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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	AMY M. SAHARIA, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ASHLEY ROBERTSON, ESQ.	
7	On behalf of the Respondent,	
8	supporting vacatur	19
9	ORAL ARGUMENT OF:	
10	JOHN F. BASH, ESQ.	
11	Court-appointed amicus curiae	
12	in support of the judgment below	37
13	REBUTTAL ARGUMENT OF:	
14	AMY M. SAHARIA, ESQ.	
15	On behalf of the Petitioner	71
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:37 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next this morning in Case 24-482,
5 Ellingburg versus United States.

6 Ms. Saharia.

7 ORAL ARGUMENT OF AMY M. SAHARIA
8 ON BEHALF OF THE PETITIONER

9 MS. SAHARIA: Mr. Chief Justice, and
10 may it please the Court:

11 The MVRA classifies restitution as
12 criminal punishment and is thus subject to the
13 Ex Post Facto Clause. Just like imprisonment
14 and fines, restitution is part of an offender's
15 criminal sentence, imposed at the end of a
16 criminal proceeding as a consequence of
17 conviction. The sentence is the punishment for
18 the crime.

19 Other features of the MVRA confirm
20 this conclusion. Restitution is intertwined
21 with other punishments and can be the only
22 punishment for misdemeanors. Like fines,
23 restitution is enforced with the threat of
24 summary imprisonment. And the Federal Rules of
25 Criminal Procedure and the chapters of Title 18

1 that govern sentencing apply.

2 All of this is why, in a trio of
3 cases, Paroline, Pasquantino, and Kelly, this
4 Court called restitution a criminal punishment
5 that serves punitive and penological purposes
6 and a criminal sanction that furthers the
7 government's interests in rehabilitation and
8 punishment.

9 Amicus responds that victim
10 compensation is the primary purpose of
11 restitution. But that purpose-based analysis
12 overlooks the threshold classification
13 question: Does the statute on its face impose
14 criminal punishment?

15 The answer here is yes. Criminal
16 punishments may serve multiple purposes at the
17 same time. Imprisonment punishes but also
18 protects the public. The same is true of
19 restitution. It punishes the offender and, if
20 the offender pays, compensates the victim.

21 Finally, this case presents the
22 question presented. The MVRA is the law being
23 applied to Petitioner retroactively. The
24 district court that denied the show-cause
25 motion applied the MVRA, and the Eighth Circuit

1 then affirmed on the ground that the MVRA
2 imposes a civil remedy. The petition
3 challenges that case-dispositive holding.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: Aren't we going to
6 have to wrestle with the fact that Petitioner
7 was not originally sentenced under the MVRA?

8 MS. SAHARIA: We don't think you --
9 the Court needs to wrestle with that fact. And
10 I'll start by saying it's not clear what
11 statute the original sentencing a court --
12 court applied 30 years ago. All we have is a
13 judgment form. The judgment form simply
14 imposes an amount of restitution. And at
15 the -- there's one portion of the judgment form
16 that -- at Pet. App. 27a that cites to Section
17 3663 in one paragraph, but the checks -- check
18 box in front of that paragraph is not checked.

19 So there's nothing in the judgment
20 form that indicates whether the district court
21 that sentenced Mr. Ellingburg applied the VWPA
22 or the MVRA.

23 Now, under the rationale of the
24 decision below of the Eighth Circuit, the MVRA
25 was the statute that governed the restitution

1 order imposed at sentencing because the Eighth
2 Circuit held, at the urging of the government
3 in this case, that the MVRA imposes only a
4 civil remedy. As a result, under the effective
5 date provision of the MVRA, it was in effect at
6 the time of the sentencing, and it applied
7 because there was no constitutional barrier to
8 its application.

9 That is the rationale that the
10 government argued to the Eighth Circuit below.
11 The Eighth Circuit accepted that argument. The
12 government continued to argue that in its brief
13 in opposition to our cert petition at page 3,
14 where it again said that the MVRA was the
15 statute that governed this restitution order.

16 JUSTICE JACKSON: And isn't your key
17 point that regardless, regardless of what
18 happened 30 years ago, today, your client is
19 being held to the responsibilities of the MVRA?

20 MS. SAHARIA: Absolutely, Your Honor.
21 The --

22 JUSTICE JACKSON: So, you know, you
23 still, I would think, have an ex post facto
24 argument because no one disputes that the MVRA
25 was not in existence at the time he committed

1 the crime.

2 MS. SAHARIA: Correct. We all agree
3 that the statute that is being applied
4 retroactively is the MVRA.

5 JUSTICE JACKSON: Is the MVRA.

6 MS. SAHARIA: Correct. We couldn't
7 make an argument that the VWPA was applied
8 retroactively. That was in effect at the time
9 of the offense in this case.

10 JUSTICE JACKSON: And, of course, you
11 would win if you did because then he couldn't
12 be held to the very provision that you are
13 trying to get nullified.

14 MS. SAHARIA: That is the argument
15 that -- that we will make on remand if we end
16 up on remand. I think the government takes a
17 different position on that issue. They think
18 that the MVRA's liability period provision can
19 apply even if the restitution order was -- was
20 imposed under the VWPA. But that would be an
21 issue for the Eighth Circuit to resolve on
22 remand.

23 Now, on the merits, I will just start
24 by saying that it's crystal-clear that
25 restitution is part of the criminal sentence.

1 This Court said that in Manrique, and there are
2 a number of textual indications of that fact in
3 the statute. Starting with Section 3556, which
4 is in the chapter entitled Sentences, that
5 provision instructs courts to impose
6 restitution in imposing a sentence on a
7 defendant. It then points courts to 3663 for
8 discretionary restitution and 3663A for
9 mandatory restitution, both of which instruct
10 courts to impose restitution when sentencing a
11 defendant.

12 In numerous parts of the code, the
13 court -- Congress used language, the language
14 "a sentence of restitution." For instance, in
15 3611, it said a person who has been sentenced
16 to pay a fine, assessment, or restitution,
17 sentenced to pay restitution. And it makes
18 sense that Congress made restitution part of
19 the sentence because it viewed restitution as a
20 punishment that had consequences for other
21 criminal punishments.

22 JUSTICE ALITO: Section 3664(m) allows
23 victims to enforce restitution as a judgment
24 lien under state law. Are you aware of any
25 criminal punishments that victims can enforce

1 personally?

2 MS. SAHARIA: No. I think this is
3 probably the only one. The MVRA gives victims
4 a very limited right to enforce restitution by
5 obtaining a lien on property within the state
6 where the conviction was imposed.

7 It does not give victims the full
8 range of civil enforcement mechanisms, such as
9 garnishment, for instance. It does give that
10 full range of enforcement mechanisms to the
11 attorney general. The attorney general has the
12 same authority to collect restitution as -- as
13 she does to collect fines. And it's telling
14 that Congress treated restitution just like
15 criminal fines, both in terms --

16 JUSTICE ALITO: But doesn't -- doesn't
17 the fact that the victims can enforce the
18 restitution order themselves cut strongly
19 against your argument that -- that restitution
20 is penal rather than -- than looking to -- to
21 provide remedies for the victims?

22 MS. SAHARIA: I don't think so when
23 you look at the entirety of the statutory
24 scheme. Again, first, the fact that it is part
25 of the sentence. Second, that the sentence can

1 be enforced not only through civil liens but
2 through the defendant's freedom.

3 This Court made that point in
4 Pennsylvania Department of Welfare versus
5 Davenport, where it noted that restitution
6 obligations differ from ordinary civil
7 obligations because they are secured by the
8 defendant's freedom.

9 In Section 3614, Congress authorized
10 courts to -- to impose any term of imprisonment
11 that may have originally been imposed as a
12 resentence in cases where defendants fail to
13 pay both restitution and criminal fines.

14 JUSTICE KAVANAUGH: You -- you --

15 CHIEF JUSTICE ROBERTS: Is -- is there
16 any reason you can't have a civil proceeding
17 running parallel to the criminal proceeding?

18 You know, there -- there's a -- a
19 state has an agency to allocate fault in the
20 case of auto -- auto accidents, you know, and
21 whoever has to pay, you know, and somebody
22 steals a car and, you know, crashes the car and
23 he's criminally prosecuted for that and, on the
24 same -- in the same accident, just has to go
25 through a civil process where he may also be

1 assessed a fine.

2 Is there -- is there anything wrong
3 with that?

4 MS. SAHARIA: No. I think Congress
5 could have chosen to do something like that.

6 Now, depending on how it was
7 structured, that may raise some serious
8 problems under the Seventh Amendment, but
9 putting the Seventh Amendment consequences of
10 such a scheme aside, Congress might have
11 created such a system. But that's not what it
12 did here.

13 JUSTICE KAVANAUGH: Could it just say,
14 we intend this to be civil, and have the
15 operations of the statute operate in the same
16 way, and then we would say it's civil?

17 In other words, it seems odd that
18 so much turns on the label as opposed to the
19 operations of how the statute works.

20 MS. SAHARIA: Well, I think, if
21 Congress perhaps just said the word "civil"
22 but did everything exactly the same, we would
23 still be before you arguing that that is
24 quintessential criminal punishment. But this
25 Court has said that the -- that the inquiry at

1 the first step of the criminal punishment --

2 JUSTICE KAVANAUGH: Quintessential
3 why, if it's payment to the victim, just like
4 a tort suit? I know some folks have
5 characterized this as just a -- tort suit-like.

6 MS. SAHARIA: Sure. I think, if
7 it's -- if it's still part of the sentence that
8 is imposed by the sentencing court as part of
9 the sentence, together with imprisonment,
10 fines, probation, all of the other criminal
11 punishments, I think our position would still
12 be that is criminal punishment. But Congress
13 could have written a different statute that
14 would have accomplished something civil, again,
15 wrestling with the Seventh Amendment
16 consequences of that.

17 The Seventh Amendment is, I think,
18 important here because it is part of the
19 backdrop against which Congress legislated in
20 the MVRA.

21 In the wake of the VWPA, which was the
22 predecessor to the MVRA, the courts of appeals
23 uniformly rejected Seventh Amendment challenges
24 to restitution on the ground that restitution
25 is criminal punishment.

1 This Court commented on that uniform
2 consensus in Kelly versus Robinson before
3 Congress enacted the MVRA. This Court also
4 construed the VWPA in Hughey before the MVRA
5 and applied lenity to the VWPA as a criminal
6 statute.

7 All of that is part of the backdrop
8 against which Congress enacted the MVRA. And
9 not only did Congress not do anything to signal
10 it was intending to depart from that consensus,
11 but it carried forward the same operative
12 language from Section 3663 in the VWPA.

13 JUSTICE JACKSON: And in its
14 legislative history, didn't it seem as though
15 Congress was pretty clear that this was not
16 just about compensating the victims? I mean,
17 I see here a quote that Congress says that the
18 MVRA is "needed to ensure that the loss to
19 crime victims is recognized and that they
20 receive the restitution that they are due. It
21 is also necessary to ensure that the offender
22 realizes the damage caused by the offense and
23 pays the debt owed to the victim as well as
24 society."

25 So it seems as though, at a minimum,

1 Congress was doing more than just saying the
2 victim has to be compensated, and if that's the
3 case, why is it characterized as a criminal
4 statute if there are two motives operating?

5 MS. SAHARIA: Sure. May I answer?

6 CHIEF JUSTICE ROBERTS: Please.

7 MS. SAHARIA: So, to take those
8 questions in -- in two parts, first,
9 absolutely, Congress made crystal-clear in the
10 legislative history that it thought the MVR --
11 MVRA was a criminal statute. If you read the
12 Senate Judiciary Committee Report, it uses the
13 word "criminal" more than 40 times, and the
14 only time it uses the word "civil" is to
15 distinguish restitution from civil proceedings.

16 Now, to take the second part of Your
17 Honor's question, the -- the inquiry that this
18 Court has adopted for when is something
19 criminal punishment just asks whether Congress
20 intended to create criminal punishment. And
21 whether it has some other purpose, such as,
22 here, compensation, such as, in the case of
23 imprisonment, protecting the public, doesn't
24 matter because all punishments serve more than
25 one purpose.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas, anything further?

4 Justice Alito?

5 JUSTICE ALITO: What will be left of
6 Smith if we rule in your favor?

7 Suppose that a state sex offender law
8 provided that the sentencing judge would
9 determine how long an offender needed to
10 register. Or suppose that the state could
11 summarily revoke probation if a defendant
12 failed to maintain his registration.

13 Would that mean that the sex offender
14 law would be penal?

15 MS. SAHARIA: Not necessarily, Your
16 Honor. We don't think there is any
17 inconsistency between a holding in our favor
18 here and Smith.

19 In Smith, the -- the requirement to
20 register as a sex offender was not imposed as
21 part of the sentence.

22 The -- the legislature used the
23 sentencing process simply to notify the
24 offender of the need to register, but it was
25 not imposed as a punishment.

1 There is a distinction between the
2 sentence itself and conditions of release or
3 probation. Those are conditions on the
4 sentence but are not the sentence itself.

5 So we don't think that a condition of
6 release, such as the obligation to register as
7 a sex offender, would -- would necessarily
8 amount to criminal punishment in the same way
9 that conditions of imprisonment, like cell
10 phone restrictions, are not themselves
11 punishment.

12 JUSTICE ALITO: Would you say that
13 the primary function of restitution under this
14 statute, the statute you would like us to
15 apply, is penal or -- or civil?

16 MS. SAHARIA: We think the --

17 JUSTICE ALITO: The primary
18 function -- is -- is the primary function to
19 punish, or is the primary function to provide
20 compensation for -- to make victims whole to
21 the extent possible? Which is primary?

22 MS. SAHARIA: The -- the Court in
23 Paroline said the primary purpose is
24 compensation. But we think the penal purpose
25 here is just as -- just as important and

1 primary, I would say, as the -- as the
2 compensatory purpose.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor?

5 JUSTICE SOTOMAYOR: Under the statute,
6 drug offenses order restitution to the society,
7 don't they?

8 MS. SAHARIA: Yes. And we think --

9 JUSTICE SOTOMAYOR: So it's -- that's
10 why you're saying it's equal?

11 MS. SAHARIA: Yes. That's a very good
12 indication that Congress was intending to do
13 more than simply compensate individual victims.

14 JUSTICE SOTOMAYOR: Number two,
15 our ex post facto jurisprudence has three
16 components: Was it being applied to previous
17 conduct, the first is the question before us,
18 is it criminal or civil, but that there is a
19 third component, does it increase punishment.

20 On that question, there's a circuit
21 split, and we didn't grant cert on that,
22 correct?

23 MS. SAHARIA: That's correct.

24 JUSTICE SOTOMAYOR: So this, at worst,
25 would be a reverse remand?

1 MS. SAHARIA: Yes, we agree with that,
2 and I think the government does as well.

3 JUSTICE SOTOMAYOR: Okay. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: What about these
6 provisions that say that on the one hand, the
7 award is offset by any civil judgment received,
8 and on the other hand, that the victim can keep
9 coming in, you know, however many years later
10 to offer proof of further damages?

11 That -- really, both of those seem
12 very odd if the statute is primarily punitive.

13 MS. SAHARIA: Sure. So, as to the
14 first one, we think that feature of the scheme
15 supports us as a matter of statutory
16 construction because those provisions, which
17 are in 3664(j) and (l), distinguish between
18 what happens at restitution -- at sentencing,
19 at the imposition of restitution, and what
20 happens in a subsequent civil proceeding.

21 And the fact that Congress used the
22 word "civil proceeding" in those particular
23 provisions, we think, makes quite clear that it
24 understood that what is happening at sentencing
25 when restitution is imposed is not a civil

1 proceeding.

2 Now, as to the second point, the fact
3 that victims can come back at future points,
4 first, that is cabined by a good-cause
5 requirement. There needs to be some reason why
6 that was not presented to the sentencing court
7 at the time of sentencing.

8 But putting that aside, we think that
9 one particular feature of the statute, similar
10 to the -- the narrow opportunity to obtain a
11 civil lien, just doesn't overcome all of the
12 indications that Congress understood it was
13 imposing a sentence.

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 Justice Kavanaugh?

18 Justice Barrett?

19 Justice Jackson?

20 Thank you, counsel.

21 MS. SAHARIA: Thank you.

22 CHIEF JUSTICE ROBERTS: Ms. Robertson.

23 ORAL ARGUMENT OF ASHLEY ROBERTSON

24 ON BEHALF OF THE RESPONDENT, SUPPORTING VACATUR

25 MS. ROBERTSON: Mr. Chief Justice, and

1 may it please the Court:

2 Congress implemented restitution under
3 the Mandatory Victims Restitution Act as
4 criminal punishment.

5 The text makes plain first that
6 restitution is punishment. In the statute's
7 terms, it is a penalty or sanction.

8 And, Justice Alito, to your question,
9 that fact alone distinguishes restitution in
10 this case from the registration requirements at
11 issue in Smith versus Doe, which the Court held
12 wasn't punishment at all.

13 Then the Court has to consider whether
14 this is criminal or civil punishment. And we
15 think the text is equally plain that it is
16 criminal. Restitution is imposed for a
17 criminal offense on a criminal defendant at
18 criminal sentencing where the United States
19 stands as the adversarial party.

20 And if there were any doubt, the
21 statutory history dispels it. The court of
22 appeals had uniformly held that restitution
23 under a predecessor statute was criminal
24 punishment. And Congress replicated the
25 relevant language in the MVRA and doubled down

1 on features indicating a punitive intent.

2 This Court should vacate so the court
3 of appeals can consider in the first instance
4 the United States' alternative arguments for
5 affirmance.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: Does it make a
8 difference if this sanction was imposed in a
9 separate proceeding?

10 MS. ROBERTSON: Does it make a
11 difference if it had been imposed outside of
12 the sentencing --

13 JUSTICE THOMAS: Yeah.

14 MS. ROBERTSON: -- context? Well, I
15 don't think it would change the nature of
16 restitution as punishment given that Congress
17 refers to it as a penalty, but it might change
18 whether we conceive of it as a civil penalty
19 like the administrative penalties at issue in
20 Hudson or in Ward or whether we consider it a
21 criminal punishment.

22 The fact that this penalty is imposed
23 in criminal -- in a criminal proceeding is one
24 strong indication that it is meant to serve as
25 criminal punishment.

1 JUSTICE THOMAS: Do you think that all
2 sanctions imposed in criminal proceedings are,
3 in fact, penal or criminal?

4 MS. ROBERTSON: So I think this is an
5 important distinction, Justice Thomas, and I
6 want to be clear that we do distinguish between
7 what is part of a criminal sentence and what
8 occurs at criminal sentencing because we agree
9 with amicus that not everything that occurs in
10 criminal sentencing or even that appears in a
11 criminal judgment is necessarily part of the
12 punishment and, therefore, part of the criminal
13 defendant's sentence.

14 So the classic example here would be
15 the registration requirements at issue in Smith
16 versus Doe because those requirements were
17 announced at sentencing. They even appeared in
18 a judgment. But that didn't make them part of
19 the sentence because they weren't meant to add
20 to the defendant's punishment at all.

21 So, here, it is quite important to our
22 analysis that Congress has specified that
23 restitution itself is meant to serve as a
24 penalty or a sanction. And that is a point
25 that we would hope that the Court would be

1 clear on in its analysis because we do think
2 that there are things that might come up at
3 criminal sentencing, including conditions of
4 supervised release, that we wouldn't conceive
5 of as punishment at all.

6 So we do think that when the Court
7 engages in the statutory construction here, it
8 is paramount to us that Congress labeled this
9 as a penalty or a sanction, and we think that
10 that really washes away many of amicus's
11 arguments about the non-punitive purposes that
12 restitution might serve because, of course, we
13 agree that restitution can serve important
14 compensatory goals, but when Congress has told
15 us expressly that it intends restitution to be
16 punitive, it intends it to be a penalty, that
17 answers the question as a matter of statutory
18 construction.

19 JUSTICE KAVANAUGH: So what -- just to
20 summarize, what should we say, in your view, in
21 the opinion to prevent the spillover effect
22 that you're concerned about? What are the key
23 components?

24 MS. ROBERTSON: So we think there
25 would be two important points for the Court to

1 make in the opinion. First is to be clear that
2 it is resolving this as a matter of statutory
3 construction under step 1, not under step 2, of
4 the Mendoza-Martinez test because we do think
5 restitution is the type of penalty that can be
6 implemented as either criminal or civil.

7 And Congress and state legislatures
8 have chosen in some circumstances to implement
9 restitution as a civil penalty. So we think a
10 decision that makes clear that the Court is
11 resting on a matter of statutory construction
12 under the MVRA will leave appropriate room for
13 legislatures in future cases to treat
14 restitution as civil.

15 When it comes to statutory
16 interpretation, we think it's important that
17 the Court not single out any one particular
18 feature that makes restitution a criminal
19 punishment. Rather, we think it's important
20 both that the text is plain that it is
21 punishment. As I said, it's referred to as a
22 penalty. Elsewhere, it's referred to as a
23 sanction. Elsewhere, the text refers to
24 defendants who are sentenced to restitution or
25 a sentence of restitution.

1 And then, when it comes to the
2 question of whether it's a criminal punishment,
3 it's important to us that all the textual clues
4 here point in the same direction, and that
5 includes that restitution is predicated on a
6 criminal conviction, that it's imposed
7 personally against the criminal defendant, that
8 it occurs at criminal sentencing, that for
9 misdemeanor offenses, it's the only punishment
10 a defendant might receive, that it's the United
11 States that is the adversarial party that can
12 enforce restitution and the obligation to
13 impose restitution in the first instance and
14 then exercises the primary authority on the
15 back end, and then, on top of all of that, that
16 restitution is codified within the criminal
17 code.

18 JUSTICE KAGAN: So, if I can
19 paraphrase, Ms. Robertson, your suggestion to
20 us is that we throw in absolutely everything --
21 (Laughter.)

22 JUSTICE KAGAN: -- so that in some
23 future case we will be sure to have some sort
24 of distinction?

25 MS. ROBERTSON: I think our test

1 here --

2 (Laughter.)

3 MS. ROBERTSON: -- is consistent with
4 any ordinary principle of statutory
5 construction, which is we don't want to suggest
6 there are hard-and-fast rules here. And, yes,
7 we -- we do say --

8 JUSTICE KAVANAUGH: You can say yes.
9 You can just say yes.

10 (Laughter.)

11 MS. ROBERTSON: We do think it's
12 important to rely on all the textual clues.

13 JUSTICE ALITO: Well, what about the
14 prior statute? Was that -- was that punitive
15 too?

16 MS. ROBERTSON: Yes, we do think that
17 restitution under the VWPA was criminal
18 punishment. The government took that position
19 when it --

20 JUSTICE ALITO: Well, then what do you
21 do with -- what do you have to say about
22 Section 2 of the VWPA, which says explicitly
23 the purpose of this is to -- is to help
24 victims?

25 MS. ROBERTSON: The reason that the

1 government took the position when this question
2 was litigated that the VWPA was criminal
3 punishment is because that statute uses similar
4 language to the one at issue here. It does
5 refer to restitution as a penalty. There was
6 also plenty of statements within the
7 legislative history there that Congress
8 intended a --

9 JUSTICE ALITO: Well, legislative
10 history --

11 MS. ROBERTSON: -- penological
12 purpose.

13 JUSTICE ALITO: -- legislative
14 history, in the statute itself, Congress
15 lamented that the criminal justice system had
16 ignored the physical, psychological, and
17 financial hardship of victims, found that the
18 criminal justice system focused only on
19 identifying and punishing offenders. As a
20 consequence, victims had lost valuable property
21 to a criminal -- to the criminal. Congress
22 enacted with the -- that Act with the stated
23 purpose of ensuring that the federal government
24 does all that is possible within limits of
25 available resources to assist victims.

1 If this -- if this turns on
2 congressional intent, how much clearer could
3 congressional intent be than that right in the
4 statute itself?

5 MS. ROBERTSON: Well, we would draw a
6 line between whether Congress intends something
7 to be punishment and the purposes that a
8 particular punishment might serve. It's not
9 unusual, for instance, for criminal fines to
10 serve a compensatory purpose. By statute, most
11 criminal fines are obligated to the crime
12 victims fund.

13 So we -- we do think that a punishment
14 can serve a compensatory purpose, but there's
15 still the threshold question of whether
16 Congress intended to implement the measure as a
17 punishment. And for purposes of this --

18 JUSTICE ALITO: Well, I thought the
19 question was congressional intent. If Congress
20 says our intent is to assist victims, isn't
21 that open and shut then?

22 MS. ROBERTSON: Well, we think the
23 fact that Congress refers to restitution as a
24 penalty is similar to saying restitution is
25 punishment. And there's no plainer statement

1 of intent than that from the text. But, for
2 purposes of this case, I think it is important
3 that whatever questions might have existed
4 about the VWPA when it was first enacted, the
5 courts of appeals uniformly treated VWPA as
6 criminal punishment. That's a consensus that
7 this Court observed in Kelly. Congress was
8 legislating against that backdrop.

9 JUSTICE ALITO: Well, maybe that's --
10 maybe they were right, maybe they weren't.
11 Maybe they, like possibly you, are worried
12 about the -- the consequences of saying that
13 it's not -- that it's not penal. But then you
14 have the VWPA followed by the MVRA, the
15 mandatory victims, talks expressly about
16 victims. Doesn't that show what Congress was
17 getting at?

18 MS. ROBERTSON: Again, we don't want
19 to -- to gainsay the important role that
20 victims play in -- in Congress's motivation
21 here, but just as to the threshold question, we
22 do think Congress's intent to implement
23 criminal punishment is clear.

24 And as to the consequences, there is a
25 real consequence to treating restitution under

1 the MVRA as a civil penalty, and that's the
2 concerns that it would implicate the Seventh
3 Amendment. We think that that was the true
4 concern that was outlined.

5 JUSTICE KAVANAUGH: And -- and
6 we're --

7 JUSTICE BARRETT: Ms. Robertson -- oh.

8 JUSTICE KAVANAUGH: Go ahead.

9 JUSTICE BARRETT: Ms. Robertson, I
10 just wanted to ask you analytically, and, you
11 know, I'll show my cards and say just because
12 of thinking about this DIG argument, do you
13 think analytically we should be thinking about
14 these as two distinct statutes, or should we be
15 thinking about the VWPA and the MVRA as just
16 different amendments to the same basic statute?

17 MS. ROBERTSON: We think that you can
18 think today of both Section 3663 and 3663A as
19 part of the MVRA because restitution imposed
20 under either scheme would be subject to all of
21 the MVRA's many provisions, including its
22 collection authorities, its procedural
23 safeguards, and all of those provisions are
24 relevant to the Court's analysis.

25 But, to be direct about the DIG, if

1 the Court wants to identify the provision at
2 issue here, we do think it should take the case
3 on the premise that it's Section 3663A. That
4 was the government's position before the court
5 of appeals. The court of appeals accepted that
6 premise. Petitioner is no longer disputing it
7 or asking this Court to revisit that factual
8 predicate.

9 And so we think it's appropriate for
10 the Court to resolve this case on the same
11 basis that we asked the Eighth Circuit to rule
12 in our favor below.

13 JUSTICE JACKSON: And that section was
14 not in effect when he committed the crime,
15 correct?

16 MS. ROBERTSON: That's correct. So
17 Section --

18 JUSTICE JACKSON: So that's the --
19 that's the source of the ex post facto problem.
20 No matter what happened at sentencing, at the
21 time he committed the crime, 3663A was not in
22 effect, and today he's being held to account
23 under that provision?

24 MS. ROBERTSON: That's correct,
25 Justice Jackson. I would make one

1 clarification. The MVRA by its terms applied
2 to Petitioner. So, if the district court
3 didn't apply 3663A, it could have only done so
4 if it determined that that provision was
5 criminal punishment, the very question at issue
6 here.

7 Now there would be a separate question
8 as to whether the limitations period that the
9 government is currently attempting to apply to
10 Petitioner might constitutionally apply. It's
11 our position that it could, even though his
12 restitution obligation was criminal punishment,
13 because we don't think increasing the time to
14 collect restitution increases his punishment.

15 JUSTICE JACKSON: That's the argument
16 you want to preserve?

17 MS. ROBERTSON: But that's the -- the
18 argument we're trying to preserve for remand.

19 JUSTICE JACKSON: Can I just go back
20 to Justice Alito's colloquy with you because I
21 guess I'm still wondering whether your argument
22 flows from the idea that there might be
23 different purposes of punishment and that you
24 could have a punitive measure that is imposed
25 for rehabilitative circumstances and with an

1 idea that you were making this person pay back
2 society, you're making this person make amends
3 for what it is that he's done, but it really is
4 still a part of the punishment in the way that
5 theorists have traditionally understood various
6 purposes of punishment.

7 MS. ROBERTSON: We think that's right.
8 And this Court made a similar observation in
9 Kelly itself where it said that restitution
10 serves as a particularly effective
11 rehabilitative penalty precisely because it
12 forces the offender to confront in concrete
13 terms the harms that his actions have caused to
14 a real person, more than a fine, which is paid
15 to an abstract entity like the state, would.

16 It also serves a particularly
17 effective deterrent purpose for that reason
18 that closely aligning the punishment that the
19 defendant faces with the harm that he's caused.

20 JUSTICE JACKSON: So, even if -- even
21 if it's defend -- even if it's victim-focused,
22 it can still be punitive in this way?

23 MS. ROBERTSON: Yes, absolutely. And
24 we do think that this punishment here serves
25 penological goals as well as compensatory ones.

1 JUSTICE JACKSON: Thank you.

2 JUSTICE KAVANAUGH: With respect to
3 our opinion, if we rule in your favor, you also
4 want us to say something about the Sixth
5 Amendment or to avoid saying anything
6 problematic about the Sixth Amendment, correct?

7 MS. ROBERTSON: That --

8 JUSTICE KAVANAUGH: What -- what
9 should -- what -- what do you suggest?

10 MS. ROBERTSON: We think that the
11 cleanest way to resolve this case when it comes
12 to constitutional avoidance is to recognize
13 that constitutional avoidance only comes into
14 play where, after exhausting all the ordinary
15 tools of construction, the court is left with
16 competing interpretations that are plausible,
17 and one would avoid constitutional concerns.

18 Here, we don't think that there are
19 competing plausible constructions. We think
20 that Congress's intent is unambiguous. We also
21 don't think that there's a construction that
22 would avoid constitutional concerns because
23 calling restitution a civil penalty would raise
24 Seventh Amendment --

25 JUSTICE KAVANAUGH: You might be

1 referring to the Seventh Amendment.

2 MS. ROBERTSON: Yeah.

3 JUSTICE KAVANAUGH: My question was
4 about your footnote about the Sixth Amendment.

5 MS. ROBERTSON: Right. So we don't
6 think that the -- the -- the Court would only
7 need to address the Sixth Amendment if there
8 were a legitimate claim to be made for
9 constitutional avoidance. And we simply think
10 that there's no legitimate claim here because
11 there are constitutional concerns on either
12 side.

13 Of course, even if the Court agrees
14 with us that restitution is criminal
15 punishment, we have alternative arguments for
16 why restitution wouldn't implicate this Court's
17 decision in Apprendi which we would continue to
18 make.

19 JUSTICE KAVANAUGH: Right. That's
20 what I was getting at.

21 CHIEF JUSTICE ROBERTS: Justice
22 Thomas, anything further?

23 Justice Alito?

24 Justice Sotomayor?

25 Justice Kagan?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: Even if this were
4 civil, we -- civil retroactivity is not -- not
5 something that we countenance without a clear
6 statement, right?

7 MS. ROBERTSON: So we -- we think that
8 the Court has been clear that the Ex Post Facto
9 Clause itself only applies to criminal
10 punishment.

11 JUSTICE KAVANAUGH: Right. You
12 disagree with Professor Logan on that. Yes.

13 MS. ROBERTSON: Yes, we do. We do --

14 JUSTICE KAVANAUGH: Yeah.

15 MS. ROBERTSON: -- disagree on that
16 point. We take the case as a --

17 JUSTICE KAVANAUGH: But we do Landgraf
18 and other cases, civil retroactivity is
19 something that's antithetical to basic
20 rule-of-law notions at least without -- in --
21 in many instances, not always, not always, but
22 Landgraf says that too, right?

23 MS. ROBERTSON: So we -- we agree that
24 it would be unusual for Congress to apply
25 either a civil or a criminal penalty

1 retroactively, of course -- without, of course,
2 a clear statement that it intends to do so. We
3 have that here. Congress clearly intended to
4 apply the MVRA retroactively to the extent
5 constitutionally permissible.

6 And it's important to us that many of
7 the MVRA's provisions can apply retroactively
8 even though it's criminal punishment because
9 not all of the MVRA's provisions increase that
10 punishment.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson? No?

14 Thank you, counsel.

15 MS. ROBERTSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Bash.

17 ORAL ARGUMENT OF JOHN F. BASH,
18 COURT-APPOINTED AMICUS CURIAE
19 IN SUPPORT OF THE JUDGMENT BELOW

20 MR. BASH: Thank you, Mr. Chief
21 Justice, and may it please the Court:

22 I'll take the DIG argument I make
23 first and then I'll move on to the merits.

24 To clarify the DIG argument, and this
25 goes to questions from Justice Thomas, Justice

1 Jackson, and Justice Barrett, it's not only
2 that the time of -- at the time of sentencing
3 the judgment forms of the old statute.

4 The position of the solicitor general
5 at the time, consistent with the proviso in the
6 statute that said only apply this retroactively
7 to the extent you believe constitutionally
8 permissible, was not to apply the statute in
9 cases like this.

10 The district court found in this
11 proceeding that the sentencing court did not
12 apply the statute on which the question was
13 presented in this case. The court of appeals
14 did not disrupt that finding as far as I can
15 see. And I don't think it would matter if it
16 did. But, at page 4a of the Pet. App., the
17 court of appeals says the MVRA is being applied
18 retroactively in this case, but what it meant
19 by that was the 20-year extension provision.
20 But, Justice Jackson, whether that would be an
21 ex post facto problem turns entirely on what
22 it's extending.

23 So, if that provision applied to
24 something that, let's say, this Court had
25 already determined was a civil penalty, the

1 mere fact that it's contained in the same
2 statute as a restitution obligation that is
3 assertedly criminal would not make the
4 application of the 20-year provision to the
5 civil penalty into criminal punishment.

6 So I do think, Justice Thomas, that
7 the Court has to decide what was applied in
8 this case because the question presented
9 relates only to the second statute, not the
10 first statute.

11 And, Justice Barrett, this isn't a
12 context in which, as Justice Kavanaugh noted,
13 congressional intent is one of the key
14 considerations. And the intent behind the '82
15 statute may have been very different than the
16 intent behind the '96 statute.

17 And just to respond to one more point
18 on this, I think I heard the government say
19 that, well, even if it applied the other
20 statute, it's all part of the same statute now.
21 But, remember, the -- what the sentencing court
22 likely did, consistent with the solicitor
23 general's position, was apply the pre-MVRA
24 version of the VWPA. So it's not as if it
25 applied the amended version, which maybe that

1 would present a closer question on the DIG. It
2 applied the pre-MVRA version.

3 I see my yellow light, so I'm happy to
4 take questions from the Court, Mr. Chief
5 Justice.

6 JUSTICE THOMAS: But it's -- the
7 considerations between the two different
8 statutes would on a higher level -- level of
9 generality be about the same, wouldn't they?

10 I mean, there's not that much
11 difference, and we're not dealing with the --
12 the -- the addition -- the increase or -- in
13 time that it -- that it expands at this level.
14 So what difference would it make?

15 MR. BASH: Justice Thomas, I do think
16 there are some pretty critical differences
17 between the statute, although my ultimate --
18 the two statutes, although my ultimate position
19 would be that neither are punitive.

20 But one big difference is that
21 especially under the earlier version of the
22 VWPA, the sentencing court could not only
23 decide whether to enter restitution amount --
24 award but decide the amount based on ordinary
25 penological considerations: Culpability, the

1 defendant's circumstances, whether the
2 defendant has dependents and so forth.

3 That is prototypical of the criminal
4 justice system, which focuses a lot on the
5 circumstances of the offense and the defendant.
6 The -- the MVRA is totally different. The MVRA
7 is a pure compensation regime that parallels
8 the tort system. It does not care about the
9 defendant's culpability. It does not care if
10 the defendant has dependents. It's full
11 restitution.

12 That is characteristic of the civil
13 tort system. And so I do think there are
14 differences. The legislative history is very
15 different. The MVRA is way more focused on
16 victim compensation than is the legislative
17 history of the VWPA.

18 JUSTICE THOMAS: Would -- would it
19 have made a difference had there been a
20 separate proceeding that looked more like a
21 civil proceeding than doing this at the
22 sentencing stage?

23 MR. BASH: I think that would make it
24 an easier case, but I don't think the outcome
25 should turn on it. So let me just put it this

1 way. Virtually every feature of this statute,
2 it's full restitution, no less, no more.
3 There's offsets for civil judgments. The
4 victim can continue to petition indefinitely
5 for further compensation, for example, for
6 medical bills that continue to arise in old age
7 based on an assault.

8 It can be enforced through a civil
9 lien. Even when the attorney general enforces
10 it, he or she enforces it in the manner of a
11 civil judgment.

12 The defendant has to notify the victim
13 when his or her ability to pay changes. All of
14 those are clearly features of a civil
15 compensatory system.

16 Now I think, if that was set up with a
17 different case number where what happened is
18 the victim or the attorney general could take
19 advantage of the collateral estoppel effect of
20 the criminal judgment and just do everything
21 exactly the same, but it had a different case
22 number on it, I think there would be no
23 question that the court would consider it a
24 non-punitive remedy.

25 So I think the question before the

1 Court is, if Congress chose, for what I think
2 are pretty obvious efficiency reasons, to fold
3 that compensatory remedy into criminal
4 sentencing, does that make it punitive?

5 Here's the reason -- here's why I
6 think the answer to that question is no. When
7 this Court has in the past look at -- looked at
8 the nature of the proceedings to answer this
9 question, and those were invariably cases in
10 which the proceedings were civil and so the
11 Court said the remedy was civil, there was
12 really no other explanation for why Congress
13 chose that form of proceeding than that it
14 intended the remedy to be civil in nature.
15 That's not true here.

16 Here, there's a preexisting criminal
17 proceeding that will happen no matter if
18 there's restitution or not in order to impose a
19 criminal judgment and imprisonment and so
20 forth. And there's a perfectly plausible and I
21 think likely explanation for why Congress
22 folded this compensatory remedy into this
23 proceeding, which it is way more efficient to
24 get victims the compensation they need --

25 JUSTICE JACKSON: But your argument

1 just --

2 MR. BASH: -- to do all its
3 sentencing --

4 JUSTICE JACKSON: -- it just seems to
5 beg the question, right? The question is
6 whether Congress intended this to be a
7 compensatory remedy. We're not sort of asking,
8 well, why did Congress put this compensatory
9 remedy here. We're asking, is this
10 compensatory, meaning civil, or not?

11 And I guess I feel like you're
12 struggling a little bit against the weight of
13 all of the consensus that existed with regard
14 to the VWPA. The preexisting statute that this
15 statute was amending everybody thought was
16 criminal. It was all over the legislative
17 history. It was in the statute. It was -- no
18 one questioned it.

19 And so I guess I'm asking you, is
20 there some kind of indication that Congress was
21 intending to shift or depart from that
22 well-established understanding when it enacted
23 this statute that was just amending the prior
24 one?

25 MR. BASH: There are substantial

1 indications, Justice Jackson, and here they
2 are. I'd start with the structure of the
3 statute. Under the VWPA as it existed when
4 those courts of appeals decisions were
5 rendered, the sentencing court could take into
6 account culpability, deterrence, just
7 punishment, the circumstances of the defendant
8 and his or her dependents in deciding not only
9 whether to impose restitution but in
10 calibrating the amount. In that respect --

11 JUSTICE JACKSON: Right. So they made
12 it mandatory. You didn't -- you don't get to
13 take those things into account. But why does
14 that mean that it becomes less criminal?

15 MR. BASH: Because that is the
16 prototypical characteristic of the civil tort
17 system. When you sue somebody for injuring you
18 or defrauding you and the jury says, yes, they
19 did it and now we need to award damages, the
20 jury cannot take into account, well, I think
21 this person's going to reform themselves, this
22 was their first offense. The jury cannot take
23 into account this person -- this defendant has
24 dependents and we want to calibrate this. None
25 of that's relevant.

1 The characteristic of the civil tort
2 system is the same as the MVRA, full
3 compensation and no more. So that is why
4 there's a huge difference between the MVRA and
5 both the VWPA and the state system that this
6 Court considered in Kelly.

7 But can I just offer you a syllogism
8 that I think makes the point especially clear?

9 JUSTICE JACKSON: Sure.

10 MR. BASH: So two propositions, both
11 from this Court's case law. One, in -- in a
12 lot of cases going back to Helvering versus
13 Mitchell in '38 and Marcus versus Hess in '43,
14 this Court has said that when a remedy is
15 compensatory, it is not punitive. And even
16 treble damages provisions, the Court said,
17 well, that's a rough form of liquidated
18 damages --

19 JUSTICE JACKSON: And I'm sorry. Was
20 this in criminal cases or are these civil
21 cases? I'm not --

22 MR. BASH: These were cases deciding
23 that a remedy was not punitive, I think in the
24 double jeopardy context. So it was --

25 JUSTICE JACKSON: But in the context

1 of a civil action?

2 MR. BASH: These were civil actions.
3 That's true.

4 JUSTICE JACKSON: Okay.

5 MR. BASH: That's true. That is a
6 distinction here, and I can address that in a
7 second. But this Court --

8 JUSTICE JACKSON: I mean, isn't that
9 relevant? We're in the context of a criminal
10 proceeding and the court, the sentencing court,
11 is imposing this as part of the punishment.

12 MR. BASH: It -- it -- it's relevant,
13 but, as I said to Justice Thomas a few moments
14 ago, I think the nature of the proceedings has
15 been relevant when it gives rise to an
16 unavoidable inference about what Congress
17 intended, but it's very different here, where
18 those proceedings would happen either way and
19 there's an obvious efficiency route --

20 JUSTICE JACKSON: What do you do with
21 the legislative history for the MVRA where
22 Congress says it is needed to ensure that the
23 loss to crime victims is recognized and that
24 they receive the restitution they are due; it
25 is also necessary to ensure that the offender

1 realizes the damage caused by the offense and
2 pays the debt owed to the victim as well as
3 society?

4 That second sentence --

5 MR. BASH: And -- and that --

6 JUSTICE JACKSON: -- sounds very
7 rehabilitative to me, which is a purpose of
8 punishment.

9 MR. BASH: And that's exactly the
10 second part of the syllogism I wanted to get
11 to. In 89 Firearms, one of this Court's cases
12 in this area, the Court said that the
13 inquiry -- inquiry is whether the remedy is
14 more remedial than punitive. In both Paroline,
15 which is one of my opponent's favorite cases,
16 and Dolan, this Court said the primary purpose
17 of restitution is remedial.

18 If you put those two things together,
19 if the question is whether it's more remedial
20 than punitive -- and this cuts to a lot of the
21 questions Justice Alito was asking to my
22 friends on the other side -- clearly, this
23 compensatory tort-like system is more remedial
24 than punitive. It's designed to get victims
25 compensation.

1 The last thing I'd say about that,
2 Justice Jackson, is this Court has repeatedly
3 recognized that virtually any monetary exaction
4 or other sanction, whether civil or not, has a
5 deterrent effect --

6 JUSTICE GORSUCH: Mr. --

7 MR. BASH: -- just like the tort
8 system has a deterrent effect --

9 JUSTICE GORSUCH: -- Bash, on -- on --

10 MR. BASH: -- when you get a -- I'm
11 sorry, Justice Gorsuch.

12 JUSTICE GORSUCH: No, no. Please
13 finish your --

14 MR. BASH: I mean, just like the tort
15 system has a deterrent effect. That's a --
16 that's a big purpose of the tort system, is to
17 deter tortfeasors from doing torts. But that
18 doesn't make it punitive. And so, if the only
19 deterrent effect that arises from a monetary
20 exaction is the deterrent effect that any form
21 of compensation would have on the relevant
22 behavior, then that's not enough to shift the
23 balance from remedial to punitive.

24 Justice Gorsuch, I'm sorry.

25 JUSTICE GORSUCH: I just wanted to

1 give you an alternative hypothesis about the
2 shift between the WPA and the MVRA going from
3 more discretionary amounts to a mandatory
4 amount.

5 Could Congress have thought, yeah,
6 this is punishment -- for sure, it's
7 punishment -- for all the reasons your friends
8 on the other side say and all the courts of
9 appeals concluded with respect to the WPA, but
10 district courts are simply not exercising their
11 discretion appropriately and we're going to
12 take that discretion away, in much the same way
13 that sometimes Congress takes discretion in
14 sentencing prison terms away and creates
15 mandatory minimums? Thoughts?

16 MR. BASH: Well, I -- I think it's
17 conceivable that Congress could have had that
18 intent, but at least in terms of the
19 legislative history of the MVRA, nothing like
20 that is shown. What's shown --

21 JUSTICE GORSUCH: How about the MVRA?
22 Isn't it pretty clear that's -- that was what
23 was going on?

24 MR. BASH: I think what's -- in the
25 MVRA?

1 JUSTICE GORSUCH: Yeah. Congress
2 thought discretion needed to be taken -- more
3 discretion had to be taken away.

4 MR. BASH: Oh. Oh, no, Justice
5 Gorsuch. I think what Congress looked at was
6 an epidemic of hospitalizations and fraud
7 wiping out people's life savings and it being
8 too hard for victims to get the compensation
9 they needed.

10 JUSTICE GORSUCH: Oh, okay. All
11 right. And -- and -- and that the awards were
12 not appropriate and they needed to be more
13 severe.

14 MR. BASH: Well, you know, they needed
15 to be more compensatory.

16 JUSTICE GORSUCH: Okay.

17 MR. BASH: And, as I said, in cases
18 like Marcus versus Hess and Helvering versus
19 Mitchell, the compensatory nature of a remedy
20 has been the lodestar --

21 JUSTICE GORSUCH: It -- it could be
22 more --

23 MR. BASH: -- for --

24 JUSTICE GORSUCH: -- it could be --

25 MR. BASH: -- rendering it

1 non-punitive.

2 JUSTICE GORSUCH: -- more compensatory
3 or it could be more punitive, couldn't it?

4 MR. BASH: Well, again, I go back to
5 this Court's precedents. This Court has said
6 that compensatory remedies, even treble damages
7 that operate --

8 JUSTICE GORSUCH: No, I understand --
9 I understand that in the civil context, but --
10 but I -- I am asking you to spot a lot, and I'm
11 asking you to spot that, you know, the -- the
12 circuits were not completely crazy in thinking
13 that the VWPA was punitive. And if that's
14 true, then -- then maybe that -- that's really
15 the source of our disagreement or at least in
16 this colloquy.

17 MR. BASH: I -- I understand the
18 intuition, Justice Gorsuch, that, well, when
19 you make something mandatory, doesn't that make
20 it more severe and --

21 JUSTICE GORSUCH: Yeah, I guess --

22 MR. BASH: -- so more punitive?

23 JUSTICE GORSUCH: -- that -- thank
24 you, Mr. Bash.

25 MR. BASH: But -- but --

1 JUSTICE GORSUCH: You stated my
2 question better than I did.

3 MR. BASH: But I don't think that
4 ultimately holds up because it is the tort
5 system that is a mandatory compensation regime.
6 It is the civil justice system that is a
7 mandatory compensation regime --

8 JUSTICE GORSUCH: It was compensatory
9 in both cases before, just an insufficient one,
10 and Congress made it more punitive, more --
11 more compensatory.

12 MR. BASH: Well, it really wasn't. It
13 was -- it was capped at compensation, but it
14 empowered judges to say how do I impose an
15 appropriate punishment on this person by
16 calibrating the amount of restitution in
17 connection with all the other things I'm going
18 to impose at sentencing. So it -- it -- it was
19 really more of a criminal system.

20 JUSTICE GORSUCH: I understand your
21 point.

22 JUSTICE KAGAN: As I understand your
23 argument, Mr. Bash, you're saying, well, look,
24 this is compensatory; here are all the ways we
25 can see that it's compensatory. But I think

1 the opposite argument is that just doesn't get
2 you home because a compensatory system can have
3 punitive -- like, it could be part of a
4 punishment scheme. And, indeed, there's a
5 theory behind this, right, which is you're
6 forcing the defendant to confront the nature
7 and the extent of the harm that he's committed,
8 and that is a powerful way of driving home his
9 wrongdoing?

10 So, you know, to say it's
11 compensation, it's compensation, is, like,
12 okay, it's compensation, but compensation can
13 be a form of punishment.

14 MR. BASH: Well, Justice -- Justice
15 Kagan, I don't think we need the rule as broad
16 as all forms of compensation are not
17 punishment. I think that would be open to the
18 Court and consistent with its precedents, but I
19 don't think you need to do that. I think you
20 can distinguish the VWPA and the statutes,
21 statutes like the one at issue in Kelly, that
22 say in imposing comp- -- a compensatory remedy,
23 don't just look at victim loss; look at what's
24 best for this defendant, what's going to
25 promote the purposes of criminal punishment and

1 deterrence and so forth.

2 But, when you have a regime that's
3 essentially just a mechanical compensatory
4 regime, I think, under this Court's precedents
5 like *Marcus and Helvering versus Mitchell*,
6 that's non-punitive. And -- and I go back
7 to --

8 JUSTICE KAGAN: I guess I'm wondering
9 why. If the whole idea of the theory is that
10 it's punishment when you force the defendant to
11 confront the extent of his wrongdoing, what
12 better way to do that than to make the
13 restitution scheme entirely focus on the
14 defendant's loss?

15 MR. BASH: Well, Justice Kagan, let me
16 try it this way. I mean, you -- 3664(1) allows
17 victims to take advantage of the collateral
18 estoppel effect of the criminal judgment in
19 bringing a separate civil suit.

20 So you can imagine a system where the
21 victim -- it works exactly the same way as it
22 does here, but the victim just goes under a
23 different case number, say, maybe even the
24 attorney general initiates it or maybe not, and
25 just invokes the collateral estoppel effect of

1 the judgment and everything's the same. It's a
2 compensatory remedy, it's offset by civil
3 judgments, all the same features here that are
4 laser-focused on compensation.

5 I think it would be pretty clear that
6 that's a typical civil compensatory statute.
7 And so the question is, does the fact that
8 Congress arguably -- and I think it's only
9 arguably -- made this part of the sentence or
10 part of sentencing proceedings change things?

11 And I think the -- the government has
12 to admit that that can't be the line because a
13 lot of civil things are imposed at sentencing
14 through conditions of supervised release.

15 This Court hasn't decided that
16 question before, but lower courts have almost
17 uniformly said that DNA testing, these are in
18 ex post facto challenges, drug testing, you
19 know, consent to certain forms of searches,
20 those are all civil things imposed at
21 sentencing because they serve non-punitive
22 goals.

23 In those cases, it's preventing
24 reoffense or reintegration into society. In
25 this case, it's compensating for harm in a way

1 that I think is materially indistinguishable
2 from what the tort system could provide.

3 JUSTICE JACKSON: Except, in the tort
4 system, if the victims receive insurance or
5 some other form of compensation, then you
6 wouldn't have the ability to get the complete
7 relief in the context of the proceeding. I'm
8 not aware here of restitution being offset by
9 other forms of relief received by the --

10 MR. BASH: It -- it is, Justice
11 Jackson.

12 JUSTICE JACKSON: It is?

13 MR. BASH: Yes. Under 3664, there's
14 two ways it happens.

15 One, once there's a restitution award
16 and the victim gets a civil judgment for the
17 same harm, it's got to be reduced. So that's
18 civil judgment.

19 JUSTICE JACKSON: Civil judgment.

20 MR. BASH: Right. So for --

21 JUSTICE JACKSON: But insurance?

22 MR. BASH: Insurance, it's not taken
23 into account in the computation of the award,
24 but then the judge can order that that portion
25 of the restitution award go to the insurance

1 company or the other source that either paid it
2 or has a obligation to pay. And the only limit
3 on that is they got to get paid last after all
4 the victims get paid. But --

5 JUSTICE KAGAN: Mr. Bash --

6 MR. BASH: But it actually is offset.

7 JUSTICE KAGAN: -- I mean, I think the
8 argument against you would go back to the way
9 that Ms. Robertson answered Justice Kavanaugh's
10 question where, when Justice Kavanaugh said:
11 What do you want? And Ms. Robertson, you know,
12 listed about 42 different ways --

13 (Laughter.)

14 JUSTICE KAGAN: -- in which Congress
15 said that this was criminal punishment. And
16 then you're here to say, yes, but look at this
17 intense focus on the victim's loss.

18 And in the context of those 42
19 different ways, you're asking us to say: Well,
20 the fact that they focused on the victim's loss
21 takes us out of the criminal punishment box.

22 And I guess what I'm suggesting is
23 that, no, in that context, it's fully
24 consistent with the rest of everything that
25 they did. It's like, yes, it's focused on the

1 victim's loss, but that doesn't make it any
2 less criminal punishment.

3 MR. BASH: I -- I -- I hate to -- to
4 attack the premise of the question, but I don't
5 think there are 42 different ways. Most of the
6 things that my colleague said I don't think are
7 persuasive at all. So the thing I kept hearing
8 was that they denoted it a penalty.

9 But there are -- this Court said in 89
10 Firearms that penalties can be either civil or
11 criminal. We've given a ton of example
12 throughout the U.S. Code where "penalty" is
13 used in a civil sense or the criminal sense.

14 "Sanction" is the same way. And, in
15 fact, in one of the provisions my -- my friend
16 relies on, the government relies on, 3551,
17 Congress said the sentence is the fine, the
18 imprisonment, and the probation, and the
19 sanction is forfeiture and restitution.

20 Now there are other provisions they
21 can point to that suggest it's a sentence. I
22 think, in reality, Congress was of two minds on
23 this at different points and probably never
24 formed a judgment about whether it is, in
25 theory, part of the sentence.

1 But, even if I accepted that it was
2 part of the sentence, I think that just goes
3 back to the point I made before, which is, can
4 Congress fold a clearly remedial compensatory
5 remedy into a sentence for efficiency's sake
6 without either triggering step 1 of
7 Mendoza-Martinez by signaling an intent that it
8 be punishment or making it have to be
9 punishment at step 2, which the government
10 doesn't even argue.

11 So I don't think there are 42
12 different ways. I think this is overwhelmingly
13 compensatory on almost every metric and -- I'm
14 sorry, Justice Alito. It looks like you might
15 have a question.

16 JUSTICE ALITO: No, I was going to ask
17 something different, but I'll go ahead since
18 there's -- since there's silence.

19 The -- the government wants to sail
20 between the Scylla of the Sixth Amendment and
21 the Charybdis of the Seventh Amendment, and it
22 seems to think that it can escape the Seventh
23 Amendment by listing 42 things that would be
24 inapplicable in any other situation, but either
25 of those would destroy this regime probably.

1 So why should -- which one is more
2 dangerous?

3 MR. BASH: The Sixth Amendment is by
4 far more dangerous.

5 Let me give you a quick pitch on the
6 DIG, though, for that, which is that this is
7 the lurking issue that actually really matters
8 here, and the parties have barely briefed it.

9 The actual question presented is
10 vanishingly unimportant for people who were --
11 committed the crime before April 1996, were
12 convicted after, for some reason, the court
13 applied the VW -- the MVRA even though the
14 government was saying to apply the VWPA, and
15 they still have an outstanding award. So the
16 actual QP is not very important.

17 As you say, though, the jury trial
18 question could destroy the whole regime.

19 So, under the Sixth Amendment, the
20 Apprendi rule, as elaborated on in Southern
21 Union, says any fact necessary to increase the
22 maximum monetary award -- I'm going to sub in
23 monetary award, but the Court has applied that
24 to fines -- requires a jury trial.

25 Lower courts have said in this context

1 that, well, the conviction authorizes the
2 maximum unlimited amount of restitution.

3 As Justice Gorsuch pointed out in a
4 separate opinion in Hester, I mean, that just
5 does not follow logically. Under 3664(e), the
6 Court has --

7 JUSTICE GORSUCH: Thank you, Mr. Bash.
8 (Laughter.)

9 MR. BASH: Under 3664(e), the Court
10 has to find by a preponderance of the evidence
11 that particular items of loss have been proved.
12 Clearly, that's fact finding. There is a --
13 for any non-zero amount of restitution, the
14 Apprendi rule would obviously require a jury
15 trial.

16 Of course, the Court could always draw
17 exceptions to it. Justice Alito, in the same
18 case, you suggested maybe just kind of drawing
19 a line there, but -- but the Apprendi rule
20 clearly applies under the Sixth Amendment.

21 The Seventh Amendment is much closer
22 to me. So the -- the -- for -- for -- you
23 know, on the original understanding of the
24 Seventh Amendment and its plain text, it says
25 suits at common law. So I think pretty clearly

1 this is not a suit at common law. It's a
2 statutory restitution proceeding. Of course,
3 this Court's cases --

4 JUSTICE GORSUCH: Well, this Court has
5 said, Mr. Bash, as you're well aware and may be
6 about to say and for which I apologize --

7 MR. BASH: I'm not going to stop
8 there, Justice Gorsuch. I -- I've got more
9 riffs on that.

10 JUSTICE GORSUCH: I'm sure you do.
11 I know.

12 MR. BASH: So --

13 JUSTICE GORSUCH: But the -- the Court
14 has said, you know, labels don't matter. And
15 if it's in substance a civil trial for
16 restitution, that would have been a suit at
17 common law surely. Wouldn't you agree?

18 MR. BASH: So what this Court has said
19 is that statutory causes of action that mimic
20 common law causes of action both in substance
21 and in remedy, meaning the Beacon Theatres
22 damages equitable distinction, trigger the
23 Seventh Amendment right. So let's just accept
24 that the Court would not reconsider that.

25 This is not quite a statutory cause of

1 action. It is sort of an unusual proceeding,
2 although the one that had a history behind it
3 at common law, as I think your opinion pointed
4 out.

5 But here's what I think is the
6 important point: This Court has been much more
7 context-dependent on whether the remedy phase
8 of a civil trial requires a jury finding.

9 So the two cases are Tull versus
10 United States and Feltner versus Columbia
11 Pictures.

12 In Tull, the Court said -- I mean,
13 this was in a footnote, but the majority said:
14 We see nothing in the Seventh Amendment that
15 requires a jury trial for the remedy phase.
16 Now that was a civil penalty where it was very
17 discretionary.

18 In Feltner, nine years later,
19 copyright damages, the Court said that requires
20 a jury trial.

21 JUSTICE GORSUCH: Right.

22 MR. BASH: But part of that was based
23 on the unique history of the Copyright Act.

24 So all I'm saying is I think there
25 would be historical work to do under the

1 Seventh Amendment.

2 The Sixth Amendment, unless this Court
3 really drew a kind of outlier exception to
4 Apprendi, you know, I think the Sixth Amendment
5 case is pretty open and shut on this other
6 meaning.

7 JUSTICE GORSUCH: Well, isn't that
8 interesting that, here, you're making an
9 argument that the government has miscalculated
10 its own interest in choosing to take the risk
11 with the Sixth rather than the Seventh?

12 MR. BASH: It does that sometimes --
13 (Laughter.)

14 MR. BASH: -- you know, and, frankly,
15 I think that -- that that --

16 JUSTICE GORSUCH: The government's
17 made its bed. Why shouldn't we let them lie in
18 it, Mr. Bash?

19 MR. BASH: Well -- well, there --
20 there is a path-dependent reason, I think, for
21 that, which is that the government developed
22 this position pre-Apprendi, and so it developed
23 this position that restitution is criminal --
24 I'm reading between the lines --

25 JUSTICE GORSUCH: Well, it made the

1 opposite argument in the Eighth Circuit, and
2 here we are. It's flipped its -- it flipped
3 its view.

4 MR. BASH: Yeah, I -- I -- I think
5 maybe the U.S. Attorney's Office there didn't
6 follow the DOJ position overall.

7 JUSTICE GORSUCH: And it's admirable
8 that the DOJ flipped its view, I want to say.
9 I -- I -- I think it is admirable that they
10 reconsidered their position. But they made
11 their judgment.

12 MR. BASH: And all I'm saying with
13 respect to their analysis of the jury trial
14 right is that they developed that position
15 pre-Apprendi, I think, precisely in order to
16 avoid the Seventh Amendment problem.

17 The problem now is -- I think,
18 arguably, the bigger constitutional problem is
19 the Sixth Amendment. And, you know, I didn't
20 hear in response to Justice Kavanaugh's
21 question a very satisfactory explanation of
22 what the Court would say in this opinion to
23 avoid the Sixth Amendment problem.

24 JUSTICE GORSUCH: Thank you.

25 JUSTICE SOTOMAYOR: But that's

1 unavoidable --

2 JUSTICE KAVANAUGH: You're not
3 buying -- go ahead.

4 JUSTICE SOTOMAYOR: I'm sorry.
5 That's unavoidable. In the civil
6 context at least at common law, I believe that
7 restitution was not an equity, was it, claim,
8 or was it a common law jury claim?

9 MR. BASH: So, Justice Sotomayor, this
10 depends a little bit on shifting meanings of
11 the word "restitution." And I agree with
12 Petitioner, who points this out in her -- in
13 her brief -- or his brief, counsel's brief,
14 "restitution" is a word for an equitable remedy
15 that I think would fall on the Beacon Theatres
16 bench trial side of the line when you're
17 talking about restoring something taken.

18 And some of the remedies under
19 restitution take that form. So, if someone
20 steals your car, restitution might have to be
21 to return the car. I think that actually would
22 fall in the Beacon Theatres line of you don't
23 need a jury trial --

24 JUSTICE SOTOMAYOR: But this is
25 different. This is paying a monetary

1 compensation.

2 MR. BASH: Some of the forms of
3 restitution, the majority in the statute here,
4 are really traditional damages forms.

5 JUSTICE SOTOMAYOR: So, really, jury
6 trials would have been required in the common
7 law. If we required them in the criminal
8 context, because it's a substitution for civil,
9 it wouldn't be the end of the world, counselor.
10 It would just be taking --

11 MR. BASH: Well --

12 JUSTICE SOTOMAYOR: -- avoiding taking
13 away a right to a jury trial.

14 MR. BASH: I -- I don't think it would
15 be end of the world as a practical matter. It
16 would mean the entire statutory scheme has been
17 unconstitutional for decades because they
18 haven't been provided jury trials. I don't
19 think practically it couldn't be implemented.
20 But, as I said, I think the Sixth Amendment
21 problem is much clearer.

22 JUSTICE SOTOMAYOR: Well, this would
23 be a new rule because we -- we pretty much have
24 established precedents to the contrary. Thank
25 you, Mr. Bash.

1 MR. BASH: I do think there would be
2 an argument under the Seventh Amendment that
3 this can survive under the reasoning of --

4 JUSTICE KAVANAUGH: So you're not
5 buying their Footnote 3 in the government's
6 brief then on the Sixth Amendment where they --

7 MR. BASH: You know, the government I
8 think, if I'm remembering the footnote,
9 rehashed the court of appeals' views that --

10 JUSTICE KAVANAUGH: Correct.

11 MR. BASH: -- the judgment of
12 conviction authorizes unlimited restitution.
13 That is just not true. There has to be a
14 finding of particular items of loss. That is a
15 factual finding that you can't -- that, without
16 which, no restitution is authorized. So it's
17 just not correct. I don't see how -- a lot of
18 court of appeals have -- have adopted that
19 view, but I don't think it is correct.

20 CHIEF JUSTICE ROBERTS: Justice
21 Thomas, anything further?

22 Justice Alito?

23 JUSTICE GORSUCH: I can't help myself.
24 You'd agree that in the civil context in
25 Seventh Amendment, when you're seeking damages,

1 you usually get a jury trial?

2 MR. BASH: Yeah, that has been -- the
3 Court held -- so held in the copyright
4 context --

5 JUSTICE GORSUCH: Yeah.

6 MR. BASH: -- in Feltner. You know, I
7 don't know that the Court has -- has
8 analyzed --

9 JUSTICE GORSUCH: And, here, nobody's
10 asking for the return of the horse. They're
11 seeking damages, right, effectively? That's
12 your view? As full compensation?

13 MR. BASH: Yeah, I don't think there's
14 a distinction between many of the heads of loss
15 here --

16 JUSTICE GORSUCH: Yeah.

17 MR. BASH: -- and legal damages. I
18 think that's true.

19 JUSTICE GORSUCH: Okay. That's --
20 that's -- that's the --

21 MR. BASH: The only point I was making
22 is that under Tull and Feltner, I think there's
23 a more nuanced analysis on whether the remedy
24 phase of a civil jury trial, that phase of it
25 requires a jury, because it held for civil

1 penalties at least that it did not.

2 JUSTICE GORSUCH: Got you.

3 MR. BASH: That's different than
4 damages on that.

5 JUSTICE GORSUCH: Got you. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 Justice Barrett?

9 Justice Jackson?

10 Thank you, counsel.

11 MR. BASH: Thank you.

12 CHIEF JUSTICE ROBERTS: Ms. Saharia.

13 REBUTTAL ARGUMENT OF AMY M. SAHARIA
14 ON BEHALF OF THE PETITIONER

15 MS. SAHARIA: Just -- just very
16 briefly. I'd like to respond to Justice
17 Alito's question about the findings and
18 purposes of the VWPA that he posed to the
19 government. If you look at Section 2 of the
20 VWPA, it is replete with references to the
21 criminal justice system and the criminal
22 justice process. Congress was intending to
23 give victims more of a role in the criminal
24 justice system. But there's nothing in those
25 findings or purposes that suggests that

1 Congress thought it was creating a civil
2 proceeding, which is the relevant question
3 here.

4 Second, with respect to the -- the
5 Sixth Amendment and Seventh Amendment question,
6 I'll just say the following. First, I think,
7 under the Seventh Amendment, this case is much
8 more like Feltner than Tull because it involves
9 compensatory damages, and what's more, the
10 inquiries that judges make at sentencing really
11 go to core liability-type questions of
12 proximate causation. To determine who is a
13 victim, the court has to determine who suffered
14 losses proximately caused by the offense
15 conduct. Those are the kinds of questions
16 that, in the civil context, juries always
17 decide.

18 And if the Court is going to pick
19 which one is worse, well, a -- a ruling that
20 restitution is civil would completely upset the
21 apple cart on the Seventh Amendment because the
22 circuits rejected that argument uniformly on
23 the ground that restitution is criminal
24 punishment.

25 In the Sixth Amendment context, the

1 courts, again, have uniformly rejected the
2 Apprendi argument, but they've done so on two
3 different grounds. Only a minority of courts
4 have adopted the -- the civil remedy ground,
5 and all of the courts have said that it's an
6 indeterminate range that just isn't subject to
7 Apprendi. That may or may not be correct, but
8 that would be an issue for the Court to address
9 in some future case if it so chose.

10 And then, finally, on the point about
11 restitution being mandatory under the MVRA, I
12 would adopt Justice Gorsuch's response to that,
13 which I thought was quite -- was -- was
14 correct, that Congress simply made the relevant
15 judgment for sentencing courts in making
16 restitution mandatory. And I think that
17 response -- the argument that restitution is
18 civil because it's mandatory doesn't account
19 for the way that Congress intertwined
20 restitution with all of the other punishments
21 imposed at sentencing.

22 For -- so, for all those reasons, we
23 ask the Court to vacate and remand.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Bash, this Court appointed you to
2 brief and argue this case as an amicus curiae
3 in support of the judgment below. You have
4 ably discharged that responsibility, for which
5 we are grateful.

6 The case is submitted.

7 (Whereupon, at 12:42 p.m., the case
8 was submitted.)

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Official - Subject to Final Review

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61:7 67:21 add [1] 22:19 addition [1] 40:12 address [3] 35:7 47:6 73:8 administrative [1] 21:19 admirable [2] 66:7,9 admit [1] 56:12 adopt [1] 73:12 adopted [3] 14:18 69:18 73:4 advantage [2] 42:19 55:17 adversarial [2] 20:19 25:11 affirmance [1] 21:5 affirmed [1] 5:1 age [1] 42:6 agency [1] 10:19 ago [3] 5:12 6:18 47:14 agree [8] 7:2 18:1 22:8 23:13 36:23 63:17 67:11 69:24 agrees [1] 35:13 ahead [3] 30:8 60:17 67:3 aligning [1] 33:18 ALITO [19] 8:22 9:16 15:4, 5 16:12,17 20:8 26:13,20 27:9,13 28:18 29:9 35:23 48:21 60:14,16 62:17 69:22 Alito's [2] 32:20 71:17 allocate [1] 10:19 allows [2] 8:22 55:16 almost [2] 56:16 60:13 alone [1] 20:9 already [1] 38:25 alternative [3] 21:4 35:15 50:1 although [3] 40:17,18 64:2 amended [1] 39:25 amending [2] 44:15,23 Amendment [37] 11:8,9 12:15,17,23 30:3 34:5,6,24 35:1,4,7 60:20,21,23 61:3, 19 62:20,21,24 63:23 64:14 65:1,2,4 66:16,19,23 68:20 69:2,6,25 72:5,5,7,21, 25 amendments [1] 30:16 amends [1] 33:2 amicus [6] 1:23 2:11 4:9 22:9 37:18 74:2 amicus's [1] 23:10 amount [9] 5:14 16:8 40:23,24 45:10 50:4 53:16 62:2,13	amounts [1] 50:3 AMY [5] 1:18 2:3,14 3:7 71:13 analysis [6] 4:11 22:22 23:1 30:24 66:13 70:23 analytically [2] 30:10,13 analyzed [1] 70:8 announced [1] 22:17 answer [4] 4:15 14:5 43:6, 8 answered [1] 58:9 answers [1] 23:17 antithetical [1] 36:19 apologize [1] 63:6 App [2] 5:16 38:16 appeals [11] 12:22 20:22 21:3 29:5 31:5,5 38:13,17 45:4 50:9 69:18 appeals' [1] 69:9 APPEARANCES [1] 1:17 appeared [1] 22:17 appears [1] 22:10 apple [1] 72:21 application [2] 6:8 39:4 applied [18] 4:23,25 5:12, 21 6:6 7:3,7 13:5 17:16 32:1 38:17,23 39:7,19,25 40:2 61:13,23 applies [2] 36:9 62:20 apply [14] 4:1 7:19 16:15 32:3,9,10 36:24 37:4,7 38:6,8,12 39:23 61:14 appointed [1] 74:1 Apprendi [7] 35:17 61:20 62:14,19 65:4 73:2,7 appropriate [4] 24:12 31:9 51:12 53:15 appropriately [1] 50:11 April [1] 61:11 area [1] 48:12 Aren't [1] 5:5 arguably [3] 56:8,9 66:18 argue [3] 6:12 60:10 74:2 argued [1] 6:10 arguing [1] 11:23 argument [31] 1:14 2:2,5,9, 13 3:4,7 6:11,24 7:7,14 9:19 19:23 30:12 32:15,18, 21 37:17,22,24 43:25 53:23 54:1 58:8 65:9 66:1 69:2 71:13 72:22 73:2,17 arguments [3] 21:4 23:11 35:15 arise [1] 42:6 arises [1] 49:19 ASHLEY [3] 1:20 2:6 19:23 aside [2] 11:10 19:8 asks [1] 14:19 assault [1] 42:7 assertedly [1] 39:3 assessed [1] 11:1 assessment [1] 8:16 assist [2] 27:25 28:20 Assistant [1] 1:20	attack [1] 59:4 attempting [1] 32:9 attorney [5] 9:11,11 42:9, 18 55:24 Attorney's [1] 66:5 Austin [1] 1:23 authorities [1] 30:22 authority [2] 9:12 25:14 authorized [2] 10:9 69:16 authorizes [2] 62:1 69:12 auto [2] 10:20,20 available [1] 27:25 avoid [5] 34:5,17,22 66:16, 23 avoidance [3] 34:12,13 35:9 avoiding [1] 68:12 award [9] 18:7 40:24 45:19 57:15,23,25 61:15,22,23 awards [1] 51:11 aware [3] 8:24 57:8 63:5 away [5] 23:10 50:12,14 51:3 68:13 B back [9] 19:3 25:15 32:19 33:1 46:12 52:4 55:6 58:8 60:3 backdrop [3] 12:19 13:7 29:8 balance [1] 49:23 barely [1] 61:8 Barrett [6] 19:18 30:7,9 38:1 39:11 71:8 barrier [1] 6:7 based [3] 40:24 42:7 64:22 BASH [75] 1:23 2:10 37:16, 17,20 40:15 41:23 44:2,25 45:15 46:10,22 47:2,5,12 48:5,9 49:7,9,10,14 50:16, 24 51:4,14,17,23,25 52:4, 17,22,24,25 53:3,12,23 54:14 55:15 57:10,13,20,22 58:5,6 59:3 61:3 62:7,9 63:5,7,12,18 64:22 65:12,14, 18,19 66:4,12 67:9 68:2,11, 14,25 69:1,7,11 70:2,6,13, 17,21 71:3,11 74:1 basic [2] 30:16 36:19 basis [1] 31:11 Beacon [3] 63:21 67:15,22 becomes [1] 45:14 bed [1] 65:17 beg [1] 44:5 behalf [8] 1:18,21 2:4,7,15 3:8 19:24 71:14 behavior [1] 49:22 behind [4] 39:14,16 54:5 64:2 believe [2] 38:7 67:6 below [7] 1:24 2:12 5:24 6:10 31:12 37:19 74:3 bench [1] 67:16 best [1] 54:24	better [2] 53:2 55:12 between [12] 15:17 16:1 18:17 22:6 28:6 40:7,17 46:4 50:2 60:20 65:24 70:14 big [2] 40:20 49:16 bigger [1] 66:18 bills [1] 42:6 bit [2] 44:12 67:10 both [11] 8:9 9:15 10:13 18:11 24:20 30:18 46:5,10 48:14 53:9 63:20 box [2] 5:18 58:21 brief [6] 6:12 67:13,13,13 69:6 74:2 briefed [1] 61:8 briefly [1] 71:16 bringing [1] 55:19 broad [1] 54:15 buying [2] 67:3 69:5 C cabined [1] 19:4 calibrate [1] 45:24 calibrating [2] 45:10 53:16 called [1] 4:4 calling [1] 34:23 came [1] 1:13 cannot [2] 45:20,22 capped [1] 53:13 car [4] 10:22,22 67:20,21 cards [1] 30:11 care [2] 41:8,9 carried [1] 13:11 cart [1] 72:21 Case [30] 3:4 4:21 6:3 7:9 10:20 14:3,22 20:10 25:23 29:2 31:2,10 34:11 36:16 38:13,18 39:8 41:24 42:17, 21 46:11 55:23 56:25 62:18 65:5 72:7 73:9 74:2,6,7 case-dispositive [1] 5:3 cases [17] 4:3 10:12 24:13 36:18 38:9 43:9 46:12,20, 21,22 48:11,15 51:17 53:9 56:23 63:3 64:9 causation [1] 72:12 cause [1] 63:25 caused [5] 13:22 33:13,19 48:1 72:14 causes [2] 63:19,20 cell [1] 16:9 cert [2] 6:13 17:21 certain [1] 56:19 challenges [3] 5:3 12:23 56:18 change [3] 21:15,17 56:10 changes [1] 42:13 chapter [1] 8:4 chapters [1] 3:25 characteristic [3] 41:12 45:16 46:1 characterized [2] 12:5 14:3
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Official - Subject to Final Review

Charybdis ^[1] 60:21 check ^[1] 5:17 checked ^[1] 5:18 checks ^[1] 5:17 CHIEF ^[19] 3:3,9 10:15 14:6 15:2 17:3 18:4 19:15,22, 25 35:21 37:12,16,20 40:4 69:20 71:6,12 73:24 choosing ^[1] 65:10 chose ^[3] 43:1,13 73:9 chosen ^[2] 11:5 24:8 Circuit ^[9] 4:25 5:24 6:2,10, 11 7:21 17:20 31:11 66:1 circuits ^[2] 52:12 72:22 circumstances ^[5] 24:8 32:25 41:1,5 45:7 cites ^[1] 5:16 civil ^[74] 5:2 6:4 9:8 10:1,6, 16,25 11:14,16,21 12:14 14:14,15 16:15 17:18 18:7, 20,22,25 19:11 20:14 21:18 24:6,9,14 30:1 34:23 36:4,4,18,25 38:25 39:5 41:12,21 42:3,8,11,14 43:10,11,14 44:10 45:16 46:1, 20 47:1,2 49:4 52:9 53:6 55:19 56:2,6,13,20 57:16, 18,19 59:10,13 63:15 64:8, 16 67:5 68:8 69:24 70:24, 25 72:1,16,20 73:4,18 claim ^[4] 35:8,10 67:7,8 clarification ^[1] 32:1 clarify ^[1] 37:24 classic ^[1] 22:14 classification ^[1] 4:12 classifies ^[1] 3:11 Clause ^[2] 3:13 36:9 cleanest ^[1] 34:11 clear ^[14] 5:10 13:15 18:23 22:6 23:1 24:1,10 29:23 36:5,8 37:2 46:8 50:22 56:5 clearer ^[2] 28:2 68:21 clearly ^[7] 37:3 42:14 48:22 60:4 62:12,20,25 client ^[1] 6:18 closely ^[1] 33:18 closer ^[2] 40:1 62:21 clues ^[2] 25:3 26:12 code ^[3] 8:12 25:17 59:12 codified ^[1] 25:16 collateral ^[3] 42:19 55:17, 25 colleague ^[1] 59:6 collect ^[3] 9:12,13 32:14 collection ^[1] 30:22 colloquy ^[2] 32:20 52:16 Columbia ^[1] 64:10 come ^[2] 19:3 23:2 comes ^[4] 24:15 25:1 34:11,13 coming ^[1] 18:9 commented ^[1] 13:1 committed ^[5] 6:25 31:14,	21 54:7 61:11 Committee ^[1] 14:12 common ^[8] 62:25 63:1,17, 20 64:3 67:6,8 68:6 comp ^[1] 54:22 company ^[1] 58:1 compensate ^[1] 17:13 compensated ^[1] 14:2 compensates ^[1] 4:20 compensating ^[2] 13:16 56:25 compensation ^[24] 4:10 14:22 16:20,24 41:7,16 42:5 43:24 46:3 48:25 49:21 51:8 53:5,7,13 54:11,11,12, 12,16 56:4 57:5 68:1 70:12 compensatory ^[29] 17:2 23:14 28:10,14 33:25 42:15 43:3,22 44:7,8,10 46:15 48:23 51:15,19 52:2,6 53:8,11,24,25 54:2,22 55:3 56:2,6 60:4,13 72:9 competing ^[2] 34:16,19 complete ^[1] 57:6 completely ^[2] 52:12 72:20 component ^[1] 17:19 components ^[2] 17:16 23:23 computation ^[1] 57:23 conceivable ^[1] 50:17 conceive ^[2] 21:18 23:4 concern ^[1] 30:4 concerned ^[1] 23:22 concerns ^[4] 30:2 34:17, 22 35:11 concluded ^[1] 50:9 conclusion ^[1] 3:20 concrete ^[1] 33:12 condition ^[1] 16:5 conditions ^[5] 16:2,3,9 23:3 56:14 conduct ^[2] 17:17 72:15 confirm ^[1] 3:19 confront ^[3] 33:12 54:6 55:11 Congress ^[61] 8:13,18 9:14 10:9 11:4,10,21 12:12, 19 13:3,8,9,15,17 14:1,9, 19 17:12 18:21 19:12 20:2, 24 21:16 22:22 23:8,14 24:7 27:7,14,21 28:6,16,19,23 29:7,16 36:24 37:3 43:1, 12,21 44:6,8,20 47:16,22 50:5,13,17 51:1,5 53:10 56:8 58:14 59:17,22 60:4 71:22 72:1 73:14,19 Congress's ^[3] 29:20,22 34:20 congressional ^[4] 28:2,3, 19 39:13 connection ^[1] 53:17 consensus ^[4] 13:2,10 29:	6 44:13 consent ^[1] 56:19 consequence ^[3] 3:16 27:20 29:25 consequences ^[5] 8:20 11:9 12:16 29:12,24 consider ^[4] 20:13 21:3,20 42:23 considerations ^[3] 39:14 40:7,25 considered ^[1] 46:6 consistent ^[5] 26:3 38:5 39:22 54:18 58:24 constitutional ^[8] 6:7 34:12,13,17,22 35:9,11 66:18 constitutionally ^[3] 32:10 37:5 38:7 construction ^[8] 18:16 23:7,18 24:3,11 26:5 34:15,21 constructions ^[1] 34:19 construed ^[1] 13:4 contained ^[1] 39:1 context ^[16] 21:14 39:12 46:24,25 47:9 52:9 57:7 58:18,23 61:25 67:6 68:8 69:24 70:4 72:16,25 context-dependent ^[1] 64:7 continue ^[3] 35:17 42:4,6 continued ^[1] 6:12 contrary ^[1] 68:24 convicted ^[1] 61:12 conviction ^[5] 3:17 9:6 25:6 62:1 69:12 copyright ^[3] 64:19,23 70:3 core ^[1] 72:11 Correct ^[13] 7:2,6 17:22,23 31:15,16,24 34:6 69:10,17, 19 73:7,14 couldn't ^[4] 7:6,11 52:3 68:19 counsel ^[4] 19:20 37:14 71:10 73:25 counsel's ^[1] 67:13 counselor ^[1] 68:9 countenance ^[1] 36:5 course ^[7] 7:10 23:12 35:13 37:1,1 62:16 63:2 COURT ^[93] 1:1,14 3:10 4:4,24 5:9,11,12,20 8:1,13 10:3 11:25 12:8 13:1,3 14:18 16:22 19:6 20:1,11,13, 21 21:2,2 22:25 23:6,25 24:10,17 29:7 31:1,4,5,7, 10 32:2 33:8 34:15 35:6, 13 36:8 37:21 38:10,11,13, 17,24 39:7,21 40:4,22 42:23 43:1,7,11 45:5 46:6,14, 16 47:7,10,10 48:12,16 49:2 52:5 54:18 56:15 59:9 61:12,23 62:6,9,16 63:4,13, 18,24 64:6,12,19 65:2 66:22 69:9,18 70:3,7 72:13,18	73:8,23 74:1 Court's ^[9] 5:4 21:6 30:24 35:16 46:11 48:11 52:5 55:4 63:3 Court-appointed ^[3] 1:23 2:11 37:18 courts ^[15] 8:5,7,10 10:10 12:22 29:5 45:4 50:8,10 56:16 61:25 73:1,3,5,15 crashes ^[1] 10:22 crazy ^[1] 52:12 create ^[1] 14:20 created ^[1] 11:11 creates ^[1] 50:14 creating ^[1] 72:1 crime ^[8] 3:18 7:1 13:19 28:11 31:14,21 47:23 61:11 criminal ^[94] 3:12,15,16,25 4:4,6,14,15 7:25 8:21,25 9:15 10:13,17 11:24 12:1,10, 12,25 13:5 14:3,11,13,19, 20 16:8 17:18 20:4,14,16, 17,17,18,23 21:21,23,23, 25 22:2,3,7,8,10,11,12 23:3 24:6,18 25:2,6,7,8,16 26:17 27:2,15,18,21,21 28:9, 11 29:6,23 32:5,12 35:14 36:9,25 37:8 39:3,5 41:3 42:20 43:3,16,19 44:16 45:14 46:20 47:9 53:19 54:25 55:18 58:15,21 59:2,11,13 65:23 68:7 71:21,21,23 72:23 criminally ^[1] 10:23 critical ^[1] 40:16 crystal-clear ^[2] 7:24 14:9 Culpability ^[3] 40:25 41:9 45:6 curiae ^[4] 1:24 2:11 37:18 74:2 currently ^[1] 32:9 cut ^[1] 9:18 cuts ^[1] 48:20	defend ^[1] 33:21 defendant ^[16] 8:7,11 15:11 20:17 25:7,10 33:19 41:2,5,10 42:12 45:7,23 54:6, 24 55:10 defendant's ^[7] 10:2,8 22:13,20 41:1,9 55:14 defendants ^[2] 10:12 24:24 defrauding ^[1] 45:18 denied ^[1] 4:24 denoted ^[1] 59:8 depart ^[2] 13:10 44:21 Department ^[2] 1:21 10:4 dependents ^[4] 41:2,10 45:8,24 depending ^[1] 11:6 depends ^[1] 67:10 designed ^[1] 48:24 destroy ^[2] 60:25 61:18 deter ^[1] 49:17 determine ^[3] 15:9 72:12, 13 determined ^[2] 32:4 38:25 deterrence ^[2] 45:6 55:1 deterrent ^[6] 33:17 49:5,8, 15,19,20 developed ^[3] 65:21,22 66:14 differ ^[1] 10:6 difference ^[7] 21:8,11 40:11,14,20 41:19 46:4 differences ^[2] 40:16 41:14 different ^[24] 7:17 12:13 30:16 32:23 39:15 40:7 41:6,15 42:17,21 47:17 55:23 58:12,19 59:5,23 60:12,17 67:25 71:3 73:3 DIG ^[6] 30:12,25 37:22,24 40:1 61:6 direct ^[1] 30:25 direction ^[1] 25:4 disagree ^[2] 36:12,15 disagreement ^[1] 52:15 discharged ^[1] 74:4 discretion ^[5] 50:11,12,13 51:2,3 discretionary ^[3] 8:8 50:3 64:17 dispels ^[1] 20:21 disputes ^[1] 6:24 disputing ^[1] 31:6 disrupt ^[1] 38:14 distinct ^[1] 30:14 distinction ^[6] 16:1 22:5 25:24 47:6 63:22 70:14 distinguish ^[4] 14:15 18:17 22:6 54:20 distinguishes ^[1] 20:9 district ^[5] 4:24 5:20 32:2 38:10 50:10 DNA ^[1] 56:17 Doe ^[2] 20:11 22:16
---	---	--	---	---

Official - Subject to Final Review

doing [3] 14:1 41:21 49:17 DOJ [2] 66:6,8 Dolan [1] 48:16 done [3] 32:3 33:3 73:2 double [1] 46:24 doubled [1] 20:25 doubt [1] 20:20 down [1] 20:25 draw [2] 28:5 62:16 drawing [1] 62:18 drew [1] 65:3 driving [1] 54:8 drug [2] 17:6 56:18 due [2] 13:20 47:24 E earlier [1] 40:21 easier [1] 41:24 effect [13] 6:5 7:8 23:21 31:14,22 42:19 49:5,8,15,19,20 55:18,25 effective [3] 6:4 33:10,17 effectively [1] 70:11 efficiency [2] 43:2 47:19 efficiency's [1] 60:5 efficient [1] 43:23 Eighth [8] 4:25 5:24 6:1,10,11 7:21 31:11 66:1 either [9] 24:6 30:20 35:11 36:25 47:18 58:1 59:10 60:6,24 elaborated [1] 61:20 ELLINGBURG [3] 1:3 3:5 5:21 Elsewhere [2] 24:22,23 empowered [1] 53:14 enacted [5] 13:3,8 27:22 29:4 44:22 end [3] 15:7 15:25 15:68:9,15 enforce [5] 8:23,25 9:4,17 25:12 enforced [3] 3:23 10:1 42:8 enforcement [2] 9:8,10 enforces [2] 42:9,10 engages [1] 23:7 enough [1] 49:22 ensure [4] 13:18,21 47:22,25 ensuring [1] 27:23 enter [1] 40:23 entire [1] 68:16 entirely [2] 38:21 55:13 entirety [1] 9:23 entitled [1] 8:4 entity [1] 33:15 epidemic [1] 51:6 equal [1] 17:10 equally [1] 20:15 equitable [2] 63:22 67:14 equity [1] 67:7 escape [1] 60:22 especially [2] 40:21 46:8	ESQ [4] 2:3,6,10,14 ESQUIRE [1] 1:18 essentially [1] 55:3 established [1] 68:24 estoppel [3] 42:19 55:18,25 even [18] 7:19 22:10,17 32:11 33:20,20,21 35:13 36:3 37:8 39:19 42:9 46:15 52:6 55:23 60:1,10 61:13 everybody [1] 44:15 everything [5] 11:22 22:9 25:20 42:20 58:24 everything's [1] 56:1 evidence [1] 62:10 Ex [7] 3:13 6:23 17:15 31:19 36:8 38:21 56:18 exaction [2] 49:3,20 exactly [4] 11:22 42:21 48:9 55:21 example [3] 22:14 42:5 59:11 Except [1] 57:3 exception [1] 65:3 exceptions [1] 62:17 exercises [1] 25:14 exercising [1] 50:10 exhausting [1] 34:14 existed [3] 29:3 44:13 45:3 existence [1] 6:25 expands [1] 40:13 explanation [3] 43:12,21 66:21 explicitly [1] 26:22 expressly [2] 23:15 29:15 extending [1] 38:22 extension [1] 38:19 extent [5] 16:21 37:4 38:7 54:7 55:11 F face [1] 4:13 faces [1] 33:19 fact [17] 5:6,9 8:2 9:17,24 18:21 19:2 20:9 21:22 22:3 28:23 39:1 56:7 58:20 59:15 61:21 62:12 Facto [7] 3:13 6:23 17:15 31:19 36:8 38:21 56:18 factual [2] 31:7 69:15 fail [1] 10:12 failed [1] 15:12 fall [2] 67:15,22 far [2] 38:14 61:4 fault [1] 10:19 favor [4] 15:6,17 31:12 34:3 favorite [1] 48:15 feature [4] 18:14 19:9 24:18 42:1 features [4] 3:19 21:1 42:14 56:3 Federal [2] 3:24 27:23 feel [1] 44:11	Feltner [5] 64:10,18 70:6,22 72:8 few [1] 47:13 Finally [2] 4:21 73:10 financial [1] 27:17 find [1] 62:10 finding [5] 38:14 62:12 64:8 69:14,15 findings [2] 71:17,25 fine [4] 8:16 11:1 33:14 59:17 finer [9] 3:14,22 9:13,15 10:13 12:10 28:9,11 61:24 finish [1] 49:13 Firearms [2] 48:11 59:10 first [15] 9:24 12:1 14:8 17:17 18:14 19:4 20:5 21:3 24:1 25:13 29:4 37:23 39:10 45:22 72:6 flipped [3] 66:2,2,8 flows [1] 32:22 focus [2] 55:13 58:17 focused [4] 27:18 41:15 58:20,25 focuses [1] 41:4 fold [2] 43:2 60:4 folded [1] 43:22 folks [1] 12:4 follow [2] 62:5 66:6 followed [1] 29:14 following [1] 72:6 footnote [4] 35:4 64:13 69:5,8 force [1] 55:10 forces [1] 33:12 forcing [1] 54:6 forfeiture [1] 59:19 form [10] 5:13,13,15,20 43:13 46:17 49:20 54:13 57:5 67:19 formed [1] 59:24 forms [6] 38:3 54:16 56:19 57:9 68:2,4 forth [3] 41:2 43:20 55:1 forward [1] 13:11 found [2] 27:17 38:10 frankly [1] 65:14 fraud [1] 51:6 freedom [2] 10:2,8 friend [1] 59:15 friends [2] 48:22 50:7 front [1] 5:18 full [6] 9:7,10 41:10 42:2 46:2 70:12 fully [1] 58:23 function [4] 16:13,18,18,19 fund [1] 28:12 further [5] 15:3 18:10 35:22 42:5 69:21 furtherers [1] 4:6 future [4] 19:3 24:13 25:23 73:9	G gainsay [1] 29:19 garnishment [1] 9:9 General [7] 1:20 9:11,11 38:4 42:9,18 55:24 general's [1] 39:23 generality [1] 40:9 gets [1] 57:16 getting [2] 29:17 35:20 give [5] 9:7,9 50:1 61:5 71:23 given [2] 21:16 59:11 gives [2] 9:3 47:15 goals [3] 23:14 33:25 56:22 good-cause [1] 19:4 Gorsuch [42] 19:16 36:1 49:6,9,11,12,24,25 50:21 51:1,5,10,16,21,24 52:2,8,18,21,23 53:1,8,20 62:3,7 63:4,8,10,13 64:21 65:7,16,25 66:7,24 69:23 70:5,9,16,19 71:2,5 Gorsuch's [1] 73:12 got [5] 57:17 58:3 63:8 71:2,5 govern [1] 4:1 governed [2] 5:25 6:15 government [19] 6:2,10,12 7:16 18:2 26:18 27:1,23 32:9 39:18 56:11 59:16 60:9,19 61:14 65:9,21 69:7 71:19 government's [4] 4:7 31:4 65:16 69:5 grant [1] 17:21 grateful [1] 74:5 ground [4] 5:1 12:24 72:23 73:4 grounds [1] 73:3 guess [6] 32:21 44:11,19 52:21 55:8 58:22 H hand [2] 18:6,8 happen [2] 43:17 47:18 happened [3] 6:18 31:20 42:17 happening [1] 18:24 happens [3] 18:18,20 57:14 happy [1] 40:3 hard [1] 51:8 hard-and-fast [1] 26:6 hardship [1] 27:17 harm [4] 33:19 54:7 56:25 57:17 harms [1] 33:13 hate [1] 59:3 heads [1] 70:14 hear [2] 3:3 66:20 heard [1] 39:18 hearing [1] 59:7	held [9] 6:2,19 7:12 20:11,22 31:22 70:3,3,25 help [2] 26:23 69:23 Helvering [3] 46:12 51:18 55:5 Hess [2] 46:13 51:18 Hester [1] 62:4 higher [1] 40:8 historical [1] 64:25 history [13] 13:14 14:10 20:21 27:7,10,14 41:14,17 44:17 47:21 50:19 64:2,23 holding [2] 5:3 15:17 holds [1] 53:4 HOLSEY [1] 1:3 home [2] 54:2,8 Honor [2] 6:20 15:16 Honor's [1] 14:17 hope [1] 22:25 horse [1] 70:10 hospitalizations [1] 51:6 however [1] 18:9 Hudson [1] 21:20 huge [1] 46:4 Hughey [1] 13:4 hypothesis [1] 50:1 I idea [3] 32:22 33:1 55:9 identify [1] 31:1 identifying [1] 27:19 ignored [1] 27:16 imagine [1] 55:20 implement [3] 24:8 28:16 29:22 implemented [3] 20:2 24:6 68:19 implicate [2] 30:2 35:16 important [15] 12:18 16:25 22:5,21 23:13,25 24:16,19 25:3 26:12 29:2,19 37:6 61:16 64:6 impose [9] 4:13 8:5,10 10:10 25:13 43:18 45:9 53:14,18 imposed [20] 3:15 6:1 7:20 9:6 10:11 12:8 15:20,25 18:25 20:16 21:8,11,22 22:2 25:6 30:19 32:24 56:13,20 73:21 imposes [3] 5:2,14 6:3 imposing [4] 8:6 19:13 47:11 54:22 imposition [1] 18:19 imprisonment [9] 3:13,24 4:17 10:10 12:9 14:23 16:9 43:19 59:18 inapplicable [1] 60:24 includes [1] 25:5 including [2] 23:3 30:21 inconsistency [1] 15:17 increase [4] 17:19 37:9 40:12 61:21 increases [1] 32:14
--	--	--	--	--

Official - Subject to Final Review

increasing ^[1] 32:13 indeed ^[1] 54:4 indefinitely ^[1] 42:4 indeterminate ^[1] 73:6 indicates ^[1] 5:20 indicating ^[1] 21:1 indication ^[3] 17:12 21:24 44:20 indications ^[3] 8:2 19:12 45:1 indistinguishable ^[1] 57:1 individual ^[1] 17:13 inference ^[1] 47:16 initiates ^[1] 55:24 injuring ^[1] 45:17 inquiries ^[1] 72:10 inquiry ^[4] 11:25 14:17 48:13,13 instance ^[5] 8:14 9:9 21:3 25:13 28:9 instances ^[1] 36:21 instruct ^[1] 8:9 instructs ^[1] 8:5 insufficient ^[1] 53:9 insurance ^[4] 57:4,21,22, 25 intend ^[1] 11:14 intended ^[7] 14:20 27:8 28:16 37:3 43:14 44:6 47:17 intending ^[4] 13:10 17:12 44:21 71:22 intends ^[4] 23:15,16 28:6 37:2 intense ^[1] 58:17 intent ^[13] 21:1 28:2,3,19, 20 29:1,22 34:20 39:13,14, 16 50:18 60:7 interest ^[1] 65:10 interesting ^[1] 65:8 interests ^[1] 4:7 interpretation ^[1] 24:16 interpretations ^[1] 34:16 intertwined ^[2] 3:20 73:19 intuition ^[1] 52:18 invariably ^[1] 43:9 invokes ^[1] 55:25 involves ^[1] 72:8 isn't ^[7] 6:16 28:20 39:11 47:8 50:22 65:7 73:6 issue ^[11] 7:17,21 20:11 21:19 22:15 27:4 31:2 32:5 54:21 61:7 73:8 items ^[2] 62:11 69:14 itself ^[7] 16:2,4 22:23 27:14 28:4 33:9 36:9 J JACKSON ^[35] 6:16,22 7:5, 10 13:13 15:1 19:19 31:13, 18,25 32:15,19 33:20 34:1 37:13 38:1,20 43:25 44:4 45:1,11 46:9,19,25 47:4,8, 20 48:6 49:2 57:3,11,12,19,	21 71:9 jeopardy ^[1] 46:24 JOHN ^[3] 1:23 2:10 37:17 JR ^[1] 1:3 judge ^[2] 15:8 57:24 judges ^[2] 53:14 72:10 judgment ^[25] 1:24 2:12 5:13,13,15,19 8:23 18:7 22:11,18 37:19 38:3 42:11,20 43:19 55:18 56:1 57:16,18, 19 59:24 66:11 69:11 73:15 74:3 judgments ^[2] 42:3 56:3 Judiciary ^[1] 14:12 juries ^[1] 72:16 jurisprudence ^[1] 17:15 jury ^[18] 45:18,20,22 61:17, 24 62:14 64:8,15,20 66:13 67:8,23 68:5,13,18 70:1,24, 25 Justice ^[201] 1:21 3:3,9 5:5 6:16,22 7:5,10 8:22 9:16 10:14,15 11:13 12:2 13:13 14:6 15:1,2,3,4,5 16:12,17 17:3,3,5,9,14,24 18:3,4,4,5 19:14,15,15,17,18,19,22, 25 20:8 21:7,13 22:1,5 23:19 25:18,22 26:8,13,20 27:9,13,15,18 28:18 29:9 30:5, 7,8,9 31:13,18,25 32:15,19, 20 33:20 34:1,2,8,25 35:3, 19,21,21,23,24,25 36:1,2,3, 11,14,17 37:11,12,12,16, 21,25,25 38:1,20 39:6,11, 12 40:5,6,15 41:4,18 43:25 44:4 45:1,11 46:9,19,25 47:4,8,13,20 48:6,21 49:2, 6,9,11,12,24,25 50:21 51:1, 4,10,16,21,24 52:2,8,18,21, 23 53:1,6,8,20,22 54:14,14 55:8,15 57:3,10,12,19,21 58:5,7,9,10,14 60:14,16 62:3,7,17 63:4,8,10,13 64:21 65:7,16,25 66:7,20,24,25 67:2,4,9,24 68:5,12,22 69:4,10,20,20,22,23 70:5,9,16, 19 71:2,5,6,6,8,9,12,16,21, 22,24 73:12,24 K Kagan ^[13] 18:4,5 19:14 25:18,22 35:25 53:22 54:15 55:8,15 58:5,7,14 KAVANAUGH ^[25] 10:14 11:13 12:2 19:17 23:19 26:8 30:5,8 34:2,8,25 35:3,19 36:2,3,11,14,17 37:11 39:12 58:10 67:2 69:4,10 71:7 Kavanaugh's ^[2] 58:9 66:20 keep ^[1] 18:8 Kelly ^[6] 4:3 13:2 29:7 33:9 46:6 54:21	kept ^[1] 59:7 key ^[3] 6:16 23:22 39:13 kind ^[3] 44:20 62:18 65:3 kinds ^[1] 72:15 L label ^[1] 11:18 labeled ^[1] 23:8 labels ^[1] 63:14 lamented ^[1] 27:15 Landgraf ^[2] 36:17,22 language ^[5] 8:13,13 13:12 20:25 27:4 laser-focused ^[1] 56:4 last ^[2] 49:1 58:3 later ^[2] 18:9 64:18 Laughter ^[6] 25:21 26:2,10 58:13 62:8 65:13 law ^[13] 4:22 8:24 15:7,14 46:11 62:25 63:1,17,20 64:3 67:6,8 68:7 least ^[6] 36:20 50:18 52:15 67:6 71:1 leave ^[1] 24:12 left ^[2] 15:5 34:15 legal ^[1] 70:17 legislated ^[1] 12:19 legislating ^[1] 29:8 legislative ^[10] 13:14 14:10 27:7,9,13 41:14,16 44:16 47:21 50:19 legislature ^[1] 15:22 legislatures ^[2] 24:7,13 legitimate ^[2] 35:8,10 lenity ^[1] 13:5 less ^[3] 42:2 45:14 59:2 level ^[3] 40:8,8,13 liability ^[1] 7:18 liability-type ^[1] 72:11 lie ^[1] 65:17 lien ^[4] 8:24 9:5 19:11 42:9 liens ^[1] 10:1 life ^[1] 51:7 light ^[1] 40:3 likely ^[2] 39:22 43:21 limit ^[1] 58:2 limitations ^[1] 32:8 limited ^[1] 9:4 limits ^[1] 27:24 line ^[5] 28:6 56:12 62:19 67:16,22 lines ^[1] 65:24 liquidated ^[1] 46:17 listed ^[1] 58:12 listing ^[1] 60:23 litigated ^[1] 27:2 little ^[2] 44:12 67:10 lodestar ^[1] 51:20 Logan ^[1] 36:12 logically ^[1] 62:5 long ^[1] 15:9 longer ^[1] 31:6 look ^[7] 9:23 43:7 53:23 54:23,23 58:16 71:19	looked ^[3] 41:20 43:7 51:5 looking ^[1] 9:20 looks ^[1] 60:14 loss ^[10] 13:18 47:23 54:23 55:14 58:17,20 59:1 62:11 69:14 70:14 losses ^[1] 72:14 lost ^[1] 27:20 lot ^[6] 41:4 46:12 48:20 52:10 56:13 69:17 lower ^[2] 56:16 61:25 lurking ^[1] 61:7 M made ^[14] 8:18 10:3 14:9 33:8 35:8 41:19 45:11 53:10 56:9 60:3 65:17,25 66:10 73:14 maintain ^[1] 15:12 majority ^[2] 64:13 68:3 mandatory ^[12] 8:9 20:3 29:15 45:12 50:3,15 52:19 53:5,7 73:11,16,18 manner ^[1] 42:10 Manrique ^[1] 8:1 many ^[6] 18:9 23:10 30:21 36:21 37:6 70:14 Marcus ^[3] 46:13 51:18 55:5 materially ^[1] 57:1 matter ^[11] 1:13 14:24 18:15 23:17 24:2,11 31:20 38:15 43:17 63:14 68:15 matters ^[1] 61:7 maximum ^[2] 61:22 62:2 mean ^[11] 13:16 15:13 40:10 45:14 47:8 49:14 55:16 58:7 62:4 64:12 68:16 meaning ^[3] 44:10 63:21 65:6 meanings ^[1] 67:10 meant ^[4] 21:24 22:19,23 38:18 measure ^[2] 28:16 32:24 mechanical ^[1] 55:3 mechanisms ^[2] 9:8,10 medical ^[1] 42:6 Mendoza-Martinez ^[2] 24:4 60:7 mere ^[1] 39:1 merits ^[2] 7:23 37:23 metric ^[1] 60:13 might ^[12] 11:10 21:17 23:2,12 25:10 28:8 29:3 32:10,22 34:25 60:14 67:20 mimic ^[1] 63:19 minds ^[1] 59:22 minimum ^[1] 13:25 minimums ^[1] 50:15 minority ^[1] 73:3 miscalculated ^[1] 65:9 misdemeanor ^[1] 25:9 misdemeanors ^[1] 3:22 Mitchell ^[3] 46:13 51:19 55:	5 moments ^[1] 47:13 monetary ^[5] 49:3,19 61:22,23 67:25 morning ^[1] 3:4 most ^[2] 28:10 59:5 motion ^[1] 4:25 motivation ^[1] 29:20 motives ^[1] 14:4 move ^[1] 37:23 Ms ^[60] 3:6,9 5:8 6:20 7:2,6, 14 9:2,22 11:4,20 12:6 14:5,7 15:15 16:16,22 17:8,11, 23 18:1,13 19:21,22,25 21:10,14 22:4 23:24 25:19,25 26:3,11,16,25 27:11 28:5, 22 29:18 30:7,9,17 31:16, 24 32:17 33:7,23 34:7,10 35:2,5 36:7,13,15,23 37:15 58:9,11 71:12,15 much ^[9] 11:18 28:2 40:10 50:12 62:21 64:6 68:21,23 72:7 multiple ^[1] 4:16 MVR ^[1] 14:10 MVRA ^[44] 3:11,19 4:22,25 5:1,7,22,24 6:3,5,14,19,24 7:4,5 9:3 12:20,22 13:3,4, 8,18 14:11 20:25 24:12 29:14 30:1,15,19 32:1 37:4 38:17 41:6,6,15 46:2,4 47:21 50:2,19,21,25 61:13 73:11 MVRA's ^[4] 7:18 30:21 37:7,9 myself ^[1] 69:23 N narrow ^[1] 19:10 nature ^[6] 21:15 43:8,14 47:14 51:19 54:6 necessarily ^[3] 15:15 16:7 22:11 necessary ^[3] 13:21 47:25 61:21 need ^[7] 15:24 35:7 43:24 45:19 54:15,19 67:23 needed ^[7] 13:18 15:9 47:22 51:2,9,12,14 needs ^[2] 5:9 19:5 neither ^[1] 40:19 never ^[1] 59:23 new ^[1] 68:23 next ^[1] 3:4 nine ^[1] 64:18 nobody's ^[1] 70:9 non-punitive ^[5] 23:11 42:24 52:1 55:6 56:21 non-zero ^[1] 62:13 None ^[1] 45:24 noted ^[2] 10:5 39:12 nothing ^[4] 5:19 50:19 64:14 71:24 notify ^[2] 15:23 42:12
---	--	---	---	---

Official - Subject to Final Review

notions ^[1] 36:20 nuanced ^[1] 70:23 nullified ^[1] 7:13 number ^[5] 8:2 17:14 42:17,22 55:23 numerous ^[1] 8:12 O obligated ^[1] 28:11 obligation ^[5] 16:6 25:12 32:12 39:2 58:2 obligations ^[2] 10:6,7 observation ^[1] 33:8 observed ^[1] 29:7 obtain ^[1] 19:10 obtaining ^[1] 9:5 obvious ^[2] 43:2 47:19 obviously ^[1] 62:14 occurs ^[3] 22:8,9 25:8 October ^[1] 1:11 odd ^[2] 11:17 18:12 offender ^[11] 4:19,20 13:21 15:7,9,13,20,24 16:7 33:12 47:25 offender's ^[1] 3:14 offenders ^[1] 27:19 offense ^[7] 7:9 13:22 20:17 41:5 45:22 48:1 72:14 offenses ^[2] 17:6 25:9 offer ^[2] 18:10 46:7 Office ^[1] 66:5 offset ^[4] 18:7 56:2 57:8 58:6 offsets ^[1] 42:3 Okay ^[6] 18:3 47:4 51:10,16 54:12 70:19 old ^[2] 38:3 42:6 once ^[1] 57:15 one ^[28] 5:15,17 6:24 9:3 14:25 18:6,14 19:9 21:23 24:17 27:4 31:25 34:17 39:13,17 40:20 44:18,24 46:11 48:11,15 53:9 54:21 57:15 59:15 61:1 64:2 72:19 ones ^[1] 33:25 only ^[22] 3:21 6:3 9:3 10:1 13:9 14:14 25:9 27:18 32:3 34:13 35:6 36:9 38:1,6 39:9 40:22 45:8 49:18 56:8 58:2 70:21 73:3 open ^[3] 28:21 54:17 65:5 operate ^[2] 11:15 52:7 operating ^[1] 14:4 operations ^[2] 11:15,19 operative ^[1] 13:11 opinion ^[6] 23:21 24:1 34:3 62:4 64:3 66:22 opponent's ^[1] 48:15 opportunity ^[1] 19:10 opposed ^[1] 11:18 opposite ^[2] 54:1 66:1 opposition ^[1] 6:13 oral ^[7] 1:14 2:2,5,9 3:7 19:23 37:17	order ^[8] 6:1,15 7:19 9:18 17:6 43:18 57:24 66:15 ordinary ^[4] 10:6 26:4 34:14 40:24 original ^[2] 5:11 62:23 originally ^[2] 5:7 10:11 Other ^[21] 3:19,21 8:20 11:17 12:10 14:21 18:8 36:18 39:19 43:12 48:22 49:4 50:8 53:17 57:5,9 58:1 59:20 60:24 65:5 73:20 out ^[6] 24:17 51:7 58:21 62:3 64:4 67:12 outcome ^[1] 41:24 outlier ^[1] 65:3 outlined ^[1] 30:4 outside ^[1] 21:11 outstanding ^[1] 61:15 over ^[1] 44:16 overall ^[1] 66:6 overcome ^[1] 19:11 overlooks ^[1] 4:12 overwhelmingly ^[1] 60:12 owed ^[2] 13:23 48:2 own ^[1] 65:10 P p.m ^[1] 74:7 PAGE ^[3] 2:2 6:13 38:16 paid ^[4] 33:14 58:1,3,4 paragraph ^[2] 5:17,18 parallel ^[1] 10:17 parallels ^[1] 41:7 paramount ^[1] 23:8 paraphrase ^[1] 25:19 Paroline ^[3] 4:3 16:23 48:14 part ^[25] 3:14 7:25 8:18 9:24 12:7,8,18 13:7 14:16 15:21 22:7,11,12,18 30:19 33:4 39:20 47:11 48:10 54:3 56:9,10 59:25 60:2 64:22 particular ^[6] 18:22 19:9 24:17 28:8 62:11 69:14 particularly ^[2] 33:10,16 parties ^[1] 61:8 parts ^[2] 8:12 14:8 party ^[2] 20:19 25:11 Pasquantino ^[1] 4:3 past ^[1] 43:7 path-dependent ^[1] 65:20 pay ^[7] 8:16,17 10:13,21 33:1 42:13 58:2 paying ^[1] 67:25 payment ^[1] 12:3 pays ^[3] 4:20 13:23 48:2 penal ^[6] 9:20 15:14 16:15,24 22:3 29:13 penalties ^[3] 21:19 59:10 71:1 penalty ^[21] 20:7 21:17,18,22 22:24 23:9,16 24:5,9,22 27:5 28:24 30:1 33:11 34:	23 36:25 38:25 39:5 59:8,12 64:16 Pennsylvania ^[1] 10:4 penological ^[4] 4:5 27:11 33:25 40:25 people ^[1] 61:10 people's ^[1] 51:7 perfectly ^[1] 43:20 perhaps ^[1] 11:21 period ^[2] 7:18 32:8 permissible ^[2] 37:5 38:8 person ^[6] 8:15 33:1,2,14 45:23 53:15 person's ^[1] 45:21 personally ^[2] 9:1 25:7 persuasive ^[1] 59:7 Pet ^[2] 5:16 38:16 petition ^[3] 5:2 6:13 42:4 Petitioner ^[12] 1:4,19 2:4,15 3:8 4:23 5:6 31:6 32:2,10 67:12 71:14 phase ^[4] 64:7,15 70:24,24 phone ^[1] 16:10 physical ^[1] 27:16 pick ^[1] 72:18 Pictures ^[1] 64:11 pitch ^[1] 61:5 plain ^[4] 20:5,15 24:20 62:24 plainer ^[1] 28:25 plausible ^[3] 34:16,19 43:20 play ^[2] 29:20 34:14 please ^[3] 3:10 14:6 20:1 37:21 49:12 plenty ^[1] 27:6 point ^[14] 6:17 10:3 19:2 22:24 25:4 36:16 39:17 46:8 53:21 59:21 60:3 64:6 70:21 73:10 pointed ^[2] 62:3 64:3 points ^[5] 8:7 19:3 23:25 59:23 67:12 portion ^[2] 5:15 57:24 posed ^[1] 71:18 position ^[14] 7:17 12:11 26:18 27:1 31:4 32:11 38:4 39:23 40:18 65:22,23 66:6,10,14 possible ^[2] 16:21 27:24 possibly ^[1] 29:11 Post ^[7] 3:13 6:23 17:15 31:19 36:8 38:21 56:18 powerful ^[1] 54:8 practical ^[1] 68:15 practically ^[1] 68:19 pre-Apprendi ^[2] 65:22 66:15 pre-MVRA ^[2] 39:23 40:2 precedents ^[4] 52:5 54:18 55:4 68:24 precisely ^[2] 33:11 66:15 predecessor ^[2] 12:22 20:23	predicate ^[1] 31:8 predicated ^[1] 25:5 preexisting ^[2] 43:16 44:14 premise ^[3] 31:3,6 59:4 preponderance ^[1] 62:10 present ^[1] 40:1 presented ^[5] 4:22 19:6 38:13 39:8 61:9 presents ^[1] 4:21 preserve ^[2] 32:16,18 pretty ^[8] 13:15 40:16 43:2 50:22 56:5 62:25 65:5 68:23 prevent ^[1] 23:21 preventing ^[1] 56:23 previous ^[1] 17:16 primarily ^[1] 18:12 primary ^[10] 4:10 16:13,17,18,19,21,23 17:1 25:14 48:16 principle ^[1] 26:4 prior ^[2] 26:14 44:23 prison ^[1] 50:14 probably ^[3] 9:3 59:23 60:25 probation ^[4] 12:10 15:11 16:3 59:18 problem ^[7] 31:19 38:21 66:16,17,18,23 68:21 problematic ^[1] 34:6 problems ^[1] 11:8 procedural ^[1] 30:22 Procedure ^[1] 3:25 proceeding ^[19] 3:16 10:16,17 18:20,22 19:1 21:9,23 38:11 41:20,21 43:13,17,23 47:10 57:7 63:2 64:1 72:2 proceedings ^[7] 14:15 22:2 43:8,10 47:14,18 56:10 process ^[3] 10:25 15:23 71:22 Professor ^[1] 36:12 promote ^[1] 54:25 proof ^[1] 18:10 property ^[2] 9:5 27:20 propositions ^[1] 46:10 prosecuted ^[1] 10:23 protecting ^[1] 14:23 protects ^[1] 4:18 prototypical ^[2] 41:3 45:16 proved ^[1] 62:11 provide ^[3] 9:21 16:19 57:2 provided ^[2] 15:8 68:18 provision ^[10] 6:5 7:12,18 8:5 31:1,23 32:4 38:19,23 39:4 provisions ^[10] 18:6,16,23 30:21,23 37:7,9 46:16 59:15,20 proviso ^[1] 38:5	proximate ^[1] 72:12 proximately ^[1] 72:14 psychological ^[1] 27:16 public ^[2] 4:18 14:23 punish ^[1] 16:19 punishes ^[2] 4:17,19 punishing ^[1] 27:19 punishment ^[71] 3:12,17,22 4:4,8,14 8:20 11:24 12:1,12,25 14:19,20 15:25 16:8,11 17:19 20:4,6,12,14,24 21:16,21,25 22:12,20 23:5 24:19,21 25:2,9 26:18 27:3 28:7,8,13,17,25 29:6,23 32:5,12,14,23 33:4,6,18,24 35:15 36:10 37:8,10 39:5 45:7 47:11 48:8 50:6,7 53:15 54:4,13,17,25 55:10 58:15,21 59:2 60:8,9 72:24 punishments ^[7] 3:21 4:16 8:21,25 12:11 14:24 73:20 punitive ^[21] 4:5 18:12 21:1 23:16 26:14 32:24 33:22 40:19 43:4 46:15,23 48:14,20,24 49:18,23 52:3,13,22 53:10 54:3 pure ^[1] 41:7 purpose ^[15] 4:10 14:21,25 16:23,24 17:2 26:23 27:12,23 28:10,14 33:17 48:7,16 49:16 purpose-based ^[1] 4:11 purposes ^[11] 4:5,16 23:11 28:7,17 29:2 32:23 33:6 54:25 71:18,25 put ^[3] 41:25 44:8 48:18 putting ^[2] 11:9 19:8 Q QP ^[1] 61:16 question ^[37] 4:13,22 14:17 17:17,20 20:8 23:17 25:2 27:1 28:15,19 29:21 32:5,7 35:3 38:12 39:8 40:1 42:23,25 43:6,9 44:5,5 48:19 53:2 56:7,16 58:10 59:4 60:15 61:9,18 66:21 71:17 72:2,5 questioned ^[1] 44:18 questions ^[9] 5:4 14:8 21:6 29:3 37:25 40:4 48:21 72:11,15 quick ^[1] 61:5 quintessential ^[2] 11:24 12:2 quite ^[4] 18:23 22:21 63:25 73:13 quote ^[1] 13:17 R raise ^[2] 11:7 34:23 range ^[3] 9:8,10 73:6 rather ^[3] 9:20 24:19 65:11
--	--	---	---	---

Official - Subject to Final Review

rationale [2] 5:23 6:9 read [1] 14:11 reading [1] 65:24 real [2] 29:25 33:14 reality [1] 59:22 realizes [2] 13:22 48:1 really [12] 18:11 23:10 33:3 43:12 52:14 53:12,19 61:7 65:3 68:4,5 72:10 reason [7] 10:16 19:5 26: 25 33:17 43:5 61:12 65:20 reasoning [1] 69:3 reasons [3] 43:2 50:7 73: 22 REBUTTAL [2] 2:13 71:13 receive [4] 13:20 25:10 47: 24 57:4 received [2] 18:7 57:9 recognize [1] 34:12 recognized [3] 13:19 47: 23 49:3 reconsider [1] 63:24 reconsidered [1] 66:10 reduced [1] 57:17 refer [1] 27:5 references [1] 71:20 referred [2] 24:21,22 referring [1] 35:1 refers [3] 21:17 24:23 28: 23 reform [1] 45:21 regard [1] 44:13 regardless [2] 6:17,17 regime [7] 41:7 53:5,7 55:2, 4 60:25 61:18 register [4] 15:10,20,24 16: 6 registration [3] 15:12 20: 10 22:15 rehabilitation [1] 4:7 rehabilitative [3] 32:25 33: 11 48:7 rehashed [1] 69:9 reintegration [1] 56:24 rejected [3] 12:23 72:22 73:1 relates [1] 39:9 release [4] 16:2,6 23:4 56: 14 relevant [9] 20:25 30:24 45:25 47:9,12,15 49:21 72: 2 73:14 relief [2] 57:7,9 relies [2] 59:16,16 rely [1] 26:12 remand [6] 7:15,16,22 17: 25 32:18 73:23 remedial [6] 48:14,17,19, 23 49:23 60:4 remedies [3] 9:21 52:6 67: 18 remedy [22] 5:2 6:4 42:24 43:3,11,14,22 44:7,9 46:14, 23 48:13 51:19 54:22 56:2	60:5 63:21 64:7,15 67:14 70:23 73:4 remember [1] 39:21 remembering [1] 69:8 rendered [1] 45:5 rendering [1] 51:25 reoffense [1] 56:24 repeatedly [1] 49:2 replete [1] 71:20 replicated [1] 20:24 Report [1] 14:12 require [1] 62:14 required [2] 68:6,7 requirement [2] 15:19 19: 5 requirements [3] 20:10 22: 15,16 requires [5] 61:24 64:8,15, 19 70:25 resentence [1] 10:12 resolve [3] 7:21 31:10 34: 11 resolving [1] 24:2 resources [1] 27:25 respect [5] 34:2 45:10 50:9 66:13 72:4 respond [2] 39:17 71:16 Respondent [4] 1:7,22 2:7 19:24 responds [1] 4:9 response [3] 66:20 73:12, 17 responsibilities [1] 6:19 responsibility [1] 74:4 rest [1] 58:24 resting [1] 24:11 restitution [104] 3:11,14,20, 23 4:4,11,19 5:14,25 6:15 7:19,25 8:6,8,9,10,14,16, 17,18,19,23 9:4,12,14,18, 19 10:5,13 12:24,24 13:20 14:15 16:13 17:6 18:18,19, 25 20:2,3,6,9,16,22 21:16 22:23 23:12,13,15 24:5,9, 14,18,24,25 25:5,12,13,16 26:17 27:5 28:23,24 29:25 30:19 32:12,14 33:9 34:23 35:14,16 39:2 40:23 41:11 42:2 43:18 45:9 47:24 48: 17 53:16 55:13 57:8,15,25 59:19 62:2,13 63:2,16 65: 23 67:7,11,14,19,20 68:3 69:12,16 72:20,23 73:11, 16,17,20 restoring [1] 67:17 restrictions [1] 16:10 result [1] 6:4 retroactively [8] 4:23 7:4, 8 37:1,4,7 38:6,18 retroactivity [2] 36:4,18 return [2] 67:21 70:10 reverse [1] 17:25 revisit [1] 31:7 revoke [1] 15:11	riffs [1] 63:9 rise [1] 47:15 risk [1] 65:10 ROBERTS [15] 3:3 10:15 14:6 15:2 17:3 18:4 19:15, 22 35:21 37:12,16 69:20 71:6,12 73:24 ROBERTSON [38] 1:20 2: 6 19:22,23,25 21:10,14 22: 4 23:24 25:19,25 26:3,11, 16,25 27:11 28:5,22 29:18 30:7,9,17 31:16,24 32:17 33:7,23 34:7,10 35:2,5 36: 7,13,15,23 37:15 58:9,11 Robinson [1] 13:2 role [2] 29:19 71:23 room [1] 24:12 rough [1] 46:17 route [1] 47:19 rule [8] 15:6 31:11 34:3 54: 15 61:20 62:14,19 68:23 rule-of-law [1] 36:20 Rules [2] 3:24 26:6 ruling [1] 72:19 running [1] 10:17 S safeguards [1] 30:23 SAHARIA [30] 1:18 2:3,14 3:6,7,9 5:8 6:20 7:2,6,14 9: 2,22 11:4,20 12:6 14:5,7 15:15 16:16,22 17:8,11,23 18:1,13 19:21 71:12,13,15 sail [1] 60:19 sake [1] 60:5 same [24] 4:17,18 9:12 10: 24,24 11:15,22 13:11 16:8 25:4 30:16 31:10 39:1,20 40:9 42:21 46:2 50:12 55: 21 56:1,3 57:17 59:14 62: 17 sanction [9] 4:6 20:7 21:8 22:24 23:9 24:23 49:4 59: 14,19 sanctions [1] 22:2 satisfactory [1] 66:21 savings [1] 51:7 saying [11] 5:10 7:24 14:1 17:10 28:24 29:12 34:5 53: 23 61:14 64:24 66:12 says [9] 13:17 26:22 28:20 36:22 38:17 45:18 47:22 61:21 62:24 scheme [7] 9:24 11:10 18: 14 30:20 54:4 55:13 68:16 Scylla [1] 60:20 searches [1] 56:19 Second [8] 9:25 14:16 19: 2 39:9 47:7 48:4,10 72:4 Section [11] 5:16 8:3,22 10: 9 13:12 26:22 30:18 31:3, 13,17 71:19 secured [1] 10:7 see [6] 13:17 38:15 40:3 53:	25 64:14 69:17 seeking [2] 69:25 70:11 seem [2] 13:14 18:11 seems [4] 11:17 13:25 44: 4 60:22 Senate [1] 14:12 sense [3] 8:18 59:13,13 sentence [26] 3:15,17 7:25 8:6,14,19 9:25,25 12:7,9 15:21 16:2,4,4 19:13 22:7, 13,19 24:25 48:4 56:9 59: 17,21,25 60:2,5 sentenced [5] 5:7,21 8:15, 17 24:24 Sentences [1] 8:4 sentencing [37] 4:1 5:11 6: 1,6 8:10 12:8 15:8,23 18: 18,24 19:6,7 20:18 21:12 22:8,10,17 23:3 25:8 31: 20 38:2,11 39:21 40:22 41: 22 43:4 44:3 45:5 47:10 50:14 53:18 56:10,13,21 72:10 73:15,21 separate [5] 21:9 32:7 41: 20 55:19 62:4 serious [1] 11:7 serve [10] 4:16 14:24 21:24 22:23 23:12,13 28:8,10,14 56:21 serves [4] 4:5 33:10,16,24 set [1] 42:16 Seventh [22] 11:8,9 12:15, 17,23 30:2 34:24 35:1 60: 21,22 62:21,24 63:23 64: 14 65:1,11 66:16 69:2,25 72:5,7,21 severe [2] 51:13 52:20 sex [4] 15:7,13,20 16:7 shift [3] 44:21 49:22 50:2 shifting [1] 67:10 shouldn't [1] 65:17 show [2] 29:16 30:11 show-cause [1] 4:24 shown [2] 50:20,20 shut [2] 28:21 65:5 side [4] 35:12 48:22 50:8 67:16 signal [1] 13:9 signaling [1] 60:7 silence [1] 60:18 similar [4] 19:9 27:3 28:24 33:8 simply [6] 5:13 15:23 17: 13 35:9 50:10 73:14 since [2] 60:17,18 single [1] 24:17 situation [1] 60:24 Sixth [17] 34:4,6 35:4,7 60: 20 61:3,19 62:20 65:2,4,11 66:19,23 68:20 69:6 72:5, 25 Smith [5] 15:6,18,19 20:11 22:15 society [5] 13:24 17:6 33:2	48:3 56:24 Solicitor [3] 1:20 38:4 39: 22 somebody [2] 10:21 45:17 someone [1] 67:19 sometimes [2] 50:13 65: 12 sorry [5] 46:19 49:11,24 60: 14 67:4 sort [3] 25:23 44:7 64:1 Sotomayor [14] 17:4,5,9, 14,24 18:3 35:24 66:25 67: 4,9,24 68:5,12,22 sounds [1] 48:6 source [3] 31:19 52:15 58: 1 Southern [1] 61:20 specified [1] 22:22 spillover [1] 23:21 split [1] 17:21 spot [2] 52:10,11 stage [1] 41:22 stands [1] 20:19 start [3] 5:10 7:23 45:2 Starting [1] 8:3 state [8] 8:24 9:5 10:19 15: 7,10 24:7 33:15 46:5 stated [2] 27:22 53:1 statement [3] 28:25 36:6 37:2 statements [1] 27:6 STATES [7] 1:1,6,15 3:5 20:18 25:11 64:10 States' [1] 21:4 statute [44] 4:13 5:11,25 6: 15 7:3 8:3 11:15,19 12:13 13:6 14:4,11 16:14,14 17: 5 18:12 19:9 20:23 26:14 27:3,14 28:4,10 30:16 38: 3,6,8,12 39:2,9,10,15,16, 20,20 40:17 42:1 44:14,15, 17,23 45:3 56:6 68:3 statute's [1] 20:6 statutes [5] 30:14 40:8,18 54:20,21 statutory [13] 9:23 18:15 20:21 23:7,17 24:2,11,15 26:4 63:2,19,25 68:16 steals [2] 10:22 67:20 step [5] 12:1 24:3,3 60:6,9 still [9] 6:23 11:23 12:7,11 28:15 32:21 33:4,22 61:15 stop [1] 63:7 strong [1] 21:24 strongly [1] 9:18 structure [1] 45:2 structured [1] 11:7 struggling [1] 44:12 sub [1] 61:22 subject [3] 3:12 30:20 73:6 submitted [2] 74:6,8 subsequent [1] 18:20 substance [2] 63:15,20 substantial [1] 44:25
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Official - Subject to Final Review

substitution ^[1] 68:8 sue ^[1] 45:17 suffered ^[1] 72:13 suggest ^[3] 26:5 34:9 59:21 suggested ^[1] 62:18 suggesting ^[1] 58:22 suggestion ^[1] 25:19 suggests ^[1] 71:25 suit ^[4] 12:4 55:19 63:1,16 suit-like ^[1] 12:5 suits ^[1] 62:25 summarily ^[1] 15:11 summarize ^[1] 23:20 summary ^[1] 3:24 supervised ^[2] 23:4 56:14 supported ^[4] 1:24 2:12 37:19 74:3 supporting ^[3] 1:22 2:8 19:24 supports ^[1] 18:15 Suppose ^[2] 15:7,10 SUPREME ^[2] 1:1,14 surely ^[1] 63:17 survive ^[1] 69:3 syllogism ^[2] 46:7 48:10 system ^[23] 11:11 27:15,18 41:4,8,13 42:15 45:17 46:2,5 48:23 49:8,15,16 53:5,6,19 54:2 55:20 57:2,4 71:21,24 T talks ^[1] 29:15 term ^[1] 10:10 terms ^[6] 9:15 20:7 32:1 33:13 50:14,18 test ^[2] 24:4 25:25 testing ^[2] 56:17,18 Texas ^[1] 1:23 text ^[6] 20:5,15 24:20,23 29:1 62:24 textual ^[3] 8:2 25:3 26:12 Theatres ^[3] 63:21 67:15,22 themselves ^[1] 45:21 themselves ^[2] 9:18 16:10 theorists ^[1] 33:5 theory ^[3] 54:5 55:9 59:25 there's ^[23] 5:15,19 10:18 17:20 28:14,25 34:21 35:10 40:10 42:3 43:16,18,20 46:4 47:19 54:4 57:13,15 60:18,18 70:13,22 71:24 therefore ^[1] 22:12 they've ^[1] 73:2 thinking ^[4] 30:12,13,15 52:12 third ^[1] 17:19 THOMAS ^[14] 5:5 15:3 21:7,13 22:1,5 35:22 37:25 39:6 40:6,15 41:18 47:13 69:21 though ^[7] 13:14,25 32:11	37:8 61:6,13,17 Thoughts ^[1] 50:15 threat ^[1] 3:23 three ^[1] 17:15 threshold ^[3] 4:12 28:15 29:21 throughout ^[1] 59:12 throw ^[1] 25:20 Title ^[1] 3:25 today ^[3] 6:18 30:18 31:22 together ^[2] 12:9 48:18 ton ^[1] 59:11 took ^[2] 26:18 27:1 tools ^[1] 34:15 top ^[1] 25:15 tort ^[12] 12:4,5 41:8,13 45:16 46:1 49:7,14,16 53:4 57:2,3 tort-like ^[1] 48:23 tortfeasors ^[1] 49:17 torts ^[1] 49:17 totally ^[1] 41:6 traditional ^[1] 68:4 traditionally ^[1] 33:5 treat ^[1] 24:13 treated ^[2] 9:14 29:5 treating ^[1] 29:25 treble ^[2] 46:16 52:6 trial ^[13] 61:17,24 62:15 63:15 64:8,15,20 66:13 67:16,23 68:13 70:1,24 trials ^[2] 68:6,18 trigger ^[1] 63:22 triggering ^[1] 60:6 trio ^[1] 4:2 true ^[8] 4:18 30:3 43:15 47:3,5 52:14 69:13 70:18 try ^[1] 55:16 trying ^[2] 7:13 32:18 Tuesday ^[1] 1:11 Tull ^[4] 64:9,12 70:22 72:8 turn ^[1] 41:25 turns ^[3] 11:18 28:1 38:21 two ^[13] 14:4,8 17:14 23:25 30:14 40:7,18 46:10 48:18 57:14 59:22 64:9 73:2 type ^[1] 24:5 typical ^[1] 56:6 U U.S ^[2] 59:12 66:5 ultimate ^[2] 40:17,18 ultimately ^[1] 53:4 unambiguous ^[1] 34:20 unavoidable ^[3] 47:16 67:1,5 unconstitutional ^[1] 68:17 under ^[33] 5:7,23 6:4 7:20 8:24 11:8 16:13 17:5 20:2,23 24:3,3,12 26:17 29:25 30:20 31:23 40:21 45:3 55:4,22 57:13 61:19 62:5,9,20 64:25 67:18 69:2,3 70:22	72:7 73:11 understand ^[5] 52:8,9,17 53:20,22 understanding ^[2] 44:22 62:23 understood ^[3] 18:24 19:12 33:5 uniform ^[1] 13:1 uniformly ^[6] 12:23 20:22 29:5 56:17 72:22 73:1 unimportant ^[1] 61:10 Union ^[1] 61:21 unique ^[1] 64:23 UNITED ^[8] 1:1,6,15 3:5 20:18 21:4 25:10 64:10 unless ^[1] 65:2 unlimited ^[2] 62:2 69:12 unusual ^[3] 28:9 36:24 64:1 up ^[4] 7:16 23:2 42:16 53:4 upset ^[1] 72:20 urging ^[1] 6:2 uses ^[3] 14:12,14 27:3 V vacate ^[2] 21:2 73:23 vacatur ^[3] 1:22 2:8 19:24 valuable ^[1] 27:20 vanishingly ^[1] 61:10 various ^[1] 33:5 version ^[4] 39:24,25 40:2,21 versus ^[12] 3:5 10:4 13:2 20:11 22:16 46:12,13 51:18,18 55:5 64:9,10 victim ^[16] 4:9,20 12:3 13:23 14:2 18:8 41:16 42:4,12,18 48:2 54:23 55:21,22 57:16 72:13 victim's ^[3] 58:17,20 59:1 victim-focused ^[1] 33:21 victims ^[29] 8:23,25 9:3,7,17,21 13:16,19 16:20 17:13 19:3 20:3 26:24 27:17,20,25 28:12,20 29:15,16,20 43:24 47:23 48:24 51:8 55:17 57:4 58:4 71:23 view ^[5] 23:20 66:3,8 69:19 70:12 viewed ^[1] 8:19 views ^[1] 69:9 Virtually ^[2] 42:1 49:3 VW ^[1] 61:13 VWPA ^[27] 5:21 7:7,20 12:21 13:4,5,12 26:17,22 27:2 29:4,5,14 30:15 39:24 40:22 41:17 44:14 45:3 46:5 50:2,9 52:13 54:20 61:14 71:18,20 W wake ^[1] 12:21 wanted ^[3] 30:10 48:10 49:25	wants ^[2] 31:1 60:19 Ward ^[1] 21:20 washes ^[1] 23:10 Washington ^[3] 1:10,18,21 way ^[18] 11:16 16:8 33:4,22 34:11 41:15 42:1 43:23 47:18 50:12 54:8 55:12,16,21 56:25 58:8 59:14 73:19 ways ^[6] 53:24 57:14 58:12,19 59:5 60:12 weight ^[1] 44:12 welcome ^[2] 5:4 21:6 Welfare ^[1] 10:4 well-established ^[1] 44:22 whatever ^[1] 29:3 Whereupon ^[1] 74:7 whether ^[22] 5:20 14:19,21 20:13 21:18,20 25:2 28:6,15 32:8,21 38:20 40:23 41:1 44:6 45:9 48:13,19 49:4 59:24 64:7 70:23 whoever ^[1] 10:21 whole ^[3] 16:20 55:9 61:18 will ^[6] 7:15,23 15:5 24:12 25:23 43:17 win ^[1] 7:11 wiping ^[1] 51:7 within ^[4] 9:5 25:16 27:6,24 without ^[5] 36:5,20 37:1 60:6 69:15 wondering ^[2] 32:21 55:8 word ^[6] 11:21 14:13,14 18:22 67:11,14 words ^[1] 11:17 work ^[1] 64:25 works ^[2] 11:19 55:21 world ^[2] 68:9,15 worried ^[1] 29:11 worse ^[1] 72:19 worst ^[1] 17:24 wrestle ^[2] 5:6,9 wrestling ^[1] 12:15 written ^[1] 12:13 wrongdoing ^[2] 54:9 55:11 Y years ^[4] 5:12 6:18 18:9 64:18 yellow ^[1] 40:3
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