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IN THE SUPREME COURT OF THE UNITED STATES

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MARVIN D. HORNE, ET AL., :

Petitioners : No. 12-123

v. :

DEPARTMENT OF AGRICULTURE :

- - - - - x

Washington, D.C.

Wednesday, March 20, 2013

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

APPEARANCES:

MICHAEL W. McCONNELL, ESQ., Washington, D.C.; on behalf of Petitioners.

JOSEPH R. PALMORE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

|    | C O N T E N T S              |      |
|----|------------------------------|------|
| 1  |                              |      |
| 2  | ORAL ARGUMENT OF             | PAGE |
| 3  | MICHAEL W. McCONNELL, ESQ.   |      |
| 4  | On behalf of the Petitioners | 3    |
| 5  | ORAL ARGUMENT OF             |      |
| 6  | JOSEPH R. PALMORE, ESQ.      |      |
| 7  | On behalf of the Respondent  | 26   |
| 8  | REBUTTAL ARGUMENT OF         |      |
| 9  | MICHAEL W. McCONNELL, ESQ.   |      |
| 10 | On behalf of the Petitioners | 55   |
| 11 |                              |      |
| 12 |                              |      |
| 13 |                              |      |
| 14 |                              |      |
| 15 |                              |      |
| 16 |                              |      |
| 17 |                              |      |
| 18 |                              |      |
| 19 |                              |      |
| 20 |                              |      |
| 21 |                              |      |
| 22 |                              |      |
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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 12-123, *Horne v. Department of Agriculture*.

Mr. McConnell?

ORAL ARGUMENT OF MICHAEL W. McCONNELL  
ON BEHALF OF THE PETITIONERS

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

There's a surprising number of difficult merits questions lurking in this case, mostly involving whether there was a taking, and if so, how it should be conceptualized and valued.

JUSTICE SOTOMAYOR: Could I -- could I just stop you on a factual matter --

MR. McCONNELL: Certainly.

JUSTICE SOTOMAYOR: -- because it has confused me. As I look at the captions of the cases, there appear to be two different partnerships: One partnership known as Raisin -- doing business as Raisin Valley Farms -- has Mr. Horne and his wife as the partners.

Lassen Valley, the producer -- not the producer, the handler -- has four other: The Hornes

1 plus two other people. So who owns the raisins? Isn't  
2 that the first partnership of the husband and wife? And  
3 isn't the handler a second partnership that does the  
4 business of handling?

5 MR. McCONNELL: The other two partners in  
6 Lassen were Laura Horne's parents, now deceased.

7 JUSTICE SOTOMAYOR: But the estates have  
8 been substituted.

9 MR. McCONNELL: That's right.

10 JUSTICE SOTOMAYOR: So isn't it two legal  
11 entities, one who owns and one who handles? One  
12 partnership produces, one partnership handles?

13 MR. McCONNELL: The Department of  
14 Agriculture did not distinguish among them.

15 JUSTICE SOTOMAYOR: Well, I don't care if  
16 they did or they didn't. I mean, we should know. Are  
17 they two separate legal entities? One who produces --

18 MR. McCONNELL: They are separate -- they  
19 are separate legal entities, all effectively controlled  
20 by the same family.

21 JUSTICE SOTOMAYOR: Well, that's -- you  
22 know, in the cat -- you get some limited liability by  
23 creating separate entities, so the creature who owns is  
24 one partnership, and the -- and the entity that  
25 produces, that handles, is a second one.

1 JUSTICE SCALIA: I assume this is one of  
2 those difficult merits questions you were alluding to,  
3 it doesn't go to whether there's jurisdiction, but to  
4 whether the claim of a taking can be asserted by the  
5 partnership in question, isn't it?

6 MR. McCONNELL: That's right,  
7 Justice Scalia.

8 JUSTICE SCALIA: I don't -- I don't see how  
9 it goes to jurisdiction, which is the only question  
10 before us.

11 JUSTICE SOTOMAYOR: Well, it does to my  
12 mind, because what is the claim, assuming that the  
13 producer owns -- the producer entity owns the raisins.  
14 What exactly is being taken from the handlers? Is it  
15 the percentage -- it can't be the raisins because they  
16 don't own them.

17 MR. McCONNELL: Well, Justice Sotomayor,  
18 I'm -- I'm delighted to preview our -- our argument on  
19 the merits on that.

20 JUSTICE SOTOMAYOR: What -- what do they  
21 own?

22 MR. McCONNELL: So the -- so the --

23 JUSTICE SOTOMAYOR: What is it that's being  
24 taken from the handler entity?

25 MR. McCONNELL: The order in this case was

1 issued against the -- the Hornes in their capacity as a  
2 handler only, so the entire fine was paid by them. None  
3 of the fine is attributable to anyone in their capacity  
4 as a producer.

5 JUSTICE SOTOMAYOR: All right. So go back.  
6 What is the -- what was taken from them -- you're saying  
7 it's just the fine, that the fine is a taking or -- what  
8 was the interest that they're claiming was taken by the  
9 government? They didn't own the raisins, so they get  
10 paid a fee for handling.

11 MR. McCONNELL: So -- so this is -- this is  
12 our position, Justice Sotomayor. I think we have to  
13 look at what is it that the Department of Agriculture  
14 attempted to take. So, in the demand letter from the  
15 Department of Agriculture addressed to the Hornes, they  
16 asked the Hornes to deliver California raisins, or the  
17 dollar equivalent. So that's the fact upon which all of  
18 this case is -- is built.

19 Now, what is the legal significance of that,  
20 California raisins or the dollar equivalent? It is our  
21 legal position, or it will be our legal position on the  
22 merits that when the government seeks a specific  
23 physical property, a res, or its monetary equivalent,  
24 that that is a taking of the res itself. And there's --  
25 and there's support for that in the -- for precedent

1 from this Court. The closest case is Village of  
2 Norwood v. Baker.

3 In this case, the -- the city condemned a  
4 strip of land for the purpose of building a road. They  
5 tried to get out of paying any compensation by claiming  
6 that the abutting landowner would gain value. That was  
7 rejected. They were assessed \$2,000 compensation for  
8 the taking. And then the city turned around and issued  
9 a special assessment against the landowner for precisely  
10 that \$2,000. The landowner came back up to this Court,  
11 and this Court held that it was a taking -- a taking of  
12 the land.

13 And in a subsequent case just a couple of  
14 years later, the Court described this as a, quote  
15 "actual confiscation of private property to public use."

16 JUSTICE KENNEDY: But you -- you began by  
17 saying that these are merits defenses, but you wanted to  
18 focus first on -- on the jurisdictional question that's  
19 before us.

20 MR. McCONNELL: That's right. I hope it  
21 helps to inform the jurisdictional question. But the  
22 jurisdictional question is this: The Ninth Circuit held  
23 that my clients could not even raise their takings claim  
24 on the merits until they had first gone to the Court of  
25 Claims.

1 I think there are three things wrong with  
2 that.

3 JUSTICE GINSBURG: Am I right in thinking  
4 that there is no dispute on that point, that the -- the  
5 takings claim could have been asserted by the Hornes as  
6 producers in the Court of Federal Claims?

7 MR. McCONNELL: I think that the Government  
8 no longer disputes, although you should ask them to be  
9 clear -- I think that they no longer dispute that this  
10 is not a jurisdictional client, even though they  
11 prevailed after the petition for rehearing was filed in  
12 the Court of Appeals --

13 JUSTICE GINSBURG: Well, jurisdictional --

14 MR. McCONNELL: -- on the ground that it was  
15 jurisdictional.

16 JUSTICE GINSBURG: -- jurisdictional or not,  
17 as a practical matter, producers who are not subject to  
18 fine as handlers, but the producers of the raisins whose  
19 raisins are being segregated, could they go to the Court  
20 of Federal Claims and say my raisins have been taken?

21 MR. McCONNELL: The -- whether the claim is  
22 being brought in the capacity of producer or handler I  
23 think is not relevant to one of our arguments, and it is  
24 relevant to the other argument.

25 JUSTICE GINSBURG: But I'd just like a



1 straight answer to that question. You -- you are  
2 representing producers, and they just produce --

3 MR. McCONNELL: No, no. No, we're  
4 representing people who are both producers and handlers.

5 JUSTICE GINSBURG: I'm saying  
6 hypothetically -- hypothetically. Is the Court of  
7 Federal Claims the proper forum for a producer?

8 MR. McCONNELL: It depends upon whether the  
9 taking has been from them or not. In the ordinary case,  
10 the ordinary relationship between a producer and a  
11 handler, the producer is not paid for the reserve  
12 raisins and therefore any payment that would come, any  
13 lawsuit on behalf of those raisins would go to the  
14 producer, and that would go I think to the Court of  
15 Claims.

16 In this case, though, the business model is  
17 quite different from that and the producers in this case  
18 were paid everything. They received full market value  
19 for their raisins. The only people who are out any  
20 money in this case are the Hornes in their capacity as  
21 handler. So that's why they are the only ones --

22 JUSTICE SOTOMAYOR: But the problem is that  
23 they weren't entitled to that money, meaning they had to  
24 pay it over to the producer. The producer was going to  
25 pay them a handling fee, but that money didn't belong to

1 them. It belonged to the producers who supplied them  
2 with the raisins and expected payment for them --

3 MR. McCONNELL: I'm not sure what --

4 JUSTICE SOTOMAYOR: -- if they were sold in  
5 the ordinary course.

6 MR. McCONNELL: I'm not sure which  
7 money you're -- they have not asserted any claim on any  
8 money. The producers have been completely paid off. It  
9 is the handlers who have been held responsible. And the  
10 reason they were held responsible was the following  
11 logic, and you see this on -- on -- on page 78 of the  
12 judicial officer's opinion.

13 They were held responsible because in  
14 their -- in their processing capacity, when they were  
15 doing the stemming, the seeding, the fumigating, the  
16 packing, that this was regarded by the Department of  
17 Agriculture as possession, physical possession of the  
18 raisins and acquisition of the raisins, even though they  
19 never had title to the raisins.

20 It's the Department of Agriculture that has  
21 attached to them a possessory interest in the raisins  
22 and then assessed them the full monetary equivalent of  
23 those raisins, full market value, \$484,000 for the  
24 market value because it's -- because under this very  
25 unusual regulatory scheme the Government regards them as

1 having possessed the raisins even though that -- that is  
2 not --

3 JUSTICE KAGAN: Mr. McConnell, I'm sorry.  
4 Could I -- along the lines of what Justice Ginsburg was  
5 saying, suppose that the Hornes had given over all the  
6 raisins, right, but that they thought that this was  
7 improper, that this marketing order was -- it was a  
8 violation of the takings clause. Could they have gone  
9 to the Court of Claims via the Tucker Act and said, we  
10 want our money back? They gave -- they gave over the  
11 raisins, they say we're entitled to compensation. Could  
12 they have gone through the Court of Claims?

13 MR. McCONNELL: If they had -- if they had  
14 not been paid for the raisins, they had taken raisins to  
15 a handler, received no money for them, I think that they  
16 could go to the Court of Claims.

17 JUSTICE KAGAN: In other words, the Hornes  
18 did what the marketing order suggested they should do.  
19 They gave over the raisins. But they said this is just  
20 improper. You're saying they could go to the Court of  
21 Claims?

22 MR. McCONNELL: Yes.

23 JUSTICE KAGAN: Okay. So if -- if that's  
24 the case, I guess then the question is, why didn't they  
25 have to go that route?

1 MR. McCONNELL: They didn't -- they didn't  
2 go that route, and the question I think is what are the  
3 -- what are the legal consequences of that --

4 JUSTICE KAGAN: Right.

5 MR. McCONNELL: -- because what they -- what  
6 they knew was that they were not going to be compensated  
7 for the raisins, and therefore they came up with a --  
8 with a plan, a business plan that they believed made --  
9 eliminated any handler and made it unnecessary for any  
10 of the independent producers on whose behalf they're  
11 operating to turn over raisins to the Government.

12 The plan was ultimately rejected and we  
13 haven't brought a -- a cert petition on it, but the plan  
14 actually complies with the -- with the language of  
15 the -- of the regulation, because they believe that in  
16 their capacity as handler, as processor, that they never  
17 acquired the raisins. "Acquisition" is the key term for  
18 becoming a handler under the rule.

19 And they believe that since they were simply  
20 providing a service for -- for \$12 a ton to their  
21 neighbors, that they never acquired the raisins, they  
22 never possessed the raisins, and therefore no one had to  
23 comply the regulation.

24 JUSTICE SCALIA: Well, some of the raisins  
25 were their own. Some of the raisins were their own.

1 MR. McCONNELL: That's correct.

2 JUSTICE SCALIA: At least as to that, that  
3 wouldn't be true, right?

4 MR. McCONNELL: That's -- that's correct. I  
5 think that's correct.

6 JUSTICE KENNEDY: Well, to get you back to  
7 the -- the jurisdiction point, let's -- let's just  
8 assume a hypothetical case where a regulated entity has  
9 to pay an exaction which it deems to be a penalty. And  
10 let's assume it can go to the Court of Claims, but it  
11 doesn't. It waits until the penalty's assessed and then  
12 when the penalty's assessed it says, this is a taking.  
13 That -- is that the case that you want to discuss with  
14 us today?

15 MR. McCONNELL: That's right. When the  
16 underlying order would be a taking and they have been  
17 assessed money because they didn't comply with the  
18 taking, we believe they can challenge that as a taking.  
19 And both under the AMAA procedures, which are exclusive,  
20 I think that they have to go through the -- through the  
21 Department of Agriculture and then to the district  
22 court, but I also think under the principles of the --  
23 announced by this Court in of the Apfel decision that  
24 they are entitled to a remedy in the district court.

25 JUSTICE GINSBURG: Mr. McConnell, would you

1 explain the -- if they were just handlers and weren't  
2 producing any raisins, if they were just handlers, do  
3 they have a claim and where? And if they were just  
4 producers -- I take it from the question I asked and the  
5 question Justice Kagan asked that if they were just  
6 producers, the raisins got set aside, they were paid for  
7 only the ones that went to market, they could go to the  
8 Court of Claims.

9 But now they're just handlers, as this  
10 entity is for most of the raisins that are involved,  
11 some 80 percent, right? It's only about 20 percent is  
12 their own. So, could this work for someone who was just  
13 a handler, doesn't produce any raisins?

14 MR. McCONNELL: So if they are just a  
15 handler --

16 JUSTICE GINSBURG: Yes.

17 MR. McCONNELL: -- as the Department of  
18 Agriculture treated them, as far as the Department of  
19 Agriculture is concerned they are only a handler. They  
20 are required to raise -- exhaust their claims before the  
21 Department of Agriculture and then challenge the order  
22 in the district court.

23 JUSTICE GINSBURG: What I'm -- I'm trying to  
24 understand is this scheme. Apparently it wasn't enough  
25 just to be a handler or just to be a producer. The

1 claim that you're making turns on the coincidence of  
2 being both the producer and a handler.

3 MR. McCONNELL: I don't think that that's  
4 so. I think that we -- that the Hornes ought to prevail  
5 on either -- in either of their capacities.

6 JUSTICE GINSBURG: So any handler, any  
7 handler could be making the same claim?

8 MR. McCONNELL: Any handler who has a  
9 business model that is similar to this. But most  
10 handlers --

11 JUSTICE GINSBURG: But what do you mean  
12 by -- what's the business model that's similar to this?

13 MR. McCONNELL: So most handlers, if they're  
14 in compliance with the order, they take all the raisins  
15 from the producers, they only pay for -- for the free  
16 pool of raisins. They don't pay for the reserve raisins  
17 and they never have any interest in the reserve raisins.  
18 In this case, the Hornes did not operate that way.  
19 The -- the producers received full value for all of  
20 their raisins.

21 So the producers are -- are not in the case.  
22 They have no standing. They have no pocketbook injury.  
23 The -- the entire pocketbook injury in this case is  
24 borne by the Hornes in their capacity as a handler.

25 JUSTICE SOTOMAYOR: I'm sorry.

1 MR. McCONNELL: In response to --

2 JUSTICE SOTOMAYOR: In the Horne model, the  
3 handlers buy, buy the free raisins and then pay the  
4 producers, is that what it --

5 MR. McCONNELL: That's correct.

6 JUSTICE SOTOMAYOR: Oh. So that's the  
7 difference in this model; they don't take title to the  
8 raisins is what you're saying?

9 MR. McCONNELL: Exactly. And the Hornes  
10 believed that this would mean that they were not  
11 handlers.

12 JUSTICE SOTOMAYOR: All right. Let me --  
13 let me --

14 MR. McCONNELL: And that -- and they were  
15 found to be handlers anyway.

16 JUSTICE SOTOMAYOR: What is -- what is the  
17 value in permitting a party who doesn't own property to  
18 raise a taking claim on behalf of other people?  
19 Meaning, doesn't the system have an interest in ensuring  
20 that people comply with their legal obligations, and to  
21 the extent that you choose to violate the law the way  
22 they have here, that the fine is punitive and not  
23 compensatory. Meaning you don't own the raisins, but  
24 you were obligated to put raisins aside for someone  
25 else. You were their agent and you failed to meet a



1 Government obligation that was independently on you.

2 MR. McCONNELL: No.

3 JUSTICE SOTOMAYOR: So I go back to my  
4 question: What was the taking? Since you didn't own  
5 the raisins, the taking is the fine is what you want to  
6 call the taking.

7 MR. McCONNELL: The taking is what the  
8 Government demanded, which was either give me your house  
9 or give me your money, give me your raisins or give us  
10 the monetary equivalent.

11 JUSTICE SOTOMAYOR: But they're not your  
12 raisins.

13 MR. McCONNELL: By the time -- by the time  
14 this order was enforced, the raisins were gone and so as  
15 a practical matter, only one of those two alternatives  
16 was left as a matter of timing.

17 JUSTICE ALITO: Well, but in answer to  
18 Justice Ginsburg's question that -- you said the  
19 producers could go to the -- the Court of Federal Claims  
20 to contest the taking of -- producers could go to  
21 contest the taking of raisins.

22 MR. McCONNELL: If they had not been paid  
23 for the raisins.

24 JUSTICE ALITO: If they had not been paid  
25 for it.

1 MR. McCONNELL: Right.

2 JUSTICE ALITO: But are you -- does that  
3 mean you do not think that the AMAA withdraws Tucker Act  
4 jurisdiction?

5 MR. McCONNELL: It withdraws Tucker Act  
6 jurisdiction only for handlers. So if we're talking  
7 about pure producers --

8 JUSTICE ALITO: Only for handlers.

9 MR. McCONNELL: -- pure producers do not go  
10 to the -- don't have to go through the AMAA process.

11 JUSTICE SCALIA: Why? Why -- why does it  
12 withdraw for the one and not the other?

13 MR. McCONNELL: These New Deal-era programs,  
14 Justice Scalia, are somewhat -- the purpose is somewhat  
15 obscure --

16 JUSTICE SCALIA: No, I don't mean the  
17 policy. I don't mean the policy reason. What in the  
18 law leads you to that conclusion?

19 MR. McCONNELL: Oh, well, this is  
20 straightforwardly set forth in the -- in the -- in  
21 Sections 14(a) and 15(a) of the AMAA. I don't think  
22 that's in dispute. So only producers are -- are  
23 regulated by this program. Only producers have a right  
24 to go through their remedies in the Department of  
25 Agriculture. Only producers have to do that. It's --

1 it's a -- it's completely a producer --

2 JUSTICE GINSBURG: You said --

3 MR. McCONNELL: I'm sorry, I'm sorry.

4 Excuse me. Each of those was -- please substitute the  
5 word "handler" for each of those. It's only the  
6 handlers that are regulated under this -- under this  
7 program.

8 So, and -- and my clients were treated as  
9 handlers. They believed that they were not. But it is  
10 the Department of Agriculture that has attached this --  
11 this status to them. And it's -- it's I think quite a  
12 Catch 22 for the Government to come along and say,  
13 although we are fining you \$700,000 in your capacity as  
14 a handler, you're not a handler for purposes of  
15 challenging the legality of that order.

16 JUSTICE BREYER: I'm just trying to get to  
17 what you're arguing about. And I might be off base by  
18 now. I feel like handlers, purchasers, raisins, like an  
19 old Abbott and Costello movie. I just want to see if  
20 I'm right. Tell me. Just say you're wrong and I don't  
21 go into it further.

22 There -- there are some people, they've been  
23 -- they are either -- they have some raisins, all right.  
24 And these particular people, whom the Department has  
25 said have acquired the raisins, it said they acquired

1 the raisins. And so they're there with some raisins,  
2 and then the Government says: Do this thing with your  
3 raisins. And they don't want to do it, so they don't.  
4 They don't do it even though the law says do it.

5 And then they say the law is  
6 unconstitutional and, moreover, you fined us a huge  
7 amount of money and we don't want to pay it because the  
8 law is unconstitutional, and we consider that money to  
9 be paid. Call it a fine, call it what you want. We  
10 consider we shouldn't have paid it and now we want it  
11 back and we want compensation and we think it's a taking  
12 and where do we go. Can't we make that argument in the  
13 Ninth Circuit? It's something like that; isn't that  
14 what we're arguing about?

15 MR. McCONNELL: That's almost exactly right.

16 JUSTICE BREYER: But not quite.

17 (Laughter.)

18 MR. McCONNELL: With -- with one detail  
19 different --

20 JUSTICE BREYER: Yes?

21 MR. McCONNELL: -- which is that this is the  
22 proceeding here that decides whether they have to pay.  
23 They have not yet paid the fine.

24 JUSTICE BREYER: Okay, okay. So we  
25 shouldn't have to pay because this is all

1 unconstitutional. And -- and now what's your argument?

2 MR. McCONNELL: So they're raising a  
3 defense. It isn't that they are -- it isn't that  
4 they're getting -- trying to get it back.

5 JUSTICE BREYER: And then the Ninth Circuit  
6 says go to the Court of Claims. And you say no, we  
7 don't have to go to the Court of Claims.

8 MR. McCONNELL: But that detail actually is  
9 quite important, because, remember, you can't even go to  
10 the Court of Claims unless you are seeking damages for  
11 an actual violation that has already taken place. We  
12 could not go to the court -- the Hornes could not go to  
13 the Court of Claims right now. What the Government says  
14 is that they should pay the \$700,000 fine first and then  
15 go to the Court of Claims to get it back. And that is  
16 exactly what this Court said in Apfel, is a, quote,  
17 "pointless set of activities that Congress could not  
18 possibly have" --

19 JUSTICE KAGAN: That's true --

20 MR. McCONNELL: -- "have contemplated."

21 JUSTICE KAGAN: I think that's true, Mr.  
22 McConnell, as to part of the fine, that part of the fine  
23 falls under Apfel, but not the other part. As to the  
24 compensation part, it seems to me you have a pretty  
25 decent Apfel argument. But as to the penalty part, I

1 don't really understand how the Apfel argument would go.

2           It seems to me that as to the penalty part,  
3 the key thing is that if they had handed over the  
4 raisins, they could have gone to the Court of Federal  
5 Claims and had the compensation done there. And the  
6 fact that the Government is penalizing them for not  
7 complying with the marketing order does not fall within  
8 the rationale of Apfel.

9           MR. McCONNELL: Well, the most pertinent  
10 case for that part of the fine, for the penalty part, is  
11 Missouri Pacific Railroad v. Nebraska. So this is the  
12 case where the railroad was told by the State to do  
13 some -- some expensive work, the railroad says no, that  
14 would be a taking if we were required to do that. There  
15 is no compensation available and so they don't do it.  
16 They're fined \$500.

17           That gets up to this Court and an opinion by  
18 Mr. -- Justice Holmes, the Court holds that that is a  
19 taking and that the railroad is entitled to challenge  
20 the taking in the form of the fine. So for -- for the  
21 penalty portion, the punishment portion of the fine,  
22 Missouri Pacific Railroad is actually the more pertinent  
23 decision.

24           Which comes back -- I don't think I fully  
25 answered all the variants of Justice Sotomayor's

1 question.

2 JUSTICE BREYER: All I was trying to do was  
3 to get you on the basic argument, which you started  
4 with, which is why is there -- why was the Ninth Circuit  
5 wrong when they said they had no jurisdiction to hear  
6 this, that rather, they had to go -- you had to go to  
7 the --

8 MR. McCONNELL: May I tick off the three  
9 reasons?

10 JUSTICE BREYER: Yes.

11 MR. McCONNELL: One is it has nothing to do  
12 with jurisdiction.

13 Second, the Tucker Act does not apply to  
14 cases where -- where there is a defense being lodged to  
15 a monetary exaction. That's Apfel as supplemented by  
16 Missouri Pacific Railroad.

17 And third, even if that were not so, the  
18 AMAA displaces the Tucker Act and they were required to  
19 exhaust their remedies before the Department of  
20 Agriculture and take their case to the district court in  
21 which they are residing.

22 JUSTICE SCALIA: What was the first? I  
23 forgot the first already. What was the first?

24 MR. McCONNELL: The first is that it isn't  
25 jurisdictional and therefore it should not have been

1 raised --

2 JUSTICE SCALIA: What -- what isn't  
3 jurisdictional?

4 MR. McCONNELL: The -- the requirement to go  
5 to the Court of Claims when you -- when you need to is  
6 not jurisdictional, that that's a matter of remedy, that  
7 is, it's -- it's the equitable principle that you may  
8 not pursue your case for an injunctive relief when  
9 there's an adequate remedy at law.

10 JUSTICE SOTOMAYOR: Mr. McConnell, in --  
11 in -- if the producers had decided to challenge this as  
12 a Tucker Act violation, they would have had to hand over  
13 the raisins? Or could they have just held on to the  
14 raisins and said, I'm not handing it over until I get  
15 just compensation?

16 MR. McCONNELL: So had they held on to their  
17 own raisins and sold them, I assume, you don't -- not  
18 just left them rot, if they had sold them, then the  
19 Department of Agriculture would have called them a  
20 handler, because anyone who sells raisins is called a  
21 handler, and then they would be fined in their capacity  
22 as a handler and it would be a somewhat similar case to  
23 this one.

24 JUSTICE SOTOMAYOR: All right.

25 MR. McCONNELL: Maybe an easier one than



1 this one.

2 JUSTICE SOTOMAYOR: Well, the point is that  
3 under a normal takings claim, you have to hand over your  
4 property, you've lost the value, and you want the  
5 Government to pay it back to you, correct?

6 MR. McCONNELL: Not necessarily correct.  
7 There are a whole string of cases in which property  
8 owners raise takings as a defense rather than turning  
9 over the property. Kaiser Aetna is perhaps the most --  
10 best known recent case, but out of an administrative  
11 context, there's the Florida Power & Light case. Penn  
12 Central was -- was like this. Loretto v. Teleprompter  
13 is like this.

14 There's a whole string of cases. The  
15 Government themselves cite six such cases, most of them  
16 fairly old, for this proposition. So there's nothing  
17 unusual about bringing a -- a defensive takings claim.

18 Mr. Chief Justice, unless --

19 JUSTICE GINSBURG: Mr. McConnell, I don't  
20 want to encroach on your rebuttal time, but one  
21 mysterious thing. The first time around, the Ninth  
22 Circuit decided this case on the merits. So if you're  
23 right, I take it, we remand and then they adjudicate the  
24 merits of the takings claim. But they already did that.

25 MR. McCONNELL: Yes, Justice Ginsburg. And

1 they did that on a ground that we think is manifestly  
2 inconsistent with this Court's precedents. We were  
3 prepared to -- we were trying to get an en banc review  
4 and were prepared to come to this Court from the merits  
5 determination.

6 We were blocked from that because the  
7 Government, after the petition for rehearing was filed,  
8 came up with calling this a jurisdictional argument,  
9 raised this objection for the first time; and the Ninth  
10 Circuit panel accepted their view, issued a new opinion  
11 stripping out the entire merits and substituting this  
12 jurisdictional holding that is producing so much  
13 enjoyment for us this morning.

14 (Laughter.)

15 MR. McCONNELL: May I reserve the remaining  
16 time? Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 Mr. McConnell.

19 Mr. Palmore?

20 ORAL ARGUMENT OF JOSEPH R. PALMORE

21 ON BEHALF OF THE RESPONDENT

22 MR. PALMORE: Thank you, Mr. Chief Justice,  
23 and may it please the Court:

24 I'd like to start where Justice Sotomayor  
25 started with Petitioner's counsel, because any takings

1 analysis needs to begin with a careful identification of  
2 what property was allegedly taken. Petitioners in this  
3 case have actually advanced two different theories about  
4 what property of theirs was taken. What taking is at  
5 issue here? Raisins and money.

6 We think both takings claims fail for  
7 threshold reasons, but they're different threshold  
8 reasons that call for different analysis.

9 JUSTICE KAGAN: Mr. Palmore, before you do  
10 that then, haven't you conceded the point that this is  
11 not jurisdictional?

12 MR. PALMORE: We agree that the failure to  
13 go to the Court of Claims is not properly viewed as a  
14 jurisdictional defect. We did invoke Ninth Circuit  
15 precedent below stating that it was jurisdictional. And  
16 some of this cases -- this Court's cases put it in  
17 ripeness terms, which is an Article III concept. So  
18 there has been confusion --

19 CHIEF JUSTICE ROBERTS: When did you first  
20 raise the argument that it was jurisdictional?

21 MR. PALMORE: In our opposition to the  
22 rehearing petition.

23 CHIEF JUSTICE ROBERTS: And now you are --  
24 now you are changing back again and saying it's not?

25 MR. PALMORE: There was Ninth Circuit

1 precedent holding that it was jurisdictional, and we  
2 relied on that and there is certainly language from this  
3 Court --

4 CHIEF JUSTICE ROBERTS: You relied on that  
5 when you got to rehearing. You didn't rely on that  
6 before you went before the Ninth Circuit, right?

7 MR. PALMORE: That's correct.

8 We think -- we think this is properly viewed  
9 as a substantive defect in the claim, so in a sense the  
10 Ninth Circuit in its initial panel decision ruled for  
11 the Government on a substantive defect one, there's no  
12 taking. And what it did on rehearing in our view,  
13 although it attached the wrong label to it, it  
14 substantively was correct in concluding that there was  
15 substantive defect number two --

16 JUSTICE KAGAN: But Mr. Palmore, if you are  
17 conceding now that this is not jurisdictional, it seems  
18 to me that your Tucker Act argument as a substantive  
19 argument, I mean, has been waived. You didn't raise  
20 that argument until the rehearing petition.

21 MR. PALMORE: That would certainly be  
22 something that -- that the Ninth Circuit could consider  
23 in the event there were a remand here. But the Ninth  
24 Circuit did decide it. The substance of its bottom line  
25 conclusion was correct and all of its analysis was

1 correct. It simply used the wrong words, so we think it  
2 is here.

3 JUSTICE SCALIA: I'm really confused. You  
4 are saying there ought to be a remand here because the  
5 question is not jurisdictional, which is just what your  
6 friend says, right?

7 MR. PALMORE: Well, the Ninth Circuit --

8 JUSTICE SCALIA: So the two of you are in  
9 agreement it ought to go back to the Ninth Circuit, they  
10 should do it on the merits, and -- and if that's wrong,  
11 we can review that.

12 MR. PALMORE: If that happens, of course, as  
13 Justice Ginsburg pointed out, the consequence for us is  
14 they reinstate the prior panel opinion, in which --

15 JUSTICE SCALIA: That may well be, but --

16 MR. PALMORE: I'm not going to resist too  
17 strenuously that kind of remand, but they did decide it.  
18 And moreover, they decided something separate, which is  
19 at JA-305 they said something different, which is the  
20 kind of threshold defect in the takings claim turning on  
21 raisins, which is there is a capacity problem.

22 So there are two problems with the raisin  
23 claims, a capacity problem and a just compensation  
24 problem. The capacity problem is this: In 2002, after  
25 having been strictly raisin producers since 1969,

1 entering into a market where there was a reserve  
2 requirement from the beginning, they knew what they were  
3 getting into, they decided to adopt a new business  
4 model, as Petitioner's counsel says. But, as was found  
5 below, they adopted a business model that was an  
6 intentional, willful attempt to evade regulatory  
7 requirements in order to secure an unfair competitive  
8 advantage.

9           But what they did was they took on the  
10 obligations of a handler. They became raisin handlers  
11 in 2002. And what came with that status were a series  
12 of regulatory obligations that apply only to handlers  
13 and under the AMAA can apply only to handlers: The  
14 requirement to have raisins inspected, the requirement  
15 to file truthful reports, the requirement to make  
16 records available, and the requirement to separate out  
17 raisins into what's called free tonnage and reserve  
18 tonnage, any raisins processed, it doesn't matter who  
19 owns them.

20           Those are handler-specific regulatory  
21 obligations that were imposed upon them, and they  
22 violated every single one of them willfully and  
23 intentionally in order to secure an unfair competitive  
24 advantage.

25           And what the USDA did was impose penalties

1 on them for the violation of law that attached to them  
2 only as raisin handlers. And then they invoked the  
3 judicial review proceedings in Section 14 that provides  
4 a judicial review mechanism only for handlers.

5 JUSTICE SCALIA: Yes, but part of that  
6 penalty was, you know, your raisins or your life, right?  
7 I mean, it was --

8 (Laughter.)

9 JUSTICE SCALIA: -- you don't have to pay  
10 the penalty if you give us the raisins.

11 MR. PALMORE: That's not correct,  
12 Justice Scalia. They have to give the raisins.  
13 Mr. McConnell referred to demand letters --

14 JUSTICE SCALIA: You mean they -- Is that  
15 right, they have to give the raisins?

16 MR. PALMORE: They are under a regulatory  
17 obligation to provide the raisins. If they violate that  
18 regulatory obligation, they are subject to sanctions.

19 JUSTICE SCALIA: Okay. So --

20 MR. PALMORE: One component --

21 JUSTICE SCALIA: -- that amounts to the same  
22 thing, your raisins or the penalty, right?

23 MR. PALMORE: No, but it's not a choice.  
24 And I think that's very important to point out. There  
25 were actually two different demand letters.

1 Mr. McConnell referred to a demand letter saying your  
2 raisins or your money. There was an initial demand  
3 letter saying: You are a handler; you have to comply;  
4 we're going to come get the raisins. The second demand  
5 letter said: We showed up -- literally it says: We  
6 showed up with our truck, you didn't provide the  
7 raisins, so now you have got to provide the cash  
8 equivalent.

9 And there were also going to be, as there  
10 were, separate regulatory proceedings brought against  
11 them for violating those -- those obligations. Not just  
12 the failure to reserve, but all these handler-specific  
13 obligations. They filed false reports. They didn't  
14 make raisins available for inspection.

15 There were a whole host of regulatory  
16 violations that were at issue here, and when they  
17 invoked the handler review action in the district court  
18 they could assert defenses as a handler. But, for  
19 instance, another producer -- producers can't invoke  
20 these judicial review schemes. Another producer  
21 couldn't have intervened in that action to assert its  
22 producer claim.

23 JUSTICE ALITO: As this case stands as it  
24 comes before us, is there a claim that they -- that  
25 money -- the Government is trying to take money from



1 them without just compensation?

2 MR. PALMORE: That was certainly not how we  
3 understood the claim to be litigated below. That's not  
4 how the Ninth Circuit thought -- understood the claim.  
5 We have been talking about the claim involving the  
6 raisins, which fails for a to capacity reason and a just  
7 compensation reason.

8 JUSTICE ALITO: Is that an issue we should  
9 decide or is that an issue that the Ninth Circuit should  
10 decide, whether there is a takings claim for money?

11 MR. PALMORE: That was certainly not decided  
12 below, so a remand -- to the extent that this was  
13 preserved, a remand would be possible outcome there. We  
14 think, though, that that claim suffers from separate --  
15 separate threshold defects.

16 JUSTICE ALITO: All right. If we assume for  
17 the sake of argument that there is such a claim, why  
18 does that not fall within Apfel?

19 MR. PALMORE: Well, we think that -- for  
20 several reasons. First of all, the Apfel opinion that's  
21 referred to is just a plurality. It's not been adopted  
22 by the Court. Second of all, the Apfel analysis relied  
23 on this one-for-one, dollar-for-dollar concept. That  
24 was a critical part of the plurality's discussion there,  
25 and it thought that it would simply be a pointless

1 exercise for Eastern Enterprises to be required to pay  
2 the premium and then to go to the Court of Federal  
3 Claims and get the exact same amount of money back.

4 JUSTICE ALITO: Don't they claim that --

5 MR. PALMORE: We suggested that there are a  
6 whole host of reasons --

7 JUSTICE ALITO: Before you leave that, don't  
8 they claim that the entire amount that is assessed  
9 against them is a taking? Now, maybe they are wrong.  
10 That the entire amount assessed against them is a taking  
11 without just compensation? Maybe they are wrong, but  
12 isn't that a merits question?

13 MR. PALMORE: That's -- that's -- they are  
14 clearly wrong about that, and I -- but I think however  
15 you characterize that defect, it defeats this  
16 dollar-for-dollar pointless exercise point that Apfel --

17 JUSTICE KAGAN: Well, why is that a  
18 necessary part of Apfel? Why didn't Apfel just mean  
19 when we are dealing with cash you don't have to go to  
20 the Court of Claims? So even if -- you know, you can  
21 have a discussion in the district court about whether  
22 it's not dollar-for-dollar and it should be discounted  
23 in some way.

24 But why should the fact that its  
25 dollar-for-dollar mean -- why is that a requirement, as

1 opposed to just it's cash and so the question of, like,  
2 you know, handing some -- handing it all over and  
3 getting some back, that can be done in the district  
4 court rather than making somebody file a separate suit?

5 MR. PALMORE: Well, I think there were two  
6 things going on in Apfel and there were really two  
7 distinct reasons why the plurality in Apfel thought that  
8 there was no requirement to go to the Tucker Act there.  
9 One was that it thought that in a statute like that,  
10 that simply allocated benefits and burdens among private  
11 entities, Congress would not have intended there to be  
12 compensation available in the event that there were a  
13 taking.

14 And that was actually the Government's  
15 position in that case and the Apfel plurality cited to  
16 that portion of the Government's brief. And it cited  
17 cases in its discussion that weren't dollar-for-dollar  
18 or even cash transfer cases in which the Court had gone  
19 to the merit of takings claims without consideration of  
20 a Tucker Act remedy.

21 Then there is the second idea, which is the  
22 cash transfer idea. And we think that the  
23 dollar-for-dollar aspect of that was important to the  
24 plurality's analysis because it viewed that as evidence  
25 that Congress would not have intended the Tucker Act to

1 be deployed, because it would have been a pointless  
2 exercise. So it really went to what Congress's intent  
3 was.

4 Here, of course, for myriad reasons, that  
5 dollar-for-dollar analysis breaks down.

6 JUSTICE BREYER: No, no, but there's a  
7 similar -- i mean, it seemed to me, again simplifying,  
8 that underlying this their clients think this whole  
9 raisin program is unconstitutional. What it does is it  
10 takes raisins that we grow, in effect throws them in the  
11 river. And in the thirties, that was done to raise  
12 raisin prices.

13 And they think as a matter of policy that  
14 just hurts people by raising prices, and as a matter of  
15 constitutional law it takes raisins from some people  
16 that belong to them and uses them for this bad purpose.  
17 Okay, that's their view of it, something like that,  
18 isn't it?

19 MR. PALMORE: Yes.

20 JUSTICE BREYER: Fine. So they're making  
21 that kind of constitutional claim. Now, I would think  
22 if all you told me was that and I knew nothing about all  
23 these statutes, I would say that's the kind of claim  
24 that should be made in a Federal district court, period,  
25 not the Court of Claims. Because their government isn't

1 going to compensate them for anything. That's against  
2 the whole point of the program.

3           Either this program is valid or it isn't.  
4 And if it isn't, some authoritative set of courts should  
5 tell us that. So I have a feeling this is somehow not a  
6 right fit with the Court of Claims.

7           Now, you explain to me why that purely  
8 instinctive feeling at this point is completely wrong.

9           MR. PALMORE: Sure. Justice Breyer, we've  
10 now shifted back to the -- the first theory about the  
11 property, which is the raisins. What they could have  
12 done in 2002, would they have been a producer of  
13 raisins, solely a producer of raisins for decades, at  
14 any point during -- between 1969 and 2002, they could  
15 have gone to the Court of Claims and said, this reserve  
16 requirement, the taking of my raisins, I want my just  
17 compensation.

18           That is not just a remedy, as Mr. McConnell  
19 suggests, it is a constitutional condition on the taking  
20 of private property for public use. As long as there's  
21 just compensation, there simply is no violation. So  
22 that's why --

23           JUSTICE SCALIA: That couldn't be what the  
24 statute meant. I think that's what Justice Breyer says.  
25 Did -- did Congress create a statute in which we're

1 going to take your raisins and then you can go to the  
2 Court of Claims and get your money back. I mean,  
3 that -- that surely is not what Congress contemplated.  
4 The -- the whole notion of the program is you can't get  
5 your money back in the Court of Claims.

6 Now, if you're raising a constitutional  
7 objection, that's something else. That should be done  
8 in district court. But to say that Congress  
9 contemplated, you know, we'll take your raisins and then  
10 you sue in the Court of Claims, they give you your money  
11 back. That's a weird statute.

12 MR. PALMORE: Justice Scalia, I have two --  
13 two responses to that. First of all, these claims have  
14 been litigated in the Court of Claims; the Evans case,  
15 the Cal-Almond case, both of which we cite in our brief.  
16 Raisin producers, or in the Cal-Almond case it was an  
17 almond producer, went to the Court of Claims and said  
18 this reserve requirement is a taking, I want my money.  
19 And they lost; the Court of Claims -- correctly, in our  
20 view -- held that there was no taking.

21 That said, we do agree that it is actually a  
22 close question whether Congress would have intended  
23 compensation to be provided in a situation like this one  
24 in the event the raisin reserve program were found to be  
25 a taking. We've said -- we've said in our brief, we do

1 view that as a close question, although on balance, we  
2 think that the proper answer is that there is a  
3 remedy -- or, sorry, there is just compensation  
4 available in the Court of Claims.

5 But there are cases, Justice --

6 JUSTICE SCALIA: And you -- you think that's  
7 a close question? You think that the way the statute is  
8 supposed to operate, once it is held that this is an  
9 unconstitutional taking, is that every year, the  
10 government takes the raisins and every year, the grower  
11 goes to the Court of Claims and gets the money back for  
12 the raisins. Is that the program that Congress  
13 anticipated?

14 MR. PALMORE: Well, we do agree that it's a  
15 close question for the --

16 JUSTICE SCALIA: I don't think it's close at  
17 all. That's a crazy statute. Every year we're going to  
18 take raisins and every year we're going to pay you in  
19 the Court of Claims. What's the purpose of that?

20 MR. PALMORE: Well, of course, Congress  
21 didn't think this was a taking. And it -- and it built  
22 considerable administrative flexibility into the  
23 statute, and at the end of the day, that's what  
24 convinces us that Congress would not have intended to  
25 preclude compensation in the Court of Claims and to --

1 to opt for an injunction instead, because the Secretary  
2 of Agriculture has wide latitude to adjust.

3 So the compensation wouldn't be paid year  
4 after year, as your hypothetical suggested. The program  
5 could be adjusted. A reserve requirement is only one  
6 way of complying with the kind of supply control  
7 provisions of the statute. There are any number of  
8 options available.

9 But I'd also point out that in this Court's  
10 precedence in Monsanto and Regional Rail, those were  
11 both statutory schemes which had their own compensation  
12 mechanism, as does this one, this reserve raisins that  
13 producers do get paid sometimes for them in a smaller  
14 amount. Those were cases in which the statutes did have  
15 compensation mechanisms, and this Court held that the  
16 Tucker Act was available as kind of a supplementary  
17 compensation in the event --

18 JUSTICE GINSBURG: Mr. Palmore, am I  
19 incorrect in thinking that the Government is saying,  
20 handlers cannot raise the constitutionality of the  
21 Raisin Marketing Order? You've told us that the  
22 producers can go to the Court of Claims. What about the  
23 handlers? They're at least being fined for violating  
24 the Act, and it's their position that the whole thing is  
25 unconstitutional.



1           Can they raise the constitutionality of the  
2 whole arrangement defensively, or they simply can't  
3 raise the constitutionality of the Act?

4           MR. PALMORE: Justice Ginsburg, I think this  
5 goes back again to the property question. If the claim  
6 is that it's unconstitutional because it takes  
7 producers' property, they can't raise that in this  
8 proceeding. If the property is the raisins, they can't  
9 raise that in this proceeding. They need to -- to  
10 comply and go to the Court of Claims for compensation,  
11 which means there has been no -- in the event there's a  
12 taking, it's a constitutional taking because just  
13 compensation is provided.

14           JUSTICE GINSBURG: But it would be --

15           MR. PALMORE: If the claim -- if the claim  
16 is that the money that was taken from me, the fine, that  
17 itself is a taking, then we think that claim can and  
18 must be brought in the context of the AMAA proceeding.  
19 That was not how the Court of Appeals understood the  
20 claim here to be, and there's no precedent for the idea  
21 that a fine for violation of law can be articulated as a  
22 taking of the lawbreaker's property without just  
23 compensation. I haven't seen any case that -- that  
24 stands for that proposition and that would be quite  
25 remarkable.

1 JUSTICE KENNEDY: But then you just -- but  
2 then you just lose on the merits. What the Ninth  
3 Circuit says, they can't even argue this.

4 MR. PALMORE: Well, Justice Kennedy --

5 JUSTICE KENNEDY: I thought that what we  
6 were going to decide was whether or not, assuming you  
7 can go to the Court of Claims, you must go to the Court  
8 of Claims, can you prefer to wait, have a penalty  
9 assessed against you and say this is unconstitutional,  
10 it's a taking. Your position is you can't say that. I  
11 don't understand why. Other than, if you want to talk  
12 about Williamson and so forth, we can get into that.

13 MR. PALMORE: But, Justice Kennedy, the --  
14 the Ninth Circuit didn't understand the taking claim to  
15 be that the fine for my violation of law is a taking of  
16 my money. That's not how the Ninth Circuit understood  
17 the claim, so they didn't analyze it in that way.

18 They understood the claim to be that the  
19 taking of producers' raisins is a taking, and we  
20 lawfully resisted it because it was an unconstitutional  
21 taking. The Ninth Circuit correctly rejected that  
22 because there was nothing unconstitutional about it  
23 because it was not without just compensation.

24 The Tucker Act is the just compensation.  
25 This Court has held --

1                   JUSTICE BREYER: The just compensation, I  
2 take it, in the program is supposed to come from the  
3 fact that raisin prices go up. Whether the poor  
4 children with their noses pressed to the glass, because  
5 they can't pay the raisins, their parents are the ones  
6 who are paying the compensation. And certainly not the  
7 taxpayer, he's not going to pay it, and maybe the other  
8 producers will pay some who get gypped or something, I  
9 don't know. But I can't believe that Congress wanted  
10 the taxpayers to pay for a program that's going to mean  
11 they have to pay higher prices as consumers.

12                   MR. PALMORE: Justice Breyer, and that goes  
13 to the -- to the merits of the case.

14                   JUSTICE BREYER: No, no. No, it doesn't go  
15 to the merits. It goes to whether or not it makes sense  
16 to think that the Court of Claims has something to say  
17 about this. And suppose we did this. Suppose we said,  
18 given the fact that you filed your thing, whatever it  
19 was, you know, late, and the -- and the light of this  
20 very enlightening discussion which has been helpful, we  
21 think that this is the kind of program and challenge to  
22 the program where there isn't going to be a remedy  
23 really in the Court of Claims and they ought to go ahead  
24 in the Ninth Circuit, and in light of all these  
25 enlightening things that we'll write, you just decide

1 the merits of -- is that -- now, I'm sure you're going  
2 to say that's absolutely terrible, it won't work at all.  
3 So tell me why not.

4 MR. PALMORE: Well, Your Honor, of course,  
5 the consequence of that is they reinstate our prior  
6 victory in the prior panel opinion --

7 JUSTICE BREYER: No, no, we'd say -- we'll  
8 say given the way that we've talked about the program,  
9 perhaps it's best to consider this matter fully.

10 MR. PALMORE: Well, they did consider the  
11 matter fully. In the initial opinion, they said there's  
12 no taking here.

13 JUSTICE BREYER: Yes.

14 MR. PALMORE: So all of the discussion we're  
15 having here is about -- is predicated on the idea that  
16 if there were a taking, would compensation be available  
17 in the first place.

18 JUSTICE SOTOMAYOR: Excuse me. Can I --

19 MR. PALMORE: We agree there's no taking.

20 JUSTICE SOTOMAYOR: All right. It almost  
21 seems to me, and I'll ask Mr. McConnell when he gets up  
22 at rebuttal, that there is some sort of due process  
23 challenge going on here that's been created by the  
24 labels they did in this new situation -- in this new  
25 business venture. In the normal situation, the handler,

1 I'm being told, would actually have title to the  
2 raisins, and they would pay the producers for the  
3 raisins. So there would be property taking.

4 In that situation, where the handlers  
5 actually own the property, would they be able to raise a  
6 taking defense?

7 MR. PALMORE: No, because of the way that  
8 the statute and the regulatory program works. If the  
9 handler is actually buying raisins from the producer,  
10 the handler never takes title to the reserve raisins.  
11 And he doesn't pay for the reserve raisins. He takes  
12 title to the free-tonnage raisins and the title to the  
13 reserve raisins passes as a matter of law from the  
14 producer to the Raisin Administrative Committee. The  
15 handler never owns those raisins.

16 JUSTICE SOTOMAYOR: So they are missing a  
17 business opportunity, because they can't take title to  
18 those raisins. And yet you're asking --

19 MR. PALMORE: They would never pay for  
20 those -- they would never pay for those raisins because  
21 they can't take title. They can't lawfully take title  
22 to those raisins. Now --

23 JUSTICE SOTOMAYOR: This really does sound  
24 to me -- and I think that both Justice Scalia and Breyer  
25 now are being more and more convinced -- there has to be

1 a place to challenge this scheme.

2 MR. PALMORE: And there absolutely is.

3 JUSTICE SOTOMAYOR: Whether it's a taking --  
4 whether there's a takings claim f.

5 Or the handler, because the handler is being  
6 asked to do things --

7 MR. PALMORE: But the handler's property is  
8 not being taken, and that's critical. There are  
9 separate takings claims that handlers have advanced  
10 that -- that could be asserted through this process.  
11 For instance, there was a case called Lion Raisins from  
12 the Federal Circuit that we cite in our brief, in which  
13 the issue was that the handler provided bins to store  
14 the raisins, and he didn't get his bins back. Okay?

15 That was a handler takings claim, and that  
16 had to be asserted in the context of this handler review  
17 scheme. But the handler doesn't own the raisins under  
18 this scheme.

19 JUSTICE SCALIA: That's -- that's a merits  
20 question again. I mean, it's not a question of whether  
21 you -- you can resist on the basis of a takings claim.  
22 It's a question of whether you are going to win.

23 MR. PALMORE: No, Justice Scalia, I think it  
24 goes to the scope, the capacity question that we were  
25 talking about before, because the statute is quite clear

1 in section 608c(13)(B) that this scheme does not  
2 regulate producers in their capacity as producers. And  
3 if someone wants to take on both roles, they will be  
4 regulated only as a handler.

5 So the regulatory obligations that applied  
6 to Petitioners when they adopted this business model  
7 were handler-only regulatory obligations, and then this  
8 is a handler judicial review proceeding. That's a very  
9 narrow means of decision here that avoids some of these  
10 kind of conceptual questions about the nature of the  
11 Takings Clause, which is that this claim simply doesn't  
12 belong in this proceeding.

13 But there's no unfairness or no due process  
14 issue here at all, because they -- in 2002, when -- when  
15 Petitioners decided to engage in this, these regulatory  
16 violations in order to secure an unfair advantage over  
17 their competitors, as was found by the ALJ at JA41, at  
18 that point they could have sought compensation for the  
19 past 6 years of raisins that they had provided. They  
20 didn't do it.

21 I don't understand why they didn't do it.  
22 They left that claim on the table. And to the extent  
23 they wanted to claim going forward, they could have  
24 continued to use compliant handlers and sued every month  
25 for compensation in the Court of Claims.

1 JUSTICE ALITO: Did I understand you to say  
2 a couple minutes ago that if the case were remanded, you  
3 would be entitled to win on the reasoning of the panel  
4 opinion?

5 MR. PALMORE: The prior panel opinion,  
6 Justice. If -- if there was a remand on the basis that  
7 the Ninth Circuit misunderstood this as a jurisdictional  
8 Article III defect, and then the Ninth Circuit were to  
9 find waiver, what the Ninth Circuit presumably would do  
10 would be to reinstate its first panel decision, which we  
11 think was also correct and held that there was no taking  
12 here. There are two --

13 JUSTICE KAGAN: Mr. Palmore, what would be  
14 wrong -- would anything be wrong -- with a -- with a  
15 disposition of this Court that went something like this:  
16 Everybody agrees that this is not a jurisdictional  
17 issue, including the Government, so they got that wrong.

18 Now, as to this whole business about the  
19 Tucker Act and whether the Tucker Act provides a remedy,  
20 the Government only started talking about that in a  
21 petition for rehearing en banc, and the Government can't  
22 do that. You know, it can't introduce an argument like  
23 this in a petition for rehearing en banc. So that's  
24 waived.

25 And now, the Ninth Circuit can go and try to



1 figure out whether this marketing order is a taking or  
2 it's just the world's most outdated law.

3 (Laughter.)

4 MR. PALMORE: That would certainly be an  
5 available option, or the Ninth Circuit could decide for  
6 itself whether there had been a waiver.

7 But there's a separate issue in that there's  
8 this capacity issue, which is a separate point that the  
9 Ninth Circuit made at JA305, when it pointed out that  
10 this was a producer claim, and that's something that was  
11 strictly a producer claim and wasn't -- wasn't a fit for  
12 this handler review action, and that's something that  
13 could also be considered on remand.

14 But the consequence of this -- of that would  
15 be for the -- the Court to impose its -- if it found a  
16 waiver, to rule for us for separate merits reasons.

17 We do view the Tucker Act -- the failure to  
18 seek just compensation -- as a merits defect in the  
19 Petitioners' claim here. So even putting this capacity  
20 problem aside, there is simply -- there's no defense.  
21 Mr. McConnell says this can be raised as a defense. But  
22 there is no defense if all you show is that there has  
23 been a taking of private property for public use, full  
24 stop.

25 JUSTICE BREYER: What does the word

1 "acquire" mean. There is some opinion here which says  
2 these handlers acquired the raisins. What is -- what's  
3 that about?

4 MR. PALMORE: "Acquire" is a defined term,  
5 and it includes to possess. So they took to --

6 JUSTICE BREYER: Like lessees or something,  
7 bailees?

8 MR. PALMORE: There was no question under  
9 the regulatory scheme here that Petitioners were  
10 handlers. And in fact, there's a surprising --

11 JUSTICE BREYER: I -- no, no. I just wanted  
12 to know what the word "acquire" --

13 MR. PALMORE: "Acquire" -- "acquire" is  
14 defined to include a number of things, including to  
15 possess. And a handler is anyone who sells raisins.  
16 There was no mystery about this. And in fact at pages 8  
17 through 11 of our brief, we cite communication after  
18 communication where USDA --

19 JUSTICE BREYER: Now, can an acquirer of my  
20 car, for example -- I don't know. Forget that.

21 JUSTICE SCALIA: A bailee?

22 (Laughter.)

23 JUSTICE BREYER: Can they -- can they  
24 assert a takings claim attaches to the car? It sounds  
25 like a standing question.

1 JUSTICE SCALIA: Yeah, I suppose a bailee  
2 could, a bailee of the car.

3 MR. PALMORE: No, I don't think a bailee  
4 could. I think the owner would have to assert that  
5 claim, right.

6 But "acquire" is a defined term, and as this  
7 case comes to this Court it's accepted. The Petitioner  
8 has not sought cert on the underlying regulatory  
9 findings. In fact, their arguments -- they were told  
10 ahead of time that they were completely wrong over and  
11 over and over again, and then they lost that claim at  
12 every level, twice within the Department of Agriculture,  
13 in the district court, in the court of appeals. They  
14 lost on that regulatory claim.

15 This wasn't a good faith misunderstanding.  
16 If you look at JA41, the ALJ found that this was a  
17 willful and intentional, knowing violation of regulatory  
18 requirements, because they were able to undercut their  
19 competitors by not playing by the rules. So this  
20 doesn't present any kind of due process --

21 JUSTICE BREYER: But still, it might if  
22 they're acquirers -- but they are acquirers, okay? They  
23 think this program is unconstitutional because it takes  
24 some other people's property, all right? So those other  
25 people are in a very special relation to them. Those

1 other people are really close. And it may be they have  
2 standing to assert those other people's claims. And if  
3 they do have standing to assert those other people's  
4 claims, why can't they make the argument that way?

5 MR. PALMORE: I -- I disagree that they have  
6 standing to make those other people's claims. And also,  
7 Petitioners haven't argued, haven't made any third-party  
8 standing argument here.

9 But -- this Court's requirements are quite  
10 strict for third-party standing. You have to have a  
11 close -- a close relationship, and I don't think a mere  
12 arm's-length commercial relationship would count.

13 JUSTICE KENNEDY: Suppose they did have  
14 standing. Could they raise the claim?

15 MR. PALMORE: If --

16 JUSTICE KENNEDY: You say no.

17 MR. PALMORE: Well, they have -- they  
18 certainly have standing as producers to raise the claim.

19 JUSTICE KENNEDY: Let's assume they have  
20 standing. Could they raise the claim --

21 MR. PALMORE: Yes, that --

22 JUSTICE KENNEDY -- that this is an  
23 unconstitutional taking?

24 MR. PALMORE: In the Court of Claims,  
25 absolutely, as producers.

1 JUSTICE KENNEDY: No, no. In the  
2 administrative proceeding where they are charged with --  
3 where a penalty is being assessed against them.

4 MR. PALMORE: I think that they would have  
5 standing, but it's still a claim that's beyond the scope  
6 of this narrow specific judicial review proceeding. I  
7 think it's a different problem.

8 CHIEF JUSTICE ROBERTS: I have to say -- I  
9 think it comes with less than good grace for you to  
10 criticize the other side for not having raised a  
11 particular argument. But I do want to clarify that you  
12 have no objection at this point for reversing the Ninth  
13 Circuit on the ground that they erred in saying that  
14 this -- they should have dismissed on jurisdictional  
15 grounds.

16 MR. PALMORE: Well, I'm not going to resist  
17 that too strenuously, -- but I think if they did decide  
18 the question, they decided it correctly. It was a  
19 threshold defect. Their analysis was all correct. So I  
20 think that's before the Court.

21 But yes, we -- we frankly acknowledge and we  
22 acknowledged in our brief that we did not -- we did  
23 suggest below that this was a jurisdictional defect.  
24 Ninth Circuit authority said that it was and we relied  
25 on that. We now believe that it's best understood not

1 as a jurisdictional defect, but as a substantive defect  
2 in the claims, not simply a choice of remedies issue, as  
3 Petitioners suggests, because choice of remedy suggests  
4 that there has been a constitutional wrong and that we  
5 need to decide what remedy is going to be available, an  
6 injunction or damages.

7 JUSTICE SOTOMAYOR: The short answer is,  
8 yes, reach the merits only if I win. That -- that's  
9 really what you want us to do.

10 MR. PALMORE: Well, we -- we think you could  
11 reach some of the merits. We think that the narrow  
12 disposition here is the capacity --

13 JUSTICE SOTOMAYOR: No, no, no. I need to  
14 ask you this question, because do you want us to reach  
15 the merits if we're going to have you lose? You got to  
16 want one or the other. Do you want us to reach the  
17 merits, period, is really the question.

18 MR. PALMORE: Yes. Our position is that  
19 we're not acquiescing in a -- in a remand. We think you  
20 can affirm, and you should affirm. However, I do  
21 recognize --

22 JUSTICE SOTOMAYOR: Do you think we should  
23 reach the merits, which is a very different question?

24 MR. PALMORE: Well, it depends on what you  
25 mean by "merits."

1 (Laughter.)

2 JUSTICE SOTOMAYOR: Only if you win, right?

3 MR. PALMORE: There is the taking -- no.

4 There is the underlying kind of takings claim, that  
5 there was -- was there a taking here at all. And that's  
6 not before the Court. I don't think anyone suggests  
7 that that's before the Court. But we do -- we do think  
8 that there are a series of other threshold defects in  
9 the claim that this Court could -- could rely on.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 Mr. Palmore.

12 Mr. McConnell, you have 3 minutes remaining.

13 ORAL ARGUMENT OF MICHAEL W. McCONNELL  
14 ON BEHALF OF THE PETITIONERS

15 MR. McCONNELL: I'd like to make two quick  
16 points. One is that I believe that the Government has  
17 essentially conceded here in this argument and in their  
18 brief that the Tucker Act does not apply. They have  
19 told us that the Tucker Act does not apply on page 50  
20 and repeated here when Congress could not have  
21 contemplated a compensation. Now, in addition -- and  
22 their only answer to that is to say, first, that  
23 Congress didn't think it would be a taking, which in  
24 Regional Rail, this Court said is not the question.

25 And secondly, that if -- if there's one --

1 we should get paid once, compensation once and then the  
2 administrator's going to cancel the program, which is no  
3 answer at all. Either the statute contemplates  
4 compensation for everybody or it contemplates it for  
5 nobody. I think they have effectively conceded that the  
6 Tucker Act does not apply.

7 JUSTICE SOTOMAYOR: Well, they've conceded  
8 that it doesn't apply to handlers.

9 MR. McCONNELL: To handlers. And --

10 JUSTICE SOTOMAYOR: Yes, and so they've  
11 conceded there is no --

12 MR. McCONNELL: And the second issue I  
13 wanted to talk about so is this capacity issue.  
14 Certainly, we have standing. When -- it's not  
15 third-party standing. All of the money comes out of our  
16 pocket, yes, we have standing. And secondly, we  
17 certainly -- and then that is in our capacity as  
18 handler.

19 Essentially, the Department of Agriculture's  
20 view is that during those couple of days when the  
21 raisins are going through our packing plant, that we  
22 acquired them and possessed them during those couple of  
23 days and that we should have given them their -- their  
24 share. That's raisins, that's not money. But by the  
25 time they get around to enforcing that and so forth, the



1 raisins are gone and now the money stands in -- stands  
2 in for the raisins. But that is a taking claim. We  
3 think it's a -- it's a straightforward taking claim  
4 under -- under Norwood and Missouri Pacific Railroad,  
5 that's a merits question. But in any event, it is not a  
6 problem of capacity. Whatever might be, that taking,  
7 that taking is in the capacity as a handler.

8 Those are my two points.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

12 (Whereupon, at 11:10 a.m., the case in the  
13 above-entitled matter was submitted.)

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| <b>A</b>                 |                        |                         |                          |                          |
|--------------------------|------------------------|-------------------------|--------------------------|--------------------------|
| <b>Abbott</b> 19:19      | 25:10 39:22            | 18:3,10,21              | 27:20 28:18,19           | <b>available</b> 22:15   |
| <b>able</b> 45:5 51:18   | 45:14 53:2             | 23:18 30:13             | 28:20 33:17              | 30:16 32:14              |
| <b>above-entitled</b>    | <b>administrator's</b> | 41:18                   | 48:22 52:4,8             | 35:12 39:4 40:8          |
| 1:11 57:13               | 56:2                   | <b>amount</b> 20:7 34:3 | 53:11 55:13,17           | 40:16 44:16              |
| <b>absolutely</b> 44:2   | <b>adopt</b> 30:3      | 34:8,10 40:14           | <b>arguments</b> 8:23    | 49:5 54:5                |
| 46:2 52:25               | <b>adopted</b> 30:5    | <b>amounts</b> 31:21    | 51:9                     | <b>avoids</b> 47:9       |
| <b>abutting</b> 7:6      | 33:21 47:6             | <b>analysis</b> 27:1,8  | <b>arm's-length</b>      | <b>a.m</b> 1:13 3:2      |
| <b>accepted</b> 26:10    | <b>advanced</b> 27:3   | 28:25 33:22             | 52:12                    | 57:12                    |
| 51:7                     | 46:9                   | 35:24 36:5              | <b>arrangement</b>       |                          |
| <b>acknowledge</b>       | <b>advantage</b> 30:8  | 53:19                   | 41:2                     | <b>B</b>                 |
| 53:21                    | 30:24 47:16            | <b>analyze</b> 42:17    | <b>Article</b> 27:17     | <b>back</b> 6:5 7:10     |
| <b>acknowledged</b>      | <b>Aetna</b> 25:9      | <b>announced</b> 13:23  | 48:8                     | 11:10 13:6 17:3          |
| 53:22                    | <b>affirm</b> 54:20,20 | <b>answer</b> 9:1 17:17 | <b>articulated</b> 41:21 | 20:11 21:4,15            |
| <b>acquiescing</b>       | <b>agent</b> 16:25     | 39:2 54:7 55:22         | <b>aside</b> 14:6 16:24  | 22:24 25:5               |
| 54:19                    | <b>ago</b> 48:2        | 56:3                    | 49:20                    | 27:24 29:9 34:3          |
| <b>acquire</b> 50:1,4    | <b>agree</b> 27:12     | <b>answered</b> 22:25   | <b>asked</b> 6:16 14:4   | 35:3 37:10 38:2          |
| 50:12,13,13              | 38:21 39:14            | <b>anticipated</b>      | 14:5 46:6                | 38:5,11 39:11            |
| 51:6                     | 44:19                  | 39:13                   | <b>asking</b> 45:18      | 41:5 46:14               |
| <b>acquired</b> 12:17    | <b>agreement</b> 29:9  | <b>anyway</b> 16:15     | <b>aspect</b> 35:23      | <b>bad</b> 36:16         |
| 12:21 19:25,25           | <b>agrees</b> 48:16    | <b>Apfel</b> 13:23      | <b>assert</b> 32:18,21   | <b>bailee</b> 50:21 51:1 |
| 50:2 56:22               | <b>Agriculture</b> 1:6 | 21:16,23,25             | 50:24 51:4 52:2          | 51:2,3                   |
| <b>acquirer</b> 50:19    | 3:5 4:14 6:13          | 22:1,8 23:15            | 52:3                     | <b>bailees</b> 50:7      |
| <b>acquirers</b> 51:22   | 6:15 10:17,20          | 33:18,20,22             | <b>asserted</b> 5:4 8:5  | <b>Baker</b> 7:2         |
| 51:22                    | 13:21 14:18,19         | 34:16,18,18             | 10:7 46:10,16            | <b>balance</b> 39:1      |
| <b>acquisition</b> 10:18 | 14:21 18:25            | 35:6,7,15               | <b>assessed</b> 7:7      | <b>banc</b> 26:3 48:21   |
| 12:17                    | 19:10 23:20            | <b>Apparently</b>       | 10:22 13:11,12           | 48:23                    |
| <b>Act</b> 11:9 18:3,5   | 24:19 40:2             | 14:24                   | 13:17 34:8,10            | <b>base</b> 19:17        |
| 23:13,18 24:12           | 51:12                  | <b>appeals</b> 8:12     | 42:9 53:3                | <b>basic</b> 23:3        |
| 28:18 35:8,20            | <b>Agriculture's</b>   | 41:19 51:13             | <b>assessment</b> 7:9    | <b>basis</b> 46:21 48:6  |
| 35:25 40:16,24           | 56:19                  | <b>appear</b> 3:20      | <b>Assistant</b> 1:17    | <b>becoming</b> 12:18    |
| 41:3 42:24               | <b>ahead</b> 43:23     | <b>APPEARANC...</b>     | <b>assume</b> 5:1 13:8   | <b>began</b> 7:16        |
| 48:19,19 49:17           | 51:10                  | 1:14                    | 13:10 24:17              | <b>beginning</b> 30:2    |
| 55:18,19 56:6            | <b>AL</b> 1:3          | <b>applied</b> 47:5     | 33:16 52:19              | <b>behalf</b> 1:15,19    |
| <b>action</b> 32:17,21   | <b>ALITO</b> 17:17,24  | <b>apply</b> 23:13      | <b>assuming</b> 5:12     | 2:4,7,10 3:8             |
| 49:12                    | 18:2,8 32:23           | 30:12,13 55:18          | 42:6                     | 9:13 12:10               |
| <b>activities</b> 21:17  | 33:8,16 34:4,7         | 55:19 56:6,8            | <b>attached</b> 10:21    | 16:18 26:21              |
| <b>actual</b> 7:15 21:11 | 48:1                   | <b>argue</b> 42:3       | 19:10 28:13              | 55:14                    |
| <b>addition</b> 55:21    | <b>ALJ</b> 47:17 51:16 | <b>argued</b> 52:7      | 31:1                     | <b>believe</b> 12:15,19  |
| <b>addressed</b> 6:15    | <b>allegedly</b> 27:2  | <b>arguing</b> 19:17    | <b>attaches</b> 50:24    | 13:18 43:9               |
| <b>adequate</b> 24:9     | <b>allocated</b> 35:10 | 20:14                   | <b>attempt</b> 30:6      | 53:25 55:16              |
| <b>adjudicate</b> 25:23  | <b>alluding</b> 5:2    | <b>argument</b> 1:12    | <b>attempted</b> 6:14    | <b>believed</b> 12:8     |
| <b>adjust</b> 40:2       | <b>almond</b> 38:17    | 2:2,5,8 3:3,7           | <b>attributable</b> 6:3  | 16:10 19:9               |
| <b>adjusted</b> 40:5     | <b>alternatives</b>    | 5:18 8:24 20:12         | <b>authoritative</b>     | <b>belong</b> 9:25       |
| <b>administrative</b>    | 17:15                  | 21:1,25 22:1            | 37:4                     | 36:16 47:12              |
|                          | <b>AMAA</b> 13:19      | 23:3 26:8,20            | <b>authority</b> 53:24   | <b>belonged</b> 10:1     |

|   |   |   |   |   |
|---|---|---|---|---|
| <p><b>benefits</b> 35:10<br/> <b>best</b> 25:10 44:9<br/>             53:25<br/> <b>beyond</b> 53:5<br/> <b>bins</b> 46:13,14<br/> <b>blocked</b> 26:6<br/> <b>borne</b> 15:24<br/> <b>bottom</b> 28:24<br/> <b>breaks</b> 36:5<br/> <b>Breyer</b> 19:16<br/>             20:16,20,24<br/>             21:5 23:2,10<br/>             36:6,20 37:9,24<br/>             43:1,12,14 44:7<br/>             44:13 45:24<br/>             49:25 50:6,11<br/>             50:19,23 51:21<br/> <b>brief</b> 35:16 38:15<br/>             38:25 46:12<br/>             50:17 53:22<br/>             55:18<br/> <b>bringing</b> 25:17<br/> <b>brought</b> 8:22<br/>             12:13 32:10<br/>             41:18<br/> <b>building</b> 7:4<br/> <b>built</b> 6:18 39:21<br/> <b>burdens</b> 35:10<br/> <b>business</b> 3:21 4:4<br/>             9:16 12:8 15:9<br/>             15:12 30:3,5<br/>             44:25 45:17<br/>             47:6 48:18<br/> <b>buy</b> 16:3,3<br/> <b>buying</b> 45:9</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>C</b> 2:1 3:1<br/> <b>California</b> 6:16<br/>             6:20<br/> <b>call</b> 17:6 20:9,9<br/>             27:8<br/> <b>called</b> 24:19,20<br/>             30:17 46:11<br/> <b>calling</b> 26:8</p> | <p><b>Cal-Almond</b><br/>             38:15,16<br/> <b>cancel</b> 56:2<br/> <b>capacities</b> 15:5<br/> <b>capacity</b> 6:1,3<br/>             8:22 9:20 10:14<br/>             12:16 15:24<br/>             19:13 24:21<br/>             29:21,23,24<br/>             33:6 46:24 47:2<br/>             49:8,19 54:12<br/>             56:13,17 57:6,7<br/> <b>captions</b> 3:19<br/> <b>car</b> 50:20,24 51:2<br/> <b>care</b> 4:15<br/> <b>careful</b> 27:1<br/> <b>case</b> 3:4,12 5:25<br/>             6:18 7:1,3,13<br/>             9:9,16,17,20<br/>             11:24 13:8,13<br/>             15:18,21,23<br/>             22:10,12 23:20<br/>             24:8,22 25:10<br/>             25:11,22 27:3<br/>             32:23 35:15<br/>             38:14,15,16<br/>             41:23 43:13<br/>             46:11 48:2 51:7<br/>             57:11,12<br/> <b>cases</b> 3:19 23:14<br/>             25:7,14,15<br/>             27:16,16 35:17<br/>             35:18 39:5<br/>             40:14<br/> <b>cash</b> 32:7 34:19<br/>             35:1,18,22<br/> <b>cat</b> 4:22<br/> <b>Catch</b> 19:12<br/> <b>Central</b> 25:12<br/> <b>cert</b> 12:13 51:8<br/> <b>certainly</b> 3:17<br/>             28:2,21 33:2,11<br/>             43:6 49:4 52:18<br/>             56:14,17<br/> <b>challenge</b> 13:18</p> | <p>14:21 22:19<br/>         24:11 43:21<br/>         44:23 46:1<br/> <b>challenging</b><br/>             19:15<br/> <b>changing</b> 27:24<br/> <b>characterize</b><br/>             34:15<br/> <b>charged</b> 53:2<br/> <b>Chief</b> 3:3,9 25:18<br/>             26:17,22 27:19<br/>             27:23 28:4 53:8<br/>             55:10 57:10<br/> <b>children</b> 43:4<br/> <b>choice</b> 31:23<br/>             54:2,3<br/> <b>choose</b> 16:21<br/> <b>Circuit</b> 7:22<br/>             20:13 21:5 23:4<br/>             25:22 26:10<br/>             27:14,25 28:6<br/>             28:10,22,24<br/>             29:7,9 33:4,9<br/>             42:3,14,16,21<br/>             43:24 46:12<br/>             48:7,8,9,25<br/>             49:5,9 53:13,24<br/> <b>cite</b> 25:15 38:15<br/>             46:12 50:17<br/> <b>cited</b> 35:15,16<br/> <b>city</b> 7:3,8<br/> <b>claim</b> 5:4,12 7:23<br/>             8:5,21 10:7<br/>             14:3 15:1,7<br/>             16:18 25:3,17<br/>             25:24 28:9<br/>             29:20 32:22,24<br/>             33:3,4,5,10,14<br/>             33:17 34:4,8<br/>             36:21,23 41:5<br/>             41:15,15,17,20<br/>             42:14,17,18<br/>             46:4,15,21<br/>             47:11,22,23<br/>             49:10,11,19</p> | <p>50:24 51:5,11<br/>         51:14 52:14,18<br/>         52:20 53:5 55:4<br/>         55:9 57:2,3<br/> <b>claiming</b> 6:8 7:5<br/> <b>claims</b> 7:25 8:6<br/>             8:20 9:7,15<br/>             11:9,12,16,21<br/>             13:10 14:8,20<br/>             17:19 21:6,7,10<br/>             21:13,15 22:5<br/>             24:5 27:6,13<br/>             29:23 34:3,20<br/>             35:19 36:25<br/>             37:6,15 38:2,5<br/>             38:10,13,14,17<br/>             38:19 39:4,11<br/>             39:19,25 40:22<br/>             41:10 42:7,8<br/>             43:16,23 46:9<br/>             47:25 52:2,4,6<br/>             52:24 54:2<br/> <b>clarify</b> 53:11<br/> <b>clause</b> 11:8<br/>             47:11<br/> <b>clear</b> 8:9 46:25<br/> <b>clearly</b> 34:14<br/> <b>client</b> 8:10<br/> <b>clients</b> 7:23 19:8<br/>             36:8<br/> <b>close</b> 38:22 39:1<br/>             39:7,15,16 52:1<br/>             52:11,11<br/> <b>closest</b> 7:1<br/> <b>coincidence</b> 15:1<br/> <b>come</b> 9:12 19:12<br/>             26:4 32:4 43:2<br/> <b>comes</b> 22:24<br/>             32:24 51:7 53:9<br/>             56:15<br/> <b>commercial</b><br/>             52:12<br/> <b>Committee</b><br/>             45:14<br/> <b>communication</b></p> | <p>50:17,18<br/> <b>compensate</b> 37:1<br/> <b>compensated</b><br/>             12:6<br/> <b>compensation</b><br/>             7:5,7 11:11<br/>             20:11 21:24<br/>             22:5,15 24:15<br/>             29:23 33:1,7<br/>             34:11 35:12<br/>             37:17,21 38:23<br/>             39:3,25 40:3,11<br/>             40:15,17 41:10<br/>             41:13,23 42:23<br/>             42:24 43:1,6<br/>             44:16 47:18,25<br/>             49:18 55:21<br/>             56:1,4<br/> <b>compensatory</b><br/>             16:23<br/> <b>competitive</b> 30:7<br/>             30:23<br/> <b>competitors</b><br/>             47:17 51:19<br/> <b>completely</b> 10:8<br/>             19:1 37:8 51:10<br/> <b>compliance</b><br/>             15:14<br/> <b>compliant</b> 47:24<br/> <b>complies</b> 12:14<br/> <b>comply</b> 12:23<br/>             13:17 16:20<br/>             32:3 41:10<br/> <b>complying</b> 22:7<br/>             40:6<br/> <b>component</b> 31:20<br/> <b>conceded</b> 27:10<br/>             55:17 56:5,7,11<br/> <b>conceding</b> 28:17<br/> <b>concept</b> 27:17<br/>             33:23<br/> <b>conceptual</b> 47:10<br/> <b>conceptualized</b><br/>             3:14<br/> <b>concerned</b> 14:19</p> |
|---|---|---|---|---|

|   |   |  |  |   |
|---|---|--|--|---|
| <p><b>concluding</b> 28:14<br/> <b>conclusion</b> 18:18<br/>                 28:25<br/> <b>condemned</b> 7:3<br/> <b>condition</b> 37:19<br/> <b>confiscation</b> 7:15<br/> <b>confused</b> 3:19<br/>                 29:3<br/> <b>confusion</b> 27:18<br/> <b>Congress</b> 21:17<br/>                 35:11,25 37:25<br/>                 38:3,8,22 39:12<br/>                 39:20,24 43:9<br/>                 55:20,23<br/> <b>Congress's</b> 36:2<br/> <b>consequence</b><br/>                 29:13 44:5<br/>                 49:14<br/> <b>consequences</b><br/>                 12:3<br/> <b>consider</b> 20:8,10<br/>                 28:22 44:9,10<br/> <b>considerable</b><br/>                 39:22<br/> <b>consideration</b><br/>                 35:19<br/> <b>considered</b> 49:13<br/> <b>constitutional</b><br/>                 36:15,21 37:19<br/>                 38:6 41:12 54:4<br/> <b>constitutionality</b><br/>                 40:20 41:1,3<br/> <b>consumers</b> 43:11<br/> <b>contemplated</b><br/>                 21:20 38:3,9<br/>                 55:21<br/> <b>contemplates</b><br/>                 56:3,4<br/> <b>contest</b> 17:20,21<br/> <b>context</b> 25:11<br/>                 41:18 46:16<br/> <b>continued</b> 47:24<br/> <b>control</b> 40:6<br/> <b>controlled</b> 4:19<br/> <b>convinced</b> 45:25</p> | <p><b>convinces</b> 39:24<br/> <b>correct</b> 13:1,4,5<br/>                 16:5 25:5,6<br/>                 28:7,14,25 29:1<br/>                 31:11 48:11<br/>                 53:19<br/> <b>correctly</b> 38:19<br/>                 42:21 53:18<br/> <b>Costello</b> 19:19<br/> <b>counsel</b> 26:25<br/>                 30:4 57:10<br/> <b>count</b> 52:12<br/> <b>couple</b> 7:13 48:2<br/>                 56:20,22<br/> <b>course</b> 10:5<br/>                 29:12 36:4<br/>                 39:20 44:4<br/> <b>court</b> 1:1,12 3:10<br/>                 7:1,10,11,14<br/>                 7:24 8:6,12,19<br/>                 9:6,14 11:9,12<br/>                 11:16,20 13:10<br/>                 13:22,23,24<br/>                 14:8,22 17:19<br/>                 21:6,7,10,12<br/>                 21:13,15,16<br/>                 22:4,17,18<br/>                 23:20 24:5 26:4<br/>                 26:23 27:13<br/>                 28:3 32:17<br/>                 33:22 34:2,20<br/>                 34:21 35:4,18<br/>                 36:24,25 37:6<br/>                 37:15 38:2,5,8<br/>                 38:10,14,17,19<br/>                 39:4,11,19,25<br/>                 40:15,22 41:10<br/>                 41:19 42:7,7,25<br/>                 43:16,23 47:25<br/>                 48:15 49:15<br/>                 51:7,13,13<br/>                 52:24 53:20<br/>                 55:6,7,9,24<br/> <b>courts</b> 37:4<br/> <b>Court's</b> 26:2</p> | <p>27:16 40:9 52:9<br/> <b>crazy</b> 39:17<br/> <b>create</b> 37:25<br/> <b>created</b> 44:23<br/> <b>creating</b> 4:23<br/> <b>creature</b> 4:23<br/> <b>critical</b> 33:24<br/>                 46:8<br/> <b>criticize</b> 53:10</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b> 1:3 3:1<br/> <b>damages</b> 21:10<br/>                 54:6<br/> <b>day</b> 39:23<br/> <b>days</b> 56:20,23<br/> <b>dealing</b> 34:19<br/> <b>Deal-era</b> 18:13<br/> <b>decades</b> 37:13<br/> <b>deceased</b> 4:6<br/> <b>decent</b> 21:25<br/> <b>decide</b> 28:24<br/>                 29:17 33:9,10<br/>                 42:6 43:25 49:5<br/>                 53:17 54:5<br/> <b>decided</b> 24:11<br/>                 25:22 29:18<br/>                 30:3 33:11<br/>                 47:15 53:18<br/> <b>decides</b> 20:22<br/> <b>decision</b> 13:23<br/>                 22:23 28:10<br/>                 47:9 48:10<br/> <b>deems</b> 13:9<br/> <b>defeats</b> 34:15<br/> <b>defect</b> 27:14 28:9<br/>                 28:11,15 29:20<br/>                 34:15 48:8<br/>                 49:18 53:19,23<br/>                 54:1,1<br/> <b>defects</b> 33:15<br/>                 55:8<br/> <b>defense</b> 21:3<br/>                 23:14 25:8 45:6<br/>                 49:20,21,22</p> | <p><b>defenses</b> 7:17<br/>                 32:18<br/> <b>defensive</b> 25:17<br/> <b>defensively</b> 41:2<br/> <b>defined</b> 50:4,14<br/>                 51:6<br/> <b>delighted</b> 5:18<br/> <b>deliver</b> 6:16<br/> <b>demand</b> 6:14<br/>                 31:13,25 32:1,2<br/>                 32:4<br/> <b>demanded</b> 17:8<br/> <b>Department</b> 1:6<br/>                 1:18 3:4 4:13<br/>                 6:13,15 10:16<br/>                 10:20 13:21<br/>                 14:17,18,21<br/>                 18:24 19:10,24<br/>                 23:19 24:19<br/>                 51:12 56:19<br/> <b>depends</b> 9:8<br/>                 54:24<br/> <b>deployed</b> 36:1<br/> <b>described</b> 7:14<br/> <b>detail</b> 20:18 21:8<br/> <b>determination</b><br/>                 26:5<br/> <b>difference</b> 16:7<br/> <b>different</b> 3:20<br/>                 9:17 20:19 27:3<br/>                 27:7,8 29:19<br/>                 31:25 53:7<br/>                 54:23<br/> <b>difficult</b> 3:11 5:2<br/> <b>disagree</b> 52:5<br/> <b>discounted</b> 34:22<br/> <b>discuss</b> 13:13<br/> <b>discussion</b> 33:24<br/>                 34:21 35:17<br/>                 43:20 44:14<br/> <b>dismissed</b> 53:14<br/> <b>displaces</b> 23:18<br/> <b>disposition</b> 48:15<br/>                 54:12<br/> <b>dispute</b> 8:4,9</p> | <p>18:22<br/> <b>disputes</b> 8:8<br/> <b>distinct</b> 35:7<br/> <b>distinguish</b> 4:14<br/> <b>district</b> 13:21,24<br/>                 14:22 23:20<br/>                 32:17 34:21<br/>                 35:3 36:24 38:8<br/>                 51:13<br/> <b>doing</b> 3:21 10:15<br/> <b>dollar</b> 6:17,20<br/> <b>dollar-for-dollar</b><br/>                 33:23 34:16,22<br/>                 34:25 35:17,23<br/>                 36:5<br/> <b>due</b> 44:22 47:13<br/>                 51:20<br/> <b>D.C</b> 1:8,15,18</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>E</b> 2:1 3:1,1<br/> <b>easier</b> 24:25<br/> <b>Eastern</b> 34:1<br/> <b>effect</b> 36:10<br/> <b>effectively</b> 4:19<br/>                 56:5<br/> <b>either</b> 15:5,5<br/>                 17:8 19:23 37:3<br/>                 56:3<br/> <b>eliminated</b> 12:9<br/> <b>en</b> 26:3 48:21,23<br/> <b>encroach</b> 25:20<br/> <b>enforced</b> 17:14<br/> <b>enforcing</b> 56:25<br/> <b>engage</b> 47:15<br/> <b>enjoyment</b> 26:13<br/> <b>enlightening</b><br/>                 43:20,25<br/> <b>ensuring</b> 16:19<br/> <b>entering</b> 30:1<br/> <b>Enterprises</b> 34:1<br/> <b>entire</b> 6:2 15:23<br/>                 26:11 34:8,10<br/> <b>entities</b> 4:11,17<br/>                 4:19,23 35:11</p> |
|---|---|--|--|---|

|  |   |   |  |  |
|--|---|---|--|--|
| <b>entitled</b> 9:23<br>11:11 13:24<br>22:19 48:3  | <b>f</b> 46:4<br><b>fact</b> 6:17 22:6<br>34:24 43:3,18<br>50:10,16 51:9  | 37:10 38:13<br>44:17 48:10<br>55:22   | <b>Ginsburg's</b> 17:18<br><b>give</b> 17:8,9,9,9<br>31:10,12,15<br>38:10  | 35:14,16<br><b>grace</b> 53:9<br><b>ground</b> 8:14 26:1<br>53:13  |
| <b>entity</b> 4:24 5:13<br>5:24 13:8 14:10   | <b>factual</b> 3:16<br><b>fail</b> 27:6<br><b>failed</b> 16:25  | <b>fit</b> 37:6 49:11<br><b>flexibility</b> 39:22<br><b>Florida</b> 25:11   | <b>given</b> 11:5 43:18<br>44:8 56:23<br><b>glass</b> 43:4   | <b>grounds</b> 53:15<br><b>grow</b> 36:10<br><b>grower</b> 39:10   |
| <b>equitable</b> 24:7<br><b>equivalent</b> 6:17<br>6:20,23 10:22<br>17:10 32:8                                   | <b>fails</b> 33:6<br><b>failure</b> 27:12<br>32:12 49:17  | <b>focus</b> 7:18<br><b>following</b> 10:10<br><b>Forget</b> 50:20  | <b>go</b> 5:3 6:5 8:19<br>9:13,14 11:16<br>11:20,25 12:2<br>13:10,20 14:7  | <b>guess</b> 11:24<br><b>gypped</b> 43:8   |
| <b>erred</b> 53:13<br><b>ESQ</b> 1:15,17 2:3<br>2:6,9  | <b>fairly</b> 25:16<br><b>faith</b> 51:15<br><b>fall</b> 22:7 33:18   | <b>form</b> 22:20<br><b>forth</b> 18:20 42:12<br>56:25  | <b>goes</b> 5:9 39:11<br>41:5 43:12,15<br>46:24  | <hr/> <b>H</b> <hr/>   |
| <b>essentially</b> 55:17<br>56:19  | <b>falls</b> 21:23<br><b>false</b> 32:13<br><b>family</b> 4:20  | <b>forum</b> 9:7<br><b>forward</b> 47:23<br><b>found</b> 16:15 30:4<br>38:24 47:17  | 17:3,19,20 18:9<br>18:10,24 19:21<br>20:12 21:6,7,9<br>21:12,12,15<br>22:1 23:6,6<br>24:4 27:13 29:9   | <b>hand</b> 24:12 25:3<br><b>handed</b> 22:3<br><b>handing</b> 24:14<br>35:2,2   |
| <b>estates</b> 4:7<br><b>ET</b> 1:3<br><b>evade</b> 30:6<br><b>Evans</b> 38:14                                   | <b>far</b> 14:18<br><b>Farms</b> 3:22<br><b>Federal</b> 8:6,20<br>9:7 17:19 22:4  | 49:15 51:16<br><b>four</b> 3:25<br><b>frankly</b> 53:21<br><b>free</b> 15:15 16:3<br>30:17  | 34:2,19 35:8<br>38:1 40:22<br>41:10 42:7,7<br>43:3,14,23<br>48:25  | <b>handler</b> 3:25 4:3<br>5:24 6:2 8:22<br>9:11,21 11:15<br>12:9,16,18<br>14:13,15,19,25<br>15:2,6,7,8,24<br>19:5,14,14<br>24:20,21,22  |
| <b>event</b> 28:23<br>35:12 38:24<br>40:17 41:11<br>57:5   | <b>fee</b> 6:10 9:25<br><b>feel</b> 19:18<br><b>feeling</b> 37:5,8<br><b>figure</b> 49:1  | <b>free-tonnage</b><br>45:12<br><b>friend</b> 29:6<br><b>full</b> 9:18 10:22,23<br>15:19 49:23  | 41:10 42:7,7<br>43:3,14,23<br>48:25<br><b>going</b> 9:24 12:6<br>29:16 32:4,9<br>35:6 37:1 38:1<br>39:17,18 42:6<br>43:7,10,22 44:1<br>44:23 46:22<br>47:23 53:16<br>54:5,15 56:2,21                     | 30:10 32:3,17<br>32:18 44:25<br>45:9,10,15 46:5<br>46:5,13,15,16<br>46:17 47:4,8<br>49:12 50:15<br>56:18 57:7  |
| <b>everybody</b> 48:16<br>56:4   | <b>file</b> 30:15 35:4<br><b>filed</b> 8:11 26:7<br>32:13 43:18   | <b>fully</b> 22:24 44:9<br>44:11<br><b>fumigating</b> 10:15<br><b>further</b> 19:21   | 46:24<br><b>good</b> 51:15 53:9<br><b>government</b> 6:9<br>6:22 8:7 10:25<br>12:11 17:1,8<br>19:12 20:2<br>21:13 22:6 25:5<br>25:15 26:7<br>28:11 32:25<br>36:25 39:10<br>40:19 48:17,20<br>48:21 55:16 | <b>handlers</b> 5:14<br>8:18 9:4 10:9<br>14:1,2,9 15:10<br>15:13 16:3,11<br>16:15 18:6,8<br>19:6,9,18 30:10<br>30:12,13 31:2,4<br>40:20,23 45:4<br>46:9 47:24 50:2<br>50:10 56:8,9 |
| <b>evidence</b> 35:24<br><b>exact</b> 34:3<br><b>exaction</b> 13:9<br>23:15                                      | <b>find</b> 48:9<br><b>findings</b> 51:9<br><b>fine</b> 6:2,3,7,7<br>8:18 16:22 17:5<br>20:9,23 21:14<br>21:22,22 22:10<br>22:20,21 36:20<br>41:16,21 42:15 | <b>gain</b> 7:6<br><b>General</b> 1:18<br><b>getting</b> 21:4 30:3<br>35:3<br><b>Ginsburg</b> 8:3,13<br>8:16,25 9:5<br>11:4 13:25<br>14:16,23 15:6<br>15:11 19:2<br>25:19,25 29:13<br>40:18 41:4,14 | 48:25<br><b>Government's</b>   | 19:5,14,14<br>24:20,21,22<br>30:10 32:3,17<br>32:18 44:25<br>45:9,10,15 46:5<br>46:5,13,15,16<br>46:17 47:4,8<br>49:12 50:15<br>56:18 57:7   |
| <b>exactly</b> 5:14 16:9<br>20:15 21:16  | <b>findings</b> 51:9<br><b>fine</b> 6:2,3,7,7<br>8:18 16:22 17:5<br>20:9,23 21:14<br>21:22,22 22:10<br>22:20,21 36:20<br>41:16,21 42:15                     | <b>General</b> 1:18<br><b>getting</b> 21:4 30:3<br>35:3<br><b>Ginsburg</b> 8:3,13<br>8:16,25 9:5<br>11:4 13:25<br>14:16,23 15:6<br>15:11 19:2<br>25:19,25 29:13<br>40:18 41:4,14                    | <b>Government's</b>  | <b>handler's</b> 46:7<br><b>handler-only</b><br>47:7<br><b>handler-specific</b><br>30:20 32:12   |
| <b>example</b> 50:20<br><b>exclusive</b> 13:19<br><b>Excuse</b> 19:4<br>44:18                                    | <b>findings</b> 51:9<br><b>fine</b> 6:2,3,7,7<br>8:18 16:22 17:5<br>20:9,23 21:14<br>21:22,22 22:10<br>22:20,21 36:20<br>41:16,21 42:15                     | <b>General</b> 1:18<br><b>getting</b> 21:4 30:3<br>35:3<br><b>Ginsburg</b> 8:3,13<br>8:16,25 9:5<br>11:4 13:25<br>14:16,23 15:6<br>15:11 19:2<br>25:19,25 29:13<br>40:18 41:4,14                    |  | <b>handler's</b> 46:7<br><b>handler-only</b><br>47:7<br><b>handler-specific</b><br>30:20 32:12   |
| <b>exercise</b> 34:1,16<br>36:2  | <b>findings</b> 51:9<br><b>fine</b> 6:2,3,7,7<br>8:18 16:22 17:5<br>20:9,23 21:14<br>21:22,22 22:10<br>22:20,21 36:20<br>41:16,21 42:15                     | <b>General</b> 1:18<br><b>getting</b> 21:4 30:3<br>35:3<br><b>Ginsburg</b> 8:3,13<br>8:16,25 9:5<br>11:4 13:25<br>14:16,23 15:6<br>15:11 19:2<br>25:19,25 29:13<br>40:18 41:4,14                    |  | <b>handler's</b> 46:7<br><b>handler-only</b><br>47:7<br><b>handler-specific</b><br>30:20 32:12   |
| <b>exhaust</b> 14:20<br>23:19  | <b>findings</b> 51:9<br><b>fine</b> 6:2,3,7,7<br>8:18 16:22 17:5<br>20:9,23 21:14<br>21:22,22 22:10<br>22:20,21 36:20<br>41:16,21 42:15                     | <b>General</b> 1:18<br><b>getting</b> 21:4 30:3<br>35:3<br><b>Ginsburg</b> 8:3,13<br>8:16,25 9:5<br>11:4 13:25<br>14:16,23 15:6<br>15:11 19:2<br>25:19,25 29:13<br>40:18 41:4,14                    |  | <b>handler's</b> 46:7<br><b>handler-only</b><br>47:7<br><b>handler-specific</b><br>30:20 32:12   |
| <b>expected</b> 10:2<br><b>expensive</b> 22:13<br><b>explain</b> 14:1 37:7<br><b>extent</b> 16:21<br>33:12 47:22 | <b>findings</b> 51:9<br><b>fine</b> 6:2,3,7,7<br>8:18 16:22 17:5<br>20:9,23 21:14<br>21:22,22 22:10<br>22:20,21 36:20<br>41:16,21 42:15                     | <b>General</b> 1:18<br><b>getting</b> 21:4 30:3<br>35:3<br><b>Ginsburg</b> 8:3,13<br>8:16,25 9:5<br>11:4 13:25<br>14:16,23 15:6<br>15:11 19:2<br>25:19,25 29:13<br>40:18 41:4,14                    |  | <b>handler's</b> 46:7<br><b>handler-only</b><br>47:7<br><b>handler-specific</b><br>30:20 32:12   |
| <hr/> <b>F</b> <hr/>   | <b>findings</b> 51:9<br><b>fine</b> 6:2,3,7,7<br>8:18 16:22 17:5<br>20:9,23 21:14<br>21:22,22 22:10<br>22:20,21 36:20<br>41:16,21 42:15                     | <b>General</b> 1:18<br><b>getting</b> 21:4 30:3<br>35:3<br><b>Ginsburg</b> 8:3,13<br>8:16,25 9:5<br>11:4 13:25<br>14:16,23 15:6<br>15:11 19:2<br>25:19,25 29:13<br>40:18 41:4,14                    |  | <b>handler's</b> 46:7<br><b>handler-only</b><br>47:7<br><b>handler-specific</b><br>30:20 32:12   |

|  |   |  |   |  |
|--|---|--|---|--|
| <p><b>handles</b> 4:11,12<br/>4:25</p> <p><b>handling</b> 4:4 6:10<br/>9:25</p> <p><b>happens</b> 29:12</p> <p><b>hear</b> 3:3 23:5</p> <p><b>held</b> 7:11,22 10:9<br/>10:10,13 24:13<br/>24:16 38:20<br/>39:8 40:15<br/>42:25 48:11</p> <p><b>helpful</b> 43:20</p> <p><b>helps</b> 7:21</p> <p><b>higher</b> 43:11</p> <p><b>holding</b> 26:12<br/>28:1</p> <p><b>holds</b> 22:18</p> <p><b>Holmes</b> 22:18</p> <p><b>Honor</b> 44:4</p> <p><b>hope</b> 7:20</p> <p><b>Horne</b> 1:3 3:4,22<br/>16:2</p> <p><b>Hornes</b> 3:25 6:1<br/>6:15,16 8:5<br/>9:20 11:5,17<br/>15:4,18,24 16:9<br/>21:12</p> <p><b>Horne's</b> 4:6</p> <p><b>host</b> 32:15 34:6</p> <p><b>house</b> 17:8</p> <p><b>huge</b> 20:6</p> <p><b>hurts</b> 36:14</p> <p><b>husband</b> 4:2</p> <p><b>hypothetical</b><br/>13:8 40:4</p> <p><b>hypothetically</b><br/>9:6,6</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> 35:21,22<br/>41:20 44:15</p> <p><b>identification</b><br/>27:1</p> <p><b>III</b> 27:17 48:8</p> <p><b>important</b> 21:9</p> | <p>31:24 35:23</p> <p><b>impose</b> 30:25<br/>49:15</p> <p><b>imposed</b> 30:21</p> <p><b>improper</b> 11:7,20</p> <p><b>include</b> 50:14</p> <p><b>includes</b> 50:5</p> <p><b>including</b> 48:17<br/>50:14</p> <p><b>inconsistent</b> 26:2</p> <p><b>incorrect</b> 40:19</p> <p><b>independent</b><br/>12:10</p> <p><b>independently</b><br/>17:1</p> <p><b>inform</b> 7:21</p> <p><b>initial</b> 28:10 32:2<br/>44:11</p> <p><b>injunction</b> 40:1<br/>54:6</p> <p><b>injunctive</b> 24:8</p> <p><b>injury</b> 15:22,23</p> <p><b>inspected</b> 30:14</p> <p><b>inspection</b> 32:14</p> <p><b>instance</b> 32:19<br/>46:11</p> <p><b>instinctive</b> 37:8</p> <p><b>intended</b> 35:11<br/>35:25 38:22<br/>39:24</p> <p><b>intent</b> 36:2</p> <p><b>intentional</b> 30:6<br/>51:17</p> <p><b>intentionally</b><br/>30:23</p> <p><b>interest</b> 6:8<br/>10:21 15:17<br/>16:19</p> <p><b>intervened</b> 32:21</p> <p><b>introduce</b> 48:22</p> <p><b>invoke</b> 27:14<br/>32:19</p> <p><b>invoked</b> 31:2<br/>32:17</p> <p><b>involved</b> 14:10</p> | <p><b>involving</b> 3:12<br/>33:5</p> <p><b>issue</b> 27:5 32:16<br/>33:8,9 46:13<br/>47:14 48:17<br/>49:7,8 54:2<br/>56:12,13</p> <p><b>issued</b> 6:1 7:8<br/>26:10</p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>JA-305</b> 29:19</p> <p><b>JA305</b> 49:9</p> <p><b>JA41</b> 47:17<br/>51:16</p> <p><b>JOSEPH</b> 1:17<br/>2:6 26:20</p> <p><b>judicial</b> 10:12<br/>31:3,4 32:20<br/>47:8 53:6</p> <p><b>jurisdiction</b> 5:3,9<br/>13:7 18:4,6<br/>23:5,12</p> <p><b>jurisdictional</b><br/>7:18,21,22 8:10<br/>8:13,15,16<br/>23:25 24:3,6<br/>26:8,12 27:11<br/>27:14,15,20<br/>28:1,17 29:5<br/>48:7,16 53:14<br/>53:23 54:1</p> <p><b>Justice</b> 1:18 3:3<br/>3:9,15,18 4:7<br/>4:10,15,21 5:1<br/>5:7,8,11,17,20<br/>5:23 6:5,12<br/>7:16 8:3,13,16<br/>8:25 9:5,22<br/>10:4 11:3,4,17<br/>11:23 12:4,24<br/>13:2,6,25 14:5<br/>14:16,23 15:6<br/>15:11,25 16:2,6<br/>16:12,16 17:3</p> | <p>17:11,17,18,24<br/>18:2,8,11,14<br/>18:16 19:2,16<br/>20:16,20,24<br/>21:5,19,21<br/>22:18,25 23:2<br/>23:10,22 24:2<br/>24:10,24 25:2<br/>25:18,19,25<br/>26:17,22,24<br/>27:9,19,23 28:4<br/>28:16 29:3,8,13<br/>29:15 31:5,9,12<br/>31:14,19,21<br/>32:23 33:8,16<br/>34:4,7,17 36:6<br/>36:20 37:9,23<br/>37:24 38:12<br/>39:5,6,16 40:18<br/>41:4,14 42:1,4<br/>42:5,13 43:1,12<br/>43:14 44:7,13<br/>44:18,20 45:16<br/>45:23,24 46:3<br/>46:19,23 48:1,6<br/>48:13 49:25<br/>50:6,11,19,21<br/>50:23 51:1,21<br/>52:13,16,19,22<br/>53:1,8 54:7,13<br/>54:22 55:2,10<br/>56:7,10 57:10</p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>Kagan</b> 11:3,17<br/>11:23 12:4 14:5<br/>21:19,21 27:9<br/>28:16 34:17<br/>48:13</p> <p><b>Kaiser</b> 25:9</p> <p><b>Kennedy</b> 7:16<br/>13:6 42:1,4,5<br/>42:13 52:13,16<br/>52:19,22 53:1</p> <p><b>key</b> 12:17 22:3</p> | <p><b>kind</b> 29:17,20<br/>36:21,23 40:6<br/>40:16 43:21<br/>47:10 51:20<br/>55:4</p> <p><b>knew</b> 12:6 30:2<br/>36:22</p> <p><b>know</b> 4:16,22<br/>31:6 34:20 35:2<br/>38:9 43:9,19<br/>48:22 50:12,20</p> <p><b>knowing</b> 51:17</p> <p><b>known</b> 3:21<br/>25:10</p> <hr/> <p style="text-align: center;"><b>L</b></p> <hr/> <p><b>label</b> 28:13</p> <p><b>labels</b> 44:24</p> <p><b>land</b> 7:4,12</p> <p><b>landowner</b> 7:6,9<br/>7:10</p> <p><b>language</b> 12:14<br/>28:2</p> <p><b>Lassen</b> 3:24 4:6</p> <p><b>late</b> 43:19</p> <p><b>latitude</b> 40:2</p> <p><b>Laughter</b> 20:17<br/>26:14 31:8 49:3<br/>50:22 55:1</p> <p><b>Laura</b> 4:6</p> <p><b>law</b> 16:21 18:18<br/>20:4,5,8 24:9<br/>31:1 36:15<br/>41:21 42:15<br/>45:13 49:2</p> <p><b>lawbreaker's</b><br/>41:22</p> <p><b>lawfully</b> 42:20<br/>45:21</p> <p><b>lawsuit</b> 9:13</p> <p><b>leads</b> 18:18</p> <p><b>leave</b> 34:7</p> <p><b>left</b> 17:16 24:18<br/>47:22</p> <p><b>legal</b> 4:10,17,19</p> |
|--|---|--|---|--|

|  |   |   |   |  |
|--|---|---|---|--|
| 6:19,21,21 12:3<br>16:20<br><b>legality</b> 19:15<br><b>lessees</b> 50:6<br><b>letter</b> 6:14 32:1,3<br>32:5<br><b>letters</b> 31:13,25<br><b>let's</b> 13:7,7,10<br>52:19<br><b>level</b> 51:12<br><b>liability</b> 4:22<br><b>life</b> 31:6<br><b>light</b> 25:11 43:19<br>43:24<br><b>limited</b> 4:22<br><b>line</b> 28:24<br><b>lines</b> 11:4<br><b>Lion</b> 46:11<br><b>literally</b> 32:5<br><b>litigated</b> 33:3<br>38:14<br><b>lodged</b> 23:14<br><b>logic</b> 10:11<br><b>long</b> 37:20<br><b>longer</b> 8:8,9<br><b>look</b> 3:19 6:13<br>51:16<br><b>Loretto</b> 25:12<br><b>lose</b> 42:2 54:15<br><b>lost</b> 25:4 38:19<br>51:11,14<br><b>lurking</b> 3:12 | <b>matter</b> 1:11 3:16<br>8:17 17:15,16<br>24:6 30:18<br>36:13,14 44:9<br>44:11 45:13<br>57:13<br><b>McCONNELL</b><br>1:15 2:3,9 3:6,7<br>3:9,17 4:5,9,13<br>4:18 5:6,17,22<br>5:25 6:11 7:20<br>8:7,14,21 9:3,8<br>10:3,6 11:3,13<br>11:22 12:1,5<br>13:1,4,15,25<br>14:14,17 15:3,8<br>15:13 16:1,5,9<br>16:14 17:2,7,13<br>17:22 18:1,5,9<br>18:13,19 19:3<br>20:15,18,21<br>21:2,8,20,22<br>22:9 23:8,11,24<br>24:4,10,16,25<br>25:6,19,25<br>26:15,18 31:13<br>32:1 37:18<br>44:21 49:21<br>55:12,13,15<br>56:9,12<br><b>mean</b> 4:16 15:11<br>16:10 18:3,16<br>18:17 28:19<br>31:7,14 34:18<br>34:25 36:7 38:2<br>43:10 46:20<br>50:1 54:25<br><b>meaning</b> 9:23<br>16:19,23<br><b>means</b> 41:11<br>47:9<br><b>meant</b> 37:24<br><b>mechanism</b> 31:4<br>40:12<br><b>mechanisms</b> | 40:15<br><b>meet</b> 16:25<br><b>mere</b> 52:11<br><b>merit</b> 35:19<br><b>merits</b> 3:12 5:2<br>5:19 6:22 7:17<br>7:24 25:22,24<br>26:4,11 29:10<br>34:12 42:2<br>43:13,15 44:1<br>46:19 49:16,18<br>54:8,11,15,17<br>54:23,25 57:5<br><b>MICHAEL</b> 1:15<br>2:3,9 3:7 55:13<br><b>mind</b> 5:12<br><b>minutes</b> 48:2<br>55:12<br><b>missing</b> 45:16<br><b>Missouri</b> 22:11<br>22:22 23:16<br>57:4<br><b>misunderstand...</b><br>51:15<br><b>misunderstood</b><br>48:7<br><b>model</b> 9:16 15:9<br>15:12 16:2,7<br>30:4,5 47:6<br><b>monetary</b> 6:23<br>10:22 17:10<br>23:15<br><b>money</b> 9:20,23<br>9:25 10:7,8<br>11:10,15 13:17<br>17:9 20:7,8<br>27:5 32:2,25,25<br>33:10 34:3 38:2<br>38:5,10,18<br>39:11 41:16<br>42:16 56:15,24<br>57:1<br><b>Monsanto</b> 40:10<br><b>month</b> 47:24<br><b>morning</b> 3:4 | 26:13<br><b>movie</b> 19:19<br><b>myriad</b> 36:4<br><b>mysterious</b><br>25:21<br><b>mystery</b> 50:16<br><hr/> <b>N</b> <hr/> <b>N</b> 2:1,1 3:1<br><b>narrow</b> 47:9 53:6<br>54:11<br><b>nature</b> 47:10<br><b>Nebraska</b> 22:11<br><b>necessarily</b> 25:6<br><b>necessary</b> 34:18<br><b>need</b> 24:5 41:9<br>54:5,13<br><b>needs</b> 27:1<br><b>neighbors</b> 12:21<br><b>never</b> 10:19<br>12:16,21,22<br>15:17 45:10,15<br>45:19,20<br><b>new</b> 18:13 26:10<br>30:3 44:24,24<br><b>Ninth</b> 7:22 20:13<br>21:5 23:4 25:21<br>26:9 27:14,25<br>28:6,10,22,23<br>29:7,9 33:4,9<br>42:2,14,16,21<br>43:24 48:7,8,9<br>48:25 49:5,9<br>53:12,24<br><b>normal</b> 25:3<br>44:25<br><b>Norwood</b> 7:2<br>57:4<br><b>noses</b> 43:4<br><b>notion</b> 38:4<br><b>number</b> 3:11<br>28:15 40:7<br>50:14<br><hr/> <b>O</b> <hr/> | <b>O</b> 2:1 3:1<br><b>objection</b> 26:9<br>38:7 53:12<br><b>obligated</b> 16:24<br><b>obligation</b> 17:1<br>31:17,18<br><b>obligations</b> 16:20<br>30:10,12,21<br>32:11,13 47:5,7<br><b>obscure</b> 18:15<br><b>officer's</b> 10:12<br><b>Oh</b> 16:6 18:19<br><b>okay</b> 11:23 20:24<br>20:24 31:19<br>36:17 46:14<br>51:22<br><b>old</b> 19:19 25:16<br><b>once</b> 39:8 56:1,1<br><b>ones</b> 9:21 14:7<br>43:5<br><b>one-for-one</b><br>33:23<br><b>operate</b> 15:18<br>39:8<br><b>operating</b> 12:11<br><b>opinion</b> 10:12<br>22:17 26:10<br>29:14 33:20<br>44:6,11 48:4,5<br>50:1<br><b>opportunity</b><br>45:17<br><b>opposed</b> 35:1<br><b>opposition</b> 27:21<br><b>opt</b> 40:1<br><b>option</b> 49:5<br><b>options</b> 40:8<br><b>oral</b> 1:11 2:2,5<br>3:7 26:20 55:13<br><b>order</b> 5:25 11:7<br>11:18 13:16<br>14:21 15:14<br>17:14 19:15<br>22:7 30:7,23<br>40:21 47:16 |
|--|---|---|---|--|

|  |   |   |  |   |
|--|---|---|--|---|
| <p>49:1<br/> <b>ordinary</b> 9:9,10<br/>                 10:5<br/> <b>ought</b> 15:4 29:4,9<br/>                 43:23<br/> <b>outcome</b> 33:13<br/> <b>outdated</b> 49:2<br/> <b>owner</b> 51:4<br/> <b>owners</b> 25:8<br/> <b>owns</b> 4:1,11,23<br/>                 5:13,13 30:19<br/>                 45:15</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>P</b> 3:1<br/> <b>Pacific</b> 22:11,22<br/>                 23:16 57:4<br/> <b>packing</b> 10:16<br/>                 56:21<br/> <b>page</b> 2:2 10:11<br/>                 55:19<br/> <b>pages</b> 50:16<br/> <b>paid</b> 6:2,10 9:11<br/>                 9:18 10:8 11:14<br/>                 14:6 17:22,24<br/>                 20:9,10,23 40:3<br/>                 40:13 56:1<br/> <b>Palmore</b> 1:17 2:6<br/>                 26:19,20,22<br/>                 27:9,12,21,25<br/>                 28:7,16,21 29:7<br/>                 29:12,16 31:11<br/>                 31:16,20,23<br/>                 33:2,11,19 34:5<br/>                 34:13 35:5<br/>                 36:19 37:9<br/>                 38:12 39:14,20<br/>                 40:18 41:4,15<br/>                 42:4,13 43:12<br/>                 44:4,10,14,19<br/>                 45:7,19 46:2,7<br/>                 46:23 48:5,13<br/>                 49:4 50:4,8,13<br/>                 51:3 52:5,15,17<br/>                 52:21,24 53:4</p> | <p>53:16 54:10,18<br/>                 54:24 55:3,11<br/> <b>panel</b> 26:10<br/>                 28:10 29:14<br/>                 44:6 48:3,5,10<br/> <b>parents</b> 4:6 43:5<br/> <b>part</b> 21:22,22,23<br/>                 21:24,25 22:2<br/>                 22:10,10 31:5<br/>                 33:24 34:18<br/> <b>particular</b> 19:24<br/>                 53:11<br/> <b>partners</b> 3:23 4:5<br/> <b>partnership</b> 3:21<br/>                 4:2,3,12,12,24<br/>                 5:5<br/> <b>partnerships</b><br/>                 3:20<br/> <b>party</b> 16:17<br/> <b>passes</b> 45:13<br/> <b>pay</b> 9:24,25 13:9<br/>                 15:15,16 16:3<br/>                 20:7,22,25<br/>                 21:14 25:5 31:9<br/>                 34:1 39:18 43:5<br/>                 43:7,8,10,11<br/>                 45:2,11,19,20<br/> <b>paying</b> 7:5 43:6<br/> <b>payment</b> 9:12<br/>                 10:2<br/> <b>penalizing</b> 22:6<br/> <b>penalties</b> 30:25<br/> <b>penalty</b> 13:9<br/>                 21:25 22:2,10<br/>                 22:21 31:6,10<br/>                 31:22 42:8 53:3<br/> <b>penalty's</b> 13:11<br/>                 13:12<br/> <b>Penn</b> 25:11<br/> <b>people</b> 4:1 9:4,19<br/>                 16:18,20 19:22<br/>                 19:24 36:14,15<br/>                 51:25 52:1<br/> <b>people's</b> 51:24<br/>                 52:2,3,6</p> | <p><b>percent</b> 14:11,11<br/> <b>percentage</b> 5:15<br/> <b>period</b> 36:24<br/>                 54:17<br/> <b>permitting</b> 16:17<br/> <b>pertinent</b> 22:9,22<br/> <b>petition</b> 8:11<br/>                 12:13 26:7<br/>                 27:22 28:20<br/>                 48:21,23<br/> <b>Petitioner</b> 51:7<br/> <b>Petitioners</b> 1:4<br/>                 1:16 2:4,10 3:8<br/>                 27:2 47:6,15<br/>                 49:19 50:9 52:7<br/>                 54:3 55:14<br/> <b>Petitioner's</b><br/>                 26:25 30:4<br/> <b>physical</b> 6:23<br/>                 10:17<br/> <b>place</b> 21:11<br/>                 44:17 46:1<br/> <b>plan</b> 12:8,8,12,13<br/> <b>plant</b> 56:21<br/> <b>playing</b> 51:19<br/> <b>please</b> 3:10 19:4<br/>                 26:23<br/> <b>plurality</b> 33:21<br/>                 35:7,15<br/> <b>plurality's</b> 33:24<br/>                 35:24<br/> <b>plus</b> 4:1<br/> <b>pocket</b> 56:16<br/> <b>pocketbook</b><br/>                 15:22,23<br/> <b>point</b> 8:4 13:7<br/>                 25:2 27:10<br/>                 31:24 34:16<br/>                 37:2,8,14 40:9<br/>                 47:18 49:8<br/>                 53:12<br/> <b>pointed</b> 29:13<br/>                 49:9<br/> <b>pointless</b> 21:17<br/>                 33:25 34:16</p> | <p>36:1<br/> <b>points</b> 55:16 57:8<br/> <b>policy</b> 18:17,17<br/>                 36:13<br/> <b>pool</b> 15:16<br/> <b>poor</b> 43:3<br/> <b>portion</b> 22:21,21<br/>                 35:16<br/> <b>position</b> 6:12,21<br/>                 6:21 35:15<br/>                 40:24 42:10<br/>                 54:18<br/> <b>possess</b> 50:5,15<br/> <b>possessed</b> 11:1<br/>                 12:22 56:22<br/> <b>possession</b> 10:17<br/>                 10:17<br/> <b>possessory</b><br/>                 10:21<br/> <b>possible</b> 33:13<br/> <b>possibly</b> 21:18<br/> <b>Power</b> 25:11<br/> <b>practical</b> 8:17<br/>                 17:15<br/> <b>precedence</b><br/>                 40:10<br/> <b>precedent</b> 6:25<br/>                 27:15 28:1<br/>                 41:20<br/> <b>precedents</b> 26:2<br/> <b>precisely</b> 7:9<br/> <b>preclude</b> 39:25<br/> <b>predicated</b> 44:15<br/> <b>prefer</b> 42:8<br/> <b>premium</b> 34:2<br/> <b>prepared</b> 26:3,4<br/> <b>present</b> 51:20<br/> <b>preserved</b> 33:13<br/> <b>pressed</b> 43:4<br/> <b>presumably</b> 48:9<br/> <b>pretty</b> 21:24<br/> <b>prevail</b> 15:4<br/> <b>prevailed</b> 8:11<br/> <b>preview</b> 5:18<br/> <b>prices</b> 36:12,14</p> | <p>43:3,11<br/> <b>principle</b> 24:7<br/> <b>principles</b> 13:22<br/> <b>prior</b> 29:14 44:5<br/>                 44:6 48:5<br/> <b>private</b> 7:15<br/>                 35:10 37:20<br/>                 49:23<br/> <b>problem</b> 9:22<br/>                 29:21,23,24,24<br/>                 49:20 53:7 57:6<br/> <b>problems</b> 29:22<br/> <b>procedures</b><br/>                 13:19<br/> <b>proceeding</b><br/>                 20:22 41:8,9,18<br/>                 47:8,12 53:2,6<br/> <b>proceedings</b> 31:3<br/>                 32:10<br/> <b>process</b> 18:10<br/>                 44:22 46:10<br/>                 47:13 51:20<br/> <b>processed</b> 30:18<br/> <b>processing</b> 10:14<br/> <b>processor</b> 12:16<br/> <b>produce</b> 9:2<br/>                 14:13<br/> <b>producer</b> 3:24,25<br/>                 5:13,13 6:4<br/>                 8:22 9:7,10,11<br/>                 9:14,24,24<br/>                 14:25 15:2 19:1<br/>                 32:19,20,22<br/>                 37:12,13 38:17<br/>                 45:9,14 49:10<br/>                 49:11<br/> <b>producers</b> 8:6,17<br/>                 8:18 9:2,4,17<br/>                 10:1,8 12:10<br/>                 14:4,6 15:15,19<br/>                 15:21 16:4<br/>                 17:19,20 18:7,9<br/>                 18:22,23,25<br/>                 24:11 29:25<br/>                 32:19 38:16</p> |
|--|---|---|--|---|



|   |   |   |   |  |
|---|---|---|---|--|
| <p>40:13,22 41:7<br/>42:19 43:8 45:2<br/>47:2,2 52:18,25<br/><b>produces</b> 4:12,17<br/>4:25<br/><b>producing</b> 14:2<br/>26:12<br/><b>program</b> 18:23<br/>19:7 36:9 37:2<br/>37:3 38:4,24<br/>39:12 40:4 43:2<br/>43:10,21,22<br/>44:8 45:8 51:23<br/>56:2<br/><b>programs</b> 18:13<br/><b>proper</b> 9:7 39:2<br/><b>properly</b> 27:13<br/>28:8<br/><b>property</b> 6:23<br/>7:15 16:17 25:4<br/>25:7,9 27:2,4<br/>37:11,20 41:5,7<br/>41:8,22 45:3,5<br/>46:7 49:23<br/>51:24<br/><b>proposition</b><br/>25:16 41:24<br/><b>provide</b> 31:17<br/>32:6,7<br/><b>provided</b> 38:23<br/>41:13 46:13<br/>47:19<br/><b>provides</b> 31:3<br/>48:19<br/><b>providing</b> 12:20<br/><b>provisions</b> 40:7<br/><b>public</b> 7:15 37:20<br/>49:23<br/><b>punishment</b><br/>22:21<br/><b>punitive</b> 16:22<br/><b>purchasers</b><br/>19:18<br/><b>pure</b> 18:7,9<br/><b>purely</b> 37:7</p> | <p><b>purpose</b> 7:4<br/>18:14 36:16<br/>39:19<br/><b>purposes</b> 19:14<br/><b>pursue</b> 24:8<br/><b>put</b> 16:24 27:16<br/><b>putting</b> 49:19</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>question</b> 5:5,9<br/>7:18,21,22 9:1<br/>11:24 12:2 14:4<br/>14:5 17:4,18<br/>23:1 29:5 34:12<br/>35:1 38:22 39:1<br/>39:7,15 41:5<br/>46:20,20,22,24<br/>50:8,25 53:18<br/>54:14,17,23<br/>55:24 57:5<br/><b>questions</b> 3:12<br/>5:2 47:10<br/><b>quick</b> 55:15<br/><b>quite</b> 9:17 19:11<br/>20:16 21:9<br/>41:24 46:25<br/>52:9<br/><b>quote</b> 7:14 21:16</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>R</b> 1:17 2:6 3:1<br/>26:20<br/><b>Rail</b> 40:10 55:24<br/><b>railroad</b> 22:11,12<br/>22:13,19,22<br/>23:16 57:4<br/><b>raise</b> 7:23 14:20<br/>16:18 25:8<br/>27:20 28:19<br/>36:11 40:20<br/>41:1,3,7,9 45:5<br/>52:14,18,20<br/><b>raised</b> 24:1 26:9<br/>49:21 53:10<br/><b>raisin</b> 3:21,21</p> | <p>29:22,25 30:10<br/>31:2 36:9,12<br/>38:16,24 40:21<br/>43:3 45:14<br/><b>raising</b> 21:2<br/>36:14 38:6<br/><b>raisins</b> 4:1 5:13<br/>5:15 6:9,16,20<br/>8:18,19,20 9:12<br/>9:13,19 10:2,18<br/>10:18,19,21,23<br/>11:1,6,11,14<br/>11:14,19 12:7<br/>12:11,17,21,22<br/>12:24,25 14:2,6<br/>14:10,13 15:14<br/>15:16,16,17,20<br/>16:3,8,23,24<br/>17:5,9,12,14<br/>17:21,23 19:18<br/>19:23,25 20:1,1<br/>20:3 22:4 24:13<br/>24:14,17,20<br/>27:5 29:21<br/>30:14,17,18<br/>31:6,10,12,15<br/>31:17,22 32:2,4<br/>32:7,14 33:6<br/>36:10,15 37:11<br/>37:13,13,16<br/>38:1,9 39:10,12<br/>39:18 40:12<br/>41:8 42:19 43:5<br/>45:2,3,9,10,11<br/>45:12,13,15,18<br/>45:20,22 46:11<br/>46:14,17 47:19<br/>50:2,15 56:21<br/>56:24 57:1,2<br/><b>rationale</b> 22:8<br/><b>reach</b> 54:8,11,14<br/>54:16,23<br/><b>really</b> 22:1 29:3<br/>35:6 36:2 43:23<br/>45:23 52:1 54:9</p> | <p>54:17<br/><b>reason</b> 10:10<br/>18:17 33:6,7<br/><b>reasoning</b> 48:3<br/><b>reasons</b> 23:9<br/>27:7,8 33:20<br/>34:6 35:7 36:4<br/>49:16<br/><b>rebuttal</b> 2:8<br/>25:20 44:22<br/><b>received</b> 9:18<br/>11:15 15:19<br/><b>recognize</b> 54:21<br/><b>records</b> 30:16<br/><b>referred</b> 31:13<br/>32:1 33:21<br/><b>regarded</b> 10:16<br/><b>regards</b> 10:25<br/><b>Regional</b> 40:10<br/>55:24<br/><b>regulate</b> 47:2<br/><b>regulated</b> 13:8<br/>18:23 19:6 47:4<br/><b>regulation</b> 12:15<br/>12:23<br/><b>regulatory</b> 10:25<br/>30:6,12,20<br/>31:16,18 32:10<br/>32:15 45:8 47:5<br/>47:7,15 50:9<br/>51:8,14,17<br/><b>rehearing</b> 8:11<br/>26:7 27:22 28:5<br/>28:12,20 48:21<br/>48:23<br/><b>reinstate</b> 29:14<br/>44:5 48:10<br/><b>rejected</b> 7:7<br/>12:12 42:21<br/><b>relation</b> 51:25<br/><b>relationship</b> 9:10<br/>52:11,12<br/><b>relevant</b> 8:23,24<br/><b>relied</b> 28:2,4<br/>33:22 53:24</p> | <p><b>relief</b> 24:8<br/><b>rely</b> 28:5 55:9<br/><b>remaining</b> 26:15<br/>55:12<br/><b>remand</b> 25:23<br/>28:23 29:4,17<br/>33:12,13 48:6<br/>49:13 54:19<br/><b>remanded</b> 48:2<br/><b>remarkable</b><br/>41:25<br/><b>remedies</b> 18:24<br/>23:19 54:2<br/><b>remedy</b> 13:24<br/>24:6,9 35:20<br/>37:18 39:3<br/>43:22 48:19<br/>54:3,5<br/><b>remember</b> 21:9<br/><b>repeated</b> 55:20<br/><b>reports</b> 30:15<br/>32:13<br/><b>representing</b> 9:2<br/>9:4<br/><b>required</b> 14:20<br/>22:14 23:18<br/>34:1<br/><b>requirement</b><br/>24:4 30:2,14,14<br/>30:15,16 34:25<br/>35:8 37:16<br/>38:18 40:5<br/><b>requirements</b><br/>30:7 51:18 52:9<br/><b>res</b> 6:23,24<br/><b>reserve</b> 9:11<br/>15:16,17 26:15<br/>30:1,17 32:12<br/>37:15 38:18,24<br/>40:5,12 45:10<br/>45:11,13<br/><b>residing</b> 23:21<br/><b>resist</b> 29:16<br/>46:21 53:16<br/><b>resisted</b> 42:20</p> |
|---|---|---|---|--|

|   |  |   |   |  |
|---|--|---|---|--|
| <b>Respondent</b> 1:19<br>2:7 26:21   | 53:13  | 30:16 32:10   | 26:24 44:18,20  | <b>strict</b> 52:10  |
| <b>response</b> 16:1  | <b>says</b> 13:12 20:2<br>20:4 21:6,13   | 33:14,15 35:4<br>46:9 49:7,8,16   | 45:16,23 46:3<br>54:7,13,22 55:2<br>56:7,10   | <b>strictly</b> 29:25<br>49:11                                       |
| <b>responses</b> 38:13  | 22:13 29:6 30:4  | <b>series</b> 30:11 55:8  | <b>Sotomayor's</b><br>22:25   | <b>string</b> 25:7,14  |
| <b>responsible</b> 10:9<br>10:10,13   | 32:5 37:24 42:3<br>49:21 50:1  | <b>service</b> 12:20  | <b>sought</b> 47:18<br>51:8   | <b>strip</b> 7:4   |
| <b>reversing</b> 53:12  | <b>Scalia</b> 5:1,7,8<br>12:24 13:2  | <b>set</b> 14:6 18:20<br>21:17 37:4   | <b>sound</b> 45:23  | <b>stripping</b> 26:11   |
| <b>review</b> 26:3<br>29:11 31:3,4<br>32:17,20 46:16<br>47:8 49:12 53:6   | 18:11,14,16<br>23:22 24:2 29:3<br>29:8,15 31:5,9<br>31:12,14,19,21<br>37:23 38:12<br>39:6,16 45:24<br>46:19,23 50:21<br>51:1 | <b>share</b> 56:24  | <b>sounds</b> 50:24   | <b>subject</b> 8:17<br>31:18   |
| <b>right</b> 4:9 5:6 6:5<br>7:20 8:3 11:6<br>12:4 13:3,15<br>14:11 16:12<br>18:1,23 19:20<br>19:23 20:15<br>21:13 24:24<br>25:23 28:6 29:6<br>31:6,15,22<br>33:16 37:6<br>44:20 51:5,24<br>55:2 | <b>scheme</b> 10:25<br>14:24 46:1,17<br>46:18 47:1 50:9  | <b>shifted</b> 37:10  | <b>special</b> 7:9 51:25  | <b>submitted</b> 57:11<br>57:13                                      |
| <b>ripeness</b> 27:17   | <b>schemes</b> 32:20<br>40:11  | <b>short</b> 54:7   | <b>specific</b> 6:22<br>53:6  | <b>subsequent</b> 7:13   |
| <b>river</b> 36:11  | <b>scope</b> 46:24 53:5  | <b>show</b> 49:22   | <b>standing</b> 15:22<br>50:25 52:2,3,6<br>52:8,10,14,18<br>52:20 53:5<br>56:14,15,16 | <b>substance</b> 28:24   |
| <b>road</b> 7:4   | <b>second</b> 4:3,25<br>23:13 32:4<br>33:22 35:21<br>56:12   | <b>showed</b> 32:5,6  | <b>stands</b> 32:23<br>41:24 57:1,1   | <b>substantive</b> 28:9<br>28:11,15,18<br>54:1                       |
| <b>ROBERTS</b> 3:3<br>26:17 27:19,23<br>28:4 53:8 55:10<br>57:10  | <b>secondly</b> 55:25<br>56:16   | <b>side</b> 53:10   | <b>start</b> 26:24  | <b>substantively</b><br>28:14  |
| <b>roles</b> 47:3   | <b>Secretary</b> 40:1  | <b>significance</b> 6:19  | <b>started</b> 23:3<br>26:25 48:20  | <b>substitute</b> 19:4   |
| <b>rot</b> 24:18  | <b>section</b> 31:3 47:1   | <b>similar</b> 15:9,12<br>24:22 36:7  | <b>State</b> 22:12  | <b>substituted</b> 4:8   |
| <b>route</b> 11:25 12:2   | <b>Sections</b> 18:21  | <b>simplifying</b> 36:7   | <b>States</b> 1:1,12  | <b>substituting</b><br>26:11   |
| <b>rule</b> 12:18 49:16   | <b>secure</b> 30:7,23<br>47:16   | <b>simply</b> 12:19<br>29:1 33:25<br>35:10 37:21<br>41:2 47:11<br>49:20 54:2  | <b>stating</b> 27:15  | <b>sue</b> 38:10   |
| <b>ruled</b> 28:10  | <b>see</b> 5:8 10:11<br>19:19  | <b>situation</b> 38:23<br>44:24,25 45:4   | <b>status</b> 19:11<br>30:11  | <b>sued</b> 47:24  |
| <b>rules</b> 51:19  | <b>seeding</b> 10:15   | <b>six</b> 25:15  | <b>statute</b> 35:9<br>37:24,25 38:11<br>39:7,17,23 40:7<br>45:8 46:25 56:3           | <b>suffers</b> 33:14   |
| <hr/> <b>S</b> <hr/>  | <b>seek</b> 49:18  | <b>smaller</b> 40:13  | <b>statutes</b> 36:23<br>40:14  | <b>suggest</b> 53:23   |
| <b>S</b> 2:1 3:1  | <b>seeking</b> 21:10   | <b>sold</b> 10:4 24:17<br>24:18   | <b>statutory</b> 40:11  | <b>suggested</b> 11:18<br>34:5 40:4                                  |
| <b>sake</b> 33:17   | <b>seeks</b> 6:22  | <b>solely</b> 37:13   | <b>stemming</b> 10:15   | <b>suggests</b> 37:19<br>54:3,3 55:6                                 |
| <b>sanctions</b> 31:18  | <b>seen</b> 41:23  | <b>Solicitor</b> 1:17   | <b>stop</b> 3:16 49:24  | <b>suit</b> 35:4   |
| <b>saying</b> 6:6 7:17<br>9:5 11:5,20<br>16:8 27:24 29:4<br>32:1,3 40:19  | <b>segregated</b> 8:19   | <b>somebody</b> 35:4<br>18:14 24:22   | <b>store</b> 46:13  | <b>supplementary</b><br>40:16  |
|   | <b>sells</b> 24:20 50:15   | <b>somewhat</b> 18:14<br>18:14 24:22  | <b>straight</b> 9:1   | <b>supplemented</b><br>23:15   |
|   | <b>sense</b> 28:9 43:15  | <b>sorry</b> 11:3 15:25<br>19:3,3 39:3  | <b>straightforward</b><br>57:3  | <b>supplied</b> 10:1   |
|   | <b>separate</b> 4:17,18<br>4:19,23 29:18   | <b>sort</b> 44:22   | <b>straightforwar...</b><br>18:20   | <b>supply</b> 40:6   |
|   |  | <b>Sotomayor</b> 3:15<br>3:18 4:7,10,15<br>4:21 5:11,17,20<br>5:23 6:5,12<br>9:22 10:4 15:25<br>16:2,6,12,16<br>17:3,11 24:10<br>24:24 25:2 | <b>strenuously</b><br>29:17 53:17   | <b>support</b> 6:25<br><b>suppose</b> 11:5<br>43:17,17 51:1<br>52:13 |
|   |  |   |   | <b>supposed</b> 39:8<br>43:2   |
|   |  |   |   | <b>Supreme</b> 1:1,12  |
|   |  |   |   | <b>sure</b> 10:3,6 37:9<br>44:1                                      |

|  |  |   |   |  |
|--|--|---|---|--|
| <p><b>surely</b> 38:3<br/> <b>surprising</b> 3:11<br/>                     50:10<br/> <b>system</b> 16:19</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>T</b> 2:1,1<br/> <b>table</b> 47:22<br/> <b>take</b> 6:14 14:4<br/>                     15:14 16:7<br/>                     23:20 25:23<br/>                     32:25 38:1,9<br/>                     39:18 43:2<br/>                     45:17,21,21<br/>                     47:3<br/> <b>taken</b> 5:14,24<br/>                     6:6,8 8:20<br/>                     11:14 21:11<br/>                     27:2,4 41:16<br/>                     46:8<br/> <b>takes</b> 36:10,15<br/>                     39:10 41:6<br/>                     45:10,11 51:23<br/> <b>takings</b> 7:23 8:5<br/>                     11:8 25:3,8,17<br/>                     25:24 26:25<br/>                     27:6 29:20<br/>                     33:10 35:19<br/>                     46:4,9,15,21<br/>                     47:11 50:24<br/>                     55:4<br/> <b>talk</b> 42:11 56:13<br/> <b>talked</b> 44:8<br/> <b>talking</b> 18:6 33:5<br/>                     46:25 48:20<br/> <b>taxpayer</b> 43:7<br/> <b>taxpayers</b> 43:10<br/> <b>Teleprompter</b><br/>                     25:12<br/> <b>tell</b> 19:20 37:5<br/>                     44:3<br/> <b>term</b> 12:17 50:4<br/>                     51:6<br/> <b>terms</b> 27:17<br/> <b>terrible</b> 44:2</p> | <p><b>Thank</b> 26:16,17<br/>                     26:22 55:10<br/>                     57:9,10<br/> <b>theirs</b> 27:4<br/> <b>theories</b> 27:3<br/> <b>theory</b> 37:10<br/> <b>thing</b> 20:2 22:3<br/>                     25:21 31:22<br/>                     40:24 43:18<br/> <b>things</b> 8:1 35:6<br/>                     43:25 46:6<br/>                     50:14<br/> <b>think</b> 6:12 8:1,7<br/>                     8:9,23 9:14<br/>                     11:15 12:2 13:5<br/>                     13:20,22 15:3,4<br/>                     18:3,21 19:11<br/>                     20:11 21:21<br/>                     22:24 26:1 27:6<br/>                     28:8,8 29:1<br/>                     31:24 33:14,19<br/>                     34:14 35:5,22<br/>                     36:8,13,21<br/>                     37:24 39:2,6,7<br/>                     39:16,21 41:4<br/>                     41:17 43:16,21<br/>                     45:24 46:23<br/>                     48:11 51:3,4,23<br/>                     52:11 53:4,7,9<br/>                     53:17,20 54:10<br/>                     54:11,19,22<br/>                     55:6,7,23 56:5<br/>                     57:3<br/> <b>thinking</b> 8:3<br/>                     40:19<br/> <b>third</b> 23:17<br/> <b>third-party</b> 52:7<br/>                     52:10 56:15<br/> <b>thirties</b> 36:11<br/> <b>thought</b> 11:6<br/>                     33:4,25 35:7,9<br/>                     42:5<br/> <b>three</b> 8:1 23:8<br/> <b>threshold</b> 27:7,7<br/>                     29:20 33:15</p> | <p>53:19 55:8<br/> <b>throws</b> 36:10<br/> <b>tick</b> 23:8<br/> <b>time</b> 17:13,13<br/>                     25:20,21 26:9<br/>                     26:16 51:10<br/>                     56:25<br/> <b>timing</b> 17:16<br/> <b>title</b> 10:19 16:7<br/>                     45:1,10,12,12<br/>                     45:17,21,21<br/> <b>today</b> 13:14<br/> <b>told</b> 22:12 36:22<br/>                     40:21 45:1 51:9<br/>                     55:19<br/> <b>ton</b> 12:20<br/> <b>tonnage</b> 30:17<br/>                     30:18<br/> <b>transfer</b> 35:18<br/>                     35:22<br/> <b>treated</b> 14:18<br/>                     19:8<br/> <b>tried</b> 7:5<br/> <b>truck</b> 32:6<br/> <b>true</b> 13:3 21:19<br/>                     21:21<br/> <b>truthful</b> 30:15<br/> <b>try</b> 48:25<br/> <b>trying</b> 14:23<br/>                     19:16 21:4 23:2<br/>                     26:3 32:25<br/> <b>Tucker</b> 11:9 18:3<br/>                     18:5 23:13,18<br/>                     24:12 28:18<br/>                     35:8,20,25<br/>                     40:16 42:24<br/>                     48:19,19 49:17<br/>                     55:18,19 56:6</p> | <p>4:17 17:15 27:3<br/>                     28:15 29:8,22<br/>                     31:25 35:5,6<br/>                     38:12,13 48:12<br/>                     55:15 57:8</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>ultimately</b> 12:12<br/> <b>unconstitutional</b><br/>                     20:6,8 21:1<br/>                     36:9 39:9 40:25<br/>                     41:6 42:9,20,22<br/>                     51:23 52:23<br/> <b>undercut</b> 51:18<br/> <b>underlying</b> 13:16<br/>                     36:8 51:8 55:4<br/> <b>understand</b><br/>                     14:24 22:1<br/>                     42:11,14 47:21<br/>                     48:1<br/> <b>understood</b> 33:3<br/>                     33:4 41:19<br/>                     42:16,18 53:25<br/> <b>unfair</b> 30:7,23<br/>                     47:16<br/> <b>unfairness</b> 47:13<br/> <b>United</b> 1:1,12<br/> <b>unnecessary</b><br/>                     12:9<br/> <b>unusual</b> 10:25<br/>                     25:17<br/> <b>USDA</b> 30:25<br/>                     50:18<br/> <b>use</b> 7:15 37:20<br/>                     47:24 49:23<br/> <b>uses</b> 36:16</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>v</b> 1:5 3:4 7:2<br/>                     22:11 25:12<br/> <b>valid</b> 37:3<br/> <b>Valley</b> 3:22,24<br/> <b>value</b> 7:6 9:18<br/>                     10:23,24 15:19<br/>                     16:17 25:4</p> | <p><b>valued</b> 3:14<br/> <b>variants</b> 22:25<br/> <b>venture</b> 44:25<br/> <b>victory</b> 44:6<br/> <b>view</b> 26:10 28:12<br/>                     36:17 38:20<br/>                     39:1 49:17<br/>                     56:20<br/> <b>viewed</b> 27:13<br/>                     28:8 35:24<br/> <b>Village</b> 7:1<br/> <b>violate</b> 16:21<br/>                     31:17<br/> <b>violated</b> 30:22<br/> <b>violating</b> 32:11<br/>                     40:23<br/> <b>violation</b> 11:8<br/>                     21:11 24:12<br/>                     31:1 37:21<br/>                     41:21 42:15<br/>                     51:17<br/> <b>violations</b> 32:16<br/>                     47:16</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>W</b> 1:15 2:3,9 3:7<br/>                     55:13<br/> <b>wait</b> 42:8<br/> <b>waits</b> 13:11<br/> <b>waived</b> 28:19<br/>                     48:24<br/> <b>waiver</b> 48:9 49:6<br/>                     49:16<br/> <b>want</b> 11:10 13:13<br/>                     17:5 19:19 20:3<br/>                     20:7,9,10,11<br/>                     25:4,20 37:16<br/>                     38:18 42:11<br/>                     53:11 54:9,14<br/>                     54:16,16<br/> <b>wanted</b> 7:17 43:9<br/>                     47:23 50:11<br/>                     56:13<br/> <b>wants</b> 47:3<br/> <b>Washington</b> 1:8</p> |
|--|--|---|---|--|

|  |  |  |  |  |
|--|--|--|--|--|
| 1:15,18<br><b>wasn't</b> 14:24<br>49:11,11 51:15<br><b>way</b> 15:18 16:21<br>34:23 39:7 40:6<br>42:17 44:8 45:7<br>52:4<br><b>Wednesday</b> 1:9<br><b>weird</b> 38:11<br><b>went</b> 14:7 28:6<br>36:2 38:17<br>48:15<br><b>weren't</b> 9:23 14:1<br>35:17<br><b>we'll</b> 3:3 38:9<br>43:25 44:7<br><b>we're</b> 9:3 11:11<br>18:6 20:14 32:4<br>37:25 39:17,18<br>44:14 54:15,19<br><b>we've</b> 37:9 38:25<br>38:25 44:8<br><b>wide</b> 40:2<br><b>wife</b> 3:22 4:2<br><b>willful</b> 30:6 51:17<br><b>willfully</b> 30:22<br><b>Williamson</b><br>42:12<br><b>win</b> 46:22 48:3<br>54:8 55:2<br><b>withdraw</b> 18:12<br><b>withdraws</b> 18:3,5<br><b>word</b> 19:5 49:25<br>50:12<br><b>words</b> 11:17 29:1<br><b>work</b> 14:12 22:13<br>44:2<br><b>works</b> 45:8<br><b>world's</b> 49:2<br><b>wouldn't</b> 13:3<br>40:3<br><b>write</b> 43:25<br><b>wrong</b> 8:1 19:20<br>23:5 28:13 29:1<br>29:10 34:9,11 | 34:14 37:8<br>48:14,14,17<br>51:10 54:4<br><hr/> <b>X</b> <hr/> x 1:2,7<br><hr/> <b>Y</b> <hr/> <b>Yeah</b> 51:1<br><b>year</b> 39:9,10,17<br>39:18 40:3,4<br><b>years</b> 7:14 47:19<br><hr/> <b>\$</b> <hr/> <b>\$12</b> 12:20<br><b>\$2,000</b> 7:7,10<br><b>\$484,000</b> 10:23<br><b>\$500</b> 22:16<br><b>\$700,000</b> 19:13<br>21:14<br><hr/> <b>1</b> <hr/> <b>10:10</b> 1:13 3:2<br><b>11</b> 50:17<br><b>11:10</b> 57:12<br><b>12-123</b> 1:4 3:4<br><b>14</b> 31:3<br><b>14(a)</b> 18:21<br><b>15(a)</b> 18:21<br><b>1969</b> 29:25 37:14<br><hr/> <b>2</b> <hr/> <b>20</b> 1:9 14:11<br><b>2002</b> 29:24 30:11<br>37:12,14 47:14<br><b>2013</b> 1:9<br><b>22</b> 19:12<br><b>26</b> 2:7<br><hr/> <b>3</b> <hr/> <b>3</b> 2:4 55:12<br><hr/> <b>5</b> <hr/> <b>50</b> 55:19<br><b>55</b> 2:10 | <hr/> <b>6</b> <hr/> <b>6</b> 47:19<br><b>608c(13)(B)</b> 47:1<br><hr/> <b>7</b> <hr/> <b>78</b> 10:11<br><hr/> <b>8</b> <hr/> <b>8</b> 50:16<br><b>80</b> 14:11 |  |  |
|--|--|--|--|--|