

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 UNITED STATES, EX REL. JESSE)
4 POLANSKY, M.D., M.P.H.,)
5 Petitioner,)
6 v.) No. 21-1052
7 EXECUTIVE HEALTH RESOURCES, INC.,)
8 ET AL.,)
9 Respondents.)
10 - - - - -

11
12 Washington, D.C.
13 Tuesday, December 6, 2022

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

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	DANIEL L. GEYSER, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	FREDERICK LIU, ESQ.	
7	On behalf of Respondent	
8	United States	48
9	ORAL ARGUMENT OF:	
10	MARK W. MOSIER, ESQ.	
11	On behalf of Respondent Executive	
12	Health Resources, Inc.	77
13	REBUTTAL ARGUMENT OF:	
14	DANIEL L. GEYSER, ESQ.	
15	On behalf of the Petitioner	90
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
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8
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 21-1052, United States ex rel. Polansky versus Executive Health Resources.

Mr. Geysler.

ORAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE PETITIONER

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

The government lacks the statutory authority to dismiss a False Claims Act case after declining to proceed with the action, and that conclusion follows directly from the Act's plain text, structure, history, and purpose.

Respondents' contrary view reads the Act's dismissal authority in isolation. It makes nonsense of the Act's deliberate structure. It renders key clauses superfluous, which Respondents concede. And it requires limiting the relator's status and rights where the Act unambiguously says the court may not limit the relator's status and rights.

When the FCA was enacted in 1863, the

1 government could not intervene at all. It was
2 not until -- in 1943 that the government even
3 had the option to take over the case at the
4 outset. If Congress truly intended the
5 government to have a global right to dismiss a
6 declined case at any time, this is not remotely
7 how the statute would read.

8 Nor can Respondents escape their weak
9 textual position with a plea to constitutional
10 avoidance, especially one requiring an
11 unprecedented holding that an ancient practice
12 predating the founding by centuries is somehow
13 unconstitutional.

14 Because the government lacked the
15 power to dismiss, the judgment below should be
16 reversed.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Mr. Geyser, would you
19 spend just a few minutes on the constitutional
20 problems that we -- that could be anticipated
21 from your -- taking your approach on the
22 separation of powers problems that -- suggested
23 in the briefs on the other side?

24 MR. GEYSER: Sure, Your Honor. I -- I
25 -- I don't think that there really is much of a

1 constitutional problem precisely because of
2 the strong historical pedigree of qui tam
3 actions. At the founding, qui tam actions were
4 commonplace. And this Court has said, when you
5 have an open and unchallenged practice that
6 predates to the founding, where the very framers
7 who crafted Article II didn't have any problem
8 with enacting these statutes, that effectively
9 fixes the constitutional meaning.

10 JUSTICE THOMAS: Beyond that, could
11 you point to a constitutional basis for it? The
12 -- the country was quite different then. You --
13 the Attorney General until the mid-19th century
14 did not -- was not really an institution, was
15 probably part time. So it was different. And I
16 understand that you would like to rely on that
17 history, but I think we need a little bit more.
18 You at least would need a constitutional hook, a
19 statute -- or a textual hook of some sort.

20 MR. GEYSER: Sure. Well, I'll provide
21 the textual hook. Just before I do, this Court
22 in Stevens said the history was "well nigh
23 conclusive" for Article III purposes. And it
24 would be very strange for it not to be well nigh
25 conclusive for Article II purposes as well.

1 JUSTICE THOMAS: And what was the
2 argument there? That was an assignment, though,
3 right?

4 MR. GEYSER: Well, the assignment is
5 what gave the relator an Article III interest in
6 the case. But the point was, was this
7 consistent with Article III? And the Court said
8 it was precisely because of the historical
9 foundation.

10 But this is the same foundation that
11 existed when the False Claims Act was enacted in
12 1863. It's the same False Claims Act when this
13 Court confronted it in United States versus
14 Hess, where the -- the Court confronted a series
15 of challenges that looked very much like the
16 constitutional claims raised by the Respondents,
17 and not a single member of the Court even paused
18 to suggest there was an Article II problem.

19 But, to look at the textual basis for
20 this, the -- the False Claims Act does not give
21 the relator exclusive control to do whatever
22 they'd like. No False Claims Act suit can
23 proceed without the government's permission.
24 The government has plenary authority at the
25 outset to take over the case, where it can step

1 in, proceed with the action, move to dismiss the
2 action. It can amend the complaint. It can add
3 claims. It can subtract claims. If a False
4 Claims Act case goes forward, it's precisely
5 because the executive has effectively said that
6 it can.

7 JUSTICE KAVANAUGH: But things can
8 change, as the other side points out. The
9 discovery could reveal new facts. There could
10 be a new administration that comes in. There
11 could be burdens on the agency that were not
12 apparent at the outset. So to bind the
13 government to its initial decision strikes me as
14 just increasing the Article II concerns that
15 Justice Thomas asked about with the statute.

16 First of all, do you agree that things
17 can change after the first 60 days?

18 MR. GEYSER: In theory, they can.
19 And, first, it's not just the first 60 days.
20 The government routinely gets extensions going
21 months or years into the process. So I think
22 it's -- it's mostly hypothetical. It's pretty
23 rare for the government if they've done their
24 job at the outset. Congress channeled the
25 government's decision to that critical initial

1 phase. It expected Congress -- or the
2 government to go forward and investigate the
3 case, vet the legal theories, vet the facts, and
4 decide whether this is an appropriate case to go
5 forward and whether it's an appropriate case for
6 the government to litigate or for the relator to
7 litigate.

8 JUSTICE KAVANAUGH: But do --

9 CHIEF JUSTICE ROBERTS: Well --

10 JUSTICE KAVANAUGH: -- related to the
11 -- go ahead, Chief.

12 CHIEF JUSTICE ROBERTS: I -- I was
13 just going to say, however many times it comes
14 up in general, this was a specific case in which
15 the government makes a strong argument that the
16 facts did change and changed dramatically. The
17 United States jumped in when they -- when the
18 extent of the burden in terms of the documents
19 they would have to review became clear and when
20 also the -- at least some questionable conduct
21 of your client with respect to discovery came to
22 light.

23 MR. GEYSER: Well, Your Honor, I want
24 to answer the Article II question, but just to
25 get into the facts very briefly, the -- the

1 burden that the government quantified when they
2 were asked what is this litigating burden, it
3 was 32 hours to redact documents and about 300
4 hours to discover -- to deal with discovery.
5 This is a potential multibillion-dollar recovery
6 for the federal FISC, so I think 332 hours with
7 two government attorneys spending about a month
8 of time is really not much of a burden.

9 And my client's --

10 JUSTICE KAGAN: But the government was
11 also concerned about privilege, wasn't it?

12 MR. GEYSER: It was, Your Honor, but
13 it was mostly concerned about the chilling
14 effect that the court's order saying that the
15 government's documents were not privileged would
16 have on future agency discussions.

17 Now the only way to eliminate that
18 chilling effect is to challenge the order.
19 Dismissing the case, if the order is what's
20 causing the government's concern, is just
21 leaving that order on the books, as opposed to
22 taking an appeal to wipe the order out.

23 But -- but, to get to the Article --

24 JUSTICE SOTOMAYOR: But didn't they
25 also think that there was not substance to the

1 claim, that there were real problems with the
2 claim?

3 MR. GEYSER: Your Honor, what -- what
4 they were concerned about in theory was that
5 there were certain elements of evidence that the
6 relator was not able to obtain. Now the
7 district court said that that evidence was not
8 necessary for the district court to prove -- for
9 the relator to prove the case. And the experts
10 quantified the evidence based on the -- or the
11 recovery based on the evidence that existed to
12 be over a billion dollars. So it --

13 JUSTICE KAGAN: Well, Mr. Geysler, I'm
14 -- I'm sure there are two sides to this
15 question, but why isn't -- why shouldn't it
16 be -- you know, it's -- it's the government's
17 action. Why shouldn't the government have the
18 ability to say things have changed, we think the
19 merits are less strong, we think the discovery
20 burdens are greater than we initially did, and
21 -- and so we want to essentially reverse our
22 prior decision?

23 MR. GEYSER: Well, a few things, Your
24 Honor. First, the -- the question isn't really
25 a matter of policy. Could Congress say that the

1 government can dismiss at any point? Of course,
2 they have. Now that's not what the False Claims
3 Act looked like in 1863. It's not what it
4 looked like in 1943, where the government
5 couldn't even intervene in the case after
6 initially declining to proceed.

7 JUSTICE JACKSON: But I think that
8 actually cuts against you because you suggest
9 that the government -- or that Congress
10 channeled the government's authority to the
11 initial stage, and I'm wondering how you can say
12 that given the history. It seems as though the
13 history of the statute is pretty clear that
14 Congress only amended it to allow for later
15 intervention because it was concerned that the
16 government didn't have an opportunity to
17 intervene after the initial period. So this is
18 sort of in line with my colleagues suggesting
19 that they wanted the government to be able to
20 come back in and take over the case if things
21 had changed or the circumstances were such. And
22 it was also clear from the history that Congress
23 was concerned about the relator having no role
24 in the suit if the government came back later.

25 So how is that consistent with your

1 theory that the government has sort of an
2 all-or-nothing choice to be made at the
3 beginning of this and it can't intervene later
4 and then act to dismiss the suit or do whatever
5 else?

6 MR. GEYSER: Sure. Well, just to be
7 clear, it is not an all-or-nothing choice
8 anymore, and our theory is perfectly consistent
9 with what Congress did in 1986. Before 1986,
10 the government couldn't intervene in the case
11 after the fact. After 1986, the government can
12 intervene.

13 Now it can't intervene and proceed
14 with the action. Congress said only intervene
15 in (c)(3) and it said they can do it with good
16 cause. And they said, importantly, they can do
17 it without affecting, without limiting the
18 status and rights of the relator.

19 JUSTICE JACKSON: I'm sorry, so what's
20 the purpose of the intervention then if they
21 can't then take over the action and -- and
22 proceed?

23 MR. GEYSER: Oh, the -- the -- the
24 purpose is very important. It gives the
25 government a chance to litigate as a full party.

1 Now what they can't do is invoke the specific
2 limitations, and that -- that's how (c)(1)
3 describes it in paragraph 2.

4 Paragraph 2 sets out special
5 limitations on the relator's rights where the
6 government initially proceeds with the action.
7 And this is very clear from the structure of the
8 Act. The -- Congress put the government to an
9 initial choice under subsection (B) and it said
10 you can either proceed with the action or you
11 can decline, in which case the relator has the
12 right to conduct the action.

13 And then it marched through the
14 different rights to the parties to the action in
15 subsection (C).

16 JUSTICE BARRETT: But, Mr. Geysler,
17 specifically, Justice Jackson's point is the
18 same question that I have. I guess I'm not sure
19 what the government then is doing there. If you
20 let the government in and you're saying -- you
21 -- you responded to Justice Jackson by saying,
22 well, the government can then be a full
23 litigant.

24 Well, litigants can move to dismiss,
25 so what can the government do?

1 MR. GEYSER: Well, the -- the
2 government can litigate as a full party. Now
3 they can move to dismiss under the Federal Rules
4 of Civil Procedure, but what a litigant normally
5 can't do in a two-party case is you can dismiss
6 your own claims, you can't dismiss someone
7 else's claims.

8 JUSTICE BARRETT: But they're kind of
9 the same claim here.

10 MR. GEYSER: Well, sure they are, and
11 that's why Congress is very clear that if the
12 government wants to be able to dismiss the case
13 at the outset, it has to intervene and proceed
14 with the --

15 JUSTICE KAVANAUGH: But the -- the --
16 the text of the dismissal provision is the key,
17 right, (c)(2)(A), and that provision is
18 straightforward. It's unqualified. The
19 government may dismiss the action
20 notwithstanding the objections of the person
21 initiating the action if the person's been
22 notified and there's a hearing. Just full stop.

23 MR. GEYSER: Full -- full stop, Your
24 Honor, but you can't read that provision in
25 isolation, but --

1 JUSTICE KAVANAUGH: But in -- I --
2 just on its own, and that's the provision that
3 refers to dismissal, it doesn't qualify it in
4 any way other than the notice and hearing. It
5 doesn't say you have to meet the standards of
6 the federal rules.

7 It's -- and it reflects the backdrop,
8 again of, as Justice Thomas alluded to, of the
9 Article II concern that would exist if the
10 government's power to control prosecution of a
11 case or pursuit of a civil action were somehow
12 removed from the government's power.

13 MR. GEYSER: Well --

14 JUSTICE KAVANAUGH: So why shouldn't
15 we read the statute, given the Article II
16 concern, read that provision for what it says?

17 MR. GEYSER: Your Honor, because I
18 think that doesn't work when you look at the
19 surrounding language and when you look what the
20 violence that would do to other parts of
21 the statute. It's effectively the argument that
22 paragraph 2 applies whether or not the
23 government proceeds with the action. That's
24 what Congress wrote in (c)(4). Yet the
25 dismissal rights are in (c)(2), not in (c)(4).

1 JUSTICE KAGAN: But why --

2 JUSTICE KAVANAUGH: But in (c) --

3 JUSTICE KAGAN: -- doesn't the
4 intervention kick you back to where the
5 government proceeds with the action under (1)
6 and then (2)(A)?

7 MR. GEYSER: I think for two reasons,
8 Your Honor, two key reasons. The first is that
9 the intervention cannot limit the status and
10 rights of the relator. Paragraph 2 is framed in
11 the statute as limitations, so that is, in fact,
12 in -- you're taking the relator, who has the
13 right to conduct the action. Before the
14 intervention, they are not subject to the
15 paragraph 2 limitations.

16 JUSTICE JACKSON: But why isn't that
17 part of the statute better read to reflect the
18 point that I made earlier, which is that
19 Congress was concerned that if the government
20 was conducting this action, the -- the relator
21 wouldn't have any role, so it's not so much
22 saying that the relator is not subject to the
23 government's determination when it is proceeding
24 with the action but that the relator still gets
25 notice, still gets to make his argument before

1 the court as to why the case should not be
2 dismissed, but it doesn't work in the way that
3 you've suggested?

4 MR. GEYSER: Well, Your Honor, again,
5 it does not say without limiting some of the
6 relator's rights. It says the relator has the
7 right to conduct the action. This is a
8 provision that applies when the government
9 elected not to proceed with the action. The
10 relator's in control. And it says the
11 government, upon a showing of good cause, can
12 intervene without limiting the relator's --

13 JUSTICE JACKSON: But what do you do
14 --

15 MR. GEYSER: -- status and rights.

16 JUSTICE JACKSON: -- what do you with
17 2 -- well, with 4? Sorry, with 4. So here's a
18 situation in which the government has determined
19 -- or it says whether or not the government
20 proceeds with the action, the government can
21 make a showing about the person initiating the
22 action's interference with the government's
23 investigation.

24 So we have a world in which Congress
25 has envisioned that the government is still

1 going to have some control and, you know, limit
2 the other person's right to conduct discovery or
3 whatever else, even though they haven't
4 intervened in that situation.

5 So how is that consistent with your
6 theory that once the person is taking over the
7 action, the government can't limit their
8 litigation tactics or whatever?

9 MR. GEYSER: Your Honor, I think
10 (c)(4) is a very strong point in our favor. It
11 shows that where Congress wanted to limit the
12 relator's rights, whether or not the government
13 proceeds with the action, it said so.

14 And the dismissal rights are not found
15 in (c)(4). In fact, the government concedes and
16 the private Respondent concedes that that
17 reading renders surplusage the introductory
18 phrase of (c)(4). It also renders superfluous
19 the final sentence of (c)(1), which says that
20 the relator can still participate where the
21 government does proceed with the case subject to
22 the limitations of paragraph 2. Congress had no
23 reason to put in that phrase that paragraph 2
24 applies in every situation.

25 JUSTICE KAVANAUGH: Now the -- on the

1 (c)(4), the "whether or not" as I read it means,
2 if it hasn't been dismissed, there are two
3 tracks the case could be going down. The
4 government could be in control or the relator
5 could be in control.

6 And what (c)(4) is making clear, as I
7 read it, whether or not the government proceeds
8 with the action, whether the government's in
9 control or the relator is in control, the
10 government can still come in either way and say
11 the discovery is interfering with the government
12 investigation or prosecution.

13 To me, that's -- doesn't detract at
14 all from the straightforward language of
15 (c)(2)(A).

16 What am I missing there?

17 MR. GEYSER: Well, Your Honor, I think
18 what you're missing is look at the -- the clear
19 progression that Congress set out in subsection
20 (C). It's -- it's a division of rights based on
21 the government's initial choice under subsection
22 (B).

23 And, again, it's using the phrase
24 "proceed with the action." The "proceed with
25 the action" phrase is found in subsection (B).

1 It is not found anywhere in subsection (c)(3)
2 where the government has the right to intervene.

3 So Congress clearly said, if the
4 government wants to proceed with the action,
5 they have certain rights. The relator can still
6 participate subject to the rights in paragraph
7 2. Congress didn't set forth what those rights
8 are.

9 Then it proceeded to other situations,
10 situations where the government elects not to
11 proceed and situations whether or not the
12 government --

13 JUSTICE KAVANAUGH: Just -- just --

14 MR. GEYSER: -- proceeds.

15 JUSTICE KAVANAUGH: -- slow down a
16 minute for me. On (c)(1), you said the last
17 clause of (c)(1) would be redundant?

18 MR. GEYSER: Yes.

19 JUSTICE KAVANAUGH: But I -- I guess
20 you could call it redundant. You could also
21 call it just making crystal clear that even if
22 the government takes over the action, the
23 relator's still a party. But just to be clear,
24 that "subject to" clause, let's just make
25 crystal clear, if it's dismissed, you're gone.

1 Like you can't continue it if it's dismissed.
2 That's what I read the "subject to" to -- to
3 kind of underscore so there would be no
4 confusion about that.

5 MR. GEYSER: Well, Your Honor, but,
6 again, but if paragraph 2 sets forth a set of
7 rights that applies in every single case,
8 whether the government proceeds, whether they
9 later intervene, whether the -- they elect not
10 to intervene at all at any point in the case,
11 there's no reason to put that language in. And
12 --

13 JUSTICE KAGAN: So, Mr. Geyser, your
14 arguments are better for the government's first
15 argument. But, if you go to the government's
16 backup argument and say that they can only
17 dismiss once they're -- they've intervened, even
18 if that intervention follows an initial
19 declining of the opportunity, then most of your
20 arguments fall away.

21 On that theory, you know, it makes
22 perfect sense to, well, the intervention kicks
23 you back to (1), which gets you into (2)(A).

24 MR. GEYSER: The -- Your Honor, I -- I
25 do agree that a lot of our arguments are

1 designed to show the government at least has to
2 intervene first and satisfy that good cause
3 showing. But we still have, I think, at least
4 two or three important arguments even to show
5 that that sort of reset-the-case argument
6 doesn't work.

7 The first again is it says you can
8 intervene. It does not say intervene and
9 proceed with the action. Congress used that
10 different terminology in (b)(2).

11 And when Congress put the government
12 to the choice of taking over the case, not just
13 intervening and participating but taking it
14 over, they always use the phrase "proceed with
15 the action." It's a very distinctive phrase and
16 it's repeated throughout the False Claims Act.

17 The second point again is that this is
18 still limiting the relator's status and rights.
19 It says you can intervene, government, but you
20 cannot limit the relator's status and rights.

21 JUSTICE KAGAN: Well, it says the
22 court shouldn't limit the status and rights.
23 That's a different thing.

24 MR. GEYSER: Well, it -- it -- it
25 does, but I think, though, that in paragraph 2,

1 none of those rights are activated unless the
2 court is doing it.

3 So the court then is limiting the
4 relator's status and rights. And by -- just
5 right on the face of the statute, paragraph 2
6 again, if you look to (c)(1), Congress described
7 the rights in (c)(2), those restrictions, as
8 limitations on the relator's participation. So
9 that is quite clearly a limit on the relator's
10 status and rights.

11 And this is also inconsistent with the
12 broader structure of the Act. Look back to the
13 -- the initial choice that the government makes.
14 That's under subsection (B). That has to happen
15 at the outset of the case.

16 It says the government has to decide
17 whether to proceed with the action or not within
18 the first 60-day period extended, you know, by
19 months and often years. There's nothing in
20 subsection (C), and it would be a very odd way
21 for Congress to have written this, to say
22 subsection (C), when the government intervenes,
23 even though we're not saying intervene and
24 proceed with the action and even though we're
25 not saying just intervene, and without limiting

1 the relator's status and rights, we have that
2 qualifier in there, that Congress thought that
3 the government at that point could reset the
4 party's rights, effectively restart the
5 litigation. If you look to 3731(c), the
6 government has the right if they do intervene
7 and proceed with the action to file a new
8 complaint. They can basically start the case
9 over years down the road, which isn't good for
10 the relator and it's not good for the private
11 defendant either.

12 JUSTICE ALITO: Mr. Geysler, perhaps
13 you've said everything that you have to say on
14 this point, but just to be clear, what do you
15 think -- if the government intervenes belatedly,
16 what do you think it can do that would not
17 constitute a limitation of the debtor's status
18 and rights?

19 MR. GEYSER: I think the government
20 can do anything that any ordinary party can do
21 under any of the Federal Rules of Civil
22 Procedure. It can file a motion to dismiss
23 under 12(b). It can file a summary judgment
24 motion on either side. It can serve discovery.
25 It can participate in the hearings. It can

1 propose jury instructions.

2 All it can't do are invoke the
3 paragraph 2 rights, which are special rights
4 that are clearly activated only where the
5 government proceeds with the action. These are
6 rights that are found only in the False Claims
7 Act. And looking at the clear structure of the
8 Act, these are rights that only apply where the
9 government proceeds at the outset.

10 JUSTICE GORSUCH: Mr. Geysler, let --
11 let -- let's -- I just want to give you an
12 opportunity to discuss the standard. Suppose we
13 disagree with you and we think the government
14 can intervene at this stage and seek to dismiss
15 the case. There's a hearing that's called for
16 under (c)(2)(A). What's that supposed to look
17 like in your view?

18 MR. GEYSER: I think the -- the fact
19 that there is a hearing requirement shows that
20 the government does have to prove something. As
21 the Seventh Circuit said, courts don't have
22 hearings just to serve coffee and donuts while
23 the parties gather together.

24 JUSTICE GORSUCH: I've actually been
25 to one of those.

1 (Laughter.)

2 JUSTICE GORSUCH: So I know it can
3 happen.

4 (Laughter.)

5 JUSTICE GORSUCH: But I'd agree with
6 you it's exceedingly rare.

7 MR. GEYSER: Yeah.

8 JUSTICE GORSUCH: So -- so -- so what
9 -- what is the standard? Is it -- do we borrow
10 from 41? Your -- your -- your kind of net --
11 net benefit -- cost/benefit analysis argument, I
12 don't know where that comes from. Help me out.

13 MR. GEYSER: Sure. I -- I think that
14 you're dealing with the relator's assigned
15 property interests in the case, so I think, at a
16 minimum, the constitutional rationality standard
17 has to apply. The government has to come
18 forward with a rational nonarbitrary basis for
19 dismissing the case.

20 And, again, we're not saying that this
21 is a constitutional error in this case. We're
22 not saying that the -- the government violated
23 our constitutional rights. We're saying the
24 government misread the statutory standard.

25 I think it's clearly not Rule 41, as I

1 think all parties to the case agree. Rule 41 is
2 distinctly inapposite in this context. It
3 involves a voluntary dismissal of someone's own
4 action. In this case, you have two parties, and
5 one is opposing the dismissal. So -- and Rule
6 41, again, is usually activated without any sort
7 of hearing. Here, you have to have a hearing.

8 So the question is, what is a court
9 supposed to do at that hearing? And, again, I
10 think it's to put the government to the proof of
11 showing that they've asserted a rational basis
12 for dismissing the case and that it is actually
13 supported by the facts and record of the case.

14 JUSTICE KAVANAUGH: You're -- you're
15 requiring the government to prove to a court
16 that it has some basis for dismissing the
17 government's own case. That's -- I mean,
18 that's -- the -- the Article II starting point
19 of all this seems in great tension with your
20 answer of how the government should be held to
21 the -- the proof. The government controls the
22 litigation. That's part of Article II.

23 MR. GEYSER: Well, no, Your Honor, not
24 in an absolute way. And also, too, remember
25 this is not only the government's case.

1 JUSTICE KAVANAUGH: Maybe not in an
2 absolute way, maybe in an absolute way, but even
3 if not in an absolute way, doesn't it have to
4 inform how we think about the whole structure of
5 the proceeding that Justice Gorsuch describes?

6 MR. GEYSER: Well, Your Honor, again,
7 our -- our contention is the government doesn't
8 even have the right to dismiss after the fact.
9 But, again, this is --

10 JUSTICE KAVANAUGH: But, if we get to
11 the hearing that Justice Gorsuch raised rightly
12 and what -- what has to happen at that hearing,
13 I think the court's interfering with the
14 government's ability to control -- the
15 executive's ability to control the suit.
16 That's -- that's an Article II concern, it seems
17 to me.

18 MR. GEYSER: Well, Your Honor, first,
19 just to be very clear, this is not only the
20 government's suit. Congress assigned a property
21 interest in the action to the relator. That's
22 why the relator has it's -- the relator's own
23 Article III standing. That's what this Court
24 held in Stevens. So the government is, in fact,
25 extinguishing not just their own claim; they're

1 extinguishing the property interest that's been
2 assigned to the relator in --

3 JUSTICE GORSUCH: And -- and, Mr.
4 Geysler, I accept -- I understand that point. I
5 mean, Blackstone talks about qui tam actions as
6 property interests, and maybe some bundle of
7 sticks have been given to you and some retained.
8 Whatever. Okay.

9 You argue for a rational basis review
10 near as I can tell in saying it's governmental
11 action and even executive governmental action
12 still has to be nonarbitrary. I mean, do -- you
13 know, I got it. Okay.

14 But the way you argue for rational
15 basis is a pretty aggressive version of it and
16 saying that, you know, we got this
17 billion-dollar case and so your inconveniences
18 aren't good enough.

19 I -- I -- you know, normally, when --
20 when we invoke rational basis review, it's
21 pretty cursory, pretty quick, and the government
22 always wins. So tell me what I'm missing there.

23 MR. GEYSER: Well, that -- that is
24 typically true, Your Honor. I think this is the
25 rare case where it could surmount that standard.

1 The rational basis standard -- this goes partly
2 to Justice Kavanaugh's question too -- it's not
3 imposing a very extreme burden on the
4 government, but I do think it is arbitrary and,
5 in fact, irrational to say, if I just stick this
6 out for one more month and do a couple of
7 redactions and answer a few more discovery
8 requests, I'm going to recover over a billion
9 dollars for the federal FISC, but you know what,
10 I'd rather not be bothered.

11 JUSTICE GORSUCH: Well, litigation's
12 always fraught with risk. I mean, I -- I -- I
13 always thought client -- every client I -- I --
14 I had as a plaintiff always thought they were
15 going to get a billion dollars at the end of the
16 day for sure. But that's not the way the system
17 works, right? So can't a government have a
18 cost/benefit analysis that differs from yours?

19 MR. GEYSER: Oh, absolutely, Your
20 Honor, but they have to run that cost/benefit
21 analysis. And this isn't just the -- our -- the
22 client saying, you know, wild pie-in-the-sky
23 theories. The -- these are experts that looked
24 at this. They quantified the evidence.

25 JUSTICE GORSUCH: Yeah.

1 MR. GEYSER: They explained the
2 theory.

3 JUSTICE GORSUCH: Right. Everybody's
4 got an expert. Okay.

5 JUSTICE BARRETT: It sounds more like
6 intermediate scrutiny really.

7 JUSTICE GORSUCH: Yeah.

8 MR. GEYSER: The -- well, Your Honor,
9 I -- I -- I don't think so in this case. We're
10 simply saying you just have to substantiate what
11 the -- what the government is saying.

12 So if I -- if I can just give one
13 example that I think proves what we're saying.
14 The government said one reason for dismissing
15 the case is that the relator promised that he
16 would narrow his claims, and then he failed to
17 do it. The relator cleared the precise
18 amendment with the government before filing it
19 with the court. The government signed off on
20 the amended complaint. And then the government,
21 after the fact, says you didn't do what we asked
22 you to do, when, in fact, they did exactly what
23 the government approved.

24 So is that arbitrary? That sounds
25 arbitrary to me. And under, I think, a

1 strict --

2 JUSTICE BARRETT: Oh, I -- sorry.

3 Finish.

4 MR. GEYSER: No, I was just saying
5 under a strict even just rationality standard.

6 JUSTICE BARRETT: You said before,
7 when I asked you what could the government do
8 when it was in the suit, and you said could make
9 a motion under Rule 41 like any other party, and
10 this is if it chooses to proceed with the
11 action. The standard there would be then the
12 same?

13 MR. GEYSER: Well, under Rule 41, it
14 wouldn't apply here because, again, you have two
15 -- you have two plaintiffs. So --

16 JUSTICE BARRETT: No, no. I mean,
17 like, if it chooses to proceed with the action
18 during the initial seal period -- sealing
19 period.

20 MR. GEYSER: Oh, I'm sorry. If -- if
21 it chooses to proceed with the action, then it
22 can move to dismiss, and I presume it would
23 invoke its (c)(2)(A) authority as opposed to
24 Rule 41.

25 JUSTICE BARRETT: Okay.

1 MR. GEYSER: I think the (c)(2)(A)
2 authority here would probably displace Rule 41.

3 JUSTICE BARRETT: So there's no -- I
4 -- I thought you had said something before about
5 Rule 41. I must have misheard.

6 MR. GEYSER: No. I'm sorry, I --

7 JUSTICE JACKSON: Well, I think what
8 -- I think what -- what you might be referring
9 to, Justice Barrett, is the fact that you said,
10 if the government intervenes later, then it can
11 act under the Federal Rules of Civil Procedure
12 as any normal party would. So why wouldn't Rule
13 41 then be available to the government at that
14 point?

15 MR. GEYSER: May I answer?

16 CHIEF JUSTICE ROBERTS: Sure.

17 MR. GEYSER: The -- I don't think it
18 would be available precisely because the -- of
19 the nature of the Act and its displacing of Rule
20 41.

21 Now what I -- what I was trying to say
22 earlier -- and I might have misspoke; if I did,
23 I apologize -- is that the government can invoke
24 other rules of federal procedure. They can
25 invoke Rule 12. They can invoke Rule 56. If

1 they think the defendant is, in fact, right and
2 that the case has no merit, they can say so, and
3 that -- there's nothing wrong with that. That's
4 not interfering with the relator's status and
5 rights.

6 What is interfering with the relator's
7 status and rights is putting specific
8 limitations from paragraph 2 on what the relator
9 can do when the relator's been vested with the
10 right to conduct the action.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas, any?

14 Justice Alito?

15 JUSTICE ALITO: The standard that
16 you're recommending for the hearing is the one
17 that's in use in the Ninth Circuit, is that
18 correct?

19 MR. GEYSER: The Ninth and Tenth
20 Circuits, yes.

21 JUSTICE ALITO: The Ninth and Tenth.
22 Are there examples of cases from those circuits
23 where the -- the court has found that the
24 standard was not met?

25 MR. GEYSER: There is a district court

1 case in the Ninth Circuit, I believe, that has.
2 And, again, this is exceedingly rare. This is
3 not putting the -- the burden -- the burden on
4 the government in a very onerous way.

5 JUSTICE ALITO: Well, this is not new,
6 so I -- I won't belabor it. It does seem like
7 what you're talking about is, in reality, either
8 nothing or a quagmire. Suppose the government
9 says we don't want this case to go forward
10 because we actually think the claim is not
11 meritorious and the defendant doesn't deserve to
12 -- to be sued. What's the court supposed to do
13 there?

14 MR. GEYSER: Well --

15 JUSTICE ALITO: Have a mini-trial on
16 the strength of the -- of the case?

17 MR. GEYSER: Well, ideally, Justice
18 Alito, what the government would have done is at
19 the initial period, where Congress channeled the
20 government's real decision-making in this in
21 giving them every tool to investigate the claim,
22 they would conclude at that point that the case
23 is not meritorious, they would intervene and
24 proceed with the action, and then they could
25 invoke the (c)(2)(A) authority to dismiss the

1 case.

2 JUSTICE ALITO: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice --

4 JUSTICE SOTOMAYOR: Mr. Geysler,
5 assuming, as did Justice Gorsuch, that I believe
6 the government can intervene and can dismiss, to
7 dismiss, because I think that's a form of
8 proceeding with the action. You can take
9 discovery. You can make a motion for summary
10 judgment. You can do all sorts of things,
11 including moving to dismiss. So assume I do
12 that.

13 Doesn't the good cause standard for
14 intervention provide you with the standard,
15 meaning, if you have to prove good cause to
16 intervene, you have to prove you have a reason,
17 and the reason just can't be arbitrary and
18 capricious. Isn't that -- the question that
19 simple and isn't that the question that would
20 happen in -- it's all one motion, as it was in
21 this case. It was one hearing. The government
22 came in and said we want to intervene because we
23 think we have to dismiss now. The court held a
24 hearing, listened to its reasons and said
25 they're rational. They're not arbitrary and

1 capricious.

2 So isn't that the standard?

3 MR. GEYSER: Well --

4 JUSTICE SOTOMAYOR: Are they arbitrary
5 and capricious?

6 MR. GEYSER: -- Yeah I -- I don't mean
7 to quibble with the premise, but just -- just to
8 be complete about it, I think Your Honor said
9 that part of proceeding with the action is
10 moving to dismiss, and, of course, under (c)(3)
11 --

12 JUSTICE SOTOMAYOR: I -- I -- I accept
13 that you don't think it is.

14 MR. GEYSER: Okay.

15 JUSTICE SOTOMAYOR: But assume I do.

16 MR. GEYSER: It -- I -- I do think the
17 good cause standard provides an extra layer of
18 protection for the relator and that the
19 government should as a part of the good cause
20 showing explain why it didn't intervene earlier.

21 JUSTICE SOTOMAYOR: I -- I don't
22 disagree with you, but that goes to the issue of
23 whether the choice they're making now is
24 arbitrary and capricious.

25 MR. GEYSER: I -- I think it does,

1 Your Honor. I think that that -- that is
2 another layer of protection for the relator.

3 JUSTICE SOTOMAYOR: How do you see
4 arbitrary and capricious as different from the
5 rational relationship test of the Ninth and
6 Tenth Circuit or between that and Rule 41, where
7 it says a court has to consider whether
8 dismissal is proper?

9 MR. GEYSER: Well, I -- I think that
10 it is similar to the Ninth and Tenth Circuit
11 standards. I think it's very different than the
12 Rule 41 standard, where the court is considering
13 whether --

14 JUSTICE SOTOMAYOR: Similar, but how
15 different?

16 MR. GEYSER: Well, I think very
17 different. It's -- Rule 41 is looking to
18 prejudice to the defendant.

19 JUSTICE SOTOMAYOR: Putting that aside
20 if -- because it's a plaintiff's motion and I
21 agree with you it's what's proper for the
22 dismissal of the action -- but assume that I
23 think proper has a meaning. What meaning would
24 you give it?

25 MR. GEYSER: If we are stuck with --

1 with the Rule 41 standard, I think proper still
2 would have to be something that is not arbitrary
3 because something that's arbitrary is improper
4 and not irrational because something that's
5 irrational is also improper.

6 JUSTICE SOTOMAYOR: Irrational is
7 different than capricious. Not arbitrary or
8 capricious is different than rational.

9 MR. GEYSER: I think -- I think that
10 could be true, Your Honor, and we'd -- we'd be
11 fine with -- I think with either standard. I
12 think, in this case, we -- we could prevail
13 under either standard if it's applied in a
14 meaningful way.

15 JUSTICE SOTOMAYOR: Okay. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?
17 Justice Gorsuch?

18 JUSTICE KAVANAUGH: Just on the good
19 cause question, that's the standard for
20 intervention, correct --

21 MR. GEYSER: That's correct.

22 JUSTICE KAVANAUGH: -- in -- in the
23 statute, and there is a separate question here
24 whether the government has to intervene in order
25 to dismiss if it's after the 60 days, correct?

1 MR. GEYSER: That -- that's correct.

2 JUSTICE KAVANAUGH: Okay. On the
3 question of the hearing that Justice Gorsuch
4 raised, the statute itself, the text of the
5 statute imposes no standard whatsoever, correct?

6 MR. GEYSER: The -- I'm sorry, the
7 statute?

8 JUSTICE KAVANAUGH: On -- on the
9 hearing on a dismissal, the text of the statute
10 imposes no standard whatsoever for the
11 government to be able to dismiss, correct?

12 MR. GEYSER: That -- that is correct.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 Justice Jackson?

17 JUSTICE JACKSON: So I'm still a
18 little stuck on your initial argument, which
19 seems to be that the subsequent intervention
20 does not permit the government to interfere with
21 the relator's status and rights, so the
22 government per the plain text of the statute can
23 come in, but you say at that point the relator
24 is still controlling the action, and, therefore,
25 the government can't move to dismiss or do

1 anything other that's sort of inconsistent with
2 the relator's control of the action.

3 Is that -- do I have right your
4 argument --

5 MR. GEYSER: Yes.

6 JUSTICE JACKSON: -- basically?

7 MR. GEYSER: But -- but it is -- just
8 to be very clear --

9 JUSTICE JACKSON: Yes.

10 MR. GEYSER: -- I'm not just making
11 this up.

12 JUSTICE JACKSON: Right.

13 MR. GEYSER: In (c)(3), it says
14 without limiting the relator's status and
15 rights.

16 JUSTICE JACKSON: Yes. No, I
17 understand the textual basis. What I'm
18 concerned about is that the most definitive
19 statement that we have related to Congress's
20 actual intent, which I know that we sometimes
21 don't look at or don't care about, but in this
22 case, the legislative history, the Senate report
23 on pages 26 and 27 say exactly something that is
24 totally inconsistent with what you've just said.

25 It talks about, as Justice Kavanaugh

1 brought up, a situation in which the government
2 has failed to intervene at the beginning and
3 they were concerned, they say, because, you
4 know, the government would be barred from
5 re-entering the litigation under a circumstance
6 in which "new evidence discovered after the
7 first 60 days of the litigation could escalate
8 the magnitude or complexity of the fraud,
9 causing the government to reevaluate its initial
10 assessment or making it difficult for the qui
11 tam relator to litigate alone."

12 And this is the key part. It says:
13 "In those situations where new and significant
14 evidence is found and the government can show
15 'good cause' for intervening, paragraph 2
16 provides that the court may allow the government
17 to take over the suit."

18 So it doesn't say that the government
19 can just intervene and act as another party. It
20 is contemplating clearly in the legislative
21 history of the Senate that the idea is that the
22 intervention is to allow the government to take
23 over the suit because we have good cause, there
24 are reasons why the relator exercising its
25 rights can't really do it. And so I don't

1 understand why under those circumstances you
2 would say the government can't act as the "owner
3 of the suit" once it re-intervenes.

4 MR. GEYSER: Your Honor, and the --
5 the sentence that you read, I'm glad you brought
6 it up --

7 JUSTICE JACKSON: Yes.

8 MR. GEYSER: -- we didn't stress it
9 precisely because the Court typically doesn't
10 look to legislative history.

11 JUSTICE JACKSON: Yes.

12 MR. GEYSER: But it's actually a
13 powerful point in our favor. Look at the Senate
14 version of the Act. The Senate version of the
15 Act is not the enacted version. It was changed
16 in two very critical ways.

17 JUSTICE JACKSON: Okay.

18 MR. GEYSER: The proposed language in
19 the Senate said "intervene and proceed with the
20 action."

21 JUSTICE JACKSON: Yes.

22 MR. GEYSER: The final version struck
23 "and proceed with the action," just "intervene."

24 The second change, which is also
25 critical, is the Senate version did not have the

1 qualifier without limiting the status and rights
2 of the relator. That was inserted in the
3 official version.

4 JUSTICE JACKSON: So do we have
5 legislative history that just explains the
6 changes that you're talking about? Do we know
7 why they struck those things?

8 MR. GEYSER: We -- unfortunately, we
9 -- we do not know why. But what I do know is
10 that when the Senate is saying we think the
11 government should be able to intervene and take
12 over the case --

13 JUSTICE JACKSON: Yeah.

14 MR. GEYSER: -- and they have very
15 distinct language in the enacted version says I
16 don't think so, you can't intervene and proceed
17 with the action.

18 JUSTICE JACKSON: So what do we do
19 about Section 5 that says the government may --
20 I'm talking about the statute -- may elect to
21 pursue its claim through any alternate remedy
22 available, including the administrative?

23 In the legislative history that I'm
24 reading, it goes on to talk about how, when the
25 government takes over the suit, it can also

1 decide to not continue to pursue it as a
2 litigated matter but can take it and put it into
3 the administrative course.

4 Is it your point that the government
5 can only do that in the beginning now based on
6 the way you read the statute?

7 MR. GEYSER: Oh, no, not at all,
8 because, again, look at the introductory
9 language to (c)(5). It says, "notwithstanding
10 the action under subsection (B)," so basically
11 notwithstanding the False Claims Act case, and
12 this is -- this is a good reason that also this
13 doesn't present any real Article II concern.

14 It's telling the executive, if you
15 would rather pursue this False Claims Act case,
16 at the start, later in the case, it doesn't
17 matter, through another proceeding, through an
18 administrative proceeding, through a different
19 judicial proceeding, you can do that, and
20 nothing about the filing of the action under
21 subsection (B), which is the private action by
22 the relator, can interfere with the government's
23 ability to pursue other forms of relief.

24 JUSTICE JACKSON: One last question.
25 Why does the government have a right to continue

1 to get information in the case if the property
2 right shifts completely to the relator once the
3 government declines to intervene initially? Is
4 it just so that they could possibly intervene
5 and come back and do something that is not
6 controlling the case?

7 MR. GEYSER: Well, it -- it -- I -- I
8 think it is, Your Honor. First of all, the
9 property isn't assigned entirely to the relator.

10 JUSTICE JACKSON: Mm-hmm.

11 MR. GEYSER: You know, the government
12 obviously gets the bulk of any recovery. But it
13 is to give the government the opportunity to
14 say, you know what, we think the relator needs
15 help or we think that this proceeding actually
16 would benefit from our stepping in and
17 supporting the defendant. But it's given --

18 JUSTICE JACKSON: What's the point of
19 good cause? Why -- why -- why does the
20 government have to show good cause to intervene
21 unless there's some implication that the
22 government might be able to do something that
23 the relator doesn't want him to do?

24 MR. GEYSER: Well, I -- I think that
25 there is good cause. It shows the respect for

1 the relator and the relator's right to conduct
2 the action. It shows that Congress really did
3 expect the government to make that initial
4 upfront choice or it would just say just come in
5 at will. Whenever you feel like it, you can
6 come back in.

7 But, again, when they can come back
8 in, they have to respect the relator's status
9 and rights, and you can't limit those rights.
10 And paragraph 2 is framed in the statute as
11 limitations on the relator's rights. So it
12 really is --

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Liu.

16 ORAL ARGUMENT OF FREDERICK LIU ON
17 BEHALF OF RESPONDENT UNITED STATES

18 MR. LIU: Thank you, Mr. Chief
19 Justice, and may it please the Court:

20 This case presents two issues, and the
21 plain text of the False Claims Act resolves them
22 both. The first issue is whether the government
23 may dismiss a qui tam action after electing not
24 to intervene during the seal period. The answer
25 is yes. The text of Section 3730(c)(2)(A) says

1 that the government may dismiss if the relator
2 is given notice and an opportunity to be heard.

3 Congress could have easily said that
4 the government may dismiss only "if the
5 government elects to intervene." Those are the
6 words that Congress used elsewhere in the
7 statute when it wanted to make a right
8 contingent on the government's election to
9 intervene. Yet Congress didn't include those
10 words or anything like them in Section
11 3730(c)(2)(A). Thus, regardless of the option
12 that the United States selects, it retains the
13 right to dismiss the action.

14 The second issue in this case concerns
15 the extent to which a court may review the
16 government's decision to dismiss. Unlike other
17 provisions of the statute, (c)(2)(A) does not
18 specify a substantive standard for a court to
19 apply. The statute thus commits to the
20 government's discretion the decision whether to
21 dismiss.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: Mr. Liu, the
24 Petitioner argues that they have a property
25 interest in this suit, and I think that's

1 underscored by Stevens, which says that they
2 have a partial in -- stake in this. If you can
3 unilaterally dismiss, how can you square that
4 with the assignment that they have?

5 MR. LIU: Well, I think the -- we --
6 we do recognize that they are assigned a
7 property interest, and that is precisely why we
8 think there is a constitutional baseline that
9 applies. It's precisely because they have a
10 property interest under the Due Process Clause
11 of the Fifth Amendment that we think, even in
12 the absence of any standard specified in the
13 statute, the government still has to comply with
14 the -- with the constitutional baseline in
15 deciding whether to dismiss.

16 That's not a very rigorous baseline.
17 I think the Ninth Circuit got the baseline wrong
18 in Sequoia Orange when the Ninth Circuit looked
19 to the standard that applies to evaluating
20 legislative action. The relevant standard here
21 is a standard that applies to evaluating
22 executive action. And this Court in cases like
23 County of Sacramento versus Lewis has made clear
24 that that is a tough standard to meet. It
25 requires egregious, outrageous executive action

1 to satisfy it.

2 JUSTICE THOMAS: Does this baseline
3 exist at the initiation of the action, or does
4 it only exist later when you have to intervene
5 in order to dismiss, as you seek to do now?

6 MR. LIU: I think it exists throughout
7 the action. We -- we think we don't need to
8 intervene at all as a prerequisite to dismissal.
9 So, if we were to exercise our dismissal right
10 even without intervening, we think we would have
11 to -- at least we -- we could not violate the
12 Constitution in doing so.

13 JUSTICE SOTOMAYOR: Mr. Liu, but you
14 wouldn't be violating a due process right. If
15 you come in before there has been an actual
16 assignment of the right, you can dismiss for any
17 reason because there hasn't been a property
18 interest created.

19 MR. LIU: Well, we understand --

20 JUSTICE SOTOMAYOR: You have 60 days
21 to decide whether to intervene, with whatever
22 exceptions -- extensions are granted, but until
23 that moment that the property right is created,
24 you don't have to give a reason because there's
25 no property right.

1 But assume that I believe that once
2 the property right is created, and we -- our
3 cases have recognized that, there has to be
4 something more than constitutional protection,
5 doesn't it?

6 MR. LIU: I don't think so, Your
7 Honor.

8 JUSTICE SOTOMAYOR: A prosecutor can
9 come in and take away somebody's property rights
10 for an arbitrary and capricious reason?

11 MR. LIU: Well, we think the --

12 JUSTICE SOTOMAYOR: Or for no reason
13 whatsoever?

14 MR. LIU: We think the Constitution --
15 the constitutional protection means that the
16 government couldn't dismiss a case if doing so
17 was arbitrary in the constitutional sense.

18 JUSTICE SOTOMAYOR: Well, that's my
19 problem, which is when is it ever proper to take
20 away a property right in the constitutional
21 sense, whether it's for a legislature or the
22 executive?

23 MR. LIU: Oh, I -- I --

24 JUSTICE SOTOMAYOR: For an arbitrary
25 and capricious reason?

1 MR. LIU: Well, I think --

2 JUSTICE SOTOMAYOR: You have to give
3 some meaning to having a hearing.

4 MR. LIU: -- I -- I think -- I think
5 that's our -- our -- our point, is if -- if the
6 relator could show that our exercise of the --
7 of the dismissal right was arbitrary in the
8 constitutional sense --

9 JUSTICE SOTOMAYOR: That's the -- the
10 interest, that's the question that I'm asking.

11 The only thing our -- in a
12 constitutional sense would be an equal
13 protection violation, a dismissal based on sex,
14 et cetera, but that's not related to the
15 property right in any way.

16 MR. LIU: Well, I -- I -- I -- I think
17 it is because there wouldn't even be that
18 protection without some property interest that
19 triggers the application of the Due Process
20 Clause. Now Congress could have layered on top
21 of the constitutional baseline an even more
22 rigorous standard of review.

23 JUSTICE SOTOMAYOR: Well, they did,
24 good cause. Good cause to intervene suggests
25 that there has to be a reason, and --

1 MR. LIU: Well, our primary argument
2 is that the government need not intervene as a
3 prerequisite to exercising --

4 JUSTICE SOTOMAYOR: I --

5 JUSTICE JACKSON: But why is that, Mr.
6 Liu? That seems odd. I mean, the -- the
7 statute is very clear that the government has a
8 period of time at the beginning to make a
9 determination about whether or not it's going to
10 take -- take over the action. If the government
11 declines and the property interest is created,
12 the statute suggests that the government can
13 come back into the action and, if you're like me
14 and believe perhaps that that means the
15 government can take it over, you know, they can
16 definitely intervene, but they have to show good
17 cause. And it would seem to me that good cause
18 does the work of ensuring that the property
19 interest that has been created is -- is taken
20 into account and understood and the government
21 can't just come back in willy-nilly.

22 So I'm curious as to the government's
23 repeated representations that they can do all
24 sorts of things related to this suit without
25 even intervening.

1 MR. LIU: Well, I think it goes to the
2 purpose of intervention under the structure of
3 the statute. The purpose of intervention under
4 the statute is for the government to become a
5 plaintiff in the case, and the point of becoming
6 a plaintiff in the -- in the case is so that the
7 government can assume the -- the rights and
8 burdens of being a full party in the case, the
9 rights being the ability to file motions, to
10 examine witnesses, to direct the presentation of
11 evidence, the burdens being the burdens under
12 the Federal Rules of Civil Procedure as they
13 pertain to discovery.

14 JUSTICE JACKSON: But not the right to
15 settle the claim? I mean, you say repeatedly
16 that the government doesn't have to intervene
17 and they can still settle this claim.

18 MR. LIU: Well, my point is none of
19 those rights or burdens matters if the whole
20 point of the government's motion is to end the
21 case. The only reason intervention matters is
22 if we want to proceed with the case, and it
23 matters what our rights are, what our burdens
24 are going forward. But, if the whole point of
25 our motion is to end the case, then there simply

1 is no reason to put us through the hurdle of
2 intervening beforehand.

3 JUSTICE KAGAN: Well, this actually
4 does --

5 CHIEF JUSTICE ROBERTS: Mr. Liu, it --
6 it -- your case would be easier for you, maybe
7 for us, if your client had a more robust view of
8 Article II. I was surprised it's cited only
9 once in your brief, you know, on page 40. We're
10 talking about the government's ability to
11 control a suit with billions of dollars of money
12 defrauded against federal law according to the
13 allegations, and yet you're -- you're not
14 arguing much about the President's authority to
15 enforce that -- that statute at all.

16 MR. LIU: Well, let me be clear about
17 two things. Number one, of course, we think
18 that in a -- in a case of a suit brought in the
19 name of the United States that is to redress
20 injuries done to the United States, the United
21 States' own views of what's in its interests
22 should be paramount.

23 But, secondly, we do not think in this
24 case that there is a constitutional problem to
25 avoid, and the reason goes to the reasoning of

1 this Court's decision in Stevens, where the
2 Court made clear that the relator here is not
3 acting as an agent of the United States, rather
4 that the relator, by virtue of the assignment
5 theory, remains a private person.

6 And in our view, the -- the Article II
7 concerns aren't triggered by a private person
8 who's simply exercising private power. They
9 would be -- they would be triggered if the
10 relator were conceived of as an agent or
11 representative of the United States.

12 CHIEF JUSTICE ROBERTS: Well, that
13 depends upon your prevailing in -- in this case.
14 I mean, if you don't, then your authority to
15 control the action would be significantly
16 circumscribed.

17 MR. LIU: Well, I think the -- the
18 bright line I'm drawing is between private
19 persons who are seeking to enforce federal law
20 on the one hand, so not just like not just the
21 relator in this case but also the Title VII
22 plaintiff or the Sherman Act plaintiff. That's
23 on the one hand. And on the other side of the
24 very bright line, an agent or representative of
25 the United States who is actually exercising

1 governmental executive power.

2 Now we think this -- this relator
3 falls on this side of the line, but, if this
4 relator fell on the other side of the line, we
5 would not think the controls in the statute
6 would be sufficient. The idea that it would be
7 sufficient for Article II purposes that we could
8 simply file papers in court and try to get the
9 court to control an agent of the United States
10 really would stretch Article II very far.

11 The only reason why this scheme is
12 constitutional is for the reason the Court gave
13 in Stevens, which is that the relator is
14 conceived of as not exercising --

15 JUSTICE GORSUCH: So, counsel --

16 MR. LIU: -- governmental power.

17 JUSTICE GORSUCH: -- if -- if I
18 understand it -- and just -- I just want to make
19 sure I'm following the bouncing ball here -- the
20 Article II problem is solved by the fact that
21 exercising its Article I authority, Congress has
22 authorized property to be conveyed to a private
23 person, which -- that's right there in the text
24 of Article I. And that's kind of how
25 Blackstone conceived of qui tam actions, as a

1 property interest that's been conveyed.

2 MR. LIU: Right.

3 JUSTICE GORSUCH: Okay. Fine. But
4 the property -- now you want to come into the
5 case, okay? Question whether you have to come
6 into the case. If it's someone else's property,
7 you might think that before you extinguish it,
8 you might have to come in and be a party to the
9 case. So that's kind of where I'm stuck on
10 that.

11 And then, when we get to the question
12 of the standard, if there is a property interest
13 that someone else has, there's a due process
14 interest there, at a minimum, forget about the
15 takings clause for now.

16 And what's wrong with the rationality
17 standard, a true rationality standard? We can
18 quibble about whether the Ninth Circuit got it
19 right, but what's wrong with that?

20 Any executive action, forget about
21 property interest, would be subject to that, and
22 why is that much different than Rule 41, which
23 says proper cause when an answer has been filed?

24 All right. A lot there. Have at it.

25 MR. LIU: Well, to your -- to your

1 first point, we don't think there are two --
2 Article II concerns here, but it is still
3 central to the way this statute works that this
4 is a suit brought in the United States' -- in
5 the United States' name to redress wrongs done
6 to the United States. So this isn't -- this --
7 this at -- at bottom is still an assignment of
8 the government's own damages claim.

9 JUSTICE GORSUCH: Sure.

10 MR. LIU: And so the government's own
11 view of whether the litigation proceeding or
12 being dismissed is in the United States'
13 interest is really something in the United
14 States' bailiwick, and -- and our view of that
15 should be controlling.

16 To your point about the -- the -- the
17 constitutional baseline, I -- I -- I think this
18 is a situation where -- where Congress could
19 have imposed a -- a stricter standard if it had
20 wanted to.

21 JUSTICE GORSUCH: Well, it set a
22 hearing, and -- and, normally, they are not tea
23 parties, right? Normally, something happens at
24 --

25 MR. LIU: Oh --

1 JUSTICE GORSUCH: -- at -- at
2 hearings. So what -- what -- what -- what
3 should happen in the hearing? Why -- what's --
4 is something wrong with the rational basis test?
5 Is it different than Rule 41 after an answer,
6 proper cause is the standard there?

7 Those things are usually very easily
8 met, and I'm -- I'm just not sure I understand
9 the objection to them.

10 MR. LIU: Sure. Well, the rationality
11 standard that the Ninth Circuit has adopted
12 isn't your typical constitution --
13 constitutional rational basis.

14 JUSTICE GORSUCH: I'll spot you that.

15 MR. LIU: Yeah.

16 JUSTICE GORSUCH: Okay.

17 MR. LIU: Yeah.

18 JUSTICE GORSUCH: I'll spot you that.

19 MR. LIU: It's also not the
20 standard --

21 JUSTICE GORSUCH: But -- but -- but
22 put that aside. Would a proper, in the
23 government's view, rational basis standard be
24 objectionable and would it be different than
25 Rule 41? Last time I'll ask the question, I

1 promise.

2 MR. LIU: It would not be
3 objectionable if it reflected this Court's
4 decisions in cases like County of Sacramento
5 versus Lewis. That's the applicable
6 constitutional test. We don't think the court
7 should invent some sort of new one -- you know,
8 one ticket only sort of test for this case.

9 Is it different from Rule 41? Yes.
10 Rule 41 governs the relationship between the
11 plaintiff and the defendant. And so what Rule
12 41 says is that when a plaintiff voluntarily
13 dismisses a case, the court can step in and
14 protect the defendant's interests by
15 dismissing --

16 JUSTICE GORSUCH: Well, it says proper
17 cause. It says a plaintiff can dismiss a case
18 for proper cause. You're now plaintiff, Rule
19 41, you want to voluntarily dismiss. Answer's
20 been filed, summary judgment, whatever, proper
21 cause. There's -- there's no more definition of
22 the standard than that.

23 MR. LIU: Right, but the -- the -- the
24 -- the standard that I think the rule-makers
25 contemplated was one where a court would be in a

1 position of evaluating whether something the
2 government did, dismissal, how that affected the
3 defendant. And that kind of inquiry, prejudice
4 to the defendant, is pretty common in the law.

5 What's not common is what Petitioner
6 is asking the Court to do here, which is to
7 evaluate as between two litigants on the same
8 side of the V, the United States and the
9 relator, which one has the better view of the
10 United States' interest. That's not something
11 Rule 41 has ever contemplated.

12 JUSTICE BARRETT: But that's because a
13 qui tam action is unusual, and Justice Gorsuch
14 is right, right, if the proper cause standard --
15 and I agree with you that courts typically apply
16 that to account for prejudice to the defendant
17 if the plaintiff dismisses after the defendant
18 has filed an answer or a dispositive motion.

19 Why couldn't the proper cause standard
20 in this unique context take care of any
21 prejudice to the relator?

22 MR. LIU: I think it's because it
23 would run straight into the teeth of Congress's
24 decision in (c)(2)(A) to leave out a substantive
25 standard. And this wasn't an accident that

1 Congress made.

2 If you look up and down the FCA, there
3 are numerous provisions where Congress specified
4 a particular showing that -- that the government
5 would need to make or a particular showing --
6 finding that the court would need to make and
7 they left out any such standard in (c)(2)(A).

8 CHIEF JUSTICE ROBERTS: Justice
9 Thomas, anything further?

10 Justice Alito?

11 JUSTICE ALITO: I still don't have a
12 very concrete understanding of what you think is
13 supposed to happen at this hearing if there has
14 to be a hearing.

15 Is it enough if the government just
16 says, we think the claim isn't meritorious or we
17 think the -- the discovery going forward is
18 going to be too burdensome?

19 Does the court just say, okay, that's
20 a -- that reason is not arbitrary and capricious
21 and therefore dismiss?

22 MR. LIU: We --

23 JUSTICE ALITO: Does it inquire into
24 those things?

25 MR. LIU: If those are the reasons we

1 gave, they would not be anywhere close to being
2 arbitrary in the constitutional sense --

3 JUSTICE ALITO: Okay.

4 MR. LIU: -- in a sort of shocks the
5 conscience way. But we do think the hearing
6 serves two important purposes.

7 JUSTICE ALITO: But does it have to do
8 more -- does the government have to do more than
9 simply say those things?

10 MR. LIU: No.

11 JUSTICE ALITO: Does it have to make
12 -- okay.

13 MR. LIU: No. And if -- and if -- and
14 if Congress had wanted the government to say
15 more than those things, it would have used
16 language like it did elsewhere in the statute,
17 which is, upon a showing by the government, the
18 court may dismiss, or upon a particular finding,
19 the court in its discretion may dismiss.

20 But, instead, the -- the language of
21 (c)(2)(A) is written in terms of the government,
22 it says the government may dismiss, and then
23 it -- the -- the Congress specified two
24 conditions, neither of which has to do with the
25 standard.

1 JUSTICE ALITO: What would be
2 insufficient in your view? So the government
3 says, we move to dismiss because we feel like
4 it, or we move to dismiss because we consulted
5 an astrologist or there is political pressure to
6 dismiss this case. What would be insufficient?

7 MR. LIU: Well, I -- I think
8 consulting an astrologer would seem arbitrary in
9 the constitutional sense, but we're not asking
10 the Court to disturb its existing precedents on
11 what is constitutional or not vis-à-vis
12 executive action. We're simply saying, take
13 those as given, and that's the constitutional
14 baseline.

15 If in a future case the Court wants to
16 adjust the constitutional baseline, that's fine,
17 but all we're saying is that the way to think
18 about this is that the statute itself does not
19 supply a standard and so the only applicable
20 standard here has to come from the Constitution.

21 JUSTICE ALITO: What happens when the
22 government belatedly intervenes and moves to
23 dismiss or belatedly moves to dismiss and
24 doesn't really have a good reason for having
25 waited, but, by that time, the relator has spent

1 a ton of money litigating the case? It's just
2 too bad for the relator?

3 MR. LIU: It is too bad. The relator
4 brings the case knowing that a condition of his
5 assignment, in effect, is that the government
6 may exercise its dismissal right. No circuit
7 has adopted Petitioner's view that the
8 government loses forever the right to dismiss if
9 it doesn't intervene at the outset. And so
10 every relator brings these suits knowing that
11 that's a possibility.

12 On top of that, the government
13 provides as required under (c)(2)(A) notice that
14 we're going to exercise this right before we
15 exercise it.

16 And just look at the facts of this
17 case. We gave notice that we were going to
18 exercise that right the first time. The relator
19 came in and persuaded us not to exercise it.
20 And so, in fact, that's -- that's evidence not
21 only that the notice is a key component and that
22 the relator had notice of what we were doing but
23 also that the hearing serves a purpose because
24 it led us to decide not to dismiss at -- at one
25 point in the case.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Answer Justice
4 Alito's entire question. The astrologer might
5 not be good enough. I don't feel like it, is
6 that good enough?

7 MR. LIU: No. I think that would be
8 arbitrary in the Constitution.

9 JUSTICE SOTOMAYOR: So let's talk
10 about political pressure. There's no reason
11 related to the case. It's simply that the
12 senator of this defendant's home state doesn't
13 want this defendant to be sued.

14 Is that good enough?

15 MR. LIU: I think it would truly
16 depend on the circumstances of the case, and the
17 reason why is because the whole point that
18 Heckler versus Chaney says that these types of
19 decisions are presumptively immune from judicial
20 review.

21 JUSTICE SOTOMAYOR: They -- they --
22 they are if you're talking about something
23 that's your property right exclusively, but this
24 is a very different situation where the relator
25 has a property interest.

1 MR. LIU: Well, I think -- I think the
2 cost/benefit analysis, though, is still just as
3 judicially unmanageable regardless of the sort
4 of analytic source of it.

5 In other words, when the government
6 makes these sorts of decisions, what's going
7 into the decision-making is a consideration of
8 the government's policies across the board,
9 whether certain resources would be better
10 allocated here or there, concerns from
11 disclosing privileged information.

12 JUSTICE SOTOMAYOR: Those -- those are
13 related to the case. I -- the question was the
14 senator of this defendant's state says don't do
15 it. He gives me money.

16 MR. LIU: I -- I --

17 JUSTICE SOTOMAYOR: This company feeds
18 me money, don't do it.

19 MR. LIU: -- I think it's -- it's hard
20 to say categorically whether that would be
21 impermissible simply because the way our system
22 works is through politics, and politics figure
23 into the sorts of policies and priorities that
24 administrations have. And --

25 JUSTICE SOTOMAYOR: So it's a fake

1 property interest the relator has?

2 MR. LIU: Oh, no --

3 JUSTICE SOTOMAYOR: Blackstone?

4 MR. LIU: It's protect -- it's
5 protected just like any other property interest
6 under the Constitution. And if Congress had
7 wanted to provide additional protections, it
8 could have done so, but it didn't.

9 JUSTICE SOTOMAYOR: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: When and how would it
12 make a difference to require the government to
13 intervene before moving to dismiss?

14 MR. LIU: Yeah. I think the practical
15 problem lies in subjecting the government's
16 dismissal decision to second-guessing by the
17 relator, and that in turn puts the Court in the
18 awfully strange position that I mentioned
19 earlier of having to decide, as between the
20 United States itself and the relator, who
21 actually has the better view of the United
22 States' interests in that case.

23 I think that runs right into the
24 problem that Heckler versus Chaney identified,
25 and I have to presume that's why Congress left

1 out any substantive standard in (c)(2)(A)
2 itself. To then read into the statute kind of
3 through the back door of (c)(3)'s intervention
4 provision a substantive standard to review that
5 decision I think gets both Congress's intent and
6 common sense wrong.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

9 JUSTICE KAVANAUGH: Just to follow up
10 on Justice Alito's question, would it be okay to
11 come in and say we don't think it's the best use
12 of agency resources to proceed?

13 MR. LIU: Yes, that would be
14 absolutely okay.

15 JUSTICE KAVANAUGH: And it's not a
16 priority of the agency to proceed with this kind
17 of case?

18 MR. LIU: Correct.

19 JUSTICE KAVANAUGH: So all the kind of
20 Heckler versus Chaney reasons. And could a
21 district court order discovery into whether
22 those were really the government's reasons?

23 MR. LIU: No, not in a typical case.
24 I think, if a relator came in and made a
25 credible showing that there was a constitutional

1 violation such as this --

2 JUSTICE KAVANAUGH: Right. The equal
3 protection example.

4 MR. LIU: Sort of an equal
5 protection --

6 JUSTICE KAVANAUGH: What about
7 privilege? Could any of this -- proceeding with
8 this will raise too many privilege concerns when
9 moving?

10 MR. LIU: Yes, I think that is a
11 legitimate reason and not arbitrary, in the
12 constitutional sense, reason for the government
13 to seek to dismiss.

14 JUSTICE KAVANAUGH: Just a question on
15 the term "property interest" here. I mean, it's
16 an odd sort of property interest, right, when it
17 can be completely extinguished by the
18 government, the Executive Branch, at any time?

19 MR. LIU: Well, I think it is a
20 property interest that --

21 JUSTICE KAVANAUGH: So it's an odd --

22 MR. LIU: It -- it --

23 JUSTICE KAVANAUGH: -- it's an odd
24 thing?

25 MR. LIU: It's an odd thing, but it

1 is, I think, the -- the structure Congress
2 contemplated and the one that this Court
3 accepted in Stevens. And I -- and I think, if
4 we accept that theory, then a lot of parts of
5 the statute make sense from an Article III and
6 an Article II perspective.

7 JUSTICE KAVANAUGH: Last question.
8 This might be what Justice Kagan was asking, but
9 it might be something different. The -- if you
10 have to intervene before you move to dismiss --
11 and so, if this is repetitive, I apologize --
12 the D.C. Circuit said that would be largely
13 academic, that requirement, if you had to
14 intervene before moving to dismiss. Do you
15 agree with that? I mean, in other words, it
16 doesn't matter one way or the other.

17 MR. LIU: Yeah, I think it -- it -- it
18 depends entirely on what standard for good cause
19 a court adopts. It's largely academic if the
20 standard for good cause means that anytime the
21 government seeks to dismiss that's automatically
22 good cause.

23 JUSTICE KAVANAUGH: So, on the good
24 cause, the things I identified earlier about
25 reasons to dismiss, you would also say, if we

1 required you to intervene first, would also
2 satisfy good cause, prioritization, resources,
3 privilege?

4 MR. LIU: Right. I mean, we would go
5 even further and say that the intent to dismiss
6 is itself good cause to at least have the notice
7 and the opportunity.

8 JUSTICE KAVANAUGH: Then it really is
9 academic, which is fine, but I just -- that's
10 good to get clarity on that. Okay. Thank you.

11 MR. LIU: Thanks.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 Justice Jackson?

15 JUSTICE JACKSON: Yes. So just
16 following up on Justice Kagan and Kavanaugh's
17 point about intervention. So you -- I thought
18 you said to Justice Kagan that intervention
19 would be problematic because it's subjecting the
20 government's dismissal decision to
21 second-guessing. But it's not the -- it's not
22 the intervention that is subjecting the motion
23 to dismiss. It's the fact that they -- you have
24 to have a hearing for a motion to dismiss,
25 right? I mean, regardless, even without

1 intervention, do you concede that the statute
2 says that the government's filing of a motion to
3 dismiss at least entitles the relator to an
4 opportunity for a hearing?

5 MR. LIU: Correct.

6 JUSTICE JACKSON: So that's the
7 hearing -- it's the hearing that creates the
8 opportunity for a second-guessing of the
9 government's determination --

10 MR. LIU: Well, but we --

11 JUSTICE JACKSON: -- about dismissal?

12 MR. LIU: -- but we think Congress in
13 (c)(2)(A) purposely left out any substantive
14 standard for a court to apply in evaluating the
15 government's dismissal decision. And to read
16 good cause as supplying that standard we don't
17 think makes sense under the -- the structure --

18 JUSTICE JACKSON: So what if we read
19 good cause as not so much -- as not so much
20 supplying a standard, but I notice in the
21 statute it says upon a showing of -- of good
22 cause such hearing may be held in camera.

23 So what if -- what if what's happening
24 there is the government, when it intervenes, has
25 the opportunity to present arguments to the

1 court about the nature of other investigations
2 or whatever it is that it does in camera, and
3 that kind of cuts against the -- the -- the
4 relator's, you know, open hearing scenario?

5 MR. LIU: Well, I -- I don't think our
6 concerns are fully addressed by moving the
7 reason -- the -- the evaluation in camera. I --
8 I think our problem with subjecting the
9 government's decision to a substantive standard
10 is, one, that's not what Congress intended, but,
11 two, it does create this practical problem where
12 the court is engaging in the sort of inquiry we
13 think Heckler versus Chaney recognized courts
14 are ill-equipped to conduct.

15 JUSTICE JACKSON: So this might be
16 repetitive. What inquiry is the court supposed
17 to be engaged in in the hearing --

18 MR. LIU: Right.

19 JUSTICE JACKSON: -- that you concede
20 the motion to dismiss goes along with?

21 MR. LIU: We think, at the hearing,
22 the -- the -- the court can consider relator's
23 allegations that we have violated the
24 constitutional baseline that we think applies in
25 this case. The hearing also serves a second

1 purpose, which that -- is that it allows the
2 relator to convince the government not to
3 exercise the right to dismiss.

4 Now that is far from an empty
5 formality, as this case illustrates, because
6 the -- the -- when we initially wanted to
7 dismiss the case, we heard from the relator and
8 then changed our minds, giving the relator a
9 chance to put the case back on the right track.
10 It was only after the case fell off that track
11 that we then ultimately exercised our dismissal
12 right.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Mosier.

17 ORAL ARGUMENT OF MARK W. MOSIER
18 ON BEHALF OF RESPONDENT EXECUTIVE HEALTH
19 RESOURCES, INC.

20 MR. MOSIER: Mr. Chief Justice, and
21 may it please the Court:

22 No court has interpreted the False
23 Claims Act to prohibit the government from
24 dismissing a qui tam suit if the government
25 initially declined to intervene. That

1 interpretation would interfere with the
2 government's dismissal authority because the
3 government cannot always determine during the
4 seal period whether a suit should be dismissed.
5 Whether the claims lack merit or whether they
6 could interfere with other enforcement actions
7 may not be known before the litigation proceeds.

8 If the False Claims Act prevents the
9 government from ending litigation that no longer
10 serves the interests of the United States, then
11 the statute is unconstitutional. The
12 enforcement of federal law cannot be left solely
13 to private relators seeking financial gain.

14 I welcome the Court's questions.

15 CHIEF JUSTICE ROBERTS: Counsel, is it
16 consistent with the Congress's view of these
17 sorts of actions, going back to 1863, to
18 continue to leave the entire proceeding in the
19 hands of the government, which it would be under
20 your theory? In other words, the government
21 didn't have a statutory right to intervene until
22 1940-something. And yet, now you would join the
23 government and say basically that they can bring
24 the -- bring the suit to a halt at any time and,
25 given the looseness of the standard that's being

1 proposed, for pretty much any reason.

2 MR. MOSIER: Yeah, I mean, we think
3 that the government's right to step in and
4 dismiss a case, a case that is brought on behalf
5 of the government, to -- pursuing claims that
6 are owned by the government, we think that the
7 government's authority to step in and stop that
8 case derives from the Constitution itself and
9 Article II. And so the early statutes that
10 didn't expressly provide for a right of -- of
11 dismissal, they also didn't foreclose the
12 government from dismissing, and we think that
13 the early statutes should be viewed as silent on
14 the issue of what authority does the executive
15 branch have to stop a qui tam suit that the
16 executive determines is not in the United
17 States' best interests.

18 JUSTICE KAGAN: Can -- can you point
19 --

20 CHIEF JUSTICE ROBERTS: So you have --
21 you have a stronger view of the President's
22 powers than the government?

23 MR. MOSIER: Yeah, I think that that
24 is the case. I will point out, in the -- in the
25 lower courts, the government did make a more

1 robust constitutional avoidance power. And --
2 and I want to be clear exactly the breadth of
3 our argument here. We have not argued that
4 every qui tam statute ever enacted is
5 unconstitutional. We haven't even challenged
6 the constitutionality of the False Claims Act as
7 interpreted by the Third Circuit in this case.

8 The only constitutional argument that
9 we have made is that if Petitioner is correct
10 that if Congress in this statute has prohibited
11 the government from dismissing or settling some
12 certain set of cases or in some circumstances,
13 that would push the statute past the break --
14 constitutional breaking port -- point and go too
15 far in interfering with the -- with the
16 President's Article II powers.

17 We know there have been a number of
18 court of appeals decisions that have upheld the
19 constitutionality of the qui tam suits, but they
20 have all but first interpreted the dismissal
21 power to apply whether or not the government
22 proceeds with the action, whether or not the
23 government initially declines or comes into the
24 case later, and they have noted how that right
25 is important in their view to allow the

1 executive to maintain the necessary control over
2 the suit.

3 It is a -- it's a very big incursion
4 into the President's authority to say that
5 somebody else gets to decide whether an
6 enforcement action is initiated in the first
7 instance. What the courts have said is, well,
8 that -- that incursion is not so substantial if
9 we interpret the statute to say that the
10 government can come in at any time and just
11 dismiss the suit.

12 But, if we're not in that circumstance
13 anymore, if it's -- we're in a circumstance when
14 the relator both can initiate the suit, and if
15 we reach a point where the government can no
16 longer come in and end the litigation, whether
17 through settlement or dismissal, then the
18 relator would have free rein to decide what
19 arguments to advance on behalf of the United
20 States, how to interpret the False Claims Act,
21 and we would say that would go too far.

22 We've -- we've talked about how the --
23 the right to dismiss at the beginning of the
24 case doesn't take into account the changed
25 circumstances, but I think it also doesn't take

1 into account the Article II responsibilities of
2 the President. It's not just that the President
3 needs to appoint officials to execute the law.
4 The Court has made clear as recently as cases
5 like *Arthrex* that the President has an ongoing
6 obligation to actively supervise the exercise of
7 executive power.

8 JUSTICE ALITO: If this were an
9 ordinary property interest, so a plaintiff is
10 bringing a private claim to protect its own
11 property interest, the government could not
12 swoop into the case and say dismiss the claim,
13 and the court's inquiry would not be limited to
14 determining whether the government's
15 intervention in the non-technical sense of the
16 term shocked the conscience, right?

17 MR. MOSIER: I think that's right, but
18 the way that we read *Stevens*, the way that we
19 read *Blackstone* and the provisions that
20 *Blackstone* cited in *Stevens*, and also the way we
21 read cases like the confiscation cases is that a
22 property interest in a *qui tam* suit vests upon
23 the entry of final judgment.

24 The actual assignment of a chose of
25 action I think is probably more akin to an

1 assigned -- a contractual right or even perhaps
2 a trust. So we think that the property right --
3 this is how we read Stevens -- the property
4 right doesn't vest until there's a judgment, and
5 that's why we don't think that the review
6 necessarily needs to be treated as the deprivation
7 of -- of a property right.

8 We think, if you look at more of a
9 contractual assignment of a cause of action, the
10 terms of the assignment have to be set by the
11 contract -- the contract or the -- which is the
12 statute in this circumstance, and one of the
13 rights in the statute as we read it and as the
14 government reads it is that the government has
15 the authority to dismiss over the relator's
16 objection. And, you know, you've asked a lot
17 about the interpretation of how to get --

18 JUSTICE ALITO: Well, that -- that
19 sounds like it's purely statutory. So, if you
20 have a contract assigning a right, you look to
21 the terms of the contract, so here we have a
22 statute, you look to the terms of the statute.
23 And then it's just not clear to me how the --
24 how Article II then gets back into the case.
25 There's either an Article II problem or there

1 isn't an Article II problem with this whole
2 procedure.

3 MR. MOSIER: Well, regardless of
4 whether you -- you view it more as a contractual
5 assignment or an assignment of a property right,
6 you still have the situation where a private
7 relator is litigating on behalf of the United
8 States to recover funds allegedly defrauded from
9 the United States. And we -- our position would
10 be that is still the exercise of executive
11 power, and that puts you in the position of
12 determining whether the President and the
13 Attorney General retain sufficient control over
14 the qui tam suit so as -- so as to not violate
15 the constitutional separation of powers.

16 When the courts of appeals have looked
17 at it, they've -- they've analyzed it in a
18 Morrison versus Olson framework to say does the
19 -- does the powers given to the relator -- is it
20 so sufficient that it deprives the Attorney
21 General of the ability to sufficiently control
22 the litigation to ensure that the laws are
23 faithfully executed? And all of those analysis
24 depend on the government's veto power
25 essentially to say this suit is no longer

1 serving the interests of the United States. We
2 need to bring it to an end.

3 JUSTICE KAGAN: And how far does that
4 go? Does -- does the constitutional argument
5 that you're making suggest that the government
6 needs to be able to bring it to an end even
7 without intervening, or are you perfectly fine
8 with a solution that says, well, first, the
9 government intervenes and then moves to dismiss?

10 MR. MOSIER: We're perfectly fine with
11 that approach. What the Third Circuit held in
12 this case is that the government needs to first
13 intervene. It found that on the facts of this
14 case there was clearly good cause to intervene.
15 The Petitioners have not challenged that -- that
16 part of the holding.

17 And so on the -- the judgment before
18 you is -- is a case in which the court of
19 appeals found not only that intervention was
20 required, but it was satisfied and good cause
21 was there, and it does deal with a lot of the
22 textual issues regarding the structure of the
23 provisions and the surplusage to say the
24 government needs to intervene, but then, once it
25 intervenes under (c)(3), it goes back into the

1 -- the world of (c)(1) and (c)(2), where it has
2 the power to dismiss.

3 We note the -- the court of appeals,
4 both the Third Circuit in this case and the
5 Seventh Circuit have required intervention, and
6 they've said it's usually going to be a low bar
7 for the government because good cause is a
8 flexible standard, and we can take into account
9 Article II separation of powers concerns when we
10 are apply -- when we are applying good cause.

11 And so we think that should go a long
12 ways to -- to addressing the government's
13 concern of what would happen if good cause is
14 too heightened of a standard and would make it
15 too difficult for the government to intervene.

16 If I -- I could, I could respond to --
17 to the government's position that as I
18 understand on the constitutional position is
19 that the -- that the relator is not exercising
20 government power because it's a private
21 individual.

22 But we don't think that should be the
23 constitutional analysis. It's -- it's -- the --
24 it is maybe a private person, but, in some ways,
25 that may become more problematic that it is a

1 private person who hasn't taken an oath to the
2 Constitution, who's not bound by DOJ guidelines,
3 who is able to litigate claims on behalf of the
4 United States.

5 And so we think it's even more
6 important that the Attorney General has
7 substantial oversight over a private person
8 litigating on behalf of the United States when
9 -- when we clearly know that the -- the interest
10 that the -- that the private relator is most
11 concerned about is the financial stake that he
12 may have in the case.

13 JUSTICE ALITO: Do you agree with the
14 government's understanding of what should and
15 should not occur at the hearing if there's going
16 to be a hearing?

17 MR. MOSIER: Yes. We -- we take a
18 similar position. I mean, some of the courts of
19 appeals have said that it does provide a useful
20 function of requiring the government to listen
21 to the relator and -- and hear -- hear the --
22 the evidence and the arguments against
23 dismissal.

24 It also -- you know, I think this
25 could be analogous to a situation of the way the

1 Court addressed -- or the Court's decision in
2 Armstrong, where they recognized that usually
3 the -- the government's decision not to
4 prosecute in a criminal case is not subject to
5 judicial review.

6 JUSTICE ALITO: But what if the
7 government doesn't really have any good reason
8 for not intervening earlier? It just says,
9 well, gee, we're embarrassed, Your Honor, but
10 this kind of fell behind a filing cabinet in DOJ
11 and we only found it recently, and the relator
12 says, well, that's fine, but we've spent
13 \$500,000 litigating this case up to this point.
14 What does the court do then? Can the court say
15 that the defendant has to pay or the government
16 has to pay? I assume they can't say the
17 defendant has to.

18 MR. MOSIER: I would certainly would
19 not --

20 JUSTICE ALITO: But how about the
21 government?

22 MR. MOSIER: -- we certainly would not
23 say that. I mean, one thing I would say,
24 especially in a case or, here, where the
25 government has expressed its opinion that it is

1 concerned about the relator's ability to prove
2 its case, then I think the concerns on the
3 relator's side of how much money they have spent
4 and how long they've litigated the case to reach
5 a point where they haven't even been able to
6 convince the government that they have a chance
7 of success, the -- the real risk of prejudice
8 and of concern is on the defendant's side, who
9 has also paid -- spent large amounts of monies
10 defending itself against claims over a period of
11 years, and now it's the government whose claims
12 the -- the case is brought on behalf, they have
13 expressed their view that the -- that the
14 relator is unlikely to be able to prove that the
15 case shouldn't --

16 JUSTICE ALITO: Yeah. So the -- so
17 the government should foot the whole bill,
18 right, should pay the -- the relator and the
19 defendant?

20 MR. MOSIER: The statute makes clear
21 that the -- the government doesn't have to pay
22 the costs of the litigation, and that's -- it's
23 the deal that the relator knows when it files
24 the suit, is that, you know, this has been the
25 uniform interpretation of the statute by every

1 court of appeals that the government can come in
2 at any stage in the litigation and dismiss over
3 the relator's objection.

4 So there's -- there's not an instance
5 of unfair surprise or that there was a new
6 interpretation offered. There -- there hasn't
7 been a court that -- that has adopted the sort
8 of restriction that the relators want.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Anything further, Justice Alito?

12 Justice Sotomayor?

13 Justice Gorsuch?

14 Justice Barrett?

15 Justice Kagan, anything further?

16 Okay. Thank you.

17 Rebuttal, Mr. Geyser.

18 REBUTTAL ARGUMENT OF DANIEL L. GEYSER

19 ON BEHALF OF THE PETITIONER

20 MR. GEYSER: Thank you, Mr. Chief

21 Justice. Just a few quick points.

22 First, if the executive must be able
23 to dismiss at any time and for any reason, then
24 the founding-era qui tam statutes are
25 unconstitutional, the 1863 version of this Act

1 is unconstitutional, and the 1943 version of
2 this Act is also unconstitutional.

3 The -- the rule has never been in the
4 qui tam setting that the executive has to
5 control the private relator's action in
6 enforcing the property interests in that claim.

7 The second point. The government says
8 that its stated basis is not subject to
9 second-guessing if it can dismiss. Now, of
10 course, that question's, why is there a hearing?
11 The normal reason for having a hearing is to
12 second-guess what the government is saying.

13 And, in fact, it is equivalent to
14 saying that because I feel like it if the
15 government can come up with any reason at all
16 and not have to justify the reason, even if it's
17 clearly arbitrary and clearly incorrect.

18 The government has also said that --
19 that second-guessing would not be subject to
20 judicially manageable standards. Now, of
21 course, Congress thought it's perfectly capable
22 to have a court subject a settlement to very
23 similar standards, and I don't know why, if the
24 government can evaluate a settlement for its
25 reasonableness and its fairness, it can't

1 evaluate a basis for dismiss for irrationality
2 or arbitrariness.

3 The government says that the lack of
4 any standard -- oh, I'm sorry. The -- the
5 government says that there isn't a standard in
6 the statute. Now, under our reading, that makes
7 more sense. If Congress expected the government
8 to take over the case and proceed with the
9 action at the outset and that's when the
10 dismissal authority would kick in, it would make
11 more sense to see the lack of a standard. That
12 would be more like a Rule 41 dismissal.

13 Now, of course, once the relator has
14 invested all that money and you're years down
15 the road and the government has no good reason
16 really for changing its mind, it's very strange
17 not to see a more concrete standard in a statute
18 that says there has to be notice and a hearing.

19 The final point I'll make is that if
20 there is a hearing and if we're wrong on our
21 main theory -- and I -- I -- I hope the Court
22 reconsiders -- then I think the constitutional
23 standard is at least baked into that statute.
24 It's implicit in saying that the government has
25 to come up with some basis for dismiss that is

1 nonarbitrary and that is rational.

2 Congress could not extinguish a
3 property interest for irrational, arbitrary
4 reasons. And if that's true, Congress also
5 can't authorize the government to extinguish a
6 property interest for irrational or arbitrary
7 reasons.

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

10 (Whereupon, at 11:25 a.m., the case
11 was submitted.)

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Official

\$	3 89:5,14 90:22	12,16	arbitrariness [1] 92:2	backdrop [1] 16:7
\$500,000 [1] 88:13	above-entitled [1] 1:15	agent [4] 57:3,10,24 58:9	arbitrary [23] 31:4 32:24, 25 37:17,25 38:4,24 39:4 40:2,3,7 52:10,17,24 53:7 64:20 65:2 66:8 68:8 72:11 91:17 93:3,6	backup [1] 22:16
1	absence [1] 50:12	aggressive [1] 30:15	argued [2] 30:9,14	bad [2] 67:2,3
1 [2] 17:5 22:23	absolute [4] 28:24 29:2,2, 3	agree [8] 8:16 22:25 27:5 28:1 39:21 63:15 73:15 87:13	argues [1] 49:24	bailiwick [1] 60:14
10:03 [2] 1:17 4:2	absolutely [2] 31:19 71:14	ahead [1] 9:11	arguing [1] 56:14	baked [1] 92:23
11:25 [1] 93:10	academic [3] 73:13,19 74:9	akin [1] 82:25	argument [24] 1:16 3:2,5,9, 13 4:4,8 7:2 9:15 16:21 17:25 22:15,16 23:5 27:11 41:18 42:4 48:16 54:1 77:17 80:3,8 85:4 90:18	ball [1] 58:19
12 [1] 34:25	accept [3] 30:4 38:12 73:4	AL [1] 1:8	arguments [7] 22:14,20,25 23:4 75:25 81:19 87:22	bar [1] 86:6
12(b) [1] 25:23	accepted [1] 73:3	ALITO [23] 25:12 35:14,15, 21 36:5,15,18 37:2 64:10, 11,23 65:3,7,11 66:1,21 82:8 83:18 87:13 88:6,20 89:16 90:11	Armstrong [1] 88:2	barred [1] 43:4
1863 [5] 4:25 7:12 12:3 78:17 90:25	accident [1] 63:25	all-or-nothing [2] 13:2,7	Article [33] 6:7,23,25 7:5,7, 18 8:14 9:24 10:23 16:9, 15 28:18,22 29:16,23 46:13 56:8 57:6 58:7,10,20,21, 24 60:2 73:5,6 79:9 80:16 82:1 83:24,25 84:1 86:9	BARRETT [13] 14:16 15:8 32:5 33:2,6,16,25 34:3,9 41:15 63:12 74:13 90:14
1940-something [1] 78:22	according [1] 56:12	allegations [2] 56:13 76:23	aside [2] 39:19 61:22	based [5] 11:10,11 20:20 46:5 53:13
1943 [3] 5:2 12:4 91:1	account [5] 54:20 63:16 81:24 82:1 86:8	allegedly [1] 84:8	asserted [1] 28:11	baseline [10] 50:8,14,16,17 51:2 53:21 60:17 66:14,16 76:24
1986 [3] 13:9,9,11	across [1] 69:8	allocated [1] 69:10	assessment [1] 43:10	basically [4] 25:8 42:6 46:10 78:23
2	Act [30] 4:13,23 7:11,12,20, 22 8:4 12:3 13:4 14:8 23:16 24:12 26:7,8 34:11,19 43:19 44:2,14,15 46:11,15 48:21 57:22 77:23 78:8 80:6 81:20 90:25 91:2	allow [4] 12:14 43:16,22 80:25	assigned [6] 27:14 29:20 30:2 47:9 50:6 83:1	basis [16] 6:11 7:19 27:18 28:11,16 30:9,15,20 31:1 42:17 61:4,13,23 91:8 92:1,25
2 [16] 14:3,4 16:22 17:10,15 18:17 19:22,23 21:7 22:6 23:25 24:5 26:3 35:8 43:15 48:10	Act's [3] 4:15,18,19	allows [1] 77:1	assigning [1] 83:20	became [1] 9:19
2)(A) [2] 17:6 22:23	acting [1] 57:3	alluded [1] 16:8	assignment [12] 7:2,4 50:4 51:16 57:4 60:7 67:5 82:24 83:9,10 84:5,5	become [2] 55:4 86:25
2022 [1] 1:13	action [74] 4:14 8:1,2 11:17 13:14,21 14:6,10,12,14 15:19,21 16:11,23 17:5,13, 20,24 18:7,9,20 19:7,13 20:8,24,25 21:4,22 23:9,15 24:17,24 25:7 26:5 28:4 29:21 30:11,11 33:11,17,21 35:10 36:24 37:8 38:9 39:22 41:24 42:2 44:20,23 45:17 46:10,20,21 48:2,23 49:13 50:20,22,25 51:3,7 54:10,13 57:15 59:20 63:13 66:12 80:22 81:6 82:25 83:9 91:5 92:9	alone [1] 43:11	assist [1] 2:5	becoming [1] 55:5
21-1052 [1] 4:4	action's [1] 18:22	alternate [1] 45:21	assume [6] 37:11 38:15 39:22 52:1 55:7 88:16	beforehand [1] 56:2
26 [1] 42:23	actions [6] 6:3,3 30:5 58:25 78:6,17	amend [1] 8:2	assuming [1] 37:5	beginning [5] 13:3 43:2 46:5 54:8 81:23
27 [1] 42:23	activated [3] 24:1 26:4 28:6	amended [2] 12:14 32:20	astrologer [2] 66:8 68:4	behalf [17] 2:3,6,8 3:4,7,11, 15 4:9 48:17 77:18 79:4 81:19 84:7 87:3,8 89:12 90:19
3	actively [1] 82:6	amendment [2] 32:18 50:11	astrologist [1] 66:5	behind [1] 88:10
300 [1] 10:3	actual [3] 42:20 51:15 82:24	amounts [1] 89:9	Attorney [4] 6:13 84:13,20 87:6	belabor [1] 36:6
32 [1] 10:3	actually [9] 12:8 26:24 28:12 36:10 44:12 47:15 56:3 57:25 70:21	analogy [1] 87:25	attorneys [1] 10:7	belatedly [3] 25:15 66:22, 23
332 [1] 10:6	add [1] 8:2	analysis [6] 27:11 31:18, 21 69:2 84:23 86:23	authority [16] 4:13,18 7:24 12:10 33:23 34:2 36:25 56:14 57:14 58:21 78:2 79:7, 14 81:4 83:15 92:10	believe [4] 36:1 37:5 52:1 54:14
3730(c)(2)(A) [2] 48:25 49:11	addressed [2] 76:6 88:1	analytic [1] 69:4	avoidance [2] 5:10 80:1	below [1] 5:15
3731(c) [1] 25:5	addressing [1] 86:12	analyzed [1] 84:17	away [3] 22:20 52:9,20	benefit [2] 27:11 47:16
4	administrative [3] 45:22 46:3,18	ancient [1] 5:11	awfully [1] 70:18	best [2] 71:11 79:17
4 [3] 3:4 18:17,17	adopted [3] 61:11 67:7 90:7	another [3] 39:2 43:19 46:17	B	better [5] 17:17 22:14 63:9 69:9 70:21
40 [1] 56:9	adopts [1] 73:19	answer [9] 9:24 28:20 31:7 34:15 48:24 59:23 61:5 63:18 68:3	b)(2) [1] 23:10	between [5] 39:6 57:18 62:10 63:7 70:19
41 [24] 27:10,25 28:1,6 33:9, 13,24 34:2,5,13,20 39:6,12, 17 40:1 59:22 61:5,25 62:9,10,12,19 63:11 92:12	advance [1] 81:19	answered [9] 9:24 28:20 31:7 34:15 48:24 59:23 61:5 63:18 68:3	back [15] 12:20,24 17:4 22:23 24:12 47:5 48:6,7 54:13,21 71:3 77:9 78:17 83:24 85:25	Beyond [1] 6:10
48 [1] 3:8	affected [1] 63:2	Answer's [1] 62:19		big [1] 81:3
5	affecting [1] 13:17	anticipated [1] 5:20		bill [1] 89:17
5 [1] 45:19	agency [4] 8:11 10:16 71:12,16	anytime [1] 73:20		billion [3] 11:12 31:8,15
56 [1] 34:25		apologize [2] 34:23 73:11		billion-dollar [1] 30:17
6		apparent [1] 8:12		billions [1] 56:11
6 [1] 1:13		appeal [1] 10:22		bind [1] 8:12
60 [5] 8:17,19 40:25 43:7 51:20		appeals [6] 80:18 84:16 85:19 86:3 87:19 90:1		bit [1] 6:17
60-day [1] 24:18		APPEARANCES [1] 2:1		Blackstone [5] 30:5 58:25 70:3 82:19,20
7		applicable [2] 62:5 66:19		board [1] 69:8
77 [1] 3:12		application [1] 53:19		books [1] 10:21
9		applied [1] 40:13		borrow [1] 27:9
90 [1] 3:15		applies [8] 16:22 18:8 19:24 22:7 50:9,19,21 76:24		both [4] 48:22 71:5 81:14 86:4
A		apply [8] 26:8 27:17 33:14 49:19 63:15 75:14 80:21 86:10		bothered [1] 31:10
a.m [3] 1:17 4:2 93:10		applying [1] 86:10		bottom [1] 60:7
ability [8] 11:18 29:14,15 46:23 55:9 56:10 84:21 89:1		appoint [1] 82:3		bouncing [1] 58:19
able [11] 11:6 12:19 15:12 41:11 45:11 47:22 85:6 87:3		approach [2] 5:21 85:11		bound [1] 87:2

Official

<p>Branch [2] 72:18 79:15 breadth [1] 80:2 break [1] 80:13 breaking [1] 80:14 brief [1] 56:9 briefly [1] 9:25 briefs [1] 5:23 bright [2] 57:18,24 bring [4] 78:23,24 85:2,6 bringing [1] 82:10 brings [2] 67:4,10 broader [1] 24:12 brought [6] 43:1 44:5 56:18 60:4 79:4 89:12 bulk [1] 47:12 bundle [1] 30:6 burden [7] 9:18 10:1,2,8 31:3 36:3,3 burdens [7] 8:11 11:20 55:8,11,11,19,23 burdensome [1] 64:18</p>	<p>10 79:4,4,8,24 80:7,24 81:24 82:12 83:24 85:12,14,18 86:4 87:12 88:4,13,24 89:2,4,12,15 92:8 93:9,10 cases [8] 35:22 50:22 52:3 62:4 80:12 82:4,21,21 categorically [1] 69:20 cause [38] 13:16 18:11 23:2 37:13,15 38:17,19 40:19 43:23 47:19,20,25 53:24,24 54:17,17 59:23 61:6 62:17,18,21 63:14,19 73:18,20,22,24 74:2,6 75:16,19,22 83:9 85:14,20 86:7,10,13 cause' [1] 43:15 causing [2] 10:20 43:9 central [1] 60:3 centuries [1] 5:12 century [1] 6:13 certain [4] 11:5 21:5 69:9 80:12 certainly [2] 88:18,22 cetera [1] 53:14 challenge [1] 10:18 challenged [2] 80:5 85:15 challenges [1] 7:15 chance [3] 13:25 77:9 89:6 Chaney [4] 68:18 70:24 71:20 76:13 change [4] 8:8,17 9:16 44:24 changed [6] 9:16 11:18 12:21 44:15 77:8 81:24 changes [1] 45:6 changing [1] 92:16 channeled [3] 8:24 12:10 36:19 CHIEF [26] 4:3,10 9:9,11,12 34:16 35:11 37:3 40:16 41:14 48:13,18 56:5 57:12 64:8 68:1 70:10 71:7 74:12 77:14,20 78:15 79:20 90:9,20 93:8 chilling [2] 10:13,18 choice [8] 13:2,7 14:9 20:21 23:12 24:13 38:23 48:4 chooses [3] 33:10,17,21 chose [1] 82:24 Circuit [15] 26:21 35:17 36:1 39:6,10 50:17,18 59:18 61:11 67:6 73:12 80:7 85:11 86:4,5 Circuits [2] 35:20,22 circumscribed [1] 57:16 circumstance [4] 43:5 81:12,13 83:12 circumstances [5] 12:21 44:1 68:16 80:12 81:25 cited [2] 56:8 82:20 Civil [5] 15:4 16:11 25:21 34:11 55:12 claim [14] 11:1,2 15:9 29:25 36:10,21 45:21 55:15,</p>	<p>17 60:8 64:16 82:10,12 91:6 Claims [27] 4:13 7:11,12,16,20,22 8:3,3,4 12:2 15:6,7 23:16 26:6 32:16 46:11,15 48:21 77:23 78:5,8 79:5 80:6 81:20 87:3 89:10,11 clarity [1] 74:10 clause [5] 21:17,24 50:10 53:20 59:15 clauses [1] 4:20 clear [23] 9:19 12:13,22 13:7 14:7 15:11 20:6,18 21:21,23,25 25:14 26:7 29:19 42:8 50:23 54:7 56:16 57:2 80:2 82:4 83:23 89:20 cleared [1] 32:17 clearly [9] 21:3 24:9 26:4 27:25 43:20 85:14 87:9 91:17,17 client [5] 9:21 31:13,13,22 56:7 client's [1] 10:9 close [1] 65:1 coffee [1] 26:22 colleagues [1] 12:18 come [22] 12:20 20:10 27:17 41:23 47:5 48:4,6,7 51:15 52:9 54:13,21 59:4,5,8 66:20 71:11 81:10,16 90:1 91:15 92:25 comes [4] 8:10 9:13 27:12 80:23 commits [1] 49:19 common [3] 63:4,5 71:6 commonplace [1] 6:4 company [1] 69:17 complaint [3] 8:2 25:8 32:20 complete [1] 38:8 completely [2] 47:2 72:17 complexity [1] 43:8 comply [1] 50:13 component [1] 67:21 concede [3] 4:21 75:1 76:19 concedes [2] 19:15,16 conceived [3] 57:10 58:14,25 concern [7] 10:20 16:9,16 29:16 46:13 86:13 89:8 concerned [10] 10:11,13 11:4 12:15,23 17:19 42:18 43:3 87:11 89:1 concerns [9] 8:14 49:14 57:7 60:2 69:10 72:8 76:6 86:9 89:2 conclude [1] 36:22 conclusion [1] 4:15 conclusive [2] 6:23,25 concrete [2] 64:12 92:17 condition [1] 67:4 conditions [1] 65:24</p>	<p>conduct [8] 9:20 14:12 17:13 18:7 19:2 35:10 48:1 76:14 conducting [1] 17:20 confiscation [1] 82:21 confronted [2] 7:13,14 confusion [1] 22:4 Congress [47] 5:4 8:24 9:1 11:25 12:9,14,22 13:9,14 14:8 15:11 16:24 17:19 18:24 19:11,22 20:19 21:3,7 23:9,11 24:6,21 25:2 29:20 36:19 48:2 49:3,6,9 53:20 58:21 60:18 64:1,3 65:14,23 70:6,25 73:1 75:12 76:10 80:10 91:21 92:7 93:2,4 Congress's [4] 42:19 63:23 71:5 78:16 conscience [2] 65:5 82:16 consider [2] 39:7 76:22 consideration [1] 69:7 considering [1] 39:12 consistent [5] 7:7 12:25 13:8 19:5 78:16 constitute [1] 25:17 Constitution [8] 51:12 52:14 61:12 66:20 68:8 70:6 79:8 87:2 constitutional [40] 5:9,19 6:1,9,11,18 7:16 27:16,21,23 50:8,14 52:4,15,17,20 53:8,12,21 56:24 58:12 60:17 61:13 62:6 65:2 66:9,11,13,16 71:25 72:12 76:24 80:1,8,14 84:15 85:4 86:18,23 92:22 constitutionality [2] 80:6,19 consulted [1] 66:4 consulting [1] 66:8 contemplated [3] 62:25 63:11 73:2 contemplating [1] 43:20 contention [1] 29:7 context [2] 28:2 63:20 contingent [1] 49:8 continue [4] 22:1 46:1,25 78:18 contract [4] 83:11,11,20,21 contractual [3] 83:1,9 84:4 contrary [1] 4:17 control [18] 7:21 16:10 18:10 19:1 20:4,5,9,9 29:14,15 42:2 56:11 57:15 58:9 81:1 84:13,21 91:5 controlling [3] 41:24 47:6 60:15 controls [2] 28:21 58:5 conveyed [2] 58:22 59:1 convince [2] 77:2 89:6 correct [11] 35:18 40:20,21,</p>	<p>25 41:1,5,11,12 71:18 75:5 80:9 cost/benefit [4] 27:11 31:18,20 69:2 costs [1] 89:22 couldn't [4] 12:5 13:10 52:16 63:19 counsel [7] 35:12 48:14 58:15 77:15 78:15 90:10 93:9 country [1] 6:12 County [2] 50:23 62:4 couple [1] 31:6 course [7] 12:1 38:10 46:3 56:17 91:10,21 92:13 COURT [68] 1:1,16 4:11,23 6:4,21 7:7,13,14,17 11:7,8 18:1 23:22 24:2,3 28:8,15 29:23 32:19 35:23,25 36:12 37:23 39:7,12 43:16 44:9 48:19 49:15,18 50:22 57:2 58:8,9,12 62:6,13,25 63:6 64:6,19 65:18,19 66:10,15 70:17 71:21 73:2,19 75:14 76:1,12,16,22 77:21,22 80:18 82:4 85:18 86:3 88:1,14,14 90:1,7 91:22 92:21 Court's [9] 5:17 10:14 29:13 49:22 57:1 62:3 78:14 82:13 88:1 courts [7] 26:21 63:15 76:13 79:25 81:7 84:16 87:18 crafted [1] 6:7 create [1] 76:11 created [5] 51:18,23 52:2 54:11,19 creates [1] 75:7 credible [1] 71:25 criminal [1] 88:4 critical [3] 8:25 44:16,25 crystal [2] 21:21,25 curious [1] 54:22 cursorly [1] 30:21 cuts [2] 12:8 76:3</p>
C				
D				
<p>D.C. [4] 1:12 2:6,8 73:12 Dallas [1] 2:3 damages [1] 60:8 DANIEL [5] 2:3 3:3,14 4:8 90:18 day [1] 31:16 days [5] 8:17,19 40:25 43:7 51:20 deal [3] 10:4 85:21 89:23 dealing [1] 27:14 debtor's [1] 25:17 December [1] 1:13 decide [8] 9:4 24:16 46:1 51:21 67:24 70:19 81:5,18 deciding [1] 50:15 decision [14] 8:13,25 11:22 49:16,20 57:1 63:24 70:16 71:5 74:20 75:15 76:9 88:1,3</p>				

Official

<p>decision-making [2] 36:20 69:7</p> <p>decisions [4] 62:4 68:19 69:6 80:18</p> <p>decline [1] 14:11</p> <p>declined [2] 5:6 77:25</p> <p>declines [3] 47:3 54:11 80:23</p> <p>declining [3] 4:14 12:6 22:19</p> <p>defendant [14] 25:11 35:1 36:11 39:18 47:17 62:11 63:3,4,16,17 68:13 88:15,17 89:19</p> <p>defendant's [4] 62:14 68:12 69:14 89:8</p> <p>defending [1] 89:10</p> <p>definitely [1] 54:16</p> <p>definition [1] 62:21</p> <p>definitive [1] 42:18</p> <p>defrauded [2] 56:12 84:8</p> <p>deliberate [1] 4:19</p> <p>Department [1] 2:6</p> <p>depend [2] 68:16 84:24</p> <p>depends [2] 57:13 73:18</p> <p>deprival [1] 83:6</p> <p>deprives [1] 84:20</p> <p>derives [1] 79:8</p> <p>described [1] 24:6</p> <p>describes [2] 14:3 29:5</p> <p>deserve [1] 36:11</p> <p>designed [1] 23:1</p> <p>determination [3] 17:23 54:9 75:9</p> <p>determine [1] 78:3</p> <p>determined [1] 18:18</p> <p>determines [1] 79:16</p> <p>determining [2] 82:14 84:12</p> <p>detract [1] 20:13</p> <p>difference [1] 70:12</p> <p>different [18] 6:12,15 14:14 23:10,23 39:4,11,15,17 40:7,8 46:18 59:22 61:5,24 62:9 68:24 73:9</p> <p>differs [1] 31:18</p> <p>difficult [2] 43:10 86:15</p> <p>direct [1] 55:10</p> <p>directly [1] 4:15</p> <p>disagree [2] 26:13 38:22</p> <p>disclosing [1] 69:11</p> <p>discover [1] 10:4</p> <p>discovered [1] 43:6</p> <p>discovery [12] 8:9 9:21 10:4 11:19 19:2 20:11 25:24 31:7 37:9 55:13 64:17 71:21</p> <p>discretion [2] 49:20 65:19</p> <p>discuss [1] 26:12</p> <p>discussions [1] 10:16</p> <p>dismiss [75] 4:13 5:5,15 8:1 12:1 13:4 14:24 15:3,5,6,12,19 22:17 25:22 26:14 29:8 33:22 36:25 37:6,7,</p>	<p>11,23 38:10 40:25 41:11,25 48:23 49:1,4,13,16,21 50:3,15 51:5,16 52:16 62:17,19 64:21 65:18,19,22 66:3,4,6,23,23 67:8,24 70:13 72:13 73:10,14,21,25 74:5,23,24 75:3 76:20 77:3,7 79:4 81:11,23 82:12 83:15 85:9 86:2 90:2,23 91:9 92:1,25</p> <p>dismissal [28] 4:18 15:16 16:3,25 19:14 28:3,5 39:8,22 41:9 51:8,9 53:7,13 63:2 67:6 70:16 74:20 75:11,15 77:11 78:2 79:11 80:20 81:17 87:23 92:10,12</p> <p>dismissed [6] 18:2 20:2 21:25 22:1 60:12 78:4</p> <p>dismisses [2] 62:13 63:17</p> <p>Dismissing [9] 10:19 27:19 28:12,16 32:14 62:15 77:24 79:12 80:11</p> <p>displace [1] 34:2</p> <p>displacing [1] 34:19</p> <p>dispositive [1] 63:18</p> <p>distinct [1] 45:15</p> <p>distinctive [1] 23:15</p> <p>distinctly [1] 28:2</p> <p>district [4] 11:7,8 35:25 71:21</p> <p>disturb [1] 66:10</p> <p>division [1] 20:20</p> <p>documents [3] 9:18 10:3,15</p> <p>doing [5] 14:19 24:2 51:12 52:16 67:22</p> <p>DOJ [2] 87:2 88:10</p> <p>dollars [4] 11:12 31:9,15 56:11</p> <p>done [5] 8:23 36:18 56:20 60:5 70:8</p> <p>donuts [1] 26:22</p> <p>door [1] 71:3</p> <p>down [5] 20:3 21:15 25:9 64:2 92:14</p> <p>dramatically [1] 9:16</p> <p>drawing [1] 57:18</p> <p>Due [4] 50:10 51:14 53:19 59:13</p> <p>during [3] 33:18 48:24 78:3</p>	<p>elect [2] 22:9 45:20</p> <p>elected [1] 18:9</p> <p>electing [1] 48:23</p> <p>election [1] 49:8</p> <p>elects [2] 21:10 49:5</p> <p>elements [1] 11:5</p> <p>eliminate [1] 10:17</p> <p>else's [2] 15:7 59:6</p> <p>elsewhere [2] 49:6 65:16</p> <p>embarrassed [1] 88:9</p> <p>empty [1] 77:4</p> <p>enacted [5] 4:25 7:11 44:15 45:15 80:4</p> <p>enacting [1] 6:8</p> <p>end [6] 31:15 55:20,25 81:16 85:2,6</p> <p>ending [1] 78:9</p> <p>enforce [2] 56:15 57:19</p> <p>enforcement [3] 78:6,12 81:6</p> <p>enforcing [1] 91:6</p> <p>engaged [1] 76:17</p> <p>engaging [1] 76:12</p> <p>enough [5] 30:18 64:15 68:5,6,14</p> <p>ensure [1] 84:22</p> <p>ensuring [1] 54:18</p> <p>entire [2] 68:4 78:18</p> <p>entirely [2] 47:9 73:18</p> <p>entitles [1] 75:3</p> <p>entry [1] 82:23</p> <p>envisioned [1] 18:25</p> <p>equal [3] 53:12 72:2,4</p> <p>equivalent [1] 91:13</p> <p>error [1] 27:21</p> <p>escalate [1] 43:7</p> <p>escape [1] 5:8</p> <p>especially [2] 5:10 88:24</p> <p>ESQ [4] 3:3,6,10,14</p> <p>ESQUIRE [2] 2:3,8</p> <p>essentially [2] 11:21 84:25</p> <p>ET [2] 1:8 53:14</p> <p>evaluate [3] 63:7 91:24 92:1</p> <p>evaluating [4] 50:19,21 63:1 75:14</p> <p>evaluation [1] 76:7</p> <p>even [26] 5:2 7:17 12:5 19:3 21:21 22:17 23:4 24:23,24 29:2,8 30:11 33:5 50:11 51:10 53:17,21 54:25 74:5,25 80:5 83:1 85:6 87:5 89:5 91:16</p> <p>Everybody's [1] 32:3</p> <p>everything [1] 25:13</p> <p>evidence [10] 11:5,7,10,11 31:24 43:6,14 55:11 67:20 87:22</p> <p>EX [2] 1:3 4:5</p> <p>exactly [3] 32:22 42:23 80:2</p> <p>examine [1] 55:10</p> <p>example [2] 32:13 72:3</p> <p>examples [1] 35:22</p>	<p>exceedingly [2] 27:6 36:2</p> <p>exceptions [1] 51:22</p> <p>exclusive [1] 7:21</p> <p>exclusively [1] 68:23</p> <p>execute [1] 82:3</p> <p>executed [1] 84:23</p> <p>EXECUTIVE [22] 1:7 2:9 3:11 4:5 8:5 30:11 46:14 50:22,25 52:22 58:1 59:20 66:12 72:18 77:18 79:14,16 81:1 82:7 84:10 90:22 91:4</p> <p>executive's [1] 29:15</p> <p>exercise [10] 51:9 53:6 67:6,14,15,18,19 77:3 82:6 84:10</p> <p>exercised [1] 77:11</p> <p>exercising [7] 43:24 54:3 57:8,25 58:14,21 86:19</p> <p>exist [3] 16:9 51:3,4</p> <p>existed [2] 7:11 11:11</p> <p>existing [1] 66:10</p> <p>exists [1] 51:6</p> <p>expect [1] 48:3</p> <p>expected [2] 9:1 92:7</p> <p>expert [1] 32:4</p> <p>experts [2] 11:9 31:23</p> <p>explain [1] 38:20</p> <p>explained [1] 32:1</p> <p>explains [1] 45:5</p> <p>expressed [2] 88:25 89:13</p> <p>expressly [1] 79:10</p> <p>extended [1] 24:18</p> <p>extensions [2] 8:20 51:22</p> <p>extent [2] 9:18 49:15</p> <p>extinguish [3] 59:7 93:2,5</p> <p>extinguished [1] 72:17</p> <p>extinguishing [2] 29:25 30:1</p> <p>extra [1] 38:17</p> <p>extreme [1] 31:3</p>	<p>federal [11] 10:6 15:3 16:6 25:21 31:9 34:11,24 55:12 56:12 57:19 78:12</p> <p>feeds [1] 69:17</p> <p>feel [4] 48:5 66:3 68:5 91:14</p> <p>fell [3] 58:4 77:10 88:10</p> <p>few [4] 5:19 11:23 31:7 90:21</p> <p>Fifth [1] 50:11</p> <p>figure [1] 69:22</p> <p>file [5] 25:7,22,23 55:9 58:8</p> <p>filed [3] 59:23 62:20 63:18</p> <p>files [1] 89:23</p> <p>filing [4] 32:18 46:20 75:2 88:10</p> <p>final [4] 19:19 44:22 82:23 92:19</p> <p>financial [2] 78:13 87:11</p> <p>finding [2] 64:6 65:18</p> <p>fine [7] 40:11 59:3 66:16 74:9 85:7,10 88:12</p> <p>Finish [1] 33:3</p> <p>first [23] 4:4 8:16,17,19,19 11:24 17:8 22:14 23:2,7 24:18 29:18 43:7 47:8 48:22 60:1 67:18 74:1 80:20 81:6 85:8,12 90:22</p> <p>FISC [2] 10:6 31:9</p> <p>fixes [1] 6:9</p> <p>flexible [1] 86:8</p> <p>follow [1] 71:9</p> <p>following [2] 58:19 74:16</p> <p>follows [2] 4:15 22:18</p> <p>foot [1] 89:17</p> <p>foreclose [1] 79:11</p> <p>forever [1] 67:8</p> <p>forget [2] 59:14,20</p> <p>form [1] 37:7</p> <p>formality [1] 77:5</p> <p>forms [1] 46:23</p> <p>forth [2] 21:7 22:6</p> <p>forward [7] 8:4 9:2,5 27:18 36:9 55:24 64:17</p> <p>found [9] 19:14 20:25 21:1 26:6 35:23 43:14 85:13,19 88:11</p> <p>foundation [2] 7:9,10</p> <p>founding [3] 5:12 6:3,6</p> <p>founding-era [1] 90:24</p> <p>framed [2] 17:10 48:10</p> <p>framers [1] 6:6</p> <p>framework [1] 84:18</p> <p>fraud [1] 43:8</p> <p>fraught [1] 31:12</p> <p>FREDERICK [3] 2:5 3:6 48:16</p> <p>free [1] 81:18</p> <p>full [7] 13:25 14:22 15:2,22,23,23 55:8</p> <p>fully [1] 76:6</p> <p>function [1] 87:20</p> <p>funds [1] 84:8</p> <p>further [4] 64:9 74:5 90:11,</p>
F				
		<p>face [1] 24:5</p> <p>fact [15] 13:11 17:11 19:15 26:18 29:8,24 31:5 32:21,22 34:9 35:1 58:20 67:20 74:23 91:13</p> <p>facts [7] 8:9 9:3,16,25 28:13 67:16 85:13</p> <p>failed [2] 32:16 43:2</p> <p>fairness [1] 91:25</p> <p>faithfully [1] 84:23</p> <p>fake [1] 69:25</p> <p>fall [1] 22:20</p> <p>falls [1] 58:3</p> <p>False [16] 4:13 7:11,12,20,22 8:3 12:2 23:16 26:6 46:11,15 48:21 77:22 78:8 80:6 81:20</p> <p>far [5] 58:10 77:4 80:15 81:21 85:3</p> <p>favor [2] 19:10 44:13</p> <p>FCA [2] 4:25 64:2</p>		

Official

15 future [2] 10:16 66:15 <hr/> G gain [1] 78:13 gather [1] 26:23 gave [4] 7:5 58:12 65:1 67:17 gee [1] 88:9 General [6] 2:5 6:13 9:14 84:13,21 87:6 gets [8] 8:20 17:24,25 22:23 47:12 71:5 81:5 83:24 GEYSER [92] 2:3 3:3,14 4:7,8,10 5:18,24 6:20 7:4 8:18 9:23 10:12 11:3,13,23 13:6,23 14:16 15:1,10,23 16:13,17 17:7 18:4,15 19:9 20:17 21:14,18 22:5,13,24 23:24 25:12,19 26:10,18 27:7,13 28:23 29:6,18 30:4,23 31:19 32:1,8 33:4,13,20 34:1,6,15,17 35:19,25 36:14,17 37:4 38:3,6,14,16,25 39:9,16,25 40:9,21 41:1,6,12 42:5,7,10,13 44:4,8,12,18,22 45:8,14 46:7 47:7,11,24 90:17,18,20 give [7] 7:20 26:11 32:12 39:24 47:13 51:24 53:2 given [8] 12:12 16:15 30:7 47:17 49:2 66:13 78:25 84:19 gives [2] 13:24 69:15 giving [2] 36:21 77:8 glad [1] 44:5 global [1] 5:5 GORSUCH [29] 26:10,24 27:2,5,8 29:5,11 30:3 31:11,25 32:3,7 37:5 40:17 41:3 58:15,17 59:3 60:9,21 61:1,14,16,18,21 62:16 63:13 71:8 90:13 got [9] 30:13,16 32:4 50:17 59:18 government [207] 4:12 5:1,2,5,14 7:24 8:13,20,23 9:2,6,15 10:1,7,10 11:17 12:1,4,9,16,19,24 13:1,10,11,25 14:6,8,19,20,22,25 15:2,12,19 16:23 17:5,19 18:8,11,18,19,20,25 19:7,12,15,21 20:4,7,10,11 21:2,4,10,12,22 22:8 23:1,11,19 24:13,16,22 25:3,6,15,19 26:5,9,13,20 27:17,22,24 28:10,15,20,21 29:7,24 30:21 31:4,17 32:11,14,18,19,20,23 33:7 34:10,13,23 36:4,8,18 37:6,21 38:19 40:24 41:11,20,22,25 43:1,4,9,14,16,18,22 44:2 45:11,19,25 46:4,25 47:3,11,13,20,22 48:3,22 49:1,4,5 50:13 52:16	54:2,7,10,12,15,20 55:4,7,16 63:2 64:4,15 65:8,14,17,21,22 66:2,22 67:5,8,12 69:5 70:12 72:12,18 73:21 75:24 77:2,23,24 78:3,9,19,20,23 79:5,6,12,22,25 80:11,21,23 81:10,15 82:11 83:14,14 85:5,9,12,24 86:7,15,20 87:20 88:7,15,21,25 89:6,11,17,21 90:1 91:7,12,15,18,24 92:3,5,7,15,24 93:5 government's [46] 7:23 8:25 10:15,20 11:16 12:10 16:10,12 17:23 18:22 20:8,21 22:14,15 28:17,25 29:14,20 36:20 46:22 49:8,16,20 54:22 55:20 56:10 60:8,10 61:23 69:8 70:15 71:22 74:20 75:2,9,15 76:9 78:2 79:3,7 82:14 84:24 86:12,17 87:14 88:3 governmental [4] 30:10,11 58:1,16 governs [1] 62:10 granted [1] 51:22 great [1] 28:19 greater [1] 11:20 guess [2] 14:18 21:19 guidelines [1] 87:2 <hr/> H halt [1] 78:24 hand [2] 57:20,23 hands [1] 78:19 happen [7] 24:14 27:3 29:12 37:20 61:3 64:13 86:13 happening [1] 75:23 happens [2] 60:23 66:21 hard [1] 69:19 HEALTH [5] 1:7 2:9 3:12 4:6 77:18 hear [3] 4:3 87:21,21 heard [2] 49:2 77:7 hearing [36] 15:22 16:4 26:15,19 28:7,7,9 29:11,12 35:16 37:21,24 41:3,9 53:3 60:22 61:3 64:13,14 65:5 67:23 74:24 75:4,7,7,22 76:4,17,21,25 87:15,16 91:10,11 92:18,20 hearings [3] 25:25 26:22 61:2 Heckler [4] 68:18 70:24 71:20 76:13 initially [7] 11:20 12:6 14:6 47:3 77:6,25 80:23 initiate [1] 81:14 initiated [1] 81:6 initiating [2] 15:21 18:21 initiation [1] 51:3 injuries [1] 56:20 inquire [1] 64:23 inquiry [4] 63:3 76:12,16 82:13 inserted [1] 45:2	home [1] 68:12 Honor [26] 5:24 9:23 10:12 11:3,24 15:24 16:17 17:8 18:4 19:9 20:17 22:5,24 28:23 29:6,18 30:24 31:20 32:8 38:8 39:1 40:10 44:4 47:8 52:7 88:9 hook [3] 6:18,19,21 hope [1] 92:21 hours [3] 10:3,4,6 however [1] 9:13 hurdle [1] 56:1 hypothetical [1] 8:22 <hr/> I idea [2] 43:21 58:6 ideally [1] 36:17 identified [2] 70:24 73:24 II [25] 6:7,25 7:18 8:14 9:24 16:9,15 28:18,22 29:16 46:13 56:8 57:6 58:7,10,20 60:2 73:6 79:9 80:16 82:1 83:24,25 84:1 86:9 III [5] 6:23 7:5,7 29:23 73:5 ill-equipped [1] 76:14 illustrates [1] 77:5 immune [1] 68:19 impermissible [1] 69:21 implication [1] 47:21 implicit [1] 92:24 important [5] 13:24 23:4 65:6 80:25 87:6 importantly [1] 13:16 imposed [1] 60:19 imposes [2] 41:5,10 imposing [1] 31:3 improper [2] 40:3,5 inapposite [1] 28:2 INC [4] 1:7 2:9 3:12 77:19 include [1] 49:9 including [2] 37:11 45:22 inconsistent [3] 24:11 42:1,24 inconveniences [1] 30:17 incorrect [1] 91:17 increasing [1] 8:14 incursion [2] 81:3,8 individual [1] 86:21 inform [1] 29:4 information [2] 47:1 69:11 initial [13] 8:13,25 12:11,17 14:9 20:21 22:18 24:13 33:18 36:19 41:18 43:9 48:3 initially [7] 11:20 12:6 14:6 47:3 77:6,25 80:23 initiate [1] 81:14 initiated [1] 81:6 initiating [2] 15:21 18:21 initiation [1] 51:3 injuries [1] 56:20 inquire [1] 64:23 inquiry [4] 63:3 76:12,16 82:13 inserted [1] 45:2	instance [2] 81:7 90:4 instead [1] 65:20 institution [1] 6:14 instructions [1] 26:1 insufficient [2] 66:2,6 intended [2] 5:4 76:10 intent [3] 42:20 71:5 74:5 interest [29] 7:5 29:21 30:1 49:25 50:7,10 51:18 53:10,18 54:11,19 59:1,12,14,21 60:13 63:10 68:25 70:1,5 72:15,16,20 82:9,11,22 87:9 93:3,6 interests [9] 27:15 30:6 56:21 62:14 70:22 78:10 79:17 85:1 91:6 interfere [4] 41:20 46:22 78:1,6 interference [1] 18:22 interfering [5] 20:11 29:13 35:4,6 80:15 intermediate [1] 32:6 interpret [2] 81:9,20 interpretation [4] 78:1 83:17 89:25 90:6 interpreted [3] 77:22 80:7,20 intervene [57] 5:1 12:5,17 13:3,10,12,13,14 15:13 18:12 21:2 22:9,10 23:2,8,8,19 24:23,25 25:6 26:14 36:23 37:6,16,22 38:20 40:24 43:2,19 44:19,23 45:11,16 47:3,4,20 48:24 49:5,9 51:4,8,21 53:24 54:2,16 55:16 67:9 70:13 73:10,14 74:1 77:25 78:21 85:13,14,24 86:15 intervened [2] 19:4 22:17 intervenes [7] 24:22 25:15 34:10 66:22 75:24 85:9,25 intervening [7] 23:13 43:15 51:10 54:25 56:2 85:7 88:8 intervention [22] 12:15 13:20 17:4,9,14 22:18,22 37:14 40:20 41:19 43:22 55:2,3,21 71:3 74:17,18,22 75:1 82:15 85:19 86:5 introductory [2] 19:17 46:8 invent [1] 62:7 invested [1] 92:14 investigate [2] 9:2 36:21 investigation [2] 18:23 20:12 investigations [1] 76:1 invoke [8] 14:1 26:2 30:20 33:23 34:23,25,25 36:25 involves [1] 28:3 irrational [6] 31:5 40:4,5,6 93:3,6 irrationality [1] 92:1 isn't [14] 11:15,24 17:16 25:	9 31:21 37:18,19 38:2 47:9 60:6 61:12 64:16 84:1 92:5 isolation [2] 4:18 15:25 issue [4] 38:22 48:22 49:14 79:14 issues [2] 48:20 85:22 itself [7] 41:4 66:18 70:20 71:2 74:6 79:8 89:10 <hr/> J JACKSON [33] 12:7 13:19 14:21 17:16 18:13,16 34:7 41:16,17 42:6,9,12,16 44:7,11,17,21 45:4,13,18 46:24 47:10,18 54:5 55:14 74:14,15 75:6,11,18 76:15,19 77:13 Jackson's [1] 14:17 JESSE [1] 1:3 job [1] 8:24 join [1] 78:22 judgment [7] 5:15 25:23 37:10 62:20 82:23 83:4 85:17 judicial [3] 46:19 68:19 88:5 judicially [2] 69:3 91:20 jumped [1] 9:17 jury [1] 26:1 Justice [216] 2:6 4:3,11 5:18 6:10 7:1 8:7,15 9:8,9,10,12 10:10,24 11:13 12:7 13:19 14:16,17,21 15:8,15 16:1,8,14 17:1,2,3,16 18:13,16 19:25 21:13,15,19 22:13 23:21 25:12 26:10,24 27:2,5,8 28:14 29:1,5,10,11 30:3 31:2,11,25 32:3,5,7 33:2,6,16,25 34:3,7,9,16 35:11,13,14,15,21 36:5,15,17 37:2,3,3,4,5 38:4,12,15,21 39:3,14,19 40:6,15,16,16,17,18,22 41:2,3,8,13,14,14,16,17 42:6,9,12,16,25 44:7,11,17,21 45:4,13,18 46:24 47:10,18 48:13,19 49:23 51:2,13,20 52:8,12,18,24 53:2,9,23 54:4,5 55:14 56:3,5 57:12 58:15,17 59:3 60:9,21 61:1,14,16,18,21 62:16 63:12,13 64:8,8,10,11,23 65:3,7,11 66:1,21 68:1,1,3,3,9,21 69:12,17,25 70:3,9,10,10,11 71:7,7,9,10,15,19 72:2,6,14,21,23 73:7,8,23 74:8,12,12,14,15,16,18 75:6,11,18 76:15,19 77:13,14,20 78:15 79:18,20 82:8 83:18 85:3 87:13 88:6,20 89:16 90:9,11,12,13,14,15,21 93:8 justify [1] 91:16
--	---	---	---	---

Official

<p style="text-align: center;">K</p> <p>KAGAN ^[16] 10:10 11:13 17:1,3 22:13 23:21 40:16 56:3 70:10,11 73:8 74:16, 18 79:18 85:3 90:15</p> <p>KAVANAUGH ^[31] 8:7 9:8, 10 15:15 16:1,14 17:2 19: 25 21:13,15,19 28:14 29:1, 10 40:18,22 41:2,8,13 42: 25 71:9,15,19 72:2,6,14,21, 23 73:7,23 74:8</p> <p>Kavanaugh's ^[2] 31:2 74: 16</p> <p>key ^[5] 4:20 15:16 17:8 43: 12 67:21</p> <p>kick ^[2] 17:4 92:10</p> <p>kicks ^[1] 22:22</p> <p>kind ^[11] 15:8 22:3 27:10 58:24 59:9 63:3 71:2,16, 19 76:3 88:10</p> <p>knowing ^[2] 67:4,10</p> <p>known ^[1] 78:7</p> <p>knows ^[1] 89:23</p>	<p>11,15 19:22 24:8 35:8 48: 11</p> <p>limited ^[1] 82:13</p> <p>limiting ^[9] 4:22 13:17 18:5, 12 23:18 24:3,25 42:14 45: 1</p> <p>line ^[5] 12:18 57:18,24 58:3, 4</p> <p>listen ^[1] 87:20</p> <p>listened ^[1] 37:24</p> <p>litigant ^[2] 14:23 15:4</p> <p>litigants ^[2] 14:24 63:7</p> <p>litigate ^[6] 9:6,7 13:25 15:2 43:11 87:3</p> <p>litigated ^[2] 46:2 89:4</p> <p>litigating ^[5] 10:2 67:1 84: 7 87:8 88:13</p> <p>litigation ^[12] 19:8 25:5 28: 22 43:5,7 60:11 78:7,9 81: 16 84:22 89:22 90:2</p> <p>litigation's ^[1] 31:11</p> <p>little ^[2] 6:17 41:18</p> <p>LIU ^[68] 2:5 3:6 48:15,16,18 49:23 50:5 51:6,13,19 52: 6,11,14,23 53:1,4,16 54:1, 6 55:1,18 56:5,16 57:17 58:16 59:2,25 60:10,25 61: 10,15,17,19 62:2,23 63:22 64:22,25 65:4,10,13 66:7 67:3 68:7,15 69:1,16,19 70:2,4,14 71:13,18,23 72:4, 10,19,22,25 73:17 74:4,11 75:5,10,12 76:5,18,21</p> <p>long ^[2] 86:11 89:4</p> <p>longer ^[3] 78:9 81:16 84:25</p> <p>look ^[17] 7:19 16:18,19 20: 18 24:6,12 25:5 26:16 42: 21 44:10,13 46:8 64:2 67: 16 83:8,20,22</p> <p>looked ^[6] 7:15 12:3,4 31: 23 50:18 84:16</p> <p>looking ^[2] 26:7 39:17</p> <p>looseness ^[1] 78:25</p> <p>loses ^[1] 67:8</p> <p>lot ^[5] 22:25 59:24 73:4 83: 16 85:21</p> <p>low ^[1] 86:6</p> <p>lower ^[1] 79:25</p>	<p>mean ^[16] 28:17 30:5,12 31: 12 33:16 38:6 54:6 55:15 57:14 72:15 73:15 74:4,25 79:2 87:18 88:23</p> <p>meaning ^[5] 6:9 37:15 39: 23,23 53:3</p> <p>meaningful ^[1] 40:14</p> <p>means ^[4] 20:1 52:15 54: 14 73:20</p> <p>meet ^[2] 16:5 50:24</p> <p>member ^[1] 7:17</p> <p>mentioned ^[1] 70:18</p> <p>merit ^[2] 35:2 78:5</p> <p>meritorious ^[3] 36:11,23 64:16</p> <p>merits ^[1] 11:19</p> <p>met ^[2] 35:24 61:8</p> <p>mid-19th ^[1] 6:13</p> <p>might ^[9] 34:8,22 47:22 59: 7,8 68:4 73:8,9 76:15</p> <p>mind ^[1] 92:16</p> <p>minds ^[1] 77:8</p> <p>mini-trial ^[1] 36:15</p> <p>minimum ^[2] 27:16 59:14</p> <p>minute ^[1] 21:16</p> <p>minutes ^[1] 5:19</p> <p>misheard ^[1] 34:5</p> <p>misread ^[1] 27:24</p> <p>missing ^[3] 20:16,18 30:22</p> <p>misspoke ^[1] 34:22</p> <p>Mm-hmm ^[1] 47:10</p> <p>moment ^[1] 51:23</p> <p>money ^[6] 56:11 67:1 69: 15,18 89:3 92:14</p> <p>monies ^[1] 89:9</p> <p>month ^[2] 10:7 31:6</p> <p>months ^[2] 8:21 24:19</p> <p>morning ^[1] 4:4</p> <p>Morrison ^[1] 84:18</p> <p>MOSIER ^[14] 2:8 3:10 77: 16,17,20 79:2,23 82:17 84: 3 85:10 87:17 88:18,22 89: 20</p> <p>most ^[3] 22:19 42:18 87:10</p> <p>mostly ^[2] 8:22 10:13</p> <p>motion ^[13] 25:22,24 33:9 37:9,20 39:20 55:20,25 63: 18 74:22,24 75:2 76:20</p> <p>motions ^[1] 55:9</p> <p>move ^[8] 8:1 14:24 15:3 33: 22 41:25 66:3,4 73:10</p> <p>moves ^[3] 66:22,23 85:9</p> <p>moving ^[6] 37:11 38:10 70: 13 72:9 73:14 76:6</p> <p>much ^[10] 5:25 7:15 10:8 17:21 56:14 59:22 75:19, 19 79:1 89:3</p> <p>multibillion-dollar ^[1] 10: 5</p> <p>must ^[2] 34:5 90:22</p>	<p>nature ^[2] 34:19 76:1</p> <p>near ^[1] 30:10</p> <p>necessarily ^[1] 83:6</p> <p>necessary ^[2] 11:8 81:1</p> <p>need ^[7] 6:17,18 51:7 54:2 64:5,6 85:2</p> <p>needs ^[6] 47:14 82:3 83:6 85:6,12,24</p> <p>neither ^[1] 65:24</p> <p>net ^[2] 27:10,11</p> <p>never ^[1] 91:3</p> <p>new ^[8] 8:9,10 25:7 36:5 43: 6,13 62:7 90:5</p> <p>nigh ^[2] 6:22,24</p> <p>Ninth ^[10] 35:17,19,21 36:1 39:5,10 50:17,18 59:18 61: 11</p> <p>non-technical ^[1] 82:15</p> <p>nonarbitrary ^[3] 27:18 30: 12 93:1</p> <p>none ^[2] 24:1 55:18</p> <p>nonsense ^[1] 4:19</p> <p>Nor ^[1] 5:8</p> <p>normal ^[2] 34:12 91:11</p> <p>normally ^[4] 15:4 30:19 60: 22,23</p> <p>note ^[1] 86:3</p> <p>noted ^[1] 80:24</p> <p>nothing ^[4] 24:19 35:3 36: 8 46:20</p> <p>notice ^[10] 16:4 17:25 49:2 67:13,17,21,22 74:6 75:20 62:18</p> <p>notified ^[1] 15:22</p> <p>notwithstanding ^[3] 15: 20 46:9,11</p> <p>Number ^[2] 56:17 80:17</p> <p>numerous ^[1] 64:3</p>	<p>13</p> <p>one ^[23] 5:10 26:25 28:5 31: 6 32:12,14 35:16 37:20,21 46:24 56:17 57:20,23 62:7, 8,25 63:9 67:24 73:2,16 76:10 83:12 88:23</p> <p>onerous ^[1] 36:4</p> <p>ongoing ^[1] 82:5</p> <p>only ^[23] 10:17 12:14 13:14 22:16 26:4,6,8 28:25 29: 19 46:5 49:4 51:4 53:11 55:21 56:8 58:11 62:8 66: 19 67:21 77:10 80:8 85:19 88:11</p> <p>open ^[2] 6:5 76:4</p> <p>opinion ^[1] 88:25</p> <p>opportunity ^[9] 12:16 22: 19 26:12 47:13 49:2 74:7 75:4,8,25</p> <p>opposed ^[2] 10:21 33:23</p> <p>opposing ^[1] 28:5</p> <p>option ^[2] 5:3 49:11</p> <p>oral ^[7] 1:16 3:2,5,9 4:8 48: 16 77:17</p> <p>Orange ^[1] 50:18</p> <p>order ^[8] 10:14,18,19,21,22 40:24 51:5 71:21</p> <p>ordinary ^[2] 25:20 82:9</p> <p>other ^[20] 5:23 8:8 16:4,20 19:2 21:9 33:9 34:24 42:1 46:23 49:16 57:23 58:4 69: 5 70:5 73:15,16 76:1 78:6, 20</p> <p>out ^[11] 8:8 10:22 14:4 20: 19 27:12 31:6 63:24 64:7 71:1 75:13 79:24</p> <p>outrageous ^[1] 50:25</p> <p>outset ^[9] 5:4 7:25 8:12,24 15:13 24:15 26:9 67:9 92: 9</p> <p>over ^[24] 5:3 7:25 11:12 12: 20 13:21 19:6 21:22 23:12, 14 25:9 31:8 43:17,23 45: 12,25 54:10,15 81:1 83:15 84:13 87:7 89:10 90:2 92: 8</p> <p>oversight ^[1] 87:7</p> <p>own ^[10] 15:6 16:2 28:3,17 29:22,25 56:21 60:8,10 82: 10</p> <p>owned ^[1] 79:6</p> <p>owner ^[1] 44:2</p>
<p style="text-align: center;">L</p> <p>lack ^[3] 78:5 92:3,11</p> <p>lacked ^[1] 5:14</p> <p>lacks ^[1] 4:12</p> <p>language ^[8] 16:19 20:14 22:11 44:18 45:15 46:9 65: 16,20</p> <p>large ^[1] 89:9</p> <p>largely ^[2] 73:12,19</p> <p>last ^[4] 21:16 46:24 61:25 73:7</p> <p>later ^[8] 12:14,24 13:3 22:9 34:10 46:16 51:4 80:24</p> <p>Laughter ^[2] 27:1,4</p> <p>law ^[5] 56:12 57:19 63:4 78: 12 82:3</p> <p>laws ^[1] 84:22</p> <p>layer ^[2] 38:17 39:2</p> <p>layered ^[1] 53:20</p> <p>least ^[8] 6:18 9:20 23:1,3 51:11 74:6 75:3 92:23</p> <p>leave ^[2] 63:24 78:18</p> <p>leaving ^[1] 10:21</p> <p>led ^[1] 67:24</p> <p>left ^[4] 64:7 70:25 75:13 78: 12</p> <p>legal ^[1] 9:3</p> <p>legislative ^[6] 42:22 43:20 44:10 45:5,23 50:20</p> <p>legislature ^[1] 52:21</p> <p>legitimate ^[1] 72:11</p> <p>less ^[1] 11:19</p> <p>Lewis ^[2] 50:23 62:5</p> <p>lies ^[1] 70:15</p> <p>light ^[1] 9:22</p> <p>limit ^[9] 4:24 17:9 19:1,7,11 23:20,22 24:9 48:9</p> <p>limitation ^[1] 25:17</p> <p>limitations ^[8] 14:2,5 17:</p>	<p style="text-align: center;">M</p> <p>M.D ^[1] 1:4</p> <p>M.P.H ^[1] 1:4</p> <p>made ^[8] 13:2 17:18 50:23 57:2 64:1 71:24 80:9 82:4</p> <p>magnitude ^[1] 43:8</p> <p>main ^[1] 92:21</p> <p>maintain ^[1] 81:1</p> <p>manageable ^[1] 91:20</p> <p>many ^[2] 9:13 72:8</p> <p>marched ^[1] 14:13</p> <p>MARK ^[3] 2:8 3:10 77:17</p> <p>matter ^[5] 1:15 11:25 46:2, 17 73:16</p> <p>matters ^[3] 55:19,21,23</p>	<p style="text-align: center;">N</p> <p>name ^[2] 56:19 60:5</p> <p>narrow ^[1] 32:16</p>	<p style="text-align: center;">O</p> <p>oath ^[1] 87:1</p> <p>objection ^[3] 61:9 83:16 90:3</p> <p>objectionable ^[2] 61:24 62:3</p> <p>objections ^[1] 15:20</p> <p>obligation ^[1] 82:6</p> <p>obtain ^[1] 11:6</p> <p>obviously ^[1] 47:12</p> <p>occur ^[1] 87:15</p> <p>odd ^[6] 24:20 54:6 72:16,21, 23,25</p> <p>offered ^[1] 90:6</p> <p>official ^[1] 45:3</p> <p>officials ^[1] 82:3</p> <p>often ^[1] 24:19</p> <p>Okay ^[19] 30:8,13 32:4 33: 25 38:14 40:15 41:2 44:17 59:3,5 61:16 64:19 65:3, 12 70:9 71:10,14 74:10 90: 16</p> <p>Olson ^[1] 84:18</p> <p>once ^[8] 19:6 22:17 44:3 47:2 52:1 56:9 85:24 92:</p>	<p style="text-align: center;">P</p> <p>PAGE ^[2] 3:2 56:9</p> <p>pages ^[1] 42:23</p> <p>paid ^[1] 89:9</p> <p>papers ^[1] 58:8</p> <p>paragraph ^[15] 14:3,4 16: 22 17:10,15 19:22,23 21:6 22:6 23:25 24:5 26:3 35:8 43:15 48:10</p> <p>paramount ^[1] 56:22</p> <p>part ^[7] 6:15 17:17 28:22</p>

Official

<p>38:9,19 43:12 85:16 partial ^[1] 50:2 participate ^[3] 19:20 21:6 25:25 participating ^[1] 23:13 participation ^[1] 24:8 particular ^[3] 64:4,5 65:18 parties ^[5] 14:14 26:23 28:1,4 60:23 partly ^[1] 31:1 parts ^[2] 16:20 73:4 party ^[9] 13:25 15:2 21:23 25:20 33:9 34:12 43:19 55:8 59:8 party's ^[1] 25:4 past ^[1] 80:13 paused ^[1] 7:17 pay ^[4] 88:15,16 89:18,21 pedigree ^[1] 6:2 per ^[1] 41:22 perfect ^[1] 22:22 perfectly ^[4] 13:8 85:7,10 91:21 perhaps ^[3] 25:12 54:14 83:1 period ^[9] 12:17 24:18 33:18,19 36:19 48:24 54:8 78:4 89:10 permission ^[1] 7:23 permit ^[1] 41:20 person ^[9] 15:20 18:21 19:6 57:5,7 58:23 86:24 87:1,7 person's ^[2] 15:21 19:2 persons ^[1] 57:19 perspective ^[1] 73:6 persuaded ^[1] 67:19 pertain ^[1] 55:13 Petitioner ^[9] 1:5 2:4 3:4,15 4:9 49:24 63:5 80:9 90:19 Petitioner's ^[1] 67:7 Petitioners ^[1] 85:15 phase ^[1] 9:1 phrase ^[6] 19:18,23 20:23,25 23:14,15 pie-in-the-sky ^[1] 31:22 plain ^[3] 4:16 41:22 48:21 plaintiff ^[11] 31:14 55:5,6 57:22,22 62:11,12,17,18 63:17 82:9 plaintiff's ^[1] 39:20 plaintiffs ^[1] 33:15 plea ^[1] 5:9 please ^[3] 4:11 48:19 77:21 plenary ^[1] 7:24 point ^[36] 6:11 7:6 12:1 14:17 17:18 19:10 22:10 23:17 25:3,14 28:18 30:4 34:14 36:22 41:23 44:13 46:4 47:18 53:5 55:5,18,20,24 60:1,16 67:25 68:17 74:17 79:18,24 80:14 81:15 88:</p>	<p>13 89:5 91:7 92:19 points ^[2] 8:8 90:21 POLANSKY ^[2] 1:4 4:5 policies ^[2] 69:8,23 policy ^[1] 11:25 political ^[2] 66:5 68:10 politics ^[2] 69:22,22 port ^[1] 80:14 position ^[8] 5:9 63:1 70:18 84:9,11 86:17,18 87:18 possibility ^[1] 67:11 possibly ^[1] 47:4 potential ^[1] 10:5 power ^[13] 5:15 16:10,12 57:8 58:1,16 80:1,21 82:7 84:11,24 86:2,20 powerful ^[1] 44:13 powers ^[6] 5:22 79:22 80:16 84:15,19 86:9 practical ^[2] 70:14 76:11 practice ^[2] 5:11 6:5 precedents ^[1] 66:10 precise ^[1] 32:17 precisely ^[7] 6:1 7:8 8:4 34:18 44:9 50:7,9 predates ^[1] 6:6 predating ^[1] 5:12 prejudice ^[5] 39:18 63:3,16,21 89:7 premise ^[1] 38:7 prerequisite ^[2] 51:8 54:3 present ^[2] 46:13 75:25 presentation ^[1] 55:10 presents ^[1] 48:20 President ^[4] 82:2,2,5 84:12 President's ^[4] 56:14 79:21 80:16 81:4 pressure ^[2] 66:5 68:10 presume ^[2] 33:22 70:25 presumptively ^[1] 68:19 pretty ^[7] 8:22 12:13 30:15,21,21 63:4 79:1 prevail ^[1] 40:12 prevailing ^[1] 57:13 prevents ^[1] 78:8 primary ^[1] 54:1 prior ^[1] 11:22 priorities ^[1] 69:23 prioritization ^[1] 74:2 priority ^[1] 71:16 private ^[17] 19:16 25:10 46:21 57:5,7,8,18 58:22 78:13 82:10 84:6 86:20,24 87:1,7,10 91:5 privilege ^[4] 10:11 72:7,8 74:3 privileged ^[2] 10:15 69:11 probably ^[3] 6:15 34:2 82:25 problem ^[12] 6:1,7 7:18 52:19 56:24 58:20 70:15,24 76:8,11 83:25 84:1 problematic ^[2] 74:19 86:</p>	<p>25 problems ^[3] 5:20,22 11:1 Procedure ^[6] 15:4 25:22 34:11,24 55:12 84:2 proceed ^[30] 4:14 7:23 8:1 12:6 13:13,22 14:10 15:13 18:9 19:21 20:24,24 21:4,11 23:9,14 24:17,24 25:7 33:10,17,21 36:24 44:19,23 45:16 55:22 71:12,16 92:8 proceeded ^[1] 21:9 proceeding ^[11] 17:23 29:5 37:8 38:9 46:17,18,19 47:15 60:11 72:7 78:18 proceeds ^[12] 14:6 16:23 17:5 18:20 19:13 20:7 21:14 22:8 26:5,9 78:7 80:22 process ^[5] 8:21 50:10 51:14 53:19 59:13 progression ^[1] 20:19 prohibit ^[1] 77:23 prohibited ^[1] 80:10 promise ^[1] 62:1 promised ^[1] 32:15 proof ^[2] 28:10,21 proper ^[13] 39:8,21,23 40:15 52:19 59:23 61:6,22 62:16,18,20 63:14,19 property ^[42] 27:15 29:20 30:1,6 47:1,9 49:24 50:7,10 51:17,23,25 52:2,9,20 53:15,18 54:11,18 58:22 59:1,4,6,12,21 68:23,25 70:1,5 72:15,16,20 82:9,11,22 83:2,3,7 84:5 91:6 93:3,6 propose ^[1] 26:1 proposed ^[2] 44:18 79:1 prosecute ^[1] 88:4 prosecution ^[2] 16:10 20:12 prosecutor ^[1] 52:8 protect ^[3] 62:14 70:4 82:10 protected ^[1] 70:5 protection ^[8] 38:18 39:25 52:4,15 53:13,18 72:3,5 protections ^[1] 70:7 prove ^[8] 11:8,9 26:20 28:15 37:15,16 89:1,14 proves ^[1] 32:13 provide ^[5] 6:20 37:14 70:7 79:10 87:19 provides ^[3] 38:17 43:16 67:13 provision ^[7] 15:16,17,24 16:2,16 18:8 71:4 provisions ^[4] 49:17 64:3 82:19 85:23 purely ^[1] 83:19 purpose ^[7] 4:16 13:20,24 55:2,3 67:23 77:1 purposely ^[1] 75:13 purposes ^[4] 6:23,25 58:7</p>	<p>65:6 pursue ^[4] 45:21 46:1,15,23 pursuing ^[1] 79:5 pursuit ^[1] 16:11 push ^[1] 80:13 put ^[9] 14:8 19:23 22:11 23:11 28:10 46:2 56:1 61:22 77:9 puts ^[2] 70:17 84:11 putting ^[3] 35:7 36:3 39:19</p> <p style="text-align: center;">Q</p> <p>quagmire ^[1] 36:8 qualifier ^[2] 25:2 45:1 qualify ^[1] 16:3 quantified ^[3] 10:1 11:10 31:24 question ^[21] 9:24 11:15,24 14:18 28:8 31:2 37:18,19 40:19,23 41:3 46:24 53:10 59:5,11 61:25 68:4 69:13 71:10 72:14 73:7 question's ^[1] 91:10 questionable ^[1] 9:20 questions ^[3] 5:17 49:22 78:14 qui ^[15] 6:2,3 30:5 43:10 48:23 58:25 63:13 77:24 79:15 80:4,19 82:22 84:14 90:24 91:4 quibble ^[2] 38:7 59:18 quick ^[2] 30:21 90:21 quite ^[2] 6:12 24:9</p> <p style="text-align: center;">R</p> <p>raise ^[1] 72:8 raised ^[3] 7:16 29:11 41:4 rare ^[4] 8:23 27:6 30:25 36:2 rather ^[3] 31:10 46:15 57:3 rational ^[13] 27:18 28:11 30:9,14,20 31:1 37:25 39:5 40:8 61:4,13,23 93:1 rationality ^[5] 27:16 33:5 59:16,17 61:10 re-entering ^[1] 43:5 re-intervenes ^[1] 44:3 reach ^[2] 81:15 89:4 read ^[18] 5:7 15:24 16:15,16 17:17 20:1,7 22:2 44:5 46:6 71:2 75:15,18 82:18,19,21 83:3,13 reading ^[3] 19:17 45:24 92:6 reads ^[2] 4:17 83:14 real ^[4] 11:1 36:20 46:13 89:7 reality ^[1] 36:7 really ^[15] 5:25 6:14 10:8 11:24 32:6 43:25 48:2,12 58:10 60:13 66:24 71:22 74:8 88:7 92:16 reason ^[31] 19:23 22:11 32:</p>	<p>14 37:16,17 46:12 51:17,24 52:10,12,25 53:25 55:21 56:1,25 58:11,12 64:20 66:24 68:10,17 72:11,12 76:7 79:1 88:7 90:23 91:11,15,16 92:15 reasonableness ^[1] 91:25 reasoning ^[1] 56:25 reasons ^[10] 17:7,8 37:24 43:24 64:25 71:20,22 73:25 93:4,7 REBUTTAL ^[3] 3:13 90:17,18 recently ^[2] 82:4 88:11 recognize ^[1] 50:6 recognized ^[3] 52:3 76:13 88:2 recommending ^[1] 35:16 reconsiders ^[1] 92:22 record ^[1] 28:13 recover ^[2] 31:8 84:8 recovery ^[3] 10:5 11:11 47:12 redact ^[1] 10:3 redactions ^[1] 31:7 redress ^[2] 56:19 60:5 redundant ^[2] 21:17,20 reevaluate ^[1] 43:9 referring ^[1] 34:8 refers ^[1] 16:3 reflect ^[1] 17:17 reflected ^[1] 62:3 reflects ^[1] 16:7 regarding ^[1] 85:22 regardless ^[4] 49:11 69:3 74:25 84:3 rein ^[1] 81:18 REL ^[2] 1:3 4:5 related ^[6] 9:10 42:19 53:14 54:24 68:11 69:13 relationship ^[2] 39:5 62:10 relator ^[75] 7:5,21 9:6 11:6,9 12:23 13:18 14:11 17:10,12,20,22,24 18:6 19:20 20:4,9 21:5 25:10 29:21,22 30:2 32:15,17 35:8 38:18 39:2 41:23 43:11,24 45:2 46:22 47:2,9,14,23 48:1 49:1 53:6 57:2,4,10,21 58:2,4,13 63:9,21 66:25 67:2,3,10,18,22 68:24 70:1,17,20 71:24 75:3 77:2,7,8 81:14,18 84:7,19 86:19 87:10,21 88:11 89:14,18,23 92:13 relator's ^[32] 4:22,24 14:5 18:6,10,12 19:12 21:23 23:18,20 24:4,8,9 25:1 27:14 29:22 35:4,6,9 41:21 42:2,14 48:1,8,11 76:4,22 83:15 89:1,3 90:3 91:5 relators ^[2] 78:13 90:8 relevant ^[1] 50:20</p>
--	--	--	--	--

Official

<p>relief ^[1] 46:23 rely ^[1] 6:16 remains ^[1] 57:5 remedy ^[1] 45:21 remember ^[1] 28:24 remotely ^[1] 5:6 removed ^[1] 16:12 renders ^[3] 4:20 19:17,18 repeated ^[2] 23:16 54:23 repeatedly ^[1] 55:15 repetitive ^[2] 73:11 76:16 report ^[1] 42:22 representations ^[1] 54:23 representative ^[2] 57:11, 24 requests ^[1] 31:8 require ^[1] 70:12 required ^[4] 67:13 74:1 85:20 86:5 requirement ^[2] 26:19 73:13 requires ^[2] 4:21 50:25 requiring ^[3] 5:10 28:15 87:20 reset ^[1] 25:3 reset-the-case ^[1] 23:5 resolves ^[1] 48:21 RESOURCES ^[8] 1:7 2:9 3:12 4:6 69:9 71:12 74:2 77:19 respect ^[3] 9:21 47:25 48:8 respond ^[1] 86:16 responded ^[1] 14:21 Respondent ^[7] 2:7,9 3:7, 11 19:16 48:17 77:18 Respondents ^[4] 1:9 4:21 5:8 7:16 Respondents' ^[1] 4:17 responsibilities ^[1] 82:1 restart ^[1] 25:4 restriction ^[1] 90:8 restrictions ^[1] 24:7 retain ^[1] 84:13 retained ^[1] 30:7 retains ^[1] 49:12 reveal ^[1] 8:9 reverse ^[1] 11:21 reversed ^[1] 5:16 review ^[9] 9:19 30:9,20 49:15 53:22 68:20 71:4 83:5 88:5 rightly ^[1] 29:11 rights ^[46] 4:22,24 13:18 14:5,14 16:25 17:10 18:6, 15 19:12,14 20:20 21:5,6,7 22:7 23:18,20,22 24:1,4,7, 10 25:1,4,18 26:3,3,6,8 27:23 35:5,7 41:21 42:15 43:25 45:1 48:9,9,11 52:9 55:7,9,19,23 83:13 rigorous ^[2] 50:16 53:22 risk ^[2] 31:12 89:7 road ^[2] 25:9 92:15 ROBERTS ^[21] 4:3 9:9,12</p>	<p>34:16 35:11 37:3 40:16 41:14 48:13 56:5 57:12 64:8 68:1 70:10 71:7 74:12 77:14 78:15 79:20 90:9 93:8 robust ^[2] 56:7 80:1 role ^[2] 12:23 17:21 routinely ^[1] 8:20 Rule ^[26] 27:25 28:1,5 33:9, 13,24 34:2,5,12,19,25,25 39:6,12,17 40:1 59:22 61:5,25 62:9,10,11,18 63:11 91:3 92:12 rule-makers ^[1] 62:24 Rules ^[6] 15:3 16:6 25:21 34:11,24 55:12 run ^[2] 31:20 63:23 runs ^[1] 70:23</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>Sacramento ^[2] 50:23 62:4 same ^[6] 7:10,12 14:18 15:9 33:12 63:7 satisfied ^[1] 85:20 satisfy ^[3] 23:2 51:1 74:2 saying ^[22] 10:14 14:20,21 17:22 24:23,25 27:20,22, 23 30:10,16 31:22 32:10, 11,13 33:4 45:10 66:12,17 91:12,14 92:24 says ^[38] 4:23 16:16 18:6, 10,19 19:19 23:7,19,21 24:16 32:21 36:9 39:7 42:13 43:12 45:15,19 46:9 48:25 50:1 59:23 62:12,16,17 64:16 65:22 66:3 68:18 69:14 75:2,21 85:8 88:8,12 91:7 92:3,5,18 scenario ^[1] 76:4 scheme ^[1] 58:11 scrutiny ^[1] 32:6 seal ^[3] 33:18 48:24 78:4 sealing ^[1] 33:18 second ^[5] 23:17 44:24 49:14 76:25 91:7 second-guess ^[1] 91:12 second-guessing ^[5] 70:16 74:21 75:8 91:9,19 secondly ^[1] 56:23 Section ^[3] 45:19 48:25 49:10 see ^[3] 39:3 92:11,17 seek ^[3] 26:14 51:5 72:13 seeking ^[2] 57:19 78:13 seeks ^[1] 73:21 seem ^[3] 36:6 54:17 66:8 seems ^[5] 12:12 28:19 29:16 41:19 54:6 selects ^[1] 49:12 Senate ^[7] 42:22 43:21 44:13,14,19,25 45:10 senator ^[2] 68:12 69:14 sense ^[14] 22:22 52:17,21 53:8,12 65:2 66:9 71:6 72:</p>	<p>12 73:5 75:17 82:15 92:7, 11 sentence ^[2] 19:19 44:5 separate ^[1] 40:23 separation ^[3] 5:22 84:15 86:9 Sequoia ^[1] 50:18 series ^[1] 7:14 serve ^[2] 25:24 26:22 serves ^[4] 65:6 67:23 76:25 78:10 serving ^[1] 85:1 set ^[6] 20:19 21:7 22:6 60:21 80:12 83:10 sets ^[2] 14:4 22:6 setting ^[1] 91:4 settle ^[2] 55:15,17 settlement ^[3] 81:17 91:22, 24 settling ^[1] 80:11 Seventh ^[2] 26:21 86:5 sex ^[1] 53:13 Sherman ^[1] 57:22 shifts ^[1] 47:2 shocked ^[1] 82:16 shocks ^[1] 65:4 shouldn't ^[5] 11:15,17 16:14 23:22 89:15 show ^[6] 23:1,4 43:14 47:20 53:6 54:16 showing ^[10] 18:11,21 23:3 28:11 38:20 64:4,5 65:17 71:25 75:21 shows ^[4] 19:11 26:19 47:25 48:2 side ^[9] 5:23 8:8 25:24 57:23 58:3,4 63:8 89:3,8 sides ^[1] 11:14 signed ^[1] 32:19 significant ^[1] 43:13 significantly ^[1] 57:15 silent ^[1] 79:13 similar ^[4] 39:10,14 87:18 91:23 simple ^[1] 37:19 simply ^[8] 32:10 55:25 57:8 58:8 65:9 66:12 68:11 69:21 single ^[2] 7:17 22:7 situation ^[8] 18:18 19:4,24 43:1 60:18 68:24 84:6 87:25 situations ^[4] 21:9,10,11 43:13 slow ^[1] 21:15 solely ^[1] 78:12 Solicitor ^[1] 2:5 solution ^[1] 85:8 solved ^[1] 58:20 somebody ^[1] 81:5 somebody's ^[1] 52:9 somehow ^[2] 5:12 16:11 someone ^[3] 15:6 59:6,13 someone's ^[1] 28:3</p>	<p>sometimes ^[1] 42:20 sorry ^[7] 13:19 18:17 33:2, 20 34:6 41:6 92:4 sort ^[14] 6:19 12:18 13:1 23:5 28:6 42:1 62:7,8 65:4 69:3 72:4,16 76:12 90:7 sorts ^[5] 37:10 54:24 69:6, 23 78:17 SOTOMAYOR ^[31] 10:24 37:4 38:4,12,15,21 39:3,14, 19 40:6,15 51:13,20 52:8, 12,18,24 53:2,9,23 54:4 68:2,3,9,21 69:12,17,25 70:3, 9 90:12 sounds ^[3] 32:5,24 83:19 source ^[1] 69:4 special ^[2] 14:4 26:3 specific ^[3] 9:14 14:1 35:7 specifically ^[1] 14:17 specified ^[3] 50:12 64:3 65:23 specify ^[1] 49:18 spend ^[1] 5:19 spending ^[1] 10:7 spent ^[4] 66:25 88:12 89:3, 9 spot ^[2] 61:14,18 square ^[1] 50:3 stage ^[3] 12:11 26:14 90:2 stake ^[2] 50:2 87:11 standard ^[61] 26:12 27:9, 16,24 30:25 31:1 33:5,11 35:15,24 37:13,14 38:2,17 39:12 40:1,11,13,19 41:5, 10 49:18 50:12,19,20,21, 24 53:22 59:12,17,17 60:19 61:6,11,20,23 62:22,24 63:14,19,25 64:7 65:25 66:19,20 71:1,4 73:18,20 75:14,16,20 76:9 78:25 86:8, 14 92:4,5,11,17,23 standards ^[4] 16:5 39:11 91:20,23 standing ^[1] 29:23 start ^[2] 25:8 46:16 starting ^[1] 28:18 state ^[2] 68:12 69:14 stated ^[1] 91:8 statement ^[1] 42:19 STATES ^[26] 1:1,3,17 2:7 3:8 4:5 7:13 9:17 48:17 49:12 56:19,20 57:3,11,25 58:9 60:6 63:8 70:20 78:10 81:20 84:8,9 85:1 87:4,8 States' ^[8] 56:21 60:4,5,12, 14 63:10 70:22 79:17 status ^[18] 4:22,24 13:18 17:9 18:15 23:18,20,22 24:4,10 25:1,17 35:4,7 41:21 42:14 45:1 48:8 statute ^[49] 5:7 6:19 8:15 12:13 16:15,21 17:11,17 24:5 40:23 41:4,5,7,9,22 45:20 46:6 48:10 49:7,17,</p>	<p>19 50:13 54:7,12 55:3,4 56:15 58:5 60:3 65:16 66:18 71:2 73:5 75:1,21 78:11 80:4,10,13 81:9 83:12, 13,22,22 89:20,25 92:6,17, 23 statutes ^[4] 6:8 79:9,13 90:24 statutory ^[4] 4:12 27:24 78:21 83:19 step ^[4] 7:25 62:13 79:3,7 stepping ^[1] 47:16 Stevens ^[9] 6:22 29:24 50:1 57:1 58:13 73:3 82:18, 20 83:3 stick ^[1] 31:5 sticks ^[1] 30:7 still ^[21] 17:24,25 18:25 19:20 20:10 21:5,23 23:3,18 30:12 40:1 41:17,24 50:13 55:17 60:2,7 64:11 69:2 84:6,10 stop ^[4] 15:22,23 79:7,15 straight ^[1] 63:23 straightforward ^[2] 15:18 20:14 strange ^[3] 6:24 70:18 92:16 strength ^[1] 36:16 stress ^[1] 44:8 stretch ^[1] 58:10 strict ^[2] 33:1,5 stricter ^[1] 60:19 strikes ^[1] 8:13 strong ^[4] 6:2 9:15 11:19 19:10 stronger ^[1] 79:21 struck ^[2] 44:22 45:7 structure ^[10] 4:16,20 14:7 24:12 26:7 29:4 55:2 73:1 75:17 85:22 stuck ^[3] 39:25 41:18 59:9 subject ^[11] 17:14,22 19:21 21:6,24 22:2 59:21 88:4 91:8,19,22 subjecting ^[4] 70:15 74:19, 22 76:8 submitted ^[2] 93:9,11 subsection ^[11] 14:9,15 20:19,21,25 21:1 24:14,20, 22 46:10,21 subsequent ^[1] 41:19 substance ^[1] 10:25 substantial ^[2] 81:8 87:7 substantiate ^[1] 32:10 substantive ^[6] 49:18 63:24 71:1,4 75:13 76:9 subtract ^[1] 8:3 success ^[1] 89:7 sued ^[2] 36:12 68:13 sufficient ^[4] 58:6,7 84:13, 20 sufficiently ^[1] 84:21 suggest ^[3] 7:18 12:8 85:5</p>
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Official

<p>suggested [2] 5:22 18:3 suggesting [1] 12:18 suggests [2] 53:24 54:12 suit [26] 7:22 12:24 13:4 29:15,20 33:8 43:17,23 44:3 45:25 49:25 54:24 56:11,18 60:4 77:24 78:4,24 79:15 81:2,11,14 82:22 84:14,25 89:24 suits [2] 67:10 80:19 summary [3] 25:23 37:9 62:20 superfluous [2] 4:20 19:18 supervise [1] 82:6 supply [1] 66:19 supplying [2] 75:16,20 supported [1] 28:13 supporting [1] 47:17 Suppose [2] 26:12 36:8 supposed [5] 26:16 28:9 36:12 64:13 76:16 SUPREME [2] 1:1,16 surmount [1] 30:25 surplusage [2] 19:17 85:23 surprise [1] 90:5 surprised [1] 56:8 surrounding [1] 16:19 swoop [1] 82:12 system [2] 31:16 69:21</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>tactics [1] 19:8 takings [1] 59:15 talked [1] 81:22 talks [2] 30:5 42:25 tam [15] 6:2,3 30:5 43:11 48:23 58:25 63:13 77:24 79:15 80:4,19 82:22 84:14 90:24 91:4 tea [1] 60:22 teeth [1] 63:23 tension [1] 28:19 Tenth [4] 35:19,21 39:6,10 term [2] 72:15 82:16 terminology [1] 23:10 terms [5] 9:18 65:21 83:10,21,22 test [4] 39:5 61:4 62:6,8 Texas [1] 2:3 text [8] 4:16 15:16 41:4,9,22 48:21,25 58:23 textual [6] 5:9 6:19,21 7:19 42:17 85:22 Thanks [1] 74:11 theories [2] 9:3 31:23 theory [11] 8:18 11:4 13:1,8 19:6 22:21 32:2 57:5 73:4 78:20 92:21 there's [17] 15:22 22:11 24:19 26:15 34:3 35:3 47:21 51:24 59:13 62:21,21 68:10 83:4,25 87:15 90:4,4</p>	<p>therefore [2] 41:24 64:21 they've [7] 8:23 22:17 28:11 84:17,17 86:6 89:4 Third [3] 80:7 85:11 86:4 THOMAS [9] 5:18 6:10 7:1 8:15 16:8 35:13 49:23 51:2 64:9 though [7] 7:2 12:12 19:3 23:25 24:23,24 69:2 three [1] 23:4 throughout [2] 23:16 51:6 ticket [1] 62:8 Title [1] 57:21 together [1] 26:23 ton [1] 67:1 tool [1] 36:21 top [2] 53:20 67:12 totally [1] 42:24 tough [1] 50:24 track [2] 77:9,10 tracks [1] 20:3 treated [1] 83:6 triggered [2] 57:7,9 triggers [1] 53:19 true [4] 30:24 40:10 59:17 93:4 truly [2] 5:4 68:15 trust [1] 83:2 try [1] 58:8 trying [1] 34:21 Tuesday [1] 1:13 turn [1] 70:17 two [17] 10:7 11:14 17:7,8 20:2 23:4 28:4 33:14,15 44:16 48:20 56:17 60:1 63:7 65:6,23 76:11 two-party [1] 15:5 types [1] 68:18 typical [2] 61:12 71:23 typically [3] 30:24 44:9 63:15</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately [1] 77:11 unambiguously [1] 4:23 unchallenged [1] 6:5 unconstitutional [6] 5:13 78:11 80:5 90:25 91:1,2 under [29] 14:9 15:3 17:5 20:21 24:14 25:21,23 26:16 32:25 33:5,9,13 34:11 38:10 40:13 43:5 44:1 46:10,20 50:10 55:2,3,11 67:13 70:6 75:17 78:19 85:25 92:6 underscore [1] 22:3 underscored [1] 50:1 understand [8] 6:16 30:4 42:17 44:1 51:19 58:18 61:8 86:18 understanding [2] 64:12 87:14 understood [1] 54:20 unfair [1] 90:5</p>	<p>unfortunately [1] 45:8 uniform [1] 89:25 unilaterally [1] 50:3 unique [1] 63:20 UNITED [34] 1:1,3,17 2:7 3:8 4:5 7:13 9:17 48:17 49:12 56:19,20,20 57:3,11,25 58:9 60:4,5,6,12,13 63:8,10 70:20,21 78:10 79:16 81:19 84:7,9 85:1 87:4,8 unless [2] 24:1 47:21 Unlike [1] 49:16 unlikely [1] 89:14 unmanageable [1] 69:3 unprecedented [1] 5:11 unqualified [1] 15:18 until [5] 5:2 6:13 51:22 78:21 83:4 unusual [1] 63:13 up [10] 9:14 42:11 43:1 44:6 64:2 71:9 74:16 88:13 91:15 92:25 upfront [1] 48:4 upheld [1] 80:18 useful [1] 87:19 using [1] 20:23</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>version [10] 30:15 44:14,14,15,22,25 45:3,15 90:25 91:1 versus [9] 4:5 7:13 50:23 62:5 68:18 70:24 71:20 76:13 84:18 vest [1] 83:4 vested [1] 35:9 vests [1] 82:22 vet [2] 9:3,3 veto [1] 84:24 view [16] 4:17 26:17 56:7 57:6 60:11,14 61:23 63:9 66:2 67:7 70:21 78:16 79:21 80:25 84:4 89:13 viewed [1] 79:13 views [1] 56:21 VII [1] 57:21 violate [2] 51:11 84:14 violated [2] 27:22 76:23 violating [1] 51:14 violation [2] 53:13 72:1 violence [1] 16:20 virtue [1] 57:4 vis-à-vis [1] 66:11 voluntarily [2] 62:12,19 voluntary [1] 28:3</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waited [1] 66:25 wanted [7] 12:19 19:11 49:7 60:20 65:14 70:7 77:6 wants [3] 15:12 21:4 66:15 Washington [3] 1:12 2:6,8 way [24] 10:17 16:4 18:2 20:10 24:20 28:24 29:2,2,3</p>	<p>30:14 31:16 36:4 40:14 46:6 53:15 60:3 65:5 66:17 69:21 73:16 82:18,18,20 87:25 ways [3] 44:16 86:12,24 weak [1] 5:8 welcome [3] 5:17 49:22 78:14 whatever [8] 7:21 13:4 19:3,8 30:8 51:21 62:20 76:2 whatsoever [3] 41:5,10 52:13 Whenever [1] 48:5 Whereupon [1] 93:10 whether [40] 9:4,5 16:22 18:19 19:12 20:1,7,8 21:11 22:8,8,9 24:17 38:23 39:7,13 40:24 48:22 49:20 50:15 51:21 52:21 54:9 59:5,18 60:11 63:1 69:9,20 71:21 78:4,5,5 80:21,22 81:5,16 82:14 84:4,12 who's [2] 57:8 87:2 whole [6] 29:4 55:19,24 68:17 84:1 89:17 wild [1] 31:22 will [3] 48:5 72:8 79:24 willy-nilly [1] 54:21 wins [1] 30:22 wipe [1] 10:22 within [1] 24:17 without [14] 7:23 13:17,17 18:5,12 24:25 28:6 42:14 45:1 51:10 53:18 54:24 74:25 85:7 witnesses [1] 55:10 wondering [1] 12:11 words [5] 49:6,10 69:5 73:15 78:20 work [4] 16:18 18:2 23:6 54:18 works [3] 31:17 60:3 69:22 world [2] 18:24 86:1 written [2] 24:21 65:21 wrongs [1] 60:5 wrote [1] 16:24</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>years [5] 8:21 24:19 25:9 89:11 92:14</p>
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