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IN THE SUPREME COURT OF THE UNITED STATES

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TRANSUNION LLC,)

Petitioner,)

v.) No. 20-297

SERGIO L. RAMIREZ,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, March 30, 2021

The above-entitled matter came on
for oral argument before the Supreme Court of the
United States at 10:00 a.m.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	NICOLE F. REAVES, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting neither party	39
9	ORAL ARGUMENT OF:	
10	SAMUEL ISSACHAROFF, ESQ.	
11	On behalf of the Respondent	62
12	REBUTTAL ARGUMENT OF:	
13	PAUL D. CLEMENT, ESQ.	
14	On behalf of the Petitioner	88
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 20-297, TransUnion
5 versus Ramirez.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

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

11 The class certified here suffers from
12 two fatal defects: the absence of class member
13 standing and typicality. Each and every member
14 of this class stands to collect thousands of
15 dollars in damages, but the first inkling that
16 many of them will have that they were injured
17 will be receiving a check in the mail.

18 The only thing the class members have
19 in common is that they were sent their entire
20 credit file in two envelopes rather than one and
21 received a summary of rights only in the first
22 mailing.

23 But simply receiving all the requisite
24 information in a non-compliant format is not
25 enough to inflict a concrete injury. And

1 Respondent fares no better on its claim that
2 TransUnion failed to use reasonable procedures
3 in preparing his credit report. Fully
4 75 percent of the class never had a credit
5 report, which is distinct from the credit file
6 sent home upon request prepared or disseminated
7 during the class period.

8 The Ninth Circuit reasoned that there
9 was a material risk that a report could be
10 prepared and disseminated. But there is no
11 evidence that the risk ever materialized for
12 over 6,000 class members, and yet they all stand
13 to receive a sizable check.

14 To be sure, Ramirez himself suffered
15 significant injuries, but that just highlights
16 the equally fatal typicality problem here.
17 Ramirez had a credit report prepared and
18 disseminated to a car dealer, was hindered in
19 obtaining credit, humiliated in front of family
20 members, and canceled a planned vacation. That
21 makes him entirely atypical and unrepresentative
22 of the average class member, who simply received
23 her credit file in two envelopes in the privacy
24 of her own home.

25 Ramirez suggests that only his legal

1 claims need to be the same. But typicality
2 means something different from commonality, and
3 the typicality requirement precludes a class
4 representative with wholly atypical injuries. A
5 contrary rule would run counter to the basic
6 promise that a class action is representative
7 litigation and would violate the Rules Enabling
8 Act to boot.

9 CHIEF JUSTICE ROBERTS: Mr. Clement,
10 could each of the class members have sued
11 TransUnion before TransUnion removed the OFAC
12 designation from their reports?

13 MR. CLEMENT: I -- I don't think so,
14 Mr. Chief Justice. I mean, obviously, if this
15 was a suit that was filed while the policy was
16 still in place, we would probably be governed by
17 the certainly impending standard of the Clapper
18 case, and I think, since the evidence in this
19 case suggests that the average class member only
20 had a 25 percent chance that their report would
21 be disseminated, I think that probably means
22 that they did not have a sufficiently impending
23 injury.

24 So I don't think it would matter if
25 this were brought prospectively.

1 CHIEF JUSTICE ROBERTS: Well, doesn't
2 that seem a little odd? I mean, they're injured
3 by having their names mistakenly or misleadingly
4 on a report that might be disseminated. They
5 just want to take that off to avoid that risk,
6 whether it's 25 percent or 98 percent. I don't
7 know why they don't have sufficient standing to
8 at least clear that up.

9 Maybe their damages aren't terribly
10 significant if, you know, no one else has seen
11 the report, but it's kind of a surprising thing
12 that somebody with misleading information about
13 someone, that -- the whole point is they hope
14 somebody asks for it because that's when they
15 get paid, and you can't do anything about it.

16 MR. CLEMENT: Well, Mr. Chief Justice,
17 what you can do about it and what the statute
18 specifically envisions to deal with this
19 situation is you can ask for a copy of your
20 credit file before your credit report is ever
21 disseminated to a third party.

22 And the way the statute envisions this
23 works is you get your credit file, you see the
24 information that you believe is inaccurate or
25 misleading, and then there's a process you can

1 initiate to get it cleared up in -- before it
2 ever gets disseminated to a third party.

3 CHIEF JUSTICE ROBERTS: Well, but
4 they've got no reason --

5 MR. CLEMENT: So there is --

6 CHIEF JUSTICE ROBERTS: -- they've got
7 no reason to ask for a credit report. You know,
8 they've -- they've never bounced a check in
9 their life. They've got perfect credit. Why
10 would they even do that?

11 MR. CLEMENT: Well, if they have no
12 reason to think they have any problem, then I'm
13 not sure how they would even know that they were
14 suffering a -- a risk of injury in a practical
15 sense.

16 But, in all events, whatever the rule
17 is prospectively, I think, when you're talking
18 about a retrospective action like this and a
19 challenge to a policy that has been
20 discontinued, then I don't think a risk really
21 matters.

22 I mean, if the risk didn't
23 materialize, at that point, I -- I think that's
24 a cause to sort of break out the champagne, not
25 to break out a lawsuit.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas.

4 JUSTICE THOMAS: Thank you, Mr. Chief
5 Justice.

6 Mr. Clement, if one of Petitioner's
7 clients contracted to get the same OFAC in for
8 -- designation information in a credit report
9 and did not receive that for -- in any reports
10 over a period of time, would that client have
11 standing to sue Petitioner?

12 MR. CLEMENT: Justice Thomas, I think
13 that that client would have standing to sue
14 because I think contracts are different for the
15 following reason: Just by virtue of having a
16 contract action, I think that means that you
17 gave consideration in exchange for the promise.

18 So I think, when you think about a
19 breach-of-contract case, you can think of the
20 injury-in-fact being supplied essentially by the
21 consideration that you gave up in exchange for
22 the promise that people would do whatever they
23 contracted to do even if that was relatively
24 trivial.

25 JUSTICE THOMAS: Well, I understand

1 that that's different from a private right
2 that's in a statute, but I don't see that that
3 difference or distinction -- the distinction
4 between those makes any difference. They're
5 both private rights.

6 MR. CLEMENT: Well, I disagree with
7 you on that, Justice Thomas. I do think this
8 involves a classic public rights regime, and I
9 think you can see that from the structure of the
10 statute. This is not a situation where the
11 statute gives the plaintiff a very specific
12 private right to enforce a very specific
13 promise, as in the contract.

14 If you look at the enforcement
15 provision, 1681n and o give the consumer a cause
16 of action for any violation of this subchapter
17 with respect to the consumer.

18 And there's 100 different requirements
19 that are imposed on the regulated parties by the
20 subchapter, which is the classic structure for a
21 public rights regulatory regime, and that
22 becomes unmistakable if you look at 1681s, which
23 is the public enforcement provision of the
24 statute, which equally gives the FTC the right
25 to bring an action for any violation of a

1 requirement of the subchapter, and they can even
2 do that in front of the FTC itself, which, of
3 course, is the hallmark of a public right. So I
4 think this is a public rights regime.

5 JUSTICE THOMAS: Well, I -- the --
6 I'll let that go for a minute. I -- you know,
7 maybe with the FTC you're right. I don't
8 necessarily agree with you, as I suggested in
9 Spokeo on the other part.

10 But let's go -- what would be your
11 definition of your test for typicality?

12 MR. CLEMENT: So my -- I would start
13 by saying that for typicality, the named
14 plaintiff for the class representative has to
15 have injuries and experience that are typical of
16 the class. It's not just a matter of having the
17 same claims. I think, if you just laid down
18 that rule of law, you would go a long way to
19 sort of solving the problem.

20 JUSTICE THOMAS: What would that leave
21 for commonality and predominance then?

22 MR. CLEMENT: Oh, I think they have
23 definitely -- definitely have a role to play,
24 but they're independent roles. I can have a
25 common issue in a case, but I can still be a

1 very atypical representative to litigate the
2 common issue or even if that common issue
3 predominates. So I think all three of those
4 provisions work together in a complementary
5 fashion.

6 JUSTICE THOMAS: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer.

9 JUSTICE BREYER: I'm interested in
10 Justice Thomas's last question, thinking of
11 typicality.

12 I mean, all of these plaintiffs, in
13 respect to every one of them in the class, the
14 -- they -- they didn't in the first letter get
15 all the information, they didn't get about the
16 terrorist related. And they said that the
17 company didn't follow reasonable procedures.
18 And they said in the second letter they didn't
19 get the summary of rights.

20 So they were all typical in that
21 respect. But Ramirez also went out and tried to
22 buy something and got into a lot of trouble, it
23 was all complicated, dah-dah-dah.

24 So, when the trial took place, would
25 it have been possible for the lawyer for the

1 company to have objected to the introduction of
2 all that separate and special information about
3 Ramirez on the ground that it had nothing to do,
4 and was prejudicial, it had nothing to do with
5 the typical injury suffered by the class?

6 MR. CLEMENT: So, Justice Breyer, I
7 don't think that that would have been a proper
8 objection to raise, and -- and -- and I think
9 the reason is that, you know, particularly with
10 respect to the reasonable procedures claim, what
11 Ramirez would be testifying about is information
12 that would be highly relevant in his own
13 individual action.

14 And I think the Rules Enabling Act
15 doesn't allow you to fundamentally change the
16 rules of the road when the person is testifying
17 in a class action versus an individualized
18 action. And so I think the right way to handle
19 this problem is to pick a class representative
20 who is, in fact, typical.

21 JUSTICE BREYER: No, I know what you
22 think is the right way. But I'm just wondering
23 why, in a class action, where the individual who
24 is the named plaintiff, say, suffers a head
25 injury, and nobody else suffers a head injury,

1 and he wants to introduce that because it had
2 something to do with the injury, you know, it's
3 a relationship.

4 But -- but can't you object to that?
5 Why not? You say, look, that -- that might have
6 been okay in an individual action to bring that
7 in, but this isn't that. This is a class
8 action. Let's stick to what the class action
9 harms were. Why can't you say that?

10 MR. CLEMENT: Well, I don't think
11 that's the right way to do it, and you can't do
12 it --

13 JUSTICE BREYER: Why?

14 MR. CLEMENT: -- in part because of
15 the Rules Enabling Act. I don't think the
16 evidence that comes in as to the named
17 plaintiffs is supposed to be fundamentally
18 different.

19 But, if you look at the Ninth Circuit
20 brief that my friends on the other side filed,
21 they specifically said they needed to put forth
22 the experiences of Ramirez at the Nissan
23 dealership in order to lay the foundation for
24 all of their claims, the reasonable procedure
25 claims and the disclosure claims.

1 JUSTICE BREYER: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Alito.

3 JUSTICE ALITO: The class members
4 whose information was disclosed to third parties
5 certainly had reason to worry about that,
6 wouldn't you say?

7 MR. CLEMENT: Well, yes or no, Justice
8 Alito. I don't mean to resist it, but I think
9 given that, you know, we know that, you know,
10 roughly 1500 people had their reports
11 disseminated and nobody other than Ramirez
12 complained, I -- I do think there are a lot of
13 people in this class who had it disseminated and
14 maybe the person on the other end took a quick
15 look at the birth dates, saw that they were
16 radically different, went ahead with the
17 transaction, having no harm/no foul.

18 JUSTICE ALITO: Well, is there really
19 no harm? Suppose someone gets this information,
20 asks for the credit report, gets the
21 information, and sees that the person has been
22 flagged as someone whose name resembles the name
23 of a person who's on this list. Doesn't that
24 inflict some psychological injury on the person
25 who gets that information?

1 MR. CLEMENT: I don't think so,
2 Justice Alito. I mean, you know, I -- I read a
3 report that -- that late Senator Kennedy ended
4 up being on the No Fly List or some list
5 associated with the No Fly List for secondary
6 screening.

7 You know, I think he managed to get it
8 cleaned up, and I'm sure it was a little bit of
9 an inconvenience for him to be on the list. But
10 the bare fact of knowing that you're on a list
11 or share a name with somebody who's on a list, I
12 -- I -- I don't know that that really is
13 injury-in-fact. Of course, even if it is,
14 that's only 25 percent of the class.

15 JUSTICE ALITO: All right. Let me
16 shift to a different subject.

17 If we were to agree with you -- and
18 this is an if -- that the district court should
19 have certified only a narrower class, only those
20 whose information was disclosed to third
21 parties, can that be remedied simply by
22 precluding recovery for those not in the class,
23 or did that possibly overbroad certification
24 hurt your client in some other way that can't be
25 untangled?

1 MR. CLEMENT: I think it did hurt my
2 client in ways that can't be untangled. I think
3 it may have even prejudiced the plaintiff a
4 little bit, given that the jury may have sort of
5 thought about the size of the class in -- in --
6 in making the award. It's a little hard to
7 completely unpack it.

8 JUSTICE ALITO: Well, how -- if -- how
9 -- in what ways might it have hurt your client
10 or did it hurt your client?

11 MR. CLEMENT: Well, the -- the -- the
12 -- the jury did hear evidence that, you know,
13 suggested that we did this to, you know,
14 thousands of people, when, you know, that's
15 actually not the case based on the premise of
16 your -- of your question.

17 So I do think that's quite prejudicial
18 to us. You know, there's also sort of a
19 theoretical problem that I'm not sure that when
20 a court proceeds on the assumption that it is
21 exercising jurisdiction over all the absent
22 class members, that you just sort of, you know,
23 at the end just say, well, never mind, we'll
24 just sort of fix that by sort of sticking this
25 to the 25 percent.

1 I would also just add we don't think
2 that Mr. Ramirez was typical even as to the
3 25 percent.

4 JUSTICE ALITO: All right. Thank you.

5 MR. CLEMENT: So we think that those
6 are the typical -- yeah.

7 JUSTICE ALITO: Thank you. My time is
8 up. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor.

11 JUSTICE SOTOMAYOR: Counsel, I read
12 Rule 23(a)(3) as requiring typical claims and
13 defenses. Mr. Ramirez's claims were not subject
14 to any unique defenses, and they were identical
15 to every class member's claims. Everyone in the
16 class was designated a potential match with
17 someone else on the OFAC list because of the
18 same unreasonable process, and everyone received
19 the same two mailings in response to requests
20 for their credit files.

21 Now you object to Mr. Ramirez's
22 atypical harms or potential individual damages.
23 But I don't see where Rule 23(a)(3) requires
24 typical damages, number one, so how do you
25 square your argument with the text of the rule?

1 But, number two, when you raised this
2 issue before the district court, it suggested a
3 verdict form that would let the jury award
4 different statutory damages for class members
5 who experienced different harms. That seemed
6 like a very reasonable way to handle the
7 situation. But TransUnion didn't ask for such a
8 form. It didn't object to Mr. Ramirez's
9 testimony or seek discovery from absent class
10 members.

11 I -- I just see this as a trial error,
12 not as an error in certifying the class, and the
13 trial error was invited by you. So I -- not by
14 you personally but by counsel below.

15 MR. CLEMENT: So, Justice Sotomayor,
16 let me respond to both pieces of the question.

17 First of all, I think, textually, on
18 Rule 23(a)(3), it requires the claims and
19 defenses to be typical. I don't think it
20 answers the question of whether that means that,
21 with respect to the claim that needs to be
22 typical --

23 JUSTICE SOTOMAYOR: Well, don't you --

24 MR. CLEMENT: -- you look at the
25 various elements --

1 JUSTICE SOTOMAYOR: -- think that this
2 is a typical claim? Meaning this is exactly
3 what this law was intended to avoid. He's as
4 typical a claimant as one could imagine with
5 respect to the law at issue. This is exactly
6 why the law was passed, to protect people from
7 exactly this situation, the situation he faced.

8 MR. CLEMENT: With respect, I don't
9 think his claim is typical of the claim of the
10 average class member. I mean, I would liken it
11 to if -- if my fingernail is broken, and I
12 represent a people -- a class of people with
13 broken fingernails, but my fingernail was broken
14 in the process of having my hand mangled, I
15 don't think I have a typical claim. I don't
16 think I'm a typical class representative.

17 And I think you would -- you would say
18 that textually by saying I just -- my claim is
19 different. It's not typical. It may be the
20 same legal claim, but it's not a typical one.
21 And typicality asks for something more than
22 commonality.

23 As to the trial error, with all due
24 respect, I think, if you look at the -- we
25 actually proposed a jury form that allowed the

1 jury to say that with respect to the statutory
2 damages, you couldn't find that every member of
3 the class was entitled to statutory damages.

4 We -- that, you know, it was -- it was
5 Ramirez or no one or -- and -- and under our
6 proposal, you can't say one -- you know, one or
7 all. That was rejected. And throughout this
8 case, the other side was the one saying that we
9 can just get one number for the statutory
10 damages award, and that's why individualized
11 damages don't predominate.

12 So I don't think this was a trial
13 error, with all due respect. And we certainly
14 prepared -- proposed a case --

15 JUSTICE SOTOMAYOR: Thank you,
16 counsel. I've run out of time.

17 MR. CLEMENT: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Kagan.

19 JUSTICE KAGAN: Mr. Clement, suppose
20 that there's a carcinogen which, when it is in
21 your drinking water, you have a 50 percent
22 chance of getting cancer, and suppose Congress
23 passes a law that everybody exposed to that
24 carcinogen can sue and obtain statutory damages,
25 and suppose that there's a class action of

1 people exposed to that carcinogen.

2 Does that satisfy Article III?

3 MR. CLEMENT: I think it probably
4 would, Justice Kagan, but if this were a weird
5 carcinogen that worked in such a way that, like,
6 a year later, you could tell whether you were in
7 the 50 percent risk or the 50 percent safe
8 category, and then you sued for statutory
9 damages retrospectively on behalf of the people
10 who averted the risk, I think you might have a
11 different result but certainly worth thinking --

12 JUSTICE KAGAN: Yeah, so that's
13 interesting, Mr. Clement, because that takes us
14 back to the question that you and the Chief
15 Justice were talking about.

16 Now, in my hypothetical, unlike with
17 the Chief Justice's question, you agree that
18 retrospectively that there -- there is standing,
19 right? So, if you -- if you just, you know --
20 you're -- you're within a five-year period,
21 let's say, nobody knows who's going to get
22 cancer, you're agreeing that everybody could be
23 in that class action and that there would be
24 standing, correct?

25 MR. CLEMENT: I -- I think so, Your

1 Honor. I mean, just to be clear, I think so
2 because I think a 50 percent exposure to cancer,
3 when you haven't figured out whether or not you
4 are going to get it because of the exposure, I
5 think that's an injury-in-fact under, you know,
6 the common law. It would probably be the kind
7 of thing that --

8 JUSTICE KAGAN: Okay. Well, now let's
9 suppose --

10 MR. CLEMENT: -- someone would --

11 JUSTICE KAGAN: -- let's suppose that
12 this cancer works so that you either get it or
13 you don't in five years, and let's say that this
14 suit is brought in the sixth year, still within
15 the statute of limitations that Congress has
16 prescribed, and it's still the same claim, the
17 -- the same class. There are both people who
18 have gotten it, and there are people who haven't
19 gotten it.

20 Now I would have said that if you're
21 willing to give me that everybody has standing
22 within the five years, it should be that
23 everybody has standing in the sixth year as well
24 because you have standing if you suffered harm
25 in the past.

1 And your concession is a concession
2 that you have suffered harm in the past, isn't
3 it?

4 MR. CLEMENT: No, I don't think so,
5 Justice Kagan, but let me add one thing to the
6 hypo to try to explain why I'm taking the
7 position I'm taking. I'm assuming that the
8 people who are suing in the sixth year, like,
9 they didn't even really know about the exposure
10 until they found out they were in the claim.
11 That's this case. And those people, I think,
12 don't get to recover. I mean, if -- if you only
13 --

14 JUSTICE KAGAN: Even though they could
15 have recovered in the fifth year, even though
16 they didn't know, because Congress, you know,
17 said that they should get to recover regardless
18 of their state of knowledge?

19 MR. CLEMENT: But even in the process
20 of filing the lawsuit during the five-year
21 period, they essentially would know. And so I
22 -- I -- I think, you know, if -- if you were
23 sort of subject to a risk that you didn't even
24 know about and the risk never materialized, at
25 that point, I don't think you can bring a

1 retrospective action for damages.

2 JUSTICE KAGAN: I mean, it -- it seems
3 as though it's a material risk of harm in the
4 language that Spokeo used. No?

5 MR. CLEMENT: In your hypo, it might
6 be, but that's in part because it's 50 percent
7 and it's cancer. And I think, you know, I -- I
8 don't want to go all Learned Hand on you, but I
9 think you sort of think about both the risk and
10 the consequences. And I think --

11 JUSTICE KAGAN: Thank you.

12 MR. CLEMENT: -- as it's here -- I'm
13 sorry.

14 CHIEF JUSTICE ROBERTS: Justice --
15 Justice Gorsuch.

16 JUSTICE GORSUCH: Mr. Clement, why
17 don't you go ahead and finish your answer. I'm
18 -- I'd be curious.

19 MR. CLEMENT: Thank you, Justice
20 Gorsuch. What I was just going to say is that,
21 you know, here, you have a 25 percent risk based
22 on the information in the -- in the record, and
23 then the consequences of that for everybody
24 other than Mr. Ramirez have not been anything
25 like getting cancer. In fact, nobody else has

1 registered essentially any complaint about what
2 happened to them and being denied credit.

3 JUSTICE GORSUCH: Is it -- is it that
4 there's no material risk that these people
5 faced, or is it that they didn't know about it?
6 Which is the key to you, your argument in
7 response to Justice Kagan?

8 MR. CLEMENT: I don't want to evade
9 the question. I think it's the combination of
10 the two. So I -- I -- but just to be clear, if
11 you ask me did -- did people in this class
12 suffer material risk, I would say no, not a
13 material risk, because materiality has to take
14 into account the consequences, and given that no
15 one other than Mr. Ramirez suffered any -- any
16 -- any consequences, I don't think that it's a
17 material risk.

18 I -- I also think, if you're thinking
19 that, you know, well, maybe it's not like the
20 risk of injury so much as it is sort of a fright
21 that you might have, like, at common law --

22 JUSTICE GORSUCH: Right.

23 MR. CLEMENT: -- for a mere battery or
24 something like that, that requires knowledge.

25 JUSTICE GORSUCH: So -- okay. So your

1 -- so your argument as I understand it then is
2 with respect to those in the -- the group that
3 didn't -- that didn't have their information
4 sent to third parties, that they need to have
5 some knowledge of the information in order to
6 have any material risk of injury. Is that -- is
7 that a fair summary of what you're saying?

8 MR. CLEMENT: I think it is, Your
9 Honor. The only thing I would add is I'm -- I'm
10 thinking that -- you know, the other side is
11 trying to argue that what makes the material
12 risk an injury-in-fact here is at least in part
13 the idea that it would kind of, you know, ruin
14 your whole day, you would be obsessed about it
15 and concerned about it. That requires some
16 knowledge of it in order for you to suffer an
17 injury-in-fact.

18 JUSTICE GORSUCH: In order to have
19 emotional distress, you have to have knowledge
20 of the thing that would cause the emotional
21 distress?

22 MR. CLEMENT: Exactly. And I think
23 you have to -- the other side, not me, with all
24 due respect, has to have a theory as to how the
25 material risk translates into an injury-in-fact,

1 unless you think that a material risk just
2 standing alone is an injury-in-fact, and, if you
3 think that, I think it's got to be a lot higher
4 than 25 percent.

5 JUSTICE GORSUCH: Okay. And then,
6 with respect to the 1800 who did have their
7 information published, when I look at, you know,
8 the common law defamation, publication was
9 presumed to give rise to injury, the idea of, if
10 something bad is said about you in public, these
11 are the -- the common law would presume an
12 injury. Why wouldn't the same hold true here?

13 MR. CLEMENT: Well, I think, Your
14 Honor, the key thing is -- and, you know, I can
15 try to quibble about whether it had to be
16 defamatory per se or false, but, here, I don't
17 think what is actually published is, in fact,
18 false because, if you go to the OFAC website
19 today and type in the Respondent's name, you
20 will get a hit.

21 So what was communicated is this name
22 is a potential match to somebody with the same
23 first name and the last name --

24 JUSTICE GORSUCH: I -- I -- I --

25 MR. CLEMENT: -- on the OFAC list.

1 JUSTICE GORSUCH: -- I got it. My
2 time's expired. At some point, though, if you
3 get a chance, if you could assume that it's
4 substantially false, then what? But I -- I'm
5 afraid my -- my -- my time's expired.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh.

8 JUSTICE KAVANAUGH: Thank you, Chief
9 Justice.

10 And good morning, Mr. Clement. To
11 pick up on Justice Gorsuch and Justice Kagan's
12 questions, let me make sure I understand the
13 risk of harm.

14 As I read your brief, you said the
15 risk of harm is likely -- risk of harm alone is
16 likely not enough for damages as opposed to
17 injunctive relief. At least that's how I read
18 Footnote 4 of your brief.

19 In response to Justice Kagan and
20 Justice Gorsuch, I think you were saying -- but
21 tell me if I'm wrong -- that the risk of harm is
22 still not enough for damages unless the risk of
23 harm is itself a separate harm, in other words,
24 the risk of harm is not cancer, in other words,
25 you don't have the cancer, but the risk of harm

1 may create emotional injury.

2 Is that an accurate way to summarize
3 what you're saying?

4 MR. CLEMENT: I think that's right,
5 Your Honor. And I guess the only other thing I
6 would add is I suppose there might be certain
7 risks of harm that are so high that maybe you
8 think that the material risk is itself an
9 injury-in-fact even if it doesn't manifest
10 itself in emotional harm or some other
11 injury-in-fact, but I don't think that's
12 25 percent chance of a dissemination of a credit
13 report.

14 JUSTICE KAVANAUGH: Even for damages
15 claims?

16 MR. CLEMENT: Even for damages claims,
17 but, as we said at the outset, I -- I do think
18 the Footnote 4 point is very important, which is
19 whatever your risk was ex-ante that might have
20 been enough to get injunctive relief to stop a
21 practice, if you're in the 75 percent that were
22 fortunate and didn't actually suffer an
23 injury-in-fact because the risk didn't
24 materialize, I don't think you have
25 injury-in-fact at that point.

1 JUSTICE KAVANAUGH: To pick up on
2 Justice Alito and also Justice Gorsuch, if we
3 agree with you on the six -- 6332 people but
4 don't agree with you on the 1853 people, exactly
5 what should we say in terms of what should
6 happen on remand?

7 MR. CLEMENT: So I would say that what
8 you should say on remand is that the -- that the
9 courts below should decertify the class,
10 because, remember, from the very beginning, we
11 said the reason you can't have a class here is
12 because the issue of injury is not common to the
13 class. And so I think you'd essentially be
14 vindicating the point.

15 And I think it's also worth
16 recognizing that I think what you'd be saying
17 about the 6,332 is not that they absolutely
18 positively don't have injury. It's just you'd
19 be saying, if they have any injury, they've got
20 to come in and show it individually. And that
21 just underscores that this class of 8,000-plus
22 was wrong from the beginning for the reasons
23 that we pointed out from the beginning.

24 JUSTICE KAVANAUGH: And then, in
25 response to Justice Thomas, I think you're

1 saying that the problem here is that Congress is
2 setting up, in essence, a shadow government of
3 private attorneys general to enforce
4 prohibitions on certain activities by certain
5 entities, and that's an Article II/Article III
6 problem, and your test is no harm/no foul.

7 But -- but how would you succinctly
8 describe how we determine whether there is
9 sufficient harm as a general matter, or can that
10 be done in a -- in a general way?

11 MR. CLEMENT: I'm not sure that's
12 capable of generalization. I just think, you
13 know, you do have to have -- the best I can do
14 would just be to repeat what I think is the gist
15 of the Spokeo decision, which is you need
16 injury-in-fact. Injury in the law won't do it.

17 And then the one thing I would add --
18 and I think this speaks particularly to people
19 that are focused on the public rights/private
20 rights distinction -- when you have a statute
21 like the one at issue here or like the one at
22 issue in Fohl, where the structure of the
23 statute is to give certain individuals, whether
24 they be consumers here or plan participants in
25 Fohl a right, essentially, to enforce any

1 violation of the subchapter, that is a strong
2 indication that Congress has not actually made
3 the judgment that this is a very specific
4 private right.

5 JUSTICE KAVANAUGH: Thank --

6 MR. CLEMENT: Instead, they basically
7 --

8 JUSTICE KAVANAUGH: -- thank you, Mr.
9 Clement.

10 MR. CLEMENT: Sure.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett.

13 JUSTICE BARRETT: Mr. Clement, I want
14 to ask you a follow-on to Justice Kagan's
15 hypothetical about the people who drink water
16 exposed to a carcinogen, they're at 50 percent
17 risk of cancer.

18 She asked you to distinguish between
19 what would happen if they filed within the
20 five-year period in which they would know
21 whether the risk had materialized or outside the
22 five-year period, say in the sixth year.

23 I want to know what would happen, say,
24 if they filed in year two, but the litigation
25 drags on and on and on and the case doesn't come

1 to its conclusion until year six.

2 So, if I understand your response to
3 Justice Kagan, it would essentially mean that
4 people had standing at the outset of the suit.
5 But, if they were in the 50 percent that were
6 home-free, they would lose their standing by the
7 end?

8 I mean, that just seems like an odd
9 way to think about it since we normally judge
10 standing at the outset, and when something
11 dissipates over the course of a suit, we think
12 about it in terms of mootness, not that the
13 injury isn't concrete. Or is this a merits
14 determination that they didn't suffer damages?
15 How do -- how do you think about that?

16 MR. CLEMENT: Well, I -- I think you
17 probably would in your hypo, which is, you know,
18 a little different from every other hypo I've
19 gotten, I think mootness might be the right
20 framing. And I also think you're probably right
21 that at that point in the case, they would
22 probably also lose because they wouldn't be able
23 to sustain their cause of action at that point.

24 The only thing I would add, Your
25 Honor, is, you know, this Court has made very

1 clear in cases like Lujan that you do have to
2 maintain your standing at every stage of the
3 case.

4 And so, you know, in -- in -- in your
5 hypo, I think what happens is sort of the clock
6 runs out on the injury. But, if the evidence
7 that ultimately emerges at trial makes clear
8 that, as to a discrete group of people, a risk
9 absolutely positively did not materialize, I do
10 think you could say at that point, based on the
11 evidence in the record at that juncture, that
12 they don't have standing.

13 JUSTICE BARRETT: Okay. Let me ask
14 you about material risk of harm. So, as I read
15 Spokeo, you know, and it cites Clapper after
16 that language, it preserves, you know, the
17 possibility of standing in a prospective suit
18 where harm is imminent but hasn't yet happened.

19 And then, for slander per se, you
20 know, there are some harms that were recognized
21 at the common law, as we have discussed during
22 this argument, that were presumed to cause harm
23 because, even if you didn't have to prove that
24 you lost a job over it, you know, that the risk
25 was so great that in and of itself the common

1 law tort proposed it.

2 And it seems like this case is about
3 whether, even going beyond that, a big risk that
4 the tort would actually happen to you is itself
5 a tort. And I -- I haven't heard you disclaim
6 that as a proper reading of Spokeo.

7 Instead, it seems like you're talking
8 about quantifying the risk, accepting that that
9 could be an injury under Spokeo but only if it's
10 an 85 or 90 percent chance of happening.

11 Am I understanding you correctly?

12 MR. CLEMENT: I -- I think you are,
13 Your Honor, but I -- I guess I would take this
14 opportunity to sort of disclaim the idea that
15 just, you know, a pure risk of injury in -- you
16 know, a real risk of injury, you know, in and of
17 itself without any link to some emotional injury
18 or a -- a property right of the type that I
19 think you would have, you know, that might be
20 one way to understand the defamation cases, I --
21 I don't think that gets it done.

22 I mean, you know -- you know, at the
23 point that you, you know, are -- are -- you
24 know, there's a real risk that you might be
25 injured, but you're not injured, I suggest the

1 way I see that is you're not injured.

2 JUSTICE BARRETT: Okay. So you're
3 talking about a distinct injury that precedes
4 it, like emotional distress?

5 MR. CLEMENT: Sure. And -- and that's
6 why I got into the discussion about sort of
7 whether you'd know about it, because, obviously,
8 you know, I think, if you don't know -- know
9 about it at all, then you can't be distressed
10 about it, and so you can't suffer the
11 injury-in-fact, whereas, with certain injuries,
12 you know, somebody trespasses on my property and
13 I find out later, but, at the time, I had no
14 idea --

15 JUSTICE BARRETT: I'm going to have to
16 stop you, Mr. Clement, because I'm out of time.
17 Thank you very much.

18 MR. CLEMENT: Sure.

19 CHIEF JUSTICE ROBERTS: A minute -- a
20 minute to wrap up, Mr. Clement.

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

23 In the end, there's no getting around
24 the two fatal flaws that the class certified
25 here. The district court recognized from the

1 outset that proof of an actual de facto injury
2 would require individualized proof and refused
3 to certify certain state law claims on that
4 ground. But he excused the class from making an
5 individualized showing of de facto injury for
6 the FCRA claims because Ninth Circuit law did
7 not require it at the time.

8 But, under any proper understanding of
9 Article III, each class member must have
10 injury-in-fact, and this class must be
11 decertified. Decertification also follows
12 because Ramirez is a radically atypical class
13 representative. He suffered serious injuries
14 that would have allowed him to seek actual
15 damages in an individual action, but, instead,
16 he sought statutory damages at the top of the
17 range, plus punitive, for a class that shared
18 few of his experiences.

19 Rule 23's typicality requirement
20 guards against just that kind of abuse. The
21 objections were repeatedly raised and rejected
22 below. The certification order cannot stand.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Ms. Reaves.

1 ORAL ARGUMENT OF NICOLE F. REAVES
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING NEITHER PARTY
4 MS. REAVES: Mr. Chief Justice, and
5 may it please the Court:

6 In Spokeo, this Court discussed a
7 number of considerations that are relevant to
8 whether a violation of a statutory right
9 constitutes a concrete injury, all of which
10 point the same direction here. The class
11 members have standing to bring reasonable
12 procedures claims.

13 By placing OFAC alerts on all class
14 members' consumer reports, Petitioner recreated
15 a real risk of harm that they would be denied
16 credit, employment opportunities, or other
17 benefits because they were wrongly labeled as
18 potential matches to a terrorist list. That is
19 precisely the type of harm that Congress sought
20 to prevent by adopting the reasonable procedures
21 provision, and defamation provides a common law
22 analogue.

23 Congress also gave consumers rights to
24 receive certain disclosures and summaries of
25 their rights, and under this Court's

1 informational standing cases, all class members
2 have standing to bring claims for violations of
3 those rights.

4 But because Mr. Ramirez suffered
5 atypical injuries, there is a significant
6 question regarding whether Rule 23 was
7 satisfied, and the Court should vacate and
8 remand on that basis.

9 I welcome the Court's questions.

10 CHIEF JUSTICE ROBERTS: Ms. Reaves,
11 putting aside the typicality questions, how, if
12 -- if any way, is your position different from
13 that of the Respondent's?

14 MS. REAVES: I think we view
15 informational standing as providing the best
16 basis for the second two violations that the
17 class alleged in this case, that is, the summary
18 of rights violation and the disclosure
19 requirement. We don't think the Court needs to
20 go through the multi-step factor process it laid
21 out in Spokeo when considering those two.

22 And I think, in addition, we look at a
23 few different factors when considering the
24 reasonable procedures requirement. We don't
25 really focus on potential of any emotional

1 distress but look at just the risk of
2 dissemination as to these class members.

3 And, similarly, we haven't taken a
4 position on whether there was third-party
5 publishing because of the activities that
6 TransUnion engaged in within its own
7 organization or with its third-party vendors.

8 CHIEF JUSTICE ROBERTS: You said in
9 your opening that the class members were wrongly
10 labeled potential matches to the OFAC list. But
11 I don't see how that's true. They were
12 potential matches, right? They had the same --
13 same name. "Potential" doesn't mean actual.
14 And I don't see how -- it doesn't mean actual.
15 And I don't see how it could be actual if they
16 were accurately labeled potential matches.

17 MS. REAVES: Mr. Chief Justice, a
18 couple of responses to that.

19 And, first of all, the statute doesn't
20 require a showing of actual falsity. It
21 requires consumer reporting agencies to follow
22 reasonable procedures to assure maximum possible
23 accuracy.

24 And one thing that's going on in this
25 case is Petitioner has conflated in a lot of

1 ways the standing and the merits arguments here.
2 So, under Spokeo, we have to look at whether
3 that's a type of harm that Congress could
4 legitimately identify and whether it has --

5 CHIEF JUSTICE ROBERTS: What is
6 your -- I think I've got that. What was your --
7 your second point?

8 MS. REAVES: And -- and the second
9 point is I think it's a stretch to say that
10 that's not wrong. A mere first and last name
11 match isn't matched to a first and last name on
12 another list, but it's not a lot different than
13 saying that John Smith and John Wayne are a
14 potential match just because they have the first
15 same name. Not necessarily --

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas.

19 JUSTICE THOMAS: Thank you, Mr. Chief
20 Justice.

21 Counsel, just so I understand you, are
22 you saying that the district court abused its
23 discretion in certifying the class here?

24 MS. REAVES: We haven't quite gone
25 that far, Justice Thomas, but we do think that

1 the court below viewed typicality through the
2 long -- wrong legal framework, and that may have
3 resulted in a improper certification of the
4 class. But we haven't taken the position that
5 it was certainly an abuse of discretion.

6 JUSTICE THOMAS: So -- but, if there
7 isn't an abuse of discretion, on what basis
8 would we send it back?

9 MS. REAVES: So we think that the
10 court below did apply the -- an incorrect legal
11 framework, but we're not sure that the ultimate
12 outcome was incorrect. And so we think that the
13 basis the Court would send it back would be to
14 say that this was the wrong typicality
15 framework. The court of appeals and district
16 court should have considered the guidelines that
17 we suggested in our brief that we think are tied
18 to the legal standard that a claim or defense be
19 typical and that the lower court should
20 reconsider this in the first instance because
21 there are open questions as to forfeiture and
22 what Petitioner and Respondent did and did not
23 agree to below.

24 JUSTICE THOMAS: So do you think that
25 there's anything other than the level of harm,

1 what -- what is atypical about this claim?

2 MS. REAVES: Mr. Ramirez's injuries
3 are atypical, we think. And, you know, a claim
4 is not necessarily defined as just the elements
5 that an individual needs to prove. Black's Law
6 Dictionary, when it defines "claim," includes
7 the relief that's requested.

8 And so a claim can consider the
9 injuries that result from an individual's
10 experiences that may well -- and while the
11 defendant's actions may have been the same as to
12 everyone, the plaintiff's experiences might have
13 some impact on what is and what is not relevant
14 for the purpose of proving a claim.

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer.

18 JUSTICE BREYER: I have the same
19 question, just if you want to say more about
20 Justice Thomas's last question. How is this
21 different? I've always thought that a -- a -- a
22 class of antitrust plaintiffs, all of whom have
23 to pay higher prices as the result of price
24 fixing, could be represented by a -- a consumer
25 who, through an odd chance, bought a thousand

1 times more of the product than anyone else in
2 the class. He just had higher damages.

3 Or a class action against somebody for
4 doing something that would send a victim to an
5 emergency room could be represented by a person
6 who was not only sent to the emergency room but,
7 through an odd set of circumstances, was
8 actually sent to the operating room and had to
9 be and had all kinds of bad -- it's the same
10 basic harm; it's just a lot worse.

11 Well, how does this differ from that?
12 In the examples I gave, are they not typical?
13 Or is -- is the -- is the defendant allowed to
14 say to the judge, Judge, don't take those
15 non-typical things into account, the extra
16 damages, at least not until we find liability;
17 then you can have a class for damages, or don't
18 consider -- I mean, how does it work?

19 MS. REAVES: A couple responses to
20 that, Justice Breyer.

21 I think, as to the two hypotheticals
22 you gave, the first hypothetical, the antitrust
23 plaintiffs, there might not be a typicality
24 problem there because any differences would be
25 easily calculated, and the court could consider

1 that at the outside -- outset of the case and
2 determine whether there's a viable damages model
3 to separate different individuals out just based
4 on kind of a mechanical mathematical
5 calculation.

6 I think the second example that you
7 gave, which kind of is a liability-type example,
8 in actuality, a lot of courts don't allow
9 product liability-type cases to proceed as a
10 class because individualized damages tend to --
11 tend to make the named plaintiff not typical or
12 run afoul of other Rule 23 considerations.

13 And, here, in the statutory damages
14 context, the jury is charged with setting the
15 amount of damages within a range. And
16 plaintiffs' specific experience can be relevant
17 to that. So, in a situation like this, where
18 one individual, the class plaintiff, was placed
19 on the stand and gave extensive testimony about
20 his specific experiences, we think that there
21 can be typicality problems there because that
22 isn't indicative of what happened to other class
23 members, and they might benefit from that in a
24 way that they really shouldn't.

25 CHIEF JUSTICE ROBERTS: Justice Alito.

1 JUSTICE ALITO: In Spokeo, the opinion
2 says, "not all inaccuracies cause harm or
3 present any material risk of harm." Do you read
4 that as -- in -- as saying that there is
5 injury-in-fact whenever there is material risk
6 of harm? Do you read that as setting out a
7 legal test for injury-in-fact?

8 MS. REAVES: I don't read that as
9 alone setting out a legal test for
10 injury-in-fact. I think the Court in Spokeo set
11 out a number of considerations that may be
12 relevant to injury-in-fact when Congress defines
13 a harm.

14 One of which is Congress's judgment;
15 another of which is whether there's a common law
16 analogue for the harm; and another of which is
17 whether there was a material risk of harm, which
18 might be necessary in some cases but not in all.

19 JUSTICE ALITO: You know, Spokeo's
20 discussion of harm is quite clipped and it's
21 potentially subject to different
22 interpretations. But let me shift to something
23 else and ask about the class members' standing
24 to assert claims for failure to provide the
25 information called for by Congress.

1 Mr. Clement says all the information
2 was actually provided, but it was just provided
3 in the wrong form. You may not agree with that.

4 But is it your position that there is
5 always injury-in-fact when information that
6 Congress says must be disclosed in a particular
7 form is not provided in that form but is
8 provided in another form, and the recipient is
9 well able to understand the information that's
10 provided?

11 MS. REAVES: That's not our position,
12 Justice Alito. The informational standing cases
13 that we rely on here require -- rely on a denial
14 of information that is statutorily required to
15 be provided.

16 And what you've just described
17 wouldn't be a denial of information. And so, if
18 there's a statutory formatting requirement, that
19 would kind of probably be back in the more
20 general Spokeo analysis, where we'd have to look
21 at the various factors that Spokeo lay out.

22 JUSTICE ALITO: All right. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor.

25 JUSTICE SOTOMAYOR: Counsel, do you

1 think that everyone in this class is entitled to
2 some measure of statutory damages?

3 MS. REAVES: Yes, Justice Sotomayor.

4 JUSTICE SOTOMAYOR: All right. So,
5 really, the issue is how much for each class
6 member, correct?

7 MS. REAVES: That is correct.

8 JUSTICE SOTOMAYOR: All right. And
9 what I'm having a problem understanding is how
10 Mr. Ramirez is not typical with respect to the
11 legal claims. His legal claims are identical to
12 everybody else's, right, the failure to have
13 reasonable procedures in place and the erroneous
14 disclosure, correct?

15 MS. REAVES: His claims are the same
16 as --

17 JUSTICE SOTOMAYOR: All right. Now if
18 you would just walk with me, okay? He's the
19 same in terms of every other class member as to
20 statutory damages.

21 And what you say, I think, is that he
22 may be atypical with respect to the amount of
23 statutory damages to which his particular type
24 of harm would be entitled. Am I correct?

25 MS. REAVES: That's correct.

1 JUSTICE SOTOMAYOR: But why isn't that
2 a trial issue? And why is that an issue for
3 23(a)? Wouldn't that be a predominance
4 requirement under 23(b)(3)?

5 MS. REAVES: So, Justice Sotomayor,
6 let me try to answer the couple of questions
7 that you have in there, and starting with the
8 last one, which is whether this is a typicality
9 problem or not.

10 While I would agree and this Court has
11 repeatedly said that there's overlap between
12 typicality and predominance and commonality,
13 here, it does seem that this problem fits best
14 within the typicality bucket, and that's because
15 typicality focuses on the named plaintiff and
16 his claims, whereas the other requirements,
17 commonality and predominance, focus on all the
18 class's claims in a -- in a broader way.

19 And getting to the second kind of
20 point, I think that this is not a trial issue
21 because this Court has repeatedly said that a
22 plaintiff needs to demonstrate that he or she
23 meets requirements of Rule 23, and this may have
24 to be done by an evidentiary showing at the
25 outset of a case. So it's not as if, if that

1 isn't sufficiently done, it's the obligation of
2 the defendant to try to fix any --

3 JUSTICE SOTOMAYOR: All right.

4 MS. REAVES: -- typicality problems
5 that were introduced.

6 JUSTICE SOTOMAYOR: Thank you,
7 counsel.

8 CHIEF JUSTICE ROBERTS: Justice Kagan.

9 JUSTICE KAGAN: Ms. Reaves, I guess
10 I'm not quite understanding your typicality
11 argument because you just said it wasn't a trial
12 issue. But, in answering Justice Breyer, you
13 said that the problem was that Mr. Ramirez had
14 testified at trial.

15 So I guess the question that I have
16 is, suppose he hadn't testified at trial, would
17 there still be a typicality problem?

18 MS. REAVES: I think it's very likely
19 that there would not be a typicality problem in
20 that situation, and that's because a plaintiff
21 is the master of their complaint and the master
22 of the case that they put on at trial.

23 JUSTICE KAGAN: Well, it's a little
24 bit odd to me to say that there wouldn't be a
25 typicality problem in that situation, but still

1 it's a -- it's -- it's a -- it's a problem
2 that's about class certification, because Mr.
3 Ramirez could have brought this case as a class
4 representative and not testified at trial or,
5 alternatively, he could have had somebody else
6 testify at trial, a different member of the
7 class. I mean, there's no necessary
8 relationship between who's the class
9 representative and who testifies at trial.

10 I mean, still a third alternative is
11 that Mr. Clement's client could have called a
12 bunch of other class members to testify at
13 trial.

14 The question of who testifies at trial
15 really has nothing to do with who the class
16 representative is, does it?

17 MS. REAVES: Not necessarily. You're
18 correct as a matter of trial management that the
19 named plaintiff wouldn't have to testify. But
20 that doesn't absolve courts of the requirement
21 to find out whether a putative named plaintiff
22 is, in fact, typical at the outset.

23 JUSTICE KAGAN: I mean, suppose that
24 -- suppose -- it's sort of a mismatch, your
25 argument and your conclusion. Suppose that

1 there were a different class representative. It
2 wasn't Mr. Ramirez. It was a class
3 representative with a perfectly typical injury.
4 But then you said I have this great idea, let's
5 put Mr. Ramirez on the stand.

6 I mean, he could do that. There might
7 be some evidentiary objection. But it wouldn't
8 be a -- a class objection, a class certification
9 objection.

10 So, again, the problem has nothing to
11 do with class certification, does it?

12 MS. REAVES: I disagree, Justice
13 Kagan. I think that what you just described, a
14 class member who's not a named plaintiff,
15 testifying to radically atypical injuries, that
16 wouldn't be a typicality problem, but it could
17 be a predominance or a commonality problem.

18 Here, it's a typicality problem
19 because it was the named plaintiff. But, as
20 this Court has laid out in cases like *Dukes* and
21 *Falcone*, a plaintiff has to bear the burden of
22 proof of demonstrating that they meet --

23 JUSTICE KAGAN: Thank you, Ms. Reaves.

24 MS. REAVES: -- Rule 23 class
25 requirements.

1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch.

4 JUSTICE GORSUCH: Good morning. I --
5 I -- I want to return to Justice Alito's last
6 question. I'm not sure I captured your answer.

7 So Congress has a statute that says
8 notice needs to be provided in a particular
9 form. This then provides it in a different
10 form.

11 Is that alone enough to create an
12 injury-in-fact under Spokeo, or do you agree
13 that something more needs to be shown, some risk
14 of harm, some actual harm, something befell the
15 plaintiff because the form of the information
16 was different?

17 MS. REAVES: Justice Gorsuch, I want
18 to be clear on this here. We think that the --
19 a difference in form wouldn't fall under
20 informational standing per se and, thus, would
21 end up under Spokeo.

22 And in that instance, a court would
23 need to look at Congress's judgment, whether
24 there was a common law analogue and whether
25 there was a material risk of harm.

1 JUSTICE GORSUCH: So some --

2 MS. REAVES: And --

3 JUSTICE GORSUCH: -- something more
4 than a mere violation of the statutory form of
5 notice?

6 MS. REAVES: I think that's likely
7 there would not be harm there, although I'm
8 obviously answering in the complete abstract
9 without any -- any statute.

10 JUSTICE GORSUCH: Okay. All right.
11 Thank you, counsel.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh.

14 JUSTICE KAVANAUGH: Thank you, Chief
15 Justice.

16 And welcome, Ms. Reaves. On the risk
17 of harm, I want to make sure I understand your
18 answer. My understanding was that a risk of
19 harm that is not itself a separate cognizable
20 harm does not give you standing to seek damages,
21 as opposed to injunctive relief, because you
22 haven't been harmed. Is that wrong?

23 MS. REAVES: We disagree with that,
24 Justice Kavanaugh, in that I think what this
25 Court suggested in Spokeo is that in certain

1 instances, a risk of harm alone can be enough to
2 provide Article III standing.

3 And an example of that from the common
4 law is libel, which is -- in which, in the
5 common law, would allow a recovery of damages
6 even if harm never actually materialized.

7 JUSTICE KAVANAUGH: Well, because
8 there's been publication, though, and so there's
9 been some kind of reputational injury, no?

10 MS. REAVES: So that -- that's part of
11 defamation, but I don't think this Court
12 suggested in Spokeo that we're forever limited
13 to the types of common law harms that have only
14 explicitly been identified.

15 JUSTICE KAVANAUGH: And then, on -- I
16 just want to see how you see -- see this case
17 fitting into the separation of powers more
18 generally.

19 I think Mr. Clement is suggesting and,
20 certainly, the amicus briefs are suggesting on
21 his side that Congress is, in essence,
22 delegating the private attorneys general to
23 enforce federal law against a wrong committed by
24 someone to try to deter that wrongful behavior.

25 And some of the amicus briefs say the

1 problem is that the executive branch enforces
2 federal law and that private plaintiffs can't do
3 that, can't be delegated that authority by
4 Congress unless they themselves have a concrete
5 injury.

6 Do you disagree with any of that?

7 MS. REAVES: I disagree. I think that
8 suggesting that because this law can be enforced
9 by the FTC, that that suggests that it can't
10 also provide some individualized concrete
11 rights. And specifically looking at the rights
12 that are at issue here, you know, the cause of
13 action provides a cause of action to any -- you
14 know, when there's a statutory violation with
15 respect to any consumer.

16 And what we're talking about here are
17 mistakes made with an individual's consumer
18 report about his or her own information. I just
19 don't think that's a violation of executive
20 power or prosecutorial power when it's an
21 individual's right that Congress has given to
22 that individual.

23 JUSTICE KAVANAUGH: Thank you. Very
24 helpful, Ms. Reaves. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett.

2 JUSTICE BARRETT: Good morning,
3 Ms. Reaves. I have a question about
4 informational injury.

5 So, you know, Atkins and Public
6 Citizen arise in the context of FOIA and -- and
7 a right to information from the government. A
8 lot of the courts of appeals who have recognized
9 this idea of informational injury in the context
10 of information to which a plaintiff is entitled
11 from a private party also rely on Havens Realty.
12 You don't. Why?

13 MS. REAVES: Justice Barrett, while we
14 didn't cite Havens Realty in our brief, we do
15 think it is relevant to the informational
16 standing inquiry here.

17 JUSTICE BARRETT: Can you describe a
18 little bit more? Because it seems to me that
19 Havens Realty is -- the harm there is
20 discrimination, not deprivation of information.
21 And since it's kind of an obvious cite, because
22 those are the three cases that the courts of
23 appeals relied on, I was surprised not to see it
24 there.

25 Do you think Havens Realty is distinct

1 -- distinguishable?

2 MS. REAVES: I don't think it's
3 distinguishable from this case. And I think
4 it's helpful because while it was against the
5 backdrop of discrimination, the Court there
6 found that the Fair Housing Act conferred on all
7 persons a legal right to truthful information.

8 JUSTICE BARRETT: Okay, let me --

9 MS. REAVES: And --

10 JUSTICE BARRETT: Let me switch gears
11 for a second and go back to Atkins and Public
12 Citizen. If in those cases those who are
13 seeking information had said we want the
14 information, we filed the FOIA request, we have
15 no indication -- we have no plans of even
16 opening the envelope with the information if you
17 provide it to us, would they have had standing
18 then?

19 MS. REAVES: I think it's certainly a
20 closer question, but I don't think that
21 informational standing, as this Court has viewed
22 it, requires -- it -- I should say it solely
23 requires the denial of information to which
24 someone is entitled under Article III.

25 JUSTICE BARRETT: Then why is it a

1 close question? If the -- if the plaintiffs in
2 those cases had disclaimed any intent to use the
3 information or even look at it, why under your
4 theory isn't it a -- a -- a straightforward yes,
5 they had informational injury and, therefore,
6 standing?

7 MS. REAVES: Well, I think the answer
8 is yes. I think it's closer, just in that it
9 might, you know, touch on the concreteness just
10 a little bit, but at the end of the day, the
11 denial of information alone is enough. And we
12 think those cases are best read that way, and we
13 think what happened here is also best seen as a
14 denial of information, regardless of the fact
15 that there's not proof potentially as to
16 individual class members about having opened the
17 envelopes.

18 JUSTICE BARRETT: Thank you, Ms.
19 Reaves.

20 CHIEF JUSTICE ROBERTS: A minute to
21 wrap up, Ms. Reaves.

22 MS. REAVES: Thank you, Mr. Chief
23 Justice.

24 While we've discussed a number of
25 hypotheticals today, it's important to keep in

1 mind the actual claims here. On these facts,
2 the various Spokeo factors all cut in favor of
3 finding standing for the reasonable procedures
4 claims. The OFAC alerts were inaccurate as to a
5 material issue, whether a party making a
6 contracting decision could lawfully contract
7 with a consumer.

8 And there was a substantial likelihood
9 that all class members' reports with the alerts
10 would be disseminated to third parties.
11 Petitioner's business model depended on
12 dissemination. Petitioner made the reports
13 available at a moment's notice. The Petitioner
14 had a high dissemination rate.

15 Congress made a clear judgment to
16 protect consumers in this situation, and nothing
17 in Article III prevents Congress from doing so.
18 This case falls on the standing side of the
19 line, regardless of where hypothetical cases
20 involving other statutory provisions and other
21 facts might come out.

22 And the disclosure and summary of
23 rights claims fall squarely within this Court's
24 informational standing precedents. But given
25 the typicality positions, the Court should

1 vacate the decision below and remand the case.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Issacharoff.

6 ORAL ARGUMENT OF SAMUEL ISSACHAROFF

7 ON BEHALF OF THE RESPONDENT

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

10 Congress recognized both risks and
11 benefits inherent in centralizing massive
12 amounts of private credit information. It gave
13 credit reporting agencies broad preemptive
14 protection from tort liability but also the
15 responsibility to ensure accuracy and to follow
16 specific procedures to enable consumers to
17 challenge this reporting.

18 Nothing in Article III restricts
19 Congress's power to create those rights. The
20 class alleged and proved invasion of
21 particularized statutory rights granted to them,
22 not the general public. The common law has long
23 recognized a concrete interest in economic
24 reputation and afforded an inferred remedy
25 without proof of actual damages.

1 TransUnion created an explosively high
2 risk of harm by placing OFAC designations, not
3 in the secretive draft -- desk drawer, but in
4 the readily acceptable credit files of innocent
5 Americans. As the SG argued, TransUnion's
6 business was dissemination of information to
7 third parties. No dissemination, no profit.

8 Both courts below found the claims
9 asserted were the same for all class members,
10 following the text of Rule 23(a)(3). Mr.
11 Ramirez's accuracy claim stems from TransUnion's
12 systemic failure to ensure accurate OFAC
13 reporting, and his disclosure claim stems from
14 the same two non-FCRA-compliant letters sent to
15 every class member. All class members sought
16 statutory damages based upon the same willful
17 misconduct of Petitioner.

18 But the heart of this case is the
19 concrete harm established at trial. Being
20 labeled a potential OFAC match is not a
21 misreported ZIP code. It is the scarlet letter
22 of our time. It banishes individuals from the
23 marketplace. It is thus staggering that since
24 2002 Petitioner could not identify a single
25 correct OFAC match despite issuing thousands of

1 OFAC alerts a year.

2 This is not Lujan or Coffey, not an
3 attempt to constrain other branches, but of
4 honoring the statutory scheme.

5 Thank you, Your Honor.

6 CHIEF JUSTICE ROBERTS: And thank you,
7 counsel.

8 Let -- let's suppose that Congress
9 creates a cause of action for statutory damages
10 for anyone driving within a quarter mile of a
11 drunk driver. You were driving within a quarter
12 mile, but you didn't know it until a few days
13 later. You know, based on a highway camera, you
14 got notice and it told you about the statute.

15 Can you bring a -- an action under
16 that statute?

17 MR. ISSACHAROFF: I believe you could
18 bring an action under that statute. The
19 question would be whether you were harmed at
20 all.

21 And Spokeo runs the inquiry about the
22 risk of harm together with the scope of the
23 congressional interest. And at that point, you
24 would have a marginal -- a marginal case, Your
25 Honor.

1 CHIEF JUSTICE ROBERTS: So you're
2 saying that you would have standing to bring --
3 bring that suit?

4 MR. ISSACHAROFF: Yes, Your Honor. In
5 footnote 6 of Lexmark, the Court distinguished
6 between proximate causation and the standing
7 inquiry and suggested as in cases like the
8 hypothetical before me, that the better approach
9 might be to dismiss this under Twombly or Iqbal
10 or for summary judgment, but that it confuses
11 the -- the statutory cause of action to address
12 it in -- in jurisdictional terms.

13 CHIEF JUSTICE ROBERTS: Well, but
14 Spokeo also said that Article III standing
15 requires a concrete injury even in the context
16 of a statutory violation. What is the concrete
17 injury in my hypothetical?

18 You -- you didn't know -- you were
19 exposed to risk, but you didn't know it, and by
20 the time you found out about it, you weren't. I
21 think Mr. Clement said, you know, you should be
22 breaking out the champagne or -- or talking
23 about how lucky you are, not -- not how much
24 you've been injured.

25 MR. ISSACHAROFF: Well, Your Honor, I

1 think Spokeo addresses the question of material
2 risk and does not do so in terms of your
3 subjective knowledge. And so the question is
4 whether you -- there was material risk of your
5 being harmed and whether Congress sought to
6 deter parties from engaging in that material
7 risky behavior by creating a cause of action.

8 CHIEF JUSTICE ROBERTS: Justice
9 Thomas.

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

12 Counsel, just a couple of quick
13 questions. You -- you -- do you agree that
14 every member of this -- of the class has to have
15 standing?

16 MR. ISSACHAROFF: Yes, Your Honor.

17 JUSTICE THOMAS: The -- let me -- I'd
18 like to just to explore something just briefly.
19 Let's assume that in this case that -- that your
20 client received a summary of -- of his rights on
21 day one on a Monday, and the company admits that
22 it inadvertently sent that out, immediately
23 corrects it the next day with an explanation, so
24 you have the two letters again with complete
25 information.

1 Would you -- would you have a claim?

2 MR. ISSACHAROFF: You would have
3 standing to bring a claim, Your Honor. I think
4 you would lose on the merits, on the ground that
5 there's no harm.

6 But the question in this particular
7 case is whether these two letters sent -- sent
8 at different times with different disclosures
9 satisfied the statutory purposes. And even the
10 drafter of these letters, an employee of
11 TransUnion, testified at trial that there was
12 confusion created here, as was the testimony of
13 Mr. Ramirez.

14 JUSTICE THOMAS: So you would have
15 standing even though there's certainly -- it
16 doesn't appear to be any intention to deceive,
17 no intention to send you the wrong letters and a
18 total correction of the problem, or an
19 explanation at least?

20 MR. ISSACHAROFF: Intentionality would
21 come in on the damages side. And the statute is
22 quite clear that it is the willfulness of the
23 defendant that gives rise to a claim for
24 statutory damages.

25 So, in this case, I think that there

1 would be standing, but there would be no remedy
2 available. It would probably go to the
3 redressability side, not the injury-in-fact
4 side.

5 JUSTICE THOMAS: So you mentioned
6 damages. That -- that leads me to this question
7 with respect to typicality.

8 Here, obviously, there's statutory
9 damages involved, so that makes it less
10 difficult from my standpoint. But what if the
11 damages available here were actual damages?
12 Would that change the typicality analysis?

13 MR. ISSACHAROFF: It would, Your
14 Honor, because the typicality analysis at that
15 point would turn on the proven harm to the
16 individual and the consequences of it. In that
17 situation, there would be difficulty for class
18 certification, let alone for the calculation of
19 damages.

20 JUSTICE THOMAS: So you think that it
21 would be -- it would really jeopardize your --
22 Petitioner's or Respondent's chance of being
23 typical of the class?

24 MR. ISSACHAROFF: Not at -- not
25 typicality, Your Honor, because the typicality

1 goes only to the claims. It would compromise
2 predominance. It would compromise perhaps the
3 adequacy of representation.

4 But so long as the claims asserted
5 themselves, as this Court said in *Falcone*, that
6 is what typicality has to ensure.

7 JUSTICE THOMAS: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Breyer.

10 JUSTICE BREYER: Well, you want to say
11 anything additional on that point, additional
12 about, I mean, what I -- what I think must have
13 come up often in -- or fairly often in class
14 cases where damages differ, but there are the
15 issues that you said are the same, someone goes
16 in and tries to testify about the extra damages
17 that he suffers, the higher, higher prices, or
18 the many more widgets that they were charged on,
19 or the special bad treatment he got in some
20 hospital, et cetera, and the other side, I
21 should think, would be able to object either
22 that it's relevant, something like it's
23 relevance is -- is small compared to the harm
24 it's going to do to our case for these damages
25 or not, really very typical.

1 They're especially egregious and it'll
2 prejudice the jury. But am I on the right track
3 there, the wrong track? What's actually
4 happened?

5 MR. ISSACHAROFF: I think you are on
6 the right track, Justice Breyer, and I would
7 have two responses.

8 The first is simply that centuries of
9 experience with the trial practice has led the
10 Federal Rules of Evidence to address exactly the
11 questions Your Honor is -- is asking about,
12 through Rule 403, the ability to object that the
13 testimony is more prejudicial than probative,
14 but also places the burden through Rule 103 on
15 the objecting party to clarify the issues before
16 the trial court and to set them up for appeal.

17 More broadly, I would -- I would say
18 that if you look at the mechanics of class
19 certification and the requirement under Rule
20 23(c) that it be done as early as practicable,
21 at this point, at the point of class
22 certification, it is unlikely that anyone has
23 any idea what the nature of the trial testimony
24 will be.

25 When Petitioner sought 23(f) review in

1 the court of appeals, it did not address the
2 typicality point. It tried to disqualify Mr.
3 Ramirez not because he was too strong but
4 because he had no claim. They said that he had
5 dissembled his application. They said that he
6 had no damages. And they tried to disqualify
7 him on summary judgment on the same basis.

8 It's only upon the retelling on appeal
9 that Mr. Ramirez emerges as Hank Aaron. There
10 was no evidence before the district court at the
11 time of certification that there was anything
12 atypical in the strength of Mr. Ramirez's claim.

13 JUSTICE BREYER: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice Alito.

15 JUSTICE ALITO: Let's assume that
16 TransUnion has a computer program, as I assume
17 they did, that will flag anybody whose first
18 name and last name corresponds to someone who is
19 on this list.

20 Do you think that everybody who would
21 be flagged if there were any sort of inquiry has
22 suffered injury-in-fact even if there never was
23 an inquiry regarding that person?

24 MR. ISSACHAROFF: I think they have
25 under this Court's standard in Spokeo. There

1 was certainly material risk.

2 Mr. Clement relies heavily on the
3 75 percent number. But the fact is that one
4 quarter of the class had their files accessed by
5 one subset of potentially accessing parties
6 within only seven of the 46 months of the class
7 period.

8 So there is material risk here, but I
9 think it goes beyond that, Justice Alito, that
10 the testimony at trial was that over 98 percent
11 of the people on the OFAC list are foreigners.
12 They are not American citizens. The class was
13 only American. And there were --

14 JUSTICE ALITO: Well, one of the --
15 let me -- let me interrupt you to try to get in
16 an additional question.

17 One of the things we look for in
18 determining whether there is Article III
19 standing is whether there's any common law
20 analogue, whether this was the kind of case that
21 would have been recognized as an appropriate
22 case in court at the time of the adoption of the
23 Constitution.

24 What is the closest case you can think
25 of where there -- where a suit could be brought

1 to recover for having been subjected to a risk
2 in the past even though the person had no
3 knowledge that the person had been subjected to
4 that risk?

5 MR. ISSACHAROFF: I think that a
6 defamation per se at common law, there was no
7 requirement that the actual party testify to his
8 knowledge of the risk. The question was whether
9 there was dissemination of information of the
10 sort that would cause damage.

11 And, here, under the facts presented,
12 there are people like landlords who routinely
13 check your credit files. Most Americans have no
14 idea when their credit files are being accessed.

15 And so this is a -- this is an -- an
16 imposition that would not have been recognized
17 at common law.

18 JUSTICE ALITO: Well, suppose in -- in
19 -- in 1786 someone was getting ready to publish
20 a newspaper article defaming me. I had no idea
21 that this was going to happen. And just before
22 the person -- before this article was published,
23 the owner of the paper said: No, we're not
24 going to do that. And so it never was
25 published.

1 Would I have been able to sue for
2 defamation in that situation? Because I was at
3 a serious risk at some point in the past of
4 being defamed, but it never eventualized and I
5 didn't even know that I was at risk.

6 MR. ISSACHAROFF: No, Your Honor. In
7 that case, there would have been absolutely no
8 risk of publication. It would have been Mr.
9 Clement's desk drawer analogy.

10 However, there's a difference between
11 that and being on readily accessible computer
12 files that are downloaded on a routine basis, we
13 have evidence in the record, millions of times
14 per month.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor.

18 JUSTICE SOTOMAYOR: Counsel, would you
19 give me your best answer to both Mr. Clement and
20 the government with respect to the typicality
21 issue on the degree of harm in this case?

22 Both of them believe that under 23(a)
23 that typicality often has to do -- has to
24 address whether your -- your -- your damages
25 claim are common to the class in some sway.

1 So give me your best answer.

2 MR. ISSACHAROFF: There have been
3 decades of experience under Rule 23(a)(3), and
4 there has never been a requirement of identity
5 of damages among all class members.

6 In fact, when Congress passed PSLRA
7 and determined that it would be best for the
8 class to have the strongest claimant take the
9 lead, there was no need to modify Rule 23 or in
10 other -- or in any other fashion change the
11 substantive law of class certification.

12 We have had experiences, as Justice
13 Breyer suggested, with antitrust cases, where
14 somebody bought a thousand times as many widgets
15 as someone else, and that does not alter whether
16 the claims or defenses are the same as are being
17 asserted by the rest of the class.

18 There is no basis for distinguishing
19 in the legal claims that are being asserted.
20 There are questions, of course, about whether
21 there can be common answers to the common
22 questions, as this Court determined in *Dukes*
23 versus Wal-Mart, or there can be questions as to
24 predominance.

25 JUSTICE SOTOMAYOR: Thank you,

1 counsel.

2 CHIEF JUSTICE ROBERTS: Justice Kagan.

3 JUSTICE KAGAN: Mr. Issacharoff, I --
4 I get the harm from your procedures claim, but
5 I'm wondering if I could press a little bit more
6 on the disclosure claims.

7 I mean, what Mr. Clement says about
8 those is that your clients are complaining about
9 receiving two envelopes in the mail rather than
10 one.

11 Why isn't that the right way to look
12 at this, that this is a real -- really a sort of
13 no harm/no foul situation?

14 MR. ISSACHAROFF: I believe that
15 that's a factual question, Your Honor. And if,
16 indeed, it was just two envelopes and they just
17 -- there was just a mistake as to the mailing,
18 that may mitigate any kind of disclosure claim.

19 But the evidence presented to the jury
20 here -- and these were factual determinations as
21 to the violation, the willful violation of the
22 statute, by the jury. The evidence presented to
23 the jury was that these were confusing not just
24 as to Mr. Ramirez, but the drafter of the
25 letters testified to that as well, and that they

1 did not serve the statutory purpose of giving
2 the disclosure in a form that was tied to the
3 specific risk of being on an OFAC match list.

4 JUSTICE KAGAN: And just -- just
5 thinking about what a material risk is, a
6 material risk of harm, as -- as -- as Spokeo
7 described it, what do you take that to mean? I
8 mean, how likely does a risk have to be? Of
9 what kind of harm are we talking about? How
10 should we think about that standard that we set
11 out?

12 MR. ISSACHAROFF: Well, Spokeo runs
13 together a number of different analytic strains.
14 And I think that if you look at the cases that
15 Spokeo addressed and relied upon and the cases
16 that have been decided by this Court more
17 recently, like Brownback and Uzuegbunam, I think
18 that what you have is a divide between completed
19 harms and injunctive relief.

20 Injunctive relief, a party has to
21 establish standing in a more exacting way. I
22 think that's one of the conclusions of Lujan.
23 It is a -- it makes a difference whether the --
24 the claim is a facial challenge to a statute or
25 an applied application to the particular

1 claimant. And, most significantly, I think it
2 makes a difference whether these are generalized
3 claims of the public at large or private claims
4 or a private endowment of the right to sue by
5 Congress.

6 So I think that the -- the answer to
7 your question, Justice Kagan, is that Spokeo
8 looks at all of these in the material risk of
9 harm in trying to determine whether there's a
10 sufficient allegation of actual injury.

11 I -- as we said in our brief, it may
12 be better to disaggregate them and to focus
13 primarily on whether these are private versus
14 public rights, because that's a simpler analytic
15 divide that helps explain the outcome in all of
16 this Court's cases.

17 JUSTICE KAGAN: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch.

20 JUSTICE GORSUCH: Counsel, in your
21 brief at least, you seem to suggest that the
22 6,332 class members have standing in part
23 because there was publication of their
24 information at least within TransUnion and its
25 agents who print up information for them.

1 And I guess my first question for you
2 is, does that -- does that pose a problem in
3 light of our intra-corporate conspiracy doctrine
4 that normally suggests what happens within a
5 corporation doesn't count for purposes of
6 conspiracy, you need to have somebody outside of
7 it, outside of it and its agents? And isn't it
8 odd to speak of publication within a company?

9 MR. ISSACHAROFF: Your Honor, we were
10 in that section of the brief addressing the
11 question from Spokeo, whether there was a common
12 law analogue to what happened here.

13 All we were arguing was not that this
14 was the basis of recovery but, rather, that the
15 common law did recognize intra-corporate
16 communications as a form of publication, and
17 that was carried forward in the Restatement
18 First and Restatement Second.

19 Our claim for recovery and for harm is
20 a statutory one, and so the question is whether
21 Congress created the private right of action.

22 JUSTICE GORSUCH: No, I -- I -- I
23 understand that point. I was just trying to
24 clarify the first one. And I guess, on that, my
25 -- my -- my follow-up to you is, would that view

1 of defamation law allow for individuals to sue
2 newspapers and other media outlets who have
3 shared false information internally but not
4 actually published it externally?

5 MR. ISSACHAROFF: There are common law
6 precedents for that, Your Honor, because, if
7 it's communicated --

8 JUSTICE GORSUCH: Do you -- do you
9 endorse that view of the law?

10 MR. ISSACHAROFF: We don't think it
11 has any bearing on the outcome of this case,
12 Your Honor.

13 JUSTICE GORSUCH: So this whole
14 argument, we should just ignore that?

15 MR. ISSACHAROFF: No, the argument is
16 to show that Congress was legislating against a
17 -- a proximate common law baseline, an argument
18 that had to be addressed in light of Spokeo.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh.

22 JUSTICE KAVANAUGH: Thank you, Chief
23 Justice.

24 Good morning, Mr. Issacharoff. I
25 think you have a good argument with respect to

1 the 1,853 in terms of the reasonable procedures,
2 but I'm more concerned about the 6,332, whose
3 information was not, in essence, published.

4 Under -- in Spokeo, of course, the
5 information was published, which is a big
6 distinction, as I see it, between that case and
7 this, as to the 6,332. And when Spokeo talked
8 then about risk of harm, it was talking about
9 harm beyond the publication, at least as I
10 understood it, for example, publication of ZIP
11 codes, which strikes me as a very different
12 thing than risk, talking about risk of harm when
13 there hasn't been publication to begin with. So
14 that -- that's point one.

15 And then, on -- on risk of harm, you
16 heard me talk about damages versus injunctive
17 relief. It strikes me that risk of harm, of
18 course, is enough to get you injunctive relief.
19 With damages, I -- I hadn't thought risk of
20 harm would get you damages -- standing for
21 damages claims unless the risk of harm was
22 itself a harm.

23 Judge Tatel in the D.C. Circuit
24 analogized it: If inaccurate information falls
25 into a database, does it make a sound? And his

1 answer to that, applying Stoke -- Spokeo, was
2 no. And I guess then-Judge Barrett talking
3 about no harm, no foul, seemed to be picking up
4 on the same thing.

5 So can you respond to the distinction
6 between this case and Spokeo and then try to
7 help me on risk of harm for the 6,332?

8 MR. ISSACHAROFF: Yes. Briefly, the
9 distinction between this and Spokeo is that this
10 is not a ZIP code or marital information, but
11 this is a serious allegation which prevents
12 individuals from being able to transact at all.
13 So --

14 JUSTICE KAVANAUGH: But it hasn't been
15 published, unlike in Spokeo.

16 MR. ISSACHAROFF: That -- that's the
17 second -- that's the second prong of this,
18 which is the publication. And we think that
19 that's a fact record. We think that under
20 Spokeo, material risk establishes the standing,
21 and then the question is whether there has been
22 publication, which would be an element of the
23 event.

24 And I think that the evidence here is
25 that with regard to the other 6,000, that there

1 was circumstantial evidence given the
2 limitations on what the defendant provided to
3 us. I would direct Your Honor's attention --

4 JUSTICE KAVANAUGH: In Spokeo, though,
5 I think, you know, there's different language
6 in there, of course, and we're going to have to
7 figure that out, but I thought the publication
8 itself was the key demarcation that helped
9 support standing there.

10 And you don't have that here for the
11 6,332. If you can continue your answer to that.

12 MR. ISSACHAROFF: The Court remanded
13 in Spokeo to determine standing given the -- the
14 quality of the injury asserted and -- so that
15 publication was not enough to get over the
16 hurdle. And I don't think that at any point in
17 Spokeo the Court said that it was a -- a -- by
18 itself a necessary condition.

19 But even assuming the burden of
20 publication, if the Court's attention could be
21 directed to Joint Appendix page 104, where
22 TransUnion did an internal audit of its OFAC
23 claims and found that in one month, in July
24 2012, which is still within the statutory
25 period, within the class period, there were over

1 17,000 OFAC alerts sent out. All of the class
2 members were still on the list at that time.

3 And so you have a situation where a
4 jury could reasonably infer, given the
5 limitations on what TransUnion was able to
6 generate from its files, that there was, indeed,
7 publication --

8 JUSTICE KAVANAUGH: Thank --

9 MR. ISSACHAROFF: -- as to all.

10 JUSTICE KAVANAUGH: -- thank -- thank
11 you very much.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett.

14 JUSTICE BARRETT: Good morning, Mr.
15 Issacharoff. I have a question about whether
16 you can ever have a bare procedural violation
17 with respect to any of these consumer protection
18 statutes like FCRA or the FDCPA. I mean, all of
19 them have procedures that are designed to
20 protect against a risk of harm. So, you know,
21 whether it's to have information put clearly on
22 two pages instead of one or, you know, whether
23 it's to say that certain things must be in
24 writing or whether it's -- I'm thinking of many
25 of the cases that the lower courts have dealt

1 with -- not having so many numbers of your
2 credit card receipt -- credit card number
3 reflected on a receipt, all of these are
4 designed to protect a consumer against the risk
5 of some harm.

6 So is there any violation that you can
7 think of -- and I'm talking about -- I'm not
8 talking about the disclosure here. I mean I'm
9 not talking about the reasonable procedures
10 claim and the disclosure of private information.
11 I'm talking about these procedural guardrails
12 like this. Is there anything that you can think
13 of that would count as a bare procedural
14 violation that's not cognizable under Spokeo?

15 MR. ISSACHAROFF: I think Spokeo
16 leaves that question open, Your Honor. I think
17 that the best answer should be that, if it is
18 trivial, if it would not have a common law
19 analogue because of the nature of the disclosure
20 or the nature of the procedural violation, that
21 the Court could reject it as a matter of
22 standing.

23 It remains a question whether the
24 Court is best off handling the standing matters,
25 meaning that the individual would then be free

1 to file in state court, or should handle it as a
2 matter of part of the injury-in-fact and
3 necessary as part of the statutory standing, and
4 then simply rule against the plaintiff on the
5 merits.

6 JUSTICE BARRETT: So then is it your
7 position that the reason why there was standing
8 for the things coming in the two envelopes and
9 the OFAC envelope not having the specific
10 information that was included in the first
11 credit report, is it your position that the
12 reason why that's not a bare procedural
13 violation as opposed to something else, you
14 didn't give an example, but something you say
15 would be trivial, is it because of it being
16 inherently shocking and confusing, like the
17 Ninth Circuit said, is that what distinguishes
18 it?

19 MR. ISSACHAROFF: That is part of what
20 distinguishes. It is also the fact that they
21 were called out on exactly these types of
22 procedures by the Third Circuit in Cortez.

23 JUSTICE BARRETT: But that doesn't
24 have anything to do with whether the plaintiff
25 was injured. That might bear on how egregious

1 TransUnion's behavior was, but that doesn't bear
2 on the injury, right?

3 MR. ISSACHAROFF: It bears on the
4 injury on the willfulness claim for statutory
5 damages --

6 JUSTICE BARRETT: But not the
7 concreteness, right?

8 MR. ISSACHAROFF: No, not the
9 concreteness to the individual plaintiff, that's
10 correct, Your Honor.

11 JUSTICE BARRETT: Okay. Thank you
12 very much.

13 CHIEF JUSTICE ROBERTS: A minute to
14 wrap up, Mr. Issacharoff.

15 MR. ISSACHAROFF: Thank you, Your
16 Honor.

17 The concern in this Court's Article
18 III cases is protecting the domain of Congress.
19 Never has this Court found Article III to remove
20 jurisdiction for retrospective damage claims,
21 when Congress has created the private cause of
22 action, that's so the affected individuals have
23 the right to bring suit, and then provided for
24 statutory remedies to those individuals.

25 It is difficult to imagine a fact

1 pattern more at the heart of the statutory zone
2 of interest or one that is more uniform across
3 the class. There were only a total of 6,000
4 people on the OFAC list, and over 98 percent of
5 them are foreigners.

6 Yet there are 8,185 class members.
7 These are all Americans. The terrorists or drug
8 kingpins on the OFAC list are not the people who
9 apply for credit at Home Depot.

10 The name match system used here
11 yielded not one Sergio Ramirez in the class of
12 three, not to mention 99 people named Maria
13 Hernandez. All were listed improperly.

14 Ramirez's claims are not only typical
15 of the other Sergio Ramirez', but are identical
16 to a group put in harm's way by TransUnion's
17 uniform course of conduct.

18 Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Mr. Clement.

20 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

21 ON BEHALF OF THE PETITIONER

22 MR. CLEMENT: Thank you, Mr. Chief

23 Justice and may it please the Court:

24 Just a few points in rebuttal. First,
25 on falsity it's interesting to hear the

1 government to say that reporting this as a
2 potential match is not -- is -- is false,
3 because if you go to the OFAC web site today and
4 type in the Respondent's name, you will get a
5 hit. And so they think it's good enough for the
6 government. I guess it -- they hold TransUnion
7 to a higher standard.

8 The government also said that the
9 information need not be false for there to be a
10 statutory violation. And that's actually an
11 important point because, if that's your
12 position, that kind of destroys the analogue
13 between the statutory violation and the common
14 law violation, which is a point Justice Scalia
15 made at argument in the Spokeo argument.

16 If I can move now to standing, on
17 standing, I think that Respondent's counsel
18 correctly answered the Chief Justice's hypo at
19 least under Respondent's view that a material
20 risk is enough under Spokeo.

21 But if a material risk is enough and
22 the answer to the Chief Justice's hypo is,
23 that's right, everybody can bring actions for
24 traffic violations that didn't actually realize
25 themselves in any harm, I mean, the Article III

1 courts could be open to all sorts of trivial
2 injuries where everybody should be essentially
3 toasting their good luck, not suing the person
4 who posed a risk to them, but didn't actually
5 injure them.

6 Another point on standing, I think it
7 is worth recognizing why this issue is so
8 important, is there are people in our system of
9 government who do get to pursue violations of
10 federal statutes without suffering
11 injuries-in-fact. They are called prosecutors.

12 But if you're going to give a cause of
13 action to an individual under our system, they
14 can only actually bring that claim into federal
15 court if they have suffered injury-in-fact.

16 On typicality, I want to make two
17 points about that. First is typicality is
18 required at the outset of the case because the
19 class representatives, typicality is important
20 from the beginning. It's not just a trial
21 issue.

22 The -- the -- the defense has the
23 right to depose the class representatives. So
24 from the very beginning of the case, the class
25 representative is essentially the embodiment of

1 the case.

2 It is true, I -- I suppose, as a
3 technical matter that the class representative
4 doesn't have to testify, but in practice they
5 do. And that's why having a typical -- an
6 atypical class representative is a bad idea from
7 the beginning.

8 The antitrust cases are different,
9 Justice Breyer, and they are different in an
10 important way because it starts with the
11 predominance question at the beginning of
12 certification.

13 In an antitrust case or securities
14 case, people will say, well, the individualized
15 issues are -- of damages will predominate.
16 People will say, no, we can deal with it with
17 some kind of claim processing issue. And then
18 the damages issue isn't that important.

19 But in a statutory damages case,
20 particularly one seeking punitives, at the
21 predominance issue what the plaintiffs say is,
22 don't worry, we have one-size-fits-all statutory
23 and punitive damages here.

24 And then if they turn around and say,
25 we're going to find the least typical class

1 representative, we can, that's an abuse. That's
2 an abuse this Court has to stop.

3 The other point I would make about
4 this -- and this is really where the standing
5 and the typicality arguments come together -- is
6 if it really is going to be the case that you
7 can have standing just by suffering a material
8 risk, and you don't actually have to have the
9 injury realized, then having somebody who
10 suffered a real injury risk and had it
11 materialize on them is a very atypical class
12 representative for a class of people who only
13 suffered a material risk.

14 And the last --

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MR. CLEMENT: -- thing I'll say is --

18 CHIEF JUSTICE ROBERTS: You can say
19 your last thing. Counsel?

20 MR. CLEMENT: I -- I'm sorry, I may
21 have exceeded my time, in which case --

22 CHIEF JUSTICE ROBERTS: Okay. Thank
23 you. Thank you, counsel.

24 The case is submitted.

25

1 (Whereupon, at 11:30 a.m., the case
2 was submitted.)
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1	A	Alito ^[2] 15:2,3,8,18 16:2,15 17:8 18:4,7 31:2 46:25 47:1,19 48:12, 22 71:14,15 72:9,14 73:18 74:15 Alito's ^[1] 54:5 allegation ^[2] 78:10 82:11 alleged ^[2] 40:17 62:20 allow ^[4] 13:15 46:8 56:5 80:1 allowed ^[3] 20:25 38:14 45:13 alone ^[7] 28:2 29:15 47:9 54:11 56:1 60:11 68:18 alter ^[1] 75:15 alternative ^[1] 52:10 alternatively ^[1] 52:5 although ^[1] 55:7 American ^[2] 72:12,13 Americans ^[3] 63:5 73:13 88:7 amicus ^[5] 2:7 3:7 39:2 56:20,25 among ^[1] 75:5 amount ^[2] 46:15 49:22 amounts ^[1] 62:12 analogized ^[1] 81:24 analogue ^[7] 39:22 47:16 54:24 72:20 79:12 85:19 89:12 analogy ^[1] 74:9 analysis ^[3] 48:20 68:12,14 analytic ^[2] 77:13 78:14 another ^[5] 42:12 47:15,16 48:8 90:6 answer ^[12] 25:17 50:6 54:6 55:18 60:7 74:19 75:1 78:6 82:1 83:11 85:17 89:22 answered ^[1] 89:18 answering ^[2] 51:12 55:8 answers ^[2] 19:20 75:21 antitrust ^[5] 44:22 45:22 75:13 91:8,13 anybody ^[1] 71:17 appeal ^[2] 70:16 71:8 appeals ^[4] 43:15 58:8,23 71:1 appear ^[1] 67:16 APPEARANCES ^[1] 2:1 Appendix ^[1] 83:21 application ^[2] 71:5 77:25 applied ^[1] 77:25 apply ^[2] 43:10 88:9 applying ^[1] 82:1 approach ^[1] 65:8 appropriate ^[1] 72:21 aren't ^[1] 7:9 argue ^[1] 27:11 argued ^[1] 63:5 arguing ^[1] 79:13 argument ^[22] 1:14 3:2,5,9,12 4:4, 7 18:25 26:6 27:1 35:22 39:1 51:11 52:25 62:6 80:14,15,17,25 88:20 89:15,15 arguments ^[2] 42:1 92:5 arise ^[1] 58:6 around ^[2] 37:23 91:24 Article ^[14] 22:2 32:5 38:9 56:2 59:24 61:17 62:18 65:14 72:18 73:20, 22 87:17,19 89:25 aside ^[1] 40:11 asks ^[3] 7:14 15:20 20:21	assert ^[1] 47:24 asserted ^[5] 63:9 69:4 75:17,19 83:14 Assistant ^[1] 2:5 associated ^[1] 16:5 assume ^[4] 29:3 66:19 71:15,16 assuming ^[2] 24:7 83:19 assumption ^[1] 17:20 assure ^[1] 41:22 Atkins ^[2] 58:5 59:11 attempt ^[1] 64:3 attention ^[2] 83:3,20 attorneys ^[2] 32:3 56:22 atypical ^[13] 5:21 6:4 12:1 18:22 38:12 40:5 44:1,3 49:22 53:15 71:12 91:6 92:11 audit ^[1] 83:22 authority ^[1] 57:3 available ^[3] 61:13 68:2,11 average ^[3] 5:22 6:19 20:10 averted ^[1] 22:10 avoid ^[2] 7:5 20:3 award ^[3] 17:6 19:3 21:10
2	B	back ^[5] 22:14 43:8,13 48:19 59:11 backdrop ^[1] 59:5 bad ^[4] 28:10 45:9 69:19 91:6 banishes ^[1] 63:22 bare ^[4] 16:10 84:16 85:13 86:12 Barrett ^[20] 33:12,13 35:13 37:2, 15 58:1,2,13,17 59:8,10,25 60:18 82:2 84:13,14 86:6,23 87:6,11 based ^[6] 17:15 25:21 35:10 46:3 63:16 64:13 baseline ^[1] 80:17 basic ^[2] 6:5 45:10 basically ^[1] 33:6 basis ^[8] 40:8,16 43:7,13 71:7 74:12 75:18 79:14 battery ^[1] 26:23 bear ^[3] 53:21 86:25 87:1 bearing ^[1] 80:11 bears ^[1] 87:3 becomes ^[1] 10:22 befell ^[1] 54:14 begin ^[1] 81:13 beginning ^[7] 31:10,22,23 90:20, 24 91:7,11 behalf ^[9] 2:4,10 3:4,11,14 4:8 22:9 62:7 88:21 behavior ^[3] 56:24 66:7 87:1 believe ^[4] 7:24 64:17 74:22 76:14 below ^[8] 19:14 31:9 38:22 43:1, 10,23 62:1 63:8 benefit ^[1] 46:23 benefits ^[2] 39:17 62:11 best ^[10] 32:13 40:15 50:13 60:12, 13 74:19 75:1,7 85:17,24 better ^[3] 5:1 65:8 78:12 between ^[11] 10:4 33:18 50:11 52:8 65:6 74:10 77:18 81:6 82:6,9 89:13 beyond ^[3] 36:3 72:9 81:9	
3			
4			
5			
6			
7			
8			
9			

Official - Subject to Final Review

<p>big [2] 36:3 81:5 birth [1] 15:15 bit [6] 16:8 17:4 51:24 58:18 60:10 76:5 Black's [1] 44:5 boot [1] 6:8 both [8] 10:5 19:16 23:17 25:9 62:10 63:8 74:19,22 bought [2] 44:25 75:14 bounced [1] 8:8 branch [1] 57:1 branches [1] 64:3 breach-of-contract [1] 9:19 break [2] 8:24,25 breaking [1] 65:22 Breyer [16] 12:8,9 13:6,21 14:13 15:1 44:17,18 45:20 51:12 69:9,10 70:6 71:13 75:13 91:9 brief [8] 14:20 29:14,18 43:17 58:14 78:11,21 79:10 briefly [2] 66:18 82:8 briefs [2] 56:20,25 bring [13] 10:25 14:6 24:25 39:11 40:2 64:15,18 65:2,3 67:3 87:23 89:23 90:14 broad [1] 62:13 broader [1] 50:18 broadly [1] 70:17 broken [3] 20:11,13,13 brought [4] 6:25 23:14 52:3 72:25 Brownback [1] 77:17 bucket [1] 50:14 bunch [1] 52:12 burden [3] 53:21 70:14 83:19 business [2] 61:11 63:6 buy [1] 12:22</p> <hr/> <p style="text-align: center;">C</p> <p>calculated [1] 45:25 calculation [2] 46:5 68:18 called [4] 47:25 52:11 86:21 90:11 came [1] 1:13 camera [1] 64:13 canceled [1] 5:20 cancer [9] 21:22 22:22 23:2,12 25:7,25 29:24,25 33:17 cannot [1] 38:22 capable [1] 32:12 captured [1] 54:6 car [1] 5:18 carcinogen [5] 21:20,24 22:1,5 33:16 card [2] 85:2,2 carried [1] 79:17 Case [47] 4:4 6:18,19 9:19 11:25 17:15 21:8,14 24:11 33:25 34:21 35:3 36:2 40:17 41:25 46:1 50:25 51:22 52:3 56:16 59:3 61:18 62:1 63:18 64:24 66:19 67:7,25 69:24 72:20,22,24 74:7,21 80:11 81:6 82:6 90:18,24 91:1,13,14,19 92:6,21,24 93:1 cases [21] 35:1 36:20 40:1 46:9 47:18 48:12 53:20 58:22 59:12 60:2,</p>	<p>12 61:19 65:7 69:14 75:13 77:14,15 78:16 84:25 87:18 91:8 category [1] 22:8 causation [1] 65:6 cause [14] 8:24 10:15 27:20 34:23 35:22 47:2 57:12,13 64:9 65:11 66:7 73:10 87:21 90:12 centralizing [1] 62:11 centuries [1] 70:8 certain [9] 30:6 32:4,4,23 37:11 38:3 39:24 55:25 84:23 certainly [9] 6:17 15:5 21:13 22:11 43:5 56:20 59:19 67:15 72:1 certification [12] 16:23 38:22 43:3 52:2 53:8,11 68:18 70:19,22 71:11 75:11 91:12 certified [3] 4:11 16:19 37:24 certify [1] 38:3 certifying [2] 19:12 42:23 cetera [1] 69:20 challenge [3] 8:19 62:17 77:24 champagne [2] 8:24 65:22 chance [7] 6:20 21:22 29:3 30:12 36:10 44:25 68:22 change [3] 13:15 68:12 75:10 charged [2] 46:14 69:18 check [4] 4:17 5:13 8:8 73:13 CHIEF [63] 4:3,9 6:9,14 7:1,16 8:3,6 9:1,4 12:7 15:2 18:9 21:18 22:14,17 25:14 29:6,8 33:11 37:19,21 38:23 39:4 40:10 41:8,17 42:5,16,19 44:16 46:25 48:23 51:8 54:2 55:12,14 57:25 60:20,22 62:3,8 64:6 65:1,13 66:8,10 69:8 71:14 74:16 76:2 78:18 80:20,22 84:12 87:13 88:19,22 89:18,22 92:15,18,22 Circuit [6] 5:8 14:19 38:6 81:23 86:17,22 circumstances [1] 45:7 circumstantial [1] 83:1 cite [2] 58:14,21 cites [1] 35:15 Citizen [2] 58:6 59:12 citizens [1] 72:12 claim [33] 5:1 13:10 19:21 20:2,9,9,15,18,20 23:16 24:10 43:18 44:1,3,6,8,14 63:11,13 67:1,3,23 71:4,12 74:25 76:4,18 77:24 79:19 85:10 87:4 90:14 91:17 claimant [3] 20:4 75:8 78:1 claims [36] 6:1 11:17 14:24,25,25 18:12,13,15 19:18 30:15,16 38:3,6 39:12 40:2 47:24 49:11,11,15 50:16,18 61:1,4,23 63:8 69:1,4 75:16,19 76:6 78:3,3 81:21 83:23 87:20 88:14 Clapper [2] 6:17 35:15 clarify [2] 70:15 79:24 class [117] 4:11,12,14,18 5:4,7,12,22 6:3,6,10,19 11:14,16 12:13 13:5,17,19,23 14:7,8 15:3,13 16:14,19,22 17:5,22 18:15,16 19:4,9,12 20:10,12,16 21:3,25 22:23 23:17</p>	<p>26:11 31:9,11,13,21 37:24 38:4,9,10,12,17 39:10,13 40:1,17 41:2,9 42:23 43:4 44:22 45:2,3,17 46:10,18,22 47:23 49:1,5,19 52:2,3,7,8,12,15 53:1,2,8,8,11,14,24 60:16 61:9 62:20 63:9,15,15 66:14 68:17,23 69:13 70:18,21 72:4,6,12 74:25 75:5,8,11,17 78:22 83:25 84:1 88:3,6,11 90:19,23,24 91:3,6,25 92:11,12 class's [1] 50:18 classic [2] 10:8,20 cleaned [1] 16:8 clear [8] 7:8 23:1 26:10 35:1,7 54:18 61:15 67:22 cleared [1] 8:1 clearly [1] 84:21 CLEMENT [72] 2:3 3:3,13 4:6,7,9 6:9,13 7:16 8:5,11 9:6,12 10:6 11:12,22 13:6 14:10,14 15:7 16:1 17:1,11 18:5 19:15,24 20:8 21:17,19 22:3,13,25 23:10 24:4,19 25:5,12,16,19 26:8,23 27:8,22 28:13,25 29:10 30:4,16 31:7 32:11 33:6,9,10,13 34:16 36:12 37:5,16,18,20,21 48:1 56:19 65:21 72:2 74:19 76:7 88:19,20,22 92:17,20 Clement's [2] 52:11 74:9 client [8] 9:10,13 16:24 17:2,9,10 52:11 66:20 clients [2] 9:7 76:8 clipped [1] 47:20 clock [1] 35:5 close [1] 60:1 closer [2] 59:20 60:8 closest [1] 72:24 code [2] 63:21 82:10 codes [1] 81:11 Coffer [1] 64:2 cognizable [2] 55:19 85:14 collect [1] 4:14 combination [1] 26:9 come [6] 31:20 33:25 61:21 67:21 69:13 92:5 comes [1] 14:16 coming [1] 86:8 committed [1] 56:23 common [30] 4:19 11:25 12:2,2 23:6 26:21 28:8,11 31:12 35:21,25 39:21 47:15 54:24 56:3,5,13 62:22 72:19 73:6,17 74:25 75:21,21 79:11,15 80:5,17 85:18 89:13 commonality [6] 6:2 11:21 20:22 50:12,17 53:17 communicated [2] 28:21 80:7 communications [1] 79:16 company [4] 12:17 13:1 66:21 79:8 compared [1] 69:23 complained [1] 15:12 complaining [1] 76:8 complaint [2] 26:1 51:21 complementary [1] 12:4 complete [2] 55:8 66:24</p>	<p>completed [1] 77:18 completely [1] 17:7 complicated [1] 12:23 compromise [2] 69:1,2 computer [2] 71:16 74:11 concern [1] 87:17 concerned [2] 27:15 81:2 concession [1] 24:1,1 conclusion [2] 34:1 52:25 conclusions [1] 77:22 concrete [9] 4:25 34:13 39:9 57:4,10 62:23 63:19 65:15,16 concreteness [3] 60:9 87:7,9 condition [1] 83:18 conduct [1] 88:17 conferred [1] 59:6 conflated [1] 41:25 confuses [1] 65:10 confusing [2] 76:23 86:16 confusion [1] 67:12 Congress [26] 21:22 23:15 24:16 32:1 33:2 39:19,23 42:3 47:12,25 48:6 54:7 56:21 57:4,21 61:15,17 62:10 64:8 66:5 75:6 78:5 79:21 80:16 87:18,21 Congress's [3] 47:14 54:23 62:19 congressional [1] 64:23 consequences [5] 25:10,23 26:14,16 68:16 consider [3] 44:8 45:18,25 consideration [2] 9:17,21 considerations [3] 39:7 46:12 47:11 considered [1] 43:16 considering [2] 40:21,23 conspiracy [2] 79:3,6 constitutes [1] 39:9 Constitution [1] 72:23 constrain [1] 64:3 consumer [10] 10:15,17 39:14 41:21 44:24 57:15,17 61:7 84:17 85:4 consumers [4] 32:24 39:23 61:16 62:16 context [4] 46:14 58:6,9 65:15 continue [1] 83:11 contract [3] 9:16 10:13 61:6 contracted [2] 9:7,23 contracting [1] 61:6 contracts [1] 9:14 contrary [1] 6:5 copy [1] 7:19 corporation [1] 79:5 correct [9] 22:24 49:6,7,14,24,25 52:18 63:25 87:10 correction [1] 67:18 correctly [2] 36:11 89:18 corrects [1] 66:23 corresponds [1] 71:18 Cortez [1] 86:22 couldn't [1] 21:2 counsel [20] 9:2 18:11 19:14 21:16 38:24 42:17,21 48:25 51:7 55:11 62:4 64:7 66:12 74:18 76:1 78:</p>
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Official - Subject to Final Review

<p>20 89:17 92:16,19,23 count [2] 79:5 85:13 counter [1] 6:5 couple [4] 41:18 45:19 50:6 66:12 course [8] 11:3 16:13 34:11 75:20 81:4,18 83:6 88:17 COURT [48] 1:1,14 4:10 16:18 17: 20 19:2 34:25 37:25 39:5,6 40:7, 19 42:22 43:1,10,13,15,16,19 45: 25 47:10 50:10,21 53:20 54:22 55: 25 56:11 59:5,21 61:25 62:9 65:5 69:5 70:16 71:1,10 72:22 75:22 77:16 83:12,17 85:21,24 86:1 87: 19 88:23 90:15 92:2 Court's [7] 39:25 40:9 61:23 71:25 78:16 83:20 87:17 courts [8] 31:9 46:8 52:20 58:8,22 63:8 84:25 90:1 create [3] 30:1 54:11 62:19 created [4] 63:1 67:12 79:21 87: 21 creates [1] 64:9 creating [1] 66:7 credit [27] 4:20 5:3,4,5,17,19,23 7: 20,20,23 8:7,9 9:8 15:20 18:20 26: 2 30:12 39:16 62:12,13 63:4 73: 13,14 85:2,2 86:11 88:9 curiae [3] 2:7 3:8 39:2 curious [1] 25:18 cut [1] 61:2</p>	<p>defects [1] 4:12 defendant [4] 45:13 51:2 67:23 83:2 defendant's [1] 44:11 defense [2] 43:18 90:22 defenses [4] 18:13,14 19:19 75: 16 defined [1] 44:4 defines [2] 44:6 47:12 definitely [2] 11:23,23 definition [1] 11:11 degree [1] 74:21 delegated [1] 57:3 delegating [1] 56:22 demarcation [1] 83:8 demonstrate [1] 50:22 demonstrating [1] 53:22 denial [5] 48:13,17 59:23 60:11,14 denied [2] 26:2 39:15 Department [1] 2:6 depended [1] 61:11 depose [1] 90:23 Depot [1] 88:9 deprivation [1] 58:20 describe [2] 32:8 58:17 described [3] 48:16 53:13 77:7 designated [1] 18:16 designation [2] 6:12 9:8 designations [1] 63:2 designed [2] 84:19 85:4 desk [2] 63:3 74:9 despite [1] 63:25 deter [2] 56:24 66:6 determination [1] 34:14 determinations [1] 76:20 determine [4] 32:8 46:2 78:9 83: 13 determined [2] 75:7,22 determining [1] 72:18 Dictionary [1] 44:6 differ [2] 45:11 69:14 difference [6] 10:3,4 54:19 74:10 77:23 78:2 differences [1] 45:24 different [29] 6:2 9:14 10:1,18 14: 18 15:16 16:16 19:4,5 20:19 22: 11 34:18 40:12,23 42:12 44:21 46: 3 47:21 52:6 53:1 54:9,16 67:8,8 77:13 81:11 83:5 91:8,9 difficult [2] 68:10 87:25 difficulty [1] 68:17 direct [1] 83:3 directed [1] 83:21 direction [1] 39:10 disaggregate [1] 78:12 disagree [5] 10:6 53:12 55:23 57: 6,7 disclaim [2] 36:5,14 disclaimed [1] 60:2 disclosed [3] 15:4 16:20 48:6 disclosure [11] 14:25 40:18 49:14 61:22 63:13 76:6,18 77:2 85:8,10, 19</p>	<p>disclosures [2] 39:24 67:8 discontinued [1] 8:20 discovery [1] 19:9 discrete [1] 35:8 discretion [3] 42:23 43:5,7 discrimination [2] 58:20 59:5 discussed [3] 35:21 39:6 60:24 discussion [2] 37:6 47:20 dismiss [1] 65:9 disqualify [2] 71:2,6 dissembled [1] 71:5 disseminated [10] 5:6,10,18 6:21 7:4,21 8:2 15:11,13 61:10 dissemination [7] 30:12 41:2 61: 12,14 63:6,7 73:9 dissipates [1] 34:11 distinct [3] 5:5 37:3 58:25 distinction [6] 10:3,3 32:20 81:6 82:5,9 distinguish [1] 33:18 distinguishable [2] 59:1,3 distinguished [1] 65:5 distinguishes [2] 86:17,20 distinguishing [1] 75:18 distress [4] 27:19,21 37:4 41:1 distressed [1] 37:9 district [6] 16:18 19:2 37:25 42:22 43:15 71:10 divide [2] 77:18 78:15 doctrine [1] 79:3 doing [2] 45:4 61:17 dollars [1] 4:15 domain [1] 87:18 done [5] 32:10 36:21 50:24 51:1 70:20 down [1] 11:17 downloaded [1] 74:12 draft [1] 63:3 drafter [2] 67:10 76:24 drags [1] 33:25 drawer [2] 63:3 74:9 drink [1] 33:15 drinking [1] 21:21 driver [1] 64:11 driving [2] 64:10,11 drug [1] 88:7 drunk [1] 64:11 due [3] 20:23 21:13 27:24 Dukes [2] 53:20 75:22 during [3] 5:7 24:20 35:21</p>	<p>emotional [7] 27:19,20 30:1,10 36: 17 37:4 40:25 employee [1] 67:10 employment [1] 39:16 enable [1] 62:16 Enabling [3] 6:7 13:14 14:15 end [6] 15:14 17:23 34:7 37:23 54: 21 60:10 ended [1] 16:3 endorse [1] 80:9 endowment [1] 78:4 enforce [4] 10:12 32:3,25 56:23 enforced [1] 57:8 enforcement [2] 10:14,23 enforces [1] 57:1 engaged [1] 41:6 engaging [1] 66:6 enough [12] 4:25 29:16,22 30:20 54:11 56:1 60:11 81:18 83:15 89: 5,20,21 ensure [3] 62:15 63:12 69:6 entire [1] 4:19 entirely [1] 5:21 entities [1] 32:5 entitled [5] 21:3 49:1,24 58:10 59: 24 envelope [2] 59:16 86:9 envelopes [6] 4:20 5:23 60:17 76: 9,16 86:8 envisions [2] 7:18,22 equally [2] 5:16 10:24 erroneous [1] 49:13 error [5] 19:11,12,13 20:23 21:13 especially [1] 70:1 ESQ [4] 3:3,6,10,13 ESQUIRE [2] 2:3,9 essence [3] 32:2 56:21 81:3 essentially [8] 9:20 24:21 26:1 31: 13 32:25 34:3 90:2,25 establish [1] 77:21 established [1] 63:19 establishes [1] 82:20 et [1] 69:20 evade [1] 26:8 even [28] 8:10,13 9:23 11:1 12:2 16:13 17:3 18:2 24:9,14,15,19,23 30:9,14,16 35:23 36:3 56:6 59:15 60:3 65:15 67:9,15 71:22 73:2 74: 5 83:19 event [1] 82:23 events [1] 8:16 eventualized [1] 74:4 everybody [9] 21:23 22:22 23:21, 23 25:23 49:12 71:20 89:23 90:2 Everyone [4] 18:15,18 44:12 49:1 evidence [13] 5:11 6:18 14:16 17: 12 35:6,11 70:10 71:10 74:13 76: 19,22 82:24 83:1 evidentiary [2] 50:24 53:7 ex-ante [1] 30:19 exacting [1] 77:21 exactly [7] 20:2,5,7 27:22 31:4 70: 10 86:21 example [5] 46:6,7 56:3 81:10 86:</p>
D			
<p>D.C [4] 1:10 2:3,6 81:23 dah-dah-dah [1] 12:23 damage [2] 73:10 87:20 damages [56] 4:15 7:9 18:22,24 19:4 21:2,3,10,11,24 22:9 25:1 29: 16,22 30:14,16 34:14 38:15,16 45: 2,16,17 46:2,10,13,15 49:2,20,23 55:20 56:5 62:25 63:16 64:9 67: 21,24 68:6,9,11,11,19 69:14,16,24 71:6 74:24 75:5 81:16,19,20,21 87:5 91:15,18,19,23 database [1] 81:25 dates [1] 15:15 day [4] 27:14 60:10 66:21,23 days [1] 64:12 de [2] 38:1,5 deal [2] 7:18 91:16 dealer [1] 5:18 dealership [1] 14:23 dealt [1] 84:25 decades [1] 75:3 deceive [1] 67:16 Decertification [1] 38:11 decertified [1] 38:11 decertify [1] 31:9 decided [1] 77:16 decision [3] 32:15 61:6 62:1 defamation [7] 28:8 36:20 39:21 56:11 73:6 74:2 80:1 defamatory [1] 28:16 defamed [1] 74:4 defaming [1] 73:20</p>	<p>defects [1] 4:12 defendant [4] 45:13 51:2 67:23 83:2 defendant's [1] 44:11 defense [2] 43:18 90:22 defenses [4] 18:13,14 19:19 75: 16 defined [1] 44:4 defines [2] 44:6 47:12 definitely [2] 11:23,23 definition [1] 11:11 degree [1] 74:21 delegated [1] 57:3 delegating [1] 56:22 demarcation [1] 83:8 demonstrate [1] 50:22 demonstrating [1] 53:22 denial [5] 48:13,17 59:23 60:11,14 denied [2] 26:2 39:15 Department [1] 2:6 depended [1] 61:11 depose [1] 90:23 Depot [1] 88:9 deprivation [1] 58:20 describe [2] 32:8 58:17 described [3] 48:16 53:13 77:7 designated [1] 18:16 designation [2] 6:12 9:8 designations [1] 63:2 designed [2] 84:19 85:4 desk [2] 63:3 74:9 despite [1] 63:25 deter [2] 56:24 66:6 determination [1] 34:14 determinations [1] 76:20 determine [4] 32:8 46:2 78:9 83: 13 determined [2] 75:7,22 determining [1] 72:18 Dictionary [1] 44:6 differ [2] 45:11 69:14 difference [6] 10:3,4 54:19 74:10 77:23 78:2 differences [1] 45:24 different [29] 6:2 9:14 10:1,18 14: 18 15:16 16:16 19:4,5 20:19 22: 11 34:18 40:12,23 42:12 44:21 46: 3 47:21 52:6 53:1 54:9,16 67:8,8 77:13 81:11 83:5 91:8,9 difficult [2] 68:10 87:25 difficulty [1] 68:17 direct [1] 83:3 directed [1] 83:21 direction [1] 39:10 disaggregate [1] 78:12 disagree [5] 10:6 53:12 55:23 57: 6,7 disclaim [2] 36:5,14 disclaimed [1] 60:2 disclosed [3] 15:4 16:20 48:6 disclosure [11] 14:25 40:18 49:14 61:22 63:13 76:6,18 77:2 85:8,10, 19</p>	<p>disclosures [2] 39:24 67:8 discontinued [1] 8:20 discovery [1] 19:9 discrete [1] 35:8 discretion [3] 42:23 43:5,7 discrimination [2] 58:20 59:5 discussed [3] 35:21 39:6 60:24 discussion [2] 37:6 47:20 dismiss [1] 65:9 disqualify [2] 71:2,6 dissembled [1] 71:5 disseminated [10] 5:6,10,18 6:21 7:4,21 8:2 15:11,13 61:10 dissemination [7] 30:12 41:2 61: 12,14 63:6,7 73:9 dissipates [1] 34:11 distinct [3] 5:5 37:3 58:25 distinction [6] 10:3,3 32:20 81:6 82:5,9 distinguish [1] 33:18 distinguishable [2] 59:1,3 distinguished [1] 65:5 distinguishes [2] 86:17,20 distinguishing [1] 75:18 distress [4] 27:19,21 37:4 41:1 distressed [1] 37:9 district [6] 16:18 19:2 37:25 42:22 43:15 71:10 divide [2] 77:18 78:15 doctrine [1] 79:3 doing [2] 45:4 61:17 dollars [1] 4:15 domain [1] 87:18 done [5] 32:10 36:21 50:24 51:1 70:20 down [1] 11:17 downloaded [1] 74:12 draft [1] 63:3 drafter [2] 67:10 76:24 drags [1] 33:25 drawer [2] 63:3 74:9 drink [1] 33:15 drinking [1] 21:21 driver [1] 64:11 driving [2] 64:10,11 drug [1] 88:7 drunk [1] 64:11 due [3] 20:23 21:13 27:24 Dukes [2] 53:20 75:22 during [3] 5:7 24:20 35:21</p>	<p style="text-align: center;">E</p> <p>Each [4] 4:13 6:10 38:9 49:5 early [1] 70:20 easily [1] 45:25 economic [1] 62:23 egregious [2] 70:1 86:25 either [2] 23:12 69:21 element [1] 82:22 elements [2] 19:25 44:4 else's [1] 49:12 embodiment [1] 90:25 emergency [2] 45:5,6 emerges [2] 35:7 71:9</p>

Official - Subject to Final Review

<p>14 examples [1] 45:12 exceeded [1] 92:21 exchange [2] 9:17,21 excused [1] 38:4 executive [2] 57:1,19 exercising [1] 17:21 experience [4] 11:15 46:16 70:9 75:3 experienced [1] 19:5 experiences [6] 14:22 38:18 44:10,12 46:20 75:12 expired [2] 29:2,5 explain [2] 24:6 78:15 explanation [2] 66:23 67:19 explicitly [1] 56:14 explore [1] 66:18 explosively [1] 63:1 exposed [4] 21:23 22:1 33:16 65:19 exposure [3] 23:2,4 24:9 extensive [1] 46:19 externally [1] 80:4 extra [2] 45:15 69:16</p>	<p>find [5] 21:2 37:13 45:16 52:21 91:25 finding [1] 61:3 fingernail [2] 20:11,13 fingernails [1] 20:13 finish [1] 25:17 first [19] 4:15,21 12:14 19:17 28:23 41:19 42:10,11,14 43:20 45:22 70:8 71:17 79:1,18,24 86:10 88:24 90:17 fits [1] 50:13 fitting [1] 56:17 five [2] 23:13,22 five-year [4] 22:20 24:20 33:20,22 fix [2] 17:24 51:2 fixing [1] 44:24 flag [1] 71:17 flagged [2] 15:22 71:21 flaws [1] 37:24 Fly [2] 16:4,5 focus [3] 40:25 50:17 78:12 focused [1] 32:19 focuses [1] 50:15 Fohl [2] 32:22,25 FOIA [2] 58:6 59:14 follow [3] 12:17 41:21 62:15 follow-on [1] 33:14 follow-up [1] 79:25 following [2] 9:15 63:10 follows [1] 38:11 Footnote [3] 29:18 30:18 65:5 foreigners [2] 72:11 88:5 forever [1] 56:12 forfeiture [1] 43:21 form [14] 19:3,8 20:25 48:3,7,7,8 54:9,10,15,19 55:4 77:2 79:16 format [1] 4:24 formatting [1] 48:18 forth [1] 14:21 fortunate [1] 30:22 forward [1] 79:17 foul [4] 15:17 32:6 76:13 82:3 found [6] 24:10 59:6 63:8 65:20 83:23 87:19 foundation [1] 14:23 framework [3] 43:2,11,15 framing [1] 34:20 free [1] 85:25 friends [1] 14:20 fright [1] 26:20 front [2] 5:19 11:2 FTC [4] 10:24 11:2,7 57:9 Fully [1] 5:3 fundamentally [2] 13:15 14:17</p>	<p>generate [1] 84:6 gets [5] 8:2 15:19,20,25 36:21 getting [5] 21:22 25:25 37:23 50:19 73:19 gist [1] 32:14 give [9] 10:15 23:21 28:9 32:23 55:20 74:19 75:1 86:14 90:12 given [8] 15:9 17:4 26:14 57:21 61:24 83:1,13 84:4 gives [3] 10:11,24 67:23 giving [1] 77:1 Gorsuch [25] 25:15,16,20 26:3,22,25 27:18 28:5,24 29:1,11,20 31:2 54:3,4,17 55:1,3,10 78:19,20 79:22 80:8,13,19 got [11] 8:4,6,9 12:22 28:3 29:1 31:19 37:6 42:6 64:14 69:19 gotten [3] 23:18,19 34:19 governed [1] 6:16 government [7] 32:2 58:7 74:20 89:1,6,8 90:9 granted [1] 62:21 great [2] 35:25 53:4 ground [3] 13:3 38:4 67:4 group [3] 27:2 35:8 88:16 guardrails [1] 85:11 guards [1] 38:20 guess [8] 30:5 36:13 51:9,15 79:1,24 82:2 89:6 guidelines [1] 43:16</p>	<p>help [1] 82:7 helped [1] 83:8 helpful [2] 57:24 59:4 helps [1] 78:15 Hernandez [1] 88:13 high [3] 30:7 61:14 63:1 higher [6] 28:3 44:23 45:2 69:17,17 89:7 highlights [1] 5:15 highly [1] 13:12 highway [1] 64:13 himself [1] 5:14 hindered [1] 5:18 hit [2] 28:20 89:5 hold [2] 28:12 89:6 home [3] 5:6,24 88:9 home-free [1] 34:6 Honor [24] 23:1 27:9 28:14 30:5 34:25 36:13 64:5,25 65:4,25 66:16 67:3 68:14,25 70:11 74:6 76:15 79:9 80:6,12 85:16 87:10,16 88:18 Honor's [1] 83:3 honoring [1] 64:4 hope [1] 7:13 hospital [1] 69:20 Housing [1] 59:6 However [1] 74:10 humiliated [1] 5:19 hurdle [1] 83:16 hurt [4] 16:24 17:1,9,10 hypo [7] 24:6 25:5 34:17,18 35:5 89:18,22 hypothetical [6] 22:16 33:15 45:22 61:19 65:8,17 hypotheticals [2] 45:21 60:25</p>
F		H	
<p>faced [2] 20:7 26:5 facial [1] 77:24 fact [11] 13:20 16:10 25:25 28:17 52:22 60:14 72:3 75:6 82:19 86:20 87:25 facto [2] 38:1,5 factor [1] 40:20 factors [3] 40:23 48:21 61:2 facts [3] 61:1,21 73:11 factual [2] 76:15,20 failed [1] 5:2 failure [3] 47:24 49:12 63:12 fair [2] 27:7 59:6 fairly [1] 69:13 Falcone [2] 53:21 69:5 fall [2] 54:19 61:23 falls [2] 61:18 81:24 false [6] 28:16,18 29:4 80:3 89:2,9 falsity [2] 41:20 88:25 family [1] 5:19 far [1] 42:25 fares [1] 5:1 fashion [2] 12:5 75:10 fatal [3] 4:12 5:16 37:24 favor [1] 61:2 FCRA [2] 38:6 84:18 FDCPA [1] 84:18 federal [5] 56:23 57:2 70:10 90:10,14 few [4] 38:18 40:23 64:12 88:24 fifth [1] 24:15 figure [1] 83:7 figured [1] 23:3 file [6] 4:20 5:5,23 7:20,23 86:1 filed [5] 6:15 14:20 33:19,24 59:14 files [7] 18:20 63:4 72:4 73:13,14 74:12 84:6 filing [1] 24:20</p>	<p>foreign [1] 30:18 foreigners [2] 72:11 88:5 forever [1] 56:12 forfeiture [1] 43:21 form [14] 19:3,8 20:25 48:3,7,7,8 54:9,10,15,19 55:4 77:2 79:16 format [1] 4:24 formatting [1] 48:18 forth [1] 14:21 fortunate [1] 30:22 forward [1] 79:17 foul [4] 15:17 32:6 76:13 82:3 found [6] 24:10 59:6 63:8 65:20 83:23 87:19 foundation [1] 14:23 framework [3] 43:2,11,15 framing [1] 34:20 free [1] 85:25 friends [1] 14:20 fright [1] 26:20 front [2] 5:19 11:2 FTC [4] 10:24 11:2,7 57:9 Fully [1] 5:3 fundamentally [2] 13:15 14:17</p>	<p>hallmark [1] 11:3 hand [2] 20:14 25:8 handle [3] 13:18 19:6 86:1 handling [1] 85:24 Hank [1] 71:9 happen [5] 31:6 33:19,23 36:4 73:21 happened [6] 26:2 35:18 46:22 60:13 70:4 79:12 happening [1] 36:10 happens [2] 35:5 79:4 hard [1] 17:6 harm [66] 15:19 23:24 24:2 25:3 29:13,15,15,21,23,23,24,25 30:7,10 32:9 35:14,18,22 39:15,19 42:3 43:25 45:10 47:2,3,6,13,16,17,20 49:24 54:14,14,25 55:7,17,19,20 56:1,6 58:19 63:2,19 64:22 67:5 68:15 69:23 74:21 76:4 77:6,9 78:9 79:19 81:8,9,12,15,17,20,21,22 82:3,7 84:20 85:5 89:25 harm's [1] 88:16 harm/no [3] 15:17 32:6 76:13 harmful [3] 55:22 64:19 66:5 harms [6] 14:9 18:22 19:5 35:20 56:13 77:19 Havens [4] 58:11,14,19,25 head [2] 13:24,25 hear [3] 4:3 17:12 88:25 heard [2] 36:5 81:16 heart [2] 63:18 88:1 heavily [1] 72:2</p>	<p>idea [10] 27:13 28:9 36:14 37:14 53:4 58:9 70:23 73:14,20 91:6 identical [3] 18:14 49:11 88:15 identified [1] 56:14 identify [2] 42:4 63:24 identity [1] 75:4 ignore [1] 80:14 II/Article [1] 32:5 Ill [12] 22:2 32:5 38:9 56:2 59:24 61:17 62:18 65:14 72:18 87:18,19 89:25 imagine [2] 20:4 87:25 immediately [1] 66:22 imminent [1] 35:18 impact [1] 44:13 impending [2] 6:17,22 important [7] 30:18 60:25 89:11 90:8,19 91:10,18 imposed [1] 10:19 imposition [1] 73:16 improper [1] 43:3 improperly [1] 88:13 inaccuracies [1] 47:2 inaccurate [3] 7:24 61:4 81:24 inadvertently [1] 66:22 included [1] 86:10</p>
G		H	
<p>gave [8] 9:17,21 39:23 45:12,22 46:7,19 62:12 gears [1] 59:10 General [7] 2:5 32:3,9,10 48:20 56:22 62:22 generalization [1] 32:12 generalized [1] 78:2 generally [1] 56:18</p>	<p>gave [8] 9:17,21 39:23 45:12,22 46:7,19 62:12 gears [1] 59:10 General [7] 2:5 32:3,9,10 48:20 56:22 62:22 generalization [1] 32:12 generalized [1] 78:2 generally [1] 56:18</p>	<p>hallmark [1] 11:3 hand [2] 20:14 25:8 handle [3] 13:18 19:6 86:1 handling [1] 85:24 Hank [1] 71:9 happen [5] 31:6 33:19,23 36:4 73:21 happened [6] 26:2 35:18 46:22 60:13 70:4 79:12 happening [1] 36:10 happens [2] 35:5 79:4 hard [1] 17:6 harm [66] 15:19 23:24 24:2 25:3 29:13,15,15,21,23,23,24,25 30:7,10 32:9 35:14,18,22 39:15,19 42:3 43:25 45:10 47:2,3,6,13,16,17,20 49:24 54:14,14,25 55:7,17,19,20 56:1,6 58:19 63:2,19 64:22 67:5 68:15 69:23 74:21 76:4 77:6,9 78:9 79:19 81:8,9,12,15,17,20,21,22 82:3,7 84:20 85:5 89:25 harm's [1] 88:16 harm/no [3] 15:17 32:6 76:13 harmful [3] 55:22 64:19 66:5 harms [6] 14:9 18:22 19:5 35:20 56:13 77:19 Havens [4] 58:11,14,19,25 head [2] 13:24,25 hear [3] 4:3 17:12 88:25 heard [2] 36:5 81:16 heart [2] 63:18 88:1 heavily [1] 72:2</p>	<p>idea [10] 27:13 28:9 36:14 37:14 53:4 58:9 70:23 73:14,20 91:6 identical [3] 18:14 49:11 88:15 identified [1] 56:14 identify [2] 42:4 63:24 identity [1] 75:4 ignore [1] 80:14 II/Article [1] 32:5 Ill [12] 22:2 32:5 38:9 56:2 59:24 61:17 62:18 65:14 72:18 87:18,19 89:25 imagine [2] 20:4 87:25 immediately [1] 66:22 imminent [1] 35:18 impact [1] 44:13 impending [2] 6:17,22 important [7] 30:18 60:25 89:11 90:8,19 91:10,18 imposed [1] 10:19 imposition [1] 73:16 improper [1] 43:3 improperly [1] 88:13 inaccuracies [1] 47:2 inaccurate [3] 7:24 61:4 81:24 inadvertently [1] 66:22 included [1] 86:10</p>

Official - Subject to Final Review

<p>includes ^[1] 44:6</p> <p>inconvenience ^[1] 16:9</p> <p>incorrect ^[2] 43:10,12</p> <p>indeed ^[2] 76:16 84:6</p> <p>independent ^[1] 11:24</p> <p>indication ^[2] 33:2 59:15</p> <p>indicative ^[1] 46:22</p> <p>individual ^[13] 13:13,23 14:6 18:22 38:15 44:5 46:18 57:22 60:16 68:16 85:25 87:9 90:13</p> <p>individual's ^[3] 44:9 57:17,21</p> <p>individualized ^[7] 13:17 21:10 38:2,5 46:10 57:10 91:14</p> <p>individually ^[1] 31:20</p> <p>individuals ^[7] 32:23 46:3 63:22 80:1 82:12 87:22,24</p> <p>infer ^[1] 84:4</p> <p>inferred ^[1] 62:24</p> <p>inflict ^[2] 4:25 15:24</p> <p>information ^[50] 4:24 7:12,24 9:8 12:15 13:2,11 15:4,19,21,25 16:20 25:22 27:3,5 28:7 47:25 48:1,5,9,14,17 54:15 57:18 58:7,10,20 59:7,13,14,16,23 60:3,11,14 62:12 63:6 66:25 73:9 78:24,25 80:3 81:3,5,24 82:10 84:21 85:10 86:10 89:9</p> <p>informational ^[10] 40:1,15 48:12 54:20 58:4,9,15 59:21 60:5 61:24</p> <p>inherent ^[1] 62:11</p> <p>inherently ^[1] 86:16</p> <p>initiate ^[1] 8:1</p> <p>injunctive ^[7] 29:17 30:20 55:21 77:19,20 81:16,18</p> <p>injure ^[1] 90:5</p> <p>injured ^[7] 4:16 7:2 36:25,25 37:1 65:24 86:25</p> <p>injuries ^[10] 5:15 6:4 11:15 37:11 38:13 40:5 44:2,9 53:15 90:2</p> <p>injuries-in-fact ^[1] 90:11</p> <p>injury ^[41] 4:25 6:23 8:14 13:5,25,25 14:2 15:24 26:20 27:6 28:9,12 30:1 31:12,18,19 32:16 34:13 35:6 36:9,15,16,17 37:3 38:1,5 39:9 53:3 56:9 57:5 58:4,9 60:5 65:15,17 78:10 83:14 87:2,4 92:9,10</p> <p>injury-in-fact ^[24] 9:20 16:13 23:5 27:12,17,25 28:2 30:9,11,23,25 32:16 37:11 38:10 47:5,7,10,12 48:5 54:12 68:3 71:22 86:2 90:15</p> <p>inkling ^[1] 4:15</p> <p>innocent ^[1] 63:4</p> <p>inquiry ^[5] 58:16 64:21 65:7 71:21,23</p> <p>instance ^[2] 43:20 54:22</p> <p>instances ^[1] 56:1</p> <p>Instead ^[4] 33:6 36:7 38:15 84:22</p> <p>intended ^[1] 20:3</p> <p>intent ^[1] 60:2</p> <p>intention ^[2] 67:16,17</p> <p>Intentionality ^[1] 67:20</p> <p>interest ^[3] 62:23 64:23 88:2</p> <p>interested ^[1] 12:9</p> <p>interesting ^[2] 22:13 88:25</p>	<p>internal ^[1] 83:22</p> <p>internally ^[1] 80:3</p> <p>interpretations ^[1] 47:22</p> <p>interrupt ^[1] 72:15</p> <p>intra-corporate ^[2] 79:3,15</p> <p>introduce ^[1] 14:1</p> <p>introduced ^[1] 51:5</p> <p>introduction ^[1] 13:1</p> <p>invasion ^[1] 62:20</p> <p>invited ^[1] 19:13</p> <p>involved ^[1] 68:9</p> <p>involves ^[1] 10:8</p> <p>involving ^[1] 61:20</p> <p>lqbal ^[1] 65:9</p> <p>isn't ^[12] 14:7 24:2 34:13 42:11 43:7 46:22 50:1 51:1 60:4 76:11 79:7 91:18</p> <p>ISSACHAROFF ^[37] 2:9 3:10 62:5,6,8 64:17 65:4,25 66:16 67:2,20 68:13,24 70:5 71:24 73:5 74:6 75:2 76:3,14 77:12 79:9 80:5,10,15,24 82:8,16 83:12 84:9,15 85:15 86:19 87:3,8,14,15</p> <p>issue ^[21] 11:25 12:2,2 19:2 20:5 31:12 32:21 22 49:5 50:2,2,20 51:12 57:12 61:5 74:21 90:7,21 91:17,18,21</p> <p>issues ^[3] 69:15 70:15 91:15</p> <p>issuing ^[1] 63:25</p> <p>it'll ^[1] 70:1</p> <p>itself ^[11] 11:2 29:23 30:8,10 35:25 36:4,17 55:19 81:22 83:8,18</p>	<p>17 59:8,10,25 60:18,20,23 62:3,9 64:6 65:1,13 66:8,8,10,11,17 67:14 68:5,20 69:7,8,8,10 70:6 71:13,14,14,15 72:9,14 73:18 74:15,16,16,18 75:12,25 76:2,2,3 77:4 78:7,17,18,18,20 79:22 80:8,13,19,20,20,22,23 82:14 83:4 84:8,10,12,12,14 86:6,23 87:6,11,13 88:19,23 89:14 91:9 92:15,18,22</p> <p>Justice's ^[3] 22:17 89:18,22</p>	<p>legitimately ^[1] 42:4</p> <p>less ^[1] 68:9</p> <p>letter ^[3] 12:14,18 63:21</p> <p>letters ^[6] 63:14 66:24 67:7,10,17 76:25</p> <p>level ^[1] 43:25</p> <p>Lexmark ^[1] 65:5</p> <p>liability ^[2] 45:16 62:14</p> <p>liability-type ^[2] 46:7,9</p> <p>libel ^[1] 56:4</p> <p>life ^[1] 8:9</p> <p>light ^[2] 79:3 80:18</p> <p>likelihood ^[1] 61:8</p> <p>likely ^[5] 29:15,16 51:18 55:6 77:8</p> <p>liken ^[1] 20:10</p> <p>limitations ^[3] 23:15 83:2 84:5</p> <p>limited ^[1] 56:12</p> <p>line ^[1] 61:19</p> <p>link ^[1] 36:17</p> <p>list ^[18] 15:23 16:4,4,5,9,10,11 18:17 28:25 39:18 41:10 42:12 71:19 72:11 77:3 84:2 88:4,8</p> <p>listed ^[1] 88:13</p> <p>litigate ^[1] 12:1</p> <p>litigation ^[2] 6:7 33:24</p> <p>little ^[9] 7:2 16:8 17:4,6 34:18 51:23 58:18 60:10 76:5</p> <p>LLC ^[1] 1:3</p> <p>long ^[4] 11:18 43:2 62:22 69:4</p> <p>look ^[18] 10:14,22 14:5,19 15:15 19:24 20:24 28:7 40:22 41:1 42:2 48:20 54:23 60:3 70:18 72:17 76:11 77:14</p> <p>looking ^[1] 57:11</p> <p>looks ^[1] 78:8</p> <p>lose ^[3] 34:6,22 67:4</p> <p>lost ^[1] 35:24</p> <p>lot ^[8] 12:22 15:12 28:3 41:25 42:12 45:10 46:8 58:8</p> <p>lower ^[2] 43:19 84:25</p> <p>luck ^[1] 90:3</p> <p>lucky ^[1] 65:23</p> <p>Lujan ^[3] 35:1 64:2 77:22</p>
	<p>J</p> <p>jeopardize ^[1] 68:21</p> <p>job ^[1] 35:24</p> <p>John ^[2] 42:13,13</p> <p>Joint ^[1] 83:21</p> <p>judge ^[4] 34:9 45:14,14 81:23</p> <p>judgment ^[6] 33:3 47:14 54:23 61:15 65:10 71:7</p> <p>July ^[1] 83:23</p> <p>juncture ^[1] 35:11</p> <p>jurisdiction ^[2] 17:21 87:20</p> <p>jurisdictional ^[1] 65:12</p> <p>jury ^[11] 17:4,12 19:3 20:25 21:1 46:14 70:2 76:19,22,23 84:4</p> <p>Justice ^[234] 2:6 4:3,9 6:9,14 7:1,16 8:3,6 9:1,3,4,5,12,25 10:7 11:5,20 12:6,7,7,9,10 13:6,21 14:13 15:1,2,2,3,7,18 16:2,15 17:8 18:4,7,9,9,11 19:15,23 20:1 21:15,18,18,19 22:4,12,15 23:8,11 24:5,14 25:2,11,14,14,15,16,19 26:3,7,22,25 27:18 28:5,24 29:1,6,6,8,9,11,11,19,20 30:14 31:1,2,2,24,25 33:5,8,11,11,13,14 34:3 35:13 37:2,15,19,22 38:23 39:4 40:10 41:8,17 42:5,16,18,19,20,25 43:6,24 44:15,16,16,18,20 45:20 46:25,25 47:1,19 48:12,22,23,23,25 49:3,4,8,17 50:1,5 51:3,6,8,8,9,12,23 52:23 53:12,23 54:1,2,2,4,5,17 55:1,3,10,12,12,14,15,24 56:7,15 57:23,25,25 58:2,13,</p>	<p>K</p> <p>Kagan ^[25] 21:18,19 22:4,12 23:8,11 24:5,14 25:2,11 26:7 29:19 34:3 51:8,9,23 52:23 53:13,23 54:1 76:2,3 77:4 78:7,17</p> <p>Kagan's ^[2] 29:11 33:14</p> <p>Kavanaugh ^[19] 29:7,8 30:14 31:1,24 33:5,8 55:13,14,24 56:7,15 57:23 80:21,22 82:14 83:4 84:8,10</p> <p>keep ^[1] 60:25</p> <p>Kennedy ^[1] 16:3</p> <p>key ^[3] 26:6 28:14 83:8</p> <p>kind ^[15] 7:11 23:6 27:13 38:20 46:4,7 48:19 50:19 56:9 58:21 72:20 76:18 77:9 89:12 91:17</p> <p>kinds ^[1] 45:9</p> <p>kingpins ^[1] 88:8</p> <p>knowing ^[1] 16:10</p> <p>knowledge ^[8] 24:18 26:24 27:5,16,19 66:3 73:3,8</p> <p>knows ^[1] 22:21</p>	<p>L</p> <p>labeled ^[4] 39:17 41:10,16 63:20</p> <p>laid ^[3] 11:17 40:20 53:20</p> <p>landlords ^[1] 73:12</p> <p>language ^[3] 25:4 35:16 83:5</p> <p>large ^[1] 78:3</p> <p>last ^[10] 12:10 28:23 42:10,11 44:20 50:8 54:5 71:18 92:14,19</p> <p>late ^[1] 16:3</p> <p>later ^[3] 22:6 37:13 64:13</p> <p>law ^[37] 11:18 20:3,5,6 21:23 23:6 26:21 28:8,11 32:16 35:21 36:1 38:3,6 39:21 44:5 47:15 54:24 56:4,5,13,23 57:2,8 62:22 72:19 73:6,17 75:11 79:12,15 80:1,5,9,17 85:18 89:14</p> <p>lawfully ^[1] 61:6</p> <p>lawsuit ^[2] 8:25 24:20</p> <p>lawyer ^[1] 12:25</p> <p>lay ^[2] 14:23 48:21</p> <p>lead ^[1] 75:9</p> <p>leads ^[1] 68:6</p> <p>Learned ^[1] 25:8</p> <p>least ^[10] 7:8 27:12 29:17 45:16 67:19 78:21,24 81:9 89:19 91:25</p> <p>leave ^[1] 11:20</p> <p>leaves ^[1] 85:16</p> <p>led ^[1] 70:9</p> <p>legal ^[11] 5:25 20:20 43:2,10,18 47:7,9 49:11,11 59:7 75:19</p> <p>legislating ^[1] 80:16</p>
		<p>M</p> <p>made ^[6] 33:2 34:25 57:17 61:12,15 89:15</p> <p>mail ^[2] 4:17 76:9</p> <p>mailing ^[2] 4:22 76:17</p> <p>mailings ^[1] 18:19</p> <p>maintain ^[1] 35:2</p> <p>managed ^[1] 16:7</p> <p>management ^[1] 52:18</p> <p>mangled ^[1] 20:14</p> <p>manifest ^[1] 30:9</p> <p>many ^[5] 4:16 69:18 75:14 84:24 85:1</p> <p>March ^[1] 1:11</p> <p>marginal ^[2] 64:24,24</p> <p>Maria ^[1] 88:12</p> <p>marital ^[1] 82:10</p> <p>marketplace ^[1] 63:23</p> <p>massive ^[1] 62:11</p> <p>master ^[2] 51:21,21</p>	

Official - Subject to Final Review

<p>match [9] 18:16 28:22 42:11,14 63:20,25 77:3 88:10 89:2</p> <p>matched [1] 42:11</p> <p>matches [4] 39:18 41:10,12,16</p> <p>material [30] 5:9 25:3 26:4,12,13,17 27:6,11,25 28:1 30:8 35:14 47:3,5,17 54:25 61:5 66:1,4,6 72:1,8 77:5,6 78:8 82:20 89:19,21 92:7,13</p> <p>materiality [1] 26:13</p> <p>materialize [4] 8:23 30:24 35:9 92:11</p> <p>materialized [4] 5:11 24:24 33:21 56:6</p> <p>mathematical [1] 46:4</p> <p>matter [8] 1:13 6:24 11:16 32:9 52:18 85:21 86:2 91:3</p> <p>matters [2] 8:21 85:24</p> <p>maximum [1] 41:22</p> <p>mean [27] 6:14 7:2 8:22 12:12 15:8 16:2 20:10 23:1 24:12 25:2 34:3,8 36:22 41:13,14 45:18 52:7,10,23 53:6 69:12 76:7 77:7,8 84:18 85:8 89:25</p> <p>Meaning [2] 20:2 85:25</p> <p>means [4] 6:2,21 9:16 19:20</p> <p>measure [1] 49:2</p> <p>mechanical [1] 46:4</p> <p>mechanics [1] 70:18</p> <p>media [1] 80:2</p> <p>meet [1] 53:22</p> <p>meets [1] 50:23</p> <p>member [13] 4:12,13 5:22 6:19 20:10 21:2 38:9 49:6,19 52:6 53:14 63:15 66:14</p> <p>member's [1] 18:15</p> <p>members [21] 4:18 5:12,20 6:10 15:3 17:22 19:4,10 39:11 40:1 41:2,9 46:23 52:12 80:16 63:9,15 75:5 78:22 84:2 88:6</p> <p>members' [3] 39:14 47:23 61:9</p> <p>mention [1] 88:12</p> <p>mentioned [1] 68:5</p> <p>mere [3] 26:23 42:10 55:4</p> <p>merits [4] 34:13 42:1 67:4 86:5</p> <p>might [20] 7:4 14:5 17:9 22:10 25:5 26:21 30:6,19 34:19 36:19,24 44:12 45:23 46:23 47:18 53:6 60:9 61:21 65:9 86:25</p> <p>mile [2] 64:10,12</p> <p>millions [1] 74:13</p> <p>mind [2] 17:23 61:1</p> <p>minute [5] 11:6 37:19,20 60:20 87:13</p> <p>misconduct [1] 63:17</p> <p>misleading [2] 7:12,25</p> <p>misleadingly [1] 7:3</p> <p>mismatch [1] 52:24</p> <p>misreported [1] 63:21</p> <p>mistake [1] 76:17</p> <p>mistakenly [1] 7:3</p> <p>mistakes [1] 57:17</p> <p>mitigate [1] 76:18</p> <p>model [2] 46:2 61:11</p>	<p>modify [1] 75:9</p> <p>moment's [1] 61:13</p> <p>Monday [1] 66:21</p> <p>month [2] 74:14 83:23</p> <p>months [1] 72:6</p> <p>mootness [2] 34:12,19</p> <p>morning [6] 4:4 29:10 54:4 58:2 80:24 84:14</p> <p>Most [2] 73:13 78:1</p> <p>move [1] 89:16</p> <p>Ms [41] 38:25 39:4 40:10,14 41:17 42:8,24 43:9 44:2 45:19 47:8 48:11 49:3,7,15,25 50:5 51:4,9,18 52:17 53:12,23,24 54:17 55:2,6,16,23 56:10 57:7,24 58:3,13 59:2,9,19 60:7,18,21,22</p> <p>much [6] 26:20 37:17 49:5 65:23 84:11 87:12</p> <p>multi-step [1] 40:20</p> <p>must [5] 38:9,10 48:6 69:12 84:23</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>name [15] 15:22,22 16:11 28:19,21,23,23 41:13 42:10,11,15 71:18,18 88:10 89:4</p> <p>named [10] 11:13 13:24 14:16 46:11 50:15 52:19,21 53:14,19 88:12</p> <p>names [1] 7:3</p> <p>narrower [1] 16:19</p> <p>nature [3] 70:23 85:19,20</p> <p>necessarily [4] 11:8 42:15 44:4 52:17</p> <p>necessary [4] 47:18 52:7 83:18 86:3</p> <p>need [7] 6:1 27:4 32:15 54:23 75:9 79:6 89:9</p> <p>needed [1] 14:21</p> <p>needs [6] 19:21 40:19 44:5 50:22 54:8,13</p> <p>neither [3] 2:8 3:8 39:3</p> <p>never [10] 5:4 8:8 17:23 24:24 56:6 71:22 73:24 74:4 75:4 87:19</p> <p>New [2] 2:9,9</p> <p>newspaper [1] 73:20</p> <p>newspapers [1] 80:2</p> <p>next [1] 66:23</p> <p>NICOLE [3] 2:5 3:6 39:1</p> <p>Ninth [4] 5:8 14:19 38:6 86:17</p> <p>Nissan [1] 14:22</p> <p>nobody [4] 13:25 15:11 22:21 25:25</p> <p>non-compliant [1] 4:24</p> <p>non-FCRA-compliant [1] 63:14</p> <p>non-typical [1] 45:15</p> <p>normally [2] 34:9 79:4</p> <p>nothing [6] 13:3,4 52:15 53:10 61:16 62:18</p> <p>notice [4] 54:8 55:5 61:13 64:14</p> <p>number [9] 18:24 19:1 21:9 39:7 47:11 60:24 72:3 77:13 85:2</p> <p>numbers [1] 85:1</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>object [5] 14:4 18:21 19:8 69:21</p>	<p>70:12</p> <p>objected [1] 13:1</p> <p>objecting [1] 70:15</p> <p>objection [4] 13:8 53:7,8,9</p> <p>objections [1] 38:21</p> <p>obligation [1] 51:1</p> <p>obsessed [1] 27:14</p> <p>obtain [1] 21:24</p> <p>obtaining [1] 5:19</p> <p>obvious [1] 58:21</p> <p>obviously [4] 6:14 37:7 55:8 68:8</p> <p>odd [6] 7:2 34:8 44:25 45:7 51:24 79:8</p> <p>OFAC [21] 6:11 9:7 18:17 28:18,25 39:13 41:10 61:4 63:2,12,20,25 64:1 72:11 77:3 83:22 84:1 86:9 88:4,8 89:3</p> <p>often [3] 69:13,13 74:23</p> <p>okay [11] 14:6 23:8 26:25 28:5 35:13 37:2 49:18 55:10 59:8 87:11 92:22</p> <p>one [37] 4:20 7:10 9:6 12:13 18:24 20:4,20 21:5,6,6,8,9 24:5 26:15 32:17,21,21 36:20 41:24 46:18 47:14 50:8 66:21 72:3,5,14,17 76:10 77:22 79:20,24 81:14 83:23 84:22 88:2,11 91:20</p> <p>one-size-fits-all [1] 91:22</p> <p>only [22] 4:18,21 5:25 6:19 16:14,19,19 24:12 27:9 30:5 34:24 36:9 45:6 56:13 69:1 71:8 72:6,13 88:3,14 90:14 92:12</p> <p>open [3] 43:21 85:16 90:1</p> <p>opened [1] 60:16</p> <p>opening [2] 41:9 59:16</p> <p>operating [1] 45:8</p> <p>opinion [1] 47:1</p> <p>opportunities [1] 39:16</p> <p>opportunity [1] 36:14</p> <p>opposed [3] 29:16 55:21 86:13</p> <p>oral [7] 1:14 3:2,5,9 4:7 39:1 62:6</p> <p>order [5] 14:23 27:5,16,18 38:22</p> <p>organization [1] 41:7</p> <p>other [32] 11:9 14:20 15:11,14 16:24 21:8 25:24 26:15 27:10,23 29:23,24 30:5,10 34:18 39:16 43:25 46:12,22 49:19 50:16 52:12 61:20,20 64:3 69:20 75:10,10 80:2 82:25 88:15 92:3</p> <p>out [26] 8:24,25 12:21 21:16 23:3 24:10 31:23 35:6 37:13,16 40:21 46:3 47:6,9,11 48:21 52:21 53:20 61:21 65:20,22 66:22 77:11 83:7 84:1 86:21</p> <p>outcome [3] 43:12 78:15 80:11</p> <p>outlets [1] 80:2</p> <p>outset [8] 30:17 34:4,10 38:1 46:1 50:25 52:22 90:18</p> <p>outside [4] 33:21 46:1 79:6,7</p> <p>over [9] 5:12 9:10 17:21 34:11 35:24 72:10 83:15,25 88:4</p> <p>overbroad [1] 16:23</p> <p>overlap [1] 50:11</p> <p>own [4] 5:24 13:12 41:6 57:18</p>	<p>owner [1] 73:23</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>PAGE [2] 3:2 83:21</p> <p>pages [1] 84:22</p> <p>paid [1] 7:15</p> <p>paper [1] 73:23</p> <p>part [9] 11:9 14:14 25:6 27:12 56:10 78:22 86:2,3,19</p> <p>participants [1] 32:24</p> <p>particular [5] 48:6 49:23 54:8 67:6 77:25</p> <p>particularized [1] 62:21</p> <p>particularly [3] 13:9 32:18 91:20</p> <p>parties [8] 10:19 15:4 16:21 27:4 61:10 63:7 66:6 72:5</p> <p>party [10] 2:8 3:8 7:21 8:2 39:3 58:11 61:5 70:15 73:7 77:20</p> <p>passed [2] 20:6 75:6</p> <p>passes [1] 21:23</p> <p>past [4] 23:25 24:2 73:2 74:3</p> <p>pattern [1] 88:1</p> <p>PAUL [5] 2:3 3:3,13 4:7 88:20</p> <p>pay [1] 44:23</p> <p>people [30] 9:22 15:10,13 17:14 20:6,12,12 22:1,9 23:17,18 24:8,11 26:4,11 31:3,4 32:18 33:15 34:4 35:8 72:11 73:12 88:4,8,12 90:8 91:14,16 92:12</p> <p>per [5] 28:16 35:19 54:20 73:6 74:14</p> <p>percent [22] 5:4 6:20 7:6,6 16:14 17:25 18:3 21:21 22:7,7 23:2 25:6,21 28:4 30:12,21 33:16 34:5 36:10 72:3,10 88:4</p> <p>perfect [1] 8:9</p> <p>perfectly [1] 53:3</p> <p>perhaps [1] 69:2</p> <p>period [9] 5:7 9:10 22:20 24:21 33:20,22 72:7 83:25,25</p> <p>person [11] 13:16 15:14,21,23,24 45:5 71:23 73:2,3,22 90:3</p> <p>personally [1] 19:14</p> <p>persons [1] 59:7</p> <p>Petitioner [15] 1:4 2:4 3:4,14 4:8 9:11 39:14 41:25 43:22 61:12,13 63:17,24 70:25 88:21</p> <p>Petitioner's [3] 9:6 61:11 68:22</p> <p>pick [3] 13:19 29:11 31:1</p> <p>picking [1] 82:3</p> <p>pieces [1] 19:16</p> <p>place [3] 6:16 12:24 49:13</p> <p>placed [1] 46:18</p> <p>places [1] 70:14</p> <p>placing [2] 39:13 63:2</p> <p>plaintiff [19] 10:11 11:14 13:24 17:3 46:11,18 50:15,22 51:20 52:19,21 53:14,19,21 54:15 58:10 86:4,24 87:9</p> <p>plaintiff's [1] 44:12</p> <p>plaintiffs [7] 12:12 14:17 44:22 45:23 57:2 60:1 91:21</p> <p>plaintiffs' [1] 46:16</p> <p>plan [1] 32:24</p>
--	--	--	---

Official - Subject to Final Review

<p>planned ^[1] 5:20 plans ^[1] 59:15 play ^[1] 11:23 please ^[4] 4:10 39:5 62:9 88:23 plus ^[1] 38:17 point ^[29] 7:13 8:23 24:25 29:2 30:18,25 31:14 34:21,23 35:10 36:23 39:10 42:7,9 50:20 64:23 68:15 69:11 70:21,21 71:2 74:3 79:23 81:14 83:16 89:11,14 90:6 92:3 pointed ^[1] 31:23 points ^[2] 88:24 90:17 policy ^[2] 6:15 8:19 pose ^[1] 79:2 posed ^[1] 90:4 position ^[9] 24:7 40:12 41:4 43:4 48:4,11 86:7,11 89:12 positions ^[1] 61:25 positively ^[2] 31:18 35:9 possibility ^[1] 35:17 possible ^[2] 12:25 41:22 possibly ^[1] 16:23 potential ^[12] 18:16,22 28:22 39:18 40:25 41:10,12,13,16 42:14 63:20 89:2 potentially ^[3] 47:21 60:15 72:5 power ^[3] 57:20,20 62:19 powers ^[1] 56:17 practicable ^[1] 70:20 practical ^[1] 8:14 practice ^[3] 30:21 70:9 91:4 precedents ^[2] 61:24 80:6 precedes ^[1] 37:3 precisely ^[1] 39:19 precludes ^[1] 6:3 precluding ^[1] 16:22 predominance ^[9] 11:21 50:3,12,17 53:17 69:2 75:24 91:11,21 predominate ^[2] 21:11 91:15 predominates ^[1] 12:3 preemptive ^[1] 62:13 prejudice ^[1] 70:2 prejudiced ^[1] 17:3 prejudicial ^[3] 13:4 17:17 70:13 premise ^[1] 17:15 prepared ^[4] 5:6,10,17 21:14 preparing ^[1] 5:3 prescribed ^[1] 23:16 present ^[1] 47:3 presented ^[3] 73:11 76:19,22 preserves ^[1] 35:16 press ^[1] 76:5 presume ^[1] 28:11 presumed ^[2] 28:9 35:22 prevent ^[1] 39:20 prevents ^[2] 61:17 82:11 price ^[1] 44:23 prices ^[2] 44:23 69:17 primarily ^[1] 78:13 print ^[1] 78:25 privacy ^[1] 5:23 private ^[15] 10:1,5,12 32:3 33:4 56:22 57:2 58:11 62:12 78:3,4,13 79:21 85:10 87:21</p>	<p>probably ^[9] 6:16,21 22:3 23:6 34:17,20,22 48:19 68:2 probative ^[1] 70:13 problem ^[23] 5:16 8:12 11:19 13:19 17:19 32:1,6 45:24 49:9 50:9,13 51:13,17,19,25 52:1 53:10,16,17,18 57:1 67:18 79:2 problems ^[2] 46:21 51:4 procedural ^[5] 84:16 85:11,13,20 86:12 procedure ^[1] 14:24 procedures ^[15] 5:2 12:17 13:10 39:12,20 40:24 41:22 49:13 61:3 62:16 76:4 81:1 84:19 85:9 86:22 proceed ^[1] 46:9 proceeds ^[1] 17:20 process ^[5] 7:25 18:18 20:14 24:19 40:20 processing ^[1] 91:17 product ^[2] 45:1 46:9 profit ^[1] 63:7 program ^[1] 71:16 prohibitions ^[1] 32:4 promise ^[4] 6:6 9:17,22 10:13 prong ^[1] 82:17 proof ^[5] 38:1,2 53:22 60:15 62:25 proper ^[3] 13:7 36:6 38:8 property ^[2] 36:18 37:12 proposal ^[1] 21:6 proposed ^[3] 20:25 21:14 36:1 prosecutorial ^[1] 57:20 prosecutors ^[1] 90:11 prospective ^[1] 35:17 prospectively ^[2] 6:25 8:17 protect ^[4] 20:6 61:16 84:20 85:4 protecting ^[1] 87:18 protection ^[2] 62:14 84:17 prove ^[2] 35:23 44:5 proved ^[1] 62:20 proven ^[1] 68:15 provide ^[4] 47:24 56:2 57:10 59:17 provided ^[9] 48:2,2,7,8,10,15 54:8 83:2 87:23 provides ^[3] 39:21 54:9 57:13 providing ^[1] 40:15 proving ^[1] 44:14 provision ^[3] 10:15,23 39:21 provisions ^[2] 12:4 61:20 proximate ^[2] 65:6 80:17 PSLRA ^[1] 75:6 psychological ^[1] 15:24 public ^[12] 10:8,21,23 11:3,4 28:10 32:19 58:5 59:11 62:22 78:3,14 publication ^[15] 28:8 56:8 74:8 78:23 79:8,16 81:9,10,13 82:18,22 83:7,15,20 84:7 publish ^[1] 73:19 published ^[8] 28:7,17 73:22,25 80:4 81:3,5 82:15 publishing ^[1] 41:5 punitive ^[2] 38:17 91:23 punitives ^[1] 91:20 pure ^[1] 36:15</p>	<p>purpose ^[2] 44:14 77:1 purposes ^[2] 67:9 79:5 pursue ^[1] 90:9 put ^[5] 14:21 51:22 53:5 84:21 88:16 putative ^[1] 52:21 putting ^[1] 40:11</p> <hr/> <p style="text-align: center;">Q</p> <p>quality ^[1] 83:14 quantifying ^[1] 36:8 quarter ^[3] 64:10,11 72:4 question ^[33] 12:10 17:16 19:16,20 22:14,17 26:9 40:6 44:19,20 51:15 52:14 54:6 58:3 59:20 60:1 64:19 66:1,3 67:6 68:6 72:16 73:8 76:15 78:7 79:1,11,20 82:21 84:15 85:16,23 91:11 questions ^[10] 29:12 40:9,11 43:21 50:6 66:13 70:11 75:20,22,23 quibble ^[1] 28:15 quick ^[2] 15:14 66:12 quite ^[5] 17:17 42:24 47:20 51:10 67:22</p> <hr/> <p style="text-align: center;">R</p> <p>radically ^[3] 15:16 38:12 53:15 raise ^[1] 13:8 raised ^[2] 19:1 38:21 RAMIREZ ^[26] 1:6 4:5 5:14,17,25 12:21 13:3,11 14:22 15:11 18:2 21:5 25:24 26:15 38:12 40:4 49:10 51:13 52:3 53:2,5 67:13 71:3,9 76:24 88:11 Ramirez' ^[1] 88:15 Ramirez's ^[7] 18:13,21 19:8 44:2 63:11 71:12 88:14 range ^[2] 38:17 46:15 rate ^[1] 61:14 rather ^[3] 4:20 76:9 79:14 read ^[9] 16:2 18:11 29:14,17 35:14 47:3,6,8 60:12 readily ^[2] 63:4 74:11 reading ^[1] 36:6 ready ^[1] 73:19 real ^[5] 36:16,24 39:15 76:12 92:10 realize ^[1] 89:24 realized ^[1] 92:9 really ^[13] 8:20 15:18 16:12 24:9 40:25 46:24 49:5 52:15 68:21 69:25 76:12 92:4,6 Realty ^[4] 58:11,14,19,25 reason ^[9] 8:4,7,12 9:15 13:9 15:5 31:11 86:7,12 reasonable ^[13] 5:2 12:17 13:10 14:24 19:6 39:11,20 40:24 41:22 49:13 61:3 81:1 85:9 reasonably ^[1] 84:4 reasoned ^[1] 5:8 reasons ^[1] 31:22 REAVES ^[44] 2:5 3:6 38:25 39:1,4 40:10,14 41:17 42:8,24 43:9 44:2 45:19 47:8 48:11 49:3,7,15,25 50:5 51:4,9,18 52:17 53:12,23,24 54:</p>	<p>17 55:2,6,16,23 56:10 57:7,24 58:3,13 59:2,9,19 60:7,19,21,22 REBUTTAL ^[3] 3:12 88:20,24 receipt ^[2] 85:2,3 receive ^[3] 5:13 9:9 39:24 received ^[4] 4:21 5:22 18:18 66:20 receiving ^[3] 4:17,23 76:9 recently ^[1] 77:17 recipient ^[1] 48:8 recognize ^[1] 79:15 recognized ^[7] 35:20 37:25 58:8 62:10,23 72:21 73:16 recognizing ^[2] 31:16 90:7 reconsider ^[1] 43:20 record ^[4] 25:22 35:11 74:13 82:19 recover ^[3] 24:12,17 73:1 recovered ^[1] 24:15 recovery ^[4] 16:22 56:5 79:14,19 recreated ^[1] 39:14 redressability ^[1] 68:3 reflected ^[1] 85:3 refused ^[1] 38:2 regard ^[1] 82:25 regarding ^[2] 40:6 71:23 regardless ^[3] 24:17 60:14 61:19 regime ^[3] 10:8,21 11:4 registered ^[1] 26:1 regulated ^[1] 10:19 regulatory ^[1] 10:21 reject ^[1] 85:21 rejected ^[2] 21:7 38:21 related ^[1] 12:16 relationship ^[2] 14:3 52:8 relatively ^[1] 9:23 relevance ^[1] 69:23 relevant ^[7] 13:12 39:7 44:13 46:16 47:12 58:15 69:22 relied ^[2] 58:23 77:15 relief ^[8] 29:17 30:20 44:7 55:21 77:19,20 81:17,18 relies ^[1] 72:2 rely ^[3] 48:13,13 58:11 remains ^[1] 85:23 remand ^[4] 31:6,8 40:8 62:1 remanded ^[1] 83:12 remedied ^[1] 16:21 remedies ^[1] 87:24 remedy ^[2] 62:24 68:1 remember ^[1] 31:10 remove ^[1] 87:19 removed ^[1] 6:11 repeat ^[1] 32:14 repeatedly ^[3] 38:21 50:11,21 report ^[15] 5:3,5,9,17 6:20 7:4,11,20 8:7 9:8 15:20 16:3 30:13 57:18 86:11 reporting ^[5] 41:21 62:13,17 63:13 89:1 reports ^[6] 6:12 9:9 15:10 39:14 61:9,12 represent ^[1] 20:12 representation ^[1] 69:3</p>
---	--	--	---

Official - Subject to Final Review

<p>representative ^[17] 6:4,6 11:14 12:1 13:19 20:16 38:13 52:4,9,16 53:1,3 90:25 91:3,6 92:1,12 representatives ^[2] 90:19,23 represented ^[2] 44:24 45:5 reputation ^[1] 62:24 reputational ^[1] 56:9 request ^[2] 5:6 59:14 requested ^[1] 44:7 requests ^[1] 18:19 require ^[4] 38:2,7 41:20 48:13 required ^[2] 48:14 90:18 requirement ^[11] 6:3 11:1 38:19 40:19,24 48:18 50:4 52:20 70:19 73:7 75:4 requirements ^[4] 10:18 50:16,23 53:25 requires ^[8] 18:23 19:18 26:24 27: 15 41:21 59:22,23 65:15 requiring ^[1] 18:12 requisite ^[1] 4:23 resembles ^[1] 15:22 resist ^[1] 15:8 respect ^[20] 10:17 12:13,21 13:10 19:21 20:5,8,24 21:1,13 27:2,24 28:6 49:10,22 57:15 68:7 74:20 80:25 84:17 respond ^[2] 19:16 82:5 Respondent ^[6] 1:7 2:10 3:11 5:1 43:22 62:7 Respondent's ^[6] 28:19 40:13 68: 22 89:4,17,19 response ^[5] 18:19 26:7 29:19 31: 25 34:2 responses ^[3] 41:18 45:19 70:7 responsibility ^[1] 62:15 rest ^[1] 75:17 Restatement ^[2] 79:17,18 restricts ^[1] 62:18 result ^[3] 22:11 44:9,23 resulted ^[1] 43:3 retelling ^[1] 71:8 retrospective ^[3] 8:18 25:1 87:20 retrospectively ^[2] 22:9,18 return ^[1] 54:5 review ^[1] 70:25 rights ^[18] 4:21 10:5,8,21 11:4 12: 19 32:20 39:23,25 40:3,18 57:11, 11 61:23 62:19,21 66:20 78:14 rights/private ^[1] 32:19 rise ^[2] 28:9 67:23 risk ^[87] 5:9,11 7:5 8:14,20,22 22:7, 10 24:23,24 25:3,9,21 26:4,12,13, 17,20 27:6,12,25 28:1 29:13,15,15, 21,22,24,25 30:8,19,23 33:17,21 35:8,14,24 36:3,8,15,16,24 39:15 41:1 47:3,5,17 54:13,25 55:16,18 56:1 63:2 64:22 65:19 66:2,4 72:1, 8 73:1,4,8 74:3,5,8 77:3,5,6,8 78: 8 81:8,12,12,15,17,19,21 82:7,20 84:20 85:4 89:20,21 90:4 92:8,10, 13 risks ^[2] 30:7 62:10 risky ^[1] 66:7</p>	<p>road ^[1] 13:16 ROBERTS ^[44] 4:3 6:9 7:1 8:3,6 9: 1 12:7 15:2 18:9 21:18 25:14 29:6 33:11 37:19 38:23 40:10 41:8 42: 5,16 44:16 46:25 48:23 51:8 54:2 55:12 57:25 60:20 62:3 64:6 65:1, 13 66:8 69:8 71:14 74:16 76:2 78: 18 80:20 84:12 87:13 88:19 92:15, 18,22 role ^[1] 11:23 roles ^[1] 11:24 room ^[3] 45:5,6,8 roughly ^[1] 15:10 routine ^[1] 74:12 routinely ^[1] 73:12 ruin ^[1] 27:13 rule ^[19] 6:5 8:16 11:18 18:12,23, 25 19:18 38:19 40:6 46:12 50:23 53:24 63:10 70:12,14,19 75:3,9 86:4 Rules ^[5] 6:7 13:14,16 14:15 70:10 run ^[3] 6:5 21:16 46:12 runs ^[3] 35:6 64:21 77:12</p> <p style="text-align: center;">S</p> <p>safe ^[1] 22:7 same ^[26] 6:1 9:7 11:17 18:18,19 20:20 23:16,17 28:12,22 39:10 41: 12,13 42:15 44:11,18 45:9 49:15, 19 63:9,14,16 69:15 71:7 75:16 82:4 SAMUEL ^[3] 2:9 3:10 62:6 satisfied ^[2] 40:7 67:9 satisfy ^[1] 22:2 saw ^[1] 15:15 saying ^[13] 11:13 20:18 21:8 27:7 29:20 30:3 31:16,19 32:1 42:13, 22 47:4 65:2 says ^[5] 47:2 48:1,6 54:7 76:7 Scalia ^[1] 89:14 scarlet ^[1] 63:21 scheme ^[1] 64:4 scope ^[1] 64:22 screening ^[1] 16:6 se ^[4] 28:16 35:19 54:20 73:6 second ^[10] 12:18 40:16 42:7,8 46: 6 50:19 59:11 79:18 82:17,17 secondary ^[1] 16:5 secretive ^[1] 63:3 section ^[1] 79:10 securities ^[1] 91:13 see ^[14] 7:23 10:2,9 18:23 19:11 37:1 41:11,14,15 56:16,16,16 58: 23 81:6 seek ^[3] 19:9 38:14 55:20 seeking ^[2] 59:13 91:20 seem ^[3] 7:2 50:13 78:21 seemed ^[2] 19:5 82:3 seems ^[5] 25:2 34:8 36:2,7 58:18 seen ^[2] 7:10 60:13 sees ^[1] 15:21 Senator ^[1] 16:3 send ^[4] 43:8,13 45:4 67:17 sense ^[1] 8:15</p>	<p>sent ^[10] 4:19 5:6 27:4 45:6,8 63: 14 66:22 67:7,7 84:1 separate ^[4] 13:2 29:23 46:3 55: 19 separation ^[1] 56:17 SERGIO ^[3] 1:6 88:11,15 serious ^[3] 38:13 74:3 82:11 serve ^[1] 77:1 set ^[4] 45:7 47:10 70:16 77:10 setting ^[4] 32:2 46:14 47:6,9 seven ^[1] 72:6 SG ^[1] 63:5 shadow ^[1] 32:2 share ^[1] 16:11 shared ^[2] 38:17 80:3 shift ^[2] 16:16 47:22 shocking ^[1] 86:16 shouldn't ^[1] 46:24 show ^[2] 31:20 80:16 showing ^[3] 38:5 41:20 50:24 shown ^[1] 54:13 side ^[10] 14:20 21:8 27:10,23 56: 21 61:18 67:21 68:3,4 69:20 significant ^[3] 5:15 7:10 40:5 significantly ^[1] 78:1 similarly ^[1] 41:3 simpler ^[1] 78:14 simply ^[5] 4:23 5:22 16:21 70:8 86: 4 since ^[4] 6:18 34:9 58:21 63:23 single ^[1] 63:24 site ^[1] 89:3 situation ^[13] 7:19 10:10 19:7 20: 7,7 46:17 51:20,25 61:16 68:17 74:2 76:13 84:3 six ^[2] 31:3 34:1 sixth ^[4] 23:14,23 24:8 33:22 sizable ^[1] 5:13 size ^[1] 17:5 slander ^[1] 35:19 small ^[1] 69:23 Smith ^[1] 42:13 solely ^[1] 59:22 Solicitor ^[1] 2:5 solving ^[1] 11:19 somebody ^[10] 7:12,14 16:11 28: 22 37:12 45:3 52:5 75:14 79:6 92: 9 someone ^[11] 7:13 15:19,22 18:17 23:10 56:24 59:24 69:15 71:18 73: 19 75:15 sorry ^[2] 25:13 92:20 sort ^[17] 8:24 11:19 17:4,18,22,24, 24 24:23 25:9 26:20 35:5 36:14 37:6 52:24 71:21 73:10 76:12 sorts ^[1] 90:1 Sotomayor ^[19] 18:10,11 19:15,23 20:1 21:15 48:24,25 49:3,4,8,17 50:1,5 51:3,6 74:17,18 75:25 sought ^[5] 38:16 39:19 63:15 66:5 70:25 sound ^[1] 81:25 speaks ^[1] 32:18 special ^[2] 13:2 69:19</p>	<p>specific ^[8] 10:11,12 33:3 46:16, 20 62:16 77:3 86:9 specifically ^[3] 7:18 14:21 57:11 Spokeo ^[42] 11:9 25:4 32:15 35:15 36:6,9 39:6 40:21 42:2 47:1,10 48: 20,21 54:12,21 55:25 56:12 61:2 64:21 65:14 66:1 71:25 77:6,12, 15 78:7 79:11 80:18 81:4,7 82:1,6, 9,15,20 83:4,13,17 85:14,15 89:15, 20 Spokeo's ^[1] 47:19 square ^[1] 18:25 squarely ^[1] 61:23 stage ^[1] 35:2 staggering ^[1] 63:23 stand ^[4] 5:12 38:22 46:19 53:5 standard ^[5] 6:17 43:18 71:25 77: 10 89:7 standing ^[56] 4:13 7:7 9:11,13 22: 18,24 23:21,23,24 28:2 34:4,6,10 35:2,12,17 39:11 40:1,2,15 42:1 47:23 48:12 54:20 55:20 56:2 58: 16 59:17,21 60:6 61:3,18,24 65:2, 6,14 66:15 67:3,15 68:1 72:19 77: 21 78:22 81:20 82:20 83:9,13 85: 22,24 86:3,7 89:16,17 90:6 92:4,7 standpoint ^[1] 68:10 stands ^[1] 4:14 start ^[1] 11:12 starting ^[1] 50:7 starts ^[1] 91:10 state ^[3] 24:18 38:3 86:1 STATES ^[5] 1:1,15 2:7 3:7 39:2 statute ^[18] 7:17,22 10:2,10,11,24 23:15 32:20,23 41:19 54:7 55:9 64:14,16,18 67:21 76:22 77:24 statutes ^[2] 84:18 90:10 statutorily ^[1] 48:14 statutory ^[36] 19:4 21:1,3,9,24 22: 8 38:16 39:8 46:13 48:18 49:2,20, 23 55:4 57:14 61:20 62:21 63:16 64:4,9 65:11,16 67:9,24 68:8 77:1 79:20 83:24 86:3 87:4,24 88:1 89: 10,13 91:19,22 stems ^[2] 63:11,13 stick ^[1] 14:8 sticking ^[1] 17:24 still ^[10] 6:16 11:25 23:14,16 29:22 51:17,25 52:10 83:24 84:2 Stoke ^[1] 82:1 stop ^[3] 30:20 37:16 92:2 straightforward ^[1] 60:4 strains ^[1] 77:13 strength ^[1] 71:12 stretch ^[1] 42:9 strikes ^[2] 81:11,17 strong ^[2] 33:1 71:3 strongest ^[1] 75:8 structure ^[3] 10:9,20 32:22 subchapter ^[4] 10:16,20 11:1 33: 1 subject ^[4] 16:16 18:13 24:23 47: 21 subjected ^[2] 73:1,3</p>
---	---	---	---

Official - Subject to Final Review

<p>subjective ^[1] 66:3 submitted ^[2] 92:24 93:2 subset ^[1] 72:5 substantial ^[1] 61:8 substantially ^[1] 29:4 substantive ^[1] 75:11 succinctly ^[1] 32:7 sue ^[6] 9:11,13 21:24 74:1 78:4 80:1 sued ^[2] 6:10 22:8 suffer ^[5] 26:12 27:16 30:22 34:14 37:10 suffered ^[11] 5:14 13:5 23:24 24:2 26:15 38:13 40:4 71:22 90:15 92:10,13 suffering ^[3] 8:14 90:10 92:7 suffers ^[4] 4:11 13:24,25 69:17 sufficient ^[3] 7:7 32:9 78:10 sufficiently ^[2] 6:22 51:1 suggest ^[2] 36:25 78:21 suggested ^[8] 11:8 17:13 19:2 43:17 55:25 56:12 65:7 75:13 suggesting ^[3] 56:19,20 57:8 suggests ^[4] 5:25 6:19 57:9 79:4 suing ^[2] 24:8 90:3 suit ^[8] 6:15 23:14 34:4,11 35:17 65:3 72:25 87:23 summaries ^[1] 39:24 summarize ^[1] 30:2 summary ^[8] 4:21 12:19 27:7 40:17 61:22 65:10 66:20 71:7 supplied ^[1] 9:20 support ^[1] 83:9 supporting ^[3] 2:8 3:8 39:3 Suppose ^[14] 15:19 21:19,22,25 23:9,11 30:6 51:16 52:23,24,25 64:8 73:18 91:2 supposed ^[1] 14:17 SUPREME ^[2] 1:1,14 surprised ^[1] 58:23 surprising ^[1] 7:11 sustain ^[1] 34:23 sway ^[1] 74:25 switch ^[1] 59:10 system ^[3] 88:10 90:8,13 systemic ^[1] 63:12</p> <hr/> <p style="text-align: center;">T</p> <p>talked ^[1] 81:7 Tatel ^[1] 81:23 technical ^[1] 91:3 tend ^[2] 46:10,11 terms ^[6] 31:5 34:12 49:19 65:12 66:2 81:1 terribly ^[1] 7:9 terrorist ^[2] 12:16 39:18 terrorists ^[1] 88:7 test ^[4] 11:11 32:6 47:7,9 testified ^[5] 51:14,16 52:4 67:11 76:25 testifies ^[2] 52:9,14 testify ^[6] 52:6,12,19 69:16 73:7 91:4 testifying ^[3] 13:11,16 53:15</p>	<p>testimony ^[6] 19:9 46:19 67:12 70:13,23 72:10 text ^[2] 18:25 63:10 textually ^[2] 19:17 20:18 themselves ^[3] 57:4 69:5 89:25 then-Judge ^[1] 82:2 theoretical ^[1] 17:19 theory ^[2] 27:24 60:4 there's ^[25] 7:25 10:18 17:18 21:20,25 26:4 36:24 37:23 43:25 46:2 47:15 48:18 50:11 52:7 56:8,8 57:14 60:15 67:5,15 68:8 72:19 74:10 78:9 83:5 therefore ^[1] 60:5 they've ^[6] 8:4,6,8,9 31:19 thinking ^[6] 12:10 22:11 26:18 27:10 77:5 84:24 third ^[9] 7:21 8:2 15:4 16:20 27:4 52:10 61:10 63:7 86:22 third-party ^[2] 41:4,7 Thomas ^[22] 9:3,4,12,25 10:7 11:5,20 12:6 31:25 42:18,19,25 43:6,24 44:15 66:9,10,17 67:14 68:5,20 69:7 Thomas's ^[2] 12:10 44:20 though ^[8] 24:14,15 25:3 29:2 56:8 67:15 73:2 83:4 thousand ^[2] 44:25 75:14 thousands ^[3] 4:14 17:14 63:25 three ^[3] 12:3 58:22 88:12 throughout ^[1] 21:7 tied ^[2] 43:17 77:2 time's ^[2] 29:2,5 toasting ^[1] 90:3 today ^[3] 28:19 60:25 89:3 together ^[4] 12:4 64:22 77:13 92:5 took ^[2] 12:24 15:14 top ^[1] 38:16 tort ^[4] 36:1,4,5 62:14 total ^[2] 67:18 88:3 touch ^[1] 60:9 track ^[3] 70:2,3,6 traffic ^[1] 89:24 transact ^[1] 82:12 transaction ^[1] 15:17 translates ^[1] 27:25 TRANSUNION ^[14] 1:3 4:4 5:2 6:11,11 19:7 41:6 63:1 67:11 71:16 78:24 83:22 84:5 89:6 TransUnion's ^[4] 63:5,11 87:1 88:16 treatment ^[1] 69:19 trespasses ^[1] 37:12 trial ^[25] 12:24 19:11,13 20:23 21:12 35:7 50:2,20 51:11,14,16,22 52:4,6,9,13,14,18 63:19 67:11 70:9,16,23 72:10 90:20 tried ^[3] 12:21 71:2,6 tries ^[1] 69:16 trivial ^[4] 9:24 85:18 86:15 90:1 trouble ^[1] 12:22 true ^[3] 28:12 41:11 91:2 truthful ^[1] 59:7 try ^[7] 24:6 28:15 50:6 51:2 56:24</p>	<p>72:15 82:6 trying ^[3] 27:11 78:9 79:23 Tuesday ^[1] 1:11 turn ^[2] 68:15 91:24 two ^[20] 4:12,20 5:23 18:19 19:1 26:10 33:24 37:24 40:16,21 45:21 63:14 66:24 67:7 70:7 76:9,16 84:22 86:8 90:16 Twombly ^[1] 65:9 type ^[6] 28:19 36:18 39:19 42:3 49:23 89:4 types ^[2] 56:13 86:21 typical ^[28] 11:15 12:20 13:5,20 18:2,6,12,24 19:19,22 20:2,4,9,15,16,19,20 43:19 45:12 46:11 49:10 52:22 53:3 68:23 69:25 88:14 91:5,25 typicality ^[39] 4:13 5:16 6:1,3 11:11,13 12:11 20:21 38:19 40:11 43:1,14 45:23 46:21 50:8,12,14,15 51:4,10,17,19,25 53:16,18 61:25 68:7,12,14,25,25 69:6 71:2 74:20,23 90:16,17,19 92:5</p> <hr/> <p style="text-align: center;">U</p> <p>ultimate ^[1] 43:11 ultimately ^[1] 35:7 under ^[26] 21:5 23:5 36:9 38:8 39:25 42:2 50:4 54:12,19,21 59:24 60:3 64:15,18 65:9 70:19 71:25 73:11 74:22 75:3 81:4 82:19 85:14 89:19,20 90:13 underscores ^[1] 31:21 understand ^[9] 9:25 27:1 29:12 34:2 36:20 42:21 48:9 55:17 79:23 understanding ^[5] 36:11 38:8 49:9 51:10 55:18 understood ^[1] 81:10 uniform ^[2] 88:2,17 unique ^[1] 18:14 UNITED ^[5] 1:1,15 2:7 3:7 39:2 unless ^[4] 28:1 29:22 57:4 81:21 unlike ^[2] 22:16 82:15 unlikely ^[1] 70:22 unmistakable ^[1] 10:22 unpack ^[1] 17:7 unreasonable ^[1] 18:18 unrepresentative ^[1] 5:21 untangled ^[2] 16:25 17:2 until ^[4] 24:10 34:1 45:16 64:12 up ^[17] 7:8 8:1 9:21 16:4,8 18:8 29:11 31:1 32:2 37:20 54:21 60:21 69:13 70:16 78:25 82:3 87:14 Uzuegbunam ^[1] 77:17</p> <hr/> <p style="text-align: center;">V</p> <p>vacate ^[2] 40:7 62:1 vacation ^[1] 5:20 various ^[3] 19:25 48:21 61:2 vendors ^[1] 41:7 verdict ^[1] 19:3 versus ^[5] 4:5 13:17 75:23 78:13 81:16</p>	<p>viable ^[1] 46:2 victim ^[1] 45:4 view ^[4] 40:14 79:25 80:9 89:19 viewed ^[2] 43:1 59:21 vindicating ^[1] 31:14 violate ^[1] 6:7 violation ^[19] 10:16,25 33:1 39:8 40:18 55:4 57:14,19 65:16 76:21,21 84:16 85:6,14,20 86:13 89:10,13,14 violations ^[4] 40:2,16 89:24 90:9 virtue ^[1] 9:15</p> <hr/> <p style="text-align: center;">W</p> <p>Wal-Mart ^[1] 75:23 walk ^[1] 49:18 wants ^[1] 14:1 Washington ^[3] 1:10 2:3,6 water ^[2] 21:21 33:15 way ^[21] 7:22 11:18 13:18,22 14:11 16:24 19:6 22:5 30:2 32:10 34:9 36:20 37:1 40:12 46:24 50:18 60:12 76:11 77:21 88:16 91:10 Wayne ^[1] 42:13 ways ^[3] 17:2,9 42:1 web ^[1] 89:3 website ^[1] 28:18 weird ^[1] 22:4 welcome ^[2] 40:9 55:16 whatever ^[3] 8:16 9:22 30:19 whenever ^[1] 47:5 whereas ^[2] 37:11 50:16 Whereupon ^[1] 93:1 whether ^[47] 7:6 19:20 22:6 23:3 28:15 32:8,23 33:21 36:3 37:7 39:8 40:6 41:4 42:2,4 46:2 47:15,17 50:8 52:21 54:23,24 61:5 64:19 66:4,5 67:7 72:18,19,20 73:8 74:24 75:15,20 77:23 78:2,9,13 79:11,20 82:21 84:15,21,22,24 85:23 86:24 who's ^[5] 15:23 16:11 22:21 52:8 53:14 whole ^[3] 7:13 27:14 80:13 wholly ^[1] 6:4 whom ^[1] 44:22 widgets ^[2] 69:18 75:14 will ^[10] 4:3,16,17 28:20 70:24 71:17 89:4 91:14,15,16 willful ^[2] 63:16 76:21 willfulness ^[2] 67:22 87:4 willing ^[1] 23:21 within ^[16] 22:20 23:14,22 33:19 41:6 46:15 50:14 61:23 64:10,11 72:6 78:24 79:4,8 83:24,25 without ^[4] 36:17 55:9 62:25 90:10 wondering ^[2] 13:22 76:5 words ^[2] 29:23,24 work ^[2] 12:4 45:18 worked ^[1] 22:5 works ^[2] 7:23 23:12 worry ^[2] 15:5 91:22 worse ^[1] 45:10</p>
---	--	--	---

Official - Subject to Final Review

worth ^[3] 22:11 31:15 90:7
wrap ^[3] 37:20 60:21 87:14
writing ^[1] 84:24
wrongful ^[1] 56:24
wrongly ^[2] 39:17 41:9

Y

year ^[9] 22:6 23:14,23 24:8,15 33:
22,24 34:1 64:1
years ^[2] 23:13,22
yielded ^[1] 88:11
York ^[2] 2:9,9

Z

ZIP ^[3] 63:21 81:10 82:10
zone ^[1] 88:1