

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DANA ROBERTS, :

4 Petitioner : No. 10-1399

5 v. :

6 SEA-LAND SERVICES, INC., ET AL. :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, January 11, 2012

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:23 a.m.

14 APPEARANCES:

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16 Petitioner.

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19 for Federal Respondent.

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21 private Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JOSHUA T. GILLELAN, II, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JOSEPH R. PALMORE, ESQ.	
7	On behalf of the Federal Respondent	28
8	ORAL ARGUMENT OF	
9	PETER D. KEISLER, ESQ.	
10	On behalf of the private Respondent	49
11	REBUTTAL ARGUMENT OF	
12	JOSHUA T. GILLELAN, II, ESQ.	
13	On behalf of the Petitioner	59
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 (11:23 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 10-1399, Roberts v. Sea-Land
5 Services.

6 Mr. Gillelan.

7 ORAL ARGUMENT OF JOSHUA T. GILLELAN, II,

8 ON BEHALF OF THE PETITIONER

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

11 Dana Roberts was injured and shortly
12 thereafter became disabled in the course of his work for
13 Sea-Land in fiscal year 2002, but he was not awarded
14 compensation until fiscal year 2007.

15 The question presented here is whether the
16 maximum weekly rate established by section 6 of the
17 Longshore Act that was in effect at the time his
18 disability began or that which was in effect at the time
19 he was awarded compensation governs his case. He is
20 entitled to whichever maximum is the applicable one.

21 Section 6(c) of the Act provides explicitly
22 that the applicable maximum is that in effect at the
23 time that the claimant is "newly awarded compensation."
24 The term "award" or "awarded" in the Longshore Act has a
25 consistent meaning throughout, contrary to the views of

1 the court of appeals below; and that meaning is a
2 compensation order filed pursuant to section 19(e) of
3 the Act, which is described in section 19(e) as "the
4 order making the award."

5 JUSTICE SCALIA: It seems to me that --

6 JUSTICE GINSBURG: What happens in the
7 case --

8 JUSTICE SCALIA: -- that the two parties are
9 at extremes and that there is indeed something in the
10 middle. I mean, you say it has to be the determination
11 of entitlement to compensation by the agency. The other
12 side says no, it's just entitlement, whether it's been
13 decreed or not. Why -- why wouldn't it be an award,
14 however, if it was the employer that voluntarily paid
15 the amount due, which is what he's supposed to do
16 anyway, right? Why wouldn't that be an award of
17 compensation?

18 MR. GILLELAN: Well, because the statute --
19 in some sense of the word "award" it is.

20 JUSTICE SCALIA: Yes, a sense that -- that
21 the text would bear, as opposed to the -- to the sense
22 that the other side argues here.

23 MR. GILLELAN: I think that the text will
24 not bear that reading, in particular because the
25 payments that you are describing that could be

1 considered an award are described throughout the Act as
2 payments "without an award." Now, how the claimant can
3 have been newly awarded benefits at the time the
4 employer makes a payment "without an award" I think
5 defies the meaning of that word.

6 JUSTICE SCALIA: Where -- well, I wish you
7 would submit the sections of the Act that use it that
8 way, that say "compensation without an award."

9 MR. GILLELAN: Section 14(a) through (e)
10 refers to compensation payments without an award.

11 JUSTICE SCALIA: Okay.

12 MR. GILLELAN: Those are the provisions.
13 Section 14(a) and (b) directs those payments without an
14 award.

15 JUSTICE GINSBURG: And the -- and the
16 critical time, then -- I think, isn't it true that most
17 compensation payments are the -- are as a result of
18 voluntary action by the employer and not a proceeding?

19 MR. GILLELAN: That is true, yes.

20 JUSTICE GINSBURG: So -- and then in those
21 cases, when the employer says, okay, I will voluntarily
22 make this compensation available, then measuring --
23 the -- the pay would be measured by the time the
24 employer makes -- makes the compensation available,
25 right?

1 MR. GILLELAN: I think not, because the --
2 the statutory provision says it's the award that's
3 determinative.

4 JUSTICE SCALIA: Well, it's --

5 JUSTICE GINSBURG: But there's no award.

6 MR. GILLELAN: But there can be an award. I
7 think that's the critical --

8 JUSTICE GINSBURG: But we have -- what is --
9 I mean, there can be. But here's a person who has been
10 injured and gets compensation without having to bring
11 any legal proceeding for it. What is the weekly -- the
12 measure then? It can't be an award, the date of the
13 award, because there is no award. So, what is it?

14 MR. GILLELAN: The employer that wants to
15 lock in this year's maximum rate and not have his
16 liability progress above that simply needs to have an
17 award entered.

18 JUSTICE SCALIA: No, he doesn't. No, he
19 doesn't. He can just begin payment. This (c), which is
20 the section we're talking about here, doesn't just
21 provide for newly awarded compensation. It also says
22 "survivors currently receiving compensation for
23 permanent total disability or death benefits."

24 "Currently receiving." Now, does that mean
25 it has to have been decreed by the agency? I don't

1 think so.

2 MR. GILLELAN: That provision, which -- that
3 clause --

4 JUSTICE SCALIA: That clause.

5 MR. GILLELAN: -- that separate clause --

6 JUSTICE SCALIA: Yes.

7 MR. GILLELAN: -- which is not in this case,
8 because --

9 JUSTICE SCALIA: I understand. But it --
10 but it applies to the question, it seems to me, that
11 Justice Ginsburg asked, doesn't it?

12 MR. GILLELAN: No, I think not.

13 JUSTICE SCALIA: No?

14 MR. GILLELAN: The function of that clause
15 is that in permanent total and death cases, because
16 there's an annual escalator provision, whatever your
17 rate is this year is going to go up -- if it's a
18 permanent total or death case -- is going to go up each
19 October 1st by the increase in the national average
20 rate.

21 JUSTICE SCALIA: But only if you've been
22 receiving compensation.

23 MR. GILLELAN: If you -- if --

24 JUSTICE SCALIA: Okay? If neither the
25 employment -- if neither the employer gives you the

1 compensation voluntarily nor as you -- as you contend,
2 there has been an award by the agency, you're out; (c)
3 doesn't apply. Right?

4 MR. GILLELAN: I wouldn't say (c) doesn't
5 apply, no. I think --

6 JUSTICE SCALIA: How else would it apply?
7 You are either receiving compensation, which I would
8 understand to mean receiving it from the employer or by
9 reason of an award, or else you've been newly awarded
10 compensation, which I guess means it hasn't yet been
11 paid, but -- but you have the award in your pocket.

12 MR. GILLELAN: Well, the -- the function of
13 that separate clause is for cases in which an award has
14 been entered of death benefits or permanent total
15 disability benefits, and everything up to that point is
16 governed by the maximum that's in effect at the time of
17 that --

18 JUSTICE SCALIA: It doesn't say that,
19 counsel. It says "survivors currently receiving
20 compensation." It doesn't say "by virtue of an award."
21 It says "receiving compensation." So, if the employer
22 is paying it voluntarily, you're in there. And then it
23 goes on and it contrasts with receiving compensation
24 those newly awarded compensation. You're not yet
25 receiving it, but you've been awarded it.

1 MR. GILLELAN: Well, Mr. Roberts did not
2 fall within the currently receiving compensation --

3 JUSTICE SCALIA: I understand that.

4 MR. GILLELAN: Okay.

5 JUSTICE SCALIA: But I'm just trying to make
6 sense out of the provision. And it doesn't seem to me
7 to make any sense unless you read it just the way I
8 suggested.

9 MR. GILLELAN: Okay. I hope I can provide
10 that sense. The function of that separate clause is
11 that a claimant who has been awarded compensation at a
12 given rate, at the -- which is the maximum at the time
13 of the award, will continue to receive compensation
14 in --

15 JUSTICE SCALIA: It doesn't say that. It
16 says nothing about an award. The last part talks about
17 an award. It says "currently receiving compensation for
18 permanent total disability or death benefits." And if
19 you're receiving it from your employer, I don't know why
20 that isn't covered by that. Why isn't it covered?

21 MR. GILLELAN: I can certainly see that
22 those terms would appear to apply --

23 JUSTICE SCALIA: Yes.

24 MR. GILLELAN: -- to that situation in which
25 the employer is paying compensation for death or for

1 permanent total disability. That wouldn't provide us
2 for a maximum -- any applicable maximum.

3 JUSTICE SCALIA: I don't think it affects
4 your case. It's just a matter of understanding what
5 this provision is talking about.

6 MR. GILLELAN: Yes. And the -- what I'm
7 trying to say about the function of this clause is that
8 a claimant who has been awarded compensation for
9 permanent total disability -- let's assume the employer
10 hasn't paid anything until the ALJ issues an award, and
11 at the time that award is issued the maximum is \$1,000 a
12 week, and the employer was making -- the employee was
13 making more than 1500. So, that maximum is the rate.

14 JUSTICE SCALIA: But if the employer has
15 been paying voluntarily, you don't penalize the employee
16 for not having an award, right? I mean he's in the same
17 position; the employer has conceded the liability.

18 MR. GILLELAN: He certainly is not in the
19 same position, no.

20 JUSTICE SOTOMAYOR: Counsel, would
21 Justice Scalia's reading in your judgment -- accept his
22 proposition that those currently receiving voluntary
23 payments from the employer fall under subsection (c).
24 Would his reading require the employer every year to
25 recalculate the benefits to the maximum that's

1 established that year?

2 MR. GILLELAN: Yes, it would. Yes, it
3 would.

4 JUSTICE SOTOMAYOR: And that's why his
5 reading --

6 MR. GILLELAN: And that is precisely the
7 function of that clause.

8 JUSTICE SOTOMAYOR: The function of (b) is
9 to set a maximum that will control all payments present
10 and future.

11 MR. GILLELAN: Yes, yes, definitely.

12 JUSTICE SOTOMAYOR: And so, if you read it
13 the way he does, that maximum would change each year.

14 MR. GILLELAN: Yes. And for permanent total
15 disability and death cases --

16 JUSTICE SCALIA: I don't understand why
17 that's so only for employment -- for employer payments
18 and not the case for awards. If that's so for the
19 employer's payment, why isn't it so for awards that have
20 been decreed? Why don't they change every year?

21 MR. GILLELAN: They do. If the award is for
22 permanent total disability or for death, they do.

23 JUSTICE SCALIA: Okay. So, then my reading
24 makes perfect sense.

25 MR. GILLELAN: Yes, your reading does make

1 perfect sense. And the function of that second -- that
2 -- the clause for those currently receiving compensation
3 for permanent total or death is that even when the
4 maximum continues to go up after the date of an award,
5 that new maximum is the applicable one for the
6 continuing period of disability or survivorship.

7 CHIEF JUSTICE ROBERTS: When -- one of the
8 arguments on the other side that I thought made some
9 sense was the idea that you should focus on a particular
10 point in time when you're figuring out what the amount
11 of the award is going to be; that it doesn't make --
12 that it's at least odd to say, well, we're going to
13 calculate how much you're entitled to at this point, but
14 in terms of the applicable maximum, we're going to wait
15 however long it takes and calculate that as of this
16 point. Doesn't it make more sense to figure out the
17 applicable numbers at the same point in time?

18 MR. GILLELAN: Marginally more sense,
19 perhaps so. But that is an argument that should be
20 addressed to Congress. Congress could easily have made
21 section 6(c) turn on the time of injury. Instead, they
22 provided very explicitly --

23 CHIEF JUSTICE ROBERTS: So, if we think --
24 if we think the statute -- in other words, your
25 argument, your response, is that the statute is

1 unambiguous and it can't be read --

2 MR. GILLELAN: Yes.

3 CHIEF JUSTICE ROBERTS: -- in a more
4 sensical way.

5 MR. GILLELAN: Yes.

6 CHIEF JUSTICE ROBERTS: Okay.

7 MR. GILLELAN: Yes, and that each use of the
8 term "award," contrary to the Ninth Circuit's view, is
9 consistent with that. That is, whenever Congress refers
10 in this statute to an award or compensation being
11 awarded, it is talking about the order making the award
12 as it's described in section 19(e).

13 JUSTICE SCALIA: You don't really have to
14 establish that, do you? All you have to establish is
15 that it is -- there is no way in which "newly awarded
16 compensation" means entitlement to compensation. That's
17 all you have to establish.

18 MR. GILLELAN: That is exactly correct.

19 JUSTICE SCALIA: You don't have to show that
20 it's used consistently throughout, only that it's never
21 used to mean entitlement to compensation.

22 MR. GILLELAN: That is -- that is exactly
23 correct, and I --

24 JUSTICE ALITO: Are you conceding in answer
25 to these questions that your reading doesn't really make

1 any sense; that's just what Congress -- that's what
2 Congress did?

3 MR. GILLELAN: No, I hope I'm not conceding
4 that.

5 JUSTICE ALITO: Well, what sense does it
6 make? What -- why should the ceiling depend on whether
7 an employee is getting compensation voluntarily from the
8 employer or as a result of a formal award? If you have
9 two identical -- identically situated employees and one
10 is getting the compensation without an award and one is
11 getting it with an award, as you understand the term
12 "award," why -- what sense does it make to treat them
13 differently?

14 MR. GILLELAN: I would say they certainly
15 are not identically situated. The claimant who has an
16 award --

17 JUSTICE ALITO: They're identically situated
18 in every respect except one. One has a formal award;
19 one does not. What sense does it make to treat them
20 differently then?

21 MR. GILLELAN: There are serious
22 consequences of the fact that one has an award and the
23 other is being paid only without an award.

24 JUSTICE SCALIA: Counsel, if I understood
25 your response to my prior line of questioning, you deny

1 that they are treated differently. The one who is
2 receiving compensation is treated the same, under the
3 same provision. There are two parts to it: survivors
4 currently receiving compensation and survivors newly
5 awarded compensation.

6 Those two classes are treated exactly the
7 same. The only one that is treated differently is
8 somebody who is neither being paid by the employer nor
9 has yet received an award.

10 MR. GILLELAN: No. No.

11 JUSTICE SCALIA: No?

12 MR. GILLELAN: No, no. The clause that
13 depends on whether you're currently receiving only
14 applies to permanent total disability and death cases.
15 In all other cases, the clause that says "newly awarded"
16 is the only applicable provision.

17 JUSTICE SCALIA: I see. Partial disability,
18 in other words.

19 MR. GILLELAN: Correct.

20 JUSTICE SCALIA: Okay.

21 MR. GILLELAN: And temporary total.
22 Temporary total has -- the rates do not go up each year.

23 JUSTICE BREYER: Would you then go back -- I
24 did have the same question Justice Alito asked, and I'd
25 like to hear the answer. The answer -- that there --

1 I'll add one footnote, perhaps, which -- make it a more
2 complete answer, and that is that it makes very little
3 sense to me when a worker becomes disabled on January 1,
4 1990, for example. He is now disabled. And so, we
5 calculate what his wage was. His wage was \$200 a week.
6 And now we say: But that shouldn't exceed twice the
7 average weekly wage, and we're not going to apply it to
8 him.

9 You're going to apply it to him at some
10 random date. His wage that he's getting paid is figured
11 out as of January 1, 1990.

12 MR. GILLELAN: Yes.

13 JUSTICE BREYER: But the maximum that it
14 could be is figured out as of January 1, 1998, when he
15 finishes a proceeding.

16 Now, I just -- for both reasons, why would
17 you distinguish and why would you get that result? For
18 those two reasons, it doesn't seem to make much sense to
19 me, your reading of it, while theirs does make sense.
20 Now, you explain why that is.

21 MR. GILLELAN: Okay. Okay. I think the
22 point is to encourage the employer to get an award
23 entered promptly because that way they will lock in that
24 early maximum rate or minimum rate. The minimum rate
25 provision applies exactly the same way under section

1 6(c).

2 JUSTICE KAGAN: But I thought Congress
3 wanted the system to operate so that people just did it
4 voluntarily without an award.

5 MR. GILLELAN: Well, they want that to
6 happen as often as possible, but the employer has the
7 right in any case to file a notice with the Department
8 of Labor saying we do not believe the claimant is
9 entitled to compensation.

10 JUSTICE SCALIA: Counsel, it really doesn't
11 make a whole lot of sense. I mean, it seems to me you
12 have to acknowledge it would be a much better statute
13 had it been written differently. And really your
14 argument here is it's not up to us to revise the
15 inadequacies of a statute. I mean, your argument is you
16 just can't read the language that way. And it provides
17 a stupid result. There are such things as stupid
18 statutes, and this is one of them, right?

19 MR. GILLELAN: I don't think it's stupid,
20 but yes, my basic argument is it isn't.

21 JUSTICE BREYER: But you think -- you think
22 it is not stupid because you think it is a good idea to
23 give a lot of work to the Department of Labor and that
24 all the employers who are going to do this voluntarily
25 and there will never be a problem with it -- all should

1 be encouraged to go and get a certificate from the
2 Department of Labor. All right. I'll take that as --
3 something.

4 And now, why is it I can't read the statute
5 the way that it seems to make somewhat more sense? I
6 don't see any words here that stop me from reading it.

7 MR. GILLELAN: "Newly awarded compensation"
8 are the critical words.

9 JUSTICE BREYER: Where now there exactly?
10 It says -- you mean in (c)?

11 MR. GILLELAN: In -- yes, 6(c).

12 JUSTICE BREYER: You just told me that just
13 has to do with permanent or total disability, and this
14 is far --

15 MR. GILLELAN: No. Excuse me. The other
16 clause of that provision, the one that says "currently
17 receiving compensation" -- that one only applies to
18 survivors and permanently totally disabled workers.

19 JUSTICE BREYER: But why -- why don't they
20 both? I mean, as I read it naturally, it says that --
21 we now have a special thing, you know, which these
22 people are the dead ones and the widows are getting it
23 and the permanently disabled people, and the -- this
24 individual, and the Secretary, the Secretary or his
25 delegate is going to calculate this thing all the time.

1 And they've got a special thing here for -- for
2 permanent people, permanently disabled, and they're
3 saying as to those people, we're giving them a break.
4 They can't look for more work. They can't look for --
5 they're dead, for example, and they can't find other
6 sources of income. And so, we say that, that if the
7 average wage goes up and their wage was higher to begin
8 with, we will raise it a bit.

9 MR. GILLELAN: Yes.

10 JUSTICE BREYER: And that applies not only
11 to the people who are just getting this for the first
12 time in the relevant period; it also applies to all
13 those who have been getting it. It applies to both
14 groups. Well, that makes sense to me.

15 MR. GILLELAN: For permanent total
16 disability --

17 JUSTICE BREYER: Yes. Right.

18 MR. GILLELAN: -- and death.

19 JUSTICE BREYER: Right.

20 MR. GILLELAN: Yes.

21 JUSTICE BREYER: So, the whole thing applies
22 just to the permanently disabled and the death things.
23 What says it applies to anybody else?

24 MR. GILLELAN: No, the -- the clause --

25 JUSTICE BREYER: The whole thing. The

1 whole -- the whole -- all of (c). That's -- in my thing
2 here, that's seven lines. All of (c) applies to
3 permanently disabled and those who died.

4 MR. GILLELAN: Well, that's certainly -- no
5 one has put forward that construction, and that would
6 mean that there is no maximum applicable to other
7 categories of disability, like Mr. Roberts's disability.

8 JUSTICE BREYER: Oh, yes. Oh.

9 MR. GILLELAN: The new --

10 JUSTICE BREYER: I feel slightly like an
11 Abbott and Costello movie, but I'm getting this --

12 (Laughter.)

13 JUSTICE SOTOMAYOR: Counsel, what happens to
14 your argument if we disagree with you that employers
15 have a way to seek a compensation order? As I read the
16 regulations, the only way they can do that is if the
17 employee files a claim, and the employee's filing of the
18 claim then sets the process in motion. I can't imagine
19 that an -- any employee, knowing that a future award
20 could help them, would bother filing a claim to help the
21 employer lock in his rate.

22 MR. GILLELAN: I think -- actually, my
23 experience, my universal experience with this statute,
24 is that that is not a realistic view of what claimants'
25 behavior is.

1 The critical difference is an -- the entry
2 of an award does not merely confirm that the employer is
3 making payments; it requires it to continue making those
4 payments until --

5 JUSTICE SOTOMAYOR: That's not my question.
6 Most of your argument is premised on the -- I thought,
7 that the employer could lock in his rate --

8 MR. GILLELAN: Yes.

9 JUSTICE SOTOMAYOR: -- by seeking an award.

10 MR. GILLELAN: Yes.

11 JUSTICE SOTOMAYOR: If I disagree with you
12 that the Act doesn't provide for that and neither do the
13 regulations, that only employees can seek awards, what
14 happens to your argument?

15 MR. GILLELAN: Oh, I think -- well -- I have
16 trouble accepting that hypothetical situation because --

17 JUSTICE SOTOMAYOR: Well, as I've studied
18 it, I think that's the case. So, assume that fact to be
19 true, that employers have no regulatory or statutory
20 right to seek an award. They can either stop paying and
21 have the employee make a claim or not.

22 How -- what does this do to your argument,
23 if that's accurate?

24 MR. GILLELAN: Nothing. It simply requires
25 the employer to induce the claimant to file a claim if

1 it wants that award.

2 JUSTICE SOTOMAYOR: By stopping payment.

3 MR. GILLELAN: Yes. Yes.

4 JUSTICE SOTOMAYOR: So, that destroys the
5 whole voluntary payment aspects of this.

6 MR. GILLELAN: Well, they wouldn't --
7 indeed, they wouldn't have to stop payment. They simply
8 need to tell the claimant: If you don't file a claim,
9 we're going to stop payments. No --

10 JUSTICE SOTOMAYOR: Isn't it an odd statute?

11 JUSTICE BREYER: I see. Is your argument
12 this now -- I'm sorry to be so slow. But that, look,
13 there is a statute here; it that says compensation
14 cannot exceed more than 200 percent of the annual weekly
15 -- or the weekly wage. Then in (3), it says how to
16 calculate that particular number. And then you go over
17 to (c), and (c) says that calculated number applies to
18 those newly awarded compensation.

19 And you're saying "newly awarded
20 compensation" means somebody got it through an award,
21 not somebody got it automatically. And since somebody
22 got it -- had to get it through an award or it wouldn't
23 apply when you just get it because they pay for it, it
24 just doesn't apply. You have to go get the award. And
25 the word you're turning on is "newly awarded."

1 MR. GILLELAN: Yes.

2 JUSTICE BREYER: That's the argument?

3 MR. GILLELAN: Yes, it is.

4 JUSTICE BREYER: Like Abbott and Costello, I
5 don't know what I'm talking about. But I do -- I do --

6 (Laughter.)

7 JUSTICE BREYER: I was -- I was --

8 JUSTICE KAGAN: Well, Mr. Gillelan --

9 JUSTICE BREYER: Now I fully understand your
10 argument.

11 JUSTICE SCALIA: Counsel, could I --

12 JUSTICE KAGAN: Could I follow --

13 JUSTICE SCALIA: Could I ask you about
14 another inconsistency in this section? We've gone over
15 one, which I think is there. Isn't there a group left
16 out of this thing, even under -- even under the
17 Government's interpretation of it? What happens to
18 people who are receiving compensation for temporary
19 total disability or for partial disability? They
20 don't -- they don't come under either one of those two
21 categories, even under the Government's interpretation,
22 right?

23 MR. GILLELAN: No. I think under the
24 Government's interpretation, as under ours, they fall
25 under those --

1 JUSTICE SCALIA: No, they haven't gotten an
2 award yet. They have not gotten an award yet, and they
3 are only partially disabled or have temporary permanent
4 disability. They're -- they're not covered by (c), are
5 they?

6 MR. GILLELAN: Well, they are covered by it,
7 but before we know which year's maximum applies, an
8 award --

9 JUSTICE SCALIA: Oh, that's right, but
10 they --

11 MR. GILLELAN: Yes.

12 JUSTICE SCALIA: It doesn't take effect --

13 MR. GILLELAN: That's correct.

14 JUSTICE SCALIA: -- during that year.

15 MR. GILLELAN: That's correct.

16 JUSTICE SCALIA: Well, does that make any
17 sense?

18 MR. GILLELAN: Yes --

19 JUSTICE SCALIA: No, it doesn't. But you
20 say the statute doesn't make sense.

21 MR. GILLELAN: I think it does because it
22 encourages the employer to have an award entered so that
23 it will have the benefit of the current maximum rate and
24 not next year's or the year's after or the year's after
25 that.

1 JUSTICE SOTOMAYOR: All right.

2 CHIEF JUSTICE ROBERTS: It's not a
3 serious --

4 JUSTICE KAGAN: Mr. Gillelan, if a --

5 CHIEF JUSTICE ROBERTS: Go ahead. You've
6 been -- you've been waiting the longest.

7 (Laughter.)

8 JUSTICE KAGAN: I think the way the argument
9 has gone so far is that we've all been saying this can't
10 make sense, and you've been saying, as you have every
11 right to say, yes, but this is what the statute says
12 based on the "newly awarded" language.

13 But that does assume that "newly awarded"
14 can't mean an entitlement. And then you run up against
15 some other statutory provisions where an award does seem
16 to mean, not a formal compensation order, but instead an
17 entitlement to funds. So, 908(d)(1), it seems as though
18 the word "award" means entitlement; 910(h)(1), it seems
19 as though the word "award" means an entitlement; and
20 933(b), which says "award in a compensation order,"
21 suggests that awards can be made in a formal order or
22 awards can be made differently because of an entitlement
23 that is automatically paid.

24 So, I guess there are three places that it
25 seems to me your reading of the word -- your limited

1 reading of the phrase "newly awarded," you know, runs
2 into problems in those three ways, and I'm left then
3 thinking we should do what makes sense.

4 MR. GILLELAN: I may have missed what the
5 third of those was. I have the --

6 JUSTICE KAGAN: 933(b), 908(d)(1), and
7 910(h)(1).

8 MR. GILLELAN: Ah, okay. Yes, 9 -- the
9 section 8(d)(1) that they're referring to refers to an
10 award to an -- the unpaid portion of an award to an
11 employee who dies before that award has been paid out.
12 Their reading of "award" in that provision is
13 contradicted by the subsequent paragraph of the same
14 subsection, which says "an award may be made after the
15 death of the injured employee." It's 908(d)(3).

16 Now, that is impossible on their reading of
17 "award" -- on the reading they give "award" in section
18 8(d)(1). No, what it means in 8(d)(1), as throughout
19 the Act, is an award. And if none has been entered
20 while the claimant is still alive, it's entered after
21 his death. And the survivors under that provision take
22 the rest of it that had not been paid before the death.

23 Now, we have essentially the same analysis
24 of those other provisions. Yes, in those other
25 provisions as well, it does mean a compensation order.

1 If you cut it loose from that statutory foundation, we
2 get three or four different possible meanings that the
3 Respondents try to put on it, and we are cut loose from
4 anything.

5 JUSTICE SCALIA: Well, you're -- you're
6 making your case harder than it has to be, it seems to
7 me, by saying that it always means an award of
8 compensation by the agency.

9 I -- I think in -- in 8(d), I don't think it
10 means that, but it certainly means an amount due and not
11 an entitlement. It means an amount, a specific amount
12 due, and that explains its meaning elsewhere, but that's
13 quite different from saying that it means entitlement.

14 MR. GILLELAN: No doubt it is, yes. And --
15 and perhaps there may be some variation in the meaning
16 in the other provisions. That's possible. But in
17 section 6(d), we think it has to mean the entry of an
18 award. That's the only definite event it could refer
19 to.

20 JUSTICE SCALIA: Oh, I think that's true,
21 but only because of the earlier portion of 6(c) which --
22 which covers all other payments that are not by virtue
23 of an award.

24 MR. GILLELAN: Right. Yes.

25 JUSTICE SCALIA: Receiving compensation.

1 MR. GILLELAN: Yes.

2 I would reserve what time I have left.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. GILLELAN: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Palmore.

6 ORAL ARGUMENT OF JOSEPH R. PALMORE

7 ON BEHALF OF THE FEDERAL RESPONDENT

8 MR. PALMORE: Mr. Chief Justice, and may it
9 please the Court:

10 Petitioner's interpretation of section 906,
11 which hinges entirely on the date of an administrative
12 compensation order, renders that provision impossible to
13 apply in the many cases expressly contemplated by the
14 Act in which there is no such order. That
15 interpretation also creates arbitrary distinctions
16 between beneficiaries' benefit levels based on
17 administrative happenstance.

18 JUSTICE SCALIA: Your --

19 CHIEF JUSTICE ROBERTS: So, if you're --

20 JUSTICE SCALIA: I'm sorry.

21 CHIEF JUSTICE ROBERTS: So, if you're
22 walking down the street, you're on a business
23 enterprise, they haven't shoveled the snow, you slip and
24 fall and you're hurt, you go home and say: Good news,
25 I've been awarded damages.

1 MR. PALMORE: The statute provides for the
2 award of damages, and I think this is -- this -- the key
3 to this, understanding how this scheme works, is
4 understanding section 914 and section 913. These are at
5 page 17a --

6 JUSTICE SCALIA: But we're not talking --

7 MR. PALMORE: -- of the appendix.

8 JUSTICE SCALIA: -- about how the scheme
9 works. Grant you that it makes a lot more sense your
10 way, but you -- will you grant that it's not up to us to
11 rewrite the statute?

12 MR. PALMORE: It's absolutely not up to
13 you --

14 JUSTICE SCALIA: Okay.

15 MR. PALMORE: -- to rewrite the statute,
16 Justice Scalia.

17 JUSTICE SCALIA: So, what we're talking
18 about is whether "awarded" in that provision can bear
19 the meaning that you want to give it. Let's assume that
20 Congress passes a -- a new statute providing for tax
21 credits for -- for each child, okay? My wife gives
22 birth to a child just before Christmas, and I say, oh,
23 goody; I've been awarded \$2,000. I wouldn't say that.
24 That's not a normal use of the language.

25 MR. PALMORE: I think it's --

1 JUSTICE SCALIA: I am entitled to it under
2 this statute. But when the event of having a child
3 occurs, I don't say I've been awarded \$2,000. You might
4 say it analogously. I mean, you know, oh, hey, I've
5 been awarded \$2,000. But that's analogous. And
6 statutes are not written by analogy; they're written to
7 say what they say.

8 And I don't know anybody that would use the
9 term "awarded" the way you want it used. The Chief
10 Justice's example is another one: Oh, good, I've been
11 awarded damages.

12 You haven't been awarded damages. You're
13 entitled to them.

14 MR. PALMORE: I think Justice Kagan
15 highlighted three provisions where the statute does in
16 fact use the word "award" to indicate a statutory
17 entitlement.

18 JUSTICE SCALIA: Let's go through those.

19 MR. PALMORE: I'd be glad to, Justice
20 Scalia.

21 JUSTICE SCALIA: And you -- you show me
22 how -- I agree with you that they don't mean the entry
23 of an award by the agency, but I don't agree with you
24 that the only -- only reading you can give them is
25 entitlement.

1 MR. PALMORE: Well, just -- to start with
2 section 933, which is at page 24a of the Government
3 appendix. This is one of the sections highlighted by
4 Justice Kagan.

5 JUSTICE SCALIA: 933 --

6 CHIEF JUSTICE ROBERTS: -- of the gray
7 brief.

8 MR. PALMORE: Of the gray brief. 933(b)
9 says: "Acceptance of compensation under an award in a
10 compensation order filed by the deputy commissioner"
11 will have certain consequences. That expressly
12 contemplates -- this is page 24a, Justice Scalia.
13 Sorry.

14 JUSTICE SCALIA: I'm sorry. Give me a
15 minute. Give me a minute.

16 MR. PALMORE: Okay.

17 JUSTICE SCALIA: The language is important,
18 isn't it?

19 MR. PALMORE: Absolutely.

20 JUSTICE SCALIA: Okay. What page?

21 MR. PALMORE: Page 24a of the appendix to
22 the gray brief.

23 JUSTICE SCALIA: Okay. Got it.

24 MR. PALMORE: Okay.

25 JUSTICE SCALIA: And the language is?

1 MR. PALMORE: So, the first sentence says:
2 "Acceptance of compensation under an award in a
3 compensation order" --

4 JUSTICE SCALIA: Right.

5 MR. PALMORE: -- "filed by the deputy
6 commissioner" shall have certain legal consequences --

7 JUSTICE SCALIA: Right.

8 MR. PALMORE: -- that aren't important here.
9 That sentence, even read by itself, suggests there can
10 be an award that's not in a compensation order.

11 Moreover --

12 JUSTICE SCALIA: Oh, yes. Yes.

13 MR. PALMORE: -- the last sentence says:
14 "For purposes of this subsection" -- not the purposes of
15 the entire Act -- "for purposes of this subsection, the
16 term 'award' with respect to a compensation order means
17 a formal order issued by the deputy commissioner, an
18 administrative law judge" --

19 JUSTICE SCALIA: That's -- that's true. And
20 what that means is that it can be considered an award if
21 you've gotten it from the employer voluntarily. That is
22 still an award of compensation.

23 That's all that that last sentence proves.

24 MR. PALMORE: I think it contemplates -- it
25 certainly precludes, I think, Petitioner --

1 Petitioner's --

2 JUSTICE SCALIA: Oh, yes. Yes. I agree
3 he's wrong.

4 (Laughter.)

5 MR. PALMORE: Well, the actual -- the
6 "actual receipt" interpretation that Your Honor is
7 advancing is not one that's been advanced in this case.
8 It would have extraordinarily -- extraordinary practical
9 difficulties, and application would be really
10 inconsistent.

11 JUSTICE SCALIA: No, no, no. I think he's
12 persuaded me that in -- in the section we're talking
13 about, subsection (c), the only meaning left for "award"
14 is an award by the agency, because --

15 MR. PALMORE: Well, I'd like to try -- I'd
16 like to try to convince you otherwise.

17 JUSTICE SCALIA: But -- but you have to show
18 me one other provision at least where the only meaning
19 you can give "award" is entitlement to money.

20 MR. PALMORE: Well, I think section
21 910(h)(1), another provision cited by Justice Kagan, is
22 another example.

23 JUSTICE SCALIA: (h)(1)?

24 MR. PALMORE: (h)(1).

25 JUSTICE SCALIA: "Upward adjustments to" --

1 MR. PALMORE: At 15a.

2 JUSTICE SCALIA: -- "compensation to
3 which" --

4 MR. PALMORE: Right. This is a very
5 complicated provision, but what's important to note here
6 is that Congress made -- this was Congress's attempt to
7 provide additional benefits to beneficiaries whose
8 disabilities commenced before 1972.

9 JUSTICE SCALIA: Right.

10 MR. PALMORE: They make a critical --

11 JUSTICE SOTOMAYOR: What page are you on?

12 MR. PALMORE: I'm sorry. Page 15a of the
13 appendix to the gray brief.

14 The specifics aren't as important as the use
15 of the phrase, and it's one, two, three, four, five
16 lines from the bottom, "or his survivor was awarded
17 compensation as the result of death." So, it makes a
18 key determinant for figuring out how these adjustments
19 are going to be made whether someone was awarded
20 compensation prior to October 27th, 1972. There's no
21 indication here, and it would make no sense to suggest,
22 that Congress meant to distinguish between people who
23 had a formal compensation order and those who didn't.

24 I think -- but if I could go back to
25 section --

1 JUSTICE SOTOMAYOR: His answer to that was
2 that the provision also permits an entry after someone
3 -- of an order after someone dies.

4 MR. PALMORE: That's his answer on some of
5 the other provisions --

6 JUSTICE SOTOMAYOR: So, it's -- the
7 incongruity is taken care of by the Act directly.

8 MR. PALMORE: Right. But here that -- here
9 there'd be no reason for someone to go in and get a
10 compensation order, because these were long-past
11 disabilities, and Congress was simply creating a rule
12 for how to true up these past beneficiaries and provide
13 them additional benefits.

14 But I think if you --

15 JUSTICE SCALIA: What -- what does "awarded
16 compensation at less than the maximum rate" mean? I'm
17 not sure what that refers to.

18 MR. PALMORE: There was an old maximum.
19 Prior to 1972, there was a \$70 maximum.

20 JUSTICE SCALIA: Right.

21 MR. PALMORE: Okay. So, if someone was --

22 JUSTICE SCALIA: Aren't you entitled to get
23 the maximum? No?

24 MR. PALMORE: Yes. But some people --
25 two-thirds of their average weekly wage resulted in a

1 figure below the maximum, right? So, for those people,
2 what section 910(h)(1) did was said if you were awarded
3 compensation at less than the prior maximum, you're
4 going to get an inflation adjustment.

5 JUSTICE SCALIA: I got you.

6 MR. PALMORE: For everyone else who was
7 already at the maximum, they got a new, statutorily
8 created time of injury, which is itself significant,
9 that Congress went -- used that route.

10 JUSTICE SCALIA: Yes.

11 MR. PALMORE: But there's no indication --

12 JUSTICE SCALIA: You're right. It doesn't
13 make sense. It --

14 MR. PALMORE: Well, it doesn't make sense
15 under Petitioner's reading. I think it does make sense
16 under our reading.

17 JUSTICE SCALIA: Yes, yes.

18 MR. PALMORE: Okay?

19 And if you go to page -- page 17a, I think
20 these are the key provisions for understanding how
21 section 906 works in the statutory scheme. Section 914,
22 at the bottom of the page, 17a to the Government's
23 brief, provides that employers must pay compensation
24 without a compensation order promptly, as soon as they
25 have notice of an injury.

1 (b), which is on the next page, 18a, says
2 that the first payment has to come in 14 days, within
3 14 days of notice of the injury, unless the employer
4 controverts liability.

5 So, if I'm an employer, I have an employee
6 who's injured, I've got to get out my checkbook on day
7 14 and start writing checks. I need to know what number
8 to fill in. I need to know --

9 CHIEF JUSTICE ROBERTS: But you're doing
10 that -- you're doing that without an award.

11 MR. PALMORE: Correct.

12 CHIEF JUSTICE ROBERTS: So, how can you say
13 what the employer pays should be considered an award?

14 MR. PALMORE: Because --

15 CHIEF JUSTICE ROBERTS: It's without an
16 award.

17 MR. PALMORE: Because if you don't consider
18 that, then the -- the statutory maximum provision is
19 impossible to apply because then it's unclear -- and I
20 haven't heard Petitioner answer what the statutory
21 maximum is. If that employee who gets his first check
22 after 14 days has not been newly awarded compensation
23 and --

24 JUSTICE KENNEDY: Well, then we're back --
25 we're back to (b) overrides (a). You -- you're saying

1 that (a) would be interpreted in favor of the Petitioner
2 but for (b)?

3 MR. PALMORE: No, I'm saying that --

4 JUSTICE KENNEDY: Because I agree with the
5 Chief Justice. Without an award, it seems to me it
6 tends to help the Petitioner.

7 MR. PALMORE: That use of "award" clearly
8 means compensation order, and I'm not here to suggest
9 that the -- that the statute never uses the word "award"
10 to mean compensation order. Often it does, and in this
11 case, that provision does. But the larger point is that
12 that employer has to start payments in 14 days, and he
13 has to know what statutory maximum applies. Under
14 Petitioner's view of the statute, there is no answer to
15 that question, because that employee has not been newly
16 awarded compensation. So, section 906(c) --

17 JUSTICE KAGAN: And in what percentage of
18 the cases are we in that world?

19 MR. PALMORE: It's a -- in a substantial
20 majority of cases no claim is ever filed, Justice Kagan.
21 Page 38 of the red brief points to legislative history
22 before Congress in 1972 which demonstrated that, and
23 that remains the case. This is a workers'
24 compensation scheme that encourages employers to pay
25 without administrative compulsion. It's supposed to be

1 simple to apply. The employer is supposed to know how
2 much to write that check for at the time he writes that
3 first check, after 14 days.

4 JUSTICE GINSBURG: But your reading doesn't
5 encourage employers to pay, because they can stop just
6 by saying they contest, right?

7 MR. PALMORE: Absolutely. They have a
8 statutory right to controvert.

9 JUSTICE GINSBURG: So -- so, your reading I
10 think leads to protraction. And they get that date of
11 injury rule no matter how long they string it out under
12 your reading. If you read -- what is the magic
13 phrase -- newly --

14 MR. PALMORE: Newly awarded compensation.

15 JUSTICE GINSBURG: You can say, well, that
16 means in the case of the employer who pays promptly,
17 pays immediately and continues to pay voluntarily, that
18 the compensation is acquired when the employer starts
19 paying voluntarily. But if the employer is not paying,
20 then the compensation is newly awarded when there's an
21 award.

22 So, I don't see why -- what kind of problems
23 this statute would have if we say newly awarded could
24 mean awarded by the statute, which would be newly
25 awarded when you're injured; but it can also mean

1 compensation ordered by an award. So, you have the
2 employer who pays promptly can lock in that early date,
3 but if he doesn't pay promptly, the -- then the ceiling
4 is going to go up till the time the award is entered.

5 What's wrong with that reading?

6 MR. PALMORE: That's again a reading that
7 hasn't been advanced in this case, but I understand Your
8 Honor's question and Your Honor's point. I think that
9 reading of it would be very difficult to apply because
10 there may be many cases where an employer will write one
11 or two checks and then stop. There made be cases in
12 which an employer will write a check for the wrong
13 amount; there will later be a dispute about what the
14 proper benefit level would be.

15 So, I think you'd develop a whole body of
16 case law and controversy about what it meant for the
17 employer to have paid, in that sense.

18 CHIEF JUSTICE ROBERTS: But those aren't
19 going to be the typical cases, I think. You said there
20 may be cases, and I suppose there may be. I assume what
21 happens -- employers just don't write checks. They say
22 this is how we calculate what we owe you. And it is
23 based on the maximum of this year, not any future ones,
24 and if the employee says no, no, no; I have a right to
25 get the -- then the employer will say, well, okay, I

1 either agree with that or not, but you don't get a
2 check.

3 MR. PALMORE: Well, the -- the employer will
4 need to protect itself by writing that check unless it's
5 going to controvert liability. Justice Ginsburg pointed
6 to one of Petitioner's arguments that this provides an
7 incentive for employers not to controvert liability when
8 they don't have a good-faith basis for doing so, but
9 section 928 of the Act provides for attorney's fees in
10 that situation. So, there's already a remedy for that
11 kind of situation.

12 CHIEF JUSTICE ROBERTS: I -- I understand
13 the amounts at issue here. What is a usual amount
14 that's at stake in this sort of case? We're talking
15 about the concerns -- I guess on both -- about
16 gamesmanship, but how much difference are we talking
17 about?

18 MR. PALMORE: Well, the --

19 CHIEF JUSTICE ROBERTS: I don't know; maybe
20 you don't have statistics, on an average.

21 MR. PALMORE: Well, I can -- we can use this
22 case as an -- as an illustration. So, in this case, the
23 Petitioner's disability began in 2002. So, our view is
24 that that's when he was initially awarded compensation.
25 And so, the 2002 maximum of \$966 applies.

1 Petitioner's view is that because he
2 received a formal compensation order in 2007, the 2007
3 maximum applies, this 1,114.

4 So, it can make a considerable difference.
5 I think, though, that Petitioner recognizes --

6 CHIEF JUSTICE ROBERTS: The consequence -- I
7 mean, there's the time value of money, too. The
8 consequence of the employee saying I'm going to wait 5
9 years because I think the maximum is going to be a lot
10 higher is that he doesn't get anything in the meantime,
11 right?

12 MR. PALMORE: Well, that's -- that's right.

13 CHIEF JUSTICE ROBERTS: It's reasonable for
14 an employer to say, okay, if you want to wait, I'll
15 wait.

16 MR. PALMORE: That's right. The larger
17 point though is that in many cases in which compensation
18 is paid without compulsion of a compensation order, an
19 employee never files a claim. Section 913 expressly
20 contemplates that by saying that an employee has 1 year
21 in which to file a claim from an injury unless he has
22 been receiving payments, in which case the time runs
23 from the last payment received.

24 JUSTICE BREYER: What happens -- just for my
25 technical knowledge here. The -- the employee suffers

1 partial disability on February 1. He then doesn't
2 notify the employer until, let's say, February 10, and
3 then the employer waits for a week or so, and then
4 begins to pay.

5 Now, is the employer supposed to calculate
6 the -- the weekly wage that he's paying on in the week
7 February 1 to February 10 or -- 3 days, he puts it
8 aside. But -- in the first week or does he do it on the
9 first week he got notice? How is that -- how does that
10 work?

11 MR. PALMORE: Well, he needs to provide --
12 he needs to make a payment within 14 days --

13 JUSTICE BREYER: That's right.

14 MR. PALMORE: -- of notice.

15 JUSTICE BREYER: But I'm saying he has to
16 write the check now.

17 MR. PALMORE: Right.

18 JUSTICE BREYER: And the wage could have
19 changed in those few weeks.

20 MR. PALMORE: It's from the --

21 JUSTICE BREYER: The first week he didn't
22 get the notice. Then the second week he did get the
23 notice. Which week does he calculate the payment on?

24 MR. PALMORE: From when the disability
25 commenced.

1 JUSTICE BREYER: All right. So, what you're
2 not --

3 MR. PALMORE: And --

4 JUSTICE BREYER: Then we can't -- we cannot
5 read this thing "award" to mean award by the employer.
6 We can't mean it to read "award" by the -- by the
7 government, in your view. We have to mean it to mean
8 the time that he became entitled to some money.

9 MR. PALMORE: That is our submission --

10 JUSTICE BREYER: Yes.

11 MR. PALMORE: -- Justice Breyer. And --

12 JUSTICE BREYER: And the tough thing is
13 saying, well, that that's an award. That's what this
14 case turns on.

15 MR. PALMORE: Well, as we -- as I was
16 discussing earlier, we think that the statute does
17 sometimes use "award" that way.

18 JUSTICE BREYER: And what you pointed to in
19 the statute is you pointed to some situations which say
20 we have situation 3 and 4, and they're not present here;
21 but in situation 3 or 4, award does mean this.

22 MR. PALMORE: I think --

23 JUSTICE BREYER: All right. That's --

24 MR. PALMORE: Right. I think if I can show
25 you -- if I can show you -- there are some cases --

1 JUSTICE BREYER: You don't have another
2 example of a -- of a situation where "award" did mean --
3 and so, you're saying there are some others where
4 "award" doesn't mean, okay. But --

5 MR. PALMORE: Well, I think there are --

6 JUSTICE BREYER: -- is there anything --
7 what's the most analogous thing you can find anywhere
8 where award has referred to the time a person became
9 entitled to a thing, prior to the time anyone was --
10 became obliged to give him some money?

11 MR. PALMORE: Well, I think --

12 JUSTICE BREYER: Even if that time first was
13 the period for -- way for calculating the money?

14 MR. PALMORE: I think 910(h)(1) is that
15 example --

16 JUSTICE BREYER: 910(h)(1).

17 MR. PALMORE: And I hesitate to go back into
18 the weeds of that --

19 JUSTICE BREYER: No, no, don't do it again.

20 MR. PALMORE: -- provision.

21 (Laughter.)

22 MR. PALMORE: But the first sentence says --
23 it talks about those who were entitled to total
24 permanent disability or death, which commenced -- so, it
25 talks about commencement of entitlement and then --

1 JUSTICE BREYER: It says was awarded
2 compensation.

3 MR. PALMORE: -- and then later uses
4 "awarded compensation." If I could go back quickly to
5 the claim issue.

6 JUSTICE BREYER: Yes, okay.

7 JUSTICE SOTOMAYOR: Your brief -- your brief
8 seem to use the "newly awarded compensation," your
9 meaning of it, at the time of injury, the time of
10 disability, the time of entitlement to compensation.
11 And it seems to use those terms interchangeably. What
12 term are you settling on and why?

13 MR. PALMORE: Okay. I think we address this
14 in footnote 9 of our brief. It's the commencement of
15 entitlement to disability benefits, which is almost
16 always going to be when disability itself commences.
17 Petitioner has pointed out that there is an
18 idiosyncratic set of cases in which, if a disability
19 lasts more than 3 days but fewer than 14, you're not
20 compensated for those first 3 days. So, in that unusual
21 circumstance, it would be day 4, but the employer who
22 writes that check at day 14 is going to know. That's --
23 that's the key.

24 JUSTICE BREYER: I mean, you can do it. You
25 can say it's the time that the statute awards him the

1 compensation. That's the English language.

2 MR. PALMORE: That's -- that's correct,
3 Justice -- Justice Breyer. And I think that --

4 JUSTICE BREYER: But it's the statute that's
5 doing the awarding.

6 MR. PALMORE: To make his -- I think
7 Petitioner has developed kind of a procedural
8 work-around to the -- the problem created by his
9 interpretation the statute, which is that he needs a
10 compensation order in every case to make the scheme make
11 sense. To get compensation order, he needs a claim in
12 every case. And as the colloquy before reflected, the
13 way he can get a claim in every case, because in many
14 cases claims are not filed today, is that the employer
15 must threaten the disabled employee to cut off benefits
16 if that employee doesn't file a claim, threaten to
17 controvert liability when that employer has no
18 good-faith basis for doing so. All to get the employee
19 to file a claim that the claim -- employee doesn't think
20 is necessary, to get a compensation order which serves
21 no other purpose than to trigger this maximum rate
22 provision.

23 That's contrary to the way this statute is
24 supposed to work. The statute is supposed to encourage
25 amicable agreement between employers and employees to

1 avoid administrative process and the gearing up of the
2 administrative machinery wherever possible.

3 And Petitioner's proffered solution to the
4 problem of the absence of a compensation order in every
5 case is contrary to that of the entire thrust of the
6 Longshore Act as a workers' compensation scheme.

7 JUSTICE GINSBURG: And your answer to the --
8 to the problem of an employer protracting -- so he
9 doesn't have to pay sooner; he can wait till later -- is
10 there would be no penalty as long as the employer says
11 I'm -- I'm contesting, but you say the attorney's fees,
12 that's -- is that --

13 MR. PALMORE: Attorney's fees and interest,
14 both of which are generally applicable remedies that
15 apply to cases that don't implicate the statutory
16 maximum or the statutory minimum. This -- Petitioner's
17 solution using his reading of the statute to deal with
18 employer delay is over-inclusive and under-inclusive.

19 It's over-inclusive because it's going to
20 deal with cases in which there hasn't been delay by any
21 responsibility by the employer, but there's been
22 administrative delay, there's been a dispute.

23 But it's also under-inclusive in that it
24 only deals with those small number of cases that deal
25 with the statutory maximum or minimum.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Palmore.

3 We'll let Mr. Keisler speak for a bit.
4 Mr. Keisler.

5 ORAL ARGUMENT OF PETER D. KEISLER
6 ON BEHALF OF THE PRIVATE RESPONDENT

7 MR. KEISLER: Mr. Chief Justice, and may it
8 please the Court:

9 I'd like to begin, if I may, by addressing
10 Justice Scalia's and the Chief Justice's questions on
11 whether the term "award" can bear the meaning that we
12 ascribe to it and then explain why, since it can bear
13 that meaning, this is the only sensible interpretation
14 of the Act.

15 First, it is not uncommon, Your Honor, to
16 use the term "award" to describe a benefit conferred by
17 a statute. The dictionary definition is a benefit
18 conferred. Your Honor, Justice Scalia used a
19 formulation -- what if a statute awards a tax credit?
20 Well, the Court's decision in *New Energy Company v.*
21 *Limbach* began: An Ohio statute awards a tax credit to a
22 certain producers of ethanol.

23 I think even Your Honor was the author of
24 that decision. It is --

25 (Laughter.)

1 JUSTICE SCALIA: Yes, well, I -- I agree
2 with that. You can speak of the statute as awarding
3 something. But when you use the phrase "newly awarded,"
4 you're not referring to the enactment of the statute;
5 you're referring to the time at which the person
6 qualifies under the statute. And I don't know any usage
7 of that sort, that a person -- well, you know, when my
8 wife has a baby, I've been awarded money.

9 You haven't been awarded money.

10 MR. KEISLER: I think the party becomes
11 newly awarded at the time the party becomes disabled,
12 and, therefore, there is an amount due under the
13 statute. And --

14 JUSTICE SCALIA: Yes, that's what you say.
15 But I don't know -- I don't know any common usage that
16 employs the term --

17 MR. KEISLER: But it is a usage within the
18 Longshore Act elsewhere, as Mr. Palmore --

19 JUSTICE BREYER: What about the -- the
20 business was newly awarded the tax credit at the time
21 they made the deduction?

22 MR. KEISLER: At the time they became
23 qualified for what the statute required them to do to
24 get the tax credit, yes. And that is how it is used in
25 910(h)(1), as Justice Kagan said. It's how it's used in

1 908. And section 933 specifically provides Petitioner's
2 definition of "award," a formal compensation order, but
3 says it is only for purposes of this subsection.

4 CHIEF JUSTICE ROBERTS: But it's not the way
5 it's used in 914.

6 MR. KEISLER: That's correct. And that's
7 why this is a case like Robinson v. Shell Oil, in which
8 the word "employer" was used throughout Title VII in
9 different ways. And what the Court said is you then
10 have to look at the context of the individual provision
11 in which the word appears that you're construing to
12 determine how the word is being used in that particular
13 provision.

14 And here the most fundamental reason why it
15 is an untenable construction of this Act to rely on the
16 date of a compensation order to determine the applicable
17 maximum rate is that then the Act would be silent as to
18 the maximum rate in the vast majority of instances in
19 which compensation is paid, because, as Mr. Palmore
20 said, in the vast majority of instances no claim is
21 filed. And, as Justice Sotomayor pointed out, when no
22 claim is filed, no compensation order will ever be
23 issued.

24 And that's not an accident. That is a
25 function of a very central feature of the Act's design

1 that Petitioner's interpretation is entirely at odds
2 with. The Act is designed to enable compensation to be
3 calculated precisely and as early as possible so that
4 the money can get into the employee's hands very quickly
5 and with a minimum of instances in which the
6 administrative machinery has to be invoked. That's why
7 the norm is no compensation order.

8 And so, Petitioner's interpretation is
9 counter to that in at least two respects: It relies on
10 the existence of a compensation order, which in most
11 instances won't and shouldn't issue, and it would
12 maximize, rather than minimize, the number of instances
13 in which someone has to go and get an order to force
14 compensation orders out of the system to make
15 Petitioner's interpretation work, even though everything
16 is happening exactly as the Act says it should. The
17 employer is voluntarily paying exactly the amount that
18 the employee says is due, and there's no need to get the
19 agency involved.

20 CHIEF JUSTICE ROBERTS: But how much of a
21 practical problem is this? I understand the -- the
22 amounts are here, but it's 5 years, and apparently the
23 employee was happy to wait 5 years to get an award.
24 Normally, if you're an employee and you're disabled, and
25 the employer says, well, here's what we're going to give

1 you, and it's based on the maximum of the latest we
2 have, you're not going to say: I'm going to wait; these
3 wages are going to go up nationally, and I'm going to
4 wait a year; maybe I'll wait 4 years because I think
5 there's a trend on national average wages, and I'm going
6 to cash in on that; I'm going to be without money for
7 the next 4 years and I'm disabled, but -- I mean, that
8 doesn't sound to me to be a plausible situation.

9 MR. KEISLER: But if Your Honor thinks about
10 the situation in which the employee is voluntarily
11 receiving from the employer everything that the employee
12 agrees is due, then the question is, in that
13 circumstance where the employer is doing everything
14 right, what can the employer do to force out of the
15 system a compensation order that will lock in the
16 maximum rate? And Petitioner's solution to that problem
17 evidences the problem with his position.

18 CHIEF JUSTICE ROBERTS: Well, no, I mean --
19 I don't know what the employers do, but usually in a
20 situation like this, the employers have good lawyers and
21 they write at the end of the check, you know: This is
22 in full satisfaction of any claims under the -- the
23 whatever.

24 MR. KEISLER: But there is no compensation
25 order until that employee files a claim. And under

1 Petitioner's interpretation, there would therefore be no
2 knowable maximum rate. And Petitioner's solution to
3 that problem, on page 16 of his reply brief, is to say
4 that the employer should threaten a bad-faith cutoff of
5 funds. The employer should say I will cut you off
6 unless you file a claim.

7 That's bad for everyone. It's bad for the
8 employee who has access to payments delayed. It's bad
9 for the employer who apparently is being told it must
10 controvert liability in bad faith, because the employer
11 doesn't in fact disagree that the employee is entitled
12 to liability, or face a 10 percent penalty for cutting
13 off the employee without a basis for controverting
14 liability. And it's bad for the agency who suddenly has
15 all these claims filed. All in a situation in which
16 everything is working exactly as the Act intends.

17 JUSTICE SCALIA: Give me your example again
18 of "award" used as "entitlement."

19 MR. KEISLER: 910(h)(1).

20 JUSTICE SCALIA: No, no, no. Not from the
21 statute.

22 MR. KEISLER: Okay.

23 JUSTICE SCALIA: You -- you gave --

24 MR. KEISLER: Oh, New Energy Company v.
25 Limbach. It was a Commerce Clause case from, I think,

1 1989 in which Your Honor began the opinion by saying, to
2 describe the setup, an Ohio statute awards tax benefits
3 to... and then described the category of energy
4 producers who could take advantage of the tax benefit.
5 And I think those energy producers --

6 JUSTICE SCALIA: That wasn't -- you gave
7 another example.

8 MR. KEISLER: Robinson v. Shell oil?

9 JUSTICE SCALIA: No, not a case.

10 MR. KEISLER: Okay.

11 JUSTICE SCALIA: Just an example you made up
12 out of your fertile imagination which --

13 (Laughter.)

14 JUSTICE SCALIA: -- which seemed to me
15 pretty good. But I forgot it. I'll get --

16 MR. KEISLER: An example --

17 JUSTICE SCALIA: I'll get it from the
18 transcript.

19 MR. KEISLER: I think it's the employee who
20 was receiving voluntary payments, and everything is
21 proceeding the way the Act intended. But the employer,
22 in order to know what its maximum rate will be, in order
23 not to be surprised 5 years hence by a maximum rate that
24 only then can be known, has to force a compensation
25 order out of the system. And the only way Petitioner

1 says the employer can do that is by threatening a
2 bad-faith cutoff of funds.

3 Whether it happens frequently or
4 infrequently, Mr. Chief Justice, I think an
5 interpretation that relies on a mechanism that is so
6 obviously counter to the way the statute is supposed to
7 function is, by virtue of that, an extremely unlikely
8 and unnatural interpretation of the statute.

9 JUSTICE GINSBURG: About what percentage of
10 the compensation cases involve the statutory maximum?
11 Because if you -- if your pay is less than the statutory
12 maximum, this issue doesn't come up.

13 MR. KEISLER: In 1972, Congress was told
14 that it would be about 10 percent. My understanding is
15 since then, it's grown so that I'm told that about 20
16 percent of cases today require application of the
17 maximum rate.

18 CHIEF JUSTICE ROBERTS: Does the maximum
19 always go up?

20 MR. KEISLER: Ever since 1972, each year's
21 maximum as calculated by the Secretary of Labor has been
22 higher than the preceding year.

23 CHIEF JUSTICE ROBERTS: Theoretically, it
24 can go down.

25 MR. KEISLER: Theoretically, it can. It

1 never has.

2 If the Court has no further questions.

3 JUSTICE KAGAN: Mr. Keisler, if I could just
4 go back to this language. If -- if according to Justice
5 Scalia's old opinion, the statute awards compensation at
6 the time of disability, essentially what you would be
7 saying is that an employee who becomes disabled in a
8 certain year is awarded compensation at that time. Is
9 that right?

10 MR. KEISLER: That's right, Your Honor.

11 JUSTICE SCALIA: Yes, but I -- I didn't say
12 in that opinion that the -- the employer in -- in that
13 -- or whoever it was that was entitled under the statute
14 -- was "newly awarded" it. I agree the statute awards
15 it, but when you say somebody is "newly awarded," you're
16 talking about an event at that time. And that's --

17 MR. KEISLER: I think the function --

18 JUSTICE SCALIA: That's a different usage.

19 MR. KEISLER: I think the function of
20 "newly" in this statute is something different,
21 Justice Scalia. And that relates to the questions that
22 Your Honor and Justice Breyer were asking about the
23 relationship between the "currently receiving" clause
24 and the final clause. I think the "currently receiving"
25 clause, which relates to those with permanent total

1 disability and death, is an adjunct to another provision
2 of the Act, section 19(f), which provides for a COLA, a
3 cost-of-living increase, every year for that narrow
4 subset of the most disabled of employees. They and they
5 alone get that annual bump-up.

6 And so, that "currently receiving" clause is
7 written for that category to make sure that their
8 bump-up isn't capped by a static maximum rate. The
9 other part of the clause, "newly awarded compensation,"
10 is about everybody else.

11 Now, I think the use of the word "newly"
12 there is just to distinguish it from the "currently
13 receiving" clause, which is escalating year by year.
14 And those newly awarded compensation, meaning at one
15 point, fixed in time -- only when you are "newly"
16 awarded compensation are you then going to have your
17 maximum rate fixed.

18 And then -- and both Petitioner and we
19 agree -- whatever it's fixed at, whatever year, that
20 stays the same for the duration of your collection of
21 compensation.

22 If the Court has no further questions, I
23 thank the Court.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Gillelan, if I got that right, you have

1 2 minutes remaining.

2 REBUTTAL ARGUMENT OF JOSHUA T. GILLELAN, II,
3 ON BEHALF OF THE PETITIONER

4 JUSTICE SOTOMAYOR: Counsel, let's assume an
5 employer pays, continues to pay over a period of time,
6 and the employee needs more money and goes in and says
7 you owe me more money; I'm going to make a claim. The
8 board says no, he doesn't owe you more money; he was
9 paying the right amount. And so, you're not entitled to
10 the 1200 you're asking for; you're only entitled to the
11 1,000 he was paying.

12 Under your view, if that happened 5 or 10
13 years after the payments started, would the employer be
14 liable for the higher average 10 years later?

15 MR. GILLELAN: Only, of course, if the
16 employee's own wages at the time of the injury qualified
17 for that, but yes.

18 JUSTICE SOTOMAYOR: Assuming it does, that
19 the answer is "yes"?

20 MR. GILLELAN: Yes. Yes.

21 JUSTICE SOTOMAYOR: So, what stops an
22 employee from simply doing what I said? What stops an
23 employee from kicking up his own maximum by -- whenever
24 he chooses to do it, years and years later?

25 MR. GILLELAN: Well, I think in that

1 situation, the claimant hasn't triggered that award. In
2 fact, the claimant has triggered the maximum that's in
3 effect at the time of that award that only makes -- it's
4 an award only of what the employer has been paying.
5 It's not a denial, as it's characterized in the
6 Government's brief. But it is an award only of what of
7 the employer has been paying.

8 If the claimant did not bring it forward
9 with that and the employer let it go for still further
10 years, then even a subsequent year's maximum would be
11 the actual --

12 JUSTICE SOTOMAYOR: If we find any ambiguity
13 in the statute, in the statutory language, would it then
14 make more sense to adopt your meaning or the
15 Government's, given all of the factors that the
16 Government argues counsels in its favor?

17 MR. GILLELAN: I think each of those
18 arguments is fallacious. They misdescribe the statute
19 in their reasons why this is not a sensible provision.
20 But even if there is an ambiguity --

21 JUSTICE SOTOMAYOR: Assume that --

22 MR. GILLELAN: Before we lose, that -- the
23 other possible meanings of "newly awarded" have got to
24 include what they say the test is.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 The case is submitted.

2 (Whereupon, at 12:23 p.m., the case in the
3 above-entitled matter was submitted.)

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A				
Abbott 20:11 23:4	40:7	apparently 52:22 54:9	aspects 22:5	40:1,4 44:5,5,6
above-entitled 1:11 61:3	advancing 33:7	appeals 4:1	Assistant 1:17	44:13,17,21
absence 48:4	advantage 55:4	appear 9:22	assume 10:9 21:18 25:13	45:2,4,8 49:11
absolutely 29:12 31:19 39:7	agency 4:11 6:25 8:2 27:8	APPEARAN... 1:14	29:19 40:20	49:16 51:2
accept 10:21	30:23 33:14	appears 51:11	59:4 60:21	52:23 54:18
Acceptance 31:9 32:2	52:19 54:14	appendix 29:7	Assuming 59:18	60:1,3,4,6
accepting 21:16	agree 30:22,23 33:2 38:4 41:1	applicable 3:20 3:22 10:2 12:5	attempt 34:6	awarded 3:13 3:19,23,24 5:3
access 54:8	50:1 57:14	12:14,17 15:16	attorney's 41:9 48:11,13	6:21 8:9,24,25
accident 51:24	58:19	20:6 48:14	author 49:23	9:11 10:8
accurate 21:23	agreement 47:25	51:16	automatically 22:21 25:23	13:11,15 15:5
acknowledge 17:12	agrees 53:12	application 33:9 56:16	available 5:22 5:24	15:15 18:7
acquired 39:18	Ah 26:8	applies 7:10 15:14 16:25	average 7:19 16:7 19:7	22:18,19,25
Act 3:17,21,24 4:3 5:1,7 21:12	ahead 25:5	18:17 19:10,12	35:25 41:20	25:12,13 26:1
26:19 28:14	AL 1:6	19:13,21,23	53:5 59:14	28:25 29:18,23
32:15 35:7	Alito 13:24 14:5 14:17 15:24	20:2 22:17	avoid 48:1	30:3,5,9,11,12
41:9 48:6	ALJ 10:10	24:7 38:13	award 3:24 4:4 4:13,16,19 5:1	34:16,19 35:15
49:14 50:18	ambiguity 60:12 60:20	41:25 42:3	5:2,4,8,10,14	36:2 37:22
51:15,17 52:2	amicable 47:25	apply 8:3,5,6 9:22 16:7,9	6:2,5,6,12,13	38:16 39:14,20
52:16 54:16	amount 4:15 12:10 27:10,11	22:23,24 28:13	6:13,17 8:2,9	39:23,24,25
55:21 58:2	27:11 40:13	37:19 39:1	8:11,13,20	41:24 46:1,4,8
action 5:18	41:13 50:12	40:9 48:15	9:13,16,17	50:3,8,9,11,20
actual 33:5,6 60:11	52:17 59:9	arbitrary 28:15	10:10,11,16	57:8,14,15
Act's 51:25	amounts 41:13 52:22	argues 4:22 60:16	11:21 12:4,11	58:9,14,16
add 16:1	analogous 30:5 45:7	argument 1:12 2:2,5,8,11 3:3	13:8,10,11	60:23
additional 34:7 35:13	analogously 30:4	3:7 12:19,25	14:8,10,11,12	awarding 47:5 50:2
address 46:13	analogy 30:6	17:14,15,20	14:16,18,22,23	awards 11:18,19 21:13 25:21,22
addressed 12:20	analysis 26:23	20:14 21:6,14	15:9 16:22	46:25 49:19,21
addressing 49:9	annual 7:16 22:14 58:5	21:22 22:11	17:4 20:19	55:2 57:5,14
adjunct 58:1	answer 13:24 15:25,25 16:2	23:2,10 25:8	21:2,9,20 22:1	a.m 1:13 3:2
adjustment 36:4	35:1,4 37:20	28:6 49:5 59:2	22:20,22,24	
adjustments 33:25 34:18	38:14 48:7	arguments 12:8 41:6 60:18	24:2,2,8,22	B
administrative 28:11,17 32:18	59:19	ascribe 49:12	25:15,18,19,20	b 5:13 11:8 37:1
38:25 48:1,2	anybody 19:23 30:8	aside 43:8	26:10,10,11,12	37:25 38:2
48:22 52:6	anyway 4:16	asked 7:11 15:24	26:14,17,17,19	baby 50:8
adopt 60:14		asking 57:22 59:10	27:7,18,23	back 15:23 34:24 37:24,25
advanced 33:7			29:2 30:16,23	45:17 46:4
			31:9 32:2,10	57:4
			32:16,20,22	bad 54:7,7,8,10 54:14
			33:13,14,19	bad-faith 54:4 56:2
			37:10,13,16	based 25:12 28:16 40:23
			38:5,7,9 39:21	

53:1	46:24 47:3,4	48:15,20,24	46:21 53:13	46:20
basic 17:20	50:19 57:22	56:10,16	cited 33:21	compensation
basis 41:8 47:18	brief 31:7,8,22	cash 53:6	claim 20:17,18	3:14,19,23 4:2
54:13	34:13 36:23	categories 20:7	20:20 21:21,25	4:11,17 5:8,10
bear 4:21,24	38:21 46:7,7	23:21	22:8 38:20	5:17,22,24
29:18 49:11,12	46:14 54:3	category 55:3	42:19,21 46:5	6:10,21,22
began 3:18	60:6	58:7	47:11,13,16,19	7:22 8:1,7,10
41:23 49:21	bring 6:10 60:8	ceiling 14:6 40:3	47:19 51:20,22	8:20,21,23,24
55:1	bump-up 58:5,8	central 51:25	53:25 54:6	9:2,11,13,17
begins 43:4	business 28:22	certain 31:11	59:7	9:25 10:8 12:2
behalf 2:4,7,10	50:20	32:6 49:22	claimant 3:23	13:10,16,16,21
2:13 3:8 28:7		57:8	5:2 9:11 10:8	14:7,10 15:2,4
49:6 59:3	C	certainly 9:21	14:15 17:8	15:5 17:9 18:7
behavior 20:25	c 2:1 3:1 6:19	10:18 14:14	21:25 22:8	18:17 20:15
believe 17:8	8:2,4 10:23	20:4 27:10	26:20 60:1,2,8	22:13,18,20
beneficiaries	18:10 20:1,2	32:25	claimants 20:24	23:18 25:16,20
28:16 34:7	22:17,17 24:4	certificate 18:1	claims 47:14	26:25 27:8,25
35:12	33:13	change 11:13,20	53:22 54:15	28:12 31:9,10
benefit 24:23	calculate 12:13	changed 43:19	classes 15:6	32:2,3,10,16
28:16 40:14	12:15 16:5	characterized	clause 7:3,4,5,14	32:22 34:2,17
49:16,17 55:4	18:25 22:16	60:5	8:13 9:10 10:7	34:20,23 35:10
benefits 5:3 6:23	40:22 43:5,23	check 37:21	11:7 12:2	35:16 36:3,23
8:14,15 9:18	calculated 22:17	39:2,3 40:12	15:12,15 18:16	36:24 37:22
10:25 34:7	52:3 56:21	41:2,4 43:16	19:24 54:25	38:8,10,16,24
35:13 46:15	calculating	46:22 53:21	57:23,24,25	39:14,18,20
47:15 55:2	45:13	checkbook 37:6	58:6,9,13	40:1 41:24
better 17:12	capped 58:8	checks 37:7	clearly 38:7	42:2,17,18
birth 29:22	care 35:7	40:11,21	COLA 58:2	46:2,4,8,10
bit 19:8 49:3	case 3:4,19 4:7	Chief 3:3,9 12:7	collection 58:20	47:1,10,11,20
board 59:8	7:7,18 10:4	12:23 13:3,6	colloquy 47:12	48:4,6 51:2,16
body 40:15	11:18 17:7	25:2,5 28:3,5,8	come 23:20 37:2	51:19,22 52:2
bother 20:20	21:18 27:6	28:19,21 30:9	56:12	52:7,10,14
bottom 34:16	33:7 38:11,23	31:6 37:9,12	commenced	53:15,24 55:24
36:22	39:16 40:7,16	37:15 38:5	34:8 43:25	56:10 57:5,8
break 19:3	41:14,22,22	40:18 41:12,19	45:24	58:9,14,16,21
Breyer 15:23	42:22 44:14	42:6,13 49:1,7	commencement	complete 16:2
16:13 17:21	47:10,12,13	49:10 51:4	45:25 46:14	complicated
18:9,12,19	48:5 51:7	52:20 53:18	commences	34:5
19:10,17,19,21	54:25 55:9	56:4,18,23	46:16	compulsion
19:25 20:8,10	61:1,2	58:24 60:25	Commerce	38:25 42:18
22:11 23:2,4,7	cases 5:21 7:15	child 29:21,22	54:25	conceded 10:17
23:9 42:24	8:13 11:15	30:2	commissioner	conceding 13:24
43:13,15,18,21	15:14,15 28:13	chooses 59:24	31:10 32:6,17	14:3
44:1,4,10,11	38:18,20 40:10	Christmas	common 50:15	concerns 41:15
44:12,18,23	40:11,19,20	29:22	Company 49:20	conferred 49:16
45:1,6,12,16	42:17 44:25	Circuit's 13:8	54:24	49:18
45:19 46:1,6	46:18 47:14	circumstance	compensated	confirm 21:2

Congress 12:20 12:20 13:9 14:1,2 17:2 29:20 34:6,22 35:11 36:9 38:22 56:13 Congress's 34:6 consequence 42:6,8 consequences 14:22 31:11 32:6 consider 37:17 considerable 42:4 considered 5:1 32:20 37:13 consistent 3:25 13:9 consistently 13:20 construction 20:5 51:15 construing 51:11 contemplated 28:13 contemplates 31:12 32:24 42:20 contend 8:1 contest 39:6 contesting 48:11 context 51:10 continue 9:13 21:3 continues 12:4 39:17 59:5 continuing 12:6 contradicted 26:13 contrary 3:25 13:8 47:23 48:5 contrasts 8:23 control 11:9 controversy	40:16 controvert 39:8 41:5,7 47:17 54:10 controverting 54:13 controverts 37:4 convince 33:16 correct 13:18,23 15:19 24:13,15 37:11 47:2 51:6 Costello 20:11 23:4 cost-of-living 58:3 counsel 8:19 10:20 14:24 17:10 20:13 23:11 28:3 58:24 59:4 60:25 counsels 60:16 counter 52:9 56:6 course 3:12 59:15 court 1:1,12 3:10 4:1 28:9 49:8 51:9 57:2 58:22,23 Court's 49:20 covered 9:20,20 24:4,6 covers 27:22 created 36:8 47:8 creates 28:15 creating 35:11 credit 49:19,21 50:20,24 credits 29:21 critical 5:16 6:7 18:8 21:1 34:10 current 24:23 currently 6:22	6:24 8:19 9:2 9:17 10:22 12:2 15:4,13 18:16 57:23,24 58:6,12 cut 27:1,3 47:15 54:5 cutoff 54:4 56:2 cutting 54:12 <hr/> D D 1:20 2:9 3:1 49:5 damages 28:25 29:2 30:11,12 Dana 1:3 3:11 date 6:12 12:4 16:10 28:11 39:10 40:2 51:16 day 37:6 46:21 46:22 days 37:2,3,22 38:12 39:3 43:7,12 46:19 46:20 dead 18:22 19:5 deal 48:17,20,24 deals 48:24 death 6:23 7:15 7:18 8:14 9:18 9:25 11:15,22 12:3 15:14 19:18,22 26:15 26:21,22 34:17 45:24 58:1 decision 49:20 49:24 decreed 4:13 6:25 11:20 deduction 50:21 defies 5:5 definite 27:18 definitely 11:11 definition 49:17 51:2 delay 48:18,20	48:22 delayed 54:8 delegate 18:25 demonstrated 38:22 denial 60:5 deny 14:25 Department 1:18 17:7,23 18:2 depend 14:6 depends 15:13 deputy 31:10 32:5,17 describe 49:16 55:2 described 4:3 5:1 13:12 55:3 describing 4:25 design 51:25 designed 52:2 destroys 22:4 determinant 34:18 determination 4:10 determinative 6:3 determine 51:12 51:16 develop 40:15 developed 47:7 dictionary 49:17 died 20:3 dies 26:11 35:3 difference 21:1 41:16 42:4 different 27:2 27:13 51:9 57:18,20 differently 14:13,20 15:1 15:7 17:13 25:22 difficult 40:9 difficulties 33:9 directly 35:7	directs 5:13 disabilities 34:8 35:11 disability 3:18 6:23 8:15 9:18 10:1,9 11:15 11:22 12:6 15:14,17 18:13 19:16 20:7,7 23:19,19 24:4 41:23 43:1,24 45:24 46:10,15 46:16,18 57:6 58:1 disabled 3:12 16:3,4 18:18 18:23 19:2,22 20:3 24:3 47:15 50:11 52:24 53:7 57:7 58:4 disagree 20:14 21:11 54:11 discussing 44:16 dispute 40:13 48:22 distinctions 28:15 distinguish 16:17 34:22 58:12 doing 37:9,10 41:8 47:5,18 53:13 59:22 doubt 27:14 due 4:15 27:10 27:12 50:12 52:18 53:12 duration 58:20 D.C 1:8,15,18 1:20 <hr/> E e 2:1 3:1,1 5:9 earlier 27:21 44:16 early 16:24 40:2
---	---	--	--	--

52:3	54:4,5,9,10	54:18	extremes 4:9	45:12,22 46:20
easily 12:20	55:21 56:1	entry 21:1 27:17	<hr/>	49:15
effect 3:17,18,22	57:12 59:5,13	30:22 35:2	F	fiscal 3:13,14
8:16 24:12	60:4,7,9	escalating 58:13	face 54:12	five 34:15
60:3	employers 17:24	escalator 7:16	fact 14:22 21:18	fixed 58:15,17
either 8:7 21:20	20:14 21:19	ESQ 1:15,17,20	30:16 54:11	58:19
23:20 41:1	36:23 38:24	2:3,6,9,12	60:2	focus 12:9
employee 10:12	39:5 40:21	essentially 26:23	factors 60:15	follow 23:12
10:15 14:7	41:7 47:25	57:6	faith 54:10	footnote 16:1
20:17,19 21:21	53:19,20	establish 13:14	fall 9:2 10:23	46:14
26:11,15 37:5	employer's	13:14,17	23:24 28:24	force 52:13
37:21 38:15	11:19	established 3:16	fallacious 60:18	53:14 55:24
40:24 42:8,19	employment	11:1	far 18:14 25:9	forgot 55:15
42:20,25 47:15	7:25 11:17	ET 1:6	favor 38:1 60:16	formal 14:8,18
47:16,18,19	employs 50:16	ethanol 49:22	feature 51:25	25:16,21 32:17
52:18,23,24	enable 52:2	event 27:18 30:2	February 43:1,2	34:23 42:2
53:10,11,25	enactment 50:4	57:16	43:7,7	51:2
54:8,11,13	encourage 16:22	everybody	Federal 1:19 2:7	formulation
55:19 57:7	39:5 47:24	58:10	28:7	49:19
59:6,22,23	encouraged	evidences 53:17	feel 20:10	forward 20:5
employees 14:9	18:1	exactly 13:18,22	fees 41:9 48:11	60:8
21:13 47:25	encourages	15:6 16:25	48:13	foundation 27:1
58:4	24:22 38:24	18:9 52:16,17	fertile 55:12	four 27:2 34:15
employee's	energy 49:20	54:16	fewer 46:19	frequently 56:3
20:17 52:4	54:24 55:3,5	example 16:4	figure 12:16	full 53:22
59:16	English 47:1	19:5 30:10	36:1	fully 23:9
employer 4:14	entered 6:17	33:22 45:2,15	figured 16:10,14	function 7:14
5:4,18,21,24	8:14 16:23	54:17 55:7,11	figuring 12:10	8:12 9:10 10:7
6:14 7:25 8:8	24:22 26:19,20	55:16	34:18	11:7,8 12:1
8:21 9:19,25	40:4	exceed 16:6	file 17:7 21:25	51:25 56:7
10:9,12,14,17	enterprise 28:23	22:14	22:8 42:21	57:17,19
10:23,24 11:17	entire 32:15	Excuse 18:15	47:16,19 54:6	fundamental
14:8 15:8	48:5	existence 52:10	filed 4:2 31:10	51:14
16:22 17:6	entirely 28:11	experience	32:5 38:20	funds 25:17 54:5
20:21 21:2,7	52:1	20:23,23	47:14 51:21,22	56:2
21:25 24:22	entitled 3:20	explain 16:20	54:15	further 57:2
32:21 37:3,5	12:13 17:9	49:12	files 20:17 42:19	58:22 60:9
37:13 38:12	30:1,13 35:22	explains 27:12	53:25	future 11:10
39:1,16,18,19	44:8 45:9,23	explicitly 3:21	filing 20:17,20	20:19 40:23
40:2,10,12,17	54:11 57:13	12:22	fill 37:8	
40:25 41:3	59:9,10	expressly 28:13	final 57:24	<hr/>
42:14 43:2,3,5	entitlement 4:11	31:11 42:19	find 19:5 45:7	G
44:5 46:21	4:12 13:16,21	extraordinarily	60:12	G 3:1
47:14,17 48:8	25:14,17,18,19	33:8	finishes 16:15	gamesmanship
48:10,18,21	25:22 27:11,13	extraordinary	first 19:11 32:1	41:16
51:8 52:17,25	30:17,25 33:19	33:8	37:2,21 39:3	gearing 48:1
53:11,13,14	45:25 46:10,15	extremely 56:7	43:8,9,21	General 1:18
				generally 48:14

getting 14:7,10 14:11 16:10 18:22 19:11,13 20:11 Gillelan 1:15 2:3 2:12 3:6,7,9 4:18,23 5:9,12 5:19 6:1,6,14 7:2,5,7,12,14 7:23 8:4,12 9:1 9:4,9,21,24 10:6,18 11:2,6 11:11,14,21,25 12:18 13:2,5,7 13:18,22 14:3 14:14,21 15:10 15:12,19,21 16:12,21 17:5 17:19 18:7,11 18:15 19:9,15 19:18,20,24 20:4,9,22 21:8 21:10,15,24 22:3,6 23:1,3,8 23:23 24:6,11 24:13,15,18,21 25:4 26:4,8 27:14,24 28:1 28:4 58:25 59:2,15,20,25 60:17,22 Ginsburg 4:6 5:15,20 6:5,8 7:11 39:4,9,15 41:5 48:7 56:9 give 17:23 26:17 29:19 30:24 31:14,15 33:19 45:10 52:25 54:17 given 9:12 60:15 gives 7:25 29:21 giving 19:3 glad 30:19 go 7:17,18 12:4 15:22,23 18:1 22:16,24 25:5	28:24 30:18 34:24 35:9 36:19 40:4 45:17 46:4 52:13 53:3 56:19,24 57:4 60:9 goes 8:23 19:7 59:6 going 7:17,18 12:11,12,14 16:7,9 17:24 18:25 22:9 34:19 36:4 40:4,19 41:5 42:8,9 46:16 46:22 48:19 52:25 53:2,2,3 53:3,5,6 58:16 59:7 good 17:22 28:24 30:10 53:20 55:15 goody 29:23 good-faith 41:8 47:18 gotten 24:1,2 32:21 governed 8:16 government 31:2 44:7 60:16 Government's 23:17,21,24 36:22 60:6,15 governs 3:19 grant 29:9,10 gray 31:6,8,22 34:13 group 23:15 groups 19:14 grown 56:15 guess 8:10 25:24 41:15	hands 52:4 happen 17:6 happened 59:12 happening 52:16 happens 4:6 20:13 21:14 23:17 40:21 42:24 56:3 happenstance 28:17 happy 52:23 harder 27:6 hear 3:3 15:25 heard 37:20 help 20:20,20 38:6 hesitate 45:17 hey 30:4 higher 19:7 42:10 56:22 59:14 highlighted 30:15 31:3 hinges 28:11 history 38:21 home 28:24 Honor 33:6 49:15,18,23 53:9 55:1 57:10,22 Honor's 40:8,8 hope 9:9 14:3 hurt 28:24 hypothetical 21:16	41:22 imagination 55:12 imagine 20:18 immediately 39:17 implicate 48:15 important 31:17 32:8 34:5,14 impossible 26:16 28:12 37:19 inadequacies 17:15 incentive 41:7 include 60:24 income 19:6 incongruity 35:7 inconsistency 23:14 inconsistent 33:10 increase 7:19 58:3 indicate 30:16 indication 34:21 36:11 individual 18:24 51:10 induce 21:25 inflation 36:4 infrequently 56:4 initially 41:24 injured 3:11 6:10 26:15 37:6 39:25 injury 12:21 36:8,25 37:3 39:11 42:21 46:9 59:16 instances 51:18 51:20 52:5,11 52:12 intended 55:21 intends 54:16	interchangeably 46:11 interest 48:13 interpretation 23:17,21,24 28:10,15 33:6 47:9 49:13 52:1,8,15 54:1 56:5,8 interpreted 38:1 invoked 52:6 involve 56:10 involved 52:19 issue 41:13 46:5 52:11 56:12 issued 10:11 32:17 51:23 issues 10:10
J				
January 1:9 16:3,11,14 JOSEPH 1:17 2:6 28:6 JOSHUA 1:15 2:3,12 3:7 59:2 judge 32:18 judgment 10:21 Justice 1:18 3:3 3:9 4:5,6,8,20 5:6,11,15,20 6:4,5,8,18 7:4 7:6,9,11,13,21 7:24 8:6,18 9:3 9:5,15,23 10:3 10:14,20,21 11:4,8,12,16 11:23 12:7,23 13:3,6,13,19 13:24 14:5,17 14:24 15:11,17 15:20,23,24 16:13 17:2,10 17:21 18:9,12 18:19 19:10,17 19:19,21,25 20:8,10,13				
I				
idea 12:9 17:22 identical 14:9 identically 14:9 14:15,17 idiosyncratic 46:18 II 1:15 2:3,12 3:7 59:2 illustration				
H				
h 33:23,24				

21:5,9,11,17 22:2,4,10,11 23:2,4,7,8,9,11 23:12,13 24:1 24:9,12,14,16 24:19 25:1,2,4 25:5,8 26:6 27:5,20,25 28:3,5,8,18,19 28:20,21 29:6 29:8,14,16,17 30:1,14,18,19 30:21 31:4,5,6 31:12,14,17,20 31:23,25 32:4 32:7,12,19 33:2,11,17,21 33:23,25 34:2 34:9,11 35:1,6 35:15,20,22 36:5,10,12,17 37:9,12,15,24 38:4,5,17,20 39:4,9,15 40:18 41:5,12 41:19 42:6,13 42:24 43:13,15 43:18,21 44:1 44:4,10,11,12 44:18,23 45:1 45:6,12,16,19 46:1,6,7,24 47:3,3,4 48:7 49:1,7,10,18 50:1,14,19,25 51:4,21 52:20 53:18 54:17,20 54:23 55:6,9 55:11,14,17 56:4,9,18,23 57:3,4,11,18 57:21,22 58:24 59:4,18,21 60:12,21,25 Justice's 30:10 49:10	<hr/> K Kagan 17:2 23:8 23:12 25:4,8 26:6 30:14 31:4 33:21 38:17,20 50:25 57:3 Keisler 1:20 2:9 49:3,4,5,7 50:10,17,22 51:6 53:9,24 54:19,22,24 55:8,10,16,19 56:13,20,25 57:3,10,17,19 KENNEDY 37:24 38:4 key 29:2 34:18 36:20 46:23 kicking 59:23 kind 39:22 41:11 47:7 know 9:19 18:21 23:5 24:7 26:1 30:4,8 37:7,8 38:13 39:1 41:19 46:22 50:6,7,15,15 53:19,21 55:22 knowable 54:2 knowing 20:19 knowledge 42:25 known 55:24 <hr/> L Labor 17:8,23 18:2 56:21 language 17:16 25:12 29:24 31:17,25 47:1 57:4 60:13 larger 38:11 42:16 lasts 46:19 latest 53:1 Laughter 20:12	23:6 25:7 33:4 45:21 49:25 55:13 law 32:18 40:16 lawyers 53:20 leads 39:10 left 23:15 26:2 28:2 33:13 legal 6:11 32:6 legislative 38:21 let's 10:9 29:19 30:18 43:2 59:4 level 40:14 levels 28:16 liability 6:16 10:17 37:4 41:5,7 47:17 54:10,12,14 liable 59:14 Limbach 49:21 54:25 limited 25:25 line 14:25 lines 20:2 34:16 little 16:2 lock 6:15 16:23 20:21 21:7 40:2 53:15 long 12:15 39:11 48:10 longest 25:6 Longshore 3:17 3:24 48:6 50:18 long-past 35:10 look 19:4,4 22:12 51:10 loose 27:1,3 lose 60:22 lot 17:11,23 29:9 42:9 <hr/> M machinery 48:2 52:6 magic 39:12	majority 38:20 51:18,20 making 4:4 10:12,13 13:11 21:3,3 27:6 Marginally 12:18 matter 1:11 10:4 39:11 61:3 maximize 52:12 maximum 3:16 3:20,22 6:15 8:16 9:12 10:2 10:2,11,13,25 11:9,13 12:4,5 12:14 16:13,24 20:6 24:7,23 35:16,18,19,23 36:1,3,7 37:18 37:21 38:13 40:23 41:25 42:3,9 47:21 48:16,25 51:17 51:18 53:1,16 54:2 55:22,23 56:10,12,17,18 56:21 58:8,17 59:23 60:2,10 mean 4:10 6:9 6:24 8:8 10:16 13:21 17:11,15 18:10,20 20:6 25:14,16 26:25 27:17 30:4,22 35:16 38:10 39:24,25 42:7 44:5,6,7,7,21 45:2,4 46:24 53:7,18 meaning 3:25 4:1 5:5 27:12 27:15 29:19 33:13,18 46:9 49:11,13 58:14 60:14 meanings 27:2 60:23	means 8:10 13:16 22:20 25:18,19 26:18 27:7,10,10,11 27:13 32:16,20 38:8 39:16 meant 34:22 40:16 measure 6:12 measured 5:23 measuring 5:22 mechanism 56:5 merely 21:2 middle 4:10 minimize 52:12 minimum 16:24 16:24 48:16,25 52:5 minute 31:15,15 minutes 59:1 misdescribe 60:18 missed 26:4 money 33:19 42:7 44:8 45:10,13 50:8 50:9 52:4 53:6 59:6,7,8 morning 3:4 motion 20:18 movie 20:11 <hr/> N N 2:1,1 3:1 narrow 58:3 national 7:19 53:5 nationally 53:3 naturally 18:20 necessary 47:20 need 22:8 37:7,8 41:4 52:18 needs 6:16 43:11 43:12 47:9,11 59:6 neither 7:24,25 15:8 21:12
---	--	--	---	--

never 13:20 17:25 38:9 42:19 57:1	Ohio 49:21 55:2 oil 51:7 55:8 okay 5:11,21 7:24 9:4,9 11:23 13:6 15:20 16:21,21 26:8 29:14,21 31:16,20,23,24 35:21 36:18 40:25 42:14 45:4 46:6,13 54:22 55:10	36:19,22 37:1 38:21 54:3 paid 4:14 8:11 10:10 14:23 15:8 16:10 25:23 26:11,22 40:17 42:18 51:19	36:23 38:24 39:5,17 40:3 43:4 48:9 56:11 59:5 paying 8:22 9:25 10:15 21:20 39:19,19 43:6 52:17 59:9,11 60:4,7	permanently 18:18,23 19:2 19:22 20:3 permits 35:2 person 6:9 45:8 50:5,7 persuaded 33:12 PETER 1:20 2:9 49:5 Petitioner 1:4 1:16 2:4,13 3:8 32:25 37:20 38:1,6 42:5 46:17 47:7 55:25 58:18 59:3
6:21 8:9,24 13:15 15:4,15 18:7 22:18,19 22:25 25:12,13 26:1 37:22 38:15 39:13,14 39:20,23,24 46:8 50:3,11 50:20 57:14,15 57:20 58:9,11 58:14,15 60:23	old 35:18 57:5 ones 18:22 40:23 operate 17:3 opinion 55:1 57:5,12 opposed 4:21 oral 1:11 2:2,5,8 3:7 28:6 49:5	Palmore 1:17 2:6 28:5,6,8 29:1,7,12,15 29:25 30:14,19 31:1,8,16,19 31:21,24 32:1 32:5,8,13,24 33:5,15,20,24 34:1,4,10,12 35:4,8,18,21 35:24 36:6,11 36:14,18 37:11 37:14,17 38:3 38:7,19 39:7 39:14 40:6 41:3,18,21 42:12,16 43:11 43:14,17,20,24 44:3,9,11,15 44:22,24 45:5 45:11,14,17,20 45:22 46:3,13 47:2,6 48:13 49:2 50:18 51:19	payment 5:4 6:19 11:19 22:2,5,7 37:2 42:23 43:12,23 payments 4:25 5:2,10,13,17 10:23 11:9,17 21:3,4 22:9 27:22 38:12 42:22 54:8 55:20 59:13 pays 37:13 39:16,17 40:2 59:5 penalize 10:15 penalty 48:10 54:12 people 17:3 18:22,23 19:2 19:3,11 23:18 34:22 35:24 36:1 percent 22:14 54:12 56:14,16 percentage 38:17 56:9 perfect 11:24 12:1 period 12:6 19:12 45:13 59:5 permanent 6:23 7:15,18 8:14 9:18 10:1,9 11:14,22 12:3 15:14 18:13 19:2,15 24:3 45:24 57:25	Petitioner's 28:10 33:1 36:15 38:14 41:6,23 42:1 48:3,16 51:1 52:1,8,15 53:16 54:1,2 phrase 26:1 34:15 39:13 50:3 places 25:24 plausible 53:8 please 3:10 28:9 49:8 pocket 8:11 point 8:15 12:10 12:13,16,17 16:22 38:11 40:8 42:17 58:15 pointed 41:5 44:18,19 46:17 51:21 points 38:21 portion 26:10 27:21 position 10:17 10:19 53:17 possible 17:6 27:2,16 48:2
news 28:24 Ninth 13:8 norm 52:7 normal 29:24 Normally 52:24 note 34:5 notice 17:7 36:25 37:3 43:9,14,22,23 notify 43:2 number 22:16 22:17 37:7 48:24 52:12 numbers 12:17	order 4:2,4 13:11 20:15 25:16,20,21 26:25 28:12,14 31:10 32:3,10 32:16,17 34:23 35:3,10 36:24 38:8,10 42:2 42:18 47:10,11 47:20 48:4 51:2,16,22 52:7,10,13 53:15,25 55:22 55:22,25 ordered 40:1 orders 52:14 overrides 37:25 over-inclusive 48:18,19 owe 40:22 59:7 59:8	paragraph 26:13 part 9:16 58:9 partial 15:17 23:19 43:1 partially 24:3 particular 4:24 12:9 22:16 51:12 parties 4:8 parts 15:3 party 50:10,11 passes 29:20 pay 5:23 22:23	permanently 18:18,23 19:2 19:22 20:3 permits 35:2 person 6:9 45:8 50:5,7 persuaded 33:12 PETER 1:20 2:9 49:5 Petitioner 1:4 1:16 2:4,13 3:8 32:25 37:20 38:1,6 42:5 46:17 47:7 55:25 58:18 59:3 Petitioner's 28:10 33:1 36:15 38:14 41:6,23 42:1 48:3,16 51:1 52:1,8,15 53:16 54:1,2 phrase 26:1 34:15 39:13 50:3 places 25:24 plausible 53:8 please 3:10 28:9 49:8 pocket 8:11 point 8:15 12:10 12:13,16,17 16:22 38:11 40:8 42:17 58:15 pointed 41:5 44:18,19 46:17 51:21 points 38:21 portion 26:10 27:21 position 10:17 10:19 53:17 possible 17:6 27:2,16 48:2	
O O 2:1 3:1 obliged 45:10 obviously 56:6 occurs 30:3 October 7:19 34:20 odd 12:12 22:10 odds 52:1 oh 20:8,8 21:15 24:9 27:20 29:22 30:4,10 32:12 33:2 54:24	P P 3:1 page 2:2 29:5 31:2,12,20,21 34:11,12 36:19			

52:3 60:23 practical 33:8 52:21 preceding 56:22 precisely 11:6 52:3 precludes 32:25 premised 21:6 present 11:9 44:20 presented 3:15 pretty 55:15 prior 14:25 34:20 35:19 36:3 45:9 private 1:21 2:10 49:6 problem 17:25 47:8 48:4,8 52:21 53:16,17 54:3 problems 26:2 39:22 procedural 47:7 proceeding 5:18 6:11 16:15 55:21 process 20:18 48:1 producers 49:22 55:4,5 proffered 48:3 progress 6:16 promptly 16:23 36:24 39:16 40:2,3 proper 40:14 proposition 10:22 protect 41:4 protracting 48:8 protraction 39:10 proves 32:23 provide 6:21 9:9 10:1 21:12 34:7 35:12	43:11 provided 12:22 provides 3:21 17:16 29:1 36:23 41:6,9 51:1 58:2 providing 29:20 provision 6:2 7:2,16 9:6 10:5 15:3,16 16:25 18:16 26:12,21 28:12 29:18 33:18,21 34:5 35:2 37:18 38:11 45:20 47:22 51:10,13 58:1 60:19 provisions 5:12 25:15 26:24,25 27:16 30:15 35:5 36:20 purpose 47:21 purposes 32:14 32:14,15 51:3 pursuant 4:2 put 20:5 27:3 puts 43:7 p.m 61:2 <hr/> Q qualified 50:23 59:16 qualifies 50:6 question 3:15 7:10 15:24 21:5 38:15 40:8 53:12 questioning 14:25 questions 13:25 49:10 57:2,21 58:22 quickly 46:4 52:4 quite 27:13 <hr/> R	R 1:17 2:6 3:1 28:6 raise 19:8 random 16:10 rate 3:16 6:15 7:17,20 9:12 10:13 16:24,24 16:24 20:21 21:7 24:23 35:16 47:21 51:17,18 53:16 54:2 55:22,23 56:17 58:8,17 rates 15:22 read 9:7 11:12 13:1 17:16 18:4,20 20:15 32:9 39:12 44:5,6 reading 4:24 10:21,24 11:5 11:23,25 13:25 16:19 18:6 25:25 26:1,12 26:16,17 30:24 36:15,16 39:4 39:9,12 40:5,6 40:9 48:17 realistic 20:24 really 13:13,25 17:10,13 33:9 reason 8:9 35:9 51:14 reasonable 42:13 reasons 16:16 16:18 60:19 REBUTTAL 2:11 59:2 recalculate 10:25 receipt 33:6 receive 9:13 received 15:9 42:2,23 receiving 6:22 6:24 7:22 8:7,8	8:19,21,23,25 9:2,17,19 10:22 12:2 15:2,4,13 18:17 23:18 27:25 42:22 53:11 55:20 57:23,24 58:6 58:13 recognizes 42:5 red 38:21 refer 27:18 referred 45:8 referring 26:9 50:4,5 refers 5:10 13:9 26:9 35:17 reflected 47:12 regulations 20:16 21:13 regulatory 21:19 relates 57:21,25 relationship 57:23 relevant 19:12 relies 52:9 56:5 rely 51:15 remaining 59:1 remains 38:23 remedies 48:14 remedy 41:10 renders 28:12 reply 54:3 require 10:24 56:16 required 50:23 requires 21:3,24 reserve 28:2 respect 14:18 32:16 respects 52:9 Respondent 1:19,21 2:7,10 28:7 49:6 Respondents 27:3	response 12:25 14:25 responsibility 48:21 rest 26:22 result 5:17 14:8 16:17 17:17 34:17 resulted 35:25 revise 17:14 rewrite 29:11,15 right 4:16 5:25 8:3 10:16 17:7 17:18 18:2 19:17,19 21:20 23:22 24:9 25:1,11 27:24 32:4,7 34:4,9 35:8,20 36:1 36:12 39:6,8 40:24 42:11,12 42:16 43:13,17 44:1,23,24 53:14 57:9,10 58:25 59:9 Roberts 1:3 3:3 3:4,11 9:1 12:7 12:23 13:3,6 25:2,5 28:3,5 28:19,21 31:6 37:9,12,15 40:18 41:12,19 42:6,13 49:1 51:4 52:20 53:18 56:18,23 58:24 60:25 Roberts's 20:7 Robinson 51:7 55:8 route 36:9 rule 35:11 39:11 run 25:14 runs 26:1 42:22 <hr/> S S 2:1 3:1 satisfaction
--	---	---	--	--

53:22 saying 17:8 19:3 22:19 25:9,10 27:7,13 37:25 38:3 39:6 42:8 42:20 43:15 44:13 45:3 55:1 57:7 says 4:12 5:21 6:2,21 8:19,21 9:16,17 15:15 18:10,16,20 19:23 22:13,15 22:17 25:11,20 26:14 31:9 32:1,13 37:1 40:24 45:22 46:1 48:10 51:3 52:16,18 52:25 56:1 59:6,8 Scalia 4:5,8,20 5:6,11 6:4,18 7:4,6,9,13,21 7:24 8:6,18 9:3 9:5,15,23 10:3 10:14 11:16,23 13:13,19 14:24 15:11,17,20 17:10 23:11,13 24:1,9,12,14 24:16,19 27:5 27:20,25 28:18 28:20 29:6,8 29:14,16,17 30:1,18,20,21 31:5,12,14,17 31:20,23,25 32:4,7,12,19 33:2,11,17,23 33:25 34:2,9 35:15,20,22 36:5,10,12,17 49:18 50:1,14 54:17,20,23 55:6,9,11,14 55:17 57:11,18	57:21 Scalia's 10:21 49:10 57:5 scheme 29:3,8 36:21 38:24 47:10 48:6 Sea-Land 1:6 3:4,13 second 12:1 43:22 Secretary 18:24 18:24 56:21 section 3:16,21 4:2,3 5:9,13 6:20 12:21 13:12 16:25 23:14 26:9,17 27:17 28:10 29:4,4 31:2 33:12,20 34:25 36:2,21,21 38:16 41:9 42:19 51:1 58:2 sections 5:7 31:3 see 9:21 15:17 18:6 22:11 39:22 seek 20:15 21:13 21:20 seeking 21:9 sense 4:19,20,21 9:6,7,10 11:24 12:1,9,16,18 14:1,5,12,19 16:3,18,19 17:11 18:5 19:14 24:17,20 25:10 26:3 29:9 34:21 36:13,14,15 40:17 47:11 60:14 sensible 49:13 60:19 sensical 13:4 sentence 32:1,9	32:13,23 45:22 separate 7:5 8:13 9:10 serious 14:21 25:3 serves 47:20 Services 1:6 3:5 set 11:9 46:18 sets 20:18 settling 46:12 setup 55:2 seven 20:2 Shell 51:7 55:8 shortly 3:11 shoveled 28:23 show 13:19 30:21 33:17 44:24,25 side 4:12,22 12:8 significant 36:8 silent 51:17 simple 39:1 simply 6:16 21:24 22:7 35:11 59:22 situated 14:9,15 14:17 situation 9:24 21:16 41:10,11 44:20,21 45:2 53:8,10,20 54:15 60:1 situations 44:19 slightly 20:10 slip 28:23 slow 22:12 small 48:24 snow 28:23 Solicitor 1:17 solution 48:3,17 53:16 54:2 somebody 15:8 22:20,21,21 57:15 somewhat 18:5 soon 36:24	sooner 48:9 sorry 22:12 28:20 31:13,14 34:12 sort 41:14 50:7 Sotomayor 10:20 11:4,8 11:12 20:13 21:5,9,11,17 22:2,4,10 25:1 34:11 35:1,6 46:7 51:21 59:4,18,21 60:12,21 sound 53:8 sources 19:6 speak 49:3 50:2 special 18:21 19:1 specific 27:11 specifically 51:1 specifics 34:14 stake 41:14 start 31:1 37:7 38:12 started 59:13 starts 39:18 States 1:1,12 static 58:8 statistics 41:20 statute 4:18 12:24,25 13:10 17:12,15 18:4 20:23 22:10,13 24:20 25:11 29:1,11,15,20 30:2,15 38:9 38:14 39:23,24 44:16,19 46:25 47:4,9,23,24 48:17 49:17,19 49:21 50:2,4,6 50:13,23 54:21 55:2 56:6,8 57:5,13,14,20 60:13,18 statutes 17:18	30:6 statutorily 36:7 statutory 6:2 21:19 25:15 27:1 30:16 36:21 37:18,20 38:13 39:8 48:15,16,25 56:10,11 60:13 stays 58:20 stop 18:6 21:20 22:7,9 39:5 40:11 stopping 22:2 stops 59:21,22 street 28:22 string 39:11 studied 21:17 stupid 17:17,17 17:19,22 submission 44:9 submit 5:7 submitted 61:1 61:3 subsection 10:23 26:14 32:14,15 33:13 51:3 subsequent 26:13 60:10 subset 58:4 substantial 38:19 suddenly 54:14 suffers 42:25 suggest 34:21 38:8 suggested 9:8 suggests 25:21 32:9 suppose 40:20 supposed 4:15 38:25 39:1 43:5 47:24,24 56:6 Supreme 1:1,12 sure 35:17 58:7
---	---	---	---	---

surprised 55:23	56:23,25	12:10,17,21	two-thirds	vast 51:18,20
survivor 34:16	thing 18:21,25	18:25 19:12	35:25	view 13:8 20:24
survivors 6:22	19:1,21,25	28:2 36:8 39:2	typical 40:19	38:14 41:23
8:19 15:3,4	20:1 23:16	40:4 42:7,22		42:1 44:7
18:18 26:21	44:5,12 45:7,9	44:8 45:8,9,12	U	59:12
survivorship	things 17:17	46:9,9,10,25	unambiguous	views 3:25
12:6	19:22	50:5,11,20,22	13:1	VII 51:8
system 17:3	think 4:23 5:4	57:6,8,16	unclear 37:19	virtue 8:20
52:14 53:15	5:16 6:1,7 7:1	58:15 59:5,16	uncommon	27:22 56:7
55:25	7:12 8:5 10:3	60:3	49:15	voluntarily 4:14
	12:23,24 16:21	Title 51:8	understand 7:9	5:21 8:1,22
T	17:19,21,21,22	today 47:14	8:8 9:3 11:16	10:15 14:7
T 1:15 2:1,1,3	20:22 21:15,18	56:16	14:11 23:9	17:4,24 32:21
2:12 3:7 59:2	23:15,23 24:21	told 18:12 54:9	40:7 41:12	39:17,19 52:17
take 18:2 24:12	25:8 27:9,9,17	56:13,15	52:21	53:10
26:21 55:4	27:20 29:2,25	total 6:23 7:15	understanding	voluntary 5:18
taken 35:7	30:14 32:24,25	7:18 8:14 9:18	10:4 29:3,4	10:22 22:5
takes 12:15	33:11,20 34:24	10:1,9 11:14	36:20 56:14	55:20
talking 6:20	35:14 36:15,19	11:22 12:3	understood	
10:5 13:11	39:10 40:8,15	15:14,21,22	14:24	W
23:5 29:6,17	40:19 42:5,9	18:13 19:15	under-inclusive	wage 16:5,5,7,10
33:12 41:14,16	44:16,22,24	23:19 45:23	48:18,23	19:7,7 22:15
57:16	45:5,11,14	57:25	United 1:1,12	35:25 43:6,18
talks 9:16 45:23	46:13 47:3,6	totally 18:18	universal 20:23	wages 53:3,5
45:25	47:19 49:23	tough 44:12	unnatural 56:8	59:16
tax 29:20 49:19	50:10 53:4	transcript 55:18	unpaid 26:10	wait 12:14 42:8
49:21 50:20,24	54:25 55:5,19	treat 14:12,19	untenable 51:15	42:14,15 48:9
55:2,4	56:4 57:17,19	treated 15:1,2,6	unusual 46:20	52:23 53:2,4,4
technical 42:25	57:24 58:11	15:7	Upward 33:25	waiting 25:6
tell 22:8	59:25 60:17	trend 53:5	usage 50:6,15,17	waits 43:3
temporary	thinking 26:3	trigger 47:21	57:18	walking 28:22
15:21,22 23:18	thinks 53:9	triggered 60:1,2	use 5:7 13:7	want 17:5 29:19
24:3	third 26:5	trouble 21:16	29:24 30:8,16	30:9 42:14
tends 38:6	thought 12:8	true 5:16,19	34:14 38:7	wanted 17:3
term 3:24 13:8	17:2 21:6	21:19 27:20	41:21 44:17	wants 6:14 22:1
14:11 30:9	threaten 47:15	32:19 35:12	46:8,11 49:16	Washington 1:8
32:16 46:12	47:16 54:4	try 27:3 33:15	50:3 58:11	1:15,18,20
49:11,16 50:16	threatening	33:16	uses 38:9 46:3	wasn't 55:6
terms 9:22	56:1	trying 9:5 10:7	usual 41:13	way 5:8 9:7
12:14 46:11	three 25:24 26:2	turn 12:21	usually 53:19	11:13 13:4,15
test 60:24	27:2 30:15	turning 22:25		16:23,25 17:16
text 4:21,23	34:15	turns 44:14	V	18:5 20:15,16
thank 28:3,4	thrust 48:5	twice 16:6	v 1:5 3:4 49:20	25:8 29:10
49:1 58:23,24	till 40:4 48:9	two 4:8 14:9	51:7 54:24	30:9 44:17
60:25	time 3:17,18,23	15:3,6 16:18	55:8	45:13 47:13,23
theirs 16:19	5:3,16,23 8:16	23:20 34:15	value 42:7	51:4 55:21,25
Theoretically	9:12 10:11	40:11 52:9	variation 27:15	56:6

ways 26:2 51:9	write 39:2 40:10	56:14 59:12,14	5
Wednesday 1:9	40:12,21 43:16	10-1399 1:4 3:4	5 42:8 52:22,23
weeds 45:18	53:21	11 1:9	55:23 59:12
week 10:12 16:5	writes 39:2	11:23 1:13 3:2	59 2:13
43:3,6,8,9,21	46:22	12:23 61:2	6
43:22,23	writing 37:7	1200 59:10	6 3:16
weekly 3:16	41:4	14 37:2,3,7,22	6(c) 3:21 12:21
6:11 16:7	written 17:13	38:12 39:3	17:1 18:11
22:14,15 35:25	30:6,6 58:7	43:12 46:19,22	27:21
43:6	wrong 33:3 40:5	14(a) 5:9,13	6(d) 27:17
weeks 43:19	40:12	15a 34:1,12	8
went 36:9	X	1500 10:13	8(d) 27:9
We'll 3:3 49:3	x 1:2,7	16 54:3	8(d)(1) 26:9,18
we're 6:20 12:12	Y	17a 29:5 36:19	26:18
12:14 16:7	year 3:13,14	36:22	9
19:3 22:9 29:6	7:17 10:24	18a 37:1	9 26:8 46:14
29:17 33:12	11:1,13,20	19(e) 4:2,3 13:12	906 28:10 36:21
37:24,25 41:14	15:22 24:14	19(f) 58:2	906(c) 38:16
52:25	40:23 42:20	1972 34:8,20	908 51:1
we've 23:14 25:9	53:4 56:22	35:19 38:22	908(d)(1) 25:17
whichever 3:20	57:8 58:3,13	56:13,20	26:6
widows 18:22	58:13,19	1989 55:1	908(d)(3) 26:15
wife 29:21 50:8	years 42:9 52:22	1990 16:4,11	910(h)(1) 25:18
wish 5:6	52:23 53:4,7	1998 16:14	26:7 33:21
word 4:19 5:5	55:23 59:13,14	2	36:2 45:14,16
22:25 25:18,19	59:24,24 60:10	2 59:1	50:25 54:19
25:25 30:16	year's 6:15 24:7	20 56:15	913 29:4 42:19
38:9 51:8,11	24:24,24,24	200 22:14	914 29:4 36:21
51:12 58:11	56:20 60:10	2002 3:13 41:23	51:5
words 12:24	\$	41:25	928 41:9
15:18 18:6,8	\$1,000 10:11	2007 3:14 42:2,2	933 31:2,5 51:1
work 3:12 17:23	\$2,000 29:23	2012 1:9	933(b) 25:20
19:4 43:10	30:3,5	24a 31:2,12,21	26:6 31:8
47:24 52:15	\$200 16:5	27th 34:20	
worker 16:3	\$70 35:19	28 2:7	
workers 18:18	\$966 41:25	3	
38:23 48:6	1	3 2:4 22:15 43:7	
working 54:16	1 16:3,11,14	44:20,21 46:19	
works 29:3,9	33:23,24 42:20	46:20	
36:21	43:1,7	38 38:21	
work-around	1st 7:19	4	
47:8	1,000 59:11	4 44:20,21 46:21	
world 38:18	1,114 42:3	53:4,7	
wouldn't 4:13	10 43:2,7 54:12	49 2:10	
4:16 8:4 10:1			
22:6,7,22			
29:23			