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IN THE SUPREME COURT OF THE UNITED STATES

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CHANTELL SACKETT, ET VIR., :
Petitioners :
v. : No. 10-1062
ENVIRONMENTAL PROTECTION AGENCY, :
ET AL. :
----- x

Washington, D.C.
Monday, January 9, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:
DAMIEN M. SCHIFF, ESQ., Sacramento, California; on behalf of Petitioners.
MALCOLM L. STEWART, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondents.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	DAMIEN M. SCHIFF, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	MALCOLM L. STEWART, ESQ.	
7	On behalf of the Respondents	25
8	REBUTTAL ARGUMENT OF	
9	DAMIEN M. SCHIFF, ESQ.	
10	On behalf of the Petitioners	53
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 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 10-1062, Sackett v. the
5 Environmental Protection Agency.

6 Mr. Schiff.

7 ORAL ARGUMENT OF DAMIEN M. SCHIFF

8 ON BEHALF OF THE PETITIONERS

9 MR. SCHIFF: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 Mike and Chantell Sackett are here today
12 because 4 years ago the Environmental Protection Agency
13 issued against them a compliance order charging them
14 with violations of the Clean Water Act, requiring that
15 they restore their property to its alleged
16 predisturbance wetlands condition, and imposing upon
17 them the threat of tens of thousands of dollars per day
18 in civil fines if they did not immediately comply with
19 the order.

20 But in these 4 years, the Sacketts have
21 never been offered a meaningful opportunity for judicial
22 review of the compliance order, an opportunity that they
23 are guaranteed under the Due Process Clause and the
24 Administrative Procedure Act.

25 JUSTICE SCALIA: Of course, there would have

1 been a daily fine with or without the compliance order,
2 wouldn't there, if they were indeed in violation of
3 the -- the act.

4 MR. SCHIFF: Justice Scalia, the fine would
5 only have been attributable to the statute itself. But
6 with the compliance order in effect, essentially, the
7 Sacketts are now subject to double liability. They can
8 be held liable for the statute as well as for actions
9 inconsistent with the compliance order.

10 JUSTICE KAGAN: So, Mr. Schiff, your
11 understanding is that each day your clients are subject
12 to \$37,500 of fines for the violation of the statute,
13 and an additional 37.5 for violation of the compliance
14 order? Is that the way you understand the penalty
15 scheme to work?

16 MR. SCHIFF: Yes -- yes, Justice Kagan. And
17 it is -- it is in fact, I might add, how the EPA
18 understands the penalty provisions. In its brief at
19 pages 30 and 31, they essentially concede that the
20 existence of the compliance order does subject the
21 Sacketts to liability for both violations of the statute
22 as well as violations of the compliance order.

23 JUSTICE GINSBURG: But the court of appeals
24 did say that there would be no independent liability
25 under the -- for -- for violation of the compliance

1 order. That is, unless there was a violation of the
2 statute, there would be no penalty for violations of the
3 compliance order.

4 MR. SCHIFF: That is correct, Justice
5 Ginsburg. The court held that as a predicate for any
6 liability for a compliance order violation, there must
7 be first a finding of a statutory violation. But that
8 doesn't change the fact, even according to the Ninth
9 Circuit, doesn't change the fact that one can still be
10 held liable for both, that there is a distinct civil
11 liability that is traceable only to the compliance
12 order.

13 JUSTICE GINSBURG: What -- what kind of
14 review are you seeking? I mean, one thing you could say
15 is you dispute that this property is subject to the act.
16 That might be a question that's reviewable. Do you seek
17 more than that? Do you seek review at this stage of
18 anything more than whether the property is subject to
19 the act?

20 MR. SCHIFF: No, Your Honor, we seek review
21 of that jurisdictional question as it is incorporated
22 into the compliance order. The compliance order is the
23 agency action for which we believe the Sacketts have a
24 right of review under the Administrative Procedure Act.
25 And our challenge under the APA to the compliance order

1 is precisely that there is no jurisdiction and therefore
2 there has been no statutory violation.

3 JUSTICE KENNEDY: Can you tell me, what --
4 what would be the scope of your holding? How would --
5 how would -- if you could write the opinion for the
6 Court on this part of your case, what would the rule be?

7 I mean, health inspectors go into
8 restaurants all the time and say: Unless you fix this,
9 I'm going to give you a citation. Fire inspectors, the
10 same thing. And I am -- I'm wondering how your general
11 theory or your general principle that you want us to
12 adopt would fit with that rather routine type of
13 enforcement?

14 MR. SCHIFF: Well, Justice Kennedy, we do
15 not believe that what we are articulating extends as far
16 as -- as creating a right under the APA for review
17 because a health inspector has come onto your property.
18 All we are arguing is that the compliance order is a
19 final agency action, it has stopped the Sacketts home
20 building, it has imposed upon them significant civil
21 liability, and therefore they should have a right under
22 the APA --

23 JUSTICE KENNEDY: Well, this is under --
24 under the APA.

25 MR. SCHIFF: Correct.

1 JUSTICE KENNEDY: This is the APA prong of
2 your argument.

3 MR. SCHIFF: Correct, Justice Kennedy. And
4 we should emphasize that we believe that the Sacketts'
5 due process rights can be satisfied by allowing their
6 APA cause of action to go forward.

7 JUSTICE SCALIA: It seems to me that -- that
8 there's another distinction, a more significant one,
9 between routine inspections by fire marshals or -- or
10 restaurant inspectors, and that is that if you -- if you
11 disobey their order, you're not subjected to any more
12 substantial liability than -- than you would have been
13 subjected to had they not issued the order.

14 It isn't the order that -- that produces
15 any -- any new fine, is it?

16 MR. SCHIFF: That is exactly correct,
17 Justice Scalia. That is -- that's the principal
18 distinction between the compliance order in this case
19 and many of the agency actions that the EPA has set
20 forth in its brief.

21 CHIEF JUSTICE ROBERTS: What if the sanction
22 imposed each day was not the \$37,000, but was \$10. If
23 you don't comply, you know, we can bring an action any
24 time to enforce this and you'll be subject to the
25 statutory maximum, but during the period, the additional

1 sanction for the -- under the administrative order, or
2 the compliance order, is \$10 a day?

3 MR. SCHIFF: Mr. Chief Justice, I don't
4 believe that would change the Court's finality analysis
5 under Bennett. The -- the fact that the fine is only
6 \$10 as opposed to \$37,000 doesn't --

7 CHIEF JUSTICE ROBERTS: But it might go to
8 adequacy of judicial review, the adequacy of the
9 judicial review that would come when the APA brings the
10 enforcement action. I understood your argument to be
11 that there was a significant extortion impact from the
12 fact that these were such significant fines -- doubled,
13 as you say -- that you could rack up for 5 years. But
14 if it's only \$10 a day, that takes a lot of the wind out
15 of your sails, doesn't it?

16 MR. SCHIFF: Well, to begin with,
17 Mr. Chief Justice, in addition to the independent
18 liability that the compliance order imposes, there are
19 other legal effects. Even if the compliance order had
20 no independent liability, there are other legal effects
21 that even EPA has conceded to. For example, the
22 existence of the compliance order makes it materially,
23 substantially more difficult for the Sacketts to apply
24 for an after-the-fact permit. A higher --

25 JUSTICE KENNEDY: To apply for a --

1 MR. SCHIFF: For an after-the-fact permit.
2 The -- once an compliance order is issued, an
3 after-the-fact permit is -- can only be applied for
4 under the "clearly appropriate" standard in the Corps'
5 regulations.

6 But, Mr. Chief Justice, in response to the
7 question, yes, of course, the amount of the fine
8 certainly factors into meaningfulness of review. It
9 factors into coerciveness. But even if there were no
10 fines, there is -- attributable to the compliance order,
11 there is still the fact that the Sacketts cannot
12 independently initiate, cannot trigger review of a
13 compliance order.

14 JUSTICE SCALIA: What do -- what do you
15 care? I mean, you have the fines, don't you? So why
16 don't you just argue that? Why do we have to wrestle
17 with the more difficult situation where there are no
18 fines? It's conceded that there are fines, isn't it?

19 MR. SCHIFF: That's correct, Justice Scalia.

20 JUSTICE SCALIA: So, you know, sufficient
21 unto the day the evil thereof. We don't have to
22 consider more difficult cases.

23 But as I understand it, you can get review
24 by applying for an after-the-fact permit from the Corps,
25 and the only -- the only expense you would incur in

1 order to get that would be to fill in, as the order
2 requires you to do, which is something like what,
3 \$27,500 or so?

4 MR. SCHIFF: Well, Justice Scalia --

5 JUSTICE SCALIA: Is that such a hard -- a
6 hard hit? That's a lot less than, you know, 37.5 a day.

7 MR. SCHIFF: Well, the difficulty,
8 Justice Scalia, is that the Sacketts cannot obtain
9 judicial review of the compliance order within the
10 context of the permitting process. The compliance order
11 is the order that has caused the deprivation, that is
12 imposed upon the Sacketts this double liability.

13 JUSTICE SCALIA: Well, but their challenge
14 to the compliance order is simply that they don't have
15 wetlands. It's the jurisdiction of the EPA. And surely
16 that can be raised in the -- before the Corps of
17 Engineers, no?

18 MR. SCHIFF: That issue might be raised,
19 Your Honor, but the Sacketts could never get review of
20 that issue within the context of the compliance order,
21 which is, of course, the agency action that has caused
22 their harm. Moreover, there is frankly no guarantee
23 that the Sacketts could even get into court through the
24 permitting process, because the Corps might very well
25 say: Well, you know, we don't believe that there are

1 wetlands on the property, and so we are not going to
2 issue you a permit, and therefore there is nothing for
3 the Sacketts to then litigate over in Federal court.

4 JUSTICE SCALIA: How long does it take to
5 get one of those after-the-fact permits?

6 MR. SCHIFF: There is -- there is a study,
7 Your Honor -- in terms of averages, I think it is about
8 a year. But there's nothing in our record that would
9 show necessarily that the Sacketts are eligible for a
10 nationwide permit. But more importantly is the fact
11 that the permitting process doesn't provide review of
12 the burden of the deprivation that the Sacketts are
13 enduring right now.

14 CHIEF JUSTICE ROBERTS: Could you -- I don't
15 understand what exactly you might get from the Army
16 Corps of Engineers. Obviously, they might give you a
17 permit, and I take it that cuts off liability; you can
18 do what you're hoping to do. They might say you don't
19 get a permit because these are wetlands. Can they do
20 something in the middle, which is: It's kind of hard
21 for us to tell; you're on your own?

22 MR. SCHIFF: Very much so. In addition to
23 saying we're not going to issue a permit because we
24 don't believe there are wetlands on the property, they
25 could also say -- under the regulations that EPA cites

1 in its brief -- that we're not even going to entertain
2 your after-the-fact permit application while the
3 compliance order is still outstanding, meaning that you
4 will likely have to comply, be fully deprived, with
5 everything the compliance order says, allow EPA on to
6 your property, requiring significant expensive
7 restoration of your property to its alleged wetlands,
8 state, before you even have the privilege of applying
9 for a permit.

10 JUSTICE KAGAN: Is that -- is that what's
11 critical, Mr. Schiff? If that were not true, if you
12 could go in, even with the compliance order on your
13 property, and get an adjudication of whether you had
14 wetlands in the context of an after-the-fact permit
15 proceeding, would that be sufficient?

16 MR. SCHIFF: No, it would not, Justice
17 Kagan, because, again, the fact is that the -- the
18 compliance order is -- well, the permitting process is
19 an entirely separate agency action. It's -- it's an
20 agency action that the Army Corps goes through. The
21 Sacketts could get no review of the -- of the compliance
22 order.

23 JUSTICE KAGAN: So why does that matter?
24 You're getting review of the question that you care
25 about, which is the question whether you have wetlands

1 on your property. And if they said you don't have
2 wetlands on your property, here's a permit, your
3 problems are finished.

4 MR. SCHIFF: Justice Kagan, the difficulty
5 is that that judicial decision would have no impact and
6 would not remedy the deprivation that the Sacketts are
7 currently enduring.

8 JUSTICE SCALIA: Do they issue permits when
9 there are no wetlands? I thought it was a permit
10 allowing you to do something on wetlands which otherwise
11 would -- would not be allowed?

12 MR. SCHIFF: That's correct, Justice Scalia.

13 JUSTICE SCALIA: So if -- if they decide
14 that there's -- that it's not a wetland, what do they --
15 what do they do? They do nothing?

16 MR. SCHIFF: That's my understanding. The
17 Corps would simply state there is nothing to permit
18 because there are no wetlands to fill. But --

19 JUSTICE KENNEDY: But then the compliance
20 order would automatically be vacated? I mean, doesn't
21 the compliance order presume that they are wetlands?
22 Hasn't the agency already made that determination?

23 MR. SCHIFF: The difficulty,
24 Justice Kennedy, is that we are talking about two
25 agencies. And this -- this is really the -- why -- one

1 additional reason why the permitting process is -- is an
2 inapt solution to the Sacketts' problem. The Sacketts
3 have been injured by EPA, by the compliance order. And
4 now --

5 JUSTICE ALITO: That seems very strange for
6 that, for a party to apply for a permit on -- on the
7 ground that they don't need a permit at all. If you
8 apply for a permit, is the Army Corps of Engineers going
9 to decide whether you -- whether it's wetlands? Isn't
10 it presupposed if you're applying for a permit that you
11 need one because there's -- they are wetlands?

12 MR. SCHIFF: That's -- that's exactly right,
13 Justice Alito. The -- that underscores how bizarre it
14 is to force the Sacketts to go through a process. They
15 have been injured by the EPA, by a compliance order, and
16 they are told they must initiate an entirely separate
17 administrative action with an entirely different agency
18 in order to get indirect, tangential, possible review of
19 the compliance order that has turned their world upside
20 down for the last 4 years?

21 The -- that is why the permitting process
22 cannot provide meaningful judicial review to the
23 Sacketts. That's why the Administrative Procedure Act
24 is the ready-made answer. And frankly, there is no
25 indication that Congress intended anything other than

1 the Administrative Procedure Act to provide an adequate
2 administrative review for the -- for the adjudication of
3 compliance orders.

4 JUSTICE GINSBURG: What would the standard
5 be -- be called? You have APA review, so it's just
6 that -- that the EPA acted reasonably in determining
7 that you have wetlands?

8 MR. SCHIFF: Yes, Justice Ginsburg, it would
9 be your typical arbitrary and capricious standard of
10 review, substantial evidence based upon the record that
11 was before the EPA when it made its finding of statutory
12 violation, which is the statutory predicate for the
13 issuance of the complaint.

14 JUSTICE SCALIA: Well, wait, wait. Surely
15 you wouldn't go in and -- and try to fight arbitrary or
16 capricious. It's arbitrary or capricious or "otherwise
17 in violation of the law." Wouldn't you go in and say,
18 that this is in violation of the law?

19 MR. SCHIFF: No, exactly, Justice Scalia. I
20 mean, I don't mean to limit ourselves to just that one
21 standard of review. But it would be a --

22 JUSTICE SCALIA: I don't think that one
23 standard of review would do you very much good, to tell
24 you the truth. They've thought about this. Maybe they
25 got it wrong, but to say it's arbitrary or capricious,

1 you are going to lose.

2 MR. SCHIFF: Well, I certainly hope not,
3 Justice Scalia. But -- but the difficulty is we don't
4 even know at this point what sort of record the EPA has.
5 In fact, the law as it stands now is that EPA doesn't
6 even need probable cause to issue a compliance order.
7 And --

8 JUSTICE ALITO: Given -- given the rather
9 vague nature of the test that's been adopted for
10 determining whether something is part of the waters of
11 the United States, wouldn't you have a very difficult
12 time showing that a determination that it was, was
13 arbitrary and capricious?

14 MR. SCHIFF: There is no question,
15 Justice Alito, that there -- there -- yes, it would be a
16 difficult time. But that, just because the Sacketts
17 might have an uphill battle I don't believe is any
18 reason to say that they should have no opportunity. I
19 mean, as it stands now, they have been told you cannot
20 build your home, you must convert your property into
21 wetlands, and you are being charged \$37,500 per day if
22 you don't immediately comply; and yet you get no day in
23 court?

24 JUSTICE KAGAN: And Mr. Schiff, is the way
25 you see this operating that you bring an action

1 contesting on the basis of the arbitrary and capricious
2 clause or otherwise not in accordance with law? If then
3 the court rules against you but you continue to fail to
4 comply, does the EPA then have to bring a separate
5 enforcement action?

6 MR. SCHIFF: Yes. The only way EPA can
7 actually take money away from the Sacketts is by filing
8 a civil action, but that would be true whether or not
9 the Sacketts bring an APA cause of action.

10 CHIEF JUSTICE ROBERTS: Would collateral
11 estoppel apply to you because of the judicial
12 determination on the compliance order in the subsequent
13 enforcement action? In other words, you lose. You seek
14 APA review and the court says: We think it's a wetland.
15 And then the EPA brings an enforcement action. They
16 have to establish it's a wetland. Don't they just
17 attach a copy of the decision?

18 MR. SCHIFF: Well, not necessarily
19 Mr. Chief Justice, because, one, the standard of review
20 would be different. It would be -- under the APA, it
21 would be the traditional deference afforded to agency
22 action. Not --

23 CHIEF JUSTICE ROBERTS: I guess I am back to
24 Justice Scalia's question. This -- it struck me as a
25 purely legal, jurisdictional issue, are these wetlands

1 or not? And I don't know why you give deference to the
2 agency's determination on a legal jurisdictional issue
3 like that.

4 MR. SCHIFF: No, you are correct,
5 Mr. Chief Justice. I mean more in terms of the
6 substantial evidence standard that usually supports
7 agency action under the APA. But -- but certainly here
8 the Sacketts also contend, regardless of questions of
9 Rapanos and connection to navigable waters, the Sacketts
10 contend that there are no wetlands at all on this
11 property, and that ultimately is -- is of course a
12 factual question that would be informed by what's in the
13 record.

14 JUSTICE KAGAN: But to go back to the Chief
15 Justice's --

16 JUSTICE KENNEDY: If they are wrong about
17 that, if there is a finding in the APA process that
18 these are wetlands, is that the end of it? Or within
19 that, the context of that review, can you say, well,
20 they are wetlands, but only to a minor extent, and these
21 conditions were onerous and -- and far more than
22 necessary to protect the wetlands? Can you argue that
23 in the APA review, or is it just up or down, wetlands
24 you lose, not wetlands you win, that's it?

25 MR. SCHIFF: No. I mean -- Justice Kennedy,

1 we would argue that, even if there are wetlands on the
2 property, which we do not believe there are, that --
3 that the compliance order would still be invalidated if
4 there were not a significant nexus between the -- the
5 alleged wetlands on the property and some navigable
6 water in the vicinity. But -- but --

7 JUSTICE SOTOMAYOR: Who would review that
8 and where? Going back to Justice Kagan's question of --
9 let's assume you went through an APA process and they
10 found it was wetlands and that the compliance terms
11 were -- had a substantial nexus. What happens when you
12 go into an enforcement action?

13 MR. SCHIFF: Well, at that point then both
14 sides get to create a new record, consistent with what
15 the Ninth Circuit held. That --

16 JUSTICE KAGAN: So the Chief Justice's
17 suggestion that there would be preclusion you do not
18 agree with?

19 MR. SCHIFF: No. In addition to the fact
20 that the standards of review would be different,
21 preponderance of the evidence in a civil action as
22 opposed to substantial evidence in the APA, it would
23 also be the fact that -- that, even as the Ninth Circuit
24 understood a civil action, when it goes forward both
25 sides have an opportunity to create a new record, or

1 to -- to establish by preponderance of the evidence the
2 elements of -- of the offense.

3 JUSTICE SOTOMAYOR: So does anything get
4 estoppel?

5 MR. SCHIFF: I'm sorry, Justice --

6 JUSTICE SOTOMAYOR: Does anything get
7 estoppel? Assuming it's not a legal question, would the
8 factual findings that there is a substantial nexus
9 between the remedy ordered and the violation, would that
10 get estoppel?

11 MR. SCHIFF: It -- it would be difficult to
12 imagine a case of estoppel, because again, in the APA
13 context it's just based upon the record at the time the
14 compliance order is issued. And so the records are
15 always going to be different, because the civil action
16 will build upon that administrative record. And then
17 secondly. In terms of the differing standards of
18 review, I suppose one could find a -- a purely factual
19 question perhaps that -- that where the standards of
20 review wouldn't matter, or a purely legal question,
21 but --

22 JUSTICE SCALIA: This wouldn't be a problem
23 if -- if this procedure were not employed. If there
24 were not this -- this prior compliance order that issues
25 before actual suit by the -- by -- by EPA to hold you

1 liable for violating the act, then you'd just have
2 one -- one suit, and the -- the issue would be clear as
3 to what burden the agency has to sustain. But it's --
4 it's really the dual nature of this process that creates
5 the difficulty, isn't it?

6 MR. SCHIFF: Yes, Justice Scalia, to some
7 extent it is, of course, the process that -- that --

8 JUSTICE SCALIA: But that's in the statute.
9 The agency didn't make that up, right? The statute
10 provides for compliance orders and it calls them
11 "compliance orders," doesn't it?

12 MR. SCHIFF: It -- it -- it does indeed, and
13 so even if the Sacketts on remand don't get their ideal
14 mode of judicial review, something is frankly better
15 than nothing. They have been told for 4 years they
16 cannot build their home, they have been threatened with
17 ruinous civil penalties, and to date they have had no
18 opportunity for their day in court.

19 The -- the Sacketts cannot trigger an
20 enforcement action. I mean, perhaps if Congress had
21 written the statute differently to allow for some sort
22 of judicial review that the Sacketts could -- could
23 initiate for a compliance order, that might -- that
24 might answer, Justice Scalia, your -- your concerns.
25 But that is not the statute we have. We have a statute

1 where Congress has said EPA can issue a compliance
2 order, and we have in combination with that the
3 presumption in favor of judicial review of final agency
4 action; we have the avoidance canon; all that point to
5 allowing for the Sacketts to get their day in court and
6 at the same time to satisfy and to vindicate Congress's
7 intent.

8 Congress wanted EPA to be able to issue
9 these -- these compliance orders. Congress gave
10 significant statutory penalties for violating these
11 compliance orders. But at the same time, there has to
12 be balance. One cannot tell landowners --

13 JUSTICE SCALIA: Of course, you know, you
14 are not going to be out of the woods. Even if you get
15 this APA review, okay, some of the factual questions
16 that go to whether these are wetlands or not are going
17 to be decided giving substantial deference to the
18 agency's determination of the facts, right?

19 MR. SCHIFF: No; that is correct,
20 Justice Scalia. That's --

21 JUSTICE SCALIA: And so even if you lose on
22 that, you might still think you can win when the EPA
23 finally brings a -- a civil action seeking to impose a
24 penalty, where the burden will be on the EPA without --
25 without any deference to its fact-finding. So, you

1 still won't know where you are, will you?

2 MR. SCHIFF: Well --

3 JUSTICE SCALIA: You've have lost one but
4 you may win the other. You will have to roll the dice.

5 MR. SCHIFF: Well, respectfully,
6 Justice Scalia, it's more than rolling the dice. It's
7 subjecting the -- the Sacketts to an interminable
8 Damoclean sword. If -- if the only way they can get
9 review is simply waiting, well, when will EPA let the
10 sword drop and bring a civil action to enforce its
11 compliance order? Who knows how long it is?

12 With EPA's theory of continuing violation,
13 the statute of limitations never even runs. And so you
14 have the Sacketts who are forever subject to this cloud
15 over themselves, cloud over their title -- they can't
16 get anyone to come on to their property to build their
17 home.

18 JUSTICE GINSBURG: Is there no limitation on
19 the compliance order? Just, it can be there forever
20 until the EPA decides to bring an enforcement action?

21 MR. SCHIFF: As -- Justice Ginsburg, as EPA
22 interprets the statute of limitations for collecting
23 civil penalties, so long as the "discharge," quote
24 unquote, remains in place, it is considered a continuing
25 limitation, and so the statute of limitations never even

1 begins to run. And so Sacketts might build their home
2 and 10 years down the road be surprised that here comes
3 EPA with its civil action.

4 Oh, now the Sacketts get judicial review,
5 but at a significant cost. They can't even enjoy the
6 home that they might build because there is always this
7 cloud hanging over them, a cloud that can be dispelled
8 if they can simply have an opportunity, which,
9 Justice Scalia, may not be the best opportunity, but
10 something is better than nothing, an APA cause of action
11 to review the EPA's assertion of its authority over
12 their property.

13 JUSTICE GINSBURG: I asked you earlier, in
14 this APA review would there be any further question
15 after the determination is it wetlands, is it not. And
16 you had said no, that would be it. But you answered
17 another question that would suggest it may be wetlands
18 but it shouldn't -- there should be -- you should be
19 allowed to build your home anyway.

20 MR. SCHIFF: Allow me to clarify, Justice
21 Ginsburg. In this APA cause of action, the Sacketts
22 challenge the jurisdictional predicate, and that is
23 really a two-part determination. One is, are there
24 wetlands on the property; and two, are those wetlands
25 sufficiently connected to navigable waters to justify

1 Federal regulation. And both of those fit into our
2 first claim for relief, our APA cause of action. And so
3 in this case that is what our APA cause of action on
4 remand would look like.

5 We would say let's look at the record that
6 EPA has assembled at the time it issued the compliance
7 order and does that record support the finding of
8 statutory violation.

9 JUSTICE SOTOMAYOR: You are conceding that
10 the compliance order, assuming there is a violation, is
11 all right? You are not challenging any of the terms of
12 the compliance order other than the finding of a
13 violation?

14 MR. SCHIFF: That is correct, Justice
15 Sotomayor, yes, that is correct. That is all that we
16 are challenging.

17 Mr. Chief Justice, if I may reserve the
18 balance of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Mr. Stewart.

21 ORAL ARGUMENT OF MALCOLM L. STEWART

22 ON BEHALF OF THE RESPONDENTS

23 MR. STEWART: Mr. Chief Justice and may it
24 please the Court:

25 I would like to begin with the question of

1 double penalties because I think it helps to clarify
2 exactly what the compliance order does and does not do
3 in terms of altering the legal regime to which the
4 Sacketts are subject.

5 The compliance order is intended to specify
6 the violation that EPA believes to have occurred and the
7 measures that EPA believes are necessary in order to
8 achieve prospective compliance. And the statute does
9 provide separately for penalties for violating the
10 statute and penalties for violating the compliance
11 order.

12 As an exercise of our duty of candor to the
13 Court, we acknowledged in our brief that the government
14 reads the statute to allow the legal possibility of
15 double penalties, that is up to \$37,500 per day for
16 violating the statute, up to 37,500 per day for
17 violating the compliance order. I think that's really a
18 theoretical rather than a practical --

19 JUSTICE BREYER: You say "practical." The
20 order itself says that. It says you don't do it you are
21 going to get penalized 32.5, which is now 37.

22 MR. STEWART: That language in the order
23 would have been accurate even if the statute didn't
24 authorize penalties for violating the order itself.
25 That is, even if the statute authorized penalties only

1 for violating the act, it would have been accurate for
2 EPA to say: We believe this is what is necessary to
3 achieve compliance and if you don't do it you will
4 potentially be subject to these civil penalties, namely
5 civil penalties for violating the statute.

6 But the reason I say that it's, the double
7 penalties, is a theoretical possibility -- let me say
8 that again. If there were no provision for penalties
9 for violating the compliance order, only penalties for
10 violating the statute, EPA could accurately have said:
11 We believe that the following steps are necessary in
12 order to achieve perspective compliance with the act,
13 and if you don't do these things you will be subject to
14 the following penalties because you will then be in
15 violation of the act and you will be subject to the
16 penalties --

17 JUSTICE KAGAN: But, Mr. Stewart --

18 CHIEF JUSTICE ROBERTS: I don't follow -- I
19 didn't follow that. What is your response to the
20 assertion that you are subject to double penalties?

21 MR. STEWART: It is --

22 CHIEF JUSTICE ROBERTS: One for violating
23 the act, two for violating the compliance order.

24 MR. STEWART: The first is it is a legal
25 possibility; we are not aware of any case in which a

1 district court has ever imposed penalties of greater
2 than the 37,000 --

3 CHIEF JUSTICE ROBERTS: Well, you don't
4 doubt that -- you don't doubt that they have the
5 authority to do that?

6 MR. STEWART: They have the authority to do
7 that. I guess the other thing I would say is the
8 possibility that penalties would be increased doesn't
9 distinguish this scheme from the sort of regime that
10 Justice Kennedy referred to or the sort of regimes that
11 we've discussed in our brief. That is, it's very common
12 for law enforcement agencies of all sorts to give
13 warnings to regulated parties: We think you are
14 violating the statute.

15 JUSTICE ALITO: Has the --

16 JUSTICE SOTOMAYOR: But, Mr. Stewart --

17 JUSTICE SOTOMAYOR: I'm sorry.

18 CHIEF JUSTICE ROBERTS: Justice Alito.

19 JUSTICE ALITO: Has the United States
20 adopted a rule or adopted a policy that it will never
21 seek anything more than the penalty for the underlying
22 violation? It will not seek an additional penalty for
23 violation of a compliance order?

24 MR. STEWART: We have not adopted a policy
25 to that effect.

1 I guess what I do want to clarify --

2 JUSTICE ALITO: So it's more than
3 theoretical, then. I don't really understand what you
4 are saying. You are saying that we may ask for more,
5 but it's unlikely courts will actually provide for more.

6 MR. STEWART: I guess the two -- I don't
7 know that we have ever asked for more than the 37,500
8 per day. Now, I think it is often the case that what
9 district courts will do is within the 37,500 statutory
10 maximum they will say: We are imposing a greater
11 penalty for the period after the compliance order was
12 issued because it shows greater culpability to continue
13 with the violation after you have been warned. But
14 that's not a feature of the compliance order that
15 distinguishes it from all manner of other agency --

16 JUSTICE SCALIA: Your order could have read,
17 it could have read: "Notice is hereby given that
18 violation of or failure to comply with the foregoing
19 Order" -- cap "O" -- "may subject respondents to: One,
20 civil penalties of up to 32.5," -- now 37.5 per day.
21 That's how it reads. It could have read: "Violation of
22 or failure to comply with the Environmental Protection
23 Act may subject respondents to civil penalties." It's
24 quite specific that it is violation of -- failure to
25 comply with the foregoing Order, which includes not

1 letting -- filling in immediately and so forth.

2 It says what it says. It's the violation of
3 the order that -- that the additional penalties are
4 attached to.

5 MR. STEWART: And again, we don't dispute
6 that violating the order could as a realistic matter
7 cause the penalties to be greater within the statutory
8 maximum. But, as I was saying, in many situations
9 agencies give warnings to regulated parties: If you
10 keep doing this you may be subject to penalties.

11 JUSTICE SCALIA: It could -- it could as a
12 theoretical matter double the penalties.

13 MR. STEWART: That's correct.

14 JUSTICE SCALIA: You are just saying as a
15 practical matter it doesn't often do that.

16 MR. STEWART: As a practical matter we are
17 not aware of any case in which the penalties imposed
18 have been greater than the per day statutory maximum
19 provided --

20 JUSTICE SCALIA: I'm not going to bet my
21 house on that.

22 MR. STEWART: In terms -- I think, first of
23 all, we would say that until we floated the theoretical
24 possibility in our opening brief, the Sacketts seemed to
25 be entirely unaware of it. That is, all of the Sacketts

1 calculations as to the penalties to which they would be
2 exposed if they continue to engage in their present
3 conduct were premised on the idea that 37,500 was the
4 statutory maximum. But the main point I want to --

5 JUSTICE SOTOMAYOR: Mr. Stewart --

6 JUSTICE KENNEDY: They were getting a good
7 night's sleep? They are getting a good night's sleep
8 before they read your brief?

9 (Laughter.)

10 MR. STEWART: I don't think that -- I guess
11 that's really my point, that the one thing the Sacketts
12 have never argued is: If it were just the 37,500 per
13 day for violating the statute, we would be willing to
14 build our house and take our chances, but once you
15 double that we are not willing to take the risk any
16 longer.

17 CHIEF JUSTICE ROBERTS: That's not their
18 argument today, either.

19 MR. STEWART: Right.

20 The one point before I move on that I do
21 want to make clear is, in a wide variety of contexts
22 agencies will issue warnings to regulated parties that
23 they are believed to be in violation of a statute. And
24 it is common under schemes where the amount of the
25 sanction is up to the judge's discretion that penalties

1 will -- may be greater for conduct that occurs after the
2 person has been warned.

3 JUSTICE KAGAN: Counsel, but those
4 situations are slightly different because the act
5 doesn't specify any specific remedies that apply to any
6 specific property. It just says: You violate the act
7 by filling in wetlands. It doesn't say that you violate
8 the act by not removing the fill and not planting trees
9 and not doing this or doing that. What it says is: You
10 violate the act if you don't comply with the compliance
11 order that tells you to do those things. So it's a very
12 theoretically violation that's going on.

13 One is in the affirmative act prohibited by
14 the statute; that's the violation of the statute. And
15 the other is the violation of the remedial steps that
16 the compliance order is the only thing that has set
17 forth.

18 MR. STEWART: I don't think that's correct,
19 Your Honor. First as to of the requirement in earlier
20 versions of the compliance order that herbaceous plants
21 be planted, et cetera, those were removed from --

22 JUSTICE KAGAN: But those are not in the
23 statute. They are permitted by the statute, but they're
24 not set forth as requirements under the statute.

25 MR. STEWART: EPA's view of the statute is

1 that without regard to the issuance of a compliance
2 order, once fill material is deposited in waters of the
3 United States EPA's view of the penalty provisions would
4 be that the violation continues for as long as the fill
5 remains in the wetlands.

6 JUSTICE KAGAN: That has nothing to do with
7 the fact that the act doesn't specifically tell you to
8 remove it.

9 MR. STEWART: The act doesn't
10 specifically -- and the act doesn't specifically tell
11 the person to remove it, but that's our interpretation
12 of the statute. And its either right or wrong. That
13 is, if we are wrong about that, if the only days on
14 which penalties can be assessed for violating the
15 statute itself are days on which fill was actually
16 discharged, then the provisions of the compliance order
17 that directed the Sacketts to remove the fill and
18 restore the property would be beyond the scope of a
19 proper compliance order under 13 --

20 CHIEF JUSTICE ROBERTS: Counsel, you
21 referred a couple of times to the EPA's view of the
22 statute. I take it that's your view as well?

23 MR. STEWART: That's our view as well. I'm
24 just saying that hasn't been definitively resolved by
25 this Court. But the position that we've taken again

1 with respect to the statute itself is that in computing
2 the daily penalties and asking how many days of
3 violation were there, the district court should take
4 into account not just the days on which fill was
5 actually deposited. But the days on which fill remained
6 in the wetlands.

7 And Petitioners have specifically expressed
8 agreement this morning with that view of the statute. I
9 think the view of the Petitioners' amici is to the same
10 effect, because in many of the amicus briefs there are
11 calculations of the very large penalties to which people
12 could be subject if they didn't adhere to compliance
13 orders and they are all premised on the idea that every
14 day fill remains in the wetlands --

15 JUSTICE SCALIA: What about those provisions
16 of the original order? I must say I was not edified by
17 the fact that when litigation was threatened or actually
18 brought the EPA modified its order: Oh, you don't have
19 to plant the trees. Does it do this as a matter of
20 practice, issue compliance orders that go well beyond
21 what the EPA would -- would demand?

22 MR. STEWART: I don't know about well
23 beyond. I think -- every version of the compliance
24 order said to the Sacketts: If you think that there are
25 things in here that are wrong or compliance measures

1 that you regard as infeasible, you are welcome to tell
2 us. And I think --

3 JUSTICE SCALIA: Well, that's very nice.

4 (Laughter.)

5 JUSTICE SCALIA: That's very nice, when you
6 have received something called a compliance order, which
7 says you are subject to penalties of 32.5 for every day
8 of violations.

9 MR. STEWART: I think the portion of the
10 order dealing with the planting of plants, which is the
11 primary one that was eliminated in the final iteration
12 of the order, is really removed from what the Sacketts
13 have been complaining about. That is, the Sacketts --

14 JUSTICE SCALIA: It shows the
15 high-handedness of the agency, it seems to me, putting
16 in there stuff that is simply not required by the EPA.

17 MR. STEWART: Well, I think in the main what
18 every version of the compliance order required was
19 appropriate if you accept the initial determination that
20 there was a violation that these were waters of the
21 United States.

22 CHIEF JUSTICE ROBERTS: What would you --
23 what would you do, Mr. Stewart, if you received this
24 compliance order? You don't think your property has
25 wetlands on it and you get this compliance order from

1 the EPA. What would you do?

2 MR. STEWART: Well, as we know from
3 documents that have -- were not in the record of the
4 case, but have been provided to --

5 CHIEF JUSTICE ROBERTS: If they weren't in
6 the record, I don't want to hear about them. You
7 appreciate that rule, that we don't consider things that
8 aren't in the record.

9 You get a compliance order, you don't think
10 your property has wetlands, what do you do?

11 MR. STEWART: I think at that stage your
12 options would be limited. You could apply for an after-
13 the-fact permit --

14 CHIEF JUSTICE ROBERTS: You wouldn't do
15 that, right? You know you will never get an
16 after-the-fact permit if the EPA has sent you a
17 compliance order saying you've got wetlands.

18 MR. STEWART: Or you could simply comply
19 with the compliance order at the cost of, it's been
20 estimated, \$27,000. Once the compliance order has been
21 resolved, there would be no further impediment --

22 CHIEF JUSTICE ROBERTS: That's what you
23 would do? You would say, I don't think there are
24 wetlands on my property but EPA does, so I'm going to
25 take out all the fill, I'm going to plant herbaceous

1 trees or whatever it is, and I will worry about whether
2 to -- that way, I'll just do what the government tells
3 me I should do.

4 MR. STEWART: It may be that the Sacketts at
5 that point were in an unattractive position. But I
6 think in determining whether it's an unfair position or
7 how the statutory scheme is supposed to operate we ought
8 to look not just at the opportunities that were
9 available to them at that moment but the opportunities
10 that they had forgone already?

11 JUSTICE SOTOMAYOR: Could I ask you --

12 JUSTICE ALITO: Mr. Stewart, if you related
13 the facts of this case as they come to us to an ordinary
14 homeowner, don't you think most ordinary homeowners
15 would say this kind of thing can't happen in the United
16 States? You don't -- you buy property to build a house.
17 You think maybe there is a little drainage problem in
18 part of your lot, so you start to build the house and
19 then you get an order from the EPA which says: You have
20 filled in wetlands, so you can't build your house;
21 remove the fill, put in all kinds of plants; and now you
22 have to let us on your premises whenever we want to.

23 You have to turn over to us all sorts of
24 documents, and for every day that you don't do all this
25 you are accumulating a potential fine of \$75,000. And

1 by the way, there is no way you can go to court to
2 challenge our determination that this is a wetlands
3 until such time as we choose to sue you.

4 MR. STEWART: Well, the first thing I would
5 say is as a matter of standard EPA practice the
6 compliance order would not be the first communication
7 from the agency that would alert the landowner to the
8 belief that there was a violation. The record in this
9 case does not make clear whether that agency practice
10 was followed in this case, but EPA's typical practice is
11 to alert landowners through prior communications that a
12 violation is existing.

13 JUSTICE ALITO: Well, so what? Somebody
14 from the EPA says we think that your backyard is a
15 wetlands, so don't build. So what -- what does the
16 homeowner do, having bought the property. Well, all
17 right, I'm just going to put it aside as a nature
18 preserve?

19 MR. STEWART: At the time that that sort of
20 letter is issued, there is no compliance order and there
21 is no impediment to an after-the-fact permit. That is,
22 at that point the landowner could ask for a permit.

23 CHIEF JUSTICE ROBERTS: In other words, what
24 the landowner is supposed to do -- the agency says,
25 because you didn't apply for a permit, you are in

1 trouble, because you didn't give us a chance to say
2 whether we were going to take away your constitutional
3 rights or not, so we can do it.

4 MR. STEWART: Well, the first two things I
5 would -- the first thing I would say is it's not simply
6 a hypothetical means of challenging CWA coverage to seek
7 a permit. That is, in both SWANCC, Solid Waste Agency
8 of Northern Cook County and Carabells, which was one of
9 the two companion cases that this Court adjudicated in
10 Rapanos, that was the way that the suit got into Federal
11 court.

12 The landowners applied for permits, they
13 were denied, they sought judicial review of the permit
14 denials and argued, inter alia, that there was no need
15 for a permit because the relevant tracts were not waters
16 of the United States.

17 The second thing I would say is it's often
18 the case that judicial review is contingent upon
19 complying with some sort of deadline or some sort of
20 prerequisite, and once a person has missed the deadline
21 that person may as a practical matter be in the same
22 position as if judicial review had not been made
23 available at all.

24 JUSTICE SCALIA: Suppose the Corps of
25 Engineers agrees that it is not a wetland and its basis

1 for refusing to issue the permit is: We don't give a
2 permit; you don't need a permit.

3 MR. STEWART: It would issue a letter either
4 to the effect that there was no wetland or that it was a
5 wetland that was not covered by --

6 JUSTICE SCALIA: Is that binding on the
7 Environmental Protection Agency?

8 MR. STEWART: Yes, we would --

9 JUSTICE BREYER: How can they bring an
10 action -- I would like some clarification here. The
11 Corps's regs say the Corps will accept an after-the-fact
12 permit. I mean one after -- if they applied tomorrow,
13 the day after getting this order, you would run up
14 against the reg, which says we won't give you any after
15 the fact, we won't even consider this matter, until any
16 required initial corrective measures are made.

17 And then, just to be safe, they say that no
18 permit application will be accepted unless the Corps
19 determines that concurrent processing of an
20 after-the-fact permit application is clearly
21 appropriate, "clearly."

22 So I looked at those two things and said:
23 Of course you can't apply to the Corps of Engineers;
24 they are not going to accept it unless you have a very
25 unusual case. So I expect you to tell me why I'm wrong

1 about that, if I am, or how many after-the-fact permit
2 applications has the Corps of Engineers accepted. Maybe
3 there are a lot.

4 MR. STEWART: It's not precluded, but I
5 would agree with you: It's very unlikely that without
6 complying with the order --

7 JUSTICE BREYER: All right, I agree. If we
8 agree then, look, for 75 years the courts have
9 interpreted statutes with an eye towards permitting
10 judicial review, not the opposite. And yet -- so here
11 you are saying that this statute that says nothing about
12 it precludes review, and then the second thing you say
13 is that this isn't final. So I read the order. It
14 looks like about as final a thing as I have ever seen.
15 So tell me why I am wrong on those two points.

16 MR. STEWART: Well, we are not arguing that
17 the statute precludes all judicial review. That is, the
18 question whether the Clean Water Act applied to this
19 tract could have been keyed up for a court in either of
20 two ways.

21 JUSTICE BREYER: You're arguing on the final
22 part --

23 JUSTICE KAGAN: You are arguing that the
24 presumption of reviewability does not apply.

25 MR. STEWART: To this particular order.

1 JUSTICE KAGAN: And that seems a very
2 strange position. Why would the presumption of
3 reviewability not apply?

4 MR. STEWART: First because the order
5 doesn't express the final -- the agency's final view
6 both in the sense that it invites the Sacketts to
7 provide further comment --

8 JUSTICE GINSBURG: But they asked for a
9 hearing. Didn't they ask EPA for a hearing on whether
10 their lands fell within the statute? They did ask for a
11 hearing and the EPA said no.

12 MR. STEWART: EPA said no to a formal
13 hearing, but I think that would be characteristic agency
14 practice. That is, when the agency is exercising what
15 is essentially its prosecutorial function, that is,
16 warning regulated parties we may do -- we may sue you if
17 you don't do the following things. It would be quite
18 common for enforcement personnel to entertain informal
19 overtures from the regulated party or his legal
20 representative, but I think it would be extraordinary,
21 for instance, for a U.S. Attorney's office to grant a
22 formal hearing to a potential criminal defendant in
23 order to discuss the -- in order to resolve the question
24 criminal charges should be brought. But --

25 JUSTICE GINSBURG: There's -- there's one

1 thing I do want you to tell us is, EPA has three
2 choices. It can go to compliance order; it can issue an
3 administrative -- trigger an administrative penalty
4 where there would be APA review; or it can bring an
5 enforcement action. How does the agency decide which of
6 those three routes it's going to take in a given case?

7 MR. STEWART: I think the admin -- the
8 agency's normal practice would be to issue an
9 administrative compliance order before initiating
10 judicial proceedings. That is, the statute doesn't
11 require it, but the EPA ordinarily would not commence a
12 lawsuit without first giving the regulated party one
13 final opportunity to come into compliance.

14 JUSTICE GINSBURG: What about this
15 administrative order that, the administrative order
16 internally within EPA subject to judicial review? When
17 does it use that as opposed to compliance order?

18 MR. STEWART: It could use that. It would
19 typically use that for violations that it perceived to
20 be less serious. The statutory cap on penalties is much
21 lower than the cap in the judicial enforcement actions.
22 I think it would probably be the case that it would
23 issue an administrative compliance order in those
24 situations as well.

25 Now, one of the things that the

1 administrative -- the cover letter to the administrative
2 compliance order does say is: Even if you comply, you
3 are still not immune from the possibility of enforcement
4 proceedings with respect to past violations.

5 JUSTICE SCALIA: Can -- can the EPA issue a
6 warning instead of using this order procedure?
7 Compliance order procedure?

8 MR. STEWART: Oh, absolutely. I mean, there
9 is no express statutory authorization for that, but I
10 think most agencies regard it as within their ordinary
11 authority to enforce the statute to send less formal
12 communication.

13 JUSTICE KAGAN: But doesn't most of--

14 JUSTICE SCALIA: So they can just dispense
15 with this compliance order and tell the Sacketts: In
16 our view, this is a warning; we believe you are in
17 violation of the act; and you will be subject to -- you
18 are subject to penalties of 37.5 per day for that
19 violation; and to remedy the violation, in our judgment,
20 you have to fill in and you have to plant, you know,
21 pine trees on the lot. It could do that.

22 MR. STEWART: They could use the letter for
23 that mechanism. And --

24 JUSTICE SCALIA: And there would be no
25 review of that.

1 MR. STEWART: We would certainly argue there
2 would be no review of that. And if the Court said that
3 there was review of the administrative compliance order
4 based on features that were distinct to the order,
5 namely, the fact that it is couched as an order, the
6 fact that penalties can be imposed for violation of the
7 order itself, an opinion along those lines wouldn't
8 suggest that.

9 JUSTICE BREYER: Is there anything you've
10 got by -- I mean, I'm -- You've got me now into the
11 area, we are applying the APA and the question is Abbott
12 Labs and is it final. Well, here there doesn't seem
13 anything more for the agency to do, and here the person
14 whom the order is directed against is being hurt a lot.
15 So the only thing I -- left in my mind here is the order
16 itself does say: Come in and talk to us about this.
17 Which may suggest it isn't final. So do you have any
18 information on that point? That is, have you looked up
19 or has the APA told you that really when we issue these
20 things, in fact people come in and modify them at X
21 percent of the time.

22 MR. STEWART: We don't have statistics on
23 that. Now--

24 JUSTICE BREYER: Is there any impression
25 that you could tell us?

1 MR. STEWART: I -- I would have the
2 impression that it's in a nontrivial number of cases,
3 the landowner does approach EPA. Now it's--

4 JUSTICE BREYER: Do --

5 MR. STEWART: I will say that the statistics
6 I do have are that only a very small percentage, you
7 know, a rough estimate somewhere on the order of 3% of
8 wetlands-related compliance orders under of the Clean
9 Water Act ultimately culminate into lawsuits for
10 enforcement.

11 JUSTICE KAGAN: But Mr. Stewart, you --

12 MR. STEWART: That would encompass both the
13 cases in which the landowners came in and talked to EPA
14 and those in which they just complied. I'm sorry.

15 JUSTICE KAGAN: Mr. Stewart, you suggested
16 that, that some communication occurs before this
17 compliance order. And my guess would be that most of
18 the back and forth between the agency and the person
19 does happen before the compliance order rather than
20 after.

21 And the notion that the person can come in
22 after the compliance order and say you were wrong, well
23 they can, but they can do that with respect to any
24 administrative action. So, am I wrong about that? That
25 really the back and forth here takes place before the

1 compliance order issues rather than after?

2 MR. STEWART: I think you are right as a
3 matter of typical agency practice that there would be an
4 invitation well before the compliance order was issued
5 to come in and give your side of the story, and you are
6 probably right that if we got to the point where a
7 compliance order was issued, then the likelihood that
8 further communications would sway the agency
9 substantially might be reduced. So I would take your
10 point there --

11 JUSTICE SOTOMAYOR: Mr. Stewart -- I'm
12 sorry, finish your answer.

13 MR. STEWART: So yes, I would agree with
14 that.

15 JUSTICE SOTOMAYOR: Your cut-off. You are
16 saying if we were troubled by the additional penalties,
17 and you were going to suggest something. If we were
18 troubled by that aspect of the order alone and you
19 haven't dealt with the permit issue after the fact, what
20 would be your approach to the case then?

21 MR. STEWART: Well, I guess the two things,
22 one of which may be more troubling rather than less
23 troubling, is to say that if you are troubled by this,
24 then there are a lot of other things that might be
25 troubling as well. Because it's often the case that

1 warnings are issued to regulated parties, and it's often
2 the case that if the regulated party continues with the
3 conduct after receiving the warning, the penalties may
4 be enhanced.

5 JUSTICE BREYER: This is not a warning. I
6 mean, you only have to look at it. I was quite moved by
7 the fact when I looked at it, it didn't say a warning.
8 It said: This is an order. It looks extremely formal.
9 I even overstated in your favor the question of
10 negotiating because it doesn't say negotiating about
11 changing the order; it says negotiating about amending
12 the order. And --so this is not just a warning, is it?

13 MR. STEWART: It-- it is not -- it is
14 phrased as an order. But the only thing that EPA is
15 authorized to do under section 1319(a)(3) is to order
16 people to do what they were already legally complied--
17 required to do. That is, order them to comply with
18 their legal obligations.

19 JUSTICE SCALIA: Can't you usually obtain a
20 declaratory judgment if prosecution is threatened and
21 you think that there is no basis for it, and you
22 can't -- you are not -- you're not compelled to just
23 stand there and wait for the prosecutor to, to drop the
24 hammer? Can't you normally bring a declaratory judgment
25 action, saying there is no basis for prosecution?

1 MR. STEWART: There is no-- the Court has
2 held that there is no constitutional bar to that, and
3 that a declaratory judgment remedy can be made available
4 in that circumstance. But, again, I think it would
5 cause a huge upheaval in the practices of many agencies
6 to say that declaratory relief is typically available
7 when the agency issued an informal warning.

8 JUSTICE SCALIA: Well, in those-- maybe with
9 an informal warning, but when you have something as
10 formal as this which shows that the agency does intend
11 to prosecute, why wouldn't you be able to bring a
12 declaratory judgment action?

13 MR. STEWART: Again, I don't think there
14 would be any value to agencies or to regulated parties
15 to encourage the agencies to hedge their bets or to say
16 less than what they really mean. That is--

17 JUSTICE BREYER: The more -- that's what I
18 am trying to get you to talk about just for one minute.
19 You are talking about a huge upheaval. My honest
20 impression is that it is the government here that is
21 fighting 75 years of practice because -- because the
22 issue is the Abbott Labs issue of finality. And of
23 course a warning isn't reviewable. But this seems to
24 meet the test where that fails. Now please correct me
25 if I am wrong about the agency practice. I can't find

1 support for you on that.

2 MR. STEWART: The Court in Abbott Labs
3 emphasized that that was an industry-wide regulation
4 having the force of law and that the basis for
5 challenging it was a purely legal ground. And one of
6 the reasons that we think judicial review of the
7 administrative compliance order within this scheme would
8 make no sense, would be out of keeping with the rest of
9 the statutory regime, is that it wouldn't solve the
10 problem.

11 As the discussion in the first part of the
12 argument made clear, petitioners share our view that the
13 administrative compliance order would be subject to
14 review if it's reviewable under a deferential standard.
15 And if the Court held that the order was not arbitrary
16 and capricious, that still wouldn't eliminate the
17 possibility that if we pursued an enforcement action the
18 Petitioners could argue that they were actually in
19 violation.

20 JUSTICE GINSBURG: But how would it work if
21 you say it's lesser standard under the APA? But the
22 question is, is this wetlands or is it not?

23 MR. STEWART: It's more than just is it
24 wetlands. It's are these wetlands that have the
25 requisite connection to traditional navigable waters.

1 And that can turn in part on factual and scientific
2 judgments.

3 JUSTICE GINSBURG: But as far -- as far as
4 the EPA is concerned, they are finished with that
5 question. This is not something that, well, we might
6 look at it again tomorrow based on new evidence. The --
7 the determination that these are qualifying wetlands,
8 that has been made?

9 MR. STEWART: I think they have reached that
10 conclusion for now. I don't think it would be accurate
11 to say that we have done all the research we would want
12 to do if we were going to be required to prove up our
13 case in court. And that's really the second half of
14 the -- the problem, that if Petitioners claim were
15 reviewable and a court held EPA didn't do sufficient
16 investigation based on the record before it at the time,
17 there was no sound basis --

18 JUSTICE ALITO: Well, that makes the EPA's
19 conduct here even more outrageous. We -- we think now
20 that this is -- these are wetlands that -- that qualify,
21 so we're going to hit you with this compliance order,
22 but, you know, when we look into it more thoroughly in
23 the future, we might change our mind?

24 MR. STEWART: I -- I would assume that any
25 prosecutor, any enforcement person, would want to be

1 better prepared when a case actually went to trial than
2 when he was communicating to the potential defendant
3 that there's a real likelihood that we would sue you.
4 But the other --

5 JUSTICE SOTOMAYOR: But you're required to
6 make a finding that there's a violation. You're not
7 suggesting that the government is going to act
8 willy-nilly and not going to act on sufficient evidence
9 in just -- in sending a letter that says "we find you
10 are violating the act."

11 MR. STEWART: Obviously, we would feel that
12 we had sufficient evidence for doing that. But the
13 second part of the point that I was going to make is,
14 even if a court found that we didn't have sufficient
15 evidence before us at the time the administrative
16 compliance order was issued, and that the order was
17 therefore arbitrary and capricious, that wouldn't
18 provide the Sacketts the protection that they needed,
19 because that wouldn't foreclose EPA from --

20 CHIEF JUSTICE ROBERTS: Well -- that's
21 right. In other words, you hope you have -- you've
22 looked at it, you hope you have a sufficient basis. And
23 because of the administrative compliance order, you're
24 really never going to be put to the test, because most
25 land owners aren't going to say, I'm going to risk the

1 \$37,000 a day. All EPA has to do is make whatever
2 finding it wants, and realize that in 99 percent of the
3 cases, it's never going to be put to the test.

4 MR. STEWART: I -- I guess the only point I
5 would make is, if Petitioners had wanted a judicial
6 resolution of the coverage question without subjecting
7 themselves to potential penalties, they could have filed
8 a permit application before discharging, they could have
9 gotten review there. All we're saying is they can't
10 discharge fill, wait to see whether EPA notices, and
11 then insist upon immediate judicial review if EPA
12 notices and objects.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Schiff, you have four minutes remaining.

15 REBUTTAL ARGUMENT OF DAMIEN M. SCHIFF

16 ON BEHALF OF THE PETITIONERS

17 MR. SCHIFF: Mr. Chief Justice, unless the
18 Court has any additional questions --

19 JUSTICE BREYER: I do, actually, because I
20 see their point better than I did. This is -- is I
21 think they are worried about. They're worried that when
22 you get judicial review of this kind of order, the Court
23 doesn't refer on fact-finding that isn't made on a
24 record. The substantial evidence test applies to
25 fact-finding made on a record, or a 556/557. And so

1 they'll have a hard time -- or a harder time -- in each
2 of these cases subjecting it to judicial fact-finding.

3 And they think that the purpose of this, the
4 purpose of this procedure given to them by statute was
5 to call it -- the shots in favor of them, because there
6 might be thousands of these things and they can't
7 prepare all that formal thing. Now, I -- I see that as
8 a -- as a -- now I understand their concern. I'm not
9 saying they're right. I understand their concern.

10 So if you want to comment, is there some way
11 to accommodate their concern that also accommodates
12 judicial review, or are we just in a kind of -- they're
13 in a Hobson's choice, in a sense.

14 MR. SCHIFF: Well, Justice Breyer, the
15 difficulty is essentially of EPA's own creation. I
16 don't understand why -- why EPA would want the power to
17 issue compliance orders that, as the Court has
18 recognized, are -- are tremendously coercive. And that
19 has --

20 JUSTICE BREYER: They want the power because
21 they have thousands of these things. They investigate
22 it, and they find the facts. They think it's sufficient
23 that judicial fact-finding is carried out before a judge
24 who doesn't have their experience, et cetera. And
25 therefore, there is a risk of incorrect decision-making,

1 at least two -- under the statute, it would be too
2 pro-homeowner rather too pro-environment. That's why it
3 is more of a dilemma than I thought.

4 MR. SCHIFF: I think, Justice Breyer, the
5 fear of it being too pro-homeowner is in fact protected
6 by the fact of the APA standard of review. We're not
7 talking about -- about the agency being forced to sort
8 of a --

9 JUSTICE SCALIA: Yes, but maybe the agency
10 is only entitled to deference when in fact it has made a
11 record. When it hasn't made a record, maybe there's no
12 reason to give it deference.

13 MR. SCHIFF: You're correct, Justice Scalia.
14 If there is no record, certainly there's by necessity no
15 substantial evidence, and in that case, the compliance
16 order would be --

17 JUSTICE BREYER: Well, they -- they might --
18 the might change their -- their system here if you -- if
19 you win this, and provide for various kinds of preorder
20 procedure or post-order procedure where they would be
21 open to change. I see a number of possibilities.

22 JUSTICE SCALIA: But then -- they'll just
23 issue warnings is what they'll do.

24 JUSTICE KENNEDY: Are there cases in the
25 courts of appeals or the district courts where

1 landowners, having received these notices or compliance
2 orders, are said that there's a taking of the property,
3 inverse condemnation?

4 MR. SCHIFF: I'm not aware of that, Your
5 Honor, but -- Justice Kennedy -- but -- as this Court I
6 believe held in *Riverside Bayview*, a takings claim under
7 the Clean Water Act is not considered ripe until a
8 permit application has been -- has been attempted.

9 Now, if a compliance order is issued, then
10 the permit application might be off the table. And in
11 fact, one can see that a compliance order might
12 potentially have a total taking effect in this case.
13 But certainly at this point, we are willing to let EPA
14 have the power. Yes, let EPA administer the act and
15 issue compliance orders. But let's also give homeowners
16 a fair shake, too. Let them have their day in court to
17 contest what the agency has done.

18 JUSTICE KAGAN: Mr. Schiff, I take it that
19 the government agrees that there's not much of a chance
20 that you could get an after-the-fact permit, but its
21 view is you should have gotten a before-the-fact permit.
22 And putting aside the weirdness which Justice Scalia
23 points out of making you go get a permit for something
24 you don't think you need a permit for -- putting that
25 aside, couldn't you have gotten the legal determination

1 that you wanted through that process?

2 MR. SCHIFF: We -- Justice Kagan, we don't
3 deny that by applying for a permit and having the Corps
4 make a decision on the permit that that's one way to get
5 into court. But the difficulty for the Sacketts and for
6 the thousands of folks in this country who are
7 recipients of compliance orders is that that's small or
8 no solace once EPA has already acted. You know, once
9 EPA has made the finding of violation and then threatens
10 these ruinous penalties on landowners.

11 JUSTICE KAGAN: Well, I think what EPA is
12 saying was, as long as you knew that your lands were
13 potentially wetlands, you could have gone in from the
14 get-go and -- and sought a determination that they were
15 not wetlands through the permit process.

16 MR. SCHIFF: That's correct, Justice Kagan.
17 But frankly, the way EPA and the Corps interpret the
18 scope of their jurisdiction, that would make essentially
19 every landowner in this country potentially on notice
20 requiring them to apply for a permit or some other
21 manner and the agency would then probably have even a
22 worse situation; it would be flooded by permits.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Counsel.

25 The case is submitted.

1 (Whereupon, at 11:04 a.m., the case in the
2 above-entitled matter was submitted.)

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17
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19
20
21
22
23
24
25

A				
Abbott 45:11	24:21 25:2,3	49:5,14,15	answer 14:24	19:1 45:1 50:18
49:22 50:2	40:10 43:5	agency 1:6 3:5	21:24 47:12	argued 31:12
able 22:8 49:11	46:24 48:25	3:12 5:23 6:19	answered 24:16	39:14
above-entitled	49:12 50:17	7:19 10:21	anyway 24:19	arguing 6:18
1:12 58:2	actions 4:8 7:19	12:19,20 13:22	APA 5:25 6:16	41:16,21,23
absolutely 44:8	43:21	14:17 17:21	6:22,24 7:1,6	argument 1:13
accept 35:19	actual 20:25	18:7 21:3,9	8:9 15:5 17:9	2:2,5,8 3:3,7
40:11,24	add 4:17	22:3 29:15	17:14,20 18:7	7:2 8:10 25:21
accepted 40:18	addition 8:17	35:15 38:7,9,24	18:17,23 19:9	31:18 50:12
41:2	11:22 19:19	39:7 40:7 42:13	19:22 20:12	53:15
accommodate	additional 4:13	42:14 43:5	22:15 24:10,14	Army 11:15
54:11	7:25 14:1 28:22	45:13 46:18	24:21 25:2,3	12:20 14:8
accommodates	30:3 47:16	47:3,8 49:7,10	43:4 45:11,19	articulating 6:15
54:11	53:18	49:25 55:7,9	50:21 55:6	aside 38:17
account 34:4	adequacy 8:8,8	56:17 57:21	appeals 4:23	56:22,25
accumulating	adequate 15:1	agency's 18:2	55:25	asked 24:13 29:7
37:25	adhere 34:12	22:18 42:5 43:8	APPEARANC...	42:8
accurate 26:23	adjudicated 39:9	ago 3:12	1:15	asking 34:2
27:1 51:10	adjudication	agree 19:18 41:5	application 12:2	aspect 47:18
accurately 27:10	12:13 15:2	41:7,8 47:13	40:18,20 53:8	assembled 25:6
achieve 26:8	admin 43:7	agreement 34:8	56:8,10	assertion 24:11
27:3,12	administer 56:14	agrees 39:25	applications 41:2	27:20
acknowledged	administrative	56:19	applied 9:3 39:12	assessed 33:14
26:13	3:24 5:24 8:1	AL 1:7	40:12 41:18	assume 19:9
act 3:14,24 4:3	14:17,23 15:1,2	alert 38:7,11	applies 53:24	51:24
5:15,19,24	20:16 43:3,3,9	alia 39:14	apply 8:23,25	assuming 20:7
14:23 15:1 21:1	43:15,15,23	Alito 14:5,13	14:6,8 17:11	25:10
27:1,12,15,23	44:1,1 45:3	16:8,15 28:15	32:5 36:12	attach 17:17
29:23 32:4,6,8	46:24 50:7,13	28:18,19 29:2	38:25 40:23	attached 30:4
32:10,13 33:7,9	52:15,23	37:12 38:13	41:24 42:3	attempted 56:8
33:10 41:18	adopt 6:12	51:18	57:20	Attorney's 42:21
44:17 46:9 52:7	adopted 16:9	alleged 3:15 12:7	applying 9:24	attributable 4:5
52:8,10 56:7,14	28:20,20,24	19:5	12:8 14:10	9:10
acted 15:6 57:8	affirmative	allow 12:5 21:21	45:11 57:3	authority 24:11
action 5:23 6:19	32:13	24:20 26:14	appreciate 36:7	28:5,6 44:11
7:6,23 8:10	afforded 17:21	allowed 13:11	approach 46:3	authorization
10:21 12:19,20	after-the-fact	24:19	47:20	44:9
14:17 16:25	8:24 9:1,3,24	allowing 7:5	appropriate 9:4	authorize 26:24
17:5,8,9,13,15	11:5 12:2,14	13:10 22:5	35:19 40:21	authorized 26:25
17:22 18:7	36:16 38:21	altering 26:3	arbitrary 15:9,15	48:15
19:12,21,24	40:11,20 41:1	amending 48:11	15:16,25 16:13	automatically
20:15 21:20	56:20	amici 34:9	17:1 50:15	13:20
22:4,23 23:10	agencies 13:25	amicus 34:10	52:17	available 37:9
23:20 24:3,10	28:12 30:9	amount 9:7 31:24	area 45:11	39:23 49:3,6
	31:22 44:10	analysis 8:4	argue 9:16 18:22	averages 11:7

<p>avoidance 22:4 aware 27:25 30:17 56:4 a.m 1:14 3:2 58:1</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back 17:23 18:14 19:8 46:18,25 backyard 38:14 balance 22:12 25:18 bar 49:2 based 15:10 20:13 45:4 51:6 51:16 basis 17:1 39:25 48:21,25 50:4 51:17 52:22 battle 16:17 Bayview 56:6 before-the-fact 56:21 begins 24:1 behalf 1:17,19 2:4,7,10 3:8 25:22 53:16 belief 38:8 believe 5:23 6:15 7:4 8:4 10:25 11:24 16:17 19:2 27:2,11 44:16 56:6 believed 31:23 believes 26:6,7 Bennett 8:5 best 24:9 bet 30:20 bets 49:15 better 21:14 24:10 52:1 53:20 beyond 33:18 34:20,23 binding 40:6 bizarre 14:13</p>	<p>bought 38:16 Breyer 26:19 40:9 41:7,21 45:9,24 46:4 48:5 49:17 53:19 54:14,20 55:4,17 brief 4:18 7:20 12:1 26:13 28:11 30:24 31:8 briefs 34:10 bring 7:23 16:25 17:4,9 23:10,20 40:9 43:4 48:24 49:11 brings 8:9 17:15 22:23 brought 34:18 42:24 build 16:20 20:16 21:16 23:16 24:1,6,19 31:14 37:16,18,20 38:15 building 6:20 burden 11:12 21:3 22:24 buy 37:16</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 calculations 31:1 34:11 California 1:16 call 54:5 called 15:5 35:6 calls 21:10 candor 26:12 canon 22:4 cap 29:19 43:20 43:21 capricious 15:9 15:16,16,25 16:13 17:1</p>	<p>50:16 52:17 Carabells 39:8 care 9:15 12:24 carried 54:23 case 3:4 6:6 7:18 20:12 25:3 27:25 29:8 30:17 36:4 37:13 38:9,10 39:18 40:25 43:6,22 47:20 47:25 48:2 51:13 52:1 55:15 56:12 57:25 58:1 cases 9:22 39:9 46:2,13 53:3 54:2 55:24 cause 7:6 16:6 17:9 24:10,21 25:2,3 30:7 49:5 caused 10:11,21 certainly 9:8 16:2 18:7 45:1 55:14 56:13 cetera 32:21 54:24 challenge 5:25 10:13 24:22 38:2 challenging 25:11,16 39:6 50:5 chance 39:1 56:19 chances 31:14 change 5:8,9 8:4 51:23 55:18,21 changing 48:11 Chantell 1:3 3:11 characteristic 42:13 charged 16:21 charges 42:24</p>	<p>charging 3:13 Chief 3:3,9 7:21 8:3,7,17 9:6 11:14 17:10,19 17:23 18:5,14 19:16 25:17,19 25:23 27:18,22 28:3,18 31:17 33:20 35:22 36:5,14,22 38:23 52:20 53:13,17 57:23 choice 54:13 choices 43:2 choose 38:3 Circuit 5:9 19:15 19:23 circumstance 49:4 citation 6:9 cites 11:25 civil 3:18 5:10 6:20-17:8 19:21 19:24 20:15 21:17 22:23 23:10,23 24:3 27:4,5 29:20,23 claim 25:2 51:14 56:6 clarification 40:10 clarify 24:20 26:1 29:1 clause 3:23 17:2 Clean 3:14 41:18 46:8 56:7 clear 21:2 31:21 38:9 50:12 clearly 9:4 40:20 40:21 clients 4:11 cloud 23:14,15 24:7,7 coercive 54:18 coerciveness 9:9</p>	<p>collateral 17:10 collecting 23:22 combination 22:2 come 6:17 8:9 23:16 37:13 43:13 45:16,20 46:21 47:5 comes 24:2 commence 43:11 comment 42:7 54:10 common 28:11 31:24 42:18 communicating 52:2 communication 38:6 44:12 46:16 communications 38:11 47:8 companion 39:9 compelled 48:22 complaining 35:13 complaint 15:13 compliance 3:13 3:22 4:1,6,9,13 4:20,22,25 5:3 5:6,11,22,22 5:25 6:18 7:18 8:2,18,19,22 9:2,10,13 10:9 10:10,14,20 12:3,5,12,18 12:21 13:19,21 14:3,15,19 15:3 16:6 17:12 19:3 19:10 20:14,24 21:10,11,23 22:1,9,11 23:11 23:19 25:6,10 25:12 26:2,5,8 26:10,17 27:3,9 27:12,23 28:23 29:11,14 32:10</p>
---	--	---	--	---

<p>32:16,20 33:1 33:16,19 34:12 34:20,23,25 35:6,18,24,25 36:9,17,19,20 38:6,20 43:2,9 43:13,17,23 44:2,7,15 45:3 46:8,17,19,22 47:1,4,7 50:7 50:13 51:21 52:16,23 54:17 55:15 56:1,9,11 56:15 57:7 complied46:14 48:16 comply 3:18 7:23 12:4 16:22 17:4 29:18,22,25 32:10 36:18 44:2 48:17 complying 39:19 41:6 computing 34:1 concede 4:19 conceded8:21 9:18 conceding 25:9 concern 54:8,9 54:11 concerned51:4 concerns 21:24 conclusion51:10 concurrent 40:19 condemnation 56:3 condition 3:16 conditions 18:21 conduct 31:3 32:1 48:3 51:19 Congress 14:25 21:20 22:1,8,9 Congress's 22:6 connected24:25 connection 18:9</p>	<p>50:25 consider9:22 36:7 40:15 considered23:24 56:7 consistent 19:14 constitutional 39:2 49:2 contend 18:8,10 contest56:17 contesting 17:1 context 10:10,20 12:14 18:19 20:13 contexts 31:21 contingent 39:18 continue 17:3 29:12 31:2 continues 33:4 48:2 continuing 23:12 23:24 convert 16:20 Cook 39:8 copy 17:17 Corps 9:4,24 10:16,24 11:16 12:20 13:17 14:8 39:24 40:11,18,23 41:2 57:3,17 Corps's 40:11 correct 5:4 6:25 7:3,16 9:19 13:12 18:4 22:19 25:14,15 30:13 32:18 49:24 55:13 57:16 corrective 40:16 cost 24:5 36:19 couched45:5 counsel 25:19 32:3 33:20 53:13 57:23,24</p>	<p>country 57:6,19 County 39:8 couple 33:21 course 3:25 9:7 10:21 18:11 21:7 22:13 40:23 49:23 court 1:1,13 3:10 4:23 5:5 6:6 10:23 11:3 16:23 17:3,14 21:18 22:5 25:24 26:13 28:1 33:25 34:3 38:1 39:9,11 41:19 45:2 49:1 50:2,15 51:13 51:15 52:14 53:18,22 54:17 56:5,16 57:5 courts 29:5,9 41:8 55:25,25 Court's 8:4 cover44:1 coverage 39:6 53:6 covered40:5 create 19:14,25 creates 21:4 creating 6:16 creation 54:15 criminal42:22 42:24 critical 12:11 culminate 46:9 culpability 29:12 currently 13:7 cuts 11:17 cut-off 47:15 CWA 39:6</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 daily 4:1 34:2 DAMIEN 1:16</p>	<p>2:3,9 3:7 53:15 Damoclean 23:8 date 21:17 day 3:17 4:11 7:22 8:2,14 9:21 10:6 16:21 16:22 21:18 22:5 26:15,16 29:8,20 30:18 31:13 34:14 35:7 37:24 40:13 44:18 53:1 56:16 days 33:13,15 34:2,4,5 deadline 39:19 39:20 dealing 35:10 dealt 47:19 decide 13:13 14:9 43:5 decided22:17 decides 23:20 decision 13:5 17:17 57:4 decision-making 54:25 declaratory 48:20,24 49:3,6 49:12 defendant 42:22 52:2 deference 17:21 18:1 22:17,25 55:10,12 deferential 50:14 definitively 33:24 demand 34:21 denials 39:14 denied39:13 deny 57:3 Department 1:19 deposited33:2 34:5</p>	<p>deprivation 10:11 11:12 13:6 deprived12:4 Deputy 1:18 determination 13:22 16:12 17:12 18:2 22:18 24:15,23 35:19 38:2 51:7 56:25 57:14 determines 40:19 determining 15:6 16:10 37:6 dice 23:4,6 different 14:17 17:20 19:20 20:15 32:4 differently 21:21 differing 20:17 difficult 8:23 9:17,22 16:11 16:16 20:11 difficulty 10:7 13:4,23 16:3 21:5 54:15 57:5 dilemma 55:3 directed33:17 45:14 discharge 23:23 53:10 discharged33:16 discharging 53:8 discretion 31:25 discuss 42:23 discussed28:11 discussion 50:11 disobey 7:11 dispelled24:7 dispense 44:14 dispute 5:15 30:5 distinct 5:10 45:4 distinction 7:8,18 distinguish28:9</p>
--	---	--	---	---

distinguishes 29:15	enforce 7:24 23:10 44:11	EPA's 23:12 24:11 32:25	extraordinary 42:20	33:17 34:4,5,14 36:25 37:21
district 28:1 29:9 34:3 55:25	enforcement 6:13 8:10 17:5 17:13,15 19:12	33:3,21 38:10 51:18 54:15	extremely 48:8	44:20 53:10
documents 36:3 37:24	21:20 23:20 28:12 42:18	ESQ 1:16,18 2:3 2:6,9	eye 41:9	filled 37:20
doing 30:10 32:9 32:9 52:12	43:5,21 44:3 46:10 50:17	essentially 4:6 4:19 42:15	<hr/> F <hr/>	filling 30:1 32:7
dollars 3:17	51:25	54:15 57:18	fact 4:17 5:8,9 8:5,12 9:11	final 6:19 22:3 35:11 41:13,14
double 4:7 10:12 26:1,15 27:6,20 30:12 31:15	engage 31:2	establish 17:16 20:1	11:10 12:17 16:5 19:19,23	41:21 42:5,5 43:13 45:12,17
doubled 8:12	Engineers 10:17 11:16 14:8	estimate 46:7	33:7 34:17 40:15 45:5,6,20	finality 8:4 49:22
doubt 28:4,4	39:25 40:23 41:2	estimated 36:20	47:19 48:7 55:5 55:6,10 56:11	finally 22:23
drainage 37:17	enhanced 48:4	estoppel 17:11 20:4,7,10,12	factors 9:8,9	find 20:18 49:25 52:9 54:22
drop 23:10 48:23	enjoy 24:5	et 1:3,7 32:21 54:24	facts 22:18 37:13 54:22	finding 5:7 15:11 18:17 25:7,12
dual 21:4	entertain 12:1 42:18	evidence 15:10 18:6 19:21,22	factual 18:12 20:8,18 22:15	52:6 53:2 57:9
due 3:23 7:5	entirely 12:19 14:16,17 30:25	20:1 51:6 52:8 52:12,15 53:24	51:1	findings 20:8
duty 26:12	entitled 55:10	55:15	fact-finding 22:25 53:23,25	fine 4:1,4 7:15 8:5 9:7 37:25
D.C 1:9,19	Environmental 1:6 3:5,12	evil 9:21	54:2,23	finer 3:18 4:12 8:12 9:10,15,18
<hr/> E <hr/>	29:22 40:7	exactly 7:16 11:15 14:12	fail 17:3	9:18
E 2:1 3:1,1	EPA 4:17 7:19 8:21 10:15	15:19 26:2	fails 49:24	finish 47:12
earlier 24:13 32:19	11:25 12:5 14:3 14:15 15:6,11	example 8:21	failure 29:18,22 29:24	finished 13:3 51:4
edified 34:16	16:4,5 17:4,6 17:15 20:25	exercise 26:12	fair 56:16	fire 6:9 7:9
effect 4:6 28:25 34:10 40:4	22:1,8,22,24 23:9,20,21 24:3	exercising 42:14	far 6:15 18:21 51:3,3	first 3:4 5:7 25:2 27:24 30:22
56:12	25:6 26:6,7 27:2,10 34:18	existence 4:20 8:22	favor 22:3 48:9 54:5	32:19 38:4,6 39:4,5 42:4
effects 8:19,20	34:21 35:16 36:1,16,24	existing 38:12	feature 29:14	43:12 50:11
either 31:18 33:12 40:3	37:19 38:5,14 42:9,11,12 43:1	expect 40:25	features 45:4	fit 6:12 25:1
41:19	43:11,16 44:5 46:3,13 48:14	expense 9:25	Federal 11:3 25:1 39:10	fix 6:8
elements 20:2	51:4,15 52:19 53:1,10,11	expensive 12:6	feel 52:11	floated 30:23
eligible 11:9	54:16 56:13,14 57:8,9,11,17	experience 54:24	feature 29:14	flooded 57:22
eliminate 50:16		express 31:2	features 45:4	folks 57:6
eliminated 35:11		expressed 34:7	Federal 11:3 25:1 39:10	follow 27:18,19
emphasize 7:4		extends 6:15	fell 42:10	followed 38:10
emphasized 50:3		extent 18:20 21:7	fight 15:15	following 27:11 27:14 42:17
employed 20:23		extortion 8:11	fighting 49:21	force 14:14 50:4
encompass 46:12			filed 53:7	forced 55:7
encourage 49:15			filing 17:7	foreclose 52:19
enduring 11:13 13:7			fill 10:1 13:18 32:8 33:2,4,15	foregoing 29:18 29:25

<p>forever 23:14,19 forgone 37:10 formal 42:12,22 44:11 48:8 49:10 54:7 forth 7:20 30:1 32:17,24 46:18 46:25 forward 7:6 19:24 found 19:10 52:14 four 53:14 frankly 10:22 14:24 21:14 57:17 fully 12:4 function 42:15 further 24:14 36:21 42:7 47:8 future 51:23</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 general 1:18 6:10,11 getting 12:24 31:6,7 40:13 get-go 57:14 Ginsburg 4:23 5:5,13 15:4,8 23:18,21 24:13 24:21 42:8,25 43:14 50:20 51:3 give 6:9 11:16 18:1 28:12 30:9 39:1 40:1,14 47:5 55:12 56:15 given 16:8,8 29:17 43:6 54:4 giving 22:17 43:12 go 6:7 7:6 8:7</p>	<p> 12:12 14:14 15:15,17 18:14 19:12 22:16 34:20 38:1 43:2 56:23 goes 12:20 19:24 going 6:9 11:1,23 12:1 14:8 16:1 19:8 20:15 22:14,16 26:21 30:20 32:12 36:24,25 38:17 39:2 40:24 43:6 47:17 51:12,21 52:7,8,13,24 52:25,25 53:3 good 15:23 31:6 31:7 gotten 53:9 56:21,25 government 26:13 37:2 49:20 52:7 56:19 grant 42:21 greater 28:1 29:10,12 30:7 30:18 32:1 ground 14:7 50:5 guarantee 10:22 guaranteed 3:23 guess 17:23 28:7 29:1,6 31:10 46:17 47:21 53:4</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 51:13 hammer 48:24 hanging 24:7 happen 37:15 46:19 happens 19:11 hard 10:5,6 11:20 54:1</p>	<p>harder 54:1 harm 10:22 health 6:7,17 hear 3:3 36:6 hearing 42:9,9 42:11,13,22 hedge 49:15 held 4:8 5:5,10 19:15 49:2 50:15 51:15 56:6 helps 26:1 herbaceous 32:20 36:25 higher 8:24 high-handedne... 35:15 hit 10:6 51:21 Hobson's 54:13 hold 20:25 holding 6:4 home 6:19 16:20 21:16 23:17 24:1,6,19 homeowner 37:14 38:16 homeowners 37:14 56:15 honest 49:19 Honor 5:20 10:19 11:7 32:19 56:5 hope 16:2 52:21 52:22 hoping 11:18 house 30:21 31:14 37:16,18 37:20 huge 49:5,19 hurt 45:14 hypothetical 39:6</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 31:3 34:13</p>	<p>ideal 21:13 imagine 20:12 immediate 53:11 immediately 3:18 16:22 30:1 immune 44:3 impact 8:11 13:5 impediment 36:21 38:21 importantly 11:10 impose 22:23 imposed 6:20 7:22 10:12 28:1 30:17 45:6 imposes 8:18 imposing 3:16 29:10 impression 45:24 46:2 49:20 inapt 14:2 includes 29:25 inconsistent 4:9 incorporated 5:21 incorrect 54:25 increased 28:8 incur 9:25 independent 4:24 8:17,20 independently 9:12 indication 14:25 indirect 14:18 industry-wide 50:3 infeasible 35:1 informal 42:18 49:7,9 information 45:18 informed 18:12 initial 35:19 40:16 initiate 9:12</p>	<p> 14:16 21:23 initiating 43:9 injured 14:3,15 insist 53:11 inspections 7:9 inspector 6:17 inspectors 6:7,9 7:10 instance 42:21 intend 49:10 intended 14:25 26:5 intent 22:7 inter 39:14 interminable 23:7 internally 43:16 interpret 57:17 interpretation 33:11 interpreted 41:9 interprets 23:22 invalidated 19:3 inverse 56:3 investigate 54:21 investigation 51:16 invitation 47:4 invites 42:6 issuance 15:13 33:1 issue 10:18,20 11:2,23 13:8 16:6 17:25 18:2 21:2 22:1,8 31:22 34:20 40:1,3 43:2,8 43:23 44:5 45:19 47:19 49:22,22 54:17 55:23 56:15 issued 3:13 7:13 9:2 20:14 25:6 29:12 38:20</p>
--	---	--	--	---

47:4,7 48:1 49:7 52:16 56:9 issues 20:24 47:1 iteration 35:11	21:8,24 22:13 22:20,21 23:3,6 23:18,21 24:9 24:13,20 25:9 25:14,17,19,23 26:19 27:17,18 27:22 28:3,10 28:15,16,17,18 28:18,19 29:2 29:16 30:11,14 30:20 31:5,6,17 32:3,22 33:6,20 34:15 35:3,5,14 35:22 36:5,14 36:22 37:11,12 38:13,23 39:24 40:6,9 41:7,21 41:23 42:1,8,25 43:14 44:5,13 44:14,24 45:9 45:24 46:4,11 46:15 47:11,15 48:5,19 49:8,17 50:20 51:3,18 52:5,20 53:13 53:17,19 54:14 54:20 55:4,9,13 55:17,22,24 56:5,18,22 57:2 57:11,16,23	keep 30:10 keeping 50:8 Kennedy 6:3,14 6:23 7:1,3 8:25 13:19,24 18:16 18:25 28:10 31:6 55:24 56:5 keyed 41:19 kind 5:13 11:20 37:15 53:22 54:12 kinds 37:21 55:19 knew 57:12 know 7:23 9:20 10:6,25 16:4 18:1 22:13 23:1 29:7 34:22 36:2 36:15 44:20 46:7 51:22 57:8 knows 23:11	left 45:15 legal 8:19,20 17:25 18:2 20:7 20:20 26:3,14 27:24 42:19 48:18 50:5 56:25 legally 48:16 lesser 50:21 letter 38:20 40:3 44:1,22 52:9 letting 30:1 let's 19:9 25:5 56:15 liability 4:7,21 4:24 5:6,11 6:21 7:12 8:18 8:20 10:12 11:17 liable 4:8 5:10 21:1 likelihood 47:7 52:3 limit 15:20 limitation 23:18 23:25 limitations 23:13 23:22,25 limited 36:12 lines 45:7 litigate 11:3 litigation 34:17 little 37:17 long 11:4 23:11 23:23 33:4 57:12 longer 31:16 look 25:4,5 37:8 41:8 48:6 51:6 51:22 looked 40:22 45:18 48:7 52:22 looks 41:14 48:8 lose 16:1 17:13	18:24 22:21 lost 23:3 lot 8:14 10:6 37:18 41:3 44:21 45:14 47:24 lower 43:21
<hr/> J <hr/> January 1:10 judge 54:23 judge's 31:25 judgment 44:19 48:20,24 49:3 49:12 judgments 51:2 judicial 3:21 8:8 8:9 10:9 13:5 14:22 17:11 21:14,22 22:3 24:4 39:13,18 39:22 41:10,17 43:10,16,21 50:6 53:5,11,22 54:2,12,23 jurisdiction 6:1 10:15 57:18 jurisdictional 5:21 17:25 18:2 24:22 Justice 1:19 3:3 3:9,25 4:4,10 4:16,23 5:4,13 6:3,14,23 7:1,3 7:7,17,21 8:3,7 8:17,25 9:6,14 9:19,20 10:4,5 10:8,13 11:4,14 12:10,16,23 13:4,8,12,13 13:19,24 14:5 14:13 15:4,8,14 15:19,22 16:3,8 16:15,24 17:10 17:19,23,24 18:5,14,16,25 19:7,8,16 20:3 20:5,6,22 21:6	<hr/> K <hr/> Kagan 4:10,16 12:10,17,23 13:4 16:24 18:14 19:16 27:17 32:3,22 33:6 41:23 42:1 44:13 46:11,15 56:18 57:2,11 57:16 Kagan's 19:8	<hr/> L <hr/> L 1:18 2:6 25:21 Labs 45:12 49:22 50:2 land 52:25 landowner 38:7 38:22,24 46:3 57:19 landowners 22:12 38:11 39:12 46:13 56:1 57:10 lands 42:10 57:12 language 26:22 large 34:11 Laughter 31:9 35:4 law 15:17,18 16:5 17:2 28:12 50:4 lawsuit 43:12 lawsuits 46:9	<hr/> M <hr/> M 1:16 2:3,9 3:7 53:15 main 31:4 35:17 making 56:23 MALCOLM 1:18 2:6 25:21 manner 29:15 57:21 marshals 7:9 material 33:2 materially 8:22 matter 1:12 12:23 20:20 30:6,12,15,16 34:19 38:5 39:21 40:15 47:3 58:2 maximum 7:25 29:10 30:8,18 31:4 mean 5:14 6:7 9:15 13:20 15:20,20 16:19 18:5,25 21:20 40:12 44:8 45:10 48:6 49:16 meaning 12:3 meaningful 3:21 14:22 meaningfulness 9:8 means 39:6 measures 26:7 34:25 40:16 mechanism	

<p>44:23 meet 49:24 middle 11:20 Mike 3:11 mind 45:15 51:23 minor 18:20 minute 49:18 minutes 53:14 missed 39:20 mode 21:14 modified 34:18 modify 45:20 moment 37:9 Monday 1:10 money 17:7 morning 3:4 34:8 move 31:20 moved 48:6</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 nationwide 11:10 nature 16:9 21:4 38:17 navigable 18:9 19:5 24:25 50:25 necessarily 11:9 17:18 necessary 18:22 26:7 27:2,11 necessity 55:14 need 14:7,11 16:6 39:14 40:2 56:24 needed 52:18 negotiating 48:10,10,11 never 3:21 10:19 23:13,25 28:20 31:12 36:15 52:24 53:3 new 7:15 19:14 19:25 51:6 nexus 19:4,11</p>	<p>20:8 nice 35:3,5 night's 31:7,7 Ninth 5:8 19:15 19:23 nontrivial 46:2 normal 43:8 normally 48:24 Northern 39:8 notice 29:17 57:19 notices 53:10,12 56:1 notion 46:21 number 46:2 55:21</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 29:19 objects 53:12 obligations 48:18 obtain 10:8 48:19 Obviously 11:16 52:11 occurred 26:6 occurs 32:1 46:16 offense 20:2 offered 3:21 office 42:21 Oh 24:4 34:18 44:8 okay 22:15 once 9:2 31:14 33:2 36:20 39:20 57:8,8 onerous 18:21 open 55:21 opening 30:24 operate 37:7 operating 16:25 opinion 6:5 45:7 opportunities 37:8,9 opportunity 3:21</p>	<p>3:22 16:18 19:25 21:18 24:8,9 43:13 opposed 8:6 19:22 43:17 opposite 41:10 options 36:12 oral 1:12 2:2,5 3:7 25:21 order 3:13,19,22 4:1,6,9,14,20 4:22 5:1,3,6,12 5:22,22,25 6:18 7:11,13,14,18 8:1,2,18,19,22 9:2,10,13 10:1 10:1,9,10,11 10:14,20 12:3,5 12:12,18,22 13:20,21 14:3 14:15,18,19 16:6 17:12 19:3 20:14,24 21:23 22:2 23:11,19 25:7,10,12 26:2 26:5,7,11,17 26:20,22,24 27:9,12,23 28:23 29:11,14 29:16,19,25 30:3,6 32:11,16 32:20 33:2,16 33:19 34:16,18 34:24 35:6,10 35:12,18,24,25 36:9,17,19,20 37:19 38:6,20 40:13 41:6,13 41:25 42:4,23 42:23 43:2,9,15 43:15,17,23 44:2,6,7,15 45:3,4,5,7,14 45:15 46:7,17 46:19,22 47:1,4</p>	<p>47:7,18 48:8,11 48:12,14,15,17 50:7,13,15 51:21 52:16,16 52:23 53:22 55:16 56:9,11 ordered 20:9 orders 15:3 21:10,11 22:9 22:11 34:13,20 46:8 54:17 56:2 56:15 57:7 ordinarily 43:11 ordinary 37:13 37:14 44:10 original 34:16 ought 37:7 outrageous 51:19 outstanding 12:3 overstated 48:9 overtures 42:19 owners 52:25</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 PAGE 2:2 pages 4:19 part 6:6 16:10 37:18 41:22 50:11 51:1 52:13 particular 41:25 parties 28:13 30:9 31:22 42:16 48:1 49:14 party 14:6 42:19 43:12 48:2 penalized 26:21 penalties 21:17 22:10 23:23 26:1,9,10,15 26:24,25 27:4,5 27:7,8,9,14,16</p>	<p>27:20 28:1,8 29:20,23 30:3,7 30:10,12,17 31:1,25 33:14 34:2,11 35:7 43:20 44:18 45:6 47:16 48:3 53:7 57:10 penalty 4:14,18 5:2 22:24 28:21 28:22 29:11 33:3 43:3 people 34:11 45:20 48:16 perceived 43:19 percent 45:21 53:2 percentage 46:6 period 7:25 29:11 permit 8:24 9:1,3 9:24 11:2,10,17 11:19,23 12:2,9 12:14 13:2,9,17 14:6,7,8,10 36:13,16 38:21 38:22,25 39:7 39:13,15 40:1,2 40:2,12,18,20 41:1 47:19 53:8 56:8,10,20,21 56:23,24 57:3,4 57:15,20 permits 11:5 13:8 39:12 57:22 permitted 32:23 permitting 10:10 10:24 11:11 12:18 14:1,21 41:9 person 32:2 33:11 39:20,21 45:13 46:18,21 51:25</p>
--	--	--	--	--

<p>personnel 42:18 perspective 27:12 petitioners 1:4 1:17 2:4,10 3:8 34:7,9 50:12,18 51:14 53:5,16 phrased 48:14 pine 44:21 place 23:24 46:25 plant 34:19 36:25 44:20 planted 32:21 planting 32:8 35:10 plants 32:20 35:10 37:21 please 3:10 25:24 49:24 point 16:4 19:13 22:4 31:4,11,20 37:5 38:22 45:18 47:6,10 52:13 53:4,20 56:13 points 41:15 56:23 policy 28:20,24 portion 35:9 position 33:25 37:5,6 39:22 42:2 possibilities 55:21 possibility 26:14 27:7,25 28:8 30:24 44:3 50:17 possible 14:18 post-order 55:20 potential 37:25 42:22 52:2 53:7 potentially 27:4 56:12 57:13,19</p>	<p>power 54:16,20 56:14 practical 26:18 26:19 30:15,16 39:21 practice 34:20 38:5,9,10 42:14 43:8 47:3 49:21 49:25 practices 49:5 precisely 6:1 precluded 41:4 precludes 41:12 41:17 preclusion 19:17 predicate 5:5 15:12 24:22 predisturbance 3:16 premised 31:3 34:13 premises 37:22 preorder 55:19 prepare 54:7 prepared 52:1 preponderance 19:21 20:1 prerequisite 39:20 present 31:2 preserve 38:18 presume 13:21 presumption 22:3 41:24 42:2 presupposed 14:10 primary 35:11 principal 7:17 principle 6:11 prior 20:24 38:11 privilege 12:8 probable 16:6 probably 43:22 47:6 57:21 problem 14:2</p>	<p>20:22 37:17 50:10 51:14 problems 13:3 procedure 3:24 5:24 14:23 15:1 20:23 44:6,7 54:4 55:20,20 proceeding 12:15 proceedings 43:10 44:4 process 3:23 7:5 10:10,24 11:11 12:18 14:1,14 14:21 18:17 19:9 21:4,7 57:1,15 processing 40:19 produces 7:14 prohibited 32:13 prong 7:1 proper 33:19 property 3:15 5:15,18 6:17 11:1,24 12:6,7 12:13 13:1,2 16:20 18:11 19:2,5 23:16 24:12,24 32:6 33:18 35:24 36:10,24 37:16 38:16 56:2 prosecute 49:11 prosecution 48:20,25 prosecutor 48:23 51:25 prosecutorial 42:15 prospective 26:8 protect 18:22 protected 55:5 protection 1:6 3:5,12 29:22 40:7 52:18</p>	<p>prove 51:12 provide 11:11 14:22 15:1 26:9 29:5 42:7 52:18 55:19 provided 30:19 36:4 provides 21:10 provision 27:8 provisions 4:18 33:3,16 34:15 pro-environment 55:2 pro-homeowner 55:2,5 purely 17:25 20:18,20 50:5 purpose 54:3,4 pursued 50:17 put 37:21 38:17 52:24 53:3 putting 35:15 56:22,24</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify 51:20 qualifying 51:7 question 5:16,21 9:7 12:24,25 16:14 17:24 18:12 19:8 20:7 20:19,20 24:14 24:17 25:25 41:18 42:23 45:11 48:9 50:22 51:5 53:6 questions 18:8 22:15 53:18 quite 29:24 42:17 48:6 quote 23:23</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 rack 8:13</p>	<p>raised 10:16,18 Rapanos 18:9 39:10 reached 51:9 read 29:16,17,21 31:8 41:13 reads 26:14 29:21 ready-made 14:24 real 52:3 realistic 30:6 realize 53:2 really 13:25 21:4 24:23 26:17 29:3 31:11 35:12 45:19 46:25 49:16 51:13 52:24 reason 14:1 16:18 27:6 55:12 reasonably 15:6 reasons 50:6 REBUTTAL 2:8 53:15 received 35:6,23 56:1 receiving 48:3 recipients 57:7 recognized 54:18 record 11:8 15:10 16:4 18:13 19:14,25 20:13,16 25:5,7 36:3,6,8 38:8 51:16 53:24,25 55:11,11,14 records 20:14 reduced 47:9 refer 53:23 referred 28:10 33:21 refusing 40:1 reg 40:14</p>
---	---	---	---	---

<p>regard 33:1 35:1 44:10 regardless 18:8 regime 26:3 28:9 50:9 regimes 28:10 regs 40:11 regulated 28:13 30:9 31:22 42:16,19 43:12 48:1,2 49:14 regulation 25:1 50:3 regulations 9:5 11:25 related 37:12 relevant 39:15 relief 25:2 49:6 remained 34:5 remaining 53:14 remains 23:24 33:5 34:14 remand 21:13 25:4 remedial 32:15 remedies 32:5 remedy 13:6 20:9 44:19 49:3 remove 33:8,11 33:17 37:21 removed 32:21 35:12 removing 32:8 representative 42:20 require 43:11 required 35:16 35:18 40:16 48:17 51:12 52:5 requirement 32:19 requirements 32:24 requires 10:2</p>	<p>requiring 3:14 12:6 57:20 requisite 50:25 research 51:11 reserve 25:17 resolution 53:6 resolve 42:23 resolved 33:24 36:21 respect 34:1 44:4 46:23 respectfully 23:5 respondents 1:20 2:7 25:22 29:19,23 response 9:6 27:19 rest 50:8 restaurant 7:10 restaurants 6:8 restoration 12:7 restore 3:15 33:18 review 3:22 5:14 5:17,20,24 6:16 8:8,9 9:8,12,23 10:9,19 11:11 12:21,24 14:18 14:22 15:2,5,10 15:21,23 17:14 17:19 18:19,23 19:7,20 20:18 20:20 21:14,22 22:3,15 23:9 24:4,11,14 39:13,18,22 41:10,12,17 43:4,16 44:25 45:2,3 50:6,14 53:9,11,22 54:12 55:6 reviewability 41:24 42:3 reviewable 5:16 49:23 50:14</p>	<p>51:15 right 5:24 6:16 6:21 11:13 14:12 21:9 22:18 25:11 31:19 33:12 36:15 38:17 41:7 47:2,6 52:21 54:9 rights 7:5 39:3 ripe 56:7 risk 31:15 52:25 54:25 Riverside 56:6 road 24:2 ROBERTS 3:3 7:21 8:7 11:14 17:10,23 25:19 27:18,22 28:3 28:18 31:17 33:20 35:22 36:5,14,22 38:23 52:20 53:13 57:23 roll 23:4 rolling 23:6 rough 46:7 routes 43:6 routine 6:12 7:9 ruinous 21:17 57:10 rule 6:6 28:20 36:7 rules 17:3 run 24:1 40:13 runs 23:13</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 Sackett 1:3 3:4 3:11 Sacketts 3:20 4:7,21 5:23 6:19 7:4 8:23 9:11 10:8,12,19</p>	<p>10:23 11:3,9,12 12:21 13:6 14:2 14:2,14,23 16:16 17:7,9 18:8,9 21:13,19 21:22 22:5 23:7 23:14 24:1,4,21 26:4 30:24,25 31:11 33:17 34:24 35:12,13 37:4 42:6 44:15 52:18 57:5 Sacramento 1:16 safe 40:17 sails 8:15 sanction 7:21 8:1 31:25 satisfied 7:5 satisfy 22:6 saying 11:23 29:4,4 30:8,14 33:24 36:17 41:11 47:16 48:25 53:9 54:9 57:12 says 12:5 17:14 26:20,20 30:2,2 32:6,9 35:7 37:19 38:14,24 40:14 41:11 48:11 52:9 Scalia 3:25 4:4 7:7,17 9:14,19 9:20 10:4,5,8 10:13 11:4 13:8 13:12,13 15:14 15:19,22 16:3 20:22 21:6,8,24 22:13,20,21 23:3,6 24:9 29:16 30:11,14 30:20 34:15 35:3,5,14 39:24 40:6 44:5,14,24 48:19 49:8 55:9</p>	<p>55:13,22 56:22 Scalia's 17:24 scheme 4:15 28:9 37:7 50:7 schemes 31:24 Schiff 1:16 2:3,9 3:6,7,9 4:4,10 4:16 5:4,20 6:14,25 7:3,16 8:3,16 9:1,19 10:4,7,18 11:6 11:22 12:11,16 13:4,12,16,23 14:12 15:8,19 16:2,14,24 17:6 17:18 18:4,25 19:13,19 20:5 20:11 21:6,12 22:19 23:2,5,21 24:20 25:14 53:14,15,17 54:14 55:4,13 56:4,18 57:2,16 scientific 51:1 scope 6:4 33:18 57:18 second 39:17 41:12 51:13 52:13 secondly 20:17 section 48:15 see 16:25 53:10 53:20 54:7 55:21 56:11 seek 5:16,17,20 17:13 28:21,22 39:6 seeking 5:14 22:23 seen 41:14 send 44:11 sending 52:9 sense 42:6 50:8 54:13 sent 36:16</p>
--	---	--	---	--

separate 12:19 14:16 17:4	52:5	37:7 43:20 44:9 50:9	submitted 57:25 58:2	table 56:10
separately 26:9	sought 39:13 57:14	steps 27:11 32:15	subsequent 17:12	take 11:4,17 17:7 31:14,15 33:22 34:3 36:25 39:2 43:6 47:9 56:18
serious 43:20	sound 51:17	Stewart 1:18 2:6 25:20,21,23 26:22 27:17,21 27:24 28:6,16 28:24 29:6 30:5 30:13,16,22 31:5,10,19 32:18,25 33:9 33:23 34:22 35:9,17,23 36:2 36:11,18 37:4 37:12 38:4,19 39:4 40:3,8 41:4,16,25 42:4 42:12 43:7,18 44:8,22 45:1,22 46:1,5,11,12 46:15 47:2,11 47:13,21 48:13 49:1,13 50:2,23 51:9,24 52:11 53:4	substantial 7:12 15:10 18:6 19:11,22 20:8 22:17 53:24 55:15	taken 33:25
set 7:19 32:16,24	specific 29:24 32:5,6		substantially 8:23 47:9	takes 8:14 46:25
shake 56:16	specifically 33:7 33:10,10 34:7		sue 38:3 42:16 52:3	takings 56:6
share 50:12	specify 26:5 32:5		sufficient 9:20 12:15 51:15 52:8,12,14,22 54:22	talk 45:16 49:18
shots 54:5	stage 5:17 36:11		sufficiently 24:25	talked 46:13
show 11:9	stand 48:23		suggest 24:17 45:8,17 47:17	talking 13:24 49:19 55:7
showing 16:12	standard 9:4 15:4,9,21,23 17:19 18:6 38:5 50:14,21 55:6		suggested 46:15	tangential 14:18
shows 29:12 35:14 49:10	standards 19:20 20:17,19		suggesting 52:7	tell 6:3 11:21 15:23 22:12 33:7,10 35:1 40:25 41:15 43:1 44:15 45:25
side 47:5	stands 16:5,19		suggestion 19:17	tells 32:11 37:2
sides 19:14,25	start 37:18		suit 20:25 21:2 39:10	tens 3:17
significant 6:20 7:8 8:11,12 12:6 19:4 22:10 24:5	state 12:8 13:17		support 25:7 50:1	terms 11:7 18:5 19:10 20:17 25:11 26:3 30:22
simply 10:14 13:17 23:9 24:8 35:16 36:18 39:5	States 1:1,13 16:11 28:19 33:3 35:21 37:16 39:16		supported 46:15	test 16:9 49:24 52:24 53:3,24
situation 9:17 57:22	statistics 45:22 46:5	stopped 6:19	supporting 52:7	Thank 3:9 25:19 53:13 57:23
situations 30:8 32:4 43:24	statute 4:5,8,12 4:21 5:2 21:8,9 21:21,25,25 23:13,22,25 26:8,10,14,16 26:23,25 27:5 27:10 28:14 31:13,23 32:14 32:14,23,23,24 32:25 33:12,15 33:22 34:1,8 41:11,17 42:10 43:10 44:11 54:4 55:1	story 47:5	suggestion 19:17	theoretical 26:18 27:7 29:3 30:12 30:23
sleep 31:7,7	statutes 41:9	strange 14:5 42:2	suit 20:25 21:2 39:10	theoretically 32:12
slightly 32:4	statutory 5:7 6:2 7:25 15:11,12 22:10 25:8 29:9 30:7,18 31:4	struck 17:24	supports 18:6	theory 6:11 23:12
small 46:6 57:7		study 11:6	suppose 20:18 39:24	thereof 9:21
solace 57:8		stuff 35:16	supposed 37:7 38:24	the-fact 36:13
Solicitor 1:18		subject 4:7,11,20 5:15,18 7:24 23:14 26:4 27:4 27:13,15,20 29:19,23 30:10 34:12 35:7 43:16 44:17,18 50:13	Supreme 1:1,13	thing 5:14 6:10 28:7 31:11 32:16 37:15 38:4 39:5,17 41:12,14 43:1 45:15 48:14
Solid 39:7		subjected 7:11 7:13	surely 10:15 15:14	
solution 14:2		subjecting 23:7 53:6 54:2	surprised 24:2	
solve 50:9			sustain 21:3	
Somebody 38:13			SWANCC 39:7	
sorry 20:5 28:17 46:14 47:12			sway 47:8	
sort 16:4 21:21 28:9,10 38:19 39:19,19 55:7			sword 23:8,10	
sorts 28:12 37:23			system 55:18	
Sotomayor 19:7 20:3,6 25:9,15 28:16,17 31:5 37:11 47:11,15				
			T	
			T 2:1,1	

<p>54:7 things 27:13 32:11 34:25 36:7 39:4 40:22 42:17 43:25 45:20 47:21,24 54:6,21 think 11:7 15:22 17:14 22:22 26:1,17 28:13 29:8 30:22 31:10 32:18 34:9,23,24 35:2 35:9,17,24 36:9 36:11,23 37:6 37:14,17 38:14 42:13,20 43:7 43:22 44:10 47:2 48:21 49:4 49:13 50:6 51:9 51:10,19 53:21 54:3,22 55:4 56:24 57:11 thoroughly 51:22 thought 13:9 15:24 55:3 thousands 3:17 54:6,21 57:6 threat 3:17 threatened 21:16 34:17 48:20 threatens 57:9 three 43:1,6 time 6:8 7:24 16:12,16 20:13 22:6,11 25:6,18 38:3,19 45:21 51:16 52:15 54:1,1 times 33:21 title 23:15 today 3:11 31:18 told 14:16 16:19 21:15 45:19 tomorrow 40:12</p>	<p>51:6 total 56:12 traceable 5:11 tract 41:19 tracts 39:15 traditional 17:21 50:25 trees 32:8 34:19 37:1 44:21 tremendously 54:18 trial 52:1 trigger 9:12 21:19 43:3 trouble 39:1 troubled 47:16 47:18,23 troubling 47:22 47:23,25 true 12:11 17:8 truth 15:24 try 15:15 trying 49:18 turn 37:23 51:1 turned 14:19 two 13:24 24:24 27:23 29:6 39:4 39:9 40:22 41:15,20 47:21 55:1 two-part 24:23 type 6:12 typical 15:9 38:10 47:3 typically 43:19 49:6</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 18:11 46:9 unattractive 37:5 unaware 30:25 underlying 28:21 underscores 14:13</p>	<p>understand 4:14 9:23 11:15 29:3 54:8,9,16 understanding 4:11 13:16 understands 4:18 understood 8:10 19:24 unfair 37:6 United 1:1,13 16:11 28:19 33:3 35:21 37:15 39:16 unquote 23:24 unusual 40:25 upheaval 49:5,19 uphill 16:17 upside 14:19 use 43:17,18,19 44:22 usually 18:6 48:19 U.S 42:21</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 vacated 13:20 vague 16:9 value 49:14 variety 31:21 various 55:19 version 34:23 35:18 versions 32:20 vicinity 19:6 view 32:25 33:3 33:21,22,23 34:8,9 42:5 44:16 50:12 56:21 vindicate 22:6 violate 32:6,7,10 violating 21:1 22:10 26:9,10</p>	<p>26:16,17,24 27:1,5,9,10,22 27:23 28:14 30:6 31:13 33:14 52:10 violation 4:2,12 4:13,25 5:1,6,7 6:2 15:12,17,18 20:9 23:12 25:8 25:10,13 26:6 27:15 28:22,23 29:13,18,21,24 30:2 31:23 32:12,14,15 33:4 34:3 35:20 38:8,12 44:17 44:19,19 45:6 50:19 52:6 57:9 violations 3:14 4:21,22 5:2 35:8 43:19 44:4 VIR 1:3</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 15:14,14 48:23 53:10 waiting 23:9 want 6:11 29:1 31:4,21 36:6 37:22 43:1 51:11,25 54:10 54:16,20 wanted 22:8 53:5 57:1 wants 53:2 warned 29:13 32:2 warning 42:16 44:6,16 48:3,5 48:7,12 49:7,9 49:23 warnings 28:13 30:9 31:22 48:1 55:23 Washington 1:9</p>	<p>1:19 Waste 39:7 water 3:14 19:6 41:18 46:9 56:7 waters 16:10 18:9 24:25 33:2 35:20 39:15 50:25 way 4:14 16:24 17:6 23:8 37:2 38:1,1 39:10 54:10 57:4,17 ways 41:20 weirdness 56:22 welcome 35:1 went 19:9 52:1 weren't 36:5 wetland 13:14 17:14,16 39:25 40:4,5 wetlands 3:16 10:15 11:1,19 11:24 12:7,14 12:25 13:2,9,10 13:18,21 14:9 14:11 15:7 16:21 17:25 18:10,18,20,22 18:23,24 19:1,5 19:10 22:16 24:15,17,24,24 32:7 33:5 34:6 34:14 35:25 36:10,17,24 37:20 38:2,15 50:22,24,24 51:7,20 57:13 57:15 wetlands-related 46:8 We'll 3:3 we're 11:23 12:1 51:21 53:9 55:6 we've 28:11 33:25</p>
--	---	--	---	--

wide 31:21	53:1			
willing 31:13,15 56:13	\$37,500 4:12 16:21 26:15			
willy-nilly 52:8	\$75,000 37:25			
win 18:24 22:22 23:4 55:19	<hr/> 1 <hr/>			
wind 8:14	10 24:2			
wondering 6:10	10-1062 1:5 3:4			
woods 22:14	10:03 1:14 3:2			
words 17:13 38:23 52:21	11:04 58:1 13 33:19			
work 4:15 50:20	1319(a)(3) 48:15			
world 14:19	<hr/> 2 <hr/>			
worried 53:21,21	2012 1:10			
worry 37:1	25 2:7			
worse 57:22	<hr/> 3 <hr/>			
wouldn't 4:2 15:15,17 16:11 20:20,22 36:14 45:7 49:11 50:9 50:16 52:17,19	3 2:4 3% 46:7 30 4:19 31 4:19 32.5 26:21 29:20 35:7 37 26:21 37,000 28:2 37,500 26:16 29:7,9 31:3,12 37.5 4:13 10:6 29:20 44:18			
<hr/> X <hr/>	<hr/> 4 <hr/>			
x 1:2,8 45:20	4 3:12,20 14:20 21:15			
<hr/> Y <hr/>	<hr/> 5 <hr/>			
year 11:8	5 8:13			
years 3:12,20 8:13 14:20 21:15 24:2 41:8 49:21	53 2:10 556/557 53:25			
<hr/> \$ <hr/>	<hr/> 7 <hr/>			
\$10 7:22 8:2,6,14	75 41:8 49:21			
\$27,000 36:20	<hr/> 9 <hr/>			
\$27,500 10:3	9 1:10			
\$37,000 7:22 8:6	99 53:2			