

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DOUGLAS BROWNBACK, ET AL.,                             )  
                                    Petitioners,                             )  
                                    v.   ) No. 19-546  
JAMES KING,   )  
                                    Respondent.                             )  
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Pages: 1 through 68  
Place: Washington, D.C.  
Date: November 9, 2020

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5                            v.                            ) No. 19-546

6   JAMES KING,                            )

7                            Respondent.            )

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10                           Washington, D.C.

11                           Monday, November 9, 2020

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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 11:13 a.m.

16

17 APPEARANCES:

18 MICHAEL R. HUSTON, Assistant to the Solicitor General,  
19 Department of Justice, Washington, D.C. ;  
20 on behalf of the Petitioners.

21 PATRICK M. JAICOMO, ESQUIRE, Arlington, Virginia ;  
22 on behalf of the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MICHAEL R. HUSTON, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	PATRICK M. JAICOMO, ESQ.	
7	On behalf of the Respondent	34
8	REBUTTAL ARGUMENT OF:	
9	MICHAEL R. HUSTON, ESQ.	
10	On behalf of the Petitioners	64
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
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23  
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P R O C E E D I N G S

(11:13 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 19-546, Brownback versus King.

Mr. Huston.

ORAL ARGUMENT OF MICHAEL R. HUSTON

ON BEHALF OF THE PETITIONERS

MR. HUSTON: Mr. Chief Justice, and may it please the Court:

The text of the FTCA judgment bar resolves this case. The district court entered the judgment in an action under Section 1346(b), so that judgment constitutes a complete bar to any action by Respondent against the federal employees involved in his FTCA claim. That broad text unambiguously precludes Respondent's Bivens action here, which asserts the same injuries based on the very same subject matter.

The Sixth Circuit's refusal to apply the judgment bar in this case rested on two propositions: first, that when the United States prevails in an FTCA action, the district court must necessarily dismiss for lack of subject matter jurisdiction, and, second, that

1 such a jurisdictional dismissal does not trigger  
2 the judgment bar.

3 Both propositions are wrong. This  
4 Court rejected the Sixth Circuit's  
5 jurisdictional analysis in *FDIC v. Meyer*, but  
6 even more important for present purposes, this  
7 Court in *Simmons v. Himmelreich* squarely  
8 rejected the Sixth Circuit's conclusion that the  
9 judgment bar never applies to an FTCA judgment  
10 for the government.

11 The Court held instead that the  
12 judgment bar does apply where a plaintiff simply  
13 fails to prove his claim. And that conclusion  
14 follows directly from the text of Section 2676,  
15 which makes "the judgment" in an FTCA action  
16 preclusive, without drawing any distinction  
17 based on which side prevails.

18 Respondent now concedes that the Sixth  
19 Circuit's reasoning cannot be reconciled with  
20 *Simmons*, so he shifts to an alternative  
21 argument. He says he should be able to bring an  
22 FTCA action and an individual action together  
23 without the judgment bar coming into play.

24 But the statutory text directly  
25 refutes that argument too. Whereas common law

1 res judicata made a judgment preclusive "in a  
2 subsequent action," Congress in the judgment bar  
3 expressly departed from that rule and prohibited  
4 any individual action following an FTCA  
5 judgment.

6 That's because Congress wrote the  
7 judgment bar to prevent duplicative litigation  
8 against the government's employees, and that  
9 objective does not depend on whether the  
10 plaintiff's individual action is brought with  
11 the same case number or a different one.

12 The judgment below should be reversed.

13 CHIEF JUSTICE ROBERTS: Mr. Huston, I  
14 -- I want to ask you about your -- your last  
15 point. As -- as you read this statute, the  
16 disposition of an FTCA claim bars Bivens claims  
17 against the employee.

18 But, of course, the statute speaks of  
19 actions, not -- not claims. And it was -- was  
20 and is very well established that there's no bar  
21 with respect to claims in the same action.

22 If -- if Congress were going to make  
23 such a dramatic departure from that rule, the  
24 obvious word to use is right there; it's  
25 "claims." And yet, they -- they didn't do that.

1                   MR. HUSTON:  If I might make two  
2 points about that, Your Honor.

3                   The first is that, as I just said,  
4 you're right that the common law rule was that a  
5 judgment in a -- in a subsequent action is  
6 preclusive.  But I think you can see that  
7 Congress made exactly the type of express  
8 departure from the common law that Your Honor  
9 mentioned, because it deleted the word  
10 "subsequent," which you will find in the First  
11 Restatement, in this Court's cases.  Over and  
12 over again, Congress removed the word  
13 "subsequent action" and replaced it with a  
14 complete bar to any action.

15                   CHIEF JUSTICE ROBERTS:  Well, I don't  
16 know -- I don't know that that's the clearest  
17 way they could go about it.  The clearest way to  
18 go about it would say "the claim."  It would be  
19 a -- a complete bar to any claim that is -- is  
20 raised, as opposed to, you know, any subsequent  
21 action.

22                   That's where the real departure is.  
23 And it seems to me that that's a much more  
24 direct way to eliminate any confusion than  
25 simply deleting, you know, the "subsequent" in

1 -- that appeared in some -- some cases.

2 MR. HUSTON: Well, Your Honor, in --  
3 in 1946, as we explain in our reply brief at  
4 page 8, the definition of the term "action" was  
5 a demand for relief in court. And I think you  
6 can see that Section 2676 uses the term "action"  
7 to be essentially synonymous with "claim"  
8 because it refers to an action under  
9 Section 1346(b). And so it's clearly tying the  
10 -- the word "action" to specific causes of  
11 action.

12 But, again, I think, if you put the  
13 common law, the classic canonical formulation of  
14 res judicata side by side with this statute, the  
15 key difference you see is the deletion of the  
16 word "subsequent" and the replacement with the  
17 word "any."

18 So I think it's not surprising that  
19 Congress would refer to preclusion of an action,  
20 because that's traditional common law res  
21 judicata. What the difference was, was that  
22 they eliminated the requirement that preclusion  
23 would occur only in a subsequent action and made  
24 it a complete bar to any action.

25 And that, of course, accords directly



1 with Congress's purpose because, from the  
2 standpoint of preventing duplicative litigation  
3 against the federal employees, it makes  
4 absolutely no difference whether the duplicative  
5 individual action is filed together in the same  
6 lawsuit with the FTCA action or separately. And  
7 I think it --

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Justice Thomas.

11 JUSTICE THOMAS: Thank you, Mr. Chief  
12 Justice.

13 Mr. Huston, I'd like to pick up on  
14 your last point.

15 Now the -- in this case, Respondent  
16 filed the Bivens action together with the FTCA  
17 action and -- though the argument seems to have  
18 just disappeared and then reappeared here.

19 Petition -- Respondent now argues that  
20 if -- if he loses on the -- on the FTCA claim,  
21 that he -- that he has the alternative argument  
22 that since -- since these were filed together,  
23 the outcome should be different from a case in  
24 which they were filed separately or  
25 sequentially.

1                   What would be your argument there?

2       First, can he even make that argument now?  And,  
3       two, if he can, what -- give -- would you  
4       elaborate more on your response to that?

5                   MR. HUSTON:  Absolutely, Justice  
6       Thomas.

7                   To your -- to your first question, I  
8       think it's clear that Respondent did not develop  
9       this argument in anything like the way that he  
10      did in his brief below.  Now whether -- whether  
11      he waived it or not, you know, we haven't taken  
12      a position on that.  He gestured at the idea  
13      that this litigation wasn't duplicative because  
14      he only filed one lawsuit.  But, certainly, this  
15      is largely an argument that's been developed in  
16      his brief in this Court.

17                  To your -- to your question about why  
18      we -- I think the text makes clear that that's  
19      not allowed, in addition to the point I was just  
20      making to the Chief Justice about the way in  
21      which Congress expressly departed from the  
22      common law by changing the -- the formulation, I  
23      think the -- the implications of Respondent's  
24      position are striking.  And the reason why every  
25      single court of appeals has rejected

1 Respondent's argument in the 70 years since the  
2 judgment bar was enacted is that his argument  
3 would permit him actually to litigate under the  
4 FTCA and prevail, to win a judgment against the  
5 United States and then seek additional damages  
6 against the government's employees, for example,  
7 punitive damages, just because he brought the  
8 actions together in the same lawsuit.

9           But we know from this Court's decision  
10 in *Gilman* that that result is precisely what  
11 Congress created the judgment bar to avoid, and  
12 that's because the policy of the judgment bar is  
13 one of repose. Congress found that lawsuits  
14 against the government's employees are extremely  
15 burdensome, and it wanted to limit them without  
16 precluding them entirely by saying that, if a  
17 plaintiff chooses to take advantage of the FTCA  
18 cause of action, then the judgment in that  
19 action will bring repose to the entire  
20 controversy.

21           JUSTICE THOMAS: On the point of what  
22 judgment, what sort of judgment in an action is  
23 included, would an appeal -- a -- a judgment  
24 that is still appealable also have the same  
25 preclusive effect?

1           MR. HUSTON: Yes, Your Honor. I think  
2 the definition of "judgment" in Section 26 is  
3 the same as the definition of the word  
4 "judgment" in the Federal Rules of Civil  
5 Procedure. It is the order of a district court  
6 that is appealable.

7           Now, of course, that means that if a  
8 plaintiff succeeds in appealing an FTCA judgment  
9 and gets it vacated by a court of appeals, at  
10 that point, there no longer is a judgment in an  
11 action under Section 1346(b) and, therefore, the  
12 judgment bar would no longer apply.

13           But, while the judgment entered by the  
14 district court is in force -- and, of course, in  
15 this case, that judgment is final -- that  
16 judgment by the plain text is a complete bar to  
17 any individual action against the federal  
18 employee.

19           JUSTICE THOMAS: Thank you.

20           CHIEF JUSTICE ROBERTS: Justice  
21 Breyer.

22           JUSTICE BREYER: Thank you.

23           Can -- can you tell me if I have this  
24 basically right? Courts of appeals get lots of  
25 appeals from district courts. And I thought a

1 judgment is a piece of paper normally that the  
2 district judge files at the end of a lawsuit,  
3 and it says "Judgment," and it tells you how the  
4 lawsuit turned out, who won, and perhaps on what  
5 grounds.

6 And, here, the judgment in an action  
7 under 1346(b) shall constitute a complete bar.  
8 But, normally, if you have four different claims  
9 in the lawsuit, the judgment doesn't come in  
10 until the whole thing is over.

11 You might preliminarily decide or you  
12 decide the judge says this -- he's going to lose  
13 on this claim, he's going to lose on this claim,  
14 maybe he'll win on this claim, and, at the very  
15 end of the thing, we have a judgment. Isn't  
16 that how it works?

17 MR. HUSTON: Yes, Your Honor, I think  
18 that description of the word "judgment" is  
19 right, but that is exactly the judgment that the  
20 district court entered here. And you can see  
21 that at Petition Appendix 86A. The district  
22 court resolved all of the claims in the case.

23 Now the key to the judgment bar, of  
24 course --

25 JUSTICE BREYER: Well, it's the

1 judgment shall constitute a bar to an action of  
2 the claimant by reason of the same subject  
3 matter, et cetera, but the judgment didn't  
4 appear until after he wanted to pursue his  
5 Bivens claim.

6 MR. HUSTON: Your Honor, the --

7 JUSTICE BREYER: There was no judgment  
8 to bar it because the judgment wasn't entered  
9 yet.

10 MR. HUSTON: Respectfully, I disagree,  
11 Your Honor. I think the judgment was entered by  
12 the district court at the -- when it resolved  
13 the dispositive motion, it resolved all of the  
14 claims in the case and it entered a judgment.

15 That document, which is at Petition  
16 Appendix 86A, that is the thing that triggered  
17 the judgment bar. And Respondent left that  
18 judgment final -- with respect, he left the  
19 judgment in the action under Section 1346(b)  
20 final by not appealing it.

21 So the core -- the core rule of the  
22 judgment bar, when that judgment was entered, it  
23 precludes any further litigation at that point.

24 JUSTICE BREYER: I -- I agree with  
25 that. But I -- but I -- I mean, wasn't the

1 judge wrong to enter a judgment before he  
2 decided the Bivens claim, or did he decide the  
3 Bivens claim in the judgment?

4 MR. HUSTON: He decided the Bivens  
5 claim, Your Honor. The district court resolved  
6 --

7 JUSTICE BREYER: All right. He  
8 decided it. Okay. On what ground did he decide  
9 it? He decided it because there was a bar.  
10 But, at that moment, there wasn't a bar because,  
11 when he decided it, it was before he entered the  
12 judgment.

13 MR. HUSTON: No, no --

14 JUSTICE BREYER: And at that point,  
15 there was no judgment.

16 MR. HUSTON: No, respectfully, Your  
17 Honor, the --

18 JUSTICE BREYER: Oh, all right.

19 MR. HUSTON: -- district court's  
20 analysis had nothing whatsoever to do with the  
21 judgment bar. The district court adjudicated  
22 the substance of both the Bivens cause of action  
23 and the FTCA cause of action. It never said  
24 anything about the judgment bar.

25 The judgment bar was triggered only

1 after the district court entered judgment. And  
2 you -- you can see this in the district court's  
3 opinion.

4 JUSTICE BREYER: All right. All  
5 right. I -- I -- I have enough to see that I  
6 have to sit down and figure this out word by  
7 word, which I'll do.

8 CHIEF JUSTICE ROBERTS: Justice Alito.

9 JUSTICE ALITO: Assuming the principal  
10 argument now made by Respondent wasn't  
11 forfeited, we have discretion whether to affirm  
12 on that alternative ground. And what would you  
13 say as to why we should not exercise that  
14 discretion?

15 MR. HUSTON: Because, Your Honor, the  
16 -- the -- this Court has held repeatedly in  
17 interpreting the FTCA that the text means what  
18 it says.

19 And, in particular, the word "any"  
20 really does mean any. No exceptions. Those are  
21 the core lessons of the Court's decisions in  
22 Simmons, in Hui, in Millbrook, in Ali, and in  
23 Smith. And so I think that all the Court has to  
24 do is say that the language of this statute is  
25 intentionally and exceptionally broad.



1           Congress imposed a complete bar to any  
2 individual action, and that precludes Respondent  
3 from bringing a demand for relief under Bivens  
4 regardless of whether it's pleaded separately  
5 from or together with the individual action.

6           So I think it's just --

7           JUSTICE ALITO: Well, that's a -- that  
8 is an argument on the merits of that issue,  
9 isn't it? I'm -- I'm asking the preliminary  
10 question, why should we even get to that here?

11           We granted cert to decide a particular  
12 question which has to do with the effect of a  
13 final judgment. Why should we not presume most  
14 of the time we answer the question on which we  
15 -- we granted review and not some other  
16 question?

17           So that's my question. That -- that's  
18 what I'm asking you. Why should we depart from  
19 our normal practice of just deciding the  
20 question presented and decide another  
21 question --

22           MR. HUSTON: I don't think that --

23           JUSTICE ALITO: -- which has been  
24 addressed by -- how many courts of appeals have  
25 addressed this issue and what have they decided?

1           MR. HUSTON: Seven courts of appeals  
2 have addressed this argument, Your Honor. Every  
3 single one of them has rejected the argument  
4 that Respondent now makes that he is entitled to  
5 litigate under the FTCA, prevail, and then  
6 continue suing the government's employees.

7           So I think Your Honor is exactly right  
8 that the reason why you should not exercise  
9 discretion to consider this argument is because  
10 it simply doesn't warrant the Court's review.

11           The only court of appeals that has --  
12 has even come close to accepting Respondent's  
13 argument is the Ninth Circuit, and the only way  
14 that it did that was by building in a rule that  
15 the judgment bar depends on which side wins.

16           And that, of course --

17           JUSTICE ALITO: Let me try to -- let  
18 me try to ask one question about the question on  
19 which we did grant review.

20           In your -- in your view, what is the  
21 dividing line between a claim that is not  
22 cognizable under 1346(b)(1) and a claim that is  
23 cognizable yet fails on the merits?

24           MR. HUSTON: Well, Your Honor, I think  
25 the insight of this Court's decision in FDIC v.

1 Meyer is that "cognizable" means the same thing  
2 as "actionable," and a claim is actionable so  
3 long as the plaintiff alleges the elements, and  
4 that -- of Section 1346(b).

5 And that makes sense because the  
6 question -- as this Court describes in -- in  
7 Meyer, the question whether the United States  
8 has waived sovereign immunity for a particular  
9 type of legal demand for relief is analytically  
10 distinct from the question whether the plaintiff  
11 can prevail on the merits or even whether he  
12 stated a claim for relief under Federal Rule of  
13 Civil Procedure 8.

14 JUSTICE ALITO: Well, is it -- is that  
15 the -- is it the same test as it would be under  
16 a federal question, in a federal question case?

17 MR. HUSTON: I think that that is a  
18 perfectly fine analogy, Your Honor. Of course,  
19 if a plaintiff pleaded in diversity that his  
20 demand for relief was worth more than \$75,000,  
21 and then it turns out later that he actually has  
22 no claim at all at summary judgment, everyone  
23 understands that that is a dismissal on the  
24 merits of the claim that triggers res judicata,  
25 even though we now know at that point that the

1 amount in controversy in the case is zero.

2 No one would think that the --

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Justice Sotomayor.

7 JUSTICE SOTOMAYOR: Counsel, I -- I am  
8 a little confused, and perhaps your adversary  
9 will un-confuse me, but I don't think every  
10 circuit has held that same suit claims of an  
11 FTCA and a Bivens claim means that you can't  
12 appeal them.

13 I thought at least the Ninth Circuit  
14 has said so. All of the other circuits, I agree  
15 with you, have said that, if you lose a FTCA  
16 claim, you can't file a separate claim. That's  
17 not the issue. It's the same claim. But your  
18 adversary can tell me what the circuit split is  
19 on that question.

20 However, I am going to go back to what  
21 Justice Alito raised. You brought the cert  
22 petition. I believe that your adversary in its  
23 -- I believe I know in its response, not at  
24 length, but it did mention this as an  
25 alternative ground not to grant cert, that he

1 could bring the two claims in the same action  
2 and not be precluded. And I think the same  
3 argument was raised below. Am I correct?

4 MR. HUSTON: Well, I certainly agree  
5 with Your Honor that the Respondent raised the  
6 argument as an alternative ground in the brief  
7 in opposition. The argument -- again, in the  
8 lower courts, in the court of appeals, the  
9 argument -- the Respondent did not develop this  
10 argument with anything like the argumentation  
11 that now appears in this Court.

12 JUSTICE SOTOMAYOR: You know  
13 something, counsel, that may or may not be true,  
14 but it's fully briefed here. It's an issue of  
15 law, isn't it? And you can defend the judgment  
16 on any legal ground, correct?

17 MR. HUSTON: Yes, Your Honor. And  
18 that's why we have fully briefed the --

19 JUSTICE SOTOMAYOR: All right. Now,  
20 counsel, let me go on to where the Chief  
21 started. He said that the FTCA talks about a  
22 judgment in an action. In Section 2672 of the  
23 FTCA, it says explicitly: Acceptance of an  
24 administrative settlement with the U.S. shall  
25 constitute a complete release of any claim

1 against the United States and against the  
2 employee of the government.

3           It seems to me that Congress knew how  
4 to say that -- that there was a big difference  
5 between a release of a claim rather than a bar  
6 to an action. So why should we accept your  
7 argument that they meant the same thing when  
8 they used different language in two different  
9 sections?

10           MR. HUSTON: Because, Your Honor, the  
11 definition of the term "action" in 1946 when  
12 Congress wrote the judgment bar is a demand for  
13 relief in court. And I think that when -- if  
14 you just substitute that for -- that into the  
15 text, then the judgment in an action under  
16 Section 13 --

17           JUSTICE SOTOMAYOR: All right,  
18 counsel, I'm almost out of time, so let me just  
19 ask you one last question. As a matter of  
20 policy, why would Congress have wanted to go  
21 around the common law rule?

22           It seems to me that then happenstance  
23 controls. This district court could have ruled  
24 the other way, could have said the Bivens claim  
25 -- or, I'm sorry, the Bivens claims -- like in

1 Manning, the Bivens claim is good, but the FTCA  
2 claim is not.

3 And you're still saying there's a bar,  
4 correct?

5 MR. HUSTON: Arguably, Your Honor, I  
6 mean, that would be consistent with one of  
7 Congress's purpose for the judgment bar to wrap  
8 everything up.

9 JUSTICE SOTOMAYOR: But why does that  
10 make --

11 MR. HUSTON: It is that --

12 JUSTICE SOTOMAYOR: -- why does that  
13 make sense when Congress explicitly, in the FTCA  
14 and in the Westfall Act, saved the Bivens  
15 claims?

16 MR. HUSTON: Because the purpose of  
17 the judgment bar, Your Honor, is repose.  
18 Congress wanted the judgment in the FTCA action  
19 to bring repose to the entire controversy.

20 To your question specifically about  
21 Bivens, I think this Court addressed that issue  
22 directly in Hui, and just as it said there, the  
23 text of the judgment bar is certainly broad  
24 enough to preclude causes of action that are  
25 both known and unknown when Congress enacted it.

1 I think the more --

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Justice Kagan.

5 JUSTICE KAGAN: Count -- counsel, just  
6 a point of clarification first as to the extent  
7 of your argument. There are courts in the  
8 Seventh and the Tenth Circuit that have said  
9 that the judgment bar can undo even prior final  
10 judgments on Bivens claims, so sort of  
11 retroactively undo a Bivens judgment.

12 Do you think that that's right?

13 MR. HUSTON: I think it's possible,  
14 Your Honor, because it would be consistent with  
15 the goal of the judgment bar to wrap the entire  
16 resolution of the claim into the judgment on the  
17 FTCA action.

18 Now, on -- I would also understand the  
19 contrary argument that when the judgment has  
20 been entered in the individual action, there is  
21 no more individual action for the judgment bar  
22 to preclude. It's, of course, not something  
23 that this Court has to decide in this case,  
24 because this is the quintessential example of an  
25 FTCA judgment on the merits and, therefore, it's



1 the judgment in an action under Section 1346(b).

2 JUSTICE KAGAN: I guess I'm wondering  
3 whether your understanding of this provision  
4 makes it into something that the language  
5 suggests it's not.

6 So, if I understand your position  
7 correctly, you're really turning this into an  
8 election-of-remedies provision; in other words,  
9 that once somebody files an FTCA claim, then,  
10 really, they -- they can't bring a Bivens claim  
11 anymore. And the only way to bring a Bivens  
12 claim is just to forego the FTCA claim.

13 And that might make sense, you know,  
14 as a policy matter, to turn this statute into  
15 such an election-of-remedies provision, but the  
16 statute doesn't read like that. It -- I mean,  
17 Congress knows how to write a provision like  
18 that.

19 Instead, this statute reads like a  
20 preclusion statute. And preclusion, as the  
21 Chief Justice began the argument by saying,  
22 always applies between suits and not within a  
23 single suit.

24 MR. HUSTON: Well, Your Honor, I -- I  
25 -- I -- I really think that Your Honor has it

1 exactly right, that the purpose of this statute  
2 was to offer plaintiffs in Respondent's position  
3 a choice. They could either stick with the  
4 traditional individual cause of action, they  
5 weren't foreclosed from that. But, if they  
6 choose to take advantage of the FTCA cause of  
7 action, which, of course, opens the opportunity  
8 for the plaintiff to recover from the judgment  
9 fund -- judgment's fund, then that choice comes  
10 with consequences, and the critical consequence  
11 --

12 JUSTICE KAGAN: All right. But I  
13 think I was suggesting, just to -- just to make  
14 myself clear, that's a perfectly sensible  
15 statute. I guess my question is, is it the  
16 statute that Congress wrote? That Congress  
17 wrote a statute -- I mean, election-of-remedy  
18 statutes are easy to write. And this is not  
19 that. This is a preclusion statute, which has a  
20 different set of consequences.

21 MR. HUSTON: Your -- yes, Your Honor,  
22 but the -- the text of the judgment bar --  
23 there's no -- is unambiguous. The triggering  
24 event is the judgment in an action under  
25 Section 1346(b), and then what comes next is a

1 extremely broad preclusion provision, a complete  
2 bar to any action against the employee.

3 I think the only fair way to read that  
4 provision is that Congress told plaintiffs that  
5 if they pursue an action under Section 1346(b)  
6 and it goes to judgment, then there can be no  
7 further litigation against the federal  
8 employees. And that's the --

9 JUSTICE KAGAN: Thank you.

10 MR. HUSTON: -- same objective --

11 CHIEF JUSTICE ROBERTS: Justice  
12 Gorsuch.

13 JUSTICE GORSUCH: Thank you. No  
14 questions.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Kavanaugh.

17 JUSTICE KAVANAUGH: Good morning,  
18 Mr. Huston. I just want to follow up on  
19 something Justice Alito raised and then Justice  
20 Sotomayor followed up on, which is this  
21 alternative argument being before us.

22 I mean, we -- we could decide it, but,  
23 as the Court's often said, we're a court of  
24 review, not of first view. And there are  
25 obviously important exceptions to that

1 principle, but I'm not sure this case really  
2 cries out for us to depart from the general  
3 principle.

4 So why don't we resolve the question  
5 presented that's presented in the cert petition,  
6 I think was Justice Alito's question, and that's  
7 sufficient unto the day, and we can worry about  
8 the other issue when and if we need to address  
9 that?

10 MR. HUSTON: Justice Kavanaugh, I  
11 think that is exactly what the Court should do.  
12 And the reason why that would be appropriate in  
13 this case is that the alternative argument  
14 raised by the Respondent would not warrant this  
15 Court's review.

16 As I mentioned, every court of appeals  
17 has rejected Respondent's position. Now the  
18 Ninth Circuit, as Justice Sotomayor pointed out,  
19 has adopted a slightly different rule, no -- not  
20 shared by any other circuit, that just -- but  
21 that really is just a relic of before Simmons,  
22 because the Ninth Circuit's rule is that whether  
23 or not the judgment bar is triggered depends on  
24 who wins in the FTCA action. And Simmons was  
25 absolutely clear that that is not how the

1 judgment bar works, which, of course, accords  
2 with the statutory text.

3 So I really don't -- I just -- I think  
4 the Court should not address the question.  
5 There's no need to, because it's not  
6 cert-worthy. We addressed it in our brief  
7 because it was raised and we wanted the Court to  
8 have all the arguments, but I think that's a  
9 perfectly sensible way to resolve the case.

10 JUSTICE KAVANAUGH: If we do resolve  
11 that question, I'm going to reiterate questions  
12 asked by others now, but the key problem for you  
13 is it says "any action," not "any claims."

14 Do you just want to summarize your  
15 best arguments in response to that?

16 MR. HUSTON: Thank you, Justice  
17 Kavanaugh, yes. Again, the term "action" is  
18 defined in legal dictionaries in 1946, at the  
19 relevant time, as a demand for relief in court.

20 So I think, if you substitute that  
21 phrase into the judgment bar, then the judgment  
22 in this FTCA action is a complete bar to any  
23 demand for relief by the plaintiff under Bivens.

24 And that is -- just the plain text of  
25 that understanding means that there's -- there's

1 no room for an exception for -- that -- that  
2 would -- that would make preclusion applicable  
3 only in a subsequent action. And I just think  
4 it's particularly clear that Congress didn't  
5 want that subsequent action limitation because  
6 that was in every description of the common law,  
7 and Congress changed that formulation expressly.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Barrett.

11 JUSTICE BARRETT: Counsel, I want to  
12 ask you a question about the question on which  
13 we granted cert. Did the government make a  
14 mistake in moving -- moving for dismissal under  
15 Rule 12(b)(1) for lack of jurisdiction, as  
16 opposed to for judgment on the pleadings or just  
17 -- I -- I know -- I know they also moved for  
18 summary judgment, but why even have the motion  
19 to dismiss for lack of jurisdiction in there?

20 And I'll tell you the reason why I'm  
21 asking is it seems to me that 1346(c) gives  
22 district courts the jurisdiction to resolve  
23 civil actions against the government on the  
24 bases that's listed in the statute. And it  
25 seems to me that that means that the government

1 is submitting as sovereign to the district  
2 court's resolution of those claims either way,  
3 whether they win or not, so it's different than,  
4 say, in Simmons, where the district court does  
5 not have jurisdiction to resolve claims if they  
6 involve misconduct in the exercise of a  
7 discretionary function.

8 So why did the government even treat  
9 this as a jurisdictional issue?

10 MR. HUSTON: Well, Your Honor, there  
11 -- at -- at the time in the Sixth Circuit, there  
12 was some precedent that suggested that the  
13 resolution of an FTCA claim on the merits would  
14 also trigger some jurisdictional implications.

15 Now we don't think that that's  
16 correct. As we explain in our brief, I think  
17 Meyer explains -- and -- and as -- as Your Honor  
18 just explained exactly correctly, the text of  
19 Section 1346(c) refers to jurisdiction over  
20 civil actions on claims alleging the FTCA's  
21 element.

22 So -- and -- and as Meyer further  
23 explained, that's analytically distinct from the  
24 question whether the plaintiff is entitled to  
25 prevail.

1           But I think what -- what critically  
2 matters for the case in this case is whether  
3 there was the judgment in an action under  
4 Section 1346(b). And Meyer is perfectly clear  
5 that a claim is actionable under Section 1346(b)  
6 so long as the plaintiff alleges the elements.  
7 And Respondent certainly alleged all the  
8 elements of the FTCA claim. You can see that in  
9 the complaint at JA 39 and 40.

10           So there's no dispute about what the  
11 substance of the judgment was here. And as I  
12 think Justice Breyer helpfully explained for the  
13 First Circuit in Rowe, what matters to  
14 preclusion is not the label that gets -- the  
15 jurisdictional label that gets attached to  
16 something, it's the substance.

17           And Semtek and many of this Court's  
18 other cases are quite clear that where a  
19 district court, as here, adjudicated the  
20 substance of the FTCA cause of action --

21           JUSTICE BARRETT: So, counsel --

22           MR. HUSTON: -- that is a merits  
23 determination that's precluded.

24           JUSTICE BARRETT: -- before my time  
25 expires, let me just clarify something. So you



1 agree that if, say, the plaintiff had not  
2 alleged all the elements and so the claim was  
3 dismissed without prejudice under 12(b)(6), that  
4 wouldn't count as a judgment that would trigger  
5 the bar?

6 MR. HUSTON: Absolutely, Your Honor.  
7 A dismissal is not a judgment. Those things are  
8 not synonymous, as Justice Breyer explained.  
9 It's -- it is only the entry of judgment that  
10 triggers the judgment bar.

11 And that's why the judgment bar was  
12 triggered in this case. When the district court  
13 entered the final judgment at the end of the  
14 case, Respondent simply chose for his own  
15 reasons not to appeal that judgment.

16 JUSTICE BARRETT: Thank you.

17 CHIEF JUSTICE ROBERTS: A minute to  
18 wrap up, Mr. Huston.

19 MR. HUSTON: Thank you, Mr. Chief  
20 Justice.

21 We've talked already about why our  
22 position is compelled by the statutory text and  
23 this Court's precedent. I want to emphasize for  
24 just a moment why it's fundamentally fair.

25 The decision below would permit a

1 plaintiff to bring a lawsuit against the United  
2 States, litigate it all the way through summary  
3 judgment, lose on the ground that the  
4 government's employees did not do what was  
5 alleged of them, and then turn around and pursue  
6 claims against the same employees using the same  
7 factual allegation.

8           That result makes little sense, and it  
9 is directly at odds with Congress's objective  
10 for the judgment bar, which was to prevent  
11 duplicative litigation against the government's  
12 employees after an FTCA judgment.

13           Congress's rule in the judgment bar  
14 was straightforward. If a plaintiff chooses to  
15 litigate an action under Section 1346(b), then  
16 the judgment in that action will bring repose to  
17 the entire controversy.

18           Respondent had a fair chance to obtain  
19 damages for his alleged injury. He didn't  
20 recover for the simple reason that he didn't  
21 prove his case. And the judgment bar does not  
22 allow him to start the case over again against  
23 the officers.

24           Thank you.

25           CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Huston.

2 Mr. Jaicomo.

3 ORAL ARGUMENT OF PATRICK M. JAICOMO

4 ON BEHALF OF THE RESPONDENT

5 MR. JAICOMO: Mr. Chief Justice, and  
6 may it please the Court.

7 Through the text of the FTCA, Congress  
8 provides two independent and easily  
9 administrable rules that control the application  
10 of the judgment bar.

11 First, the judgment bar does not apply  
12 to claims brought together in a single action.  
13 As Will and Simmons explained, the text of  
14 Section 2676 imports common law res judicata.  
15 In the history of American law, res judicata has  
16 never been applied to claims brought together in  
17 a single action.

18 Section 2676's requirement of the  
19 judgment in an action, not a judgment on a  
20 claim, demonstrates that Congress did not intend  
21 a judgment bar to depart from that common law  
22 history.

23 Second, the judgment bar does not  
24 apply to claims dismissed for lack of  
25 jurisdiction. Because Section 1346 restricts

1 FTCA jurisdiction to actions on claims that  
2 satisfy six elements, the dismissal of an FTCA  
3 claim under Rule 12(b)(6) does not trigger the  
4 judgment bar.

5 As Meyer explained, a claim does not  
6 come within the FTCA's jurisdiction unless a  
7 plaintiff has alleged facts sufficient to state  
8 a cause of action under the statute. Thus, a  
9 court's holding that a plaintiff has failed to  
10 state a claim under the FTCA is not the judgment  
11 in an action under Section 1346; it is a holding  
12 that the court lacks jurisdiction to enter such  
13 a judgment.

14 Both the same claims rule and the  
15 jurisdictional rule honor the language Congress  
16 enacted in the FTCA. Both present simple,  
17 predictable standards that courts and parties  
18 can follow, and neither results in duplicative  
19 litigation. Under either rule, the judgment bar  
20 does not apply to this case.

21 This Court should affirm the decision  
22 below and allow King to pursue his meritorious  
23 constitutional claims in this action, which is  
24 the one and only lawsuit King has ever filed.

25 I welcome this Court's questions.

1                   CHIEF JUSTICE ROBERTS: Mr. Jaicomo,  
2 your theory really would combine the merits and  
3 jurisdiction not just in a case like this but in  
4 every case.

5                   I mean, if you think you have a claim  
6 under a federal question statute, if it turns  
7 out you don't, then you would say, okay, well,  
8 then there wasn't jurisdiction because I didn't  
9 satisfy the elements of the statute that gave  
10 rise to a federal -- a federal question.

11                   We've -- we've, I think, long held  
12 that in a case like -- like this one, where, if  
13 you make a determination under the merits, there  
14 isn't the established jurisdiction against the  
15 United States, that they're treated the same.  
16 You can't -- in other words, whenever you lose,  
17 you don't lose because the court had -- under  
18 your theory, would have had no jurisdiction.

19                   That doesn't seem to make much sense.

20                   MR. JAICOMO: Yes, Mr. Chief Justice,  
21 that's -- that's not the extent of our position.  
22 We actually offer three different ways the Court  
23 can view jurisdiction. And -- and I'll first  
24 state that the reason that it's so complicated  
25 is that through Section 1346, as the government

1 agrees, Congress simultaneously waived its  
2 sovereign immunity, sets jurisdiction, and  
3 provides the elements for a cause of action.

4           So the -- the most narrow way this  
5 Court could look at that is to look at a case  
6 like this and simply say the district court  
7 itself entered a judgment under 12(b)(1).  
8 Therefore, it concluded pursuant to Rule  
9 12(h)(3) that it lacked jurisdiction of the  
10 subject matter.

11           The -- the -- the middle ground  
12 position is the position from Meyer, which is  
13 that to trigger the jurisdiction of  
14 Section 1346, a claim has to allege a valid  
15 cause of action, which is also consistent with  
16 this Court's dealing with the sovereign immunity  
17 statute in Helmerich and Payne.

18           Only in the very broadest  
19 understanding, which is brought in through the  
20 Arbaugh decision, do any of the concerns that  
21 you have raised come to light.

22           And so this Court could easily dispose  
23 of this jurisdictional question without reaching  
24 that furthest ruling, but I'm happy to discuss  
25 it further if -- if Your Honor would like to do

1 so.

2 CHIEF JUSTICE ROBERTS: Well, I guess  
3 I don't really understand. I think, under your  
4 view, a -- a -- a favorable decision for the  
5 government would never satisfy the elements of  
6 the judgment bar because of the lack of  
7 jurisdiction.

8 What -- what am I missing in that?

9 MR. JAICOMO: Yes, Your Honor. No,  
10 that's only if this Court adopts the Arbaugh  
11 standard. We offer two other more restrictive  
12 understandings. So only under Arbaugh would  
13 that be the case.

14 If this Court decides that  
15 jurisdiction attaches after a claim passes  
16 beyond Rule 12(b)(6) or if this Court decides  
17 that jurisdiction has to be decided at Rule  
18 12(b)(1), either way, a -- a -- a decision  
19 favorable or not for the government would  
20 trigger the judgment bar.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Justice Thomas.

24 JUSTICE THOMAS: Thank you, Mr. Chief  
25 Justice.

1                   Counsel, why should we even consider  
2 your argument that the judgment bar doesn't  
3 apply when the claims are brought together?

4                   MR. JAICOMO: For several reasons,  
5 Your Honor.

6                   The first is that that's what the  
7 language of the statute requires.

8                   But the second is that that question  
9 is embedded in the question presented that the  
10 government brought to this Court. And I'll  
11 quote the relevant language. It says, "the  
12 question presented is whether a final judgment  
13 in an action bars a claim." And that  
14 necessarily requires this Court to consider how  
15 that claim is presented.

16                   And -- and, finally, this is not an  
17 issue that has just come up now. The first  
18 argument we made in the Sixth Circuit was that  
19 the reason the judgment bar shouldn't be applied  
20 to this case is because there's no chance of  
21 duplicative litigation when claims are brought  
22 together in the same action.

23                   And as the government has conceded,  
24 this is also a point that we made in our brief  
25 in opposition to cert when that was filed.



1 JUSTICE THOMAS: Well, I have one  
2 unrelated question, brief question.

3 Should it matter in deciding this case  
4 that Bivens was -- didn't exist at the time the  
5 judgment bar was enacted?

6 MR. JAICOMO: No, Your Honor, I don't  
7 think that -- that that has an impact on the  
8 outcome of this case simply because, as we  
9 explain in our briefing, since the judgment bar  
10 incorporates res judicata, the controlling issue  
11 is that claim -- or that King brought all of his  
12 claims in a single action.

13 So the subject matter for the action  
14 is not at issue here since the Bivens claim and  
15 the FTCA claim are brought in the same lawsuit.

16 JUSTICE THOMAS: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Breyer.

19 JUSTICE BREYER: Well, if we did reach  
20 this other question, what is your -- what will  
21 you say to what your opposing colleague said?  
22 Look, he said, if you read 1346(b)(1), if you  
23 read -- it says the judgment in any action shall  
24 constitute a complete bar.

25 Now, to any government claimant --

1 against the employee of the government, now  
2 that's the point of this statute. Go sue the  
3 United States; don't sue the employee.

4 But, if you're right, what you could  
5 do as a plaintiff is you sue under the statute  
6 against the government, you win, and then you go  
7 sue against the employee, the very thing that  
8 the statute was passed to stop.

9 MR. JAICOMO: No, Your Honor. Our --  
10 our position, even under the broadest  
11 understanding of jurisdiction, is that if you  
12 bring separate actions and one of them is  
13 against the United States and that concludes --

14 JUSTICE BREYER: No, you bring the  
15 same action. What you do is you have a couple  
16 of defendants.

17 MR. JAICOMO: Well, in -- in that  
18 case, Your Honor, this would simply be a matter  
19 of applying res judicata through the judgment  
20 bar, which presents exactly that same scenario  
21 where you could sue, for example, an employer  
22 and an employee in the same lawsuit. And the  
23 disposition of one claim or another wouldn't  
24 necessarily foreclose your claim against the  
25 other one.

1 JUSTICE BREYER: Well, that's my  
2 problem, the disposition of one against the  
3 other. So you win against the employer, the  
4 government, and then you go sue the employee.

5 Well, I think, if there was one thing  
6 this statute was passed to stop, it was that.  
7 It was that the United States should take the  
8 liability and the employee wouldn't.

9 MR. JAICOMO: Well, Your Honor, that  
10 --

11 JUSTICE BREYER: Am I wrong about  
12 that?

13 MR. JAICOMO: No. But the  
14 hypothetical you propose is that the claims are  
15 brought together in the same action, so there is  
16 no separate going and suing the employee.  
17 There's only one lawsuit.

18 JUSTICE BREYER: Look, take my point.  
19 I'm not interested in exactly how you do it.

20 MR. JAICOMO: Sure.

21 JUSTICE BREYER: But if you can get --  
22 Claim 1, we sue the government, give us some  
23 money. Claim 2, employee, you're involved in  
24 this lawsuit too, give us some money. Okay?

25 Now that's what I'm worried that your

1 argument here would lead to. And from what you  
2 said so far, you say that's just what it would  
3 lead to, and that's a good thing.

4 MR. JAICOMO: No, Your Honor. There's  
5 no chance, for example, you could get a  
6 duplicative recovery where you would --

7 JUSTICE BREYER: No, not duplicative.  
8 He said extra damages, for example.

9 MR. JAICOMO: Oh, okay. Yes, so this  
10 comes down to the fact that, as the Westfall Act  
11 and this Court's decisions in Carlson and Wilkie  
12 versus Robbins and Correction Incorporation  
13 versus Malesko indicate, that Bivens and the  
14 FTCA provide parallel, complementary remedies.

15 So it was exactly what Congress  
16 intended for the rest of the courts --

17 JUSTICE BREYER: Okay. Then your  
18 answer is he's right, you could do this, and  
19 you're saying Congress did not want to stop all  
20 the recoveries against the employee, right?

21 MR. JAICOMO: Yes, absolutely.

22 JUSTICE BREYER: Okay.

23 MR. JAICOMO: Absolutely.

24 JUSTICE BREYER: That's your answer.

25 Thank you very much.

1 CHIEF JUSTICE ROBERTS: Justice Alito.

2 JUSTICE ALITO: If a district court  
3 rejects a claim under the FTCA for failure to  
4 proof -- failure of proof, does the judgment bar  
5 apply to that, or is that a jurisdictional  
6 determination?

7 MR. JAICOMO: It wouldn't apply in any  
8 case if the claims are brought together in the  
9 same action, but, if they were brought  
10 separately --

11 JUSTICE ALITO: Well, that wasn't my  
12 question. How about if you answer the question  
13 I actually asked?

14 MR. JAICOMO: If -- if they were  
15 brought separately, Your Honor, the case would  
16 have to pursue beyond trial, the same -- which  
17 is the line that's drawn by Rule 12(h)(2).

18 JUSTICE ALITO: The case would have to  
19 proceed beyond trial. What does that mean?

20 MR. JAICOMO: It -- it's the standard  
21 where a party can no longer raise a 12(b)(6)  
22 defense. Rule 12(h)(2) says you can raise that  
23 defense up to and at trial but not beyond it.

24 JUSTICE ALITO: Why is 12(b)(6) the  
25 dividing line?

1 MR. JAICOMO: Because the language of  
2 Section 1346 confers jurisdiction only when  
3 there are claims that satisfy the elements of  
4 the FTCA.

5 JUSTICE ALITO: Why are the elements  
6 of the FTCA satisfied up to the -- not satisfied  
7 up to 12(b)(6) but are satisfied after that  
8 point?

9 MR. JAICOMO: Because, as this Court  
10 explained in the Meyer decision, Your Honor, the  
11 -- the trigger for jurisdiction is whether a  
12 plaintiff has pleaded allegations that set forth  
13 a cause of action. And so the failure of proof  
14 portion of it, as is noted in the footnote of  
15 Meyer, doesn't come into play until there's  
16 actually fact-finding being done by the court.

17 JUSTICE ALITO: Why was the decision  
18 here in essence a 12(b)(6) decision?

19 MR. JAICOMO: Well, for several  
20 reasons.

21 First, Your Honor, is that the  
22 government itself moved under 12(b)(1) and  
23 12(b)(6). And the reason is that the court more  
24 specifically held it was dismissing the case  
25 under Rule 12(b)(1) or, alternatively, for

1 failure to state a claim under Rule 12(b)(6).

2 JUSTICE ALITO: What is the breakout  
3 of the circuits on the question that you would  
4 like us to decide?

5 MR. JAICOMO: Yes, Your Honor. So  
6 there -- there is -- only the Ninth Circuit  
7 has -- has adopted this same claims argument,  
8 but that argument's also consistent with this  
9 Court's decisions in Will and Simmons.

10 And, as we point out in the brief,  
11 none of the other courts of appeals, which all  
12 have somewhat different analyses of how they get  
13 there, actually address the common law aspects  
14 of Section 2676. And most of them simply rely  
15 on the Manning decision from the Seventh  
16 Circuit.

17 JUSTICE ALITO: In light of those --  
18 what is it -- six circuits that have decided the  
19 issue the other way, do you still think the  
20 question is so clear that we should decide it  
21 even though it was not the question that we were  
22 asked to decide in this case?

23 MR. JAICOMO: Yes, Your Honor, it is  
24 that clear. I think the language of  
25 Section 2676 and the common law concepts that it

1 incorporates make it very clear. And so the  
2 government has essentially come up with its  
3 using of the judgment bar in this way in the  
4 last couple decades. It's not as if this has  
5 been the case since 1946.

6 And so I think this Court's  
7 involvement would be very helpful on this issue.

8 JUSTICE ALITO: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Sotomayor.

11 JUSTICE SOTOMAYOR: Counsel, I want to  
12 separate out the two arguments, the  
13 jurisdictional argument, which was the  
14 government's -- which was the Sixth Circuit's  
15 conclusion and the basis of the -- most of the  
16 government's argument.

17 Your alternative argument, I call, the  
18 same case argument. Can you -- Justice  
19 Kavanaugh asked this question earlier, and I  
20 posed the same one.

21 Given that it is one circuit against  
22 others, has there been sufficient percolation  
23 before the court below, the Sixth Circuit, for  
24 us to jump in and decide this question now?

25 MR. JAICOMO: Yes, Your Honor.



1 JUSTICE SOTOMAYOR: As a matter of  
2 policy, why should we do that? Meaning it's up  
3 to us to decide whether to take a -- to address  
4 a ground not decided upon by the court below.

5 MR. JAICOMO: Yes, Your Honor. So,  
6 although the Sixth Circuit decision below didn't  
7 address this issue, the Sixth Circuit has  
8 addressed this issue, and I'll -- I'll concede  
9 that it came out on the other side of it.

10 But the reason that this Court should  
11 address this issue from a policy standpoint is  
12 exactly the reason that this Court explained the  
13 judgment bar shouldn't operate in the Simmons  
14 decision, which is, if this Court doesn't draw  
15 the line on claims in the same action, the  
16 result of a favor -- a decision in favor of the  
17 government will be an enormous increase in  
18 litigation. And because the government has  
19 adopted this peculiar election of remedies  
20 that's not really an election of remedies, that  
21 litigation will be infinitely more complex and  
22 plaintiffs will be obligated to make it complex  
23 to ensure that the FTCA portion or separate  
24 action never gets --

25 JUSTICE SOTOMAYOR: Counsel, I -- I do

1 have some practical difficulties with the  
2 government's position on the same action,  
3 meaning that what the government is encouraging  
4 plaintiffs to do is to file their Bivens claims  
5 first, win or lose, then file their FTCA claims,  
6 and -- and hope that they've won and that we  
7 don't put a bar in like the one that Justice  
8 Kagan referred to earlier.

9           That seems somewhat time-confuse --  
10 consuming. It also makes a difference whether a  
11 district court decides whether it's going to  
12 decide the Bivens claims first and just say, I  
13 don't need to decide the FTCA claims, or try  
14 both claims together, win both, give judgment on  
15 both, and then go on appeal.

16           There seems variations that are very  
17 inefficient. Am I right about that?

18           MR. JAICOMO: Yes, Your Honor. In  
19 fact, every variation is very inefficient  
20 because, as Your Honor's question indicates,  
21 there's no way from an ex-post position for a  
22 plaintiff to know what it should do to ensure  
23 that it can litigate these claims in parallel,  
24 even though Congress and this Court have both  
25 said they can be litigated in parallel.

1 JUSTICE SOTOMAYOR: And that's the  
2 answer to Justice Breyer, isn't it, that  
3 Congress in both -- in both -- in both the FTCA  
4 and in Westfall have agreed that Bivens claims  
5 can and should be brought, correct?

6 MR. JAICOMO: Yes, Your Honor, that's  
7 exactly correct.

8 JUSTICE SOTOMAYOR: Unless there's  
9 been a bar of a judgment previously?

10 MR. JAICOMO: That's correct.

11 CHIEF JUSTICE ROBERTS: Justice Kagan.

12 JUSTICE KAGAN: Yes, Mr. Jaicomo, just  
13 to continue in this same vein, I mean, what the  
14 government is saying about this provision, you  
15 know, makes sense in a way. I mean, the  
16 government is saying this reflects a broad  
17 remedial compromise. Plaintiffs can sue the  
18 United States, but, in exchange for that, they  
19 give up certain remedies against federal  
20 employees, and that that's the way we should  
21 read the provision.

22 And you can well imagine how Congress  
23 might have thought that that would be a good  
24 thing to do. So why shouldn't we read the  
25 provision that way?

1           MR. JAICOMO:  Yes, Your Honor.  I  
2    don't dispute that you could make a policy  
3    argument for why the -- that Congress should  
4    create an exclusive -- or an election of  
5    remedies, but the reason this Court shouldn't  
6    read it that way is because Congress has not  
7    done so and has explicitly carved out the  
8    ability of plaintiffs to bring, under the  
9    Westfall Act, an FTCA claim and a Bivens claim.

10           And even before then, since 1952 in  
11    the Brooks case this Court decided, it has said  
12    there is not an election of remedies in the FTCA  
13    and has continued to say that every time it's  
14    had the opportunity over the last 70 years.

15           JUSTICE KAGAN:  And if you were just  
16    to look at the -- at the language of the  
17    provision, what would you say about the language  
18    of the provision with respect to this question?

19           MR. JAICOMO:  Yes, Your Honor.  So  
20    this gets us back to the distinction between "an  
21    action" and "any action."  And it would -- it's  
22    simply a situation where someone had the coupon  
23    to go to a grocery store that says if you buy a  
24    case of pop or soda, as -- as people might call  
25    it, you get any case free.  Of course, a

1 reasonable person would not understand that  
2 coupon to mean the first case was free. You  
3 have to buy the first case.

4 The government is, in this case -- in  
5 this situation, asking the Court to say that  
6 coupon applies to the first case of soda or, in  
7 this instance, the first and only action that's  
8 ever been brought.

9 JUSTICE KAGAN: If I understood  
10 Mr. Huston's argument, it was that, you know,  
11 you might think that we're taking the word  
12 "action" and making it mean "claim" and, in  
13 fact, you might think that the two words are  
14 different, but, in fact, they're not, because  
15 Mr. Huston said an action is just a demand for  
16 relief in court, you know, when this statute was  
17 written.

18 So why isn't that true?

19 MR. JAICOMO: Yes, Your Honor.  
20 Because the definition that my friend relies on  
21 is -- is definitely well outside the mainstream.  
22 In the CalPERS decision, which is actually cited  
23 in Public Citizen's textual analysis, amicus  
24 brief, they -- this Court clearly delineated  
25 between actions and claims, and it did so by

1 citing 1933's Black's Law Dictionary, which says  
2 that the concept of an action is, if not  
3 entirely, almost entirely synonymous with a  
4 suit.

5 And so there's no way to split that  
6 hair, especially in light of the fact that, as I  
7 believe you pointed out earlier, Your Honor,  
8 Section 2672, which is the release bar, refers  
9 to complete release of any claim.

10 So Congress knew how to distinguish  
11 between these concepts. It chose not to in the  
12 judgment bar because it was adopting res  
13 judicata.

14 JUSTICE KAGAN: Thank you,  
15 Mr. Jaicomo.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Gorsuch.

18 JUSTICE GORSUCH: Good morning,  
19 counsel. I -- I'd like to just return to the --  
20 I guess your alternative argument in the same  
21 action simultaneously pending position. What do  
22 we do about the fact that your client chose not  
23 to pursue his FTCA claim on appeal? And so the  
24 judgment there would seem to be in an action and  
25 it's final. There doesn't appear to be any

1 simultaneously pending action under the FTCA at  
2 this point.

3 MR. JAICOMO: Yes, Your Honor. So the  
4 distinction is still the concept of actions  
5 versus claims. So even with an action that has  
6 multiple claims, the -- the failure of one claim  
7 or the waiver of that claim doesn't doom the  
8 other claims, as we cite on page 26 of our brief  
9 the statement from Wright Miller, which says  
10 claim preclusion is not appropriate within a  
11 single lawsuit so long as it continues to be  
12 managed as a single action.

13 JUSTICE GORSUCH: So -- so we go back  
14 to the question whether "any" means any, any  
15 judgment in an action, which seems to  
16 contemplate the possibility of multiple  
17 judgments.

18 MR. JAICOMO: No, Your Honor.  
19 Actually, the language of Section 2676 says  
20 "the" judgment in an action, which is -- the  
21 definite article requires that there can only be  
22 a single judgment in an action.

23 JUSTICE GORSUCH: Yeah.

24 MR. JAICOMO: And that judgment  
25 necessarily must deal with all the claims in the

1 action. So you can't have the judgment in an  
2 action and there still be any action left to  
3 apply the preclusive bar to.

4 JUSTICE GORSUCH: What -- what about  
5 the "any action by the claimant" language?

6 MR. JAICOMO: Yes, Your Honor. This  
7 just goes back to the -- the linguistic  
8 distinction between "an action" and "any  
9 action." And I'll -- I'll also point out that a  
10 number of courts before the enactment of the  
11 judgment bar had used the phrase "complete bar  
12 to any action" to mean res judicata.

13 But, even if that weren't the case, at  
14 the time the judgment bar was enacted, Congress  
15 understood that, for jurisdictional reasons, a  
16 party could not sue the United States as a  
17 codefendant with its employees. So the need for  
18 something like separate or subsequent --

19 JUSTICE GORSUCH: I -- I guess what  
20 I'm trying to get at is we have "the" judgment  
21 in an action under the FTCA, and that would seem  
22 to bar any other action like Bivens later.

23 MR. JAICOMO: Right.

24 JUSTICE GORSUCH: And your way around  
25 that is to say that they're simultaneously



1 pending, but "the" judgment under the FTCA seems  
2 to be final in this case.

3 MR. JAICOMO: No, Your Honor, the --

4 JUSTICE GORSUCH: It ought to be.

5 MR. JAICOMO: The judgment in an  
6 action is not final because that action is this  
7 case directly on appeal. So --

8 JUSTICE GORSUCH: But you -- you have  
9 to -- well, okay. All right. Thank you,  
10 counsel.

11 MR. JAICOMO: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Kavanaugh.

14 JUSTICE KAVANAUGH: Thank you.

15 Good afternoon, Mr. Jaicomo. I want  
16 to raise the point that's bothering me about  
17 what we should decide, and I don't blame you for  
18 raising the alternative argument. I understand  
19 that. You're trying to win the case. But  
20 trying to think about why we should consider it.

21 We obviously discuss very carefully  
22 our decisions to grant certiorari on particular  
23 cases and particular issues within that case,  
24 and we don't usually decide things that weren't  
25 decided by the court below.

1           And there are exceptions to that, and  
2 no doubt about that, and you -- but I don't  
3 think this is embedded within in the way you  
4 said. And sometimes we'll do it if it's really  
5 -- really simple and it will be helpful just to  
6 go ahead and resolve it. But I'm not sure this  
7 qualifies as really simple either because, if we  
8 get to the merits -- at least not very simple in  
9 your direction because, if we get to the merits  
10 of that alternative argument, every court of  
11 appeals, save one, has ruled against you, and  
12 the text says "any action," not any subsequent  
13 action.

14           You have forceful arguments in  
15 response to that, but I guess I'm just back at  
16 why should we consider that issue at this time  
17 in this case, given the way it was developed in  
18 the Sixth Circuit?

19           MR. JAICOMO: Yes, Your Honor. So,  
20 like -- as I mentioned earlier, there's no  
21 question that the Sixth Circuit didn't predicate  
22 its decision on this point. But it was raised  
23 in the Sixth Circuit. And in the Simmons case,  
24 this Court actually decided the FTCA decision on  
25 a separate ground than the one that the Sixth

1 Circuit had used below.

2           And so, here, I think the -- the  
3 existence of the other circuit court  
4 decisions -- which, as I mentioned, although  
5 they somehow agree on this same claims point,  
6 they do so in very different ways -- illustrates  
7 that there's an enormous amount of confusion  
8 that this Court could very simply clear up and  
9 do so consistent with its decision in Simmons  
10 and Will, which is focused on stating that the  
11 purpose of the judgment bar is to prevent  
12 duplicative litigation, as this Court said in  
13 Will, multiple suits on identical matters.

14           JUSTICE KAVANAUGH: Well, can I just  
15 stop you there? You said the other courts of  
16 appeals have ruled against your position on this  
17 issue in many different ways, and I don't see  
18 how that makes it easier to clear that up. That  
19 just means there are lots of routes that courts  
20 of appeals have thought that lead to the  
21 opposite result from what you're suggesting  
22 here. That would seem to make it harder, not  
23 easier, for us to just, in your words -- well, I  
24 don't know if you used this phrase, but to clean  
25 it up or clear it up, as you said.

1                   MR. JAICOMO: Yes, Your Honor. I -- I  
2 do think the -- the one thing that animates all  
3 of those decisions is why this Court should  
4 weigh in, which is that all of those decisions  
5 repudiate or simply ignore the fact that  
6 Section 2676 incorporates res judicata, which  
7 has as its central premise the concept that you  
8 can't be barring claims brought together in one  
9 lawsuit.

10                   JUSTICE KAVANAUGH: Well, that just  
11 goes back to the "any action" versus "any  
12 subsequent action" argument of the government,  
13 which I -- I understand your point on that.

14                   My time's up. Thank you very much.

15                   CHIEF JUSTICE ROBERTS: Justice  
16 Barrett.

17                   JUSTICE BARRETT: Counsel, I want to  
18 make sure that I understand your position on the  
19 nature of this judgment and whether it's on the  
20 merits or can be a bar.

21                   Is it your position -- I thought I  
22 heard you say this earlier; maybe it was in  
23 response to the Chief Justice -- that a judgment  
24 is only -- functions as a bar if it's entered  
25 after trial?

1           MR. JAICOMO: Yes, Your Honor, that's  
2 one of the lines that we draw. There are three.  
3 Simply put, in this case, because the government  
4 requested and received a 12(b)(1) dismissal, the  
5 Court doesn't even need to reach that second --

6           JUSTICE BARRETT: Okay. But -- but  
7 what about if it's a summary judgment? Didn't  
8 the government also in this case request summary  
9 judgment in the alternative? I thought they had  
10 said 12(b)(1), 12(b)(6), or summary judgment.

11          MR. JAICOMO: Yes, Your Honor, they  
12 did request it in the alternative, but the  
13 district court didn't grant that. And all  
14 through the Sixth Circuit, the government  
15 continuously said it only moved under Rule 12,  
16 and only then at the merits stage did they  
17 announce that it was actually a Rule 56 summary  
18 judgment decision.

19          JUSTICE BARRETT: Okay. So what if  
20 they had won summary judgment? In your view  
21 then, is that a judgement that, even if the  
22 United States wins, can then be a bar?

23          MR. JAICOMO: I -- I think it depends,  
24 Your Honor. I think, because a court is  
25 required to assess its own jurisdiction, that a

1 court necessarily has to decide. Certainly, in  
2 a -- in a situation where a party has raised  
3 these alternative avenues for relief, that --

4 JUSTICE BARRETT: No, no, no, just  
5 answer as to the question. So it's summary  
6 judgment and the United States -- I just don't  
7 understand how that's not done on the merits.

8 MR. JAICOMO: Yes, Your Honor. It --  
9 it simply depends on whether there has been  
10 actual fact-finding or not. And the reason that  
11 the on-the-merits portion is a little obscure is  
12 because, as I mentioned, and the government  
13 agrees, the language of Section 1346(b)  
14 intertwines merits, jurisdiction, and sovereign  
15 immunity.

16 JUSTICE BARRETT: Okay. Let me ask  
17 you a question about the second alternative  
18 argument that you've made. Let's say that  
19 you're -- you bring a Bivens claim first and you  
20 lose, and then you bring an FTCA claim against  
21 the United States.

22 Can the United States then just under  
23 regular common law preclusion assert defensive  
24 issue preclusion against you?

25 MR. JAICOMO: No, Your Honor, I don't

1 think that it can because, as the professors'  
2 amicus brief points out, there's a different  
3 primary right at stake. And so, if -- if simple  
4 preclusion was being applied, a Bivens claim  
5 before an FTCA claim would not have a preclusive  
6 bar.

7 JUSTICE BARRETT: Well, but issue  
8 preclusion just requires identity of issues,  
9 right?

10 MR. JAICOMO: Yes. Of course, we're  
11 talking about claim preclusion, but, if we were  
12 talking about issue --

13 JUSTICE BARRETT: I know, but I asked  
14 about issue.

15 MR. JAICOMO: If we were talking about  
16 issue preclusion, Your Honor, yes, there would  
17 be certain issues that could be carried over  
18 from the Bivens claim to the FTCA claim. But,  
19 if you look at a case like this, the FTCA claim  
20 was decided on grounds of government immunity  
21 that wouldn't apply to a Bivens claim.

22 So it depends on how the Bivens claim  
23 is decided, if you're -- if you're looking at  
24 issue preclusion.

25 JUSTICE BARRETT: Okay. Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Jaicomo,  
2 you can take a couple of minutes to wrap up.

3 MR. JAICOMO: Yes, Your Honor.

4 Embedded in Congress's enactment of  
5 the FTCA and its judgment bar, it is a very  
6 simple common law doctrine that has been with  
7 litigants since the beginning of this country,  
8 which is the concept of res judicata.

9 The primary basis for res judicata is  
10 that it only applies to separate lawsuits. This  
11 Court has said so on many occasions. And that  
12 it only applies once a judgment has been entered  
13 on the merits by a court with jurisdiction.

14 So, as I mentioned, we raised this  
15 issue of duplicative litigation in the Sixth  
16 Circuit. The government has addressed it in its  
17 brief. It's fully briefed. There's no reason  
18 that this Court shouldn't honor the language  
19 that Congress enacted by addressing this claim  
20 at issue.

21 And even if -- even in the  
22 alternative, the independent ground here also  
23 justifies this Court affirming the Sixth Circuit  
24 because the government moved for and received a  
25 dismissal on the basis of jurisdiction.



1                   It should not now be allowed to come  
2 to this Court and say: Jurisdiction and merits  
3 are the same and -- and merits should,  
4 therefore, prevail because, as Wright and Miller  
5 in the First Restatement and many other places  
6 have said, anytime jurisdiction's entwined with  
7 merits, jurisdiction controls, not merits.

8                   And if it were the other way around,  
9 the Court would be able to reach beyond its  
10 actual authority granted by Congress.

11                   So, for these reasons, this Court  
12 should affirm the Sixth Circuit and allow James  
13 King to continue taking his first and only bite  
14 at the apple in this lawsuit.

15                   CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17                   Mr. Huston, three minutes for  
18 rebuttal.

19                   REBUTTAL ARGUMENT OF MICHAEL R. HUSTON

20                   ON BEHALF OF COMPLAINANT

21                   MR. HUSTON: Thank you, Mr. Chief  
22 Justice.

23                   Regarding the question presented, the  
24 judgment bar is triggered by the judgment in an  
25 action under Section 1346(b). Respondent

1 created just such an action by pleading a demand  
2 for relief alleging the elements of Section  
3 1346(b), and the district court indisputably  
4 entered judgment.

5 The Sixth Circuit explained at  
6 Petition Appendix 1A, Note 1, why the district  
7 court's judgment is best understood as a summary  
8 judgment in favor of the government, because  
9 both parties submitted a body of extensive  
10 evidentiary exhibits in support of the motion.

11 But even if the Court concluded that  
12 the judgment was best understood as a dismissal  
13 for failure to state a claim, it makes no  
14 difference because it's still the judgment in an  
15 action under Section 1346(b), as Meyer  
16 explained, and this Court's canonical decision  
17 in *Bell v. Hood* makes clear that a dismissal for  
18 failure to state a claim for relief is a  
19 decision on the merits and, therefore,  
20 preclusive.

21 The surest way to know Respondent's  
22 main argument on the question presented is  
23 incorrect is that it forces my friend into the  
24 extraordinary conclusion that the judgment bar  
25 is not triggered by a judgment in favor of the

1 United States on the FTCA action. Simmons  
2 squarely foreclosed that, and the plain text  
3 refutes it.

4 Now, regarding my friend's fallback  
5 argument, I think, as the Court has recognized  
6 this morning, it certainly has discretion not to  
7 consider that argument in this case, and that's  
8 the most appropriate disposition because the  
9 alternative question simply isn't cert-worthy.

10 There's no significant disagreement  
11 about the circuits on it. The only circuit that  
12 has even come close to saying something like  
13 that argument is the Ninth, and that's -- the  
14 basis of its -- of its reasoning was abrogated  
15 by Simmons.

16 The Court should not leave in place  
17 the Sixth Circuit's rather obvious mistaken  
18 interpretation of the judgment bar and, instead,  
19 decide the case in favor of Respondent on an  
20 alternative ground that no other court has  
21 accepted.

22 And -- and even if -- if the Court  
23 were inclined to reach the alternative question,  
24 we think the text is unambiguous in our favor.  
25 Congress would have looked at a lawsuit like

1 this one and said Respondent has an action under  
2 Section 1346(b) and an action under Bivens, and  
3 he has joined them together in a single lawsuit,  
4 but there's simply no way to read the phrase  
5 "complete bar to any action" to actually mean  
6 that Respondent is precluded only from bringing  
7 a subsequent action when that is exactly the  
8 common law rule that Congress expressly changed.

9 In the 70 years since the judgment bar  
10 was enacted, the courts of appeals have  
11 overwhelmingly rejected this argument, and  
12 that's because, as Justice Breyer recognized, it  
13 directly conflicts with Congress's purpose.

14 Congress's -- the rule that Respondent  
15 advocates would permit a plaintiff to sue the  
16 United States and win and then continue pursuing  
17 individual government employees for additional  
18 relief just because he brought his two actions  
19 together in the same lawsuit. That is exactly  
20 the result that Congress created the judgment  
21 bar to prevent, as this Court explained in  
22 Gilman.

23 For all those reasons, the judgment  
24 should be reversed.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel. The case is submitted.  
3 (Whereupon, at 12:16 p.m., the case  
4 was submitted.)

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## Official - Subject to Final Review

<b>\$</b>			
<b>\$75,000</b> [1] 18:20	<b>abrogated</b> [1] 66:14	<b>alleged</b> [5] 31:7 32:2 33:5,19 35:7	<b>around</b> [4] 21:21 33:5 55:24 64:8
<b>1</b>	<b>absolutely</b> [6] 8:4 9:5 27:25 32:6 43:21,23	<b>alleges</b> [2] 18:3 31:6	<b>article</b> [1] 54:21
<b>1</b> [2] 42:22 65:6	<b>accept</b> [1] 21:6	<b>alleging</b> [2] 30:20 65:2	<b>aspects</b> [1] 46:13
<b>11:13</b> [2] 1:15 3:2	<b>Acceptance</b> [1] 20:23	<b>allow</b> [3] 33:22 35:22 64:12	<b>assert</b> [1] 61:23
<b>12</b> [1] 60:15	<b>accepted</b> [1] 66:21	<b>allowed</b> [2] 9:19 64:1	<b>asserts</b> [1] 3:18
<b>12(b)(1)</b> [7] 29:15 37:7 38:18 45:22, 25 60:4,10	<b>accepting</b> [1] 17:12	<b>almost</b> [2] 21:18 53:3	<b>assess</b> [1] 60:25
<b>12(b)(6)</b> [10] 32:3 35:3 38:16 44:21, 24 45:7,18,23 46:1 60:10	<b>accords</b> [2] 7:25 28:1	<b>already</b> [1] 32:21	<b>Assistant</b> [1] 1:18
<b>12(h)(2)</b> [2] 44:17,22	<b>Act</b> [3] 22:14 43:10 51:9	<b>alternative</b> [19] 4:20 8:21 15:12 19:25 20:6 26:21 27:13 47:17 53:20 56:18 57:10 60:9,12 61:3,17 63:22 66:9,20,23	<b>Assuming</b> [1] 15:9
<b>12(h)(3)</b> [1] 37:9	<b>action</b> [122] 3:13,15,18,23 4:15,22, 22 5:2,4,10,21 6:5,13,14,21 7:4,6, 8,10,11,19,23,24 8:5,6,16,17 10:18,19,22 11:11,17 12:6 13:1,19 14:22,23 16:2,5 20:1,22 21:6,11, 15 22:18,24 23:17,20,21 24:1 25:4,7,24 26:2,5 27:24 28:13,17,22 29:3,5 31:3,20 33:15,16 34:12,17, 19 35:8,11,23 37:3,15 39:13,22 40:12,13,23 41:15 42:15 44:9 45:13 48:15,24 49:2 51:21,21 52:7, 12,15 53:2,21,24 54:1,5,12,15,20, 22 55:1,2,2,5,8,9,12,21,22 56:6,6 57:12,13 59:11,12 64:25 65:1,15 66:1 67:1,2,5,7	<b>alternatively</b> [1] 45:25	<b>attached</b> [1] 31:15
<b>12:16</b> [1] 68:3	<b>actionable</b> [3] 18:2,2 31:5	<b>although</b> [2] 48:6 58:4	<b>attaches</b> [1] 38:15
<b>13</b> [1] 21:16	<b>actions</b> [9] 5:19 10:8 29:23 30:20 35:1 41:12 52:25 54:4 67:18	<b>American</b> [1] 34:15	<b>authority</b> [1] 64:10
<b>1346</b> [5] 34:25 35:11 36:25 37:14 45:2	<b>actual</b> [2] 61:10 64:10	<b>amicus</b> [2] 52:23 62:2	<b>avenues</b> [1] 61:3
<b>1346(b)</b> [17] 3:13 7:9 11:11 12:7 13:19 18:4 24:1 25:25 26:5 31:4,5 33:15 61:13 64:25 65:3,15 67:2	<b>actually</b> [11] 10:3 18:21 36:22 44:13 45:16 46:13 52:22 54:19 57:24 60:17 67:5	<b>amount</b> [2] 19:1 58:7	<b>avoid</b> [1] 10:11
<b>1346(b)(1)</b> [2] 17:22 40:22	<b>addition</b> [1] 9:19	<b>analogy</b> [1] 18:18	<b>B</b>
<b>1346(c)</b> [2] 29:21 30:19	<b>additional</b> [2] 10:5 67:17	<b>analyses</b> [1] 46:12	<b>back</b> [6] 19:20 51:20 54:13 55:7 57:15 59:11
<b>19-546</b> [1] 3:4	<b>address</b> [6] 27:8 28:4 46:13 48:3, 7,11	<b>analysis</b> [3] 4:5 14:20 52:23	<b>bar</b> [90] 3:11,14,21 4:2,9,12,23 5:2, 7,20 6:14,19 7:24 10:2,11,12 11:12,16 12:7,23 13:1,8,17,22 14:9, 10,21,24,25 16:1 17:15 21:5,12 22:3,7,17,23 23:9,15,21 25:22 26:2 27:23 28:1,21,22 32:5,10,11 33:10,13,21 34:10,11,21,23 35:4,19 38:6,20 39:2,19 40:5,9,24 41:20 44:4 47:3 48:13 49:7 50:9 53:8,12 55:3,11,11,14,22 58:11 59:20,24 60:22 62:6 63:5 64:24 65:24 66:18 67:5,9,21
<b>1933's</b> [1] 53:1	<b>addressed</b> [7] 16:24,25 17:2 22:21 28:6 48:8 63:16	<b>animates</b> [1] 59:2	<b>Barrett</b> [14] 29:10,11 31:21,24 32:16 59:16,17 60:6,19 61:4,16 62:7, 13,25
<b>1946</b> [4] 7:3 21:11 28:18 47:5	<b>addressing</b> [1] 63:19	<b>announce</b> [1] 60:17	<b>barring</b> [1] 59:8
<b>1952</b> [1] 51:10	<b>adjudicated</b> [2] 14:21 31:19	<b>another</b> [2] 16:20 41:23	<b>bars</b> [2] 5:16 39:13
<b>1A</b> [1] 65:6	<b>administrable</b> [1] 34:9	<b>answer</b> [6] 16:14 43:18,24 44:12 50:2 61:5	<b>based</b> [2] 3:19 4:17
<b>2</b>	<b>administrative</b> [1] 20:24	<b>anytime</b> [1] 64:6	<b>bases</b> [1] 29:24
<b>2</b> [1] 42:23	<b>adopted</b> [3] 27:19 46:7 48:19	<b>appeal</b> [6] 10:23 19:12 32:15 49:15 53:23 56:7	<b>basically</b> [1] 11:24
<b>2020</b> [1] 1:11	<b>adopting</b> [1] 53:12	<b>appealable</b> [2] 10:24 11:6	<b>basis</b> [4] 47:15 63:9,25 66:14
<b>26</b> [2] 11:2 54:8	<b>adopts</b> [1] 38:10	<b>appealing</b> [2] 11:8 13:20	<b>began</b> [1] 24:21
<b>2672</b> [2] 20:22 53:8	<b>advantage</b> [2] 10:17 25:6	<b>appeals</b> [14] 9:25 11:9,24,25 16:24 17:1,11 20:8 27:16 46:11 57:11 58:16,20 67:10	<b>beginning</b> [1] 63:7
<b>2676</b> [7] 4:14 7:6 34:14 46:14,25 54:19 59:6	<b>adversary</b> [3] 19:8,18,22	<b>appear</b> [2] 13:4 53:25	<b>behalf</b> [8] 1:20,22 2:4,7,10 3:8 34:4 64:20
<b>2676's</b> [1] 34:18	<b>advocates</b> [1] 67:15	<b>APPEARANCES</b> [1] 1:17	<b>believe</b> [3] 19:22,23 53:7
<b>3</b>	<b>affirm</b> [3] 15:11 35:21 64:12	<b>appeared</b> [1] 7:1	<b>Bell</b> [1] 65:17
<b>3</b> [1] 2:4	<b>affirming</b> [1] 63:23	<b>appears</b> [1] 20:11	<b>below</b> [10] 5:12 9:10 20:3 32:25 35:22 47:23 48:4,6 56:25 58:1
<b>34</b> [1] 2:7	<b>afternoon</b> [1] 56:15	<b>Appendix</b> [3] 12:21 13:16 65:6	<b>best</b> [3] 28:15 65:7,12
<b>39</b> [1] 31:9	<b>agree</b> [5] 13:24 19:14 20:4 32:1 58:5	<b>apple</b> [1] 64:14	<b>between</b> [7] 17:21 21:5 24:22 51:20 52:25 53:11 55:8
<b>4</b>	<b>agreed</b> [1] 50:4	<b>applied</b> [3] 34:16 39:19 62:4	<b>beyond</b> [5] 38:16 44:16,19,23 64:9
<b>40</b> [1] 31:9	<b>agrees</b> [2] 37:1 61:13	<b>applies</b> [5] 4:9 24:22 52:6 63:10, 12	<b>big</b> [1] 21:4
<b>5</b>	<b>ahead</b> [1] 57:6	<b>apply</b> [11] 3:20 4:12 11:12 34:11, 24 35:20 39:3 44:5,7 55:3 62:21	<b>bite</b> [1] 64:13
<b>56</b> [1] 60:17	<b>AL</b> [1] 1:3	<b>applying</b> [1] 41:19	<b>Bivens</b> [34] 3:18 5:16 8:16 13:5 14:2,3,4,22 16:3 19:11 21:24,25 22:1, 14,21 23:10,11 24:10,11 28:23 40:4,14 43:13 49:4,12 50:4 51:9 55:22 61:19 62:4,18,21,22 67:2
<b>6</b>	<b>Ali</b> [1] 15:22	<b>appropriate</b> [3] 27:12 54:10 66:8	<b>Black's</b> [1] 53:1
<b>64</b> [1] 2:10	<b>Alito</b> [19] 15:8,9 16:7,23 17:17 18:14 19:3,21 26:19 44:1,2,11,18,24 45:5,17 46:2,17 47:8	<b>Arbaugh</b> [3] 37:20 38:10,12	<b>blame</b> [1] 56:17
<b>7</b>	<b>Alito's</b> [1] 27:6	<b>Arguably</b> [1] 22:5	<b>body</b> [1] 65:9
<b>70</b> [3] 10:1 51:14 67:9	<b>allegation</b> [1] 33:7	<b>argues</b> [1] 8:19	<b>Both</b> [13] 4:3 14:22 22:25 35:14,16 49:14,14,15,24 50:3,3,3 65:9
<b>8</b>	<b>allegations</b> [1] 45:12	<b>argument</b> [55] 1:14 2:2,5,8 3:4,7 4:21,25 8:17,21 9:1,2,9,15 10:1,2 15:10 16:8 17:2,3,9,13 20:3,6,7,9, 10 21:7 23:7,19 24:21 26:21 27:13 34:3 39:2,18 43:1 46:7 47:13, 16,17,18 51:3 52:10 53:20 56:18 57:10 59:12 61:18 64:19 65:22 66:5,7,13 67:11	<b>bothering</b> [1] 56:16
<b>8</b> [2] 7:4 18:13	<b>allege</b> [1] 37:14	<b>argument's</b> [1] 46:8	<b>breakout</b> [1] 46:2
<b>86A</b> [2] 12:21 13:16		<b>argumentation</b> [1] 20:10	
<b>9</b>		<b>arguments</b> [4] 28:8,15 47:12 57:14	
<b>9</b> [1] 1:11		<b>Arlington</b> [1] 1:21	
<b>A</b>			
<b>a.m</b> [2] 1:15 3:2			
<b>ability</b> [1] 51:8			
<b>able</b> [2] 4:21 64:9			
<b>above-entitled</b> [1] 1:13			

## Official - Subject to Final Review

<p><b>Breyer</b> <sup>[24]</sup> 11:21,22 12:25 13:7,24 14:7,14,18 15:4 31:12 32:8 40:18, 19 41:14 42:1,11,18,21 43:7,17,22, 24 50:2 67:12</p> <p><b>brief</b> <sup>[13]</sup> 7:3 9:10,16 20:6 28:6 30: 16 39:24 40:2 46:10 52:24 54:8 62:2 63:17</p> <p><b>briefed</b> <sup>[3]</sup> 20:14,18 63:17</p> <p><b>briefing</b> <sup>[1]</sup> 40:9</p> <p><b>bring</b> <sup>[13]</sup> 4:21 10:19 20:1 22:19 24:10,11 33:1,16 41:12,14 51:8 61:19,20</p> <p><b>bringing</b> <sup>[2]</sup> 16:3 67:6</p> <p><b>broad</b> <sup>[5]</sup> 3:17 15:25 22:23 26:1 50:16</p> <p><b>broadest</b> <sup>[2]</sup> 37:18 41:10</p> <p><b>Brooks</b> <sup>[1]</sup> 51:11</p> <p><b>brought</b> <sup>[19]</sup> 5:10 10:7 19:21 34: 12,16 37:19 39:3,10,21 40:11,15 42:15 44:8,9,15 50:5 52:8 59:8 67: 18</p> <p><b>BROWNBACK</b> <sup>[2]</sup> 1:3 3:4</p> <p><b>building</b> <sup>[1]</sup> 17:14</p> <p><b>burdensome</b> <sup>[1]</sup> 10:15</p> <p><b>buy</b> <sup>[2]</sup> 51:23 52:3</p>	<p>44:1 47:9 50:11 53:16 56:12 59: 15,23 63:1 64:15,21 68:1</p> <p><b>choice</b> <sup>[2]</sup> 25:3,9</p> <p><b>choose</b> <sup>[1]</sup> 25:6</p> <p><b>chooses</b> <sup>[2]</sup> 10:17 33:14</p> <p><b>chose</b> <sup>[3]</sup> 32:14 53:11,22</p> <p><b>Circuit</b> <sup>[27]</sup> 17:13 19:10,13,18 23:8 27:18,20 30:11 31:13 39:18 46:6, 16 47:21,23 48:6,7 57:18,21,23 58:1,3 60:14 63:16,23 64:12 65:5 66:11</p> <p><b>Circuit's</b> <sup>[7]</sup> 3:20 4:4,8,19 27:22 47:14 66:17</p> <p><b>circuits</b> <sup>[4]</sup> 19:14 46:3,18 66:11</p> <p><b>cite</b> <sup>[1]</sup> 54:8</p> <p><b>cited</b> <sup>[1]</sup> 52:22</p> <p><b>citing</b> <sup>[1]</sup> 53:1</p> <p><b>Citizen's</b> <sup>[1]</sup> 52:23</p> <p><b>Civil</b> <sup>[4]</sup> 11:4 18:13 29:23 30:20</p> <p><b>claim</b> <sup>[77]</sup> 3:16 4:13 5:16 6:18,19 7: 7 8:20 12:13,13,14 13:5 14:2,3,5 17:21,22 18:2,12,22,24 19:11,16, 16,17 20:25 21:5,24 22:1,2 23:16 24:9,10,12,12 30:13 31:5,8 32:2 34:20 35:3,5,10 36:5 37:14 38:15 39:13,15 40:11,14,15 41:23,24 42: 22,23 44:3 46:1 51:9,9 52:12 53:9, 23 54:6,7,10 61:19,20 62:4,5,11, 18,18,19,21,22 63:19 65:13,18</p> <p><b>claimant</b> <sup>[3]</sup> 13:2 40:25 55:5</p> <p><b>claims</b> <sup>[45]</sup> 5:16,19,21,25 12:8,22 13:14 19:10 20:1 21:25 22:15 23: 10 28:13 30:2,5,20 33:6 34:12,16, 24 35:1,14,23 39:3,21 40:12 42: 14 44:8 45:3 46:7 48:15 49:4,5,12, 13,14,23 50:4 52:25 54:5,6,8,25 58:5 59:8</p> <p><b>clarification</b> <sup>[1]</sup> 23:6</p> <p><b>clarify</b> <sup>[1]</sup> 31:25</p> <p><b>classic</b> <sup>[1]</sup> 7:13</p> <p><b>clean</b> <sup>[1]</sup> 58:24</p> <p><b>clear</b> <sup>[14]</sup> 9:8,18 25:14 27:25 29:4 31:4,18 46:20,24 47:1 58:8,18,25 65:17</p> <p><b>clearest</b> <sup>[2]</sup> 6:16,17</p> <p><b>clearly</b> <sup>[2]</sup> 7:9 52:24</p> <p><b>client</b> <sup>[1]</sup> 53:22</p> <p><b>close</b> <sup>[2]</sup> 17:12 66:12</p> <p><b>codefendant</b> <sup>[1]</sup> 55:17</p> <p><b>cognizable</b> <sup>[3]</sup> 17:22,23 18:1</p> <p><b>colleague</b> <sup>[1]</sup> 40:21</p> <p><b>combine</b> <sup>[1]</sup> 36:2</p> <p><b>come</b> <sup>[9]</sup> 12:9 17:12 35:6 37:21 39: 17 45:15 47:2 64:1 66:12</p> <p><b>comes</b> <sup>[3]</sup> 25:9,25 43:10</p> <p><b>coming</b> <sup>[1]</sup> 4:23</p> <p><b>common</b> <sup>[15]</sup> 4:25 6:4,8 7:13,20 9: 22 21:21 29:6 34:14,21 46:13,25 61:23 63:6 67:8</p> <p><b>compelled</b> <sup>[1]</sup> 32:22</p> <p><b>COMPLAINANT</b> <sup>[1]</sup> 64:20</p> <p><b>complaint</b> <sup>[1]</sup> 31:9</p> <p><b>complementary</b> <sup>[1]</sup> 43:14</p> <p><b>complete</b> <sup>[14]</sup> 3:14 6:14,19 7:24</p>	<p>11:16 12:7 16:1 20:25 26:1 28:22 40:24 53:9 55:11 67:5</p> <p><b>complex</b> <sup>[2]</sup> 48:21,22</p> <p><b>complicated</b> <sup>[1]</sup> 36:24</p> <p><b>compromise</b> <sup>[1]</sup> 50:17</p> <p><b>concede</b> <sup>[1]</sup> 48:8</p> <p><b>conceded</b> <sup>[1]</sup> 39:23</p> <p><b>concedes</b> <sup>[1]</sup> 4:18</p> <p><b>concept</b> <sup>[4]</sup> 53:2 54:4 59:7 63:8</p> <p><b>concepts</b> <sup>[2]</sup> 46:25 53:11</p> <p><b>concerns</b> <sup>[1]</sup> 37:20</p> <p><b>concluded</b> <sup>[2]</sup> 37:8 65:11</p> <p><b>concludes</b> <sup>[1]</sup> 41:13</p> <p><b>conclusion</b> <sup>[4]</sup> 4:8,13 47:15 65:24</p> <p><b>confers</b> <sup>[1]</sup> 45:2</p> <p><b>conflicts</b> <sup>[1]</sup> 67:13</p> <p><b>confused</b> <sup>[1]</sup> 19:8</p> <p><b>confusion</b> <sup>[2]</sup> 6:24 58:7</p> <p><b>Congress</b> <sup>[40]</sup> 5:2,6,22 6:7,12 7: 19 9:21 10:11,13 16:1 21:3,12,20 22:13,18,25 24:17 25:16,16 26:4 29:4,7 34:7,20 35:15 37:1 43:15, 19 49:24 50:3,22 51:3,6 53:10 55: 14 63:19 64:10 66:25 67:8,20</p> <p><b>Congress's</b> <sup>[7]</sup> 8:1 22:7 33:9,13 63:4 67:13,14</p> <p><b>consequence</b> <sup>[1]</sup> 25:10</p> <p><b>consequences</b> <sup>[2]</sup> 25:10,20</p> <p><b>consider</b> <sup>[6]</sup> 17:9 39:1,14 56:20 57:16 66:7</p> <p><b>consistent</b> <sup>[5]</sup> 22:6 23:14 37:15 46:8 58:9</p> <p><b>constitute</b> <sup>[4]</sup> 12:7 13:1 20:25 40: 24</p> <p><b>constitutes</b> <sup>[1]</sup> 3:14</p> <p><b>constitutional</b> <sup>[1]</sup> 35:23</p> <p><b>consuming</b> <sup>[1]</sup> 49:10</p> <p><b>contemplate</b> <sup>[1]</sup> 54:16</p> <p><b>continue</b> <sup>[4]</sup> 17:6 50:13 64:13 67: 16</p> <p><b>continued</b> <sup>[1]</sup> 51:13</p> <p><b>continues</b> <sup>[1]</sup> 54:11</p> <p><b>continuously</b> <sup>[1]</sup> 60:15</p> <p><b>contrary</b> <sup>[1]</sup> 23:19</p> <p><b>control</b> <sup>[1]</sup> 34:9</p> <p><b>controlling</b> <sup>[1]</sup> 40:10</p> <p><b>controls</b> <sup>[2]</sup> 21:23 64:7</p> <p><b>controversy</b> <sup>[4]</sup> 10:20 19:1 22:19 33:17</p> <p><b>core</b> <sup>[3]</sup> 13:21,21 15:21</p> <p><b>correct</b> <sup>[7]</sup> 20:3,16 22:4 30:16 50: 5,7,10</p> <p><b>Correction</b> <sup>[1]</sup> 43:12</p> <p><b>correctly</b> <sup>[2]</sup> 24:7 30:18</p> <p><b>counsel</b> <sup>[19]</sup> 8:9 19:5,7 20:13,20 21:18 23:3,5 29:11 31:21 38:22 39:1 47:11 48:25 53:19 56:10 59: 17 64:16 68:2</p> <p><b>Count</b> <sup>[2]</sup> 23:5 32:4</p> <p><b>country</b> <sup>[1]</sup> 63:7</p> <p><b>couple</b> <sup>[3]</sup> 41:15 47:4 63:2</p> <p><b>coupon</b> <sup>[3]</sup> 51:22 52:2,6</p> <p><b>course</b> <sup>[12]</sup> 5:18 7:25 11:7,14 12: 24 17:16 18:18 23:22 25:7 28:1</p>	<p>51:25 62:10</p> <p><b>COURT</b> <sup>[93]</sup> 1:1,14 3:10,12,24 4:4, 7,11 7:5 9:16,25 11:5,9,14 12:20, 22 13:12 14:5,21 15:1,16,23 17: 11 18:6 20:8,11 21:13,23 22:21 23:23 26:23 27:11,16 28:4,7,19 30:4 31:19 32:12 34:6 35:12,21 36:17,22 37:5,6,22 38:10,14,16 39:10,14 44:2 45:9,16,23 47:23 48:4,10,12,14 49:11,24 51:5,11 52:5,16,24 56:25 57:10,24 58:3,8, 12 59:3 60:5,13,24 61:1 63:11,13, 18,23 64:2,9,11 65:3,11 66:5,16, 20,22 67:21</p> <p><b>Court's</b> <sup>[20]</sup> 6:11 10:9 14:19 15:2, 21 17:10,25 26:23 27:15 30:2 31: 17 32:23 35:9,25 37:16 43:11 46: 9 47:6 65:7,16</p> <p><b>Courts</b> <sup>[14]</sup> 11:24,25 16:24 17:1 20:8 23:7 29:22 35:17 43:16 46: 11 55:10 58:15,19 67:10</p> <p><b>create</b> <sup>[1]</sup> 51:4</p> <p><b>created</b> <sup>[3]</sup> 10:11 65:1 67:20</p> <p><b>cries</b> <sup>[1]</sup> 27:2</p> <p><b>critical</b> <sup>[1]</sup> 25:10</p> <p><b>critically</b> <sup>[1]</sup> 31:1</p>
<b>C</b>		<b>D</b>	
<p><b>call</b> <sup>[2]</sup> 47:17 51:24</p> <p><b>CalPERS</b> <sup>[1]</sup> 52:22</p> <p><b>came</b> <sup>[2]</sup> 1:13 48:9</p> <p><b>cannot</b> <sup>[1]</sup> 4:19</p> <p><b>canonical</b> <sup>[2]</sup> 7:13 65:16</p> <p><b>carefully</b> <sup>[1]</sup> 56:21</p> <p><b>Carlson</b> <sup>[1]</sup> 43:11</p> <p><b>carried</b> <sup>[1]</sup> 62:17</p> <p><b>carved</b> <sup>[1]</sup> 51:7</p> <p><b>Case</b> <sup>[59]</sup> 3:4,12,21 5:11 8:15,23 11:15 12:22 13:14 18:16 19:1 23: 23 27:1,13 28:9 31:2,2 32:12,14 33:21,22 35:20 36:3,4,12 37:5 38: 13 39:20 40:3,8 41:18 44:8,15,18 45:24 46:22 47:5,18 51:11,24,25 52:2,3,4,6 55:13 56:2,7,19,23 57: 17,23 60:3,8 62:19 66:7,19 68:2,3</p> <p><b>cases</b> <sup>[4]</sup> 6:11 7:1 31:18 56:23</p> <p><b>cause</b> <sup>[10]</sup> 10:18 14:22,23 25:4,6 31:20 35:8 37:3,15 45:13</p> <p><b>causes</b> <sup>[2]</sup> 7:10 22:24</p> <p><b>central</b> <sup>[1]</sup> 59:7</p> <p><b>cert</b> <sup>[6]</sup> 16:11 19:21,25 27:5 29:13 39:25</p> <p><b>cert-worthy</b> <sup>[2]</sup> 28:6 66:9</p> <p><b>certain</b> <sup>[2]</sup> 50:19 62:17</p> <p><b>certainly</b> <sup>[6]</sup> 9:14 20:4 22:23 31:7 61:1 66:6</p> <p><b>certiorari</b> <sup>[1]</sup> 56:22</p> <p><b>cetera</b> <sup>[1]</sup> 13:3</p> <p><b>chance</b> <sup>[3]</sup> 33:18 39:20 43:5</p> <p><b>changed</b> <sup>[2]</sup> 29:7 67:8</p> <p><b>changing</b> <sup>[1]</sup> 9:22</p> <p><b>CHIEF</b> <sup>[37]</sup> 3:3,9 5:13 6:15 8:8,11 9:20 11:20 15:8 19:4 20:20 23:2 24:21 26:11,15 29:9 32:17,19 33: 25 34:5 36:1,20 38:2,21,24 40:17</p>	<p><b>call</b> <sup>[2]</sup> 47:17 51:24</p> <p><b>CalPERS</b> <sup>[1]</sup> 52:22</p> <p><b>came</b> <sup>[2]</sup> 1:13 48:9</p> <p><b>cannot</b> <sup>[1]</sup> 4:19</p> <p><b>canonical</b> <sup>[2]</sup> 7:13 65:16</p> <p><b>carefully</b> <sup>[1]</sup> 56:21</p> <p><b>Carlson</b> <sup>[1]</sup> 43:11</p> <p><b>carried</b> <sup>[1]</sup> 62:17</p> <p><b>carved</b> <sup>[1]</sup> 51:7</p> <p><b>Case</b> <sup>[59]</sup> 3:4,12,21 5:11 8:15,23 11:15 12:22 13:14 18:16 19:1 23: 23 27:1,13 28:9 31:2,2 32:12,14 33:21,22 35:20 36:3,4,12 37:5 38: 13 39:20 40:3,8 41:18 44:8,15,18 45:24 46:22 47:5,18 51:11,24,25 52:2,3,4,6 55:13 56:2,7,19,23 57: 17,23 60:3,8 62:19 66:7,19 68:2,3</p> <p><b>cases</b> <sup>[4]</sup> 6:11 7:1 31:18 56:23</p> <p><b>cause</b> <sup>[10]</sup> 10:18 14:22,23 25:4,6 31:20 35:8 37:3,15 45:13</p> <p><b>causes</b> <sup>[2]</sup> 7:10 22:24</p> <p><b>central</b> <sup>[1]</sup> 59:7</p> <p><b>cert</b> <sup>[6]</sup> 16:11 19:21,25 27:5 29:13 39:25</p> <p><b>cert-worthy</b> <sup>[2]</sup> 28:6 66:9</p> <p><b>certain</b> <sup>[2]</sup> 50:19 62:17</p> <p><b>certainly</b> <sup>[6]</sup> 9:14 20:4 22:23 31:7 61:1 66:6</p> <p><b>certiorari</b> <sup>[1]</sup> 56:22</p> <p><b>cetera</b> <sup>[1]</sup> 13:3</p> <p><b>chance</b> <sup>[3]</sup> 33:18 39:20 43:5</p> <p><b>changed</b> <sup>[2]</sup> 29:7 67:8</p> <p><b>changing</b> <sup>[1]</sup> 9:22</p> <p><b>CHIEF</b> <sup>[37]</sup> 3:3,9 5:13 6:15 8:8,11 9:20 11:20 15:8 19:4 20:20 23:2 24:21 26:11,15 29:9 32:17,19 33: 25 34:5 36:1,20 38:2,21,24 40:17</p>	<p><b>call</b> <sup>[2]</sup> 47:17 51:24</p> <p><b>CalPERS</b> <sup>[1]</sup> 52:22</p> <p><b>came</b> <sup>[2]</sup> 1:13 48:9</p> <p><b>cannot</b> <sup>[1]</sup> 4:19</p> <p><b>canonical</b> <sup>[2]</sup> 7:13 65:16</p> <p><b>carefully</b> <sup>[1]</sup> 56:21</p> <p><b>Carlson</b> <sup>[1]</sup> 43:11</p> <p><b>carried</b> <sup>[1]</sup> 62:17</p> <p><b>carved</b> <sup>[1]</sup> 51:7</p> <p><b>Case</b> <sup>[59]</sup> 3:4,12,21 5:11 8:15,23 11:15 12:22 13:14 18:16 19:1 23: 23 27:1,13 28:9 31:2,2 32:12,14 33:21,22 35:20 36:3,4,12 37:5 38: 13 39:20 40:3,8 41:18 44:8,15,18 45:24 46:22 47:5,18 51:11,24,25 52:2,3,4,6 55:13 56:2,7,19,23 57: 17,23 60:3,8 62:19 66:7,19 68:2,3</p> <p><b>cases</b> <sup>[4]</sup> 6:11 7:1 31:18 56:23</p> <p><b>cause</b> <sup>[10]</sup> 10:18 14:22,23 25:4,6 31:20 35:8 37:3,15 45:13</p> <p><b>causes</b> <sup>[2]</sup> 7:10 22:24</p> <p><b>central</b> <sup>[1]</sup> 59:7</p> <p><b>cert</b> <sup>[6]</sup> 16:11 19:21,25 27:5 29:13 39:25</p> <p><b>cert-worthy</b> <sup>[2]</sup> 28:6 66:9</p> <p><b>certain</b> <sup>[2]</sup> 50:19 62:17</p> <p><b>certainly</b> <sup>[6]</sup> 9:14 20:4 22:23 31:7 61:1 66:6</p> <p><b>certiorari</b> <sup>[1]</sup> 56:22</p> <p><b>cetera</b> <sup>[1]</sup> 13:3</p> <p><b>chance</b> <sup>[3]</sup> 33:18 39:20 43:5</p> <p><b>changed</b> <sup>[2]</sup> 29:7 67:8</p> <p><b>changing</b> <sup>[1]</sup> 9:22</p> <p><b>CHIEF</b> <sup>[37]</sup> 3:3,9 5:13 6:15 8:8,11 9:20 11:20 15:8 19:4 20:20 23:2 24:21 26:11,15 29:9 32:17,19 33: 25 34:5 36:1,20 38:2,21,24 40:17</p>	<p><b>D.C</b> <sup>[2]</sup> 1:10,19</p> <p><b>damages</b> <sup>[4]</sup> 10:5,7 33:19 43:8</p> <p><b>day</b> <sup>[1]</sup> 27:7</p> <p><b>deal</b> <sup>[1]</sup> 54:25</p> <p><b>dealing</b> <sup>[1]</sup> 37:16</p> <p><b>decades</b> <sup>[1]</sup> 47:4</p> <p><b>decide</b> <sup>[19]</sup> 12:11,12 14:2,8 16:11, 20 23:23 26:22 46:4,20,22 47:24 48:3 49:12,13 56:17,24 61:1 66: 19</p> <p><b>decided</b> <sup>[14]</sup> 14:2,4,8,9,11 16:25 38:17 46:18 48:4 51:11 56:25 57: 24 62:20,23</p> <p><b>decides</b> <sup>[3]</sup> 38:14,16 49:11</p> <p><b>deciding</b> <sup>[2]</sup> 16:19 40:3</p> <p><b>decision</b> <sup>[21]</sup> 10:9 17:25 32:25 35: 21 37:20 38:4,18 45:10,17,18 46: 15 48:6,14,16 52:22 57:22,24 58: 9 60:18 65:16,19</p> <p><b>decisions</b> <sup>[7]</sup> 15:21 43:11 46:9 56: 22 58:4 59:3,4</p> <p><b>defend</b> <sup>[1]</sup> 20:15</p> <p><b>defendants</b> <sup>[1]</sup> 41:16</p> <p><b>defense</b> <sup>[2]</sup> 44:22,23</p> <p><b>defensive</b> <sup>[1]</sup> 61:23</p> <p><b>defined</b> <sup>[1]</sup> 28:18</p> <p><b>definite</b> <sup>[1]</sup> 54:21</p> <p><b>definitely</b> <sup>[1]</sup> 52:21</p> <p><b>definition</b> <sup>[5]</sup> 7:4 11:2,3 21:11 52: 20</p> <p><b>deleted</b> <sup>[1]</sup> 6:9</p> <p><b>deleting</b> <sup>[1]</sup> 6:25</p> <p><b>deletion</b> <sup>[1]</sup> 7:15</p> <p><b>delineated</b> <sup>[1]</sup> 52:24</p> <p><b>demand</b> <sup>[9]</sup> 7:5 16:3 18:9,20 21: 12 28:19,23 52:15 65:1</p>

## Official - Subject to Final Review

<p><b>demonstrates</b> <sup>[1]</sup> 34:20  <b>depart</b> <sup>[3]</sup> 16:18 27:2 34:21  <b>departed</b> <sup>[2]</sup> 5:3 9:21  <b>Department</b> <sup>[1]</sup> 1:19  <b>departure</b> <sup>[3]</sup> 5:23 6:8,22  <b>depend</b> <sup>[1]</sup> 5:9  <b>depends</b> <sup>[5]</sup> 17:15 27:23 60:23 61:9 62:22  <b>describes</b> <sup>[1]</sup> 18:6  <b>description</b> <sup>[2]</sup> 12:18 29:6  <b>determination</b> <sup>[3]</sup> 31:23 36:13 44:6  <b>develop</b> <sup>[2]</sup> 9:8 20:9  <b>developed</b> <sup>[2]</sup> 9:15 57:17  <b>dictionaries</b> <sup>[1]</sup> 28:18  <b>Dictionary</b> <sup>[1]</sup> 53:1  <b>difference</b> <sup>[6]</sup> 7:15,21 8:4 21:4 49:10 65:14  <b>different</b> <sup>[14]</sup> 5:11 8:23 12:8 21:8, 8 25:20 27:19 30:3 36:22 46:12 52:14 58:6,17 62:2  <b>difficulties</b> <sup>[1]</sup> 49:1  <b>direct</b> <sup>[1]</sup> 6:24  <b>direction</b> <sup>[1]</sup> 57:9  <b>directly</b> <sup>[7]</sup> 4:14,24 7:25 22:22 33:9 56:7 67:13  <b>disagree</b> <sup>[1]</sup> 13:10  <b>disagreement</b> <sup>[1]</sup> 66:10  <b>disappeared</b> <sup>[1]</sup> 8:18  <b>discretion</b> <sup>[4]</sup> 15:11,14 17:9 66:6  <b>discretionary</b> <sup>[1]</sup> 30:7  <b>dismiss</b> <sup>[2]</sup> 37:24 56:21  <b>dismissal</b> <sup>[9]</sup> 4:1 18:23 29:14 32:7 35:2 60:4 63:25 65:12,17  <b>dismissed</b> <sup>[2]</sup> 32:3 34:24  <b>dismissing</b> <sup>[1]</sup> 45:24  <b>dispose</b> <sup>[1]</sup> 37:22  <b>disposition</b> <sup>[4]</sup> 5:16 41:23 42:2 66:8  <b>dispositive</b> <sup>[1]</sup> 13:13  <b>dispute</b> <sup>[2]</sup> 31:10 51:2  <b>distinct</b> <sup>[2]</sup> 18:10 30:23  <b>distinction</b> <sup>[4]</sup> 4:16 51:20 54:4 55:8  <b>distinguish</b> <sup>[1]</sup> 53:10  <b>district</b> <sup>[26]</sup> 3:12,23 11:5,14,25 12:2,20,21 13:12 14:5,19,21 15:1,2 21:23 29:22 30:1,4 31:19 32:12 37:6 44:2 49:11 60:13 65:3,6  <b>diversity</b> <sup>[1]</sup> 18:19  <b>dividing</b> <sup>[2]</sup> 17:21 44:25  <b>doctrine</b> <sup>[1]</sup> 63:6  <b>document</b> <sup>[1]</sup> 13:15  <b>done</b> <sup>[3]</sup> 45:16 51:7 61:7  <b>doom</b> <sup>[1]</sup> 54:7  <b>doubt</b> <sup>[1]</sup> 57:2  <b>DOUGLAS</b> <sup>[1]</sup> 1:3  <b>down</b> <sup>[2]</sup> 15:6 43:10  <b>dramatic</b> <sup>[1]</sup> 5:23  <b>draw</b> <sup>[2]</sup> 48:14 60:2  <b>drawing</b> <sup>[1]</sup> 4:16  <b>drawn</b> <sup>[1]</sup> 44:17  <b>duplicative</b> <sup>[11]</sup> 5:7 8:2,4 9:13 33:</p>	<p>11 35:18 39:21 43:6,7 58:12 63:15  <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>earlier</b> <sup>[5]</sup> 47:19 49:8 53:7 57:20 59:22  <b>easier</b> <sup>[2]</sup> 58:18,23  <b>easily</b> <sup>[2]</sup> 34:8 37:22  <b>easy</b> <sup>[1]</sup> 25:18  <b>effect</b> <sup>[2]</sup> 10:25 16:12  <b>either</b> <sup>[5]</sup> 25:3 30:2 35:19 38:18 57:7  <b>elaborate</b> <sup>[1]</sup> 9:4  <b>election</b> <sup>[4]</sup> 48:19,20 51:4,12  <b>election-of-remedies</b> <sup>[2]</sup> 24:8,15  <b>election-of-remedy</b> <sup>[1]</sup> 25:17  <b>element</b> <sup>[1]</sup> 30:21  <b>elements</b> <sup>[11]</sup> 18:3 31:6,8 32:2 35:2 36:9 37:3 38:5 45:3,5 65:2  <b>eliminate</b> <sup>[1]</sup> 6:24  <b>eliminated</b> <sup>[1]</sup> 7:22  <b>embedded</b> <sup>[3]</sup> 39:9 57:3 63:4  <b>emphasize</b> <sup>[1]</sup> 32:23  <b>employee</b> <sup>[13]</sup> 5:17 11:18 21:2 26:2 41:1,3,7,22 42:4,8,16,23 43:20  <b>employees</b> <sup>[13]</sup> 3:16 5:8 8:3 10:6,14 17:6 26:8 33:4,6,12 50:20 55:17 67:17  <b>employer</b> <sup>[2]</sup> 41:21 42:3  <b>enacted</b> <sup>[7]</sup> 10:2 22:25 35:16 40:5 55:14 63:19 67:10  <b>enactment</b> <sup>[2]</sup> 55:10 63:4  <b>encouraging</b> <sup>[1]</sup> 49:3  <b>end</b> <sup>[3]</sup> 12:2,15 32:13  <b>enormous</b> <sup>[2]</sup> 48:17 58:7  <b>enough</b> <sup>[2]</sup> 15:5 22:24  <b>ensure</b> <sup>[2]</sup> 48:23 49:22  <b>enter</b> <sup>[2]</sup> 14:1 35:12  <b>entered</b> <sup>[15]</sup> 3:12 11:13 12:20 13:8,11,14,22 14:11 15:1 23:20 32:13 37:7 59:24 63:12 65:4  <b>entire</b> <sup>[4]</sup> 10:19 22:19 23:15 33:17  <b>entirely</b> <sup>[3]</sup> 10:16 53:3,3  <b>entitled</b> <sup>[2]</sup> 17:4 30:24  <b>entry</b> <sup>[1]</sup> 32:9  <b>entwined</b> <sup>[1]</sup> 64:6  <b>especially</b> <sup>[1]</sup> 53:6  <b>ESQ</b> <sup>[3]</sup> 2:3,6,9  <b>ESQUIRE</b> <sup>[1]</sup> 1:21  <b>essence</b> <sup>[1]</sup> 45:18  <b>essentially</b> <sup>[2]</sup> 7:7 47:2  <b>established</b> <sup>[2]</sup> 5:20 36:14  <b>ET</b> <sup>[2]</sup> 1:3 13:3  <b>even</b> <sup>[23]</sup> 4:6 9:2 16:10 17:12 18:11,25 23:9 29:18 30:8 39:1 41:10 46:21 49:24 51:10 54:5 55:13 60:5,21 63:21,21 65:11 66:12,22  <b>event</b> <sup>[1]</sup> 25:24  <b>everyone</b> <sup>[1]</sup> 18:22  <b>everything</b> <sup>[1]</sup> 22:8  <b>evidentiary</b> <sup>[1]</sup> 65:10  <b>ex-post</b> <sup>[1]</sup> 49:21  <b>exactly</b> <sup>[13]</sup> 6:7 12:19 17:7 25:1 27:11 30:18 41:20 42:19 43:15 48:</p> </p>	<p>12 50:7 67:7,19  <b>example</b> <sup>[5]</sup> 10:6 23:24 41:21 43:5,8  <b>exception</b> <sup>[1]</sup> 29:1  <b>exceptionally</b> <sup>[1]</sup> 15:25  <b>exceptions</b> <sup>[3]</sup> 15:20 26:25 57:1  <b>exchange</b> <sup>[1]</sup> 50:18  <b>exclusive</b> <sup>[1]</sup> 51:4  <b>exercise</b> <sup>[3]</sup> 15:13 17:8 30:6  <b>exhibits</b> <sup>[1]</sup> 65:10  <b>exist</b> <sup>[1]</sup> 40:4  <b>existence</b> <sup>[1]</sup> 58:3  <b>expires</b> <sup>[1]</sup> 31:25  <b>explain</b> <sup>[3]</sup> 7:3 30:16 40:9  <b>explained</b> <sup>[11]</sup> 30:18,23 31:12 32:8 34:13 35:5 45:10 48:12 65:5,16 67:21  <b>explains</b> <sup>[1]</sup> 30:17  <b>explicitly</b> <sup>[3]</sup> 20:23 22:13 51:7  <b>express</b> <sup>[1]</sup> 6:7  <b>expressly</b> <sup>[4]</sup> 5:3 9:21 29:7 67:8  <b>extensive</b> <sup>[1]</sup> 65:9  <b>extent</b> <sup>[2]</sup> 23:6 36:21  <b>extra</b> <sup>[1]</sup> 43:8  <b>extraordinary</b> <sup>[1]</sup> 65:24  <b>extremely</b> <sup>[2]</sup> 10:14 26:1  <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>fact</b> <sup>[7]</sup> 43:10 49:19 52:13,14 53:6,22 59:5  <b>fact-finding</b> <sup>[2]</sup> 45:16 61:10  <b>facts</b> <sup>[1]</sup> 35:7  <b>factual</b> <sup>[1]</sup> 33:7  <b>failed</b> <sup>[1]</sup> 35:9  <b>fails</b> <sup>[2]</sup> 4:13 17:23  <b>failure</b> <sup>[7]</sup> 44:3,4 45:13 46:1 54:6 65:13,18  <b>fair</b> <sup>[3]</sup> 26:3 32:24 33:18  <b>fallback</b> <sup>[1]</sup> 66:4  <b>far</b> <sup>[1]</sup> 43:2  <b>favor</b> <sup>[6]</sup> 48:16,16 65:8,25 66:19,24  <b>favorable</b> <sup>[2]</sup> 38:4,19  <b>FDIC</b> <sup>[2]</sup> 4:5 17:25  <b>federal</b> <sup>[12]</sup> 3:15 8:3 11:4,17 18:12,16,16 26:7 36:6,10,10 50:19  <b>figure</b> <sup>[1]</sup> 15:6  <b>file</b> <sup>[9]</sup> 19:16 49:4,5  <b>filed</b> <sup>[7]</sup> 8:5,16,22,24 9:14 35:24 39:25  <b>files</b> <sup>[2]</sup> 12:2 24:9  <b>final</b> <sup>[10]</sup> 11:15 13:18,20 16:13 23:9 32:13 39:12 53:25 56:2,6  <b>finally</b> <sup>[1]</sup> 39:16  <b>find</b> <sup>[1]</sup> 6:10  <b>fine</b> <sup>[1]</sup> 18:18  <b>first</b> <sup>[22]</sup> 3:22 6:3,10 9:2,7 23:6 26:24 31:13 34:11 36:23 39:6,17 45:21 49:5,12 52:2,3,6,7 61:19 64:5,13  <b>focused</b> <sup>[1]</sup> 58:10  <b>follow</b> <sup>[2]</sup> 26:18 35:18  <b>followed</b> <sup>[1]</sup> 26:20  <b>following</b> <sup>[1]</sup> 5:4</p> </p>	<p><b>follows</b> <sup>[1]</sup> 4:14  <b>footnote</b> <sup>[1]</sup> 45:14  <b>force</b> <sup>[1]</sup> 11:14  <b>forceful</b> <sup>[1]</sup> 57:14  <b>forces</b> <sup>[1]</sup> 65:23  <b>foreclose</b> <sup>[1]</sup> 41:24  <b>foreclosed</b> <sup>[2]</sup> 25:5 66:2  <b>forego</b> <sup>[1]</sup> 24:12  <b>forfeited</b> <sup>[1]</sup> 15:11  <b>formulation</b> <sup>[3]</sup> 7:13 9:22 29:7  <b>forth</b> <sup>[1]</sup> 45:12  <b>found</b> <sup>[1]</sup> 10:13  <b>four</b> <sup>[1]</sup> 12:8  <b>free</b> <sup>[2]</sup> 51:25 52:2  <b>friend</b> <sup>[2]</sup> 52:20 65:23  <b>friend's</b> <sup>[1]</sup> 66:4  <b>FTCA</b> <sup>[62]</sup> 3:11,16,23 4:9,15,22 5:4,16 8:6,16,20 10:4,17 11:8 14:23 15:17 17:5 19:11,15 20:21,23 22:1,13,18 23:17,25 24:9,12 25:6 27:24 28:22 30:13 31:8,20 33:12 34:7 35:1,2,10,16 40:15 43:14 44:3 45:4,6 48:23 49:5,13 50:3 51:9,12 53:23 54:1 55:21 56:1 57:24 61:20 62:5,18,19 63:5 66:1  <b>FTCA's</b> <sup>[2]</sup> 30:20 35:6  <b>fully</b> <sup>[3]</sup> 20:14,18 63:17  <b>function</b> <sup>[1]</sup> 30:7  <b>functions</b> <sup>[1]</sup> 59:24  <b>fund</b> <sup>[2]</sup> 25:9,9  <b>fundamentally</b> <sup>[1]</sup> 32:24  <b>further</b> <sup>[4]</sup> 13:23 26:7 30:22 37:25  <b>furthest</b> <sup>[1]</sup> 37:24  <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>gave</b> <sup>[1]</sup> 36:9  <b>General</b> <sup>[2]</sup> 1:18 27:2  <b>gestured</b> <sup>[1]</sup> 9:12  <b>gets</b> <sup>[11]</sup> 9:31,14,15 48:24 51:20  <b>Gilman</b> <sup>[2]</sup> 10:10 67:22  <b>give</b> <sup>[5]</sup> 9:3 42:22,24 49:14 50:19  <b>Given</b> <sup>[2]</sup> 47:21 57:17  <b>gives</b> <sup>[1]</sup> 29:21  <b>goal</b> <sup>[1]</sup> 23:15  <b>Gorsuch</b> <sup>[11]</sup> 26:12,13 53:17,18 54:13,23 55:4,19,24 56:4,8  <b>government</b> <sup>[34]</sup> 4:10 21:2 29:13,23,25 30:8 36:25 38:5,19 39:10,23 40:25 41:1,6 42:4,22 45:22 47:2 48:17,18 49:3 50:14,16 52:4 59:12 60:3,8,14 61:12 62:20 63:16,24 65:8 67:17  <b>government's</b> <sup>[9]</sup> 5:8 10:6,14 17:6 33:4,11 47:14,16 49:2  <b>grant</b> <sup>[4]</sup> 17:19 19:25 56:22 60:13  <b>granted</b> <sup>[4]</sup> 16:11,15 29:13 64:10  <b>grocery</b> <sup>[1]</sup> 51:23  <b>ground</b> <sup>[11]</sup> 14:8 15:12 19:25 20:6,16 33:3 37:11 48:4 57:25 63:22 66:20  <b>grounds</b> <sup>[2]</sup> 12:5 62:20  <b>guess</b> <sup>[6]</sup> 24:2 25:15 38:2 53:20 55:19 57:15</p> </p>
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## Official - Subject to Final Review

<p style="text-align: center;"><b>H</b></p> <p>hair <sup>[1]</sup> 53:6  happenstance <sup>[1]</sup> 21:22  happy <sup>[1]</sup> 37:24  harder <sup>[1]</sup> 58:22  he'll <sup>[1]</sup> 12:14  hear <sup>[1]</sup> 3:3  heard <sup>[1]</sup> 59:22  held <sup>[5]</sup> 4:11 15:16 19:10 36:11 45:24  Helmerich <sup>[1]</sup> 37:17  helpful <sup>[2]</sup> 47:7 57:5  helpfully <sup>[1]</sup> 31:12  Himmelreich <sup>[1]</sup> 4:7  history <sup>[2]</sup> 34:15,22  holding <sup>[2]</sup> 35:9,11  Honor <sup>[62]</sup> 6:2,8 7:2 11:1 12:17 13:6,11 14:5,17 15:15 17:2,7,24 18:18 20:5,17 21:10 22:5,17 23:14 24:24,25 25:21 30:10,17 32:6 35:15 37:25 38:9 39:5 40:6 41:9,18 42:9 43:4 44:15 45:10,21 46:5,23 47:25 48:5 49:18 50:6 51:1,19 52:19 53:7 54:3,18 55:6 56:3 57:19 59:1 60:1,11,24 61:8,25 62:16 63:3,18  Honor's <sup>[1]</sup> 49:20  Hood <sup>[1]</sup> 65:17  hope <sup>[1]</sup> 49:6  However <sup>[1]</sup> 19:20  Hui <sup>[2]</sup> 15:22 22:22  HUSTON <sup>[47]</sup> 1:18 2:3,9 3:6,7,9 5:13 6:1 7:2 8:13 9:5 11:1 12:17 13:6,10 14:4,13,16,19 15:15 16:22 17:1,24 18:17 20:4,17 21:10 22:5,11,16 23:13 24:24 25:21 26:10,18 27:10 28:16 30:10 31:22 32:6,18,19 34:1 52:15 64:17,19,21  Huston's <sup>[1]</sup> 52:10  hypothetical <sup>[1]</sup> 42:14</p>	<p>indicates <sup>[1]</sup> 49:20  indisputably <sup>[1]</sup> 65:3  individual <sup>[11]</sup> 4:22 5:4,10 8:5 11:17 16:2,5 23:20,21 25:4 67:17  inefficient <sup>[2]</sup> 49:17,19  infinitely <sup>[1]</sup> 48:21  injuries <sup>[1]</sup> 3:19  injury <sup>[1]</sup> 33:19  insight <sup>[1]</sup> 17:25  instance <sup>[1]</sup> 52:7  instead <sup>[3]</sup> 4:11 24:19 66:18  intend <sup>[1]</sup> 34:20  intended <sup>[1]</sup> 43:16  intentionally <sup>[1]</sup> 15:25  interested <sup>[1]</sup> 42:19  interpretation <sup>[1]</sup> 66:18  interpreting <sup>[1]</sup> 15:17  intertwines <sup>[1]</sup> 61:14  involve <sup>[1]</sup> 30:6  involved <sup>[2]</sup> 3:16 42:23  involvement <sup>[1]</sup> 47:7  Isn't <sup>[7]</sup> 12:15 16:9 20:15 36:14 50:2 52:18 66:9  issue <sup>[25]</sup> 16:8,25 19:17 20:14 22:21 27:8 30:9 39:17 40:10,14 46:19 47:7 48:7,8,11 57:16 58:17 61:24 62:7,12,14,16,24 63:15,20  issues <sup>[3]</sup> 56:23 62:8,17  itself <sup>[2]</sup> 37:7 45:22</p>	<p>judgments <sup>[2]</sup> 23:10 54:17  judicata <sup>[13]</sup> 5:1 7:14,21 18:24 34:14,15 40:10 41:19 53:13 55:12 59:6 63:8,9  jump <sup>[1]</sup> 47:24  jurisdiction <sup>[30]</sup> 3:25 29:15,19,22 30:5,19 34:25 35:1,6,12 36:3,8,14,18,23 37:2,9,13 38:7,15,17 41:11 45:2,11 60:25 61:14 63:13,25 64:2,7  jurisdiction's <sup>[1]</sup> 64:6  jurisdictional <sup>[10]</sup> 4:1,5 30:9,14 31:15 35:15 37:23 44:5 47:13 55:15  Justice <sup>[152]</sup> 1:19 3:3,9 5:13 6:15 8:8,10,11,12 9:5,20 10:21 11:19,20,20,22 12:25 13:7,24 14:7,14,18 15:4,8,8,9 16:7,23 17:17 18:14 19:3,4,6,7,21 20:12,19 21:17 22:9,12 23:2,4,5 24:2,21 25:12 26:9,11,11,13,15,15,17,19,19 27:6,10,18 28:10,16 29:8,9,9,11 31:12,21,24 32:8,16,17,20 33:25 34:5 36:1,20 38:2,21,23,24,25 40:1,16,17,17,19 41:14 42:1,11,18,21 43:7,17,22,24 44:1,1,2,11,18,24 45:5,17 46:2,17 47:8,9,9,11,18 48:1,25 49:7 50:1,2,8,11,11,12 51:15 52:9 53:14,16,16,18 54:13,23 55:4,19,24 56:4,8,12,12,14 58:14 59:10,15,15,17,23 60:6,19 61:4,16 62:7,13,25 63:1 64:15,22 67:12 68:1  justifies <sup>[1]</sup> 63:23</p>	<p>lead <sup>[3]</sup> 43:1,3 58:20  least <sup>[2]</sup> 19:13 57:8  leave <sup>[1]</sup> 66:16  left <sup>[3]</sup> 13:17,18 55:2  legal <sup>[3]</sup> 18:9 20:16 28:18  length <sup>[1]</sup> 19:24  lessons <sup>[1]</sup> 15:21  liability <sup>[1]</sup> 42:8  light <sup>[3]</sup> 37:21 46:17 53:6  limit <sup>[1]</sup> 10:15  limitation <sup>[1]</sup> 29:5  line <sup>[4]</sup> 17:21 44:17,25 48:15  lines <sup>[1]</sup> 60:2  linguistic <sup>[1]</sup> 55:7  listed <sup>[1]</sup> 29:24  litigants <sup>[1]</sup> 63:7  litigate <sup>[5]</sup> 10:3 17:5 33:2,15 49:23  litigated <sup>[1]</sup> 49:25  litigation <sup>[12]</sup> 5:7 8:2 9:13 13:23 26:7 33:11 35:19 39:21 48:18,21 58:12 63:15  little <sup>[3]</sup> 19:8 33:8 61:11  long <sup>[4]</sup> 18:3 31:6 36:11 54:11  longer <sup>[3]</sup> 11:10,12 44:21  look <sup>[6]</sup> 37:5,5 40:22 42:18 51:16 62:19  looked <sup>[1]</sup> 66:25  looking <sup>[1]</sup> 62:23  lose <sup>[8]</sup> 12:12,13 19:15 33:3 36:16,17 49:5 61:20  loses <sup>[1]</sup> 8:20  lots <sup>[2]</sup> 11:24 58:19  lower <sup>[1]</sup> 20:8</p>
<p style="text-align: center;"><b>I</b></p> <p>idea <sup>[1]</sup> 9:12  identical <sup>[1]</sup> 58:13  identity <sup>[1]</sup> 62:8  ignore <sup>[1]</sup> 59:5  illustrates <sup>[1]</sup> 58:6  imagine <sup>[1]</sup> 50:22  immunity <sup>[5]</sup> 18:8 37:2,16 61:15 62:20  impact <sup>[1]</sup> 40:7  implications <sup>[2]</sup> 9:23 30:14  important <sup>[2]</sup> 4:6 26:25  imports <sup>[1]</sup> 34:14  imposed <sup>[1]</sup> 16:1  inclined <sup>[1]</sup> 66:23  included <sup>[1]</sup> 10:23  incorporates <sup>[3]</sup> 40:10 47:1 59:6  Incorporation <sup>[1]</sup> 43:12  incorrect <sup>[1]</sup> 65:23  increase <sup>[1]</sup> 48:17  independent <sup>[2]</sup> 34:8 63:22  indicate <sup>[1]</sup> 43:13</p>	<p style="text-align: center;"><b>J</b></p> <p>JA <sup>[1]</sup> 31:9  JAICOMO <sup>[57]</sup> 1:21 2:6 34:2,3,5 36:1,20 38:9 39:4 40:6 41:9,17 42:9,13,20 43:4,9,21,23 44:7,14,20 45:1,9,19 46:5,23 47:25 48:5 49:18 50:6,10,12 51:1,19 52:19 53:15 54:3,18,24 55:6,23 56:3,5,11,15 57:19 59:1 60:1,11,23 61:8,25 62:10,15 63:1,3  JAMES <sup>[2]</sup> 1:6 64:12  joined <sup>[1]</sup> 67:3  judge <sup>[3]</sup> 12:2,12 14:1  judgement <sup>[1]</sup> 60:21  judgment <sup>[164]</sup> 3:11,13,14,21 4:2,9,9,12,15,23 5:1,2,5,7,12 6:5 10:2,4,11,12,18,22,22,23 11:2,4,8,10,12,13,15,16 12:1,3,6,9,15,18,19,23 13:1,3,7,8,11,14,17,18,19,22,22 14:1,3,12,15,21,24,25 15:1 16:13 17:15 18:22 20:15,22 21:12,15 22:7,17,18,23 23:9,11,15,16,19,21,25 24:1 25:8,22,24 26:6 27:23 28:1,21,21 29:16,18 31:3,11 32:4,7,9,10,11,13,15 33:3,10,12,13,16,21 34:10,11,19,19,21,23 35:4,10,13,19 37:7 38:6,20 39:2,12,19 40:5,9,23 41:19 44:4 47:3 48:13 49:14 50:9 53:12,24 54:15,20,22,24 55:1,11,14,20 56:1,5 58:11 59:19,23 60:7,9,10,18,20 61:6 63:5,12 64:24,24 65:4,7,8,12,14,24,25 66:18 67:9,20,23  judgment's <sup>[1]</sup> 25:9</p>	<p style="text-align: center;"><b>K</b></p> <p>Kagan <sup>[11]</sup> 23:4,5 24:2 25:12 26:9 49:8 50:11,12 51:15 52:9 53:14  Kavanaugh <sup>[11]</sup> 26:16,17 27:10 28:10 17 29:8 47:19 56:13,14 58:14 59:10  key <sup>[3]</sup> 7:15 12:23 28:12  KING <sup>[6]</sup> 1:6 3:5 35:22,24 40:11 64:13  known <sup>[1]</sup> 22:25  knows <sup>[1]</sup> 24:17</p> <p style="text-align: center;"><b>L</b></p> <p>label <sup>[2]</sup> 31:14,15  lack <sup>[5]</sup> 3:24 29:15,19 34:24 38:6  lacked <sup>[1]</sup> 37:9  lacks <sup>[1]</sup> 35:12  language <sup>[14]</sup> 15:24 21:8 24:4 35:15 39:7,11 45:1 46:24 51:16,17 54:19 55:5 61:13 63:18  largely <sup>[1]</sup> 9:15  last <sup>[5]</sup> 5:14 8:14 21:19 47:4 51:14  later <sup>[2]</sup> 18:21 55:22  law <sup>[18]</sup> 4:25 6:4,8 7:13,20 9:22 20:15 21:21 29:6 34:14,15,21 46:13,25 53:1 61:23 63:6 67:8  lawsuit <sup>[18]</sup> 8:6 9:14 10:8 12:2,4,9 33:1 35:24 40:15 41:22 42:17,24 54:11 59:9 64:14 66:25 67:3,19  lawsuits <sup>[2]</sup> 10:13 63:10</p>	<p style="text-align: center;"><b>M</b></p> <p>made <sup>[7]</sup> 5:1 6:7 7:23 15:10 39:18,24 61:18  main <sup>[1]</sup> 65:22  mainstream <sup>[1]</sup> 52:21  Malesko <sup>[1]</sup> 43:13  managed <sup>[1]</sup> 54:12  Manning <sup>[2]</sup> 22:1 46:15  many <sup>[5]</sup> 16:24 31:17 58:17 63:11 64:5  matter <sup>[11]</sup> 1:13 3:19,25 13:3 21:19 24:14 37:10 40:3,13 41:18 48:1  matters <sup>[3]</sup> 31:2,13 58:13  mean <sup>[14]</sup> 13:25 15:20 22:6 24:16 25:17 26:22 36:5 44:19 50:13,15 52:2,12 55:12 67:5  Meaning <sup>[2]</sup> 48:2 49:3  means <sup>[8]</sup> 11:7 15:17 18:1 19:11 28:25 29:25 54:14 58:19  meant <sup>[1]</sup> 21:7  mention <sup>[1]</sup> 19:24  mentioned <sup>[6]</sup> 6:9 27:16 57:20 58:4 61:12 63:14  meritorious <sup>[1]</sup> 35:22  merits <sup>[21]</sup> 16:8 17:23 18:11,24 23:25 30:13 31:22 36:2,13 57:8,9 59:20 60:16 61:7,14 63:13 64:2,3,7,7 65:19  Meyer <sup>[11]</sup> 4:5 18:1,7 30:17,22 31:</p>

## Official - Subject to Final Review

<p>4 35:5 37:12 45:10,15 65:15  <b>MICHAEL</b> [5] 1:18 2:3,9 3:7 64:19  <b>middle</b> [1] 37:11  <b>might</b> [7] 6:1 12:11 24:13 50:23 51:24 52:11,13  <b>Millbrook</b> [1] 15:22  <b>Miller</b> [2] 54:9 64:4  <b>minute</b> [1] 32:17  <b>minutes</b> [2] 63:2 64:17  <b>misconduct</b> [1] 30:6  <b>missing</b> [1] 38:8  <b>mistake</b> [1] 29:14  <b>mistaken</b> [1] 66:17  <b>moment</b> [2] 14:10 32:24  <b>Monday</b> [1] 1:11  <b>money</b> [2] 42:23,24  <b>morning</b> [3] 26:17 53:18 66:6  <b>most</b> [5] 16:13 37:4 46:14 47:15 66:8  <b>motion</b> [3] 13:13 29:18 65:10  <b>moved</b> [4] 29:17 45:22 60:15 63:24  <b>moving</b> [2] 29:14,14  <b>much</b> [4] 6:23 36:19 43:25 59:14  <b>multiple</b> [3] 54:6,16 58:13  <b>must</b> [2] 3:24 54:25  <b>myself</b> [1] 25:14</p> <hr/> <p style="text-align: center;"><b>N</b></p> <p><b>narrow</b> [1] 37:4  <b>nature</b> [1] 59:19  <b>necessarily</b> [5] 3:24 39:14 41:24 54:25 61:1  <b>need</b> [5] 27:8 28:5 49:13 55:17 60:5  <b>neither</b> [1] 35:18  <b>never</b> [5] 4:9 14:23 34:16 38:5 48:24  <b>next</b> [2] 3:4 25:25  <b>Ninth</b> [6] 17:13 19:13 27:18,22 46:6 66:13  <b>none</b> [1] 46:11  <b>normal</b> [1] 16:19  <b>normally</b> [2] 12:1,8  <b>Note</b> [1] 65:6  <b>noted</b> [1] 45:14  <b>nothing</b> [1] 14:20  <b>November</b> [1] 1:11  <b>number</b> [2] 5:11 55:10</p> <hr/> <p style="text-align: center;"><b>O</b></p> <p><b>objective</b> [3] 5:9 26:10 33:9  <b>obligated</b> [1] 48:22  <b>obscure</b> [1] 61:11  <b>obtain</b> [1] 33:18  <b>obvious</b> [2] 5:24 66:17  <b>obviously</b> [2] 26:25 56:21  <b>occasions</b> [1] 63:11  <b>occur</b> [1] 7:23  <b>odds</b> [1] 33:9  <b>offer</b> [3] 25:2 36:22 38:11  <b>officers</b> [1] 33:23  <b>often</b> [1] 26:23  <b>Okay</b> [11] 14:8 36:7 42:24 43:9,17,</p>	<p>22 56:9 60:6,19 61:16 62:25  <b>on-the-merits</b> [1] 61:11  <b>once</b> [2] 24:9 63:12  <b>one</b> [27] 5:11 9:14 10:13 17:3,18 19:2 21:19 22:6 35:24 36:12 40:1 41:12,23,25 42:2,5,17 47:20,21 49:7 54:6 57:11,25 59:2,8 60:2 67:1  <b>only</b> [26] 7:23 9:14 14:25 17:11,13 24:11 26:3 29:3 32:9 35:24 37:18 38:10,12 42:17 45:2 46:6 52:7 54:21 59:24 60:15,16 63:10,12 64:13 66:11 67:6  <b>opens</b> [1] 25:7  <b>operate</b> [1] 48:13  <b>opinion</b> [1] 15:3  <b>opportunity</b> [2] 25:7 51:14  <b>opposed</b> [2] 6:20 29:16  <b>opposing</b> [1] 40:21  <b>opposite</b> [1] 58:21  <b>opposition</b> [2] 20:7 39:25  <b>oral</b> [5] 1:14 2:2,5 3:7 34:3  <b>order</b> [1] 11:5  <b>other</b> [22] 16:15 19:14 21:24 24:8 27:8,20 31:18 36:16 38:11 40:20 41:25 42:3 46:11,19 48:9 54:8 55:22 58:3,15 64:5,8 66:20  <b>others</b> [2] 28:12 47:22  <b>ought</b> [1] 56:4  <b>out</b> [14] 12:4 15:6 18:21 21:18 27:2,18 36:7 46:10 47:12 48:9 51:7 53:7 55:9 62:2  <b>outcome</b> [2] 8:23 40:8  <b>outside</b> [1] 52:21  <b>Over</b> [7] 6:11,12 12:10 30:19 33:22 51:14 62:17  <b>overwhelmingly</b> [1] 67:11  <b>own</b> [2] 32:14 60:25</p> <hr/> <p style="text-align: center;"><b>P</b></p> <p><b>p.m</b> [1] 68:3  <b>PAGE</b> [3] 2:2 7:4 54:8  <b>paper</b> [1] 12:1  <b>parallel</b> [3] 43:14 49:23,25  <b>particular</b> [5] 15:19 16:11 18:8 56:22,23  <b>particularly</b> [1] 29:4  <b>parties</b> [2] 35:17 65:9  <b>party</b> [3] 44:21 55:16 61:2  <b>passed</b> [2] 41:8 42:6  <b>passes</b> [1] 38:15  <b>PATRICK</b> [3] 1:21 2:6 34:3  <b>Payne</b> [1] 37:17  <b>peculiar</b> [1] 48:19  <b>pending</b> [3] 53:21 54:1 56:1  <b>people</b> [1] 51:24  <b>percolation</b> [1] 47:22  <b>perfectly</b> [4] 18:18 25:14 28:9 31:4  <b>perhaps</b> [2] 12:4 19:8  <b>permit</b> [3] 10:3 32:25 67:15  <b>person</b> [1] 52:1  <b>Petition</b> [6] 8:19 12:21 13:15 19:22 27:5 65:6</p>	<p><b>Petitioners</b> [5] 1:4,20 2:4,10 3:8  <b>phrase</b> [4] 28:21 55:11 58:24 67:4  <b>pick</b> [1] 8:13  <b>piece</b> [1] 12:1  <b>place</b> [1] 66:16  <b>places</b> [1] 64:5  <b>plain</b> [3] 11:16 28:24 66:2  <b>plaintiff</b> [19] 4:12 10:17 11:8 18:3,10,19 25:8 28:23 30:24 31:6 32:1 33:1,14 35:7,9 41:5 45:12 49:22 67:15  <b>plaintiff's</b> [1] 5:10  <b>plaintiffs</b> [6] 25:2 26:4 48:22 49:4 50:17 51:8  <b>play</b> [2] 4:23 45:15  <b>pleaded</b> [3] 16:4 18:19 45:12  <b>pleading</b> [1] 65:1  <b>pleadings</b> [1] 29:16  <b>please</b> [2] 3:10 34:6  <b>point</b> [20] 5:15 8:14 9:19 10:21 11:10 13:23 14:14 18:25 23:6 39:24 41:2 42:18 45:8 46:10 54:2 55:9 56:16 57:22 58:5 59:13  <b>pointed</b> [2] 27:18 53:7  <b>points</b> [2] 6:2 62:2  <b>policy</b> [6] 10:12 21:20 24:14 48:2,11 51:2  <b>pop</b> [1] 51:24  <b>portion</b> [3] 45:14 48:23 61:11  <b>posed</b> [1] 47:20  <b>position</b> [16] 9:12,24 24:6 25:2 27:17 32:22 36:21 37:12,12 41:10 49:2,21 53:21 58:16 59:18,21  <b>possibility</b> [1] 54:16  <b>possible</b> [1] 23:13  <b>practical</b> [1] 49:1  <b>practice</b> [1] 16:19  <b>precedent</b> [2] 30:12 32:23  <b>precisely</b> [1] 10:10  <b>preclude</b> [2] 22:24 23:22  <b>precluded</b> [3] 20:2 31:23 67:6  <b>precludes</b> [3] 3:17 13:23 16:2  <b>precluding</b> [1] 10:16  <b>preclusion</b> [16] 7:19,22 24:20,20 25:19 26:1 29:2 31:14 54:10 61:23,24 62:4,8,11,16,24  <b>preclusive</b> [7] 4:16 5:1 6:6 10:25 55:3 62:5 65:20  <b>predicate</b> [1] 57:21  <b>predictable</b> [1] 35:17  <b>prejudice</b> [1] 32:3  <b>preliminarily</b> [1] 12:11  <b>preliminary</b> [1] 16:9  <b>premise</b> [1] 59:7  <b>present</b> [2] 4:6 35:16  <b>presented</b> [8] 16:20 27:5,5 39:9,12,15 64:23 65:22  <b>presents</b> [1] 41:20  <b>presume</b> [1] 16:13  <b>prevail</b> [5] 10:4 17:5 18:11 30:25 64:4  <b>prevails</b> [2] 3:23 4:17  <b>prevent</b> [4] 5:7 33:10 58:11 67:21  <b>preventing</b> [1] 8:2</p>	<p><b>previously</b> [1] 50:9  <b>primary</b> [2] 62:3 63:9  <b>principal</b> [1] 15:9  <b>principle</b> [2] 27:1,3  <b>prior</b> [1] 23:9  <b>problem</b> [2] 28:12 42:2  <b>Procedure</b> [2] 11:5 18:13  <b>proceed</b> [1] 44:19  <b>professors'</b> [1] 62:1  <b>prohibited</b> [1] 5:3  <b>proof</b> [3] 44:4,4 45:13  <b>propose</b> [1] 42:14  <b>propositions</b> [2] 3:22 4:3  <b>prove</b> [2] 4:13 33:21  <b>provide</b> [1] 43:14  <b>provides</b> [2] 34:8 37:3  <b>provision</b> [11] 24:3,8,15,17 26:1,4 50:14,21,25 51:17,18  <b>Public</b> [1] 52:23  <b>punitive</b> [1] 10:7  <b>purpose</b> [6] 8:1 22:7,16 25:1 58:11 67:13  <b>purposes</b> [1] 4:6  <b>pursuant</b> [1] 37:8  <b>pursue</b> [6] 13:4 26:5 33:5 35:22 44:16 53:23  <b>pursuing</b> [1] 67:16  <b>put</b> [3] 7:12 49:7 60:3</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>qualifies</b> [1] 57:7  <b>question</b> [53] 9:7,17 16:10,12,14,16,17,20,21 17:18,18 18:6,7,10,16,16 19:19 21:19 22:20 25:15 27:4,6 28:4,11 29:12,12 30:24 36:6,10 37:23 39:8,9,12 40:2,2,20 44:12,12 46:3,20,21 47:19,24 49:20 51:18 54:14 57:21 61:5,17 64:23 65:22 66:9,23  <b>questions</b> [3] 26:14 28:11 35:25  <b>quintessential</b> [1] 23:24  <b>quite</b> [1] 31:18  <b>quote</b> [1] 39:11</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>raise</b> [3] 44:21,22 56:16  <b>raised</b> [11] 6:20 19:21 20:3,5 26:19 27:14 28:7 37:21 57:22 61:2 63:14  <b>raising</b> [1] 56:18  <b>rather</b> [2] 21:5 66:17  <b>reach</b> [4] 40:19 60:5 64:9 66:23  <b>reaching</b> [1] 37:23  <b>read</b> [9] 5:15 24:16 26:3 40:22,23 50:21,24 51:6 67:4  <b>reads</b> [1] 24:19  <b>real</b> [1] 6:22  <b>really</b> [13] 15:20 24:7,10,25 27:1,21 28:3 36:2 38:3 48:20 57:4,5,7  <b>reappeared</b> [1] 8:18  <b>reason</b> [14] 9:24 13:2 17:8 27:12 29:20 33:20 36:24 39:19 45:23 48:10,12 51:5 61:10 63:17  <b>reasonable</b> [1] 52:1</p>
---	---	---	--

## Official - Subject to Final Review

<p><b>reasoning</b> <sup>[2]</sup> 4:19 66:14  <b>reasons</b> <sup>[6]</sup> 32:15 39:4 45:20 55:15 64:11 67:23  <b>REBUTTAL</b> <sup>[3]</sup> 2:8 64:18,19  <b>received</b> <sup>[2]</sup> 60:4 63:24  <b>recognized</b> <sup>[2]</sup> 66:5 67:12  <b>reconciled</b> <sup>[1]</sup> 4:19  <b>recover</b> <sup>[2]</sup> 25:8 33:20  <b>recovers</b> <sup>[1]</sup> 43:20  <b>recovery</b> <sup>[1]</sup> 43:6  <b>refer</b> <sup>[1]</sup> 7:19  <b>referred</b> <sup>[1]</sup> 49:8  <b>refers</b> <sup>[3]</sup> 7:8 30:19 53:8  <b>reflects</b> <sup>[1]</sup> 50:16  <b>refusal</b> <sup>[1]</sup> 3:20  <b>refutes</b> <sup>[2]</sup> 4:25 66:3  <b>Regarding</b> <sup>[2]</sup> 64:23 66:4  <b>regardless</b> <sup>[1]</sup> 16:4  <b>regular</b> <sup>[1]</sup> 61:23  <b>reiterate</b> <sup>[1]</sup> 28:11  <b>rejected</b> <sup>[6]</sup> 4:4,8 9:25 17:3 27:17 67:11  <b>rejects</b> <sup>[1]</sup> 44:3  <b>release</b> <sup>[4]</sup> 20:25 21:5 53:8,9  <b>relevant</b> <sup>[2]</sup> 28:19 39:11  <b>relic</b> <sup>[1]</sup> 27:21  <b>relief</b> <sup>[13]</sup> 7:5 16:3 18:9,12,20 21:13 28:19,23 52:16 61:3 65:2,18 67:18  <b>relies</b> <sup>[1]</sup> 52:20  <b>rely</b> <sup>[1]</sup> 46:14  <b>remedial</b> <sup>[1]</sup> 50:17  <b>remedies</b> <sup>[6]</sup> 43:14 48:19,20 50:19 51:5,12  <b>removed</b> <sup>[1]</sup> 6:12  <b>repeatedly</b> <sup>[1]</sup> 15:16  <b>replaced</b> <sup>[1]</sup> 6:13  <b>replacement</b> <sup>[1]</sup> 7:16  <b>reply</b> <sup>[1]</sup> 7:3  <b>repose</b> <sup>[5]</sup> 10:13,19 22:17,19 33:16  <b>repudiate</b> <sup>[1]</sup> 59:5  <b>request</b> <sup>[2]</sup> 60:8,12  <b>requested</b> <sup>[1]</sup> 60:4  <b>required</b> <sup>[1]</sup> 60:25  <b>requirement</b> <sup>[2]</sup> 7:22 34:18  <b>requires</b> <sup>[4]</sup> 39:7,14 54:21 62:8  <b>res</b> <sup>[13]</sup> 5:1 7:14,20 18:24 34:14,15 40:10 41:19 53:12 55:12 59:6 63:8,9  <b>resolution</b> <sup>[3]</sup> 23:16 30:2,13  <b>resolve</b> <sup>[6]</sup> 27:4 28:9,10 29:22 30:5 57:6  <b>resolved</b> <sup>[4]</sup> 12:22 13:12,13 14:5  <b>resolves</b> <sup>[1]</sup> 3:12  <b>respect</b> <sup>[3]</sup> 5:21 13:18 51:18  <b>Respectfully</b> <sup>[2]</sup> 13:10 14:16  <b>Respondent</b> <sup>[24]</sup> 1:7,22 2:7 3:15 4:18 8:15,19 9:8 13:17 15:10 16:2 17:4 20:5,9 27:14 31:7 32:14 33:18 34:4 64:25 66:19 67:1,6,14  <b>Respondent's</b> <sup>[7]</sup> 3:17 9:23 10:1 17:12 25:2 27:17 65:21  <b>response</b> <sup>[5]</sup> 9:4 19:23 28:15 57:</p>	<p>15 59:23  <b>rest</b> <sup>[1]</sup> 43:16  <b>Restatement</b> <sup>[2]</sup> 6:11 64:5  <b>rested</b> <sup>[1]</sup> 3:21  <b>restrictive</b> <sup>[1]</sup> 38:11  <b>restricts</b> <sup>[1]</sup> 34:25  <b>result</b> <sup>[5]</sup> 10:10 33:8 48:16 58:21 67:20  <b>results</b> <sup>[1]</sup> 35:18  <b>retroactively</b> <sup>[1]</sup> 23:11  <b>return</b> <sup>[1]</sup> 53:19  <b>reversed</b> <sup>[2]</sup> 5:12 67:24  <b>review</b> <sup>[5]</sup> 16:15 17:10,19 26:24 27:15  <b>rise</b> <sup>[1]</sup> 36:10  <b>Robbins</b> <sup>[1]</sup> 43:12  <b>ROBERTS</b> <sup>[26]</sup> 3:3 5:13 6:15 8:8 11:20 15:8 19:4 23:2 26:11,15 29:9 32:17 33:25 36:1 38:2,21 40:17 44:1 47:9 50:11 53:16 56:12 59:15 63:1 64:15 68:1  <b>room</b> <sup>[1]</sup> 29:1  <b>routes</b> <sup>[1]</sup> 58:19  <b>Rowe</b> <sup>[1]</sup> 31:13  <b>rule</b> <sup>[26]</sup> 5:3,23 6:4 13:21 17:14 18:12 21:21 27:19,22 29:15 33:13 35:3,14,15,19 37:8 38:16,17 44:17,22 45:25 46:1 60:15,17 67:8,14  <b>ruled</b> <sup>[3]</sup> 21:23 57:11 58:16  <b>Rules</b> <sup>[2]</sup> 11:4 34:9  <b>ruling</b> <sup>[1]</sup> 37:24</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>same</b> <sup>[39]</sup> 3:18,19 5:11,21 8:5 10:8,24 11:3 13:2 18:1,15 19:10,17 20:1,2 21:7 26:10 33:6,6 35:14 36:15 39:22 40:15 41:15,20,22 42:15 44:9,16 46:7 47:18,20 48:15 49:2 50:13 53:20 58:5 64:3 67:19  <b>satisfied</b> <sup>[3]</sup> 45:6,6,7  <b>satisfy</b> <sup>[4]</sup> 35:2 36:9 38:5 45:3  <b>save</b> <sup>[1]</sup> 57:11  <b>saved</b> <sup>[1]</sup> 22:14  <b>saying</b> <sup>[7]</sup> 10:16 22:3 24:21 43:19 50:14,16 66:12  <b>says</b> <sup>[14]</sup> 4:21 12:3,12 15:18 20:23 28:13 39:11 40:23 44:22 51:23 53:1 54:9,19 57:12  <b>scenario</b> <sup>[1]</sup> 41:20  <b>second</b> <sup>[5]</sup> 3:25 34:23 39:8 60:5 61:17  <b>Section</b> <sup>[34]</sup> 3:13 4:14 7:6,9 11:2,11 13:19 18:4 20:22 21:16 24:1 25:25 26:5 30:19 31:4,5 33:15 34:14,18,25 35:11 36:25 37:14 45:2 46:14,25 53:8 54:19 59:6 61:13 64:25 65:2,15 67:2  <b>sections</b> <sup>[1]</sup> 21:9  <b>see</b> <sup>[8]</sup> 6:6 7:6,15 12:20 15:2,5 31:8 58:17  <b>seek</b> <sup>[1]</sup> 10:5  <b>seem</b> <sup>[4]</sup> 36:19 53:24 55:21 58:22  <b>seems</b> <sup>[10]</sup> 6:23 8:17 21:3,22 29:21,25 49:9,16 54:15 56:1</p>	<p><b>Semtek</b> <sup>[1]</sup> 31:17  <b>sense</b> <sup>[6]</sup> 18:5 22:13 24:13 33:8 36:19 50:15  <b>sensible</b> <sup>[2]</sup> 25:14 28:9  <b>separate</b> <sup>[8]</sup> 19:16 41:12 42:16 47:12 48:23 55:18 57:25 63:10  <b>separately</b> <sup>[5]</sup> 8:6,24 16:4 44:10,15  <b>sequentially</b> <sup>[1]</sup> 8:25  <b>set</b> <sup>[2]</sup> 25:20 45:12  <b>sets</b> <sup>[1]</sup> 37:2  <b>settlement</b> <sup>[1]</sup> 20:24  <b>Seven</b> <sup>[1]</sup> 17:1  <b>Seventh</b> <sup>[2]</sup> 23:8 46:15  <b>several</b> <sup>[2]</sup> 39:4 45:19  <b>shall</b> <sup>[4]</sup> 12:7 13:1 20:24 40:23  <b>shared</b> <sup>[1]</sup> 27:20  <b>shifts</b> <sup>[1]</sup> 4:20  <b>shouldn't</b> <sup>[5]</sup> 39:19 48:13 50:24 51:5 63:18  <b>side</b> <sup>[5]</sup> 4:17 7:14,14 17:15 48:9  <b>significant</b> <sup>[1]</sup> 66:10  <b>Simmons</b> <sup>[13]</sup> 4:7,20 15:22 27:21,24 30:4 34:13 46:9 48:13 57:23 58:9 66:1,15  <b>simple</b> <sup>[7]</sup> 33:20 35:16 57:5,7,8 62:3 63:6  <b>simply</b> <sup>[15]</sup> 4:12 6:25 17:10 32:14 37:6 40:8 41:18 46:14 51:22 58:8 59:5 60:3 61:9 66:9 67:4  <b>simultaneously</b> <sup>[4]</sup> 37:1 53:21 54:1 55:25  <b>since</b> <sup>[9]</sup> 8:22,22 10:1 40:9,14 47:5 51:10 63:7 67:9  <b>single</b> <sup>[10]</sup> 9:25 17:3 24:23 34:12,17 40:12 54:11,12,22 67:3  <b>sit</b> <sup>[1]</sup> 15:6  <b>situation</b> <sup>[3]</sup> 51:22 52:5 61:2  <b>six</b> <sup>[2]</sup> 35:2 46:18  <b>Sixth</b> <sup>[20]</sup> 3:20 4:4,8,18 30:11 39:18 47:14,23 48:6,7 57:18,21,23,25 60:14 63:15,23 64:12 65:5 66:17  <b>slightly</b> <sup>[1]</sup> 27:19  <b>Smith</b> <sup>[1]</sup> 15:23  <b>soda</b> <sup>[2]</sup> 51:24 52:6  <b>Solicitor</b> <sup>[1]</sup> 1:18  <b>somebody</b> <sup>[1]</sup> 24:9  <b>somehow</b> <sup>[1]</sup> 58:5  <b>someone</b> <sup>[1]</sup> 51:22  <b>sometimes</b> <sup>[1]</sup> 57:4  <b>somewhat</b> <sup>[2]</sup> 46:12 49:9  <b>sorry</b> <sup>[1]</sup> 21:25  <b>sort</b> <sup>[2]</sup> 10:22 23:10  <b>Sotomayor</b> <sup>[15]</sup> 19:6,7 20:12,19 21:17 22:9,12 26:20 27:18 47:10,11 48:1,25 50:1,8  <b>sovereign</b> <sup>[5]</sup> 18:8 30:1 37:2,16 61:14  <b>speaks</b> <sup>[1]</sup> 5:18  <b>specific</b> <sup>[1]</sup> 7:10  <b>specifically</b> <sup>[2]</sup> 22:20 45:24  <b>split</b> <sup>[2]</sup> 19:18 53:5  <b>squarely</b> <sup>[2]</sup> 4:7 66:2  <b>stage</b> <sup>[1]</sup> 60:16</p>	<p><b>stake</b> <sup>[1]</sup> 62:3  <b>standard</b> <sup>[2]</sup> 38:11 44:20  <b>standards</b> <sup>[1]</sup> 35:17  <b>standpoint</b> <sup>[2]</sup> 8:2 48:11  <b>start</b> <sup>[1]</sup> 33:22  <b>started</b> <sup>[1]</sup> 20:21  <b>state</b> <sup>[6]</sup> 35:7,10 36:24 46:1 65:13,18  <b>stated</b> <sup>[1]</sup> 18:12  <b>statement</b> <sup>[1]</sup> 54:9  <b>STATES</b> <sup>[19]</sup> 1:1,15 3:23 10:5 18:7 21:1 33:2 36:15 41:3,13 42:7 50:18 55:16 60:22 61:6,21,22 66:1 67:16  <b>stating</b> <sup>[1]</sup> 58:10  <b>statute</b> <sup>[24]</sup> 5:15,18 7:14 15:24 24:14,16,19,20 25:1,15,16,17,19 29:24 35:8 36:6,9 37:17 39:7 41:2,5,8 42:6 52:16  <b>statutes</b> <sup>[1]</sup> 25:18  <b>statutory</b> <sup>[3]</sup> 4:24 28:2 32:22  <b>stick</b> <sup>[1]</sup> 25:3  <b>still</b> <sup>[6]</sup> 10:24 22:3 46:19 54:4 55:2 65:14  <b>stop</b> <sup>[4]</sup> 41:8 42:6 43:19 58:15  <b>store</b> <sup>[1]</sup> 51:23  <b>straightforward</b> <sup>[1]</sup> 33:14  <b>striking</b> <sup>[1]</sup> 9:24  <b>subject</b> <sup>[5]</sup> 3:19,25 13:2 37:10 40:13  <b>submitted</b> <sup>[3]</sup> 65:9 68:2,4  <b>submitting</b> <sup>[1]</sup> 30:1  <b>subsequent</b> <sup>[14]</sup> 5:2 6:5,10,13,20,25 7:16,23 29:3,5 55:18 57:12 59:12 67:7  <b>substance</b> <sup>[4]</sup> 14:22 31:11,16,20  <b>substitute</b> <sup>[2]</sup> 21:14 28:20  <b>succeeds</b> <sup>[1]</sup> 11:8  <b>sue</b> <sup>[10]</sup> 41:2,3,5,7,21 42:4,22 50:17 55:16 67:15  <b>sufficient</b> <sup>[3]</sup> 27:7 35:7 47:22  <b>suggested</b> <sup>[1]</sup> 30:12  <b>suggesting</b> <sup>[2]</sup> 25:13 58:21  <b>suggests</b> <sup>[1]</sup> 24:5  <b>suing</b> <sup>[2]</sup> 17:6 42:16  <b>suit</b> <sup>[3]</sup> 19:10 24:23 53:4  <b>suits</b> <sup>[2]</sup> 24:22 58:13  <b>summarize</b> <sup>[1]</sup> 28:14  <b>summary</b> <sup>[10]</sup> 18:22 29:18 33:2 60:7,8,10,17,20 61:5 65:7  <b>support</b> <sup>[1]</sup> 65:10  <b>SUPREME</b> <sup>[2]</sup> 1:1,14  <b>surest</b> <sup>[1]</sup> 65:21  <b>surprising</b> <sup>[1]</sup> 7:18  <b>synonymous</b> <sup>[3]</sup> 7:7 32:8 53:3</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>talked</b> <sup>[1]</sup> 32:21  <b>talks</b> <sup>[1]</sup> 20:21  <b>tells</b> <sup>[1]</sup> 12:3  <b>Tenth</b> <sup>[1]</sup> 23:8  <b>term</b> <sup>[4]</sup> 7:4,6 21:11 28:17  <b>test</b> <sup>[1]</sup> 18:15  <b>text</b> <sup>[19]</sup> 3:11,17 4:14,24 9:18 11:</p>
---	---	--	--

## Official - Subject to Final Review

<p>16 15:17 21:15 22:23 25:22 28:2, 24 30:18 32:22 34:7,13 57:12 66:2,24</p> <p><b>textual</b> <sup>[1]</sup> 52:23</p> <p><b>theory</b> <sup>[2]</sup> 36:2,18</p> <p><b>there's</b> <sup>[20]</sup> 5:20 22:3 25:23 28:5, 25,25 31:10 39:20 42:17 43:4 45:15 49:21 50:8 53:5 57:20 58:7 62:2 63:17 66:10 67:4</p> <p><b>therefore</b> <sup>[5]</sup> 11:11 23:25 37:8 64:4 65:19</p> <p><b>they've</b> <sup>[1]</sup> 49:6</p> <p><b>Thomas</b> <sup>[9]</sup> 8:10,11 9:6 10:21 11:19 38:23,24 40:1,16</p> <p><b>though</b> <sup>[4]</sup> 8:17 18:25 46:21 49:24</p> <p><b>three</b> <sup>[3]</sup> 36:22 60:2 64:17</p> <p><b>time's</b> <sup>[1]</sup> 59:14</p> <p><b>time-confuse</b> <sup>[1]</sup> 49:9</p> <p><b>together</b> <sup>[16]</sup> 4:22 8:5,16,22 10:8 16:5 34:12,16 39:3,22 42:15 44:8 49:14 59:8 67:3,19</p> <p><b>traditional</b> <sup>[2]</sup> 7:20 25:4</p> <p><b>treat</b> <sup>[1]</sup> 30:8</p> <p><b>treated</b> <sup>[1]</sup> 36:15</p> <p><b>trial</b> <sup>[4]</sup> 44:16,19,23 59:25</p> <p><b>trigger</b> <sup>[7]</sup> 4:1 30:14 32:4 35:3 37:13 38:20 45:11</p> <p><b>triggered</b> <sup>[6]</sup> 13:16 14:25 27:23 32:12 64:24 65:25</p> <p><b>triggering</b> <sup>[1]</sup> 25:23</p> <p><b>triggers</b> <sup>[2]</sup> 18:24 32:10</p> <p><b>true</b> <sup>[2]</sup> 20:13 52:18</p> <p><b>try</b> <sup>[3]</sup> 17:17,18 49:13</p> <p><b>trying</b> <sup>[3]</sup> 55:20 56:19,20</p> <p><b>turn</b> <sup>[2]</sup> 24:14 33:5</p> <p><b>turned</b> <sup>[1]</sup> 12:4</p> <p><b>turning</b> <sup>[1]</sup> 24:7</p> <p><b>turns</b> <sup>[2]</sup> 18:21 36:6</p> <p><b>two</b> <sup>[10]</sup> 3:21 6:1 9:3 20:1 21:8 34:8 38:11 47:12 52:13 67:18</p> <p><b>tying</b> <sup>[1]</sup> 7:9</p> <p><b>type</b> <sup>[2]</sup> 6:7 18:9</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>U.S</b> <sup>[1]</sup> 20:24</p> <p><b>un-confuse</b> <sup>[1]</sup> 19:9</p> <p><b>unambiguous</b> <sup>[2]</sup> 25:23 66:24</p> <p><b>unambiguously</b> <sup>[1]</sup> 3:17</p> <p><b>under</b> <sup>[48]</sup> 3:13 7:8 10:3 11:11 12:7 13:19 16:3 17:5,22 18:12,15 21:15 24:1 25:24 26:5 28:23 29:14 31:3,5 32:3 33:15 35:3,8,10,11,19 36:6,13,17 37:7 38:3,12 41:5,10 44:3 45:22,25 46:1 51:8 54:1 55:21 56:1 60:15 61:22 64:25 65:15 67:1,2</p> <p><b>understand</b> <sup>[8]</sup> 23:18 24:6 38:3 52:1 56:18 59:13,18 61:7</p> <p><b>understanding</b> <sup>[4]</sup> 24:3 28:25 37:19 41:11</p> <p><b>understandings</b> <sup>[1]</sup> 38:12</p> <p><b>understands</b> <sup>[1]</sup> 18:23</p> <p><b>understood</b> <sup>[4]</sup> 52:9 55:15 65:7,12</p>	<p><b>undo</b> <sup>[2]</sup> 23:9,11</p> <p><b>UNITED</b> <sup>[19]</sup> 1:1,15 3:22 10:5 18:7 21:1 33:1 36:15 41:3,13 42:7 50:18 55:16 60:22 61:6,21,22 66:1 67:16</p> <p><b>unknown</b> <sup>[1]</sup> 22:25</p> <p><b>unless</b> <sup>[2]</sup> 35:6 50:8</p> <p><b>unrelated</b> <sup>[1]</sup> 40:2</p> <p><b>until</b> <sup>[3]</sup> 12:10 13:4 45:15</p> <p><b>unto</b> <sup>[1]</sup> 27:7</p> <p><b>up</b> <sup>[18]</sup> 8:13 22:8 26:18,20 32:18 39:17 44:23 45:6,7 47:2 48:2 50:19 58:8,18,25,25 59:14 63:2</p> <p><b>uses</b> <sup>[1]</sup> 7:6</p> <p><b>using</b> <sup>[2]</sup> 33:6 47:3</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>vacated</b> <sup>[1]</sup> 11:9</p> <p><b>valid</b> <sup>[1]</sup> 37:14</p> <p><b>variation</b> <sup>[1]</sup> 49:19</p> <p><b>variations</b> <sup>[1]</sup> 49:16</p> <p><b>vein</b> <sup>[1]</sup> 50:13</p> <p><b>versus</b> <sup>[5]</sup> 3:4 43:12,13 54:5 59:11</p> <p><b>view</b> <sup>[5]</sup> 17:20 26:24 36:23 38:4 60:20</p> <p><b>Virginia</b> <sup>[1]</sup> 1:21</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>waived</b> <sup>[3]</sup> 9:11 18:8 37:1</p> <p><b>waiver</b> <sup>[1]</sup> 54:7</p> <p><b>wanted</b> <sup>[5]</sup> 10:15 13:4 21:20 22:18 28:7</p> <p><b>warrant</b> <sup>[2]</sup> 17:10 27:14</p> <p><b>Washington</b> <sup>[2]</sup> 1:10,19</p> <p><b>way</b> <sup>[28]</sup> 6:17,17,24 9:9,20 17:13 21:24 24:11 26:3 28:9 30:2 33:2 37:4 38:18 46:19 47:3 49:21 50:15,20,25 51:6 53:5 55:24 57:3,17 64:8 65:21 67:4</p> <p><b>ways</b> <sup>[3]</sup> 36:22 58:6,17</p> <p><b>weigh</b> <sup>[1]</sup> 59:4</p> <p><b>welcome</b> <sup>[1]</sup> 35:25</p> <p><b>Westfall</b> <sup>[4]</sup> 22:14 43:10 50:4 51:9</p> <p><b>whatsoever</b> <sup>[1]</sup> 14:20</p> <p><b>whenever</b> <sup>[1]</sup> 36:16</p> <p><b>Whereas</b> <sup>[1]</sup> 4:25</p> <p><b>Whereupon</b> <sup>[1]</sup> 68:3</p> <p><b>whether</b> <sup>[22]</sup> 5:9 8:4 9:10,10 15:11 16:4 18:7,10,11 24:3 27:22 30:3,24 31:2 39:12 45:11 48:3 49:10,11 54:14 59:19 61:9</p> <p><b>whole</b> <sup>[1]</sup> 12:10</p> <p><b>Wilkie</b> <sup>[1]</sup> 43:11</p> <p><b>will</b> <sup>[14]</sup> 3:3 6:10 10:19 19:9 33:16 34:13 40:20 46:9 48:17,21,22 57:5 58:10,13</p> <p><b>win</b> <sup>[9]</sup> 10:4 12:14 30:3 41:6 42:3 49:5,14 56:19 67:16</p> <p><b>wins</b> <sup>[3]</sup> 17:15 27:24 60:22</p> <p><b>within</b> <sup>[5]</sup> 24:22 35:6 54:10 56:23 57:3</p> <p><b>without</b> <sup>[5]</sup> 4:16,23 10:15 32:3 37:23</p> <p><b>won</b> <sup>[3]</sup> 12:4 49:6 60:20</p>	<p><b>wondering</b> <sup>[1]</sup> 24:2</p> <p><b>word</b> <sup>[12]</sup> 5:24 6:9,12 7:10,16,17 11:3 12:18 15:6,7,19 52:11</p> <p><b>words</b> <sup>[4]</sup> 24:8 36:16 52:13 58:23</p> <p><b>works</b> <sup>[2]</sup> 12:16 28:1</p> <p><b>worried</b> <sup>[1]</sup> 42:25</p> <p><b>worry</b> <sup>[1]</sup> 27:7</p> <p><b>worth</b> <sup>[1]</sup> 18:20</p> <p><b>wrap</b> <sup>[4]</sup> 22:7 23:15 32:18 63:2</p> <p><b>Wright</b> <sup>[2]</sup> 54:9 64:4</p> <p><b>write</b> <sup>[2]</sup> 24:17 25:18</p> <p><b>written</b> <sup>[1]</sup> 52:17</p> <p><b>wrote</b> <sup>[4]</sup> 5:6 21:12 25:16,17</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>years</b> <sup>[3]</sup> 10:1 51:14 67:9</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p><b>zero</b> <sup>[1]</sup> 19:1</p>
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