

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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McLAUGHLIN CHIROPRACTIC )  
ASSOCIATES, INC., )  
                                Petitioner, )  
                                v. ) No. 23-1226  
McKESSON CORPORATION, ET AL., )  
                                Respondents. )  
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ASSOCIATES, INC., )

Petitioner, )

v. ) No. 23-1226

McKESSON CORPORATION, ET AL., )

Respondents. )

- - - - -

Washington, D.C.

Tuesday, January 21, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:17 a.m.

1 APPEARANCES:  
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7 Department of Justice, Washington, D.C.; for the  
8 United States, as amicus curiae, supporting the  
9 Respondents.  
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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MATTHEW W.H. WESSLER, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	JOSEPH R. PALMORE, ESQ.	
7	On behalf of the Respondents	34
8	ORAL ARGUMENT OF:	
9	MATTHEW GUARNIERI, ESQ.	
10	For the United States, as amicus	
11	curiae, supporting the Respondents	61
12	REBUTTAL ARGUMENT OF:	
13	MATTHEW W.H. WESSLER, ESQ.	
14	On behalf of the Petitioner	81
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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3  
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P R O C E E D I N G S

(11:17 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-1226, McLaughlin Chiropractic Associates against McKesson Corporation.

Mr. Wessler.

ORAL ARGUMENT OF MATTHEW W.H. WESSLER  
ON BEHALF OF THE PETITIONER

MR. WESSLER: Thank you, Mr. Chief Justice, and may it please the Court:

Five years ago, in PDR Network, four justices recognized that, properly construed, the Hobbs Act does not require district courts to treat agency orders that interpret federal statutes as binding precedent. Instead, it operates just like other pre-enforcement channeling statutes by providing for direct review of agency orders in the courts of appeals.

McKesson and the government reject this view. Together, they urge an interpretation that would bind courts, including this one, to agency interpretations of federal statutes no matter how wrong, and that would be

1 true even for interpretive rules that, by  
2 definition, do not carry the force of law,  
3 transforming even the most informal agency  
4 interpretations into permanently binding ones.

5 But none of the relevant markers,  
6 text, context, structure, and history support  
7 such a misguided and possibly unconstitutional  
8 reading of the Hobbs Act. The key phrase,  
9 "determine the validity of," authorizes courts  
10 of appeals to determine whether an order is  
11 legally in effect, and a court does this by  
12 issuing a declaratory judgment that the order is  
13 valid or invalid.

14 Context cinches this. The phrase is  
15 immediately surrounded by terms which all denote  
16 specific forms of equitable relief directed  
17 against the order itself. The phrase "determine  
18 the validity of" should therefore be read the  
19 same way.

20 The Act's broader structure reinforces  
21 this understanding. From beginning to end, it  
22 establishes procedures designed to govern direct  
23 review proceedings and elsewhere uses the phrase  
24 "determine the validity of" to mean a  
25 declaratory judgment.

1                   And, finally, there's history. The  
2 Act was never intended to implicate actions  
3 between private parties. Instead, it was  
4 patterned on similar statutes established for  
5 the review of orders from other agencies that  
6 have never been thought to bind district courts.

7                   Consistent with the longstanding  
8 recognition that interpreting statutes is a job  
9 for the judiciary, this Court should construe  
10 the Hobbs Act for what it is, a commonplace  
11 jurisdictional provision that allows parties to  
12 obtain equitable relief directly against agency  
13 orders in the courts of appeals.

14                   I welcome the Court's questions.

15                   JUSTICE THOMAS: What -- what would  
16 you do with the Port of Boston case?

17                   MR. WESSLER: I think the Port of  
18 Boston case is -- is different for a couple of  
19 reasons, Justice Thomas, but most importantly,  
20 in that case, both parties that were involved in  
21 the district court were also involved in the  
22 regulatory proceeding seeking a petition for  
23 review.

24                   And I think, in that scenario, where  
25 you've got two parties that are specifically

1 bound by an agency action, you've got normal  
2 estoppel principles, issue preclusion principles  
3 that would apply. But we're not really talking  
4 about a situation --

5 JUSTICE SOTOMAYOR: That's not what  
6 the Court there said. The Court could have  
7 easily said that, that res -- collateral  
8 estoppel principles apply, but it didn't. It  
9 said -- the Court said that the Act is explicit  
10 that the district court was without authority to  
11 review the merits of the Commission's decision.

12 So you have a problem that the -- that  
13 the analysis that the Court used was directly  
14 contrary to your position.

15 MR. WESSLER: But I think the -- the  
16 difference, Your Honor, in -- in -- in that case  
17 compared with what we have here is you've got a  
18 situation where the parties that are -- are  
19 fighting about the meaning of the agency  
20 interpretation were also parties in the agency  
21 proceeding itself.

22 Here, you don't have a situation  
23 where, you know, the plaintiffs in this case had  
24 any role to play or had any --

25 JUSTICE SOTOMAYOR: But they could



1 have.

2 MR. WESSLER: -- were involved at all.

3 JUSTICE SOTOMAYOR: You haven't denied  
4 they had an opportunity to -- to --

5 MR. WESSLER: Well -- well, we don't  
6 deny that -- that, in theory, they had an  
7 opportunity.

8 JUSTICE SOTOMAYOR: No, not in theory.  
9 They -- they -- the -- this is an unusual case  
10 where the proceeding was actually in effect  
11 during the litigation. In my experience, and I  
12 think we've said this, if there is something  
13 like that happening, the district court -- the  
14 court below should stay letting that decision  
15 become final, and --

16 MR. WESSLER: I think, Your Honor,  
17 that illustrates what kind of empty promise  
18 the -- my friends on the other side's  
19 interpretation would have for the Hobbs Act  
20 because, you're right, what happened here was  
21 the litigation was proceeding for six years and  
22 the agency then issued this Amerifactors order.

23 If, in fact, what was supposed to  
24 happen at that point was the -- the parties  
25 in -- in the underlying litigation were required

1 to go and seek some sort of relief in front of  
2 either the agency or a petition for review, we  
3 are six years on from -- from that point in time  
4 happening, and the agency hasn't actually  
5 resolved what one -- what one party had actually  
6 done in that case, which was to file for  
7 reconsideration.

8           And so I think, as the concurrences in  
9 PDR Network pointed out, that kind of circuitous  
10 route to judicial review doesn't really make  
11 very much sense either if you look at the terms  
12 of the Hobbs Act text itself or in practical  
13 sense.

14           If, in fact, it's the case that a  
15 party could seek judicial review in some way,  
16 why not allow district courts to -- to -- to  
17 provide that review in a case which arises  
18 organically from just a claim that the --

19           JUSTICE SOTOMAYOR: Thank you,  
20 counsel.

21           MR. WESSLER: -- the statute had been  
22 violated.

23           JUSTICE SOTOMAYOR: What do I do with  
24 the dictionary definition of "validity?"  
25 "Valid" means things like lawful, meritorious,

1 or correct. No dictionary suggests that you  
2 only need a declaratory judgment for that. We  
3 have Heck versus Humphrey, where the Court said  
4 that you cannot bring a wrongful conviction  
5 claim under 1983 because doing so would amount  
6 to a collateral challenge to the conviction's  
7 validity. 1983 only requires money damages.  
8 And yet we use "validity" in a very different  
9 sense because nothing in the 1983 was going to  
10 vacate the conviction.

11 So we've -- there are multiple ways to  
12 challenge validity without a declaration.

13 MR. WESSLER: Well, I -- I -- I agree  
14 with that, Justice Sotomayor. But I think that  
15 the phrase "determine the validity" helps  
16 provide, I think, clarity for what that term  
17 means in the context of 2342.

18 It isn't just that a court is opining  
19 on the -- on the validity in a colloquial sense  
20 of -- of the legitimacy or reasoning of the  
21 order. It's that it's finally resolving whether  
22 that order is valid or invalid.

23 JUSTICE SOTOMAYOR: It was the same  
24 language in Yakus, and yet -- "determine the  
25 validity" -- and in Yakus, we said it was

1 exclusive.

2 I know you rely on the Second Circuit,  
3 but, if you look at the analysis, it barely  
4 mentions the Second -- the Second Circuit, the  
5 sentence -- the second circuit -- sentence --  
6 boy, my tongue got tied.

7 MR. WESSLER: Yes.

8 JUSTICE SOTOMAYOR: What it did was  
9 focus in on that language, "determine the  
10 validity."

11 MR. WESSLER: Well, I -- I  
12 respectfully disagree with -- with how much it  
13 relied on the first sentence or the second  
14 sentence. I think it said those two sentences  
15 together lead to the conclusion that we reach in  
16 that case.

17 And, you know, the key language there  
18 as -- as --

19 JUSTICE SOTOMAYOR: But we made that  
20 finding, and Congress a few years later uses  
21 exactly the same language, "determine the  
22 validity," in this statute, the Hobbs Act.

23 MR. WESSLER: It -- it -- it does, but  
24 it doesn't use what I think is, in fact, the key  
25 language of the second sentence, which is not

1 "determine the validity" but "consider the  
2 validity."

3           And I think there's also another  
4 distinction at least as a textual matter between  
5 the -- the language of the Emergency Price  
6 Control Act that was at issue in Yakus and here,  
7 which is, if you look at where that language  
8 "determine the validity" is in the Emergency  
9 Price Control Act, it doesn't come -- it's not  
10 included in the -- in -- in a series of -- of  
11 other terms that denote specific forms of  
12 equitable relief.

13           And so, yes, the phrase "determine the  
14 validity of" is the same between the two  
15 statutes, but the context is different.

16           JUSTICE SOTOMAYOR: I don't  
17 understand. When you have a sentence that  
18 doesn't say "and," it says "or," the equitable  
19 relief is set forth at first. It says has  
20 exclusive jurisdiction to "enjoin," that's  
21 equitable. "Set aside," equitable. "Suspend"  
22 and "hold in part."

23           And it doesn't use the word "and" --  
24 "or" -- "and determine the validity of." It  
25 says "or to determine the validity of." That's

1 broader. That's intended to be broader.

2 MR. WESSLER: Well, I respectfully  
3 would disagree with that. I think it's -- it's  
4 different and distinct but not necessarily  
5 broader. What I think is notable about the way  
6 that that -- that sentence is structured is you  
7 have the first three terms, "enjoin," "set  
8 aside," and "suspend," all referring to some  
9 form of injunctive or coercive relief.

10 The next phrase, "determine the  
11 validity of," refers to something entirely  
12 different, albeit a form of equitable relief,  
13 but a declaratory judgment.

14 JUSTICE SOTOMAYOR: Well, as I  
15 mentioned, "or determine the validity of" can be  
16 done in a variety of different ways. It doesn't  
17 require just a declaratory judgment.

18 MR. WESSLER: I think, in the  
19 abstract, "validity" might lead a -- a -- a  
20 reader to think that that could be true.

21 But I think, read in context, what's  
22 going on in this provision, both with respect to  
23 the use of the -- of the term "determine" but  
24 also that it's appearing in a list of other  
25 forms of equitable relief, that what the statute

1 is trying to do is it's trying to provide  
2 some -- something of an instruction manual for  
3 parties who are -- are planning to seek direct  
4 review of an agency action.

5 And it's saying: For that kind of  
6 petitioner proceeding, where you actually want  
7 the agency order to be enjoined in some way or  
8 declared invalid, you can do that by filing your  
9 petition within 60 days in a court of appeals.

10 But what it is not trying to do is  
11 forever bind courts in any garden-variety,  
12 run-of-the-mill enforcement --

13 JUSTICE SOTOMAYOR: It does seem to me  
14 that the word "exclusive" has a lot of power  
15 otherwise.

16 JUSTICE JACKSON: Why do you say --

17 JUSTICE SOTOMAYOR: But thank you.

18 JUSTICE JACKSON: -- that it forever  
19 binds? I guess, if we have this mechanism in  
20 the Hobbs Act for people to challenge the agency  
21 order, I don't understand why -- why you're  
22 saying it forever binds -- the agency's order  
23 forever binds.

24 MR. WESSLER: Well, I mean, you can  
25 take this case. The district -- the minute

1 the -- the agency issued this Amerifactors  
2 order, the district court in this case said: I  
3 have no license to review whether the agency's  
4 interpretation of the TCPA is correct or not.

5 JUSTICE JACKSON: Right, until the  
6 court of appeals hears that question per the  
7 statute.

8 MR. WESSLER: Well, of course, in this  
9 case, it may never hear that question.

10 JUSTICE JACKSON: It may not, but  
11 there is a mechanism for it to be corrected. I  
12 mean, the suggestion that the agency issues an  
13 order and the courts are suddenly divested of  
14 any opportunity to address its validity, I  
15 think, is inconsistent with the very provision  
16 we're talking about here, which allows for the  
17 courts of appeals to assess the validity.

18 At a minimum, you agree that the  
19 courts of appeals can do that, right?

20 MR. WESSLER: Yes, with a maybe  
21 friendly amendment, which is not assess the  
22 validity but to determine the validity once and  
23 for all. And I do think that there is an  
24 important distinction --

25 JUSTICE JACKSON: No, I understand how



1 your argument plays out.

2 I guess what I'm just saying is it  
3 seems to me that we're just talking about a  
4 period of time in which the district court is  
5 hearing a -- a -- a -- an enforcement action or  
6 whatnot, and the agency issues an order. And  
7 given that the Hobbs Act -- until the court of  
8 appeals determines the validity, the district  
9 court has to assume for the purpose of any  
10 litigation that's before it that it is a valid  
11 order.

12 MR. WESSLER: I -- I -- I think we're  
13 using the term "determine the validity" in  
14 different ways.

15 I think what the Hobbs Act says and  
16 what it requires is that if -- if you are  
17 seeking a petition for review to enjoin or  
18 actually declare invalid once and for all this  
19 agency action, then, yes, you must bring that  
20 petition within 60 days in a court of appeals.

21 But, if what you want is just a  
22 district court to -- to --

23 JUSTICE JACKSON: Not apply this order  
24 in the context of the litigation that's before  
25 it.

1 MR. WESSLER: Correct. Correct.

2 JUSTICE JACKSON: I appreciate that  
3 distinction.

4 MR. WESSLER: Yes.

5 JUSTICE JACKSON: I understand it.

6 MR. WESSLER: Yes.

7 JUSTICE JACKSON: What I'm suggesting  
8 is just the -- the ultimate conclusion on your  
9 part that -- or at least you said it at the  
10 beginning -- that this somehow means that the  
11 courts never have a chance to get out from under  
12 the agency order, that the agency order will  
13 bind the courts forever, perhaps permanently you  
14 say. And I -- I guess I just don't understand  
15 that.

16 MR. WESSLER: Well, I -- I mean, I  
17 think it comes up in a number of different  
18 contexts, but you could take, for instance, a  
19 set of consumers who would have no reason to  
20 ever think that an agency interpretation of the  
21 TCPA would matter to them.

22 So the FCC could issue this  
23 Amerifactors order --

24 JUSTICE JACKSON: Why wouldn't they if  
25 we interpret -- if we say that when an agency

1 issues an order, unless and until the -- the  
2 court of appeals determines its validity, all  
3 litigation that is ongoing related to that order  
4 is going to treat it as valid?

5 MR. WESSLER: Correct. My -- my --  
6 maybe I didn't -- I was unclear. My -- my  
7 hypothetical was just imagine there is no case,  
8 the Amerifactors order is issued. A party only  
9 has 60 days to file a petition for review under  
10 the Hobbs Act.

11 So, in three years down the road, if  
12 some consumers believe that a company has  
13 violated the TCPA, they are not capable or  
14 permitted to bring a petition for review under  
15 the Hobbs Act.

16 JUSTICE JACKSON: There's no  
17 equitable --

18 MR. WESSLER: No. This is a -- this  
19 is a -- a bar, a bar.

20 And, in that scenario, Your Honor, a  
21 district court, under my friend's interpretation  
22 of this provision, would have no choice but to  
23 enforce the agency's interpretation of the TCPA.

24 JUSTICE KAGAN: Can I take you back,  
25 Mr. Wessler, to Justice Thomas's initial

1 question about the Port case and about Venner  
2 and ask you to tell me what your reply brief  
3 means with respect to those cases?

4 Because what you say in your reply  
5 brief is that those cases stand for a kind of  
6 anti-circumvention principle, that we're not  
7 going to allow people to evade the Hobbs Act,  
8 and you say what those cases do is they shut  
9 down collateral challenges that could have been  
10 brought under the Hobbs Act.

11 So what do you mean by that? What do  
12 you take the scope of those cases to be? Or  
13 said otherwise, what do you take the set of  
14 collateral challenges to be that those cases  
15 preclude?

16 MR. WESSLER: Sure. I think there are  
17 maybe two kind of categories, the way to think  
18 about it. The first would be in a -- in a case  
19 in which the actual parties who are in the --  
20 the -- the -- the civil proceeding were also  
21 parties to an agency action. And I think, in  
22 that scenario, that's --

23 JUSTICE KAGAN: That's not Port of  
24 Boston, right?

25 MR. WESSLER: Well, that is Port of

1 Boston. In Port of Boston, both parties that  
2 were the subject of the district court  
3 proceeding were also parties in the -- in the  
4 agency action that was taking place kind of  
5 simultaneously.

6 And so, in that scenario, I think it  
7 is fair to say: Well, an order from the  
8 district court would effectively enjoin the  
9 agency action in a way that -- that would  
10 suspend the -- the -- the -- the functioning of  
11 the order and would be subject to the Hobbs Act.

12 But I don't think in any of those old  
13 cases, Venner, Port of Boston --

14 JUSTICE KAGAN: You said that there  
15 were two things? You said -- sorry.

16 MR. WESSLER: The other -- I think the  
17 other category would be a case in which you  
18 might have one party who is specifically given,  
19 like, a waiver by an agency.

20 And I think, in a scenario like that,  
21 if it later got sued and the only -- the only  
22 agency action related to that specific party,  
23 the effect of a later suit might be to suspend  
24 the agency order in a way that would look like  
25 the kinds of equitable relief that the Hobbs Act

1 covers.

2 But, once you're out of those two  
3 pretty narrow categories -- and, certainly, that  
4 isn't the case we've got here or what we had in  
5 PDR Network -- it cannot be the case, I think,  
6 or would submit to the Court that the Hobbs Act  
7 covers any proceeding that arises in the -- in  
8 the normal course of a district court's  
9 jurisdiction in which the -- the district court  
10 is being asked to evaluate or interpret the  
11 meaning of a statute and compare the agency's  
12 reasoning.

13 JUSTICE KAGAN: So I -- I understand  
14 that position, but I guess I'm wondering why  
15 you've argued this case quite so broadly. I  
16 mean, it seems to me that you win this case so  
17 long as you say: There's at least a requirement  
18 that the parties bringing the suit are legally  
19 bound, and that's not met here, and so we win on  
20 that ground.

21 Like, why go further than that?

22 MR. WESSLER: Well, I mean, we -- I  
23 will take a -- a -- a reversal win in whatever  
24 way the Court thinks is best. But I do think  
25 that there is something quite odd about an

1 interpretation that the other side has offered  
2 for 2342 that would extend to cover a district  
3 court's ability to interpret the statute.

4 And I think that really is what we're  
5 talking about in this case. I think it's even  
6 more extreme when you look at the nature of the  
7 Amerifactors order here, which all parties  
8 argued and agreed below was an interpretive  
9 order, one that was --

10 JUSTICE KAGAN: Right. I mean, I  
11 guess that's exactly what I'm suggesting. I  
12 mean, I think that the -- in our initial opinion  
13 in -- remind me of the name --

14 MR. WESSLER: PDR -- PDR Network.

15 JUSTICE KAGAN: PDR, right. That the  
16 majority opinion basically says, you know -- I  
17 think it's important to us the majority opinion  
18 says whether this is an interpretive rule. And,  
19 here, it seems to me you can just come up and  
20 say: This is an interpretive rule, the majority  
21 in PDR got it right, that that was an important  
22 question, and if it's an interpretive rule, you  
23 know, it -- it falls outside the Hobbs Act.

24 MR. WESSLER: Correct.

25 JUSTICE KAGAN: End of case.

1                   MR. WESSLER: Correct. And we  
2 would -- we would accept a -- a decision going  
3 no further than that.

4                   I do think that it is hard to square  
5 the -- McKesson and the government's  
6 interpretation of 2342 as expansively as they  
7 have argued it to mean anytime a district court  
8 is -- is asked to assess the -- the -- the  
9 meaning of a statute, if the agency has taken a  
10 position on that already, it is -- it is barred  
11 from doing that.

12                   And I don't think that the -- that the  
13 language of 2342 or the structure of the Hobbs  
14 Act could be read to -- to -- to sustain that  
15 kind of understanding about what Congress is  
16 doing.

17                   JUSTICE JACKSON: What about its  
18 purposes? How -- how do you square your point  
19 with its purposes?

20                   MR. WESSLER: Sure. I mean, I -- I  
21 don't think there's any indication if you look  
22 back in the -- in the sort of transformation  
23 from the Urgent Deficiency Act to the Hobbs Act  
24 what Congress was trying to do to suggest that  
25 they were -- that the design of and goal of this



1 statute was to do the -- to do that kind of  
2 complete removal of the ability of courts to --

3 JUSTICE JACKSON: I mean, wasn't it  
4 trying to --

5 MR. WESSLER: -- assess the meaning.

6 JUSTICE JACKSON: -- wasn't it trying  
7 to establish finality, predictability,  
8 uniformity? When -- when the court of appeals  
9 rules on the validity or does the statutory  
10 interpretation you're talking about, we then  
11 have a sort of definitive interpretation that  
12 applies at least to a particular region.

13 It seems to me that to say that the  
14 court -- or that the Congress was still trying  
15 to preserve the district courts' ability to  
16 make, you know, essentially ad hoc  
17 determinations within the context of each of its  
18 cases flies in the face of the idea that they  
19 were channeling exclusive jurisdiction to  
20 determine the validity of the agency's  
21 interpretation in the court of appeals.

22 MR. WESSLER: Yes, but we -- we may  
23 just disagree on what "determine the validity"  
24 in that -- in this context means, because I  
25 agree with everything you just said, but I -- I

1 think it is tailored to a specific kind of --  
2 of -- of remedy for parties who are adversely  
3 affected by agency orders.

4 JUSTICE JACKSON: But why does the  
5 remedy matter? If you -- if you accept -- if  
6 you agree with my premise that what Congress was  
7 trying to do was get a rule out there that is  
8 being consistently applied, then it really  
9 doesn't relate to the remedy. It relates to the  
10 merits of the party's claim that this is a valid  
11 or invalid interpretation.

12 MR. WESSLER: I --

13 JUSTICE JACKSON: And it wanted the  
14 court of appeals to make that decision.

15 MR. WESSLER: -- I disagree with that.  
16 I think what -- what Congress wanted to do was  
17 to create a streamlined process for obtaining  
18 quick review of agency actions that would either  
19 uphold them throughout or strike them down and  
20 invalidate them.

21 But what it was not trying to do --  
22 and we -- we know this, I think, for a couple of  
23 reasons -- was to extend the Hobbs Act's  
24 coverage further to foreclose district courts in  
25 the mine-run case from even evaluating whether

1 the agency's interpretation of a statute is  
2 correct.

3           And we know that I think for -- there  
4 are a couple of, I think, indicia. One, you  
5 know, it had -- Congress had -- as we discussed  
6 earlier, it had Yakus and the Emergency Price  
7 Control Act out there when it was enacting the  
8 Hobbs Act, and it did not integrate into the  
9 Hobbs Act the key second sentence of that  
10 statute which had been interpreted, along with  
11 the first sentence, to have this result.

12           But I think just as significantly, we  
13 know -- and the concurrences in PDR Network  
14 pointed this out -- we know that Congress knows  
15 how to accomplish, I think, what -- what Your  
16 Honor is suggesting, which is to eliminate the  
17 ability of district courts of any type -- to  
18 provide any judicial review in an enforcement  
19 proceeding over an agency interpretation of a  
20 statute.

21           We see that in the environmental  
22 statutes. There are three or four of them.  
23 And, you know, that language, which I think is  
24 quite clear, provides a kind of negative  
25 prescription that district courts do not have

1 the authority to provide any sort of judicial  
2 review in an enforcement proceeding, just is  
3 absent from the Hobbs Act here.

4           And I think that that's a quite  
5 significant distinction and one, I think, that  
6 we have to, again, as -- as -- as we know from  
7 PDR Network, recognize that -- you know, that  
8 the silence that the Hobbs Act has when it comes  
9 to that kind of question, I think, ought to be  
10 significant in the way we understand the  
11 background rule that's operating here, which is,  
12 for -- for -- for, you know, claims that don't  
13 fall within one of these channeling statutes, a  
14 district court is always free in that context to  
15 assess the, you know, reasoning of an agency's  
16 interpretation and interpret the statute itself.

17           And I think the Hobbs Act, because it  
18 didn't foreclose that kind of judicial review  
19 that we see from other statutes, means that  
20 district courts must remain free to be able to  
21 do that in a case like this one or like in what  
22 we had in PDR Network.

23           JUSTICE GORSUCH: Mr. Wessler, I'm  
24 struggling a little bit with the off-ramp you  
25 were discussing with Justice Kagan, and as I

1 understand it, the idea goes that the Hobbs Act  
2 doesn't even apply at all because the  
3 Amerifactors order wasn't really an order; it  
4 was an interpretive rule.

5 But it was an adjudication, and -- and  
6 there was a final order issued in that  
7 administrative adjudication. That would seem to  
8 be, to me, every day of the week and twice on  
9 Sundays an order and therefore implicate the  
10 Hobbs Act and -- and raise unavoidably the  
11 larger question in this case.

12 What am I missing?

13 MR. WESSLER: Yeah, I -- I don't think  
14 we disagree with any of that, and -- and I don't  
15 think our view is that this isn't an order.

16 I think just because -- you know, the  
17 other side has said, well, it's an adjudication  
18 and so somehow that doesn't implicate whether  
19 there's an interpretive or legislative rule. We  
20 think --

21 JUSTICE GORSUCH: I -- I -- one -- I  
22 know what an interpretive --

23 MR. WESSLER: Yes.

24 JUSTICE GORSUCH: -- rule looks like,  
25 and it doesn't look like an administrative

1 agency order to parties in an adjudication.

2 MR. WESSLER: Right.

3 JUSTICE GORSUCH: At least that's what  
4 I had always understood, but maybe I'm missing  
5 something.

6 MR. WESSLER: Right, although what --  
7 what we have in this order -- it -- it is an  
8 adjudicatory order. What we have in this order  
9 is an agency simply advising the public of its  
10 view of the meaning of a specific phrase in the  
11 TCPA. And so, you know, I do think that --

12 JUSTICE KAGAN: And you don't  
13 understand that as binding on you, correct?

14 MR. WESSLER: Correct.

15 JUSTICE GORSUCH: No, it's not binding  
16 on you, but it's binding, isn't it?

17 MR. WESSLER: Well, we wouldn't -- we  
18 wouldn't say it's -- it's binding --

19 JUSTICE GORSUCH: It's just a piece of  
20 paper in the world? I mean --

21 MR. WESSLER: Yes. It would be like  
22 an informal guidance offering a -- a view of --  
23 of a statute. We don't think that there --  
24 actually carries any binding significance. And  
25 so I think -- you were asking about an off-ramp.

1 I do think that in that way, you know, what a  
2 district court in a -- in a garden-variety, you  
3 know, civil case could do is it could simply  
4 ignore the order.

5 JUSTICE GORSUCH: That's not how the  
6 court of appeals understood it.

7 MR. WESSLER: Certainly not.  
8 Certainly not. But we think that that -- if  
9 that were -- if, in fact, the court wanted to, I  
10 think, move in this direction, it wouldn't be  
11 determining the validity of anything because the  
12 order is non-binding by nature because it's  
13 interpretive.

14 Now the Ninth Circuit, you know, is  
15 the only circuit that we're aware of that has  
16 adopted an understanding of the Hobbs Act that  
17 renders the classification between interpretive  
18 and legislative rules irrelevant. In the Ninth  
19 Circuit, it is -- it does not matter. Any --  
20 any order that is subject to the Hobbs Act  
21 immediately withdraws jurisdiction from the  
22 district court to do anything.

23 And I think -- I would submit to the  
24 Court that that just cannot be right because it  
25 does mean that even non-binding informal

1 guidance is capable of binding district  
2 courts --

3 JUSTICE SOTOMAYOR: Counsel, the  
4 problem I'm having with your interpretation is I  
5 don't even know why they gave jurisdiction to  
6 the agency at all to do anything, meaning --  
7 Justice Kavanaugh expressed a concern that if a  
8 defendant could not challenge an agency's order  
9 in an enforcement proceeding, that might be  
10 unfair or even raise due process concerns.

11 But your interpretation means that if  
12 a regular -- regulated party seeks an agency  
13 order to determine whether its conduct is  
14 permissible, it asks the agency for that, it  
15 relies on that order to send the e-faxes, and  
16 it's still liable for treble damages to any  
17 plaintiff who wants to come in and say: Even  
18 though I had an opportunity to challenge this  
19 interpretation before the agency, I didn't have  
20 to bother; I could just wait and sue anyone who  
21 followed the agency's order, correct?

22 MR. WESSLER: Well, a couple of --

23 JUSTICE SOTOMAYOR: That's the  
24 downside.

25 MR. WESSLER: -- a couple of responses



1 to that. I mean, first, I do not think that a  
2 defendant would necessarily be on the hook in  
3 that scenario for treble damages because that  
4 does -- the treble damages provision of the TCPA  
5 requires -- or there is built in a reasonable  
6 reliance issue.

7 JUSTICE SOTOMAYOR: But it still would  
8 be liable.

9 MR. WESSLER: But I do think you're --  
10 you're not wrong to suggest that there might be  
11 some reliance interests at stake here. I do not  
12 think those can overcome what the text of this  
13 statute means.

14 I also think that if we're --

15 JUSTICE SOTOMAYOR: Unless we believe  
16 that the Act, by giving an out to people who  
17 didn't have an -- an -- an adequate opportunity  
18 for review, that's the out --

19 MR. WESSLER: Well, I don't think  
20 that -- yeah.

21 JUSTICE SOTOMAYOR: -- that it was --  
22 that it intended to make these orders final  
23 unless overturned by the court of appeals.

24 MR. WESSLER: May I answer?

25 CHIEF JUSTICE ROBERTS: Certainly.

1           MR. WESSLER: Yeah. With respect, I  
2 do not think adequacy is a sufficient safety  
3 valve, and I think that's true for at least two  
4 reasons.

5           The first, Your Honor, is that, you  
6 know, the -- you know, the -- this Court has  
7 never taken a position on what adequacy in the  
8 APA means. I do not think that the point of a  
9 jurisdictional statute would be to invest  
10 district courts in all of these cases in -- from  
11 assessing the specific circumstances of when  
12 individual parties in their case may or may not  
13 have known about a particular order that would  
14 have given rise to a Hobbs Act claim.

15           And I also think it begs a question,  
16 exclusive jurisdiction to do what, which, in  
17 this case, we would submit the Hobbs Act only  
18 requires for petitions that are directly  
19 challenging agency actions.

20           CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22           Justice Thomas?

23           Justice Alito?

24           Anything further, Justice Sotomayor?

25           No?

1 Justice Kagan?

2 Justice Kavanaugh? No?

3 Justice Barrett?

4 Justice Jackson?

5 Okay. Thank you, counsel.

6 MR. WESSLER: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Palmore.

8 ORAL ARGUMENT OF JOSEPH R. PALMORE

9 ON BEHALF OF THE RESPONDENTS

10 MR. PALMORE: Thank you, Mr. Chief

11 Justice, and may it please the Court:

12 The Hobbs Act's text, history,  
13 precedent, and purpose all support the  
14 conclusion that a lower court here could not  
15 impose liability on McKesson for engaging in  
16 conduct that the FCC said did not violate the  
17 TCPA, where a plaintiff concedes it had adequate  
18 opportunity for judicial review under the Hobbs  
19 Act.

20 The statutory text and structure show  
21 that a Hobbs Act course exclusive jurisdiction  
22 to determine the validity of an order means it  
23 alone can evaluate whether the order is correct.  
24 If Congress had wanted to limit this exclusivity  
25 to declaratory judgments, it would have done so

1 expressly.

2           Instead, Sections 2349 and 2342  
3 together show that the Hobbs Act court has  
4 exclusive jurisdiction not just over remedies  
5 against the order but also over evaluation of  
6 its merits.

7           And that is exactly how this Court  
8 interpreted predecessor statutes, whose terms  
9 and precedent Congress incorporated into the  
10 Hobbs Act, under both the Urgent Deficiencies  
11 Act and the Emergency Price Control Act, this  
12 Court construed those statutes to bar collateral  
13 review in enforcement and private party  
14 disputes, even when no declaratory judgment or  
15 other relief was sought against the order.

16           And consistent with that precedent,  
17 Justice Thomas, the Court in Port of Boston  
18 interpreted the Hobbs Act's exclusive  
19 jurisdiction to mean "review the merits." And  
20 on that understanding, it barred redetermination  
21 of the same issue decided by an agency in a  
22 private payment dispute; again, where no  
23 declaratory judgment or relief against the order  
24 was sought and whether or not the party  
25 participated before the agency.

1                   Finally, the Hobbs Act's purpose of  
2                   establishing finality, certainty, and reliance  
3                   would be undermined by Petitioner's position  
4                   that an FCC order, even if affirmed under Hobbs  
5                   Act review, could forever be subject to  
6                   second-guessing in state and federal courts all  
7                   across the country.

8                   I welcome the Court's questions.

9                   JUSTICE THOMAS: So as I understand  
10                  it, if a case -- if this case were to come  
11                  before a district judge, an order before a  
12                  district judge, and a district judge says this  
13                  is the most ridiculous opinion I have ever seen  
14                  in my many years on the bench, however, I have  
15                  though no authority to review it, that -- you  
16                  don't see a problem with that?

17                  MR. PALMORE: Justice Thomas, this is  
18                  not an issue of agency versus court. This is an  
19                  issue of which court and when. And I think it's  
20                  important to emphasize how --

21                  JUSTICE THOMAS: It's still -- you  
22                  have the same -- you have a collateral attack.  
23                  You have a disagreement between two parties.  
24                  They're in court.

25                  And the district judge says under the

1 Hobbs Act, I have no authority, even though I  
2 can see this is -- this order is ridiculous.

3 MR. PALMORE: That's because the Hobbs  
4 Act court has that authority. And if the order  
5 is ridiculous, the Hobbs Act court will reverse.  
6 And I think it's important to emphasize page 4  
7 of the cert reply says Petitioners ask this  
8 Court to decide the question presented on the  
9 assumption that they had a prior and adequate  
10 opportunity for judicial review under the Hobbs  
11 Act.

12 So the -- the -- the issue about delay  
13 and long ago orders that were presented in PDR  
14 is not presented here.

15 JUSTICE JACKSON: Do you -- do you  
16 concede that if they didn't have an adequate  
17 opportunity, that we would have the problem that  
18 Petitioner raises here?

19 MR. PALMORE: Well, we think adequacy  
20 is an important safety valve. And Justice  
21 Kavanaugh in his concurrence in PDR Network  
22 canvassed a number of concerns with an overly  
23 strict reading of exclusivity in this scheme.  
24 And we -- we understand that --

25 JUSTICE JACKSON: What about the

1 timing? I mean, I had a little colloquy with  
2 Petitioner and he says that, you know, some of  
3 these customers, people affected, would have no  
4 -- would have had no reason to bring this up  
5 with the court of appeals within 60 days of the  
6 original order.

7 MR. PALMORE: So two responses,  
8 Justice Jackson.

9 One is that concern is not presented  
10 here, but given the concession that they did  
11 have a prior and adequate opportunity and they  
12 just chose not to exercise it, so their view is  
13 Hobbs Act exclusivity is optional, they can go  
14 either way.

15 Two, in a hypothetical case where that  
16 issue was presented, we view that as an adequacy  
17 problem. We think Congress addressed potential  
18 unfairness, potential due process concerns that  
19 Justice Kavanaugh canvassed in his PDR Network  
20 concurrence, not through limiting the exclusive  
21 jurisdiction of the Hobbs Act court, but by  
22 creating an adequacy safety valve.

23 And we think that's where the  
24 consideration of -- of timing, interests,  
25 standing, that's where that would go.

1 JUSTICE ALITO: Suppose I'm a district  
2 judge in New Jersey and someone shows me a Ninth  
3 Circuit opinion on a question of law that I'm  
4 considering. And if I conclude that -- and  
5 there's no Third Circuit precedent on point, and  
6 no Supreme Court precedent on point.

7 If I disagree with the Ninth Circuit's  
8 interpretation, am I invalidating the Ninth  
9 Circuit decision?

10 MR. PALMORE: No, Justice Alito. But  
11 that's not the statutory language here. It's  
12 not invalidating. It's determining the  
13 validity, which is a capacious term. And it  
14 wasn't one that was new to this statute. It had  
15 just been construed by this Court in Yakus.

16 And it's comfortably understood to  
17 mean evaluate the soundness. The -- this Court  
18 said in Port of Boston, it meant review the  
19 merits or collaterally redetermine the same  
20 issue.

21 And if I can just make one quick point  
22 on Port of Boston. Mr. Wessler says: Well,  
23 that party participated. There were alternative  
24 holdings in Port of Boston.

25 The first holding was we think you



1 participated through an agent, but the Court was  
2 crystal clear. It went on and said: Even if  
3 not, your interests were implicated. You could  
4 have participated and you chose not to.

5           Having made that choice, you can't now  
6 get a collateral redetermination of that same  
7 issue in the private payment dispute. And that  
8 was a dispute over the meaning of Section 15 of  
9 the Shipping Act. It was a statutory  
10 construction question.

11           And, Justice Kagan, this kind of idea  
12 of is this a non-coercive order, the  
13 Amerifactors issue came up in Port of Boston  
14 also, because the party there who was objecting  
15 to that order and seeking to get collateral  
16 review of it said this order has no course of  
17 effect. This is just the agency kind of opining  
18 on the meaning of the Shipping Act.

19           And what this Court said was that's  
20 still reviewable under the Hobbs Act because  
21 there's this -- it's a finality consideration,  
22 does it determine rights or obligations and do  
23 legal consequences flow from it?

24           And the Court said: Yes, they do,  
25 when an agency with statutory authority

1 construes a statute within its jurisdiction,  
2 that means something. And it cited this Court's  
3 decision in the Frozen Foods Express case, which  
4 was construing the APA declaratory order  
5 provision which is now codified in 54(e), which  
6 says agencies have authority to terminate  
7 controversy or remove uncertainty. And that's  
8 what this order did.

9           It was an adjudication, as Justice  
10 Gorsuch pointed out, with real, legal effect.  
11 And they've conceded again that they could have  
12 sought Hobbs Act review. They asked the Court  
13 to decide the question on that understanding,  
14 but opted -- simply opted not to.

15           JUSTICE KAVANAUGH: You mentioned  
16 Yakus in response to Justice Alito. Of course,  
17 the other side points out that Yakus had the two  
18 sentences, determine the validity and consider  
19 the validity.

20           Can you just address that?

21           MR. PALMORE: Sure, Justice Kavanaugh.

22           What Congress did in the Hobbs Act was  
23 combine the two sentences. So the first  
24 sentence in Yakus said determine the emergency  
25 court of appeals has exclusive jurisdiction to

1 determine the validity and then the second  
2 sentence says, and no other court can consider  
3 the validity, adjoin, or set aside.

4           What Congress did in the Hobbs Act was  
5 meld the two sentences into one. And it drew  
6 both from that Emergency Price Control Act and  
7 also from the Urgent Deficiencies Act. So it  
8 takes "determine the validity" and "enjoin" from  
9 the first and second sentence of Yakus; it takes  
10 "set aside" from the second sentence of Yakus,  
11 also from the Urgent Deficiencies Act. It takes  
12 "suspend" only from the Urgent Deficiencies Act.

13           So it's drawing on both these sources,  
14 both of which had been interpreted to bar  
15 collateral redetermination of the same issue and  
16 it combined them into one.

17           To the extent that my friend is saying  
18 that the second sentence is necessary, Congress  
19 can provide exclusive jurisdiction to a court  
20 without stating the necessary implication. It  
21 can, of course, choose to do that if it wants  
22 to, that exclusive jurisdiction over A means  
23 other courts can't exercise jurisdiction over A,  
24 but there's no rule I'm aware of that they have  
25 to proceed that way.

1           And I think given the old soil  
2 principle, the way that this language was  
3 construed in Port of Boston, that -- that --  
4 that "determine the validity" has the meaning  
5 that we and the government are suggesting.

6           JUSTICE ALITO: Yakus was a very harsh  
7 decision rendered in a wartime atmosphere based  
8 on particular facts in a particular statute.  
9 And you want us to read an awful lot into it.

10           Why should we do that?

11           MR. PALMORE: Justice Alito, you are,  
12 of course, correct that the Yakus was a World  
13 War II statute, but I think it's important to  
14 emphasize that the discussion of the wartime  
15 exigencies was only in the due process part of  
16 the decision. It was not in the statutory  
17 construction part of the decision, which is what  
18 we're relying on here. And that makes sense.

19           Statutes -- the meaning of statutes  
20 don't change, depending on whether the country  
21 is at war or enjoying peace.

22           The due process holding in Yakus,  
23 Congress responded to that by amending the  
24 Emergency Price Control Act, not to change the  
25 "determine the validity" language or the

1 exclusivity but to reopen a window for criminal  
2 defendants, civil defendants to seek review  
3 through that exclusive path in the event they  
4 were prosecuted or sued.

5           And, here, of course, the -- kind of  
6 the -- what you describe as the harsh result in  
7 Yakus is avoided, we believe, by Section 703.  
8 703 was not on the books at the time of Yakus.  
9 It was enacted two years later and before the  
10 Hobbs Act. And so Congress adopts the Hobbs Act  
11 knowing that 703 is there, and we believe it  
12 provides a very important safety valve.

13           JUSTICE GORSUCH: I'd like to ask you  
14 a question about 703 -- your view of 703. Of  
15 course, it's not in the Hobbs Act, but you're  
16 interpreting the Hobbs Act in light of it. I  
17 understand that. It seems to me we have two  
18 choices basically, one recognizing that there's  
19 an order here, as, indeed, there is. You can  
20 say, well, on the one hand, the Hobbs Act  
21 doesn't preclude the district court from saying  
22 this is the craziest decision I ever saw because  
23 it's not undermining that order in any way; it's  
24 just adjudicating the rights of the parties  
25 presently before the court. That's one option.

1           The second option is to say, ah, yeah,  
2     it's still sort of affecting that order in some  
3     way, but no worries if you didn't have an  
4     adequate opportunity to challenge it. And  
5     that's the -- that's what you're asking us to  
6     do.

7           Are we going to then have a  
8     jurisprudence of adequacy? And, if so, what  
9     does that look like for parties who weren't  
10    alive at the time of -- of the administrative  
11    proceeding, for parties who wish to present  
12    different arguments than was considered by the  
13    agency at the time, for parties with different  
14    factual circumstances than those that the agency  
15    may have had in mind at the time it adjudicated  
16    the case before it? Thoughts.

17           MR. PALMORE: Sure, Justice Gorsuch.  
18    I'll give you some thoughts. I mean, I think I  
19    would emphasize at the outset that that issue is  
20    not presented here because adequacy is -- is  
21    conceded.

22           JUSTICE GORSUCH: I understand that.

23           MR. PALMORE: Right?

24           JUSTICE GORSUCH: But -- but you're  
25    asking us --

1 MR. PALMORE: So --

2 JUSTICE GORSUCH: -- to open a new  
3 door and -- and -- and create a jurisprudence of  
4 adequacy. And I just want to understand what it  
5 would look like because I think those -- those  
6 are our two choices in this case, right, that --  
7 that I outlined at the very beginning of my --  
8 my question?

9 MR. PALMORE: Well -- right.

10 JUSTICE GORSUCH: One -- one --

11 MR. PALMORE: You can -- you can  
12 enforce what we believe to be the proper reading  
13 of the Hobbs Act, bracketing that adequacy  
14 exists --

15 JUSTICE GORSUCH: Right.

16 MR. PALMORE: -- for -- for hard  
17 cases.

18 JUSTICE GORSUCH: Or simply say  
19 that --

20 MR. PALMORE: Or we could lose,  
21 right --

22 JUSTICE GORSUCH: You could lose,  
23 right.

24 MR. PALMORE: -- on the Hobbs -- on  
25 the Hobbs Act. Sure.

1 JUSTICE GORSUCH: Those are the two  
2 choices. But, once -- if we buy yours --

3 MR. PALMORE: Right.

4 JUSTICE GORSUCH: -- what does this  
5 jurisprudence of adequacy look like?

6 MR. PALMORE: Well, I think that --  
7 that there are a couple data points already in  
8 the Court's cases. So PDR Network, admittedly,  
9 not a definitive holding, but it remanded for  
10 consideration of adequacy. And we understand  
11 that to be a response to the defendant's  
12 argument there that they would have had no  
13 interest in participating at the FCC or seeking  
14 Hobbs Act review at the time that that order  
15 issued. And the Court viewed that  
16 party-specific argument as a possible adequacy  
17 issue.

18 We think Port of Boston, although it's  
19 not citing 703, is consistent with that because  
20 it looked at the specifics of that party and it  
21 said you had every interest in participating and  
22 you didn't.

23 JUSTICE GORSUCH: So what I think  
24 it'll wind up doing is saying, for the people  
25 who are really closely tied at -- at the moment,



1 who could have been there or were there, a kind  
2 of collateral estoppel sort of idea. But I  
3 don't know what it means much beyond that. Five  
4 years out, 10 years out, different people,  
5 different arguments, different facts.

6 Are -- are we just going to wind up in  
7 the same place?

8 MR. PALMORE: Well, Justice Gorsuch,  
9 we think Congress was balancing two competing  
10 interests here. It was -- it was balancing  
11 finality reliance, what this Court called in  
12 Corner Post the kind of finality-focused  
13 orientation of the Hobbs Act, with, we think,  
14 fairness and due process concerns. And so  
15 Congress is, of course, not required to pursue  
16 all its objectives to the ends of the earth. It  
17 can balance them. And we think that that's what  
18 it did here.

19 But I think what I'd emphasize is,  
20 even if there was some work to do in future  
21 cases, that would all be work to do about the  
22 meaning of "adequacy" because that's --

23 JUSTICE GORSUCH: I -- I understand  
24 that --

25 MR. PALMORE: Yes.

1                   JUSTICE GORSUCH: -- but, if -- if  
2                   finality is so important and it turns out that  
3                   your interpretation doesn't do much to advance  
4                   finality beyond a few parties presently, what --  
5                   what are we here about?

6                   MR. PALMORE: Well, I think it would,  
7                   Justice Gorsuch. Of course, here, again,  
8                   adequacy is conceded, so the Court doesn't  
9                   really have to get into that. But, in -- you  
10                  alluded to this yourself. I mean, the FCC  
11                  operates in a highly regulated -- you know, this  
12                  is a highly regulated industry. You have an  
13                  amicus brief from some of the major trade  
14                  associations who are repeat players. They have  
15                  armies of people who follow what goes on at the  
16                  FCC. They engage in litigation. Those folks  
17                  are like -- unlikely to be able to make any kind  
18                  of adequacy argument, and they are the ones who  
19                  are often engaged in this litigation.

20                  But we think Congress allowed a safety  
21                  valve.

22                  JUSTICE GORSUCH: But -- but then  
23                  we're going to have the Corner Posts of the  
24                  world who are going to come in and say: I  
25                  wasn't alive, I wasn't there, I wasn't in

1 business. And we've said the statute of  
2 limitations allows them to file their claims.  
3 That's got to mean something, right?

4 MR. PALMORE: Well, perhaps so, Your  
5 Honor. So I guess, in our conception -- and the  
6 government has a different view on adequacy,  
7 which is probably a less capacious view.

8 JUSTICE GORSUCH: Substantially, I  
9 suspect.

10 MR. PALMORE: Substantially, right.  
11 We have more of a -- you know, we -- we believe  
12 it can be more party-specific, but I think it's  
13 important to emphasize the implications of  
14 Petitioner's view, right, is that a party could  
15 go to the agency, say I want to send faxes to  
16 online fax services, get a declaratory order,  
17 which is like a declaratory judgment, someone  
18 wants guidance, they want a ruling before they  
19 act at their own peril. The agency could say  
20 that's right; that's not covered. That could be  
21 affirmed by a court of appeals under the Hobbs  
22 Act.

23 Then years later, they could be  
24 exposed to liability in a federal court, in a  
25 state court, for having relied on and sent the

1       faxes that the FCC in a Hobbs Act-affirmed order  
2       said was permissible. We think that --

3                 JUSTICE JACKSON: Mr. Palmore?

4                 MR. PALMORE: Yes.

5                 JUSTICE JACKSON: Sorry. Mr. Palmore,  
6       can you speak to Petitioner's argument about  
7       interpretive rule? Do you agree that this is an  
8       interpretive rule?

9                 MR. PALMORE: Absolutely not, Justice  
10       Jackson. This is an adjudication. It's not a  
11       rule of any kind. It's an adjudication.

12                And through -- in 5 U.S.C. 554(e),  
13       Congress gave agencies authority to issue  
14       declaratory orders with like effect as to other  
15       orders to terminate a controversy or remove  
16       uncertainty. And that's what it did here.

17                The FCC, like many other agencies,  
18       based on this Court's decision in *Chenery II*, in  
19       the *NLRB versus Bell Aerospace*, often announces  
20       kind of broad things that look like rules  
21       through declaratory orders. It did it here with  
22       notice-and-comment rulemaking.

23                JUSTICE JACKSON: And you considered  
24       this to be binding then?

25                MR. PALMORE: Yes. Yes. It's binding

1 in -- it's binding because the -- the FCC was  
2 not just deciding a dispute between two  
3 particular parties; it was applying the statute  
4 to a particular technology, which was this --  
5 these online fax businesses.

6 JUSTICE KAGAN: But -- so, I mean,  
7 suppose that I think that you have some good  
8 arguments about why it's not just suits asking  
9 for declaratory judgments that fall within the  
10 Hobbs Act but that you at least have to have a  
11 suit that's challenging an agency decision with  
12 the force of law, that that's a necessity to  
13 fall within the Hobbs Act.

14 You think that if that's the rule you  
15 are covered?

16 MR. PALMORE: Absolutely. And I think  
17 Port of Boston stands for that proposition.  
18 Port of Boston, again, if you look at the  
19 relevant part --

20 JUSTICE KAGAN: So do you think that  
21 that should be the rule? Yeah, you don't have  
22 to have a declaratory judgment, but -- but the  
23 only thing that the Hobbs Act is talking about  
24 is challenging -- challenges to agency rulings  
25 with the force of law, that the Hobbs Act just

1 excludes anything that doesn't have the force of  
2 law?

3 MR. PALMORE: I think that's -- that  
4 that's right. So the SG cites in their brief a  
5 Seventh Circuit decision called the American  
6 Trucking case, which was a ICC report where the  
7 ICC was just kind of opining on some things.

8 And the -- what the Seventh Circuit  
9 said was that's not a Hobbs Act reviewable order  
10 because it has no legal consequences, it doesn't  
11 determine rights or obligations, so it's not a  
12 Hobbs Act order, so then there would be no  
13 preclusion at all.

14 JUSTICE KAGAN: So -- but then --

15 JUSTICE KAVANAUGH: Can you --

16 JUSTICE KAGAN: -- I take it that  
17 you're actually agreeing with Mr. Wessler more  
18 than I maybe thought you were but disagreeing  
19 just as to what this ruling does and what it is.  
20 In other words, you're saying, yeah, we too  
21 agree that if you're talking in the land of  
22 interpretations, you're outside the Hobbs Act.  
23 But you think that if -- if we limit the Hobbs  
24 Act coverage to rulings with the force of law,  
25 you think you're in. Mr. Wessler thinks you're

1 out.

2 MR. PALMORE: I want to be careful in  
3 how I answer this. So "interpretation" is being  
4 used in multiple different ways here. Of  
5 course, agencies always are interpreting  
6 statutes, including when they issue legislative  
7 rules. They -- they are creatures of -- of  
8 statute, and they --

9 JUSTICE KAGAN: Yeah, but we know what  
10 binding decisions are and what they're not.

11 MR. PALMORE: Right.

12 JUSTICE KAGAN: And I take Mr. Wessler  
13 to be essentially saying there is -- that the --  
14 the -- the decision that you're challenging is  
15 not binding on you, and that's at least one  
16 reason why you don't have a good argument under  
17 the Hobbs Act.

18 MR. PALMORE: So a couple points,  
19 Justice Kagan. We think an order is either in  
20 under the Hobbs Act or it's out. It's either  
21 reviewable under the Hobbs Act or it's not  
22 reviewable, and then this exclusivity discussion  
23 we're having is inapplicable. They've conceded  
24 in, you know, Footnote 2 of their reply brief  
25 that this is a final order reviewable under the

1 Hobbs Act.

2           So our point is there may be some  
3 things agencies do that have absolutely no legal  
4 consequences that are not reviewable under the  
5 Hobbs Act at all, and then we wouldn't be having  
6 this discussion.

7           There's no middle category, though --  
8 and this is a point I want to emphasize -- of  
9 orders that are somehow reviewable under the  
10 Hobbs Act, they're final and legally  
11 consequential enough to be reviewable under the  
12 Hobbs Act but don't trigger this kind of  
13 exclusivity.

14           CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16           Justice Thomas?

17           JUSTICE THOMAS: I'm going to try one  
18 more time. You mentioned Yakus. Yakus was a  
19 criminal trial. They were indicted for  
20 violating one of the stabilization laws.

21           And the district court refused to  
22 admit evidence, their arguments, to allow their  
23 arguments that the ruling of the Board or  
24 Commission was improper.

25           What if the judge, the district judge,



1 said that it's ridiculous, it's the worst thing  
2 I've ever seen? You find nothing wrong with  
3 that even in the criminal context?

4 MR. PALMORE: Well, I don't think the  
5 court -- of course, this is not a criminal case,  
6 and -- and --

7 JUSTICE THOMAS: No. Well -- but  
8 you're relying on Yakus.

9 MR. PALMORE: Well, there's a due  
10 process holding in Yakus that is as you  
11 described.

12 We don't need to rely on the full  
13 extent of that Yakus due process holding. We're  
14 the defendant. We're the ones wielding an  
15 agency order that says that what we did did not  
16 violate the statute. And the other side is  
17 trying to impose liability on us.

18 So the situation is -- is flipped.  
19 The due process concerns -- and I completely  
20 understand them, and Justice Rutledge wrote  
21 about them at length, although he tethered his  
22 discussion to the criminal context. Those --  
23 none of those issues is -- is applicable here.

24 CHIEF JUSTICE ROBERTS: Justice Alito?

25 JUSTICE SOTOMAYOR: The problem with

1 the other side's argument is that unlike Corner  
2 Post, where the new entity went and -- as it has  
3 a right to do, to challenge the order completely  
4 by -- they could do a petition for  
5 reconsideration, correct, before the Commission?

6 MR. PALMORE: Yes, Your Honor.

7 JUSTICE SOTOMAYOR: They can file a  
8 petition for a declaratory judgment in a circuit  
9 court, correct?

10 MR. PALMORE: A declaratory ruling at  
11 the agency, right.

12 JUSTICE SOTOMAYOR: Yeah.

13 MR. PALMORE: And then they could get  
14 Hobbs Act review of that.

15 JUSTICE SOTOMAYOR: Exactly.

16 MR. PALMORE: Yes.

17 JUSTICE SOTOMAYOR: So now we -- if we  
18 don't do something like this, people can just  
19 ignore agency final orders because they can't  
20 be -- if they think they got a good argument,  
21 they might as well just go ahead and do it  
22 and -- because the agency ruling will have no  
23 effect on them.

24 MR. PALMORE: I -- I think that's  
25 right. And the Hobbs Act is somewhat unique, as

1 this Court in Corner Post described it. It's  
2 unique in having the marrying of "exclusive" and  
3 "determine the validity." And Congress really  
4 wanted finality in this situation.

5 And, again, in a case like this one,  
6 where the party has conceded that it could have  
7 sought judicial review and it said that was a  
8 reason why this was a good cert vehicle, their  
9 position would basically turn Hobbs Act  
10 exclusive review into an option. A party could  
11 decide to do it, or they could decide to kind of  
12 hang back and wait and see if it mattered to  
13 them down the road.

14 JUSTICE SOTOMAYOR: Until somebody  
15 sued them, the government or --

16 MR. PALMORE: Correct.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?  
18 Justice Gorsuch?

19 JUSTICE KAVANAUGH: Just one question  
20 in response to Justice Kagan.

21 Force of law, do you think that -- or  
22 what do you think that means?

23 MR. PALMORE: I -- the best I can do,  
24 Justice Kavanaugh, is use this Court's words. I  
25 mean, it -- does it -- does it determine legal

1 consequences, or do -- I'm sorry, determine  
2 rights or obligations, or do legal consequences  
3 flow from it?

4 So that's what this Court in Port of  
5 Boston said when this same kind of argument was  
6 made. Well, this isn't a coercive order. And,  
7 of course, that became the -- kind of the  
8 formulation in Bennett versus Spear --

9 JUSTICE KAVANAUGH: There's a lot of  
10 debate --

11 MR. PALMORE: -- down the road.

12 JUSTICE KAVANAUGH: -- a lot of debate  
13 in application about particular things, whether  
14 they have the force of law, isn't there?

15 MR. PALMORE: Well, perhaps, but I  
16 think the FCC declaratory orders are quite  
17 common. They're done through notice-and-comment  
18 rulemaking. They have, for decades, resulted in  
19 Hobbs Act review. This Court's decision --

20 JUSTICE KAVANAUGH: Yeah.

21 MR. PALMORE: -- in City of Arlington  
22 was a declaratory ruling.

23 JUSTICE KAVANAUGH: That's one.

24 MR. PALMORE: So they -- agencies can  
25 and do kind of broadly applicable things through

1 this font of their authority.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Barrett?

5 Justice Jackson?

6 JUSTICE JACKSON: Was the character of  
7 this order as interpretive or otherwise  
8 addressed by the lower court?

9 MR. PALMORE: It was -- yes, this  
10 issue was joined. And the -- the Ninth Circuit  
11 held it was an adjudication. It did not hold  
12 that it was an interpretive rule. It said this  
13 is an adjudication. And that was actually  
14 critical --

15 JUSTICE JACKSON: Well, I thought  
16 the -- I thought legislative versus interpretive  
17 was the fault line. You -- you --

18 MR. PALMORE: So -- so there's  
19 legislative and interpretive, is kind of over  
20 here.

21 JUSTICE JACKSON: Yeah.

22 MR. PALMORE: And then there's  
23 adjudication over here.

24 And what the Ninth Circuit said was  
25 this is an adjudication.

1           And that was critical to one of its  
2 holdings, which was that it applied  
3 retroactively because that's what adjudications  
4 do. And so that -- that was the holding below,  
5 that this was an adjudication, not that it was  
6 an interpretive rule.

7           And the -- and the Petitioners never  
8 explained in the cert petition or anywhere else  
9 why the Ninth Circuit was wrong in what it said,  
10 other than to say: Well, this was an  
11 adjudicatory order kind of interpreting the  
12 statute. But that's a different use of the word  
13 "interpretive" because agencies always interpret  
14 statutes.

15           JUSTICE JACKSON: Thank you.

16           CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18           Mr. Guarneri.

19           ORAL ARGUMENT OF MATTHEW GUARNIERI,  
20 FOR THE UNITED STATES, AS AMICUS CURIAE,  
21 SUPPORTING THE RESPONDENTS

22           MR. GUARNIERI: Mr. Chief Justice, and  
23 may it please the Court:

24           The Hobbs Act precludes collateral  
25 attacks on covered agency actions in district

1 court even in suits between private parties.  
2 The Act does so by conferring exclusive  
3 jurisdiction on the courts of appeals to  
4 determine the validity of covered agency  
5 actions.

6 Now Petitioner contends, as you've  
7 heard this morning, that determining the  
8 validity of an order refers only to entering a  
9 declaratory judgment finding that the order is  
10 valid or invalid.

11 That reading of the Act is  
12 inconsistent with its plain language, purpose,  
13 and history, and with this Court's precedent,  
14 particularly the -- the Port of Boston case,  
15 which we refer to as Transatlantic, which I  
16 still don't think Petitioner has provided an  
17 adequate explanation for.

18 If you accept Petitioner's view, that  
19 would mean that a regulated party could obtain a  
20 final order from the FCC determining that some  
21 particular course of conduct does not violate  
22 the TCPA. That order could be upheld on direct  
23 review by the court of appeals under the Hobbs  
24 Act procedures, and a private plaintiff could  
25 nonetheless go into district court, sue the

1 regulated party, and ask the district court to  
2 disregard the agency's order and impose  
3 liability.

4 That is not how the Hobbs Act has ever  
5 been understood to work, and we ask this Court  
6 to reject that interpretation.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Does that take you as  
9 far as the Court in *Yakus*?

10 MR. GUARNIERI: I -- I think, at least  
11 with respect to the statutory interpretation  
12 piece of this, yes. And that's no accident.  
13 Congress was clearly drawing on the language  
14 that this Court interpreted in *Yakus*.

15 The Emergency Price Control Act  
16 conferred on a special emergency court exclusive  
17 jurisdiction to determine the validity of price  
18 control regulations, and Congress took that  
19 language, which -- which was, I think, unique at  
20 the time in the Emergency Control Act. Congress  
21 took it and brought it into the Hobbs Act in  
22 order to accomplish the same purpose that this  
23 Court construed the Emergency Price Control Act  
24 to have in the *Yakus* decision.

25 JUSTICE GORSUCH: If you take the



1 Hobbs Act to go as far as Yakus -- I mean,  
2 that's an extraordinary thing. I mean, Yakus is  
3 not a case people usually want to rely on  
4 outside the wartime context.

5 But, if that's as far as the Hobbs Act  
6 goes, if it goes that far, aren't we going to  
7 have real due process questions? I mean,  
8 Justice Rutledge raised them. Justice Powell  
9 raised them years later in -- what was that?

10 JUSTICE BARRETT: Do you know the  
11 reference?

12 JUSTICE GORSUCH: In one of them.  
13 Yeah. You know which one I'm talking about.

14 MR. GUARNIERI: I do, Your Honor.

15 JUSTICE GORSUCH: Let's see. I can  
16 even find it for you.

17 MR. GUARNIERI: Adamo, right?

18 JUSTICE GORSUCH: Adamo or --  
19 whatever. However you pronounce it. Adamo.  
20 Yeah.

21 Do you really want us to start a -- a  
22 Fourteenth Amendment jurisprudence about this?

23 MR. GUARNIERI: Well, I don't think  
24 that you -- that -- that there are going to be  
25 cognizable due process claims in the mine-run of

1 applications of the Hobbs Act.

2 The Due Process Clause of the  
3 Fourteenth Amendment does not create any kind of  
4 freestanding entitlement to get judicial review  
5 of agency action in any court at any time that  
6 the plaintiff chooses.

7 JUSTICE GORSUCH: Well, I -- I think  
8 it does generally --

9 MR. GUARNIERI: Congress --

10 JUSTICE GORSUCH: -- I think it does  
11 generally say: When Congress chooses to invest  
12 courts with jurisdiction, as a rule, judges  
13 interpret the law and they have a duty to do so  
14 independently and -- and not to automatically  
15 and reflexively have to adopt interpretations  
16 that the executive branch chooses and prescribes  
17 for them. Right?

18 MR. GUARNIERI: I -- I think, Justice  
19 Gorsuch, that might be a little bit different  
20 than the due process concern that my friend has  
21 articulated. That's more --

22 JUSTICE GORSUCH: It's -- it's one I  
23 have --

24 MR. GUARNIERI: -- in the nature or  
25 line of an Article III --

1 JUSTICE GORSUCH: -- so why don't you  
2 address it.

3 MR. GUARNIERI: Sure. So I think, if  
4 you're thinking about the way the Hobbs Act  
5 generally -- the way Congress envisioned this  
6 would work, you would get judicial review in the  
7 court of appeals under the Hobbs Act, and it  
8 would be that application of Article III  
9 authority that would then be binding in the  
10 sense that a district court would be --

11 JUSTICE GORSUCH: I understand that,  
12 but -- but somebody -- some -- the fact that one  
13 person gets judicial review under the Hobbs Act  
14 and makes whatever arguments in our adversarial  
15 system that they choose, and then another party,  
16 years later potentially, with very different  
17 arguments and different facts, it wasn't around,  
18 and you're telling me due process has nothing to  
19 say about whether that individual gets to have a  
20 judge decide his case?

21 MR. GUARNIERI: Well, again, I think  
22 Congress was talking here about which court gets  
23 to do that. It's the Hobbs Act court that gets  
24 to exercise Article III authority to determine  
25 the validity of the agency's covered action.

1 JUSTICE GORSUCH: I understand that.  
2 And I'm asking you on the due process question.  
3 You don't think that raises any due process  
4 questions?

5 MR. GUARNIERI: No, I don't think that  
6 you would have a viable due process argument if  
7 your contention is that you are -- are not  
8 entitled to challenge the validity of the  
9 agency's order in an enforcement action.

10 I think you can also get there -- I  
11 mean, Section 703, I think, confirms that.  
12 Section 703 of the APA is the provision that  
13 recognizes that Congress can provide for an  
14 exclusive review scheme. And there are  
15 circumstances in which, when Congress does that,  
16 parties are not entitled to judicial review of  
17 the agency's action in the enforcement  
18 proceeding.

19 JUSTICE GORSUCH: So Justice Rutledge  
20 was wrong --

21 MR. GUARNIERI: I think that would  
22 be --

23 JUSTICE GORSUCH: -- and Justice  
24 Powell were wrong to be worried about those  
25 concerns?

1                   MR. GUARNIERI: No, of course not, but  
2 I -- you know, I think they were focused on  
3 aspects of the Emergency Price Control Act that  
4 aren't necessarily replicated in the Hobbs Act.

5                   The other thing that I would -- I  
6 would point out for the -- I mean, this is a --  
7 it is the plaintiff here, the plaintiff in the  
8 private TCPA action, who is seeking to avoid the  
9 application of an FCC order, or an order by a  
10 component bureau of the FCC. And I think the  
11 due process concerns are particularly weak --  
12 weak in that context.

13                  JUSTICE GORSUCH: Yes, but you're  
14 asking --

15                  MR. GUARNIERI: I mean, at least in  
16 the Yakus --

17                  JUSTICE GORSUCH: -- us to draw a much  
18 broader rule based on Yakus. And so we have to  
19 consider where that leads and -- anyway, I --  
20 I've taken up enough of your time.

21                  JUSTICE KAGAN: Mr. Guarnieri, in your  
22 brief, you say the term "validity" refers in  
23 this context to having legal strength, force, or  
24 authority -- that's one -- or to being grounded  
25 in sound principles.

1           So suppose I agree with the first half  
2 of that, that validity does refer in this  
3 context to having legal force, but that I don't  
4 agree with the second half, that it just refers  
5 to is the ruling grounded in sound principles,  
6 that what we're talking about here under the  
7 Hobbs Act is a challenge to the -- the legal  
8 effect of an agency order, not the sort of hazy  
9 challenge to, like, do I have sound -- did the  
10 agency have sound principles?

11           So what would it mean if I took your  
12 definition and chopped it in half and said I  
13 only agree with the first part, that the Hobbs  
14 Act covers that?

15           MR. GUARNIERI: Sure. Justice Kagan,  
16 if I'm understanding your question, I think this  
17 goes back to some of the issues you -- you may  
18 have been discussing with -- with my friends  
19 earlier about, you know, what do we do with this  
20 declaratory order and what do you do if you  
21 think, you know, some particular agency action  
22 is not meant to have legal force or effect at  
23 all?

24           I agree with the way that Mr. Palmore  
25 put it. The Hobbs Act in Section 2342 both

1 specifies the things that are reviewable under  
2 the Hobbs Act and provides that that  
3 jurisdiction is exclusive and no district court  
4 here may determine the validity of the covered  
5 agency actions.

6 Now, if you do that analysis and you  
7 determine that some particular agency action  
8 actually has no legal force or effect and is not  
9 the kind of thing specified in the Hobbs Act as  
10 an agency action for which you could get direct  
11 review in the court of appeals, then you're just  
12 out. There is -- the - the -- you -- the  
13 exclusivity provision does not come into play  
14 because that agency action --

15 JUSTICE KAGAN: So what do you think  
16 is just out? What category of rulings is just  
17 out?

18 MR. GUARNIERI: I think there are some  
19 things agencies do that are -- would constitute  
20 interpretive rules as that -- in the technical  
21 meaning of that sense under the APA that have no  
22 legal force or effect. We cite a case involving  
23 a report issued by the ICC. The FCC commonly  
24 issues reports both to the public and to  
25 Congress. Those things don't have legal force

1 or effect. They wouldn't satisfy the test for  
2 finality.

3 JUSTICE KAGAN: So what I understand  
4 --

5 MR. GUARNIERI: Yeah.

6 JUSTICE KAGAN: -- Mr. Wessler to be  
7 saying, and he'll correct me if I'm wrong, is in  
8 this case, notwithstanding that there's an  
9 adjudication, it was not an adjudication binding  
10 on the parties here.

11 MR. GUARNIERI: I -- I'm not actually  
12 sure what Mr. Wessler would say about that. I  
13 think he has tried to characterize this as an  
14 interpretive rule, which is simply incorrect.  
15 The FCC understands declaratory orders to  
16 have -- they are legally binding orders issued  
17 by the agency after adjudication.

18 Here the agency put this out for  
19 public -- it -- it gave notice. It solicited  
20 public comment on this. Declaratory orders  
21 under the APA, under 5 U.S.C. 554(e), have like  
22 effect as other agency orders. These are not  
23 the same thing as an informal guidance document  
24 that the agency might issue to advise the public  
25 of its understanding of some preexisting



1 statutory obligation. I mean --

2 JUSTICE KAGAN: Thank you.

3 MR. GUARNIERI: -- these are -- this  
4 is a real agency order.

5 JUSTICE JACKSON: Can I understand a  
6 little bit more, though? I mean, you said if --  
7 if the agency act has no legal force or effect,  
8 then you're just outside the Hobbs Act. So  
9 that, in your view, would allow the district  
10 court to consider it in the context of an  
11 enforcement action. Is that right?

12 MR. GUARNIERI: Yes, Justice Jackson.

13 JUSTICE JACKSON: But doesn't that  
14 seem odd when the language in the exclusive  
15 jurisdiction provision says that the court of  
16 appeals determines the validity? It seems  
17 counterintuitive that you would have the  
18 district court determining whether or not this  
19 has a legal force and effect and therefore the  
20 Hobbs Act applies at all, when that goes to  
21 validity, even your brief suggested it, and yet  
22 we have the language in the statute that says  
23 the validity is supposed to be interpreted -- or  
24 determined by the court of appeals.

25 MR. GUARNIERI: Well, Justice Jackson,

1 the statute says that the court of appeals shall  
2 have exclusive jurisdiction to determine the  
3 validity of, and it's followed by an enumerated  
4 list. And the enumerated list specifies various  
5 statutes -- statutory authorities exercised by  
6 agencies like the FCC.

7 And I -- I don't think it would  
8 violate the exclusivity provision for a district  
9 court to determine that something the FCC has  
10 done in a particular case is not, for example, a  
11 final order made reviewable under Section 402(a)  
12 of the Communications Act. If the district  
13 court decides that, then the district court has  
14 effectively decided that this is not the kind of  
15 thing the Hobbs Act covers at all.

16 The other point that I would make on  
17 this, if I may --

18 CHIEF JUSTICE ROBERTS: Sure.

19 MR. GUARNIERI: -- is simply that it  
20 is open to regulated parties to argue that the  
21 FCC has done something by declaratory order that  
22 it could only have permissibly done by  
23 notice-and-comment rulemaking.

24 But that is the kind of challenge that  
25 must be brought within the Hobbs Act framework

1       itself. You could present that argument to the  
2       court of appeals. And we have seen cases like  
3       that.

4                   CHIEF JUSTICE ROBERTS: Thank you,  
5       counsel.

6                   Justice Thomas?

7                   Justice Alito?

8                   JUSTICE ALITO: Let me just ask you  
9       another question about Port of Boston.

10                   Why can't Port of Boston be read to  
11       mean that when a litigant is an actual party to  
12       an adjudicatory proceeding and that proceeding  
13       produces an order regarding the rights of that  
14       specific party, the party must seek review  
15       through the Hobbs Act and not by waiting for an  
16       enforcement action? Why can't Port of Boston be  
17       interpreted that way?

18                   MR. GUARNIERI: That is not the  
19       rationale that this Court gave for its decision  
20       in Port of Boston. The Court squarely rested on  
21       the exclusivity language in Hobbs Act. There  
22       was a factual dispute there about whether the  
23       shipper, Transatlantic, had been represented in  
24       the agency proceedings through its agent, which  
25       was -- agent was a member of the shipping

1 association which was a party to the agency  
2 proceeding. This Court said, even if you were  
3 not a formal party to the proceeding, you're  
4 interests were at stake and you had an  
5 opportunity to participate, and you did not.

6 So I don't think the reasoning of the  
7 decision can be squared with my friend's  
8 suggestion that you could write that off as a  
9 case about -- you know, an instance in which a  
10 party is actually bound by the agency  
11 adjudication in the sense of sort of preclusion  
12 principles.

13 JUSTICE ALITO: Did the Court in Port  
14 of Boston grapple with all the considerations  
15 that were laid out in Justice Kavanaugh's  
16 concurring opinion in PDR?

17 MR. GUARNIERI: No, Justice Alito. I  
18 mean, I will grant you that the -- the analysis  
19 in Transatlantic or Port of Boston doesn't seem  
20 as troubled by some of the -- the analysis set  
21 forth in -- in Justice Kavanaugh's concurring  
22 opinion in PDR Network.

23 But the issue was squarely presented  
24 there, and the Court had no difficulty  
25 determining that the suit at issue in that case

1 was in effect an effort to get a collateral  
2 redetermination of something that had already  
3 been settled by the Federal Maritime Commission  
4 and for which review under the Hobbs Act was the  
5 exclusive mechanism for -- for determining the  
6 validity of that agency action.

7 I don't think you have to rest -- I  
8 think Port of Boston is a -- a strong card for  
9 us, but I don't think you have to rest  
10 exclusively on that decision either. I mean,  
11 this goes back to cases like Venner and Lambert  
12 Run Coal Company. There are numerous decisions  
13 of this Court decided under the predecessor  
14 scheme, the Urgent Deficiencies Act, that  
15 likewise rejected efforts to get a kind of  
16 collateral attack on the agency's order and in  
17 suits in which no party was requesting  
18 declaratory relief against that order.

19 So I don't think -- in addition to --  
20 to Transatlantic, there are -- there are other  
21 pre-Hobbs Act precedents that just can't be  
22 squared with my friend's understanding of how  
23 this statute should -- works.

24 JUSTICE ALITO: Well, let me take you  
25 -- ask one final question about Yakus. And I

1 don't know how big the defendants in Yakus were,  
2 but let's suppose they were -- you know, this  
3 was some mom-and-pop operation that was subject  
4 to the price controls that were in effect during  
5 World War II. And it was really quite unlikely  
6 that an entity in that position was going to be  
7 following all the details of what was being --  
8 of what was being done in wartime regulations.  
9 So they just were unaware of what was happening,  
10 and then they find themselves in court being  
11 criminally prosecuted for violating the price  
12 controls.

13                   Would you say there's not a due  
14 process concern there?

15                   MR. GUARNIERI: I think the holding of  
16 Yakus is that there was no due process violation  
17 in that application of the statute, even in the  
18 context of a criminal prosecution. Obviously,  
19 we are one step removed from that here. This is  
20 a civil enforcement action, not a criminal  
21 prosecution.

22                   Now, I will say my -- the Respondent  
23 in this case has suggested that today if a  
24 similar issue arose, you have Section 703 as a  
25 safety valve. Now, in PDR Network, we took the

1 position that in Section 703, when the statute  
2 refers to an adequate prior opportunity for  
3 review under one of these exclusive scenes,  
4 adequacy was supposed to be judged at a level of  
5 generality. The question is whether the  
6 statutory scheme provided an adequate  
7 opportunity to reg -- the regulated community in  
8 general, not the specific party in that case.

9 We haven't had occasion to revisit  
10 that position here because Petitioner has asked  
11 the Court to decide this case on the premise  
12 that Petitioner already had a prior and adequate  
13 opportunity to seek review under the Hobbs Act.

14 But what I want to stress is: If you  
15 disagree with us about how to read the adequacy  
16 language in Section 703, I mean, that could be  
17 something the Court could address in an  
18 appropriate future case. It is not a reason to  
19 adopt Petitioner's understanding of the Hobbs  
20 Act.

21 JUSTICE ALITO: All right. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Sotomayor?

24 Justice Kagan?

25 Justice Gorsuch?

1                   JUSTICE GORSUCH: Just one quick  
2 question about Port of Boston. You -- you  
3 emphasized that -- that Transatlantic there  
4 wasn't a party to the administrative  
5 proceedings, right?

6                   MR. GUARNIERI: Yes, although I think  
7 there was a factual dispute in that case about  
8 the extent to which it should be --

9                   JUSTICE GORSUCH: Right. Didn't the  
10 court expressly rely on the fact that  
11 Transatlantic had been represented before the  
12 Commission?

13                   MR. GUARNIERI: No, Your Honor. I  
14 think if you look at the final paragraph of --

15                   JUSTICE GORSUCH: "It was, in fact,  
16 represented before the Commission and has  
17 previously made numerous claims to party's  
18 status. In the petition for reconsideration  
19 filed with the Commission, it asserted that it  
20 had been represented in the administrative  
21 evidentiary proceeding through its agent."

22                   MR. GUARNIERI: Yes, Justice Gorsuch,  
23 but I think if you --

24                   JUSTICE GORSUCH: That's part of the  
25 holding of the court, right?



1                   MR. GUARNIERI: I -- I entirely agree.  
2                   The -- the Court was engaging in two alternative  
3                   analyses, alternative holdings. I think I heard  
4                   Mr. Palmore use that phrase earlier.

5                   I -- I entirely agree with you that  
6                   the court was saying that Transatlantic was  
7                   trying to have it both ways. They had claimed  
8                   party status before --

9                   JUSTICE GORSUCH: Right.

10                  MR. GUARNIERI: -- and now they were  
11                  disclaiming it.

12                  If you look at the next paragraph --

13                  JUSTICE GORSUCH: I'm looking it.

14                  MR. GUARNIERI: -- there is a clause  
15                  that says: "Even if Transatlantic was not a  
16                  formal party" --

17                  JUSTICE GORSUCH: Yeah. It does say  
18                  that.

19                  MR. GUARNIERI: -- "the exclusivity  
20                  analysis applies the same way."

21                  JUSTICE GORSUCH: It -- it says that  
22                  because it had every opportunity to participate  
23                  before the Commission. And not in the abstract,  
24                  in the sense that it did, and just discussed in  
25                  the prior paragraph.

1           It's not that somebody could have come  
2 in. It's that these people did come in. It was  
3 -- that was bound up in the Court's analysis,  
4 wasn't it?

5           MR. GUARNIERI: Yeah, I think we would  
6 say the same thing about a party in McLaughlin's  
7 shoes. McLaughlin had every opportunity to  
8 participate in the agency proceedings and chose  
9 not to. And I think the analysis would look the  
10 same way.

11           CHIEF JUSTICE ROBERTS: Justice  
12 Kavanaugh?

13           Justice Barrett?

14           Justice Jackson? No?

15           Thank you, counsel.

16           Rebuttal, Mr. Wessler.

17           REBUTTAL ARGUMENT OF MATTHEW W.H. WESSLER  
18           ON BEHALF OF THE PETITIONER

19           MR. WESSLER: Thank you. Just a -- a  
20 few brief points in rebuttal.

21           The Hobbs Act's grant of exclusive  
22 jurisdiction simply means that a district court  
23 may not entertain a petition for review of an  
24 agency action subject to the Act.

25           Nobody questions that the Hobbs Act's

1 grant of that kind of jurisdiction is designed  
2 to create a streamlined process for funneling  
3 preenforcement facial challenges to agency  
4 actions into the courts of appeals.

5           And, of course, no matter how the  
6 Court resolves this case, those challenges will  
7 continue. But I think what's at issue here is  
8 really whether the Hobbs Act -- the text of that  
9 statute, this Court ought to read it in a way  
10 that expands and extends the sweep of the Hobbs  
11 Act to cover any opportunity a district court  
12 might have in a garden-variety civil litigation  
13 case to even consider or evaluate the reasoning  
14 of an agency interpretation.

15           I think that can't be right, as we've  
16 explained based on both text, structure, and  
17 history of the statute.

18           I think to your point, Justice Alito,  
19 yes, Port of Boston, I think distinctly  
20 different from what we've got going on here  
21 because it involved parties who, Justice  
22 Gorsuch, as you noted, were themselves directly  
23 involved in the agency proceeding.

24           That isn't the kind of proceeding that  
25 we have here, in which the FCC has issued a

1 declaratory order that only one party sought.  
2 So in -- so in this case, you have Amerifactors,  
3 a company seeking a declaratory order. There  
4 are no other parties, nor could there be for  
5 purposes of this agency action.

6 I think that's significant because the  
7 only opportunity that a party in the plaintiff's  
8 shoes in this case would have, should they --  
9 had they wanted to try to challenge that  
10 interpretation, would be to do what another  
11 party did, which is to file a petition for  
12 reconsideration in front of the agency.

13 That is an empty promise of judicial  
14 review, as, Justice Gorsuch -- as, Justice  
15 Kavanaugh, you pointed out in your concurrence  
16 in PDR Network, because that petition for  
17 reconsideration of the FCC's Amerifactors order  
18 has been pending for more than five years.

19 I think what you heard from my friends  
20 on the other side was perhaps a backing away of  
21 a view that the Hobbs Act covers interpretive  
22 orders along with legislative orders.

23 If that's correct, it would require  
24 reversal here, because the Ninth Circuit's rule  
25 from which we have taken an appeal is that the

1 Hobbs Act covers both interpretive and  
2 legislative orders.

3 I note that the government on page 31  
4 of its brief defends that proposition. Despite  
5 what you heard today, it has taken the position  
6 that there is no exception under the Hobbs Act  
7 for interpretive rules. It covers both kinds of  
8 rules.

9 And adjudication can still be an  
10 interpretive rule, as courts have routinely  
11 held. Adjudications are simply an alternative  
12 path to a regulation or a rule-making that an  
13 agency can take, but it does not affect a  
14 distinction between agency action that carries  
15 the force of law versus agency action that does  
16 not.

17 And I will just point out that in PDR  
18 Network, there, the FCC issued a rule through  
19 notice and comment, but on remand the Fourth  
20 Circuit held that it was interpretive and  
21 therefore not subject to the FCC.

22 This Court should make clear once and  
23 for all that the Hobbs Act does not require a  
24 district court to follow an agency's interpret  
25 -- interpretation of a statute, no matter how

1 wrong.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 The case is submitted.

6 (Whereupon, at 12:32 p.m., the case  
7 was submitted.)

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## Official - Subject to Final Review

<b>1</b>	47:14 48:13 50:19,22 52:10,13,23,25 53:9,12,22,24 54:17,20,21 55:1,5,10,12 57:14,25 58:9 59:19 61:24 62:2,11,24 63:4,15,20,21,23 64:1,5 65:1 66:4,7,13,23 68:3,4 69:7,14,25 70:2,9 72:7,8,20 73:12,15,25 74:15,21 76:4,14,21 78:13,20 81:24 82:8,11 83:21 84:1,6,23	affected [2] 25:3 38:3 affecting [1] 45:2 affirmed [2] 36:4 50:21 agencies [10] 6:5 41:6 51:13,17 54:5 55:3 59:24 61:13 70:19 73:6 agency [84] 4:15,19,24 5:3 6:12 7:1,19,20 8:22 9:2,4 14:4,7,20 15:1,12 16:6,19 17:12,12,20,25 19:21 20:4,9,19,22,24 23:9 25:3,18 26:19 29:1,9 31:6,12,14,19 33:19 35:21,25 36:18 40:17,25 45:13,14 50:15,19 52:11,24 56:15 57:11,19,22,21 70:5,7,10,14 71:17,18,22,24 72:4,7 74:24 75:1,10 76:6 81:8,24 82:3,14,23 83:5,12 84:13,14,15 agency's [15] 14:22 15:3 18:23 21:11 24:20 26:1 27:15 31:8,21 63:2 66:25 67:9,17 76:16 84:24 agent [4] 40:1 74:24,25 79:21 ago [2] 4:12 37:13 agree [12] 10:13 15:18 24:25 25:6 51:7 53:21 69:1,4,13,24 80:1,5 agreed [1] 22:8 addressed [2] 38:17 60:8 adequacy [18] 33:2,7 37:19 38:16,22 45:8,20 46:4,13 47:5,10,16 48:22 49:8,18 50:6 78:4,15 adequate [10] 32:17 34:17 37:9,16 38:11 45:4 62:17 78:2,6,12 adjoin [1] 42:3 adjudicated [1] 45:15 adjudicating [1] 44:24 adjudication [17] 28:5,7,17 29:1 41:9 51:10,11 60:11,13,23,25 61:5 71:9,9,17 75:11 84:9 adjudications [2] 61:3 84:11 adjudicatory [3] 29:8 61:11 74:12 administrative [5] 28:7,25 45:10 79:4,20 admit [1] 55:22 admittedly [1] 47:8 adopt [2] 65:15 78:19 adopted [1] 30:16 adopts [1] 44:10 advance [1] 49:3 adversarial [1] 66:14 adversely [1] 25:2 advise [1] 71:24 advising [1] 29:9 Aerospace [1] 51:19 affect [1] 84:13	analysis [8] 7:13 11:3 70:6 75:18,20 80:20 81:3,9 announces [1] 51:19 another [4] 12:3 66:15 74:9 83:10 answer [2] 32:24 54:3 anti-circumvention [1] 19:6 anytime [1] 23:7 anyway [1] 68:19 APA [5] 33:8 41:4 67:12 70:21 71:21 appeal [1] 83:25 appeals [27] 4:20 5:10 6:13 14:9 15:6,17,19 16:8,20 18:2 24:8,21 25:14 30:6 32:23 38:5 41:25 50:21 62:3,23 66:7 70:11 72:16,24 73:1 74:2 82:4 APPEARANCES [1] 2:1 appearing [1] 13:24 applicable [2] 56:23 59:25 application [4] 59:13 66:8 68:9 77:17 applications [1] 65:1 applied [2] 25:8 61:2 applies [3] 24:12 72:20 80:20 apply [4] 7:3,8 16:23 28:2 applying [1] 52:3 appreciate [1] 17:2 appropriate [1] 78:18 aren't [2] 64:6 68:4 argue [1] 73:20 argued [3] 21:15 22:8 23:7 12 4:4,8 16:1 34:8 47:12,16 49:18 51:6 54:16 57:1,20 59:5 61:19 67:6 74:1 81:17 arguments [7] 45:12 48:5 52:8 55:22,23 66:14,17 arises [2] 9:17 21:7 Arlington [1] 59:21 armies [1] 49:15 arose [1] 77:24 around [1] 66:17 Article [3] 65:25 66:8,24 articulated [1] 65:21 aside [4] 12:21 13:8 42:3,10 asks [1] 31:14 aspects [1] 68:3 asserted [1] 79:19 assess [5] 15:17,21 23:8 24:5 27:15 assessing [1] 33:11 Assistant [1] 2:6 ASSOCIATES [2] 1:4 4:5 association [1] 75:1 associations [1] 49:14 assume [1] 16:9 assumption [1] 37:9 atmosphere [1] 43:7	attack [2] 36:22 76:16 attacks [1] 61:25 authorities [1] 73:5 authority [12] 7:10 27:1 36:15 37:1,4 40:25 41:6 51:13 60:1 66:9,24 68:24 authorizes [1] 5:9 automatically [1] 65:14 avoid [1] 68:8 avoided [1] 44:7 aware [2] 30:15 42:24 away [1] 83:20 awful [1] 43:9
<b>2</b>	2 [1] 54:24 2025 [1] 1:12 21 [1] 1:12 23-1226 [1] 4:4 2342 [6] 10:17 22:2 23:6,13 35:2 69:25 2349 [1] 35:2			
<b>3</b>	31 [1] 84:3 34 [1] 3:7			
<b>4</b>	4 [2] 3:4 37:6 402(a) [1] 73:11			
<b>5</b>	5 [2] 51:12 71:21 54(e) [1] 41:5 554(e) [2] 51:12 71:21			
<b>6</b>	60 [4] 14:9 16:20 18:9 38:5 61 [1] 3:11			
<b>7</b>	703 [11] 44:7,8,11,14,14 47:19 67:11,12 77:24 78:1,16			
<b>8</b>	81 [1] 3:14			
<b>A</b>	a.m [2] 1:16 4:2 ability [4] 22:3 24:2,15 26:17 able [2] 27:20 49:17 above-entitled [1] 1:14 absent [1] 27:3 Absolutely [3] 51:9 52:16 55:3 abstract [2] 13:19 80:23 accept [3] 23:2 25:5 62:18 accident [1] 63:12 accomplish [2] 26:15 63:22 across [1] 36:7 Act [134] 4:14 5:8 6:2,10 7:9 8:19 9:12 11:22 12:6,9 14:20 16:7,15 18:10,15 19:7,10 20:11,25 21:6 22:23 23:14,23,23 26:7,8,9 27:3,8,17 28:1,10 30:16,20 32:16 33:14,17 34:19,21 35:3,10,11,11 36:5 37:1,4,5,11 38:13,21 40:9,18,20 41:12,22 42:4,6,7,11,12 43:24 44:10,10,15,16,20 46:13,25			
<b>B</b>	back [5] 18:24 23:22 58:12 69:17 76:11 background [1] 27:11 backing [1] 83:20 balance [1] 48:17 balancing [2] 48:9,10 bar [4] 18:19,19 35:12 42:14 barely [1] 11:3 barred [2] 23:10 35:20 Barrett [4] 34:3 60:4 64:10 81:13 based [4] 43:7 51:18 68:18 82:16 basically [3] 22:16 44:18 58:9 became [1] 59:7 become [1] 8:15 beginning [3] 5:21 17:10 46:7 begs [1] 33:15 behalf [8] 2:3,5 3:4,7,14 4:9 34:9 81:18 believe [8] 18:12 32:15 44:7,11 46:12 50:11 Bell [1] 51:19 below [3] 8:14 22:8 61:4 bench [1] 36:14 Bennett [1] 59:8 best [2] 21:24 58:23 between [8] 6:3 12:4,14 30:17 36:23 52:2 62:1 84:14 beyond [2] 48:3 49:4 big [1] 77:1 bind [4] 4:23 6:6 14:11 17:13 binding [16] 4:16 5:4 29:13,15,16,18,24 31:1 51:24,25 52:1 54:10,15 66:9 71:9,16 binds [3] 14:19,22,23 bit [3] 27:24 65:19 72:6 Board [1] 55:23 books [1] 44:8 Boston [26] 6:16,18 19:24 20:1,1,13 35:17 39:18,22,24 40:13 43:3 47:18 52:17,18 59:5 62:14 74:9,10,16,20 75:14,19 76:8 79:2 82:			

## Official - Subject to Final Review

19 <b>both</b> <sup>[13]</sup> 6:20 13:22 20:1 35:10 42:6,13,14 69:25 70: 24 80:7 82:16 84:1,7 <b>bother</b> <sup>[1]</sup> 31:20 <b>bound</b> <sup>[4]</sup> 7:1 21:19 75:10 81:3 <b>boy</b> <sup>[1]</sup> 11:6 <b>bracketing</b> <sup>[1]</sup> 46:13 <b>branch</b> <sup>[1]</sup> 65:16 <b>brief</b> <sup>[9]</sup> 19:2,5 49:13 53:4 54:24 68:22 72:21 81:20 84:4 <b>bring</b> <sup>[4]</sup> 10:4 16:19 18:14 38:4 <b>bringing</b> <sup>[1]</sup> 21:18 <b>broad</b> <sup>[1]</sup> 51:20 <b>broader</b> <sup>[5]</sup> 5:20 13:1,1,5 68:18 <b>broadly</b> <sup>[2]</sup> 21:15 59:25 <b>brought</b> <sup>[3]</sup> 19:10 63:21 73: 25 <b>built</b> <sup>[1]</sup> 32:5 <b>bureau</b> <sup>[1]</sup> 68:10 <b>business</b> <sup>[1]</sup> 50:1 <b>businesses</b> <sup>[1]</sup> 52:5 <b>buy</b> <sup>[1]</sup> 47:2	<b>challenges</b> <sup>[5]</sup> 19:9,14 52: 24 82:3,6 <b>challenging</b> <sup>[4]</sup> 33:19 52: 11,24 54:14 <b>chance</b> <sup>[1]</sup> 17:11 <b>change</b> <sup>[2]</sup> 43:20,24 <b>channeling</b> <sup>[3]</sup> 4:18 24:19 27:13 <b>character</b> <sup>[1]</sup> 60:6 <b>characterize</b> <sup>[1]</sup> 71:13 <b>Chenery</b> <sup>[1]</sup> 51:18 <b>CHIEF</b> <sup>[17]</sup> 4:3,10 32:25 33: 20 34:7,10 55:14 56:24 58: 17 60:3 61:16,22 73:18 74: 4 78:22 81:11 85:3 <b>CHIROPRACTIC</b> <sup>[2]</sup> 1:3 4: 5 <b>choice</b> <sup>[2]</sup> 18:22 40:5 <b>choices</b> <sup>[3]</sup> 44:18 46:6 47: 2 <b>choose</b> <sup>[2]</sup> 42:21 66:15 <b>chooses</b> <sup>[3]</sup> 65:6,11,16 <b>chopped</b> <sup>[1]</sup> 69:12 <b>chose</b> <sup>[3]</sup> 38:12 40:4 81:8 <b>cinches</b> <sup>[1]</sup> 5:14 <b>Circuit</b> <sup>[16]</sup> 11:2,4,5 30:14, 15,19 39:3,5,9 53:5,8 57:8 60:10,24 61:9 84:20 <b>Circuit's</b> <sup>[2]</sup> 39:7 83:24 <b>circuitous</b> <sup>[1]</sup> 9:9 <b>circumstances</b> <sup>[3]</sup> 33:11 45:14 67:15 <b>cite</b> <sup>[1]</sup> 70:22 <b>cited</b> <sup>[1]</sup> 41:2 <b>cites</b> <sup>[1]</sup> 53:4 <b>citing</b> <sup>[1]</sup> 47:19 <b>City</b> <sup>[1]</sup> 59:21 <b>civil</b> <sup>[5]</sup> 19:20 30:3 44:2 77: 20 82:12 <b>claim</b> <sup>[4]</sup> 9:18 10:5 25:10 33:14 <b>claimed</b> <sup>[1]</sup> 80:7 <b>claims</b> <sup>[4]</sup> 27:12 50:2 64: 25 79:17 <b>clarity</b> <sup>[1]</sup> 10:16 <b>classification</b> <sup>[1]</sup> 30:17 <b>Clause</b> <sup>[2]</sup> 65:2 80:14 <b>clear</b> <sup>[3]</sup> 26:24 40:2 84:22 <b>clearly</b> <sup>[1]</sup> 63:13 <b>closely</b> <sup>[1]</sup> 47:25 <b>Coal</b> <sup>[1]</sup> 76:12 <b>codified</b> <sup>[1]</sup> 41:5 <b>coercive</b> <sup>[2]</sup> 13:9 59:6 <b>cognizable</b> <sup>[1]</sup> 64:25 <b>collateral</b> <sup>[13]</sup> 7:7 10:6 19: 9,14 35:12 36:22 40:6,15 42:15 48:2 61:24 76:1,16 <b>collaterally</b> <sup>[1]</sup> 39:19 <b>colloquial</b> <sup>[1]</sup> 10:19 <b>colloquy</b> <sup>[1]</sup> 38:1 <b>combine</b> <sup>[1]</sup> 41:23 <b>combined</b> <sup>[1]</sup> 42:16 <b>come</b> <sup>[8]</sup> 12:9 22:19 31:17 36:10 49:24 70:13 81:1,2	<b>comes</b> <sup>[2]</sup> 17:17 27:8 <b>comfortably</b> <sup>[1]</sup> 39:16 <b>comment</b> <sup>[2]</sup> 71:20 84:19 <b>Commission</b> <sup>[7]</sup> 55:24 57: 5 76:3 79:12,16,19 80:23 <b>Commission's</b> <sup>[1]</sup> 7:11 <b>common</b> <sup>[1]</sup> 59:17 <b>commonly</b> <sup>[1]</sup> 70:23 <b>commonplace</b> <sup>[1]</sup> 6:10 <b>Communications</b> <sup>[1]</sup> 73: 12 <b>community</b> <sup>[1]</sup> 78:7 <b>company</b> <sup>[3]</sup> 18:12 76:12 83:3 <b>compare</b> <sup>[1]</sup> 21:11 <b>compared</b> <sup>[1]</sup> 7:17 <b>competing</b> <sup>[1]</sup> 48:9 <b>complete</b> <sup>[1]</sup> 24:2 <b>completely</b> <sup>[2]</sup> 56:19 57:3 <b>component</b> <sup>[1]</sup> 68:10 <b>concede</b> <sup>[1]</sup> 37:16 <b>conceded</b> <sup>[5]</sup> 41:11 45:21 49:8 54:23 58:6 <b>concedes</b> <sup>[1]</sup> 34:17 <b>conception</b> <sup>[1]</sup> 50:5 <b>concern</b> <sup>[4]</sup> 31:7 38:9 65: 20 77:14 <b>concerns</b> <sup>[7]</sup> 31:10 37:22 38:18 48:14 56:19 67:25 68:11 <b>concession</b> <sup>[1]</sup> 38:10 <b>conclude</b> <sup>[1]</sup> 39:4 <b>conclusion</b> <sup>[3]</sup> 11:15 17:8 34:14 <b>concurrence</b> <sup>[3]</sup> 37:21 38: 20 83:15 <b>concurrences</b> <sup>[2]</sup> 9:8 26: 13 <b>concurring</b> <sup>[2]</sup> 75:16,21 <b>conduct</b> <sup>[3]</sup> 31:13 34:16 62:21 <b>conferred</b> <sup>[1]</sup> 63:16 <b>conferring</b> <sup>[1]</sup> 62:2 <b>confirms</b> <sup>[1]</sup> 67:11 <b>Congress</b> <sup>[3]</sup> 11:20 23:15, 24 24:14 25:6,16 26:5,14 34:24 35:9 38:17 41:22 42: 4,18 43:23 44:10 48:9,15 49:20 51:13 58:3 63:13,18, 20 65:9,11 66:5,22 67:13, 15 70:25 <b>consequences</b> <sup>[5]</sup> 40:23 53:10 55:4 59:1,2 <b>consequential</b> <sup>[1]</sup> 55:11 <b>consider</b> <sup>[6]</sup> 12:1 41:18 42: 2 68:19 72:10 82:13 <b>consideration</b> <sup>[3]</sup> 38:24 40:21 47:10 <b>considerations</b> <sup>[1]</sup> 75:14 <b>considered</b> <sup>[2]</sup> 45:12 51: 23 <b>considering</b> <sup>[1]</sup> 39:4 <b>Consistent</b> <sup>[3]</sup> 6:7 35:16 47:19	<b>consistently</b> <sup>[1]</sup> 25:8 <b>constitute</b> <sup>[1]</sup> 70:19 <b>construction</b> <sup>[2]</sup> 40:10 43: 17 <b>construe</b> <sup>[1]</sup> 6:9 <b>construed</b> <sup>[5]</sup> 4:13 35:12 39:15 43:3 63:23 <b>construes</b> <sup>[1]</sup> 41:1 <b>construing</b> <sup>[1]</sup> 41:4 <b>consumers</b> <sup>[2]</sup> 17:19 18: 12 <b>contends</b> <sup>[1]</sup> 62:6 <b>contention</b> <sup>[1]</sup> 67:7 <b>context</b> <sup>[17]</sup> 5:6,14 10:17 12:15 13:21 16:24 24:17, 24 27:14 56:3,22 64:4 68: 12,23 69:3 72:10 77:18 <b>contexts</b> <sup>[1]</sup> 17:18 <b>continue</b> <sup>[1]</sup> 82:7 <b>contrary</b> <sup>[1]</sup> 7:14 <b>Control</b> <sup>[11]</sup> 12:6,9 26:7 35: 11 42:6 43:24 63:15,18,20, 23 68:3 <b>controls</b> <sup>[2]</sup> 77:4,12 <b>controversy</b> <sup>[2]</sup> 41:7 51: 15 <b>conviction</b> <sup>[2]</sup> 10:4,10 <b>conviction's</b> <sup>[1]</sup> 10:6 <b>Corner</b> <sup>[4]</sup> 48:12 49:23 57: 1 58:1 <b>CORPORATION</b> <sup>[2]</sup> 1:7 4: 6 <b>correct</b> <sup>[18]</sup> 10:1 15:4 17:1, 1 18:5 22:24 23:1 26:2 29: 13,14 31:21 34:23 43:12 57:5,9 58:16 71:7 83:23 <b>corrected</b> <sup>[1]</sup> 15:11 <b>counsel</b> <sup>[9]</sup> 9:20 31:3 33: 21 34:5 55:15 61:17 74:5 81:15 85:4 <b>counterintuitive</b> <sup>[1]</sup> 72:17 <b>country</b> <sup>[2]</sup> 36:7 43:20 <b>couple</b> <sup>[7]</sup> 6:18 25:22 26:4 31:22,25 47:7 54:18 <b>course</b> <sup>[17]</sup> 15:8 21:8 34: 21 40:16 41:16 42:21 43: 12 44:5,15 48:15 49:7 54: 5 56:5 59:7 62:21 68:1 82: 5 <b>COURT</b> <sup>[126]</sup> 1:1,15 4:11 5: 11 6:9,21 7:6,6,9,10,13 8: 13,14 10:3,18 14:9 15:2,6 16:4,7,9,20,22 18:2,21 20: 2,8 21:6,9,24 23:7 24:8,14, 21 25:14 27:14 30:2,6,9,22, 24 32:23 33:6 34:11,14 35: 3,7,12,17 36:18,19,24 37:4, 5,8 38:5,21 39:6,15,17 40: 1,19,24 41:12,25 42:2,19 44:21,25 47:15 48:11 49:8 50:21,24,25 55:21 56:5 57: 9 58:1 59:4 60:8 61:23 62: 1,23,25 63:1,5,9,14,16,23 65:5 66:7,10,22,23 70:3,11	72:10,15,18,24 73:1,9,13, 13 74:2,19,20 75:2,13,24 76:13 77:10 78:11,17 79: 10,25 80:2,6 81:22 82:6,9, 11 84:22,24 <b>Court's</b> <sup>[12]</sup> 6:14 21:8 22:3 36:8 41:2 47:8 51:18 58: 24 59:19 62:13 63:7 81:3 <b>courts</b> <sup>[26]</sup> 4:14,19,23 5:9 6:6,13 9:16 14:11 15:13, 17,19 17:11,13 24:2 25:24 26:17,25 27:20 31:2 33:10 36:6 42:23 62:3 65:12 82: 4 84:10 <b>courts'</b> <sup>[1]</sup> 24:15 <b>cover</b> <sup>[2]</sup> 22:2 82:11 <b>coverage</b> <sup>[2]</sup> 25:24 53:24 <b>covered</b> <sup>[6]</sup> 50:20 52:15 61:25 62:4 66:25 70:4 <b>covers</b> <sup>[7]</sup> 21:1,7 69:14 73: 15 83:21 84:1,7 <b>craziest</b> <sup>[1]</sup> 44:22 <b>create</b> <sup>[4]</sup> 25:17 46:3 65:3 82:2 <b>creating</b> <sup>[1]</sup> 38:22 <b>creatures</b> <sup>[1]</sup> 54:7 <b>criminal</b> <sup>[7]</sup> 44:1 55:19 56: 3,5,22 77:18,20 <b>criminally</b> <sup>[1]</sup> 77:11 <b>critical</b> <sup>[2]</sup> 60:14 61:1 <b>crystal</b> <sup>[1]</sup> 40:2 <b>curiae</b> <sup>[3]</sup> 2:8 3:11 61:20 <b>customers</b> <sup>[1]</sup> 38:3
<hr/> <b>C</b> <hr/>				<hr/> <b>D</b> <hr/>
<b>called</b> <sup>[2]</sup> 48:11 53:5 <b>came</b> <sup>[2]</sup> 1:14 40:13 <b>cannot</b> <sup>[3]</sup> 10:4 21:5 30:24 <b>canvassed</b> <sup>[2]</sup> 37:22 38: 19 <b>capable</b> <sup>[2]</sup> 18:13 31:1 <b>capacious</b> <sup>[2]</sup> 39:13 50:7 <b>card</b> <sup>[1]</sup> 76:8 <b>careful</b> <sup>[1]</sup> 54:2 <b>carries</b> <sup>[2]</sup> 29:24 84:14 <b>carry</b> <sup>[1]</sup> 5:2 <b>Case</b> <sup>[58]</sup> 4:4 6:16,18,20 7: 16,23 8:9 9:6,14,17 11:16 14:25 15:2,9 18:7 19:1,18 20:17 21:4,5,15,16 22:5,25 25:25 27:21 28:11 30:3 33: 12,17 36:10,10 38:15 41:3 45:16 46:6 53:6 56:5 58:5 62:14 64:3 66:20 70:22 71: 8 73:10 75:9,25 77:23 78: 8,11,18 79:7 82:6,13 83:2, 8 85:5,6 <b>cases</b> <sup>[13]</sup> 19:3,5,8,12,14 20:13 24:18 33:10 46:17 47:8 48:21 74:2 76:11 <b>categories</b> <sup>[2]</sup> 19:17 21:3 <b>category</b> <sup>[3]</sup> 20:17 55:7 70: 16 <b>cert</b> <sup>[3]</sup> 37:7 58:8 61:8 <b>certainly</b> <sup>[4]</sup> 21:3 30:7,8 32:25 <b>certainty</b> <sup>[1]</sup> 36:2 <b>challenge</b> <sup>[12]</sup> 10:6,12 14: 20 31:8,18 45:4 57:3 67:8 69:7,9 73:24 83:9			<b>D.C</b> <sup>[4]</sup> 1:11 2:2,4,7 <b>damages</b> <sup>[4]</sup> 10:7 31:16 32:3,4 <b>data</b> <sup>[1]</sup> 47:7 <b>day</b> <sup>[1]</sup> 28:8 <b>days</b> <sup>[4]</sup> 14:9 16:20 18:9 38: 5 <b>debate</b> <sup>[2]</sup> 59:10,12 <b>decades</b> <sup>[1]</sup> 59:18 <b>decide</b> <sup>[6]</sup> 37:8 41:13 58: 11,11 66:20 78:11 <b>decided</b> <sup>[3]</sup> 35:21 73:14 76: 13 <b>decides</b> <sup>[1]</sup> 73:13 <b>deciding</b> <sup>[1]</sup> 52:2 <b>decision</b> <sup>[19]</sup> 7:11 8:14 23: 2 25:14 39:9 41:3 43:7,16, 17 44:22 51:18 52:11 53:5 54:14 59:19 63:24 74:19 75:7 76:10 <b>decisions</b> <sup>[2]</sup> 54:10 76:12 <b>declaration</b> <sup>[1]</sup> 10:12 <b>declaratory</b> <sup>[27]</sup> 5:12,25 10:2 13:13,17 34:25 35:14, 23 41:4 50:16,17 51:14,21 52:9,22 57:8,10 59:16,22 62:9 69:20 71:15,20 73:21 76:18 83:1,3 <b>declare</b> <sup>[1]</sup> 16:18	



## Official - Subject to Final Review

<p><b>declared</b> [1] 14:8</p> <p><b>defendant</b> [3] 31:8 32:2 56:14</p> <p><b>defendant's</b> [1] 47:11</p> <p><b>defendants</b> [3] 44:2,2 77:1</p> <p><b>defends</b> [1] 84:4</p> <p><b>Deficiencies</b> [5] 35:10 42:7,11,12 76:14</p> <p><b>Deficiency</b> [1] 23:23</p> <p><b>definition</b> [3] 5:2 9:24 69:12</p> <p><b>definitive</b> [2] 24:11 47:9</p> <p><b>delay</b> [1] 37:12</p> <p><b>denied</b> [1] 8:3</p> <p><b>denote</b> [2] 5:15 12:11</p> <p><b>deny</b> [1] 8:6</p> <p><b>Department</b> [1] 2:7</p> <p><b>depending</b> [1] 43:20</p> <p><b>describe</b> [1] 44:6</p> <p><b>described</b> [2] 56:11 58:1</p> <p><b>design</b> [1] 23:25</p> <p><b>designed</b> [2] 5:22 82:1</p> <p><b>Despite</b> [1] 84:4</p> <p><b>details</b> [1] 77:7</p> <p><b>determinations</b> [1] 24:17</p> <p><b>determine</b> [40] 5:9,10,17,24 10:15,24 11:9,21 12:1,8,13,24,25 13:10,15,23 15:22 16:13 24:20,23 31:13 34:22 40:22 41:18,24 42:1,8 43:4,25 53:11 58:3,25 59:1 62:4 63:17 66:24 70:4,7 73:2,9</p> <p><b>determined</b> [1] 72:24</p> <p><b>determines</b> [3] 16:8 18:2 72:16</p> <p><b>determining</b> [7] 30:11 39:12 62:7,20 72:18 75:25 76:5</p> <p><b>dictionary</b> [2] 9:24 10:1</p> <p><b>difference</b> [1] 7:16</p> <p><b>different</b> [20] 6:18 10:8 12:15 13:4,12,16 16:14 17:17 45:12,13 48:4,5,5 50:6 54:4 61:12 65:19 66:16,17 82:20</p> <p><b>difficulty</b> [1] 75:24</p> <p><b>direct</b> [5] 4:18 5:22 14:3 62:22 70:10</p> <p><b>directed</b> [1] 5:16</p> <p><b>direction</b> [1] 30:10</p> <p><b>directly</b> [4] 6:12 7:13 33:18 82:22</p> <p><b>disagree</b> [7] 11:12 13:3 24:23 25:15 28:14 39:7 78:15</p> <p><b>disagreeing</b> [1] 53:18</p> <p><b>disagreement</b> [1] 36:23</p> <p><b>disclaiming</b> [1] 80:11</p> <p><b>discussed</b> [2] 26:5 80:24</p> <p><b>discussing</b> [2] 27:25 69:18</p> <p><b>discussion</b> [4] 43:14 54:22 55:6 56:22</p> <p><b>dispute</b> [6] 35:22 40:7,8 52:</p>	<p>2 74:22 79:7</p> <p><b>disputes</b> [1] 35:14</p> <p><b>disregard</b> [1] 63:2</p> <p><b>distinct</b> [1] 13:4</p> <p><b>distinction</b> [5] 12:4 15:24 17:3 27:5 84:14</p> <p><b>distinctly</b> [1] 82:19</p> <p><b>district</b> [49] 4:14 6:6,21 7:10 8:13 9:16 14:25 15:2 16:4,8,22 18:21 20:2,8 21:8,9 22:2 23:7 24:15 25:24 26:17,25 27:14,20 30:2,22 31:1 33:10 36:11,12,12,25 39:1 44:21 55:21,25 61:25 62:25 63:1 66:10 70:3 72:9,18 73:8,12,13 81:22 82:11 84:24</p> <p><b>divested</b> [1] 15:13</p> <p><b>document</b> [1] 71:23</p> <p><b>doing</b> [4] 10:5 23:11,16 47:24</p> <p><b>done</b> [8] 9:6 13:16 34:25 59:17 73:10,21,22 77:8</p> <p><b>door</b> [1] 46:3</p> <p><b>down</b> [5] 18:11 19:9 25:19 58:13 59:11</p> <p><b>downside</b> [1] 31:24</p> <p><b>draw</b> [1] 68:17</p> <p><b>drawing</b> [2] 42:13 63:13</p> <p><b>drew</b> [1] 42:5</p> <p><b>due</b> [19] 31:10 38:18 43:15,22 48:14 56:9,13,19 64:7,25 65:2,20 66:18 67:2,3,6 68:11 77:13,16</p> <p><b>during</b> [2] 8:11 77:4</p> <p><b>duty</b> [1] 65:13</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>e-faxes</b> [1] 31:15</p> <p><b>each</b> [1] 24:17</p> <p><b>earlier</b> [3] 26:6 69:19 80:4</p> <p><b>earth</b> [1] 48:16</p> <p><b>easily</b> [1] 7:7</p> <p><b>effect</b> [17] 5:11 8:10 20:23 40:17 41:10 51:14 57:23 69:8,22 70:8,22 71:1,22 72:7,19 76:1 77:4</p> <p><b>effectively</b> [2] 20:8 73:14</p> <p><b>effort</b> [1] 76:1</p> <p><b>efforts</b> [1] 76:15</p> <p><b>either</b> [7] 9:2,11 25:18 38:14 54:19,20 76:10</p> <p><b>eliminate</b> [1] 26:16</p> <p><b>elsewhere</b> [1] 5:23</p> <p><b>Emergency</b> [12] 12:5,8 26:6 35:11 41:24 42:6 43:24 63:15,16,20,23 68:3</p> <p><b>emphasize</b> [7] 36:20 37:6 43:14 45:19 48:19 50:13 55:8</p> <p><b>emphasized</b> [1] 79:3</p> <p><b>empty</b> [2] 8:17 83:13</p> <p><b>enacted</b> [1] 44:9</p> <p><b>enacting</b> [1] 26:7</p>	<p><b>end</b> [2] 5:21 22:25</p> <p><b>ends</b> [1] 48:16</p> <p><b>enforce</b> [2] 18:23 46:12</p> <p><b>enforcement</b> [11] 14:12 16:5 26:18 27:2 31:9 35:13 67:9,17 72:11 74:16 77:20</p> <p><b>engage</b> [1] 49:16</p> <p><b>engaged</b> [1] 49:19</p> <p><b>engaging</b> [2] 34:15 80:2</p> <p><b>enjoin</b> [5] 12:20 13:7 16:17 20:8 42:8</p> <p><b>enjoined</b> [1] 14:7</p> <p><b>enjoying</b> [1] 43:21</p> <p><b>enough</b> [2] 55:11 68:20</p> <p><b>entering</b> [1] 62:8</p> <p><b>entertain</b> [1] 81:23</p> <p><b>entirely</b> [3] 13:11 80:1,5</p> <p><b>entitled</b> [2] 67:8,16</p> <p><b>entitlement</b> [1] 65:4</p> <p><b>entity</b> [2] 57:2 77:6</p> <p><b>enumerated</b> [2] 73:3,4</p> <p><b>environmental</b> [1] 26:21</p> <p><b>envisioned</b> [1] 66:5</p> <p><b>equitable</b> [10] 5:16 6:12 12:12,18,21,21 13:12,25 18:17 20:25</p> <p><b>ESQ</b> [4] 3:3,6,9,13</p> <p><b>ESQUIRE</b> [2] 2:2,4</p> <p><b>essentially</b> [2] 24:16 54:13</p> <p><b>establish</b> [1] 24:7</p> <p><b>established</b> [1] 6:4</p> <p><b>establishes</b> [1] 5:22</p> <p><b>establishing</b> [1] 36:2</p> <p><b>estoppel</b> [3] 7:2,8 48:2</p> <p><b>ET</b> [1] 1:7</p> <p><b>evade</b> [1] 19:7</p> <p><b>evaluate</b> [4] 21:10 34:23 39:17 82:13</p> <p><b>evaluating</b> [1] 25:25</p> <p><b>evaluation</b> [1] 35:5</p> <p><b>even</b> [22] 5:1,3 22:5 25:25 28:2 30:25 31:5,10,17 35:14 36:4 37:1 40:2 48:20 56:3 62:1 64:16 72:21 75:2 77:17 80:15 82:13</p> <p><b>event</b> [1] 44:3</p> <p><b>everything</b> [1] 24:25</p> <p><b>evidence</b> [1] 55:22</p> <p><b>evidentiary</b> [1] 79:21</p> <p><b>exactly</b> [4] 11:21 22:11 35:7 57:15</p> <p><b>example</b> [1] 73:10</p> <p><b>exception</b> [1] 84:6</p> <p><b>excludes</b> [1] 53:1</p> <p><b>exclusive</b> [24] 11:1 12:20 14:14 24:19 33:16 34:21 35:4,18 38:20 41:25 42:19,22 44:3 58:2,10 62:2 63:16 67:14 70:3 72:14 73:2 76:5 78:3 81:21</p> <p><b>exclusively</b> [1] 76:10</p> <p><b>exclusivity</b> [10] 34:24 37:23 38:13 44:1 54:22 55:13</p>	<p>70:13 73:8 74:21 80:19</p> <p><b>executive</b> [1] 65:16</p> <p><b>exercise</b> [3] 38:12 42:23 66:24</p> <p><b>exercised</b> [1] 73:5</p> <p><b>exigencies</b> [1] 43:15</p> <p><b>exists</b> [1] 46:14</p> <p><b>expands</b> [1] 82:10</p> <p><b>expansively</b> [1] 23:6</p> <p><b>experience</b> [1] 8:11</p> <p><b>explained</b> [2] 61:8 82:16</p> <p><b>explanation</b> [1] 62:17</p> <p><b>explicit</b> [1] 7:9</p> <p><b>exposed</b> [1] 50:24</p> <p><b>Express</b> [1] 41:3</p> <p><b>expressed</b> [1] 31:7</p> <p><b>expressly</b> [2] 35:1 79:10</p> <p><b>extend</b> [2] 22:2 25:23</p> <p><b>extends</b> [1] 82:10</p> <p><b>extent</b> [3] 42:17 56:13 79:8</p> <p><b>extraordinary</b> [1] 64:2</p> <p><b>extreme</b> [1] 22:6</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>face</b> [1] 24:18</p> <p><b>facial</b> [1] 82:3</p> <p><b>fact</b> [7] 8:23 9:14 11:24 30:9 66:12 79:10,15</p> <p><b>facts</b> [3] 43:8 48:5 66:17</p> <p><b>factual</b> [3] 45:14 74:22 79:7</p> <p><b>fair</b> [1] 20:7</p> <p><b>fairness</b> [1] 48:14</p> <p><b>fall</b> [3] 27:13 52:9,13</p> <p><b>falls</b> [1] 22:23</p> <p><b>far</b> [4] 63:9 64:1,5,6</p> <p><b>fault</b> [1] 60:17</p> <p><b>fax</b> [2] 50:16 52:5</p> <p><b>faxes</b> [2] 50:15 51:1</p> <p><b>FCC</b> [21] 17:22 34:16 36:4 47:13 49:10,16 51:1,17 52:1 59:16 62:20 68:9,10 70:23 71:15 73:6,9,21 82:25 84:18,21</p> <p><b>FCC's</b> [1] 83:17</p> <p><b>federal</b> [5] 4:15,24 36:6 50:24 76:3</p> <p><b>few</b> [3] 11:20 49:4 81:20</p> <p><b>fighting</b> [1] 7:19</p> <p><b>file</b> [5] 9:6 18:9 50:2 57:7 83:11</p> <p><b>filed</b> [1] 79:19</p> <p><b>filing</b> [1] 14:8</p> <p><b>final</b> [10] 8:15 28:6 32:22 54:25 55:10 57:19 62:20 73:11 76:25 79:14</p> <p><b>finality</b> [8] 24:7 36:2 40:21 48:11 49:2,4 58:4 71:2</p> <p><b>finality-focused</b> [1] 48:12</p> <p><b>finally</b> [3] 6:1 10:21 36:1</p> <p><b>find</b> [3] 56:2 64:16 77:10</p> <p><b>finding</b> [2] 11:20 62:9</p> <p><b>first</b> [12] 11:13 12:19 13:7 19:18 26:11 32:1 33:5 39:</p>	<p>25 41:23 42:9 69:1,13</p> <p><b>Five</b> [3] 4:12 48:3 83:18</p> <p><b>flies</b> [1] 24:18</p> <p><b>flipped</b> [1] 56:18</p> <p><b>flow</b> [2] 40:23 59:3</p> <p><b>focus</b> [1] 11:9</p> <p><b>focused</b> [1] 68:2</p> <p><b>folks</b> [1] 49:16</p> <p><b>follow</b> [2] 49:15 84:24</p> <p><b>followed</b> [2] 31:21 73:3</p> <p><b>following</b> [1] 77:7</p> <p><b>font</b> [1] 60:1</p> <p><b>Foods</b> [1] 41:3</p> <p><b>Footnote</b> [1] 54:24</p> <p><b>force</b> [16] 5:2 52:12,25 53:1,24 58:21 59:14 68:23 69:3,22 70:8,22,25 72:7,19 84:15</p> <p><b>foreclose</b> [2] 25:24 27:18</p> <p><b>forever</b> [6] 14:11,18,22,23 17:13 36:5</p> <p><b>form</b> [2] 13:9,12</p> <p><b>formal</b> [2] 75:3 80:16</p> <p><b>forms</b> [3] 5:16 12:11 13:25</p> <p><b>formulation</b> [1] 59:8</p> <p><b>forth</b> [2] 12:19 75:21</p> <p><b>four</b> [2] 4:12 26:22</p> <p><b>Fourteenth</b> [2] 64:22 65:3</p> <p><b>Fourth</b> [1] 84:19</p> <p><b>framework</b> [1] 73:25</p> <p><b>free</b> [2] 27:14,20</p> <p><b>freestanding</b> [1] 65:4</p> <p><b>friend</b> [2] 42:17 65:20</p> <p><b>friend's</b> [3] 18:21 75:7 76:22</p> <p><b>friendly</b> [1] 15:21</p> <p><b>friends</b> [3] 8:18 69:18 83:19</p> <p><b>front</b> [2] 9:1 83:12</p> <p><b>Frozen</b> [1] 41:3</p> <p><b>full</b> [1] 56:12</p> <p><b>functioning</b> [1] 20:10</p> <p><b>funneling</b> [1] 82:2</p> <p><b>further</b> [4] 21:21 23:3 25:24 33:24</p> <p><b>future</b> [2] 48:20 78:18</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>garden-variety</b> [3] 14:11 30:2 82:12</p> <p><b>gave</b> [4] 31:5 51:13 71:19 74:19</p> <p><b>General</b> [2] 2:6 78:8</p> <p><b>generality</b> [1] 78:5</p> <p><b>generally</b> [3] 65:8,11 66:5</p> <p><b>gets</b> [4] 66:13,19,22,23</p> <p><b>give</b> [1] 45:18</p> <p><b>given</b> [5] 16:7 20:18 33:14 38:10 43:1</p> <p><b>giving</b> [1] 32:16</p> <p><b>goal</b> [1] 23:25</p> <p><b>GORSUCH</b> [54] 27:23 28:21,24 29:3,15,19 30:5 41:10 44:13 45:17,22,24 46:2,</p>
---	--	--	--	--

## Official - Subject to Final Review

10,15,18,22 47:1,4,23 48:8, 23 49:1,7,22 50:8 58:18 63:25 64:12,15,18 65:7,10, 19,22 66:1,11 67:1,19,23 68:13,17 78:25 79:1,9,15, 22,24 80:9,13,17,21 82:22 83:14 got <sup>[10]</sup> 6:25 7:1,17 11:6 20: 21 21:4 22:21 50:3 57:20 82:20 govern <sup>[1]</sup> 5:22 government <sup>[5]</sup> 4:21 43:5 50:6 58:15 84:3 government's <sup>[1]</sup> 23:5 grant <sup>[3]</sup> 75:18 81:21 82:1 grapple <sup>[1]</sup> 75:14 ground <sup>[1]</sup> 21:20 grounded <sup>[2]</sup> 68:24 69:5 GUARNIERI <sup>[38]</sup> 2:6 3:9 61:18,19,22 63:10 64:14, 17,23 65:9,18,24 66:3,21 67:5,21 68:1,15,21 69:15 70:18 71:5,11 72:3,12,25 73:19 74:18 75:17 77:15 79:6,13,22 80:1,10,14,19 81:5 guess <sup>[6]</sup> 14:19 16:2 17:14 21:14 22:11 50:5 guidance <sup>[4]</sup> 29:22 31:1 50:18 71:23	48:13 50:21 51:1 52:10,13, 23,25 53:9,12,22,23 54:17, 20,21 55:1,5,10,12 57:14, 25 58:9 59:19 61:24 62:23 63:4,21 64:1,5 65:1 66:4,7, 13,23 68:4 69:7,13,25 70:2, 9 72:8,20 73:15,25 74:15, 21 76:4 78:13,19 81:21,25 82:8,10 83:21 84:1,6,23 hoc <sup>[1]</sup> 24:16 hold <sup>[2]</sup> 12:22 60:11 holding <sup>[8]</sup> 39:25 43:22 47: 9 56:10,13 61:4 77:15 79: 25 holdings <sup>[3]</sup> 39:24 61:2 80: 3 Honor <sup>[9]</sup> 7:16 8:16 18:20 26:16 33:5 50:5 57:6 64: 14 79:13 hook <sup>[1]</sup> 32:2 however <sup>[2]</sup> 36:14 64:19 Humphrey <sup>[1]</sup> 10:3 hypothetical <sup>[2]</sup> 18:7 38: 15	initial <sup>[2]</sup> 18:25 22:12 injunctive <sup>[1]</sup> 13:9 instance <sup>[2]</sup> 17:18 75:9 Instead <sup>[3]</sup> 4:16 6:3 35:2 instruction <sup>[1]</sup> 14:2 integrate <sup>[1]</sup> 26:8 intended <sup>[3]</sup> 6:2 13:1 32: 22 interest <sup>[2]</sup> 47:13,21 interests <sup>[5]</sup> 32:11 38:24 40:3 48:10 75:4 interpret <sup>[8]</sup> 4:15 17:25 21: 10 22:3 27:16 61:13 65:13 84:24 interpretation <sup>[27]</sup> 4:23 7: 20 8:19 15:4 17:20 18:21, 23 22:1 23:6 24:10,11,21 25:11 26:1,19 27:16 31:4, 11,19 39:8 49:3 54:3 63:6, 11 82:14 83:10 84:25 interpretations <sup>[4]</sup> 4:24 5: 4 53:22 65:15 interpreted <sup>[7]</sup> 26:10 35:8, 18 42:14 63:14 72:23 74: 17 interpreting <sup>[4]</sup> 6:8 44:16 54:5 61:11 interpretive <sup>[25]</sup> 5:1 22:8, 18,20,22 28:4,19,22 30:13, 17 51:7,8 60:7,12,16,19 61: 6,13 70:20 71:14 83:21 84: 1,7,10,20 invalid <sup>[6]</sup> 5:13 10:22 14:8 16:18 25:11 62:10 invalidate <sup>[1]</sup> 25:20 invalidating <sup>[2]</sup> 39:8,12 invest <sup>[2]</sup> 33:9 65:11 involved <sup>[5]</sup> 6:20,21 8:2 82: 21,23 irrelevant <sup>[1]</sup> 70:22 irrelevant <sup>[1]</sup> 30:18 isn't <sup>[7]</sup> 10:18 21:4 28:15 29:16 59:6,14 82:24 issue <sup>[23]</sup> 7:2 12:6 17:22 32:6 35:21 36:18,19 37:12 38:16 39:20 40:7,13 42:15 45:19 47:17 51:13 54:6 60: 10 71:24 75:23,25 77:24 82:7 issued <sup>[9]</sup> 8:22 15:1 18:8 28:6 47:15 70:23 71:16 82: 25 84:18 issues <sup>[6]</sup> 15:12 16:6 18:1 56:23 69:17 70:24 issuing <sup>[1]</sup> 5:12 it'll <sup>[1]</sup> 47:24 itself <sup>[5]</sup> 5:17 7:21 9:12 27: 16 74:1	51:3,5,10,23 60:5,6,15,21 61:15 72:5,12,13,25 81:14 January <sup>[1]</sup> 1:12 Jersey <sup>[1]</sup> 39:2 job <sup>[1]</sup> 6:8 joined <sup>[1]</sup> 60:10 JOSEPH <sup>[3]</sup> 2:4 3:6 34:8 judge <sup>[8]</sup> 36:11,12,12,25 39:2 55:25,25 66:20 judged <sup>[1]</sup> 78:4 judges <sup>[1]</sup> 65:12 judgment <sup>[11]</sup> 5:12,25 10: 2 13:13,17 35:14,23 50:17 52:22 57:8 62:9 judgments <sup>[2]</sup> 34:25 52:9 judicial <sup>[13]</sup> 9:10,15 26:18 27:1,18 34:18 37:10 58:7 65:4 66:6,13 67:16 83:13 judiciary <sup>[1]</sup> 6:9 jurisdiction <sup>[23]</sup> 12:20 21: 9 24:19 30:21 31:5 33:16 34:21 35:4,19 38:21 41:1, 25 42:19,22,23 62:3 63:17 65:12 70:3 72:15 73:2 81: 22 82:1 jurisdictional <sup>[2]</sup> 6:11 33: 9 jurisprudence <sup>[4]</sup> 45:8 46: 3 47:5 64:22 Justice <sup>[214]</sup> 2:7 4:3,11 6: 15,19 7:5,25 8:3,8 9:19,23 10:14,23 11:8,19 12:16 13: 14 14:13,16,17,18 15:5,10, 25 16:23 17:2,5,7,24 18:16, 24,25 19:23 20:14 21:13 22:10,15,25 23:17 24:3,6 25:4,13 27:23,25 28:21,24 29:3,12,15,19 30:5 31:3,7, 23 32:7,15,21,25 33:20,22, 23,24 34:1,2,3,4,7,11 35: 17 36:9,17,21 37:15,20,25 38:8,19 39:1,10 40:11 41: 9,15,16,21 43:6,11 44:13 45:17,22,24 46:2,10,15,18, 22 47:1,4,23 48:8,23 49:1, 7,22 50:8 51:3,5,9,23 52:6, 20 53:14,15,16 54:9,12,19 55:14,16,17 56:7,20,24,24, 25 57:7,12,15,17 58:14,17, 17,18,19,20,24 59:9,12,20, 23 60:2,3,3,5,6,15,21 61: 15,16,22 63:8,25 64:8,8,10, 12,15,18 65:7,10,18,22 66: 1,11 67:1,19,19,23,23 68: 13,17,21 69:15 70:15 71:3, 6 72:2,5,12,13,25 73:18 74: 4,6,7,8 75:13,15,17,21 76: 24 78:21,22,22,24,25 79:1, 9,15,22,24 80:9,13,17,21 81:11,11,13,14 82:18,21 83:14,14 85:3 justices <sup>[1]</sup> 4:13	KAGAN <sup>[27]</sup> 18:24 19:23 20:14 21:13 22:10,15,25 27:25 29:12 34:1 40:11 52: 6,20 53:14,16 54:9,12,19 58:17,20 68:21 69:15 70: 15 71:3,6 72:2 78:24 Kavanaugh <sup>[16]</sup> 31:7 34:2 37:21 38:19 41:15,21 53: 15 58:19,24 59:9,12,20,23 60:2 81:12 83:15 Kavanaugh's <sup>[2]</sup> 75:15,21 key <sup>[4]</sup> 5:8 11:17,24 26:9 kind <sup>[35]</sup> 8:17 9:9 14:5 19:5, 17 20:4 23:15 24:1 25:1 26:24 27:9,18 40:11,17 44: 5 48:1,12 49:17 51:11,20 53:7 55:12 58:11 59:5,7, 25 60:19 61:11 65:3 70:9 73:14,24 76:15 82:1,24 kinds <sup>[2]</sup> 20:25 84:7 knowing <sup>[1]</sup> 44:11 known <sup>[1]</sup> 33:13 knows <sup>[1]</sup> 26:14
<b>H</b> half <sup>[3]</sup> 69:1,4,12 hand <sup>[1]</sup> 44:20 hang <sup>[1]</sup> 58:12 happen <sup>[1]</sup> 8:24 happened <sup>[1]</sup> 8:20 happening <sup>[3]</sup> 8:13 9:4 77: 9 hard <sup>[2]</sup> 23:4 46:16 harsh <sup>[2]</sup> 43:6 44:6 hazy <sup>[1]</sup> 69:8 he'll <sup>[1]</sup> 71:7 hear <sup>[2]</sup> 4:3 15:9 heard <sup>[4]</sup> 62:7 80:3 83:19 84:5 hearing <sup>[1]</sup> 16:5 hears <sup>[1]</sup> 15:6 Heck <sup>[1]</sup> 10:3 held <sup>[3]</sup> 60:11 84:11,20 helps <sup>[1]</sup> 10:15 highly <sup>[2]</sup> 49:11,12 history <sup>[5]</sup> 5:6 6:1 34:12 62:13 82:17 Hobbs <sup>[114]</sup> 4:14 5:8 6:10 8:19 9:12 11:22 14:20 16: 7,15 18:10,15 19:7,10 20: 11,25 21:6 22:23 23:13,23 25:23 26:8,9 27:3,8,17 28: 1,10 30:16,20 33:14,17 34: 12,18,21 35:3,10,18 36:1,4 37:1,3,5,10 38:13,21 40:20 41:12,22 42:4 44:10,10,15, 16,20 46:13,24,25 47:14	<b>I</b> ICC <sup>[3]</sup> 53:6,7 70:23 idea <sup>[4]</sup> 24:18 28:1 40:11 48:2 ignore <sup>[2]</sup> 30:4 57:19 II <sup>[3]</sup> 43:13 51:18 77:5 III <sup>[3]</sup> 65:25 66:8,24 illustrates <sup>[1]</sup> 8:17 imagine <sup>[1]</sup> 18:7 immediately <sup>[2]</sup> 5:15 30: 21 implicate <sup>[3]</sup> 6:2 28:9,18 implicated <sup>[1]</sup> 40:3 implication <sup>[1]</sup> 42:20 implications <sup>[1]</sup> 50:13 important <sup>[10]</sup> 15:24 22:17, 21 36:20 37:6,20 43:13 44: 12 49:2 50:13 importantly <sup>[1]</sup> 6:19 impose <sup>[3]</sup> 34:15 56:17 63: 2 improper <sup>[1]</sup> 55:24 inapplicable <sup>[1]</sup> 54:23 INC <sup>[1]</sup> 1:4 included <sup>[1]</sup> 12:10 including <sup>[2]</sup> 4:23 54:6 inconsistent <sup>[2]</sup> 15:15 62: 12 incorporated <sup>[1]</sup> 35:9 incorrect <sup>[1]</sup> 71:14 indeed <sup>[1]</sup> 44:19 independently <sup>[1]</sup> 65:14 indication <sup>[1]</sup> 23:21 indicia <sup>[1]</sup> 26:4 indicted <sup>[1]</sup> 55:19 individual <sup>[2]</sup> 33:12 66:19 industry <sup>[1]</sup> 49:12 informal <sup>[4]</sup> 5:3 29:22 30: 25 71:23	<b>J</b> JACKSON <sup>[34]</sup> 14:16,18 15:5,10,25 16:23 17:2,5,7, 24 18:16 23:17 24:3,6 25: 4,13 34:4 37:15,25 38:8	<b>K</b>	<b>L</b> laid <sup>[1]</sup> 75:15 Lambert <sup>[1]</sup> 76:11 land <sup>[1]</sup> 53:21 language <sup>[19]</sup> 10:24 11:9, 17,21,25 12:5,7 23:13 26: 23 39:11 43:2,25 62:12 63: 13,19 72:14,22 74:21 78: 16 larger <sup>[1]</sup> 28:11 later <sup>[7]</sup> 11:20 20:21,23 44: 9 50:23 64:9 66:16 law <sup>[10]</sup> 5:2 39:3 52:12,25 53:2,24 58:21 59:14 65:13 84:15 lawful <sup>[1]</sup> 9:25 laws <sup>[1]</sup> 55:20 lead <sup>[2]</sup> 11:15 13:19 leads <sup>[1]</sup> 68:19 least <sup>[10]</sup> 12:4 17:9 21:17 24:12 29:3 33:3 52:10 54: 15 63:10 68:15 legal <sup>[15]</sup> 40:23 41:10 53: 10 55:3 58:25 59:2 68:23 69:3,7,22 70:8,22,25 72:7, 19 legally <sup>[4]</sup> 5:11 21:18 55:10 71:16 legislative <sup>[7]</sup> 28:19 30:18 54:6 60:16,19 83:22 84:2 legitimacy <sup>[1]</sup> 10:20 length <sup>[1]</sup> 56:21 less <sup>[1]</sup> 50:7 letting <sup>[1]</sup> 8:14 level <sup>[1]</sup> 78:4 liability <sup>[4]</sup> 34:15 50:24 56: 17 63:3 liable <sup>[2]</sup> 31:16 32:8 license <sup>[1]</sup> 15:3 light <sup>[1]</sup> 44:16

## Official - Subject to Final Review

<p><b>likewise</b> <sup>[1]</sup> 76:15  <b>limit</b> <sup>[2]</sup> 34:24 53:23  <b>limitations</b> <sup>[1]</sup> 50:2  <b>limiting</b> <sup>[1]</sup> 38:20  <b>line</b> <sup>[2]</sup> 60:17 65:25  <b>list</b> <sup>[3]</sup> 13:24 73:4,4  <b>litigant</b> <sup>[1]</sup> 74:11  <b>litigation</b> <sup>[9]</sup> 8:11,21,25 16:10,24 18:3 49:16,19 82:12  <b>little</b> <sup>[4]</sup> 27:24 38:1 65:19 72:6  <b>long</b> <sup>[2]</sup> 21:17 37:13  <b>longstanding</b> <sup>[1]</sup> 6:7  <b>look</b> <sup>[15]</sup> 9:11 11:3 12:7 20:24 22:6 23:21 28:25 45:9 46:5 47:5 51:20 52:18 79:14 80:12 81:9  <b>looked</b> <sup>[1]</sup> 47:20  <b>looking</b> <sup>[1]</sup> 80:13  <b>looks</b> <sup>[1]</sup> 28:24  <b>lose</b> <sup>[2]</sup> 46:20,22  <b>lot</b> <sup>[4]</sup> 14:14 43:9 59:9,12  <b>lower</b> <sup>[2]</sup> 34:14 60:8</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>made</b> <sup>[5]</sup> 11:19 40:5 59:6 73:11 79:17  <b>major</b> <sup>[1]</sup> 49:13  <b>majority</b> <sup>[3]</sup> 22:16,17,20  <b>manual</b> <sup>[1]</sup> 14:2  <b>many</b> <sup>[2]</sup> 36:14 51:17  <b>Maritime</b> <sup>[1]</sup> 76:3  <b>markers</b> <sup>[1]</sup> 5:5  <b>marrying</b> <sup>[1]</sup> 58:2  <b>matter</b> <sup>[8]</sup> 1:14 4:25 12:4 17:21 25:5 30:19 82:5 84:25  <b>mattered</b> <sup>[1]</sup> 58:12  <b>MATTHEW</b> <sup>[8]</sup> 2:2,6 3:3,9,13 4:8 61:19 81:17  <b>McKESSON</b> <sup>[5]</sup> 1:7 4:5,21 23:5 34:15  <b>McLAUGHLIN</b> <sup>[3]</sup> 1:3 4:4 81:7  <b>McLaughlin's</b> <sup>[1]</sup> 81:6  <b>mean</b> <sup>[37]</sup> 5:24 14:24 15:12 17:16 19:11 21:16,22 22:10,12 23:7,20 24:3 29:20 30:25 32:1 35:19 38:1 39:17 45:18 49:10 50:3 52:6 58:25 62:19 64:1,2,7 67:11 68:6,15 69:11 72:1,6 74:11 75:18 76:10 78:16  <b>meaning</b> <sup>[12]</sup> 7:19 21:11 23:9 24:5 29:10 31:6 40:8,18 43:4,19 48:22 70:21  <b>means</b> <sup>[15]</sup> 9:25 10:17 17:10 19:3 24:24 27:19 31:11 32:13 33:8 34:22 41:2 42:22 48:3 58:22 81:22  <b>meant</b> <sup>[2]</sup> 39:18 69:22  <b>mechanism</b> <sup>[3]</sup> 14:19 15:11 76:5  <b>meld</b> <sup>[1]</sup> 42:5</p>	<p><b>member</b> <sup>[1]</sup> 74:25  <b>mentioned</b> <sup>[3]</sup> 13:15 41:15 55:18  <b>mentions</b> <sup>[1]</sup> 11:4  <b>meritorious</b> <sup>[1]</sup> 9:25  <b>merits</b> <sup>[5]</sup> 7:11 25:10 35:6,19 39:19  <b>met</b> <sup>[1]</sup> 21:19  <b>middle</b> <sup>[1]</sup> 55:7  <b>might</b> <sup>[9]</sup> 13:19 20:18,23 31:9 32:10 57:21 65:19 71:24 82:12  <b>mind</b> <sup>[1]</sup> 45:15  <b>mine-run</b> <sup>[2]</sup> 25:25 64:25  <b>minimum</b> <sup>[1]</sup> 15:18  <b>minute</b> <sup>[1]</sup> 14:25  <b>misguided</b> <sup>[1]</sup> 5:7  <b>missing</b> <sup>[2]</sup> 28:12 29:4  <b>mom-and-pop</b> <sup>[1]</sup> 77:3  <b>moment</b> <sup>[1]</sup> 47:25  <b>money</b> <sup>[1]</sup> 10:7  <b>morning</b> <sup>[1]</sup> 62:7  <b>most</b> <sup>[3]</sup> 5:3 6:19 36:13  <b>move</b> <sup>[1]</sup> 30:10  <b>much</b> <sup>[9]</sup> 9:11 11:12 48:3 49:3 68:17  <b>multiple</b> <sup>[2]</sup> 10:11 54:4  <b>must</b> <sup>[4]</sup> 16:19 27:20 73:25 74:14</p> <hr/> <p style="text-align: center;"><b>N</b></p> <p><b>name</b> <sup>[1]</sup> 22:13  <b>narrow</b> <sup>[1]</sup> 21:3  <b>nature</b> <sup>[3]</sup> 22:6 30:12 65:24  <b>necessarily</b> <sup>[3]</sup> 13:4 32:2 68:4  <b>necessary</b> <sup>[2]</sup> 42:18,20  <b>necessity</b> <sup>[1]</sup> 52:12  <b>need</b> <sup>[2]</sup> 10:2 56:12  <b>negative</b> <sup>[1]</sup> 26:24  <b>Network</b> <sup>[14]</sup> 4:12 9:9 21:5 22:14 26:13 27:7,22 37:21 38:19 47:8 75:22 77:25 83:16 84:18  <b>never</b> <sup>[6]</sup> 6:2,6 15:9 17:11 33:7 61:7  <b>New</b> <sup>[4]</sup> 39:2,14 46:2 57:2  <b>next</b> <sup>[3]</sup> 4:4 13:10 80:12  <b>Ninth</b> <sup>[9]</sup> 30:14,18 39:2,7,8 60:10,24 61:9 83:24  <b>NLRB</b> <sup>[1]</sup> 51:19  <b>Nobody</b> <sup>[1]</sup> 81:25  <b>non-binding</b> <sup>[2]</sup> 30:12,25  <b>non-coercive</b> <sup>[1]</sup> 40:12  <b>none</b> <sup>[2]</sup> 5:5 56:23  <b>nonetheless</b> <sup>[1]</sup> 62:25  <b>nor</b> <sup>[1]</sup> 83:4  <b>normal</b> <sup>[2]</sup> 7:1 21:8  <b>notable</b> <sup>[1]</sup> 13:5  <b>note</b> <sup>[1]</sup> 84:3  <b>noted</b> <sup>[1]</sup> 82:22  <b>nothing</b> <sup>[3]</sup> 10:9 56:2 66:18  <b>notice</b> <sup>[2]</sup> 71:19 84:19</p>	<p><b>notice-and-comment</b> <sup>[3]</sup> 51:22 59:17 73:23  <b>notwithstanding</b> <sup>[1]</sup> 71:8  <b>number</b> <sup>[2]</sup> 17:17 37:22  <b>numerous</b> <sup>[2]</sup> 76:12 79:17</p> <hr/> <p style="text-align: center;"><b>O</b></p> <p><b>objecting</b> <sup>[1]</sup> 40:14  <b>objectives</b> <sup>[1]</sup> 48:16  <b>obligation</b> <sup>[1]</sup> 72:1  <b>obligations</b> <sup>[3]</sup> 40:22 53:11 59:2  <b>obtain</b> <sup>[2]</sup> 6:12 62:19  <b>obtaining</b> <sup>[1]</sup> 25:17  <b>Obviously</b> <sup>[1]</sup> 77:18  <b>occasion</b> <sup>[1]</sup> 78:9  <b>odd</b> <sup>[2]</sup> 21:25 72:14  <b>off-ramp</b> <sup>[2]</sup> 27:24 29:25  <b>offered</b> <sup>[1]</sup> 22:1  <b>offering</b> <sup>[1]</sup> 29:22  <b>often</b> <sup>[2]</sup> 49:19 51:19  <b>Okay</b> <sup>[1]</sup> 34:5  <b>old</b> <sup>[2]</sup> 20:12 43:1  <b>once</b> <sup>[5]</sup> 15:22 16:18 21:2 47:2 84:22  <b>one</b> <sup>[37]</sup> 4:24 9:5,5 20:18 22:9 26:4 27:5,13,21 28:21 38:9 39:14,21 42:5,16 44:18,20,25 46:10,10 54:15 55:17,20 58:5,19 59:23 61:1 64:12,13 65:22 66:12 68:24 76:25 77:19 78:3 79:1 83:1  <b>ones</b> <sup>[3]</sup> 5:4 49:18 56:14  <b>ongoing</b> <sup>[1]</sup> 18:3  <b>online</b> <sup>[2]</sup> 50:16 52:5  <b>only</b> <sup>[15]</sup> 10:2,7 18:8 20:21,21 30:15 33:17 42:12 43:15 52:23 62:8 69:13 73:22 83:1,7  <b>open</b> <sup>[2]</sup> 46:2 73:20  <b>operates</b> <sup>[2]</sup> 4:17 49:11  <b>operating</b> <sup>[1]</sup> 27:11  <b>operation</b> <sup>[1]</sup> 77:3  <b>opining</b> <sup>[3]</sup> 10:18 40:17 53:7  <b>opinion</b> <sup>[7]</sup> 22:12,16,17 36:13 39:3 75:16,22  <b>opportunity</b> <sup>[18]</sup> 8:4,7 15:14 31:18 32:17 34:18 37:10,17 38:11 45:4 75:5 78:2,7,13 80:22 81:7 82:11 83:7  <b>opted</b> <sup>[2]</sup> 41:14,14  <b>option</b> <sup>[3]</sup> 44:25 45:1 58:10  <b>optional</b> <sup>[1]</sup> 38:13  <b>oral</b> <sup>[7]</sup> 1:15 3:2,5,8 4:8 34:8 61:19  <b>order</b> <sup>[92]</sup> 5:10,12,17 8:22 10:21,22 14:7,21,22 15:2,13 16:6,11,23 17:12,12,23 18:1,3,8 20:7,11,24 22:7,9 28:3,3,6,9,15 29:1,7,8,8 30:4,12,20 31:8,13,15,21</p>	<p><b>33:13 34:22,23 35:5,15,23 36:4,11 37:2,4 38:6 40:12,15,16 41:4,8 44:19,23 45:2 47:14 50:16 51:1 53:9,12 54:19,25 56:15 57:3 59:6 60:7 61:11 62:8,9,20,22 63:2,22 67:9 68:9,9 69:8,20 72:4 73:11,21 74:13 76:16,18 83:1,3,17</b>  <b>orders</b> <sup>[20]</sup> 4:15,19 6:5,13 25:3 32:22 37:13 51:14,15,21 55:9 57:19 59:16 71:15,16,20,22 83:22,22 84:2  <b>organically</b> <sup>[1]</sup> 9:18  <b>orientation</b> <sup>[1]</sup> 48:13  <b>original</b> <sup>[1]</sup> 38:6  <b>other</b> <sup>[26]</sup> 4:17 6:5 8:18 12:11 13:24 20:16,17 22:1 27:19 28:17 35:15 41:17 42:2,23 51:14,17 53:20 56:16 57:1 61:10 68:5 71:22 73:16 76:20 83:4,20  <b>otherwise</b> <sup>[3]</sup> 14:15 19:13 60:7  <b>ought</b> <sup>[2]</sup> 27:9 82:9  <b>out</b> <sup>[24]</sup> 9:9 16:1 17:11 21:2 25:7 26:7,14 32:16,18 41:10,17 48:4,4 49:2 54:1,20 68:6 70:12,16,17 71:18 75:15 83:15 84:17  <b>outlined</b> <sup>[1]</sup> 46:7  <b>outset</b> <sup>[1]</sup> 45:19  <b>outside</b> <sup>[4]</sup> 22:23 53:22 64:4 72:8  <b>over</b> <sup>[8]</sup> 26:19 35:4,5 40:8 42:22,23 60:19,23  <b>overcome</b> <sup>[1]</sup> 32:12  <b>overly</b> <sup>[1]</sup> 37:22  <b>overturned</b> <sup>[1]</sup> 32:23  <b>own</b> <sup>[1]</sup> 50:19</p> <hr/> <p style="text-align: center;"><b>P</b></p> <p><b>p.m</b> <sup>[1]</sup> 85:6  <b>PAGE</b> <sup>[3]</sup> 3:2 37:6 84:3  <b>PALMORE</b> <sup>[55]</sup> 2:4 3:6 34:7,8,10 36:17 37:3,19 38:7 39:10 41:21 43:11 45:17,23 46:1,9,11,16,20,24 47:3,6 48:8,25 49:6 50:4,10 51:3,4,5,9,25 52:16 53:3 54:2,11,18 56:4,9 57:6,10,13,16,24 58:16,23 59:11,15,21,24 60:9,18,22 69:24 80:4  <b>paper</b> <sup>[1]</sup> 29:20  <b>paragraph</b> <sup>[3]</sup> 79:14 80:12,25  <b>part</b> <sup>[7]</sup> 12:22 17:9 43:15,17 52:19 69:13 79:24  <b>participate</b> <sup>[3]</sup> 75:5 80:22 81:8  <b>participated</b> <sup>[4]</sup> 35:25 39:23 40:1,4  <b>participating</b> <sup>[2]</sup> 47:13,21  <b>particular</b> <sup>[11]</sup> 24:12 33:13</p>	<p><b>43:8,8 52:3,4 59:13 62:21 69:21 70:7 73:10</b>  <b>particularly</b> <sup>[2]</sup> 62:14 68:11  <b>parties</b> <sup>[30]</sup> 6:3,11,20,25 7:18,20 8:24 14:3 19:19,21 20:1,3 21:18 22:7 25:2 29:1 33:12 36:23 44:24 45:9,11,13 49:4 52:3 62:1 67:16 71:10 73:20 82:21 83:4  <b>party</b> <sup>[32]</sup> 9:5,15 18:8 20:18,22 31:12 35:13,24 39:23 40:14 47:20 50:14 58:6,10 62:19 63:1 66:15 74:11,14,14 75:1,3,10 76:17 78:8 79:4 80:8,16 81:6 83:1,7,11  <b>party's</b> <sup>[2]</sup> 25:10 79:17  <b>party-specific</b> <sup>[2]</sup> 47:16 50:12  <b>path</b> <sup>[2]</sup> 44:3 84:12  <b>pattered</b> <sup>[1]</sup> 6:4  <b>payment</b> <sup>[2]</sup> 35:22 40:7  <b>PDR</b> <sup>[19]</sup> 4:12 9:9 21:5 22:14,14,15,21 26:13 27:7,22 37:13,21 38:19 47:8 75:16,22 77:25 83:16 84:17  <b>peace</b> <sup>[1]</sup> 43:21  <b>pending</b> <sup>[1]</sup> 83:18  <b>people</b> <sup>[10]</sup> 14:20 19:7 32:16 38:3 47:24 48:4 49:15 57:18 64:3 81:2  <b>per</b> <sup>[1]</sup> 15:6  <b>perhaps</b> <sup>[4]</sup> 17:13 50:4 59:15 83:20  <b>peril</b> <sup>[1]</sup> 50:19  <b>period</b> <sup>[1]</sup> 16:4  <b>permanently</b> <sup>[2]</sup> 5:4 17:13  <b>permissible</b> <sup>[2]</sup> 31:14 51:2  <b>permissibly</b> <sup>[1]</sup> 73:22  <b>permitted</b> <sup>[1]</sup> 18:14  <b>person</b> <sup>[1]</sup> 66:13  <b>petition</b> <sup>[14]</sup> 6:22 9:2 14:9 16:17,20 18:9,14 57:4,8 61:8 79:18 81:23 83:11,16  <b>Petitioner</b> <sup>[13]</sup> 1:5 2:3 3:4,14 4:9 14:6 37:18 38:2 62:6,16 78:10,12 81:18  <b>Petitioner's</b> <sup>[5]</sup> 36:3 50:14 51:6 62:18 78:19  <b>Petitioners</b> <sup>[2]</sup> 37:7 61:7  <b>petitions</b> <sup>[1]</sup> 33:18  <b>phrase</b> <sup>[9]</sup> 5:8,14,17,23 10:15 12:13 13:10 29:10 80:4  <b>piece</b> <sup>[2]</sup> 29:19 63:12  <b>place</b> <sup>[2]</sup> 20:4 48:7  <b>plain</b> <sup>[1]</sup> 62:12  <b>plaintiff</b> <sup>[6]</sup> 31:17 34:17 62:24 65:6 68:7,7  <b>plaintiff's</b> <sup>[1]</sup> 83:7  <b>plaintiffs</b> <sup>[1]</sup> 7:23  <b>planning</b> <sup>[1]</sup> 14:3  <b>play</b> <sup>[2]</sup> 7:24 70:13  <b>players</b> <sup>[1]</sup> 49:14</p>
---	--	--	--	--

## Official - Subject to Final Review

<p><b>plays</b> <sup>[1]</sup> 16:1</p> <p><b>please</b> <sup>[3]</sup> 4:11 34:11 61:23</p> <p><b>point</b> <sup>[13]</sup> 8:24 9:3 23:18 33:8 39:5,6,21 55:2,8 68:6 73:16 82:18 84:17</p> <p><b>pointed</b> <sup>[4]</sup> 9:9 26:14 41:10 83:15</p> <p><b>points</b> <sup>[4]</sup> 41:17 47:7 54:18 81:20</p> <p><b>Port</b> <sup>[27]</sup> 6:16,17 19:1,23,25 20:1,13 35:17 39:18,22,24 40:13 43:3 47:18 52:17,18 59:4 62:14 74:9,10,16,20 75:13,19 76:8 79:2 82:19</p> <p><b>position</b> <sup>[10]</sup> 7:14 21:14 23:10 33:7 36:3 58:9 77:6 78:1,10 84:5</p> <p><b>possible</b> <sup>[1]</sup> 47:16</p> <p><b>possibly</b> <sup>[1]</sup> 5:7</p> <p><b>Post</b> <sup>[3]</sup> 48:12 57:2 58:1</p> <p><b>Posts</b> <sup>[1]</sup> 49:23</p> <p><b>potential</b> <sup>[2]</sup> 38:17,18</p> <p><b>potentially</b> <sup>[1]</sup> 66:16</p> <p><b>Powell</b> <sup>[2]</sup> 64:8 67:24</p> <p><b>power</b> <sup>[1]</sup> 14:14</p> <p><b>practical</b> <sup>[1]</sup> 9:12</p> <p><b>pre-enforcement</b> <sup>[1]</sup> 4:17</p> <p><b>pre-Hobbs</b> <sup>[1]</sup> 76:21</p> <p><b>precedent</b> <sup>[7]</sup> 4:16 34:13 35:9,16 39:5,6 62:13</p> <p><b>precedents</b> <sup>[1]</sup> 76:21</p> <p><b>preclude</b> <sup>[2]</sup> 19:15 44:21</p> <p><b>precludes</b> <sup>[1]</sup> 61:24</p> <p><b>preclusion</b> <sup>[3]</sup> 7:2 53:13 75:11</p> <p><b>predecessor</b> <sup>[2]</sup> 35:8 76:13</p> <p><b>predictability</b> <sup>[1]</sup> 24:7</p> <p><b>preenforcement</b> <sup>[1]</sup> 82:3</p> <p><b>preexisting</b> <sup>[1]</sup> 71:25</p> <p><b>premise</b> <sup>[2]</sup> 25:6 78:11</p> <p><b>prescribes</b> <sup>[1]</sup> 65:16</p> <p><b>prescription</b> <sup>[1]</sup> 26:25</p> <p><b>present</b> <sup>[2]</sup> 45:11 74:1</p> <p><b>presented</b> <sup>[7]</sup> 37:8,13,14 38:9,16 45:20 75:23</p> <p><b>presently</b> <sup>[2]</sup> 44:25 49:4</p> <p><b>preserve</b> <sup>[1]</sup> 24:15</p> <p><b>pretty</b> <sup>[1]</sup> 21:3</p> <p><b>previously</b> <sup>[1]</sup> 79:17</p> <p><b>Price</b> <sup>[12]</sup> 12:5,9 26:6 35:11 42:6 43:24 63:15,17,23 68:3 77:4,11</p> <p><b>principle</b> <sup>[2]</sup> 19:6 43:2</p> <p><b>principles</b> <sup>[7]</sup> 7:2,2,8 68:25 69:5,10 75:12</p> <p><b>prior</b> <sup>[5]</sup> 37:9 38:11 78:2,12 80:25</p> <p><b>private</b> <sup>[7]</sup> 6:3 35:13,22 40:7 62:1,24 68:8</p> <p><b>probably</b> <sup>[1]</sup> 50:7</p> <p><b>problem</b> <sup>[6]</sup> 7:12 31:4 36:16 37:17 38:17 56:25</p>	<p><b>procedures</b> <sup>[2]</sup> 5:22 62:24</p> <p><b>proceed</b> <sup>[1]</sup> 42:25</p> <p><b>proceeding</b> <sup>[20]</sup> 6:22 7:21 8:10,21 14:6 19:20 20:3 21:7 26:19 27:2 31:9 45:11 67:18 74:12,12 75:2,3 79:21 82:23,24</p> <p><b>proceedings</b> <sup>[4]</sup> 5:23 74:24 79:5 81:8</p> <p><b>process</b> <sup>[21]</sup> 25:17 31:10 38:18 43:15,22 48:14 56:10,13,19 64:7,25 65:2,20 66:18 67:2,3,6 68:11 77:14,16 82:2</p> <p><b>produces</b> <sup>[1]</sup> 74:13</p> <p><b>promise</b> <sup>[2]</sup> 8:17 83:13</p> <p><b>pronounce</b> <sup>[1]</sup> 64:19</p> <p><b>proper</b> <sup>[1]</sup> 46:12</p> <p><b>properly</b> <sup>[1]</sup> 4:13</p> <p><b>proposition</b> <sup>[2]</sup> 52:17 84:4</p> <p><b>prosecuted</b> <sup>[2]</sup> 44:4 77:11</p> <p><b>prosecution</b> <sup>[2]</sup> 77:18,21</p> <p><b>provide</b> <sup>[7]</sup> 9:17 10:16 14:1 26:18 27:1 42:19 67:13</p> <p><b>provided</b> <sup>[2]</sup> 62:16 78:6</p> <p><b>provides</b> <sup>[3]</sup> 26:24 44:12 70:2</p> <p><b>providing</b> <sup>[1]</sup> 4:18</p> <p><b>provision</b> <sup>[10]</sup> 6:11 13:22 15:15 18:22 32:4 41:5 67:12 70:13 72:15 73:8</p> <p><b>public</b> <sup>[5]</sup> 29:9 70:24 71:19,20,24</p> <p><b>purpose</b> <sup>[5]</sup> 16:9 34:13 36:1 62:12 63:22</p> <p><b>purposes</b> <sup>[3]</sup> 23:18,19 83:5</p> <p><b>pursue</b> <sup>[1]</sup> 48:15</p> <p><b>put</b> <sup>[2]</sup> 69:25 71:18</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>question</b> <sup>[20]</sup> 15:6,9 19:1 22:22 27:9 28:11 33:15 37:8 39:3 40:10 41:13 44:14 46:8 58:19 67:2 69:16 74:9 76:25 78:5 79:2</p> <p><b>questions</b> <sup>[6]</sup> 14 36:8 63:7 64:7 67:4 81:25</p> <p><b>quick</b> <sup>[3]</sup> 25:18 39:21 79:1</p> <p><b>quite</b> <sup>[6]</sup> 21:15,25 26:24 27:4 59:16 77:5</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>raise</b> <sup>[2]</sup> 28:10 31:10</p> <p><b>raised</b> <sup>[2]</sup> 64:8,9</p> <p><b>raises</b> <sup>[2]</sup> 37:18 67:3</p> <p><b>rationale</b> <sup>[1]</sup> 74:19</p> <p><b>reach</b> <sup>[1]</sup> 11:15</p> <p><b>read</b> <sup>[7]</sup> 5:18 13:21 23:14 43:9 74:10 78:15 82:9</p> <p><b>reader</b> <sup>[1]</sup> 13:20</p> <p><b>reading</b> <sup>[4]</sup> 5:8 37:23 46:12 62:11</p> <p><b>real</b> <sup>[3]</sup> 41:10 64:7 72:4</p>	<p><b>really</b> <sup>[11]</sup> 7:3 9:10 22:4 25:8 28:3 47:25 49:9 58:3 64:21 77:5 82:8</p> <p><b>reason</b> <sup>[5]</sup> 17:19 38:4 54:16 58:8 78:18</p> <p><b>reasonable</b> <sup>[1]</sup> 32:5</p> <p><b>reasoning</b> <sup>[5]</sup> 10:20 21:12 27:15 75:6 82:13</p> <p><b>reasons</b> <sup>[3]</sup> 6:19 25:23 33:4</p> <p><b>REBUTTAL</b> <sup>[4]</sup> 3:12 81:16,17,20</p> <p><b>recognition</b> <sup>[1]</sup> 6:8</p> <p><b>recognize</b> <sup>[1]</sup> 27:7</p> <p><b>recognized</b> <sup>[1]</sup> 4:13</p> <p><b>recognizes</b> <sup>[1]</sup> 67:13</p> <p><b>recognizing</b> <sup>[1]</sup> 44:18</p> <p><b>reconsideration</b> <sup>[5]</sup> 9:7 57:5 79:18 83:12,17</p> <p><b>redetermination</b> <sup>[4]</sup> 35:20 40:6 42:15 76:2</p> <p><b>redetermine</b> <sup>[1]</sup> 39:19</p> <p><b>refer</b> <sup>[2]</sup> 62:15 69:2</p> <p><b>reference</b> <sup>[1]</sup> 64:11</p> <p><b>referring</b> <sup>[1]</sup> 13:8</p> <p><b>refers</b> <sup>[5]</sup> 13:11 62:8 68:22 69:4 78:2</p> <p><b>reflexively</b> <sup>[1]</sup> 65:15</p> <p><b>refused</b> <sup>[1]</sup> 55:21</p> <p><b>reg</b> <sup>[1]</sup> 78:7</p> <p><b>regarding</b> <sup>[1]</sup> 74:13</p> <p><b>region</b> <sup>[1]</sup> 24:12</p> <p><b>regular</b> <sup>[1]</sup> 31:12</p> <p><b>regulated</b> <sup>[7]</sup> 31:12 49:11,12 62:19 63:1 73:20 78:7</p> <p><b>regulation</b> <sup>[1]</sup> 84:12</p> <p><b>regulations</b> <sup>[2]</sup> 63:18 77:8</p> <p><b>regulatory</b> <sup>[1]</sup> 6:22</p> <p><b>reinforces</b> <sup>[1]</sup> 5:20</p> <p><b>reject</b> <sup>[2]</sup> 4:21 63:6</p> <p><b>rejected</b> <sup>[1]</sup> 76:15</p> <p><b>relate</b> <sup>[1]</sup> 25:9</p> <p><b>related</b> <sup>[2]</sup> 18:3 20:22</p> <p><b>relates</b> <sup>[1]</sup> 25:9</p> <p><b>relevant</b> <sup>[2]</sup> 5:5 52:19</p> <p><b>reliance</b> <sup>[4]</sup> 32:6,11 36:2 48:11</p> <p><b>relied</b> <sup>[2]</sup> 11:13 50:25</p> <p><b>relief</b> <sup>[12]</sup> 5:16 6:12 9:1 12:12,19 13:9,12,25 20:25 35:15,23 76:18</p> <p><b>relies</b> <sup>[1]</sup> 31:15</p> <p><b>rely</b> <sup>[4]</sup> 11:2 56:12 64:3 79:10</p> <p><b>relying</b> <sup>[2]</sup> 43:18 56:8</p> <p><b>remain</b> <sup>[1]</sup> 27:20</p> <p><b>remand</b> <sup>[1]</sup> 84:19</p> <p><b>remanded</b> <sup>[1]</sup> 47:9</p> <p><b>remedies</b> <sup>[1]</sup> 35:4</p> <p><b>remedy</b> <sup>[3]</sup> 25:2,5,9</p> <p><b>remind</b> <sup>[1]</sup> 22:13</p> <p><b>removal</b> <sup>[1]</sup> 24:2</p> <p><b>remove</b> <sup>[2]</sup> 41:7 51:15</p> <p><b>removed</b> <sup>[1]</sup> 77:19</p>	<p><b>rendered</b> <sup>[1]</sup> 43:7</p> <p><b>renders</b> <sup>[1]</sup> 30:17</p> <p><b>reopen</b> <sup>[1]</sup> 44:1</p> <p><b>repeat</b> <sup>[1]</sup> 49:14</p> <p><b>replicated</b> <sup>[1]</sup> 68:4</p> <p><b>reply</b> <sup>[4]</sup> 19:2,4 37:7 54:24</p> <p><b>report</b> <sup>[2]</sup> 53:6 70:23</p> <p><b>reports</b> <sup>[1]</sup> 70:24</p> <p><b>represented</b> <sup>[4]</sup> 74:23 79:11,16,20</p> <p><b>requesting</b> <sup>[1]</sup> 76:17</p> <p><b>require</b> <sup>[4]</sup> 4:14 13:17 83:23 84:23</p> <p><b>required</b> <sup>[2]</sup> 8:25 48:15</p> <p><b>requirement</b> <sup>[1]</sup> 21:17</p> <p><b>requires</b> <sup>[4]</sup> 10:7 16:16 32:5 33:18</p> <p><b>res</b> <sup>[1]</sup> 7:7</p> <p><b>resolved</b> <sup>[1]</sup> 9:5</p> <p><b>resolves</b> <sup>[1]</sup> 82:6</p> <p><b>resolving</b> <sup>[1]</sup> 10:21</p> <p><b>respect</b> <sup>[4]</sup> 13:22 19:3 33:1 63:11</p> <p><b>respectfully</b> <sup>[2]</sup> 11:12 13:2</p> <p><b>responded</b> <sup>[1]</sup> 43:23</p> <p><b>Respondent</b> <sup>[1]</sup> 77:22</p> <p><b>Respondents</b> <sup>[7]</sup> 1:8 2:5,9 3:7,11 34:9 61:21</p> <p><b>response</b> <sup>[3]</sup> 41:16 47:11 58:20</p> <p><b>responses</b> <sup>[2]</sup> 31:25 38:7</p> <p><b>rest</b> <sup>[2]</sup> 76:7,9</p> <p><b>rested</b> <sup>[1]</sup> 74:20</p> <p><b>result</b> <sup>[2]</sup> 26:11 44:6</p> <p><b>resulted</b> <sup>[1]</sup> 59:18</p> <p><b>retroactively</b> <sup>[1]</sup> 61:3</p> <p><b>reversal</b> <sup>[2]</sup> 21:23 83:24</p> <p><b>reverse</b> <sup>[1]</sup> 37:5</p> <p><b>review</b> <sup>[47]</sup> 4:19 5:23 6:5,23 7:11 9:2,10,15,17 14:4 15:3 16:17 18:9,14 25:18 26:18 27:2,18 32:18 34:18 35:13,19 36:5,15 37:10 39:18 40:16 41:12 44:2 47:14 57:14 58:7,10 59:19 62:23 65:4 66:6,13 67:14,16 70:11 74:14 76:4 78:3,13 81:23 83:14</p> <p><b>reviewable</b> <sup>[10]</sup> 40:20 53:9 54:21,22,25 55:4,9,11 70:1 73:11</p> <p><b>revisit</b> <sup>[1]</sup> 78:9</p> <p><b>ridiculous</b> <sup>[4]</sup> 36:13 37:2,5 56:1</p> <p><b>rights</b> <sup>[5]</sup> 40:22 44:24 53:11 59:2 74:13</p> <p><b>rise</b> <sup>[1]</sup> 33:14</p> <p><b>road</b> <sup>[3]</sup> 18:11 58:13 59:11</p> <p><b>ROBERTS</b> <sup>[14]</sup> 4:3 32:25 33:20 34:7 55:14 56:24 58:17 60:3 61:16 73:18 74:4 78:22 81:11 85:3</p> <p><b>role</b> <sup>[1]</sup> 7:24</p> <p><b>route</b> <sup>[1]</sup> 9:10</p>	<p><b>routinely</b> <sup>[1]</sup> 84:10</p> <p><b>rule</b> <sup>[22]</sup> 22:18,20,22 25:7 27:11 28:4,19,24 42:24 51:7,8,11 52:14,21 60:12 61:6 65:12 68:18 71:14 83:24 84:10,18</p> <p><b>rule-making</b> <sup>[1]</sup> 84:12</p> <p><b>rulemaking</b> <sup>[3]</sup> 51:22 59:18 73:23</p> <p><b>rules</b> <sup>[8]</sup> 5:1 24:9 30:18 51:20 54:7 70:20 84:7,8</p> <p><b>ruling</b> <sup>[7]</sup> 50:18 53:19 55:23 57:10,22 59:22 69:5</p> <p><b>rulings</b> <sup>[3]</sup> 52:24 53:24 70:16</p> <p><b>Run</b> <sup>[1]</sup> 76:12</p> <p><b>run-of-the-mill</b> <sup>[1]</sup> 14:12</p> <p><b>Rutledge</b> <sup>[3]</sup> 56:20 64:8 67:19</p> <hr/> <p style="text-align: center;"><b>S</b></p> <p><b>safety</b> <sup>[6]</sup> 33:2 37:20 38:22 44:12 49:20 77:25</p> <p><b>same</b> <sup>[16]</sup> 5:19 10:23 11:21 12:14 35:21 36:22 39:19 40:6 42:15 48:7 59:5 63:22 71:23 80:20 81:6,10</p> <p><b>satisfy</b> <sup>[1]</sup> 71:1</p> <p><b>saw</b> <sup>[1]</sup> 44:22</p> <p><b>saying</b> <sup>[10]</sup> 14:5,22 16:2 42:17 44:21 47:24 53:20 54:13 71:7 80:6</p> <p><b>says</b> <sup>[19]</sup> 12:18,19,25 16:15 22:16,18 36:12,25 37:7 38:2 39:22 41:6 42:2 56:15 72:15,22 73:1 80:15,21</p> <p><b>scenario</b> <sup>[6]</sup> 6:24 18:20 19:22 20:6,20 32:3</p> <p><b>scenes</b> <sup>[1]</sup> 78:3</p> <p><b>scheme</b> <sup>[4]</sup> 37:23 67:14 76:14 78:6</p> <p><b>scope</b> <sup>[1]</sup> 19:12</p> <p><b>Second</b> <sup>[13]</sup> 11:2,4,4,5,13,25 26:9 42:1,9,10,18 45:1 69:4</p> <p><b>second-guessing</b> <sup>[1]</sup> 36:6</p> <p><b>Section</b> <sup>[9]</sup> 40:8 44:7 67:11,12 69:25 73:11 77:24 78:1,16</p> <p><b>Sections</b> <sup>[1]</sup> 35:2</p> <p><b>see</b> <sup>[6]</sup> 26:21 27:19 36:16 37:2 58:12 64:15</p> <p><b>seek</b> <sup>[6]</sup> 9:1,15 14:3 44:2 74:14 78:13</p> <p><b>seeking</b> <sup>[6]</sup> 6:22 16:17 40:15 47:13 68:8 83:3</p> <p><b>seeks</b> <sup>[1]</sup> 31:12</p> <p><b>seem</b> <sup>[4]</sup> 14:13 28:7 72:14 75:19</p> <p><b>seems</b> <sup>[6]</sup> 16:3 21:16 22:19 24:13 44:17 72:16</p> <p><b>seen</b> <sup>[3]</sup> 36:13 56:2 74:2</p> <p><b>send</b> <sup>[2]</sup> 31:15 50:15</p>
---	--	--	--	---

## Official - Subject to Final Review

<p><b>sense</b> <sup>[9]</sup> 9:11,13 10:9,19 43:18 66:10 70:21 75:11 80:24</p> <p><b>sent</b> <sup>[1]</sup> 50:25</p> <p><b>sentence</b> <sup>[14]</sup> 11:5,5,13,14, 25 12:17 13:6 26:9,11 41: 24 42:2,9,10,18</p> <p><b>sentences</b> <sup>[4]</sup> 11:14 41:18, 23 42:5</p> <p><b>series</b> <sup>[1]</sup> 12:10</p> <p><b>services</b> <sup>[1]</sup> 50:16</p> <p><b>set</b> <sup>[8]</sup> 12:19,21 13:7 17:19 19:13 42:3,10 75:20</p> <p><b>settled</b> <sup>[1]</sup> 76:3</p> <p><b>Seventh</b> <sup>[2]</sup> 53:5,8</p> <p><b>SG</b> <sup>[1]</sup> 53:4</p> <p><b>shall</b> <sup>[1]</sup> 73:1</p> <p><b>shipper</b> <sup>[1]</sup> 74:23</p> <p><b>Shipping</b> <sup>[3]</sup> 40:9,18 74:25</p> <p><b>shoes</b> <sup>[2]</sup> 81:7 83:8</p> <p><b>show</b> <sup>[2]</sup> 34:20 35:3</p> <p><b>shows</b> <sup>[1]</sup> 39:2</p> <p><b>shut</b> <sup>[1]</sup> 19:8</p> <p><b>side</b> <sup>[5]</sup> 22:1 28:17 41:17 56:16 83:20</p> <p><b>side's</b> <sup>[2]</sup> 8:18 57:1</p> <p><b>significance</b> <sup>[1]</sup> 29:24</p> <p><b>significant</b> <sup>[3]</sup> 27:5,10 83: 6</p> <p><b>significantly</b> <sup>[1]</sup> 26:12</p> <p><b>silence</b> <sup>[1]</sup> 27:8</p> <p><b>similar</b> <sup>[2]</sup> 6:4 77:24</p> <p><b>simply</b> <sup>[8]</sup> 29:9 30:3 41:14 46:18 71:14 73:19 81:22 84:11</p> <p><b>simultaneously</b> <sup>[1]</sup> 20:5</p> <p><b>situation</b> <sup>[5]</sup> 7:4,18,22 56: 18 58:4</p> <p><b>six</b> <sup>[2]</sup> 8:21 9:3</p> <p><b>soil</b> <sup>[1]</sup> 43:1</p> <p><b>solicited</b> <sup>[1]</sup> 71:19</p> <p><b>Solicitor</b> <sup>[1]</sup> 2:6</p> <p><b>somebody</b> <sup>[3]</sup> 58:14 66:12 81:1</p> <p><b>somehow</b> <sup>[3]</sup> 17:10 28:18 55:9</p> <p><b>someone</b> <sup>[2]</sup> 39:2 50:17</p> <p><b>somewhat</b> <sup>[1]</sup> 57:25</p> <p><b>sorry</b> <sup>[3]</sup> 20:15 51:5 59:1</p> <p><b>sort</b> <sup>[8]</sup> 9:1 23:22 24:11 27: 1 45:2 48:2 69:8 75:11</p> <p><b>SOTOMAYOR</b> <sup>[27]</sup> 7:5,25 8:3,8 9:19,23 10:14,23 11: 8,19 12:16 13:14 14:13,17 31:3,23 32:7,15,21 33:24 56:25 57:7,12,15,17 58:14 78:23</p> <p><b>sought</b> <sup>[5]</sup> 35:15,24 41:12 58:7 83:1</p> <p><b>sound</b> <sup>[4]</sup> 68:25 69:5,9,10</p> <p><b>soundness</b> <sup>[1]</sup> 39:17</p> <p><b>sources</b> <sup>[1]</sup> 42:13</p> <p><b>Spears</b> <sup>[1]</sup> 59:8</p> <p><b>special</b> <sup>[1]</sup> 63:16</p>	<p><b>specific</b> <sup>[8]</sup> 5:16 12:11 20: 22 25:1 29:10 33:11 74:14 78:8</p> <p><b>specifically</b> <sup>[2]</sup> 6:25 20:18</p> <p><b>specifics</b> <sup>[1]</sup> 47:20</p> <p><b>specified</b> <sup>[1]</sup> 70:9</p> <p><b>specifies</b> <sup>[2]</sup> 70:1 73:4</p> <p><b>square</b> <sup>[2]</sup> 23:4,18</p> <p><b>squared</b> <sup>[2]</sup> 75:7 76:22</p> <p><b>squarely</b> <sup>[2]</sup> 74:20 75:23</p> <p><b>stabilization</b> <sup>[1]</sup> 55:20</p> <p><b>stake</b> <sup>[2]</sup> 32:11 75:4</p> <p><b>stand</b> <sup>[1]</sup> 19:5</p> <p><b>standing</b> <sup>[1]</sup> 38:25</p> <p><b>stands</b> <sup>[1]</sup> 52:17</p> <p><b>start</b> <sup>[1]</sup> 64:21</p> <p><b>state</b> <sup>[2]</sup> 36:6 50:25</p> <p><b>STATES</b> <sup>[5]</sup> 1:1,16 2:8 3: 10 61:20</p> <p><b>stating</b> <sup>[1]</sup> 42:20</p> <p><b>status</b> <sup>[2]</sup> 79:18 80:8</p> <p><b>statute</b> <sup>[32]</sup> 9:21 11:22 13: 25 15:7 21:11 22:3 23:9 24:1 26:1,10,20 27:16 29: 23 32:13 33:9 39:14 41:1 43:8,13 50:1 52:3 54:8 56: 16 61:12 72:22 73:1 76:23 77:17 78:1 82:9,17 84:25</p> <p><b>statutes</b> <sup>[16]</sup> 4:16,18,25 6: 4,8 12:15 26:22 27:13,19 35:8,12 43:19,19 54:6 61: 14 73:5</p> <p><b>statutory</b> <sup>[10]</sup> 24:9 34:20 39:11 40:9,25 43:16 63:11 72:1 73:5 78:6</p> <p><b>stay</b> <sup>[1]</sup> 8:14</p> <p><b>step</b> <sup>[1]</sup> 77:19</p> <p><b>still</b> <sup>[8]</sup> 24:14 31:16 32:7 36: 21 40:20 45:2 62:16 84:9</p> <p><b>streamlined</b> <sup>[2]</sup> 25:17 82: 2</p> <p><b>strength</b> <sup>[1]</sup> 68:23</p> <p><b>stress</b> <sup>[1]</sup> 78:14</p> <p><b>strict</b> <sup>[1]</sup> 37:23</p> <p><b>strike</b> <sup>[1]</sup> 25:19</p> <p><b>strong</b> <sup>[1]</sup> 76:8</p> <p><b>structure</b> <sup>[5]</sup> 5:6,20 23:13 34:20 82:16</p> <p><b>structured</b> <sup>[1]</sup> 13:6</p> <p><b>struggling</b> <sup>[1]</sup> 27:24</p> <p><b>subject</b> <sup>[7]</sup> 20:2,11 30:20 36:5 77:3 81:24 84:21</p> <p><b>submit</b> <sup>[3]</sup> 21:6 30:23 33: 17</p> <p><b>submitted</b> <sup>[2]</sup> 85:5,7</p> <p><b>Substantially</b> <sup>[2]</sup> 50:8,10</p> <p><b>suddenly</b> <sup>[1]</sup> 15:13</p> <p><b>sue</b> <sup>[2]</sup> 31:20 62:25</p> <p><b>sued</b> <sup>[3]</sup> 20:21 44:4 58:15</p> <p><b>sufficient</b> <sup>[1]</sup> 33:2</p> <p><b>suggest</b> <sup>[2]</sup> 23:24 32:10</p> <p><b>suggested</b> <sup>[2]</sup> 72:21 77:23</p> <p><b>suggesting</b> <sup>[4]</sup> 17:7 22:11 26:16 43:5</p>	<p><b>suggestion</b> <sup>[2]</sup> 15:12 75:8</p> <p><b>suggests</b> <sup>[1]</sup> 10:1</p> <p><b>suit</b> <sup>[4]</sup> 20:23 21:18 52:11 75:25</p> <p><b>suits</b> <sup>[3]</sup> 52:8 62:1 76:17</p> <p><b>Sundays</b> <sup>[1]</sup> 28:9</p> <p><b>support</b> <sup>[2]</sup> 5:6 34:13</p> <p><b>supporting</b> <sup>[3]</sup> 2:8 3:11 61: 21</p> <p><b>Suppose</b> <sup>[4]</sup> 39:1 52:7 69: 1 77:2</p> <p><b>supposed</b> <sup>[3]</sup> 8:23 72:23 78:4</p> <p><b>SUPREME</b> <sup>[3]</sup> 1:1,15 39:6</p> <p><b>surrounded</b> <sup>[1]</sup> 5:15</p> <p><b>suspect</b> <sup>[1]</sup> 50:9</p> <p><b>Suspend</b> <sup>[5]</sup> 12:21 13:8 20: 10,23 42:12</p> <p><b>sustain</b> <sup>[1]</sup> 23:14</p> <p><b>sweep</b> <sup>[1]</sup> 82:10</p> <p><b>system</b> <sup>[1]</sup> 66:15</p> <hr/> <p style="text-align: center;"><b>T</b></p> <p><b>tailored</b> <sup>[1]</sup> 25:1</p> <p><b>TCPA</b> <sup>[9]</sup> 15:4 17:21 18:13, 23 29:11 32:4 34:17 62:22 68:8</p> <p><b>technical</b> <sup>[1]</sup> 70:20</p> <p><b>technology</b> <sup>[1]</sup> 52:4</p> <p><b>term</b> <sup>[5]</sup> 10:16 13:23 16:13 39:13 68:22</p> <p><b>terminate</b> <sup>[2]</sup> 41:6 51:15</p> <p><b>terms</b> <sup>[5]</sup> 5:15 9:11 12:11 13:7 35:8</p> <p><b>test</b> <sup>[1]</sup> 71:1</p> <p><b>tethered</b> <sup>[1]</sup> 56:21</p> <p><b>text</b> <sup>[7]</sup> 5:6 9:12 32:12 34: 12,20 82:8,16</p> <p><b>textual</b> <sup>[1]</sup> 12:4</p> <p><b>themselves</b> <sup>[2]</sup> 77:10 82: 22</p> <p><b>theory</b> <sup>[2]</sup> 8:6,8</p> <p><b>there's</b> <sup>[17]</sup> 6:1 12:3 18:16 21:17 23:21 28:19 39:5 40: 21 42:24 44:18 55:7 56:9 59:9 60:18,22 71:8 77:13</p> <p><b>therefore</b> <sup>[4]</sup> 5:18 28:9 72: 19 84:21</p> <p><b>they've</b> <sup>[2]</sup> 41:11 54:23</p> <p><b>thinking</b> <sup>[1]</sup> 66:4</p> <p><b>thinks</b> <sup>[2]</sup> 21:24 53:25</p> <p><b>Third</b> <sup>[1]</sup> 39:5</p> <p><b>THOMAS</b> <sup>[12]</sup> 6:15,19 33: 22 35:17 36:9,17,21 55:16, 17 56:7 63:8 74:6</p> <p><b>Thomas's</b> <sup>[1]</sup> 18:25</p> <p><b>though</b> <sup>[5]</sup> 31:18 36:15 37: 1 55:7 72:6</p> <p><b>Thoughts</b> <sup>[2]</sup> 45:16,18</p> <p><b>three</b> <sup>[3]</sup> 13:7 18:11 26:22</p> <p><b>throughout</b> <sup>[1]</sup> 25:19</p> <p><b>tied</b> <sup>[2]</sup> 11:6 47:25</p> <p><b>timing</b> <sup>[2]</sup> 38:1,24</p> <p><b>today</b> <sup>[2]</sup> 77:23 84:5</p>	<p><b>Together</b> <sup>[3]</sup> 4:22 11:15 35: 3</p> <p><b>tongue</b> <sup>[1]</sup> 11:6</p> <p><b>took</b> <sup>[4]</sup> 63:18,21 69:11 77: 25</p> <p><b>trade</b> <sup>[1]</sup> 49:13</p> <p><b>Transatlantic</b> <sup>[8]</sup> 62:15 74: 23 75:19 76:20 79:3,11 80: 6,15</p> <p><b>transformation</b> <sup>[1]</sup> 23:22</p> <p><b>transforming</b> <sup>[1]</sup> 5:3</p> <p><b>treat</b> <sup>[2]</sup> 4:15 18:4</p> <p><b>treble</b> <sup>[3]</sup> 31:16 32:3,4</p> <p><b>trial</b> <sup>[1]</sup> 55:19</p> <p><b>tried</b> <sup>[1]</sup> 71:13</p> <p><b>trigger</b> <sup>[1]</sup> 55:12</p> <p><b>troubled</b> <sup>[1]</sup> 75:20</p> <p><b>Trucking</b> <sup>[1]</sup> 53:6</p> <p><b>true</b> <sup>[3]</sup> 5:1 13:20 33:3</p> <p><b>try</b> <sup>[2]</sup> 55:17 83:9</p> <p><b>trying</b> <sup>[11]</sup> 14:1,1,10 23:24 24:4,6,14 25:7,21 56:17 80:7</p> <p><b>Tuesday</b> <sup>[1]</sup> 1:12</p> <p><b>turn</b> <sup>[1]</sup> 58:9</p> <p><b>turns</b> <sup>[1]</sup> 49:2</p> <p><b>twice</b> <sup>[1]</sup> 28:8</p> <p><b>two</b> <sup>[20]</sup> 6:25 11:14 12:14 19:17 20:15 21:2 33:3 36: 23 38:7,15 41:17,23 42:5 44:9,17 46:6 47:1 48:9 52: 2 80:2</p> <p><b>type</b> <sup>[1]</sup> 26:17</p> <hr/> <p style="text-align: center;"><b>U</b></p> <p><b>U.S.C</b> <sup>[2]</sup> 51:12 71:21</p> <p><b>ultimate</b> <sup>[1]</sup> 17:8</p> <p><b>unavoidably</b> <sup>[1]</sup> 28:10</p> <p><b>unaware</b> <sup>[1]</sup> 77:9</p> <p><b>uncertainty</b> <sup>[2]</sup> 41:7 51:16</p> <p><b>unclear</b> <sup>[1]</sup> 18:6</p> <p><b>unconstitutional</b> <sup>[1]</sup> 5:7</p> <p><b>under</b> <sup>[34]</sup> 10:5 17:11 18:9, 14,21 19:10 34:18 35:10 36:4,25 37:10 40:20 50:21 54:16,20,21,25 55:4,9,11 62:23 66:7,13 69:6 70:1, 21 71:21,21 73:11 76:4,13 78:3,13 84:6</p> <p><b>underlying</b> <sup>[1]</sup> 8:25</p> <p><b>undermined</b> <sup>[1]</sup> 36:3</p> <p><b>undermining</b> <sup>[1]</sup> 44:23</p> <p><b>understand</b> <sup>[21]</sup> 12:17 14: 21 15:25 17:5,14 21:13 27: 10 28:1 29:13 36:9 37:24 44:17 45:22 46:4 47:10 48: 23 56:20 66:11 67:1 71:3 72:5</p> <p><b>understanding</b> <sup>[9]</sup> 5:21 23:15 30:16 35:20 41:13 69:16 71:25 76:22 78:19</p> <p><b>understands</b> <sup>[1]</sup> 71:15</p> <p><b>understood</b> <sup>[4]</sup> 29:4 30:6 39:16 63:5</p>	<p><b>unfair</b> <sup>[1]</sup> 31:10</p> <p><b>unfairness</b> <sup>[1]</sup> 38:18</p> <p><b>uniformity</b> <sup>[1]</sup> 24:8</p> <p><b>unique</b> <sup>[3]</sup> 57:25 58:2 63: 19</p> <p><b>UNITED</b> <sup>[5]</sup> 1:1,16 2:8 3:10 61:20</p> <p><b>unless</b> <sup>[3]</sup> 18:1 32:15,23</p> <p><b>unlike</b> <sup>[1]</sup> 57:1</p> <p><b>unlikely</b> <sup>[2]</sup> 49:17 77:5</p> <p><b>until</b> <sup>[4]</sup> 15:5 16:7 18:1 58: 14</p> <p><b>unusual</b> <sup>[1]</sup> 8:9</p> <p><b>up</b> <sup>[8]</sup> 17:17 22:19 38:4 40: 13 47:24 48:6 68:20 81:3</p> <p><b>upheld</b> <sup>[1]</sup> 62:22</p> <p><b>uphold</b> <sup>[1]</sup> 25:19</p> <p><b>urge</b> <sup>[1]</sup> 4:22</p> <p><b>Urgent</b> <sup>[6]</sup> 23:23 35:10 42: 7,11,12 76:14</p> <p><b>uses</b> <sup>[2]</sup> 5:23 11:20</p> <p><b>using</b> <sup>[1]</sup> 16:13</p> <hr/> <p style="text-align: center;"><b>V</b></p> <p><b>vacate</b> <sup>[1]</sup> 10:10</p> <p><b>valid</b> <sup>[7]</sup> 5:13 9:25 10:22 16: 10 18:4 25:10 62:10</p> <p><b>validity</b> <sup>[55]</sup> 5:9,18,24 9:24 10:7,8,12,15,19,25 11:10, 22 12:1,2,8,14,24,25 13:11, 15,19 15:14,17,22,22 16:8, 13 18:2 24:9,20,23 30:11 34:22 39:13 41:18,19 42:1, 3,8 43:4,25 58:3 62:4,8 63: 17 66:25 67:8 68:22 69:2 70:4 72:16,21,23 73:3 76: 6</p> <p><b>valve</b> <sup>[6]</sup> 33:3 37:20 38:22 44:12 49:21 77:25</p> <p><b>variety</b> <sup>[1]</sup> 13:16</p> <p><b>various</b> <sup>[1]</sup> 73:4</p> <p><b>vehicle</b> <sup>[1]</sup> 58:8</p> <p><b>Venner</b> <sup>[3]</sup> 19:1 20:13 76: 11</p> <p><b>versus</b> <sup>[6]</sup> 10:3 36:18 51: 19 59:8 60:16 84:15</p> <p><b>viable</b> <sup>[1]</sup> 67:6</p> <p><b>view</b> <sup>[13]</sup> 4:22 28:15 29:10, 22 38:12,16 44:14 50:6,7, 14 62:18 72:9 83:21</p> <p><b>viewed</b> <sup>[1]</sup> 47:15</p> <p><b>violate</b> <sup>[4]</sup> 34:16 56:16 62: 21 73:8</p> <p><b>violated</b> <sup>[2]</sup> 9:22 18:13</p> <p><b>violating</b> <sup>[2]</sup> 55:20 77:11</p> <p><b>violation</b> <sup>[1]</sup> 77:16</p> <hr/> <p style="text-align: center;"><b>W</b></p> <p><b>W.H</b> <sup>[5]</sup> 2:2 3:3,13 4:8 81: 17</p> <p><b>wait</b> <sup>[2]</sup> 31:20 58:12</p> <p><b>waiting</b> <sup>[1]</sup> 74:15</p> <p><b>waiver</b> <sup>[1]</sup> 20:19</p> <p><b>wanted</b> <sup>[6]</sup> 25:13,16 30:9</p>
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## Official - Subject to Final Review

<p><b>34:24 58:4 83:9</b>  <b>wants</b> [3] <b>31:17 42:21 50:18</b>  <b>War</b> [3] <b>43:13,21 77:5</b>  <b>wartime</b> [4] <b>43:7,14 64:4 77:8</b>  <b>Washington</b> [4] <b>1:11 2:2,4,7</b>  <b>way</b> [22] <b>5:19 9:15 13:5 14:7 19:17 20:9,24 21:24 27:10 30:1 38:14 42:25 43:2 44:23 45:3 66:4,5 69:24 74:17 80:20 81:10 82:9</b>  <b>ways</b> [5] <b>10:11 13:16 16:14 54:4 80:7</b>  <b>weak</b> [2] <b>68:11,12</b>  <b>week</b> [1] <b>28:8</b>  <b>welcome</b> [3] <b>6:14 36:8 63:7</b>  <b>WESSLER</b> [66] <b>2:2 3:3,13 4:7,8,10 6:17 7:15 8:2,5,16 9:21 10:13 11:7,11,23 13:2,18 14:24 15:8,20 16:12 17:1,4,6,16 18:5,18,25 19:16,25 20:16 21:22 22:14,24 23:1,20 24:5,22 25:12,15 27:23 28:13,23 29:2,6,14,17,21 30:7 31:22,25 32:9,19,24 33:1 34:6 39:22 53:17,25 54:12 71:6,12 81:16,17,19</b>  <b>whatever</b> [3] <b>21:23 64:19 66:14</b>  <b>whatnot</b> [1] <b>16:6</b>  <b>Whereupon</b> [1] <b>85:6</b>  <b>whether</b> [16] <b>5:10 10:21 15:3 22:18 25:25 28:18 31:13 34:23 35:24 43:20 59:13 66:19 72:18 74:22 78:5 82:8</b>  <b>wielding</b> [1] <b>56:14</b>  <b>will</b> [8] <b>17:12 21:23 37:5 57:22 75:18 77:22 82:6 84:17</b>  <b>win</b> [3] <b>21:16,19,23</b>  <b>wind</b> [2] <b>47:24 48:6</b>  <b>window</b> [1] <b>44:1</b>  <b>wish</b> [1] <b>45:11</b>  <b>withdraws</b> [1] <b>30:21</b>  <b>within</b> [9] <b>14:9 16:20 24:17 27:13 38:5 41:1 52:9,13 73:25</b>  <b>without</b> [3] <b>7:10 10:12 42:20</b>  <b>wondering</b> [1] <b>21:14</b>  <b>word</b> [3] <b>12:23 14:14 61:12</b>  <b>words</b> [2] <b>53:20 58:24</b>  <b>work</b> [4] <b>48:20,21 63:5 66:6</b>  <b>works</b> [1] <b>76:23</b>  <b>world</b> [4] <b>29:20 43:12 49:24 77:5</b>  <b>worried</b> [1] <b>67:24</b>  <b>worries</b> [1] <b>45:3</b>  <b>worst</b> [1] <b>56:1</b></p>	<p><b>write</b> [1] <b>75:8</b>  <b>wrongful</b> [1] <b>10:4</b>  <b>wrote</b> [1] <b>56:20</b>  <hr/> <b>Y</b>  <hr/> <b>Yakus</b> [30] <b>10:24,25 12:6 26:6 39:15 41:16,17,24 42:9,10 43:6,12,22 44:7,8 55:18,18 56:8,10,13 63:9,14,24 64:1,2 68:16,18 76:25 77:1,16</b>  <b>years</b> [13] <b>4:12 8:21 9:3 11:20 18:11 36:14 44:9 48:4,4 50:23 64:9 66:16 83:18</b>  <b>yourself</b> [1] <b>49:10</b></p>
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