

IN THE SUPREME COURT OF THE UNITED STATES

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16
17
18
19
20
21
22
23
24
25

C O N T E N T S

ORAL ARGUMENT OF:	PAGE:
KANNON K. SHANMUGAM	
On behalf of the Petitioner	3
ORAL ARGUMENT OF:	
DANIEL L. GEYSER	
On behalf of the Respondent	26
ORAL ARGUMENT OF:	
CHRISTOPHER G. MICHEL	
On behalf of the United States,	
as amicus curiae, supporting the	
Respondent	47
REBUTTAL ARGUMENT OF:	
KANNON K. SHANMUGAM	
On behalf of the Petitioner	61

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

2 (11:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 16-1276, Digital Realty
5 Trust versus Somers.

6 Mr. Shanmugam.

7 ORAL ARGUMENT OF KANNON K. SHANMUGAM
8 ON BEHALF OF THE PETITIONER

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

11 The Dodd-Frank Act provides incentives
12 to and protections for whistleblowers; that is,
13 individuals who have reported securities law
14 violations to the SEC.

15 The question presented in this case is
16 whether the statutory definition of
17 whistleblower applies to the subsection of the
18 statute that protects whistleblowers from
19 retaliation for engaging in certain types of
20 conduct.

21 The answer to that question is yes.
22 By its plain terms, the statutory definition
23 applies to the entirety of the section,
24 including the anti-retaliation provision. Far
25 from being absurd, that plain text

1 interpretation is entirely consistent with the
2 history and the structure of the whistleblower
3 provisions and with Congress's overarching
4 objective of promoting reporting to the SEC.

5 It also preserves the balance between
6 the Dodd-Frank Act and the Sarbanes-Oxley Act,
7 which already provides broad protections to
8 whistleblowers who report internally. And even
9 if the statute were somehow ambiguous, the
10 SEC's interpretation is not entitled to
11 deference because its rule-making was
12 procedurally defective. This Court should
13 reject the interpretation of the Ninth Circuit,
14 and it should reverse the judgment of the Ninth
15 Circuit in this case.

16 Now, by its terms, the Dodd-Frank
17 Act's anti-retaliation provision prohibits
18 retaliation only against a particular category
19 of persons; namely, whistleblowers. And the
20 statutory definition of whistleblower, again by
21 its terms, applies in this section.

22 That section, of course, indisputably
23 includes the anti-retaliation provision, as
24 well as the award provisions. And, therefore,
25 the anti-retaliation provision only applies to

1 individuals who meet the statutory definition
2 of whistleblower; again, individuals who have
3 reported securities law violations to the SEC.

4 Now, as I said at the outset, we
5 believe that that's consistent with the
6 history, structure, and objectives of the
7 whistleblower provisions.

8 As to the history, perhaps the most
9 telling fact is the fact that an earlier
10 version of the anti-retaliation provision
11 reached all employees. Congress then amended
12 the provision to apply to a narrower set of
13 individuals, whistleblowers.

14 As to the structure of these
15 provisions, in our view, the anti-retaliation
16 provision protects the very class of persons to
17 whom the award provisions provide incentives,
18 and, therefore, the anti-retaliation provision
19 in a very real sense works hand-and-glove with
20 the anti-retaliation -- with the award
21 provisions.

22 JUSTICE GINSBURG: What about
23 employees who must report internally before
24 they can report to the SEC?

25 MR. SHANMUGAM: So, Justice Ginsburg,

1 where an employee reports internally and then
2 suffers an adverse action in the immediate
3 aftermath of doing so, the Sarbanes-Oxley Act
4 will provide protection.

5 In our view, the Dodd-Frank Act's
6 anti-retaliation provision only applies to
7 individuals who report to the SEC. And, to be
8 sure, it applies to those individuals really
9 without regard to the reason for retaliation.

10 So just to make clear what our
11 affirmative interpretation of the
12 anti-retaliation provision and, in particular,
13 the third clause is, the third clause, which
14 was the last of the clauses to be added,
15 reaches a situation in which an employee, in
16 fact, reports to the SEC but is retaliated
17 against because of an internal report or
18 perhaps a report to another governmental
19 entity.

20 And precisely because a report to the
21 SEC will often be confidential, there may very
22 well be cases in which the reason for the
23 retaliation is not the report to the SEC, which
24 is covered by the first clause, but is instead
25 some other report, such as an internal report.

1 Now, the primary argument on the other
2 side, as to why our interpretation is somehow
3 absurd or as to why this is one of those
4 exceptional circumstances where the Court
5 should not pay heed to the unambiguous
6 language, is that there are relatively few
7 cases that would be covered by the third
8 clause.

9 But I don't think that there's really
10 any basis for that conclusion here. As the
11 government recognizes in its brief, around
12 80 percent of individuals who report to the SEC
13 also report internally. And so contrary to the
14 reasoning of really the leading case on the
15 other side, the Second Circuit's decision in
16 Berman, we know that there certainly is a
17 category of employees who report in both ways.

18 So then the question becomes whether,
19 in fact, there are very few cases in which an
20 individual is able to get to the step of
21 reporting to the SEC. The argument on the
22 other side is that when an employee reports
23 internally, retaliation will come so quickly
24 that they will not be able also to report to
25 the SEC.

1 JUSTICE SOTOMAYOR: So can you please
2 tell me, under your reading, what we make of
3 subdivision (h)(1)(a)(ii)? It protects from
4 discrimination an employee who's been fired for
5 initiating, testifying in, or assisting in any
6 investigation or judicial or administrative
7 action of the Commission.

8 Under what law is the employee who's
9 called by the SEC after another employee
10 reports the violation and assists the SEC in
11 its investigation, under your reading, that
12 employee is not protected?

13 MR. SHANMUGAM: So --

14 JUSTICE SOTOMAYOR: And I -- and I
15 don't know that that employee is protected
16 under the Sarbanes-Oxley provision either. The
17 only thing that would protect that particular
18 employee is the government's reading.

19 MR. SHANMUGAM: So, Justice Sotomayor,
20 I think you point up the reason why we actually
21 think that our interpretation must be correct,
22 and that is because the first and the second
23 clauses in subsection (h)(1)(a) actually were
24 already in the statute at the time that
25 Congress made the judgment, to which I adverted

1 a couple minutes ago, to replace the broader
2 term "employees, contractors, or agents" with
3 the narrower term, "whistleblower."

4 Now, it may very well be that an
5 individual in your circumstance is not covered
6 by the Sarbanes-Oxley Act, but the critical
7 point is --

8 JUSTICE SOTOMAYOR: And they wouldn't
9 be covered by this act either?

10 MR. SHANMUGAM: They wouldn't. But in
11 our view, in that circumstance, the decision by
12 Congress to replace employees with the narrower
13 term whistleblower, in fact, takes effect.

14 In other words, if you have a
15 circumstance in which you have employee 1, who,
16 in fact, reports the securities law violation
17 to the SEC, and employee 2, who merely
18 testifies in a subsequent SEC proceeding, the
19 replacement of "employee" with "whistleblower,"
20 in fact, knocks employee 2 out of the statute.
21 But we know that that was a considered judgment
22 made by Congress when the Senate replaced the
23 term "employee" with "whistleblower."

24 The primary anomaly on which
25 Respondent and the government relies, the

1 purported anomaly, relates not to the second
2 clause but to the third clause. Their argument
3 is that because the third clause was added at
4 the last minute, Congress somehow was not aware
5 of the fact that it was adding that clause to a
6 statute that already, by its terms, limited the
7 protected classes --

8 JUSTICE SOTOMAYOR: Well, the SC --
9 SEC has always been arguing -- they'll speak
10 for themselves, but they've always been arguing
11 that "whistleblower" should be given a natural
12 reading. I'll question them on where they get
13 that because I'm not sure there's a natural
14 reading.

15 But assuming I accept that
16 proposition, isn't the fact that a natural
17 reading would cover that second employee and
18 potentially the third employee who is required
19 to report internally first, isn't that reason
20 enough because there are two provisions that
21 would be rendered partially nugatory?

22 MR. SHANMUGAM: They would not be --

23 JUSTICE SOTOMAYOR: To read it the
24 government's way?

25 MR. SHANMUGAM: They would not be so

1 rendered, Justice Sotomayor, and let me address
2 that. And then I do also want to address the
3 premise about there being some ordinary meaning
4 of "whistleblower."

5 Under our interpretation, all three of
6 these clauses have meaningful effect. In other
7 words, our primary submission is that what
8 Congress was trying to do in the
9 anti-retaliation provision was to provide broad
10 protection to individuals who report securities
11 law violations to the SEC, whatever the reason
12 for the retaliation.

13 And then Congress spoke quite broadly
14 in these three clauses as to the reasons for
15 the retaliation. Once you have reported a
16 securities law violation to the SEC, if you're
17 retaliated against for that report, you're
18 covered. If you're retaliated against for your
19 subsequent cooperation in SEC proceedings,
20 you're covered. And if you're retaliated
21 against for some internal report or some other
22 report, you're covered.

23 And, again, I do think that it is
24 critical to --

25 JUSTICE KAGAN: But, isn't that

1 disjunction quite odd? Right? A typical
2 anti-retaliation provision, you would think,
3 well, if I report internally and I'm fired for
4 it, then I get my protection.

5 But here you're saying they don't get
6 protection, except if they do something
7 completely unrelated, they might have made a
8 report to the SEC about a completely different
9 topic, they might have made it 10 years
10 earlier, and that's going to give them
11 protection even though they haven't been fired
12 for anything remotely to do with that.

13 MR. SHANMUGAM: So, Justice Kagan, let
14 me explain why I think that makes sense. And I
15 do want to address this purported anomaly with
16 our interpretation with regard to the lack of a
17 nexus between the internal report and the SEC
18 report.

19 I think more generally the reason why
20 this regime makes sense is precisely because
21 Congress adopted this more specific regime that
22 provides heightened protection to, in the words
23 of the title of the statute, securities
24 whistleblowers, against the backdrop of a
25 broader regime for whistleblowers more

1 generally in the Sarbanes-Oxley Act.

2 And we know that Congress wanted those
3 two anti-retaliation regimes to coexist,
4 because in the very same section of Dodd-Frank
5 that added the Dodd-Frank anti-whistleblower
6 provision, Section 922, Congress also amended
7 and to some extent expanded the protection for
8 whistleblowers more generally in the
9 Sarbanes-Oxley Act. Those are subsections (a)
10 and (c) of Section 922 more generally.

11 Now, what Respondent and the
12 government are asking you to do, to use the
13 metaphor from the last argument, is to view the
14 third clause in particular of the
15 anti-retaliation provision as the proverbial
16 elephant in a mouse hole, to say that when
17 Congress added the third clause, it was
18 essentially adding an all-purpose
19 anti-retaliation provision.

20 And I think that if that was what
21 Congress was doing, it would at a minimum
22 substantially diminish the role of the
23 Sarbanes-Oxley Act anti-retaliation provision,
24 if not render it effectively superfluous.

25 And, indeed --

1 JUSTICE KAGAN: But if I could just --
2 I guess I just don't understand what the theory
3 is. There are two employees, and they both
4 internally report, and they're both fired.

5 And one of them, tough luck, but the
6 other one is going to get protection because
7 he's filed a report with the SEC about some
8 different matter entirely 10 years earlier.

9 Why does he get extra protection?

10 MR. SHANMUGAM: So Congress was trying
11 to create incentives for reporting to the SEC,
12 and it did so by providing a carrot in the form
13 of the incentives in the award provision and a
14 stick in the form of the anti-retaliation
15 provision in cases where that employee,
16 employee number 2, suffers retaliation, and,
17 again, really without regard to whether the
18 retaliation was because the employer happened
19 to find out about the SEC report specifically
20 and retaliated on that basis.

21 But you do raise the question of this
22 purported anomaly because you could potentially
23 have a case in which the employee makes a
24 report to the SEC and then reports some
25 entirely unconnected conduct internally. There

1 could be some gap of time between those two
2 things.

3 Now, in our view, it's entirely
4 possible that Congress might very well have
5 made the judgment that it wanted to provide
6 protection, that it wanted to provide a broad
7 incentive to employees who suffer retaliation
8 over time and for a wide variety of
9 disclosures.

10 But to the extent that the government,
11 in particular, sort of cites this hypothetical
12 where, say, five years has passed between the
13 internal report and the report to the SEC, any
14 incidental overbreadth with our interpretation
15 pales in comparison to the wild overbreadth of
16 Respondent and the government's interpretation,
17 because Respondent and the government would
18 concededly cover cases in which an employee
19 makes a disclosure that bears no relation to a
20 securities violation.

21 And, tellingly, the SEC itself in the
22 regulation at issue here seemed to recognize
23 that absurdity because at the same time that
24 the SEC unexpectedly dispensed with the
25 requirement of reporting to the SEC, it sought

1 implicitly to narrow the category of
2 disclosures that are covered by the third
3 clause to disclosures involving securities law
4 violations or Section 1514(a) of
5 Sarbanes-Oxley.

6 And I think that that was a
7 recognition that there are many, many
8 hypotheticals that one can posit under
9 Respondent's and the government's
10 interpretation that really have nothing to do
11 with the securities laws at all.

12 And so, again, our core submission
13 here, Justice Kagan, is that this is a very
14 specific subset of cases that Congress was
15 targeting in the Dodd -- in the Dodd-Frank Act
16 and much more specific than the much broader
17 protection that was provided under
18 Sarbanes-Oxley.

19 JUSTICE BREYER: A question I would
20 have for both sides really is, what do you
21 think, is there any -- could the SEC here
22 promulgate a regulation that would define the
23 manner of reporting to the SEC, which manner
24 would include the class of cases where the
25 report or the information goes to an Audit

1 Committee under circumstances such that, were
2 the Audit Committee and others to do nothing
3 about it, it would likely end up at the SEC's
4 window?

5 MR. SHANMUGAM: So I don't think that
6 the SEC could do that.

7 JUSTICE BREYER: Why not?

8 MR. SHANMUGAM: Our core submission is
9 that the SEC cannot dispense with the statutory
10 requirement of reporting to the SEC.

11 JUSTICE BREYER: It doesn't. It
12 doesn't. That's what I -- I worked this out,
13 perhaps wrongly, but in a way that at least
14 arguably doesn't. It is providing for -- it's
15 defining a manner of reporting to the SEC.

16 And the manner includes just what I
17 said, report to an Audit Committee under
18 circumstances where, if no action is taken, it
19 is likely to end up at the SEC.

20 MR. SHANMUGAM: I don't think --

21 JUSTICE BREYER: And it might not
22 physically get there, but, nonetheless, this is
23 a class of cases where quite likely it will get
24 to the SEC. What's wrong with that?

25 MR. SHANMUGAM: Justice Breyer, I

1 think it has to get there. In other words, I
2 think that --

3 JUSTICE BREYER: You mean it actually
4 has to get there?

5 MR. SHANMUGAM: I -- I -- I think that
6 the whistleblower --

7 JUSTICE BREYER: So, if they're caught
8 on the way because they don't get there because
9 there's a snowstorm, doesn't count?

10 MR. SHANMUGAM: Under the statutory
11 language, and this is in the definition in
12 subsection (A)6, the whistleblower has to
13 provide information to the Commission.

14 Now, you're right that it goes on to
15 say in a manner established by rule or
16 regulation by the Commission, and I would
17 submit, Justice Breyer, that the Commission
18 does have broad authority to issue a regulation
19 concerning how that information has to be
20 provided. And, indeed, the Commission has done
21 just that in Rule 21(f)-9 with regard to the
22 award provisions, and it says that you have to
23 report either on-line or by using a particular
24 form.

25 We have no quibble with that. But

1 what I don't think you can do, contrary to the
2 submission in one of the amicus briefs, is to
3 use the "in the manner" language to define away
4 the separate requirement of reporting to the
5 Commission.

6 That is a distinct statutory
7 requirement, and, again, I don't think that the
8 Commission really has any leeway in that
9 regard. And I do think that the way that the
10 Commission went about the rule-making here is
11 telling.

12 As the Court will be aware, in the
13 proposed rule, the SEC issued a rule that
14 merely tracked the statutory definition, and
15 the SEC provided no indication in the notice of
16 proposed rule-making that it was contemplating
17 the possibility of dispensing with that
18 requirement.

19 JUSTICE GINSBURG: But, aren't there
20 comments to that effect?

21 MR. SHANMUGAM: There were three
22 comments out of the 240 or so that seemed to
23 suggest that the Commission might want to do
24 that.

25 But I don't think that the mere fact

1 that there were a small number of comments that
2 suggested that is an indication that interested
3 parties as a whole were on notice that this
4 issue was potentially in play.

5 There were certainly some who thought
6 that that would be desirable, but there is
7 nothing in the notice of proposed rule-making,
8 and to the extent that Respondent and the
9 government cites some language that suggests
10 that the Commission was considering broadening
11 the application of the anti-retaliation
12 provision and inviting comments to that effect,
13 the very previous sentence in the notice of
14 proposed rule-making indicates that the
15 Commission intended to retain the requirement
16 of reporting to the SEC.

17 So, again, there was no notice, until
18 such a time as the Commission came out with its
19 final rule and converted the one statutory
20 definition of whistleblower into two.

21 And I think that there can be no
22 better evidence of how nakedly atextual
23 Respondent and the government's interpretation
24 is than the final rule itself, which contains
25 these two separate definitions, the one for

1 purposes of the award provisions, and the other
2 for purposes of the --

3 JUSTICE BREYER: Some law on this --
4 see, I don't know quite -- just as you put your
5 finger on something I -- I don't know what to
6 do with.

7 I thought the argument made below was
8 a plausible argument, that they have made a
9 rule like the one I was just suggesting, and
10 then you come back and say: Well, the
11 rule-making proceeding was no good, they didn't
12 tell anybody they were going to do this, and
13 this is way beyond, dah-dah-dah.

14 And then they say: But you should
15 have raised this earlier. Now, there is some
16 law on when you have to raise an attack on a
17 rule established by a Commission and there is
18 some time limit.

19 And -- and then there's no answer that
20 I have found, I don't know how that works, what
21 am I supposed to do with that? Have they
22 abandoned all that here or what?

23 MR. SHANMUGAM: Sure. Justice Breyer,
24 let me address that. And I do, by the way,
25 want to come back to Justice Sotomayor's

1 question about the ordinary meaning of
2 whistleblower.

3 JUSTICE BREYER: You don't have to. I
4 can look it up, you know.

5 MR. SHANMUGAM: Well, let me address
6 your question first. Our submission, our core
7 submission to the Court is this is a simple
8 case that can be resolved at step 1 of Chevron,
9 the terms and reach of the statutory definition
10 are unambiguous and there's certainly no
11 absurdity here.

12 If this Court were somehow to get to
13 step 2 of Chevron, we have an argument under
14 Encino Motorcars that this Court should not
15 afford Chevron deference because the
16 rule-making was procedurally defective for the
17 reasons that I just mentioned.

18 The other side rightly points out that
19 we did not make that argument below. We don't
20 believe that it is necessary for us to have
21 made that argument below, because this is just
22 another argument in response to their claim
23 that there should be Chevron deference here.

24 And, parenthetically, this Court's
25 decision in Encino Motorcars came down while

1 the briefing was ongoing in the Ninth Circuit.

2 But as to the argument concerning
3 timing, because there is an argument made by
4 the Respondent, though not by the government,
5 that we're somehow out of time here, let me
6 explain why that's not true.

7 Respondent relies on section, I
8 believe it's 2401, which is the general
9 six-year limitations period for claims against
10 the government. That is a limitations period
11 that is applicable in ordinary APA actions.

12 We are not raising a free-standing APA
13 claim here. Our argument, consistent with
14 Encino Motorcars, is simply an argument that
15 the rule should not be given Chevron deference.
16 It's not even an argument that the rule is
17 somehow invalid. It's an argument that, at
18 most, the SEC is entitled to Skidmore deference
19 here.

20 And so we don't think that it would be
21 appropriate to apply the six-year limitations
22 period here, and to the extent that Respondent
23 relies on the D.C. Circuit's decision in a case
24 called Gem Broadcasting, that was a case in
25 which a regulated party was essentially arguing

1 for invalidity. They were not making the type
2 of argument we're making here.

3 Now, with regard to the ordinary
4 meaning of whistleblower because I do want to
5 finish up my answer to Justice Sotomayor's
6 question from now sometime ago, I think we
7 would concede that the term "whistleblower"
8 naturally refers to an individual who reports
9 misconduct, but I don't think that we would
10 concede that there is an ordinary meaning as to
11 the person to whom the misconduct is reported.

12 I think, if anything, if you look at
13 sources like Black's Law Dictionary, they seem
14 to suggest that you have to have reporting to a
15 government authority. And so, you know, I
16 think that it is telling that contrary to the
17 Solicitor General's submission, Congress really
18 is not using the unadorned term "whistleblower"
19 very often in statutes.

20 It's either using a different term or
21 it is providing a definition for whistleblower.
22 And I think that that is, again, precisely what
23 Congress was doing here.

24 Congress consciously made the decision
25 to replace the term "employee" with the term

1 "whistleblower," and Congress added the third
2 clause, which is concededly the broadest of the
3 three clauses, to a statute that already used
4 the term "whistleblower."

5 And this is just not one of those
6 paradigmatic cases in which the text points in
7 one direction but there's legislative history
8 to the contrary. There's really no actual
9 legislative history with regard to the third
10 clause.

11 And it is quite telling that the
12 government in its brief can muster no
13 legislative history other than an article from
14 Law 360 that it cites in Footnote 15.

15 And if you take a look at that article
16 and you take a look at the underlying e-mails
17 that are cited in that article, there's really
18 no indication even that the individual who
19 allegedly proposed the third clause thought
20 that what he was doing was extending the
21 statute beyond the statutorily-defined category
22 of whistleblowers to individuals who merely
23 report internally.

24 Unless the Court has any further
25 questions, I think I'll reserve the balance of

1 my time for rebuttal if needed. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Geyser.

5 ORAL ARGUMENT OF DANIEL L. GEYSER

6 ON BEHALF OF THE RESPONDENT

7 MR. GEYSER: Thank you, Mr. Chief
8 Justice, and may it please the Court:

9 The true elephant in the mouse hole
10 here would be using the indirect use of the
11 word whistleblower in subsection (h) to limit
12 what is otherwise a broad and sweeping clause
13 that aligns Dodd-Frank's amendment with the
14 modern trend of major whistleblowing
15 legislation.

16 Now, to start with Justice Kagan's
17 point it is -- actually, it is exactly true
18 that Petitioner's reading does create a serious
19 anomaly. If anyone reports to the SEC at any
20 time, it could be half a decade or a decade
21 earlier on a completely unrelated issue,
22 they're a whistleblower for life. So any
23 report they make at a later time is protected,
24 even if the information doesn't get to the SEC.

25 But I think there's actually an even

1 greater anomaly. My friend suggests that
2 Congress, all they really were concerned about
3 here was getting information to the government,
4 to the SEC.

5 Take someone who reports internally,
6 as they're often required to do under
7 Sarbanes-Oxley, and they're immediately
8 terminated. And then the second they walk out
9 of that meeting they report to the SEC. They
10 even use the right fax number and they use the
11 right form. That way the SEC has exactly the
12 information that Congress supposedly wanted it
13 to obtain. That person isn't protected under
14 this provision.

15 JUSTICE BREYER: Yeah, but he's
16 protected under Sarbanes-Oxley, isn't he?

17 MR. GEYSER: Yes, Your Honor.

18 JUSTICE BREYER: So in all the
19 differences that he has maybe a shorter statute
20 of limitations and you have to go through an
21 exhaustion procedure. So -- so what is the
22 anomaly about saying, well, you're reporting
23 directly to the SEC, you're going to have a --
24 a shorter -- you're going to have a longer
25 statute of limitations and you don't have to

1 exhaust, but if it's an indirect thing, you do.

2 Why is that anomalous?

3 MR. GEYSER: It is highly anomalous,
4 Your Honor. The -- the entire reason that
5 Congress added a clause (iii) is to strengthen
6 the remedies in Sarbanes-Oxley. Sarbanes-Oxley
7 --

8 JUSTICE BREYER: It does. It
9 strengthens them in the cases where they report
10 to the SEC, which is what it says.

11 MR. GEYSER: Well, reports --

12 JUSTICE BREYER: It strengthens it.
13 It just means you don't have to exhaust. So
14 what's the big deal?

15 MR. GEYSER: Well, but it would
16 strengthen it in a way that would not protect
17 people who occasionally do report to the SEC
18 and protect people who later don't report to
19 the SEC. That doesn't make any sense.

20 And so the other thing it would do too
21 is it puts the employer in a position of being
22 entirely unaware of the critical factor that
23 activates or takes away protection under clause
24 (iii).

25 So it --

1 JUSTICE SOTOMAYOR: I'm sorry, the
2 employer is rarely knowledgeable about the SEC
3 filing. I believe the SEC rules require
4 confidentiality of the filing.

5 MR. GEYSER: That's exactly right.

6 JUSTICE SOTOMAYOR: So virtually
7 always an employer is going to fire someone
8 because of internal reporting, not because of
9 SEC reporting.

10 MR. GEYSER: That's right, Your Honor,
11 but what that really shows is that this is a
12 highly unusual form of an anti-retaliation
13 statute. Anti-retaliation statutes are
14 designed to deter specific conduct.

15 And here we know that Congress was
16 focused on deterring specific conduct because
17 subsection (h) is framed in terms of a
18 prohibition on employers. It says employers
19 shall not take certain acts against people
20 engaged in certain conduct.

21 The use of whistleblower is entirely
22 indirect. It would be highly unusual for
23 Congress to think that they were trying to
24 bolster remedies in Sarbanes-Oxley because they
25 did realize these were highly ineffective.

1 There is evidence in the record, we do
2 cite studies in our brief, that show that
3 Sarbanes-Oxley generally was providing relief
4 in under 10 percent of cases.

5 JUSTICE GINSBURG: What about this
6 case? Did Somers avail himself of
7 Sarbanes-Oxley or just Dodd-Frank?

8 MR. GEYSER: Only Dodd-Frank, Your
9 Honor. He missed the limitations period for
10 Sarbanes-Oxley, which will happen frequently
11 because not everyone who's not a lawyer is
12 aware of all their rights under federal law.

13 The entire point that Congress had
14 made in this statute, and consistent again with
15 every piece of modern, major whistleblowing
16 legislation is to protect internal
17 whistleblowing.

18 The entire securities framework is --
19 is hinged on internal whistleblowing. Everyone
20 thinks it is better to have people go first --

21 JUSTICE GORSUCH: Well, I -- I'm just
22 stuck on the plain language here, and maybe you
23 can get me unstuck, but --

24 MR. GEYSER: Sure.

25 JUSTICE GORSUCH: -- how much clearer

1 could Congress have been than to say in this
2 section the following definitions shall apply,
3 and whistleblower is defined as including a
4 report to the Commission.

5 What else would you have had Congress
6 do if it had wanted to achieve that which your
7 opponent says it achieved?

8 MR. GEYSER: Your Honor, this Court
9 doesn't read language like that in isolation.
10 It has to read it against a backdrop of --

11 JUSTICE GORSUCH: I'm asking what --
12 what would you have had Congress do?

13 MR. GEYSER: Well, I think in this --
14 what they could have done, and given all the
15 anomalies that this would produce and how --
16 and how contrary this is to the modern trend of
17 legislation, they'd have to be a lot clearer
18 than they were here, but let me give you --

19 JUSTICE GORSUCH: Clearer than in this
20 section, the following definitions shall apply?

21 MR. GEYSER: Just as --

22 JUSTICE GORSUCH: How much clearer
23 could they have possibly been?

24 MR. GEYSER: That is the same language
25 in Utility Air where the definition of "air

1 pollutant" was in this chapter. And in Duke
2 Energy, it gets even worse. In that case --

3 JUSTICE GORSUCH: So "shall" just
4 means maybe; sometimes?

5 MR. GEYSER: Not at all. Well, let me
6 give an example to, I think, prove the point.
7 Suppose that in Subsection (h) Congress
8 included a parenthetical after the word
9 "whistleblower" that said as this term is used
10 in Sarbanes-Oxley or as this term is used in
11 its ordinary idiomatic sense, no one at that
12 point would think that the definition in
13 Subsection (a)(6) applies.

14 Our contention is that the clear
15 meaning from the text, the context, the
16 structure, the purpose, the history of this
17 provision is tantamount to that kind of
18 parenthetical.

19 JUSTICE GORSUCH: Well --

20 CHIEF JUSTICE ROBERTS: Counsel, this
21 case, Utility Air, the difficulty of applying
22 the defined term in that case strikes me as so
23 -- so much more insurmountable than in this
24 case.

25 MR. GEYSER: I think it could be more

1 or less, Your Honor, but I think the important
2 point here is that having an incentive to skip
3 over internal reporting would be disastrous to
4 the modern scheme of securities regulation,
5 which turns on internal reporting.

6 Under my friend's view --

7 JUSTICE BREYER: That's -- that's
8 exact -- sorry -- that's exactly what's
9 bothering me. You're using -- and that's why I
10 think I'd like a little elaboration on my first
11 question because, see, I don't put as much --
12 I'll be perhaps a little bit more willing to go
13 with your not clear language, maybe, but it
14 seems to make sense what Congress was trying to
15 do to follow the language.

16 Why? Because the ordinary
17 whistleblower is protected under
18 Sarbanes-Oxley. He just has to have some
19 exhaustion. And it's a shorter statute of
20 limitations.

21 And if you want to make it tougher,
22 which they do, it makes sense in a statute
23 that's mostly about awards for reporting to the
24 SEC to say it's where the SEC is directly
25 involved that we cut out the need to exhaust,

1 that we cut out the need, while if, in fact,
2 you read it your way, we -- we've basically
3 eliminated Sarbanes-Oxley because everybody
4 would bring it under this provision.

5 Now, that's -- that's why, when you
6 say, you know, this is totally anomalous, this
7 is a disaster, et cetera, et cetera, I say:
8 Well, you haven't shown me that yet. So maybe
9 you want to spend one minute on doing that.

10 MR. GEYSER: Sure. I mean, first,
11 Your Honor, this would not eliminate the
12 Sarbanes-Oxley remedial scheme even though it
13 was largely ineffective. There could be some
14 people who would prefer it because they don't
15 have a lawyer, they prefer to have the
16 assistance of OSHA, but, more importantly, the
17 Petitioner's reading would undermine not the
18 remedial scheme but the entire regulatory
19 scheme of Sarbanes-Oxley.

20 Sarbanes-Oxley requires people to --
21 to disclose internally.

22 What Congress wanted was as -- this is
23 the ordinary progression of getting information
24 to the government. You first give the
25 corporation a chance for self-governance. You

1 give them the chance to swiftly and efficiently
2 address the problem and to make sure that they
3 remediate whatever the violation is.

4 If they refuse to do it, then you go
5 to the government.

6 JUSTICE SOTOMAYOR: Is every employee
7 obligated by law to report a violation or is it
8 only certain employees, lawyers and accountants
9 and others who are affirmatively obligated to
10 report?

11 MR. GEYSER: It's some employees like
12 lawyers and auditors do have the affirmative
13 obligation. Other employees may not have the
14 legal or regulatory obligation, but they often
15 do have a corporate obligation under the
16 corporation's code of conduct.

17 JUSTICE SOTOMAYOR: All right. So why
18 would Congress want to treat lawyers and
19 accountants to the generous provisions of the
20 whistleblower statute when they have an
21 obligation anyway, they're basically being
22 incentivized to do what they're already legally
23 obligated to do.

24 They've got a protection,
25 Sarbanes-Oxley. Why put them under the

1 whistleblower statute as well?

2 MR. GEYSER: Because Congress saw
3 examples, and they saw this in Enron, where
4 people were deterred from fulfilling those
5 roles and disclosing the information in
6 whistleblowing because they didn't want to be
7 terminated. And the threat of termination --

8 JUSTICE SOTOMAYOR: But that was
9 Sarbanes-Oxley.

10 MR. GEYSER: And Dodd-Frank --

11 JUSTICE SOTOMAYOR: And that's the
12 statute Congress provided to incentivize them
13 to do what they were legally obligated to do.

14 MR. GEYSER: Sure. And Congress
15 specifically singled out the protections in
16 Sarbanes-Oxley as something that needed to be
17 bolstered in Dodd-Frank. So I don't think it's
18 fair to divorce the two from each other.

19 JUSTICE SOTOMAYOR: Well, I see
20 Dodd-Frank as -- as expanding the category of
21 people, not limiting or -- or expanding it to
22 include people who are already included.

23 MR. GEYSER: Well, it does expand
24 people in some situations like with
25 self-regulatory organizations who aren't

1 covered under Sarbanes-Oxley. But notably then
2 that doesn't apply for internal reporters in
3 those groups under Petitioner's reading.

4 So even though Congress would have
5 singled out those people and said these people
6 should be protected from making internal
7 disclosures, they would actually have no legal
8 protection at all if they didn't first report
9 to the SEC, which, again, is contrary to even
10 the regulated stakeholder's interest in this
11 very setting.

12 We know from the Chamber of Commerce,
13 who submitted elaborate comments during the
14 notice and comment process, that the policy
15 touchstone of Dodd-Frank -- and I think this
16 goes a little bit too to Justice Breyer's
17 question -- should be preserving internal
18 compliance systems.

19 JUSTICE GORSUCH: I'd like to talk
20 about that notice and comment period for just a
21 moment. It seems to me you've got this plain
22 language problem, so you've got to generate an
23 ambiguity. That's the first step of your --
24 your move.

25 Then the second step is that the SEC

1 has reasonably resolved that ambiguity and that
2 we should defer to it.

3 But here the notice and comment period
4 provided notice that we're going to issue a
5 rule-making with respect to whistleblowers who
6 report to the Commission.

7 Then -- then the rule comes out and
8 says reporting to the Commission is not
9 required, in an ipsi dixit unreasoned opinion,
10 one line, basically, and then we have two
11 circuits that actually gave deference to that
12 interpretation.

13 Now, that seems to me to put the whole
14 administrative process on its head because
15 you're providing no notice to people, no
16 reasonable opportunity to comment, maybe a few
17 people spot the issue, but most people don't.

18 The agency acts without the benefit of
19 the notice and comment and is unable to issue a
20 reasoned decision-making, and then we're
21 supposed to defer to that to resolve this
22 ambiguity? Help me out with that scheme.

23 MR. GEYSER: Sure.

24 JUSTICE GORSUCH: That just doesn't
25 quite hold together for me.

1 MR. GEYSER: Let me try to break it
2 down into a number of steps. Now, first, to be
3 clear, I think we win under act -- under the --
4 the better reading of the statute. We don't
5 even need any deference at all.

6 But to -- to go through the steps, on
7 page 70,511 in the Federal Register, the agency
8 specifically asked for comments about whether
9 to broaden or change the definition of
10 whistleblower for purposes of the
11 anti-retaliation.

12 JUSTICE GORSUCH: It said to the
13 Commission, for reports to the Commission, that
14 language is in there, too, right?

15 MR. GEYSER: Well, that language is in
16 the initial, in the initial rule.

17 JUSTICE GORSUCH: Yeah.

18 MR. GEYSER: It also suggested,
19 though, that you could qualify under the
20 whistleblower protections without satisfying
21 all the manners of reporting to the Commission.
22 So I think there actually is some ambiguity
23 there.

24 And, again, the SEC specifically
25 requested comments on that exact issue. Three

1 people did comment on it and suggested that it
2 should make clear, the SEC should make clear
3 that internal whistleblowers are covered.

4 The Association of Corporate Counsel
5 implied that they just assumed that -- and this
6 is a pretty big group -- they -- they assumed
7 that internal whistleblowers were covered.

8 There's not a single comment out of
9 the over 250 or so that were submitted that
10 suggested that internal reporting would not be
11 protected under Dodd-Frank, and I think that's
12 telling, because I don't know any corporation,
13 while they were strongly urging the Commission
14 --

15 JUSTICE GORSUCH: Well, if it's not --
16 if it's not -- if it's not fairly put to the
17 notice, is it any surprise that many people
18 don't comment on it?

19 MR. GEYSER: Well, Your Honor, we
20 disagree that it wasn't fairly put to the
21 notice because they specifically requested
22 comments on exactly this topic. That's
23 generally considered enough.

24 And for the reasoned explanation, we
25 think they did provide a sufficient basis,

1 certainly as strong a basis as the agency
2 provided in the Long Island case.

3 But I also want to make another point
4 that I think goes back to the original
5 definition of whistleblower, and I do think
6 this is important, and it shows that what
7 Congress really had in mind with A-6 had
8 nothing to do with the anti-retaliation
9 provision.

10 The sentence does not end --

11 JUSTICE GORSUCH: I'm looking at the
12 notice, though. I'm sorry, I'm just still
13 stuck there. Paragraph 42 I assume is what
14 you're referring to, right?

15 MR. GEYSER: And -- and the language
16 that precedes paragraph 42.

17 JUSTICE GORSUCH: Yeah, should --
18 should -- should the anti-retaliation
19 protections, yada, yada, yada, apply broadly to
20 any person who provides information to the
21 Commission concerning a potential violation,
22 right?

23 MR. GEYSER: Your Honor, but, again,
24 it's should we broaden it, should we change it.

25 JUSTICE GORSUCH: To the Commission,

1 yeah, but to the Commission, right?

2 MR. GEYSER: Your Honor, part -- part
3 of the logical outgrowth test, which -- which I
4 think this Court has effectively endorsed, but
5 I think there's some lack of clarity there,
6 too, it doesn't require that the exact proposal
7 be endorsed.

8 JUSTICE BREYER: No, but his point
9 really, I think, is that notice which says we
10 include -- we're going to include who counts as
11 providing information to the Commission does
12 not put people on notice that they are
13 including -- going to apply it to people who
14 don't provide information to the Commission.

15 I mean, that's English, I would think.
16 Now, that's the question. That's why I
17 actually found your argument below, perhaps --
18 but you've abandoned that, right?

19 Now we're just back at -- if I find
20 this sort of interesting, your argument below,
21 I'm out of luck, it's abandoned, gone, right?

22 MR. GEYSER: Your Honor, the -- I
23 think the argument that was accepted by the
24 Ninth Circuit below didn't suggest that the SEC
25 was saying that if --

1 JUSTICE BREYER: No, no, but I mean I
2 asked that -- first, I want you to answer
3 Justice Gorsuch's question.

4 Second, I just wonder separately
5 whether I am just bound by what seems to be
6 your concession, I guess I am, that the
7 argument below is abandoned.

8 MR. GEYSER: Your Honor, I think that
9 you can affirm on any ground that's present in
10 the record. So, if you think that that's the
11 better reading of it, then -- then we would
12 warmly embrace it.

13 Justice Gorsuch, I think that -- I
14 think, again, that the logical outgrowth test
15 would assume that in a proceeding --

16 JUSTICE GORSUCH: The logical
17 outgrowth test, is -- is it anticipated that
18 something is going to follow? Is it reasonable
19 notice?

20 And, again, what's reasonable about
21 saying X and then doing not X or the opposite
22 of X, and then doing it in an ipsi dixit,
23 one-line sentence, that's unreasoned and
24 wouldn't normally get much deference from us in
25 the first place.

1 MR. GEYSER: The --

2 JUSTICE GORSUCH: How does all that
3 get you Chevron?

4 MR. GEYSER: The key issue in the
5 proceeding was how do you deal with the
6 interaction between internal reporting and
7 preserving internal compliance mechanisms and
8 -- and the anti-retaliation provision and
9 making sure that the award program makes sense.

10 So I think the -- the interaction of
11 those things suggests that, while corporations
12 thought we need to preserve internal
13 compliance, so we need to make sure that people
14 first report internally and give corporations a
15 chance to fix the problem, that the necessary
16 counterpart to that is people have to be
17 protected when they internally report.

18 It doesn't make any sense to say that
19 people have to engage in internal reporting,
20 yet they're unprotected when they do that.

21 I'd like to get to the (a)(6). Again,
22 the definition section does not end by saying
23 the report has to go to the Commission. It
24 says, "in a manner established by rule or
25 regulation by the Commission."

1 And I think that's important because
2 Congress realized that the Commission needed to
3 -- to prevent the situation where the SEC has a
4 big enforcement award and -- everyone comes out
5 of the woodwork and they all claim an
6 entitlement to part of that award.

7 The manner established by the
8 Commission ensures that there is a -- a simple,
9 easy way to track exactly who is eligible for
10 award and who is not. Congress did not need to
11 limit the anti-retaliation section to whether a
12 whistleblower filled out the right form or
13 faxed a form to the exact right number; even if
14 they provided information to the SEC,
15 accomplishing the core objective of the
16 whistleblower litigation -- legislation in the
17 very first place.

18 JUSTICE GINSBURG: May I just ask
19 whether Somers -- was there any reason he
20 didn't report to the SEC?

21 MR. GEYSER: He -- I think it just
22 simply did not occur to him at the time. And
23 so -- and in the same way that he missed the
24 limitations period for the Sarbanes-Oxley
25 claim.

1 What he tried to do was do the right
2 thing, and to honor the corporate Code of
3 Conduct by calling the -- the misconduct to his
4 supervisor's attention; which again is exactly
5 what all the corporate stakeholders, you know,
6 in this proceeding have said is their goal,
7 too.

8 No one thinks it's better to have
9 reports go directly to the SEC, unless the
10 corporation is entirely unwilling to remediate
11 and address the problem. So, I -- again, it is
12 consistent with the -- the natural, regulatory
13 scheme in Sarbanes-Oxley; and Dodd-Frank is not
14 passed in a vacuum. Dodd-Frank is part -- and
15 Sarbanes-Oxley work together. They each amend
16 provisions of the Exchange Act.

17 So I don't think it -- I think it's
18 highly odd to say that: in Dodd-Frank,
19 Congress wanted to create a heavy incentive not
20 to report internally; but in Sarbanes-Oxley,
21 Congress was focused intently on internal
22 reporting, and especially internal reporting of
23 lawyers and auditors.

24 So under my friend's reading,
25 Dodd-Frank would leave those critical groups,

1 the groups that this Court in Lawson versus FMR
2 recognized were best equipped to spot and
3 detect and prevent fraud, out of these critical
4 protections; after Congress recognized that
5 Sarbanes-Oxley had been ineffective in getting
6 lawyers and auditors and other employees to
7 report internally.

8 This is critical whistleblower
9 protections, and we don't see any basis for
10 carving those groups out of the statute.

11 If the Court has no further questions.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Michel.

15 ORAL ARGUMENT of CHRISTOPHER G. MICHEL
16 ON BEHALF OF THE UNITED STATES, AS
17 AMICUS CURIAE, SUPPORTING THE RESPONDENT

18 MR. MICHEL: Mr. Chief Justice, and
19 may it please the Court: The statutory
20 definition of whistleblower is tailor-made for
21 the awards program, but it does not fit in the
22 retaliation programs.

23 Giving the term its ordinary meaning
24 in the retaliation context would harmonize the
25 statute and avoid the anomalies that would

1 result from woodenly applying the statutory
2 definition.

3 Some of those anomalies have been
4 discussed already by the Court. But I do think
5 the most drastic one is that applying the
6 statutory definition, which requires reporting
7 to the Commission, into clause (iii) of the
8 retaliation provisions, which protects internal
9 reporting; would decouple retaliation liability
10 from the Act that causes the retaliation; and
11 moreover, would make employers liable for
12 conduct that they don't know about. Now, that
13 in our view would be a one of a kind
14 retaliation provision in the U.S. code.

15 JUSTICE KAGAN: So, Mr. Michel, I do
16 think that that's a real anomaly. And I -- I
17 -- and I also think if you really look at the
18 way this statute came to be; it's quite
19 possible the way this provision gets in very
20 late in the game, that they didn't know that
21 they'll -- they forgot about this definitional
22 provision, and they were meaning it more in the
23 ordinary-language sense.

24 But there you are, you have this
25 definitional provision, and it says what it

1 says. And it says that it applies to this
2 section. And you have to have a really, really
3 severe anomaly to get over that.

4 So what makes it rise to that level?
5 It's odd; it's peculiar; it's probably not what
6 Congress meant. But what makes it the kind of
7 thing where we can just say we're going to
8 ignore it?

9 MR. MICHEL: So, I -- Justice Kagan,
10 I'd direct you to the Lawson versus Suwanee
11 Fruit case, which I think is often cited as a
12 canonical case on statutory definitions.

13 That was a worker's compensation case.
14 And the statute included the term "injury,"
15 which was defined understandably enough for a
16 worker's compensation case as injury on the
17 job.

18 But there was a provision in which the
19 employer was relieved from liability if the
20 employee had a preexisting injury. And the
21 Court said if you apply the statutory
22 definition to that preexisting injury and
23 require that injury to be on the job; that
24 would be anomalous, because it would unfairly
25 assign liability to the employer, and it would

1 deter the statutory purpose of keeping
2 employers from retaliating against disabled
3 employees.

4 So I think that decision is analogous
5 here. You would deter employers from -- excuse
6 me -- you would unfairly apportion liability to
7 employers based on conduct that they don't know
8 about; and you would take out the premise of
9 the retaliation provision, because the very
10 conduct that is an element in the retaliation
11 claim -- reporting to the Commission -- is
12 different from the conduct for which they
13 retaliated against the employee. One --

14 JUSTICE ALITO: Now this sort of thing
15 will come up in other cases in which the
16 government is involved. And do you want us to
17 write an opinion that uses the terminology that
18 you just used?

19 So, you have a statute with -- a --
20 that uses a particular term, and there's a
21 definitional provision in the statute. And
22 what we write is that the definition in the
23 statute doesn't apply if it produces an
24 anomaly.

25 Is that the standard? That's all you

1 need to get out of the definitional provision?

2 MR. MICHEL: I -- I think, you know,
3 if you look at Suwanee Fruit, for example, the
4 Court talked about incongruities, it talked
5 about undermining the purpose of the statute.

6 If you look at the -- the Public
7 Utilities case, the Court talks about
8 undermining the purpose of the statute.

9 JUSTICE GINSBURG: I thought -- I
10 thought the stock phrase was absurd, that you
11 -- if the statute gives a definition, you
12 follow the definition in the statute unless it
13 would lead not merely to an anomaly, but to an
14 absurd result.

15 MR. MICHEL: Justice Ginsburg, I -- I
16 don't think that -- with respect, I don't think
17 that's the standard the -- the Court has
18 applied. In fact, in all of the cases we cite,
19 starting with Suwanee Fruit and Public
20 Utilities --

21 JUSTICE GORSUCH: And you'd -- and you
22 agree you don't have an absurdity here.

23 I mean, the government concedes that
24 Subsection (iii) would cover a subset of cases
25 -- maybe not as much as the government would

1 like, but -- but it's not an absurd reading,
2 right?

3 MR. MICHEL: We're not arguing that
4 it's absurd. That -- that's correct, Justice
5 Gorsuch.

6 It would, however, I -- I do want to
7 stress how narrow the meaning that would be
8 left for clause (iii) is. That --

9 CHIEF JUSTICE ROBERTS: Well, but I
10 mean, it's not just that it's not absurd. It
11 seems to me that if you look at Utility Air, it
12 has to be -- not absurd or anomalous, whatever
13 you want to say -- it has to be cut very
14 broadly.

15 I mean, if you get to a tiny little
16 thing and you're saying, well, the definition
17 doesn't work there, it's one thing to say,
18 well, then we're not going to apply it to that
19 provision.

20 The cases where you're allowed to move
21 beyond the defined term are when if you stick
22 to it, it really makes a mess of the whole
23 thing.

24 MR. MICHEL: I agree, Mr. Chief
25 Justice, but I think it's a pretty big mess

1 that -- that the Petitioner's reading is -- is
2 making here. You know, in addition to the
3 anomalies we have already discussed, I do think
4 a very important one is that Petitioner's
5 reading would eviscerate the incentive for
6 internal reporting.

7 Keep in mind, Petitioner wants to
8 import the entire --

9 JUSTICE GORSUCH: Well, counsel, you
10 might have an argument there if there weren't
11 Sarbanes-Oxley as the backdrop, but there is.
12 And so the Chief Justice's point and Justice
13 Breyer's point is that if it were to make a
14 hash of the entire statute, and there'd be
15 meaning -- no meaning at all, maybe, maybe, but
16 you don't -- you don't have -- you don't even
17 allege that here.

18 MR. MICHEL: Well -- let me try two
19 responses, Justice Gorsuch.

20 First of all, I think it's quite clear
21 that what Congress was trying to do in
22 Dodd-Frank was bolster the remedies that were
23 available under Sarbanes-Oxley. That's why it
24 was --

25 JUSTICE GORSUCH: But -- but we don't

1 follow what they're trying to do. We follow
2 what they do do, right?

3 MR. MICHEL: So what they did --

4 JUSTICE GORSUCH: You -- you would
5 agree with me on that?

6 MR. MICHEL: Absolutely.

7 JUSTICE GORSUCH: All right.

8 MR. MICHEL: And what they did do was
9 change the statute of limitations from six
10 months to six years. They changed the single
11 back pay to double back pay.

12 JUSTICE GORSUCH: Do you want to
13 comment on the notice and -- and rule-making
14 procedures here and its reference to how much
15 deference we owe? And I -- I, again, I'm just
16 stuck with the absence of any fair notice, an
17 ipse dixit decision, without any reasons that
18 wouldn't normally pass muster under the APA;
19 and then we have two circuit courts that
20 nonetheless thought that it was appropriate to
21 defer to that, which seems to me allowing an
22 agency to swallow a large amount of legislative
23 power and judicial power in the process, giving
24 up our opportunity to -- to -- to interpret the
25 law as it is.

1 MR. MICHEL: So just I -- I'll start
2 with a small correction, which is the Court of
3 Appeals in this case actually primarily --

4 JUSTICE GORSUCH: Did both --

5 MR. MICHEL: -- interpreted the
6 statute.

7 JUSTICE GORSUCH: Did both. And the
8 other -- and the other court relied exclusively
9 on Chevron --

10 MR. MICHEL: It --

11 JUSTICE GORSUCH: So here we are.

12 MR. MICHEL: That -- that's right. I
13 think I would also point out that, you know,
14 this procedural deficiency argument has a
15 serious procedural deficiency of its own, in
16 which --

17 JUSTICE GORSUCH: It's not making an
18 invalidity argument. It's -- it's asking for
19 deference, as -- as your friend pointed out,
20 which is a different animal.

21 MR. MICHEL: It's true. And I do want
22 to go to the merits of that.

23 JUSTICE GORSUCH: Good.

24 MR. MICHEL: As --

25 JUSTICE GORSUCH: Please.

1 MR. MICHEL: -- I -- you're, you know,
2 as you're reading from the notice of proposed
3 rule-making, I do want to point out that it's
4 the Supreme Court that is doing this in the
5 first instance. No court in case or any other
6 case has -- has consulted this before.

7 But if you want to look at it, I do
8 think Petitioner pointed to what we think is
9 the closest statement in the rule, which is at
10 page 70,511, and lays out, you know, as -- as
11 my friend read, "the Commission is seeking
12 comments on whether it should promulgate rules
13 regarding the implementation of the -- of this
14 section, should application of the retaliation
15 provisions be limited or broadened."

16 I -- I think the fact that several
17 comments --

18 JUSTICE GORSUCH: "Who provides
19 information to the Commission." Right? That's
20 kind of an important little phrase there.

21 MR. MICHEL: Right. I -- I agree with
22 that.

23 JUSTICE GORSUCH: Right.

24 MR. MICHEL: And -- and I'm not saying
25 that it couldn't have been written more

1 clearly. I do think if you look at --

2 JUSTICE GORSUCH: I think it was
3 written very clearly.

4 MR. MICHEL: Well, I think if you look
5 actually, Justice Gorsuch, at the -- at the
6 Long Island Care case, which I think is -- is
7 probably this Court's leading case on the
8 logical outgrowth test, it -- it ultimately
9 says that, you know, proposing X and getting
10 not X is enough to satisfy the logical
11 outgrowth.

12 Now, maybe that's not logical, but
13 that is the -- you know, the Court's precedent
14 in this area. And I think we certainly satisfy
15 that test here.

16 JUSTICE SOTOMAYOR: Bottom line, are
17 you -- how much are you relying on just Chevron
18 deference here?

19 MR. MICHEL: That -- that's not even
20 our principal argument. We're -- we're
21 certainly happy to have Chevron deference if
22 you find the statute ambiguous, but we -- we
23 think you can resolve this without Chevron
24 deference, simply as the Ninth Circuit did in
25 its primary holding by saying that we have the

1 best reading of the statute. I think a number
2 of the lower courts have done that too.
3 There's a District of Nebraska opinion that we
4 cite that I think is particularly helpful in --
5 in evaluating the statute.

6 JUSTICE GORSUCH: Would -- would you
7 agree, though, that a notice-and-comment
8 rule-making that didn't provide fair notice
9 shouldn't be deferred to?

10 MR. MICHEL: I -- this -- I think
11 Encino is some support for that, although this
12 Court has never taken the additional step of
13 saying that the -- failure to meet the logical
14 outgrowth test as distinguished from the
15 inadequate explanation --

16 JUSTICE GORSUCH: Well, just
17 hypothetically, let's say whatever your logical
18 outgrowth test is fails to meet that, okay? No
19 notice, no adequate procedures. Should --
20 should courts defer to that as -- as the law?

21 MR. MICHEL: Again, I think there's a
22 lot of, you know, preliminary questions you'd
23 have to answer about timing and -- and
24 everything else, but in -- in a properly --

25 JUSTICE GORSUCH: Let's get to the

1 merits.

2 MR. MICHEL: I think in a properly
3 presented challenge, that -- that you wouldn't
4 be able to defer to that. I'll -- I'll agree
5 with that, Justice Gorsuch.

6 JUSTICE GORSUCH: You would not -- you
7 would not be able to defer to that?

8 MR. MICHEL: Correct.

9 JUSTICE GORSUCH: All right.

10 MR. MICHEL: But -- but I don't think
11 this -- that's this case for a lot of the
12 reasons that we have discussed.

13 JUSTICE BREYER: Are you wary of the
14 government conceding that point? I would be
15 wary of that because I don't know what
16 implications it has for other cases where, in
17 fact, you start chipping away in an unforeseen
18 way, I mean maybe -- I can think of a lot of
19 reasons for not deferring to the rule here.
20 Among others, it doesn't refer to manner.
21 There's nothing in there about manner that I
22 could find.

23 I could think of reasons, but I -- I'm
24 just saying I -- that is not necessarily what
25 you just said, a -- a lifetime concession on

1 the part of the government, is it?

2 MR. MICHEL: No, it is not.

3 (Laughter.)

4 MR. MICHEL: I -- I do want to try to
5 get back to the point about internal
6 whistleblowing and internal reporting, which I
7 think is something that there's a unity of
8 interest from employees, employers, and the
9 Commission. And -- and my friend --

10 JUSTICE SOTOMAYOR: So why don't you
11 give an award for that?

12 MR. MICHEL: May I answer, Mr. Chief
13 Justice?

14 CHIEF JUSTICE ROBERTS: Certainly.

15 MR. MICHEL: We do actually give an
16 award for people who report internally if the
17 -- if the company then reports to the
18 Commission and the person then reports within
19 120 days. So the rule does reflect that
20 principle.

21 JUSTICE SOTOMAYOR: You only give it
22 if they report to the SEC?

23 MR. MICHEL: They have to ultimately
24 report to the SEC within 120 days.

25 Thank you, Mr. Chief Justice.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Mr. Shanmugam, seven minutes.

4 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM
5 ON BEHALF OF THE PETITIONER

6 MR. SHANMUGAM: Just two quick points
7 on rebuttal. And thank you, Mr. Chief Justice.

8 The first, with regard to these cases
9 concerning statutory definitions, I think if
10 you look at the cases cited by Respondent and
11 the government, most of those cases are cases
12 in which either the terms of the statutory
13 definition are ambiguous or in which the reach
14 of the statutory definition is unclear.

15 Whereas here, both the terms and the
16 reach of the statutory definition are
17 unambiguous, this Court has refused to give
18 effect to a statutory definition, only where it
19 would lead to absurd results. And to be sure,
20 many of those cases are pre-1986 cases.

21 They do not use the term "absurdity,"
22 but they sound in absurdity. And the perfect
23 example of that is Mr. Michel's favorite case,
24 Lawson versus Suwannee Fruit. That was a case
25 in which if the statutory definition of

1 disability were given effect, an employer would
2 be liable for the entirety of an employee's
3 disability, even if the previous partial
4 disability occurred when the employee was not
5 on the job.

6 And the Court said that that would
7 lead to obvious incongruities in the language
8 and destroy the very purpose of the statute.
9 So, again, that's absurdity by any other name.

10 And to the extent that Respondent and
11 the government seem to suggest that absurdity
12 is not required here, I would submit that it
13 would be a very odd regime of statutory
14 interpretation if this Court were to apply a
15 different standard to unambiguous language in a
16 statutory definition from the standard that it
17 applies where you have unambiguous language
18 anywhere else. If anything, where Congress
19 provides a specific statutory definition, that
20 ought to be given effect and more respect,
21 rather than less.

22 And to the extent that there may be
23 some incidental overbreadth with our
24 interpretation because one could posit a
25 hypothetical in which there's really not a

1 nexus between the internal report and the
2 report to the SEC, I would respectfully submit
3 that this case is a lot like the Court's last
4 whistleblower case, Lawson versus FMR, where
5 the Court said that incidental overbreadth, the
6 mere fact that one could think of hypotheticals
7 involving gardeners, nannies, and housekeepers
8 in the words of the Court, is not enough to
9 invalidate an interpretation, particularly
10 where the contrary interpretation suffers from
11 a similar deficiency, the wild overbreadth to
12 which I referred in my opening.

13 And my second point is just a brief
14 point on the procedural issue concerning the
15 rule-making here. I think Justice Gorsuch put
16 his finger on the exact language in the
17 proposed rule that makes clear that the SEC was
18 operating from the premise that reporting to
19 the Commission was required.

20 And to the extent that the Commission
21 asked whether the application of the
22 anti-retaliation provision could be limited or
23 broadened, it was asking about limiting or
24 broadening it in other ways, such as by adding
25 the same requirements, the procedural

1 requirements that apply to eligibility for the
2 award provisions, to the anti-retaliation
3 provision as well.

4 And it is certainly true, as
5 Mr. Geyser said, that this Court and lower
6 courts have often asked whether the final rule
7 is somehow the logical outgrowth from the
8 proposed rule. But in the words of Judge
9 Randolph from the D.C. Circuit, something
10 cannot grow out of nothing.

11 And where there is nothing in the
12 proposed rule to put interested parties on
13 notice that an agency is considering a
14 particular interpretation, it would be the
15 height of inequity to uphold a rule and to
16 afford deference to the agency in those
17 circumstances.

18 In our view, the SEC's interpretation
19 here was procedurally improper, as well as
20 substantively invalid, and for that reason and
21 the other reasons set out in the briefs, the
22 judgment of the Ninth Circuit should be
23 reversed.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 12:07 p.m., the case
3 was submitted.)

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Official - Subject to Final Review

<p>1</p> <p>1 [2] 9:15 22:8 10 [3] 12:9 14:8 30:4 11:11 [2] 1:15 3:2 12:07 [1] 65:2 120 [2] 60:19,24 15 [1] 25:14 1514(a) [1] 16:4 16-1276 [1] 3:4</p> <hr/> <p>2</p> <p>2 [4] 9:17,20 14:16 22:13 2017 [1] 1:11 21(f)-9 [1] 18:21 240 [1] 19:22 2401 [1] 23:8 250 [1] 40:9 26 [1] 2:8 28 [1] 1:11</p> <hr/> <p>3</p> <p>3 [1] 2:5 360 [1] 25:14</p> <hr/> <p>4</p> <p>42 [2] 41:13,16 47 [1] 2:13</p> <hr/> <p>6</p> <p>61 [1] 2:16</p> <hr/> <p>7</p> <p>70,511 [2] 39:7 56:10</p> <hr/> <p>8</p> <p>80 [1] 7:12</p> <hr/> <p>9</p> <p>922 [2] 13:6,10</p> <hr/> <p>A</p> <p>a)(6) [2] 32:13 44:21 A)6 [1] 18:12 A-6 [1] 41:7 a.m [2] 1:15 3:2 abandoned [4] 21:22 42:18,21 43:7 able [4] 7:20,24 59:4,7 above-entitled [1] 1:13 absence [1] 54:16 Absolutely [1] 54:6 absurd [9] 3:25 7:3 51:10,14 52:1,4,10,12 61:19 absurdity [7] 15:23 22:11 51:22 61:21,22 62:9,11 accept [1] 10:15 accepted [1] 42:23 accomplishing [1] 45:15 accountants [2] 35:8,19 achieve [1] 31:6 achieved [1] 31:7 Act [13] 3:11 4:6,6 6:3 9:6,9 13:1,9,23 16:15 39:3 46:16 48:10 Act's [2] 4:17 6:5 action [3] 6:2 8:7 17:18 actions [1] 23:11</p>	<p>activates [1] 28:23 acts [2] 29:19 38:18 actual [1] 25:8 actually [12] 8:20,23 18:3 26:17,25 37:7 38:11 39:22 42:17 55:3 57:5 60:15 added [6] 6:14 10:3 13:5,17 25:1 28:5 adding [3] 10:5 13:18 63:24 addition [1] 53:2 additional [1] 58:12 address [7] 11:1,2 12:15 21:24 22:5 35:2 46:11 adequate [1] 58:19 administrative [2] 8:6 38:14 adopted [1] 12:21 adverse [1] 6:2 adverted [1] 8:25 affirm [1] 43:9 affirmative [2] 6:11 35:12 affirmatively [1] 35:9 afford [2] 22:15 64:16 aftermath [1] 6:3 agency [6] 38:18 39:7 41:1 54:22 64:13,16 agents [1] 9:2 ago [2] 9:1 24:6 agree [6] 51:22 52:24 54:5 56:21 58:7 59:4 Air [4] 31:25,25 32:21 52:11 aligns [1] 26:13 ALITO [1] 50:14 all-purpose [1] 13:18 allege [1] 53:17 allegedly [1] 25:19 allowed [1] 52:20 allowing [1] 54:21 already [8] 4:7 8:24 10:6 25:3 35:22 36:22 48:4 53:3 although [1] 58:11 ambiguity [4] 37:23 38:1,22 39:22 ambiguous [3] 4:9 57:22 61:13 amend [1] 46:15 amended [2] 5:11 13:6 amendment [1] 26:13 amicus [4] 1:25 2:12 19:2 47:17 Among [1] 59:20 amount [1] 54:22 analogous [1] 50:4 animal [1] 55:20 anomalies [4] 31:15 47:25 48:3 53:3 anomalous [5] 28:2,3 34:6 49:24 52:12 anomaly [11] 9:24 10:1 12:15 14:22 26:19 27:1,22 48:16 49:3 50:24 51:13 another [4] 6:18 8:9 22:22 41:3 answer [6] 3:21 21:19 24:5 43:2 58:23 60:12 anti-retaliation [27] 3:24 4:17,23,25 5:10,15,18,20 6:6,12 11:9 12:2 13:3,15,19,23 14:14 20:11 29:12,13 39:11 41:8,18 44:8 45:11 63:22 64:2 anti-whistleblower [1] 13:5 anticipated [1] 43:17 anybody [1] 21:12 anyway [1] 35:21 APA [3] 23:11,12 54:18 Appeals [1] 55:3 APPEARANCES [1] 1:17 applicable [1] 23:11 application [3] 20:11 56:14 63:21 applied [1] 51:18 applies [9] 3:17,23 4:21,25 6:6,8 32:13 49:1 62:17 apply [12] 5:12 23:21 31:2,20 37:2 41:19 42:13 49:21 50:23 52:18 62:14 64:1 applying [3] 32:21 48:1,5 apportion [1] 50:6 appropriate [2] 23:21 54:20 area [1] 57:14 aren't [2] 19:19 36:25 arguably [1] 17:14 arguing [4] 10:9,10 23:25 52:3 argument [35] 1:14 2:3,6,9,14 3:4,7 7:1,21 10:2 13:13 21:7,8 22:13,19,21,22 23:2,3,13,14,16,17 24:2 26:5 42:17,20,23 43:7 47:15 53:10 55:14,18 57:20 61:4 around [1] 7:11 article [3] 25:13,15,17 assign [1] 49:25 assistance [1] 34:16 Assistant [1] 1:22 assisting [1] 8:5 assists [1] 8:10 Association [1] 40:4 assume [2] 41:13 43:15 assumed [2] 40:5,6 assuming [1] 10:15 atextual [1] 20:22 attack [1] 21:16 attention [1] 46:4 Audit [3] 16:25 17:2,17 auditors [3] 35:12 46:23 47:6 authority [2] 18:18 24:15 avail [1] 30:6 available [1] 53:23 avoid [1] 47:25 award [13] 4:24 5:17,20 14:13 18:22 21:1 44:9 45:4,6,10 60:11,16 64:2 awards [2] 33:23 47:21 aware [3] 10:4 19:12 30:12 away [3] 19:3 28:23 59:17</p> <hr/> <p>B</p> <p>back [7] 21:10,25 41:4 42:19 54:11,11 60:5 backdrop [3] 12:24 31:10 53:11 balance [2] 4:5 25:25 based [1] 50:7 basically [3] 34:2 35:21 38:10 basis [5] 7:10 14:20 40:25 41:1 47:9</p>	<p>bears [1] 15:19 becomes [1] 7:18 behalf [11] 1:18,20,24 2:5,8,11,16 3:8 26:6 47:16 61:5 believe [4] 5:5 22:20 23:8 29:3 below [7] 21:7 22:19,21 42:17,20,24 43:7 benefit [1] 38:18 Berman [1] 7:16 best [2] 47:2 58:1 better [5] 20:22 30:20 39:4 43:11 46:8 between [6] 4:5 12:17 15:1,12 44:6 63:1 beyond [3] 21:13 25:21 52:21 big [4] 28:14 40:6 45:4 52:25 bit [2] 33:12 37:16 Black's [1] 24:13 bolster [2] 29:24 53:22 bolstered [1] 36:17 both [7] 7:17 14:3,4 16:20 55:4,7 61:15 bothering [1] 33:9 Bottom [1] 57:16 bound [1] 43:5 break [1] 39:1 BREYER [19] 16:19 17:7,11,21,25 18:3,7,17 21:3,23 22:3 27:15,18 28:8,12 33:7 42:8 43:1 59:13 Breyer's [2] 37:16 53:13 brief [4] 7:11 25:12 30:2 63:13 briefing [1] 23:1 briefs [2] 19:2 64:21 bring [1] 34:4 broad [5] 4:7 11:9 15:6 18:18 26:12 Broadcasting [1] 23:24 broaden [2] 39:9 41:24 broadened [2] 56:15 63:23 broadening [2] 20:10 63:24 broadier [3] 9:1 12:25 16:16 broadest [1] 25:2 broadly [3] 11:13 41:19 52:14</p> <hr/> <p>C</p> <p>called [2] 8:9 23:24 calling [1] 46:3 came [4] 1:13 20:18 22:25 48:18 cannot [2] 17:9 64:10 canonical [1] 49:12 Care [1] 57:6 carrot [1] 14:12 carving [1] 47:10 Case [31] 3:4,15 4:15 7:14 14:23 22:8 23:23,24 30:6 32:2,21,22,24 41:2 49:11,12,13,16 51:7 55:3 56:5,6 57:6,7 59:11 61:23,24 63:3,4 65:1,2 cases [22] 6:22 7:7,19 14:15 15:18 16:14,24 17:23 25:6 28:9 30:4 50:15 51:18,24 52:20 59:16 61:8,10,11,11,20,20 category [5] 4:18 7:17 16:1 25:21 36:20</p>
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Official - Subject to Final Review

<p>caught ^[1] 18:7</p> <p>causes ^[1] 48:10</p> <p>certain ^[4] 3:19 29:19,20 35:8</p> <p>certainly ^[8] 7:16 20:5 22:10 41:1 57:14,21 60:14 64:4</p> <p>cetera ^[2] 34:7,7</p> <p>challenge ^[1] 59:3</p> <p>Chamber ^[1] 37:12</p> <p>chance ^[3] 34:25 35:1 44:15</p> <p>change ^[3] 39:9 41:24 54:9</p> <p>changed ^[1] 54:10</p> <p>chapter ^[1] 32:1</p> <p>Chevron ^[10] 22:8,13,15,23 23:15 44:3 55:9 57:17,21,23</p> <p>CHIEF ^[6] 3:3,9 26:2,7 32:20 47:12,18 52:9,24 53:12 60:12,14,25 61:1,7 64:25</p> <p>chipping ^[1] 59:17</p> <p>CHRISTOPHER ^[3] 1:22 2:10 47:15</p> <p>Circuit ^[8] 4:13,15 23:1 42:24 54:19 57:24 64:9,22</p> <p>Circuit's ^[2] 7:15 23:23</p> <p>circuits ^[1] 38:11</p> <p>circumstance ^[3] 9:5,11,15</p> <p>circumstances ^[4] 7:4 17:1,18 64:17</p> <p>cite ^[3] 30:2 51:18 58:4</p> <p>cited ^[3] 25:17 49:11 61:10</p> <p>cites ^[3] 15:11 20:9 25:14</p> <p>claim ^[5] 22:22 23:13 45:5,25 50:11</p> <p>claims ^[1] 23:9</p> <p>clarity ^[1] 42:5</p> <p>class ^[3] 5:16 16:24 17:23</p> <p>classes ^[1] 10:7</p> <p>clause ^[19] 6:13,13,24 7:8 10:2,2,3, 5 13:14,17 16:3 25:2,10,19 26:12 28:5,23 48:7 52:8</p> <p>clauses ^[5] 6:14 8:23 11:6,14 25:3</p> <p>clear ^[8] 6:10 32:14 33:13 39:3 40:2,2 53:20 63:17</p> <p>clearer ^[4] 30:25 31:17,19,22</p> <p>clearly ^[2] 57:1,3</p> <p>closest ^[1] 56:9</p> <p>code ^[3] 35:16 46:2 48:14</p> <p>coexist ^[1] 13:3</p> <p>come ^[4] 7:23 21:10,25 50:15</p> <p>comes ^[2] 38:7 45:4</p> <p>comment ^[9] 37:14,20 38:3,16,19 40:1,8,18 54:13</p> <p>comments ^[10] 19:20,22 20:1,12 37:13 39:8,25 40:22 56:12,17</p> <p>Commerce ^[1] 37:12</p> <p>Commission ^[37] 8:7 18:13,16,17, 20 19:5,8,10,23 20:10,15,18 21:17 31:4 38:6,8 39:13,13,21 40:13 41:21,25 42:1,11,14 44:23,25 45:2,8 48:7 50:11 56:11,19 60:9,18 63:19,20</p> <p>Committee ^[3] 17:1,2,17</p> <p>company ^[1] 60:17</p> <p>comparison ^[1] 15:15</p> <p>compensation ^[2] 49:13,16</p>	<p>completely ^[3] 12:7,8 26:21</p> <p>compliance ^[3] 37:18 44:7,13</p> <p>concede ^[2] 24:7,10</p> <p>concededly ^[2] 15:18 25:2</p> <p>concedes ^[1] 51:23</p> <p>conceding ^[1] 59:14</p> <p>concerned ^[1] 27:2</p> <p>concerning ^[5] 18:19 23:2 41:21 61:9 63:14</p> <p>concession ^[2] 43:6 59:25</p> <p>conclusion ^[1] 7:10</p> <p>conduct ^[11] 3:20 14:25 29:14,16, 20 35:16 46:3 48:12 50:7,10,12</p> <p>confidential ^[1] 6:21</p> <p>confidentiality ^[1] 29:4</p> <p>Congress ^[45] 5:11 8:25 9:12,22 10:4 11:8,13 12:21 13:2,6,17,21 14:10 15:4 16:14 24:17,23,24 25:1 27:2,12 28:5 29:15,23 30:13 31:1,5,12 32:7 33:14 34:22 35:18 36:2,12,14 37:4 41:7 45:2,10 46:19, 21 47:4 49:6 53:21 62:18</p> <p>Congress's ^[1] 4:3</p> <p>consciously ^[1] 24:24</p> <p>considered ^[2] 9:21 40:23</p> <p>considering ^[2] 20:10 64:13</p> <p>consistent ^[5] 4:1 5:5 23:13 30:14 46:12</p> <p>consulted ^[1] 56:6</p> <p>contains ^[1] 20:24</p> <p>contemplating ^[1] 19:16</p> <p>contention ^[1] 32:14</p> <p>context ^[2] 32:15 47:24</p> <p>contractors ^[1] 9:2</p> <p>contrary ^[7] 7:13 19:1 24:16 25:8 31:16 37:9 63:10</p> <p>converted ^[1] 20:19</p> <p>cooperation ^[1] 11:19</p> <p>core ^[4] 16:12 17:8 22:6 45:15</p> <p>corporate ^[4] 35:15 40:4 46:2,5</p> <p>corporation ^[3] 34:25 40:12 46:10</p> <p>corporation's ^[1] 35:16</p> <p>corporations ^[2] 44:11,14</p> <p>correct ^[3] 8:21 52:4 59:8</p> <p>correction ^[1] 55:2</p> <p>couldn't ^[1] 56:25</p> <p>counsel ^[7] 26:3 32:20 40:4 47:13 53:9 61:2 65:1</p> <p>count ^[1] 18:9</p> <p>counterpart ^[1] 44:16</p> <p>counts ^[1] 42:10</p> <p>couple ^[1] 9:1</p> <p>course ^[1] 4:22</p> <p>COURT ^[32] 1:1,14 3:10 4:12 7:4 19:12 22:7,12,14 25:24 26:8 31:8 42:4 47:1,11,19 48:4 49:21 51:4,7, 17 55:2,8 56:4,5 58:12 61:17 62:6, 14 63:5,8 64:5</p> <p>Court's ^[4] 22:24 57:7,13 63:3</p> <p>courts ^[4] 54:19 58:2,20 64:6</p> <p>cover ^[3] 10:17 15:18 51:24</p> <p>covered ^[11] 6:24 7:7 9:5,9 11:18, 20,22 16:2 37:1 40:3,7</p> <p>create ^[3] 14:11 26:18 46:19</p>	<p>critical ^[6] 9:6 11:24 28:22 46:25 47:3,8</p> <p>curiae ^[3] 1:25 2:12 47:17</p> <p>cut ^[3] 33:25 34:1 52:13</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C ^[5] 1:10,18,23 23:23 64:9</p> <p>dah-dah-dah ^[1] 21:13</p> <p>Dallas ^[1] 1:20</p> <p>DANIEL ^[3] 1:20 2:7 26:5</p> <p>days ^[2] 60:19,24</p> <p>deal ^[2] 28:14 44:5</p> <p>decade ^[2] 26:20,20</p> <p>decision ^[7] 7:15 9:11 22:25 23:23 24:24 50:4 54:17</p> <p>decision-making ^[1] 38:20</p> <p>decouple ^[1] 48:9</p> <p>defective ^[2] 4:12 22:16</p> <p>defer ^[6] 38:2,21 54:21 58:20 59:4, 7</p> <p>deference ^[14] 4:11 22:15,23 23:15,18 38:11 39:5 43:24 54:15 55:19 57:18,21,24 64:16</p> <p>deferred ^[1] 58:9</p> <p>deferring ^[1] 59:19</p> <p>deficiency ^[3] 55:14,15 63:11</p> <p>define ^[2] 16:22 19:3</p> <p>defined ^[4] 31:3 32:22 49:15 52:21</p> <p>defining ^[1] 17:15</p> <p>definition ^[29] 3:16,22 4:20 5:1 18:11 19:14 20:20 22:9 24:21 31:25 32:12 39:9 41:5 44:22 47:20 48:2, 6 49:22 50:22 51:11,12 52:16 61:13,14,16,18,25 62:16,19</p> <p>definitional ^[4] 48:21,25 50:21 51:1</p> <p>definitions ^[5] 20:25 31:2,20 49:12 61:9</p> <p>Department ^[1] 1:23</p> <p>designed ^[1] 29:14</p> <p>desirable ^[1] 20:6</p> <p>destroy ^[1] 62:8</p> <p>detect ^[1] 47:3</p> <p>deter ^[3] 29:14 50:1,5</p> <p>deterred ^[1] 36:4</p> <p>detering ^[1] 29:16</p> <p>Dictionary ^[1] 24:13</p> <p>differences ^[1] 27:19</p> <p>different ^[6] 12:8 14:8 24:20 50:12 55:20 62:15</p> <p>difficulty ^[1] 32:21</p> <p>DIGITAL ^[2] 1:3 3:4</p> <p>diminish ^[1] 13:22</p> <p>direct ^[1] 49:10</p> <p>direction ^[1] 25:7</p> <p>directly ^[3] 27:23 33:24 46:9</p> <p>disability ^[3] 62:1,3,4</p> <p>disabled ^[1] 50:2</p> <p>disagree ^[1] 40:20</p> <p>disaster ^[1] 34:7</p> <p>disastrous ^[1] 33:3</p> <p>disclose ^[1] 34:21</p> <p>disclosing ^[1] 36:5</p>	<p>disclosure ^[1] 15:19</p> <p>disclosures ^[4] 15:9 16:2,3 37:7</p> <p>discrimination ^[1] 8:4</p> <p>discussed ^[3] 48:4 53:3 59:12</p> <p>disjunction ^[1] 12:1</p> <p>dispense ^[1] 17:9</p> <p>dispensed ^[1] 15:24</p> <p>dispensing ^[1] 19:17</p> <p>distinct ^[1] 19:6</p> <p>distinguished ^[1] 58:14</p> <p>District ^[1] 58:3</p> <p>divorce ^[1] 36:18</p> <p>dixit ^[3] 38:9 43:22 54:17</p> <p>Dodd ^[1] 16:15</p> <p>Dodd-Frank ^[19] 3:11 4:6,16 6:5 13:4,5 16:15 30:7,8 36:10,17,20 37:15 40:11 46:13,14,18,25 53:22</p> <p>Dodd-Frank's ^[1] 26:13</p> <p>doing ^[8] 6:3 13:21 24:23 25:20 34:9 43:21,22 56:4</p> <p>done ^[3] 18:20 31:14 58:2</p> <p>double ^[1] 54:11</p> <p>down ^[2] 22:25 39:2</p> <p>drastic ^[1] 48:5</p> <p>Duke ^[1] 32:1</p> <p>during ^[1] 37:13</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>e-mails ^[1] 25:16</p> <p>each ^[2] 36:18 46:15</p> <p>earlier ^[5] 5:9 12:10 14:8 21:15 26:21</p> <p>easy ^[1] 45:9</p> <p>effect ^[7] 9:13 11:6 19:20 20:12 61:18 62:1,20</p> <p>effectively ^[2] 13:24 42:4</p> <p>efficiently ^[1] 35:1</p> <p>either ^[5] 8:16 9:9 18:23 24:20 61:12</p> <p>elaborate ^[1] 37:13</p> <p>elaboration ^[1] 33:10</p> <p>element ^[1] 50:10</p> <p>elephant ^[2] 13:16 26:9</p> <p>eligibility ^[1] 64:1</p> <p>eligible ^[1] 45:9</p> <p>eliminate ^[1] 34:11</p> <p>eliminated ^[1] 34:3</p> <p>embrace ^[1] 43:12</p> <p>employee ^[25] 6:1,15 7:22 8:4,8,9, 12,15,18 9:15,17,19,20,23 10:17, 18 14:15,16,23 15:18 24:25 35:6 49:20 50:13 62:4</p> <p>employee's ^[1] 62:2</p> <p>employees ^[13] 5:11,23 7:17 9:2, 12 14:3 15:7 35:8,11,13 47:6 50:3 60:8</p> <p>employer ^[7] 14:18 28:21 29:2,7 49:19,25 62:1</p> <p>employers ^[7] 29:18,18 48:11 50:2,5,7 60:8</p> <p>Encino ^[4] 22:14,25 23:14 58:11</p> <p>end ^[4] 17:3,19 41:10 44:22</p> <p>endorsed ^[2] 42:4,7</p> <p>Energy ^[1] 32:2</p>
---	--	---	---

Official - Subject to Final Review

<p>enforcement ^[1] 45:4 engage ^[1] 44:19 engaged ^[1] 29:20 engaging ^[1] 3:19 English ^[1] 42:15 enough ^[5] 10:20 40:23 49:15 57:10 63:8 Enron ^[1] 36:3 ensures ^[1] 45:8 entire ^[6] 28:4 30:13,18 34:18 53:8,14 entirely ^[7] 4:1 14:8,25 15:3 28:22 29:21 46:10 entirety ^[2] 3:23 62:2 entitled ^[2] 4:10 23:18 entitlement ^[1] 45:6 entity ^[1] 6:19 equipped ^[1] 47:2 especially ^[1] 46:22 essentially ^[2] 13:18 23:25 established ^[4] 18:15 21:17 44:24 45:7 et ^[2] 34:7,7 evaluating ^[1] 58:5 even ^[16] 4:8 12:11 23:16 25:18 26:24,25 27:10 32:2 34:12 37:4,9 39:5 45:13 53:16 57:19 62:3 everybody ^[1] 34:3 everyone ^[3] 30:11,19 45:4 everything ^[1] 58:24 evidence ^[2] 20:22 30:1 eviscerate ^[1] 53:5 exact ^[5] 33:8 39:25 42:6 45:13 63:16 exactly ^[7] 26:17 27:11 29:5 33:8 40:22 45:9 46:4 example ^[3] 32:6 51:3 61:23 examples ^[1] 36:3 except ^[1] 12:6 exceptional ^[1] 7:4 Exchange ^[1] 46:16 exclusively ^[1] 55:8 excuse ^[1] 50:5 exhaust ^[3] 28:1,13 33:25 exhaustion ^[2] 27:21 33:19 expand ^[1] 36:23 expanded ^[1] 13:7 expanding ^[2] 36:20,21 explain ^[2] 12:14 23:6 explanation ^[2] 40:24 58:15 extending ^[1] 25:20 extent ^[7] 13:7 15:10 20:8 23:22 62:10,22 63:20 extra ^[1] 14:9</p>	<p>Far ^[1] 3:24 favorite ^[1] 61:23 fax ^[1] 27:10 faxed ^[1] 45:13 federal ^[2] 30:12 39:7 few ^[3] 7:6,19 38:16 filed ^[1] 14:7 filing ^[2] 29:3,4 filled ^[1] 45:12 final ^[3] 20:19,24 64:6 find ^[4] 14:19 42:19 57:22 59:22 finger ^[2] 21:5 63:16 finish ^[1] 24:5 fire ^[1] 29:7 fired ^[4] 8:4 12:3,11 14:4 first ^[18] 6:24 8:22 10:19 22:6 30:20 33:10 34:10,24 37:8,23 39:2 43:2,25 44:14 45:17 53:20 56:5 61:8 fit ^[1] 47:21 five ^[1] 15:12 fix ^[1] 44:15 FMR ^[2] 47:1 63:4 focused ^[2] 29:16 46:21 follow ^[5] 33:15 43:18 51:12 54:1,1 following ^[2] 31:2,20 Footnote ^[1] 25:14 forgot ^[1] 48:21 form ^[7] 14:12,14 18:24 27:11 29:12 45:12,13 found ^[2] 21:20 42:17 framed ^[1] 29:17 framework ^[1] 30:18 fraud ^[1] 47:3 free-standing ^[1] 23:12 frequently ^[1] 30:10 friend ^[4] 27:1 55:19 56:11 60:9 friend's ^[2] 33:6 46:24 Fruit ^[4] 49:11 51:3,19 61:24 fulfilling ^[1] 36:4 further ^[2] 25:24 47:11</p>	<p>5 45:18 51:9,15 give ^[10] 12:10 31:18 32:6 34:24 35:1 44:14 60:11,15,21 61:17 given ^[5] 10:11 23:15 31:14 62:1,20 gives ^[1] 51:11 Giving ^[2] 47:23 54:23 goal ^[1] 46:6 GORSUCH ^[43] 30:21,25 31:11,19,22 32:3,19 37:19 38:24 39:12,17 40:15 41:11,17,25 43:13,16 44:2 51:21 52:5 53:9,19,25 54:4,7,12 55:4,7,11,17,23,25 56:18,23 57:2,5 58:6,16,25 59:5,6,9 63:15 Gorsuch's ^[1] 43:3 got ^[3] 35:24 37:21,22 government ^[20] 7:11 9:25 13:12 15:10,17 20:9 23:4,10 24:15 25:12 27:3 34:24 35:5 50:16 51:23,25 59:14 60:1 61:11 62:11 government's ^[5] 8:18 10:24 15:16 16:9 20:23 governmental ^[1] 6:18 greater ^[1] 27:1 ground ^[1] 43:9 group ^[1] 40:6 groups ^[4] 37:3 46:25 47:1,10 grow ^[1] 64:10 guess ^[2] 14:2 43:6</p>	<p>hypotheticals ^[2] 16:8 63:6</p> <hr/> <p>idiomatic ^[1] 32:11 ignore ^[1] 49:8 iii ^[5] 28:5,24 48:7 51:24 52:8 immediate ^[1] 6:2 immediately ^[1] 27:7 implementation ^[1] 56:13 implications ^[1] 59:16 implicitly ^[1] 16:1 implied ^[1] 40:5 import ^[1] 53:8 important ^[5] 33:1 41:6 45:1 53:4 56:20 importantly ^[1] 34:16 improper ^[1] 64:19 inadequate ^[1] 58:15 INC ^[1] 1:3 incentive ^[4] 15:7 33:2 46:19 53:5 incentives ^[4] 3:11 5:17 14:11,13 incentivize ^[1] 36:12 incentivized ^[1] 35:22 incidental ^[3] 15:14 62:23 63:5 include ^[4] 16:24 36:22 42:10,10 included ^[3] 32:8 36:22 49:14 includes ^[2] 4:23 17:16 including ^[3] 3:24 31:3 42:13 incongruities ^[2] 51:4 62:7 indeed ^[2] 13:25 18:20 indicates ^[1] 20:14 indication ^[3] 19:15 20:2 25:18 indirect ^[3] 26:10 28:1 29:22 indisputably ^[1] 4:22 individual ^[4] 7:20 9:5 24:8 25:18 individuals ^[9] 3:13 5:1,2,13 6:7,8 7:12 11:10 25:22 ineffective ^[3] 29:25 34:13 47:5 inequity ^[1] 64:15 information ^[13] 16:25 18:13,19 26:24 27:3,12 34:23 36:5 41:20 42:11,14 45:14 56:19 initial ^[2] 39:16,16 initiating ^[1] 8:5 injury ^[5] 49:14,16,20,22,23 instance ^[1] 56:5 instead ^[1] 6:24 insurmountable ^[1] 32:23 intended ^[1] 20:15 intently ^[1] 46:21 interaction ^[2] 44:6,10 interest ^[2] 37:10 60:8 interested ^[2] 20:2 64:12 interesting ^[1] 42:20 internal ^[27] 6:17,25 11:21 12:17 15:13 29:8 30:16,19 33:3,5 37:2,6,17 40:3,7,10 44:6,7,12,19 46:21,22 48:8 53:6 60:5,6 63:1 internally ^[17] 4:8 5:23 6:1 7:13,23 10:19 12:3 14:4,25 25:23 27:5 34:21 44:14,17 46:20 47:7 60:16 interpret ^[1] 54:24 interpretation ^[19] 4:1,10,13 6:11 7:2 8:21 11:5 12:16 15:14,16 16:</p>
<p>F</p> <hr/> <p>fact ^[15] 5:9,9 6:16 7:19 9:13,16,20 10:5,16 19:25 34:1 51:18 56:16 59:17 63:6 factor ^[1] 28:22 fails ^[1] 58:18 failure ^[1] 58:13 fair ^[3] 36:18 54:16 58:8 fairly ^[2] 40:16,20</p>	<p>G</p> <hr/> <p>game ^[1] 48:20 gap ^[1] 15:1 gardeners ^[1] 63:7 gave ^[1] 38:11 Gem ^[1] 23:24 General ^[2] 1:23 23:8 General's ^[1] 24:17 generally ^[6] 12:19 13:1,8,10 30:3 40:23 generate ^[1] 37:22 generous ^[1] 35:19 gets ^[2] 32:2 48:19 getting ^[4] 27:3 34:23 47:5 57:9 GEYSER ^[39] 1:20 2:7 26:4,5,7 27:17 28:3,11,15 29:5,10 30:8,24 31:8,13,21,24 32:5,25 34:10 35:11 36:2,10,14,23 38:23 39:1,15,18 40:19 41:15,23 42:2,22 43:8 44:1,4 45:21 64:5 GINSBURG ^[7] 5:22,25 19:19 30:</p>	<p>H</p> <hr/> <p>h)(1)(a) ^[1] 8:23 h)(1)(a)(ii) ^[1] 8:3 hac ^[1] 1:24 half ^[1] 26:20 hand-and-glove ^[1] 5:19 happen ^[1] 30:10 happened ^[1] 14:18 happy ^[1] 57:21 harmonize ^[1] 47:24 hash ^[1] 53:14 head ^[1] 38:14 hear ^[1] 3:3 heavy ^[1] 46:19 heed ^[1] 7:5 height ^[1] 64:15 heightened ^[1] 12:22 Help ^[1] 38:22 helpful ^[1] 58:4 highly ^[5] 28:3 29:12,22,25 46:18 himself ^[1] 30:6 hinged ^[1] 30:19 history ^[7] 4:2 5:6,8 25:7,9,13 32:16 hold ^[1] 38:25 holding ^[1] 57:25 hole ^[2] 13:16 26:9 Honor ^[13] 27:17 28:4 29:10 30:9 31:8 33:1 34:11 40:19 41:23 42:2,22 43:8 46:2 housekeepers ^[1] 63:7 however ^[1] 52:6 hypothetical ^[2] 15:11 62:25 hypothetically ^[1] 58:17</p>	

Official - Subject to Final Review

<p>10 20:23 38:12 62:14,24 63:9,10 64:14,18 interpreted ^[1] 55:5 invalid ^[2] 23:17 64:20 invalidate ^[1] 63:9 invalidity ^[2] 24:1 55:18 investigation ^[2] 8:6,11 inviting ^[1] 20:12 involved ^[2] 33:25 50:16 involving ^[2] 16:3 63:7 ipse ^[1] 54:17 ipsi ^[2] 38:9 43:22 Island ^[2] 41:2 57:6 isn't ^[5] 10:16,19 11:25 27:13,16 isolation ^[1] 31:9 issue ^[10] 15:22 18:18 20:4 26:21 38:4,17,19 39:25 44:4 63:14 issued ^[1] 19:13 itself ^[2] 15:21 20:24</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>job ^[3] 49:17,23 62:5 Judge ^[1] 64:8 judgment ^[5] 4:14 8:25 9:21 15:5 64:22 judicial ^[2] 8:6 54:23 Justice ^[115] 1:23 3:3,10 5:22,25 8:1,14,19 9:8 10:8,23 11:1,25 12:13 14:1 16:13,19 17:7,11,21,25 18:3,7,17 19:19 21:3,23,25 22:3 24:5 26:2,8,16 27:15,18 28:8,12 29:1,6 30:5,21,25 31:11,19,22 32:3,19,20 33:7 35:6,17 36:8,11,19 37:16,19 38:24 39:12,17 40:15 41:11,17,25 42:8 43:1,3,13,16 44:2 45:18 47:12,18 48:15 49:9 50:14 51:9,15,21 52:4,9,25 53:9,12,19,25 54:4,7,12 55:4,7,11,17,23,25 56:18,23 57:2,5,16 58:6,16,25 59:5,6,9,13 60:10,13,14,21,25 61:1,7 63:15 64:25 Justice's ^[1] 53:12</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>KAGAN ^[6] 11:25 12:13 14:1 16:13 48:15 49:9 Kagan's ^[1] 26:16 KANNON ^[5] 1:18 2:4,15 3:7 61:4 Keep ^[1] 53:7 keeping ^[1] 50:1 key ^[1] 44:4 kind ^[4] 32:17 48:13 49:6 56:20 knocks ^[1] 9:20 knowledgeable ^[1] 29:2</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack ^[2] 12:16 42:5 language ^[17] 7:6 18:11 19:3 20:9 30:22 31:9,24 33:13,15 37:22 39:14,15 41:15 62:7,15,17 63:16 large ^[1] 54:22 largely ^[1] 34:13 last ^[4] 6:14 10:4 13:13 63:3 late ^[1] 48:20 later ^[2] 26:23 28:18 Laughter ^[1] 60:3</p>	<p>law ^[15] 3:13 5:3 8:8 9:16 11:11,16 16:3 21:3,16 24:13 25:14 30:12 35:7 54:25 58:20 laws ^[1] 16:11 Lawson ^[4] 47:1 49:10 61:24 63:4 lawyer ^[2] 30:11 34:15 lawyers ^[5] 35:8,12,18 46:23 47:6 lays ^[1] 56:10 lead ^[3] 51:13 61:19 62:7 leading ^[2] 7:14 57:7 least ^[1] 17:13 leave ^[1] 46:25 leeway ^[1] 19:8 left ^[1] 52:8 legal ^[2] 35:14 37:7 legally ^[2] 35:22 36:13 legislation ^[4] 26:15 30:16 31:17 45:16 legislative ^[4] 25:7,9,13 54:22 less ^[2] 33:1 62:21 level ^[1] 49:4 liability ^[4] 48:9 49:19,25 50:6 liable ^[2] 48:11 62:2 life ^[1] 26:22 lifetime ^[1] 59:25 likely ^[3] 17:3,19,23 limit ^[3] 21:18 26:11 45:11 limitations ^[9] 23:9,10,21 27:20,25 30:9 33:20 45:24 54:9 limited ^[3] 10:6 56:15 63:22 limiting ^[2] 36:21 63:23 line ^[2] 38:10 57:16 litigation ^[1] 45:16 little ^[5] 33:10,12 37:16 52:15 56:20 logical ^[9] 42:3 43:14,16 57:8,10,12 58:13,17 64:7 Long ^[2] 41:2 57:6 longer ^[1] 27:24 look ^[12] 22:4 24:12 25:15,16 48:17 51:3,6 52:11 56:7 57:1,4 61:10 looking ^[1] 41:11 lot ^[5] 31:17 58:22 59:11,18 63:3 lower ^[2] 58:2 64:5 luck ^[2] 14:5 42:21</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made ^[11] 8:25 9:22 12:7,9 15:5 21:7,8 22:21 23:3 24:24 30:14 major ^[2] 26:14 30:15 manner ^[10] 16:23,23 17:15,16 18:15 19:3 44:24 45:7 59:20,21 manners ^[1] 39:21 many ^[4] 16:7,7 40:17 61:20 matter ^[2] 1:13 14:8 mean ^[8] 18:3 34:10 42:15 43:1 51:23 52:10,15 59:18 meaning ^[10] 11:3 22:1 24:4,10 32:15 47:23 48:22 52:7 53:15,15 meaningful ^[1] 11:6 means ^[2] 28:13 32:4 meant ^[1] 49:6 mechanisms ^[1] 44:7 meet ^[3] 5:1 58:13,18</p>	<p>meeting ^[1] 27:9 mentioned ^[1] 22:17 mere ^[2] 19:25 63:6 merely ^[4] 9:17 19:14 25:22 51:13 merits ^[2] 55:22 59:1 mess ^[2] 52:22,25 metaphor ^[1] 13:13 MICHEL ^[36] 1:22 2:10 47:14,15,18 48:15 49:9 51:2,15 52:3,24 53:18 54:3,6,8 55:1,5,10,12,21,24 56:1,21,24 57:4,19 58:10,21 59:2,8,10 60:2,4,12,15,23 Michel's ^[1] 61:23 might ^[6] 12:7,9 15:4 17:21 19:23 53:10 mind ^[2] 41:7 53:7 minimum ^[1] 13:21 minute ^[2] 10:4 34:9 minutes ^[2] 9:1 61:3 misconduct ^[3] 24:9,11 46:3 missed ^[2] 30:9 45:23 modern ^[4] 26:14 30:15 31:16 33:4 moment ^[1] 37:21 months ^[1] 54:10 moreover ^[1] 48:11 most ^[5] 5:8 23:18 38:17 48:5 61:11 mostly ^[1] 33:23 Motorcars ^[3] 22:14,25 23:14 mouse ^[2] 13:16 26:9 move ^[2] 37:24 52:20 much ^[10] 16:16,16 30:25 31:22 32:23 33:11 43:24 51:25 54:14 57:17 must ^[2] 5:23 8:21 muster ^[2] 25:12 54:18</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>nakedly ^[1] 20:22 name ^[1] 62:9 namely ^[1] 4:19 nannies ^[1] 63:7 narrow ^[2] 16:1 52:7 narrower ^[3] 5:12 9:3,12 natural ^[4] 10:11,13,16 46:12 naturally ^[1] 24:8 Nebraska ^[1] 58:3 necessarily ^[1] 59:24 necessary ^[2] 22:20 44:15 need ^[7] 33:25 34:1 39:5 44:12,13 45:10 51:1 needed ^[3] 26:1 36:16 45:2 never ^[1] 58:12 next ^[1] 3:4 nexus ^[2] 12:17 63:1 Ninth ^[6] 4:13,14 23:1 42:24 57:24 64:22 nonetheless ^[2] 17:22 54:20 normally ^[2] 43:24 54:18 notably ^[1] 37:1 nothing ^[7] 16:10 17:2 20:7 41:8 59:21 64:10,11 notice ^[23] 19:15 20:3,7,13,17 37:14,20 38:3,4,15,19 40:17,21 41:12 42:9,12 43:19 54:13,16 56:2 58:8,19 64:13 notice-and-comment ^[1] 58:7 November ^[1] 1:11 nugatory ^[1] 10:21 number ^[6] 14:16 20:1 27:10 39:2 45:13 58:1</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objective ^[2] 4:4 45:15 objectives ^[1] 5:6 obligated ^[4] 35:7,9,23 36:13 obligation ^[4] 35:13,14,15,21 obtain ^[1] 27:13 obvious ^[1] 62:7 occasionally ^[1] 28:17 occur ^[1] 45:22 occurred ^[1] 62:4 odd ^[4] 12:1 46:18 49:5 62:13 often ^[6] 6:21 24:19 27:6 35:14 49:11 64:6 okay ^[1] 58:18 on-line ^[1] 18:23 Once ^[1] 11:15 one ^[21] 7:3 14:5,6 16:8 19:2 20:19,25 21:9 25:5,7 32:11 34:9 38:10 46:8 48:5,13 50:13 52:17 53:4 62:24 63:6 one-line ^[1] 43:23 ongoing ^[1] 23:1 only ^[8] 4:18,25 6:6 8:17 30:8 35:8 60:21 61:18 opening ^[1] 63:12 operating ^[1] 63:18 opinion ^[3] 38:9 50:17 58:3 opponent ^[1] 31:7 opportunity ^[2] 38:16 54:24 opposite ^[1] 43:21 oral ^[7] 1:13 2:3,6,9 3:7 26:5 47:15 ordinary ^[9] 11:3 22:1 23:11 24:3,10 32:11 33:16 34:23 47:23 ordinary-language ^[1] 48:23 organizations ^[1] 36:25 original ^[1] 41:4 OSHA ^[1] 34:16 other ^[24] 6:25 7:1,15,22 9:14 11:6,21 14:6 18:1 21:1 22:18 25:13 28:20 35:13 36:18 47:6 50:15 55:8,8 56:5 59:16 62:9 63:24 64:21 others ^[3] 17:2 35:9 59:20 otherwise ^[1] 26:12 ought ^[1] 62:20 out ^[28] 9:20 14:19 17:12 19:22 20:18 22:18 23:5 27:8 33:25 34:1 36:15 37:5 38:7,22 40:8 42:21 45:4,12 47:3,10 50:8 51:1 55:13,19 56:3,10 64:10,21 outgrowth ^[8] 42:3 43:14,17 57:8,11 58:14,18 64:7 outset ^[1] 5:4 over ^[4] 15:8 33:3 40:9 49:3 overarching ^[1] 4:3 overbreadth ^[5] 15:14,15 62:23</p>
--	--	---

Official - Subject to Final Review

<p>63:5,11 owe ^[1] 54:15 own ^[1] 55:15</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p.m. ^[1] 65:2 PAGE ^[3] 2:3 39:7 56:10 pales ^[1] 15:15 paradigmatic ^[1] 25:6 Paragraph ^[2] 41:13,16 parenthetical ^[2] 32:8,18 parenthetically ^[1] 22:24 part ^[5] 42:2,2 45:6 46:14 60:1 partial ^[1] 62:3 partially ^[1] 10:21 particular ^[8] 4:18 6:12 8:17 13:14 15:11 18:23 50:20 64:14 particularly ^[2] 58:4 63:9 parties ^[2] 20:3 64:12 party ^[1] 23:25 pass ^[1] 54:18 passed ^[2] 15:12 46:14 PAUL ^[1] 1:6 pay ^[3] 7:5 54:11,11 peculiar ^[1] 49:5 people ^[23] 28:17,18 29:19 30:20 34:14,20 36:4,21,22,24 37:5,5 38:15,17,17 40:1,17 42:12,13 44:13,16,19 60:16 percent ^[2] 7:12 30:4 perfect ^[1] 61:22 perhaps ^[5] 5:8 6:18 17:13 33:12 42:17 period ^[7] 23:9,10,22 30:9 37:20 38:3 45:24 person ^[4] 24:11 27:13 41:20 60:18 persons ^[2] 4:19 5:16 Petitioner ^[8] 1:4,19 2:5,16 3:8 53:7 56:8 61:5 Petitioner's ^[5] 26:18 34:17 37:3 53:1,4 phrase ^[2] 51:10 56:20 physically ^[1] 17:22 piece ^[1] 30:15 place ^[2] 43:25 45:17 plain ^[4] 3:22,25 30:22 37:21 plausible ^[1] 21:8 play ^[1] 20:4 please ^[5] 3:10 8:1 26:8 47:19 55:25 point ^[17] 8:20 9:7 26:17 30:13 32:6,12 33:2 41:3 42:8 53:12,13 55:13 56:3 59:14 60:5 63:13,14 pointed ^[2] 55:19 56:8 points ^[3] 22:18 25:6 61:6 policy ^[1] 37:14 pollutant ^[1] 32:1 posit ^[2] 16:8 62:24 position ^[1] 28:21 possibility ^[1] 19:17 possible ^[2] 15:4 48:19 possibly ^[1] 31:23 potential ^[1] 41:21</p>	<p>potentially ^[3] 10:18 14:22 20:4 power ^[2] 54:23,23 pre-1986 ^[1] 61:20 precedent ^[1] 57:13 precedes ^[1] 41:16 precisely ^[3] 6:20 12:20 24:22 preexisting ^[2] 49:20,22 prefer ^[2] 34:14,15 preliminary ^[1] 58:22 premise ^[3] 11:3 50:8 63:18 present ^[1] 43:9 presented ^[2] 3:15 59:3 preserve ^[1] 44:12 preserves ^[1] 4:5 preserving ^[2] 37:17 44:7 pretty ^[2] 40:6 52:25 prevent ^[2] 45:3 47:3 previous ^[2] 20:13 62:3 primarily ^[1] 55:3 primary ^[4] 7:1 9:24 11:7 57:25 principal ^[1] 57:20 principle ^[1] 60:20 pro ^[1] 1:24 probably ^[2] 49:5 57:7 problem ^[4] 35:2 37:22 44:15 46:11 procedural ^[4] 55:14,15 63:14,25 procedurally ^[3] 4:12 22:16 64:19 procedure ^[1] 27:21 procedures ^[2] 54:14 58:19 proceeding ^[5] 9:18 21:11 43:15 44:5 46:6 proceedings ^[1] 11:19 process ^[3] 37:14 38:14 54:23 produce ^[1] 31:15 produces ^[1] 50:23 program ^[2] 44:9 47:21 programs ^[1] 47:22 progression ^[1] 34:23 prohibition ^[1] 29:18 prohibits ^[1] 4:17 promoting ^[1] 4:4 promulgate ^[2] 16:22 56:12 properly ^[2] 58:24 59:2 proposal ^[1] 42:6 proposed ^[9] 19:13,16 20:7,14 25:19 56:2 63:17 64:8,12 proposing ^[1] 57:9 proposition ^[1] 10:16 protect ^[4] 8:17 28:16,18 30:16 protected ^[10] 8:12,15 10:7 26:23 27:13,16 33:17 37:6 40:11 44:17 protection ^[14] 6:4 11:10 12:4,6,11,22 13:7 14:6,9 15:6 16:17 28:23 35:24 37:8 protections ^[7] 3:12 4:7 36:15 39:20 41:19 47:4,9 protects ^[4] 3:18 5:16 8:3 48:8 prove ^[1] 32:6 proverbial ^[1] 13:15 provide ^[9] 5:17 6:4 11:9 15:5,6 18:13 40:25 42:14 58:8 provided ^[7] 16:17 18:20 19:15 36:12 38:4 41:2 45:14</p>	<p>provides ^[6] 3:11 4:7 12:22 41:20 56:18 62:19 providing ^[6] 14:12 17:14 24:21 30:3 38:15 42:11 provision ^[36] 3:24 4:17,23,25 5:10,12,16,18 6:6,12 8:16 11:9 12:2 13:6,15,19,23 14:13,15 20:12 27:14 32:17 34:4 41:9 44:8 48:14,19,22,25 49:18 50:9,21 51:1 52:19 63:22 64:3 provisions ^[14] 4:3,24 5:7,15,17,21 10:20 18:22 21:1 35:19 46:16 48:8 56:15 64:2 Public ^[2] 51:6,19 purported ^[3] 10:1 12:15 14:22 purpose ^[5] 32:16 50:1 51:5,8 62:8 purposes ^[3] 21:1,2 39:10 put ^[9] 21:4 33:11 35:25 38:13 40:16,20 42:12 63:15 64:12 puts ^[1] 28:21</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify ^[1] 39:19 question ^[13] 3:15,21 7:18 10:12 14:21 16:19 22:1,6 24:6 33:11 37:17 42:16 43:3 questions ^[3] 25:25 47:11 58:22 quibble ^[1] 18:25 quick ^[1] 61:6 quickly ^[1] 7:23 quite ^[8] 11:13 12:1 17:23 21:4 25:11 38:25 48:18 53:20</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raise ^[2] 14:21 21:16 raised ^[1] 21:15 raising ^[1] 23:12 Randolph ^[1] 64:9 rarely ^[1] 29:2 rather ^[1] 62:21 reach ^[3] 22:9 61:13,16 reached ^[1] 5:11 reaches ^[1] 6:15 read ^[5] 10:23 31:9,10 34:2 56:11 reading ^[17] 8:2,11,18 10:12,14,17 26:18 34:17 37:3 39:4 43:11 46:24 52:1 53:1,5 56:2 58:1 real ^[2] 5:19 48:16 realize ^[1] 29:25 realized ^[1] 45:2 really ^[19] 6:8 7:9,14 14:17 16:10,20 19:8 24:17 25:8,17 27:2 29:11 41:7 42:9 48:17 49:2,2 52:22 62:25 REALTY ^[2] 1:3 3:4 reason ^[9] 6:9,22 8:20 10:19 11:11 12:19 28:4 45:19 64:20 reasonable ^[3] 38:16 43:18,20 reasonably ^[1] 38:1 reasoned ^[2] 38:20 40:24 reasoning ^[1] 7:14 reasons ^[7] 11:14 22:17 54:17 59:12,19,23 64:21</p>	<p>REBUTTAL ^[4] 2:14 26:1 61:4,7 recognition ^[1] 16:7 recognize ^[1] 15:22 recognized ^[2] 47:2,4 recognizes ^[1] 7:11 record ^[2] 30:1 43:10 refer ^[1] 59:20 reference ^[1] 54:14 referred ^[1] 63:12 referring ^[1] 41:14 refers ^[1] 24:8 reflect ^[1] 60:19 refuse ^[1] 35:4 refused ^[1] 61:17 regard ^[8] 6:9 12:16 14:17 18:21 19:9 24:3 25:9 61:8 regarding ^[1] 56:13 regime ^[4] 12:20,21,25 62:13 regimes ^[1] 13:3 Register ^[1] 39:7 regulated ^[2] 23:25 37:10 regulation ^[6] 15:22 16:22 18:16,18 33:4 44:25 regulatory ^[3] 34:18 35:14 46:12 reject ^[1] 4:13 relates ^[1] 10:1 relation ^[1] 15:19 relatively ^[1] 7:6 relied ^[1] 55:8 relief ^[1] 30:3 relies ^[3] 9:25 23:7,23 relieved ^[1] 49:19 relying ^[1] 57:17 remedial ^[2] 34:12,18 remediate ^[2] 35:3 46:10 remedies ^[3] 28:6 29:24 53:22 remotely ^[1] 12:12 render ^[1] 13:24 rendered ^[2] 10:21 11:1 replace ^[3] 9:1,12 24:25 replaced ^[1] 9:22 replacement ^[1] 9:19 report ^[54] 4:8 5:23,24 6:7,17,18,20,23,25,25 7:12,13,17,24 10:19 11:10,17,21,22 12:3,8,17,18 14:4,7,19,24 15:13,13 16:25 17:17 18:23 25:23 26:23 27:9 28:9,17,18 31:4 35:7,10 37:8 38:6 44:14,17,23 45:20 46:20 47:7 60:16,22,24 63:1,2 reported ^[4] 3:13 5:3 11:15 24:11 reporters ^[1] 37:2 reporting ^[29] 4:4 7:21 14:11 15:25 16:23 17:10,15 19:4 20:16 24:14 27:22 29:8,9 33:3,5,23 38:8 39:21 40:10 44:6,19 46:22,22 48:6,9 50:11 53:6 60:6 63:18 reports ^[14] 6:1,16 7:22 8:10 9:16 14:24 24:8 26:19 27:5 28:11 39:13 46:9 60:17,18 requested ^[2] 39:25 40:21 require ^[3] 29:3 42:6 49:23 required ^[5] 10:18 27:6 38:9 62:12 63:19</p>
---	--	--	--

Official - Subject to Final Review

<p>requirement ^[6] 15:25 17:10 19:4, 7,18 20:15</p> <p>requirements ^[2] 63:25 64:1</p> <p>requires ^[2] 34:20 48:6</p> <p>reserve ^[1] 25:25</p> <p>resolve ^[2] 38:21 57:23</p> <p>resolved ^[2] 22:8 38:1</p> <p>respect ^[3] 38:5 51:16 62:20</p> <p>respectfully ^[1] 63:2</p> <p>Respondent ^[18] 1:7,21,25 2:8,13 9:25 13:11 15:16,17 20:8,23 23:4, 7,22 26:6 47:17 61:10 62:10</p> <p>Respondent's ^[1] 16:9</p> <p>response ^[1] 22:22</p> <p>responses ^[1] 53:19</p> <p>result ^[2] 48:1 51:14</p> <p>results ^[1] 61:19</p> <p>retain ^[1] 20:15</p> <p>retaliated ^[6] 6:16 11:17,18,20 14: 20 50:13</p> <p>retaliating ^[1] 50:2</p> <p>retaliation ^[19] 3:19 4:18 6:9,23 7: 23 11:12,15 14:16,18 15:7 47:22, 24 48:8,9,10,14 50:9,10 56:14</p> <p>reverse ^[1] 4:14</p> <p>reversed ^[1] 64:23</p> <p>rightly ^[1] 22:18</p> <p>rights ^[1] 30:12</p> <p>rise ^[1] 49:4</p> <p>ROBERTS ^[8] 3:3 26:2 32:20 47: 12 52:9 60:14 61:1 64:25</p> <p>role ^[1] 13:22</p> <p>roles ^[1] 36:5</p> <p>rule ^[21] 18:15,21 19:13,13 20:19, 24 21:9,17 23:15,16 38:7 39:16 44:24 56:9 59:19 60:19 63:17 64: 6,8,12,15</p> <p>rule-making ^[12] 4:11 19:10,16 20: 7,14 21:11 22:16 38:5 54:13 56:3 58:8 63:15</p> <p>rules ^[2] 29:3 56:12</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>same ^[5] 13:4 15:23 31:24 45:23 63:25</p> <p>Sarbanes-Oxley ^[34] 4:6 6:3 8:16 9:6 13:1,9,23 16:5,18 27:7,16 28: 6,6 29:24 30:3,7,10 32:10 33:18 34:3,12,19,20 35:25 36:9,16 37:1 45:24 46:13,15,20 47:5 53:11,23</p> <p>satisfy ^[2] 57:10,14</p> <p>satisfying ^[1] 39:20</p> <p>saw ^[2] 36:2,3</p> <p>saying ^[10] 12:5 27:22 42:25 43:21 44:22 52:16 56:24 57:25 58:13 59: 24</p> <p>says ^[11] 18:22 28:10 29:18 31:7 38:8 42:9 44:24 48:25 49:1,1 57:9</p> <p>SC ^[1] 10:8</p> <p>scheme ^[6] 33:4 34:12,18,19 38: 22 46:13</p> <p>SEC ^[68] 3:14 4:4 5:3,24 6:7,16,21, 23 7:12,21,25 8:9,10 9:17,18 10:9 11:11,16,19 12:8,17 14:7,11,19,24</p>	<p>15:13,21,24,25 16:21,23 17:6,9,10, 15,19,24 19:13,15 20:16 23:18 26: 19,24 27:4,9,11,23 28:10,17,19 29: 2,3,9 33:24,24 37:9,25 39:24 40:2 42:24 45:3,14,20 46:9 60:22,24 63:2,17</p> <p>SEC's ^[4] 4:10 17:3 64:18</p> <p>Second ^[8] 7:15 8:22 10:1,17 27:8 37:25 43:4 63:13</p> <p>section ^[14] 3:23 4:21,22 13:4,6, 10 16:4 23:7 31:2,20 44:22 45:11 49:2 56:14</p> <p>securities ^[11] 3:13 5:3 9:16 11: 10,16 12:23 15:20 16:3,11 30:18 33:4</p> <p>see ^[4] 21:4 33:11 36:19 47:9</p> <p>seeking ^[1] 56:11</p> <p>seem ^[2] 24:13 62:11</p> <p>seemed ^[2] 15:22 19:22</p> <p>seems ^[6] 33:14 37:21 38:13 43:5 52:11 54:21</p> <p>self-governance ^[1] 34:25</p> <p>self-regulatory ^[1] 36:25</p> <p>Senate ^[1] 9:22</p> <p>sense ^[10] 5:19 12:14,20 28:19 32: 11 33:14,22 44:9,18 48:23</p> <p>sentence ^[3] 20:13 41:10 43:23</p> <p>separate ^[2] 19:4 20:25</p> <p>separately ^[1] 43:4</p> <p>serious ^[2] 26:18 55:15</p> <p>set ^[2] 5:12 64:21</p> <p>setting ^[1] 37:11</p> <p>seven ^[1] 61:3</p> <p>several ^[1] 56:16</p> <p>severe ^[1] 49:3</p> <p>shall ^[4] 29:19 31:2,20 32:3</p> <p>SHANMUGAM ^[26] 1:18 2:4,15 3: 6,7,9 5:25 8:13,19 9:10 10:22,25 12:13 14:10 17:5,8,20,25 18:5,10 19:21 21:23 22:5 61:3,4,6</p> <p>shorter ^[3] 27:19,24 33:19</p> <p>shouldn't ^[1] 58:9</p> <p>show ^[1] 30:2</p> <p>shown ^[1] 34:8</p> <p>shows ^[2] 29:11 41:6</p> <p>side ^[4] 7:2,15,22 22:18</p> <p>sides ^[1] 16:20</p> <p>similar ^[1] 63:11</p> <p>simple ^[2] 22:7 45:8</p> <p>simply ^[3] 23:14 45:22 57:24</p> <p>single ^[2] 40:8 54:10</p> <p>singled ^[2] 36:15 37:5</p> <p>situation ^[2] 6:15 45:3</p> <p>situations ^[1] 36:24</p> <p>six ^[2] 54:9,10</p> <p>six-year ^[2] 23:9,21</p> <p>Skidmore ^[1] 23:18</p> <p>skip ^[1] 33:2</p> <p>small ^[2] 20:1 55:2</p> <p>snowstorm ^[1] 18:9</p> <p>Solicitor ^[2] 1:22 24:17</p> <p>somehow ^[7] 4:9 7:2 10:4 22:12 23:5,17 64:7</p> <p>someone ^[2] 27:5 29:7</p>	<p>SOMERS ^[4] 1:6 3:5 30:6 45:19</p> <p>sometime ^[1] 24:6</p> <p>sometimes ^[1] 32:4</p> <p>sorry ^[3] 29:1 33:8 41:12</p> <p>sort ^[3] 15:11 42:20 50:14</p> <p>SOTOMAYOR ^[17] 8:1,14,19 9:8 10:8,23 11:1 29:1,6 35:6,17 36:8, 11,19 57:16 60:10,21</p> <p>Sotomayor's ^[2] 21:25 24:5</p> <p>sought ^[1] 15:25</p> <p>sound ^[1] 61:22</p> <p>sources ^[1] 24:13</p> <p>specific ^[6] 12:21 16:14,16 29:14, 16 62:19</p> <p>specifically ^[5] 14:19 36:15 39:8, 24 40:21</p> <p>spend ^[1] 34:9</p> <p>spoke ^[1] 11:13</p> <p>spot ^[2] 38:17 47:2</p> <p>stakeholder's ^[1] 37:10</p> <p>stakeholders ^[1] 46:5</p> <p>standard ^[4] 50:25 51:17 62:15,16</p> <p>start ^[3] 26:16 55:1 59:17</p> <p>starting ^[1] 51:19</p> <p>statement ^[1] 56:9</p> <p>STATES ^[5] 1:1,14,24 2:11 47:16</p> <p>statue ^[1] 54:9</p> <p>statute ^[35] 3:18 4:9 8:24 9:20 10: 6 12:23 25:3,21 27:19,25 29:13 30:14 33:19,22 35:20 36:1,12 39: 4 47:10,25 48:18 49:14 50:19,21, 23 51:5,8,11,12 53:14 55:6 57:22 58:1,5 62:8</p> <p>statutes ^[2] 24:19 29:13</p> <p>statutorily-defined ^[1] 25:21</p> <p>statutory ^[25] 3:16,22 4:20 5:1 17: 9 18:10 19:6,14 20:19 22:9 47:19 48:1,6 49:12,21 50:1 61:9,12,14, 16,18,25 62:13,16,19</p> <p>step ^[6] 7:20 22:8,13 37:23,25 58: 12</p> <p>steps ^[2] 39:2,6</p> <p>stick ^[2] 14:14 52:21</p> <p>still ^[1] 41:12</p> <p>stock ^[1] 51:10</p> <p>strengthen ^[2] 28:5,16</p> <p>strengthens ^[2] 28:9,12</p> <p>stress ^[1] 52:7</p> <p>strikes ^[1] 32:22</p> <p>strong ^[1] 41:1</p> <p>strongly ^[1] 40:13</p> <p>structure ^[4] 4:2 5:6,14 32:16</p> <p>stuck ^[3] 30:22 41:13 54:16</p> <p>studies ^[1] 30:2</p> <p>subdivision ^[1] 8:3</p> <p>submission ^[7] 11:7 16:12 17:8 19:2 22:6,7 24:17</p> <p>submit ^[3] 18:17 62:12 63:2</p> <p>submitted ^[4] 37:13 40:9 65:1,3</p> <p>subsection ^[3] 3:17 8:23 18:12 26:11 29:17 32:7,13 51:24</p> <p>subsections ^[1] 13:9</p> <p>subsequent ^[2] 9:18 11:19</p> <p>subset ^[2] 16:14 51:24</p>	<p>substantially ^[1] 13:22</p> <p>substantively ^[1] 64:20</p> <p>suffer ^[1] 15:7</p> <p>suffers ^[3] 6:2 14:16 63:10</p> <p>sufficient ^[1] 40:25</p> <p>suggest ^[4] 19:23 24:14 42:24 62: 11</p> <p>suggested ^[4] 20:2 39:18 40:1,10</p> <p>suggesting ^[1] 21:9</p> <p>suggests ^[3] 20:9 27:1 44:11</p> <p>superfluous ^[1] 13:24</p> <p>supervisor's ^[1] 46:4</p> <p>support ^[1] 58:11</p> <p>supporting ^[3] 1:25 2:12 47:17</p> <p>Suppose ^[1] 32:7</p> <p>supposed ^[2] 21:21 38:21</p> <p>supposedly ^[1] 27:12</p> <p>SUPREME ^[3] 1:1,14 56:4</p> <p>surprise ^[1] 40:17</p> <p>Suwanee ^[3] 49:10 51:3,19</p> <p>Suwannee ^[1] 61:24</p> <p>swallow ^[1] 54:22</p> <p>sweeping ^[1] 26:12</p> <p>swiftly ^[1] 35:1</p> <p>systems ^[1] 37:18</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>tailor-made ^[1] 47:20</p> <p>talked ^[2] 51:4,4</p> <p>talks ^[1] 51:7</p> <p>tantamount ^[1] 32:17</p> <p>targeting ^[1] 16:15</p> <p>tellingly ^[1] 15:21</p> <p>term ^[18] 9:2,3,13,23 24:7,18,20,25, 25 25:4 32:9,10,22 47:23 49:14 50:20 52:21 61:21</p> <p>terminated ^[2] 27:8 36:7</p> <p>termination ^[1] 36:7</p> <p>terminology ^[1] 50:17</p> <p>terms ^[8] 3:22 4:16,21 10:6 22:9 29:17 61:12,15</p> <p>test ^[7] 42:3 43:14,17 57:8,15 58: 14,18</p> <p>testifies ^[1] 9:18</p> <p>testifying ^[1] 8:5</p> <p>Texas ^[1] 1:20</p> <p>text ^[3] 3:25 25:6 32:15</p> <p>themselves ^[1] 10:10</p> <p>theory ^[1] 14:2</p> <p>there'd ^[1] 53:14</p> <p>there's ^[17] 7:9 10:13 18:9 21:19 22:10 25:7,8,17 26:25 40:8 42:5 50:20 58:3,21 59:21 60:7 62:25</p> <p>therefore ^[2] 4:24 5:18</p> <p>they'll ^[2] 10:9 48:21</p> <p>they've ^[2] 10:10 35:24</p> <p>thinks ^[2] 30:20 46:8</p> <p>third ^[12] 6:13,13 7:7 10:2,3,18 13: 14,17 16:2 25:1,9,19</p> <p>though ^[7] 12:11 23:4 34:12 37:4 39:19 41:12 58:7</p> <p>threat ^[1] 36:7</p> <p>three ^[5] 11:5,14 19:21 25:3 39:25</p> <p>timing ^[2] 23:3 58:23</p>
---	---	---	---

Official - Subject to Final Review

<p>tiny ^[1] 52:15 title ^[1] 12:23 together ^[2] 38:25 46:15 topic ^[2] 12:9 40:22 totally ^[1] 34:6 touchstone ^[1] 37:15 tough ^[1] 14:5 tougher ^[1] 33:21 track ^[1] 45:9 tracked ^[1] 19:14 treat ^[1] 35:18 trend ^[2] 26:14 31:16 tried ^[1] 46:1 true ^[5] 23:6 26:9,17 55:21 64:4 TRUST ^[2] 1:3 3:5 try ^[3] 39:1 53:18 60:4 trying ^[6] 11:8 14:10 29:23 33:14 53:21 54:1 Tuesday ^[1] 1:11 turns ^[1] 33:5 two ^[11] 10:20 13:3 14:3 15:1 20:20,25 36:18 38:10 53:18 54:19 61:6 type ^[1] 24:1 types ^[1] 3:19 typical ^[1] 12:1</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S ^[1] 48:14 ultimately ^[2] 57:8 60:23 unable ^[1] 38:19 unadorned ^[1] 24:18 unambiguous ^[5] 7:5 22:10 61:17 62:15,17 unaware ^[1] 28:22 unclear ^[1] 61:14 unconnected ^[1] 14:25 under ^[31] 8:2,8,11,16 11:5 16:8,17 17:1,17 18:10 22:13 27:6,13,16 28:23 30:4,12 33:6,17 34:4 35:15,25 37:1,3 39:3,3,19 40:11 46:24 53:23 54:18 underlying ^[1] 25:16 undermine ^[1] 34:17 undermining ^[2] 51:5,8 understand ^[1] 14:2 understandably ^[1] 49:15 unexpectedly ^[1] 15:24 unfairly ^[2] 49:24 50:6 unforeseen ^[1] 59:17 UNITED ^[5] 1:1,14,24 2:11 47:16 unity ^[1] 60:7 Unless ^[3] 25:24 46:9 51:12 unprotected ^[1] 44:20 unreasoned ^[2] 38:9 43:23 unrelated ^[2] 12:7 26:21 unstuck ^[1] 30:23 until ^[1] 20:17 unusual ^[2] 29:12,22 unwilling ^[1] 46:10 up ^[7] 8:20 17:3,19 22:4 24:5 50:15 54:24 uphold ^[1] 64:15 urging ^[1] 40:13</p>	<p>uses ^[2] 50:17,20 using ^[5] 18:23 24:18,20 26:10 33:9 Utilities ^[2] 51:7,20 Utility ^[3] 31:25 32:21 52:11</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacuum ^[1] 46:14 variety ^[1] 15:8 version ^[1] 5:10 versus ^[5] 3:5 47:1 49:10 61:24 63:4 vice ^[1] 1:24 view ^[8] 5:15 6:5 9:11 13:13 15:3 33:6 48:13 64:18 violation ^[7] 8:10 9:16 11:16 15:20 35:3,7 41:21 violations ^[4] 3:14 5:3 11:11 16:4 virtually ^[1] 29:6</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>walk ^[1] 27:8 wanted ^[7] 13:2 15:5,6 27:12 31:6 34:22 46:19 wants ^[1] 53:7 warmly ^[1] 43:12 wary ^[2] 59:13,15 Washington ^[3] 1:10,18,23 way ^[14] 10:24 17:13 18:8 19:9 21:13,24 27:11 28:16 34:2 45:9,23 48:18,19 59:18 ways ^[2] 7:17 63:24 whatever ^[4] 11:11 35:3 52:12 58:17 Whereas ^[1] 61:15 Whereupon ^[1] 65:2 whether ^[10] 3:16 7:18 14:17 39:8 43:5 45:11,19 56:12 63:21 64:6 whistleblower ^[37] 3:17 4:2,20 5:2,7 9:3,13,19,23 10:11 11:4 18:6,12 20:20 22:2 24:4,7,18,21 25:1,4 26:11,22 29:21 31:3 32:9 33:17 35:20 36:1 39:10,20 41:5 45:12,16 47:8,20 63:4 whistleblowers ^[12] 3:12,18 4:8,19 5:13 12:24,25 13:8 25:22 38:5 40:3,7 whistleblowing ^[6] 26:14 30:15,17,19 36:6 60:6 who's ^[3] 8:4,8 30:11 whole ^[3] 20:3 38:13 52:22 whom ^[2] 5:17 24:11 wide ^[1] 15:8 wild ^[2] 15:15 63:11 will ^[8] 6:4,21 7:23,24 17:23 19:12 30:10 50:15 willing ^[1] 33:12 win ^[1] 39:3 window ^[1] 17:4 within ^[2] 60:18,24 without ^[6] 6:9 14:17 38:18 39:20 54:17 57:23 wonder ^[1] 43:4 woodenly ^[1] 48:1</p>	<p>woodwork ^[1] 45:5 word ^[2] 26:11 32:8 words ^[6] 9:14 11:7 12:22 18:1 63:8 64:8 work ^[2] 46:15 52:17 worked ^[1] 17:12 worker's ^[2] 49:13,16 works ^[2] 5:19 21:20 worse ^[1] 32:2 write ^[2] 50:17,22 written ^[2] 56:25 57:3 wrongly ^[1] 17:13</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>yada ^[3] 41:19,19,19 years ^[4] 12:9 14:8 15:12 54:10</p>
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