

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ROSE MARY KNICK, )  
 )  
                   Petitioner, )  
 )  
                   v. ) No. 17-647  
 )  
TOWNSHIP OF SCOTT, PENNSYLVANIA, )  
 )  
ET AL., )  
 )  
                   Respondents. )  
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Pages: 1 through 75

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	J. DAVID BREEMER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	GEN. NOEL G. FRANCISCO, ESQ.	
7	For the United States,	
8	as amicus curiae	25
9	ORAL ARGUMENT OF:	
10	TERESA FICKEN SACHS, ESQ.	
11	On behalf of the Respondents	38
12	REBUTTAL ARGUMENT OF:	
13	J. DAVID BREEMER, ESQ.	
14	On behalf of the Petitioner	71
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
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24  
25

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 17-647, Knick versus the Township of Scott, Pennsylvania.

Mr. Breemer.

ORAL ARGUMENT OF J. DAVID BREEMER  
ON BEHALF OF THE PETITIONER

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

The critical issue in this case is this: When is an invasion of property without just compensation in violation of the Just Compensation Clause so that a property owner can claim an unconstitutional taking requiring damages?

The understanding adopted well before Williamson County and Dow and other cases is that the invasion itself gives rise to a constitutionally rooted claim for compensation, unless, as in Cherokee Nation, the government recognizes the owner's entitlement to compensation and provides a process for collecting it at the time of the invasion.

1           This is the understanding that  
2 controls in takings cases against the United  
3 States under the Tucker Act, and there's no  
4 reason why we should have a different  
5 constitutional interpretation of the Just  
6 Compensation Clause simply because the  
7 defendant is a local government entity.

8           But, in fact, Williamson County does  
9 adopt a conflicting and anomalous and mistaken  
10 interpretation of the Just Compensation Clause  
11 in holding that an invasion of property is not  
12 without compensation and not actionable under  
13 the Takings Clause until state remedies are  
14 exhausted.

15           A basis for this understanding is this  
16 Court's decision -- the initial basis is the  
17 Great Falls Manufacturing case. This is 1884.  
18 And in that case, this Court said that when a  
19 property owner has their property invaded, they  
20 are entitled from that moment to go seek  
21 compensation on a constitutional basis. So --

22           CHIEF JUSTICE ROBERTS: Well, I mean,  
23 the -- the question is whether or not to  
24 overrule Williamson County. And your  
25 assumption thus far has been that it turns

1 solely on when you have a complete violation of  
2 the Constitution and should be able to proceed  
3 at that point.

4 But do we -- is it necessarily the  
5 case that the -- the same rule has to apply  
6 with respect to the federal proceedings and a  
7 state court proceeding? I mean, maybe what  
8 we're looking at is not something as grand as  
9 when the constitutional violation is -- has  
10 come to fruition, but, instead, simply a rule  
11 about how those cases should be handled in  
12 state court as opposed to federal court.

13 Williamson County, as -- what I think  
14 of as a special rule for state court  
15 proceedings that requires, obviously, you to go  
16 to the state court, and I'm just wondering if  
17 you can address that on its own without issuing  
18 some ruling about when a Takings Clause is  
19 complete and -- and actionable.

20 MR. BREEMER: I don't think so because  
21 the only basis for that Williamson County  
22 scheme, state readiness scheme, is an  
23 interpretation of the Just Compensation Clause  
24 when you have a complete claim. There's no  
25 other basis for that.

1           And so, if you have a complete claim,  
2           as you do in the -- in claims against the  
3           United States under Dow, if you have a complete  
4           federal claim, well, then you have a federal  
5           question and you have the option to go to  
6           federal court under Section 1983. That's the  
7           purpose of Section 1983, as you know.

8           So I don't see how you -- I don't  
9           think the Fifth Amendment varies depending on  
10          what court you're in or what you're defending,  
11          and I think the Just Compensation Clause has to  
12          be interpreted in the same way in both of those  
13          circumstances, and there's no other basis for  
14          saying, well, state courts should have it  
15          first. That's -- that's the no exhaustion  
16          doctrine in Monroe and other cases that this  
17          Court has rejected.

18                 JUSTICE KAGAN: So could --

19                 JUSTICE BREYER: How does it work? I  
20                 mean, I -- I'm having trouble understanding.  
21                 We have a -- an environmental agency, a state  
22                 environmental agency which has some kind of a  
23                 rule, only so much lead can be put into the sea  
24                 or air or something every mile. Now there are  
25                 dozens of pieces of property within that area.

1 And depending upon the reasonable expectations  
2 of individual property owners, it might violate  
3 some, and it might not violate others. The  
4 state also has a system of courts that, where  
5 there's a violation, they pay. Okay?

6 So EPA, state, what are they supposed  
7 to do? I mean, how do we decide which ones are  
8 right and which ones are wrong? How do we  
9 decide which property owners do have the  
10 reasonable expectation and not? In your  
11 opinion, how do we do it?

12 MR. BREEMER: Well, that, as I  
13 understand your question --

14 JUSTICE BREYER: I mean, if you're  
15 EPA, you are the state EPA, you go into your  
16 office --

17 MR. BREEMER: I --

18 JUSTICE BREYER: -- and there's a  
19 queue of people and all of them are saying our  
20 property is being taken and we all have  
21 different times of purchase, different  
22 conditions, dah-dah, dah-dah.

23 All right. How do you decide who's  
24 entitled to it?

25 MR. BREEMER: That's a merits question



1 as I -- as I understand it.

2 JUSTICE BREYER: I know. I don't care  
3 what kind of question it is. I would like an  
4 answer --

5 MR. BREEMER: And they don't --

6 JUSTICE BREYER: -- to that question.

7 (Laughter.)

8 MR. BREEMER: Okay. How do you --

9 JUSTICE BREYER: How do you decide the  
10 merits?

11 MR. BREEMER: How do you decide? The  
12 government -- the EPA doesn't have to decide  
13 that. The -- a -- those property owners won't  
14 have an actionable claim until they have a ripe  
15 claim, there has been a finding --

16 JUSTICE BREYER: No, I'm not asking  
17 you that.

18 MR. BREEMER: Okay.

19 JUSTICE BREYER: You are in the state  
20 EPA. Mr. Smith comes in, and Mr. Jones. They  
21 each say you have taken my property. The  
22 conditions are different.

23 What do you tell them?

24 MR. BREEMER: They shouldn't be going  
25 to the state agency in the first place.

1 JUSTICE BREYER: They don't even go to  
2 the EPA?

3 MR. BREEMER: They should --

4 JUSTICE BREYER: They don't even ask?

5 MR. BREEMER: If -- if -- if their  
6 property has been injured by an EPA rule, then  
7 they -- and it's a final decision that injures  
8 their property, then they have the right to  
9 assert if that injury gets compensation --

10 JUSTICE BREYER: No, it's not a final.  
11 What they -- what they have in our state --

12 MR. BREEMER: Then they don't have a  
13 claim.

14 JUSTICE BREYER: Our state, if you  
15 think the state EPA took a piece of your  
16 property, go ask them for some money, and  
17 there's a good chance they'll give it to you if  
18 they think you're right.

19 MR. BREEMER: Well, there -- you --

20 JUSTICE BREYER: So what happens?

21 MR. BREEMER: You -- you can't ask for  
22 money, Your Honor, until you have an  
23 entitlement. And if the -- the government, the  
24 EPA here, has a --

25 JUSTICE BREYER: Sure, I can. I can

1 say, Mr. Smith, give me some money.

2 MR. BREEMER: Well -- well -- well --

3 JUSTICE BREYER: I just did.

4 (Laughter.)

5 MR. BREEMER: Well, in -- then -- then  
6 we're going to have a debate about whether I  
7 owe you money or not. And --

8 JUSTICE BREYER: No, no, I don't care.  
9 All I want is the money. And I want to know  
10 how you, the official, decide whether I'm  
11 right.

12 MR. BREEMER: You don't. It's not  
13 your job as the official.

14 JUSTICE ALITO: Well, let me ask then  
15 --

16 JUSTICE BREYER: So, in other words,  
17 your proposal is of the, let's say -- let me  
18 not exaggerate -- 50 million rules in state  
19 agencies in the country, and let's say  
20 affecting only 200 million people, that each of  
21 those people is not even to ask the state  
22 agency for money? It is to go to a federal  
23 court somewhere? Is that your position?

24 MR. BREEMER: No, not at all.

25 JUSTICE BREYER: What is it?

1           MR. BREEMER: Because they -- those --  
2 the situations you're describing, you still  
3 have exhaustion and variance and waiver  
4 requirements --

5           JUSTICE BREYER: I'll tell you what  
6 the exhaustion in our state -- when the EPA  
7 takes something of yours, in your opinion, you  
8 know what you do? Go ask them for some money.  
9 And if they think you're right, they'll give it  
10 to you. Now what other exhaustion is there?

11          MR. BREEMER: The exhaustion I'm  
12 talking about is you have to have -- we're not  
13 trying to -- to abrogate all of Williamson  
14 County. You still have to have a ripe claim.  
15 You can't come --

16          JUSTICE BREYER: I'm not talking about  
17 Williamson County --

18          MR. BREEMER: Okay.

19          JUSTICE BREYER: -- or anything else.  
20 I just would like the answer to my question.

21          MR. BREEMER: The -- the answer --

22          JUSTICE BREYER: You are correct  
23 that --

24          MR. BREEMER: As I understand it, the  
25 answer is that the administrative agency is not

1 the right, proper place to go --

2 JUSTICE BREYER: Where is the proper  
3 place?

4 MR. BREEMER: -- adjudicate a Takings  
5 Clause claim.

6 JUSTICE BREYER: No, there's no  
7 adjudication. You would just like them to give  
8 you some money. So, look, the reason I'm  
9 asking this, if you -- if you really -- it  
10 should be obvious -- but there is no practical  
11 way that I can think of to implement your rule  
12 because you have to go ask somebody for money.

13 And they're going to say yes or no,  
14 and they're going to say yes or no in a tough  
15 case depending upon what papers you show them.  
16 That's called evidence.

17 MR. BREEMER: It's -- it's --

18 JUSTICE BREYER: And then what the  
19 federal court will be doing will be just what  
20 they're doing now. They will be reviewing that  
21 evidence in the state. And somebody's going to  
22 say: You know, we have in our state a judicial  
23 review system, and you're barred by res  
24 judicata. In other words, we're not helping  
25 you by deciding in your favor. All we're doing

1 is producing extra complication.

2 That's at the root of my question.

3 And I haven't even got to the tough part, where  
4 you agree they have some money but only \$3.

5 And they think they're entitled to \$40. And so  
6 we have to have adjudications on that too.

7 Okay. Do you see, that's the whole point.

8 Sorry to take so long --

9 MR. BREEMER: There --

10 JUSTICE BREYER: -- but you seem not  
11 to see the connection.

12 MR. BREEMER: There's -- there's no --  
13 well, I -- maybe I don't. I'm sorry if I  
14 misunderstand you. But there's no right to ask  
15 for compensation, and there's no duty on the  
16 part of the government to pay compensation  
17 until there's been an invasion of private  
18 property.

19 At the time of that invasion, that's  
20 what creates the liability, is there's a -- the  
21 government has invaded your property and hasn't  
22 given you anything or any guarantee of  
23 compensation.

24 JUSTICE ALITO: But let me ask --

25 CHIEF JUSTICE ROBERTS: So I suppose

1 --

2 JUSTICE ALITO: -- essentially the  
3 same --

4 CHIEF JUSTICE ROBERTS: I was going to  
5 say, I suppose the way this most frequently  
6 comes up is through a municipal ordinance or  
7 something else like the, you know, enforcement  
8 of the alleged property right in this case, and  
9 there's no reason to suppose that the state is  
10 going to give you any money at all.

11 They pass a law that says, well, for  
12 example, you -- you know, you can't build a  
13 garage on this property anymore or we no longer  
14 have -- allow this particular type of  
15 development.

16 And I suppose if they were going to  
17 give you money, they would bring an eminent  
18 domain proceeding or something of that sort.  
19 But I think in most cases that would arise,  
20 there's no prospect of -- of payment.

21 MR. BREEMER: That's right. That's  
22 exactly right. And that's why the  
23 understanding under Dow, Dickinson, and Kirby  
24 is that, if there's a final injury, an invasion  
25 of property, and there's no condemnation of it,

1 that itself gives rise to your claim for  
2 compensation.

3 Now the government can have --

4 JUSTICE KAGAN: But why is that, Dr.  
5 Breemer? I mean, suppose that there were a  
6 statute of the kind that the Chief Justice was  
7 talking about, an invasion of a property  
8 interest, and the statute actually said, or  
9 maybe the statute didn't say, but the people  
10 who were in charge of administering the statute  
11 made an announcement that, if the regulatory  
12 invasion of property came to a certain level,  
13 invaded your property interests sufficiently,  
14 they would entertain a request for money.

15 Can you just go into federal court  
16 even though that's a possibility?

17 MR. BREEMER: Yes, you could. Under  
18 Dow, the understanding is the invasion itself  
19 gives rise to the claim for compensation. And  
20 so that wouldn't be sufficient because you  
21 still have no entitlement. Your property's  
22 been invaded. It's been harmed. It's been  
23 injured. But you have no compensation, no  
24 guarantee of compensation.

25 JUSTICE KAGAN: Right. I mean, I



1 think it's a -- so there are two things going  
2 on here. One is a more theoretical concern.  
3 One is a more practical concern.

4 The theoretical concern is, why is  
5 that true? We've always understood the Takings  
6 Clause to give rise to a claim when there's  
7 been both an invasion of property and a refusal  
8 to pay just compensation.

9 And so the theoretical problem that  
10 your position has or at least the theoretical  
11 question it raises is, well, you don't know  
12 whether there has been a refusal of just  
13 compensation because now we're in a situation  
14 where it may be that the State will refuse, but  
15 it may be that the State will actually give you  
16 some money for the invasion.

17 So --

18 MR. BREEMER: Right.

19 JUSTICE KAGAN: So that's the  
20 theoretical problem.

21 MR. BREEMER: Right.

22 JUSTICE KAGAN: And then the practical  
23 problem is, in this period where you don't know  
24 whether the state is going to give you money or  
25 not going to give you money -- it could, it

1       couldn't -- why should you be -- this is  
2       Justice Breyer's concern -- you know, everybody  
3       will just flock to federal courts and the  
4       federal courts won't -- won't know what to do  
5       with the case.

6                 MR. BREEMER: Right. I understand  
7       those -- the two different concerns. The  
8       problem I have is with the first premise.

9                 You do know, when your property's  
10       invaded by the government, it's taking the  
11       benefit of invading your land and using it for  
12       its purpose, and it hasn't given you  
13       compensation or secured your compensation, you  
14       are without just compensation at that time.

15                That's the original understanding  
16       under Dow, Dickinson, Kirby, Clarke, all the  
17       cases prior to Williamson County. You do know.  
18       So it's not --

19                JUSTICE KAGAN: At that time just  
20       exactly when the invasion occurs?

21                MR. BREEMER: Yes.

22                JUSTICE KAGAN: So, if the -- if the  
23       State says we'll give you a check in a week,  
24       you've been --

25                MR. BREEMER: No.

1 JUSTICE KAGAN: -- you've had a -- or  
2 the State -- you know, the State says -- the  
3 State says, we will decide in a week.

4 MR. BREEMER: The first one is  
5 adequate under Cherokee Nation.

6 JUSTICE KAGAN: That's why I changed  
7 it.

8 (Laughter.)

9 MR. BREEMER: The second one, no, see,  
10 it -- it -- it's been confusing, this area, but  
11 when you -- when you look at it, you have the  
12 Dow is the original rule, the original rule of  
13 Great Falls Manufacturing, the invasion itself,  
14 when they don't condemn it, you have a claim  
15 then.

16 And then Cherokee Nation created an  
17 exception for the government. Well, if you  
18 secure compensation, then you --

19 JUSTICE KAGAN: Right. But I'm -- I'm  
20 suggesting -- I'm suggesting the government  
21 doesn't know yet. You have -- you know,  
22 governments are slow. They have to have time  
23 to review the situation, to review the evidence  
24 that you're going to give them.

25 It doesn't know yet. It's trying to

1 figure out whether you should get compensation  
2 or not. What happens?

3 MR. BREEMER: Well --

4 JUSTICE KAGAN: Do you have a claim, a  
5 constitutional claim at that moment?

6 MR. BREEMER: If the -- yes, if the  
7 government is fast enough to go into your  
8 property and declare it to be public access, at  
9 that time, and take the benefit of it, without  
10 condemning it or providing compensation, yes,  
11 you have -- even if it thinks it might decide  
12 later, yes, you have a compensation --

13 JUSTICE BREYER: That's not the easy  
14 case I'm thinking of. Imagine I'm your client.  
15 Forget I'm a judge. That's not too difficult.

16 (Laughter.)

17 JUSTICE BREYER: I'm your client. I  
18 am the local agency. You are my lawyer. I  
19 say: Lawyer, friend, I have a regulation here.  
20 It's going to affect a lot of people. It might  
21 take some land or right and with others it  
22 won't. Okay? Tell me what to do. I would  
23 like to pay the right ones and not the wrong  
24 ones. Tell me what to do. You are my lawyer.  
25 Advise me.

1           MR. BREEMER: What I would say to you  
2 is this, is that if the -- if you enact an  
3 ordinance that concretely harms and injures  
4 private property, those --

5           JUSTICE BREYER: It does some and not  
6 others, and so I want to know what I'm supposed  
7 to do. And not only some but not others, but I  
8 don't know the land values of any of them.

9           MR. BREEMER: If you do not know what  
10 to do, then you go ahead and you enact the  
11 ordinance. And a property owner may bear the  
12 burden of bringing an expensive lawsuit under  
13 Section 1983 or otherwise to prove that it is a  
14 taking, if it's ripe.

15           JUSTICE BREYER: What -- where is the  
16 --

17           MR. BREEMER: They may do that, just  
18 like in any other context, they may do that.  
19 Just like in the free speech, the seizure, the  
20 due process, if you make a final enactment that  
21 harms somebody, there's a risk that they may  
22 file a Section 1983 lawsuit, but that's the  
23 price that was paid by the Congress when they  
24 enacted Section 1983.

25           JUSTICE SOTOMAYOR: Can I -- can I

1 stop because I'm confused, because there seems  
2 to be a very different theory that goes on with  
3 the federal government. May I continue, Chief?

4 CHIEF JUSTICE ROBERTS: Sure.

5 JUSTICE SOTOMAYOR: All right. The  
6 federal government is permitted to pass a  
7 regulation to take property and to rely on the  
8 Tucker Act to have the claimant go into federal  
9 court and ask for compensation.

10 There's no entitlement for you to stop  
11 the litigation or to say there's been a taking  
12 until the process of the Tucker Act is  
13 completed. And then, if you win, you get  
14 money. And, if you lose, you don't.

15 You're saying for the State it's  
16 different. It can't act to pass a regulation  
17 that may potentially -- we don't know yet --  
18 take money. It can't take property in an  
19 emergency, let's say, without ending up  
20 immediately, according to you, in federal  
21 court, unlike the federal government, where you  
22 can't stop that from happening because you get  
23 potential compensation in the Tucker Act.

24 It seems to me that both the State and  
25 the federal government should be entitled to

1 say to a landowner: I will pay you if I've  
2 taken something from you, and I will pay you in  
3 this way, whether it's an administrative rule  
4 that says this is going to happen and you have  
5 a right of review in the agency, and you seem  
6 to say that you have to exhaust that right of  
7 review in the agency to get the final no, is  
8 that correct? Just an answer, yes or no, to  
9 that.

10 An agency does something. There's an  
11 administrative process before it's a final  
12 decision.

13 MR. BREEMER: That is a ripeness rule  
14 and, yes, that ripeness rule will continue to  
15 apply, but, for compensation purposes, it  
16 doesn't.

17 JUSTICE SOTOMAYOR: All right. So  
18 what's the difference between that and a state  
19 saying, instead of going through the agency,  
20 we're going to pick a decisionmaker, a judge,  
21 who's more independent, more impartial, more  
22 fair than an agency can be. And if you think  
23 you've been harmed and are entitled to  
24 compensation, go there.

25 What's -- what -- where is the

1 difference? That's what the federal government  
2 does. Why are, A, we treating states  
3 differently?

4 MR. BREEMER: Right. And that's the  
5 question I --

6 JUSTICE SOTOMAYOR: And, B, why is  
7 administrative exhaustion, ripeness okay, but  
8 not the same thing if someone goes into state  
9 court to get a final decision?

10 MR. BREEMER: And I'm going to answer  
11 --

12 JUSTICE SOTOMAYOR: And, by the way,  
13 that state court final decision will end up in  
14 federal court. If we did our job, which I hope  
15 we would do, we have review of final state  
16 court decisions. So it's going to get into  
17 federal court if it's a serious error on the  
18 state court's part.

19 MR. BREEMER: I think I'm going to  
20 answer really quickly because I'm losing time.  
21 I think there's a misconception about how the  
22 Tucker Act process works.

23 The Tucker Act and Section 1983 aren't  
24 substantially different. They both give  
25 jurisdiction in a federal court. The



1 difference is in how the Just Compensation  
2 Clause is interpreted.

3 Under the Tucker Act, you have an  
4 immediate claim for compensation, as soon as  
5 the United States invades your private  
6 property, in the designated federal court.  
7 Under Williamson County, you do not have a  
8 federal, Fifth Amendment claim. It's  
9 interpreted differently. You have no complete  
10 compensation entitlement until after state  
11 remedies.

12 So the issue is not this court or that  
13 court or this agency. It's how are we going to  
14 interpret the Fifth Amendment? If it's  
15 complete at the time of the invasion, you have  
16 a federal question.

17 And you may go to state court. It may  
18 go to federal court. But it doesn't matter.  
19 And you -- yes, you have state remedies, but  
20 you have state remedies everywhere, and it's  
21 never been a requirement that you have a state  
22 remedies exhaustion requirement if you already  
23 have a complete federal question under  
24 Section 1983, which you do here.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 General Francisco.

4 ORAL ARGUMENT OF GEN. NOEL G. FRANCISCO  
5 FOR THE UNITED STATES, AS AMICUS CURIAE

6 GENERAL FRANCISCO: Mr. Chief Justice,  
7 and may it please the Court:

8 I'd like to make two basic points that  
9 I think are responsive to much of the colloquy  
10 that we've been having.

11 First, we think that Williamson  
12 County's premise was correct, that the  
13 government doesn't violate the Takings Clause  
14 if it provides a mechanism for awarding  
15 compensation after the fact.

16 But that doesn't justify Williamson  
17 County's conclusion that a Section 1983 action  
18 is not available to redress the deprivation of  
19 the right to just compensation.

20 We think it's available to redress all  
21 constitutional rights, including that one. And  
22 the right to just compensation is one that  
23 vests the moment the property is taken. That's  
24 why a property owner is entitled to interest  
25 dating back to the moment of a taking.

1           So a property owner, under  
2 Section 1983, is quite literally deprived of  
3 that right to compensation from the moment of  
4 the taking until they get paid. In this --

5           JUSTICE KAGAN: But his, General, is  
6 -- is -- this is what you argued the first  
7 time, that a property owner is deprived of a  
8 constitutional right even before the  
9 constitutional violation has taken place, is  
10 that correct?

11           GENERAL FRANCISCO: That's correct,  
12 Your Honor, and, frankly --

13           JUSTICE KAGAN: It -- it seems like a  
14 sentence that you don't even -- you can't even  
15 say without stumbling over it.

16           GENERAL FRANCISCO: I -- I -- I very  
17 much disagree because, frankly, everybody here  
18 agrees that these property owners can enforce  
19 their constitutional right to just compensation  
20 under the Fifth Amendment right now in a state  
21 inverse condemnation action.

22           The only question is whether they have  
23 to enforce that constitutional right in state  
24 court first. And there's simply nothing in the  
25 Fifth Amendment that says you have to go to

1 state court before you go to federal court.

2 I think it's helpful to think --

3 JUSTICE KAGAN: Is there any other  
4 area in our law generally where somebody can go  
5 to court under 1983, under anything else, and  
6 say I've been deprived of a constitutional  
7 right before a constitutional violation has  
8 occurred?

9 GENERAL FRANCISCO: Yes, Your Honor,  
10 the Tucker Act, and that was going to be my  
11 next point.

12 I think it's useful to think of  
13 Section 1983 in this context as similar to a  
14 Tucker Act -- a Tucker Act claim. It doesn't  
15 redress the violation of a Fifth Amendment  
16 right, but it does provide you with a mechanism  
17 to enforce your Fifth Amendment right to just  
18 compensation.

19 After all, the entire reason why a  
20 property owner is entitled to interest dating  
21 back to the moment of the taking is because  
22 they're entitled to be compensated for the  
23 entire period of their deprivation, the period  
24 in which they have neither the property nor the  
25 money.

1                   JUSTICE GORSUCH: Well, but -- well,  
2 but that right there seems to give the lie to  
3 your argument. You've just talked about the  
4 deprivation of their property from the moment  
5 it was taken.

6                   GENERAL FRANCISCO: Yes.

7                   JUSTICE GORSUCH: That would suggest  
8 that that's when the injury arises for  
9 constitutional purposes and all purposes.  
10 Again, I'm -- I'm with Justice Kagan, I can't  
11 think of another area in the law where we have  
12 this kind of artificial distinction that you're  
13 proposing.

14                   GENERAL FRANCISCO: Well, I think  
15 you're right that there's not another area of  
16 the law where you have this distinction. I  
17 think where I push back is that it's an  
18 artificial distinction and, if I could explain,  
19 because for most constitutional rights, there  
20 is simply no difference between a deprivation  
21 and a violation. The government violates --  
22 deprives you of your First Amendment rights,  
23 for example, only when it violates the First  
24 Amendment.

25                   But the Takings Clause is uniquely

1 different because the right to just  
2 compensation vests only when the government  
3 acts lawfully. It's the government's lawful  
4 taking of your property that triggers that  
5 right, constitutional right, to just  
6 compensation. And it's a right that vests the  
7 moment the government lawfully takes your  
8 property.

9 JUSTICE KAVANAUGH: An implicit  
10 premise of your argument and Petitioner's  
11 argument for overruling Williamson County, I  
12 think, is that the state courts aren't as good  
13 as the federal courts.

14 Why is that in your view?

15 GENERAL FRANCISCO: Sure, Your Honor.  
16 And I -- and to -- to -- respectfully, it's not  
17 my judgment that state courts aren't as good.

18 JUSTICE KAVANAUGH: But the  
19 argument --

20 GENERAL FRANCISCO: It's the  
21 Reconstruction era Congress's judgment that  
22 state courts could not be fully entrusted --

23 JUSTICE KAVANAUGH: That's --

24 GENERAL FRANCISCO: -- to enforce  
25 federal constitutional rights.

1 JUSTICE KAVANAUGH: That's why I said  
2 a premise of the argument for overruling  
3 because we need --

4 GENERAL FRANCISCO: Yes.

5 JUSTICE KAVANAUGH: -- more than just  
6 that it's wrong, right? There must be  
7 something more, and --

8 GENERAL FRANCISCO: Sure.

9 JUSTICE KAVANAUGH: -- I think the  
10 implicit premise is that the state courts  
11 aren't good enough in protecting rights. Is  
12 that because they're not quick enough? Because  
13 they're not awarding enough money? Because  
14 they're not competent enough? What is the  
15 implicit premise of their --

16 GENERAL FRANCISCO: Well, Your -- Your  
17 Honor, I don't have any particular criticism --  
18 criticism of state courts today, but  
19 Section 1983 was predicated on the  
20 Reconstruction era Congress's judgment that  
21 state courts could not be fully entrusted to  
22 enforce federal constitutional rights.

23 And that's why they created a dual  
24 system where every individual would have a  
25 right to access --

1 JUSTICE KAVANAUGH: Didn't Williamson  
2 -- I'm sorry to interrupt. Didn't Williamson  
3 County -- County necessarily reject that  
4 interpretation of 1983?

5 GENERAL FRANCISCO: I think so, but I  
6 want to go straight --

7 JUSTICE KAVANAUGH: And -- and  
8 isn't --

9 GENERAL FRANCISCO: -- to your stare  
10 decisis --

11 JUSTICE KAVANAUGH: And isn't that  
12 statutory stare decisis, which is a higher --

13 GENERAL FRANCISCO: It -- it is  
14 statutory stare decisis, Your Honor, but I  
15 still think that there are special  
16 justifications for overturning it, principally  
17 this Court has never actually explained  
18 Williamson County's rationale, and as a result,  
19 I think it has had the unintended consequence  
20 of closing the federal courthouse doors to an  
21 entire category of takings claimants, and  
22 that's something I don't think Williamson  
23 County envisioned when it issued its decision.

24 JUSTICE KAVANAUGH: Can I just get  
25 more on what are the problems in state courts?



1 State courts are not doing a good job because?

2 GENERAL FRANCISCO: Again, Your Honor,  
3 I am not here to take the position that today  
4 state courts are not capable of resolving  
5 takings claims. We do not have that criticism  
6 today of state courts.

7 But Section 1983 fundamentally  
8 reflects the Reconstruction era Congress's  
9 judgment. And there's no basis for thinking  
10 that the Reconstruction era Congress believed  
11 that the right to just compensation is the one  
12 area where we could trust state courts above  
13 all others.

14 If, frankly, you think that that  
15 judgment was wrong and it's -- and it's  
16 available to this Court to go counter to it, I  
17 think that you should probably overrule Patsy  
18 as well, which rejected a state law exhaustion  
19 requirement precisely because Section 1983 was  
20 meant to provide a mechanism for accessing  
21 federal court.

22 And, here, we think that property  
23 owners, just like all other litigants who are  
24 raising federal constitutional rights, should  
25 have a federal avenue to redress those

1 constitutional rights.

2 JUSTICE KAVANAUGH: If we -- if we  
3 agreed with your 1331 argument, is there any  
4 practical difference in how things would  
5 transpire?

6 GENERAL FRANCISCO: I think for the  
7 most part -- and that --

8 JUSTICE KAVANAUGH: Between that and  
9 your 1983 argument?

10 GENERAL FRANCISCO: Yeah. And that  
11 was the point I was going to pivot to next. I  
12 think that you can effectively reach the same  
13 result under our International College of  
14 Surgeons' Section 1331 argument, because, under  
15 International College of Surgeons, this Court  
16 made clear that if a state cause of action  
17 pleads a federal takings claim as such, then  
18 that federal takings claim presents a  
19 substantial federal question that arises under  
20 the Constitution for purposes of 1331.

21 And, yes, Justice Kavanaugh, I do  
22 believe you can effectively reach the same  
23 result through our International College of  
24 Surgeons argument, and that does not require  
25 you to overturn Williamson County.

1           So we think there are essentially two  
2 ways that you could go at this problem here.  
3 One is to take on Williamson County directly  
4 and overturn it. And we do believe it was  
5 wrongly decided. But the other way is to  
6 effectively reach the same result under our  
7 International College of Surgeons argument.

8           In -- in either event, we do think  
9 that the property owners here, like all other  
10 constitutional litigants, should be given a --  
11 a means to access federal courts.

12           JUSTICE BREYER: There's a big  
13 difference? The -- the difference is that if a  
14 state provides a speedy and fair remedy where  
15 they're going to pay the money, there is no  
16 constitutional violation.

17           And I can't think of a difference with  
18 that. And the trouble with that is that once  
19 you say that, of course, they have to have some  
20 procedure for deciding whether there's a --  
21 such a payment has been made or will in three  
22 days be made.

23           And once you say that, you're back  
24 where you started because it's going to be a  
25 state administrative procedure, possibly

1 reviewable in state court, and then res  
2 judicata may apply to that and, God knows,  
3 we've accomplished nothing.

4 Now that is what's bothering me, but  
5 you'll have an answer, which is why I ask you.

6 GENERAL FRANCISCO: Yes, Your Honor,  
7 because I think that your criticism is not  
8 unique to takings litigation. I think states  
9 can always provide an administrative remedy to  
10 redress constitutional claims.

11 But, in Patsy, this Court made clear  
12 that you do not require litigants to exhaust  
13 state remedies precisely because Section 1983  
14 was predicated on the notion that litigants  
15 should have a choice between federal and state  
16 court because the Reconstruction era Congress  
17 did not believe that state courts could be  
18 fully entrusted to --

19 JUSTICE BREYER: I see that. There is  
20 this difference. But the Constitution itself  
21 says that this violation isn't complete unless  
22 they -- as long as they pay you. And that  
23 isn't true of other state court -- I mean of  
24 other -- of other constitutional, you know, and  
25 there are loads of cases that say that.

1                   GENERAL FRANCISCO:   And I --

2                   JUSTICE BREYER:   That's -- that's --

3                   GENERAL FRANCISCO:   Right.   Yeah.

4                   JUSTICE BREYER:   All right.   So what  
5 do you -- what do you --

6                   GENERAL FRANCISCO:   A couple of  
7 responses --

8                   JUSTICE BREYER:   Yeah.

9                   GENERAL FRANCISCO:   -- Your Honor.  
10                  My first response is that the right to  
11 just compensation, regardless of whether  
12 there's a violation, is one that vests  
13 immediately.   That's why, when you're suing the  
14 federal government for a takings claim, you can  
15 march into the claims court and -- and demand  
16 just compensation in a ripe cause of action.  
17 And it's also why these litigants can march  
18 into state court tomorrow with a ripe cause of  
19 action under the Fifth Amendment and demand  
20 just compensation.

21                  So I do think that there's a  
22 meaningful difference between the Takings  
23 Clause and other constitutional provisions in  
24 that regard and that, here, the right to just  
25 compensation vests before there's a violation.

1 So I think it's -- it's helpful to think of  
2 1983 and, frankly, to think of state inverse  
3 condemnation actions as similar to a Tucker Act  
4 claim. They're all --

5 JUSTICE KAGAN: General?

6 GENERAL FRANCISCO: Yeah.

7 JUSTICE KAGAN: You've expressed some  
8 concerns about this Court's adopting  
9 Mr. Breemer's argument. What -- what exactly  
10 are those concerns?

11 GENERAL FRANCISCO: So at least as we  
12 understand that argument, Mr. Breemer's  
13 argument is that there's a constitutional  
14 violation if the state takes property but  
15 doesn't admit that it's a taking at the front  
16 end.

17 Well, we -- we think that that's  
18 contrary to the Tucker Act, and it would  
19 effectively require federal government  
20 officials to determine on the front end whether  
21 their action constitutes a taking before they  
22 proceed, since, after all -- may I finish, Your  
23 Honor -- since, after all, federal government  
24 officials are duty bound not to violate the  
25 Constitution.

1           We don't think that's required because  
2           the Tucker Act constitutes an implicit promise  
3           to pay in the event that there is a taking.  
4           But it doesn't change the fact that we think a  
5           Section 1983 action is available.

6           CHIEF JUSTICE ROBERTS: Thank you,  
7           General.

8           GENERAL FRANCISCO: Thank you, Your  
9           Honor.

10          CHIEF JUSTICE ROBERTS: Ms. Sachs?

11          ORAL ARGUMENT OF TERESA FICKEN SACHS

12          ON BEHALF OF THE RESPONDENTS

13          MS. FICKEN SACHS: Mr. Chief Justice,  
14          and may it please the Court:

15                 The Williamson County decision, which  
16                 is at issue here, needs some context that I  
17                 think will answer some of the questions we have  
18                 been hearing, because the presentation of  
19                 Williamson County as something that completely  
20                 changed an existing landscape is simply not  
21                 true.

22                 And I think it all -- this -- this  
23                 point will also answer the question about the  
24                 justification for the rule. The big change in  
25                 this area, the sea change was the Monell

1 decision when this Court decided that  
2 municipalities could be sued under  
3 Section 1983.

4 Before that, none of this was an issue  
5 because a takings claim against a municipality  
6 would be that claim in state court for  
7 compensation.

8 In Williamson County, this Court first  
9 time had to address sort of the marrying of two  
10 long-standing doctrines for the first time.  
11 One was a claim under Section 1983 relying upon  
12 a deprivation of constitutional rights, a  
13 required element of Section 1983. The other  
14 long-standing doctrine is that the Fifth  
15 Amendment is not violated, a property owner is  
16 not deprived of any rights under the Fifth  
17 Amendment where the government has provided a  
18 reasonable, certain, and adequate means to  
19 recover just compensation.

20 And that is not dependent -- this  
21 Court has never made it dependent upon whether  
22 or not the government admitted to the taking.  
23 So, in that respect, we agree with the  
24 Solicitor General's position.

25 There were -- there are at least 10



1 cases over --

2 JUSTICE ALITO: You are merging -- you  
3 -- you are merging the executive branch of the  
4 state government with the judicial branch of  
5 the state government. So -- and maybe that's  
6 right, but this is the situation that is  
7 troubling to me.

8 The -- a municipality enacts a  
9 regulation and the property owner says: Wow,  
10 this regulation goes so far it completely  
11 deprives my property of any value. This is a  
12 taking of my property.

13 And it goes to the municipality and  
14 says: You have effectively taken my property.  
15 Will you pay me just compensation?

16 And the municipality, speaking for the  
17 executive branch of the Commonwealth of  
18 Pennsylvania or whatever state is involved,  
19 says: Absolutely not. We're not going to pay  
20 you one penny.

21 Now, of course, if you want to take us  
22 to court, we're going to fight you tooth and  
23 nail all the way through the state court  
24 system, and if in the end you get a judgment  
25 that says that there was a taking and you're

1 entitled to a certain amount of just  
2 compensation, we're going to pay that.

3 Now you're saying that there has been  
4 no violation of the Takings Clause until the  
5 end of that state court litigation, right?

6 MS. FICKEN SACHS: We are saying there  
7 has been no constitutional violation until  
8 there is a -- a failure to provide the process  
9 for recovering just compensation.

10 So where the state provides that  
11 process, and in the -- I think following up on  
12 Your Honor's example, it's what Pennsylvania  
13 does, and there's no constitutional reason a  
14 state can't do what Pennsylvania does, the  
15 responsibility for adjudicating whether or not  
16 a taking has occurred at all and what  
17 compensation is due can be delegated to the  
18 state courts. That's perfectly appropriate.

19 And it certainly makes perfect sense  
20 in the regulatory situation like we're facing  
21 here, I think for the very reason that Justice  
22 Breyer posited that this Court has recognized  
23 many times.

24 Regulatory enactments pose the most  
25 difficult issues for this Court as to when they

1 are and are not a taking. Even for this Court,  
2 there are so many different ways property  
3 rights could be affected, there are so many  
4 different properties that could be affected,  
5 they're very individual.

6 JUSTICE ALITO: All right. If you're  
7 a lawyer advising a municipality about a  
8 proposed regulation that might cause property  
9 owners to litigate the question of whether  
10 there was a regulatory taking and demand just  
11 compensation, would you not try to determine  
12 whether those might be valid and, therefore,  
13 how much money your municipality might be out  
14 of if they went ahead with that regulation?

15 You would just plow ahead with the  
16 regulation and say: Well, you know, we don't  
17 really know, and we don't really care, and if  
18 at the end of this litigation process it ends  
19 up costing us \$20 million, so be it. Is that  
20 what you would do?

21 MS. FICKEN SACHS: Your Honor, what I  
22 would -- what I would advise the municipality  
23 is that they can rely upon this Court's  
24 decisions going back to the Hayes case and all  
25 the way back to Cherokee Nation, that if a

1 regulatory taking turns out in some  
2 unanticipated way, a reg -- I'm sorry, a  
3 regulation turns out in some unanticipated way  
4 to effect a taking, the enactment is,  
5 nevertheless, constitutional because the state  
6 already has a process in place that is complete  
7 and thorough and will provide the compensation.

8           And if the property owner does go to  
9 state court on something that the state or the  
10 municipality did not think was a taking and the  
11 court says it is, the court will assign  
12 compensation and the municipality will pay.

13           JUSTICE ALITO: You're really telling  
14 me that you would -- you're telling me you  
15 would not tell the municipality: You ought to  
16 think about the budgetary consequences of what  
17 you're doing?

18           MS. FICKEN SACHS: Well, Your Honor, I  
19 think that -- I -- I assume that every  
20 municipality certainly in these days has to  
21 think about the budgetary consequences of what  
22 they're doing, but I think your question is, in  
23 enacting a regulation, do they have to assume  
24 that it's going to be unconstitutional if they  
25 don't pay upfront, because that's the argument.

1           JUSTICE BREYER: Is there -- is -- is  
2 there some kind of middle position here? I  
3 mean, it's an unusual provision. It provides  
4 for compensation. And so, if the state's going  
5 to give the compensation, no problem. And  
6 there has to be some method of finding out  
7 whether there is or is not compensation owed.

8           But hasn't the court said something  
9 like the state system has to be fair to do that  
10 thing it promises to do, and what about adding  
11 speedy? I mean, I think what people are  
12 worried about is that, that they're tied up  
13 forever in the state courts and then they can't  
14 even get to federal court.

15           But could you say where the state  
16 doesn't have a speedy, fair system for  
17 determining whether there's compensation or  
18 not, then you can go into federal court? That  
19 would be totally practical but not -- but not  
20 beyond the words of the Constitution in this  
21 area.

22           MS. FICKEN SACHS: And I think that is  
23 already inherent, Your Honor. And -- and we  
24 agree in the Section 1983 test because there  
25 has to be that reasonable, certain, adequate

1 process.

2 And this Court has --

3 CHIEF JUSTICE ROBERTS: Well, what  
4 counts as -- what counts as speedy in the  
5 Pennsylvania court system?

6 JUSTICE BREYER: Yeah.

7 MS. FICKEN SACHS: What is speedy?

8 CHIEF JUSTICE ROBERTS: Yeah. If I  
9 file one of these cases, I -- well, in this  
10 case, Ms. Knick says you're violating her  
11 property rights because your rule is people get  
12 to walk all over land to go see the old  
13 gravestones, and she brings a suit.

14 How long would it take her to get a  
15 decision through the Pennsylvania Supreme  
16 Court?

17 MS. FICKEN SACHS: Well, it would have  
18 been over before now, Your Honor. But I think  
19 the important part is where it starts because I  
20 don't think we can assume that the state court  
21 wouldn't properly apply the law at the outset.  
22 The Inverse Condemnation Act of Pennsylvania --

23 CHIEF JUSTICE ROBERTS: Well, the  
24 state court -- I'm sorry, go ahead.

25 MS. FICKEN SACHS: But I think, to

1 answer Your Honor's question, this process,  
2 Petitioner has never even questioned as a  
3 reasonable, certain, and adequate. It's far --  
4 in some ways offers far more remedies and is  
5 more generous than the Tucker Act.

6 CHIEF JUSTICE ROBERTS: Well, I don't  
7 think that does -- I don't think that does  
8 answer my question. I mean, you -- you --  
9 you've litigated in these courts. How long do  
10 you think it would take, on average?

11 MS. FICKEN SACHS: For an inverse  
12 condemnation action to go through the -- the  
13 determination? Two years perhaps, because  
14 they're entitled to immediate appeals, and  
15 every aspect of the statute, unlike our  
16 standard procedures, emphasizes promptness.

17 Every stage along the way, assigning a  
18 board of reviewers, holding a hearing,  
19 assessing the compensation, all has to happen  
20 promptly. This is a very, very favorable  
21 process for the property owner.

22 JUSTICE ALITO: Why would the --

23 MS. FICKEN SACHS: And if it weren't  
24 -- I'm sorry.

25 JUSTICE ALITO: Would the property

1 owner be entitled to attorneys' fees if the  
2 property owner prevailed?

3 MS. FICKEN SACHS: Yes.

4 JUSTICE ALITO: Under Pennsylvania  
5 law --

6 MS. FICKEN SACHS: Yes.

7 JUSTICE ALITO: -- would be entitled  
8 to attorneys' fees?

9 MS. FICKEN SACHS: Yes.

10 JUSTICE ALITO: Why do you want to be  
11 in state court?

12 MS. FICKEN SACHS: Because the state  
13 court --

14 JUSTICE ALITO: I mean, Mr. -- Mr.  
15 Breemer wants to be in federal court. You want  
16 to be in state court.

17 Does -- does he want to be in federal  
18 court because he thinks the state courts are  
19 bad? Do you want to be in state court because  
20 you think the federal courts are bad?

21 MS. FICKEN SACHS: Your Honor, I  
22 think --

23 (Laughter.)

24 MS. FICKEN SACHS: Of course not, Your  
25 Honor.



1 JUSTICE ALITO: So why do you want to  
2 be in state court?

3 MS. FICKEN SACHS: I --

4 JUSTICE ALITO: You want the home  
5 court advantage, right? That's what all --  
6 that's what all litigants and lawyers want.  
7 They want the home court advantage.

8 MS. FICKEN SACHS: No, because this --

9 JUSTICE ALITO: No?

10 MS. FICKEN SACHS: The question of how  
11 to get into federal court relies on -- on a --  
12 a preliminary determination that we've somehow  
13 violated the Constitution. And that's what we  
14 don't want.

15 We -- the -- the Section 1983  
16 interpretation that has been posited by  
17 Petitioner and by the Solicitor General that  
18 Section 1983 now doesn't require a violation,  
19 it can just be used as an alternate  
20 enforcement mechanism, that is --

21 JUSTICE ALITO: You're telling me that  
22 you have no practical reason for wanting to be  
23 in state court as opposed to federal court?

24 MS. FICKEN SACHS: Well --

25 JUSTICE ALITO: It's just some airy,

1 theoretical idea you -- that -- that the state  
2 court --

3 MS. FICKEN SACHS: I --

4 JUSTICE ALITO: -- is where this  
5 belongs?

6 MS. FICKEN SACHS: I think there's a  
7 -- I think there's a -- a legal reason as far  
8 as doctrine, and there's also a practical  
9 reason, Your Honor. I think -- doctrinally, I  
10 think the states have -- they're -- they're the  
11 best places to look at all these issues of  
12 state law that involve balancing a lot of local  
13 interests. They have an interest in shaping  
14 state property law.

15 But, as a practical matter --

16 JUSTICE KAVANAUGH: Do you agree  
17 with --

18 MS. FICKEN SACHS: -- you're also  
19 talking --

20 JUSTICE KAVANAUGH: I'm -- please  
21 finish.

22 MS. FICKEN SACHS: I'll be quick. As  
23 a practical matter, you're also talking about  
24 requiring local municipalities to, instead of  
25 litigating cases that do come up close to home,

1 they're -- you're now adding an additional  
2 benefit of litigating a constitutional  
3 violation in a more distant court.

4           And when you're talking about a lot of  
5 municipalities and a lot of regulations,  
6 potentially, you're talking especially for --  
7 for the Respondent here -- this is a small,  
8 rural county, and there are many, many, many  
9 like them across the country, where there's a  
10 state interest in developing the law and in  
11 enabling these resolutions in -- in a way that  
12 doesn't bankrupt the municipality and the  
13 taxpayers.

14           JUSTICE KAVANAUGH: Do the  
15 municipalities get a home court advantage in  
16 state court as compared to federal court, in  
17 your judgment?

18           MS. FICKEN SACHS: No, Your Honor. I  
19 would say no, and I would also say that that is  
20 this Court's role. This Court has said that  
21 most of its takings litigation comes from state  
22 courts of last resort.

23           This Court can -- can correct any  
24 misapprehensions or misapplications of federal  
25 law, if this Court sees that, and -- and always

1 has. So that --

2 JUSTICE KAGAN: So the -- the -- the  
3 difficulty, Ms. Sachs, with your position, I --  
4 I don't think that there would be any  
5 difficulty if it weren't for preclusion rules,  
6 because if it weren't for preclusion rules, you  
7 would go through the state system, and if you  
8 were dissatisfied, then you would have a  
9 federal claim, you would file your federal  
10 claim.

11 I think the difficulty with your  
12 position is not Williamson, which says go to  
13 the state courts first. It's San Remo, which  
14 says that the federal courts are going to be  
15 applying preclusion rules, and the state  
16 court's judgment is going to be effectively  
17 final.

18 So I guess, first, are we looking at  
19 the wrong case? But, second, you know, what  
20 should we do with that? Isn't that a  
21 difficulty?

22 MS. FICKEN SACHS: I think that --  
23 that San Remo is -- is a great place to start,  
24 Your Honor, because in this -- in San Remo,  
25 this Court teed that up for Congress. This is

1 an issue that Congress could address.

2 Congress is aware of it. They  
3 certainly were aware of it after San Remo. But  
4 they have considered it at least three times,  
5 and they have rejected it.

6 This is something that Congress could  
7 address. This Court should not be  
8 reinterpreting the Constitution and tossing  
9 away over 100 years of its jurisprudence to  
10 address something Congress should address.

11 CHIEF JUSTICE ROBERTS: You -- you  
12 love San Remo, right?

13 (Laughter.)

14 MS. FICKEN SACHS: Would I love --

15 CHIEF JUSTICE ROBERTS: You would not  
16 -- that's the last thing you would want, to get  
17 rid of San Remo, because then we go through  
18 your system entirely, and they say, okay, let's  
19 start all over again. You wouldn't like that?

20 MS. FICKEN SACHS: No. No, Your  
21 Honor, but what I'm saying is when -- when  
22 Justice Kagan was asking about how do we  
23 address this, I think that the way to address  
24 it is what this Court did in San Remo, which is  
25 clarify what the rule is. And that is a

1 necessary result of the full faith and credit  
2 statute.

3 JUSTICE KAVANAUGH: What about --

4 MS. FICKEN SACHS: Congress could  
5 address that statute if Congress thought it  
6 needed addressing, and they have considered it  
7 and --

8 JUSTICE GORSUCH: Okay, so San Remo is  
9 going nowhere. I think we've established that  
10 in your view.

11 MS. FICKEN SACHS: Uh-huh.

12 JUSTICE GORSUCH: What do we do about  
13 the fact that a -- an individual who claims the  
14 federal government has engaged in a taking can  
15 bring a claim immediately for a takings  
16 violation in -- under the Tucker Act in federal  
17 court, but you would have those who happen to  
18 be the victim of state takings have to exhaust  
19 these administrative remedies?

20 MS. FICKEN SACHS: We're not talking  
21 about an exhaustion of administrative remedies,  
22 Your Honor. We're talking about the state  
23 process that is the equivalent --

24 JUSTICE GORSUCH: You're saying they  
25 can't bring -- you're saying they can't bring a

1 takings claim.

2 MS. FICKEN SACHS: We're saying that  
3 the --

4 JUSTICE GORSUCH: That is an  
5 exhaustion requirement. How come that applies  
6 in state court but not in federal?

7 MS. FICKEN SACHS: Because it -- I --  
8 I think that the -- that the difference that  
9 I'm trying to point out, Your Honor, is that  
10 it's an element of the Section 1983 cause of  
11 action that does not give such a claimant an  
12 automatic right to be in federal court because  
13 they don't have a constitutional --

14 JUSTICE GORSUCH: But if it's -- so if  
15 it comes from -- so you're saying it comes from  
16 1983, not the Takings Clause then, right?

17 MS. FICKEN SACHS: I -- the -- the  
18 Takings Clause, they have an immediate right,  
19 and I think in this respect --

20 JUSTICE GORSUCH: Okay. So --

21 MS. FICKEN SACHS: -- there's no  
22 disagreement to --

23 JUSTICE GORSUCH: -- so it comes from  
24 1983? That's your position now?

25 MS. FICKEN SACHS: It -- the -- the --

1 the fact that they do not have a federal cause  
2 of action, yes.

3 JUSTICE GORSUCH: Okay.

4 MS. FICKEN SACHS: There -- there's --  
5 there --

6 JUSTICE GORSUCH: Okay.

7 MS. FICKEN SACHS: Congress has not  
8 given a --

9 JUSTICE GORSUCH: What do we do about  
10 the fact that we've said repeatedly that there  
11 is no exhaustion requirement in 1983? Now  
12 maybe there should be. And if there is, maybe  
13 there should be for Fourth Amendment claims and  
14 Fourteenth Amendment claims too because there  
15 are wonderful state courts capable of  
16 adjudicating the deprivation of Fourth  
17 Amendment rights, capable of adjudicating fully  
18 and fairly. I think we'd all agree the  
19 deprivation of Fourteenth Amendment rights.  
20 But we don't generally require that.

21 And if we're going to get into the  
22 business of saying exhaustion here, I guess I'm  
23 at a loss as to why we wouldn't say exhaustion  
24 everywhere.

25 MS. FICKEN SACHS: And -- and to try



1 to answer that, Your Honor, I -- I just have to  
2 disagree with the -- the calculus of exhaustion  
3 because it's not an exhaustion of an existing  
4 remedy. It's the fact that they don't yet have  
5 a cause of action. I didn't --

6 JUSTICE GORSUCH: Now you keep going  
7 back. A cause of action under 1983?

8 MS. FICKEN SACHS: Under 1983, but  
9 they do have a cause of action in state court,  
10 which is the equivalent of the Tucker Act.  
11 They're entitled to go to state court and get  
12 their just compensation. And we agree that the  
13 injury occurs at the time of taking.

14 The question is that Congress has not  
15 created a cause of action that would give every  
16 takings plaintiff the right to come to federal  
17 court with their claim. And 1331 should not be  
18 that.

19 JUSTICE KAVANAUGH: What about 1331?  
20 Yes, 13 -- what about the 1331 argument?

21 MS. FICKEN SACHS: Because 1331 has --  
22 has been always treated by this Court as for  
23 special cases under state law, the -- the  
24 unusual case that doesn't upset the  
25 constitutional balance of authority that

1 Congress has created.

2           Allowing every plaintiff in every  
3 takings case in every county or municipality to  
4 go straight to federal court would certainly  
5 upset that balance, but it'll also -- this  
6 would not be the case to even consider that  
7 question, Your Honor, because, in this case,  
8 there is no state takings claim. Petitioner  
9 never made a state takings claim.

10           JUSTICE KAVANAUGH: But -- but, in  
11 terms of the law on 1331, if we were to so  
12 hold, as the Solicitor General argues, then  
13 Congress, of course, could trim that back. But  
14 their argument is 1331, at least as interpreted  
15 by our precedent, does allow a certain narrow  
16 category of state law claims to be directly  
17 brought in federal court, and the question is  
18 what -- why is that wrong and what problems  
19 would that create, in your view?

20           MS. FICKEN SACHS: Because every claim  
21 that involves a federal element is not a case  
22 arising under federal law for Section 1331  
23 purposes, at least as this Court has ever  
24 interpreted it.

25           For the reason that it would not fall

1 within that special category of cases, it would  
2 be every case. Every state case would now be  
3 in federal court. And Section 1331  
4 jurisdiction has been interpreted by this Court  
5 much more narrowly.

6           And, again, Congress could fix that.  
7 Congress could enact Section 1331(a) and give  
8 -- or whatever, and give state takings  
9 claimants, just looking for compensation, a  
10 route straight to federal court. But Congress  
11 has not done that. And this Court should not  
12 do that by modifying or creating a whole  
13 different interpretation of federal court  
14 jurisdiction.

15           JUSTICE BREYER: Well, suppose --  
16 suppose you tried this: Suppose you said,  
17 since it's San Remo, San Remo says your claim  
18 isn't ripe until they deny you the  
19 compensation. And then, when they do deny you  
20 the compensation, you try to go to federal  
21 court, they say it's res judicata, and that  
22 does seem rather unfair.

23           So suppose you said that once the  
24 state indicates either through a lengthy  
25 proceeding or in other ways, that there will

1 not be a speedy and fair determination, under  
2 those circumstances the claim is ripe and  
3 that's all you'd need, because once the claim  
4 is ripe, you can go into federal court.

5 MS. FICKEN SACHS: And -- and to  
6 answer that question --

7 JUSTICE BREYER: And then suppose you  
8 had fairly strict rules. I mean, suppose you  
9 had fairly strict --

10 MS. FICKEN SACHS: And to answer that  
11 question --

12 JUSTICE BREYER: Yeah.

13 MS. FICKEN SACHS: Yes, I think that  
14 that -- that the court -- Congress could say  
15 that. And I actually think that Section 1983  
16 --

17 JUSTICE BREYER: Well, why couldn't we  
18 say that in interpreting -- in interpreting  
19 when this unusual hybrid taking plus no  
20 compensation becomes ripe for adjudication?

21 MS. FICKEN SACHS: You're the Supreme  
22 Court, Your Honor --

23 JUSTICE BREYER: Yeah, but I'm -- not  
24 for one of those reasons, but I mean --

25 MS. FICKEN SACHS: -- but in Section

1 1983 --

2 JUSTICE BREYER: -- ripeness is --  
3 ripeness is a fairly -- ripeness is the kind of  
4 issue that judges do decide.

5 MS. FICKEN SACHS: But -- but I -- I  
6 think, perhaps, although you could do that, it  
7 would not be necessary where Section 1983 would  
8 already provide that claim.

9 A claimant could say my state process  
10 doesn't -- there is no existing state process  
11 that's reasonable, certain, and adequate, or  
12 they could even later at the conclusion of a  
13 state case, perhaps, say as applied to my case  
14 this process was not reasonable, certain, and  
15 adequate means to just compensation.

16 That's a Section 1983 claim because  
17 it's a constitutional violation. So then we  
18 already have a cause of action over which  
19 Congress has given the federal courts  
20 jurisdiction, and no need to -- to jump in and  
21 reinterpret this Court's existing jurisprudence  
22 on Section 1331.

23 JUSTICE SOTOMAYOR: Do you have any --  
24 have you given any thought to the possibility  
25 that if you lose this case, that a 1983

1 plaintiff could go into federal court and  
2 enjoin the municipality from enforcing a  
3 regulation?

4 MS. FICKEN SACHS: Yes, Your Honor.  
5 And that is one of the problems, I think, that,  
6 when we were talking earlier about how the  
7 municipalities have -- have depended on -- on  
8 the current interpretation to -- that there is  
9 no takings, no federal takings claim until  
10 there is a violation.

11 CHIEF JUSTICE ROBERTS: Well it's a  
12 normal --

13 MS. FICKEN SACHS: The Constitution  
14 isn't violated until --

15 CHIEF JUSTICE ROBERTS: Go ahead,  
16 sure, no, go ahead.

17 JUSTICE SOTOMAYOR: Well, an  
18 injunction is a high bar because money can --  
19 if money can --

20 MS. FICKEN SACHS: Right.

21 JUSTICE SOTOMAYOR: -- make you whole,  
22 you can't get an injunction. But I can  
23 certainly see people arguing that money can't  
24 make them whole because whatever it is that  
25 they have is unique and not compensable by

1 money, presumably.

2 MS. FICKEN SACHS: It certainly --

3 JUSTICE SOTOMAYOR: Some people could  
4 argue that on some pieces of property.

5 MS. FICKEN SACHS: I agree, Your  
6 Honor, that is certainly a danger. And it is  
7 one of the reasons why being able to rely upon  
8 the state process to ensure that no  
9 constitutional violation ever happens also  
10 prohibits or -- or shortcuts any possibility of  
11 a Section 1983 claim seeking to enjoin a  
12 violation.

13 JUSTICE GORSUCH: Counsel, when we're  
14 talking about stare decisis, not only are we --  
15 the courts often said, of course, that money  
16 damages, the availability precludes injunctive  
17 relief in just these sorts of cases.

18 But an additional factor for me is  
19 Williamson purported to interpret the  
20 Constitution.

21 You're now not arguing that. You're  
22 saying 1983. Williamson County was talking  
23 about the Constitution, though, at least as I  
24 read it.

25 So help me out with that, Number 1.

1 Number 2, when we're looking at stare decisis,  
2 this is an alternative holding. It isn't well  
3 reasoned. It's very briefly provided. And  
4 it's inconsistent with a lot of other law  
5 that's developed around it, including First  
6 English, which this Court has held that the  
7 deprivation of the right takes place  
8 immediately.

9 So all of those factors seem to weigh  
10 against you. What do we do about that?

11 MS. FICKEN SACHS: Justice Gorsuch,  
12 let me go back to the -- the first part of your  
13 question, which is the -- the violation under  
14 Williamson County, and was Williamson County  
15 talking about the Constitution or Section 1983.

16 And I would respectfully disagree  
17 because the entire definition --

18 JUSTICE GORSUCH: Okay. Assume you're  
19 wrong on that. Then what?

20 (Laughter.)

21 MS. FICKEN SACHS: I'm sorry?

22 JUSTICE GORSUCH: Assuming I disagree  
23 with you on that, then what?

24 MS. FICKEN SACHS: I would say that  
25 you still have to have a constitutional



1 violation. And in Williamson County, the only  
2 claim --

3 JUSTICE GORSUCH: The precedential  
4 force, you would concede, if Williamson County  
5 was interpreting the Constitution, the  
6 precedential force is diminished when you are  
7 arguing only it's a matter of interpreting  
8 1983, right?

9 MS. FICKEN SACHS: Statutory -- well,  
10 actually, statutory decisis has a stronger --  
11 yes, stronger stare decisis effect. So if it  
12 were only constitutional, I would agree with  
13 Your Honor.

14 But that, again, that's a -- that's a  
15 supposition because the only claim raised in  
16 Williamson County, just like the only claim  
17 raised in this case, was a Section 1983 claim.

18 And so to answer Your Honor's second  
19 question about whether Williamson County was  
20 well reasoned, it is when you put it back in  
21 that context.

22 The context was has a constitutional  
23 violation been identified? And there was no  
24 constitutional violation because the Petitioner  
25 there had not been deprived of a reasonable,

1 certain, and adequate means of getting  
2 compensation.

3 And, therefore, there is -- that that  
4 was the -- that -- that marrying of the two  
5 doctrines that I talked about before. The  
6 Court did talk about the constitutional  
7 requirements and what would violate the Fifth  
8 Amendment, but they found that a Section 1983  
9 violation had not occurred.

10 JUSTICE KAVANAUGH: If Williamson  
11 County is wrong, you argue that it still should  
12 not be overruled. Why?

13 MS. FICKEN SACHS: Your Honor, because  
14 the -- the -- the underlying principles of  
15 Williamson County are what municipalities have  
16 relied upon.

17 JUSTICE KAVANAUGH: And how do they  
18 rely on them?

19 MS. FICKEN SACHS: They've relied upon  
20 them by enacting litigation -- I'm sorry,  
21 regulations, ordinances, statutes, knowing that  
22 they cannot be attacked as unconstitutional for  
23 failing to provide just compensation.

24 They -- they know that --

25 JUSTICE KAVANAUGH: Well, they know

1 they can be attacked in state court.

2 MS. FICKEN SACHS: They can -- they  
3 can be -- compensation can be requested, but  
4 the enactments are not rendered  
5 unconstitutional by failing to provide just  
6 compensation. And that's a really important  
7 difference.

8 And it goes back to one of the  
9 questions here before about -- about regulatory  
10 takings and their difficulty.

11 I think it's -- it's important just to  
12 keep in mind that when this Court found in the  
13 Mahon case in 1922, that the -- the doc -- that  
14 sort of created the doctrine of regulatory  
15 takings in the first place, it was against an  
16 existing backdrop of the Hayes case, just two  
17 years earlier, where this Court held that a --  
18 an inverse condemnation action was a  
19 reasonable, certain, and adequate method for  
20 obtaining compensation, even where the  
21 government, as it did in that case, denied that  
22 there was any taking.

23 This Court has held that many times  
24 since then and --

25 JUSTICE ALITO: You've totally --

1 you've totally lost me in your explanation  
2 on -- on --

3 MS. FICKEN SACHS: I'll --

4 JUSTICE ALITO: -- where -- where the  
5 municipal reliance is.

6 MS. FICKEN SACHS: Because if -- if  
7 the -- if municipalities -- the reliance, I  
8 guess, maybe I can say it's on the front end,  
9 Your Honor. It's not on the back end, are they  
10 going to federal court or state court.

11 It's on the front end. Are their  
12 enactments constitutional or are they not  
13 constitutional? And we know that their --

14 JUSTICE ALITO: Yeah, and that's going  
15 to be decided if it's, you know, if the  
16 property owner disagrees, it's going to be  
17 contested in state court or in federal court.

18 I -- I don't understand the  
19 difference. What's -- where's the reliance,  
20 other than reliance on the fact that, well, if  
21 we go ahead with this, at least we're going to  
22 get -- and -- and it's challenged, at least  
23 it's going to be in our own courts.

24 MS. FICKEN SACHS: Because the basis  
25 of the challenge would be different, Your

1 Honor.

2 JUSTICE ALITO: No, it won't. How is  
3 it different?

4 MS. FICKEN SACHS: Because under  
5 Section 1983, the claim is that the  
6 municipality has already violated the  
7 Constitution. And the -- under a state inverse  
8 condemnation action, it's a claim for -- for  
9 compensation.

10 JUSTICE GORSUCH: But you conceded  
11 that there is a violation of the Constitution.  
12 I mean, you acknowledge that the violation of  
13 the Constitution is complete. So --

14 MS. FICKEN SACHS: No, Your Honor. If  
15 I said that, let me back up. The injury, there  
16 is an injury --

17 JUSTICE GORSUCH: Well, I -- I -- I'm  
18 sure I heard that. And -- and I'm quite sure I  
19 heard that, counsel, that you said the problem  
20 here is that there is no 1983 cause of action.

21 MS. FICKEN SACHS: Correct.

22 JUSTICE GORSUCH: Not that there's a  
23 violation of the constitution, absence of that.

24 MS. FICKEN SACHS: No. The 1983 cause  
25 of action requires violation of the

1 Constitution, Your Honor. So I -- I don't  
2 know -- if I missaid that, let me say it again.

3 A 1983 action requires a violation of  
4 the Constitution.

5 JUSTICE GORSUCH: Surely, but, again,  
6 counsel, I -- I -- I'm pretty sure I heard  
7 earlier --

8 MS. FICKEN SACHS: Okay.

9 JUSTICE GORSUCH: -- that -- that you  
10 acknowledge that there is a violation of the  
11 Constitution upon the taking and the failure to  
12 provide compensation. We said as much in First  
13 English, right?

14 MS. FICKEN SACHS: No. No, only when  
15 there is not -- yeah, where there is no process  
16 provided. And I agree with Your Honor. If  
17 there is no process provided, then yes. The  
18 taking and the violation happen at the same  
19 time.

20 But the -- the -- the injury, that's  
21 the taking, is not the same as the violation.  
22 And I think that is really important to keep in  
23 mind because I think there's been a lot of  
24 conflating of those two terms in talking about  
25 a federal takings claim versus a constitutional

1 -- a claim for a constitutional violation.

2 JUSTICE KAGAN: And, Ms. Sachs, tell  
3 me if I'm wrong, but I understood the argument  
4 you were just making as very similar to the  
5 General's argument, at the end of his argument,  
6 where he said if -- if -- if Mr. Breemer's  
7 theory were accepted, it would put employees of  
8 the government in a very ticklish situation  
9 because, at a much earlier time, you would be  
10 forcing employees to say we're going to go  
11 invade the Constitution. Isn't that right?

12 MS. FICKEN SACHS: Yes. Correct, Your  
13 Honor.

14 JUSTICE GORSUCH: So you are adopting  
15 the government's view on this score?

16 MS. FICKEN SACHS: On -- on -- we --  
17 we are in agreement with the government with  
18 respect to the -- the fact that a -- an inverse  
19 condemnation action provides what the  
20 Constitution requires.

21 I think the Solicitor General says it  
22 provides what the Constitution requires, all  
23 that the Takings Clause requires under the  
24 Fifth Amendment, and yet somehow the Solicitor  
25 General says that's not true when a state does

1 the same thing. And that's where we greatly  
2 disagree.

3 The Section 1983 provides remedies  
4 coextensive with the Fourteenth Amendment. The  
5 Fourteenth Amendment does not put greater  
6 burdens on the state than it does on the  
7 federal government.

8 CHIEF JUSTICE ROBERTS: Thank you.

9 MS. FICKEN SACHS: And the Solicitor  
10 General cannot have it both ways. Thank you,  
11 Your Honor.

12 CHIEF JUSTICE ROBERTS: Thank you, Ms.  
13 Sachs.

14 Mr. Breemer, two minutes remaining.

15 REBUTTAL ARGUMENT OF J. DAVID BREEMER  
16 ON BEHALF OF THE PETITIONER

17 MR. BREEMER: Thank you. May it  
18 please the Court:

19 I want to talk about state courts real  
20 quickly. One of the problems in just saying,  
21 well, it's a wash and you can bring your Fifth  
22 Amendment claim in state court so what's the  
23 problem, is you can't bring your Fifth  
24 Amendment claim in the state court.

25 Williamson County says this: No Fifth



1 Amendment Takings Clause claim exists until you  
2 use a state law inverse condemnation process.

3 In federal court or state court, it  
4 does not exist. While over in the court of  
5 claims it does exist. And since you have to  
6 use that state law inverse condemnation  
7 process, it's different in every state.

8 There are different procedures,  
9 different rules. And until you go through all  
10 that state law procedure, you don't have a  
11 Fifth Amendment claim. But why is a Just  
12 Compensation Clause different?

13 JUSTICE KAVANAUGH: Is the substance  
14 of the claim any different from the takings  
15 claim?

16 MR. BREEMER: In many case it is, yes.  
17 In state law inverse condemnation cases, in  
18 many cases it is. In many states you have to  
19 file a writ of mandate action first before you  
20 can bring that inverse condemnation. Inverse  
21 condemnation requires that initial writ of  
22 mandate action to try and invalidate. And  
23 Section 1983 doesn't require that. And the  
24 Just Compensation Clause doesn't require that.

25 The other point I would like to make

1 real quickly is that the government doesn't  
2 have to consider every regulation to see if  
3 it's a taking unless it wants the benefit of  
4 the Cherokee Nation exception. That's a  
5 benefit for the government to say, oh, we're  
6 going to consider if it's a taking, and -- and  
7 admit it and provide a process. That's not a  
8 burden. That's a benefit.

9 It can go under the regular rule, just  
10 like every other constitutional provision, and  
11 decide, look, we're going to do this, final  
12 act, it may harm some people --

13 JUSTICE SOTOMAYOR: What happens --  
14 what happens when the government says, yes, the  
15 graveyard municipality ordinance requires  
16 compensation. Everybody who has some person  
17 living there gets compensation.

18 MR. BREEMER: That's the --

19 JUSTICE SOTOMAYOR: Now, somebody  
20 comes in and says I have my goldfish or my dog  
21 buried there. Why shouldn't I get compensation  
22 for the people who want to come visit -- the  
23 prior owners who want to visit the dog  
24 cemetery? Well, that person can go to federal  
25 court now.

1 MR. BREEMER: No, I --

2 JUSTICE SOTOMAYOR: Even though the  
3 state has said we'll pay compensation for a  
4 taking?

5 MR. BREEMER: If the -- when the state  
6 says we'll pay compensation for a specific act,  
7 that's Cherokee Nation. Then it -- the  
8 entitlement is established. There's no  
9 violation of just compensation. The  
10 entitlement is established. That's why there  
11 is an exception for that rule.

12 JUSTICE SOTOMAYOR: So why can't the  
13 state just come in and say we will pay just  
14 compensation to anyone who's been injured by  
15 this so long as a state court says it's a  
16 taking? I -- I don't -- it's no different than  
17 the goldfish guy.

18 CHIEF JUSTICE ROBERTS: You --

19 MR. BREEMER: Can I answer?

20 CHIEF JUSTICE ROBERTS: You may -- you  
21 may answer briefly.

22 MR. BREEMER: Because we're talking  
23 about the Fifth Amendment. There are state  
24 remedies for many, many injuries, but there are  
25 also federal remedies.

1                   And the Fifth Amendment stands on its  
2                   own in that the just compensation is complete  
3                   at the time of invasion. And when the United  
4                   States invades you, it should be complete at  
5                   the time when the local government invades you,  
6                   and we wouldn't have all these problems with  
7                   res judicata removal that make the state court  
8                   option practically unviable and unpredictable.

9                   CHIEF JUSTICE ROBERTS: Thank you,  
10                  counsel. The case is submitted.

11                  (Whereupon, at 11:07 a.m., the case  
12                  was submitted.)

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## Official - Subject to Final Review

<b>\$</b>	<b>actionable</b> [3] 4:12 5:19 8:14	<b>answer</b> [18] 8:4 11:20,21,25 22:8 23:10,20 35:5 38:17,23 46:1,8 56:1 59:6,10 64:18 74:19,21	<b>believe</b> [3] 33:22 34:4 35:17
<b>\$20</b> [1] 42:19	<b>actions</b> [1] 37:3	<b>appeals</b> [1] 46:14	<b>believed</b> [1] 32:10
<b>\$3</b> [1] 13:4	<b>acts</b> [1] 29:3	<b>APPEARANCES</b> [1] 1:18	<b>belongs</b> [1] 49:5
<b>\$40</b> [1] 13:5	<b>actually</b> [5] 15:8 16:15 31:17 59:15 64:10	<b>applied</b> [1] 60:13	<b>benefit</b> [6] 17:11 19:9 50:2 73:3,5, 8
<b>1</b>	<b>adding</b> [2] 44:10 50:1	<b>applies</b> [1] 54:5	<b>best</b> [1] 49:11
<b>1</b> [1] 62:25	<b>additional</b> [2] 50:1 62:18	<b>apply</b> [4] 5:5 22:15 35:2 45:21	<b>between</b> [5] 22:18 28:20 33:8 35:15 36:22
<b>10</b> [1] 39:25	<b>address</b> [9] 5:17 39:9 52:1,7,10, 10,23,23 53:5	<b>applying</b> [1] 51:15	<b>beyond</b> [1] 44:20
<b>10:03</b> [2] 1:16 3:2	<b>addressing</b> [1] 53:6	<b>appropriate</b> [1] 41:18	<b>big</b> [2] 34:12 38:24
<b>100</b> [1] 52:9	<b>adequate</b> [8] 18:5 39:18 44:25 46:3 60:11,15 65:1 66:19	<b>area</b> [8] 6:25 18:10 27:4 28:11,15 32:12 38:25 44:21	<b>board</b> [1] 46:18
<b>11:07</b> [1] 75:11	<b>adjudicate</b> [1] 12:4	<b>aren't</b> [4] 23:23 29:12,17 30:11	<b>both</b> [5] 6:12 16:7 21:24 23:24 71:10
<b>13</b> [1] 56:20	<b>adjudicating</b> [3] 41:15 55:16,17	<b>argue</b> [2] 62:4 65:11	<b>bothering</b> [1] 35:4
<b>1331</b> [12] 33:3,14,20 56:17,19,20, 21 57:11,14,22 58:3 60:22	<b>adjudication</b> [2] 17:7 59:20	<b>argued</b> [1] 26:6	<b>bound</b> [1] 37:24
<b>1331(a)</b> [1] 58:7	<b>adjudications</b> [1] 13:6	<b>argues</b> [1] 57:12	<b>branch</b> [3] 40:3,4,17
<b>16</b> [1] 1:12	<b>administering</b> [1] 15:10	<b>arguing</b> [3] 61:23 62:21 64:7	<b>BREEMER</b> [62] 1:19 2:3,13 3:7,8, 10 5:20 7:12,17,25 8:5,8,11,18,24 9:3,5,12,19,21 10:2,5,12,24 11:1, 11,18,21,24 12:4,17 13:9,12 14:21 15:5,17 16:18,21 17:6,21,25 18:4, 9 19:3,6 20:1,9,17 22:13 23:4,10, 19 47:15 71:14,15,17 72:16 73:18 74:1,5,19,22
<b>17-647</b> [1] 3:4	<b>administrative</b> [8] 11:25 22:3,11 23:7 34:25 35:9 53:19,21	<b>argument</b> [29] 1:15 2:2,5,9,12 3:4, 8 25:4 28:3 29:10,11,19 30:2 33:3, 9,14,24 34:7 37:9,12,13 38:11 43:25 56:20 57:14 70:3,5,5 71:15	<b>Bremer's</b> [3] 37:9,12 70:6
<b>1884</b> [1] 4:17	<b>admit</b> [2] 37:15 73:7	<b>arise</b> [1] 14:19	<b>BREYER</b> [44] 6:19 7:14,18 8:2,6,9, 16,19 9:1,4,10,14,20,25 10:3,8,16, 25 11:5,16,19,22 12:2,6,18 13:10 19:13,17 20:5,15 34:12 35:19 36:2,4,8 41:22 44:1 45:6 58:15 59:7, 12,17,23 60:2
<b>1922</b> [1] 66:13	<b>admitted</b> [1] 39:22	<b>arises</b> [2] 28:8 33:19	<b>Breyer's</b> [1] 17:2
<b>1983</b> [48] 6:6,7 20:13,22,24 23:23 24:24 25:17 26:2 27:5,13 30:19 31:4 32:7,19 33:9 35:13 37:2 38:5, 39:3,11,13 44:24 48:15,18 54:10, 16,24 55:11 56:7,8 59:15 60:1,7, 16,25 62:11,22 63:15 64:8,17 65:8 68:5,20,24 69:3 71:3 72:23	<b>adopt</b> [1] 4:9	<b>arising</b> [1] 57:22	<b>briefly</b> [2] 63:3 74:21
<b>24:24 25:17 26:2 27:5,13 30:19 31:4 32:7,19 33:9 35:13 37:2 38:5, 39:3,11,13 44:24 48:15,18 54:10, 16,24 55:11 56:7,8 59:15 60:1,7, 16,25 62:11,22 63:15 64:8,17 65:8 68:5,20,24 69:3 71:3 72:23</b>	<b>adopted</b> [1] 3:18	<b>around</b> [1] 63:25	<b>bring</b> [7] 14:17 53:15,25,25 71:21, 23 72:20
<b>2</b>	<b>adopting</b> [2] 37:8 70:14	<b>artificial</b> [2] 28:12,18	<b>bringing</b> [1] 20:12
<b>2</b> [1] 63:1	<b>advantage</b> [3] 48:5,7 50:15	<b>aspect</b> [1] 46:15	<b>brings</b> [1] 45:13
<b>200</b> [1] 10:20	<b>Advise</b> [2] 19:25 42:22	<b>assert</b> [1] 9:9	<b>brought</b> [1] 57:17
<b>2019</b> [1] 1:12	<b>advising</b> [1] 42:7	<b>assessing</b> [1] 46:19	<b>budgetary</b> [2] 43:16,21
<b>25</b> [1] 2:8	<b>affect</b> [1] 19:20	<b>assign</b> [1] 43:11	<b>build</b> [1] 14:12
<b>3</b>	<b>affected</b> [2] 42:3,4	<b>assigning</b> [1] 46:17	<b>burden</b> [2] 20:12 73:8
<b>3</b> [1] 2:4	<b>affecting</b> [1] 10:20	<b>assume</b> [4] 43:19,23 45:20 63:18	<b>burdens</b> [1] 71:6
<b>38</b> [1] 2:11	<b>agencies</b> [1] 10:19	<b>Assuming</b> [1] 63:22	<b>buried</b> [1] 73:21
<b>5</b>	<b>agency</b> [12] 6:21,22 8:25 10:22 11:25 19:18 22:5,7,10,19,22 24:13	<b>assumption</b> [1] 4:25	<b>business</b> [1] 55:22
<b>50</b> [1] 10:18	<b>agree</b> [9] 13:4 39:23 44:24 49:16 55:18 56:12 62:5 64:12 69:16	<b>attacked</b> [2] 65:22 66:1	<b>C</b>
<b>7</b>	<b>agreed</b> [1] 33:3	<b>attorneys'</b> [2] 47:1,8	<b>calculus</b> [1] 56:2
<b>71</b> [1] 2:14	<b>agreement</b> [1] 70:17	<b>authority</b> [1] 56:25	<b>California</b> [1] 1:19
<b>A</b>	<b>agrees</b> [1] 26:18	<b>automatic</b> [1] 54:12	<b>called</b> [1] 12:16
<b>a.m</b> [3] 1:16 3:2 75:11	<b>ahead</b> [7] 20:10 42:14,15 45:24 61:15,16 67:21	<b>availability</b> [1] 62:16	<b>came</b> [2] 1:14 15:12
<b>able</b> [2] 5:2 62:7	<b>air</b> [1] 6:24	<b>available</b> [4] 25:18,20 32:16 38:5	<b>cannot</b> [2] 65:22 71:10
<b>above</b> [1] 32:12	<b>airy</b> [1] 48:25	<b>avenue</b> [1] 32:25	<b>capable</b> [3] 32:4 55:15,17
<b>above-entitled</b> [1] 1:14	<b>AL</b> [1] 1:7	<b>average</b> [1] 46:10	<b>care</b> [3] 8:2 10:8 42:17
<b>abrogate</b> [1] 11:13	<b>ALITO</b> [22] 10:14 13:24 14:2 40:2 42:6 43:13 46:22,25 47:4,7,10,14 48:1,4,9,21,25 49:4 66:25 67:4,14 68:2	<b>awarding</b> [2] 25:14 30:13	<b>Case</b> [29] 3:4,12 4:17,18 5:5 12:15 14:8 17:5 19:14 42:24 45:10 51:19 56:24 57:3,6,7,21 58:2,2 60:13, 13,25 64:17 66:13,16,21 72:16 75:10,11
<b>absence</b> [1] 68:23	<b>alleged</b> [1] 14:8	<b>aware</b> [2] 52:2,3	<b>cases</b> [15] 3:19 4:2 5:11 6:16 14:19 17:17 35:25 40:1 45:9 49:25 56:23 58:1 62:17 72:17,18
<b>Absolutely</b> [1] 40:19	<b>allow</b> [2] 14:14 57:15	<b>away</b> [1] 52:9	<b>category</b> [3] 31:21 57:16 58:1
<b>accepted</b> [1] 70:7	<b>Allowing</b> [1] 57:2	<b>B</b>	<b>cause</b> [13] 33:16 36:16,18 42:8 54:10 55:1 56:5,7,9,15 60:18 68:20,
<b>access</b> [3] 19:8 30:25 34:11	<b>already</b> [6] 24:22 43:6 44:23 60:8, 18 68:6	<b>back</b> [13] 25:25 27:21 28:17 34:23 42:24,25 56:7 57:13 63:12 64:20 66:8 67:9 68:15	
<b>accessing</b> [1] 32:20	<b>alternates</b> [1] 48:19	<b>backdrop</b> [1] 66:16	
<b>accomplished</b> [1] 35:3	<b>alternative</b> [1] 63:2	<b>bad</b> [2] 47:19,20	
<b>according</b> [1] 21:20	<b>although</b> [1] 60:6	<b>balance</b> [2] 56:25 57:5	
<b>acknowledge</b> [2] 68:12 69:10	<b>Amendment</b> [26] 6:9 24:8,14 26:20,25 27:15,17 28:22,24 36:19 39:15,17 55:13,14,17,19 65:8 70:24 71:4,5,22,24 72:1,11 74:23 75:1	<b>balancing</b> [1] 49:12	
<b>across</b> [1] 50:9	<b>amicus</b> [3] 1:23 2:8 25:5	<b>bankrupt</b> [1] 50:12	
<b>Act</b> [20] 4:3 21:8,12,16,23 23:22,23 24:3 27:10,14,14 37:3,18 38:2 45:22 46:5 53:16 56:10 73:12 74:6	<b>amount</b> [1] 41:1	<b>bar</b> [1] 61:18	
<b>action</b> [23] 25:17 26:21 33:16 36:16,19 37:21 38:5 46:12 54:11 55:2 56:5,7,9,15 60:18 66:18 68:8,20, 25 69:3 70:19 72:19,22	<b>announcement</b> [1] 15:11	<b>barred</b> [1] 12:23	
	<b>anomalous</b> [1] 4:9	<b>basic</b> [1] 25:8	
	<b>another</b> [2] 28:11,15	<b>basis</b> [8] 4:15,16,21 5:21,25 6:13 32:9 67:24	
		<b>bear</b> [1] 20:11	
		<b>becomes</b> [1] 59:20	
		<b>behalf</b> [8] 1:20,25 2:4,11,14 3:9 38:12 71:16	

## Official - Subject to Final Review

<p>24  <b>cemetery</b> <sup>[1]</sup> 73:24  <b>certain</b> <sup>[10]</sup> 15:12 39:18 41:1 44:25 46:3 57:15 60:11,14 65:1 66:19  <b>certainly</b> <sup>[7]</sup> 41:19 43:20 52:3 57:4 61:23 62:2,6  <b>challenge</b> <sup>[1]</sup> 67:25  <b>challenged</b> <sup>[1]</sup> 67:22  <b>chance</b> <sup>[1]</sup> 9:17  <b>change</b> <sup>[3]</sup> 38:4,24,25  <b>changed</b> <sup>[2]</sup> 18:6 38:20  <b>charge</b> <sup>[1]</sup> 15:10  <b>check</b> <sup>[1]</sup> 17:23  <b>Cherokee</b> <sup>[6]</sup> 3:22 18:5,16 42:25 73:4 74:7  <b>CHIEF</b> <sup>[26]</sup> 3:3,10 4:22 13:25 14:4 15:6 21:3,4 25:1,6 38:6,10,13 45:3,8,23 46:6 52:11,15 61:11,15 71:8,12 74:18,20 75:9  <b>choice</b> <sup>[1]</sup> 35:15  <b>circumstances</b> <sup>[2]</sup> 6:13 59:2  <b>claim</b> <sup>[55]</sup> 3:16,21 5:24 6:1,4 8:14,15 9:13 11:14 12:5 15:1,19 16:6 18:14 19:4,5 24:4,8 27:14 33:17,18 36:14 37:4 39:5,6,11 51:9,10 53:15 54:1 56:17 57:8,9,20 58:17 59:2,3 60:8,16 61:9 62:11 64:2,15,16,17 68:5,8 69:25 70:1 71:22,24 72:1,11,14,15  <b>claimant</b> <sup>[3]</sup> 21:8 54:11 60:9  <b>claimants</b> <sup>[2]</sup> 31:21 58:9  <b>claims</b> <sup>[9]</sup> 6:2 32:5 35:10 36:15 53:13 55:13,14 57:16 72:5  <b>clarify</b> <sup>[1]</sup> 52:25  <b>Clarke</b> <sup>[1]</sup> 17:16  <b>Clause</b> <sup>[20]</sup> 3:15 4:6,10,13 5:18,23 6:11 12:5 16:6 24:2 25:13 28:25 36:23 41:4 54:16,18 70:23 72:1,12,24  <b>clear</b> <sup>[2]</sup> 33:16 35:11  <b>client</b> <sup>[2]</sup> 19:14,17  <b>close</b> <sup>[1]</sup> 49:25  <b>closing</b> <sup>[1]</sup> 31:20  <b>coextensive</b> <sup>[1]</sup> 71:4  <b>collecting</b> <sup>[1]</sup> 3:25  <b>College</b> <sup>[4]</sup> 33:13,15,23 34:7  <b>colloquy</b> <sup>[1]</sup> 25:9  <b>come</b> <sup>[7]</sup> 5:10 11:15 49:25 54:5 56:16 73:22 74:13  <b>comes</b> <sup>[7]</sup> 8:20 14:6 50:21 54:15,15,23 73:20  <b>Commonwealth</b> <sup>[1]</sup> 40:17  <b>compared</b> <sup>[1]</sup> 50:16  <b>compensable</b> <sup>[1]</sup> 61:25  <b>compensated</b> <sup>[1]</sup> 27:22  <b>compensation</b> <sup>[84]</sup> 3:14,15,21,24 4:6,10,12,21 5:23 6:11 9:9 13:15,16,23 15:2,19,23,24 16:8,13 17:13,13,14 18:18 19:1,10,12 21:9,23 22:15,24 24:1,4,10 25:15,19,22 26:3,19 27:18 29:2,6 32:11 36:11,16,20,25 39:7,19 40:15 41:2,9,17 42:11 43:7,12 44:4,5,7,17 46:19</p>	<p>56:12 58:9,19,20 59:20 60:15 65:2,23 66:3,6,20 68:9 69:12 72:12,24 73:16,17,21 74:3,6,9,14 75:2  <b>competent</b> <sup>[1]</sup> 30:14  <b>complete</b> <sup>[13]</sup> 5:1,19,24 6:1,3 24:9,15,23 35:21 43:6 68:13 75:2,4  <b>completed</b> <sup>[1]</sup> 21:13  <b>completely</b> <sup>[2]</sup> 38:19 40:10  <b>complication</b> <sup>[1]</sup> 13:1  <b>concede</b> <sup>[1]</sup> 64:4  <b>conceded</b> <sup>[1]</sup> 68:10  <b>concern</b> <sup>[4]</sup> 16:2,3,4 17:2  <b>concerns</b> <sup>[3]</sup> 17:7 37:8,10  <b>conclusion</b> <sup>[2]</sup> 25:17 60:12  <b>concretely</b> <sup>[1]</sup> 20:3  <b>condemn</b> <sup>[1]</sup> 18:14  <b>condemnation</b> <sup>[13]</sup> 14:25 26:21 37:3 45:22 46:12 66:18 68:8 70:19 72:2,6,17,20,21  <b>condemning</b> <sup>[1]</sup> 19:10  <b>conditions</b> <sup>[2]</sup> 7:22 8:22  <b>conflating</b> <sup>[1]</sup> 69:24  <b>conflicting</b> <sup>[1]</sup> 4:9  <b>confused</b> <sup>[1]</sup> 21:1  <b>confusing</b> <sup>[1]</sup> 18:10  <b>Congress</b> <sup>[19]</sup> 20:23 32:10 35:16 51:25 52:1,2,6,10 53:4,5 55:7 56:14 57:1,13 58:6,7,10 59:14 60:19  <b>Congress's</b> <sup>[3]</sup> 29:21 30:20 32:8  <b>connection</b> <sup>[1]</sup> 13:11  <b>consequence</b> <sup>[1]</sup> 31:19  <b>consequences</b> <sup>[2]</sup> 43:16,21  <b>consider</b> <sup>[3]</sup> 57:6 73:2,6  <b>considered</b> <sup>[2]</sup> 52:4 53:6  <b>constitutes</b> <sup>[2]</sup> 37:21 38:2  <b>Constitution</b> <sup>[22]</sup> 5:2 33:20 35:20 37:25 44:20 48:13 52:8 61:13 62:20,23 63:15 64:5 68:7,11,13,23 69:1,4,11 70:11,20,22  <b>constitutional</b> <sup>[43]</sup> 4:5,21 5:9 19:5 25:21 26:8,9,19,23 27:6,7 28:9,19 29:5,25 30:22 32:24 33:1 34:10,16 35:10,24 36:23 37:13 39:12 41:7,13 43:5 50:2 54:13 56:25 60:17 62:9 63:25 64:12,22,24 65:6 67:12,13 69:25 70:1 73:10  <b>constitutionally</b> <sup>[1]</sup> 3:21  <b>contested</b> <sup>[1]</sup> 67:17  <b>context</b> <sup>[5]</sup> 20:18 27:13 38:16 64:21,22  <b>continue</b> <sup>[2]</sup> 21:3 22:14  <b>contrary</b> <sup>[1]</sup> 37:18  <b>controls</b> <sup>[1]</sup> 4:2  <b>correct</b> <sup>[8]</sup> 11:22 22:8 25:12 26:10,11 50:23 68:21 70:12  <b>costing</b> <sup>[1]</sup> 42:19  <b>couldn't</b> <sup>[2]</sup> 17:1 59:17  <b>counsel</b> <sup>[5]</sup> 25:2 62:13 68:19 69:6 75:10  <b>counter</b> <sup>[1]</sup> 32:16  <b>country</b> <sup>[2]</sup> 10:19 50:9  <b>counts</b> <sup>[2]</sup> 45:4,4  <b>County</b> <sup>[30]</sup> 3:19 4:8,24 5:13,21 11:14,17 17:17 24:7 29:11 31:3,3,23</p>	<p>33:25 34:3 38:15,19 39:8 50:8 57:3 62:22 63:14,14 64:1,4,16,19 65:11,15 71:25  <b>County's</b> <sup>[3]</sup> 25:12,17 31:18  <b>couple</b> <sup>[1]</sup> 36:6  <b>course</b> <sup>[5]</sup> 34:19 40:21 47:24 57:13 62:15  <b>COURT</b> <sup>[127]</sup> 1:1,15 3:11 4:18 5:7,12,12,14,16 6:6,10,17 10:23 12:19 15:15 21:9,21 23:9,13,14,16,17,25 24:6,12,13,17,18 25:7 26:24 27:1,1,5 31:17 32:16,21 33:15 35:1,11,16,23 36:15,18 38:14 39:1,6,8,21 40:22,23 41:5,22,25 42:1 43:9,11,11 44:8,14,18 45:2,5,16,20,24 47:11,13,15,16,18,19 48:2,5,7,11,23,23 49:2 50:3,15,16,16,20,23,25 51:25 52:7,24 53:17 54:6,12 56:9,11,17,22 57:4,17,23 58:3,4,10,11,13,21 59:4,14,22 61:1 63:6 65:6 66:1,12,17,23 67:10,10,17,17 71:18,22,24 72:3,3,4 73:25 74:15 75:7  <b>Court's</b> <sup>[7]</sup> 4:16 23:18 37:8 42:23 50:20 51:16 60:21  <b>courthouse</b> <sup>[1]</sup> 31:20  <b>courts</b> <sup>[31]</sup> 6:14 7:4 17:3,4 29:12,13,17,22 30:10,18,21 31:25 32:1,4,6,12 34:11 35:17 41:18 44:13 46:9 47:18,20 50:22 51:13,14 55:15 60:19 62:15 67:23 71:19  <b>create</b> <sup>[1]</sup> 57:19  <b>created</b> <sup>[5]</sup> 18:16 30:23 56:15 57:1 66:14  <b>creates</b> <sup>[1]</sup> 13:20  <b>creating</b> <sup>[1]</sup> 58:12  <b>credit</b> <sup>[1]</sup> 53:1  <b>critical</b> <sup>[1]</sup> 3:12  <b>criticism</b> <sup>[4]</sup> 30:17,18 32:5 35:7  <b>curiae</b> <sup>[3]</sup> 1:23 2:8 25:5  <b>current</b> <sup>[1]</sup> 61:8</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D.C</b> <sup>[2]</sup> 1:11,22  <b>dah-dah</b> <sup>[2]</sup> 7:22,22  <b>damages</b> <sup>[2]</sup> 3:17 62:16  <b>danger</b> <sup>[1]</sup> 62:6  <b>dating</b> <sup>[2]</sup> 25:25 27:20  <b>DAVID</b> <sup>[5]</sup> 1:19 2:3,13 3:8 71:15  <b>days</b> <sup>[2]</sup> 34:22 43:20  <b>debate</b> <sup>[1]</sup> 10:6  <b>decide</b> <sup>[11]</sup> 7:7,9,23 8:9,11,12 10:10 18:3 19:11 60:4 73:11  <b>decided</b> <sup>[3]</sup> 34:5 39:1 67:15  <b>deciding</b> <sup>[2]</sup> 12:25 34:20  <b>decision</b> <sup>[9]</sup> 4:16 9:7 22:12 23:9,13 31:23 38:15 39:1 45:15  <b>decisionmaker</b> <sup>[1]</sup> 22:20  <b>decisions</b> <sup>[2]</sup> 23:16 42:24  <b>decisis</b> <sup>[7]</sup> 31:10,12,14 62:14 63:1 64:10,11  <b>declare</b> <sup>[1]</sup> 19:8  <b>defendant</b> <sup>[1]</sup> 4:7  <b>defending</b> <sup>[1]</sup> 6:10  <b>definition</b> <sup>[1]</sup> 63:17</p>	<p><b>delegated</b> <sup>[1]</sup> 41:17  <b>demand</b> <sup>[3]</sup> 36:15,19 42:10  <b>denied</b> <sup>[1]</sup> 66:21  <b>deny</b> <sup>[2]</sup> 58:18,19  <b>Department</b> <sup>[1]</sup> 1:22  <b>depended</b> <sup>[1]</sup> 61:7  <b>dependent</b> <sup>[2]</sup> 39:20,21  <b>depending</b> <sup>[3]</sup> 6:9 7:1 12:15  <b>deprivation</b> <sup>[8]</sup> 25:18 27:23 28:4,20 39:12 55:16,19 63:7  <b>deprived</b> <sup>[5]</sup> 26:2,7 27:6 39:16 64:25  <b>deprives</b> <sup>[2]</sup> 28:22 40:11  <b>describing</b> <sup>[1]</sup> 11:2  <b>designated</b> <sup>[1]</sup> 24:6  <b>determination</b> <sup>[3]</sup> 46:13 48:12 59:1  <b>determine</b> <sup>[2]</sup> 37:20 42:11  <b>determining</b> <sup>[1]</sup> 44:17  <b>developed</b> <sup>[1]</sup> 63:5  <b>developing</b> <sup>[1]</sup> 50:10  <b>development</b> <sup>[1]</sup> 14:15  <b>Dickinson</b> <sup>[2]</sup> 14:23 17:16  <b>difference</b> <sup>[13]</sup> 22:18 23:1 24:1 28:20 33:4 34:13,13,17 35:20 36:22 54:8 66:7 67:19  <b>different</b> <sup>[20]</sup> 4:4 7:21,21 8:22 17:7 21:2,16 23:24 29:1 42:2,4 58:13 67:25 68:3 72:7,8,9,12,14 74:16  <b>differently</b> <sup>[2]</sup> 23:3 24:9  <b>difficult</b> <sup>[2]</sup> 19:15 41:25  <b>difficulty</b> <sup>[5]</sup> 51:3,5,11,21 66:10  <b>diminished</b> <sup>[1]</sup> 64:6  <b>directly</b> <sup>[2]</sup> 34:3 57:16  <b>disagree</b> <sup>[5]</sup> 26:17 56:2 63:16,22 71:2  <b>disagreement</b> <sup>[1]</sup> 54:22  <b>disagrees</b> <sup>[1]</sup> 67:16  <b>dissatisfied</b> <sup>[1]</sup> 51:8  <b>distant</b> <sup>[1]</sup> 50:3  <b>distinction</b> <sup>[3]</sup> 28:12,16,18  <b>doc</b> <sup>[1]</sup> 66:13  <b>doctrinally</b> <sup>[1]</sup> 49:9  <b>doctrine</b> <sup>[4]</sup> 6:16 39:14 49:8 66:14  <b>doctrines</b> <sup>[2]</sup> 39:10 65:5  <b>dog</b> <sup>[2]</sup> 73:20,23  <b>doing</b> <sup>[6]</sup> 12:19,20,25 32:1 43:17,22  <b>domain</b> <sup>[1]</sup> 14:18  <b>done</b> <sup>[1]</sup> 58:11  <b>doors</b> <sup>[1]</sup> 31:20  <b>Dow</b> <sup>[6]</sup> 3:19 6:3 14:23 15:18 17:16 18:12  <b>dozens</b> <sup>[1]</sup> 6:25  <b>dual</b> <sup>[1]</sup> 30:23  <b>due</b> <sup>[2]</sup> 20:20 41:17  <b>duty</b> <sup>[2]</sup> 13:15 37:24</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>each</b> <sup>[2]</sup> 8:21 10:20  <b>earlier</b> <sup>[4]</sup> 61:6 66:17 69:7 70:9  <b>easy</b> <sup>[1]</sup> 19:13  <b>effect</b> <sup>[2]</sup> 43:4 64:11  <b>effectively</b> <sup>[6]</sup> 33:12,22 34:6 37:</p>
---	---	---	---

## Official - Subject to Final Review

<p>19 40:14 51:16  <b>either</b> [2] 34:8 58:24  <b>element</b> [3] 39:13 54:10 57:21  <b>emergency</b> [1] 21:19  <b>eminent</b> [1] 14:17  <b>emphasizes</b> [1] 46:16  <b>employees</b> [2] 70:7,10  <b>enabling</b> [1] 50:11  <b>enact</b> [3] 20:2,10 58:7  <b>enacted</b> [1] 20:24  <b>enacting</b> [2] 43:23 65:20  <b>enactment</b> [2] 20:20 43:4  <b>enactments</b> [3] 41:24 66:4 67:12  <b>enacts</b> [1] 40:8  <b>end</b> [10] 23:13 37:16,20 40:24 41:5  42:18 67:8,9,11 70:5  <b>ending</b> [1] 21:19  <b>ends</b> [1] 42:18  <b>enforce</b> [5] 26:18,23 27:17 29:24  30:22  <b>enforcement</b> [2] 14:7 48:20  <b>enforcing</b> [1] 61:2  <b>engaged</b> [1] 53:14  <b>English</b> [2] 63:6 69:13  <b>enjoin</b> [2] 61:2 62:11  <b>enough</b> [5] 19:7 30:11,12,13,14  <b>ensure</b> [1] 62:8  <b>entertain</b> [1] 15:14  <b>entire</b> [4] 27:19,23 31:21 63:17  <b>entirely</b> [1] 52:18  <b>entitled</b> [13] 4:20 7:24 13:5 21:25  22:23 25:24 27:20,22 41:1 46:14  47:1,7 56:11  <b>entitlement</b> [7] 3:23 9:23 15:21  21:10 24:10 74:8,10  <b>entity</b> [1] 4:7  <b>entrusted</b> [3] 29:22 30:21 35:18  <b>environmental</b> [2] 6:21,22  <b>envisioned</b> [1] 31:23  <b>EPA</b> [10] 7:6,15,15 8:12,20 9:2,6,  15,24 11:6  <b>equivalent</b> [2] 53:23 56:10  <b>era</b> [5] 29:21 30:20 32:8,10 35:16  <b>error</b> [1] 23:17  <b>especially</b> [1] 50:6  <b>ESQ</b> [6] 1:19,24 2:3,6,10,13  <b>essentially</b> [2] 14:2 34:1  <b>established</b> [3] 53:9 74:8,10  <b>ET</b> [1] 1:7  <b>even</b> [16] 9:1,4 10:21 13:3 15:16  19:11 26:8,14,14 42:1 44:14 46:2  57:6 60:12 66:20 74:2  <b>event</b> [2] 34:8 38:3  <b>everybody</b> [3] 17:2 26:17 73:16  <b>everywhere</b> [2] 24:20 55:24  <b>evidence</b> [3] 12:16,21 18:23  <b>exactly</b> [3] 14:22 17:20 37:9  <b>exaggerate</b> [1] 10:18  <b>example</b> [3] 14:12 28:23 41:12  <b>exception</b> [3] 18:17 73:4 74:11  <b>executive</b> [2] 40:3,17  <b>exhaust</b> [3] 22:6 35:12 53:18  <b>exhausted</b> [1] 4:14  <b>exhaustion</b> [15] 6:15 11:3,6,10,11</p>	<p>23:7 24:22 32:18 53:21 54:5 55:  11,22,23 56:2,3  <b>exist</b> [2] 72:4,5  <b>existing</b> [5] 38:20 56:3 60:10,21  66:16  <b>exists</b> [1] 72:1  <b>expectation</b> [1] 7:10  <b>expectations</b> [1] 7:1  <b>expensive</b> [1] 20:12  <b>explain</b> [1] 28:18  <b>explained</b> [1] 31:17  <b>explanation</b> [1] 67:1  <b>expressed</b> [1] 37:7  <b>extra</b> [1] 13:1</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>facing</b> [1] 41:20  <b>fact</b> [9] 4:8 25:15 38:4 53:13 55:1,  10 56:4 67:20 70:18  <b>factor</b> [1] 62:18  <b>factors</b> [1] 63:9  <b>failing</b> [2] 65:23 66:5  <b>failure</b> [2] 41:8 69:11  <b>fair</b> [5] 22:22 34:14 44:9,16 59:1  <b>fairly</b> [4] 55:18 59:8,9 60:3  <b>faith</b> [1] 53:1  <b>fall</b> [1] 57:25  <b>Falls</b> [2] 4:17 18:13  <b>far</b> [5] 4:25 40:10 46:3,4 49:7  <b>fast</b> [1] 19:7  <b>favor</b> [1] 12:25  <b>favorable</b> [1] 46:20  <b>federal</b> [78] 5:6,12 6:4,4,6 10:22  12:19 15:15 17:3,4 21:3,6,8,20,21,  25 23:1,14,17,25 24:6,8,16,18,23  27:1 29:13,25 30:22 31:20 32:21,  24,25 33:17,18,19 34:11 35:15 36:  14 37:19,23 44:14,18 47:15,17,20  48:11,23 50:16,24 51:9,9,14 53:  14,16 54:6,12 55:1 56:16 57:4,17,  21,22 58:3,10,13,20 59:4 60:19  61:1,9 67:10,17 69:25 71:7 72:3  73:24 74:25  <b>fees</b> [2] 47:1,8  <b>FICKEN</b> [75] 1:24 2:10 38:11,13  41:6 42:21 43:18 44:22 45:7,17,  25 46:11,23 47:3,6,9,12,21,24 48:  3,8,10,24 49:3,6,18,22 50:18 51:  22 52:14,20 53:4,11,20 54:2,7,17,  21,25 55:4,7,25 56:8,21 57:20 59:  5,10,13,21,25 60:5 61:4,13,20 62:  2,5 63:11,21,24 64:9 65:13,19 66:  2 67:3,6,24 68:4,14,21,24 69:8,14  70:12,16 71:9  <b>Fifth</b> [18] 6:9 24:8,14 26:20,25 27:  15,17 36:19 39:14,16 65:7 70:24  71:21,23,25 72:11 74:23 75:1  <b>fight</b> [1] 40:22  <b>figure</b> [1] 19:1  <b>file</b> [4] 20:22 45:9 51:9 72:19  <b>final</b> [11] 9:7,10 14:24 20:20 22:7,  11 23:9,13,15 51:17 73:11  <b>finding</b> [2] 8:15 44:6  <b>finish</b> [2] 37:22 49:21</p>	<p><b>first</b> [20] 3:4 6:15 8:25 17:8 18:4  25:11 26:6,24 28:22,23 36:10 39:  8,10 51:13,18 63:5,12 66:15 69:  12 72:19  <b>fix</b> [1] 58:6  <b>flock</b> [1] 17:3  <b>following</b> [1] 41:11  <b>force</b> [2] 64:4,6  <b>forcing</b> [1] 70:10  <b>forever</b> [1] 44:13  <b>Forget</b> [1] 19:15  <b>found</b> [2] 65:8 66:12  <b>Fourteenth</b> [4] 55:14,19 71:4,5  <b>Fourth</b> [2] 55:13,16  <b>FRANCISCO</b> [30] 1:21 2:6 25:3,4,  6 26:11,16 27:9 28:6,14 29:15,20,  24 30:4,8,16 31:5,9,13 32:2 33:6,  10 35:6 36:1,3,6,9 37:6,11 38:8  <b>frankly</b> [4] 26:12,17 32:14 37:2  <b>free</b> [1] 20:19  <b>frequently</b> [1] 14:5  <b>friend</b> [1] 19:19  <b>front</b> [4] 37:15,20 67:8,11  <b>fruition</b> [1] 5:10  <b>full</b> [1] 53:1  <b>fully</b> [4] 29:22 30:21 35:18 55:17  <b>fundamentally</b> [1] 32:7</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>garage</b> [1] 14:13  <b>GEN</b> [3] 1:21 2:6 25:4  <b>General</b> [36] 1:21 25:3,6 26:5,11,  16 27:9 28:6,14 29:15,20,24 30:4,  8,16 31:5,9,13 32:2 33:6,10 35:6  36:1,3,6,9 37:5,6,11 38:7,8 48:17  57:12 70:21,25 71:10  <b>General's</b> [2] 39:24 70:5  <b>generally</b> [2] 27:4 55:20  <b>generous</b> [1] 46:5  <b>gets</b> [2] 9:9 73:17  <b>getting</b> [1] 65:1  <b>give</b> [19] 9:17 10:1 11:9 12:7 14:10,  17 16:6,15,24,25 17:23 18:24 23:  24 28:2 44:5 54:11 56:15 58:7,8  <b>given</b> [6] 13:22 17:12 34:10 55:8  60:19,24  <b>gives</b> [3] 3:20 15:1,19  <b>God</b> [1] 35:2  <b>goldfish</b> [2] 73:20 74:17  <b>GORSUCH</b> [24] 28:1,7 53:8,12,24  54:4,14,20,23 55:3,6,9 56:6 62:13  63:11,18,22 64:3 68:10,17,22 69:  5,9 70:14  <b>got</b> [1] 13:3  <b>government</b> [36] 3:22 4:7 8:12 9:  23 13:16,21 15:3 17:10 18:17,20  19:7 21:3,6,21,25 23:1 25:13 28:  21 29:2,7 36:14 37:19,23 39:17,  22 40:4,5 53:14 66:21 70:8,17 71:  7 73:1,5,14 75:5  <b>government's</b> [2] 29:3 70:15  <b>governments</b> [1] 18:22  <b>grand</b> [1] 5:8  <b>gravestones</b> [1] 45:13</p>	<p><b>graveyard</b> [1] 73:15  <b>Great</b> [3] 4:17 18:13 51:23  <b>greater</b> [1] 71:5  <b>greatly</b> [1] 71:1  <b>guarantee</b> [2] 13:22 15:24  <b>guess</b> [3] 51:18 55:22 67:8  <b>guy</b> [1] 74:17</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>handled</b> [1] 5:11  <b>happen</b> [4] 22:4 46:19 53:17 69:  18  <b>happening</b> [1] 21:22  <b>happens</b> [5] 9:20 19:2 62:9 73:13,  14  <b>harm</b> [1] 73:12  <b>harmed</b> [2] 15:22 22:23  <b>harms</b> [2] 20:3,21  <b>Hayes</b> [2] 42:24 66:16  <b>hear</b> [1] 3:3  <b>heard</b> [3] 68:18,19 69:6  <b>hearing</b> [2] 38:18 46:18  <b>held</b> [3] 63:6 66:17,23  <b>help</b> [1] 62:25  <b>helpful</b> [2] 27:2 37:1  <b>helping</b> [1] 12:24  <b>high</b> [1] 61:18  <b>higher</b> [1] 31:12  <b>hold</b> [1] 57:12  <b>holding</b> [3] 4:11 46:18 63:2  <b>home</b> [4] 48:4,7 49:25 50:15  <b>Honor</b> [37] 9:22 26:12 27:9 29:15  30:17 31:14 32:2 35:6 36:9 37:23  38:9 42:21 43:18 44:23 45:18 47:  21,25 49:9 50:18 51:24 52:21 53:  22 54:9 56:1 57:7 59:22 61:4 62:6  64:13 65:13 67:9 68:1,14 69:1,16  70:13 71:11  <b>Honor's</b> [3] 41:12 46:1 64:18  <b>hope</b> [1] 23:14  <b>hybrid</b> [1] 59:19</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> [1] 49:1  <b>identified</b> [1] 64:23  <b>Imagine</b> [1] 19:14  <b>immediate</b> [3] 24:4 46:14 54:18  <b>immediately</b> [4] 21:20 36:13 53:  15 63:8  <b>impartial</b> [1] 22:21  <b>implement</b> [1] 12:11  <b>implicit</b> [4] 29:9 30:10,15 38:2  <b>important</b> [4] 45:19 66:6,11 69:22  <b>including</b> [2] 25:21 63:5  <b>inconsistent</b> [1] 63:4  <b>independent</b> [1] 22:21  <b>indicates</b> [1] 58:24  <b>individual</b> [4] 7:2 30:24 42:5 53:  13  <b>inherent</b> [1] 44:23  <b>initial</b> [2] 4:16 72:21  <b>injunction</b> [2] 61:18,22  <b>injunctive</b> [1] 62:16  <b>injured</b> [3] 9:6 15:23 74:14</p>
---	--	---	---

## Official - Subject to Final Review

<p><b>injures</b> [2] 9:7 20:3  <b>injuries</b> [1] 74:24  <b>injury</b> [7] 9:9 14:24 28:8 56:13 68:15,16 69:20  <b>instead</b> [3] 5:10 22:19 49:24  <b>interest</b> [5] 15:8 25:24 27:20 49:13 50:10  <b>interests</b> [2] 15:13 49:13  <b>International</b> [4] 33:13,15,23 34:7  <b>interpret</b> [2] 24:14 62:19  <b>interpretation</b> [7] 4:5,10 5:23 31:4 48:16 58:13 61:8  <b>interpreted</b> [6] 6:12 24:2,9 57:14,24 58:4  <b>interpreting</b> [4] 59:18,18 64:5,7  <b>interrupt</b> [1] 31:2  <b>invade</b> [1] 70:11  <b>invaded</b> [5] 4:19 13:21 15:13,22 17:10  <b>invades</b> [3] 24:5 75:4,5  <b>invading</b> [1] 17:11  <b>invalidate</b> [1] 72:22  <b>invasion</b> [16] 3:13,20,25 4:11 13:17,19 14:24 15:7,12,18 16:7,16 17:20 18:13 24:15 75:3  <b>inverse</b> [12] 26:21 37:2 45:22 46:11 66:18 68:7 70:18 72:2,6,17,20,20  <b>involve</b> [1] 49:12  <b>involved</b> [1] 40:18  <b>involves</b> [1] 57:21  <b>isn't</b> [9] 31:8,11 35:21,23 51:20 58:18 61:14 63:2 70:11  <b>issue</b> [6] 3:12 24:12 38:16 39:4 52:1 60:4  <b>issued</b> [1] 31:23  <b>issues</b> [2] 41:25 49:11  <b>issuing</b> [1] 5:17  <b>it'll</b> [1] 57:5  <b>itself</b> [5] 3:20 15:1,18 18:13 35:20</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>January</b> [1] 1:12  <b>job</b> [3] 10:13 23:14 32:1  <b>Jones</b> [1] 8:20  <b>judge</b> [2] 19:15 22:20  <b>judges</b> [1] 60:4  <b>judgment</b> [8] 29:17,21 30:20 32:9,15 40:24 50:17 51:16  <b>judicata</b> [4] 12:24 35:2 58:21 75:7  <b>judicial</b> [2] 12:22 40:4  <b>jump</b> [1] 60:20  <b>jurisdiction</b> [4] 23:25 58:4,14 60:20  <b>jurisprudence</b> [2] 52:9 60:21  <b>Justice</b> [173] 1:22 3:3,10 4:22 6:18,19 7:14,18 8:2,6,9,16,19 9:1,4,10,14,20,25 10:3,8,14,16,25 11:5,16,19,22 12:2,6,18 13:10,24,25 14:2,4 15:4,6,25 16:19,22 17:2,19,22 18:1,6,19 19:4,13,17 20:5,15,25 21:4,5 22:17 23:6,12 25:1,6 26:5,13 27:3 28:1,7,10 29:9,18,23 30:1,5,9 31:1,7,11,24 33:2,8,21 34:12</p>	<p>35:19 36:2,4,8 37:5,7 38:6,10,13 40:2 41:21 42:6 43:13 44:1 45:3,6,8,23 46:6,22,25 47:4,7,10,14 48:1,4,9,21,25 49:4,16,20 50:14 51:2 52:11,15,22 53:3,8,12,24 54:4,14,20,23 55:3,6,9 56:6,19 57:10 58:15 59:7,12,17,23 60:2,23 61:11,15,17,21 62:3,13 63:11,18,22 64:3 65:10,17,25 66:25 67:4,14 68:2,10,17,22 69:5,9 70:2,14 71:8,12 72:13 73:13,19 74:2,12,18,20 75:9  <b>justification</b> [1] 38:24  <b>justifications</b> [1] 31:16  <b>justify</b> [1] 25:16</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>KAGAN</b> [20] 6:18 15:4,25 16:19,22 17:19,22 18:1,6,19 19:4 26:5,13 27:3 28:10 37:5,7 51:2 52:22 70:2  <b>KAVANAUGH</b> [23] 29:9,18,23 30:1,5,9 31:1,7,11,24 33:2,8,21 49:16,20 50:14 53:3 56:19 57:10 65:10,17,25 72:13  <b>keep</b> [3] 56:6 66:12 69:22  <b>kind</b> [6] 6:22 8:3 15:6 28:12 44:2 60:3  <b>Kirby</b> [2] 14:23 17:16  <b>KNICK</b> [3] 1:3 3:5 45:10  <b>knowing</b> [1] 65:21  <b>knows</b> [1] 35:2</p> <hr/> <p style="text-align: center;"><b>L</b></p> <p><b>land</b> [4] 17:11 19:21 20:8 45:12  <b>landowner</b> [1] 22:1  <b>landscape</b> [1] 38:20  <b>last</b> [2] 50:22 52:16  <b>later</b> [2] 19:12 60:12  <b>Laughter</b> [7] 8:7 10:4 18:8 19:16 47:23 52:13 63:20  <b>law</b> [20] 14:11 27:4 28:11,16 32:18 45:21 47:5 49:12,14 50:10,25 56:23 57:11,16,22 63:4 72:2,6,10,17  <b>lawful</b> [1] 29:3  <b>lawfully</b> [2] 29:3,7  <b>lawsuit</b> [2] 20:12,22  <b>lawyer</b> [4] 19:18,19,24 42:7  <b>lawyers</b> [1] 48:6  <b>lead</b> [1] 6:23  <b>least</b> [9] 16:10 37:11 39:25 52:4 57:14,23 62:23 67:21,22  <b>legal</b> [1] 49:7  <b>lengthy</b> [1] 58:24  <b>level</b> [1] 15:12  <b>liability</b> [1] 13:20  <b>lie</b> [1] 28:2  <b>literally</b> [1] 26:2  <b>litigants</b> [6] 32:23 34:10 35:12,14 36:17 48:6  <b>litigate</b> [1] 42:9  <b>litigated</b> [1] 46:9  <b>litigating</b> [2] 49:25 50:2  <b>litigation</b> [6] 21:11 35:8 41:5 42:18 50:21 65:20</p>	<p><b>living</b> [1] 73:17  <b>loads</b> [1] 35:25  <b>local</b> [5] 4:7 19:18 49:12,24 75:5  <b>long</b> [5] 13:8 35:22 45:14 46:9 74:15  <b>long-standing</b> [2] 39:10,14  <b>longer</b> [1] 14:13  <b>look</b> [4] 12:8 18:11 49:11 73:11  <b>looking</b> [4] 5:8 51:18 58:9 63:1  <b>lose</b> [2] 21:14 60:25  <b>losing</b> [1] 23:20  <b>loss</b> [1] 55:23  <b>lost</b> [1] 67:1  <b>lot</b> [6] 19:20 49:12 50:4,5 63:4 69:23  <b>love</b> [2] 52:12,14</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>made</b> [7] 15:11 33:16 34:21,22 35:11 39:21 57:9  <b>Mahon</b> [1] 66:13  <b>mandate</b> [2] 72:19,22  <b>Manufacturing</b> [2] 4:17 18:13  <b>many</b> [12] 41:23 42:2,3 50:8,8,8 66:23 72:16,18,18 74:24,24  <b>march</b> [2] 36:15,17  <b>marrying</b> [2] 39:9 65:4  <b>MARY</b> [1] 1:3  <b>matter</b> [5] 1:14 24:18 49:15,23 64:7  <b>mean</b> [15] 4:22 5:7 6:20 7:7,14 15:5,25 35:23 44:3,11 46:8 47:14 59:8,24 68:12  <b>meaningful</b> [1] 36:22  <b>means</b> [4] 34:11 39:18 60:15 65:1  <b>meant</b> [1] 32:20  <b>mechanism</b> [4] 25:14 27:16 32:20 48:20  <b>merging</b> [2] 40:2,3  <b>merits</b> [2] 7:25 8:10  <b>method</b> [2] 44:6 66:19  <b>middle</b> [1] 44:2  <b>might</b> [7] 7:2,3 19:11,20 42:8,12,13  <b>mile</b> [1] 6:24  <b>million</b> [3] 10:18,20 42:19  <b>mind</b> [2] 66:12 69:23  <b>minutes</b> [1] 71:14  <b>misapplications</b> [1] 50:24  <b>misapprehensions</b> [1] 50:24  <b>misconception</b> [1] 23:21  <b>missaid</b> [1] 69:2  <b>mistaken</b> [1] 4:9  <b>misunderstand</b> [1] 13:14  <b>modifying</b> [1] 58:12  <b>moment</b> [8] 4:20 19:5 25:23,25 26:3 27:21 28:4 29:7  <b>Monell</b> [1] 38:25  <b>money</b> [27] 9:16,22 10:1,7,9,22 11:8 12:8,12 13:4 14:10,17 15:14 16:16,24,25 21:14,18 27:25 30:13 34:15 42:13 61:18,19,23 62:1,15  <b>Monroe</b> [1] 6:16  <b>morning</b> [1] 3:4</p>	<p><b>most</b> [6] 14:5,19 28:19 33:7 41:24 50:21  <b>Ms</b> [77] 38:10,13 41:6 42:21 43:18 44:22 45:7,10,17,25 46:11,23 47:3,6,9,12,21,24 48:3,8,10,24 49:3,6,18,22 50:18 51:3,22 52:14,20 53:4,11,20 54:2,7,17,21,25 55:4,7,25 56:8,21 57:20 59:5,10,13,21,25 60:5 61:4,13,20 62:2,5 63:11,21,24 64:9 65:13,19 66:2 67:3,6,24 68:4,14,21,24 69:8,14 70:2,12,16 71:9,12  <b>much</b> [7] 6:23 25:9 26:17 42:13 58:5 69:12 70:9  <b>municipal</b> [2] 14:6 67:5  <b>municipalities</b> [7] 39:2 49:24 50:5,15 61:7 65:15 67:7  <b>municipality</b> [16] 39:5 40:8,13,16 42:7,13,22 43:10,12,15,20 50:12 57:3 61:2 68:6 73:15  <b>must</b> [1] 30:6</p> <hr/> <p style="text-align: center;"><b>N</b></p> <p><b>nail</b> [1] 40:23  <b>narrow</b> [1] 57:15  <b>narrowly</b> [1] 58:5  <b>Nation</b> [6] 3:22 18:5,16 42:25 73:4 74:7  <b>necessarily</b> [2] 5:4 31:3  <b>necessary</b> [2] 53:1 60:7  <b>need</b> [3] 30:3 59:3 60:20  <b>needed</b> [1] 53:6  <b>needs</b> [1] 38:16  <b>neither</b> [1] 27:24  <b>never</b> [5] 24:21 31:17 39:21 46:2 57:9  <b>nevertheless</b> [1] 43:5  <b>next</b> [2] 27:11 33:11  <b>NOEL</b> [3] 1:21 2:6 25:4  <b>none</b> [1] 39:4  <b>nor</b> [1] 27:24  <b>normal</b> [1] 61:12  <b>nothing</b> [2] 26:24 35:3  <b>notion</b> [1] 35:14  <b>nowhere</b> [1] 53:9  <b>Number</b> [2] 62:25 63:1</p> <hr/> <p style="text-align: center;"><b>O</b></p> <p><b>obtaining</b> [1] 66:20  <b>obvious</b> [1] 12:10  <b>obviously</b> [1] 5:15  <b>occurred</b> [3] 27:8 41:16 65:9  <b>occurs</b> [2] 17:20 56:13  <b>offers</b> [1] 46:4  <b>office</b> [1] 7:16  <b>official</b> [2] 10:10,13  <b>officials</b> [2] 37:20,24  <b>often</b> [1] 62:15  <b>Okay</b> [14] 7:5 8:8,18 11:18 13:7 19:22 23:7 52:18 53:8 54:20 55:3,6 63:18 69:8  <b>old</b> [1] 45:12  <b>once</b> [4] 34:18,23 58:23 59:3  <b>One</b> [17] 16:2,3 18:4,9 25:21,22 32:</p>
---	---	---	---



## Official - Subject to Final Review

<p>11 34:3 36:12 39:11 40:20 45:9 59:24 61:5 62:7 66:8 71:20 <b>ones</b> [4] 7:7,8 19:23,24 <b>only</b> [15] 5:21 6:23 10:20 13:4 20:7 26:22 28:23 29:2 62:14 64:1,7,12, 15,16 69:14 <b>opinion</b> [2] 7:11 11:7 <b>opposed</b> [2] 5:12 48:23 <b>option</b> [2] 6:5 75:8 <b>oral</b> [7] 1:15 2:2,5,9 3:8 25:4 38:11 <b>ordinance</b> [4] 14:6 20:3,11 73:15 <b>ordinances</b> [1] 65:21 <b>original</b> [3] 17:15 18:12,12 <b>other</b> [22] 3:19 5:25 6:13,16 10:16 11:10 12:24 20:18 27:3 32:23 34: 5,9 35:23,24,24 36:23 39:13 58: 25 63:4 67:20 72:25 73:10 <b>others</b> [5] 7:3 19:21 20:6,7 32:13 <b>otherwise</b> [1] 20:13 <b>ought</b> [1] 43:15 <b>out</b> [7] 19:1 42:13 43:1,3 44:6 54:9 62:25 <b>outset</b> [1] 45:21 <b>over</b> [8] 26:15 40:1 45:12,18 52:9, 19 60:18 72:4 <b>overrule</b> [2] 4:24 32:17 <b>overruled</b> [1] 65:12 <b>overruling</b> [2] 29:11 30:2 <b>overturn</b> [2] 33:25 34:4 <b>overturning</b> [1] 31:16 <b>owe</b> [1] 10:7 <b>owed</b> [1] 44:7 <b>own</b> [3] 5:17 67:23 75:2 <b>owner</b> [14] 3:15 4:19 20:11 25:24 26:1,7 27:20 39:15 40:9 43:8 46: 21 47:1,2 67:16 <b>owner's</b> [1] 3:23 <b>owners</b> [8] 7:2,9 8:13 26:18 32:23 34:9 42:9 73:23</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>PAGE</b> [1] 2:2 <b>paid</b> [2] 20:23 26:4 <b>papers</b> [1] 12:15 <b>part</b> [6] 13:3,16 23:18 33:7 45:19 63:12 <b>particular</b> [2] 14:14 30:17 <b>pass</b> [3] 14:11 21:6,16 <b>Patsy</b> [2] 32:17 35:11 <b>pay</b> [17] 7:5 13:16 16:8 19:23 22:1, 2 34:15 35:22 38:3 40:15,19 41:2 43:12,25 74:3,6,13 <b>payment</b> [2] 14:20 34:21 <b>PENNSYLVANIA</b> [10] 1:6,25 3:6 40:18 41:12,14 45:5,15,22 47:4 <b>penny</b> [1] 40:20 <b>people</b> [11] 7:19 10:20,21 15:9 19: 20 44:11 45:11 61:23 62:3 73:12, 22 <b>perfect</b> [1] 41:19 <b>perfectly</b> [1] 41:18 <b>perhaps</b> [3] 46:13 60:6,13 <b>period</b> [3] 16:23 27:23,23 <b>permitted</b> [1] 21:6</p>	<p><b>person</b> [2] 73:16,24 <b>Petitioner</b> [10] 1:4,20 2:4,14 3:9 46:2 48:17 57:8 64:24 71:16 <b>Petitioner's</b> [1] 29:10 <b>Philadelphia</b> [1] 1:24 <b>pick</b> [1] 22:20 <b>piece</b> [1] 9:15 <b>pieces</b> [2] 6:25 62:4 <b>pivot</b> [1] 33:11 <b>place</b> [8] 8:25 12:1,3 26:9 43:6 51: 23 63:7 66:15 <b>places</b> [1] 49:11 <b>plaintiff</b> [3] 56:16 57:2 61:1 <b>pleads</b> [1] 33:17 <b>please</b> [5] 3:11 25:7 38:14 49:20 71:18 <b>plow</b> [1] 42:15 <b>plus</b> [1] 59:19 <b>point</b> [7] 5:3 13:7 27:11 33:11 38: 23 54:9 72:25 <b>points</b> [1] 25:8 <b>pose</b> [1] 41:24 <b>posited</b> [2] 41:22 48:16 <b>position</b> [8] 10:23 16:10 32:3 39: 24 44:2 51:3,12 54:24 <b>possibility</b> [3] 15:16 60:24 62:10 <b>possibly</b> [1] 34:25 <b>potential</b> [1] 21:23 <b>potentially</b> [2] 21:17 50:6 <b>practical</b> [9] 12:10 16:3,22 33:4 44:19 48:22 49:8,15,23 <b>practically</b> [1] 75:8 <b>precedent</b> [1] 57:15 <b>precedential</b> [2] 64:3,6 <b>precisely</b> [2] 32:19 35:13 <b>precludes</b> [1] 62:16 <b>preclusion</b> [3] 51:5,6,15 <b>predicated</b> [2] 30:19 35:14 <b>preliminary</b> [1] 48:12 <b>premise</b> [6] 17:8 25:12 29:10 30:2, 10,15 <b>presentation</b> [1] 38:18 <b>presents</b> [1] 33:18 <b>presumably</b> [1] 62:1 <b>pretty</b> [1] 69:6 <b>prevailed</b> [1] 47:2 <b>price</b> [1] 20:23 <b>principally</b> [1] 31:16 <b>principles</b> [1] 65:14 <b>prior</b> [2] 17:17 73:23 <b>private</b> [3] 13:17 20:4 24:5 <b>probably</b> [1] 32:17 <b>problem</b> [8] 16:9,20,23 17:8 34:2 44:5 68:19 71:23 <b>problems</b> [5] 31:25 57:18 61:5 71: 20 75:6 <b>procedure</b> [3] 34:20,25 72:10 <b>procedures</b> [2] 46:16 72:8 <b>proceed</b> [2] 5:2 37:22 <b>proceeding</b> [3] 5:7 14:18 58:25 <b>proceedings</b> [2] 5:6,15 <b>process</b> [22] 3:24 20:20 21:12 22: 11 23:22 41:8,11 42:18 43:6 45:1 46:1,21 53:23 60:9,10,14 62:8 69: 15,17 72:2,7 73:7</p>	<p><b>producing</b> [1] 13:1 <b>prohibits</b> [1] 62:10 <b>promise</b> [1] 38:2 <b>promises</b> [1] 44:10 <b>promptly</b> [1] 46:20 <b>promptness</b> [1] 46:16 <b>proper</b> [2] 12:1,2 <b>properly</b> [1] 45:21 <b>properties</b> [1] 42:4 <b>property</b> [57] 3:13,15 4:11,19,19 6: 25 7:2,9,20 8:13,21 9:6,8,16 13: 18,21 14:8,13,25 15:7,12,13 16:7 19:8 20:4,11 21:7,18 24:6 25:23, 24 26:1,7,18 27:20,24 28:4 29:4,8 32:22 34:9 37:14 39:15 40:9,11, 12,14 42:2,8 43:8 45:11 46:21,25 47:2 49:14 62:4 67:16 <b>property's</b> [2] 15:21 17:9 <b>proposal</b> [1] 10:17 <b>proposed</b> [1] 42:8 <b>proposing</b> [1] 28:13 <b>prospect</b> [1] 14:20 <b>protecting</b> [1] 30:11 <b>prove</b> [1] 20:13 <b>provide</b> [10] 27:16 32:20 35:9 41:8 43:7 60:8 65:23 66:5 69:12 73:7 <b>provided</b> [4] 39:17 63:3 69:16,17 <b>provides</b> [8] 3:24 25:14 34:14 41: 10 44:3 70:19,22 71:3 <b>providing</b> [1] 19:10 <b>provision</b> [2] 44:3 73:10 <b>provisions</b> [1] 36:23 <b>public</b> [1] 19:8 <b>purchase</b> [1] 7:21 <b>purported</b> [1] 62:19 <b>purpose</b> [2] 6:7 17:12 <b>purposes</b> [5] 22:15 28:9,9 33:20 57:23 <b>push</b> [1] 28:17 <b>put</b> [4] 6:23 64:20 70:7 71:5</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>question</b> [27] 4:23 6:5 7:13,25 8:3, 6 11:20 13:2 16:11 23:5 24:16,23 26:22 33:19 38:23 42:9 43:22 46: 1,8 48:10 56:14 57:7,17 59:6,11 63:13 64:19 <b>questioned</b> [1] 46:2 <b>questions</b> [2] 38:17 66:9 <b>queue</b> [1] 7:19 <b>quick</b> [2] 30:12 49:22 <b>quickly</b> [3] 23:20 71:20 73:1 <b>quite</b> [2] 26:2 68:18</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>raised</b> [2] 64:15,17 <b>raises</b> [1] 16:11 <b>raising</b> [1] 32:24 <b>rather</b> [1] 58:22 <b>rationale</b> [1] 31:18 <b>reach</b> [3] 33:12,22 34:6 <b>read</b> [1] 62:24 <b>readiness</b> [1] 5:22</p>	<p><b>real</b> [2] 71:19 73:1 <b>really</b> [7] 12:9 23:20 42:17,17 43: 13 66:6 69:22 <b>reason</b> [10] 4:4 12:8 14:9 27:19 41: 13,21 48:22 49:7,9 57:25 <b>reasonable</b> [9] 7:1,10 39:18 44:25 46:3 60:11,14 64:25 66:19 <b>reasoned</b> [2] 63:3 64:20 <b>reasons</b> [2] 59:24 62:7 <b>REBUTTAL</b> [2] 2:12 71:15 <b>recognized</b> [1] 41:22 <b>recognizes</b> [1] 3:23 <b>Reconstruction</b> [5] 29:21 30:20 32:8,10 35:16 <b>recover</b> [1] 39:19 <b>recovering</b> [1] 41:9 <b>redress</b> [5] 25:18,20 27:15 32:25 35:10 <b>reflects</b> [1] 32:8 <b>refusal</b> [2] 16:7,12 <b>refuse</b> [1] 16:14 <b>reg</b> [1] 43:2 <b>regard</b> [1] 36:24 <b>regardless</b> [1] 36:11 <b>regular</b> [1] 73:9 <b>regulation</b> [12] 19:19 21:7,16 40:9, 10 42:8,14,16 43:3,23 61:3 73:2 <b>regulations</b> [2] 50:5 65:21 <b>regulatory</b> [7] 15:11 41:20,24 42: 10 43:1 66:9,14 <b>reinterpret</b> [1] 60:21 <b>reinterpreting</b> [1] 52:8 <b>reject</b> [1] 31:3 <b>rejected</b> [3] 6:17 32:18 52:5 <b>reliance</b> [4] 67:5,7,19,20 <b>relied</b> [2] 65:16,19 <b>relief</b> [1] 62:17 <b>relies</b> [1] 48:11 <b>rely</b> [4] 21:7 42:23 62:7 65:18 <b>relying</b> [1] 39:11 <b>remaining</b> [1] 71:14 <b>remedies</b> [12] 4:13 24:11,19,20,22 35:13 46:4 53:19,21 71:3 74:24, 25 <b>remedy</b> [3] 34:14 35:9 56:4 <b>Remo</b> [10] 51:13,23,24 52:3,12,17, 24 53:8 58:17,17 <b>removal</b> [1] 75:7 <b>rendered</b> [1] 66:4 <b>repeatedly</b> [1] 55:10 <b>request</b> [1] 15:14 <b>requested</b> [1] 66:3 <b>require</b> [7] 33:24 35:12 37:19 48: 18 55:20 72:23,24 <b>required</b> [2] 38:1 39:13 <b>requirement</b> [5] 24:21,22 32:19 54:5 55:11 <b>requirements</b> [2] 11:4 65:7 <b>requires</b> [8] 5:15 68:25 69:3 70:20, 22,23 72:21 73:15 <b>requiring</b> [2] 3:16 49:24 <b>res</b> [4] 12:23 35:1 58:21 75:7 <b>resolutions</b> [1] 50:11 <b>resolving</b> [1] 32:4</p>
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## Official - Subject to Final Review

<p><b>resort</b> <sup>[1]</sup> 50:22  <b>respect</b> <sup>[4]</sup> 5:6 39:23 54:19 70:18  <b>respectfully</b> <sup>[2]</sup> 29:16 63:16  <b>Respondent</b> <sup>[1]</sup> 50:7  <b>Respondents</b> <sup>[4]</sup> 1:8,25 2:11 38:12  <b>response</b> <sup>[1]</sup> 36:10  <b>responses</b> <sup>[1]</sup> 36:7  <b>responsibility</b> <sup>[1]</sup> 41:15  <b>responsive</b> <sup>[1]</sup> 25:9  <b>result</b> <sup>[5]</sup> 31:18 33:13,23 34:6 53:1  <b>review</b> <sup>[6]</sup> 12:23 18:23,23 22:5,7 23:15  <b>reviewable</b> <sup>[1]</sup> 35:1  <b>reviewers</b> <sup>[1]</sup> 46:18  <b>reviewing</b> <sup>[1]</sup> 12:20  <b>rid</b> <sup>[1]</sup> 52:17  <b>rights</b> <sup>[14]</sup> 25:21 28:19,22 29:25 30:11,22 32:24 33:1 39:12,16 42:3 45:11 55:17,19  <b>ripe</b> <sup>[9]</sup> 8:14 11:14 20:14 36:16,18 58:18 59:2,4,20  <b>ripeness</b> <sup>[6]</sup> 22:13,14 23:7 60:2,3,3  <b>rise</b> <sup>[4]</sup> 3:20 15:1,19 16:6  <b>risk</b> <sup>[1]</sup> 20:21  <b>ROBERTS</b> <sup>[21]</sup> 3:3 4:22 13:25 14:4 21:4 25:1 38:6,10 45:3,8,23 46:6 52:11,15 61:11,15 71:8,12 74:18,20 75:9  <b>role</b> <sup>[1]</sup> 50:20  <b>root</b> <sup>[1]</sup> 13:2  <b>rooted</b> <sup>[1]</sup> 3:21  <b>ROSE</b> <sup>[1]</sup> 1:3  <b>route</b> <sup>[1]</sup> 58:10  <b>rule</b> <sup>[16]</sup> 5:5,10,14 6:23 9:6 12:11 18:12,12 22:3,13,14 38:24 45:11 52:25 73:9 74:11  <b>rules</b> <sup>[6]</sup> 10:18 51:5,6,15 59:8 72:9  <b>ruling</b> <sup>[1]</sup> 5:18  <b>rural</b> <sup>[1]</sup> 50:8</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>SACHS</b> <sup>[79]</sup> 1:24 2:10 38:10,11,13 41:6 42:21 43:18 44:22 45:7,17,25 46:11,23 47:3,6,9,12,21,24 48:3,8,10,24 49:3,6,18,22 50:18 51:3,22 52:14,20 53:4,11,20 54:2,7,17,21,25 55:4,7,25 56:8,21 57:20 59:5,10,13,21,25 60:5 61:4,13,20 62:2,5 63:11,21,24 64:9 65:13,19 66:2 67:3,6,24 68:4,14,21,24 69:8,14 70:2,12,16 71:9,13  <b>Sacramento</b> <sup>[1]</sup> 1:19  <b>same</b> <sup>[10]</sup> 5:5 6:12 14:3 23:8 33:12,22 34:6 69:18,21 71:1  <b>San</b> <sup>[10]</sup> 51:13,23,24 52:3,12,17,24 53:8 58:17,17  <b>saying</b> <sup>[14]</sup> 6:14 7:19 21:15 22:19 41:3,6 52:21 53:24,25 54:2,15 55:22 62:22 71:20  <b>says</b> <sup>[23]</sup> 14:11 17:23 18:2,3 22:4 26:25 35:21 40:9,14,19,25 43:11 45:10 51:12,14 58:17 70:21,25 71:</p>	<p>25 73:14,20 74:6,15  <b>scheme</b> <sup>[2]</sup> 5:22,22  <b>score</b> <sup>[1]</sup> 70:15  <b>SCOTT</b> <sup>[2]</sup> 1:6 3:5  <b>sea</b> <sup>[2]</sup> 6:23 38:25  <b>second</b> <sup>[3]</sup> 18:9 51:19 64:18  <b>Section</b> <sup>[38]</sup> 6:6,7 20:13,22,24 23:23 24:24 25:17 26:2 27:13 30:19 32:7,19 33:14 35:13 38:5 39:3,11,13 44:24 48:15,18 54:10 57:22 58:3,7 59:15,25 60:7,16,22 62:11 63:15 64:17 65:8 68:5 71:3 72:23  <b>secure</b> <sup>[1]</sup> 18:18  <b>secured</b> <sup>[1]</sup> 17:13  <b>see</b> <sup>[8]</sup> 6:8 13:7,11 18:9 35:19 45:12 61:23 73:2  <b>seek</b> <sup>[1]</sup> 4:20  <b>seeking</b> <sup>[1]</sup> 62:11  <b>seem</b> <sup>[4]</sup> 13:10 22:5 58:22 63:9  <b>seems</b> <sup>[4]</sup> 21:1,24 26:13 28:2  <b>sees</b> <sup>[1]</sup> 50:25  <b>seizure</b> <sup>[1]</sup> 20:19  <b>sense</b> <sup>[1]</sup> 41:19  <b>sentence</b> <sup>[1]</sup> 26:14  <b>serious</b> <sup>[1]</sup> 23:17  <b>shaping</b> <sup>[1]</sup> 49:13  <b>shortcuts</b> <sup>[1]</sup> 62:10  <b>shouldn't</b> <sup>[2]</sup> 8:24 73:21  <b>show</b> <sup>[1]</sup> 12:15  <b>similar</b> <sup>[3]</sup> 27:13 37:3 70:4  <b>simply</b> <sup>[5]</sup> 4:6 5:10 26:24 28:20 38:20  <b>since</b> <sup>[5]</sup> 37:22,23 58:17 66:24 72:5  <b>situation</b> <sup>[5]</sup> 16:13 18:23 40:6 41:20 70:8  <b>situations</b> <sup>[1]</sup> 11:2  <b>slow</b> <sup>[1]</sup> 18:22  <b>small</b> <sup>[1]</sup> 50:7  <b>Smith</b> <sup>[2]</sup> 8:20 10:1  <b>solely</b> <sup>[1]</sup> 5:1  <b>Solicitor</b> <sup>[7]</sup> 1:21 39:24 48:17 57:12 70:21,24 71:9  <b>somebody</b> <sup>[4]</sup> 12:12 20:21 27:4 73:19  <b>somebody's</b> <sup>[1]</sup> 12:21  <b>somehow</b> <sup>[2]</sup> 48:12 70:24  <b>someone</b> <sup>[1]</sup> 23:8  <b>somewhere</b> <sup>[1]</sup> 10:23  <b>soon</b> <sup>[1]</sup> 24:4  <b>Sorry</b> <sup>[8]</sup> 13:8,13 31:2 43:2 45:24 46:24 63:21 65:20  <b>sort</b> <sup>[3]</sup> 14:18 39:9 66:14  <b>sorts</b> <sup>[1]</sup> 62:17  <b>SOTOMAYOR</b> <sup>[13]</sup> 20:25 21:5 22:17 23:6,12 60:23 61:17,21 62:3 73:13,19 74:2,12  <b>speaking</b> <sup>[1]</sup> 40:16  <b>special</b> <sup>[4]</sup> 5:14 31:15 56:23 58:1  <b>specific</b> <sup>[1]</sup> 74:6  <b>speech</b> <sup>[1]</sup> 20:19  <b>speedy</b> <sup>[6]</sup> 34:14 44:11,16 45:4,7 59:1  <b>stage</b> <sup>[1]</sup> 46:17</p>	<p><b>standard</b> <sup>[1]</sup> 46:16  <b>stands</b> <sup>[1]</sup> 75:1  <b>stare</b> <sup>[6]</sup> 31:9,12,14 62:14 63:1 64:11  <b>start</b> <sup>[2]</sup> 51:23 52:19  <b>started</b> <sup>[1]</sup> 34:24  <b>starts</b> <sup>[1]</sup> 45:19  <b>state</b> <sup>[138]</sup> 4:13 5:7,12,14,16,22 6:14,21 7:4,6,15 8:19,25 9:11,14,15 10:18,21 11:6 12:21,22 14:9 16:14,15,24 17:23 18:2,2,3 21:15,24 22:18 23:8,13,15,18 24:10,17,19,20,21 26:20,23 27:1 29:12,17,22 30:10,18,21 31:25 32:1,4,6,12,18 33:16 34:14,25 35:1,13,15,17,23 36:18 37:2,14 39:6 40:4,5,18,23 41:5,10,14,18 43:5,9,9 44:9,13,15 45:20,24 47:11,12,16,18,19 48:2,23 49:1,12,14 50:10,16,21 51:7,13,15 53:18,22 54:6 55:15 56:9,11,23 57:8,9,16 58:2,8,24 60:9,10,13 62:8 66:1 67:10,17 68:7 70:25 71:6,19,22,24 72:2,3,6,7,10,17 74:3,5,13,15,23 75:7  <b>state's</b> <sup>[1]</sup> 44:4  <b>STATES</b> <sup>[13]</sup> 1:1,16,23 2:7 4:3 6:3 23:2 24:5 25:5 35:8 49:10 72:18 75:4  <b>statute</b> <sup>[7]</sup> 15:6,8,9,10 46:15 53:2,5  <b>statutes</b> <sup>[1]</sup> 65:21  <b>statutory</b> <sup>[4]</sup> 31:12,14 64:9,10  <b>still</b> <sup>[6]</sup> 11:2,14 15:21 31:15 63:25 65:11  <b>stop</b> <sup>[3]</sup> 21:1,10,22  <b>straight</b> <sup>[3]</sup> 31:6 57:4 58:10  <b>strict</b> <sup>[2]</sup> 59:8,9  <b>stronger</b> <sup>[2]</sup> 64:10,11  <b>stumbling</b> <sup>[1]</sup> 26:15  <b>submitted</b> <sup>[2]</sup> 75:10,12  <b>substance</b> <sup>[1]</sup> 72:13  <b>substantial</b> <sup>[1]</sup> 33:19  <b>substantially</b> <sup>[1]</sup> 23:24  <b>sued</b> <sup>[1]</sup> 39:2  <b>sufficient</b> <sup>[1]</sup> 15:20  <b>sufficiently</b> <sup>[1]</sup> 15:13  <b>suggest</b> <sup>[1]</sup> 28:7  <b>suggesting</b> <sup>[2]</sup> 18:20,20  <b>suing</b> <sup>[1]</sup> 36:13  <b>suit</b> <sup>[1]</sup> 45:13  <b>suppose</b> <sup>[11]</sup> 13:25 14:5,9,16 15:5 58:15,16,16,23 59:7,8  <b>supposed</b> <sup>[2]</sup> 7:6 20:6  <b>supposition</b> <sup>[1]</sup> 64:15  <b>SUPREME</b> <sup>[4]</sup> 1:1,15 45:15 59:21  <b>Surely</b> <sup>[1]</sup> 69:5  <b>Surgeons</b> <sup>[3]</sup> 33:15,24 34:7  <b>Surgeons'</b> <sup>[1]</sup> 33:14  <b>system</b> <sup>[9]</sup> 7:4 12:23 30:24 40:24 44:9,16 45:5 51:7 52:18</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>takings</b> <sup>[35]</sup> 4:2,13 5:18 12:4 16:5 25:13 28:25 31:21 32:5 33:17,18</p>	<p>35:8 36:14,22 39:5 41:4 50:21 53:15,18 54:1,16,18 56:16 57:3,8,9 58:8 61:9,9 66:10,15 69:25 70:23 72:1,14  <b>talked</b> <sup>[2]</sup> 28:3 65:5  <b>taxpayers</b> <sup>[1]</sup> 50:13  <b>teed</b> <sup>[1]</sup> 51:25  <b>TERESA</b> <sup>[3]</sup> 1:24 2:10 38:11  <b>terms</b> <sup>[2]</sup> 57:11 69:24  <b>test</b> <sup>[1]</sup> 44:24  <b>theoretical</b> <sup>[6]</sup> 16:2,4,9,10,20 49:1  <b>theory</b> <sup>[2]</sup> 21:2 70:7  <b>there's</b> <sup>[43]</sup> 4:3 5:24 6:13 7:5,18 9:17 12:6 13:12,12,14,15,17,20 14:9,20,24,25 16:6 20:21 21:10,11 22:10 23:21 26:24 28:15 32:9 34:12,20 36:12,21,25 37:13 41:13 44:17 49:6,7,8 50:9 54:21 55:4 68:22 69:23 74:8  <b>therefore</b> <sup>[2]</sup> 42:12 65:3  <b>they'll</b> <sup>[2]</sup> 9:17 11:9  <b>They've</b> <sup>[1]</sup> 65:19  <b>thinking</b> <sup>[2]</sup> 19:14 32:9  <b>thinks</b> <sup>[2]</sup> 19:11 47:18  <b>thorough</b> <sup>[1]</sup> 43:7  <b>though</b> <sup>[3]</sup> 15:16 62:23 74:2  <b>three</b> <sup>[2]</sup> 34:21 52:4  <b>ticklish</b> <sup>[1]</sup> 70:8  <b>tied</b> <sup>[1]</sup> 44:12  <b>today</b> <sup>[3]</sup> 30:18 32:3,6  <b>tomorrow</b> <sup>[1]</sup> 36:18  <b>took</b> <sup>[1]</sup> 9:15  <b>tooth</b> <sup>[1]</sup> 40:22  <b>tossing</b> <sup>[1]</sup> 52:8  <b>totally</b> <sup>[3]</sup> 44:19 66:25 67:1  <b>tough</b> <sup>[2]</sup> 12:14 13:3  <b>TOWNSHIP</b> <sup>[2]</sup> 1:6 3:5  <b>transpire</b> <sup>[1]</sup> 33:5  <b>treated</b> <sup>[1]</sup> 56:22  <b>treating</b> <sup>[1]</sup> 23:2  <b>tried</b> <sup>[1]</sup> 58:16  <b>triggers</b> <sup>[1]</sup> 29:4  <b>trim</b> <sup>[1]</sup> 57:13  <b>trouble</b> <sup>[2]</sup> 6:20 34:18  <b>troubling</b> <sup>[1]</sup> 40:7  <b>true</b> <sup>[4]</sup> 16:5 35:23 38:21 70:25  <b>trust</b> <sup>[1]</sup> 32:12  <b>try</b> <sup>[4]</sup> 42:11 55:25 58:20 72:22  <b>trying</b> <sup>[3]</sup> 11:13 18:25 54:9  <b>Tucker</b> <sup>[16]</sup> 4:3 21:8,12,23 23:22,23 24:3 27:10,14,14 37:3,18 38:2 46:5 53:16 56:10  <b>turns</b> <sup>[3]</sup> 4:25 43:1,3  <b>two</b> <sup>[10]</sup> 16:1 17:7 25:8 34:1 39:9 46:13 65:4 66:16 69:24 71:14  <b>type</b> <sup>[1]</sup> 14:14</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>unanticipated</b> <sup>[2]</sup> 43:2,3  <b>unconstitutional</b> <sup>[4]</sup> 3:16 43:24 65:22 66:5  <b>under</b> <sup>[36]</sup> 4:3,12 6:3,6 14:23 15:17 17:16 18:5 20:12 24:3,7,23 26:1,20 27:5,5 33:13,14,19 34:6 36:</p>
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## Official - Subject to Final Review

<p>19 39:2,11,16 47:4 53:16 56:7,8, 23 57:22 59:1 63:13 68:4,7 70:23 73:9 underlying <sup>[1]</sup> 65:14 understand <sup>[6]</sup> 7:13 8:1 11:24 17: 6 37:12 67:18 understanding <sup>[7]</sup> 3:18 4:1,15 6: 20 14:23 15:18 17:15 understood <sup>[2]</sup> 16:5 70:3 unfair <sup>[1]</sup> 58:22 unintended <sup>[1]</sup> 31:19 unique <sup>[2]</sup> 35:8 61:25 uniquely <sup>[1]</sup> 28:25 UNITED <sup>[9]</sup> 1:1,16,23 2:7 4:2 6:3 24:5 25:5 75:3 unless <sup>[3]</sup> 3:22 35:21 73:3 unlike <sup>[2]</sup> 21:21 46:15 unpredictable <sup>[1]</sup> 75:8 until <sup>[14]</sup> 4:13 8:14 9:22 13:17 21: 12 24:10 26:4 41:4,7 58:18 61:9, 14 72:1,9 unusual <sup>[3]</sup> 44:3 56:24 59:19 unviable <sup>[1]</sup> 75:8 up <sup>[9]</sup> 14:6 21:19 23:13 41:11 42: 19 44:12 49:25 51:25 68:15 upfront <sup>[1]</sup> 43:25 upset <sup>[2]</sup> 56:24 57:5 useful <sup>[1]</sup> 27:12 using <sup>[1]</sup> 17:11</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p>valid <sup>[1]</sup> 42:12 value <sup>[1]</sup> 40:11 values <sup>[1]</sup> 20:8 variance <sup>[1]</sup> 11:3 varies <sup>[1]</sup> 6:9 versus <sup>[2]</sup> 3:5 69:25 vests <sup>[5]</sup> 25:23 29:2,6 36:12,25 victim <sup>[1]</sup> 53:18 view <sup>[4]</sup> 29:14 53:10 57:19 70:15 violate <sup>[5]</sup> 7:2,3 25:13 37:24 65:7 violated <sup>[4]</sup> 39:15 48:13 61:14 68: 6 violates <sup>[2]</sup> 28:21,23 violating <sup>[1]</sup> 45:10 violation <sup>[37]</sup> 3:14 5:1,9 7:5 26:9 27:7,15 28:21 34:16 35:21 36:12, 25 37:14 41:4,7 48:18 50:3 53:16 60:17 61:10 62:9,12 63:13 64:1, 23,24 65:9 68:11,12,23,25 69:3,10, 18,21 70:1 74:9 visit <sup>[2]</sup> 73:22,23</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p>waiver <sup>[1]</sup> 11:3 walk <sup>[1]</sup> 45:12 wanting <sup>[1]</sup> 48:22 wants <sup>[2]</sup> 47:15 73:3 wash <sup>[1]</sup> 71:21 Washington <sup>[2]</sup> 1:11,22 way <sup>[13]</sup> 6:12 12:11 14:5 22:3 23: 12 34:5 40:23 42:25 43:2,3 46:17 50:11 52:23 ways <sup>[5]</sup> 34:2 42:2 46:4 58:25 71:</p>	<p>10 Wednesday <sup>[1]</sup> 1:12 week <sup>[2]</sup> 17:23 18:3 weigh <sup>[1]</sup> 63:9 whatever <sup>[3]</sup> 40:18 58:8 61:24 where's <sup>[1]</sup> 67:19 Whereupon <sup>[1]</sup> 75:11 whether <sup>[18]</sup> 4:23 10:6,10 16:12, 24 19:1 22:3 26:22 34:20 36:11 37:20 39:21 41:15 42:9,12 44:7, 17 64:19 who's <sup>[3]</sup> 7:23 22:21 74:14 whole <sup>[4]</sup> 13:7 58:12 61:21,24 will <sup>[20]</sup> 12:19,19,20 16:14,15 17:3 18:3 22:1,2,14 23:13 34:21 38:17, 23 40:15 43:7,11,12 58:25 74:13 Williamson <sup>[33]</sup> 3:19 4:8,24 5:13, 21 11:13,17 17:17 24:7 25:11,16 29:11 31:1,2,18,22 33:25 34:3 38: 15,19 39:8 51:12 62:19,22 63:14, 14 64:1,4,16,19 65:10,15 71:25 win <sup>[1]</sup> 21:13 within <sup>[2]</sup> 6:25 58:1 without <sup>[7]</sup> 3:13 4:12 5:17 17:14 19:9 21:19 26:15 wonderful <sup>[1]</sup> 55:15 wondering <sup>[1]</sup> 5:16 words <sup>[3]</sup> 10:16 12:24 44:20 work <sup>[1]</sup> 6:19 works <sup>[1]</sup> 23:22 worried <sup>[1]</sup> 44:12 Wow <sup>[1]</sup> 40:9 writ <sup>[2]</sup> 72:19,21 wrongly <sup>[1]</sup> 34:5</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p>years <sup>[3]</sup> 46:13 52:9 66:17</p>
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