





1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	PETER K. STRIS, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	SOPAN JOSHI, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioners	21
9	ORAL ARGUMENT:	
10	JOSEPH R. PALMORE, ESQ.	
11	On behalf of the Respondents	33
12	REBUTTAL ARGUMENT OF:	
13	PETER K. STRIS, ESQ.	
14	On behalf of the Petitioners	68
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 17-1712, Thole versus United States Bank.

Mr. Stris.

ORAL ARGUMENT OF PETER K. STRIS

ON BEHALF OF THE PETITIONERS

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

My clients are beneficiaries of a pension trust. We allege that the trustees, through disloyalty and imprudence, caused the trust to lose \$750 million.

The suit presents a justiciable case or controversy for three reasons. First, my clients have an equitable interest in all assets of their pension trust. That is a property interest. And when \$750 million of that property was lost, my clients suffered a concrete injury.

Respondents are between a rock and a hard place. They can't argue that participants have an equitable interest in only some of the trust corpus, because the trust is unsegregated

1 and undivided. So they're forced to take the  
2 incredible position, to quote their brief, that  
3 defined-benefit plan participants have no  
4 interest in plan assets.

5           If Respondents were right, no one  
6 would have an equitable interest in any of the  
7 trust's assets. But a trust can't exist unless  
8 someone holds equitable title to its assets, and  
9 that someone here can only be the participants.

10           Second, and independently, my clients  
11 have a right to loyal stewardship of their  
12 retirement savings. When Respondents engaged in  
13 self-dealing, my clients suffered a concrete  
14 injury. Under the centuries-old "no further  
15 inquiry" rule, beneficiaries could sue even when  
16 there was no conceivable possibility of a  
17 financial loss. The breach itself gives rise to  
18 a case or controversy.

19           In any event, and third, my clients  
20 have representational standing to vindicate  
21 injury to their plan. Since before the  
22 founding, when a trustee was unwilling to sue,  
23 equity courts allowed beneficiaries to do so on  
24 behalf of the trust.

25           And so I'd like to begin with our

1 property injury. A defined-benefit plan under  
2 ERISA is a private exchange of services.  
3 Workers forgo wages in exchange for a promise of  
4 a future payment secured by trust property.  
5 This is critical because there is an  
6 unsegregated, undivided pool of assets, the  
7 trust, that pays the pension of all the  
8 beneficiaries. So plan participants, like my  
9 clients, have an equitable interest in those  
10 assets.

11 CHIEF JUSTICE ROBERTS: Does your  
12 argument depend upon a forward-looking theory of  
13 injury? In other words, it's -- if -- it's one  
14 thing to have a conflict of interest or all the  
15 other things you allege that lead to a situation  
16 that causes you no direct financial harm, but is  
17 your theory that, well, because they did that in  
18 this situation, and even if that didn't hurt us,  
19 somebody like that is likely to do it again and  
20 that might hurt us? Or is it purely the fact of  
21 -- retrospective, this person did something that  
22 under common trust law would be regarded as a  
23 bad thing, and under the no inquiry rule, that's  
24 enough, so you shouldn't worry about the fact  
25 that it didn't harm us at all?

1           MR. STRIS: So the answer to that  
2 question is we have multiple concrete injuries  
3 here. And the things that we're seeking flow  
4 from the particular injuries, right?

5           So what I'm talking about right now is  
6 our property injury. If we're right that we  
7 have an equitable interest in the assets, that  
8 theory depends on a diminution in the value of  
9 the trust assets. So I don't know -- I wouldn't  
10 call that prospective; I would say the trust  
11 lost \$750 million, and so --

12           CHIEF JUSTICE ROBERTS: What did your  
13 clients lose? I mean, your friend on the other  
14 side says they get nothing. They're in the same  
15 position if you win or if you lose.

16           MR. STRIS: Well, so I mean I -- I  
17 couldn't disagree with that more. There's  
18 always risk. Pension plans fail. Businesses  
19 fail. In 2008, AIG had \$100 billion until they  
20 didn't. And so --

21           CHIEF JUSTICE ROBERTS: Well, those  
22 are other situations. They say in this case --  
23 well, just look at it abstractly. You know, say  
24 you need \$600 million in your fund so everybody  
25 will feel comfortable your clients are going to

1 get everyone's benefits, and, you know, there  
2 are \$8 million in the fund and there's some  
3 fraud that reduces it to -- 800 million to -- to  
4 700 million. Do you think you could sue on that  
5 -- that misconduct by the trustee?

6 MR. STRIS: Well, if -- if the assets  
7 of the trust are -- are lost and there has been  
8 a breach, yes. I don't think it's abstract at  
9 all. If I loan -- if I loan Bill Gates money  
10 and take -- and I take a security interest, and  
11 he destroys the secured property, he encumbers  
12 it, he burns it down, I can still sue him even  
13 if he makes every progress payment and happens  
14 to have \$100 million in assets because we  
15 recognize that having a security interest in  
16 something is concrete.

17 Our core position --

18 CHIEF JUSTICE ROBERTS: But I  
19 understood -- I meant my hypothetical to suppose  
20 that the -- your property is -- is secure, your  
21 -- your -- your client's property, the  
22 beneficiaries' property is completely secure.  
23 In the Gates hypothetical, I thought you were  
24 suggesting -- you seem to be suggesting the  
25 security that -- that protected the -- the



1 interest of your -- your loan was -- was  
2 destroyed.

3 MR. STRIS: Oh, but --

4 CHIEF JUSTICE ROBERTS: But in my  
5 hypothetical -- it may not be your case -- but  
6 -- but in the abstract, what's alleged to have  
7 been wrongfully done doesn't affect the  
8 financial security of your defined-benefit plan.  
9 You can still sue --

10 MR. STRIS: So --

11 CHIEF JUSTICE ROBERTS: -- because the  
12 person is a bad guy?

13 MR. STRIS: No. You can still sue,  
14 but not because the person is a bad guy, but  
15 because your property interest has been  
16 impaired. I want to be very clear about this.

17 To have an equitable interest -- this  
18 has been the case since the 15th century. To  
19 have an equitable interest in trust assets, a  
20 beneficiary has never had to show that she's  
21 likely to receive the trust assets. As long as  
22 she has the possibility of benefiting from the  
23 assets, she has a present property right to  
24 prevent others from damaging them. That's the  
25 lesson from the contingent and discretionary --

1 JUSTICE KAVANAUGH: What they say --

2 MR. STRIS: -- cases.

3 CHIEF JUSTICE ROBERTS: But what's the  
4 lesson from Article III? There has to be a  
5 tangible injury to the plaintiff. And under my  
6 hypothetical, if 600 million is enough to secure  
7 them against anything, and the trust corpus goes  
8 from 800 million to 700 million, how are they  
9 injured in the terms of Article III?

10 MR. STRIS: In the same way that if I  
11 own property and you come and you put your toe  
12 on it, even though I never saw you, you didn't  
13 step on my tulips, you didn't upset me in any  
14 way, you impaired my property right.

15 JUSTICE GORSUCH: What if -- what if,  
16 counsel -- I mean, just to put the chief's point  
17 in a -- in a finer light even than he has, which  
18 I think he has done an admirable job of, let's  
19 say this were a defined benefits plan rather  
20 than a defined contribution plan. And let's say  
21 that -- sorry, this were a defined contribution  
22 plan rather than a defined benefits plan. And  
23 -- and the menu of options is varied. Most of  
24 them are clean. But there is one option that's  
25 dirty. Okay? But your client didn't invest in

1 that.

2 MR. STRIS: Sure.

3 JUSTICE GORSUCH: Would you -- could  
4 you still sue?

5 MR. STRIS: I don't think -- I don't  
6 think --

7 JUSTICE GORSUCH: I mean, even in the  
8 law of trusts way back to the 15th century,  
9 there was a remoteness limitation --

10 MR. STRIS: Well --

11 JUSTICE GORSUCH: -- on how far  
12 someone could sue, wasn't there?

13 MR. STRIS: Well, so, Justice Gorsuch,  
14 I think there wouldn't be standing but it would  
15 have nothing to do with -- with remoteness. And  
16 here's why: In a defined contribution plan, the  
17 assets are -- are unsegregated, just as in a  
18 defined benefit plan. That's true. But they're  
19 not undivided.

20 So the proper analogue there would be  
21 -- and this happened a lot -- you had a trust,  
22 it held the deed to White Acre. It held the  
23 deed to Black Acre. We don't suggest that the  
24 person who had the beneficial interest in Black  
25 Acre could sue for a restoration of losses to

1 White Acre. That's the case in a defined  
2 contribution plan.

3 JUSTICE GORSUCH: Okay. So there are  
4 Article III limits, then, on how far the  
5 standing -- whatever is provided for by the  
6 statute here.

7 MR. STRIS: Well, there are many  
8 limits, just to be clear about the modesty of  
9 our position. First of all, from a historical  
10 standpoint, this is probably -- this -- what  
11 we're describing here in terms of the property  
12 interests impairment has more of -- at least as  
13 much of a historical pedigree as qui tam suits  
14 in Vermont Agency. And this Court has said time  
15 and time again that if suits existed at the time  
16 of the founding, it fit the definition of case  
17 or controversy from a constitutional  
18 perspective.

19 JUSTICE BREYER: If we do that -- I  
20 don't remember the 15th century, surprisingly,  
21 but, nonetheless --

22 (Laughter.)

23 JUSTICE BREYER: We did look up some  
24 things. And my -- at least a quick research  
25 suggests that -- that there are different

1 duties, fiduciary duties. One is the duty of  
2 loyalty. Another is the duty of prudence.

3 And in respect to loyalty, yes, what  
4 you say, I think, shows pretty accurate, people  
5 with an interest in trust, like beneficiary can  
6 sue the trustee for breach of the loyalty where  
7 he may be invested in a great investment for  
8 them, but shouldn't have, because it helped him  
9 too.

10 But there was a duty of prudence,  
11 which seems what you're really interested in.  
12 And there you couldn't. That is to say, they  
13 said that a -- that a life beneficiary could sue  
14 for loss of income but if there is no risk of  
15 loss of income, he can't sue.

16 A remainderman could sue to injuries  
17 to the principal of the trust, but that's all he  
18 has an interest in. And as long as that's safe,  
19 he can't sue.

20 Now if that's the right analogy, I  
21 would draw from that, yeah, you can sue for  
22 duties of breach of loyalty, but not for duties  
23 of a breach of prudence.

24 MR. STRIS: So a few responses,  
25 Justice Breyer.

1           So loyalty is our second injury. I  
2 haven't gotten to that yet. The property injury  
3 is prudence. That is what I'm talking about.

4           JUSTICE BREYER: And there the  
5 remainderman could not sue, it says.

6           MR. STRIS: Absolutely. We're not a  
7 remainderman.

8           JUSTICE BREYER: Oh, you aren't? What  
9 is your interest in the money -- in the trust  
10 that is any greater since it's fully funded and  
11 everything and has many, many sources, that was  
12 greater than the remainderman's interest in the  
13 income that's being paid out of a body -- a  
14 corpus, which you will eventually get, which  
15 isn't hurt?

16           MR. STRIS: The answer is, we have an  
17 interest in a promise of future payments secured  
18 by the entirety of the trust corpus.

19           And let me tell you about history. So  
20 the rule for a present beneficiaries with a  
21 contingent interest has been settled since at  
22 least 1808, according to the English Courts of  
23 Chancery. I would point your attention to Allen  
24 versus Allen. This is 33 English Reporter 704.  
25 Here's what the English Courts of Chancery said

1 and it is followed through in every case that I  
2 have seen.

3 A present interest, the enjoyment of  
4 which may depend upon the most remote and  
5 improbable contingency, is nevertheless a  
6 present estate.

7 JUSTICE BREYER: Yes, that's -- you're  
8 talking about a contingent interest. A  
9 contingent interest is an interest in a certain  
10 set of -- a certain property, a certain body of  
11 money. A remainderman had no interest.

12 MR. STRIS: That's right. We had --

13 JUSTICE BREYER: But he would receive  
14 not a contingent interest. He had no interest  
15 in anything except the body of -- and -- and  
16 what -- it's hard to see a difference between  
17 that remainderman and the interest of a  
18 beneficiary.

19 MR. STRIS: Here's the difference.

20 JUSTICE BREYER: Go ahead.

21 MR. STRIS: The difference comes both  
22 from the plan document in this case and ERISA.  
23 Let's start with the plan document.

24 It's pages 60 to 61 of the Joint  
25 Appendix. Here's what it says. And this is

1 representative of every defined-benefit plan  
2 I've seen.

3           It says, "All of the plan assets," and  
4 that's not a contract, that's stocks, bonds,  
5 investments, "shall be held in a trust fund  
6 separate from the bank's assets." It says, "the  
7 trust assets can only be used to benefit the  
8 participants, except as permitted by ERISA and  
9 the tax code."

10           ERISA and the tax code are very clear,  
11 they prohibit taking or wasting any of the trust  
12 assets, including the surplus. So the point  
13 that's being made here to -- to what I believe  
14 you were asking, Mr. Chief Justice, which is a  
15 fair point is, well, you may not need the  
16 surplus, so how do you have an interest?

17           And our core submission is that since  
18 the 15th century, the way trust law has worked  
19 is, it has -- it has conferred a property  
20 interest in the corpus without any case-by-case  
21 assessment. But --

22           JUSTICE ALITO: But you -- you have  
23 some strong arguments. I -- I want to get this  
24 one question in before your time is up.

25           You have arguments based on of



1 Congress having granted a right to sue, and you  
2 have arguments based on the -- the analogy  
3 between trust law and ERISA, but an ERISA plan  
4 is not a trust in the normal sense of the word.  
5 But put all of that aside. I want to hear about  
6 practicalities.

7           So let's say a beneficiary of a  
8 defined-benefit plan comes to you and says: I  
9 don't know anything about ERISA, I don't even  
10 know what it means, I don't know anything about  
11 trust law or the 15th century, anything like  
12 that.

13           What I want you to tell me is, what is  
14 the practical chance -- this is the beneficiary  
15 of this plan -- that I'm not going to get paid  
16 my benefits? What do you tell that person?

17           MR. STRIS: So that -- that's a --  
18 a -- a totally fair question, and let me answer  
19 it in the context of this case. And I mean this  
20 very seriously.

21           If you look at our complaint, Joint  
22 Appendix page 90, paragraph 167, we pled,  
23 because we believe that there was a substantial  
24 increased risk of default here, there was \$750  
25 million less.

1 JUSTICE ALITO: But you pled --

2 MR. STRIS: In answering the --

3 JUSTICE ALITO: You pled that, but  
4 compliance with Article III has to be reassessed  
5 at different stages of the -- of the proceeding.  
6 Is there any -- is the risk greater than the  
7 risk of being hit by a meteorite?

8 MR. STRIS: This is my core point,  
9 Justice Alito. As -- I think the best example  
10 of this is the Pension Rights Center's brief.  
11 They explain, based up on their experience that  
12 the swings in funding of -- of defined-benefit  
13 plans changes incredibly quickly. The Harley  
14 case out of the Eighth Circuit. In one year,  
15 there was a \$600 million contribution but the  
16 plan was 800 billion -- \$800 billion dollars  
17 underfunded.

18 CHIEF JUSTICE ROBERTS: Well, that --

19 MR. STRIS: Because of --

20 CHIEF JUSTICE ROBERTS: I'm sorry, go  
21 ahead.

22 MR. STRIS: Because of that, Congress  
23 exercised their judgment to say we are going to  
24 confer a property interest in the entirety of  
25 the trust corpus so we don't have to do a

1 case-by-case assessment. The --

2 JUSTICE KAVANAUGH: But Congress made  
3 clear that not only the plan but the employer  
4 and in the PBGC, which you haven't mentioned at  
5 all, is in play here. And the combination of  
6 the plan, the employer, and the PBGC, doesn't  
7 that make the practical answer to Justice  
8 Alito's question --

9 MR. STRIS: That's a fair point. I  
10 don't think so at all. The PBGC, which has its  
11 own solvency issues --

12 JUSTICE KAVANAUGH: It does, but it's  
13 backed by the United States Government.

14 MR. STRIS: Not the full faith and  
15 credit of the government. It's -- what happens  
16 is there are premium payments so it doesn't  
17 function that way. But more importantly, the  
18 PBGC doesn't fund anything above a minimum set  
19 of benefits. The core -- here's the answer to  
20 the core practical question.

21 JUSTICE KAVANAUGH: But they exceed  
22 the benefits of your clients in this case.

23 MR. STRIS: There -- there are two  
24 things going on here right now. I want to be  
25 very --

1 JUSTICE KAVANAUGH: Is that --

2 MR. STRIS -- clear --

3 JUSTICE KAVANAUGH: Is that yes?

4 MR. STRIS: Yes, my two clients, yes.

5 But there's two things going on here, Justice  
6 Kavanaugh, and it's really important to separate  
7 them out: What matters for standing and why we  
8 care practically. I am answering the latter  
9 one.

10 And what I'm saying is, in any  
11 individual case, you don't know whether you're  
12 going to need the surplus until it's gone. I  
13 think if -- if the financial collapse in AIG and  
14 Lehman tells us anything, it's that.

15 So if I am right that Congress said,  
16 in exchange for a tax benefit, you have to put  
17 all of these assets in trust, you have to confer  
18 a property interest in the full -- the full  
19 trust, I have -- I'm right on standing and  
20 there's -- there's an Article III injury, you  
21 don't have to inquire into the risk, but I also  
22 have a practical answer that doesn't matter for  
23 standing but, so that you don't have heartburn,  
24 you can see why a sensible policy-maker would  
25 make that decision. That's precisely what they

1 did.

2 And that's precisely how many types of  
3 analogous trusts worked in an unbroken line of  
4 cases since the 15th century.

5 JUSTICE GINSBURG: Before you -- you  
6 finish, can you clarify the precise actions of  
7 the fiduciary that you are assailing in this  
8 case?

9 MR. STRIS: Yes.

10 JUSTICE GINSBURG: First the district  
11 court said that to challenge to the 100 percent  
12 equity investment is off the table because it's  
13 time-barred. So I think that that's out of the  
14 case.

15 MR. STRIS: I -- I don't agree.

16 JUSTICE GINSBURG: All right. Then  
17 tell -- tell me -- and then as far as the  
18 bank-affiliated funds, they say that they -- the  
19 bank says you long ago got rid of all of them.

20 MR. STRIS: So here's what happened,  
21 Justice Ginsburg, and this is critical of the  
22 procedural posture.

23 May I answer, Your Honor?

24 CHIEF JUSTICE ROBERTS: Briefly.

25 MR. STRIS: I'll be -- I'll be brief.

1           The -- the first claim, the equities,  
2 was dismissed on statute of limitations grounds  
3 prior to this Court's decision in Tibble. We  
4 appealed. The Court never -- the Court of  
5 Appeals never reached the question because it  
6 held that we have no standing.

7           So you don't assume in doing the  
8 standing analysis that that claim is gone. The  
9 only reason that's gone is because we weren't  
10 able to appeal it. Based on this Court's  
11 decision in Tibble, it will clearly be reversed.

12           CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14           Mr. Joshi.

15                           ORAL ARGUMENT OF SOPAN JOSHI  
16                           FOR THE UNITED STATES, AS AMICUS CURIAE,  
17                           SUPPORTING THE PETITIONERS

18           MR. JOSHI: Mr. Chief Justice and may  
19 it please the Court:

20           When a trustee breaches his fiduciary  
21 duties and causes losses to the trust, real  
22 money losses, the beneficiary always has been  
23 able to sue the trustee for the breach of trust.  
24 It's been the law for hundreds of years of trust  
25 law and it's expressly in ERISA's text as well.

1 And that rule makes really good sense.

2           The beneficiaries are the ones who are  
3 getting paid out of the trust. The  
4 beneficiaries are the ones, as this Court  
5 recognized in Russell, who have an interest in  
6 the financial integrity of the trust. And the  
7 beneficiaries are in the best position to  
8 monitor and police the trustee for breaches of  
9 trust.

10           And that's why the traditional rule,  
11 as my friend mentioned earlier, is that even  
12 contingent beneficiaries could sue a trustee.  
13 But the rule goes even further than that. If  
14 you read the treatises, even discretionary  
15 beneficiaries could sue a trustee for breach of  
16 trust. These are beneficiaries who have  
17 absolutely no entitlement to any trust assets,  
18 except those that the trustee in his own  
19 discretion will give to the beneficiary.  
20 Nevertheless, a breach of trust would allow the  
21 beneficiary to sue that very trustee.

22           That history, I think, decides this  
23 case. We --

24           JUSTICE GORSUCH: Let me propose a  
25 hypothetical then about the defined contribution

1 plans. Let's say the trustee is left with  
2 discretion. After everybody is paid, if there's  
3 extra, you can throw it to somebody, even though  
4 it's not in their own contribution plan.

5 So I think you would say the result  
6 would be that every single beneficiary could  
7 sue, even if all of their investments are clean,  
8 for somebody else's defined contribution plan  
9 where the -- where the -- where the plan might  
10 be dirty; is that right? Does that follow?

11 MR. JOSHI: I -- I think that might  
12 follow, and I think it might -- I -- I -- I do  
13 think it might and I think that comes from not  
14 only our -- our -- you know, the positions we've  
15 laid out in the case in trust law and the  
16 undifferentiated assets but also from this  
17 Court's decision in LaRue.

18 In LaRue, of course, this Court held  
19 that the plaintiff, who was suing over harms to  
20 his own account, nevertheless could maintain a  
21 suit under 502(a)(2) for harm to the entire  
22 trust because the trust included the account,  
23 the account was part of the trust.

24 So I think on that theory, then, if  
25 you just extend it, that would have to be the



1 logic. My answer would have to be yes. But --  
2 I want to --

3 JUSTICE GORSUCH: Everybody could sue  
4 for everything.

5 MR. JOSHI: -- I want to hasten to add  
6 that, as a practical matter, these cases,  
7 especially in the posture you just mentioned,  
8 are -- are going to arise in the class context,  
9 and I think it would be perfectly reasonable for  
10 a court to look at that and --

11 JUSTICE GORSUCH: What about -- what  
12 about Justice Alito's meteor, the likelihood of  
13 getting a discretionary benefit from the trustee  
14 might be less than the chance of being hit by a  
15 meteor? Would Article III have something to say  
16 there? Or are you saying -- suggesting no,  
17 everybody can sue for everything anyway?

18 MR. JOSHI: So, historically, trust  
19 law has allowed the beneficiary to sue the  
20 trustee, a discretionary beneficiary to do so.  
21 And one might imagine when you sue the trustee,  
22 he's probably not likely to exercise his  
23 discretion in your favor; but, nevertheless, you  
24 were allowed to sue.

25 What Article III has to say about

1 it -- and -- and I know there's a lot of  
2 doctrine around Article III, but I think the key  
3 point, and -- and Spokeo reiterated it and 50  
4 years of case law has reiterated it, it comes  
5 from the words "cases and controversies" in the  
6 text of the Constitution. And the meaning of  
7 those words at a minimum includes the cases and  
8 controversies heard in the courts of Westminster  
9 and in the colonies at the --

10 JUSTICE KAVANAUGH: But isn't that --

11 MR. JOSHI: -- time of the founding.

12 JUSTICE KAVANAUGH: -- the -- I'm  
13 sorry. The tension in this case as I see it,  
14 and I think it's a close case, is the history is  
15 strong but the answer to the question -- it's  
16 99.99 percent certain that the benefits promised  
17 are going to be there. And how do we resolve  
18 what I see as that tension? Because it -- it  
19 would be odd for us to grant standing in a case  
20 where the -- the chances are so small.

21 On the other hand, you're right about  
22 the history. I mean, you make a good point  
23 about the history.

24 MR. JOSHI: Yeah, I -- I -- I think  
25 the answer really is the history, but to the

1 extent, you know, there's a chance, I guess I  
2 have two answers to that. One is this Court has  
3 and -- and certainly the "no further inquiry"  
4 cases made clear that even when the trust  
5 benefits from a particular breach of duty, you  
6 still have standing, if you will, to sue.

7           And, you know, one case out of many  
8 that we cited is Magruder against Drury. That's  
9 a decision of this Court in which the trustee  
10 was making loans on trust notes and allowing the  
11 trust to -- to acquire those notes, and it was  
12 on -- there was no question that it was on  
13 beneficial terms and there was no question that  
14 the trust benefited because it could make these  
15 reinvestments and save brokerage fees. That --  
16 those are in the facts of -- of the decision of  
17 this Court. Nevertheless, the Court said that,  
18 you know, not only did the beneficiaries have  
19 standing to sue -- it didn't discuss standing --  
20 but they -- they were entitled to recover. So  
21 that's one answer.

22           The other answer to your -- to your  
23 question is, no matter how low the risk might be  
24 as my friend mentioned -- PBGC tells me that  
25 plans that are highly overfunded the next year

1 become underfunded. So as a practical matter,  
2 you don't know and, more importantly --

3 JUSTICE KAVANAUGH: What is -- what is  
4 the role -- I'm sorry to interrupt, but the  
5 PBGC, how should we think about that, if we get  
6 away from the history at all, its role and how  
7 it guarantees a back stop?

8 MR. JOSHI: I -- I don't think it  
9 matters at all. No one ever suggested that the  
10 mere fact that you might have insurance means  
11 you don't have standing to sue someone for the  
12 harms they cause.

13 JUSTICE KAVANAUGH: It's the -- it's  
14 the combination of the plan plus the employer  
15 plus the PBGC would all have to --

16 MR. JOSHI: You -- the fact that there  
17 may be many layers of insurance, if you will,  
18 doesn't change the fact that when a trustee  
19 breaches his fiduciary duties, you can sue. And  
20 -- and --

21 JUSTICE ALITO: And how -- how far  
22 with you push the analogy to trust law in this?  
23 Since -- it -- was there a trust where the  
24 settlor of the trust had an obligation to step  
25 in and increase the amount of money in the trust

1 in order to -- to ensure that beneficiaries  
2 would be paid?

3 MR. JOSHI: Not -- not to my  
4 knowledge. And --

5 JUSTICE ALITO: I mean, that's the big  
6 difference between the situation here and trust  
7 law, right?

8 MR. JOSHI: I -- I don't think it's  
9 different. I don't think it's a distinction  
10 that -- that makes any practical difference, at  
11 least for Article III. It is an additional  
12 protection that the drafters of ERISA wanted to  
13 make, in addition to making the plan its own  
14 entity. Those are all additional protections  
15 for beneficiaries, precisely because in  
16 Congress's judgment, as this Court laid out in  
17 footnote 8 of Russell, trust law was not  
18 protective enough of beneficiaries.

19 And -- and here's is the point -- and  
20 this is to finish my answer to -- to your  
21 question, Justice Kavanaugh -- to merely say  
22 it's highly likely you're going to get your  
23 money back is -- you might say that if, for  
24 example, to -- to pick up on my friend's  
25 analogy, you know, you were to loan money to

1 Bill Gates. You're pretty sure he's going to be  
2 able to repay your money, but the difference  
3 between having the repayment or the -- the money  
4 you're entitled to come as a result of a  
5 contract and come as a result of a trust is very  
6 different.

7 You get a very meaningful benefit from  
8 having your money come from a trust. And that  
9 is it's managed by a fiduciary --

10 JUSTICE BREYER: All right. Can you  
11 just give me -- do you want to finish? Go  
12 ahead.

13 MR. JOSHI: Yeah. Sure.

14 JUSTICE BREYER: All right. Just  
15 don't spend more than 15 seconds. But what in  
16 the law -- see, the stock market goes up and  
17 down. And every time it goes down, it's  
18 underfunded. Every time it goes up, it's  
19 overfunded. Okay? Once it's overfunded,  
20 everybody's just as well off as they were  
21 before.

22 Now, that happens probably quite a  
23 lot. Now, if we -- if you -- what in the law  
24 prevents a class action every time it goes down  
25 and then it goes back up and they're better off,

1 and you say, well, now we're talking about  
2 yesterday? What prevents -- something should  
3 prevent that. Now, what is it that prevents  
4 that?

5 MR. JOSHI: Well, I -- I'm not certain  
6 what context you're talking about.

7 JUSTICE BREYER: I'm just saying the  
8 standing thing might be one of the things that  
9 prevents that because -- I mean, I -- and you  
10 can say, well, they have to have a good case,  
11 dah-dah-dah. All right, I understand that. But  
12 is there anything else in the law that, except  
13 this standing business, that can protect against  
14 that?

15 MR. JOSHI: If you have suffered an  
16 injury of a pepper corn, you have standing to  
17 sue. Now, you -- there might not be --

18 JUSTICE BREYER: But that's --

19 MR. JOSHI: But the other thing is  
20 that --

21 JUSTICE BREYER: -- of course, I want  
22 to say, okay, your answer is nothing protects in  
23 the law.

24 MR. JOSHI: Well, again, it -- it's  
25 hard to answer that question in the abstract.

1 What I do know is that, in this particular  
2 context, there are trust duties that are set  
3 forth in the law, trust --

4 JUSTICE BREYER: I know there's some,  
5 but this is a duty of prudence, which means you  
6 made a bad investment, and you do make bad  
7 investments and you say, well, the trustees say  
8 dah-dah-dah. Okay. But I wonder if there is  
9 anything that prevents against the roller  
10 coaster which would mean many, many suits, even  
11 though the beneficiaries are even better off  
12 sometimes after the stock market's finished its  
13 little roller coaster. You're saying nothing?  
14 Okay. I got the answer.

15 MR. JOSHI: Well --

16 JUSTICE KAVANAUGH: Aren't you  
17 saying --

18 MR. JOSHI: What I'm --

19 JUSTICE KAVANAUGH: I'm sorry, aren't  
20 you saying the deference afforded to the plan  
21 administrators on the merits is --

22 MR. JOSHI: That -- that's --

23 JUSTICE KAVANAUGH: If properly  
24 applied?

25 JUSTICE BREYER: That's right.



1           MR. JOSHI: That's exactly right. And  
2 I think to -- to -- if you just look at it, you  
3 know, the -- the funding rules in 303 and the  
4 fiduciary rules in 404 and 406, Congress did not  
5 make these --

6           JUSTICE BREYER: Okay, all on the  
7 merits --

8           MR. JOSHI: -- exclusive. They --

9           JUSTICE BREYER: I -- I -- I --

10          MR. JOSHI: -- they all apply at all  
11 times. It's --

12          JUSTICE BREYER: -- I see.

13          CHIEF JUSTICE ROBERTS: I'm not sure  
14 you're giving adequate weight to the -- when  
15 you're looking at the history, the significance  
16 of Article III to our role in the separation of  
17 powers.

18                 The requirement to decide an actual  
19 case or controversy is the only thing that gives  
20 us authority to do what we do. And so the fact,  
21 well, you say in history in, you know, 14  
22 whatever you didn't need to show that, well,  
23 that doesn't necessarily take into account how  
24 Article III works today under the Constitution.

25          MR. JOSHI: That may be right, but as

1 I said, the Magruder case and many others that  
2 we've cited in the briefs do recognize this  
3 principle of trust law. And I'd also point out  
4 that nobody disputes that if the allegations are  
5 true, that the plan's loss of \$748 million -- if  
6 I may finish --

7 CHIEF JUSTICE ROBERTS: Mm-hmm.

8 MR. JOSHI: -- is a injury to the plan  
9 and the plan itself would have standing to sue.  
10 But, of course, the plan's not a human being.  
11 Someone has to sue on behalf of it.

12 And when the trustee is the one that  
13 caused that loss, the one person who's going to  
14 step into the shoes to sue for the plan's injury  
15 is the beneficiary.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Mr. Palmore.

19 ORAL ARGUMENT OF JOSEPH R. PALMORE  
20 ON BEHALF OF THE RESPONDENTS

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

23 There is no ERISA exception to Article  
24 III. Like all plaintiffs in federal court,  
25 those with ERISA claims must demonstrate injury.

1 Neither Petitioner here can do that.

2           This month, Petitioner James Thole  
3 will receive a pension payment of \$2,198.38,  
4 just as he has every month since his retirement  
5 from US Bank. And Petitioner Sherry Smith will  
6 receive the same \$42.26 payment she has received  
7 since her retirement.

8           If this Court affirms dismissal of all  
9 of their claims, it is undisputed that those  
10 payments will be exactly the same every month  
11 for the rest of their lives, not one penny less.

12           If, on the other hand, this Court were  
13 to reverse, this case were to be litigated to  
14 judgment in favor of plaintiffs and they were to  
15 receive every single form of relief they demand,  
16 those payments would also be exactly the same,  
17 not one penny more.

18           Federal courts are not available to  
19 adjudicate claims like this that do not matter  
20 to the plaintiffs. Whether viewed as a matter  
21 of Article III or statutory standing, none of  
22 Petitioners' arguments solve that fundamental  
23 problem with their case.

24           First, at trust law, beneficiaries  
25 could sue to challenge fiduciary breaches only

1 when they affected their interests, unharmed  
2 beneficiaries could not sue.

3 Second, Petitioners lack any property  
4 interest in the trust underlying this  
5 defined-benefit pension plan. That is because,  
6 as this Court explained in Hughes Aircraft,  
7 their level of benefits is unconnected with the  
8 value of the assets in the trust corpus.

9 US Bank, not a participant, bears the  
10 risk of loss from poor performance and US Bank,  
11 not a participant, benefits from plan  
12 overfunding.

13 Third, Petitioners cannot sue in a  
14 representational capacity on behalf of the plan  
15 unless they have their own injury. In fact, for  
16 the reasons just stated, they don't.

17 Mr. Stris started off by saying they  
18 have a property interest in the plan, but under  
19 the structure of ERISA and Hughes Aircraft, they  
20 don't. The trustee owns legal title of the plan  
21 and owns -- and the equitable interest in the  
22 plan is -- is the plan itself holds the  
23 equitable interest in the plan.

24 The -- and this -- the fact that they  
25 have no right to sue over the fluctuations, the

1 ups and downs in the value and the trust corpus  
2 is actually entirely consistent with the history  
3 at trust law. They don't have a contingent  
4 interest in the plan in the sense of if A  
5 happens, they may inherit all of the trust  
6 corpus or if B happens, their benefits may get  
7 up -- may go up.

8           They have no such interest. And at  
9 trust law, a plaintiff or a beneficiary whose  
10 interest was completely unconnected to the value  
11 of the trust could not sue. And we've cited the  
12 -- Bogert, section 871 for that proposition, the  
13 restatement second on torts, section 214,  
14 comment B, all stand for that proposition.

15           That's -- it's a different situation  
16 if you have a contingent beneficiary situation  
17 where there are two beneficiaries --

18           JUSTICE KAVANAUGH: Can you imagine a  
19 situation in which a participant in a  
20 defined-benefit plan would have standing? And  
21 can you describe the particular line that would  
22 separate that from this case?

23           MR. PALMORE: Yes, Your Honor. I  
24 think a -- a participant in a defined-benefit  
25 plan would have standing consistent with normal

1 Black Letter Article III principles if they  
2 could show that there was a risk to their  
3 benefits.

4 JUSTICE KAVANAUGH: And how would they  
5 show that? How would they show that?

6 MR. PALMORE: Well, they could show,  
7 A, I'm not getting paid what I was promised.

8 JUSTICE KAVANAUGH: Put aside they are  
9 not getting paid. But if they're still getting  
10 paid --

11 MR. PALMORE: Right.

12 JUSTICE KAVANAUGH: -- how would they  
13 show what are the particulars that you think  
14 would be necessary?

15 MR. PALMORE: Well, I think -- you  
16 know, I don't think -- first of all, I would  
17 just preface my remarks by saying I don't think  
18 this case calls for the Court to --

19 JUSTICE KAVANAUGH: I understand that.

20 MR. PALMORE: -- opine on that.  
21 Because they've said that there's no risk at all  
22 that's required.

23 But I think this Court -- I think it  
24 would be simple factual application of Clapper  
25 where the Court talked about imminent risk or a

1 substantial risk.

2 JUSTICE KAVANAUGH: Right. I know the  
3 terms. I'm just trying to figure out how --

4 MR. PALMORE: Well, I think -- and I  
5 think those terms are flexible enough to take  
6 into account the long-term time horizon of a  
7 pension plan. So I don't think you'd have to  
8 show that the plan was going to fail tomorrow,  
9 but I think it's not -- wouldn't be enough to  
10 show that the plan was simply underfunded. The  
11 Fifth Circuit --

12 JUSTICE KAVANAUGH: Well, let me pause  
13 there. What's the delta between you can take  
14 into account the long-term likelihood --

15 MR. PALMORE: Well, I think you have  
16 to look --

17 JUSTICE KAVANAUGH: -- and  
18 underfunded. It seems like pleading. I guess  
19 my point is pleading what you think is necessary  
20 won't be as big a hurdle as you're really  
21 implying, I don't think.

22 MR. PALMORE: Well, I think you would  
23 have to plead not only was the plan at risk but  
24 that the employer either could not or would not  
25 fulfill its legal obligation to make up any

1 deficit in the plan.

2           So the Fifth Circuit's case in Lee  
3 versus Verizon is instructive here. That was  
4 post-Spokeo, that was a GVR case in which the --  
5 that -- the Verizon pension plan was only  
6 66 percent funded. But what the Fifth Circuit  
7 said was that the plaintiffs there hadn't  
8 adequately alleged injury because they hadn't  
9 alleged that Verizon, one of the biggest  
10 companies in the country, would be unable to  
11 fulfill its legal obligations to make up that  
12 deficit and to --

13           CHIEF JUSTICE ROBERTS: Well, we've  
14 had --

15           MR. PALMORE: -- be able to fund their  
16 payments.

17           CHIEF JUSTICE ROBERTS: In the not too  
18 far off past, there have been situations where  
19 people were surprised of some of the companies  
20 that turned out not to have enough money to go  
21 forward.

22           And it -- let's say that the -- a  
23 person running the trust or, you know, running  
24 the company loses \$100 million in the first  
25 month and 100 in the second and 100 in the



1 third, and although there is no significant harm  
2 to the beneficiaries in the terms that you've  
3 discussed it, they look and say: Well, this guy  
4 is going to continue to lose a lot of money and  
5 can you -- can they bring a suit in that case?

6 MR. PALMORE: If they could show he's  
7 going to continue to lose a lot of money and it  
8 will result in an impairment of their only  
9 interest, which is the stream of payments from  
10 the pension plan, then yes, they can bring a  
11 suit and they can get an injunction to have him  
12 removed.

13 JUSTICE SOTOMAYOR: So, I've --

14 MR. PALMORE: Here they've --

15 JUSTICE SOTOMAYOR: I've --

16 MR. PALMORE: -- never -- they've  
17 never established that or claimed that here.

18 JUSTICE SOTOMAYOR: I'm sorry. I  
19 don't know why we need all that, meaning there  
20 is a simple -- two simple claims here. One, a  
21 breach of loyalty that they invested in -- in a  
22 vehicle that cost more money than was needed,  
23 and it was self-dealing, so trust law has always  
24 said, you can't self-deal. You can't make money  
25 off of the assets of the plan.

1           So whether or not they get something  
2           or don't, trust law has been clear forever that  
3           that belongs to the trust and the plan  
4           participants have trustees who are self-dealing,  
5           they're not going to sue for themselves, we can  
6           sue for that self-dealing.

7           Secondly, the plan lost 750-odd  
8           billion dollars or whatever the money was,  
9           millions, in imprudent investment. Now, whether  
10          we lose money or not, the plan lost money. It  
11          lost \$753 million or whatever the figure was.  
12          And, in fact, until you contributed 311 million  
13          of that 753, the plan was underfunded.

14          You then came along and said: Well,  
15          we'll give that much, a part of that loss but  
16          not the whole. And so if the trustees are not  
17          going to give the whole amount because it's not  
18          in their best interests, but it's in the plan's  
19          best interests, what does it matter whether the  
20          participants get a piece of that or not? The  
21          plan gets it and they're representing the plan.

22          So I -- I guess what I'm having  
23          trouble with in this case is that they're right,  
24          whether they have a property interest or they  
25          have a representational interest, they still

1 have standing.

2 MR. PALMORE: Your Honor, first of  
3 all, they don't have a property interest for the  
4 reasons I stated --

5 JUSTICE SOTOMAYOR: So, why?

6 MR. PALMORE: -- and as the reasons  
7 this Court stated in Hughes Aircraft, they don't  
8 have a property interest.

9 JUSTICE SOTOMAYOR: Let's remember the  
10 following in Hughes. They were seeking a  
11 distribution of a surplus that the court said  
12 they couldn't seek.

13 MR. PALMORE: And the reason --

14 JUSTICE SOTOMAYOR: But here --

15 MR. PALMORE: Yes.

16 JUSTICE SOTOMAYOR: -- they're not  
17 asking for a distribution to themselves of a  
18 surplus. They are asking for a payment to the  
19 plan.

20 MR. PALMORE: Right. But Hughes  
21 rejected that claim on the merits because of the  
22 structure of defined-benefits plan.

23 But if I can move to the  
24 representational standing question that you  
25 asked, a party can sue on behalf of another only

1 if that party has their own injury. That's  
2 Perry versus Hollingsworth. That's -- there are  
3 many such cases.

4 So in a qui tam case, the relator will  
5 personally recover and get money. In a  
6 derivative action, that the plaintiff owns a  
7 share of the corporation so any benefit to the  
8 corporation will flow down and they will get a  
9 minute part of it. And if they don't, this  
10 Court explained in Gollust versus Mendell,  
11 there's an Article III problem.

12 With respect to the first part of your  
13 question, which is the no further inquiry rule,  
14 I think it is critical to understand there are  
15 two separate questions: How is harm  
16 established, and then who has the relevant  
17 injury to sue to remedy that harm.

18 The no further inquiry rule went only  
19 to that first question. It said that if the  
20 trust engaged in a transaction that was  
21 inconsistent with the duty of loyalty or was  
22 otherwise prohibited, there would be a  
23 presumption of harm to the trust and, therefore,  
24 that transaction could be rescinded.

25 But there is always -- they don't need

1 the presumption here. They have alleged harm to  
2 the trust. There's always a separate question  
3 of whose interest is implicated by harm to the  
4 trust.

5 JUSTICE GORSUCH: Counsel, on that,  
6 what if Congress had in its statute -- I know  
7 you would disagree that it did this -- what if  
8 it had said that every beneficiary has a  
9 property interest or a private right to a  
10 completely clean trustee. Would that suffice  
11 for standing in your view?

12 MR. PALMORE: I don't think so, Your  
13 Honor. Of course, I don't think you have to  
14 address that question. But as Spokeo explained,  
15 there are limits on Congress's ability to  
16 provide causes of action and to identify  
17 injuries and make violation of them concrete.

18 JUSTICE GORSUCH: This isn't creating  
19 a cause of action. I agree with you about all  
20 of that. I understand your point. But say you  
21 actually have a right, a legal right, creating a  
22 new -- and we know this is new, we admit it's  
23 new --

24 MR. PALMORE: Yeah.

25 JUSTICE GORSUCH: -- but we think it's

1 important, because whatever -- whatever good  
2 policy reasons, some of which we have heard  
3 articulated here.

4 MR. PALMORE: Well, I think this Court  
5 would look to the substance of it. I think if  
6 they just labeled it a property interest, I  
7 don't think that would be good enough. If they  
8 somehow tied the level of benefits to the value  
9 in the trust corpus, this would be a whole  
10 different ball game, and they clearly would have  
11 standing.

12 But like we talked earlier about the  
13 questions about the contingent beneficiaries, if  
14 you had two beneficiaries at common law, they  
15 each had a 50 percent chance of getting the  
16 trust corpus, yes, they had standing at common  
17 law, because they did have an equitable interest  
18 in the trust corpus. They might get all of it.

19 Here we're not talking about  
20 50 percent. We're talking about zero percent.  
21 These Petitioners will never get any of this  
22 money.

23 JUSTICE KAGAN: Mr. Palmore,  
24 regardless of whether it's zero or 50, if I  
25 understand your argument, you are acknowledging

1 that if they have an equitable interest, then  
2 they have standing; is that correct?

3 MR. PALMORE: If they had a property  
4 interest in --

5 JUSTICE KAGAN: An equitable interest  
6 --

7 MR. PALMORE: -- the trust corpus --

8 JUSTICE KAGAN: -- in the trust  
9 corpus.

10 MR. PALMORE: An equitable -- an  
11 equitable property interest, then, yes, a loss  
12 of a dollar from the trust corpus is loss of a  
13 dollar to them, but they don't. That's the  
14 critical point.

15 JUSTICE KAGAN: So but that's what  
16 everything depends on in your view. I mean,  
17 your argument just falls apart if we look at  
18 ERISA and we say that's exactly what Congress  
19 did here, was to give all of the beneficiaries  
20 and participants an equitable interest in the  
21 integrity of the trust.

22 MR. PALMORE: And I don't want to  
23 quibble over terminology, but I would say an  
24 equitable property interest, if they did --

25 JUSTICE KAGAN: That's what I --

1 MR. PALMORE: -- in the real. Yes --

2 -

3 JUSTICE KAGAN: We're not talking  
4 about --

5 MR. PALMORE: -- then perhaps, but  
6 they didn't. The plan is -- has the equitable  
7 interest and the fiduciary duties run to the  
8 plan. And, moreover what they are entitled --

9 JUSTICE KAGAN: And where do you get  
10 that from? What does that mean, that the plan  
11 has the equitable interest? I mean, the plan is  
12 the thing that there's an interest in, isn't  
13 there?

14 MR. PALMORE: No, Your Honor. This is  
15 -- the structure of an ERISA plan, you have a --  
16 legal title is owned by the trustee. And the  
17 trustee holds legal title for the benefit of the  
18 plan itself.

19 And this Court explained in Russell  
20 that the fiduciary duties run to -- for plan  
21 asset management, run to the plan, but even if  
22 you don't agree with that, I think the history  
23 here is still critical because at common law, a  
24 remainderman couldn't sue -- and this is Terry  
25 versus Allen, it's the -- it's the Connecticut



1 Supreme Court case that we cite, Justice Breyer,  
2 the remainderman who had an interest in only the  
3 trust principal was a beneficiary but could not  
4 sue, didn't have standing to sue for  
5 mismanagement of that trust corpus because a  
6 bond protected his only interest, which was a  
7 certain payment.

8 Here U.S. Bank is the bond. We're  
9 talking about one of the best capitalized banks  
10 in the country. There is no risk that this plan  
11 was not going to be able to make good on the  
12 stream of payments to these plaintiffs and that  
13 is their only legal interest. It's getting that  
14 check every month.

15 Now if they take --

16 JUSTICE ALITO: Do you think that -- I  
17 didn't quite understand your answer. Do you  
18 think that Article III is satisfied whenever  
19 Congress puts the label "property interest" or  
20 "equitable interest" on something?

21 MR. PALMORE: No, Your Honor, I didn't  
22 -- didn't mean to suggest that. I don't think  
23 the label would matter. I was trying to suggest  
24 that if it -- if it were substantively a  
25 property interest --

1 JUSTICE ALITO: What does that mean  
2 for it to be substantively a property interest?

3 MR. PALMORE: I think if their  
4 benefits were tied to the value of the trust  
5 corpus, then they would have standing. But if  
6 their benefits are fixed, as these benefits are,  
7 then -- and they can't show that any harm to the  
8 trust corpus actually jeopardized that stream of  
9 payments, then they don't have standing, just  
10 like the remainderman in Terry versus Allen --

11 JUSTICE KAVANAUGH: It's a little --

12 MR. PALMORE: -- didn't have standing.

13 JUSTICE KAVANAUGH: -- different  
14 though. I'm sorry to interrupt. It's a little  
15 different because we're talking about a  
16 predictive judgment, right? And the plaintiffs  
17 are going to say there's an increased risk of  
18 harm. And, of course, in regulatory cases that  
19 we've done, we've confronted that issue.

20 And how much of an increased risk of  
21 harm that they won't receive the payments is  
22 necessary, and isn't that just going to be a  
23 pleading exercise that prevents -- presents a  
24 whole new collateral set of cases trying to  
25 figure out have you pled exactly enough,

1 increased risk of harm here?

2 And I guess the bottom line is is that  
3 worth the candle? I guess, summarizing, if we  
4 don't have clarity on the line, is it worth the  
5 candle of trying to draw a line rather than just  
6 going with the historical approach advocated by  
7 the other side?

8 MR. PALMORE: Well, Your Honor, first  
9 just to put a footnote on it, I disagree that  
10 the history is on their side.

11 JUSTICE KAVANAUGH: Right.

12 MR. PALMORE: But I think it is worth  
13 the candle because Article III requires it,  
14 right? So Article III and Iqbal and Twombly  
15 would require proper pleadings. So here they  
16 said --

17 JUSTICE KAVANAUGH: I obviously agree  
18 with that --

19 MR. PALMORE: Yeah.

20 JUSTICE KAVANAUGH: -- but you've been  
21 referring to these old cases, which kind of said  
22 you're out. And you're not saying you're out if  
23 you're a participant in a defined-benefit plan.  
24 You're in, so long as you can allege a  
25 sufficiently increased risk of harm that my

1 benefits won't be paid.

2 And then the question becomes: What  
3 do you have to allege to that? Well, it's  
4 underfunded and, therefore -- and the company  
5 may go belly up and, therefore, that's enough.

6 MR. PALMORE: Yeah, I think if it --  
7 if it was significantly underfunded and the  
8 company was struggling or was distressed and  
9 didn't have adequate assets --

10 JUSTICE KAVANAUGH: That's just going  
11 to be a whole mess, isn't it?

12 MR. PALMORE: But that's required in  
13 order to show --

14 JUSTICE KAVANAUGH: Okay.

15 MR. PALMORE: -- that you have a  
16 injury. So I don't think it's a whole mess.  
17 There's a ton of information available here.

18 So you look at the facts of Clapper,  
19 those plaintiffs had literally no ability to  
20 demonstrate that their calls were being  
21 surveilled.

22 Here pension plans file annual reports  
23 with the Department of Labor, that's the Form  
24 5500. There's ample public information about  
25 publicly-traded companies. There's a lot of

1 information out there. And that information  
2 here showed that even at the time this plan was  
3 modestly underfunded, U.S. Bank had \$86 billion  
4 in liquid assets.

5 JUSTICE BREYER: But -- but --

6 CHIEF JUSTICE ROBERTS: There's a  
7 standard -- Article III, there's a lot of case  
8 law about what standard the injury has to  
9 satisfy. And if you're analyzing this under  
10 Article III, that's not an open issue.  
11 Concrete, particularized, and so on and so forth  
12 that it has come -- developed through all sorts  
13 of cases where there's a challenge to the nature  
14 of the injury.

15 MR. PALMORE: No, that's absolutely  
16 right, so I think it really would be a  
17 fact-bound application of -- of Clapper, of the  
18 imminent harm standard in Clapper or the  
19 substantial risk standard in Clapper, which --  
20 which the Court talked about, but what's --

21 JUSTICE KAVANAUGH: But, but -- sorry  
22 to prolong it, but it's bothering me. If you  
23 just allege that it's underfunded significantly,  
24 and therefore in the complaint it says and there  
25 is therefore a substantially increased risk of

1 harm I won't receive my promised benefits, is  
2 that enough?

3 MR. PALMORE: That wouldn't be enough.

4 JUSTICE KAVANAUGH: Okay. What more  
5 is needed?

6 MR. PALMORE: I think -- and this,  
7 again, would be the Fifth Circuit's decision in  
8 Lee, which I would commend to the Court.

9 JUSTICE KAVANAUGH: So you agree with  
10 -- I just want to make sure, you agree with the  
11 Fifth Circuit's formulation?

12 MR. PALMORE: We do. So underfunded  
13 isn't enough because of the way that ERISA is  
14 structured that the employer is always on the  
15 hook to make up any deficit in that plan. So  
16 you've got -- it would have to allege both  
17 underfunding and an employer who was unwilling  
18 or unable --

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

20 MR. PALMORE: -- to --

21 JUSTICE BREYER: -- that's in a -- I  
22 agree with the Chief Justice that I've seen  
23 numerous cases. And whenever it is a question  
24 of standing and it's a money case, which this  
25 is, you have to have some injury to money. All

1 right.

2 But we have two things. One, at least  
3 as to the duty of loyalty, the history seems to  
4 show that those were fairly typical trust cases  
5 brought, although there was no injury to the  
6 individual beneficiary or trustee beneficiary,  
7 who could have -- that's true of the duty of  
8 loyalty.

9 Under the -- that's -- we've looked at  
10 the cites and they seem to say that.

11 MR. PALMORE: I respectfully disagree  
12 with that but let's --

13 JUSTICE BREYER: All right.

14 MR. PALMORE: -- continue.

15 JUSTICE BREYER: I want to know that.

16 MR. PALMORE: Okay.

17 JUSTICE BREYER: But the other is  
18 this. There are exceptions to this harm  
19 business quantitatively. The Sierra Club, I  
20 mean, their members can sue. And I agree that  
21 the members have to have once taken a, you know,  
22 a look around Yellowstone or something, but, I  
23 mean, it's pretty minimal.

24 And here Congress has tried to create  
25 an organization that involves pensions and, you

1 know, the members that they list in the statute  
2 as being able to sue. So why isn't that good  
3 enough? Why isn't it good enough that -- that  
4 Congress has created something like an  
5 association, associational members do have the  
6 right to sue, even though there's nothing more  
7 than their belonging to an association that --  
8 that suffered? Shouldn't that be an analogy?  
9 Why not?

10 MR. PALMORE: No, Your Honor.

11 JUSTICE BREYER: So I am interested in  
12 both of those.

13 MR. PALMORE: Sure. First of all,  
14 under *Rings v. Bird*, the simple conferral of a  
15 cause of a cause of action is not enough to  
16 confer standing. And then what you were  
17 alluding to in 502(a)(2) and (a)(3), is simply a  
18 bare cause of action. That's not enough. There  
19 has to be an invasion of statutorily protected  
20 right and there has to be a concrete injury.

21 JUSTICE KAGAN: At the very least,  
22 though, Mr. Palmore, that suggests who Congress  
23 thought the fiduciary obligations ran to. In  
24 other words, this goes back to this question of  
25 who really owns this thing equitably.



1                   Is it the plan or is it the  
2 beneficiaries and participants? And in creating  
3 those causes of action, Congress essentially,  
4 you know, indicated that it thought that the  
5 obligations ran to the beneficiaries and the  
6 participants, meaning that it's the  
7 beneficiaries and the participants who have the  
8 equitable ownership stake in the financial  
9 integrity of the fund.

10                   MR. PALMORE: Your Honor, I -- I read  
11 this Court's decision in Russell to -- to be --  
12 say exactly the opposite. So 502(a)(2), which  
13 goes to claims for fiduciary breach involving  
14 plan asset management, which is what we have  
15 here, the Court was quite clear that those  
16 fiduciary duties run to the plan, not to  
17 individual beneficiaries.

18                   JUSTICE KAGAN: But even Russell said  
19 that beneficiaries have a stake in the financial  
20 integrity of the plan and then you have Harris  
21 Trust, which says that ERISA gives a fiduciary  
22 -- it makes clear that the fiduciary duty goes  
23 to the beneficiaries.

24                   MR. PALMORE: Your Honor, what this  
25 Court said -- has -- has said in subsequent

1 cases after Russell was that there are -- there  
2 are other kinds of fiduciary duties which may  
3 run directly to a beneficiary, so, for instance,  
4 the right to receive truthful information, but  
5 the Court reiterated in verity that the -- that  
6 the fiduciary duty with respect to plan asset  
7 management runs to the trust.

8 But even if you don't --

9 JUSTICE KAGAN: I mean, isn't that a  
10 fairly odd thing to say the that fiduciary  
11 obligations runs to an abstract plan rather than  
12 the beneficiaries and the participants who are  
13 supposed to benefit from it?

14 MR. PALMORE: No, Your Honor, because  
15 ERISA was an innovation in that it created the  
16 plan as an actual legal entity with -- and a  
17 heavily regulated one, at trust -- at common  
18 law, the trust itself wasn't the legal entity.  
19 It was just a series of relationships between  
20 individuals.

21 So -- so ERISA was an innovation. But  
22 even if you don't agree with me on that, this  
23 question would still remain, even if the  
24 fiduciary duties flow to the individuals, can  
25 they sue if they are not harmed?

1           So at the contingent beneficiary  
2 analogy that we have been talking about, if you  
3 have two contingent beneficiaries, either of  
4 whom could receive 50 -- might have a 50 percent  
5 shot at getting the trust corpus, here it's a  
6 zero percent shot. None of these -- these  
7 Petitioners is going to get that trust corpus.

8           And again, the -- Justice Breyer going  
9 back to your question, the no further inquiry  
10 rule involved only how you establish harm to the  
11 trust itself, to the trust corpus.

12           In not one of their cases do they cite  
13 an example of a beneficiary whose concrete  
14 financial interest were not tied to the value of  
15 assets in the trust corpus, in not one of their  
16 cases was that beneficiary able --

17           JUSTICE BREYER: But if you don't --  
18 if you don't have to assess injury to the trust  
19 where there is no injury to the trust, how could  
20 there be any injury to a beneficiary of the  
21 trust?

22           MR. PALMORE: Because there was  
23 presumed under the no further inquiry rule,  
24 there was presumed injury to the trust.

25           JUSTICE BREYER: Means sometimes you

1 presume that there is injury to the trust --

2 MR. PALMORE: Yes.

3 JUSTICE BREYER: -- when there isn't.

4 All right, focus on those.

5 MR. PALMORE: Correct.

6 JUSTICE BREYER: In that set of cases,

7 there is no injury to the trust. And,

8 therefore, a fortiori, there is no injury to the

9 beneficiary.

10 MR. PALMORE: I would -- I would

11 change your wording slightly. There is a

12 presumed injury to the trust. There is a --

13 JUSTICE BREYER: Same thing. On the

14 duty of the -- on the duty of loyalty --

15 MR. PALMORE: Yes.

16 JUSTICE BREYER: -- there is a

17 presumed injury to the beneficiary.

18 MR. PALMORE: To the -- to the trust.

19 JUSTICE BREYER: Oh, there's a --

20 MR. PALMORE: To the trust. And then

21 any beneficiary with an interest in the trust

22 could then sue. So if it was the remainderman

23 who had only an interest in the principal, like

24 the plaintiff in Terry versus Allen --

25 JUSTICE BREYER: I see your point.

1           MR. PALMORE: -- and that that  
2           interest was fully protected, that plaintiff  
3           couldn't sue, right? So there -- it's critical  
4           to keep those two separate questions in mind,  
5           how is harm established, is it either proved or  
6           conclusively presumed under the no further  
7           inquiry rule but there was always the second  
8           question, and this is Bogart 871, restatement  
9           214, comment B, there was always a second  
10          question of who can sue to remedy that harm to  
11          the trust. And there the trust law is quite  
12          clear that that "who" is someone whose actual  
13          concrete interests were affected.

14                 JUSTICE KAVANAUGH: Can I go back to  
15          the particulars of your theory of what would be  
16          sufficient?

17                 MR. PALMORE: Yes.

18                 JUSTICE KAVANAUGH: You said if the  
19          plan -- if you allege that the plan is  
20          underfunded and you allege that the employer is  
21          unwilling or unable to meet the obligations, I  
22          think you said.

23                 MR. PALMORE: Yes.

24                 JUSTICE KAVANAUGH: Let's put aside  
25          unwilling for a second. In alleging that an

1 employer is unable to meet the obligations, how  
2 would you allege that? What do you think would  
3 be necessary?

4 MR. PALMORE: I think you would have  
5 to look at their -- you know, their publicly  
6 disclosed financial information and show that  
7 they -- that this was a seriously underfunded  
8 plan and that this was a distressed company and  
9 it was going to be unable to -- to put in  
10 adequate money or unable to comply with the  
11 minimum funding requirements that ERISA places  
12 on them.

13 JUSTICE KAVANAUGH: If that's alleged,  
14 how can that be disputed at the pleadings stage  
15 or what do you envision -- what kind of process  
16 do you envision for disputing an allegation to  
17 that effect in a complaint?

18 MR. PALMORE: Well, I don't -- I mean,  
19 I think if it's -- if it's alleged with  
20 sufficient particularity, then -- then they've  
21 properly alleged standing and then there would  
22 be a factual question down the road.

23 JUSTICE ALITO: Yeah, but then you  
24 would -- then it's a question of subject matter  
25 jurisdiction under Article III. So it's not

1 like Iqbal and Twombly where it's failure to --  
2 a question of whether it stated a claim.

3           Wouldn't you immediately file a motion  
4 to dismiss for lack of subject matter  
5 jurisdiction? And that wouldn't be -- the  
6 determination of that would not be based solely  
7 on the pleadings.

8           MR. PALMORE: Exactly right, Your  
9 Honor. And that's actually what happened here.  
10 We dismissed under 12(b)-- we moved to dismiss  
11 under 12(b)(6). That was denied. I think that  
12 was incorrect but it was denied.

13           And then we made a motion under  
14 12(b)(1) and the district court actually engaged  
15 in fact finding and found as as a matter of fact  
16 that there were -- there was no risk to these --  
17 to the --

18           JUSTICE KAVANAUGH: That's what I was  
19 getting at.

20           MR. PALMORE: The plan was actually  
21 overfunded.

22           JUSTICE KAVANAUGH: I think that's  
23 right. You have a separate factual proceeding  
24 on whether the allegation that the employer  
25 wouldn't be able to meet the obligations.

1           MR. PALMORE: Exactly. And that's  
2 actually what happened here. The plan then was  
3 overfunded and the overfunding line, that's the  
4 line that Congress has drawn, it says if you  
5 meet that level of funding in the plan, there's  
6 enough there to pay all the future benefits, so  
7 this plan at the relevant time was overfunded.  
8 That was the basis for the dismissal here.

9           And I think that --

10          JUSTICE KAGAN: And Mr. Palmore --

11          MR. PALMORE: Yes.

12          JUSTICE KAGAN: -- what do you do  
13 about the fact that these plans can be  
14 underfunded in January and overfunded in  
15 February and underfunded in March again?

16                 And what do you do about the fact that  
17 the health of even, you know, secure companies,  
18 if you're in 2008, all of a sudden it turns out  
19 they're not so secure after all.

20          MR. PALMORE: Well, Your Honor, I  
21 think that's why the -- the -- I think if a plan  
22 is overfunded, I think that's sufficient to  
23 defeat standing. I don't think it's actually  
24 necessary.

25                 And I think for the reasons that you



1 state, if something is toggling between  
2 overfunded and underfunded, there isn't going to  
3 be standing unless the critical second step of  
4 the inquiry can be alleged or factually  
5 determined at the 12(b)(1) stage that the  
6 employer won't be able to meet its legal  
7 obligations to make the minimum funding  
8 contributions to make sure there's enough money  
9 in that plan to insure the stream of benefits.

10 But just kind of speculation about AIG  
11 and maybe there will be another market meltdown,  
12 that's clearly not enough under -- under Article  
13 III. And especially -- and if that's their  
14 theory, they picked the wrong defendant because  
15 there were, you know, \$86 billion in liquid  
16 assets.

17 JUSTICE KAVANAUGH: Under your theory,  
18 the PBGC doesn't matter, correct?

19 MR. PALMORE: I think the PBGC does --  
20 does matter. It's --

21 JUSTICE KAVANAUGH: You did not -- you  
22 did not articulate that when you articulated --

23 MR. PALMORE: Yeah. Well, we  
24 articulated that in our brief and the courts of  
25 appeals cases that are all on our side do

1 articulate that as well. That's the ultimate  
2 backstop. And that's funded through insurance  
3 premiums paid by the employer.

4 So it's not what my friend on the  
5 other side said, that the beneficiaries somehow  
6 had their own insurance that would cover the  
7 loss.

8 This is part of the employer's  
9 obligation to pay these premiums so that there  
10 is an ultimate backstop.

11 JUSTICE KAVANAUGH: Wouldn't --  
12 wouldn't that theory taken to its logical  
13 conclusion mean that a participant could never  
14 sue, a defined-benefit participant or  
15 beneficiary could never sue?

16 MR. PALMORE: No, Your Honor, because  
17 the PBGC guarantees benefits only up to a  
18 certain level.

19 JUSTICE KAVANAUGH: Anyone whose  
20 benefits are under that limit, they can never  
21 sue, is that your theory?

22 MR. PALMORE: That -- that -- it --  
23 that would be a theory, Your Honor. I don't  
24 think --

25 JUSTICE KAVANAUGH: Is it your theory?

1                   MR. PALMORE: Yeah, it is my theory.  
2           I don't think you need to adopt that theory here  
3           because US Bank by itself was fully sufficient.  
4           But to the extent, again, that there -- and to  
5           the extent that that's no employee or  
6           defined-benefit -- beneficiary whose benefits  
7           are at risk and there -- so therefore wouldn't  
8           have standing.

9                   First of all, that's not a reason to  
10          find that that's standing because there are  
11          other enforcers -- the Department of Labor,  
12          co-fiduciaries -- but that's actually a good  
13          thing, not a bad thing.

14                   It means that the employer stands  
15          ready to make good on the pension payments just  
16          as --

17                   JUSTICE SOTOMAYOR: I am having a very  
18          --

19                   JUSTICE GINSBURG: You went quickly  
20          over the Department of Labor, but we've heard  
21          from the Department of Labor, they can't do this  
22          job. It has to be someone who is able to sue.  
23          And it's not going to be the trustee because the  
24          trustee is the one who has alleged to engaged in  
25          imprudent or impermissible transactions.

1           So the only one possible is the plan  
2 participant. So the government itself is  
3 telling us Congress set this thing up knowing --  
4 depending on the participant's ability to sue,  
5 because the Department of Labor just doesn't  
6 have the resources to do the job.

7           MR. PALMORE: May I answer?

8           CHIEF JUSTICE ROBERTS: Yes.

9           MR. PALMORE: The Department of Labor  
10 has the legal authority to bring -- to bring an  
11 action. Co-fiduciaries have a --a legal -- have  
12 a legal authority to bring an action. Trustees  
13 can bring an action. You have to look no  
14 further than this Court's own cases. Harris  
15 Trust. It's called Harris Trust because the  
16 plaintiff there was the trustee that was suing  
17 to rescind a transaction.

18           And in this very case, there was an  
19 early claim about a securities lending program  
20 that fell out because U.S. Bank had taken action  
21 against an employee who had committed misconduct  
22 and had recovered that money for the plan.

23           So there are plenty of other tools  
24 available, other than fiduciary lawsuits brought  
25 by uninjured parties.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Three minutes, Mr. Stris.

4 REBUTTAL ARGUMENT OF PETER K. STRIS  
5 ON BEHALF OF THE PETITIONERS

6 MR. STRIS: Thank you. Three brief  
7 points. The first two have a lot to do, I  
8 think, with question begging.

9 So the first is we have a concrete  
10 property interest. If we lose that argument, we  
11 lose, but saying that we're uninjured doesn't do  
12 the work.

13 Justice Alito, you, I think, asked a  
14 question that's very important. You said, well,  
15 can Congress put a property label on anything?  
16 And I think that goes to the heart of this case  
17 because they can't and they didn't.

18 Here's what happens in an ERISA plan:  
19 Private parties make a bargain with real private  
20 interests and real money. A worker gives up  
21 wages in exchange for a promise to be paid in  
22 the future with money put in a trust as  
23 security. That's all fact. No one can dispute  
24 that.

25 The question is do we have a -- an

1 interest, my clients in the trust, and what is  
2 that interest? So let's sweep aside the  
3 question begging and get to the main issue.

4 Our point is it's always been the case  
5 since the 15th century that we have an interest.  
6 At first, my friend doesn't dispute this. Look  
7 at page 25 of their brief. He says in the 15th  
8 century, chancellors began to recognize the  
9 beneficiaries' interest as a form of ownership,  
10 protecting it much like the common law treated  
11 the legal interest in property.

12 This is why he spends much of his  
13 brief and he gets up here today and he says, Ah,  
14 the participants, the beneficiaries, they're not  
15 actually the beneficiaries. The plan is the  
16 beneficiary.

17 If he's right, we lose. But he's  
18 obviously wrong, because the beneficiaries are  
19 the beneficiaries. To your questions earlier,  
20 Justice Kagan, you don't need to look any  
21 further than the congressional statements of  
22 purpose. Everything in ERISA says that to  
23 protect the interest of these individuals, we're  
24 putting the money in the trust.

25 So that's the property interest.

1 There's nothing abstract about it. That's how  
2 it's been for a while and for good reason.  
3 Okay.

4 I'm going to take my points out of  
5 order. The second one is the practical  
6 concerns. What is the good reason? Because I  
7 think there's a reason why the United States  
8 Government across a number of -- of  
9 administrations have endorsed this position of  
10 standing. It's because -- Justice Breyer, you  
11 say imprudence cases. Well, maybe standing  
12 should be a gatekeeper, because can people sue  
13 in every case, like when there's been a loss --  
14 I get it. That's a concern. I don't think it  
15 should inform the standing inquiry. Think of  
16 the flip side.

17 The flip side is if their rule is  
18 correct, you will have to have, to figure out if  
19 there's an injury, a battle of experts in every  
20 case about the level of risk and potentially  
21 throughout the case about the level of risk.  
22 Entirely unworkable. Again, this shouldn't  
23 drive standing, but if it's the elephant in the  
24 room. And in situations of catastrophe like AIG  
25 and Enron, there's no solution. We ask that you

1 reverse.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel. The case is submitted.

4 (Whereupon, at 12:11 p.m., the case  
5 was submitted.)

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## Official - Subject to Final Review

<b>\$</b>	<b>871</b> [2] 36:12 60:8	23 53:16 60:19,20 61:2	<b>Assistant</b> [1] 1:19
<b>\$100</b> [3] 6:19 7:14 39:24	<b>9</b>	<b>alleged</b> [9] 8:6 39:8,9 44:1 61:13, 19,21 64:4 66:24	<b>association</b> [2] 55:5,7
<b>\$2,198.38</b> [1] 34:3	<b>90</b> [1] 16:22	<b>alleging</b> [1] 60:25	<b>associational</b> [1] 55:5
<b>\$42.26</b> [1] 34:6	<b>99.99</b> [1] 25:16	<b>Allen</b> [5] 13:23,24 47:25 49:10 59: 24	<b>assume</b> [1] 21:7
<b>\$600</b> [2] 6:24 17:15	<b>A</b>	<b>allow</b> [1] 22:20	<b>attention</b> [1] 13:23
<b>\$748</b> [1] 33:5	<b>a(3)</b> [1] 55:17	<b>allowed</b> [3] 4:23 24:19,24	<b>authority</b> [3] 32:20 67:10,12
<b>\$750</b> [4] 3:14,19 6:11 16:24	<b>a.m</b> [2] 1:14 3:2	<b>allowing</b> [1] 26:10	<b>available</b> [3] 34:18 51:17 67:24
<b>\$753</b> [1] 41:11	<b>ability</b> [3] 44:15 51:19 67:4	<b>alluding</b> [1] 55:17	<b>away</b> [1] 27:6
<b>\$8</b> [1] 7:2	<b>able</b> [10] 21:10,23 29:2 39:15 48: 11 55:2 58:16 62:25 64:6 66:22	<b>although</b> [2] 40:1 54:5	<b>B</b>
<b>\$800</b> [1] 17:16	<b>above</b> [1] 18:18	<b>amicus</b> [3] 1:21 2:7 21:16	<b>back</b> [7] 10:8 27:7 28:23 29:25 55: 24 58:9 60:14
<b>\$86</b> [2] 52:3 64:15	<b>above-entitled</b> [1] 1:12	<b>amount</b> [2] 27:25 41:17	<b>backed</b> [1] 18:13
<b>1</b>	<b>Absolutely</b> [3] 13:6 22:17 52:15	<b>ample</b> [1] 51:24	<b>backstop</b> [2] 65:2,10
<b>100</b> [3] 20:11 39:25,25	<b>abstract</b> [5] 7:8 8:6 30:25 57:11 70:1	<b>analogous</b> [1] 20:3	<b>bad</b> [6] 5:23 8:12,14 31:6,6 66:13
<b>11:09</b> [2] 1:14 3:2	<b>abstractly</b> [1] 6:23	<b>analogue</b> [1] 10:20	<b>ball</b> [1] 45:10
<b>12(b)</b> [1] 62:10	<b>account</b> [6] 23:20,22,23 32:23 38: 6,14	<b>analogy</b> [6] 12:20 16:2 27:22 28: 25 55:8 58:2	<b>BANK</b> [10] 1:6 3:5 20:19 34:5 35:9, 10 48:8 52:3 66:3 67:20
<b>12(b)(1)</b> [2] 62:14 64:5	<b>accurate</b> [1] 12:4	<b>analysis</b> [1] 21:8	<b>bank's</b> [1] 15:6
<b>12(b)(6)</b> [1] 62:11	<b>acknowledging</b> [1] 45:25	<b>analyzing</b> [1] 52:9	<b>bank-affiliated</b> [1] 20:18
<b>12:11</b> [1] 71:4	<b>acquire</b> [1] 26:11	<b>Angeles</b> [1] 1:17	<b>banks</b> [1] 48:9
<b>13</b> [1] 1:10	<b>Acre</b> [4] 10:22,23,25 11:1	<b>annual</b> [1] 51:22	<b>bare</b> [1] 55:18
<b>14</b> [1] 32:21	<b>across</b> [1] 70:8	<b>Another</b> [3] 12:2 42:25 64:11	<b>bargain</b> [1] 68:19
<b>15</b> [1] 29:15	<b>action</b> [11] 29:24 43:6 44:16,19 55: 15,18 56:3 67:11,12,13,20	<b>answer</b> [18] 6:1 13:16 16:18 18:7, 19 19:22 20:23 24:1 25:15,25 26: 21,22 28:20 30:22,25 31:14 48:17 67:7	<b>based</b> [5] 15:25 16:2 17:11 21:10 62:6
<b>15th</b> [8] 8:18 10:8 11:20 15:18 16: 11 20:4 69:5,7	<b>actions</b> [1] 20:6	<b>answering</b> [2] 17:2 19:8	<b>basis</b> [1] 63:8
<b>167</b> [1] 16:22	<b>actual</b> [3] 32:18 57:16 60:12	<b>answers</b> [1] 26:2	<b>battle</b> [1] 70:19
<b>17-1712</b> [1] 3:4	<b>actually</b> [10] 36:2 44:21 49:8 62:9, 14,20 63:2,23 66:12 69:15	<b>anyway</b> [1] 24:17	<b>bears</b> [1] 35:9
<b>1808</b> [1] 13:22	<b>add</b> [1] 24:5	<b>apart</b> [1] 46:17	<b>become</b> [1] 27:1
<b>2</b>	<b>addition</b> [1] 28:13	<b>appeal</b> [1] 21:10	<b>becomes</b> [1] 51:2
<b>2008</b> [2] 6:19 63:18	<b>additional</b> [2] 28:11,14	<b>appealed</b> [1] 21:4	<b>begain</b> [1] 69:8
<b>2020</b> [1] 1:10	<b>address</b> [1] 44:14	<b>Appeals</b> [2] 21:5 64:25	<b>begging</b> [2] 68:8 69:3
<b>21</b> [1] 2:8	<b>adequate</b> [3] 32:14 51:9 61:10	<b>APPEARANCES</b> [1] 1:16	<b>begin</b> [1] 4:25
<b>214</b> [2] 36:13 60:9	<b>adequately</b> [1] 39:8	<b>Appendix</b> [2] 14:25 16:22	<b>behalf</b> [12] 1:18,24 2:4,11,14 3:8 4: 24 33:11,20 35:14 42:25 68:5
<b>25</b> [1] 69:7	<b>adjudicate</b> [1] 34:19	<b>application</b> [2] 37:24 52:17	<b>believe</b> [2] 15:13 16:23
<b>3</b>	<b>administrations</b> [1] 70:9	<b>applied</b> [1] 31:24	<b>belly</b> [1] 51:5
<b>3</b> [1] 2:4	<b>administrators</b> [1] 31:21	<b>apply</b> [1] 32:10	<b>belonging</b> [1] 55:7
<b>303</b> [1] 32:3	<b>admirable</b> [1] 9:18	<b>approach</b> [1] 50:6	<b>belongs</b> [1] 41:3
<b>311</b> [1] 41:12	<b>admit</b> [1] 44:22	<b>aren't</b> [3] 13:8 31:16,19	<b>beneficial</b> [2] 10:24 26:13
<b>33</b> [2] 2:11 13:24	<b>adopt</b> [1] 66:2	<b>argue</b> [1] 3:23	<b>beneficiaries</b> [36] 3:11 4:15,23 5: 8 13:20 22:2,4,7,12,15,16 26:18 28:1,15,18 31:11 34:24 35:2 36: 17 40:2 45:13,14 46:19 56:2,5,7, 17,19,23 57:12 58:3 65:5 69:14, 15,18,19
<b>4</b>	<b>advocated</b> [1] 50:6	<b>argument</b> [14] 1:13 2:2,5,9,12 3:4, 7 5:12 21:15 33:19 45:25 46:17 68:4,10	<b>beneficiaries'</b> [2] 7:22 69:9
<b>404</b> [1] 32:4	<b>affect</b> [1] 8:7	<b>arguments</b> [4] 15:23,25 16:2 34: 22	<b>beneficiary</b> [30] 8:20 12:5,13 14: 18 16:7,14 21:22 22:19,21 23:6 24:19,20 33:15 36:9,16 44:8 48:3 54:6,6 57:3 58:1,13,16,20 59:9,17, 21 65:15 66:6 69:16
<b>406</b> [1] 32:4	<b>affected</b> [2] 35:1 60:13	<b>arise</b> [1] 24:8	<b>benefit</b> [8] 10:18 15:7 19:16 24:13 29:7 43:7 47:17 57:13
<b>5</b>	<b>affirms</b> [1] 34:8	<b>around</b> [2] 25:2 54:22	<b>benefited</b> [1] 26:14
<b>50</b> [6] 25:3 45:15,20,24 58:4,4	<b>afforded</b> [1] 31:20	<b>Article</b> [22] 9:4,9 11:4 17:4 19:20 24:15,25 25:2 28:11 32:16,24 33: 23 34:21 37:1 43:11 48:18 50:13, 14 52:7,10 61:25 64:12	<b>benefiting</b> [1] 8:22
<b>502(a)(2)</b> [3] 23:21 55:17 56:12	<b>Agency</b> [1] 11:14	<b>articulate</b> [2] 64:22 65:1	<b>benefits</b> [23] 7:1 9:19,22 16:16 18: 19,22 25:16 26:5 35:7,11 36:6 37: 3 45:8 49:4,6,6 51:1 53:1 63:6 64: 9 65:17,20 66:6
<b>5500</b> [1] 51:24	<b>ago</b> [1] 20:19	<b>articulated</b> [3] 45:3 64:22,24	<b>best</b> [5] 17:9 22:7 41:18,19 48:9
<b>6</b>	<b>agree</b> [9] 20:15 44:19 47:22 50:17 53:9,10,22 54:20 57:22	<b>aside</b> [4] 16:5 37:8 60:24 69:2	<b>better</b> [2] 29:25 31:11
<b>60</b> [1] 14:24	<b>Ah</b> [1] 69:13	<b>assailing</b> [1] 20:7	<b>between</b> [8] 3:22 14:16 16:3 28:6 29:3 38:13 57:19 64:1
<b>600</b> [1] 9:6	<b>ahead</b> [3] 14:20 17:21 29:12	<b>assess</b> [1] 58:18	
<b>61</b> [1] 14:24	<b>AIG</b> [4] 6:19 19:13 64:10 70:24	<b>assessment</b> [2] 15:21 18:1	
<b>66</b> [1] 39:6	<b>Aircraft</b> [3] 35:6,19 42:7	<b>asset</b> [3] 47:21 56:14 57:6	
<b>68</b> [1] 2:14	<b>AL</b> [2] 1:3,6	<b>assets</b> [27] 3:17 4:4,7,8 5:6,10 6:7, 9 7:6,14 8:19,21,23 10:17 15:3,6, 7,12 19:17 22:17 23:16 35:8 40: 25 51:9 52:4 58:15 64:16	
<b>7</b>	<b>ALITO</b> [10] 15:22 17:1,3,9 27:21 28:5 48:16 49:1 61:23 68:13		
<b>700</b> [2] 7:4 9:8	<b>Alito's</b> [2] 18:8 24:12		
<b>704</b> [1] 13:24	<b>allegation</b> [2] 61:16 62:24		
<b>750-odd</b> [1] 41:7	<b>allegations</b> [1] 33:4		
<b>753</b> [1] 41:13	<b>allege</b> [3] 3:12 5:15 50:24 51:3 52: 23 53:16 60:19,20 61:2		
<b>8</b>			
<b>8</b> [1] 28:17			
<b>800</b> [3] 7:3 9:8 17:16			

## Official - Subject to Final Review

<p><b>big</b> [2] 28:5 38:20  <b>biggest</b> [1] 39:9  <b>Bill</b> [2] 7:9 29:1  <b>billion</b> [6] 6:19 17:16,16 41:8 52:3 64:15  <b>Bird</b> [1] 55:14  <b>Black</b> [3] 10:23,24 37:1  <b>body</b> [3] 13:13 14:10,15  <b>Bogart</b> [1] 60:8  <b>Bogert</b> [1] 36:12  <b>bond</b> [2] 48:6,8  <b>bonds</b> [1] 15:4  <b>both</b> [3] 14:21 53:16 55:12  <b>bothering</b> [1] 52:22  <b>bottom</b> [1] 50:2  <b>breach</b> [1] 4:17 7:8 12:6,22,23 21:23 22:15,20 26:5 40:21 56:13  <b>breaches</b> [4] 21:20 22:8 27:19 34:25  <b>BREYER</b> [36] 11:19,23 12:25 13:4, 8 14:7,13,20 29:10,14 30:7,18,21 31:4,25 32:6,9,12 48:1 52:5 53:19, 21 54:13,15,17 55:11 58:8,17,25 59:3,6,13,16,19,25 70:10  <b>brief</b> [7] 4:2 17:10 20:25 64:24 68:6 69:7,13  <b>Briefly</b> [1] 20:24  <b>briefs</b> [1] 33:2  <b>bring</b> [6] 40:5,10 67:10,10,12,13  <b>brokerage</b> [1] 26:15  <b>brought</b> [2] 54:5 67:24  <b>burns</b> [1] 7:12  <b>business</b> [2] 30:13 54:19  <b>Businesses</b> [1] 6:18</p>	<p><b>century</b> [8] 8:18 10:8 11:20 15:18 16:11 20:4 69:5,8  <b>certain</b> [7] 14:9,10,10 25:16 30:5 48:7 65:18  <b>certainly</b> [1] 26:3  <b>challenge</b> [3] 20:11 34:25 52:13  <b>chance</b> [4] 16:14 24:14 26:1 45:15  <b>chancellors</b> [1] 69:8  <b>Chancery</b> [2] 13:23,25  <b>chances</b> [1] 25:20  <b>change</b> [2] 27:18 59:11  <b>changes</b> [1] 17:13  <b>check</b> [1] 48:14  <b>CHIEF</b> [26] 3:3,9 5:11 6:12,21 7:18 8:4,11 9:3 15:14 17:18,20 20:24 21:12,18 32:13 33:7,16,21 39:13, 17 52:6 53:22 67:8 68:1 71:2  <b>chief's</b> [1] 9:16  <b>Circuit</b> [3] 17:14 38:11 39:6  <b>Circuit's</b> [3] 39:2 53:7,11  <b>cite</b> [2] 48:1 58:12  <b>cited</b> [3] 26:8 33:2 36:11  <b>cites</b> [1] 54:10  <b>claim</b> [5] 21:1,8 42:21 62:2 67:19  <b>claimed</b> [1] 40:17  <b>claims</b> [5] 33:25 34:9,19 40:20 56:13  <b>Clapper</b> [5] 37:24 51:18 52:17,18, 19  <b>clarify</b> [1] 20:6  <b>clarity</b> [1] 50:4  <b>class</b> [2] 24:8 29:24  <b>clean</b> [3] 9:24 23:7 44:10  <b>clear</b> [10] 8:16 11:8 15:10 18:3 19:2 26:4 41:2 56:15,22 60:12  <b>clearly</b> [3] 21:11 45:10 64:12  <b>client</b> [1] 9:25  <b>client's</b> [1] 7:21  <b>clients</b> [12] 3:11,17,20 4:10,13,19 5:9 6:13,25 18:22 19:4 69:1  <b>close</b> [1] 25:14  <b>Club</b> [1] 54:19  <b>co-fiduciaries</b> [2] 66:12 67:11  <b>coaster</b> [2] 31:10,13  <b>code</b> [2] 15:9,10  <b>collapse</b> [1] 19:13  <b>collateral</b> [1] 49:24  <b>colonies</b> [1] 25:9  <b>combination</b> [2] 18:5 27:14  <b>come</b> [5] 9:11 29:4,5,8 52:12  <b>comes</b> [4] 14:21 16:8 23:13 25:4  <b>comfortable</b> [1] 6:25  <b>commend</b> [1] 53:8  <b>comment</b> [2] 36:14 60:9  <b>committed</b> [1] 67:21  <b>common</b> [5] 5:22 45:14,16 47:23 57:17 69:10  <b>companies</b> [4] 39:10,19 51:25 63:17  <b>company</b> [4] 39:24 51:4,8 61:8  <b>complaint</b> [3] 16:21 52:24 61:17  <b>completely</b> [3] 7:22 36:10 44:10  <b>compliance</b> [1] 17:4  <b>comply</b> [1] 61:10</p>	<p><b>conceivable</b> [1] 4:16  <b>concern</b> [1] 70:14  <b>concerns</b> [1] 70:6  <b>conclusion</b> [1] 65:13  <b>conclusively</b> [1] 60:6  <b>concrete</b> [10] 3:21 4:13 6:2 7:16 44:17 52:11 55:20 58:13 60:13 68:9  <b>confer</b> [3] 17:24 19:17 55:16  <b>conferral</b> [1] 55:14  <b>conferred</b> [1] 15:19  <b>conflict</b> [1] 5:14  <b>confronted</b> [1] 49:19  <b>Congress</b> [15] 16:1 17:22 18:2 19:15 32:4 44:6 46:18 48:19 54:24 55:4,22 56:3 63:4 67:3 68:15  <b>Congress's</b> [2] 28:16 44:15  <b>congressional</b> [1] 69:21  <b>Connecticut</b> [1] 47:25  <b>consistent</b> [2] 36:2,25  <b>Constitution</b> [2] 25:6 32:24  <b>constitutional</b> [1] 11:17  <b>context</b> [4] 16:19 24:8 30:6 31:2  <b>contingency</b> [1] 14:5  <b>contingent</b> [11] 8:25 13:21 14:8,9, 14 22:12 36:3,16 45:13 58:1,3  <b>continue</b> [3] 40:4,7 54:14  <b>contract</b> [2] 15:4 29:5  <b>contributed</b> [1] 41:12  <b>contribution</b> [8] 9:20,21 10:16 11:2 17:15 22:25 23:4,8  <b>contributions</b> [1] 64:8  <b>controversies</b> [2] 25:5,8  <b>controversy</b> [4] 3:16 4:18 11:17 32:19  <b>core</b> [5] 7:17 15:17 17:8 18:19,20  <b>corn</b> [1] 30:16  <b>corporation</b> [2] 43:7,8  <b>corpus</b> [22] 3:25 9:7 13:14,18 15:20 17:25 35:8 36:1,6 45:9,16,18 46:7,9,12 48:5 49:5,8 58:5,7,11, 15  <b>correct</b> [4] 46:2 59:5 64:18 70:18  <b>cost</b> [1] 40:22  <b>couldn't</b> [5] 6:17 12:12 42:12 47:24 60:3  <b>counsel</b> [6] 9:16 21:13 33:17 44:5 68:2 71:3  <b>country</b> [2] 39:10 48:10  <b>course</b> [5] 23:18 30:21 33:10 44:13 49:18  <b>COURT</b> [36] 1:1,13 3:10 11:14 20:11 21:4,4,19 22:4 23:18 24:10 26:2,9,17,17 28:16 33:22,24 34:8,12 35:6 37:18,23,25 42:7,11 43:10 45:4 47:19 48:1 52:20 53:8 56:15, 25 57:5 62:14  <b>Court's</b> [5] 21:3,10 23:17 56:11 67:14  <b>courts</b> [6] 4:23 13:22,25 25:8 34:18 64:24  <b>cover</b> [1] 65:6  <b>create</b> [1] 54:24  <b>created</b> [2] 55:4 57:15</p>	<p><b>creating</b> [3] 44:18,21 56:2  <b>credit</b> [1] 18:15  <b>critical</b> [7] 5:5 20:21 43:14 46:14 47:23 60:3 64:3  <b>curiae</b> [3] 1:21 2:8 21:16</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D.C.</b> [3] 1:9,20,23  <b>dah-dah-dah</b> [2] 30:11 31:8  <b>damaging</b> [1] 8:24  <b>decide</b> [1] 32:18  <b>decides</b> [1] 22:22  <b>decision</b> [8] 19:25 21:3,11 23:17 26:9,16 53:7 56:11  <b>deed</b> [2] 10:22,23  <b>default</b> [1] 16:24  <b>defeat</b> [1] 63:23  <b>defendant</b> [1] 64:14  <b>deference</b> [1] 31:20  <b>deficit</b> [3] 39:1,12 53:15  <b>defined</b> [9] 9:19,20,21,22 10:16,18 11:1 22:25 23:8  <b>defined-benefit</b> [12] 4:3 5:1 8:8 15:1 16:8 17:12 35:5 36:20,24 50:23 65:14 66:6  <b>defined-benefits</b> [1] 42:22  <b>definition</b> [1] 11:16  <b>delta</b> [1] 38:13  <b>demand</b> [1] 34:15  <b>demonstrate</b> [2] 33:25 51:20  <b>denied</b> [2] 62:11,12  <b>Department</b> [7] 1:20 51:23 66:11, 20,21 67:5,9  <b>depend</b> [2] 5:12 14:4  <b>depending</b> [1] 67:4  <b>depends</b> [2] 6:8 46:16  <b>derivative</b> [1] 43:6  <b>describe</b> [1] 36:21  <b>describing</b> [1] 11:11  <b>destroyed</b> [1] 8:2  <b>destroys</b> [1] 7:11  <b>determination</b> [1] 62:6  <b>determined</b> [1] 64:5  <b>developed</b> [1] 52:12  <b>difference</b> [6] 14:16,19,21 28:6,10 29:2  <b>different</b> [8] 11:25 17:5 28:9 29:6 36:15 45:10 49:13,15  <b>diminution</b> [1] 6:8  <b>direct</b> [1] 5:16  <b>directly</b> [1] 57:3  <b>dirty</b> [2] 9:25 23:10  <b>disagree</b> [4] 6:17 44:7 50:9 54:11  <b>disclosed</b> [1] 61:6  <b>discretion</b> [3] 22:19 23:2 24:23  <b>discretionary</b> [4] 8:25 22:14 24:13,20  <b>discuss</b> [1] 26:19  <b>discussed</b> [1] 40:3  <b>disloyalty</b> [1] 3:13  <b>dismiss</b> [2] 62:4,10  <b>dismissal</b> [2] 34:8 63:8  <b>dismissed</b> [2] 21:2 62:10  <b>dispute</b> [2] 68:23 69:6</p>
---	---	--	---

## Official - Subject to Final Review

<p><b>disputed</b> <sup>[1]</sup> 61:14  <b>disputes</b> <sup>[1]</sup> 33:4  <b>disputing</b> <sup>[1]</sup> 61:16  <b>distinction</b> <sup>[1]</sup> 28:9  <b>distressed</b> <sup>[2]</sup> 51:8 61:8  <b>distribution</b> <sup>[2]</sup> 42:11,17  <b>district</b> <sup>[2]</sup> 20:10 62:14  <b>doctrine</b> <sup>[1]</sup> 25:2  <b>document</b> <sup>[2]</sup> 14:22,23  <b>doing</b> <sup>[1]</sup> 21:7  <b>dollar</b> <sup>[2]</sup> 46:12,13  <b>dollars</b> <sup>[2]</sup> 17:16 41:8  <b>done</b> <sup>[3]</sup> 8:7 9:18 49:19  <b>down</b> <sup>[6]</sup> 7:12 29:17,17,24 43:8 61:22  <b>downs</b> <sup>[1]</sup> 36:1  <b>drafters</b> <sup>[1]</sup> 28:12  <b>draw</b> <sup>[2]</sup> 12:21 50:5  <b>drawn</b> <sup>[1]</sup> 63:4  <b>drive</b> <sup>[1]</sup> 70:23  <b>Drury</b> <sup>[1]</sup> 26:8  <b>duties</b> <sup>[12]</sup> 12:1,1,22,22 21:21 27:19 31:2 47:7,20 56:16 57:2,24  <b>duty</b> <sup>[12]</sup> 12:1,2,10 26:5 31:5 43:21 54:3,7 56:22 57:6 59:14,14</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>each</b> <sup>[1]</sup> 45:15  <b>earlier</b> <sup>[3]</sup> 22:11 45:12 69:19  <b>early</b> <sup>[1]</sup> 67:19  <b>effect</b> <sup>[1]</sup> 61:17  <b>Eighth</b> <sup>[1]</sup> 17:14  <b>either</b> <sup>[3]</sup> 38:24 58:3 60:5  <b>elephant</b> <sup>[1]</sup> 70:23  <b>else's</b> <sup>[1]</sup> 23:8  <b>employee</b> <sup>[2]</sup> 66:5 67:21  <b>employer</b> <sup>[12]</sup> 18:3,6 27:14 38:24 53:14,17 60:20 61:1 62:24 64:6 65:3 66:14  <b>employer's</b> <sup>[1]</sup> 65:8  <b>encumbers</b> <sup>[1]</sup> 7:11  <b>endorsed</b> <sup>[1]</sup> 70:9  <b>enforcers</b> <sup>[1]</sup> 66:11  <b>engaged</b> <sup>[4]</sup> 4:12 43:20 62:14 66:24  <b>English</b> <sup>[3]</sup> 13:22,24,25  <b>enjoinment</b> <sup>[1]</sup> 14:3  <b>enough</b> <sup>[19]</sup> 5:24 9:6 28:18 38:5,9 39:20 45:7 49:25 51:5 53:2,3,13 55:3,3,15,18 63:6 64:8,12  <b>Enron</b> <sup>[1]</sup> 70:25  <b>ensure</b> <sup>[1]</sup> 28:1  <b>entire</b> <sup>[1]</sup> 23:21  <b>entirely</b> <sup>[2]</sup> 36:2 70:22  <b>entirety</b> <sup>[2]</sup> 13:18 17:24  <b>entitled</b> <sup>[3]</sup> 26:20 29:4 47:8  <b>entitlement</b> <sup>[1]</sup> 22:17  <b>entity</b> <sup>[3]</sup> 28:14 57:16,18  <b>envision</b> <sup>[2]</sup> 61:15,16  <b>equitable</b> <sup>[2]</sup> 3:17,24 4:6,8 5:9 6:7 8:17,19 35:21,23 45:17 46:1,5,10,11,20,24 47:6,11 48:20 56:8  <b>equitably</b> <sup>[1]</sup> 55:25  <b>equities</b> <sup>[1]</sup> 21:1</p>	<p><b>equity</b> <sup>[2]</sup> 4:23 20:12  <b>ERISA</b> <sup>[20]</sup> 5:2 14:22 15:8,10 16:3,3,9 28:12 33:23,25 35:19 46:18 47:15 53:13 56:21 57:15,21 61:11 68:18 69:22  <b>ERISA's</b> <sup>[1]</sup> 21:25  <b>especially</b> <sup>[2]</sup> 24:7 64:13  <b>ESQ</b> <sup>[4]</sup> 2:3,6,10,13  <b>essentially</b> <sup>[1]</sup> 56:3  <b>establish</b> <sup>[1]</sup> 58:10  <b>established</b> <sup>[3]</sup> 40:17 43:16 60:5  <b>estate</b> <sup>[1]</sup> 14:6  <b>ET</b> <sup>[2]</sup> 1:3,6  <b>even</b> <sup>[23]</sup> 4:15 5:18 7:12 9:12,17 10:7 16:9 22:11,13,14 23:3,7 26:4 31:10,11 47:21 52:2 55:6 56:18 57:8,22,23 63:17  <b>event</b> <sup>[1]</sup> 4:19  <b>eventually</b> <sup>[1]</sup> 13:14  <b>everybody</b> <sup>[4]</sup> 6:24 23:2 24:3,17  <b>everybody's</b> <sup>[1]</sup> 29:20  <b>everyone's</b> <sup>[1]</sup> 7:1  <b>everything</b> <sup>[5]</sup> 13:11 24:4,17 46:16 69:22  <b>exactly</b> <sup>[8]</sup> 32:1 34:10,16 46:18 49:25 56:12 62:8 63:1  <b>example</b> <sup>[3]</sup> 17:9 28:24 58:13  <b>exceed</b> <sup>[1]</sup> 18:21  <b>except</b> <sup>[4]</sup> 14:15 15:8 22:18 30:12  <b>exception</b> <sup>[1]</sup> 33:23  <b>exceptions</b> <sup>[1]</sup> 54:18  <b>exchange</b> <sup>[4]</sup> 5:2,3 19:16 68:21  <b>exclusive</b> <sup>[1]</sup> 32:8  <b>exercise</b> <sup>[2]</sup> 24:22 49:23  <b>exercised</b> <sup>[1]</sup> 17:23  <b>exist</b> <sup>[1]</sup> 4:7  <b>existed</b> <sup>[1]</sup> 11:15  <b>experience</b> <sup>[1]</sup> 17:11  <b>experts</b> <sup>[1]</sup> 70:19  <b>explain</b> <sup>[1]</sup> 17:11  <b>explained</b> <sup>[4]</sup> 35:6 43:10 44:14 47:19  <b>expressly</b> <sup>[1]</sup> 21:25  <b>extend</b> <sup>[1]</sup> 23:25  <b>extent</b> <sup>[3]</sup> 26:1 66:4,5  <b>extra</b> <sup>[1]</sup> 23:3</p> <hr/> <p style="text-align: center;"><b>F</b></p> <p><b>fact</b> <sup>[14]</sup> 5:20,24 27:10,16,18 32:20 35:15,24 41:12 62:15,15 63:13,16 68:23  <b>fact-bound</b> <sup>[1]</sup> 52:17  <b>facts</b> <sup>[2]</sup> 26:16 51:18  <b>factual</b> <sup>[3]</sup> 37:24 61:22 62:23  <b>factually</b> <sup>[1]</sup> 64:4  <b>fail</b> <sup>[3]</sup> 6:18,19 38:8  <b>failure</b> <sup>[1]</sup> 62:1  <b>fair</b> <sup>[3]</sup> 15:15 16:18 18:9  <b>fairly</b> <sup>[2]</sup> 54:4 57:10  <b>faith</b> <sup>[1]</sup> 18:14  <b>falls</b> <sup>[1]</sup> 46:17  <b>far</b> <sup>[5]</sup> 10:11 11:4 20:17 27:21 39:18  <b>favor</b> <sup>[2]</sup> 24:23 34:14</p>	<p><b>February</b> <sup>[1]</sup> 63:15  <b>federal</b> <sup>[2]</sup> 33:24 34:18  <b>feel</b> <sup>[1]</sup> 6:25  <b>fees</b> <sup>[1]</sup> 26:15  <b>fell</b> <sup>[1]</sup> 67:20  <b>few</b> <sup>[1]</sup> 12:24  <b>fiduciary</b> <sup>[19]</sup> 12:1 20:7 21:20 27:19 29:9 32:4 34:25 47:7,20 55:23 56:13,16,21,22 57:2,6,10,24 67:24  <b>Fifth</b> <sup>[5]</sup> 38:11 39:2,6 53:7,11  <b>figure</b> <sup>[4]</sup> 38:3 41:11 49:25 70:18  <b>file</b> <sup>[2]</sup> 51:22 62:3  <b>financial</b> <sup>[9]</sup> 4:17 5:16 8:8 19:13 22:6 56:8,19 58:14 61:6  <b>find</b> <sup>[1]</sup> 66:10  <b>finding</b> <sup>[1]</sup> 62:15  <b>finer</b> <sup>[1]</sup> 9:17  <b>finish</b> <sup>[4]</sup> 20:6 28:20 29:11 33:6  <b>finished</b> <sup>[1]</sup> 31:12  <b>First</b> <sup>[16]</sup> 3:16 11:9 20:10 21:1 34:24 37:16 39:24 42:2 43:12,19 50:8 55:13 66:9 68:7,9 69:6  <b>fit</b> <sup>[1]</sup> 11:16  <b>fixed</b> <sup>[1]</sup> 49:6  <b>flexible</b> <sup>[1]</sup> 38:5  <b>flip</b> <sup>[2]</sup> 70:16,17  <b>flow</b> <sup>[3]</sup> 6:3 43:8 57:24  <b>fluctuations</b> <sup>[1]</sup> 35:25  <b>focus</b> <sup>[1]</sup> 59:4  <b>follow</b> <sup>[2]</sup> 23:10,12  <b>followed</b> <sup>[1]</sup> 14:1  <b>following</b> <sup>[1]</sup> 42:10  <b>footnote</b> <sup>[2]</sup> 28:17 50:9  <b>forced</b> <sup>[1]</sup> 4:1  <b>forever</b> <sup>[1]</sup> 41:2  <b>forgo</b> <sup>[1]</sup> 5:3  <b>form</b> <sup>[3]</sup> 34:15 51:23 69:9  <b>formulation</b> <sup>[1]</sup> 53:11  <b>forth</b> <sup>[2]</sup> 31:3 52:11  <b>fortiori</b> <sup>[1]</sup> 59:8  <b>forward</b> <sup>[1]</sup> 39:21  <b>forward-looking</b> <sup>[1]</sup> 5:12  <b>found</b> <sup>[1]</sup> 62:15  <b>founding</b> <sup>[3]</sup> 4:22 11:16 25:11  <b>fraud</b> <sup>[1]</sup> 7:3  <b>friend</b> <sup>[5]</sup> 6:13 22:11 26:24 65:4 69:6  <b>friend's</b> <sup>[1]</sup> 28:24  <b>fulfill</b> <sup>[2]</sup> 38:25 39:11  <b>full</b> <sup>[3]</sup> 18:14 19:18,18  <b>fully</b> <sup>[3]</sup> 13:10 60:2 66:3  <b>function</b> <sup>[1]</sup> 18:17  <b>fund</b> <sup>[6]</sup> 6:24 7:2 15:5 18:18 39:15 56:9  <b>fundamental</b> <sup>[1]</sup> 34:22  <b>funded</b> <sup>[3]</sup> 13:10 39:6 65:2  <b>funding</b> <sup>[5]</sup> 17:12 32:3 61:11 63:5 64:7  <b>funds</b> <sup>[1]</sup> 20:18  <b>further</b> <sup>[10]</sup> 4:14 22:13 26:3 43:13,18 58:9,23 60:6 67:14 69:21  <b>future</b> <sup>[4]</sup> 5:4 13:17 63:6 68:22</p> <hr/> <p style="text-align: center;"><b>G</b></p> <p><b>game</b> <sup>[1]</sup> 45:10  <b>gatekeeper</b> <sup>[1]</sup> 70:12  <b>Gates</b> <sup>[3]</sup> 7:9,23 29:1  <b>General</b> <sup>[1]</sup> 1:19  <b>gets</b> <sup>[2]</sup> 41:21 69:13  <b>getting</b> <sup>[9]</sup> 22:3 24:13 37:7,9,9 45:15 48:13 58:5 62:19  <b>GINSBURG</b> <sup>[5]</sup> 20:5,10,16,21 66:19  <b>give</b> <sup>[5]</sup> 22:19 29:11 41:15,17 46:19  <b>gives</b> <sup>[4]</sup> 4:17 32:19 56:21 68:20  <b>giving</b> <sup>[1]</sup> 32:14  <b>Gollust</b> <sup>[1]</sup> 43:10  <b>GORSUCH</b> <sup>[12]</sup> 9:15 10:3,7,11,13 11:3 22:24 24:3,11 44:5,18,25  <b>got</b> <sup>[3]</sup> 20:19 31:14 53:16  <b>gotten</b> <sup>[1]</sup> 13:2  <b>Government</b> <sup>[4]</sup> 18:13,15 67:2 70:8  <b>grant</b> <sup>[1]</sup> 25:19  <b>granted</b> <sup>[1]</sup> 16:1  <b>great</b> <sup>[1]</sup> 12:7  <b>greater</b> <sup>[3]</sup> 13:10,12 17:6  <b>grounds</b> <sup>[1]</sup> 21:2  <b>guarantees</b> <sup>[2]</sup> 27:7 65:17  <b>guess</b> <sup>[5]</sup> 26:1 38:18 41:22 50:2,3  <b>guy</b> <sup>[3]</sup> 8:12,14 40:3  <b>GVR</b> <sup>[1]</sup> 39:4</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>hand</b> <sup>[2]</sup> 25:21 34:12  <b>happened</b> <sup>[4]</sup> 10:21 20:20 62:9 63:2  <b>happens</b> <sup>[6]</sup> 7:13 18:15 29:22 36:5,6 68:18  <b>hard</b> <sup>[3]</sup> 3:23 14:16 30:25  <b>Harley</b> <sup>[1]</sup> 17:13  <b>harm</b> <sup>[20]</sup> 5:16,25 23:21 40:1 43:15,17,23 44:1,3 49:7,18,21 50:1,25 52:18 53:1 54:18 58:10 60:5,10  <b>harmed</b> <sup>[1]</sup> 57:25  <b>harms</b> <sup>[2]</sup> 23:19 27:12  <b>Harris</b> <sup>[3]</sup> 56:20 67:14,15  <b>hasten</b> <sup>[1]</sup> 24:5  <b>health</b> <sup>[1]</sup> 63:17  <b>hear</b> <sup>[2]</sup> 3:3 16:5  <b>heard</b> <sup>[3]</sup> 25:8 45:2 66:20  <b>heart</b> <sup>[1]</sup> 68:16  <b>heartburn</b> <sup>[1]</sup> 19:23  <b>heavily</b> <sup>[1]</sup> 57:17  <b>held</b> <sup>[5]</sup> 10:22,22 15:5 21:6 23:18  <b>helped</b> <sup>[1]</sup> 12:8  <b>highly</b> <sup>[2]</sup> 26:25 28:22  <b>historical</b> <sup>[3]</sup> 11:9,13 50:6  <b>historically</b> <sup>[1]</sup> 24:18  <b>history</b> <sup>[13]</sup> 13:19 22:22 25:14,22,23,25 27:6 32:15,21 36:2 47:22 50:10 54:3  <b>hit</b> <sup>[2]</sup> 17:7 24:14  <b>holds</b> <sup>[3]</sup> 4:8 35:22 47:17  <b>Hollingsworth</b> <sup>[1]</sup> 43:2  <b>Honor</b> <sup>[15]</sup> 20:23 36:23 42:2 44:13</p>
---	---	--

## Official - Subject to Final Review

<p>47:14 48:21 50:8 55:10 56:10,24 57:14 62:9 63:20 65:16,23</p> <p><b>hook</b> [1] 53:15</p> <p><b>horizon</b> [1] 38:6</p> <p><b>Hughes</b> [5] 35:6,19 42:7,10,20</p> <p><b>human</b> [1] 33:10</p> <p><b>hundreds</b> [1] 21:24</p> <p><b>hurdle</b> [1] 38:20</p> <p><b>hurt</b> [3] 5:18,20 13:15</p> <p><b>hypothetical</b> [5] 7:19,23 8:5 9:6 22:25</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>identify</b> [1] 44:16</p> <p><b>Ill</b> [22] 9:4,9 11:4 17:4 19:20 24:15, 25 25:2 28:11 32:16,24 33:24 34: 21 37:1 43:11 48:18 50:13,14 52: 7,10 61:25 64:13</p> <p><b>imagine</b> [2] 24:21 36:18</p> <p><b>immediately</b> [1] 62:3</p> <p><b>imminent</b> [2] 37:25 52:18</p> <p><b>impaired</b> [2] 8:16 9:14</p> <p><b>impairment</b> [2] 11:12 40:8</p> <p><b>impermissible</b> [1] 66:25</p> <p><b>implicated</b> [1] 44:3</p> <p><b>implying</b> [1] 38:21</p> <p><b>important</b> [3] 19:6 45:1 68:14</p> <p><b>importantly</b> [2] 18:17 27:2</p> <p><b>improbable</b> [1] 14:5</p> <p><b>imprudence</b> [2] 3:13 70:11</p> <p><b>imprudent</b> [2] 41:9 66:25</p> <p><b>included</b> [1] 23:22</p> <p><b>includes</b> [1] 25:7</p> <p><b>including</b> [1] 15:12</p> <p><b>income</b> [3] 12:14,15 13:13</p> <p><b>inconsistent</b> [1] 43:21</p> <p><b>incorrect</b> [1] 62:12</p> <p><b>increase</b> [1] 27:25</p> <p><b>increased</b> [6] 16:24 49:17,20 50:1, 25 52:25</p> <p><b>incredible</b> [1] 4:2</p> <p><b>incredibly</b> [1] 17:13</p> <p><b>independently</b> [1] 4:10</p> <p><b>indicated</b> [1] 56:4</p> <p><b>individual</b> [3] 19:11 54:6 56:17</p> <p><b>individuals</b> [3] 57:20,24 69:23</p> <p><b>inform</b> [1] 70:15</p> <p><b>information</b> [6] 51:17,24 52:1,1 57:4 61:6</p> <p><b>inherit</b> [1] 36:5</p> <p><b>injunction</b> [1] 40:11</p> <p><b>injured</b> [1] 9:9</p> <p><b>injuries</b> [4] 6:2,4 12:16 44:17</p> <p><b>injury</b> [34] 3:21 4:14,21 5:1,13 6:6 9:5 13:1,2 19:20 30:16 33:8,14,25 35:15 39:8 43:1,17 51:16 52:8,14 53:25 54:5 55:20 58:18,19,20,24 59:1,7,8,12,17 70:19</p> <p><b>innovation</b> [2] 57:15,21</p> <p><b>inquire</b> [1] 19:21</p> <p><b>inquiry</b> [10] 4:15 5:23 26:3 43:13, 18 58:9,23 60:7 64:4 70:15</p> <p><b>instance</b> [1] 57:3</p> <p><b>instructive</b> [1] 39:3</p>	<p><b>insurance</b> [4] 27:10,17 65:2,6</p> <p><b>insure</b> [1] 64:9</p> <p><b>integrity</b> [4] 22:6 46:21 56:9,20</p> <p><b>interest</b> [78] 3:17,19,24 4:4,6 5:9, 14 6:7 7:10,15 8:1,15,17,19 10:24 12:5,18 13:9,12,17,21 14:3,8,9,9, 11,14,14,17 15:16,20 17:24 19:18 22:5 35:4,18,21,23 36:4,8,10 40:9 41:24,25 42:3,8 44:3,9 45:6,17 46: 1,4,5,11,20,24 47:7,11,12 48:2,6, 13,19,20,25 49:2 58:14 59:21,23 60:2 68:10 69:1,2,5,9,11,23,25</p> <p><b>interested</b> [2] 12:11 55:11</p> <p><b>interests</b> [6] 11:12 35:1 41:18,19 60:13 68:20</p> <p><b>interrupt</b> [2] 27:4 49:14</p> <p><b>invasion</b> [1] 55:19</p> <p><b>invest</b> [1] 9:25</p> <p><b>invested</b> [2] 12:7 40:21</p> <p><b>investment</b> [4] 12:7 20:12 31:6 41:9</p> <p><b>investments</b> [3] 15:5 23:7 31:7</p> <p><b>involved</b> [1] 58:10</p> <p><b>involves</b> [1] 54:25</p> <p><b>involving</b> [1] 56:13</p> <p><b>lqbal</b> [2] 50:14 62:1</p> <p><b>isn't</b> [12] 13:15 25:10 44:18 47:12 49:22 51:11 53:13 55:2,3 57:9 59: 3 64:2</p> <p><b>issue</b> [3] 49:19 52:10 69:3</p> <p><b>issues</b> [1] 18:11</p> <p><b>itself</b> [8] 4:17 33:9 35:22 47:18 57: 18 58:11 66:3 67:2</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>JAMES</b> [2] 1:3 34:2</p> <p><b>January</b> [2] 1:10 63:14</p> <p><b>jeopardized</b> [1] 49:8</p> <p><b>job</b> [3] 9:18 66:22 67:6</p> <p><b>Joint</b> [2] 14:24 16:21</p> <p><b>JOSEPH</b> [3] 1:23 2:10 33:19</p> <p><b>JOSHI</b> [27] 1:19 2:6 21:14,15,18 23:11 24:5,18 25:11,24 27:8,16 28:3,8 29:13 30:5,15,19,24 31:15, 18,22 32:1,8,10,25 33:8</p> <p><b>judgment</b> [4] 17:23 28:16 34:14 49:16</p> <p><b>jurisdiction</b> [2] 61:25 62:5</p> <p><b>Justice</b> [157] 1:20 3:3,10 5:11 6:12, 21 7:18 8:4,11 9:1,3,15 10:3,7,11, 13 11:3,19,23 12:25 13:4,8 14:7, 13,20 15:14,22 17:1,3,9,18,20 18: 2,7,12,21 19:1,3,5 20:5,10,16,21, 24 21:12,18 22:24 24:3,11,12 25: 10,12 27:3,13,21 28:5,21 29:10,14 30:7,18,21 31:4,16,19,23,25 32:6, 9,12,13 33:7,16,22 36:18 37:4,8, 12,19 38:2,12,17 39:13,17 40:13, 15,18 42:5,9,14,16 44:5,18,25 45: 23 46:5,8,15,25 47:3,9 48:1,16 49: 1,11,13 50:11,17,20 51:10,14 52:5, 6,21 53:4,9,19,21,22 54:13,15,17 55:11,21 56:18 57:9 58:8,17,25 59:3,6,13,16,19,25 60:14,18,24 61:</p>	<p>13,23 62:18,22 63:10,12 64:17,21 65:11,19,25 66:17,19 67:8 68:1, 13 69:20 70:10 71:2</p> <p><b>justiciable</b> [1] 3:15</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>KAGAN</b> [13] 45:23 46:5,8,15,25 47: 3,9 55:21 56:18 57:9 63:10,12 69: 20</p> <p><b>KAVANAUGH</b> [44] 9:1 18:2,12,21 19:1,3,6 25:10,12 27:3,13 28:21 31:16,19,23 36:18 37:4,8,12,19 38:2,12,17 49:11,13 50:11,17,20 51:10,14 52:21 53:4,9 60:14,18, 24 61:13 62:18,22 64:17,21 65:11, 19,25</p> <p><b>keep</b> [1] 60:4</p> <p><b>key</b> [1] 25:2</p> <p><b>kind</b> [3] 50:21 61:15 64:10</p> <p><b>kinds</b> [1] 57:2</p> <p><b>knowing</b> [1] 67:3</p> <p><b>knowledge</b> [1] 28:4</p> <hr/> <p style="text-align: center;"><b>L</b></p> <p><b>label</b> [3] 48:19,23 68:15</p> <p><b>labeled</b> [1] 45:6</p> <p><b>Labor</b> [6] 51:23 66:11,20,21 67:5,9</p> <p><b>lack</b> [2] 35:3 62:4</p> <p><b>laid</b> [2] 23:15 28:16</p> <p><b>LaRue</b> [2] 23:17,18</p> <p><b>latter</b> [1] 19:8</p> <p><b>Laughter</b> [1] 11:22</p> <p><b>law</b> [31] 5:22 10:8 15:18 16:3,11 21:24,25 23:15 24:19 25:4 27:22 28:7,17 29:16,23 30:12,23 31:3 33:3 34:24 36:3,9 40:23 41:2 45: 14,17 47:23 52:8 57:18 60:11 69: 10</p> <p><b>lawsuits</b> [1] 67:24</p> <p><b>layers</b> [1] 27:17</p> <p><b>lead</b> [1] 5:15</p> <p><b>least</b> [6] 11:12,24 13:22 28:11 54:2 55:21</p> <p><b>Lee</b> [2] 39:2 53:8</p> <p><b>left</b> [1] 23:1</p> <p><b>legal</b> [14] 35:20 38:25 39:11 44:21 47:16,17 48:13 57:16,18 64:6 67: 10,11,12 69:11</p> <p><b>Lehman</b> [1] 19:14</p> <p><b>lending</b> [1] 67:19</p> <p><b>less</b> [3] 16:25 24:14 34:11</p> <p><b>lesson</b> [2] 8:25 9:4</p> <p><b>Letter</b> [1] 37:1</p> <p><b>level</b> [6] 35:7 45:8 63:5 65:18 70: 20,21</p> <p><b>life</b> [1] 12:13</p> <p><b>light</b> [1] 9:17</p> <p><b>likelihood</b> [2] 24:12 38:14</p> <p><b>likely</b> [4] 5:19 8:21 24:22 28:22</p> <p><b>limit</b> [1] 65:20</p> <p><b>limitation</b> [1] 10:9</p> <p><b>limitations</b> [1] 21:2</p> <p><b>limits</b> [3] 11:4,8 44:15</p> <p><b>line</b> [7] 20:3 36:21 50:2,4,5 63:3,4</p>	<p><b>liquid</b> [2] 52:4 64:15</p> <p><b>list</b> [1] 55:1</p> <p><b>literally</b> [1] 51:19</p> <p><b>litigated</b> [1] 34:13</p> <p><b>little</b> [3] 31:13 49:11,14</p> <p><b>lives</b> [1] 34:11</p> <p><b>loan</b> [4] 7:9,9 8:1 28:25</p> <p><b>loans</b> [1] 26:10</p> <p><b>logic</b> [1] 24:1</p> <p><b>logical</b> [1] 65:12</p> <p><b>long</b> [4] 8:21 12:18 20:19 50:24</p> <p><b>long-term</b> [2] 38:6,14</p> <p><b>look</b> [15] 6:23 11:23 16:21 24:10 32:2 38:16 40:3 45:5 46:17 51:18 54:22 61:5 67:13 69:6,20</p> <p><b>looked</b> [1] 54:9</p> <p><b>looking</b> [1] 32:15</p> <p><b>Los</b> [1] 1:17</p> <p><b>lose</b> [9] 3:14 6:13,15 40:4,7 41:10 68:10,11 69:17</p> <p><b>loses</b> [1] 39:24</p> <p><b>loss</b> [11] 4:17 12:14,15 33:5,13 35: 10 41:15 46:11,12 65:7 70:13</p> <p><b>losses</b> [3] 10:25 21:21,22</p> <p><b>lost</b> [6] 3:20 6:11 7:7 41:7,10,11</p> <p><b>lot</b> [8] 10:21 25:1 29:23 40:4,7 51: 25 52:7 68:7</p> <p><b>low</b> [1] 26:23</p> <p><b>loyal</b> [1] 4:11</p> <p><b>loyalty</b> [10] 12:2,3,6,22 13:1 40:21 43:21 54:3,8 59:14</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>made</b> [5] 15:13 18:2 26:4 31:6 62: 13</p> <p><b>Magruder</b> [2] 26:8 33:1</p> <p><b>main</b> [1] 69:3</p> <p><b>maintain</b> [1] 23:20</p> <p><b>managed</b> [1] 29:9</p> <p><b>management</b> [3] 47:21 56:14 57: 7</p> <p><b>many</b> [10] 11:7 13:11,11 20:2 26:7 27:17 31:10,10 33:1 43:3</p> <p><b>March</b> [1] 63:15</p> <p><b>market</b> [2] 29:16 64:11</p> <p><b>market's</b> [1] 31:12</p> <p><b>matter</b> [14] 1:12 19:22 24:6 26:23 27:1 34:19,20 41:19 48:23 61:24 62:4,15 64:18,20</p> <p><b>matters</b> [2] 19:7 27:9</p> <p><b>mean</b> [19] 6:13,16 9:16 10:7 16:19 25:22 28:5 30:9 31:10 46:16 47: 10,11 48:22 49:1 54:20,23 57:9 61:18 65:13</p> <p><b>meaning</b> [3] 25:6 40:19 56:6</p> <p><b>meaningful</b> [1] 29:7</p> <p><b>means</b> [5] 16:10 27:10 31:5 58:25 66:14</p> <p><b>meant</b> [1] 7:19</p> <p><b>meet</b> [5] 60:21 61:1 62:25 63:5 64: 6</p> <p><b>meltdown</b> [1] 64:11</p> <p><b>members</b> [4] 54:20,21 55:1,5</p> <p><b>Mendell</b> [1] 43:10</p>
---	---	--	---

## Official - Subject to Final Review

<p><b>mentioned</b> <sup>[4]</sup> 18:4 22:11 24:7 26:24</p> <p><b>menu</b> <sup>[1]</sup> 9:23</p> <p><b>mere</b> <sup>[1]</sup> 27:10</p> <p><b>merely</b> <sup>[1]</sup> 28:21</p> <p><b>merits</b> <sup>[3]</sup> 31:21 32:7 42:21</p> <p><b>mess</b> <sup>[2]</sup> 51:11,16</p> <p><b>meteor</b> <sup>[2]</sup> 24:12,15</p> <p><b>meteorite</b> <sup>[1]</sup> 17:7</p> <p><b>might</b> <sup>[14]</sup> 5:20 23:9,11,12,13 24:14,21 26:23 27:10 28:23 30:8,17 45:18 58:4</p> <p><b>million</b> <sup>[17]</sup> 3:14,19 6:11,24 7:2,3,4,14 9:6,8,8 16:25 17:15 33:5 39:24 41:11,12</p> <p><b>millions</b> <sup>[1]</sup> 41:9</p> <p><b>mind</b> <sup>[1]</sup> 60:4</p> <p><b>minimal</b> <sup>[1]</sup> 54:23</p> <p><b>minimum</b> <sup>[4]</sup> 18:18 25:7 61:11 64:7</p> <p><b>minute</b> <sup>[1]</sup> 43:9</p> <p><b>minutes</b> <sup>[1]</sup> 68:3</p> <p><b>misconduct</b> <sup>[2]</sup> 7:5 67:21</p> <p><b>mismanagement</b> <sup>[1]</sup> 48:5</p> <p><b>Mm-hmm</b> <sup>[1]</sup> 33:7</p> <p><b>modestly</b> <sup>[1]</sup> 52:3</p> <p><b>modesty</b> <sup>[1]</sup> 11:8</p> <p><b>Monday</b> <sup>[1]</sup> 1:10</p> <p><b>money</b> <sup>[28]</sup> 7:9 13:9 14:11 21:22 27:25 28:23,25 29:2,3,8 39:20 40:4,7,22,24 41:8,10,10 43:5 45:22 53:24,25 61:10 64:8 67:22 68:20,22 69:24</p> <p><b>monitor</b> <sup>[1]</sup> 22:8</p> <p><b>month</b> <sup>[5]</sup> 34:2,4,10 39:25 48:14</p> <p><b>moreover</b> <sup>[1]</sup> 47:8</p> <p><b>morning</b> <sup>[1]</sup> 3:4</p> <p><b>Most</b> <sup>[2]</sup> 9:23 14:4</p> <p><b>motion</b> <sup>[2]</sup> 62:3,13</p> <p><b>move</b> <sup>[1]</sup> 42:23</p> <p><b>moved</b> <sup>[1]</sup> 62:10</p> <p><b>much</b> <sup>[5]</sup> 11:13 41:15 49:20 69:10,12</p> <p><b>multiple</b> <sup>[1]</sup> 6:2</p> <p><b>must</b> <sup>[1]</sup> 33:25</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N.A</b> <sup>[1]</sup> 1:6</p> <p><b>nature</b> <sup>[1]</sup> 52:13</p> <p><b>necessarily</b> <sup>[1]</sup> 32:23</p> <p><b>necessary</b> <sup>[5]</sup> 37:14 38:19 49:22 61:3 63:24</p> <p><b>need</b> <sup>[8]</sup> 6:24 15:15 19:12 32:22 40:19 43:25 66:2 69:20</p> <p><b>needed</b> <sup>[2]</sup> 40:22 53:5</p> <p><b>Neither</b> <sup>[1]</sup> 34:1</p> <p><b>never</b> <sup>[10]</sup> 8:20 9:12 21:4,5 40:16,17 45:21 65:13,15,20</p> <p><b>nevertheless</b> <sup>[5]</sup> 14:5 22:20 23:20 24:23 26:17</p> <p><b>new</b> <sup>[4]</sup> 44:22,22,23 49:24</p> <p><b>next</b> <sup>[2]</sup> 3:4 26:25</p> <p><b>nobody</b> <sup>[1]</sup> 33:4</p> <p><b>none</b> <sup>[2]</sup> 34:21 58:6</p>	<p><b>nonetheless</b> <sup>[1]</sup> 11:21</p> <p><b>normal</b> <sup>[2]</sup> 16:4 36:25</p> <p><b>notes</b> <sup>[2]</sup> 26:10,11</p> <p><b>nothing</b> <sup>[6]</sup> 6:14 10:15 30:22 31:13 55:6 70:1</p> <p><b>number</b> <sup>[1]</sup> 70:8</p> <p><b>numerous</b> <sup>[1]</sup> 53:23</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>obligation</b> <sup>[3]</sup> 27:24 38:25 65:9</p> <p><b>obligations</b> <sup>[8]</sup> 39:11 55:23 56:5 57:11 60:21 61:1 62:25 64:7</p> <p><b>obviously</b> <sup>[2]</sup> 50:17 69:18</p> <p><b>odd</b> <sup>[2]</sup> 25:19 57:10</p> <p><b>Okay</b> <sup>[11]</sup> 9:25 11:3 29:19 30:22 31:8,14 32:6 51:14 53:4 54:16 70:3</p> <p><b>old</b> <sup>[1]</sup> 50:21</p> <p><b>Once</b> <sup>[2]</sup> 29:19 54:21</p> <p><b>one</b> <sup>[28]</sup> 4:5 5:13 9:24 12:1 15:24 17:14 19:9 24:21 26:2,7,21 27:9 30:8 33:12,13 34:11,17 39:9 40:20 48:9 54:2 57:17 58:12,15 66:24 67:1 68:23 70:5</p> <p><b>ones</b> <sup>[2]</sup> 22:2,4</p> <p><b>only</b> <sup>[21]</sup> 3:24 4:9 15:7 18:3 21:9 23:14 26:18 32:19 34:25 38:23 39:5 40:8 42:25 43:18 48:2,6,13 58:10 59:23 65:17 67:1</p> <p><b>open</b> <sup>[1]</sup> 52:10</p> <p><b>opine</b> <sup>[1]</sup> 37:20</p> <p><b>opposite</b> <sup>[1]</sup> 56:12</p> <p><b>option</b> <sup>[1]</sup> 9:24</p> <p><b>options</b> <sup>[1]</sup> 9:23</p> <p><b>oral</b> <sup>[7]</sup> 1:12 2:2,5,9 3:7 21:15 33:19</p> <p><b>order</b> <sup>[3]</sup> 28:1 51:13 70:5</p> <p><b>organization</b> <sup>[1]</sup> 54:25</p> <p><b>other</b> <sup>[16]</sup> 5:13,15 6:13,22 25:21 26:22 30:19 34:12 50:7 54:17 55:24 57:2 65:5 66:11 67:23,24</p> <p><b>others</b> <sup>[2]</sup> 8:24 33:1</p> <p><b>otherwise</b> <sup>[1]</sup> 43:22</p> <p><b>out</b> <sup>[19]</sup> 13:13 17:14 19:7 20:13 22:3 23:15 26:7 28:16 33:3 38:3 39:20 49:25 50:22,22 52:1 63:18 67:20 70:4,18</p> <p><b>over</b> <sup>[4]</sup> 23:19 35:25 46:23 66:20</p> <p><b>overfunded</b> <sup>[9]</sup> 26:25 29:19,19 62:21 63:3,7,14,22 64:2</p> <p><b>overfunding</b> <sup>[2]</sup> 35:12 63:3</p> <p><b>own</b> <sup>[10]</sup> 9:11 18:11 22:18 23:4,20 28:13 35:15 43:1 65:6 67:14</p> <p><b>owned</b> <sup>[1]</sup> 47:16</p> <p><b>ownership</b> <sup>[2]</sup> 56:8 69:9</p> <p><b>owns</b> <sup>[4]</sup> 35:20,21 43:6 55:25</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> <sup>[1]</sup> 71:4</p> <p><b>PAGE</b> <sup>[3]</sup> 2:2 16:22 69:7</p> <p><b>pages</b> <sup>[1]</sup> 14:24</p> <p><b>paid</b> <sup>[11]</sup> 13:13 16:15 22:3 23:2 28:2 37:7,9,10 51:1 65:3 68:21</p> <p><b>PALMORE</b> <sup>[8]</sup> 1:23 2:10 33:18,19,21 36:23 37:6,11,15,20 38:4,15,22 39:15 40:6,14,16 42:2,6,13,15,20 44:12,24 45:4,23 46:3,7,10,22 47:1,5,14 48:21 49:3,12 50:8,12,19 51:6,12,15 52:15 53:3,6,12,20 54:11,14,16 55:10,13,22 56:10,24 57:14 58:22 59:2,5,10,15,18,20 60:1,17,23 61:4,18 62:8,20 63:1,10,11,20 64:19,23 65:16,22 66:1 67:7,9</p> <p><b>paragraph</b> <sup>[1]</sup> 16:22</p> <p><b>part</b> <sup>[5]</sup> 23:23 41:15 43:9,12 65:8</p> <p><b>participant</b> <sup>[8]</sup> 35:9,11 36:19,24 50:23 65:13,14 67:2</p> <p><b>participant's</b> <sup>[1]</sup> 67:4</p> <p><b>participants</b> <sup>[13]</sup> 3:23 4:3,9 5:8 15:8 41:4,20 46:20 56:2,6,7 57:12 69:14</p> <p><b>particular</b> <sup>[4]</sup> 6:4 26:5 31:1 36:21</p> <p><b>particularity</b> <sup>[1]</sup> 61:20</p> <p><b>particularized</b> <sup>[1]</sup> 52:11</p> <p><b>particulars</b> <sup>[2]</sup> 37:13 60:15</p> <p><b>parties</b> <sup>[2]</sup> 67:25 68:19</p> <p><b>party</b> <sup>[2]</sup> 42:25 43:1</p> <p><b>past</b> <sup>[1]</sup> 39:18</p> <p><b>pause</b> <sup>[1]</sup> 38:12</p> <p><b>pay</b> <sup>[2]</sup> 63:6 65:9</p> <p><b>payment</b> <sup>[6]</sup> 5:4 7:13 34:3,6 42:18 48:7</p> <p><b>payments</b> <sup>[10]</sup> 13:17 18:16 34:10,16 39:16 40:9 48:12 49:9,21 66:15</p> <p><b>pays</b> <sup>[1]</sup> 5:7</p> <p><b>PBGC</b> <sup>[10]</sup> 18:4,6,10,18 26:24 27:5,15 64:18,19 65:17</p> <p><b>pedigree</b> <sup>[1]</sup> 11:13</p> <p><b>penny</b> <sup>[2]</sup> 34:11,17</p> <p><b>pension</b> <sup>[12]</sup> 3:12,18 5:7 6:18 17:10 34:3 35:5 38:7 39:5 40:10 51:22 66:15</p> <p><b>pensions</b> <sup>[1]</sup> 54:25</p> <p><b>people</b> <sup>[3]</sup> 12:4 39:19 70:12</p> <p><b>pepper</b> <sup>[1]</sup> 30:16</p> <p><b>percent</b> <sup>[8]</sup> 20:11 25:16 39:6 45:15,20,20 58:4,6</p> <p><b>perfectly</b> <sup>[1]</sup> 24:9</p> <p><b>performance</b> <sup>[1]</sup> 35:10</p> <p><b>perhaps</b> <sup>[1]</sup> 47:5</p> <p><b>permitted</b> <sup>[1]</sup> 15:8</p> <p><b>Perry</b> <sup>[1]</sup> 43:2</p> <p><b>person</b> <sup>[7]</sup> 5:21 8:12,14 10:24 16:16 33:13 39:23</p> <p><b>personally</b> <sup>[1]</sup> 43:5</p> <p><b>perspective</b> <sup>[1]</sup> 11:18</p> <p><b>PETER</b> <sup>[5]</sup> 1:17 2:3,13 3:7 68:4</p> <p><b>Petitioner</b> <sup>[3]</sup> 34:1,2,5</p> <p><b>Petitioners</b> <sup>[13]</sup> 1:4,18,22 2:4,8,14 3:8 21:17 35:3,13 45:21 58:7 68:5</p> <p><b>Petitioners'</b> <sup>[1]</sup> 34:22</p> <p><b>pick</b> <sup>[1]</sup> 28:24</p> <p><b>picked</b> <sup>[1]</sup> 64:14</p> <p><b>piece</b> <sup>[1]</sup> 41:20</p> <p><b>place</b> <sup>[1]</sup> 3:23</p> <p><b>places</b> <sup>[1]</sup> 61:11</p>	<p><b>plaintiff</b> <sup>[7]</sup> 9:5 23:19 36:9 43:6 59:24 60:2 67:16</p> <p><b>plaintiffs</b> <sup>[7]</sup> 33:24 34:14,20 39:7 48:12 49:16 51:19</p> <p><b>plan</b> <sup>[90]</sup> 4:3,4,21 5:1,8 8:8 9:19,20,22,22 10:16,18 11:2 14:22,23 15:1,3 16:3,8,15 17:16 18:3,6 23:4,8,9 27:14 28:13 31:20 33:8,9 35:5,11,14,18,20,22,22,23 36:4,20,25 38:7,8,10,23 39:1,5 40:10,25 41:3,7,10,13,21,21 42:19,22 47:6,8,10,11,15,18,20,21 48:10 50:23 52:2 53:15 56:1,14,16,20 57:6,11,16 60:19,19 61:8 62:20 63:2,5,7,21 64:9 67:1,22 68:18 69:15</p> <p><b>plan's</b> <sup>[4]</sup> 33:5,10,14 41:18</p> <p><b>plans</b> <sup>[6]</sup> 6:18 17:13 23:1 26:25 51:22 63:13</p> <p><b>play</b> <sup>[1]</sup> 18:5</p> <p><b>plead</b> <sup>[1]</sup> 38:23</p> <p><b>pleading</b> <sup>[3]</sup> 38:18,19 49:23</p> <p><b>pleadings</b> <sup>[3]</sup> 50:15 61:14 62:7</p> <p><b>please</b> <sup>[3]</sup> 3:10 21:19 33:22</p> <p><b>pled</b> <sup>[4]</sup> 16:22 17:1,3 49:25</p> <p><b>pledgy</b> <sup>[1]</sup> 67:23</p> <p><b>plus</b> <sup>[2]</sup> 27:14,15</p> <p><b>point</b> <sup>[15]</sup> 9:16 13:23 15:12,15 17:8 18:9 25:3,22 28:19 33:3 38:19 44:20 46:14 59:25 69:4</p> <p><b>points</b> <sup>[2]</sup> 68:7 70:4</p> <p><b>police</b> <sup>[1]</sup> 22:8</p> <p><b>policy</b> <sup>[1]</sup> 45:2</p> <p><b>policy-maker</b> <sup>[1]</sup> 19:24</p> <p><b>pool</b> <sup>[1]</sup> 5:6</p> <p><b>poor</b> <sup>[1]</sup> 35:10</p> <p><b>position</b> <sup>[6]</sup> 4:2 6:15 7:17 11:9 22:7 70:9</p> <p><b>positions</b> <sup>[1]</sup> 23:14</p> <p><b>possibility</b> <sup>[2]</sup> 4:16 8:22</p> <p><b>possible</b> <sup>[1]</sup> 67:1</p> <p><b>post-Spokeo</b> <sup>[1]</sup> 39:4</p> <p><b>posture</b> <sup>[2]</sup> 20:22 24:7</p> <p><b>potentially</b> <sup>[1]</sup> 70:20</p> <p><b>powers</b> <sup>[1]</sup> 32:17</p> <p><b>practical</b> <sup>[8]</sup> 16:14 18:7,20 19:22 24:6 27:1 28:10 70:5</p> <p><b>practicalities</b> <sup>[1]</sup> 16:6</p> <p><b>practically</b> <sup>[1]</sup> 19:8</p> <p><b>precise</b> <sup>[1]</sup> 20:6</p> <p><b>precisely</b> <sup>[3]</sup> 19:25 20:2 28:15</p> <p><b>predictive</b> <sup>[1]</sup> 49:16</p> <p><b>preface</b> <sup>[1]</sup> 37:17</p> <p><b>premium</b> <sup>[1]</sup> 18:16</p> <p><b>premiums</b> <sup>[2]</sup> 65:3,9</p> <p><b>present</b> <sup>[4]</sup> 8:23 13:20 14:3,6</p> <p><b>presents</b> <sup>[2]</sup> 3:15 49:23</p> <p><b>presume</b> <sup>[1]</sup> 59:1</p> <p><b>presumed</b> <sup>[5]</sup> 58:23,24 59:12,17 60:6</p> <p><b>presumption</b> <sup>[2]</sup> 43:23 44:1</p> <p><b>pretty</b> <sup>[3]</sup> 12:4 29:1 54:23</p> <p><b>prevent</b> <sup>[2]</sup> 8:24 30:3</p> <p><b>prevents</b> <sup>[6]</sup> 29:24 30:2,3,9 31:9 49:23</p>
---	---	---

## Official - Subject to Final Review

<p><b>principal</b> <sup>[3]</sup> 12:17 48:3 59:23</p> <p><b>principle</b> <sup>[1]</sup> 33:3</p> <p><b>principles</b> <sup>[1]</sup> 37:1</p> <p><b>prior</b> <sup>[1]</sup> 21:3</p> <p><b>private</b> <sup>[4]</sup> 5:2 44:9 68:19,19</p> <p><b>probably</b> <sup>[3]</sup> 11:10 24:22 29:22</p> <p><b>problem</b> <sup>[2]</sup> 34:23 43:11</p> <p><b>procedural</b> <sup>[1]</sup> 20:22</p> <p><b>proceeding</b> <sup>[2]</sup> 17:5 62:23</p> <p><b>process</b> <sup>[1]</sup> 61:15</p> <p><b>program</b> <sup>[1]</sup> 67:19</p> <p><b>progress</b> <sup>[1]</sup> 7:13</p> <p><b>prohibit</b> <sup>[1]</sup> 15:11</p> <p><b>prohibited</b> <sup>[1]</sup> 43:22</p> <p><b>prolong</b> <sup>[1]</sup> 52:22</p> <p><b>promise</b> <sup>[3]</sup> 5:3 13:17 68:21</p> <p><b>promised</b> <sup>[3]</sup> 25:16 37:7 53:1</p> <p><b>proper</b> <sup>[2]</sup> 10:20 50:15</p> <p><b>properly</b> <sup>[2]</sup> 31:23 61:21</p> <p><b>property</b> <sup>[36]</sup> 3:18,20 5:1,4 6:6 7:11,20,21,22 8:15,23 9:11,14 11:11 13:2 14:10 15:19 17:24 19:18 35:3,18 41:24 42:3,8 44:9 45:6 46:3,11,24 48:19,25 49:2 68:10,15 69:11,25</p> <p><b>propose</b> <sup>[1]</sup> 22:24</p> <p><b>proposition</b> <sup>[2]</sup> 36:12,14</p> <p><b>prospective</b> <sup>[1]</sup> 6:10</p> <p><b>protect</b> <sup>[2]</sup> 30:13 69:23</p> <p><b>protected</b> <sup>[4]</sup> 7:25 48:6 55:19 60:2</p> <p><b>protecting</b> <sup>[1]</sup> 69:10</p> <p><b>protection</b> <sup>[1]</sup> 28:12</p> <p><b>protections</b> <sup>[1]</sup> 28:14</p> <p><b>protective</b> <sup>[1]</sup> 28:18</p> <p><b>protects</b> <sup>[1]</sup> 30:22</p> <p><b>proved</b> <sup>[1]</sup> 60:5</p> <p><b>provide</b> <sup>[1]</sup> 44:16</p> <p><b>provided</b> <sup>[1]</sup> 11:5</p> <p><b>prudence</b> <sup>[5]</sup> 12:2,10,23 13:3 31:5</p> <p><b>public</b> <sup>[1]</sup> 51:24</p> <p><b>publicly</b> <sup>[1]</sup> 61:5</p> <p><b>publicly-traded</b> <sup>[1]</sup> 51:25</p> <p><b>purely</b> <sup>[1]</sup> 5:20</p> <p><b>purpose</b> <sup>[1]</sup> 69:22</p> <p><b>push</b> <sup>[1]</sup> 27:22</p> <p><b>put</b> <sup>[10]</sup> 9:11,16 16:5 19:16 37:8 50:9 60:24 61:9 68:15,22</p> <p><b>puts</b> <sup>[1]</sup> 48:19</p> <p><b>putting</b> <sup>[1]</sup> 69:24</p>	<p><b>quite</b> <sup>[4]</sup> 29:22 48:17 56:15 60:11</p> <p><b>quote</b> <sup>[1]</sup> 4:2</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>ran</b> <sup>[2]</sup> 55:23 56:5</p> <p><b>rather</b> <sup>[4]</sup> 9:19,22 50:5 57:11</p> <p><b>reached</b> <sup>[1]</sup> 21:5</p> <p><b>read</b> <sup>[2]</sup> 22:14 56:10</p> <p><b>ready</b> <sup>[1]</sup> 66:15</p> <p><b>real</b> <sup>[4]</sup> 21:21 47:1 68:19,20</p> <p><b>really</b> <sup>[7]</sup> 12:11 19:6 22:1 25:25 38:20 52:16 55:25</p> <p><b>reason</b> <sup>[6]</sup> 21:9 42:13 66:9 70:2,6,7</p> <p><b>reasonable</b> <sup>[1]</sup> 24:9</p> <p><b>reasons</b> <sup>[6]</sup> 3:16 35:16 42:4,6 45:2 63:25</p> <p><b>reassessed</b> <sup>[1]</sup> 17:4</p> <p><b>REBUTTAL</b> <sup>[2]</sup> 2:12 68:4</p> <p><b>receive</b> <sup>[9]</sup> 8:21 14:13 34:3,6,15 49:21 53:1 57:4 58:4</p> <p><b>received</b> <sup>[1]</sup> 34:6</p> <p><b>recognize</b> <sup>[3]</sup> 7:15 33:2 69:8</p> <p><b>recognized</b> <sup>[1]</sup> 22:5</p> <p><b>recover</b> <sup>[2]</sup> 26:20 43:5</p> <p><b>recovered</b> <sup>[1]</sup> 67:22</p> <p><b>reduces</b> <sup>[1]</sup> 7:3</p> <p><b>referring</b> <sup>[1]</sup> 50:21</p> <p><b>regarded</b> <sup>[1]</sup> 5:22</p> <p><b>regardless</b> <sup>[1]</sup> 45:24</p> <p><b>regulated</b> <sup>[1]</sup> 57:17</p> <p><b>regulatory</b> <sup>[1]</sup> 49:18</p> <p><b>reinvestments</b> <sup>[1]</sup> 26:15</p> <p><b>reiterated</b> <sup>[3]</sup> 25:3,4 57:5</p> <p><b>rejected</b> <sup>[1]</sup> 42:21</p> <p><b>relationships</b> <sup>[1]</sup> 57:19</p> <p><b>relator</b> <sup>[1]</sup> 43:4</p> <p><b>relevant</b> <sup>[2]</sup> 43:16 63:7</p> <p><b>relief</b> <sup>[1]</sup> 34:15</p> <p><b>remain</b> <sup>[1]</sup> 57:23</p> <p><b>remainderman</b> <sup>[9]</sup> 12:16 13:5,7 14:11,17 47:24 48:2 49:10 59:22</p> <p><b>remainderman's</b> <sup>[1]</sup> 13:12</p> <p><b>remarks</b> <sup>[1]</sup> 37:17</p> <p><b>remedy</b> <sup>[2]</sup> 43:17 60:10</p> <p><b>remember</b> <sup>[2]</sup> 11:20 42:9</p> <p><b>remote</b> <sup>[1]</sup> 14:4</p> <p><b>remoteness</b> <sup>[2]</sup> 10:9,15</p> <p><b>removed</b> <sup>[1]</sup> 40:12</p> <p><b>repay</b> <sup>[1]</sup> 29:2</p> <p><b>repayment</b> <sup>[1]</sup> 29:3</p> <p><b>Reporter</b> <sup>[1]</sup> 13:24</p> <p><b>reports</b> <sup>[1]</sup> 51:22</p> <p><b>representational</b> <sup>[4]</sup> 4:20 35:14 41:25 42:24</p> <p><b>representative</b> <sup>[1]</sup> 15:1</p> <p><b>representing</b> <sup>[1]</sup> 41:21</p> <p><b>require</b> <sup>[1]</sup> 50:15</p> <p><b>required</b> <sup>[2]</sup> 37:22 51:12</p> <p><b>requirement</b> <sup>[1]</sup> 32:18</p> <p><b>requirements</b> <sup>[1]</sup> 61:11</p> <p><b>requires</b> <sup>[1]</sup> 50:13</p> <p><b>rescind</b> <sup>[1]</sup> 67:17</p> <p><b>rescinded</b> <sup>[1]</sup> 43:24</p>	<p><b>research</b> <sup>[1]</sup> 11:24</p> <p><b>resolve</b> <sup>[1]</sup> 25:17</p> <p><b>resources</b> <sup>[1]</sup> 67:6</p> <p><b>respect</b> <sup>[3]</sup> 12:3 43:12 57:6</p> <p><b>respectfully</b> <sup>[1]</sup> 54:11</p> <p><b>Respondents</b> <sup>[7]</sup> 1:7,24 2:11 3:22 4:5,12 33:20</p> <p><b>responses</b> <sup>[1]</sup> 12:24</p> <p><b>rest</b> <sup>[1]</sup> 34:11</p> <p><b>restatement</b> <sup>[2]</sup> 36:13 60:8</p> <p><b>restoration</b> <sup>[1]</sup> 10:25</p> <p><b>result</b> <sup>[4]</sup> 23:5 29:4,5 40:8</p> <p><b>retirement</b> <sup>[3]</sup> 4:12 34:4,7</p> <p><b>retrospective</b> <sup>[1]</sup> 5:21</p> <p><b>reverse</b> <sup>[2]</sup> 34:13 71:1</p> <p><b>reversed</b> <sup>[1]</sup> 21:11</p> <p><b>rid</b> <sup>[1]</sup> 20:19</p> <p><b>Rights</b> <sup>[1]</sup> 17:10</p> <p><b>Rings</b> <sup>[1]</sup> 55:14</p> <p><b>rise</b> <sup>[1]</sup> 4:17</p> <p><b>risk</b> <sup>[24]</sup> 6:18 12:14 16:24 17:6,7 19:21 26:23 35:10 37:2,21,25 38:1,2,3 48:10 49:17,20 50:1,25 52:19,25 62:16 66:7 70:20,21</p> <p><b>road</b> <sup>[1]</sup> 61:22</p> <p><b>ROBERTS</b> <sup>[2]</sup> 3:3 5:11 6:12,21 7:18 8:4,11 9:3 17:18,20 20:24 21:12 32:13 33:7,16 39:13,17 52:6 67:8 68:1 71:2</p> <p><b>rock</b> <sup>[1]</sup> 3:22</p> <p><b>role</b> <sup>[3]</sup> 27:4,6 32:16</p> <p><b>roller</b> <sup>[2]</sup> 31:9,13</p> <p><b>room</b> <sup>[1]</sup> 70:24</p> <p><b>rule</b> <sup>[12]</sup> 4:15 5:23 13:20 22:1,10,13 43:13,18 58:10,23 60:7 70:17</p> <p><b>rules</b> <sup>[2]</sup> 32:3,4</p> <p><b>run</b> <sup>[5]</sup> 47:7,20,21 56:16 57:3</p> <p><b>running</b> <sup>[2]</sup> 39:23,23</p> <p><b>runs</b> <sup>[2]</sup> 57:7,11</p> <p><b>Russell</b> <sup>[6]</sup> 22:5 28:17 47:19 56:11,18 57:1</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>safe</b> <sup>[1]</sup> 12:18</p> <p><b>same</b> <sup>[6]</sup> 6:14 9:10 34:6,10,16 59:13</p> <p><b>satisfied</b> <sup>[1]</sup> 48:18</p> <p><b>satisfy</b> <sup>[1]</sup> 52:9</p> <p><b>save</b> <sup>[1]</sup> 26:15</p> <p><b>savings</b> <sup>[1]</sup> 4:12</p> <p><b>saw</b> <sup>[1]</sup> 9:12</p> <p><b>saying</b> <sup>[10]</sup> 19:10 24:16 30:7 31:13,17,20 35:17 37:17 50:22 68:11</p> <p><b>says</b> <sup>[13]</sup> 6:14 13:5 14:25 15:3,6 16:8 20:19 52:24 56:21 63:4 69:7,13,22</p> <p><b>Second</b> <sup>[10]</sup> 4:10 13:1 35:3 36:13 39:25 60:7,9,25 64:3 70:5</p> <p><b>Secondly</b> <sup>[1]</sup> 41:7</p> <p><b>seconds</b> <sup>[1]</sup> 29:15</p> <p><b>section</b> <sup>[2]</sup> 36:12,13</p> <p><b>secure</b> <sup>[5]</sup> 7:20,22 9:6 63:17,19</p> <p><b>secured</b> <sup>[3]</sup> 5:4 7:11 13:17</p> <p><b>securities</b> <sup>[1]</sup> 67:19</p>	<p><b>security</b> <sup>[5]</sup> 7:10,15,25 8:8 68:23</p> <p><b>see</b> <sup>[7]</sup> 14:16 19:24 25:13,18 29:16 32:12 59:25</p> <p><b>seek</b> <sup>[1]</sup> 42:12</p> <p><b>seeking</b> <sup>[2]</sup> 6:3 42:10</p> <p><b>seem</b> <sup>[2]</sup> 7:24 54:10</p> <p><b>seems</b> <sup>[3]</sup> 12:11 38:18 54:3</p> <p><b>seen</b> <sup>[3]</sup> 14:2 15:2 53:22</p> <p><b>self-deal</b> <sup>[1]</sup> 40:24</p> <p><b>self-dealing</b> <sup>[4]</sup> 4:13 40:23 41:4,6</p> <p><b>sense</b> <sup>[3]</sup> 16:4 22:1 36:4</p> <p><b>sensible</b> <sup>[1]</sup> 19:24</p> <p><b>separate</b> <sup>[7]</sup> 15:6 19:6 36:22 43:15 44:2 60:4 62:23</p> <p><b>separation</b> <sup>[1]</sup> 32:16</p> <p><b>series</b> <sup>[1]</sup> 57:19</p> <p><b>seriously</b> <sup>[2]</sup> 16:20 61:7</p> <p><b>services</b> <sup>[1]</sup> 5:2</p> <p><b>set</b> <sup>[6]</sup> 14:10 18:18 31:2 49:24 59:6 67:3</p> <p><b>settled</b> <sup>[1]</sup> 13:21</p> <p><b>settlor</b> <sup>[1]</sup> 27:24</p> <p><b>shall</b> <sup>[1]</sup> 15:5</p> <p><b>share</b> <sup>[1]</sup> 43:7</p> <p><b>she's</b> <sup>[1]</sup> 8:20</p> <p><b>Sherry</b> <sup>[1]</sup> 34:5</p> <p><b>shoes</b> <sup>[1]</sup> 33:14</p> <p><b>shot</b> <sup>[2]</sup> 58:5,6</p> <p><b>shouldn't</b> <sup>[4]</sup> 5:24 12:8 55:8 70:22</p> <p><b>show</b> <sup>[14]</sup> 8:20 32:22 37:2,5,5,6,13 38:8,10 40:6 49:7 51:13 54:4 61:6</p> <p><b>showed</b> <sup>[1]</sup> 52:2</p> <p><b>shows</b> <sup>[1]</sup> 12:4</p> <p><b>side</b> <sup>[7]</sup> 6:14 50:7,10 64:25 65:5 70:16,17</p> <p><b>Sierra</b> <sup>[1]</sup> 54:19</p> <p><b>significance</b> <sup>[1]</sup> 32:15</p> <p><b>significant</b> <sup>[1]</sup> 40:1</p> <p><b>significantly</b> <sup>[2]</sup> 51:7 52:23</p> <p><b>simple</b> <sup>[4]</sup> 37:24 40:20,20 55:14</p> <p><b>simply</b> <sup>[2]</sup> 38:10 55:17</p> <p><b>Since</b> <sup>[10]</sup> 4:21 8:18 13:10,21 15:17 20:4 27:23 34:4,7 69:5</p> <p><b>single</b> <sup>[2]</sup> 23:6 34:15</p> <p><b>situation</b> <sup>[6]</sup> 5:15,18 28:6 36:15,16,19</p> <p><b>situations</b> <sup>[3]</sup> 6:22 39:18 70:24</p> <p><b>slightly</b> <sup>[1]</sup> 59:11</p> <p><b>small</b> <sup>[1]</sup> 25:20</p> <p><b>Smith</b> <sup>[1]</sup> 34:5</p> <p><b>solely</b> <sup>[1]</sup> 62:6</p> <p><b>Solicitor</b> <sup>[1]</sup> 1:19</p> <p><b>solution</b> <sup>[1]</sup> 70:25</p> <p><b>solve</b> <sup>[1]</sup> 34:22</p> <p><b>solvency</b> <sup>[1]</sup> 18:11</p> <p><b>somebody</b> <sup>[3]</sup> 5:19 23:3,8</p> <p><b>somehow</b> <sup>[2]</sup> 45:8 65:5</p> <p><b>someone</b> <sup>[7]</sup> 4:8,9 10:12 27:11 33:11 60:12 66:22</p> <p><b>sometimes</b> <sup>[2]</sup> 31:12 58:25</p> <p><b>SOPAN</b> <sup>[3]</sup> 1:19 2:6 21:15</p> <p><b>sorry</b> <sup>[8]</sup> 9:21 17:20 25:13 27:4 31:19 40:18 49:14 52:21</p> <p><b>sorts</b> <sup>[1]</sup> 52:12</p>
---	---	---	---

## Official - Subject to Final Review

<p><b>SOTOMAYOR</b> [8] 40:13,15,18 42:5,9,14,16 66:17  <b>sources</b> [1] 13:11  <b>speculation</b> [1] 64:10  <b>spend</b> [1] 29:15  <b>spends</b> [1] 69:12  <b>Spokeo</b> [2] 25:3 44:14  <b>stage</b> [2] 61:14 64:5  <b>stages</b> [1] 17:5  <b>stake</b> [2] 56:8,19  <b>stand</b> [1] 36:14  <b>standard</b> [4] 52:7,8,18,19  <b>standing</b> [4] 4:20 10:14 11:5 19:7,19,23 21:6,8 25:19 26:6,19,19 27:11 30:8,13,16 33:9 34:21 36:20,25 42:1,24 44:11 45:11,16 46:2 48:4 49:5,9,12 53:24 55:16 61:21 63:23 64:3 66:8,10 70:10,11,15,23  <b>standpoint</b> [1] 11:10  <b>stands</b> [1] 66:14  <b>start</b> [1] 14:23  <b>started</b> [1] 35:17  <b>state</b> [1] 64:1  <b>stated</b> [4] 35:16 42:4,7 62:2  <b>statements</b> [1] 69:21  <b>STATES</b> [8] 1:1,13,21 2:7 3:5 18:13 21:16 70:7  <b>statute</b> [4] 11:6 21:2 44:6 55:1  <b>statutorily</b> [1] 55:19  <b>statutory</b> [1] 34:21  <b>step</b> [4] 9:13 27:24 33:14 64:3  <b>stewardship</b> [1] 4:11  <b>still</b> [9] 7:12 8:9,13 10:4 26:6 37:9 41:25 47:23 57:23  <b>stock</b> [2] 29:16 31:12  <b>stocks</b> [1] 15:4  <b>stop</b> [1] 27:7  <b>stream</b> [4] 40:9 48:12 49:8 64:9  <b>STRIS</b> [43] 1:17 2:3,13 3:6,7,9 6:1,16 7:6 8:3,10,13 9:2,10 10:2,5,10,13 11:7 12:24 13:6,16 14:12,19,21 16:17 17:2,8,19,22 18:9,14,23 19:2,4 20:9,15,20,25 35:17 68:3,4,6  <b>strong</b> [2] 15:23 25:15  <b>structure</b> [3] 35:19 42:22 47:15  <b>structured</b> [1] 53:14  <b>struggling</b> [1] 51:8  <b>subject</b> [2] 61:24 62:4  <b>submission</b> [1] 15:17  <b>submitted</b> [2] 71:3,5  <b>subsequent</b> [1] 56:25  <b>substance</b> [1] 45:5  <b>substantial</b> [3] 16:23 38:1 52:19  <b>substantially</b> [1] 52:25  <b>substantively</b> [2] 48:24 49:2  <b>sudden</b> [1] 63:18  <b>sue</b> [60] 4:15,22 7:4,12 8:9,13 10:4,12,25 12:6,13,15,16,19,21 13:5 16:1 21:23 22:12,15,21 23:7 24:3,17,19,21,24 26:6,19 27:11,19 30:17 33:9,11,14 34:25 35:2,13,25 36:11 41:5,6 42:25 43:17 47:24 48:4,</p>	<p>4 54:20 55:2,6 57:25 59:22 60:3,10 65:14,15,21 66:22 67:4 70:12  <b>suffered</b> [4] 3:20 4:13 30:15 55:8  <b>suffice</b> [1] 44:10  <b>sufficient</b> [4] 60:16 61:20 63:22 66:3  <b>sufficiently</b> [1] 50:25  <b>suggest</b> [3] 10:23 48:22,23  <b>suggested</b> [1] 27:9  <b>suggesting</b> [3] 7:24,24 24:16  <b>suggests</b> [2] 11:25 55:22  <b>suing</b> [2] 23:19 67:16  <b>suit</b> [4] 3:15 23:21 40:5,11  <b>suits</b> [3] 11:13,15 31:10  <b>summarizing</b> [1] 50:3  <b>supporting</b> [3] 1:22 2:8 21:17  <b>suppose</b> [1] 7:19  <b>supposed</b> [1] 57:13  <b>SUPREME</b> [3] 1:1,13 48:1  <b>surplus</b> [5] 15:12,16 19:12 42:11,18  <b>surprised</b> [1] 39:19  <b>surprisingly</b> [1] 11:20  <b>surveilled</b> [1] 51:21  <b>sweep</b> [1] 69:2  <b>swings</b> [1] 17:12</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>table</b> [1] 20:12  <b>talked</b> [3] 37:25 45:12 52:20  <b>tam</b> [2] 11:13 43:4  <b>tangible</b> [1] 9:5  <b>tax</b> [3] 15:9,10 19:16  <b>tells</b> [2] 19:14 26:24  <b>tension</b> [2] 25:13,18  <b>terminology</b> [1] 46:23  <b>terms</b> [6] 9:9 11:11 26:13 38:3,5 40:2  <b>Terry</b> [3] 47:24 49:10 59:24  <b>text</b> [2] 21:25 25:6  <b>themselves</b> [2] 41:5 42:17  <b>theory</b> [13] 5:12,17 6:8 23:24 60:15 64:14,17 65:12,21,23,25 66:1,2  <b>There's</b> [29] 6:17 7:2 19:5,20,20 23:2 25:1 26:1 31:4 37:21 43:11 44:2 47:12 49:17 51:17,24,25 52:6,7,13 55:6 59:19 63:5 64:8 70:1,7,13,19,25  <b>therefore</b> [7] 43:23 51:4,5 52:24,25 59:8 66:7  <b>they've</b> [4] 37:21 40:14,16 61:20  <b>third</b> [3] 4:19 35:13 40:1  <b>THOLE</b> [3] 1:3 3:5 34:2  <b>though</b> [6] 9:12 23:3 31:11 49:14 55:6,22  <b>three</b> [3] 3:16 68:3,6  <b>throughout</b> [1] 70:21  <b>throw</b> [1] 23:3  <b>Tibble</b> [2] 21:3,11  <b>tied</b> [2] 45:8 58:14  <b>time-barred</b> [1] 20:13  <b>title</b> [4] 4:8 35:20 47:16,17  <b>today</b> [2] 32:24 69:13  <b>toe</b> [1] 9:11</p>	<p><b>toggling</b> [1] 64:1  <b>tomorrow</b> [1] 38:8  <b>ton</b> [1] 51:17  <b>tools</b> [1] 67:23  <b>torts</b> [1] 36:13  <b>totally</b> [1] 16:18  <b>traditional</b> [1] 22:10  <b>transaction</b> [3] 43:20,24 67:17  <b>transactions</b> [1] 66:25  <b>treated</b> [1] 69:10  <b>treatises</b> [1] 22:14  <b>tried</b> [2] 49:4 54:24  <b>trouble</b> [1] 41:23  <b>true</b> [3] 10:18 33:5 54:7  <b>trust</b> [114] 3:12,14,18,25,25 4:7,24 5:4,7,22 6:9,10 7:7 8:19,21 9:7 10:21 12:5,17 13:9,18 15:5,7,11,18 16:3,4,11 17:25 19:17,19 21:21,23,24 22:3,6,9,16,17,20 23:15,22,22,23 24:18 26:4,10,11,14 27:22,23,24,25 28:6,17 29:5,8 31:2,3 33:3 34:24 35:4,8 36:1,3,5,9,11 39:23 40:23 41:2,3 43:20,23 44:2,4 45:9,16,18 46:7,8,12,21 48:3,5 49:4,8 54:4 56:21 57:7,17,18 58:5,7,11,11,15,18,19,21,24 59:1,7,12,18,20,21 60:11,11 67:15,15 68:22 69:1,24  <b>trust's</b> [1] 4:7  <b>trustee</b> [25] 4:22 7:5 12:6 21:20,23 22:8,12,15,18,21 23:1 24:13,20,21 26:9 27:18 33:12 35:20 44:10 47:16,17 54:6 66:23,24 67:16  <b>trustees</b> [5] 3:12 31:7 41:4,16 67:12  <b>trusts</b> [2] 10:8 20:3  <b>truthful</b> [1] 57:4  <b>trying</b> [4] 38:3 48:23 49:24 50:5  <b>tulips</b> [1] 9:13  <b>turned</b> [1] 39:20  <b>turns</b> [1] 63:18  <b>two</b> [12] 18:23 19:4,5 26:2 36:17 40:20 43:15 45:14 54:2 58:3 60:4 68:7  <b>Twombly</b> [2] 50:14 62:1</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>U.S.</b> [4] 1:6 48:8 52:3 67:20  <b>ultimate</b> [2] 65:1,10  <b>unable</b> [6] 39:10 53:18 60:21 61:1,9,10  <b>unbroken</b> [1] 20:3  <b>unconnected</b> [2] 35:7 36:10  <b>Under</b> [21] 4:14 5:1,22,23 9:5 23:21 32:24 35:18 52:9 54:9 55:14 58:23 60:6 61:25 62:10,11,13 64:12,12,17 65:20  <b>underfunded</b> [16] 17:17 27:1 29:18 38:10,18 41:13 51:4,7 52:3,23 53:12 60:20 61:7 63:14,15 64:2  <b>underfunding</b> [1] 53:17  <b>underlying</b> [1] 35:4</p>	<p><b>understand</b> [6] 30:11 37:19 43:14 44:20 45:25 48:17  <b>understood</b> [1] 7:19  <b>undifferentiated</b> [1] 23:16  <b>undisputed</b> [1] 34:9  <b>undivided</b> [3] 4:1 5:6 10:19  <b>unharmd</b> [1] 35:1  <b>uninjured</b> [2] 67:25 68:11  <b>UNITED</b> [8] 1:1,13,21 2:7 3:5 18:13 21:16 70:7  <b>unless</b> [3] 4:7 35:15 64:3  <b>unsegregated</b> [3] 3:25 5:6 10:17  <b>until</b> [3] 6:19 19:12 41:12  <b>unwilling</b> [4] 4:22 53:17 60:21,25  <b>unworkable</b> [1] 70:22  <b>up</b> [17] 11:23 15:24 17:11 28:24 29:16,18,25 36:7,7 38:25 39:11 51:5 53:15 65:17 67:3 68:20 69:13  <b>ups</b> [1] 36:1  <b>upset</b> [1] 9:13</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>value</b> [7] 6:8 35:8 36:1,10 45:8 49:4 58:14  <b>varied</b> [1] 9:23  <b>vehicle</b> [1] 40:22  <b>verity</b> [1] 57:5  <b>Verizon</b> [3] 39:3,5,9  <b>Vermont</b> [1] 11:14  <b>versus</b> [8] 3:5 13:24 39:3 43:2,10 47:25 49:10 59:24  <b>view</b> [2] 44:11 46:16  <b>viewed</b> [1] 34:20  <b>vindicate</b> [1] 4:20  <b>violation</b> [1] 44:17</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wages</b> [2] 5:3 68:21  <b>wanted</b> [1] 28:12  <b>Washington</b> [3] 1:9,20,23  <b>wasting</b> [1] 15:11  <b>way</b> [6] 9:10,14 10:8 15:18 18:17 53:13  <b>weight</b> [1] 32:14  <b>Westminster</b> [1] 25:8  <b>whatever</b> [6] 11:5 32:22 41:8,11 45:1,1  <b>whenever</b> [2] 48:18 53:23  <b>Whereupon</b> [1] 71:4  <b>whether</b> [9] 19:11 34:20 41:1,9,19,24 45:24 62:2,24  <b>White</b> [2] 10:22 11:1  <b>who's</b> [1] 33:13  <b>whole</b> [6] 41:16,17 45:9 49:24 51:11,16  <b>whom</b> [1] 58:4  <b>will</b> [16] 6:25 13:14 21:11 22:19 26:6 27:17 34:3,5,10 40:8 43:4,8,8 45:21 64:11 70:18  <b>win</b> [1] 6:15  <b>without</b> [1] 15:20  <b>wonder</b> [1] 31:8  <b>word</b> [1] 16:4  <b>wording</b> [1] 59:11</p>
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## Official - Subject to Final Review

**words** <sup>[4]</sup> 5:13 25:5,7 55:24  
**work** <sup>[1]</sup> 68:12  
**worked** <sup>[2]</sup> 15:18 20:3  
**worker** <sup>[1]</sup> 68:20  
**Workers** <sup>[1]</sup> 5:3  
**works** <sup>[1]</sup> 32:24  
**worry** <sup>[1]</sup> 5:24  
**worth** <sup>[3]</sup> 50:3,4,12  
**wrongfully** <sup>[1]</sup> 8:7

---

**Y**

---

**year** <sup>[2]</sup> 17:14 26:25  
**years** <sup>[2]</sup> 21:24 25:4  
**Yellowstone** <sup>[1]</sup> 54:22  
**yesterday** <sup>[1]</sup> 30:2

---

**Z**

---

**zero** <sup>[3]</sup> 45:20,24 58:6