

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF EDUCATION, ET AL.,)
 Petitioners,)
 v.) No. 22-535
MYRA BROWN, ET AL.,)
 Respondents.)

Pages: 1 through 88
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Date: February 28, 2023

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MYRA BROWN, ET AL.,)

Respondents.)

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Washington, D.C.

Tuesday, February 28, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:21 p.m.

APPEARANCES:

GEN. ELIZABETH B. PRELOGAR, Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Petitioners.

J. MICHAEL CONNOLLY, ESQUIRE, Arlington, Virginia; on
behalf of the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	GEN. ELIZABETH B. PRELOGAR	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	J. MICHAEL CONNOLLY, ESQ.	
7	On behalf of the Respondents	53
8	REBUTTAL ARGUMENT OF:	
9	GEN. ELIZABETH B. PRELOGAR	
10	On behalf of the Petitioners	83
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
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8
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P R O C E E D I N G S

(12:21 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument, we'll continue argument, in Case 22-535, Department of Education versus Brown.

Welcome back.

ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

ON BEHALF OF THE PETITIONERS

GENERAL PRELOGAR: Thank you, Mr. Chief Justice, and may it please the Court:

Across the board, Brown and Taylor's arguments in this case run counter to precedent and principle. On standing, Respondents' asserted injury is a complete mismatch for the relief they seek. They claim to want greater loan forgiveness than the plan provides, but they ask this Court to hold that the HEROES Act doesn't authorize loan forgiveness at all.

A win on that theory would mean that no one could get any HEROES Act relief, not Brown, who would get nothing for herself, not Taylor, who would lose \$10,000, and not any of the millions of borrowers who need this critical relief. Respondents lack standing to seek that result. Parties cannot go to Court to make

1 themselves and everyone else worse off.

2 To get around that problem, Brown and
3 Taylor gesture at the idea that if the Secretary
4 can't act under the HEROES Act, he might
5 consider making an entirely different decision
6 to grant debt relief under the Education Act.

7 But, on the merits, Respondents are
8 broadly attacking the whole idea of providing
9 loan forgiveness under any executive action.
10 They never explain why they think the Secretary
11 could provide broader relief to even more
12 borrowers under the Education Act.

13 And, in any event, this Court has
14 never endorsed that kind of circuitous route to
15 standing. A plaintiff who isn't injured by
16 agency action can't establish standing by
17 speculating that invalidating that -- that
18 action might prompt the agency to take an
19 entirely different action under a different
20 statute.

21 If the Court reaches the merits, it
22 should reject Respondents' claim. They argue
23 the plan is unlawful because the Secretary
24 didn't use certain rulemaking procedures. But
25 Congress specifically exempted the Secretary

1 from following those procedures when he issues
2 waivers and modifications under the HEROES Act.
3 Respondents' procedural claim fails in light of
4 that clear statutory exemption.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Are there any
7 instances in which you would have procedural
8 standing?

9 GENERAL PRELOGAR: So I think that if
10 they wanted to argue that the Secretary should
11 have reconsidered his decision under the HEROES
12 Act to grant broader relief, then it's possible
13 that they could have raised both a procedural
14 claim and a substantive claim because, at that
15 point, their injury would be redressable. They
16 would be saying that the Secretary drew
17 arbitrary lines, that the plan should be
18 expanded to include them and to provide relief
19 to them, and that would be a very
20 straightforward route to making the arguments if
21 what they really want is loan forgiveness.

22 But, instead, their whole argument
23 here is that the Secretary can't give them or
24 anyone else relief under the HEROES Act. And
25 when you look at it that way, there is no case

1 that we've been able to find, and we really
2 tried to boil the oceans here, that could
3 plausibly support that theory of procedural
4 injury.

5 It would blow open the doors to
6 asserting Article III injury when you are not
7 directly affected by an agency action and, by
8 your own rights, you can't stand to benefit from
9 any ruling on that agency action merely because
10 you think that if you can block it, you could --
11 the agency might reach out and look for some
12 other source of authority to regulate and make a
13 new action.

14 JUSTICE SOTOMAYOR: This action has
15 nothing to do with their right if they thought
16 it was permissible to seek relief under the
17 Education Act, correct?

18 GENERAL PRELOGAR: That's correct.
19 It's a --

20 JUSTICE SOTOMAYOR: They could --

21 GENERAL PRELOGAR: -- it's a totally
22 different source of authority. If they want
23 relief under the Education Act, there are
24 provisions where they can file a petition for
25 rulemaking and ask for that relief right now.

1 And it's not as though these are mutually
2 exclusive sources of authority. The Education
3 Act is -- is not directed to national
4 emergencies. It's not -- it's an independent
5 source of authority here, unlike the HEROES Act,
6 which is the action they're challenging that's
7 specifically focused on this agency -- this
8 national emergency situation.

9 CHIEF JUSTICE ROBERTS: I understand
10 your argument on standing, and I know this isn't
11 directly on point, but, when I saw it, it's sort
12 of like the equal protection cases, you know,
13 where discrimination between men and women on
14 the level of pensions and the women -- widows
15 get more and the widowers get less, and the
16 challenge is brought and the argument was, well,
17 if you win, we're going to take the excess away
18 from the -- the widows, so you're not going to
19 get anything, so you don't have standing.

20 Why is that case -- I appreciate the
21 way in which it's different, but why isn't that
22 at least some authority on which they can rely?

23 GENERAL PRELOGAR: I think that the
24 equal protection cases are fundamentally
25 different because, there, your injury is your

1 complaint of unequal treatment. And so, whether
2 you level up or level down, your injury is being
3 redressed. You're no longer being subject to
4 unequal treatment, and, instead, everyone is
5 being subject to the same treatment.

6 But this case stands in a very
7 different posture because, here, their argument
8 is our injury is we're not getting loan
9 forgiveness, and the -- the relief they're
10 seeking, which is a declaration that the HEROES
11 Act doesn't authorize loan forgiveness in the
12 first place, doesn't redress that injury one
13 bit.

14 CHIEF JUSTICE ROBERTS: Right, but
15 it's -- it's --

16 GENERAL PRELOGAR: It just carves it
17 into stone.

18 CHIEF JUSTICE ROBERTS: Right. But, I
19 mean, without looking after the case, yes, you
20 could lower it or -- or raise it, but that's an
21 uncertainty that had -- that we did not -- we
22 decided that that did not affect their right to
23 bring the action because it may be changed in a
24 particular way.

25 And I suppose their argument would be

1 that, you know, they are injured by not being --
2 participating in the program, and if the program
3 is struck down in its current form, it may be
4 changed in a particular way that would help
5 them.

6 GENERAL PRELOGAR: So I think that
7 there is, though, a complete disconnect between
8 the claim of injury. And it's true that in the
9 equal protection context, you don't know ex ante
10 what the remedy is going to be. But the Court
11 has determined that doesn't affect standing
12 because, either way, no matter what remedy
13 occurs, based on the equal protection injury,
14 it's going to fix the nature of the harm of
15 providing unequal treatment.

16 And, here, the -- the only certainty
17 is that if they prevail on their claims, it's
18 going to make it harder to provide them or
19 anyone else with debt relief. Their suggestion
20 here that the Secretary wholly lacks this
21 authority under the HEROES Act and their
22 assertion of arguments to support that claim
23 that broadly attack this whole concept of loan
24 forgiveness, I think, demonstrate that we're far
25 afield from the equal protection case law.

1 JUSTICE JACKSON: Can I just ask you,
2 I -- I had understood them to be complaining
3 about the procedures. Am I completely off base
4 here? Are you suggesting that they are
5 complaining about not getting enough loan
6 forgiveness or something? Maybe I misheard you,
7 but I thought they were trying to bring a
8 procedural claim in that the reason why this was
9 problematic was because the procedures that they
10 are saying are lacking are actually under the
11 other source of authority, that they -- that if
12 we looked at the source of authority that the
13 Secretary used in this scenario, it doesn't
14 guarantee them those procedures, so you can't
15 really complain about not getting procedures in
16 another stat -- under another statute that was
17 not invoked in -- in this situation.

18 Am I wrong about this?

19 GENERAL PRELOGAR: No. And I
20 understand the confusion because --

21 JUSTICE JACKSON: Okay.

22 GENERAL PRELOGAR: -- the -- the
23 theory here is a little convoluted, and so let
24 me try to unpack it. They are asserting a
25 procedural injury, but what they're saying is we

1 want an opportunity to comment on loan
2 forgiveness so it'll include us as well. Our
3 underlying injury is that, without having a
4 chance to comment on the Secretary's use of
5 authority under the HEROES Act, we didn't get a
6 chance to advocate for us to be included in the
7 plan.

8 The problem with that procedural
9 theory of harm is that by their own arguments in
10 the case, the Secretary couldn't make a
11 different decision. He couldn't go back to the
12 drawing board and think about it and decide,
13 yes, I'm going to expand the plan under the
14 HEROES Act to provide these borrowers with
15 relief too. So they aren't able to assert that
16 kind of redressability for an asserted
17 procedural injury under the HEROES Act.

18 JUSTICE JACKSON: And that's because
19 there aren't negotiated procedures under the
20 HEROES Act?

21 GENERAL PRELOGAR: Right. The
22 statutory text is very clear. So, even if you
23 were to get to it on the merits, they haven't
24 actually been deprived of any procedural rights.
25 The HEROES Act specifies that waivers and

1 modifications issued under the HEROES Act are
2 exempt from notice and comment.

3 But I think because of the fundamental
4 flaw with their theory of injury and the fact
5 that it couldn't be redressed by their own
6 arguments in this case, they've now brought up
7 this Education Act idea.

8 They haven't been deprived of any
9 procedural rights under the Education Act. You
10 know, procedural rights derive from specific
11 agency decisions under agency authority. So
12 it's not as though they have some procedural
13 right in the ether to just comment on the
14 concept of loan forgiveness writ large.

15 Instead, under the HEROES Act, as
16 we've just discussed, there isn't a notice and
17 comment procedural right, and under the
18 Education Act, no decision has been made. And
19 so they haven't been deprived of any procedure
20 associated --

21 JUSTICE JACKSON: And so what they
22 would --

23 GENERAL PRELOGAR: -- with that
24 decision-making.

25 JUSTICE JACKSON: -- so what they

1 would need, I suppose, is certainty that if they
2 -- if we -- if we nullify the authority of the
3 Secretary to do what it did in the HEROES Act,
4 that there would necessarily be a loan
5 forgiveness program under the HEA?

6 GENERAL PRELOGAR: Yes. And they
7 can't make anything like that showing here.

8 JUSTICE JACKSON: Right.

9 GENERAL PRELOGAR: It's total
10 speculation on their part to suggest that if the
11 Secretary is blocked from taking this action,
12 maybe he'll look for a different source of
13 authority and issue an entirely different
14 program under that source of authority. And I
15 think that that shows that their -- their theory
16 is unduly speculative here.

17 I think it's important to recognize as
18 well why they're pressing this claim and the
19 upshot of this theory. The reason they're
20 asking the Court to go down this road is so that
21 they can effectively raise a substantive
22 challenge to the HEROES Act.

23 That was actually the only claim on
24 which they prevailed below. The district court
25 in this case rejected their assertions of

1 procedural harm and instead went on to resolve a
2 standalone substantive challenge to the
3 Secretary's plan and said that it was unlawful
4 under the HEROES Act.

5 But they've now entirely abandoned
6 that basis for prevailing below. They say that
7 the district court was wrong to consider that.
8 They're not defending that ruling.

9 And it makes good sense because they
10 obviously lack standing to maintain a
11 substantive standalone challenge to the HEROES
12 Act since that wouldn't do anything to redress
13 their harm but instead just ensure that they
14 aren't going to get any debt relief.

15 By raising this procedural argument,
16 though, they're effectively asking for an
17 opportunity to raise the very same substantive
18 claim that they lack standing to pursue through
19 the guise of a procedural challenge to the act.

20 And there is no apparent reason for
21 the Court to allow that kind of gambit and to
22 take what is actually a substantive challenge
23 based on a generalized grievance with how the
24 executive is administering the law and alter the
25 ordinary Article III standards to allow a

1 plaintiff to revisit that conclusion through a
2 procedural mechanism.

3 JUSTICE GORSUCH: General, I -- I
4 appreciate your standing arguments and they've
5 been laid out very clearly here. An interesting
6 feature of this particular case is -- as you
7 well know, is that the Court entered a universal
8 decree. We've chatted about this in prior
9 cases.

10 GENERAL PRELOGAR: We have indeed,
11 Justice Gorsuch.

12 JUSTICE GORSUCH: And I -- I -- I just
13 wanted to give you another chance to talk about
14 universal vacatur with some of my friends here
15 --

16 (Laughter.)

17 JUSTICE GORSUCH: -- if you want it.
18 And if you don't, that's fine.

19 GENERAL PRELOGAR: I will always take
20 that opportunity.

21 We did argue below that the district
22 court didn't have authority to enter universal
23 vacatur in this case. And, you know, the -- the
24 language that courts have relied upon in
25 thinking that this is a permissible remedy under

1 the APA --

2 JUSTICE GORSUCH: For -- for -- for --
3 for a handful of plaintiffs.

4 GENERAL PRELOGAR: Yes, yes, for two
5 individual borrowers is the set-aside language.

6 But, as we've explained, that language
7 which comes from Section 706 of the APA, if you
8 look back and trace through what Congress was
9 doing when it enacted the APA was not meant to
10 be the remedial provision of the APA.

11 Instead, that comes from Section 703,
12 which tells you to either look at a special
13 statutory review provision if one exists, and
14 sometimes there are special statutory review
15 provisions that say you can operate directly on
16 the agency action at issue.

17 But, in the absence of that, then it's
18 the traditional equitable remedies that predated
19 the APA, and there was nothing like this
20 universal vacatur remedy then, which would take
21 you far beyond party-specific relief.

22 JUSTICE GORSUCH: I mean, talk about
23 ways in which courts can interfere with the
24 processes of government through two individuals
25 in one state who don't like the program can seek

1 and obtain a universal relief barring it for
2 anybody anywhere.

3 GENERAL PRELOGAR: That's right, for
4 millions of Americans they've been able on the
5 basis of this claim to hold up that critical
6 relief.

7 JUSTICE JACKSON: But, of course, if
8 they actually had standing to do that, then, you
9 know, they could bring such a claim, and I guess
10 your position, which is not in this case because
11 we don't have a question presented about
12 universal vacatur, but your position is that,
13 what, the Court doesn't have the ability to
14 issue an injunction that would prevent this plan
15 from operating just because it was two people
16 who brought the claim originally?

17 GENERAL PRELOGAR: Well, to be clear,
18 we're not suggesting that injunctions would be
19 off the table, but those too would have to be
20 targeted to party-specific relief. This idea --

21 JUSTICE JACKSON: And how would it be
22 -- how would it be targeted in a -- in a plan
23 such as this?

24 GENERAL PRELOGAR: So, for example,
25 if, in fact, they had standing to pursue a

1 procedural right, then the Secretary would be
2 enjoined to provide them the process that's due
3 and to take into account their views in
4 determining whether to expand eligibility under
5 the program.

6 JUSTICE JACKSON: And do you have the
7 --

8 GENERAL PRELOGAR: But nothing about
9 that, Justice Jackson --

10 JUSTICE JACKSON: Yes.

11 GENERAL PRELOGAR: -- would in any way
12 call into question whether other people should
13 get this right.

14 JUSTICE JACKSON: I understand. But,
15 if -- would you have the same reaction to
16 universal vacatur if the claim on the table was
17 about their particular entitlement to getting,
18 let's say, more money under this plan?

19 Would you -- would -- would we be in a
20 world if you were right about universal vacatur
21 in which every single borrower in the country
22 would have to bring a lawsuit in order to
23 vindicate a right that the Court would say these
24 two people have?

25 GENERAL PRELOGAR: Well, I think, in a

1 situation, it depends a little bit on which
2 court you're talking about.

3 Obviously, this Court has the
4 authority to resolve issues like that for the
5 entire nation. So, if a -- if a question makes
6 its way to this Court, then it wouldn't be
7 necessary to have follow-on suits.

8 In the absence of that, then, yes, our
9 argument is you should provide party-specific
10 relief, that the -- the traditional concepts of
11 remedial authority under Article III were
12 limited in that way and that to instead allow
13 single district courts throughout the nation to
14 claim the power to put a critical policy on hold
15 is out of accord with --

16 JUSTICE KAVANAUGH: So think of --

17 JUSTICE KAGAN: I recall that the last
18 time we did this every member of the D.C.
19 Circuit --

20 JUSTICE KAVANAUGH: Yeah, this is
21 going to take a while.

22 (Laughter.)

23 JUSTICE KAVANAUGH: We can go into
24 this, but --

25 JUSTICE KAGAN: So -- so I'm just

1 going to change the subject if that's okay.

2 JUSTICE GORSUCH: General, I'm sorry.

3 JUSTICE KAVANAUGH: Actually, I --

4 GENERAL PRELOGAR: No need, Justice
5 Kagan. Thank you.

6 JUSTICE KAVANAUGH: No, I have a
7 question.

8 JUSTICE KAGAN: Of course, there are
9 many former --

10 JUSTICE KAVANAUGH: I'm going to go
11 back.

12 CHIEF JUSTICE ROBERTS: Sometimes I
13 need a gavel.

14 JUSTICE KAGAN: -- many former members
15 of the D.C. Circuit. I'd like to --

16 JUSTICE KAVANAUGH: I'm going back to
17 it.

18 JUSTICE KAGAN: Okay. I'd like to
19 hear about the merits of this case. I want to
20 come back to some of the claims that both sets
21 of Respondents here have in common dealing with
22 what we've called the arbitrary and capricious
23 aspects of the case.

24 And, as I understand it, the
25 memorandum really talks about two things. It

1 talks about forbearance and it talks about sort
2 of economics/COVID conditions, forbearance as a
3 kind of separate thing that people who have been
4 granted forbearance for long periods of time are
5 more likely to go into default or become
6 delinquent in their payments.

7 And I guess I wonder, is that about
8 COVID, or is that just about something that
9 happens when you excuse loan payments for a long
10 period of time? And how it is that that gets to
11 be converted into an emergency COVID rationale?

12 And then, on the economic
13 considerations, and I think it was Justice
14 Barrett who talked about this a little, it
15 seems, you know, a real mixture of COVID and
16 non-COVID-related things.

17 And, of course, this is how the
18 economy works, that COVID interacts with other
19 features of the economy to produce certain
20 economic conditions, but, again, I'm wondering
21 whether, you know, there was more of an
22 obligation on the part of the Secretary to
23 isolate how COVID was affecting these borrowers?

24 GENERAL PRELOGAR: Of course. And
25 I'll take each of those considerations in turn.

1 I'll start with your questions about
2 forbearance, and I want to be really clear
3 because I think my friends have confused the
4 issue about this a little bit, that the
5 Secretary wasn't finding that forbearance itself
6 had caused the economic harm to borrowers or
7 that it was the root cause of why they needed
8 additional relief.

9 Instead, the Secretary analyzed the
10 historical data regarding forbearance as a data
11 point in understanding that forbearance is not
12 always a complete solution to the underlying
13 economic harm caused by the national emergency.

14 So, here, there's no doubt that
15 forbearance has provided very powerful and
16 critical support to borrowers over the life of
17 the COVID pandemic, but the Secretary found that
18 once forbearance policy lifts, millions and
19 millions of borrowers are going to be worse off
20 with respect to their ability to pay because of
21 COVID.

22 The forbearance policy hasn't fixed
23 the underlying economic harm of the -- of the
24 pandemic and the emergency. So, to the extent
25 that there's a bootstrapping concern here, I

1 just want to push back forcefully on that. I
2 think that the Secretary's decision memoranda
3 makes clear that sometimes additional relief is
4 necessary not because of forbearance but in
5 spite of forbearance.

6 To turn to your question about the
7 various causes or influences of economic harm
8 here, it's, of course, true that I can't make a
9 representation that the harms that borrowers are
10 facing are solely due to COVID-19. But I think
11 that it would be an impossible burden to place
12 on the Secretary to suggest that he needs to
13 isolate and identify just one economic factor or
14 force that's causing that kind of distress for
15 borrowers.

16 You know, our -- our economy is very
17 complex and there are often multiple factors and
18 forces at play, but the Secretary here found,
19 and I don't think that anyone could reasonably
20 dispute, that but for COVID, borrowers would not
21 be in this situation of facing severe financial
22 harms and the very real risk that they'll have
23 to go into default or delinquency when they
24 start repaying their student loans.

25 So I think, to the extent that there's

1 concern here about how the standard could
2 operate, at the very least, the Secretary made
3 the requisite findings that these are financial
4 harms that derive directly from and are a
5 but-for result of the COVID pandemic.

6 CHIEF JUSTICE ROBERTS: Counsel, I'm
7 sure I'm misreading the graphs on -- I'm looking
8 at 247, 248. Didn't half the borrowers say they
9 would not have any trouble paying their loans
10 without regard to the forgiveness program?

11 GENERAL PRELOGAR: So it varies based
12 on income bracket, and, yes, it's true that --
13 that in certain income brackets, the data I
14 think reflected that, you know, 51 percent of
15 borrowers expected that they would be unable to
16 pay their student loans. That wasn't the only
17 -- the only data the Secretary consulted,
18 though. In those same studies that he
19 referenced, there was general data about levels
20 of financial insecurity, and overwhelming
21 majorities of borrowers expressed huge financial
22 insecurity concerns about their ability to make
23 ends meet going 10 years into the future.

24 And I think one of the important
25 things to recognize, again, as I had mentioned

1 in the last argument, is that it's not necessary
2 for the Secretary to make a finding that each
3 and every borrower who receives relief under
4 this plan would have necessarily gone into
5 default or delinquency without it. That would
6 --

7 CHIEF JUSTICE ROBERTS: No, of course
8 not, but, I mean, it does kind of factor into
9 the consideration, particularly in a situation
10 where you don't have notice and comment
11 proceedings, that maybe, again, that's something
12 that a broader representation of national
13 interests in Congress would take into account,
14 rather than what the -- the Secretary in a
15 particular case, who's weighing a lot of options
16 and considerations as well, would take into
17 account.

18 I mean, if more than half the people
19 say they don't need this relief, extending
20 relief to that breadth certainly raises
21 questions.

22 GENERAL PRELOGAR: So let me be clear
23 that I think there is an avenue to address those
24 kinds of questions with overbreadth. I don't
25 think that it's a function of statutory

1 interpretation, though. That would be
2 applications of the statute to particular fact
3 patterns and whether the Secretary could justify
4 the lines he drew and the level of relief he
5 decided was necessary.

6 And, here, Secretary -- Secretary
7 Cardona explained that huge numbers of borrowers
8 were going to go into default and delinquency,
9 and it's not as though he could easily segregate
10 and say here are the 50 percent where I know for
11 sure it will happen and here are the 50 percent
12 where it won't. If he could make that kind of
13 determination, it might provide a basis to
14 determine that he should have drawn different
15 lines, but we don't have anything like that
16 here.

17 And I would just point again to the
18 forbearance policy. You know, that has applied
19 across the board to every single student-loan
20 borrower with a federally held loan for the past
21 three years. But I think that both Secretaries
22 acted entirely within the domain of the HEROES
23 Act in recognizing that that kind of broad
24 class-wide relief was necessary due to the
25 particular exigencies of this emergency.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 Since we're dealing in a -- in a case
3 with individual borrowers or would-be borrowers,
4 I think it appropriate to consider some of the
5 fairness arguments. You know, you have two
6 situations, both two kids come out of high
7 school, they can't afford college, one takes a
8 loan, and the other says, well, I'm going to,
9 you know, try my hand at setting up a lawn care
10 service, and he takes out a bank loan for that.

11 At the end of four years, we know
12 statistically that the person with the college
13 degree is going to do significantly financially
14 better over the course of life than the person
15 without.

16 And then along comes the government
17 and tells that person: You don't have to pay
18 your loan. Nobody's telling the person who is
19 trying to set up the lawn service business that
20 he doesn't have to pay his loan. He still does,
21 even though his tax dollars are going to support
22 the forgiveness of the loan for the -- the
23 college graduate, who's now going to make a lot
24 more than him over the course of his lifetime.

25 Now it seems to me you may have views

1 on fairness of that and they don't count. I may
2 have views on the fairness of that and mine
3 don't count. We like to usually leave
4 situations of that sort, when you're talking
5 about spending the government's money, which is
6 the taxpayers' money, to the people in charge of
7 the money, which is Congress.

8 Now why isn't that a factor that
9 should enter into our consideration under the
10 Major Questions Doctrine again, where we look at
11 things a little more strictly than we might
12 otherwise when we're talking about statutory
13 grants of authority, to make sure that this is
14 something that Congress would have contemplated?

15 GENERAL PRELOGAR: So my reaction to
16 that, Mr. Chief Justice, is that Congress did
17 take those kinds of considerations into account
18 in specifically providing this authority to the
19 Secretary. I think that the same kinds of
20 arguments about fairness or --

21 CHIEF JUSTICE ROBERTS: Well, it's
22 just circular. You're -- you're -- you know,
23 it's sort of, you know, begs the question to say
24 that for -- I don't see any evidence that they
25 took -- the -- the person who is trying to start

1 the lawn service, because he can't afford
2 college, I don't see any evidence that they took
3 him into account.

4 GENERAL PRELOGAR: But, if that's what
5 Congress would need to take into account and
6 show, then it can't legislate, it can't provide
7 the executive with preauthorization to take
8 action into an emergency. Congress can't look
9 ahead to the future and say, okay, in the year
10 2020, when an unprecedented global pandemic
11 hits, we've decided that the lawn care
12 professional should, you know, not benefit from
13 this program, but the student-loan borrower
14 should.

15 CHIEF JUSTICE ROBERTS: So, yet,
16 you're relying on -- you're relying on an
17 interpretation of the statutory authority to say
18 that that's implementing Congress's intent to do
19 that. In a pandemic that they couldn't have
20 foreseen, we do think, no, they would have
21 foreseen the idea when they said "modify or
22 waive," that that would mean waiving the whole
23 liability for 40 million Americans at a cost of
24 half a trillion dollars, that they've foreseen
25 -- that they foresaw that enough to allow the

1 Secretary to act without any express
2 congressional authority, any more express
3 congressional authority than the authority you
4 rely on.

5 GENERAL PRELOGAR: Well, let me break
6 it apart into two different components because I
7 think there's a first order question of whether
8 Congress could have foreseen the possibility of
9 debt discharge at all.

10 And I think the answer to that has to
11 be yes. That was a well-established form of
12 relief that you can provide to borrowers in --
13 in hardship situations, as I previously
14 mentioned, it's one of the core provisions in
15 Title IV, and Congress, in specifically enacting
16 a statute that's aimed at this problem of not
17 leaving borrowers worse off in reaction to a
18 national emergency, clearly understood that
19 using this broad language --

20 CHIEF JUSTICE ROBERTS: So we're just
21 going --

22 GENERAL PRELOGAR: Well, so that's the
23 first order question.

24 CHIEF JUSTICE ROBERTS: I'm not -- I'm
25 not --

1 GENERAL PRELOGAR: I recognize --

2 CHIEF JUSTICE ROBERTS: -- I'm not --
3 I'm not faulting you for repeating your answer
4 since I think I probably repeated my question,
5 but you're just saying -- you know, it's the
6 same argument about what "modify and waive"
7 means.

8 GENERAL PRELOGAR: It is as a
9 statutory matter on the categorical argument
10 about debt discharge.

11 Now you have asked me several
12 questions about the scope of this program, and
13 let me try to be responsive to that. I
14 recognize that this is a big program, but that's
15 in direct reaction to the COVID-19 pandemic,
16 which itself was a really big problem. There
17 hasn't been a national emergency like this in
18 the time that the HEROES Act has been on the
19 books that's affected this many borrowers.

20 And so I think it's not surprising to
21 see in response to this once-in-a-century
22 pandemic the kind of relief that the Secretaries
23 have offered here, the forbearance policy that
24 has itself cost 150 billion dollars and now this
25 loan forgiveness program.

1 To the extent that you have concerns
2 about the scope and size of the program, though,
3 I would say that if I can get you to agree with
4 me, and maybe I can't, on this point that the
5 categorical debt discharge argument doesn't work
6 as a statutory matter, then I think the right
7 place to look to house those concerns is in
8 arbitrary and capricious review.

9 We think here that the Secretary drew
10 reasonable lines in crafting the scope of
11 relief, but if you disagree or if you think he
12 should have taken different interests into
13 account, that would be a basis to reverse him on
14 arbitrary and capricious grounds, not to distort
15 the plain meaning of the HEROES Act.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 Justice Thomas?

18 Justice Alito?

19 JUSTICE ALITO: Well, the Secretary
20 did what he did, so, presumably, he had and has
21 a view about the fairness question that the
22 Chief Justice posed to you. What is that view?

23 GENERAL PRELOGAR: So the Secretary
24 understood the statutory authority and mandate
25 here to focus on whether this national emergency

1 was going to leave borrowers worse off because
2 of the pandemic. This is Congress deciding that
3 the government should be in a position to
4 provide benefits solely within the context of --

5 JUSTICE ALITO: Well, no. I -- I --

6 GENERAL PRELOGAR: -- the student loan
7 program.

8 JUSTICE ALITO: Yeah. Well --

9 GENERAL PRELOGAR: And I don't think
10 there's any part of the statutory analysis, this
11 is Congress's judgment, that borrowers should be
12 able to get relief if the Secretary makes these
13 determinations, with no suggestion that the
14 relief should turn on or off based on the
15 possible impacts on those outside the student
16 loan program.

17 Congress obviously knew, when it was
18 giving this authority, to take care of borrowers
19 who are otherwise going to be worse off, that
20 that might have otherwise impacts outside the
21 program, but it wanted to make sure the
22 Secretary could provide relief to borrowers.

23 JUSTICE ALITO: Was the Secretary
24 legally obligated to do what he did for the --

25 GENERAL PRELOGAR: No, he's not

1 required to provide relief under the HEROES Act.

2 JUSTICE ALITO: All right. So he
3 decided to do what he did and must have had
4 reasons for -- for doing it, and some of them
5 are on the record; some may not be. But the
6 Secretary -- if you're right, then the Secretary
7 presumably could do more.

8 And, therefore, I think it's a fair
9 question to say, what is your clients' view
10 about the fairness question that some people
11 have posed and that was reiterated for you by
12 the -- the Chief Justice?

13 GENERAL PRELOGAR: The view of the
14 Department is that this relief --

15 JUSTICE ALITO: Why is it fair?

16 GENERAL PRELOGAR: -- is warranted.

17 JUSTICE ALITO: Why is it fair? If it
18 was -- if he didn't have to do it, why is it an
19 answer to say that it was warranted? Maybe it
20 was warranted, but why was it done? I guess you
21 don't want to answer the question.

22 GENERAL PRELOGAR: It was fair
23 because, in the absence of this relief, it's
24 undisputed that there are going to be millions
25 of student-loan borrowers who are not going to

1 be able to pay their -- their student loans --

2 JUSTICE ALITO: Yeah, I --

3 GENERAL PRELOGAR: -- who are going
4 into default and delinquency --

5 JUSTICE ALITO: And -- and they --

6 GENERAL PRELOGAR: -- and the HEROES
7 Act was specifically designed for this
8 situation. This is Congress telling the
9 Secretary you don't have to let that happen.
10 And when we have this kind of a pandemic that
11 requires this kind of relief, I think that the
12 HEROES Act is operating right within its domain.

13 JUSTICE ALITO: All right. I'll try
14 one more time. Why was it fair to the people
15 who didn't get arguably comparable relief? Now
16 it may be that their interests were outweighed
17 by the interests of those who were benefitted or
18 they were somehow less deserving of solicitude,
19 but what is your answer to that question?

20 GENERAL PRELOGAR: My answer to that
21 question is that Congress has already made the
22 judgment that when there is a national emergency
23 that affects borrowers in this way, the
24 Secretary can provide relief. And you could
25 make this critique of every prior exercise of

1 HEROES Act authority.

2 There too, you could say, well, that
3 only benefits the specific enumerated affected
4 individuals, but it's Congress who defined those
5 individuals, and the Secretary acted properly
6 here in giving them relief.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: I take your
10 bottom-line answer to be, everybody suffered in
11 the pandemic, but different people got different
12 benefits because they qualified under different
13 programs, correct?

14 GENERAL PRELOGAR: That's right.
15 There's been enormous relief efforts.

16 JUSTICE SOTOMAYOR: There's -- there's
17 inherent unfairness in society because we're not
18 a society of unlimited resources. Every law has
19 people who encompass it or people outside it.
20 Correct?

21 GENERAL PRELOGAR: That's correct.

22 JUSTICE SOTOMAYOR: And that's not an
23 issue of fairness. It's an issue of what the
24 law protects or doesn't?

25 GENERAL PRELOGAR: Yes.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: I mean, Congress
3 passed a statute that dealt with loan repayment
4 for colleges, and it didn't pass a statute that
5 dealt with loan repayment for lawn businesses.

6 And so Congress made a choice, and
7 that may have been the right choice or it may
8 have been the wrong choice, but that's
9 Congress's choice.

10 And you're saying that the Secretary
11 implemented his powers under Congress's choice,
12 which gave him authority over loan repayment.
13 Definitely did not give him authority over loans
14 for lawn care.

15 GENERAL PRELOGAR: That's correct.
16 The Secretary would have no authority to act
17 outside the student loan program. The HEROES
18 Act is specifically designed only to empower the
19 Secretary with respect to that portfolio of
20 loans.

21 JUSTICE KAGAN: And maybe as Justice
22 Sotomayor said, Congress gave a different kind
23 of authority to a different Secretary with
24 respect to a different set of activities when an
25 emergency struck. Is that correct?

1 GENERAL PRELOGAR: Yes.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?

4 JUSTICE GORSUCH: I just wanted to
5 make sure I understood your position with
6 respect to some of the gnarly language in this
7 statute, which is waive or modify, affected
8 individuals to ensure they're not placed in a
9 worse position financially because of the COVID
10 crisis.

11 You'd agree that doesn't authorize the
12 Secretary to place persons in a better position
13 than they were because of the COVID crisis?

14 GENERAL PRELOGAR: So I agree that the
15 purpose is to ensure that they're not worse off,
16 but I would disagree insofar as it's clear that
17 he can provide class-wide relief.

18 So, if it turns out at the end of the
19 day that some individuals are getting relief who
20 it turns out wouldn't have needed it, Congress
21 tolerated that and, in fact, encouraged the
22 Secretary to err on the side of over-inclusion.

23 JUSTICE GORSUCH: So you read this
24 statute as not just authorizing the Secretary to
25 place people in the same position that they were

1 prior to an emergency but to allow the Secretary
2 to place persons in a better position than they
3 were prior to the emergency?

4 GENERAL PRELOGAR: No. I'm sorry.
5 Let me try to clarify. His purpose has to be to
6 ensure that they're not left worse off.

7 JUSTICE GORSUCH: But his effect can
8 be.

9 GENERAL PRELOGAR: But, if the effect
10 is that some individuals in the class receive
11 relief who wouldn't otherwise need it, that
12 doesn't mean that his plan is invalid.

13 But if I could respond --

14 JUSTICE GORSUCH: Let me --

15 GENERAL PRELOGAR: -- to your question
16 about better off/worse off --

17 JUSTICE GORSUCH: -- let me just --
18 I'm sorry, let me pose a different question.

19 GENERAL PRELOGAR: Yeah.

20 JUSTICE GORSUCH: So some persons can
21 be better off is your position. I guess how
22 many is my next question, right? Let's say two
23 people in Missouri, okay, all right, they're
24 better off, fine. But what if it's 90 percent
25 of the class just hypothetically that -- could

1 -- could the Secretary do that under this
2 statute?

3 GENERAL PRELOGAR: So I think the
4 right way to analyze that would be under
5 arbitrary and capricious review because, as I've
6 just explained, we think the statute tolerates
7 some over-breadth. And so, at that point, you
8 would want to look at the Secretary's
9 justification for his action.

10 It sounds to me like that could be
11 unreasonable, that maybe he wouldn't be able to
12 justify that particular line-drawing choice
13 because it would be so extensive relief that
14 isn't actually necessary.

15 But one of the things you'd want to
16 look at is whether there was a way to tailor it,
17 whether there was a way to segregate the people
18 who actually needed the relief from not.

19 JUSTICE GORSUCH: I -- I understand
20 that. I --

21 GENERAL PRELOGAR: And just in case
22 you think this plan does that, Justice Gorsuch
23 --

24 JUSTICE GORSUCH: No, no, no. I --
25 I'm --

1 GENERAL PRELOGAR: -- it -- it does
2 not.

3 JUSTICE GORSUCH: -- I'm asking a
4 hypothetical. And -- and I understand your
5 point you direct us to arbitrary and capricious
6 review.

7 With respect to the fairness question
8 that the Chief Justice posed, would that --
9 would that -- would you direct us as well to
10 maybe State Farm, for example, where the
11 Secretary has to weigh not just the benefits to
12 the persons he's acting to favor but also the
13 cost to others?

14 GENERAL PRELOGAR: I think that that
15 is a more natural way to analyze those issues.
16 I should emphasize because we're in this case --

17 JUSTICE GORSUCH: But you'd agree that
18 --

19 GENERAL PRELOGAR: -- that these
20 individual borrowers didn't raise --

21 JUSTICE GORSUCH: No, I --

22 GENERAL PRELOGAR: -- a State Farm
23 argument.

24 JUSTICE GORSUCH: -- I know that. I
25 know that. I --

1 GENERAL PRELOGAR: So they're not
2 making these fairness allegations.

3 JUSTICE GORSUCH: -- I -- I hear you.
4 But you'd agree that that would be a relevant
5 consideration at some stage in the Court's
6 analysis of -- of -- of -- of the Secretary's
7 action?

8 GENERAL PRELOGAR: I don't think that
9 the Secretary could be faulted for not
10 considering the interests of non-student-loan
11 borrowers because I don't think that's one of
12 the relevant interests that Congress expected
13 him to take into account under this authority.

14 As we've been discussing, laws all the
15 time --

16 JUSTICE GORSUCH: So no, it's just --
17 it's just irrelevant?

18 GENERAL PRELOGAR: Yes. I think
19 that -- that his charge under the HEROES Act is
20 to determine whether student-loan borrowers need
21 this relief.

22 JUSTICE GORSUCH: I appreciate it.
23 Thank you. That's clarifying. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 JUSTICE KAVANAUGH: Just to pick up on
2 the Chief Justice's and Justice Alito's
3 questions, if we're thinking about how to
4 interpret the statute and we're trying to think
5 about the context of the statute in interpreting
6 it, the word "waive" in isolation, one thing,
7 the word -- but it doesn't use cancellation, so
8 that cuts the other way. I take your response
9 to that.

10 But then you're thinking about
11 contextually how it all works, it fits together,
12 the fact that there will be winners and losers,
13 big winners and big losers, relatively speaking,
14 if the executive branch has this kind of
15 authority, people who didn't go to college, as
16 the Chief Justice said, or people who had just
17 paid -- who had paid off their loans, who say
18 what they did to pay off their loans and they're
19 getting no relief because of the timing of the
20 situation.

21 And if Congress were doing this,
22 Congress could and would, no doubt, try to --
23 would hear about all of that and factor all that
24 in in a way that a Secretary could not,
25 especially without notice and comment.

1 Should any of that factor into how we
2 think about whether to give a broad reading to
3 waive or a narrower reading to waive, given the
4 context?

5 GENERAL PRELOGAR: No, I don't think
6 that that should factor into how to interpret
7 the statute. I think instead, as this Court
8 usually does, it needs to consider that text on
9 its own terms. And I don't see any way to read
10 the provision to waive or modify any Title IV
11 provision to mean but only do it a little bit,
12 only in response to minor emergencies.

13 It would actually be perverse to
14 suggest that when there's a big emergency that
15 might necessitate broader relief, the
16 Secretary's more disabled from acting.

17 Instead, that's the language in the
18 statute that's meant to empower the Secretary
19 and to ensure that he has whatever tools are
20 necessary to fulfill the statutory purpose, to
21 ensure that borrowers are not left worse off.

22 With respect to these concerns about
23 whether there's room to take into account other
24 interests beyond student-loan borrowers, you
25 know, there are avenues to go to Congress for

1 additional relief, to implement other programs.

2 There's been unprecedented levels of
3 COVID pandemic aid, as I mentioned, and I think
4 to suggest that the Secretary here should have
5 told borrowers who he had determined were at
6 massive risk of default and delinquency in
7 record numbers, that he wasn't going to use the
8 authority under the HEROES Act that's
9 tailor-made to prevent that result, would have
10 been an irresponsible thing to do.

11 So, again, I think that this really
12 comes down to Congress's judgment that there
13 should be authority to provide the benefit
14 within the context of this program. Obviously,
15 there are additional authorities and benefits
16 that can be provided under other programs.

17 JUSTICE KAVANAUGH: A separate
18 question. The student loan issue is a major
19 public policy issue without regard to COVID to
20 begin with, obviously, and how to deal with that
21 and the burdens it's imposing on people after
22 they get out of college who have massive student
23 loans to pay back. Obviously, a huge public
24 policy issue that was being considered before
25 COVID.

1 Should that factor into how we think
2 about this? In other words, this is something
3 that was on the table, being discussed, being
4 debated, and then all of a sudden it's -- this
5 public policy idea is attached that was being
6 proposed and pursued before the pandemic is
7 attached to pandemic legislation?

8 Matter at all?

9 GENERAL PRELOGAR: I think that it's
10 really hard to think about how that should work
11 as a matter of statutory interpretation and
12 specifically what kind of burden this Court
13 would be putting on Congress if it goes down
14 that road.

15 If you put yourself back in the shoes
16 of the 2003 Congress, it couldn't necessarily
17 anticipate exactly what would be the subjects of
18 political discussion and debate at the time that
19 the COVID national emergency pandemic hit. And
20 so going down the road of suggesting the meaning
21 of the statute could change or it should be
22 interpreted in a -- in an atextual way because
23 of current conditions, I think, would basically
24 disable Congress from being able to take the
25 kind of action we have here, of trying to ensure

1 that the executive can act quickly, with
2 preauthorization, in an emergency, to forestall
3 massive student-loan default.

4 JUSTICE KAVANAUGH: Last question. I
5 can't resist on Justice Gorsuch's earlier
6 question.

7 (Laughter.)

8 JUSTICE KAVANAUGH: If -- if it were
9 party-specific relief and it went up to the
10 court of appeals, and the court of -- and you
11 had sought an emergency injunction in the court
12 of appeals, and the court of appeals ruled
13 against the government on that, would you then
14 follow that in that circuit or not?

15 GENERAL PRELOGAR: I think, as a
16 practical matter, we generally do follow that in
17 the circuit. I want to be careful here because
18 I --

19 JUSTICE KAVANAUGH: You might not in
20 the future, right?

21 (Laughter.)

22 GENERAL PRELOGAR: Well, no.

23 JUSTICE KAVANAUGH: You could admit
24 it.

25 (Laughter.)

1 GENERAL PRELOGAR: Our general
2 practice is yes, we --

3 JUSTICE KAVANAUGH: Yeah.

4 GENERAL PRELOGAR: -- we treat it as
5 binding within the relevant circuit. But,
6 again, the concern here is that actually it's
7 imposing on us an obligation to follow it
8 throughout the nation.

9 JUSTICE KAVANAUGH: And if you came up
10 to this Court in an emergency application and we
11 said you did not have a likelihood of success, I
12 think you said earlier you would follow that.
13 Why would you follow that?

14 GENERAL PRELOGAR: We recognize that
15 this Court has authority to resolve these issues
16 for the nation. So we --

17 JUSTICE KAVANAUGH: Even though there
18 are only two parties in the case, you would say
19 we're going to follow it for everyone else and
20 not force every other affected individual to
21 come to court? Do you think every future
22 administration will have that same approach?

23 GENERAL PRELOGAR: Well, I think that
24 they would likewise understand that even if the
25 relief didn't formally extend beyond the parties

1 in the case, obviously the precedential force of
2 this Court's decisions in a given area rule for
3 the nation.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: I won't ask you
8 about universal vacatur.

9 (Laughter.)

10 JUSTICE BARRETT: I just want to ask
11 you one thing about the statutory language on
12 "waive or modify" that I wonder whether it's an
13 indication of the scope of "waive or modify."

14 So the Secretary's authority to waive
15 or modify to ensure that affected individuals
16 are not placed in a worse position financially
17 in relation to that financial assistance, so in
18 relation to their debt.

19 So you agree, right, that we're not
20 talking about a worse financial position
21 generally; we're just talking about in
22 relationship to the debt?

23 GENERAL PRELOGAR: That's correct.
24 The two often collapse, obviously --

25 JUSTICE BARRETT: Right.

1 GENERAL PRELOGAR: -- because if you
2 are distressed financially, it might mean that
3 you're having trouble paying your mortgage or
4 paying your rent, buying your groceries, and
5 paying your debt. But, yes, the -- the function
6 of the HEROES Act focuses on your position with
7 respect to your ability to repay your student
8 loans.

9 JUSTICE BARRETT: So it seems to me
10 that that language "in relation to" that
11 financial assistance suggests that the
12 relationship would continue, but the waiver or
13 modification here severed the relationship to
14 the debt so that it no longer exists.

15 So why would that be consistent? I
16 mean, doesn't the statutory language "in
17 relation to" that financial assistance
18 presuppose an ongoing relationship that might be
19 modified but not completely ended?

20 GENERAL PRELOGAR: No. I think that
21 would be reading in limitations that can't be
22 gleaned from the text. What we understand the
23 statute to be focusing on, and specifically
24 looking at the subparagraph here that justified
25 this Act, making sure that student-loan

1 borrowers are not worse off with respect to
2 their loans, that functions as a matter of their
3 probability of being able to actually make their
4 payments.

5 And this actually relates to some of
6 the questions that Justice Gorsuch was asking
7 about better off, worse off. You know, imagine
8 a student-loan borrower, for example, who before
9 the pandemic had her affairs entirely in order.
10 She had a zero percent chance of defaulting on
11 that debt. But then COVID hit, her life has
12 been disrupted. Her job was disrupted.
13 Inflation is at record levels. She's having
14 trouble making ends meet. And now she has a
15 much higher likelihood of not being able to pay
16 her student loans.

17 In that situation, HEROES Act relief,
18 if it were to operate even to completely
19 eliminate her debt so she doesn't have an
20 ongoing relationship with it, it would just
21 restore her to her pre-pandemic relation insofar
22 as her risk of default and -- and delinquency.
23 She was zero percent before and now she'll be
24 zero percent after.

25 And so it doesn't inherently make her

1 better off within the meaning of the statute.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

5 JUSTICE JACKSON: I just wanted to
6 quickly circle back to the fairness point. I
7 guess I'm wondering whether or not the same
8 fairness issue would arise with respect to any
9 federal benefit program. So I'm thinking about
10 the fact that, as a result of COVID, we had
11 massive infusions of money given to various
12 companies, organizations, clearly authorized
13 because Congress said do it.

14 I'm wondering whether that would be
15 unfair to people who didn't own a company or
16 somebody who didn't have, you know, a nonprofit
17 and wasn't getting that money. I just don't
18 know how far we can go with this notion of, to
19 the extent that the government is providing
20 much-needed assistance to people in an
21 emergency, it's going to be unfair to those who
22 don't get the same benefit.

23 GENERAL PRELOGAR: Yes, that's exactly
24 right, and what I would say is that is
25 inherently an aspect of what Congress authorized

1 in the HEROES Act as well.

2 It specifically thought about this
3 situation, what to do about student-loan
4 borrowers who are impacted by a national
5 emergency who might then end up in a worse
6 position with respect to their ability to repay,
7 and Congress made the judgment you can give them
8 relief.

9 And with any benefits program, there
10 are going to be others outside the context of
11 that particular program who aren't getting the
12 benefit. But I don't see how that could
13 possibly provide a basis to just say that you're
14 paralyzed in doing what Congress intended to
15 ensure that the class they were focused on gets
16 the relief they need.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 General.

20 Mr. Connolly?

21 ORAL ARGUMENT OF J. MICHAEL CONNOLLY
22 ON BEHALF OF THE RESPONDENTS

23 MR. CONNOLLY: Mr. Chief Justice, and
24 may it please the Court:

25 This case turns on the same issue as

1 Nebraska versus Biden, whether the HEROES Act
2 authorizes the debt forgiveness program. It
3 does not, as this Court has already heard. I'd
4 like to focus here on three issues specific to
5 this case.

6 First, the HEROES Act is the
7 Secretary's only excuse for not adopting the
8 program through negotiated rulemaking and notice
9 and comment. If that Act does not apply, there
10 is no dispute that the program is procedurally
11 improper.

12 Second, on standing, the government
13 makes one argument, that if Respondents prevail,
14 the Secretary won't provide debt forgiveness to
15 them under the HEROES Act. But that isn't the
16 proper inquiry.

17 Respondents need only show that there
18 was some possibility that the relief they seek
19 will prompt the Secretary to forgive their
20 debts. On that question, there is no debate.
21 Debt forgiveness is a top priority of this
22 administration. The parties agree that the
23 Secretary can forgive debts under the Higher
24 Education Act, and the Secretary has never
25 denied that he may follow the proper procedures

1 and forgive Respondents' debts after his current
2 program is declared unlawful.

3 Finally, on the merits, Congress did
4 not authorize the Secretary to create a \$400
5 billion debt forgiveness program behind closed
6 doors with no public involvement. The whole
7 point of negotiated rulemaking and notice and
8 comment is that the individuals most affected by
9 student loan regulations, like the Respondents,
10 must have a meaningful voice in the regulatory
11 process.

12 But here, the Respondents were
13 deprived of their procedural rights, and their
14 finances suffered. Brown got nothing, and
15 Taylor received only \$10,000, even though
16 high-income individuals making more than five
17 times as much got \$20,000. The law requires
18 that the Secretary give Respondents an
19 opportunity to be heard.

20 The judgment below should be affirmed.

21 JUSTICE THOMAS: Mr. Connolly, has
22 this Court ever held that the notice-and-comment
23 provisions of the APA can establish -- are
24 enough for standing in a case like this?

25 MR. CONNOLLY: Yeah. I would -- I

1 would point to Summers. In Summers, this Court
2 held that an environmental organization had
3 standing to challenge the Forest Service's
4 approval of the Burnt Ridge Project, and --
5 because the Forest Service approved that without
6 going through notice and comment. And that
7 environmental organization had standing because
8 there was some possibility that if they went
9 through the proper process, that the Forest
10 Service would change its mind and wouldn't
11 approve the Burnt Ridge Project.

12 And I think it's the same thing here.
13 If the Secretary goes through the proper
14 process, there is some -- and does negotiated
15 rulemaking and notice and comment, there's some
16 possibility that he will change his mind and
17 forgive our debts.

18 JUSTICE THOMAS: Were the procedures
19 in Summers applied in Summers?

20 MR. CONNOLLY: Were they implied? I
21 think it was --

22 JUSTICE THOMAS: No, applied.

23 MR. CONNOLLY: Oh, applied. In that
24 case, yes, the Court said -- the Court found --
25 it was drawing a distinction between why they

1 would have had standing in one place and
2 wouldn't have in another. And the reason that
3 the group ultimately didn't have standing is
4 because they had settled it. But the Court said
5 that if Burnt Ridge had still been on the table,
6 that they would have had standing.

7 JUSTICE JACKSON: Doesn't your theory
8 of injury rely on the assumption that if the
9 HEROES Act isn't there or if there's a problem
10 with the HEROES Act, the administration would
11 necessarily have done the same thing under the
12 HEA?

13 MR. CONNOLLY: No, I don't think so.
14 In -- in fact, I think the program will look
15 quite different once it does go through
16 negotiated rulemaking and notice and comment.

17 JUSTICE JACKSON: No, I guess I'm
18 asking you -- you seem to be assuming that if
19 you get the relief of invalidation of the action
20 under the HEROES Act, that the administration
21 would necessarily move forward -- because you
22 said it was a top priority of this
23 Administration that they would necessarily do
24 the same thing or a similar thing, meaning
25 provide debt relief to people under the other

1 legal avenue.

2 And, I -- I mean, I can imagine a
3 world, if you think of a hypothetical, in which
4 the Secretary believes that they -- that -- that
5 the Department only has authority under the
6 HEROES Act. Here we are in the midst of a
7 pandemic. The intention of the Department is to
8 provide this relief in the context of the
9 emergency and that if we don't have an emergency
10 and that if we're not in this circumstance and
11 we don't see the HEROES Act there, then they
12 would not move forward.

13 So I think you kind of have to
14 convince us that the Administration would have
15 provided this sort of debt relief under the
16 authority you point to that you say has the
17 procedures that were not provided.

18 MR. CONNOLLY: Two responses. I think
19 the best evidence for this is the nature of the
20 program. The program applies to 95 percent of
21 all borrowers. It's not remotely tailored to
22 individuals who are suffering from the pandemic,
23 and the reason is because this is a program
24 that's just designed to help people who are in
25 need of debt relief.

1 And on the authority point, the
2 parties are in agreement that they have the
3 power to do this under -- under the HEA. And
4 the Secretary has never come up here and denied
5 that they won't do -- go through the exact same
6 process, which they should have done in the
7 first place, once this program is declared
8 unlawful.

9 JUSTICE SOTOMAYOR: Except my biggest
10 problem is you've shown me nothing to suggest
11 that if they'd have to or will go under HEA,
12 that they're going to deprive you of due
13 process. They're going to let you be heard.

14 What Justice Jackson was getting to is
15 you could be heard and not accepted. I mean,
16 your position could be rejected. Then we'd have
17 to look at that program and decide if that
18 program fits the HEA requirements and the
19 arbitrary and capricious standard.

20 But there is no injury that you're
21 suffering unless you get a speculative new plan
22 that goes into effect. You have no proof that
23 if a speculative new plan does arise under the
24 HEA that you're going to be deprived of notice
25 and comment. And you certainly can't say if

1 they rule against that interest and you had
2 notice and an opportunity to be heard that it
3 was arbitrary and capricious.

4 So I'm at a loss as to how you have
5 standing because there is no notice and
6 procedure required under the HEROES Act. The
7 only way you can win is if you strike down this
8 program completely, and that means that you
9 don't get an opportunity to be heard, but nobody
10 else does either.

11 MR. CONNOLLY: The Secretary created a
12 400 billion dollar debt forgiveness program.
13 Under --

14 JUSTICE SOTOMAYOR: No. You're --
15 you're arguing what the state's arguing. I'm
16 asking about you.

17 MR. CONNOLLY: Sure.

18 JUSTICE SOTOMAYOR: You as a student,
19 under the HEROES Act, your 10,000 dollar student
20 --

21 MR. CONNOLLY: Yeah.

22 JUSTICE SOTOMAYOR: -- is going to get
23 nothing. He's not going to get 20,000. You
24 strike it down, he gets nothing.

25 Neither does your person who wants

1 something. This is so totally illogical to me
2 that you come into court to say I want more, I'm
3 going to file a suit to get more, but I know I'm
4 going to get nothing.

5 MR. CONNOLLY: So the Secretary
6 created a -- a -- a massive debt forgiveness
7 program, and he says that he's doing it one time
8 and one time only. He said this in his brief,
9 in his declarations, on its website, and in the
10 reply brief, he said he took costs into account.

11 And so, if we miss this shot, we will
12 never have another opportunity to get debt
13 forgiveness.

14 JUSTICE SOTOMAYOR: No, you can -- the
15 General said you can --

16 JUSTICE JACKSON: I don't know if that
17 hurts you or helps you.

18 JUSTICE SOTOMAYOR: -- always go under
19 the HEA.

20 JUSTICE JACKSON: It seems to hurt you
21 to -- to suggest that. I thought your argument
22 was, if we strike down this program, then we
23 know the Secretary is going to try again under
24 the HEA and that's the relief that we are
25 seeking, the procedures that exist under that

1 program.

2 So, if he's done, if we strike it
3 down, aren't -- isn't Justice Sotomayor right
4 that you're in a much worse position by bringing
5 this lawsuit?

6 MR. CONNOLLY: We're in a -- if -- if
7 he completes the program, but we are ask -- we
8 are trying to stop this program so that it can
9 go through the proper process so that we have an
10 opportunity to comment and urge the Secretary to
11 forgive our debts.

12 Right now, Ms. Brown has \$17,000 in
13 student loan debts and she's not getting a dime
14 of debt forgiveness.

15 And if this had gone through the
16 proper process, there's some possibility that we
17 would have had our debts forgiven. And in -- in
18 Lujan, what Lujan talks about is this is why
19 procedural rights are special, because the
20 agency can always come in and say, you know
21 what, we would have done the exact same thing
22 even if we -- you would have had that process,
23 your -- your injuries aren't redressable,
24 they're speculative. But that's why procedural
25 rights are -- are special.

1 CHIEF JUSTICE ROBERTS: Do you rely --
2 to what extent do you rely on the fact that your
3 clients include an existing student loan
4 borrower and that you have a little different
5 than one that is not, in other words, it's not
6 speculative in the question of how would that be
7 person be remedied, but it is another borrower.
8 You're asking for notice and comment.

9 And, during that period, if it's
10 granted, that would -- it -- it would entitle
11 you to raise, you know, why the limit, whatever
12 the credit limit is, that should -- should be
13 changed. Is that -- I mean, I think your
14 challenge is -- is to make that sufficiently
15 particularized and non-speculative.

16 I mean, the -- the problem with
17 standing jurisprudence for something that looks
18 for something concrete and particularized, it's
19 also very academic, you know, a dollar of injury
20 and you're in, hundreds of millions that they
21 can't trace directly to the agency action and --
22 and you're not.

23 So what is it that makes the interest
24 of your client who has, what, a \$17,000 loan?

25 MR. CONNOLLY: Right.

1 CHIEF JUSTICE ROBERTS: How is that
2 sufficiently concrete and particularized in the
3 context of something that the government would
4 address if it can't do what it's doing now?

5 MR. CONNOLLY: Sure. So she -- I -- I
6 think it is critical that we're -- we're here
7 representing borrowers. She has student loan
8 debt and it's not being repaid, and that --
9 those are concrete interests at stake.

10 So this is not someone off the street
11 who is upset that his or her taxes are going to
12 go up. That -- that -- there's no question that
13 would be a -- that wouldn't be a -- that would
14 be a generalized grievance. But, here, if you
15 look at the scope and the purpose of the
16 program, it's to help student-loan borrowers.

17 But instead of doing this through
18 negotiated rulemaking and notice and comment,
19 they -- they did -- they carved up the lines and
20 they did it all in secret.

21 I -- I'd point the Court to page 31 of
22 the government's reply brief. In that -- on
23 that page, the -- the government said that it
24 had extensive discussions with banks and
25 ultimately decided not to forgive FFEL loans.

1 That's the type of thing that should be
2 happening on the public record.

3 JUSTICE KAGAN: But, Mr. Connolly,
4 aren't you really fighting Congress on this one?
5 The HEROES Act specifically says no notice and
6 comment, no negotiated rulemaking. Specifically
7 says there's going to be an emergency, so we're
8 waiving those procedural requirements.

9 So, you know, you might think that
10 Congress made a wrong call there, but that's
11 Congress's call.

12 MR. CONNOLLY: Because, when -- when
13 Congress wrote the HEROES Act, the waivers and
14 modifications have to actually be authorized by
15 the Act. You can't just label something a
16 waiver or modification and skip through
17 negotiated rulemaking and notice and comment.

18 Right there, subsection (d), it says
19 the negotiated rulemaking requirements shall not
20 apply to the waivers and modifications
21 authorized or required by the Act.

22 It doesn't say anything that the
23 Secretary labels a waiver or modification is
24 authorized by or required by the Act.

25 And so we recognize that -- that

1 Congress did create an exception, but the
2 waivers and modifications actually have to
3 apply. They have to actually be authorized by
4 the HEROES Act.

5 JUSTICE BARRETT: Mr. Connolly, what
6 are the limits of your theory? Could someone
7 who finished paying their loans off, you know,
8 right last year sue because they were
9 disappointed that they weren't included for
10 reimbursement?

11 MR. CONNOLLY: No, I don't think so
12 because there's -- there's no mechanism by which
13 the Department of Education can -- can -- can
14 write those borrowers a check, and so their
15 injuries are not redressable.

16 Here, there is a mechanism under which
17 the Secretary can forgive Ms. Brown's debts,
18 forgive Mr. Taylor's debts, and that's the
19 difference.

20 JUSTICE BARRETT: What about the Chief
21 Justice's lawn -- lawn care person who doesn't
22 go to college, starts a lawn care business.

23 MR. CONNOLLY: Right.

24 JUSTICE BARRETT: But, as the Chief
25 said, this person has some fairness concerns and

1 feels like this shouldn't have happened and --
2 and kind of level up or level down and wants to
3 level down.

4 MR. CONNOLLY: Sure. Again, the
5 Secretary -- or the Secretary of Education has
6 no power to give any money to that individual or
7 do anything like that, and so there -- even if
8 he could come up with a concrete interest, it
9 couldn't be redressable.

10 JUSTICE BARRETT: Could have persuaded
11 him not to do it, would be, I -- I -- I take it,
12 with the fairness concern in the hypothetical
13 the Chief posed you, I think it would have been
14 to say, well, this isn't fair, you're not doing
15 this for me, so you shouldn't have done it for
16 anyone.

17 But you're not taking the position
18 that that would be an injury in fact.

19 MR. CONNOLLY: No. He would not
20 because you -- you have to have -- you have to
21 have concrete interests, it has to be
22 particularized, can't be abstract. And so --

23 JUSTICE BARRETT: So it's not just the
24 getting shut out of notice and comment, in other
25 words?

1 MR. CONNOLLY: Correct, correct.
2 These individuals have concrete interests.
3 There was a \$400 billion debt forgiveness
4 program that was created, and the Respondents
5 have debts and they're not being forgiven, and
6 if it had gone through the proper process,
7 negotiated rulemaking and notice and comment, we
8 could have argued that you -- our debts should
9 be forgiven too.

10 CHIEF JUSTICE ROBERTS: The suggestion
11 is not that the Secretary of Education should
12 forgive, on behalf of different banks, loans to
13 loan service companies. It is that that is a
14 consideration of other Americans in a comparable
15 situation who will not get that sort of relief
16 that maybe the Secretary should have taken into
17 account. And then if we had notice-and-comment
18 rulemaking, that maybe -- that would be a
19 consideration that would be -- come forth, or
20 maybe if Congress were involved in this
21 expenditure of \$500 billion, that that might be
22 something that they could consider.

23 MR. CONNOLLY: Right. And I would
24 also point to negotiated rule -- the negotiated
25 rulemaking statute. This is a unique statute

1 that Congress said specifically that it wanted
2 all of the individuals who are affected by the
3 Title IV loan process, student-loan borrowers,
4 universities, everyone, it wants them to be
5 involved in the process. And it strengthened
6 those requirements in 1998.

7 And so the idea, I think, that right
8 after doing that, it really strengthened the
9 negotiated rulemaking, that Congress said, yeah,
10 you can create a \$400 billion program on your
11 own in secret without any public involvement, it
12 just doesn't -- it just doesn't seem possible.

13 CHIEF JUSTICE ROBERTS: But what is --
14 what is the limiting principle? I mean, there
15 are many, many programs out there that people
16 say, well, I ought to -- you know, I ought to be
17 covered by that and I wasn't.

18 And we certainly don't allow everybody
19 to come in and say just because I would have a
20 right to comment, if this -- if this law were
21 struck down, I therefore have a right to bring a
22 -- bring a suit. I mean, how is this -- I
23 understand maybe -- you have the one client that
24 has a student loan and one that doesn't, right?

25 MR. CONNOLLY: Right.

1 CHIEF JUSTICE ROBERTS: Well, there's
2 a clear difference between those two situations,
3 isn't there?

4 MR. CONNOLLY: Sorry. They both have
5 -- they both student loan debts right now.
6 Brown has 17,000, and Taylor has \$35,000 in
7 debt.

8 CHIEF JUSTICE ROBERTS: Oh, okay.
9 Well, what principle should we look at to try to
10 limit the universe of people who -- because
11 otherwise you get people --

12 MR. CONNOLLY: Right.

13 CHIEF JUSTICE ROBERTS: -- who are
14 interested in any kind of law at all and say I
15 have something to say that the Secretary might
16 find of interest in notice and comment, and so I
17 should be able to sue to block what's there now.

18 MR. CONNOLLY: I think you have to
19 look at the -- the scope and purpose of the
20 agency action. Was the individual's concrete
21 interest at stake? If they're doing something
22 that has no relation to what you're complaining
23 about, your concrete interest, then it's coming
24 out of left field and that person isn't going to
25 have standing. Or if there's no possibility

1 that the Secretary is going to give you relief
2 because we're dealing with topic A and you're
3 coming in here on topic B, then that person
4 isn't going to have standing.

5 But here we have -- there is no
6 dispute, they're -- the Secretary is trying to
7 give relief to student-loan borrowers. That's
8 the nature and the scope and the purpose of this
9 Act. And instead of figuring out, okay, among
10 this universe of student-loan borrowers, who's
11 going to get what, how much, instead of doing
12 that on the public record, they did it in secret
13 first.

14 JUSTICE KAVANAUGH: So for purposes of
15 standing, as distinct as to who can comment,
16 because anyone can comment --

17 MR. CONNOLLY: Right.

18 JUSTICE KAVANAUGH: -- for standing
19 purposes, it has to be someone who is in the
20 class of people who could have been afforded
21 relief? Is that --

22 MR. CONNOLLY: Yeah, I -- I think
23 that's a fair way to put it. You have to have
24 -- you have to have concrete interests. It has
25 to be particularized. And that's -- and that's

1 what we have here, I think.

2 JUSTICE KAGAN: And if I understand
3 your -- your theory, it's once you strike down
4 this program, then the Secretary just uses
5 authority under the HEA? Is that the nature of
6 your theory? Which would include notice and
7 comment and negotiated rulemaking?

8 MR. CONNOLLY: The HEA gives the
9 Secretary the power --

10 JUSTICE KAGAN: But -- but the theory
11 is that the Secretary will just switch to
12 another statute?

13 MR. CONNOLLY: Well, I think that's
14 focusing -- you look at the agency action. You
15 look at the facts on the ground of what's
16 actually happening.

17 JUSTICE KAGAN: But you're striking
18 down this program. That's the whole point of
19 your being there. You're trying to -- this
20 program is not -- right?

21 MR. CONNOLLY: Yeah.

22 JUSTICE KAGAN: You have to strike
23 down this program to get any possibility of
24 notice and comment under another statute, right?

25 MR. CONNOLLY: Right.

1 JUSTICE KAGAN: So you have to strike
2 down this program. Then you go under another
3 statute, and -- where you do get notice and
4 comment. That's the theory?

5 MR. CONNOLLY: That is -- that is
6 correct. The HEA gives us a right -- they have
7 to go through negotiated rulemaking and notice
8 and comment.

9 JUSTICE KAGAN: Right. I mean,
10 usually, when we give standing for procedural
11 violations, we're talking about procedural
12 violations within a particular program, right?
13 We're not talking about, you know, if you have a
14 problem with the procedures relating to one
15 program, you can just come in and strike down
16 the program so that you're in another statute
17 entirely.

18 MR. CONNOLLY: Well, I don't think
19 it's right to look at -- to focus on the -- the
20 statute that they're using as -- as an excuse.
21 When you look at what -- we look at --

22 JUSTICE KAGAN: It's the statute they
23 acted under.

24 MR. CONNOLLY: Well, I --

25 JUSTICE KAGAN: And it's a statute

1 that says you don't have to use notice and
2 comment.

3 MR. CONNOLLY: Well, I think we focus
4 on the agency action at issue. So in Lujan, the
5 -- Lujan footnote 7, the agency is approving a
6 dam. In Summers, the agency is tearing down a
7 forest. Here, the agency is -- is doing debt
8 forgiveness. I think you look at the action.

9 JUSTICE KAVANAUGH: What --

10 JUSTICE KAGAN: Suppose --

11 MR. CONNOLLY: But I would point to --

12 JUSTICE KAVANAUGH: Go ahead.

13 JUSTICE KAGAN: Suppose there were no
14 HEA. Suppose it was this statute or nothing.
15 Would you then say you still have standing,
16 because once you strike down this -- this --
17 this program, you know, the Secretary would go
18 back to Congress and get a new statute?

19 MR. CONNOLLY: No, I don't think so.
20 At that point, there would be no possibility
21 that he would go back and give a --

22 JUSTICE KAGAN: Well, yes, there is a
23 possibility. He goes back to Congress and says
24 this is terrible, nobody can get loan
25 forgiveness, so I'll go back and get a new

1 statute.

2 MR. CONNOLLY: That would -- that
3 relief would be coming from Congress. The --
4 the -- the way you look at the redressability is
5 whether there's some possibility that the agency
6 will reconsider its decision -- will reconsider
7 its decision. And here, the decision was the
8 debt forgiveness program.

9 JUSTICE KAVANAUGH: What --

10 MR. CONNOLLY: And so --

11 JUSTICE KAVANAUGH: Keep going.

12 Sorry.

13 MR. CONNOLLY: And so you look -- you
14 look at the -- you look at the agency action.
15 And the one -- the other line of cases I would
16 point to is -- is the structural separation of
17 powers cases. In those cases, you focus on the
18 agency action. You don't look to see whether
19 the Act's -- the actions -- or the Act's
20 restrictions on removal are injuring the
21 individual. You look at whether the agency's
22 actions are injuring the individual.

23 And I think it's the same thing here.

24 JUSTICE KAVANAUGH: What's your best
25 case, if you have one, for your answer to

1 Justice Kagan's question about you going under a
2 different statute? Are -- are you aware of such
3 a case?

4 MR. CONNOLLY: The -- I guess a few
5 responses. First, I would go back to the ones I
6 just mentioned, Lujan and Summers. They're --
7 none -- none of those cases focused on the
8 statute at issue. They look at the action.
9 Lujan footnote 7, the -- the dam example, an
10 individual who is living next to a dam, when
11 they approve that dam without going through the
12 proper process, that individual has a procedural
13 right to challenge that.

14 When the agency approves the dam,
15 they're approving it under the Federal Power
16 Act. When the individual is going to get
17 relief, he's getting it under the Endangered
18 Species Act. And I think what that footnote
19 shows and what that example shows is that the
20 statute really doesn't matter, what they're
21 acting under. What matters is the agency
22 action.

23 JUSTICE JACKSON: Well, let me ask you
24 about the evidence. What -- what evidence do
25 you need, as the plaintiff coming in claiming

1 standing, that the agency would have proceeded
2 under this other statute? Because it's not a
3 world in which, you know, they overlap so
4 entirely that if we take one away, they're
5 automatically in the --

6 MR. CONNOLLY: Right.

7 JUSTICE JACKSON: -- world of HEA.
8 They would have to actually elect to operate in
9 that other world. And so this goes back to my
10 very first question to you which was about don't
11 we -- aren't you relying on the assumption that
12 if the HEROES Act falls, this agency or this --
13 this administration would pursue the same course
14 of action under this other statute?

15 MR. CONNOLLY: Sure. A few responses.
16 First, if you look at the nature of the action,
17 it is applying to 95 percent of all borrowers.
18 It's not remotely tailored --

19 JUSTICE JACKSON: Do you have --

20 MR. CONNOLLY: -- to the pandemic.

21 JUSTICE JACKSON: -- evidence that
22 they've said, even pursuant to this litigation,
23 for example, that if the Supreme Court strikes
24 this down, we're going to pursue the same relief
25 under the HEA? I'm asking about the -- like

1 what do --

2 MR. CONNOLLY: Sure.

3 JUSTICE JACKSON: Is it enough for you
4 just to identify another path? Don't you have
5 to at least have some evidence that the
6 administration is going to move in that
7 direction?

8 MR. CONNOLLY: So, yes. So, again, I
9 point to the nature of the rule. That it's
10 broad-based. It's not -- it's not tied to
11 pandemic. The second thing I would point to is
12 that there's all sorts of evidence. When --
13 during the -- during the campaign, they were
14 talking about doing broad-based debt relief. It
15 wasn't related to the pandemic. Senator Warren
16 and others passed resolutions urging the
17 Secretary to use the Higher Education Act to
18 pass debt forgiveness. Scholars have written
19 about this.

20 JUSTICE JACKSON: And yet --

21 MR. CONNOLLY: -- legal scholars --

22 JUSTICE JACKSON: -- and yet the
23 Secretary chose this path. So I guess I'm just
24 trying to say, do we have something from the
25 Secretary saying that, you know, we're

1 definitely doing this under all circumstances
2 and we pick the HEA if the HEROES Act falls?

3 MR. CONNOLLY: I think that would be a
4 very high burden for us to meet.

5 JUSTICE JACKSON: Thank you.

6 MR. CONNOLLY: Because if you look,
7 again, at footnote 7 of Lujan, when it's talking
8 about why procedural rights are special, what
9 it's saying is if -- if the burden is on the
10 plaintiff to come back and say, you know, my
11 comments are going to be amazing, they're going
12 to do this, they're going to change their mind,
13 procedural rights are going -- are going to be
14 useless. They can always come back and say --

15 JUSTICE JACKSON: No, but that's --

16 MR. CONNOLLY: -- you know, we would
17 have done the same --

18 JUSTICE JACKSON: -- change your mind
19 within the context of a particular program.
20 That's -- this is Justice Kagan's point.

21 I mean, yes, redressability gets
22 relaxed when we're in the world in which
23 procedural rights would have otherwise existed
24 and you don't have to as a plaintiff show that
25 they would have made a different ultimate

1 determination if they'd heard your comments.

2 MR. CONNOLLY: Right.

3 JUSTICE JACKSON: We understand that.

4 But what you're suggesting is that same
5 principle of redressability applies to whether
6 or not they would shift to an entirely different
7 legal base of authority to pursue this program.
8 And I have never seen that before.

9 MR. CONNOLLY: And -- and -- and
10 again, I -- I think this exact -- this -- this
11 program, they could have -- they could have
12 cited Section 1082 of the HEA to go under it.

13 They -- they believe they can do it.
14 They've said it in their brief that they can do
15 it. The reason they -- I -- I -- my guess is
16 the reason why they didn't do that is because
17 they would have had to go under negotiated
18 rulemaking and notice and comment.

19 And if you look at the -- the --
20 the -- the breadth of this program, it's not
21 about the -- it's not about helping people who
22 are uniquely suffering from the pandemic. It's
23 helping 95 percent of all borrowers, and --
24 except for -- except for the Respondents here.

25 And so I think when you look at the

1 nature of the -- of the program at issue, plus
2 the campaign statements, plus the fact that
3 they've never gotten up here and -- and denied
4 it, you put all that together, and I think we
5 have a strong -- at a minimum, some possibility
6 that they're going to get -- when this program
7 is declared unlawful and they go back to the
8 drawing board, I don't think they're going to
9 fold up shop. I think they're going to say how
10 about the HEA?

11 JUSTICE KAVANAUGH: What's your theory
12 if any, maybe I should be asking the other side
13 this, but your theory for why they didn't want
14 notice and comment?

15 MR. CONNOLLY: I think because it's --
16 it's a -- it's a -- the negotiated rulemaking
17 process and the notice and comment process, I
18 mean, it's a long process. And agencies
19 probably would -- most agencies would prefer not
20 to have to do that.

21 JUSTICE KAGAN: And this is an
22 emergency. And emergency statutes typically do
23 not have notice and comments, do they?

24 MR. CONNOLLY: If this were authorized
25 by the HEROES Act, then they could have gone

1 under it. But it's not.

2 JUSTICE KAVANAUGH: They could have
3 done the good cause exception, though, right?

4 MR. CONNOLLY: They could have tried
5 to, but they didn't, and -- and probably because
6 it's not an -- an actual emergency to have to
7 forego notice and comment and negotiated
8 rulemaking.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Oh, wait --

12 MR. CONNOLLY: Yeah --

13 CHIEF JUSTICE ROBERTS: I'm sorry, I
14 didn't mean to cut you off too quickly. I'm
15 sorry.

16 Justice Thomas, do you have anything?

17 Justice Alito?

18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: No.

20 CHIEF JUSTICE ROBERTS: No.

21 Justice Barrett?

22 Justice Jackson?

23 See? Okay.

24 (Laughter.)

25 MR. CONNOLLY: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you very
2 much.

3 General Prelogar?

4 REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
5 ON BEHALF OF THE PETITIONERS

6 GENERAL PRELOGAR: Thank you, Mr.
7 Chief Justice.

8 I want to begin with standing again.
9 My friend was asked several times whether he has
10 a case to support this novel theory of standing.
11 He referred to Lujan and Summers. Those cases
12 don't support the theory he's advancing here.

13 In every case where there has been an
14 asserted procedural injury, the plaintiff was
15 asking the -- the -- for the agency to
16 reconsider its decision under the very statutory
17 authority at issue.

18 He's not been able to identify any
19 precedent where, instead, a plaintiff is able to
20 say, I acknowledge I can't get any relief under
21 the particular agency action at issue. Instead,
22 I'm hoping for some kind of bank shot where if I
23 can hold up the agency in this one area, maybe
24 it'll take a different action under a different
25 statute that will down the road provide me some

1 kind of benefit.

2 And that would be an extraordinary
3 expansion of Article III injury in the context
4 of procedural injuries in particular.

5 He was asked whether he had a limiting
6 principle and he suggested, well, you have to
7 have a general interest or stake in the subject
8 matter of the dispute. But I don't see how that
9 limits it at all.

10 Go back to the cases he cited which
11 involved environmental plaintiffs. And imagine
12 a scenario where you have an environmental
13 plaintiff who is interested in pollution. And
14 the agency has decided to regulate water
15 pollution.

16 Now, that plaintiff doesn't actually
17 have a stake in water pollution, isn't harmed by
18 it, but the plaintiff thinks that if it can hold
19 up the agency from regulating water pollution,
20 maybe the next priority or goal will be to go
21 after air pollution.

22 I think that if a plaintiff came to
23 court and pressed that kind of claim, it would
24 be clear that it is far too attenuated and can't
25 possibly supply a basis to allow this universe

1 of plaintiffs to newly assert these kinds of
2 procedural injuries or substantive injuries with
3 respect to agency decisions that have not been
4 made.

5 He said that they have a concrete
6 interest in trying to have their debts forgiven.
7 If that were their interest, there were several
8 straightforward mechanisms to try to vindicate
9 it here.

10 They could have challenged this plan
11 as being arbitrary and capricious on substantive
12 grounds to say you should expand the plan to
13 include us or if for some reason they really
14 wanted to have this under the Education Act,
15 they could have gone to the Secretary and filed
16 a petition for rulemaking and said give us
17 relief under the Education Act.

18 But instead, their argument here is
19 that the Secretary can't provide debt relief.
20 That is a really anomalous way to try to
21 vindicate an interest that they claim they have
22 in loan forgiveness.

23 I've been thinking of it effectively
24 as this Rube Goldberg theory of standing where
25 instead of taking the most direct route, you've

1 set up this complicated route to try to get what
2 you want all in service of being able to smuggle
3 in a substantive challenge to the HEROES Act for
4 borrowers who are not hurt one bit by the
5 Secretary's decision to grant relief under that
6 act.

7 Finally, I want to respond to his
8 suggestion that instead the Secretary should
9 have proceeded under the Higher Education Act
10 here.

11 I would think that at the very least,
12 if they were going to ask this Court to
13 recognize a cognizable Article III injury on
14 that basis, it would be incumbent on them to
15 explain their wholly unexplained position of why
16 they think the Secretary could do this under the
17 Higher Education Act.

18 My friend has suggested that that's
19 what this program was actually designed to do.
20 But this is a pandemic-related program. It
21 specifically focuses on the national emergency
22 circumstances that have had profound financial
23 effects on student-loan borrowers. And the
24 Secretary acted to try to mitigate those
25 financial harms from COVID.

1 That's what the HEROES Act was made
2 for. It is a perfect fit for this kind of
3 circumstance and it explains why the Secretary
4 chose to provide this relief to those who were
5 harmed by COVID, just as the forbearance policy
6 was put into place right at the start of the
7 pandemic similarly on those COVID concerns.

8 And then, finally, I -- I know that we
9 have had hours today on the legal issues in this
10 case, but I do want to step back for a moment
11 and focus on the stakes of this case for the
12 tens of millions of student-loan borrowers in
13 this country who have had devastating financial
14 impacts based on this unprecedented pandemic.

15 Over the past three years, they have
16 benefitted from the critical relief of the
17 forbearance policy. That's an unprecedented
18 form of relief, but it was very much needed in
19 the circumstance to ensure that we did not see a
20 deluge of default and delinquency on student
21 loan debt.

22 And it's undisputed, my friends have
23 not disputed that when that forbearance policy
24 ends, and it can't continue indefinitely, once
25 it ends, there are going to be millions of

1 borrowers who are in a worse position because of
2 COVID with respect to their ability to repay
3 their loans.

4 Ninety percent of the borrowers
5 covered by this plan make less than \$75,000 a
6 year and the Secretary documented the extreme
7 impacts that COVID had had on their financial
8 affairs.

9 Already, 26 million people have
10 applied for this relief, and 16 million people
11 have been approved to receive it. For those
12 Americans, this is a critical lifeline to ensure
13 that they are not subject to the severe negative
14 consequences of delinquency and default on
15 student loan debt.

16 And the relief for these Americans has
17 been held up by two student-loan borrowers who
18 don't even have standing and whose claims fail
19 on the merits. So we'd urge you to reject their
20 claims.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 General, Mr. Connolly. The case is submitted.

23 (Whereupon, at 1:37 p.m., the case was
24 submitted.)

25

Official - Subject to Final Review

\$	abstract ^[1] 67:22	agency ^[30] 4:16,18 6:7,9,11 7:7 12:11,11 16:16 62:20 63:21 70:20 72:14 74:4,5,6,7 75:5,14,18 76:14,21 77:1,12 83:15,21,23 84:14,19 85:3	8,14 40:5 41:5 59:19 60:3 85:11	11,16,20 23:1 45:23 46:15 52:6 74:18,21,23,25 76:5 77:9 79:10,14 81:7 84:10 87:10
\$10,000 ^[2] 3:22 55:15	academic ^[1] 63:19	11 7:7 12:11,11 16:16 62:20 63:21 70:20 72:14 74:4,5,6,7 75:5,14,18 76:14,21 77:1,12 83:15,21,23 84:14,19 85:3	area ^[2] 49:2 83:23	bank ^[2] 27:10 83:22
\$17,000 ^[2] 62:12 63:24	accepted ^[1] 59:15	agency's ^[1] 75:21	aren't ^[8] 11:15,19 14:14 53:11 62:3,23 65:4 77:11	banks ^[2] 64:24 68:12
\$20,000 ^[1] 55:17	account ^[11] 18:3 25:13,17 28:17 29:3,5 32:13 42:13 44:23 61:10 68:17	agree ^[7] 32:3 38:11,14 41:17 42:4 49:19 54:22	argue ^[3] 4:22 5:10 15:21	Barrett ^[13] 21:14 49:6,7,10,25 50:9 52:2 66:5,20,24 67:10,23 82:21
\$35,000 ^[1] 70:6	acknowledge ^[1] 83:20	agreement ^[1] 59:2	argued ^[1] 68:8	barring ^[1] 17:1
\$400 ^[3] 55:4 68:3 69:10	Across ^[2] 3:11 26:19	ahead ^[2] 29:9 74:12	arguing ^[2] 60:15,15	base ^[2] 10:3 80:7
\$500 ^[1] 68:21	Act ^[79] 3:17,20 4:4,4,6,12 5:2,12,24 6:17,23 7:3,5 8:11 9:21 11:5,14,17,20,25 12:1,7,9,15,18 13:3,22 14:4,12,19 26:23 30:1 31:18 32:15 34:1 35:7,12 36:1 37:16,18 42:19 45:8 47:1 50:6,25 51:17 53:1 54:1,6,9,15,24 57:9,10,20 58:6,11 60:6,19 65:5,13,15,21,24 66:4 71:9 76:16,18 77:12 78:17 79:2 81:25 85:14,17 86:3,6,9,17 87:1	aid ^[1] 45:3	argument ^[24] 1:14 2:2,5,8 3:4,4,7 5:22 7:10,16 8:7,25 14:15 19:9 25:1 31:6,9 32:5 41:23 53:21 54:13 61:21 83:4 85:18	based ^[5] 9:13 14:23 24:11 33:14 87:14
\$75,000 ^[1] 88:5	Act's ^[2] 75:19,19	aimed ^[1] 30:16	arguments ^[8] 3:12 5:20 9:22 11:9 12:6 15:4 27:5 28:20	basically ^[1] 46:23
1	acted ^[4] 26:22 36:5 73:23 86:24	air ^[1] 84:21	arise ^[2] 52:8 59:23	basis ^[7] 14:6 17:5 26:13 32:13 53:13 84:25 86:14
1:37 ^[1] 88:23	acting ^[3] 41:12 44:16 76:21	AL ^[2] 1:3,6	Arlington ^[1] 1:21	become ^[1] 21:5
10 ^[1] 24:23	action ^[30] 4:9,16,18,19 6:7,9,13,14 7:6 8:23 13:11 16:16 29:8 40:9 42:7 46:25 57:19 63:21 70:20 72:14 74:4,8 75:14,18 76:8,22 77:14,16 83:21,24	Alito ^[12] 32:18,19 33:5,8,23 34:2,15,17 35:2,5,13 82:17	around ^[1] 4:2	begin ^[2] 45:20 83:8
10,000 ^[1] 60:19	actions ^[2] 75:19,22	Alito's ^[1] 43:2	Article ^[5] 6:6 14:25 19:11 84:3 86:13	begs ^[1] 28:23
1082 ^[1] 80:12	activities ^[1] 37:24	allegations ^[1] 42:2	aspect ^[1] 52:25	behalf ^[9] 1:19,22 2:4,7,10 3:8 53:22 68:12 83:5
12:21 ^[2] 1:15 3:2	actual ^[1] 82:6	allow ^[7] 14:21,25 19:12 29:25 39:1 69:18 84:25	aspects ^[1] 20:23	behind ^[1] 55:5
150 ^[1] 31:24	actually ^[19] 10:10 11:24 13:23 14:22 17:8 20:3 40:14,18 44:13 48:6 51:3,5 65:14 66:2,3 72:16 77:8 84:16 86:19	alter ^[1] 14:24	assert ^[2] 11:15 85:1	believe ^[1] 80:13
16 ^[1] 88:10	additional ^[4] 22:8 23:3 45:1,15	amazing ^[1] 79:11	asserted ^[3] 3:14 11:16 83:14	believes ^[1] 58:4
17,000 ^[1] 70:6	address ^[2] 25:23 64:4	Americans ^[5] 17:4 29:23 68:14 88:12,16	asserting ^[2] 6:6 10:24	below ^[4] 13:24 14:6 15:21 55:20
1998 ^[1] 69:6	administering ^[1] 14:24	among ^[1] 71:9	assertion ^[1] 9:22	benefit ^[7] 6:8 29:12 45:13 52:9,22 53:12 84:1
2	administration ^[8] 48:22 54:22 57:10,20,23 58:14 77:13 78:6	analysis ^[2] 33:10 42:6	assessments ^[1] 13:25	benefits ^[6] 33:4 36:3,12 41:11 45:15 53:9
20,000 ^[1] 60:23	admit ^[1] 47:23	analyze ^[2] 40:4 41:15	assistance ^[4] 49:17 50:11,17 52:20	benefitted ^[2] 35:17 87:16
2003 ^[1] 46:16	admitting ^[1] 54:7	analyzed ^[1] 22:9	associated ^[1] 12:20	best ^[2] 58:19 75:24
2020 ^[1] 29:10	advancing ^[1] 83:12	anomalous ^[1] 85:20	assuming ^[1] 57:18	better ^[8] 27:14 38:12 39:2,16,21,24 51:7 52:1
2023 ^[1] 1:11	advocate ^[1] 11:6	another ^[11] 10:16,16 15:13 57:2 61:12 63:7 72:12,24 73:2,16 78:4	assumption ^[2] 57:8 77:11	between ^[4] 7:13 9:7 56:25 70:2
22-535 ^[1] 3:5	affairs ^[2] 51:9 88:8	answer ^[8] 30:10 31:3 34:19,21 35:19,20 36:10 75:25	atextual ^[1] 46:22	beyond ^[3] 16:21 44:24 48:25
247 ^[1] 24:8	affect ^[2] 8:22 9:11	ante ^[1] 9:9	attached ^[2] 46:5,7	Biden ^[1] 54:1
248 ^[1] 24:8	affected ^[8] 6:7 31:19 36:3 38:7 48:20 49:15 55:8 69:2	anticipate ^[1] 46:17	attack ^[1] 9:23	big ^[5] 31:14,16 43:13,13 44:14
26 ^[1] 88:9	affecting ^[1] 21:23	anybody ^[1] 17:2	attacking ^[1] 4:8	biggest ^[1] 59:9
28 ^[1] 1:11	affects ^[1] 35:23	APA ^[6] 16:1,7,9,10,19 55:23	attenuated ^[1] 84:24	billion ^[6] 31:24 55:5 60:12 68:3,21 69:10
3	affirmed ^[1] 55:20	apart ^[1] 30:6	authorities ^[1] 45:15	binding ^[1] 48:5
3 ^[1] 2:4	afford ^[2] 27:7 29:1	apparent ^[1] 14:20	authority ^[41] 6:12,22 7:2,5,22 9:21 10:11,12 11:5 12:11 13:2,13,14 15:22 19:4,11 28:13,18 29:17 30:2,3,3 32:24 33:18 36:1 37:12,13,16,23 42:13 43:15 45:8,13 48:15 49:14 58:5,16 59:1 72:5 80:7 83:17	bit ^[5] 8:13 19:1 22:4 44:11 86:4
31 ^[1] 64:21	afforded ^[1] 71:20	appeals ^[3] 47:10,12,12	authorized ^[7] 52:12,25 65:14,21,24 66:3 81:24	blocked ^[1] 13:11
4	affield ^[1] 9:25	APPEARANCES ^[1] 1:17	authorizes ^[1] 54:2	blow ^[1] 6:5
40 ^[1] 29:23	agencies ^[2] 81:18,19	application ^[1] 48:10	automating ^[1] 38:24	board ^[4] 3:11 11:12 26:19 81:8
400 ^[1] 60:12		applications ^[1] 26:2	automatically ^[1] 77:5	boil ^[1] 6:2
5		applied ^[5] 26:18 56:19,22,23 88:10	avenue ^[2] 25:23 58:1	books ^[1] 31:19
50 ^[2] 26:10,11		applies ^[2] 58:20 80:5	avenues ^[1] 44:25	bootstrapping ^[1] 22:25
51 ^[1] 24:14		apply ^[3] 54:9 65:20 66:3	aware ^[1] 76:2	borrower ^[7] 18:21 25:3 26:20 29:13 51:8 63:4,7
53 ^[1] 2:7		applying ^[1] 77:17	away ^[2] 7:17 77:4	borrowers ^[49] 3:23 4:12 11:14 16:5 21:23 22:6,16,19 23:9,15,20 24:8,15,21 26:7 27:3,3 30:12,17 31:19 33:1,11,18,22 34:25 35:23 41:20 42:11,20 44:21,24 45:5 51:1 53:4 58:21
7		appreciate ^[3] 7:20 15:4 42:22	B	
7 ^[3] 74:5 76:9 79:7		approach ^[1] 48:22	back ^[2] 3:6 11:11 16:8 20:	
703 ^[1] 16:11		appropriate ^[1] 27:4		
706 ^[1] 16:7		approval ^[1] 56:4		
8		approve ^[2] 56:11 76:11		
83 ^[1] 2:10		approved ^[2] 56:5 88:11		
9		approves ^[1] 76:14		
90 ^[1] 39:24		approving ^[2] 74:5 76:15		
95 ^[3] 58:20 77:17 80:23		arbitrary ^[9] 5:17 20:22 32:		
A				
abandoned ^[1] 14:5				
ability ^[6] 17:13 22:20 24:22 50:7 53:6 88:2				
able ^[13] 6:1 11:15 17:4 33:12 35:1 40:11 46:24 51:3,15 70:17 83:18,19 86:2				
above-entitled ^[1] 1:13				
absence ^[3] 16:17 19:8 34:23				

Official - Subject to Final Review

<p>64:7,16 66:14 69:3 71:7, 10 77:17 80:23 86:4,23 87:12 88:1,4,17</p> <p>both [6] 5:13 20:20 26:21 27:6 70:4,5</p> <p>bottom-line [1] 36:10</p> <p>bracket [1] 24:12</p> <p>brackets [1] 24:13</p> <p>branch [1] 43:14</p> <p>breadth [2] 25:20 80:20</p> <p>break [1] 30:5</p> <p>brief [4] 61:8,10 64:22 80:14</p> <p>bring [6] 8:23 10:7 17:9 18:22 69:21,22</p> <p>bringing [1] 62:4</p> <p>broad [3] 26:23 30:19 44:2</p> <p>broad-based [2] 78:10,14</p> <p>broader [4] 4:11 5:12 25:12 44:15</p> <p>broadly [2] 4:8 9:23</p> <p>brought [3] 7:16 12:6 17:16</p> <p>BROWN [8] 1:6 3:5,11,21 4:2 55:14 62:12 70:6</p> <p>Brown's [1] 66:17</p> <p>burden [4] 23:11 46:12 79:4,9</p> <p>burdens [1] 45:21</p> <p>Burnt [3] 56:4,11 57:5</p> <p>business [2] 27:19 66:22</p> <p>businesses [1] 37:5</p> <p>but-for [1] 24:5</p> <p>buying [1] 50:4</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>call [3] 18:12 65:10,11</p> <p>called [1] 20:22</p> <p>came [3] 1:13 48:9 84:22</p> <p>campaign [2] 78:13 81:2</p> <p>cancellation [1] 43:7</p> <p>cannot [1] 3:25</p> <p>capricious [8] 20:22 32:8,14 40:5 41:5 59:19 60:3 85:11</p> <p>Cardona [1] 26:7</p> <p>care [6] 27:9 29:11 33:18 37:14 66:21,22</p> <p>careful [1] 47:17</p> <p>carved [1] 64:19</p> <p>carves [1] 8:16</p> <p>Case [33] 3:4,12 5:25 7:20 8:6,19 9:25 11:10 12:6 13:25 15:6,23 17:10 20:19,23 25:15 27:2 40:21 41:16 48:18 49:1 53:25 54:5 55:24 56:24 75:25 76:3 83:10,13 87:10,11 88:22,23</p> <p>cases [9] 7:12,24 15:9 75:15,17,17 76:7 83:11 84:10</p> <p>categorical [2] 31:9 32:5</p> <p>cause [2] 22:7 82:3</p> <p>caused [2] 22:6,13</p> <p>causes [1] 23:7</p>	<p>causing [1] 23:14</p> <p>certain [3] 4:24 21:19 24:13</p> <p>certainly [3] 25:20 59:25 69:18</p> <p>certainty [2] 9:16 13:1</p> <p>challenge [10] 7:16 13:22 14:2,11,19,22 56:3 63:14 76:13 86:3</p> <p>challenged [1] 85:10</p> <p>challenging [1] 7:6</p> <p>chance [4] 11:4,6 15:13 51:10</p> <p>change [6] 20:1 46:21 56:10,16 79:12,18</p> <p>changed [3] 8:23 9:4 63:13</p> <p>charge [2] 28:6 42:19</p> <p>chatted [1] 15:8</p> <p>check [1] 66:14</p> <p>CHIEF [45] 3:3,10 7:9 8:14,18 20:12 24:6 25:7 27:1 28:16,21 29:15 30:20,24 31:2 32:16,22 34:12 36:7 37:1 38:2 41:8 42:24 43:2,16 49:5 52:3 53:18,23 63:1 64:1 66:20,24 67:13 68:10 69:13 70:1,8,13 82:9,13,20 83:1,7 88:21</p> <p>choice [6] 37:6,7,8,9,11 40:12</p> <p>chose [2] 78:23 87:4</p> <p>circle [1] 52:6</p> <p>Circuit [5] 19:19 20:15 47:14,17 48:5</p> <p>circuitous [1] 4:14</p> <p>circular [1] 28:22</p> <p>circumstance [3] 58:10 87:3,19</p> <p>circumstances [2] 79:1 86:22</p> <p>cited [2] 80:12 84:10</p> <p>claim [18] 3:15 4:22 5:3,14,14 9:8,22 10:8 13:18,23 14:18 17:5,9,16 18:16 19:14 84:23 85:21</p> <p>claiming [1] 76:25</p> <p>claims [4] 9:17 20:20 88:18,20</p> <p>clarify [1] 39:5</p> <p>clarifying [1] 42:23</p> <p>class [4] 39:10,25 53:15 71:20</p> <p>class-wide [2] 26:24 38:17</p> <p>clear [9] 5:4 11:22 17:17 22:2 23:3 25:22 38:16 70:2 84:24</p> <p>clearly [3] 15:5 30:18 52:12</p> <p>client [2] 63:24 69:23</p> <p>clients [1] 63:3</p> <p>clients' [1] 34:9</p> <p>closed [1] 55:5</p> <p>cognizable [1] 86:13</p>	<p>collapse [1] 49:24</p> <p>college [7] 27:7,12,23 29:2 43:15 45:22 66:22</p> <p>colleges [1] 37:4</p> <p>come [12] 20:20 27:6 48:21 59:4 61:2 62:20 67:8 68:19 69:19 73:15 79:10,14</p> <p>comes [4] 16:7,11 27:16 45:12</p> <p>coming [4] 70:23 71:3 75:3 76:25</p> <p>comment [33] 11:1,4 12:2,13,17 25:10 43:25 54:9 55:8 56:6,15 57:16 59:25 62:10 63:8 64:18 65:6,17 67:24 68:7 69:20 70:16 71:15,16 72:7,24 73:4,8 74:2 80:18 81:14,17 82:7</p> <p>comments [3] 79:11 80:1 81:23</p> <p>common [1] 20:21</p> <p>companies [2] 52:12 68:13</p> <p>company [1] 52:15</p> <p>comparable [2] 35:15 68:14</p> <p>complain [1] 10:15</p> <p>complaining [3] 10:2,5 70:22</p> <p>complaint [1] 8:1</p> <p>complete [3] 3:14 9:7 22:12</p> <p>completely [4] 10:3 50:19 51:18 60:8</p> <p>completes [1] 62:7</p> <p>complex [1] 23:17</p> <p>complicated [1] 86:1</p> <p>components [1] 30:6</p> <p>concept [2] 9:23 12:14</p> <p>concepts [1] 19:10</p> <p>concern [4] 22:25 24:1 48:6 67:12</p> <p>concerns [6] 24:22 32:1,7 44:22 66:25 87:7</p> <p>conclusion [1] 15:1</p> <p>concrete [10] 63:18 64:2,9 67:8,21 68:2 70:20,23 71:24 85:5</p> <p>conditions [3] 21:2,20 46:23</p> <p>confused [1] 22:3</p> <p>confusion [1] 10:20</p> <p>Congress [41] 4:25 16:8 25:13 28:7,14,16 29:5,8 30:8,15 33:2,17 35:8,21 36:4 37:2,6,22 38:20 42:12 43:21,22 44:25 46:13,16,24 52:13,25 53:7,14 55:3 65:4,10,13 66:1 68:20 69:1,9 74:18,23 75:3</p> <p>Congress's [6] 29:18 33:11 37:9,11 45:12 65:11</p> <p>congressional [2] 30:2,3</p> <p>CONNOLLY [64] 1:21 2:6</p>	<p>53:20,21,23 55:21,25 56:20,23 57:13 58:18 60:11,17,21 61:5 62:6 63:25 64:5 65:3,12 66:5,11,23 67:4,19 68:1,23 69:25 70:4,12,18 71:17,22 72:8,13,21,25 73:5,18,24 74:3,11,19 75:2,10,13 76:4 77:6,15,20 78:2,8,21 79:3,6,16 80:2,9 81:15,24 82:4,12,25 88:22</p> <p>consequences [1] 88:14</p> <p>consider [5] 4:5 14:7 27:4 44:8 68:22</p> <p>consideration [5] 25:9 28:9 42:5 68:14,19</p> <p>considerations [4] 21:13,25 25:16 28:17</p> <p>considered [1] 45:24</p> <p>considering [1] 42:10</p> <p>consistent [1] 50:15</p> <p>consulted [1] 24:17</p> <p>contemplated [1] 28:14</p> <p>context [10] 9:9 33:4 43:5 44:4 45:14 53:10 58:8 64:3 79:19 84:3</p> <p>contextually [1] 43:11</p> <p>continue [3] 3:4 50:12 87:24</p> <p>converted [1] 21:11</p> <p>convince [1] 58:14</p> <p>convoluted [1] 10:23</p> <p>core [1] 30:14</p> <p>correct [1] 6:17,18 36:13,20,21 37:15,25 49:23 68:1,1 73:6</p> <p>cost [3] 29:23 31:24 41:13</p> <p>costs [1] 61:10</p> <p>couldn't [6] 11:10,11 12:5 29:19 46:16 67:9</p> <p>Counsel [2] 24:6 82:10</p> <p>count [2] 28:1,3</p> <p>counter [1] 3:12</p> <p>country [2] 18:21 87:13</p> <p>course [9] 17:7 20:8 21:17,24 23:8 25:7 27:14,24 77:13</p> <p>COURT [40] 1:1,14 3:10,17,25 4:13,21 9:10 13:20,24 14:7,21 15:7,22 17:13 18:23 19:2,3,6 44:7 46:12 47:10,10,11,12 48:10,15,21 53:24 54:3 55:22 56:1,24,24 57:4 61:2 64:21 77:23 84:23 86:12</p> <p>Court's [3] 5:5 42:5 49:2</p> <p>courts [3] 15:24 16:23 19:13</p> <p>covered [2] 69:17 88:5</p> <p>COVID [22] 21:8,11,15,18,23 22:17,21 23:20 24:5 38:9,13 45:3,19,25 46:19 51:11 52:10 86:25 87:5,7 88:2,7</p> <p>COVID-19 [2] 23:10 31:15</p>	<p>crafting [1] 32:10</p> <p>create [3] 55:4 66:1 69:10</p> <p>created [3] 60:11 61:6 68:4</p> <p>credit [1] 63:12</p> <p>crisis [2] 38:10,13</p> <p>critical [7] 3:23 17:5 19:14 22:16 64:6 87:16 88:12</p> <p>critique [1] 35:25</p> <p>current [3] 9:3 46:23 55:1</p> <p>cut [1] 82:14</p> <p>cuts [1] 43:8</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C [4] 1:10,19 19:18 20:15</p> <p>dam [5] 74:6 76:9,10,11,14</p> <p>data [5] 22:10,10 24:13,17,19</p> <p>day [1] 38:19</p> <p>deal [1] 45:20</p> <p>dealing [3] 20:21 27:2 71:2</p> <p>dealt [2] 37:3,5</p> <p>debate [2] 46:18 54:20</p> <p>debated [1] 46:4</p> <p>debt [33] 4:6 9:19 14:14 30:9 31:10 32:5 49:18,22 50:5,14 51:11,19 54:2,14,21 55:5 57:25 58:15,25 60:12 61:6,12 62:14 64:8 68:3 70:7 74:7 75:8 78:14,18 85:19 87:21 88:15</p> <p>debts [13] 54:20,23 55:1 56:17 62:11,13,17 66:17,18 68:5,8 70:5 85:6</p> <p>decide [2] 11:12 59:17</p> <p>decided [6] 8:22 26:5 29:11 34:3 64:25 84:14</p> <p>deciding [1] 33:2</p> <p>decision [10] 4:5 5:11 11:11 12:18 23:2 75:6,7,7 83:16 86:5</p> <p>decision-making [1] 12:24</p> <p>decisions [3] 12:11 49:2 85:3</p> <p>declaration [1] 8:10</p> <p>declarations [1] 61:9</p> <p>declared [3] 55:2 59:7 81:7</p> <p>decree [1] 15:8</p> <p>default [10] 21:5 23:23 25:5 26:8 35:4 45:6 47:3 51:22 87:20 88:14</p> <p>defaulting [1] 51:10</p> <p>defending [1] 14:8</p> <p>defined [1] 36:4</p> <p>Definitely [2] 37:13 79:1</p> <p>degree [1] 27:13</p> <p>delinquency [8] 23:23 25:5 26:8 35:4 45:6 51:22 87:20 88:14</p> <p>delinquent [1] 21:6</p> <p>deluge [1] 87:20</p> <p>demonstrate [1] 9:24</p> <p>denied [3] 54:25 59:4 81:3</p>
--	--	---	--	---

Official - Subject to Final Review

<p>DEPARTMENT [7] 1:3,19 3:5 34:14 58:5,7 66:13 depends [1] 19:1 deprive [1] 59:12 deprived [5] 11:24 12:8,19 55:13 59:24 derive [2] 12:10 24:4 deserving [1] 35:18 designed [4] 35:7 37:18 58:24 86:19 determination [2] 26:13 80:1 determinations [1] 33:13 determine [2] 26:14 42:20 determined [2] 9:11 45:5 determining [1] 18:4 devastating [1] 87:13 difference [2] 66:19 70:2 different [28] 4:5,19,19 6: 22 7:21,25 8:7 11:11 13: 12,13 26:14 30:6 32:12 36: 11,11,12 37:22,23,24 39: 18 57:15 63:4 68:12 76:2 79:25 80:6 83:24,24 dime [1] 62:13 direct [4] 31:15 41:5,9 85: 25 directed [1] 7:3 direction [1] 78:7 directly [5] 6:7 7:11 16:15 24:4 63:21 disable [1] 46:24 disabled [1] 44:16 disagree [2] 32:11 38:16 disappointed [1] 66:9 discharge [3] 30:9 31:10 32:5 disconnect [1] 9:7 discrimination [1] 7:13 discussed [2] 12:16 46:3 discussing [1] 42:14 discussion [1] 46:18 discussions [1] 64:24 dispute [4] 23:20 54:10 71: 6 84:8 disputed [1] 87:23 disrupted [2] 51:12,12 distinct [1] 71:15 distinction [1] 56:25 distort [1] 32:14 distress [1] 23:14 distressed [1] 50:2 district [4] 13:24 14:7 15: 21 19:13 Doctrine [1] 28:10 documented [1] 88:6 doing [14] 16:9 34:4 43:21 53:14 61:7 64:4,17 67:14 69:8 70:21 71:11 74:7 78: 14 79:1 dollar [3] 60:12,19 63:19 dollars [3] 27:21 29:24 31: 24 domain [2] 26:22 35:12</p>	<p>done [8] 34:20 57:11 59:6 62:2,21 67:15 79:17 82:3 doors [2] 6:5 55:6 doubt [2] 22:14 43:22 down [22] 8:2 9:3 13:20 45: 12 46:13,20 60:7,24 61:22 62:3 67:2,3 69:21 72:3,18, 23 73:2,15 74:6,16 77:24 83:25 drawing [3] 11:12 56:25 81:8 drawn [1] 26:14 drew [3] 5:16 26:4 32:9 due [4] 18:2 23:10 26:24 59: 12 during [3] 63:9 78:13,13</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [2] 21:25 25:2 earlier [2] 47:5 48:12 easily [1] 26:9 economic [7] 21:12,20 22: 6,13,23 23:7,13 economics/COVID [1] 21: 2 economy [3] 21:18,19 23: 16 EDUCATION [19] 1:3 3:5 4: 6,12 6:17,23 7:2 12:7,9,18 54:24 66:13 67:5 68:11 78: 17 85:14,17 86:9,17 effect [3] 39:7,9 59:22 effectively [3] 13:21 14:16 85:23 effects [1] 86:23 efforts [1] 36:15 either [3] 9:12 16:12 60:10 elect [1] 77:8 eligibility [1] 18:4 eliminate [1] 51:19 ELIZABETH [5] 1:18 2:3,9 3:7 83:4 emergencies [2] 7:4 44: 12 emergency [27] 7:8 21:11 22:13,24 26:25 29:8 30:18 31:17 32:25 35:22 37:25 39:1,3 44:14 46:19 47:2, 11 48:10 52:21 53:5 58:9, 9 65:7 81:22,22 82:6 86: 21 emphasize [1] 41:16 empower [2] 37:18 44:18 enacted [1] 16:9 enacting [1] 30:15 encompass [1] 36:19 encouraged [1] 38:21 end [3] 27:11 38:18 53:5 Endangered [1] 76:17 ended [1] 50:19 endorsed [1] 4:14 ends [4] 24:23 51:14 87:24, 25 enjoined [1] 18:2</p>	<p>enormous [1] 36:15 enough [4] 10:5 29:25 55: 24 78:3 ensure [11] 14:13 38:8,15 39:6 44:19,21 46:25 49:15 53:15 87:19 88:12 enter [2] 15:22 28:9 entered [1] 15:7 entire [1] 19:5 entirely [9] 4:5,19 13:13 14: 5 26:22 51:9 73:17 77:4 80:6 entitle [1] 63:10 entitlement [1] 18:17 enumerated [1] 36:3 environmental [4] 56:2,7 84:11,12 equal [5] 7:12,24 9:9,13,25 equitable [1] 16:18 err [1] 38:22 especially [1] 43:25 ESQ [1] 2:6 ESQUIRE [1] 1:21 establish [2] 4:16 55:23 ET [2] 1:3,6 ether [1] 12:13 even [11] 4:11 11:22 27:21 48:17,24 51:18 55:15 62: 22 67:7 77:22 88:18 event [1] 4:13 everybody [2] 36:10 69:18 everyone [4] 4:1 8:4 48:19 69:4 evidence [8] 28:24 29:2 58: 19 76:24,24 77:21 78:5,12 ex [1] 9:9 exact [3] 59:5 62:21 80:10 exactly [2] 46:17 52:23 example [6] 17:24 41:10 51:8 76:9,19 77:23 Except [3] 59:9 80:24,24 exception [2] 66:1 82:3 excess [1] 7:17 exclusive [1] 7:2 excuse [3] 21:9 54:7 73:20 executive [5] 4:9 14:24 29: 7 43:14 47:1 exempt [1] 12:2 exempted [1] 4:25 exemption [1] 5:4 exercise [1] 35:25 exigencies [1] 26:25 exist [1] 61:25 existed [1] 79:23 existing [1] 63:3 exists [2] 16:13 50:14 expand [3] 11:13 18:4 85: 12 expanded [1] 5:18 expansion [1] 84:3 expected [2] 24:15 42:12 expenditure [1] 68:21 explain [2] 4:10 86:15 explained [3] 16:6 26:7 40:</p>	<p>6 explains [1] 87:3 express [2] 30:1,2 expressed [1] 24:21 extend [1] 48:25 extending [1] 25:19 extensive [2] 40:13 64:24 extent [5] 22:24 23:25 32:1 52:19 63:2 extraordinary [1] 84:2 extreme [1] 88:6</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facing [2] 23:10,21 fact [10] 12:4 17:25 26:2 38: 21 43:12 52:10 57:14 63:2 67:18 81:2 factor [7] 23:13 25:8 28:8 43:23 44:1,6 46:1 factors [1] 23:17 facts [1] 72:15 fail [1] 88:18 fails [1] 5:3 fair [7] 34:8,15,17,22 35:14 67:14 71:23 fairness [13] 27:5 28:1,2, 20 32:21 34:10 36:23 41:7 42:2 52:6,8 66:25 67:12 falls [2] 77:12 79:2 far [4] 9:24 16:21 52:18 84: 24 Farm [2] 41:10,22 faulted [1] 42:9 faulting [1] 31:3 favor [1] 41:12 feature [1] 15:6 features [1] 21:19 February [1] 1:11 federal [2] 52:9 76:15 federally [1] 26:20 feels [1] 67:1 few [2] 76:4 77:15 FFEL [1] 64:25 field [1] 70:24 fighting [1] 65:4 figuring [1] 71:9 file [2] 6:24 61:3 filed [1] 85:15 Finally [3] 55:3 86:7 87:8 finances [1] 55:14 financial [12] 23:21 24:3, 20,21 49:17,20 50:11,17 86:22,25 87:13 88:7 financially [4] 27:13 38:9 49:16 50:2 find [2] 6:1 70:16 finding [2] 22:5 25:2 findings [1] 24:3 fine [2] 15:18 39:24 finished [1] 66:7 first [9] 8:12 30:7,23 54:6 59:7 71:13 76:5 77:10,16 fit [1] 87:2 fits [2] 43:11 59:18</p>	<p>five [1] 55:16 fix [1] 9:14 fixed [1] 22:22 flaw [1] 12:4 focus [6] 32:25 54:4 73:19 74:3 75:17 87:11 focused [3] 7:7 53:15 76:7 focuses [2] 50:6 86:21 focusing [2] 50:23 72:14 fold [1] 81:9 follow [7] 47:14,16 48:7,12, 13,19 54:25 follow-on [1] 19:7 following [1] 5:1 footnote [4] 74:5 76:9,18 79:7 forbearance [17] 21:1,2,4 22:2,5,10,11,15,18,22 23:4, 5 26:18 31:23 87:5,17,23 force [3] 23:14 48:20 49:1 forcefully [1] 23:1 forces [1] 23:18 forego [1] 82:7 foresaw [1] 29:25 foreseen [4] 29:20,21,24 30:8 Forest [4] 56:3,5,9 74:7 forestall [1] 47:2 forgive [9] 54:19,23 55:1 56:17 62:11 64:25 66:17, 18 68:12 forgiven [4] 62:17 68:5,9 85:6 forgiveness [28] 3:16,18 4: 9 5:21 8:9,11 9:24 10:6 11: 2 12:14 13:5 24:10 27:22 31:25 54:2,14,21 55:5 60: 12 61:6,13 62:14 68:3 74: 8,25 75:8 78:18 85:22 form [3] 9:3 30:11 87:18 formally [1] 48:25 former [2] 20:9,14 forth [1] 68:19 forward [2] 57:21 58:12 found [3] 22:17 23:18 56: 24 four [1] 27:11 friend [2] 83:9 86:18 friends [3] 15:14 22:3 87: 22 fulfill [1] 44:20 function [2] 25:25 50:5 functions [1] 51:2 fundamental [1] 12:3 fundamentally [1] 7:24 future [4] 24:23 29:9 47:20 48:21</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gambit [1] 14:21 gave [2] 37:12,22 gavel [1] 20:13 GEN [5] 1:18 2:3,9 3:7 83:4 General [84] 1:18 3:9 5:9 6:</p>
---	--	---	---	---

Official - Subject to Final Review

18,21 7:23 8:16 9:6 10:19, 22 11:21 12:23 13:6,9 15: 3,10,19 16:4 17:3,17,24 18: 8,11,25 20:2,4 21:24 24:11, 19 25:22 28:15 29:4 30:5, 22 31:1,8 32:23 33:6,9,25 34:13,16,22 35:3,6,20 36: 14,21,25 37:15 38:1,14 39: 4,9,15,19 40:3,21 41:1,14, 19,22 42:1,8,18 44:5 46:9 47:15,22 48:1,1,4,14,23 49: 23 50:1,20 52:23 53:19 61: 15 83:3,6 84:7 88:22 generalized [2] 14:23 64: 14 generally [2] 47:16 49:21 gesture [1] 4:3 gets [4] 21:10 53:15 60:24 79:21 getting [12] 8:8 10:5,15 18: 17 38:19 43:19 52:17 53: 11 59:14 62:13 67:24 76: 17 give [12] 5:23 15:13 37:13 44:2 53:7 55:18 67:6 71:1, 7 73:10 74:21 85:16 given [3] 44:3 49:2 52:11 gives [2] 72:8 73:6 giving [2] 33:18 36:6 gleaned [1] 50:22 global [1] 29:10 gnarly [1] 38:6 goal [1] 84:20 Goldberg [1] 85:24 GORSUCH [25] 15:3,11,12, 17 16:2,22 20:2 38:3,4,23 39:7,14,17,20 40:19,22,24 41:3,17,21,24 42:3,16,22 51:6 Gorsuch's [1] 47:5 got [3] 36:11 55:14,17 gotten [1] 81:3 government [8] 16:24 27: 16 33:3 47:13 52:19 54:12 64:3,23 government's [2] 28:5 64: 22 graduate [1] 27:23 grant [3] 4:6 5:12 86:5 granted [2] 21:4 63:10 grants [1] 28:13 graphs [1] 24:7 greater [1] 3:15 grievance [2] 14:23 64:14 groceries [1] 50:4 ground [1] 72:15 grounds [2] 32:14 85:12 group [1] 57:3 guarantee [1] 10:14 guess [9] 17:9 21:7 34:20 39:21 52:7 57:17 76:4 78: 23 80:15 guise [1] 14:19	H	21 46:5 69:7 identify [3] 23:13 78:4 83: 18 Ill [5] 6:6 14:25 19:11 84:3 86:13 illogical [1] 61:1 imagine [3] 51:7 58:2 84: 11 impacted [1] 53:4 impacts [4] 33:15,20 87:14 88:7 implement [1] 45:1 implemented [1] 37:11 implementing [1] 29:18 implied [1] 56:20 important [2] 13:17 24:24 imposing [2] 45:21 48:7 impossible [1] 23:11 improper [1] 54:11 include [5] 5:18 11:2 63:3 72:6 85:13 included [2] 11:6 66:9 income [2] 24:12,13 incumbent [1] 86:14 indeed [1] 15:10 indefinitely [1] 87:24 independent [1] 7:4 indication [1] 49:13 individual [10] 16:5 27:3 41:20 48:20 67:6 75:21,22 76:10,12,16 individual's [1] 70:20 individuals [12] 16:24 36:4, 5 38:8,19 39:10 49:15 55: 8,16 58:22 68:2 69:2 Inflation [1] 51:13 influences [1] 23:7 infusions [1] 52:11 inherent [1] 36:17 inherently [2] 51:25 52:25 injunction [2] 17:14 47:11 injunctions [1] 17:18 injured [2] 4:15 9:1 injuries [5] 62:23 66:15 84: 4 85:2,2 injuring [2] 75:20,22 injury [21] 3:14 5:15 6:4,6 7:25 8:2,8,12 9:8,13 10:25 11:3,17 12:4 57:8 59:20 63:19 67:18 83:14 84:3 86: 13 inquiry [1] 54:16 insecurity [2] 24:20,22 insofar [2] 38:16 51:21 instances [1] 5:7 instead [18] 5:22 8:4 12:15 14:1,13 16:11 19:12 22:9 44:7,17 64:17 71:9,11 83: 19,21 85:18,25 86:8 intended [1] 53:14 intent [1] 29:18 intention [1] 58:7 interacts [1] 21:18 interest [10] 60:1 63:23 67:	8 70:16,21,23 84:7 85:6,7, 21 interested [2] 70:14 84:13 interesting [1] 15:5 interests [11] 25:13 32:12 35:16,17 42:10,12 44:24 64:9 67:21 68:2 71:24 interfere [1] 16:23 interpret [2] 43:4 44:6 interpretation [3] 26:1 29: 17 46:11 interpreted [1] 46:22 interpreting [1] 43:5 invalid [1] 39:12 invalidating [1] 4:17 invalidation [1] 57:19 invoked [1] 10:17 involved [3] 68:20 69:5 84: 11 involvement [2] 55:6 69: 11 irrelevant [1] 42:17 irresponsible [1] 45:10 isn't [14] 4:15 7:10,21 12: 16 28:8 40:14 54:15 57:9 62:3 67:14 70:3,24 71:4 84:17 isolate [2] 21:23 23:13 isolation [1] 43:6 issue [16] 13:13 16:16 17: 14 22:4 36:23,23 45:18,19, 24 52:8 53:25 74:4 76:8 81:1 83:17,21 issued [1] 12:1 issues [6] 5:1 19:4 41:15 48:15 54:4 87:9 it'll [2] 11:2 83:24 itself [3] 22:5 31:16,24 IV [3] 30:15 44:10 69:3	8,17,21,24 42:3,16,22,24, 24 43:1,2,16 45:17 47:4,5, 8,19,23 48:3,9,17 49:4,5,5, 7,10,25 50:9 51:6 52:2,3,3, 5 53:17,18,23 55:21 56:18, 22 57:7,17 59:9,14 60:14, 18,22 61:14,16,18,20 62:3 63:1 64:1 65:3 66:5,20,24 67:10,23 68:10 69:13 70:1, 8,13 71:14,18 72:2,10,17, 22 73:1,9,22,25 74:9,10,12, 13,22 75:9,11,24 76:1,23 77:7,19,21 78:3,20,22 79:5, 15,18,20 80:3 81:1,11,21 82: 2,9,13,16,17,18,19,20,21, 22 83:1,7 88:21 Justice's [2] 43:2 66:21 justification [1] 40:9 justified [1] 50:24 justify [2] 26:3 40:12	K	KAGAN [22] 19:17,25 20:5, 8,14,18 37:1,2,21 65:3 72: 2,10,17,22 73:1,9,22,25 74: 10,13,22 81:21 Kagan's [2] 76:1 79:20 KAVANAUGH [29] 19:16, 20,23 20:3,6,10,16 42:25 43:1 45:17 47:4,8,19,23 48:3,9,17 49:4 71:14,18 74:9,12 75:9,11,24 81:11 82:2,18,19 Keep [1] 75:11 kids [1] 27:6 kind [22] 4:14 11:16 14:21 21:3 23:14 25:8 26:12,23 31:22 35:10,11 37:22 43: 14 46:12,25 58:13 67:2 70: 14 83:22 84:1,23 87:2 kinds [4] 25:24 28:17,19 85:1	L	label [1] 65:15 labels [1] 65:23 lack [3] 3:24 14:10,18 lacking [1] 10:10 lacks [1] 9:20 laid [1] 15:5 language [9] 15:24 16:5,6 30:19 38:6 44:17 49:11 50: 10,16 large [1] 12:14 last [4] 19:17 25:1 47:4 66: 8 Laughter [7] 15:16 19:22 47:7,21,25 49:9 82:24 law [7] 9:25 14:24 36:18,24 55:17 69:20 70:14 lawn [9] 27:9,19 29:1,11 37: 5,14 66:21,21,22 laws [1] 42:14 lawsuit [2] 18:22 62:5
--	----------	--	---	--	----------	--	----------	--

Official - Subject to Final Review

<p>least ^[4] 7:22 24:2 78:5 86:11</p> <p>leave ^[2] 28:3 33:1</p> <p>leaving ^[1] 30:17</p> <p>left ^[3] 39:6 44:21 70:24</p> <p>legal ^[4] 58:1 78:21 80:7 87:9</p> <p>legally ^[1] 33:24</p> <p>legislate ^[1] 29:6</p> <p>legislation ^[1] 46:7</p> <p>less ^[3] 7:15 35:18 88:5</p> <p>level ^[7] 7:14 8:2,2 26:4 67:2,2,3</p> <p>levels ^[3] 24:19 45:2 51:13</p> <p>liability ^[1] 29:23</p> <p>life ^[3] 22:16 27:14 51:11</p> <p>lifeline ^[1] 88:12</p> <p>lifetime ^[1] 27:24</p> <p>lifts ^[1] 22:18</p> <p>light ^[1] 5:3</p> <p>likelihood ^[2] 48:11 51:15</p> <p>likely ^[1] 21:5</p> <p>likewise ^[1] 48:24</p> <p>limit ^[3] 63:11,12 70:10</p> <p>limitations ^[1] 50:21</p> <p>limited ^[1] 19:12</p> <p>limiting ^[2] 69:14 84:5</p> <p>limits ^[2] 66:6 84:9</p> <p>line ^[1] 75:15</p> <p>line-drawing ^[1] 40:12</p> <p>lines ^[5] 5:17 26:4,15 32:10 64:19</p> <p>litigation ^[1] 77:22</p> <p>little ^[7] 10:23 19:1 21:14 22:4 28:11 44:11 63:4</p> <p>living ^[1] 76:10</p> <p>loan ^[39] 3:16,18 4:9 5:21 8:8,11 9:23 10:5 11:1 12:14 13:4 21:9 26:20 27:8,10,18,20,22 31:25 33:6,16 37:3,5,12,17 45:18 55:9 62:13 63:3,24 64:7 68:13 69:3,24 70:5 74:24 85:22 87:21 88:15</p> <p>loans ^[16] 23:24 24:9,16 35:1 37:13,20 43:17,18 45:23 50:8 51:2,16 64:25 66:7 68:12 88:3</p> <p>long ^[3] 21:4,9 81:18</p> <p>longer ^[2] 8:3 50:14</p> <p>look ^[32] 5:25 6:11 13:12 16:8,12 28:10 29:8 32:7 40:8,16 57:14 59:17 64:15 70:9,19 72:14,15 73:19,21,21 74:8 75:4,13,14,14,18,21 76:8 77:16 79:6 80:19,25</p> <p>looked ^[1] 10:12</p> <p>looking ^[3] 8:19 24:7 50:24</p> <p>looks ^[1] 63:17</p> <p>lose ^[1] 3:22</p> <p>losers ^[2] 43:12,13</p> <p>loss ^[1] 60:4</p> <p>lot ^[2] 25:15 27:23</p>	<p>lower ^[1] 8:20</p> <p>Lujan ^[8] 62:18,18 74:4,5 76:6,9 79:7 83:11</p> <hr/> <p style="text-align: center;">M</p> <p>made ^[9] 12:18 24:2 35:21 37:6 53:7 65:10 79:25 85:4 87:1</p> <p>maintain ^[1] 14:10</p> <p>Major ^[2] 28:10 45:18</p> <p>majorities ^[1] 24:21</p> <p>mandate ^[1] 32:24</p> <p>many ^[6] 20:9,14 31:19 39:22 69:15,15</p> <p>massive ^[5] 45:6,22 47:3 52:11 61:6</p> <p>matter ^[10] 1:13 9:12 31:9 32:6 46:8,11 47:16 51:2 76:20 84:8</p> <p>matters ^[1] 76:21</p> <p>mean ^[21] 3:19 8:19 16:22 25:8,18 29:22 37:2 39:12 44:11 50:2,16 58:2 59:15 63:13,16 69:14,22 73:9 79:21 81:18 82:14</p> <p>meaning ^[4] 32:15 46:20 52:1 57:24</p> <p>meaningful ^[1] 55:10</p> <p>means ^[2] 31:7 60:8</p> <p>meant ^[2] 16:9 44:18</p> <p>mechanism ^[3] 15:2 66:12,16</p> <p>mechanisms ^[1] 85:8</p> <p>meet ^[3] 24:23 51:14 79:4</p> <p>member ^[1] 19:18</p> <p>members ^[1] 20:14</p> <p>memoranda ^[1] 23:2</p> <p>memorandum ^[1] 20:25</p> <p>men ^[1] 7:13</p> <p>mentioned ^[4] 24:25 30:14 45:3 76:6</p> <p>merely ^[1] 6:9</p> <p>merits ^[6] 4:7,21 11:23 20:19 55:3 88:19</p> <p>MICHAEL ^[3] 1:21 2:6 53:21</p> <p>midst ^[1] 58:6</p> <p>might ^[14] 4:4,18 6:11 26:13 28:11 33:20 44:15 47:19 50:2,18 53:5 65:9 68:21 70:15</p> <p>million ^[3] 29:23 88:9,10</p> <p>millions ^[8] 3:23 17:4 22:18,19 34:24 63:20 87:12,25</p> <p>mind ^[4] 56:10,16 79:12,18</p> <p>mine ^[1] 28:2</p> <p>minimum ^[1] 81:5</p> <p>minor ^[1] 44:12</p> <p>misheard ^[1] 10:6</p> <p>mismatch ^[1] 3:14</p> <p>misreading ^[1] 24:7</p> <p>miss ^[1] 61:11</p> <p>Missouri ^[1] 39:23</p>	<p>mitigate ^[1] 86:24</p> <p>mixture ^[1] 21:15</p> <p>modification ^[3] 50:13 65:16,23</p> <p>modifications ^[5] 5:2 12:1 65:14,20 66:2</p> <p>modified ^[1] 50:19</p> <p>modify ^[7] 29:21 31:6 38:7 44:10 49:12,13,15</p> <p>moment ^[1] 87:10</p> <p>money ^[7] 18:18 28:5,6,7 52:11,17 67:6</p> <p>mortgage ^[1] 50:3</p> <p>most ^[3] 55:8 81:19 85:25</p> <p>move ^[3] 57:21 58:12 78:6</p> <p>Ms ^[2] 62:12 66:17</p> <p>much ^[6] 51:15 55:17 62:4 71:11 83:2 87:18</p> <p>much-needed ^[1] 52:20</p> <p>multiple ^[1] 23:17</p> <p>must ^[2] 34:3 55:10</p> <p>mutually ^[1] 7:1</p> <p>MYRA ^[1] 1:6</p> <hr/> <p style="text-align: center;">N</p> <p>narrower ^[1] 44:3</p> <p>nation ^[5] 19:5,13 48:8,16 49:3</p> <p>national ^[11] 7:3,8 22:13 25:12 30:18 31:17 32:25 35:22 46:19 53:4 86:21</p> <p>natural ^[1] 41:15</p> <p>nature ^[7] 9:14 58:19 71:8 72:5 77:16 78:9 81:1</p> <p>Nebraska ^[1] 54:1</p> <p>necessarily ^[6] 13:4 25:4 46:16 57:11,21,23</p> <p>necessary ^[7] 19:7 23:4 25:1 26:5,24 40:14 44:20</p> <p>necessitate ^[1] 44:15</p> <p>need ^[12] 3:23 13:1 20:4,13 25:19 29:5 39:11 42:20 53:16 54:17 58:25 76:25</p> <p>needed ^[4] 22:7 38:20 40:18 87:18</p> <p>needs ^[2] 23:12 44:8</p> <p>negative ^[1] 88:13</p> <p>negotiated ^[18] 11:19 54:8 55:7 56:14 57:16 64:18 65:6,17,19 68:7,24,24 69:9 72:7 73:7 80:17 81:16 82:7</p> <p>Neither ^[1] 60:25</p> <p>never ^[7] 4:10,14 54:24 59:4 61:12 80:8 81:3</p> <p>new ^[5] 6:13 59:21,23 74:18,25</p> <p>newly ^[1] 85:1</p> <p>next ^[3] 39:22 76:10 84:20</p> <p>Ninety ^[1] 88:4</p> <p>nobody ^[2] 60:9 74:24</p> <p>Nobody's ^[1] 27:18</p> <p>non-COVID-related ^[1] 21:16</p> <p>non-speculative ^[1] 63:15</p>	<p>non-student-loan ^[1] 42:10</p> <p>none ^[2] 76:7,7</p> <p>nonprofit ^[1] 52:16</p> <p>nothing ^[10] 3:21 6:15 16:19 18:8 55:14 59:10 60:23,24 61:4 74:14</p> <p>notice ^[29] 12:2,16 25:10 43:25 54:8 55:7 56:6,15 57:16 59:24 60:2,5 63:8 64:18 65:5,17 67:24 68:7 70:16 72:6,24 73:3,7 74:1 80:18 81:14,17,23 82:7</p> <p>notice-and-comment ^[2] 55:22 68:17</p> <p>notion ^[1] 52:18</p> <p>novel ^[1] 83:10</p> <p>nullify ^[1] 13:2</p> <p>numbers ^[2] 26:7 45:7</p> <hr/> <p style="text-align: center;">O</p> <p>obligated ^[1] 33:24</p> <p>obligation ^[2] 21:22 48:7</p> <p>obtain ^[1] 17:1</p> <p>obviously ^[8] 14:10 19:3 33:17 45:14,20,23 49:1,24</p> <p>occurs ^[1] 9:13</p> <p>oceans ^[1] 6:2</p> <p>off/worse ^[1] 39:16</p> <p>offered ^[1] 31:23</p> <p>often ^[2] 23:17 49:24</p> <p>Okay ^[8] 10:21 20:1,18 29:9 39:23 70:8 71:9 82:23</p> <p>once ^[6] 22:18 57:15 59:7 72:3 74:16 87:24</p> <p>once-in-a-century ^[1] 31:21</p> <p>one ^[27] 3:20 8:12 16:13,25 23:13 24:24 27:7 30:14 35:14 40:15 42:11 43:6 49:11 54:13 57:1 61:7,8 63:5 65:4 69:23,24 73:14 75:15,25 77:4 83:23 86:4</p> <p>ones ^[1] 76:5</p> <p>ongoing ^[2] 50:18 51:20</p> <p>only ^[15] 9:16 13:23 24:16,17 36:3 37:18 44:11,12 48:18 54:7,17 55:15 58:5 60:7 61:8</p> <p>open ^[1] 6:5</p> <p>operate ^[4] 16:15 24:2 51:18 77:8</p> <p>operating ^[2] 17:15 35:12</p> <p>opportunity ^[8] 11:1 14:17 15:20 55:19 60:2,9 61:12 62:10</p> <p>options ^[1] 25:15</p> <p>oral ^[5] 1:13 2:2,5 3:7 53:21</p> <p>order ^[4] 18:22 30:7,23 51:9</p> <p>ordinary ^[1] 14:25</p> <p>organization ^[2] 56:2,7</p> <p>organizations ^[1] 52:12</p>	<p>originally ^[1] 17:16</p> <p>other ^[20] 6:12 10:11 18:12 21:18 27:8 43:8 44:23 45:1,16 46:2 48:20 57:25 63:5 67:24 68:14 75:15 77:2,9,14 81:12</p> <p>others ^[3] 41:13 53:10 78:16</p> <p>otherwise ^[6] 28:12 33:19,20 39:11 70:11 79:23</p> <p>ought ^[2] 69:16,16</p> <p>out ^[12] 6:11 15:5 19:15 27:6,10 38:18,20 45:22 67:24 69:15 70:24 71:9</p> <p>outside ^[5] 33:15,20 36:19 37:17 53:10</p> <p>outweighed ^[1] 35:16</p> <p>over ^[6] 22:16 27:14,24 37:12,13 87:15</p> <p>over-breadth ^[1] 40:7</p> <p>over-inclusion ^[1] 38:22</p> <p>overbreadth ^[1] 25:24</p> <p>overlap ^[1] 77:3</p> <p>overwhelming ^[1] 24:20</p> <p>own ^[6] 6:8 11:9 12:5 44:9 52:15 69:11</p> <hr/> <p style="text-align: center;">P</p> <p>p.m ^[3] 1:15 3:2 88:23</p> <p>PAGE ^[3] 2:2 64:21,23</p> <p>paid ^[2] 43:17,17</p> <p>pandemic ^[23] 22:17,24 24:5 29:10,19 31:15,22 33:2 35:10 36:11 45:3 46:6,7,19 51:9 58:7,22 77:20 78:11,15 80:22 87:7,14</p> <p>pandemic-related ^[1] 86:20</p> <p>paralyzed ^[1] 53:14</p> <p>part ^[3] 13:10 21:22 33:10</p> <p>participating ^[1] 9:2</p> <p>particular ^[13] 8:24 9:4 15:6 18:17 25:15 26:2,25 40:12 53:11 73:12 79:19 83:21 84:4</p> <p>particularized ^[5] 63:15,18 64:2 67:22 71:25</p> <p>particularly ^[1] 25:9</p> <p>Parties ^[3] 25 48:18,25 54:22 59:2</p> <p>party-specific ^[4] 16:21 17:20 19:9 47:9</p> <p>pass ^[2] 37:4 78:18</p> <p>passed ^[2] 37:3 78:16</p> <p>past ^[2] 26:20 87:15</p> <p>path ^[2] 78:4,23</p> <p>patterns ^[1] 26:3</p> <p>pay ^[8] 22:20 24:16 27:17,20 35:1 43:18 45:23 51:15</p> <p>paying ^[5] 24:9 50:3,4,5 66:7</p> <p>payments ^[3] 21:6,9 51:4</p> <p>pensions ^[1] 7:14</p> <p>people ^[28] 17:15 18:12,24</p>
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Official - Subject to Final Review

<p>21:3 25:18 28:6 34:10 35:14 36:11,19,19 38:25 39:23 40:17 43:15,16 45:21 52:15,20 57:25 58:24 69:15 70:10,11 71:20 80:21 88:9,10</p> <p>percent ^[11] 24:14 26:10, 11 39:24 51:10,23,24 58:20 77:17 80:23 88:4</p> <p>perfect ^[1] 87:2</p> <p>period ^[2] 21:10 63:9</p> <p>periods ^[1] 21:4</p> <p>permissible ^[2] 6:16 15:25</p> <p>person ^[11] 27:12,14,17,18 28:25 60:25 63:7 66:21,25 70:24 71:3</p> <p>persons ^[4] 38:12 39:2,20 41:12</p> <p>persuaded ^[1] 67:10</p> <p>perverse ^[1] 44:13</p> <p>petition ^[2] 6:24 85:16</p> <p>Petitioners ^[6] 1:4,20 2:4, 10 3:8 83:5</p> <p>pick ^[2] 43:1 79:2</p> <p>place ^[9] 8:12 23:11 32:7 38:12,25 39:2 57:1 59:7 87:6</p> <p>placed ^[2] 38:8 49:16</p> <p>plain ^[1] 32:15</p> <p>plaintiff ^[11] 4:15 15:1 76:25 79:10,24 83:14,19 84:13,16,18,22</p> <p>plaintiffs ^[3] 16:3 84:11 85:1</p> <p>plan ^[17] 3:16 4:23 5:17 11:7,13 14:3 17:14,22 18:18 25:4 39:12 40:22 59:21,23 85:10,12 88:5</p> <p>plausibly ^[1] 6:3</p> <p>play ^[1] 23:18</p> <p>please ^[2] 3:10 53:24</p> <p>plus ^[2] 81:1,2</p> <p>point ^[21] 5:15 7:11 22:11 26:17 32:4 40:7 41:5 52:6 55:7 56:1 58:16 59:1 64:21 68:24 72:18 74:11,20 75:16 78:9,11 79:20</p> <p>policy ^[11] 19:14 22:18,22 26:18 31:23 45:19,24 46:5 87:5,17,23</p> <p>political ^[1] 46:18</p> <p>pollution ^[5] 84:13,15,17, 19,21</p> <p>portfolio ^[1] 37:19</p> <p>pose ^[1] 39:18</p> <p>posed ^[4] 32:22 34:11 41:8 67:13</p> <p>position ^[18] 17:10,12 33:3 38:5,9,12,25 39:2,21 49:16, 20 50:6 53:6 59:16 62:4 67:17 86:15 88:1</p> <p>possibility ^[11] 30:8 54:18 56:8,16 62:16 70:25 72:23 74:20,23 75:5 81:5</p>	<p>possible ^[3] 5:12 33:15 69:12</p> <p>possibly ^[2] 53:13 84:25</p> <p>posture ^[1] 8:7</p> <p>power ^[5] 19:14 59:3 67:6 72:9 76:15</p> <p>powerful ^[1] 22:15</p> <p>powers ^[2] 37:11 75:17</p> <p>practical ^[1] 47:16</p> <p>practice ^[1] 48:2</p> <p>pre-pandemic ^[1] 51:21</p> <p>preauthorization ^[2] 29:7 47:2</p> <p>precedent ^[2] 3:12 83:19</p> <p>precedential ^[1] 49:1</p> <p>predated ^[1] 16:18</p> <p>prefer ^[1] 81:19</p> <p>PRELOGAR ^[80] 1:18 2:3, 9 3:7,9 5:9 6:18,21 7:23 8:16 9:6 10:19,22 11:21 12:23 13:6,9 15:10,19 16:4 17:3,17,24 18:8,11,25 20:4 21:24 24:11 25:22 28:15 29:4 30:5,22 31:1,8 32:23 33:6,9,25 34:13,16,22 35:3, 6,20 36:14,21,25 37:15 38:1,14 39:4,9,15,19 40:3,21 41:1,14,19,22 42:1,8,18 44:5 46:9 47:15,22 48:1,4,14, 23 49:23 50:1,20 52:23 83:3,4,6</p> <p>presented ^[1] 17:11</p> <p>pressed ^[1] 84:23</p> <p>pressing ^[1] 13:18</p> <p>presumably ^[2] 32:20 34:7</p> <p>presuppose ^[1] 50:18</p> <p>prevail ^[2] 9:17 54:13</p> <p>prevailed ^[1] 13:24</p> <p>prevailing ^[1] 14:6</p> <p>prevent ^[2] 17:14 45:9</p> <p>previously ^[1] 30:13</p> <p>principle ^[5] 3:13 69:14 70:9 80:5 84:6</p> <p>prior ^[4] 15:8 35:25 39:1,3</p> <p>priority ^[3] 54:21 57:22 84:20</p> <p>probability ^[1] 51:3</p> <p>probably ^[3] 31:4 81:19 82:5</p> <p>problem ^[8] 4:2 11:8 30:16 31:16 57:9 59:10 63:16 73:14</p> <p>problematic ^[1] 10:9</p> <p>procedural ^[31] 5:3,7,13 6:3 10:8,25 11:8,17,24 12:9, 10,12,17 14:1,15,19 15:2 18:1 55:13 62:19,24 65:8 73:10,11 76:12 79:8,13,23 83:14 84:4 85:2</p> <p>procedurally ^[1] 54:10</p> <p>procedure ^[2] 12:19 60:6</p> <p>procedures ^[12] 4:24 5:1 10:3,9,14,15 11:19 54:25 56:18 58:17 61:25 73:14</p>	<p>proceeded ^[2] 77:1 86:9</p> <p>proceedings ^[1] 25:11</p> <p>process ^[16] 18:2 55:11 56:9,14 59:6,13 62:9,16,22 68:6 69:3,5 76:12 81:17,17,18</p> <p>processes ^[1] 16:24</p> <p>produce ^[1] 21:19</p> <p>professional ^[1] 29:12</p> <p>profound ^[1] 86:22</p> <p>program ^[60] 9:2,2 13:5,14 16:25 18:5 24:10 29:13 31:12,14,25 32:2 33:7,16,21 37:17 45:14 52:9 53:9,11 54:2,8,10 55:2,5 57:14 58:20,20,23 59:7,17,18 60:8, 12 61:7,22 62:1,7,8 64:16 68:4 69:10 72:4,18,20,23 73:2,12,15,16 74:17 75:8 79:19 80:7,11,20 81:1,6 86:19,20</p> <p>programs ^[4] 36:13 45:1, 16 69:15</p> <p>Project ^[2] 56:4,11</p> <p>prompt ^[2] 4:18 54:19</p> <p>proof ^[1] 59:22</p> <p>proper ^[8] 54:16,25 56:9, 13 62:9,16 68:6 76:12</p> <p>properly ^[1] 36:5</p> <p>proposed ^[1] 46:6</p> <p>protection ^[5] 7:12,24 9:9, 13,25</p> <p>protects ^[1] 36:24</p> <p>provide ^[22] 4:11 5:18 9:18 11:14 18:2 19:9 26:13 29:6 30:12 33:4,22 34:1 35:24 38:17 45:13 53:13 54:14 57:25 58:8 83:25 85:19 87:4</p> <p>provided ^[4] 22:15 45:16 58:15,17</p> <p>provides ^[1] 3:16</p> <p>providing ^[4] 4:8 9:15 28:18 52:19</p> <p>provision ^[4] 16:10,13 44:10,11</p> <p>provisions ^[4] 6:24 16:15 30:14 55:23</p> <p>public ^[7] 45:19,23 46:5 55:6 65:2 69:11 71:12</p> <p>purpose ^[6] 38:15 39:5 44:20 64:15 70:19 71:8</p> <p>purposes ^[2] 71:14,19</p> <p>pursuant ^[1] 77:22</p> <p>pursue ^[5] 14:18 17:25 77:13,24 80:7</p> <p>pursued ^[1] 46:6</p> <p>push ^[1] 23:1</p> <p>put ^[5] 19:14 46:15 71:23 81:4 87:6</p> <p>putting ^[1] 46:13</p>	<p>19:5 20:7 23:6 28:23 30:7, 23 31:4 32:21 34:9,10,21 35:19,21 39:15,18,22 41:7 45:18 47:4,6 54:20 63:6 64:12 76:1 77:10</p> <p>questions ^[8] 5:5 22:1 25:21,24 28:10 31:12 43:3 51:6</p> <p>quickly ^[3] 47:1 52:6 82:14</p> <p>quite ^[1] 57:15</p>	<p>reimbursement ^[1] 66:10</p> <p>reiterated ^[1] 34:11</p> <p>reject ^[2] 4:22 88:19</p> <p>rejected ^[2] 13:25 59:16</p> <p>related ^[1] 78:15</p> <p>relates ^[1] 51:5</p> <p>relating ^[1] 73:14</p> <p>relation ^[6] 49:17,18 50:10, 17 51:21 70:22</p> <p>relationship ^[5] 49:22 50:12,13,18 51:20</p> <p>relatively ^[1] 43:13</p> <p>relaxed ^[1] 79:22</p> <p>relevant ^[3] 42:4,12 48:5</p> <p>relied ^[1] 15:24</p> <p>relief ^[79] 3:15,20,24 4:6,11 5:12,18,24 6:16,23,25 8:9 9:19 11:15 14:14 16:21 17:1,6,20 19:10 22:8 23:3 25:3,19,20 26:4,24 30:12 31:22 32:11 33:12,14,22 34:1, 14,23 35:11,15,24 36:6,15 38:17,19 39:11 40:13,18 42:21 43:19 44:15 45:1 47:9 48:25 51:17 53:8,16 54:18 57:19,25 58:8,15,25 61:24 68:15 71:1,7,21 75:3 76:17 77:24 78:14 83:20 85:17,19 86:5 87:4,16,18 88:10,16</p> <p>rely ^[5] 7:22 30:4 57:8 63:1, 2</p> <p>relying ^[3] 29:16,16 77:11</p> <p>remedial ^[2] 16:10 19:11</p> <p>remedied ^[1] 63:7</p> <p>remedies ^[1] 16:18</p> <p>remedy ^[4] 9:10,12 15:25 16:20</p> <p>remotely ^[2] 58:21 77:18</p> <p>removal ^[1] 75:20</p> <p>rent ^[1] 50:4</p> <p>repaid ^[1] 64:8</p> <p>repay ^[3] 50:7 53:6 88:2</p> <p>repaying ^[1] 23:24</p> <p>repayment ^[3] 37:3,5,12</p> <p>repeated ^[1] 31:4</p> <p>repeating ^[1] 31:3</p> <p>reply ^[2] 61:10 64:22</p> <p>representation ^[2] 23:9 25:12</p> <p>representing ^[1] 64:7</p> <p>required ^[4] 34:1 60:6 65:21,24</p> <p>requirements ^[4] 59:18 65:8,19 69:6</p> <p>requires ^[2] 35:11 55:17</p> <p>requisite ^[1] 24:3</p> <p>resist ^[1] 47:5</p> <p>resolutions ^[1] 78:16</p> <p>resolve ^[3] 14:1 19:4 48:15</p> <p>resources ^[1] 36:18</p> <p>respect ^[12] 22:20 37:19, 24 38:6 41:7 44:22 50:7 51:1 52:8 53:6 85:3 88:2</p>
R				
<p>raise ^[5] 8:20 13:21 14:17 41:20 63:11</p> <p>raised ^[1] 5:13</p> <p>raises ^[1] 25:20</p> <p>raising ^[1] 14:15</p> <p>rather ^[1] 25:14</p> <p>rationale ^[1] 21:11</p> <p>reach ^[1] 6:11</p> <p>reaches ^[1] 4:21</p> <p>reaction ^[4] 18:15 28:15 30:17 31:15</p> <p>read ^[2] 38:23 44:9</p> <p>reading ^[3] 44:2,3 50:21</p> <p>real ^[2] 21:15 23:22</p> <p>really ^[13] 5:21 6:1 10:15 20:25 22:2 31:16 45:11 46:10 65:4 69:8 76:20 85:13, 20</p> <p>reason ^[8] 10:8 13:19 14:20 57:2 58:23 80:15,16 85:13</p> <p>reasonable ^[1] 32:10</p> <p>reasonably ^[1] 23:19</p> <p>reasons ^[1] 34:4</p> <p>REBUTTAL ^[2] 2:8 83:4</p> <p>recall ^[1] 19:17</p> <p>receive ^[2] 39:10 88:11</p> <p>received ^[1] 55:15</p> <p>receives ^[1] 25:3</p> <p>recognize ^[7] 13:17 24:25 31:1,14 48:14 65:25 86:13</p> <p>recognizing ^[1] 26:23</p> <p>reconsider ^[3] 75:6,6 83:16</p> <p>reconsidered ^[1] 5:11</p> <p>record ^[5] 34:5 45:7 51:13 65:2 71:12</p> <p>redress ^[2] 8:12 14:12</p> <p>redressability ^[4] 11:16 75:4 79:21 80:5</p> <p>redressable ^[4] 5:15 62:23 66:15 67:9</p> <p>redressed ^[2] 8:3 12:5</p> <p>referenced ^[1] 24:19</p> <p>referred ^[1] 83:11</p> <p>reflected ^[1] 24:14</p> <p>regard ^[2] 24:10 45:19</p> <p>regarding ^[1] 22:10</p> <p>regulate ^[2] 6:12 84:14</p> <p>regulating ^[1] 84:19</p> <p>regulations ^[1] 55:9</p> <p>regulatory ^[1] 55:10</p>	<p>qualified ^[1] 36:12</p> <p>question ^[27] 17:11 18:12</p>	Q		

Official - Subject to Final Review

<p>respond [2] 39:13 86:7</p> <p>Respondents [14] 1:7,22 2:7 3:24 4:7 20:21 53:22 54:13,17 55:9,12,18 68:4 80:24</p> <p>Respondents' [4] 3:13 4:22 5:3 55:1</p> <p>response [3] 31:21 43:8 44:12</p> <p>responses [3] 58:18 76:5 77:15</p> <p>responsive [1] 31:13</p> <p>restore [1] 51:21</p> <p>restrictions [1] 75:20</p> <p>result [4] 3:25 24:5 45:9 52:10</p> <p>reverse [1] 32:13</p> <p>review [5] 16:13,14 32:8 40:5 41:6</p> <p>revisit [1] 15:1</p> <p>Ridge [3] 56:4,11 57:5</p> <p>rights [10] 6:8 11:24 12:9,10 55:13 62:19,25 79:8,13,23</p> <p>risk [3] 23:22 45:6 51:22</p> <p>road [4] 13:20 46:14,20 83:25</p> <p>ROBERTS [33] 3:3 7:9 8:14,18 20:12 24:6 25:7 27:1 28:21 29:15 30:20,24 31:2 32:16 36:7 37:1 38:2 42:24 49:5 52:3 53:18 63:1 64:1 68:10 69:13 70:1,8,13 82:9,13,20 83:1 88:21</p> <p>room [1] 44:23</p> <p>root [1] 22:7</p> <p>route [4] 4:14 5:20 85:25 86:1</p> <p>Rube [1] 85:24</p> <p>rule [4] 49:2 60:1 68:24 78:9</p> <p>ruled [1] 47:12</p> <p>rulemaking [20] 4:24 6:25 54:8 55:7 56:15 57:16 64:18 65:6,17,19 68:7,18,25 69:9 72:7 73:7 80:18 81:16 82:8 85:16</p> <p>ruling [2] 6:9 14:8</p> <p>run [1] 3:12</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>same [21] 8:5 14:17 18:15 24:18 28:19 31:6 38:25 48:22 52:7,22 53:25 56:12 57:11,24 59:5 60:21 75:23 77:13,24 79:17 80:4</p> <p>saw [1] 7:11</p> <p>saying [7] 5:16 10:10,25 31:5 37:10 78:25 79:9</p> <p>says [7] 27:8 61:7 65:5,7,18 74:1,23</p> <p>scenario [2] 10:13 84:12</p> <p>Scholars [2] 78:18,21</p> <p>school [1] 27:7</p>	<p>scope [7] 31:12 32:2,10 49:13 64:15 70:19 71:8</p> <p>Second [2] 54:12 78:11</p> <p>secret [3] 64:20 69:11 71:12</p> <p>Secretaries [2] 26:21 31:22</p> <p>Secretary [89] 4:3,10,23,25 5:10,16,23 9:20 10:13 11:10 13:3,11 18:1 21:22 22:5,9,17 23:12,18 24:2,17 25:2,14 26:3,6,6 28:19 30:1 32:9,19,23 33:12,22,23 34:6,6 35:9,24 36:5 37:10,16,19,23 38:12,22,24 39:1 40:1 41:11 42:9 43:24 44:18 45:4 54:14,19,23,24 55:4,18 56:13 58:4 59:4 60:11 61:5,23 62:10 65:23 66:17 67:5,5 68:11,16 70:15 71:1,6 72:4,9,11 74:17 78:17,23,25 85:15,19 86:8,16,24 87:3 88:6</p> <p>Secretary's [9] 11:4 14:3 23:2 40:8 42:6 44:16 49:14 54:7 86:5</p> <p>Section [3] 16:7,11 80:12</p> <p>see [10] 28:24 29:2 31:21 44:9 53:12 58:11 75:18 82:23 84:8 87:19</p> <p>seek [5] 3:15,24 6:16 16:25 54:18</p> <p>seeking [2] 8:10 61:25</p> <p>seem [2] 57:18 69:12</p> <p>seems [4] 21:15 27:25 50:9 61:20</p> <p>seen [1] 80:8</p> <p>segregate [2] 26:9 40:17</p> <p>Senator [1] 78:15</p> <p>sense [1] 14:9</p> <p>separate [2] 21:3 45:17</p> <p>separation [1] 75:16</p> <p>service [7] 27:10,19 29:1 56:5,10 68:13 86:2</p> <p>Service's [1] 56:3</p> <p>set [3] 27:19 37:24 86:1</p> <p>set-aside [1] 16:5</p> <p>sets [1] 20:20</p> <p>setting [1] 27:9</p> <p>settled [1] 57:4</p> <p>several [3] 31:11 83:9 85:7</p> <p>severe [2] 23:21 88:13</p> <p>severed [1] 50:13</p> <p>shall [1] 65:19</p> <p>she'll [1] 51:23</p> <p>She's [2] 51:13 62:13</p> <p>shift [1] 80:6</p> <p>shoes [1] 46:15</p> <p>shop [1] 81:9</p> <p>shot [2] 61:11 83:22</p> <p>shouldn't [2] 67:1,15</p> <p>show [3] 29:6 54:17 79:24</p> <p>showing [1] 13:7</p> <p>shown [1] 59:10</p>	<p>shows [3] 13:15 76:19,19</p> <p>shut [1] 67:24</p> <p>side [2] 38:22 81:12</p> <p>significantly [1] 27:13</p> <p>similar [1] 57:24</p> <p>similarly [1] 87:7</p> <p>since [3] 14:12 27:2 31:4</p> <p>single [3] 18:21 19:13 26:19</p> <p>situation [10] 7:8 10:17 19:1 23:21 25:9 35:8 43:20 51:17 53:3 68:15</p> <p>situations [4] 27:6 28:4 30:13 70:2</p> <p>size [1] 32:2</p> <p>skip [1] 65:16</p> <p>smuggle [1] 86:2</p> <p>society [2] 36:17,18</p> <p>solely [2] 23:10 33:4</p> <p>Solicitor [1] 1:18</p> <p>solicitude [1] 35:18</p> <p>solution [1] 22:12</p> <p>somebody [1] 52:16</p> <p>someone [1] 35:18</p> <p>someone [3] 64:10 66:6 71:19</p> <p>sometimes [3] 16:14 20:12 23:3</p> <p>sorry [7] 20:2 39:4,18 70:4 75:12 82:13,15</p> <p>sort [6] 7:11 21:1 28:4,23 58:15 68:15</p> <p>sorts [1] 78:12</p> <p>SOTOMAYOR [14] 6:14,20 36:8,9,16,22 37:22 59:9 60:14,18,22 61:14,18 62:3</p> <p>sought [1] 47:11</p> <p>sounds [1] 40:10</p> <p>source [7] 6:12,22 7:5 10:11,12 13:12,14</p> <p>sources [1] 7:2</p> <p>speaking [1] 43:13</p> <p>special [5] 16:12,14 62:19,25 79:8</p> <p>Species [1] 76:18</p> <p>specific [3] 12:10 36:3 54:4</p> <p>specifically [13] 4:25 7:7 28:18 30:15 35:7 37:18 46:12 50:23 53:2 65:5,6 69:1 86:21</p> <p>specifies [1] 11:25</p> <p>speculating [1] 4:17</p> <p>speculation [1] 13:10</p> <p>speculative [5] 13:16 59:21,23 62:24 63:6</p> <p>spending [1] 28:5</p> <p>spite [1] 23:5</p> <p>stage [1] 42:5</p> <p>stake [4] 64:9 70:21 84:7,17</p> <p>stakes [1] 87:11</p> <p>stand [1] 6:8</p> <p>standalone [2] 14:2,11</p>	<p>standard [2] 24:1 59:19</p> <p>standards [1] 14:25</p> <p>standing [33] 3:13,24 4:15,16 5:8 7:10,19 9:11 14:10,18 15:4 17:8,25 54:12 55:24 56:3,7 57:1,3,6 60:5 63:17 70:25 71:4,15,18 73:10 74:15 77:1 83:8,10 85:24 88:18</p> <p>stands [1] 8:6</p> <p>start [4] 22:1 23:24 28:25 87:6</p> <p>starts [1] 66:22</p> <p>stat [1] 10:16</p> <p>state [3] 16:25 41:10,22</p> <p>state's [1] 60:15</p> <p>statements [1] 81:2</p> <p>STATES [2] 1:1,15</p> <p>statistically [1] 27:12</p> <p>statute [35] 4:20 10:16 26:2 30:16 37:3,4 38:7,24 40:2,6 43:4,5 44:7,18 46:21 50:23 52:1 68:25,25 72:12,24 73:3,16,20,22,25 74:14,18 75:1 76:2,8,20 77:2,14 83:25</p> <p>statutes [1] 81:22</p> <p>statutory [16] 5:4 11:22 16:13,14 25:25 28:12 29:17 31:9 32:6,24 33:10 44:20 46:11 49:11 50:16 83:16</p> <p>step [1] 87:10</p> <p>still [3] 27:20 57:5 74:15</p> <p>stone [1] 8:17</p> <p>stop [1] 62:8</p> <p>straightforward [2] 5:20 85:8</p> <p>street [1] 64:10</p> <p>strengthened [2] 69:5,8</p> <p>strictly [1] 28:11</p> <p>strike [9] 60:7,24 61:22 62:2 72:3,22 73:1,15 74:16</p> <p>strikes [1] 77:23</p> <p>striking [1] 72:17</p> <p>strong [1] 81:5</p> <p>struck [3] 9:3 37:25 69:21</p> <p>structural [1] 75:16</p> <p>student [20] 23:24 24:16 33:6,15 35:1 37:17 45:18,22 50:7 51:16 55:9 60:18,19 62:13 63:3 64:7 69:24 70:5 87:20 88:15</p> <p>student-loan [16] 26:19 29:13 34:25 42:20 44:24 47:3 50:25 51:8 53:3 64:16 69:3 71:7,10 86:23 87:12 88:17</p> <p>studies [1] 24:18</p> <p>subject [5] 8:3,5 20:1 84:7 88:13</p> <p>subjects [1] 46:17</p> <p>submitted [2] 88:22,24</p> <p>subparagraph [1] 50:24</p> <p>subsection [1] 65:18</p>	<p>substantive [9] 5:14 13:21 14:2,11,17,22 85:2,11 86:3</p> <p>success [1] 48:11</p> <p>sudden [1] 46:4</p> <p>sue [2] 66:8 70:17</p> <p>suffered [2] 36:10 55:14</p> <p>suffering [3] 58:22 59:21 80:22</p> <p>sufficiently [2] 63:14 64:2</p> <p>suggest [6] 13:10 23:12 44:14 45:4 59:10 61:21</p> <p>suggested [2] 84:6 86:18</p> <p>suggesting [4] 10:4 17:18 46:20 80:4</p> <p>suggestion [4] 9:19 33:13 68:10 86:8</p> <p>suggests [1] 50:11</p> <p>suit [2] 61:3 69:22</p> <p>suits [1] 19:7</p> <p>Summers [7] 56:1,1,19,19 74:6 76:6 83:11</p> <p>supply [1] 84:25</p> <p>support [6] 6:3 9:22 22:16 27:21 83:10,12</p> <p>suppose [5] 8:25 13:1 74:10,13,14</p> <p>SUPREME [3] 1:1,14 77:23</p> <p>surprising [1] 31:20</p> <p>switch [1] 72:11</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table [4] 17:19 18:16 46:3 57:5</p> <p>tailor [1] 40:16</p> <p>tailor-made [1] 45:9</p> <p>tailored [2] 58:21 77:18</p> <p>talked [1] 21:14</p> <p>talks [4] 20:25 21:1,1 62:18</p> <p>targeted [2] 17:20,22</p> <p>tax [1] 27:21</p> <p>taxes [1] 64:11</p> <p>taxpayers' [1] 28:6</p> <p>Taylor [4] 3:22 4:3 55:15 70:6</p> <p>Taylor's [2] 3:11 66:18</p> <p>tearing [1] 74:6</p> <p>tells [2] 16:12 27:17</p> <p>tens [1] 87:12</p> <p>terms [1] 44:9</p> <p>terrible [1] 74:24</p> <p>text [3] 11:22 44:8 50:22</p> <p>themselves [1] 4:1</p> <p>theory [18] 3:19 6:3 10:23 11:9 12:4 13:15,19 57:7 66:6 72:3,6,10 73:4 81:11,13 83:10,12 85:24</p> <p>there's [22] 22:14,25 23:25 30:7 33:10 36:15,16,16 44:14,23 45:2 56:15 57:9 62:16 64:12 65:7 66:12,12 70:1,25 75:5 78:12</p> <p>therefore [2] 34:8 69:21</p> <p>they'll [1] 23:22</p>
--	---	--	--	--

Official - Subject to Final Review

<p>they've ^[8] 12:6 14:5 15:4 17:4 29:24 77:22 80:14 81:3</p> <p>thinking ^[5] 15:25 43:3,10 52:9 85:23</p> <p>thinks ^[1] 84:18</p> <p>THOMAS ^[6] 5:6 32:17 55:21 56:18,22 82:16</p> <p>though ^[12] 7:1 9:7 12:12 14:16 24:18 26:1,9 27:21 32:2 48:17 55:15 82:3</p> <p>three ^[3] 26:21 54:4 87:15</p> <p>throughout ^[2] 19:13 48:8</p> <p>tied ^[1] 78:10</p> <p>timing ^[1] 43:19</p> <p>Title ^[3] 30:15 44:10 69:3</p> <p>today ^[1] 87:9</p> <p>together ^[2] 43:11 81:4</p> <p>tolerated ^[1] 38:21</p> <p>tolerates ^[1] 40:6</p> <p>took ^[3] 28:25 29:2 61:10</p> <p>tools ^[1] 44:19</p> <p>top ^[2] 54:21 57:22</p> <p>topic ^[2] 71:2,3</p> <p>total ^[1] 13:9</p> <p>totally ^[2] 6:21 61:1</p> <p>trace ^[2] 16:8 63:21</p> <p>traditional ^[2] 16:18 19:10</p> <p>treat ^[1] 48:4</p> <p>treatment ^[4] 8:1,4,5 9:15</p> <p>tried ^[2] 6:2 82:4</p> <p>trillion ^[1] 29:24</p> <p>trouble ^[3] 24:9 50:3 51:14</p> <p>true ^[3] 9:8 23:8 24:12</p> <p>try ^[12] 10:24 27:9 31:13 35:13 39:5 43:22 61:23 70:9 85:8,20 86:1,24</p> <p>trying ^[10] 10:7 27:19 28:25 43:4 46:25 62:8 71:6 72:19 78:24 85:6</p> <p>Tuesday ^[1] 1:11</p> <p>turn ^[3] 21:25 23:6 33:14</p> <p>turns ^[3] 38:18,20 53:25</p> <p>two ^[14] 16:4,24 17:15 18:24 20:25 27:5,6 30:6 39:22 48:18 49:24 58:18 70:2 88:17</p> <p>type ^[1] 65:1</p> <p>typically ^[1] 81:22</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimate ^[1] 79:25</p> <p>ultimately ^[2] 57:3 64:25</p> <p>unable ^[1] 24:15</p> <p>uncertainty ^[1] 8:21</p> <p>under ^[81] 4:4,6,9,12,19 5:2,11,24 6:16,23 9:21 10:10, 16 11:5,13,17,19 12:1,9,11, 15,17 13:5,14 14:4 15:25 18:4,18 19:11 25:3 28:9 34:1 36:12 37:11 40:1,4 42:13,19 45:8,16 54:15,23 57:11,20,25 58:5,15 59:3,3, 11,23 60:6,13,19 61:18,23,</p>	<p>25 66:16 72:5,24 73:2,23 76:1,15,17,21 77:2,14,25 79:1 80:12,17 82:1 83:16, 20,24 85:14,17 86:5,9,16</p> <p>underlying ^[3] 11:3 22:12, 23</p> <p>understand ^[11] 7:9 10:20 18:14 20:24 40:19 41:4 48:24 50:22 69:23 72:2 80:3</p> <p>understanding ^[1] 22:11</p> <p>understood ^[4] 10:2 30:18 32:24 38:5</p> <p>undisputed ^[2] 34:24 87:22</p> <p>unduly ^[1] 13:16</p> <p>unequal ^[3] 8:1,4 9:15</p> <p>unexplained ^[1] 86:15</p> <p>unfair ^[2] 52:15,21</p> <p>unfairness ^[1] 36:17</p> <p>unique ^[1] 68:25</p> <p>uniquely ^[1] 80:22</p> <p>UNITED ^[2] 1:1,14</p> <p>universal ^[9] 15:7,14,22 16:20 17:1,12 18:16,20 49:8</p> <p>universe ^[3] 70:10 71:10 84:25</p> <p>universities ^[1] 69:4</p> <p>unlawful ^[5] 4:23 14:3 55:2 59:8 81:7</p> <p>unless ^[1] 59:21</p> <p>unlike ^[1] 7:5</p> <p>unlimited ^[1] 36:18</p> <p>unpack ^[1] 10:24</p> <p>unprecedented ^[4] 29:10 45:2 87:14,17</p> <p>unreasonable ^[1] 40:11</p> <p>up ^[20] 8:2 12:6 17:5 27:9, 19 43:1 47:9 48:9 53:5 59:4 64:12,19 67:2,8 81:3,9 83:23 84:19 86:1 88:17</p> <p>upset ^[1] 64:11</p> <p>upshot ^[1] 13:19</p> <p>urge ^[2] 62:10 88:19</p> <p>urging ^[1] 78:16</p> <p>useless ^[1] 79:14</p> <p>uses ^[1] 72:4</p> <p>using ^[2] 30:19 73:20</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacatur ^[7] 15:14,23 16:20 17:12 18:16,20 49:8</p> <p>varies ^[1] 24:11</p> <p>various ^[2] 23:7 52:11</p> <p>versus ^[2] 3:5 54:1</p> <p>view ^[4] 32:21,22 34:9,13</p> <p>views ^[3] 18:3 27:25 28:2</p> <p>vindicate ^[3] 18:23 85:8,21</p> <p>violations ^[2] 73:11,12</p> <p>Virginia ^[1] 1:21</p> <p>voice ^[1] 55:10</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait ^[1] 82:11</p>	<p>waive ^[10] 29:22 31:6 38:7 43:6 44:3,3,10 49:12,13,14</p> <p>waiver ^[3] 50:12 65:16,23</p> <p>waivers ^[5] 5:2 11:25 65:13,20 66:2</p> <p>waiving ^[2] 29:22 65:8</p> <p>wanted ^[7] 5:10 15:13 33:21 38:4 52:5 69:1 85:14</p> <p>wants ^[3] 60:25 67:2 69:4</p> <p>warranted ^[3] 34:16,19,20</p> <p>Warren ^[1] 78:15</p> <p>Washington ^[2] 1:10,19</p> <p>water ^[3] 84:14,17,19</p> <p>way ^[21] 5:25 7:21 8:24 9:4, 12 18:11 19:6,12 35:23 40:4, 16,17 41:15 43:8,24 44:9 46:22 60:7 71:23 75:4 85:20</p> <p>ways ^[1] 16:23</p> <p>website ^[1] 61:9</p> <p>weigh ^[1] 41:11</p> <p>weighing ^[1] 25:15</p> <p>Welcome ^[2] 3:6 5:5</p> <p>well-established ^[1] 30:11</p> <p>whatever ^[2] 44:19 63:11</p> <p>Whereupon ^[1] 88:23</p> <p>whether ^[22] 8:1 18:4,12 21:21 26:3 30:7 32:25 40:16, 17 42:20 44:2,23 49:12 52:7,14 54:1 75:5,18,21 80:5 83:9 84:5</p> <p>who's ^[3] 25:15 27:23 71:10</p> <p>whole ^[6] 4:8 5:22 9:23 29:22 55:6 72:18</p> <p>wholly ^[2] 9:20 86:15</p> <p>widowers ^[1] 7:15</p> <p>widows ^[2] 7:14,18</p> <p>will ^[16] 3:3 15:19 26:11 43:12 48:22 54:19 56:16 57:14 59:11 61:11 68:15 72:11 75:6,6 83:25 84:20</p> <p>win ^[3] 3:19 7:17 60:7</p> <p>winners ^[2] 43:12,13</p> <p>within ^[8] 26:22 33:4 35:12 45:14 48:5 52:1 73:12 79:19</p> <p>without ^[11] 8:19 11:3 24:10 25:5 27:15 30:1 43:25 45:19 56:5 69:11 76:11</p> <p>women ^[2] 7:13,14</p> <p>wonder ^[2] 21:7 49:12</p> <p>wondering ^[3] 21:20 52:7, 14</p> <p>word ^[2] 43:6,7</p> <p>words ^[3] 46:2 63:5 67:25</p> <p>work ^[2] 32:5 46:10</p> <p>works ^[2] 21:18 43:11</p> <p>world ^[6] 18:20 58:3 77:3,7, 9 79:22</p> <p>worse ^[16] 4:1 22:19 30:17 33:1,19 38:9,15 39:6 44:21 49:16,20 51:1,7 53:5</p>	<p>62:4 88:1</p> <p>would-be ^[1] 27:3</p> <p>writ ^[1] 12:14</p> <p>write ^[1] 66:14</p> <p>written ^[1] 78:18</p> <p>wrote ^[1] 65:13</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[3] 29:9 66:8 88:6</p> <p>years ^[4] 24:23 26:21 27:11 87:15</p> <p>yourself ^[1] 46:15</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>zero ^[3] 51:10,23,24</p>
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