

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOSHUA E. BUFKIN, ET AL.,)

4 Petitioners,)

5 v.) No. 23-713

6 DENIS R. McDONOUGH, SECRETARY OF)

7 VETERANS AFFAIRS,)

8 Respondent.)

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11 Washington, D.C.

12 Wednesday, October 16, 2024

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14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:06 a.m.

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18 APPEARANCES:

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20 behalf of the Petitioners.

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23 of the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MELANIE L. BOSTWICK, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	SOPAN JOSHI, ESQ.	
7	On behalf of the Respondent	42
8	REBUTTAL ARGUMENT OF:	
9	MELANIE L. BOSTWICK, ESQ.	
10	On behalf of the Petitioners	80
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
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8
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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 23-713, Bufkin versus McDonough, Secretary of Veterans Affairs.

Ms. Bostwick.

ORAL ARGUMENT OF MELANIE L. BOSTWICK
ON BEHALF OF THE PETITIONERS

MS. BOSTWICK: Mr. Chief Justice, and may it please the Court:

In Gilbert, one of its earliest decisions, the newly created Veterans Court recognized both the importance of the benefit-of-the-doubt principle and the difference between reviewing findings of fact for clear error and reviewing VA's application of the approximate balance standard of proof as a matter of law, but the Veterans Court soon strayed from that understanding, and by 2001, the court had declared that the agency's approximate balance assessment can be reviewed only under the deferential clear-error standard of 7261(a)(4).

Congress responded by changing the

1 statute. It directed the Veterans Court to take
2 due account of the Secretary's application of
3 Section 5107(b), the benefit-of-the-doubt
4 statute, and that new statutory command, unique
5 in administrative review, directed to a
6 specialized Article I tribunal reviewing a
7 uniquely pro-claimant agency process, must be
8 given effect.

9 Petitioners have provided an account
10 of Section 7261(b)(1)'s plain text that gives
11 effect to all parts of the statute and allows
12 for the meaningful and independent judicial
13 scrutiny that Congress intended.

14 Yet the government insists that the
15 statute not only requires nothing that wasn't
16 already required by Section (a) before 2002 but
17 also requires the one thing we know Congress
18 didn't want. Under its view, the Veterans Court
19 does not even look at the agency's
20 benefit-of-the-doubt rulings unless a -- so long
21 as no factual finding specifically challenged by
22 the veteran is infected with clear error.

23 That is also what the Veterans Court
24 and the Federal Circuit held in these cases.
25 Their decisions render Congress's statutory

1 amendment entirely superfluous. They mean that
2 a uniquely generous standard of proof is
3 reviewed in a uniquely ungenerous way. And, if
4 upheld, they will allow the agency's
5 non-compliance with its statutory mandate to
6 continue unchecked.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Would you spend a
9 minute or so explaining how your approach would
10 work in comparison to the government's approach?

11 MS. BOSTWICK: Certainly, Your Honor.
12 So our view of the statute, it starts with the
13 text. So the text is "in making the
14 determinations under subsection (a)." What are
15 the determinations that the Veterans Court makes
16 under subsection (a)? It is looking at the
17 particular aspects of the agency's order that
18 are challenged on appeal, so deciding whether to
19 affirm, reverse, or vacate those decisions.
20 That's the determinations under subsection (a).

21 In making those determinations, just
22 like the Veterans Court, if it's otherwise
23 inclined to reverse or vacate, under (b)(2), it
24 has to do a -- a -- a check to make sure that
25 the -- any error was, in fact, prejudicial.

1 Under (b)(1), if it's otherwise inclined to
2 affirm, it nonetheless has to do a -- a check
3 and make sure that the decisions that it is
4 about to affirm complied with the -- with
5 Section 5107(b). That is the
6 benefit-of-the-doubt statute.

7 And the benefit-of-the-doubt statute,
8 in turn, has two mandatory requirements. It
9 requires the VA to consider all medical and lay
10 evidence and information relevant to the -- the
11 issue, and then it requires, if there is an
12 approximate balance of positive and negative
13 evidence on any issue, that the veteran receives
14 the benefit of the doubt.

15 CHIEF JUSTICE ROBERTS: But -- but --

16 MS. BOSTWICK: So our view is --

17 CHIEF JUSTICE ROBERTS: Go ahead.

18 MS. BOSTWICK: Thank you, Your Honor.

19 Our view is that this is something the
20 Veterans Court has to do in every case, that it
21 is not bound by party presentation, and that it
22 is a non-deferential review.

23 CHIEF JUSTICE ROBERTS: But it's a
24 pretty unusual law, right? It says that the
25 administration shall take account of, take due

1 account of. It -- it doesn't seem that they're
2 changing the legal standard at all. It just
3 says sort of be more careful.

4 And to take from that instruction some
5 change in the legal standard of review, I think,
6 is -- is quite a leap.

7 MS. BOSTWICK: So we don't think that
8 it was -- was changing what the standard of
9 review should have been. That's clear, for
10 example, as to -- to any aspect of the
11 Secretary's application of Section 5107(b) that
12 presents a legal question. The government
13 agrees with us that there are at least some of
14 those.

15 As to this approximate balance piece,
16 our view is that the Veterans Court, as it
17 recognized in its -- its Gilbert decision, was
18 supposed to be reviewing that as a matter of law
19 all along. It wasn't doing that. It was doing
20 this narrow clear-error review. And so Congress
21 came back and, you know, it thought about, well,
22 should we just change the -- the standard of
23 review for factual issues? No. Why not?
24 Because that wouldn't fix the problem. Instead,
25 they -- they took this more direct approach.

1 It is unique, Your Honor. This is
2 a -- this is a unique court reviewing, you know,
3 one uniquely pro-claimant system. So it -- it
4 makes sense that Congress would do something
5 sort of sui generis here.

6 JUSTICE JACKSON: Can you be a little
7 bit more specific when you say it was supposed
8 to be -- the court, the Veterans Court --

9 MS. BOSTWICK: That's right.

10 JUSTICE JACKSON: -- was supposed to
11 be doing that all along? What exactly is the
12 "that"?

13 MS. BOSTWICK: So the -- the "that," I
14 think it's most helpful if -- if we look at
15 Section 5107, and that is at Pet. App. 93a.

16 So -- so, again, Section 5107(b) has
17 these two requirements. It obligates the agency
18 to "consider all information and lay and medical
19 evidence of record," and "when there is an
20 approximate balance of positive and negative
21 evidence [on any material issue] . . . , the
22 Secretary shall give the benefit of the doubt to
23 the claimant."

24 Our view is that before 2002, under
25 subsection (a) of Section 7261, if a veteran

1 presented an argument that the Secretary had not
2 complied with this statute, the Veterans Court
3 was supposed to be doing that. It was.

4 As to this particular category of
5 Section 5107(b) errors that is about the -- the
6 review of was the evidence actually in
7 approximate balance, the Veterans Court was --
8 was only looking at whether there had been a
9 clear error of fact and not whether -- having,
10 you know, assessed the credibility of the
11 evidence, the persuasiveness of any piece of
12 evidence, and -- and sort of put those on the
13 evidentiary scales, whether the Veterans Court
14 had correctly judged if there was an approximate
15 balance or if --

16 JUSTICE JACKSON: And you say no --
17 and you say no -- no deference should be given
18 to the Veterans -- to the administration, to the
19 agency, with making that determination?

20 MS. BOSTWICK: That's correct. That
21 is a -- a question about whether -- it's a legal
22 conclusion about the state of the evidentiary
23 record, was it sufficient to meet the applicable
24 standard of proof.

25 Here, you have this kind of unique

1 standard of proof, approximate balance, but like
2 other standards of proof, the court should be
3 reviewing it de novo.

4 JUSTICE KAVANAUGH: Wouldn't you
5 expect that Congress, if they thought that the
6 standard of review was wrong, instead of saying
7 take due account, would have said review de
8 novo?

9 MS. BOSTWICK: That might have been a
10 clearer way to indicate this, but I -- I think
11 what is clear is that Congress put this in a --
12 an entirely new separate provision. They didn't
13 simply adjust the -- the standard of review for
14 facts.

15 We think that's -- that's right
16 because this isn't a factual question. And --
17 and what they did was they took a part of the
18 statute that was already there. (b)(2) had
19 already said take due account of the role of
20 prejudicial error.

21 JUSTICE KAGAN: Well, how could this
22 not be a factual question? I mean, I could
23 understand it if you were looking at a decision
24 by the Secretary or the Board where they
25 completely ignored the benefit-of-the-doubt rule

1 or where -- or where they gave the benefit of
2 the doubt to the wrong party. Then I can see
3 your saying, well, look, they made a legal error
4 and that's subject to de novo review.

5 But assume that they do that. Assume
6 that they just say, you know, we don't -- we
7 don't see that this case is in equipoise, so
8 we're not giving the benefit of the doubt to the
9 claimant. And then the court takes another look
10 at it.

11 I would think that what the court is
12 doing is to evaluate how the Board has evaluated
13 evidence, weighed evidence, contrasted one
14 party's evidence with another party's evidence,
15 decided which is the more credible. All of that
16 sounds like typical factual issues, factual
17 determinations.

18 MS. BOSTWICK: So there -- there are
19 certainly factual determinations underlying it,
20 and we agree that -- that the -- the Board's
21 assessment of -- of credibility or -- or
22 persuasive value or probative value to any given
23 piece of evidence should be reviewed
24 deferentially, just like it is in other
25 sufficiency-of-the-evidence challenges. But the

1 ultimate question that contrasts between the
2 party's evidence, that question is -- is
3 traditionally reviewed as a question of law.

4 And we think the same would apply
5 here. And I -- I can give Your Honor an example
6 of when there might be, for example, no clear
7 error but, nonetheless, an -- a legal error in
8 applying the approximate balance standard.

9 If -- if the -- and this is a
10 simplified example, but if the agency has before
11 it two medical opinions. Let's say the -- the
12 question is, is the veteran's disabling pain
13 linked to a gunshot wound that he received in
14 service. There is one medical opinion that says
15 it is, one medical opinion that says it's not.

16 The agency says: Both of these are
17 credible and -- and probative, but, nonetheless,
18 we're going to go with the opinion that says no
19 nexus.

20 That wouldn't meet the clear-error
21 standard of review, right, because, under clear
22 error, if there's two permissible views of the
23 evidence, it can't be a clear error.

24 But it would be, in our view, a
25 violation of the approximate balance standard of

1 proof. You have two competing opinions that the
2 agency has credited. You'd think that stands in
3 approximate balance. And that's the kind of
4 judgment that --

5 JUSTICE SOTOMAYOR: I'm sorry.

6 JUSTICE ALITO: No, I don't understand
7 that at -- at all because, if the administration
8 said the evidence is completely in equipoise,
9 then they would have to find in favor of
10 whichever party did not have the burden of proof
11 on that question.

12 And it -- sure, it would be a legal
13 error if one party has -- you know, one party
14 has the obligation to prove a fact by that fact,
15 you know, whether there's a linkage by a
16 preponderance of the evidence. If the -- if the
17 court or the administration doesn't heed where
18 the burden of proof has been allocated, then,
19 yes, that's legal error.

20 But, if they find -- that they say
21 that the -- the -- a particular burden of proof
22 has been satisfied or has not been satisfied on
23 a question of fact and then there's an appeal,
24 the appellate court determines whether it was
25 clear error to apply the applicable burden of

1 proof in the way that is necessary in that
2 situation.

3 So I don't see any incompatibility.
4 If we view the burden -- the -- the
5 benefit-of-the-doubt rule as equivalent to the
6 allocation of the burden of -- of proof on -- on
7 a certain issue, I don't see any incompatibility
8 between that and ultimate clear-error review.

9 MS. BOSTWICK: So I -- I think the
10 example I gave is -- is an instance in which
11 the -- the Veterans Court would find no clear
12 error because there is a plausible basis for
13 finding a lack of nexus if you have one, you
14 know, credible medical opinion in the record
15 that says that. But there's, nonetheless, a
16 failure to apply the approximate balance
17 standard of proof.

18 I do want to be clear that we --

19 JUSTICE ALITO: No, I think it would
20 be a -- it would be a mistake, it would be a
21 legal error if they said, we're disregarding the
22 fact that the claimant was entitled to the --
23 the benefit of the doubt in the proceeding
24 before the administration. That would be a
25 mistake in applying the applicable law.

1 But, if they apply the applicable law,
2 then what is the problem with reviewing the
3 finding under the clear-error standard? Do you
4 agree that that would be appropriate?

5 MS. BOSTWICK: I -- I think that the
6 finding is reviewed for clear error, but the
7 application of the standard of proof is reviewed
8 de novo. This is how sufficiency of the
9 evidence works.

10 An example would be a -- a judge
11 reviewing a -- a motion for judgment as a matter
12 of law. There's a measure of deference in there
13 to things like credibility and persuasion.

14 In the JMOL context, it's -- it's
15 built in through inferences. Here, it would be
16 based on the explanation that the agency has
17 given about its credibility judgments and
18 persuasive judgments, which the agency is
19 required to provide in its opinion under the
20 reasons-and-bases requirement.

21 But the ultimate question, just like
22 in JMOL, was the evidence sufficient to meet
23 that standard of proof -- whether it's
24 preponderance or clear and convincing in the
25 civil context; here, it's approximate balance --

1 was the evidence sufficient -- you know, did the
2 veteran present sufficient evidence to get into
3 that approximate balance, or was the agency
4 instead correct to find itself persuaded against
5 the veteran?

6 JUSTICE SOTOMAYOR: Counsel, it --
7 it's very rare -- and I think Justice Alito is
8 right. If the agency simply says both sides are
9 credible, I'm going to pick B, and stops there,
10 that's legal error because they have not --
11 the -- the rule says you have to give the
12 benefit of the doubt to the plaintiff, and if
13 they say everything's equal, they've committed
14 legal error because it's in equipoise.

15 What actually happens, however, is
16 that the AIJ does a whole set of credibility
17 determinations to support the conclusion of why
18 they're going to believe one side or another.
19 They're going to look at the expert they believe
20 or -- and say: That expert had more
21 information. That expert was more precise about
22 A, B, and C. The other expert didn't know this
23 fact.

24 I think that's, in fact, what happened
25 in one of these cases. And they give a whole

1 set of reasons as to why they're disbelieving
2 one expert or not accepting one expert over the
3 other.

4 So let's get to that point. That, to
5 me, is a mixed question of law and fact.

6 MS. BOSTWICK: I think you could look
7 at it as a mixed question of law and fact. We
8 think that the -- the sufficiency-of-the-
9 evidence standards are -- are -- are more of a
10 helpful analog. But, if you look at it under
11 the mixed question test, this is surely a
12 predominantly legal question that would be
13 reviewed non-deferentially. So it's -- if we
14 look at --

15 JUSTICE SOTOMAYOR: So that's done in
16 almost -- in so few areas of law, most of them
17 constitutional. Like, is there probable cause?
18 I -- I don't know of any other area of civil law
19 where we view mixed questions of law and fact as
20 predominantly legal.

21 MS. BOSTWICK: And I would say this is
22 a -- a unique area of law, right? It has a
23 uniquely generous standard that is unlike
24 anything else that applies in civil litigation.
25 So having a unique standard of review --

1 JUSTICE SOTOMAYOR: But we go back to
2 Justice Kavanaugh's question, which is due
3 account --

4 MS. BOSTWICK: Yes.

5 JUSTICE SOTOMAYOR: -- seems to me not
6 to include a standard of review. They knew how
7 to say it's a matter of law or it's a matter of
8 fact and what standard of review applied, and
9 they didn't use those words.

10 MS. BOSTWICK: But they didn't use
11 "clear error" either. And they didn't put it
12 under (a)(4), which is the standard of review
13 for facts. I think that's a clear recognition
14 that this is not a factual question or at least
15 not purely a factual question.

16 To take --

17 JUSTICE SOTOMAYOR: But there are
18 components that are factual and components that
19 are legal, and we -- they take due consideration
20 of the standard of review that applies to each.

21 MS. BOSTWICK: But just because
22 something involves facts doesn't mean that the
23 ultimate question is -- is a question of fact.
24 There are many tests. I think, in the
25 intellectual property context, we have something

1 like obviousness in patent law or fair use in
2 copyright law.

3 Those tests are both based on
4 subsidiary factual findings that are reviewed
5 deferentially. The ultimate conclusion is
6 reviewed as a matter of law. So I don't think
7 this is so unusual.

8 JUSTICE KAGAN: But I think --

9 JUSTICE JACKSON: What happens --

10 JUSTICE BARRETT: Ms. Bostwick, can
11 I -- can I ask you just about the scope of your
12 argument for a moment?

13 You say that the Veterans Court must
14 consider this sua sponte in every case. But
15 both of your clients did raise the
16 benefit-of-the-doubt argument, so why should we
17 even reach that question?

18 MS. BOSTWICK: For a couple reasons,
19 Your Honor.

20 First, because it -- it matters to
21 address the "when presented" language in order
22 to actually give effect to Congress's text and
23 not make it duplicative of what's already
24 required under subsection (a). But I would say
25 also that it matters concretely to these

1 Petitioners.

2 I think that's -- the clearest example
3 is the fact that Mr. Thornton had two claims
4 that the agency resolved against him. One was
5 his rating for PTSD, as to which he did raise
6 the benefit-of-the-doubt argument to the
7 Veterans Court. The other was his rating for
8 his undiagnosed illness, as to which he did not
9 raise a -- specifically raise a
10 benefit-of-the-doubt error to the Veterans
11 Court.

12 Under our view, because he raised
13 other challenges to that rating denial, the
14 Veterans Court would have to look at -- have to
15 perform its -- its (b)(1) review as to that
16 claim as well.

17 JUSTICE BARRETT: Well, I do have one
18 quick question about Mr. Thornton. Since he did
19 receive benefits, I just don't understand
20 exactly what he stands to gain because, because
21 of his unemployability, wasn't he given complete
22 disability? So what further relief could he get
23 if he wins before us?

24 MS. BOSTWICK: Yes, Your Honor. So
25 the -- his total disability based on individual

1 unemployment, because of his age, it's not a
2 permanent benefit. The -- he is subject to
3 continual review on that. So, even though he is
4 receiving a hundred -- benefits at the
5 hundred percent level right now, that could
6 change in the future. So the rating for his
7 individual conditions is important.

8 He also may be in a situation where he
9 would be entitled to special monthly
10 compensation, which goes above the
11 hundred percent level.

12 JUSTICE BARRETT: Thank you.

13 JUSTICE GORSUCH: I -- I'd like to
14 follow up on -- on -- on Justice Barrett's
15 question, Ms. Bostwick.

16 The party presentation question wasn't
17 really squarely addressed in either of the lower
18 court opinions, and I wonder whether we should,
19 as a court of review rather than first view,
20 give them the chance to tackle that first and
21 just address the question of, when it is
22 presented, must -- must it be interpreted the
23 way you -- you -- you propose.

24 What do you think of that?

25 MS. BOSTWICK: So, respectfully, Your

1 Honor, I -- I disagree. I do think the Federal
2 Circuit --

3 JUSTICE GORSUCH: I know you disagree.

4 MS. BOSTWICK: -- resolved this
5 question. But -- I -- I --

6 JUSTICE GORSUCH: I -- I -- I know
7 that, but would you object to a partial win
8 rather than a complete one, counsel?

9 MS. BOSTWICK: I'm certainly not going
10 to object, Your Honor, but I would point the
11 Court to Pet. App. 9a in the Bufkin opinion,
12 where it relies on the "when presented" language
13 to say that -- that arguments that are -- are
14 benefit-of-the-doubt errors that are not raised
15 to the Veterans Court don't have to be
16 addressed, so --

17 JUSTICE GORSUCH: And I understand
18 there's language in -- in some of the Federal
19 Circuit opinions -- suggests that they do (a)
20 review, the -- sorry, (b)(2) review, that is,
21 the prejudicial error review, even when it isn't
22 presented, which is a little odd, but -- and I
23 understand that you want your -- your provision
24 interpreted in pari materia with that, but I
25 just wonder whether, as a first bite, we should

1 just tackle the narrow question that is squarely
2 presented.

3 MS. BOSTWICK: It would certainly
4 be -- be helpful for the Court to -- to address
5 any -- any of these questions. We do think
6 the -- the "when presented" piece is an
7 important part of giving the statute effect, but
8 if it -- if the Court wanted to leave that for
9 the Federal Circuit to consider with the benefit
10 of the Court's other guidance, that would be
11 fine.

12 I do -- again, I think that this
13 language at Pet. App. 9a --

14 JUSTICE GORSUCH: 9a. I've got that.
15 I've got that note.

16 MS. BOSTWICK: In the --

17 JUSTICE GORSUCH: And then,
18 separately, there's been some discussion about
19 the "take due account of" language, and I -- I'm
20 certainly sympathetic to that point. But
21 (b)(2), the "take due account of the rule of
22 prejudicial error," courts -- it seems to be a
23 given between the courts and both sides here
24 that that means that the reviewing court will
25 conduct a harmless error review.

1 MS. BOSTWICK: Yes, Your Honor.

2 JUSTICE GORSUCH: And it looks at the
3 record given -- given what's not clearly
4 erroneous. It takes those facts as given and
5 then does a de novo legal analysis and decides
6 whether the -- the -- the error which is found
7 would have been -- made a difference in the
8 outcome of the case.

9 MS. BOSTWICK: Yes, Your Honor.

10 JUSTICE GORSUCH: And you're asking
11 (b)(1) to be interpreted in the same manner?

12 MS. BOSTWICK: Yes, for -- for two
13 reasons. They're -- they're subject to the same
14 language, and -- and two pieces of language are
15 important. One is that subsection (b), unlike
16 subsection (a), the Veterans Court is directed
17 to make these determinations on -- based on a
18 review of the record of proceedings before the
19 Secretary and the Board. That's a comprehensive
20 review, as this Court recognized in Sanders when
21 addressing (b)(2).

22 And also, the -- the words "take due
23 account," right? What -- to take due account of
24 something is -- what -- what account is due will
25 depend on the thing being taken account of. In

1 the prejudicial-error context, it was, okay,
2 let's do it the same way we do in the APA.

3 Here, what are we dealing with? We're
4 dealing with the Secretary's application of
5 Section 510(c), a mandatory statute that binds
6 the agency with not one but two "shall"
7 commands. A reviewing court takes due account
8 of that by looking at whether the agency
9 complied with its obligations, and the piece of
10 that, the approximate balance piece of that that
11 sets out the standard of proof, reviewing courts
12 look at the -- the standard of proof as a matter
13 of law.

14 CHIEF JUSTICE ROBERTS: Are you -- are
15 you just asking for another line in the opinion
16 saying our conclusions take due account of what
17 it's supposed to, and then that's -- because, I
18 mean, your friend on the other side says that
19 this really doesn't add anything. And you seem
20 to be saying no, they have to look at this and
21 this.

22 So what -- I mean, I know you want a
23 different result in this case, but in terms of
24 the analysis, what are you looking for?

25 MS. BOSTWICK: Yeah, I -- I don't

1 think going from one rubber stamp to another
2 system would -- would be helpful here. We think
3 that this is a meaningful analysis that the
4 Veterans Court must perform.

5 I'll give you an example of what the
6 Veterans Court shouldn't be doing, which is at
7 Pet. App. 43a in Mr. Thornton's case.
8 Mr. Thornton, again, yes, he raised a
9 benefit-of-the-doubt challenge, but,
10 nonetheless, the Veterans Court said that the --
11 the agency's conclusion -- the outcome of the
12 agency's approximate balance analysis is a
13 factual finding. And because Mr. Thornton had
14 said, I'm not challenging factual findings, I'm
15 making a legal argument, the Veterans Court said
16 we don't have to do anything. Thus, he has not
17 shown error in the Board's application of
18 Section 5107(b).

19 That certainly can't be right.
20 What -- whatever precise level of deference or
21 scrutiny the -- that is appropriate to take due
22 account of the Secretary's application of this
23 statute, it has to be some meaningful review.

24 And that's the -- the purpose of the
25 Veterans Court, right, is to -- to superintend

1 this one agency. If the Veterans Court is
2 meaningfully looking at this
3 benefit-of-the-doubt rule, then we will get a
4 developed law on what does approximate balance
5 mean, how does it apply in different cases. We
6 will get uniformity, which we don't have now.

7 I would point the Court to page 9 of
8 the DAV amicus brief, where it talks about
9 examples of veterans from -- who served on Eglin
10 Air Force Base, where the government concedes it
11 used toxic herbicides. You have veterans with
12 identical records, some of them being given the
13 benefit of the doubt and others not. That --
14 that is the kind of legal error that the
15 Veterans Court should be supervising and should
16 be preventing by -- by doing an actual
17 meaningful review of this statute.

18 JUSTICE JACKSON: And should be
19 because, you say, Congress intended that. I
20 mean, I -- I understood from your argument that
21 Congress came back and put (b)(1) into the
22 statute, which suggests that it intended that it
23 do some work, I would think.

24 MS. BOSTWICK: Yes, Your Honor, that
25 it do some work. And we think the -- you know,

1 Congress putting it in subsection (b), where
2 it's something that applies in every case and --
3 and isn't bound to the specific arguments that
4 the parties raise and is based on a review of
5 the record, is indicative of the importance of
6 this issue.

7 I think it also is important for the
8 Court to bear in mind the number of veterans who
9 appear pro se even at the Veterans Court. There
10 were more than 1100 of them last year alone.
11 And, certainly, those veterans, you know, they
12 may not know to raise a specific articulation of
13 a -- a 5107(b) error, but they know something
14 went wrong.

15 And what Congress is telling the
16 Veterans Court is you have to look. It's --
17 it's the Veterans Court's obligation to take due
18 account of the agency's compliance.

19 JUSTICE JACKSON: And going back to
20 Justice Gorsuch's point, we do see parallel
21 language between (b)(1) and (b)(2), so I just
22 want to be clear that (b)(2) does have this sort
23 of separate obligation, is that right, by the
24 court? In other words, (b) -- sorry, Chief.
25 May I?

1 CHIEF JUSTICE ROBERTS: No, no, you
2 can finish.

3 JUSTICE JACKSON: (b)(2) doesn't
4 require sort of a threshold analysis of legal
5 error versus factual error or whatnot. Everyone
6 agrees that when the statute says "take due
7 account," the court operates, as Justice Gorsuch
8 suggests, to just determine whether there is a
9 harmless error under these circumstances.

10 MS. BOSTWICK: Yes. And under the
11 Federal Circuit's Tadlock ruling and others,
12 that is a mandatory obligation on the court.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 Justice Alito?

18 JUSTICE ALITO: Let me just pursue for
19 a second the example that you gave earlier in
20 your argument about a hypothetical case in which
21 there are two experts who testify on the
22 question of the linkage between the disability
23 and service.

24 And let's say, in that situation,
25 the -- the Veterans Administration finds that

1 even taking into -- even giving the claimant the
2 benefit of the doubt, the expert who says that
3 there is no linkage is more persuasive, okay?

4 Now that finding would be dispositive
5 of the claim for benefits, would it not?

6 MS. BOSTWICK: I -- I -- I don't mean
7 to -- to be difficult, but I would say it
8 depends on the circumstances because the test is
9 not -- again, the test isn't equipoise and the
10 test isn't, you know, has one person persuaded
11 more than the other. It is an approximate
12 balance assessment.

13 JUSTICE ALITO: Right. They say:
14 Taking into account the approximate balance, the
15 approximate balance is not in favor of the
16 claimant, it is against the claimant, all right?
17 So that is a finding. And let's assume it's
18 dispositive of the -- of the claim for benefits.
19 And then there is -- then there is a review in
20 the Veterans Court.

21 Is it your argument that the finding
22 of fact as to which expert is more credible is
23 subject to de novo review or clear-error review?

24 MS. BOSTWICK: No, that aspect is
25 subject to clear-error review.

1 JUSTICE ALITO: And then what is
2 subject to de novo review?

3 MS. BOSTWICK: The judgment of taking
4 all of the evidence, right? It's -- it's rare
5 that there's going to be just these two pieces
6 of evidence and it's so clear how they balance
7 out. Taking all -- into account all of the lay
8 and medical evidence relevant to the issue, was
9 the evidence in approximate balance, or did it
10 persuasively favor one side or the other?

11 JUSTICE ALITO: Well, let's say that
12 there is a finding of fact on every piece of
13 evidence, and on all of these pieces of
14 evidence, the finding of fact is that even
15 giving the claimant the benefit of the doubt,
16 the fact has not been proved.

17 Then what is the standard of review
18 before the Veterans Court? Do you say that --
19 that that is -- although each of them is subject
20 to clear error -- each of these findings is
21 subject to clear-error review, when you put it
22 all together, that is a question of law that is
23 subject to de novo review? Is that your
24 argument?

25 MS. BOSTWICK: Yes, Your Honor.

1 JUSTICE ALITO: Why wouldn't that
2 apply in -- in every civil bench trial? The
3 question of whether the -- the -- the -- the
4 judge erred in rejecting a particular civil
5 claim, that would be a -- in your view, that's
6 a -- that's a question of -- of law?

7 MS. BOSTWICK: If -- if there's a
8 motion that the -- if -- if there's -- if the
9 challenge is not to any factual finding but just
10 to the sufficiency of the evidence, that is a --
11 a question of law, as -- as this Court --

12 JUSTICE ALITO: But it takes into
13 account the -- the findings on all the
14 subsidiary facts?

15 MS. BOSTWICK: Yes. And that's our
16 view of how this works as well, Your Honor.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: What is the
20 difference between (b)(1) and (b)(2)? (b)(2)
21 says, "take due account of the rule of
22 prejudicial error," and that's because the
23 Secretary doesn't do that, correct?

24 MS. BOSTWICK: Correct, Your Honor.

25 JUSTICE SOTOMAYOR: So it's only

1 the -- it -- it's the Veterans Court that has to
2 do that because it's the only one charged with
3 doing it?

4 MS. BOSTWICK: Yes, Your Honor.

5 JUSTICE SOTOMAYOR: All right. So it
6 has to apply it. But (1) says: "Take due
7 account of the Secretary's [obligation --]
8 application of section 5107(b)." That's
9 substantially different. It's asking a -- it's
10 asking them to review what someone else has
11 done, correct?

12 MS. BOSTWICK: Yes, Your Honor.

13 It's --

14 JUSTICE SOTOMAYOR: And so that
15 comes -- may come to a different standard of
16 review, correct?

17 MS. BOSTWICK: It could, and -- and so
18 we have to look further at what is the -- the
19 Secretary's application of 5107(b).

20 JUSTICE SOTOMAYOR: I'm -- my point is
21 only that (b) doesn't really tell us much.

22 MS. BOSTWICK: I don't think it -- it
23 answers the -- the question, no, Your Honor.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: I just want to make

1 sure I understand.

2 Do you agree with the -- the
3 description of the benefit-of-the-doubt rule,
4 that it's essentially just a change in the
5 burden of proof, right?

6 Usually, a claimant comes in and he
7 has to meet a 51 percent burden. And what the
8 benefit-of-the-doubt rule does is to say: No,
9 if you meet 50 percent, you win, and maybe even
10 a little bit more because it's an approximate
11 balance. So maybe, if you go 49 percent, you
12 win.

13 But that's what this rule is. It's
14 just a shift in the burden of proof?

15 MS. BOSTWICK: Yes. I'd say it's --
16 it's a different burden of proof.

17 And I do want to be clear it is not a
18 50 percent rule. It is not a preponderance
19 rule. The Federal Circuit has rejected that.
20 It is broader than that.

21 JUSTICE KAGAN: Okay. So it's in --
22 right, that, like, even if you don't get up to
23 50 percent, maybe because we find that there is
24 an approximate balance, you still win. But
25 that's just a -- a -- a -- that's just another

1 way of shifting the burden of proof. That's
2 what this rule is?

3 MS. BOSTWICK: Yeah. It's -- it's
4 also -- the burden remains on the claimant, but
5 the level of the burden they have to -- the
6 threshold they have to meet is different. It
7 sort of creates three zones: persuasively
8 favoring the veteran, veteran wins; persuasively
9 against the veteran, veteran loses on that
10 issue; and then this middle zone of approximate
11 balance. It would chase the veteran --

12 JUSTICE KAGAN: Yeah. So why isn't
13 the way we usually do this -- it's like usually,
14 in, like, a totally factual case, where you have
15 all these subsidiary factual findings and then
16 you have a question of whose facts weigh more
17 heavily, whose facts are more credible, and we
18 usually think about that as, like, was it clear
19 error to find that the claimant didn't meet his
20 51 percent burden of proof.

21 Now we just say: Is it clear error to
22 find that the plaintiff didn't meet his slightly
23 less stringent burden of proof? But it's still
24 clear error.

25 MS. BOSTWICK: I -- I don't think so,

1 Your Honor. Again, I think, when you're judging
2 the sufficiency of the evidence to meet whatever
3 the applicable standard of proof is, I mean,
4 this case -- this Court's case in -- in Reeves,
5 in Weisgram, talks about that. And then, of
6 course, in the criminal context with probable
7 cause, it -- it -- it talks about that as an
8 ultimate question of law.

9 JUSTICE KAGAN: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 JUSTICE GORSUCH: Let me see if I've
13 got it, and I may not, Ms. Bostwick.

14 So, in -- in a normal civil case, for
15 example, we -- we look at all -- on a reviewing
16 court will look at all of the facts in the light
17 most favorable to the prevailing party below.

18 MS. BOSTWICK: Yes, Your Honor.

19 JUSTICE GORSUCH: We take those facts
20 and then we do a legal analysis to see if
21 they're sufficient as a matter of law to support
22 the verdict rendered, and we do that de novo.

23 MS. BOSTWICK: Yes, Your Honor.

24 JUSTICE GORSUCH: That -- that --
25 that's just what it is. Now that standard is:

1 Could any reasonable juror come to this
2 conclusion? But that's the legal standard we
3 ask based on the evidence that's given.

4 MS. BOSTWICK: Yes.

5 JUSTICE GORSUCH: And you're here
6 asking us essentially to say, take all the
7 non-clearly erroneous facts and ask: Was the
8 Secretary's approximate -- instead of a
9 sufficiency line, whether the -- whether the
10 Secretary's determination that they were not in
11 approximate balance is correct?

12 MS. BOSTWICK: Yes, Your Honor.

13 JUSTICE GORSUCH: And what's an
14 approximate balance? Nobody knows. But
15 that's -- that's what -- what you were talking
16 with Justice Kagan about. It's something less
17 than 50 percent.

18 MS. BOSTWICK: It's -- the -- the way
19 the Federal Circuit has described it in the --
20 the governing Lynch opinion is whether the
21 evidence persuasively favors one side or the
22 other or whether it's instead an approximate
23 balance. And they have rejected the idea
24 that -- that proof by a preponderance for the
25 government is enough to get you out of

1 approximate balance.

2 JUSTICE GORSUCH: Okay. So, to take
3 your example of the two experts, let's say
4 they're both super well qualified and they both
5 do a really good job. And one says:
6 Service-related. The other says: Not.

7 The agency favors the one that's not
8 because, hmm, he -- he interviewed the claimant
9 more recently in time or ran one more test.
10 And -- and that's not clearly erroneous because
11 a clearly erroneous standard is very hard to
12 meet.

13 MS. BOSTWICK: Yes, Your Honor.

14 JUSTICE GORSUCH: Right? It's -- it's
15 basically: Were they crazy in -- in choosing
16 this one fact over the other fact? And they
17 were not crazy. So there's no clear error.

18 But, as a matter of law, you would
19 say, as I understand your argument, that, hey,
20 those are really pretty similar, and the
21 Secretary's decision that it wasn't decisively
22 in favor, I think is the language you used, or
23 something like that, in favor of -- of -- of the
24 government means that -- that this standard has
25 teeth and should be applied?

1 MS. BOSTWICK: Yes, Your Honor.

2 JUSTICE GORSUCH: Okay. And in the
3 same way that -- that -- that the prejudicial
4 error language works, we take all the
5 non-clearly erroneous facts and say: Okay,
6 would this error have made any difference?

7 MS. BOSTWICK: Yes, Your Honor.

8 JUSTICE GORSUCH: All right. I think
9 I got it. Thank you.

10 MS. BOSTWICK: Yeah.

11 JUSTICE GORSUCH: All right.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh?

14 JUSTICE KAVANAUGH: Two things. I
15 assume you don't want us to accept the premise
16 that clearly erroneous is the same as crazy as a
17 general proposition.

18 (Laughter.)

19 MS. BOSTWICK: The -- correct, Your
20 Honor. The way the Veterans Court has
21 articulated it is: Is there a plausible basis?

22 JUSTICE KAVANAUGH: And, second, can
23 you quantify or try to quantify what approximate
24 balance is?

25 MS. BOSTWICK: I think we're -- we're,

1 in this case, not challenging the -- the -- the
2 Lynch decision, and so it is just: Have you
3 persuasively favored one side or the other?

4 Trying to put numbers on that --

5 JUSTICE KAVANAUGH: Is -- is that 35,
6 40, 45, 49? What do you think?

7 MS. BOSTWICK: I think that's a
8 question that -- that this Court doesn't have to
9 resolve in this case. What we do know is that
10 it's -- it's more than, you know, 51/49.
11 It's -- it's broader than that difference.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Barrett?

15 JUSTICE BARRETT: No.

16 CHIEF JUSTICE ROBERTS: Justice
17 Jackson?

18 JUSTICE JACKSON: So just a final
19 point on this.

20 You've said a couple of times that
21 this area is involving a unique standard, and
22 what I took you to mean is that the approximate
23 balance standard itself, the 5017(b) standard,
24 is unique, but what you're asking of the courts,
25 the rule that you would like to have applied

1 here is very similar to what courts do when they
2 evaluate sufficiency of the evidence, as you had
3 in the dialogue with Justice Gorsuch.

4 Is that what you're saying? So we're
5 not -- you're not asking for something new and
6 different by the Court with respect to the
7 assessment here?

8 MS. BOSTWICK: We don't view it as new
9 and different. Correct, Your Honor. It's just
10 that the -- the -- you know, whereas, in a Rule
11 50 context, for example, you might be looking at
12 the sufficiency of the evidence through a
13 preponderance standard --

14 JUSTICE JACKSON: Right.

15 MS. BOSTWICK: -- this is a -- a
16 different test, this approximate balance.

17 JUSTICE JACKSON: But we're still
18 doing the same -- qualitatively, same kind of
19 review as a sufficiency-of-the-evidence review?

20 MS. BOSTWICK: Analytically, we think
21 it is the same, yes, Your Honor.

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Joshi.

1 ORAL ARGUMENT OF SOPAN JOSHI
2 ON BEHALF OF THE RESPONDENT

3 MR. JOSHI: Mr. Chief Justice, and may
4 it please the Court:

5 The Veterans Court does not apply
6 5107(b) itself. It takes due account of the
7 Secretary's application of it, and it does so in
8 making the determinations under subsection (a).

9 Those textual clues point to standard
10 principles of judicial review of agency action.
11 That is, the Veterans Court reviews legal
12 aspects of the Secretary's application of
13 5107(b) de novo and factual aspects
14 deferentially, here, for clear error.

15 The Secretary's determination that all
16 the evidence in the record on a particular issue
17 is or is not an approximate balance is itself
18 factual or predominantly factual and so should
19 be reviewed for clear error.

20 Now what I heard my friend say this
21 morning and the reason Petitioners resist that
22 fairly obvious conclusion, I think, is because
23 they observe that everything I just said could
24 have been inferred from subsection (a) itself.
25 And so that leaves subsection (b)(1) with no

1 additional work to do.

2 But, when Congress enacted (b)(1) in
3 2002, it took what was implicit or just
4 generally covered in (a) and made it explicit
5 and specific. It put an exclamation point on
6 it. That's not nothing. Think of the Tenth
7 Amendment, for example.

8 But, even if you think that our
9 interpretation renders (b)(1) largely redundant,
10 it's still better than the alternative that
11 Petitioners offer you.

12 Petitioners say that the approximate
13 balance finding should be reviewed de novo. But
14 that creates needless contradictions in the
15 text. It conflicts with the express standard of
16 review Congress supplied in (a)(4). It's in
17 serious tension with the prohibition on trial de
18 novo in subsection (c). It's a real divergence
19 from standard principles of judicial review
20 generally and judicial review of agency
21 decisions more specifically.

22 And it's even inconsistent with the
23 way other factual issues under (b)(1) are
24 reviewed, as my friend mentioned this morning,
25 like the in-service connection or existence of a

1 disability. If Congress intended that highly
2 irregular result, I think the language in (b)(1)
3 is an awfully cryptic way of going about it.

4 So, as between two interpretations,
5 one that's sort of consistent, coherent, with a
6 little bit of redundancy, and one that
7 eliminates the redundancy at the cost of a
8 statute at war with itself, I think you should
9 pick the former over the latter.

10 I'm sorry, I welcome the Court's
11 questions.

12 JUSTICE THOMAS: Well, in order for
13 you -- us to accept your argument, don't we have
14 to accept that Congress passed a meaningless
15 provision?

16 MR. JOSHI: I don't think so, Justice
17 Thomas. I think --

18 JUSTICE THOMAS: So what work is it
19 doing?

20 MR. JOSHI: So I -- I just want to be
21 clear I -- I'm willing to accept that it's
22 redundant but not that it does no work. It does
23 work. It just does work that subsection (a)
24 generally, you could infer, also does. So it's
25 doing duplicate work. It's not a nullity.

1 So I know, you know, when there are
2 statutory nullities, you should avoid those at
3 all costs, but redundancy --

4 JUSTICE GORSUCH: What -- what's the
5 difference between a duplicative work and a
6 redundancy?

7 MR. JOSHI: Oh, no, there's no
8 difference there. I'm drawing a distinction
9 between that and a nullity, where a statute says
10 do X, but we say it actually has no effect, you
11 don't have to do X.

12 JUSTICE GORSUCH: Well, no, that's
13 very different.

14 MR. JOSHI: Yeah.

15 JUSTICE GORSUCH: But I -- I think
16 Justice Thomas's question is, if (a) does all
17 the work, what does (b) do?

18 MR. JOSHI: Yeah -- yeah. So I
19 think --

20 JUSTICE GORSUCH: You say it's an
21 exclamation point like the Tenth Amendment. I
22 -- I hope you don't think the Tenth Amendment's
23 a redundancy and a nullity.

24 MR. JOSHI: So --

25 JUSTICE GORSUCH: But put that aside.

1 MR. JOSHI: Well, so, Justice Gorsuch,
2 this Court in New York against United States
3 said that the Tenth Amendment simply makes
4 clear -- and this is quoting Justice Story --
5 simply makes clear what you would already do to
6 address --

7 JUSTICE GORSUCH: It makes very clear
8 what you do --

9 MR. JOSHI: Yeah.

10 JUSTICE GORSUCH: -- already. And the
11 question is, is that what this does?

12 MR. JOSHI: I --

13 JUSTICE GORSUCH: Are you suggesting
14 this only --

15 MR. JOSHI: I think so. And let me
16 give you just a little bit of history that is
17 recounted in -- I think even in Petitioners'
18 tale in the -- the -- the -- the history they
19 cite of the enactment.

20 Veterans groups came to Congress and
21 they said, look, you have given us -- they
22 didn't -- they weren't identifying some gap in
23 the statute. They were saying, you gave us this
24 lower standard of proof, whether it's 49, 50,
25 48, whatever it is, a lower standard of proof,

1 but we're not getting the benefit of it and the
2 Veterans Court isn't holding the Board to giving
3 us the benefit of this thing.

4 And so Congress, I think, reacted in a
5 way you might expect when faced --

6 JUSTICE GORSUCH: So -- no. Right --
7 right --

8 MR. JOSHI: -- with that problem,
9 not --

10 JUSTICE GORSUCH: Right. But you just
11 said that they came to Congress saying that the
12 Veterans Court isn't giving the benefit of the
13 rule. And -- and I'm -- and I'm just wondering,
14 after the law passed, I think you're still
15 saying that the court doesn't have to do that.

16 MR. JOSHI: No.

17 JUSTICE GORSUCH: It just does
18 clear -- clear-error analysis.

19 MR. JOSHI: Well, so there are a
20 couple things there. Let -- let me first say I
21 think what the statute did was remind the
22 Veterans Court of its preexisting obligation.
23 And you see that in the case law. So --

24 JUSTICE GORSUCH: What -- what
25 obligation does it have?

1 MR. JOSHI: So the obligation is to --
2 so let me give you an example, and I'm going to
3 cite a couple cases in the Senate report, but
4 I -- Congress was thinking about these cases.

5 So Congress identified two cases as
6 exemplary of what the Veterans Court was doing
7 that it didn't like, that it thought was not
8 honoring the statute it had already passed.
9 They're called -- the two cases are called
10 Ammons, I think, A-m-m-o-n-s, and Presley.

11 And if you look at these cases, they
12 rejected factual challenges by the claimants,
13 and they rejected it for having no plausible
14 basis in the record. And there's just no
15 citation or mention of the benefit --

16 JUSTICE GORSUCH: So that's clear
17 error?

18 MR. JOSHI: They don't even mention --

19 JUSTICE GORSUCH: But that would be --
20 that would fail --

21 MR. JOSHI: Yeah.

22 JUSTICE GORSUCH: -- on clear-error
23 standard, right?

24 MR. JOSHI: I'm sorry?

25 JUSTICE GORSUCH: Those examples would

1 fail for lack -- they would be clearly
2 erroneous --

3 MR. JOSHI: No.

4 JUSTICE GORSUCH: -- factual findings,
5 right?

6 MR. JOSHI: No. What -- what I'm
7 saying is that those cases found no clear error
8 without any recognition that it's a clear-error
9 review against a standard of proof that is lower
10 than a preponderance, right?

11 Standards of proof and standards of
12 review are two different things, and you can mix
13 and match. There's no -- you could have a high
14 standard of proof, like clear and convincing, or
15 a low one, like -- like this one here, but you
16 can mix and match with de novo or deferential
17 review. There -- there's no reason one compels
18 the other. But --

19 CHIEF JUSTICE ROBERTS: Counsel --

20 JUSTICE JACKSON: Mister --

21 CHIEF JUSTICE ROBERTS: -- I -- I want
22 to go back before you get off it. What other
23 examples do you have of Congress passing a law
24 that doesn't do anything?

25 MR. JOSHI: As I -- so we cite a

1 couple of cases in our brief involving statutes,
2 O'Gilvie and Kawashima. You know, in O'Gilvie,
3 there, the -- you know, if -- if you -- I don't
4 want to delve too deep into it, but there was a
5 statute that said damages in litigation about
6 personal injuries are not taxable, you can
7 exclude them from your income, and the question
8 was, well, what about punitive damages because
9 those aren't on account of your physical injury;
10 they're on account of, you know, punishing the
11 defendant or something. And the Court said, no,
12 punitive damages are excluded. You have to
13 count those as income.

14 And the argument was made on the other
15 side, well, wait a minute, Congress had passed a
16 subsequent amendment saying that punitive
17 damages are excluded in personal injury cases
18 for non-physical injuries, so like mental
19 injuries. And they said, well, that statute
20 would be completely superfluous if punitive
21 damages were not already included. And you
22 said, well, it doesn't matter. We go with the
23 reasonable test.

24 JUSTICE KAVANAUGH: What --

25 CHIEF JUSTICE ROBERTS: Well, but that

1 seems to me that there's a legal determination
2 and that the law that you're talking about sort
3 of pointed the Court in the right direction.

4 I mean, here, I -- it was an
5 eye-catching sentence in your brief for me when
6 you said "the amendment would serve a useful
7 purpose even if it simply confirmed and
8 emphasized a preexisting legal duty."

9 Now this is not part of a complicated
10 law where they wanted to say and we want you to
11 do this. This was freestanding, right? It said
12 this is what you get in -- in the veterans
13 groups making a -- a fairly significant push to
14 get this fixed from their point of view.

15 And you say what they got was
16 something that didn't do anything.

17 MR. JOSHI: I -- I -- I think it did
18 have a good effect. So, to finish my answer to
19 Justice Gorsuch, I mentioned the Ammons and
20 Presley cases, which applied a clear-error
21 standard with no recognition that the standard
22 of proof against which it was measuring the
23 clear error was lower than a preponderance.

24 But then, shortly after the law was
25 passed, there was a case, it's not discussed

1 here, but it was discussed extensively in the
2 Federal Circuit below in these cases, a case
3 called Mariano from the Veterans Court, where it
4 just looks completely different. It's still
5 applying clear-error review, but it is actually
6 reversing the --

7 JUSTICE KAVANAUGH: That's why --
8 why -- yeah. Why are you accepting the premise
9 that it didn't do anything? It seems to me the
10 way you're describing it, it did something
11 important, which was describing the practice at
12 least in some cases by the Veterans Court where
13 they weren't separately analyzing it in light of
14 the benefit-of-the-doubt rule and telling the
15 Veterans Court you need to take due account of
16 the benefit-of-the-doubt rule.

17 That is accomplishing something. And,
18 in fact, as you say, the proof's in the pudding,
19 then the Veterans Court and the -- they're doing
20 that, right?

21 MR. JOSHI: That's exactly right,
22 Justice Kavanaugh.

23 JUSTICE JACKSON: Doesn't it depend on
24 what the complaint --

25 JUSTICE KAVANAUGH: Well -- well --

1 JUSTICE JACKSON: Oh, sorry. Go
2 ahead.

3 JUSTICE KAVANAUGH: -- just -- so I
4 guess I'm not sure why you so easily accept the
5 premise. I mean, it seems to me it accomplished
6 something important.

7 MR. JOSHI: I -- I agree completely.
8 There are times I -- I think Congress is free to
9 pass a statute that reminds a court of its
10 obligation if it feels that the court is not
11 currently fulfilling the obligation that already
12 exists --

13 JUSTICE KAVANAUGH: I -- I mean, it
14 didn't just --

15 MR. JOSHI: -- but doesn't want to
16 change the obligation.

17 JUSTICE KAVANAUGH: Congress didn't
18 just pass the same words.

19 MR. JOSHI: Correct.

20 JUSTICE KAVANAUGH: Right, right.

21 MR. JOSHI: Correct. And -- and --

22 JUSTICE JACKSON: But doesn't --
23 doesn't it depend on the complaint that's being
24 made, though? I mean, that's why I think it's
25 really important that we understand what the

1 veterans were complaining about to begin with.

2 If the sum total of the complaint was
3 that the Veterans Court was completely ignoring
4 the benefit-of-the-doubt rule, it never raised
5 it, it didn't say anything about it, et cetera,
6 then I suppose you could have an argument that a
7 subsequent amendment that was designed to remind
8 the Veterans Court that this obligation existed
9 makes sense.

10 But, if the complaint was maybe there
11 are times when a court is completely ignoring
12 it, but what we really are worried about is that
13 we're not actually getting it, that they're
14 saying benefit of the doubt or whatever, but
15 then, when they're applying it, they are not
16 actually giving us -- they're not evaluating
17 whether the evidence is in equipoise properly;
18 when it is in equipoise, they're not giving it
19 to us.

20 In that circumstance, if that was the
21 complaint, it seems odd that Congress would just
22 come back and point to the benefit-of-the-doubt
23 rule as opposed to saying we need a court that's
24 actually policing the extent to which the
25 Veteran -- the administration is giving people

1 what we said in 5017.

2 MR. JOSHI: Right, Justice Jackson.

3 So, as I -- as I read it and as I read it as
4 Petitioners' account of it, it was that it was
5 not -- they were not complaining that there was
6 some gap in the statute.

7 JUSTICE JACKSON: No, not gap, meaning
8 the gap in the statute would be we don't have
9 the ability to bring this to the court's
10 attention. We all agree that before, under the
11 existing statute, under the existing
12 circumstances, they could make a claim about the
13 benefit-of-the-doubt rule.

14 The question is, when Congress amended
15 the statute to say something to the Veterans
16 Court, weren't they -- this is the other side's
17 argument -- weren't they saying what we need you
18 to do is to make sure that the agency is
19 actually applying this consistent with the law?

20 And that's why it becomes, as Justice
21 Gorsuch suggested, a legal question, because
22 just like the sufficiency of the evidence is a
23 standard in the law and we want to make sure
24 that the evidence is sufficient, here, Congress
25 is saying you need to make sure, court, that

1 when this comes to you, it's not just a
2 deference to the agency, whatever they did with
3 respect to benefit of the doubt, but you're
4 actually making clear that they met the legal
5 standard of giving the veteran what they're
6 entitled to under this statute.

7 MR. JOSHI: Okay. So there was a lot
8 there. I would like --

9 JUSTICE JACKSON: Yes, I'm sorry.

10 MR. JOSHI: -- to address all of the
11 pieces of it.

12 Let me just start with sufficiency of
13 the evidence because that's come up a lot in
14 this morning's discussion. That is a
15 deferential standard of review.

16 Remember, a sufficiency-of-the-
17 evidence challenge has a reviewing court looking
18 at the fact finder's application of a legal
19 standard to the facts. Fact finder in
20 sufficiency challenges would be the jury, right?

21 But the reviewing court, in reviewing
22 a sufficiency motion, doesn't ask did the jury
23 err in finding --

24 JUSTICE JACKSON: No, I understand.

25 MR. JOSHI: -- every element met

1 beyond a reasonable doubt.

2 JUSTICE JACKSON: But isn't it a
3 question of law? It is a -- we -- we evaluate
4 it as --

5 MR. JOSHI: No, no. That --

6 JUSTICE JACKSON: -- a question of
7 law, don't we?

8 MR. JOSHI: No. That's my point.
9 It's -- it's a deferential standard. It doesn't
10 ask if the jury erred. It doesn't even ask if
11 the jury clearly erred. It asks, did the -- was
12 the jury so out to lunch in finding each element
13 met beyond a reasonable doubt because, in fact,
14 there is no reasonable juror on the face of the
15 earth who could have found every element beyond
16 a reasonable doubt.

17 JUSTICE GORSUCH: Right. Right.
18 Right. But, counsel, I -- I --

19 MR. JOSHI: It's the most
20 deferential --

21 JUSTICE GORSUCH: Sure. But it is
22 a --

23 MR. JOSHI: -- standard of review I
24 know.

25 JUSTICE GORSUCH: -- it is a -- it is

1 a legal standard, though, isn't it? Because
2 we --

3 MR. JOSHI: No --

4 JUSTICE GORSUCH: Just a second.
5 Don't we take, when we do sufficient -- I mean,
6 maybe I'm just wrong, out to lunch, and I'm -- I
7 welcome being corrected.

8 But I -- I -- I thought, when I used
9 to do this a lot on the court of appeals, that
10 I'd take all the facts in the light most
11 favorable to the victor, those are the facts
12 I've got to use, and then ask the legal question
13 whether any reasonable juror could come to the
14 conclusion this jury did. That's a legal
15 question.

16 MR. JOSHI: It's a legal standard. Of
17 course, it is.

18 JUSTICE GORSUCH: Okay. That's all.
19 That -- that -- that --

20 MR. JOSHI: But it's a deferential
21 standard.

22 JUSTICE GORSUCH: Oh, of -- sure it
23 is. Yeah.

24 MR. JOSHI: Yeah.

25 JUSTICE GORSUCH: And the question --

1 MR. JOSHI: So that's all we're saying
2 here, is --

3 JUSTICE GORSUCH: I --

4 MR. JOSHI: -- the deferential
5 standard is clear error.

6 JUSTICE GORSUCH: On -- on the fact --

7 JUSTICE JACKSON: No, but the clear
8 error goes to the facts.

9 JUSTICE GORSUCH: -- facts.

10 MR. JOSHI: Yes.

11 JUSTICE JACKSON: Right. So the
12 deference is baked into the -- the acceptance of
13 the facts. But then, once you have that bucket
14 of non-clear-error facts, you're making a legal
15 determination as to whether or not it satisfies
16 the standard.

17 MR. JOSHI: So -- so there are
18 multiple things going on here, but -- but I
19 agree that the -- that the -- that the
20 approximate balance standard is a legal
21 standard. Of course, it is.

22 And you apply it to all of these
23 historical facts that have been found: the
24 expert evidence, the lay evidence, the medical
25 evidence. That's the application of a legal

1 standard to the facts in the record.

2 That is a classic mixed question of
3 law. And so then the question is: How do you
4 review -- how does a reviewing court review the
5 fact finder's mixed question resolution?

6 And the answer there, which has been
7 given in case after case -- Village of Lakeridge
8 is probably a great example from a few terms
9 ago -- you ask: Does answering that mixed
10 question entail primarily factual work or
11 primarily legal work?

12 And, here, it is clearly, I think,
13 primarily factual. I mean, it says "balance."
14 That means assigning weights to different
15 evidence and then putting them on the scales and
16 seeing how heavy they are.

17 JUSTICE KAGAN: So --

18 JUSTICE BARRETT: So, Mister --

19 JUSTICE KAGAN: -- can I ask,
20 Mr. Joshi, how would you describe what the
21 reviewing court -- how the reviewing court is
22 supposed to take into account the
23 benefit-of-the-doubt rule in conducting its
24 review?

25 MR. JOSHI: Sure. So, for example, a

1 claimant raises an injury or says: I suffer
2 from PTSD. And the Board rules against him and
3 says: You don't actually suffer from PTSD.

4 What the Veterans Court will do on
5 appeal is say: All right, the standard of proof
6 was little -- was lower than preponderance, and
7 so we're going to ask: Did the Board clearly
8 err in finding -- well, the first step -- I
9 should back up. It's the Secretary's
10 application of 5107(b). The first part of
11 5107(b) says: The Secretary has to take into
12 account all the lay and medical evidence in the
13 record.

14 So the first thing the Court should do
15 is say: Did the Board actually take into
16 account all the evidence? If not, that's a
17 legal error. You can reverse.

18 Then you say: Okay, it did take into
19 account. Is the Board -- based on all of the
20 evidence in the record, is the Board's
21 conclusion that the claimant did not reach 48 or
22 49 --

23 JUSTICE KAGAN: Clear error.

24 MR. JOSHI: -- is that clearly
25 erroneous or not?

1 JUSTICE KAGAN: So -- so, in the -- in
2 the usual case where a claimant has a 51 percent
3 standard, you would say, did the Board clearly
4 err in -- in deciding that the plaintiff did not
5 meet his 51 percent standard?

6 MR. JOSHI: Exactly.

7 JUSTICE KAGAN: And, in this case, you
8 would ask the same question, except you would
9 substitute for the 51 percent standard some
10 lower standard, whatever it is --

11 MR. JOSHI: Exactly.

12 JUSTICE KAGAN: -- 45, 35, whatever it
13 is?

14 MR. JOSHI: Exactly right.

15 JUSTICE KAGAN: But you would ask the
16 same question?

17 MR. JOSHI: Exactly right.

18 JUSTICE GORSUCH: But --

19 JUSTICE KAGAN: And your -- if I
20 understand the difference between you and
21 Ms. Bostwick, Ms. Bostwick says, look -- she
22 accepts that all the individual facts should be
23 reviewed only for clear error, right, so that,
24 like, any particular factual matter is -- gets
25 clear-error review, any particular factual

1 determination. But this ultimate balance and
2 the ultimate determination of whether the weight
3 of the evidence indicates that the plaintiff did
4 or did not meet the standard is an entirely
5 legal question.

6 And the difference is you're saying
7 it's not a legal question, that last bit, that
8 that last bit is at -- is at most -- it's either
9 a pure factual question or it's the kind of
10 mixed question that U.S. Bank was talking about
11 when it talked about mixed questions that
12 immerse courts in case-specific factual issues,
13 compelling them to marshal and weigh evidence
14 and make credibility judgments.

15 Is that correct?

16 MR. JOSHI: It's exactly right.
17 That's our position, and that's what we view as
18 the critical difference between the two sides in
19 this case.

20 JUSTICE GORSUCH: If that's the case,
21 then what do we do about the fact that courts
22 all the time do sufficiency-of-the-evidence
23 review de novo based on the record, again, in
24 the light most favorable?

25 And the -- the next section of (b) --

1 (b)(2) is the same -- works the same way, I
2 think, on your -- on your understanding as well,
3 that the court, in deciding whether there's
4 harmless error, takes all the non-clearly
5 erroneous facts and asks de novo whether, as a
6 matter of law, it would have made any
7 difference, the -- the -- the error, that is.

8 MR. JOSHI: So let me answer both
9 pieces of that question, Justice Gorsuch.

10 JUSTICE GORSUCH: Yeah.

11 MR. JOSHI: First, I want to push back
12 on the premise that sufficiency is a -- a --
13 it -- it is a legal standard, but it is a
14 deferential standard of review.

15 JUSTICE GORSUCH: No, I understand.
16 But it's a legal standard. And -- and harmless
17 error is --

18 MR. JOSHI: Yeah, but ---

19 JUSTICE GORSUCH: -- also a legal
20 standard, isn't it?

21 MR. JOSHI: Correct, it is a legal
22 standard. But the point is the legal standard
23 is applied to evaluate whether the fact finder
24 erred in coming to some conclusion or not.

25 JUSTICE GORSUCH: Mm-hmm.

1 MR. JOSHI: Here, the fact finder is
2 the Board. Sufficiency would be the jury.

3 But -- and then, as you go up further
4 levels of appellate review, there's not
5 cascading deference up the appellate chain.
6 It's each reviewing court is reviewing the fact
7 finder. And so I think, colloquially, we might
8 say, oh, the Supreme Court reviews the court of
9 appeals' sufficiency determinations de novo.
10 Sure, we can say that colloquially.

11 JUSTICE GORSUCH: No, no, no. I'm
12 talking --

13 MR. JOSHI: But, really, you're
14 applying a deferential standard to the fact
15 finder.

16 JUSTICE GORSUCH: Again, I'm just, you
17 know --

18 MR. JOSHI: Yeah. The second -- the
19 second piece was on (b)(2). I think I have two
20 answers to that.

21 Number one, what Justice Sotomayor
22 said, which is that the court is applying
23 prejudicial error. That's something only a
24 court applies. And that's different from the
25 Secretary's application of (b)(1), which invokes

1 principles of review of agency action. And so
2 that's a difference.

3 But I do think that -- so we disagree
4 with Petitioners that the Federal Circuit thinks
5 that the prejudicial error has to apply in every
6 case. They cite this Tadlock case.

7 JUSTICE GORSUCH: No, I know --

8 MR. JOSHI: I've read the Tadlock
9 case. It wasn't presented there at all.

10 JUSTICE GORSUCH: Put that -- put
11 that -- put -- put that aside.

12 MR. JOSHI: Yeah.

13 JUSTICE GORSUCH: We normally read
14 statutes in pari materia. And (b)(2) you agree
15 is a -- is a de novo legal standard the Court
16 has to apply when raised?

17 MR. JOSHI: Yes.

18 JUSTICE GORSUCH: Okay.

19 MR. JOSHI: Yeah, that's right.

20 JUSTICE KAVANAUGH: Does the
21 approximate balance determination go only to the
22 final conclusion, or does it go as well to
23 subsidiary factual conclusions, just to make
24 sure we're clear on that?

25 MR. JOSHI: I think it would do both.

1 JUSTICE KAVANAUGH: That's what I
2 thought. Okay.

3 MR. JOSHI: I think it would go to
4 subsidiary as well. I -- I think the -- the
5 statute says on any material issue. And one can
6 imagine there are subsidiary material issues and
7 ultimate ones.

8 And I think that's the most consistent
9 with cases like Anderson against Bessemer City,
10 where this Court said clear-error review, for
11 example, applies to both subsidiary and ultimate
12 facts.

13 JUSTICE KAVANAUGH: Okay. Thank you.

14 JUSTICE JACKSON: How big a deal is
15 this? I mean, I can imagine there are not that
16 many situations in which the evidence is truly
17 an approximate balance.

18 So even if the government's position
19 is -- you know, if we agreed with the Petitioner
20 here, is this going to be a big deal?

21 MR. JOSHI: I think it is going to be
22 a big deal. I think the vast majority of cases
23 that get appealed to the Veterans Court are
24 raising essentially factual challenges to
25 findings that there's no present disability or

1 no in-service connection or no causation between
2 the two.

3 JUSTICE JACKSON: Right. But the
4 question --

5 MR. JOSHI: And -- but --

6 JUSTICE JACKSON: Yeah. Mm-hmm.

7 MR. JOSHI: Oh, sorry. So just to --
8 just to continue on that --

9 JUSTICE JACKSON: Yeah. Yeah.

10 MR. JOSHI: -- so, because of that, I
11 think, as these cases illustrate, the Veterans
12 Court is going to be reviewing the factual
13 findings and, thus, has to take due account of
14 the Secretary's application.

15 But, if it's a de novo review, that
16 means that in every case, this appellate court,
17 which is not well situated to do it -- the
18 appellate court is going to have to, in every
19 case -- almost every case, review the entire
20 record, assign weight, balance things, figure
21 out if it's an approximate balance.

22 Appellate courts are not well suited
23 to doing this, as Anderson against Bessemer City
24 made clear. That's why there's a really strong
25 norm in our system that --

1 JUSTICE JACKSON: I know. But then
2 why -- why did Congress clearly require the
3 court to do it? I -- this is the thing that's a
4 little unfortunate in a way in the way that I
5 think you're arguing it because, even if we say
6 Congress went back and underscored this
7 obligation, the approximate balance obligation
8 runs to the Secretary, right, and the
9 underscoring is now to the court.

10 So it's obvious that Congress wanted
11 the court to have some assessment of whether or
12 not the Secretary is doing it correctly. So I
13 think you -- you don't get out of that by just
14 saying, oh, the court is not in well positioned.

15 Congress thought the court was going
16 to do something, right?

17 MR. JOSHI: Yes. But Congress
18 expressly had before it a proposal to change the
19 standard of review and then rejected it and said
20 we're sticking with the clear error review. So
21 I think Congress was pretty --

22 JUSTICE JACKSON: Yeah, but Congress
23 also had before it a proposal to put that
24 into -- this new "take due account" into (a),
25 which would have made clear that clear-error

1 review was supposed to be happening in this
2 context, and it rejected it.

3 MR. JOSHI: So I -- I -- I disagree
4 with that. I mean, look, it said "in making the
5 determinations under ... (a)," which put it in
6 there. And just to spin -- spin that out a
7 little bit more, Justice Jackson, if they had
8 put it in (a)(4), I think it would have been an
9 awkward fit there because, as we say, the
10 benefit-of-the-doubt rule does have some legal
11 aspects to it.

12 You know, for example, if you don't
13 review all the evidence in the record, that's
14 legal error. If the Secretary says it's not an
15 approximate balance unless it's in absolute
16 perfect equipoise, I think that would be a legal
17 error. So they -- so Congress couldn't stick it
18 just in (a)(4) because there are legal aspects
19 to it.

20 But nor could it put it as an (a)(5)
21 because it's not something that happens after
22 you go through (a)(1), (2), (3), (4), you know,
23 compel agency action, unlawfully withheld, et
24 cetera. It's not like a separate thing you do.
25 You do it in the course of reviewing statutory

1 legal challenges, agency action withheld,
2 factual findings.

3 And so the natural place to put it is
4 somewhere else. You see this in 706 of the APA.
5 It's the -- the prejudicial error rule is not
6 stuck in 7062.

7 JUSTICE JACKSON: And so you don't
8 think --

9 MR. JOSHI: It's put outside.

10 JUSTICE JACKSON: -- that the
11 deference that you say Congress wanted to retain
12 was in the assessment of what evidence is
13 positive and negative? In other words, the --
14 the -- the approximate balance rule says when
15 there is an approximate balance of positive and
16 negative evidence regarding any issue material
17 to the determination of the matter. And I could
18 see a world in which the Secretary's assessment
19 of whether this evidence is material to this
20 issue, is it, you know, credible and, therefore,
21 I'm going to count it as positive? Is it
22 credible on the negative side? All of those
23 individual determinations the court cannot
24 review for anything other than clear error.

25 But I thought you said earlier in this

1 conversation -- and maybe I misheard you -- that
2 you did think that approximate balance itself,
3 once we know what the positive -- bucket of
4 positive evidence and bucket of negative
5 evidence is, is a question of law. I thought I
6 heard you say it was a question of law.

7 MR. JOSHI: Oh, approximate balance is
8 a legal standard.

9 JUSTICE JACKSON: Okay.

10 MR. JOSHI: And what it means is, of
11 course, a legal question as to what it means,
12 but when --

13 JUSTICE JACKSON: And whether or not
14 it's satisfied?

15 MR. JOSHI: Whether it's satisfied is
16 a classic mixed question, right? It's a
17 standard of proof that you apply to facts in a
18 case. And the application of a statutory
19 standard of proof to the facts and record
20 evidence is a classic mixed question. And how
21 you review a mixed question, this Court has said
22 time and again, depends on the nature of the
23 mixed question. Does it involve primarily
24 factual work or primarily legal work?

25 And our submission here today is that

1 applying an approximate balance -- and the word
2 "balance" itself implies weights and weighing
3 things against each other as facts --

4 JUSTICE JACKSON: Yeah, but you've
5 already got -- you've already taken care of the
6 factual assessments. I have my bucket. I
7 understand it involves facts because we're
8 balancing facts, but we already have the bucket
9 of positive and bucket of negative that the
10 Secretary has determined and we're stuck with
11 that.

12 The question of whether or not they
13 are roughly equal, I don't understand -- I don't
14 know why that isn't a -- a factual question.

15 MR. JOSHI: Well, I mean, look, I
16 think because there aren't -- we don't put
17 actual weights with numbers on pieces of
18 evidence and add it up. If we did, it would be
19 a trivial exercise, right? It's always
20 qualitative.

21 And so, at the end of the day, the
22 Board is just going to look at expert opinions
23 like here, for example, in Mr. Bufkin's case,
24 right? The -- the Board look at the medical
25 opinions in the record, and Mr. Bufkin had

1 presented a medical opinion saying he suffered
2 from PTSD, and then there were other medical
3 evaluations that said he did not suffer.

4 And the Board looked at them and said:
5 Well, the regulations require any diagnosis of
6 PTSD to conform with DSM V. The one doctor who
7 said he suffers from PTSD didn't apply DSM V at
8 all. And, indeed, the next doctor who did apply
9 DSM V and said he doesn't suffer from PTSD, said
10 the first --

11 JUSTICE JACKSON: Right. So -- so --
12 so those would not be credible. They wouldn't
13 be in the bucket. And when the court did its
14 assessment of whether there's approximate
15 balance, it would say there's not, right?

16 MR. JOSHI: Right. I -- I think --

17 JUSTICE JACKSON: All I'm saying is
18 approximate balance sounds to me like
19 sufficient -- sufficiency of the evidence, and
20 sufficiency, approximate, seems like a legal
21 question, not a factual one. So you keep saying
22 this is factual, intensely fact -- the only
23 factual part is deciding what facts go in to be
24 weighed, but whether or not they're in balance
25 seems to me to be a question of law.

1 MR. JOSHI: I disagree. I think what
2 constitutes --

3 JUSTICE JACKSON: Yeah.

4 MR. JOSHI: -- an approximate balance,
5 how far away the scales should be --

6 JUSTICE JACKSON: Yeah.

7 MR. JOSHI: -- that's a legal
8 question. But I think where are the scales in
9 this particular case I think is predominantly
10 factual.

11 JUSTICE JACKSON: Thank you.

12 MR. JOSHI: And -- and, as I mentioned
13 to Justice Kagan, I think that is the
14 fundamental disagreement between the parties
15 in -- in this case.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas, anything further?

19 Justice Alito?

20 JUSTICE SOTOMAYOR: I have a question.
21 The Chief started with whether this was a
22 redundant, duplicate, unimportant provision or
23 not. It's pretty absolute. The language of the
24 BOPDR review provision says: "The Court shall
25 review" that issue. Yet you say, no, they don't

1 really have to unless the party presents it.

2 If I say no, you're wrong, that
3 doesn't make this provision superfluous, does
4 it?

5 MR. JOSHI: That's correct,
6 although --

7 JUSTICE SOTOMAYOR: You don't want
8 that outcome, but that's how to avoid the
9 superfluous -- how -- making this provision
10 superfluous, correct?

11 MR. JOSHI: That -- that would avoid
12 the redundancy, yes, right.

13 JUSTICE SOTOMAYOR: And wouldn't that
14 also take care of everything you said was wrong
15 with the old system, which was -- and -- and I
16 remember that veterans are generally not
17 represented. They're laypeople. And
18 recognizing that they may not be schooled enough
19 to raise an issue on appeal, wouldn't this
20 provision require the -- the Veterans Court to
21 ensure that the court below has actually done
22 everything it needed to do, that it looked at
23 all of the relevant facts and didn't commit the
24 legal error of avoiding one, whether raised to
25 it or not, and whether or not it committed clear

1 error in its balance or not, et cetera?

2 It would do a lot of work to ensure
3 the system was actually taking care of the
4 problem Congress saw, wouldn't it?

5 MR. JOSHI: It would do work. I don't
6 think -- if I could just --

7 JUSTICE SOTOMAYOR: Mm-hmm.

8 MR. JOSHI: -- now push back a little
9 bit, I think it's -- it wasn't the problem that
10 Congress was facing, first of all. And I think
11 it can't be supported by --

12 JUSTICE SOTOMAYOR: Well, it was. The
13 court --

14 MR. JOSHI: Well --

15 JUSTICE SOTOMAYOR: -- the court --
16 the two cases you mentioned were the Secretary
17 not looking at things and the Veterans Court not
18 looking at what they did.

19 MR. JOSHI: No, I disagree, and I -- I
20 apologize if that was the impression I gave you.
21 I think the two cases that were mentioned were
22 really the Veterans Court saying we find no
23 clear error in the Board's finding of facts,
24 without mentioning or even recognizing that the
25 standard of proof against which clear error was

1 to be measured was lower than a preponderance.
2 It was represented by the approximate balance,
3 so --

4 JUSTICE SOTOMAYOR: It wasn't looking
5 at what went on below and figuring out if it was
6 done right.

7 MR. JOSHI: No, we don't -- we don't
8 know. You could indulge the presumption of
9 regularity and think the Veterans Court was
10 cognizant of it, but to -- to say -- you know,
11 you could -- for example, with a given set of
12 facts, it could always be possible to say that
13 if the standard of proof were a preponderance,
14 the fact finder would not have clearly erred in
15 finding that the party --

16 JUSTICE SOTOMAYOR: All right. One
17 last question.

18 MR. JOSHI: -- with the burden didn't
19 meet but did clearly err --

20 JUSTICE SOTOMAYOR: Should we reach
21 this issue?

22 MR. JOSHI: No, you shouldn't because
23 both of the Petitioners here didn't raise it.

24 JUSTICE SOTOMAYOR: But your colleague
25 on the other side, in -- in her presentation,

1 pointed out to one issue that Mr. Thornton
2 allegedly did not raise. What do I do about
3 that?

4 MR. JOSHI: I mean, I -- I -- again, I
5 think the right standard, if you do want to
6 reach it, would just be to say that the "when
7 presented" language, which is a condition
8 precedent on making determinations under (a),
9 and making determinations under (a) is a
10 condition precedent --

11 JUSTICE SOTOMAYOR: I think that might
12 be better for us --

13 MR. JOSHI: -- but it's just --

14 JUSTICE SOTOMAYOR: -- than saying
15 that Congress acts -- that it's okay for
16 Congress to act in duplicate and make a
17 provision wholly useless.

18 MR. JOSHI: Not useless, just
19 emphasizing something that already exists. And,
20 as a practical matter, it did have an effect.

21 JUSTICE SOTOMAYOR: Thank you,
22 counsel.

23 MR. JOSHI: So I think it worked.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?
25 Justice Gorsuch?

1 JUSTICE GORSUCH: Do you think
2 Congress adopted this language about the
3 benefit-of-the-doubt rule, in both instances
4 where it did, in recognition of the high esteem
5 in which our nation holds those who have served
6 in the armed services?

7 MR. JOSHI: Probably, yes.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

10 Justice Barrett?

11 Justice Jackson? Okay.

12 Thank you, counsel.

13 Rebuttal, Ms. Bostwick?

14 REBUTTAL ARGUMENT OF MELANIE L. BOSTWICK
15 ON BEHALF OF THE PETITIONERS

16 MS. BOSTWICK: Section 7261(b)(1) is
17 not an exclamation point. It is an entirely new
18 sentence placed in an entirely new statutory
19 sub-provision. It was not responding to the
20 problem that my colleague on the other side has
21 identified.

22 As we've explained in our briefs, the
23 Veterans Court very much was reviewing
24 benefit-of-the-doubt errors when presented.
25 This is not a -- a -- a case like O'Gilvie,

1 where there was genuine uncertainty in the law.

2 The problem was that the Veterans
3 Court was being overly deferential when it
4 reviewed. So I would point the Court to the
5 Wensch case, which is also discussed in the
6 legislative history, as an example of what
7 Congress didn't like.

8 There, the court recognized that
9 5107(b) was the applicable standard. It said:
10 We can review for clear error. We can review
11 reasons and bases. And we can't do anything
12 else.

13 That is the problem that Congress was
14 addressing. And, unfortunately, what the
15 Veterans Court did is, a year after the statute
16 was past, in a case called Roberson in 2003, it
17 looked at it and said: We don't think Congress
18 made any change here. We don't think it altered
19 the judicial landscape.

20 And so this statute has never been
21 given the effect that it was intended.
22 Instead -- so the idea that it -- that what --
23 what Congress did worked, absolutely not, Your
24 Honor.

25 You see that in the Mariano case that

1 the government mentioned. There too, the -- the
2 Veterans Court says: This outcome is a factual
3 determination. We review for clear error. The
4 same thing it had said in the Wensch case that
5 Congress rejected.

6 And that's what's happening today.
7 That's what happened in these cases. In
8 Mr. Bufkin's case, they reviewed only the
9 relative credibility judgments for clear error,
10 did not look at approximate balance, even
11 though, again, he raised the -- the argument.

12 And in Mr. Thornton's case, they said:
13 We're not even going to look at this. You say
14 you're not challenging any facts. And so, even
15 though you've said there was a
16 benefit-of-the-doubt problem, we're not going to
17 look at it.

18 Everyone agrees that at least some
19 aspect of this review, this approximate balance
20 review, is legal. That is reason enough why the
21 Federal Circuit's decision is wrong, because the
22 Federal Circuit held that the (b)(1) review is
23 limited to clear error review under (a)(4).

24 But we think that even the -- the
25 approximate balance test should be reviewed

1 non-deferentially, exactly as Justice Jackson
2 articulated it.

3 I would point out that if you,
4 instead, try to review the approximate balance
5 judgment for clear error, the two things are
6 just incompatible.

7 Under Anderson, if there are two
8 permissible views of the evidence, it cannot be
9 clear error. That is exactly the opposite of
10 what the benefit-of-the-doubt rule is supposed
11 to achieve. If there are two permissible views
12 of the error, the veteran gets the benefit of
13 the doubt there.

14 If -- if the Court is inclined to view
15 this as a mixed question, we think it is the
16 kind that should be treated as a question of
17 law. Among other reasons, we have an expert
18 tribunal reviewing the full record and being --
19 being competent to make these decisions. And we
20 would be able to provide uniformity in the law
21 here.

22 If the Court thinks it's -- it's too
23 factual to call this de novo, at a minimum, I
24 would say this -- this statute, again, unique in
25 the administrative review, at least requires the

1 Veterans Court to take a hard look at what the
2 agency has done with the benefit-of-the-doubt
3 rule and not be the kind of rubber stamp that
4 was happening pre-2002 and that continues to
5 happen today in these cases.

6 The question was asked: How -- how
7 big of a deal is this? I -- I'd say it's a big
8 deal that the agency is still today not
9 complying with its statutory obligation under
10 Section 5107(b) and that the Veterans Court is
11 still, after multiple statutory attempts by
12 Congress, not looking at and enforcing that --
13 this important standard of review.

14 As to, you know, an example of -- of
15 how this is failing, counsel said that
16 Mr. Bufkin had one positive opinion on the PTSD
17 diagnosis. That's incorrect. He had two. And
18 that's part of the problem with the Board's
19 decision and the kind of error that the Veterans
20 Court should be looking at, is whether the
21 agency actually considered all of the evidence
22 relevant to that question.

23 We would ask the Court to reverse the
24 Federal Circuit.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon at 11:19 a.m., the case was
3 submitted.)

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25

1	<p>1 [1] 33:6 1100 [1] 28:10</p>	<p>accepting [2] 17:2 52:8 accepts [1] 62:22 accomplished [1] 53:5 accomplishing [1] 52:17 account [32] 6:25 7:1 10:7,19 18:3 23:19,21 24:23,23,24,25 25:7,16 26:22 28:18 29:7 30:14 31:7 32:13,21 33:7 42:6 50:9,10 52:15 55:4 60:22 61:12,16,19 68:13 69:24 achieve [1] 83:11 act [1] 79:16 action [4] 42:10 66:1 70:23 71:1 acts [1] 79:15 actual [2] 27:16 73:17 actually [15] 9:6 16:15 19:22 45:10 52:5 54:13,16,24 55:19 56:4 61:3,15 76:21 77:3 84:21 add [2] 25:19 73:18 additional [1] 43:1 address [5] 19:21 21:21 23:4 46:6 56:10 addressed [2] 21:17 22:16 addressing [2] 24:21 81:14 adjust [1] 10:13 administration [7] 6:25 9:18 13:7,17 14:24 29:25 54:25 administrative [1] 83:25 adopted [1] 80:2 affirm [2] 6:2,4 age [1] 21:1 agency [24] 8:17 9:19 12:10,16 13:2 15:16,18 16:3,8 20:4 25:6,8 27:1 38:7 42:10 43:20 55:18 56:2 66:1 70:23 71:1 84:2,8,21 agency's [3] 26:11,12 28:18 ago [1] 60:9 agree [7] 11:20 15:4 34:2 53:7 55:10 59:19 66:14 agreed [1] 67:19 agrees [3] 7:13 29:6 82:18 ahead [2] 6:17 53:2 aij [1] 16:16 air [1] 27:10 alito [11] 13:6 14:19 16:7 29:17,18 30:13 31:1,11 32:1,12 75:19 allegedly [1] 79:2 allocated [1] 13:18 allocation [1] 14:6 almost [2] 17:16 68:19 alone [1] 28:10 already [12] 10:18,19 19:23 46:5,10 48:8 50:21 53:11 73:5,5,8 79:19 altered [1] 81:18 alternative [1] 43:10 although [2] 31:19 76:6 amended [1] 55:14 amendment [6] 43:7 45:21 46:3 50:16</p>	<p>51:6 54:7 amendment's [1] 45:22 amicus [1] 27:8 ammons [2] 48:10 51:19 a-m-m-o-n-s [1] 48:10 among [1] 83:17 analog [1] 17:10 analysis [7] 24:5 25:24 26:3,12 29:4 36:20 47:18 analytically [1] 41:20 analyzing [1] 52:13 anderson [3] 67:9 68:23 83:7 another [6] 11:9,14 16:18 25:15 26:1 34:25 answer [3] 51:18 60:6 64:8 answering [1] 60:9 answers [2] 33:23 65:20 apa [2] 25:2 71:4 apologize [1] 77:20 app [4] 8:15 22:11 23:13 26:7 appeal [3] 13:23 61:5 76:19 appealed [1] 67:23 appeals [1] 58:9 appeals' [1] 65:9 appear [1] 28:9 appellate [6] 13:24 65:4,5 68:16,18,22 applicable [6] 9:23 13:25 14:25 15:1 36:3 81:9 application [15] 7:11 15:7 25:4 26:17,22 33:8,19 42:7,12 56:18 59:25 61:10 65:25 68:14 72:18 applied [5] 18:8 38:25 40:25 51:20 64:23 applies [5] 17:24 18:20 28:2 65:24 67:11 apply [14] 12:4 13:25 14:16 15:1 27:5 32:2 33:6 42:5 59:22 66:5,16 72:17 74:7,8 applying [8] 12:8 14:25 52:5 54:15 55:19 65:14,22 73:1 approach [1] 7:25 appropriate [2] 15:4 26:21 approximate [52] 6:12 7:15 8:20 9:7,14 10:1 12:8,25 13:3 14:16 15:25 16:3 25:10 26:12 27:4 30:11,14,15 31:9 34:10,24 35:10 37:8,11,14,22 38:1 39:23 40:22 41:16 42:17 43:12 59:20 66:21 67:17 68:21 69:7 70:15 71:14,15 72:2,7 73:1 74:14,18,20 75:4 78:2 82:10,19,25 83:4 area [3] 17:18,22 40:21 areas [1] 17:16 aren't [2] 50:9 73:16 arguing [1] 69:5 argument [17] 9:1 19:12,16 20:6 26:15 27:20 29:20 30:21 31:24 38:19 42:1 44:13 50:14 54:6 55:17 80:14 82:</p>
2	<p>2 [1] 70:22 2002 [2] 8:24 43:3 2003 [1] 81:16</p>		
3	<p>3 [1] 70:22 35 [2] 40:5 62:12</p>		
4	<p>4 [1] 70:22 40 [1] 40:6 43a [1] 26:7 45 [2] 40:6 62:12 48 [2] 46:25 61:21 49 [4] 34:11 40:6 46:24 61:22</p>		
5	<p>50 [6] 34:9,18,23 37:17 41:11 46:24 5017 [1] 55:1 5017(b) [1] 40:23 51 [5] 34:7 35:20 62:2,5,9 51/49 [1] 40:10 510(c) [1] 25:5 5107 [1] 8:15 5107(b) [14] 6:5 7:11 8:16 9:5 26:18 28:13 33:8,19 42:6,13 61:10,11 81:9 84:10</p>		
7	<p>706 [1] 71:4 7062 [1] 71:6 7261 [1] 8:25 7261(b)(1) [1] 80:16</p>		
9	<p>9 [1] 27:7 93a [1] 8:15 9a [3] 22:11 23:13,14</p>		
A	<p>a)(1) [1] 70:22 a)(4) [5] 18:12 43:16 70:8,18 82:23 a)(5) [1] 70:20 ability [1] 55:9 able [1] 83:20 above [1] 21:10 absolute [2] 70:15 75:23 absolutely [1] 81:23 accept [5] 39:15 44:13,14,21 53:4 acceptance [1] 59:12</p>		

<p>11 arguments [2] 22:13 28:3 armed [1] 80:6 articulated [2] 39:21 83:2 articulation [1] 28:12 aside [2] 45:25 66:11 asks [2] 57:11 64:5 aspect [3] 7:10 30:24 82:19 aspects [4] 42:12,13 70:11,18 assessed [1] 9:10 assessment [7] 11:21 30:12 41:7 69:11 71:12,18 74:14 assessments [1] 73:6 assign [1] 68:20 assigning [1] 60:14 assume [4] 11:5,5 30:17 39:15 attempts [1] 84:11 attention [1] 55:10 avoid [3] 45:2 76:8,11 avoiding [1] 76:24 away [1] 75:5 awfully [1] 44:3 awkward [1] 70:9</p>	<p>believe [2] 16:18,19 below [4] 36:17 52:2 76:21 78:5 bench [1] 32:2 benefit [18] 6:14 8:22 11:1,8 14:23 16:12 21:2 23:9 27:13 30:2 31:15 47:1,3,12 48:15 54:14 56:3 83:12 benefit-of-the-doubt [24] 6:6,7 10:25 14:5 19:16 20:6,10 22:14 26:9 27:3 34:3,8 52:14,16 54:4,22 55:13 60:23 70:10 80:3,24 82:16 83:10 84:2 benefits [4] 20:19 21:4 30:5,18 bessemer [2] 67:9 68:23 better [2] 43:10 79:12 between [13] 12:1 14:8 23:23 28:21 29:22 32:20 44:4 45:5,9 62:20 63:18 68:1 75:14 beyond [3] 57:1,13,15 big [5] 67:14,20,22 84:7,7 binds [1] 25:5 bit [8] 8:7 34:10 44:6 46:16 63:7,8 70:7 77:9 bite [1] 22:25 board [13] 10:24 11:12 24:19 47:2 61:2,7,15,19 62:3 65:2 73:22,24 74:4 board's [5] 11:20 26:17 61:20 77:23 84:18 bopdr [1] 75:24 bostwick [65] 6:16,18 7:7 8:9,13 9:20 10:9 11:18 14:9 15:5 17:6,21 18:4,10,21 19:10,18 20:24 21:15,25 22:4,9 23:3,16 24:1,9,12 25:25 27:24 29:10 30:6,24 31:3,25 32:7,15,24 33:4,12,17,22 34:15 35:3,25 36:13,18,23 37:4,12,18 38:13 39:1,7,10,19,25 40:7 41:8,15,20 62:21,21 80:13,14,16 both [12] 12:16 16:8 19:3,15 23:23 38:4,4 64:8 66:25 67:11 78:23 80:3 bound [2] 6:21 28:3 brief [3] 27:8 50:1 51:5 briefs [1] 80:22 bring [1] 55:9 broader [2] 34:20 40:11 bucket [7] 59:13 72:3,4 73:6,8,9 74:13 bufkin [3] 22:11 73:25 84:16 bufkin's [2] 73:23 82:8 built [1] 15:15 burden [16] 13:10,18,21,25 14:4,6 34:5,7,14,16 35:1,4,5,20,23 78:18</p>	<p>case [40] 6:20 11:7 19:14 24:8 25:23 26:7 28:2 29:20 35:14 36:4,4,14 40:1,9 47:23 51:25 52:2 60:7,7 62:2,7 63:19,20 66:6,6,9 68:16,19,19 72:18 73:23 75:9,15 80:25 81:5,16,25 82:4,8,12 cases [20] 16:25 27:5 48:3,4,5,9,11 49:7 50:1,17 51:20 52:2,12 67:9,22 68:11 77:16,21 82:7 84:5 case-specific [1] 63:12 category [1] 9:4 causation [1] 68:1 cause [2] 17:17 36:7 certain [1] 14:7 certainly [6] 11:19 22:9 23:3,20 26:19 28:11 cetera [3] 54:5 70:24 77:1 chain [1] 65:5 challenge [3] 26:9 32:9 56:17 challenges [6] 11:25 20:13 48:12 56:20 67:24 71:1 challenging [3] 26:14 40:1 82:14 chance [1] 21:20 change [7] 7:5,22 21:6 34:4 53:16 69:18 81:18 changing [2] 7:2,8 charged [1] 33:2 chase [1] 35:11 check [1] 6:2 chief [23] 6:15,17,23 25:14 28:24 29:1,14 32:17 33:24 36:10 39:12 40:13,16 41:23 42:3 49:19,21 50:25 75:16,21 79:24 80:8 84:25 choosing [1] 38:15 circuit [9] 22:2,19 23:9 34:19 37:19 52:2 66:4 82:22 84:24 circuit's [2] 29:11 82:21 circumstance [1] 54:20 circumstances [3] 29:9 30:8 55:12 citation [1] 48:15 cite [4] 46:19 48:3 49:25 66:6 city [2] 67:9 68:23 civil [6] 15:25 17:18,24 32:2,4 36:14 claim [5] 20:16 30:5,18 32:5 55:12 claimant [14] 8:23 11:9 14:22 30:1,16,16 31:15 34:6 35:4,19 38:8 61:1,21 62:2 claimants [1] 48:12 claims [1] 20:3 classic [3] 60:2 72:16,20 clear [51] 7:9 9:9 10:11 12:6,21,23 13:25 14:11,18 15:6,24 18:11,13 28:22 31:6,20 34:17 35:18,21,24 38:17 42:14,19 44:21 46:4,5,7 47:18 48:16 49:7,14 51:23 56:4 59:5,7 61:23 62:23 66:24 68:24 69:20,25 71:24 76:25 77:23,25 81:10 82:3,9,23 83:5,9</p>
B		
<p>b)(1 [13] 6:1 20:15 24:11 27:21 28:21 32:20 42:25 43:2,9,23 44:2 65:25 82:22 b)(2 [12] 10:18 22:20 23:21 24:21 28:21,22 29:3 32:20,20 64:1 65:19 66:14 back [10] 7:21 18:1 27:21 28:19 49:22 54:22 61:9 64:11 69:6 77:8 baked [1] 59:12 balance [57] 6:12 7:15 8:20 9:7,15 10:1 12:8,25 13:3 14:16 15:25 16:3 25:10 26:12 27:4 30:12,14,15 31:6,9 34:11,24 35:11 37:11,14,23 38:1 39:24 40:23 41:16 42:17 43:13 59:20 60:13 63:1 66:21 67:17 68:20,21 69:7 70:15 71:14,15 72:2,7 73:1,2 74:15,18,24 75:4 77:1 78:2 82:10,19,25 83:4 balancing [1] 73:8 bank [1] 63:10 barrett [7] 19:10 20:17 21:12 40:14,15 60:18 80:10 barrett's [1] 21:14 base [1] 27:10 based [8] 15:16 19:3 20:25 24:17 28:4 37:3 61:19 63:23 bases [1] 81:11 basically [1] 38:15 basis [3] 14:12 39:21 48:14 bear [1] 28:8 becomes [1] 55:20 begin [1] 54:1 behalf [2] 42:2 80:15</p>	<p style="text-align: center;">C</p> <p>call [1] 83:23 called [4] 48:9,9 52:3 81:16 came [4] 7:21 27:21 46:20 47:11 cannot [2] 71:23 83:8 care [3] 73:5 76:14 77:3 careful [1] 7:3 cascading [1] 65:5</p>	

Official

<p>clearer ^[1] 10:10 clear-error ^[15] 7:20 12:20 14:8 15:3 30:23,25 31:21 47:18 48:22 49:8 51: 20 52:5 62:25 67:10 69:25 clearest ^[1] 20:2 clearly ^[13] 24:3 38:10,11 39:16 49:1 57:11 60:12 61:7,24 62:3 69:2 78:14, 19 clients ^[1] 19:15 clues ^[1] 42:9 cognizant ^[1] 78:10 coherent ^[1] 44:5 colleague ^[2] 78:24 80:20 colloquially ^[2] 65:7,10 come ^[5] 33:15 37:1 54:22 56:13 58: 13 comes ^[3] 33:15 34:6 56:1 coming ^[1] 64:24 commands ^[1] 25:7 commit ^[1] 76:23 committed ^[2] 16:13 76:25 compel ^[1] 70:23 compelling ^[1] 63:13 compels ^[1] 49:17 compensation ^[1] 21:10 competent ^[1] 83:19 competing ^[1] 13:1 complaining ^[2] 54:1 55:5 complaint ^[5] 52:24 53:23 54:2,10,21 complete ^[2] 20:21 22:8 completely ^[7] 10:25 13:8 50:20 52:4 53:7 54:3,11 compliance ^[1] 28:18 complicated ^[1] 51:9 complied ^[3] 6:4 9:2 25:9 complying ^[1] 84:9 components ^[2] 18:18,18 comprehensive ^[1] 24:19 concedes ^[1] 27:10 conclusion ^[10] 9:22 16:17 19:5 26:11 37:2 42:22 58:14 61:21 64:24 66:22 conclusions ^[2] 25:16 66:23 concretely ^[1] 19:25 condition ^[2] 79:7,10 conditions ^[1] 21:7 conduct ^[1] 23:25 conducting ^[1] 60:23 confirmed ^[1] 51:7 conflicts ^[1] 43:15 conform ^[1] 74:6 congress ^[44] 7:20 8:4 10:5,11 27:19, 21 28:1,15 43:2,16 44:1,14 46:20 47: 4,11 48:4,5 49:23 50:15 53:8,17 54: 21 55:14,24 69:2,6,10,15,17,21,22 70: 17 71:11 77:4,10 79:15,16 80:2 81:7, 13,17,23 82:5 84:12 congress's ^[1] 19:22</p>	<p>connection ^[2] 43:25 68:1 consider ^[4] 6:9 8:18 19:14 23:9 consideration ^[1] 18:19 considered ^[1] 84:21 consistent ^[3] 44:5 55:19 67:8 constitutes ^[1] 75:2 constitutional ^[1] 17:17 context ^[7] 15:14,25 18:25 25:1 36:6 41:11 70:2 continual ^[1] 21:3 continue ^[1] 68:8 continues ^[1] 84:4 contradictions ^[1] 43:14 contrasted ^[1] 11:13 contrasts ^[1] 12:1 conversation ^[1] 72:1 convincing ^[2] 15:24 49:14 copyright ^[1] 19:2 correct ^[15] 9:20 16:4 32:23,24 33:11, 16 37:11 39:19 41:9 53:19,21 63:15 64:21 76:5,10 corrected ^[1] 58:7 correctly ^[2] 9:14 69:12 cost ^[1] 44:7 costs ^[1] 45:3 couldn't ^[1] 70:17 counsel ^[10] 16:6 22:8 29:15 41:24 49: 19 57:18 75:17 79:22 80:12 84:15 count ^[2] 50:13 71:21 couple ^[5] 19:18 40:20 47:20 48:3 50: 1 course ^[5] 36:6 58:17 59:21 70:25 72: 11 courts ^[8] 23:22,23 25:11 40:24 41:1 63:12,21 68:22 court's ^[5] 23:10 28:17 36:4 44:10 55: 9 covered ^[1] 43:4 crazy ^[3] 38:15,17 39:16 creates ^[2] 35:7 43:14 credibility ^[7] 9:10 11:21 15:13,17 16: 16 63:14 82:9 credible ^[9] 11:15 12:17 14:14 16:9 30:22 35:17 71:20,22 74:12 credited ^[1] 13:2 criminal ^[1] 36:6 critical ^[1] 63:18 cryptic ^[1] 44:3 currently ^[1] 53:11</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>damages ^[5] 50:5,8,12,17,21 dav ^[1] 27:8 day ^[1] 73:21 de ^[19] 10:3,7 11:4 15:8 24:5 30:23 31: 2,23 36:22 42:13 43:13,17 49:16 63: 23 64:5 65:9 66:15 68:15 83:23</p>	<p>deal ^[5] 67:14,20,22 84:7,8 dealing ^[2] 25:3,4 decided ^[1] 11:15 decides ^[1] 24:5 deciding ^[3] 62:4 64:3 74:23 decision ^[6] 7:17 10:23 38:21 40:2 82: 21 84:19 decisions ^[3] 6:3 43:21 83:19 decisively ^[1] 38:21 deep ^[1] 50:4 defendant ^[1] 50:11 deference ^[7] 9:17 15:12 26:20 56:2 59:12 65:5 71:11 deferential ^[9] 49:16 56:15 57:9,20 58: 20 59:4 64:14 65:14 81:3 deferentially ^[3] 11:24 19:5 42:14 delve ^[1] 50:4 denial ^[1] 20:13 depend ^[3] 24:25 52:23 53:23 depends ^[2] 30:8 72:22 describe ^[1] 60:20 described ^[1] 37:19 describing ^[2] 52:10,11 description ^[1] 34:3 designed ^[1] 54:7 determination ^[10] 9:19 37:10 42:15 51:1 59:15 63:1,2 66:21 71:17 82:3 determinations ^[10] 11:17,19 16:17 24:17 42:8 65:9 70:5 71:23 79:8,9 determine ^[1] 29:8 determined ^[1] 73:10 determines ^[1] 13:24 developed ^[1] 27:4 diagnosis ^[2] 74:5 84:17 dialogue ^[1] 41:3 difference ^[11] 24:7 32:20 39:6 40:11 45:5,8 62:20 63:6,18 64:7 66:2 different ^[14] 25:23 27:5 33:9,15 34: 16 35:6 41:6,9,16 45:13 49:12 52:4 60:14 65:24 difficult ^[1] 30:7 direct ^[1] 7:25 directed ^[1] 24:16 direction ^[1] 51:3 disability ^[5] 20:22,25 29:22 44:1 67: 25 disabling ^[1] 12:12 disagree ^[6] 22:1,3 66:3 70:3 75:1 77: 19 disagreement ^[1] 75:14 disbelieving ^[1] 17:1 discussed ^[3] 51:25 52:1 81:5 discussion ^[2] 23:18 56:14 dispositive ^[2] 30:4,18 disregarding ^[1] 14:21 distinction ^[1] 45:8 divergence ^[1] 43:18</p>
---	---	---

Official

<p>doctor [2] 74:6,8</p> <p>doing [15] 7:19,19 8:11 9:3 11:12 26:6 27:16 33:3 41:18 44:19,25 48:6 52:19 68:23 69:12</p> <p>done [5] 17:15 33:11 76:21 78:6 84:2</p> <p>doubt [15] 6:14 8:22 11:2,8 14:23 16:12 27:13 30:2 31:15 54:14 56:3 57:1,13,16 83:13</p> <p>drawing [1] 45:8</p> <p>dsm [3] 74:6,7,9</p> <p>due [21] 6:25 10:7,19 18:2,19 23:19,21 24:22,23,24 25:7,16 26:21 28:17 29:6 32:21 33:6 42:6 52:15 68:13 69:24</p> <p>duplicate [3] 44:25 75:22 79:16</p> <p>duplicative [2] 19:23 45:5</p> <p>duty [1] 51:8</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [6] 18:20 31:19,20 57:12 65:6 73:3</p> <p>earlier [2] 29:19 71:25</p> <p>earth [1] 57:15</p> <p>easily [1] 53:4</p> <p>effect [6] 19:22 23:7 45:10 51:18 79:20 81:21</p> <p>eglin [1] 27:9</p> <p>either [3] 18:11 21:17 63:8</p> <p>element [3] 56:25 57:12,15</p> <p>eliminates [1] 44:7</p> <p>emphasized [1] 51:8</p> <p>emphasizing [1] 79:19</p> <p>enacted [1] 43:2</p> <p>enactment [1] 46:19</p> <p>end [1] 73:21</p> <p>enforcing [1] 84:12</p> <p>enough [3] 37:25 76:18 82:20</p> <p>ensure [2] 76:21 77:2</p> <p>entail [1] 60:10</p> <p>entire [1] 68:19</p> <p>entirely [4] 10:12 63:4 80:17,18</p> <p>entitled [3] 14:22 21:9 56:6</p> <p>equal [2] 16:13 73:13</p> <p>equipoise [7] 11:7 13:8 16:14 30:9 54:17,18 70:16</p> <p>equivalent [1] 14:5</p> <p>err [4] 56:23 61:8 62:4 78:19</p> <p>erred [5] 32:4 57:10,11 64:24 78:14</p> <p>erroneous [9] 24:4 37:7 38:10,11 39:5,16 49:2 61:25 64:5</p> <p>error [67] 9:9 10:20 11:3 12:7,7,22,23 13:13,19,25 14:12,21 15:6 16:10,14 18:11 20:10 22:21 23:22,25 24:6 26:17 27:14 28:13 29:5,5,9 31:20 32:22 35:19,21,24 38:17 39:4,6 42:14,19 48:17 49:7 51:23 59:5,8 61:17,23 62:23 64:4,7,17 65:23 66:5 69:20 70:14,</p>	<p>17 71:5,24 76:24 77:1,23,25 81:10 82:3,9,23 83:5,9,12 84:19</p> <p>errors [3] 9:5 22:14 80:24</p> <p>essentially [3] 34:4 37:6 67:24</p> <p>esteem [1] 80:4</p> <p>et [3] 54:5 70:23 77:1</p> <p>evaluate [4] 11:12 41:2 57:3 64:23</p> <p>evaluated [1] 11:12</p> <p>evaluating [1] 54:16</p> <p>evaluations [1] 74:3</p> <p>even [22] 19:17 21:3 22:21 28:9 30:1,1 31:14 34:9,22 43:8,22 46:17 48:18 51:7 57:10 67:18 69:5 77:24 82:10,13,14,24</p> <p>everyone [2] 29:5 82:18</p> <p>everything [3] 42:23 76:14,22</p> <p>everything's [1] 16:13</p> <p>evidence [60] 6:10,13 8:19,21 9:6,11,12 11:13,13,14,14,23 12:2,23 13:8,16 15:9,22 16:1,2 17:9 31:4,6,8,9,13,14 32:10 36:2 37:3,21 41:2,12 42:16 54:17 55:22,24 56:13,17 59:24,24,25 60:15 61:12,16,20 63:3,13 67:16 70:13 71:12,16,19 72:4,5,20 73:18 74:19 83:8 84:21</p> <p>evidentiary [2] 9:13,22</p> <p>exactly [10] 8:11 20:20 52:21 62:6,11,14,17 63:16 83:1,9</p> <p>example [22] 7:10 12:5,6,10 14:10 15:10 20:2 26:5 29:19 36:15 38:3 41:11 43:7 48:2 60:8,25 67:11 70:12 73:23 78:11 81:6 84:14</p> <p>examples [3] 27:9 48:25 49:23</p> <p>except [1] 62:8</p> <p>exclamation [3] 43:5 45:21 80:17</p> <p>exclude [1] 50:7</p> <p>excluded [2] 50:12,17</p> <p>exemplary [1] 48:6</p> <p>exercise [1] 73:19</p> <p>existed [1] 54:8</p> <p>existence [1] 43:25</p> <p>existing [2] 55:11,11</p> <p>exists [2] 53:12 79:19</p> <p>expect [2] 10:5 47:5</p> <p>expert [11] 16:19,20,21,22 17:2,2 30:2,22 59:24 73:22 83:17</p> <p>experts [2] 29:21 38:3</p> <p>explained [1] 80:22</p> <p>explanation [1] 15:16</p> <p>explicit [1] 43:4</p> <p>express [1] 43:15</p> <p>expressly [1] 69:18</p> <p>extensively [1] 52:1</p> <p>extent [1] 54:24</p> <p>eye-catching [1] 51:5</p> <hr/> <p style="text-align: center;">F</p> <hr/>	<p>face [1] 57:14</p> <p>faced [1] 47:5</p> <p>facing [1] 77:10</p> <p>fact [32] 9:9 13:14,14,23 14:22 16:23,24 17:5,7,19 18:8,23 20:3 30:22 31:12,14,16 38:16,16 52:18 56:18,19 57:13 59:6 60:5 63:21 64:23 65:1,6,14 74:22 78:14</p> <p>facts [33] 10:14 18:13,22 24:4 32:14 35:16,17 36:16,19 37:7 39:5 56:19 58:10,11 59:8,9,13,14,23 60:1 62:22 64:5 67:12 72:17,19 73:3,7,8 74:23 76:23 77:23 78:12 82:14</p> <p>factual [41] 7:23 10:16,22 11:16,16,19 18:14,15,18 19:4 26:13,14 29:5 32:9 35:14,15 42:13,18,18 43:23 48:12 49:4 60:10,13 62:24,25 63:9,12 66:23 67:24 68:12 71:2 72:24 73:6,14 74:21,22,23 75:10 82:2 83:23</p> <p>fail [2] 48:20 49:1</p> <p>failing [1] 84:15</p> <p>failure [1] 14:16</p> <p>fair [1] 19:1</p> <p>fairly [2] 42:22 51:13</p> <p>far [1] 75:5</p> <p>favor [5] 13:9 30:15 31:10 38:22,23</p> <p>favorable [3] 36:17 58:11 63:24</p> <p>favor [1] 40:3</p> <p>favoring [1] 35:8</p> <p>favours [2] 37:21 38:7</p> <p>federal [11] 22:1,18 23:9 29:11 34:19 37:19 52:2 66:4 82:21,22 84:24</p> <p>feels [1] 53:10</p> <p>few [2] 17:16 60:8</p> <p>figure [1] 68:20</p> <p>figuring [1] 78:5</p> <p>final [2] 40:18 66:22</p> <p>find [8] 13:9,20 14:11 16:4 34:23 35:19,22 77:22</p> <p>finder [6] 56:19 64:23 65:1,7,15 78:14</p> <p>finder's [2] 56:18 60:5</p> <p>finding [16] 14:13 15:3,6 26:13 30:4,17,21 31:12,14 32:9 43:13 56:23 57:12 61:8 77:23 78:15</p> <p>findings [9] 19:4 26:14 31:20 32:13 35:15 49:4 67:25 68:13 71:2</p> <p>finds [1] 29:25</p> <p>fine [1] 23:11</p> <p>finish [2] 29:2 51:18</p> <p>first [11] 19:20 21:19,20 22:25 47:20 61:8,10,14 64:11 74:10 77:10</p> <p>fit [1] 70:9</p> <p>fix [1] 7:24</p> <p>fixed [1] 51:14</p> <p>follow [1] 21:14</p> <p>force [1] 27:10</p> <p>former [1] 44:9</p>
---	--	---

found [4] 24:6 49:7 57:15 59:23
free [1] 53:8
freestanding [1] 51:11
friend [3] 25:18 42:20 43:24
fulfilling [1] 53:11
full [1] 83:18
fundamental [1] 75:14
further [4] 20:22 33:18 65:3 75:18
future [1] 21:6

G

gain [1] 20:20
gap [4] 46:22 55:6,7,8
gave [5] 11:1 14:10 29:19 46:23 77:20
general [1] 39:17
generally [4] 43:4,20 44:24 76:16
generis [1] 8:5
generous [1] 17:23
genuine [1] 81:1
gets [2] 62:24 83:12
getting [2] 47:1 54:13
gilbert [1] 7:17
give [9] 8:22 12:5 16:11,25 19:22 21:20 26:5 46:16 48:2
given [14] 9:17 11:22 15:17 20:21 23:23 24:3,3,4 27:12 37:3 46:21 60:7 78:11 81:21
giving [10] 11:8 23:7 30:1 31:15 47:2,12 54:16,18,25 56:5
gorsuch [66] 21:13 22:3,6,17 23:14,17 24:2,10 29:7 36:11,12,19,24 37:5,13 38:2,14 39:2,8,11 41:3 45:4,12,15,20,25 46:1,7,10,13 47:6,10,17,24 48:16,19,22,25 49:4 51:19 55:21 57:17,21,25 58:4,18,22,25 59:3,6,9 62:18 63:20 64:9,10,15,19,25 65:11,16 66:7,10,13,18 79:25 80:1
gorsuch's [1] 28:20
got [7] 23:14,15 36:13 39:9 51:15 58:12 73:5
governing [1] 37:20
government [5] 7:12 27:10 37:25 38:24 82:1
government's [1] 67:18
great [1] 60:8
groups [2] 46:20 51:13
guess [1] 53:4
guidance [1] 23:10
gunshot [1] 12:13

H

happen [1] 84:5
happened [2] 16:24 82:7
happening [3] 70:1 82:6 84:4
happens [3] 16:15 19:9 70:21
hard [2] 38:11 84:1
harmless [4] 23:25 29:9 64:4,16

heard [2] 42:20 72:6
heavily [1] 35:17
heavy [1] 60:16
heed [1] 13:17
held [1] 82:22
helpful [4] 8:14 17:10 23:4 26:2
herbicides [1] 27:11
high [2] 49:13 80:4
highly [1] 44:1
historical [1] 59:23
history [3] 46:16,18 81:6
hmm [1] 38:8
holding [1] 47:2
holds [1] 80:5
honor [27] 6:18 8:1 12:5 19:19 20:24 22:1,10 24:1,9 27:24 31:25 32:16,24 33:4,12,23 36:1,18,23 37:12 38:13 39:1,7,20 41:9,21 81:24
honoring [1] 48:8
hope [1] 45:22
however [1] 16:15
hundred [3] 21:4,5,11
hypothetical [1] 29:20

I

idea [2] 37:23 81:22
identical [1] 27:12
identified [2] 48:5 80:21
identifying [1] 46:22
ignored [1] 10:25
ignoring [2] 54:3,11
illness [1] 20:8
illustrate [1] 68:11
imagine [2] 67:6,15
immerse [1] 63:12
implicit [1] 43:3
implies [1] 73:2
importance [1] 28:5
important [8] 21:7 23:7 24:15 28:7 52:11 53:6,25 84:13
impression [1] 77:20
inclined [2] 6:1 83:14
include [1] 18:6
included [1] 50:21
income [2] 50:7,13
incompatibility [2] 14:3,7
incompatible [1] 83:6
inconsistent [1] 43:22
incorrect [1] 84:17
indeed [1] 74:8
indicate [1] 10:10
indicates [1] 63:3
indicative [1] 28:5
individual [4] 20:25 21:7 62:22 71:23
indulge [1] 78:8
infer [1] 44:24
inferences [1] 15:15

inferred [1] 42:24
information [3] 6:10 8:18 16:21
injuries [3] 50:6,18,19
injury [3] 50:9,17 61:1
in-service [2] 43:25 68:1
instance [1] 14:10
instances [1] 80:3
instead [7] 7:24 10:6 16:4 37:8,22 81:22 83:4
instruction [1] 7:4
intellectual [1] 18:25
intended [4] 27:19,22 44:1 81:21
intensely [1] 74:22
interpretation [1] 43:9
interpretations [1] 44:4
interpreted [3] 21:22 22:24 24:11
interviewed [1] 38:8
invokes [1] 65:25
involve [1] 72:23
involves [2] 18:22 73:7
involving [2] 40:21 50:1
irregular [1] 44:2
isn't [12] 10:16 22:21 28:3 30:9,10 35:12 47:2,12 57:2 58:1 64:20 73:14
issue [15] 6:11,13 8:21 14:7 28:6 31:8 35:10 42:16 67:5 71:16,20 75:25 76:19 78:21 79:1
issues [5] 7:23 11:16 43:23 63:12 67:6
itself [8] 16:4 40:23 42:6,17,24 44:8 72:2 73:2

J

jackson [44] 8:6,10 9:16 19:9 27:18 28:19 29:3,13 40:17,18 41:14,17,22 49:20 52:23 53:1,22 55:2,7 56:9,24 57:2,6 59:7,11 67:14 68:3,6,9 69:1,22 70:7 71:7,10 72:9,13 73:4 74:11,17 75:3,6,11 80:11 83:1
jmol [2] 15:14,22
job [1] 38:5
joshi [96] 41:25 42:1,3 44:16,20 45:7,14,18,24 46:1,9,12,15 47:8,16,19 48:1,18,21,24 49:3,6,25 51:17 52:21 53:7,15,19,21 55:2 56:7,10,25 57:5,8,19,23 58:3,16,20,24 59:1,4,10,17 60:20,25 61:24 62:6,11,14,17 63:16 64:8,11,18,21 65:1,13,18 66:8,12,17,19,25 67:3,21 68:5,7,10 69:17 70:3 71:9 72:7,10,15 73:15 74:16 75:1,4,7,12 76:5,11 77:5,8,14,19 78:7,18,22 79:4,13,18,23 80:7
judge [2] 15:10 32:4
judged [1] 9:14
judging [1] 36:1
judgment [4] 13:4 15:11 31:3 83:5
judgments [4] 15:17,18 63:14 82:9

Official

<p>judicial [4] 42:10 43:19,20 81:19 juror [3] 37:1 57:14 58:13 jury [7] 56:20,22 57:10,11,12 58:14 65:2</p>	<p>linkage [3] 13:15 29:22 30:3 linked [1] 12:13 litigation [2] 17:24 50:5 little [9] 8:6 22:22 34:10 44:6 46:16 61:6 69:4 70:7 77:8 look [25] 8:14 11:3,9 16:19 17:6,10,14 20:14 25:12,20 28:16 33:18 36:15,16 46:21 48:11 62:21 70:4 73:15,22,24 82:10,13,17 84:1 looked [3] 74:4 76:22 81:17 looking [12] 9:8 10:23 25:8,24 27:2 41:11 56:17 77:17,18 78:4 84:12,20 looks [2] 24:2 52:4 loses [1] 35:9 lot [4] 56:7,13 58:9 77:2 low [1] 49:15 lower [8] 21:17 46:24,25 49:9 51:23 61:6 62:10 78:1 lunch [2] 57:12 58:6 lynch [2] 37:20 40:2</p>	<p>16,21 82:1 mentioning [1] 77:24 met [3] 56:4,25 57:13 middle [1] 35:10 might [6] 10:9 12:6 41:11 47:5 65:7 79:11 mind [1] 28:8 minimum [1] 83:23 minute [1] 50:15 misheard [1] 72:1 mistake [2] 14:20,25 mister [2] 49:20 60:18 mix [2] 49:12,16 mixed [14] 17:5,7,11,19 60:2,5,9 63:10,11 72:16,20,21,23 83:15 mm-hmm [3] 64:25 68:6 77:7 moment [1] 19:12 monthly [1] 21:9 morning [2] 42:21 43:24 morning's [1] 56:14 most [8] 8:14 17:16 36:17 57:19 58:10 63:8,24 67:8 motion [3] 15:11 32:8 56:22 ms [64] 6:16,18 7:7 8:9,13 9:20 10:9 11:18 14:9 15:5 17:6,21 18:4,10,21 19:10,18 20:24 21:15,25 22:4,9 23:3,16 24:1,9,12 25:25 27:24 29:10 30:6,24 31:3,25 32:7,15,24 33:4,12,17,22 34:15 35:3,25 36:13,18,23 37:4,12,18 38:13 39:1,7,10,19,25 40:7 41:8,15,20 62:21,21 80:13,16 much [2] 33:21 80:23 multiple [2] 59:18 84:11 must [4] 19:13 21:22,22 26:4</p>
<p style="text-align: center;">K</p> <p>kagan [18] 10:21 19:8 33:24,25 34:21 35:12 36:9 37:16 60:17,19 61:23 62:1,7,12,15,19 75:13 79:24 kavanaugh [18] 10:4 39:13,14,22 40:5,12 50:24 52:7,22,25 53:3,13,17,20 66:20 67:1,13 80:9 kavanaugh's [1] 18:2 kawashima [1] 50:2 keep [1] 74:21 kind [8] 9:25 13:3 27:14 41:18 63:9 83:16 84:3,19 knows [1] 37:14</p>	<p style="text-align: center;">M</p> <p>made [10] 11:3 24:7 39:6 43:4 50:14 53:24 64:6 68:24 69:25 81:18 majority [1] 67:22 mandatory [3] 6:8 25:5 29:12 manner [1] 24:11 many [2] 18:24 67:16 mariano [2] 52:3 81:25 marshal [1] 63:13 match [2] 49:13,16 materia [2] 22:24 66:14 material [5] 8:21 67:5,6 71:16,19 matter [13] 7:18 15:11 18:7,7 19:6 25:12 36:21 38:18 50:22 62:24 64:6 71:17 79:20 matters [2] 19:20,25 mean [19] 10:22 18:22 25:18,22 27:5,20 30:6 36:3 40:22 51:4 53:5,13,24 58:5 60:13 67:15 70:4 73:15 79:4 meaning [1] 55:7 meaningful [3] 26:3,23 27:17 meaningfully [1] 27:2 meaningless [1] 44:14 means [6] 23:24 38:24 60:14 68:16 72:10,11 measure [1] 15:12 measured [1] 78:1 measuring [1] 51:22 medical [12] 6:9 8:18 12:11,14,15 14:14 31:8 59:24 61:12 73:24 74:1,2 meet [13] 9:23 12:20 15:22 34:7,9 35:6,19,22 36:2 38:12 62:5 63:4 78:19 melanie [1] 80:14 mental [1] 50:18 mention [2] 48:15,18 mentioned [6] 43:24 51:19 75:12 77:</p>	<p style="text-align: center;">N</p> <p>narrow [2] 7:20 23:1 nation [1] 80:5 natural [1] 71:3 nature [1] 72:22 necessary [1] 14:1 need [4] 52:15 54:23 55:17,25 needed [1] 76:22 needless [1] 43:14 negative [7] 6:12 8:20 71:13,16,22 72:4 73:9 never [2] 54:4 81:20 new [7] 10:12 41:5,8 46:2 69:24 80:17,18 next [2] 63:25 74:8 nexus [2] 12:19 14:13 nobody [1] 37:14 non-clear-error [1] 59:14 non-clearly [3] 37:7 39:5 64:4 non-deferential [1] 6:22 non-deferentially [2] 17:13 83:1 nonetheless [5] 6:2 12:7,17 14:15 26:</p>
<p style="text-align: center;">L</p> <p>lack [2] 14:13 49:1 lakeridge [1] 60:7 landscape [1] 81:19 language [14] 19:21 22:12,18 23:13,19 24:14,14 28:21 38:22 39:4 44:2 75:23 79:7 80:2 largely [1] 43:9 last [4] 28:10 63:7,8 78:17 latter [1] 44:9 laughter [1] 39:18 law [42] 6:24 7:18 12:3 14:25 15:1,12 17:5,7,16,18,19,22 18:7 19:1,2,6 25:13 27:4 31:22 32:6,11 36:8,21 38:18 47:14,23 49:23 51:2,10,24 55:19,23 57:3,7 60:3 64:6 72:5,6 74:25 81:1 83:17,20 lay [5] 6:9 8:18 31:7 59:24 61:12 laypeople [1] 76:17 leap [1] 7:6 least [5] 7:13 18:14 52:12 82:18 83:25 leave [1] 23:8 leaves [1] 42:25 legal [55] 7:2,5,12 9:21 11:3 12:7 13:12,19 14:21 16:10,14 17:12,20 18:19 24:5 26:15 27:14 29:4 36:20 37:2 42:11 51:1,8 55:21 56:4,18 58:1,12,14,16 59:14,20,25 60:11 61:17 63:5,7 64:13,16,19,21,22 66:15 70:10,14,16,18 71:1 72:8,11,24 74:20 75:7 76:24 82:20 legislative [1] 81:6 less [2] 35:23 37:16 level [4] 21:5,11 26:20 35:5 levels [1] 65:4 light [4] 36:16 52:13 58:10 63:24 limited [1] 82:23 line [2] 25:15 37:9</p>	<p style="text-align: center;">M</p>	<p style="text-align: center;">N</p>

Official

<p>10 non-physical [1] 50:18 nor [1] 70:20 norm [1] 68:25 normal [1] 36:14 normally [1] 66:13 note [1] 23:15 nothing [1] 43:6 novo [19] 10:3,8 11:4 15:8 24:5 30:23 31:2,23 36:22 42:13 43:13,18 49:16 63:23 64:5 65:9 66:15 68:15 83:23 nullities [1] 45:2 nullity [3] 44:25 45:9,23 number [2] 28:8 65:21 numbers [2] 40:4 73:17</p>	<p>others [2] 27:13 29:11 otherwise [1] 6:1 out [11] 25:11 31:7 37:25 57:12 58:6 68:21 69:13 70:6 78:5 79:1 83:3 outcome [4] 24:8 26:11 76:8 82:2 outside [1] 71:9 over [3] 17:2 38:16 44:9 overly [1] 81:3</p>	<p>plaintiff [4] 16:12 35:22 62:4 63:3 plausible [3] 14:12 39:21 48:13 please [1] 42:4 point [17] 17:4 22:10 23:20 27:7 28:20 33:20 40:19 42:9 43:5 45:21 51:14 54:22 57:8 64:22 80:17 81:4 83:3 pointed [2] 51:3 79:1 policing [1] 54:24 position [2] 63:17 67:18 positioned [1] 69:14 positive [9] 6:12 8:20 71:13,15,21 72: 3,4 73:9 84:16 possible [1] 78:12 practical [1] 79:20 practice [1] 52:11 pre-2002 [1] 84:4 precedent [2] 79:8,10 precise [2] 16:21 26:20 predominantly [4] 17:12,20 42:18 75: 9 preexisting [2] 47:22 51:8 prejudicial [8] 10:20 22:21 23:22 32: 22 39:3 65:23 66:5 71:5 prejudicial-error [1] 25:1 premise [4] 39:15 52:8 53:5 64:12 preponderance [10] 13:16 15:24 34: 18 37:24 41:13 49:10 51:23 61:6 78: 1,13 present [2] 16:2 67:25 presentation [3] 6:21 21:16 78:25 presented [11] 9:1 19:21 21:22 22:12, 22 23:2,6 66:9 74:1 79:7 80:24 presents [2] 7:12 76:1 presley [2] 48:10 51:20 presumption [1] 78:8 pretty [4] 6:24 38:20 69:21 75:23 prevailing [1] 36:17 preventing [1] 27:16 primarily [5] 60:10,11,13 72:23,24 principles [3] 42:10 43:19 66:1 pro [1] 28:9 probable [2] 17:17 36:6 probably [2] 60:8 80:7 probative [2] 11:22 12:17 problem [10] 7:24 15:2 47:8 77:4,9 80: 20 81:2,13 82:16 84:18 proceeding [1] 14:23 proceedings [1] 24:18 pro-claimant [1] 8:3 prohibition [1] 43:17 proof [33] 9:24 10:1,2 13:1,10,18,21 14:1,6,17 15:7,23 25:11,12 34:5,14, 16 35:1,20,23 36:3 37:24 46:24,25 49:9,11,14 51:22 61:5 72:17,19 77: 25 78:13 proof's [1] 52:18 properly [1] 54:17</p>
<p style="text-align: center;">O</p> <p>object [2] 22:7,10 obligates [1] 8:17 obligation [15] 13:14 28:17,23 29:12 33:7 47:22,25 48:1 53:10,11,16 54:8 69:7,7 84:9 obligations [1] 25:9 observe [1] 42:23 obvious [2] 42:22 69:10 obviousness [1] 19:1 odd [2] 22:22 54:21 offer [1] 43:11 o'gilvie [3] 50:2,2 80:25 okay [16] 25:1 30:3 34:21 36:9 38:2 39:2,5 56:7 58:18 61:18 66:18 67:2, 13 72:9 79:15 80:11 old [1] 76:15 once [2] 59:13 72:3 one [40] 8:3 11:13 12:14,15 13:13,13 14:13 16:18,25 17:2,2 20:4,17 22:8 24:15 25:6 26:1 27:1 30:10 31:10 33: 2 37:21 38:5,7,9,16 40:3 44:5,6 49: 15,15,17 65:21 67:5 74:6,21 76:24 78:16 79:1 84:16 ones [1] 67:7 only [10] 9:8 32:25 33:2,21 46:14 62: 23 65:23 66:21 74:22 82:8 operates [1] 29:7 opinion [10] 12:14,15,18 14:14 15:19 22:11 25:15 37:20 74:1 84:16 opinions [6] 12:11 13:1 21:18 22:19 73:22,25 opposed [1] 54:23 opposite [1] 83:9 oral [1] 42:1 order [2] 19:21 44:12 other [28] 10:2 11:24 16:22 17:3,18 20: 7,13 23:10 25:18 28:24 30:11 31:10 37:22 38:6,16 40:3 43:23 49:18,22 50:14 55:16 71:13,24 73:3 74:2 78: 25 80:20 83:17</p>	<p style="text-align: center;">P</p> <p>page [1] 27:7 pain [1] 12:12 parallel [1] 28:20 pari [2] 22:24 66:14 part [6] 10:17 23:7 51:9 61:10 74:23 84:18 partial [1] 22:7 particular [7] 9:4 13:21 32:4 42:16 62: 24,25 75:9 parties [2] 28:4 75:14 party [9] 6:21 11:2 13:10,13,13 21:16 36:17 76:1 78:15 party's [3] 11:14,14 12:2 pass [2] 53:9,18 passed [5] 44:14 47:14 48:8 50:15 51: 25 passing [1] 49:23 past [1] 81:16 patent [1] 19:1 people [1] 54:25 percent [12] 21:5,11 34:7,9,11,18,23 35:20 37:17 62:2,5,9 perfect [1] 70:16 perform [2] 20:15 26:4 permanent [1] 21:2 permissible [3] 12:22 83:8,11 person [1] 30:10 personal [2] 50:6,17 persuaded [2] 16:4 30:10 persuasion [1] 15:13 persuasive [3] 11:22 15:18 30:3 persuasively [5] 31:10 35:7,8 37:21 40:3 persuasiveness [1] 9:11 pet [4] 8:15 22:11 23:13 26:7 petitioner [1] 67:19 petitioners [7] 20:1 42:21 43:11,12 66: 4 78:23 80:15 petitioners' [2] 46:17 55:4 physical [1] 50:9 pick [2] 16:9 44:9 piece [8] 7:15 9:11 11:23 23:6 25:9,10 31:12 65:19 pieces [6] 24:14 31:5,13 56:11 64:9 73:17 place [1] 71:3 placed [1] 80:18</p>	

<p>property ^[1] 18:25 proposal ^[2] 69:18,23 propose ^[1] 21:23 proposition ^[1] 39:17 prove ^[1] 13:14 proved ^[1] 31:16 provide ^[2] 15:19 83:20 provision ^[9] 10:12 22:23 44:15 75:22, 24 76:3,9,20 79:17 ptsd ^[8] 20:5 61:2,3 74:2,6,7,9 84:16 pudding ^[1] 52:18 punishing ^[1] 50:10 punitive ^[4] 50:8,12,16,20 pure ^[1] 63:9 purely ^[1] 18:15 purpose ^[2] 26:24 51:7 pursue ^[1] 29:18 push ^[3] 51:13 64:11 77:8 put ^[19] 9:12 10:11 18:11 27:21 31:21 40:4 43:5 45:25 66:10,10,11,11 69: 23 70:5,8,20 71:3,9 73:16 putting ^[2] 28:1 60:15</p>	<p>real ^[1] 43:18 really ^[11] 21:17 25:19 33:21 38:5,20 53:25 54:12 65:13 68:24 76:1 77:22 reason ^[3] 42:21 49:17 82:20 reasonable ^[7] 37:1 50:23 57:1,13,14, 16 58:13 reasons ^[5] 17:1 19:18 24:13 81:11 83: 17 reasons-and-bases ^[1] 15:20 rebuttal ^[2] 80:13,14 receive ^[1] 20:19 received ^[1] 12:13 receives ^[1] 6:13 receiving ^[1] 21:4 recently ^[1] 38:9 recognition ^[4] 18:13 49:8 51:21 80:4 recognized ^[3] 7:17 24:20 81:8 recognizing ^[2] 76:18 77:24 record ^[17] 8:19 9:23 14:14 24:3,18 28: 5 42:16 48:14 60:1 61:13,20 63:23 68:20 70:13 72:19 73:25 83:18 records ^[1] 27:12 recounted ^[1] 46:17 redundancy ^[6] 44:6,7 45:3,6,23 76: 12 redundant ^[3] 43:9 44:22 75:22 reeves ^[1] 36:4 regarding ^[1] 71:16 regularity ^[1] 78:9 regulations ^[1] 74:5 rejected ^[7] 34:19 37:23 48:12,13 69: 19 70:2 82:5 rejecting ^[1] 32:4 relative ^[1] 82:9 relevant ^[4] 6:10 31:8 76:23 84:22 relief ^[1] 20:22 relies ^[1] 22:12 remains ^[1] 35:4 remember ^[2] 56:16 76:16 remind ^[2] 47:21 54:7 reminds ^[1] 53:9 rendered ^[1] 36:22 renders ^[1] 43:9 report ^[1] 48:3 represented ^[2] 76:17 78:2 require ^[4] 29:4 69:2 74:5 76:20 required ^[2] 15:19 19:24 requirement ^[1] 15:20 requirements ^[2] 6:8 8:17 requires ^[3] 6:9,11 83:25 resist ^[1] 42:21 resolution ^[1] 60:5 resolve ^[1] 40:9 resolved ^[2] 20:4 22:4 respect ^[2] 41:6 56:3 respectfully ^[1] 21:25 respondent ^[1] 42:2</p>	<p>responding ^[1] 80:19 result ^[2] 25:23 44:2 retain ^[1] 71:11 reverse ^[2] 61:17 84:23 reversing ^[1] 52:6 review ^[80] 6:22 7:5,9,20,23 9:6 10:6,7, 13 11:4 12:21 14:8 17:25 18:6,8,12, 20 20:15 21:3,19 22:20,20,21 23:25 24:18,20 26:23 27:17 28:4 30:19,23, 23,25 31:2,17,21,23 33:10,16 41:19, 19 42:10 43:16,19,20 49:9,12,17 52: 5 56:15 57:23 60:4,4,24 62:25 63:23 64:14 65:4 66:1 67:10 68:15,19 69: 19,20 70:1,13 71:24 72:21 75:24,25 81:10,10 82:3,19,20,22,23 83:4,25 84:13 reviewed ^[14] 11:23 12:3 15:6,7 17:13 19:4,6 42:19 43:13,24 62:23 81:4 82: 8,25 reviewing ^[21] 7:18 8:2 10:3 15:2,11 23:24 25:7,11 36:15 56:17,21,21 60: 4,21,21 65:6,6 68:12 70:25 80:23 83: 18 reviews ^[2] 42:11 65:8 roberson ^[1] 81:16 roberts ^[20] 6:15,17,23 25:14 29:1,14 32:17 33:24 36:10 39:12 40:13,16 41: 23 49:19,21 50:25 75:16 79:24 80:8 84:25 role ^[1] 10:19 roughly ^[1] 73:13 rubber ^[2] 26:1 84:3 rule ^[27] 10:25 14:5 16:11 23:21 27:3 32:21 34:3,8,13,18,19 35:2 40:25 41: 10 47:13 52:14,16 54:4,23 55:13 60: 23 70:10 71:5,14 80:3 83:10 84:3 rules ^[1] 61:2 ruling ^[1] 29:11 runs ^[1] 69:8</p>
<p style="text-align: center;">Q</p> <hr/> <p>qualified ^[1] 38:4 qualitative ^[1] 73:20 qualitatively ^[1] 41:18 quantify ^[2] 39:23,23 question ^[76] 7:12 9:21 10:16,22 12:1, 2,3,12 13:11,23 15:21 17:5,7,11,12 18:2,14,15,23,23 19:17 20:18 21:15, 16,21 22:5 23:1 29:22 31:22 32:3,6, 11 33:23 35:16 36:8 40:8 45:16 46: 11 50:7 55:14,21 57:3,6 58:12,15,25 60:2,3,5,10 62:8,16 63:5,7,9,10 64:9 68:4 72:5,6,11,16,20,21,23 73:12,14 74:21,25 75:8,20 78:17 83:15,16 84: 6,22 questions ^[4] 17:19 23:5 44:11 63:11 quick ^[1] 20:18 quite ^[1] 7:6 quoting ^[1] 46:4</p>		
<p style="text-align: center;">R</p> <hr/> <p>raise ^[9] 19:15 20:5,9,9 28:4,12 76:19 78:23 79:2 raised ^[7] 20:12 22:14 26:8 54:4 66:16 76:24 82:11 raises ^[1] 61:1 raising ^[1] 67:24 ran ^[1] 38:9 rare ^[2] 16:7 31:4 rather ^[2] 21:19 22:8 rating ^[4] 20:5,7,13 21:6 reach ^[4] 19:17 61:21 78:20 79:6 reacted ^[1] 47:4 read ^[4] 55:3,3 66:8,13</p>		<p style="text-align: center;">S</p> <hr/> <p>same ^[15] 12:4 24:11,13 25:2 39:3,16 41:18,18,21 53:18 62:8,16 64:1,1 82: 4 sanders ^[1] 24:20 satisfied ^[4] 13:22,22 72:14,15 satisfies ^[1] 59:15 saw ^[1] 77:4 saying ^[22] 10:6 11:3 25:16,20 41:4 46:23 47:11,15 49:7 50:16 54:14,23 55:17,25 59:1 63:6 69:14 74:1,17,21 77:22 79:14 says ^[27] 6:24 7:3 12:14,15,16,18 14: 15 16:8,11 25:18 29:6 30:2 32:21 33: 6 38:5,6 45:9 60:13 61:1,3,11 62:21 67:5 70:14 71:14 75:24 82:2 scales ^[4] 9:13 60:15 75:5,8</p>

Official

<p> schooled ^[1] 76:18 scope ^[1] 19:11 scrutiny ^[1] 26:21 se ^[1] 28:9 second ^[5] 29:19 39:22 58:4 65:18,19 secretary ^[11] 8:22 9:1 10:24 24:19 32:23 61:11 69:8,12 70:14 73:10 77:16 secretary's ^[15] 7:11 25:4 26:22 33:7,19 37:8,10 38:21 42:7,12,15 61:9 65:25 68:14 71:18 section ^[12] 6:5 7:11 8:15,16,25 9:5 25:5 26:18 33:8 63:25 80:16 84:10 see ^[11] 11:2,7 14:3,7 28:20 36:12,20 47:23 71:4,18 81:25 seeing ^[1] 60:16 seem ^[2] 7:1 25:19 seems ^[8] 18:5 23:22 51:1 52:9 53:5 54:21 74:20,25 senate ^[1] 48:3 sense ^[2] 8:4 54:9 sentence ^[2] 51:5 80:18 separate ^[3] 10:12 28:23 70:24 separately ^[2] 23:18 52:13 serious ^[1] 43:17 serve ^[1] 51:6 served ^[2] 27:9 80:5 service ^[2] 12:14 29:23 service-related ^[1] 38:6 services ^[1] 80:6 set ^[3] 16:16 17:1 78:11 sets ^[1] 25:11 shall ^[4] 6:25 8:22 25:6 75:24 shift ^[1] 34:14 shifting ^[1] 35:1 shortly ^[1] 51:24 shouldn't ^[2] 26:6 78:22 shown ^[1] 26:17 side ^[9] 16:18 25:18 31:10 37:21 40:3 50:15 71:22 78:25 80:20 sides ^[3] 16:8 23:23 63:18 side's ^[1] 55:16 significant ^[1] 51:13 similar ^[2] 38:20 41:1 simplified ^[1] 12:10 simply ^[5] 10:13 16:8 46:3,5 51:7 since ^[1] 20:18 situated ^[1] 68:17 situation ^[3] 14:2 21:8 29:24 situations ^[1] 67:16 slightly ^[1] 35:22 someone ^[1] 33:10 somewhere ^[1] 71:4 sopan ^[1] 42:1 sorry ^[8] 13:5 22:20 28:24 44:10 48:24 53:1 56:9 68:7 sort ^[8] 7:3 8:5 9:12 28:22 29:4 35:7 44:5 51:2 </p>	<p> sotomayor ^[26] 13:5 16:6 17:15 18:1,5,17 32:18,19,25 33:5,14,20 65:21 75:20 76:7,13 77:7,12,15 78:4,16,20,24 79:11,14,21 sounds ^[2] 11:16 74:18 special ^[1] 21:9 specific ^[4] 8:7 28:3,12 43:5 specifically ^[2] 20:9 43:21 spin ^[2] 70:6,6 sponte ^[1] 19:14 squarely ^[2] 21:17 23:1 stamp ^[2] 26:1 84:3 standard ^[81] 7:2,5,8,22 9:24 10:1,6,13 12:8,21,25 14:17 15:3,7,23 17:23,25 18:6,8,12,20 25:11,12 31:17 33:15 36:3,25 37:2 38:11,24 40:21,23,23 41:13 42:9 43:15,19 46:24,25 48:23 49:9,14 51:21,21 55:23 56:5,15,19 57:9,23 58:1,16,21 59:5,16,20,21 60:1 61:5 62:3,5,9,10 63:4 64:13,14,16,20,22,22 65:14 66:15 69:19 72:8,17,19 77:25 78:13 79:5 81:9 84:13 standards ^[4] 10:2 17:9 49:11,11 stands ^[2] 13:2 20:20 start ^[1] 56:12 started ^[1] 75:21 state ^[1] 9:22 states ^[1] 46:2 statute ^[27] 6:6,7 9:2 10:18 23:7 25:5 26:23 27:17,22 29:6 44:8 45:9 46:23 47:21 48:8 50:5,19 53:9 55:6,8,11,15 56:6 67:5 81:15,20 83:24 statutes ^[2] 50:1 66:14 statutory ^[6] 45:2 70:25 72:18 80:18 84:9,11 step ^[1] 61:8 stick ^[1] 70:17 sticking ^[1] 69:20 still ^[8] 34:24 35:23 41:17 43:10 47:14 52:4 84:8,11 stops ^[1] 16:9 story ^[1] 46:4 stringent ^[1] 35:23 strong ^[1] 68:24 stuck ^[2] 71:6 73:10 sua ^[1] 19:14 subject ^[9] 11:4 21:2 24:13 30:23,25 31:2,19,21,23 submission ^[1] 72:25 sub-provision ^[1] 80:19 subsection ^[10] 8:25 19:24 24:15,16 28:1 42:8,24,25 43:18 44:23 subsequent ^[2] 50:16 54:7 subsidiary ^[7] 19:4 32:14 35:15 66:23 67:4,6,11 substantially ^[1] 33:9 substitute ^[1] 62:9 </p>	<p> suffer ^[4] 61:1,3 74:3,9 suffered ^[1] 74:1 suffers ^[1] 74:7 sufficiency-of-the ^[1] 56:16 sufficiency ^[15] 15:8 32:10 36:2 37:9 41:2,12 55:22 56:12,20,22 64:12 65:2,9 74:19,20 sufficiency-of-the ^[1] 17:8 sufficiency-of-the-evidence ^[3] 11:25 41:19 63:22 sufficient ^[8] 9:23 15:22 16:1,2 36:21 55:24 58:5 74:19 suggested ^[1] 55:21 suggesting ^[1] 46:13 suggests ^[3] 22:19 27:22 29:8 sui ^[1] 8:5 suited ^[1] 68:22 sum ^[1] 54:2 super ^[1] 38:4 superfluous ^[4] 50:20 76:3,9,10 superintend ^[1] 26:25 supervising ^[1] 27:15 supplied ^[1] 43:16 support ^[2] 16:17 36:21 supported ^[1] 77:11 suppose ^[1] 54:6 supposed ^[8] 7:18 8:7,10 9:3 25:17 60:22 70:1 83:10 supreme ^[1] 65:8 surely ^[1] 17:11 sympathetic ^[1] 23:20 system ^[5] 8:3 26:2 68:25 76:15 77:3 </p> <hr/> <p style="text-align: center;">T</p> <hr/> <p> tackle ^[2] 21:20 23:1 tadlock ^[3] 29:11 66:6,8 tale ^[1] 46:18 talked ^[1] 63:11 talks ^[3] 27:8 36:5,7 taxable ^[1] 50:6 teeth ^[1] 38:25 tension ^[1] 43:17 tenth ^[4] 43:6 45:21,22 46:3 terms ^[2] 25:23 60:8 test ^[8] 17:11 30:8,9,10 38:9 41:16 50:23 82:25 testify ^[1] 29:21 tests ^[2] 18:24 19:3 text ^[2] 19:22 43:15 textual ^[1] 42:9 therefore ^[1] 71:20 there's ^[22] 12:22 13:15,23 14:15 15:12 22:18 23:18 31:5 32:7,8 38:17 45:7 48:14 49:13,17 51:1 64:3 65:4 67:25 68:24 74:14,15 they've ^[1] 16:13 thinking ^[1] 48:4 </p>
--	--	--

Official

thinks [2] 66:4 83:22
thomas [5] 29:16 44:12,17,18 75:18
thomas's [1] 45:16
thornton [5] 20:3,18 26:8,13 79:1
thornton's [2] 26:7 82:12
though [5] 21:3 53:24 58:1 82:11,15
three [1] 35:7
threshold [2] 29:4 35:6
today [4] 72:25 82:6 84:5,8
together [1] 31:22
took [4] 7:25 10:17 40:22 43:3
total [2] 20:25 54:2
totally [1] 35:14
toxic [1] 27:11
traditionally [1] 12:3
treated [1] 83:16
trial [2] 32:2 43:17
tribunal [1] 83:18
trivial [1] 73:19
truly [1] 67:16
try [2] 39:23 83:4
trying [1] 40:4
turn [1] 6:8
two [26] 6:8 8:17 12:11,22 13:1 20:3
 24:12,14 25:6 29:21 31:5 38:3 39:14
 44:4 48:5,9 49:12 63:18 65:19 68:2
 77:16,21 83:5,7,11 84:17
typical [1] 11:16

U

u.s [1] 63:10
ultimate [10] 12:1 14:8 15:21 18:23 19:
 5 36:8 63:1,2 67:7,11
uncertainty [1] 81:1
under [22] 6:1 8:24 12:21 15:3,19 17:
 10 18:12 19:24 20:12 29:9,10 42:8
 43:23 55:10,11 56:6 70:5 79:8,9 82:
 23 83:7 84:9
underlying [1] 11:19
underscored [1] 69:6
underscoring [1] 69:9
understand [13] 10:23 13:6 20:19 22:
 17,23 34:1 38:19 53:25 56:24 62:20
 64:15 73:7,13
understanding [1] 64:2
understood [1] 27:20
undiagnosed [1] 20:8
unemployability [2] 20:21 21:1
unfortunate [1] 69:4
unfortunately [1] 81:14
uniformity [2] 27:6 83:20
unimportant [1] 75:22
unique [8] 8:1,2 9:25 17:22,25 40:21,
 24 83:24
uniquely [2] 8:3 17:23
united [1] 46:2
unlawfully [1] 70:23

unless [2] 70:15 76:1
unlike [2] 17:23 24:15
unusual [2] 6:24 19:7
up [7] 21:14 34:22 56:13 61:9 65:3,5
 73:18
useful [1] 51:6
useless [2] 79:17,18
usual [1] 62:2

V

va [1] 6:9
value [2] 11:22,22
vast [1] 67:22
verdict [1] 36:22
versus [1] 29:5
veteran [12] 6:13 8:25 16:2,5 35:8,8,9,
 9,11 54:25 56:5 83:12
veterans [64] 6:20 7:16 8:8 9:2,7,13,
 18 14:11 19:13 20:7,10,14 22:15 24:
 16 26:4,6,10,15,25 27:1,9,11,15 28:8,
 9,11,16,17 29:25 30:20 31:18 33:1
 39:20 42:5,11 46:20 47:2,12,22 48:6
 51:12 52:3,12,15,19 54:1,3,8 55:15
 61:4 67:23 68:11 76:16,20 77:17,22
 78:9 80:23 81:2,15 82:2 84:1,10,19
veteran's [1] 12:12
victor [1] 58:11
view [15] 6:16,19 7:16 8:24 12:24 14:4
 17:19 20:12 21:19 32:5,16 41:8 51:
 14 63:17 83:14
views [3] 12:22 83:8,11
village [1] 60:7
violation [1] 12:25

W

wait [1] 50:15
wanted [4] 23:8 51:10 69:10 71:11
war [1] 44:8
way [16] 10:10 14:1 21:23 25:2 35:1,
 13 37:18 39:3,20 43:23 44:3 47:5 52:
 10 64:1 69:4,4
weigh [2] 35:16 63:13
weighed [2] 11:13 74:24
weighing [1] 73:2
weight [2] 63:2 68:20
weights [3] 60:14 73:2,17
weisgram [1] 36:5
welcome [2] 44:10 58:7
wensch [2] 81:5 82:4
whatever [7] 26:20 36:2 46:25 54:14
 56:2 62:10,12
whatnot [1] 29:5
whereas [1] 41:10
whether [36] 9:8,9,13,21 13:15,24 15:
 23 21:18 22:25 24:6 25:8 29:8 32:3
 37:9,9,20,22 46:24 54:17 58:13 59:
 15 63:2 64:3,5,23 69:11 71:19 72:13,

15 73:12 74:14,24 75:21 76:24,25 84:
 20
whichever [1] 13:10
whole [2] 16:16,25
wholly [1] 79:17
will [6] 23:24 24:24 27:3,6 36:16 61:4
willing [1] 44:21
win [4] 22:7 34:9,12,24
wins [2] 20:23 35:8
withheld [2] 70:23 71:1
without [2] 49:8 77:24
wonder [2] 21:18 22:25
wondering [1] 47:13
word [1] 73:1
words [5] 18:9 24:22 28:24 53:18 71:
 13
work [16] 27:23,25 43:1 44:18,22,23,
 23,25 45:5,17 60:10,11 72:24,24 77:
 2,5
worked [2] 79:23 81:23
works [4] 15:9 32:16 39:4 64:1
world [1] 71:18
worried [1] 54:12
wound [1] 12:13

Y

year [2] 28:10 81:15
york [1] 46:2

Z

zone [1] 35:10
zones [1] 35:7