SUPREME COURT
OF THE UNITED STATES

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         IN THE SUPREME COURT OF THE UNITED STATES

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FLOWERS FOODS, INC., ET AL.,          )

               Petitioners,           )

          v.                          ) No. 24-935

ANGELO BROCK,                         )

               Respondent.            )

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Pages:  1 through 90

Place:  Washington, D.C.

Date:   March 25, 2026
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3   FLOWERS FOODS, INC., ET AL.,   )

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5   v.   ) No. 24-935

6   ANGELO BROCK,   )

7   Respondent.   )

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10   Washington, D.C.

11   Wednesday, March 25, 2026

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13   The above-entitled matter came on for

14   oral argument before the Supreme Court of the

15   United States at 10:08 a.m.

16

17

18   APPEARANCES:

19   TRACI L. LOVITT, ESQUIRE, New York, New York; on

20   behalf of the Petitioners.

21   JENNIFER D. BENNETT, ESQUIRE, San Francisco,

22   California; on behalf of the Respondent.

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1   C O N T E N T S

2   ORAL ARGUMENT OF: PAGE:

3   TRACI L. LOVITT, ESQ.

4   On behalf of the Petitioners   3

5   ORAL ARGUMENT OF:

6   JENNIFER D. BENNETT, ESQ.

7   On behalf of the Respondent   39

8   REBUTTAL ARGUMENT OF:

9   TRACI L. LOVITT, ESQ.

10   On behalf of the Petitioners   85

11

12

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14

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16

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18

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

2   (10:08 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument this morning in Case 24-935, Flowers

5   Foods versus Brock.

6   Ms. Lovitt.

7   ORAL ARGUMENT OF TRACI L. LOVITT

8   ON BEHALF OF THE PETITIONERS

9   MS. LOVITT: Thank you, Mr. Chief

10   Justice, and may it please the Court:

11   In Bissonnette and Saxon, this Court

12   held that a Section 1 transportation worker

13   must be actively engaged in transportation of

14   goods across borders. The class of workers

15   must be directly and actively performing

16   cross-border transportation work.

17   Brock picks up goods from a warehouse

18   in Colorado and delivers them to retail outlets

19   in Colorado. When he takes the goods, they've

20   crossed their last border and they have been

21   unloaded from the interstate vehicle carrying

22   them. Mr. Brock performs no work in

23   cross-border transportation and is not exempt

24   under Section 1.

25   This result is faithful to Section 1's

     1   text and to this Court's precedent because it

     2   focuses the inquiry on the worker's

     3   connectivity to cross-border transportation

     4   work. Brock's rule departs from text and

     5   precedent by focusing on the worker's

     6   relationship to a good and the good's

     7   relationship to interstate commerce.

     8   And Brock's approach would lead to

     9   unlimited chaos. It is a world where

    10   everything is dispositive and -- everything is

    11   relevant and nothing is dispositive. We know

    12   that because that's what's happening in the

    13   First, Ninth, and Tenth Circuits today, all of

    14   which follow Brock's approach.

    15   And Brock's approach sweeps in too

    16   many workers into Section 1. Today, in the

    17   Ninth Circuit, workers who deliver The New York

    18   Times in the State of California have been

    19   deemed Section 1 exempt workers by the Ninth

    20   Circuit because The New York Times is printed

    21   in another state and arrives in California in

    22   boxes from another state. Under that logic,

    23   the store clerk who unpacks boxes from another

    24   state and transports them to the shelf should

    25   also be exempt.

1   But, in 1925, no one viewed the store

2   clerk or the paperboy as a cross-border

3   transportation worker. The Court should pick

4   up where Bissonnette left off and reaffirm that

5   Section 1 does not have limitless terms.

6   I welcome the Court's questions.

7   JUSTICE THOMAS: Ms. Lovitt, what is

8   the final destination for the product in this

9   case?

10   MS. LOVITT: I'm not sure. I think

11   that's a -- a question better posed to our

12   opponent because one could argue that the final

13   destination is the shelves, one could argue

14   it's the warehouse, one could --

15   JUSTICE THOMAS: But, I mean, it's

16   your product. So, if it's -- if it's -- if

17   it's Flowers's product, then what should be the

18   final destination?

19   MS. LOVITT: Again, I think that is a

20   question that can be answered on many levels.

21   Under the Federal Motor Carriers Act, the

22   destination is to the ultimate retailer. Under

23   the Commerce Clause, it's -- it's -- it's --

24   you know, I'm not sure because the final

25   destination cases don't give you a framework by

1   which to judge the final destination.

2   JUSTICE SOTOMAYOR: I thought, at the

3   cert stage, you told us that you conceded that

4   Brock's is Flowers's -- Flowers's last-mile

5   driver who delivers Flowers's goods that have

6   traveled across state lines from local

7   warehouses to local retailers.

8   Now whether the district court and the

9   circuit were right in making that finding is

10   irrelevant. You gave us a concession. So that

11   concession answers the question. The contract

12   was between Flowers and its retail -- and its

13   local retailers.

14   MS. LOVITT: I -- I think --

15   JUSTICE SOTOMAYOR: So I don't know

16   why you're saying it depends. The concession

17   told us.

18   MS. LOVITT: Because it begs the

19   question, last-mile driver of what? Of the

20   good or of the final mile of cross-border

21   transportation? He may be the --

22   JUSTICE SOTOMAYOR: Well, counsel,

23   it's the goods, so the goods are traveling in

24   interstate commerce. Now the question is, is

25   this driver helping that interstate process?

1   MS. LOVITT: So --

2   JUSTICE SOTOMAYOR: Is he involved?

3   MS. LOVITT: Is he involved from a

4   Commerce Clause --

5   JUSTICE SOTOMAYOR: Is it related?

6   Yes.

7   MS. LOVITT: From a Commerce Clause

8   perspective, yes. Otherwise, we wouldn't fall

9   within Section 2 of the FAA. We're not pushing

10   back on the fact that Mr. Brock is engaged in

11   interstate commerce from a Commerce Clause

12   perspective.

13   But this Court for -- twice in four

14   years has held that Section 1 requires more

15   than a Commerce Clause analysis. It requires

16   an analysis of the actual work the worker is

17   performing. And the worker is performing the

18   work of a local delivery here, not any

19   cross-border transportation.

20   And, on this, I think Saxon is quite

21   informative on what is cross-border --

22   JUSTICE SOTOMAYOR: The problem is

23   that we have too many cases that say you don't

24   have to be the person who actually does the

25   transport. The baggage carrier that's

1   unloading from an airplane hasn't transported

2   the goods across --

3   MS. LOVITT: Well, in --

4   JUSTICE SOTOMAYOR: -- interstate

5   lines. We have a slew of cases that talk about

6   people who don't cross state lines. So it's

7   not that.

8   MS. LOVITT: That's not our position.

9   We fully embrace Saxon. In our view, Saxon was

10   asking the question, what is cross-border

11   transportation? And it looked through to cases

12   in the bill-of-lading context and said

13   transportation ends when a good is unloaded.

14   So we read -- I think it's a fair

15   extension of Saxon to say --

16   JUSTICE SOTOMAYOR: When goods are

17   unloaded, and that's what Mr. Brock does as the

18   last-mile driver for Flowers, which is a

19   concession you made.

20   MS. LOVITT: But he's unloading in a

21   intrastate journey. And the -- the question

22   is, when does the interstate journey end? And

23   it ends at the warehouse when the goods are

24   unloaded by someone other than Mr. Brock.

25   CHIEF JUSTICE ROBERTS: I -- I

1   understood -- and maybe it's very

2   oversimplistic -- I understood the case to

3   involve a dispute between whether we look to

4   the goods or whether we look to essentially the

5   vehicle. Is that a fair oversimplification?

6   MS. LOVITT: I -- I think it's fair

7   but a slight oversimplification. We would say

8   that you look to the work of cross-border

9   transportation. And the direct and active

10   engagement that Saxon and Bissonnette require,

11   it's hard to imagine a situation where you

12   wouldn't have some interaction with the vehicle

13   to be directly and actively engaged. I mean,

14   Ms. Saxon had interaction with the vehicle.

15   But it's not our position -- I want to

16   just be clear for the record that you have to

17   be crossing the border. That's been a

18   characterization of our position that's

19   inaccurate.

20   Our -- our position is you have to be

21   performing the work of cross-border

22   transportation. And Saxon says that begins at

23   the loading process and it ends at the

24   unloading process, and the cross-border

25   movement in between is a relevant

1   transportation.

2   Mr. Brock loads for an intrastate

3   journey and unloads on an intrastate journey

4   and never performs any actual transportation

5   work that -- that involves cross-border

6   performance.

7   JUSTICE JACKSON: That -- it's really

8   only, I think, if you ignore what is happening

9   to the goods. And I -- the thing that's a

10   little puzzling to me about your analysis is

11   that you've set it up in a way that would end

12   up having different workers along the journey

13   of a particular good being characterized

14   differently.

15   And I don't understand why Congress

16   would do that or how that even makes sense.

17   So, I mean, take Flowers, right? Suppose you

18   have a worker who drives the bread from

19   Flowers's bakery in Kansas to the border

20   between Kansas and Colorado, but that worker

21   doesn't cross state lines.

22   And then you have a second worker who

23   unloads the bread from the first worker's truck

24   inside, still inside Kansas, puts it on his own

25   truck, drives it across the border and unloads

1   the bread at a warehouse in Colorado.

2   And you have a third worker, like

3   Brock, who picks up the bread in Colorado and

4   delivers it to a store in Colorado. I think

5   your analysis has only the second worker

6   covered by Section 1 exemption, and I'm not

7   sure I understand why that would be.

8   MS. LOVITT: I -- I -- I think that's

9   an accurate characterization. It's because

10   crossing a border matters. It matters from a

11   legal perspective, and it's express in the

12   residual clause that you --

13   JUSTICE JACKSON: But doesn't it only

14   matter because the goods are crossing the

15   border?

16   MS. LOVITT: No, it matters --

17   JUSTICE JACKSON: The person is not

18   crossing the border. So what -- what -- what

19   relevance is it to your analysis that you have

20   a particular worker in the middle of the goods'

21   journey who himself crosses the border or who

22   touches a vehicle that crosses the border?

23   It would seem to me that the only real

24   thing that makes sense about characterizing any

25   of these people as interstate transportation

1   workers is that they're working with respect to

2   goods that are making this interstate journey.

3   MS. LOVITT: Because this Court,

4   again, has held twice in four years that you're

5   looking at the work that's performed. You're

6   look -- and the workers' performance --

7   JUSTICE JACKSON: Right, but it's the

8   work that is performed relative to goods that

9   are crossing the border, I think, as opposed to

10   your theory, which is the work that is

11   performed in a particular leg of the goods'

12   journey that has crossed somehow.

13   MS. LOVITT: There -- there's nothing

14   textually in Section 1 that's compelling a

15   focus on the good. To the contrary, Section 1

16   is sort of dripping with workers' work and

17   vehicles. The enumerated classes are defined

18   by the relationship between workers and

19   vehicles, by definition, seamen or crew on a

20   vessel.

21   JUSTICE JACKSON: So Ms. Saxon is not

22   herself on a vehicle, moving a vehicle, going

23   across the border, but you say she counts

24   understand your view because why? She has

25   loaded or unloaded cargo off of a vehicle that

1   crossed the border?

2   MS. LOVITT: Because Saxon held that

3   the cross-border transportation begins at

4   loading and ends at unloading.

5   JUSTICE JACKSON: Yeah, but it's

6   loading what? It's loading goods. So I -- I

7   don't know how you can isolate the goods and

8   take them out of it. She's not going across

9   the border. The vehicle that she's touching is

10   not going across the border at the time she's

11   touching it.

12   What -- what causes the interstateness

13   of that scenario is that goods, she's picking

14   up and touching goods that have crossed.

15   MS. LOVITT: No. What the Court

16   held -- with -- with all due respect --

17   JUSTICE JACKSON: Yes.

18   MS. LOVITT: -- I read Saxon to say

19   that the -- the interconnection is not just the

20   loading of the goods. It's loading the goods

21   on a vehicle that's on an interstate journey.

22   That second -- the Court would not

23   have needed to -- to -- to labor as much as it

24   did over the fact that the vehicle was in -- is

25   on an interstate journey and to labor over the

 1   fact that you have to be crossing the border --

 2   JUSTICE GORSUCH: Ms. --

 3   MS. LOVITT: -- if the test was as

 4   easy as a goods test.

 5   JUSTICE GORSUCH: Ms. Lovitt, there --

 6   MS. LOVITT: Yes?

 7   JUSTICE GORSUCH: -- there does seem

 8   to me a lot of room for dispute about who owned

 9   the goods and who ordered from whom and lots of

10   facts here. We have some excellent diagrams in

11   the Tenth Circuit opinion that are helpful to

12   me at least, but I -- I wonder whether we need

13   to really get into any of that because, as I

14   understand it, you're advocating for a

15   bright-line rule.

16   You -- you think there needs to be

17   clarity here. And the bright-line rule I think

18   you're asking us to adopt is that a delivery

19   driver is in interstate commerce unless he does

20   not cross state borders and he doesn't interact

21   with vehicles that cross state borders, right?

22   MS. LOVITT: Close. I think we would

23   say you bookend the transportation with loading

24   and unloading. That's -- that's the result you

25   held in Saxon.

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 1              JUSTICE GORSUCH:  No, but -- but --
 2    but --
 3              MS. LOVITT:  Yeah.
 4              JUSTICE GORSUCH:  -- I'm -- I'm -- I'm
 5    not really interested in any of that.
 6              MS. LOVITT:  Yep.
 7              JUSTICE GORSUCH:  I -- I'm saying I
 8    don't see that in the QP, okay?  I don't see
 9    goods.  I don't see anything like that in the
10    QP and -- and unloading and whatever.  I see --
11    but do not transport the goods across borders
12    nor -- that means and -- interact with vehicles
13    across borders.
14              That's the question you asked us to
15    decide, right?
16              MS. LOVITT:  Correct.
17              JUSTICE GORSUCH:  Should we adopt a
18    bright-line rule that -- that drive -- delivery
19    drivers are in interstate commerce unless they
20    do both of those things?
21              MS. LOVITT:  Unless -- I would say
22    unless they do either of those things.
23              JUSTICE GORSUCH:  Well, you say, okay,
24    either.
25              MS. LOVITT:  Right.  Unless they're --
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1   JUSTICE GORSUCH: Either of those

2   things.

3   MS. LOVITT: -- they're loading or

4   unloading across border via --

5   JUSTICE GORSUCH: Either interacting

6   with vehicles or crossing the borders

7   themselves?

8   MS. LOVITT: Yeah.

9   JUSTICE GORSUCH: And if we -- we can

10   answer that question yes or no and be done with

11   this case?

12   MS. LOVITT: And I -- yes.

13   JUSTICE GORSUCH: Okay.

14   MS. LOVITT: And I think Section 1 is

15   demanding as -- as a threshold requirement,

16   it's -- it's -- it's -- it's --

17   JUSTICE GORSUCH: No, I understand

18   it's a -- it's a -- it's a bright-line rule.

19   MS. LOVITT: It's a bright-line rule.

20   JUSTICE GORSUCH: Okay. Yeah.

21   MS. LOVITT: And in our view --

22   JUSTICE GORSUCH: What you're asking

23   for. You're not -- you're not asking us to get

24   into whether Brock takes title of the goods,

25   whether the grocery stores order products from

 1   him or from you, how long the goods stay in a

 2   warehouse in Colorado after arriving from out

 3   of state, whether the goods are transformed or

 4   repackaged, whether the contract here with --

 5   with a corporation is covered by -- by -- by

 6   the FAA, or how much control Flowers has over

 7   Brock.

 8   None of those questions we need to get

 9   into?

10   MS. LOVITT: Correct. And I think

11   that's what's steering the Tenth Circuit in the

12   wrong direction because none of those facts

13   have anything to do with the worker's work.

14   JUSTICE GORSUCH: Well, whether they

15   do or don't, we don't need to get into them?

16   MS. LOVITT: Exactly.

17   JUSTICE GORSUCH: Okay.

18   MS. LOVITT: I mean, I think they're

19   another ground on which we win, but that's not

20   what we're arguing here.

21   JUSTICE SOTOMAYOR: The problem with

22   that --

23   JUSTICE ALITO: Suppose a company

24   structures its delivery drivers so that Driver

25   1 drives 10 hours on an intrastate leg. Then

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 1    Driver 2 drives one minute across an interstate
 2    border.  Then Driver 3 completes the journey
 3    with another 10-hour intrastate drive.  Each
 4    driver uses a different vehicle.
 5            Is Driver 2 the only person covered by
 6    the exemption?
 7            MS. LOVITT:  Can I ask a clarifying
 8    question, is -- because, as I read Saxon, the
 9    cross-border transportation ends with
10    unloading.  So, if there's no unloading, that's
11    one cross-border transportation.
12            But, if you're -- when you added
13    different vehicles, it makes me question
14    whether you have an unloading process, which
15    would demarcate a new leg of transportation.
16            JUSTICE ALITO:  Yeah, there's an
17    unloading.  Obviously, the -- the goods have to
18    get from one truck to another.  But, under that
19    situation, only Driver 2 would be covered by
20    the exemption?
21            MS. LOVITT:  Yeah, because the
22    bookends are loading and unloading.  And Saxon
23    says that the transportation continues until
24    the unloading process.
25            And we read that -- and -- and looking
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1   through to the cases that Saxon's citing, those

2   cases are about when does transportation end

3   because transportation needs to end at some

4   point.

5   And they're holding that cross-border

6   transportation ends at the unloading process,

7   which makes sense. If you've ever been stuck

8   on the subway and you can't get out, you really

9   feel like your transportation hasn't ended

10   until the doors open. And those cases are

11   saying there is a clear demarcation in

12   transportation, loading, unloading, and the

13   movement in between.

14   And if the movement in between is

15   cross-border or interstate, it falls within the

16   rule. And it -- it may sound simple, but this

17   is the kind of clarity that Section 1 really

18   needs to have because it is a threshold

19   requirement. And the -- the --

20   JUSTICE ALITO: It's -- it's clear,

21   but where does it come from?

22   MS. LOVITT: It comes from -- it comes

23   from a combination of ejusdem, which tells us

24   that the workers in the residual clause are

25   transportation workers, and then it also comes

1   from this Court's --

2   JUSTICE ALITO: Where does it come

3   from in the language of the statute?

4   MS. LOVITT: Engaged in. This Court

5   interpreted "engaged in" in both Saxon and

6   Bissonnette as being directly and actively

7   employed. And then add to it the interstate

8   component, which requires interstate

9   transportation because you're talking about

10   transportation workers, it's all three of those

11   principles coming together that say you have to

12   be a transportation worker that's actively and

13   directly involved in cross-border

14   transportation.

15   And then Saxon asked the question,

16   well, what is cross-border transportation? Is

17   it just the movement of the vehicle? And the

18   Court held no, actually, that process continues

19   through loading and unloading. That --

20   JUSTICE SOTOMAYOR: I'm sorry.

21   This -- Justice Alito is asking you a lot of

22   questions. I'm trying to deal with our cases,

23   and we have a bunch of them. At the time of

24   the FAA, okay, which said let's start with

25   Philadelphia & Reading versus Hancock, this

1   Court held that a first-mile trainman, whose

2   duties involved transporting coal from a mine

3   to a storage yard solely within Philadelphia,

4   and that coal was then transferred by a

5   different crew to another train that was going

6   in interstate commerce, the Court explained

7   that that first-mile driver, not the last-mile

8   driver that had done everything in Philadelphia

9   and the goods were unloaded and reshipped

10   somewhere else, the Court said that shipment

11   was but a step in the transportation of the

12   coal to real and ultimate destinations in

13   another state, and so that trainman, that first

14   trainman, was involved in interstate commerce.

15   You want to distinguish that case?

16   MS. LOVITT: Yeah.

17   JUSTICE SOTOMAYOR: Here, the same

18   thing happened. You want to distinguish all

19   the cases with first-mile drivers, second-mile

20   drivers. You want to create a new test. And I

21   still want to come to where in the language of

22   the FAA that uses the word "engaged," which is

23   the same word we used in Saxon, that defined

24   all of these people as engaged in interstate

25   commerce?

1   MS. LOVITT: So two -- two answers to

2   your question. The first is we would disagree

3   with the characterization of Hancock because,

4   in Hancock, that was a railcar, a single

5   railcar, that started at -- at the mines and

6   went interstate. It was never unloaded. So

7   the corollary here to Hancock would be if

8   Mr. Brock got into the truck that actually --

9   and -- and drove the final 10 miles to the

10   warehouse. That's the corollary to Hancock.

11   That's not what Mr. Brock is doing.

12   And -- and -- and, again, FELA is

13   focused on what exactly are the

14   instrumentalities of the rail carrier doing.

15   The instrumentality, the railcar, was crossing

16   state lines. So it's actually close --

17   JUSTICE SOTOMAYOR: But it's not --

18   CHIEF JUSTICE ROBERTS: Oh --

19   JUSTICE SOTOMAYOR: -- the issue of

20   the railcar. And you're saying don't look at

21   the goods; look at the worker. And the worker

22   wasn't doing any of that.

23   MS. LOVITT: Well, I mean, we're

24   saying FELA is inapposite. You shouldn't be in

25   the -- you know, these are FELA cases that have

1   a very different text and structure.

2   JUSTICE SOTOMAYOR: But I don't

3   understand.

4   MS. LOVITT: But --

5   JUSTICE SOTOMAYOR: You just tried to

6   distinguish them, but they're what we relied on

7   Saxon.

8   MS. LOVITT: Yeah. Well, it -- we

9   did -- you did rely on it in -- you actually

10   relied -- relied on two cases in Saxon, which

11   were Burtch and Shuart. The Burtch case is a

12   FELA case which said that cargo -- that

13   transportation continues until you're unloaded.

14   And -- and Shuart was a bill-of-lading case

15   that held the same principle.

16   JUSTICE SOTOMAYOR: Unloaded at --

17   CHIEF JUSTICE ROBERTS: How --

18   JUSTICE SOTOMAYOR: -- the point of

19   destination.

20   MS. LOVITT: Unloading of the vehicle.

21   Unloading of the vehicle. And because

22   they're -- they're -- they're defining what

23   transportation is. They're -- transportation

24   needs -- can have an end that's different from

25   the goods' end.

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 1                 JUSTICE SOTOMAYOR:  All right.  Would
 2    you go back --
 3                 MS. LOVITT:  And what Section -- to
 4    add as your second --
 5                 JUSTICE SOTOMAYOR:  I'm sorry, I may
 6    have interrupted Judge Alito, and I --
 7                 MS. LOVITT:  I'm sorry, Chief.
 8                 CHIEF JUSTICE ROBERTS:  I'll just
 9    ask -- I'll just ask one or two questions.
10                 JUSTICE ALITO:  I've asked -- I've
11    asked all my questions.
12                 (Laughter.)
13                 CHIEF JUSTICE ROBERTS:  What -- how do
14    you handle first-mile drivers?  Is that -- is
15    your analysis different than those?
16                 MS. LOVITT:  No.  They're the mirror
17    image of Brock.  If a first-mile driver -- so
18    that's -- and to clarify terms because I
19    don't -- there's a lot of loading of what first
20    and last mile mean.  If the driver were to pick
21    up the goods at the bakery and take them to a
22    local warehouse, where they were -- and -- and
23    unload them, that's, to me, the first-mile
24    driver.  That's the mirror image of Brock.  And
25    they would not be exempt.
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1   CHIEF JUSTICE ROBERTS: Okay. Thank

2   you.

3   JUSTICE KAGAN: I mean, just to go

4   back to, I think, the point that Justice Alito

5   was making with his hypothetical is, like,

6   whether or not your test is clear, it has a --

7   a real arbitrariness to it. Practically

8   speaking, what you want to be thinking about

9   here, it would seem to me, is there's a

10   manufacturer of bread and the manufacturer of

11   bread needs to get it to all the local markets

12   that sell bread.

13   And so, when we think of what's in

14   interstate commerce, what we're thinking of is

15   the trip by which the manufacturer, it might be

16   one leg or three legs or eight legs. It

17   might -- different legs might cross different

18   state boundaries or not. But what the

19   manufacturer needs to do is to get the bread

20   from the factory to the supermarket.

21   And if that's in interstate commerce,

22   if your -- if the goods, the cargo, the bread,

23   is crossing state lines, then everybody who's

24   involved in making the goods cross those state

25   lines ought to fall into the same category, not

 1   be split up based on the sort of happenstance

 2   of did you take the first mile, did your

 3   10-mile -- did your 10-hour shift cross a state

 4   line or didn't it or whatnot.

 5   MS. LOVITT: So, to answer your

 6   question, I think the textual hook here is

 7   "engaged in." And this Court held in Saxon and

 8   in Bissonnette that "engaged in" requires

 9   direct and active employment in cross-border

10   transportation, the performance of cross-border

11   transportation, not in interstate commerce.

12   And, second, in Bissonnette --

13   JUSTICE KAGAN: Well, they're all

14   what -- regardless of which leg that they're

15   exactly on, they're all directly engaged in the

16   interstate shipment of your bread.

17   MS. LOVITT: But that's -- that's not

18   the -- that's not the test -- respectfully, as

19   we read Saxon and Bissonnette, the text is,

20   what is the -- what is the class of workers

21   doing? What work are they performing? And

22   Bissonnette says you shouldn't be looking at

23   what Flowers is doing. I mean, that was the --

24   the hard lesson we learned from Bissonnette, is

25   it doesn't matter that we're in the industry of

1   selling bread cross-borders, that the Court

2   shouldn't be looking at that.

3   That was the -- the clear takeaway

4   from Bissonnette. It should be looking at what

5   is this class of workers doing, what's their

6   task, what's their job, what are they

7   performing.

8   JUSTICE KAGAN: They're -- they're all

9   driving the trucks that get your bread from the

10   factory to the supermarket. That's what all of

11   them are doing.

12   And when the -- those trucks, when

13   that trip is an interstate trip, they're all

14   doing the same thing, regardless of the

15   happenstance of whether one or the other of

16   them is crossing a state line.

17   MS. LOVITT: And that's where we

18   respectfully disagree because we think crossing

19   the state line matters. It's in the text of

20   Section 1 that it has to be interstate. And

21   so, if you're looking at whether the -- the

22   class of workers is actually performing

23   cross-border transportation, they need to be

24   crossing the border. And crossing the border

25   is legally significant.

1   JUSTICE KAGAN: Well, the Saxon

2   workers were not crossing the border.

3   MS. LOVITT: Well, the --

4   JUSTICE KAGAN: So we've given that

5   one up already.

6   MS. LOVITT: Well, they -- the

7   Saxon --

8   JUSTICE KAGAN: But they were -- but

9   they were involved in shipments of goods that

10   did cross borders, and that's what mattered.

11   MS. LOVITT: Well, as I -- again, as I

12   read Saxon, it's saying that cross-border

13   transportation is a definable thing that starts

14   with loading and ends with unloading. And if

15   you're loading on a vehicle that's traveling

16   interstate, that is part and parcel of -- of

17   the journey across the border because you can't

18   journey across the border until the good's

19   loaded. You can't end the journey until the

20   good's off.

21   And I -- I think that's --

22   JUSTICE JACKSON: Can I ask you a

23   question about that to just test your

24   hypothetical? What -- what if the goods were

25   always in state, but the vehicle somehow

1   crossed the border? Is that not going to --

2   you say loading and unloading, and I guess

3   you're assuming that it's loaded in another

4   state and unloaded in this one. Or could it be

5   that you are a worker who is working with

6   vehicles that have themselves crossed the

7   border regardless of where the loading and

8   unloading happens?

9   MS. LOVITT: So this -- you know, this

10   Court has always talked about moving goods, but

11   I think, in your example, if your class of

12   workers are -- are interstate truck drivers --

13   and -- and this is actually akin to the Zachary

14   case, where you -- you have an empty truck and

15   you're -- you're driving the truck across state

16   lines to pick something up, I would think that

17   that --

18   JUSTICE JACKSON: No, not across state

19   lines. Not across. You -- Ms. Saxon didn't go

20   across state lines. So let's hold the worker

21   constant. They're not moving.

22   You say what makes Saxon count is not

23   that the goods that she was loading and

24   unloading had been across state lines; it was

25   that the airplane that she was loading from had

1   been across state lines.

2   So I'm testing this hypothetical or

3   this theory by isolating the goods, having the

4   goods remain in state, and just having workers

5   who are working with vehicles that have crossed

6   state lines. In that situation, are the

7   workers interstate workers from your

8   perspective?

9   MS. LOVITT: I'm going to have to ask

10   a clarifying question because I'm not

11   understanding what the workers' relationship is

12   with the vehicle.

13   JUSTICE JACKSON: The -- the --

14   MS. LOVITT: Are they loading it?

15   JUSTICE JACKSON: Yeah, they're

16   loading it, but they're loading it for goods

17   that were loaded still in the state. But the

18   vehicle has crossed state lines. The vehicle

19   themselves, for some reason -- for some reason,

20   in my hypothetical --

21   MS. LOVITT: I mean --

22   JUSTICE JACKSON: -- the -- the

23   vehicle is moving across state lines, but the

24   goods have always remained in the state.

25   MS. LOVITT: So --

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 1              JUSTICE JACKSON:  So the worker is
 2      working with the kind of vehicle that you say
 3      counts, and I -- and the goods are staying put
 4      in the same state.  Do -- do -- is that person
 5      an interstate -- in a class of workers that is
 6      operating interstate in your view?
 7              MS. LOVITT:  So, if the class of
 8      workers is loading a vehicle that is not in
 9      interstate -- it's not --
10              JUSTICE JACKSON:  No, the vehicle is
11      in interstate.  The vehicle comes in from New
12      York, and I'm in New Jersey.  And I'm the
13      worker, and I'm loading this vehicle in New
14      Jersey with goods that started in New Jersey
15      and that are going to end in New Jersey, but
16      the vehicle came in in the morning from New
17      York.  The vehicle has been in interstate
18      commerce or interstate traffic.
19              For your purposes, is that worker an
20      interstate class of worker?
21              MS. LOVITT:  Under Saxon, the
22      transportation, that leg of transportation
23      begins with loading.  And so you wouldn't look
24      at where the vehicle came from.
25              JUSTICE JACKSON:  So you don't look at
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1   the vehicle at that point --

2   MS. LOVITT: You -- you --

3   JUSTICE JACKSON: -- in that part of

4   the analysis?

5   MS. LOVITT: Because, no, the question

6   is when does cross-border transportation begin

7   and end, and Saxon says it begins with loading

8   and it continues through to the unloading. So

9   that leg, you would start the analysis at the

10   loading and say where -- now where is this

11   vehicle going.

12   JUSTICE JACKSON: Without regard --

13   without regard to where the vehicle came from?

14   MS. LOVITT: Yeah, because --

15   JUSTICE JACKSON: All right.

16   MS. LOVITT: -- Saxon draws a clear

17   line at loading.

18   JUSTICE JACKSON: Thank you.

19   CHIEF JUSTICE ROBERTS: Thank you,

20   counsel.

21   Justice Thomas?

22   Justice Alito?

23   Justice Sotomayor?

24   Justice -- okay.

25   Justice Gorsuch?

1   JUSTICE GORSUCH: Quick question. Why

2   didn't you argue title, that -- that the title

3   changed? Once you delivered it to Brock in

4   Colorado, you're done? That would have been an

5   interesting argument.

6   MS. LOVITT: We -- we argued that at

7   the lower courts.

8   JUSTICE GORSUCH: I know. You lost

9   that one below, but --

10   MS. LOVITT: And there was no

11   circuit --

12   JUSTICE GORSUCH: -- but it hasn't

13   stopped you from -- from no circuit split.

14   MS. LOVITT: There's no circuit split.

15   JUSTICE GORSUCH: Ah. Okay.

16   MS. LOVITT: So it -- it made for a --

17   you know --

18   JUSTICE GORSUCH: So that's a --

19   MS. LOVITT: -- it would be an

20   interesting question for that.

21   JUSTICE GORSUCH: That's a -- that's a

22   question for another day?

23   MS. LOVITT: Just an honest answer.

24   JUSTICE GORSUCH: So it's a question

25   for another day?

1   MS. LOVITT: Yeah.

2   JUSTICE GORSUCH: Thank you.

3   MS. LOVITT: Well, if you -- I

4   don't -- I mean, just to --

5   JUSTICE GORSUCH: Well, if -- if -- if

6   you win, there's no need to resolve it.

7   MS. LOVITT: Exactly.

8   JUSTICE GORSUCH: But, if you -- if

9   you should lose, it's a question for another

10   day.

11   MS. LOVITT: And just to -- I think,

12   if -- if we prevail on this rule, you're

13   solving --

14   JUSTICE GORSUCH: No, I understand.

15   MS. LOVITT: -- 999 cases out of a

16   thousand.

17   JUSTICE GORSUCH: I understand that.

18   MS. LOVITT: Okay.

19   JUSTICE GORSUCH: And -- but if --

20   if -- if -- it could happen, right?

21   MS. LOVITT: It could happen.

22   JUSTICE GORSUCH: If you should lose,

23   that's a question for another day?

24   MS. LOVITT: And then maybe you'll see

25   me here again in another year.

1   (Laughter.)

2   JUSTICE GORSUCH: Yeah. Well, I --

3   I -- I'll look forward to it.

4   CHIEF JUSTICE ROBERTS: Justice

5   Kavanaugh?

6   Justice Barrett?

7   JUSTICE BARRETT: So that's one

8   question that might be reserved. Let -- let's

9   just -- let's imagine a hypothetical world that

10   you don't want to be in in which you do lose.

11   Things that you would want to reserve

12   would be this title question?

13   MS. LOVITT: Correct.

14   JUSTICE BARRETT: What else?

15   MS. LOVITT: Contract of employment.

16   And that's where the next circuit split is

17   developing, is, you know, when do you have a

18   contract of employment as opposed to a

19   third-party service provider.

20   JUSTICE BARRETT: Okay. And if I

21   envision the movement, the interstate movement

22   of goods in a relay race way -- this goes to

23   some of the hypotheticals Justices Alito and

24   Kagan were asking you -- you know, where the

25   goods pass from one to the other, so it doesn't

1   really matter, you know, if the drive -- if the

2   Mile 3 driver was solely intrastate or not,

3   what -- and, again, we're imagining a world in

4   which that is viewed as a continuous journey.

5   What would, in your view, be an interrupting

6   point?

7   Because they're being -- it can't just

8   be -- in -- in that world, it can't just be

9   loading and unloading because they're loading

10   and unloading into trucks.

11   Would it be when they're off wheels,

12   and so then they're put into a warehouse? I

13   mean, what -- what would be the danger spots in

14   your view in that?

15   MS. LOVITT: I -- I think Saxon draws

16   a bright line at unloading. Saxon says that

17   the -- the -- the transportation process

18   continues until unloading. So I think, once

19   the goods are off the vehicle, that's --

20   JUSTICE BARRETT: But -- but I'm

21   imagining a world in which you lose that

22   point --

23   MS. LOVITT: Yeah.

24   JUSTICE BARRETT: -- because it goes

25   right to another vehicle. In Saxon, they were

1   unloaded and then, you know, maybe they went on

2   to the little cart in the airport that moves

3   them to the -- to the line, but, I mean, they

4   had reached their destination.

5   In the hypothetical Justices Kagan and

6   Alito were giving you, in that series of

7   hypotheticals, they were being loaded from one

8   truck to another truck. So maybe there was

9   always movement. It was just like a relay race

10   where it went from one to another, but it

11   wasn't unloaded at a destination, right, in

12   that -- in those hypotheticals?

13   MS. LOVITT: In -- in those

14   hypotheticals, in -- in -- in our view, it

15   doesn't matter if it's at its destination or

16   not because you're not looking at the goods,

17   you're looking at the worker. So, if it's

18   unloaded -- but, if it's a true relay, if it's

19   like the Hancock case and you have Mr. Brock

20   jumping into the truck or, you know, the true

21   analogy to Hancock is you take the trailer and

22   you put it on a new tractor, you know, that is

23   not the -- you know, the taking the goods off

24   of the vehicle. It's the relay.

25   And the relay counts until the goods

1   actually come off of the vehicle under Saxon.

2   JUSTICE BARRETT: Okay. Thank you.

3   MS. LOVITT: Mm-hmm.

4   CHIEF JUSTICE ROBERTS: Justice

5   Jackson, anything further?

6   JUSTICE JACKSON: Can I just clarify

7   that the title contract of employment, all

8   those issues are just factors that help us to

9   determine whether this person is a last-mile

10   driver, and so the reason why they weren't

11   raised or argued here is because you assumed

12   that, you conceded that at the beginning, for

13   the purpose of this case?

14   MS. LOVITT: Well, for the purposes of

15   the case.

16   JUSTICE JACKSON: For the purpose of

17   this case --

18   MS. LOVITT: For the purpose of this

19   case, yes.

20   JUSTICE JACKSON: -- we -- we were

21   just to focus on, assuming he's a last-mile

22   driver, what is the answer? And those

23   questions about title and contract and whatnot

24   that the Tenth Circuit actually grappled with

25   are about whether he qualifies as a last-mile

1   driver, right?

2   MS. LOVITT: Well, I -- I mean, not to

3   push back on the term last-mile driver, but I

4   think that begs the question of last mile of

5   what? You know, our argument is he's not the

6   last-mile driver of the cross-border

7   transportation.

8   But, to your point, I think that, you

9   know, this Court could, if it wanted to, look

10   at those factors, but that's -- that's

11   definitely --

12   JUSTICE JACKSON: It doesn't answer

13   the question that's before us today.

14   MS. LOVITT: It doesn't -- it

15   doesn't -- it doesn't answer the question

16   before -- it doesn't resolve the split.

17   JUSTICE JACKSON: Yeah. Thank you.

18   MS. LOVITT: Mm-hmm.

19   CHIEF JUSTICE ROBERTS: Thank you,

20   counsel.

21   Ms. Bennett.

22   ORAL ARGUMENT OF JENNIFER D. BENNETT

23   ON BEHALF OF THE RESPONDENT

24   MS. BENNETT: Mr. Chief Justice, and

25   may it please the Court:

1   As this Court recognized in Saxon,

2   interstate commerce is not merely the act of

3   crossing a state line. It is trade and traffic

4   between the people of different states. That's

5   why interstate commerce has never been

6   understood to end the moment that freight

7   crosses the border.

8   It ends when the goods reach their

9   final destination. And workers who transport

10   goods that are traveling in interstate commerce

11   are, by definition, engaged in that commerce,

12   regardless of whether they personally cross

13   state lines or interact with a vehicle that

14   does.

15   These principles were well established

16   in 1925 when Congress exempted any class of

17   workers engaged in interstate commerce. And

18   last-mile drivers transport goods on the last

19   leg of an interstate journey. Under the FAA's

20   plain text, these last-mile drivers are exempt.

21   Now Flowers asks this Court to add an

22   additional requirement that workers interact

23   with a border crossing vehicle, but, as I just

24   heard, Flowers can't point to a single case in

25   any context from any time period where a court

1   has ever adopted that requirement.

2   So not only is this interpretation

3   atextual, it would require courts to develop a

4   whole new jurisprudence about what it means to

5   interact with a vehicle. So we just heard that

6   if the trailer goes from one truck to another,

7   that counts. I'm not sure whether the trailer

8   is a vehicle or not, but, apparently, it is.

9   What if the goods were taken directly

10   off the first truck and handed to Mr. Brock to

11   put on his truck? Would that count? Highway

12   gas station attendants touch cross-border

13   vehicles all the time. Are they exempt?

14   And none of this would eliminate the

15   need to determine where an interstate journey

16   begins and ends because you can't know if a

17   vehicle is in interstate commerce without

18   knowing where that journey begins and ends.

19   But, on Flowers's view, history and

20   precedent can't help answer that question

21   because the words of the FAA mean something

22   different than they've ever meant in any other

23   context at any other time. So this requirement

24   of interaction with a vehicle doesn't make the

25   worker exemption easier to apply. It just

1   makes it more arbitrary.

2   I welcome the Court's questions.

3   JUSTICE THOMAS: In Saxon, we referred

4   to activities within the flow of interstate

5   commerce, and that at some point begins and it

6   ends.

7   In this case, what would be the final

8   destination of the bread?

9   MS. BENNETT: The final destination in

10   this case is the retail stores that are

11   Flowers's customers, so the Walmart, the Sam's

12   Club, and the reason for that is because, in

13   1925, it was really clear that what the final

14   destination was is where the parties to the

15   commerce intended the journey to end.

16   And I realize the Tenth Circuit's

17   decision is written in a complicated way, but I

18   think this case is actually a straightforward

19   case, as most cases will be.

20   Flowers repeatedly has admitted and

21   described what's going on here as -- as that

22   the destination are its retail stores. So, if

23   you look at, for example, the court of appeals

24   joint appendix at 272, Flowers says the

25   destination of these goods is the retail stores

1   and the distribution depots are just a

2   temporary pause.

3   And if you look at the contract,

4   Mr. Brock would be fired if he didn't bring the

5   goods to the retail store.

6   JUSTICE THOMAS: If the --

7   CHIEF JUSTICE ROBERTS: Well, but --

8   I'm sorry.

9   JUSTICE THOMAS: No, go ahead, Chief.

10   CHIEF JUSTICE ROBERTS: Well, but, I

11   mean, look, the other way, why isn't the

12   ultimate destination your -- your -- the person

13   who eats the bread, right? And -- and without

14   that, there's no reason. And -- and it's just

15   I don't know how you -- you over -- you -- you

16   skip over the step from the warehouse to the

17   driver but not skip over -- particularly skip

18   over the step from the store to the consumer,

19   particularly now since a lot of people, you

20   know, don't even go to the store, they use one

21   of these services that will get the bread from

22   the -- the local warehouse.

23   MS. BENNETT: Sure. So this question

24   came up in 1925.

25   CHIEF JUSTICE ROBERTS: I didn't

1   remember that.

2   (Laughter.)

3   MS. BENNETT: And -- and the way

4   courts answered that, how do you figure out

5   what the final destination of one journey is

6   and where there's an independent journey, you

7   look at the intention of the shipper and the

8   parties to the commerce. So, when Flowers,

9   Flowers is the shipper here, when Flowers

10   shipped its goods, the journey was to the

11   retail store.

12   The -- the commerce of a local, you

13   know, retail store sending by Instacart or

14   something groceries to a local consumer,

15   they're different parties to that commerce.

16   It's a separate journey.

17   JUSTICE GORSUCH: Well, Ms. Bennett,

18   though, I mean, do we need to get into any of

19   that? I mean, one might argue that in some

20   cases at least, the manufacturer really doesn't

21   care what happens once it passes title to a

22   wholesaler, right? I mean, it delivers it to

23   Brock's warehouse. Let's just suppose

24   hypothetically title passed.

25   It doesn't care whether that bread

       1   gets to a store, a consumer, or spoils. It's

       2   got its money. It's done. One could see that

       3   argument. But that's not in this case. So why

       4   are we -- why are we fussing over it?

       5   MS. BENNETT: I -- I think that's

       6   right. And I think the -- the question you

       7   just asked is exactly the -- the question that

       8   was asked in 1925, which is, when this good was

       9   shipped, where was the end of that journey, and

      10   if the shipper doesn't care it -- it goes

      11   beyond a particular point, that's the end of

      12   the journey.

      13   JUSTICE GORSUCH: That's the end of

      14   the journey, right.

      15   MS. BENNETT: And --

      16   JUSTICE GORSUCH: So that could be the

      17   answer and that if you prevail, that -- that --

      18   that's an argument that will be available to

      19   Ms. Lovitt and her friends in the next case,

      20   along with what a contract of employment is,

      21   along with can -- can a corporation be a

      22   transportation worker, along with a whole bunch

      23   of other things.

      24   All we need to decide in this case is

      25   Ms. Lovitt's proposed bright-line rule that

         1   you're in interstate commerce unless you drive

         2   across state lines or -- and I take the or --

         3   interact with vehicles that do. And we --

         4   MS. BENNETT: That's right.

         5   JUSTICE GORSUCH: -- just need to

         6   answer that question and be done in this case?

         7   MS. BENNETT: That's exactly right,

         8   Your Honor. There's lots of things that

         9   Flowers conceded for purposes of this

        10   particular question presented.

        11   JUSTICE GORSUCH: And we will get to

        12   see you back here again and again and again,

        13   right?

        14   MS. BENNETT: You -- you would.

        15   JUSTICE GORSUCH: Yeah.

        16   JUSTICE BARRETT: Counsel, can I ask

        17   you a question? How would you define the class

        18   of workers here? I mean, last-mile driver

        19   seems fairly imprecise because you could be a

        20   last-mile driver for -- for this purpose. You

        21   could be a last-mile driver of a fully

        22   intrastate journey. You could be a last -- I

        23   mean, there are many different ways in which

        24   that term could be used.

        25   So how would you define the class of

 1   workers here that's engaged in interstate

 2   commerce?

 3   MS. BENNETT: I would define it as

 4   workers who perform the last leg of an

 5   interstate journey. And that's similar to the

 6   way --

 7   JUSTICE BARRETT: Well, why do you

 8   want us to define it that way? Because it

 9   could be the third leg of an interstate journey

10   if we're answering the question that Ms. Lovitt

11   proposed. It could be driving the third leg of

12   an interstate journey but only an intrastate

13   portion of it.

14   So why do we have to use this word

15   "last-mile drivers" at all? Is it truckers?

16   Is it -- what -- who is the class here to whom

17   your client -- to which your client belongs?

18   MS. BENNETT: Sure. You don't have

19   to. I would have no objection to "drivers who

20   drive an intrastate leg of an interstate

21   journey." I think that also works.

22   I think, potentially, the class of

23   truck drivers is analogous to seamen and

24   railroad employees, with the caveat of Saxon

25   that because truck drivers are doing the actual

1   transportation work, we're not pulling in any

2   other employees, although that's not the

3   question presented here.

4   The reason we have picked "last-mile

5   drivers" -- well, two reasons. In the cert

6   petition and the reply, that is the class of

7   workers that Flowers said we were talking

8   about --

9   JUSTICE BARRETT: Sure.

10   MS. LOVITT: -- but --

11   JUSTICE ALITO: Well, let me take you

12   back to the --

13   MS. BENNETT: Sure.

14   JUSTICE BARRETT: Can I -- can I --

15   JUSTICE ALITO: Sure. Sure.

16   JUSTICE BARRETT: But is that a

17   term -- I mean, my concern here is do we spin

18   off the jurisprudence of what is a last-mile

19   driver and does that apply to different

20   contexts. So just to wrap this up, you're not

21   wed to this term? You don't think that this

22   term particularly matters? The class could be

23   defined differently?

24   MS. BENNETT: No, and I think you

25   could -- you know, you see in the real --

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1      the -- you know, what we're getting at is a --
2      is a class of workers that exists in the real
3      world, is well established, it's not
4      gerrymandered for this case, like seamen and
5      railroad employees.  And in 1925 and now, in
6      the real world, you can advertise for
7      essentially an intrastate leg of an interstate
8      journey.  They're often called last-mile
9      drivers regardless of what leg they're in,
10     but -- but no objection to -- to defining it
11     that way.
12                JUSTICE ALITO:  Let me take you back
13     to the Chief Justice's question.  So suppose a
14     grocery -- a -- a grocery item is produced in
15     one state, it is shipped across state lines to
16     a grocery store in another state, and then an
17     Uber Eats driver picks up goods that have been
18     ordered by a customer, gets in a vehicle,
19     drives to that person's house, delivers the
20     goods.  Is that person within the exemption?
21                MS. BENNETT:  No.  And here's why.
22                JUSTICE ALITO:  Why?  He's the
23     last-minute driver --
24                MS. BENNETT:  Because --
25                JUSTICE ALITO:  -- I mean the
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1   last-mile driver.

2   MS. BENNETT: For the same reason that

3   he wouldn't have been in 1925. And what we're

4   looking at is the intent of the parties to the

5   commerce to see whether the journey -- where

6   the journey begins and ends.

7   So, here, Flowers shipped its goods to

8   retail stores and had -- and -- and the parties

9   to that commerce are Flowers and their retail

10   stores. The parties to commerce of an Uber

11   Eats driver is a local consumer, a local store,

12   and a local driver. And -- and that case

13   was -- was clear in 1925. You can look at the

14   Weigle versus Curtice Brothers case.

15   JUSTICE ALITO: I mean, I find that

16   hard to understand. The -- the person who --

17   the company that produces the goods out of

18   states -- out of state intends to be paid for

19   those goods and is not going to be paid for

20   those goods unless they're sold. The intent of

21   that company is not just to have them shipped

22   to a grocery store and sit there.

23   MS. BENNETT: So my understanding is

24   that the sale is from Flowers to the grocery

25   store, and so Flowers doesn't care whether the

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 1    grocery store sells the goods or not.  Flowers
 2    has completed its sale when its purchase then
 3    arrives at the grocery store.  And what the
 4    grocery store is buying is the goods plus
 5    transportation.  There is a separate sale
 6    between a retail store and a local consumer.
 7             And, again, that line was clear in
 8    1925.  It's the Weigle case.  And lower courts
 9    are unanimous on this question.  They have had
10    no trouble distinguishing last-mile drivers,
11    that is, people who are doing the last leg --
12    you know, goods are ordered from -- from one
13    state, ordered from another state, and people
14    who are doing the last leg of that journey
15    to -- to get the goods from one state to
16    another --
17             JUSTICE ALITO:  Okay.  So I -- I make
18    these -- I produce these goods in one state.  I
19    sell them to someone else.  Title passes.  Then
20    that company ships them to the grocery store,
21    and that's the end of it.  The person who --
22    the -- the shipment from the -- from the person
23    to whom I sold the goods to the grocery store,
24    that's -- that's not -- that person's not
25    engaged in interstate commerce?
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1               MS. BENNETT:  I -- I think it might
2     depend.  And, again, I want to -- you know,
3     what we're asking about here is not whether
4     last-mile drivers, however defined, are a class
5     of workers that are exempt.  What we're talking
6     about now is, how do you know whether someone
7     is in that class?  How do you know what is an
8     independent journey from an interstate journey?
9               And I think, on your hypothetical, as
10    I understand it, you have a manufacturer
11    shipping goods to either a distributor or
12    retailer, and that's the end of that
13    transaction.  The manufacturer doesn't care
14    what happens to those goods and what the
15    retailer -- what is purchased.  It's just
16    transportation from the manufacturer to
17    someone in one state.
18              JUSTICE KAGAN:  But, if I -- if I
19    understand what you're saying -- and this is a
20    clarification question.  In other words, you
21    could have Manufacturer A, and Manufacturer A
22    wants to get his goods all the way to the
23    stores, the grocery stores.  And then you could
24    have Manufacturer B, and Manufacturer B just
25    conceives of his business in a different way
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1   and just wants to get the goods to wholesalers,

2   and after that, what the wholesalers do, how

3   they get the goods to grocery stores or anybody

4   else, is up to them.

5   So -- so then, if Manufacturer B just

6   got the goods to the wholesaler, that would be

7   it?

8   MS. BENNETT: That's exactly right.

9   You know, what we're looking at is, what was

10   the intent of the shipper at the time it was

11   shipped? And --

12   JUSTICE KAGAN: And so do you just

13   look to contracts for this? Is -- is it -- is

14   it always going to be clear whether the

15   manufacturer is just dealing with a wholesaler

16   or whether the manufacturer is engaged in

17   getting goods to retailers? What -- how -- how

18   do you decide that?

19   MS. BENNETT: So I think the easiest

20   way is the manufacturer will in or the employer

21   will in almost every case, I think every case,

22   will just -- will know that. And so all you

23   will need is a declaration that says here's

24   where we're shipping our goods, here's the

25   intended final destination.

1   In fact, you know, Flowers -- here,

2   there was no discovery, there was no

3   mini-trial, but Flowers describes its work in

4   documents that just --

5   JUSTICE GORSUCH: Well --

6   MS. BENNETT: -- and declarations that

7   say our intended destination is the retail

8   store.

9   JUSTICE GORSUCH: Well --

10   MS. BENNETT: And you will be able to

11   get that easily in -- in every case, I think.

12   JUSTICE GORSUCH: Well, Ms. Bennett, I

13   don't know about that. So a title is a clear

14   line, right? If title passes, boom. And you

15   seem to be sort of endorsing that, that -- that

16   view, once title passes, that's it.

17   But, if you look at this case, the

18   contract's kind of muddled, right? It says

19   title passes to Brock. So you might think -- I

20   know this isn't in the case, so we don't have

21   to decide it. Great, and I'm grateful for

22   that. But it says title passes. But then

23   Flowers also maintains lots of control over

24   Brock and what happens in the retail.

25   What do you do when you've got a

1   muddled contract like that?

2   MS. BENNETT: Sure. So I don't think

3   that title is the -- is the line. It could be

4   evidence. If you -- if you're having trouble

5   figuring out where the end of the journey is,

6   it could be some evidence, but, again, I don't

7   think it -- it is usually going to matter.

8   But let me -- there's two parts of

9   that. So, one, does title matter? And I think

10   the answer to that is -- is no. If you look

11   at --

12   JUSTICE GORSUCH: Title doesn't matter

13   at all?

14   MS. BENNETT: It -- it -- it will

15   matter as evidence of what the end of the

16   journey is.

17   JUSTICE GORSUCH: Okay.

18   MS. BENNETT: But the fact that title

19   passes is not dispositive. If you -- this

20   Court said that in the Rearick case, which was

21   the case where a very --

22   JUSTICE GORSUCH: So -- so what's

23   dispositive, is what I -- because often

24   Manufacturer B in Justice Kagan's hypothetical

25   will have lots of restrictions on how

 1   Wholesaler C, I dare, behaves and interacts

 2   with grocery stores as representatives de facto

 3   of the manufacturer.

 4   And, you know, there are varying

 5   levels of that. There are an infinite variety.

 6   I mean, are we -- are we going to wind up in

 7   Ms. Lovitt's world where everything's relevant

 8   and nothing's dispositive?

 9   MS. BENNETT: I don't think so because

10   the only -- you know, the thing that is

11   relevant is the intended final destination of

12   the shipper.

13   JUSTICE GORSUCH: So, so long as the

14   parties say I intend it to end here, period, is

15   that dispositive?

16   MS. BENNETT: I think unless you think

17   what's happening is obfuscation. So there are,

18   you know --

19   JUSTICE GORSUCH: Well, it's a -- it's

20   a contract is a contract. Now you -- are you

21   going to say it's a contract of adhesion and --

22   and, you know, I had to sign it and, you know,

23   public policy and -- I mean, where are we going

24   to go with this? How far down the rabbit hole

25   are you going to take us, Ms. Bennett?

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1                MS. BENNETT:  I don't think very far

2      at all if -- I don't think you need to get in

3      the rabbit hole, and here's why.  You know,

4      look at -- you can take this case, right,

5      the -- the --

6                JUSTICE GORSUCH:  Well, don't take

7      this case.  Help me with the precedents from

8      1925, of which you are so knowledgeable --

9                MS. BENNETT:  Sure.

10               JUSTICE GORSUCH:  -- because this is

11     what the understanding of the Commerce Clause

12     meant a long time ago.

13               MS. BENNETT:  Yes.

14               JUSTICE GORSUCH:  Pre-Wickard.

15               MS. BENNETT:  Yes.

16               JUSTICE GORSUCH:  And -- and there

17     have to be cases deciding all these questions.

18     And what's -- what's the rule that you're going

19     to advocate for?

20               MS. BENNETT:  That's right.  So the

21     rule I would advocate for is intended final

22     destination.  And I hear you saying that

23     sometimes that might have a line-drawing

24     problem.  Usually, it doesn't, you know,

25     because shippers know where they sent their
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 1   goods. And if you say file a declaration under

 2   oath to where you intended these goods to go,

 3   unless they're lying under oath, that will

 4   answer the question.

 5   JUSTICE GORSUCH: How do the cases

 6   handle this?

 7   MS. BENNETT: So the --

 8   JUSTICE GORSUCH: This complicated

 9   question, the rabbit hole questions.

10   MS. BENNETT: So I am happy to give

11   you, you know, sort of where the lines were,

12   and they're the same lines that the lower

13   courts have had no trouble adopting here.

14   There are really, I think, three categories of

15   cases that were hard potentially in 1925 and,

16   because they're solved in 1925, are not hard

17   here.

18   So one is the question of I think

19   Justice Alito was asking, how do you

20   distinguish between the first sale or

21   transaction from, say, you know, the

22   manufacturer out of state or the wholesaler to

23   the retailer and the -- and then is the

24   retailer to the -- to the consumer a separate

25   journey? And that -- the Weigle case answers

 1   that in 1925, separate journeys. So that's

 2   established. Courts have all agreed on that.

 3   The second kind of case is the case

 4   where manufacturers are sending their goods,

 5   they're essentially pre-shipping their goods

 6   and sending them to a place where they know a

 7   customer is going to order them, but the

 8   customer hasn't yet ordered them. The customer

 9   orders it either along the way or sometime very

10   quickly thereafter.

11   You can think of part of Amazon's

12   business like that. That's -- that seems like

13   it should be a genuinely hard question except

14   that's exactly how the livestock industry

15   worked in 1925. And so, if you look at cases

16   like Schechter, like Stafford v. Wallace, those

17   questions -- and the third case, there's a set

18   of three cases, one is Stafford v. Wallace, one

19   is Schechter, and one is Swift versus the

20   United States, and those cases dealt with

21   exactly this anticipatory shipping question and

22   answered that. And that's why, again, the

23   lower courts are all in agreement about how

24   that case comes out because they apply that

25   rule.

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 1              JUSTICE ALITO:  I find this

 2    extremely -- your argument extremely confusing.

 3    Maybe that is inherent in the pre-1925 case

 4    law.  I would think that anybody who produces

 5    consumer goods intends for the final

 6    destination of those goods to be with the

 7    consumer because, unless the consumer pays for

 8    the goods, then the producer of the goods isn't

 9    going to make any money.

10              So I don't understand what it means to

11    ask what is the intended end point of the --

12    the distribution chain.

13              MS. BENNETT:  So let me try to clarify

14    that.  It is not -- the -- the question that

15    was asked in 1925 and that we would say should

16    be asked here is not the final end point of the

17    distribution chain.  It's when you shipped --

18              JUSTICE ALITO:  It's the final end

19    point of what?

20              MS. BENNETT:  Of -- of the journey

21    when you shipped the goods.  So the goods

22    here -- you take -- take a case -- you know,

23    you ship through UPS.  Most of this kind of

24    commerce happens through something like UPS,

25    FedEx.  You ship through UPS.  Where are you
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1   trying to get those goods to go to when you

2   ship them? Not where are they then going to

3   subsequent -- subsequently go after that.

4   So, here, the -- when Flowers ships

5   its goods, where it's trying to get them to go

6   is the retail stores. That's the end of that

7   journey. There may be a separate journey if

8   someone buys that bread from the retail store.

9   JUSTICE ALITO: Why do you say Flowers

10   intends the retail stores to be the end of the

11   journey?

12   MS. BENNETT: Because that is how

13   Flowers describes what is happening here.

14   Flowers, in the record, has said the

15   destination -- again, this is at court of

16   appeal joint appendix at 272, the destination

17   is the retail stores and distribution depots

18   are just a temporary pause, and if Brock

19   doesn't deliver to the retail stores, he's

20   fired.

21   JUSTICE ALITO: So -- so suppose

22   Flowers had said, I intend for my bread to make

23   it to consumers. This would be a different

24   case?

25   MS. BENNETT: I think, if Flowers

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1       ships its bread to consumers, if consumers

2       ordered from Flowers, that would be a different

3       case.  And -- and maybe I can explain it -- let

4       me try a different way, which is to say, you

5       know, in 1925, the easy cases were cases where

6       somebody orders it from one state, orders

7       something from another state.  That journey is

8       from shipment in the other state to the person

9       or business who ordered it.

10              And that is what is going on here.

11      The retail stores order goods, and -- and

12      Flowers ships them from another state.  That is

13      engaged in interstate commerce in 1925, and

14      there's a host of cases, most of which don't

15      involve interacting with a vehicle at all.

16      I'll give you some examples.

17              So the Rearick case, for example, is a

18      case of brooms that were manufactured in one

19      state ordered by customers from another, and

20      workers exactly like those here --

21              JUSTICE ALITO:  So I -- I don't want

22      to --

23              MS. BENNETT:  Sure.

24              JUSTICE ALITO:  I can read the cases,

25      and I appreciate your descriptions of them.
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1   So is what you're saying that the

2   Federal Arbitration Act incorporates the 1925

3   understanding of the limits of the Interstate

4   Commerce Clause, and so we have to go back and

5   try to sort out what that meant? That was a

6   body of case law with a lot of arbitrary lines.

7   That's what you want us to do?

8   MS. BENNETT: No, Your Honor.

9   JUSTICE ALITO: And -- and follow what

10   the lower courts at that time thought about the

11   limits of interstate -- of the inter- -- of

12   Congress's power to regulate interstate

13   commerce?

14   MS. BENNETT: No, Your Honor, and I

15   want to be really clear about this. This

16   Court -- this case has nothing to do with what

17   the limits of the Commerce Clause were in 1925.

18   What we're asking this Court to do is look at

19   what the meaning of the words "interstate

20   commerce" meant in 1925 and then what it meant

21   to be engaged in interstate commerce.

22   And whether you look at, you know,

23   cases under any body of law, if you look at

24   cases under the Commerce Clause, if you look at

25   cases under FELA, if you look at cases under

1   the Interstate Commerce Act, under the Motor

2   Carrier Act, which was passed a little bit

3   later, those cases are not defining the -- the

4   utility of those cases is that they're showing

5   what it means -- meant to be engaged in

6   interstate commerce within the meaning of those

7   words.

8   JUSTICE ALITO: And those courts were

9   not -- they were not trying to understand --

10   they were not basing their understanding of the

11   meaning of interstate commerce on the meaning

12   of interstate commerce under the Commerce

13   Clause? This was -- this was independent of

14   that?

15   MS. BENNETT: They -- I think the --

16   the scope of the Commerce Clause is about not

17   what the meaning of interstate commerce is.

18   It's about what relationship to interstate

19   commerce an activity has to have to be

20   regulable.

21   So, under any doctrine, the meaning of

22   the words interstate commerce was the same and

23   the question under various cases, under various

24   statutes, and under the Commerce Clause is, is

25   this activity have the relationship required

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1     either by the Commerce Clause or various

2     statutes to interstate commerce to count, so --

3              JUSTICE JACKSON:  And that's not --

4     that's not before us, right?  I mean, that's --

5              MS. BENNETT:  No.

6              JUSTICE JACKSON:  So can I focus us on

7     what is before us?

8              MS. BENNETT:  Sure.

9              JUSTICE JACKSON:  I think I'm just

10    trying to really get back to the issue of the

11    day.  As I understand your argument, you are

12    starting or we are all starting from the

13    position of taking for the purpose of today

14    that both sides agree that the retail stores

15    were the end of the journey at issue.

16             MS. BENNETT:  That's right.

17             JUSTICE JACKSON:  Right.  So no

18    dispute on that.  For the purpose -- I know

19    they're going to argue about it later, but,

20    right now, everybody says, okay, retail stores

21    are the end.

22             And we know that Mr. Brock drives

23    these goods to the retail stores intrastate.

24    He gets the goods in the state and he gets them

25    to the retail store.  That is the end of this
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1   interstate journey that the goods have been on.

2   MS. BENNETT: That's right.

3   JUSTICE JACKSON: All right. So the

4   only question before us right now is how do we

5   characterize Mr. Brock, his role, his work in

6   that particular journey or set of

7   circumstances?

8   Your friend on the other side,

9   Ms. Lovitt, says we have to look at the class

10   of cross-border workers, that the only way that

11   Mr. Brock gets to have this exemption is that

12   if we can say that he is a class -- a

13   cross-border worker, I think she has that

14   terminology -- the worker at -- at each leg or

15   at his leg has to be engaged in cross-border

16   transportation work.

17   Now we know that we've already said he

18   himself doesn't have to cross the border. So

19   she says how you make that determination about

20   cross-border transportation work is whether he

21   engages in vehicles that have crossed the

22   border.

23   What is your response to why she's

24   wrong about the extent to which he would have

25   to engage -- you know, the extent -- first of

1   all, is she right that we should be looking at

2   whether he is engaged in "cross-border

3   transportation work" and, if so, is she right

4   that the way to do that is to focus on his

5   engagement with the vehicle?

6   MS. BENNETT: Sure. So, in 1925, the

7   ordinary meaning of the words "engaged in

8   interstate commerce," and I took Flowers to

9   agree with this in their opening brief but

10   maybe has backed away from it, is a worker who

11   is engaged in interstate transportation or work

12   that is so closely related to that to be

13   practically a part of it.

14   So what we're looking at, this,

15   Mr. Brock, and drivers like him are engaged in

16   interstate transportation, that's the question.

17   And so the question is -- and -- and

18   to be engaged in interstate transportation in

19   1925, you do not have to interact with a

20   vehicle. And with apologies to Justice Alito,

21   I'll just give you a few examples. There's the

22   Rearick case, which I mentioned. That's

23   workers exactly like this held to be engaged in

24   interstate commerce. There's a case called

25   Seaboard Air Line Railroad versus Moore, which

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 1      is in our brief.  There, the worker is a

 2      railroad worker who is held to be "actually

 3      engaged in interstate commerce," even though

 4      his work didn't take him out of Florida.  And

 5      the reason for that is because he transported a

 6      train that had lumber, and that lumber was then

 7      unloaded and put on a boat to a different

 8      state.  So it's -- it's again, an exact --

 9                JUSTICE JACKSON:  So it was the goods

10      that was --

11                MS. BENNETT:  Exactly right.

12                JUSTICE JACKSON:  I mean, I think

13      that's the key question.

14                MS. BENNETT:  Correct.

15                JUSTICE JACKSON:  You get it because

16      you are working or engaging with goods that

17      have been in -- in interstate commerce or not.

18                MS. BENNETT:  That's right.  And

19      that's exactly right.  You know, Hancock, the

20      question, they said a worker is employed in

21      interstate commerce if any of the cars in his

22      train contained interstate freight.  So it's

23      keyed to the freight.

24                And the cars was actually a harder

25      question in 1925.  You could, of course, some
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1   workers were either engaged in interstate

2   transportation or worked so closely related to

3   it because they interacted with

4   instrumentalities of commerce. That was a hard

5   question in 1925.

6   JUSTICE JACKSON: Right. If you -- I

7   was just saying in Hancock, I mean, it doesn't

8   seem to me that you getter clearer to the

9   statement, "The determining circumstance is

10   that the shipment was but a step in the

11   transportation of the coal to real and ultimate

12   destinations in another state."

13   So it was the coal that was moving in

14   interstate commerce that became the quote,

15   unquote, "determining circumstance" in Hancock.

16   Is that right?

17   MS. BENNETT: That's exactly right.

18   And the Zachary case that they mentioned. What

19   the -- what the Court said is because the cars

20   crossed state lines, there's a reasonable

21   inference that the freight did and that would

22   make the worker engaged in interstate commerce.

23   JUSTICE ALITO: So the oranges that

24   are delivered by the Uber Eats guy in Colorado

25   to the -- so then he's -- I think you -- you

 1   just shifted to the goods.

 2   MS. BENNETT: So I want to be clear.

 3   The question isn't whether the goods have been

 4   transported in interstate commerce. So your

 5   question is, once it gets to the retail store,

 6   is the next leg still in interstate commerce?

 7   I'll flag that that's a different

 8   question than the question here, which is, is

 9   it in -- is the -- are the goods in interstate

10   commerce for the part of the -- for the journey

11   to the retail store -- so if there's a separate

12   journey for the Instacart driver and the

13   orange?

14   The question there is are those

15   oranges still in interstate commerce? I think

16   the answer to that is no. Again, that's the --

17   the Weigle case. And it's all, you know, where

18   -- when goods were ordered. If you look at the

19   Lipscomb case, if you look at the -- the

20   Rearick case, the Seaboard case, when goods are

21   ordered from one state or from another state,

22   the -- the interstate journey is from the

23   manufacturing plant or whoever is selling those

24   goods to the person or company who ordered

25   them. That's the journey.

1   JUSTICE KAGAN: So in a -- when an

2   ultimate consumer does the ordering, I mean,

3   suppose that I get on the Internet and I click

4   into some cosmetics company, and so I'm getting

5   these cosmetics from the cosmetics company.

6   Then it's everything that happens from

7   where the cosmetics company is making the

8   product to the ultimate consumer, isn't it?

9   MS. BENNETT: Right, because it's --

10   you look at who ordered the goods, and the

11   shipment from whoever's selling or

12   manufacturing the goods to who ordered them,

13   that's a journey.

14   And then anything --

15   JUSTICE KAGAN: And does it matter if

16   --

17   MS. BENNETT: -- that happens after

18   that --

19   JUSTICE KAGAN: -- when I order those

20   goods from the cosmetics company, the cosmetics

21   company actually has a way of, like, signaling

22   some wholesaler or signaling even a retail

23   store, you know, get the cosmetics to

24   Ms. Kagan?

25   MS. BENNETT: I don't think so, but,

1   again, to answer that question, what I would do

2   is say, would that have counted as interstate

3   transportation in 1925? And I would look at

4   the -- the livestock cases actually that I was

5   mentioning to Justice Gorsuch to -- to figure

6   that out because this wasn't an uncommon

7   situation then.

8   CHIEF JUSTICE ROBERTS: Thank you,

9   counsel.

10   If you have a -- a big wholesaler,

11   right, and you know -- you know that -- I

12   understand your argument there. And then you

13   say, well, between the wholesaler and the

14   consumer, no, right? Well, the way business is

15   these days in products, in consumer products,

16   they're often big wholesalers and then little

17   wholesalers. And -- and so, I mean, you can

18   chop this up as many ways as you want.

19   Is it -- well, what is it between the

20   big wholesaler in -- in, you know, Chicago and

21   the little wholesaler in a little town outside

22   of Chicago? I mean, it doesn't always go from

23   this big wholesaling to -- to the individual

24   home.

25   So where do you -- where do you stop

1   -- what's your choice between those two? Big

2   wholesaler, the little wholesaler, little

3   wholesaler to home, you're saying, I guess,

4   that doesn't count. But what about the link

5   between the two different types of wholesalers?

6   MS. BENNETT: If I understand

7   correctly, you're saying somebody in -- you

8   know, a wholesaler orders goods from a bigger

9   wholesaler in the state. I think when those

10   goods are shipped to the person who ordered

11   them, that journey is over.

12   And then you look to the -- there may

13   be a subsequent journey after that that's

14   independent that may or may not be interstate.

15   But when goods are shipped to the -- the person

16   or company that ordered them, that's the

17   journey.

18   CHIEF JUSTICE ROBERTS: Even if it's

19   not -- even if they've already stopped at a

20   wholesale facility, apart from the -- the

21   truck?

22   MS. BENNETT: I --

23   CHIEF JUSTICE ROBERTS: Maybe I'm not

24   understanding. Here's the -- the --the truck

25   goes to the wholesaler, right, and the

1   wholesaler, instead of going right to the

2   consumer, goes to another wholesale facility,

3   which happens a lot.

4   MS. BENNETT: Right. I -- I think --

5   but if the -- if what's happening is the

6   consumer is ordering a good from out of state,

7   and the -- what's happening when the

8   out-of-state company ships the good, that --

9   that journey is in interstate commerce from the

10   time it leaves the manufacturing or first

11   wholesaler until it gets to the consumer,

12   because -- because that was well established in

13   1925.

14   If you look at Lipscomb or Rearick,

15   what you'll see is the -- the interstate

16   journey is from order to place that is selling

17   or manufacturing it.

18   CHIEF JUSTICE ROBERTS: Well, I don't

19   know if they had the sophisticated and

20   multi-variegated distribution system we have

21   today in 1925.

22   MS. BENNETT: That is, I think, a

23   little bit less, but you'd be surprised. So,

24   again, these livestock cases had these kinds of

25   complicated arrangements. But -- but they

 1   often boil down to fundamental principles,

 2   which is what did the parties to the commerce

 3   intend the shipment to be? When you shipped

 4   this good, where was it going?

 5   And if somebody orders a good that

 6   gets shipped to them from out of state, that's

 7   a journey. And whatever happens after that is

 8   -- is an independent journey. But -- but that

 9   -- but that's where I would put the -- the

10   beginning and end.

11   CHIEF JUSTICE ROBERTS: Thank you.

12   JUSTICE KAGAN: Whatever happens --

13   CHIEF JUSTICE ROBERTS: Justice --

14   JUSTICE KAGAN: I'm sorry.

15   CHIEF JUSTICE ROBERTS: Yeah.

16   Justice Thomas?

17   JUSTICE THOMAS: If Flowers were to

18   simply ship to its final -- a final destination

19   at a distribution center and relinquish title

20   to your client, would that change your

21   argument?

22   MS. BENNETT: I think if the commerce

23   was truly between Flowers and Mr. Brock --

24   JUSTICE THOMAS: Yeah.

25   MS. BENNETT: -- that -- that would be

1   a different case. Mr. Brock would then

2   essentially be a retailer like Walmart or Sam's

3   Club, but -- but yeah.

4   CHIEF JUSTICE ROBERTS: Justice Alito?

5   Justice Sotomayor?

6   JUSTICE SOTOMAYOR: The cases you're

7   relying on are all Supreme Court cases,

8   correct?

9   MS. BENNETT: Correct.

10   JUSTICE SOTOMAYOR: So they're not

11   lower court cases. They're what the cases

12   defined as interstate commerce and workers

13   involved in interstate commerce, correct?

14   MS. BENNETT: Correct.

15   JUSTICE SOTOMAYOR: For purposes of

16   FELA and many examples, but it was what

17   "engaged in commerce" meant at the time?

18   MS. BENNETT: That's exactly right.

19   And that's what this Court -- you know, you

20   have cases from 1925. You have this Court's

21   decision in Morris versus McComb, which --

22   which says that drivers are engaged in

23   interstate commerce when they do this kind of

24   last-mile -- mile journeys.

25   There are a number of precedents from

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1    this Court that this Court, I think, would have
2    to overrule to say that last-mile drivers or
3    intrastate-like drivers are not engaged in
4    interstate commerce or the Court would have say
5    the FAA means something different with those
6    words than has meant -- those words have ever
7    meant.
8              JUSTICE SOTOMAYOR:  And Justice
9    Gorsuch has put a question to your adversary
10   about what -- or opposing counsel -- I
11   shouldn't use the word "adversary" -- opposing
12   counsel about how to define her -- the question
13   presented.
14             Answer the question he posed.  It
15   would be, no, it doesn't matter whether --
16             MS. BENNETT:  I -- I would say the
17   answer, I think, to the question presented as
18   posed, which I take to be:  Are workers who
19   don't physically cross state lines and don't
20   interact with a vehicle engaged in interstate
21   commerce are exempt from the FAA?  I would say
22   it depends on what class of workers they are,
23   are a member of and what the work of that class
24   is.
25             JUSTICE SOTOMAYOR:  Okay.
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 1                    CHIEF JUSTICE ROBERTS:  Justice Kagan?

 2                    Justice Gorsuch?

 3                    Justice Kavanaugh?

 4                    JUSTICE KAVANAUGH:  Two questions.

 5                    MS. BENNETT:  Sure.

 6                    JUSTICE KAVANAUGH:  One, you said in

 7       response to Justice Barrett, "last-mile

 8       drivers" doesn't need to be the term.  I wasn't

 9       clear on what the exact phrase you would use as

10       a substitute for the term.

11                    MS. BENNETT:  Sure.  I understood the

12       question to be could we define the class as

13       people who perform an intrastate leg of an

14       interstate journey.

15                    JUSTICE KAVANAUGH:  And that's --

16       you're good with that --

17                    MS. BENNETT:  I --

18                    JUSTICE KAVANAUGH:  -- phrasing right

19       there?

20                    MS. BENNETT:  Absolutely, yeah.

21                    JUSTICE KAVANAUGH:  Okay.  And then in

22       response to Justice Gorsuch, I think you were

23       going through, very helpfully, categories of

24       cases and you got through one and two, which

25       I'm not sure you got through the third but
```

1   maybe you covered it in later questions. I

2   want to make sure I'm not missing that third

3   category.

4   MS. BENNETT: Sure. So I think there

5   were -- there are three. And I think the ones

6   I got through were anticipatory shipping. So

7   what do you do when the order is anticipated

8   but not actually delivered.

9   JUSTICE KAVANAUGH: Got that one.

10   MS. BENNETT: I think the second one,

11   I actually don't remember what the second one

12   was that I -- that I answered to you so I'm not

13   sure what two and three are, but -- but the

14   second one I think was the retail stores, also

15   clear line in 1925. And that's, again, it

16   follows from the order.

17   And then the third one is this

18   obfuscation question, where a company was

19   trying to obfuscate exactly what the commerce

20   -- what commerce is happening or where the

21   journey begins and ends. That was very common

22   in 1925, where companies would try to get out

23   of, say, the Interstate Commerce Act or FELA by

24   obfuscating where the beginning and -- and the

25   end of the journey is.

1   And there are lots of cases about that

2   in 1925 that says you can't convert an

3   interstate shipment into intrastate

4   transportation just by dividing up the legs.

5   You can look at the Baer Brothers case. You

6   can look at the Southern Pacific Terminal case,

7   you can look at the Sabine Tram case and -- and

8   that's how those courts analyzed it. What

9   we're going to do is we're going to look at

10   where were the goods ordered and where were

11   they ordered from.

12   JUSTICE KAVANAUGH: Thank you.

13   CHIEF JUSTICE ROBERTS: Justice

14   Barrett?

15   JUSTICE BARRETT: I want to be sure I

16   understand your position.

17   MS. BENNETT: Sure.

18   JUSTICE BARRETT: You've been asked a

19   lot of questions about the line drawing in your

20   position because it does involve some

21   complicated lines. You said, I think, in

22   response to Justice Sotomayor that the answer

23   to the QP technically in your view would be it

24   depends.

25   MS. BENNETT: Mm-hmm.

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1              JUSTICE BARRETT:  It seems to me that
2     the further question of depends on what is
3     pretty complicated.  How do you figure out
4     intent?  Are we looking at what title passes?
5     Are we looking at some sort of declaration?
6     Are we looking at who gets the profit, how the
7     -- you can start to see why the Tenth -- Tenth
8     Circuit's opinion was quite complicated, right?
9              But I think those are questions for
10    another day.  Is that your position?
11             MS. BENNETT:  Yes.
12             JUSTICE BARRETT:  Like just answer it
13    depends, there's no automatic rule of
14    exclusion, but what it depends on can be very
15    complicated.
16             And it may not always be the case that
17    these 1925 cases you're pointing us to answer
18    the question in the -- in the modern
19    complicated world with different kinds of
20    distribution chains, livestock, maybe there's
21    some good analogies to be drawn between
22    livestock and, you know, computer equipment,
23    but those are pretty complicated questions and
24    I think Ms. Lovitt correctly points out that
25    there would be very difficult line-drawing
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     1   questions, that even if your position is right,

     2   that courts would have to face.

     3   So we could say it depends, and not

     4   depends on what?

     5   MS. BENNETT: Yes. Although I want to

     6   be clear. I think in most cases there will not

     7   be complicated line-drawing questions. And you

     8   see this because, you know, most of the cases

     9   Flowers cites for their complicated

    10   line-drawing questions are cases where the

    11   district courts easily granted a motion to

    12   compel arbitration and had almost nothing to do

    13   with last-mile drivers.

    14   But -- and -- and the other categories

    15   of cases are ride share cases, which on our

    16   view, that comes -- case comes to the court

    17   once. And what you would look at, I think the

    18   difficulty with ride share drivers is that some

    19   of them cross state lines. They're in Kansas

    20   City or D.C.

    21   And in our view, the question there

    22   would be, in 1925 where workers who were

    23   performing what is fundamentally local

    24   transportation but sometimes cross state lines,

    25   were they engaged in interstate commerce?

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 1                  JUSTICE BARRETT:  Do horses and

 2      buggies cross state lines?

 3                  MS. BENNETT:  There was -- there was

 4      --

 5                  JUSTICE BARRETT:  But we don't have to

 6      answer those questions.

 7                  MS. BENNETT:  Correct.  You don't have

 8      to answer any of these questions.  The only

 9      thing this Court has to say to answer the

10      question presented is there is no absolute

11      requirement that you physically cross a state

12      line or interact with a vehicle that does,

13      whatever it might mean to interact with a

14      vehicle.

15                  CHIEF JUSTICE ROBERTS:  Justice

16      Jackson?

17                  JUSTICE JACKSON:  One final quick

18      thing.

19                  You -- you say or you've set this all

20      up to have the analysis turning on the intended

21      destination of the goods or the freight as the

22      parties agreed.

23                  Ms. Lovitt has it turning on loading

24      and unloading.  There was a -- a -- a key part

25      of her analysis that was about loading and
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          1   unloading. In 1925, is there any evidence that

          2   that was a factor in how we're supposed to be

          3   thinking about this?

          4   MS. BENNETT: So the -- yes and no,

          5   which is to say I think in 1925 the interstate

          6   transportation ended when the goods were

          7   unloaded at their final destination.

          8   JUSTICE JACKSON: I see.

          9   MS. BENNETT: So I think it's clear

         10   that anything that happens once you get to the

         11   destination and unload the goods, that's out.

         12   But there -- but it wasn't whether the goods

         13   were unloaded and -- loaded and unloaded at

         14   intermediate points.

         15   And the Rearick case loaded and

         16   unloaded. The Seaboard Air Line case that's

         17   lumber, that is --

         18   JUSTICE JACKSON: So that's not a

         19   factor, you think, in isolating or answering

         20   this question?

         21   MS. BENNETT: No, I don't think -- I

         22   don't think that's a factor. It -- it does

         23   help answer -- you know, make clear that why

         24   some of the hypotheticals posed about what's

         25   going to happen afterwards --

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1               JUSTICE JACKSON:  Yeah.

2               MS. BENNETT:  -- are not implicated by

3      this case.  You know, a -- a retail clerk that

4      handles goods after they've been unloaded at

5      the final destination, that commerce has ended.

6               JUSTICE JACKSON:  Yeah.

7               MS. BENNETT:  But -- but it doesn't

8      answer the intermediate question.

9               JUSTICE JACKSON:  Thank you.

10              CHIEF JUSTICE ROBERTS:  Thank you,

11     counsel.

12              Rebuttal, Ms. Lovitt.

13               REBUTTAL ARGUMENT OF TRACI L. LOVITT

14                  ON BEHALF OF THE PETITIONERS

15              MS. LOVITT:  Thank you, Mr. Chief

16     Justice.

17              Section 1 asks a fundamentally

18     different question than the Commerce Clause was

19     asking in 1925.  It's asking whether or not the

20     transportation worker is engaged in

21     cross-border transportation work.  That's what

22     this Court held in Saxon and Bissonnette.

23              It's different from the Commerce

24     Clause analysis because of the words "engaged

25     in," which this Court has twice held are
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1   narrower than the scope of the Commerce Clause

2   and are intended to limit to something --

3   something much more direct and active in the

4   movement of goods across borders.

5   So to answer the question, you

6   shouldn't -- you shouldn't be looking to

7   Commerce Clause cases. Those are going far too

8   broadly. The key -- the key cases in -- in

9   this context are Saxon and Bissonnette. And

10   they explain the question is what is the work

11   the worker is performing?

12   Ms. Saxon's work, the task that she

13   was performing, was loading and unloading goods

14   on to vehicles that were traveling to different

15   states. It is the transportation work that

16   matters, not the destination of the good.

17   So you've heard a lot -- you heard a

18   lot in the last 35 minutes, you heard a lot

19   about parties' intent. You heard about, well,

20   you have to know where the profit turns. You

21   have to know where things are preordered. You

22   have to know whether you're manufacturer A or

23   manufacturer B. All of which Bissonnette says

24   shouldn't matter because that's about the

25   business that the -- the manufacturer is in,

 1   not the business of what the worker is doing.

 2   What you didn't hear about was any

 3   defense of the four court -- circuit court

 4   decisions that have adopted Brock's approach,

 5   not in a briefing and not here today. That's

 6   because all you had to do is read those four

 7   cases and see how quickly this analysis spins

 8   out of control or read Judge Bress's dissent in

 9   Rittmann, the first case that adopted this

10   approach.

11   He predicted that exactly this would

12   occur because in 1925, the lines weren't

13   bright, they weren't clear, they were so

14   muddled that people were asking questions about

15   whether brooms were in the same package that

16   they were or whether they had been

17   disentangled.

18   That is not the kind of bright-line

19   rule that a threshold requirement like Section

20   1 should have. Clarity is needed for rules

21   that establish the threshold, particularly

22   under the FAA, the whole point of which is to

23   avoid litigation, to have speed and efficiency

24   in resolving conflicts. This is without adding

25   a whole separate layer.

1   Brock's approach is adding a whole

2   separate layer of litigation over intent.

3   There's no more fact-bound question in the law

4   than what are the parties' intent? And you

5   heard that today because you can't answer it

6   without "it depends."

7   And Section 1 is answer -- is begging

8   for an answer other than "it depends." And

9   that answer is directly from the text of

10   Section 1. It's not an ambiguous rule. It's

11   not a made-up rule. Section 1 is saying you

12   have to be engaged in cross-border movement,

13   cross-border transportation, and we know that

14   from Saxon and Bissonnette.

15   If you -- and -- and I think the lower

16   courts are showing you what happens when you

17   don't approach -- what happens when you adopt

18   this rule. For 100 years, this Court has lived

19   with the FAA Section 1. And there has not been

20   any lack of clarity because the industry

21   understands what it means to be a

22   transportation worker.

23   You move a good across a border, you

24   load it, you unload it. That's where

25   transportation begins and ends. That rule has

 1   been clear since 1925 because this Court in

 2   Saxon decided the cases showing that that's how

 3   transportation work. Not interstate commerce,

 4   but transportation work was judged in 1925, and

 5   the point of loading and unloading.

 6   The question of final destination is a

 7   question of interstate commerce under the

 8   Commerce Clause. And the Commerce Clause,

 9   despite what counsel says, and none of the

10   cases that she cited under the Commerce Clause

11   define the terms "engaged in."

12   You can read the Commerce Clause for a

13   long time and you won't find those terms within

14   the Commerce Clause. You will find them in

15   Section 1. And it's engaged in interstate

16   commerce that's used in conjunction with a

17   justum that tells you that the commerce that

18   these -- the workers have to be engaged in

19   isn't a transaction in interstate commerce,

20   it's transportation that crosses the border.

21   In our view, this is a clear case.

22   And Section 1 demands a clear rule. The

23   clearer rule, the narrower the disputes. And

24   that's what Section 1 demands.

25   CHIEF JUSTICE ROBERTS: Thank you,

1   counsel. The case is submitted.

2   (Whereupon, at 11:27 a.m., the case

3   was submitted.)

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1 [16] **11**:6 **12**:14,15 **16**:14 **17**:25 **19**:17 **27**:20 **85**:17 **87**:20 **88**:7,10,11,19 **89:** 15,22,24
10 [2] **17**:25 **22**:9
100 [1] **88**:18
10-hour [2] **18**:3 **26**:3
10-mile [1] **26**:3
1925 [38] **40**:16 **42**:13 **43**:24 **45**:8 **49**:5 **50**:3,13 **51**:8 **57**:8 **58**:15,16 **59**:1,15 **60**:15 **62**:5,13 **63**:2,17,20 **67**:6,19 **68:** 25 **69**:5 **72**:3 **74**:13,21 **76**:20 **79**:15, 22 **80**:2 **81**:17 **82**:22 **84**:1,5 **85**:19 **87:** 12 **89**:1,4

2

2 [3] **18**:1,5,19
272 [2] **42**:24 **61**:16

3

3 [2] **18**:2 **36**:2
35 [1] **86**:18

9

999 [1] **34**:15

A

able [1] **54**:10
about [37] **8**:5 **10**:10 **11**:24 **14**:8 **19**:2 **20**:9 **25**:8 **28**:23 **29**:10 **38**:23,25 **41**:4 **48**:8 **52**:3,6 **54**:13 **59**:23 **63**:10,15 **64:** 16,18 **65**:19 **66**:19,24 **73**:4 **77**:10,12 **80**:1,19 **83**:25 **84**:3,24 **86**:19,19,24 **87**:2,14
absolute [1] **83**:10
absolutely [1] **78**:20
accurate [1] **11**:9
across [22] **8**:2 **10**:25 **12**:23 **13**:8,10 **15**:11,13 **16**:4 **18**:1 **28**:17,18 **29**:15, 18,19,20,24 **30**:1,23 **46**:2 **49**:15 **86**:4 **88**:23
act [5] **40**:2 **63**:2 **64**:1,2 **79**:23
active [3] **9**:9 **26**:9 **86**:3
actively [3] **9**:13 **20**:6,12
activities [1] **42**:4
activity [2] **64**:19,25
actual [2] **10**:4 **47**:25
actually [15] **20**:18 **22**:8,16 **23**:9 **27**:22 **29**:13 **38**:1,24 **42**:18 **68**:2,24 **71**:21 **72**:4 **79**:8,11
add [3] **20**:7 **24**:4 **40**:21
added [1] **18**:12
adding [2] **87**:24 **88**:1
additional [1] **40**:22
adhesion [1] **56**:21
admitted [1] **42**:20
adopt [3] **14**:18 **15**:17 **88**:17

adopted [3] **41**:1 **87**:4,9
adopting [1] **58**:13
adversary [2] **77**:9,11
advertise [1] **49**:6
advocate [2] **57**:19,21
advocating [1] **14**:14
after [7] **17**:2 **53**:2 **61**:3 **71**:17 **73**:13 **75**:7 **85**:4
afterwards [1] **84**:25
again [18] **12**:4 **22**:12 **28**:11 **34**:25 **36:** 3 **46**:12,12,12 **51**:7 **52**:2 **55**:6 **59**:22 **61**:15 **68**:8 **70**:16 **72**:1 **74**:24 **79**:15
ago [1] **57**:12
agree [2] **65**:14 **67**:9
agreed [2] **59**:2 **83**:22
agreement [1] **59**:23
ah [1] **33**:15
ahead [1] **43**:9
air [2] **67**:25 **84**:16
airplane [2] **8**:1 **29**:25
airport [1] **37**:2
akin [1] **29**:13
alito [30] **17**:23 **18**:16 **19**:20 **20**:2,21 **24**:6,10 **25**:4 **32**:22 **35**:23 **37**:6 **48**:11, 15 **49**:12,22,25 **50**:15 **51**:17 **58**:19 **60:** 1,18 **61**:9,21 **62**:21,24 **63**:9 **64**:8 **67:** 20 **69**:23 **76**:4
all [33] **13**:16 **20**:10 **21**:18,24 **24**:1,11 **25**:11 **26**:13,15 **27**:8,10,13 **32**:15 **38:** 7 **41**:13 **45**:24 **47**:15 **52**:22 **53**:22 **55:** 13 **57**:2,17 **59**:2,23 **62**:15 **65**:12 **66**:3 **67**:1 **70**:17 **76**:7 **83**:19 **86**:23 **87**:6
almost [2] **53**:21 **82**:12
along [5] **10**:12 **45**:20,21,22 **59**:9
already [3] **28**:5 **66**:17 **73**:19
also [4] **19**:25 **47**:21 **54**:23 **79**:14
although [2] **48**:2 **82**:5
always [7] **28**:25 **29**:10 **30**:24 **37**:9 **53:** 14 **72**:22 **81**:16
am [1] **58**:10
amazon's [1] **59**:11
ambiguous [1] **88**:10
an [47] **8**:1 **10**:2,3 **11**:9 **13**:21,25 **17**:25 **18**:1,14,16 **23**:24 **27**:13 **29**:14 **31**:5, 19 **33**:4,19,23 **36**:5 **40**:19,21 **41**:15 **44**:6 **45**:18 **47**:4,9,12,12,20,20 **49**:7,7, 16 **50**:10 **52**:7,8 **56**:5 **64**:19 **68**:8 **71**:1 **72**:6 **75**:8 **78**:13,13 **80**:2 **88**:8,10
analogies [1] **81**:21
analogous [1] **47**:23
analogy [1] **37**:21
analysis [10] **10**:10 **11**:5,19 **24**:15 **32**:4, 9 **83**:20,25 **85**:24 **87**:7
analyzed [1] **80**:8
another [25] **17**:19 **18**:3,18 **21**:5,13 **29:** 3 **33**:22,25 **34**:9,23,25 **36**:25 **37**:8,10 **41**:6 **49**:16 **51**:13,16 **62**:7,12,19 **69:** 12 **70**:21 **74**:2 **81**:10

answer [28] **16**:10 **26**:5 **33**:23 **38**:22 **39**:12,15 **41**:20 **45**:17 **46**:6 **55**:10 **58:** 4 **70**:16 **72**:1 **77**:14,17 **80**:22 **81**:12, 17 **83**:6,8,9 **84**:23 **85**:8 **86**:5 **88**:5,7,8, 9
answered [3] **44**:4 **59**:22 **79**:12
answering [2] **47**:10 **84**:19
answers [2] **22**:1 **58**:25
anticipated [1] **79**:7
anticipatory [2] **59**:21 **79**:6
any [20] **10**:4 **11**:24 **14**:13 **15**:5 **22**:22 **40**:16,25,25 **41**:22,23 **44**:18 **48**:1 **60:** 9 **63**:23 **64**:21 **68**:21 **83**:8 **84**:1 **87**:2 **88**:20
anybody [2] **53**:3 **60**:4
anything [5] **15**:9 **17**:13 **38**:5 **71**:14 **84:** 10
apart [1] **73**:20
apologies [1] **67**:20
apparently [1] **41**:8
appeal [1] **61**:16
appeals [1] **42**:23
appendix [2] **42**:24 **61**:16
apply [3] **41**:25 **48**:19 **59**:24
appreciate [1] **62**:25
approach [4] **87**:4,10 **88**:1,17
arbitrariness [1] **25**:7
arbitrary [2] **42**:1 **63**:6
arbitration [2] **63**:2 **82**:12
argue [3] **33**:2 **44**:19 **65**:19
argued [2] **33**:6 **38**:11
arguing [1] **17**:20
argument [10] **33**:5 **39**:5,22 **45**:3,18 **60:** 2 **65**:11 **72**:12 **75**:21 **85**:13
arrangements [1] **74**:25
arrives [1] **51**:3
arriving [1] **17**:2
as [39] **8**:17 **11**:25 **12**:9 **13**:23,23 **14**:3, 4,13 **16**:15,15 **18**:8 **20**:6 **21**:24 **24**:4 **26**:18 **28**:11,11 **35**:18 **36**:4 **38**:25 **40:** 1,23 **42**:19,21,21 **47**:3 **52**:9 **55**:15 **56:** 2,13 **65**:11 **72**:2,18,18 **76**:12 **77**:17 **78**:9,12 **83**:21
ask [7] **18**:7 **24**:9,9 **28**:22 **30**:9 **46**:16 **60**:11
asked [9] **15**:14 **20**:15 **24**:10,11 **45**:7,8 **60**:15,16 **80**:18
asking [12] **8**:10 **14**:18 **16**:22,23 **20**:21 **35**:24 **52**:3 **58**:19 **63**:18 **85**:19,19 **87:** 14
asks [2] **40**:21 **85**:17
assumed [1] **38**:11
assuming [2] **29**:3 **38**:21
at [90] **8**:23 **9**:22,23 **11**:1 **12**:5 **13**:3,4, 10 **14**:12 **19**:3,6 **20**:23 **22**:5,5,20,21 **23**:16 **24**:21 **26**:22 **27**:2,4,21 **31**:24, 25 **32**:1,9,17 **33**:6 **36**:16 **37**:11,15,16, 17 **38**:12 **39**:10 **41**:23 **42**:5,23,24 **43:**

chain [2] **60**:12,17
chains [1] **81**:20
change [1] **75**:20
changed [1] **33**:3
characterization [3] **9**:18 **11**:9 **22**:3
characterize [1] **66**:5
characterized [1] **10**:13
characterizing [1] **11**:24
chicago [2] **72**:20,22
chief [31] **8**:25 **22**:18 **23**:17 **24**:7,8,13
 25:1 **32**:19 **35**:4 **38**:4 **39**:19,24 **43**:7,9,
 10,25 **49**:13 **72**:8 **73**:18,23 **74**:18 **75**:
 11,13,15 **76**:4 **78**:1 **80**:13 **83**:15 **85**:
 10,15 **89**:25
choice [1] **73**:1
chop [1] **72**:18
circuit [8] **14**:11 **17**:11 **33**:11,13,14 **35**:
 16 **38**:24 **87**:3
circuit's [2] **42**:16 **81**:8
circumstance [2] **69**:9,15
circumstances [1] **66**:7
cited [1] **89**:10
cites [1] **82**:9
citing [1] **19**:1
city [1] **82**:20
clarification [1] **52**:20
clarify [3] **24**:18 **38**:6 **60**:13
clarifying [2] **18**:7 **30**:10
clarity [4] **14**:17 **19**:17 **87**:20 **88**:20
class [22] **26**:20 **27**:5,22 **29**:11 **31**:5,7,
 20 **40**:16 **46**:17,25 **47**:16,22 **48**:6,22
 49:2 **52**:4,7 **66**:9,12 **77**:22,23 **78**:12
classes [1] **12**:17
clause [19] **11**:12 **19**:24 **57**:11 **63**:4,17,
 24 **64**:13,16,24 **65**:1 **85**:18,24 **86**:1,7
 89:8,8,10,12,14
clear [22] **9**:16 **19**:11,20 **25**:6 **27**:3 **32**:
 16 **42**:13 **50**:13 **51**:7 **53**:14 **54**:13 **63**:
 15 **70**:2 **78**:9 **79**:15 **82**:6 **84**:9,23 **87**:
 13 **89**:1,21,22
clearer [2] **69**:8 **89**:23
clerk [1] **85**:3
click [1] **71**:3
client [3] **47**:17,17 **75**:20
close [2] **14**:22 **22**:16
closely [2] **67**:12 **69**:2
club [2] **42**:12 **76**:3
coal [5] **21**:2,4,12 **69**:11,13
colorado [7] **10**:20 **11**:1,3,4 **17**:2 **33**:4
 69:24
combination [1] **19**:23
come [4] **19**:21 **20**:2 **21**:21 **38**:1
comes [7] **19**:22,22,25 **31**:11 **59**:24 **82**:
 16,16
coming [1] **20**:11
commerce [87] **14**:19 **15**:19 **21**:6,14,
 25 **25**:14,21 **26**:11 **31**:18 **40**:2,5,10,11,
 17 **41**:17 **42**:5,15 **44**:8,12,15 **46**:1 **47**:

2 **50**:5,9,10 **51**:25 **57**:11 **60**:24 **62**:13
 63:4,13,17,20,21,24 **64**:1,6,11,12,12,
 16,17,19,22,24 **65**:1,2 **67**:8,24 **68**:3,
 17,21 **69**:4,14,22 **70**:4,6,10,15 **74**:9
 75:2,22 **76**:12,13,17,23 **77**:4,21 **79**:19,
 20,23 **82**:25 **85**:5,18,23 **86**:1,7 **89**:3,7,
 8,8,10,12,14,16,17,19
common [1] **79**:21
companies [1] **79**:22
company [13] **17**:23 **50**:17,21 **51**:20
 70:24 **71**:4,5,7,20,21 **73**:16 **74**:8 **79**:
 18
compel [1] **82**:12
compelling [1] **12**:14
completed [1] **51**:2
completes [1] **18**:2
complicated [11] **42**:17 **58**:8 **74**:25 **80**:
 21 **81**:3,8,15,19,23 **82**:7,9
component [1] **20**:8
computer [1] **81**:22
conceded [2] **38**:12 **46**:9
conceives [1] **52**:25
concern [1] **48**:17
concession [1] **8**:19
conflicts [1] **87**:24
confusing [1] **60**:2
congress [2] **10**:15 **40**:16
congress's [1] **63**:12
conjunction [1] **89**:16
constant [1] **29**:21
consumer [16] **43**:18 **44**:14 **45**:1 **50**:11
 51:6 **58**:24 **60**:5,7,7 **71**:2,8 **72**:14,15
 74:2,6,11
consumers [3] **61**:23 **62**:1,1
contained [1] **68**:22
context [4] **8**:12 **40**:25 **41**:23 **86**:9
contexts [1] **48**:20
continues [5] **18**:23 **20**:18 **23**:13 **32**:8
 36:18
continuous [1] **36**:4
contract [11] **17**:4 **35**:15,18 **38**:7,23 **43**:
 3 **45**:20 **55**:1 **56**:20,20,21
contracts [1] **53**:13
contract's [1] **54**:18
contrary [1] **12**:15
control [3] **17**:6 **54**:23 **87**:8
convert [1] **80**:2
corollary [2] **22**:7,10
corporation [2] **17**:5 **45**:21
correct [9] **15**:16 **17**:10 **35**:13 **68**:14
 76:8,9,13,14 **83**:7
correctly [2] **73**:7 **81**:24
cosmetics [7] **71**:4,5,5,7,20,20,23
could [21] **29**:4 **34**:20,21 **39**:9 **45**:2,16
 46:19,21,22,24 **47**:9,11 **48**:22,25 **52**:
 21,23 **55**:3,6 **68**:25 **78**:12 **82**:3
counsel [8] **32**:20 **39**:20 **46**:16 **72**:9 **77**:
 10,12 **85**:11 **89**:9

count [4] **29**:22 **41**:11 **65**:2 **73**:4
counted [1] **72**:2
counts [4] **12**:23 **31**:3 **37**:25 **41**:7
course [1] **68**:25
court [36] **12**:3 **13**:15,22 **20**:4,18 **21**:1,
 6,10 **26**:7 **27**:1 **29**:10 **39**:9,25 **40**:1,21,
 25 **42**:23 **55**:20 **61**:15 **63**:16,18 **69**:19
 76:7,11,19 **77**:1,1,4 **82**:16 **83**:9 **85**:22,
 25 **87**:3,3 **88**:18 **89**:1
courts [13] **33**:7 **41**:3 **44**:4 **51**:8 **58**:13
 59:2,23 **63**:10 **64**:8 **80**:8 **82**:2,11 **88**:
 16
court's [3] **20**:1 **42**:2 **76**:20
covered [5] **11**:6 **17**:5 **18**:5,19 **79**:1
create [1] **21**:20
crew [2] **12**:19 **21**:5
cross [15] **8**:6 **10**:21 **14**:20,21 **25**:17,
 24 **26**:3 **28**:10 **40**:12 **66**:18 **77**:19 **82**:
 19,24 **83**:2,11
cross-border [27] **8**:10 **9**:8,21,24 **10**:5
 13:3 **18**:9,11 **19**:5,15 **20**:13,16 **26**:9,
 10 **27**:23 **28**:12 **32**:6 **39**:6 **41**:12 **66**:
 10,13,15,20 **67**:2 **85**:21 **88**:12,13
cross-borders [1] **27**:1
crossed [9] **12**:12 **13**:1,14 **29**:1,6 **30**:5,
 18 **66**:21 **69**:20
crosses [4] **11**:21,22 **40**:7 **89**:20
crossing [16] **9**:17 **11**:10,14,18 **12**:9
 14:1 **16**:6 **22**:15 **25**:23 **27**:16,18,24,
 24 **28**:2 **40**:3,23
curtice [1] **50**:14
customer [4] **49**:18 **59**:7,8,8
customers [2] **42**:11 **62**:19

D

d [1] **39**:22
d.c [1] **82**:20
danger [1] **36**:13
dare [1] **56**:1
day [6] **33**:22,25 **34**:10,23 **65**:11 **81**:10
days [1] **72**:15
de [1] **56**:2
deal [1] **20**:22
dealing [1] **53**:15
dealt [1] **59**:20
decide [4] **15**:15 **45**:24 **53**:18 **54**:21
decided [1] **89**:2
deciding [1] **57**:17
decision [2] **42**:17 **76**:21
decisions [1] **87**:4
declaration [3] **53**:23 **58**:1 **81**:5
declarations [1] **54**:6
defense [1] **87**:3
definable [1] **28**:13
define [7] **46**:17,25 **47**:3,8 **77**:12 **78**:12
 89:11
defined [5] **12**:17 **21**:23 **48**:23 **52**:4 **76**:
 12

defining [3] **23**:22 **49**:10 **64**:3	**district** [1] **82**:11	**either** [8] **15**:22,24 **16**:1,5 **52**:11 **59**:9
definitely [1] **39**:11	**dividing** [1] **80**:4	**65**:1 **69**:1
definition [2] **12**:19 **40**:11	**do** [45] **10**:16 **15**:11,20,22 **17**:13,15 **24**:	**ejusdem** [1] **19**:23
deliver [1] **61**:19	13 **25**:19 **31**:4,4 **35**:10,17 **44**:4,18 **46**:	**eliminate** [1] **41**:14
delivered [3] **33**:3 **69**:24 **79**:8	3 **47**:7,14 **48**:17 **52**:6,7 **53**:2,12,18 **54**:	**else** [4] **21**:10 **35**:14 **51**:19 **53**:4
delivers [3] **11**:4 **44**:22 **49**:19	25,25 **58**:5,19 **61**:9 **63**:7,16,18 **66**:4	**embrace** [1] **8**:9
delivery [3] **14**:18 **15**:18 **17**:24	**67**:4,19 **72**:1,25,25 **76**:23 **79**:7,7 **80**:9	**employed** [2] **20**:7 **68**:20
demanding [1] **16**:15	**81**:3 **82**:12 **83**:1 **87**:6	**employees** [3] **47**:24 **48**:2 **49**:5
demands [2] **89**:22,24	**doctrine** [1] **64**:21	**employer** [1] **53**:20
demarcate [1] **18**:15	**documents** [1] **54**:4	**employment** [5] **26**:9 **35**:15,18 **38**:7
demarcation [1] **19**:11	**does** [16] **8**:17,22 **14**:7,19 **19**:2,21 **20**:2	**45**:20
depend [1] **52**:2	**32**:6 **40**:14 **48**:19 **55**:9 **71**:2,15 **80**:20	**empty** [1] **29**:14
depends [9] **77**:22 **80**:24 **81**:2,13,14	**83**:12 **84**:22	**end** [29] **8**:22 **10**:11 **19**:2,3 **23**:24,25
82:3,4 **88**:6,8	**doesn't** [27] **10**:21 **11**:13 **14**:20 **26**:25	**28**:19 **31**:15 **32**:7 **40**:6 **42**:15 **45**:9,11,
depots [2] **43**:1 **61**:17	**35**:25 **37**:15 **39**:12,14,15,15,16 **41**:24	13 **51**:21 **52**:12 **55**:5,15 **56**:14 **60**:11,
described [1] **42**:21	**44**:20,25 **45**:10 **50**:25 **52**:13 **55**:12 **57**:	16,18 **61**:6,10 **65**:15,21,25 **75**:10 **79**:
describes [2] **54**:3 **61**:13	24 **61**:19 **66**:18 **69**:7 **72**:22 **73**:4 **77**:	25
descriptions [1] **62**:25	15 **78**:8 **85**:7	**ended** [3] **19**:9 **84**:6 **85**:5
despite [1] **89**:9	**doing** [12] **22**:11,14,22 **26**:21,23 **27**:5,	**endorsing** [1] **54**:15
destination [26] **23**:19 **37**:4,11,15 **40**:9	11,14 **47**:25 **51**:11,14 **87**:1	**ends** [14] **8**:13,23 **9**:23 **13**:4 **18**:9 **19**:6
42:8,9,14,22,25 **43**:12 **44**:5 **53**:25 **54**:	**don't** [39] **8**:6 **10**:15 **13**:7 **15**:8,8,9 **17**:	**28**:14 **40**:8 **41**:16,18 **42**:6 **50**:6 **79**:21
7 **56**:11 **57**:22 **60**:6 **61**:15,16 **75**:18	15,15 **22**:20 **23**:2 **24**:19 **31**:25 **34**:4	**88**:25
83:21 **84**:7,11 **85**:5 **86**:16 **89**:6	**35**:10 **43**:15,20 **47**:18 **48**:21 **54**:13,20	**engage** [1] **66**:25
destinations [2] **21**:12 **69**:12	**55**:2,6 **56**:9 **57**:1,2,6 **60**:10 **62**:14,21	**engaged** [37] **9**:13 **20**:4,5 **21**:22,24 **26**:
determination [1] **66**:19	**71**:25 **74**:18 **77**:19,19 **79**:11 **83**:5,7	7,8,15 **40**:11,17 **47**:1 **51**:25 **53**:16 **62**:
determine [2] **38**:9 **41**:15	**84**:21,22 **88**:17	13 **63**:21 **64**:5 **66**:15 **67**:2,7,11,15,18,
determining [2] **69**:9,15	**doors** [1] **19**:10	23 **68**:3 **69**:1,22 **76**:17,22 **77**:3,20 **82**:
develop [1] **41**:3	**down** [2] **56**:24 **75**:1	25 **85**:20,24 **88**:12 **89**:11,15,18
developing [1] **35**:17	**drawing** [1] **80**:19	**engagement** [2] **9**:10 **67**:5
diagrams [1] **14**:10	**drawn** [1] **81**:21	**engages** [1] **66**:21
did [9] **13**:24 **23**:9,9 **26**:2,2,3 **28**:10 **69**:	**draws** [2] **32**:16 **36**:15	**engaging** [1] **68**:16
21 **75**:2	**dripping** [1] **12**:16	**enumerated** [1] **12**:17
didn't [7] **26**:4 **29**:19 **33**:2 **43**:4,25 **68**:4	**drive** [5] **15**:18 **18**:3 **36**:1 **46**:1 **47**:20	**envision** [1] **35**:21
87:2	**driver** [30] **8**:18 **14**:19 **17**:24 **18**:1,2,4,5,	**equipment** [1] **81**:22
different [27] **10**:12 **18**:4,13 **21**:5 **23**:1,	19 **21**:7,8 **24**:17,20,24 **36**:2 **38**:10,22	**essentially** [4] **9**:4 **49**:7 **59**:5 **76**:2
24 **24**:15 **25**:17,17 **40**:4 **41**:22 **44**:15	**39**:1,3,6 **43**:17 **46**:18,20,21 **48**:19 **49**:	**establish** [1] **87**:21
46:23 **48**:19 **52**:25 **61**:23 **62**:2,4 **68**:7	17,23 **50**:1,11,12 **70**:12	**established** [4] **40**:15 **49**:3 **59**:2 **74**:12
70:7 **73**:5 **76**:1 **77**:5 **81**:19 **85**:18,23	**drivers** [23] **15**:19 **17**:24 **21**:19,20 **24**:	**even** [7] **10**:16 **43**:20 **68**:3 **71**:22 **73**:18,
86:14	14 **29**:12 **40**:18,20 **47**:15,19,23,25 **48**:	19 **82**:1
differently [2] **10**:14 **48**:23	5 **49**:9 **51**:10 **52**:4 **67**:15 **76**:22 **77**:2,3	**ever** [4] **19**:7 **41**:1,22 **77**:6
difficult [1] **81**:25	**78**:8 **82**:13,18	**every** [3] **53**:21,21 **54**:11
difficulty [1] **82**:18	**drives** [6] **10**:18,25 **17**:25 **18**:1 **49**:19	**everybody** [2] **25**:23 **65**:20
direct [3] **9**:9 **26**:9 **86**:3	**65**:22	**everything** [2] **21**:8 **71**:6
direction [1] **17**:12	**driving** [3] **27**:9 **29**:15 **47**:11	**everything's** [1] **56**:7
directly [6] **9**:13 **20**:6,13 **26**:15 **41**:9 **88**:	**drove** [1] **22**:9	**evidence** [4] **55**:4,6,15 **84**:1
9	**due** [1] **13**:16	**exact** [2] **68**:8 **78**:9
disagree [2] **22**:2 **27**:18	**duties** [1] **21**:2	**exactly** [17] **17**:16 **22**:13 **26**:15 **34**:7 **45**:
discovery [1] **54**:2		7 **46**:7 **53**:8 **59**:14,21 **62**:20 **67**:23 **68**:
disentangled [1] **87**:17	**E**	11,19 **69**:17 **76**:18 **79**:19 **87**:11
dispositive [4] **55**:19,23 **56**:8,15		**example** [3] **29**:11 **42**:23 **62**:17
dispute [3] **9**:3 **14**:8 **65**:18	**each** [2] **18**:3 **66**:14	**examples** [3] **62**:16 **67**:21 **76**:16
disputes [1] **89**:23	**easier** [1] **41**:25	**excellent** [1] **14**:10
dissent [1] **87**:8	**easiest** [1] **53**:19	**except** [1] **59**:13
distinguish [4] **21**:15,18 **23**:6 **58**:20	**easily** [2] **54**:11 **82**:11	**exclusion** [1] **81**:14
distinguishing [1] **51**:10	**easy** [2] **14**:4 **62**:5	**exempt** [5] **24**:25 **40**:20 **41**:13 **52**:5 **77**:
distribution [7] **43**:1 **60**:12,17 **61**:17	**eats** [4] **43**:13 **49**:17 **50**:11 **69**:24	21
74:20 **75**:19 **81**:20	**efficiency** [1] **87**:23	**exempted** [1] **40**:16
distributor [1] **52**:11	**eight** [1] **25**:16	**exemption** [6] **11**:6 **18**:6,20 **41**:25 **49**:

20 **66**:11
exists [1] **49**:2
explain [2] **62**:3 **86**:10
explained [1] **21**:6
express [1] **11**:11
extension [1] **8**:15
extent [2] **66**:24,25
extremely [2] **60**:2,2

F

faa [8] **17**:6 **20**:24 **21**:22 **41**:21 **77**:5,21
 87:22 **88**:19
faa's [1] **40**:19
face [1] **82**:2
facility [2] **73**:20 **74**:2
fact [4] **13**:24 **14**:1 **54**:1 **55**:18
fact-bound [1] **88**:3
facto [1] **56**:2
factor [3] **84**:2,19,22
factors [2] **38**:8 **39**:10
factory [2] **25**:20 **27**:10
facts [2] **14**:10 **17**:12
fair [3] **8**:14 **9**:5,6
fairly [1] **46**:19
fall [1] **25**:25
falls [1] **19**:15
far [3] **56**:24 **57**:1 **86**:7
federal [1] **63**:2
fedex [1] **60**:25
feel [1] **19**:9
fela [7] **22**:12,24,25 **23**:12 **63**:25 **76**:16
 79:23
few [1] **67**:21
figure [3] **44**:4 **72**:5 **81**:3
figuring [1] **55**:5
file [1] **58**:1
final [18] **22**:9 **40**:9 **42**:7,9,13 **44**:5 **53**:
 25 **56**:11 **57**:21 **60**:5,16,18 **75**:18,18
 83:17 **84**:7 **85**:5 **89**:6
find [4] **50**:15 **60**:1 **89**:13,14
fired [2] **43**:4 **61**:20
first [10] **10**:23 **21**:13 **22**:2 **24**:19 **26**:2
 41:10 **58**:20 **66**:25 **74**:10 **87**:9
first-mile [6] **21**:1,7,19 **24**:14,17,23
flag [1] **70**:7
florida [1] **68**:4
flow [1] **42**:4
flowers [33] **8**:18 **10**:17 **17**:6 **26**:23 **40**:
 21,24 **42**:20,24 **44**:8,9,9 **46**:9 **48**:7 **50**:
 7,9,24,25 **51**:1 **54**:1,3,23 **61**:4,9,13,14,
 22,25 **62**:2,12 **67**:8 **75**:17,23 **82**:9
flowers's [3] **10**:19 **41**:19 **42**:11
focus [4] **12**:15 **38**:21 **65**:6 **67**:4
focused [1] **22**:13
follow [1] **63**:9
follows [1] **79**:16
for [52] **8**:18 **9**:16 **10**:2 **14**:8,14 **16**:23
 30:16,19,19 **31**:19 **33**:16,20,22,25 **34**:

9,23 **38**:12,14,16,18 **42**:12,23 **46**:9,20,
20 **49**:4,6 **50**:2,18,19 **53**:13 **54**:21 **57**:
19,21 **60**:5,7 **61**:22 **62**:17 **65**:13,18
 68:5 **70**:10,10,12 **76**:15 **78**:10 **81**:9
 82:9 **87**:20 **88**:8,18 **89**:12
forward [1] **35**:3
four [3] **12**:4 **87**:3,6
freight [5] **40**:6 **68**:22,23 **69**:21 **83**:21
friend [1] **66**:8
friends [1] **45**:19
from [78] **8**:1 **10**:18,23 **11**:10 **14**:9 **16**:
25 **17**:1,2 **18**:18 **19**:21,22,23 **20**:1,3
 21:2 **23**:24 **25**:20 **26**:24 **27**:4,9 **29**:25
 30:7 **31**:11,16,24 **32**:13 **33**:13,13 **35**:
25 **37**:7,10 **40**:25 **41**:6 **43**:16,18,21
 50:24 **51**:12,12,13,15,22,22 **52**:8,16
 57:7 **58**:21 **61**:8 **62**:2,6,7,8,12,19 **65**:
12 **67**:10 **70**:21,21,22 **71**:5,6,11,20 **72**:
22 **73**:8,20 **74**:6,9,16 **75**:6 **76**:20,25
 77:21 **79**:16 **80**:11 **85**:23 **88**:9,14
fully [2] **8**:9 **46**:21
fundamental [1] **75**:1
fundamentally [2] **82**:23 **85**:17
further [2] **38**:5 **81**:2
fussing [1] **45**:4

G

gas [1] **41**:12
genuinely [1] **59**:13
gerrymandered [1] **49**:4
get [26] **14**:13 **16**:23 **17**:8,15 **18**:18 **19**:
8 **25**:11,19 **27**:9 **43**:21 **44**:18 **46**:11
 51:15 **52**:22 **53**:1,3 **54**:11 **57**:2 **61**:1,5
 65:10 **68**:15 **71**:3,23 **79**:22 **84**:10
gets [9] **45**:1 **49**:18 **65**:24,24 **66**:11 **70**:
5 **74**:11 **75**:6 **81**:6
getter [1] **69**:8
getting [3] **49**:1 **53**:17 **71**:4
give [3] **58**:10 **62**:16 **67**:21
given [1] **28**:4
giving [1] **37**:6
go [12] **24**:2 **25**:3 **29**:19 **43**:9,20 **56**:24
 58:2 **61**:1,3,5 **63**:4 **72**:22
goes [6] **35**:22 **36**:24 **41**:6 **45**:10 **73**:25
 74:2
going [29] **12**:22 **13**:8,10 **21**:5 **29**:1 **30**:
9 **31**:15 **32**:11 **42**:21 **50**:19 **53**:14 **55**:
7 **56**:6,21,23,25 **57**:18 **59**:7 **60**:9 **61**:2
 62:10 **65**:19 **74**:1 **75**:4 **78**:23 **80**:9,9
 84:25 **86**:7
good [12] **8**:13 **10**:13 **12**:15 **45**:8 **74**:6,
8 **75**:4,5 **78**:16 **81**:21 **86**:16 **88**:23
goods' [3] **11**:20 **12**:11 **23**:25
good's [2] **28**:18,20
gorsuch [57] **14**:2,5,7 **15**:1,4,7,17,23
 16:1,5,9,13,17,20,22 **17**:14,17 **32**:25
 33:1,8,12,15,18,21,24 **34**:2,5,8,14,17,
19,22 **35**:2 **44**:17 **45**:13,16 **46**:5,11,15

54:5,9,12 **55**:12,17,22 **56**:13,19 **57**:6,
10,14,16 **58**:5,8 **72**:5 **77**:9 **78**:2,22
got [8] **22**:8 **45**:2 **53**:6 **54**:25 **78**:24,25
 79:6,9
granted [1] **82**:11
grappled [1] **38**:24
grateful [1] **54**:21
great [1] **54**:21
groceries [1] **44**:14
grocery [14] **16**:25 **49**:14,14,16 **50**:22,
24 **51**:1,3,4,20,23 **52**:23 **53**:3 **56**:2
ground [1] **17**:19
guess [2] **29**:2 **73**:3
guy [1] **69**:24

H

had [16] **9**:14 **21**:8 **29**:24,25 **37**:4 **50**:8
 51:9 **56**:22 **58**:13 **61**:22 **68**:6 **74**:19,
24 **82**:12 **87**:6,16
hancock [10] **20**:25 **22**:3,4,7,10 **37**:19,
21 **68**:19 **69**:7,15
handed [1] **41**:10
handle [2] **24**:14 **58**:6
handles [1] **85**:4
happen [3] **34**:20,21 **84**:25
happened [1] **21**:18
happening [6] **10**:8 **56**:17 **61**:13 **74**:5,
7 **79**:20
happens [13] **29**:8 **44**:21 **52**:14 **54**:24
 60:24 **71**:6,17 **74**:3 **75**:7,12 **84**:10 **88**:
16,17
happenstance [2] **26**:1 **27**:15
happy [1] **58**:10
hard [7] **9**:11 **26**:24 **50**:16 **58**:15,16 **59**:
13 **69**:4
harder [1] **68**:24
has [30] **11**:5 **12**:4,12,24 **17**:6 **25**:6 **27**:
20 **29**:10 **30**:18 **31**:17 **40**:5 **41**:1 **42**:
20 **51**:2 **61**:14 **63**:16 **64**:19 **66**:13,15
 67:10 **71**:21 **77**:6,9 **83**:9,23 **85**:5,25
 88:18,19,25
hasn't [4] **8**:1 **19**:9 **33**:12 **59**:8
have [78] **8**:5 **9**:12,16,20 **10**:18,22 **11**:2,
19 **13**:14,23 **14**:1,10 **17**:13 **18**:14,17
 19:18 **20**:11,23 **22**:25 **23**:24 **24**:6 **29**:
6,14 **30**:5,9,24 **33**:4 **35**:17 **37**:19 **47**:
14,18,19 **48**:4 **49**:17 **50**:3,21 **51**:9 **52**:
10,21,24 **54**:20 **55**:25 **57**:17,23 **58**:13
 59:2 **63**:4 **64**:19,25 **66**:1,9,11,18,21,
24 **67**:19 **68**:17 **70**:3 **72**:2,10 **74**:20
 76:20,20 **77**:1,4,6 **82**:2 **83**:5,7,20 **86**:
20,21,22 **87**:4,20,23 **88**:12 **89**:18
having [4] **10**:12 **30**:3,4 **55**:4
he [15] **14**:19,20 **38**:25 **43**:4 **50**:3 **65**:24,
24 **66**:12,17,20,24 **67**:2 **68**:5 **77**:14
 87:11
hear [2] **57**:22 **87**:2
heard [7] **40**:24 **41**:5 **86**:17,17,18,19

88:5
held [12] **12**:4 **13**:2,16 **14**:25 **20**:18 **21**:
1 **23**:15 **26**:7 **67**:23 **68**:2 **85**:22,25
help [4] **38**:8 **41**:20 **57**:7 **84**:23
helpful [1] **14**:11
helpfully [1] **78**:23
her [3] **45**:19 **77**:12 **83**:25
here [32] **14**:10,17 **17**:4,20 **21**:17 **22**:7
25:9 **26**:6 **34**:25 **38**:11 **42**:21 **44**:9 **46**:
12,18 **47**:1,16 **48**:3,17 **50**:7 **52**:3 **54**:1
56:14 **58**:13,17 **60**:16,22 **61**:4,13 **62**:
10,20 **70**:8 **87**:5
here's [5] **49**:21 **53**:23,24 **57**:3 **73**:24
herself [1] **12**:22
he's [6] **8**:20 **38**:21 **39**:5 **49**:22 **61**:19
69:25
highway [1] **41**:11
him [3] **17**:1 **67**:15 **68**:4
himself [2] **11**:21 **66**:18
his [11] **10**:24 **25**:5 **41**:11 **52**:22,25 **66**:
5,5,15 **67**:4 **68**:4,21
history [1] **41**:19
hold [1] **29**:20
holding [1] **19**:5
hole [3] **56**:24 **57**:3 **58**:9
home [2] **72**:24 **73**:3
honest [1] **33**:23
honor [3] **46**:8 **63**:8,14
hook [1] **26**:6
horses [1] **83**:1
host [1] **62**:14
hours [1] **17**:25
house [1] **49**:19
how [31] **10**:16 **13**:7 **17**:1,6 **23**:17 **24**:
13 **43**:15 **44**:4 **46**:17,25 **52**:6,7 **53**:2,
17,17 **55**:25 **56**:24 **58**:5,19 **59**:14,23
61:12 **66**:4,19 **77**:12 **80**:8 **81**:3,6 **84**:2
87:7 **89**:2
however [1] **52**:4
hypothetical [8] **25**:5 **28**:24 **30**:2,20
35:9 **37**:5 **52**:9 **55**:24
hypothetically [1] **44**:24
hypotheticals [5] **35**:23 **37**:7,12,14 **84**:
24

I

if [88] **10**:8 **14**:3 **16**:9 **18**:10,12 **19**:7,14
22:7 **24**:17,20 **25**:21,22,22 **27**:21 **28**:
14,24 **29**:11 **31**:7 **34**:3,5,5,5,8,8,12,12,
19,20,20,22 **35**:20 **36**:1,1 **37**:15,17,18,
18 **39**:9 **41**:6,9,16 **42**:22 **43**:3,4,6 **45**:
10,17 **47**:10 **52**:18,18 **53**:5 **54**:14,17
55:4,4,10,19 **57**:2 **58**:1 **59**:15 **61**:7,18,
25 **62**:1 **63**:23,24,25 **66**:12 **67**:3 **68**:
21 **69**:6 **70**:11,18,19 **71**:15 **72**:10 **73**:
6,18,19 **74**:5,5,14,19 **75**:5,17,22 **82**:1
88:15
ignore [1] **10**:8

i'll [6] **24**:8,9 **35**:3 **62**:16 **67**:21 **70**:7
i'm [26] **11**:6 **15**:4,4,4,7 **20**:20,22 **24**:5,
7 **30**:2,9,10 **31**:12,12,13 **36**:20 **41**:7
43:8 **54**:21 **65**:9 **71**:4 **73**:23 **75**:14 **78**:
25 **79**:2,12
image [2] **24**:17,24
imagine [2] **9**:11 **35**:9
imagining [2] **36**:3,21
implicated [1] **85**:2
imprecise [1] **46**:19
inaccurate [1] **9**:19
inapposite [1] **22**:24
incorporates [1] **63**:2
independent [5] **44**:6 **52**:8 **64**:13 **73**:
14 **75**:8
individual [1] **72**:23
industry [3] **26**:25 **59**:14 **88**:20
inference [1] **69**:21
infinite [1] **56**:5
inherent [1] **60**:3
inside [2] **10**:24,24
instacart [2] **44**:13 **70**:12
instead [1] **74**:1
instrumentalities [2] **22**:14 **69**:4
instrumentality [1] **22**:15
intend [3] **56**:14 **61**:22 **75**:3
intended [9] **42**:15 **53**:25 **54**:7 **56**:11
57:21 **58**:2 **60**:11 **83**:20 **86**:2
intends [3] **50**:18 **60**:5 **61**:10
intent [7] **50**:4,20 **53**:10 **81**:4 **86**:19 **88**:
2,4
intention [1] **44**:7
inter [1] **63**:11
interact [10] **14**:20 **15**:12 **40**:13,22 **41**:
5 **46**:3 **67**:19 **77**:20 **83**:12,13
interacted [1] **69**:3
interacting [2] **16**:5 **62**:15
interaction [3] **9**:12,14 **41**:24
interacts [1] **56**:1
interconnection [1] **13**:19
interested [1] **15**:5
interesting [2] **33**:5,20
intermediate [2] **84**:14 **85**:8
internet [1] **71**:3
interpretation [1] **41**:2
interpreted [1] **20**:5
interrupted [1] **24**:6
interrupting [1] **36**:5
interstate [100] **8**:4,22 **11**:25 **12**:2 **13**:
21,25 **14**:19 **15**:19 **18**:1 **19**:15 **20**:7,8
21:6,14,24 **22**:6 **25**:14,21 **26**:11,16
27:13,20 **28**:16 **29**:12 **30**:7 **31**:5,6,9,
11,17,18,20 **35**:21 **40**:2,5,10,17,19 **41**:
15,17 **42**:4 **46**:1 **47**:1,5,9,12,20 **49**:7
51:25 **52**:8 **62**:13 **63**:3,11,12,19,21
64:1,6,11,12,17,18,22 **65**:2 **66**:1 **67**:8,
11,16,18,24 **68**:3,17,21,22 **69**:1,14,22
70:4,6,9,15,22 **72**:2 **73**:14 **74**:9,15 **76**:

12,13,23 **77**:4,20 **78**:14 **79**:23 **80**:3
82:25 **84**:5 **89**:3,7,15,19
interstateness [1] **13**:12
into [12] **14**:13 **16**:24 **17**:9,15 **22**:8 **25**:
25 **36**:10,12 **37**:20 **44**:18 **71**:4 **80**:3
intrastate [13] **8**:21 **10**:2,3 **17**:25 **18**:3
36:2 **46**:22 **47**:12,20 **49**:7 **65**:23 **78**:
13 **80**:3
intrastate-like [1] **77**:3
involve [3] **9**:3 **62**:15 **80**:20
involved [6] **20**:13 **21**:2,14 **25**:24 **28**:9
76:13
involves [1] **10**:5
isn't [6] **43**:11 **54**:20 **60**:8 **70**:3 **71**:8 **89**:
19
isolate [1] **13**:7
isolating [2] **30**:3 **84**:19
issue [3] **22**:19 **65**:10,15
issues [1] **38**:8
item [1] **49**:14
its [12] **17**:24 **37**:15 **42**:22 **44**:10 **45**:2
50:7 **51**:2,2 **54**:3 **61**:5 **62**:1 **75**:18
it's [65] **8**:6,14 **9**:1,6,11,15 **10**:7 **11**:9,
11 **12**:7 **13**:5,6,20 **16**:16,16,16,16,18,
18,18,19 **19**:20,20 **20**:10 **22**:16,17 **27**:
19 **28**:12 **29**:3 **31**:9 **33**:24 **34**:9 **37**:15,
17,18,18,24 **43**:14 **44**:16 **45**:1,2 **49**:3
51:8 **52**:15 **56**:19,19,21 **60**:17,18 **61**:
5 **64**:18 **68**:8,8,22 **70**:17 **71**:6,9 **73**:18
84:9 **85**:19,23 **88**:10,10 **89**:15,20
i've [2] **24**:10,10

J

jackson [41] **10**:7 **11**:13,17 **12**:7,21 **13**:
5,17 **28**:22 **29**:18 **30**:13,15,22 **31**:1,10,
25 **32**:3,12,15,18 **38**:5,6,16,20 **39**:12,
17 **65**:3,6,9,17 **66**:3 **68**:9,12,15 **69**:6
83:16,17 **84**:8,18 **85**:1,6,9
jennifer [1] **39**:22
jersey [4] **31**:12,14,14,15
job [1] **27**:6
joint [2] **42**:24 **61**:16
journey [63] **8**:21,22 **10**:3,3,12 **11**:21
12:2,12 **13**:21,25 **18**:2 **28**:17,18,19
36:4 **40**:19 **41**:15,18 **42**:15 **44**:5,6,10,
16 **45**:9,12,14 **46**:22 **47**:5,9,12,21 **49**:
8 **50**:5,6 **51**:14 **52**:8,8 **55**:5,16 **58**:25
60:20 **61**:7,7,11 **62**:7 **65**:15 **66**:1,6 **70**:
10,12,22,25 **71**:13 **73**:11,13,17 **74**:9,
16 **75**:7,8 **78**:14 **79**:21,25
journeys [2] **59**:1 **76**:24
judge [2] **24**:6 **87**:8
judged [1] **89**:4
jumping [1] **37**:20
jurisprudence [2] **41**:4 **48**:18
just [44] **9**:16 **13**:19 **20**:17 **23**:5 **24**:8,9
25:3 **28**:23 **30**:4 **33**:23 **34**:4,11 **35**:9
36:7,8 **37**:9 **38**:6,8,21 **40**:23 **41**:5,25

43:1,14 **44**:23 **45**:7 **46**:5 **48**:20 **50**:21 **52**:15,24 **53**:1,5,12,15,22 **54**:4 **61**:18 **65**:9 **67**:21 **69**:7 **70**:1 **80**:4 **81**:12
justices [2] **35**:23 **37**:5
justice's [1] **49**:13
justum [1] **89**:17

K

kagan [17] **25**:3 **26**:13 **27**:8 **28**:1,4,8 **35**:24 **37**:5 **52**:18 **53**:12 **71**:1,15,19, 24 **75**:12,14 **78**:1
kagan's [1] **55**:24
kansas [4] **10**:19,20,24 **82**:19
kavanaugh [9] **35**:5 **78**:3,4,6,15,18,21 **79**:9 **80**:12
key [4] **68**:13 **83**:24 **86**:8,8
keyed [1] **68**:23
kind [7] **19**:17 **31**:2 **54**:18 **59**:3 **60**:23 **76**:23 **87**:18
kinds [2] **74**:24 **81**:19
know [64] **13**:7 **22**:25 **29**:9 **33**:8,17 **35**: 17,24 **36**:1 **37**:1,20,22,23 **39**:5,9 **41**: 16 **43**:15,20 **44**:13 **48**:25 **49**:1 **51**:12 **52**:2,6,7 **53**:9,22 **54**:1,13,20 **56**:4,10, 18,22,22 **57**:3,24,25 **58**:11,21 **59**:6 **60**: 22 **62**:5 **63**:22 **65**:18,22 **66**:17,25 **68**: 19 **70**:17 **71**:23 **72**:11,11,20 **73**:8 **74**: 19 **76**:19 **81**:22 **82**:8 **84**:23 **85**:3 **86**: 20,21,22 **88**:13
knowing [1] **41**:18
knowledgeable [1] **57**:8

L

l [1] **85**:13
labor [2] **13**:23,25
lack [1] **88**:20
language [2] **20**:3 **21**:21
last [8] **24**:20 **39**:4 **40**:18 **46**:22 **47**:4 **51**:11,14 **86**:18
last-mile [23] **8**:18 **21**:7 **38**:9,21,25 **39**: 3,6 **40**:18,20 **46**:18,20,21 **47**:15 **48**:4, 18 **49**:8 **50**:1 **51**:10 **52**:4 **76**:24 **77**:2 **78**:7 **82**:13
last-minute [1] **49**:23
later [3] **64**:3 **65**:19 **79**:1
laughter [3] **24**:12 **35**:1 **44**:2
law [4] **60**:4 **63**:6,23 **88**:3
layer [2] **87**:25 **88**:2
learned [1] **26**:24
least [2] **14**:12 **44**:20
leaves [1] **74**:10
leg [20] **12**:11 **17**:25 **18**:15 **25**:16 **26**:14 **31**:22 **32**:9 **40**:19 **47**:4,9,11,20 **49**:7,9 **51**:11,14 **66**:14,15 **70**:6 **78**:13
legal [1] **11**:11
legally [1] **27**:25
legs [4] **25**:16,16,17 **80**:4
less [1] **74**:23

lesson [1] **26**:24
let [6] **35**:8 **48**:11 **49**:12 **55**:8 **60**:13 **62**: 3
let's [5] **20**:24 **29**:20 **35**:8,9 **44**:23
levels [1] **56**:5
like [20] **11**:2 **15**:9 **19**:9 **25**:5 **37**:9,19 **49**:4 **55**:1 **59**:12,12,16,16 **60**:24 **62**: 20 **67**:15,23 **71**:21 **76**:2 **81**:12 **87**:19
limit [1] **86**:2
limits [3] **63**:3,11,17
line [15] **26**:4 **27**:16,19 **32**:17 **36**:16 **37**: 3 **40**:3 **51**:7 **54**:14 **55**:3 **67**:25 **79**:15 **80**:19 **83**:12 **84**:16
line-drawing [4] **57**:23 **81**:25 **82**:7,10
lines [27] **8**:5,6 **10**:21 **22**:16 **25**:23,25 **29**:16,19,20,24 **30**:1,6,18,23 **40**:13 **46**: 2 **49**:15 **58**:11,12 **63**:6 **69**:20 **77**:19 **80**:21 **82**:19,24 **83**:2 **87**:12
link [1] **73**:4
lipscomb [2] **70**:19 **74**:14
litigation [2] **87**:23 **88**:2
little [9] **10**:10 **37**:2 **64**:2 **72**:16,21,21 **73**:2,2 **74**:23
lived [1] **88**:18
livestock [5] **59**:14 **72**:4 **74**:24 **81**:20, 22
load [1] **88**:24
loaded [7] **12**:25 **28**:19 **29**:3 **30**:17 **37**: 7 **84**:13,15
loading [33] **9**:23 **13**:4,6,6,20,20 **14**:23 **16**:3 **18**:22 **19**:12 **20**:19 **24**:19 **28**:14, 15 **29**:2,7,23,25 **30**:14,16,16 **31**:8,13, 23 **32**:7,10,17 **36**:9,9 **83**:23,25 **86**:13 **89**:5
loads [1] **10**:2
local [10] **24**:22 **25**:11 **43**:22 **44**:12,14 **50**:11,11,12 **51**:6 **82**:23
long [4] **17**:1 **56**:13 **57**:12 **89**:13
look [37] **9**:3,4,8 **12**:6 **22**:20,21 **31**:23, 25 **35**:3 **39**:9 **42**:23 **43**:3,11 **44**:7 **50**: 13 **53**:13 **54**:17 **55**:10 **57**:4 **59**:15 **63**: 18,22,23,24,25 **66**:9 **70**:18,19 **71**:10 **72**:3 **73**:12 **74**:14 **80**:5,6,7,9 **82**:17
looked [1] **8**:11
looking [16] **12**:5 **18**:25 **26**:22 **27**:2,4, 21 **37**:16,17 **50**:4 **53**:9 **67**:1,14 **81**:4,5, 6 **86**:6
lose [4] **34**:9,22 **35**:10 **36**:21
lost [1] **33**:8
lot [10] **14**:8 **20**:21 **24**:19 **43**:19 **63**:6 **74**:3 **80**:19 **86**:17,18,18
lots [5] **14**:9 **46**:8 **54**:23 **55**:25 **80**:1
lovitt [93] **8**:3,8,20 **9**:6 **11**:8,16 **12**:3,13 **13**:2,15,18 **14**:3,5,6,22 **15**:3,6,16,21, 25 **16**:3,8,12,14,19,21 **17**:10,16,18 **18**: 7,21 **19**:22 **20**:4 **21**:16 **22**:1,23 **23**:4,8, 20 **24**:3,7,16 **26**:5,17 **27**:17 **28**:3,6,11 **29**:9 **30**:9,14,21,25 **31**:7,21 **32**:2,5,14,

16 **33**:6,10,14,16,19,23 **34**:1,3,7,11, 15,18,21,24 **35**:13,15 **36**:15,23 **37**:13 **38**:3,14,18 **39**:2,14,18 **45**:19 **47**:10 **48**:10 **66**:9 **81**:24 **83**:23 **85**:12,13,15
lovitt's [2] **45**:25 **56**:7
lower [7] **33**:7 **51**:8 **58**:12 **59**:23 **63**:10 **76**:11 **88**:15
lumber [3] **68**:6,6 **84**:17
lying [1] **58**:3

M

made [2] **8**:19 **33**:16
made-up [1] **88**:11
maintains [1] **54**:23
make [8] **41**:24 **51**:17 **60**:9 **61**:22 **66**: 19 **69**:22 **79**:2 **84**:23
makes [6] **10**:16 **11**:24 **18**:13 **19**:7 **29**: 22 **42**:1
making [4] **12**:2 **25**:5,24 **71**:7
manufactured [1] **62**:18
manufacturer [22] **25**:10,10,15,19 **44**: 20 **52**:10,13,16,21,21,24,24 **53**:5,15, 16,20 **55**:24 **56**:3 **58**:22 **86**:22,23,25
manufacturers [1] **59**:4
manufacturing [4] **70**:23 **71**:12 **74**:10, 17
many [3] **46**:23 **72**:18 **76**:16
markets [1] **25**:11
matter [11] **11**:14 **26**:25 **36**:1 **37**:15 **55**: 7,9,12,15 **71**:15 **77**:15 **86**:24
mattered [1] **28**:10
matters [6] **11**:10,10,16 **27**:19 **48**:22 **86**:16
may [8] **19**:16 **24**:5 **39**:25 **61**:7 **73**:12, 14,14 **81**:16
maybe [10] **9**:1 **34**:24 **37**:1,8 **60**:3 **62**:3 **67**:10 **73**:23 **79**:1 **81**:20
mccomb [1] **76**:21
me [16] **10**:10 **11**:23 **14**:8,12 **18**:13 **24**: 23 **25**:9 **34**:25 **48**:11 **49**:12 **55**:8 **57**:7 **60**:13 **62**:4 **69**:8 **81**:1
mean [31] **9**:13 **10**:17 **17**:18 **22**:23 **24**: 20 **25**:3 **26**:23 **30**:21 **34**:4 **36**:13 **37**:3 **39**:2 **41**:21 **43**:11 **44**:18,19,22 **46**:18, 23 **48**:17 **49**:25 **50**:15 **56**:6,23 **65**:4 **68**:12 **69**:7 **71**:2 **72**:17,22 **83**:13
meaning [7] **63**:19 **64**:6,11,11,17,21 **67**:7
means [6] **15**:12 **41**:4 **60**:10 **64**:5 **77**:5 **88**:21
meant [9] **41**:22 **57**:12 **63**:5,20,20 **64**:5 **76**:17 **77**:6,7
member [1] **77**:23
mentioned [2] **67**:22 **69**:18
mentioning [1] **72**:5
merely [1] **40**:2
middle [1] **11**:20
might [9] **25**:15,17,17 **35**:8 **44**:19 **52**:1

54:19 57:23 83:13
mile [5] **24**:20 **26**:2 **36**:2 **39**:4 **76**:24
miles [1] **22**:9
mine [1] **21**:2
mines [1] **22**:5
mini-trial [1] **54**:3
minute [1] **18**:1
minutes [1] **86**:18
mirror [2] **24**:16,24
missing [1] **79**:2
mm-hmm [3] **38**:3 **39**:18 **80**:25
modern [1] **81**:18
moment [1] **40**:6
money [2] **45**:2 **60**:9
moore [1] **67**:25
more [3] **42**:1 **86**:3 **88**:3
morning [1] **31**:16
morris [1] **76**:21
most [5] **42**:19 **60**:23 **62**:14 **82**:6,8
motion [1] **82**:11
motor [1] **64**:1
move [1] **88**:23
movement [9] **9**:25 **19**:13,14 **20**:17 **35**:
 21,21 **37**:9 **86**:4 **88**:12
moves [1] **37**:2
moving [5] **12**:22 **29**:10,21 **30**:23 **69**:
 13
mr [16] **8**:17,24 **10**:2 **22**:8,11 **37**:19 **39**:
 24 **41**:10 **43**:4 **65**:22 **66**:5,11 **67**:15
 75:23 **76**:1 **85**:15
much [3] **13**:23 **17**:6 **86**:3
muddled [3] **54**:18 **55**:1 **87**:14
multi-variegated [1] **74**:20
my [5] **24**:11 **30**:20 **48**:17 **50**:23 **61**:22

N

narrower [2] **86**:1 **89**:23
need [12] **14**:12 **17**:8,15 **27**:23 **34**:6 **41**:
 15 **44**:18 **45**:24 **46**:5 **53**:23 **57**:2 **78**:8
needed [2] **13**:23 **87**:20
needs [6] **14**:16 **19**:3,18 **23**:24 **25**:11,
 19
never [3] **10**:4 **22**:6 **40**:5
new [10] **18**:15 **21**:20 **31**:11,12,13,14,
 15,16 **37**:22 **41**:4
next [3] **35**:16 **45**:19 **70**:6
no [39] **11**:16 **13**:15 **15**:1 **16**:10,17 **18**:
 10 **20**:18 **24**:16 **29**:18 **31**:10 **32**:5 **33**:
 10,13,14 **34**:6,14 **43**:9,14 **47**:19 **48**:24
 49:10,21 **51**:10 **54**:2,2 **55**:10 **58**:13
 63:8,14 **65**:5,17 **70**:16 **72**:14 **77**:15
 81:13 **83**:10 **84**:4,21 **88**:3
none [4] **17**:8,12 **41**:14 **89**:9
nor [1] **15**:12
not [95] **8**:7,8 **9**:15 **11**:6,17 **12**:21 **13**:8,
 10,19,22 **14**:20 **15**:5,11 **16**:23,23 **17**:
 19 **21**:7 **22**:11,17 **24**:25 **25**:6,18,25
 26:11,17,18 **28**:2 **29**:1,18,19,21,22 **30**:

10 **31**:8,9 **36**:2 **37**:16,16,23 **39**:2,5 **40**:
 2 **41**:2,7,8 **43**:17 **45**:3 **48**:1,2,20 **49**:3
 50:19,21 **51**:1,24,24 **52**:3 **55**:19 **58**:
 16 **60**:14,16 **61**:2 **64**:3,9,9,10,16 **65**:3,
 4 **67**:19 **68**:17 **73**:14,19,23 **76**:10 **77**:
 3 **78**:25 **79**:2,8,12 **81**:16 **82**:3,6 **84**:18
 85:2,19 **86**:16 **87**:1,5,5,18 **88**:10,11,
 19 **89**:3
nothing [3] **12**:13 **63**:16 **82**:12
nothing's [1] **56**:8
now [9] **32**:10 **40**:21 **43**:19 **49**:5 **52**:6
 56:20 **65**:20 **66**:4,17
number [1] **76**:25

O

oath [2] **58**:2,3
obfuscate [1] **79**:19
obfuscating [1] **79**:24
obfuscation [2] **56**:17 **79**:18
objection [2] **47**:19 **49**:10
obviously [1] **18**:17
occur [1] **87**:12
off [8] **12**:25 **28**:20 **36**:11,19 **37**:23 **38**:
 1 **41**:10 **48**:18
often [4] **49**:8 **55**:23 **72**:16 **75**:1
oh [1] **22**:18
okay [17] **15**:8,23 **16**:13,20 **17**:17 **20**:
 24 **25**:1 **32**:24 **33**:15 **34**:18 **35**:20 **38**:
 2 **51**:17 **55**:17 **65**:20 **77**:25 **78**:21
on [52] **10**:3,24 **12**:15,19,22 **13**:21,21,
 25 **17**:19,25 **19**:8 **22**:13 **23**:6,9,10 **26**:
 1,15 **28**:15 **34**:12 **37**:1,22 **38**:21 **39**:3,
 23 **40**:18 **41**:11,19 **42**:21 **51**:9 **52**:9
 55:25 **59**:2 **62**:10 **64**:11 **65**:6,18 **66**:1,
 8 **67**:4 **68**:7 **71**:3 **76**:7 **77**:22 **78**:9 **81**:
 2,14 **82**:4,15 **83**:20,23 **85**:14 **86**:14
once [7] **33**:3 **36**:18 **44**:21 **54**:16 **70**:5
 82:17 **84**:10
one [39] **18**:1,11,18 **24**:9 **25**:16 **27**:15
 28:5 **29**:4 **33**:9 **35**:7,25 **37**:7,10 **41**:6
 43:20 **44**:5,19 **45**:2 **49**:15 **51**:12,15,
 18 **52**:17 **55**:9 **58**:18 **59**:18,18,19 **62**:
 6,18 **70**:21 **78**:6,24 **79**:9,10,11,14,17
 83:17
ones [1] **79**:5
only [12] **10**:8 **11**:5,13,23 **18**:5,19 **41**:2
 47:12 **56**:10 **66**:4,10 **83**:8
open [1] **19**:10
opening [1] **67**:9
operating [1] **31**:6
opinion [2] **14**:11 **81**:8
opposed [2] **12**:9 **35**:18
opposing [2] **77**:10,11
or [76] **9**:4 **10**:16 **11**:21 **12**:19,25 **16**:3,
 6,10 **17**:1,3,6,15 **19**:15 **24**:9 **25**:6,16,
 16,18 **26**:4,4 **27**:15 **29**:4 **30**:2 **31**:18
 36:2 **37**:15,20 **38**:11 **40**:13 **41**:8 **44**:
 13 **45**:1 **46**:2,2 **51**:1 **52**:11 **53**:3,16,20

58:20,22 **59**:9 **62**:9 **65**:1,12 **66**:6,14
 67:11 **68**:16,17 **69**:2 **70**:21,23,24 **71**:
 11,22 **73**:14,16 **74**:10,14,17 **76**:2 **77**:2,
 4,10 **79**:20,23 **82**:20 **83**:12,19,21 **84**:
 19 **85**:19 **86**:22 **87**:8,16
oral [1] **39**:22
orange [1] **70**:13
oranges [2] **69**:23 **70**:15
order [7] **16**:25 **59**:7 **62**:11 **71**:19 **74**:
 16 **79**:7,16
ordered [17] **14**:9 **49**:18 **51**:12,13 **59**:8
 62:2,9,19 **70**:18,21,24 **71**:10,12 **73**:10,
 16 **80**:10,11
ordering [2] **71**:2 **74**:6
orders [5] **59**:9 **62**:6,6 **73**:8 **75**:5
ordinary [1] **67**:7
other [13] **8**:24 **27**:15 **35**:25 **41**:22,23
 43:11 **45**:23 **48**:2 **52**:20 **62**:8 **66**:8 **82**:
 14 **88**:8
ought [1] **25**:25
our [16] **8**:8,9 **9**:15,18,20,20 **16**:21 **20**:
 22 **37**:14 **39**:5 **53**:24 **54**:7 **68**:1 **82**:15,
 21 **89**:21
out [20] **13**:8 **17**:2 **19**:8 **34**:15 **44**:4 **50**:
 17,18 **55**:5 **58**:22 **59**:24 **63**:5 **68**:4 **72**:
 6 **74**:6 **75**:6 **79**:22 **81**:3,24 **84**:11 **87**:8
out-of-state [1] **74**:8
outside [1] **72**:21
over [11] **13**:24,25 **17**:6 **43**:15,16,17,18
 45:4 **54**:23 **73**:11 **88**:2
overrule [1] **77**:2
oversimplification [2] **9**:5,7
oversimplistic [1] **9**:2
own [1] **10**:24
owned [1] **14**:8

P

pacific [1] **80**:6
package [1] **87**:15
paid [2] **50**:18,19
parcel [1] **28**:16
part [6] **28**:16 **32**:3 **59**:11 **67**:13 **70**:10
 83:24
particular [6] **10**:13 **11**:20 **12**:11 **45**:11
 46:10 **66**:6
particularly [4] **43**:17,19 **48**:22 **87**:21
parties [9] **42**:14 **44**:8,15 **50**:4,8,10 **56**:
 14 **75**:2 **83**:22
parties' [2] **86**:19 **88**:4
parts [1] **55**:8
pass [1] **35**:25
passed [2] **44**:24 **64**:2
passes [8] **44**:21 **51**:19 **54**:14,16,19,22
 55:19 **81**:4
pause [2] **43**:2 **61**:18
pays [1] **60**:7
people [9] **8**:6 **11**:25 **21**:24 **40**:4 **43**:19
 51:11,13 **78**:13 **87**:14

perform [2] **47**:4 **78**:13
performance [3] **10**:6 **12**:6 **26**:10
performed [3] **12**:5,8,11
performing [7] **9**:21 **26**:21 **27**:7,22 **82**:
 23 **86**:11,13
performs [1] **10**:4
period [2] **40**:25 **56**:14
person [13] **11**:17 **18**:5 **31**:4 **38**:9 **43**:
 12 **49**:20 **50**:16 **51**:21,22 **62**:8 **70**:24
 73:10,15
personally [1] **40**:12
person's [2] **49**:19 **51**:24
perspective [2] **11**:11 **30**:8
petition [1] **48**:6
petitioners [1] **85**:14
philadelphia [3] **20**:25 **21**:3,8
phrase [1] **78**:9
phrasing [1] **78**:18
physically [2] **77**:19 **83**:11
pick [2] **24**:20 **29**:16
picked [1] **48**:4
picking [1] **13**:13
picks [2] **11**:3 **49**:17
place [2] **59**:6 **74**:16
plain [1] **40**:20
plant [1] **70**:23
please [1] **39**:25
plus [1] **51**:4
point [15] **19**:4 **23**:18 **25**:4 **32**:1 **36**:6,
 22 **39**:8 **40**:24 **42**:5 **45**:11 **60**:11,16,
 19 **87**:22 **89**:5
pointing [1] **81**:17
points [2] **81**:24 **84**:14
policy [1] **56**:23
portion [1] **47**:13
posed [3] **77**:14,18 **84**:24
position [9] **8**:8 **9**:15,18,20 **65**:13 **80**:
 16,20 **81**:10 **82**:1
potentially [2] **47**:22 **58**:15
power [1] **63**:12
practically [2] **25**:7 **67**:13
pre-1925 [1] **60**:3
precedent [1] **41**:20
precedents [2] **57**:7 **76**:25
predicted [1] **87**:11
preordered [1] **86**:21
presented [5] **46**:10 **48**:3 **77**:13,17 **83**:
 10
pre-shipping [1] **59**:5
pretty [2] **81**:3,23
prevail [2] **34**:12 **45**:17
pre-wickard [1] **57**:14
principle [1] **23**:15
principles [3] **20**:11 **40**:15 **75**:1
problem [2] **17**:21 **57**:24
process [7] **9**:23,24 **18**:14,24 **19**:6 **20**:
 18 **36**:17
produce [1] **51**:18

produced [1] **49**:14
producer [1] **60**:8
produces [2] **50**:17 **60**:4
product [1] **71**:8
products [3] **16**:25 **72**:15,15
profit [2] **81**:6 **86**:20
proposed [2] **45**:25 **47**:11
provider [1] **35**:19
public [1] **56**:23
pulling [1] **48**:1
purchase [1] **51**:2
purchased [1] **52**:15
purpose [6] **38**:13,16,18 **46**:20 **65**:13,
 18
purposes [4] **31**:19 **38**:14 **46**:9 **76**:15
push [1] **39**:3
put [7] **31**:3 **36**:12 **37**:22 **41**:11 **68**:7 **75**:
 9 **77**:9
puts [1] **10**:24
puzzling [1] **10**:10

Q

qp [3] **15**:8,10 **80**:23
qualifies [1] **38**:25
question [73] **8**:10,21 **15**:14 **16**:10 **18**:
 8,13 **20**:15 **22**:2 **26**:6 **28**:23 **30**:10 **32**:
 5 **33**:1,20,22,24 **34**:9,23 **35**:8,12 **39**:4,
 13,15 **41**:20 **43**:23 **45**:6,7 **46**:6,10,17
 47:10 **48**:3 **49**:13 **51**:9 **52**:20 **58**:4,9,
 18 **59**:13,21 **60**:14 **64**:23 **66**:4 **67**:16,
 17 **68**:13,20,25 **69**:5 **70**:3,5,8,8,14 **72**:
 1 **77**:9,12,14,17 **78**:12 **79**:18 **81**:2,18
 82:21 **83**:10 **84**:20 **85**:8,18 **86**:5,10
 88:3 **89**:6,7
questions [20] **17**:8 **20**:22 **24**:9,11 **38**:
 23 **42**:2 **57**:17 **58**:9 **59**:17 **78**:4 **79**:1
 80:19 **81**:9,23 **82**:1,7,10 **83**:6,8 **87**:14
quick [2] **33**:1 **83**:17
quickly [2] **59**:10 **87**:7
quite [1] **81**:8
quote [1] **69**:14

R

rabbit [3] **56**:24 **57**:3 **58**:9
race [2] **35**:22 **37**:9
rail [1] **22**:14
railcar [4] **22**:4,5,15,20
railroad [4] **47**:24 **49**:5 **67**:25 **68**:2
raised [1] **38**:11
reach [1] **40**:8
reached [1] **37**:4
read [10] **8**:14 **13**:18 **18**:8,25 **26**:19 **28**:
 12 **62**:24 **87**:6,8 **89**:12
reading [1] **20**:25
real [7] **11**:23 **21**:12 **25**:7 **48**:25 **49**:2,6
 69:11
realize [1] **42**:16
really [11] **10**:7 **14**:13 **15**:5 **19**:8,17 **36**:

1 **42**:13 **44**:20 **58**:14 **63**:15 **65**:10
rearick [6] **55**:20 **62**:17 **67**:22 **70**:20 **74**:
 14 **84**:15
reason [8] **30**:19,19 **38**:10 **42**:12 **43**:14
 48:4 **50**:2 **68**:5
reasonable [1] **69**:20
reasons [1] **48**:5
rebuttal [2] **85**:12,13
recognized [1] **40**:1
record [2] **9**:16 **61**:14
referred [1] **42**:3
regard [2] **32**:12,13
regardless [5] **26**:14 **27**:14 **29**:7 **40**:12
 49:9
regulable [1] **64**:20
regulate [1] **63**:12
related [2] **67**:12 **69**:2
relationship [4] **12**:18 **30**:11 **64**:18,25
relative [1] **12**:8
relay [5] **35**:22 **37**:9,18,24,25
relevance [1] **11**:19
relevant [3] **9**:25 **56**:7,11
relied [3] **23**:6,10,10
relinquish [1] **75**:19
rely [1] **23**:9
relying [1] **76**:7
remain [1] **30**:4
remained [1] **30**:24
remember [2] **44**:1 **79**:11
repackaged [1] **17**:4
repeatedly [1] **42**:20
reply [1] **48**:6
representatives [1] **56**:2
require [2] **9**:10 **41**:3
required [1] **64**:25
requirement [7] **16**:15 **19**:19 **40**:22 **41**:
 1,23 **83**:11 **87**:19
requires [2] **20**:8 **26**:8
reserve [1] **35**:11
reserved [1] **35**:8
reshipped [1] **21**:9
residual [2] **11**:12 **19**:24
resolve [2] **34**:6 **39**:16
resolving [1] **87**:24
respect [2] **12**:1 **13**:16
respectfully [2] **26**:18 **27**:18
respondent [1] **39**:23
response [4] **66**:23 **78**:7,22 **80**:22
restrictions [1] **55**:25
result [1] **14**:24
retail [26] **42**:10,22,25 **43**:5 **44**:11,13
 50:8,9 **51**:6 **54**:7,24 **61**:6,8,10,17,19
 62:11 **65**:14,20,23,25 **70**:5,11 **71**:22
 79:14 **85**:3
retailer [5] **52**:12,15 **58**:23,24 **76**:2
retailers [1] **53**:17
ride [2] **82**:15,18
right [48] **10**:17 **12**:7 **14**:21 **15**:15,25

24:1 **32**:15 **34**:20 **36**:25 **37**:11 **39**:1 **43**:13 **44**:22 **45**:6,14 **46**:4,7,13 **53**:8 **54**:14,18 **57**:4,20 **65**:4,16,17,20 **66**:2, 3,4 **67**:1,3 **68**:11,18,19 **69**:6,16,17 **71**: 9 **72**:11,14 **73**:25 **74**:1,4 **76**:18 **78**:18 **81**:8 **82**:1	**sell** [2] **25**:12 **51**:19 **selling** [4] **27**:1 **70**:23 **71**:11 **74**:16 **sells** [1] **51**:1 **sending** [3] **44**:13 **59**:4,6 **sense** [3] **10**:16 **11**:24 **19**:7	**someone** [5] **8**:24 **51**:19 **52**:6,17 **61**:8 **something** [8] **29**:16 **41**:21 **44**:14 **60**: 24 **62**:7 **77**:5 **86**:2,3 **sometime** [1] **59**:9 **sometimes** [2] **57**:23 **82**:24

rittmann [1] **87**:9 **roberts** [26] **8**:25 **22**:18 **23**:17 **24**:8,13 **25**:1 **32**:19 **35**:4 **38**:4 **39**:19 **43**:7,10, 25 **72**:8 **73**:18,23 **74**:18 **75**:11,13,15 **76**:4 **78**:1 **80**:13 **83**:15 **85**:10 **89**:25 **role** [1] **66**:5 **room** [1] **14**:8 **rule** [19] **14**:15,17 **15**:18 **16**:18,19 **19**: 16 **34**:12 **45**:25 **57**:18,21 **59**:25 **81**:13 **87**:19 **88**:10,11,18,25 **89**:22,23 **rules** [1] **87**:20	**sent** [1] **57**:25 **separate** [8] **44**:16 **51**:5 **58**:24 **59**:1 **61**: 7 **70**:11 **87**:25 **88**:2 **series** [1] **37**:6 **service** [1] **35**:19 **services** [1] **43**:21 **set** [4] **10**:11 **59**:17 **66**:6 **83**:19 **share** [2] **82**:15,18 **she** [10] **12**:23,24 **29**:23,25 **66**:13,19 **67**:1,3 **86**:12 **89**:10 **she's** [5] **13**:8,9,10,13 **66**:23 **shift** [1] **26**:3 **shifted** [1] **70**:1	**somewhere** [1] **21**:10 **sophisticated** [1] **74**:19 **sorry** [5] **20**:20 **24**:5,7 **43**:8 **75**:14 **sort** [6] **12**:16 **26**:1 **54**:15 **58**:11 **63**:5 **81**:5 **sotomayor** [21] **8**:4,16 **17**:21 **20**:20 **21**: 17 **22**:17,19 **23**:2,5,16,18 **24**:1,5 **32**: 23 **76**:5,6,10,15 **77**:8,25 **80**:22 **sound** [1] **19**:16 **southern** [1] **80**:6 **speaking** [1] **25**:8 **speed** [1] **87**:23 **spin** [1] **48**:17

S	

sabine [1] **80**:7 **said** [13] **8**:12 **20**:24 **21**:10 **23**:12 **48**:7 **55**:20 **61**:14,22 **66**:17 **68**:20 **69**:19 **78**: 6 **80**:21 **sale** [4] **50**:24 **51**:2,5 **58**:20 **same** [10] **21**:17,23 **23**:15 **25**:25 **27**:14 **31**:4 **50**:2 **58**:12 **64**:22 **87**:15 **sam's** [2] **42**:11 **76**:2 **saxon** [38] **8**:9,9,15 **9**:10,14,22 **12**:21 **13**:2,18 **14**:25 **18**:8,22 **20**:5,15 **21**:23 **23**:7,10 **26**:7,19 **28**:1,7,12 **29**:19,22 **31**:21 **32**:7,16 **36**:15,16,25 **38**:1 **40**:1 **42**:3 **47**:24 **85**:22 **86**:9 **88**:14 **89**:2 **saxon's** [2] **19**:1 **86**:12 **say** [32] **8**:15 **9**:7 **12**:23 **13**:18 **14**:23 **15**: 21,23 **20**:11 **29**:2,22 **31**:2 **32**:10 **54**:7 **56**:14,21 **58**:1,21 **60**:15 **61**:9 **62**:4 **66**: 12 **72**:2,13 **77**:2,4,16,21 **79**:23 **82**:3 **83**:9,19 **84**:5 **saying** [12] **15**:7 **19**:11 **22**:20,24 **28**:12 **52**:19 **57**:22 **63**:1 **69**:7 **73**:3,7 **88**:11 **says** [16] **9**:22 **18**:23 **26**:22 **32**:7 **36**:16 **42**:24 **53**:23 **54**:18,22 **65**:20 **66**:9,19 **76**:22 **80**:2 **86**:23 **89**:9 **scenario** [1] **13**:13 **schechter** [2] **59**:16,19 **scope** [2] **64**:16 **86**:1 **seaboard** [3] **67**:25 **70**:20 **84**:16 **seamen** [3] **12**:19 **47**:23 **49**:4 **second** [9] **10**:22 **11**:5 **13**:22 **24**:4 **26**: 12 **59**:3 **79**:10,11,14 **second-mile** [1] **21**:19 **section** [16] **11**:6 **12**:14,15 **16**:14 **19**: 17 **24**:3 **27**:20 **85**:17 **87**:19 **88**:7,10, 11,19 **89**:15,22,24 **see** [14] **15**:8,8,9,10 **34**:24 **45**:2 **46**:12 **48**:25 **50**:5 **74**:15 **81**:7 **82**:8 **84**:8 **87**:7 **seem** [5] **11**:23 **14**:7 **25**:9 **54**:15 **69**:8 **seems** [3] **46**:19 **59**:12 **81**:1	**ship** [4] **60**:23,25 **61**:2 **75**:18 **shipment** [8] **21**:10 **26**:16 **51**:22 **62**:8 **69**:10 **71**:11 **75**:3 **80**:3 **shipments** [1] **28**:9 **shipped** [12] **44**:10 **45**:9 **49**:15 **50**:7,21 **53**:11 **60**:17,21 **73**:10,15 **75**:3,6 **shipper** [5] **44**:7,9 **45**:10 **53**:10 **56**:12 **shippers** [1] **57**:25 **shipping** [4] **52**:11 **53**:24 **59**:21 **79**:6 **ships** [5] **51**:20 **61**:4 **62**:1,12 **74**:8 **should** [8] **15**:17 **27**:4 **34**:9,22 **59**:13 **60**:15 **67**:1 **87**:20 **shouldn't** [7] **22**:24 **26**:22 **27**:2 **77**:11 **86**:6,6,24 **showing** [3] **64**:4 **88**:16 **89**:2 **shuart** [2] **23**:11,14 **side** [1] **66**:8 **sides** [1] **65**:14 **sign** [1] **56**:22 **signaling** [2] **71**:21,22 **significant** [1] **27**:25 **similar** [1] **47**:5 **simple** [1] **19**:16 **simply** [1] **75**:18 **since** [2] **43**:19 **89**:1 **single** [2] **22**:4 **40**:24 **sit** [1] **50**:22 **situation** [4] **9**:11 **18**:19 **30**:6 **72**:7 **skip** [3] **43**:16,17,17 **slew** [1] **8**:5 **slight** [1] **9**:7 **sold** [2] **50**:20 **51**:23 **solely** [2] **21**:3 **36**:2 **solved** [1] **58**:16 **solving** [1] **34**:13 **some** [18] **9**:12 **14**:10 **19**:3 **30**:19,19 **35**:23 **42**:5 **44**:19 **55**:6 **62**:16 **68**:25 **71**:4,22 **80**:20 **81**:5,21 **82**:18 **84**:24 **somebody** [3] **62**:6 **73**:7 **75**:5 **somehow** [2] **12**:12 **28**:25	**spins** [1] **87**:7 **split** [5] **26**:1 **33**:13,14 **35**:16 **39**:16 **spoils** [1] **45**:1 **spots** [1] **36**:13 **stafford** [2] **59**:16,18 **start** [3] **20**:24 **32**:9 **81**:7 **started** [2] **22**:5 **31**:14 **starting** [2] **65**:12,12 **starts** [1] **28**:13 **state** [59] **8**:6 **10**:21 **14**:20,21 **17**:3 **21**: 13 **22**:16 **25**:18,23,24 **26**:3 **27**:16,19 **28**:25 **29**:4,15,18,20,24 **30**:1,4,6,17, 18,23,24 **31**:4 **40**:3,13 **46**:2 **49**:15,15, 16 **50**:18 **51**:13,13,15,18 **52**:17 **58**:22 **62**:6,7,8,12,19 **65**:24 **68**:8 **69**:12,20 **70**:21,21 **73**:9 **74**:6 **75**:6 **77**:19 **82**:19, 24 **83**:2,11 **statement** [1] **69**:9 **states** [4] **40**:4 **50**:18 **59**:20 **86**:15 **station** [1] **41**:12 **statute** [1] **20**:3 **statutes** [2] **64**:24 **65**:2 **stay** [1] **17**:1 **staying** [1] **31**:3 **steering** [1] **17**:11 **step** [4] **21**:11 **43**:16,18 **69**:10 **still** [5] **10**:24 **21**:21 **30**:17 **70**:6,15 **stop** [1] **72**:25 **stopped** [2] **33**:13 **73**:19 **storage** [1] **21**:3 **store** [23] **11**:4 **43**:5,18,20 **44**:11,13 **45**: 1 **49**:16 **50**:11,22,25 **51**:1,3,4,6,20,23 **54**:8 **61**:8 **65**:25 **70**:5,11 **71**:23 **stores** [19] **16**:25 **42**:10,22,25 **50**:8,10 **52**:23,23 **53**:3 **56**:2 **61**:6,10,17,19 **62**: 11 **65**:14,20,23 **79**:14 **straightforward** [1] **42**:18 **structure** [1] **23**:1 **structures** [1] **17**:24 **stuck** [1] **19**:7

subsequent [2] **61**:3 **73**:13
subsequently [1] **61**:3
substitute [1] **78**:10
subway [1] **19**:8
supermarket [2] **25**:20 **27**:10
suppose [6] **10**:17 **17**:23 **44**:23 **49**:13
 61:21 **71**:3
supposed [1] **84**:2
supreme [1] **76**:7
sure [21] **11**:7 **41**:7 **43**:23 **47**:18 **48**:9,
 13,15,15 **55**:2 **57**:9 **62**:23 **65**:8 **67**:6
 78:5,11,25 **79**:2,4,13 **80**:15,17
surprised [1] **74**:23
swift [1] **59**:19
system [1] **74**:20

T

take [15] **10**:17 **13**:8 **24**:21 **26**:2 **37**:21
 46:2 **48**:11 **49**:12 **56**:25 **57**:4,6 **60**:22,
 22 **68**:4 **77**:18
takeaway [1] **27**:3
taken [1] **41**:9
takes [1] **16**:24
taking [2] **37**:23 **65**:13
talk [1] **8**:5
talked [1] **29**:10
talking [3] **20**:9 **48**:7 **52**:5
task [2] **27**:6 **86**:12
technically [1] **80**:23
tells [2] **19**:23 **89**:17
temporary [2] **43**:2 **61**:18
tenth [6] **14**:11 **17**:11 **38**:24 **42**:16 **81**:7,
 7
term [7] **39**:3 **46**:24 **48**:17,21,22 **78**:8,
 10
terminal [1] **80**:6
terminology [1] **66**:14
terms [3] **24**:18 **89**:11,13
test [6] **14**:3,4 **21**:20 **25**:6 **26**:18 **28**:23
testing [1] **30**:2
text [5] **23**:1 **26**:19 **27**:19 **40**:20 **88**:9
textual [1] **26**:6
textually [1] **12**:14
than [9] **8**:24 **24**:15 **41**:22 **70**:8 **77**:6 **85**:
 18 **86**:1 **88**:4,8
thank [14] **25**:1 **32**:18,19 **34**:2 **38**:2 **39**:
 17,19 **72**:8 **75**:11 **80**:12 **85**:9,10,15
 89:25
that's [100] **8**:8,17 **9**:17,18 **10**:9 **11**:8
 12:5,14 **13**:21 **14**:24,24 **15**:14 **17**:11,
 19 **18**:10 **20**:12 **22**:10,11 **23**:24 **24**:18,
 23,24 **25**:21 **26**:17,17,18 **27**:10,17 **28**:
 10,15,21 **33**:18,21,21 **34**:23 **35**:7,16
 36:19 **39**:10,10,13 **40**:4 **45**:3,5,11,13,
 18 **46**:4,7 **47**:1,5 **48**:2 **51**:21,24,24 **52**:
 12 **53**:8 **54**:16 **57**:20 **59**:1,12,14,22
 61:6 **63**:7 **65**:3,4,4,16 **66**:2 **67**:16,22
 68:13,18,19 **69**:17 **70**:7,16,25 **71**:13

73:13,16 **75**:6,9 **76**:18,19 **78**:15 **79**:
 15 **80**:8 **84**:11,16,18,22 **85**:21 **86**:24
 87:5 **88**:24 **89**:2,16,24
their [12] **27**:5,6 **37**:4 **40**:8 **50**:9 **57**:25
 59:4,5 **64**:10 **67**:9 **82**:9 **84**:7
them [28] **13**:8 **17**:15 **20**:23 **23**:6 **24**:21,
 23 **27**:11,16 **37**:3 **50**:21 **51**:19,20 **53**:
 4 **59**:6,7,8 **61**:2,5 **62**:12,25 **65**:24 **70**:
 25 **71**:12 **73**:11,16 **75**:6 **82**:19 **89**:14
themselves [3] **16**:7 **29**:6 **30**:19
then [32] **10**:22 **17**:25 **18**:2 **19**:25 **20**:7,
 15 **21**:4 **25**:23 **34**:24 **36**:12 **37**:1 **49**:
 16 **51**:2,19 **52**:23 **53**:5 **54**:22 **58**:23
 60:8 **61**:2 **63**:20 **68**:6 **69**:25 **71**:6,14
 72:7,12,16 **73**:12 **76**:1 **78**:21 **79**:17
theory [2] **12**:10 **30**:3
there [37] **12**:13 **14**:5,7,16 **19**:11 **33**:10
 37:8 **46**:23 **50**:22 **51**:5 **54**:2,2 **56**:4,5,
 17 **57**:16 **58**:14 **61**:7 **68**:1 **70**:14 **72**:
 12 **73**:12 **76**:25 **78**:19 **79**:4,5 **80**:1 **81**:
 25 **82**:6,21 **83**:3,3,10,24 **84**:1,12 **88**:
 19
thereafter [1] **59**:10
there's [20] **12**:13 **18**:10,16 **24**:19 **25**:9
 33:14 **34**:6 **43**:14 **44**:6 **46**:8 **55**:8 **59**:
 17 **62**:14 **67**:21,24 **69**:20 **70**:11 **81**:13,
 20 **88**:3
these [19] **11**:25 **21**:24 **22**:25 **40**:15,20
 42:25 **43**:21 **51**:18,18 **57**:17 **58**:2 **65**:
 23 **71**:5 **72**:15 **74**:24,24 **81**:17 **83**:8
 89:18
they [43] **15**:19,22 **17**:14 **24**:22,25 **26**:
 21 **27**:6,23 **28**:6,8,9 **30**:14 **36**:25 **37**:1,
 3,7 **38**:10 **40**:12 **41**:13 **43**:20 **51**:9 **53**:
 3 **57**:25 **59**:6,24 **61**:2 **64**:9,10,15 **68**:
 20 **69**:3,18 **74**:19,25 **76**:23 **77**:22 **80**:
 11 **82**:25 **86**:10 **87**:13,13,16,16
they're [38] **12**:1 **15**:25 **16**:3 **17**:18 **19**:
 5 **23**:6,22,22,22,23 **24**:16 **26**:13,14,15
 27:8,8,13 **29**:21 **30**:15,16 **36**:7,9,11,
 12 **44**:15 **49**:8,9 **50**:20 **58**:3,12,16 **59**:
 5 **64**:4 **65**:19 **72**:16 **76**:10,11 **82**:19
they've [3] **41**:22 **73**:19 **85**:4
thing [8] **10**:9 **11**:24 **21**:18 **27**:14 **28**:13
 56:10 **83**:9,18
things [7] **15**:20,22 **16**:2 **35**:11 **45**:23
 46:8 **86**:21
think [79] **8**:14 **9**:6 **10**:8 **11**:4,8 **12**:9 **14**:
 16,17,22 **16**:14 **17**:10,18 **25**:4,13 **26**:6
 27:18 **28**:21 **29**:11,16 **34**:11 **36**:15,18
 39:4,8 **42**:18 **45**:5,6 **47**:21,22 **48**:21,
 24 **52**:1,9 **53**:19,21 **54**:11,19 **55**:2,7,9
 56:9,16,16 **57**:1,2 **58**:14,18 **59**:11 **60**:
 4 **61**:25 **64**:15 **65**:9 **66**:13 **68**:12 **69**:
 25 **70**:15 **71**:25 **73**:9 **74**:4,22 **75**:22
 77:1,17 **78**:22 **79**:4,5,10,14 **80**:21 **81**:
 9,24 **82**:6,17 **84**:5,9,19,21,22 **88**:15
thinking [3] **25**:8,14 **84**:3

third [7] **11**:2 **47**:9,11 **59**:17 **78**:25 **79**:
 2,17
third-party [1] **35**:19
thomas [7] **32**:21 **42**:3 **43**:6,9 **75**:16,17,
 24
those [42] **15**:20,22 **16**:1 **17**:8,12 **19**:1,
 10 **20**:10 **24**:15 **25**:24 **27**:12 **37**:12,13
 38:8,22 **39**:10 **50**:19,20 **52**:14 **59**:16,
 20 **60**:6 **61**:1 **62**:20 **64**:3,4,6,8 **70**:14,
 23 **71**:19 **73**:1,9 **77**:5,6 **80**:8 **81**:9,23
 83:6 **86**:7 **87**:6 **89**:13
though [2] **44**:18 **68**:3
thought [1] **63**:10
thousand [1] **34**:16
three [6] **20**:10 **25**:16 **58**:14 **59**:18 **79**:5,
 13
threshold [4] **16**:15 **19**:18 **87**:19,21
through [11] **8**:11 **19**:1 **20**:19 **32**:8 **60**:
 23,24,25 **78**:23,24,25 **79**:6
time [11] **13**:10 **20**:23 **40**:25 **41**:13,23
 53:10 **57**:12 **63**:10 **74**:10 **76**:17 **89**:13
title [20] **16**:24 **33**:2,2 **35**:12 **38**:7,23
 44:21,24 **51**:19 **54**:13,14,16,19,22 **55**:
 3,9,12,18 **75**:19 **81**:4
today [5] **39**:13 **65**:13 **74**:21 **87**:5 **88**:5
together [1] **20**:11
too [1] **86**:7
took [1] **67**:8
touch [1] **41**:12
touches [1] **11**:22
touching [3] **13**:9,11,14
town [1] **72**:21
traci [1] **85**:13
tractor [1] **37**:22
trade [1] **40**:3
traffic [2] **31**:18 **40**:3
trailer [3] **37**:21 **41**:6,7
train [3] **21**:5 **68**:6,22
trainman [3] **21**:1,13,14
tram [1] **80**:7
transaction [3] **52**:13 **58**:21 **89**:19
transferred [1] **21**:4
transformed [1] **17**:3
transport [3] **15**:11 **40**:9,18
transportation [62] **8**:11,13 **9**:9,22 **10**:
 1,4 **11**:25 **13**:3 **14**:23 **18**:9,11,15,23
 19:2,3,6,9,12,25 **20**:9,10,12,14,16 **21**:
 11 **23**:13,23,23 **26**:10,11 **27**:23 **28**:13
 31:22,22 **32**:6 **36**:17 **39**:7 **45**:22 **48**:1
 51:5 **52**:16 **66**:16,20 **67**:3,11,16,18
 69:2,11 **72**:3 **80**:4 **82**:24 **84**:6 **85**:20,
 21 **86**:15 **88**:13,22,25 **89**:3,4,20
transported [3] **8**:1 **68**:5 **70**:4
transporting [1] **21**:2
traveling [3] **28**:15 **40**:10 **86**:14
tried [1] **23**:5
trip [3] **25**:15 **27**:13,13
trouble [3] **51**:10 **55**:4 **58**:13

truck [17] **10**:23,25 **18**:18 **22**:8 **29**:12, 14,15 **37**:8,8,20 **41**:6,10,11 **47**:23,25 **73**:21,24	**uses** [2] **18**:4 **21**:22	3 **44**:18 **45**:4,4,24 **46**:3,11 **47**:14 **48**:4,

Official - Subject to Final Review

6 **82**:22
whoever [1] **70**:23
whoever's [1] **71**:11
whole [5] **41**:4 **45**:22 **87**:22,25 **88**:1
wholesale [2] **73**:20 **74**:2
wholesaler [18] **44**:22 **53**:6,15 **56**:1 **58**: 22 **71**:22 **72**:10,13,20,21 **73**:2,2,3,8,9, 25 **74**:1,11
wholesalers [5] **53**:1,2 **72**:16,17 **73**:5
wholesaling [1] **72**:23
whom [3] **14**:9 **47**:16 **51**:23
who's [1] **25**:23
whose [1] **21**:1
why [19] **10**:15 **11**:7 **12**:24 **33**:1 **38**:10 **40**:5 **43**:11 **45**:3,4 **47**:7,14 **49**:21,22 **57**:3 **59**:22 **61**:9 **66**:23 **81**:7 **84**:23
will [15] **42**:19 **43**:21 **45**:18 **46**:11 **53**: 20,21,22,22,23 **54**:10 **55**:14,25 **58**:3 **82**:6 **89**:14
win [2] **17**:19 **34**:6
wind [1] **56**:6
with [66] **9**:12,14 **12**:1,16 **13**:16,16 **14**: 21,23 **15**:12 **16**:6,10 **17**:4,5,13,21 **18**: 3,9 **20**:22,24 **21**:19 **22**:3 **25**:5 **28**:14, 14 **29**:5 **30**:5,12 **31**:2,14,23 **32**:7 **38**: 24 **40**:13,23 **41**:5,24 **45**:20,21,22 **46**:3 **47**:24 **53**:15 **56**:2,24 **57**:7 **59**:20 **60**:6 **62**:15 **63**:6,16 **67**:5,9,19,20 **68**:16 **69**: 3 **77**:5,20 **78**:16 **81**:19 **82**:13,18 **83**: 12,13 **88**:19 **89**:16
within [6] **19**:15 **21**:3 **42**:4 **49**:20 **64**:6 **89**:13
without [6] **32**:12,13 **41**:17 **43**:13 **87**: 24 **88**:6
wonder [1] **14**:12
won't [1] **89**:13
word [4] **21**:22,23 **47**:14 **77**:11
words [9] **41**:21 **52**:20 **63**:19 **64**:7,22 **67**:7 **77**:6,6 **85**:24
work [24] **9**:8,21 **10**:5 **12**:5,8,10,16 **17**: 13 **26**:21 **48**:1 **54**:3 **66**:5,16,20 **67**:3, 11 **68**:4 **77**:23 **85**:21 **86**:10,12,15 **89**: 3,4
worked [2] **59**:15 **69**:2
worker [29] **10**:18,20,22 **11**:2,5,20 **20**: 12 **22**:21,21 **29**:5,20 **31**:1,13,19,20 **37**: 17 **41**:25 **45**:22 **66**:13,14 **67**:10 **68**:1, 2,20 **69**:22 **85**:20 **86**:11 **87**:1 **88**:22
workers [34] **10**:12 **12**:1,18 **19**:24,25 **20**:10 **26**:20 **27**:5,22 **28**:2 **29**:12 **30**:4, 7,7 **31**:5,8 **40**:9,17,22 **46**:18 **47**:1,4 **48**:7 **49**:2 **52**:5 **62**:20 **66**:10 **67**:23 **69**: 1 **76**:12 **77**:18,22 **82**:22 **89**:18
workers' [3] **12**:6,16 **30**:11
worker's [2] **10**:23 **17**:13
working [5] **12**:1 **29**:5 **30**:5 **31**:2 **68**:16
works [1] **47**:21
world [8] **35**:9 **36**:3,8,21 **49**:3,6 **56**:7

81:19
would [62] **9**:7 **10**:11,16 **11**:7,23 **13**:22 **14**:22 **15**:21 **18**:15,19 **22**:2,7 **24**:1,25 **25**:9 **29**:16 **32**:9 **33**:4,19 **35**:11,12 **36**: 5,11,13 **41**:3,11,14 **42**:7 **43**:4 **46**:14, 17,25 **47**:3,19 **53**:6 **57**:21 **60**:4,15 **61**: 23 **62**:2 **66**:24 **69**:21 **72**:1,2,3 **75**:9,20, 25 **76**:1 **77**:1,4,15,16,21 **78**:9 **79**:22 **80**:23 **81**:25 **82**:2,17,22 **87**:11
wouldn't [3] **9**:12 **31**:23 **50**:3
wrap [1] **48**:20
written [1] **42**:17
wrong [2] **17**:12 **66**:24

Y

yard [1] **21**:3
yeah [21] **13**:5 **15**:3 **16**:8,20 **18**:16,21 **21**:16 **23**:8 **30**:15 **32**:14 **34**:1 **35**:2 **36**: 23 **39**:17 **46**:15 **75**:15,24 **76**:3 **78**:20 **85**:1,6
year [1] **34**:25
years [2] **12**:4 **88**:18
yep [1] **15**:6
yes [10] **13**:17 **14**:6 **16**:10,12 **38**:19 **57**: 13,15 **81**:11 **82**:5 **84**:4
yet [1] **59**:8
york [2] **31**:12,17
you'd [1] **74**:23
you'll [2] **34**:24 **74**:15
your [49] **10**:10 **11**:5,19 **12**:10,24 **19**:9 **22**:2 **24**:4,15 **25**:6,22 **26**:2,3,5,16 **27**: 9 **28**:23 **29**:11,11 **30**:7 **31**:6,19 **36**:5, 14 **39**:8 **43**:12,12 **46**:8 **47**:17,17 **52**:9 **60**:2 **62**:25 **63**:8,14 **65**:11 **66**:8,23 **70**: 4 **72**:12 **73**:1 **75**:20,20 **77**:9 **80**:16,19, 23 **81**:10 **82**:1
you're [32] **12**:4,5 **14**:14,18 **16**:22,23, 23 **18**:12 **20**:9 **22**:20 **23**:13 **27**:21 **28**: 15 **29**:3,15,15 **33**:4 **34**:12 **37**:16,17 **46**:1 **48**:20 **52**:19 **55**:4 **57**:18 **63**:1 **73**: 3,7 **76**:6 **78**:16 **81**:17 **86**:22
you've [6] **10**:11 **19**:7 **54**:25 **80**:18 **83**: 19 **86**:17

Z

zachary [2] **29**:13 **69**:18