

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CORNER POST, INC., )  
Petitioner, )  
v. ) No. 22-1008  
BOARD OF GOVERNORS OF THE )  
FEDERAL RESERVE SYSTEM, )  
Respondent. )  
- - - - -

Pages: 1 through 82

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 BOARD OF GOVERNORS OF THE )  
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 FEDERAL RESERVE SYSTEM, )  
 )  
 Respondent. )

Tuesday, February 20, 2024

BENJAMIN W. SNYDER, Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.;  
on behalf of the Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	BRYAN K. WEIR, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	BENJAMIN W. SNYDER, ESQ.	
7	On behalf of the Respondent	38
8	REBUTTAL ARGUMENT OF:	
9	BRYAN K. WEIR, ESQ.	
10	On behalf of the Petitioner	79
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 22-1008,  
5 Corner Post versus the Board of Governors of the  
6 Federal Reserve System.

7 Mr. Weir.

8 ORAL ARGUMENT OF BRYAN K. WEIR

9 ON BEHALF OF THE PETITIONER

10 MR. WEIR: Mr. Chief Justice, and may  
11 it please the Court:

12 Corner Post opened for business in  
13 2018. Since then, it's paid several hundred  
14 thousand dollars in debit card fees that it  
15 thinks are unlawful. But the government says  
16 that Corner Post's clock to challenge those fees  
17 actually started in 2011, seven years before  
18 Corner Post pumped a single gallon of gas.

19 The government is wrong. Corner  
20 Post's clock started when it swiped its first  
21 debit card and paid its first fee. That is the  
22 right outcome here for three main reasons.

23 First and most importantly, the text.  
24 Section 2401's limitations period starts when a  
25 claim "first accrues." This Court has said that

1 phrase means the clock starts only once a  
2 plaintiff can sue, and this Court has also said  
3 that an APA plaintiff can sue only once it's  
4 first harmed by regulation. We just want the  
5 Court to apply those settled principles.

6 By contrast, the government wants a  
7 special rule that contradicts how accrual  
8 statutes have worked since at least the 1830s.  
9 That government-only carveout would convert  
10 Section 2401 into a repose-based statute like  
11 the Hobbs Act. But Congress knows exactly how  
12 to craft repose-based statutes when it wants to,  
13 and it hasn't done so for APA claims.

14 Second, with no textual foothold, the  
15 government resorts to policy arguments. It says  
16 that siding with Corner Post will undermine  
17 reliance interests because it will let  
18 plaintiffs challenge rules that are older than  
19 six years. But challenges to those rules  
20 already happen all the time in the as-applied  
21 context, and the government admits that  
22 as-applied challenges have no time limit.

23 Third, if Congress's textual choice  
24 leads to outcomes that the government doesn't  
25 like, this Court has said that those concerns

1     should be addressed to Congress, not to this  
2     Court. This Court's role is simply to enforce  
3     the value judgments that Congress has already  
4     made. We ask that it do so here.

5                 I welcome the Court's questions.

6                 JUSTICE THOMAS: Do you have any  
7     examples of accrual cases or questions where the  
8     injury and the unlawful conduct are on different  
9     dates?

10                MR. WEIR: Well, that -- that's really  
11     any typical accrual statute. For example, there  
12     are torts where a -- where a -- where a tort is  
13     committed and -- and the cause of action is not  
14     complete until later, until the harm is felt.  
15     So that's a basic. We think there's nothing  
16     remarkable about -- about that fact pattern.

17                JUSTICE THOMAS: Well, but how many  
18     cases are like yours, where the regulation has  
19     been adopted, it's final, and you are not yet in  
20     business, so it can't apply to you and -- so are  
21     there any cases like yours --

22                MR. WEIR: So --

23                JUSTICE THOMAS: -- where the injury  
24     is later?

25                MR. WEIR: -- so we -- we think that

1     -- so, certainly, there are -- there are  
2     repose-based statutes that would -- that would  
3     cut off review for someone like us, but the APA  
4     is the background rule, and that --

5             JUSTICE THOMAS: No. Do you have --  
6     so do you have any other cases like yours?

7             MR. WEIR: So the question being if  
8     there -- are there any other accrual-based  
9     statutes for agency-specific --

10            JUSTICE THOMAS: Where you -- where  
11    the -- the injury occurs long after the rule is  
12    adopted?

13            MR. WEIR: So there's -- there's the  
14    Herr case in the Sixth Circuit, which -- which  
15    starts the circuit split in -- in -- in this --  
16    in this context. That's one case where it  
17    happened. But I think the question, unless I'm  
18    misunderstanding it, Justice Thomas, is are  
19    there any other statutes of limitations that  
20    operate the way we say that 2401 --

21            JUSTICE THOMAS: Yes.

22            MR. WEIR: So we think that 20 --  
23    we're not aware of any --

24            JUSTICE THOMAS: Actually, I'm more  
25    interested in the fact pattern that we have

1 here. Your business -- you have a rule that's  
2 adopted. It's final. It's been challenged.  
3 Then you go into business, you begin to operate  
4 under these rules, and you claim, of course,  
5 that's the beginning of your injury, and then,  
6 of course, you say that restarts the statute of  
7 limitations.

8 That's what I'm interested in.

9 MR. WEIR: So in the -- in the -- in  
10 the regulatory context?

11 JUSTICE THOMAS: Yes.

12 MR. WEIR: And so, in the regulatory  
13 context, as far as we know, the APA -- 2401 is  
14 the only rule that applies that way.

15 JUSTICE THOMAS: Okay. So --

16 MR. WEIR: But that --

17 JUSTICE THOMAS: -- if that's the  
18 case, do you have an example that is similar to  
19 yours?

20 MR. WEIR: I think the Herr -- the  
21 Herr family in the Sixth Circuit --

22 JUSTICE THOMAS: So that's the only  
23 one?

24 MR. WEIR: Well, every -- the lower  
25 courts have rejected our reading of 2401.



1 JUSTICE THOMAS: Yeah.

2 MR. WEIR: And so there wouldn't be  
3 other cases because they would have been  
4 time-barred under that rule.

5 JUSTICE SOTOMAYOR: Counsel, there --  
6 there is something about this that plagues at  
7 the back of my mind, which is, how can someone  
8 be injured who goes into a business knowing its  
9 structure? Meaning this is the business that  
10 you've accepted. The rule was passed whatever  
11 number of years ago. There's no enforcement  
12 against you.

13 I understand injury when the  
14 government's seeking to compel you to do  
15 something or to stop doing something. But  
16 there's no injury in my mind when you enter a  
17 business knowing its structure and accepting  
18 rules that have been final.

19 So explain to me what makes sense in  
20 -- this has often been called a facial challenge  
21 as opposed to an as-applied challenge, and I  
22 think that for valid reasons, which is, if you  
23 go in, you accept the regulatory conditions of  
24 the business, and you're not burdened because  
25 you knew it going in.

1                   MR. WEIR: Well, I think that assumes  
2                   that -- that small business owners understand  
3                   the entire regulatory regime that they're  
4                   entering before they actually go into business.  
5                   And I think this Court has recognized that it is  
6                   -- that is a tall task to ask of any small  
7                   business owner like Corner Post.

8                   But the first time Corner Post was  
9                   ever actually injured is the time that they --  
10                  they did pay the actual debit card fees that --  
11                  that they had to pay whenever they swiped a  
12                  debit card. So that's the first time there is  
13                  any injury.

14                 And so accrual-based statutes, this  
15                 Court has -- has, I think, recognized throughout  
16                 history, are necessarily plaintiff-specific, and  
17                 that's exactly what we have here. The first  
18                 time the plaintiff here was harmed is when that  
19                 plaintiff's cause of action accrues to challenge  
20                 that particular rule.

21                 JUSTICE KAGAN: But I think what  
22                 Justice Thomas's question suggested is that this  
23                 is a context in which this would be a quite  
24                 novel rule. There are no other statutes of  
25                 limitations that work this way. And with

1     respect to this statute of limitations, the  
2     consensus view of all the circuits, until the  
3     Herr came -- case came along, which was fairly  
4     recently in a little bit different context, but  
5     the consensus view of all the circuits was that  
6     the statute of limitations began to run when you  
7     had final agency action.

8             Of course, what typically would  
9     happen, a rule like this, is that there would be  
10    that final agency action, many people would  
11    challenge the rule, trade associations of the  
12    same kind that are in back of this case, that  
13    that challenge would go forward. You would get  
14    a decision. It would be final. It would create  
15    the legal background rule sometimes for an  
16    entire industry, and that was the end of the  
17    matter.

18            And, you know, what you're suggesting  
19    is a very different rule than the administrative  
20    sphere has worked under for many, many years.

21            MR. WEIR: So we don't think so. I --  
22    I think that the -- the 29 examples that the  
23    government points out in its brief of  
24    agency-specific repose-based statutes shows that  
25    Congress intended to have a different rule for

1 the APA. It has not subjected --

2 JUSTICE KAGAN: Well, it doesn't show  
3 that. I mean, the APA, you're right, it's  
4 different language. It says accrues. Now, you  
5 know, "accrues" just means arises. There's  
6 nothing in the language itself that -- that  
7 would suggest that your principle is mandated.

8 We do, you're quite right, have a  
9 general principle that when we see something  
10 that says "accrues," what that usually means is  
11 that there's a -- a -- a full cause of action  
12 that can be brought.

13 But this is a very different context  
14 in which the rule has operated differently for  
15 decades and decades and decades, where no court  
16 has ever suggested your solution until, again,  
17 the Herr case. And I guess I would suggest  
18 there's nothing in the word "accrues" that  
19 suggests that every court for decades and  
20 decades and decades has been wrong.

21 MR. WEIR: So -- so two responses,  
22 Justice Kagan. The first is, if you look at the  
23 lower court decisions applying this statutory  
24 scheme, not a single one of them actually looked  
25 at the text of 2401 or 702. None of them did.

1                   And then the path marking decision --

2                   JUSTICE KAGAN: Well, but what I'm  
3                   suggesting, Mr. Weir, is that there's not much  
4                   in the text to look at. "Accrues" just means  
5                   arises. Now we do have precedent, but that  
6                   precedent arose in a very different context as  
7                   to what "accrues" meant, so you wouldn't find a  
8                   lot looking at this text.

9                   MR. WEIR: So I -- I disagree with  
10                  that as well. I think this Court definitively  
11                  interpreted the phrase "first accrues" in  
12                  Gabelli versus SEC just 11 years ago, and it  
13                  said, in common parlance, a right first accrues  
14                  when it comes into existence. And that was  
15                  under the administrative --

16                  JUSTICE KAGAN: We made very clear  
17                  that that was a default rule, a general rule  
18                  that could be, of course, countermanded by  
19                  Congress but that also could be countermanded by  
20                  different circumstances, that if you look at the  
21                  Crown Coat opinion, for example, there's a very  
22                  explicit recognition by this Court -- and I'm  
23                  just reading -- the hazards inherent in  
24                  attempting to define for all purposes when a  
25                  cause of action first accrues what are those

1 hazards. You know, a word like that should be  
2 interpreted in the light of the general purposes  
3 of the statute, with due regard to those  
4 practical ends which are to be served by any  
5 limitation of the time within which an action  
6 may be brought.

7 And what they're -- you know, you  
8 couldn't find better language to point to. This  
9 is a really different context with really  
10 different interests, including reliance  
11 interests of many, many parties who are not  
12 before the Court.

13 And -- and courts have responded to  
14 that and created a different rule which has  
15 lasted -- I -- I -- I -- I mean, this is kind of  
16 a revolutionary ask.

17 MR. WEIR: So we disagree. On Crown  
18 Coat, the top-line holding from Crown Coat as we  
19 read it is that Congress would not want under  
20 2401 the under -- the -- the -- the statute of  
21 limitations to start running until the plaintiff  
22 had the opportunity to sue.

23 And that language that you just quoted  
24 that the government relies on, we see that as a  
25 recognition that obviously the underlying cause

1 of action accrues -- differs between causes of  
2 action. Torts accrue at different times than  
3 breaches of contract. Different torts can  
4 accrue differ -- at different times. And so we  
5 just see that language as just recognizing that.

6 And as far as if you -- the purposes  
7 of the statute, this Court said in Abbott Labs  
8 the purpose of the APA was it embodies a  
9 presumption of judicial review. So, if we're  
10 going to look at the underlying statute and its  
11 purposes, I think that cuts our way, not the  
12 government's way.

13 JUSTICE JACKSON: Mr. -- Mr. Weir,  
14 I -- I thought that we had sort of basic first  
15 principles governing statutes of limitations,  
16 and it sort of goes to what Justice Kagan  
17 pointed out, but I thought that we ordinarily  
18 say that a cause of action arises, which is  
19 accrues, it arises, when all of the facts that  
20 are necessary to establish the elements of that  
21 cause of action have occurred.

22 You know, in a tort situation, when  
23 there's a duty, if there's a breach and injury  
24 as a result of the breach, those facts have  
25 occurred, the cause of action has arisen, and we

1 say the clock starts running at that point  
2 because a claim against the defendant can be  
3 sustained in court when those facts exist.

4 All right. So, if that's right as a  
5 first principle, I guess I don't understand your  
6 argument that the cause of action is arising  
7 here when the plaintiff can bring the claim.

8 I think the law regarding to -- you  
9 know, when a plaintiff can bring a claim is  
10 something different, but we have here a cause of  
11 action arising out of the final agency action  
12 because that is the point at which a person can  
13 sustain a claim against the agency under the  
14 APA.

15 Why am I wrong about that?

16 MR. WEIR: So this -- this Court has  
17 identified the elements of an APA claim and it  
18 requires a plaintiff who is injured and injured  
19 by agency action. So those are the elements.

20 JUSTICE JACKSON: Where -- where --  
21 where have we said that that was an element? I  
22 thought that was just a statement of the statute  
23 as to who can bring the claim, not the element,  
24 not -- not like the element of the claim, when  
25 has the defendant violated the law.



1           MR. WEIR: So I would point the Court  
2           to the Lujan decision, 1990, where it outlines  
3           the elements of an APA claim.

4           JUSTICE JACKSON: Mm-hmm.

5           MR. WEIR: The Court -- Court dealt  
6           with it there. But you can look at the statute  
7           itself. Section 702 identifies who, a person.  
8           That who has -- that's who has the cause of  
9           action, a person.

10          JUSTICE JACKSON: Right. Who has the  
11          cause of action. I'm talking about what are the  
12          elements of the cause of action, and I thought  
13          it was the agency has enacted a final rule that  
14          you claim is arbitrary and capricious or not in  
15          accordance with the law, that once the agency  
16          has done that, we have a cause of action, it has  
17          arisen, and then these other elements or these  
18          other aspects of the statute say who is the  
19          person who can bring such a claim.

20          MR. WEIR: So I disagree with that.  
21          This Court has said that certainly final agency  
22          action is an element of an APA claim, but the  
23          other element, as this Court noted in Lujan and  
24          I think in Newport News, is somebody who is  
25          actually harmed by it, a plaintiff who was

1     harmed by it.

2                   And accrual-based statutes are  
3     necessarily plaintiff-specific. They are --  
4     that's an accrual -- that's in their DNA. We're  
5     not aware of a -- a statute that uses accrual  
6     language or accrual-like language where the  
7     statute of limitations starts on the first day  
8     and ends on the first day for everyone, and we  
9     think that's because that's not an accrual  
10    statute, that's a statute of repose.

11                  And Congress certainly knows how to  
12    pass those, and Congress knew how to pass those  
13    when it passed the APA. In 1940 -- in 1934,  
14    there -- there -- Congress passed a -- a sort of  
15    Hobbs Act-like statute for the SEC. It did so  
16    in 1938 for the FTC. And in 1950, it actually  
17    passed the Hobbs Act.

18                  Between those bookends, it passed the  
19    APA, did not subject the APA to a -- a  
20    repose-based statute of limitations, and it  
21    passed 2401 two years later. So we think that  
22    necessarily must be an intentional choice that  
23    APA claims are not subject to the type of repose  
24    as other types of cause of action.

25                  CHIEF JUSTICE ROBERTS: Well, but

1     repose is a little bit different in this  
2     context. I mean, you're talking about sort of  
3     establishing the ground rules for how a  
4     particular regulatory regime is going to  
5     operate, and, you know, you've got six years to  
6     do that. And, you know, you often see trade and  
7     other associations bringing fundamental  
8     challenges to the, you know, structure of the  
9     market or -- or the -- or the agency.

10           And under your system, those -- that  
11     sort of challenge as to how everything is  
12     structured are going to be -- could be -- are  
13     going to be brought 10 years later, 20 years  
14     later.

15           And -- and it seems to me that you  
16     sort of have to create the universe, you know,  
17     repeatedly, as opposed to just taking those are  
18     the ground rules and here's how -- how they're  
19     going to work.

20           MR. WEIR: So we think challenges to  
21     regulations like that are happening already in  
22     the as-applied context. You can always have an  
23     as-applied challenge. Those happen to broad  
24     sets of regulations already. And so we don't  
25     see that really as an issue.

1                   And -- and -- and there -- I just want  
2     to be clear there's no incentive to challenge  
3     valid regulations or anything like that. We're  
4     talking about challenges only to regulations  
5     that presumably have some defects, and those are  
6     exactly the type of challenges that Congress  
7     would want people to bring. That's why it  
8     passed the APA.

9                   CHIEF JUSTICE ROBERTS: How does,  
10    like, stare decisis and rules like that, how do  
11    they work under this regime? You have, you  
12    know, presumably fundamental challenges, the new  
13    regulatory regime that starts up and they get  
14    decisions and maybe they, you know, force the  
15    agency to change things.

16                  And then every time somebody brings a  
17    new facial challenge, they basically have to  
18    litigate that same question over again?

19                  MR. WEIR: So I -- I'm not sure stare  
20    decisis would apply unless it was an  
21    interpretation of this Court, of course. But,  
22    in the lower courts --

23                  CHIEF JUSTICE ROBERTS: The agency,  
24    whatever they call agency common law.

25                  MR. WEIR: You know, I think anybody

1     who was bringing a subsequent lawsuit, of  
2     course, they have to run up against the fact  
3     that there's apparently, you know, a  
4     well-reasoned decision that's already ruled  
5     against them, so there is an uphill climb to  
6     start with, I think. But -- but that is what's  
7     commanded by -- we think that's what's commanded  
8     by the text of 2401 and the APA.

9             And we -- we want to be clear, even  
10     for people that have claims --

11            JUSTICE SOTOMAYOR: There's no res  
12     judicata or collateral estoppel, correct?

13            MR. WEIR: I'm sorry, Your Honor?

14            JUSTICE SOTOMAYOR: There's no res  
15     judicata or collateral estoppel?

16            MR. WEIR: Well, the government has  
17     argued in the district court below here that  
18     there are res judicata principles at play. And  
19     so, if -- if we prevail on remand, they're  
20     welcome to raise those or any other equitable --

21            JUSTICE SOTOMAYOR: Is that your --

22            JUSTICE GORSUCH: For --

23            JUSTICE SOTOMAYOR: I'm sorry.

24            JUSTICE GORSUCH: No, please.

25            JUSTICE SOTOMAYOR: Is that your

1 answer to the list of examples on page 39 of the  
2 government's brief of all of the -- I want to --  
3 I don't want to be dismissive because I'm not.  
4 There's a whole list of parade of horrors that  
5 I see as potentially true that the government  
6 lists at page 39.

7 And your response has been, don't  
8 worry about it, it's not going to happen. But  
9 tell me why they aren't real possibilities.

10 MR. WEIR: Well, we think --

11 JUSTICE SOTOMAYOR: Tell me what  
12 guardrails there are in the law that would  
13 prevent those kinds of challenges, the ones that  
14 the Chief said 10, 20, 30, 40 years ago. What  
15 stops those from re-occurring constantly?

16 MR. WEIR: So we think there's a  
17 number of things that do. First, there are --  
18 there are many defenses the government can raise  
19 to what -- what some call, you know,  
20 manufactured plaintiffs that are creating an  
21 injury to challenge regulations. We outline  
22 those in our blue brief. We don't see the  
23 government as contesting those.

24 But even if --

25 JUSTICE SOTOMAYOR: That's very hard

1 to prove.

2 MR. WEIR: So -- so -- so it's the  
3 government's own position at the cert stage that  
4 parties like Corner Post who are harmed for the  
5 first time more than six years after a  
6 regulation is issued are relatively uncommon.  
7 That's the government's position. And we think  
8 there's a reason why.

9 Vast swaths of the regulatory state  
10 are already carved out by repose-based statutes,  
11 the 29 that -- that the government cites. So  
12 those wouldn't even be subject to -- to -- to --  
13 to this Court's decision here. They're already  
14 time-barred. They're -- they're out.

15 But even what's left for the APA, for  
16 APA claims, the vast majority of the country is  
17 already time-barred from bringing challenges to  
18 old regulations under the APA. The only ones  
19 that have those -- that have the ability to  
20 bring those challenges are those who are harmed  
21 for the first time in the last six years. So  
22 this Court cited --

23 JUSTICE KAGAN: Well, that doesn't  
24 seem very hard. I mean, you can always find a  
25 new company, a new regulated entity. You can

1     create a new company or a new regulated entity  
2     if the same trade association that has had its  
3     first bite at the apple doesn't like the answer  
4     10 years later and looks around and thinks: You  
5     know, the environment is more hospitable, the  
6     judges have changed, let's try again. Just  
7     create a new entity.

8             MR. WEIR: Well, I think just creating  
9     a new entity won't -- won't get you there, but I  
10    think, to get to the heart of -- of -- of -- of  
11    your point, if that were true, we would have  
12    seen that in the Sixth Circuit. We would have  
13    seen sophisticated litigants bringing challenges  
14    to old regulations in the Sixth Circuit. And it  
15    just didn't happen. There was no uptick --

16            JUSTICE GORSUCH: Counsel --

17            MR. WEIR: -- to old -- old reg --

18            JUSTICE GORSUCH: -- counsel, if I --  
19    if I understand your point, and I just want to  
20    make sure I do, we're talking about a facial  
21    challenge here. If -- if there were circuit  
22    precedent that would bar you, as a matter of  
23    stare decisis, that would be a winner on the  
24    merits. You'd lose. You just -- you'd have a  
25    timely claim, but you'd lose, is that right?



1 MR. WEIR: That's correct.

2 JUSTICE GORSUCH: And the government  
3 may be able to use non-mutual collateral  
4 estoppel or some other res judicata principle to  
5 say the matter is decided effectively against  
6 you anyway, right?

7 MR. WEIR: That's correct.

8 JUSTICE GORSUCH: So we're just  
9 talking about the timing of the suit.

10 And then you -- you mentioned that  
11 nobody contests that as-applied challenges could  
12 go forward. But how could that be? I mean, if  
13 you lose, why wouldn't as-applied challenges  
14 also be barred because they too accrued back  
15 when -- if the accrual rule turns on the  
16 adoption of the rule, that would seem to bar all  
17 future claims, whether as-applied or facial.

18 MR. WEIR: Well, certainly. That's  
19 possible. The lower court precedent now, I'm  
20 not sure this Court's addressed -- directly  
21 addressed it --

22 JUSTICE GORSUCH: I understand lower  
23 court precedent has distinguished between the  
24 two, but they haven't discussed what "accrual"  
25 means and how -- how that word might be a

1 chameleon and differ between as-applied and  
2 facial challenges.

3 And if -- if you were to lose and we  
4 were to hold "accrual" means the time of the  
5 adoption of the rule, it would seem to upset and  
6 undermine all of those decisions too, wouldn't  
7 it?

8 MR. WEIR: I think I agree with that.

9 JUSTICE GORSUCH: Okay. And then I  
10 have --

11 JUSTICE KAGAN: Mr. Weir, how could  
12 that be because --

13 JUSTICE GORSUCH: I'm sorry. I just  
14 have one -- one more question, and -- and this  
15 is the last sentence of 702, which the  
16 government draws our attention to, and it says  
17 that nothing herein shall -- affects other  
18 limitations on judicial review. And I didn't  
19 see your response to that argument. Do you  
20 understand what I'm getting at?

21 MR. WEIR: I do.

22 JUSTICE GORSUCH: Can you -- can you  
23 give me your thoughts on that?

24 MR. WEIR: I -- I can. So -- so two  
25 -- two responses. First, this Court already

1     dealt with that issue in Darby versus Cisneros.  
2     What happened in 1976 is Congress waived  
3     sovereign immunity and -- under 702, and what  
4     Congress wanted to do was make clear that that  
5     waiver did not affect any other limitation on  
6     judicial review that already existed. So it's  
7     the -- the -- the waiver of sovereign immunity  
8     that's not affecting anything else.

9             But even on its own terms, on the  
10    government's own terms, we think that argument  
11    doesn't work because all accrual-based statutes  
12    necessarily depend on the underlying cause of  
13    action. So they work together. So 702 -- so  
14    applying 702 in the way we think it should be  
15    applied is merely an application of 2401.

16            JUSTICE GORSUCH: So you're saying, in  
17    other words, that your view -- I just want to  
18    make sure I understand it -- doesn't affect any  
19    other limitation; it just interprets the word  
20    "accrual"?

21            MR. WEIR: That's correct.

22            JUSTICE GORSUCH: Is that a fair  
23    summary of it?

24            MR. WEIR: That's -- that's -- it's --  
25    it's an -- it's an application of an accrual

1 statute.

2 JUSTICE GORSUCH: Okay. All right.

3 Thank you.

4 MR. WEIR: And, again, this Court  
5 dealt with that in Darby versus Cisneros.

6 JUSTICE GORSUCH: Thank you.

7 JUSTICE KAGAN: If -- if I could go  
8 back, Mr. Weir, to what you suggested about  
9 accrual would operate the same way in an action  
10 where there was an as-applied defense in an  
11 enforcement action, you know, I don't think it  
12 could. 2401(a) just talks about civil actions  
13 commenced against the United States. It has no  
14 application to -- to -- to places where there's  
15 an enforcement action and this functions as a  
16 defense.

17 MR. WEIR: So there are different  
18 types of contexts for as-applied. If -- if --  
19 if you are denied a permit, for example, you  
20 usually take that to court in -- in federal  
21 district court and you sue the United States.  
22 And so, on its face, 2401 would apply in that  
23 context.

24 JUSTICE GORSUCH: So the distinction  
25 there is between an enforcement action against

1     you by the government, in which case you'd have  
2     the ability to -- to -- to make your challenges,  
3     but, if you sought an as-applied challenge  
4     affirmatively yourself, you might be barred? Is  
5     that -- is that --

6                 MR. WEIR: I think that's right.

7                 JUSTICE GORSUCH: Yeah.

8                 MR. WEIR: I just want to -- I just  
9     want to point out what the government is asking  
10    for is -- is several carveouts. It's asking for  
11    a carveout for how general accrual rules have  
12    had -- have worked since the 1830s. It's asking  
13    for a carveout for how this Court has actually  
14    interpreted the phrase "first accrues" from  
15    Gabelli. It's actually asking for a carveout of  
16    how this Court has applied 2401 in the past.

17                We think Crown Coat supports us, but  
18    the Court had applied 2401's predecessors in the  
19    1900s. The Chamber brief outlines several  
20    examples where -- where -- where "first accrues"  
21    is applied just how we want.

22                And -- and so what the government is  
23    asking for is a special rule just for it. And  
24    this Court rejected the special -- that exact  
25    same argument in the Franconia case when it was

1 leading --

2 JUSTICE JACKSON: What do you do with  
3 the "first" in the actual statute? I mean, you  
4 seem to be asking us to read the statute as if  
5 it says a complaint is barred from the time in  
6 which the plaintiff is first aggrieved. But  
7 that's not what it says.

8 So how is it that every new company  
9 that is created in the aftermath of the creation  
10 of a rule can claim that this is the first time  
11 that the cause of action has arisen under the  
12 APA?

13 MR. WEIR: Because, under  
14 accrual-based statutes, the -- the -- the -- the  
15 claim is plaintiff-specific. So, if you look  
16 at, like, the Hobbs Act, the Hobbs Act --

17 JUSTICE JACKSON: All right. But  
18 you're just assuming away the question at the  
19 beginning by saying this is an accrual-based  
20 statute. What I'm suggesting is that it's not.  
21 Just because it says the cause of action accrues  
22 doesn't make it an accrual-based statute in the  
23 way that you are interpreting, and I don't  
24 understand how it can be when it says "first  
25 accrues."

1           MR. WEIR: So the way we interpret  
2 "first accrues" is that the first time you  
3 suffer a harm, that is when your statute of  
4 limitations starts running.

5           JUSTICE JACKSON: Right. But isn't  
6 that reading words into the statute in a way  
7 that doesn't make a whole lot of sense? You're  
8 suggesting that this statute is the first time  
9 anybody is harmed by the United States, they  
10 have six years, anybody, for any reason.

11          MR. WEIR: That's how 2401 reads and  
12 is applied. And to be clear, it applies to not  
13 just APA claims. It applies to FOIA actions.  
14 It applies to government decisions that are not  
15 -- that are not covered by Title VII. And the  
16 government's rule doesn't make sense in those  
17 contexts.

18          You can imagine an agency that had an  
19 unlawful employment policy, and under the  
20 government's rule, the first employee that was  
21 harmed by that policy, that would start the  
22 statute of limitations for everybody at the same  
23 time, including --

24          CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Justice Thomas?

2 Justice Alito?

3 JUSTICE ALITO: The government says  
4 that late-arising objectors like Corner Post can  
5 get relief by petitioning for a new rulemaking.  
6 Why isn't that sufficient for you?

7 MR. WEIR: So we don't think that's a  
8 -- a -- a -- a -- a viable path to judicial  
9 review for a couple reasons.

10 First, the government gets to decide  
11 when it rules on a petition for rulemaking, and  
12 it can sit on it for years. But even the  
13 government acknowledged I think in PDR Network  
14 that this is not a guaranteed path to judicial  
15 review.

16 Typically, a denial of a petition for  
17 rulemaking gets very deferential review that  
18 doesn't allow the -- the plaintiff to actually  
19 get at the merits of the underlying regulation  
20 they're trying to -- they're trying to -- trying  
21 to challenge.

22 And -- and -- and -- and we know what  
23 would have happened in this case if we filed a  
24 petition for review. The -- the Board itself  
25 issued a -- a -- an NPRM after we -- after the



1 Court granted cert and is not going to revisit  
2 the part of the rule that we want it to revisit,  
3 and so it wouldn't have mattered even if we did.

4 JUSTICE ALITO: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Sotomayor?

7 Justice Kagan?

8 Justice Gorsuch, any --

9 Justice Kavanaugh?

10 JUSTICE KAVANAUGH: Just so I'm clear  
11 on Justice Gorsuch's questions, in an as-applied  
12 enforcement action against you, I think you and  
13 the government agree that you can always raise a  
14 legal challenge to the -- the rule or the  
15 regulation?

16 MR. WEIR: That's correct. That's --  
17 that's how lower courts have interpreted it.

18 JUSTICE KAVANAUGH: Okay. Second  
19 question, and this is looking down the road and  
20 is really a tangential issue, but it interests  
21 me. So what relief can you get here --

22 MR. WEIR: So in -- in --

23 JUSTICE KAVANAUGH: -- if you can't  
24 get vacatur of the rule?

25 MR. WEIR: If we can't get vacatur?

1 We -- we can't imagine a situation where our  
2 client can get relief from this rule absent  
3 vacatur. But that's not true in -- in most  
4 cases. In most cases --

5 JUSTICE KAVANAUGH: Right.

6 MR. WEIR: -- directly regulated  
7 parties can --

8 JUSTICE KAVANAUGH: Directly -- but --  
9 but, on the vacatur issue, which is always  
10 lurking, a party who's not regulated would be  
11 able to get no relief in a situation like this?

12 MR. WEIR: I think it would depend on  
13 the context.

14 JUSTICE KAVANAUGH: I think you -- I  
15 think you just said that.

16 MR. WEIR: Yeah. There are some  
17 instances where you might be able to do it but  
18 --

19 JUSTICE KAVANAUGH: Yeah.

20 MR. WEIR: -- but not -- not in this  
21 one.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Barrett?

25 JUSTICE BARRETT: I just have one

1 question and it's about your point about  
2 procedural challenges not being the kind of  
3 challenges that you could bring or, and you say,  
4 I think, that that's part of the explanation for  
5 why the government's parade of horrors on page  
6 39 of its brief is not so horrible.

7 The procedural challenges are out, am  
8 I right?

9 MR. WEIR: That's -- that's what we  
10 think is the -- is the best reading of -- of how  
11 injury occurs in that context. It doesn't need  
12 -- the Court doesn't need to reach it in this --

13 JUSTICE BARRETT: Are --

14 MR. WEIR: -- case because we don't  
15 have procedural challenges.

16 JUSTICE BARRETT: So are arbitrary and  
17 capricious challenges procedural or not?

18 MR. WEIR: Those are substantive. And  
19 -- and you --

20 JUSTICE BARRETT: So those would be  
21 substantive in your view?

22 MR. WEIR: That's correct. And --  
23 and -- and you can raise those in as-applied  
24 enforcement contexts as well.

25 JUSTICE BARRETT: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Jackson?

3 JUSTICE JACKSON: So can I just be  
4 clear, injury, you're saying that injury is an  
5 element of an APA claim?

6 MR. WEIR: It is.

7 JUSTICE JACKSON: Okay. And can I  
8 also be clear on the consequences of your  
9 decision because I guess I worry that if you  
10 win, every agency rule in existence today would  
11 be subject to some sort of a challenge in this  
12 way. So I'm trying to understand that argument.

13 MR. WEIR: Sure. So I think, first,  
14 many of those regulations are already subject to  
15 challenge in the as-applied context, as -- as  
16 I've already said, but -- but we don't think  
17 that there's going to be any opening of the  
18 flood gates or parade of horrors because even  
19 the government said that parties that can bring  
20 this type of claim are relatively uncommon, and  
21 we think that's because most parties are harmed  
22 the day a regulation is actually issued.

23 And I think you also have vast -- vast  
24 swaths --

25 JUSTICE JACKSON: But why wouldn't

1     this be extraordinarily destabilizing in the way  
2     that Justice Sotomayor suggested? I mean, we  
3     have settled rules that govern all sorts of  
4     industries, the healthcare industry, the finance  
5     industry, and people have adjusted themselves  
6     around them. There are experts who understand  
7     how the law works and companies follow suit.

8             If I understand you correctly, each  
9     new company that is created in an industry can  
10    suddenly bring a challenge that might risk or  
11    undermine valid -- invalidation of the entire  
12    basis of the industry, each new company, because  
13    you say each new company that's created can  
14    bring such a lawsuit.

15            Now, whether or not it will succeed, I  
16    understand, but aren't you risking  
17    destabilization of the industry in this way?

18            MR. WEIR: We don't think so. We --  
19    we think the experience in the Sixth Circuit is  
20    what you'll see. There -- there was no uptick  
21    in challenges to old regulations in the Sixth  
22    Circuit, and we would have seen them there in  
23    the last --

24            JUSTICE JACKSON: Is -- is that  
25    possible because we had other doctrines that

1 prevented, so, you know, for example, Chevron  
2 existed and so there were lots of things that  
3 already -- you know, right? Like, there are  
4 reasons why you might not have an uptick. I'm  
5 just wondering, in a world in which you could  
6 bring these actions, why wouldn't you have this  
7 problem?

8 MR. WEIR: Well, I -- I think that  
9 because most regulations are -- are valid,  
10 there's -- there's no argument that they're  
11 unlawful. So you would -- so you wouldn't see  
12 them. It's only the ones that have defects that  
13 you're going to see challenges to or potential  
14 defects.

15 JUSTICE JACKSON: And going back to  
16 Justice Thomas's question, we had already had a  
17 challenge on this very set of regulations, so  
18 why is that not enough to satisfy this scenario?

19 MR. WEIR: Well, because our client  
20 was first injured by this -- that same rule and  
21 has its -- has its own challenge to bring under  
22 the APA. It's the -- the American tradition is  
23 everyone gets their day in court, and the APA  
24 itself provides for a presumption of judicial  
25 review.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Mr. Snyder.

5 ORAL ARGUMENT OF BENJAMIN W. SNYDER  
6 ON BEHALF OF THE RESPONDENT

7 MR. SNYDER: Mr. Chief Justice, and  
8 may it please the Court:

9 For decades, the courts of appeals  
10 have consistently recognized that the six-year  
11 statute of limitations on an APA claim accrues  
12 at the time of the challenged agency action, not  
13 the time when a particular plaintiff comes  
14 within the relevant statute's zone of interests.

15 In asking this Court to reject that  
16 settled practice, Corner Post argues that the  
17 word "accrues" in Section 2401(a) invariably  
18 refers to a time at which a specific plaintiff  
19 obtains a complete and present cause of action  
20 and that every newly formed entity therefore has  
21 six years to challenge any prior agency actions  
22 that affect its business or other interests,  
23 even if those actions occurred decades ago.  
24 Nothing in the APA or Section 2401(a) requires  
25 that destabilizing result.

1                   In Crown Coat Front Company, this  
2     Court explicitly rejected Corner Post's  
3     one-size-fits-all definition of "accrues,"  
4     warning of the hazards of attempting to devise a  
5     single accrual rule for all purposes.

6                   Instead, the Court explained that to  
7     apply the general word "accrues" a court has to  
8     consider the particular type of claim at issue  
9     and how the practical purposes of a statute of  
10    limitations apply in that context.

11                  In conducting that necessary analysis,  
12    courts should give primary weight to evidence  
13    about the accrual rule that Congress itself has  
14    adopted when it has specifically focused on  
15    other claims of the same type.

16                  Doing so ensures that courts are not  
17    just engaged in their own policy balancing about  
18    the respective costs of review and repose but  
19    instead are faithfully following Congress's  
20    lead. Here, Congress's standard practice when  
21    it's focused on the time for challenging an  
22    agency action has been to run the limitations  
23    period for that type of claim from the date of  
24    the agency action at issue.

25                  It would, therefore, reasonably have



1 expected courts to follow the same approach when  
2 applying Section 2401(a)'s catch-all statute of  
3 limitations to claims under the APA, and because  
4 that's what the court of appeals did here, the  
5 decision below should be affirmed.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: So when did the --  
8 the claim accrue for this Petitioner?

9 MR. SNYDER: So this Court has -- has  
10 said that a claim can accrue for different  
11 purposes or can -- can accrue for purposes of  
12 the statute of limitations at a point that's  
13 different from the point at which a plaintiff  
14 can bring suit.

15 And so Corner Post could not have sued  
16 until some point after it was incorporated, it's  
17 not exactly clear when, but when it had formed  
18 an intent to accept debit cards, but for statute  
19 of limitations purposes, its claim accrued at  
20 the time that regulation was adopted in 2011.

21 JUSTICE THOMAS: Is that normal to  
22 have two different times?

23 MR. SNYDER: So, in the context of  
24 administrative law challenges to agency action,  
25 that's absolutely the standard rule. My -- my

1 friend acknowledged that he can't point to  
2 another statute that doesn't treat accrual that  
3 way.

4 In other contexts, in the contract  
5 context or the tort context, it's true that that  
6 sort of rule is unusual, but in the context of  
7 administrative law challenges, it's entirely  
8 typical, and it would be strange to say that the  
9 rule should apply at some other time -- at some  
10 other time here.

11 CHIEF JUSTICE ROBERTS: Counsel, so I  
12 have a -- a -- I think I must be missing  
13 something fundamental. You have an individual  
14 or an entity that is harmed by something the  
15 government is doing, and you're saying, well,  
16 that's just too bad, you can't do anything about  
17 it because other people had six years to do  
18 something about it and maybe another person, a  
19 business organization or whatever, did do  
20 something about it.

21 I -- I mean, your friend on the other  
22 side said everybody is entitled to their day in  
23 court, and it doesn't say unless somebody else  
24 had a day in court or unless the government gave  
25 other people, anybody, six years, but you didn't

1 -- you weren't injured in six years, you were  
2 injured -- injured in seven years.

3 I -- I just -- I guess I am -- must be  
4 missing something because I don't understand why  
5 this wasn't settled 60 years ago. It seems  
6 pretty fundamental.

7 MR. SNYDER: So, Mr. Chief Justice, I  
8 understand that -- that intuition, but I think  
9 the available evidence shows that Congress  
10 doesn't share it. I mean, my friend pointed out  
11 that we've -- we've identified 29 other  
12 limitations periods on challenges that are  
13 substantively the same as his.

14 CHIEF JUSTICE ROBERTS: Okay, yeah,  
15 Congress doesn't share it, but, I mean, it  
16 has -- it's not exactly an uninterested party.  
17 It has set up an agency and they just as soon  
18 not -- it not be challenged.

19 We don't say when there's a legal  
20 challenge to something else that Congress is  
21 happy with it, so go home.

22 MR. SNYDER: So, Mr. Chief Justice, I  
23 don't think there's any dispute that Congress  
24 can say that facial challenges are not available  
25 after a certain point. My friend is not here

1 suggesting that the Hobbs Act or the dozens of  
2 other special statutory review provisions that  
3 we've pointed to are unconstitutional.

4 And there are in the APA -- APA  
5 context other ways in which parties can raise  
6 challenges to agency action, and --

7 CHIEF JUSTICE ROBERTS: Like what?

8 MR. SNYDER: So --

9 CHIEF JUSTICE ROBERTS: Like what one  
10 is going to help Corner Post? I mean, they're  
11 not injured by direct enforcement of the  
12 regulation, so don't tell me, well, they can  
13 object to enforcement.

14 What else is there?

15 MR. SNYDER: So the other option is  
16 that they can petition for rulemaking. That's  
17 something that Congress set out in Section  
18 553(e) of the APA itself. In 555(e), it  
19 required the agency to respond in a reasonable  
20 time.

21 My friend --

22 CHIEF JUSTICE ROBERTS: Well, but --  
23 but maybe they don't want a rule. They want the  
24 government to stop what it's doing to them.

25 MR. SNYDER: Well, I mean, we were --

1 we were talking in this case about Corner Post's  
2 interests. I think it's relevant that Corner  
3 Post is not relevant or, excuse me, is not  
4 regulated. And so it's true that Corner Post  
5 can't assert these types of claims in an  
6 enforcement action, but that's because this rule  
7 doesn't apply to Corner Post.

8 CHIEF JUSTICE ROBERTS: But you don't  
9 doubt that it has standing, right?

10 MR. SNYDER: No, we don't doubt that  
11 it has standing. And so it could have brought a  
12 suit within six years after the regulation was  
13 adopted, just as --

14 CHIEF JUSTICE ROBERTS: Well, but they  
15 weren't -- they weren't in existence six years  
16 after the regulation was adopted.

17 MR. SNYDER: So that's true. It's  
18 also true in the Hobbs Act context, it's true in  
19 dozens of other contexts as well --

20 CHIEF JUSTICE ROBERTS: We have a  
21 whole bunch of things that are illegal.

22 MR. SNYDER: I -- I don't think anyone  
23 has suggested that those are illegal, I mean --

24 CHIEF JUSTICE ROBERTS: Well, I --

25 MR. SNYDER: -- except for the Chief

1 Justice of the United States.

2 (Laughter.)

3 MR. SNYDER: So --

4 CHIEF JUSTICE ROBERTS: Thanks.

5 MR. SNYDER: -- with -- with that  
6 caveat, let me put it this way. I don't think  
7 the -- the entity with the strongest interest in  
8 making that kind of argument has made any  
9 serious suggestion that the Hobbs Act is  
10 unconstitutional or that those other special  
11 statutory review provisions are  
12 unconstitutional. So I think --

13 CHIEF JUSTICE ROBERTS: I didn't mean  
14 to suggest it either, but you do have a specific  
15 injury inflicted by the government, the  
16 individual has standing, and your argument is,  
17 well, Congress doesn't want people to sue, or  
18 somebody else had the chance to sue and you  
19 could have joined that trade association.

20 MR. SNYDER: So, Mr. Chief Justice, I  
21 do want to push back a little bit on the idea  
22 that this injury is inflicted by the government.  
23 I think the reason that they cannot assert this  
24 claim in an enforcement proceeding is because  
25 the government is not applying this regulation

1 to them directly.

2 What their argument is, is that the  
3 government should be regulating someone else  
4 more aggressively. And so, in that context,  
5 it's true that they have fewer rights to  
6 judicial process when what they want is for the  
7 government to go and regulate someone else. If  
8 they were the one regulated, they would have  
9 additional rights, and that's true in the  
10 context of dozens of other special statutory  
11 regime questions as well.

12 JUSTICE GORSUCH: But, counsel, I  
13 mean, you mention the enforcement action  
14 possibility, but why would banks challenge this  
15 rule? They benefit from it. So that avenue  
16 doesn't seem to be very helpful to you.

17 MR. SNYDER: So, I mean, I think the  
18 banks probably think the rule should be higher,  
19 but --

20 JUSTICE GORSUCH: Right.

21 MR. SNYDER: But I do want --

22 JUSTICE GORSUCH: Right. If anything,  
23 they want more money.

24 MR. SNYDER: I do want to get to my  
25 friend's suggestion that the Board has been

1 unresponsive to petitions for rulemaking.

2 JUSTICE GORSUCH: Well, no, that --  
3 that -- that wasn't my question. And -- and --  
4 and just to pick up on the Chief Justice's, I  
5 can certainly understand Congress might want to  
6 pass statutes of repose with respect to  
7 rulemaking in a variety of contexts, as it did  
8 before the APA and it did after the APA with  
9 respect to specific statutory schemes.

10 But the APA was passed 80 years ago as  
11 the background rule, the kind of minimum, the  
12 floor, and it was with a presumption of judicial  
13 review. And it uses the word "accrue," which  
14 had a lot of encrusted meaning, and we have a  
15 lot of precedent about it that suggests, yes, an  
16 injury, that's when it starts, okay?

17 Why wouldn't -- and just as a matter  
18 of sense -- your whole argument is it doesn't  
19 make sense to interpret it differently than  
20 those agency-specific statutes, the Hobbs Act  
21 and others. But -- but is that so? Why  
22 wouldn't it be also perfectly rational for  
23 Congress to have adopted as the background rule  
24 the norm, the traditional common law rule?

25 MR. SNYDER: So, Justice Gorsuch, I



1 disagree that that's the traditional rule in  
2 this context. Both before and after the  
3 adoption of the APA and --

4 JUSTICE GORSUCH: I'm talking about  
5 the word "accrue."

6 MR. SNYDER: And that's what I'm  
7 talking about too. In Reading Company, this  
8 Court adopted an interpretation of the word  
9 "accrues" in which the -- the statute of  
10 limitations started to run before the plaintiff  
11 could recover on the claim.

12 And then, in Crown Coat Front Company,  
13 the Court, pointing back to --

14 JUSTICE GORSUCH: Certainly, there are  
15 statutes where that's done, and, again, I don't  
16 dispute that. But the normal rule -- and I  
17 think you'd have to concede it -- is that the  
18 plaintiff's injury is the moment of accrual,  
19 that that's the normal rule.

20 MR. SNYDER: So I think that is the  
21 norm --

22 JUSTICE GORSUCH: And if we're looking  
23 at what the APA was trying to do, as a -- as --  
24 as a floor -- again, I'm not disputing that  
25 there are other examples -- but why would it be

1     irrational to think that that's what Congress  
2     had in mind? That's my question.

3                 MR. SNYDER: So just as a point of  
4     clarification, in Reading Company, the statute  
5     just used the word "accrues."

6                 JUSTICE GORSUCH: I understand.

7                 MR. SNYDER: And so it doesn't just  
8     have this single meaning. Now --

9                 JUSTICE GORSUCH: If you could answer  
10    my question.

11                MR. SNYDER: So my friend pointed out  
12    that at the time the APA and Section 2401(a)  
13    were adopted, there were other statutes dealing  
14    with administrative review provisions, and those  
15    statutes ran from the time of agency action.

16                If you look at 21 U.S.C. 37 -- or 371  
17    --

18                JUSTICE GORSUCH: Okay. I got it. I  
19    got it. And just flipping back to the question  
20    that we had earlier with your friend on the  
21    other side, if we were to interpret the word  
22    "accrue" to mean the moment of the agency's  
23    action, what's the consequence for as-applied  
24    challenges? Put aside, again, enforcement  
25    because that's, you know, in a criminal

1 proceeding or an enforcement proceeding. Here,  
2 it's an APA challenge, and there's no  
3 distinction in the statutory text between  
4 as-applied and facial challenges.

5 And I understand courts of appeals for  
6 years have said as-applied challenges may  
7 proceed without carefully looking at the word  
8 "accrue" either.

9 MR. SNYDER: So I think the difference  
10 is which action is being challenged. The reason  
11 you can raise a challenge in the as-applied  
12 context is that the final agency -- the final  
13 agency action that you're challenging is the  
14 agency action actually applying the regulation.  
15 And so you're bringing your challenge less than  
16 six years after the final agency action  
17 occurred.

18 What you can't do is go back and  
19 challenge a regulation that was adopted decades  
20 ago.

21 JUSTICE GORSUCH: I -- I --

22 JUSTICE KAGAN: Mr. Snyder, may I ask,  
23 what is the coverage of this provision? In  
24 other words, you've noted that there are many  
25 statutes that deal with particular kinds of

1     agency action.  So what's left over other than  
2     this regulation?  What's the world of things  
3     that this decision will matter to?  Is it small,  
4     is it medium-sized, is it large?  What's in it?

5                 MR. SNYDER:  So I think it is  
6     relatively large in the sense that a general APA  
7     cause of action applies to a broad range of  
8     government claims.  Is that -- I'm not -- I  
9     don't know exactly how to quantify that, but I  
10    think it is true that --

11                JUSTICE KAGAN:  But what kinds of  
12    claims?  From what kind of agencies?  What is  
13    not -- what are we -- what is not at issue here?

14                MR. SNYDER:  I -- I can't give you a  
15    precise answer on that.  I mean, I -- I can  
16    point you to the special statutory review  
17    provisions that we've identified in footnote 4  
18    of our brief.  Candidly, we got to a page-long  
19    footnote and stopped, so there are a lot of  
20    other special statutory review provisions that  
21    all use "accrual" in exactly the same way.

22                I mean, I think looking at a survey of  
23    this Court's cases and thinking about how often  
24    the Court encounters challenges in the context  
25    of an APA claim indicates that it's a pretty

1 broad category of cases, but I don't have sort  
2 of precise contours I can draw.

3 JUSTICE KAVANAUGH: But how much will  
4 it matter kind of in the real world? Because,  
5 when you have a regulation that has some  
6 defects, it's probably going to be challenged  
7 sooner rather than later by someone. And then,  
8 if it's held invalid, it usually will get to  
9 this Court, which will provide, you know, a  
10 final answer on that question.

11 So coming in more than six years later  
12 is not typically a winning strategy for  
13 challenging a rule. So just kind of real-world  
14 implications, picking up on Justice Kagan's  
15 point.

16 MR. SNYDER: So I think one of the  
17 real-world implications to highlight is that  
18 this doesn't just apply in the context of  
19 regulations. I mean, their rule would apply in  
20 the context of a permit issued to operate a dam.  
21 And on their theory, someone who travels out  
22 west for the first time to go see the snail  
23 darter can say, I've never been here before,  
24 I've never been affected by this dam, and so I'm  
25 going to mount an APA challenge to that permit

1     that was issued 20 years ago to allow the -- the  
2     dam to continue operating.

3             I think that type of application  
4     extrapolated across the entire federal  
5     government and all of the final agency actions  
6     that the government engages in outside of the  
7     context of rulemaking, it's pretty hard to  
8     overstate the significance of allowing those  
9     challenges to be brought more than six years  
10    later.

11            JUSTICE KAVANAUGH: And then thinking  
12    about what Congress was getting at here, I'm not  
13    sure it was really getting at this issue at all  
14    because six years is an extremely long time to  
15    begin with to challenge a regulation. So, I  
16    mean, I don't -- I don't know that they were  
17    thinking about this context. We just have to  
18    apply the text as it is, but I -- I'm --

19            MR. SNYDER: So, Justice Kavanaugh, I  
20    think I agree with you in the sense that 2401(a)  
21    is a catch-all statute of limitations. Congress  
22    adopted it as a backstop. It erred on the side  
23    of caution in setting a lengthy six-year term.

24            But, in understanding how to apply  
25    that catch-all statute of limitations to

1 particular types of claims, I think the way to  
2 show fidelity to Congress's intent and  
3 Congress's expectations is to look at how  
4 Congress has approached accrual when it's dealt  
5 with similar claims of the same type.

6 JUSTICE KAVANAUGH: But -- but  
7 Congress could easily -- this is an obvious  
8 point, but Congress could easily do that across  
9 the board for agency actions and certainly would  
10 do something shorter than six years if it did  
11 because repose has been thrown around here.

12 Six years doesn't give you much repose  
13 to begin with if you're the government, at least  
14 unless this Court has -- has ruled on the issue.

15 MR. SNYDER: So I -- I mean, I think,  
16 of course, six years is better than six decades,  
17 which, I mean, that's not even a limit on my  
18 friend's rule. So I do think that six years  
19 meaningfully -- meaningfully protects repose  
20 interests.

21 And that lengthy term accounts, again,  
22 for the fact that this covers a broad range of  
23 claims. Even outside the administrative law  
24 context, I mean, there are any number of other  
25 types of claims that are subject to Section

1 2401.

2 JUSTICE KAVANAUGH: Right. Okay. One  
3 other question, on a petition for rulemaking  
4 that you mentioned, would you acknowledge that  
5 the standard of judicial review for the denial  
6 of that would be not the same as in a direct  
7 challenge to the rule?

8 MR. SNYDER: Yes, I think that's  
9 right. And that's by --

10 JUSTICE KAVANAUGH: And that's the  
11 problem.

12 MR. SNYDER: One would -- one from my  
13 position would say that's what Congress has  
14 chosen.

15 JUSTICE KAVANAUGH: Yeah.

16 MR. SNYDER: And to say that because  
17 Congress has chosen a petition for rulemaking  
18 process that is deferential, the Court should  
19 instead allow challenges to things that happened  
20 decades ago, I don't think that really follows.

21 And I do think that this case is a  
22 good illustration of the odd fit that this sort  
23 of claim is in a context brought a decade after.  
24 If you look at the complaint, it's full of  
25 references to, you know, cost data from 2013,



1     2015, 2017, 2019. But all of that data is  
2     completely irrelevant if they're right that --  
3     that they can go forward on a challenge to the  
4     rule as it was adopted in 2011.

5             It makes far more sense to handle this  
6     kind of challenge in the context of a petition  
7     for rulemaking, where the agency can actually  
8     take account of experience with the rule and  
9     decide what makes sense going forward.

10            JUSTICE ALITO: Well, that just --

11            JUSTICE BARRETT: Mr. --

12            JUSTICE ALITO: -- suggests that the  
13     claim would fail on the merits, right? It's not  
14     -- it doesn't go to the issue of accrual.

15            MR. SNYDER: I -- I -- I -- so my  
16     point is not that the claim would fail. I mean,  
17     they -- they have other arguments about the law.  
18     We -- we think those arguments would fail too.

19            But my point about the intervening  
20     information is that they have thought that  
21     information is relevant to showing something  
22     about this rule, and yet, in the procedural  
23     mechanism they are using here, that information  
24     is completely irrelevant. That suggests that  
25     maybe it's not the right procedural mechanism.

1 JUSTICE ALITO: When -- when I read  
 2 your brief in opposition, I came away with the  
 3 impression that this case would not have a broad  
 4 practical effect. You say on page 11 that --  
 5 that it's relatively uncommon -- it's a  
 6 relatively uncommon circumstance for a person  
 7 who was not injured when the rule was  
 8 promulgated to become injured at a later date.

9 But then I got a very different  
 10 message from your brief on the merits when you  
 11 say that accrual -- the Petitioner's approach to  
 12 accrual under 2401(a) would substantially expand  
 13 the class of potential challengers and thereby  
 14 increase the burdens on agencies and courts.

15 So what accounts for this different  
 16 message?

17 MR. SNYDER: So I think it's a -- a  
 18 difference in the -- the focus. At the -- at  
 19 the cert stage, the -- the point we were making  
 20 was --

21 JUSTICE ALITO: That we shouldn't take  
 22 the case because it wasn't a big deal. But  
 23 after we took it --

24 (Laughter.)

25 MR. SNYDER: Our point was that there

1     aren't a lot of -- of plaintiffs in Petitioner's  
2     position as compared to plaintiffs who can bring  
3     the challenge. I think that is empirically a  
4     correct statement.

5             If you think about this case, for  
6     example, the challenge that was brought to  
7     Regulation II back in 2011 was brought on behalf  
8     of tens of thousands of merchants.

9             My friend is here at this point  
10    representing just one plaintiff. So it's true  
11    that the numbers are different, but my friend,  
12    as he said, is seeking exactly the same relief  
13    that those entities sought back in 2011. And  
14    so, from the government's perspective, allowing  
15    this exception, even though it's only going to  
16    benefit a relatively small number of plaintiffs,  
17    would have really far-reaching effects.

18            JUSTICE KAGAN: But does that --

19            JUSTICE ALITO: I mean, 2401 -- 2401  
20    is a very broad statute that applies to every  
21    civil action against the United States, and as I  
22    understand your argument, you want us to say  
23    that the term "accrue" means something different  
24    in different contexts.

25            Have we ever said anything like that?

1                   MR. SNYDER: So I think the Court said  
2                   basically that in Crown -- Crown Coat Front  
3                   Company, interpreting 2401. It said that  
4                   "accrues" is a general word, that it's hazardous  
5                   to try to give it one definition for all  
6                   purposes and that instead you have to interpret  
7                   it in -- in the light of the specific statute at  
8                   issue.

9                   And if I could point you to Section  
10                  2401(b), which is the provision governing tort  
11                  claims against the United States, that similarly  
12                  uses the word "accrues," and the Court has  
13                  acknowledged in that context that different  
14                  claims are subject to different accrual rules.

15                 So, in United States versus Kubrick,  
16                  the Court said that most tort claims against the  
17                  United States accrue at the time of injury but  
18                  that some accrue at the time the injury is  
19                  discovered in the context of medical  
20                  malpractice, for example.

21                 So the Court has acknowledged that  
22                  "accrues" can lead to different accrual rules  
23                  for different kinds of claims.

24                 JUSTICE KAGAN: An argument that Mr.  
25                  Weir makes is that if this were also

1     destabilizing, as you suggest, we would have  
2     seen that already because there can always be  
3     enforcement actions in which a party can defend  
4     itself by saying that the rule is invalid.

5                 So why hasn't that -- why is this so  
6     much more destabilizing than that sort of  
7     regime?

8                 MR. SNYDER: Because, first of all,  
9     this applies in contexts where there aren't  
10    going to be enforcement proceedings, so, for  
11    example, the permit context that I mentioned.  
12    His rule would apply in that context, and I  
13    think that alone would make it pretty  
14    destabilizing.

15                But I also think it's just the case  
16    that there are far fewer enforcement actions  
17    than there are regulated entities, and so  
18    allowing every -- every new regulated entity to  
19    bring a facial challenge would significantly  
20    expand the number of claims that you would see.

21                The other -- the other point that my  
22    friend has made about why you shouldn't think  
23    this is going to lead to bad results is that  
24    there's been experience in the Sixth Circuit. I  
25    do want to address that.

1           The Sixth Circuit, courts in the Sixth  
2   Circuit have not understood Herr to adopt the  
3   rule that my friend is arguing for, and the best  
4   evidence I can give you of that is that a newly  
5   incorporated pizzeria filed suit against  
6   Regulation II in Kentucky in 2022, and the  
7   court, applying Herr, said that claim,  
8   materially identical to this one, is untimely  
9   because Herr dealt with as-applied challenges as  
10  opposed to facial challenges like this one.

11           So there's just nowhere in the country  
12  that you can look to see what my friend's rule  
13  would look like.

14           JUSTICE JACKSON:   And, Mr. --

15           JUSTICE BARRETT:   Mr. Snyder --

16           JUSTICE JACKSON:   Oh.   Go ahead.

17           JUSTICE BARRETT:   -- is -- is your  
18  rule of accrual completely desegregated from  
19  injury?  Because you agree, right, as a matter  
20  of the APA and Article III that a plaintiff  
21  can't actually even bring a suit unless the  
22  plaintiff has been injured, right?

23           MR. SNYDER:   Yes.   That -- that's  
24  true.  I mean, our accrual rule is the same  
25  accrual rule that Congress has called for in the

1 context of the Hobbs Act.

2 JUSTICE BARRETT: I know, I know, I  
3 know. But we're talking about 2401. And -- and  
4 in Crown Point, the entitlement to payment  
5 didn't arise until at the point where we said it  
6 accrued. So, you know, there's language in  
7 Crown Point that helps you, but on the actual  
8 facts of the case, that was when the injury was  
9 complete.

10 And so -- but -- but what I want to  
11 know is, would this be the only time for  
12 purposes of 2401, as -- as opposed to things  
13 like the Hobbs Act, where we would have  
14 interpreted "accrue" to be separate from injury?  
15 Like, what if the government delayed enforcement  
16 and there wasn't an injury yet, for example?

17 MR. SNYDER: So I -- I'm not aware of  
18 another case in which this Court has interpreted  
19 2401(a) to sort of go in either direction. I  
20 mean, in Crown Coat Front Company, the -- the  
21 accrual point was both the point of injury and  
22 the time of agency action. So we're not  
23 suggesting that Crown Coat Front Company by its  
24 holding resolves it between those two.

25 JUSTICE BARRETT: Mm-hmm.

1                   MR. SNYDER: As to a case where there  
2 was no -- where there was delayed enforcement, I  
3 mean, I think the whole idea of pre-enforcement  
4 review is that a -- a plaintiff can bring suit  
5 even if they are not yet subject to enforcement  
6 action. And so I don't think that that would  
7 prevent someone from bringing a challenge when  
8 the regulation was first adopted.

9                   JUSTICE BARRETT: But injury isn't  
10 part of the calculus. It's really just  
11 finality?

12                  MR. SNYDER: So, yes, we -- we think  
13 that's true for the APA just as it's true for  
14 other --

15                  JUSTICE JACKSON: And doesn't it have  
16 to be that way? Because I guess I'm trying to  
17 understand when the injury would occur under  
18 their theory with respect to the promulgation of  
19 the rule, right? I mean, the claim under an APA  
20 case in this way is that the rule was  
21 promulgated in an invalid way.

22                  So I'm trying to understand when the  
23 plaintiff would be injured if we're going to go  
24 with an injury theory. I don't even know when  
25 that would happen really.



1                   Can you speak to that?

2                   MR. SNYDER: I mean, I think they  
3 would say that they were injured for the first  
4 time when they felt the effects of the rule. So  
5 I think they would say, I mean, what the --

6                   JUSTICE JACKSON: But they came into  
7 the environment the rule was already in  
8 existence. So I guess it was the day they were  
9 incorporated?

10                  MR. SNYDER: So they have -- they have  
11 said it's not the date they were incorporated.  
12 They've said it's the day they opened the doors  
13 for business. I don't know why on their --  
14 their understanding of the accrual rule it  
15 wouldn't be the day that we say --

16                  JUSTICE JACKSON: But don't we have to  
17 pin that down if we're going to go with their  
18 rule? I mean, we've got to figure out when the  
19 clock starts. So is it --

20                  MR. SNYDER: I -- I'm with you. I --  
21 I mean, don't understand what the -- the right  
22 point would be for their rule.

23                  JUSTICE JACKSON: And it's because  
24 their claim is about the promulgation of the  
25 rule, which happened before they existed,

1       whereas an as-applied claim, as I understand  
2       your argument to be, would be that, you know,  
3       it's when the rule was applied to them. Then  
4       everybody has a clear date and we understand  
5       that the clock starts at that point.

6               But this is a different kind of claim,  
7       so I don't understand when the injury would  
8       occur in this situation.

9               MR. SNYDER: I -- I think that's  
10       right. I think it would be really difficult to  
11       figure out exactly at what point on their theory  
12       they could actually bring suit.

13              JUSTICE ALITO: Well, Mr. Snyder, I'm  
14       not --

15              JUSTICE KAVANAUGH: Isn't it when the  
16       --

17              JUSTICE ALITO: I -- I'm having a  
18       little trouble understanding your answer, but  
19       probably I'm -- I'm not understanding it  
20       correctly. Is it your argument that a facial  
21       challenge to a statute or a rule always accrues  
22       at the time of the adoption of the statute or  
23       rule and that once the statute of limitations  
24       has passed, no one can bring a facial challenge  
25       to that statute or rule?

1                   MR. SNYDER: So I -- I think the  
2     statutory context is different because there is  
3     no --

4                   JUSTICE ALITO: All right. Forget the  
5     statute. A regulatory context.

6                   MR. SNYDER: So, in the regulatory  
7     context, yes. Our position is, once the  
8     regulation has been adopted, there is a six-year  
9     period to challenge the final agency action  
10    adopting the regulation. And after that point,  
11    there's -- there's not an opportunity to bring a  
12    facial challenge. It can be challenged in the  
13    context of enforcement proceedings.

14                  JUSTICE ALITO: All right. Let's say  
15    there was a regulation that said that only men  
16    can be admitted to one of the military  
17    academies, and after the statute of limitations  
18    has run, a woman applies, wants to be admitted  
19    to a military academy, and you would say it's  
20    too late for -- for her to bring a facial  
21    challenge to that?

22                  MR. SNYDER: We would say that if she  
23    applies to the military academy and is denied  
24    admission, that at that point there is an  
25    application of the regulation to her and that

1 she can raise substantive challenges to the  
2 regulation in that context.

3 JUSTICE ALITO: What's the difference  
4 between that and the situation of Corner Post,  
5 other than the fact that they are indirectly  
6 hurt rather than being directly hurt?

7 MR. SNYDER: I -- I mean, I think the  
8 difference is that in that case, there is a  
9 subsequent final agency action that provides  
10 the -- the focus and that is within the last six  
11 years, whereas, on their theory, there's no  
12 final agency action that they're pointing to.

13 JUSTICE KAVANAUGH: In Justice  
14 Jackson's questions, I would have thought it  
15 starts running the day they open the business.

16 MR. SNYDER: So, Justice Kavanaugh, I  
17 don't think --

18 JUSTICE KAVANAUGH: Just compared to  
19 usual APA suits, which start the day the rule is  
20 adopted and you're an ongoing business.

21 MR. SNYDER: So I think that if they  
22 wanted to challenge suit before they opened  
23 business -- the doors for business, what they'd  
24 say is, we have concrete plans to accept debit  
25 cards.

1 JUSTICE KAVANAUGH: Okay. So they --  
2 yeah, I take that point.

3 MR. SNYDER: I mean, I think, like,  
4 I'm not saying it's impossible to figure it out.

5 JUSTICE KAVANAUGH: Maybe a little bit  
6 before. Maybe a little bit before, but you'd  
7 have to make a showing there, I think, to -- to  
8 get in the door in that context, right?

9 MR. SNYDER: Well, I -- I think more  
10 problematically, it's not they would who have  
11 have to make that showing. Ordinarily, in an  
12 APA case, they would come forward and say we  
13 have concrete plans to accept debit cards as of  
14 today, and so we can bring the challenge.  
15 That's easy.

16 The problem here is that we would have  
17 to come in and say they formed concrete plans to  
18 accept debit cards sometime before they opened  
19 their doors, but how do we know when that was?

20 Again, I'm not saying that's  
21 impossible --

22 JUSTICE KAVANAUGH: Yeah. That's --

23 MR. SNYDER: -- but I'm saying --

24 JUSTICE KAVANAUGH: I mean, that's a  
25 pretty in-the-weeds debate, but -- and -- and I

1     don't think that arises -- that would arise that  
2     often, but maybe I'm wrong about that.

3             Let me ask a question about the  
4     Article III standing point that was raised, just  
5     to make sure we're on the same page on that. My  
6     understanding is the day a rule is adopted and  
7     you're a regulated party, even if nothing has  
8     happened to you by the agency, you have standing  
9     to go in to sue. That happens all the time,  
10    right?

11            MR. SNYDER: That's my understanding  
12    too, yes.

13            JUSTICE KAVANAUGH: Okay. And if  
14    you're not a regulated party but you're an  
15    affected party, which is a bag swath of -- at  
16    law, you also, if you can show you're an  
17    affected party in some way, have standing to sue  
18    in injury on the day the rule is promulgated?

19            MR. SNYDER: I agree with that too.

20            JUSTICE KAVANAUGH: Okay.

21            CHIEF JUSTICE ROBERTS: What -- what  
22    do you -- how do those -- your answers apply if  
23    it's a corporation that wasn't incorporated  
24    until seven years, you know, rather than six  
25    years? But you'd still say they -- they have

1 standing?

2 MR. SNYDER: Yes. We -- we don't  
3 dispute that they have standing. We just think  
4 that their -- their claim is untimely.

5 I do, if -- if I could, want to come  
6 to the final sentence --

7 JUSTICE BARRETT: Can I just follow up  
8 on the Chief's question? What if they were  
9 thinking about incorporating, but they haven't  
10 yet incorporated and they're still within the  
11 six-year period and part of whether they  
12 incorporate and go into business depends on the  
13 structure of the industry and whether this rule  
14 is going to help? No standing, right?

15 MR. SNYDER: I think that's right. I  
16 mean, there -- there's no case law I can point  
17 you to on this because no court in the country  
18 has applied their rule. I mean, I think  
19 adopting their rule would open the Court up to  
20 all sorts of really thorny questions, however  
21 far down in the weeds they might be. I think  
22 those questions just haven't been explored.

23 JUSTICE KAVANAUGH: Those questions --  
24 I mean, those questions come up in other  
25 contexts. Where is the business really

1 operating? Is it a phony challenge to an -- I  
2 mean, I've seen that before. So, I mean, maybe.

3 JUSTICE BARRETT: Mr. Snyder, would  
4 this rule have effects -- Justice Alito in his  
5 hypothetical started to ask you about a statute  
6 and then switched and was focused on rule. So  
7 2401 is the all-purpose statute of limitations.

8 I'm just wondering, is your argument  
9 that we should interpret "accrue" this way  
10 because, in the administrative law context and  
11 because of the Hobbs Act and all these  
12 specialized statutes, a statute of repose-style  
13 accrual is -- makes more sense? Would there be  
14 spillover effects in, say, you know, hey, I'm  
15 sure Congress would prefer all challenges to a  
16 statute to be adjudicated right away. Would  
17 there be spillover effects?

18 MR. SNYDER: I don't think there would  
19 be spillover effects. You're right that a  
20 primary part of our argument, the primary part  
21 of our argument is the Hobbs Act and the other  
22 special statutory review -- review provisions  
23 establishing the standard rule in this context.  
24 And so it -- it applies sort of here as well.

25 We also have an argument about the



1 final sentence of Section 702 that we haven't  
2 discussed.

3 But the -- the last reason that I  
4 don't think it would spill over to statutes is  
5 the challenges to statutes are -- are  
6 necessarily -- may I finish the sentence?

7 CHIEF JUSTICE ROBERTS: Sure.

8 MR. SNYDER: -- are necessarily  
9 constitutional. And so the Court has allowed  
10 claims against the validity of statutes outside  
11 of the context of a final agency action  
12 requirement as in the APA.

13 CHIEF JUSTICE ROBERTS: Thank you.

14 Justice Thomas?

15 Justice Alito?

16 JUSTICE SOTOMAYOR: Just a couple of  
17 follow-up.

18 You mentioned the permitting processes  
19 being one that would be unraveled by this new  
20 rule. Are there other areas that you haven't  
21 mentioned?

22 MR. SNYDER: I -- I -- I mean, I think  
23 similar areas like that, so land management  
24 plans, other things like that that are not  
25 regulations but are instead actions that the

1 government has taken in carrying out all of the  
2 -- the many functions that Congress has  
3 entrusted to it. Land sales, land leases,  
4 things like that.

5 I don't know exactly how their rule  
6 would apply in those circumstances, but I think  
7 it's at least plausible to think that it would  
8 apply to all of those. I don't know why it  
9 wouldn't on its logic. Again, I think that  
10 would be destabilizing.

11 JUSTICE SOTOMAYOR: And, number two,  
12 opposing counsel, in answering Justice Barrett,  
13 said that procedural challenges would not  
14 happen. But in your brief, you suggested they  
15 would. Could you tell me why their concession  
16 is not convincing to you?

17 MR. SNYDER: Well, I mean, we said our  
18 brief -- we said it in our brief before they had  
19 made that concession. They -- they hadn't said  
20 that until the reply brief. And their complaint  
21 includes procedural challenges. If you look at  
22 paragraphs 93 and 95 of their complaint, they  
23 include arguments that the agency failed to  
24 provide a reasoned explanation of Regulation II  
25 and that the record before the agency wasn't

1 sufficient to support it.

2           So I -- I'm glad that they're willing  
3 to give up procedural challenges, but we hadn't  
4 anticipated that before.

5           CHIEF JUSTICE ROBERTS: Justice Kagan?

6           JUSTICE KAGAN: Mr. -- Mr. Snyder, I  
7 want to emphasize that I'm asking you a  
8 hypothetical question. It's an "if" question.

9           There is obviously another big  
10 challenge to the way courts review agency action  
11 before this Court. Has the -- has the Justice  
12 Department and the agencies considered whether  
13 there is any interaction between these two  
14 challenges? And, again, you know, if Chevron  
15 were reinforced, were affirmed. If Chevron were  
16 reversed, how does that affect what you're  
17 talking about here?

18           MR. SNYDER: So I want to be careful  
19 here. I mean, we of course have thought about  
20 it. I think what I'd say is that a decision for  
21 Petitioner here would magnify the effect of any  
22 other decisions changing the way that this Court  
23 or other courts have approached administrative  
24 law questions, because it would -- it would  
25 potentially mean that those changes would then

1 be applied retroactively to every regulation  
2 that an agency has adopted in the last, I don't  
3 know, 75 years or something.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Gorsuch?

6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: One follow-up  
8 question on something you said earlier. This is  
9 also about future effects on standing.

10 They asked in this suit to set aside  
11 the rule. Your position, the Solicitor  
12 General's position, is that that can't be done  
13 under the APA. If you can't set aside the rule  
14 and you're not a regulated party, how is their  
15 injury redressable in this suit and why do they  
16 have standing?

17 MR. SNYDER: So I -- I think our  
18 position has been that courts are only able to  
19 provide relief to the party before them and that  
20 ordinarily --

21 JUSTICE KAVANAUGH: How would that be  
22 done in a circumstance like this?

23 MR. SNYDER: So I think -- and I'm --  
24 I'm a little hesitant to say this -- but I think  
25 that in this circumstance, it's possible that

1 the only way to provide this party relief would  
2 be vacatur. I -- I'm not certain that that's  
3 right, but I think that's possible.

4 JUSTICE KAVANAUGH: I think that's  
5 probably right, which is why I was surprised  
6 when you said what you said, that if you don't  
7 have the set aside remedy, they probably don't  
8 have standing here.

9 MR. SNYDER: So I think the reason is  
10 that the -- the power that the court has under  
11 the APA is to provide relief to the party before  
12 it, not more broadly. And it's possible that in  
13 circumstances where the only way to give the  
14 party before the court relief is vacatur, that  
15 that would be consistent with traditional  
16 equitable considerations in a way that providing  
17 vacatur in other cases is not.

18 JUSTICE KAVANAUGH: Well, that's a new  
19 twist.

20 MR. SNYDER: I -- I don't intend that  
21 to be a new twist.

22 (Laughter.)

23 MR. SNYDER: So to the extent that is  
24 --

25 JUSTICE KAVANAUGH: Okay. I'll --

1 I'll review the transcript. Thank you.

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: Justice  
4 Barrett?

5 JUSTICE BARRETT: No.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Jackson?

8 JUSTICE JACKSON: So just one  
9 question. The Chief mentioned the sort of  
10 common intuition that everybody gets their day  
11 in court. And I understand that and agree in a  
12 general sense.

13 But there's also the intuition that  
14 the Court sometimes talk about the importance of  
15 finality. And it seems to me that in this  
16 particular scenario, finality principles should  
17 be playing a significant role.

18 So can you just speak to -- this has  
19 comes up a couple of times, but why a new  
20 company that has been born into a particular  
21 regulatory environment, why should they be  
22 entitled to appear on the scene and potentially  
23 unsettle all of the long-established rules and  
24 expectations that govern all of the other  
25 companies that exist in that space?

1           MR. SNYDER: So, of course, we don't  
2 think they should. And I think -- I mean, any  
3 statute of limitations is always balancing the  
4 interest in judicial review, on the one hand,  
5 and the interest in repose, on the other.

6           And I think in the context of  
7 administrative law challenges to agency action,  
8 both of those considerations sort of point in  
9 the direction of accrual at the time of agency  
10 action because the new entrant to the market  
11 knows what it's getting into. So its interest  
12 in having its day in court is less than it might  
13 be in some other contexts.

14           And on the other hand, because there  
15 are so many new entrants every day in a market,  
16 if you don't cut off the limitations period at  
17 that point, then the -- the time for bringing  
18 challenges would extend to decades. And this  
19 Court has consistently rejected readings of  
20 limitations provisions that would allow suits to  
21 be brought decades after the thing that's being  
22 challenged occurred.

23           JUSTICE JACKSON: Thank you.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1                   Rebuttal, Mr. Weir?

2                   REBUTTAL ARGUMENT OF BRYAN K. WEIR

3                   ON BEHALF OF THE PETITIONER

4                   MR. WEIR: Thank you. Just a few  
5 points. At the outset, the challenges that --  
6 that my friend discussed are not procedural.  
7 Those are State Farm substantive challenges that  
8 we have in our complaint. Those are available  
9 in as-applied contexts. We think they will be  
10 available if -- if the Court sides with us.

11                  On the question of when an APA first  
12 accrues, we think the statute tells you. It  
13 says in the past tense or you're already being  
14 affected, you're already harmed. We think that  
15 when you first are harmed by the regulation is  
16 when it starts.

17                  But even if it starts at imminence, we  
18 don't think it really matters that much. This  
19 Court dealt with when an -- when an injury is  
20 imminent in Lujan. It's an objective test. You  
21 have to do more than just say I want to go  
22 somewhere. And so we would say you can look at  
23 Lujan.

24                  But in any event, the difference  
25 between when an injury is imminent and when it's



1 actual is -- is typically very small and six  
2 years into the future it's really not going to  
3 matter when the statute of limitations runs. We  
4 think it's a rare case where that's going to  
5 actually matter.

6 As far as the -- the concern about the  
7 APA being the only accrual-based statute in the  
8 regulatory context, we think that makes sense.  
9 The APA is the background rule. You would only  
10 pass an agency-specific rule to deviate from  
11 that background so there would be no real -- no  
12 real reason to pass an agency-specific rule.

13 And, again, Congress knows exactly how  
14 to -- to -- to pass a repose-based statute. It  
15 did it before the APA. It did it after the APA.  
16 We think that's an intentional choice. And it's  
17 done it many times since.

18 And -- and the idea that because  
19 Congress has done it that way for some  
20 regulations that we should apply that rule to --  
21 to -- to -- to 2401(a) I think upsets basic  
22 interpretive principles. When Congress makes  
23 different choices, it expects different rules.

24 Finally, I -- I think the government  
25 is asking really for a special exception that

1 would upset a lot of this Court's precedent.  
2 You would have to either undermine -- it would  
3 undermine the reasoning or flatly overrule the  
4 Court's precedents applying accrual-based  
5 statutes limitations including this Court's  
6 decision in Gabelli where it interpreted this  
7 exact same language as -- as meaning what we say  
8 it means.

9 And also undermine this Court's  
10 holding in Franconia where -- where the Court --  
11 where the government asked for special rules,  
12 again, the exact same language in the "Big"  
13 Tucker Act under first accrues and -- and the  
14 government -- and this Court said that it should  
15 apply the exact same as it does to private  
16 parties.

17 And to the extent there -- there is  
18 some problem here, this Court said in Rotkiske,  
19 just five years ago it is Congress's job to  
20 change the text of this statute, not this  
21 Court's.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel. The case is submitted.

25

1                   (Whereupon, at 11:12 a.m., the case  
2    was submitted.)  
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<p><b>behalf</b> [9] 1:19,23 2:4,7,10 3:9 38:6 58:7 79:3</p> <p><b>below</b> [2] 20:17 40:5</p> <p><b>benefit</b> [2] 46:15 58:16</p> <p><b>BENJAMIN</b> [3] 1:21 2:6 38:5</p> <p><b>best</b> [2] 34:10 61:3</p> <p><b>better</b> [2] 13:8 54:16</p> <p><b>between</b> [10] 14:1 17:18 24:23 25:1 27:25 50:3 62:24 67:4 74:13 79:25</p> <p><b>big</b> [3] 57:22 74:9 81:12</p> <p><b>bit</b> [5] 10:4 18:1 45:21 68:5,6</p> <p><b>bite</b> [1] 23:3</p> <p><b>blue</b> [1] 21:22</p> <p><b>BOARD</b> [5] 1:6 3:5 31:24 46:25 54:9</p> <p><b>bookends</b> [1] 17:18</p> <p><b>born</b> [1] 77:20</p> <p><b>Both</b> [3] 48:2 62:21 78:8</p> <p><b>breach</b> [2] 14:23,24</p> <p><b>breaches</b> [1] 14:3</p> <p><b>brief</b> [12] 10:23 21:2,22 28:19 34:6 51:18 57:2,10 73:14,18,18,20</p> <p><b>bring</b> [22] 15:7,9,23 16:19 19:7 22:20 34:3 35:19 36:10,14 37:6,21 40:14 58:2 60:19 61:21 63:4 65:12,24 66:11,20 68:14</p> <p><b>bringing</b> [7] 18:7 20:1 22:17 23:13 50:15 63:7 78:17</p> <p><b>brings</b> [1] 19:16</p> <p><b>broad</b> [6] 18:23 51:7 52:1 54:22 57:3 58:20</p> <p><b>broadly</b> [1] 76:12</p> <p><b>brought</b> [9] 11:12 13:6 18:13 44:11 53:9 55:23 58:6,7 78:21</p> <p><b>BRYAN</b> [5] 1:19 2:3,9 3:8 79:2</p> <p><b>bunch</b> [1] 44:21</p> <p><b>burdened</b> [1] 8:24</p> <p><b>burdens</b> [1] 57:14</p> <p><b>business</b> [20] 3:12 5:20 7:1,3 8:8,9,17,24 9:2,4,7 38:22 41:19 64:13 67:15,20,23,23 70:12,25</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>calculus</b> [1] 63:10</p> <p><b>call</b> [2] 19:24 21:19</p> <p><b>called</b> [2] 8:20 61:25</p> <p><b>came</b> [5] 1:14 10:3,3 57:2 64:6</p> <p><b>Candidly</b> [1] 51:18</p> <p><b>cannot</b> [1] 45:23</p> <p><b>capricious</b> [2] 16:14 34:17</p> <p><b>card</b> [4] 3:14,21 9:10,12</p> <p><b>cards</b> [4] 40:18 67:25 68:13,18</p> <p><b>careful</b> [1] 74:18</p> <p><b>carefully</b> [1] 50:7</p>	<p><b>carrying</b> [1] 73:1</p> <p><b>carved</b> [1] 22:10</p> <p><b>carveout</b> [4] 4:9 28:11,13,15</p> <p><b>carveouts</b> [1] 28:10</p> <p><b>Case</b> [27] 3:4 6:14,16 7:18 10:3,12 11:17 28:1,25 31:23 34:14 44:1 55:21 57:3,22 58:5 60:15 62:8,18 63:1,20 67:8 68:12 70:16 80:4 81:24 82:1</p> <p><b>cases</b> [10] 5:7,18,21 6:6 8:3 33:4,4 51:23 52:1 76:17</p> <p><b>catch-all</b> [3] 40:2 53:21,25</p> <p><b>category</b> [1] 52:1</p> <p><b>cause</b> [20] 5:13 9:19 11:11 12:25 13:25 14:18,21,25 15:6,10 16:8,11,12,16 17:24 26:12 29:11,21 38:19 51:7</p> <p><b>causes</b> [1] 14:1</p> <p><b>caution</b> [1] 53:23</p> <p><b>caveat</b> [1] 45:6</p> <p><b>cert</b> [3] 22:3 32:1 57:19</p> <p><b>certain</b> [2] 42:25 76:2</p> <p><b>certainly</b> [7] 6:1 16:21 17:11 24:18 47:5 48:14 54:9</p> <p><b>challenge</b> [46] 3:16 4:18 8:20,21 9:19 10:11,13 18:11,23 19:2,17 21:21 23:21 28:3 31:21 32:14 35:11,15 36:10 37:17,21 38:21 42:20 46:14 50:2,11,15,19 52:25 53:15 55:7 56:3,6 58:3,6 60:19 63:7 65:21,24 66:9,12,21 67:22 68:14 71:1 74:10</p> <p><b>challenged</b> [7] 7:2 38:12 42:18 50:10 52:6 66:12 78:22</p> <p><b>challengers</b> [1] 57:13</p> <p><b>challenges</b> [46] 4:19,22 18:8,20 19:4,6,12 21:13 22:17,20 23:13 24:11,13 25:2 28:2 34:2,3,7,15,17 36:21 37:13 40:24 41:7 42:12,24 43:6 49:24 50:4,6 51:24 53:9 55:19 61:9,10 67:1 71:15 72:5 73:13,21 74:3,14 78:7,18 79:5,7</p> <p><b>challenging</b> [3] 39:21 50:13 52:13</p> <p><b>Chamber</b> [1] 28:19</p> <p><b>chameleon</b> [1] 25:1</p> <p><b>chance</b> [1] 45:18</p> <p><b>change</b> [2] 19:15 81:20</p> <p><b>changed</b> [1] 23:6</p> <p><b>changes</b> [1] 74:25</p> <p><b>changing</b> [1] 74:22</p> <p><b>Chevron</b> [3] 37:1 74:14,15</p> <p><b>CHIEF</b> [38] 3:3,10 17:25 19:9,23 21:14 30:24 32:5 33:23 35:1 38:2,7 41:11 42:7,14,22 43:7,9,22 44:8,14,20,</p>	<p>24,25 45:4,13,20 47:4 69:21 72:7,13 74:5 75:4 77:3,6,9 78:24 81:23</p> <p><b>Chief's</b> [1] 70:8</p> <p><b>choice</b> [3] 4:23 17:22 80:16</p> <p><b>choices</b> [1] 80:23</p> <p><b>chosen</b> [2] 55:14,17</p> <p><b>Circuit</b> [11] 6:14,15 7:21 23:12,14,21 36:19,22 60:24 61:1,2</p> <p><b>circuits</b> [2] 10:2,5</p> <p><b>circumstance</b> [3] 57:6 75:22,25</p> <p><b>circumstances</b> [3] 12:20 73:6 76:13</p> <p><b>Cisneros</b> [2] 26:1 27:5</p> <p><b>cited</b> [1] 22:22</p> <p><b>cites</b> [1] 22:11</p> <p><b>civil</b> [2] 27:12 58:21</p> <p><b>claim</b> [36] 3:25 7:4 15:2,7,9,13,17,23,24 16:3,14,19,22 23:25 29:10,15 35:5,20 38:11 39:8,23 40:8,10,19 45:24 48:11 51:25 55:23 56:13,16 61:7 63:19 64:24 65:1,6 70:4</p> <p><b>claims</b> [21] 4:13 17:23 20:10 22:16 24:17 30:13 39:15 40:3 44:5 51:8,12 54:1,5,23,25 59:11,14,16,23 60:20 72:10</p> <p><b>clarification</b> [1] 49:4</p> <p><b>class</b> [1] 57:13</p> <p><b>clear</b> [10] 12:16 19:2 20:9 26:4 30:12 32:10 35:4,8 40:17 65:4</p> <p><b>client</b> [2] 33:2 37:19</p> <p><b>climb</b> [1] 20:5</p> <p><b>clock</b> [6] 3:16,20 4:1 15:1 64:19 65:5</p> <p><b>Coat</b> [9] 12:21 13:18,18 28:17 39:1 48:12 59:2 62:20,23</p> <p><b>collateral</b> [3] 20:12,15 24:3</p> <p><b>come</b> [4] 68:12,17 70:5,24</p> <p><b>comes</b> [3] 12:14 38:13 77:19</p> <p><b>coming</b> [1] 52:11</p> <p><b>commanded</b> [2] 20:7,7</p> <p><b>commenced</b> [1] 27:13</p> <p><b>committed</b> [1] 5:13</p> <p><b>common</b> [4] 12:13 19:24 47:24 77:10</p> <p><b>companies</b> [2] 36:7 77:25</p> <p><b>company</b> [14] 22:25 23:1 29:8 36:9,12,13 39:1 48:7,12 49:4 59:3 62:20,23 77:20</p> <p><b>compared</b> [2] 58:2 67:18</p> <p><b>compel</b> [1] 8:14</p> <p><b>complaint</b> [5] 29:5 55:24 73:20,22 79:8</p>	<p><b>complete</b> [3] 5:14 38:19 62:9</p> <p><b>completely</b> [3] 56:2,24 61:18</p> <p><b>concede</b> [1] 48:17</p> <p><b>concern</b> [1] 80:6</p> <p><b>concerns</b> [1] 4:25</p> <p><b>concession</b> [2] 73:15,19</p> <p><b>concrete</b> [3] 67:24 68:13,17</p> <p><b>conditions</b> [1] 8:23</p> <p><b>conduct</b> [1] 5:8</p> <p><b>conducting</b> [1] 39:11</p> <p><b>Congress</b> [35] 4:11 5:1,3 10:25 12:19 13:19 17:11,12,14 19:6 26:2,4 39:13 42:9,15,20,23 43:17 45:17 47:5,23 49:1 53:12,21 54:4,7,8 55:13,17 61:25 71:15 73:2 80:13,19,22</p> <p><b>Congress's</b> [6] 4:23 39:19,20 54:2,3 81:19</p> <p><b>consensus</b> [2] 10:2,5</p> <p><b>consequence</b> [1] 49:23</p> <p><b>consequences</b> [1] 35:8</p> <p><b>consider</b> [1] 39:8</p> <p><b>considerations</b> [2] 76:16 78:8</p> <p><b>considered</b> [1] 74:12</p> <p><b>consistent</b> [1] 76:15</p> <p><b>consistently</b> [2] 38:10 78:19</p> <p><b>constantly</b> [1] 21:15</p> <p><b>constitutional</b> [1] 72:9</p> <p><b>contesting</b> [1] 21:23</p> <p><b>contests</b> [1] 24:11</p> <p><b>context</b> [50] 4:21 6:16 7:10,13 9:23 10:4 11:13 12:6 13:9 18:2,22 27:23 33:13 34:11 35:15 39:10 40:23 41:5,5,6 43:5 44:18 46:4,10 48:2 50:12 51:24 52:18,20 53:7,17 54:24 55:23 56:6 59:13,19 60:11,12 62:1 66:2,5,7,13 67:2 68:8 71:10,23 72:11 78:6 80:8</p> <p><b>contexts</b> [11] 27:18 30:17 34:24 41:4 44:19 47:7 58:24 60:9 70:25 78:13 79:9</p> <p><b>continue</b> [1] 53:2</p> <p><b>contours</b> [1] 52:2</p> <p><b>contract</b> [2] 14:3 41:4</p> <p><b>contradicts</b> [1] 4:7</p> <p><b>contrast</b> [1] 4:6</p> <p><b>convert</b> [1] 4:9</p> <p><b>convincing</b> [1] 73:16</p> <p><b>CORNER</b> [20] 1:3 3:5,12,16,18,19 4:16 9:7,8 22:4 31:4 38:16 39:2 40:15 43:10 44:1,2,4,7 67:4</p> <p><b>corporation</b> [1] 69:23</p> <p><b>correct</b> [7] 20:12 24:1,7 26:21 32:16 34:22 58:4</p> <p><b>correctly</b> [2] 36:8 65:20</p>	<p><b>cost</b> [1] 55:25</p> <p><b>costs</b> [1] 39:18</p> <p><b>couldn't</b> [1] 13:8</p> <p><b>Counsel</b> [10] 8:5 23:16,18 30:25 38:3 41:11 46:12 73:12 78:25 81:24</p> <p><b>countermanded</b> [2] 12:18,19</p> <p><b>country</b> [3] 22:16 61:11 70:17</p> <p><b>couple</b> [3] 31:9 72:16 77:19</p> <p><b>course</b> [9] 7:4,6 10:8 12:18 19:21 20:2 54:16 74:19 78:1</p> <p><b>COURT</b> [77] 1:1,15 3:11,25 4:2,5,25 5:2 9:5,15 11:15,19,23 12:10,22 13:12 14:7 15:3,16 16:1,5,5,21,23 19:21 20:17 22:22 24:19,23 25:25 27:4,20,21 28:13,16,18,24 32:1 34:12 37:23 38:8,15 39:2,6,7 40:4,9 41:23,24 48:8,13 51:24 52:9 54:14 55:18 59:1,12,16,21 61:7 62:18 70:17,19 72:9 74:11,22 76:10,14 77:11,14 78:12,19 79:10,19 81:10,14,18</p> <p><b>Court's</b> [11] 5:2,5 22:13 24:20 40:6 51:23 81:1,4,5,9,21</p> <p><b>courts</b> [14] 7:25 13:13 19:22 32:17 38:9 39:12,16 40:1 50:5 57:14 61:1 74:10,23 75:18</p> <p><b>coverage</b> [1] 50:23</p> <p><b>covered</b> [1] 30:15</p> <p><b>covers</b> [1] 54:22</p> <p><b>craft</b> [1] 4:12</p> <p><b>create</b> [4] 10:14 18:16 23:1,7</p> <p><b>created</b> [4] 13:14 29:9 36:9,13</p> <p><b>creating</b> [2] 21:20 23:8</p> <p><b>creation</b> [1] 29:9</p> <p><b>criminal</b> [1] 49:25</p> <p><b>Crown</b> [12] 12:21 13:17,18 28:17 39:1 48:12 59:2,2 62:4,7,20,23</p> <p><b>cut</b> [2] 6:3 78:16</p> <p><b>cuts</b> [1] 14:11</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D.C</b> [2] 1:11,22</p> <p><b>dam</b> [3] 52:20,24 53:2</p> <p><b>Darby</b> [2] 26:1 27:5</p> <p><b>darter</b> [1] 52:23</p> <p><b>data</b> [2] 55:25 56:1</p> <p><b>date</b> [4] 39:23 57:8 64:11 65:4</p> <p><b>dates</b> [1] 5:9</p> <p><b>day</b> [16] 17:7,8 35:22 37:23 41:22,24 64:8,12,15 67:15,</p>
---	--	---	--	--

## Official - Subject to Final Review

<p>19 69:6,18 77:10 78:12,15  <b>deal</b> [2] 50:25 57:22  <b>dealing</b> [1] 49:13  <b>dealt</b> [6] 16:5 26:1 27:5 54:4 61:9 79:19  <b>debate</b> [1] 68:25  <b>debit</b> [8] 3:14,21 9:10,12 40:18 67:24 68:13,18  <b>decade</b> [1] 55:23  <b>decades</b> [13] 11:15,15,15,19,20,20 38:9,23 50:19 54:16 55:20 78:18,21  <b>decide</b> [2] 31:10 56:9  <b>decided</b> [1] 24:5  <b>decision</b> [10] 10:14 12:1 16:2 20:4 22:13 35:9 40:5 51:3 74:20 81:6  <b>decisions</b> [5] 11:23 19:14 25:6 30:14 74:22  <b>decisis</b> [3] 19:10,20 23:23  <b>default</b> [1] 12:17  <b>defects</b> [4] 19:5 37:12,14 52:6  <b>defend</b> [1] 60:3  <b>defendant</b> [2] 15:2,25  <b>defense</b> [2] 27:10,16  <b>defenses</b> [1] 21:18  <b>deferential</b> [2] 31:17 55:18  <b>define</b> [1] 12:24  <b>definition</b> [2] 39:3 59:5  <b>definitively</b> [1] 12:10  <b>delayed</b> [2] 62:15 63:2  <b>denial</b> [2] 31:16 55:5  <b>denied</b> [2] 27:19 66:23  <b>Department</b> [2] 1:22 74:12  <b>depend</b> [2] 26:12 33:12  <b>depends</b> [1] 70:12  <b>desegregated</b> [1] 61:18  <b>destabilization</b> [1] 36:17  <b>destabilizing</b> [6] 36:1 38:25 60:1,6,14 73:10  <b>deviate</b> [1] 80:10  <b>devise</b> [1] 39:4  <b>differ</b> [2] 14:4 25:1  <b>difference</b> [5] 50:9 57:18 67:3,8 79:24  <b>different</b> [33] 5:8 10:4,19,25 11:4,13 12:6,20 13:9,10,14 14:2,3,4 15:10 18:1 27:17 40:10,13,22 57:9,15 58:11,23,24 59:13,14,22,23 65:6 66:2 80:23,23  <b>differently</b> [2] 11:14 47:19  <b>differs</b> [1] 14:1  <b>difficult</b> [1] 65:10  <b>direct</b> [2] 43:11 55:6  <b>direction</b> [2] 62:19 78:9  <b>directly</b> [5] 24:20 33:6,8 46:1 67:6  <b>disagree</b> [4] 12:9 13:17 16:20 48:1  <b>discovered</b> [1] 59:19  <b>discussed</b> [3] 24:24 72:2 79:6</p>	<p><b>dismissive</b> [1] 21:3  <b>dispute</b> [3] 42:23 48:16 70:3  <b>disputing</b> [1] 48:24  <b>distinction</b> [2] 27:24 50:3  <b>distinguished</b> [1] 24:23  <b>district</b> [2] 20:17 27:21  <b>DNA</b> [1] 17:4  <b>doctrines</b> [1] 36:25  <b>doing</b> [4] 8:15 39:16 41:15 43:24  <b>dollars</b> [1] 3:14  <b>done</b> [7] 4:13 16:16 48:15 75:12,22 80:17,19  <b>door</b> [1] 68:8  <b>doors</b> [3] 64:12 67:23 68:19  <b>doubt</b> [2] 44:9,10  <b>down</b> [3] 32:19 64:17 70:21  <b>dozens</b> [3] 43:1 44:19 46:10  <b>draw</b> [1] 52:2  <b>draws</b> [1] 25:16  <b>due</b> [1] 13:3  <b>duty</b> [1] 14:23</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>each</b> [3] 36:8,12,13  <b>earlier</b> [2] 49:20 75:8  <b>easily</b> [2] 54:7,8  <b>easy</b> [1] 68:15  <b>effect</b> [2] 57:4 74:21  <b>effectively</b> [1] 24:5  <b>effects</b> [7] 58:17 64:4 71:4,14,17,19 75:9  <b>either</b> [4] 45:14 50:8 62:19 81:2  <b>element</b> [6] 15:21,23,24 16:22,23 35:5  <b>elements</b> [6] 14:20 15:17,19 16:3,12,17  <b>embodies</b> [1] 14:8  <b>emphasize</b> [1] 74:7  <b>empirically</b> [1] 58:3  <b>employee</b> [1] 30:20  <b>employment</b> [1] 30:19  <b>enacted</b> [1] 16:13  <b>encounters</b> [1] 51:24  <b>encrusted</b> [1] 47:14  <b>end</b> [1] 10:16  <b>ends</b> [2] 13:4 17:8  <b>enforce</b> [1] 5:2  <b>enforcement</b> [20] 8:11 27:11,15,25 32:12 34:24 43:11,13 44:6 45:24 46:13 49:24 50:1 60:3,10,16 62:15 63:2,5 66:13  <b>engaged</b> [1] 39:17  <b>engages</b> [1] 53:6  <b>enough</b> [1] 37:18  <b>ensures</b> [1] 39:16  <b>enter</b> [1] 8:16  <b>entering</b> [1] 9:4</p>	<p><b>entire</b> [4] 9:3 10:16 36:11 53:4  <b>entirely</b> [1] 41:7  <b>entities</b> [2] 58:13 60:17  <b>entitled</b> [2] 41:22 77:22  <b>entitlement</b> [1] 62:4  <b>entity</b> [8] 22:25 23:1,7,9 38:20 41:14 45:7 60:18  <b>entrant</b> [1] 78:10  <b>entrants</b> [1] 78:15  <b>entrusted</b> [1] 73:3  <b>environment</b> [3] 23:5 64:7 77:21  <b>equitable</b> [2] 20:20 76:16  <b>erred</b> [1] 53:22  <b>ESQ</b> [3] 2:3,6,9  <b>ESQUIRE</b> [1] 1:19  <b>establish</b> [1] 14:20  <b>establishing</b> [2] 18:3 71:23  <b>estoppel</b> [3] 20:12,15 24:4  <b>even</b> [17] 20:9 21:24 22:12,15 26:9 31:12 32:3 35:18 38:23 54:17,23 58:15 61:21 63:5,24 69:7 79:17  <b>event</b> [1] 79:24  <b>everybody</b> [4] 30:22 41:22 65:4 77:10  <b>everyone</b> [2] 17:8 37:23  <b>everything</b> [1] 18:11  <b>evidence</b> [3] 39:12 42:9 61:4  <b>exact</b> [4] 28:24 81:7,12,15  <b>exactly</b> [1] 4:11 9:17 19:6 40:17 42:16 51:9,21 58:12 65:11 73:5 80:13  <b>example</b> [9] 5:11 7:18 12:21 27:19 37:1 58:6 59:20 60:11 62:16  <b>examples</b> [5] 5:7 10:22 21:1 28:20 48:25  <b>except</b> [1] 44:25  <b>exception</b> [2] 58:15 80:25  <b>excuse</b> [1] 44:3  <b>exist</b> [2] 15:3 77:25  <b>existed</b> [3] 26:6 37:2 64:25  <b>existence</b> [4] 12:14 35:10 44:15 64:8  <b>expand</b> [2] 57:12 60:20  <b>expectations</b> [2] 54:3 77:24  <b>expected</b> [1] 40:1  <b>expects</b> [1] 80:23  <b>experience</b> [3] 36:19 56:8 60:24  <b>experts</b> [1] 36:6  <b>explain</b> [1] 8:19  <b>explained</b> [1] 39:6  <b>explanation</b> [2] 34:4 73:24  <b>explicit</b> [1] 12:22  <b>explicitly</b> [1] 39:2  <b>explored</b> [1] 70:22  <b>extend</b> [1] 78:18  <b>extent</b> [2] 76:23 81:17</p>	<p><b>extraordinarily</b> [1] 36:1  <b>extrapolated</b> [1] 53:4  <b>extremely</b> [1] 53:14</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>face</b> [1] 27:22  <b>facial</b> [13] 8:20 19:17 23:20 24:17 25:2 42:24 50:4 60:19 61:10 65:20,24 66:12,20  <b>fact</b> [5] 5:16 6:25 20:2 54:22 67:5  <b>facts</b> [4] 14:19,24 15:3 62:8  <b>fail</b> [3] 56:13,16,18  <b>failed</b> [1] 73:23  <b>fair</b> [1] 26:22  <b>fairly</b> [1] 10:3  <b>faithfully</b> [1] 39:19  <b>family</b> [1] 7:21  <b>far</b> [6] 7:13 14:6 56:5 60:16 70:21 80:6  <b>far-reaching</b> [1] 58:17  <b>Farm</b> [1] 79:7  <b>February</b> [1] 1:12  <b>FEDERAL</b> [4] 1:7 3:6 27:20 53:4  <b>fee</b> [1] 3:21  <b>fees</b> [3] 3:14,16 9:10  <b>felt</b> [2] 5:14 64:4  <b>few</b> [1] 79:4  <b>fewer</b> [2] 46:5 60:16  <b>fidelity</b> [1] 54:2  <b>figure</b> [3] 64:18 65:11 68:4  <b>filed</b> [2] 31:23 61:5  <b>final</b> [20] 5:19 7:2 8:18 10:7,10,14 15:11 16:13,21 50:12,12,16 52:10 53:5 66:9 67:9,12 70:6 72:1,11  <b>finality</b> [3] 63:11 77:15,16  <b>Finally</b> [1] 80:24  <b>finance</b> [1] 36:4  <b>find</b> [3] 12:7 13:8 22:24  <b>finish</b> [1] 72:6  <b>first</b> [42] 3:4,20,21,23,25 4:4 9:8,12,17 11:22 12:11,13,25 14:14 15:5 17:7,8 21:17 22:5,21 23:3 25:25 28:14,20 29:3,6,10,24 30:2,2,8,20 31:10 35:13 37:20 52:22 60:8 63:8 64:3 79:11,15 81:13  <b>fit</b> [1] 55:22  <b>five</b> [1] 81:19  <b>flatly</b> [1] 81:3  <b>flipping</b> [1] 49:19  <b>flood</b> [1] 35:18  <b>floor</b> [2] 47:12 48:24  <b>focus</b> [2] 57:18 67:10  <b>focused</b> [3] 39:14,21 71:6  <b>FOIA</b> [1] 30:13  <b>follow</b> [3] 36:7 40:1 70:7  <b>follow-up</b> [2] 72:17 75:7  <b>following</b> [1] 39:19</p>	<p><b>follows</b> [1] 55:20  <b>foothold</b> [1] 4:14  <b>footnote</b> [2] 51:17,19  <b>force</b> [1] 19:14  <b>Forget</b> [1] 66:4  <b>formed</b> [3] 38:20 40:17 68:17  <b>forward</b> [5] 10:13 24:12 56:3,9 68:12  <b>Franconia</b> [2] 28:25 81:10  <b>friend</b> [12] 41:1,21 42:10,25 43:21 49:11,20 58:9,11 60:22 61:3 79:6  <b>friend's</b> [3] 46:25 54:18 61:12  <b>Front</b> [5] 39:1 48:12 59:2 62:20,23  <b>FTC</b> [1] 17:16  <b>full</b> [2] 11:11 55:24  <b>functions</b> [2] 27:15 73:2  <b>fundamental</b> [4] 18:7 19:12 41:13 42:6  <b>future</b> [3] 24:17 75:9 80:2</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>Gabelli</b> [3] 12:12 28:15 81:6  <b>gallon</b> [1] 3:18  <b>gas</b> [1] 3:18  <b>gates</b> [1] 35:18  <b>gave</b> [1] 41:24  <b>General</b> [9] 1:22 11:9 12:17 13:2 28:11 39:7 51:6 59:4 77:12  <b>General's</b> [1] 75:12  <b>gets</b> [4] 31:10,17 37:23 77:10  <b>getting</b> [4] 25:20 53:12,13 78:11  <b>give</b> [8] 25:23 39:12 51:14 54:12 59:5 61:4 74:3 76:13  <b>glad</b> [1] 74:2  <b>GORSUCH</b> [30] 20:22,24 23:16,18 24:2,8,22 25:9,13,22 26:16,22 27:2,6,24 28:7 32:8 46:12,20,22 47:2,25 48:4,14,22 49:6,9,18 50:21 75:5  <b>Gorsuch's</b> [1] 32:11  <b>got</b> [6] 18:5 49:18,19 51:18 57:9 64:18  <b>govern</b> [2] 36:3 77:24  <b>governing</b> [2] 14:15 59:10  <b>government</b> [41] 3:15,19 4:6,15,21,24 10:23 13:24 20:16 21:5,18,23 22:11 24:2 25:16 28:1,9,22 30:14 31:3,10,13 32:13 35:19 41:15,24 43:24 45:15,22,25 46:3,7 51:8 53:5,6 54:13 62:15 73:1 80:24 81:11,14  <b>government's</b> [10] 8:14 14:12 21:2 22:3,7 26:10</p>
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## Official - Subject to Final Review

<p>30:16,20 34:5 58:14  <b>government-only</b> <sup>[1]</sup> 4:9  <b>GOVERNORS</b> <sup>[2]</sup> 1:6 3:5  <b>granted</b> <sup>[1]</sup> 32:1  <b>ground</b> <sup>[2]</sup> 18:3,18  <b>guaranteed</b> <sup>[1]</sup> 31:14  <b>guardrails</b> <sup>[1]</sup> 21:12  <b>guess</b> <sup>[6]</sup> 11:17 15:5 35:9  42:3 63:16 64:8</p> <hr/> <p><b>H</b></p> <p><b>hand</b> <sup>[2]</sup> 78:4,14  <b>handle</b> <sup>[1]</sup> 56:5  <b>happen</b> <sup>[7]</sup> 4:20 10:9 18:23  21:8 23:15 63:25 73:14  <b>happened</b> <sup>[6]</sup> 6:17 26:2 31:23  55:19 64:25 69:8  <b>happening</b> <sup>[1]</sup> 18:21  <b>happens</b> <sup>[1]</sup> 69:9  <b>happy</b> <sup>[1]</sup> 42:21  <b>hard</b> <sup>[3]</sup> 21:25 22:24 53:7  <b>harm</b> <sup>[2]</sup> 5:14 30:3  <b>harmed</b> <sup>[12]</sup> 4:4 9:18 16:25  17:1 22:4,20 30:9,21 35:21  41:14 79:14,15  <b>hazardous</b> <sup>[1]</sup> 59:4  <b>hazards</b> <sup>[3]</sup> 12:23 13:1 39:4  <b>healthcare</b> <sup>[1]</sup> 36:4  <b>hear</b> <sup>[1]</sup> 3:3  <b>heart</b> <sup>[1]</sup> 23:10  <b>held</b> <sup>[1]</sup> 52:8  <b>help</b> <sup>[2]</sup> 43:10 70:14  <b>helpful</b> <sup>[1]</sup> 46:16  <b>helps</b> <sup>[1]</sup> 62:7  <b>herein</b> <sup>[1]</sup> 25:17  <b>Herr</b> <sup>[8]</sup> 6:14 7:20,21 10:3  11:17 61:2,7,9  <b>hesitant</b> <sup>[1]</sup> 75:24  <b>higher</b> <sup>[1]</sup> 46:18  <b>highlight</b> <sup>[1]</sup> 52:17  <b>history</b> <sup>[1]</sup> 9:16  <b>Hobbs</b> <sup>[13]</sup> 4:11 17:15,17  29:16,16 43:1 44:18 45:9  47:20 62:1,13 71:11,21  <b>hold</b> <sup>[1]</sup> 25:4  <b>holding</b> <sup>[3]</sup> 13:18 62:24 81:10  <b>home</b> <sup>[1]</sup> 42:21  <b>Honor</b> <sup>[1]</sup> 20:13  <b>horrible</b> <sup>[1]</sup> 34:6  <b>horribles</b> <sup>[3]</sup> 21:4 34:5 35:18  <b>hospitable</b> <sup>[1]</sup> 23:5  <b>however</b> <sup>[1]</sup> 70:20  <b>hundred</b> <sup>[1]</sup> 3:13  <b>hurt</b> <sup>[2]</sup> 67:6,6  <b>hypothetical</b> <sup>[2]</sup> 71:5 74:8</p> <hr/> <p><b>I</b></p> <p><b>idea</b> <sup>[3]</sup> 45:21 63:3 80:18  <b>identical</b> <sup>[1]</sup> 61:8  <b>identified</b> <sup>[3]</sup> 15:17 42:11  51:17</p>	<p><b>identifies</b> <sup>[1]</sup> 16:7  <b>II</b> <sup>[3]</sup> 58:7 61:6 73:24  <b>III</b> <sup>[2]</sup> 61:20 69:4  <b>illegal</b> <sup>[2]</sup> 44:21,23  <b>illustration</b> <sup>[1]</sup> 55:22  <b>imagine</b> <sup>[2]</sup> 30:18 33:1  <b>imminence</b> <sup>[1]</sup> 79:17  <b>imminent</b> <sup>[2]</sup> 79:20,25  <b>immunity</b> <sup>[2]</sup> 26:3,7  <b>implications</b> <sup>[2]</sup> 52:14,17  <b>importance</b> <sup>[1]</sup> 77:14  <b>importantly</b> <sup>[1]</sup> 3:23  <b>impossible</b> <sup>[2]</sup> 68:4,21  <b>impression</b> <sup>[1]</sup> 57:3  <b>in-the-weeds</b> <sup>[1]</sup> 68:25  <b>INC</b> <sup>[1]</sup> 1:3  <b>incentive</b> <sup>[1]</sup> 19:2  <b>include</b> <sup>[1]</sup> 73:23  <b>includes</b> <sup>[1]</sup> 73:21  <b>including</b> <sup>[3]</sup> 13:10 30:23  81:5  <b>incorporate</b> <sup>[1]</sup> 70:12  <b>incorporated</b> <sup>[6]</sup> 40:16 61:5  64:9,11 69:23 70:10  <b>incorporating</b> <sup>[1]</sup> 70:9  <b>increase</b> <sup>[1]</sup> 57:14  <b>indicates</b> <sup>[1]</sup> 51:25  <b>indirectly</b> <sup>[1]</sup> 67:5  <b>individual</b> <sup>[2]</sup> 41:13 45:16  <b>industries</b> <sup>[1]</sup> 36:4  <b>industry</b> <sup>[7]</sup> 10:16 36:4,5,9,  12,17 70:13  <b>inflicted</b> <sup>[2]</sup> 45:15,22  <b>information</b> <sup>[3]</sup> 56:20,21,  23  <b>inherent</b> <sup>[1]</sup> 12:23  <b>injured</b> <sup>[14]</sup> 8:8 9:9 15:18,  18 37:20 42:1,2,2 43:11  57:7,8 61:22 63:23 64:3  <b>injury</b> <sup>[31]</sup> 5:8,23 6:11 7:5  8:13,16 9:13 14:23 21:21  34:11 35:4,4 45:15,22 47:16  48:18 59:17,18 61:19  62:8,14,16,21 63:9,17,24  65:7 69:18 75:15 79:19,25  <b>instances</b> <sup>[1]</sup> 33:17  <b>Instead</b> <sup>[5]</sup> 39:6,19 55:19  59:6 72:25  <b>intend</b> <sup>[1]</sup> 76:20  <b>intended</b> <sup>[1]</sup> 10:25  <b>intent</b> <sup>[2]</sup> 40:18 54:2  <b>intentional</b> <sup>[2]</sup> 17:22 80:16  <b>interaction</b> <sup>[1]</sup> 74:13  <b>interest</b> <sup>[4]</sup> 45:7 78:4,5,11  <b>interested</b> <sup>[2]</sup> 6:25 7:8  <b>interests</b> <sup>[8]</sup> 4:17 13:10,11  32:20 38:14,22 44:2 54:20  <b>interpret</b> <sup>[5]</sup> 30:1 47:19 49:21  59:6 71:9  <b>interpretation</b> <sup>[2]</sup> 19:21  48:8  <b>interpreted</b> <sup>[7]</sup> 12:11 13:2  28:14 32:17 62:14,18 81:6  <b>interpreting</b> <sup>[2]</sup> 29:23 59:3</p>	<p><b>interpretive</b> <sup>[1]</sup> 80:22  <b>interprets</b> <sup>[1]</sup> 26:19  <b>intervening</b> <sup>[1]</sup> 56:19  <b>intuition</b> <sup>[3]</sup> 42:8 77:10,13  <b>invalid</b> <sup>[3]</sup> 52:8 60:4 63:21  <b>invalidation</b> <sup>[1]</sup> 36:11  <b>invariably</b> <sup>[1]</sup> 38:17  <b>irrational</b> <sup>[1]</sup> 49:1  <b>irrelevant</b> <sup>[2]</sup> 56:2,24  <b>isn't</b> <sup>[4]</sup> 30:5 31:6 63:9 65:15  <b>issue</b> <sup>[11]</sup> 18:25 26:1 32:20  33:9 39:8,24 51:13 53:13  54:14 56:14 59:8  <b>issued</b> <sup>[5]</sup> 22:6 31:25 35:22  52:20 53:1  <b>itself</b> <sup>[7]</sup> 11:6 16:7 31:24  37:24 39:13 43:18 60:4</p> <hr/> <p><b>J</b></p> <p><b>JACKSON</b> <sup>[23]</sup> 14:13 15:20  16:4,10 29:2,17 30:5  35:2,3,7,25 36:24 37:15  38:1 61:14,16 63:15 64:6,  16,23 77:7,8 78:23  <b>Jackson's</b> <sup>[1]</sup> 67:14  <b>job</b> <sup>[1]</sup> 81:19  <b>joined</b> <sup>[1]</sup> 45:19  <b>judges</b> <sup>[1]</sup> 23:6  <b>judgments</b> <sup>[1]</sup> 5:3  <b>judicata</b> <sup>[4]</sup> 20:12,15,18 24:4  <b>judicial</b> <sup>[10]</sup> 14:9 25:18 26:6  31:8,14 37:24 46:6 47:12  55:5 78:4  <b>Justice</b> <sup>[205]</sup> 1:22 3:3,10 5:6,  17,23 6:5,10,18,21,24 7:11,  15,17,22 8:1,5 9:21,22  11:2,22 12:2,16 14:13,16  15:20 16:4,10 17:25 19:9,  23 20:11,14,21,22,23,24,  25 21:11,25 22:23 23:16,  18 24:2,8,22 25:9,11,13,22  26:16,22 27:2,6,7,24 28:7  29:2,17 30:5,24 31:1,2,3  32:4,5,5,7,8,9,10,11,18,23  33:5,8,14,19,22,23,25  34:13,16,20,25 35:1,1,3,7,  25 36:2,24 37:15,16 38:1,2,  7 40:7,21 41:11 42:7,14,22  43:7,9,22 44:8,14,20,24 45:1,  4,13,20 46:12,20,22 47:2,  25 48:4,14,22 49:6,9,18 50:21,  22 51:11 52:3,14 53:11,  19 54:6 55:2,10,15 56:10,  11,12 57:1,21 58:18,19 59:24  61:14,15,16,17 62:2,25  63:9,15 64:6,16,23 65:13,  15,17 66:4,14 67:3,13,13,  16,18 68:1,5,22,24 69:13,  20,21 70:7,23 71:3,4 72:7,  13,14,15,16 73:11,12 74:5,  5,6,11 75:4,4,6,7,21 76:4,  18,25 77:3,3,5,6,6,8 78:23,</p>	<p>24 81:23  <b>Justice's</b> <sup>[1]</sup> 47:4</p> <hr/> <p><b>K</b></p> <p><b>KAGAN</b> <sup>[16]</sup> 9:21 11:2,22  12:2,16 14:16 22:23 25:11  27:7 32:7 50:22 51:11 58:18  59:24 74:5,6  <b>Kagan's</b> <sup>[1]</sup> 52:14  <b>Kavanaugh</b> <sup>[33]</sup> 32:9,10,  18,23 33:5,8,14,19,22 52:3  53:11,19 54:6 55:2,10,15  65:15 67:13,16,18 68:1,5,  22,24 69:13,20 70:23 75:6,  7,21 76:4,18,25  <b>Kentucky</b> <sup>[1]</sup> 61:6  <b>kind</b> <sup>[10]</sup> 10:12 13:15 34:2  45:8 47:11 51:12 52:4,13  56:6 65:6  <b>kinds</b> <sup>[4]</sup> 21:13 50:25 51:11  59:23  <b>knowing</b> <sup>[2]</sup> 8:8,17  <b>knows</b> <sup>[4]</sup> 4:11 17:11 78:11  80:13  <b>Kubrick</b> <sup>[1]</sup> 59:15</p> <hr/> <p><b>L</b></p> <p><b>Labs</b> <sup>[1]</sup> 14:7  <b>land</b> <sup>[3]</sup> 72:23 73:3,3  <b>language</b> <sup>[10]</sup> 11:4,6 13:8,  23 14:5 17:6,6 62:6 81:7,  12  <b>large</b> <sup>[2]</sup> 51:4,6  <b>last</b> <sup>[6]</sup> 22:21 25:15 36:23  67:10 72:3 75:2  <b>lasted</b> <sup>[1]</sup> 13:15  <b>late</b> <sup>[1]</sup> 66:20  <b>late-arising</b> <sup>[1]</sup> 31:4  <b>later</b> <sup>[10]</sup> 5:14,24 17:21 18:13,  14 23:4 52:7,11 53:10  57:8  <b>Laughter</b> <sup>[4]</sup> 45:2 57:24 76:22  77:2  <b>law</b> <sup>[16]</sup> 15:8,25 16:15 19:24  21:12 36:7 40:24 41:7  47:24 54:23 56:17 69:16  70:16 71:10 74:24 78:7  <b>lawsuit</b> <sup>[2]</sup> 20:1 36:14  <b>lead</b> <sup>[3]</sup> 39:20 59:22 60:23  <b>leading</b> <sup>[1]</sup> 29:1  <b>leads</b> <sup>[1]</sup> 4:24  <b>leases</b> <sup>[1]</sup> 73:3  <b>least</b> <sup>[3]</sup> 4:8 54:13 73:7  <b>left</b> <sup>[2]</sup> 22:15 51:1  <b>legal</b> <sup>[3]</sup> 10:15 32:14 42:19  <b>lengthy</b> <sup>[2]</sup> 53:23 54:21  <b>less</b> <sup>[2]</sup> 50:15 78:12  <b>light</b> <sup>[2]</sup> 13:2 59:7  <b>limit</b> <sup>[2]</sup> 4:22 54:17  <b>limitation</b> <sup>[3]</sup> 13:5 26:5,19  <b>limitations</b> <sup>[31]</sup> 3:24 6:19  7:7 9:25 10:1,6 13:21 14:15  17:7,20 25:18 30:4,22  38:11 39:10,22 40:3,12,19</p>	<p>42:12 48:10 53:21,25 65:23  66:17 71:7 78:3,16,20  80:3 81:5  <b>list</b> <sup>[2]</sup> 21:1,4  <b>lists</b> <sup>[1]</sup> 21:6  <b>litigants</b> <sup>[1]</sup> 23:13  <b>litigate</b> <sup>[1]</sup> 19:18  <b>little</b> <sup>[7]</sup> 10:4 18:1 45:21 65:18  68:5,6 75:24  <b>logic</b> <sup>[1]</sup> 73:9  <b>long</b> <sup>[2]</sup> 6:11 53:14  <b>long-established</b> <sup>[1]</sup> 77:23  <b>look</b> <sup>[13]</sup> 11:22 12:4,20 14:10  16:6 29:15 49:16 54:3  55:24 61:12,13 73:21 79:22  <b>looked</b> <sup>[1]</sup> 11:24  <b>looking</b> <sup>[5]</sup> 12:8 32:19 48:22  50:7 51:22  <b>looks</b> <sup>[1]</sup> 23:4  <b>lose</b> <sup>[4]</sup> 23:24,25 24:13 25:3  <b>lot</b> <sup>[7]</sup> 12:8 30:7 47:14,15  51:19 58:1 81:1  <b>lots</b> <sup>[1]</sup> 37:2  <b>lower</b> <sup>[6]</sup> 7:24 11:23 19:22  24:19,22 32:17  <b>Lujan</b> <sup>[4]</sup> 16:2,23 79:20,23  <b>lurking</b> <sup>[1]</sup> 33:10</p> <hr/> <p><b>M</b></p> <p><b>made</b> <sup>[5]</sup> 5:4 12:16 45:8 60:22  73:19  <b>magnify</b> <sup>[1]</sup> 74:21  <b>main</b> <sup>[1]</sup> 3:22  <b>majority</b> <sup>[1]</sup> 22:16  <b>malpractice</b> <sup>[1]</sup> 59:20  <b>management</b> <sup>[1]</sup> 72:23  <b>mandated</b> <sup>[1]</sup> 11:7  <b>manufactured</b> <sup>[1]</sup> 21:20  <b>many</b> <sup>[12]</sup> 5:17 10:10,20,20  13:11,11 21:18 35:14 50:24  73:2 78:15 80:17  <b>market</b> <sup>[3]</sup> 18:9 78:10,15  <b>marking</b> <sup>[1]</sup> 12:1  <b>materially</b> <sup>[1]</sup> 61:8  <b>matter</b> <sup>[10]</sup> 1:14 10:17 23:22  24:5 47:17 51:3 52:4  61:19 80:3,5  <b>mattered</b> <sup>[1]</sup> 32:3  <b>matters</b> <sup>[1]</sup> 79:18  <b>mean</b> <sup>[47]</sup> 11:3 13:15 18:2  22:24 24:12 29:3 36:2 41:21  42:10,15 43:10,25 44:23  45:13 46:13,17 49:22  51:15,22 52:19 53:16 54:15,  17,24 56:16 58:19 61:24  62:20 63:3,19 64:2,5,18,  21 67:7 68:3,24 70:16,18,  24 71:2,2 72:22 73:17 74:19,  25 78:2  <b>Meaning</b> <sup>[4]</sup> 8:9 47:14 49:8  81:7</p>
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## Official - Subject to Final Review

<p><b>meaningfully</b> <sup>[1]</sup> 54:19</p> <p><b>meaningly</b> <sup>[1]</sup> 54:19</p> <p><b>means</b> <sup>[8]</sup> 4:1 11:5,10 12:4 24:25 25:4 58:23 81:8</p> <p><b>meant</b> <sup>[1]</sup> 12:7</p> <p><b>mechanism</b> <sup>[2]</sup> 56:23,25</p> <p><b>medical</b> <sup>[1]</sup> 59:19</p> <p><b>medium-sized</b> <sup>[1]</sup> 51:4</p> <p><b>men</b> <sup>[1]</sup> 66:15</p> <p><b>mention</b> <sup>[1]</sup> 46:13</p> <p><b>mentioned</b> <sup>[6]</sup> 24:10 55:4 60:11 72:18,21 77:9</p> <p><b>merchants</b> <sup>[1]</sup> 58:8</p> <p><b>merely</b> <sup>[1]</sup> 26:15</p> <p><b>merits</b> <sup>[4]</sup> 23:24 31:19 56:13 57:10</p> <p><b>message</b> <sup>[2]</sup> 57:10,16</p> <p><b>might</b> <sup>[8]</sup> 24:25 28:4 33:17 36:10 37:4 47:5 70:21 78:12</p> <p><b>military</b> <sup>[3]</sup> 66:16,19,23</p> <p><b>mind</b> <sup>[3]</sup> 8:7,16 49:2</p> <p><b>minimum</b> <sup>[1]</sup> 47:11</p> <p><b>missing</b> <sup>[2]</sup> 41:12 42:4</p> <p><b>misunderstanding</b> <sup>[1]</sup> 6:18</p> <p><b>Mm-hmm</b> <sup>[2]</sup> 16:4 62:25</p> <p><b>moment</b> <sup>[2]</sup> 48:18 49:22</p> <p><b>money</b> <sup>[1]</sup> 46:23</p> <p><b>morning</b> <sup>[1]</sup> 3:4</p> <p><b>most</b> <sup>[6]</sup> 3:23 33:3,4 35:21 37:9 59:16</p> <p><b>mount</b> <sup>[1]</sup> 52:25</p> <p><b>much</b> <sup>[5]</sup> 12:3 52:3 54:12 60:6 79:18</p> <p><b>must</b> <sup>[3]</sup> 17:22 41:12 42:3</p> <p style="text-align: center;"><b>N</b></p> <p><b>necessarily</b> <sup>[6]</sup> 9:16 17:3, 22 26:12 72:6,8</p> <p><b>necessary</b> <sup>[2]</sup> 14:20 39:11</p> <p><b>need</b> <sup>[2]</sup> 34:11,12</p> <p><b>Network</b> <sup>[1]</sup> 31:13</p> <p><b>never</b> <sup>[2]</sup> 52:23,24</p> <p><b>new</b> <sup>[20]</sup> 19:12,17 22:25,25 23:1,1,7,9 29:8 31:5 36:9, 12,13 60:18 72:19 76:18, 21 77:19 78:10,15</p> <p><b>newly</b> <sup>[2]</sup> 38:20 61:4</p> <p><b>Newport</b> <sup>[1]</sup> 16:24</p> <p><b>News</b> <sup>[1]</sup> 16:24</p> <p><b>nobody</b> <sup>[1]</sup> 24:11</p> <p><b>non-mutual</b> <sup>[1]</sup> 24:3</p> <p><b>None</b> <sup>[1]</sup> 11:25</p> <p><b>norm</b> <sup>[2]</sup> 47:24 48:21</p> <p><b>normal</b> <sup>[3]</sup> 40:21 48:16,19</p> <p><b>noted</b> <sup>[2]</sup> 16:23 50:24</p> <p><b>nothing</b> <sup>[6]</sup> 5:15 11:6,18 25:17 38:24 69:7</p> <p><b>novel</b> <sup>[1]</sup> 9:24</p> <p><b>nowhere</b> <sup>[1]</sup> 61:11</p> <p><b>NPRM</b> <sup>[1]</sup> 31:25</p> <p><b>number</b> <sup>[6]</sup> 8:11 21:17 54:24 58:16 60:20 73:11</p>	<p><b>numbers</b> <sup>[1]</sup> 58:11</p> <p style="text-align: center;"><b>O</b></p> <p><b>object</b> <sup>[1]</sup> 43:13</p> <p><b>objective</b> <sup>[1]</sup> 79:20</p> <p><b>objectors</b> <sup>[1]</sup> 31:4</p> <p><b>obtains</b> <sup>[1]</sup> 38:19</p> <p><b>obvious</b> <sup>[1]</sup> 54:7</p> <p><b>obviously</b> <sup>[2]</sup> 13:25 74:9</p> <p><b>occur</b> <sup>[2]</sup> 63:17 65:8</p> <p><b>occurred</b> <sup>[5]</sup> 14:21,25 38:23 50:17 78:22</p> <p><b>occurs</b> <sup>[2]</sup> 6:11 34:11</p> <p><b>odd</b> <sup>[1]</sup> 55:22</p> <p><b>often</b> <sup>[4]</sup> 8:20 18:6 51:23 69:2</p> <p><b>Okay</b> <sup>[13]</sup> 7:15 25:9 27:2 32:18 35:7 42:14 47:16 49:18 55:2 68:1 69:13,20 76:25</p> <p><b>old</b> <sup>[5]</sup> 22:18 23:14,17,17 36:21</p> <p><b>older</b> <sup>[1]</sup> 4:18</p> <p><b>once</b> <sup>[5]</sup> 4:1,3 16:15 65:23 66:7</p> <p><b>one</b> <sup>[23]</sup> 6:16 7:23 11:24 25:14,14 33:21,25 43:9 46:8 52:16 55:2,12,12 58:10 59:5 61:8,10 65:24 66:16 72:19 75:7 77:8 78:4</p> <p><b>one-size-fits-all</b> <sup>[1]</sup> 39:3</p> <p><b>ones</b> <sup>[3]</sup> 21:13 22:18 37:12</p> <p><b>ongoing</b> <sup>[1]</sup> 67:20</p> <p><b>only</b> <sup>[15]</sup> 4:1,3 7:14,22 19:4 22:18 37:12 58:15 62:11 66:15 75:18 76:1,13 80:7, 9</p> <p><b>open</b> <sup>[2]</sup> 67:15 70:19</p> <p><b>opened</b> <sup>[4]</sup> 3:12 64:12 67:22 68:18</p> <p><b>opening</b> <sup>[1]</sup> 35:17</p> <p><b>operate</b> <sup>[5]</sup> 6:20 7:3 18:5 27:9 52:20</p> <p><b>operated</b> <sup>[1]</sup> 11:14</p> <p><b>operating</b> <sup>[2]</sup> 53:2 71:1</p> <p><b>opinion</b> <sup>[1]</sup> 12:21</p> <p><b>opportunity</b> <sup>[2]</sup> 13:22 66:11</p> <p><b>opposed</b> <sup>[4]</sup> 8:21 18:17 61:10 62:12</p> <p><b>opposing</b> <sup>[1]</sup> 73:12</p> <p><b>opposition</b> <sup>[1]</sup> 57:2</p> <p><b>option</b> <sup>[1]</sup> 43:15</p> <p><b>oral</b> <sup>[5]</sup> 1:15 2:5 3:8 38:5</p> <p><b>ordinarily</b> <sup>[3]</sup> 14:17 68:11 75:20</p> <p><b>organization</b> <sup>[1]</sup> 41:19</p> <p><b>other</b> <sup>[56]</sup> 6:6,8,19 8:3 9:24 16:17,18,23 17:24 18:7 20:20 24:4 25:17 26:5,17,19 36:25 38:22 39:15 41:4,9, 10,17,21,25 42:11 43:2,5, 15 44:19 45:10 46:10 48:25 49:13,21 50:24 51:1,20 54:24 55:3 56:17 60:21,21</p>	<p><b>63:14 67:5 70:24 71:21 72:20,24 74:22,23 76:17 77:24 78:5,13,14</b></p> <p><b>others</b> <sup>[1]</sup> 47:21</p> <p><b>out</b> <sup>[15]</sup> 10:23 14:17 15:11 22:10,14 28:9 34:7 42:10 43:17 49:11 52:21 64:18 65:11 68:4 73:1</p> <p><b>outcome</b> <sup>[1]</sup> 3:22</p> <p><b>outcomes</b> <sup>[1]</sup> 4:24</p> <p><b>outline</b> <sup>[1]</sup> 21:21</p> <p><b>outlines</b> <sup>[2]</sup> 16:2 28:19</p> <p><b>outset</b> <sup>[1]</sup> 79:5</p> <p><b>outside</b> <sup>[3]</sup> 53:6 54:23 72:10</p> <p><b>over</b> <sup>[3]</sup> 19:18 51:1 72:4</p> <p><b>overrule</b> <sup>[1]</sup> 81:3</p> <p><b>overstate</b> <sup>[1]</sup> 53:8</p> <p><b>own</b> <sup>[5]</sup> 22:3 26:9,10 37:21 39:17</p> <p><b>owner</b> <sup>[1]</sup> 9:7</p> <p><b>owners</b> <sup>[1]</sup> 9:2</p> <p style="text-align: center;"><b>P</b></p> <p><b>PAGE</b> <sup>[6]</sup> 2:2 21:1,6 34:5 57:4 69:5</p> <p><b>page-long</b> <sup>[1]</sup> 51:18</p> <p><b>paid</b> <sup>[2]</sup> 3:13,21</p> <p><b>parade</b> <sup>[3]</sup> 21:4 34:5 35:18</p> <p><b>paragraphs</b> <sup>[1]</sup> 73:22</p> <p><b>parlance</b> <sup>[1]</sup> 12:13</p> <p><b>part</b> <sup>[6]</sup> 32:2 34:4 63:10 70:11 71:20,20</p> <p><b>particular</b> <sup>[8]</sup> 9:20 18:4 38:13 39:8 50:25 54:1 77:16, 20</p> <p><b>parties</b> <sup>[7]</sup> 13:11 22:4 33:7 35:19,21 43:5 81:16</p> <p><b>party</b> <sup>[12]</sup> 33:10 42:16 60:3 69:7,14,15,17 75:14,19 76:1,11,14</p> <p><b>pass</b> <sup>[6]</sup> 17:12,12 47:6 80:10,12,14</p> <p><b>passed</b> <sup>[9]</sup> 8:10 17:13,14, 17,18,21 19:8 47:10 65:24</p> <p><b>past</b> <sup>[2]</sup> 28:16 79:13</p> <p><b>path</b> <sup>[3]</sup> 12:1 31:8,14</p> <p><b>pattern</b> <sup>[2]</sup> 5:16 6:25</p> <p><b>pay</b> <sup>[2]</sup> 9:10,11</p> <p><b>payment</b> <sup>[1]</sup> 62:4</p> <p><b>PDR</b> <sup>[1]</sup> 31:13</p> <p><b>people</b> <sup>[7]</sup> 10:10 19:7 20:10 36:5 41:17,25 45:17</p> <p><b>perfectly</b> <sup>[1]</sup> 47:22</p> <p><b>period</b> <sup>[5]</sup> 3:24 39:23 66:9 70:11 78:16</p> <p><b>periods</b> <sup>[1]</sup> 42:12</p> <p><b>permit</b> <sup>[4]</sup> 27:19 52:20,25 60:11</p> <p><b>permitting</b> <sup>[1]</sup> 72:18</p> <p><b>person</b> <sup>[6]</sup> 15:12 16:7,9,19 41:18 57:6</p> <p><b>perspective</b> <sup>[1]</sup> 58:14</p> <p><b>petition</b> <sup>[7]</sup> 31:11,16,24 43:16 55:3,17 56:6</p> <p><b>Petitioner</b> <sup>[8]</sup> 1:4,20 2:4, 10 3:9 40:8 74:21 79:3</p> <p><b>Petitioner's</b> <sup>[2]</sup> 57:11 58:1</p> <p><b>petitioning</b> <sup>[1]</sup> 31:5</p> <p><b>petitions</b> <sup>[1]</sup> 47:1</p> <p><b>phony</b> <sup>[1]</sup> 71:1</p> <p><b>phrase</b> <sup>[3]</sup> 4:1 12:11 28:14</p> <p><b>pick</b> <sup>[1]</sup> 47:4</p> <p><b>picking</b> <sup>[1]</sup> 52:14</p> <p><b>pin</b> <sup>[1]</sup> 64:17</p> <p><b>pizzeria</b> <sup>[1]</sup> 61:5</p> <p><b>places</b> <sup>[1]</sup> 27:14</p> <p><b>plagues</b> <sup>[1]</sup> 8:6</p> <p><b>plaintiff</b> <sup>[19]</sup> 4:2,3 9:18 13:21 15:7,9,18 16:25 29:6 31:18 38:13,18 40:13 48:10 58:10 61:20,22 63:4,23</p> <p><b>plaintiff's</b> <sup>[2]</sup> 9:19 48:18</p> <p><b>plaintiff-specific</b> <sup>[3]</sup> 9:16 17:3 29:15</p> <p><b>plaintiffs</b> <sup>[5]</sup> 4:18 21:20 58:1,2,16</p> <p><b>plans</b> <sup>[4]</sup> 67:24 68:13,17 72:24</p> <p><b>plausible</b> <sup>[1]</sup> 73:7</p> <p><b>play</b> <sup>[1]</sup> 20:18</p> <p><b>playing</b> <sup>[1]</sup> 77:17</p> <p><b>please</b> <sup>[3]</sup> 3:11 20:24 38:8</p> <p><b>point</b> <sup>[39]</sup> 13:8 15:1,12 16:1 23:11,19 28:9 34:1 40:12, 13,16 41:1 42:25 49:3 51:16 52:15 54:8 56:16,19 57:19,25 58:9 59:9 60:21 62:4,5,7,21,21 64:22 65:5,11 66:10,24 68:2 69:4 70:16 78:8,17</p> <p><b>pointed</b> <sup>[4]</sup> 14:17 42:10 43:3 49:11</p> <p><b>pointing</b> <sup>[2]</sup> 48:13 67:12</p> <p><b>points</b> <sup>[2]</sup> 10:23 79:5</p> <p><b>policy</b> <sup>[4]</sup> 4:15 30:19,21 39:17</p> <p><b>position</b> <sup>[8]</sup> 22:3,7 55:13 58:2 66:7 75:11,12,18</p> <p><b>possibilities</b> <sup>[1]</sup> 21:9</p> <p><b>possibility</b> <sup>[1]</sup> 46:14</p> <p><b>possible</b> <sup>[5]</sup> 24:19 36:25 75:25 76:3,12</p> <p><b>POST</b> <sup>[16]</sup> 1:3 3:5,12,18 4:16 9:7,8 22:4 31:4 38:16 40:15 43:10 44:3,4,7 67:4</p> <p><b>Post's</b> <sup>[4]</sup> 3:16,20 39:2 44:1</p> <p><b>potential</b> <sup>[2]</sup> 37:13 57:13</p> <p><b>potentially</b> <sup>[3]</sup> 21:5 74:25 77:22</p> <p><b>power</b> <sup>[1]</sup> 76:10</p> <p><b>practical</b> <sup>[3]</sup> 13:4 39:9 57:4</p> <p><b>practice</b> <sup>[2]</sup> 38:16 39:20</p> <p><b>pre-enforcement</b> <sup>[1]</sup> 63:3</p> <p><b>precedent</b> <sup>[7]</sup> 12:5,6 23:22 24:19,23 47:15 81:1</p>	<p><b>precedents</b> <sup>[1]</sup> 81:4</p> <p><b>precise</b> <sup>[2]</sup> 51:15 52:2</p> <p><b>predecessors</b> <sup>[1]</sup> 28:18</p> <p><b>prefer</b> <sup>[1]</sup> 71:15</p> <p><b>present</b> <sup>[1]</sup> 38:19</p> <p><b>presumably</b> <sup>[2]</sup> 19:5,12</p> <p><b>presumption</b> <sup>[3]</sup> 14:9 37:24 47:12</p> <p><b>pretty</b> <sup>[5]</sup> 42:6 51:25 53:7 60:13 68:25</p> <p><b>prevail</b> <sup>[1]</sup> 20:19</p> <p><b>prevent</b> <sup>[2]</sup> 21:13 63:7</p> <p><b>prevented</b> <sup>[1]</sup> 37:1</p> <p><b>primary</b> <sup>[3]</sup> 39:12 71:20,20</p> <p><b>principle</b> <sup>[4]</sup> 11:7,9 15:5 24:4</p> <p><b>principles</b> <sup>[5]</sup> 4:5 14:15 20:18 77:16 80:22</p> <p><b>prior</b> <sup>[1]</sup> 38:21</p> <p><b>private</b> <sup>[1]</sup> 81:15</p> <p><b>probably</b> <sup>[5]</sup> 46:18 52:6 65:19 76:5,7</p> <p><b>problem</b> <sup>[4]</sup> 37:7 55:11 68:16 81:18</p> <p><b>problematically</b> <sup>[1]</sup> 68:10</p> <p><b>procedural</b> <sup>[10]</sup> 34:2,7,15, 17 56:22,25 73:13,21 74:3 79:6</p> <p><b>proceed</b> <sup>[1]</sup> 50:7</p> <p><b>proceeding</b> <sup>[3]</sup> 45:24 50:1, 1</p> <p><b>proceedings</b> <sup>[2]</sup> 60:10 66:13</p> <p><b>process</b> <sup>[2]</sup> 46:6 55:18</p> <p><b>processes</b> <sup>[1]</sup> 72:18</p> <p><b>promulgated</b> <sup>[3]</sup> 57:8 63:21 69:18</p> <p><b>promulgation</b> <sup>[2]</sup> 63:18 64:24</p> <p><b>protects</b> <sup>[1]</sup> 54:19</p> <p><b>prove</b> <sup>[1]</sup> 22:1</p> <p><b>provide</b> <sup>[5]</sup> 52:9 73:24 75:19 76:1,11</p> <p><b>provides</b> <sup>[2]</sup> 37:24 67:9</p> <p><b>providing</b> <sup>[1]</sup> 76:16</p> <p><b>provision</b> <sup>[2]</sup> 50:23 59:10</p> <p><b>provisions</b> <sup>[7]</sup> 43:2 45:11 49:14 51:17,20 71:22 78:20</p> <p><b>pumped</b> <sup>[1]</sup> 3:18</p> <p><b>purpose</b> <sup>[1]</sup> 14:8</p> <p><b>purposes</b> <sup>[11]</sup> 12:24 13:2 14:6,11 39:5,9 40:11,11,19 59:6 62:12</p> <p><b>push</b> <sup>[1]</sup> 45:21</p> <p><b>put</b> <sup>[2]</sup> 45:6 49:24</p> <p style="text-align: center;"><b>Q</b></p> <p><b>quantify</b> <sup>[1]</sup> 51:9</p> <p><b>question</b> <sup>[22]</sup> 6:7,17 9:22 19:18 25:14 29:18 32:19 34:1 37:16 47:3 49:2,10, 19 52:10 55:3 69:3 70:8 74:8,8 75:8 77:9 79:11</p>
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## Official - Subject to Final Review

<p><b>questions</b> <sup>[11]</sup> 5:5,7 32:11 40:6 46:11 67:14 70:20,22, 23,24 74:24 <b>quite</b> <sup>[2]</sup> 9:23 11:8 <b>quoted</b> <sup>[1]</sup> 13:23</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>raise</b> <sup>[7]</sup> 20:20 21:18 32:13 34:23 43:5 50:11 67:1 <b>raised</b> <sup>[1]</sup> 69:4 <b>ran</b> <sup>[1]</sup> 49:15 <b>range</b> <sup>[2]</sup> 51:7 54:22 <b>rare</b> <sup>[1]</sup> 80:4 <b>rather</b> <sup>[3]</sup> 52:7 67:6 69:24 <b>rational</b> <sup>[1]</sup> 47:22 <b>re-occurring</b> <sup>[1]</sup> 21:15 <b>reach</b> <sup>[1]</sup> 34:12 <b>read</b> <sup>[3]</sup> 13:19 29:4 57:1 <b>reading</b> <sup>[6]</sup> 7:25 12:23 30: 6 34:10 48:7 49:4 <b>readings</b> <sup>[1]</sup> 78:19 <b>reads</b> <sup>[1]</sup> 30:11 <b>real</b> <sup>[4]</sup> 21:9 52:4 80:11,12 <b>real-world</b> <sup>[2]</sup> 52:13,17 <b>really</b> <sup>[16]</sup> 5:10 13:9,9 18: 25 32:20 53:13 55:20 58: 17 63:10,25 65:10 70:20, 25 79:18 80:2,25 <b>reason</b> <sup>[7]</sup> 22:8 30:10 45: 23 50:10 72:3 76:9 80:12 <b>reasonable</b> <sup>[1]</sup> 43:19 <b>reasonably</b> <sup>[1]</sup> 39:25 <b>reasoned</b> <sup>[1]</sup> 73:24 <b>reasoning</b> <sup>[1]</sup> 81:3 <b>reasons</b> <sup>[4]</sup> 3:22 8:22 31:9 37:4 <b>REBUTTAL</b> <sup>[3]</sup> 2:8 79:1,2 <b>recently</b> <sup>[1]</sup> 10:4 <b>recognition</b> <sup>[2]</sup> 12:22 13: 25 <b>recognized</b> <sup>[3]</sup> 9:5,15 38: 10 <b>recognizing</b> <sup>[1]</sup> 14:5 <b>record</b> <sup>[1]</sup> 73:25 <b>recover</b> <sup>[1]</sup> 48:11 <b>redressable</b> <sup>[1]</sup> 75:15 <b>references</b> <sup>[1]</sup> 55:25 <b>refers</b> <sup>[1]</sup> 38:18 <b>reg</b> <sup>[1]</sup> 23:17 <b>regard</b> <sup>[1]</sup> 13:3 <b>regarding</b> <sup>[1]</sup> 15:8 <b>regime</b> <sup>[6]</sup> 9:3 18:4 19:11, 13 46:11 60:7 <b>regulate</b> <sup>[1]</sup> 46:7 <b>regulated</b> <sup>[11]</sup> 22:25 23:1 33:6,10 44:4 46:8 60:17, 18 69:7,14 75:14 <b>regulating</b> <sup>[1]</sup> 46:3 <b>regulation</b> <sup>[27]</sup> 4:4 5:18 22: 6 31:19 32:15 35:22 40:20 43:12 44:12,16 45:25 50: 14,19 51:2 52:5 53:15 58: 7 61:6 63:8 66:8,10,15,25 67:2 73:24 75:1 79:15</p>	<p><b>regulations</b> <sup>[14]</sup> 18:21,24 19:3,4 21:21 22:18 23:14 35:14 36:21 37:9,17 52:19 72:25 80:20 <b>regulatory</b> <sup>[11]</sup> 7:10,12 8: 23 9:3 18:4 19:13 22:9 66: 5,6 77:21 80:8 <b>reinforced</b> <sup>[1]</sup> 74:15 <b>reject</b> <sup>[1]</sup> 38:15 <b>rejected</b> <sup>[4]</sup> 7:25 28:24 39: 2 78:19 <b>relatively</b> <sup>[6]</sup> 22:6 35:20 51: 6 57:5,6 58:16 <b>relevant</b> <sup>[4]</sup> 38:14 44:2,3 56:21 <b>reliance</b> <sup>[2]</sup> 4:17 13:10 <b>relief</b> <sup>[9]</sup> 31:5 32:21 33:2, 11 58:12 75:19 76:1,11,14 <b>relies</b> <sup>[1]</sup> 13:24 <b>remand</b> <sup>[1]</sup> 20:19 <b>remarkable</b> <sup>[1]</sup> 5:16 <b>remedy</b> <sup>[1]</sup> 76:7 <b>repeatedly</b> <sup>[1]</sup> 18:17 <b>reply</b> <sup>[1]</sup> 73:20 <b>repose</b> <sup>[9]</sup> 17:10,23 18:1 39:18 47:6 54:11,12,19 78: 5 <b>repose-based</b> <sup>[7]</sup> 4:10,12 6:2 10:24 17:20 22:10 80: 14 <b>repose-style</b> <sup>[1]</sup> 71:12 <b>representing</b> <sup>[1]</sup> 58:10 <b>required</b> <sup>[1]</sup> 43:19 <b>requirement</b> <sup>[1]</sup> 72:12 <b>requires</b> <sup>[2]</sup> 15:18 38:24 <b>res</b> <sup>[4]</sup> 20:11,14,18 24:4 <b>RESERVE</b> <sup>[2]</sup> 1:7 3:6 <b>resolves</b> <sup>[1]</sup> 62:24 <b>resorts</b> <sup>[1]</sup> 4:15 <b>respect</b> <sup>[4]</sup> 10:1 47:6,9 63: 18 <b>respective</b> <sup>[1]</sup> 39:18 <b>respond</b> <sup>[1]</sup> 43:19 <b>responded</b> <sup>[1]</sup> 13:13 <b>Respondent</b> <sup>[4]</sup> 1:8,23 2:7 38:6 <b>response</b> <sup>[2]</sup> 21:7 25:19 <b>responses</b> <sup>[2]</sup> 11:21 25:25 <b>restarts</b> <sup>[1]</sup> 7:6 <b>result</b> <sup>[2]</sup> 14:24 38:25 <b>results</b> <sup>[1]</sup> 60:23 <b>retroactively</b> <sup>[1]</sup> 75:1 <b>reversed</b> <sup>[1]</sup> 74:16 <b>review</b> <sup>[23]</sup> 6:3 14:9 25:18 26:6 31:9,15,17,24 37:25 39:18 43:2 45:11 47:13 49: 14 51:16,20 55:5 63:4 71: 22,22 74:10 77:1 78:4 <b>revisit</b> <sup>[2]</sup> 32:1,2 <b>revolutionary</b> <sup>[1]</sup> 13:16 <b>rights</b> <sup>[2]</sup> 46:5,9 <b>risk</b> <sup>[1]</sup> 36:10 <b>risking</b> <sup>[1]</sup> 36:16 <b>road</b> <sup>[1]</sup> 32:19</p>	<p><b>ROBERTS</b> <sup>[29]</sup> 3:3 17:25 19:9,23 30:24 32:5 33:23 35:1 38:2 41:11 42:14 43: 7,9,22 44:8,14,20,24 45:4, 13 69:21 72:7,13 74:5 75: 4 77:3,6 78:24 81:23 <b>role</b> <sup>[2]</sup> 5:2 77:17 <b>Rotkiske</b> <sup>[1]</sup> 81:18 <b>rule</b> <sup>[91]</sup> 4:7 6:4,11 7:1,14 8: 4,10 9:20,24 10:9,11,15,19, 25 11:14 12:17,17 13:14 16:13 24:15,16 25:5 28:23 29:10 30:16,20 32:2,14,24 33:2 35:10 37:20 39:5,13 40:25 41:6,9 43:23 44:6 46:15,18 47:11,23,24 48:1, 16,19 52:13,19 54:18 55:7 56:4,8,22 57:7 60:4,12 61: 3,12,18,24,25 63:19,20 64: 4,7,14,18,22,25 65:3,21,23, 25 67:19 69:6,18 70:13,18, 19 71:4,6,23 72:20 73:5 75:11,13 80:9,10,12,20 <b>ruled</b> <sup>[2]</sup> 20:4 54:14 <b>rulemaking</b> <sup>[10]</sup> 31:5,11, 17 43:16 47:1,7 53:7 55:3, 17 56:7 <b>rules</b> <sup>[15]</sup> 4:18,19 7:4 8:18 18:3,18 19:10 28:11 31:11 36:3 59:14,22 77:23 80:23 81:11 <b>run</b> <sup>[5]</sup> 10:6 20:2 39:22 48: 10 66:18 <b>running</b> <sup>[4]</sup> 13:21 15:1 30: 4 67:15 <b>runs</b> <sup>[1]</sup> 80:3</p> <hr/> <p style="text-align: center;"><b>S</b></p> <p><b>sales</b> <sup>[1]</sup> 73:3 <b>same</b> <sup>[19]</sup> 10:12 19:18 23:2 27:9 28:25 30:22 37:20 39: 15 40:1 42:13 51:21 54:5 55:6 58:12 61:24 69:5 81: 7,12,15 <b>satisfy</b> <sup>[1]</sup> 37:18 <b>saying</b> <sup>[8]</sup> 26:16 29:19 35: 4 41:15 60:4 68:4,20,23 <b>says</b> <sup>[11]</sup> 3:15 4:15 11:4,10 25:16 29:5,7,21,24 31:3 79:13 <b>scenario</b> <sup>[2]</sup> 37:18 77:16 <b>scene</b> <sup>[1]</sup> 77:22 <b>scheme</b> <sup>[1]</sup> 11:24 <b>schemes</b> <sup>[1]</sup> 47:9 <b>SEC</b> <sup>[2]</sup> 12:12 17:15 <b>Second</b> <sup>[2]</sup> 4:14 32:18 <b>Section</b> <sup>[11]</sup> 3:24 4:10 16:7 38:17,24 40:2 43:17 49:12 54:25 59:9 72:1 <b>see</b> <sup>[14]</sup> 11:9 13:24 14:5 18: 6,25 21:5,22 25:19 36:20 37:11,13 52:22 60:20 61: 12 <b>seeking</b> <sup>[2]</sup> 8:14 58:12</p>	<p><b>seem</b> <sup>[5]</sup> 22:24 24:16 25:5 29:4 46:16 <b>seems</b> <sup>[3]</sup> 18:15 42:5 77: 15 <b>seen</b> <sup>[5]</sup> 23:12,13 36:22 60: 2 71:2 <b>sense</b> <sup>[12]</sup> 8:19 30:7,16 47: 18,19 51:6 53:20 56:5,9 71:13 77:12 80:8 <b>sentence</b> <sup>[4]</sup> 25:15 70:6 72:1,6 <b>separate</b> <sup>[1]</sup> 62:14 <b>serious</b> <sup>[1]</sup> 45:9 <b>served</b> <sup>[1]</sup> 13:4 <b>set</b> <sup>[6]</sup> 37:17 42:17 43:17 75:10,13 76:7 <b>sets</b> <sup>[1]</sup> 18:24 <b>setting</b> <sup>[1]</sup> 53:23 <b>settled</b> <sup>[4]</sup> 4:5 36:3 38:16 42:5 <b>seven</b> <sup>[3]</sup> 3:17 42:2 69:24 <b>several</b> <sup>[3]</sup> 3:13 28:10,19 <b>shall</b> <sup>[1]</sup> 25:17 <b>share</b> <sup>[2]</sup> 42:10,15 <b>shorter</b> <sup>[1]</sup> 54:10 <b>shouldn't</b> <sup>[2]</sup> 57:21 60:22 <b>show</b> <sup>[3]</sup> 11:2 54:2 69:16 <b>showing</b> <sup>[3]</sup> 56:21 68:7,11 <b>shows</b> <sup>[2]</sup> 10:24 42:9 <b>side</b> <sup>[3]</sup> 41:22 49:21 53:22 <b>sides</b> <sup>[1]</sup> 79:10 <b>siding</b> <sup>[1]</sup> 4:16 <b>significance</b> <sup>[1]</sup> 53:8 <b>significant</b> <sup>[1]</sup> 77:17 <b>significantly</b> <sup>[1]</sup> 60:19 <b>similar</b> <sup>[3]</sup> 7:18 54:5 72:23 <b>similarly</b> <sup>[1]</sup> 59:11 <b>simply</b> <sup>[1]</sup> 5:2 <b>Since</b> <sup>[4]</sup> 3:13 4:8 28:12 80: 17 <b>single</b> <sup>[4]</sup> 3:18 11:24 39:5 49:8 <b>sit</b> <sup>[1]</sup> 31:12 <b>situation</b> <sup>[5]</sup> 14:22 33:1,11 65:8 67:4 <b>six</b> <sup>[23]</sup> 4:19 18:5 22:5,21 30:10 38:21 41:17,25 42:1 44:12,15 50:16 52:11 53:9, 14 54:10,12,16,18 67: 10 69:24 80:1 <b>six-year</b> <sup>[4]</sup> 38:10 53:23 66: 8 70:11 <b>Sixth</b> <sup>[9]</sup> 6:14 7:21 23:12, 14 36:19,21 60:24 61:1,1 <b>small</b> <sup>[5]</sup> 9:2,6 51:3 58:16 80:1 <b>snail</b> <sup>[1]</sup> 52:22 <b>SNYDER</b> <sup>[79]</sup> 1:21 2:6 38:4, 5,7 40:9,23 42:7,22 43:8, 15,25 44:10,17,22,25 45:3, 5,20 46:17,21,24 47:25 48: 6,20 49:3,7,11 50:9,22 51: 5,14 52:16 53:19 54:15 55: 8,12,16 56:15 57:17,25 59:</p>	<p>1 60:8 61:15,23 62:17 63: 1,12 64:2,10,20 65:9,13 66: 1,6,22 67:7,16,21 68:3,9, 23 69:11,19 70:2,15 71:3, 18 72:8,22 73:17 74:6,18 75:17,23 76:9,20,23 78:1 <b>Solicitor</b> <sup>[2]</sup> 1:21 75:11 <b>solution</b> <sup>[1]</sup> 11:16 <b>somebody</b> <sup>[4]</sup> 16:24 19:16 41:23 45:18 <b>someone</b> <sup>[7]</sup> 6:3 8:7 46:3, 7 52:7,21 63:7 <b>sometime</b> <sup>[1]</sup> 68:18 <b>sometimes</b> <sup>[2]</sup> 10:15 77: 14 <b>somewhere</b> <sup>[1]</sup> 79:22 <b>soon</b> <sup>[1]</sup> 42:17 <b>sooner</b> <sup>[1]</sup> 52:7 <b>sophisticated</b> <sup>[1]</sup> 23:13 <b>sorry</b> <sup>[3]</sup> 20:13,23 25:13 <b>sort</b> <sup>[15]</sup> 14:14,16 17:14 18: 2,11,16 35:11 41:6 52:1 55:22 60:6 62:19 71:24 77: 9 78:8 <b>sorts</b> <sup>[2]</sup> 36:3 70:20 <b>SOTOMAYOR</b> <sup>[12]</sup> 8:5 20: 11,14,21,23,25 21:11,25 32:6 36:2 72:16 73:11 <b>sought</b> <sup>[2]</sup> 28:3 58:13 <b>sovereign</b> <sup>[2]</sup> 26:3,7 <b>space</b> <sup>[1]</sup> 77:25 <b>special</b> <sup>[11]</sup> 4:7 28:23,24 43:2 45:10 46:10 51:16,20 71:22 80:25 81:11 <b>specialized</b> <sup>[1]</sup> 71:12 <b>specific</b> <sup>[4]</sup> 38:18 45:14 47: 9 59:7 <b>specifically</b> <sup>[1]</sup> 39:14 <b>sphere</b> <sup>[1]</sup> 10:20 <b>spill</b> <sup>[1]</sup> 72:4 <b>spillover</b> <sup>[3]</sup> 71:14,17,19 <b>split</b> <sup>[1]</sup> 6:15 <b>stage</b> <sup>[2]</sup> 22:3 57:19 <b>standard</b> <sup>[4]</sup> 39:20 40:25 55:5 71:23 <b>standing</b> <sup>[12]</sup> 44:9,11 45: 16 69:4,8,17 70:1,3,14 75: 9,16 76:8 <b>stare</b> <sup>[3]</sup> 19:10,19 23:23 <b>start</b> <sup>[4]</sup> 13:21 20:6 30:21 67:19 <b>started</b> <sup>[4]</sup> 3:17,20 48:10 71:5 <b>starts</b> <sup>[13]</sup> 3:24 4:1 6:15 15: 1 17:7 19:13 30:4 47:16 64:19 65:5 67:15 79:16,17 <b>state</b> <sup>[2]</sup> 22:9 79:7 <b>statement</b> <sup>[2]</sup> 15:22 58:4 <b>STATES</b> <sup>[10]</sup> 1:1,16 27:13, 21 30:9 45:1 58:21 59:11, 15,17 <b>statute</b> <sup>[55]</sup> 4:10 5:11 7:6 10:1,6 13:3,20 14:7,10 15: 22 16:6,18 17:5,7,10,10,15,</p>
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## Official - Subject to Final Review

<p>20 27:1 29:3,4,20,22 30:3, 6,8,22 38:11 39:9 40:2,12, 18 41:2 48:9 49:4 53:21, 25 58:20 59:7 65:21,22,23, 25 66:5,17 71:5,7,12,16 78: 3 79:12 80:3,7,14 81:20</p> <p><b>statute's</b> [1] 38:14</p> <p><b>statutes</b> [24] 4:8,12 6:2,9, 19 9:14,24 10:24 14:15 17: 2 22:10 26:11 29:14 47:6, 20 48:15 49:13,15 50:25 71:12 72:4,5,10 81:5</p> <p><b>statutory</b> [10] 11:23 43:2 45:11 46:10 47:9 50:3 51: 16,20 66:2 71:22</p> <p><b>still</b> [2] 69:25 70:10</p> <p><b>stop</b> [2] 8:15 43:24</p> <p><b>stopped</b> [1] 51:19</p> <p><b>stops</b> [1] 21:15</p> <p><b>strange</b> [1] 41:8</p> <p><b>strategy</b> [1] 52:12</p> <p><b>strongest</b> [1] 45:7</p> <p><b>structure</b> [4] 8:9,17 18:8 70:13</p> <p><b>structured</b> [1] 18:12</p> <p><b>subject</b> [8] 17:19,23 22:12 35:11,14 54:25 59:14 63:5</p> <p><b>subjected</b> [1] 11:1</p> <p><b>submitted</b> [2] 81:24 82:2</p> <p><b>subsequent</b> [2] 20:1 67:9</p> <p><b>substantially</b> [1] 57:12</p> <p><b>substantive</b> [4] 34:18,21 67:1 79:7</p> <p><b>substantively</b> [1] 42:13</p> <p><b>succeed</b> [1] 36:15</p> <p><b>suddenly</b> [1] 36:10</p> <p><b>sue</b> [8] 4:2,3 13:22 27:21 45:17,18 69:9,17</p> <p><b>sued</b> [1] 40:15</p> <p><b>suffer</b> [1] 30:3</p> <p><b>sufficient</b> [2] 31:6 74:1</p> <p><b>suggest</b> [4] 11:7,17 45:14 60:1</p> <p><b>suggested</b> [6] 9:22 11:16 27:8 36:2 44:23 73:14</p> <p><b>suggesting</b> [6] 10:18 12:3 29:20 30:8 43:1 62:23</p> <p><b>suggestion</b> [2] 45:9 46:25</p> <p><b>suggests</b> [4] 11:19 47:15 56:12,24</p> <p><b>suit</b> [11] 24:9 36:7 40:14 44: 12 61:5,21 63:4 65:12 67: 22 75:10,15</p> <p><b>suits</b> [2] 67:19 78:20</p> <p><b>summary</b> [1] 26:23</p> <p><b>support</b> [1] 74:1</p> <p><b>supports</b> [1] 28:17</p> <p><b>SUPREME</b> [2] 1:1,15</p> <p><b>surprised</b> [1] 76:5</p> <p><b>survey</b> [1] 51:22</p> <p><b>sustain</b> [1] 15:13</p> <p><b>sustained</b> [1] 15:3</p> <p><b>swath</b> [1] 69:15</p> <p><b>swaths</b> [2] 22:9 35:24</p>	<p><b>swiped</b> [2] 3:20 9:11</p> <p><b>switched</b> [1] 71:6</p> <p><b>SYSTEM</b> [3] 1:7 3:6 18:10</p> <hr/> <p><b>T</b></p> <p><b>talks</b> [1] 27:12</p> <p><b>tall</b> [1] 9:6</p> <p><b>tangential</b> [1] 32:20</p> <p><b>task</b> [1] 9:6</p> <p><b>tells</b> [1] 79:12</p> <p><b>tens</b> [1] 58:8</p> <p><b>tense</b> [1] 79:13</p> <p><b>term</b> [3] 53:23 54:21 58:23</p> <p><b>terms</b> [2] 26:9,10</p> <p><b>test</b> [1] 79:20</p> <p><b>text</b> [8] 3:23 11:25 12:4,8 20:8 50:3 53:18 81:20</p> <p><b>textual</b> [2] 4:14,23</p> <p><b>Thanks</b> [1] 45:4</p> <p><b>themselves</b> [1] 36:5</p> <p><b>theory</b> [5] 52:21 63:18,24 65:11 67:11</p> <p><b>there's</b> [34] 5:15 6:13,13 8: 11,16 11:5,11,18 12:3,21 14:23,23 19:2 20:3,11,14 21:4,16 22:8 27:14 35:17 37:10,10 42:19,23 50:2 60: 24 61:11 62:6 66:11,11 67: 11 70:16 77:13</p> <p><b>thereby</b> [1] 57:13</p> <p><b>therefore</b> [2] 38:20 39:25</p> <p><b>They've</b> [1] 64:12</p> <p><b>thinking</b> [4] 51:23 53:11, 17 70:9</p> <p><b>thinks</b> [2] 3:15 23:4</p> <p><b>Third</b> [1] 4:23</p> <p><b>THOMAS</b> [17] 5:6,17,23 6: 5,10,18,21,24 7:11,15,17, 22 8:1 31:1 40:7,21 72:14</p> <p><b>Thomas's</b> [2] 9:22 37:16</p> <p><b>thorny</b> [1] 70:20</p> <p><b>though</b> [1] 58:15</p> <p><b>thoughts</b> [1] 25:23</p> <p><b>thousand</b> [1] 3:14</p> <p><b>thousands</b> [1] 58:8</p> <p><b>three</b> [1] 3:22</p> <p><b>throughout</b> [1] 9:15</p> <p><b>thrown</b> [1] 54:11</p> <p><b>time-barred</b> [3] 8:4 22:14, 17</p> <p><b>timely</b> [1] 23:25</p> <p><b>timing</b> [1] 24:9</p> <p><b>Title</b> [1] 30:15</p> <p><b>today</b> [2] 35:10 68:14</p> <p><b>together</b> [1] 26:13</p> <p><b>took</b> [1] 57:23</p> <p><b>top-line</b> [1] 13:18</p> <p><b>tort</b> [5] 5:12 14:22 41:5 59: 10,16</p> <p><b>torts</b> [3] 5:12 14:2,3</p> <p><b>trade</b> [4] 10:11 18:6 23:2 45:19</p> <p><b>tradition</b> [1] 37:22</p> <p><b>traditional</b> [3] 47:24 48:1</p>	<p>76:15</p> <p><b>transcript</b> [1] 77:1</p> <p><b>travels</b> [1] 52:21</p> <p><b>treat</b> [1] 41:2</p> <p><b>trouble</b> [1] 65:18</p> <p><b>true</b> [15] 21:5 23:11 33:3 41: 5 44:4,17,18,18 46:5,9 51: 10 58:10 61:24 63:13,13</p> <p><b>try</b> [2] 23:6 59:5</p> <p><b>trying</b> [7] 31:20,20,20 35: 12 48:23 63:16,22</p> <p><b>Tucker</b> [1] 81:13</p> <p><b>Tuesday</b> [1] 1:12</p> <p><b>turns</b> [1] 24:15</p> <p><b>twist</b> [2] 76:19,21</p> <p><b>two</b> [9] 11:21 17:21 24:24 25:24,25 40:22 62:24 73: 11 74:13</p> <p><b>type</b> [8] 17:23 19:6 35:20 39:8,15,23 53:3 54:5</p> <p><b>types</b> [5] 17:24 27:18 44:5 54:1,25</p> <p><b>typical</b> [2] 5:11 41:8</p> <p><b>typically</b> [4] 10:8 31:16 52: 12 80:1</p> <hr/> <p><b>U</b></p> <p><b>U.S.C</b> [1] 49:16</p> <p><b>uncommon</b> [4] 22:6 35:20 57:5,6</p> <p><b>unconstitutional</b> [3] 43:3 45:10,12</p> <p><b>under</b> [22] 7:4 8:4 10:20 12: 15 13:19,20 15:13 18:10 19:11 22:18 26:3 29:11,13 30:19 37:21 40:3 57:12 63: 17,19 75:13 76:10 81:13</p> <p><b>underlying</b> [4] 13:25 14:10 26:12 31:19</p> <p><b>undermine</b> [6] 4:16 25:6 36:11 81:2,3,9</p> <p><b>understand</b> [25] 8:13 9:2 15:5 23:19 24:22 25:20 26: 18 29:24 35:12 36:6,8,16 42:4,8 47:5 49:6 50:5 58: 22 63:17,22 64:21 65:1,4,7 77:11</p> <p><b>understanding</b> [6] 53:24 64:14 65:18,19 69:6,11</p> <p><b>understood</b> [1] 61:2</p> <p><b>uninterested</b> [1] 42:16</p> <p><b>UNITED</b> [10] 1:1,16 27:13, 21 30:9 45:1 58:21 59:11, 15,17</p> <p><b>universe</b> [1] 18:16</p> <p><b>unlawful</b> [4] 3:15 5:8 30: 19 37:11</p> <p><b>unless</b> [6] 6:17 19:20 41: 23,24 54:14 61:21</p> <p><b>unraveled</b> [1] 72:19</p> <p><b>unresponsive</b> [1] 47:1</p> <p><b>unsettle</b> [1] 77:23</p> <p><b>until</b> [9] 5:14,14 10:2 11:16 13:21 40:16 62:5 69:24 73:</p>	<p>20</p> <p><b>untimely</b> [2] 61:8 70:4</p> <p><b>unusual</b> [1] 41:6</p> <p><b>up</b> [10] 19:13 20:2 42:17 47: 4 52:14 70:7,19,24 74:3 77:19</p> <p><b>uphill</b> [1] 20:5</p> <p><b>upset</b> [2] 25:5 81:1</p> <p><b>upsets</b> [1] 80:21</p> <p><b>uptick</b> [3] 23:15 36:20 37:4</p> <p><b>uses</b> [3] 17:5 47:13 59:12</p> <p><b>using</b> [1] 56:23</p> <p><b>usual</b> [1] 67:19</p> <hr/> <p><b>V</b></p> <p><b>vacatur</b> [7] 32:24,25 33:3,9 76:2,14,17</p> <p><b>valid</b> [4] 8:22 19:3 36:11 37: 9</p> <p><b>validity</b> [1] 72:10</p> <p><b>value</b> [1] 5:3</p> <p><b>variety</b> [1] 47:7</p> <p><b>Vast</b> [4] 22:9,16 35:23,23</p> <p><b>versus</b> [5] 3:5 12:12 26:1 27:5 59:15</p> <p><b>viable</b> [1] 31:8</p> <p><b>view</b> [4] 10:2,5 26:17 34:21</p> <p><b>VII</b> [1] 30:15</p> <p><b>violated</b> [1] 15:25</p> <p><b>Virginia</b> [1] 1:19</p> <hr/> <p><b>W</b></p> <p><b>waived</b> [1] 26:2</p> <p><b>waiver</b> [2] 26:5,7</p> <p><b>wanted</b> [2] 26:4 67:22</p> <p><b>wants</b> [3] 4:6,12 66:18</p> <p><b>warning</b> [1] 39:4</p> <p><b>Washington</b> [2] 1:11,22</p> <p><b>way</b> [28] 6:20 7:14 9:25 14: 11,12 26:14 27:9 29:23 30: 1,6 35:12 36:1,17 41:3 45: 6 51:21 54:1 63:16,20,21 69:17 71:9 74:10,22 76:1, 13,16 80:19</p> <p><b>ways</b> [1] 43:5</p> <p><b>weeds</b> [1] 70:21</p> <p><b>weight</b> [1] 39:12</p> <p><b>WEIR</b> [77] 1:19 2:3,9 3:7,8, 10 5:10,22,25 6:7,13,22 7: 9,12,16,20,24 8:2 9:1 10: 21 11:21 12:3,9 13:17 14: 13 15:16 16:1,5,20 18:20 19:19,25 20:13,16 21:10, 16 22:2 23:8,17 24:1,7,18 25:8,11,21,24 26:21,24 27: 4,8,17 28:6,8 29:13 30:1, 11 31:7 32:16,22,25 33:6, 12,16,20 34:9,14,18,22 35: 6,13 36:18 37:8,19 59:25 79:1,2,4</p> <p><b>welcome</b> [3] 5:5 20:20 40: 6</p> <p><b>well-reasoned</b> [1] 20:4</p> <p><b>west</b> [1] 52:22</p>	<p><b>whatever</b> [3] 8:10 19:24 41:19</p> <p><b>whenever</b> [1] 9:11</p> <p><b>whereas</b> [2] 65:1 67:11</p> <p><b>Whereupon</b> [1] 82:1</p> <p><b>whether</b> [5] 24:17 36:15 70:11,13 74:12</p> <p><b>who's</b> [1] 33:10</p> <p><b>whole</b> [5] 21:4 30:7 44:21 47:18 63:3</p> <p><b>will</b> [8] 4:16,17 36:15 51:3 52:3,8,9 79:9</p> <p><b>willing</b> [1] 74:2</p> <p><b>win</b> [1] 35:10</p> <p><b>winner</b> [1] 23:23</p> <p><b>winning</b> [1] 52:12</p> <p><b>within</b> [5] 13:5 38:14 44:12 67:10 70:10</p> <p><b>without</b> [1] 50:7</p> <p><b>woman</b> [1] 66:18</p> <p><b>wondering</b> [2] 37:5 71:8</p> <p><b>word</b> [14] 11:18 13:1 24:25 26:19 38:17 39:7 47:13 48: 5,8 49:5,21 50:7 59:4,12</p> <p><b>words</b> [3] 26:17 30:6 50:24</p> <p><b>work</b> [5] 9:25 18:19 19:11 26:11,13</p> <p><b>worked</b> [3] 4:8 10:20 28:12</p> <p><b>works</b> [1] 36:7</p> <p><b>world</b> [3] 37:5 51:2 52:4</p> <p><b>worry</b> [2] 21:8 35:9</p> <hr/> <p><b>Y</b></p> <p><b>years</b> [40] 3:17 4:19 8:11 10:20 12:12 17:21 18:5,13, 13 21:14 22:5,21 23:4 30: 10 31:12 38:21 41:17,25 42:1,2,5 44:12,15 47:10 50:6,16 52:11 53:1,9,14 54:10,12,16,18 67:11 69: 24,25 75:3 80:2 81:19</p> <p><b>yourself</b> [1] 28:4</p> <hr/> <p><b>Z</b></p> <p><b>zone</b> [1] 38:14</p>
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