

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   SPRINT COMMUNICATIONS, INC.,           :

4           Petitioner                               :   No. 12-815

5           v.                                       :

6   ELIZABETH S. JACOBS, ET AL.           :

7   - - - - - x

8                       Washington, D.C.

9                       Tuesday, November 5, 2013

10

11           The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 11:06 a.m.

14 APPEARANCES:

15 TIMOTHY J. SIMEONE, ESQ., Washington, D.C.; on behalf of  
16 Petitioner.

17 DAVID J. LYNCH, ESQ., Des Moines, Iowa; on behalf of  
18 Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	TIMOTHY J. SIMEONE, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	DAVID J. LYNCH, ESQ.	
7	On behalf of the Respondents	21
8	REBUTTAL ARGUMENT OF	
9	TIMOTHY J. SIMEONE, ESQ.	
10	On behalf of the Petitioner	42
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will next hear  
4 argument in Case 12-815, Sprint Communications v.  
5 Jacobs.

6 Mr. Simeone.

7 ORAL ARGUMENT OF TIMOTHY J. SIMEONE

8 ON BEHALF OF THE PETITIONER

9 MR. SIMEONE: Mr. Chief Justice, and may it  
10 please the Court:

11 The IUB's arguments here would transform  
12 Younger abstention from the exception into the rule for  
13 State agency adjudications. Virtually, all State agency  
14 decisions, even on issues of Federal law, would be  
15 subject to challenge only in State court.

16 There's no basis for that broad rule in this  
17 Court's decisions. Younger abstention began with the  
18 traditional principle going back to the time of the  
19 framing that Federal courts sitting in equity shouldn't  
20 intrude on State criminal cases.

21 This Court's decisions have, of course,  
22 expanded Younger slightly beyond criminal cases. In  
23 Huffman, in Moore, in Trainor, the Court extended  
24 Younger to civil enforcement actions in aid of State  
25 criminal laws.

1           In Middlesex County, in Dayton, the Court  
2     extended Younger to administrative disciplinary actions.  
3     But all of these cases are still coercive civil  
4     enforcement actions, where the State's enforcement  
5     interests are similar to those in criminal cases.

6           JUSTICE SOTOMAYOR:           Counsel, one of the  
7     problems I have is I don't know how to define  
8     "coercive." The line seems very hard to draw. There  
9     are plenty of examples in the brief where some courts  
10    have said this kind of proceeding is coercive and that  
11    kind is not. So --

12          MR. SIMEONE:           Yes, Your Honor.

13          JUSTICE SOTOMAYOR:           -- is it -- is it  
14    worthwhile using that distinction at all? Or should we  
15    be thinking about going back to basic principles and  
16    doing something like the Second Circuit does, which is  
17    to say it's a sovereign interest, rather than a personal  
18    interest?

19          MR. SIMEONE:           Your Honor, we've argued that  
20    there is no magic to the -- to the word "coercive."  
21    Coercive is a sort of shorthand that the lower courts  
22    have used to mean coercive in the ways that this Court's  
23    Younger decisions are coercive.

24          So I think the question of how far this  
25    Court has extended Younger is really the heart of this

1 case, as opposed to sort of what is the meaning of the  
2 word "coercive." And I think, as I was saying, the  
3 Court started with criminal cases, and it extended that  
4 principle somewhat in Huffman and Moore and Trainor.

5 JUSTICE SOTOMAYOR: Those were when most of  
6 them involved State proceedings.

7 MR. SIMEONE: Yes. There's -- they're --  
8 but they're a specific kind of State enforcement action.  
9 In each of those cases, this Court held that the State  
10 enforcement action was in aid of criminal law. So it's  
11 a small extension of the traditional principle that  
12 courts sitting in equity don't intrude on State criminal  
13 cases.

14 JUSTICE SOTOMAYOR: But then we went further  
15 in Pennzoil and in New Orleans -- well, perhaps not.

16 MR. SIMEONE: Yes, the Court went further in  
17 a couple of different directions, and I want to try to  
18 address them separately, if I may.

19 The first direction is, really, the Dayton  
20 Middlesex County cases. Those were administrative  
21 disciplinary actions. And I think the Dayton case is  
22 actually especially helpful here in drawing the kind of  
23 line that you're looking for, Your Honor. The Dayton  
24 case helps to give some substance to exactly what is a  
25 civil enforcement proceeding.

1           So in -- in Dayton, the Ohio Civil Rights  
2   Commission conducted an investigation and found that the  
3   school there had engaged in discrimination on the basis  
4   of sex. The commission proposed a consent order, and it  
5   told the school, if you don't agree to this consent  
6   order under which you need to hire back the professor --  
7   I mean, the teacher and pay her back pay, then we're  
8   going to proceed to disciplinary action; we're going to  
9   file an administrative complaint.

10          The school ignored the consent order,  
11   refused to show up for a hearing that the commission had  
12   scheduled. And so, in Dayton, the State filed an  
13   administrative complaint, charging violations of the  
14   Ohio Civil Rights Act. And those violations that were  
15   charged were third-degree misdemeanors, subject to  
16   fines, subject to jail time, up to 60 days in jail.

17          So we think that Dayton gives some substance  
18   to what is a civil enforcement action. It's the sort of  
19   proceeding where you have an investigation. You have  
20   factual findings. You have an administrative complaint.  
21   You have the possibility of -- of civil penalties, and  
22   potentially, in that case, there was jail time as well.

23          JUSTICE GINSBURG:           Mr. Simeone, this -- the  
24   background of this case, I don't quite grasp. You  
25   originally said that you wanted to make sure you --

1     there was no disconnection, pending the FCC's resolution  
2     of the issue.

3             MR. SIMEONE:             That's exactly right, Your  
4     Honor.

5             JUSTICE GINSBURG:         Has the FCC had a  
6     proceeding to resolve it?

7             MR. SIMEONE:             Yes, although the FCC is  
8     surprisingly adept at not resolving the issue in the  
9     proceedings that it holds to resolve the issue. So, in  
10    fact, the FCC had a proceeding pending before it at the  
11    time that this case was before the IUB, in which Sprint  
12    expected that the -- that the FCC would resolve this  
13    issue.

14            What the FCC did was resolve the issue of  
15    what inter-carrier compensation regime applies going  
16    forward, but it didn't address these calls that have  
17    already occurred. So this is a sort of strange corner  
18    of telecommunications law now.

19            Going forward, the FCC has applied specific  
20    inter-carrier compensation regime under Federal law to  
21    this kind of call. But going backwards, the appropriate  
22    inter-carrier compensation regime to apply under the  
23    1996 Act, under the federal law is -- is still at issue.

24            JUSTICE GINSBURG:         Well, why wouldn't --  
25    let's say you -- you -- there were no abstention. You

1 have your case in Federal court. And the Federal judge  
2 says, the FCC hasn't spoken, so I don't want to step out  
3 in front of the FCC on this -- on this question.

4 MR. SIMEONE: We -- we strongly urged the  
5 IUB not to address these issues of Federal law. The  
6 IUB, I think, was frustrated with the FCC, which had not  
7 implemented the relevant provisions of Federal law, and  
8 the IUB reached out to make decisions on Federal law.

9 And all we're saying in this case is that  
10 we -- we think that we ought to be able to challenge  
11 those decisions that the IUB made as to what's an  
12 information service, what's a telecommunications  
13 service.

14 JUSTICE GINSBURG: Well, you could. You  
15 could challenge it in the State court or this Court  
16 and -- eventually, but there's a proceeding going on in  
17 the State court, and there's a review -- State review  
18 attached to that.

19 And you're -- you're saying we can cut off  
20 this administrative process that ends in State review.  
21 We could cut it off and go to the Federal court.

22 MR. SIMEONE: To be clear, Your Honor, we  
23 actually aren't seeking to enjoin any proceeding in the  
24 State. We filed the action in State court because we  
25 were required to by Eighth Circuit law. The Eighth



1 Circuit has a line of cases --

2 JUSTICE GINSBURG: Then you explain that.

3 But -- but in the review -- in your review petition from  
4 the State court -- to -- to the State court, you brought  
5 up more than just this -- the question of these -- these  
6 charges.

7 MR. SIMEONE: Yes, Your Honor. This  
8 could -- this is a situation quite comparable to the  
9 England case. In the England case, the -- the Federal  
10 court plaintiffs thought that they were required to go  
11 to State court with their Federal law issues.

12 And this Court said that they didn't have to  
13 go to Federal court -- to State court with their Federal  
14 law issues. And since they did, they were still  
15 entitled to reserve their Federal law issues for Federal  
16 court.

17 In our case, we actually were required by  
18 Eighth Circuit precedent to go to State court. The  
19 Eighth Circuit rule is that, if you don't go to State  
20 court with your Federal law issues, then abstention --  
21 Younger abstention applies anyway, even though there is  
22 no State proceeding whatsoever.

23 So in this case, we went to State court, but  
24 only because we had to under Eighth Circuit -- under the  
25 Eighth Circuit's unusual law of Younger abstention.

1           When we got to State court, we tried to  
2           essentially do an England reservation. We said to the  
3           State court: We'd like to stay the Federal issues while  
4           they go forward in Federal court because, of course, the  
5           Federal court has jurisdiction and a virtually  
6           unflagging obligation to exercise that jurisdiction.

7           The -- the State court actually held those  
8           issues in abeyance for 2 years while the abstention  
9           issues were heard in Federal court. When -- when the  
10          Federal abstention issues were decided by the Eighth  
11          Circuit, incorrectly, we think, the State court decided  
12          to go forward.

13          But our -- our argument here is that in a  
14          system of concurrent jurisdiction, where we have the  
15          right to be in Federal court, to get review of our  
16          Federal law issues, the fact that we were forced by  
17          Eighth Circuit law to go to State court, too, shouldn't  
18          preclude the Federal court proceeding from going  
19          forward.

20          JUSTICE KENNEDY:           Well, what would have been  
21          the ruling, do you think -- what would have been the  
22          correct ruling if you had filed your Federal action  
23          while the case was still -- the issue was still pending  
24          before the Iowa board?

25          In other words, before the State judicial

1 review process kicked in? Would the -- would your  
2 analysis of the case be the same or would we apply a  
3 different --

4 MR. SIMEONE: It would not be the same, Your  
5 Honor, but we do think that we should --

6 JUSTICE KENNEDY: Because it would be an --  
7 because it would be Burford at that point or what?

8 MR. SIMEONE: I don't think it would be -- I  
9 don't think it would be Burford because the State  
10 doesn't argue that there's a complex regulatory regime  
11 here of the sort that's covered by Burford.

12 What we think is that, if this were still  
13 before the IUB, that would really take us back to our  
14 main argument here in this case. Our argument is that  
15 neither the State court proceeding, nor the IUB  
16 proceeding, was the kind of civil enforcement action to  
17 which this Court has extended Younger.

18 So even if we'd filed in Federal court at  
19 the time that proceeding was still pending before the  
20 IUB, we think that Younger still shouldn't apply. But  
21 here, there's an additional reason why it shouldn't  
22 apply.

23 We waited for the IUB proceeding to  
24 conclude. And, by the way, we then paid the invoices  
25 that Windstream wanted us to pay. There's -- there's

1 nothing further that we could be obliged to do here.  
2 We've already paid.

3 But the -- but the additional reason why we  
4 think we would -- we should prevail here really goes to  
5 the issue that this Court reserved in NOPSI. So in  
6 NOPSI, the Court assumed, without deciding, that the  
7 agency proceeding and the State court review of the  
8 agency proceeding were a unitary proceeding. We think  
9 that those proceedings should only be treated as unitary  
10 in situations where the State interests at the two  
11 levels are similar.

12 So in Burford, to go back to your question,  
13 Your Honor, in Burford, the State appellate court was  
14 participating in the regulatory process with the State  
15 agency. And, of course, this Court treated that as a  
16 unitary proceeding.

17 In this case, the State court proceeding, as  
18 the IUB discusses on pages 33 and 34 of its brief, has  
19 nothing to do with the partnership with the -- with the  
20 agency. The relevant partnership here -- the relevant  
21 place to review the Federal law issues is Federal court.

22 The State's only interest in the State court  
23 proceeding here is a State interest in State court  
24 review, as opposed to Federal court review, of Federal  
25 law issues. That's not the same kind of interest that

1 it had at the regulatory proceeding level.

2 So our view here is that issue in NOPSI  
3 of -- you know, is the State interest, for purposes of  
4 Younger, the interest at the agency level, or is there a  
5 separate interest when it comes to State judicial review  
6 of State agency action and Federal judicial review of  
7 State agency action, we think that that should be  
8 resolved in our favor.

9 So that's a --

10 JUSTICE KAGAN: Mr. Simeone?

11 MR. SIMEONE: Yes.

12 JUSTICE KAGAN: Could I take you back to --  
13 to the agency proceeding? So I guess I understood, from  
14 your respective briefs, that you say the agency  
15 proceeding was not an enforcement proceeding, and the  
16 agency says it was an enforcement proceeding because you  
17 might have brought it initially, but you tried to get  
18 out, and then the agency compelled you to keep on going  
19 in its process.

20 So could you explain that to me.

21 MR. SIMEONE: I can do my best. It's  
22 somewhat complicated. We went to the agency with an  
23 issue of State law. We went to the agency to ask the  
24 agency to hold that Windstream was not entitled to stop  
25 connecting our calls to its customers without IUB

1 approval under Iowa's consumer protection rules. So  
2 that's the issue that we took to the State agency.

3 When we got to the State agency, Windstream  
4 said, oh, no, no, no, we are not going to really stop  
5 connecting your calls to our customers because that's a  
6 big no-no in the telecommunications world. You are not  
7 supposed to stop connecting calls. So they -- so that  
8 dispute went away.

9 What the IUB did was it reached out to  
10 decide a different set of issues, the underlying  
11 question of what inter-carrier compensation regime  
12 should apply to -- to these calls.

13 So at that point, the IUB's theory, now, is  
14 when they reached out to decide these Federal issues  
15 under the 1996 Act -- you know, what's -- what's an  
16 information service, what's a telecommunication service,  
17 what inter-carrier compensation regime applies here --  
18 when they reached out to decide those Federal issues  
19 they say this case became a civil enforcement  
20 proceeding.

21 But this takes me back to my description of  
22 Dayton. Dayton was a civil enforcement proceeding.  
23 There was an investigation there. There was a finding  
24 of violations of the Ohio civil rights statute. There  
25 was an administrative complaint charging third degree

1     misdemeanors and threatening penalties and jail time.

2             That is the kind of civil enforcement  
3     proceeding to which this Court has applied Younger.  
4     That's the kind of proceeding that's like a criminal  
5     case, that takes us back to that traditional principle  
6     that courts -- Federal courts sitting in equity don't  
7     intrude on -- into State criminal proceedings.

8             JUSTICE ALITO:             On Dayton, if the only  
9     relief available had been reinstatement and back pay,  
10    would that matter?

11            MR. SIMEONE:            No, I don't think it would  
12    matter, Your Honor. I think that, again, the posture of  
13    the case was very different. There, you know, there  
14    was -- again, there was an investigation, there was a  
15    due process right to a hearing. There was an agency  
16    that was enforcing existing State law.

17            Here, the agency was essentially  
18    implementing Federal law. The FCC hadn't implemented  
19    these provisions. Everyone in the industry was  
20    frustrated. We were frustrated. We had taken these  
21    issues to the FCC -- you know, please decide what  
22    inter-carrier compensation regime applies here. The FCC  
23    hadn't done it.

24            And so the IUB, quite understandably,  
25    reached out to decide those issues. But in announcing

1 the kind of inter-carrier compensation regime that ought  
2 to apply to these calls, the IUB wasn't conducting an  
3 enforcement proceeding against Sprint.

4 An interesting point here, I think, is that  
5 the IUB's position makes for something very strange  
6 under Ex Parte Young -- you know, agencies generally  
7 have the choice to proceed either by rulemaking, which  
8 they often do, or by adjudication. And they can make  
9 the exact same rules in either way.

10 Under the -- under the IUB's theory, if the  
11 agency proceeds by rulemaking under Ex Parte Young, you  
12 can go to Federal court and get an injunction. If the  
13 agency proceeds by adjudication, making the exact same  
14 rules, you can't because you -- there is a unitary  
15 proceeding up through the State court appeals, and you  
16 are stuck with that, and certiori review by this Court,  
17 of course.

18 That, to me, makes no sense under Ex Parte  
19 Young. The agency's decision to proceed by rulemaking  
20 versus proceeding by adjudication -- which, by the way,  
21 the IUB had in this case. The IUB, when -- when the  
22 dispute disappeared between Sprint and Windstream, the  
23 IUB could have said, we'll close that docket, and we're  
24 going to start a rulemaking to implement these  
25 provisions of Federal law that the FCC can't seem to get



1 around to implementing.

2 In that case, we would, of course, have been  
3 entitled under Ex Parte Young -- and this is an Ex Parte  
4 Young case -- we could have gone to Federal court and  
5 gotten an injunction -- a declaratory ruling and  
6 injunction. And, of course, it didn't -- it really  
7 doesn't make sense to distinguish whether that relief is  
8 available on the basis of what -- how the agency decides  
9 to proceed.

10 I want to go back to a question that came up  
11 earlier about Pennzoil and Juidice and how they fit into  
12 this Court's extension of that traditional principle  
13 that -- that courts of equity shouldn't intrude into  
14 State criminal proceedings. Juidice and Pennzoil are a  
15 kind of unusual corner of Younger abstention law because  
16 they both involve challenges to the processes that the  
17 States use to enforce their judgments.

18 So in Juidice, the Federal Plaintiff was  
19 asking -- what challenging under -- under the due  
20 process clause New York's contempt procedures, sort of  
21 how they went about holding folks in contempt.

22 In Pennzoil, Texaco was challenging the bond  
23 requirements to appeal in Texas, but they were both  
24 Federal court cases bringing challenges to aspects of  
25 the way -- the way that the States enforce their

1 judgments.

2 In this case, Sprint has no quarrel at all  
3 with any aspect of Iowa law. We followed Iowa law to a  
4 T and -- and filed the State court appeal that the  
5 Eighth Circuit required us to file.

6 JUSTICE ALITO: Well, those cases are  
7 different. But why is there a -- why is there a greater  
8 federalism concern in those cases than in this case  
9 where the IUB has a legitimate interest in how much  
10 citizens of Iowa pay for a telephone service?

11 MR. SIMEONE: Well, I think this really goes  
12 back, Your Honor, to the traditional principle that I  
13 started with. The -- the basic idea of Younger is that  
14 Federal courts sitting in equity don't intrude into  
15 State criminal proceedings.

16 That's a very important traditional rule  
17 because that's where the State police power is really at  
18 its zenith -- you know, enforcing State criminal law.  
19 We think that the Pennzoil and Juidice cases are very  
20 similar.

21 The -- the idea that a State can't enforce a  
22 judgment once its courts have gone through the process  
23 of coming to judgment is -- would be very unsettling.  
24 That's -- that's the kind of police -- you know, State  
25 police power at its absolute zenith.

1           Now, all the things that State regulatory  
2 agencies do are important -- you know, but -- but -- you  
3 know, not every rule of a State agency is at that same  
4 level of importance as a State criminal court.

5           JUSTICE ALITO:           But then, if the question is  
6 whether something is tied to something that can be  
7 regarded as criminal or quasi-criminal, what about  
8 Middlesex County? That's not criminal -- or is not  
9 criminal.

10          MR. SIMEONE:           Well, Middlesex County is not  
11 criminal, certainly. It's a -- I call it an  
12 administrative disciplinary proceeding. And I think  
13 that the State's interests in that kind of disciplinary  
14 proceeding is, in fact, very similar to its interest in  
15 a criminal case.

16          In -- in Middlesex County itself, of course,  
17 a lawyer had referred to a trial as a kangaroo court and  
18 a legalized lynching. And -- and the New Jersey Ethics  
19 Committee -- you know, said that that was the sort of  
20 conduct that -- that couldn't be permitted under the  
21 State bar rules.

22          So that is not literally a criminal case.  
23 It is one of this Court's extensions of -- of the  
24 principle to the civil enforcement proceeding context;  
25 but it does seem to me to be motivated by very much the

1 same sorts of interests.

2 JUSTICE GINSBURG: What do you say about the  
3 argument that -- that once the IUB decided to go on with  
4 this proceeding, you didn't want them to, but they did,  
5 that that then became a proceeding for them to enforce  
6 the access charge?

7 MR. SIMEONE: Well, I think, again, Your  
8 Honor, that that goes back to the differences between  
9 this sort of case and the Dayton case. In this case,  
10 what the IUB really was doing was announcing its  
11 understanding of -- of these provisions of the Federal  
12 act.

13 In -- in a case like Dayton, where this  
14 Court has applied Younger, the -- the commission there  
15 was -- you know, seeking to penalize wrongdoing by  
16 the -- by the school. And it seems to me that  
17 there's a -- there's an important difference with  
18 respect to that traditional principle that Younger  
19 reflects of not interfering with State criminal actions.

20 There's a big difference between when the  
21 State announces rules that will be broadly applicable  
22 throughout the industry, like here, and when the State  
23 is actually seeking to punish wrongdoing, as in Dayton  
24 or as in Middlesex County.

25 If there are no further questions, I will

1 reserve the balance of my time.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Lynch?

4 ORAL ARGUMENT OF DAVID J. LYNCH

5 ON BEHALF OF THE RESPONDENTS

6 MR. LYNCH: Mr. Chief Justice, and may it  
7 please the Court:

8 Under Sprint's proposed test, after Sprint  
9 chose to invoke the jurisdiction of the Iowa Utilities  
10 Board, Windstream could have gone to Federal court at  
11 any time to enjoin the board proceedings because, under  
12 Sprint's test, the board proceedings were remedial and  
13 the -- Younger abstention was not applicable to those  
14 proceedings.

15 That's true despite the fact that, at that  
16 time, when the petition was filed, the board was faced  
17 with a compelling State interest; that is, an immediate  
18 and direct threat to public health and welfare.

19 If Windstream had been able to go to the  
20 Federal court and interrupt the State proceedings at  
21 that moment, that very act would unavoidably cast  
22 dispersions on the State's ability to resolve the  
23 Federal issues here in the context of that important  
24 State interest, and that is precisely one of the evils  
25 that Younger abstention is directed to.

1 CHIEF JUSTICE ROBERTS: So -- but, I mean,  
2 is there a different category, some of the normal  
3 regulatory interests are important and other regulatory  
4 interests are not? I mean, it seems to me the line that  
5 Younger drew -- or that I thought it was drawing,  
6 between criminal and civil has been eroded to a  
7 considerable extent.

8 But your friend analogized that the other  
9 cases, for want of a better word, to -- they're sort of  
10 quasi-criminal or at least touching upon the process as  
11 opposed to a particular proceeding. I mean, do you  
12 think that the abstention applies in the case of every  
13 regulatory proceeding?

14 MR. LYNCH: No, Your Honor, we do not.

15 CHIEF JUSTICE ROBERTS: Well, how do you --  
16 how do you tell which --

17 MR. LYNCH: The -- let me give you two parts  
18 to that answer. First of all, that -- we believe that  
19 it applies when the agency proceedings are engaged in  
20 enforcement of a State statute, State law, that that's  
21 kind of the touchstone for when you're more likely to  
22 see an important State interest.

23 JUSTICE SCALIA: When -- when aren't they?

24 MR. LYNCH: I've got to take this case and  
25 make two changes to it, and I have an example for you.

1     Instead of having Sprint in the position of saying that  
2     the access -- intrastate access charge tariff does not  
3     apply at all, imagine that the dispute between Sprint  
4     and Windstream was over merely the calculation of the  
5     amounts, over un -- over ambiguous language within that  
6     tariff. And because Sprint admitted that the tariff  
7     applied, whatever it meant, there would be no threat of  
8     disconnection.

9             Under those circumstances, you truly do have  
10    the garden variety commercial dispute between two  
11    parties that Sprint tries to characterize this case as,  
12    but this case involved more.

13            This case involved the Filed Tariff  
14    Doctrine, a statutory provision the Court's familiar  
15    with, that the board is charged with enforcing. This  
16    board, at least initially -- or excuse me -- this case  
17    also involved, initially, that threat of disconnection,  
18    which added an element of exigency to the board's action  
19    that is not present in most of these cases.

20            JUSTICE SOTOMAYOR:           Counsel, what's left of  
21    Colorado River, under your view of this case? I mean,  
22    in Colorado River, we made it very clear that abstention  
23    should be the exception. I always thought that was a  
24    driving principle, which Federal law should be announced  
25    by Federal courts.

1           If we take the Eighth Circuit rule, where  
2   everything is unitary and required and your rule that  
3   any time it involves a State agency, essentially, it's  
4   subject to abstention, what's left of Federal courts  
5   having any jurisdiction?

6           MR. LYNCH:           Well, first of all, let me say  
7   that the question of whether it's a unitary proceeding  
8   or whether there's a -- a fork in the road after the  
9   agency has completed its proceedings, that question is  
10   not part of the question presented here in this case  
11   today.

12          The Court does not need to reach that  
13   question. It can do as it did in New Orleans Public  
14   Service and simply assume that it is a case of the  
15   unitary requirement without deciding it.

16          JUSTICE SOTOMAYOR:       Well, the Eighth Circuit  
17   has decided that question. You're right. We didn't --

18          MR. LYNCH:           There's --

19          JUSTICE SOTOMAYOR:       They say it is.

20          MR. LYNCH:           There is, in fact, under our  
21   research, about a 4-3 split among the circuits on that  
22   question. The parties haven't really briefed it.

23          JUSTICE SOTOMAYOR:       No, I --

24          MR. LYNCH:           And if you're going to get to  
25   that question, in fact --



1 JUSTICE SOTOMAYOR: But why don't you get to  
2 the essence of my question?

3 MR. LYNCH: Thank you. Then what's left of  
4 the Colorado River case is what it has always been  
5 there, which is when the -- there is not an important  
6 State interest, Younger abstention does not apply. And  
7 that is always the touchstone of this analysis.

8 You know, the three Middlesex County  
9 factors, the first one's easy, is there a pending State  
10 proceeding or not? That's always -- either its there or  
11 it isn't. That's not a problem.

12 In much that way, when Sprint chose to come  
13 to the Iowa Utilities Board, it could have gone to  
14 Federal court instead, I assume. It chose to come to the  
15 board for relief, even though it says that the issues  
16 involved are Federal law.

17 The third factor in Middlesex County, the  
18 ability of the courts -- the State courts, through a  
19 state process, to address the Federal questions, also  
20 typically not an issue in this type of proceeding.  
21 There is the right of appeal to the State courts, and  
22 that is going to provide an adequate remedy.

23 Sprint has not challenged that in this case.

24 JUSTICE SCALIA: Counsel, especially in  
25 cases that involve jurisdictional issues. It seems an

1     awfully -- awful waste of counsel's time and client's  
2     money to be litigating about which court you ought to be  
3     in, and it seems to me, to avoid that, the lines ought  
4     to be clear.

5             And it doesn't seem to me that the  
6     line -- you know, whether there is a significant State  
7     interest involved or not, is a clear line. You can  
8     argue about that in almost any case. So I'm disinclined  
9     to use that kind of a -- of a test along with any  
10    others.

11            Why can't we just limit -- limit Younger  
12    abstention to the three categories discussed in NOPSI,  
13    and say, that's it, no more?

14            MR. LYNCH:            The -- because it would, if you  
15    were to take that approach, it would result in a denial  
16    of abstention in cases like this one that present  
17    exactly the evils, the concerns that were presented in  
18    Younger, in terms of disrespect for the State's ability  
19    to resolve Federal questions, the concerns of  
20    federalism, the concerns of avoiding duplicative --  
21    duplicative cases in the courts.

22            JUSTICE SCALIA:       Any purely civil case that  
23    raises that kind of an issue can arguably be subject to  
24    Younger abstention; is that right?

25            MR. LYNCH:            It would be up to the judges to

1     decide whether there was an important State interest  
2     there or not.

3             JUSTICE GINSBURG:             Are you saying, then,  
4     that in every State agency adjudication attended by  
5     State court review -- Younger would apply?

6             MR. LYNCH:             No, Your Honor, I'm not.

7             JUSTICE GINSBURG:             So can you -- so can you  
8     then -- we have only the two cases. We have Middlesex  
9     and Dayton, and you say this case belongs in that  
10    Younger category. What State court adjudication --  
11    State agency adjudications attended by State court  
12    review would fall outside Younger on your rationale of  
13    what Younger covers?

14            MR. LYNCH:            A State agency adjudication that  
15    did not involve the State agency attempting to enforce a  
16    State statute or State law. And that's, as I tried to  
17    describe in my earlier example, if that would be the  
18    case here, if the dispute between Sprint and Windstream  
19    had been something other than does the --

20            JUSTICE SOTOMAYOR:            What was the State law  
21    here? They were interpreting Federal law.

22            MR. LYNCH:            The State law here was Iowa Code  
23    Section 476.5, the filed tariff doctrine, which requires  
24    that, in this case, that Windstream charge Sprint for  
25    providing intrastate access services --

1 JUSTICE SOTOMAYOR: That mimicked the Federal  
2 law.

3 MR. LYNCH: On the State side. That's --  
4 it's our version of that Federal law, yes.

5 JUSTICE SOTOMAYOR: But you don't derive any  
6 power independent of that Federal law?

7 MR. LYNCH: Oh, no, I'm sorry. I  
8 misunderstood. This is an independent State statute.  
9 It is not -- it is analogous to the Federal interstate  
10 filed tariff doctrine, but it is not dependent upon it  
11 at all. It's existed for I don't know how many years.

12 JUSTICE SOTOMAYOR: By the way, there are  
13 other abstention doctrines that can take care of State  
14 interests, aren't there? There's Burford, and there are  
15 many others.

16 MR. LYNCH: In appropriate cases, yes.

17 JUSTICE SOTOMAYOR: So I don't know why  
18 Younger as you're -- in following up on Justice Scalia's  
19 question, why Younger has to be the only vehicle, why we  
20 need to create more categories than NOPSI did to protect  
21 State interests when we have an awful lot of other  
22 doctrines that do that already.

23 MR. LYNCH: I don't know that we're asking  
24 you to create a new category or a new extension. We  
25 felt that this case fit, very clearly, within the

1 Middlesex test under Younger abstention. And it was a  
2 straightforward application of that three-part test, and  
3 obviously, a district court judge agreed.

4 It was not -- it does not require any  
5 extension of Younger to apply that principle to this  
6 case.

7 JUSTICE SOTOMAYOR: By the way, have we ever  
8 used the Younger abstention in a case where the Federal  
9 plaintiff also filed the Federal -- the State action as  
10 well?

11 MR. LYNCH: Do you mean the State action  
12 before the board or before --

13 JUSTICE SOTOMAYOR: Before anybody, court or  
14 a board.

15 MR. LYNCH: Not that I'm aware of, no.

16 But that brings me to my second point, which  
17 is that, if the court were to decide to apply the  
18 coercive-remedial distinction as a test in this case,  
19 the results before the Eighth Circuit should still be  
20 affirmed because the board proceedings were, in fact,  
21 coercive.

22 As has already been alluded to here today,  
23 after Sprint filed its petition with the board,  
24 Windstream came back and said, in essence, we will not  
25 disconnect Sprint as long as they pay the access

1 charges, going forward. They can hold the money going  
2 back. We won't disconnect them as long as they pay,  
3 going forward.

4 Sprint came back and said, we're not going  
5 to pay you, going forward, but we've got -- you're not  
6 going to disconnect us. We've got what we want. We  
7 want to withdraw our petition.

8 And at that point, the board said, that's  
9 fine; you can take your petition, but don't go anywhere.  
10 Stay here. We're going to get to the bottom of this  
11 because, if we let you go, it's going to reoccur.  
12 This case --

13 CHIEF JUSTICE ROBERTS: I'm sorry, it's  
14 going to what?

15 MR. LYNCH: Reoccur.

16 CHIEF JUSTICE ROBERTS: Oh.

17 MR. LYNCH: The case would inevitably be  
18 before the board again, perhaps next time with Sprint --  
19 with Windstream filing, instead of Sprint, or Sprint  
20 saying they're threatening us with disconnection again.  
21 There was no point in letting it start over. We got to  
22 the bottom of it, to see what was going on.

23 The lower courts have identified various --  
24 this goes to your -- to your earlier question, Justice  
25 Sotomayor, about how to define coercive proceedings.

1 And the lower courts have identified a number of factors  
2 that they've considered in this, including who initiated  
3 the proceeding, was participation in the proceeding  
4 mandatory, does the Federal Plaintiff contend that the  
5 State proceeding is unlawful, or do they -- does the  
6 Federal plaintiff, instead, seek a remedy from some  
7 other State-initiated inflicted wrong, is the Federal  
8 plaintiff alleged to have committed a bad act, and  
9 finally, whether the proceeding involved the State's  
10 enforcement of its laws.

11 CHIEF JUSTICE ROBERTS: Well, don't all --  
12 it's sort of like the important State interests. I  
13 assume the State's not doing anything, unless they think  
14 it's important. And any type of administrative  
15 proceeding, remedial or otherwise, has to have some  
16 bite to it.

17 There has to be something that is going  
18 happen to you if you don't do what they tell you to do.  
19 So in that sense, I mean, almost every administrative  
20 proceeding is coercive.

21 MR. LYNCH: If it can be backed up, as this  
22 one could. When the board issued its order and directed  
23 Sprint to make payment to Windstream, had Sprint failed  
24 to do that, Sprint could have been subject to civil  
25 penalties assessed by the board. So I think to the

1 extent that the agency proceedings are backed up with  
2 that kind of enforcement --

3 CHIEF JUSTICE ROBERTS: Well, my point is it  
4 doesn't seem like much of a limiting test, if you can  
5 say any time -- sort of any time anything bad can happen  
6 to you as a result of an administrative proceeding,  
7 that's coercive. It doesn't seem like a serious  
8 constraint on the application of Younger.

9 MR. LYNCH: And what that -- what that may  
10 go to, Your Honor, is the fact that the  
11 coercive-remedial distinction is not any easier to apply  
12 than the important State interest test.

13 JUSTICE ALITO: Well, could you give me an  
14 example of State administrative proceedings that would  
15 not fall within your understanding of the scope of  
16 Younger?

17 MR. LYNCH: With respect to my own agency,  
18 for instance, a -- well, there is all the obvious  
19 examples, legislative action, the cases where there is  
20 no State agency -- or no State proceeding pending.

21 But in terms of a quasi-judicial agency  
22 action that would not be entitled to Younger abstention,  
23 I've given the earlier example if the parties were in what's  
24 called the garden -- truly in a garden-variety  
25 commercial dispute between two parties and the agency is



1 simply resolving that dispute between the two parties,  
2 the State's interest is substantially diminished in that  
3 proceeding.

4 JUSTICE KAGAN: I think --

5 CHIEF JUSTICE ROBERTS: Why is -- I'm sorry.  
6 I was just going to say why is that? Presumably, the  
7 State is resolving that dispute pursuant to some State  
8 law or State regulation, State policy. I don't know why  
9 the -- the State interest is unimportant simply because  
10 it's the resolution of a private dispute.

11 MR. LYNCH: Let me be clear. I don't say  
12 the State interest is unimportant; it is simply  
13 diminished. And at some point, it would be diminished  
14 to the point where Younger abstention would not be  
15 appropriate.

16 JUSTICE BREYER: Does it matter if it's just  
17 purely Federal law? I mean, think of a civil case  
18 involving a State on one side and private parties on  
19 another in a State court, which has jurisdiction over  
20 Federal laws. The State claims that the defendant has  
21 violated, civilly, a Federal statute. There's an action  
22 also in Federal Court.

23 In your view, does the Federal Court have to  
24 abstain?

25 MR. LYNCH: If the Federal plaintiff brought

1 the Federal action in order to enjoin the State court  
2 proceedings --

3 JUSTICE BREYER: No, no. There's no action  
4 for an injunction. What they want is the judge to  
5 decide the case. The private party wants the Federal  
6 judge to decide his case. That's all. It's a matter of  
7 interpreting Federal law.

8 Now, in your opinion, is Younger -- does  
9 Younger, not some other doctrine, does Younger require  
10 abstention?

11 MR. LYNCH: Yes.

12 JUSTICE BREYER: Yes. Okay. So on your  
13 view, we can never have a case proceed in Federal court  
14 even on a purely Federal issue if, in fact, there is  
15 involving this estate civil case on the same question?

16 MR. LYNCH: Involving the same parties?

17 JUSTICE BREYER: Yes.

18 MR. LYNCH: Yeah.

19 JUSTICE BREYER: Well, I can't think of a --  
20 doesn't it often happen that there are such cases? I  
21 mean, I -- I would think that wouldn't be too difficult.  
22 I mean, either there never is one and you tend to be  
23 right, or there are a whole lot of them and you tend to  
24 be wrong.

25 I've just never heard it put in that extreme

1 way, and maybe you're right. I don't know. What's  
2 your -- do you have authority for it or any light to  
3 shed?

4 MR. LYNCH: I think my authority for it is  
5 in this case -- in this Court's Younger abstention  
6 decisions. The Middlesex County test is a simple  
7 three-part test that focuses always on the second  
8 factor, what is the State's interest -- what is the  
9 important State interest?

10 JUSTICE ALITO: Well, suppose it's a  
11 licensing procedure. Somebody's been denied a license  
12 to be a barber or a hairdresser and the person wants to  
13 challenge that in Federal court. Would Younger apply  
14 there?

15 MR. LYNCH: No, I don't think that would  
16 be a --

17 JUSTICE ALITO: Why?

18 MR. LYNCH: I don't believe that would be  
19 agency action in a judicial manner.

20 JUSTICE ALITO: Why not?

21 MR. LYNCH: I'm assuming that they filed  
22 a -- a form, filled it out, gave it to the agency, and  
23 it was denied. That seems more to me to be of an  
24 executive character.

25 JUSTICE ALITO: Well, suppose there's

1 some -- there's an -- an administrative agency in the  
2 State that hears appeals from that.

3 MR. LYNCH: If the person applying for that  
4 license had then gone on to ask for a hearing before  
5 that department that hears administrative appeals, and  
6 it had a quasi-judicial proceeding in order to make that  
7 determination, then I believe that Younger would --  
8 could apply there, if there's an important State  
9 interest attached to the denial of that license.

10 JUSTICE KAGAN: I guess, Mr. Lynch, the  
11 concern is, given that we think agencies are doing  
12 things that implicate important State interests most of  
13 the time, that's why they do them, that -- that your  
14 test -- and not just your test, but the Eighth Circuit's  
15 tests, would turn agency adjudicators into the primary  
16 legal decision-makers in our system on all matters that  
17 they were -- you know, wanted to get into, including  
18 matters of Federal law.

19 MR. LYNCH: That would -- to the extent that  
20 the cases are brought before the State agencies in the  
21 first place, and the Federal issues are raised there,  
22 before it goes to the Federal court, that would be  
23 correct.

24 JUSTICE KAGAN: That does seem like a big  
25 proposition -- no? I mean, do you think that

1 Younger says that or that Middlesex says that or that  
2 we've ever said that?

3 MR. LYNCH: I think that Middlesex, combined  
4 with Huffman, providing for the State a unitary  
5 proceeding does, in fact, provide for that result.  
6 Leads logic --

7 JUSTICE BREYER: Does Younger say "before"?

8 MR. LYNCH: I'm sorry?

9 JUSTICE BREYER: Does Younger say "before"?

10 MR. LYNCH: No. Middlesex --

11 JUSTICE BREYER: You just said before.

12 MR. LYNCH: Middlesex --

13 JUSTICE BREYER: No. So -- so in your view,  
14 it doesn't matter which is brought first, I guess.

15 MR. LYNCH: No. Middlesex County requires  
16 that there be a pending State proceeding.

17 There is one other argument I'd like to  
18 address --

19 JUSTICE ALITO: Is it correct that, under  
20 Eighth Circuit law, the -- the party that wants to bring  
21 the Federal lawsuit has to go to State court first?

22 MR. LYNCH: You mean following the agency  
23 proceedings, the unitary proceeding -- that is the  
24 Eighth Circuit's approach, yes, that once you've gotten  
25 on the -- the State train, you have to ride that through

1 to the end of the State process.

2 JUSTICE ALITO: Well, I thought that -- I  
3 thought that Sprint was -- said that they had to go to  
4 State court whether they wanted to or not or else they  
5 wouldn't be able to go to Federal court.

6 MR. LYNCH: I believe Sprint's argument -- I  
7 don't care -- don't want to speak for them, but I  
8 believe their argument on that point was, following the  
9 board's decision, they feel that the Eighth Circuit law  
10 required them to file petitions in both Federal court  
11 and to invoke the judicial review process in State  
12 district court.

13 JUSTICE BREYER: If Younger only applies  
14 to -- to State proceedings that are brought first, then  
15 I guess we could have a -- a criminal defendant, who's  
16 not yet one, bring an action in Federal court to say  
17 that the law is unconstitutional or something or  
18 violates a Federal law. And then the State prosecutes  
19 him criminally, and the Federal court couldn't -- and  
20 the Federal court could enjoin the criminal proceeding.

21 MR. LYNCH: That would be the -- very much  
22 like the case in this Court's decision in Steffel  
23 against --

24 JUSTICE BREYER: So we've said they can't --  
25 you can enjoin a criminal decision -- a criminal

1 proceeding in a State court, as long as the criminal  
2 proceeding wasn't brought first. Is that what this  
3 Court has said?

4 MR. LYNCH: As I read it, what this Court  
5 has said is that there's no Younger abstention when  
6 there's no pending State criminal proceeding.

7 JUSTICE BREYER: No, no. There is a pending  
8 one by the time they get around to it. Then what? I  
9 mean, I --

10 MR. LYNCH: So -- I'm sorry. I  
11 misunderstood.

12 JUSTICE BREYER: I'll ask you to clarify.  
13 You've come up with a couple of rules that strike me as  
14 counterintuitive, and so I'm trying to figure that one  
15 out.

16 The before or after one doesn't seem to work  
17 too well in my mind because it would seem -- you know,  
18 you couldn't -- Federal court couldn't. Federal court  
19 could enjoin a criminal proceeding that came up later in  
20 your view, I guess.

21 MR. LYNCH: Yes. I think the Federal court,  
22 at least, could answer the Federal question presented.  
23 I guess I have a hard time seeing --

24 JUSTICE BREYER: All right.

25 MR. LYNCH: Okay.

1           The last thing I wanted to address is there  
2   is a lot of discussion, particularly in some of the  
3   amicus briefs, to the effect that the board was acting  
4   under Federally delegated authority here under some --  
5   as some kind of deputized Federal agent. That is not  
6   the case at all here. The board was acting under its  
7   State law authority.

8           Sprint relies, for instance, on the AT&T vs.  
9   Iowa Utilities Board case for the proposition that the  
10   1996 Telecommunications Act asserted Federal authority  
11   to regulate local telecommunications matters.

12          That's true, insofar as it goes, but that  
13   case is limited to matters addressed by the '96 Act,  
14   which was addressed to create in competition within the  
15   local exchange marketplace.

16          What we're talking about in this case is  
17   access services by which a long distance carrier, such  
18   as Sprint, delivers a long distance call to the local  
19   exchange carrier, such as Windstream, for completion to  
20   Windstream's customers. That service remains  
21   practically a monopoly service.

22          Sprint has no way to get those calls to  
23   Windstream's customers, other than by connecting it to  
24   Windstream and letting Windstream -- compensating  
25   Windstream for carrying those calls to the end.



1           Because of that, the Federal  
2   Telecommunications Act of '96, in Section 251(g),  
3   expressly reserved the tariffed access charge regime and  
4   did not affect the State's jurisdiction over intrastate  
5   access charges. Sprint acknowledges that in its reply  
6   brief at pages 22 and 23, but claims that the situation  
7   is unclear as to what applied between 1996 and 2011.

8           But the fact remains that Sprint paid those  
9   intrastate access charges without protest from 1996 to  
10   2009, when it made the unilateral decision to change the  
11   process and start withholding those payments.

12           JUSTICE GINSBURG:           Well, then why wouldn't  
13   you say that Sprint was not the initiator of this State  
14   process? Because Sprint withdrew its complaint, right?

15           MR. LYNCH:           I'm sorry. I missed a few words  
16   there.

17           JUSTICE GINSBURG:           Sprint -- Sprint withdrew  
18   its complaint.

19           MR. LYNCH:           Sprint was allowed to withdraw  
20   its complaint.

21           JUSTICE GINSBURG:           Yes. So, at that point,  
22   it becomes the board's proceeding. It becomes a  
23   proceeding initiated by the board and not by Sprint.

24           MR. LYNCH:           That is correct.

25           Thus, even under the first-to-file test, we

1 believe that this case was coercive at the time it was  
2 before the board, to the extent that the  
3 coercive-remedial distinction matters.

4 Those are the points I had to cover. If  
5 there are no further questions, thank you.

6 CHIEF JUSTICE ROBERTS: Thank you counsel.

7 Mr. Simeone, you have 6 minutes remaining.

8 REBUTTAL ARGUMENT OF TIMOTHY J. SIMEONE

9 ON BEHALF OF THE PETITIONER

10 MR. SIMEONE: I hope to be very brief. But  
11 there was a lot of discussion about the problem with the  
12 IUB's approach lacking sort of meaningful limits. And I  
13 just want to say a couple words about the Middlesex  
14 County test because I don't think that that lack of  
15 meaningful limits necessarily follows from -- from the  
16 Middlesex County test, although I do think some  
17 clarification of the test would be -- would be helpful.

18 Under Middlesex County, of course, Younger  
19 requires an ongoing State judicial proceeding, and it  
20 requires an important State interest. So with respect  
21 to ongoing State judicial proceeding, the IUB  
22 understands "judicial" to be any adjudicative  
23 proceeding. But as we argue in our briefs, that's not  
24 necessarily consistent with the rest of this Court's  
25 cases under -- applying Younger.

1           "Judicial," we think, means an exercise of  
2   the State's judicial enforcement authority. So limiting  
3   that prong of Middlesex County to an exercise of the  
4   State's judicial enforcement authority would help to  
5   draw this line.

6           A second similar point is with respect to  
7   the State interest prong of Middlesex County, we argue,  
8   of course, that the relevant State interest is the  
9   State's interest in the ongoing State proceeding. Here  
10   the ongoing State proceeding was this -- was judicial  
11   review of the agency proceeding.

12          So by -- by limiting the proceeding that  
13   you're looking at to the ongoing State judicial  
14   proceeding required by the first prong of Middlesex  
15   County, then you're really just looking at the State's  
16   interest in State judicial review of Federal law  
17   questions, as opposed to Federal court judicial review  
18   of -- of Federal law questions.

19          And, again, that seems to me to help to --  
20   to draw a line.

21          Unless there are further questions, that was  
22   all I had.

23          CHIEF JUSTICE ROBERTS:           Thank you, counsel.  
24   Counsel.

25          The case is submitted.

1           (Whereupon, at 11:57 a.m., the case in the  
2 above-entitled matter was submitted.)

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<p><b>A</b></p> <p><b>abeyance</b> 10:8</p> <p><b>ability</b> 21:22 25:18 26:18</p> <p><b>able</b> 8:10 21:19 38:5</p> <p><b>aboveentitled</b> 1:11 44:2</p> <p><b>absolute</b> 18:25</p> <p><b>abstain</b> 33:24</p> <p><b>abstention</b> 3:12,17 7:25 9:20,21,25 10:8,10 17:15 21:13,25 22:12 23:22 24:4 25:6 26:12,16,24 28:13 29:1,8 32:22 33:14 34:10 35:5 39:5</p> <p><b>access</b> 20:6 23:2,2 27:25 29:25 40:17 41:3,5,9</p> <p><b>acknowledges</b> 41:5</p> <p><b>act</b> 6:14 7:23 14:15 20:12 21:21 31:8 40:10,13 41:2</p> <p><b>acting</b> 40:3,6</p> <p><b>action</b> 5:8,10 6:8,18 8:24 10:22 11:16 13:6,7 23:18 29:9 29:11 32:19,22 33:21 34:1,3 35:19 38:16</p> <p><b>actions</b> 3:24 4:2,4 5:21 20:19</p> <p><b>added</b> 23:18</p> <p><b>additional</b> 11:21 12:3</p> <p><b>address</b> 5:18 7:16 8:5 25:19 37:18 40:1</p> <p><b>addressed</b> 40:13,14</p> <p><b>adept</b> 7:8</p> <p><b>adequate</b> 25:22</p> <p><b>adjudication</b> 16:8 16:13,20 27:4,10</p>	<p>27:14</p> <p><b>adjudications</b> 3:13 27:11</p> <p><b>adjudicative</b> 42:22</p> <p><b>adjudicators</b> 36:15</p> <p><b>administrative</b> 4:2 5:20 6:9,13,20 8:20 14:25 19:12 31:14,19 32:6,14 36:1,5</p> <p><b>admitted</b> 23:6</p> <p><b>affect</b> 41:4</p> <p><b>affirmed</b> 29:20</p> <p><b>agencies</b> 16:6 19:2 36:11,20</p> <p><b>agency</b> 3:13,13 12:7,8,15,20 13:4 13:6,7,13,14,16 13:18,22,23,24 14:2,3 15:15,17 16:11,13 17:8 19:3 22:19 24:3,9 27:4,11,14,15 32:1,17,20,21,25 35:19,22 36:1,15 37:22 43:11</p> <p><b>agencys</b> 16:19</p> <p><b>agent</b> 40:5</p> <p><b>agree</b> 6:5</p> <p><b>agreed</b> 29:3</p> <p><b>aid</b> 3:24 5:10</p> <p><b>al</b> 1:6</p> <p><b>alito</b> 15:8 18:6 19:5 32:13 35:10,17,20 35:25 37:19 38:2</p> <p><b>alleged</b> 31:8</p> <p><b>allowed</b> 41:19</p> <p><b>alluded</b> 29:22</p> <p><b>ambiguous</b> 23:5</p> <p><b>amicus</b> 40:3</p> <p><b>amounts</b> 23:5</p> <p><b>analogized</b> 22:8</p> <p><b>analogous</b> 28:9</p> <p><b>analysis</b> 11:2 25:7</p> <p><b>announced</b> 23:24</p> <p><b>announces</b> 20:21</p>	<p><b>announcing</b> 15:25 20:10</p> <p><b>answer</b> 22:18 39:22</p> <p><b>anybody</b> 29:13</p> <p><b>anyway</b> 9:21</p> <p><b>appeal</b> 17:23 18:4 25:21</p> <p><b>appeals</b> 16:15 36:2 36:5</p> <p><b>appearances</b> 1:14</p> <p><b>appellate</b> 12:13</p> <p><b>applicable</b> 20:21 21:13</p> <p><b>application</b> 29:2 32:8</p> <p><b>applied</b> 7:19 15:3 20:14 23:7 41:7</p> <p><b>applies</b> 7:15 9:21 14:17 15:22 22:12 22:19 38:13</p> <p><b>apply</b> 7:22 11:2,20 11:22 14:12 16:2 23:3 25:6 27:5 29:5,17 32:11 35:13 36:8</p> <p><b>applying</b> 36:3 42:25</p> <p><b>approach</b> 26:15 37:24 42:12</p> <p><b>appropriate</b> 7:21 28:16 33:15</p> <p><b>approval</b> 14:1</p> <p><b>arent</b> 8:23 22:23 28:14</p> <p><b>arguably</b> 26:23</p> <p><b>argue</b> 11:10 26:8 42:23 43:7</p> <p><b>argued</b> 4:19</p> <p><b>argument</b> 1:12 2:2 2:5,8 3:4,7 10:13 11:14,14 20:3 21:4 37:17 38:6,8 42:8</p> <p><b>arguments</b> 3:11</p> <p><b>asking</b> 17:19 28:23</p> <p><b>aspect</b> 18:3</p>	<p><b>aspects</b> 17:24</p> <p><b>asserted</b> 40:10</p> <p><b>assessed</b> 31:25</p> <p><b>assume</b> 24:14 25:14 31:13</p> <p><b>assumed</b> 12:6</p> <p><b>assuming</b> 35:21</p> <p><b>attached</b> 8:18 36:9</p> <p><b>attempting</b> 27:15</p> <p><b>attended</b> 27:4,11</p> <p><b>authority</b> 35:2,4 40:4,7,10 43:2,4</p> <p><b>available</b> 15:9 17:8</p> <p><b>avoid</b> 26:3</p> <p><b>avoiding</b> 26:20</p> <p><b>aware</b> 29:15</p> <p><b>awful</b> 26:1 28:21</p> <p><b>awfully</b> 26:1</p> <p><b>B</b></p> <p><b>back</b> 3:18 4:15 6:6 6:7 11:13 12:12 13:12 14:21 15:5 15:9 17:10 18:12 20:8 29:24 30:2,4</p> <p><b>backed</b> 31:21 32:1</p> <p><b>background</b> 6:24</p> <p><b>backwards</b> 7:21</p> <p><b>bad</b> 31:8 32:5</p> <p><b>balance</b> 21:1</p> <p><b>bar</b> 19:21</p> <p><b>barber</b> 35:12</p> <p><b>basic</b> 4:15 18:13</p> <p><b>basis</b> 3:16 6:3 17:8</p> <p><b>began</b> 3:17</p> <p><b>behalf</b> 1:15,17 2:4 2:7,10 3:8 21:5 42:9</p> <p><b>believe</b> 22:18 35:18 36:7 38:6,8 42:1</p> <p><b>belongs</b> 27:9</p> <p><b>best</b> 13:21</p> <p><b>better</b> 22:9</p> <p><b>beyond</b> 3:22</p> <p><b>big</b> 14:6 20:20 36:24</p>	<p><b>bite</b> 31:16</p> <p><b>board</b> 10:24 21:10 21:11,12,16 23:15 23:16 25:13,15 29:12,14,20,23 30:8,18 31:22,25 40:3,6,9 41:23 42:2</p> <p><b>boards</b> 23:18 38:9 41:22</p> <p><b>bond</b> 17:22</p> <p><b>bottom</b> 30:10,22</p> <p><b>breyer</b> 33:16 34:3 34:12,17,19 37:7 37:9,11,13 38:13 38:24 39:7,12,24</p> <p><b>brief</b> 4:9 12:18 41:6 42:10</p> <p><b>briefed</b> 24:22</p> <p><b>briefs</b> 13:14 40:3 42:23</p> <p><b>bring</b> 37:20 38:16</p> <p><b>bringing</b> 17:24</p> <p><b>brings</b> 29:16</p> <p><b>broad</b> 3:16</p> <p><b>broadly</b> 20:21</p> <p><b>brought</b> 9:4 13:17 33:25 36:20 37:14 38:14 39:2</p> <p><b>burford</b> 11:7,9,11 12:12,13 28:14</p> <p><b>C</b></p> <p><b>c</b> 1:8,15 2:1 3:1</p> <p><b>calculation</b> 23:4</p> <p><b>call</b> 7:21 19:11 40:18</p> <p><b>called</b> 32:24</p> <p><b>calls</b> 7:16 13:25 14:5,7,12 16:2 40:22,25</p> <p><b>cant</b> 16:14,25 18:21 26:11 34:19 38:24</p> <p><b>care</b> 28:13 38:7</p> <p><b>carrier</b> 40:17,19</p> <p><b>carrying</b> 40:25</p>
---	--	--	---	---

<b>case</b> 3:4 5:1,21,24 6:22,24 7:11 8:1,9 9:9,9,17,23 10:23 11:2,14 12:17 14:19 15:5,13 16:21 17:2,4 18:2 18:8 19:15,22 20:9,9,9,13 22:12 22:24 23:11,12,13 23:16,21 24:10,14 25:4,23 26:8,22 27:9,18,24 28:25 29:6,8,18 30:12 30:17 33:17 34:5 34:6,13,15 35:5 38:22 40:6,9,13 40:16 42:1 43:25 44:1 <b>cases</b> 3:20,22 4:3,5 5:3,9,13,20 9:1 17:24 18:6,8,19 22:9 23:19 25:25 26:16,21 27:8 28:16 32:19 34:20 36:20 42:25 <b>cast</b> 21:21 <b>categories</b> 26:12 28:20 <b>category</b> 22:2 27:10 28:24 <b>certainly</b> 19:11 <b>certiori</b> 16:16 <b>challenge</b> 3:15 8:10 8:15 35:13 <b>challenged</b> 25:23 <b>challenges</b> 17:16,24 <b>challenging</b> 17:19 17:22 <b>change</b> 41:10 <b>changes</b> 22:25 <b>character</b> 35:24 <b>characterize</b> 23:11 <b>charge</b> 20:6 23:2 27:24 41:3 <b>charged</b> 6:15 23:15 <b>charges</b> 9:6 30:1	41:5,9 <b>charging</b> 6:13 14:25 <b>chief</b> 3:3,9 21:2,6 22:1,15 30:13,16 31:11 32:3 33:5 42:6 43:23 <b>choice</b> 16:7 <b>chose</b> 21:9 25:12,14 <b>circuit</b> 4:16 8:25 9:1,18,19,24 10:11,17 18:5 24:1,16 29:19 37:20 38:9 <b>circuits</b> 9:25 24:21 36:14 37:24 <b>circumstances</b> 23:9 <b>citizens</b> 18:10 <b>civil</b> 3:24 4:3 5:25 6:1,14,18,21 11:16 14:19,22,24 15:2 19:24 22:6 26:22 31:24 33:17 34:15 <b>civily</b> 33:21 <b>claims</b> 33:20 41:6 <b>clarification</b> 42:17 <b>clarify</b> 39:12 <b>clause</b> 17:20 <b>clear</b> 8:22 23:22 26:4,7 33:11 <b>clearly</b> 28:25 <b>clients</b> 26:1 <b>close</b> 16:23 <b>code</b> 27:22 <b>coercive</b> 4:3,8,10 4:20,21,22,23 5:2 29:21 30:25 31:20 32:7 42:1 <b>coerciveremedial</b> 29:18 32:11 42:3 <b>colorado</b> 23:21,22 25:4 <b>combined</b> 37:3 <b>come</b> 25:12,14 39:13	<b>comes</b> 13:5 <b>coming</b> 18:23 <b>commercial</b> 23:10 32:25 <b>commission</b> 6:2,4 6:11 20:14 <b>committed</b> 31:8 <b>committee</b> 19:19 <b>communications</b> 1:3 3:4 <b>comparable</b> 9:8 <b>compelled</b> 13:18 <b>compelling</b> 21:17 <b>compensating</b> 40:24 <b>compensation</b> 7:15 7:20,22 14:11,17 15:22 16:1 <b>competition</b> 40:14 <b>complaint</b> 6:9,13 6:20 14:25 41:14 41:18,20 <b>completed</b> 24:9 <b>completion</b> 40:19 <b>complex</b> 11:10 <b>complicated</b> 13:22 <b>concern</b> 18:8 36:11 <b>concerns</b> 26:17,19 26:20 <b>conclude</b> 11:24 <b>concurrent</b> 10:14 <b>conduct</b> 19:20 <b>conducted</b> 6:2 <b>conducting</b> 16:2 <b>connecting</b> 13:25 14:5,7 40:23 <b>consent</b> 6:4,5,10 <b>considerable</b> 22:7 <b>considered</b> 31:2 <b>consistent</b> 42:24 <b>constraint</b> 32:8 <b>consumer</b> 14:1 <b>contempt</b> 17:20,21 <b>contend</b> 31:4 <b>context</b> 19:24 21:23 <b>corner</b> 7:17 17:15	<b>correct</b> 10:22 36:23 37:19 41:24 <b>couldnt</b> 19:20 38:19 39:18,18 <b>counsel</b> 4:6 21:2 23:20 25:24 42:6 43:23,24 <b>counsels</b> 26:1 <b>counterintuitive</b> 39:14 <b>county</b> 4:1 5:20 19:8,10,16 20:24 25:8,17 35:6 37:15 42:14,16,18 43:3,7,15 <b>couple</b> 5:17 39:13 42:13 <b>course</b> 3:21 10:4 12:15 16:17 17:2 17:6 19:16 42:18 43:8 <b>court</b> 1:1,12 3:10 3:15,23 4:1,25 5:3 5:9,16 8:1,15,15 8:17,21,24 9:4,4 9:10,11,12,13,13 9:16,18,20,23 10:1,3,4,5,7,9,11 10:15,17,18 11:15 11:17,18 12:5,6,7 12:13,15,17,21,22 12:23,24 15:3 16:12,15,16 17:4 17:24 18:4 19:4 19:17 20:14 21:7 21:10,20 24:12 25:14 26:2 27:5 27:10,11 29:3,13 29:17 33:19,22,23 34:1,13 35:13 36:22 37:21 38:4 38:5,10,12,16,19 38:20 39:1,3,4,18 39:18,21 43:17 <b>courts</b> 3:17,19,21 4:9,21,22 5:12	15:6,6 17:12,13 18:14,22 19:23 23:14,25 24:4 25:18,18,21 26:21 30:23 31:1 35:5 38:22 42:24 <b>cover</b> 42:4 <b>covered</b> 11:11 <b>covers</b> 27:13 <b>create</b> 28:20,24 40:14 <b>criminal</b> 3:20,22,25 4:5 5:3,10,12 15:4 15:7 17:14 18:15 18:18 19:4,7,8,9 19:11,15,22 20:19 22:6 38:15,20,25 38:25 39:1,6,19 <b>criminally</b> 38:19 <b>customers</b> 13:25 14:5 40:20,23 <b>cut</b> 8:19,21
<b>D</b>				
<b>d</b> 1:8,15 3:1 <b>david</b> 1:17 2:6 21:4 <b>days</b> 6:16 <b>dayton</b> 4:1 5:19,21 5:23 6:1,12,17 14:22,22 15:8 20:9,13,23 27:9 <b>decide</b> 14:10,14,18 15:21,25 27:1 29:17 34:5,6 <b>decided</b> 10:10,11 20:3 24:17 <b>decides</b> 17:8 <b>deciding</b> 12:6 24:15 <b>decision</b> 16:19 38:9 38:22,25 41:10 <b>decisionmakers</b> 36:16 <b>decisions</b> 3:14,17 3:21 4:23 8:8,11 35:6 <b>declaratory</b> 17:5				

<b>defendant</b> 33:20 38:15 <b>define</b> 4:7 30:25 <b>degree</b> 14:25 <b>delegated</b> 40:4 <b>delivers</b> 40:18 <b>denial</b> 26:15 36:9 <b>denied</b> 35:11,23 <b>department</b> 36:5 <b>dependent</b> 28:10 <b>deputized</b> 40:5 <b>derive</b> 28:5 <b>des</b> 1:17 <b>describe</b> 27:17 <b>description</b> 14:21 <b>despite</b> 21:15 <b>determination</b> 36:7 <b>didn't</b> 7:16 9:12 17:6 20:4 24:17 <b>difference</b> 20:17,20 <b>differences</b> 20:8 <b>different</b> 5:17 11:3 14:10 15:13 18:7 22:2 <b>difficult</b> 34:21 <b>diminished</b> 33:2,13 33:13 <b>direct</b> 21:18 <b>directed</b> 21:25 31:22 <b>direction</b> 5:19 <b>directions</b> 5:17 <b>disappeared</b> 16:22 <b>disciplinary</b> 4:2 5:21 6:8 19:12,13 <b>disconnect</b> 29:25 30:2,6 <b>disconnection</b> 7:1 23:8,17 30:20 <b>discrimination</b> 6:3 <b>discussed</b> 26:12 <b>discusses</b> 12:18 <b>discussion</b> 40:2 42:11 <b>disinclined</b> 26:8 <b>dispersions</b> 21:22	<b>dispute</b> 14:8 16:22 23:3,10 27:18 32:25 33:1,7,10 <b>disrespect</b> 26:18 <b>distance</b> 40:17,18 <b>distinction</b> 4:14 29:18 32:11 42:3 <b>distinguish</b> 17:7 <b>district</b> 29:3 38:12 <b>docket</b> 16:23 <b>doctrine</b> 23:14 27:23 28:10 34:9 <b>doctrines</b> 28:13,22 <b>doesn't</b> 11:10 17:7 26:5 32:4,7 34:20 37:14 39:16 <b>doing</b> 4:16 20:10 31:13 36:11 <b>dont</b> 4:7 5:12 6:5 6:24 8:2 9:19 11:8,9 15:6,11 18:14 25:1 28:5 28:11,17,23 30:9 31:11,18 33:8,11 35:1,15,18 38:7,7 42:14 <b>draw</b> 4:8 43:5,20 <b>drawing</b> 5:22 22:5 <b>drew</b> 22:5 <b>driving</b> 23:24 <b>due</b> 15:15 17:19 <b>duplicative</b> 26:20 26:21	<b>either</b> 16:7,9 25:10 34:22 <b>element</b> 23:18 <b>elizabeth</b> 1:6 <b>ends</b> 8:20 <b>enforce</b> 17:17,25 18:21 20:5 27:15 <b>enforcement</b> 3:24 4:4,4 5:8,10,25 6:18 11:16 13:15 13:16 14:19,22 15:2 16:3 19:24 22:20 31:10 32:2 43:2,4 <b>enforcing</b> 15:16 18:18 23:15 <b>engaged</b> 6:3 22:19 <b>england</b> 9:9,9 10:2 <b>enjoin</b> 8:23 21:11 34:1 38:20,25 39:19 <b>entitled</b> 9:15 13:24 17:3 32:22 <b>equity</b> 3:19 5:12 15:6 17:13 18:14 <b>eroded</b> 22:6 <b>especially</b> 5:22 25:24 <b>esq</b> 1:15,17 2:3,6,9 <b>essence</b> 25:2 29:24 <b>essentially</b> 10:2 15:17 24:3 <b>estate</b> 34:15 <b>et</b> 1:6 <b>ethics</b> 19:18 <b>eventually</b> 8:16 <b>evils</b> 21:24 26:17 <b>ex</b> 16:6,11,18 17:3 17:3 <b>exact</b> 16:9,13 <b>exactly</b> 5:24 7:3 26:17 <b>example</b> 22:25 27:17 32:14,23 <b>examples</b> 4:9 32:19 <b>exception</b> 3:12	23:23 <b>exchange</b> 40:15,19 <b>excuse</b> 23:16 <b>executive</b> 35:24 <b>exercise</b> 10:6 43:1,3 <b>exigency</b> 23:18 <b>existed</b> 28:11 <b>existing</b> 15:16 <b>expanded</b> 3:22 <b>expected</b> 7:12 <b>explain</b> 9:2 13:20 <b>expressly</b> 41:3 <b>extended</b> 3:23 4:2 4:25 5:3 11:17 <b>extension</b> 5:11 17:12 28:24 29:5 <b>extensions</b> 19:23 <b>extent</b> 22:7 32:1 36:19 42:2 <b>extreme</b> 34:25	13:6 14:14,18 15:6,18 16:12,25 17:4,18,24 18:14 20:11 21:10,20,23 23:24,25 24:4 25:14,16,19 26:19 27:21 28:1,4,6,9 29:8,9 31:4,6,7 33:17,20,21,22,23 33:25 34:1,5,7,13 34:14 35:13 36:18 36:21,22 37:21 38:5,10,16,18,19 38:20 39:18,18,21 39:22 40:5,10 41:1 43:16,17,18 <b>federalism</b> 18:8 26:20 <b>federally</b> 40:4 <b>feel</b> 38:9 <b>felt</b> 28:25 <b>figure</b> 39:14 <b>file</b> 6:9 18:5 38:10 <b>filed</b> 6:12 8:24 10:22 11:18 18:4 21:16 23:13 27:23 28:10 29:9,23 35:21 <b>filing</b> 30:19 <b>filled</b> 35:22 <b>finally</b> 31:9 <b>finding</b> 14:23 <b>findings</b> 6:20 <b>fine</b> 30:9 <b>finer</b> 6:16 <b>first</b> 5:19 22:18 24:6 25:9 36:21 37:14,21 38:14 39:2 43:14 <b>firsttofile</b> 41:25 <b>fit</b> 17:11 28:25 <b>focuses</b> 35:7 <b>folks</b> 17:21 <b>followed</b> 18:3 <b>following</b> 28:18 37:22 38:8
---	--	---	---	--

<b>follows</b> 42:15 <b>forced</b> 10:16 <b>fork</b> 24:8 <b>form</b> 35:22 <b>forward</b> 7:16,19 10:4,12,19 30:1,3 30:5 <b>found</b> 6:2 <b>framing</b> 3:19 <b>friend</b> 22:8 <b>front</b> 8:3 <b>frustrated</b> 8:6 15:20,20 <b>further</b> 5:14,16 12:1 20:25 42:5 43:21	31:17 33:6 <b>gotten</b> 17:5 37:24 <b>grasp</b> 6:24 <b>greater</b> 18:7 <b>guess</b> 13:13 36:10 37:14 38:15 39:20 39:23	<b>ill</b> 39:12 <b>im</b> 26:8 27:6 28:7 29:15 30:13 33:5 35:21 37:8 39:10 39:14 41:15 <b>imagine</b> 23:3 <b>immediate</b> 21:17 <b>implement</b> 16:24 <b>implemented</b> 8:7 15:18 <b>implementing</b> 15:18 17:1 <b>implicate</b> 36:12 <b>importance</b> 19:4 <b>important</b> 18:16 19:2 20:17 21:23 22:3,22 25:5 27:1 31:12,14 32:12 35:9 36:8,12 42:20 <b>including</b> 31:2 36:17 <b>incorrectly</b> 10:11 <b>independent</b> 28:6,8 <b>industry</b> 15:19 20:22 <b>inevitably</b> 30:17 <b>inflicted</b> 31:7 <b>information</b> 8:12 14:16 <b>initially</b> 13:17 23:16,17 <b>initiated</b> 31:2 41:23 <b>initiator</b> 41:13 <b>injunction</b> 16:12 17:5,6 34:4 <b>insofar</b> 40:12 <b>instance</b> 32:18 40:8 <b>intercarrier</b> 7:15 7:20,22 14:11,17 15:22 16:1 <b>interest</b> 4:17,18 12:22,23,25 13:3 13:4,5 18:9 19:14 21:17,24 22:22 25:6 26:7 27:1	32:12 33:2,9,12 35:8,9 36:9 42:20 43:7,8,9,16 <b>interesting</b> 16:4 <b>interests</b> 4:5 12:10 19:13 20:1 22:3,4 28:14,21 31:12 36:12 <b>interfering</b> 20:19 <b>interpreting</b> 27:21 34:7 <b>interrupt</b> 21:20 <b>interstate</b> 28:9 <b>intrastate</b> 23:2 27:25 41:4,9 <b>intrude</b> 3:20 5:12 15:7 17:13 18:14 <b>investigation</b> 6:2 6:19 14:23 15:14 <b>invoices</b> 11:24 <b>invoke</b> 21:9 38:11 <b>involve</b> 17:16 25:25 27:15 <b>involved</b> 5:6 23:12 23:13,17 25:16 26:7 31:9 <b>involves</b> 24:3 <b>involving</b> 33:18 34:15,16 <b>iowa</b> 1:17 10:24 18:3,3,10 21:9 25:13 27:22 40:9 <b>iowas</b> 14:1 <b>isnt</b> 25:11 <b>issue</b> 7:2,8,9,13,14 7:23 10:23 12:5 13:2,23 14:2 25:20 26:23 34:14 <b>issued</b> 31:22 <b>issues</b> 3:14 8:5 9:11 9:14,15,20 10:3,8 10:9,10,16 12:21 12:25 14:10,14,18 15:21,25 21:23 25:15,25 36:21 <b>iub</b> 7:11 8:5,6,8,11	11:13,15,20,23 12:18 13:25 14:9 15:24 16:2,21,21 16:23 18:9 20:3 20:10 42:21 <b>iubs</b> 3:11 14:13 16:5,10 42:12 <b>ive</b> 22:24 34:25
<hr/> <b>G</b>	<hr/> <b>H</b>			<hr/> <b>J</b>
<b>g</b> 3:1 41:2 <b>garden</b> 23:10 32:24 <b>gardenvariety</b> 32:24 <b>generally</b> 16:6 <b>ginsburg</b> 6:23 7:5 7:24 8:14 9:2 20:2 27:3,7 41:12 41:17,21 <b>give</b> 5:24 22:17 32:13 <b>given</b> 32:23 36:11 <b>gives</b> 6:17 <b>go</b> 8:21 9:10,13,18 9:19 10:4,12,17 12:12 16:12 17:10 20:3 21:19 30:9 30:11 32:10 37:21 38:3,5 <b>goes</b> 12:4 18:11 20:8 30:24 36:22 40:12 <b>going</b> 3:18 4:15 6:8 6:8 7:15,19,21 8:16 10:18 13:18 14:4 16:24 24:24 25:22 30:1,1,3,4,5 30:6,10,11,14,22	<b>hadnt</b> 15:18,23 <b>hairdresser</b> 35:12 <b>happen</b> 31:18 32:5 34:20 <b>hard</b> 4:8 39:23 <b>hasnt</b> 8:2 <b>havent</b> 24:22 <b>health</b> 21:18 <b>hear</b> 3:3 <b>heard</b> 10:9 34:25 <b>hearing</b> 6:11 15:15 36:4 <b>hears</b> 36:2,5 <b>heart</b> 4:25 <b>held</b> 5:9 10:7 <b>help</b> 43:4,19 <b>helpful</b> 5:22 42:17 <b>helps</b> 5:24 <b>hire</b> 6:6 <b>hold</b> 13:24 30:1 <b>holding</b> 17:21 <b>holds</b> 7:9 <b>honor</b> 4:12,19 5:23 7:4 8:22 9:7 11:5 12:13 15:12 18:12 20:8 22:14 27:6 32:10 <b>hope</b> 42:10 <b>huffman</b> 3:23 5:4 37:4			<b>j</b> 1:15,17 2:3,6,9 3:7 21:4 42:8 <b>jacobs</b> 1:6 3:5 <b>jail</b> 6:16,16,22 15:1 <b>jersey</b> 19:18 <b>judge</b> 8:1 29:3 34:4 34:6 <b>judges</b> 26:25 <b>judgment</b> 18:22,23 <b>judgments</b> 17:17 18:1 <b>judicial</b> 10:25 13:5 13:6 35:19 38:11 42:19,21,22 43:1 43:2,4,10,13,16 43:17 <b>judice</b> 17:11,14,18 18:19 <b>jurisdiction</b> 10:5,6 10:14 21:9 24:5 33:19 41:4 <b>jurisdictional</b> 25:25 <b>justice</b> 3:3,9 4:6,13 5:5,14 6:23 7:5,24 8:14 9:2 10:20 11:6 13:10,12 15:8 18:6 19:5 20:2 21:2,6 22:1 22:15,23 23:20 24:16,19,23 25:1 25:24 26:22 27:3 27:7,20 28:1,5,12 28:17,18 29:7,13 30:13,16,24 31:11 32:3,13 33:4,5,16
<hr/> <b>I</b>	<hr/> <b>I</b>			
<b>id</b> 37:17 <b>idea</b> 18:13,21 <b>identified</b> 30:23 31:1 <b>ignored</b> 6:10				



34:3,12,17,19 35:10,17,20,25 36:10,24 37:7,9 37:11,13,19 38:2 38:13,24 39:7,12 39:24 41:12,17,21 42:6 43:23	33:20 <b>lawsuit</b> 37:21 <b>lawyer</b> 19:17 <b>leads</b> 37:6 <b>left</b> 23:20 24:4 25:3 <b>legal</b> 36:16 <b>legalized</b> 19:18 <b>legislative</b> 32:19 <b>legitimate</b> 18:9 <b>letting</b> 30:21 40:24 <b>level</b> 13:1,4 19:4 <b>levels</b> 12:11 <b>license</b> 35:11 36:4,9 <b>licensing</b> 35:11 <b>light</b> 35:2 <b>limit</b> 26:11,11 <b>limited</b> 40:13 <b>limiting</b> 32:4 43:2 43:12 <b>limits</b> 42:12,15 <b>line</b> 4:8 5:23 9:1 22:4 26:6,7 43:5 43:20 <b>lines</b> 26:3 <b>literally</b> 19:22 <b>litigating</b> 26:2 <b>local</b> 40:11,15,18 <b>logic</b> 37:6 <b>long</b> 29:25 30:2 39:1 40:17,18 <b>looking</b> 5:23 43:13 43:15 <b>lot</b> 28:21 34:23 40:2 42:11 <b>lower</b> 4:21 30:23 31:1 <b>lynch</b> 1:17 2:6 21:3 21:4,6 22:14,17 22:24 24:6,18,20 24:24 25:3 26:14 26:25 27:6,14,22 28:3,7,16,23 29:11,15 30:15,17 31:21 32:9,17 33:11,25 34:11,16 34:18 35:4,15,18	35:21 36:3,10,19 37:3,8,10,12,15 37:22 38:6,21 39:4,10,21,25 41:15,19,24 <b>lynching</b> 19:18	<b>moment</b> 21:21 <b>money</b> 26:2 30:1 <b>monopoly</b> 40:21 <b>moore</b> 3:23 5:4 <b>motivated</b> 19:25	<b>originally</b> 6:25 <b>orleans</b> 5:15 24:13 <b>ought</b> 8:10 16:1 26:2,3 <b>outside</b> 27:12
<b>K</b>		<b>M</b>	<b>N</b>	<b>P</b>
<b>kagan</b> 13:10,12 33:4 36:10,24 <b>kangaroo</b> 19:17 <b>keep</b> 13:18 <b>kennedy</b> 10:20 11:6 <b>kicked</b> 11:1 <b>kind</b> 4:10,11 5:8,22 7:21 11:16 12:25 15:2,4 16:1 17:15 18:24 19:13 22:21 26:9,23 32:2 40:5 <b>know</b> 4:7 13:3 14:15 15:13,21 16:6 18:18,24 19:2,3,19 20:15 25:8 26:6 28:11 28:17,23 33:8 35:1 36:17 39:17	<b>legislated</b> 19:18 <b>legislative</b> 32:19 <b>legitimate</b> 18:9 <b>letting</b> 30:21 40:24 <b>level</b> 13:1,4 19:4 <b>levels</b> 12:11 <b>license</b> 35:11 36:4,9 <b>licensing</b> 35:11 <b>light</b> 35:2 <b>limit</b> 26:11,11 <b>limited</b> 40:13 <b>limiting</b> 32:4 43:2 43:12 <b>limits</b> 42:12,15 <b>line</b> 4:8 5:23 9:1 22:4 26:6,7 43:5 43:20 <b>lines</b> 26:3 <b>literally</b> 19:22 <b>litigating</b> 26:2 <b>local</b> 40:11,15,18 <b>logic</b> 37:6 <b>long</b> 29:25 30:2 39:1 40:17,18 <b>looking</b> 5:23 43:13 43:15 <b>lot</b> 28:21 34:23 40:2 42:11 <b>lower</b> 4:21 30:23 31:1 <b>lynch</b> 1:17 2:6 21:3 21:4,6 22:14,17 22:24 24:6,18,20 24:24 25:3 26:14 26:25 27:6,14,22 28:3,7,16,23 29:11,15 30:15,17 31:21 32:9,17 33:11,25 34:11,16 34:18 35:4,15,18	<b>m</b> 1:13 3:2 44:1 <b>magic</b> 4:20 <b>main</b> 11:14 <b>making</b> 16:13 <b>mandatory</b> 31:4 <b>manner</b> 35:19 <b>marketplace</b> 40:15 <b>matter</b> 1:11 15:10 15:12 33:16 34:6 37:14 44:2 <b>matters</b> 36:16,18 40:11,13 42:3 <b>mean</b> 4:22 6:7 22:1 22:4,11 23:21 29:11 31:19 33:17 34:21,22 36:25 37:22 39:9 <b>meaning</b> 5:1 <b>meaningful</b> 42:12 42:15 <b>means</b> 43:1 <b>meant</b> 23:7 <b>merely</b> 23:4 <b>middlesex</b> 4:1 5:20 19:8,10,16 20:24 25:8,17 27:8 29:1 35:6 37:1,3,10,12 37:15 42:13,16,18 43:3,7,14 <b>mimicked</b> 28:1 <b>mind</b> 39:17 <b>minutes</b> 42:7 <b>misdemeanors</b> 6:15 15:1 <b>missed</b> 41:15 <b>misunderstood</b> 28:8 39:11 <b>moines</b> 1:17	<b>n</b> 2:1,1 3:1 <b>necessarily</b> 42:15 42:24 <b>need</b> 6:6 24:12 28:20 <b>neither</b> 11:15 <b>never</b> 34:13,22,25 <b>new</b> 5:15 17:20 19:18 24:13 28:24 28:24 <b>nono</b> 14:6 <b>nopsi</b> 12:5,6 13:2 26:12 28:20 <b>normal</b> 22:2 <b>november</b> 1:9 <b>number</b> 31:1	<b>originally</b> 6:25 <b>orleans</b> 5:15 24:13 <b>ought</b> 8:10 16:1 26:2,3 <b>outside</b> 27:12
<b>L</b>			<b>O</b>	
<b>lack</b> 42:14 <b>lacking</b> 42:12 <b>language</b> 23:5 <b>law</b> 3:14 5:10 7:18 7:20,23 8:5,7,8,25 9:11,14,15,20,25 10:16,17 12:21,25 13:23 15:16,18 16:25 17:15 18:3 18:3,18 22:20 23:24 25:16 27:16 27:20,21,22 28:2 28:4,6 33:8,17 34:7 36:18 37:20 38:9,17,18 40:7 43:16,18 <b>laws</b> 3:25 31:10			<b>o</b> 2:1 3:1 <b>obligation</b> 10:6 <b>obliged</b> 12:1 <b>obvious</b> 32:18 <b>obviously</b> 29:3 <b>occurred</b> 7:17 <b>oh</b> 14:4 28:7 30:16 <b>ohio</b> 6:1,14 14:24 <b>okay</b> 34:12 39:25 <b>once</b> 18:22 20:3 37:24 <b>ones</b> 25:9 <b>ongoing</b> 42:19,21 43:9,10,13 <b>opinion</b> 34:8 <b>opposed</b> 5:1 12:24 22:11 43:17 <b>oral</b> 1:11 2:2,5 3:7 21:4 <b>order</b> 6:4,6,10 31:22 34:1 36:6	<b>participating</b> 12:14 <b>participation</b> 31:3 <b>particular</b> 22:11 <b>particularly</b> 40:2 <b>parties</b> 23:11 24:22 32:23,25 33:1,18 34:16 <b>partnership</b> 12:19 12:20 <b>parts</b> 22:17 <b>party</b> 34:5 37:20 <b>pay</b> 6:7,7 11:25 15:9 18:10 29:25 30:2,5 <b>payment</b> 31:23 <b>payments</b> 41:11 <b>penalize</b> 20:15 <b>penalties</b> 6:21 15:1 31:25 <b>pending</b> 7:1,10 10:23 11:19 25:9 32:20 37:16 39:6 39:7 <b>pennzoil</b> 5:15 17:11 17:14,22 18:19 <b>permitted</b> 19:20 <b>person</b> 35:12 36:3 <b>personal</b> 4:17 <b>petition</b> 9:3 21:16 29:23 30:7,9 <b>petitioner</b> 1:4,16

<p>2:4,10 3:8 42:9  <b>petitions</b> 38:10  <b>place</b> 12:21 36:21  <b>plaintiff</b> 17:18 29:9  31:4,6,8 33:25  <b>plaintiffs</b> 9:10  <b>please</b> 3:10 15:21  21:7  <b>plenty</b> 4:9  <b>point</b> 11:7 14:13  16:4 29:16 30:8  30:21 32:3 33:13  33:14 38:8 41:21  43:6  <b>points</b> 42:4  <b>police</b> 18:17,24,25  <b>policy</b> 33:8  <b>position</b> 16:5 23:1  <b>possibility</b> 6:21  <b>posture</b> 15:12  <b>potentially</b> 6:22  <b>power</b> 18:17,25  28:6  <b>practically</b> 40:21  <b>precedent</b> 9:18  <b>precisely</b> 21:24  <b>preclude</b> 10:18  <b>present</b> 23:19  26:16  <b>presented</b> 24:10  26:17 39:22  <b>presumably</b> 33:6  <b>prevail</b> 12:4  <b>primary</b> 36:15  <b>principle</b> 3:18 5:4  5:11 15:5 17:12  18:12 19:24 20:18  23:24 29:5  <b>principles</b> 4:15  <b>private</b> 33:10,18  34:5  <b>problem</b> 25:11  42:11  <b>problems</b> 4:7  <b>procedure</b> 35:11  <b>procedures</b> 17:20</p>	<p><b>proceed</b> 6:8 16:7  16:19 17:9 34:13  <b>proceeding</b> 4:10  5:25 6:19 7:6,10  8:16,23 9:22  10:18 11:15,16,19  11:23 12:7,8,8,16  12:17,23 13:1,13  13:15,15,16 14:20  14:22 15:3,4 16:3  16:15,20 19:12,14  19:24 20:4,5  22:11,13 24:7  25:10,20 31:3,3,5  31:9,15,20 32:6  32:20 33:3 36:6  37:5,16,23 38:20  39:1,2,6,19 41:22  41:23 42:19,21,23  43:9,10,11,12,14  <b>proceedings</b> 5:6 7:9  12:9 15:7 17:14  18:15 21:11,12,14  21:20 22:19 24:9  29:20 30:25 32:1  32:14 34:2 37:23  38:14  <b>proceeds</b> 16:11,13  <b>process</b> 8:20 11:1  12:14 13:19 15:15  17:20 18:22 22:10  25:19 38:1,11  41:11,14  <b>processes</b> 17:16  <b>professor</b> 6:6  <b>prong</b> 43:3,7,14  <b>proposed</b> 6:4 21:8  <b>proposition</b> 36:25  40:9  <b>prosecutes</b> 38:18  <b>protect</b> 28:20  <b>protection</b> 14:1  <b>protest</b> 41:9  <b>provide</b> 25:22 37:5  <b>providing</b> 27:25  37:4</p>	<p><b>provision</b> 23:14  <b>provisions</b> 8:7  15:19 16:25 20:11  <b>public</b> 21:18 24:13  <b>punish</b> 20:23  <b>purely</b> 26:22 33:17  34:14  <b>purposes</b> 13:3  <b>pursuant</b> 33:7  <b>put</b> 34:25</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>quarrel</b> 18:2  <b>quasicriminal</b> 19:7  22:10  <b>quasijudicial</b> 32:21  36:6  <b>question</b> 4:24 8:3  9:5 12:12 14:11  17:10 19:5 24:7,9  24:10,13,17,22,25  25:2 28:19 30:24  34:15 39:22  <b>questions</b> 20:25  25:19 26:19 42:5  43:17,18,21  <b>quite</b> 6:24 9:8  15:24</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>r</b> 3:1  <b>raised</b> 36:21  <b>raises</b> 26:23  <b>rationale</b> 27:12  <b>reach</b> 24:12  <b>reached</b> 8:8 14:9  14:14,18 15:25  <b>read</b> 39:4  <b>really</b> 4:25 5:19  11:13 12:4 14:4  17:6 18:11,17  20:10 24:22 43:15  <b>reason</b> 11:21 12:3  <b>rebuttal</b> 2:8 42:8  <b>referred</b> 19:17  <b>reflects</b> 20:19</p>	<p><b>refused</b> 6:11  <b>regarded</b> 19:7  <b>regime</b> 7:15,20,22  11:10 14:11,17  15:22 16:1 41:3  <b>regulate</b> 40:11  <b>regulation</b> 33:8  <b>regulatory</b> 11:10  12:14 13:1 19:1  22:3,3,13  <b>reinstatement</b> 15:9  <b>relevant</b> 8:7 12:20  12:20 43:8  <b>relief</b> 15:9 17:7  25:15  <b>relies</b> 40:8  <b>remaining</b> 42:7  <b>remains</b> 40:20 41:8  <b>remedial</b> 21:12  31:15  <b>remedy</b> 25:22 31:6  <b>reoccur</b> 30:11,15  <b>reply</b> 41:5  <b>require</b> 29:4 34:9  <b>required</b> 8:25 9:10  9:17 18:5 24:2  38:10 43:14  <b>requirement</b> 24:15  <b>requirements</b>  17:23  <b>requires</b> 27:23  37:15 42:19,20  <b>research</b> 24:21  <b>reservation</b> 10:2  <b>reserve</b> 9:15 21:1  <b>reserved</b> 12:5 41:3  <b>resolution</b> 7:1  33:10  <b>resolve</b> 7:6,9,12,14  21:22 26:19  <b>resolved</b> 13:8  <b>resolving</b> 7:8 33:1  33:7  <b>respect</b> 20:18 32:17  42:20 43:6  <b>respective</b> 13:14</p>	<p><b>respondents</b> 1:18  2:7 21:5  <b>rest</b> 42:24  <b>result</b> 26:15 32:6  37:5  <b>results</b> 29:19  <b>review</b> 8:17,17,20  9:3,3 10:15 11:1  12:7,21,24,24  13:5,6 16:16 27:5  27:12 38:11 43:11  43:16,17  <b>ride</b> 37:25  <b>right</b> 7:3 10:15  15:15 24:17 25:21  26:24 34:23 35:1  39:24 41:14  <b>rights</b> 6:1,14 14:24  <b>river</b> 23:21,22 25:4  <b>road</b> 24:8  <b>roberts</b> 3:3 21:2  22:1,15 30:13,16  31:11 32:3 33:5  42:6 43:23  <b>rule</b> 3:12,16 9:19  18:16 19:3 24:1,2  <b>rulemaking</b> 16:7  16:11,19,24  <b>rules</b> 14:1 16:9,14  19:21 20:21 39:13  <b>ruling</b> 10:21,22  17:5</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>s</b> 1:6 2:1 3:1  <b>saying</b> 5:2 8:9,19  23:1 27:3 30:20  <b>says</b> 8:2 13:16  25:15 37:1,1  <b>scalia</b> 22:23 25:24  26:22  <b>scalias</b> 28:18  <b>scheduled</b> 6:12  <b>school</b> 6:3,5,10  20:16  <b>scope</b> 32:15</p>
---	--	--	--	---

<b>second</b> 4:16 29:16 35:7 43:6 <b>section</b> 27:23 41:2 <b>see</b> 22:22 30:22 <b>seeing</b> 39:23 <b>seek</b> 31:6 <b>seeking</b> 8:23 20:15 20:23 <b>sense</b> 16:18 17:7 31:19 <b>separate</b> 13:5 <b>separately</b> 5:18 <b>serious</b> 32:7 <b>service</b> 8:12,13 14:16,16 18:10 24:14 40:20,21 <b>services</b> 27:25 40:17 <b>set</b> 14:10 <b>sex</b> 6:4 <b>shed</b> 35:3 <b>shorthand</b> 4:21 <b>shouldnt</b> 3:19 10:17 11:20,21 17:13 <b>show</b> 6:11 <b>side</b> 28:3 33:18 <b>significant</b> 26:6 <b>simeone</b> 1:15 2:3,9 3:6,7,9 4:12,19 5:7,16 6:23 7:3,7 8:4,22 9:7 11:4,8 13:10,11,21 15:11 18:11 19:10 20:7 42:7,8,10 <b>similar</b> 4:5 12:11 18:20 19:14 43:6 <b>simple</b> 35:6 <b>simply</b> 24:14 33:1,9 33:12 <b>sitting</b> 3:19 5:12 15:6 18:14 <b>situation</b> 9:8 41:6 <b>situations</b> 12:10 <b>slightly</b> 3:22 <b>small</b> 5:11	<b>somebodys</b> 35:11 <b>somewhat</b> 5:4 13:22 <b>sorry</b> 28:7 30:13 33:5 37:8 39:10 41:15 <b>sort</b> 4:21 5:1 6:18 7:17 11:11 17:20 19:19 20:9 22:9 31:12 32:5 42:12 <b>sorts</b> 20:1 <b>sotomayor</b> 4:6,13 5:5,14 23:20 24:16,19,23 25:1 27:20 28:1,5,12 28:17 29:7,13 30:25 <b>sovereign</b> 4:17 <b>speak</b> 38:7 <b>specific</b> 5:8 7:19 <b>split</b> 24:21 <b>spoken</b> 8:2 <b>sprint</b> 1:3 3:4 7:11 16:3,22 18:2 21:8 23:1,3,6,11 25:12 25:23 27:18,24 29:23,25 30:4,18 30:19,19 31:23,23 31:24 38:3 40:8 40:18,22 41:5,8 41:13,14,17,17,19 41:23 <b>sprints</b> 21:8,12 38:6 <b>start</b> 16:24 30:21 41:11 <b>started</b> 5:3 18:13 <b>state</b> 3:13,13,15,20 3:24 5:6,8,9,12 6:12 8:15,17,17 8:20,24,24 9:4,4 9:11,13,18,19,22 9:23 10:1,3,7,11 10:17,25 11:9,15 12:7,10,13,14,17 12:22,23,23 13:3	13:5,6,7,23 14:2,3 15:7,16 16:15 17:14 18:4,15,17 18:18,21,24 19:1 19:3,4,21 20:19 20:21,22 21:17,20 21:24 22:20,20,22 24:3 25:6,9,18,19 25:21 26:6 27:1,4 27:5,10,11,11,14 27:15,16,16,20,22 28:3,8,13,21 29:9 29:11 31:5,12 32:12,14,20,20 33:7,7,8,8,9,12,18 33:19,20 34:1 35:9 36:2,8,12,20 37:4,16,21,25 38:1,4,11,14,18 39:1,6 40:7 41:13 42:19,20,21 43:7 43:8,9,10,13,16 <b>stateinitiated</b> 31:7 <b>states</b> 1:1,12 4:4 12:22 17:17,25 19:13 21:22 26:18 31:9,13 33:2 35:8 41:4 43:2,4,9,15 <b>statute</b> 14:24 22:20 27:16 28:8 33:21 <b>statutory</b> 23:14 <b>stay</b> 10:3 30:10 <b>steffel</b> 38:22 <b>step</b> 8:2 <b>stop</b> 13:24 14:4,7 <b>straightforward</b> 29:2 <b>strange</b> 7:17 16:5 <b>strike</b> 39:13 <b>strongly</b> 8:4 <b>stuck</b> 16:16 <b>subject</b> 3:15 6:15 6:16 24:4 26:23 31:24 <b>submitted</b> 43:25 44:2	<b>substance</b> 5:24 6:17 <b>substantially</b> 33:2 <b>suppose</b> 35:10,25 <b>supposed</b> 14:7 <b>supreme</b> 1:1,12 <b>sure</b> 6:25 <b>surprisingly</b> 7:8 <b>system</b> 10:14 36:16 <hr/> <b>T</b> <hr/> <b>t</b> 2:1,1 18:4 40:8 <b>take</b> 11:13 13:12 22:24 24:1 26:15 28:13 30:9 <b>taken</b> 15:20 <b>takes</b> 14:21 15:5 <b>talking</b> 40:16 <b>tariff</b> 23:2,6,6,13 27:23 28:10 <b>tariffed</b> 41:3 <b>teacher</b> 6:7 <b>telecommunication</b> 14:16 <b>telecommunicati...</b> 7:18 8:12 14:6 40:10,11 41:2 <b>telephone</b> 18:10 <b>tell</b> 22:16 31:18 <b>tend</b> 34:22,23 <b>terms</b> 26:18 32:21 <b>test</b> 21:8,12 26:9 29:1,2,18 32:4,12 35:6,7 36:14,14 41:25 42:14,16,17 <b>tests</b> 36:15 <b>texaco</b> 17:22 <b>texas</b> 17:23 <b>thank</b> 21:2 25:3 42:5,6 43:23 <b>thats</b> 7:3 11:11 12:25 13:9 14:2,5 15:4,4 18:16,17 18:24,24 19:8 21:15 22:20 25:10 25:11 26:13 27:16	28:3 30:8 32:7 34:6 36:13 40:12 42:23 <b>theory</b> 14:13 16:10 <b>theres</b> 3:16 5:7 8:16,17 11:10,21 11:25,25 20:17,17 20:20 24:8,18 28:14 33:21 34:3 35:25 36:1,8 39:5 39:6 <b>theyre</b> 5:7,8 22:9 30:20 <b>theyve</b> 31:2 <b>thing</b> 40:1 <b>things</b> 19:1 36:12 <b>think</b> 4:24 5:2,21 6:17 8:6,10 10:11 10:21 11:5,8,9,12 11:20 12:4,8 13:7 15:11,12 16:4 18:11,19 19:12 20:7 22:12 31:13 31:25 33:4,17 34:19,21 35:4,15 36:11,25 37:3 39:21 42:14,16 43:1 <b>thinking</b> 4:15 <b>third</b> 14:25 25:17 <b>thirddegree</b> 6:15 <b>thought</b> 9:10 22:5 23:23 38:2,3 <b>threat</b> 21:18 23:7 23:17 <b>threatening</b> 15:1 30:20 <b>three</b> 25:8 26:12 <b>threepart</b> 29:2 35:7 <b>tied</b> 19:6 <b>time</b> 3:18 6:16,22 7:11 11:19 15:1 21:1,11,16 24:3 26:1 30:18 32:5,5 36:13 39:8,23 42:1
---	---	--	---	--

timothy 1:15 2:3,9 3:7 42:8 today 24:11 29:22 told 6:5 touching 22:10 touchstone 22:21 25:7 traditional 3:18 5:11 15:5 17:12 18:12,16 20:18 train 37:25 trainor 3:23 5:4 transform 3:11 treated 12:9,15 trial 19:17 tried 10:1 13:17 27:16 tries 23:11 true 21:15 40:12 truly 23:9 32:24 try 5:17 trying 39:14 tuesday 1:9 turn 36:15 two 12:10 22:17,25 23:10 27:8 32:25 33:1 type 25:20 31:14 typically 25:20	33:12 unitary 12:8,9,16 16:14 24:2,7,15 37:4,23 united 1:1,12 unlawful 31:5 unsettling 18:23 unusual 9:25 17:15 urged 8:4 use 17:17 26:9 utilities 21:9 25:13 40:9	40:22 ways 4:22 wed 10:3 11:18 welfare 21:18 went 5:14,16 9:23 13:22,23 14:8 17:21 weve 4:19 12:2 30:5,6 37:2 38:24 whats 8:11,12 14:15,15,16 23:20 24:4 25:3 32:23 35:1 whatsoever 9:22 whos 38:15 windstream 11:25 13:24 14:3 16:22 21:10,19 23:4 27:18,24 29:24 30:19 31:23 40:19 40:24,24,25 windstreams 40:20 40:23 withdraw 30:7 41:19 withdrew 41:14,17 withholding 41:11 wont 30:2 word 4:20 5:2 22:9 words 10:25 41:15 42:13 work 39:16 world 14:6 worthwhile 4:14 wouldnt 7:24 34:21 38:5 41:12 wrong 31:7 34:24 wrongdoing 20:15 20:23	yorks 17:20 young 16:6,11,19 17:3,4 younger 3:12,17,22 3:24 4:2,23,25 9:21,25 11:17,20 13:4 15:3 17:15 18:13 20:14,18 21:13,25 22:5 25:6 26:11,18,24 27:5,10,12,13 28:18,19 29:1,5,8 32:8,16,22 33:14 34:8,9,9 35:5,13 36:7 37:1,7,9 38:13 39:5 42:18 42:25 youre 5:23 8:19,19 22:21 24:17,24 28:18 30:5 35:1 43:13,15 youve 37:24 39:13	33 12:18 34 12:18  4 42 2:10 43 24:21 476 27:23  5 5 1:9 27:23 57 44:1  6 6 42:7 60 6:16  7  8  9 96 40:13 41:2
U	V	W	Z	
un 23:5 unavoidably 21:21 unclear 41:7 unconstitutional 38:17 underlying 14:10 understandably 15:24 understanding 20:11 32:15 understands 42:22 understood 13:13 unflagging 10:6 unilateral 41:10 unimportant 33:9	v 1:5 3:4 variety 23:10 various 30:23 vehicle 28:19 version 28:4 versus 16:20 view 13:2 23:21 33:23 34:13 37:13 39:20 violated 33:21 violates 38:18 violations 6:13,14 14:24 virtually 3:13 10:5 vs 40:8	waited 11:23 want 5:17 8:2 17:10 20:4 22:9 30:6,7 34:4 38:7 42:13 wanted 6:25 11:25 36:17 38:4 40:1 wants 34:5 35:12 37:20 washington 1:8,15 wasnt 16:2 39:2 waste 26:1 way 11:24 16:9,20 17:25,25 25:12 28:12 29:7 35:1	zenith 18:18,25  0 06 1:13 3:2  1 11 1:13 3:2 44:1 12815 1:4 3:4 1996 7:23 14:15 40:10 41:7,9  2 2 10:8 2009 41:10 2011 41:7 2013 1:9 21 2:7 22 41:6 23 41:6 251 41:2  3 3 2:4	