most people, especially when it comes
4 to their ESOP, don't buy and sell on a regular
5 basis; they sit and they don't pay attention to
6 it at all.

7 And if you're going to have a harsher
8 stock price correction and a slower stock price
9 recovery, that will affect all the holders.
10 That will affect the long-term stability of the
11 investment.

12 JUSTICE KAGAN: So is your view that
13 in pretty much every case, maybe there are some
14 exceptions, but that in pretty much every case,
15 the role of the fiduciary is to operate
16 consistently with the holders, neither the
17 buyers nor the sellers, but just the holders?

18 MR. BONDEROFF: Well, when you're
19 thinking about the long term, what's best long
20 term for the investment, you're going to think
21 about the holders more than the buyers and
22 sellers.

23 There could be specific factual
24 circumstances where you have an unusual company
25 in an unusual situation where, in fact, most of

1 people are buyers or most of them are sellers.
2 But in the vast majority of cases, yes, you
3 should put the holders up front --

4 JUSTICE KAGAN: I mean, you've said a
5 number of times the long-term value of the
6 investment. Why is that the thing that the
7 fiduciary should look to?

8 MR. BONDEROFF: Well, for one thing,
9 it's the thing you can actually make a
10 reasonable assessment about in real time, at the
11 time, based on what you, as a fiduciary, know.

12 It doesn't require you to figure out
13 whether you've been a buyer or seller over the
14 past however many years or months and then try
15 to make a prediction about whether you will
16 continue to be a buyer or seller. It's
17 something you can think about in a way very much
18 the way you would think about other non-ESOP
19 investments because that -- that same issue
20 comes up with a non-ESOP investment all the
21 time.

22 JUSTICE GORSUCH: Well, if that's the
23 case and -- and we're supposed to -- the
24 fiduciary is supposed to consider the long-term
25 best interests of some abstract, non-identified

1 person, why wouldn't the securities law be a
2 really good place to start and maybe finish in
3 assessing what those long-term overall health of
4 the corporate interests might be?

5 MR. BONDEROFF: I would respond to
6 that in two ways. One, I think as a practical
7 matter --

8 JUSTICE GORSUCH: I mean, isn't that
9 what the securities law are all about? It's --
10 it's -- it's ensuring the markets function on a
11 net basis with as much transparency and
12 efficiency as we can muster, subject to
13 reasonable -- imposing reasonable costs and
14 reasonable duties on people?

15 MR. BONDEROFF: I don't disagree with
16 that description of the securities laws, but the
17 securities laws have different interests than
18 ERISA does. And that's going to create a
19 problem when you're talking about both --

20 JUSTICE GORSUCH: But I -- I -- I
21 accept that if -- if we're talking about some
22 specified ESOP member, but you've told us to
23 ignore that, you told us to ignore whether we're
24 talking about a buyer or a seller or -- just
25 abstract it to the general interests of the --

1 of the plan as a whole.

2 And once we do that, I would have
3 thought the securities law would have been a
4 really good proxy for the duties we'd expect a
5 fiduciary to abide.

6 MR. BONDEROFF: I think in -- as a
7 practical matter, much of the time it is. But
8 not all of the time.

9 And what we are here to discuss and
10 what the question presented to this Court is
11 about is: What kind of a pleading standard
12 should be adopted?

13 JUSTICE KAGAN: Well, where do the two
14 diverge?

15 MR. BONDEROFF: Well, I could envision
16 at least two situations where they might
17 diverge. And the reason they do is because the
18 two statutes have different concerns and they
19 protect different interests.

20 So the securities laws care about
21 motive. So that's why you have to plead
22 scienter, and that's why there is a strong
23 scienter requirement, because bad intent
24 matters.

25 ERISA doesn't care about motive and it

1 never has.

2 JUSTICE KAGAN: Well, I think --

3 MR. BONDEROFF: Not when it comes --

4 JUSTICE KAGAN: -- Mr. Clement would
5 just say that you're not really pointing to a
6 divergence in what the securities laws and ERISA
7 are meant to prevent. You're just pointing --
8 you know, he would say you're using the ERISA
9 clause to water down the securities standard.

10 MR. BONDEROFF: No, it -- it will
11 actually play out as a real difference because
12 let's say you adopt the government's rule.
13 We'll be back here in five years trying to
14 figure out what that means.

15 It seems like a nice, bright-line,
16 clear rule. It's not. And if you think about
17 it a little bit and push forward, you can see
18 why, because when you're pleading a claim under
19 the securities laws, you have to meet the
20 pleadings standard of the PSLRA. We all agree
21 on that. And when you are pleading a claim
22 under ERISA, you don't. We all agree on that.
23 You don't plead scienter for a duty of prudence
24 claim.

25 Now -- let's say we have adopted the

1 government's rule. Now do I have to plead as an
2 ERISA participant scienter under the PSLRA in
3 order to plead more harm than good under ERISA?
4 And if I don't, what do I have to plead?
5 Because is there a securities law violation, if
6 there's not an actionable 10b-5 action
7 underneath it? Or is the standard maybe what
8 the SEC could do if it brought an enforcement
9 action? Because the SEC is not obliged to meet
10 the PSLRA standards.

11 How is that going to work? We're
12 going to be sending that back to the courts and
13 they're going to be trying to figure out how do
14 I apply the securities law, which cares about
15 things like motive, to an ERISA action, which
16 doesn't, and figure out if that's more harm than
17 good?

18 Is a securities law disclosure
19 required but under the standard of ERISA? It
20 actually gets very confusing when you try to
21 apply it.

22 JUSTICE KAGAN: What was the second
23 way? Didn't you say that there were two ways it
24 would diverge, one is the scienter standard?
25 Maybe I'm wrong.

1 MR. BONDEROFF: Oh. No, I -- well, I
2 -- I -- I think I got to both of -- of my points
3 ultimately.

4 JUSTICE GORSUCH: Well, if that's the
5 point, I guess I'm -- the -- the response that
6 might -- I expect we're going to hear in -- in
7 rebuttal shortly enough, might -- might as well
8 just get your thoughts on it -- on it now, is,
9 well, may -- maybe -- maybe we ought to apply
10 the same rule we apply to all private litigants.
11 And maybe that's scienter, and you say ERISA
12 doesn't care about that, and maybe Mr. Clement
13 says, well, it does in this context.

14 Because if we're concerned about the
15 net interests of the fund and they are
16 completely aligned with the net interests of the
17 company, as you've suggested, then -- then that
18 is the standard that best protects them that
19 we've developed over time and, through the
20 securities laws, to protect investors consistent
21 with, you know, reasonable -- imposing
22 reasonable duties on people.

23 I expect something like that. And I
24 just wanted to give you a chance to have the
25 opportunity to respond before Mr. Clement

1 launches.

2 MR. BONDEROFF: Absolutely. And,
3 actually, now I -- I think in answering your
4 question, Justice Gorsuch, I can get back to
5 that lost second part of my answer, Justice
6 Kagan, which is that if you force people to
7 plead what a private litigant could plead under
8 the securities laws, but under ERISA, you are as
9 a matter of statute -- of plain language of the
10 ERISA statute, imposing a pleading requirement
11 on an ERISA claim that is not in the statute.

12 You're doing exactly what this Court
13 said it couldn't do in Dudenhoeffer, because
14 there is no scienter requirement under ERISA.
15 The law of trusts has never required it for a
16 prudence claim.

17 And I could actually envision a
18 situation where the securities laws might
19 require disclosure, but ERISA wouldn't. And the
20 government's rule really doesn't adequately
21 address that either.

22 I think of it as the Rinehart example,
23 the Second Circuit case of Rinehart. So you
24 have Lehman Brothers, which has massive
25 sub-prime exposure, and you bring a securities

1 claim against them and say they should have
2 disclosed it once they knew the risks and so
3 forth. It's a pretty straightforward 10b-5
4 claim. And the securities laws say if they knew
5 about it, and they had the requisite scienter,
6 they should have disclosed.

7 But if you're looking at it from the
8 point of view of ERISA and what a prudent
9 fiduciary would think would do more harm than
10 good at the time, you could make an argument, a
11 plausible argument, that a prudent fiduciary
12 would say: Well, it's a particularly fraught
13 time in the market for companies like us.
14 People -- Bear Stearns has gone under. People
15 are wondering if we're next. I actually think
16 from an ERISA point of view, we ought to wait.

17 And that's part of the reason we do a
18 separate inquiry for an ERISA claim as opposed
19 to a securities claim.

20 JUSTICE ALITO: I mean, a fiduciary --
21 the fiduciary who is simply managing a fund is
22 not necessarily doing things on a very regular
23 basis that affect the market price of -- of
24 stocks, but an insider fiduciary here would be,
25 wouldn't it?

1 And an insider fiduciary would receive
2 daily or very regularly all sorts of information
3 that has if -- that might, if disclosed, have an
4 effect on the price of the stocks.

5 So wouldn't it -- is this going to
6 result in the constant injection into the mix of
7 information about stocks all kinds of
8 information that wouldn't otherwise come out?

9 MR. BONDEROFF: I don't think it will.
10 I'm --

11 JUSTICE ALITO: It applies to positive
12 as well as negative information, right, doesn't
13 it?

14 MR. BONDEROFF: I wouldn't think it
15 would. I -- I would say the Moench presumption
16 first came out, and I am -- I promise to answer
17 the question. The Moench presumption comes out
18 in 1995. And then over the course of the next
19 19 years, it's adopted by various circuits,
20 although not all of them.

21 All that time there are people
22 bringing claims against insiders fiduciaries for
23 failing to make the kind of disclosures we're
24 talking about.

25 Yet, as far as I can see, there was no

1 difference in the number of insiders who became
2 -- who continued to be appointed as fiduciaries,
3 and there was no diminution in the number of
4 ESOPs that companies decided to have.

5 In fact, if you take that rule that an
6 insider fiduciary, the rule, the Pegram --
7 although I think it's really a misreading of
8 Pegram -- but the Pegram rule that Mr. Clement
9 is talking about, imagine a situation like the
10 Enron case.

11 The reason there wasn't a viable
12 prudence ERISA claim against the Enron
13 fiduciaries is that they were also insiders who
14 knew that the company was a house of cards, and
15 so they should have acted on that information to
16 protect plan participants.

17 Under Petitioner's rule, the Enron
18 fiduciaries had no ERISA obligation to act on
19 their information about a company like Enron.
20 It doesn't make sense and there's no basis for
21 it.

22 A question, I think it was Justice
23 Breyer, raised earlier as to why it's useful to
24 have insiders as fiduciaries, it's actually
25 because they know the inside information and

1 are, therefore, in a better position to act to
2 protect plan participants.

3 That makes them -- that's an
4 advantage. That's a feature and not a bug. The
5 case where you have here where you have -- and I
6 -- and I -- and I sense that we all have a
7 little bit of a concern about a situation where
8 a securities case is dismissed for failing to
9 plead scienter, as happened here, but the ERISA
10 case is allowed to go forward.

11 And it seems like are we opening the
12 door to repleading securities cases as ERISA
13 cases? Is this going to happen all the time?
14 It shouldn't.

15 This should be the rare exception,
16 that even the government in its brief talks
17 about, you know, extraordinary circumstances
18 when you might need to make a disclosure, even
19 though the securities laws don't requirement --
20 require it.

21 I -- I don't think they had this case
22 in mind, but this is actually a rare case where
23 you have a situation where you have fiduciaries
24 who happen to be insiders, insiders who happen
25 to be involved in the thing that is alleged to

1 have inflated the stock price, who happen to
2 have direct knowledge in that, and who happen to
3 have responsibility for the accounting of that,
4 and, therefore, are in a position to know about
5 it. You know, there is a fourth member of the
6 Retirement Plans Committee we didn't sue, the
7 Senior Vice President of Human Resources.

8 We didn't sue him because he wouldn't
9 have any knowledge of microelectronics, the
10 effort to sell it, or how to account for that,
11 we -- but we had the general counsel, the chief
12 accounting officer, and the CFO.

13 And they spend a year trying to sell
14 this. It becomes more likely than not that it's
15 going to be sold. And if it's sold, the
16 disclosure is going to come out. And you're not
17 in a situation where IBM is in a particularly
18 sensitive juncture such that they can't make the
19 disclosure without throwing things into
20 disarray.

21 JUSTICE KAVANAUGH: So I guess I'm not
22 sure why it's so rare, I mean, the things you
23 just identified, a fiduciary who's an insider,
24 that's what this is about, and then knows
25 something, whether they're involved or not, as

1 long as they know the duty is triggered, so
2 that's something that's going to affect the
3 stock price. That doesn't seem rare at all.
4 That seems fairly commonplace.

5 Am I wrong about that?

6 MR. BONDEROFF: I think so. I -- and
7 I -- I -- I speak not just in theory but from my
8 own experience with these cases, both before and
9 after Moench, or before and after Dudenhoeffer,
10 I should say.

11 These cases, even with the standard as
12 applied by the Second Circuit here, are hard to
13 plead and they're hard to win. They don't get
14 through very often. Less often than securities
15 cases do.

16 It's much more common for the
17 securities case to get through than for the
18 ERISA case to get through. And that's even
19 before Dudenhoeffer that was the case.

20 JUSTICE BREYER: I don't want to sort
21 of pour cold water on this issue, but it sounds
22 to me listening as if it's exactly the kind of
23 issue about the relationship between the
24 securities laws' objectives and the allegation
25 that the ERISA trustee should or needn't

1 disclose, in a different, you know, that's the
2 issue. That's the second.

3 So if I thought that that's the second
4 question, the second part, not the third, and if
5 I thought we just granted the third, what should
6 I do in terms of the disposition of this case?

7 In other words, I think the issue you
8 raise, both raise and discuss is very
9 interesting, and important, but I -- I don't
10 know that it's here.

11 So if I think that, what's the right
12 disposition?

13 MR. BONDEROFF: Disclosure here would
14 not have been inconsistent with the securities
15 laws. Just because it's not required by them,
16 even the government concedes --

17 JUSTICE BREYER: Well, that's your --

18 MR. BONDEROFF: -- it's not required
19 by them.

20 JUSTICE BREYER: -- your first
21 position is it isn't. Okay. Suppose I'm
22 uncertain and don't think the issue was
23 presented sufficiently below, and -- and -- or
24 argued sufficiently here.

25 What do I do? I'm asking for your --

1 MR. BONDEROFF: It -- it --

2 JUSTICE BREYER: -- I'm not asking you
3 -- it's not hostile or friendly. I just want to
4 know what you think I should do.

5 MR. BONDEROFF: I -- and -- but it's a
6 -- it's a tricky proposition because you would
7 have to send -- I think you would have to send
8 it back to the Second Circuit, but you will have
9 to tell them what kind of pleading needs to be
10 done to answer this question.

11 What statute are we pleading under?
12 What interests matter? Because if you are just
13 analyzing this as an ERISA claim but you are
14 saying you can only make disclosures that are
15 required by the securities laws, it becomes a
16 very difficult question as to whether the
17 disclosure here is required by them or not.

18 On one hand, there wasn't an
19 actionable 10b-5 claim.

20 JUSTICE KAVANAUGH: On -- on the
21 question we granted cert on, which is the third
22 Dudenhoeffer factor, there is a circuit split,
23 and we granted cert to resolve that circuit
24 split, and basically is earlier disclosure
25 required in a situation when there are different

1 classes of beneficiaries or is that a situation
2 where a prudent fiduciary should not be held
3 liable? Isn't that the question presented?

4 MR. BONDEROFF: Well, I think that --

5 JUSTICE KAVANAUGH: And it's a
6 yes-or-no answer to that question --

7 MR. BONDEROFF: That is --

8 JUSTICE KAVANAUGH: -- presented
9 based --

10 MR. BONDEROFF: -- yes, yes.

11 JUSTICE KAVANAUGH: All right.

12 MR. BONDEROFF: And in that question
13 presented, I think the Second Circuit did
14 exactly what you would want courts to be doing
15 in analyzing these issues. You know, just
16 because you can plead that a fiduciary knows
17 something that hasn't been disclosed, and you
18 can try to say that it's inevitable, doesn't
19 mean that all the facts around it are going to
20 back that up.

21 And it doesn't mean that a district
22 court is going to look at that and be persuaded
23 just because you said it's inevitable and
24 earlier is better than later. You have to have
25 the meat on the bones or it doesn't work.

1 JUSTICE SOTOMAYOR: So wouldn't --
2 looking at Mr. Clement and looking just at the
3 third prong, you suggested that whether you are
4 a buyer or seller can't be judged, that you
5 really should be looking at the hold -- hold
6 class, but none of that is pled.

7 You pled you were a buyer and the
8 district court said -- that the period showed
9 more buying than selling -- and the district
10 court said, no, it shows more selling than
11 buying.

12 So wouldn't a more particularized
13 pleading basically put forth that theory, need
14 to put forth that theory, and need to air it so
15 that a district court judge could determine
16 whether the pleadings are accurate?

17 MR. BONDEROFF: I think we did put
18 forth that theory, actually. I think in our
19 complaint we pleaded that holders were also
20 damaged here by the harsher correction and
21 slower stock price recovery that resulted.

22 JUSTICE SOTOMAYOR: You said that.
23 But we still don't know whether the buyer and
24 holder class was greater than the seller class.
25 Where do I --

1 MR. BONDEROFF: Well, it's --

2 JUSTICE SOTOMAYOR: -- see that in
3 here?

4 MR. BONDEROFF: I -- I will say, I
5 mean, it is a pretty -- it is a reasonable
6 inference for virtually any stock plan, but
7 particularly one of a company of this size, to
8 say that the holders vastly outnumber the
9 buyers.

10 JUSTICE BREYER: So -- so is it fair
11 to say, when you talk about meat on the bones, I
12 find one little piece of specific meat. And
13 that is the word "inevitable."

14 And if I want to be fair to you, which
15 I do, I'd say "inevitable within a reasonably
16 short time." And so we have one, or four --
17 three things. One, in the longer run, the
18 company benefits from disclosing now. All
19 right?

20 Number two, this is particularly true
21 here where it's inevitable or nearly inevitable.
22 Three, in the short time and, four, there is
23 nothing special about this fund, implied.

24 That's it?

25 MR. BONDEROFF: Yes.

1 JUSTICE BREYER: Okay.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MR. BONDEROFF: Thank you.

5 CHIEF JUSTICE ROBERTS: Four minutes,
6 Mr. Clement.

7 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
8 ON BEHALF OF THE PETITIONERS

9 MR. CLEMENT: Thank you, Mr. Chief
10 Justice. Just a few points in rebuttal.

11 I mean, first of all, I do want to be
12 clear. This is not a case where the Petitioner
13 is running away from the question presented we
14 got cert granted on.

15 There is a circuit split. We think we
16 win on the question presented.

17 The allegations here are generic
18 allegations that could be made in every stock
19 drop case. And then if you look at specifics,
20 it really falls apart because one specific was
21 net buyer, which turns out just isn't true, and
22 they're not telling you that it's not true. I
23 mean, they've walked away from that.

24 And then the other one is this idea,
25 well, there's this sale that makes it

1 particularly likely. Well, listen to what my
2 friend said. He said IBM was looking for a year
3 to try to sell this Microelectronics unit. The
4 sale itself was hardly inevitable. And the
5 allegations of the complaint say that. They say
6 it was more likely than not. They don't say it
7 was inevitable.

8 JUSTICE BREYER: And -- and,
9 implicitly, nothing special. So you break your
10 points when you send in the answer, when you
11 move for summary judgment, and, if necessary,
12 have a trial.

13 But the question is if they ask the
14 four things, they put in the four things we just
15 mentioned, and why isn't that sufficient? And
16 then the rest is up to the defendant to deny
17 whatever it is --

18 MR. CLEMENT: I don't --

19 JUSTICE BREYER: -- or say there is
20 something special or say -- say -- why not?

21 MR. CLEMENT: I don't think it's
22 sufficient, Your Honor, because you're going to
23 be able to make those four allegations in every
24 stock drop case. And the whole point, I
25 thought, of the Dudenhoefffer factor was to

1 separate meritless goats from plausible sheep.
2 And if everything's a sheep, then I don't think
3 Dudenhoeffer does what it says it's supposed to
4 do.

5 But -- so I think we win on the
6 question presented, but the reason that we
7 briefed the broader issues of Pegram is that the
8 longer you hear even the plaintiffs talk about
9 this, the more you find there's a fundamental
10 problem here.

11 As he said, you know, their -- the --
12 the principal people he thinks the fiduciary
13 should be looking out for are holders. Well,
14 there's another word for holders. They're
15 shareholders in the company. And the entire
16 purpose of the disclosure regime under the
17 securities law is to make sure that managers of
18 company -- companies are looking out for the
19 long-term interests of shareholders in trying to
20 maximize the value of the company and they're
21 supposed to disclose at certain intervals and
22 not disclose at other intervals. They don't
23 have to disclose when they have positive inside
24 information. There's a whole body of law that
25 addresses those interests. And that's the body

1 of law that should be looked to here.

2 One thing I want to be emphatic that I
3 disagree with my friend on the other side is he
4 says that the reason that we want these insiders
5 to serve as fiduciaries is so they can be sort
6 of canaries in the coal mine, they can take
7 early action based on their unique access to
8 inside information.

9 That is absolutely wrong. The whole
10 -- all these funds are set up to make sure that
11 doesn't happen. Because if that did happen,
12 these would all be latent security violations.

13 So the reason, Justice Gorsuch, that
14 it actually isn't implausible that a manager, a
15 fiduciary of this doesn't know whether they're
16 going to be net buyers and sellers is because
17 they don't really do any of the buying and
18 selling. That's just if you've got more people
19 who are new employees, who say yes, I want to be
20 in the ESOP plan, then you get net buyers. If
21 you have retirees who are selling, you have net
22 sellers. And you don't know in advance.

23 And I thought, based on what I read in
24 Dudenhoeffer, that that ought to inure to the
25 benefit of the fiduciary. I thought you were

1 only liable if you could not have thought it was
2 prudent to say I'm not going to mess with this
3 early disclosure.

4 The last thing I want to end with is
5 just there is -- I don't want there to be a
6 mistake. We do not agree with the United States
7 on the bottom line here. We do not think that
8 you should engage in a brave new world of hybrid
9 ERISA/securities actions where, I agree with my
10 friend, lower courts would have to struggle with
11 whether scienter applies. We said the solution
12 is the securities law, full stop.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

15 (Whereupon, at 12:10 p.m., the case
16 was submitted.)

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Official - Subject to Final Review

1	<p>ad [3] 28:14 32:22,25 add [1] 29:9 addition [1] 31:8 additional [2] 28:13 31:8 address [2] 23:19 52:21 addressed [1] 23:22 addresses [1] 66:25 addressing [1] 22:21 adequacy [1] 22:12 adequate [1] 23:24 adequately [1] 52:20 administrability [1] 39:1 admit [1] 10:25 adopt [1] 49:12 adopted [3] 48:12 49:25 54:19 advance [1] 67:22 advantage [2] 19:9 56:4 advert [1] 26:10 affect [5] 44:24 45:9,10 53:23 58:2 affected [1] 44:3 afresh [1] 29:8 agree [7] 19:2 29:19 32:21 49:20, 22 68:6,9 agreements [1] 31:11 agrees [1] 33:9 ah [2] 20:25 21:4 aiding [1] 12:25 air [1] 62:14 aired [1] 28:23 AL [2] 1:4,7 aligned [1] 51:16 ALITO [5] 30:10 31:24 37:1 53:20 54:11 allegation [6] 5:11 13:18 25:8 40:10 41:1 58:24 allegations [17] 4:2,24 5:1,5 13:7 19:20 23:15 24:12 26:11,16,23 31:17,22 64:17,18 65:5,23 allege [2] 34:17,18 alleged [11] 3:20 11:20 19:21 24:20 25:24,25 30:18 39:5,6 44:10 56:25 alleges [1] 25:3 allow [1] 5:21 allowed [1] 56:10 almost [1] 37:11 already [1] 4:19 alternative [3] 3:17 20:16 36:10 although [3] 24:20 54:20 55:7 amended [3] 8:5 23:14 40:8 amicus [3] 1:23 2:7 27:5 among [1] 9:4 analysis [3] 29:13 35:23 39:20 analyzing [2] 60:13 61:15 another [4] 7:19 19:8 26:10 66:14 answer [9] 8:17 24:23,25 34:13 52:5 54:16 60:10 61:6 65:10 answering [1] 52:3 antecedent [1] 14:4 antifraud [1] 31:5 anyway [1] 34:11 apart [1] 64:20 appeals [2] 29:5 34:16 APPEARANCES [1] 1:17</p>	<p>applied [2] 38:14 58:12 applies [2] 54:11 68:11 apply [6] 38:24 39:2 50:14,21 51:9, 10 appointed [1] 55:2 appropriate [4] 27:20 30:7 33:14 38:20 approved [1] 14:10 argue [1] 33:19 argued [1] 59:24 arguing [1] 14:6 argument [18] 1:14 2:2,5,9,12 3:4, 7 5:25 6:11 19:3 22:18 27:4 32:5 34:3 38:1 53:10,11 64:7 around [1] 61:19 articulated [1] 3:12 artificial [2] 35:3,15 assessing [1] 47:3 assessment [1] 46:10 assets [1] 38:8 Assistant [1] 1:20 assume [3] 30:16 34:5 35:15 attention [1] 45:5 attuned [1] 22:12 available [4] 25:9,15 42:22,24 avoid [1] 9:17 avoiding [1] 9:10 away [3] 24:19 64:13,23</p>	<p>between [2] 23:1 58:23 bit [2] 49:17 56:7 blowing [1] 21:17 Blue [1] 12:22 body [8] 22:11 27:19 32:19 33:6 35:5,17 66:24,25 BONDEROFF [41] 1:24 2:10 37:23 38:1,3 40:23 42:2 43:2,15,18, 20,24 44:6,15,19 45:18 46:8 47:5, 15 48:6,15 49:3,10 51:1 52:2 54:9, 14 58:6 59:13,18 60:1,5 61:4,7,10, 12 62:17 63:1,4,25 64:4 bones [2] 61:25 63:11 both [9] 8:13 9:24 33:19 43:5 44:23 47:19 51:2 58:8 59:8 bottom [1] 68:7 box [1] 16:5 boy [1] 22:11 brave [1] 68:8 break [1] 65:9 BREYER [26] 22:15,18 23:25 24:10,14,17,22,25 25:2,6,13,24 26:5 28:17 33:16,18 40:6 55:23 58:20 59:17,20 60:2 63:10 64:1 65:8,19 brief [3] 14:6 28:24 56:16 briefed [1] 66:7 briefs [2] 15:23 22:19 bright [4] 6:11,13,16,18 bright-line [1] 49:15 bring [1] 52:25 bringing [1] 54:22 broader [2] 13:14 66:7 Brothers [1] 52:24 brought [2] 12:11 50:8 bug [1] 56:4 business [1] 14:13 buttness [1] 8:6 buy [3] 14:25 32:12 45:4 buyer [13] 24:18 25:22 42:20 43:13 44:7,10 46:13,16 47:24 62:4,7, 23 64:21 buyers [12] 6:22 9:23 20:8 32:13 42:8 45:2,17,21 46:1 63:9 67:16, 20 buying [4] 7:14 62:9,11 67:17</p>
2	<p>200 [2] 18:4,23 2000 [1] 9:6 2008 [1] 8:4 201 [1] 17:24 2013 [1] 41:12 2019 [1] 1:11 27 [1] 2:8 29 [1] 26:14</p>	<p>back [9] 14:3 17:5 19:8 42:11 49:13 50:12 52:4 60:8 61:20 bad [1] 48:23 balance [3] 30:4 32:20 39:14 balances [1] 37:17 balancing [4] 28:14 32:22 37:1,4 Bancorp [1] 19:19 Bank [1] 12:23 based [11] 25:8 27:11,25 28:14 31:6,17 42:6 46:11 61:9 67:7,23 basic [2] 4:1 12:12 basically [3] 38:23 60:24 62:13 basis [7] 11:3 25:13 39:24 45:5 47:11 53:23 55:20 battle [1] 8:20 Bear [1] 53:14 became [1] 55:1 becomes [2] 57:14 60:15 beef [1] 12:12 begins [1] 41:10 behalf [9] 1:19,25 2:4,11,14 3:8 12:3 38:2 64:8 below [2] 28:23 59:23 beneficiaries [6] 6:1 7:1 41:20,25 44:3 61:1 beneficiaries' [1] 7:11 benefit [7] 4:7 9:18 10:10 16:15 19:12 35:9 67:25 benefits [1] 63:18 benefitted [1] 41:21 best [5] 29:19 33:11 45:19 46:25 51:18 better [6] 15:6 34:23 35:21 41:5 56:1 61:24</p>	<p>B</p>
3	<p>3 [2] 2:4 34:21 38 [1] 2:11</p>	<p>back [9] 14:3 17:5 19:8 42:11 49:13 50:12 52:4 60:8 61:20 bad [1] 48:23 balance [3] 30:4 32:20 39:14 balances [1] 37:17 balancing [4] 28:14 32:22 37:1,4 Bancorp [1] 19:19 Bank [1] 12:23 based [11] 25:8 27:11,25 28:14 31:6,17 42:6 46:11 61:9 67:7,23 basic [2] 4:1 12:12 basically [3] 38:23 60:24 62:13 basis [7] 11:3 25:13 39:24 45:5 47:11 53:23 55:20 battle [1] 8:20 Bear [1] 53:14 became [1] 55:1 becomes [2] 57:14 60:15 beef [1] 12:12 begins [1] 41:10 behalf [9] 1:19,25 2:4,11,14 3:8 12:3 38:2 64:8 below [2] 28:23 59:23 beneficiaries [6] 6:1 7:1 41:20,25 44:3 61:1 beneficiaries' [1] 7:11 benefit [7] 4:7 9:18 10:10 16:15 19:12 35:9 67:25 benefits [1] 63:18 benefitted [1] 41:21 best [5] 29:19 33:11 45:19 46:25 51:18 better [6] 15:6 34:23 35:21 41:5 56:1 61:24</p>	<p>both [9] 8:13 9:24 33:19 43:5 44:23 47:19 51:2 58:8 59:8 bottom [1] 68:7 box [1] 16:5 boy [1] 22:11 brave [1] 68:8 break [1] 65:9 BREYER [26] 22:15,18 23:25 24:10,14,17,22,25 25:2,6,13,24 26:5 28:17 33:16,18 40:6 55:23 58:20 59:17,20 60:2 63:10 64:1 65:8,19 brief [3] 14:6 28:24 56:16 briefed [1] 66:7 briefs [2] 15:23 22:19 bright [4] 6:11,13,16,18 bright-line [1] 49:15 bring [1] 52:25 bringing [1] 54:22 broader [2] 13:14 66:7 Brothers [1] 52:24 brought [2] 12:11 50:8 bug [1] 56:4 business [1] 14:13 buttness [1] 8:6 buy [3] 14:25 32:12 45:4 buyer [13] 24:18 25:22 42:20 43:13 44:7,10 46:13,16 47:24 62:4,7, 23 64:21 buyers [12] 6:22 9:23 20:8 32:13 42:8 45:2,17,21 46:1 63:9 67:16, 20 buying [4] 7:14 62:9,11 67:17</p>
6	<p>6 [1] 1:11 64 [1] 2:14</p>	<p>B</p>	<p>C</p>
9	<p>98 [1] 20:7</p>	<p>back [9] 14:3 17:5 19:8 42:11 49:13 50:12 52:4 60:8 61:20 bad [1] 48:23 balance [3] 30:4 32:20 39:14 balances [1] 37:17 balancing [4] 28:14 32:22 37:1,4 Bancorp [1] 19:19 Bank [1] 12:23 based [11] 25:8 27:11,25 28:14 31:6,17 42:6 46:11 61:9 67:7,23 basic [2] 4:1 12:12 basically [3] 38:23 60:24 62:13 basis [7] 11:3 25:13 39:24 45:5 47:11 53:23 55:20 battle [1] 8:20 Bear [1] 53:14 became [1] 55:1 becomes [2] 57:14 60:15 beef [1] 12:12 begins [1] 41:10 behalf [9] 1:19,25 2:4,11,14 3:8 12:3 38:2 64:8 below [2] 28:23 59:23 beneficiaries [6] 6:1 7:1 41:20,25 44:3 61:1 beneficiaries' [1] 7:11 benefit [7] 4:7 9:18 10:10 16:15 19:12 35:9 67:25 benefits [1] 63:18 benefitted [1] 41:21 best [5] 29:19 33:11 45:19 46:25 51:18 better [6] 15:6 34:23 35:21 41:5 56:1 61:24</p>	<p>calculation [1] 32:10 called [2] 22:24 37:1 came [5] 1:13 29:7,7 42:5 54:16 canaries [1] 67:6 cannot [1] 6:4 capacity [4] 4:6,23 10:24,25 cards [1] 55:14 care [4] 10:15 48:20,25 51:12 cares [1] 50:14 Case [49] 3:4 5:5 7:4 10:16 11:19 12:15,16 13:5,5,17,17 24:2 25:11, 12 29:7,8 31:17,20,21,21 34:5 35:16,21 36:8 37:11 39:11 40:25 41:4 43:11,23 45:13,14 46:23 52:23 55:10 56:5,8,10,21,22 58:17,18,19 59:6 64:12,19 65:24 68:14,15 case-by-case [1] 39:24</p>
A	<p>a.m [2] 1:15 3:2 abetting [1] 12:25 abide [1] 48:5 able [2] 14:23 65:23 above [1] 7:15 above-entitled [1] 1:13 absolutely [4] 6:7 23:3 52:2 67:9 abstract [2] 46:25 47:25 accept [1] 47:21 access [2] 4:14 67:7 accommodate [1] 18:24 accommodating [1] 14:13 account [3] 9:14 15:22 57:10 accounting [3] 14:1 57:3,12 accurate [2] 31:3 62:16 act [9] 4:18,19 10:18 14:8,25 29:2, 3 55:18 56:1 acted [1] 55:15 action [9] 13:2 20:21 27:11 36:10, 23 50:6,9,15 67:7 actionable [2] 50:6 60:19 actions [6] 12:21 18:12 20:18,19 27:24 68:9 active [1] 11:5 acts [1] 36:15 actually [13] 20:18 40:23,25 46:9 49:11 50:20 52:3,17 53:15 55:24 56:22 62:18 67:14</p>	<p>applied [2] 38:14 58:12 applies [2] 54:11 68:11 apply [6] 38:24 39:2 50:14,21 51:9, 10 appointed [1] 55:2 appropriate [4] 27:20 30:7 33:14 38:20 approved [1] 14:10 argue [1] 33:19 argued [1] 59:24 arguing [1] 14:6 argument [18] 1:14 2:2,5,9,12 3:4, 7 5:25 6:11 19:3 22:18 27:4 32:5 34:3 38:1 53:10,11 64:7 around [1] 61:19 articulated [1] 3:12 artificial [2] 35:3,15 assessing [1] 47:3 assessment [1] 46:10 assets [1] 38:8 Assistant [1] 1:20 assume [3] 30:16 34:5 35:15 attention [1] 45:5 attuned [1] 22:12 available [4] 25:9,15 42:22,24 avoid [1] 9:17 avoiding [1] 9:10 away [3] 24:19 64:13,23</p>	<p>both [9] 8:13 9:24 33:19 43:5 44:23 47:19 51:2 58:8 59:8 bottom [1] 68:7 box [1] 16:5 boy [1] 22:11 brave [1] 68:8 break [1] 65:9 BREYER [26] 22:15,18 23:25 24:10,14,17,22,25 25:2,6,13,24 26:5 28:17 33:16,18 40:6 55:23 58:20 59:17,20 60:2 63:10 64:1 65:8,19 brief [3] 14:6 28:24 56:16 briefed [1] 66:7 briefs [2] 15:23 22:19 bright [4] 6:11,13,16,18 bright-line [1] 49:15 bring [1] 52:25 bringing [1] 54:22 broader [2] 13:14 66:7 Brothers [1] 52:24 brought [2] 12:11 50:8 bug [1] 56:4 business [1] 14:13 buttness [1] 8:6 buy [3] 14:25 32:12 45:4 buyer [13] 24:18 25:22 42:20 43:13 44:7,10 46:13,16 47:24 62:4,7, 23 64:21 buyers [12] 6:22 9:23 20:8 32:13 42:8 45:2,17,21 46:1 63:9 67:16, 20 buying [4] 7:14 62:9,11 67:17</p>

Official - Subject to Final Review

<p>case-specific ^[1] 26:16</p> <p>cases ^[14] 12:22 20:15 21:22 22:6 24:15 27:15 39:23 43:5 46:2 56:12,13 58:8,11,15</p> <p>caught ^[2] 30:19,20</p> <p>caused ^[1] 38:18</p> <p>causes ^[2] 40:10,11</p> <p>Central ^[1] 12:23</p> <p>cert ^[7] 19:16 22:22 23:12 33:25 60:21,23 64:14</p> <p>certain ^[3] 27:14 31:9 66:21</p> <p>certainly ^[1] 8:21</p> <p>CFO ^[1] 57:12</p> <p>chance ^[1] 51:24</p> <p>change ^[1] 18:23</p> <p>changes ^[1] 31:11</p> <p>channels ^[18] 3:23 4:7,11,11,15, 18,24 11:23,25 12:1,13 20:23 21:6,12,16 22:11,14 34:8</p> <p>charged ^[1] 10:14</p> <p>CHIEF ^[12] 3:3,9 26:12 27:1,7 37:21 38:3 57:11 64:2,5,9 68:13</p> <p>Chip ^[1] 12:22</p> <p>choice ^[1] 14:14</p> <p>circuit ^[10] 38:12 41:18 44:9 52:23 58:12 60:8,22,23 61:13 64:15</p> <p>Circuit's ^[1] 42:5</p> <p>circuits ^[1] 54:19</p> <p>circumstance ^[4] 6:25 36:7 41:22 44:4</p> <p>circumstances ^[7] 6:5 14:23 20:4 27:13 41:19 45:24 56:17</p> <p>cite ^[1] 8:4</p> <p>claim ^[19] 7:2,9,12,23,25 8:6 14:1 49:18,21,24 52:11,16 53:1,4,18,19 55:12 60:13,19</p> <p>claims ^[8] 7:8,16 12:24,25 20:16 21:2,3 54:22</p> <p>class ^[5] 24:17 41:9 62:6,24,24</p> <p>classes ^[6] 6:1,25 41:20,25 44:3 61:1</p> <p>classic ^[1] 7:9</p> <p>clause ^[1] 49:9</p> <p>clear ^[6] 11:23 14:12,16 19:2 49:16 64:12</p> <p>clearly ^[1] 18:21</p> <p>CLEMENT ^[56] 1:18 2:3,13 3:6,7,9 5:10 6:6,17 7:5 8:24 9:2,15,20 10:1,21 11:12,18 14:2 15:3,11 16:2,14,18,22,25 17:8,14 18:17,20 19:7 20:2 22:16 23:25 24:7,11,15,19, 24 25:1,5,7,14 26:3,6,14 49:4 51:12,25 55:8 62:2 64:6,7,9 65:18,21</p> <p>close ^[5] 6:11,13,18 13:24 32:19</p> <p>coal ^[1] 67:6</p> <p>coextensive ^[1] 14:7</p> <p>cold ^[1] 58:21</p> <p>come ^[10] 6:10 13:2 17:10 28:23 32:15 35:20,22 39:2 54:8 57:16</p> <p>comes ^[6] 10:7,20 45:3 46:20 49:3 54:17</p> <p>coming ^[2] 7:6 21:17</p> <p>Commission ^[5] 30:5 33:13 35:12, 13 37:16</p>	<p>commissions ^[1] 7:15</p> <p>COMMITTEE ^[3] 1:3 3:5 57:6</p> <p>committing ^[1] 5:22</p> <p>common ^[3] 17:16,19 58:16</p> <p>commonplace ^[1] 58:4</p> <p>community ^[1] 23:9</p> <p>companies ^[6] 17:2,15,21 53:13 55:4 66:18</p> <p>company ^[20] 7:12 16:20 17:11 20:6 30:16 31:18 33:1,1,10 35:7 41:8 45:24 51:17 55:14,19 63:7,18 66:15,18,20</p> <p>competing ^[2] 8:21 9:4</p> <p>complaint ^[12] 8:6 12:4,5,9,11 23:14,23 25:2 36:9 40:8 62:19 65:5</p> <p>complete ^[1] 19:13</p> <p>completely ^[1] 51:16</p> <p>complicated ^[2] 13:19 32:9</p> <p>comply ^[1] 11:8</p> <p>concealment ^[3] 3:24 5:3 8:3</p> <p>concede ^[1] 44:22</p> <p>concedes ^[1] 59:16</p> <p>concern ^[1] 56:7</p> <p>concerned ^[1] 51:14</p> <p>concerns ^[2] 38:16 48:18</p> <p>conclude ^[5] 28:18 30:3 33:7,8 37:14</p> <p>concluded ^[1] 20:25</p> <p>conclusion ^[1] 42:1</p> <p>conclusions ^[1] 42:6</p> <p>conduct ^[3] 3:18 9:9 11:20</p> <p>confines ^[1] 29:17</p> <p>confronted ^[2] 9:5 20:24</p> <p>confused ^[1] 42:25</p> <p>confusing ^[1] 50:20</p> <p>Congress ^[3] 14:10 15:24 30:4</p> <p>Congress's ^[1] 18:22</p> <p>consider ^[3] 27:16 37:7 46:24</p> <p>considerable ^[1] 41:14</p> <p>consideration ^[4] 5:12,13 7:24 19:18</p> <p>considerations ^[4] 20:14 22:25 27:14 36:17</p> <p>consistent ^[2] 36:4 51:20</p> <p>consistently ^[1] 45:16</p> <p>constant ^[1] 54:6</p> <p>context ^[3] 7:8 39:3 51:13</p> <p>context-specific ^[1] 39:24</p> <p>continue ^[2] 44:11 46:16</p> <p>continued ^[1] 55:2</p> <p>contrary ^[4] 7:23 9:11 11:15 18:21</p> <p>control ^[1] 31:11</p> <p>controls ^[1] 30:12</p> <p>corporate ^[30] 3:21,23 4:5,6,10,13, 14,15,18,18,19,23,24 10:5,13,19, 24 12:2,13 15:11 18:5 21:6,10,12, 15,16 22:10,13,14 47:4</p> <p>corporation ^[3] 10:4 12:3,12</p> <p>correct ^[1] 31:19</p> <p>correction ^[2] 45:8 62:20</p> <p>corrections ^[1] 31:7</p> <p>corrective ^[1] 8:12</p> <p>correctly ^[1] 21:24</p> <p>cost ^[3] 16:8,14 18:7</p>	<p>costs ^[5] 8:2 16:9,18,21 47:13</p> <p>couldn't ^[3] 17:17 40:13 52:13</p> <p>counsel ^[5] 27:2 37:22 57:11 64:3 68:14</p> <p>couple ^[3] 25:17 31:1 42:3</p> <p>course ^[9] 3:18 5:21 8:8 11:20 20:16 25:18 26:17 36:23 54:18</p> <p>courses ^[1] 20:25</p> <p>COURT ^[32] 1:1,14 3:10,11,16 5:19 12:21 13:16 14:13 17:6 24:21 25:10,10 27:8,9,12 29:4,5,6,10,11 34:16 37:6 38:4,15 40:1 48:10 52:12 61:22 62:8,10,15</p> <p>Court's ^[1] 19:12</p> <p>courts ^[9] 20:12,24 23:8,21 34:4 39:22 50:12 61:14 68:10</p> <p>crazy ^[1] 21:1</p> <p>create ^[2] 7:17 47:18</p> <p>created ^[1] 6:20</p> <p>criterion ^[1] 34:21</p> <p>curiae ^[3] 1:23 2:8 27:5</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C ^[3] 1:10,18,22</p> <p>daily ^[1] 54:2</p> <p>damaged ^[1] 62:20</p> <p>day ^[1] 14:18</p> <p>day-to-day ^[1] 11:3</p> <p>days ^[1] 31:12</p> <p>deal ^[1] 14:6</p> <p>dealing ^[2] 22:23 39:22</p> <p>debatable ^[1] 13:25</p> <p>decades ^[1] 39:23</p> <p>decide ^[1] 25:12</p> <p>decided ^[4] 29:8 33:11,14 55:4</p> <p>deciding ^[3] 30:5 39:11,13</p> <p>decision ^[2] 14:14 40:2</p> <p>decisions ^[1] 39:18</p> <p>defendant ^[1] 65:16</p> <p>define ^[2] 10:18 27:13</p> <p>defines ^[1] 10:17</p> <p>definite ^[1] 31:11</p> <p>definitely ^[1] 7:19</p> <p>definition ^[2] 5:5 15:7</p> <p>delay ^[1] 9:25</p> <p>deliberate ^[1] 23:3</p> <p>deliberately ^[1] 17:18</p> <p>Denver ^[1] 12:23</p> <p>deny ^[1] 65:16</p> <p>Department ^[2] 1:21 27:23</p> <p>depends ^[3] 43:2,15,16</p> <p>description ^[1] 47:16</p> <p>detail ^[1] 20:3</p> <p>determine ^[2] 32:1 62:15</p> <p>developed ^[2] 23:21 51:19</p> <p>deviate ^[2] 17:16,19</p> <p>devoted ^[1] 14:6</p> <p>difference ^[2] 49:11 55:1</p> <p>different ^[22] 5:20 6:1,25 7:10 9:4 11:11,14 16:5 22:21 39:7,15 40:16 41:19,24,25 42:6 44:2 47:17 48:18,19 59:1 60:25</p> <p>differently ^[2] 14:25 39:8</p> <p>difficult ^[4] 39:2,18,20 60:16</p>	<p>difficulties ^[1] 38:18</p> <p>diligence ^[1] 10:14</p> <p>diminution ^[1] 55:3</p> <p>direct ^[1] 57:2</p> <p>directly ^[2] 7:23 16:15</p> <p>disabled ^[1] 15:1</p> <p>disagree ^[2] 47:15 67:3</p> <p>disarray ^[1] 57:20</p> <p>disclose ^[21] 5:4,15 11:22 12:3 22:4 27:18 29:1,21 33:21 34:11,15 35:19 36:12 37:8 39:12 41:2,6 59:1 66:21,22,23</p> <p>disclosed ^[9] 3:22 26:20 31:12 34:7 41:16 53:2,6 54:3 61:17</p> <p>disclosing ^[4] 5:22 34:12 35:19 63:18</p> <p>disclosure ^[49] 3:13,23,23 4:7,10, 14,18,24 6:3 8:7 11:11 12:13 13:9 19:25 20:22,23 21:5,11,24 22:4,9, 10 28:2,13,19 29:25 30:13,21,24 31:8 32:1,25 33:10 34:16 35:8,14 37:15,17 44:21 50:18 52:19 56:18 57:16,19 59:13 60:17,24 66:16 68:3</p> <p>disclosure's ^[1] 5:2</p> <p>disclosures ^[9] 7:3 11:25 21:15 22:13 27:20 30:6 37:18 54:23 60:14</p> <p>discovery ^[2] 19:21 43:8</p> <p>discuss ^[2] 48:9 59:8</p> <p>discussed ^[1] 19:3</p> <p>discussing ^[2] 29:11 39:1</p> <p>discussion ^[1] 25:4</p> <p>dismiss ^[2] 8:22 14:1</p> <p>dismissed ^[1] 56:8</p> <p>dismissing ^[1] 25:11</p> <p>disposition ^[2] 59:6,12</p> <p>district ^[9] 13:16 24:21 25:10,10 29:4 61:21 62:8,9,15</p> <p>diverge ^[3] 48:14,17 50:24</p> <p>diversify ^[1] 49:6</p> <p>diversify ^[1] 38:8</p> <p>doable ^[1] 32:11</p> <p>documents ^[1] 25:9</p> <p>doing ^[10] 10:3,5,8 15:1 18:6 30:1 39:19 52:12 53:22 61:14</p> <p>dollars ^[1] 25:18</p> <p>done ^[5] 4:12 17:21 26:24 40:3 60:10</p> <p>door ^[1] 56:12</p> <p>down ^[2] 33:23 49:9</p> <p>drive ^[1] 33:22</p> <p>drop ^[5] 7:4 44:21,23 64:19 65:24</p> <p>Dudenhoeffer ^[22] 3:11 5:13,14 7:24 20:14 27:9 36:1,4,14,18 37:2 38:5,11 40:1,15 52:13 58:9,19 60:22 65:25 66:3 67:24</p> <p>due ^[2] 10:14 25:5</p> <p>During ^[1] 24:17</p> <p>duties ^[4] 11:17 47:14 48:4 51:22</p> <p>duty ^[15] 6:4 7:7,9,11,16 9:9 10:18, 18 29:1 30:23 38:6,23 41:24 49:23 58:1</p>
--	---	---	--

Official - Subject to Final Review

<p style="text-align: center;">E</p> <p>earlier [6] 6:3 7:2 19:4 55:23 60:24 61:24</p> <p>early [5] 5:4 8:6 13:9 67:7 68:3</p> <p>easier [1] 17:20</p> <p>easiest [1] 18:17</p> <p>economic [4] 8:13,17,23 41:2</p> <p>effect [2] 28:1 54:4</p> <p>effects [1] 9:17</p> <p>efficiency [1] 47:12</p> <p>effort [1] 57:10</p> <p>ehh [2] 16:12,17</p> <p>either [3] 20:4 38:13 52:21</p> <p>ELLIS [15] 1:20 2:6 27:3,4,7 28:5,7,9 29:6 31:1,14 32:16 35:2 36:2 37:5</p> <p>emphatic [1] 67:2</p> <p>employees [5] 14:17 15:21 16:7 18:6 67:19</p> <p>encourage [2] 15:19 38:17</p> <p>end [2] 14:18 68:4</p> <p>ends [1] 6:17</p> <p>enforcement [1] 50:8</p> <p>engage [1] 68:8</p> <p>enough [5] 12:14 25:22 40:13,17 51:7</p> <p>Enron [4] 55:10,12,17,19</p> <p>ensuring [1] 47:10</p> <p>entire [5] 22:5,9 27:18 32:19 66:15</p> <p>entirely [1] 31:8</p> <p>entitled [1] 8:22</p> <p>envision [2] 48:15 52:17</p> <p>equal [1] 26:22</p> <p>ERISA [41] 13:2 14:7 17:11,12 23:1 27:25 28:14 38:7,19 41:5 42:10,11,19 43:5,11 44:25 47:18 48:25 49:6,8,22 50:2,3,15,19 51:11 52:8,10,11,14,19 53:8,16,18 55:12,18 56:9,12 58:18,25 60:13</p> <p>ERISA-based [2] 27:11 37:7</p> <p>ERISA/securities [1] 68:9</p> <p>ESOP [25] 4:3 5:18 6:20 7:13 10:7,13,19 11:3 18:1,14,15,18,19,24,25 27:10 28:20 30:9 33:2 37:20 38:5,13 45:4 47:22 67:20</p> <p>ESOPs [3] 14:11 38:17 55:4</p> <p>especially [1] 45:3</p> <p>ESQ [6] 1:18,24 2:3,6,10,13</p> <p>essentially [2] 11:6 39:25</p> <p>ET [2] 1:4,7</p> <p>evaluated [1] 31:22</p> <p>even [15] 4:21 13:3 22:7 37:13 41:9 42:10 44:2,6,8 56:16,18 58:11,18 59:16 66:8</p> <p>event [1] 25:23</p> <p>events [3] 24:7 31:9,10</p> <p>everybody [1] 29:18</p> <p>everyone [1] 33:9</p> <p>everything [2] 17:24,25</p> <p>everything's [1] 66:2</p> <p>evidentiary [1] 38:15</p> <p>Exactly [6] 11:18 14:16 25:19 52:12 58:22 61:14</p>	<p>examining [1] 40:2</p> <p>example [2] 36:8 52:22</p> <p>except [1] 38:7</p> <p>exception [3] 6:12,19 56:15</p> <p>exceptions [1] 45:14</p> <p>exercising [1] 10:14</p> <p>exist [1] 8:18</p> <p>expect [8] 10:3,4,7 12:7 25:19 48:4 51:6,23</p> <p>experience [3] 20:13 43:4 58:8</p> <p>experiencing [2] 9:22,23</p> <p>expert [2] 33:13,13</p> <p>experts [1] 8:21</p> <p>exposure [1] 52:25</p> <p>extension [3] 4:16 10:22 11:1</p> <p>extent [1] 30:13</p> <p>extraordinary [4] 20:21,23 21:18 56:17</p> <p>eyes [1] 32:19</p> <p style="text-align: center;">F</p> <p>face [2] 4:3 18:11</p> <p>faces [1] 29:17</p> <p>facing [1] 9:3</p> <p>fact [11] 8:19,20 25:14 26:8 31:17 36:17 38:25 39:18 42:10 45:25 55:5</p> <p>factor [9] 24:2,3,4,5,9 37:6,13 60:22 65:25</p> <p>factors [3] 36:5,7,19</p> <p>facts [2] 42:6 61:19</p> <p>factual [1] 45:23</p> <p>failing [2] 54:23 56:8</p> <p>fair [2] 63:10,14</p> <p>fairly [2] 23:16 58:4</p> <p>falls [1] 64:20</p> <p>far [1] 54:25</p> <p>fast [1] 34:19</p> <p>favor [2] 18:6 38:13</p> <p>feature [2] 7:20 56:4</p> <p>federal [3] 27:19 28:3 33:12</p> <p>few [2] 40:19 64:10</p> <p>fiduciaries [20] 3:14,21 4:4 10:6 12:6 14:11 18:13 21:17 33:2 36:15 38:6,13 43:7 54:22 55:2,13,18,24 56:23 67:5</p> <p>fiduciary [65] 4:4,22 5:21 9:3,8,12 10:3,15,25 11:17 12:7,7 17:18 20:18,20 21:1 22:2 26:6 27:10,23 28:1,7,15,18 29:16 30:3,24 32:1,9,17 33:4,21 35:3,4,16 36:22 37:14 38:7 41:5,23 42:19 43:11,14,22 44:13,17,18 45:15 46:7,11,24 48:5 53:9,11,20,21,24 54:1 55:6 57:23 61:2,16 66:12 67:15,25</p> <p>Fifth [4] 19:18 41:18 42:4 44:8</p> <p>figure [6] 13:11,13 46:12 49:14 50:13,16</p> <p>Financial [1] 8:5</p> <p>find [2] 63:12 66:9</p> <p>fine [1] 12:10</p> <p>finish [1] 47:2</p> <p>First [9] 4:2 15:4 17:2 21:9 31:2 36:7 54:16 59:20 64:11</p>	<p>five [2] 20:12 49:13</p> <p>focus [1] 28:24</p> <p>follow [1] 14:9</p> <p>force [1] 52:6</p> <p>forced [1] 17:11</p> <p>fore [1] 42:14</p> <p>foreseeable [1] 44:12</p> <p>forever [3] 5:2 8:1,2</p> <p>forget [1] 38:11</p> <p>forth [4] 53:3 62:13,14,18</p> <p>forward [2] 49:17 56:10</p> <p>found [1] 38:15</p> <p>four [7] 31:12 63:16,22 64:5 65:14,14,23</p> <p>fourth [1] 57:5</p> <p>frankly [1] 43:3</p> <p>fraud [9] 5:1 7:25 8:1,2 9:17,18 19:21 30:18 31:20</p> <p>fraudulent [3] 9:9 30:14,15</p> <p>fraught [1] 53:12</p> <p>friend [4] 21:23 65:2 67:3 68:10</p> <p>friendly [1] 60:3</p> <p>front [1] 46:3</p> <p>full [1] 68:12</p> <p>fully [1] 36:4</p> <p>function [1] 47:10</p> <p>fund [8] 3:16,19 39:5 42:20 43:12 51:15 53:21 63:23</p> <p>fund's [1] 38:8</p> <p>fundamental [1] 66:9</p> <p>fundamentally [1] 5:11</p> <p>funds [4] 17:24 18:9,23 67:10</p> <p>future [4] 27:14 32:14 44:12,13</p> <p style="text-align: center;">G</p> <p>GAAP [1] 13:8</p> <p>gain [4] 14:17 16:7,8 17:1</p> <p>gained [4] 4:5,23 10:24 15:21</p> <p>General [5] 1:21 34:14 41:1 47:25 57:11</p> <p>generalized [1] 19:19</p> <p>generally [2] 19:21 43:6</p> <p>generic [2] 5:5 64:17</p> <p>gets [2] 26:24 50:20</p> <p>getting [3] 15:9,24 20:11</p> <p>GINSBURG [1] 28:21</p> <p>give [4] 12:13 13:18 26:13 51:24</p> <p>given [1] 41:24</p> <p>goats [2] 5:6 66:1</p> <p>Goldman [1] 41:8</p> <p>GORSUCH [23] 14:2 15:4,10,13 16:11,17,21,24 17:7,13 18:16,19 19:5 42:17 43:9,17,19 46:22 47:8,20 51:4 52:4 67:13</p> <p>got [5] 17:5 33:1 51:2 64:14 67:18</p> <p>govern [2] 11:17 31:4</p> <p>government [5] 22:19 23:4,6 56:16 59:16</p> <p>government's [4] 11:16 49:12 50:1 52:20</p> <p>granted [8] 22:22 23:12 33:25 35:1 59:5 60:21,23 64:14</p> <p>great [1] 14:5</p> <p>greater [1] 62:24</p>	<p>ground [1] 21:2</p> <p>group [1] 7:19</p> <p>grow [2] 3:25 5:3</p> <p>growth [1] 20:5</p> <p>guess [6] 14:4,12,16 42:24 51:5 57:21</p> <p>guys [1] 18:2</p> <p style="text-align: center;">H</p> <p>hand [1] 60:18</p> <p>happen [7] 56:13,24,24 57:1,2 67:11,11</p> <p>happened [2] 25:7 56:9</p> <p>happening [1] 11:7</p> <p>happy [1] 24:1</p> <p>hard [3] 41:22 58:12,13</p> <p>hardly [1] 65:4</p> <p>harm [19] 3:14,18 5:23 11:21 19:17,20 28:19,25 29:15 32:3 36:24 37:19 40:3,11,12 44:23 50:3,16 53:9</p> <p>harmed [3] 6:2 9:24 41:21</p> <p>harms [2] 3:24 5:2</p> <p>harsher [2] 45:7 62:20</p> <p>hat [5] 4:13 10:13,19,19 21:10</p> <p>hats [1] 12:2</p> <p>head [2] 16:9,12</p> <p>health [1] 47:3</p> <p>hear [3] 3:3 51:6 66:8</p> <p>heard [1] 13:16</p> <p>held [1] 61:2</p> <p>help [4] 9:9 15:2,18 34:20</p> <p>helped [1] 6:3</p> <p>hiring [1] 41:8</p> <p>hoc [3] 28:14 32:22,25</p> <p>hold [3] 41:23 62:5,5</p> <p>holder [2] 12:24 62:24</p> <p>holders [14] 6:23,23 9:22 44:25 45:3,9,16,17,21 46:3 62:19 63:8 66:13,14</p> <p>holds [1] 5:18</p> <p>honest [1] 15:23</p> <p>honestly [1] 20:10</p> <p>Honor [4] 26:25 28:10 31:2 65:22</p> <p>hope [1] 8:24</p> <p>hostile [1] 60:3</p> <p>house [1] 55:14</p> <p>however [3] 8:13 27:12 46:14</p> <p>Human [1] 57:7</p> <p>hundred [1] 25:18</p> <p>hurt [3] 34:12,20 43:22</p> <p>hybrid [1] 68:8</p> <p style="text-align: center;">I</p> <p>IBM [10] 1:3 3:5 11:25 12:1 13:7 17:21 18:18 25:20 57:17 65:2</p> <p>idea [3] 14:9 15:25 64:24</p> <p>identified [2] 27:13 57:23</p> <p>identify [1] 3:17</p> <p>ignorant [1] 32:18</p> <p>ignore [4] 35:5,16 47:23,23</p> <p>illegal [3] 29:23 36:14,15</p> <p>imagine [5] 6:24 19:23,24 20:10 55:9</p>
--	--	--	--

Official - Subject to Final Review

<p>immediate ^[1] 5:23 immediately ^[1] 3:15 impact ^[1] 5:17 impairments ^[1] 31:10 implausible ^[1] 67:14 implicitly ^[1] 65:9 implied ^[1] 63:23 important ^[4] 7:20 17:22 21:22 59:9 importantly ^[2] 28:16 29:12 impose ^[2] 28:13 32:25 imposing ^[3] 47:13 51:21 52:10 imprudent ^[2] 39:5,6 incentivize ^[3] 17:1,3,15 including ^[2] 30:8 45:1 inconsistent ^[4] 5:11 32:24 37:8 59:14 increase ^[1] 8:3 increases ^[1] 19:22 indeed ^[2] 4:13 36:13 indicated ^[1] 14:20 individuals ^[1] 18:8 inevitability ^[3] 14:15 26:15,22 inevitable ^[14] 3:24 5:2 19:20 34:16,17,19 61:18,23 63:13,15,21,21 65:4,7 inevitably ^[3] 30:19 32:15 41:16 inference ^[3] 13:23,24 63:6 inflated ^[1] 57:1 information ^[39] 3:13,22 4:5,22 5:16 10:9,24 11:4 12:14 15:7,8 16:4 27:12,17,25 29:2,21 32:2,2,14 33:22 34:7,18 35:20,22,22 36:11 42:9,22 43:7 54:2,7,8,12 55:15,19,25 66:24 67:8 inherently ^[2] 4:12 32:4 injection ^[1] 54:6 inquiry ^[1] 53:18 inside ^[16] 3:13,21 5:15 10:9,23 11:4 15:8 18:2 27:12,17,25 29:21 32:2 55:25 66:23 67:8 insider ^[14] 3:14,20 4:22 14:25 15:12,20 17:17 29:1 31:25 33:2 53:24 54:1 55:6 57:23 insiders ^[15] 4:13 11:4 12:12 14:8,10,15,17 18:13 54:22 55:1,13,24 56:24,24 67:4 insufficient ^[1] 4:25 insurmountable ^[1] 4:3 intended ^[1] 32:20 intent ^[2] 18:22 48:23 interest ^[2] 42:15,16 interesting ^[1] 59:9 interests ^[20] 6:22 7:11,18 32:20 33:11 39:15 40:4,20,25 41:24 46:25 47:4,17,25 48:19 51:15,16 60:12 66:19,25 interrupt ^[1] 42:18 interrupting ^[1] 42:25 intersection ^[1] 38:18 intervals ^[2] 66:21,22 inure ^[1] 67:24 invested ^[1] 41:14 investigation ^[2] 8:10,11</p>	<p>investment ^[9] 38:24 39:4,13 42:15,16 45:11,20 46:6,20 investments ^[2] 39:21 46:19 investors ^[8] 27:21 30:7,8 35:11 37:20 39:9,10 51:20 involved ^[2] 56:25 57:25 isn't ^[10] 8:19 15:8 39:11 41:17 47:8 59:21 61:3 64:21 65:15 67:14 issue ^[10] 19:4,10 22:21 42:3 46:19 58:21,23 59:2,7,22 issues ^[4] 19:5 38:25 61:15 66:7 It'll ^[3] 8:20 13:19 17:20 itself ^[1] 65:4</p> <hr/> <p style="text-align: center;">J</p> <p>JANDER ^[2] 1:7 3:5 job ^[1] 39:19 JONATHAN ^[3] 1:20 2:6 27:4 Journal ^[1] 8:5 judge ^[1] 62:15 judged ^[1] 62:4 judgment ^[2] 14:24 65:11 judicial ^[1] 25:16 juncture ^[1] 57:18 jury ^[1] 8:20 Justice ^[113] 1:21 3:3,9 5:9,24 6:9,24 8:9 9:1,7,16,21 10:1,12,21 11:10,13 14:2 15:3,10,13 16:11,17,21,24 17:7,13 18:16,19 19:1,5,6,15 22:15,18,20 23:25 24:10,14,17,22,25 25:2,6,13,24 26:5,12 27:1,7 28:4,6,8,17,21 30:10,11 31:13,24 33:16,17,18 35:24 36:19,25 37:21 38:3 40:6 41:17 42:17 43:9,17,19,21 44:1,14,16 45:12 46:4,22 47:8,20 48:13 49:2,4 50:22 51:4 52:4,5 53:20 54:11 55:22 57:21 58:20 59:17,20 60:2,20 61:5,8,11 62:1,22 63:2,10 64:1,2,5,10 65:8,19 67:13 68:13</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN ^[12] 33:17 35:24 36:19 44:14,16 45:12 46:4 48:13 49:2,4 50:22 52:6 KAVANAUGH ^[12] 5:24 6:9,24 19:1 41:17 43:21 44:1 57:21 60:20 61:5,8,11 kind ^[13] 7:16,18 13:19 14:20,24 18:11 20:3 39:25 42:9 48:11 54:23 58:22 60:9 kinds ^[2] 39:23 54:7 know-nothing ^[1] 15:17 know-nothings ^[1] 14:19 knowledge ^[5] 10:16,17,20 57:2,9 known ^[1] 20:6 knows ^[2] 57:24 61:16</p> <hr/> <p style="text-align: center;">L</p> <p>Labor ^[1] 27:23 language ^[1] 52:9 LARRY ^[1] 1:7 last ^[2] 23:2 68:4 lasts ^[3] 5:1 8:1,2 latent ^[1] 67:12</p>	<p>Later ^[6] 19:25 34:15 41:3,6,13 61:24 Laughter ^[1] 24:6 launches ^[1] 52:1 law ^[31] 4:20 8:4 9:12 11:8 12:8,11,18,24 13:1,21 17:16,19 22:11 23:1 27:19 30:12 32:19 33:6 35:6,17 47:1,9 48:3 50:5,14,18 52:15 66:17,24 67:1 68:12 laws ^[28] 11:15,16 23:1 28:3,13 29:12,17,23 31:4,5 32:24 33:12,20 37:10,16 38:19 47:16,17 48:20 49:6,19 51:20 52:8,18 53:4 56:19 59:15 60:15 laws' ^[1] 58:24 leads ^[1] 28:10 leak ^[1] 15:14 leaks ^[1] 16:4 least ^[4] 15:15 30:2 33:7 48:16 leaving ^[1] 23:20 left ^[1] 40:9 Lehman ^[1] 52:24 less ^[4] 14:12 16:9 21:13 58:14 liability ^[1] 14:7 liable ^[3] 41:23 61:3 68:1 likely ^[9] 26:8,17,19,21,21 41:15 57:14 65:1,6 limit ^[1] 12:20 limits ^[1] 12:19 line ^[7] 6:12,14,16,18 13:18,20 68:7 listed ^[1] 40:19 listen ^[1] 65:1 listening ^[1] 58:22 literature ^[1] 8:14 litigant ^[1] 52:7 litigants ^[1] 51:10 litigated ^[1] 43:5 little ^[5] 41:22 42:24 49:17 56:7 63:12 loads ^[1] 34:18 logical ^[2] 8:13 9:19 long ^[4] 25:22 45:19,19 58:1 long-established ^[1] 26:7 long-term ^[9] 6:23 39:9 42:14,15 45:10 46:5,24 47:3 66:19 longer ^[2] 63:17 66:8 look ^[12] 9:22 12:4 23:22 24:5,11 26:23 30:4 33:6 36:22 46:7 61:22 64:19 looked ^[4] 29:8 42:10,11 67:1 looking ^[9] 41:4,12 53:7 62:2,2,5 65:2 66:13,18 lose ^[1] 24:8 loss ^[1] 8:12 losses ^[2] 9:10 13:9 lost ^[1] 52:5 lot ^[8] 17:10 31:5 34:3,4 36:8 38:25 39:17,19 lower ^[3] 23:8,21 68:10</p> <hr/> <p style="text-align: center;">M</p> <p>made ^[11] 5:4,7 7:2,3 12:1,1 24:12 25:8 31:18 35:8 64:18</p>	<p>major ^[1] 31:9 majority ^[2] 44:25 46:2 managed ^[1] 11:4 manager ^[1] 67:14 managers ^[1] 66:17 managing ^[1] 53:21 many ^[2] 43:5 46:14 map ^[1] 19:2 market ^[14] 5:16 7:15 10:10 12:14 21:7,14 22:5,9,16 27:18 33:3 34:8 53:13,23 market-wide ^[2] 28:2 35:10 markets ^[1] 47:10 Martone ^[1] 44:9 massive ^[1] 52:24 material ^[1] 31:10 matter ^[9] 1:13 8:19 34:14 38:9,10 47:7 48:7 52:9 60:12 matters ^[1] 48:24 mature ^[2] 21:22 25:19 matured ^[3] 20:15 21:3 22:6 maximize ^[1] 66:20 mean ^[22] 6:7,19 7:8 16:4,19 19:10 20:9,20 24:1 33:21 35:25 36:16,25 46:4 47:8 53:20 57:22 61:19,21 63:5 64:11,23 meaningful ^[1] 38:9 means ^[2] 7:7 49:14 meant ^[1] 49:7 measure ^[1] 9:24 measures ^[1] 8:12 meat ^[3] 61:25 63:11,12 meet ^[3] 19:25 49:19 50:9 member ^[2] 47:22 57:5 members ^[1] 9:5 mentioned ^[1] 65:15 menu ^[1] 39:14 meritless ^[1] 66:1 mess ^[1] 68:2 metaphysical ^[1] 15:15 microelectronics ^[4] 13:10,13 57:9 65:3 might ^[12] 14:22 25:21 39:2 43:10 47:4 48:16 51:6,7,7 52:18 54:3 56:18 migrated ^[1] 20:17 million ^[1] 25:18 mind ^[1] 56:22 mine ^[1] 67:6 minute ^[1] 14:3 minutes ^[1] 64:5 misapplied ^[1] 13:8 miscalculated ^[1] 13:7 misleading ^[2] 30:14,15 misreading ^[1] 55:7 missing ^[4] 8:16 20:1,2 44:5 misstatement ^[2] 31:18,19 misstatements ^[2] 31:6,7 mistake ^[1] 68:6 mistaken ^[1] 25:14 mix ^[1] 54:6 Moench ^[3] 54:15,17 58:9 moment ^[1] 23:23 monitoring ^[1] 39:20</p>
---	--	--	---

Official - Subject to Final Review

<p>months ^[1] 46:14 most ^[7] 22:19 24:12 45:1,2,3,25 46:1 motion ^[1] 8:22 motive ^[3] 48:21,25 50:15 move ^[1] 65:11 much ^[12] 6:16 10:8 11:13 16:3 37:17,18 45:13,14 46:17 47:11 48:7 58:16 multiple ^[1] 6:8 muster ^[1] 47:12 mutual ^[1] 39:5</p>	<p>obligation ^[6] 4:4,22 10:23 27:11 37:7 55:18 obligations ^[1] 9:4 obliged ^[1] 50:9 obvious ^[1] 43:1 Obviously ^[1] 24:3 offer ^[1] 17:24 office ^[1] 29:7 officer ^[1] 57:12 officers ^[1] 10:5 officials ^[4] 12:2 18:5 21:15 22:13 often ^[2] 58:14,14 okay ^[10] 16:9,13,14 28:10 33:25 40:22 43:17,21 59:21 64:1 Once ^[4] 21:9 22:6 48:2 53:2 one ^[26] 7:6,18 16:8 19:3 23:7,19 24:14,15 26:10 27:16 31:22 35:10,10 44:19 45:1 46:8 47:6 50:24 60:18 63:7,12,16,17 64:20,24 67:2 only ^[10] 3:25 4:13 5:3 15:9 18:6 30:12 31:4 40:24 60:14 68:1 opening ^[1] 56:11 operate ^[1] 45:15 operated ^[1] 43:3 opportunity ^[1] 51:25 opposed ^[2] 25:20 53:18 oral ^[7] 1:14 2:2,5,9 3:7 27:4 38:1 order ^[4] 11:7 13:11 18:23 50:3 other ^[10] 8:16 15:16 21:23 23:20 38:7 46:18 59:7 64:24 66:22 67:3 others ^[1] 23:10 otherwise ^[1] 54:8 ought ^[4] 23:2 51:9 53:16 67:24 out ^[30] 6:10 13:11,13 15:1 16:19 21:23 22:20 24:20 25:9 31:16 32:15 34:22 35:13,18,20 36:17 40:7 44:9 46:12 49:11,14 50:13,16 54:8,16,17 57:16 64:21 66:13,18 outnumber ^[1] 63:8 outsider ^[3] 14:22 15:5,7 over ^[11] 3:25 5:3 8:3 12:21 13:18,20 19:22 36:1 46:13 51:19 54:18 overall ^[1] 47:3 owed ^[1] 38:6 own ^[1] 58:8</p>	<p>party ^[3] 1:23 2:8 27:6 past ^[2] 44:7 46:14 PAUL ^[5] 1:18 2:3,13 3:7 64:7 pay ^[2] 16:22 45:5 paying ^[1] 7:15 Pegram ^[13] 4:3,16 10:22 11:1,24 17:6 19:4,10 21:19 55:6,8,8 66:7 pension ^[2] 17:2,3 people ^[16] 9:10 20:7 39:6 40:3 45:1,2,3 46:1 47:14 51:22 52:6 53:14,14 54:21 66:12 67:18 percent ^[1] 20:7 perfectly ^[1] 12:10 Perhaps ^[1] 43:15 period ^[3] 24:18 41:9 62:8 person ^[1] 47:1 perspective ^[1] 41:5 persuaded ^[1] 61:22 pervasively ^[1] 4:19 Petitioner ^[1] 64:12 Petitioner's ^[1] 55:17 Petitioners ^[6] 1:5,19 2:4,14 3:8 64:8 piece ^[1] 63:12 place ^[4] 17:3 38:21 40:24 47:2 plain ^[1] 52:9 plaintiff ^[1] 43:10 plaintiffs ^[4] 3:17 21:3 22:7 66:8 plan ^[29] 3:14,15 4:7 6:13 9:5 10:10 16:15,23 17:11,12,24 20:3,5 21:25 22:2 24:18 25:19 26:7 34:12,20 39:7,11 43:3,16 48:1 55:16 56:2 63:6 67:20 PLANS ^[7] 1:3 3:5 17:2,4 18:4 45:1 57:6 plausible ^[2] 53:11 66:1 play ^[1] 49:11 plead ^[11] 21:19 48:21 49:23 50:1,3,4 52:7,7 56:9 58:13 61:16 pleaded ^[1] 62:19 pleading ^[11] 3:12 19:18 38:9 43:11 48:11 49:18,21 52:10 60:9,11 62:13 pleadings ^[3] 38:14 49:20 62:16 please ^[4] 3:10 27:8 35:24 38:4 pled ^[4] 7:17 12:18 62:6,7 PLSRA ^[1] 18:12 point ^[13] 5:25 15:1 22:7 28:16 31:16 32:3,14 35:18 40:7 51:5 53:8,16 65:24 pointed ^[3] 22:20 25:9 44:9 pointing ^[2] 49:5,7 points ^[6] 10:2 21:23 31:1 51:2 64:10 65:10 policy ^[1] 38:16 positing ^[1] 42:23 position ^[12] 11:16 15:6 29:16 32:7,18 33:5 34:23,24 36:4 56:1 57:4 59:21 positive ^[3] 35:22 54:11 66:23 possibility ^[1] 15:16 possible ^[2] 15:14 27:16 potential ^[1] 9:23 pour ^[1] 58:21</p>	<p>practical ^[3] 31:25 47:6 48:7 practice ^[1] 11:2 precise ^[5] 20:4 27:13 35:6 36:6 44:4 precisely ^[2] 22:12 35:7 predict ^[1] 44:13 prediction ^[1] 46:15 premise ^[7] 5:8,12 7:22,23,25 16:3 31:2 premised ^[1] 5:14 present ^[1] 19:11 presented ^[8] 48:10 59:23 61:3,8,13 64:13,16 66:6 President ^[1] 57:7 presumption ^[4] 38:12,20 54:15,17 pretty ^[6] 6:16,18 45:13,14 53:3 63:5 prevent ^[2] 11:7 49:7 price ^[10] 7:4 33:22 44:21 45:8,8 53:23 54:4 57:1 58:3 62:21 principal ^[1] 66:12 principle ^[4] 8:13,17 13:25 41:2 private ^[2] 51:10 52:7 problem ^[8] 4:3 11:24 21:6,8,20 41:18 47:19 66:10 problems ^[1] 4:1 programs ^[1] 11:6 promise ^[1] 54:16 promote ^[1] 9:9 prong ^[2] 29:14 62:3 prongs ^[1] 6:8 proper ^[1] 8:11 proposition ^[1] 60:6 protect ^[4] 48:19 51:20 55:16 56:2 protecting ^[1] 40:5 protection ^[2] 27:21 30:7 protections ^[1] 18:12 protects ^[1] 51:18 provide ^[1] 15:20 provisions ^[1] 31:6 proxy ^[1] 48:4 prudence ^[12] 6:4 7:8,9,12,16 38:6,13,23 41:24 49:23 52:16 55:12 prudent ^[22] 5:4,23 8:7 20:16 21:1 27:23 28:17 29:16 30:2,3 32:17 33:4 34:6 35:2,4,16 36:15 37:14 53:8,11 61:2 68:2 PSLRA ^[4] 12:19 49:20 50:2,10 public ^[5] 16:4 29:25 32:2 33:1 35:10 publicly ^[2] 25:8,15 purport ^[1] 11:17 purpose ^[1] 66:16 push ^[1] 49:17 put ^[9] 12:21 21:10 34:22 42:14 46:3 62:13,14,17 65:14</p>
<p style="text-align: center;">N</p> <p>namely ^[3] 23:3,12 27:17 narrow ^[2] 34:25 35:3 nature ^[1] 20:3 nearly ^[1] 63:21 necessarily ^[4] 8:9 42:4 43:24 53:22 necessary ^[4] 27:20 30:6 33:14 65:11 need ^[9] 5:19 22:8,8,9 38:8,17 56:18 62:13,14 needed ^[1] 31:19 needn't ^[1] 58:25 needs ^[1] 60:9 negative ^[5] 3:13 5:15,17 35:21 54:12 neither ^[5] 1:23 2:8 27:6 45:2,16 net ^[23] 6:22,22 20:7 24:18 25:12,17,21 26:1,9 32:12,12 42:20 43:13,13 44:7,10 47:11 51:15,16 64:21 67:16,20,21 never ^[3] 40:11 49:1 52:15 New ^[8] 1:24,24 6:13 20:5 25:20 30:16 67:19 68:8 newly ^[2] 6:12,20 next ^[5] 3:4 28:11 34:10 53:15 54:18 nice ^[1] 49:15 non-ERISA ^[1] 38:24 non-ESOP ^[3] 39:3 46:18,20 non-identified ^[1] 46:25 none ^[1] 62:6 nonetheless ^[1] 5:23 nonpublic ^[1] 29:1 nor ^[2] 45:2,17 normal ^[2] 5:21 20:22 normally ^[1] 12:7 noted ^[1] 29:13 nothing ^[4] 12:5 34:14 63:23 65:9 notice ^[1] 25:16 notwithstanding ^[1] 38:16 November ^[1] 1:11 nowhere ^[1] 28:23 number ^[5] 27:24 46:5 55:1,3 63:20</p>	<p style="text-align: center;">P</p> <p>p.m ^[1] 68:15 PAGE ^[2] 2:2 26:14 paragraph ^[1] 40:7 paragraphs ^[1] 23:16 part ^[9] 6:7 13:15 17:14 19:10 21:13 22:24 52:5 53:17 59:4 participant ^[1] 50:2 participants ^[16] 3:15 4:8 10:10 16:16,23 21:25 22:3 28:20 29:20,22 32:12 34:13 35:9 36:12 55:16 56:2 participating ^[1] 30:9 particular ^[5] 8:1 19:24 32:3 36:20 40:6 particularized ^[1] 62:12 particularly ^[7] 4:9 26:4 53:12 57:17 63:7,20 65:1</p>	<p style="text-align: center;">P</p> <p>point ^[13] 5:25 15:1 22:7 28:16 31:16 32:3,14 35:18 40:7 51:5 53:8,16 65:24 pointed ^[3] 22:20 25:9 44:9 pointing ^[2] 49:5,7 points ^[6] 10:2 21:23 31:1 51:2 64:10 65:10 policy ^[1] 38:16 positing ^[1] 42:23 position ^[12] 11:16 15:6 29:16 32:7,18 33:5 34:23,24 36:4 56:1 57:4 59:21 positive ^[3] 35:22 54:11 66:23 possibility ^[1] 15:16 possible ^[2] 15:14 27:16 potential ^[1] 9:23 pour ^[1] 58:21</p>	<p style="text-align: center;">Q</p> <p>question ^[27] 14:4 19:17 23:6,12,13 28:22 29:24 31:3 34:10,25 35:6 39:25 48:10 52:4 54:17 55:22 59:4 60:10,16,21 61:3,6,12 64:13,16 65:13 66:6</p>
<p style="text-align: center;">O</p> <p>objective ^[1] 5:14 objectives ^[4] 28:12 29:11 37:9 58:24 obligated ^[1] 11:14</p>			

Official - Subject to Final Review

<p>questions [2] 19:6 23:20 quibble [1] 16:3 quickly [1] 40:12 quite [2] 21:23 28:10</p> <hr/> <p style="text-align: center;">R</p> <p>raise [2] 59:8,8 raised [3] 19:5 23:20 55:23 rare [4] 56:15,22 57:22 58:3 rarely [1] 28:1 Rather [3] 23:17 34:15 41:3 reached [2] 32:6,7 reaction [1] 34:2 read [3] 19:17 23:16 67:23 reading [1] 23:7 real [6] 15:22 17:1 18:14 42:7 46:10 49:11 reality [2] 5:15 11:2 realize [1] 23:7 really [17] 7:23 9:8 10:7 19:12 21:8,10,19 24:5 44:4 47:2 48:4 49:5 52:20 55:7 62:5 64:20 67:17 reason [11] 6:19 19:11 21:13 34:1,11 48:17 53:17 55:11 66:6 67:4,13 reasonable [11] 30:2 36:21 37:14 44:17 46:10 47:13,13,14 51:21,22 63:5 reasonably [3] 33:7,8 63:15 reasoned [1] 14:23 reasons [2] 28:9 37:3 REBUTTAL [4] 2:12 51:7 64:7,10 receive [1] 54:1 recognized [2] 3:12 27:9 recognizing [1] 7:22 recovery [3] 44:24 45:9 62:21 reduce [1] 8:12 reducing [1] 3:15 reference [1] 26:13 reflect [1] 11:2 regardless [1] 31:14 regime [6] 17:9 28:13 31:9 32:25 35:14 66:16 regular [12] 3:22 4:6,10,14 11:22,24 21:5,12,16 22:10 45:4 53:22 regularly [1] 54:2 regulated [1] 4:20 regulating [1] 22:12 regulations [1] 13:8 relation [1] 23:1 relationship [1] 58:23 relevant [3] 27:14 29:14 36:5 rely [1] 8:22 repleading [1] 56:12 reporting [1] 13:14 require [7] 10:22 28:1,5 31:25 46:12 52:19 56:20 required [12] 3:16 27:24 30:25 37:15 44:12 50:19 52:15 59:15,18 60:15,17,25 requirement [5] 13:3 48:23 52:10,14 56:19 requires [1] 4:16 requisite [1] 53:5</p>	<p>resolve [1] 60:23 resources [2] 41:15 57:7 respect [3] 4:9 10:6 25:5 respectfully [1] 12:17 respond [2] 47:5 51:25 Respondents [6] 1:8,25 2:11 3:20 11:19 38:2 Respondents' [3] 4:2 5:10 7:22 response [2] 27:17 51:5 responsibilities [2] 17:10 22:2 responsibility [1] 57:3 responsive [1] 16:6 rest [2] 33:3 65:16 result [1] 54:6 resulted [1] 62:21 results [1] 26:19 retirees [1] 67:21 RETIREMENT [3] 1:3 3:4 57:6 reveal [1] 40:12 Review [1] 8:4 rid [2] 18:18,24 Rinehart [2] 52:22,23 risk [1] 18:14 risks [1] 53:2 road [1] 19:2 ROBERTS [7] 3:3 26:12 27:1 37:21 64:2,5 68:13 role [1] 45:15 roles [1] 4:15 room [1] 6:16 roughly [1] 34:24 rule [11] 17:16,19 49:12,16 50:1 51:10 52:20 55:5,6,8,17 rules [1] 15:20 rulings [1] 42:5 run [6] 10:11 18:5,8,13,23 63:17 running [2] 16:19 64:13</p> <hr/> <p style="text-align: center;">S</p> <p>Sachs [1] 41:8 sale [4] 26:17,18 64:25 65:4 same [6] 35:23 38:6,24 39:25 46:19 51:10 SAMUEL [3] 1:24 2:10 38:1 satisfied [2] 19:19 34:21 satisfy [1] 40:17 saving [1] 18:7 savings [2] 16:8,15 saw [1] 28:23 saying [6] 9:8 22:8 33:24 40:9,16 60:14 says [9] 7:12 10:17 24:25 36:14 37:4 38:23 51:13 66:3 67:4 scenario [1] 37:8 scienter [14] 13:3,22,23,24 48:22,23 49:23 50:2,24 51:11 52:14 53:5 56:9 68:11 scrap [1] 35:25 SEC [4] 27:22 30:25 50:8,9 second [19] 4:21 5:24 6:11 8:5 19:3 21:21 22:24 24:2,5 36:17 50:22 52:5,23 58:12 59:2,3,4 60:8 61:13 secure [2] 10:16,17 securities [67] 4:20 9:12 11:8,15,</p>	<p>16,22,25 12:8,11,15,18,21,24 13:1,2,6,12,17,21 14:8 18:11 23:1,9 28:12 29:2,3,12,17,23 30:12 31:4,5 32:24 33:12,20 35:13 37:9,16 38:19 47:1,9,16,17 48:3,20 49:6,9,19 50:5,14,18 51:20 52:8,18,25 53:4,19 56:8,12,19 58:14,17,24 59:14 60:15 66:17 68:12 security [4] 13:5 20:22 28:3 67:12 see [7] 13:22,23 15:22 29:4 49:17 54:25 63:2 seem [5] 22:19,23 23:16 28:24 58:3 seemed [1] 33:19 seems [13] 6:10,13 8:18 9:10,21 13:19 23:24 32:8,11 40:8 49:15 56:11 58:4 seen [1] 20:15 selective [1] 35:8 selectively [2] 29:22 36:12 self [1] 11:15 sell [8] 14:24 39:13 40:12 41:7 45:4 57:10,13 65:3 seller [11] 25:12,17 26:1,9 42:21 43:13 46:13,16 47:24 62:4,24 sellers [12] 6:23 9:9,13,13 32:13 42:8 45:2,17,22 46:1 67:16,22 selling [5] 7:14 62:9,10 67:18,21 send [3] 60:7,7 65:10 sending [1] 50:12 senior [2] 18:4 57:7 sense [3] 32:17 55:20 56:6 sensitive [1] 57:18 sentence [2] 23:2 40:14 separate [4] 5:6 13:14 53:18 66:1 serve [3] 14:15 17:17 67:5 service [1] 36:20 set [8] 7:13,13 11:7 17:20 18:3 20:4 35:13 67:10 shaking [2] 16:9,11 share [1] 33:23 shareholder [1] 40:20 shareholders [4] 33:12 39:15 66:15,19 sheep [3] 5:6 66:1,2 short [2] 63:16,22 short-term [2] 6:23 39:10 shortly [1] 51:7 should've [1] 35:7 shouldn't [4] 8:17,21 34:11 56:14 showed [1] 62:8 shows [2] 34:18 62:10 side [2] 21:23 67:3 sides [1] 43:5 sign [1] 11:23 similar [1] 41:19 simply [2] 23:19 53:21 single [3] 5:7 24:13 28:14 sit [1] 45:5 situated [1] 39:8 situation [14] 6:20,21 9:3 30:23 32:8,13 45:25 52:18 55:9 56:7,23 57:17 60:25 61:1 situations [1] 48:16</p>	<p>Sixth [2] 41:18 42:4 size [1] 63:7 sketched [1] 34:22 slightly [1] 40:15 slower [2] 45:8 62:21 so-called [1] 26:15 sold [2] 57:15,15 Solicitor [1] 1:20 solution [3] 19:13 32:22 68:11 solve [1] 21:6 somebody [1] 25:20 somehow [1] 36:16 sometimes [2] 27:10 38:11 sooner [4] 34:15 35:20 41:2,6 sophisticated [1] 18:8 sorry [3] 28:8 42:18,25 sort [3] 32:25 58:20 67:5 sorts [1] 54:2 SOTOMAYOR [21] 5:9 8:9 9:1,7,16,21 10:1,12,21 11:10,13 19:15 22:20 28:4,6,8 30:11 31:13 62:1,22 63:2 Sotomayor's [1] 19:6 sound [2] 33:17 35:25 sounds [1] 58:21 speaking [1] 43:4 speaks [2] 35:6,7 special [8] 15:20 22:1,3 34:10,14 63:23 65:9,20 specific [11] 3:17 5:20 11:20 12:6 23:17 26:11,23 40:18 45:23 63:12 64:20 specifics [2] 8:16 64:19 specified [1] 47:22 spend [1] 57:13 split [4] 38:12 60:22,24 64:15 spook [1] 21:7 spooky [1] 21:14 stability [1] 45:10 stage [2] 38:14,15 stakeholders [1] 39:7 Stamps [1] 12:22 standard [14] 3:12 19:25 28:25 29:15 32:5 33:9 48:11 49:9,20 50:7,19,24 51:18 58:11 standards [1] 50:10 start [3] 36:1 41:12 47:2 started [1] 20:17 startup [1] 25:21 state [1] 31:23 statement [2] 30:15,17 STATES [6] 1:1,15,22 2:7 27:5 68:6 statute [6] 38:22,22 52:9,10,11 60:11 statutes [1] 48:18 Stearns [1] 53:14 step [1] 17:5 stick [1] 23:11 still [6] 4:25 7:1 34:24 36:5 38:20 62:23 stock [12] 5:17 7:3 24:18 44:21 45:8,8 57:1 58:3 62:21 63:6 64:18 65:24</p>
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Official - Subject to Final Review

<p>stocks ^[3] 53:24 54:4,7 stop ^[2] 20:19 68:12 straightforward ^[1] 53:3 stress ^[1] 34:1 strong ^[3] 13:22,24 48:22 struck ^[2] 30:4,5 struggle ^[1] 68:10 sub-prime ^[1] 52:25 subject ^[3] 12:19,20 47:12 submission ^[1] 4:2 submit ^[1] 12:17 submitted ^[2] 68:14,16 substantive ^[1] 38:10 subtle ^[1] 21:5 sue ^[2] 57:6,8 sued ^[1] 41:11 sufficient ^[4] 26:2 31:23 65:15,22 sufficiently ^[3] 13:14 59:23,24 suggested ^[2] 51:17 62:3 suggesting ^[2] 30:22 34:9 summary ^[1] 65:11 supported ^[1] 8:14 supporting ^[3] 1:23 2:8 27:6 suppose ^[2] 14:9 59:21 supposed ^[6] 40:4 44:17 46:23,24 66:3,21 SUPREME ^[2] 1:1,14</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>talks ^[1] 56:16 term ^[2] 45:19,20 terms ^[1] 59:6 test ^[3] 36:20 37:1 39:2 tests ^[1] 37:4 that'll ^[1] 21:6 themselves ^[1] 21:19 theory ^[6] 8:23 28:22 58:7 62:13,14,18 There's ^[24] 8:10,10,11 10:2,2,16,23 12:5 15:15 17:10 19:24 27:18 31:7,15,15 34:13 36:23 44:1 50:6 55:20 64:25 66:9,14,24 therefore ^[4] 6:3 23:11 56:1 57:4 They'll ^[2] 18:24 34:22 they've ^[3] 41:13,14 64:23 thinking ^[2] 23:23 45:19 thinks ^[1] 66:12 third ^[15] 5:12,13 7:24 19:18 23:13 24:2,4,8 29:14 36:17 37:12 59:4,5 60:21 62:3 though ^[1] 56:19 thoughts ^[1] 51:8 three ^[5] 19:9 22:25 36:5 63:17,22 throwing ^[1] 57:19 timeline ^[1] 44:24 timing ^[1] 37:18 today ^[1] 39:1 top ^[1] 21:17 trade ^[4] 6:22 11:5 29:20 36:11 tradeoff ^[1] 7:18 trading ^[2] 7:10 20:20 transparency ^[1] 47:11 treated ^[1] 13:5 trial ^[1] 65:12</p>	<p>tricky ^[1] 60:6 tried ^[1] 40:21 trier ^[1] 8:20 triggered ^[1] 58:1 trouble ^[1] 7:6 true ^[5] 4:9 35:19 63:20 64:21,22 trustee ^[3] 25:25 34:7 58:25 trustees ^[3] 14:16,18 15:20 trusts ^[1] 52:15 try ^[6] 10:9 15:3 46:14 50:20 61:18 65:3 trying ^[7] 33:19 41:7,13 49:13 50:13 57:13 66:19 turn ^[1] 41:1 turns ^[2] 24:20 64:21 two ^[11] 4:1 10:2 16:7 28:9 36:7 47:6 48:13,16,18 50:23 63:20 twofold ^[1] 21:8</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately ^[1] 51:3 uncertain ^[1] 59:22 uncertainty ^[1] 44:2 under ^[20] 12:18,24,25 13:21 14:7 24:2,8 29:2 49:18,22 50:2,3,19 52:7,8,14 53:14 55:17 60:11 66:16 underlying ^[2] 13:6 42:6 undermine ^[1] 28:12 underneath ^[1] 50:7 understand ^[4] 14:5 15:19 17:22 43:9 understood ^[1] 30:12 underwrite ^[1] 15:25 unhelpful ^[1] 35:15 unique ^[1] 67:7 uniquely ^[1] 18:11 unit ^[4] 13:10,13,15 65:3 UNITED ^[6] 1:1,15,22 2:7 27:5 68:6 unnecessary ^[1] 28:19 unplanned ^[1] 28:2 until ^[2] 42:9 43:8 unusual ^[3] 17:9 45:24,25 up ^[16] 6:17 7:6,13,13 11:7 14:3,18 17:20 18:4 20:5 39:2 46:3,20 61:20 65:16 67:10 useful ^[3] 29:9,10 55:23 using ^[2] 11:4 49:8</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>value ^[4] 3:16 5:17 46:5 66:20 Vanguard ^[2] 16:20 18:1 various ^[2] 18:8 54:19 vast ^[2] 44:25 46:2 vastly ^[1] 63:8 versus ^[2] 3:5 7:19 viable ^[1] 55:11 Vice ^[1] 57:7 view ^[3] 45:12 53:8,16 views ^[5] 23:4,5,8,10 27:22 violated ^[1] 6:4 violating ^[1] 41:23 violation ^[2] 13:12 50:5 violations ^[1] 67:12</p>	<p>virtually ^[1] 63:6 virtue ^[1] 7:10 vote ^[1] 24:4</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait ^[1] 53:16 walked ^[2] 24:19 64:23 wanted ^[1] 51:24 Washington ^[3] 1:10,18,22 water ^[2] 49:9 58:21 way ^[12] 7:14 11:5 13:4 14:25 18:23 21:4,18 39:22 43:3 46:17,18 50:23 ways ^[2] 47:6 50:23 wearing ^[3] 4:12 10:13 12:2 Wednesday ^[1] 1:11 well-developed ^[1] 27:19 well-founded ^[1] 8:23 whatever ^[2] 20:13 65:17 whatsoever ^[1] 4:17 Whereupon ^[1] 68:15 Wherever ^[1] 10:15 whether ^[24] 13:11,13 14:24 19:17 31:22 32:1,11 36:21 37:7 39:11,12,13 42:20 43:12 46:13,15 47:23 57:25 60:16 62:3,16,23 67:15 68:11 who's ^[1] 57:23 whole ^[9] 3:19 10:11 12:14 21:18 22:17 48:1 65:24 66:24 67:9 whom ^[4] 6:2,2 41:20,21 wiggle ^[1] 6:15 will ^[18] 9:24 32:3,13,15 33:22 34:12,19,20 35:20 39:6 44:21 45:9,10 46:15 49:10 54:9 60:8 63:4 win ^[5] 24:1 35:1 58:13 64:16 66:5 wind ^[1] 14:18 wise ^[1] 11:1 within ^[3] 20:22 31:12 63:15 without ^[2] 18:12 57:19 wondering ^[2] 6:15 53:15 word ^[2] 63:13 66:14 words ^[2] 40:16 59:7 work ^[3] 36:8 50:11 61:25 workable ^[4] 31:25 32:5,16,21 world ^[1] 68:8 worth ^[1] 7:21 write ^[1] 40:15 writing ^[1] 36:16</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[7] 41:7,9,12,14 44:7 57:13 65:2 years ^[6] 12:22 19:9 20:12 46:14 49:13 54:19 yes-or-no ^[1] 61:6 York ^[2] 1:24,24</p>
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