

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

OKLAHOMA, ET AL.,)
Petitioners,)
v.) No. 23-1067
ENVIRONMENTAL PROTECTION AGENCY,)
ET AL.,)
Respondents.)

PACIFICORP, ET AL.,)
Petitioners,)
v.) No. 23-1068
ENVIRONMENTAL PROTECTION AGENCY,)
ET AL.,)
Respondents.)

Pages: 1 through 56

Place: Washington, D.C.

Date: March 25, 2025

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19
20
21
22
23
24
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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MITHUN MANSINGHANI, ESQ.	
4	On behalf of the Petitioners	
5	in Case 23-1067	4
6	ORAL ARGUMENT OF:	
7	MISHA TSEYTLIN, ESQ.	
8	On behalf of the Petitioners	
9	in Case 23-1068	22
10	ORAL ARGUMENT OF:	
11	MALCOLM L. STEWART, ESQ.	
12	On behalf of the Respondents	37
13	REBUTTAL ARGUMENT OF:	
14	MITHUN MANSINGHANI, ESQ.	
15	On behalf of the Petitioners	
16	in Case 23-1067	53
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:50 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 23-1067, Oklahoma versus
5 the Environmental Protection Agency.

6 Mr. Mansinghani.

7 ORAL ARGUMENT OF MITHUN MANSINGHANI
8 ON BEHALF OF THE PETITIONERS IN CASE 23-1067

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

11 EPA actions to approve or disapprove
12 state implementation plans are the prototypical
13 action reviewed in the regional circuit. As I
14 believe Mr. Stewart confirmed in the previous
15 argument, all parties agree at this point that
16 if EPA had disapproved Oklahoma's and Utah's
17 plans in separate Federal Register notices,
18 those would be locally applicable actions.

19 So when it comes to applicability, the
20 only disputed question is whether the
21 disapprovals of these state plans are
22 transformed into a single national action
23 because EPA chose to process and publish them
24 together with the disapprovals of 19 other
25 states.

1 But the text of the Act's venue
2 provision directs the courts to look at the
3 statutory authority under which EPA took its
4 action, not the form of publication. Here
5 Section 7410 authorizes EPA to take local
6 action, approval or disapproval of state
7 implementation plans. EPA's position that the
8 form of publication dictates the action's
9 applicability for venue purposes has no basis in
10 the text of the statute and, indeed, is at war
11 with it.

12 That leaves EPA's backup, that the
13 Oklahoma and Utah disapproval actions must be
14 reviewed in the D.C. Circuit because they are
15 based on a determination of nationwide scope or
16 effect. That exception, however, only applies
17 to actions where EPA arrives at a generic
18 conclusion that applies uniformly to all states
19 and that forms a dispositive reason for the
20 agency's action, irrespective of local factors.

21 As Justice Gorsuch's and Kavanaugh's
22 questions earlier today indicate, EPA's reading
23 applying that exception any time EPA articulates
24 a rubric or a standard and then applies it to a
25 local circumstance would mean essentially every

1 local EPA action is one that is based on a
2 nationwide determination.

3 The Court should reverse the decision
4 below and send this case back to the Tenth
5 Circuit.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: You heard the last
8 argument. How did -- factually, how does the --
9 your case differ from the refinery case?

10 MR. MANSINGHANI: So one major
11 difference is that state plan approvals and
12 disapprovals are explicitly listed in the
13 locally and regionally applicable part of the
14 statute, in the second sentence of the statute.
15 That's not true of -- of Renewable Fuel Standard
16 exemptions, so that makes this like a really
17 easy case for -- for us to say this is locally
18 or regionally applicable.

19 JUSTICE SOTOMAYOR: Is the nature of
20 the presumption here different? Meaning there
21 were two, arguably in the first case, nationwide
22 rules, one having to do with focusing just on
23 compliance with legal requirement and the
24 second, the presumption that you couldn't have
25 hardship.

1 Here it -- it -- it -- it's been
2 strange in my mind because you don't actually
3 have to follow the EPA's formula, correct?

4 MR. MANSINGHANI: That's correct. We
5 don't have to follow their modeling. We don't
6 have to follow their framework. And EPA was
7 very clear about that. So I --

8 JUSTICE SOTOMAYOR: Right. So
9 whatever their framework is, since you don't
10 have to follow it, it's hard to see how it has a
11 nationwide effect, isn't it?

12 MR. MANSINGHANI: That's correct.
13 It -- it's not even meets their definition of a
14 determination, which is the conclusive ending of
15 a controversy. If we didn't have to follow
16 their framework, it's hard to see how it's
17 even --

18 JUSTICE SOTOMAYOR: The only --

19 MR. MANSINGHANI: -- a determination.

20 JUSTICE SOTOMAYOR: -- argument that I
21 see that might be different is that 1 percent
22 rule that they have. And there's at least a
23 bunch of amici who say that, in absolutely every
24 challenge to a SIP, that the 1 percent rule is
25 being fought about.

1 So could one say that that's
2 determinative in a way that's nationwide?

3 MR. MANSINGHANI: So EPA was also
4 clear that with respect to the 1 percent rule,
5 it has "not imposed a requirement that states
6 [must] use a 1 percent threshold." That's at
7 page 9373 of the final Federal Register notice.

8 The other problem is that EPA didn't
9 identify that as one of the nationwide
10 determinations when they say -- when they were
11 invoking the venue exception. So you have a
12 Chenery problem there, and you also have a
13 problem that the statute requires EPA to make a
14 publication.

15 And, of course, this is also a
16 long-standing thing that they've used. In -- in
17 page 47 of their brief, they -- they acknowledge
18 they've used the 1 percent rule in prior
19 transport orders and -- and in EME Homer. So it
20 doesn't -- it also doesn't meet their test for
21 that reason because, you know, I guess EPA
22 would -- would consider it settled.

23 When Utah tried to use an alternative
24 as a 1 parts per billion threshold instead of a
25 1 percent threshold, it gave very Utah-specific

1 reasons for why it thought that a 1 part per
2 billion threshold was more appropriate. And EPA
3 gave very Utah-specific reasons for why it was
4 rejecting Utah's Utah-specific reasons.

5 JUSTICE GORSUCH: Counsel, if I might
6 just push back a little bit. I would have
7 thought that, if anything, the intuitive appeal
8 of the idea that -- that your case involves
9 nationwide determinations would be the stronger
10 one in some ways for EPA, given that we're
11 talking here about clean air obligations of
12 states and the downwind impact of any state on
13 others. Its good neighbor obligations as the
14 statute calls it.

15 I mean, gosh, if anything's -- if
16 anything is nationwide in impact, it's got to be
17 air pollution because it travels.

18 MR. MANSINGHANI: Well, the whole
19 statute's about air pollution. But with respect
20 to the good neighbor provision, EPA made clear
21 that interstate ozone transport is a "regional
22 scale pollution problem." You can see that at
23 page 9801 of Oklahoma's proposed disapproval.

24 JUSTICE GORSUCH: Yeah, but it crosses
25 the country in ways that don't respect our

1 jurisdictional boundaries between circuits.

2 MR. MANSINGHANI: Sure. And I think,
3 at most, that makes it something that has
4 regional effects. It's not of regional
5 applicability when EPA disapproves this
6 individual state's plan. So, for example,
7 Oklahoma's plan was disapproved because it was
8 polluting -- allegedly significantly
9 contributing to Texas non-attainment --

10 JUSTICE GORSUCH: Well, you --

11 MR. MANSINGHANI: -- and Utah --

12 JUSTICE GORSUCH: -- got two circuits
13 right there.

14 MR. MANSINGHANI: And -- and for the
15 reasons Mr. Huston gave in the prior case, I
16 don't think their two-circuit rule really is --
17 is something that --

18 JUSTICE GORSUCH: Why not? We're
19 going to have different interpretations of the
20 statute with different -- different circuits and
21 all these terrible splits and -- and, gosh, we
22 won't have the immediate resolution of the D.C.
23 Circuit that we could have.

24 MR. MANSINGHANI: Well, respectfully,
25 I don't think splits are all that terrible.

1 JUSTICE GORSUCH: Oh. Oh. Oh.

2 (Laughter.)

3 MR. MANSINGHANI: This Court's --

4 JUSTICE GORSUCH: Really? We deal
5 with them?

6 MR. MANSINGHANI: This Court's
7 landmark Clean Air Act cases, state
8 implementation plan cases, Train and Union
9 Electric, both arose from circuit splits where
10 different circuits were adjudicating different
11 state plans but it touched on cross-cutting
12 issues such as whether variances could be
13 allowed in a state plan or whether EPA had to
14 consider cost or feasibility, technical
15 feasibility, in approving or disapproving a
16 state plan.

17 And there's no indication that those
18 circuit splits that led to the -- this Court's
19 landmark decisions in Train and Union Electric
20 were the things that Congress was trying to do
21 away with --

22 JUSTICE JACKSON: And, Counsel, I --

23 MR. MANSINGHANI: -- when it enacted
24 the --

25 JUSTICE JACKSON: -- I mean, I thought

1 your original point was that the statute itself
2 when -- in section -- sentence 2 talks about
3 what counts as locally or regionalbly applicable
4 and that should go in the appropriate circuit
5 includes approval of SIPs.

6 MR. MANSINGHANI: That's correct.

7 JUSTICE JACKSON: I mean specifically.

8 MR. MANSINGHANI: Specifically if
9 people --

10 JUSTICE JACKSON: So, regardless of us
11 thinking that air pollution seems national,
12 Congress was putting it in the local or regional
13 bucket.

14 MR. MANSINGHANI: That's -- that's
15 absolutely correct, Justice Jackson.

16 JUSTICE GORSUCH: So are you making
17 the argument, then, that -- that the third
18 provision has no application to SIPs? Could
19 never be applied to SIPs?

20 MR. MANSINGHANI: No, Justice Gorsuch,
21 I'm not making that argument.

22 JUSTICE GORSUCH: Ah.

23 MR. MANSINGHANI: So, the --

24 JUSTICE JACKSON: You're making the
25 argument that the first doesn't, because we're

1 in the second, locally or regional. And then we
2 go to the exception, and we have to decide
3 whether or not it's in the D.C. Circuit, but on
4 the basis of the third prong, not the first one?

5 MR. MANSINGHANI: That's correct,
6 Justice Jackson. So the examples historically
7 that arose prior to the enactment of the
8 exception are both things that relate to SIPs.
9 They weren't SIP approvals or disapprovals
10 necessarily.

11 But the NRDC case -- cases from the
12 First and D.C. Circuits that Mr. Stewart
13 mentioned, the -- the First Circuit said it
14 involved an automatic application of standard
15 nationwide guidelines to all plans that
16 simultaneously preordained wholesale extensions
17 of the -- of the attainment deadline.

18 The Dayton Power case from the Sixth
19 Circuit was the other case that -- that led
20 to -- at least according to the legislation
21 history, the enactment of this exception. And
22 there, the Sixth Circuit said what was at issue
23 was a uniform rule that had the effect of
24 amending every state's implementation plan in
25 precisely the same way.

1 JUSTICE GORSUCH: Were these rules?

2 MR. MANSINGHANI: Say that again,
3 Justice?

4 JUSTICE GORSUCH: Were these rules?

5 MR. MANSINGHANI: They -- it's hard to
6 say that the amendment of a state plan is a
7 rule-making, but it was published in the Federal
8 Register as -- as a rule-making --

9 JUSTICE GORSUCH: Mm-hmm.

10 MR. MANSINGHANI: -- in -- in perhaps
11 what I would say is a single order.

12 And -- and it's those types of things
13 where you have a -- a conclusion that applies
14 uniformly to all states, and that forms the
15 dispositive reason for the agency's action that
16 are covered by the exception.

17 It's not the types of things that led
18 to this -- this Court's cases in Train and Union
19 Electric, where you have an intense mix of very
20 local issues and perhaps some cross-cutting
21 issues that may be true across different states.

22 Not every state was the 1 percent
23 threshold an issue. Not every state was the
24 modeling that made the difference between
25 approval or disapproval.

1 And here, of course, EPA had issued
2 approvals of state plans individually or
3 sometimes in groups. And there's no indication
4 that I have seen from EPA that there was a
5 reason why its approvals were issued
6 individually, would go to the regional circuit,
7 and its disapprovals would go to -- to the
8 D.C. --

9 JUSTICE JACKSON: Can I ask you about
10 the remedy? So if we agree with you that the
11 court of appeals here was wrong to hold that
12 this was nationally applicable under prong 1,
13 would you say that we should remand it to the
14 Tenth Circuit to apply steps 2 and potentially
15 3?

16 MR. MANSINGHANI: That would certainly
17 be an option, but not our first preference. So
18 I think this Court has fully in front of it the
19 issue, and it's fairly encompassed within the
20 question presented as to whether the exception
21 applies.

22 And I think in elucidating how the
23 exception applies in our case and the Calumet
24 case, it will provide greater guidance to lower
25 courts by -- by showing how it applies in two

1 very different factual scenarios.

2 JUSTICE GORSUCH: What weight should
3 we give the EPA's determination? I mean,
4 that -- that's -- that's a thing, right? I
5 mean, EPA, you know, wrote the determination.
6 Does that -- is it -- is that owed deference?

7 MR. MANSINGHANI: It is not owed
8 deference to the -- on the question of whether
9 the action's, in fact, based on a nationwide
10 determination of scope and effect.

11 And remember, this is a venue
12 provision that we're interpreting. And it's
13 very unusual for this Court to defer to one
14 party or another's choice of venue. Instead,
15 this Court applies the law de novo.

16 And so here, the statute, as -- as my
17 friend Mr. Huston said, has two elements. One,
18 that it is based on a determination of
19 nationwide scope and effect. That's reviewed de
20 novo. And, second, that EPA publish a finding
21 along those lines.

22 And I think that could be reviewed for
23 arbitrary and capriciousness if EPA chose or
24 didn't choose to publish a finding in any given
25 circumstance, but the first thing is viewed --

1 is reviewed de novo.

2 JUSTICE KAGAN: Suppose that, you
3 know, of these four determinations -- let's just
4 focus -- suppose that with this -- just this
5 one, which dealt with the contribution
6 threshold.

7 MR. MANSINGHANI: Mm-hmm.

8 JUSTICE KAGAN: And suppose that the
9 contribution threshold that EPA picked was super
10 low. Like, so instead of 1 percent, it
11 was .01 percent or something like that. So low
12 that you knew that every SIP was going to get
13 rejected, every state plan.

14 What would the answer be then?

15 MR. MANSINGHANI: I think there
16 would -- that would present a closer case. And
17 I think that would get closest to what would be
18 a determination of nationwide effect.

19 So it wouldn't have nationwide scope
20 because, you know, in theory a state could,
21 possibly, be under that super low threshold, but
22 it might still, nonetheless, be something that's
23 of nationwide effect.

24 JUSTICE KAGAN: I mean, it's of
25 nationwide -- you know, presumably they know

1 what effect this is going to have in every
2 state, in -- in my hypothetical. So it's -- it
3 seems actually unusual not to say it would be of
4 nationwide scope.

5 And I'm not suggesting that my
6 hypothetical is at all the same as your case. I
7 mean, actually, it seems to me that these four
8 nation -- nationwide determinations, that the
9 nature of them is the -- you still -- the agency
10 still has to do a lot of work before deciding
11 whether to issue -- whether to approve any state
12 SIP.

13 But in my hypothetical, that's not
14 right. Basically, the nationwide determination
15 is doing all the work.

16 MR. MANSINGHANI: So I'll push back on
17 one thing, Justice Kagan, which is to say that
18 if the screening threshold operates in the same
19 way in your hypothetical as it does in our rule,
20 then, yes, there still has to be a lot of work
21 done.

22 Because a screening threshold is just
23 that, it screens out what are de minimis
24 contributions and what are contributions that
25 have to be further evaluated to determine

1 whether they are significant.

2 So even a really low screening
3 threshold would still require a lot of further
4 analysis to determine whether any given state's
5 contributions to another state are --

6 JUSTICE KAGAN: I take that point. So
7 I guess I was hypothesizing a more simple-minded
8 inquiry --

9 MR. MANSINGHANI: Right.

10 JUSTICE KAGAN: -- where basically
11 this threshold was going to make the difference
12 between approval and not. And it was set at so
13 low a level that it was clear that no state
14 could meet it.

15 And then to me, that says: Okay, that
16 should be in the D.C. Circuit. Like, you don't
17 want 11 circuits deciding whether that's a
18 preposterously low level or not.

19 MR. MANSINGHANI: Yeah. So if it was
20 an automatic generic conclusion that applied to
21 all states uniformly, you didn't have to really
22 consider whether the state's circumstances,
23 yeah, I think that would get, you know, very
24 close to meeting the exception.

25 Now, to be very clear, we would think

1 that is very illegal, and the state -- and the
2 EPA doesn't have --

3 JUSTICE KAGAN: Yeah, yeah, yeah.

4 MR. MANSINGHANI: -- the ability to
5 set a screening threshold that low and to -- to
6 cabin and state discretion that much. But yes,
7 a very legal thing could be adjudicated by the
8 D.C. Circuit as very illegal.

9 JUSTICE KAVANAUGH: Do you agree or --
10 do you disagree with anything Mr. Huston said in
11 the -- in the prior argument in terms of the
12 scope of -- of the third sentence or how much
13 effect the third sentence might have in
14 practice?

15 MR. MANSINGHANI: So I think the only
16 gap in our position is that Mr. Huston's
17 position is that the statute alone dictates what
18 the relevant determination is. And I think my
19 test is a little bit more flexible.

20 That said, you know, if Mr. Huston's
21 position is correct, I think we still also
22 prevail. Because in order to disapprove our
23 state plans, EPA would have to conclude that
24 Oklahoma was significantly contributing to
25 another state. That is the relevant

1 determination.

2 JUSTICE KAVANAUGH: Right. It has to
3 look at the state-specific --

4 MR. MANSINGHANI: That's precisely
5 correct, Justice --

6 JUSTICE JACKSON: I perceived
7 Mr. Huston's argument to be substantially
8 different than yours, so maybe I'm not
9 understanding.

10 I -- I thought you were taking -- you
11 were willing to accept the idea that the third
12 prong allows for a generic conclusion by the EPA
13 that applies uniformly irrespective of factual
14 differences, and that that could be enough.

15 And I took Mr. Huston to be saying
16 something different than that.

17 MR. MANSINGHANI: So I take Mr. Huston
18 to be saying that that generic conclusion has to
19 be mandated by statute.

20 JUSTICE JACKSON: Mmm.

21 MR. MANSINGHANI: I don't -- I don't
22 quite go that far.

23 JUSTICE JACKSON: I see.

24 MR. MANSINGHANI: But I think,
25 otherwise, our tests are very similar.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Anything further?

5 Anything further?

6 Thank you.

7 MR. MANSINGHANI: Thank you, Your
8 Honor.

9 CHIEF JUSTICE ROBERTS: Mr. Tseytlin.

10 ORAL ARGUMENT OF MISHA TSEYTLIN

11 ON BEHALF OF THE PETITIONERS IN CASE 23-1068

12 MR. TSEYTLIN: Mr. Chief Justice and
13 may it please the Court:

14 The Clean Air Act's venue provision
15 challenge -- channels challenges to national EPA
16 actions to the D.C. Circuit, while channeling
17 challenges to local or regional EPA actions,
18 such as SIP approvals and disapprovals, to the
19 regional circuits.

20 As you heard this morning, EPA
21 attempts to change this neutral venue rule,
22 which respects cooperative federalism and the
23 expertise of regional circuits, into something
24 very different. There are three fundamental
25 problems with EPA's approach:

1 First, it is a war with the statutory
2 text, including because it -- it requires, for
3 it to not devolve into everything being in the
4 D.C. Circuit, the creation of multiple
5 non-statutory tests. Like whether the bundling
6 of multiple actions is a sham, like whether a
7 determination made somewhere in a Federal
8 Register preamble is novel.

9 Second, it leads to unadministrable,
10 wasteful litigation about where actions should
11 be brought. We saw this with my -- with some of
12 my friends' answers today about how you have to
13 look at all the comments that were submitted,
14 and I was thinking, for these 21 states, how
15 tall the comment letters would be piling up next
16 to me, that I'd have to read all of them to
17 determine which court that I would need to sue
18 in.

19 And, finally -- and we haven't heard
20 that much about it today -- it -- it leaves more
21 of an opportunity of significant venue
22 manipulation by EPA that Congress certainly did
23 not envision.

24 I welcome the Court's questions.

25 JUSTICE THOMAS: Just as a matter of

1 curiosity, what is the difference between an
2 action that is nationally applicable and one
3 that is nationwide in effect or scope?

4 MR. TSEYTLIN: Right. So whether an
5 action is nationally applicable is based on the
6 statutory authority under which Congress was
7 acting. So with SIP approvals or disapprovals
8 under 110(k) that has to be done state by state.

9 However, hypothetically, there could
10 be a SIP disapproval or SIP approval that
11 hypothetically could have nationwide effect.
12 The -- the example that we talked about -- it's
13 a completely hypothetical example that we talked
14 about in our reply brief -- if a state's
15 pollution problem is so significant that it
16 pollutes across the entire nation -- let's say
17 it has that much NOx emissions and it goes all
18 across the nation -- theoretically, that locally
19 applicable action would have nationwide effect.
20 And so that would be an example where the
21 exception would have a real meaning.

22 Now, I want to cover this issue of
23 venue manipulation, and it hasn't gotten -- even
24 though we've been here for, like, two hours,
25 that hasn't gotten a lot of airing, and I think

1 it's a very problematic aspect of both EPA's
2 arguments on -- on the first two sentences and
3 on its exception.

4 EPA essentially says that if it
5 packages separate actions in a single -- in a
6 single Federal Register notice, subject to an
7 ill-defined sham exception, it can always get
8 into the D.C. Circuit.

9 Further, EPA says that under the
10 exception, if that's not good enough to get them
11 to the D.C. Circuit every time, they can say,
12 well, we can point to any general reasoning,
13 which as Justice Gorsuch pointed out is just
14 non-arbitrary/capricious rule-making under the
15 APA, and say that that sends us to the D.C.
16 Circuit under -- under the -- the third prong.

17 It -- it is that amount of power for
18 EPA to essentially take local and regionally
19 applicable actions and send them to D.C., send
20 them here, is a war with the Clean Air Act's
21 cooperative federalism regime.

22 And with regard to SIPs, which are a
23 big part of that, in particular, the whole
24 notion of SIPs, including with transport SIPs,
25 is that those are state-specific. Those are

1 decisions made by the states, how to control
2 pollution coming from sources in the state. The
3 venue provision here is just part and parcel of
4 that, that when you have those state-specific
5 decisions, you don't have to go to D.C. to
6 litigate the legality of that. You get to stay
7 in your own backyard.

8 And the cases here, the ones that are
9 pending in the lower courts are -- are a stark
10 example of what would happen if you allow EPA to
11 essentially subvert this regime. We --

12 JUSTICE JACKSON: Can I ask you about
13 your --

14 MR. TSEYTLIN: Yes.

15 JUSTICE JACKSON: Can I ask you about
16 your view of remand? Would you object if we
17 reversed the decision on the nationally
18 applicable prong and sent it back to the Tenth
19 Circuit for a determination of whether or not
20 there is -- the exception applies here?

21 MR. TSEYTLIN: Certainly, I never want
22 to turn down a -- a win, but I would say that
23 one of the arguments made by EPA in opposition
24 to our -- to our cert petition was that they
25 hadn't -- was that the Tenth Circuit hadn't

1 decided that question. And our answer in our
2 reply brief wasn't, like, give us a round trip.
3 It was that the issue had been fully briefed, it
4 had been decided in other circuits, and this
5 Court would be fully able to answer it.

6 We've now been here for -- we've had a
7 lot of pages of briefing, had a lot of oral
8 arguments. I think that this Court is now in a
9 good position to decide the meaning of that
10 pro -- the meaning of that third sentence and to
11 apply it both in the -- in the Calumet case and
12 in our case here.

13 And -- and -- and so just to finish --
14 just to finish my thought, when thinking about
15 what would be the consequence of allowing EPA
16 to -- to jam all these cases into the D.C.
17 Circuit, we took a look at how many pages in the
18 Sixth Circuit, in the six circuits that are
19 currently taking briefing in the -- in these --
20 in these cases; focused on these specific
21 issues. And we counted up to 300 pages of just
22 merits briefing that were focusing on just the
23 specific issues, not to say on the background
24 section.

25 To say that all of this could be

1 jammed into the D.C. Circuit and that these
2 local, intensely local issues, quintessentially
3 local issues would be able to practically get
4 a -- a fair airing is I think -- don't think not
5 realistic and not what Congress envisioned.

6 And I will say that we do have a -- a
7 different wrinkle in the way we approach the
8 third sentence, which I --

9 JUSTICE KAVANAUGH: I thought your
10 point on the venue --

11 MR. TSEYTLIN: Yes?

12 JUSTICE KAVANAUGH: -- was just
13 convenience, not -- or is there more to it than
14 that?

15 MR. TSEYTLIN: Sorry.

16 JUSTICE KAVANAUGH: In other words,
17 you want to be able to litigate in your home.
18 You know, it's more convenient to litigate in
19 the -- in the circuit in the -- in the home --

20 MR. TSEYTLIN: It -- it -- it's more
21 convenient and it's also --

22 JUSTICE KAVANAUGH: Is there anything
23 else to it that your -- is behind -- any other
24 premise behind your comment there?

25 MR. TSEYTLIN: Yeah, well, it's --

1 it's -- I guess it depends how you define the
2 word "convenient." I mean, the -- you get to
3 litigate your issues without being jammed in
4 with folks that want to submit 270 pages of
5 briefing on issues in different parts of the
6 country.

7 SIPs are quintessentially --
8 decisional SIPs -- quintessentially local. You
9 know, we had -- you know, there was -- there
10 was, you know, again, the comment, the -- the --

11 JUSTICE KAVANAUGH: Well, the premise
12 there --

13 MR. TSEYTLIN: Yeah.

14 JUSTICE KAVANAUGH: -- I'm not going
15 to dispute it too much, but --

16 MR. TSEYTLIN: Yeah.

17 JUSTICE KAVANAUGH: -- you know,
18 they -- they get fair attention in both courts.

19 MR. TSEYTLIN: It is true that the --
20 you know, the judges of -- of the D.C. Circuit
21 are excellent judges and work very hard.

22 (Laughter.)

23 MR. TSEYTLIN: But --

24 JUSTICE KAVANAUGH: And they're not
25 afraid to rule against EPA pretty routinely

1 either.

2 MR. TSYETLIN: Yeah.

3 JUSTICE KAVANAUGH: When justified.

4 MR. TSEYTLIN: When -- when justified.

5 (Laughter.)

6 MR. TSEYTLIN: But -- but -- but I
7 would also say that, as a practical matter, when
8 you get -- when you get consolidated in the D.C.
9 Circuit, the fight for word count and page count
10 to raise intensively, that is -- I mean, I
11 don't -- those of you who have -- it is fierce
12 to get a couple of pages on these local-specific
13 issues. You know, these 300 pages, you know,
14 they're -- there are, you know, when I thought
15 our case was being transferred to D.C., thinking
16 about how things that I had 15 pages to say I
17 would now have 2 pages to say or 3 pages to say,
18 that was a daunting thought and certainly not
19 what Congress envisioned when it specifically
20 listed in the second sentence the SIP approvals
21 and disapprovals go to the regional circuits.

22 JUSTICE KAGAN: Mr. Tseytlin, explain
23 to me how, notwithstanding the four
24 determinations, how a SIP approval would vary
25 among states? Like, what -- what -- what would

1 the variations be, notwithstanding that the EPA
2 has made these four nationwide determinations?

3 MR. TSEYTLIN: Well, if you're talking
4 about the third sentence, our approach to the --
5 our --

6 JUSTICE KAGAN: I'm talking about the
7 third sentence.

8 MR. TSEYTLIN: Our approach to the
9 third sentence is -- is somewhat different,
10 while it does ultimately lead to the same result
11 as -- as my friends on the states have --

12 JUSTICE KAGAN: But mostly, I'm not
13 talking about any sentence. I'm -- I'm actually
14 just talking about, like, your sense of the
15 practicalities of the situation. You come in
16 with a SIP. EPA has to approve it. It has to
17 disapprove it. They've said these four things
18 which apply uniformly to all their
19 approval/disapproval decisions. But I'm taking
20 it that you're saying, notwithstanding that
21 they've said those four things, the supposed
22 common denominator actually pales in
23 significance relative to the state-specific
24 circumstances and situations and arguments and
25 so on.

1 And I think I want a little bit more
2 meat on the bones as to what that would -- what
3 that means.

4 MR. TSEYTLIN: Yeah, so, I mean, I
5 will say that those kind observations are not
6 really relevant to either one of our -- aspects
7 of our test. You know, our first test for
8 applicable -- applicability is just --

9 JUSTICE KAGAN: I just want --

10 MR. TSEYTLIN: Yeah.

11 JUSTICE KAGAN: -- like, your sense
12 of, like, what happens.

13 MR. TSEYTLIN: Okay. Well, what
14 happens is, for example, on the 1 -- the 1 --
15 the 1 percent threshold, you know, Utah's and,
16 you know, PacifiCorp was my client there, our
17 submission was that, you know, with regard to
18 states in the west, the -- the 1 percent doesn't
19 make sense. And we used an example --

20 JUSTICE KAGAN: Not what I'm saying.

21 MR. TSEYTLIN: Okay.

22 JUSTICE KAGAN: Suppose we take these
23 four nationwide determinations --

24 MR. TSEYTLIN: Mm-hmm.

25 JUSTICE KAGAN: -- and we just assume

1 that the EPA is going to apply them uniformly.
2 Is there still work to be done as to any SIP
3 approval/disapproval decision?

4 MR. TSEYTLIN: Yes, of course. So --

5 JUSTICE KAGAN: So what is -- what is
6 the non-common denominator work that remains to
7 be done?

8 MR. TSEYTLIN: The state specific
9 arguments, for example, in Utah. We made the
10 argument that we are like Arizona, and Arizona a
11 couple years before, EPA had declined to apply
12 the -- the 1 percent threshold, essentially
13 because the down-state pollution there was to
14 California and the mountains were essentially
15 trapping most of the -- most of the pollution
16 there, and so the 1 -- there was so much -- so
17 little import to the contribution that Arizona
18 was making to California that it wouldn't make
19 any sense to apply the 1 percent threshold. We
20 said we, in Utah, we're -- we're told that we're
21 triggering monitors in the Denver area. We said
22 look, there's mountains around Denver. It's
23 trapping it over there. And so treat us like
24 Arizona.

25 Now, that is a very specific

1 regional-specific thing that, you know, I
2 wouldn't get to argue -- you know, the -- it
3 would get lost in -- in the D.C. Circuit and
4 also it is not one of the four determinations.
5 It's something very particular.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas? Anything further?
9 Nothing?

10 JUSTICE KAVANAUGH: It doesn't get
11 lost.

12 JUSTICE BARRETT: I -- I --

13 JUSTICE KAVANAUGH: I'll just say
14 that.

15 CHIEF JUSTICE ROBERTS: I'm sorry,
16 Justice Gorsuch? Anything?

17 JUSTICE GORSUCH: Yeah. But there are
18 four things, right? I mean, the EPA says they
19 are uncommon to all and wouldn't it be efficient
20 to have those determined in one venue with
21 excellent judges who pay close attention to
22 them.

23 (Laughter.)

24 JUSTICE GORSUCH: And then any other
25 regional matters to resolve regionally.

1 MR. TSEYTLIN: Yeah, well --

2 JUSTICE GORSUCH: I mean, that would

3 be a good system too, right?

4 MR. TSEYTLIN: Certainly that would be

5 a system that Congress could enact.

6 JUSTICE GORSUCH: Yeah.

7 MR. TSEYTLIN: Further --

8 JUSTICE GORSUCH: Okay, thanks.

9 MR. TSEYTLIN: -- further the way

10 that -- you know -- that -- you know --

11 CHIEF JUSTICE ROBERTS: Justice

12 Kavanaugh.

13 JUSTICE KAVANAUGH: Just to make sure

14 on deference, are you saying no deference to

15 EPA's determination that it's nationwide scope

16 and effect?

17 MR. TSEYTLIN: Yeah, my position is

18 the same as Mr. Huston, but I will have one

19 addition -- sorry to interrupt.

20 JUSTICE KAVANAUGH: Yeah. Go ahead

21 there.

22 MR. TSEYTLIN: My additional wrinkle

23 is that regardless of whether the Court believes

24 that deference is warranted to -- when EPA

25 applies the proper framework, here there's no

1 deference to the fact that their -- the finding
2 that they made was on the wrong thing.

3 So if you take a look at the Federal
4 Register notice, the only thing that they're
5 finding as a nationwide determination of a scope
6 and effect is based on the fundamental flaw that
7 applies to the first and second sentence, which
8 is that they think that the -- the action is all
9 21. So the fact that they identified the
10 wrong --

11 JUSTICE KAVANAUGH: Right.

12 MR. TSEYTLIN: -- the wrong action
13 wouldn't be entitled to deference no matter
14 what.

15 JUSTICE KAVANAUGH: I understand that
16 point.

17 MR. TSEYTLIN: Yeah.

18 JUSTICE KAVANAUGH: Okay. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 Justice Jackson?

22 JUSTICE JACKSON: Yeah, you said a
23 couple of times that your approach to the third
24 sentence differed, but you never quite got out
25 how so.

1 MR. TSEYTLIN: Yeah. So the sentence,
2 the -- the key sentences, if such an action is
3 based on a determination of scope -- of
4 nationwide scope and effect, we think that the
5 word "of" is ambiguous. We take the states and
6 maybe EPA to -- to read "of" as, if such an
7 action is based on a determination that has a
8 nationwide scope and effect.

9 We read that "of" to be, if such an
10 action is based on a determination of that
11 action's nationwide scope and effect. And I --
12 I think if -- you know, as this opinion writes,
13 I think if you take a look at that, that is the
14 most administrable rule that can be made for the
15 third sentence. And it gives it real import,
16 even though it's in a limited number of cases.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Stewart. Welcome back.

21 ORAL ARGUMENT OF MALCOLM L. STEWART
22 ON BEHALF OF THE RESPONDENTS

23 MR. STEWART: Thank you, Mr. Chief
24 Justice, and may it please the Court:

25 Let me just make two or three quick

1 observations and -- and then take questions.

2 The first is that there's been
3 colloquy in both of these cases about the
4 propriety of EPA getting deference on a question
5 about what forum the case will be heard in.
6 Under the statute, EPA's has some influence on
7 the question of whether the case, all challenges
8 to a particular action will be heard in a -- a
9 centralized forum or whether, instead, they can
10 be brought all throughout the country.

11 And if EPA chooses the former --
12 course, the fact that the cases go to the D.C.
13 Circuit, the fact that the D.C. Circuit is the
14 centralized forum, that's the choice of
15 Congress. That's not the choice of EPA. And so
16 it -- it's not the case that EPA can direct
17 challenges to whatever court it wishes.

18 The second thing I would say, and this
19 goes back to the -- the NRDC cases that I
20 mentioned earlier, that when Congress was
21 studying the venue provision in -- in
22 preparation for the 1977 amendments, it had in
23 mind the SIP approval actions that had taken
24 place and been challenged in many -- in NRDC
25 cases.

1 And when it chose the -- the path that
2 EPA's general counsel recommended, rather than
3 the path that ACUS recommended, it wanted to
4 ensure that there was some mechanism available
5 for review of national issues, even when they
6 pertained to the approval or disapproval of
7 SIPs.

8 And -- and, finally, Justice Kagan,
9 you said something to the effect and -- that
10 under EPA's framework here, as opposed to the
11 framework in the case before, even once you got
12 past the -- the 1 percent threshold, the 1 --
13 questions about the propriety of the 1 percent
14 de minimis threshold, there was still a lot of
15 work to be done.

16 And I -- I think the analysis is
17 complicated, but at the end of the day, EPA
18 disapproved 21 plans. It approved, I think, 23.

19 I -- I believe that all 23 plans that
20 were approved were approved on the ground that
21 the state fell under the 1 percent de minimis
22 threshold. So as a practical matter, the
23 determination of whether a particular state
24 exceeded the 1 percent threshold had great
25 predictive effect in terms of whether the plan

1 would be approved or disapproved.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: But once you got past
4 the 1 percent -- threshold, which they have in
5 common, the rest of it seems quite
6 particularized. And how would you deal with
7 that as opposed to the refineries, where we were
8 only talking about a couple of factors?

9 MR. STEWART: Well, I would say
10 they -- they do require analysis of particular
11 state circumstances, but they -- they are still
12 national in scope and they still were contested;
13 that is, EPA received comments indicating that
14 challenges to even the subsequent steps of the
15 analysis were not simply going to be we accept
16 these factors, but we think we satisfy them.

17 They were going to be challenges to
18 the factors themselves.

19 CHIEF JUSTICE ROBERTS: There's been
20 talk about the benefit of having a simple and
21 straightforward standard, and I think that's
22 true.

23 I -- I also think the point
24 Mr. Tseytlin makes is a -- a significant one
25 too, that if you're -- however you want to put

1 it -- more at home in your local circuit and
2 less likely to get lost in the shuffle here in
3 Washington. And I wondered if you had a
4 response to his concern in that respect.

5 MR. STEWART: I -- I mean, I think
6 that just depends -- I mean, part of the
7 awkwardness of the case is, the extent of the
8 statute is the extent to which that is so
9 depends on the extent to which your challenges
10 are to the national criteria that EPA has
11 promulgated or whether they are to the way in
12 which those criteria are applied to your own
13 state-specific circumstances.

14 And the -- the more that the latter is
15 the case, the more it makes sense to be in the
16 regional circuit. The reason I say it's an
17 awkwardness of the statute is the statute
18 requires that the venue determination be made as
19 of -- at the time that the action is taken, and
20 it doesn't take into account what set of
21 challenges do particular petitions for review
22 choose to make.

23 And so the best we can do is have a
24 test that tries to use proxies for actions that
25 are -- as to which the national determinations

1 are likely to be the focus of judicial review.

2 JUSTICE JACKSON: So the statute does
3 look at the action at the time it's taken. And
4 sentence 2 very clearly puts these kinds of
5 actions, the SIPs, in the local or regional
6 bucket. So I guess I'm -- I'm confused as to
7 why the government is even taking the position
8 that the first bucket is applicable here.

9 MR. STEWART: I -- I mean, we see the
10 specification in -- of SIP decisions in prong 2
11 as referring to decisions regarding an -- an
12 individual SIP. And to the extent that we
13 publish approvals or disapprovals of particular
14 state SIPs on a one -- one-onto-one basis, we
15 would agree that those are regionally --

16 JUSTICE JACKSON: So -- so you think
17 the statute was really meant to distinguish
18 between 1 and 2 on the basis of the EPA's
19 publishing determinations?

20 MR. STEWART: Well, I would say that
21 the statute was meant to distinguish between 1
22 and 2 on the basis of the action that EPA took.
23 And if -- if you regard the -- the -- what EPA
24 did here as simply a publishing decision, then
25 we would say no, you should probably disregard

1 it.

2 We -- we think of it as more than that
3 in -- in the same way --

4 JUSTICE JACKSON: Are they materially
5 different? If what the EPA did here was
6 separate out -- I mean, I understand. I see
7 one -- one publication that lists each state
8 separately and has the analysis for each state
9 separately.

10 If EPA put a page break between each
11 one of the states and published them
12 differently, would you say that's a sentence 2
13 scenario?

14 MR. STEWART: I -- I don't think a
15 page break would be enough, but if EPA issued
16 different -- you know, 21 different Federal
17 Register notices on 21 consecutive days all
18 applying the --

19 JUSTICE JACKSON: With the same
20 content --

21 MR. STEWART: With -- with --

22 JUSTICE JACKSON: -- exactly the same
23 content.

24 MR. STEWART: With the same kind of
25 content as to the nationwide part of it, and

1 then each one with a different analysis, how
2 does this content, the nationwide content apply
3 to the particular state involved, then we would
4 say that's a series of discrete state-specific
5 actions.

6 And in -- in a way the most
7 straightforward way for us to prevail in this
8 case ultimately is on prong 3, because the
9 analysis under prong 3 doesn't depend on what if
10 any weight the court gives to EPA's decision to
11 issue these, all of these in one Federal
12 Register notice.

13 JUSTICE JACKSON: So on the thought,
14 the prong 3 determination, what -- what is your
15 view as to why this is still driven? I
16 understand that you have four factors and you're
17 applying the four factors. And we would hope
18 that that would be the case, that you would be
19 assessing each state consistently using a set of
20 criteria.

21 But I take your point that that's
22 enough to make it a -- a determination of
23 national scope or application?

24 MR. STEWART: Well, I mean, it -- it
25 is partly that they were the four criteria we

1 were going to use. It was partly that they at
2 least to a degree were new and contested. We
3 anticipated from comments we received on the
4 proposed disapprovals that the states would
5 contest the methodology, not just its
6 application.

7 The -- the other thing I would say is
8 all of the states whose plans were disapproved
9 had proposed to take no further ameliorative
10 action with respect to ozone transport beyond
11 what they were already doing. So it would have
12 been a much more complicated analysis if various
13 states had been planning to improve their plans
14 in different ways and EPA was required to make
15 state-by-state determinations as to is this good
16 enough.

17 In -- instead, we had -- we approved a
18 lot of plans that -- for states that fell below
19 the 1 percent threshold, disapproved a lot of
20 plans for states that in our view fell above it
21 and that didn't propose to do anything
22 additional.

23 JUSTICE GORSUCH: Right. So they --
24 the -- you knew the challenges were going to be
25 to the four factors --

1 MR. STEWART: Right.

2 JUSTICE GORSUCH: -- because the plans
3 in all the states was to do nothing. And so it
4 had to challenge the -- the -- the factors that
5 you were using?

6 MR. STEWART: We -- we -- we
7 anticipated that, and we had confirmation of
8 that from the fact that we had proposed --
9 had -- had published proposed disapprovals for
10 each of the states and had received comments
11 on --

12 JUSTICE GORSUCH: Saying this much.

13 MR. STEWART: Yes.

14 JUSTICE GORSUCH: Exactly. And so,
15 again, as I take it, you -- you're consistent
16 between the two cases in this respect. You're
17 saying: There are new criteria. That's what's
18 going to get challenged. That should go to the
19 D.C. Circuit. And maybe 10 years later when the
20 criteria are settled, and it really does turn on
21 local factors, then -- then the regional
22 circuits can take over again?

23 MR. STEWART: Yes, exactly.

24 JUSTICE GORSUCH: Yeah.

25 JUSTICE JACKSON: But isn't it here

1 how those factors are actually working and the
2 differences in the modeling in each state that
3 is driving the determination?

4 I mean, I think this goes back to
5 Justice Kagan's points earlier that, yes,
6 there -- the factors are new, they are going to
7 be contested, and if those factors had
8 necessarily come out the same way because we
9 didn't really care about the facts of each case
10 in the application, then perhaps it would make
11 sense to have the D.C. Circuit doing it, but if
12 you're applying new factors and it matters that
13 you are Denver versus, you know, Arizona or
14 whatever in terms of how the modeling works, I
15 guess I don't see how this is necessarily the
16 same as the refining -- the refinery
17 determination.

18 MR. STEWART: I -- I mean, there's an
19 obvious difference in outcomes in the sense that
20 with the refineries, we ultimately denied all
21 105 of the exemption applications; whereas with
22 the various state plans that EPA got, we
23 disapproved 21 of them and approved I -- 23 or
24 plus -- plus or minus one or two of that. So we
25 were approving a little over half the plan

1 submissions. In that case, it -- it looks as
2 though there's more -- and there is -- more
3 state-specific variation in outcome.

4 The two things I would say are a -- a
5 determination can be -- a -- a nationwide
6 determination can be central to the analysis and
7 be the focus of judicial scrutiny and be the
8 sort of thing that -- for which centralized
9 review is important, even if it doesn't kind of
10 preordain the outcome of a particular matter.

11 And then the second thing I would say
12 is, with respect to the state-by-state
13 variations here, the -- the big predictor was
14 did you fall above or below the
15 1 percent threshold.

16 JUSTICE JACKSON: I know, but we're in
17 the exception. I mean, the thing that -- the
18 thing that troubles me about your first point,
19 at least --

20 MR. STEWART: Right.

21 JUSTICE JACKSON: -- is that we've
22 already determined in the structure of the
23 statute that these are local because we're in
24 prong 3. And the exception, I would think,
25 would just be identifying the particular

1 circumstances in which, even though we know we
2 have state-specific variation that matters,
3 that's why we're local, we're still going to say
4 no, this is really being driven in a significant
5 way by the -- the national determination.

6 And so I guess I just don't -- it's --
7 it's hard to for me to square that understanding
8 of the structure of the statute and the fact
9 that we're in an exception with an argument that
10 says yes, but there's a national standard doing
11 some work here.

12 MR. STEWART: Well, I mean, obviously
13 the only -- the only people who -- who are going
14 to seek judicial review are people who didn't
15 get the result that they want from the agency.
16 And so in -- in the case of SIP disapprovals,
17 the -- the disappointed parties would
18 predominantly be states, to some extent
19 industry.

20 And so you -- you would have to -- you
21 would have to ask -- if you were trying to route
22 to the D.C. Circuit the recurring national
23 issues, while leaving local issues to the
24 regional circuits, you -- you'd want to be
25 anticipating as best you can are the people who

1 are disappointed by this decision likely, in the
2 main, to challenge it on the ground that the
3 national framework was no good or, in the main,
4 will they argue that even accepting the national
5 framework, the out could of -- come should have
6 been different in my case?

7 Again, based on the -- both the kind
8 of the nature of the inquiry and the comments we
9 had received on the proposed disapprovals, EPA
10 anticipated that, in the main, the challenges
11 would be to the nationwide aspects.

12 And although it's not directly
13 relevant to the venue question, that's been
14 borne out in practice. The people who have
15 challenged these -- the SIP disapprovals in the
16 regional circuits have primarily focused on the
17 nationwide framework, rather than on the
18 site-specific application.

19 JUSTICE KAVANAUGH: In your rebuttal
20 in the earlier case, where you said some cases
21 have ended up in the D.C. Circuit without being
22 challenged, the venue being challenged --

23 MR. STEWART: Right.

24 JUSTICE KAVANAUGH: -- and I think
25 that's right, were you referring, though, to the

1 prong 1 cases or prong 3 cases?

2 MR. STEWART: I -- I mean, I think in
3 most of these cases, it would -- EPA would
4 identify both in the rule-making as bases for
5 D.C. Circuit venue. And so as -- as happened in
6 this Federal -- these Federal Register
7 notices --

8 JUSTICE KAVANAUGH: So they're both
9 prong 1 and 3.

10 MR. STEWART: Both prong 1 and 3. And
11 because the people sued in the D.C. Circuit and
12 nobody contested venue, it -- it wasn't --

13 JUSTICE KAVANAUGH: But the point -- I
14 think the point would be -- is different if it
15 were an exclusively prong 3 situation.

16 MR. STEWART: I -- I -- I think that's
17 right although --

18 JUSTICE KAVANAUGH: Then it would --

19 MR. STEWART: I -- I guess my only --

20 JUSTICE KAVANAUGH: You get -- you get
21 my point.

22 MR. STEWART: Yeah. And my -- my
23 response to Mr. Huston was just to the effect
24 that the -- the fact that we can't point to
25 published court of appeals opinions that have

1 upheld prong 3 findings by EPA is more a
2 function of those findings not being challenged
3 in prior litigation than it is of we make
4 findings, prong 3 findings, and sometimes
5 they're struck down and -- but they're never
6 upheld. That -- that hasn't been the case.
7 We're not aware of any case in which EPA has
8 made a prong 3 finding and a court has
9 disapproved it.

10 I -- I guess the -- the last thing I
11 wanted to say is I'm be -- I've always bemused
12 in these papers by references to the D.C.
13 Circuit as a hometown court for EPA because if
14 location in D.C. meant that the D.C. Circuit is
15 a hometown court, then this Court would be a
16 hometown court for EPA, and I've never had that
17 perception.

18 (Laughter.)

19 MR. STEWART: Thank you, Mr. Chief
20 Justice.

21 CHIEF JUSTICE ROBERTS: Anything
22 further?

23 MR. STEWART: Or do --

24 CHIEF JUSTICE ROBERTS: Yeah.
25 Anything further?

1 Thank you, counsel.

2 MR. STEWART: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr.

4 Mansinghani.

5 REBUTTAL ARGUMENT OF MITHUN MANSINGHANI

6 ON BEHALF OF THE PETITIONERS IN CASE 23-1067

7 MR. MANSINGHANI: Thank you, Mr. Chief
8 Justice. Two quick points.

9 To Justice Kagan's question about
10 whether the four determinations were sort of the
11 be all/end all here, and it seems like
12 Mr. Stewart seemed to think so with the
13 1 percent threshold, you know if you look at
14 Oklahoma's plan, Oklahoma said, look, even --
15 even though we're above the screening threshold,
16 here's why our contributions are not
17 significantly going to contribute to
18 non-attainment down-wind. Look at the trends in
19 Oklahoma's emissions due to the specific
20 structure of the Southern Power Pool and to how
21 Oklahoma operates its electric generating fleet.
22 And look at the dropping ozone levels in
23 down-wind states like Texas, because of mobile
24 source changes.

25 EPA rejected those rationales, but

1 nonetheless those were state-specific things
2 that ended up controlling the decision.

3 Similarly with Utah, Utah said based
4 on a weight -- weight-of-the-evidence analysis,
5 we don't think we're significantly contributing
6 because in the west, as EPA had prior determined
7 with states like Arizona and California, the --
8 the relative contributions are relatively low.
9 Around 6 to 7 percent are coming from other
10 states, very different from what's happening in
11 the east.

12 So these were all very state-specific
13 things that EPA had to -- to adjudicate, even
14 after it got past all of those four
15 determinations.

16 The second thing I wanted to talk
17 about was where we are with the text of the
18 exception. You know, Mr. Stewart's test has a
19 lot of atextual things to it. Well, it has to
20 be a determination but a -- a new one, not a --
21 not an old one. We have to try to figure out
22 where -- what -- what part of the action
23 litigants are likely to challenge. Are they
24 likely to challenge the local aspects or the
25 national aspects? That -- that seems like a

1 very hard-to-adjudicate venue test. And it's
2 also something that doesn't come from anywhere
3 in the statute.

4 I think our test comes from the words
5 "based on," which in this Court's Foreign
6 Sovereign Immunities Act decision in *Sachs*, I
7 think takes a similar approach as we do. It has
8 to be the gravamen -- gravamen or foundation of
9 the action and not just an element. And in that
10 case, this Court declined to apply the
11 commercial activities exception in a unanimous
12 decision, even though plaintiffs had alleged
13 commercial activities, because the Court said
14 that alleging all of those things alone still
15 entitled plaintiffs to nothing.

16 But then you also couple that with the
17 fact that I think the third sentence has to be
18 read in conjunction with the first two. It has
19 to be things like are in the first sentence,
20 like the setting of a national uniform air
21 quality standard or a national uniform standard
22 of performance for sources.

23 Couple that with the types of cases
24 that we talked about like the NRDC cases and
25 Dayton Power cases and the fact that this is a

1 venue clause, so it shouldn't be manipulable,
 2 and the fact that it's an exception, so it
 3 shouldn't be read to swallow the rule. I think
 4 all of that leads to -- to our test.

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

7 (Whereupon, at 12:39 p.m., the case
 8 was submitted.)

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<p>0</p> <p>01 [1] 17:11</p> <hr/> <p>1</p> <p>1 [32] 7:21,24 8:4,6,18,24, 25 9:1 14:22 15:12 17:10 32:14,14,15,18 33:12,16, 19 39:12,12,13,21,24 40:4 42:18,21 45:19 48:15 51:1, 9,10 53:13</p> <p>10 [1] 46:19</p> <p>105 [1] 47:21</p> <p>11 [1] 19:17</p> <p>11:50 [2] 1:23 4:2</p> <p>110(k) [1] 24:8</p> <p>12:39 [1] 56:7</p> <p>15 [1] 30:16</p> <p>19 [1] 4:24</p> <p>1977 [1] 38:22</p> <hr/> <p>2</p> <p>2 [8] 12:2 15:14 30:17 42:4, 10,18,22 43:12</p> <p>2025 [1] 1:19</p> <p>21 [6] 23:14 36:9 39:18 43: 16,17 47:23</p> <p>22 [1] 3:9</p> <p>23 [3] 39:18,19 47:23</p> <p>23-1067 [6] 2:3 3:5,16 4:4, 8 53:6</p> <p>23-1068 [3] 2:5 3:9 22:11</p> <p>25 [1] 1:19</p> <p>270 [1] 29:4</p> <hr/> <p>3</p> <p>3 [13] 15:15 30:17 44:8,9,14 48:24 51:1,9,10,15 52:1,4, 8</p> <p>300 [2] 27:21 30:13</p> <p>37 [1] 3:12</p> <hr/> <p>4</p> <p>4 [1] 3:5</p> <p>47 [1] 8:17</p> <hr/> <p>5</p> <p>53 [1] 3:16</p> <hr/> <p>6</p> <p>6 [1] 54:9</p> <hr/> <p>7</p> <p>7 [1] 54:9</p> <p>7410 [1] 5:5</p> <hr/> <p>9</p> <p>9373 [1] 8:7</p> <p>9801 [1] 9:23</p> <hr/> <p>A</p> <p>a.m [2] 1:23 4:2</p> <p>ability [1] 20:4</p> <p>able [3] 27:5 28:3,17</p> <p>above [3] 45:20 48:14 53: 15</p> <p>above-entitled [1] 1:21</p>	<p>absolutely [2] 7:23 12:15</p> <p>accept [2] 21:11 40:15</p> <p>accepting [1] 50:4</p> <p>according [1] 13:20</p> <p>account [1] 41:20</p> <p>acknowledge [1] 8:17</p> <p>across [3] 14:21 24:16,18</p> <p>Act [2] 11:7 55:6</p> <p>Act's [3] 5:1 22:14 25:20</p> <p>acting [1] 24:7</p> <p>action [22] 4:13,22 5:4,6,20 6:1 14:15 24:2,5,19 36:8, 12 37:2,7,10 38:8 41:19 42:3,22 45:10 54:22 55:9</p> <p>action's [3] 5:8 16:9 37:11</p> <p>actions [14] 4:11,18 5:13, 17 22:16,17 23:6,10 25:5, 19 38:23 41:24 42:5 44:5</p> <p>activities [2] 55:11,13</p> <p>actually [6] 7:2 18:3,7 31: 13,22 47:1</p> <p>ACUS [1] 39:3</p> <p>addition [1] 35:19</p> <p>additional [2] 35:22 45:22</p> <p>adjudicate [1] 54:13</p> <p>adjudicated [1] 20:7</p> <p>adjudicating [1] 11:10</p> <p>administrable [1] 37:14</p> <p>afraid [1] 29:25</p> <p>AGENCY [5] 1:6,13 4:5 18: 9 49:15</p> <p>agency's [2] 5:20 14:15</p> <p>agree [4] 4:15 15:10 20:9 42:15</p> <p>Ah [1] 12:22</p> <p>ahead [1] 35:20</p> <p>air [8] 9:11,17,19 11:7 12: 11 22:14 25:20 55:20</p> <p>airing [2] 24:25 28:4</p> <p>AL [4] 1:3,7,10,14</p> <p>all/end [1] 53:11</p> <p>alleged [1] 55:12</p> <p>allegedly [1] 10:8</p> <p>alleging [1] 55:14</p> <p>allow [1] 26:10</p> <p>allowed [1] 11:13</p> <p>allowing [1] 27:15</p> <p>allows [1] 21:12</p> <p>alone [2] 20:17 55:14</p> <p>already [2] 45:11 48:22</p> <p>alternative [1] 8:23</p> <p>although [2] 50:12 51:17</p> <p>ambiguous [1] 37:5</p> <p>ameliorative [1] 45:9</p> <p>amending [1] 13:24</p> <p>amendment [1] 14:6</p> <p>amendments [1] 38:22</p> <p>amici [1] 7:23</p> <p>among [1] 30:25</p> <p>amount [1] 25:17</p> <p>analysis [10] 19:4 39:16 40: 10,15 43:8 44:1,9 45:12 48:6 54:4</p> <p>another [2] 19:5 20:25</p>	<p>another's [1] 16:14</p> <p>answer [3] 17:14 27:1,5</p> <p>answers [1] 23:12</p> <p>anticipated [3] 45:3 46:7 50:10</p> <p>anticipating [1] 49:25</p> <p>anything's [1] 9:15</p> <p>APA [1] 25:15</p> <p>appeal [1] 9:7</p> <p>appeals [2] 15:11 51:25</p> <p>APPEARANCES [1] 2:1</p> <p>applicability [4] 4:19 5:9 10:5 32:8</p> <p>applicable [12] 4:18 6:13, 18 12:3 15:12 24:2,5,19 25:19 26:18 32:8 42:8</p> <p>application [6] 12:18 13: 14 44:23 45:6 47:10 50:18</p> <p>applications [1] 47:21</p> <p>applied [3] 12:19 19:20 41: 12</p> <p>applies [12] 5:16,18,24 14: 13 15:21,23,25 16:15 21: 13 26:20 35:25 36:7</p> <p>apply [8] 15:14 27:11 31:18 33:1,11,19 44:2 55:10</p> <p>applying [4] 5:23 43:18 44: 17 47:12</p> <p>approach [6] 22:25 28:7 31:4,8 36:23 55:7</p> <p>appropriate [2] 9:2 12:4</p> <p>approval [8] 5:6 12:5 14: 25 19:12 24:10 30:24 38: 23 39:6</p> <p>approval/disapproval [2] 31:19 33:3</p> <p>approvals [8] 6:11 13:9 15: 2,5 22:18 24:7 30:20 42: 13</p> <p>approve [3] 4:11 18:11 31: 16</p> <p>approved [6] 39:18,20,20 40:1 45:17 47:23</p> <p>approving [2] 11:15 47:25</p> <p>arbitrary [1] 16:23</p> <p>area [1] 33:21</p> <p>arguably [1] 6:21</p> <p>argue [2] 34:2 50:4</p> <p>argument [20] 1:22 3:2,6, 10,13 4:4,7,15 6:8 7:20 12: 17,21,25 20:11 21:7 22:10 33:10 37:21 49:9 53:5</p> <p>arguments [5] 25:2 26:23 27:8 31:24 33:9</p> <p>Arizona [6] 33:10,10,17,24 47:13 54:7</p> <p>arose [2] 11:9 13:7</p> <p>around [2] 33:22 54:9</p> <p>arrives [1] 5:17</p> <p>articulates [1] 5:23</p> <p>aspect [1] 25:1</p> <p>aspects [4] 32:6 50:11 54: 24,25</p> <p>assessing [1] 44:19</p>	<p>assume [1] 32:25</p> <p>atextual [1] 54:19</p> <p>attainment [1] 13:17</p> <p>attempts [1] 22:21</p> <p>attention [2] 29:18 34:21</p> <p>authority [2] 5:3 24:6</p> <p>authorizes [1] 5:5</p> <p>automatic [2] 13:14 19:20</p> <p>available [1] 39:4</p> <p>aware [1] 52:7</p> <p>away [1] 11:21</p> <p>awkwardness [2] 41:7,17</p> <hr/> <p>B</p> <p>back [7] 6:4 9:6 18:16 26: 18 37:20 38:19 47:4</p> <p>background [1] 27:23</p> <p>backup [1] 5:12</p> <p>backyard [1] 26:7</p> <p>BARRETT [2] 34:12 36:20</p> <p>based [12] 5:15 6:1 16:9,18 24:5 36:6 37:3,7,10 50:7 54:3 55:5</p> <p>bases [1] 51:4</p> <p>Basically [2] 18:14 19:10</p> <p>basis [5] 5:9 13:4 42:14,18, 22</p> <p>behalf [11] 2:2,4,7 3:4,8,12, 15 4:8 22:11 37:22 53:6</p> <p>behind [2] 28:23,24</p> <p>believe [2] 4:14 39:19</p> <p>believes [1] 35:23</p> <p>below [3] 6:4 45:18 48:14</p> <p>bemused [1] 52:11</p> <p>benefit [1] 40:20</p> <p>best [2] 41:23 49:25</p> <p>between [8] 10:1 14:24 19: 12 24:1 42:18,21 43:10 46: 16</p> <p>beyond [1] 45:10</p> <p>big [2] 25:23 48:13</p> <p>billion [2] 8:24 9:2</p> <p>bit [3] 9:6 20:19 32:1</p> <p>bones [1] 32:2</p> <p>borne [1] 50:14</p> <p>both [10] 11:9 13:8 25:1 27: 11 29:18 38:3 50:7 51:4,8, 10</p> <p>boundaries [1] 10:1</p> <p>break [2] 43:10,15</p> <p>brief [3] 8:17 24:14 27:2</p> <p>briefed [1] 27:3</p> <p>briefing [4] 27:7,19,22 29: 5</p> <p>brought [2] 23:11 38:10</p> <p>bucket [3] 12:13 42:6,8</p> <p>bunch [1] 7:23</p> <p>bundling [1] 23:5</p> <hr/> <p>C</p> <p>cabin [1] 20:6</p> <p>California [3] 33:14,18 54: 7</p> <p>calls [1] 9:14</p>	<p>Calumet [2] 15:23 27:11</p> <p>came [1] 1:21</p> <p>capriciousness [1] 16:23</p> <p>care [1] 47:9</p> <p>Case [44] 2:3,5 3:5,9,16 4:4, 8 6:4,9,9,17,21 9:8 10:15 13:11,18,19 15:23,24 17: 16 18:6 22:11 27:11,12 30: 15 38:5,7,16 39:11 41:7,15 44:8,18 47:9 48:1 49:16 50:6,20 52:6,7 53:6 55:10 56:6,7</p> <p>cases [20] 11:7,8 13:11 14: 18 26:8 27:16,20 37:16 38: 3,12,19,25 46:16 50:20 51: 1,1,3 55:23,24,25</p> <p>central [1] 48:6</p> <p>centralized [3] 38:9,14 48: 8</p> <p>cert [1] 26:24</p> <p>certainly [5] 15:16 23:22 26:21 30:18 35:4</p> <p>challenge [6] 7:24 22:15 46:4 50:2 54:23,24</p> <p>challenged [6] 38:24 46: 18 50:15,22,22 52:2</p> <p>challenges [10] 22:15,17 38:7,17 40:14,17 41:9,21 45:24 50:10</p> <p>change [1] 22:21</p> <p>changes [1] 53:24</p> <p>channeling [1] 22:16</p> <p>channels [1] 22:15</p> <p>Chenery [1] 8:12</p> <p>Chicago [1] 2:4</p> <p>CHIEF [18] 4:3,9 22:2,9,12 34:6,15 35:11 36:19 37:18, 23 40:19 52:19,21,24 53:3, 7 56:5</p> <p>choice [3] 16:14 38:14,15</p> <p>choose [2] 16:24 41:22</p> <p>chooses [1] 38:11</p> <p>chose [3] 4:23 16:23 39:1</p> <p>circuit [41] 4:13 5:14 6:5 10:23 11:9,18 12:4 13:3, 13,19,22 15:6,14 19:16 20: 8 22:16 23:4 25:8,11,16 26:19,25 27:17,18 28:1,19 29:20 30:9 34:3 38:13,13 41:1,16 46:19 47:11 49:22 50:21 51:5,11 52:13,14</p> <p>circuits [14] 10:1,12,20 11: 10 13:12 19:17 22:19,23 27:4,18 30:21 46:22 49:24 50:16</p> <p>circumstance [2] 5:25 16: 25</p> <p>circumstances [5] 19:22 31:24 40:11 41:13 49:1</p> <p>City [1] 2:2</p> <p>clause [1] 56:1</p> <p>clean [4] 9:11 11:7 22:14 25:20</p> <p>clear [5] 7:7 8:4 9:20 19:13,</p>
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Official

<p>25 clearly ^[1] 42:4 client ^[1] 32:16 close ^[2] 19:24 34:21 closer ^[1] 17:16 closest ^[1] 17:17 colloquy ^[1] 38:3 come ^[4] 31:15 47:8 50:5 55:2 comes ^[2] 4:19 55:4 coming ^[2] 26:2 54:9 comment ^[3] 23:15 28:24 29:10 comments ^[5] 23:13 40:13 45:3 46:10 50:8 commercial ^[2] 55:11,13 common ^[2] 31:22 40:5 completely ^[1] 24:13 compliance ^[1] 6:23 complicated ^[2] 39:17 45:12 concern ^[1] 41:4 conclude ^[1] 20:23 conclusion ^[5] 5:18 14:13 19:20 21:12,18 conclusive ^[1] 7:14 confirmation ^[1] 46:7 confirmed ^[1] 4:14 confused ^[1] 42:6 Congress ^[9] 11:20 12:12 23:22 24:6 28:5 30:19 35:5 38:15,20 conjunction ^[1] 55:18 consecutive ^[1] 43:17 consequence ^[1] 27:15 consider ^[3] 8:22 11:14 19:22 consistent ^[1] 46:15 consistently ^[1] 44:19 consolidated ^[1] 30:8 content ^[5] 43:20,23,25 44:2,2 contest ^[1] 45:5 contested ^[4] 40:12 45:2 47:7 51:12 contribute ^[1] 53:17 contributing ^[3] 10:9 20:24 54:5 contribution ^[3] 17:5,9 33:17 contributions ^[5] 18:24,24 19:5 53:16 54:8 control ^[1] 26:1 controlling ^[1] 54:2 controversy ^[1] 7:15 convenience ^[1] 28:13 convenient ^[3] 28:18,21 29:2 cooperative ^[2] 22:22 25:21 correct ^[8] 7:3,4,12 12:6,15 13:5 20:21 21:5 cost ^[1] 11:14 couldn't ^[1] 6:24</p>	<p>Counsel ^[8] 9:5 11:22 22:3 34:7 37:19 39:2 53:1 56:6 count ^[2] 30:9,9 counted ^[1] 27:21 country ^[3] 9:25 29:6 38:10 counts ^[1] 12:3 couple ^[6] 30:12 33:11 36:23 40:8 55:16,23 course ^[4] 8:15 15:1 33:4 38:12 COURT ^[24] 1:1,22 4:10 6:3 15:11,18 16:13,15 22:13 23:17 27:5,8 35:23 37:24 38:17 44:10 51:25 52:8,13,15,15,16 55:10,13 Court's ^[8] 6:6 11:3,6,18 14:18 23:24 40:2 55:5 courts ^[4] 5:2 15:25 26:9 29:18 cover ^[1] 24:22 covered ^[1] 14:16 creation ^[1] 23:4 criteria ^[6] 41:10,12 44:20,25 46:17,20 cross-cutting ^[2] 11:11 14:20 crosses ^[1] 9:24 curiosity ^[1] 24:1 currently ^[1] 27:19</p> <hr/> <p>D</p> <p>D.C. ^[33] 1:18 2:7 5:14 10:22 13:3,12 15:8 19:16 20:8 22:16 23:4 25:8,11,15,19 26:5 27:16 28:1 29:20 30:8,15 34:3 38:12,13 46:19 47:11 49:22 50:21 51:5,11 52:12,14,14 daunting ^[1] 30:18 day ^[1] 39:17 days ^[1] 43:17 Dayton ^[2] 13:18 55:25 de ^[6] 16:15,19 17:1 18:23 39:14,21 deadline ^[1] 13:17 deal ^[2] 11:4 40:6 dealt ^[1] 17:5 decide ^[2] 13:2 27:9 decided ^[2] 27:1,4 deciding ^[2] 18:10 19:17 decision ^[9] 6:3 26:17 33:3 42:24 44:10 50:1 54:2 55:6,12 decisional ^[1] 29:8 decisions ^[6] 11:19 26:1,5 31:19 42:10,11 declined ^[2] 33:11 55:10 defer ^[1] 16:13 deference ^[8] 16:6,8 35:14,14,24 36:1,13 38:4 define ^[1] 29:1 definition ^[1] 7:13 degree ^[1] 45:2</p>	<p>denied ^[1] 47:20 denominator ^[2] 31:22 33:6 Denver ^[3] 33:21,22 47:13 Department ^[1] 2:7 depend ^[1] 44:9 depends ^[3] 29:1 41:6,9 Deputy ^[1] 2:6 determination ^[29] 5:15 6:2 7:14,19 16:3,5,10,18 17:18 18:14 20:18 21:1 23:7 26:19 35:15 36:5 37:3,7,10 39:23 41:18 44:14,22 47:3,17 48:5,6 49:5 54:20 determinations ^[13] 8:10 9:9 17:3 18:8 30:24 31:2 32:23 34:4 41:25 42:19 45:15 53:10 54:15 determinative ^[1] 8:2 determine ^[3] 18:25 19:4 23:17 determined ^[3] 34:20 48:22 54:6 devolve ^[1] 23:3 dictates ^[2] 5:8 20:17 differ ^[1] 6:9 differed ^[1] 36:24 difference ^[5] 6:11 14:24 19:11 24:1 47:19 differences ^[2] 21:14 47:2 different ^[23] 6:20 7:21 10:19,20,20 11:10,10 14:21 16:1 21:8,16 22:24 28:7 29:5 31:9 43:5,16,16 44:1 45:14 50:6 51:14 54:10 differently ^[1] 43:12 direct ^[1] 38:16 directly ^[1] 50:12 directs ^[1] 5:2 disagree ^[1] 20:10 disappointed ^[2] 49:17 50:1 disapproval ^[6] 5:6,13 9:23 14:25 24:10 39:6 disapprovals ^[14] 4:21,24 6:12 13:9 15:7 22:18 24:7 30:21 42:13 45:4 46:9 49:16 50:9,15 disapprove ^[3] 4:11 20:22 31:17 disapproved ^[8] 4:16 10:7 39:18 40:1 45:8,19 47:23 52:9 disapproves ^[1] 10:5 disapproving ^[1] 11:15 discrete ^[1] 44:4 discretion ^[1] 20:6 dispositive ^[2] 5:19 14:15 dispute ^[1] 29:15 disputed ^[1] 4:20 disregard ^[1] 42:25 distinguish ^[2] 42:17,21 doing ^[4] 18:15 45:11 47:11 49:10</p>	<p>done ^[5] 18:21 24:8 33:2,7 39:15 down ^[2] 26:22 52:5 down-state ^[1] 33:13 down-wind ^[2] 53:18,23 downwind ^[1] 9:12 driven ^[2] 44:15 49:4 driving ^[1] 47:3 dropping ^[1] 53:22 due ^[1] 53:19</p> <hr/> <p>E</p> <p>each ^[8] 43:7,8,10 44:1,19 46:10 47:2,9 earlier ^[4] 5:22 38:20 47:5 50:20 east ^[1] 54:11 easy ^[1] 6:17 effect ^[20] 5:16 7:11 13:23 16:10,19 17:18,23 18:1 20:13 24:3,11,19 35:16 36:6 37:4,8,11 39:9,25 51:23 effects ^[1] 10:4 efficient ^[1] 34:19 either ^[2] 30:1 32:6 Electric ^[4] 11:9,19 14:19 53:21 element ^[1] 55:9 elements ^[1] 16:17 elucidating ^[1] 15:22 EME ^[1] 8:19 emissions ^[2] 24:17 53:19 enact ^[1] 35:5 enacted ^[1] 11:23 enactment ^[2] 13:7,21 encompassed ^[1] 15:19 end ^[1] 39:17 ended ^[2] 50:21 54:2 ending ^[1] 7:14 enough ^[5] 21:14 25:10 43:15 44:22 45:16 ensure ^[1] 39:4 entire ^[1] 24:16 entitled ^[2] 36:13 55:15 ENVIRONMENTAL ^[3] 1:6,13 4:5 envision ^[1] 23:23 envisioned ^[2] 28:5 30:19 EPA ^[68] 4:11,16,23 5:3,5,17,23 6:1 7:6 8:3,8,13,21 9:2,10,20 10:5 11:13 15:1,4 16:5,20,23 17:9 20:2,23 21:12 22:15,17,20 23:22 25:4,9,18 26:10,23 27:15 29:25 31:1,16 33:1,11 34:18 35:24 37:6 38:4,11,15,16 39:17 40:13 41:10 42:22,23 43:5,10,15 45:14 47:22 50:9 51:3 52:1,7,13,16 53:25 54:6,13 EPA's ^[13] 5:7,12,22 7:3 16:3 22:25 25:1 35:15 38:6 39:2,10 42:18 44:10 ESQ ^[4] 3:3,7,11,14</p>	<p>essentially ^[6] 5:25 25:4,18 26:11 33:12,14 ET ^[4] 1:3,7,10,14 evaluated ^[1] 18:25 even ^[16] 7:13,17 19:2 24:23 37:16 39:5,11 40:14 42:7 48:9 49:1 50:4 53:14,15 54:13 55:12 everything ^[1] 23:3 exactly ^[3] 43:22 46:14,23 example ^[8] 10:6 24:12,13,20 26:10 32:14,19 33:9 examples ^[1] 13:6 exceeded ^[1] 39:24 excellent ^[2] 29:21 34:21 exception ^[2] 5:16,23 8:11 13:2,8,21 14:16 15:20,23 19:24 24:21 25:3,7,10 26:20 48:17,24 49:9 54:18 55:11 56:2 exclusively ^[1] 51:15 exemption ^[1] 47:21 exemptions ^[1] 6:16 expertise ^[1] 22:23 explain ^[1] 30:22 explicitly ^[1] 6:12 extensions ^[1] 13:16 extent ^[5] 41:7,8,9 42:12 49:18</p> <hr/> <p>F</p> <p>fact ^[11] 16:9 36:1,9 38:12,13 46:8 49:8 51:24 55:17,25 56:2 factors ^[13] 5:20 40:8,16,18 44:16,17 45:25 46:4,21 47:1,6,7,12 facts ^[1] 47:9 factual ^[2] 16:1 21:13 factually ^[1] 6:8 fair ^[2] 28:4 29:18 fairly ^[1] 15:19 fall ^[1] 48:14 far ^[1] 21:22 feasibility ^[2] 11:14,15 Federal ^[10] 4:17 8:7 14:7 23:7 25:6 36:3 43:16 44:11 51:6,6 federalism ^[2] 22:22 25:21 fell ^[3] 39:21 45:18,20 fierce ^[1] 30:11 fight ^[1] 30:9 figure ^[1] 54:21 final ^[1] 8:7 finally ^[2] 23:19 39:8 finding ^[5] 16:20,24 36:1,5 52:8 findings ^[4] 52:1,2,4,4 finish ^[2] 27:13,14 first ^[16] 6:21 12:25 13:4,12,13 15:17 16:25 23:1 25:2 32:7 36:7 38:2 42:8 48:18 55:18,19 flaw ^[1] 36:6</p>
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Official

fleet ^[1] 53:21 flexible ^[1] 20:19 focus ^[3] 17:4 42:1 48:7 focused ^[2] 27:20 50:16 focusing ^[2] 6:22 27:22 folks ^[1] 29:4 follow ^[5] 7:3,5,6,10,15 Foreign ^[1] 55:5 form ^[2] 5:4,8 former ^[1] 38:11 forms ^[2] 5:19 14:14 formula ^[1] 7:3 forum ^[3] 38:5,9,14 fought ^[1] 7:25 foundation ^[1] 55:8 four ^[15] 17:3 18:7 30:23 31:2,17,21 32:23 34:4,18 44:16,17,25 45:25 53:10 54:14 framework ^[9] 7:6,9,16 35:25 39:10,11 50:3,5,17 friend ^[1] 16:17 friends ^[1] 31:11 friends' ^[1] 23:12 front ^[1] 15:18 Fuel ^[1] 6:15 fully ^[3] 15:18 27:3,5 function ^[1] 52:2 fundamental ^[2] 22:24 36:6 further ^[11] 18:25 19:3 22:4,5 25:9 34:8 35:7,9 45:9 52:22,25	guidance ^[1] 15:24 guidelines ^[1] 13:15 <hr/> H <hr/> half ^[1] 47:25 happen ^[1] 26:10 happened ^[1] 51:5 happening ^[1] 54:10 happens ^[2] 32:12,14 hard ^[5] 7:10,16 14:5 29:21 49:7 hard-to-adjudicate ^[1] 55:1 hardship ^[1] 6:25 hear ^[1] 4:3 heard ^[5] 6:7 22:20 23:19 38:5,8 historically ^[1] 13:6 history ^[1] 13:21 hold ^[1] 15:11 home ^[3] 28:17,19 41:1 Homer ^[1] 8:19 hometown ^[3] 52:13,15,16 Honor ^[1] 22:8 hope ^[1] 44:17 hours ^[1] 24:24 however ^[3] 5:16 24:9 40:25 Huston ^[7] 10:15 16:17 20:10 21:15,17 35:18 51:23 Huston's ^[3] 20:16,20 21:7 hypothesizing ^[1] 19:7 hypothetical ^[5] 18:2,6,13,19 24:13 hypothetically ^[2] 24:9,11	instead ^[5] 8:24 16:14 17:10 38:9 45:17 intense ^[1] 14:19 intensely ^[1] 28:2 intensively ^[1] 30:10 interpretations ^[1] 10:19 interpreting ^[1] 16:12 interrupt ^[1] 35:19 interstate ^[1] 9:21 intuitive ^[1] 9:7 invoking ^[1] 8:11 involved ^[2] 13:14 44:3 involves ^[1] 9:8 irrespective ^[2] 5:20 21:13 isn't ^[2] 7:11 46:25 issue ^[7] 13:22 14:23 15:19 18:11 24:22 27:3 44:11 issued ^[3] 15:1,5 43:15 issues ^[13] 11:12 14:20,21 27:21,23 28:2,3 29:3,5 30:13 39:5 49:23,23 itself ^[1] 12:1 <hr/> J <hr/> JACKSON ^[26] 11:22,25 12:7,10,15,24 13:6 15:9 21:6,20,23 22:1 26:12,15 36:21,22 37:17 42:2,16 43:4,19,22 44:13 46:25 48:16,21 jam ^[1] 27:16 jammed ^[2] 28:1 29:3 judges ^[3] 29:20,21 34:21 judicial ^[3] 42:1 48:7 49:14 jurisdictional ^[1] 10:1 Justice ^[128] 2:7 4:3,10 5:21 6:7,19 7:8,18,20 9:5,24 10:10,12,18 11:1,4,22,25 12:7,10,15,16,20,22,24 13:6 14:1,3,4,9 15:9 16:2 17:2,8,24 18:17 19:6,10 20:3,9 21:2,5,6,20,23 22:1,2,9,12 23:25 25:13 26:12,15 28:9,12,16,22 29:11,14,17,24 30:3,22 31:6,12 32:9,11,20,22,25 33:5 34:6,8,10,12,13,15,16,17,24 35:2,6,8,11,11,13,20 36:11,15,18,19,19,21,22 37:17,18,24 39:8 40:3,19 42:2,16 43:4,19,22 44:13 45:23 46:2,12,14,24,25 47:5 48:16,21 50:19,24 51:8,13,18,20 52:20,21,24 53:3,8,9 56:5 justified ^[2] 30:3,4	2 28:9,12,16,22 29:11,14,17,24 30:3 34:10,13 35:12,13,20 36:11,15,18 50:19,24 51:8,13,18,20 Kavanaugh's ^[1] 5:21 key ^[1] 37:2 kind ^[4] 32:5 43:24 48:9 50:7 kinds ^[1] 42:4 <hr/> L <hr/> landmark ^[2] 11:7,19 last ^[2] 6:7 52:10 later ^[1] 46:19 latter ^[1] 41:14 Laughter ^[5] 11:2 29:22 30:5 34:23 52:18 law ^[1] 16:15 lead ^[1] 31:10 leads ^[2] 23:9 56:4 least ^[4] 7:22 13:20 45:2 48:19 leaves ^[2] 5:12 23:20 leaving ^[1] 49:23 led ^[3] 11:18 13:19 14:17 legal ^[2] 6:23 20:7 legality ^[1] 26:6 legislation ^[1] 13:20 less ^[1] 41:2 letters ^[1] 23:15 level ^[2] 19:13,18 levels ^[1] 53:22 likely ^[5] 41:2 42:1 50:1 54:23,24 limited ^[1] 37:16 lines ^[1] 16:21 listed ^[2] 6:12 30:20 lists ^[1] 43:7 litigants ^[1] 54:23 litigate ^[4] 26:6 28:17,18 29:3 litigation ^[2] 23:10 52:3 little ^[5] 9:6 20:19 32:1 33:17 47:25 local ^[19] 5:5,20,25 6:1 12:12 14:20 22:17 25:18 28:2,2,3 29:8 41:1 42:5 46:21 48:23 49:3,23 54:24 local-specific ^[1] 30:12 locally ^[6] 4:18 6:13,17 12:3 13:1 24:18 location ^[1] 52:14 long-standing ^[1] 8:16 look ^[12] 5:2 21:3 23:13 27:17 33:22 36:3 37:13 42:3 53:13,14,18,22 looks ^[1] 48:1 lost ^[3] 34:3,11 41:2 lot ^[10] 18:10,20 19:3 24:25 27:7,7 39:14 45:18,19 54:19 low ^[8] 17:10,11,21 19:2,13,18 20:5 54:8 lower ^[2] 15:24 26:9	<hr/> M <hr/> made ^[11] 9:20 14:24 23:7 26:1,23 31:2 33:9 36:2 37:14 41:18 52:8 main ^[3] 50:2,3,10 major ^[1] 6:10 MALCOLM ^[3] 2:6 3:11 37:21 mandated ^[1] 21:19 manipulable ^[1] 56:1 manipulation ^[2] 23:22 24:23 MANSINGHANI ^[45] 2:2 3:3,14 4:6,7,9 6:10 7:4,12,19 8:3 9:18 10:2,11,14,24 11:3,6,23 12:6,8,14,20,23 13:5 14:2,5,10 15:16 16:7 17:7,15 18:16 19:9,19 20:4,15 21:4,17,21,24 22:7 53:4,5,7 many ^[2] 27:17 38:24 March ^[1] 1:19 materially ^[1] 43:4 matter ^[6] 1:21 23:25 30:7 36:13 39:22 48:10 matters ^[3] 34:25 47:12 49:2 mean ^[23] 5:25 9:15 11:25 12:7 16:3,5 17:24 18:7 29:2 30:10 32:4 34:18 35:2 41:5,6 42:9 43:6 44:24 47:4,18 48:17 49:12 51:2 Meaning ^[4] 6:20 24:21 27:9,10 means ^[1] 32:3 meant ^[3] 42:17,21 52:14 meat ^[1] 32:2 mechanism ^[1] 39:4 meet ^[2] 8:20 19:14 meeting ^[1] 19:24 meets ^[1] 7:13 mentioned ^[2] 13:13 38:20 merits ^[1] 27:22 methodology ^[1] 45:5 might ^[4] 7:21 9:5 17:22 20:13 mind ^[2] 7:2 38:23 minimis ^[3] 18:23 39:14,21 minus ^[1] 47:24 MISHA ^[3] 2:4 3:7 22:10 MITHUN ^[5] 2:2 3:3,14 4:7 53:5 mix ^[1] 14:19 Mm-hmm ^[3] 14:9 17:7 32:24 Mmm ^[1] 21:20 mobile ^[1] 53:23 modeling ^[4] 7:5 14:24 47:2,14 monitors ^[1] 33:21 morning ^[1] 22:20 most ^[6] 10:3 33:15,15 37:14 44:6 51:3
---	--	---	--	--

Official

<p>mostly ^[1] 31:12</p> <p>mountains ^[2] 33:14,22</p> <p>much ^[8] 20:6,12 23:20 24:17 29:15 33:16 45:12 46:12</p> <p>multiple ^[2] 23:4,6</p> <p>must ^[2] 5:13 8:6</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>nation ^[3] 18:8 24:16,18</p> <p>national ^[16] 4:22 12:11 22:15 39:5 40:12 41:10,25 44:23 49:5,10,22 50:3,4 54:25 55:20,21</p> <p>nationally ^[4] 15:12 24:2,5 26:17</p> <p>nationwide ^[33] 5:15 6:2,21 7:11 8:2,9 9:9,16 13:15 16:9,19 17:18,19,23,25 18:4,8,14 24:3,11,19 31:2 32:23 35:15 36:5 37:4,8,11 43:25 44:2 48:5 50:11,17</p> <p>nature ^[3] 6:19 18:9 50:8</p> <p>necessarily ^[3] 13:10 47:8,15</p> <p>need ^[1] 23:17</p> <p>neighbor ^[2] 9:13,20</p> <p>neutral ^[1] 22:21</p> <p>never ^[5] 12:19 26:21 36:24 52:5,16</p> <p>new ^[5] 45:2 46:17 47:6,12 54:20</p> <p>next ^[2] 4:4 23:15</p> <p>nobody ^[1] 51:12</p> <p>non-arbitrary/capricious ^[1] 25:14</p> <p>non-attainment ^[2] 10:9 53:18</p> <p>non-common ^[1] 33:6</p> <p>non-statutory ^[1] 23:5</p> <p>nonetheless ^[2] 17:22 54:1</p> <p>Nothing ^[3] 34:9 46:3 55:15</p> <p>notice ^[4] 8:7 25:6 36:4 44:12</p> <p>notices ^[3] 4:17 43:17 51:7</p> <p>notion ^[1] 25:24</p> <p>notwithstanding ^[3] 30:23 31:1,20</p> <p>novel ^[1] 23:8</p> <p>novo ^[3] 16:15,20 17:1</p> <p>NOx ^[1] 24:17</p> <p>NRDC ^[4] 13:11 38:19,24 55:24</p> <p>number ^[1] 37:16</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>object ^[1] 26:16</p> <p>obligations ^[2] 9:11,13</p> <p>observations ^[2] 32:5 38:1</p> <p>obvious ^[1] 47:19</p> <p>obviously ^[1] 49:12</p>	<p>Okay ^[5] 19:15 32:13,21 35:8 36:18</p> <p>OKLAHOMA ^[8] 1:3 2:2,2 4:4 5:13 20:24 53:14,21</p> <p>Oklahoma's ^[4] 4:16 9:23 10:7 53:14,19</p> <p>old ^[1] 54:21</p> <p>once ^[2] 39:11 40:3</p> <p>one ^[27] 6:1,10,22 8:1,9 9:10 13:4 16:13,17 17:5 18:17 24:2 26:23 32:6 34:4,20 35:18 40:24 42:14 43:7,7,11 44:1,11 47:24 54:20,21</p> <p>one-onto-one ^[1] 42:14</p> <p>ones ^[1] 26:8</p> <p>only ^[9] 4:20 5:16 7:18 20:15 36:4 40:8 49:13,13 51:19</p> <p>operates ^[2] 18:18 53:21</p> <p>opinion ^[1] 37:12</p> <p>opinions ^[1] 51:25</p> <p>opportunity ^[1] 23:21</p> <p>opposed ^[2] 39:10 40:7</p> <p>opposition ^[1] 26:23</p> <p>option ^[1] 15:17</p> <p>oral ^[8] 1:22 3:2,6,10 4:7 22:10 27:7 37:21</p> <p>order ^[2] 14:11 20:22</p> <p>orders ^[1] 8:19</p> <p>original ^[1] 12:1</p> <p>other ^[9] 4:24 8:8 13:19 27:4 28:16,23 34:24 45:7 54:9</p> <p>others ^[1] 9:13</p> <p>otherwise ^[1] 21:25</p> <p>out ^[8] 18:23 25:13 36:24 43:6 47:8 50:5,14 54:21</p> <p>outcome ^[2] 48:3,10</p> <p>outcomes ^[1] 47:19</p> <p>over ^[3] 33:23 46:22 47:25</p> <p>owed ^[2] 16:6,7</p> <p>own ^[2] 26:7 41:12</p> <p>ozone ^[3] 9:21 45:10 53:22</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m ^[1] 56:7</p> <p>PACIFICORP ^[2] 1:10 32:16</p> <p>packages ^[1] 25:5</p> <p>PAGE ^[7] 3:2 8:7,17 9:23 30:9 43:10,15</p> <p>pages ^[9] 27:7,17,21 29:4 30:12,13,16,17,17</p> <p>pales ^[1] 31:22</p> <p>papers ^[1] 52:12</p> <p>parcel ^[1] 26:3</p> <p>part ^[7] 6:13 9:1 25:23 26:3 41:6 43:25 54:22</p> <p>particular ^[10] 25:23 34:5 38:8 39:23 40:10 41:21 42:13 44:3 48:10,25</p> <p>particularized ^[1] 40:6</p> <p>parties ^[2] 4:15 49:17</p>	<p>partly ^[2] 44:25 45:1</p> <p>parts ^[2] 8:24 29:5</p> <p>party ^[1] 16:14</p> <p>past ^[3] 39:12 40:3 54:14</p> <p>path ^[2] 39:1,3</p> <p>pay ^[1] 34:21</p> <p>pending ^[1] 26:9</p> <p>people ^[6] 12:9 49:13,14,25 50:14 51:11</p> <p>per ^[2] 8:24 9:1</p> <p>perceived ^[1] 21:6</p> <p>percent ^[22] 7:21,24 8:4,6,18,25 14:22 17:10,11 32:15,18 33:12,19 39:12,13,21,24 40:4 45:19 48:15 53:13 54:9</p> <p>perception ^[1] 52:17</p> <p>performance ^[1] 55:22</p> <p>perhaps ^[3] 14:10,20 47:10</p> <p>pertained ^[1] 39:6</p> <p>petition ^[1] 26:24</p> <p>Petitioners ^[10] 1:4,11 2:3,5 3:4,8,15 4:8 22:11 53:6</p> <p>petitions ^[1] 41:21</p> <p>picked ^[1] 17:9</p> <p>piling ^[1] 23:15</p> <p>place ^[1] 38:24</p> <p>plaintiffs ^[2] 55:12,15</p> <p>plan ^[12] 6:11 10:6,7 11:8,13,16 13:24 14:6 17:13 39:25 47:25 53:14</p> <p>planning ^[1] 45:13</p> <p>plans ^[16] 4:12,17,21 5:7 11:11 13:15 15:2 20:23 39:18,19 45:8,13,18,20 46:2 47:22</p> <p>please ^[3] 4:10 22:13 37:24</p> <p>plus ^[2] 47:24,24</p> <p>point ^[13] 4:15 12:1 19:6 25:12 28:10 36:16 40:23 44:21 48:18 51:13,14,21,24</p> <p>pointed ^[1] 25:13</p> <p>points ^[2] 47:5 53:8</p> <p>pollutes ^[1] 24:16</p> <p>polluting ^[1] 10:8</p> <p>pollution ^[8] 9:17,19,22 12:11 24:15 26:2 33:13,15</p> <p>Pool ^[1] 53:20</p> <p>position ^[7] 5:7 20:16,17,21 27:9 35:17 42:7</p> <p>possibly ^[1] 17:21</p> <p>potentially ^[1] 15:14</p> <p>Power ^[4] 13:18 25:17 53:20 55:25</p> <p>practical ^[2] 30:7 39:22</p> <p>practicalities ^[1] 31:15</p> <p>practically ^[1] 28:3</p> <p>practice ^[2] 20:14 50:14</p> <p>preamble ^[1] 23:8</p> <p>precisely ^[2] 13:25 21:4</p> <p>predictive ^[1] 39:25</p>	<p>predictor ^[1] 48:13</p> <p>predominantly ^[1] 49:18</p> <p>preference ^[1] 15:17</p> <p>premise ^[2] 28:24 29:11</p> <p>preordain ^[1] 48:10</p> <p>preordained ^[1] 13:16</p> <p>preparation ^[1] 38:22</p> <p>preposterously ^[1] 19:18</p> <p>present ^[1] 17:16</p> <p>presented ^[1] 15:20</p> <p>presumably ^[1] 17:25</p> <p>presumption ^[2] 6:20,24</p> <p>pretty ^[1] 29:25</p> <p>prevail ^[2] 20:22 44:7</p> <p>previous ^[1] 4:14</p> <p>primarily ^[1] 50:16</p> <p>prior ^[6] 8:18 10:15 13:7 20:11 52:3 54:6</p> <p>pro ^[1] 27:10</p> <p>probably ^[1] 42:25</p> <p>problem ^[5] 8:8,12,13 9:22 24:15</p> <p>problematic ^[1] 25:1</p> <p>problems ^[1] 22:25</p> <p>process ^[1] 4:23</p> <p>promulgated ^[1] 41:11</p> <p>prong ^[18] 13:4 15:12 21:12 25:16 26:18 42:10 44:8,9,14 48:24 51:1,1,9,10,15 52:1,4,8</p> <p>proper ^[1] 35:25</p> <p>propose ^[1] 45:21</p> <p>proposed ^[6] 9:23 45:4,9 46:8,9 50:9</p> <p>propriety ^[2] 38:4 39:13</p> <p>PROTECTION ^[3] 1:6,13 4:5</p> <p>prototypical ^[1] 4:12</p> <p>provide ^[1] 15:24</p> <p>provision ^[7] 5:2 9:20 12:18 16:12 22:14 26:3 38:21</p> <p>proxies ^[1] 41:24</p> <p>publication ^[4] 5:4,8 8:14 43:7</p> <p>publish ^[4] 4:23 16:20,24 42:13</p> <p>published ^[4] 14:7 43:11 46:9 51:25</p> <p>publishing ^[2] 42:19,24</p> <p>purposes ^[1] 5:9</p> <p>push ^[2] 9:6 18:16</p> <p>put ^[2] 40:25 43:10</p> <p>puts ^[1] 42:4</p> <p>putting ^[1] 12:12</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quality ^[1] 55:21</p> <p>question ^[8] 4:20 15:20 16:8 27:1 38:4,7 50:13 53:9</p> <p>questions ^[6] 5:22 6:6 23:24 38:1 39:13 40:2</p> <p>quick ^[2] 37:25 53:8</p> <p>quintessentially ^[3] 28:2 29:7,8</p>	<p>quite ^[3] 21:22 36:24 40:5</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raise ^[1] 30:10</p> <p>rather ^[2] 39:2 50:17</p> <p>rationales ^[1] 53:25</p> <p>read ^[5] 23:16 37:6,9 55:18 56:3</p> <p>reading ^[1] 5:22</p> <p>real ^[2] 24:21 37:15</p> <p>realistic ^[1] 28:5</p> <p>really ^[10] 6:16 10:16 11:4 19:2,21 32:6 42:17 46:20 47:9 49:4</p> <p>reason ^[5] 5:19 8:21 14:15 15:5 41:16</p> <p>reasoning ^[1] 25:12</p> <p>reasons ^[4] 9:1,3,4 10:15</p> <p>REBUTTAL ^[3] 3:13 50:19 53:5</p> <p>received ^[4] 40:13 45:3 46:10 50:9</p> <p>recommended ^[2] 39:2,3</p> <p>recurring ^[1] 49:22</p> <p>references ^[1] 52:12</p> <p>referring ^[2] 42:11 50:25</p> <p>refineries ^[2] 40:7 47:20</p> <p>refinery ^[2] 6:9 47:16</p> <p>refining ^[1] 47:16</p> <p>regard ^[3] 25:22 32:17 42:23</p> <p>regarding ^[1] 42:11</p> <p>regardless ^[2] 12:10 35:23</p> <p>regime ^[2] 25:21 26:11</p> <p>regional ^[17] 4:13 9:21 10:4,4 12:12 13:1 15:6 22:17,19,23 30:21 34:25 41:16 42:5 46:21 49:24 50:16</p> <p>regional-specific ^[1] 34:1</p> <p>regionally ^[1] 12:3</p> <p>regionally ^[5] 6:13,18 25:18 34:25 42:15</p> <p>Register ^[9] 4:17 8:7 14:8 23:8 25:6 36:4 43:17 44:12 51:6</p> <p>rejected ^[2] 17:13 53:25</p> <p>rejecting ^[1] 9:4</p> <p>relate ^[1] 13:8</p> <p>relative ^[2] 31:23 54:8</p> <p>relatively ^[1] 54:8</p> <p>relevant ^[4] 20:18,25 32:6 50:13</p> <p>remains ^[1] 33:6</p> <p>remand ^[2] 15:13 26:16</p> <p>remedy ^[1] 15:10</p> <p>remember ^[1] 16:11</p> <p>Renewable ^[1] 6:15</p> <p>reply ^[2] 24:14 27:2</p> <p>require ^[2] 19:3 40:10</p> <p>required ^[1] 45:14</p> <p>requirement ^[2] 6:23 8:5</p> <p>requires ^[3] 8:13 23:2 41:18</p> <p>resolution ^[1] 10:22</p>
---	--	---	---	--

Official

<p>resolve ^[1] 34:25 respect ^[7] 8:4 9:19,25 41:4 45:10 46:16 48:12 respectfully ^[1] 10:24 respects ^[1] 22:22 Respondents ^[5] 1:8,15 2:8 3:12 37:22 response ^[2] 41:4 51:23 rest ^[1] 40:5 result ^[2] 31:10 49:15 reverse ^[1] 6:3 reversed ^[1] 26:17 review ^[5] 39:5 41:21 42:1 48:9 49:14 reviewed ^[5] 4:13 5:14 16:19,22 17:1 ROBERTS ^[13] 4:3 22:2,9 34:6,15 35:11 36:19 37:18 40:19 52:21,24 53:3 56:5 round ^[1] 27:2 route ^[1] 49:21 routinely ^[1] 29:25 rubric ^[1] 5:24 rule ^[11] 7:22,24 8:4,18 10:16 13:23 18:19 22:21 29:25 37:14 56:3 rule-making ^[4] 14:7,8 25:14 51:4 rules ^[3] 6:22 14:1,4</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>Sachs ^[1] 55:6 same ^[11] 13:25 18:6,18 31:10 35:18 43:3,19,22,24 47:8,16 satisfy ^[1] 40:16 saw ^[1] 23:11 saying ^[7] 21:15,18 31:20 32:20 35:14 46:12,17 says ^[5] 19:15 25:4,9 34:18 49:10 scale ^[1] 9:22 scenario ^[1] 43:13 scenarios ^[1] 16:1 scope ^[15] 5:15 16:10,19 17:19 18:4 20:12 24:3 35:15 36:5 37:3,4,8,11 40:12 44:23 screening ^[5] 18:18,22 19:2 20:5 53:15 screens ^[1] 18:23 scrutiny ^[1] 48:7 second ^[10] 6:14,24 13:1 16:20 23:9 30:20 36:7 38:18 48:11 54:16 Section ^[3] 5:5 12:2 27:24 see ^[8] 7:10,16,21 9:22 21:23 42:9 43:6 47:15 seek ^[1] 49:14 seemed ^[1] 53:12 seems ^[6] 12:11 18:3,7 40:5 53:11 54:25 seen ^[1] 15:4 send ^[3] 6:4 25:19,19</p>	<p>sends ^[1] 25:15 sense ^[7] 31:14 32:11,19 33:19 41:15 47:11,19 sent ^[1] 26:18 sentence ^[19] 6:14 12:2 20:12,13 27:10 28:8 30:20 31:4,7,9,13 36:7,24 37:1,15 42:4 43:12 55:17,19 sentences ^[2] 25:2 37:2 separate ^[3] 4:17 25:5 43:6 separately ^[2] 43:8,9 series ^[1] 44:4 set ^[4] 19:12 20:5 41:20 44:19 setting ^[1] 55:20 settled ^[2] 8:22 46:20 sham ^[2] 23:6 25:7 shouldn't ^[2] 56:1,3 showing ^[1] 15:25 shuffle ^[1] 41:2 significance ^[1] 31:23 significant ^[5] 19:1 23:21 24:15 40:24 49:4 significantly ^[4] 10:8 20:24 53:17 54:5 similar ^[2] 21:25 55:7 Similarly ^[1] 54:3 simple ^[1] 40:20 simple-minded ^[1] 19:7 simply ^[2] 40:15 42:24 simultaneously ^[1] 13:16 since ^[1] 7:9 single ^[4] 4:22 14:11 25:5,6 SIP ^[17] 7:24 13:9 17:12 18:12 22:18 24:7,10,10 30:20,24 31:16 33:2 38:23 42:10,12 49:16 50:15 SIPs ^[12] 12:5,18,19 13:8 25:22,24,24 29:7,8 39:7 42:5,14 site-specific ^[1] 50:18 situation ^[2] 31:15 51:15 situations ^[1] 31:24 six ^[1] 27:18 Sixth ^[3] 13:18,22 27:18 Solicitor ^[1] 2:6 sometimes ^[2] 15:3 52:4 somewhat ^[1] 31:9 somewhere ^[1] 23:7 Sorry ^[3] 28:15 34:15 35:19 sort ^[2] 48:8 53:10 SOTOMAYOR ^[4] 6:19 7:8,18,20 source ^[1] 53:24 sources ^[2] 26:2 55:22 Southern ^[1] 53:20 Sovereign ^[1] 55:6 specific ^[5] 27:20,23 33:8,25 53:19 specifically ^[3] 12:7,8 30:19 specification ^[1] 42:10</p>	<p>splits ^[4] 10:21,25 11:9,18 square ^[1] 49:7 standard ^[7] 5:24 6:15 13:14 40:21 49:10 55:21,21 stark ^[1] 26:9 state ^[37] 4:12,21 5:6 6:11 9:12 11:7,11,13,16 14:6,22,23 15:2 17:13,20 18:2,11 19:5,13 20:1,6,23,25 24:8,8 26:2 33:8 39:21,23 40:11 42:14 43:7,8 44:3,19 47:2,22 state's ^[5] 10:6 13:24 19:4,22 24:14 state-by-state ^[2] 45:15 48:12 state-specific ^[10] 21:3 25:25 26:4 31:23 41:13 44:4 48:3 49:2 54:1,12 STATES ^[27] 1:1,23 4:25 5:18 8:5 9:12 14:14,21 19:21 23:14 26:1 30:25 31:11 32:18 37:5 43:11 45:4,8,13,18,20 46:3,10 49:18 53:23 54:7,10 statute ^[20] 5:10 6:14,14 8:13 9:14 10:20 12:1 16:16 20:17 21:19 38:6 41:8,17,17 42:2,17,21 48:23 49:8 55:3 statute's ^[1] 9:19 statutory ^[3] 5:3 23:1 24:6 stay ^[1] 26:6 steps ^[2] 15:14 40:14 STEWART ^[32] 2:6 3:11 4:14 13:12 37:20,21,23 40:9 41:5 42:9,20 43:14,21,24 44:24 46:1,6,13,23 47:18 48:20 49:12 50:23 51:2,10,16,19,22 52:19,23 53:2,12 Stewart's ^[1] 54:18 still ^[13] 17:22 18:9,10,20 19:3 20:21 33:2 39:14 40:11,12 44:15 49:3 55:14 straightforward ^[2] 40:21 44:7 strange ^[1] 7:2 stronger ^[1] 9:9 struck ^[1] 52:5 structure ^[3] 48:22 49:8 53:20 studying ^[1] 38:21 subject ^[1] 25:6 submission ^[1] 32:17 submissions ^[1] 48:1 submit ^[1] 29:4 submitted ^[3] 23:13 56:6,8 subsequent ^[1] 40:14 substantially ^[1] 21:7 subvert ^[1] 26:11 sue ^[1] 23:17 sued ^[1] 51:11 suggesting ^[1] 18:5 super ^[2] 17:9,21</p>	<p>Suppose ^[4] 17:2,4,8 32:22 supposed ^[1] 31:21 SUPREME ^[2] 1:1,22 swallow ^[1] 56:3 system ^[2] 35:3,5</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>talked ^[3] 24:12,13 55:24 talks ^[1] 12:2 tall ^[1] 23:15 technical ^[1] 11:14 Tenth ^[4] 6:4 15:14 26:18,25 terms ^[3] 20:11 39:25 47:14 terrible ^[2] 10:21,25 test ^[9] 8:20 20:19 32:7,7 41:24 54:18 55:1,4 56:4 tests ^[2] 21:25 23:5 Texas ^[2] 10:9 53:23 text ^[4] 5:1,10 23:2 54:17 thanks ^[1] 35:8 themselves ^[1] 40:18 theoretically ^[1] 24:18 theory ^[1] 17:20 there's ^[10] 7:22 11:17 15:3 33:22 35:25 38:2 40:19 47:18 48:2 49:10 they've ^[4] 8:16,18 31:17,21 thinking ^[4] 12:11 23:14 27:14 30:15 third ^[14] 12:17 13:4 20:12,13 21:11 25:16 27:10 28:8 31:4,7,9 36:23 37:15 55:17 THOMAS ^[4] 6:7 23:25 34:8 40:3 though ^[7] 24:24 37:16 48:2 49:1 50:25 53:15 55:12 three ^[2] 22:24 37:25 threshold ^[25] 8:6,24,25 9:2 14:23 17:6,9,21 18:18,22 19:3,11 20:5 32:15 33:12,19 39:12,14,22,24 40:4 45:19 48:15 53:13,15 throughout ^[1] 38:10 today ^[3] 5:22 23:12,20 together ^[1] 4:24 took ^[4] 5:3 21:15 27:17 42:22 touched ^[1] 11:11 Train ^[3] 11:8,19 14:18 transferred ^[1] 30:15 transformed ^[1] 4:22 transport ^[4] 8:19 9:21 25:24 45:10 trapping ^[2] 33:15,23 travels ^[1] 9:17 treat ^[1] 33:23 trends ^[1] 53:18 tried ^[1] 8:23 tries ^[1] 41:24</p>	<p>triggering ^[1] 33:21 trip ^[1] 27:2 troubles ^[1] 48:18 true ^[4] 6:15 14:21 29:19 40:22 try ^[1] 54:21 trying ^[2] 11:20 49:21 TSEYTLIN ^[38] 2:4 3:7 22:9,10,12 24:4 26:14,21 28:11,15,20,25 29:13,16,19,23 30:4,6,22 31:3,8 32:4,10,13,21,24 33:4,8 35:1,4,7,9,17,22 36:12,17 37:1 40:24 TSYETLIN ^[1] 30:2 Tuesday ^[1] 1:19 turn ^[2] 26:22 46:20 two ^[12] 6:21 10:12 15:25 16:17 24:24 25:2 37:25 46:16 47:24 48:4 53:8 55:18 two-circuit ^[1] 10:16 types ^[3] 14:12,17 55:23</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately ^[3] 31:10 44:8 47:20 unadministrable ^[1] 23:9 unanimous ^[1] 55:11 uncommon ^[1] 34:19 under ^[13] 5:3 15:12 17:21 24:6,8 25:9,14,16,16 38:6 39:10,21 44:9 understand ^[3] 36:15 43:6 44:16 understanding ^[2] 21:9 49:7 uniform ^[3] 13:23 55:20,21 uniformly ^[6] 5:18 14:14 19:21 21:13 31:18 33:1 Union ^[3] 11:8,19 14:18 UNITED ^[2] 1:1,23 unusual ^[2] 16:13 18:3 up ^[4] 23:15 27:21 50:21 54:2 upheld ^[2] 52:1,6 using ^[2] 44:19 46:5 Utah ^[7] 5:13 8:23 10:11 33:9,20 54:3,3 Utah's ^[3] 4:16 9:4 32:15 Utah-specific ^[3] 8:25 9:3,4</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>variances ^[1] 11:12 variation ^[2] 48:3 49:2 variations ^[2] 31:1 48:13 various ^[2] 45:12 47:22 vary ^[1] 30:24 venue ^[20] 5:1,9 8:11 16:11,14 22:14,21 23:21 24:23 26:3 28:10 34:20 38:21 41:18 50:13,22 51:5,12 55:1 56:1 versus ^[2] 4:4 47:13</p>
--	---	---	--	--

view ^[3] 26:16 44:15 45:20**viewed** ^[1] 16:25

W

wanted ^[3] 39:3 52:11 54:16**war** ^[3] 5:10 23:1 25:20**warranted** ^[1] 35:24**Washington** ^[3] 1:18 2:7 41:3**wasteful** ^[1] 23:10**way** ^[11] 8:2 13:25 18:19 28:7 35:9 41:11 43:3 44:6,7 47:8 49:5**ways** ^[3] 9:10,25 45:14**weight** ^[3] 16:2 44:10 54:4**weight-of-the-evidence** ^[1] 54:4**welcome** ^[4] 6:6 23:24 37:20 40:2**west** ^[2] 32:18 54:6**whatever** ^[3] 7:9 38:17 47:14**whereas** ^[1] 47:21**Whereupon** ^[1] 56:7**whether** ^[23] 4:20 11:12,13 13:3 15:20 16:8 18:11,11 19:1,4,17,22 23:5,6 24:4 26:19 35:23 38:7,9 39:23,25 41:11 53:10**whole** ^[2] 9:18 25:23**wholesale** ^[1] 13:16**will** ^[7] 15:24 28:6 32:5 35:18 38:5,8 50:4**willing** ^[1] 21:11**win** ^[1] 26:22**wishes** ^[1] 38:17**within** ^[1] 15:19**without** ^[2] 29:3 50:21**wondered** ^[1] 41:3**word** ^[3] 29:2 30:9 37:5**words** ^[2] 28:16 55:4**work** ^[8] 18:10,15,20 29:21 33:2,6 39:15 49:11**working** ^[1] 47:1**works** ^[1] 47:14**wrinkle** ^[2] 28:7 35:22**writes** ^[1] 37:12**wrote** ^[1] 16:5

Y

years ^[2] 33:11 46:19