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IN THE SUPREME COURT OF THE UNITED STATES

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PEDRO PABLO GUERRERO-LASPRILLA,)
Petitioner,)

v.) No. 18-776

WILLIAM P. BARR, ATTORNEY GENERAL,)
Respondent.)

- - - - -

RUBEN OVALLES,)
Petitioner,)

v.) No. 18-1015

WILLIAM P. BARR, ATTORNEY GENERAL,)
Respondent.)

- - - - -

Washington, D.C.

Monday, December 9, 2019

The above-entitled matter came on
for oral argument before the Supreme Court of
the United States at 10:05 a.m.

1 APPEARANCES:

2 PAUL W. HUGHES, ESQ., Washington, D.C.;

3 on behalf of the Petitioners.

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6 on behalf of the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	PAUL W. HUGHES, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF:	
6	FREDERICK LIU, ESQ.	
7	On behalf of the Respondent	31
8	REBUTTAL ARGUMENT OF:	
9	PAUL W. HUGHES, ESQ.	
10	On behalf of the Petitioners	62
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
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4
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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 18-776, Guerrero-Lasprilla versus Ovalles and Attorney General Barr.

ORAL ARGUMENT OF PAUL W. HUGHES

ON BEHALF OF THE PETITIONERS

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

Section (2)(D) provides for review of questions of law decided by the Board of Immigration Appeals. I'll start with where we and the government agree. At minimum, courts may review whether the Board identified the proper legal standard. The government agrees.

For this review to be meaningful and not just a requirement of correct boilerplate, courts must determine whether the government used the proper standard. Again, the government agrees. Review extends to whether "the Board actually used the wrong standard."

Despite acknowledging this, the government fails to distinguish how reviewing whether the Board actually used the correct

1 standard is different than reviewing whether the
2 Board correctly applied that standard. In our
3 view, these inquiries are effectively the same.
4 They use the same tool, applying the correct
5 legal standard to the facts.

6 To the extent there is a difference,
7 the government does not provide a test for
8 telling them apart. Jurisdictional rules need
9 to be clear, but the government does not explain
10 how courts decide whether the Board actually
11 used the correct standard.

12 Our rule is clear. There is no
13 judicial review over historical facts, but there
14 is review over their legal significance. The
15 Court should adopt this construction for three
16 reasons.

17 First, it accords with the essential
18 premise of judicial review which the statutory
19 text has unmistakably established. Second, it
20 is necessary for Congress to have fully
21 responded to St. Cyr. And, third, it is a clear
22 rule which is crucial to establish the
23 boundaries of jurisdiction.

24 Turning to what Congress needed to do
25 in order to fully respond to St. Cyr, there are

1 at least four separate points that illustrate
2 Congress had to create jurisdiction for the
3 application of law to fact.

4 JUSTICE ALITO: Before you get to
5 that, I wonder if you have not read too much
6 into the government's statement that a -- that
7 under their theory, it would be permissible for
8 a court to review not just whether the -- the --
9 the Board articulated the right theory but
10 whether it actually used the right theory.

11 When I read that, I thought what they
12 were saying was that review would extend to
13 those perhaps rare situations where, although it
14 was in response to your argument that if the --
15 if the -- if the right standard was merely
16 mentioned, that would be sufficient. And I
17 thought they were just saying that if it was
18 clear that even though the right standard was
19 mentioned, you could see that that was not at
20 all what was being done, that there would be
21 review there.

22 So I thought that was a very narrow
23 exception. So the -- the difference between
24 what I understood them to be arguing and your
25 position was considerably larger than what you

1 suggested to start out.

2 MR. HUGHES: Well, as Your Honor
3 suggests, I think the government does agree that
4 if the -- the decision of the Board on the face
5 invokes the correct standard, but a reasonable
6 reader of that decision would appreciate that
7 that standard was not used to actually decide
8 the case, that there would be judicial review
9 over that.

10 Once the government agrees with that,
11 which I think they must, otherwise it's judicial
12 review in substance -- or not in substance at
13 all, only in form, once the government agrees
14 with that, they haven't actually articulated how
15 that test differs from applying law to fact.
16 And our point is --

17 JUSTICE ALITO: Well, I think it's
18 like a sham. It's a sham exception. So, if
19 that's really not what's going on, they're not
20 really applying the right theory, the theory
21 that they claim to apply, there would be review
22 in that situation. That's how I read it. Now
23 --

24 MR. HUGHES: Oh, well, Your Honor,
25 I --

1 JUSTICE ALITO: -- Mr. Liu can correct
2 that.

3 MR. HUGHES: -- I think a few things
4 about that. First, I think it's very difficult
5 to distinguish what makes for a sham
6 articulation of the standard versus not actually
7 looking to determine whether it was properly
8 applied.

9 How do we determine if it was a sham?
10 You consider what the right standard is. You
11 consider the facts. And if the facts turn out
12 to be a textbook application of that standard,
13 but the Board reached the opposite conclusion,
14 you would find that it was a sham.

15 JUSTICE ALITO: But there's a big
16 difference between your two positions, and it
17 has to do with the application of -- of the
18 legal standard to the facts where the -- the
19 legal standard requires a considerable exercise
20 of judgment, as it does with equitable tolling,
21 where you have to determine whether there's due
22 diligence or exceptional circumstances. You
23 would say all of that can be reviewed.

24 MR. HUGHES: Well, Your Honor, yes,
25 but I think to the extent there's a difference,

1 if there is a difference, it's a difference in
2 degree, but the government doesn't provide a way
3 to distinguish between when the degree is
4 sufficiently enough to say that the standard
5 wasn't actually used.

6 But the other problem with this is, if
7 that is the test that the government advances,
8 it has the effect of merging the underlying
9 merits of the inquiry with the jurisdictional
10 analysis.

11 The end result would be there would be
12 jurisdiction if the decision of the Board was
13 really, really wrong, but not if it was a little
14 bit wrong. And so that result would be that
15 you'd -- you'd have to do the merits inquiry to
16 figure out even if you have jurisdiction over
17 the case.

18 JUSTICE ALITO: Well, suppose we -- we
19 take their principal argument, which is that
20 this applies -- the only thing that can be
21 reviewed is a pure question of law, all right?
22 That's a clear rule. Is it not?

23 MR. HUGHES: Yes, and I don't think
24 they actually stick with that, but that would be
25 a clear -- a clear rule. Yes, Your Honor.

1 JUSTICE ALITO: Okay. And under your
2 interpretation, what is the difference between
3 the degree of review that is permitted in the
4 case of a criminal alien and the degree of
5 review that's permitted in the case of a
6 non-criminal alien?

7 MR. HUGHES: So there --

8 JUSTICE ALITO: It's very, very --
9 it's very slight, right?

10 MR. HUGHES: I don't think so, Your
11 Honor. There's a very substantial difference,
12 and that's that there's no review over all of
13 the factual determinations that are made. And
14 there are very substantial factual
15 determinations that are often dispositive of
16 removal cases that are made throughout these
17 proceedings, and those would not be subject to
18 judicial review.

19 JUSTICE ALITO: Yeah. Well --

20 JUSTICE KAGAN: But those are all made
21 under a substantial evidence standard. It's a
22 highly deferential standard. So I take your
23 point that there might be a few cases that would
24 come out differently, but it would be rare,
25 wouldn't it?

1 MR. HUGHES: I don't think it would
2 necessarily be rare, Your Honor. I think there
3 are many cases where courts of appeals, under
4 substantial evidence review, still reverse the
5 -- the factual findings.

6 But what we have here is we have a
7 statute, (2)(D), that was written far after
8 (2)(C), and the reason that (2)(D) was -- was
9 written on top of (2)(C) was as a response to
10 what this Court held in St. Cyr. So I think to
11 understand what Congress was trying to
12 accomplish in (2)(D), it's important to
13 understand what Congress needed do in order to
14 respond to what this Court --

15 JUSTICE KAGAN: Could I take you off
16 --

17 MR. HUGHES: -- held in St. Cyr.

18 JUSTICE KAGAN: I'm sorry. You keep
19 on wanting to talk about St. Cyr and we keep
20 wanting to talk about other things.

21 But, before you get to that,
22 throughout your brief, there's this idea that
23 really mixed questions of law are pure questions
24 of law. I mean, that, you know, if we have to
25 put them in one bucket or another, they should

1 go in the legal bucket because they're all
2 matters of interpretation, you say; they're all
3 essentially law-like.

4 But, you know, I started looking
5 around to -- to think about some of the other
6 questions that your view might suggest is a law
7 question, and so here are just a few that I came
8 up with: whether a non-citizen's removal would
9 result in exceptional and extremely unusual
10 hardship, whether a non-citizen has been
11 subjected to extreme cruelty, whether changed
12 country conditions are present.

13 I could go on, but all of these -- you
14 know, if you just sort of look at them and say
15 what is it mostly going to involve, it seems as
16 though most of those questions are going to
17 mostly involve fact-finding.

18 MR. HUGHES: So, Your Honor, a few
19 responses to that. First, some of the examples
20 that you gave are ultimately issues that are
21 discretionary. And when we have a discretionary
22 question, of course, there's a different
23 framework under (2)(B) which would -- there
24 would be review over the eligibility for the
25 discretionary determination; for example,

1 whether or not there's a changed country
2 condition is likely a discretionary
3 determination by the Board.

4 But to -- but to get to Your Honor's
5 principal question about how we disentangle the
6 -- the facts and the law here, and I think the
7 question goes to whether or not the Lakeridge
8 style analysis where we characterize mixed
9 questions as more principally legal or more
10 principally factual should be used in this
11 context.

12 And I think that, of course, the Court
13 has established that sort of framework for use
14 in other parts of the law.

15 JUSTICE KAGAN: Well, I wasn't even
16 talking about using the Lakeridge framework
17 here. I was just sort of talking about the
18 assumption that your briefs make that, if you
19 were to put these in one bucket, just one
20 bucket, it should be the legal bucket, that
21 these are really law questions.

22 And I guess I'm saying that when I
23 look at the range of these questions, quite a
24 lot of them seemed to me to be really fact
25 questions, you know, cases where it's not only

1 the finding of facts, but it's the weighing of
2 facts, the making credibility judgments, the
3 weighing, you know, the balancing of different
4 facts against each other, that sort of thing.

5 MR. HUGHES: So, Your Honor, I -- I
6 agree insofar as what the Board is doing is
7 finding historic facts or finding credibility or
8 adding historic facts to make other judgments
9 about historic facts or predictions about future
10 facts. Those sorts of factual determinations
11 are things that there would not be jurisdiction
12 under 2(D).

13 What our point is, is once those
14 historic facts have been found and then a legal
15 standard is applied to those facts, that aspect
16 of the mixed question is legal. So -- and let
17 me try to clarify our briefs.

18 We think in every mixed question, by
19 its definition, there is a legal element and
20 there's a factual element. And so sometimes
21 it's true the factual element will be far
22 greater than the legal element.

23 But our point is that 1252 creates a
24 structure where there is judicial review insofar
25 as there is the legal element of the mixed

1 question, and that, unlike what happens in other
2 contexts where those two are put together and
3 there is a single standard of review provided,
4 the structure that 1252 creates is the courts
5 disaggregate the -- the -- the legal findings
6 from the factual findings and they have to set
7 those aside.

8 So all of the examples Your Honor
9 provided about the factual findings we agree are
10 not reviewable. But, to the extent there's the
11 application of a legal standard or considering
12 the legal significance of those historic facts,
13 that is where the -- the -- the Board is doing
14 legal work and there is judicial review over
15 that, as a question of law --

16 JUSTICE SOTOMAYOR: I was thinking --

17 MR. HUGHES: -- under Section 2(D).

18 JUSTICE SOTOMAYOR: -- about this in
19 similar terms to Justice Kagan, but what I
20 realize gave me some clarity was a statement
21 that my colleague made in a case involving the
22 exceptional circumstances of diligence and where
23 he said it's a question of law, because let's
24 take the cruel -- cruelty issue.

25 Whether a punch is cruel or a knife

1 wound is or a threat to family is, all of those
2 are facts that can be found by the BIA or a
3 finder of fact. But whether it constitutes or
4 rises to the level of the legal standard is a
5 question of law, correct?

6 MR. HUGHES: I think that's right,
7 Your Honor. And one example in this case is --
8 is the issue of whether or not the Fifth
9 Circuit's decision in Lugo-Resendez qualifies as
10 an extraordinary circumstance. Either that
11 change in the law qualifies as an extraordinary
12 circumstance, which has substantial effects for
13 equitable tolling, or it doesn't.

14 But whatever the answer to that
15 question is, that's the sort of legal issue that
16 should be decided the same.

17 CHIEF JUSTICE ROBERTS: Well, but, I
18 -- I mean, you know, is a punch cruel? I mean,
19 obviously, in the -- in the abstract, it could
20 be anything. However soft it is, to the extent
21 it's an offense to dignity or, you know, I mean,
22 isn't -- wouldn't one thing to do if you're
23 trying to figure that out to be look at the
24 range of legal decisions, determinations, that
25 said this conduct is cruel, this conduct is not,

1 this conduct is cruel, and I don't know that
2 that makes it any easier to characterize.

3 MR. HUGHES: Well, I -- I think, Your
4 Honor, the Court has found that it is relatively
5 easy, although there is always line drawing, but
6 the courts are well equipped to be able to
7 distinguish between where historic fact ends and
8 legal conclusions begin. That's something the
9 courts have to do every day of the week when
10 they resolve 12(b)(6) motions, for example,
11 where if Iqbal and Twombly instruct the courts
12 to set aside legal conclusions that are within a
13 complaint.

14 So I --

15 JUSTICE GINSBURG: But don't -- we do
16 --

17 MR. HUGHES: -- agree those --

18 JUSTICE GINSBURG: -- we do know that
19 Congress meant to restrict the court of appeals'
20 review of orders of removal of criminal aliens,
21 so that was Congress's purpose when it wanted
22 the limited -- limited review in -- in the case
23 of removal of criminal aliens.

24 And you -- you -- your position is
25 only fact disputes are reviewable, no law,

1 application of law to undisputed facts, only
2 straight out fact disputes.

3 And how often do straight out fact
4 disputes come to court of appeals? Because
5 usually facts are decided in the first instance.

6 MR. HUGHES: Well, Your Honor, I can
7 say that factual disputes are very often
8 entirely dispositive of removal proceedings.
9 It's true that those cases may be less often
10 appealed because of the substantial or the
11 standard of review that courts of appeals apply,
12 but I can just provide a few examples of factual
13 issues that are often dispositive.

14 For example, an individual might claim
15 that they were born in the United States, so, in
16 fact, a U.S. citizen. They might claim that
17 examples of past persecution occurred, so
18 they're entitled to asylum, but the Board might
19 disagree.

20 That can include, if they had forced
21 sterilization or forced abortions, the Board
22 will have to decide whether or not those things
23 occurred.

24 Did the individual testify credibly?
25 That will often be dispositive of the removal

1 proceeding. And I can go on with a list of
2 different issues. For example, was the
3 individual convicted of the particular crime or
4 was it somebody else with the same name?

5 Those are factual disputes that the
6 Boards are resolving or that the immigration
7 judges in the first instance and then the Boards
8 are resolving on a daily basis.

9 JUSTICE GORSUCH: Mr. Hughes, along
10 similar lines, the question we have here is
11 reasonable diligence. That -- that's the big
12 question. And when that's reviewed under 1252,
13 where it can be reviewed, my understanding is
14 the courts of appeals review that for abuse of
15 discretion. And that would typically be the
16 case in a lot of questions where diligence is --
17 is the issue. The courts of appeals will review
18 that for -- for abuse of discretion.

19 If that's right, and just suppose for
20 a moment that's right, all right, let's not
21 argue about that, let's suppose that's the right
22 standard of review. What does that teach us
23 about the -- the question before us?

24 MR. HUGHES: As Your Honor suggests, I
25 -- I -- our principal argument is to resist the

1 premise. We do think that the weight of the
2 laws in this Court's precedent is treating
3 diligence not as -- as a question of law that is
4 reviewed de novo.

5 But if the Court -- accepting the
6 premise and the Court disagrees with us, which I
7 don't think it should, but if the Court does
8 disagree with us, what this Court still holds
9 is, to the extent that there is deference or --
10 or -- a discretion that lies with the Board,
11 still the proper way to approach Section 2(D) in
12 these contexts is to determine whether or not
13 the individual has shown their legal
14 eligibility, that 2(D) provides review over that
15 eligibility for the ultimate exercise of
16 discretion.

17 So even if reasonable diligence is
18 discretionary, and we don't think it is, but
19 there would still be the question if they've
20 shown the threshold step of being eligible.

21 And Your Honors' decision in *Iliev* in
22 the Tenth Circuit, I think, clearly established
23 how, even when there is an underlying
24 discretionary determination, there is --

25 JUSTICE GORSUCH: I think I did

1 everything I could to avoid this question in
2 that case, and I think you know that.

3 But I -- I -- I -- I guess I'm just
4 trying to disentangle what would be available
5 for us to review legally versus what would then
6 be left to the Board, the discretionary
7 decision, if, in fact, we review the case for
8 abuse of discretion in our legal review.

9 MR. HUGHES: Well, Your Honor, where I
10 think abuse of discretion comes in is not at the
11 question of -- of diligence. It comes in with
12 whether or not the Board chooses to reopen the
13 case.

14 The Board -- that is a decision that
15 we agree the Board has discretion as to whether
16 or not to reopen the case. I think diligence,
17 as this Court has said in Bank of Columbia, and
18 I can cite five more cases, that is a pure
19 question of law.

20 But, when the Board decides a case in
21 a different way and says we're deciding this as
22 a matter of discretion, we're issuing what the
23 Board calls a discretionary denial, that is the
24 sort of issue that is not subject to judicial
25 review.

1 And when the Board does a
2 discretionary denial, that is very clear on the
3 face of it. And let me just provide an example.

4 We -- we just went and found a recent
5 BIA decision from November 1, 2019. This is
6 Matter of CASD. And the Board said "we conclude
7 that Respondent does not merit a favorable
8 exercise of discretion because 'the equities in
9 his case are insufficient to outweigh his
10 history of very serious and violent criminal
11 conduct.'"

12 When the Board is exercising its
13 discretion to make a discretionary denial, it
14 says so expressly on the face of the opinion.
15 We agree that none of that exercise of
16 discretion when appropriate is reviewable, and
17 that could be the case with a motion to reopen,
18 where the Board does have discretion.

19 But the Board did not exercise that
20 discretion in this case. It found that he was
21 ineligible for --

22 JUSTICE KAGAN: Mr. Hughes, I mean, I
23 think the question that Justice Gorsuch asked is
24 a very broad one, and it's -- it's with respect
25 not just to the diligence but to all these other

1 questions that you think should end up being
2 reviewable, like the ones that I mentioned,
3 which sound awfully factual, you know, extreme
4 cruelty, whether there is unusual hardship,
5 whether there's changed country conditions.

6 All of those are reviewed generally
7 with a highly deferential standard.

8 And -- and that suggests that -- that
9 -- that -- that everybody's aware that most of
10 the work is being done at the factual level and
11 the application of the legal standard at the end
12 is -- is -- is not where the action is. And
13 given what Justice Ginsburg was saying about
14 Congress's intent here, which was pretty clearly
15 to withdraw review power from large categories
16 of cases, except the ones that were principally
17 legal in quality, you know, why -- why doesn't
18 that suggest that you're putting too much in
19 this reviewable basket?

20 MR. HUGHES: Well, Your Honor, to the
21 extent those questions, as you say, are driven
22 principally by the facts and the legal work is
23 only doing a little tail at the end, then that
24 would be true on appeal as well. The legal work
25 would not be doing a whole lot, and the

1 decisions might be established by the facts that
2 would be found by the Board and would not be
3 reviewable.

4 But let me provide an example where I
5 think it is heavily factual, but I think we
6 would say that review would be a question of
7 law. Assume for a moment in an asylum case
8 there's a question of past persecution, which is
9 very important in asylum cases. Persecution is
10 generally defined as a threat to one's life or
11 freedom, and past persecution creates a
12 presumption of future persecution. The Board
13 takes a case. They properly state that
14 standard. Then they find these facts: An
15 individual was imprisoned in a particular
16 country for a decade because of their membership
17 in a political party. That is a classic case of
18 persecution. But then the Board concludes:
19 This individual was not subject to past
20 persecution.

21 Well, what do you do with that case?
22 The Board said that they properly -- they
23 identified the proper standard, they found the
24 facts, and usually the facts are going to be
25 dispositive, but there at the end where that --

1 the -- the law issue came in was only a very
2 small part of the case but turned out to be
3 dispositive.

4 I think the government even agrees
5 that, in circumstances like that, for judicial
6 review to actually be substantive judicial
7 review, there would have to be review in that
8 case. And we think that is critical for the
9 Court to recognize that in cases like that,
10 there is judicial review.

11 JUSTICE KAVANAUGH: On the statutory
12 history point that Justice Kagan raised, St. Cyr
13 involves what the Court characterized as pure
14 questions of law. Congress, we know, then comes
15 in, and there are a variety of statutes, as
16 you're aware, that refer to mixed questions, but
17 Congress in this statute does not refer
18 specifically to mixed questions.

19 So, if you put those two things
20 together, you would lean toward reading this
21 statute to refer to what one might call pure
22 questions of law. That's the government's
23 argument. How do you respond to that statutory
24 history?

25 MR. HUGHES: A few reasons, Your

1 Honor. First, I think this is the government's
2 three-part topology, that Congress speaks of
3 mixed questions. And I think that's disproven
4 by a section of the REAL ID Act that is just a
5 couple sections after where (2)(D) was created,
6 and that amended (b)(9), the zipper clause, in a
7 way to deal with all of the issues that arise in
8 immigration, and there it speaks of law or fact.
9 So we know that Congress often speaks of law or
10 fact to be inclusive of the whole universe.

11 But the second point is, in order to
12 respond to St. Cyr, what Congress knew or was
13 attempting to do, and this is shared ground with
14 the government, was take the scope of then
15 existing habeas jurisdiction that was occurring
16 in the district courts, keep that scope of
17 jurisdiction the same, and move that
18 jurisdiction into the courts of appeals for
19 petitions for review under Section 1252.

20 The evidence there is unanimous that
21 four courts of appeals following St. Cyr had
22 looked at the -- that decision and addressed the
23 scope of jurisdiction. All four courts had
24 found that there was decidedly jurisdiction to
25 resolve the application of law to fact. If

1 Congress had not had (2)(D)'s sweep to include
2 applications of law to fact, that habeas
3 jurisdiction that had been recognized in four
4 separate circuits would have been retained.

5 And then a final point on the history
6 there, Your Honor, is that earlier drafts had
7 included the -- the term "pure questions of
8 law." That drew a specific objection from
9 commentators during the markup process. And
10 after that objection to the word "pure" was
11 lodged, Congress then struck that limitation and
12 this Court --

13 JUSTICE KAVANAUGH: But they said that
14 was because it was redundant.

15 MR. HUGHES: Well, that was in the
16 conference report, Your Honor, and if this Court
17 is going to look to the conference report, where
18 I think this is an area to be skeptical because
19 what Congress actually did is far more
20 probative, but if the Court looks to the
21 conference report, I think you look a couple
22 sentences later where the Court -- where the
23 conference report says what happens with mixed
24 questions, you review to the extent there are
25 legal elements. We think that sweeps in our

1 rule.

2 But, again, I think when the language
3 actually appeared, there was an objection and it
4 was withdrawn. That's a little bit more
5 probative than what the conference report says
6 on the --

7 JUSTICE SOTOMAYOR: Can you succinctly
8 tell me what the questions of law are in your
9 two cases?

10 MR. HUGHES: Yes, Your Honor. First,
11 with Mr. Guerrero-Lasprilla, the question is
12 does Lugo-Resendez qualify as an extraordinary
13 circumstance that would then have the effect of
14 affecting his -- his period of reasonable
15 diligence.

16 For Mr. --

17 JUSTICE SOTOMAYOR: I -- I phrased it
18 differently in my own head, whether the
19 existence of adverse circuit precedent serves as
20 an obstacle to filing a timely motion to reopen.

21 MR. HUGHES: That's -- I think that's
22 just a broader way of saying the same question,
23 yes, Your Honor. I think that -- that is a --

24 JUSTICE SOTOMAYOR: All right.

25 MR. HUGHES: That is yes.

1 JUSTICE SOTOMAYOR: And Mr. Ovalles?

2 MR. HUGHES: There, I think one --
3 there are a few questions. The principal one
4 is, is an asserted period of delay alone a basis
5 in order to find that an individual was not
6 reasonably diligent? Is that creation of a
7 per se rule? The Sixth Circuit in the Gordillo
8 case, pointing to earlier Seventh Circuit
9 precedent in the Pervaiz case, said expressly
10 that looking just to the passage of time without
11 considering other factors that suggest a
12 person's diligence in the circumstances is not
13 an appropriate way to undertake the diligence
14 inquiry.

15 So I think that that -- that case is
16 -- is focused on whether or not the Board's
17 application of an eight-month per se rule
18 violated the underlying principles of reasonable
19 diligence.

20 JUSTICE KAGAN: Mr. Hughes, you
21 haven't spoken much about the presumption of
22 reviewability. I just have a question about the
23 nature of that presumption, and I -- I guess I
24 would like Mr. Liu to answer the same question.

25 Do you think that that presumption is

1 a presumption about congressional intent, or do
2 you think that that presumption is a presumption
3 that's meant to reflect other values?

4 MR. HUGHES: I think it's -- it's
5 both, Your Honor. I think it's a presumption of
6 congressional intent, but I think it's also a
7 presumption that's meant to reflect an
8 appropriate balance between judicial power and
9 the administrative power because, of course,
10 here, if the Court finds that questions are --
11 are factual, lean factual and therefore assign
12 legal work to the administrative agency, the
13 effect that that has is ceding authority from
14 the Article III courts to the administrative
15 courts to have more authority to be able to
16 decide whatever tail legal aspect there is
17 there.

18 So I think the presumption of
19 reviewability goes to not just a congressional
20 presumption but also a separation of powers
21 principle.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Liu.

25

1 ORAL ARGUMENT OF FREDERICK LIU
2 ON BEHALF OF THE RESPONDENT

3 MR. LIU: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 When Congress used the words
6 "questions of law" in Section 1252(a)(2)(D), it
7 meant questions of law only, not questions of
8 fact and not mixed questions of law and fact.
9 We know that from the text of the provision
10 itself, which doesn't mention questions of fact
11 or mixed questions. But we also know it from
12 the context in which Congress enacted the
13 provision.

14 In *St. Cyr*, this Court held that
15 denying criminal aliens a judicial forum for
16 pure questions of law would raise constitutional
17 doubts. When Congress enacted this provision
18 following *St. Cyr*, it wanted to provide criminal
19 aliens enough judicial review to avoid those
20 doubts but no more. Questions of law thus
21 refers to the same questions identified in this
22 Court's decision in *St. Cyr*, pure questions of
23 law.

24 Now Petitioners would read "questions
25 of law" to extend far beyond purely legal

1 questions to encompass every mixed question of
2 law and fact. But mixed questions aren't
3 mentioned in the text of Section 1252(a)(2)(D),
4 they're not mentioned anywhere in St. Cyr
5 either, and construing questions of law to
6 encompass every mixed question would all but
7 undo Congress's efforts to limit the scope of
8 judicial review in cases involving criminal
9 aliens.

10 Remember it's been Congress's goal
11 since 1996 to streamline and expedite the
12 removal of criminal aliens. And yet, under
13 Petitioners' reading, criminal and non-criminal
14 aliens alike would get judicial review of all
15 constitutional claims, of all questions of law,
16 and of all mixed questions.

17 The only difference in the judicial
18 review that they would get would be limited to
19 the category of questions of fact, as some of
20 the justices this morning have already noted.
21 That difference would be this: whereas in
22 criminal -- cases involving criminal aliens, the
23 Board's factual findings would be conclusive;
24 whereas in cases involving non-criminal aliens,
25 the Board's factual findings would be conclusive

1 unless not supported by substantial evidence.

2 Now that's a pretty subtle difference,
3 given that courts don't often overturn factual
4 findings for lack of substantial evidence, and
5 if that's the narrow difference that Congress
6 really sought to achieve, one would have thought
7 they would have written these --

8 JUSTICE KAVANAUGH: But the --

9 MR. LIU: -- provisions differently.

10 JUSTICE KAVANAUGH: -- the original
11 version of the statute had "pure questions of
12 law." And to pick up on your point on the
13 statutory history, then that's deleted, and
14 Deputy Assistant Attorney General Cohn testifies
15 and says a mixed question of law is in effect a
16 question with two parts, the legal part and the
17 factual part. The legal part, of course, is
18 reviewable. That's what the Justice Department
19 said in response to the ACLU's objection to the
20 draft.

21 MR. LIU: Right.

22 JUSTICE KAVANAUGH: Was that correct?

23 MR. LIU: We do think the legal part
24 is reviewable, but I think it's important to
25 understand what we think that legal part to be.

1 That legal part is the same part this Court
2 identified in Lakeridge. It is the legal test
3 or standard that the Board used in deciding the
4 case.

5 I -- I think Congress was pretty
6 justified in thinking the word "pure" was
7 superfluous. I mean, just as a matter of
8 ordinary English, you know, a question is a
9 mixed question because it involves both law and
10 fact. If you leave off the words "and fact" and
11 refer only to a question of law, then it's an
12 unmixed question.

13 JUSTICE GORSUCH: Mr. Liu, I -- I --
14 I'd like to poke at that just a little bit and
15 -- and return to Justice Alito's question at the
16 beginning of argument.

17 MR. LIU: Sure.

18 JUSTICE GORSUCH: Is it the
19 government's position that only pure questions
20 of law are reviewable, or is it also the
21 government's position that there can be some
22 applications that are so egregious that they
23 would rise to the level of being questions of
24 law?

25 MR. LIU: It's the former position.

1 So our view is that only pure questions.

2 JUSTICE GORSUCH: Okay. If that's the
3 case, is there any judicial review here
4 meaningfully at all? Because all the BIA has to
5 do is recite the legal standard and we become a
6 rubber stamp --

7 MR. LIU: Right.

8 JUSTICE GORSUCH: -- and say, yes,
9 they have recited the correct legal standard.
10 And no matter how unreasonable, no matter how
11 crazy the application is, we have to provide a
12 judicial imprimatur to that decision.

13 Does that -- does that cause any
14 concerns for you, for the government, and what
15 about the clear statement rule and the idea of
16 the presumption of reviewability here and the
17 separation of powers concerns that Justice Kagan
18 pointed out that undergird it?

19 MR. LIU: I guess I would just make
20 maybe three points. First is it's not -- it's
21 not the -- the case that every case is going to
22 involve an already-settled legal principle.
23 There are actually issues of -- of first
24 impression out there, and when the Board decides
25 those legal questions, those are reviewable in

1 the courts of appeals.

2 Now there are going to be cases where
3 the -- the legal standard has been settled, like
4 it is in the -- in the case of reasonable
5 diligence. It's very easy for the Board to know
6 what the applicable standard is.

7 In those cases, when the Board does
8 state the applicable legal standard, that is,
9 except in the very rare instance that I think
10 Justice Alito alluded to, that's going to be the
11 end of the matter.

12 JUSTICE GORSUCH: Now -- now -- now --
13 now you're backtracking, I think, a little bit.
14 Is -- is it just, if they recite the legal
15 standard, the pure question of law correctly,
16 we're done, or is there some further review by
17 the -- by the court available for completely
18 crazy applications? And I -- I -- I think I've
19 heard you go both ways on that and I'm just
20 trying to --

21 MR. LIU: No, I --

22 JUSTICE GORSUCH: -- nail you down on
23 that.

24 MR. LIU: -- I want to give you --
25 maybe I can illustrate this with an example. I

1 mean, if --

2 JUSTICE GORSUCH: No, no. Just before
3 -- before we get in -- into examples, if you
4 could just firmly answer the question.

5 MR. LIU: The -- the -- in our view,
6 the Court can never review an application of law
7 to fact.

8 JUSTICE GORSUCH: Okay. All right.

9 MR. LIU: Never review that. What it
10 can do is make sure the Board used the correct
11 legal standard.

12 So if the Board says the -- the
13 standard for equitable tolling is reasonable
14 diligence, but then it goes on to cite cases
15 from a bygone era where the standard was maximum
16 feasible diligence and says, oh, we're -- we're
17 going to apply this case there, apply this case
18 there, the -- the Court doesn't need to review
19 any part of the application of law to fact --

20 JUSTICE GORSUCH: I understand.

21 MR. LIU: -- to know that the Board
22 has used the wrong standard.

23 JUSTICE ALITO: Suppose the -- the
24 issue is whether there were exceptional
25 circumstances that might justify equitable

1 tolling, and let's say the -- the alien in
2 question was in a coma.

3 What would happen there? No judicial
4 -- and they say, well, that's not an exceptional
5 circumstance.

6 MR. LIU: Well, I -- I -- I think to
7 the extent the question is, as a categorical
8 matter, is being in a coma an exceptional
9 circumstance, that could be a question of law.
10 I mean, take -- take this -- this Court's
11 decision in Helton versus Florida. I think the
12 question there was --

13 JUSTICE GORSUCH: Mr. Liu, if you --
14 if you -- if you accept that, haven't you given
15 up the ghost? Then we're just into deciding
16 whether the application given these facts is or
17 isn't reasonable diligence as a matter of law.

18 MR. LIU: I -- I -- I don't think so.
19 I mean, I think in the -- in the --

20 JUSTICE GORSUCH: Why are comas
21 special?

22 MR. LIU: Well, they -- they very well
23 might not be. But I think it would be a
24 declaration of a legal principle to say they
25 weren't special.

1 Just like in Helton versus Florida
2 when this Court said, you know, the Eleventh
3 Circuit had applied an overly rigid rule
4 regarding attorney misconduct, I understand that
5 to be a legal principle.

6 JUSTICE SOTOMAYOR: So how is --

7 JUSTICE GORSUCH: So when --

8 JUSTICE SOTOMAYOR: -- that different
9 from the case here, where at least one of the
10 plaintiffs says binding circuit precedent made
11 it unreasonable for me to file a motion to
12 reopen and the Fifth Circuit said, no, you could
13 have filed it earlier.

14 That seems to me to be a pure legal
15 question under your definition.

16 MR. LIU: And -- and -- and we don't
17 understand the -- the Fifth Circuit to have even
18 reached that issue. That issue throughout this
19 case has been teed up as an issue under the
20 extraordinary circumstances prong.

21 JUSTICE SOTOMAYOR: Well --

22 JUSTICE BREYER: Then -- - then, look,
23 what I think everyone is trying to ask you, is
24 Hurricane Katrina blows the courthouse away,
25 okay, the standard is you have to file within 15

1 days. But there is no courthouse. It's blown
2 to Florida.

3 And so, question, was that, the
4 standard says, an unusual circumstance?
5 Writing, the court says, if it's an unusual
6 circumstance, well, then it's extended. All
7 right?

8 We agree Katrina blew the courthouse
9 away. But that isn't an unusual circumstance.

10 Now, no review? Isn't that -- I mean,
11 that's -- that's what we're trying to find out.

12 MR. LIU: There's no review. And I --

13 JUSTICE BREYER: No review, but, my
14 goodness, if we look at the cases, I mean, then
15 you've taken from the attorneys for the person
16 who's trying to get review any kind of check
17 through appeal on the action of a district
18 judge.

19 Now that's a -- I think it's pretty
20 hard to find statutes that do that in a country
21 that has a presumption of judicial review. I
22 think it's pretty difficult to read St. Cyr as
23 saying that, when Congress made statutory what
24 it thought was the standard of St. Cyr and
25 included review of mixed questions of fact and

1 law.

2 So, I mean, if that's actually your
3 position, it's unbounded, and -- and I -- I -- I
4 don't get that.

5 MR. LIU: I think to determine what is
6 reviewable and what is not under our position,
7 you look at the type of analysis that's required
8 to evaluate that claim. So there are going to
9 be certain claims that entail only a purely
10 legal analysis.

11 You look at the statute. You
12 interpret it. There's no need to -- to have
13 recourse to --

14 JUSTICE KAVANAUGH: How is the --

15 MR. LIU: -- a particular --

16 JUSTICE KAVANAUGH: -- how is the
17 Katrina hypo different from the coma
18 hypothetical? You said one's reviewable and
19 one's not reviewable, I think, if I heard you
20 correctly.

21 MR. LIU: Well, I -- I think it's
22 because, to answer the Katrina hypo, we would
23 need to know more about the circumstances
24 surrounding the storm and the particular
25 circumstances of the litigant in trying to

1 overcome --

2 JUSTICE BREYER: What would you like
3 to know? I'll tell you the courthouse is in
4 Florida.

5 (Laughter.)

6 MR. LIU: Well, but this is --

7 JUSTICE BREYER: And the litigant, by
8 the way, has never been able to walk more than
9 one mile and his car has been blown up.

10 MR. LIU: Right. But this is exactly
11 my point. I think those facts -- those facts
12 are extremely helpful to answering the question.

13 JUSTICE BREYER: Oh --

14 MR. LIU: And -- and -- and it's
15 because I need those facts to answer the
16 question.

17 JUSTICE BREYER: You do?

18 CHIEF JUSTICE ROBERTS: I thought that
19 your -- your answer was that at some point the
20 factual mistake becomes so egregious that it
21 reflects a misunderstanding of what exceptional
22 means, rather than a misapplication of fact,
23 which, correct me if I'm wrong, because that
24 does lead into Justice Gorsuch's concern that,
25 you know, you've kind of given up the game

1 because then it's just a question of how
2 exceptional is the fact.

3 MR. LIU: Right. Now --

4 CHIEF JUSTICE ROBERTS: Which begins
5 to look, once you say that, it begins to look
6 like your standard application of law to fact.

7 MR. LIU: Right. And I -- I -- Mr.
8 Chief Justice, I wouldn't draw the line in terms
9 of how egregious the error is. I think that
10 does invite the sort of review of the
11 application of law to fact in order to determine
12 whether there has been an error of law. I think
13 that's sort of a reverse-engineering end run
14 around the statute.

15 What I really mean to say is, if the
16 question can be answered through purely legal
17 analysis, then it is a pure question of law --

18 JUSTICE BREYER: Well, all right, here
19 is the difficulty. That, I think, is really a
20 difficult question. I didn't think the other
21 that I asked was so difficult. But this one, I
22 think, is.

23 I mean, I learned years ago that you
24 can absolutely distinguish the factual part of a
25 missed -- of a mixed question from the legal

1 part, and I also learned that no class is able
2 to grasp my clear understanding of that.

3 I also learned that there are many
4 lawyers, and probably even more judges, that
5 find that difficult. And there are many cases
6 that are mixed up in that respect. Is it a
7 coerced confession? Was there, in fact -- you
8 know, there are loads of them.

9 Okay. Now the difficulty is that
10 sometimes it's important and sometimes it isn't,
11 and sometimes it's easy to separate out and
12 sometimes it isn't.

13 And so rather than produce just a
14 confusion in the lower courts and in the bar by
15 saying the legal part is, but the factual part
16 isn't, why not read this as saying, when they
17 say questions of law, they mean to include mixed
18 questions of fact and law and leave it at that,
19 just as St. Cyr did, just as those statutes you
20 quoted did, and that's the end of it. Everyone
21 can understand it.

22 And, of course, if the district judge
23 has discretion, well, then the right question of
24 law will be did he abuse his discretion.

25 MR. LIU: Right. Justice Breyer, we

1 just don't think that's consistent with the
2 text, the history of --

3 JUSTICE BREYER: The text says
4 questions of law. And I can find statutes that
5 use those words, and they clearly mean both, as
6 they say.

7 MR. LIU: I -- I think -- I think that
8 the best reference point for what questions of
9 law means is 1254(2), which -- which this Court
10 itself has applied in a pretty principled way to
11 distinguish pure questions of law from mixed
12 questions. I mean, identifying pure questions
13 of law is something appellate courts are quite
14 used to doing.

15 JUSTICE ALITO: Now the phrase
16 "questions of law" is like the term
17 "jurisdiction." It's used -- it means lots of
18 different things. It's used sometimes rather
19 sloppily, and it's asked for different purposes.

20 So I -- I don't get anything out of
21 the arguments on either side about what is meant
22 by "questions of law" in general. The question
23 is what Congress meant here.

24 MR. LIU: I think --

25 JUSTICE ALITO: Anyway, that's just

1 a --

2 MR. LIU: -- I -- I think it's fair to
3 look at the context in which Congress looked --
4 wrote this statute. As I said at the outset, I
5 think the context here points in a very clear
6 direction. I mean, this was a Congress whose
7 primary policy preference was to give criminal
8 aliens no judicial review at all.

9 JUSTICE ALITO: Yeah. And I think you
10 have to bite the bullet on the -- the issue of
11 the -- the hypotheticals about the comatose
12 alien or the -- the alien who can't file because
13 the courthouse has been blown away by a
14 hurricane. If -- if you posit a lower-level
15 decision-maker who's either a monster or an
16 idiot, then, of course, you're always going to
17 think that there's a case for judicial review.

18 Whenever judicial review is cut off,
19 you open up the possibility that there's going
20 to be a decision that would otherwise be
21 reviewed that seems really, really wrong. So
22 you have to -- you have to make the argument
23 that this is what Congress wanted. And why
24 would they have wanted that in this situation?

25 MR. LIU: And I think they would have

1 wanted that because their goal all along, since
2 1996, is to -- is to expedite the removal of
3 criminal aliens. I think it's exactly --

4 JUSTICE SOTOMAYOR: But why did this
5 --

6 JUSTICE KAVANAUGH: But they expedite
7 it, though, by -- by moving it to the court of
8 appeals and taking the district court out, so
9 that -- that --

10 MR. LIU: Well, I think -- I think
11 that's half the equation. I think part of the
12 expediting --

13 JUSTICE KAVANAUGH: I mean, that's a
14 year or more, you know, in many cases that's cut
15 out by doing that. So that's a significant
16 saving of time.

17 MR. LIU: But I think -- I think
18 that's only half -- half the equation. The
19 other half is in the types of decisions --

20 JUSTICE KAVANAUGH: Right.

21 MR. LIU: -- that the courts of
22 appeals would have to engage in. And under my
23 friend's --

24 JUSTICE KAVANAUGH: On that -- on that
25 -- on the context point that you were just

1 referencing to, what about 1252(b)(9)? That
2 seems important. That's amended in the REAL ID
3 Act, and that refers to a universe where you
4 just have questions of law and questions of fact
5 in this statute. And if you look at that, it
6 doesn't refer to mixed questions separately.

7 The only thing excluded, arguably, the
8 argument goes, is questions of fact.

9 MR. LIU: Well, I --

10 JUSTICE KAVANAUGH: Everything else is
11 a question of law and thus reviewable when you
12 combine your stat -- this statute with (b)(9).

13 MR. LIU: I think (b)(9), which refers
14 to all questions of law and fact, is just a
15 natural way of referring to all three
16 categories. I mean, we -- we are talking about
17 questions of law, mixed questions of law and
18 fact, and questions of fact. And so, to refer
19 to all three at once, I think it's quite natural
20 to say all questions of law and fact.

21 JUSTICE KAGAN: Mr. Liu --

22 MR. LIU: I think that's --

23 JUSTICE KAGAN: I'm sorry.

24 MR. LIU: I was just going to say I
25 think that's -- that's all the zipper clause is

1 doing, and I think the language there fits
2 naturally with our argument.

3 JUSTICE SOTOMAYOR: Mr. Liu, there is
4 no question that we have a presumption in favor
5 of judicial review, correct?

6 MR. LIU: Yes.

7 JUSTICE SOTOMAYOR: Now you said
8 that's a way of divining congressional intent.
9 I don't actually think that because I think it's
10 much broader than that. It has to be a
11 presumption that we will avoid what St. Cyr
12 pointed to as a constitutional problem or a
13 statutory problem because St. Cyr was saying
14 very clearly the issuance of the writ was not
15 limited to challenges to the jurisdiction of the
16 custodian but encompassed the tensions based on
17 errors of law, including the erroneous
18 application or interpretation of the statute.

19 And so, if we take that statement with
20 the presumption, we know that Congress wasn't
21 intending to remove judicial review altogether.
22 It put this in the court of appeals, as Justice
23 Kavanaugh pointed. I'm not sure where I get the
24 presumption that it was going to cut St. Cyr's
25 concern in half by not including the application

1 of -- of -- of law to settled facts.

2 MR. LIU: We don't -- we don't read
3 that line in St. Cyr to be referring to the
4 application of law to fact. Rather, we read
5 that line to be about the scope of a statute's
6 coverage, in other words, its application.

7 JUSTICE SOTOMAYOR: It begs -- it begs
8 the question, doesn't it?

9 MR. LIU: Well, I -- I don't think --

10 JUSTICE SOTOMAYOR: Because you don't
11 --

12 MR. LIU: -- I don't think so. I
13 mean, if you -- if you use the Court's opinion
14 in St. Cyr as its own dictionary, you'll see on
15 page 293, the Court itself uses "application" to
16 describe the pure question of law in that case.
17 And then, in Part III, where the Court actually
18 addresses that question, it uses the word
19 "apply" or "applied" or "application" no fewer
20 than 18 times to describe the retroactive
21 application --

22 JUSTICE SOTOMAYOR: Except --

23 CHIEF JUSTICE ROBERTS: Mr. Liu, I
24 think Justice Kagan had a question on the table.

25 JUSTICE KAGAN: Have you finished?

1 MR. LIU: Yep. Sure.

2 JUSTICE KAGAN: Here's one way to look
3 at this case: The text gets neither side all
4 the way home; can't possibly. The analogy is,
5 this is similar to Justice Alito, they're really
6 different contexts on both sides. The
7 legislative history is basically you can't --
8 you don't have a clue what it means. St. Cyr
9 can be read multiple ways.

10 So all of those -- I mean, you have
11 arguments and Mr. Hughes has arguments, and --
12 but none of them really seem to carry the day.
13 And that suggests to me that the presumption of
14 reviewability should carry the day. Why isn't
15 this the classic case in which -- it's like it's
16 just not clear, and so the presumption does the
17 work and you would lose.

18 MR. LIU: Well, to -- to answer your
19 question directly, we do think it's -- it's a
20 presumption of congressional intent. We think
21 that's reflected in the Block Nutrition case,
22 but I -- I guess I -- maybe I'm just going to
23 fight the premise. I mean, we don't think
24 Congress's intent is at all ambiguous here, that
25 -- that we get to a point where you need to put

1 a thumb on the scales in favor of judicial
2 review.

3 JUSTICE KAGAN: Well, I take that
4 point. I mean, that's why I asked about what's
5 the nature of this presumption, because, if this
6 presumption is only about congressional intent,
7 it has to fight against a pretty strong sense
8 that Congress wanted to do something significant
9 here about cutting off review for criminal
10 aliens.

11 But, if this presumption is about more
12 than that, if it's a presumption that sort of
13 stands in for important separation of powers
14 principles, then that response isn't quite good
15 enough.

16 MR. LIU: Well, I -- I think at the
17 end of the day, the presumption, if we know
18 anything about it, it's -- it's not a -- a sort
19 of magic words requirement. And I -- I think
20 this is a case where we know exactly what
21 Congress was responding to. We know the goal it
22 ultimately wanted to achieve, and we know it
23 wanted to achieve that goal as far as possible.

24 And I -- I think there are good
25 structural reasons to think my friend's reading

1 is wrong. The one is what I said at the outset,
2 that -- that under my friend's reading, there
3 really would be no meaningful difference between
4 review in cases involving criminal aliens and
5 review involving non-criminal aliens. And if --

6 JUSTICE BREYER: But suppose that you
7 take that presumption, very interesting and deep
8 question that I have, and maybe you have a view
9 on this. I have always thought that it is
10 really basic. It is the presumption that
11 assures every person in the United States of
12 America that this government will not harm that
13 person in ways that are unlawful, unfair,
14 arbitrary, capricious, unconstitutional, or an
15 abuse of discretion. And that if you want to
16 have a country that has a government that is
17 under control, there is no better way.

18 I'm not saying judges are perfect, but
19 that separation of powers is designed to provide
20 a check. Do you see how basic I say it is?

21 MR. LIU: And I think the separation
22 of --

23 JUSTICE BREYER: And what do you
24 think?

25 MR. LIU: I don't think the separation

1 of powers is -- is a concern for us. I mean,
2 what Congress has done in this provision is
3 preserve judicial review over the most important
4 questions.

5 JUSTICE GORSUCH: Well, I -- I don't
6 think that quite gets to Justice Breyer's
7 question, in fairness. Forget about the
8 statute. Isn't the presumption pretty ancient
9 really? I mean, it goes back to the common law
10 that the king can't act arbitrarily without some
11 check, some review, some opportunity to be heard
12 by citizens.

13 Isn't that where the presumption
14 really comes from? And isn't that pretty
15 fundamental to the separation of powers and due
16 process and those considerations?

17 MR. LIU: I don't dispute any of that.
18 What -- what I would say is St. Cyr cashed out
19 all those concerns in its constitutional
20 avoidance holding.

21 JUSTICE GORSUCH: Okay. But -- but
22 you'd agree, though, that the presumption itself
23 has those roots?

24 MR. LIU: That's -- that's fair
25 enough, Justice Gorsuch, absolutely. But I -- I

1 would -- I would think that when Congress makes
2 its intent clear that it wants to foreclose
3 judicial review in those circumstances and go up
4 to the limits that this Court identified, the
5 constitutional doubts that this Court identified
6 in *St. Cyr*, that Congress is able to do so.

7 JUSTICE KAVANAUGH: But Congress knew
8 about this. We know that from the ACLU
9 objection and the back and forth and the
10 deletion of "pure." And Congress could have
11 easily written a statute that said review of
12 questions of law, no review of facts or
13 application of law to fact. And it has used
14 that kind of phrasing in other statutes. That
15 would have been the clear language that I think
16 you're looking for.

17 MR. LIU: Well, I mean, I -- I think
18 that -- that language would have been equally
19 clear. But I think Congress thought all it was
20 doing was tracking this Court's concerns in *St.*
21 *Cyr*, which were focused on the availability of
22 judicial review for constitutional claims and
23 pure questions of law.

24 Now, I -- I think the problem with my
25 friend's position is it would -- it would reduce

1 this difference. And his only safety valve is
2 to say: Well, some of these mixed application
3 decisions would be discretionary and, therefore,
4 not reviewable.

5 Well, that -- that's just not how this
6 statute works. And I think he's relying on
7 1252(a)(2)(B), which does say that discretionary
8 denials are unreviewable. But the questions of
9 law, preservation, the saving clause here
10 applies equally to 1252(a)(2)(B).

11 And so I -- I don't think that's a
12 solution to the problem. You see this play out
13 in the Ninth Circuit where they have read
14 questions of law to include every mixed question
15 of law and fact. And what that's done is that
16 it has gutted the application of the
17 discretionary denial bar, because virtually
18 everything that you can call an exercise of
19 discretion you can also describe as involving
20 the application of law to fact.

21 And if questions of law are an
22 exception to that bar, then you're -- you're not
23 really left with -- with much that's -- that's
24 protected from review. So I -- I don't think
25 that's a solution to -- to -- to trying to make

1 this meaningful.

2 I did want to mention, too, the -- the
3 administrative -- administrability issue with
4 Petitioner's position. They would have this
5 Court tell -- have courts of appeals start
6 trying to distinguish questions of historical
7 fact from mixed questions of law. You know, of
8 course this Court has experience with that.

9 I mean, pre-AEDPA, this was the regime
10 because factual questions got a -- a lot of
11 deference and mixed questions and legal
12 questions didn't. And there was a whole line of
13 cases that this Court decided trying to put
14 questions on one side of the line or the other.

15 The line we're proposing, which is a
16 -- a, indeed, a pure questions line, I think my
17 friend acknowledges is a clear line to
18 administer. And it's one that appellate courts
19 are well suited to administer and they have been
20 doing in -- in -- in many other contexts.

21 I think -- Justice Gorsuch mentioned
22 the -- the lay of the land in the courts of
23 appeals. It -- it's absolutely the case that
24 all ten courts of appeals that have addressed
25 the standard of review that applies to the very

1 issue here, that is reasonable diligence for
2 purposes of equitable tolling, for purposes of
3 seeking to reopen removal proceedings, that
4 determination is reviewed for abuse of
5 discretion when this bar doesn't apply.

6 And so Petitioner's reading would
7 create a mismatch in one of two ways: Either we
8 would be labeling as a question of law something
9 that would otherwise be reviewed for abuse of
10 discretion or we would be reviewing de novo
11 something that would otherwise be reviewed under
12 a highly deferential standard.

13 I -- I -- I don't think that that's
14 really a tenable position. I think what the --
15 what those cases teach us is that the issue here
16 is at the very least a primarily factual mixed
17 question.

18 JUSTICE GORSUCH: Mr. Liu, on that,
19 the way I -- I worked my way through it, and I
20 want to give you a shot at it, is to say that
21 when we have the abuse of discretion standard
22 review, we often mean really two things.

23 One can abuse the discretion by a
24 clear error of fact finding, and one can abuse
25 one's discretion by misapplying the law.

1 And both of those can be abuses of
2 discretion. I -- I see it breaking down into --
3 into those two camps. And when I'm applying the
4 abuse of discretion -- when I used to apply the
5 abuse of standard discretion review, and the
6 facts were agreed upon, it then became in my
7 mind a legal question much as it would at
8 summary judgment or 12(b)(6), whether these
9 facts, as given, rise to the level that the law
10 requires.

11 Now, I -- I know you don't agree with
12 that, so have your shot at it.

13 MR. LIU: Well, I think that inquiry
14 is still -- requires a -- a great deal of
15 exercise of judgment on behalf of whoever is
16 conducting the inquiry. You are taking in all
17 the historical facts. You're looking at them as
18 a whole. You're balancing one against the
19 other. There are judgments made throughout the
20 process.

21 So, you know, you might -- you might
22 label it one thing or the other. But I think
23 when you get down to what the actual nature of
24 the inquiry is, it is one that's bound up with
25 the facts of the case.

1 And I think the teaching of this
2 Court's opinion in Lakeridge is that there is a
3 part of a mixed question where you can't unwind
4 the factual and the legal parts, that is, there
5 is a part where they are so intertwined that the
6 best you can say is, well, this is either
7 primarily factual or primarily legal.

8 It's those mixed questions that I
9 don't think Congress was trying to give judicial
10 review of because, if that were the case, there
11 really wouldn't be any -- any difference between
12 the review that the criminal aliens got and the
13 review that the non-criminal --

14 JUSTICE KAVANAUGH: You've mentioned
15 --

16 MR. LIU: -- aliens got.

17 JUSTICE KAVANAUGH: -- St. Cyr and
18 Congress was just responding to that. But isn't
19 it true that the courts of appeals, in the wake
20 of that decision, reviewed mixed questions
21 before -- so after St. Cyr, before the Real ID
22 Act?

23 MR. LIU: Well, only -- only four
24 courts of appeals did. I don't think that's a
25 broad enough consensus for this Court to apply

1 any sort of --

2 JUSTICE KAVANAUGH: But Congress
3 indicated it was -- at least a committee
4 indicated awareness of those decisions.

5 MR. LIU: I don't think that's right.
6 If you look at the passage of -- of the
7 conference report on which Petitioners rely --

8 JUSTICE KAVANAUGH: Well, put aside
9 that. Put aside that. Is it -- go back to the
10 courts of appeals decisions. They had reviewed
11 mixed questions --

12 MR. LIU: Yeah.

13 JUSTICE KAVANAUGH: -- in that
14 interim.

15 MR. LIU: Four of them had. That's --
16 that's -- that's far from the sort of consensus,
17 I think, Congress was focused on. There's no
18 indication Congress was aware of those
19 decisions.

20 And all those decisions rested on a
21 reading of one line of St. Cyr, which, as I
22 said, is mistaken. I mean, if -- even if you
23 look at the -- at the decision cited in that
24 line, it's footnote 18, you'll see that each of
25 the sources cited involves a pure question of

1 law that is a question of statutory
2 construction.

3 So I don't think the word application
4 can -- can bear all that weight.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Five minutes, Mr. Hughes.

8 REBUTTAL ARGUMENT OF PAUL W. HUGHES

9 ON BEHALF OF THE PETITIONERS

10 MR. HUGHES: Thank you, Your Honor.

11 I'll -- I'll be brief.

12 Our -- our first point is that because
13 Congress created judicial review, that review
14 must, in fact, be substantive. It is not just
15 review over whether or not the Board wrote down
16 the right boilerplate. We think that's an
17 important starting point. And when Congress
18 created Section 2(d), it must have meant for
19 more than just whether or not the Board used the
20 right statement of the standard. It must
21 include whether or not that standard's used.

22 The second point is jurisdictional
23 rules, particularly rules like this that are
24 often implied -- applied have to be clear.
25 There needs to be clear direction to the courts

1 of appeals as to, at the outset of a case, when
2 they have jurisdiction and when they don't have
3 jurisdiction.

4 The rule we've offered provides the
5 Court a clear test.

6 The government, by contrast, if we set
7 aside its extreme position, the position that
8 would be you look at the boilerplate only, there
9 is no test the government has offered as to
10 meaningfully distinguish between whether or not
11 a standard was actually used and whether or not
12 the standard was correctly applied.

13 Because the courts need clarity, we
14 think the rule that we offer is by far the most
15 suitable and -- and appropriate rule that will
16 allow courts to adjudicate these cases as they
17 arise.

18 Third and finally, if there is any
19 doubt here, I think the presumption of judicial
20 review is quite important. This does bear not
21 just on underlying congressional intent but core
22 separation of powers principles.

23 The view of, if there's going to be
24 any delegation of lawmaking authority to the
25 agencies, that certainly needs to be clearly

1 stated by Congress. So any doubt as to how the
2 various statutory interpretation factors and the
3 history in St. Cyr all apply, to the extent that
4 that is a wash, we don't think it is, we think
5 it strongly favors our position, but that would
6 strongly favor applying the presumption and
7 ultimately concluding that there is judicial
8 review over the application of -- of lots of
9 facts.

10 So ultimately our rule is necessary to
11 fulfill the promise of judicial review and the
12 premise of judicial review that's undeniably
13 created in the statutory text. It's also
14 required to be a fulsome response to St. Cyr, as
15 the cases in the wake of St. Cyr, as well as the
16 pre-1789 cases that we identify in our briefs
17 make clear. There would be substantial
18 Suspension Clause problems if the Court -- if
19 Congress had not in the Real ID Act included the
20 application of law to fact.

21 But then finally and ultimately, our
22 rule is the one that is clear, that is
23 manageable, that gives a workable test for the
24 lower courts that will be applying this hundreds
25 of times each year to know where jurisdiction

1 starts and stops.

2 And it's the one that's ultimately
3 true to the presumption in favor of judicial
4 review in the event of any ambiguity.

5 Thank you, Your Honor.

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

8 (Whereupon, at 11:04 a.m., the case
9 was submitted.)

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Official - Subject to Final Review

1	<p>1 [1] 22:5 10:05 [2] 1:20 4:2 11:04 [1] 65:8 12(b)(6) [2] 17:10 59:8 1252 [4] 14:23 15:4 19:12 26:19 1252(a)(2)(B) [2] 56:7,10 1252(a)(2)(D) [2] 31:6 32:3 1252(b)(9) [1] 48:1 1254(2) [1] 45:9 15 [1] 39:25 18 [2] 50:20 61:24 18-776 [1] 4:4 1996 [2] 32:11 47:2</p>	<p>applied [8] 5:2 8:8 14:15 39:3 45:10 50:19 62:24 63:12 applies [3] 9:20 56:10 57:25 apply [9] 7:21 18:11 37:17,17 50:19 58:5 59:4 60:25 64:3 applying [6] 5:4 7:15,20 59:3 64:6,24 appreciate [1] 7:6 approach [1] 20:11 appropriate [4] 22:16 29:13 30:8 63:15 arbitrarily [1] 54:10 arbitrary [1] 53:14 area [1] 27:18 aren't [1] 32:2 arguably [1] 48:7 argue [1] 19:21 arguing [1] 6:24 argument [16] 1:19 3:2,5,8 4:4,7 6:14 9:19 19:25 25:23 31:1 34:16 46:22 48:8 49:2 62:8 arguments [3] 45:21 51:11,11 arise [2] 26:7 63:17 around [2] 12:5 43:14 Article [1] 30:14 articulated [2] 6:9 7:14 articulation [1] 8:6 aside [5] 15:7 17:12 61:8,9 63:7 aspect [2] 14:15 30:16 asserted [1] 29:4 assign [1] 30:11 Assistant [2] 2:4 33:14 Assume [1] 24:7 assumption [1] 13:18 assures [1] 53:11 asylum [3] 18:18 24:7,9 attempting [1] 26:13 ATTORNEY [5] 1:6,12 4:5 33:14 39:4 attorneys [1] 40:15 authority [3] 30:13,15 63:24 availability [1] 55:21 available [2] 21:4 36:17 avoid [3] 21:1 31:19 49:11 avoidance [1] 54:20 aware [3] 23:9 25:16 61:18 awareness [1] 61:4 away [3] 39:24 40:9 46:13 awfully [1] 23:3</p>	<p>bear [2] 62:4 63:20 became [1] 59:6 become [1] 35:5 becomes [1] 42:20 begin [1] 17:8 beginning [1] 34:16 begins [2] 43:4,5 begs [2] 50:7,7 behalf [9] 2:3,6 3:4,7,10 4:8 31:2 59:15 62:9 best [2] 45:8 60:6 better [1] 53:17 between [9] 6:23 8:16 9:3 10:2 17:7 30:8 53:3 60:11 63:10 beyond [1] 31:25 BIA [3] 16:2 22:5 35:4 big [2] 8:15 19:11 binding [1] 39:10 bit [4] 9:14 28:4 34:14 36:13 bite [1] 46:10 blew [1] 40:8 Block [1] 51:21 blown [3] 40:1 42:9 46:13 blows [1] 39:24 Board [40] 4:12,15,21,25 5:2,10 6:9 7:4 8:13 9:12 13:3 14:6 15:13 18:18,21 20:10 21:6,12,14,15,20,23 22:1,6,12,18,19 24:2,12,18,22 34:3 35:24 36:5,7 37:10,12,21 62:15,19 Board's [3] 29:16 32:23,25 Boards [2] 19:6,7 boilerplate [3] 4:18 62:16 63:8 born [1] 18:15 both [6] 30:5 34:9 36:19 45:5 51:6 59:1 bound [1] 59:24 boundaries [1] 5:23 breaking [1] 59:2 BREYER [11] 39:22 40:13 42:2,7,13,17 43:18 44:25 45:3 53:6,23 Breyer's [1] 54:6 brief [2] 11:22 62:11 briefs [3] 13:18 14:17 64:16 broad [2] 22:24 60:25 broader [2] 28:22 49:10 bucket [5] 11:25 12:1 13:19,20,20 bullet [1] 46:10 bygone [1] 37:15</p>
2	<p>2(D) [5] 14:12 15:17 20:11,14 62:18 2)(B) [1] 12:23 2)(C) [2] 11:8,9 2)(D) [5] 4:11 11:7,8,12 26:5 2)(D)'s [1] 27:1 2019 [2] 1:16 22:5 293 [1] 50:15</p>	<p>aliens [16] 17:20,23 31:15,19 32:9,12,14,22,24 46:8 47:3 52:10 53:4,5 60:12,16 alike [1] 32:14 ALITO [14] 6:4 7:17 8:1,15 9:18 10:1,8,19 36:10 37:23 45:15,25 46:9 51:5 Alito's [1] 34:15 allow [1] 63:16 alluded [1] 36:10 alone [1] 29:4 already [1] 32:20 already-settled [1] 35:22 although [2] 6:13 17:5 altogether [1] 49:21 ambiguity [1] 65:4 ambiguous [1] 51:24 amended [2] 26:6 48:2 America [1] 53:12 analogy [1] 51:4 analysis [5] 9:10 13:8 41:7,10 43:17 ancient [1] 54:8 another [1] 11:25 answer [7] 16:14 29:24 37:4 41:22 42:15,19 51:18 answered [1] 43:16 answering [1] 42:12 Anyway [1] 45:25 apart [1] 5:8 appeal [2] 23:24 40:17 appealed [1] 18:10 Appeals [19] 4:13 11:3 18:4,11 19:14,17 26:18,21 36:1 47:8,22 49:22 57:5,23,24 60:19,24 61:10 63:1</p>	<p>arguing [1] 6:24 argument [16] 1:19 3:2,5,8 4:4,7 6:14 9:19 19:25 25:23 31:1 34:16 46:22 48:8 49:2 62:8 arguments [3] 45:21 51:11,11 arise [2] 26:7 63:17 around [2] 12:5 43:14 Article [1] 30:14 articulated [2] 6:9 7:14 articulation [1] 8:6 aside [5] 15:7 17:12 61:8,9 63:7 aspect [2] 14:15 30:16 asserted [1] 29:4 assign [1] 30:11 Assistant [2] 2:4 33:14 Assume [1] 24:7 assumption [1] 13:18 assures [1] 53:11 asylum [3] 18:18 24:7,9 attempting [1] 26:13 ATTORNEY [5] 1:6,12 4:5 33:14 39:4 attorneys [1] 40:15 authority [3] 30:13,15 63:24 availability [1] 55:21 available [2] 21:4 36:17 avoid [3] 21:1 31:19 49:11 avoidance [1] 54:20 aware [3] 23:9 25:16 61:18 awareness [1] 61:4 away [3] 39:24 40:9 46:13 awfully [1] 23:3</p>
3	<p>31 [1] 3:7</p>	<p>appeals' [1] 17:19 APPEARANCES [1] 2:1 appeared [1] 28:3 appellate [2] 45:13 57:18 applicable [2] 36:6,8 application [28] 6:3 8:12,17 15:11 18:1 23:11 26:25 29:17 35:11 37:6,19 38:16 43:6,11 49:18,25 50:4,6,15,19,21 55:13 56:2,16,20 62:3 64:8,20 applications [3] 27:2 34:22 36:18</p>	<p>both [6] 30:5 34:9 36:19 45:5 51:6 59:1 bound [1] 59:24 boundaries [1] 5:23 breaking [1] 59:2 BREYER [11] 39:22 40:13 42:2,7,13,17 43:18 44:25 45:3 53:6,23 Breyer's [1] 54:6 brief [2] 11:22 62:11 briefs [3] 13:18 14:17 64:16 broad [2] 22:24 60:25 broader [2] 28:22 49:10 bucket [5] 11:25 12:1 13:19,20,20 bullet [1] 46:10 bygone [1] 37:15</p>
4	<p>4 [1] 3:4</p>	<p>attorneys [1] 40:15 authority [3] 30:13,15 63:24 availability [1] 55:21 available [2] 21:4 36:17 avoid [3] 21:1 31:19 49:11 avoidance [1] 54:20 aware [3] 23:9 25:16 61:18 awareness [1] 61:4 away [3] 39:24 40:9 46:13 awfully [1] 23:3</p>	<p>call [2] 25:21 56:18 calls [1] 21:23 came [3] 1:18 12:7 25:1 camps [1] 59:3 capricious [1] 53:14 car [1] 42:9 carry [2] 51:12,14 CASD [1] 22:6 Case [47] 4:4 7:8 9:17 10:4,5 15:21 16:7 17:22 19:16 21:2,7,13,16,20 22:9,17,20 24:7,13,17,21 25:2,8 29:8,9,15 34:4 35:3,21,21 36:4 37:17,17 39:9,19 46:17 50:16 51:</p>
6	<p>62 [1] 3:10</p>	<p>back [3] 54:9 55:9 61:9 backtracking [1] 36:13 balance [1] 30:8 balancing [2] 14:3 59:18 Bank [1] 21:17 bar [4] 44:14 56:17,22 58:5 BARR [3] 1:6,12 4:6 based [1] 49:16 basic [2] 53:10,20 basically [1] 51:7 basis [2] 19:8 29:4 basket [1] 23:19</p>	<p>call [2] 25:21 56:18 calls [1] 21:23 came [3] 1:18 12:7 25:1 camps [1] 59:3 capricious [1] 53:14 car [1] 42:9 carry [2] 51:12,14 CASD [1] 22:6 Case [47] 4:4 7:8 9:17 10:4,5 15:21 16:7 17:22 19:16 21:2,7,13,16,20 22:9,17,20 24:7,13,17,21 25:2,8 29:8,9,15 34:4 35:3,21,21 36:4 37:17,17 39:9,19 46:17 50:16 51:</p>
9	<p>9 [1] 1:16</p>	<p>based [1] 49:16 basic [2] 53:10,20 basically [1] 51:7 basis [2] 19:8 29:4 basket [1] 23:19</p>	<p>call [2] 25:21 56:18 calls [1] 21:23 came [3] 1:18 12:7 25:1 camps [1] 59:3 capricious [1] 53:14 car [1] 42:9 carry [2] 51:12,14 CASD [1] 22:6 Case [47] 4:4 7:8 9:17 10:4,5 15:21 16:7 17:22 19:16 21:2,7,13,16,20 22:9,17,20 24:7,13,17,21 25:2,8 29:8,9,15 34:4 35:3,21,21 36:4 37:17,17 39:9,19 46:17 50:16 51:</p>
A	<p>a.m [3] 1:20 4:2 65:8 able [5] 17:6 30:15 42:8 44:1 55:6 abortions [1] 18:21 above-entitled [1] 1:18 absolutely [3] 43:24 54:25 57:23 abstract [1] 16:19 abuse [13] 19:14,18 21:8,10 44:24 53:15 58:4,9,21,23,24 59:4,5 abuses [1] 59:1 accept [1] 38:14 accepting [1] 20:5 accomplish [1] 11:12 accords [1] 5:17 achieve [3] 33:6 52:22,23 acknowledges [1] 57:17 acknowledging [1] 4:23 ACLU [1] 55:8 ACLU's [1] 33:19 Act [5] 26:4 48:3 54:10 60:22 64:19 action [2] 23:12 40:17 actual [1] 59:23 actually [17] 4:22,25 5:10 6:10 7:7,14 8:6 9:5,24 25:6 27:19 28:3 35:23 41:2 49:9 50:17 63:11 adding [1] 14:8 addressed [2] 26:22 57:24 addresses [1] 50:18</p>	<p>awfully [1] 23:3</p>	<p>awfully [1] 23:3</p>
A	<p>awfully [1] 23:3</p>	<p>awfully [1] 23:3</p>	<p>awfully [1] 23:3</p>

Official - Subject to Final Review

<p>3,15,21 52:20 57:23 59:25 60:10 63:1 65:7,8 cases [25] 10:16,23 11:3 13:25 18: 9 21:18 23:16 24:9 25:9 28:9 32:8, 22,24 36:2,7 37:14 40:14 44:5 47: 14 53:4 57:13 58:15 63:16 64:15, 16 cached [1] 54:18 categorical [1] 38:7 categories [2] 23:15 48:16 category [1] 32:19 cause [1] 35:13 ceding [1] 30:13 certain [1] 41:9 certainly [1] 63:25 challenges [1] 49:15 change [1] 16:11 changed [3] 12:11 13:1 23:5 characterize [2] 13:8 17:2 characterized [1] 25:13 check [3] 40:16 53:20 54:11 CHIEF [11] 4:3,9 16:17 30:22 31:3 42:18 43:4,8 50:23 62:5 65:6 chooses [1] 21:12 Circuit [9] 20:22 28:19 29:7,8 39:3, 10,12,17 56:13 Circuit's [1] 16:9 circuits [1] 27:4 circumstance [8] 16:10,12 28:13 38:5,9 40:4,6,9 circumstances [9] 8:22 15:22 25: 5 29:12 37:25 39:20 41:23,25 55: 3 cite [2] 21:18 37:14 cited [2] 61:23,25 citizen [1] 18:16 citizens [1] 54:12 claim [4] 7:21 18:14,16 41:8 claims [3] 32:15 41:9 55:22 clarify [1] 14:17 clarity [2] 15:20 63:13 class [1] 44:1 classic [2] 24:17 51:15 clause [4] 26:6 48:25 56:9 64:18 clear [22] 5:9,12,21 6:18 9:22,25, 25 22:2 35:15 44:2 46:5 51:16 55: 2,15,19 57:17 58:24 62:24,25 63: 5 64:17,22 clearly [5] 20:22 23:14 45:5 49:14 63:25 clue [1] 51:8 coerced [1] 44:7 Cohn [1] 33:14 colleague [1] 15:21 Columbia [1] 21:17 coma [3] 38:2,8 41:17 comas [1] 38:20 comatose [1] 46:11 combine [1] 48:12 come [2] 10:24 18:4 comes [4] 21:10,11 25:14 54:14 commentators [1] 27:9 committee [1] 61:3 common [1] 54:9</p>	<p>complaint [1] 17:13 completely [1] 36:17 concern [3] 42:24 49:25 54:1 concerns [4] 35:14,17 54:19 55: 20 conclude [1] 22:6 concludes [1] 24:18 concluding [1] 64:7 conclusion [1] 8:13 conclusions [2] 17:8,12 conclusive [2] 32:23,25 condition [1] 13:2 conditions [2] 12:12 23:5 conduct [3] 16:25,25 17:1 conduct.' [1] 22:11 conducting [1] 59:16 conference [6] 27:16,17,21,23 28: 5 61:7 confession [1] 44:7 confusion [1] 44:14 Congress [42] 5:20,24 6:2 11:11, 13 17:19 25:14,17 26:2,9,12 27:1, 11,19 31:5,12,17 33:5 34:5 40:23 45:23 46:3,6,23 49:20 52:8,21 54: 2 55:1,6,7,10,19 60:9,18 61:2,17, 18 62:13,17 64:1,19 Congress's [5] 17:21 23:14 32:7, 10 51:24 congressional [7] 30:1,6,19 49:8 51:20 52:6 63:21 consensus [2] 60:25 61:16 consider [2] 8:10,11 considerable [1] 8:19 considerably [1] 6:25 considerations [1] 54:16 considering [2] 15:11 29:11 consistent [1] 45:1 constitutes [1] 16:3 constitutional [6] 31:16 32:15 49: 12 54:19 55:5,22 construction [2] 5:15 62:2 construing [1] 32:5 context [5] 13:11 31:12 46:3,5 47: 25 contexts [4] 15:2 20:12 51:6 57: 20 contrast [1] 63:6 control [1] 53:17 convicted [1] 19:3 core [1] 63:21 correct [12] 4:18,25 5:4,11 7:5 8:1 16:5 33:22 35:9 37:10 42:23 49:5 correctly [4] 5:2 36:15 41:20 63: 12 counsel [3] 30:23 62:6 65:7 country [6] 12:12 13:1 23:5 24:16 40:20 53:16 couple [2] 26:5 27:21 course [7] 12:22 13:12 30:9 33:17 44:22 46:16 57:8 COURT [45] 1:1,19 4:10 5:15 6:8 11:10,14 13:12 17:4,19 18:4 20:5, 6,7,8 21:17 25:9,13 27:12,16,20, 22 30:10 31:4,14 34:1 36:17 37:6,</p>	<p>18 39:2 40:5 45:9 47:7,8 49:22 50: 15,17 55:4,5 57:5,8,13 60:25 63:5 64:18 Court's [6] 20:2 31:22 38:10 50:13 55:20 60:2 courthouse [5] 39:24 40:1,8 42:3 46:13 courts [33] 4:14,19 5:10 11:3 15:4 17:6,9,11 18:11 19:14,17 26:16, 18,21,23 30:14,15 33:3 36:1 44: 14 45:13 47:21 57:5,18,22,24 60: 19,24 61:10 62:25 63:13,16 64:24 coverage [1] 50:6 crazy [2] 35:11 36:18 create [2] 6:2 58:7 created [4] 26:5 62:13,18 64:13 creates [3] 14:23 15:4 24:11 creation [1] 29:6 credibility [2] 14:2,7 credibly [1] 18:24 crime [1] 19:3 criminal [16] 10:4 17:20,23 22:10 31:15,18 32:8,12,13,22,22 46:7 47:3 52:9 53:4 60:12 critical [1] 25:8 crucial [1] 5:22 cruel [5] 15:24,25 16:18,25 17:1 cruelty [3] 12:11 15:24 23:4 custodian [1] 49:16 cut [3] 46:18 47:14 49:24 cutting [1] 52:9 Cyr [29] 5:21,25 11:10,17,19 25:12 26:12,21 31:14,18,22 32:4 40:22, 24 44:19 49:11,13 50:3,14 51:8 54:18 55:6,21 60:17,21 61:21 64: 3,14,15 Cyr's [1] 49:24</p>	<p>degree [4] 9:2,3 10:3,4 delay [1] 29:4 delegation [1] 63:24 deleted [1] 33:13 deletion [1] 55:10 denial [4] 21:23 22:2,13 56:17 denials [1] 56:8 denying [1] 31:15 Department [2] 2:5 33:18 Deputy [1] 33:14 describe [3] 50:16,20 56:19 designed [1] 53:19 Despite [1] 4:23 determination [4] 12:25 13:3 20: 24 58:4 determinations [4] 10:13,15 14: 10 16:24 determine [7] 4:19 8:7,9,21 20:12 41:5 43:11 dictionary [1] 50:14 difference [15] 5:6 6:23 8:16,25 9: 1,1 10:2,11 32:17,21 33:2,5 53:3 56:1 60:11 different [10] 5:1 12:22 14:3 19:2 21:21 39:8 41:17 45:18,19 51:6 differently [3] 10:24 28:18 33:9 differs [1] 7:15 difficult [5] 8:4 40:22 43:20,21 44: 5 difficulty [2] 43:19 44:9 dignity [1] 16:21 diligence [18] 8:22 15:22 19:11,16 20:3,17 21:11,16 22:25 28:15 29: 12,13,19 36:5 37:14,16 38:17 58: 1 diligent [1] 29:6 direction [2] 46:6 62:25 directly [1] 51:19 disaggregate [1] 15:5 disagree [2] 18:19 20:8 disagrees [1] 20:6 discretion [25] 19:15,18 20:10,16 21:8,10,15,22 22:8,13,16,18,20 44: 23,24 53:15 56:19 58:5,10,21,23, 25 59:2,4,5 discretionary [13] 12:21,21,25 13: 2 20:18,24 21:6,23 22:2,13 56:3,7, 17 disentangle [2] 13:5 21:4 dispositive [6] 10:15 18:8,13,25 24:25 25:3 disproven [1] 26:3 dispute [1] 54:17 disputes [5] 17:25 18:2,4,7 19:5 distinguish [8] 4:24 8:5 9:3 17:7 43:24 45:11 57:6 63:10 district [4] 26:16 40:17 44:22 47:8 divining [1] 49:8 doing [9] 14:6 15:13 23:23,25 45: 14 47:15 49:1 55:20 57:20 done [5] 6:20 23:10 36:16 54:2 56: 15 doubt [2] 63:19 64:1 doubts [3] 31:17,20 55:5</p>
D			
	<p>D.C [3] 1:15 2:2,5 daily [1] 19:8 day [4] 17:9 51:12,14 52:17 days [1] 40:1 de [2] 20:4 58:10 deal [2] 26:7 59:14 decade [1] 24:16 December [1] 1:16 decide [4] 5:10 7:7 18:22 30:16 decided [4] 4:12 16:16 18:5 57:13 decidedly [1] 26:24 decides [2] 21:20 35:24 deciding [3] 21:21 34:3 38:15 decision [15] 7:4,6 9:12 16:9 20: 21 21:7,14 22:5 26:22 31:22 35: 12 38:11 46:20 60:20 61:23 decision-maker [1] 46:15 decisions [8] 16:24 24:1 47:19 56: 3 61:4,10,19,20 declaration [1] 38:24 deep [1] 53:7 deference [2] 20:9 57:11 deferential [3] 10:22 23:7 58:12 defined [1] 24:10 definition [2] 14:19 39:15</p>		

Official - Subject to Final Review

<p>down ^[4] 36:22 59:2,23 62:15 draft ^[1] 33:20 drafts ^[1] 27:6 draw ^[1] 43:8 drawing ^[1] 17:5 drew ^[1] 27:8 driven ^[1] 23:21 due ^[2] 8:21 54:15 during ^[1] 27:9</p>	<p>everything ^[3] 21:1 48:10 56:18 evidence ^[5] 10:21 11:4 26:20 33:1,4 exactly ^[3] 42:10 47:3 52:20 example ^[8] 12:25 16:7 17:10 18:14 19:2 22:3 24:4 36:25 examples ^[5] 12:19 15:8 18:12,17 37:3 except ^[3] 23:16 36:9 50:22 exception ^[3] 6:23 7:18 56:22 exceptional ^[8] 8:22 12:9 15:22 37:24 38:4,8 42:21 43:2 excluded ^[1] 48:7 exercise ^[7] 8:19 20:15 22:8,15,19 56:18 59:15 exercising ^[1] 22:12 existence ^[1] 28:19 existing ^[1] 26:15 expedite ^[3] 32:11 47:2,6 expediting ^[1] 47:12 experience ^[1] 57:8 explain ^[1] 5:9 expressly ^[2] 22:14 29:9 extend ^[2] 6:12 21:25 extended ^[1] 40:6 extends ^[1] 4:21 extent ^[9] 5:6 8:25 15:10 16:20 20:9 23:21 27:24 38:7 64:3 extraordinary ^[4] 16:10,11 28:12 39:20 extreme ^[3] 12:11 23:3 63:7 extremely ^[2] 12:9 42:12</p>	<p>25 29:3 fewer ^[1] 50:19 Fifth ^[3] 16:8 39:12,17 fight ^[2] 51:23 52:7 figure ^[2] 9:16 16:23 file ^[3] 39:11,25 46:12 filed ^[1] 39:13 filing ^[1] 28:20 final ^[1] 27:5 finally ^[2] 63:18 64:21 find ^[7] 8:14 24:14 29:5 40:11,20 44:5 45:4 finder ^[1] 16:3 finding ^[4] 14:1,7,7 58:24 findings ^[7] 11:5 15:5,6,9 32:23, 25 33:4 finds ^[1] 30:10 finished ^[1] 50:25 firmly ^[1] 37:4 first ^[11] 4:4 5:17 8:4 12:19 18:5 19:7 26:1 28:10 35:20,23 62:12 fits ^[1] 49:1 five ^[2] 21:18 62:7 Florida ^[4] 38:11 39:1 40:2 42:4 focused ^[3] 29:16 55:21 61:17 following ^[2] 26:21 31:18 footnote ^[1] 61:24 forced ^[2] 18:20,21 foreclose ^[1] 55:2 Forget ^[1] 54:7 form ^[1] 7:13 former ^[1] 34:25 forth ^[1] 55:9 forum ^[1] 31:15 found ^[8] 14:14 16:2 17:4 22:4,20 24:2,23 26:24 four ^[6] 6:1 26:21,23 27:3 60:23 61:15 framework ^[3] 12:23 13:13,16 FREDERICK ^[3] 2:4 3:6 31:1 freedom ^[1] 24:11 friend ^[1] 57:17 friend's ^[4] 47:23 52:25 53:2 55:25 fulfill ^[1] 64:11 fully ^[2] 5:20,25 fulsome ^[1] 64:14 fundamental ^[1] 54:15 further ^[1] 36:16 future ^[2] 14:9 24:12</p>	<p>goal ^[4] 32:10 47:1 52:21,23 goodness ^[1] 40:14 Gordillo ^[1] 29:7 GORSUCH ^[20] 19:9 20:25 22:23 34:13,18 35:2,8 36:12,22 37:2,8, 20 38:13,20 39:7 54:5,21,25 57:21 58:18 Gorsuch's ^[1] 42:24 got ^[3] 57:10 60:12,16 government ^[19] 4:14,16,19,20,24 5:7,9 7:3,10,13 9:2,7 25:4 26:14 35:14 53:12,16 63:6,9 government's ^[5] 6:6 25:22 26:1 34:19,21 grasp ^[1] 44:2 great ^[1] 59:14 greater ^[1] 14:22 ground ^[1] 26:13 GUERRERO-LASPRILLA ^[3] 1:3 4:5 28:11 guess ^[5] 13:22 21:3 29:23 35:19 51:22 guttled ^[1] 56:16</p>
<p style="text-align: center;">E</p> <p>each ^[3] 14:4 61:24 64:25 earlier ^[3] 27:6 29:8 39:13 easier ^[1] 17:2 easily ^[1] 55:11 easy ^[3] 17:5 36:5 44:11 effect ^[4] 9:8 28:13 30:13 33:15 effectively ^[1] 5:3 effects ^[1] 16:12 efforts ^[1] 32:7 egregious ^[3] 34:22 42:20 43:9 eight-month ^[1] 29:17 Either ^[6] 16:10 32:5 45:21 46:15 58:7 60:6 element ^[5] 14:19,20,21,22,25 elements ^[1] 27:25 Eleventh ^[1] 39:2 eligibility ^[3] 12:24 20:14,15 eligible ^[1] 20:20 enacted ^[2] 31:12,17 encompass ^[2] 32:1,6 encompassed ^[1] 49:16 end ^[9] 9:11 23:1,11,23 24:25 36:11 43:13 44:20 52:17 ends ^[1] 17:7 engage ^[1] 47:22 English ^[1] 34:8 enough ^[5] 9:4 31:19 52:15 54:25 60:25 entail ^[1] 41:9 entirely ^[1] 18:8 entitled ^[1] 18:18 equally ^[2] 55:18 56:10 equation ^[2] 47:11,18 equipped ^[1] 17:6 equitable ^[5] 8:20 16:13 37:13,25 58:2 equities ^[1] 22:8 era ^[1] 37:15 erroneous ^[1] 49:17 error ^[3] 43:9,12 58:24 errors ^[1] 49:17 ESQ ^[4] 2:2 3:3,6,9 essential ^[1] 5:17 essentially ^[1] 12:3 establish ^[1] 5:22 established ^[4] 5:19 13:13 20:22 24:1 evaluate ^[1] 41:8 even ^[9] 6:18 9:16 13:15 20:17,23 25:4 39:17 44:4 61:22 event ^[1] 65:4 everybody's ^[1] 23:9 everyone ^[2] 39:23 44:20</p>	<p style="text-align: center;">F</p> <p>face ^[3] 7:4 22:3,14 fact ^[44] 6:3 7:15 13:24 16:3 17:7, 25 18:2,3,16 21:7 26:8,10,25 27:2 31:8,8,10 32:2,19 34:10,10 37:7, 19 40:25 42:22 43:2,6,11 44:7,18 48:4,8,14,18,18,20 50:4 55:13 56:15,20 57:7 58:24 62:14 64:20 fact-finding ^[1] 12:17 factors ^[2] 29:11 64:2 facts ^[35] 5:5,13 8:11,11,18 13:6 14:1,2,4,7,8,9,10,14,15 15:12 16:2 18:1,5 23:22 24:1,14,24,24 38:16 42:11,11,15 50:1 55:12 59:6,9,17, 25 64:9 factual ^[28] 10:13,14 11:5 13:10 14:10,20,21 15:6,9 18:7,12 19:5 23:3,10 24:5 30:11,11 32:23,25 33:3,17 42:20 43:24 44:15 57:10 58:16 60:4,7 fails ^[1] 4:24 fair ^[2] 46:2 54:24 fairness ^[1] 54:7 family ^[1] 16:1 far ^[7] 11:7 14:21 27:19 31:25 52:23 61:16 63:14 favor ^[4] 49:4 52:1 64:6 65:3 favorable ^[1] 22:7 favours ^[1] 64:5 feasible ^[1] 37:16 few ^[7] 8:3 10:23 12:7,18 18:12 25:</p>	<p style="text-align: center;">G</p> <p>game ^[1] 42:25 gave ^[2] 12:20 15:20 GENERAL ^[6] 1:6,12 2:5 4:6 33:14 45:22 generally ^[2] 23:6 24:10 gets ^[2] 51:3 54:6 ghost ^[1] 38:15 GINSBURG ^[3] 17:15,18 23:13 give ^[4] 36:24 46:7 58:20 60:9 given ^[6] 23:13 33:3 38:14,16 42:25 59:9 gives ^[1] 64:23</p>	<p style="text-align: center;">H</p> <p>habeas ^[2] 26:15 27:2 half ^[5] 47:11,18,18,19 49:25 happen ^[1] 38:3 happens ^[2] 15:1 27:23 hard ^[1] 40:20 hardship ^[2] 12:10 23:4 harm ^[1] 53:12 head ^[1] 28:18 hear ^[1] 4:3 heard ^[3] 36:19 41:19 54:11 heavily ^[1] 24:5 held ^[3] 11:10,17 31:14 helpful ^[1] 42:12 Helton ^[2] 38:11 39:1 highly ^[3] 10:22 23:7 58:12 historic ^[6] 14:7,8,9,14 15:12 17:7 historical ^[3] 5:13 57:6 59:17 history ^[8] 22:10 25:12,24 27:5 33:13 45:2 51:7 64:3 holding ^[1] 54:20 holds ^[1] 20:8 home ^[1] 51:4 Honor ^[23] 7:2,24 8:24 9:25 10:11 11:2 12:18 14:5 15:8 16:7 17:4 18:6 19:24 21:9 23:20 26:1 27:6,16 28:10,23 30:5 62:10 65:5 Honor's ^[1] 13:4 Honors' ^[1] 20:21 However ^[1] 16:20 HUGHES ^[38] 2:2 3:3,9 4:7,9 7:2, 24 8:3,24 9:23 10:7,10 11:1,17 12:18 14:5 15:17 16:6 17:3,17 18:6 19:9,24 21:9 22:22 23:20 25:25 27:15 28:10,21,25 29:2,20 30:4 51:11 62:7,8,10 hundreds ^[1] 64:24 Hurricane ^[2] 39:24 46:14 hypo ^[2] 41:17,22 hypothetical ^[1] 41:18</p>

Official - Subject to Final Review

<p>hypotheticals ^[1] 46:11</p> <hr/> <p style="text-align: center;">I</p> <p>ID ^[4] 26:4 48:2 60:21 64:19 idea ^[2] 11:22 35:15 identified ^[6] 4:15 24:23 31:21 34:2 55:4,5 identify ^[1] 64:16 identifying ^[1] 45:12 idiot ^[1] 46:16 Ill ^[2] 30:14 50:17 Iliev ^[1] 20:21 illustrate ^[2] 6:1 36:25 Immigration ^[3] 4:13 19:6 26:8 implied ^[1] 62:24 important ^[9] 11:12 24:9 33:24 44:10 48:2 52:13 54:3 62:17 63:20 impression ^[1] 35:24 imprimatur ^[1] 35:12 imprisoned ^[1] 24:15 include ^[5] 18:20 27:1 44:17 56:14 62:21 included ^[3] 27:7 40:25 64:19 including ^[2] 49:17,25 inclusive ^[1] 26:10 indeed ^[1] 57:16 indicated ^[2] 61:3,4 indication ^[1] 61:18 individual ^[7] 18:14,24 19:3 20:13 24:15,19 29:5 ineligible ^[1] 22:21 inquiries ^[1] 5:3 inquiry ^[6] 9:9,15 29:14 59:13,16, 24 insofar ^[2] 14:6,24 instance ^[3] 18:5 19:7 36:9 instruct ^[1] 17:11 insufficient ^[1] 22:9 intending ^[1] 49:21 intent ^[9] 23:14 30:1,6 49:8 51:20, 24 52:6 55:2 63:21 interesting ^[1] 53:7 interim ^[1] 61:14 interpret ^[1] 41:12 interpretation ^[4] 10:2 12:2 49:18 64:2 intertwined ^[1] 60:5 invite ^[1] 43:10 invokes ^[1] 7:5 involve ^[3] 12:15,17 35:22 involves ^[3] 25:13 34:9 61:25 involving ^[7] 15:21 32:8,22,24 53:4,5 56:19 Iqbal ^[1] 17:11 isn't ^[13] 16:22 38:17 40:9,10 44:10,12,16 51:14 52:14 54:8,13,14 60:18 issuance ^[1] 49:14 issue ^[14] 15:24 16:8,15 19:17 21:24 25:1 37:24 39:18,18,19 46:10 57:3 58:1,15 issues ^[5] 12:20 18:13 19:2 26:7 35:23 issuing ^[1] 21:22</p>	<p>itself ^[4] 31:10 45:10 50:15 54:22</p> <hr/> <p style="text-align: center;">J</p> <p>judge ^[2] 40:18 44:22 judges ^[3] 19:7 44:4 53:18 judgment ^[3] 8:20 59:8,15 judgments ^[3] 14:2,8 59:19 judicial ^[37] 5:13,18 7:8,11 10:18 14:24 15:14 21:24 25:5,6,10 30:8 31:15,19 32:8,14,17 35:3,12 38:3 40:21 46:8,17,18 49:5,21 52:1 54:3 55:3,22 60:9 62:13 63:19 64:7, 11,12 65:3 jurisdiction ^[16] 5:23 6:2 9:12,16 14:11 26:15,17,18,23,24 27:3 45:17 49:15 63:2,3 64:25 Jurisdictional ^[3] 5:8 9:9 62:22 Justice ^[113] 2:5 4:3,9 6:4 7:17 8:1,15 9:18 10:1,8,19,20 11:15,18 13:15 15:16,18,19 16:17 17:15,18 19:9 20:25 22:22,23 23:13 25:11, 12 27:13 28:7,17,24 29:1,20 30:22 31:4 33:8,10,18,22 34:13,15,18 35:2,8,17 36:10,12,22 37:2,8,20, 23 38:13,20 39:6,7,8,21,22 40:13 41:14,16 42:2,7,13,17,18,24 43:4, 8,18 44:25 45:3,15,25 46:9 47:4,6, 13,20,24 48:10,21,23 49:3,7,22 50:7,10,22,23,24,25 51:2,5 52:3 53:6, 23 54:5,6,21,25 55:7 57:21 58:18 60:14,17 61:2,8,13 62:5 65:6 justices ^[1] 32:20 justified ^[1] 34:6 justify ^[1] 37:25</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN ^[15] 10:20 11:15,18 13:15 15:19 22:22 25:12 29:20 35:17 48:21,23 50:24,25 51:2 52:3 Katrina ^[4] 39:24 40:8 41:17,22 KAVANAUGH ^[19] 25:11 27:13 33:8,10,22 41:14,16 47:6,13,20,24 48:10 49:23 55:7 60:14,17 61:2,8,13 keep ^[3] 11:18,19 26:16 kind ^[3] 40:16 42:25 55:14 king ^[1] 54:10 knife ^[1] 15:25</p> <hr/> <p style="text-align: center;">L</p> <p>label ^[1] 59:22 labeling ^[1] 58:8 lack ^[1] 33:4 Lakeridge ^[4] 13:7,16 34:2 60:2 land ^[1] 57:22 language ^[4] 28:2 49:1 55:15,18 large ^[1] 23:15 larger ^[1] 6:25 later ^[1] 27:22 Laughter ^[1] 42:5 law ^[88] 4:12 6:3 7:15 9:21 11:23, 24 12:6 13:6,14,21 15:15,23 16:5, 11 17:25 18:1 20:3 21:19 24:7 25:1,14,22 26:8,9,25 27:2,8 28:8 31:6,7,8,16,20,23,25 32:2,5,15 33:12, 15 34:9,11,20,24 36:15 37:6,19</p>	<p>38:9,17 41:1 43:6,11,12,17 44:17, 18,24 45:4,9,11,13,16,22 48:4,11, 14,17,17,20 49:17 50:1,4,16 54:9 55:12,13,23 56:9,14,15,20,21 57:7 58:8,25 59:9 62:1 64:20 law-like ^[1] 12:3 lawmaking ^[1] 63:24 laws ^[1] 20:2 lawyers ^[1] 44:4 lay ^[1] 57:22 lead ^[1] 42:24 lean ^[2] 25:20 30:11 learned ^[3] 43:23 44:1,3 least ^[4] 6:1 39:9 58:16 61:3 leave ^[2] 34:10 44:18 left ^[2] 21:6 56:23 legal ^[57] 4:16 5:5,14 8:18,19 12:1 13:9,20 14:14,16,19,22,25 15:5,11, 12,14 16:4,15,24 17:8,12 20:13 21:8 23:11,17,22,24 27:25 30:12, 16 31:25 33:16,17,23,25 34:1,2 35:5,9,22,25 36:3,8,14 37:11 38:24 39:5,14 41:10 43:16,25 44:15 57:11 59:7 60:4,7 legally ^[1] 21:5 legislative ^[1] 51:7 less ^[1] 18:9 level ^[4] 16:4 23:10 34:23 59:9 lies ^[1] 20:10 life ^[1] 24:10 likely ^[1] 13:2 limit ^[1] 32:7 limitation ^[1] 27:11 limited ^[4] 17:22,22 32:18 49:15 limits ^[1] 55:4 line ^[11] 17:5 43:8 50:3,5 57:12,14, 15,16,17 61:21,24 lines ^[1] 19:10 list ^[1] 19:1 litigant ^[2] 41:25 42:7 little ^[5] 9:13 23:23 28:4 34:14 36:13 LIU ^[68] 2:4 3:6 8:1 29:24 30:24 31:1,3 33:9,21,23 34:13,17,25 35:7, 19 36:21,24 37:5,9,21 38:6,13,18, 22 39:16 40:12 41:5,15,21 42:6, 10,14 43:3,7 44:25 45:7,24 46:2, 25 47:10,17,21 48:9,13,21,22,24 49:3,6 50:2,9,12,23 51:1,18 52:16 53:21,25 54:17,24 55:17 58:18 59:13 60:16,23 61:5,12,15 loads ^[1] 44:8 lodged ^[1] 27:11 look ^[17] 12:14 13:23 16:23 27:17, 21 39:22 40:14 41:7,11 43:5,5 46:3 48:5 51:2 61:6,23 63:8 looked ^[2] 26:22 46:3 looking ^[5] 8:7 12:4 29:10 55:16 59:17 looks ^[1] 27:20 lose ^[1] 51:17 lot ^[4] 13:24 19:16 23:25 57:10 lots ^[2] 45:17 64:8 lower ^[2] 44:14 64:24</p>	<p>lower-level ^[1] 46:14 Lugo-Resendez ^[2] 16:9 28:12</p> <hr/> <p style="text-align: center;">M</p> <p>made ^[7] 10:13,16,20 15:21 39:10 40:23 59:19 magic ^[1] 52:19 manageable ^[1] 64:23 many ^[5] 11:3 44:3,5 47:14 57:20 markup ^[1] 27:9 matter ^[9] 1:18 21:22 22:6 34:7 35:10,10 36:11 38:8,17 matters ^[1] 12:2 maximum ^[1] 37:15 mean ^[30] 11:24 16:18,18,21 22:22 34:7 37:1 38:10,19 40:10,14 41:2 43:15,23 44:17 45:5,12 46:6 47:13 48:16 50:13 51:10,23 52:4 54:1,9 55:17 57:9 58:22 61:22 meaningful ^[3] 4:17 53:3 57:1 meaningfully ^[2] 35:4 63:10 means ^[4] 42:22 45:9,17 51:8 meant ^[7] 17:19 30:3,7 31:7 45:21, 23 62:18 membership ^[1] 24:16 mention ^[2] 31:10 57:2 mentioned ^[7] 6:16,19 23:2 32:3, 4 57:21 60:14 merely ^[1] 6:15 merging ^[1] 9:8 merit ^[1] 22:7 merits ^[2] 9:9,15 might ^[11] 10:23 12:6 18:14,16,18 24:1 25:21 37:25 38:23 59:21,21 mile ^[1] 42:9 mind ^[1] 59:7 minimum ^[1] 4:14 minutes ^[1] 62:7 misapplication ^[1] 42:22 misapplying ^[1] 58:25 misconduct ^[1] 39:4 mismatch ^[1] 58:7 missed ^[1] 43:25 mistake ^[1] 42:20 mistaken ^[1] 61:22 misunderstanding ^[1] 42:21 mixed ^[33] 11:23 13:8 14:16,18,25 25:16,18 26:3 27:23 31:8,11 32:1, 2,6,16 33:15 34:9 40:25 43:25 44:6,17 45:11 48:6,17 56:2,14 57:7, 11 58:16 60:3,8,20 61:11 moment ^[2] 19:20 24:7 Monday ^[1] 1:16 monster ^[1] 46:15 morning ^[2] 4:4 32:20 most ^[4] 12:16 23:9 54:3 63:14 mostly ^[2] 12:15,17 motion ^[3] 22:17 28:20 39:11 motions ^[1] 17:10 move ^[1] 26:17 moving ^[1] 47:7 much ^[6] 6:5 23:18 29:21 49:10 56:23 59:7 multiple ^[1] 51:9</p>
---	---	--	---

Official - Subject to Final Review

<p>must ^[5] 4:19 7:11 62:14,18,20</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>nail ^[1] 36:22 name ^[1] 19:4 narrow ^[2] 6:22 33:5 natural ^[2] 48:15,19 naturally ^[1] 49:2 nature ^[3] 29:23 52:5 59:23 necessarily ^[1] 11:2 necessary ^[2] 5:20 64:10 need ^[7] 5:8 37:18 41:12,23 42:15 51:25 63:13 needed ^[2] 5:24 11:13 needs ^[2] 62:25 63:25 neither ^[1] 51:3 never ^[3] 37:6,9 42:8 Ninth ^[1] 56:13 non-citizen ^[1] 12:10 non-citizen's ^[1] 12:8 non-criminal ^[5] 10:6 32:13,24 53:5 60:13 none ^[2] 22:15 51:12 noted ^[1] 32:20 November ^[1] 22:5 novo ^[2] 20:4 58:10 Nutrition ^[1] 51:21</p>	<p>4,8 15:1 22:25 29:11 30:3 43:20 47:19 50:6 55:14 57:14,20 59:19, 22 otherwise ^[4] 7:11 46:20 58:9,11 out ^[17] 7:1 8:11 9:16 10:24 16:23 18:2,3 25:2 35:18,24 40:11 44:11 45:20 47:8,15 54:18 56:12 outset ^[3] 46:4 53:1 63:1 outweigh ^[1] 22:9 OVALLES ^[3] 1:9 4:5 29:1 over ^[11] 5:13,14 7:9 9:16 10:12 12:24 15:14 20:14 54:3 62:15 64:8 overcome ^[1] 42:1 overly ^[1] 39:3 overturn ^[1] 33:3 own ^[2] 28:18 50:14</p>	<p>posit ^[1] 46:14 position ^[13] 6:25 17:24 34:19,21, 25 41:3,6 55:25 57:4 58:14 63:7,7 64:5 positions ^[1] 8:16 possibility ^[1] 46:19 possible ^[1] 52:23 possibly ^[1] 51:4 power ^[3] 23:15 30:8,9 powers ^[7] 30:20 35:17 52:13 53:19 54:1,15 63:22 pre-1789 ^[1] 64:16 pre-AEDPA ^[1] 57:9 precedent ^[4] 20:2 28:19 29:9 39:10 predictions ^[1] 14:9 preference ^[1] 46:7 premise ^[5] 5:18 20:1,6 51:23 64:12 present ^[1] 12:12 preservation ^[1] 56:9 preserve ^[1] 54:3 presumption ^[33] 24:12 29:21,23, 25 30:1,2,2,5,7,18,20 35:16 40:21 49:4,11,20,24 51:13,16,20 52:5,6, 11,12,17 53:7,10 54:8,13,22 63:19 64:6 65:3 pretty ^[9] 23:14 33:2 34:5 40:19,22 45:10 52:7 54:8,14 primarily ^[3] 58:16 60:7,7 primary ^[1] 46:7 principal ^[4] 9:19 13:5 19:25 29:3 principally ^[4] 13:9,10 23:16,22 principle ^[4] 30:21 35:22 38:24 39:5 principled ^[1] 45:10 principles ^[3] 29:18 52:14 63:22 probably ^[1] 44:4 probative ^[2] 27:20 28:5 problem ^[5] 9:6 49:12,13 55:24 56:12 problems ^[1] 64:18 proceeding ^[1] 19:1 proceedings ^[3] 10:17 18:8 58:3 process ^[3] 27:9 54:16 59:20 produce ^[1] 44:13 promise ^[1] 64:11 prong ^[1] 39:20 proper ^[4] 4:16,20 20:11 24:23 properly ^[3] 8:7 24:13,22 proposing ^[1] 57:15 protected ^[1] 56:24 provide ^[8] 5:7 9:2 18:12 22:3 24:4 31:18 35:11 53:19 provided ^[2] 15:3,9 provides ^[3] 4:11 20:14 63:4 provision ^[4] 31:9,13,17 54:2 provisions ^[1] 33:9 punch ^[2] 15:25 16:18 pure ^[23] 9:21 11:23 21:18 25:13, 21 27:7,10 31:16,22 33:11 34:6, 19 35:1 36:15 39:14 43:17 45:11, 12 50:16 55:10,23 57:16 61:25 purely ^[3] 31:25 41:9 43:16</p>	<p>purpose ^[1] 17:21 purposes ^[3] 45:19 58:2,2 put ^[9] 11:25 13:19 15:2 25:19 49:22 51:25 57:13 61:8,9 putting ^[1] 23:18</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualifies ^[2] 16:9,11 qualify ^[1] 28:12 quality ^[1] 23:17 question ^[69] 9:21 12:7,22 13:5,7 14:16,18 15:1,15,23 16:5,15 19:10,12,23 20:3,19 21:1,11,19 22:23 24:6,8 28:11,22 29:22,24 32:1,6 33:15,16 34:8,9,11,12,15 36:15 37:4 38:2,7,9,12 39:15 40:3 42:12, 16 43:1,16,17,20,25 44:23 45:22 48:11 49:4 50:8,16,18,24 51:19 53:8 54:7 56:14 58:8,17 59:7 60:3 61:25 62:1 questions ^[79] 4:12 11:23,23 12:6, 16 13:9,21,23,25 19:16 23:1,21 25:14,16,18,22 26:3 27:7,24 28:8 29:3 30:10 31:6,7,8,10,11,16,20, 21,22,24 32:1,2,5,15,16,19 33:11 34:19,23 35:1,25 40:25 44:17,18 45:4,8,11,12,12,16,22 48:4,4,6,8, 14,17,17,18,20 54:4 55:12,23 56:8, 14,21 57:6,7,10,11,12,14,16 60:8, 20 61:11 quite ^[6] 13:23 45:13 48:19 52:14 54:6 63:20 quoted ^[1] 44:20</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raise ^[1] 31:16 raised ^[1] 25:12 range ^[2] 13:23 16:24 rare ^[4] 6:13 10:24 11:2 36:9 rather ^[4] 42:22 44:13 45:18 50:4 reached ^[2] 8:13 39:18 read ^[10] 6:5,11 7:22 31:24 40:22 44:16 50:2,4 51:9 56:13 reader ^[1] 7:6 reading ^[6] 25:20 32:13 52:25 53:2 58:6 61:21 REAL ^[4] 26:4 48:2 60:21 64:19 realize ^[1] 15:20 really ^[22] 7:19,20 9:13,13 11:23 13:21,24 33:6 43:15,19 46:21,21 51:5,12 53:3,10 54:9,14 56:23 58:14,22 60:11 reason ^[1] 11:8 reasonable ^[9] 7:5 19:11 20:17 28:14 29:18 36:4 37:13 38:17 58:1 reasonably ^[1] 29:6 reasons ^[3] 5:16 25:25 52:25 REBUTTAL ^[2] 3:8 62:8 recent ^[1] 22:4 recite ^[2] 35:5 36:14 recited ^[1] 35:9 recognize ^[1] 25:9 recognized ^[1] 27:3</p>
--	---	--	---

Official - Subject to Final Review

<p>recourse ^[1] 41:13 reduce ^[1] 55:25 redundant ^[1] 27:14 refer ^[6] 25:16,17,21 34:11 48:6,18 reference ^[1] 45:8 referencing ^[1] 48:1 referring ^[2] 48:15 50:3 refers ^[3] 31:21 48:3,13 reflect ^[2] 30:3,7 reflected ^[1] 51:21 reflects ^[1] 42:21 regarding ^[1] 39:4 regime ^[1] 57:9 relatively ^[1] 17:4 rely ^[1] 61:7 relying ^[1] 56:6 Remember ^[1] 32:10 removal ^[9] 10:16 12:8 17:20,23 18:8,25 32:12 47:2 58:3 remove ^[1] 49:21 reopen ^[6] 21:12,16 22:17 28:20 39:12 58:3 report ^[6] 27:16,17,21,23 28:5 61:7 required ^[2] 41:7 64:14 requirement ^[2] 4:18 52:19 requires ^[3] 8:19 59:10,14 resist ^[1] 19:25 resolve ^[2] 17:10 26:25 resolving ^[2] 19:6,8 respect ^[2] 22:24 44:6 respond ^[4] 5:25 11:14 25:23 26:12 responded ^[1] 5:21 Respondent ^[6] 1:7,13 2:6 3:7 22:7 31:2 responding ^[2] 52:21 60:18 response ^[5] 6:14 11:9 33:19 52:14 64:14 responses ^[1] 12:19 rested ^[1] 61:20 restrict ^[1] 17:19 result ^[3] 9:11,14 12:9 retained ^[1] 27:4 retroactive ^[1] 50:20 return ^[1] 34:15 reverse ^[1] 11:4 reverse-engineering ^[1] 43:13 review ^[87] 4:11,15,17,21 5:13,14,18 6:8,12,21 7:8,12,21 10:3,5,12,18 11:4 12:24 14:24 15:3,14 17:20,22 18:11 19:14,17,22 20:14 21:5,7,8,25 23:15 24:6 25:6,7,7,10 26:19 27:24 31:19 32:8,14,18 35:3 36:16 37:6,9,18 40:10,12,13,16,21,25 43:10 46:8,17,18 49:5,21 52:2,9 53:4,5 54:3,11 55:3,11,12,22 56:24 57:25 58:22 59:5 60:10,12,13 62:13,13,15 63:20 64:8,11,12 65:4 reviewability ^[4] 29:22 30:19 35:16 51:14 reviewable ^[15] 15:10 17:25 22:16 23:2,19 24:3 33:18,24 34:20 35:</p>	<p>25 41:6,18,19 48:11 56:4 reviewed ^[12] 8:23 9:21 19:12,13 20:4 23:6 46:21 58:4,9,11 60:20 61:10 reviewing ^[3] 4:24 5:1 58:10 rigid ^[1] 39:3 rise ^[2] 34:23 59:9 rises ^[1] 16:4 ROBERTS ^[8] 4:3 16:17 30:22 42:18 43:4 50:23 62:5 65:6 roots ^[1] 54:23 rubber ^[1] 35:6 RUBEN ^[1] 1:9 rule ^[14] 5:12,22 9:22,25 28:1 29:7,17 35:15 39:3 63:4,14,15 64:10,22 rules ^[3] 5:8 62:23,23 run ^[1] 43:13</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>safety ^[1] 56:1 same ^[9] 5:3,4 16:16 19:4 26:17 28:22 29:24 31:21 34:1 saving ^[2] 47:16 56:9 saying ^[10] 6:12,17 13:22 23:13 28:22 40:23 44:15,16 49:13 53:18 says ^[11] 21:21 22:14 27:23 28:5 33:15 37:12,16 39:10 40:4,5 45:3 scales ^[1] 52:1 scope ^[5] 26:14,16,23 32:7 50:5 se ^[2] 29:7,17 Second ^[3] 5:19 26:11 62:22 Section ^[8] 4:11 15:17 20:11 26:4,19 31:6 32:3 62:18 sections ^[1] 26:5 see ^[6] 6:19 50:14 53:20 56:12 59:2 61:24 seeking ^[1] 58:3 seem ^[1] 51:12 seeded ^[1] 13:24 seems ^[4] 12:15 39:14 46:21 48:2 sense ^[1] 52:7 sentences ^[1] 27:22 separate ^[3] 6:1 27:4 44:11 separately ^[1] 48:6 separation ^[8] 30:20 35:17 52:13 53:19,21,25 54:15 63:22 serious ^[1] 22:10 serves ^[1] 28:19 set ^[3] 15:6 17:12 63:6 settled ^[2] 36:3 50:1 Seventh ^[1] 29:8 sham ^[5] 7:18,18 8:5,9,14 shared ^[1] 26:13 shot ^[2] 58:20 59:12 shown ^[2] 20:13,20 side ^[3] 45:21 51:3 57:14 sides ^[1] 51:6 significance ^[2] 5:14 15:12 significant ^[2] 47:15 52:8 similar ^[3] 15:19 19:10 51:5 since ^[2] 32:11 47:1 single ^[1] 15:3 situation ^[2] 7:22 46:24</p>	<p>situations ^[1] 6:13 Sixth ^[1] 29:7 skeptical ^[1] 27:18 slight ^[1] 10:9 sloppily ^[1] 45:19 small ^[1] 25:2 soft ^[1] 16:20 Solicitor ^[1] 2:4 solution ^[2] 56:12,25 somebody ^[1] 19:4 sometimes ^[6] 14:20 44:10,10,11,12 45:18 sorry ^[2] 11:18 48:23 sort ^[12] 12:14 13:13,17 14:4 16:15 21:24 43:10,13 52:12,18 61:1,16 sorts ^[1] 14:10 SOTOMAYOR ^[15] 15:16,18 28:7,17,24 29:1 39:6,8,21 47:4 49:3,7 50:7,10,22 sought ^[1] 33:6 sound ^[1] 23:3 sources ^[1] 61:25 speaks ^[3] 26:2,8,9 special ^[2] 38:21,25 specific ^[1] 27:8 specifically ^[1] 25:18 spoken ^[1] 29:21 St ^[30] 5:21,25 11:10,17,19 25:12 26:12,21 31:14,18,22 32:4 40:22,24 44:19 49:11,13,24 50:3,14 51:8 54:18 55:6,20 60:17,21 61:21 64:3,14,15 stamp ^[1] 35:6 standard ^[51] 4:16,20,22 5:1,2,5,11 6:15,18 7:5,7 8:6,10,12,18,19 9:4 10:21,22 14:15 15:3,11 16:4 18:11 19:22 23:7,11 24:14,23 34:3 35:5,9 36:3,6,8,15 37:11,13,15,22 39:25 40:4,24 43:6 57:25 58:12,21 59:5 62:20 63:11,12 standard's ^[1] 62:21 stands ^[1] 52:13 start ^[3] 4:13 7:1 57:5 started ^[1] 12:4 starting ^[1] 62:17 starts ^[1] 65:1 stat ^[1] 48:12 state ^[2] 24:13 36:8 stated ^[1] 64:1 statement ^[5] 6:6 15:20 35:15 49:19 62:20 STATES ^[4] 1:1,20 18:15 53:11 statute ^[13] 11:7 25:17,21 33:11 41:11 43:14 46:4 48:5,12 49:18 54:8 55:11 56:6 statute's ^[1] 50:5 statutes ^[5] 25:15 40:20 44:19 45:4 55:14 statutory ^[9] 5:18 25:11,23 33:13 40:23 49:13 62:1 64:2,13 step ^[1] 20:20 sterilization ^[1] 18:21 stick ^[1] 9:24 still ^[5] 11:4 20:8,11,19 59:14</p>	<p>stops ^[1] 65:1 storm ^[1] 41:24 straight ^[2] 18:2,3 streamline ^[1] 32:11 strong ^[1] 52:7 strongly ^[2] 64:5,6 struck ^[1] 27:11 structural ^[1] 52:25 structure ^[2] 14:24 15:4 style ^[1] 13:8 subject ^[3] 10:17 21:24 24:19 subjected ^[1] 12:11 submitted ^[2] 65:7,9 substance ^[2] 7:12,12 substantial ^[9] 10:11,14,21 11:4 16:12 18:10 33:1,4 64:17 substantive ^[2] 25:6 62:14 subtle ^[1] 33:2 succinctly ^[1] 28:7 sufficient ^[1] 6:16 sufficiently ^[1] 9:4 suggest ^[3] 12:6 23:18 29:11 suggested ^[1] 7:1 suggests ^[4] 7:3 19:24 23:8 51:13 suitable ^[1] 63:15 suited ^[1] 57:19 summary ^[1] 59:8 superfluous ^[1] 34:7 supported ^[1] 33:1 suppose ^[5] 9:18 19:19,21 37:23 53:6 SUPREME ^[2] 1:1,19 surrounding ^[1] 41:24 Suspension ^[1] 64:18 sweep ^[1] 27:1 sweeps ^[1] 27:25</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table ^[1] 50:24 tail ^[2] 23:23 30:16 teach ^[2] 19:22 58:15 teaching ^[1] 60:1 teed ^[1] 39:19 ten ^[1] 57:24 tenable ^[1] 58:14 tensions ^[1] 49:16 Tenth ^[1] 20:22 term ^[2] 27:7 45:16 terms ^[2] 15:19 43:8 test ^[7] 5:7 7:15 9:7 34:2 63:5,9 64:23 testifies ^[1] 33:14 testify ^[1] 18:24 text ^[7] 5:19 31:9 32:3 45:2,3 51:3 64:13 textbook ^[1] 8:12 theory ^[5] 6:7,9,10 7:20,20 there's ^[18] 8:15,21,25 10:11,12 11:22 12:22 13:1 14:20 15:10 23:5 24:8 40:12 41:12 46:17,19 61:17 63:23 therefore ^[2] 30:11 56:3 they've ^[1] 20:19 thinking ^[2] 15:16 34:6</p>
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Official - Subject to Final Review

<p>third ^[2] 5:21 63:18 though ^[4] 6:18 12:16 47:7 54:22 threat ^[2] 16:1 24:10 three ^[4] 5:15 35:20 48:15,19 three-part ^[1] 26:2 threshold ^[1] 20:20 throughout ^[4] 10:16 11:22 39:18 59:19 thumb ^[1] 52:1 timely ^[1] 28:20 together ^[2] 15:2 25:20 tolling ^[5] 8:20 16:13 37:13 38:1 58:2 tool ^[1] 5:4 top ^[1] 11:9 topology ^[1] 26:2 toward ^[1] 25:20 tracking ^[1] 55:20 treating ^[1] 20:2 true ^[5] 14:21 18:9 23:24 60:19 65: 3 try ^[1] 14:17 trying ^[12] 11:11 16:23 21:4 36:20 39:23 40:11,16 41:25 56:25 57:6, 13 60:9 turn ^[1] 8:11 turned ^[1] 25:2 Turning ^[1] 5:24 two ^[8] 8:16 15:2 25:19 28:9 33:16 58:7,22 59:3 Twombly ^[1] 17:11 type ^[1] 41:7 types ^[1] 47:19 typically ^[1] 19:15</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S ^[1] 18:16 ultimate ^[1] 20:15 ultimately ^[6] 12:20 52:22 64:7,10, 21 65:2 unanimous ^[1] 26:20 unbounded ^[1] 41:3 unconstitutional ^[1] 53:14 undeniably ^[1] 64:12 under ^[17] 6:7 10:1,21 11:3 12:23 14:12 15:17 19:12 26:19 32:12 39: 15,19 41:6 47:22 53:2,17 58:11 undergird ^[1] 35:18 underlying ^[4] 9:8 20:23 29:18 63: 21 understand ^[7] 11:11,13 33:25 37: 20 39:4,17 44:21 understanding ^[2] 19:13 44:2 understood ^[1] 6:24 undertake ^[1] 29:13 undisputed ^[1] 18:1 undo ^[1] 32:7 unfair ^[1] 53:13 UNITED ^[4] 1:1,20 18:15 53:11 universe ^[2] 26:10 48:3 unlawful ^[1] 53:13 unless ^[1] 33:1 unlike ^[1] 15:1 unmistakably ^[1] 5:19</p>	<p>unmixed ^[1] 34:12 unreasonable ^[2] 35:10 39:11 unreviewable ^[1] 56:8 unusual ^[5] 12:9 23:4 40:4,5,9 unwind ^[1] 60:3 up ^[11] 12:8 23:1 33:12 38:15 39: 19 42:9,25 44:6 46:19 55:3 59:24 uses ^[2] 50:15,18 using ^[1] 13:16</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>values ^[1] 30:3 valve ^[1] 56:1 variety ^[1] 25:15 various ^[1] 64:2 version ^[1] 33:11 versus ^[5] 4:5 8:6 21:5 38:11 39:1 view ^[6] 5:3 12:6 35:1 37:5 53:8 63:23 violated ^[1] 29:18 violent ^[1] 22:10 virtually ^[1] 56:17</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wake ^[2] 60:19 64:15 walk ^[1] 42:8 wanted ^[8] 17:21 31:18 46:23,24 47:1 52:8,22,23 wanting ^[2] 11:19,20 wants ^[1] 55:2 wash ^[1] 64:4 Washington ^[3] 1:15 2:2,5 way ^[15] 9:2 20:11 21:21 26:7 28: 22 29:13 42:8 45:10 48:15 49:8 51:2,4 53:17 58:19,19 ways ^[4] 36:19 51:9 53:13 58:7 week ^[1] 17:9 weighing ^[2] 14:1,3 weight ^[2] 20:1 62:4 whatever ^[2] 16:14 30:16 Whenever ^[1] 46:18 whereas ^[2] 32:21,24 Whereupon ^[1] 65:8 whether ^[35] 4:15,19,21,25 5:1,10 6:8,10 8:7,21 12:8,10,11 13:1,7 15:25 16:3,8 18:22 20:12 21:12, 15 23:4,5 28:18 29:16 37:24 38: 16 43:12 59:8 62:15,19,21 63:10, 11 who's ^[2] 40:16 46:15 whoever ^[1] 59:15 whole ^[4] 23:25 26:10 57:12 59:18 will ^[9] 14:21 18:22,25 19:17 44:24 49:11 53:12 63:15 64:24 WILLIAM ^[2] 1:6,12 withdraw ^[1] 23:15 withdrawn ^[1] 28:4 within ^[2] 17:12 39:25 without ^[2] 29:10 54:10 wonder ^[1] 6:5 word ^[4] 27:10 34:6 50:18 62:3 words ^[5] 31:5 34:10 45:5 50:6 52: 19 work ^[6] 15:14 23:10,22,24 30:12</p>	<p>51:17 workable ^[1] 64:23 worked ^[1] 58:19 works ^[1] 56:6 wound ^[1] 16:1 writ ^[1] 49:14 Writing ^[1] 40:5 written ^[4] 11:7,9 33:7 55:11 wrote ^[2] 46:4 62:15</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[2] 47:14 64:25 years ^[1] 43:23 Yep ^[1] 51:1</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zipper ^[2] 26:6 48:25</p>
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