

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL BOWE,)
 Petitioner,)
 v.) No. 24-5438
UNITED STATES,)
 Respondent.)
- - - - -

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Place: Washington, D.C.
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Tuesday, October 14, 2025

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21
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24
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	ANDREW L. ADLER, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	ANTHONY A. YANG, ESQ.	
7	On behalf of the Respondent	44
8	ORAL ARGUMENT OF:	
9	KASDIN M. MITCHELL, ESQ.	
10	Court-appointed amicus curiae in	
11	support of the judgment below as to	
12	Question 1	87
13	REBUTTAL ARGUMENT OF:	
14	ANDREW L. ADLER, ESQ.	
15	On behalf of the Petitioner	101
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 24-5438,
5 Bowe versus United States.

6 Mr. Adler.

7 ORAL ARGUMENT OF ANDREW L. ADLER

8 ON BEHALF OF THE PETITIONER

9 MR. ADLER: Mr. Chief Justice, and may
10 it please the Court:

11 By its plain terms, 2244(b)(1) applies
12 to habeas corpus applications under Section
13 2254. It therefore does not apply to motions
14 to vacate under Section 2255. After all, those
15 motions have their own separate gatekeeping
16 requirements.

17 Resisting this straightforward
18 conclusion, the Court-appointed amicus proposes
19 an elaborate theory that no court in the
20 country has adopted. But the plain text,
21 context, and structure of the statute make
22 clear that (b)(1) does not apply to federal
23 prisoners. This Court has jurisdiction to so
24 hold.

25 We have offered several arguments for

1 why 2244(b)(3)(E) does not bar review here, but
2 the simplest one is this: The subject of our
3 cert petition is -- was not the denial of an
4 authorization. This argument is based on
5 Castro and the passage on page 380 that starts
6 with the sentence "Even if for argument's
7 sake." The Court assumed that there was a
8 denial of an authorization because the court of
9 appeals had stated that the prisoner could not
10 satisfy the gatekeeping requirements. But this
11 Court unanimously held that this denial was not
12 the subject of the cert petition because the
13 prisoner sought review only on the antecedent
14 question of whether he had to satisfy the
15 gatekeeping requirements at all.

16 There is no material distinction
17 between that question reviewed in Castro and
18 the question here, which is whether Petitioner
19 must satisfy the gatekeeping requirement in
20 (b)(1) at all. Because there is jurisdiction,
21 the Court should seize this opportunity to
22 resolve the 6-3 split that has evaded the
23 Court's review for the past several years and
24 that will otherwise go unresolved.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: Why would Congress
2 want to treat federal and state prisoners
3 different?

4 MR. ADLER: Justice Thomas, the short
5 answer is federalism. We know throughout AEDPA
6 that Congress did, in fact, treat state and
7 federal prisoners differently. We cited
8 numerous examples in the statutory text that
9 reflects that differential treatment. And we
10 even see that with respect to second or
11 successive applications as well with respect to
12 the newly discovered evidence criteria, which
13 we know are different.

14 The fact is that state prisoners, when
15 they are in federal court and challenging a
16 state judgment, that the tension is high
17 with -- with the sovereignty of a state court.
18 And so that is why we see it with exhaustion.
19 We see it with the deferential standard in
20 2254(d). We see it with the limitations on
21 evidentiary hearings. And (b)(1) is just
22 another example of that differential treatment.

23 JUSTICE THOMAS: So what was the
24 point -- what was Congress trying to accomplish
25 with 2255, with the addition of (h) in 20 --

1 2255?

2 MR. ADLER: In (h), Congress was
3 enumerating the two conditions that federal
4 prisoners must -- one of two conditions that
5 they must satisfy before they can bring a
6 second or successive 2255 motion. The only
7 other thing it did in (h) was incorporate the
8 certification provisions in 2244(b)(3) that
9 govern how that determination is going to be
10 made.

11 JUSTICE THOMAS: As between federal
12 and state, beyond the federalism issue, why
13 would those be treated differently? The
14 prisoners, the federal prisoners and the state
15 prisoners, they had been treated differently,
16 but I think the effort by Congress was to bring
17 them closer together in treatment.

18 MR. ADLER: Your Honor, we don't agree
19 with that. We see numerous examples in AEDPA
20 where they are treated differently, so we know
21 that they're not treated the same.

22 And beyond federalism, we know
23 finality concerns are different. State
24 prisoners have had multiple rounds of review by
25 the time they get to a successive 2255 -- 4

1 petition, and -- and the number of state
2 prisoners far outnumber federal prisoners in
3 our -- in our system. And so Congress would
4 have been concerned about finality most of all
5 with state prisoners, including the fact that
6 the vast majority of capital inmates here in
7 this country are in state -- are state
8 prisoners.

9 JUSTICE SOTOMAYOR: Going back to that
10 point when you say multiple rounds, a state
11 prisoner has had a state court, intermediate
12 state court, final supreme court, a district
13 court, and a court of appeals. But, in federal
14 court, a prisoner only has two rounds or three
15 rounds of review, correct?

16 MR. ADLER: That's correct. What
17 state prisoners have that federal prisoners do
18 not is they also have state post-conviction
19 review, which serves as an additional level of
20 review that federal prisoners do not have.
21 They also have, of course, the right to appeal
22 any federal claim to this Court, even on direct
23 appeal of their state conviction. And we
24 actually see a collateral estoppel bar in
25 2244(c) that applies only to state prisoners.

1 JUSTICE GORSUCH: Mr. --

2 JUSTICE SOTOMAYOR: Counsel -- I'm
3 sorry.

4 JUSTICE GORSUCH: No, no, please.

5 JUSTICE SOTOMAYOR: Counsel, I don't
6 want you to give up your first argument on
7 jurisdiction. I know that in -- in a previous
8 statement I made in this very case, I suggested
9 that it was wrong. But your brief gave me
10 great pause. Don't give up on it. All right?

11 You -- your position is that the
12 first -- that the cross-reference barring
13 jurisdiction does not unambiguously incorporate
14 the cert bar that exists for state prisoners,
15 correct?

16 MR. ADLER: That's correct.

17 JUSTICE SOTOMAYOR: And our case law
18 is replete that to deprive us of jurisdiction
19 it has to be clear.

20 MR. ADLER: That's correct.

21 JUSTICE SOTOMAYOR: All right. And
22 unambiguous?

23 MR. ADLER: Correct.

24 JUSTICE SOTOMAYOR: And this is not.
25 All it says is that successive habeas functions

1 filed by federal prisoners "must be certified,
2 as provided in Section 2244, by a panel of the
3 appropriate court of appeals." Right?

4 MR. ADLER: Correct.

5 JUSTICE SOTOMAYOR: Now that's not
6 sufficiently clear because this Court is not a
7 panel of the court of appeals, right?

8 MR. ADLER: That is correct.

9 JUSTICE SOTOMAYOR: And so it's
10 speaking about whether a full panel could hear
11 it, not whether the Supreme Court could hear
12 it, correct?

13 MR. ADLER: That's correct. I -- to
14 be clear, we are not giving up that argument.

15 JUSTICE SOTOMAYOR: All right.

16 MR. ADLER: We are simply saying, as
17 we did on page 15 of our reply brief, that it's
18 not necessary.

19 JUSTICE SOTOMAYOR: Because of the
20 Castro argument?

21 MR. ADLER: And our other narrower
22 arguments.

23 JUSTICE SOTOMAYOR: All right.

24 MR. ADLER: But our argument --

25 JUSTICE SOTOMAYOR: But any review by

1 this Court of a panel's cert decision is not
2 part of how the panel certifies a successive
3 filing, correct?

4 MR. ADLER: That's correct. Our
5 argument is based on the text of 2255(h),
6 which -- which incorporates the parts of 2244
7 that "provide" for how a motion is to be
8 "certified" by a "panel" of the appropriate
9 court of appeals. And our position is that
10 incorporates (b)(3)(A) through (D) because
11 those provisions do just that, but it does not
12 incorporate (E), which comes into play only
13 after the certification determination has been
14 made, and it provides limitations on further
15 review in the form of rehearing and certiorari.

16 JUSTICE JACKSON: But why in the --

17 JUSTICE ALITO: Doesn't your --

18 JUSTICE GORSUCH: Sorry. Please go
19 ahead.

20 JUSTICE SOTOMAYOR: One last question.

21 The two standards of review, (h) and
22 what the state court looks for, you mentioned
23 earlier, are very different things, correct?
24 The substantive standard.

25 MR. ADLER: With respect to the newly

1 discovered evidence, they are different. With
2 respect to new rules of constitutional law,
3 they are identical.

4 JUSTICE SOTOMAYOR: But there's still
5 a difference?

6 MR. ADLER: With the newly discovered
7 evidence, yes.

8 JUSTICE SOTOMAYOR: And six circuits
9 are applying the state prisoner substantive
10 review provisions rather than the federal
11 substantive review provisions?

12 MR. ADLER: Our -- our position is
13 that they are applying (b)(1), which, on its
14 face, applies only to state prisoners. That's
15 correct.

16 JUSTICE SOTOMAYOR: All right. Thank
17 you, counsel.

18 CHIEF JUSTICE ROBERTS: Justice Alito?

19 JUSTICE GORSUCH: Go ahead. Yeah,
20 please.

21 JUSTICE ALITO: Doesn't your reading
22 of 2255(h) make a hash of the procedure that
23 Congress has prescribed? An authorization to
24 file a second or successive application must be
25 certified by a panel of a court of appeals,

1 and that court has to do that not later than
2 30 days after the filing of a motion.

3 But, on your reading, even though the
4 panel has to move very quickly, once the panel
5 has ruled, if it denies the application, then
6 the prisoner can move for rehearing en banc and
7 there are no special time limits on that or
8 rehearing before the panel, there are no
9 special time limits on that. Can file a
10 petition for a writ of certiorari, there are no
11 special time limits on that.

12 So doesn't your reading completely
13 vitiate what Congress was getting at?

14 MR. ADLER: Sure. We understand that
15 concern, Your Honor. Our position on -- this
16 is -- this only goes to our broadest
17 jurisdictional argument that Justice Sotomayor
18 referenced, not our narrow ones.

19 JUSTICE ALITO: Yeah, I understand.

20 MR. ADLER: But, to answer your
21 concern, we don't think that Congress has to
22 legislate in an all-or-nothing manner here.
23 So, with the 30-day limitation on the front
24 end, that significantly increases the
25 expediency of the process here. Where,

1 normally, an appeal would take a year, now it
2 takes 30 days.

3 But that doesn't mean that Congress
4 also wanted to eliminate all forms of further
5 review, and we see Congress doing this in 2266,
6 another provision of AEDPA, which places time
7 limits on the resolution of capital cases but
8 does not dispense with further review and
9 rehearing or certiorari.

10 Of course, our position is that the
11 Court does not need to address this argument
12 because we have three other narrower arguments,
13 and this, of course, was the same approach
14 that this Court took in *Castro*, where it --

15 JUSTICE ALITO: Every court of appeals
16 has decided the issue you've just been deciding
17 against you, right?

18 MR. ADLER: In the context of
19 rehearing. Of course, no court of appeals has
20 done so in the context of certiorari. But,
21 yes, I believe that is correct.

22 However -- none of the --

23 JUSTICE GORSUCH: If that -- if that's
24 correct, right, so just to step back, you --
25 you agree that (b)(3)(A), (B), (C), and (D) are

1 all incorporated in 2255?

2 MR. ADLER: Correct.

3 JUSTICE GORSUCH: So we're left with
4 (E). And, as Justice Alito pointed out, every
5 single court that's addressed the issue says
6 that that does bar panel rehearings and en banc
7 rehearings. But you would ask us to overturn
8 all those decisions, or do you think there's a
9 way to say those decisions are correct, but
10 it's only the bar -- it's pretty express -- no
11 certiorari right there in (E). Is it somehow
12 different?

13 MR. ADLER: From the rehearing bar?
14 No, that's not our position. We just think
15 that the six -- the circuit --

16 JUSTICE GORSUCH: So they're all
17 wrong? All those courts are wrong?

18 MR. ADLER: Correct. They have not
19 actually taken the text of 2255(h) seriously.

20 JUSTICE GORSUCH: Okay. Okay. I
21 appreciate that argument. I understand that
22 argument.

23 Is there something odd about the fact
24 that you would bar cert petitions and rehearing
25 petitions for not just state prisoners under

1 2254 but also any 2244 pre-conviction prisoners
2 but yet not federal prisoners?

3 Do you see what I'm saying?

4 I mean, 2244 isn't just
5 post-conviction relief. It's pre-conviction
6 relief too often. That's its -- that was its
7 central and original function.

8 And yet they couldn't bring cert
9 petitions. They couldn't bring rehearing
10 petitions. State prisoners can't bring
11 rehearing petitions post-conviction, but
12 federal prisoners can?

13 Is -- do you see the incongruity there
14 that I'm observing?

15 MR. ADLER: I -- I think it's a
16 difficult question whether 2244(b) applies to
17 2241 habeas petitions, which I think is what
18 your question is getting at. I certainly don't
19 think the Court has to decide any of that here.

20 JUSTICE GORSUCH: But that is -- that
21 is where your logic leads, and so I just wonder
22 how that could be.

23 MR. ADLER: Our --

24 JUSTICE GORSUCH: What would be the
25 rational account for it if that's how it works?

1 MR. ADLER: Our position is simply
2 that the text here treats federal prisoners
3 differently in (b)(3)(E) in the same way it
4 does in (b)(1). And that is, of course, due to
5 federalism. That is the -- that is a plausible
6 explanation.

7 Again, however, I don't think the
8 Court needs to go broad here when we have
9 narrower --

10 JUSTICE GORSUCH: But can -- but
11 can -- can you think of -- and maybe -- maybe
12 the answer is you can't on your feet, and I get
13 it -- any reason why pre-conviction prisoners
14 would be barred, but post-conviction prisoners
15 wouldn't be?

16 MR. ADLER: Well, Congress has drawn a
17 distinction throughout the statute between
18 people who are in custody pursuant to a
19 judgment and people who are not.

20 As for pretrial detainees, my
21 experience is that they are not having to file
22 second or successive motions to file their
23 2241 petitions.

24 To the extent that's a category of
25 cases, I'm just not aware of it. So I think,

1 in practice, it just hasn't been an issue.

2 But, again, I just don't think that the Court
3 has to decide any of this in this --

4 JUSTICE JACKSON: Right. So you keep
5 going back to your narrow jurisdictional
6 argument, and I'm quite interested in it. And
7 I guess I'm trying to understand whether your
8 response to Justice Gorsuch's bringing up all
9 of the prior court of appeals cases is that
10 perhaps they weren't focused on whether or not
11 the panel had actually granted or denied -- had
12 actually applied the substantive criteria and
13 that what (E) is really doing -- this is what
14 I take your argument to be -- is essentially
15 establishing a finality requirement when the
16 panel actually does apply the substantive
17 criteria and makes a determination about
18 whether this authorization should be granted
19 or denied.

20 But when, as here, the panel doesn't
21 do that because it makes some other
22 determination about, let's say, its lack of
23 jurisdiction to make that kind of a ruling,
24 that's still on the table as you read (E).
25 That's not being stripped by this statute.

1 Is that right?

2 MR. ADLER: In general -- generally,
3 yes. We have --

4 JUSTICE JACKSON: Okay.

5 MR. ADLER: -- three different narrow
6 arguments here and they're all slightly
7 different. If I can just briefly sketch those
8 out?

9 JUSTICE JACKSON: Sure.

10 MR. ADLER: The first one logically is
11 that the court of appeals here did not deny the
12 motion for authorization, the key word being
13 "denial," because the court of appeals
14 dismissed it for lack of jurisdiction. It did
15 not issue a ruling on the merits. And that
16 argument follows from this Court's decision in
17 Stuart.

18 The second argument --

19 JUSTICE JACKSON: But wait. That's --
20 that's sort of what I'm saying, right? It
21 didn't make the requisite determination --

22 MR. ADLER: Correct.

23 JUSTICE JACKSON: -- that triggers
24 (E).

25 MR. ADLER: Correct.

1 JUSTICE JACKSON: You have to grant or
2 deny, not dismiss.

3 MR. ADLER: That is correct. That is
4 correct.

5 JUSTICE JACKSON: All right.

6 MR. ADLER: That's our first argument.

7 Our second argument is, even if
8 there's a denial, they didn't -- they didn't --
9 the court of appeals did not issue a denial of
10 an authorization because it went beyond the
11 gatekeeping requirements.

12 Now this argument depends on whether
13 we're right about (b)(1), but if we are, it
14 means that the court of appeals did not issue a
15 proper authorization determination because it
16 relied on a requirement that is, in fact, not a
17 requirement for authorization at all. In fact,
18 it's irrelevant to the case.

19 And our third argument is based on
20 Castro, and it's the one I opened with, which
21 is that even if there is a denial of an
22 authorization, it's not the subject of our cert
23 petition.

24 The subject of our cert petition is a
25 antecedent question about whether we have to

1 even satisfy the gatekeeping requirement in
2 (b)(1) at all. That is the line that Castro
3 drew.

4 And on the other side of the spectrum,
5 if we had, say, challenged -- the court of
6 appeals said you cannot actually satisfy these
7 gatekeeping requirements, that's a denial,
8 that's barred. That is the sort of core focus
9 of (b)(3)(E).

10 JUSTICE JACKSON: So, under your --
11 under this narrow jurisdictional approach,
12 there's still work for (E) to do. It's not as
13 though your -- your broadest argument is (E)
14 doesn't even apply in federal cases.

15 MR. ADLER: Correct.

16 JUSTICE JACKSON: That's the one that
17 Justice Sotomayor explored with you.

18 MR. ADLER: Correct.

19 JUSTICE JACKSON: But now you're
20 saying, even if (E) applies, it doesn't apply
21 in our circumstance for these three reasons.

22 MR. ADLER: Correct. And this
23 situation is so far removed from the core of
24 (b)(3)(E). (b)(3)(E) is about preventing
25 this Court from reviewing individualized

1 applications and determinations, people seeking
2 error correction in this Court.

3 This case is far removed from that
4 because, first of all, we have a
5 non-merits-based dismissal based on a
6 gatekeeping requirement that we contend does
7 not even apply in this case.

8 JUSTICE JACKSON: Thank you.

9 JUSTICE KAVANAUGH: If I can --

10 JUSTICE ALITO: But you applied for --
11 you applied for authorization, right?

12 MR. ADLER: Correct.

13 JUSTICE ALITO: To file a second or
14 successive?

15 MR. ADLER: That's correct.

16 JUSTICE ALITO: And is that still on
17 the docket of the court of appeals?

18 MR. ADLER: No, it was -- it -- it is
19 not.

20 JUSTICE ALITO: So it was denied,
21 right?

22 MR. ADLER: No, Your Honor. There's a
23 distinction between a dismissal and a denial in
24 the statute.

25 JUSTICE ALITO: Well, it was

1 effectively -- it was effectively denied. What
2 you're saying is it was denied on an improper
3 ground.

4 MR. ADLER: Correct. The effect of
5 it --

6 JUSTICE ALITO: But --

7 MR. ADLER: -- was a denial. However,
8 we know from Stuart, this Court's decision in
9 Stuart, that the effect does not matter because
10 the effect of the ruling by the court of
11 appeals in Stuart was to grant authorization.

12 In fact, the court of appeals
13 transferred it to the district court. This
14 Court said it's not a grant of authorization.

15 And the reason why is it didn't rule
16 on the merits.

17 Now, here, the effect is to deny, but
18 the effect doesn't matter. What matters is the
19 court of appeals did not rule on the merits.
20 That's our first dismissal/denial argument
21 based on Stuart.

22 JUSTICE ALITO: All right. Okay.
23 Thank you.

24 JUSTICE KAVANAUGH: On -- on your
25 broader argument, picking up on Justice

1 Gorsuch's question, the distinction between en
2 banc or petition for rehearing in the court of
3 appeals and then this Court's review might
4 depend on the clear statement rule in part.
5 How should we think about the clear statement
6 rule and how to apply it here?

7 MR. ADLER: Your Honor, that is a
8 correct distinction that the clear statement
9 rule that this Court applied in *Castro* to
10 (b)(3)(E) would only apply to the certiorari
11 bar rather than the rehearing bar. So, if the
12 Court wanted to sort of decouple those, that
13 would be the basis to do it.

14 That's not our position. We just
15 think that (E) is not covered by the text of
16 the cross-reference in (b)(3)(E) because it
17 comes into play after the certification
18 determination has been made. And, as the
19 government acknowledges, (b)(3)(E), it's just a
20 limitation on further review. And -- and so
21 that's why we think the whole thing falls
22 outside the scope of (E). But you're correct
23 that to the extent the clear statement rule
24 would make a difference here, yes, the
25 certiorari bar is even further removed.

1 JUSTICE KAVANAUGH: What would a clear
2 statement -- what -- what more would Congress
3 have to do, do you think?

4 MR. ADLER: Well, we have a clear
5 statement in (E) itself with respect to state
6 prisoners with respect to habeas applications.
7 What we don't have is a clear statement in (h),
8 where we're talking about federal prisoners.

9 And we pointed this out in our initial
10 brief with the Hohn decision, and that case
11 drew a contrast between (b)(3)(E) as a clear
12 statement and a certificate of appealability
13 provision in 2253, which didn't have that.

14 And we think that same sort of
15 contrast exists here with (b)(3)(E) and
16 2255(h), which says nothing about jurisdiction.

17 JUSTICE BARRETT: 2255(h) does say --
18 and this is just -- as I'm trying to think
19 about this argument, this clear statement point
20 that you have, I think, is your best one on
21 your broader argument. 2255(h) does say,
22 though, that a second or successive motion must
23 be certified, as provided in Section 2254,
24 by -- 2244 by a panel of the appropriate court
25 of appeals.

1 So what are we to make of that? It
2 says certification has to come from a panel.
3 And then one could flip back to 2244 and say
4 that this whole section in (3) is talking about
5 how that certification happens by a panel, and
6 then (E) says and, yeah, it really happens by a
7 panel. The panel's word is final.

8 MR. ADLER: Your Honor, I understand
9 that point. That's not what (E) says, however.
10 All (E) does is prohibit a petition for
11 rehearing. So that's why every circuit to look
12 at this has said that sua sponte rehearing is
13 still on the table.

14 All we're saying is that (b)(3)(A)
15 through (D) say that the certification
16 determination has to be made by a three-judge
17 panel, but it doesn't prohibit rehearing
18 petitions by federal prisoners.

19 So it's a difficult -- it's a
20 difficult argument and a difficult issue,
21 again, that I don't think the Court would have
22 to address if it went with one of our narrower
23 arguments.

24 JUSTICE KAGAN: I mean, what (E) tells
25 you is when the certification process generally

1 stops. I suppose that's the same point that
2 Justice Barrett is making, and it seems to be
3 slicing the baloney pretty thin to say, well,
4 we'll do (A) through (D), but then we don't do
5 (E) even though (E) basically puts the period
6 on what (A) through (D) says. It says here's
7 when it ends, the certification process.

8 MR. ADLER: Sure, Your Honor. We take
9 that point. I think the key word that you just
10 used is "process," which is not a word that's
11 used in (h). That's a word that's added by the
12 government in its brief along with the words
13 "final" and "conclusive."

14 JUSTICE KAGAN: I take the point,
15 but -- but, you know, it's -- what (h) is about
16 is how something gets certified. So it doesn't
17 seem to be too much of a leap to say, when
18 you're talking about how something gets
19 certified, you're talking about the
20 certification process, and that includes sort
21 of the statement which (E) gives about when and
22 how that certification process ends.

23 MR. ADLER: Sure, Your Honor. So,
24 again, our argument is based on the full text
25 of (h), certified as provided by a panel of the

1 appropriate court of appeals. We think that
2 only covers the provisions that provide for
3 certification. (E) comes after that
4 determination has been made.

5 JUSTICE BARRETT: Could you win
6 without the clear statement rule?

7 MR. ADLER: I'm sorry?

8 JUSTICE BARRETT: Could you win this
9 argument without the clear statement rule?

10 MR. ADLER: I think so, Your Honor,
11 but, again, I think we're perhaps losing sight
12 of the bigger picture here, which is that the
13 top priority in this case, we think, is for
14 this Court to be able to resolve the circuit
15 conflict on (b)(1).

16 So we don't have a particular dog in
17 the fight on how the Court resolves its own
18 jurisdiction here. And that's why I keep
19 coming back to our narrower arguments because,
20 to the extent that anyone is concerned about
21 the implications for this, the narrower
22 arguments would avoid that.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 In your brief, you argue that

1 interpreting (b)(3)(E) as taking jurisdiction
2 away would raise serious questions under the
3 Exceptions Clause. You want to answer that
4 serious question?

5 MR. ADLER: I certainly don't want to
6 answer that question, Your Honor, but I think
7 this Court might have to if it concludes -- if
8 it rejects all of our jurisdictional arguments
9 such that there's really no way for this Court
10 to exercise its essential function under
11 Article III, which is to ensure the uniformity
12 of federal law, including a very important
13 federal statutory provision in AEDPA.

14 CHIEF JUSTICE ROBERTS: Well, it says
15 that not with respect to AEDPA but subject to
16 such exceptions and regulations as Congress may
17 make. Why isn't this just an exception that
18 Congress has made?

19 MR. ADLER: Sure. So, if you reject
20 all of our jurisdictional arguments, and given
21 the potential unavailability of original habeas
22 petitions by federal prisoners after Jones
23 v. Hendrix, there is really no viable way for
24 this Court to be able to ensure the uniformity
25 of federal law here.

1 Now the amicus beef -- brief by the
2 federal courts professors lays this out very
3 well and summarizes the scholarship, but this
4 case is a unique one in the sense that original
5 habeas has always functioned as a safety valve
6 here. That's what the Court has always pointed
7 to. And if that's not available, and if
8 certiorari is not available under any of our
9 arguments, then that is why I think we come
10 into serious problems here with the Exceptions
11 Clause. And I think the Court can simply avoid
12 all of that if it narrowly construes (b)(3)(E)
13 as it has always done in the only two cases
14 where it's interpreted that provision, in
15 Stuart and Castro, and exercises jurisdiction
16 on one of our narrower arguments and,
17 therefore, directly resolved the conflict over
18 (b)(1).

19 CHIEF JUSTICE ROBERTS: But we've
20 never held that the Exceptions Clause does not
21 mean what it says, have we?

22 MR. ADLER: I'm not aware of any
23 decision by this Court resolving that question,
24 no. And I don't think that this is the case to
25 do it because of the avoidance -- the avenues

1 we've given this Court to exercise jurisdiction
2 on some other narrower ground.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Alito?

7 JUSTICE ALITO: On the relitigation
8 bar, what's your response to the argument that
9 Congress may not have been particularly
10 attentive to terminology but that the thrust of
11 what it was trying to do was to apply the same
12 rules to federal and state prisoners?

13 MR. ADLER: I think there's simply no
14 evidence to support that in the text. We have
15 2254 appearing in (b)(1) and (b)(2) but not in
16 (b)(3), by the way, which everyone agrees the
17 certifications there do apply. So that
18 distinction is important.

19 Everybody agrees, the Eleventh
20 Circuit, Court-appointed amicus agree that
21 (b)(2) doesn't apply to federal prisoners and
22 it uses the exact same 2254 language.

23 And then we have two separate and
24 independent gatekeeping requirements for
25 federal prisoners in (h)(1) and (h)(2), state

1 prisoners in (b)(1) and (b)(2). So it's a
2 symmetrical regime that they set up here. So I
3 think every textual indication here is to the
4 contrary.

5 JUSTICE ALITO: All right. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 JUSTICE SOTOMAYOR: Counsel, if
9 Congress wanted to include the cert bar, it
10 could have just said, "as provided in
11 Section 2244(b)(3)," correct?

12 MR. ADLER: Correct.

13 JUSTICE SOTOMAYOR: But it didn't. I
14 used a different phraseology.

15 MR. ADLER: Correct. It -- correct.

16 JUSTICE SOTOMAYOR: And the process
17 that was used that it references is a process
18 of court certification, not of cert, correct?

19 MR. ADLER: Correct.

20 JUSTICE SOTOMAYOR: And that's your
21 basic point?

22 MR. ADLER: That is supportive of our
23 basic point. Our basic point is really a
24 textual argument here. It's not a policy
25 argument. I think that's what the government

1 is trying to say here, is we don't want to see
2 a lot of cert petitions here because we're
3 overworked. I think that's the main concern.
4 But we're making a textual argument about the
5 scope of the reference in -- cross-reference in
6 (h).

7 JUSTICE SOTOMAYOR: All right. Could
8 you go back a moment to -- to the Chief
9 Justice's question, okay, with respect to
10 review by the court of appeals or -- or why
11 isn't there a constitutional question with
12 AEDPA, but there would be one if we deprive
13 federal prisoners of review of this issue?

14 MR. ADLER: I think this particular
15 circuit conflict on (b)(1) is unique in the
16 sense that it can be raised only by federal
17 prisoners. And if federal prisoners can no
18 longer file original habeas petitions in this
19 Court challenging their conviction and sentence
20 after Jones v. Hendrix, then this particular
21 split, I think, highlights the potential
22 constitutional problem in a way that no other
23 split would.

24 Now other splits could still raise the
25 question because this Court has rarely, if

1 ever, actually used its original habeas power,
2 but this particular split, I think, is -- is
3 the problem here because there's really no
4 other viable way for this Court to resolve this
5 circuit conflict on (b)(1).

6 JUSTICE SOTOMAYOR: And the circuit
7 conflict is on whether the successive petition
8 bars review at all?

9 MR. ADLER: No. The circuit conflict
10 is on whether (b)(1) applies to 2255 motions.

11 JUSTICE SOTOMAYOR: (b)(1). That's
12 what I meant.

13 MR. ADLER: Correct.

14 JUSTICE SOTOMAYOR: Okay. Thank you.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: Mr. Adler, the clear
17 statement rule that you invoke from Castro I
18 take it comes from the sentence where it -- it
19 speaks of the basic principle that we read
20 limitations on our jurisdiction to review
21 narrowly. Is that --

22 MR. ADLER: No, Your Honor. There's a
23 sentence, I believe, right before or right
24 after that, it says that we are not going to
25 read (b)(3)(E) in a manner that would deprive

1 the -- close this Court's door -- this Court's
2 courthouse doors to a class of habeas
3 petitioners without a clear indication that
4 Congress sought to do so.

5 JUSTICE KAGAN: Clear indications.

6 MR. ADLER: Correct.

7 JUSTICE KAGAN: Okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 JUSTICE GORSUCH: We haven't given you
11 much of a chance on the merits to speak, and I
12 do have one question for you about that that
13 I'm struggling with. So you agree that (b)(3)
14 and (b)(4) apply when we get to the merits,
15 right?

16 MR. ADLER: If you reject our broader
17 jurisdictional argument, then we would agree
18 with that.

19 JUSTICE GORSUCH: Okay. All right.

20 MR. ADLER: But not if you agree with
21 it.

22 JUSTICE GORSUCH: I understand that.

23 MR. ADLER: Okay.

24 JUSTICE GORSUCH: Okay. So we've got
25 (b)(3) and we've got (b)(4) in there but not

1 (b)(1) and (b)(2).

2 MR. ADLER: Correct.

3 JUSTICE GORSUCH: And one of the main
4 arguments as I understand it has been because
5 (b)(1) and (b)(2) speak about applications
6 under Section 2254, right?

7 MR. ADLER: Yes.

8 JUSTICE GORSUCH: Okay. I wonder why
9 that doesn't cut the other way because,
10 throughout 2244(b)(1), (2), (3), (4), it speaks
11 of applications, not motions, which you have in
12 the 2255 context. So you've got to -- you've
13 got to -- you've got to read motions as
14 applications, okay.

15 And 2254 is the state post-conviction
16 procedure that's most analogous to 2255, right?

17 MR. ADLER: I would agree with that,
18 yes.

19 JUSTICE GORSUCH: Okay. And that's
20 what's referenced in (b)(1) and (b)(2), is the
21 state post-conviction procedure.

22 MR. ADLER: Mm-hmm.

23 JUSTICE GORSUCH: And (b)(3) and
24 (b)(4) just talk about applications, which
25 includes pre-conviction, again, 2241 possibly,

1 possibly. So what do we do with that?

2 It seems to me like the fact that it
3 mentions 2254 in (b)(1) and (b)(2) makes it
4 more likely to be applicable rather than less.

5 MR. ADLER: No, Your Honor, we
6 strongly disagree with that.

7 JUSTICE GORSUCH: I know you do, and
8 I'm wondering why.

9 MR. ADLER: Here's why, because the
10 fact that 2254 is referenced in (b)(1) and
11 (b)(2) but not (b)(3) and (b)(4) suggests that
12 number one, the 2254 language in (b)(1) and
13 (b)(2) was deliberate, and number two, it
14 suggests that the omission of that language in
15 (b)(3) and (b)(4) allows those provisions to
16 apply to 2255 motions in a way that (b)(1) and
17 (b)(2) cannot.

18 JUSTICE GORSUCH: But why wouldn't --
19 I -- I -- I understand that. That's what you
20 said in your briefs. But I'm not sure it's
21 totally responsive to what I'm getting at,
22 which is it definitely signals that we're
23 talking about post-conviction when you mention
24 2254.

25 MR. ADLER: Mm-hmm.

1 JUSTICE GORSUCH: And the later
2 sections suggests it applies to all habeas,
3 whether it's 2241 or 2240 -- 2255, right?

4 MR. ADLER: No. So (b)(3) and (b)(4),
5 which don't have the 2254 language --

6 JUSTICE GORSUCH: Yeah.

7 MR. ADLER: -- we acknowledge what you
8 said earlier. I think everyone agrees the word
9 "application," which refers to a habeas corpus
10 application --

11 JUSTICE GORSUCH: Yeah.

12 MR. ADLER: -- has to mean motion in
13 order for the cross-reference in (h) to work.

14 JUSTICE GORSUCH: Right. I understand
15 that.

16 MR. ADLER: So then the question is,
17 once you -- once you adjust application to
18 motion, then what do you do there? All we're
19 doing is we're reading the rest of that (b)(3)
20 in that context.

21 What amicus wants you to do is,
22 instead of adjusting, you know, requirements of
23 the subsection, she -- she wants you to keep
24 that the same as it applies to applications and
25 then go up to (b)(1) and (b)(2) and rewrite

1 2254 to mean 2255 in a way that would
2 immediately create both conflict and
3 superfluity with (h)(1) and (h)(2).

4 JUSTICE GORSUCH: Okay. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice --

6 JUSTICE BARRETT: Counsel, I want to
7 sketch something out for you and see if you
8 think it might work, okay?

9 So the government points out on pages
10 12 and 13 of its reply that if we agree with
11 you about your (b)(1) point, agree with you and
12 the government about the (b)(1) point, that it
13 would be pretty natural, even if we disagree
14 with you and agree with the government on the
15 jurisdictional point, pretty natural to express
16 agreement with the (b)(1) point in the course
17 of an analysis on the other.

18 Okay. Now let's say that I -- and
19 this is true. I do think there's something to
20 this argument that the courts of appeals have
21 made that (E) does not deprive them of
22 jurisdiction to sua sponte have a panel hearing
23 re -- rehearing en banc or -- sorry, panel
24 rehearing or rehearing en banc because it's
25 really talking about the prisoner's inability

1 to file such a petition or a petition for writ
2 of certiorari.

3 Okay. So this is what I'm sketching
4 out here. Wouldn't it be possible if this
5 Court said in the course of the analysis, as
6 the government proposes, that (b)(1) is not
7 incorporated? Wouldn't it be possible for the
8 Eleventh Circuit on remand to sua sponte
9 correct its error? Wouldn't it be quite
10 surprising, in fact, if the Eleventh Circuit
11 didn't do that sua sponte if it has the
12 authority under (E) either by the panel or en
13 banc if we say that it is wrong in (b)(1)?

14 MR. ADLER: The problem with that,
15 Your Honor, is that there will be no remand if
16 the Court dismisses this case for lack of
17 jurisdiction. So we don't think the Court
18 should consider the government's proposal on
19 page 12 unless the Court totally rejects all of
20 our jurisdictional arguments. That's the
21 only --

22 JUSTICE BARRETT: That was the premise
23 of my question.

24 MR. ADLER: Oh, okay, I'm sorry. So
25 yes, then there would be no remand for the

1 Eleventh Circuit to do that sua sponte
2 rehearing that you suggest.

3 And this is our concern here with the
4 suggestion, is that it's even beyond that,
5 which is that if the Court tries to resolve the
6 (b)(1) conflict in the course of dismissing
7 this case for lack of jurisdiction, we are
8 concerned that the courts of appeals may
9 perceive that to be dicta or -- or worse, an
10 advisory opinion.

11 So, if the Court does consider that
12 option, we would urge the Court to be as
13 explicit as possible on the (b)(1) question,
14 even to the point of saying that the reasoning
15 on the (b)(1) issue is a holding.

16 Otherwise, what's going to happen is
17 that if even one of the six circuits says, you
18 know what, this is dicta, it doesn't abrogate
19 our prior panel rules and the Eleventh Circuit
20 in particular has a very strict one, then we're
21 in a situation where there's no way to get back
22 up to this Court on cert and the circuit
23 conflict will never be resolved and then we
24 have -- we'll have wasted all of our time and
25 this will all be for nothing.

1 So I think the better way to deal with
2 this, rather than that sort of very unorthodox
3 approach, is to narrowly construe (b)(3)(E) as
4 it has always done, as this Court has always
5 done, and directly resolve the circuit conflict
6 over (b)(1).

7 JUSTICE BARRETT: Okay. Well, I don't
8 know that that would be unorthodox because we
9 say things, we have alternate holdings and we
10 say things in opinions all the time that aren't
11 directly relevant, but I take your point.

12 Just one other question. The Chief
13 Justice asked you about the constitutional
14 avoidance on the essential functions piece, and
15 you say that, yes, it would raise a
16 constitutional question because construing this
17 jurisdictional bar to be total would threaten
18 the Court's essential function of maintaining
19 the uniformity of federal law.

20 Why wouldn't that completely
21 eviscerate the Exceptions Clause? Because it's
22 possible to have a split on any question of
23 federal law, right?

24 So why could Congress ever withdraw
25 our jurisdiction to weigh in on any question

1 because, even if a -- a split doesn't exist
2 then, it could always exist, right?

3 MR. ADLER: We're not saying that it
4 wouldn't, a problem wouldn't arise in that
5 situation. I think it's important to point out
6 that this statute, (b)(3)(E), is unique. There
7 is no other statute like this. There are
8 plenty of statutes that bar judicial review
9 across the board, but there is no statute like
10 this that targets this Court's certiorari
11 jurisdiction.

12 And the -- and the problem that arises
13 is the lower courts, the federal courts of
14 appeals, are interpreting and applying AEDPA.
15 And if this Court cannot superintend that and
16 step in when there's a conflict --

17 JUSTICE BARRETT: So Congress can't --
18 I mean, I -- I -- I take then the -- the
19 straightforward answer to my question is that,
20 yes, Congress can really never deprive this
21 Court of certiorari to resolve questions of
22 federal law because that would deprive us of
23 our ability to ensure the uniformity of federal
24 law?

25 MR. ADLER: I think there's at least a

1 serious question about that, and that's
2 because, whenever lower courts are deciding
3 issues of federal law and this Court cannot
4 step in, then this Court ceases to be the
5 Supreme Court. The courts of appeals then
6 become their own mini supreme courts.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 Thank you, counsel.

11 Mr. Yang.

12 ORAL ARGUMENT OF ANTHONY A. YANG

13 ON BEHALF OF THE RESPONDENT

14 MR. YANG: Mr. Chief Justice, and may
15 it please the Court:

16 Section 2255(h) incorporates the
17 certification process for second or successive
18 applications in 2244(b)(3) and (b)(4). And
19 because (b)(3)(E) prohibits review by petition
20 for writ of certiorari, this Court lacks
21 jurisdiction.

22 2255(h) specifies three key aspects
23 for certifying a successive application: Who
24 must certify it, what is certified, and how
25 that process proceeds and stops.

1 First, certification must be by a
2 panel of the appropriate court of appeals.
3 Second, the application must be certified to
4 contain either of (h)(1) or (h)(2)'s content
5 requirements for new evidence or a new rule of
6 constitutional law. And, third, the
7 application must be certified as provided in
8 Section 2244, which means the certification
9 process proceeds in the same manner as in 2244.

10 (B)(3) and (b)(4) are the only
11 provisions in Section 2244 that address the
12 certification process for authorizing the
13 filing of a successive application. Every
14 provision in (b)(3) and (b)(4) and only those
15 provisions in Section 2244 use authorization
16 language and use the term "second or successive
17 application," a term that naturally captures a
18 federal prisoner's 2255 application and a state
19 prisoner's 2254 application.

20 Petitioner agrees that (b)(3)(A)
21 through (D) apply to federal prisoners. He
22 previously argued in his habeas petition to
23 this Court that (E) also applies. And there's
24 no sound basis for excluding (E), as every
25 court of appeals to have addressed (E) has

1 concluded. Petitioner did not even attempt in
2 his reply brief to rebut any of our arguments
3 on this broader point. He instead notes that
4 (E) prohibits cert only when authorization is
5 granted or denied, and he primarily focuses on
6 that point, saying his request was not denied;
7 it was merely dismissed.

8 But a dismissal is quite literally a
9 denial of his request. That denial is the
10 subject of his certiorari petition. This
11 Court, therefore, lacks jurisdiction.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Mr. Yang, would you
14 turn to the clear statement rule and how it
15 applies here?

16 MR. YANG: Yes. We think the language
17 is clear, both the text as well as an important
18 contextual point, and I'd like to build on what
19 Justice Alito said there, and then I'd also
20 like to address the clear statement rule, which
21 I don't think is as clear as Castro, the one
22 passage in Castro might suggest.

23 First, the contextual point, and we
24 can talk about text, but one significant
25 contextual point is not only would allowing a

1 90- to a 150-day period simply to petition this
2 Court for a writ of certiorari, not only would
3 that blow the 30-day limit apart, but you have
4 to ask why would Congress impose a 30-day limit
5 on the most important part of this process.
6 That's the court of appeals' screening decision
7 itself. Why would that be limited to 30 days
8 if Congress contemplated that a petitioner
9 could take 90 to 50 -- 150 days just to
10 consider whether to file a petition for a writ
11 of certiorari --

12 JUSTICE KAGAN: Mr. Yang, that might
13 be a good argument, but it's not the kind of
14 argument that you can make if there's a clear
15 statement rule.

16 MR. YANG: And -- and I think, though,
17 actually, context is considered. If you're
18 looking at statutory construction for clear
19 statement, you include both the text and the
20 context. And we think that --

21 JUSTICE KAGAN: You might put it in
22 as, like, "and also."

23 MR. YANG: Well --

24 JUSTICE KAGAN: But you need -- you
25 need something in the text that is a clear

1 indication, that is a clear statement that
2 basically says what you want to say.

3 MR. YANG: And we think (h) does that.
4 (h) incorporates the "shall be certified as
5 provided in 2244." And part of that process is
6 to decide who is certifying it and how is it
7 being certified. It's being certified on a
8 request for leave to file filed by a
9 petitioner -- a prisoner. It's not on a
10 petition for rehearing or on a petition for
11 cert. The process ends. It does not continue.

12 JUSTICE KAGAN: When I tried a version
13 of that argument to Mr. Adler, Mr. Adler told
14 me that I was adding the word "process," which
15 no place appears in the statute.

16 MR. YANG: Well --

17 JUSTICE KAGAN: And, of course, he's
18 right about that.

19 MR. YANG: -- "process" doesn't
20 appear, but it says "certified as provided in
21 Section 22" --

22 JUSTICE KAGAN: As provided by the
23 court of appeals. So that would suggest that
24 even though it looks a little bit weird to go
25 from (A) to (D) and skip (E), what -- what

1 2255(h) describes is the stuff that's described
2 in (A) through (D) but not in (E).

3 MR. YANG: And -- but that's just part
4 of the analysis. You also have to look at the
5 language in (E). (E) uses "second or
6 successive application," and it talks about the
7 authorization.

8 "Second or successive application," if
9 Congress had intended to include -- to cut out
10 state prisoners, it would have done exactly
11 what it did in (b)(1) and (b)(2). It would
12 have said second or successive habeas corpus
13 application under Section 2254.

14 Instead, (b)(3) and (b)(4), which are
15 all procedural provisions regarding the
16 process, which we think is incorporated, all
17 use distinct language. And the -- no one
18 has -- has come up with any explanation that --
19 that will respond to the Russello presumption.
20 It's a strong presumption. All of these
21 provisions were enacted at the same time.

22 JUSTICE KAGAN: Could you comment on
23 Mr. Adler points to this language from Castro,
24 which is about this very provision, of course,
25 and it says that, you know, read one way, it

1 would close our doors to a class of habeas
2 petitioners seeking review without any clear
3 indication that such was Congress's intent,
4 indicating that a clear indication is what's
5 needed given the basic principle that we read
6 limitations on our jurisdiction to -- narrowly.

7 MR. YANG: I think that should be read
8 somewhat narrower. It has to be read in light
9 of what immediately preceded it in that
10 paragraph. In that paragraph, the Court says,
11 first, we've already construed (E) to allow the
12 government -- when -- when the lower court
13 disfavors the government, the government can
14 seek review on the question of whether it was a
15 second or successive. And then it goes on to
16 say: And we're not going to deny the flip-side
17 rule when a prisoner comes up.

18 But that is all in the context of
19 asking the core question of, was this a second
20 or successive application? Was it in the box
21 that the jurisdictional bar --

22 JUSTICE KAVANAUGH: Do you --

23 MR. YANG: -- comes from? And that's
24 all that --

25 JUSTICE KAVANAUGH: Do you think

1 there's a clear statement rule or not?

2 MR. YANG: I think no.

3 JUSTICE KAVANAUGH: No?

4 MR. YANG: At least not broad -- as
5 broadly defined. If you look at what --

6 JUSTICE KAVANAUGH: Well, what does
7 that mean? I'm not --

8 MR. YANG: Well, if you look at what
9 Castro cites, it cites to, for the clear
10 statement, Utah versus Evans.

11 JUSTICE KAVANAUGH: You think there
12 should be a clear statement rule, add that in
13 too?

14 MR. YANG: No. First of all, this
15 Court has narrowly construed grants of
16 appellate jurisdiction to it. Appellate --
17 mandatory appellate jurisdiction under 1253 and
18 what was formerly 1254(2), and if you look at,
19 like, Abbott versus Perez or Maine versus
20 Taylor, the Court narrowly construes those
21 grants of -- grants of jurisdiction, and it
22 does not sit comfortably to narrowly construe
23 exceptions to jurisdiction in light of those
24 precedents.

25 And if you look at what the Court was

1 doing --

2 JUSTICE SOTOMAYOR: Why? Meaning
3 Congress has given us a very broad
4 jurisdictional grant over decisions by court of
5 appeals through our cert jurisdiction, and when
6 Congress wants to take it back, it's when we
7 require clarity.

8 MR. YANG: But that reasoning would
9 equally apply to 1253, which is the three-judge
10 district court appeal, or what used to be
11 1254(2), which is state appeals with regards to
12 the unconstitutionality of state provisions.
13 Both of those are -- are phrased broadly, but
14 the Court narrowly -- has narrowly construed
15 them in a long line of decisions.

16 Now the -- the -- the question about
17 what was going on in Castro, I think, has to be
18 read in light of that and in light of what --

19 JUSTICE SOTOMAYOR: Are you going back
20 to Justice Kavanaugh's question?

21 MR. YANG: Yeah. I'm -- I'm trying to
22 pivot back to -- to what Utah versus Evans --

23 JUSTICE KAVANAUGH: The reason for a
24 clear statement rule or -- or a clear
25 indication is that the underlying

1 constitutional question is one that we haven't
2 had to squarely answer for 236 years.

3 MR. YANG: Yeah. And the Exceptions
4 Clause, if you were going to address the
5 Exceptions Clause and the scope of Congress's
6 power there, it would not be in the context of
7 a habeas appeal because, at the founding,
8 it's -- it's well established that there was no
9 right to appeal at all the denial of habeas.
10 It was not in this Court's or any court's
11 appellate jurisdiction. And so the idea that
12 there would be an Exceptions Clause problem is
13 just a completely ahistorical principle.

14 JUSTICE KAVANAUGH: So we get out of
15 that in your view because this is just
16 different because it's habeas?

17 MR. YANG: It's -- it's habeas, I
18 mean, and -- and there's just no founding
19 era --

20 JUSTICE KAVANAUGH: Collateral.

21 MR. YANG: -- principle that would
22 have applied here.

23 JUSTICE JACKSON: So -- so --

24 MR. YANG: Moreover, there are some
25 bases for review. I don't -- I don't think

1 that --

2 JUSTICE KAVANAUGH: Yeah. What are
3 those?

4 MR. YANG: Yeah. So, first of all, I
5 think, as -- as Justice Barrett indicated, this
6 Court could -- if the Court took the
7 interpretive approach that we did here, I think
8 its decision on jurisdiction would effectively
9 announce the proper interpretation of --

10 JUSTICE KAVANAUGH: Would the lower
11 courts have to follow that? I think not.

12 MR. YANG: You know, I -- I would
13 think it would be a pretty willful lower court
14 that --

15 JUSTICE KAVANAUGH: Well, what would
16 we do if they didn't?

17 MR. YANG: Well, if you didn't --

18 JUSTICE KAVANAUGH: If they didn't --

19 MR. YANG: -- there is the question of
20 sua sponte en banc, which we can discuss, but
21 if you wanted to address it specifically, I
22 think there's a question of certified -- a
23 certified question to this Court.

24 JUSTICE KAVANAUGH: And if it's not
25 certified?

1 MR. YANG: Well, first of all, I think
2 the court of appeals misunderstood the
3 certification standard. The certification
4 standard here is whether it's appropriate in a
5 rare instance when advisable in the proper
6 administration and exposition --

7 JUSTICE KAVANAUGH: The only point I
8 was making is that it seems pretty cute to kind
9 of have a collateral dicta and expect everyone
10 to follow that when we're openly saying, under
11 your view, no jurisdiction.

12 MR. YANG: It depends on how the Court
13 writes the opinion. I -- I think it's not a --
14 the Court will not go out of its way to escape
15 the -- you know, rule on the merits when
16 addressing jurisdiction. But, if you agree
17 with us, the natural way to do that is to
18 analyze the statute in a way that will carve
19 out (b)(1).

20 JUSTICE KAGAN: Mr. Adler says --

21 JUSTICE BARRETT: So what about
22 relief --

23 JUSTICE KAGAN: -- at the very
24 least --

25 JUSTICE BARRETT: Oh, I was just going

1 to ask about what about relief for Mr. Bowe on
2 remand?

3 MR. YANG: Well, Mr. Bowe might not --
4 there wouldn't be a remand, but Mr. Bowe --

5 JUSTICE BARRETT: Right.

6 MR. YANG: -- has already filed
7 multiple applications in the Eleventh Circuit
8 on his --

9 JUSTICE BARRETT: But your solution --

10 MR. YANG: He could just file another
11 one.

12 JUSTICE BARRETT: But your solution
13 for the page 12 and 13 of your reply proposal
14 that you make would apply for other petitioners
15 in other circuits but would not help this
16 Petitioner?

17 MR. YANG: On this application.

18 JUSTICE BARRETT: On this application.

19 MR. YANG: But he could simply file
20 another successive application.

21 JUSTICE JACKSON: So, Mr. --

22 JUSTICE SOTOMAYOR: And why wouldn't
23 it suffer the same fate?

24 MR. YANG: Because --

25 JUSTICE SOTOMAYOR: They've already

1 said they're not certifying to us.

2 MR. YANG: Because the court of
3 appeals --

4 JUSTICE SOTOMAYOR: They've already
5 said they're not --

6 MR. YANG: No, no, no, because the
7 court of appeals would say the reason we -- we
8 bumped it before is we thought (b)(1) applied.
9 The Supreme Court has construed 2244 --

10 JUSTICE SOTOMAYOR: So a third or
11 fourth successive petition for him would be a
12 second --

13 MR. YANG: Well, he's not --

14 JUSTICE SOTOMAYOR: -- or third or
15 fourth.

16 MR. YANG: -- he's not even filed a
17 second application yet.

18 JUSTICE SOTOMAYOR: All right. Thank
19 you.

20 JUSTICE JACKSON: So, Mr. Yang, can I
21 just -- let's say I agree with you that (E) is
22 a part of the certification process that is
23 being referenced in (h).

24 Can I have you address the more narrow
25 jurisdictional argument which does focus on the

1 text of (E)? Your argument seems to suggest
2 that we should not pay attention to the
3 difference between granting and denying
4 something or denying an authorization and
5 dismissing the entire matter for lack of
6 jurisdiction.

7 And I guess I don't understand that.
8 We have very clear procedural requirements and
9 understandings when a court is doing certain
10 things. And, here, the court of appeals panel
11 did not grant or deny an authorization.

12 MR. YANG: We disagree with that.

13 JUSTICE JACKSON: Okay.

14 MR. YANG: The statute says -- and
15 this is (D) -- the Court shall grant or deny
16 authorization, shall.

17 JUSTICE JACKSON: Right.

18 MR. YANG: Those are the two -- only
19 two statutory options.

20 JUSTICE JACKSON: What if the Court
21 doesn't do that? Let's say the --

22 MR. YANG: Well --

23 JUSTICE JACKSON: Let's -- let me give
24 you a hypothetical, all right? Suppose we have
25 a three-judge panel that doesn't do what

1 Congress has said you're supposed to do with
2 respect.

3 MR. YANG: Well, what -- what does it
4 do?

5 JUSTICE JACKSON: No, I -- I'm -- let
6 me finish.

7 MR. YANG: Yeah, yeah.

8 JUSTICE JACKSON: All right? So, in
9 my hypothetical, the three-judge panel doesn't
10 apply any of the relevant statutory criteria
11 when it reviews an authorization request.

12 So you agree here that the (h)(1) and
13 (h)(2) substantive requirements apply, and in
14 my hypothetical, the panel says we don't care
15 about that. We're just going to rubber stamp
16 all of these applications as denied.

17 All right? So we have a rogue panel
18 not following what the statute says. Now
19 they've technically denied in that sense, but
20 they certainly haven't followed what the
21 statute says. They haven't granted or denied
22 on the merits.

23 And I guess I'm trying to understand
24 why (E) would preclude someone from appealing
25 that. It seems to me that (E) was really just

1 about Congress not wanting the actual
2 substantive determination that a panel properly
3 makes to be appealed.

4 What it was not doing was policing all
5 of the -- or -- or precluding an appeal about
6 whether or not the panel had acted procedurally
7 properly under the statute.

8 MR. YANG: Well, there's two
9 responses. One is a textual response, and then
10 I think you're actually getting into a policy
11 response.

12 JUSTICE JACKSON: No, I'm not
13 actually.

14 MR. YANG: Well, I think -- well, the
15 textual response is this. It says grant or
16 deny. Literally, a dismissal is a denial of
17 the application, as this Court has recognized
18 in Gonzalez. It's denied on the ground that
19 the claim would be dismissed.

20 Now, whether a court is wrong in a
21 denial or wrong in a grant, it can happen both
22 ways.

23 JUSTICE JACKSON: No, no, no. But
24 we're talking -- we're --

25 MR. YANG: A grant or denial is not

1 subject to review by this Court.

2 JUSTICE JACKSON: We're -- we're --
3 I -- I guess I understand your point. It just
4 seems to me to elide a very key and critical
5 thing that Congress was trying to do here,
6 which is Congress gave this panel particular
7 requirements that it has to apply when making
8 this decision.

9 One could conceive of the finality
10 requirement as being, once the panel has gone
11 through and applied (h)(1) and applied (h)(2)
12 and determined that authorization should be
13 denied, that's the end of it. That's final.
14 That's the work of (E).

15 To me, and I think, textually, you
16 know, this -- it supports the view that if a
17 panel has not done that, if a panel has not
18 actually made a determination about whether or
19 not this should be granted or denied and say
20 they have dismissed it for some other reason,
21 it doesn't trigger what (E) is trying to do.

22 There isn't a finality requirement in
23 the same way. Congress -- why would Congress
24 have even put in the substantive criteria if
25 the panel could do whatever it wanted?

1 MR. YANG: Well --

2 JUSTICE JACKSON: There still has to
3 be judicial review as to whether or not the
4 panel has acted properly procedurally pursuant
5 to the statute.

6 MR. YANG: -- the premise -- that
7 premise does not lead to the conclusion. Of
8 course, Congress wanted the panel to follow the
9 law. But the question is whether Congress
10 determined that there should be certiorari
11 review of claims that the panel erred.

12 The -- the statute doesn't say --

13 JUSTICE JACKSON: Erred with respect
14 to what?

15 MR. YANG: But the statute does not
16 say grant or deny on the merits. It says grant
17 or deny, period.

18 JUSTICE JACKSON: All right. Thank
19 you.

20 MR. YANG: And a dismissal is a
21 denial. Moreover, the structure, the structure
22 you have -- with a 30-day time limit, that time
23 limit cannot depend on the disposition of a
24 court, which is unknown in advance, if the
25 court doesn't know if it's going to dismiss or

1 deny, it can't operate under a 30-day time
2 limit unless it knows what the time limit is in
3 advance.

4 That theory of dismissal being
5 distinguishable from denial would apply not
6 only to (E), it would apply to (D), which is
7 where the 30 time -- 30-day time limit is. It
8 makes absolutely no sense.

9 It's arbitrary, and it would also be
10 asymmetric. It would allow, where denials for
11 grant -- for -- for -- on a non-merits ground,
12 that could go up on cert, but if granted, like
13 if the Court rejects the non-merits ground and
14 allows it to go forward, that couldn't be.
15 That -- again, that doesn't make great sense
16 and it's not compelled by the text.

17 The -- I think we were talking about
18 certified questions briefly. I -- I just want
19 to address this because I think this is
20 important. The court of appeals said that
21 certified questions are very rare. And that's
22 right normally, but that's because certiorari
23 jurisdiction is available.

24 The standard is when it's available --
25 advisable and the proper administration and

1 expedition of judicial business. When there's
2 cert, which can be granted before or after
3 judgment, extraordinarily rare, but if cert's
4 not available, if cert's not available and
5 there's a square and significant conflict
6 that's recurring, it's entirely appropriate for
7 a court of appeals panel and you only need two
8 judges on a panel to certify the question to
9 this Court and then this Court could decide
10 what to do.

11 Moreover, there's merits review. As
12 you may remember, Justice Kavanaugh, you wrote
13 separately in a case called Avery. Avery came
14 out of the Sixth Circuit raising this exact
15 (b)(1) issue, but it came in a different
16 posture. It came where the panel -- a -- a --
17 a panel cert -- certified a second or
18 successive. It went down to district court,
19 was litigated and came back.

20 The issue can come back on the merits
21 in that way too. And, of course, there's All
22 Writs Act jurisdiction. All Writs jurisdiction
23 is not precluded. Now it would only address
24 clearest errors, but it still exists.

25 JUSTICE KAVANAUGH: Right. The

1 standard there would be indisputably clear.

2 MR. YANG: It's a very high standard,
3 but it -- but it would take care of the
4 clearest errors. Now there's a question --
5 and -- and so, even if -- which I don't think
6 is -- is clear, but even if there weren't
7 original habeas in this Court, which is what I
8 think the hook that Petitioner relies on,
9 there's other avenues for this Court to address
10 these issues.

11 JUSTICE KAGAN: Mr. Yang, when you and
12 Justice Kavanaugh were talking about the clear
13 statement rule, your answer to him seemed to
14 reduce to habeas is different. But, of course,
15 Castro is a habeas case, and Castro dealt with
16 the very habeas provision that we're talking
17 about here.

18 And I guess I'm -- you -- you referred
19 me to earlier sentences from Castro, and I've
20 read those sentences again now.

21 MR. YANG: Mm-hmm.

22 JUSTICE KAGAN: And I -- I really
23 don't see how it gets around what Castro says,
24 which is that you need a clear indication to
25 when -- when -- when the -- the interpretation

1 would limit our jurisdiction.

2 MR. YANG: I -- I think it has to --
3 this is a two-step process. First, the Court
4 recognized we that already allowed this for the
5 government. Now we're talking about the flip
6 side. Same question, though, about whether
7 it's second or successive, whether that's
8 barred.

9 Then you look at Utah, Utah versus
10 Evans, which is ultimately the cite for the
11 narrow reading.

12 JUSTICE KAGAN: Yeah, but Utah, I
13 mean -- I mean, that's the kind of cite that
14 people throw in because it has good language.
15 So I don't think you can read Utah v. Evans
16 back into this.

17 MR. YANG: Well, there -- well,
18 there's two things actually going on in Utah
19 versus Evans. First, it -- which I don't think
20 applies, but it says that with respect to this
21 narrow reading, it rejects the argument that
22 because Congress allowed a pre-sentence
23 challenge, it precludes a post-sentence
24 challenge. But that's about any review. It's
25 not this Court's review. Then it --

1 JUSTICE KAGAN: This was -- this is
2 not an opinion, is what I'm trying to say,
3 where it says, you know, really we should look
4 to Utah v. Evans for the rule, you know, and
5 describes why or describes how this case is the
6 same as Utah v. Evans. It's just plucking some
7 language from Utah v. Evans. But the -- the
8 purport of this paragraph is quite clear, is
9 that because there's a construction that limits
10 our jurisdiction, you need a clear indication.

11 MR. YANG: But the part that -- of
12 Utah versus Evans which is actually analogous
13 to what's going on here is, there, the Court
14 said that it was not going to read into a
15 statute an unexpressed intent to bar
16 jurisdiction that we have previously exercised.

17 And, there, the Court had previously
18 exercised post-census review. And, here, what
19 the Court is saying is we previously exercised
20 jurisdiction when the government comes up
21 saying this is second or successive when it was
22 deemed not to be.

23 And, here, it's the flip side. Here,
24 it's the prisoner. Now maybe, on that --

25 JUSTICE KAGAN: I don't -- I don't

1 read any of that in this paragraph.

2 MR. YANG: Well, this is how we read
3 the paragraph because there's three sentences
4 in the paragraph.

5 JUSTICE KAGAN: I mean, the paragraph
6 doesn't say any of that.

7 MR. YANG: Well, it's true that
8 this -- that the paragraph doesn't say that
9 explicitly, but I think you have to read
10 between the lines. Anyway, the principle that
11 this Court's cert jurisdiction is always to
12 be --

13 JUSTICE KAGAN: That would be reading
14 between the lines so that we could do your
15 policy arguments.

16 MR. YANG: Well, I don't think it's a
17 policy argument. We have textual arguments.
18 But I don't think -- this is also actually a
19 relatively significant question that intersects
20 with Congress's authority to exercise its
21 Exceptions Clause. And I think, there, the --
22 the question is, you know, why do you need a
23 clear statement?

24 This has not been followed by this
25 Court. This -- this is kind of an isolated

1 thing. And if you look at the authority for
2 it, it just doesn't bear fruit, particularly
3 when you look at how the Court has construed
4 its mandatory jurisdiction.

5 JUSTICE ALITO: Well, Mr. -- Mr. Yang,
6 there's been a lot of talk about a clear
7 statement rule, which seemed to suggest that
8 some sort of verbal formulation is required,
9 but what Castro says is that there has to be a
10 clear indication of Congress's intent. So what
11 Castro says is that we look to the intent and
12 some clear indication of intent.

13 Can't that indication of intent come
14 from something other than specific words? Can
15 it come from the structure?

16 MR. YANG: Certainly. I mean, that's
17 normal statutory construction. You -- you --
18 you determine the meaning of Congress through
19 interpretation of the words and the context and
20 surrounding provisions. And, again, all of
21 these are coming together, in our view, to
22 point in our direction. No one --

23 JUSTICE ALITO: And do you think those
24 structural arguments are policy arguments?

25 MR. YANG: No, not at all. These

1 are -- these are textual arguments. And, you
2 know, no one has come up with an answer. No
3 one has come up with an answer to why Congress
4 used the particular text, "second or successive
5 application," in (E). (A), (B), (C), (D), and
6 (E) all use that broad language that naturally
7 captures 2255 and 2254. Why did it do that and
8 then in (b)(1) and (b)(2) uses very specific
9 targeted language, "habeas corpus petition
10 under Section 2254."

11 That is, I think, almost fatal to any
12 argument that either the amicus or Petitioner
13 has that would -- that would sweep out, you
14 know, either jurisdiction or sweep in (b)(1).
15 Now I would say the amicus, if you take the
16 amicus's reading, the amicus's reading would
17 sweep in (E) anyway. We'd win on jurisdiction
18 under the amicus's reading.

19 But the text, there's just not been a
20 textual explanation for Congress's deliberate
21 use of this distinct language. That language,
22 though, maps directly -- the language is --
23 both the authorization language in (b)(3)(A)
24 through (E), as well as (4), the authorization
25 language and the broader use of "successive" --

1 "second or successive application," all of that
2 directly maps onto 2255, which is asking about
3 the certification process in 2244.

4 So, when you add all of that together,
5 we think there's a pretty strong and compelling
6 textual reason to conclude that there's no
7 jurisdiction here. And the idea that this is a
8 dismissal, not a denial, just, I think, is
9 counter-textual, and not only that, I think we
10 really haven't gone into what Castro says, but
11 Castro's holding is ultimately that the
12 subject is -- it says the subject is not the
13 denial of authorization, which would be a
14 denial of authorization to file a second or
15 successive. It is the lower court's refusal to
16 recognize that the 2255 motion is his first,
17 not his second.

18 That, again, maps directly onto the
19 question of whether it's a second or -- a
20 second or successive under the jurisdictional
21 provision that bars review of denials of second
22 or successive.

23 All that Castro, just like
24 Villamonte-Marquez or Stuart if you call it
25 that, all those two cases were deciding was

1 that these cases aren't in the box of second or
2 successive. The whole grant-or-denial thing is
3 not relevant here. Therefore, there's no
4 jurisdictional bar.

5 If you were to start construing the
6 juris- -- the -- the cert bar to include, well,
7 we're going to look to the reason, maybe this
8 applies, maybe that doesn't apply, you're --
9 you're creating a huge hole when Congress used
10 broad language to say any -- is any -- it's
11 going to be any grant or denial of
12 authorization is now subject to review.

13 JUSTICE JACKSON: Does it matter,
14 Mr. Yang, that in Castro, there was a dismissal
15 of the motion for failure to comply with the
16 second or successive?

17 MR. YANG: It does because what
18 happened is --

19 JUSTICE JACKSON: Just like there's a
20 dismissal here for failure to -- or for lack of
21 jurisdiction?

22 MR. YANG: It's different. It's
23 different. The procedural posture is very
24 different. If I may finish?

25 CHIEF JUSTICE ROBERTS: Please. Yeah.

1 MR. YANG: The procedural posture in
2 Castro was that the prisoner filed a 22-5
3 application, actual application, the habeas
4 corpus, if you want to call it habeas, 2255 in
5 district court. The district court dismissed
6 it because it concluded it was second or
7 successive without certification from the court
8 of appeals.

9 That went up on direct appeal to the
10 court of appeals on a COA. The sort of CO --
11 the court of appeals said, yeah, we agree, this
12 was second or successive. Therefore, it was
13 not properly filed in district court to begin
14 with.

15 Then it comes to this Court on cert.
16 There's no limit -- this is kind of like an
17 Avery issue. It came up on the merits because
18 it had been resolved by the court of appeals.
19 And the court of appeals said, yeah -- you
20 know, this Court said no, no, no, this is not
21 the grant or denial of a second or successive.
22 It's just a normal case.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Yang, would your arguments be

1 different, and why, if Congress decided this is
2 still getting too messy or whatever, and the
3 decision of the district court judge will be
4 final?

5 MR. YANG: I'm sorry, I didn't --

6 CHIEF JUSTICE ROBERTS: The decision
7 of the district court judge in these matters
8 will be final and not subject to further
9 review. Same language with respect to the
10 court of appeals' decision, except applying it
11 to the district court.

12 MR. YANG: I think it would probably
13 be the same. I mean, if -- if --

14 CHIEF JUSTICE ROBERTS: So the
15 Department's position is that you could cut off
16 review after a district court decision?

17 MR. YANG: Well, if -- so is -- I'm a
18 little confused. Is the district court
19 decision like a screening decision? Is that
20 what your problem --

21 CHIEF JUSTICE ROBERTS: Well, just,
22 no, in the final, regular application of
23 whatever, you know, the habeas application --

24 MR. YANG: There might be distinctions
25 between a final disposition. I think, with

1 respect to the Exceptions Clause, I think we'd
2 have to revisit the question about what was
3 expected at the founding when Congress enacted
4 Article III. And Congress went on to --

5 CHIEF JUSTICE ROBERTS: Not -- not --
6 not the Exceptions Clause. Just whatever kind
7 of provision that the -- no further review.

8 MR. YANG: If Congress --

9 CHIEF JUSTICE ROBERTS: You may say
10 cutting off the review at the court of appeals
11 stage. And I just wonder why don't your
12 arguments support the idea of cutting review
13 off at the district court phase?

14 MR. YANG: If Congress enacted a
15 statute that said the district court's
16 determination in some set of cases shall be
17 final and not subject to review of any form,
18 that would be a little harder. I mean, you
19 might not therefore get -- you wouldn't get
20 certification. There wouldn't be other
21 avenues. I think it would be a little more
22 difficult for purposes of the question about an
23 exception to this Court's appellate
24 jurisdiction.

25 But, again, if this was limited to the

1 habeas context, again, it's not clear to me
2 that as -- as an original matter, when you go
3 back to the founding, Article III would have
4 thought that that's an issue since there was no
5 appellate jurisdictional at all over habeas
6 determinations.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Justice Thomas?

9 Justice Alito?

10 JUSTICE ALITO: On the issue of
11 constitutional avoidance, haven't we said that
12 there has to be a real constitutional -- a real
13 potential constitutional problem that hasn't
14 been considered and that the -- the canon, the
15 constitutional avoidance canon, doesn't mean,
16 well, if there -- you know, if somebody
17 suggests that there might be a constitutional
18 problem, that's -- then the canon comes into
19 play? Haven't we limited that canon in that
20 way? And has this Exceptions Clause issue been
21 briefed adequately in this case for us to base
22 a decision on avoiding a potential Exceptions
23 Clause issue?

24 MR. YANG: Well, there's two questions
25 there. I think you're right that you need a

1 very significant constitutional question in
2 order to avoid it.

3 And then, two, whether the briefing is
4 sufficient, I mean, I would leave that to the
5 Court. We addressed the Exceptions Clause in
6 two ways, both as an original matter discussing
7 the habeas jurisdiction, as well as the fact
8 that there are other avenues for this Court's
9 review outside of cert from a denial of a -- or
10 grant of leave to file a second or successive.
11 Whether that's sufficient, I would leave that
12 to the Court.

13 JUSTICE ALITO: Is the limitation that
14 you think is placed on our jurisdiction here at
15 all comparable to a rule that would prevent us
16 from reviewing the merits of cases decided by a
17 district court or a court of appeals?

18 MR. YANG: No. That -- this -- this
19 is much more narrow. Remember the posture that
20 this comes up in is there's already been direct
21 review through the federal system. There's
22 already been one full round of collateral
23 review through the federal system, including a
24 cert petition to this Court. Now we're talking
25 about seconds or successives. The aperture of

1 the case has really narrowed down.

2 And Congress had very significant
3 finality concerns in this context, both with
4 respect to federal prisoners, as well as state
5 prisoners, and, therefore, appropriately
6 provided for certification that's just done by
7 a panel of the court of appeals in 30 days and
8 not subject to cert with the 90- to 50 --
9 150-day deadline to file after.

10 The process ends in the court of
11 appeals.

12 JUSTICE ALITO: And this is a
13 screening process that's supposed to weed
14 out -- the panel of the court of appeals has
15 to -- is supposed to weed out the frivolous
16 applications essentially --

17 MR. YANG: That's correct.

18 JUSTICE ALITO: -- and only let those
19 that might conceivably have some merit go
20 forward. So --

21 MR. YANG: That's correct. And I
22 would -- I would note that the options for
23 either review in the court of appeals, which
24 would be a sua sponte rehearing or en banc or a
25 certification by a court of appeals to this

1 Court, are things that are done when judges
2 decide that this is sufficiently important.

3 JUSTICE ALITO: Right. Thank you.

4 MR. YANG: Not when a prisoner decides
5 to petition.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: Counselor, we
10 haven't gotten back to the main question that
11 amicus has addressed. You agree with
12 Petitioner that 2244(b)(1) applies only to
13 state prisoners, the successive -- the same
14 claim litigation bar, correct?

15 MR. YANG: That is correct, although
16 we may have slightly different reasons for
17 concluding that. I think some of it overlap,
18 but they don't --

19 JUSTICE SOTOMAYOR: Either --

20 MR. YANG: -- rely on all of our --

21 JUSTICE SOTOMAYOR: But you disagree
22 with amici's position?

23 MR. YANG: That is correct.

24 JUSTICE SOTOMAYOR: Why don't you just
25 summarize why you disagree with amici.

1 MR. YANG: Well, I think there's
2 the -- the -- I'll give you a preface and
3 then I'll -- I'll jump to, I think, a more
4 dispositive point.

5 First, when you look at the language
6 that's used in (b)(3) and (b)(4), the language
7 is distinctive from (b)(1) and (b)(2). It uses
8 second or successive application and it uses
9 authorization language.

10 Both of those map directly onto what
11 (h) is doing; that is, bringing a federal
12 prisoner --

13 JUSTICE SOTOMAYOR: Just go back to
14 it.

15 MR. YANG: And then the second -- and
16 then is second point is even if you -- most of
17 the amicus's argument turns on the fact that
18 (b)(3)(C) says look to the prima facie
19 requirement with respect to the requirements of
20 the subsection, subsection (b) includes (b)(1)
21 and (b)(2).

22 Even if you accept that you look to
23 the subsection, when you look at (b)(1), by its
24 own terms, it only applies to a habeas corpus
25 petition under Section 2240- -- 54.

1 JUSTICE SOTOMAYOR: So what you're --

2 MR. YANG: It just wouldn't --

3 JUSTICE SOTOMAYOR: So the bottom --

4 MR. YANG: -- even apply to its own
5 terms. It --

6 JUSTICE SOTOMAYOR: -- line is, you
7 agree substantively that the court of appeals,
8 the district court, and the court of appeals,
9 or the -- the court of appeals did not subject
10 this to the proper review. It should have
11 reviewed it under the -- under this --

12 MR. YANG: Yes, and this has been the
13 department's position before any court of
14 appeals took this.

15 JUSTICE SOTOMAYOR: Yes, that was --
16 you've been saying that from the beginning.

17 But you're claiming that this
18 is unlike Castro and that we don't have
19 jurisdiction even under the narrow reading,
20 which is the Castro reading by your --

21 MR. YANG: That is correct.

22 JUSTICE SOTOMAYOR: -- by your
23 adversary.

24 MR. YANG: That is correct.

25 JUSTICE SOTOMAYOR: Does that make any

1 sense?

2 MR. YANG: Yes.

3 JUSTICE SOTOMAYOR: There has been no
4 review of the merits of this case --

5 MR. YANG: Well, Justice Sotomayor --

6 JUSTICE SOTOMAYOR: -- at all by the
7 court of appeals?

8 MR. YANG: Justice Sotomayor, the
9 jurisdictional inquiry does not look to whether
10 there is an error and then decide if they have
11 jurisdiction.

12 JUSTICE SOTOMAYOR: Well, they used it
13 that way. They refused to apply 2255(h) by
14 dismissing the case. They didn't deny the
15 application as not newly discovered evidence or
16 not a new rule of constitutional law.

17 They dismissed the case instead of
18 denying it because they said they lacked
19 jurisdiction.

20 MR. YANG: That supports my point.
21 Their point was not that it doesn't -- we're
22 not going to address whether he's right or
23 wrong, the petitioner prisoner is right or
24 wrong. We just lack jurisdiction. The same
25 thing is true here.

1 JUSTICE SOTOMAYOR: Well, if they
2 didn't --

3 MR. YANG: The first jurisdictional
4 inquiry does not turn --

5 JUSTICE SOTOMAYOR: -- lack
6 jurisdiction, they got the ground wrong.
7 That's what basically Marshall is saying.

8 MR. YANG: I am not seeing any
9 decision by this Court that clearly sets the --
10 the --

11 JUSTICE SOTOMAYOR: By the way, by the
12 way there is no question that if he goes back
13 down and they look at it substantively they
14 will probably boot him out anyway, but it
15 wouldn't take care of the circuit split.

16 MR. YANG: It wouldn't, but as -- as
17 we've discussed, there are other ways to take
18 care of that. This -- just because this
19 vehicle comes to you doesn't mean you need to
20 pull the trigger immediately, particularly when
21 there's a jurisdictional bar that would -- if
22 you rule against us on the broad ground, at
23 least, would triple the number of filings by
24 prisoners.

25 JUSTICE SOTOMAYOR: No, it wouldn't.

1 Because all that would have to happen is that
2 circuit courts would just say we're granting or
3 denying under (h). And that's clearly barred.
4 That's what they should be doing anyway, but
5 they are not doing. Some of them are using
6 the state habeas substantive boot provisions
7 instead of the federal habeas substantive
8 provisions.

9 MR. YANG: Well, we agree that there
10 is an error there, but I don't think that's
11 error --

12 JUSTICE SOTOMAYOR: That's all --
13 that -- there wouldn't be an increase in
14 filings. We would simply -- Castro hasn't
15 increased our filings. We -- they would just
16 do what they are supposed to do, say under (h),
17 denied.

18 MR. YANG: Well, that's because Castro
19 is only the question of whether it's second or
20 successive. And in this case, there is no
21 question, it's the second application. It --
22 it's -- it would be his second.

23 JUSTICE SOTOMAYOR: But it would only
24 be with respect to (b)(1), a ruling by us.

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch?

2 JUSTICE GORSUCH: Just real briefly,
3 Mr. Yang, on the merits.

4 You make -- you ask us to read all
5 of (b)(3)(A), (B), (C), (D) and (E) on
6 jurisdiction as a piece, but on the merits you
7 ask us to split up (B).

8 So you say don't split up 3 on
9 jurisdiction but split up, on the merits, (B).
10 And you say (b)(3) and (4) apply, but (b)(1)
11 and (2) don't.

12 And one of the arguments, main
13 argument, as I understand it from you is,
14 because the first two mention Section 2254.

15 But the same question I had to
16 Mr. Adler, why doesn't that cut against your
17 view on the merits given that this provision,
18 (B) is all about all habeas, pre- and
19 post-conviction, federal and state?

20 You -- you agree that that's -- that's
21 the case and --

22 MR. YANG: Are you -- I'm sorry, do
23 you mean all of (b) or just (b)(3) and (b)(4)?

24 JUSTICE GORSUCH: Well, (b)(3) and (4)
25 are all about all applications. Everybody.

1 Everybody.

2 MR. YANG: Yep.

3 JUSTICE GORSUCH: Everybody is in,
4 pre and post. And what the inclusion of 2254
5 tells us is that that's addressed to
6 post-conviction applications.

7 Why -- why isn't that a natural
8 understanding that it's actually more
9 applicable in the 2255 context?

10 We have to read motions as
11 applications anyway, under your reading. Why
12 aren't these the most relevant applications for
13 federal prisoners?

14 MR. YANG: 2255 is post-conviction
15 too.

16 JUSTICE GORSUCH: I understand that.
17 That's my point.

18 MR. YANG: Well, I guess I'm confused,
19 because Congress has --

20 JUSTICE GORSUCH: All right. I'll ask
21 your -- I'll ask --

22 MR. YANG: Congress chose distinct
23 language.

24 JUSTICE GORSUCH: Yes, I understand
25 that. And that -- I'm asking why. That's all

1 right. I'll ask amicus.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Justice Gorsuch.

4 Justice Barrett?

5 Justice Jackson?

6 Thank you, counsel.

7 MR. YANG: Thank you, Your Honor.

8 CHIEF JUSTICE ROBERTS: Ms. Mitchell.

9 ORAL ARGUMENT OF KASDIN M. MITCHELL

10 COURT-APPOINTED AMICUS CURIAE IN SUPPORT OF
11 THE JUDGMENT BELOW AS TO QUESTION 1.

12 MS. MITCHELL: Mr. Chief Justice, and
13 may it please the Court:

14 On the one-year anniversary of Timothy
15 McVeigh's bombing of a federal building,
16 Congress passed AEDPA to advance the finality
17 of criminal convictions. Congress largely did
18 away with post-conviction applications by
19 federal prisoners requiring them to file
20 motions under Section 2255.

21 And Congress amended Section 2244
22 to provide finality requirements for
23 state prisoners who largely seek
24 post-conviction relief via an application
25 under Section 2254.

1 Everyone agrees that Section 2244 is
2 principally about state prisoners and that
3 there is a cross-reference that makes it
4 applicable to federal prisoners.

5 That structure means that there is
6 going to be language in 2244 that is specific
7 to state prisoners. And you have to read that
8 in light of a cross-reference that makes
9 language about state prisoners apply to federal
10 prisoners.

11 Everyone agrees that the
12 cross-reference incorporates 2244(b)(3)(C),
13 which says to apply the requirements of this
14 subsection, subsection (b).

15 And the very first requirement of
16 subsection (b) is the do-over bar. That
17 interpretation follows from simple statutory
18 cross references.

19 It also makes perfect sense in light
20 of Congress's clear goals. There is no reason
21 to think that in the landmark legislation
22 passed in the wake of the Oklahoma City bombing
23 in which Congress was trying to focus on
24 finality, it entirely eliminated any do-over
25 bar on post-conviction motions by federal

1 prisoners like McVeigh.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Ms. Mitchell, the --
4 both the government and Petitioner, they will
5 put more weight on the difference in language
6 in 2255 and 44, the language, application
7 versus motion, that there's more emphasis on
8 habeas for state prisoners.

9 How do you reconcile that, the
10 difference in language?

11 MS. MITCHELL: Justice Thomas, the way
12 you reconcile this is because you're viewing
13 this statute via the lens of a cross-reference.
14 I think this is really important to understand
15 what both the government and Petitioner are
16 arguing.

17 They're saying that when you see the
18 word "application," on its face, it includes
19 federal motions. That carries significant
20 consequences for AEDPA.

21 In the statute of limitations
22 provision, for example, 2244(d)(1)(B), Congress
23 distinguished in the state context filing an
24 application.

25 In the statute of limitation provision

1 governing federal prisoners, 2255(f)(2), it
2 used different language. It said an impediment
3 to making a motion.

4 That application and motion
5 distinction was critical to AEDPA. Both the
6 Petitioner and the government say, well, we're
7 just going to read "application" to mean
8 "motion." And I don't think you can do that.
9 Application means application.

10 You apply it to motions via
11 cross-reference. And that's why the Justice
12 Gorsuch's question, the under 2254 language,
13 makes it a closer fit to 2255 motions than the
14 general provisions in subsection (b)(3).
15 (b)(3) speaks only of applications which on its
16 face excludes 2255 motions.

17 In addition to rewriting "motion" to
18 mean "application," both the governor --
19 government and the Petitioner want to rewrite
20 the language of this subsection.

21 And, again, that has sweeping
22 consequences not just for AEDPA, but for the
23 U.S. Code.

24 One of the principal decisions that my
25 brief relies on is the Cyan decision, where

1 this Court said clearly that when Congress
2 means "subsection" -- it says "subsection," it
3 means "subsection."

4 JUSTICE JACKSON: But why wouldn't we
5 take that to be right in the category of the
6 very first thing that you said, which is we all
7 agree that this -- this 2244 primarily applies
8 to state prisoners and that there will be
9 language, as a result, that might not be a
10 perfect fit because it's directed to state
11 prisoners? And I would think this subsection
12 is that kind of thing.

13 MS. MITCHELL: I don't think so, Your
14 Honor, because this subsection is direct
15 command of the cross-reference, and it says to
16 apply all of (b).

17 And that's part of the very provision
18 that everyone agrees is incorporated.

19 JUSTICE JACKSON: I understand. But
20 your -- your -- your view of this makes us
21 think that Congress was trying to get to (b)(1)
22 in the federal context through two
23 cross-references.

24 That seems like such a -- an odd way.
25 I mean, if Congress wanted the (b)(1) bar to

1 apply in federal habeas scenarios, they easily
2 could have just written that, or in (h), they
3 could have directly referenced (b)(1). But you
4 get us there through the cross-reference in (h)
5 and then the cross-reference in (b)(3). And
6 that just seems so strange.

7 MS. MITCHELL: I think that's the
8 easiest way to do it in light of all the
9 parties agreement that (b)(3)(C) applies. But
10 there is another path, which is to say on its
11 face, it's a requirement that applies via the
12 cross-reference because the cross-reference
13 says "as provided in 2244," and you're going to
14 bring in subsection (b)(1), which isn't
15 displaced by (h)(1) and (2), which applies.

16 And we think that the -- the better
17 place is to start where all the parties agree.
18 But I am not going to resist a reading that
19 would bring it in on the "as provided" in 2244
20 cross-reference alone.

21 JUSTICE JACKSON: Thank you.

22 MS. MITCHELL: In addition, just to
23 hone in on the problems with reading
24 "subsection" to mean something else, not only
25 did this Court confront that in the Cyan

1 decision, which neither the government or
2 Petitioner even cite in their reply brief, but
3 it's been an issue in numerous other cases this
4 Court has confronted, including with respect
5 the Federal Vacancies Act in NLRB versus
6 Southwest General and throughout.

7 We also know that in AEDPA, Congress
8 knew how to specify and pick and choose
9 provisions when it wanted. So, for example, in
10 2264(b), Congress said: Following review,
11 subject to subsections (A), (D), and (E) of
12 section 2254, the Court shall rule on the
13 claims properly before it.

14 So there are other examples in AEDPA
15 where it picked and -- decided to pick and
16 choose among subsections and it was specific.
17 Here Congress enacted in a wholesale
18 cross-reference with respect to at a minimum
19 the certification provisions, that all agree
20 include (b)(3)(C).

21 JUSTICE KAVANAUGH: What do you make
22 of the fact that Congress -- to your
23 alternative point to Justice Jackson, that
24 Congress didn't just end at 2255(h) after "as
25 provided in Section 2244? They could have just

1 ended it there, and then the cross-reference
2 would have been complete, I think. And what
3 are we to make of that other language, if
4 anything?

5 MS. MITCHELL: They could -- they
6 could have done that. There are two reasons
7 why I think they didn't.

8 The first is because they were
9 bringing over the certification procedures.
10 And the second is they wanted to provide
11 constraints on the abuse of the writ, which is
12 what (h)(1) and (2) principally address.

13 So in the pre- -- pre-AEDPA context,
14 there were two problems that the court faced
15 with habeas corpus applications. One was the
16 successive problem. So you have someone who's
17 bringing in a claim that they brought again. A
18 separate and distinct problem was abuse of the
19 writ, which is where you held on to a claim,
20 you brought one, waited, you brought your other
21 one and another one in a second application,
22 you bring third one. That was a distinct
23 problem, abuse of the writ.

24 And in 1948 when Congress amended
25 AEDPA, they added in 2255, a successive bar.

1 So what Congress said was the sentencing court
2 shall not be required to entertain a second or
3 successive motion for similar relief on behalf
4 of the same prisoner. This was in the 1948
5 Act.

6 This Court interpreted that language
7 in Sanders to say Section 2244 -- and this
8 language is addressed only to the problem of
9 successive applications. And what the Court
10 did is say, well, we're not going to read that
11 to read out the abuse of the writ doctrine. So
12 we're going to -- this is addressing successive
13 applications, and we're also going to apply
14 abuse of the writ doctrine.

15 The provisions in (1) and (2), which
16 are now after the 2008 technical amendments
17 (h)(1) and (2) only address abuse of the writ.
18 So there's no reason to think that when
19 Congress omitted that language and instead put
20 a cross-reference to 2244, that it meant not to
21 include the number one finality-promoting
22 provision, which is (b)(1).

23 Additionally, there are some argument
24 that the government and the Petitioner make
25 that this is really not a problem and what are

1 we doing here? But judge Rosenbaum in the
2 Eleventh Circuit observed that in the three
3 months after this Court's decision in Welch,
4 the Eleventh Circuit saw 1800 applications for
5 Johnson-based review. So I do think it is a
6 real problem that courts are grappling with.

7 And the tools that Congress gave the
8 courts of appeals to deal with this problem
9 allowed it to make the expeditious
10 determination under the 30-day clock. And what
11 Petitioner and the government would say is,
12 well, we're going to take one of those key
13 tools out of their tool belt. We're not going
14 to allow them to look and see was this argument
15 already presented and, if so, can we dismiss it
16 on that basis alone? And that makes it more
17 difficult to accomplish its task in 30 days.

18 I think one thing that's significant
19 about that also is Congress provided the same
20 30-day clock for state prisoners and federal
21 prisoners. It didn't say we're going to give
22 30 days for state prisoners and 45 for federal
23 or some other indication that they intended to
24 treat them differently.

25 And, Justice Thomas, to your question

1 to Petitioner, all indications by use of
2 legislating by cross-reference is that Congress
3 wanted to treat, at least for successive
4 applications, the state prisoners and federal
5 prisoners alike. That's why they choose --
6 chose this kind of clunky mechanism to do so
7 via cross-reference.

8 One additional point, Petitioner, in
9 response to one of the questions about
10 jurisdiction, said that there is a clear
11 statement rule as it relates to state prisoners
12 with the jurisdictional point because of the
13 word "application" in (3)(E). That's
14 significant because that is saying that is a
15 clear statement that this applies to state
16 prisoners, which is exactly our point.

17 Every time Congress said
18 "application," it was excluding on its face
19 federal motions. So in order to read any of
20 these provisions as applying to federal motions
21 under 2255, you have to view them in light of
22 the cross-reference. And that's exactly what
23 you do when you look at (3)(C)'s
24 cross-reference to (b)(1). You read that
25 language, "a successive habeas corpus

1 application," under 2254 in light of that
2 cross-reference to apply to similarly situated
3 federal prisoners.

4 And, again, Justice Gorsuch, to your
5 question, it's not like it says applications by
6 Guantanamo detainees. I think my argument
7 would be harder if the additional language was
8 something that didn't map on so tightly to the
9 2255 mechanism, but instead that's a closer fit
10 than the application language that the
11 government and Petitioner rely on to bring in
12 the certification provisions in the first
13 place.

14 JUSTICE GORSUCH: Which can include
15 pre-conviction detainees?

16 MS. MITCHELL: Yes, Your Honor.

17 JUSTICE GORSUCH: Yeah.

18 MS. MITCHELL: And so it's just a
19 natural fit to see what Congress was doing
20 there. Again, in the wake of Oklahoma City, it
21 -- there's no reason to think that the number
22 one finality provision in 2244, which was
23 titled "Finality of Determinations," that they
24 intended that not to apply to federal prisoners
25 like McVeigh, which was the exact target of the

1 one-year anniversary when President Clinton
2 signed in bill into law.

3 JUSTICE GORSUCH: You -- the implicit
4 repeal of a power federal courts had previously
5 to prevent do-over petitions by federal habeas
6 petitioners.

7 MS. MITCHELL: Exactly. And, instead,
8 they routed them through the provisions for
9 22 -- the provisions that otherwise applied to
10 state prisoners. And one important point, the
11 standalone language that prevented successive
12 application by federal prisoners had long been
13 marginalized by this Court. In Sanders, the
14 Court said this can't be taken seriously. And
15 so it's perfectly natural for Congress to say
16 you didn't -- you didn't do what we said in
17 2255, and so this time around, we're going to
18 put you in the same bucket as state prisoners,
19 where you will enforce the successive bar.

20 And the combination of (b)(1),
21 together with subsection (1) and (2) in 2255,
22 address both the successive and the abuse of
23 the writ problems that Congress was targeting
24 in AEDPA.

25 CHIEF JUSTICE ROBERTS: Thank you.

1 Justice Thomas, anything further?

2 Justice Alito?

3 Justice Sotomayor?

4 JUSTICE SOTOMAYOR: Counsel,
5 collateral estoppel would apply to successive
6 positions in federal court, so you get to the
7 same place, just a different issue.

8 MS. MITCHELL: That --

9 JUSTICE SOTOMAYOR: And as quick.

10 MS. MITCHELL: That's not true, Your
11 Honor. There are decisions by this Court
12 saying that res judicata does not apply into
13 the habeas -- in the habeas context, and,
14 instead, what 2254 and 2255 did was -- and this
15 is in the legislative history -- was to codify
16 a modified res judicata principle. So res
17 judicata traditionally --

18 JUSTICE SOTOMAYOR: All right.

19 MS. MITCHELL: -- had not applied in
20 habeas.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 Justice Gorsuch?

24 Justice Kavanaugh?

25 Justice Barrett?

1 JUSTICE BARRETT: No.

2 CHIEF JUSTICE ROBERTS: Justice
3 Jackson?

4 Thank you, counsel.

5 MS. MITCHELL: Thank you.

6 CHIEF JUSTICE ROBERTS: Mr. Adler,
7 rebuttal?

8 REBUTTAL ARGUMENT OF ANDREW L. ADLER
9 ON BEHALF OF THE PETITIONER

10 MR. ADLER: Thank you, Mr. Chief
11 Justice.

12 We acknowledge that this is a
13 technical case but I'd like to try to simplify
14 how the Court should resolve it, if it agrees
15 with us on (b)(1), which we do believe is
16 resolved on the face of the provision. This is
17 -- this is the rare AEDPA case where the plain
18 text of the statute resolves the question.

19 So if you agree with us on (b)(1),
20 then on the jurisdictional question, there's
21 two options, I think. One is the government's
22 late-breaking suggestion on page 12 of its
23 reply brief that, to dismiss this case for lack
24 of jurisdiction and indirectly resolve the
25 (b)(1) question, this goes to Justice Barrett's

1 suggestion earlier, our concerns with that
2 remain that there is a significant risk that
3 doing that would not resolve the circuit
4 conflict unless the Court is crystal clear that
5 it is purporting to resolve the (b)(1) question
6 in a holding. We also have significant
7 concerns about whether Mr. Bowe of all people
8 could benefit from that.

9 We appreciate the government's
10 suggestion that he could refile. However, we
11 are not sure about that in light of some
12 language in the Bradford decision, Eleventh
13 Circuit, that says the (b)(1) dismissals are
14 with prejudice. And if anybody should benefit
15 from a statement by this Court on (b)(1), it's
16 Mr. Bowe who has been waging a three-year
17 campaign designed to eliminate this atextual
18 obstacle that has been placed in front of him.

19 So that's one option. We think it is
20 highly unorthodox and can be avoided, simply by
21 accepting one of our narrower jurisdictional
22 arguments and we have given the Court three of
23 them. We think the clear statement rule
24 applies to all of them. I don't understand how
25 the government can say there's no clear

1 statement rule when Castro says it on this
2 particular statutory provision.

3 We don't have to do two steps. It's
4 right there on the face of the opinion. And,
5 by the way, the case it cites for that is not
6 Utah versus Walker. It is Felker versus Turpin
7 which is a habeas case that says no implied
8 repeals of habeas jurisdiction, the Court
9 applies it here to (b)(3)(E).

10 Justice Jackson, I think you have
11 identified the simplest way to -- to find
12 jurisdiction over this case. And it is the
13 fact that the court of appeals dismissed this
14 without ruling on the merits. It did not grant
15 or deny. The text of (b)3 is very clear that
16 we have grants or denials and we have
17 dismissals.

18 The court here dismissed this case
19 improperly. That's not the error that we're
20 complaining about. That would be harmless
21 because the effect would be a denial. But it
22 is the reason why there's jurisdiction.
23 There's no -- a denial here.

24 That follows directly from this
25 Court's (b)3 precedent in Stuart, which also

1 involved the dismissal, no merits ruling, and
2 the Court said the effect even though it was to
3 grant it didn't matter, it wasn't a grant.

4 And the final thing about that, if the
5 Court simply clarifies that in this opinion
6 that courts of appeals should not be dismissing
7 claims in this posture but should instead be
8 granting or denying them, and the Court will
9 not see a single cert petition under that
10 theory come to this Court because the courts of
11 appeals will simply grant or deny moving
12 forward.

13 And so if the Court is concerned about
14 receiving additional cert petitions under this
15 statute, that's the easy way to go. And so at
16 the end of the day, we think the text of (b)(1)
17 is plain. This Court has jurisdiction to
18 effectuate that text. And resolve the circuit
19 conflict directly once and for all. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. Ms. Mitchell, the Court appointed you
22 to brief and argue this case as an amicus
23 curiae in support of the judgment below as to
24 Question 1. You have ably discharged your
25 responsibility for which we are grateful.

1 Thank you.

2 The case is submitted.

3 (Whereupon, at 11:36 a.m., the case
4 was submitted.)

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71:2,16 73:4 86:9,14 87:20 89:6 90:13,16 94:25 97:21 98:9 99:17,21 100:14 2255(f)(2) [1] 90:1 2255(h) [1] 11:5 12:22 15:19 25:16,17,21 44:16,22 49:1 82:13 93:24 2264(b) [1] 93:10 2266 [1] 14:5</p>	<p>236 [1] 53:2 24-5438 [1] 4:4</p> <hr/> <p>3</p> <p>3 [3] 26:4 36:10 85:8 3)(C)'s [1] 97:23 3)(E) [1] 97:13 30 [7] 13:2 14:2 47:7 63:7 78:7 96:17,22 30-day [8] 13:23 47:3,4 62:22 63:1,7 96:10,20 380 [1] 5:5</p> <hr/> <p>4</p> <p>4 [6] 3:4 7:25 36:10 70:24 85:10,24 44 [2] 3:7 89:6 45 [1] 96:22</p> <hr/> <p>5</p> <p>50 [2] 47:9 78:8 54 [1] 80:25</p> <hr/> <p>6</p> <p>6-3 [1] 5:22</p> <hr/> <p>8</p> <p>87 [1] 3:12</p> <hr/> <p>9</p> <p>90 [3] 47:1,9 78:8</p> <hr/> <p>A</p> <p>a.m [3] 1:15 4:2 105:3 Abbott [1] 51:19 ability [1] 43:23 able [2] 28:14 29:24 ably [1] 104:24 above-entitled [1] 1:13 abrogate [1] 41:18 absolutely [1] 63:8 abuse [7] 94:11,18,23 95:11,14,17 99:22 accept [1] 80:22 accepting [1] 102:21 accomplish [2] 6:24 96:17 account [1] 16:25 acknowledge [2] 38:7 101:12 acknowledges [1] 24:19 across [1] 43:9 Act [3] 64:22 93:5 95:5 acted [2] 60:6 62:4 actual [2] 60:1 73:3 actually [15] 8:24 15:19 18:11,12,16 21:6 34:1 47:17 60:10,13 61:18 66:18 67:12 68:18 86:8 add [2] 51:12 71:4 added [2] 27:11 94:25 adding [1] 48:14 addition [3] 6:25 90:17 92:22 additional [4] 8:19 97:8 98:7 104:14 Additionally [1] 95:23</p>	<p>address [14] 14:11 26:22 45:11 46:20 53:4 54:21 57:24 63:19 64:23 65:9 82:22 94:12 95:17 99:22 addressed [6] 15:5 45:25 77:5 79:11 86:5 95:8 addressing [2] 55:16 95:12 adequately [1] 76:21 adjust [1] 38:17 adjusting [1] 38:22 ADLER [96] 2:2 3:3,14 4:6,7,9 6:4 7:2,18 8:16 9:16,20,23 10:4,8,13,16,21,24 11:4,25 12:6,12 13:14,20 14:18 15:2,13,18 16:15,23 17:1,16 19:2,5,10,22,25 20:3,6 21:15,18,22 22:12,15,18,22 23:4,7 24:7 25:4 26:8 27:8,23 28:7,10 29:5,19 30:22 31:13 32:12,15,19,22 33:14 34:9,13,16,22 35:6,16,20,23 36:2,7,17,22 37:5,9,25 38:4,7,12,16 40:14,24 43:3,25 48:13,13 49:23 55:20 85:16 101:6,8,10 administration [2] 55:6 63:25 adopted [1] 4:20 advance [3] 62:24 63:3 87:16 adversary [1] 81:23 advisable [2] 55:5 63:25 advisory [1] 41:10 AEDPA [16] 6:5 7:19 14:6 29:13,15 33:12 43:14 87:16 89:20 90:5,22 93:7,14 94:25 99:24 101:17 agree [22] 7:18 14:25 31:20 35:13,17,20 36:17 39:10,11,14 55:16 57:21 59:12 73:11 79:11 81:7 84:9 85:20 91:7 92:17 93:19 101:19 agreement [2] 39:16 92:9 agrees [8] 31:16,19 38:8 45:20 88:1,11 91:18 101:14 ahead [2] 11:19 12:19 ahistorical [1] 53:13 alike [1] 97:5 ALITO [27] 11:17 12:18,21 13:19 14:15 15:4 22:10,13,16,20,25 23:6,22 31:6,7 32:5 46:19 69:5,23 76:9,10 77:13 78:12,18 79:3,6 100:2 all-or-nothing [1] 13:22 allow [3] 50:11 63:10 96:14 allowed [3] 66:4,22 96:9 allowing [1] 46:25 allows [2] 37:15 63:14 almost [1] 70:11 alone [2] 92:20 96:16</p>	<p>already [8] 50:11 56:6,25 57:4 66:4 77:20,22 96:15 alternate [1] 42:9 alternative [1] 93:23 although [1] 79:15 amended [2] 87:21 94:24 amendments [1] 95:16 amici [1] 79:25 amici's [1] 79:22 amicus [12] 2:9 3:10 4:18 30:1 31:20 38:21 70:12,15 79:11 87:1,10 104:22 amicus's [4] 70:16,16,18 80:17 among [1] 93:16 analogous [2] 36:16 67:12 analysis [3] 39:17 40:5 49:4 analyze [1] 55:18 ANDREW [5] 2:2 3:3,14 4:7 101:8 anniversary [2] 87:14 99:1 announce [1] 54:9 another [6] 6:22 14:6 56:10,20 92:10 94:21 answer [10] 6:5 13:20 17:12 29:3,6 43:19 53:2 65:13 70:2,3 antecedent [2] 5:13 20:25 ANTHONY [3] 2:5 3:6 44:12 anybody [1] 102:14 Anyway [5] 68:10 70:17 83:14 84:4 86:11 apart [1] 47:3 aperture [1] 77:25 appeal [8] 8:21,23 14:1 52:10 53:7,9 60:5 73:9 appealability [1] 25:12 appealed [1] 60:3 appealing [1] 59:24 appeals [58] 5:9 8:13 10:3,7 11:9 12:25 14:15,19 18:9 19:11,13 20:9,14 21:6 22:17 23:11,12,19 24:3 25:25 28:1 33:10 39:20 41:8 43:14 44:5 45:2,25 48:23 52:5,11 55:2 57:3,7 58:10 63:20 64:7 73:8,10,11,18,19 75:10 77:17 78:7,11,14,23,25 81:7,8,9,14 82:7 96:8 103:13 104:6,11 appeals' [2] 47:6 74:10 appear [1] 48:20 APPEARANCES [1] 2:1 appearing [1] 31:15 appears [1] 48:15 appellate [6] 51:16,16,17 53:11 75:23 76:5 applicable [3] 37:4 86:9 88:4 application [45] 12:24 13:5 38:9,10,17 44:23 45:3,7,13,17,18,19 49:6,8,13 50:</p>	<p>20 56:17,18,20 57:17 60:17 70:5 71:1 73:3,3 74:22,23 80:8 82:15 84:21 87:24 89:6,18,24 90:4,7,9,9,18 94:21 97:13,18 98:1,10 99:12 applications [25] 4:12 6:11 22:1 25:6 36:5,11,14,24 38:24 44:18 56:7 59:16 78:16 85:25 86:6,11,12 87:18 90:15 94:15 95:9,13 96:4 97:4 98:5 applied [10] 18:12 22:10,11 24:9 53:22 57:8 61:11,11 99:9 100:19 applies [21] 4:11 8:25 12:14 16:16 21:20 34:10 38:2,24 45:23 46:15 66:20 72:8 79:12 80:24 91:7 92:9,11,15 97:15 102:24 103:9 apply [35] 4:13,22 18:16 21:14,20 22:7 24:6,10 31:11,17,21 35:14 37:16 45:21 52:9 56:14 59:10,13 61:7 63:5,6 72:8 81:4 82:13 85:10 88:9,13 90:10 91:16 92:1 95:13 98:2,24 100:5,12 applying [5] 12:9,13 43:14 74:10 97:20 appointed [1] 104:21 appreciate [2] 15:21 102:9 approach [4] 14:13 21:11 42:3 54:7 appropriate [7] 10:3 11:8 25:24 28:1 45:2 55:4 64:6 appropriately [1] 78:5 arbitrary [1] 63:9 aren't [3] 42:10 72:1 86:12 argue [2] 28:25 104:22 argued [1] 45:22 arguing [1] 89:16 argument [55] 1:14 3:2,5,8,13 4:4,7 5:4 9:6 10:14,20,24 11:5 13:17 14:11 15:21,22 18:6,14 19:16,18 20:6,7,12,19 21:13 23:20,25 25:19,21 26:20 27:24 28:9 31:8 32:24,25 33:4 35:17 39:20 44:12 47:13,14 48:13 57:25 58:1 66:21 68:17 70:12 80:17 85:13 87:9 95:23 96:14 98:6 101:8 argument's [1] 5:6 arguments [23] 4:25 10:22 14:12 19:6 26:23 28:19,22 29:8,20 30:9,16 36:4 40:20 46:2 68:15,17 69:24,24 70:1 73:25 75:12 85:12 102:22 arise [1] 43:4 arises [1] 43:12 around [2] 65:23 99:17 Article [3] 29:11 75:4 76:3 aspects [1] 44:22</p>
---	---	--	---	---

Official - Subject to Final Review

Assistant [2] 2:2,5 assumed [1] 5:7 asymmetric [1] 63:10 atextual [1] 102:17 attempt [1] 46:1 attention [1] 58:2 attentive [1] 31:10 authority [3] 40:12 68:20 69:1 authorization [26] 5:4,8 12:23 18:18 19:12 20:10, 15,17,22 22:11 23:11,14 45:15 46:4 49:7 58:4,11, 16 59:11 61:12 70:23,24 71:13,14 72:12 80:9 authorizing [1] 45:12 available [6] 30:7,8 63:23, 24 64:4,4 avenues [4] 30:25 65:9 75: 21 77:8 Avery [3] 64:13,13 73:17 avoid [3] 28:22 30:11 77:2 avoidance [4] 30:25 42:14 76:11,15 avoided [1] 102:20 avoiding [1] 76:22 aware [2] 17:25 30:22 away [2] 29:2 87:18 <hr/> B b)(1) [57] 4:22 5:20 6:21 12: 13 17:4 20:13 21:2 28:15 30:18 31:15 32:1 33:15 34: 5,10,11 36:1,5,20 37:3,10, 12,16 38:25 39:11,12,16 40:6,13 41:6,13,15 42:6 49:11 55:19 57:8 64:15 70: 8,14 80:7,20,23 84:24 85: 10 91:21,25 92:3,14 95:22 97:24 99:20 101:15,19,25 102:5,13,15 104:16 b)(2) [15] 31:15,21 32:1 36:1, 5,20 37:3,11,13,17 38:25 49:11 70:8 80:7,21 b)(3) [18] 31:16 35:13,25 36: 23 37:11,15 38:4,19 45:10, 14 49:14 80:6 85:10,23,24 90:14,15 92:5 b)(3)(A) [6] 11:10 14:25 26: 14 45:20 70:23 85:5 b)(3)(C) [3] 80:18 92:9 93: 20 b)(3)(E) [16] 17:3 21:9,24,24 24:10,16,19 25:11,15 29:1 30:12 34:25 42:3 43:6 44: 19 103:9 b)(4) [12] 35:14,25 36:24 37: 11,15 38:4 44:18 45:10,14 49:14 80:6 85:23 b)3 [2] 103:15,25 back [17] 8:9 14:24 18:5 26: 3 28:19 33:8 41:21 52:6, 19,22 64:19,20 66:16 76:3 79:10 80:13 83:12	baloney [1] 27:3 banc [8] 13:6 15:6 24:2 39: 23,24 40:13 54:20 78:24 bar [25] 5:1 8:24 9:14 15:6, 10,13,24 24:11,11,25 31:8 32:9 42:17 43:8 50:21 67: 15 72:4,6 79:14 83:21 88: 16,25 91:25 94:25 99:19 barred [4] 17:14 21:8 66:8 84:3 BARRETT [18] 25:17 27:2 28:5,8 39:6 40:22 42:7 43: 17 54:5 55:21,25 56:5,9,12, 18 87:4 100:25 101:1 Barrett's [1] 101:25 barring [1] 9:12 bars [2] 34:8 71:21 base [1] 76:21 based [6] 5:4 11:5 20:19 22:5 23:21 27:24 bases [1] 53:25 basic [5] 32:21,23,23 34:19 50:5 basically [3] 27:5 48:2 83: 7 basis [3] 24:13 45:24 96:16 bear [1] 69:2 become [1] 44:6 beef [1] 30:1 begin [1] 73:13 beginning [1] 81:16 behalf [9] 2:3,6 3:4,7,15 4: 8 44:13 95:3 101:9 believe [3] 14:21 34:23 101:15 below [4] 2:9 3:11 87:11 104:23 belt [1] 96:13 benefit [2] 102:8,14 best [1] 25:20 better [2] 42:1 92:16 between [10] 5:17 7:11 17: 17 22:23 24:1 25:11 58:3 68:10,14 74:25 beyond [4] 7:12,22 20:10 41:4 bigger [1] 28:12 bill [1] 99:2 bit [1] 48:24 blow [1] 47:3 board [1] 43:9 bombing [2] 87:15 88:22 boot [2] 83:14 84:6 both [14] 39:2 46:17 47:19 52:13 60:21 70:23 77:6 78: 3 80:10 89:4,15 90:5,18 99:22 bottom [1] 81:3 BOWE [7] 1:3 4:5 56:1,3,4 102:7,16 box [2] 50:20 72:1 Bradford [1] 102:12 brief [11] 9:9 10:17 25:10 27:12 28:25 30:1 46:2 90:	25 93:2 101:23 104:22 briefed [1] 76:21 briefing [1] 77:3 briefly [3] 19:7 63:18 85:2 briefs [1] 37:20 bring [9] 7:5,16 16:8,9,10 92:14,19 94:22 98:11 bringing [4] 18:8 80:11 94: 9,17 broad [6] 17:8 51:4 52:3 70:6 72:10 83:22 broader [5] 23:25 25:21 35: 16 46:3 70:25 broadest [2] 13:16 21:13 broadly [2] 51:5 52:13 brought [3] 94:17,20,20 bucket [1] 99:18 build [1] 46:18 building [1] 87:15 bumped [1] 57:8 business [1] 64:1 <hr/> C call [2] 71:24 73:4 called [1] 64:13 came [6] 1:13 64:13,15,16, 19 73:17 campaign [1] 102:17 cannot [5] 21:6 37:17 43: 15 44:3 62:23 canon [4] 76:14,15,18,19 capital [2] 8:6 14:7 captures [2] 45:17 70:7 care [4] 59:14 65:3 83:15, 18 carries [1] 89:19 carve [1] 55:18 Case [33] 4:4 9:8,17 20:18 22:3,7 25:10 28:13 30:4, 24 40:16 41:7 64:13 65:15 67:5 73:22 76:21 78:1 82: 4,14,17 84:20 85:21 101: 13,17,23 103:5,7,12,18 104:22 105:2,3 cases [10] 14:7 17:25 18:9 21:14 30:13 71:25 72:1 75: 16 77:16 93:3 Castro [29] 5:5,17 10:20 14: 14 20:20 21:2 24:9 30:15 34:17 46:21,22 49:23 51:9 52:17 65:15,15,19,23 69:9, 11 71:10,23 72:14 73:2 81: 18,20 84:14,18 103:1 Castro's [1] 71:11 category [2] 17:24 91:5 ceases [1] 44:4 central [1] 16:7 cert [26] 5:3,12 9:14 11:1 15:24 16:8 20:22,24 32:9, 18 33:2 41:22 46:4 48:11 52:5 63:12 64:2,17 68:11 72:6 73:15 77:9,24 78:8 104:9,14 cert's [2] 64:3,4	certain [1] 58:9 certainly [4] 16:18 29:5 59: 20 69:16 certificate [1] 25:12 certification [27] 7:8 11:13 24:17 26:2,5,15,25 27:7,20, 22 28:3 32:18 44:17 45:1, 8,12 55:3,3 57:22 71:3 73: 7 75:20 78:6,25 93:19 94: 9 98:12 certifications [1] 31:17 certified [20] 10:1 11:8 12: 25 25:23 27:16,19,25 44: 24 45:3,7 48:4,7,7,20 54: 22,23,25 63:18,21 64:17 certifies [1] 11:2 certify [2] 44:24 64:8 certifying [3] 44:23 48:6 57:1 certiorari [17] 11:15 13:10 14:9,20 15:11 24:10,25 30: 8 40:2 43:10,21 44:20 46: 10 47:2,11 62:10 63:22 challenge [2] 66:23,24 challenged [1] 21:5 challenging [2] 6:15 33:19 chance [1] 35:11 CHIEF [34] 4:3,9 12:18 28: 23 29:14 30:19 31:3 32:6 33:8 34:15 35:8 39:5 42: 12 44:8,14 72:25 73:23 74: 6,14,21 75:5,9 76:7 79:7 84:25 87:2,8,12 99:25 100: 22 101:2,6,10 104:20 choose [3] 93:8,16 97:5 chose [2] 86:22 97:6 circuit [23] 15:15 26:11 28: 14 31:20 33:15 34:5,6,9 40:8,10 41:1,19,22 42:5 56:7 64:14 83:15 84:2 96: 2,4 102:3,13 104:18 circuits [3] 12:8 41:17 56: 15 circumstance [1] 21:21 cite [3] 66:10,13 93:2 cited [1] 6:7 cites [3] 51:9,9 103:5 City [2] 88:22 98:20 claim [5] 8:22 60:19 79:14 94:17,19 claiming [1] 81:17 claims [3] 62:11 93:13 104: 7 clarifies [1] 104:5 clarity [1] 52:7 class [2] 35:2 50:1 Clause [13] 29:3 30:11,20 42:21 53:4,5,12 68:21 75: 1,6 76:20,23 77:5 clear [52] 4:22 9:19 10:6,14 24:4,5,8,23 25:1,4,7,11,19 28:6,9 34:16 35:3,5 46:14, 17,20,21 47:14,18,25 48:1 50:2,4 51:1,9,12 52:24,24	58:8 65:1,6,12,24 67:8,10 68:23 69:6,10,12 76:1 88: 20 97:10,15 102:4,23,25 103:15 clearest [2] 64:24 65:4 clearly [3] 83:9 84:3 91:1 Clinton [1] 99:1 clock [2] 96:10,20 close [2] 35:1 50:1 closer [3] 7:17 90:13 98:9 clunky [1] 97:6 CO [1] 73:10 COA [1] 73:10 Code [1] 90:23 codify [1] 100:15 collateral [5] 84:24 53:20 55:9 77:22 100:5 combination [1] 99:20 come [9] 26:2 30:9 49:18 64:20 69:13,15 70:2,3 104: 10 comes [11] 11:12 24:17 28: 3 34:18 50:17,23 67:20 73: 15 76:18 77:20 83:19 comfortably [1] 51:22 coming [2] 28:19 69:21 command [1] 91:15 comment [1] 49:22 comparable [1] 77:15 compelled [1] 63:16 compelling [1] 71:5 complaining [1] 103:20 complete [1] 94:2 completely [3] 13:12 42: 20 53:13 comply [1] 72:15 conceivably [1] 78:19 conceive [1] 61:9 concern [4] 13:15,21 33:3 41:3 concerned [4] 8:4 28:20 41:8 104:13 concerns [4] 7:23 78:3 102:1,7 conclude [1] 71:6 concluded [2] 46:1 73:6 concludes [1] 29:7 concluding [1] 79:17 conclusion [2] 4:18 62:7 conclusive [1] 27:13 conditions [2] 7:3,4 conflict [14] 28:15 30:17 33:15 34:5,7,9 39:2 41:6, 23 42:5 43:16 64:5 102:4 104:19 confront [1] 92:25 confronted [1] 93:4 confused [2] 74:18 86:18 Congress [69] 6:1,6,24 7:2, 16 8:3 12:23 13:13,21 14: 3,5 17:16 25:2 29:16,18 31:9 32:9 35:4 42:24 43: 17,20 47:4,8 49:9 52:3,6 59:1 60:1 61:5,6,23,23 62:
---	--	--	---	--

Official - Subject to Final Review

<p>8,9 66:22 69:18 70:3 72:9 74:1 75:3,4,8,14 78:2 86: 19,22 87:16,17,21 88:23 89:22 91:1,21,25 93:7,10, 17,22,24 94:24 95:1,19 96: 7,19 97:2,17 98:19 99:15, 23 Congress's [6] 50:3 53:5 68:20 69:10 70:20 88:20 consequences [2] 89:20 90:22 consider [3] 40:18 41:11 47:10 considered [2] 47:17 76: 14 constitutional [14] 12:2 33:11,22 42:13,16 45:6 53: 1 76:11,12,13,15,17 77:1 82:16 constraints [1] 94:11 construction [3] 47:18 67: 9 69:17 construe [2] 42:3 51:22 construed [5] 50:11 51:15 52:14 57:9 69:3 construes [2] 30:12 51:20 construing [2] 42:16 72:5 contain [1] 45:4 contemplated [1] 47:8 contend [1] 22:6 content [1] 45:4 context [17] 4:21 14:18,20 36:12 38:20 47:17,20 50: 18 53:6 69:19 76:1 78:3 86:9 89:23 91:22 94:13 100:13 contextual [3] 46:18,23,25 continue [1] 48:11 contrary [1] 32:4 contrast [2] 25:11,15 conviction [2] 8:23 33:19 convictions [1] 87:17 core [3] 21:8,23 50:19 corpus [8] 4:12 38:9 49:12 70:9 73:4 80:24 94:15 97: 25 correct [48] 8:15,16 9:15, 16,20,23 10:4,8,12,13 11:3, 4,23 12:15 14:21,24 15:2,9, 18 19:22,25 20:3,4 21:15, 18,22 22:12,15 23:4 24:8, 22 32:11,12,15,15,18,19 34:13 35:6 36:2 40:9 78: 17,21 79:14,15,23 81:21, 24 correction [1] 22:2 couldn't [3] 16:8,9 63:14 Counsel [13] 9:2,5 12:17 28:24 31:4 32:8 39:6 44: 10 73:24 87:6 100:4 101:4 104:21 Counselor [1] 79:9 counter-textual [1] 71:9 country [2] 4:20 8:7</p>	<p>course [13] 8:21 14:10,13, 19 17:4 39:16 40:5 41:6 48:17 49:24 62:8 64:21 65: 14 COURT [196] 1:1,14 4:10, 19,23 5:7,8,11,21 6:15,17 8:11,12,12,13,13,14,22 10: 3,6,7,11 11:1,9,22 12:25 13:1 14:11,14,15,19 15:5 16:19 17:8 18:2,9 19:11, 13 20:9,14 21:5,25 22:2,17 23:10,12,13,14,19 24:2,9, 12 25:24 26:21 28:1,14,17 29:7,9,24 30:6,11,23 31:1 32:18 33:10,19,25 34:4 40: 5,16,17,19 41:5,11,12,22 42:4 43:15,21 44:3,4,5,15, 20 45:2,23,25 46:11 47:2,6 48:23 50:10,12 51:15,20, 25 52:4,10,14 54:6,6,13,23 55:2,12,14 57:2,7,9 58:9, 10,15,20 60:17,20 61:1 62: 24,25 63:13,20 64:7,9,9,18 65:7,9 66:3 67:13,17,19 68:25 69:3 73:5,5,7,10,11, 13,15,18,19,20 74:3,7,10, 11,16,18 75:10,13 77:5,12, 17,17,24 78:7,10,14,23,25 79:1 81:7,8,8,9,13 82:7 83: 9 87:13 91:1 92:25 93:4, 12 94:14 95:1,6,9 99:13,14 100:6,11 101:14 102:4,15, 22 103:8,13,18 104:2,5,8, 10,13,17,21 Court's [21] 5:23,25 19:16 23:8 24:3 35:1,1 42:18 43: 10 46:12 53:10,10 66:25 68:11 71:15 75:15,23 77:8 89:2 96:3 103:25 Court-appointed [5] 2:8 3: 10 4:18 31:20 87:10 courthouse [1] 35:2 courts [16] 15:17 30:2 39: 20 41:8 43:13,13 44:2,5,6 54:11 84:2 96:6,8 99:4 104:6,10 covered [1] 24:15 covers [1] 28:2 create [1] 39:2 creating [1] 72:9 criminal [1] 87:17 criteria [5] 6:12 18:12,17 59:10 61:24 critical [2] 61:4 90:5 cross [1] 88:18 cross-reference [23] 9:12 24:16 33:5 38:13 88:3,8, 12 89:13 90:11 91:15 92:4, 5,12,12,20 93:18 94:1 95: 20 97:2,7,22,24 98:2 cross-references [1] 91: 23 crystal [1] 102:4 curiae [4] 2:9 3:10 87:10</p>	<p>104:23 custody [1] 17:18 cut [4] 36:9 49:9 74:15 85: 16 cute [1] 55:8 cutting [2] 75:10,12 Cyan [2] 90:25 92:25</p> <hr/> <p>D</p> <p>D.C [2] 1:10 2:6 Dallas [1] 2:8 day [1] 104:16 days [7] 13:2 14:2 47:7,9 78:7 96:17,22 deadline [1] 78:9 deal [2] 42:1 96:8 dealt [1] 65:15 decide [6] 16:19 18:3 48:6 64:9 79:2 82:10 decided [4] 14:16 74:1 77: 16 93:15 decides [1] 79:4 deciding [3] 14:16 44:2 71: 25 decision [20] 11:1 19:16 23:8 25:10 30:23 47:6 54: 8 61:8 74:3,6,10,16,19,19 76:22 83:9 90:25 93:1 96: 3 102:12 decisions [6] 15:8,9 52:4, 15 90:24 100:11 decouple [1] 24:12 deemed [1] 67:22 Defender [1] 2:2 deferential [1] 6:19 defined [1] 51:5 definitely [1] 37:22 deliberate [2] 37:13 70:20 denial [26] 5:3,8,11 19:13 20:8,9,21 21:7 22:23 23:7 46:9,9 53:9 60:16,21,25 62:21 63:5 71:8,13,14 72: 11 73:21 77:9 103:21,23 denials [3] 63:10 71:21 103:16 denied [14] 18:11,19 22:20 23:1,2 46:5,6 59:16,19,21 60:18 61:13,19 84:17 denies [1] 13:5 deny [13] 19:11 20:2 23:17 50:16 58:11,15 60:16 62: 16,17 63:1 82:14 103:15 104:11 denying [5] 58:3,4 82:18 84:3 104:8 Department [1] 2:6 Department's [2] 74:15 81:13 depend [2] 24:4 62:23 depends [2] 20:12 55:12 deprive [6] 9:18 33:12 34: 25 39:21 43:20,22 described [1] 49:1 describes [3] 49:1 67:5,5</p>	<p>designed [1] 102:17 detainees [3] 17:20 98:6, 15 determination [13] 7:9 11: 13 18:17,22 19:21 20:15 24:18 26:16 28:4 60:2 61: 18 75:16 96:10 determinations [3] 22:1 76:6 98:23 determine [1] 69:18 determined [2] 61:12 62: 10 dicta [3] 41:9,18 55:9 difference [5] 12:5 24:24 58:3 89:5,10 different [19] 6:3,13 7:23 11:23 12:1 15:12 19:5,7 32:14 53:16 64:15 65:14 72:22,23,24 74:1 79:16 90: 2 100:7 differential [2] 6:9,22 differently [6] 6:7 7:13,15, 20 17:3 96:24 difficult [6] 16:16 26:19,20, 20 75:22 96:17 direct [4] 8:22 73:9 77:20 91:14 directed [1] 91:10 direction [1] 69:22 directly [10] 30:17 42:5,11 70:22 71:2,18 80:10 92:3 103:24 104:19 disagree [5] 37:6 39:13 58: 12 79:21,25 discharged [1] 104:24 discovered [4] 6:12 12:1,6 82:15 discuss [1] 54:20 discussed [1] 83:17 discussing [1] 77:6 disfavors [1] 50:13 dismiss [4] 20:2 62:25 96: 15 101:23 dismissal [10] 22:5,23 46: 8 60:16 62:20 63:4 71:8 72:14,20 104:1 dismissal/denial [1] 23: 20 dismissals [2] 102:13 103: 17 dismissed [8] 19:14 46:7 60:19 61:20 73:5 82:17 103:13,18 dismisses [1] 40:16 dismissing [4] 41:6 58:5 82:14 104:6 dispense [1] 14:8 displaced [1] 92:15 disposition [2] 62:23 74: 25 dispositive [1] 80:4 distinct [5] 49:17 70:21 86: 22 94:18,22 distinction [7] 5:16 17:17</p>	<p>22:23 24:1,8 31:18 90:5 distinctions [1] 74:24 distinctive [1] 80:7 distinguishable [1] 63:5 distinguished [1] 89:23 district [16] 8:12 23:13 52: 10 64:18 73:5,5,13 74:3,7, 11,16,18 75:13,15 77:17 81:8 do-over [3] 88:16,24 99:5 docket [1] 22:17 doctrine [2] 95:11,14 dog [1] 28:16 doing [12] 14:5 18:13 38: 19 52:1 58:9 60:4 80:11 84:4,5 96:1 98:19 102:3 done [9] 14:20 30:13 42:4, 5 49:10 61:17 78:6 79:1 94:6 door [1] 35:1 doors [2] 35:2 50:1 down [3] 64:18 78:1 83:13 drawn [1] 17:16 drew [2] 21:3 25:11 due [1] 17:4</p> <hr/> <p>E</p> <p>earlier [4] 11:23 38:8 65:19 102:1 easiest [1] 92:8 easily [1] 92:1 easy [1] 104:15 effect [7] 23:4,9,10,17,18 103:21 104:2 effectively [3] 23:1,1 54:8 effectuate [1] 104:18 effort [1] 7:16 either [6] 40:12 45:4 70:12, 14 78:23 79:19 elaborate [1] 4:19 Eleventh [9] 31:19 40:8,10 41:1,19 56:7 96:2,4 102: 12 elide [1] 61:4 eliminate [2] 14:4 102:17 eliminated [1] 88:24 emphasis [1] 89:7 en [8] 13:6 15:6 24:1 39:23, 24 40:12 54:20 78:24 enacted [4] 49:21 75:3,14 93:17 end [4] 13:24 61:13 93:24 104:16 ended [1] 94:1 ends [4] 27:7,22 48:11 78: 10 enforce [1] 99:19 ensure [3] 29:11,24 43:23 entertain [1] 95:2 entire [1] 58:5 entirely [2] 64:6 88:24 enumerating [1] 7:3 equally [1] 52:9 era [1] 53:19</p>
--	--	---	--	--

Official - Subject to Final Review

<p>erred [2] 62:11,13 error [6] 22:2 40:9 82:10 84:10,11 103:19 errors [2] 64:24 65:4 escape [1] 55:14 ESQ [4] 3:3,6,9,14 essential [3] 29:10 42:14, 18 essentially [2] 18:14 78:16 established [1] 53:8 establishing [1] 18:15 estoppel [2] 8:24 100:5 evaded [1] 5:22 Evans [9] 51:10 52:22 66: 10,15,19 67:4,6,7,12 Even [29] 5:6 6:10 8:22 13: 3 20:7,21 21:1,14,20 22:7 24:25 27:5 39:13 41:4,14, 17 43:1 46:1 48:24 57:16 61:24 65:5,6 80:16,22 81: 4,19 93:2 104:2 Everybody [4] 31:19 85:25 86:1,3 everyone [6] 31:16 38:8 55:9 88:1,11 91:18 evidence [6] 6:12 12:1,7 31:14 45:5 82:15 evidentiary [1] 6:21 eviscerate [1] 42:21 exact [3] 31:22 64:14 98:25 exactly [4] 49:10 97:16,22 99:7 example [3] 6:22 89:22 93: 9 examples [3] 6:8 7:19 93: 14 except [1] 74:10 exception [2] 29:17 75:23 Exceptions [15] 29:3,16 30:10,20 42:21 51:23 53:3, 5,12 68:21 75:1,6 76:20,22 77:5 excludes [1] 90:16 excluding [2] 45:24 97:18 exercise [3] 29:10 31:1 68: 20 exercised [3] 67:16,18,19 exercises [1] 30:15 exhaustion [1] 6:18 exist [2] 43:1,2 exists [3] 9:14 25:15 64:24 expect [1] 55:9 expected [1] 75:3 expediency [1] 13:25 expedition [1] 64:1 expeditious [1] 96:9 experience [1] 17:21 explanation [3] 17:6 49:18 70:20 explicit [1] 41:13 explicitly [1] 68:9 explored [1] 21:17 exposition [1] 55:6 express [2] 15:10 39:15</p>	<p>extent [3] 17:24 24:23 28: 20 extraordinarily [1] 64:3</p> <hr/> <p style="text-align: center;">F</p> <p>face [7] 12:14 89:18 90:16 92:11 97:18 101:16 103:4 faced [1] 94:14 facie [1] 80:18 fact [14] 6:6,14 8:5 15:23 20:16,17 23:12 37:2,10 40: 10 77:7 80:17 93:22 103: 13 failure [2] 72:15,20 falls [1] 24:21 far [3] 8:2 21:23 22:3 fatal [1] 70:11 fate [1] 56:23 Federal [68] 2:2 4:22 6:2,7, 15 7:3,11,14 8:2,13,17,20, 22 10:1 12:10 16:2,12 17: 2 21:14 25:8 26:18 29:12, 13,22,25 30:2 31:12,21,25 33:13,16,17 42:19,23 43: 13,22,23 44:3 45:18,21 77: 21,23 78:4 80:11 84:7 85: 19 86:13 87:15,19 88:4,9, 25 89:19 90:1 91:22 92:1 93:5 96:20,22 97:4,19,20 98:3,24 99:4,5,12 100:6 federalism [4] 6:5 7:12,22 17:5 feet [1] 17:12 Felker [1] 103:6 fight [1] 28:17 file [15] 12:24 13:9 17:21,22 22:13 33:18 40:1 47:10 48: 8 56:10,19 71:14 77:10 78: 9 87:19 filed [6] 10:1 48:8 56:6 57: 16 73:2,13 filing [4] 11:3 13:2 45:13 89:23 filings [3] 83:23 84:14,15 final [10] 8:12 26:7 27:13 61:13 74:4,8,22,25 75:17 104:4 finality [11] 7:23 8:4 18:15 61:9,22 78:3 87:16,22 88: 24 98:22,23 finality-promoting [1] 95: 21 find [1] 103:11 finish [2] 59:6 72:24 first [23] 4:4 9:6,12 19:10 20:6 22:4 23:20 45:1 46: 23 50:11 51:14 54:4 55:1 66:3,19 71:16 80:5 83:3 85:14 88:15 91:6 94:8 98: 12 fit [4] 90:13 91:10 98:9,19 flip [3] 26:3 66:5 67:23 flip-side [1] 50:16 Florida [1] 2:3</p>	<p>focus [3] 21:8 57:25 88:23 focused [1] 18:10 focuses [1] 46:5 follow [3] 54:11 55:10 62:8 followed [2] 59:20 68:24 following [2] 59:18 93:10 follows [3] 19:16 88:17 103:24 form [2] 11:15 75:17 formerly [1] 51:18 forms [1] 14:4 formulation [1] 69:8 Fort [1] 2:3 forward [3] 63:14 78:20 104:12 founding [4] 53:7,18 75:3 76:3 fourth [2] 57:11,15 frivolous [1] 78:15 front [2] 13:23 102:18 fruit [1] 69:2 full [3] 10:10 27:24 77:22 function [3] 16:7 29:10 42: 18 functioned [1] 30:5 functions [2] 9:25 42:14 further [8] 11:14 14:4,8 24: 20,25 74:8 75:7 100:1</p> <hr/> <p style="text-align: center;">G</p> <p>gatekeeping [9] 4:15 5:10, 15,19 20:11 21:1,7 22:6 31:24 gave [3] 9:9 61:6 96:7 General [4] 2:5 19:2 90:14 93:6 generally [2] 19:2 26:25 gets [3] 27:16,18 65:23 getting [5] 13:13 16:18 37: 21 60:10 74:2 give [5] 9:6,10 58:23 80:2 96:21 given [7] 29:20 31:1 35:10 50:5 52:3 85:17 102:22 gives [1] 27:21 giving [1] 10:14 goals [1] 88:20 Gonzalez [1] 60:18 GORSUCH [40] 9:1,4 11: 18 12:19 14:23 15:3,16,20 16:20,24 17:10 35:9,10,19, 22,24 36:3,8,19,23 37:7,18 38:1,6,11,14 39:4 85:1,2, 24 86:3,16,20,24 87:3 98:4, 14,17 99:3 100:23 Gorsuch's [3] 18:8 24:1 90:12 got [6] 35:24,25 36:12,13, 13 83:6 gotten [1] 79:10 govern [1] 7:9 governing [1] 90:1 government [21] 24:19 27: 12 32:25 39:9,12,14 40:6</p>	<p>50:12,13,13 66:5 67:20 89: 4,15 90:6,19 93:1 95:24 96:11 98:11 102:25 government's [3] 40:18 101:21 102:9 governor [1] 90:18 grant [19] 20:1 23:11,14 52: 4 58:11,15 60:15,21,25 62: 16,16 63:11 72:11 73:21 77:10 103:14 104:3,3,11 grant-or-denial [1] 72:2 granted [7] 18:11,18 46:5 59:21 61:19 63:12 64:2 granting [3] 58:3 84:2 104: 8 grants [4] 51:15,21,21 103: 16 grappling [1] 96:6 grateful [1] 104:25 great [2] 9:10 63:15 ground [7] 23:3 31:2 60:18 63:11,13 83:6,22 Guantanamo [1] 98:6 guess [6] 18:7 58:7 59:23 61:3 65:18 86:18</p> <hr/> <p style="text-align: center;">H</p> <p>h)(1) [8] 31:25 39:3 45:4 59: 12 61:11 92:15 94:12 95: 17 h)(2) [4] 31:25 39:3 59:13 61:11 h)(2)'s [1] 45:4 habeas [43] 4:12 9:25 16: 17 25:6 29:21 30:5 33:18 34:1 35:2 38:2,9 45:22 49: 12 50:1 53:7,9,16,17 65:7, 14,15,16 70:9 73:3,4 74:23 76:1,5 77:7 80:24 84:6,7 85:18 89:8 92:1 94:15 97: 25 99:5 100:13,13,20 103: 7,8 happen [3] 41:16 60:21 84: 1 happened [1] 72:18 happens [2] 26:5,6 harder [2] 75:18 98:7 harmless [1] 103:20 hash [1] 12:22 hear [3] 4:3 10:10,11 hearing [1] 39:22 hearings [1] 6:21 held [3] 5:11 30:20 94:19 help [1] 56:15 Hendrix [2] 29:23 33:20 high [2] 6:16 65:2 highlights [1] 33:21 highly [1] 102:20 history [1] 100:15 Hohn [1] 25:10 hold [1] 4:24 holding [3] 41:15 71:11 102:6 holdings [1] 42:9</p>	<p>hole [1] 72:9 hone [1] 92:23 Honor [16] 7:18 13:15 22: 22 24:7 26:8 27:8,23 28: 10 29:6 34:22 37:5 40:15 87:7 91:14 98:16 100:11 hook [1] 65:8 However [5] 14:22 17:7 23: 7 26:9 102:10 huge [1] 72:9 hypothetical [3] 58:24 59: 9,14</p> <hr/> <p style="text-align: center;">I</p> <p>idea [3] 53:11 71:7 75:12 identical [1] 12:3 identified [1] 103:11 Ill [3] 29:11 75:4 76:3 immediately [3] 39:2 50:9 83:20 impediment [1] 90:2 implications [1] 28:21 implicit [1] 99:3 implied [1] 103:7 important [9] 29:12 31:18 43:5 46:17 47:5 63:20 79: 2 89:14 99:10 impose [1] 47:4 improper [1] 23:2 improperly [1] 103:19 inability [1] 39:25 include [7] 32:9 47:19 49:9 72:6 93:20 95:21 98:14 includes [4] 27:20 36:25 80:20 89:18 including [4] 8:5 29:12 77: 23 93:4 inclusion [1] 86:4 incongruity [1] 16:13 incorporate [3] 7:7 9:13 11:12 incorporated [4] 15:1 40: 7 49:16 91:18 incorporates [5] 11:6,10 44:16 48:4 88:12 increase [1] 84:13 increased [1] 84:15 increases [1] 13:24 independent [1] 31:24 indicated [1] 54:5 indicating [1] 50:4 indication [12] 32:3 35:3 48:1 50:3,4 52:25 65:24 67:10 69:10,12,13 96:23 indications [2] 35:5 97:1 indirectly [1] 101:24 indisputably [1] 65:1 individualized [1] 21:25 initial [1] 25:9 inmates [1] 8:6 inquiry [2] 82:9 83:4 instance [1] 55:5 instead [10] 38:22 46:3 49: 14 82:17 84:7 95:19 98:9</p>
--	--	--	---	--

Official - Subject to Final Review

<p>99:7 100:14 104:7 intended [3] 49:9 96:23 98:24 intent [6] 50:3 67:15 69:10, 11, 12, 13 interested [1] 18:6 intermediate [1] 8:11 interpretation [4] 54:9 65:25 69:19 88:17 interpreted [2] 30:14 95:6 interpreting [2] 29:1 43:14 interpretive [1] 54:7 intersects [1] 68:19 invoke [1] 34:17 involved [1] 104:1 irrelevant [1] 20:18 isn't [6] 16:4 29:17 33:11 61:22 86:7 92:14 isolated [1] 68:25 issue [19] 7:12 14:16 15:5 18:1 19:15 20:9, 14 26:20 33:13 41:15 64:15, 20 73:17 76:4, 10, 20, 23 93:3 100:7 issues [2] 44:3 65:10 itself [2] 25:5 47:7</p>	<p>20 102:21 Justice [282] 2:6 4:3, 9 6:1, 4, 23 7:11 8:9 9:1, 2, 4, 5, 17, 21, 24 10:5, 9, 15, 19, 23, 25 11:16, 17, 18, 20 12:4, 8, 16, 18, 18, 19, 21 13:17, 19 14:15, 23 15:3, 4, 16, 20 16:20, 24 17:10 18:4, 8 19:4, 9, 19, 23 20:1, 5 21:10, 16, 17, 19 22:8, 9, 10, 13, 16, 20, 25 23:6, 22, 24, 25 25:1, 17 26:24 27:2, 14 28:5, 8, 23 29:14 30:19 31:3, 5, 6, 7 32:5, 6, 6, 8, 13, 16, 20 33:7 34:6, 11, 14, 15, 15, 16 35:5, 7, 8, 8, 10, 19, 22, 24 36:3, 8, 19, 23 37:7, 18 38:1, 6, 11, 14 39:4, 5, 5, 6 40:22 42:7, 13 43:17 44:8, 8, 14 46:13, 19 47:12, 21, 24 48:12, 17, 22 49:22 50:22, 25 51:3, 6, 11 52:2, 19, 20, 23 53:14, 20, 23 54:2, 5, 10, 15, 18, 24 55:7, 20, 21, 23, 25 56:5, 9, 12, 18, 21, 22, 25 57:4, 10, 14, 18, 20 58:13, 17, 20, 23 59:5, 8 60:12, 23 61:2 62:2, 13, 18 64:12, 25 65:11, 12, 22 66:12 67:1, 25 68:5, 13 69:5, 23 72:13, 19, 25 73:23 74:6, 14, 21 75:5, 9 76:7, 8, 9, 10 77:13 78:12, 18 79:3, 6, 7, 9, 19, 21, 24 80:13 81:1, 3, 6, 15, 22, 25 82:3, 5, 6, 8, 12 83:1, 5, 11, 25 84:12, 23, 25, 25 85:1, 2, 24 86:3, 16, 20, 24 87:2, 3, 4, 5, 8, 12 89:3, 11 90:11 91:4, 19 92:21 93:21, 23 96:25 98:4, 14, 17 99:3, 25 100:1, 2, 3, 4, 9, 18, 21, 22, 22, 23, 24, 25 101:1, 2, 2, 6, 11, 25 103:10 104:20 Justice's [1] 33:9</p>	<p>L lack [9] 18:22 19:14 40:16 41:7 58:5 72:20 82:24 83:5 101:23 lacked [1] 82:18 lacks [2] 44:20 46:11 landmark [1] 88:21 language [42] 31:22 37:12, 14 38:5 45:16 46:16 49:5, 17, 23 66:14 67:7 70:6, 9, 21, 21, 22, 23, 25 72:10 74:9 80:5, 6, 9 86:23 88:6, 9 89:5, 6, 10 90:2, 12, 20 91:9 94:3 95:6, 8, 19 97:25 98:7, 10 99:11 102:12 largely [2] 87:17, 23 last [1] 11:20 late-breaking [1] 101:22 later [2] 13:1 38:1 Lauderdale [1] 2:3 law [13] 9:17 12:2 29:12, 25 42:19, 23 43:22, 24 44:3 45:6 62:9 82:16 99:2 lays [1] 30:2 lead [1] 62:7 leads [1] 16:21 leap [1] 27:17 least [5] 43:25 51:4 55:24 83:23 97:3 leave [4] 48:8 77:4, 10, 11 left [1] 15:3 legislate [1] 13:22 legislating [1] 97:2 legislation [1] 88:21 legislative [1] 100:15 lens [1] 89:13 less [1] 37:4 level [1] 8:19 light [10] 50:8 51:23 52:18, 18 88:8, 19 92:8 97:21 98:1 102:11 likely [1] 37:4 limit [9] 47:3, 4 62:22, 23 63:2, 2, 7 66:1 73:16 limitation [4] 13:23 24:20 77:13 89:25 limitations [5] 6:20 11:14 34:20 50:6 89:21 limited [3] 47:7 75:25 76:19 limits [5] 13:7, 9, 11 14:7 67:9 line [3] 21:2 52:15 81:6 lines [2] 68:10, 14 literally [2] 46:8 60:16 litigated [1] 64:19 litigation [1] 79:14 little [4] 48:24 74:18 75:18, 21 logic [1] 16:21 logically [1] 19:10 long [2] 52:15 99:12 longer [1] 33:18</p>	<p>look [20] 26:11 49:4 51:5, 8, 18, 25 66:9 67:3 69:1, 3, 11 72:7 80:5, 18, 22, 23 82:9 83:13 96:14 97:23 looking [1] 47:18 looks [2] 11:22 48:24 losing [1] 28:11 lot [2] 33:2 69:6 lower [6] 43:13 44:2 50:12 54:10, 13 71:15 M made [9] 7:10 9:8 11:14 24:18 26:16 28:4 29:18 39:21 61:18 main [4] 33:3 36:3 79:10 85:12 Maine [1] 51:19 maintaining [1] 42:18 majority [1] 8:6 mandatory [2] 51:17 69:4 manner [3] 13:22 34:25 45:9 map [2] 80:10 98:8 maps [3] 70:22 71:2, 18 marginalized [1] 99:13 Marshall [1] 83:7 material [1] 5:16 matter [8] 1:13 23:9, 18 58:5 72:13 76:2 77:6 104:3 matters [2] 23:18 74:7 McVeigh [2] 89:1 98:25 McVeigh's [1] 87:15 mean [23] 14:3 16:4 26:24 30:21 38:12 39:1 43:18 51:7 53:18 66:13, 13 68:5 69:16 74:13 75:18 76:15 77:4 83:19 85:23 90:7, 18 91:25 92:24 Meaning [2] 52:2 69:18 means [6] 20:14 45:8 88:5 90:9 91:2, 3 meant [2] 34:12 95:20 mechanism [2] 97:6 98:9 mention [2] 37:23 85:14 mentioned [1] 11:22 mentions [1] 37:3 merely [1] 46:7 merit [1] 78:19 merits [19] 19:15 23:16, 19 35:11, 14 55:15 59:22 62:16 64:11, 20 73:17 77:16 82:4 85:3, 6, 9, 17 103:14 104:1 messy [1] 74:2 MICHAEL [1] 1:3 might [12] 24:3 29:7 39:8 46:22 47:12, 21 56:3 74:24 75:19 76:17 78:19 91:9 mini [1] 44:6 minimum [1] 93:18 misunderstood [1] 55:2 MITCHELL [19] 2:8 3:9 87:8, 9, 12 89:3, 11 91:13 92:7,</p>	<p>22 94:5 98:16, 18 99:7 100:8, 10, 19 101:5 104:21 Mm-hmm [3] 36:22 37:25 65:21 modified [1] 100:16 moment [1] 33:8 months [1] 96:3 Moreover [3] 53:24 62:21 64:11 morning [1] 4:4 most [5] 8:4 36:16 47:5 80:16 86:12 motion [15] 7:6 11:7 13:2 19:12 25:22 38:12, 18 71:16 72:15 89:7 90:3, 4, 8, 17 95:3 motions [16] 4:13, 15 17:22 34:10 36:11, 13 37:16 86:10 87:20 88:25 89:19 90:10, 13, 16 97:19, 20 move [2] 13:4, 6 moving [1] 104:11 Ms [16] 87:8, 12 89:3, 11 91:13 92:7, 22 94:5 98:16, 18 99:7 100:8, 10, 19 101:5 104:21 much [3] 27:17 35:11 77:19 multiple [3] 7:24 8:10 56:7 must [10] 5:19 7:4, 5 10:1 12:24 25:22 44:24 45:1, 3, 7 N narrow [9] 13:18 18:5 19:5 21:11 57:24 66:11, 21 77:19 81:19 narrowed [1] 78:1 narrower [10] 10:21 14:12 17:9 26:22 28:19, 21 30:16 31:2 50:8 102:21 narrowly [9] 30:12 34:21 42:3 50:6 51:15, 20, 22 52:14, 14 natural [6] 39:13, 15 55:17 86:7 98:19 99:15 naturally [2] 45:17 70:6 necessary [1] 10:18 need [9] 14:11 47:24, 25 64:7 65:24 67:10 68:22 76:25 83:19 needed [1] 50:5 needs [1] 17:8 neither [1] 93:1 never [3] 30:20 41:23 43:20 new [4] 12:2 45:5, 5 82:16 newly [4] 6:12 11:25 12:6 82:15 NLRB [1] 93:5 non-merits [2] 63:11, 13 non-merits-based [1] 22:5 none [1] 14:22</p>
--	--	--	--	--

Official - Subject to Final Review

<p>normal [2] 69:17 73:22 normally [2] 14:1 63:22 note [1] 78:22 notes [1] 46:3 nothing [2] 25:16 41:25 number [6] 8:1 37:12,13 83:23 95:21 98:21 numerous [3] 6:8 7:19 93:3</p> <hr/> <p style="text-align: center;">O</p> <p>observed [1] 96:2 observing [1] 16:14 obstacle [1] 102:18 October [1] 1:11 odd [2] 15:23 91:24 offered [1] 4:25 often [1] 16:6 Okay [20] 15:20,20 19:4 23:22 33:9 34:14 35:7,19,23,24 36:8,14,19 39:4,8,18 40:3,24 42:7 58:13 Oklahoma [2] 88:22 98:20 omission [1] 37:14 omitted [1] 95:19 once [5] 13:4 38:17,17 61:10 104:19 one [47] 5:2 7:4 11:20 19:10 20:20 21:16 25:20 26:3,22 30:4,16 33:12 35:12 36:3 37:12 41:17,20 42:12 46:21,24 49:17,25 53:1 56:11 60:9 61:9 69:22 70:2,3 77:22 85:12 90:24 94:15,20,21,21,22 95:21 96:12,18 97:8,9 98:22 99:10 101:21 102:19,21 one-year [2] 87:14 99:1 ones [1] 13:18 only [33] 5:13 7:6 8:14,25 11:12 12:14 13:16 15:10 24:10 28:2 30:13 33:16 40:21 45:10,14 46:4,25 47:2 55:7 58:18 63:6 64:7,23 71:9 78:18 79:12 80:24 84:19,23 90:15 92:24 95:8,17 opened [1] 20:20 openly [1] 55:10 operate [1] 63:1 opinion [5] 41:10 55:13 67:2 103:4 104:5 opinions [1] 42:10 opportunity [1] 5:21 option [2] 41:12 102:19 options [3] 58:19 78:22 101:21 oral [7] 1:14 3:2,5,8 4:7 44:12 87:9 order [3] 38:13 77:2 97:19 original [8] 16:7 29:21 30:4 33:18 34:1 65:7 76:2 77:6 other [26] 7:7 10:21 14:12 18:21 21:4 31:2 33:22,24</p>	<p>34:4 36:9 39:17 42:12 43:7 56:14,15 61:20 65:9 69:14 75:20 77:8 83:17 93:3,14 94:3,20 96:23 otherwise [3] 5:24 41:16 99:9 out [19] 15:4 19:8 25:9 30:2 39:7,9 40:4 43:5 49:9 53:14 55:14,19 64:14 70:13 78:14,15 83:14 95:11 96:13 outnumber [1] 8:2 outside [2] 24:22 77:9 over [6] 30:17 42:6 52:4 76:5 94:9 103:12 overlap [1] 79:17 overturn [1] 15:7 overworked [1] 33:3 own [5] 4:15 28:17 44:6 80:24 81:4</p> <hr/> <p style="text-align: center;">P</p> <p>PAGE [6] 3:2 5:5 10:17 40:19 56:13 101:22 pages [1] 39:9 panel [45] 10:2,7,10 11:2,8 12:25 13:4,4,8 15:6 18:11,16,20 25:24 26:2,5,7,17 27:25 39:22,23 40:12 41:19 45:2 58:10,25 59:9,14,17 60:2,6 61:6,10,17,17,25 62:4,8,11 64:7,8,16,17 78:7,14 panel's [2] 11:1 26:7 paragraph [8] 50:10,10 67:8 68:1,3,4,5,8 part [8] 11:2 24:4 47:5 48:5 49:3 57:22 67:11 91:17 particular [8] 28:16 33:14,20 34:2 41:20 61:6 70:4 103:2 particularly [3] 31:9 69:2 83:20 parties [2] 92:9,17 parts [1] 11:6 passage [2] 5:5 46:22 passed [2] 87:16 88:22 past [1] 5:23 path [1] 92:10 pause [1] 9:10 pay [1] 58:2 people [5] 17:18,19 22:1 66:14 102:7 perceive [1] 41:9 Perez [1] 51:19 perfect [2] 88:19 91:10 perfectly [1] 99:15 perhaps [2] 18:10 28:11 period [3] 27:5 47:1 62:17 petition [24] 5:3,12 8:1 13:10 20:23,24 24:2 26:10 34:7 40:1,1 44:19 45:22 46:10 47:1,10 48:10,10 57:11 70:9 77:24 79:5 80:25 104:</p>	<p>9 Petitioner [26] 1:4 2:4 3:4,15 4:8 5:18 45:20 46:1 47:8 48:9 56:16 65:8 70:12 79:12 82:23 89:4,15 90:6,19 93:2 95:24 96:11 97:1,8 98:11 101:9 petitioners [4] 35:3 50:2 56:14 99:6 petitions [13] 15:24,25 16:9,10,11,17 17:23 26:18 29:22 33:2,18 99:5 104:14 phase [1] 75:13 phrased [1] 52:13 phraseology [1] 32:14 pick [2] 93:8,15 picked [1] 93:15 picking [1] 23:25 picture [1] 28:12 piece [2] 42:14 85:6 pivot [1] 52:22 place [4] 48:15 92:17 98:13 100:7 placed [2] 77:14 102:18 places [1] 14:6 plain [4] 4:11,20 101:17 104:17 plausible [1] 17:5 play [3] 11:12 24:17 76:19 please [7] 4:10 9:4 11:18 12:20 44:15 72:25 87:13 plenty [1] 43:8 plucking [1] 67:6 point [35] 6:24 8:10 25:19 26:9 27:1,9,14 32:21,23,23 39:11,12,15,16 41:14 42:11 43:5 46:3,6,18,23,25 55:7 61:3 69:22 80:4,16 82:20,21 86:17 93:23 97:8,12,16 99:10 pointed [3] 15:4 25:9 30:6 points [2] 39:9 49:23 policing [1] 60:4 policy [5] 32:24 60:10 68:15,17 69:24 position [11] 9:11 11:9 12:12 13:15 14:10 15:14 17:124:14 74:15 79:22 81:13 positions [1] 100:6 possible [4] 40:4,7 41:13 42:22 possibly [2] 36:25 37:1 post [1] 86:4 post-census [1] 67:18 post-conviction [13] 8:18 16:5,11 17:14 36:15,21 37:23 85:19 86:6,14 87:18,24 88:25 post-sentence [1] 66:23 posture [5] 64:16 72:23 73:1 77:19 104:7 potential [4] 29:21 33:21 76:13,22 power [3] 34:1 53:6 99:4</p>	<p>practice [1] 18:1 pre [3] 85:18 86:4 94:13 pre-AEDPA [1] 94:13 pre-conviction [5] 16:1,5 17:13 36:25 98:15 pre-sentence [1] 66:22 preceded [1] 50:9 precedent [1] 103:25 precedents [1] 51:24 preclude [1] 59:24 precluded [1] 64:23 precludes [1] 66:23 precluding [1] 60:5 preface [1] 80:2 prejudice [1] 102:14 premise [3] 40:22 62:6,7 prescribed [1] 12:23 presented [1] 96:15 President [1] 99:1 presumption [2] 49:19,20 pretrial [1] 17:20 pretty [7] 15:10 27:3 39:13,15 54:13 55:8 71:5 prevent [2] 77:15 99:5 prevented [1] 99:11 preventing [1] 21:24 previous [1] 9:7 previously [5] 45:22 67:16,17,19 99:4 prima [1] 80:18 primarily [2] 46:5 91:7 principal [1] 90:24 principally [2] 88:2 94:12 principle [6] 34:19 50:5 53:13,21 68:10 100:16 prior [2] 18:9 41:19 priority [1] 28:13 prisoner [14] 5:9,13 8:11,14 12:9 13:6 48:9 50:17 67:24 73:2 79:4 80:12 82:23 95:4 prisoner's [3] 39:25 45:18,19 prisoners [70] 4:23 6:2,7,14 7:4,14,14,15,24 8:2,2,5,8,17,17,20,25 9:14 10:1 12:14 15:25 16:1,2,10,12 17:2,13,14 25:6,8 26:18 29:22 31:12,21,25 32:1 33:13,17,17 45:21 49:10 78:4,5 79:13 83:24 86:13 87:19,23 88:2,4,7,9,10 89:1,8 90:1 91:8,11 96:20,21,22 97:4,5,11,16 98:3,24 99:10,12,18 probably [2] 74:12 83:14 problem [16] 33:22 34:3 40:14 43:4,12 53:12 74:20 76:13,18 94:16,18,23 95:8,25 96:6,8 problems [4] 30:10 92:23 94:14 99:23 procedural [4] 49:15 58:8 72:23 73:1 procedurally [2] 60:6 62:4</p>	<p>procedure [3] 12:22 36:16,21 procedures [1] 94:9 proceeds [2] 44:25 45:9 process [23] 13:25 26:25 27:7,10,20,22 32:16,17 44:17,25 45:9,12 47:5 48:5,11,14,19 49:16 57:22 66:3 71:3 78:10,13 professors [1] 30:2 prohibit [2] 26:10,17 prohibits [2] 44:19 46:4 proper [5] 20:15 54:9 55:5 63:25 81:10 properly [5] 60:2,7 62:4 73:13 93:13 proposal [2] 40:18 56:13 proposes [2] 4:18 40:6 provide [4] 11:7 28:2 87:22 94:10 provided [13] 10:2 25:23 27:25 32:10 45:7 48:5,20,22 78:6 92:13,19 93:25 96:19 provides [1] 11:14 provision [17] 14:6 25:13 29:13 30:14 45:14 49:24 65:16 71:21 75:7 85:17 89:22,25 91:17 95:22 98:22 101:16 103:2 provisions [22] 7:8 11:11 12:10,11 28:2 37:15 45:11,15 49:15,21 52:12 69:20 84:6,8 90:14 93:9,19 95:15 97:20 98:12 99:8,9 Public [1] 2:2 pull [1] 83:20 purport [1] 67:8 purporting [1] 102:5 purposes [1] 75:22 pursuant [2] 17:18 62:4 put [5] 47:21 61:24 89:5 95:19 99:18 puts [1] 27:5</p> <hr/> <p style="text-align: center;">Q</p> <p>Question [58] 2:10 3:12 5:14,17,18 11:20 16:16,18 20:25 24:1 29:4,6 30:23 33:9,11,25 35:12 38:16 40:23 41:13 42:12,16,22,25 43:19 44:1 50:14,19 52:16,20 53:1 54:19,22,23 62:9 64:8 65:4 66:6 68:19,22 71:19 75:2,22 77:1 79:10 83:12 84:19,21 85:15 87:11 90:12 96:25 98:5 101:18,20,25 102:5 104:24 questions [9] 5:25 29:2 43:21 46:12 63:18,21 76:24 89:2 97:9 quick [1] 100:9 quickly [1] 13:4 quite [4] 18:6 40:9 46:8 67:</p>
---	--	--	--	--

Official - Subject to Final Review

<p>8</p> <p>R</p> <p>raise [3] 29:2 33:24 42:15</p> <p>raised [1] 33:16</p> <p>raising [1] 64:14</p> <p>rare [4] 55:5 63:21 64:3 101:17</p> <p>rarely [1] 33:25</p> <p>rather [4] 12:10 24:11 37:4 42:2</p> <p>rational [1] 16:25</p> <p>re [1] 39:23</p> <p>read [23] 18:24 34:19,25 36:13 49:25 50:5,7,8 52:18 65:20 66:15 67:14 68:1,2,9 85:4 86:10 88:7 90:7 95:10,11 97:19,24</p> <p>reading [15] 12:21 13:3,12 38:19 66:11,21 68:13 70:16,16,18 81:19,20 86:11 92:18,23</p> <p>real [4] 76:12,12 85:2 96:6</p> <p>really [15] 18:13 26:6 29:9,23 32:23 34:3 39:25 43:20 59:25 65:22 67:3 71:10 78:1 89:14 95:25</p> <p>reason [11] 17:13 23:15 52:23 57:7 61:20 71:6 72:7 88:20 95:18 98:21 103:22</p> <p>reasoning [2] 41:14 52:8</p> <p>reasons [3] 21:21 79:16 94:6</p> <p>rebut [1] 46:2</p> <p>REBUTTAL [3] 3:13 101:7,8</p> <p>receiving [1] 104:14</p> <p>recognize [1] 71:16</p> <p>recognized [2] 60:17 66:4</p> <p>reconcile [2] 89:9,12</p> <p>recurring [1] 64:6</p> <p>reduce [1] 65:14</p> <p>reference [1] 33:5</p> <p>referenced [5] 13:18 36:20 37:10 57:23 92:3</p> <p>references [2] 32:17 88:18</p> <p>referred [1] 65:18</p> <p>refers [1] 38:9</p> <p>refile [1] 102:10</p> <p>reflects [1] 6:9</p> <p>refusal [1] 71:15</p> <p>refused [1] 82:13</p> <p>regarding [1] 49:15</p> <p>regards [1] 52:11</p> <p>regime [1] 32:2</p> <p>regular [1] 74:22</p> <p>regulations [1] 29:16</p> <p>rehearing [20] 11:15 13:6,8 14:9,19 15:13,24 16:9,11 24:2,11 26:11,12,17 39:23,24,24 41:2 48:10 78:24</p> <p>rehearings [2] 15:6,7</p> <p>reject [2] 29:19 35:16</p> <p>rejects [4] 29:8 40:19 63:</p>	<p>13 66:21</p> <p>relates [1] 97:11</p> <p>relatively [1] 68:19</p> <p>relevant [4] 42:11 59:10 72:3 86:12</p> <p>relied [1] 20:16</p> <p>relief [6] 16:5,6 55:22 56:1 87:24 95:3</p> <p>relies [2] 65:8 90:25</p> <p>relitigation [1] 31:7</p> <p>rely [2] 79:20 98:11</p> <p>remain [1] 102:2</p> <p>remand [5] 40:8,15,25 56:2,4</p> <p>remember [2] 64:12 77:19</p> <p>removed [3] 21:23 22:3 24:25</p> <p>repeal [1] 99:4</p> <p>repeals [1] 103:8</p> <p>replete [1] 9:18</p> <p>reply [6] 10:17 39:10 46:2 56:13 93:2 101:23</p> <p>request [4] 46:6,9 48:8 59:11</p> <p>require [1] 52:7</p> <p>required [2] 69:8 95:2</p> <p>requirement [11] 5:19 18:15 20:16,17 21:1 22:6 61:10,22 80:19 88:15 92:11</p> <p>requirements [14] 4:16 5:10,15 20:11 21:7 31:24 38:22 45:5 58:8 59:13 61:7 80:19 87:22 88:13</p> <p>requiring [1] 87:19</p> <p>requisite [1] 19:21</p> <p>res [3] 100:12,16,16</p> <p>resist [1] 92:18</p> <p>Resisting [1] 4:17</p> <p>resolution [1] 14:7</p> <p>resolve [11] 5:22 28:14 34:4 41:5 42:5 43:21 101:14,24 102:3,5 104:18</p> <p>resolved [4] 30:17 41:23 73:18 101:16</p> <p>resolves [2] 28:17 101:18</p> <p>resolving [1] 30:23</p> <p>respect [18] 6:10,11 11:25 12:2 25:5,6 29:15 33:9 59:2 62:13 66:20 74:9 75:1 78:4 80:19 84:24 93:4,18</p> <p>respond [1] 49:19</p> <p>Respondent [4] 1:7 2:7 3:7 44:13</p> <p>response [6] 18:8 31:8 60:9,11,15 97:9</p> <p>responses [1] 60:9</p> <p>responsibility [1] 104:25</p> <p>responsive [1] 37:21</p> <p>rest [1] 38:19</p> <p>result [1] 91:9</p> <p>review [48] 5:1,13,23 7:24 8:15,19,20 10:25 11:15,21 12:10,11 14:5,8 24:3,20 33:10,13 34:8,20 43:8 44:</p>	<p>19 50:2,14 53:25 61:1 62:3,11 64:11 66:24,25 67:18 71:21 72:12 74:9,16 75:7,10,12,17 77:9,21,23 78:23 81:10 82:4 93:10 96:5</p> <p>reviewed [2] 5:17 81:11</p> <p>reviewing [2] 21:25 77:16</p> <p>reviews [1] 59:11</p> <p>revisit [1] 75:2</p> <p>rewrite [2] 38:25 90:19</p> <p>rewriting [1] 90:17</p> <p>risk [1] 102:2</p> <p>ROBERTS [28] 4:3 12:18 28:23 29:14 30:19 31:3 32:6 34:15 35:8 39:5 44:8 72:25 73:23 74:6,14,21 75:5,9 76:7 79:7 84:25 87:2,8 99:25 100:22 101:2,6 104:20</p> <p>rogue [1] 59:17</p> <p>Rosenbaum [1] 96:1</p> <p>round [1] 77:22</p> <p>rounds [4] 7:24 8:10,14,15</p> <p>routed [1] 99:8</p> <p>rubber [1] 59:15</p> <p>rule [28] 23:15,19 24:4,6,9,23 28:6,9 34:17 45:5 46:14,20 47:15 50:17 51:1,12 52:24 55:15 65:13 67:4 69:7 77:15 82:16 83:22 93:12 97:11 102:23 103:1</p> <p>ruled [1] 13:5</p> <p>rules [3] 12:2 31:12 41:19</p> <p>ruling [6] 18:23 19:15 23:10 84:24 103:14 104:1</p> <p>Russello [1] 49:19</p> <p>S</p> <p>safety [1] 30:5</p> <p>sake [1] 5:7</p> <p>same [23] 7:21 14:13 17:3 25:14 27:1 31:11,22 38:24 45:9 49:21 56:23 61:23 66:6 67:6 74:9,13 79:13 82:24 85:15 95:4 96:19 99:18 100:7</p> <p>Sanders [2] 95:7 99:13</p> <p>satisfy [6] 5:10,14,19 7:5 21:1,6</p> <p>saw [1] 96:4</p> <p>saying [17] 10:16 16:3 19:20 21:20 23:2 26:14 41:14 43:3 46:6 55:10 67:19,21 81:16 83:7 89:17 97:14 100:12</p> <p>says [39] 9:25 15:5 25:16 26:2,6,9 27:6,6 29:14 30:21 34:24 41:17 48:2,20 49:25 50:10 55:20 58:14 59:14,18,21 60:15 62:16 65:23 66:20 67:3 69:9,11 71:10,12 80:18 88:13 91:2,15 92:13 98:5 102:13 103:1,7</p> <p>scenarios [1] 92:1</p> <p>scholarship [1] 30:3</p>	<p>scope [3] 24:22 33:5 53:5</p> <p>screening [3] 47:6 74:19 78:13</p> <p>second [43] 6:10 7:6 12:24 17:22 19:18 20:7 22:13 25:22 44:17 45:3,16 49:5,8,12 50:15,19 57:12,17 64:17 66:7 67:21 70:4 71:1,14,17,19,20,21 72:1,16 73:6,12,21 77:10 80:8,15,16 84:19,21,22 94:10,21 95:2</p> <p>seconds [1] 77:25</p> <p>Section [23] 4:12,14 10:2 25:23 26:4 32:11 36:6 44:16 45:8,11,15 48:21 49:13 70:10 80:25 85:14 87:20,21,25 88:1 93:12,25 95:7</p> <p>sections [1] 38:2</p> <p>see [16] 6:10,18,19,20 7:19 8:24 14:5 16:3,13 33:1 39:7 65:23 89:17 96:14 98:19 104:9</p> <p>seeing [1] 83:8</p> <p>seek [2] 50:14 87:23</p> <p>seeking [2] 22:1 50:2</p> <p>seem [1] 27:17</p> <p>seemed [2] 65:13 69:7</p> <p>seems [8] 27:2 37:2 55:8 58:1 59:25 61:4 91:24 92:6</p> <p>seize [1] 5:21</p> <p>sense [7] 30:4 33:16 59:19 63:8,15 82:1 88:19</p> <p>sentence [4] 5:6 33:19 34:18,23</p> <p>sentences [3] 65:19,20 68:3</p> <p>sentencing [1] 95:1</p> <p>separate [3] 4:15 31:23 94:18</p> <p>separately [1] 64:13</p> <p>serious [4] 29:2,4 30:10 44:1</p> <p>seriously [2] 15:19 99:14</p> <p>serves [1] 8:19</p> <p>set [2] 32:2 75:16</p> <p>sets [1] 83:9</p> <p>several [2] 4:25 5:23</p> <p>shall [6] 48:4 58:15,16 75:16 93:12 95:2</p> <p>short [1] 6:4</p> <p>side [3] 21:4 66:6 67:23</p> <p>sight [1] 28:11</p> <p>signals [1] 37:22</p> <p>signed [1] 99:2</p> <p>significant [10] 46:24 64:5 68:19 77:1 78:2 89:19 96:18 97:14 102:2,6</p> <p>significantly [1] 13:24</p> <p>similar [1] 95:3</p> <p>similarly [1] 98:2</p> <p>simple [1] 88:17</p> <p>simplest [2] 5:2 103:11</p> <p>simplify [1] 101:13</p>	<p>simply [10] 10:16 17:1 30:11 31:13 47:1 56:19 84:14 102:20 104:5,11</p> <p>since [1] 76:4</p> <p>single [2] 15:5 104:9</p> <p>sit [1] 51:22</p> <p>situated [1] 98:2</p> <p>situation [3] 21:23 41:21 43:5</p> <p>six [3] 12:8 15:15 41:17</p> <p>Sixth [1] 64:14</p> <p>sketch [2] 19:7 39:7</p> <p>sketching [1] 40:3</p> <p>skip [1] 48:25</p> <p>slicing [1] 27:3</p> <p>slightly [2] 19:6 79:16</p> <p>Solicitor [1] 2:5</p> <p>solution [2] 56:9,12</p> <p>somebody [1] 76:16</p> <p>somehow [1] 15:11</p> <p>someone [2] 59:24 94:16</p> <p>somewhat [1] 50:8</p> <p>sorry [7] 9:3 11:18 28:7 39:23 40:24 74:5 85:22</p> <p>sort [8] 19:20 21:8 24:12 25:14 27:20 42:2 69:8 73:10</p> <p>SOTOMAYOR [63] 8:9 9:2,5,17,21,24 10:5,9,15,19,23,25 11:20 12:4,8,16 13:17 21:17 32:7,8,13,16,20 33:7 34:6,11,14 52:2,19 56:22,25 57:4,10,14,18 79:8,9,19,21,24 80:13 81:1,3,6,15,22,25 82:3,5,6,8,12 83:1,5,11,25 84:12,23 100:3,4,9,18,21</p> <p>sought [2] 5:13 35:4</p> <p>sound [1] 45:24</p> <p>Southwest [1] 93:6</p> <p>sovereignty [1] 6:17</p> <p>speaking [1] 10:10</p> <p>speaks [3] 34:19 36:10 90:15</p> <p>special [3] 13:7,9,11</p> <p>specific [4] 69:14 70:8 88:6 93:16</p> <p>specifically [1] 54:21</p> <p>specifies [1] 44:22</p> <p>specify [1] 93:8</p> <p>spectrum [1] 21:4</p> <p>split [10] 5:22 33:21,23 34:2 42:22 43:1 83:15 85:7,8,9</p> <p>splits [1] 33:24</p> <p>sponte [7] 26:12 39:22 40:8,11 41:1 54:20 78:24</p> <p>square [1] 64:5</p> <p>squarely [1] 53:2</p> <p>stage [1] 75:11</p> <p>stamp [1] 59:15</p> <p>standalone [1] 99:11</p> <p>standard [7] 6:19 11:24 55:3,4 63:24 65:1,2</p>
--	--	--	--	--

Official - Subject to Final Review

<p>standards ^[1] 11:21 start ^[2] 72:5 92:17 starts ^[1] 5:5 state ^[53] 6:2,6,14,16,17 7:12,14,23 8:1,5,7,7,10,11,12,17,18,23,25 9:14 11:22 12:9,14 15:25 16:10 25:5 31:12,25 36:15,21 45:18 49:10 52:11,12 78:4 79:13 84:6 85:19 87:23 88:2,7,9 89:8,23 91:8,10 96:20,22 97:4,11,15 99:10,18 stated ^[1] 5:9 statement ^[31] 9:8 24:4,5,8,23 25:2,5,7,12,19 27:21 28:6,9 34:17 46:14,20 47:15,19 48:1 51:1,10,12 52:24 65:13 68:23 69:7 97:11,15 102:15,23 103:1 STATES ^[4] 1:1,6,15 4:5 statute ^[23] 4:21 17:17 18:25 22:24 43:6,7,9 48:15 55:18 58:14 59:18,21 60:7 62:5,12,15 67:15 75:15 89:13,21,25 101:18 104:15 statutes ^[1] 43:8 statutory ^[8] 6:8 29:13 47:18 58:19 59:10 69:17 88:17 103:2 step ^[3] 14:24 43:16 44:4 steps ^[1] 103:3 still ^[9] 12:4 18:24 21:12 22:16 26:13 33:24 62:2 64:24 74:2 stops ^[2] 27:1 44:25 straightforward ^[2] 4:17 43:19 strange ^[1] 92:6 strict ^[1] 41:20 stripped ^[1] 18:25 strong ^[2] 49:20 71:5 strongly ^[1] 37:6 structural ^[1] 69:24 structure ^[5] 4:21 62:21,21 69:15 88:5 struggling ^[1] 35:13 Stuart ^[8] 19:17 23:8,9,11,21 30:15 71:24 103:25 stuff ^[1] 49:1 sua ^[7] 26:12 39:22 40:8,11 41:1 54:20 78:24 subject ^[15] 5:2,12 20:22,24 29:15 46:10 61:1 71:12,12 72:12 74:8 75:17 78:8 81:9 93:11 submitted ^[2] 105:2,4 subsection ^[17] 38:23 80:20,20,23 88:14,14,16 90:14,20 91:2,2,3,11,14 92:14,24 99:21 subsections ^[2] 93:11,16 substantive ^[10] 11:24 12:9,11 18:12,16 59:13 60:2 61:24 84:6,7</p>	<p>substantively ^[2] 81:7 83:13 successive ^[50] 6:11 7:6,25 9:25 11:2 12:24 17:22 22:14 25:22 34:7 44:17,23 45:13,16 49:6,8,12 50:15,20 56:20 57:11 64:18 66:7 67:21 70:4,25 71:1,15,20,22 72:2,16 73:7,12,21 77:10 79:13 80:8 84:20 94:16,25 95:3,9,12 97:3,25 99:11,19,22 100:5 successives ^[1] 77:25 suffer ^[1] 56:23 sufficient ^[2] 77:4,11 sufficiently ^[2] 10:6 79:2 suggest ^[5] 41:2 46:22 48:23 58:1 69:7 suggested ^[1] 9:8 suggestion ^[4] 41:4 101:22 102:1,10 suggests ^[4] 37:11,14 38:2 76:17 summarize ^[1] 79:25 summarizes ^[1] 30:3 superfluity ^[1] 39:3 superintend ^[1] 43:15 support ^[6] 2:9 3:11 31:14 75:12 87:10 104:23 supportive ^[1] 32:22 supports ^[2] 61:16 82:20 suppose ^[2] 27:1 58:24 supposed ^[4] 59:1 78:13,15 84:16 SUPREME ^[7] 1:1,14 8:12 10:11 44:5,6 57:9 surprising ^[1] 40:10 surrounding ^[1] 69:20 sweep ^[3] 70:13,14,17 sweeping ^[1] 90:21 symmetrical ^[1] 32:2 system ^[3] 8:3 77:21,23</p> <hr/> <p>T</p> <p>table ^[2] 18:24 26:13 talks ^[1] 49:6 target ^[1] 98:25 targeted ^[1] 70:9 targeting ^[1] 99:23 targets ^[1] 43:10 task ^[1] 96:17 Taylor ^[1] 51:20 technical ^[2] 95:16 101:13 technically ^[1] 59:19 tells ^[2] 26:24 86:5 tension ^[1] 6:16 term ^[2] 45:16,17 terminology ^[1] 31:10 terms ^[3] 4:11 80:24 81:5 Texas ^[1] 2:8 text ^[20] 4:20 6:8 11:5 15:19 17:2 24:15 27:24 31:14 46:17,24 47:19,25 58:1 63:16 70:4,19 101:18 103:15</p>	<p>104:16,18 textual ^[9] 32:3,24 33:4 60:9,15 68:17 70:1,20 71:6 textually ^[1] 61:15 theory ^[3] 4:19 63:4 104:10 there's ^[47] 12:4 15:8 20:8 21:12 22:22 29:9 31:13 34:3,22 39:19 41:21 43:16,25 45:23 47:14 51:1 53:18 54:22 60:8 64:1,5,11,21 65:4,9 66:18 67:9 68:3 69:6 70:19 71:5,6 72:3,19 73:16 76:24 77:20,21 80:1 83:21 89:7 95:18 98:21 101:20 102:25 103:22,23 therefore ^[7] 4:13 30:17 46:11 72:3 73:12 75:19 78:5 They've ^[3] 56:25 57:4 59:19 thin ^[1] 27:3 third ^[5] 20:19 45:6 57:10,14 94:22 THOMAS ^[11] 6:1,4,23 7:11 31:5 46:13 76:8 89:3,11 96:25 100:1 though ^[9] 13:3 21:13 25:22 27:5 47:16 48:24 66:6 70:22 104:2 threaten ^[1] 42:17 three ^[8] 8:14 14:12 19:5 21:21 44:22 68:3 96:2 102:22 three-judge ^[4] 26:16 52:9 58:25 59:9 three-year ^[1] 102:16 throughout ^[4] 6:5 17:17 36:10 93:6 throw ^[1] 66:14 thrust ^[1] 31:10 tightly ^[1] 98:8 Timothy ^[1] 87:14 titled ^[1] 98:23 together ^[4] 7:17 69:21 71:4 99:21 took ^[3] 14:14 54:6 81:14 tool ^[1] 96:13 tools ^[2] 96:7,13 top ^[1] 28:13 total ^[1] 42:17 totally ^[2] 37:21 40:19 traditionally ^[1] 100:17 transferred ^[1] 23:13 treat ^[4] 6:2,6 96:24 97:3 treated ^[4] 7:13,15,20,21 treatment ^[3] 6:9,22 7:17 treats ^[1] 17:2 tried ^[1] 48:12 tries ^[1] 41:5 trigger ^[2] 61:21 83:20 triggers ^[1] 19:23 triple ^[1] 83:23 true ^[4] 39:19 68:7 82:25 100:10</p>	<p>try ^[1] 101:13 trying ^[12] 6:24 18:7 25:18 31:11 33:1 52:21 59:23 61:5,21 67:2 88:23 91:21 Tuesday ^[1] 1:11 turn ^[2] 46:14 83:4 turns ^[1] 80:17 Turpin ^[1] 103:6 two ^[22] 7:3,4 8:14 11:21 30:13 31:23 37:13 58:18,19 60:8 64:7 66:18 71:25 76:24 77:3,6 85:14 91:22 94:6,14 101:21 103:3 two-step ^[1] 66:3</p> <hr/> <p>U</p> <p>U.S ^[1] 90:23 ultimately ^[2] 66:10 71:11 unambiguous ^[1] 9:22 unambiguously ^[1] 9:13 unanimously ^[1] 5:11 unavailability ^[1] 29:21 unconstitutionality ^[1] 52:12 under ^[33] 4:12,14 15:25 21:10,11 29:2,10 30:8 36:6 40:12 49:13 51:17 55:10 60:7 63:1 70:10,18 71:20 80:25 81:11,11,19 84:3,16 86:11 87:20,25 90:12 96:10 97:21 98:1 104:9,14 underlying ^[1] 52:25 understand ^[18] 13:14,19 15:21 18:7 26:8 35:22 36:4 37:19 38:14 58:7 59:23 61:3 85:13 86:16,24 89:14 91:19 102:24 understanding ^[1] 86:8 understandings ^[1] 58:9 unexpressed ^[1] 67:15 uniformity ^[4] 29:11,24 42:19 43:23 unique ^[3] 30:4 33:15 43:6 UNITED ^[4] 1:1,6,15 4:5 unknown ^[1] 62:24 unless ^[3] 40:19 63:2 102:4 unlike ^[1] 81:18 unorthodox ^[3] 42:2,8 102:20 unresolved ^[1] 5:24 up ^[20] 9:6,10 10:14 18:8 23:25 32:2 38:25 41:22 49:18 50:17 63:12 67:20 70:2,3 73:9,17 77:20 85:7,8,9 urge ^[1] 41:12 uses ^[5] 31:22 49:5 70:8 80:7,8 using ^[1] 84:5 Utah ^[12] 51:10 52:22 66:9,9,12,15,18 67:4,6,7,12 103:6</p> <hr/> <p>V</p>	<p>Vacancies ^[1] 93:5 vacate ^[1] 4:14 valve ^[1] 30:5 vast ^[1] 8:6 vehicle ^[1] 83:19 verbal ^[1] 69:8 version ^[1] 48:12 versus ^[12] 4:5 51:10,19,19 52:22 66:9,19 67:12 89:7 93:5 103:6,6 via ^[5] 87:24 89:13 90:10 92:11 97:7 viable ^[2] 29:23 34:4 view ^[7] 53:15 55:11 61:16 69:21 85:17 91:20 97:21 viewing ^[1] 89:12 Villamonte-Marquez ^[1] 71:24 vitiate ^[1] 13:13</p> <hr/> <p>W</p> <p>waging ^[1] 102:16 wait ^[1] 19:19 waited ^[1] 94:20 wake ^[2] 88:22 98:20 Walker ^[1] 103:6 wanted ^[10] 14:4 24:12 32:9 54:21 61:25 62:8 91:25 93:9 94:10 97:3 wanting ^[1] 60:1 wants ^[3] 38:21,23 52:6 Washington ^[2] 1:10 2:6 wasted ^[1] 41:24 way ^[28] 15:9 17:3 29:9,23 31:16 33:22 34:4 36:9 37:16 39:1 41:21 42:1 49:25 55:14,17,18 61:23 64:21 76:20 82:13 83:11,12 89:11 91:24 92:8 103:5,11 104:15 ways ^[3] 60:22 77:6 83:17 weed ^[2] 78:13,15 weigh ^[1] 42:25 weight ^[1] 89:5 weird ^[1] 48:24 Welch ^[1] 96:3 welcome ^[3] 5:25 46:12 89:2 whatever ^[4] 61:25 74:2,23 75:6 whenever ^[1] 44:2 Whereupon ^[1] 105:3 whether ^[30] 5:14,18 10:10,11 16:16 18:7,10,18 20:12,25 34:7,10 38:3 47:10 50:14 55:4 60:6,20 61:18 62:3,9 66:6,7 71:19 77:3,11 82:9,22 84:19 102:7 who's ^[1] 94:16 whole ^[3] 24:21 26:4 72:2 wholesale ^[1] 93:17 will ^[16] 4:3 5:24 40:15 41:23,25 49:19 55:14,18 74:3,8 83:14 89:4 91:8 99:19</p>
---	---	---	--	--

Official - Subject to Final Review

104:8,11
willful ^[1] **54:13**
win ^[3] **28:5,8 70:17**
withdraw ^[1] **42:24**
without ^[6] **28:6,9 35:3 50:**
2 73:7 103:14
wonder ^[3] **16:21 36:8 75:**
11
wondering ^[1] **37:8**
word ^[9] **19:12 26:7 27:9,**
10,11 38:8 48:14 89:18 97:
13
words ^[3] **27:12 69:14,19**
work ^[4] **21:12 38:13 39:8**
61:14
works ^[1] **16:25**
worse ^[1] **41:9**
writ ^[12] **13:10 40:1 44:20**
47:2,10 94:11,19,23 95:11,
14,17 99:23
writes ^[1] **55:13**
Writs ^[2] **64:22,22**
written ^[1] **92:2**
wrote ^[1] **64:12**

Y

YANG ^[110] **2:5 3:6 44:11,**
12,14 46:13,16 47:12,16,
23 48:3,16,19 49:3 50:7,23
51:2,4,8,14 52:8,21 53:3,
17,21,24 54:4,12,17,19 55:
1,12 56:3,6,10,17,19,24 57:
2,6,13,16,20 58:12,14,18,
22 59:3,7 60:8,14,25 62:1,
6,15,20 65:2,11,21 66:2,17
67:11 68:2,7,16 69:5,16,25
72:14,17,22 73:1,25 74:5,
12,17,24 75:8,14 76:24 77:
18 78:17,21 79:4,15,20,23
80:1,15 81:2,4,12,21,24 82:
2,5,8,20 83:3,8,16 84:9,18
85:3,22 86:2,14,18,22 87:7
year ^[1] **14:1**
years ^[2] **5:23 53:2**
Yep ^[1] **86:2**