

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DOUGLAS BROWNBACK, ET AL.,)
 Petitioners,)
 v.) No. 19-546
JAMES KING,)
 Respondent.)

Pages: 1 through 68
Place: Washington, D.C.
Date: November 9, 2020

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

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -

3 DOUGLAS BROWNBACK, ET AL.,)

4 Petitioners,)

5 v.) No. 19-546

6 JAMES KING,)

7 Respondent.)

8 - - - - -

9

10 Washington, D.C.

11 Monday, November 9, 2020

12

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

16

17 APPEARANCES:

18 MICHAEL R. HUSTON, Assistant to the Solicitor General,
19 Department of Justice, Washington, D.C.;
20 on behalf of the Petitioners.

21 PATRICK M. JAICOMO, ESQUIRE, Arlington, Virginia;
22 on behalf of the Respondent.

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MICHAEL R. HUSTON, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	PATRICK M. JAICOMO, ESQ.	
7	On behalf of the Respondent	34
8	REBUTTAL ARGUMENT OF:	
9	MICHAEL R. HUSTON, ESQ.	
10	On behalf of the Petitioners	64
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(11:13 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 19-546, Brownback versus King.

Mr. Huston.

ORAL ARGUMENT OF MICHAEL R. HUSTON
ON BEHALF OF THE PETITIONERS

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

The text of the FTCA judgment bar resolves this case. The district court entered the judgment in an action under Section 1346(b), so that judgment constitutes a complete bar to any action by Respondent against the federal employees involved in his FTCA claim. That broad text unambiguously precludes Respondent's Bivens action here, which asserts the same injuries based on the very same subject matter.

The Sixth Circuit's refusal to apply the judgment bar in this case rested on two propositions: first, that when the United States prevails in an FTCA action, the district court must necessarily dismiss for lack of subject matter jurisdiction, and, second, that

1 such a jurisdictional dismissal does not trigger
2 the judgment bar.

3 Both propositions are wrong. This
4 Court rejected the Sixth Circuit's
5 jurisdictional analysis in *FDIC v. Meyer*, but
6 even more important for present purposes, this
7 Court in *Simmons v. Himmelreich* squarely
8 rejected the Sixth Circuit's conclusion that the
9 judgment bar never applies to an FTCA judgment
10 for the government.

11 The Court held instead that the
12 judgment bar does apply where a plaintiff simply
13 fails to prove his claim. And that conclusion
14 follows directly from the text of Section 2676,
15 which makes "the judgment" in an FTCA action
16 preclusive, without drawing any distinction
17 based on which side prevails.

18 Respondent now concedes that the Sixth
19 Circuit's reasoning cannot be reconciled with
20 *Simmons*, so he shifts to an alternative
21 argument. He says he should be able to bring an
22 FTCA action and an individual action together
23 without the judgment bar coming into play.

24 But the statutory text directly
25 refutes that argument too. Whereas common law

1 res judicata made a judgment preclusive "in a
2 subsequent action," Congress in the judgment bar
3 expressly departed from that rule and prohibited
4 any individual action following an FTCA
5 judgment.

6 That's because Congress wrote the
7 judgment bar to prevent duplicative litigation
8 against the government's employees, and that
9 objective does not depend on whether the
10 plaintiff's individual action is brought with
11 the same case number or a different one.

12 The judgment below should be reversed.

13 CHIEF JUSTICE ROBERTS: Mr. Huston, I
14 -- I want to ask you about your -- your last
15 point. As -- as you read this statute, the
16 disposition of an FTCA claim bars Bivens claims
17 against the employee.

18 But, of course, the statute speaks of
19 actions, not -- not claims. And it was -- was
20 and is very well established that there's no bar
21 with respect to claims in the same action.

22 If -- if Congress were going to make
23 such a dramatic departure from that rule, the
24 obvious word to use is right there; it's
25 "claims." And yet, they -- they didn't do that.

1 MR. HUSTON: If I might make two
2 points about that, Your Honor.

3 The first is that, as I just said,
4 you're right that the common law rule was that a
5 judgment in a -- in a subsequent action is
6 preclusive. But I think you can see that
7 Congress made exactly the type of express
8 departure from the common law that Your Honor
9 mentioned, because it deleted the word
10 "subsequent," which you will find in the first
11 Restatement, in this Court's cases over and over
12 again. Congress removed the word "subsequent
13 action" and replaced it with a complete bar to
14 any action.

15 CHIEF JUSTICE ROBERTS: Well, I don't
16 know -- I don't know that that's the clearest
17 way they could go about it. The clearest way to
18 go about it would say the claim, it would be a
19 -- a complete bar to any claim that is -- is
20 raised as opposed to, you know, any subsequent
21 action.

22 That's where the real departure is.
23 And it seems to me that that's a much more
24 direct way to eliminate any confusion than
25 simply deleting, you know, the "subsequent" in

1 -- that appeared in some -- some cases.

2 MR. HUSTON: Well, Your Honor, in --
3 in 1946, as we explain in our reply brief at
4 page 8, the definition of the term "action" was
5 a demand for relief in court. And I think you
6 can see that Section 2676 uses the term "action"
7 to be essentially synonymous with "claim"
8 because it refers to an action under
9 Section 1346(b). And so it's clearly tying the
10 -- the word "action" to specific causes of
11 action.

12 But, again, I think, if you put the
13 common law, the classic canonical formulation of
14 res judicata side by side with this statute, the
15 key difference you see is the deletion of the
16 word "subsequent" and the replacement with the
17 word "any."

18 So I think it's not surprising that
19 Congress would refer to preclusion of an action,
20 because that's traditional common law res
21 judicata. What the difference was, was that
22 they eliminated the requirement that preclusion
23 would occur only in a subsequent action and made
24 it a complete bar to any action.

25 And that, of course, accords directly

1 with Congress's purpose because, from the
2 standpoint of preventing duplicative litigation
3 against the federal employees, it makes
4 absolutely no difference whether the duplicative
5 individual action is filed together in the same
6 lawsuit with the FTCA action or separately. And
7 I think it --

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas.

11 JUSTICE THOMAS: Thank you, Mr. Chief
12 Justice.

13 Mr. Huston, I'd like to pick up on
14 your last point. Now the -- in this case,
15 Respondent filed the Bivens action together with
16 the FTCA action and -- though the argument seems
17 to have just disappeared and then reappeared
18 here.

19 Petition -- Respondent now argues that
20 if -- if he loses on the -- on the FTCA claim,
21 that he -- that he has the alternative argument
22 that since -- since these were filed together,
23 the outcome should be different from a case in
24 which they were filed separately or
25 sequentially.

1 What would be your argument there?

2 First, can he even make that argument now? And,
3 two, if he can, what -- give -- would you
4 elaborate more on your response to that?

5 MR. HUSTON: Absolutely, Justice
6 Thomas.

7 To your -- to your first question, I
8 think it's clear that Respondent did not develop
9 this argument in anything like the way that he
10 did in his brief below. Now whether -- whether
11 he waived it or not, you know, we haven't taken
12 a position on that. He gestured at the idea
13 that this litigation wasn't duplicative because
14 he only filed one lawsuit. But, certainly, this
15 is largely an argument that's been developed in
16 his brief in this Court.

17 To your -- to your question about why
18 we -- I think the text makes clear that that's
19 not allowed, in addition to the point I was just
20 making to the Chief Justice about the way in
21 which Congress expressly departed from the
22 common law by changing the -- the formulation.

23 I think the -- the implications of
24 Respondent's position are striking. And the
25 reason why every single court of appeals has

1 rejected Respondent's argument in the 70 years
2 since the judgment bar was enacted is that his
3 argument would permit him actually to litigate
4 under the FTCA and prevail, to win a judgment
5 against the United States and then seek
6 additional damages against the government's
7 employees, for example, punitive damages, just
8 because he brought the actions together in the
9 same lawsuit.

10 But we know from this Court's decision
11 in *Gilman* that that result is precisely what
12 Congress created the judgment bar to avoid, and
13 that's because the policy of the judgment bar is
14 one of repose. Congress found that lawsuits
15 against the government's employees are extremely
16 burdensome, and it wanted to limit them without
17 precluding them entirely by saying that, if a
18 plaintiff chooses to take advantage of the FTCA
19 cause of action, then the judgment in that
20 action will bring repose to the entire
21 controversy.

22 JUSTICE THOMAS: On the point of what
23 judgment, what sort of judgment in an action is
24 included, would an appeal -- a -- a judgment
25 that is still appealable also have the same

1 preclusive effect?

2 MR. HUSTON: Yes, Your Honor. I think
3 the definition of judgment in Section 26 is the
4 same as the definition of the word judgment in
5 the Federal Rules of Civil Procedure.

6 It is the order of a district court
7 that is appealable. Now, of course, that means
8 that if a plaintiff succeeds in appealing an
9 FTCA judgment and gets it vacated by a court of
10 appeals, at that point, there no longer is a
11 judgment in an action under Section 1346(b) and,
12 therefore, the judgment bar would no longer
13 apply.

14 But, while the judgment entered by the
15 district court is in force -- and, of course, in
16 this case, that judgment is final -- that
17 judgment by the plain text is a complete bar to
18 any individual action against the federal
19 employees.

20 JUSTICE THOMAS: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Breyer.

23 JUSTICE BREYER: Thank you.

24 Can -- can you tell me if I have this
25 basically right. Courts of appeals get lots of

1 appeals from district courts. And I thought a
2 judgment is a piece of paper normally that the
3 district judge files at the end of a lawsuit,
4 and it says judgment, and it tells you how the
5 lawsuit turned out, who won, and perhaps on what
6 grounds.

7 And, here, the judgment in an action
8 under 1346(b) shall constitute a complete bar.
9 But, normally, if you have four different claims
10 in the lawsuit, the judgment doesn't come in
11 until the whole thing is over.

12 You might preliminarily decide or you
13 decide the judge says this -- you're going to
14 lose on this claim, he's going to lose on this
15 claim, maybe he'll win on this claim, and, at
16 the very end of the thing, we have a judgment.
17 Isn't that how it works?

18 MR. HUSTON: Yes, Your Honor, I think
19 that description of the word judgment is right,
20 but that is exactly the judgment that the
21 district court entered here. And you can see
22 that at Petition Appendix 86A. The district
23 court resolved all of the claims in the case.

24 Now the key to the judgment bar, of
25 course --

1 JUSTICE BREYER: Well, it's the
2 judgment shall constitute a bar to an action of
3 the claimant by reason of the same subject
4 matter, et cetera, but the judgment didn't
5 appear until after he wanted to pursue his
6 Bivens claim.

7 MR. HUSTON: Your Honor, the --

8 JUSTICE BREYER: There was no judgment
9 to bar it because the judgment wasn't entered
10 yet.

11 MR. HUSTON: Respectfully, I disagree,
12 Your Honor. I think the judgment was entered by
13 the district court at the -- when it resolved
14 the dispositive motion, it resolved all of the
15 claims in the case and it entered a judgment.

16 That document, which is at Petition
17 Appendix 86A, that is the thing that triggered
18 the judgment bar. And Respondent left that
19 judgment final -- with respect, he left the
20 judgment in the action under Section 1346(b)
21 final by not appealing it.

22 So the core -- the core rule of the
23 judgment bar, when that judgment was entered, it
24 precludes any further litigation at that point.

25 JUSTICE BREYER: I -- I agree with

1 that. But I -- but I -- I mean, wasn't the
2 judge wrong to enter a judgment before he
3 decided the Bivens claim, or did he decide the
4 Bivens claim in the judgment?

5 MR. HUSTON: He decided the Bivens
6 claim, Your Honor. The district court resolved
7 --

8 JUSTICE BREYER: All right. He
9 decided it. Okay. On what ground did he decide
10 it? He decided it because there was a bar.
11 But, at that moment, there wasn't a bar because,
12 when he decided it, it was before he entered the
13 judgment.

14 MR. HUSTON: No, no --

15 JUSTICE BREYER: And at that point,
16 there was no judgment.

17 MR. HUSTON: No, respectfully, Your
18 Honor, the --

19 JUSTICE BREYER: Oh, all right.

20 MR. HUSTON: -- district court's
21 analysis had nothing whatsoever to do with the
22 judgment bar. The district court adjudicated
23 the substance of both the Bivens cause of action
24 and the FTCA cause of action. It never said
25 anything about the judgment bar.

1 The judgment bar was triggered only
2 after the district court entered judgment. And
3 you -- you can see this in the district court's
4 opinion.

5 JUSTICE BREYER: All right. All
6 right. I -- I -- I have enough to see that I
7 have to sit down and figure this out word by
8 word, which I'll do.

9 CHIEF JUSTICE ROBERTS: Justice Alito.

10 JUSTICE ALITO: Assuming the principal
11 argument now made by Respondent wasn't
12 forfeited, we have discretion whether to affirm
13 on that alternative ground. And what would you
14 say as to why we should not exercise that
15 discretion?

16 MR. HUSTON: Because, Your Honor, the
17 -- the -- this Court has held repeatedly in
18 interpreting the FTCA that the text means what
19 it says.

20 And, in particular, the word "any"
21 really does mean any. No exceptions. Those are
22 the core lessons of the Court's decisions in
23 Simmons, in Hui, in Millbrook, in Ali, and in
24 Smith. And so I think that all the Court has to
25 do is say that the language of this statute is

1 intentionally and exceptionally broad.

2 Congress imposed a complete bar to any
3 individual action, and that precludes Respondent
4 from bringing a demand for relief under Bivens
5 regardless of whether it's pleaded separately
6 from or together with the individual action.

7 So I think it's just --

8 JUSTICE ALITO: Well, that's a -- that
9 is an argument on the merits of that issue,
10 isn't it? I'm -- I'm asking the preliminary
11 question, why should we even get to that here?

12 We granted cert to decide a particular
13 question which has to do with the effect of a
14 final judgment. Why should we not presume most
15 of the time we answer the question on which we
16 -- we granted review and not some other
17 question?

18 So that's my question. That -- that's
19 what I'm asking you. Why should we depart from
20 our normal practice of just deciding the
21 question presented and decide another
22 question --

23 MR. HUSTON: I don't think that --

24 JUSTICE ALITO: -- which has been
25 addressed by -- how many courts of appeals have

1 addressed this issue and what have they decided?

2 MR. HUSTON: Seven courts of appeals
3 have addressed this argument, Your Honor. Every
4 single one of them has rejected the argument
5 that Respondent now makes that he is entitled to
6 litigate under the FTCA, prevail, and then
7 continue suing the government's employees.

8 So I think Your Honor is exactly right
9 that the reason why you should not exercise
10 discretion to consider this argument is because
11 it simply doesn't warrant the Court's review.

12 The only court of appeals that has --
13 has even come close to accepting Respondent's
14 argument is the Ninth Circuit, and the only way
15 that it did that was by building in a rule that
16 the judgment bar depends on which side wins.

17 And that, of course --

18 JUSTICE ALITO: Let me try to -- let
19 me try to ask one question about the question on
20 which we did grant review.

21 In your -- in your view, what is the
22 dividing line between a claim that is not
23 cognizable under 1346(b)(1) and a claim that is
24 cognizable yet fails on the merits?

25 MR. HUSTON: Well, Your Honor, I think

1 the insight of this Court's decision in FDIC v.
2 Meyer is that cognizable means the same thing as
3 actionable, and a claim is actionable so long as
4 the plaintiff alleges the elements, and that --
5 of Section 1346(b).

6 And that makes sense because the
7 question -- as this Court describes in Meyer,
8 the question whether the United States has
9 waived sovereign immunity for a particular type
10 of legal demand for relief is analytically
11 distinct from the question whether the plaintiff
12 can prevail on the merits or even whether he
13 stated a claim for relief under Federal Rule of
14 Civil Procedure 8.

15 JUSTICE ALITO: Well, is it -- is that
16 the -- is it the same test as it would be under
17 a federal question, in a federal question case?

18 MR. HUSTON: I think that that is a
19 perfectly fine analogy, Your Honor. Of course,
20 if a plaintiff pleaded in diversity that his
21 demand for relief was worth more than \$75,000,
22 and then it turns out later that he actually has
23 no claim at all at summary judgment, everyone
24 understands that that is a dismissal on the
25 merits of the claim that triggers res judicata,

1 even though we now know at that point that the
2 amount in controversy in the case is zero.

3 No one would think that the --

4 JUSTICE ALITO: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Sotomayor.

8 JUSTICE SOTOMAYOR: Counsel, I -- I am
9 a little confused, and perhaps your adversary
10 will un-confuse me, but I don't think every
11 circuit has held that a same suit claim of an
12 FTCA and a Bivens claim means that you can't
13 appeal them.

14 I thought at least the Ninth Circuit
15 has said so. All of the other circuits, I agree
16 with you, have said that, if you lose a FTCA
17 claim, you can't file the separate claim.
18 That's not the issue. It's the same claim.

19 But your adversary can tell me what
20 the circuit split is on that question. However,
21 I am going to go back to what Justice Alito
22 raised.

23 You brought the cert petition. I
24 believe that your adversary in its -- I believe
25 I know in its response, not at length, but it

1 did mention this as an alternative ground not to
2 grant cert, that he could bring the two claims
3 in the same action and not be precluded.

4 And I think the same argument was
5 raised below. Am I correct?

6 MR. HUSTON: Well, I certainly agree
7 with Your Honor that the Respondent raised the
8 argument as an alternative ground in the brief
9 in opposition. The argument -- again, in the
10 lower courts, in the court of appeals, the
11 argument -- the Respondent did not develop this
12 argument with anything like the argumentation
13 that now appears in this Court.

14 JUSTICE SOTOMAYOR: You know
15 something, counsel, that may or may not be true,
16 but it's fully briefed here. It's an issue of
17 law, isn't it? And you can defend the judgment
18 on any legal ground, correct?

19 MR. HUSTON: Yes, Your Honor. And
20 that's why we have fully briefed the --

21 JUSTICE SOTOMAYOR: All right. Now,
22 counsel, let me go on to where the Chief
23 started. He said that the FTCA talks about a
24 judgment in an action. In Section 2672 of the
25 FTCA, it says explicitly: Acceptance of an

1 administrative settlement with the U.S. shall
2 constitute a complete release of any claim
3 against the United States and against the
4 employee of the government.

5 It seems to me that Congress knew how
6 to say that -- that there was a big difference
7 between a release of a claim rather than a bar
8 to an action. So why should we accept your
9 argument that they meant the same thing when
10 they used different language in two different
11 sections?

12 MR. HUSTON: Because, Your Honor, the
13 definition of the term "action" in 1946 when
14 Congress wrote the judgment bar is a demand for
15 relief in court. And I think that when -- if
16 you just substitute that for -- that into the
17 text, then the judgment in an action under
18 Section 13 --

19 JUSTICE SOTOMAYOR: All right,
20 counsel, I'm almost out of time, so let me just
21 ask you one last question.

22 As a matter of policy, why would
23 Congress have wanted to go around the common law
24 rule?

25 It seems to me that then happenstance

1 controls. This district court could have ruled
2 the other way, could have said the Bivens claim
3 -- or, I'm sorry, the Bivens claims -- like in
4 Manning, the Bivens claim is good, but the FTCA
5 claim is not.

6 And you're still saying there's a bar,
7 correct?

8 MR. HUSTON: Arguably, Your Honor, I
9 mean, that would be consistent with one of
10 Congress's purpose for the judgment bar to wrap
11 everything up.

12 JUSTICE SOTOMAYOR: Well, why does
13 that make --

14 MR. HUSTON: It is that --

15 JUSTICE SOTOMAYOR: -- why does that
16 make sense when Congress explicitly, in the FTCA
17 and in the Westfall Act, saved the Bivens
18 claims?

19 MR. HUSTON: Because the purpose of
20 the judgment bar, Your Honor, is repose.
21 Congress wanted the judgment in the FTCA action
22 to bring repose to the entire controversy.

23 To your question specifically about
24 Bivens, I think this Court addressed that issue
25 directly in Hui, and just as it said there, the

1 text of the judgment bar is certainly broad
2 enough to preclude causes of action that are
3 both known and unknown when Congress enacted it.
4 I think the more --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Kagan.

8 JUSTICE KAGAN: Count -- counsel, just
9 a point of clarification first as to the extent
10 of your argument. There are courts in the
11 Seventh and the Tenth Circuit that have said
12 that the judgment bar can undo even prior final
13 judgments on Bivens claims, so sort of
14 retroactively undo a Bivens judgment.

15 Do you think that that's right?

16 MR. HUSTON: I think it's possible,
17 Your Honor, because it would be consistent with
18 the goal of the judgment bar to wrap the entire
19 resolution of the claim into the judgment on the
20 FTCA action.

21 Now, on -- I would also understand the
22 contrary argument that when the judgment has
23 been entered in the individual action, there is
24 no more individual action for the judgment bar
25 to preclude. It's, of course, not something

1 that this Court has to decide in this case,
2 because this is the quintessential example of an
3 FTCA judgment on the merits and, therefore, it's
4 the judgment in an action under Section 1346(b).

5 JUSTICE KAGAN: I guess I'm wondering
6 whether your understanding of this provision
7 makes it into something that the language
8 suggests it's not.

9 So, if I understand your position
10 correctly, you're really turning this into an
11 election-of-remedies provision; in other words,
12 that once somebody files an FTCA claim, then,
13 really, they -- they can't bring a Bivens claim
14 anymore. And the only way to bring a Bivens
15 claim is just to forego the FTCA claim.

16 And that might make sense, you know,
17 as a policy matter, to turn this statute into
18 such an election-of-remedies provision, but the
19 statute doesn't read like that. It -- I mean,
20 Congress knows how to write a provision like
21 that.

22 Instead, this statute reads like a
23 preclusion statute. And preclusion, as the
24 Chief Justice began the argument by saying,
25 always applies between suits and not within a

1 single suit.

2 MR. HUSTON: Well, Your Honor, I -- I
3 -- I -- I really think that Your Honor has it
4 exactly right, that the purpose of this statute
5 was to offer plaintiffs in Respondent's position
6 a choice. They could either stick with the
7 traditional individual cause of action, they
8 weren't foreclosed from that, but, if they
9 choose to take advantage of the FTCA cause of
10 action, which, of course, opens the opportunity
11 for the plaintiff to recover from the judgment
12 fund -- judgment's fund, then that choice comes
13 with consequences. And the critical consequence
14 --

15 JUSTICE KAGAN: All right. But I
16 think I was suggesting, just to -- just to make
17 myself clear, that's a perfectly sensible
18 statute. I guess my question is, is it the
19 statute that Congress wrote? That Congress
20 wrote a statute -- I mean, election-of-remedy
21 statutes are easy to write. And this is not
22 that. This is a preclusion statute, which has a
23 different set of consequences.

24 MR. HUSTON: Your -- yes, Your Honor,
25 but the -- the text of the judgment bar --

1 there's no -- is unambiguous. The triggering
2 event is the judgment in an action under
3 Section 1346(b), and then what comes next is a
4 extremely broad preclusion provision, a complete
5 bar to any action against the employee.

6 I think the only fair way to read that
7 provision is that Congress told plaintiffs that
8 if they pursue an action under Section 1346(b)
9 and it goes to judgment, then there can be no
10 further litigation against the federal
11 employees. And that's the --

12 JUSTICE KAGAN: Thank you.

13 MR. HUSTON: -- same objective --

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch.

16 JUSTICE GORSUCH: Thank you. No
17 questions.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh.

20 JUSTICE KAVANAUGH: Good morning,
21 Mr. Huston. I just want to follow up on
22 something Justice Alito raised and then Justice
23 Sotomayor followed up on, which is this
24 alternative argument being before us.

25 I mean, we could decide it, but, as

1 the Court's often said, we're a court of review,
2 not of first view. And there are obviously
3 important exceptions to that principle, but I'm
4 not sure this case really cries out for us to
5 depart from the general principle.

6 So why don't we resolve the question
7 presented as presented in the cert petition, I
8 think was Justice Alito's question, and that's
9 sufficient under the day, and we can worry about
10 the other issue when and if we need to address
11 that?

12 MR. HUSTON: Justice Kavanaugh, I
13 think that is exactly what the Court should do.
14 And the reason why that would be appropriate in
15 this case is that the alternative argument
16 raised by the Respondent would not warrant this
17 Court's review.

18 As I mentioned, every court of appeals
19 has rejected Respondent's position. Now the
20 Ninth Circuit, as Justice Sotomayor pointed out,
21 has adopted a slightly different rule, no -- not
22 shared by any other circuit, that just -- but
23 that really is just a relic of before Simmons,
24 because the Ninth Circuit's rule is that whether
25 or not the judgment bar is triggered depends on

1 who wins in the FTCA action. And Simmons was
2 absolutely clear that that is not how the
3 judgment bar works, which, of course, accords
4 with the statutory text.

5 So I really don't -- I just -- I think
6 the Court should not address the question.
7 There's no need to, because it's not cert
8 worthy. We addressed it in our brief because it
9 was raised and we wanted the Court to have all
10 the arguments, but I think that's a perfectly
11 sensible way to resolve the case.

12 JUSTICE KAVANAUGH: If we do resolve
13 that question, I'm going to reiterate questions
14 asked by others now, but the key problem for you
15 is it says "any action," not "any claims."

16 Do you just want to just summarize
17 your best arguments in response to that?

18 MR. HUSTON: Thank you, Justice
19 Kavanaugh, yes. Again, the term "action" is
20 defined in legal dictionaries in 1946, at the
21 relevant time, as a demand for relief in court.

22 So I think, if you substitute that
23 phrase into the judgment bar, then the judgment
24 in this FTCA action is a complete bar to any
25 demand for relief by the plaintiff under Bivens.

1 And that is -- just the plain text of
2 that understanding means that there's -- there's
3 no room for an exception for -- that -- that
4 would -- that would make preclusion applicable
5 only in a subsequent action. And I just think
6 it's particularly clear that Congress didn't
7 want that subsequent action limitation because
8 that was in every description of the common law,
9 and Congress changed that formulation expressly.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett.

13 JUSTICE BARRETT: Counsel, I want to
14 ask you a question about the question on which
15 we granted cert. Did the government make a
16 mistake in moving -- moving for dismissal under
17 Rule 12(b)(1) for lack of jurisdiction, as
18 opposed to for judgment on the pleadings or just
19 -- I -- I know -- I know they also moved for
20 summary judgment, but why even have the motion
21 to dismiss for lack of jurisdiction in there?

22 And I'll tell you the reason why I'm
23 asking is it seems to me that 1346(c) gives
24 district courts the jurisdiction to resolve
25 civil actions against the government on the

1 bases that's listed in the statute. And it
2 seems to me that that means that the government
3 is submitting as sovereign to the district
4 court's resolution of those claims either way,
5 whether they win or not, so it's different than,
6 say, in Simmons, where the district court does
7 not have jurisdiction to resolve claims if they
8 involve misconduct in the exercise of a
9 discretionary function.

10 So why did the government even treat
11 this as a jurisdictional issue?

12 MR. HUSTON: Well, Your Honor, there
13 -- at -- at the time in the Sixth Circuit, there
14 was some precedent that suggested that the
15 resolution of an FTCA claim on the merits would
16 also trigger some jurisdictional implications.

17 Now we don't think that that's
18 correct. As we explain in our brief, I think
19 Meyer explains -- and -- and as -- as Your Honor
20 just explained exactly correctly, the text of
21 Section 1346(c) refers to jurisdiction over
22 civil actions on claims alleging the FTCA's
23 element.

24 So -- and -- and as Meyer further
25 explained, that's analytically distinct from the

1 question whether the plaintiff is entitled to
2 prevail. But I think what -- what critically
3 matters for the case in this case is whether
4 there was the judgment in an action under
5 Section 1346(b).

6 And Meyer is perfectly clear that a
7 claim is actionable under Section 1346(b) so
8 long as the plaintiff alleges the elements. And
9 Respondent certainly alleged all the elements of
10 the FTCA claim. You can see that in the
11 complaint at JA 39 and 40.

12 So there's no dispute about what the
13 substance of the judgment was here. And as I
14 think Justice Breyer helpfully explained for the
15 First Circuit in Rowe, what matters to
16 preclusion is not the label that gets -- the
17 jurisdictional label that gets attached to
18 something, it's the substance.

19 And Semtek and many of this Court's
20 other cases are quite clear that where a
21 district court, as here, adjudicated the
22 substance of the FTCA cause of action --

23 JUSTICE BARRETT: So, counsel --

24 MR. HUSTON: -- that is a merits
25 determination that's precluded.

1 JUSTICE BARRETT: -- before my time
2 expires, let me just clarify something. So you
3 agree that if, say, the plaintiff had not
4 alleged all the elements and so the claim was
5 dismissed without prejudice under 12(b)(6), that
6 wouldn't count as a judgment that would trigger
7 the bar?

8 MR. HUSTON: Absolutely, Your Honor.
9 A dismissal is not a judgment. Those things are
10 not synonymous, as Justice Breyer explained.
11 It's -- it is only the entry of judgment that
12 triggers the judgment bar.

13 And that's why the judgment bar was
14 triggered in this case. When the district court
15 entered the final judgment at the end of the
16 case, Respondent simply chose for his own
17 reasons not to appeal that judgment.

18 JUSTICE BARRETT: Thank you.

19 CHIEF JUSTICE ROBERTS: A minute to
20 wrap up, Mr. Huston.

21 MR. HUSTON: Thank you, Mr. Chief
22 Justice.

23 We've talked already about why our
24 position is compelled by the statutory text and
25 this Court's precedent. I want to emphasize for

1 just a moment why it's fundamentally fair.

2 The decision below would permit a
3 plaintiff to bring a lawsuit against the United
4 States, litigate it all the way through summary
5 judgment, lose on the ground that the
6 government's employees did not do what was
7 alleged of them, and then turn around and pursue
8 claims against the same employees using the same
9 factual allegation.

10 That result makes little sense, and it
11 is directly at odds with Congress's objective
12 for the judgment bar, which was to prevent
13 duplicative litigation against the government's
14 employees after an FTCA judgment.

15 Congress's rule in the judgment bar
16 was straightforward. If a plaintiff chooses to
17 litigate an action under Section 1346(b), then
18 the judgment in that action will bring repose to
19 the entire controversy.

20 Respondent had a fair chance to obtain
21 damages for his alleged injury. He didn't
22 recover for the simple reason that he didn't
23 prove his case. And the judgment bar does not
24 allow him to start the case over again against
25 the officers. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, Mr.
2 Huston.

3 Mr. Jaicomo.

4 ORAL ARGUMENT OF PATRICK M. JAICOMO
5 ON BEHALF OF THE RESPONDENT

6 MR. JAICOMO: Mr. Chief Justice, and
7 may it please the Court.

8 Through the text of the FTCA, Congress
9 provides two independent and easily
10 administrable rules that control the application
11 of the judgment bar.

12 First, the judgment bar does not apply
13 to claims brought together in a single action.

14 As Will and Simmons explained, the
15 text of Section 2676 imports common law res
16 judicata. In the history of American law, res
17 judicata has never been applied to claims
18 brought together in a single action.

19 Section 2676's requirement of the
20 judgment in an action, not a judgment on a
21 claim, demonstrates that Congress did not intend
22 a judgment bar to depart from that common law
23 history.

24 Second, the judgment bar does not
25 apply to claims dismissed for lack of

1 jurisdiction. Because Section 1346 restricts
2 FTCA jurisdiction to actions on claims that
3 satisfy six elements, the dismissal of an FTCA
4 claim under Rule 12(b)(6) does not trigger the
5 judgment bar.

6 As Meyer explained, a claim does not
7 come within the FTCA's jurisdiction unless a
8 plaintiff has alleged facts sufficient to state
9 a cause of action under the statute. Thus, a
10 court's holding that a plaintiff has failed to
11 state a claim under the FTCA is not the judgment
12 in an action under Section 1346; it is a holding
13 that the court lacks jurisdiction to enter such
14 a judgment.

15 Both the same claims rule and the
16 jurisdictional rule honor the language Congress
17 enacted in the FTCA. Both present simple,
18 predictable standards that courts and parties
19 can follow, and neither results in duplicative
20 litigation. Under either rule, the judgment bar
21 does not apply to this case.

22 This Court should affirm the decision
23 below and allow King to pursue his meritorious
24 constitutional claims in this action, which is
25 the one and only lawsuit King has ever filed.

1 I welcome this Court's questions.

2 CHIEF JUSTICE ROBERTS: Mr. Jaicomo,
3 your theory really would combine the merits and
4 jurisdiction not just in a case like this but in
5 every case.

6 I mean, if you think you have a claim
7 under a federal question statute, if it turns
8 out you don't, then you would say, okay, well,
9 then there wasn't jurisdiction because I didn't
10 satisfy the elements of the statute that gave
11 rise to a federal -- federal question.

12 We've -- we've, I think, long held
13 that in a case like -- like this one, where, if
14 you make a determination under the merits, there
15 isn't the established jurisdiction against the
16 United States, that they're treated the same.
17 You can't -- in other words, whenever you lose,
18 you don't lose because the court had -- under
19 your theory, would have had no jurisdiction.

20 That doesn't seem to make much sense.

21 MR. JAICOMO: Yes, Mr. Chief Justice,
22 that's -- that's not the extent of our position.
23 We actually offer three different ways the Court
24 can view jurisdiction. And -- and I'll first
25 state that the reason that it's so complicated

1 is that through Section 1346, as the government
2 agrees, Congress simultaneously waived its
3 sovereign immunity, sets jurisdiction, and
4 provides the elements for a cause of action.

5 So the -- the most narrow way this
6 Court could look at that is to look at a case
7 like this and simply say the district court
8 itself entered a judgment under 12(b)(1).
9 Therefore, it concluded pursuant to Rule
10 12(h)(3) that it lacked jurisdiction of the
11 subject matter.

12 The -- the -- the middle ground
13 position is the position from Meyer, which is
14 that to trigger the jurisdiction of
15 Section 1346, a claim has to allege a valid
16 cause of action, which is also consistent with
17 this Court's dealing with the sovereign immunity
18 statute in Helmerich and Payne.

19 Only in the very broadest
20 understanding, which is brought in through the
21 Arbaugh decision, do any of the concerns that
22 you have raised come to light.

23 And so this Court could easily dispose
24 of this jurisdictional question without reaching
25 that furthest ruling, but I'm happy to discuss

1 it further if -- if Your Honor would like to do
2 so.

3 CHIEF JUSTICE ROBERTS: Well, I guess
4 I don't really understand. I think, under your
5 view, a -- a -- a favorable decision for the
6 government would never satisfy the elements of
7 the judgment bar because of the lack of
8 jurisdiction.

9 What -- what am I missing in that?

10 MR. JAICOMO: Yes, Your Honor. No,
11 that's only if this Court adopts the Arbaugh
12 standard. We offer two other more restrictive
13 understandings. So only under Arbaugh would
14 that be the case.

15 If this Court decides that
16 jurisdiction attaches after a claim passes
17 beyond Rule 12(b)(6) or if this Court decides
18 that jurisdiction has to be decided at Rule
19 12(b)(1), either way, a -- a -- a decision
20 favorable or not for the government would
21 trigger the judgment bar.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas.

25 JUSTICE THOMAS: Thank you, Mr. Chief

1 Justice.

2 Counsel, why should we even consider
3 your argument that the judgment bar doesn't
4 apply when the claims are brought together?

5 MR. JAICOMO: For several reasons,
6 Your Honor.

7 The first is that that's what the
8 language of the statute requires.

9 But the second is that that question
10 is embedded in the question presented that the
11 government brought to this Court. And I'll
12 quote the relevant language. It says, "the
13 question presented is whether a final judgment
14 in an action bars a claim." And that
15 necessarily requires this Court to consider how
16 that claim is presented.

17 And -- and, finally, this is not an
18 issue that has just come up now. The first
19 argument we made in the Sixth Circuit was that
20 the reason the judgment bar shouldn't be applied
21 to this case is because there's no chance of
22 duplicative litigation when claims are brought
23 together in the same action.

24 And as the government has conceded,
25 this is also a point that we made in our brief

1 in opposition to cert when that was filed.

2 JUSTICE THOMAS: Well, I have one
3 unrelated question, brief question.

4 Should it matter in deciding this case
5 that Bivens was -- didn't exist at the time the
6 judgment bar was enacted?

7 MR. JAICOMO: No, Your Honor, I don't
8 think that -- that that has an impact on the
9 outcome of this case simply because, as we
10 explain in our briefing, since the judgment bar
11 incorporates res judicata, the controlling issue
12 is that claim -- or that King brought all of his
13 claims in a single action.

14 So the subject matter for the action
15 is not at issue here since the Bivens claim and
16 the FTCA claim are brought in the same lawsuit.

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer.

20 JUSTICE BREYER: Well, if we did reach
21 this other question, what is your -- what will
22 you say to what your opposing colleague said?
23 Look, he said, if you read 1346(b)(1), if you
24 read -- it says the judgment in any action shall
25 constitute a complete bar.

1 Now, to any government claimant --
2 against the employee of the government, now
3 that's the point of this statute. Go sue the
4 United States; don't sue the employee. But, if
5 you're right, what you could do as a plaintiff
6 is you sue under the statute against the
7 government, you win, and then you go sue against
8 the employee, the very thing that the statute
9 was passed to stop.

10 MR. JAICOMO: No, Your Honor. Our --
11 our position, even under the broadest
12 understanding of jurisdiction, is that if you
13 bring separate actions and one of them is
14 against the United States and that concludes --

15 JUSTICE BREYER: No, you bring the
16 same action. What you do is you have a couple
17 of defendants.

18 MR. JAICOMO: Well, in -- in that
19 case, Your Honor, this would simply be a matter
20 of applying res judicata through the judgment
21 bar, which presents exactly that same scenario
22 where you could sue, for example, an employer
23 and an employee in the same lawsuit. And the
24 disposition of one claim or another wouldn't
25 necessarily foreclose your claim against the

1 other one.

2 JUSTICE BREYER: Well, that's my
3 problem, the disposition of one against the
4 other. So you win against the employer, the
5 government, and then you go sue the employee.

6 Well, I think if there was one thing
7 this statute was passed to stop, it was that.
8 It was that the United States should take the
9 liability and the employee wouldn't.

10 MR. JAICOMO: Well, Your Honor, that
11 --

12 JUSTICE BREYER: Am I wrong about
13 that?

14 MR. JAICOMO: No. But the
15 hypothetical you propose is that the claims are
16 brought together in the same action, so there is
17 no separate going and suing the employee.
18 There's only one lawsuit.

19 JUSTICE BREYER: Look, take my point.
20 I'm not interested in exactly how you do it.

21 MR. JAICOMO: Sure.

22 JUSTICE BREYER: If you can get --
23 Claim 1, we sue the government, give us some
24 money. Claim 2, employee, you're involved in
25 this lawsuit too, give us some money. Okay?

1 Now that's what I'm worried that your
2 argument here would lead to. And from what you
3 said so far, you say that's just what it would
4 lead to, and that's a good thing.

5 MR. JAICOMO: No, Your Honor. There's
6 no chance, for example, you could get a
7 duplicative recovery where you would --

8 JUSTICE BREYER: No, not duplicative.
9 He said extra damages, for example.

10 MR. JAICOMO: Oh, okay. Yes, so this
11 comes down to the fact that, as the Westfall Act
12 and this Court's decisions in Carlson and Wilkie
13 versus Robbins and Correction Incorporation
14 versus Malesko indicate, that Bivens and the
15 FTCA provide parallel, complementary remedies.

16 So it was exactly what Congress
17 intended for the rest of the courts --

18 JUSTICE BREYER: Okay. Then your
19 answer is he's right, you could do this, and
20 you're saying Congress did not want to stop all
21 the recoveries against the employee, right?

22 MR. JAICOMO: Yes, absolutely.

23 JUSTICE BREYER: Okay.

24 MR. JAICOMO: Absolutely.

25 JUSTICE BREYER: That's your answer.

1 Thank you very much.

2 CHIEF JUSTICE ROBERTS: Justice Alito.

3 JUSTICE ALITO: If a district court
4 rejects a claim under the FTCA for failure to
5 proof -- failure of proof, does the judgment bar
6 apply to that, or is that a jurisdictional
7 determination?

8 MR. JAICOMO: It wouldn't apply in any
9 case if the claims are brought together in the
10 same action, but, if they were brought
11 separately --

12 JUSTICE ALITO: Well, that wasn't my
13 question. How about if you answer the question
14 I actually asked?

15 MR. JAICOMO: If -- if they were
16 brought separately, Your Honor, the case would
17 have to pursue beyond trial, the same -- which
18 is the line that's drawn by Rule 12(h)(2).

19 JUSTICE ALITO: The case would have to
20 proceed beyond trial. What does that mean?

21 MR. JAICOMO: It's -- it's the
22 standard where a party can no longer raise a
23 12(b)(6) defense. Rule 12(h)(2) says you can
24 raise that defense up to and at trial but not
25 beyond it.

1 JUSTICE ALITO: Why is 12(b)(6) the
2 dividing line?

3 MR. JAICOMO: Because the language of
4 Section 1346 confers jurisdiction only when
5 there are claims that satisfy the elements of
6 the FTCA.

7 JUSTICE ALITO: Why are the elements
8 of the FTCA satisfied up to the -- not satisfied
9 up to 12(b)(6) but are satisfied after that
10 point?

11 MR. JAICOMO: Because, as this Court
12 explained in the Meyer decision, Your Honor, the
13 -- the trigger for jurisdiction is whether a
14 plaintiff has pleaded allegations that set forth
15 a cause of action. And so the failure of proof
16 portion of it, as is noted in the footnote of
17 Meyer, doesn't come into play until there's
18 actually fact-finding being done by the court.

19 JUSTICE ALITO: Why was the decision
20 here in essence a 12(b)(6) decision?

21 MR. JAICOMO: Well, for several
22 reasons.

23 First, Your Honor, is that the
24 government itself moved under 12(b)(1) and
25 12(b)(6). And the reason is that the court more

1 specifically held it was dismissing the case
2 under Rule 12(b)(1) or, alternatively, for
3 failure to state a claim under Rule 12(b)(6).

4 JUSTICE ALITO: What is the breakout
5 of the circuits on the question that you would
6 like us to decide?

7 MR. JAICOMO: Yes, Your Honor. So
8 there -- there is -- only the Ninth Circuit
9 has -- has adopted this same claims argument,
10 but that argument's also consistent with this
11 Court's decisions in Will and Simmons.

12 And, as we point out in the brief,
13 none of the other courts of appeals, which all
14 have somewhat different analyses of how they get
15 there, actually address the common law aspects
16 of Section 2676. And most of them simply rely
17 on the Manning decision from the Seventh
18 Circuit.

19 JUSTICE ALITO: In light of those --
20 what is it -- six circuits that have decided the
21 issue the other way, do you still think the
22 question is so clear that we should decide it
23 even though it was not the question that we were
24 asked to decide in this case?

25 MR. JAICOMO: Yes, Your Honor, it is

1 that clear. I think the language of
2 Section 2676 and the common law concepts that it
3 incorporates make it very clear. And so the
4 government has essentially come up with its
5 using of the judgment bar in this way in the
6 last couple decades. It's not as if this has
7 been the case since 1946.

8 And so I think this Court's
9 involvement would be very helpful on this issue.

10 JUSTICE ALITO: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor.

13 JUSTICE SOTOMAYOR: Counsel, I want to
14 separate out the two arguments, the
15 jurisdictional argument, which was the
16 government's -- which was the Sixth Circuit's
17 conclusion and the basis of the -- most of the
18 government's argument.

19 Your alternative argument, I call, the
20 same case argument. Can you -- Justice
21 Kavanaugh asked this question earlier, and I
22 posed the same one.

23 Given that it is one circuit against
24 others, has there been sufficient percolation
25 before the court below the Sixth Circuit for us

1 to jump in and decide this question now?

2 MR. JAICOMO: Yes, Your Honor.

3 JUSTICE SOTOMAYOR: As a matter of
4 policy, why should we do that? Meaning it's up
5 to us to decide whether to take a -- to address
6 a ground not decided upon by the court below.

7 MR. JAICOMO: Yes, Your Honor. So,
8 although the Sixth Circuit decision below didn't
9 address this issue, the Sixth Circuit has
10 addressed this issue, and I'll -- I'll concede
11 that it came out on the other side of it.

12 But the reason that this Court should
13 address this issue from a policy standpoint is
14 exactly the reasons that this Court explained
15 the judgment bar shouldn't operate in the
16 Simmons decision, which is, if this Court
17 doesn't draw the line on claims in the same
18 action, the result of a favor -- a decision in
19 favor of the government will be an enormous
20 increase in litigation. And because the
21 government has adopted this peculiar election of
22 remedies that's not really an election of
23 remedies, that litigation will be infinitely
24 more complex and plaintiffs will be obligated to
25 make it complex to ensure that the FTCA portion

1 or separate action never gets --

2 JUSTICE SOTOMAYOR: Counsel, I -- I do
3 have some practical difficulties with the
4 government's position on the same action,
5 meaning that what the government is encouraging
6 plaintiffs to do is to file their Bivens claims
7 first, win or lose, then file their FTCA claims,
8 and -- and hope that they've won and that we
9 don't put a bar in like the one that Justice
10 Kagan referred to earlier.

11 That seems somewhat time-confuse --
12 consuming. It also makes a difference whether a
13 district court decides whether it's going to
14 decide the Bivens claims first and just say, I
15 don't need to decide the FTCA claims, or try
16 both claims together, win both, give judgment on
17 both, and then go on appeal.

18 There seems variations that are very
19 inefficient. Am I right about that?

20 MR. JAICOMO: Yes, Your Honor. In
21 fact, every variation is very inefficient
22 because, as Your Honor's question indicates,
23 there's no way from an ex-post position for a
24 plaintiff to know what it should do to ensure
25 that it can litigate these claims in parallel,

1 even though Congress and this Court have both
2 said they can be litigated in parallel.

3 JUSTICE SOTOMAYOR: And that's the
4 answer to Justice Breyer, isn't it, that
5 Congress in both -- in both -- in both the FTCA
6 and in Westfall have agreed that Bivens claims
7 can and should be brought, correct?

8 MR. JAICOMO: Yes, Your Honor, that's
9 exactly correct.

10 JUSTICE SOTOMAYOR: Unless there has
11 been a bar of a judgment previously?

12 MR. JAICOMO: That's correct.

13 CHIEF JUSTICE ROBERTS: Justice Kagan.

14 JUSTICE KAGAN: Yes, Mr. Jaicomo, just
15 to continue in this same vein, I mean, what the
16 government is saying about this provision, you
17 know, makes sense in a way. I mean, the
18 government is saying this reflects a broad
19 remedial compromise. Plaintiffs can sue the
20 United States, but in exchange for that, they
21 give up certain remedies against federal
22 employees, and that that's the way we should
23 read the provision.

24 And you can well imagine how Congress
25 might have thought that that would be a good

1 thing to do. So why shouldn't we read the
2 provision that way?

3 MR. JAICOMO: Yes, Your Honor. I
4 don't dispute that you could make a policy
5 argument for why the -- that Congress should
6 create an exclusive -- or an election of
7 remedies, but this reason this Court shouldn't
8 read it that way is because Congress has not
9 done so and has explicitly carved out the
10 ability of plaintiffs to bring, under the
11 Westfall Act, an FTCA claim and a Bivens claim.

12 And even before then, since 1952 in
13 the Brooks case this Court decided, it has said
14 there is not an election of remedies in the FTCA
15 and has continued to say that every time it's
16 had the opportunity over the last 70 years.

17 JUSTICE KAGAN: And if you were just
18 to look at the -- at the language of the
19 provision, what would you say about the language
20 of the provision with respect to this question?

21 MR. JAICOMO: Yes, Your Honor. So
22 this gets us back to the distinction between an
23 action and any action. And it would -- it's
24 simply a situation where someone had the coupon
25 to go to a grocery store that says if you buy a

1 case of pop or soda, as -- as people might call
2 it, you get any case free. Of course, a
3 reasonable person would not understand that
4 coupon to mean the first case was free. You
5 have to buy the first case.

6 The government is, in this case -- in
7 this situation, asking the Court to say that
8 coupon applies to the first case of soda or, in
9 this instance, the first and only action that's
10 ever been brought.

11 JUSTICE KAGAN: If I understood
12 Mr. Huston's argument, it was that, you know,
13 you might think that we're taking the word
14 "action" and making it mean "claim" and, in
15 fact, you might think that the two words are
16 different, but, in fact, they're not, because
17 Mr. Huston said an action is just a demand for
18 relief in court, you know, when this statute was
19 written.

20 So why isn't that true?

21 MR. JAICOMO: Yes, Your Honor.
22 Because the definition that my friend relies on
23 is -- is definitely well outside the mainstream.
24 In the CALPERS decision, which is actually cited
25 in Public Citizen's textual analysis, amicus

1 brief, they -- this Court clearly delineated
2 between actions and claims, and it did so by
3 citing 1933's Black's Law Dictionary, which says
4 that the concept of an action is, if not
5 entirely, almost entirely synonymous with a
6 suit.

7 And so there's no way to split that
8 hair, especially in light of the fact that, as I
9 believe you pointed out earlier, Your Honor,
10 Section 2672, which is the release bar, refers
11 to complete release of any claim.

12 So Congress knew how to distinguish
13 between these concepts. It chose not to in the
14 judgment bar because it was adopting res
15 judicata.

16 JUSTICE KAGAN: Thank you,
17 Mr. Jaicomo.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch.

20 JUSTICE GORSUCH: Good morning, Your
21 Honor. I'd like to just return to the -- I
22 guess your alternative argument in the same
23 action simultaneously pending position. What do
24 we do about the fact that your client chose not
25 to pursue his FTCA claim on appeal? And so the

1 judgment there would seem to be in an action and
2 it's final. There doesn't appear to be any
3 simultaneously pending action under the FTCA at
4 this point.

5 MR. JAICOMO: Yes, Your Honor. So the
6 distinction is still the concept of actions
7 versus claims. So even with an action that has
8 multiple claims, the -- the failure of one claim
9 or the waiver of that claim doesn't doom the
10 other claims. As we cite on page 26 of our
11 brief, the statement from Wright Miller, which
12 says claim preclusion is not appropriate within
13 a single lawsuit so long as it continues to be
14 managed as a single action.

15 JUSTICE GORSUCH: So we go back to the
16 question of whether "any" means any, any
17 judgment in an action, which seems to
18 contemplate the possibility of multiple
19 judgments.

20 MR. JAICOMO: No, Your Honor.
21 Actually, the language of Section 2676 says
22 "the" judgment in an action, which is the
23 definite article requires that there can only be
24 a single judgment in an action.

25 JUSTICE GORSUCH: Yeah.

1 MR. JAICOMO: And that judgment
2 necessarily must deal with all the claims in the
3 action. So you can't have the judgment in an
4 action and there still be any action left to
5 apply the preclusive bar to.

6 JUSTICE GORSUCH: What -- what about
7 the "any action by the claimant" language?

8 MR. JAICOMO: Yes, Your Honor. This
9 just goes back to the -- the linguistic
10 distinction between "an action" and "any
11 action." And I'll -- I'll also point out that
12 any number of courts before the enactment of the
13 judgment bar had used the phrase "complete bar
14 to any action" to mean res judicata.

15 But even if that weren't the case, at
16 the time the judgment bar was enacted, Congress
17 understood that, for jurisdictional reasons, a
18 party could not sue the United States as a
19 codefendant with its employee. So the need for
20 something like separate or subsequent --

21 JUSTICE GORSUCH: I -- I guess what
22 I'm trying to get at is we have "the" judgment
23 in an action under the FTCA, and that would seem
24 to bar any other action like Bivens later.

25 MR. JAICOMO: Right.

1 JUSTICE GORSUCH: And your way around
2 that is to say that they're simultaneously
3 pending, but "the" judgment under the FTCA seems
4 to be final in this case.

5 MR. JAICOMO: Well, no, Your Honor,
6 the --

7 JUSTICE GORSUCH: It ought to be.

8 MR. JAICOMO: The judgment in an
9 action is not final because that action is this
10 case directly on appeal. So --

11 JUSTICE GORSUCH: But you'd have to --
12 well, okay. All right. Thank you, counsel.

13 MR. JAICOMO: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Thank you. Good
17 afternoon, Mr. Jaicomo.

18 I want to raise the point that's
19 bothering me about what we should decide, and I
20 don't blame you for raising the alternative
21 argument. I understand that. You're trying to
22 win the case. But trying to think about why we
23 should consider it.

24 We obviously discuss very carefully
25 our decisions to grant certiorari on particular

1 cases and particular issues within that case,
2 and we don't usually decide things that weren't
3 decided by the court below.

4 And there are exceptions to that, and
5 no doubt about that, and you -- but I don't
6 think this is embedded within in the way you
7 said. And sometimes we'll do it if it's really
8 -- really simple and it will be helpful just to
9 go ahead and resolve it. But I'm not sure this
10 qualifies as really simple either, because if we
11 get to the merits -- at least not very simple in
12 your direction because if we get to the merits
13 of that alternative argument, every court of
14 appeals, save one, has ruled against you, and
15 the text says "any action," not any subsequent
16 action.

17 You have forceful arguments in
18 response to that, but I guess I'm just back at
19 why should we consider that issue at this time
20 in this case, given the way it was developed in
21 the Sixth Circuit?

22 MR. JAICOMO: Yes, Your Honor. So,
23 like -- as I mentioned earlier, there's no
24 question that the Sixth Circuit didn't predicate
25 its decision on this point. But it was raised

1 in the Sixth Circuit. And in the Simmons case,
2 this Court actually decided the FTCA decision on
3 separate grounds than the one that the Sixth
4 Circuit had used below.

5 And so here I think the -- the
6 existence of the other circuit court
7 decisions -- which, as I mentioned, although
8 they somehow agree on this same claims point,
9 they do so in very different ways -- illustrates
10 that there's an enormous amount of confusion
11 that this Court could very simply clear up and
12 do so consistent with its decision in Simmons
13 and Will, which is focused on stating that the
14 purpose of the judgment bar is to prevent
15 duplicative litigation, as this Court said in
16 Will, multiple suits on identical --

17 JUSTICE KAVANAUGH: Well, can I just
18 stop you there? You said the other courts of
19 appeals have ruled against your position on this
20 issue in many different ways, and I don't see
21 how that makes it easier to clear that up. That
22 just means there are lots of routes that courts
23 of appeals have thought that lead to the
24 opposite result from what you're suggesting
25 here. That would seem to make it harder, not

1 easier, for us to just, in your words -- well, I
2 don't know if you used this phrase, but to clean
3 it up or clear it up, as you said.

4 MR. JAICOMO: Yes, Your Honor. I -- I
5 do think the -- the one thing that animates all
6 of those decisions is why this Court should
7 weigh in, which is that all of those decisions
8 repudiate or simply ignore the fact that
9 Section 2676 incorporates res judicata, which
10 has as its central premise the concept that you
11 can't be barring claims brought together in one
12 lawsuit.

13 JUSTICE KAVANAUGH: Well, that just
14 goes back to the any action versus any
15 subsequent action argument of the government,
16 which I -- I understand your point on that.

17 My time's up. Thank you very much.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett.

20 JUSTICE BARRETT: Counsel, I want to
21 make sure that I understand your position on the
22 nature of this judgment and whether it's on the
23 merits or can be a bar.

24 Is it your position -- I thought I
25 heard you say this earlier; maybe it was in

1 response to the Chief Justice -- that a judgment
2 is only -- functions as a bar if it's entered
3 after trial?

4 MR. JAICOMO: Yes, Your Honor. That's
5 one of the lines that we draw. There are three.
6 Simply put, in this case because the government
7 requested and received a 12(b)(1) dismissal, the
8 Court doesn't even need to reach that second --

9 JUSTICE BARRETT: Okay. But -- but
10 what about if it's a summary judgment? Didn't
11 the government also in this case request summary
12 judgment in the alternative? I thought they had
13 said 12(b)(1), 12(b)(6), or summary judgment.

14 MR. JAICOMO: Yes, Your Honor, they
15 did request it in the alternative, but the
16 district court didn't grant that. And all
17 through the Sixth Circuit, the government
18 continuously said it only moved under Rule 12,
19 and only then at the merits stage did they
20 announce that it was actually a Rule 56 summary
21 judgment decision.

22 JUSTICE BARRETT: Okay. So what if
23 they had won summary judgment? In your view,
24 then, is that a judgement that, even if the
25 United States wins, can then be a bar?

1 MR. JAICOMO: I -- I think it depends,
2 Your Honor. I think because the court is
3 required to assess its own jurisdiction, that a
4 court necessarily has to decide. Certainly in
5 -- in a situation where a party has raised these
6 alternative avenues for relief, that --

7 JUSTICE BARRETT: No, no, no, just
8 answer as to the question. So it's summary
9 judgment and the United States -- I just don't
10 understand how that's not done on the merits.

11 MR. JAICOMO: Yes, Your Honor. It --
12 it simply depends on whether there has been
13 actual fact-finding or not. And the reason that
14 the on-the-merits portion is a little obscure is
15 because, as I mentioned, and the government
16 agrees, the language of Section 1346(b)
17 intertwines merits, jurisdiction, and sovereign
18 immunity.

19 JUSTICE BARRETT: Okay. Let me ask
20 you a question about this second alternative
21 argument that you've made. Let's say that
22 you're -- you bring a Bivens claim first and you
23 lose, and then you bring an FTCA claim against
24 the United States.

25 Can the United States then just under

1 regular common law preclusion assert defensive
2 issue preclusion against you?

3 MR. JAICOMO: No, Your Honor, I don't
4 think that it can, because as the professors'
5 amicus brief points out, there's a different
6 primary right at stake.

7 And so if simple preclusion was being
8 applied, a Bivens claim before an FTCA claim
9 would not have a preclusive bar.

10 JUSTICE BARRETT: Well, but issue
11 preclusion just requires identity of issues,
12 right?

13 MR. JAICOMO: Yes. Of course, we're
14 talking about claim preclusion, but if we were
15 talking about issues --

16 JUSTICE BARRETT: I know, but I asked
17 about issue.

18 MR. JAICOMO: If we were talking about
19 issue preclusion, Your Honor, yes, there would
20 be certain issues that could be carried over
21 from the Bivens claim to the FTCA claim, but if
22 you look at a case like this, the FTCA claim was
23 decided on grounds of government immunity that
24 wouldn't apply to a Bivens claim.

25 So it depends on how the Bivens claim

1 is decided, if you're -- if you're looking at
2 issue preclusion.

3 JUSTICE BARRETT: Okay, thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Jaicomo,
5 you can take a couple of minutes to wrap up.

6 MR. JAICOMO: Yes, Your Honor.

7 Embedded in Congress's enactment of
8 the FTCA and its judgment bar, it is a very
9 simple common law doctrine that has been with
10 litigants since the beginning of this country,
11 which is the concept of res judicata.

12 The primary basis for res judicata is
13 that it only applies a separate lawsuit. This
14 Court has said so on many occasions. And that
15 it only applies once a judgment has been entered
16 on the merits by a Court with jurisdiction.

17 So, as I mentioned, we raised this
18 issue of duplicative litigation in the Sixth
19 Circuit. The government has addressed it in its
20 brief. It's fully briefed. There's no reason
21 that this Court shouldn't honor the language
22 that Congress enacted by addressing this claim
23 issue.

24 And even if -- even in the
25 alternative, the independent ground here also

1 justifies this Court affirming the Sixth Circuit
2 because the government moved for and received a
3 dismissal on the basis of jurisdiction.

4 It should not now be allowed to come
5 to this Court and say: Jurisdiction and merits
6 are the same and merits should, therefore,
7 prevail because, as Wright and Miller and the
8 First Restatement and many other places have
9 said, any time jurisdiction is entwined with
10 merits, jurisdiction controls, not merits.

11 And if it went the other way around,
12 the Court would be able to reach beyond its
13 actual authority granted by Congress.

14 So for these reasons, this Court
15 should affirm the Sixth Circuit and allow James
16 King to continue taking his first and only bite
17 at the apple in this lawsuit.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Huston, three minutes for
21 rebuttal.

22 REBUTTAL ARGUMENT OF MICHAEL R. HUSTON

23 ON BEHALF OF COMPLAINANT

24 MR. HUSTON: Thank you, Mr. Chief
25 Justice.

1 Regarding the question presented, the
2 judgment bar is triggered by the judgment in an
3 action under Section 1346(b). Respondent
4 created just such an action by pleading a demand
5 for relief alleging the elements of Section
6 1346(b) and the district court indisputably
7 entered judgment.

8 The Sixth Circuit explained at
9 Petition Appendix 1A, note 1, why the district
10 court's judgment is best understood as a summary
11 judgment in favor of the government because both
12 parties submitted a body of extensive
13 evidentiary exhibits in support of the motion,
14 but even if the Court concluded that the
15 judgment was best understood as a dismissal for
16 failure to state a claim, it makes no difference
17 because it's still the judgment in an action
18 under Section 1346(b), as Meyer explained, and
19 this Court's canonical decision in *Bell v. Hood*
20 makes clear that a dismissal for failure to
21 state a claim for relief is a decision on the
22 merits, and, therefore, preclusive.

23 The surest way to know Respondent's
24 main argument on the question presented is
25 incorrect is that it forces my friend into the

1 extraordinary conclusion that the judgment bar
2 is not triggered by a judgment in favor of the
3 United States on the FTCA action. Simmons
4 squarely foreclosed that and the plain text
5 refutes it.

6 Now, regarding my friend's fallback
7 argument, I think as the Court has recognized
8 this morning, it certainly has discretion not to
9 consider that argument in this case. And that's
10 the most appropriate disposition because the
11 alternative question simply isn't cert worthy.

12 There's no significant disagreement
13 about the circuits on it. The only circuit that
14 has even come close to saying something like
15 that argument is the Ninth. And that's -- the
16 basis of its -- of its reasoning was abrogated
17 by Simmons.

18 The Court should not leave in place
19 the Sixth Circuit's rather obvious mistaken
20 interpretation of the judgment bar and, instead,
21 decide the case in favor of Respondent on an
22 alternative ground that no other court has
23 accepted.

24 And -- and even if -- if the Court
25 were inclined to reach the alternative question,

1 we think the text is unambiguous in our favor.
2 Congress would have looked at a lawsuit like
3 this one and said Respondent has an action under
4 Section 1346(b) and an action under Bivens, and
5 he has joined them together in a single lawsuit,
6 but there's simply no way to read the phrase
7 "complete bar to any action" to actually mean
8 that Respondent is precluded only from bringing
9 a subsequent action, when that is exactly the
10 common law rule that Congress expressly changed.

11 In the 70 years since the judgment bar
12 was enacted, the courts of appeals have
13 overwhelmingly rejected this argument. And
14 that's because, as Justice Breyer recognized, it
15 directly conflicts with Congress's purpose.

16 Congress -- the rule that Respondent
17 advocates would permit a plaintiff to sue the
18 United States and win, and then continue
19 pursuing individual government employees for
20 additional relief, just because he brought his
21 two actions together in the same lawsuit. That
22 is exactly the result that Congress, it created
23 that judgment bar to prevent, as this Court
24 explained in *Gilman*.

25 For all those reasons, the judgment

1 should be reversed. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 12:16 p.m., the case
5 was submitted.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Official - Subject to Final Review

\$	absolutely ^[6] 8:4 9:5 28:2 32:8 43:22,24	alleging ^[2] 30:22 65:5	assert ^[1] 62:1
\$75,000 ^[1] 18:21	accept ^[1] 21:8	allow ^[3] 33:24 35:23 64:15	asserts ^[1] 3:18
1	Acceptance ^[1] 20:25	allowed ^[2] 9:19 64:4	assess ^[1] 61:3
1 ^[2] 42:23 65:9	accepted ^[1] 66:23	almost ^[2] 21:20 53:5	Assistant ^[1] 1:18
11:13 ^[2] 1:15 3:2	accepting ^[1] 17:13	already ^[1] 32:23	Assuming ^[1] 15:10
12 ^[1] 60:18	accords ^[2] 7:25 28:3	alternative ^[19] 4:20 8:21 15:13 20:1,8 26:24 27:15 47:19 53:22 56:20 57:13 60:12,15 61:6,20 63: 25 66:11,22,25	attached ^[1] 31:17
12(b)(1) ^[7] 29:17 37:8 38:19 45:24 46:2 60:7,13	Act ^[3] 22:17 43:11 51:11	alternatively ^[1] 46:2	attaches ^[1] 38:16
12(b)(6) ^[10] 32:5 35:4 38:17 44:23 45:1,9,20,25 46:3 60:13	action ^[122] 3:13,15,18,23 4:15,22, 22 5:2,4,10,21 6:5,13,14,21 7:4,6, 8,10,11,19,23,24 8:5,6,15,16 10: 19,20,23 11:11,18 12:7 13:2,20 14:23,24 16:3,6 20:3,24 21:8,13, 17 22:21 23:2,20,23,24 24:4 25:7, 10 26:2,5,8 28:1,15,19,24 29:5,7 31:4,22 33:17,18 34:13,18,20 35: 9,12,24 37:4,16 39:14,23 40:13,14, 24 41:16 42:16 44:10 45:15 48:18 49:1,4 51:23,23 52:9,14,17 53:4, 23 54:1,3,7,14,17,22,24 55:3,4,4,7, 10,11,14,23,24 56:9,9 57:15,16 59: 14,15 65:3,4,17 66:3 67:3,4,7,9	although ^[2] 48:8 58:7	authority ^[1] 64:13
12(h)(2) ^[2] 44:18,23	actionable ^[3] 18:3,3 31:7	American ^[1] 34:16	avenues ^[1] 61:6
12(h)(3) ^[1] 37:10	actions ^[9] 5:19 10:8 29:25 30:22 35:2 41:13 53:2 54:6 67:21	amicus ^[2] 52:25 62:5	avoid ^[1] 10:12
12:16 ^[1] 68:4	actual ^[2] 61:13 64:13	amount ^[2] 19:2 58:10	B
13 ^[1] 21:18	actually ^[11] 10:3 18:22 36:23 44: 14 45:18 46:15 52:24 54:21 58:2 60:20 67:7	analogy ^[1] 18:19	back ^[6] 19:21 51:22 54:15 55:9 57:18 59:14
1346 ^[9] 35:1,12 37:1,15 45:4	addition ^[1] 9:19	analyses ^[1] 46:14	bar ^[90] 3:11,14,21 4:2,9,12,23 5:2, 7,20 6:13,19 7:24 10:2,12,13 11: 12,17 12:8,24 13:2,9,18,23 14:10, 11,22,25 15:1 16:2 17:16 21:7,14 22:6,10,20 23:1,12,18,24 25:25 26:5 27:25 28:3,23,24 32:7,12,13 33:12,15,23 34:11,12,22,24 35:5, 20 38:7,21 39:3,20 40:6,10,25 41: 21 44:5 47:5 48:15 49:9 50:11 53: 10,14 55:5,13,13,16,24 58:14 59: 23 60:2,25 62:9 63:8 65:2 66:1,20 67:7,11,23
1346(b) ^[17] 3:13 7:9 11:11 12:8 13: 20 18:5 24:4 26:3,8 31:5,7 33:17 61:16 65:3,6,18 67:4	address ^[6] 27:10 28:6 46:15 48:5, 9,13	analysis ^[3] 4:5 14:21 52:25	Barrett ^[14] 29:12,13 31:23 32:1, 18 59:19,20 60:9,22 61:7,19 62: 10,16 63:3
1346(b)(1) ^[2] 17:23 40:23	addressed ^[7] 16:25 17:1,3 22:24 28:8 48:10 63:19	analytically ^[2] 18:10 30:25	barring ^[1] 59:11
1346(c) ^[2] 29:23 30:21	addressing ^[1] 63:22	animates ^[1] 59:5	bars ^[2] 5:16 39:14
19-546 ^[1] 3:4	administrable ^[1] 34:10	announce ^[1] 60:20	based ^[2] 3:19 4:17
1933's ^[1] 53:3	administrative ^[1] 21:1	another ^[2] 16:21 41:24	bases ^[1] 30:1
1946 ^[4] 7:3 21:13 28:20 47:7	adopted ^[3] 27:21 46:9 48:21	answer ^[6] 16:15 43:19,25 44:13 50:4 61:8	basically ^[1] 11:25
1952 ^[1] 51:12	adopting ^[1] 53:14	appeal ^[6] 10:24 19:13 32:17 49: 17 53:25 56:10	basis ^[4] 47:17 63:12 64:3 66:16
1A ^[1] 65:9	adopts ^[1] 38:11	appealable ^[2] 10:25 11:7	began ^[1] 24:24
2	advantage ^[2] 10:18 25:9	appealing ^[2] 11:8 13:21	beginning ^[1] 63:10
2 ^[1] 42:24	adversary ^[3] 19:9,19,24	appeals ^[14] 9:25 11:10,25 12:1 16:25 17:2,12 20:10 27:18 46:13 57:14 58:19,23 67:12	behalf ^[8] 1:20,22 2:4,7,10 3:8 34: 5 64:23
2020 ^[1] 1:11	advocates ^[1] 67:17	appear ^[2] 13:5 54:2	believe ^[3] 19:24,24 53:9
26 ^[2] 11:3 54:10	affirm ^[3] 15:12 35:22 64:15	APPEARANCES ^[1] 1:17	Bell ^[1] 65:19
2672 ^[2] 20:24 53:10	affirming ^[1] 64:1	appeared ^[1] 7:1	below ^[10] 5:12 9:10 20:5 33:2 35: 23 47:25 48:6,8 57:3 58:4
2676 ^[7] 4:14 7:6 34:15 46:16 47:2 54:21 59:9	afternoon ^[1] 56:17	appears ^[1] 20:13	best ^[3] 28:17 65:10,15
2676's ^[1] 34:19	agree ^[5] 13:25 19:15 20:6 32:3 58: 8	Appendix ^[3] 12:22 13:17 65:9	between ^[7] 17:22 21:7 24:25 51: 22 53:2,13 55:10
3	agreed ^[1] 50:6	apple ^[1] 64:17	beyond ^[5] 38:17 44:17,20,25 64: 12
3 ^[1] 2:4	agrees ^[2] 37:2 61:16	applicable ^[1] 29:4	big ^[1] 21:6
34 ^[1] 2:7	ahead ^[1] 57:9	application ^[1] 34:10	bite ^[1] 64:16
39 ^[1] 31:11	AL ^[1] 1:3	applied ^[3] 34:17 39:20 62:8	Bivens ^[34] 3:18 5:16 8:15 13:6 14: 3,4,5,23 16:4 19:12 22:2,3,4,17,24 23:13,14 24:13,14 28:25 40:5,15 43:14 49:6,14 50:6 51:11 55:24 61:22 62:8,21,24,25 67:4
4	Ali ^[1] 15:23	applies ^[5] 4:9 24:25 52:8 63:13, 15	Black's ^[1] 53:3
40 ^[1] 31:11	Alito ^[19] 15:9,10 16:8,24 17:18 18: 15 19:4,21 26:22 44:2,3,12,19 45: 1,7,19 46:4,19 47:10	apply ^[11] 3:20 4:12 11:13 34:12, 25 35:21 39:4 44:6,8 55:5 62:24	blame ^[1] 56:20
5	Alito's ^[1] 27:8	applying ^[1] 41:20	body ^[1] 65:12
56 ^[1] 60:20	allegation ^[1] 33:9	appropriate ^[3] 27:14 54:12 66:10	Both ^[13] 4:3 14:23 23:3 35:15,17 49:16,16,17 50:1,5,5,5 65:11
6	allegations ^[1] 45:14	Arbaugh ^[3] 37:21 38:11,13	bothering ^[1] 56:19
64 ^[1] 2:10	allege ^[1] 37:15	Arguably ^[1] 22:8	breakout ^[1] 46:4
7	alleged ^[5] 31:9 32:4 33:7,21 35:8	argues ^[1] 8:19	Breyer ^[24] 11:22,23 13:1,8,25 14: 8,15,19 15:5 31:14 32:10 40:19,
70 ^[3] 10:1 51:16 67:11	alleges ^[2] 18:4 31:8	argument ^[55] 1:14 2:2,5,8 3:4,7 4: 21,25 8:16,21 9:1,2,9,15 10:1,3 15:11 16:9 17:3,4,10,14 20:4,8,9, 11,12 21:9 23:10,22 24:24 26:24 27:15 34:4 39:3,19 43:2 46:9 47: 15,18,19,20 51:5 52:12 53:22 56: 21 57:13 59:15 61:21 64:22 65:24 66:7,9,15 67:13	
8		argument's ^[1] 46:10	
8 ^[2] 7:4 18:14		argumentation ^[1] 20:12	
86A ^[2] 12:22 13:17		arguments ^[4] 28:10,17 47:14 57: 17	
9		Arlington ^[1] 1:21	
9 ^[1] 1:11		around ^[4] 21:23 33:7 56:1 64:11	
A		article ^[1] 54:23	
a.m ^[2] 1:15 3:2		aspects ^[1] 46:15	
ability ^[1] 51:10			
able ^[2] 4:21 64:12			
above-entitled ^[1] 1:13			
abrogated ^[1] 66:16			

Official - Subject to Final Review

<p>20 41:15 42:2,12,19,22 43:8,18,23, 25 50:4 67:14</p> <p>brief [13] 7:3 9:10,16 20:8 28:8 30: 18 39:25 40:3 46:12 53:1 54:11 62:5 63:20</p> <p>briefed [3] 20:16,20 63:20</p> <p>briefing [1] 40:10</p> <p>bring [13] 4:21 10:20 20:2 22:22 24:13,14 33:3,18 41:13,15 51:10 61:22,23</p> <p>bringing [2] 16:4 67:8</p> <p>broad [5] 3:17 16:1 23:1 26:4 50: 18</p> <p>broadest [2] 37:19 41:11</p> <p>Brooks [1] 51:13</p> <p>brought [19] 5:10 10:8 19:23 34: 13,18 37:20 39:4,11,22 40:12,16 42:16 44:9,10,16 50:7 52:10 59: 11 67:20</p> <p>BROWNBACK [2] 1:3 3:4</p> <p>building [1] 17:15</p> <p>burdensome [1] 10:16</p> <p>buy [2] 51:25 52:5</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>call [2] 47:19 52:1</p> <p>CALPERS [1] 52:24</p> <p>came [2] 1:13 48:11</p> <p>cannot [1] 4:19</p> <p>canonical [2] 7:13 65:19</p> <p>carefully [1] 56:24</p> <p>Carlson [1] 43:12</p> <p>carried [1] 62:20</p> <p>carved [1] 51:9</p> <p>Case [59] 3:4,12,21 5:11 8:14,23 11:16 12:23 13:15 18:17 19:2 24: 1 27:4,15 28:11 31:3,3 32:14,16 33:23,24 35:21 36:4,5,13 37:6 38: 14 39:21 40:4,9 41:19 44:9,16,19 46:1,24 47:7,20 51:13 52:1,2,4,5, 6,8 55:15 56:4,10,22 57:1,20 58:1 60:6,11 62:22 66:9,21 68:3,4</p> <p>cases [4] 6:11 7:1 31:20 57:1</p> <p>cause [10] 10:19 14:23,24 25:7,9 31:22 35:9 37:4,16 45:15</p> <p>causes [2] 7:10 23:2</p> <p>central [1] 59:10</p> <p>cert [8] 16:12 19:23 20:2 27:7 28:7 29:15 40:1 66:11</p> <p>certain [2] 50:21 62:20</p> <p>certainly [6] 9:14 20:6 23:1 31:9 61:4 66:8</p> <p>certiorari [1] 56:25</p> <p>cetera [1] 13:4</p> <p>chance [3] 33:20 39:21 43:6</p> <p>changed [2] 29:9 67:10</p> <p>changing [1] 9:22</p> <p>CHIEF [37] 3:3,9 5:13 6:15 8:8,11 9:20 11:21 15:9 19:5 20:22 23:5 24:24 26:14,18 29:11 32:19,21 34: 1,6 36:2,21 38:3,22,25 40:18 44:2 47:11 50:13 53:18 56:14 59:18 60: 1 63:4 64:18,24 68:2</p> <p>choice [2] 25:6,12</p>	<p>choose [1] 25:9</p> <p>chooses [2] 10:18 33:16</p> <p>chose [3] 32:16 53:13,24</p> <p>Circuit [27] 17:14 19:11,14,20 23: 11 27:20,22 30:13 31:15 39:19 46: 8,18 47:23,25 48:8,9 57:21,24 58: 1,4,6 60:17 63:19 64:1,15 65:8 66: 13</p> <p>Circuit's [7] 3:20 4:4,8,19 27:24 47:16 66:19</p> <p>circuits [4] 19:15 46:5,20 66:13</p> <p>cite [1] 54:10</p> <p>cited [1] 52:24</p> <p>citing [1] 53:3</p> <p>Citizen's [1] 52:25</p> <p>Civil [4] 11:5 18:14 29:25 30:22</p> <p>claim [78] 3:16 4:13 5:16 6:18,19 7: 7 8:20 12:14,15,15 13:6 14:3,4,6 17:22,23 18:3,13,23,25 19:11,12, 17,17,18 21:2,7 22:2,4,5 23:19 24: 12,13,15,15 30:15 31:7,10 32:4 34:21 35:4,6,11 36:6 37:15 38:16 39:14,16 40:12,15,16 41:24,25 42: 23,24 44:4 46:3 51:11,11 52:14 53:11,25 54:8,9,12 61:22,23 62:8, 8,14,21,21,22,24,25 63:22 65:16, 21</p> <p>claimant [3] 13:3 41:1 55:7</p> <p>claims [44] 5:16,19,21,25 12:9,23 13:15 20:2 22:3,18 23:13 28:15 30:4,7,22 33:8 34:13,17,25 35:2, 15,24 39:4,22 40:13 42:15 44:9 45:5 46:9 48:17 49:6,7,14,15,16, 25 50:6 53:2 54:7,8,10 55:2 58:8 59:11</p> <p>clarification [1] 23:9</p> <p>clarify [1] 32:2</p> <p>classic [1] 7:13</p> <p>clean [1] 59:2</p> <p>clear [14] 9:8,18 25:17 28:2 29:6 31:6,20 46:22 47:1,3 58:11,21 59: 3 65:20</p> <p>clearest [2] 6:16,17</p> <p>clearly [2] 7:9 53:1</p> <p>client [1] 53:24</p> <p>close [2] 17:13 66:14</p> <p>codefendant [1] 55:19</p> <p>cognizable [3] 17:23,24 18:2</p> <p>colleague [1] 40:22</p> <p>combine [1] 36:3</p> <p>come [9] 12:10 17:13 35:7 37:22 39:18 45:17 47:4 64:4 66:14</p> <p>comes [3] 25:12 26:3 43:11</p> <p>coming [1] 4:23</p> <p>common [15] 4:25 6:4,8 7:13,20 9: 22 21:23 29:8 34:15,22 46:15 47: 2 62:1 63:9 67:10</p> <p>compelled [1] 32:24</p> <p>COMPLAINANT [1] 64:23</p> <p>complaint [1] 31:11</p> <p>complementary [1] 43:15</p> <p>complete [14] 3:14 6:13,19 7:24 11:17 12:8 16:2 21:2 26:4 28:24 40:25 53:11 55:13 67:7</p>	<p>complex [2] 48:24,25</p> <p>complicated [1] 36:25</p> <p>compromise [1] 50:19</p> <p>concede [1] 48:10</p> <p>conceded [1] 39:24</p> <p>concedes [1] 4:18</p> <p>concept [4] 53:4 54:6 59:10 63:11</p> <p>concepts [2] 47:2 53:13</p> <p>concerns [1] 37:21</p> <p>concluded [2] 37:9 65:14</p> <p>concludes [1] 41:14</p> <p>conclusion [4] 4:8,13 47:17 66:1</p> <p>confers [1] 45:4</p> <p>conflicts [1] 67:15</p> <p>confused [1] 19:9</p> <p>confusion [2] 6:24 58:10</p> <p>Congress [41] 5:2,6,22 6:7,12 7: 19 9:21 10:12,14 16:2 21:5,14,23 22:16,21 23:3 24:20 25:19,19 26: 7 29:6,9 34:8,21 35:16 37:2 43:16, 20 50:1,5,24 51:5,8 53:12 55:16 63:22 64:13 67:2,10,16,22</p> <p>Congress's [6] 8:1 22:10 33:11, 15 63:7 67:15</p> <p>consequence [1] 25:13</p> <p>consequences [2] 25:13,23</p> <p>consider [6] 17:10 39:2,15 56:23 57:19 66:9</p> <p>consistent [5] 22:9 23:17 37:16 46:10 58:12</p> <p>constitute [4] 12:8 13:2 21:2 40: 25</p> <p>constitutes [1] 3:14</p> <p>constitutional [1] 35:24</p> <p>consuming [1] 49:12</p> <p>contemplate [1] 54:18</p> <p>continue [4] 17:7 50:15 64:16 67: 18</p> <p>continued [1] 51:15</p> <p>continues [1] 54:13</p> <p>continuously [1] 60:18</p> <p>contrary [1] 23:22</p> <p>control [1] 34:10</p> <p>controlling [1] 40:11</p> <p>controls [2] 22:1 64:10</p> <p>controversy [4] 10:21 19:2 22:22 33:19</p> <p>core [3] 13:22,22 15:22</p> <p>correct [7] 20:5,18 22:7 30:18 50: 7,9,12</p> <p>Correction [1] 43:13</p> <p>correctly [2] 24:10 30:20</p> <p>counsel [18] 8:9 19:6,8 20:15,22 21:20 23:6,8 29:13 31:23 38:23 39:2 47:13 49:2 56:12 59:20 64: 19 68:3</p> <p>Count [2] 23:8 32:6</p> <p>country [1] 63:10</p> <p>couple [3] 41:16 47:6 63:5</p> <p>coupon [3] 51:24 52:4,8</p> <p>course [12] 5:18 7:25 11:7,15 12: 25 17:17 18:19 23:25 25:10 28:3 52:2 62:13</p> <p>COURT [93] 1:1,14 3:10,12,24 4:4,</p>	<p>7,11 7:5 9:16,25 11:6,9,15 12:21, 23 13:13 14:6,22 15:2,17,24 17: 12 18:7 20:10,13 21:15 22:1,24 24:1 27:1,13,18 28:6,9,21 30:6 31: 21 32:14 34:7 35:13,22 36:18,23 37:6,7,23 38:11,15,17 39:11,15 44:3 45:11,18,25 47:25 48:6,12, 14,16 49:13 50:1 51:7,13 52:7,18 53:1 57:3,13 58:2,6,11,15 59:6 60: 8,16 61:2,4 63:14,16,21 64:1,5,12, 14 65:6,14 66:7,18,22,24 67:23</p> <p>Court's [20] 6:11 10:10 14:20 15:3, 22 17:11 18:1 27:1,17 30:4 31:19 32:25 35:10 36:1 37:17 43:12 46: 11 47:8 65:10,19</p> <p>Courts [14] 11:25 12:1 16:25 17:2 20:10 23:10 29:24 35:18 43:17 46: 13 55:12 58:18,22 67:12</p> <p>create [1] 51:6</p> <p>created [3] 10:12 65:4 67:22</p> <p>cries [1] 27:4</p> <p>critical [1] 25:13</p> <p>critically [1] 31:2</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C [2] 1:10,19</p> <p>damages [4] 10:6,7 33:21 43:9</p> <p>day [1] 27:9</p> <p>deal [1] 55:2</p> <p>dealing [1] 37:17</p> <p>decades [1] 47:6</p> <p>decide [19] 12:12,13 14:3,9 16:12, 21 24:1 26:25 46:6,22,24 48:1,5 49:14,15 56:19 57:2 61:4 66:21</p> <p>decided [14] 14:3,5,9,10,12 17:1 38:18 46:20 48:6 51:13 57:3 58:2 62:23 63:1</p> <p>decides [3] 38:15,17 49:13</p> <p>deciding [2] 16:20 40:4</p> <p>decision [21] 10:10 18:1 33:2 35: 22 37:21 38:5,19 45:12,19,20 46: 17 48:8,16,18 52:24 57:25 58:2, 12 60:21 65:19,21</p> <p>decisions [7] 15:22 43:12 46:11 56:25 58:7 59:6,7</p> <p>defend [1] 20:17</p> <p>defendants [1] 41:17</p> <p>defense [2] 44:23,24</p> <p>defensive [1] 62:1</p> <p>defined [1] 28:20</p> <p>definite [1] 54:23</p> <p>definitely [1] 52:23</p> <p>definition [5] 7:4 11:3,4 21:13 52: 22</p> <p>deleted [1] 6:9</p> <p>deleting [1] 6:25</p> <p>deletion [1] 7:15</p> <p>delineated [1] 53:1</p> <p>demand [9] 7:5 16:4 18:10,21 21: 14 28:21,25 52:17 65:4</p> <p>demonstrates [1] 34:21</p> <p>depart [3] 16:19 27:5 34:22</p> <p>departed [2] 5:3 9:21</p> <p>Department [1] 1:19</p>
--	--	---	--

Official - Subject to Final Review

<p>departure [3] 5:23 6:8,22 depend [1] 5:9 depends [5] 17:16 27:25 61:1,12 62:25 describes [1] 18:7 description [2] 12:19 29:8 determination [3] 31:25 36:14 44:7 develop [2] 9:8 20:11 developed [2] 9:15 57:20 dictionaries [1] 28:20 Dictionary [1] 53:3 difference [6] 7:15,21 8:4 21:6 49:12 65:16 different [14] 5:11 8:23 12:9 21:10, 10 25:23 27:21 30:5 36:23 46:14 52:16 58:9,20 62:5 difficulties [1] 49:3 direct [1] 6:24 direction [1] 57:12 directly [7] 4:14,24 7:25 22:25 33:11 56:10 67:15 disagree [1] 13:11 disagreement [1] 66:12 disappeared [1] 8:17 discretion [4] 15:12,15 17:10 66:8 discretionary [1] 30:9 discuss [2] 37:25 56:24 dismiss [2] 3:24 29:21 dismissal [9] 4:1 18:24 29:16 32:9 35:3 60:7 64:3 65:15,20 dismissed [2] 32:5 34:25 dismissing [1] 46:1 dispose [1] 37:23 disposition [4] 5:16 41:24 42:3 66:10 dispositive [1] 13:14 dispute [2] 31:12 51:4 distinct [2] 18:11 30:25 distinction [4] 4:16 51:22 54:6 55:10 distinguish [1] 53:12 district [26] 3:12,23 11:6,15 12:1,3, 21,22 13:13 14:6,20,22 15:2,3 22:1 29:24 30:3,6 31:21 32:14 37:7 44:3 49:13 60:16 65:6,9 diversity [1] 18:20 dividing [2] 17:22 45:2 doctrine [1] 63:9 document [1] 13:16 done [3] 45:18 51:9 61:10 doom [1] 54:9 doubt [1] 57:5 DOUGLAS [1] 1:3 down [2] 15:7 43:11 dramatic [1] 5:23 draw [2] 48:17 60:5 drawing [1] 4:16 drawn [1] 44:18 uplicative [11] 5:7 8:2,4 9:13 33:13 35:19 39:22 43:7,8 58:15 63:18</p> <hr/> <p style="text-align: center;">E</p>	<p>earlier [5] 47:21 49:10 53:9 57:23 59:25 easier [2] 58:21 59:1 easily [2] 34:9 37:23 easy [1] 25:21 effect [2] 11:1 16:13 either [5] 25:6 30:4 35:20 38:19 57:10 elaborate [1] 9:4 election [4] 48:21,22 51:6,14 election-of-remedies [2] 24:11, 18 election-of-remedy [1] 25:20 element [1] 30:23 elements [11] 18:4 31:8,9 32:4 35:3 36:10 37:4 38:6 45:5,7 65:5 eliminate [1] 6:24 eliminated [1] 7:22 embedded [3] 39:10 57:6 63:7 emphasize [1] 32:25 employee [13] 5:17 21:4 26:5 41:2, 4,8,23 42:5,9,17,24 43:21 55:19 employees [13] 3:16 5:8 8:3 10:7, 15 11:19 17:7 26:11 33:6,8,14 50:22 67:19 employer [2] 41:22 42:4 enacted [7] 10:2 23:3 35:17 40:6 55:16 63:22 67:12 enactment [2] 55:12 63:7 encouraging [1] 49:5 end [3] 12:3,16 32:15 enormous [2] 48:19 58:10 enough [2] 15:6 23:2 ensure [2] 48:25 49:24 enter [2] 14:2 35:13 entered [15] 3:12 11:14 12:21 13:9, 12,15,23 14:12 15:2 23:23 32:15 37:8 60:2 63:15 65:7 entire [4] 10:20 22:22 23:18 33:19 entirely [3] 10:17 53:5,5 entitled [2] 17:5 31:1 entry [1] 32:11 entwined [1] 64:9 especially [1] 53:8 ESQ [3] 2:3,6,9 ESQUIRE [1] 1:21 essence [1] 45:20 essentially [2] 7:7 47:4 established [2] 5:20 36:15 ET [2] 1:3 13:4 even [23] 4:6 9:2 16:11 17:13 18:12 19:1 23:12 29:20 30:10 39:2 41:11 46:23 50:1 51:12 54:7 55:15 60:8,24 63:24,24 65:14 66:14, 24 event [1] 26:2 everyone [1] 18:23 everything [1] 22:11 evidentiary [1] 65:13 ex-post [1] 49:23 exactly [13] 6:7 12:20 17:8 25:4 27:13 30:20 41:21 42:20 43:16 48:14 50:9 67:9,22 example [5] 10:7 24:2 41:22 43:6,</p>	<p>9 exception [1] 29:3 exceptionally [1] 16:1 exceptions [3] 15:21 27:3 57:4 exchange [1] 50:20 exclusive [1] 51:6 exercise [3] 15:14 17:9 30:8 exhibits [1] 65:13 exist [1] 40:5 existence [1] 58:6 expires [1] 32:2 explain [3] 7:3 30:18 40:10 explained [11] 30:20,25 31:14 32:10 34:14 35:6 45:12 48:14 65:8, 18 67:24 explains [1] 30:19 explicitly [3] 20:25 22:16 51:9 express [1] 6:7 expressly [4] 5:3 9:21 29:9 67:10 extensive [1] 65:12 extent [2] 23:9 36:22 extra [1] 43:9 extraordinary [1] 66:1 extremely [2] 10:15 26:4</p> <hr/> <p style="text-align: center;">F</p> <p>fact [7] 43:11 49:21 52:15,16 53:8, 24 59:8 fact-finding [2] 45:18 61:13 facts [1] 35:8 factual [1] 33:9 failed [1] 35:10 fails [2] 4:13 17:24 failure [7] 44:4,5 45:15 46:3 54:8 65:16,20 fair [3] 26:6 33:1,20 fallback [1] 66:6 far [1] 43:3 favor [6] 48:18,19 65:11 66:2,21 67:1 favorable [2] 38:5,20 FDIC [2] 4:5 18:1 federal [12] 3:15 8:3 11:5,18 18:13, 17,17 26:10 36:7,11,11 50:21 figure [1] 15:7 file [3] 19:17 49:6,7 filed [7] 8:5,15,22,24 9:14 35:25 40:1 files [2] 12:3 24:12 final [10] 11:16 13:19,21 16:14 23:12 32:15 39:13 54:2 56:4,9 finally [1] 39:17 find [1] 6:10 fine [1] 18:19 first [22] 3:22 6:3,10 9:2,7 23:9 27:2 31:15 34:12 36:24 39:7,18 45:23 49:7,14 52:4,5,8,9 61:22 64:8, 16 focused [1] 58:13 follow [2] 26:21 35:19 followed [1] 26:23 following [1] 5:4 follows [1] 4:14 footnote [1] 45:16</p>	<p>force [1] 11:15 forceful [1] 57:17 forces [1] 65:25 foreclose [1] 41:25 foreclosed [2] 25:8 66:4 forego [1] 24:15 forfeited [1] 15:12 formulation [3] 7:13 9:22 29:9 forth [1] 45:14 found [1] 10:14 four [1] 12:9 free [2] 52:2,4 friend [2] 52:22 65:25 friend's [1] 66:6 FTCA [62] 3:11,16,23 4:9,15,22 5:4, 16 8:6,16,20 10:4,18 11:9 14:24 15:18 17:6 19:12,16 20:23,25 22:4,16,21 23:20 24:3,12,15 25:9 28:1,24 30:15 31:10,22 33:14 34:8 35:2,3,11,17 40:16 43:15 44:4 45:6,8 48:25 49:7,15 50:5 51:11,14 53:25 54:3 55:23 56:3 58:2 61:23 62:8,21,22 63:8 66:3 FTCA's [2] 30:22 35:7 fully [3] 20:16,20 63:20 function [1] 30:9 functions [1] 60:2 fund [2] 25:12,12 fundamentally [1] 33:1 further [4] 13:24 26:10 30:24 38:1 furthest [1] 37:25</p> <hr/> <p style="text-align: center;">G</p> <p>gave [1] 36:10 General [2] 1:18 27:5 gestured [1] 9:12 gets [5] 11:9 31:16,17 49:1 51:22 Gilman [2] 10:11 67:24 give [5] 9:3 42:23,25 49:16 50:21 Given [2] 47:23 57:20 gives [1] 29:23 goal [1] 23:18 Gorsuch [11] 26:15,16 53:19,20 54:15,25 55:6,21 56:1,7,11 government [34] 4:10 21:4 29:15, 25 30:2,10 37:1 38:6,20 39:11,24 41:1,2,7 42:5,23 45:24 47:4 48:19, 21 49:5 50:16,18 52:6 59:15 60:6, 11,17 61:15 62:23 63:19 64:2 65:11 67:19 government's [9] 5:8 10:6,15 17:7 33:6,13 47:16,18 49:4 grant [4] 17:20 20:2 56:25 60:16 granted [4] 16:12,16 29:15 64:13 grocery [1] 51:25 ground [10] 14:9 15:13 20:1,8,18 33:5 37:12 48:6 63:25 66:22 grounds [3] 12:6 58:3 62:23 guess [6] 24:5 25:18 38:3 53:22 55:21 57:18</p> <hr/> <p style="text-align: center;">H</p> <p>hair [1] 53:8 happenstance [1] 21:25</p>
---	--	--	--

Official - Subject to Final Review

<p>happy ^[1] 37:25 harder ^[1] 58:25 he'll ^[1] 12:15 hear ^[1] 3:3 heard ^[1] 59:25 held ^[5] 4:11 15:17 19:11 36:12 46:1 Helmerich ^[1] 37:18 helpful ^[2] 47:9 57:8 helpfully ^[1] 31:14 Himmelreich ^[1] 4:7 history ^[2] 34:16,23 holding ^[2] 35:10,12 Honor ^[63] 6:2,8 7:2 11:2 12:18 13:7,12 14:6,18 15:16 17:3,8,25 18:19 20:7,19 21:12 22:8,20 23:17 25:2,3,24 30:12,19 32:8 35:16 38:1,10 39:6 40:7 41:10,19 42:10 43:5 44:16 45:12,23 46:7,25 48:2,7 49:20 50:8 51:3,21 52:21 53:9,21 54:5,20 55:8 56:5 57:22 59:4 60:4,14 61:2,11 62:3,19 63:6,21 Honor's ^[1] 49:22 Hood ^[1] 65:19 hope ^[1] 49:8 However ^[1] 19:20 Hui ^[2] 15:23 22:25 HUSTON ^[47] 1:18 2:3,9 3:6,7,9 5:13 6:1 7:2 8:13 9:5 11:2 12:18 13:7,11 14:5,14,17,20 15:16 16:23 17:2,25 18:18 20:6,19 21:12 22:8,14,19 23:16 25:2,24 26:13,21 27:12 28:18 30:12 31:24 32:8,20,21 34:2 52:17 64:20,22,24 Huston's ^[1] 52:12 hypothetical ^[1] 42:15</p> <hr/> <p>I</p> <p>idea ^[1] 9:12 identical ^[1] 58:16 identity ^[1] 62:11 ignore ^[1] 59:8 illustrates ^[1] 58:9 imagine ^[1] 50:24 immunity ^[5] 18:9 37:3,17 61:18 62:23 impact ^[1] 40:8 implications ^[2] 9:23 30:16 important ^[2] 4:6 27:3 imports ^[1] 34:15 imposed ^[1] 16:2 inclined ^[1] 66:25 included ^[1] 10:24 incorporates ^[3] 40:11 47:3 59:9 Incorporation ^[1] 43:13 incorrect ^[1] 65:25 increase ^[1] 48:20 independent ^[2] 34:9 63:25 indicate ^[1] 43:14 indicates ^[1] 49:22 indisputably ^[1] 65:6 individual ^[11] 4:22 5:4,10 8:5 11:18 16:3,6 23:23,24 25:7 67:19 inefficient ^[2] 49:19,21</p>	<p>infinitely ^[1] 48:23 injuries ^[1] 3:19 injury ^[1] 33:21 insight ^[1] 18:1 instance ^[1] 52:9 instead ^[3] 4:11 24:22 66:20 intend ^[1] 34:21 intended ^[1] 43:17 intentionally ^[1] 16:1 interested ^[1] 42:20 interpretation ^[1] 66:20 interpreting ^[1] 15:18 intertwines ^[1] 61:17 involve ^[1] 30:8 involved ^[2] 3:16 42:24 involvement ^[1] 47:9 Isn't ^[7] 12:17 16:10 20:17 36:15 50:4 52:20 66:11 issue ^[24] 16:9 17:1 19:18 20:16 22:24 27:10 30:11 39:18 40:11,15 46:21 47:9 48:9,10,13 57:19 58:20 62:2,10,17,19 63:2,18,23 issues ^[4] 57:1 62:11,15,20 itself ^[2] 37:8 45:24</p> <hr/> <p>J</p> <p>JA ^[1] 31:11 JAICOMO ^[57] 1:21 2:6 34:3,4,6 36:2,21 38:10 39:5 40:7 41:10,18 42:10,14,21 43:5,10,22,24 44:8,15,21 45:3,11,21 46:7,25 48:2,7 49:20 50:8,12,14 51:3,21 52:21 53:17 54:5,20 55:1,8,25 56:5,8,13,17 57:22 59:4 60:4,14 61:1,11 62:3,13,18 63:4,6 JAMES ^[2] 1:6 64:15 joined ^[1] 67:5 judge ^[3] 12:3,13 14:2 judgement ^[1] 60:24 judgment ^[164] 3:11,13,14,21 4:2,9,9,12,15,23 5:1,2,5,7,12 6:5 10:2,4,12,13,19,23,23,24 11:3,4,9,11,12,14,16,17 12:2,4,7,10,16,19,20,24 13:2,4,8,9,12,15,18,19,20,23,23 14:2,4,13,16,22,25 15:1,2 16:14 17:16 18:23 20:17,24 21:14,17 22:10,20,21 23:1,12,14,18,19,22,24 24:3,4 25:11,25 26:2,9 27:25 28:3,23,23 29:18,20 31:4,13 32:6,9,11,12,13,15,17 33:5,12,14,15,18,23 34:11,12,20,20,22,24 35:5,11,14,20 37:8 38:7,21 39:3,13,20 40:6,10,24 41:20 44:5 47:5 48:15 49:16 50:11 53:14 54:1,17,22,24 55:1,3,13,16,22 56:3,8 58:14 59:22 60:1,10,12,13,21,23 61:9 63:8,15 65:2,2,7,10,11,15,17 66:1,2,20 67:11,23,25 judgment's ^[1] 25:12 judgments ^[2] 23:13 54:19 judicata ^[13] 5:1 7:14,21 18:25 34:16,17 40:11 41:20 53:15 55:14 59:9 63:11,12 jump ^[1] 48:1</p>	<p>jurisdiction ^[31] 3:25 29:17,21,24 30:7,21 35:1,2,7,13 36:4,9,15,19,24 37:3,10,14 38:8,16,18 41:12 45:4,13 61:3,17 63:16 64:3,5,9,10 jurisdictional ^[10] 4:1,5 30:11,16 31:17 35:16 37:24 44:6 47:15 55:17 Justice ^[152] 1:19 3:3,9 5:13 6:15 8:8,10,11,12 9:5,20 10:22 11:20,21,21,23 13:1,8,25 14:8,15,19 15:5,9,9,10 16:8,24 17:18 18:15 19:4,5,7,8,21 20:14,21 21:19 22:12,15 23:5,7,8 24:5,24 25:15 26:12,14,14,16,18,18,20,22,22 27:8,12,20 28:12,18 29:10,11,11,13 31:14,23 32:1,10,18,19,22 34:1,6 36:2,21 38:3,22,24,25 39:1 40:2,17,18,18,20 41:15 42:2,12,19,22 43:8,18,23,25 44:2,2,3,12,19 45:1,7,19 46:4,19 47:10,11,11,13,20 48:3 49:2,9 50:3,4,10,13,13,14 51:17 52:11 53:16,18,18,20 54:15,25 55:6,21 56:1,7,11,14,14,16 58:17 59:13,18,18,20 60:1,9,22 61:7,19 62:10,16 63:3,4 64:18,25 67:14 68:2 justifies ^[1] 64:1</p> <hr/> <p>K</p> <p>Kagan ^[11] 23:7,8 24:5 25:15 26:12 49:10 50:13,14 51:17 52:11 53:16 Kavanaugh ^[11] 26:19,20 27:12 28:12,19 29:10 47:21 56:15,16 58:17 59:13 key ^[3] 7:15 12:24 28:14 KING ^[6] 1:6 3:5 35:23,25 40:12 64:16 known ^[1] 23:3 knows ^[1] 24:20</p> <hr/> <p>L</p> <p>label ^[2] 31:16,17 lack ^[5] 3:24 29:17,21 34:25 38:7 lacked ^[1] 37:10 lacks ^[1] 35:13 language ^[14] 15:25 21:10 24:7 35:16 39:8,12 45:3 47:1 51:18,19 54:21 55:7 61:16 63:21 largely ^[1] 9:15 last ^[5] 5:14 8:14 21:21 47:6 51:16 later ^[2] 18:22 55:24 law ^[18] 4:25 6:4,8 7:13,20 9:22 20:17 21:23 29:8 34:15,16,22 46:15 47:2 53:3 62:1 63:9 67:10 lawsuit ^[19] 8:6 9:14 10:9 12:3,5,10 33:3 35:25 40:16 41:23 42:18,25 54:13 59:12 63:13 64:17 67:2,5,21 lawsuits ^[1] 10:14 lead ^[3] 43:2,4 58:23 least ^[2] 19:14 57:11 leave ^[1] 66:18 left ^[3] 13:18,19 55:4 legal ^[3] 18:10 20:18 28:20</p>	<p>length ^[1] 19:25 lessons ^[1] 15:22 liability ^[1] 42:9 light ^[3] 37:22 46:19 53:8 limit ^[1] 10:16 limitation ^[1] 29:7 line ^[4] 17:22 44:18 45:2 48:17 lines ^[1] 60:5 linguistic ^[1] 55:9 listed ^[1] 30:1 litigants ^[1] 63:10 litigate ^[5] 10:3 17:6 33:4,17 49:25 litigated ^[1] 50:2 litigation ^[12] 5:7 8:2 9:13 13:24 26:10 33:13 35:20 39:22 48:20,23 58:15 63:18 little ^[3] 19:9 33:10 61:14 long ^[4] 18:3 31:8 36:12 54:13 longer ^[3] 11:10,12 44:22 look ^[6] 37:6,6 40:23 42:19 51:18 62:22 looked ^[1] 67:2 looking ^[1] 63:1 lose ^[8] 12:14,14 19:16 33:5 36:17,18 49:7 61:23 loses ^[1] 8:20 lots ^[2] 11:25 58:22 lower ^[1] 20:10</p> <hr/> <p>M</p> <p>made ^[7] 5:1 6:7 7:23 15:11 39:19,25 61:21 main ^[1] 65:24 mainstream ^[1] 52:23 Malesko ^[1] 43:14 managed ^[1] 54:14 Manning ^[2] 22:4 46:17 many ^[5] 16:25 31:19 58:20 63:14 64:8 matter ^[11] 1:13 3:19,25 13:4 21:22 24:17 37:11 40:4,14 41:19 48:3 matters ^[2] 31:3,15 mean ^[14] 14:1 15:21 22:9 24:19 25:20 26:25 36:6 44:20 50:15,17 52:4,14 55:14 67:7 Meaning ^[2] 48:4 49:5 means ^[8] 11:7 15:18 18:2 19:12 29:2 30:2 54:16 58:22 meant ^[1] 21:9 mention ^[1] 20:1 mentioned ^[6] 6:9 27:18 57:23 58:7 61:15 63:17 meritorious ^[1] 35:23 merits ^[21] 16:9 17:24 18:12,25 24:3 30:15 31:24 36:3,14 57:11,12 59:23 60:19 61:10,17 63:16 64:5,6,10,10 65:22 Meyer ^[11] 4:5 18:2,7 30:19,24 31:6 35:6 37:13 45:12,17 65:18 MICHAEL ^[5] 1:18 2:3,9 3:7 64:22 middle ^[1] 37:12 might ^[7] 6:1 12:12 24:16 50:25 52:1,13,15</p>
--	---	--	---

Official - Subject to Final Review

<p>Millbrook ^[1] 15:23 Miller ^[2] 54:11 64:7 minute ^[1] 32:19 minutes ^[2] 63:5 64:20 misconduct ^[1] 30:8 missing ^[1] 38:9 mistake ^[1] 29:16 mistaken ^[1] 66:19 moment ^[2] 14:11 33:1 Monday ^[1] 1:11 money ^[2] 42:24,25 morning ^[3] 26:20 53:20 66:8 most ^[5] 16:14 37:5 46:16 47:17 66:10 motion ^[3] 13:14 29:20 65:13 moved ^[4] 29:19 45:24 60:18 64:2 moving ^[2] 29:16,16 much ^[4] 6:23 36:20 44:1 59:17 multiple ^[3] 54:8,18 58:16 must ^[2] 3:24 55:2 myself ^[1] 25:17</p>	<p>9 54:8 57:14 58:3 59:5,11 60:5 67:3 only ^[26] 7:23 9:14 15:1 17:12,14 24:14 26:6 29:5 32:11 35:25 37:19 38:11,13 42:18 45:4 46:8 52:9 54:23 60:2,18,19 63:13,15 64:16 66:13 67:8 opens ^[1] 25:10 operate ^[1] 48:15 opinion ^[1] 15:4 opportunity ^[2] 25:10 51:16 opposed ^[2] 6:20 29:18 opposing ^[1] 40:22 opposite ^[1] 58:24 opposition ^[2] 20:9 40:1 oral ^[5] 1:14 2:2,5 3:7 34:4 order ^[1] 11:6 other ^[22] 16:16 19:15 22:2 24:11 27:10,22 31:20 36:17 38:12 40:21 42:1,4 46:13,21 48:11 54:10 55:24 58:6,18 64:8,11 66:22 others ^[2] 28:14 47:24 ought ^[1] 56:7 out ^[14] 12:5 15:7 18:22 21:20 27:4,20 36:8 46:12 47:14 48:11 51:9 53:9 55:11 62:5 outcome ^[2] 8:23 40:9 outside ^[1] 52:23 over ^[7] 6:11,11 12:11 30:21 33:24 51:16 62:20 overwhelmingly ^[1] 67:13 own ^[2] 32:16 61:3</p>	<p>plain ^[3] 11:17 29:1 66:4 plaintiff ^[19] 4:12 10:18 11:8 18:4, 11,20 25:11 28:25 31:1,8 32:3 33:3,16 35:8,10 41:5 45:14 49:24 67:17 plaintiff's ^[1] 5:10 plaintiffs ^[6] 25:5 26:7 48:24 49:6 50:19 51:10 play ^[2] 4:23 45:17 pleaded ^[3] 16:5 18:20 45:14 pleading ^[1] 65:4 pleadings ^[1] 29:18 please ^[2] 3:10 34:7 point ^[20] 5:15 8:14 9:19 10:22 11:10 13:24 14:15 19:1 23:9 39:25 41:3 42:19 45:10 46:12 54:4 55:11 56:18 57:25 58:8 59:16 pointed ^[2] 27:20 53:9 points ^[2] 6:2 62:5 policy ^[6] 10:13 21:22 24:17 48:4, 13 51:4 pop ^[1] 52:1 portion ^[3] 45:16 48:25 61:14 posed ^[1] 47:22 position ^[16] 9:12,24 24:9 25:5 27:19 32:24 36:22 37:13,13 41:11 49:4,23 53:23 58:19 59:21,24 possibility ^[1] 54:18 possible ^[1] 23:16 practical ^[1] 49:3 practice ^[1] 16:20 precedent ^[2] 30:14 32:25 precisely ^[1] 10:11 preclude ^[2] 23:2,25 precluded ^[3] 20:3 31:25 67:8 precludes ^[3] 3:17 13:24 16:3 precluding ^[1] 10:17 preclusion ^[16] 7:19,22 24:23,23 25:22 26:4 29:4 31:16 54:12 62:1, 2,7,11,14,19 63:2 preclusive ^[7] 4:16 5:1 6:6 11:1 55:5 62:9 65:22 predicate ^[1] 57:24 predictable ^[1] 35:18 prejudice ^[1] 32:5 preliminarily ^[1] 12:12 preliminary ^[1] 16:10 premise ^[1] 59:10 present ^[2] 4:6 35:17 presented ^[8] 16:21 27:7,7 39:10, 13,16 65:1,24 presents ^[1] 41:21 presume ^[1] 16:14 prevail ^[5] 10:4 17:6 18:12 31:2 64:7 prevails ^[2] 3:23 4:17 prevent ^[4] 5:7 33:12 58:14 67:23 preventing ^[1] 8:2 previously ^[1] 50:11 primary ^[2] 62:6 63:12 principal ^[1] 15:10 principle ^[2] 27:3,5 prior ^[1] 23:12 problem ^[2] 28:14 42:3</p>	<p>Procedure ^[2] 11:5 18:14 proceed ^[1] 44:20 professors' ^[1] 62:4 prohibited ^[1] 5:3 proof ^[3] 44:5,5 45:15 propose ^[1] 42:15 propositions ^[2] 3:22 4:3 prove ^[2] 4:13 33:23 provide ^[1] 43:15 provides ^[2] 34:9 37:4 provision ^[11] 24:6,11,18,20 26:4, 7 50:16,23 51:2,19,20 Public ^[1] 52:25 punitive ^[1] 10:7 purpose ^[6] 8:1 22:10,19 25:4 58:14 67:15 purposes ^[1] 4:6 pursuant ^[1] 37:9 pursue ^[6] 13:5 26:8 33:7 35:23 44:17 53:25 pursuing ^[1] 67:19 put ^[3] 7:12 49:9 60:6</p>
N		Q	
<p>narrow ^[1] 37:5 nature ^[1] 59:22 necessarily ^[5] 3:24 39:15 41:25 55:2 61:4 need ^[5] 27:10 28:7 49:15 55:19 60:8 neither ^[1] 35:19 never ^[5] 4:9 14:24 34:17 38:6 49:1 next ^[2] 3:4 26:3 Ninth ^[6] 17:14 19:14 27:20,24 46:8 66:15 none ^[1] 46:13 normal ^[1] 16:20 normally ^[2] 12:2,9 note ^[1] 65:9 noted ^[1] 45:16 nothing ^[1] 14:21 November ^[1] 1:11 number ^[2] 5:11 55:12</p>	<p>ought ^[1] 56:7 out ^[14] 12:5 15:7 18:22 21:20 27:4,20 36:8 46:12 47:14 48:11 51:9 53:9 55:11 62:5 outcome ^[2] 8:23 40:9 outside ^[1] 52:23 over ^[7] 6:11,11 12:11 30:21 33:24 51:16 62:20 overwhelmingly ^[1] 67:13 own ^[2] 32:16 61:3</p>	<p>pop ^[1] 52:1 portion ^[3] 45:16 48:25 61:14 posed ^[1] 47:22 position ^[16] 9:12,24 24:9 25:5 27:19 32:24 36:22 37:13,13 41:11 49:4,23 53:23 58:19 59:21,24 possibility ^[1] 54:18 possible ^[1] 23:16 practical ^[1] 49:3 practice ^[1] 16:20 precedent ^[2] 30:14 32:25 precisely ^[1] 10:11 preclude ^[2] 23:2,25 precluded ^[3] 20:3 31:25 67:8 precludes ^[3] 3:17 13:24 16:3 precluding ^[1] 10:17 preclusion ^[16] 7:19,22 24:23,23 25:22 26:4 29:4 31:16 54:12 62:1, 2,7,11,14,19 63:2 preclusive ^[7] 4:16 5:1 6:6 11:1 55:5 62:9 65:22 predicate ^[1] 57:24 predictable ^[1] 35:18 prejudice ^[1] 32:5 preliminarily ^[1] 12:12 preliminary ^[1] 16:10 premise ^[1] 59:10 present ^[2] 4:6 35:17 presented ^[8] 16:21 27:7,7 39:10, 13,16 65:1,24 presents ^[1] 41:21 presume ^[1] 16:14 prevail ^[5] 10:4 17:6 18:12 31:2 64:7 prevails ^[2] 3:23 4:17 prevent ^[4] 5:7 33:12 58:14 67:23 preventing ^[1] 8:2 previously ^[1] 50:11 primary ^[2] 62:6 63:12 principal ^[1] 15:10 principle ^[2] 27:3,5 prior ^[1] 23:12 problem ^[2] 28:14 42:3</p>	<p>qualifies ^[1] 57:10 question ^[53] 9:7,17 16:11,13,15, 17,18,21,22 17:19,19 18:7,8,11,17, 17 19:20 21:21 22:23 25:18 27:6, 8 28:6,13 29:14,14 31:1 36:7,11 37:24 39:9,10,13 40:3,3,21 44:13, 13 46:5,22,23 47:21 48:1 49:22 51:20 54:16 57:24 61:8,20 65:1, 24 66:11,25 questions ^[3] 26:17 28:13 36:1 quintessential ^[1] 24:2 quite ^[1] 31:20 quote ^[1] 39:12</p>
O		R	
<p>objective ^[3] 5:9 26:13 33:11 obligated ^[1] 48:24 obscure ^[1] 61:14 obtain ^[1] 33:20 obvious ^[2] 5:24 66:19 obviously ^[2] 27:2 56:24 occasions ^[1] 63:14 occur ^[1] 7:23 odds ^[1] 33:11 offer ^[3] 25:5 36:23 38:12 officers ^[1] 33:25 often ^[1] 27:1 Okay ^[11] 14:9 36:8 42:25 43:10,18, 23 56:12 60:9,22 61:19 63:3 on-the-merits ^[1] 61:14 once ^[2] 24:12 63:15 one ^[27] 5:11 9:14 10:14 17:4,19 19:3 21:21 22:9 35:25 36:13 40:2 41:13,24 42:1,3,6,18 47:22,23 49:</p>	<p>p.m ^[1] 68:4 PAGE ^[3] 2:2 7:4 54:10 paper ^[1] 12:2 parallel ^[3] 43:15 49:25 50:2 particular ^[5] 15:20 16:12 18:9 56:25 57:1 particularly ^[1] 29:6 parties ^[2] 35:18 65:12 party ^[3] 44:22 55:18 61:5 passed ^[2] 41:9 42:7 passes ^[1] 38:16 PATRICK ^[3] 1:21 2:6 34:4 Payne ^[1] 37:18 peculiar ^[1] 48:21 pending ^[3] 53:23 54:3 56:3 people ^[1] 52:1 percolation ^[1] 47:24 perfectly ^[4] 18:19 25:17 28:10 31:6 perhaps ^[2] 12:5 19:9 permit ^[3] 10:3 33:2 67:17 person ^[1] 52:3 Petition ^[6] 8:19 12:22 13:16 19:23 27:7 65:9 Petitioners ^[5] 1:4,20 2:4,10 3:8 phrase ^[4] 28:23 55:13 59:2 67:6 pick ^[1] 8:13 piece ^[1] 12:2 place ^[1] 66:18 places ^[1] 64:8</p>	<p>raise ^[3] 44:22,24 56:18 raised ^[11] 6:20 19:22 20:5,7 26:22 27:16 28:9 37:22 57:25 61:5 63:17 raising ^[1] 56:20 rather ^[2] 21:7 66:19 reach ^[4] 40:20 60:8 64:12 66:25 reaching ^[1] 37:24 read ^[9] 5:15 24:19 26:6 40:23,24 50:23 51:1,8 67:6 reads ^[1] 24:22 real ^[1] 6:22 really ^[13] 15:21 24:10,13 25:3 27:4,23 28:5 36:3 38:4 48:22 57:7,8, 10 reappeared ^[1] 8:17 reason ^[13] 9:25 13:3 17:9 27:14 29:22 33:22 36:25 39:20 45:25 48:12 51:7 61:13 63:20 reasonable ^[1] 52:3 reasoning ^[2] 4:19 66:16 reasons ^[7] 32:17 39:5 45:22 48:14 55:17 64:14 67:25 REBUTTAL ^[3] 2:8 64:21,22 received ^[2] 60:7 64:2</p>	<p>raise ^[3] 44:22,24 56:18 raised ^[11] 6:20 19:22 20:5,7 26:22 27:16 28:9 37:22 57:25 61:5 63:17 raising ^[1] 56:20 rather ^[2] 21:7 66:19 reach ^[4] 40:20 60:8 64:12 66:25 reaching ^[1] 37:24 read ^[9] 5:15 24:19 26:6 40:23,24 50:23 51:1,8 67:6 reads ^[1] 24:22 real ^[1] 6:22 really ^[13] 15:21 24:10,13 25:3 27:4,23 28:5 36:3 38:4 48:22 57:7,8, 10 reappeared ^[1] 8:17 reason ^[13] 9:25 13:3 17:9 27:14 29:22 33:22 36:25 39:20 45:25 48:12 51:7 61:13 63:20 reasonable ^[1] 52:3 reasoning ^[2] 4:19 66:16 reasons ^[7] 32:17 39:5 45:22 48:14 55:17 64:14 67:25 REBUTTAL ^[3] 2:8 64:21,22 received ^[2] 60:7 64:2</p>

Official - Subject to Final Review

<p>recognized [2] 66:7 67:14 reconciled [1] 4:19 recover [2] 25:11 33:22 recoveries [1] 43:21 recovery [1] 43:7 refer [1] 7:19 referred [1] 49:10 refers [3] 7:8 30:21 53:10 reflects [1] 50:18 refusal [1] 3:20 refutes [2] 4:25 66:5 Regarding [2] 65:1 66:6 regardless [1] 16:5 regular [1] 62:1 reiterate [1] 28:13 rejected [6] 4:4,8 10:1 17:4 27:19 67:13 rejects [1] 44:4 release [4] 21:2,7 53:10,11 relevant [2] 28:21 39:12 relic [1] 27:23 relief [13] 7:5 16:4 18:10,13,21 21:15 28:21,25 52:18 61:6 65:5,21 67:10 relies [1] 52:22 rely [1] 46:16 remedial [1] 50:19 remedies [6] 43:15 48:22,23 50:21 51:7,14 removed [1] 6:12 repeatedly [1] 15:17 replaced [1] 6:13 replacement [1] 7:16 reply [1] 7:3 repose [5] 10:14,20 22:20,22 33:18 repudiate [1] 59:8 request [2] 60:11,15 requested [1] 60:7 required [1] 61:3 requirement [2] 7:22 34:19 requires [4] 39:8,15 54:23 62:11 res [13] 5:1 7:14,20 18:25 34:15,16 40:11 41:20 53:14 55:14 59:9 63:11,12 resolution [3] 23:19 30:4,15 resolve [6] 27:6 28:11,12 29:24 30:7 57:9 resolved [4] 12:23 13:13,14 14:6 resolves [1] 3:12 respect [3] 5:21 13:19 51:20 Respectfully [2] 13:11 14:17 Respondent [24] 1:7,22 2:7 3:15 4:18 8:15,19 9:8 13:18 15:11 16:3 17:5 20:7,11 27:16 31:9 32:16 33:20 34:5 65:3 66:21 67:3,8,16 Respondent's [7] 3:17 9:24 10:1 17:13 25:5 27:19 65:23 response [5] 9:4 19:25 28:17 57:18 60:1 rest [1] 43:17 Restatement [2] 6:11 64:8 rested [1] 3:21 restrictive [1] 38:12</p>	<p>restricts [1] 35:1 result [5] 10:11 33:10 48:18 58:24 67:22 results [1] 35:19 retroactively [1] 23:14 return [1] 53:21 reversed [2] 5:12 68:1 review [5] 16:16 17:11,20 27:1,17 rise [1] 36:11 Robbins [1] 43:13 ROBERTS [26] 3:3 5:13 6:15 8:8 11:21 15:9 19:5 23:5 26:14,18 29:11 32:19 34:1 36:2 38:3,22 40:18 44:2 47:11 50:13 53:18 56:14 59:18 63:4 64:18 68:2 room [1] 29:3 routes [1] 58:22 Rowe [1] 31:15 rule [26] 5:3,23 6:4 13:22 17:15 18:13 21:24 27:21,24 29:17 33:15 35:4,15,16,20 37:9 38:17,18 44:18,23 46:2,3 60:18,20 67:10,16 ruled [3] 22:1 57:14 58:19 Rules [2] 11:5 34:10 ruling [1] 37:25</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>same [39] 3:18,19 5:11,21 8:5 10:9,25 11:4 13:3 18:2,16 19:11,18 20:3,4 21:9 26:13 33:8,8 35:15 36:16 39:23 40:16 41:16,21,23 42:16 44:10,17 46:9 47:20,22 48:17 49:4 50:15 53:22 58:8 64:6 67:21 satisfied [3] 45:8,8,9 satisfy [4] 35:3 36:10 38:6 45:5 save [1] 57:14 saved [1] 22:17 saying [7] 10:17 22:6 24:24 43:20 50:16,18 66:14 says [14] 4:21 12:4,13 15:19 20:25 28:15 39:12 40:24 44:23 51:25 53:3 54:12,21 57:15 scenario [1] 41:21 second [5] 3:25 34:24 39:9 60:8 61:20 Section [34] 3:13 4:14 7:6,9 11:3,11 13:20 18:5 20:24 21:18 24:4 26:3,8 30:21 31:5,7 33:17 34:15,19 35:1,12 37:1,15 45:4 46:16 47:2 53:10 54:21 59:9 61:16 65:3,5,18 67:4 sections [1] 21:11 see [8] 6:6 7:6,15 12:21 15:3,6 31:10 58:20 seek [1] 10:5 seem [4] 36:20 54:1 55:23 58:25 seems [10] 6:23 8:16 21:5,25 29:23 30:2 49:11,18 54:17 56:3 Semtek [1] 31:19 sense [6] 18:6 22:16 24:16 33:10 36:20 50:17 sensible [2] 25:17 28:11 separate [8] 19:17 41:13 42:17 47:14 49:1 55:20 58:3 63:13</p>	<p>separately [5] 8:6,24 16:5 44:11,16 sequentially [1] 8:25 set [2] 25:23 45:14 sets [1] 37:3 settlement [1] 21:1 Seven [1] 17:2 Seventh [2] 23:11 46:17 several [2] 39:5 45:21 shall [4] 12:8 13:2 21:1 40:24 shared [1] 27:22 shifts [1] 4:20 shouldn't [5] 39:20 48:15 51:1,7 63:21 side [5] 4:17 7:14,14 17:16 48:11 significant [1] 66:12 Simmons [13] 4:7,20 15:23 27:23 28:1 30:6 34:14 46:11 48:16 58:1,12 66:3,17 simple [7] 33:22 35:17 57:8,10,11 62:7 63:9 simply [15] 4:12 6:25 17:11 32:16 37:7 40:9 41:19 46:16 51:24 58:11 59:8 60:6 61:12 66:11 67:6 simultaneously [4] 37:2 53:23 54:3 56:2 since [9] 8:22,22 10:2 40:10,15 47:7 51:12 63:10 67:11 single [10] 9:25 17:4 25:1 34:13,18 40:13 54:13,14,24 67:5 sit [1] 15:7 situation [3] 51:24 52:7 61:5 six [2] 35:3 46:20 Sixth [20] 3:20 4:4,8,18 30:13 39:19 47:16,25 48:8,9 57:21,24 58:1,3 60:17 63:18 64:1,15 65:8 66:19 slightly [1] 27:21 Smith [1] 15:24 soda [2] 52:1,8 Solicitor [1] 1:18 somebody [1] 24:12 somehow [1] 58:8 someone [1] 51:24 sometimes [1] 57:7 somewhat [2] 46:14 49:11 sorry [1] 22:3 sort [2] 10:23 23:13 Sotomayor [15] 19:7,8 20:14,21 21:19 22:12,15 26:23 27:20 47:12,13 48:3 49:2 50:3,10 sovereign [5] 18:9 30:3 37:3,17 61:17 speaks [1] 5:18 specific [1] 7:10 specifically [2] 22:23 46:1 split [2] 19:20 53:7 squarely [2] 4:7 66:4 stage [1] 60:19 stake [1] 62:6 standard [2] 38:12 44:22 standards [1] 35:18 standpoint [2] 8:2 48:13 start [1] 33:24 started [1] 20:23</p>	<p>state [6] 35:8,11 36:25 46:3 65:16,21 stated [1] 18:13 statement [1] 54:11 STATES [19] 1:1,15 3:23 10:5 18:8 21:3 33:4 36:16 41:4,14 42:8 50:20 55:18 60:25 61:9,24,25 66:3 67:18 stating [1] 58:13 statute [24] 5:15,18 7:14 15:25 24:17,19,22,23 25:4,18,19,20,22 30:1 35:9 36:7,10 37:18 39:8 41:3,6,8 42:7 52:18 statutes [1] 25:21 statutory [3] 4:24 28:4 32:24 stick [1] 25:6 still [6] 10:25 22:6 46:21 54:6 55:4 65:17 stop [4] 41:9 42:7 43:20 58:18 store [1] 51:25 straightforward [1] 33:16 striking [1] 9:24 subject [5] 3:19,25 13:3 37:11 40:14 submitted [3] 65:12 68:3,5 submitting [1] 30:3 subsequent [14] 5:2 6:5,10,12,20,25 7:16,23 29:5,7 55:20 57:15 59:15 67:9 substance [4] 14:23 31:13,18,22 substitute [2] 21:16 28:22 succeeds [1] 11:8 sue [10] 41:3,4,6,7,22 42:5,23 50:19 55:18 67:17 sufficient [3] 27:9 35:8 47:24 suggested [1] 30:14 suggesting [2] 25:16 58:24 suggests [1] 24:8 suing [2] 17:7 42:17 suit [3] 19:11 25:1 53:6 suits [2] 24:25 58:16 summarize [1] 28:16 summary [10] 18:23 29:20 33:4 60:10,11,13,20,23 61:8 65:10 support [1] 65:13 SUPREME [2] 1:1,14 surest [1] 65:23 surprising [1] 7:18 synonymous [3] 7:7 32:10 53:5</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>talked [1] 32:23 talks [1] 20:23 tells [1] 12:4 Tenth [1] 23:11 term [4] 7:4,6 21:13 28:19 test [1] 18:16 text [19] 3:11,17 4:14,24 9:18 11:17 15:18 21:17 23:1 25:25 28:4 29:1 30:20 32:24 34:8,15 57:15 66:4 67:1 textual [1] 52:25 theory [2] 36:3,19 there's [19] 5:20 22:6 26:1 28:7 29:</p>
--	--	--	---

Official - Subject to Final Review

<p>2,2 31:12 39:21 42:18 43:5 45:17 49:23 53:7 57:23 58:10 62:5 63: 20 66:12 67:6 therefore [5] 11:12 24:3 37:9 64:6 65:22 they've [1] 49:8 Thomas [9] 8:10,11 9:6 10:22 11: 20 38:24,25 40:2,17 though [4] 8:16 19:1 46:23 50:1 three [3] 36:23 60:5 64:20 time's [1] 59:17 time-confuse [1] 49:11 together [16] 4:22 8:5,15,22 10:8 16:6 34:13,18 39:4,23 42:16 44:9 49:16 59:11 67:5,21 traditional [2] 7:20 25:7 treat [1] 30:10 treated [1] 36:16 trial [4] 44:17,20,24 60:3 trigger [7] 4:1 30:16 32:6 35:4 37: 14 38:21 45:13 triggered [6] 13:17 15:1 27:25 32: 14 65:2 66:2 triggering [1] 26:1 triggers [2] 18:25 32:12 true [2] 20:15 52:20 try [3] 17:18,19 49:15 trying [3] 55:22 56:21,22 turn [2] 24:17 33:7 turned [1] 12:5 turning [1] 24:10 turns [2] 18:22 36:7 two [10] 3:21 6:1 9:3 20:2 21:10 34: 9 38:12 47:14 52:15 67:21 tying [1] 7:9 type [2] 6:7 18:9</p> <hr/> <p style="text-align: center;">U</p> <p>U.S [1] 21:1 un-confuse [1] 19:10 unambiguous [2] 26:1 67:1 unambiguously [1] 3:17 under [49] 3:13 7:8 10:4 11:11 12: 8 13:20 16:4 17:6,23 18:13,16 21: 17 24:4 26:2,8 27:9 28:25 29:16 31:4,7 32:5 33:17 35:4,9,11,12,20 36:7,14,18 37:8 38:4,13 41:6,11 44:4 45:24 46:2,3 51:10 54:3 55: 23 56:3 60:18 61:25 65:3,18 67:3, 4 understand [8] 23:21 24:9 38:4 52:3 56:21 59:16,21 61:10 understanding [4] 24:6 29:2 37: 20 41:12 understandings [1] 38:13 understands [1] 18:24 understood [4] 52:11 55:17 65:10, 15 undo [2] 23:12,14 UNITED [19] 1:1,15 3:22 10:5 18:8 21:3 33:3 36:16 41:4,14 42:8 50: 20 55:18 60:25 61:9,24,25 66:3 67:18 unknown [1] 23:3</p>	<p>unless [2] 35:7 50:10 unrelated [1] 40:3 until [3] 12:11 13:5 45:17 up [18] 8:13 22:11 26:21,23 32:20 39:18 44:24 45:8,9 47:4 48:4 50: 21 58:11,21 59:3,3,17 63:5 uses [1] 7:6 using [2] 33:8 47:5</p> <hr/> <p style="text-align: center;">V</p> <p>vacated [1] 11:9 valid [1] 37:15 variation [1] 49:21 variations [1] 49:18 vein [1] 50:15 versus [5] 3:4 43:13,14 54:7 59:14 view [5] 17:21 27:2 36:24 38:5 60: 23 Virginia [1] 1:21</p> <hr/> <p style="text-align: center;">W</p> <p>waived [3] 9:11 18:9 37:2 waiver [1] 54:9 wanted [5] 10:16 13:5 21:23 22:21 28:9 warrant [2] 17:11 27:16 Washington [2] 1:10,19 way [28] 6:17,17,24 9:9,20 17:14 22:2 24:14 26:6 28:11 30:4 33:4 37:5 38:19 46:21 47:5 49:23 50: 17,22 51:2,8 53:7 56:1 57:6,20 64: 11 65:23 67:6 ways [3] 36:23 58:9,20 weigh [1] 59:7 welcome [1] 36:1 Westfall [4] 22:17 43:11 50:6 51: 11 whatsoever [1] 14:21 whenever [1] 36:17 Whereas [1] 4:25 Whereupon [1] 68:4 whether [22] 5:9 8:4 9:10,10 15:12 16:5 18:8,11,12 24:6 27:24 30:5 31:1,3 39:13 45:13 48:5 49:12,13 54:16 59:22 61:12 whole [1] 12:11 Wilkie [1] 43:12 will [14] 3:3 6:10 10:20 19:10 33: 18 34:14 40:21 46:11 48:19,23,24 57:8 58:13,16 win [9] 10:4 12:15 30:5 41:7 42:4 49:7,16 56:22 67:18 wins [3] 17:16 28:1 60:25 within [5] 24:25 35:7 54:12 57:1,6 without [5] 4:16,23 10:16 32:5 37: 24 won [3] 12:5 49:8 60:23 wondering [1] 24:5 word [12] 5:24 6:9,12 7:10,16,17 11:4 12:19 15:7,8,20 52:13 words [4] 24:11 36:17 52:15 59:1 works [2] 12:17 28:3 worried [1] 43:1 worry [1] 27:9</p>	<p>worth [1] 18:21 worthy [2] 28:8 66:11 wrap [4] 22:10 23:18 32:20 63:5 Wright [2] 54:11 64:7 write [2] 24:20 25:21 written [1] 52:19 wrote [4] 5:6 21:14 25:19,20</p> <hr/> <p style="text-align: center;">Y</p> <p>years [3] 10:1 51:16 67:11</p> <hr/> <p style="text-align: center;">Z</p> <p>zero [1] 19:2</p>
---	---	---