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IN THE SUPREME COURT OF THE UNITED STATES

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ERIC L. THOMPSON, :

Petitioner : No. 09-291

v. :

NORTH AMERICAN STAINLESS, LP :

- - - - - x

Washington, D.C.

Tuesday, December 7, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

ERIC SCHNAPPER, ESQ., Seattle, Washington; on behalf of Petitioner.

LEONDRA R. KRUGER, ESQ., Acting Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioner.

LEIGH GROSS LATHEROW, ESQ., Ashland, Kentucky; on behalf of Respondent.

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	ERIC SCHNAPPER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	LEONDRA R. KRUGER, ESQ.	
7	On behalf of the United States, as	
8	amicus curiae, supporting Petitioner	17
9	ORAL ARGUMENT OF	
10	LEIGH GROSS LATHEROW, ESQ.	
11	On behalf of the Respondent	28
12	REBUTTAL ARGUMENT OF	
13	ERIC SCHNAPPER, ESQ.	
14	On behalf of the Petitioner	52
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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3
4
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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 09-291, Thompson v. North American Stainless.

Mr. Schnapper.

ORAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONER

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

Section 704(a), Title VII, prohibits the use of third-party reprisals as a method of retaliating against a person who complained to the EEOC or otherwise opposed discrimination. The text of section 704(a) doesn't limit the types of retaliation which are forbidden. The elements of the statute are unrelated to that.

The first requirement is that the plaintiff show that discrimination occurred with regard to the individual who engaged in a protected activity. In a case like that, like this, that's shown by -- would be shown by evidence that they singled out Ms. Regalado and Ms. Regalado's fiancé. They didn't go fire anybody else's fiancé. That was the basis on which this particular action was taken.

1 Secondly, the plaintiff must show that the
2 conduct was discrimination against the person who
3 engaged in protected activity. That language is easily
4 applicable to a situation where you single out, say, a
5 family member or a fiancé. The purpose of that, the
6 complaint can fairly be read to allege, was to punish
7 the person who had engaged in protected activity.

8 There are a number of Federal statutes that
9 use the word "against" in precisely this way. They say
10 that actions cannot be taken to -- say, against a family
11 member of a sitting judge or other Federal official
12 where the purpose is to act against the official.

13 JUSTICE SCALIA: Is Ms. Regalado still
14 engaged to this fellow?

15 JUSTICE GINSBURG: She's married to him.

16 MR. SCHNAPPER: I'm sorry. Is she still
17 engaged to him?

18 JUSTICE SCALIA: Yes.

19 MR. SCHNAPPER: They're married.

20 JUSTICE SCALIA: Oh, they're married.

21 MR. SCHNAPPER: And they have a lovely
22 2-year-old daughter.

23 JUSTICE SCALIA: Oh, good. Well, why didn't
24 she bring this suit?

25 MR. SCHNAPPER: I -- I think, Your Honor,

1 that your -- this Court's Article III jurisprudence
2 would have precluded her from getting any remedy. The
3 -- certainly most of the remedies that are needed here.
4 She wouldn't have had Article III standing to win an
5 award of back pay to -- to her now husband. She
6 couldn't have gotten an award of damages to him. I
7 think, if I'm right --

8 JUSTICE KENNEDY: Could she have gotten
9 reinstatement on the grounds that his continuing
10 inability to be employed by the company is an ongoing
11 hurt to her?

12 MR. SCHNAPPER: Perhaps. It would depend on
13 the circumstances. In this particular case, almost
14 certainly not, because of just the -- the course of
15 subsequent events. But it's -- she subsequently left
16 the company. At this point, they live nowhere near that
17 town. It simply wouldn't work.

18 JUSTICE KENNEDY: Suppose an employer --
19 suppose an employer dismisses an employee on an
20 impermissible ground, impermissible under Title VII, and
21 it's a very valuable employee. Can the shareholders sue
22 on the ground that the shareholders are now injured
23 because the company is worth less, having lost this
24 employee, under Title VII?

25 MR. SCHNAPPER: I don't -- I don't believe

1 so, Your Honor. I don't believe so. But the situation
2 here is different than that.

3 JUSTICE GINSBURG: Because you start with
4 somebody who is -- who is unlike the shareholders.
5 There's no Title VII violation as to them. Regalado is
6 complaining of sex discrimination, and then she said,
7 because I made a complaint, they retaliated against me.
8 Shareholders are not in that position, because there was
9 no initial charge there.

10 JUSTICE KENNEDY: No, it's the same
11 hypothetical. We'll just say Regalado, all the same
12 facts, except she is very valuable to the company. The
13 company is now worth less; shareholder sues.

14 MR. SCHNAPPER: I think the thrust of your
15 question was -- is: Are the shareholders like Thompson?
16 And I think -- I think that Thompson's situation is
17 quite different. He was the very target of the illegal
18 act. The illegality occurs only by means of dismissing
19 him.

20 JUSTICE ALITO: The question is whether he's
21 aggrieved within the meaning of Title VII, right?

22 MR. SCHNAPPER: That is the other question.

23 JUSTICE ALITO: And your argument is that if
24 there's injury in fact sufficient to satisfy Article III
25 of the Constitution, then the person is aggrieved.

1 MR. SCHNAPPER: The -- the Court's decision
2 in Trafficante goes that far, and in practice it has not
3 proved a problem under Title VIII. It's -- that's
4 generally been its understanding of -- here.

5 JUSTICE ALITO: But your -- is it your
6 argument that we have -- that we should go that far?

7 MR. SCHNAPPER: You do not --

8 JUSTICE ALITO: We should say that there was
9 injury --

10 MR. SCHNAPPER: You do not --

11 JUSTICE ALITO: We don't? We don't need to
12 go that far?

13 MR. SCHNAPPER: You do not need to go that
14 far.

15 JUSTICE ALITO: Where do we draw the line?

16 MR. SCHNAPPER: Well, I think -- I think the
17 Government has -- I -- I think as far as you need to go,
18 which is not the same as saying that's as far as the law
19 goes, is the standard articulated by the Government, as
20 in McCready, where the action against Thompson was the
21 very method by which the law was violated, that that
22 would satisfy the requirement of person aggrieved.

23 JUSTICE ALITO: Where does that come from?
24 Where does that test come from?

25 MR. SCHNAPPER: Your Honor, I don't -- I

1 think that's as far as you need to go in this case. I
2 think the standard of aggrieved is broader than that,
3 but the -- in -- as this has played out in the lower
4 courts since *Trafficante*, there's a wide range of
5 different kinds of circumstances under which the
6 *Trafficante* rule has been invoked in Title VII cases.
7 We're not asking you to address all of those.

8 JUSTICE ALITO: I understand the argument.
9 I don't really -- it's not too helpful, at least to me,
10 to say as far as we need to go in order to reverse.
11 That's really not how a statute ought to be interpreted,
12 I would say. What does it mean? What -- now, I
13 understand the argument that "aggrieved" means all the
14 way to what's -- all that's necessary is what is
15 necessary to satisfy the Constitution. And I understand
16 that argument. It's a very broad argument with a lot of
17 implications.

18 But if -- if that's not correct, then what
19 is the correct test and where does it come from?

20 MR. SCHNAPPER: Well, Your Honor, I think
21 that there are two other limitations that would be
22 applicable here, as indeed they would have been under
23 Title VIII.

24 First one is proximate cause, which will cut
25 off a lot of injuries down the road. And Title VII is

1 adopted against a background of proximate cause rules,
2 and there, I don't think -- we don't contend that in
3 using the word "person aggrieved" they meant -- Congress
4 meant to set those aside.

5 Secondly, the -- I think a fair reading of
6 the word "aggrieved" is that it is -- "aggrieved" is
7 both, in ordinary English, frankly, broader and narrower
8 than "injured." It is broader -- and that's, of course,
9 not your concern -- in the sense that it covers people
10 who haven't been injured yet but might be injured in the
11 future.

12 But it also has a second element which is
13 that the action at issue involves some sort of a wrong.
14 If someone deliberately knocks me down, I'm injured, I'm
15 probably aggrieved, but not if I'm carrying a football
16 in the middle of a football game. That's a legitimate
17 thing to do.

18 So I think that there has to be a wrong, and
19 the wrong has to be the -- the basis of the -- of the
20 plaintiff's objection. You could have a situation where
21 the plaintiff really didn't care one way or another why
22 -- why that harm had happened. It was -- but in this
23 case, that's precisely why Thompson complains. He's not
24 suggesting that he would be wronged if he were ever
25 fired at all. He is aggrieved because he was fired for

1 a reason that was an improper reason. And -- and we
2 think those are -- those are limiting principles.

3 JUSTICE GINSBURG: What -- what do you do
4 with the argument that says there's a middle step? You
5 can -- you have the sex discrimination complaint, and
6 then you have Thompson, who is aggrieved in the sense
7 that he was hurt, he was injured. But they say there's
8 no cause of action, there's no statutory cause of
9 action, for Thompson.

10 MR. SCHNAPPER: Well, the -- we think that's
11 just clearly wrong. The statute provides a cause of
12 action.

13 If I might go back to how that came up in
14 the court of appeals, the court of appeals appears to
15 have assumed that third-party reprisals are unlawful.
16 It's not entirely clear. And then, in footnote 1, the
17 court of appeals said that -- that Thompson was
18 aggrieved.

19 Notwithstanding that, they then went on to
20 say that there's no cause of action in the statute --
21 they said in section 704(a). That really doesn't make
22 any sense. The -- the statute provides an express cause
23 of action. It says that individuals -- certain
24 individuals, if the requirements are met, can bring
25 lawsuits.

1 So the question is, as -- as Justice Alito
2 put it and -- and it was put before, which is whether
3 the plaintiff is aggrieved. But if he's aggrieved, he's
4 clearly got a cause of action --

5 JUSTICE ALITO: Suppose Thompson were not
6 Regalado's fiancé at the time. Suppose they were
7 just -- they were just good friends. Would -- and
8 everything else happened, and he alleged that he was
9 fired in retaliation for her engaging in protected
10 conduct. The way the company wanted to get at her was
11 by firing her friend. Would that be enough?

12 MR. SCHNAPPER: Well, the -- the plaintiff
13 would have to prove two things. First of all, the
14 plaintiff would have to prove that that was indeed the
15 company's motive for picking him to fire him.

16 Secondly, under this Court's decision in
17 Burlington Northern, the plaintiff would have to show
18 that this was a retaliatory action sufficiently serious
19 that it was -- it would likely persuade a reasonable
20 employee in Regalado's position -- dissuade her
21 complaint. And -- and that's why we've agreed with the
22 Respondent's contention that -- that they're entitled to
23 an evidentiary determination about whether that standard
24 was met here.

25 So that's an important limiting principle,

1 and it has --

2 JUSTICE ALITO: How does that translate?
3 How does that Burlington Northern standard translate
4 into the situation in which there is some sort of
5 relationship between the -- the person who engaged in
6 the protected conduct and the person who suffers the
7 adverse employment action?

8 That's what's troubling to me about -- about
9 the theory. Where it's a fiancé, it's -- that's a
10 relatively strong case, but I can imagine a whole
11 spectrum of cases in which there is a lesser
12 relationship between those two persons, and if -- if --
13 unless there's a clear line there someplace, this theory
14 is rather troubling.

15 MR. SCHNAPPER: Well, I think --

16 JUSTICE ALITO: Can you help -- can you help
17 provide where the clear line is? Does it go to -- does
18 it include simply a good friend? Does it include
19 somebody who just has lunch in the cafeteria every day
20 with the person who engaged in the protected conduct?
21 Somebody who once dated the person who engaged in the
22 protected conduct? Are these all questions that have to
23 go to a jury?

24 MR. SCHNAPPER: They wouldn't all have to go
25 to a jury. I mean, the -- the problem, as you cast it,

1 is that's the standard in Burlington Northern -- no
2 offense -- isn't a bright line. It is the standard,
3 which it is. And the same question could arise about
4 other methods of retaliation.

5 What about -- you know, what about cutting
6 someone out of 5 meetings or 10 meetings? But that same
7 problem exists under Burlington Northern no matter what.

8 JUSTICE BREYER: But why can't --

9 JUSTICE SCALIA: Well --

10 JUSTICE BREYER: Why can't they get -- the
11 first question, to go back, is just a confusion in my
12 mind: Why couldn't she bring this suit? And she says:
13 I was discriminated against because they did A, B, C, D
14 to him, and the remedy is cure the way in which I was
15 discriminated against. And to cure that way, you would
16 have to make the man whole in respect to those elements
17 that we're discriminating against her.

18 Do you give him back pay? Do you restore
19 him? You do everything you would normally have to do,
20 because otherwise she is suffering the kind of injury,
21 though it was to him, that amounts to discrimination for
22 opposing a practice. What's wrong with that theory?

23 MR. SCHNAPPER: I think that that kind of
24 remedy would pose very serious problems under Article
25 III.

1 JUSTICE BREYER: Why? Why?

2 MR. SCHNAPPER: Because money isn't going to
3 her.

4 JUSTICE BREYER: So what? She's hurt.
5 Suppose it was a child that they -- what they -- or
6 suppose they robbed -- they robbed the -- the judge's
7 wife in order to get him to do something? And -- and
8 that's a crime, and suppose there was a civil statute.
9 The judge says: The way you cure what you did to get me
10 to do something is you make me whole. And in that
11 instance, it requires making her whole. What's the
12 Article III problem?

13 Well, anyway --

14 MR. SCHNAPPER: I don't --

15 JUSTICE BREYER: I don't know that this is
16 crucial, but I'm -- I'm -- I'm just saying --

17 MR. SCHNAPPER: Well, I think it -- I think
18 it is of some -- some importance here. I mean, it --
19 it -- the -- ordinarily, Article III would bar me from
20 suing for an award of money to be paid to somebody else.

21 JUSTICE BREYER: But that's because the
22 award of money to be paid for somebody else, their
23 absence of money didn't hurt you, but where there -- for
24 example, if you're a trustee, you certainly can sue to
25 get the beneficiary put back. There are dozens of cases

1 where you can sue to get somebody else paid back money,
2 and -- and why isn't this one of them?

3 But anyway, I'm not -- I don't want to
4 pursue it beyond a quick answer, because there are other
5 things in this case.

6 MR. SCHNAPPER: Well, as I say, I think -- I
7 think Article III would be -- would be a major obstacle
8 there.

9 CHIEF JUSTICE ROBERTS: I understood your
10 brief, and certainly the Government's brief, to take a
11 very expansive view of what type of retaliation would
12 give rise to a cause of action by the -- the directly
13 harmed employee.

14 Now you seem to be suggesting that that
15 employee would not have Article III standing to bring an
16 action.

17 MR. SCHNAPPER: I think we've got a
18 situation here in which this violates the rights of
19 Regalado, but Regalado's ability to herself bring a
20 lawsuit and get a remedy is limited, and that -- that --

21 JUSTICE GINSBURG: You're not taking the
22 position that she could not have sued for retaliation?
23 It would be awkward because he is -- it's his injury
24 that requires compensation. But are you saying that she
25 could not have brought a retaliation suit?

1 MR. SCHNAPPER: It's possible she could
2 bring a suit. The question would be whether she had
3 Article III standing to seek the remedy that she was
4 then seeking, which would often be a problem.

5 JUSTICE GINSBURG: Let me -- because your
6 time is running -- the Americans with Disabilities Act
7 has an explicit provision that allows suits by adversely
8 affected close relatives. You are essentially asking us
9 to read that provision, which is stated expressly in the
10 ADA --

11 MR. SCHNAPPER: If I might respond to that
12 briefly, you're referring to section 12112(b)(4) of the
13 ADA. That is a provision directed at a very different
14 problem, which is not associations between employees.
15 It's -- it's directed at employers who might refuse to
16 hire a worker because, for example, he had or she had a
17 child with a disability.

18 The EEOC's commentaries on the regs about
19 this explain it. It is -- it is not concerned with
20 employee relations. It's concerned with a
21 discrimination against a worker, prospective worker,
22 typically because they have a family member who has a
23 disability, and the employer has preconceptions about
24 whether they'll be good workers based on that.

25 CHIEF JUSTICE ROBERTS: Thank you --

1 JUSTICE SOTOMAYOR: But the Fair Housing Act
2 has a definition of injury that would include
3 Mr. Thompson, and that's not in this Act, that express
4 language.

5 MR. SCHNAPPER: That's correct, Your Honor.
6 That -- that statute was adopted somewhat later.

7 There are large numbers of statutes that
8 have rather general language like "person aggrieved."
9 But I think that, in the case of the Housing Act, that
10 language fairly describes the ordinary English meaning
11 of "aggrieved." Sometimes Congress does that.

12 There are other definitions in the Fair
13 Housing Act like that, like the definition of
14 "dwelling." It doesn't mean "dwelling"; it means
15 something else everywhere else in the U.S. Code. Just,
16 Congress, in that instance, decided to spell out what
17 everyone, I think, would have understood the word to
18 have meant.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Ms. Kruger.

21 ORAL ARGUMENT OF LEONDRA R. KRUGER,
22 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE
23 SUPPORTING THE PETITIONER

24 MS. KRUGER: Mr. Chief Justice, and may it
25 please the Court:

1 When an employer fires an employee as a
2 means of retaliating against a relative or close
3 associate who has filed an EEOC charge, the employee who
4 has been fired is entitled under Title VII to go to
5 court and seek appropriate remedies, even if he hasn't
6 himself engaged in protected activity.

7 JUSTICE ALITO: Can I ask you this?

8 CHIEF JUSTICE ROBERTS: You --

9 JUSTICE ALITO: Suppose --

10 CHIEF JUSTICE ROBERTS: Go ahead.

11 JUSTICE ALITO: Put yourself in the -- in
12 the shoes of an employer, and you -- you think -- you
13 want to take an adverse employment action against
14 employee A. You think you have good grounds for doing
15 that, but you want -- before you do it, you want to know
16 whether you're potentially opening yourself up to a
17 retaliation claim.

18 Now, what is the employer supposed to do
19 then? They say, well, let's -- we need to survey
20 everybody who is engaged in protected conduct, and now
21 we need to see whether this person who we're thinking of
22 taking the adverse employment action against has a,
23 quote, unquote, "close relationship" with any of those
24 people.

25 So what do you do? Do you call everybody in

1 from the company and you say, now, is -- you know,
2 was -- are these people dating? Did they once date?
3 Are they good friends?

4 What are you supposed to do?

5 MS. KRUGER: Justice Alito, we're not
6 arguing for a test that would create a kind of
7 protection for a so-called right of association under
8 Title VII. It's not the case that so long as somebody
9 is associated with somebody who has complained about
10 discrimination, they would be automatically protected
11 under the test that we're advocating.

12 The reason the relationship is important in
13 this case is because it tends to render plausible the
14 argument that there's a causal connection between the
15 adverse action visited on Thompson in this case --

16 JUSTICE ALITO: I understand that. I do
17 understand that, but I wish you'd -- I'd like you to
18 answer my question.

19 Does the employer have to keep a -- a
20 journal on the intimate or casual relationships between
21 all of its employees so that it knows what it's -- it's
22 opening itself up to when it wants to take an action
23 against somebody?

24 MS. KRUGER: No, I think it's actually quite
25 the contrary. I think if the employer doesn't know

1 about the relationship, any allegation like the
2 allegation that we have in this case simply isn't going
3 to be plausible. It isn't going to be a plausible
4 contention that there is a relationship between one
5 employee's protected activity and an adverse action
6 visited on the plaintiff.

7 CHIEF JUSTICE ROBERTS: Well, but you say --
8 but it won't be because of the degree of connection
9 between the -- the retaliated-against employee and the
10 means of retaliating.

11 I understood your brief. I'm just looking
12 at page 6. The limitation you propose is someone --
13 someone close to him. The anti-retaliation prohibition
14 "prohibits an employer from firing an employee because
15 someone close to him filed an EEOC complaint."

16 And I guess I have the same concern that
17 we've been discussing for a little while. How are we
18 supposed to tell, or how is an employer supposed to
19 tell, whether somebody is close enough or not?

20 MS. KRUGER: Well, if there's -- I don't
21 think that there's any reason for the Court to try to
22 fashion a hard-and-fast rule that identifies some
23 relationships that are close enough and others that
24 aren't.

25 The question in every case is the question

1 that's posed by this Court's standard in Burlington
2 Northern: Was this an action that a reasonable employee
3 would have considered materially adverse? Would it have
4 been deterred --

5 CHIEF JUSTICE ROBERTS: But Burlington
6 Northern, of course, is quite different, because you're
7 just -- you're dealing with the obvious plaintiff in
8 that case. You -- your -- your concern is confined to a
9 particular person.

10 In this hypothetical, it's an unlimited
11 universe that you don't have any reason to know where it
12 ends.

13 MS. KRUGER: Well, it's certainly going to
14 be important, whenever a plaintiff brings a suit like
15 this, both to establish that the employer knew of the
16 relationship and the relationship was one that is of
17 sufficient closeness that a reasonable employee might be
18 deterred from making or supporting a charge of
19 discrimination --

20 JUSTICE SOTOMAYOR: Why does that matter
21 under your theory? Let's assume the different --
22 slightly different, that they're just coworkers, but a
23 coworker who has expressed sympathy for the
24 discriminated person, has spoken about them in a
25 favorable light or has tried to defend them. Would that

1 person be protected from being fired --

2 MS. KRUGER: Well --

3 JUSTICE SOTOMAYOR: -- if the intent was to
4 retaliate against the person complaining of
5 discrimination by getting rid of their friend who's
6 supporting them?

7 MS. KRUGER: In that scenario, I think that
8 that person would have a cause of action but for a
9 different reason.

10 Under this Court's decision in Crawford,
11 that person would probably be considered to be a person
12 who had opposed the discrimination and, for that reason,
13 would themselves have engaged in a protected activity.

14 JUSTICE SOTOMAYOR: So an opposer is anyone
15 who -- who assists?

16 MS. KRUGER: That's our understanding of
17 what this Court held in -- in the Crawford case.

18 JUSTICE SOTOMAYOR: But let's assume they
19 did it just in private, but the employer knew it. They
20 overheard a conversation between the close friend and
21 the employee saying: I really am in support of you; I
22 know you've been treated unfairly. I like you; I like
23 you working here.

24 Would that person be close enough?

25 MS. KRUGER: I think that -- again, I think

1 that's a question that sort of turns on whether a jury
2 would find the reasonable employee in the position of
3 the person who had engaged in protected activity would
4 be deterred from making or supporting a charge of
5 discrimination if they knew the consequence was that
6 their best friend would be fired.

7 JUSTICE SCALIA: I don't want to have to go
8 before a jury as an employer all the time. I want -- I
9 want a safe harbor. I don't even want to mess with
10 people that might -- that might be buying a lawsuit.
11 And you're telling me, well, you know, I can't help you.
12 You have to go before a jury and say if this person is
13 close enough.

14 Why can't we say members of family and
15 fiancés? Would -- would that be a nice rule?

16 MS. KRUGER: Well, I think that it would be
17 an essentially arbitrary rule.

18 JUSTICE SCALIA: I know.

19 MS. KRUGER: At end of the day, when the
20 question is just the question that the Court assigned
21 under Burlington Northern, it's a question that turns on
22 the specific facts and context of the -- a specific
23 case.

24 JUSTICE SCALIA: Yes, but as --

25 MS. KRUGER: But I think to the extent that

1 the Court --

2 JUSTICE SCALIA: As the Chief said, it -- it
3 spreads much further than Burlington Northern.

4 Burlington Northern -- at least you know who it is you
5 have to be careful with --

6 MS. KRUGER: Well --

7 JUSTICE SCALIA: -- the person who's -- you
8 know, who has made a complaint. But -- but with what
9 you're proposing -- my goodness, I don't know who it is
10 I have to be careful with.

11 MS. KRUGER: Well, an employer always is
12 going to have to be careful to some degree not to visit
13 harm on an employee for retaliatory reasons.

14 JUSTICE ALITO: But you're -- you're a
15 reasonable person. What would you say is the degree of
16 closeness that's required?

17 MS. KRUGER: I don't think that there's any
18 way to fashion a hard-and-fast rule. The fact of the
19 matter is that most of the cases that have arisen that
20 have raised third-party retaliation arguments and which
21 are indeed cognizable under a number of -- of employment
22 statutes -- and I don't think Respondent disputes that
23 they are rightly so -- have largely concerned
24 relationships like the relationship between parent and
25 child, between husband and wife.

1 In one case under the Occupational Safety
2 and Health Act, it's -- it's involved a relationship
3 between very good friends in the workplace, whereas
4 there is a D.C. Court of Appeals decision that holds
5 that a merely professional relationship that doesn't
6 exhibit that degree of personal affection isn't
7 sufficiently close.

8 JUSTICE ALITO: Very good friends is enough?

9 MS. KRUGER: I think that a reasonable
10 employee who knows that the consequence of making or
11 supporting a charge of discrimination is going to be
12 that their best friend at work is going to be fired may
13 be deterred from engaging in protected activity.

14 JUSTICE KENNEDY: And in -- in your view,
15 could Regalado have brought this suit or brought a suit?

16 MS. KRUGER: Yes, Justice Kennedy, we do
17 think that Regalado could have brought a suit in her own
18 right, because she, too, is a person aggrieved within
19 the meaning of the statute.

20 JUSTICE KENNEDY: Well, if that is so, why
21 doesn't that vindicate the purposes of the Act?

22 MS. KRUGER: Well, for two reasons, Justice
23 Kennedy. First of all, Regalado here didn't sue, just
24 like most people in her position didn't sue, because
25 mostly people who are charged with the enforcement of

1 Title VII, as the private attorney generals under the
2 statutory scheme, will assume that the person who lost
3 their job, rather than the person who's --

4 JUSTICE KENNEDY: Well, but I -- I assume
5 that part of the thrust of your argument is that this
6 was designed to hurt this -- Regalado, that she was
7 hurt, that this was injurious; then you say, oh, well,
8 it's not important enough for her to sue, so somebody
9 that's more remote can sue. That's an odd rule.

10 MS. KRUGER: Well, I think in that
11 situation, she certainly -- she might sue, but she also
12 might assume that it ought to be her fiancé whose job
13 was actually lost who ought to carry the mantle --

14 CHIEF JUSTICE ROBERTS: Well, can't they
15 talk about that?

16 MS. KRUGER: They might --

17 CHIEF JUSTICE ROBERTS: I mean, it's not
18 like you're dealing with strangers. That's the whole
19 point. It's someone close to them.

20 I -- on the one hand you're saying, well,
21 you only have to worry about people really close, and
22 then your response to this line of questioning is, well,
23 the other person might not sue. They're going to sit
24 and say: Well, you sue. No, you sue.

25 MS. KRUGER: Well, the fact that they were

1 close at the time of the retaliatory act doesn't
2 necessarily mean that they might still be close at the
3 time that they need to decide whether or not to press
4 charges.

5 JUSTICE GINSBURG: But that's different from
6 the -- the point that you were first making, I thought,
7 was these are lay people; they don't have a lawyer; they
8 would naturally think that the person who was hurt would
9 be the one to sue.

10 MS. KRUGER: That's exactly right, Justice
11 Ginsburg. And I think the other --

12 CHIEF JUSTICE ROBERTS: Why is that a
13 problem? You're dealing with people who are close.
14 They assume the person who was hurt, the person
15 retaliated against, would sue. Well, why -- why don't
16 they? You said that person has a valid suit.

17 MS. KRUGER: They may not be close by the
18 time --

19 CHIEF JUSTICE ROBERTS: They're lay people.
20 They don't know about Article III.

21 MS. KRUGER: Well, that is certainly one
22 point. But I think even if they were perfectly informed
23 and the rule that this Court announced was one that put
24 Regalado in the driver's seat entirely with respect to
25 whether or not to pursue the cause of action under Title

1 VII, there would still be a problem with respect to
2 whether or not she could seek full relief, the relief
3 that's necessary to make him whole.

4 JUSTICE ALITO: Well, if somebody in
5 Thompson's position filed a charge with the EEOC,
6 couldn't the EEOC tell him you're the wrong person to
7 sue?

8 MS. KRUGER: It conceivably could, but that
9 is --

10 JUSTICE GINSBURG: But EEOC thinks he's the
11 right person.

12 MS. KRUGER: Well, EEOC certainly does think
13 that he's the right person. If this Court were to say
14 that the EEOC's wrong --

15 JUSTICE ALITO: If the rule is that -- if
16 the rule is otherwise, why couldn't they provide advice?

17 MS. KRUGER: The EEOC is ordinarily not in
18 the business of advising people who filed charges with
19 respect to charges that other people might file, for
20 confidentiality reasons, among other reasons.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Ms. Kruger.

23 Ms. Latherow.

24 ORAL ARGUMENT OF LEIGH GROSS LATHEROW

25 ON BEHALF OF THE RESPONDENT

1 MS. LATHEROW: Mr. Chief Justice, and may it
2 please the Court:

3 Eric Thompson does not allege that he was
4 discriminated against, but Title VII is a discrimination
5 statute. The only person who alleges that they were --
6 that was --

7 JUSTICE SOTOMAYOR: Do you -- if Regalado
8 had sued and said -- assume the fact; I know that you
9 claim it didn't happen -- they fired my fiancé to
10 retaliate against me.

11 MS. LATHEROW: Yes, ma'am.

12 JUSTICE SOTOMAYOR: Do you agree with your
13 adversary that she wouldn't have Article III standing to
14 seek reinstatement or back pay for her fiancé?

15 MS. LATHEROW: I don't -- I do think she
16 could seek reinstatement through the general equitable
17 relief of the court. In terms of back pay, I don't see
18 why she couldn't recover that for him. But in terms of
19 his coming back to work --

20 JUSTICE SOTOMAYOR: I would like to see that
21 case next.

22 MS. LATHEROW: I'm sorry --

23 JUSTICE SOTOMAYOR: And see what position
24 you take the next time.

25 (Laughter.)

1 JUSTICE SOTOMAYOR: Are you willing to
2 commit your company to that position today? I won't do
3 that to you.

4 MS. LATHEROW: Okay. Thank you, Your Honor.
5 (Laughter.)

6 MS. LATHEROW: No one is seeking damages for
7 Ms. Regalado in this case. Eric Thompson is here to use
8 her rights to recover for her alleged discrimination
9 based upon her conduct.

10 JUSTICE SCALIA: Yes, but if -- you know, if
11 you concede that she could have sued, then what's the
12 big deal? Then we still have the same problem, that the
13 employer doesn't know whom -- whom he has to treat with
14 kid gloves.

15 What's the difference whether, when the law
16 comes down on him, it's -- it's she who brings the suit
17 or her fiancé? He's worried about the suit. He still
18 doesn't know whom he has to be careful with.

19 MS. LATHEROW: I -- I agree that she can
20 bring the cause of action based upon Burlington and the
21 way that the language is written in Burlington. I think
22 it's very, very broad.

23 JUSTICE SCALIA: Right.

24 MS. LATHEROW: And so she has -- the
25 Burlington says she has to prove injury, that

1 retaliation without injury is not actionable. So she --

2 JUSTICE SCALIA: Okay. So that's your only
3 point, not that -- not that it's going to be very
4 difficult for employers to figure out who can be
5 protected and who can't? You abandon that -- that
6 issue?

7 MS. LATHEROW: No. I think if Regalado has
8 the right to bring a cause of action, it is going to be
9 very difficult.

10 JUSTICE SCALIA: Okay.

11 MS. LATHEROW: But I think that the way that
12 Burlington reads now, and that is whether someone would
13 be dissuaded, if that is harm to her, then she could
14 bring the cause of action. What's difficult about
15 applying the Burlington standard is you could have
16 someone who is dissuaded from filing a claim but may not
17 be harmed.

18 For example, if an employer announced a
19 proposition that it was going to fire an employee at
20 random whenever someone filed an EEOC charge, I might
21 not file a charge because I wouldn't want someone, even
22 someone who I didn't know, to be terminated, but I
23 wouldn't be injured in that scenario.

24 JUSTICE KENNEDY: So you're saying an
25 employer could adopt that policy?

1 MS. LATHEROW: I'm sorry.

2 JUSTICE KENNEDY: Are you saying an employer
3 could adopt that policy?

4 MS. LATHEROW: No, I'm not, because the
5 person who is discriminated against --

6 JUSTICE KENNEDY: So if an employer says,
7 now, if anybody makes a discrimination claim, we're
8 going to fire two other employees just to show you that
9 we run an efficient corporation out here, you say that
10 that is --

11 (Laughter.)

12 JUSTICE KENNEDY: -- that's proper or
13 improper?

14 MS. LATHEROW: It's improper, because the
15 person who was discriminated against would have the
16 right to sue. What clouds this case --

17 CHIEF JUSTICE ROBERTS: Wait, wait. Who is
18 the person who is discriminated against in the
19 hypothetical?

20 MS. LATHEROW: The person who -- the person
21 who filed the EEOC charge.

22 CHIEF JUSTICE ROBERTS: Okay.

23 MS. LATHEROW: What makes this case a little
24 cloudy --

25 JUSTICE KENNEDY: But the -- the persons --

1 the two people in the hypothetical that are fired can't
2 sue?

3 MS. LATHEROW: They cannot, not under -- not
4 under the discrimination provision of Title VII, because
5 they were not discriminated against based upon their
6 conduct. It wasn't anything that they did. And that's
7 what Burlington Northern says, that the anti-retaliation
8 provision of Title VII seeks to prevent harm to
9 individuals based upon what they do, based upon their
10 conduct. Those two hypotheticals --

11 JUSTICE SCALIA: Well, why -- why should --
12 in this World War II Nazi scenario --

13 (Laughter.)

14 JUSTICE SCALIA: Why would the -- the woman
15 who caused the random firing -- why would she bring a
16 lawsuit if these people are really nothing to her? She
17 just has a guilt of conscience or something? I mean, I
18 don't see why she'd bring the lawsuit. If it was her
19 fiancé, maybe, but --

20 MS. LATHEROW: She may not, but the EEOC
21 could.

22 JUSTICE SCALIA: She might not even like the
23 people who were fired.

24 (Laughter.)

25 MS. LATHEROW: In -- in which case, she

1 wouldn't have been injured --

2 JUSTICE SCALIA: Okay.

3 MS. LATHEROW: -- so she would have no
4 claim. And if you think about it, if she was not
5 discriminated against, then the other people could not
6 bring a claim for discrimination based upon her.

7 What makes this case a little cloudy is that
8 Eric Thompson is an employee as well, but he doesn't
9 bring this case as an employee. You could very well
10 have Eric Thompson as a spouse who is not employed. So,
11 for example, if Mr. Thompson had been just -- let's make
12 him a spouse, an even closer relationship than a fiancé,
13 and suppose that he -- his job -- he ran an animal
14 shelter in Carrollton, Kentucky, and it was a benevolent
15 organization, but his only source of revenue was a
16 generous gift from North American Stainless at
17 Christmastime.

18 And in 2003, after Regalado filed her claim
19 with the EEOC, filed her charge, North American
20 Stainless said: I'm not going to -- I'm not going to
21 give money this year to the animal shelter, to Mr.
22 Thompson, and I'm not going to do it because of
23 Regalado, who is our employee, because she filed a
24 charge of discrimination. I'm not going to do anything
25 to help her. I'm not going to do anything to help him.

1 In that case, under Mr. Schnapper's
2 standard, that any person aggrieved can bring a claim,
3 that person, who is not even an employee, because they
4 have some kind of injury could bring a claim.

5 CHIEF JUSTICE ROBERTS: Well, but his point
6 was that "aggrieved" includes not only injury but
7 wrongfulness. It may not be very -- I don't know, but
8 -- nice, but there's nothing wrongful about North
9 American Stainless deciding it's not going to fund an
10 animal shelter because of some other reason.

11 MS. LATHEROW: But it's -- but it's treating
12 Regalado with discrimination. It is treating her
13 differently than it might treat another employee because
14 she brought the cause of action. That would be
15 discrimination against Regalado because it's treating
16 her differently, but under their analysis --

17 JUSTICE BREYER: But you couldn't win on
18 that under Burlington. I mean, I think that there are
19 three separate issues here that have to be kept
20 straight.

21 No one can win in court unless they show
22 there was a human being -- in this case, the woman --
23 who suffered material -- who suffered serious harm,
24 serious harm. And serious harm is defined as materially
25 adverse action which might well have dissuaded a

1 reasonable worker from making or supporting a charge of
2 discrimination. So unless she suffered that kind of
3 serious harm, nobody wins.

4 Then the next question is suppose, in the
5 course of that, somebody else was hurt. And the person
6 aggrieved provision suggests, because of the history of
7 the word "aggrieved," that more than just she can bring
8 the lawsuit. That's our first question.

9 And then our third question is, if the
10 second question is yes, why can't the whole world do it?
11 At least the barber who doesn't get the haircut anymore
12 because the person fired doesn't have any money or the
13 landlord who can't get his rent or the -- you know, we
14 can go on indefinitely. Okay?

15 MS. LATHEROW: Yes.

16 JUSTICE BREYER: So why don't we get to the
17 second question?

18 The second question is -- the word
19 "aggrieved" has a history. I think it comes out of --
20 what's the case? It's -- I think it comes out of FCC v.
21 Sanders Brothers, which is a 1940 case, which said that
22 sometimes where there's a statute using the word "person
23 aggrieved," that that means that a person can bring a
24 lawsuit even though that person does not suffer injury
25 of the type that the statute was meant to prevent

1 against.

2 MS. LATHEROW: Yes, Your Honor.

3 JUSTICE BREYER: That was picked up by the

4 APA.

5 MS. LATHEROW: Yes, Your Honor.

6 JUSTICE BREYER: It says "person aggrieved."

7 MS. LATHEROW: Yes.

8 JUSTICE BREYER: So we have a statute that
9 says "person aggrieved." Maybe it means it in a
10 different sense, or maybe it means it in the APA sense,
11 Sanders Brothers sense, which means, in principle, this
12 plaintiff can sue. Now, you can argue against that if
13 you want, but, I mean, that's where I'm starting from.

14 And then we can have the third part, which
15 is: Is there a way of limiting this?

16 MS. LATHEROW: Yes, Your Honor.

17 JUSTICE BREYER: You don't have to. I'm --
18 just a question.

19 (Laughter.)

20 MS. LATHEROW: Yes, Your Honor.

21 JUSTICE BREYER: Quite a long question.

22 JUSTICE SCALIA: You don't even have to
23 agree with his description of what Sanders Brothers and
24 the APA say.

25 JUSTICE BREYER: No, you don't --

1 JUSTICE SCALIA: I don't.

2 JUSTICE BREYER: -- but it would be pretty
3 hard to do that, because it's in black and white here.

4 JUSTICE SCALIA: It -- isn't there a
5 doctrine of -- of the scope of persons protected under
6 the -- under a particular statute?

7 MS. LATHEROW: Absolutely, Your Honor.

8 JUSTICE SCALIA: And doesn't the word
9 "person aggrieved" bring that -- that whole lore along
10 with it?

11 MS. LATHEROW: I believe it does, Your
12 Honor. In --

13 JUSTICE GINSBURG: Can we go back to basics?
14 First, you agree that it is unlawful to retaliate -- to
15 retaliate against a person who filed a complaint, under
16 Title VII, by dismissing a close relative? It is an
17 unlawful employment practice; is it not?

18 MS. LATHEROW: I believe it -- it could meet
19 the standard under Burlington, yes, Your Honor.

20 CHIEF JUSTICE ROBERTS: Do you want to get
21 back to Justice Breyer's question? I don't think you
22 had a chance to respond to it.

23 MS. LATHEROW: Yes, Your Honor. Thank you.

24 Justice Breyer, I believe your question was
25 the scope and what does this term "aggrieved" mean? And

1 in the Sanders case, the Court said that this term
2 "aggrieved" means something broad, and it is intended to
3 bring a lot of people in.

4 But that case was interpreting the APA,
5 which has specific language. Just like in Trafficante,
6 the Court was considering the Fair Housing Act, both of
7 which have very different -- than the statute in
8 question. The APA says a person suffering a legal wrong
9 because of an agency action or adversely affected or
10 aggrieved by agency action within a meaning of a
11 relevant statute is entitled to judicial review. And
12 that's much broader than what we have in this case.

13 So we have to be looking at whether
14 prudential standing rules apply, and we know that
15 Congress legislates against that prudential standing
16 doctrine.

17 JUSTICE SCALIA: I'm not sure it's broader.
18 Why do you say it's broader? It says "adversely
19 affected" -- "adversely affected" -- or "aggrieved
20 within the meaning of the relevant statute." And it's
21 that language that says, well, the statute was only
22 meant to protect this group of people, and the fact that
23 somebody else was incidentally harmed would -- would not
24 be covered.

25 I don't know why you say that's broader. If

1 anything, it's narrower than what we have here. We just
2 say "aggrieved." It doesn't say within the meaning of a
3 relevant statute. You want us to read that into it?

4 MS. LATHEROW: Yes, I -- I believe it should
5 be read into Title VII, because that's the term
6 "aggrieved."

7 If someone -- if my husband calls and says,
8 oh, my gosh, we've been involved in a car accident, I
9 don't say: Honey, are you aggrieved? I say: Honey,
10 are you injured? And that's exactly -- exactly the
11 definition of "aggrieved" in the Fair Housing Act.

12 So Congress recognized, just 4 years later
13 after Title VII was adopted, when it enacted the Fair
14 Housing Act, and it defined "aggrieved" and said
15 aggrieved means or includes any person who claims to
16 have been injured. I mean, that's really --

17 JUSTICE GINSBURG: This is not -- this is
18 not an altogether novel question, because it has come up
19 under some other statutes. You are suggesting that this
20 is carrying "a person aggrieved" to new heights, but we
21 have both the NLRB and we have OSHA, and both of those
22 agencies have said that to take adverse action against a
23 close relative is an unfair employment practice, and
24 they've done that for some time; have they not?

25 MS. LATHEROW: Yes, Your Honor. And, again,

1 we're not saying that discriminating against an employee
2 in taking some kind of action against someone that they
3 loved is not an unlawful employment action. It can be.
4 That's not the position that North American Stainless is
5 taking. The question is if the person who was not
6 discriminated against, the person who was injured by the
7 action -- can they bring the cause of action?

8 JUSTICE SCALIA: Ms. --

9 MS. LATHEROW: And Title VII --

10 JUSTICE SCALIA: Go on. I'm sorry. Finish
11 your --

12 MS. LATHEROW: Oh, I'm sorry. Burlington
13 makes clear that the interests to be protected about with
14 the anti-retaliation provision, and that's what we're
15 talking about.

16 JUSTICE BREYER: Now, that's -- that's why
17 this is -- see, what Sanders Brothers did is the
18 interest to be protected against had nothing to do with
19 protecting competitors from competition. The Court says
20 that. And it says: But here is a competitor trying to
21 protect himself from competition; can he bring a suit?
22 Well, normally not. But Congress used the word "person
23 aggrieved" or "adversely affected," and, therefore, they
24 can. Now, that's the precedent that -- that -- that's
25 harmful to you. I'm not certain.

1 What about the third part? I have a
2 suggestion, and I'd like your response, because I'm just
3 playing with the thought: That the way to limit this is
4 to say that where a person is being used, person B is
5 hurt because -- in order to retaliate against person A,
6 okay? That that is a person aggrieved where person B is
7 being -- is hurt. The injury, the injury to B, not to
8 A, is the means of hurting A. But where it is a
9 consequence of hurting A, that doesn't fall within the
10 statute.

11 That gets rid of the bowling alley, it gets
12 rid of the landlord, it gets rid of the shareholder, it
13 gets rid of all the people who -- who are not the person
14 retaliated against, but they suffer injury because he
15 was retaliated against. It keeps the people who are
16 being used as a means. They can bring the lawsuit.

17 MS. LATHEROW: And, I'm sorry -- and your
18 question is?

19 JUSTICE BREYER: If, in fact, you set in
20 motion hurting Mrs. Smith, the child, the wife, even the
21 coworker, though that would be hard to get past
22 Burlington, if you do that in order to hurt A, to
23 retaliate against A, B can bring the suit. But if B is
24 a person who is injured only because you retaliated A,
25 that really wasn't the means, B can't bring a suit.

1 MS. LATHEROW: But, Your Honor,
2 respectfully, there's no basis in the statute to adopt
3 that rule.

4 JUSTICE BREYER: That is the problem with my
5 theory.

6 (Laughter.)

7 MS. LATHEROW: I'm glad --

8 JUSTICE BREYER: But there are -- I do -- I
9 think that it isn't so hard to find, in some of the
10 sources that Justice Ginsburg mentioned and others,
11 instances where the only kinds of suits that have been
12 allowed are where it was like a family member or was
13 being used as a means, and there never have been cases
14 where they allowed somebody who was just suffering
15 consequent injury. So it's quite possible I can be
16 borne out, though I think your criticism is a pretty
17 good one.

18 (Laughter.)

19 MS. LATHEROW: If we look at the kinds of
20 cases, for example, the Trafficante case, and the other
21 cases under the APA where Congress has used this broad
22 language or has interpreted the term "aggrieved"
23 broadly, those cases are -- the nature of those cases,
24 such as with Bennett v. Spear, the Environmental Species
25 Act, or the Blue Shield of Virginia case, which was a

1 Sherman Act case, the injury or the act, the violation,
2 the violation in those cases had the potential to -- to
3 inflict harm on a large group of people. So that, under
4 Trafficante there were over 8,000 people who lived in
5 the housing complex. Under Bennett v. Spear, with the
6 Environmental Species Act, there was more than one
7 person who was adversely affected or potentially was
8 adversely affected. In Blue Cross --

9 JUSTICE SCALIA: I don't see where you're
10 going. The employer has to fire three fiancés or a
11 larger number of --

12 (Laughter.)

13 MS. LATHEROW: No, my point is, is that if
14 we're looking at trying to compare Title VII and whether
15 or not we're going to impose some prudential limitations
16 on the "aggrieved" language, those statutes are
17 different than the statute that we have in question --

18 JUSTICE SCALIA: Well, you know, I don't
19 know what "aggrieved" means. I don't think anybody
20 does. Why shouldn't we be guided by the EEOC, which has
21 responsibility for implementing this statute? And
22 they've come up with their theory of what it means, and
23 we usually do accede to a reasonable theory proposed by
24 the implementing agency. Why -- why shouldn't we do
25 that?

1 MS. LATHEROW: Your Honor, this is not a
2 situation like Holowecki, where the Court is trying to
3 determine something about a procedure within the EEOC,
4 and that is what does it mean for a charge, because you
5 need some kind of special expertise. Here the Court is
6 the expert on interpreting.

7 And Thompson even disagrees with the EEOC.
8 The EEOC would say Regalado and Thompson could bring the
9 claim, but Thompson disagrees with that. So it's hard
10 for Thompson to come and say let's do what the EEOC says
11 when he disagrees with it himself.

12 JUSTICE GINSBURG: But it's not -- it's not
13 100 percent clear he does. He thought there might be an
14 Article III impediment. But in -- in your brief, I
15 think you suggested that the EEOC doesn't get a whole
16 lot of deference, and you -- but the other agencies that
17 I mentioned, where there is this claim that can be
18 brought by a close relative, the NLRB gets a lot of
19 deference; the Department of Labor, when we're dealing
20 with Occupational Safety and Health Administration or
21 the mine safety -- those agencies get a fair degree of
22 deference, and they've come to the same conclusion.

23 MS. LATHEROW: I -- I agree with that, Your
24 Honor. And in this -- this -- I don't know, but I
25 believe this to be true, that, for example, with the

1 NLRB and with OSHA, they have their own administrative
2 agencies where there would be hearings within those
3 agencies versus, with Title VII, the EEOC does not --
4 they're not a determiner of --

5 JUSTICE GINSBURG: But this is a -- an
6 interpretation of the substantive meaning of the
7 statute.

8 MS. LATHEROW: Yes, Your Honor.

9 JUSTICE GINSBURG: It doesn't have to do
10 with the evidence in a particular hearing. Can a person
11 who is a close relative sue on the grounds that he was
12 injured, deliberately so, in order to retaliate against
13 his spouse or his fiancée?

14 MS. LATHEROW: Yes, Your Honor. I -- I
15 don't know the distinction between relying on those --
16 those agencies versus the EEOC, but I do know that in
17 the Burlington Court, this Court noted that the EEOC
18 Compliance Manual -- and that's what we're talking
19 about, is the compliance manual. We're not talking
20 about a regulation. We're not talking something else,
21 but a compliance manual. So, in your hypothetical, I
22 don't know if we're talking about a compliance manual
23 from the NLRB or OSHA, but this is a compliance manual.

24 And, in Burlington, this Court noted that
25 there were inconsistencies regarding the

1 anti-retaliation within the compliance manual as to what
2 an adverse action meant or what would constitute an
3 adverse action.

4 JUSTICE SCALIA: What's the function of the
5 compliance manual? What does it do? Does it say
6 we'll -- we'll leave you alone if you do this?

7 MS. LATHEROW: I don't know --

8 JUSTICE SCALIA: But they have to leave him
9 alone. There's really nothing the EEOC can do to
10 somebody, right, except -- what, can the EEOC take them
11 to court?

12 MS. LATHEROW: Yes, they can.

13 JUSTICE SCALIA: Well, so can the Justice
14 Department, but we don't defer, thank goodness, to the
15 Justice Department's interpretation of the criminal law,
16 do we?

17 MS. LATHEROW: No.

18 JUSTICE SCALIA: No.

19 MS. LATHEROW: Your Honor, the concerns from
20 the employment side in this case are substantial. Under
21 Thompson's theory of the case, anyone who is injured --
22 or what he says is "aggrieved" -- anyone who receives
23 injury becomes a protected party. It's not just
24 bringing the lawsuit, but it's the protected party.

25 He's not even a silent opposer in this case.

1 There were -- there were concerns in Crawford about the
2 silent opposer and how do we know who they are. He says
3 it's based solely upon his relationship. He has engaged
4 in no protected conduct. The silent opposer, assuming
5 they can have -- bring a claim, at least engaged in some
6 conduct, but Thompson has no protection under this
7 statute. He could have very easily gotten the
8 protection.

9 In our joint appendix, we -- we've submitted
10 the brief that Eric -- or the memo that Eric Thompson
11 submitted to his supervisor just shortly before he was
12 terminated. He complains in that memo about his
13 compensation. And this is on page 22 and 23 of the
14 joint appendix. He says --

15 JUSTICE SCALIA: 22 and 23 of --

16 MS. LATHEROW: The joint appendix.

17 JUSTICE SCALIA: Okay.

18 MS. LATHEROW: He says in this memo: I am
19 disappointed in compensation this year.

20 At the time that he submitted this memo to
21 his supervisor, his fiancée had a complaint or a charge
22 with the EEOC pending. If he had only come forward in
23 this memo, Congress says you would have gotten
24 protection. If he had come forward and said, and by the
25 way, I think the way you treat my wife is

1 discriminatory, he would have gotten protection.

2 The -- the means by which employees get
3 protection under the statute are not very difficult.
4 All they have to do is to come forward and oppose.
5 Thompson clearly had an avenue and a means to do that
6 because he was taking -- he was taking action on his own
7 behalf to complain. So Thompson wants to bring a claim
8 under -- for Regalado, but he couldn't at that time come
9 forward and step up to the plate and say to the
10 employer, hey, I have a problem with this. But yet, he
11 wants to come into court and to claim his rights -- or
12 to claim her rights as a basis to bring this suit.

13 According to the EEOC statistics, in 1992,
14 when data first began being collected, 14.5 percent of
15 charges filed with the EEOC were retaliation claims. By
16 2009, that had risen by 31 percent.

17 In the Chamber's brief on page 2, they
18 submit -- or recite to a study that was published in
19 1994 saying that the average cost to defend an
20 employment litigation in 1994, when the study was
21 published, was \$120,000. In this case, what Thompson
22 would propose is to give protected party to a wide range
23 of people.

24 And with respect to the Government's
25 position today, at the Sixth Circuit Court of Appeals

1 they advocated that there would be no limitation, that
2 everyone would get the protection. That's a broad --
3 that is a lot of protection for people. And I can tell
4 you that employers who are faced with someone in a
5 protected party, they are -- employers are reluctant to
6 take adverse decisions against them; they're reluctant
7 to implement discipline; they will postpone implementing
8 that decision because they know that at some point
9 they're going to have to establish a legitimate
10 nondiscriminatory reason.

11 When we -- when we point out -- when we
12 point this out in our arguments, the response by Eric
13 Thompson as -- as to who gets the protection -- it's in
14 his footnote on page 4 at his reply. He says that "the
15 identity of individuals who might have a claim is a
16 function of the employer's own intent."

17 So, in other words, in order to determine
18 whether someone has protection, you have to look at the
19 employer's intent. So there are no protected parties
20 anymore until the employer can establish that they had
21 no intent -- or the other way. Everyone is a protected
22 party until the employer can show that he had no intent.
23 So what that means at the trial is that there will never
24 be --

25 JUSTICE BREYER: I'm not sure why the

1 employer's intent comes into this. A is the person who
2 is being retaliated against, and the issue would be:
3 Did the employer take such action against B as the A
4 would think, quite reasonably -- he'd have to reasonably
5 think that the action that the employer took was
6 retaliation, was meant to be -- whatever those words
7 were -- was -- might well have dissuaded a reasonable
8 worker from making or supporting a charge of
9 discrimination.

10 MS. LATHEROW: But the position that's set
11 forward by Thompson is you determine whether someone is
12 a protected party by looking at the intent of the
13 employer.

14 JUSTICE BREYER: Well, you'd have to show he
15 had a retaliatory intent, that's true, but that's true
16 however he retaliates.

17 MS. LATHEROW: That's true at trial, though,
18 after a plaintiff gets past his initial burden of proof.
19 And in this case the plaintiff is going to be able to
20 establish their burden of proof solely by saying that
21 they were a protected party and there was intent on the
22 other side. That is going to shift the burden to the
23 employer at the outset of the case to prove that there
24 was no retaliation, that there was no intent.

25 Your Honor, in conclusion, the Sixth Circuit

1 Court of Appeals was correct. The Sixth Circuit
2 determined that Eric Thompson, who was not discriminated
3 against, had no protection under the statute. This
4 Court clearly held in Burlington that the
5 anti-retaliation provision of Title VII is designed to
6 protect employees based upon what they do, based upon
7 their conduct. In this case, Eric Thompson engaged in
8 none of that behavior, he had no conduct, he did not
9 come forward on behalf of anyone; yet, he is here asking
10 for remedies, remedies that really should belong to
11 Regalado.

12 There's no reason that Regalado could not
13 have brought this case. There -- if the concern is that
14 employers are going to discriminate against employees,
15 the response to that is employers will still be held
16 liable and can still be held liable, and that is by the
17 person who is discriminated against from bringing the
18 suit.

19 We ask that the Sixth Circuit Court of
20 Appeals' decision be affirmed.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Schnapper, you have 3 minutes remaining.

23 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

24 ON BEHALF OF THE PETITIONER

25 MR. SCHNAPPER: Thank you, Your Honor. I

1 just have a couple quick points.

2 JUSTICE GINSBURG: Mr. Schnapper, in the
3 points that you're making, would you have an answer to
4 this point that was made about the burden of proof? The
5 argument was that you wouldn't have McDonnell Douglas
6 anymore, and you wouldn't know how to proceed on this
7 third-party claim.

8 MR. SCHNAPPER: Your Honor, McDonnell
9 Douglas -- the particular formula in McDonnell Douglas
10 was for hiring cases. The courts have readily adapted
11 it to other kinds of cases where the -- depending on the
12 nature of the claim, the plaintiff produces some minimal
13 amount of information, and the employer is required to
14 -- to articulate a reason. But I don't think it would
15 be a problem here.

16 Getting back to the question that was asked,
17 the --

18 JUSTICE SOTOMAYOR: I'm not sure why not.

19 MR. SCHNAPPER: What?

20 JUSTICE SOTOMAYOR: I'm not sure why not.
21 Plaintiff comes in and says: I engaged in protected
22 activity. They --

23 MR. SCHNAPPER: Well, probably -- the other
24 person did.

25 JUSTICE SOTOMAYOR: The other person did.

1 They retaliated against me.

2 How do you -- what -- then the employer
3 always has the burden to come forth and give an
4 explanation as to why? What would be -- the prima facie
5 case generally is they treated me differently than
6 similarly situated people, I complained at a time close
7 to my firing. There's --

8 MR. SCHNAPPER: Well, there has to be --

9 JUSTICE SOTOMAYOR: -- a whole series of
10 prima facie elements.

11 MR. SCHNAPPER: Right. There would have to
12 be some evidence that could plausibly give rise to -- to
13 an inference of motive. Even if I were complaining that
14 I was retaliated against, I can't just come in and say I
15 engaged in protected activity and was fired. I would
16 need more than that.

17 So you would need that additional amount
18 here, plus you'd also have to have some evidence to give
19 rise to an inference that this third party was selected
20 as a victim. So it wouldn't -- you could -- you could
21 adapt it.

22 But getting back to what was asked earlier,
23 there's no question the burden of proof is on the
24 plaintiff at all times to establish motive; and as we
25 get particularly far afield from family members, someone

1 closely associated with the plaintiff, it is going to be
2 difficult to -- to establish, to meet that burden.

3 CHIEF JUSTICE ROBERTS: What happens in
4 the --

5 MR. SCHNAPPER: These cases --

6 CHIEF JUSTICE ROBERTS: What happens in the
7 animal shelter hypothetical that your friend proposed?
8 You know that North American Stainless funds the animal
9 shelter of -- that -- where the wife works, and they cut
10 off their funding, as a means presumably of --

11 MR. SCHNAPPER: I don't -- I don't -- I
12 think this Court's decision in Burlington Northern makes
13 it clear that the plaintiff wouldn't have to be an
14 employee. In that case, one of the questions was, could
15 you retaliate against an FBI agent by not protecting his
16 wife from being murdered? I think that would be a
17 pretty good way to -- to keep people from complaining.

18 But I think the Burlington Northern
19 limitation would -- you know, would have some traction
20 in these cases. The animal shelter seems unlikely.

21 But the burden of proof is there. As the --
22 as the relationship becomes more attenuated, once you
23 get past family members, I think it's going to be
24 difficult, even at summary judgment, for these cases to
25 survive. And --

1 CHIEF JUSTICE ROBERTS: Thank you. Thank
2 you, counsel.

3 The case is submitted.

4 (Whereupon at 12:00 p.m., the case in the
5 above-entitled matter was submitted.)

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A				
abandon 31:5	40:13	alleges 29:5	2:9,12 3:3,7 6:23	13:11,18 14:25
ability 15:19	adversary 29:13	alley 42:11	7:6 8:8,13,16,16	15:1 29:14,17,19
able 51:19	adverse 12:7 18:13	allowed 43:12,14	10:4 17:21 19:14	38:13,21 53:16
above-entitled 1:11	18:22 19:15 20:5	allows 16:7	26:5 28:24 52:23	54:22
56:5	21:3 35:25 40:22	altogether 40:18	53:5	background 9:1
absence 14:23	47:2,3 50:6	American 1:6 3:4	arguments 24:20	bar 14:19
Absolutely 38:7	adversely 16:7 39:9	34:16,19 35:9 41:4	50:12	barber 36:11
abut 41:13	39:18,19 41:23	55:8	arisen 24:19	based 16:24 30:9,20
accede 44:23	44:7,8	Americans 16:6	Article 5:1,4 6:24	33:5,9,9 34:6 48:3
accident 40:8	advice 28:16	amicus 1:19 2:8	13:24 14:12,19	52:6,6
act 4:12 6:18 16:6	advising 28:18	17:22	15:7,15 16:3 27:20	basics 38:13
17:1,3,9,13 25:2	advocated 50:1	amount 53:13 54:17	29:13 45:14	basis 3:24 9:19 43:2
25:21 27:1 39:6	advocating 19:11	amounts 13:21	articulate 53:14	49:12
40:11,14 43:25	affection 25:6	analysis 35:16	articulated 7:19	began 49:14
44:1,1,6	affirmed 52:20	animal 34:13,21	Ashland 1:21	behalf 1:15,19,21
Acting 1:17	afield 54:25	35:10 55:7,8,20	aside 9:4	2:4,7,11,14 3:8
action 3:25 7:20	agencies 40:22	announced 27:23	asked 53:16 54:22	17:22 28:25 49:7
9:13 10:8,9,12,20	45:16,21 46:2,3,16	31:18	asking 8:7 16:8 52:9	52:9,24
10:23 11:4,18 12:7	agency 39:9,10	answer 15:4 19:18	assigned 23:20	behavior 52:8
15:12,16 18:13,22	44:24	53:3	assists 22:15	believe 5:25 6:1
19:15,22 20:5 21:2	agent 55:15	anti-retaliation	associate 18:3	38:11,18,24 40:4
22:8 27:25 30:20	aggrieved 6:21,25	20:13 33:7 41:14	associated 19:9	45:25
31:8,14 35:14,25	7:22 8:2,13 9:3,6,6	47:1 52:5	55:1	belong 52:10
39:9,10 40:22 41:2	9:15,25 10:6,18	anybody 3:23 32:7	association 19:7	beneficiary 14:25
41:3,7,7 47:2,3	11:3,3 17:8,11	44:19	associations 16:14	benevolent 34:14
49:6 51:3,5	25:18 35:2,6 36:6	anymore 36:11	assume 21:21 22:18	Bennett 43:24 44:5
actionable 31:1	36:7,19,23 37:6,9	50:20 53:6	26:2,4,12 27:14	best 23:6 25:12
actions 4:10	38:9,25 39:2,10,19	anyway 14:13 15:3	29:8	beyond 15:4
activity 3:20 4:3,7	40:2,6,9,11,14,15	APA 37:4,10,24	assumed 10:15	big 30:12
18:6 20:5 22:13	40:20 41:23 42:6	39:4,8 43:21	assuming 48:4	black 38:3
23:3 25:13 53:22	43:22 44:16,19	appeals 10:14,14,17	attenuated 55:22	Blue 43:25 44:8
54:15	47:22	25:4 49:25 52:1,20	attorney 26:1	borne 43:16
ADA 16:10,13	agree 29:12 30:19	APPEARANCES	automatically 19:10	bowling 42:11
adapt 54:21	37:23 38:14 45:23	1:14	avenue 49:5	Breyer 13:8,10 14:1
adapted 53:10	agreed 11:21	appears 10:14	average 49:19	14:4,15,21 35:17
additional 54:17	ahead 18:10	appendix 48:9,14,16	award 5:5,6 14:20	36:16 37:3,6,8,17
address 8:7	Alito 6:20,23 7:5,8	applicable 4:4 8:22	14:22	37:21,25 38:2,24
Administration	7:11,15,23 8:8	apply 39:14	awkward 15:23	41:16 42:19 43:4,8
45:20	11:1,5 12:2,16	applying 31:15	a.m 1:13 3:2	50:25 51:14
administrative 46:1	18:7,9,11 19:5,16	appropriate 18:5		Breyer's 38:21
adopt 31:25 32:3	24:14 25:8 28:4,15	arbitrary 23:17	B	brief 15:10,10 20:11
43:2	allegation 20:1,2	argue 37:12	B 13:13 42:4,6,7,23	45:14 48:10 49:17
adopted 9:1 17:6	allege 4:6 29:3	arguing 19:6	42:23,25 51:3	briefly 16:12
	alleged 11:8 30:8	argument 1:12 2:2,5	back 5:5 10:13	bright 13:2

<p>bring 4:24 10:24 13:12 15:15,19 16:2 30:20 31:8,14 33:15,18 34:6,9 35:2,4 36:7,23 38:9 39:3 41:7,21 42:16,23,25 45:8 48:5 49:7,12 bringing 47:24 52:17 brings 21:14 30:16 broad 8:16 30:22 39:2 43:21 50:2 broader 8:2 9:7,8 39:12,17,18,25 broadly 43:23 Brothers 36:21 37:11,23 41:17 brought 15:25 25:15 25:15,17 35:14 45:18 52:13 burden 51:18,20,22 53:4 54:3,23 55:2 55:21 Burlington 11:17 12:3 13:1,7 21:1,5 23:21 24:3,4 30:20 30:21,25 31:12,15 33:7 35:18 38:19 41:12 42:22 46:17 46:24 52:4 55:12 55:18 business 28:18 buying 23:10</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 13:13 cafeteria 12:19 call 18:25 calls 40:7 car 40:8 care 9:21 careful 24:5,10,12 30:18</p>	<p>Carrollton 34:14 carry 26:13 carrying 9:15 40:20 case 3:4,21 5:13 8:1 9:23 12:10 15:5 17:9 19:8,13,15 20:2,25 21:8 22:17 23:23 25:1 29:21 30:7 32:16,23 33:25 34:7,9 35:1 35:22 36:20,21 39:1,4,12 43:20,25 44:1 47:20,21,25 49:21 51:19,23 52:7,13 54:5 55:14 56:3,4 cases 8:6 12:11 14:25 24:19 43:13 43:20,21,23,23 44:2 53:10,11 55:5 55:20,24 cast 12:25 casual 19:20 causal 19:14 cause 8:24 9:1 10:8 10:8,11,20,22 11:4 15:12 22:8 27:25 30:20 31:8,14 35:14 41:7 caused 33:15 certain 10:23 41:25 certainly 5:3,14 14:24 15:10 21:13 26:11 27:21 28:12 Chamber's 49:17 chance 38:22 charge 6:9 18:3 21:18 23:4 25:11 28:5 31:20,21 32:21 34:19,24 36:1 45:4 48:21 51:8 charged 25:25 charges 27:4 28:18</p>	<p>28:19 49:15 Chief 3:3,9 15:9 16:25 17:19,24 18:8,10 20:7 21:5 24:2 26:14,17 27:12,19 28:21 29:1 32:17,22 35:5 38:20 52:21 55:3,6 56:1 child 14:5 16:17 24:25 42:20 Christmastime 34:17 Circuit 49:25 51:25 52:1,19 circumstances 5:13 8:5 civil 14:8 claim 18:17 29:9 31:16 32:7 34:4,6 34:18 35:2,4 45:9 45:17 48:5 49:7,11 49:12 50:15 53:7 53:12 claims 40:15 49:15 clear 10:16 12:13,17 41:13 45:13 55:13 clearly 10:11 11:4 49:5 52:4 close 16:8 18:2,23 20:13,15,19,23 22:20,24 23:13 25:7 26:19,21 27:1 27:2,13,17 38:16 40:23 45:18 46:11 54:6 closely 55:1 closeness 21:17 24:16 closer 34:12 clouds 32:16 cloudy 32:24 34:7 Code 17:15 cognizable 24:21</p>	<p>collected 49:14 come 7:23,24 8:19 40:18 44:22 45:10 45:22 48:22,24 49:4,8,11 52:9 54:3,14 comes 30:16 36:19 36:20 51:1 53:21 coming 29:19 commentaries 16:18 commit 30:2 company 5:10,16,23 6:12,13 11:10 19:1 30:2 company's 11:15 compare 44:14 compensation 15:24 48:13,19 competition 41:19 41:21 competitor 41:20 competitors 41:19 complain 49:7 complained 3:13 19:9 54:6 complaining 6:6 22:4 54:13 55:17 complains 9:23 48:12 complaint 4:6 6:7 10:5 11:21 20:15 24:8 38:15 48:21 complex 44:5 compliance 46:18 46:19,21,22,23 47:1,5 concede 30:11 conceivably 28:8 concern 9:9 20:16 21:8 52:13 concerned 16:19,20 24:23 concerns 47:19 48:1</p>	<p>conclusion 45:22 51:25 conduct 4:2 11:10 12:6,20,22 18:20 30:9 33:6,10 48:4 48:6 52:7,8 confidentiality 28:20 confined 21:8 confusion 13:11 Congress 9:3 17:11 17:16 39:15 40:12 41:22 43:21 48:23 connection 19:14 20:8 conscience 33:17 consequence 23:5 25:10 42:9 consequent 43:15 considered 21:3 22:11 considering 39:6 constitute 47:2 Constitution 6:25 8:15 contend 9:2 contention 11:22 20:4 context 23:22 continuing 5:9 contrary 19:25 conversation 22:20 corporation 32:9 correct 8:18,19 17:5 52:1 cost 49:19 counsel 17:19 52:21 56:2 couple 53:1 course 5:14 9:8 21:6 36:5 court 1:1,12 3:10 10:14,14,17 17:25 18:5 20:21 22:17</p>
---	---	--	---	---

<p>23:20 24:1 25:4 27:23 28:13 29:2 29:17 35:21 39:1,6 41:19 45:2,5 46:17 46:17,24 47:11 49:11,25 52:1,4,19 courts 8:4 53:10 Court's 5:1 7:1 11:16 21:1 22:10 55:12 covered 39:24 covers 9:9 coworker 21:23 42:21 coworkers 21:22 Crawford 22:10,17 48:1 create 19:6 crime 14:8 criminal 47:15 criticism 43:16 Cross 44:8 crucial 14:16 cure 13:14,15 14:9 curiae 1:20 2:8 17:22 cut 8:24 55:9 cutting 13:5</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 13:13 damages 5:6 30:6 data 49:14 date 19:2 dated 12:21 dating 19:2 daughter 4:22 day 12:19 23:19 deal 30:12 dealing 21:7 26:18 27:13 45:19 December 1:9 decide 27:3 decided 17:16</p>	<p>deciding 35:9 decision 7:1 11:16 22:10 25:4 50:8 52:20 55:12 decisions 50:6 defend 21:25 49:19 defer 47:14 deference 45:16,19 45:22 defined 35:24 40:14 definition 17:2,13 40:11 definitions 17:12 degree 20:8 24:12 24:15 25:6 45:21 deliberately 9:14 46:12 Department 1:18 45:19 47:14 Department's 47:15 depend 5:12 depending 53:11 Deputy 1:17 describes 17:10 description 37:23 designed 26:6 52:5 determination 11:23 determine 45:3 50:17 51:11 determined 52:2 determiner 46:4 deterred 21:4,18 23:4 25:13 difference 30:15 different 6:2,17 8:5 16:13 21:6,21,22 22:9 27:5 37:10 39:7 44:17 differently 35:13,16 54:5 difficult 31:4,9,14 49:3 55:2,24 directed 16:13,15 directly 15:12</p>	<p>Disabilities 16:6 disability 16:17,23 disagrees 45:7,9,11 disappointed 48:19 discipline 50:7 discriminate 52:14 discriminated 13:13 13:15 21:24 29:4 32:5,15,18 33:5 34:5 41:6 52:2,17 discriminating 13:17 41:1 discrimination 3:14 3:19 4:2 6:6 10:5 13:21 16:21 19:10 21:19 22:5,12 23:5 25:11 29:4 30:8 32:7 33:4 34:6,24 35:12,15 36:2 51:9 discriminatory 49:1 discussing 20:17 dismisses 5:19 dismissing 6:18 38:16 disputes 24:22 dissuade 11:20 dissuaded 31:13,16 35:25 51:7 distinction 46:15 doctrine 38:5 39:16 doing 18:14 Douglas 53:5,9,9 dozens 14:25 draw 7:15 driver's 27:24 dwelling 17:14,14 D.C 1:8,19 25:4</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 earlier 54:22 easily 4:3 48:7 EEOC 3:13 18:3 20:15 28:5,6,10,12</p>	<p>28:17 31:20 32:21 33:20 34:19 44:20 45:3,7,8,10,15 46:3,16,17 47:9,10 48:22 49:13,15 EEOC's 16:18 28:14 efficient 32:9 element 9:12 elements 3:16 13:16 54:10 else's 3:24 employed 5:10 34:10 employee 5:19,21 5:24 11:20 15:13 15:15 16:20 18:1,3 18:14 20:9,14 21:2 21:17 22:21 23:2 24:13 25:10 31:19 34:8,9,23 35:3,13 41:1 55:14 employees 16:14 19:21 32:8 49:2 52:6,14 employee's 20:5 employer 5:18,19 16:23 18:1,12,18 19:19,25 20:14,18 21:15 22:19 23:8 24:11 30:13 31:18 31:25 32:2,6 44:10 49:10 50:20,22 51:3,5,13,23 53:13 54:2 employers 16:15 31:4 50:4,5 52:14 52:15 employer's 50:16 50:19 51:1 employment 12:7 18:13,22 24:21 38:17 40:23 41:3 47:20 49:20</p>	<p>enacted 40:13 ends 21:12 enforcement 25:25 engaged 3:20 4:3,7 4:14,17 12:5,20,21 18:6,20 22:13 23:3 48:3,5 52:7 53:21 54:15 engaging 11:9 25:13 English 9:7 17:10 entirely 10:16 27:24 entitled 11:22 18:4 39:11 Environmental 43:24 44:6 equitable 29:16 Eric 1:3,15 2:3,13 3:7 29:3 30:7 34:8 34:10 48:10,10 50:12 52:2,7,23 ESQ 1:15,17,21 2:3 2:6,10,13 essentially 16:8 23:17 establish 21:15 50:9 50:20 51:20 54:24 55:2 events 5:15 everybody 18:20,25 evidence 3:22 46:10 54:12,18 evidentiary 11:23 exactly 27:10 40:10 40:10 example 14:24 16:16 31:18 34:11 43:20 45:25 exhibit 25:6 exists 13:7 expansive 15:11 expert 45:6 expertise 45:5 explain 16:19 explanation 54:4</p>
---	---	--	--	---

<p>explicit 16:7 express 10:22 17:3 expressed 21:23 expressly 16:9 extent 23:25</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>faced 50:4 facie 54:4,10 fact 6:24 24:18 26:25 29:8 39:22 42:19 facts 6:12 23:22 fair 9:5 17:1,12 39:6 40:11,13 45:21 fairly 4:6 17:10 fall 42:9 family 4:5,10 16:22 23:14 43:12 54:25 55:23 far 7:2,6,12,14,17 7:18 8:1,10 54:25 fashion 20:22 24:18 favorable 21:25 FBI 55:15 FCC 36:20 Federal 4:8,11 fellow 4:14 fiancé 3:23,24 4:5 11:6 12:9 26:12 29:9,14 30:17 33:19 34:12 fiancée 46:13 48:21 fiancés 23:15 44:10 figure 31:4 file 28:19 31:21 filed 18:3 20:15 28:5 28:18 31:20 32:21 34:18,19,23 38:15 49:15 filing 31:16 find 23:2 43:9 Finish 41:10 fire 3:23 11:15</p>	<p>31:19 32:8 44:10 fired 9:25,25 11:9 18:4 22:1 23:6 25:12 29:9 33:1,23 36:12 54:15 fires 18:1 firing 11:11 20:14 33:15 54:7 first 3:18 8:24 11:13 13:11 25:23 27:6 36:8 38:14 49:14 football 9:15,16 footnote 10:16 50:14 forbidden 3:16 formula 53:9 forth 54:3 forward 48:22,24 49:4,9 51:11 52:9 frankly 9:7 friend 11:11 12:18 22:5,20 23:6 25:12 55:7 friends 11:7 19:3 25:3,8 full 28:2 function 47:4 50:16 fund 35:9 funding 55:10 funds 55:8 further 24:3 future 9:11</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 game 9:16 general 1:18 17:8 29:16 generally 7:4 54:5 generals 26:1 generous 34:16 getting 5:2 22:5 53:16 54:22 gift 34:16</p>	<p>Ginsburg 4:15 6:3 10:3 15:21 16:5 27:5,11 28:10 38:13 40:17 43:10 45:12 46:5,9 53:2 give 13:18 15:12 34:21 49:22 54:3 54:12,18 glad 43:7 gloves 30:14 go 3:23 7:6,12,13,17 8:1,10 10:13 12:17 12:23,24 13:11 18:4,10 23:7,12 36:14 38:13 41:10 goes 7:2,19 going 14:2 20:2,3 21:13 24:12 25:11 25:12 26:23 31:3,8 31:19 32:8 34:20 34:20,22,24,25 35:9 44:10,15 50:9 51:19,22 52:14 55:1,23 good 4:23 11:7 12:18 16:24 18:14 19:3 25:3,8 43:17 55:17 goodness 24:9 47:14 gosh 40:8 gotten 5:6,8 48:7,23 49:1 Government 7:17 7:19 Government's 15:10 49:24 GROSS 1:21 2:10 28:24 ground 5:20,22 grounds 5:9 18:14 46:11 group 39:22 44:3 guess 20:16</p>	<p>guided 44:20 guilt 33:17</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>haircut 36:11 hand 26:20 happen 29:9 happened 9:22 11:8 happens 55:3,6 harbor 23:9 hard 38:3 42:21 43:9 45:9 hard-and-fast 20:22 24:18 harm 9:22 24:13 31:13 33:8 35:23 35:24,24 36:3 44:3 harmed 15:13 31:17 39:23 harmful 41:25 Health 25:2 45:20 hear 3:3 hearing 46:10 hearings 46:2 heights 40:20 held 22:17 52:4,15 52:16 help 12:16,16 23:11 34:25,25 helpful 8:9 hey 49:10 hire 16:16 hiring 53:10 history 36:6,19 holds 25:4 Holowecki 45:2 Honey 40:9,9 Honor 4:25 6:1 7:25 8:20 17:5 30:4 37:2,5,16,20 38:7 38:12,19,23 40:25 43:1 45:1,24 46:8 46:14 47:19 51:25 52:25 53:8</p>	<p>housing 17:1,9,13 39:6 40:11,14 44:5 human 35:22 hurt 5:11 10:7 14:4 14:23 26:6,7 27:8 27:14 36:5 42:5,7 42:22 hurting 42:8,9,20 husband 5:5 24:25 40:7 hypothetical 6:11 21:10 32:19 33:1 46:21 55:7 hypotheticals 33:10</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>identifies 20:22 identity 50:15 II 33:12 III 5:1,4 6:24 13:25 14:12,19 15:7,15 16:3 27:20 29:13 45:14 illegal 6:17 illegality 6:18 imagine 12:10 impediment 45:14 impermissible 5:20 5:20 implement 50:7 implementing 44:21 44:24 50:7 implications 8:17 importance 14:18 important 11:25 19:12 21:14 26:8 impose 44:15 improper 10:1 32:13 32:14 inability 5:10 incidentally 39:23 include 12:18,18 17:2 includes 35:6 40:15</p>
--	--	--	---	--

<p>inconsistencies 46:25 indefinitely 36:14 individual 3:20 individuals 10:23,24 33:9 50:15 inference 54:13,19 inflict 44:3 information 53:13 informed 27:22 initial 6:9 51:18 injured 5:22 9:8,10 9:10,14 10:7 31:23 34:1 40:10,16 41:6 42:24 46:12 47:21 injuries 8:25 injurious 26:7 injury 6:24 7:9 13:20 15:23 17:2 30:25 31:1 35:4,6 36:24 42:7,7,14 43:15 44:1 47:23 instance 14:11 17:16 instances 43:11 intended 39:2 intent 22:3 50:16,19 50:21,22 51:1,12 51:15,21,24 interest 41:18 interests 41:13 interpretation 46:6 47:15 interpreted 8:11 43:22 interpreting 39:4 45:6 intimate 19:20 invoked 8:6 involved 25:2 40:8 involves 9:13 issue 9:13 31:6 51:2 issues 35:19</p>	<p style="text-align: center;">J</p> <hr/> <p>job 26:3,12 34:13 joint 48:9,14,16 journal 19:20 judge 4:11 14:9 judge's 14:6 judgment 55:24 judicial 39:11 jurisprudence 5:1 jury 12:23,25 23:1,8 23:12 Justice 1:18 3:3,9 4:13,15,18,20,23 5:8,18 6:3,10,20 6:23 7:5,8,11,15 7:23 8:8 10:3 11:1 11:5 12:2,16 13:8 13:9,10 14:1,4,15 14:21 15:9,21 16:5 16:25 17:1,19,24 18:7,8,9,10,11 19:5,16 20:7 21:5 21:20 22:3,14,18 23:7,18,24 24:2,7 24:14 25:8,14,16 25:20,22 26:4,14 26:17 27:5,10,12 27:19 28:4,10,15 28:21 29:1,7,12,20 29:23 30:1,10,23 31:2,10,24 32:2,6 32:12,17,22,25 33:11,14,22 34:2 35:5,17 36:16 37:3 37:6,8,17,21,22 37:25 38:1,2,4,8 38:13,20,21,24 39:17 40:17 41:8 41:10,16 42:19 43:4,8,10 44:9,18 45:12 46:5,9 47:4 47:8,13,13,15,18 48:15,17 50:25 51:14 52:21 53:2</p>	<p>53:18,20,25 54:9 55:3,6 56:1</p> <p style="text-align: center;">K</p> <hr/> <p>keep 19:19 55:17 keeps 42:15 Kennedy 5:8,18 6:10 25:14,16,20 25:23 26:4 31:24 32:2,6,12,25 Kentucky 1:21 34:14 kept 35:19 kid 30:14 kind 13:20,23 19:6 35:4 36:2 41:2 45:5 kinds 8:5 43:11,19 53:11 knew 21:15 22:19 23:5 knocks 9:14 know 13:5 14:15 18:15 19:1,25 21:11 22:22 23:11 23:18 24:4,8,9 27:20 29:8 30:10 30:13,18 31:22 35:7 36:13 39:14 39:25 44:18,19 45:24 46:15,16,22 47:7 48:2 50:8 53:6 55:8,19 knows 19:21 25:10 Kruger 1:17 2:6 17:20,21,24 19:5 19:24 20:20 21:13 22:2,7,16,25 23:16 23:19,25 24:6,11 24:17 25:9,16,22 26:10,16,25 27:10 27:17,21 28:8,12 28:17,22</p>	<p style="text-align: center;">L</p> <hr/> <p>L 1:3 Labor 45:19 landlord 36:13 42:12 language 4:3 17:4,8 17:10 30:21 39:5 39:21 43:22 44:16 large 17:7 44:3 largely 24:23 larger 44:11 Latherow 1:21 2:10 28:23,24 29:1,11 29:15,22 30:4,6,19 30:24 31:7,11 32:1 32:4,14,20,23 33:3 33:20,25 34:3 35:11 36:15 37:2,5 37:7,16,20 38:7,11 38:18,23 40:4,25 41:9,12 42:17 43:1 43:7,19 44:13 45:1 45:23 46:8,14 47:7 47:12,17,19 48:16 48:18 51:10,17 Laughter 29:25 30:5 32:11 33:13,24 37:19 43:6,18 44:12 law 7:18,21 30:15 47:15 lawsuit 15:20 23:10 33:16,18 36:8,24 42:16 47:24 lawsuits 10:25 lawyer 27:7 lay 27:7,19 leave 47:6,8 left 5:15 legal 39:8 legislates 39:15 legitimate 9:16 50:9 LEIGH 1:21 2:10 28:24</p>	<p>LEONDRA 1:17 2:6 17:21 lesser 12:11 let's 18:19 21:21 22:18 34:11 45:10 liable 52:16,16 light 21:25 limit 3:15 42:3 limitation 20:12 50:1 55:19 limitations 8:21 44:15 limited 15:20 limiting 10:2 11:25 37:15 line 7:15 12:13,17 13:2 26:22 litigation 49:20 little 20:17 32:23 34:7 live 5:16 lived 44:4 long 19:8 37:21 look 43:19 50:18 looking 20:11 39:13 44:14 51:12 lore 38:9 lost 5:23 26:2,13 lot 8:16,25 39:3 45:16,18 50:3 loved 41:3 lovely 4:21 lower 8:3 LP 1:6 lunch 12:19</p> <p style="text-align: center;">M</p> <hr/> <p>major 15:7 making 14:11 21:18 23:4 25:10 27:6 36:1 51:8 53:3 man 13:16 mantle 26:13 manual 46:18,19,21</p>
--	---	--	---	---

<p>46:22,23 47:1,5 married4:15,19,20 material 35:23 materially 21:3 35:24 matter1:11 13:7 21:20 24:19 56:5 ma'am 29:11 McCready 7:20 McDonnell 53:5,8,9 mean 8:12 12:25 14:18 17:14 26:17 27:2 33:17 35:18 37:13 38:25 40:16 45:4 meaning 6:21 17:10 25:19 39:10,20 40:2 46:6 means 6:18 8:13 17:14 18:2 20:10 36:23 37:9,10,11 39:2 40:15 42:8,16 42:25 43:13 44:19 44:22 49:2,5 50:23 55:10 meant 9:3,4 17:18 36:25 39:22 47:2 51:6 meet 38:18 55:2 meetings 13:6,6 member4:5,11 16:22 43:12 members 23:14 54:25 55:23 memo 48:10,12,18 48:20,23 mentioned43:10 45:17 merely 25:5 mess 23:9 met 10:24 11:24 method 3:12 7:21 methods 13:4 middle 9:16 10:4</p>	<p>mind 13:12 mine 45:21 minimal 53:12 minutes 52:22 money 14:2,20,22 14:23 15:1 34:21 36:12 motion 42:20 motive 11:15 54:13 54:24 murdered55:16</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 narrower9:7 40:1 naturally 27:8 nature 43:23 53:12 Nazi 33:12 near 5:16 necessarily 27:2 necessary 8:14,15 28:3 need7:11,13,17 8:1 8:10 18:19,21 27:3 45:5 54:16,17 needed5:3 never43:13 50:23 new40:20 nice 23:15 35:8 NLRB 40:21 45:18 46:1,23 nondiscriminatory 50:10 normally 13:19 41:22 North 1:6 3:4 34:16 34:19 35:8 41:4 55:8 Northern 11:17 12:3 13:1,7 21:2,6 23:21 24:3,4 33:7 55:12,18 noted46:17,24 Notwithstanding</p>	<p>10:19 novel40:18 number4:8 24:21 44:11 numbers 17:7</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objection 9:20 obstacle 15:7 obvious 21:7 Occupational 25:1 45:20 occurred3:19 occurs 6:18 odd 26:9 offense 13:2 official 4:11,12 oh 4:20,23 26:7 40:8 41:12 okay 30:4 31:2,10 32:22 34:2 36:14 42:6 48:17 once 12:21 19:2 55:22 ongoing 5:10 opening 18:16 19:22 oppose 49:4 opposed3:14 22:12 opposer22:14 47:25 48:2,4 opposing 13:22 oral 1:11 2:2,5,9 3:7 17:21 28:24 order8:10 14:7 42:5 42:22 46:12 50:17 ordinarily 14:19 28:17 ordinary 9:7 17:10 organization 34:15 OSHA 40:21 46:1 46:23 ought 8:11 26:12,13 outset 51:23</p>	<p>overheard 22:20</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 20:12 48:13 49:17 50:14 paid 14:20,22 15:1 parent 24:24 part 26:5 37:14 42:1 particular 3:25 5:13 21:9 38:6 46:10 53:9 particularly 54:25 parties 50:19 party 47:23,24 49:22 50:5,22 51:12,21 54:19 pay 5:5 13:18 29:14 29:17 pending 48:22 people 9:9 18:24 19:2 23:10 25:24 25:25 26:21 27:7 27:13,19 28:18,19 33:1,16,23 34:5 39:3,22 42:13,15 44:3,4 49:23 50:3 54:6 55:17 percent 45:13 49:14 49:16 perfectly 27:22 person 3:13 4:2,7 6:25 7:22 9:3 12:5 12:6,20,21 17:8 18:21 21:9,24 22:1 22:4,8,11,11,24 23:3,12 24:7,15 25:18 26:2,3,23 27:8,14,14,16 28:6 28:11,13 29:5 32:5 32:15,18,20,20 35:2,3 36:5,12,22 36:23,24 37:6,9 38:9,15 39:8 40:15</p>	<p>40:20 41:5,6,22 42:4,4,5,6,6,13,24 44:7 46:10 51:1 52:17 53:24,25 personal 25:6 persons 12:12 32:25 38:5 persuade 11:19 Petitioner 1:4,16,20 2:4,8,14 3:8 17:23 52:24 picked 37:3 picking 11:15 plaintiff 3:18 4:1 9:21 11:3,12,14,17 20:6 21:7,14 37:12 51:18,19 53:12,21 54:24 55:1,13 plaintiff's 9:20 plate 49:9 plausible 19:13 20:3 20:3 plausibly 54:12 played 8:3 playing 42:3 please 3:10 17:25 29:2 plus 54:18 point 5:16 26:19 27:6,22 31:3 35:5 44:13 50:8,11,12 53:4 points 53:1,3 policy 31:25 32:3 pose 13:24 posed 21:1 position 6:8 11:20 15:22 23:2 25:24 28:5 29:23 30:2 41:4 49:25 51:10 possible 16:1 43:15 postpone 50:7 potential 44:2 potentially 18:16</p>
--	---	--	---	--

<p>44:7 practice 7:2 13:22 38:17 40:23 precedent 41:24 precisely 4:9 9:23 precluded 5:2 preconceptions 16:23 press 27:3 presumably 55:10 pretty 38:2 43:16 55:17 prevent 33:8 36:25 prima 54:4,10 Principal 1:17 principle 11:25 37:11 principles 10:2 private 22:19 26:1 probably 9:15 22:11 53:23 problem 7:3 12:25 13:7 14:12 16:4,14 27:13 28:1 30:12 43:4 49:10 53:15 problems 13:24 procedure 45:3 proceed 53:6 produces 53:12 professional 25:5 prohibition 20:13 prohibits 3:11 20:14 proof 51:18,20 53:4 54:23 55:21 proper 32:12 propose 20:12 49:22 proposed 44:23 55:7 proposing 24:9 proposition 31:19 prospective 16:21 protect 39:22 41:21 52:6 protected 3:20 4:3,7 11:9 12:6,20,22</p>	<p>18:6,20 19:10 20:5 22:1,13 23:3 25:13 31:5 38:5 41:13,18 47:23,24 48:4 49:22 50:5,19,21 51:12,21 53:21 54:15 protecting 41:19 55:15 protection 19:7 48:6 48:8,24 49:1,3 50:2,3,13,18 52:3 prove 11:13,14 30:25 51:23 proved 7:3 provide 12:17 28:16 provides 10:11,22 provision 16:7,9,13 33:4,8 36:6 41:14 52:5 proximate 8:24 9:1 prudential 39:14,15 44:15 published 49:18,21 punish 4:6 purpose 4:5,12 purposes 25:21 pursue 15:4 27:25 put 11:2,2 14:25 18:11 27:23 p.m 56:4</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>question 6:15,20,22 11:1 13:3,11 16:2 19:18 20:25,25 23:1,20,20,21 36:4 36:8,9,10,17,18 37:18,21 38:21,24 39:8 40:18 41:5 42:18 44:17 53:16 54:23 questioning 26:22 questions 12:22</p>	<p>55:14 quick 15:4 53:1 quite 6:17 19:24 21:6 37:21 43:15 51:4 quote 18:23</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 1:17 2:6 3:1 17:21 raised 24:20 ran 34:13 random 31:20 33:15 range 8:4 49:22 read 4:6 16:9 40:3,5 readily 53:10 reading 9:5 reads 31:12 really 8:9,11 9:21 10:21 22:21 26:21 33:16 40:16 42:25 47:9 52:10 reason 10:1,1 19:12 20:21 21:11 22:9 22:12 35:10 50:10 52:12 53:14 reasonable 11:19 21:2,17 23:2 24:15 25:9 36:1 44:23 51:7 reasonably 51:4,4 reasons 24:13 25:22 28:20,20 REBUTTAL 2:12 52:23 receives 47:22 recite 49:18 recognized 40:12 recover 29:18 30:8 referring 16:12 refuse 16:15 Regalado 3:22 4:13 6:5,11 15:19 25:15 25:17,23 26:6 27:24 29:7 30:7</p>	<p>31:7 34:18,23 35:12,15 45:8 49:8 52:11,12 Regalado's 3:23 11:6,20 15:19 regard 3:19 regarding 46:25 regs 16:18 regulation 46:20 reinstatement 5:9 29:14,16 relations 16:20 relationship 12:5,12 18:23 19:12 20:1,4 21:16,16 24:24 25:2,5 34:12 48:3 55:22 relationships 19:20 20:23 24:24 relative 18:2 38:16 40:23 45:18 46:11 relatively 12:10 relatives 16:8 relevant 39:11,20 40:3 relief 28:2,2 29:17 reluctant 50:5,6 relying 46:15 remaining 52:22 remedies 5:3 18:5 52:10,10 remedy 5:2 13:14 13:24 15:20 16:3 remote 26:9 render 19:13 rent 36:13 reply 50:14 reprisals 3:12 10:15 required 24:16 53:13 requirement 3:18 7:22 requirements 10:24 requires 14:11</p>	<p>15:24 respect 13:16 27:24 28:1,19 49:24 respectfully 43:2 respond 16:11 38:22 Respondent 1:22 2:11 24:22 28:25 Respondent's 11:22 response 26:22 42:2 50:12 52:15 responsibility 44:21 restore 13:18 retaliate 22:4 29:10 38:14,15 42:5,23 46:12 55:15 retaliated 6:7 27:15 42:14,15,24 51:2 54:1,14 retaliated-against 20:9 retaliates 51:16 retaliating 3:12 18:2 20:10 retaliation 3:15 11:9 13:4 15:11,22,25 18:17 24:20 31:1 49:15 51:6,24 retaliatory 11:18 24:13 27:1 51:15 revenue 34:15 reverse 8:10 review 39:11 rid 22:5 42:11,12,12 42:13 right 5:7 6:21 19:7 25:18 27:10 28:11 28:13 30:23 31:8 32:16 47:10 54:11 rightly 24:23 rights 15:18 30:8 49:11,12 rise 15:12 54:12,19 risen 49:16 road 8:25</p>
--	--	---	--	--

<p>robbed 14:6,6 ROBERTS 3:3 15:9 16:25 17:19 18:8 18:10 20:7 21:5 26:14,17 27:12,19 28:21 32:17,22 35:5 38:20 52:21 55:3,6 56:1 rule 8:6 20:22 23:15 23:17 24:18 26:9 27:23 28:15,16 43:3 rules 9:1 39:14 run 32:9 running 16:6</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 3:1 safe 23:9 safety 25:1 45:20,21 Sanders 36:21 37:11,23 39:1 41:17 satisfy 6:24 7:22 8:15 saying 7:18 14:16 15:24 22:21 26:20 31:24 32:2 41:1 49:19 51:20 says 10:4,23 13:12 14:9 30:25 32:6 33:7 37:6,9 39:8 39:18,21 40:7 41:19,20 45:10 47:22 48:2,14,18 48:23 50:14 53:21 SCALIA 4:13,18,20 4:23 13:9 23:7,18 23:24 24:2,7 30:10 30:23 31:2,10 33:11,14,22 34:2 37:22 38:1,4,8 39:17 41:8,10 44:9 44:18 47:4,8,13,18</p>	<p>48:15,17 scenario 22:7 31:23 33:12 scheme 26:2 Schnapper 1:15 2:3 2:13 3:6,7,9 4:16 4:19,21,25 5:12,25 6:14,22 7:1,7,10 7:13,16,25 8:20 10:10 11:12 12:15 12:24 13:23 14:2 14:14,17 15:6,17 16:1,11 17:5 52:22 52:23,25 53:2,8,19 53:23 54:8,11 55:5 55:11 Schnapper's 35:1 scope 38:5,25 seat 27:24 Seattle 1:15 second 9:12 36:10 36:17,18 Secondly 4:1 9:5 11:16 section 3:11,14 10:21 16:12 see 18:21 29:17,20 29:23 33:18 41:17 44:9 seek 16:3 18:5 28:2 29:14,16 seeking 16:4 30:6 seeks 33:8 selected 54:19 sense 9:9 10:6,22 37:10,10,11 separate 35:19 series 54:9 serious 11:18 13:24 35:23,24,24 36:3 set 9:4 42:19 51:10 sex 6:6 10:5 shareholder 6:13 42:12</p>	<p>shareholders 5:21 5:22 6:4,8,15 shelter 34:14,21 35:10 55:7,9,20 Sherman 44:1 she'd 33:18 Shield 43:25 shift 51:22 shoes 18:12 shortly 48:11 show 3:19 4:1 11:17 32:8 35:21 50:22 51:14 shown 3:21,22 side 47:20 51:22 silent 47:25 48:2,4 similarly 54:6 simply 5:17 12:18 20:2 single 4:4 singled 3:22 sit 26:23 sitting 4:11 situated 54:6 situation 4:4 6:1,16 9:20 12:4 15:18 26:11 45:2 Sixth 49:25 51:25 52:1,19 slightly 21:22 Smith 42:20 solely 48:3 51:20 Solicitor 1:18 somebody 6:4 12:19 12:21 14:20,22 15:1 19:8,9,23 20:19 26:8 28:4 36:5 39:23 43:14 47:10 someplace 12:13 somewhat 17:6 sorry 4:16 29:22 32:1 41:10,12 42:17</p>	<p>sort 9:13 12:4 23:1 SOTOMAYOR 17:1 21:20 22:3,14 22:18 29:7,12,20 29:23 30:1 53:18 53:20,25 54:9 source 34:15 sources 43:10 so-called 19:7 Spear 43:24 44:5 special 45:5 Species 43:24 44:6 specific 23:22,22 39:5 spectrum 12:11 spell 17:16 spoken 21:24 spouse 34:10,12 46:13 spreads 24:3 Stainless 1:6 3:5 34:16,20 35:9 41:4 55:8 standard 7:19 8:2 11:23 12:3 13:1,2 21:1 31:15 35:2 38:19 standing 5:4 15:15 16:3 29:13 39:14 39:15 start 6:3 starting 37:13 stated 16:9 States 1:1,12,19 2:7 17:22 statistics 49:13 statute 3:16 8:11 10:11,20,22 14:8 17:6 25:19 29:5 36:22,25 37:8 38:6 39:7,11,20,21 40:3 42:10 43:2 44:17 44:21 46:7 48:7 49:3 52:3</p>	<p>statutes 4:8 17:7 24:22 40:19 44:16 statutory 10:8 26:2 step 10:4 49:9 straight 35:20 strangers 26:18 strong 12:10 study 49:18,20 submit 49:18 submitted 48:9,11 48:20 56:3,5 subsequent 5:15 subsequently 5:15 substantial 47:20 substantive 46:6 sue 5:21 14:24 15:1 25:23,24 26:8,9,11 26:23,24,24 27:9 27:15 28:7 32:16 33:2 37:12 46:11 sued 15:22 29:8 30:11 sues 6:13 suffer 36:24 42:14 suffered 35:23,23 36:2 suffering 13:20 39:8 43:14 suffers 12:6 sufficient 6:24 21:17 sufficiently 11:18 25:7 suggested 45:15 suggesting 9:24 15:14 40:19 suggestion 42:2 suggests 36:6 suing 14:20 suit 4:24 13:12 15:25 16:2 21:14 25:15,15,17 27:16 30:16,17 41:21 42:23,25 49:12 52:18</p>
--	--	---	---	---

<p>suits 16:7 43:11 summary 55:24 supervisor 48:11,21 support 22:21 supporting 1:20 2:8 17:23 21:18 22:6 23:4 25:11 36:1 51:8 suppose 5:18,19 11:5,6 14:5,6,8 18:9 34:13 36:4 supposed 18:18 19:4 20:18,18 Supreme 1:1,12 sure 39:17 50:25 53:18,20 survey 18:19 survive 55:25 sympathy 21:23</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 take 15:10 18:13 19:22 29:24 40:22 47:10 50:6 51:3 taken 3:25 4:10 talk 26:15 talking 41:15 46:18 46:19,20,22 target 6:17 tell 20:18,19 28:6 50:3 telling 23:11 tends 19:13 term 38:25 39:1 40:5 43:22 terminated 31:22 48:12 terms 29:17,18 test 7:24 8:19 19:6 19:11 text 3:14 thank 16:25 17:19 28:21 30:4 38:23</p>	<p>47:14 52:21,25 56:1,1 theory 12:9,13 13:22 21:21 43:5 44:22,23 47:21 thing 9:17 things 11:13 15:5 think 4:25 5:7 6:14 6:16,16 7:16,16,17 8:1,2,20 9:2,5,18 10:2,10 12:15 13:23 14:17,17 15:6,7,17 17:9,17 18:12,14 19:24,25 20:21 22:7,25,25 23:16,25 24:17,22 25:9,17 26:10 27:8 27:11,22 28:12 29:15 30:21 31:7 31:11 34:4 35:18 36:19,20 38:21 43:9,16 44:19 45:15 48:25 51:4,5 53:14 55:12,16,18 55:23 thinking 18:21 thinks 28:10 third 36:9 37:14 42:1 54:19 third-party 3:12 10:15 24:20 53:7 Thompson 1:3 3:4 6:15 7:20 9:23 10:6,9,17 11:5 17:3 19:15 29:3 30:7 34:8,10,11,22 45:7,8,9,10 48:6 48:10 49:5,7,21 50:13 51:11 52:2,7 Thompson's 6:16 28:5 47:21 thought 27:6 42:3 45:13 three 35:19 44:10</p>	<p>thrust 6:14 26:5 time 11:6 16:6 23:8 27:1,3,18 29:24 40:24 48:20 49:8 54:6 times 54:24 Title 3:11 5:20,24 6:5,21 7:3 8:6,23 8:25 18:4 19:8 26:1 27:25 29:4 33:4,8 38:16 40:5 40:13 41:9 44:14 46:3 52:5 today 30:2 49:25 town 5:17 traction 55:19 Trafficante 7:2 8:4 8:6 39:5 43:20 44:4 translate 12:2,3 treat 30:13 35:13 48:25 treated 22:22 54:5 treating 35:11,12,15 trial 50:23 51:17 tried 21:25 troubling 12:8,14 true 45:25 51:15,15 51:17 trustee 14:24 try 20:21 trying 41:20 44:14 45:2 Tuesday 1:9 turns 23:1,21 two 8:21 11:13 12:12 25:22 32:8 33:1,10 type 15:11 36:25 types 3:15 typically 16:22</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>understand 8:8,13</p>	<p>8:15 19:16,17 understanding 7:4 22:16 understood 15:9 17:17 20:11 unfair 40:23 unfairly 22:22 United 1:1,12,19 2:7 17:22 universe 21:11 unlawful 10:15 38:14,17 41:3 unlimited 21:10 unquote 18:23 unrelated 3:16 use 3:11 4:9 30:7 usually 44:23 U.S 17:15</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 36:20 43:24 44:5 valid 27:16 valuable 5:21 6:12 versus 46:3,16 victim 54:20 view 15:11 25:14 VII 3:11 5:20,24 6:5 6:21 8:6,25 18:4 19:8 26:1 28:1 29:4 33:4,8 38:16 40:5,13 41:9 44:14 46:3 52:5 VIII 7:3 8:23 vindicate 25:21 violated 7:21 violates 15:18 violation 6:5 44:1,2 Virginia 43:25 visit 24:12 visited 19:15 20:6</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 32:17,17</p>	<p>want 15:3 18:13,15 18:15 23:7,8,9,9 31:21 37:13 38:20 40:3 wanted 11:10 wants 19:22 49:7,11 War 33:12 Washington 1:8,15 1:18 wasn't 33:6 42:25 way 4:9 8:14 9:21 11:10 13:14,15 14:9 24:18 30:21 31:11 37:15 42:3 48:25,25 50:21 55:17 went 10:19 we'll 3:3 6:11 47:6,6 we're 8:7 13:17 18:21 19:5,11 32:7 41:1,14 44:14,15 45:19 46:18,19,20 46:22 we've 11:21 15:17 20:17 40:8 48:9 white 38:3 wide 8:4 49:22 wife 14:7 24:25 42:20 48:25 55:9 55:16 willing 30:1 win 5:4 35:17,21 wins 36:3 wish 19:17 woman 33:14 35:22 word 4:9 9:3,6 17:17 36:7,18,22 38:8 41:22 words 50:17 51:6 work 5:17 25:12 29:19 worker 16:16,21,21 36:1 51:8 workers 16:24</p>
---	---	--	---	--

working 22:23	2			
workplace 25:3	2 49:17			
works 55:9	2-year-old 4:22			
world 33:12 36:10	2003 34:18			
worried 30:17	2009 49:16			
worry 26:21	2010 1:9			
worth 5:23 6:13	22 48:13,15			
wouldn't 5:4,17	23 48:13,15			
12:24 29:13 31:21	28 2:11			
31:23 34:1 53:5,6				
54:20 55:13	3			
written 30:21	3 2:4 52:22			
wrong 9:13,18,19	31 49:16			
10:11 13:22 28:6				
28:14 39:8	4			
wronged 9:24	4 40:12 50:14			
wrongful 35:8				
wrongfulness 35:7	5			
	5 13:6			
X	52 2:14			
x 1:2,7				
	6			
Y	6 20:12			
year 34:21 48:19				
years 40:12	7			
	7 1:9			
\$	704(a) 3:11,14			
\$120,000 49:21	10:21			
	8			
0	8,000 44:4			
09-291 1:4 3:4				
	1			
1 10:16				
10 13:6				
100 45:13				
11:04 1:13 3:2				
12:00 56:4				
12112(b)(4) 16:12				
14.5 49:14				
17 2:8				
1940 36:21				
1992 49:13				
1994 49:19,20				