



1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ERIC SCHNAPPER, ESQ.	
4	On behalf of the Petitioner	3
5	LISA S. BLATT, ESQ.	
6	On behalf of the United States, as amicus	
7	curiae, supporting the Petitioner	18
8	CARTER G. PHILLIPS, ESQ.	
9	On behalf of the Respondent	28
10	REBUTTAL ARGUMENT OF	
11	ERIC SCHNAPPER, ESQ.	
12	On behalf of the Petitioner	56
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case 08-441, Gross v. FBL  
5 Financial Services.

6 Mr. Schnapper.

7 ORAL ARGUMENT OF ERIC SCHNAPPER

8 ON BEHALF OF THE PETITIONER

9 MR. SCHNAPPER: Thank you.

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

11 The court of appeals erred in holding that  
12 the plaintiff had to have direct evidence in order to  
13 obtain the specific instruction at issue in this case.

14 This Court's decision in Desert Palace makes  
15 two important points that are relevant today. First,  
16 the Court noted that this Court had at no time imposed a  
17 direct evidence requirement without an affirmative  
18 directive from Congress to do so. Secondly, the Court  
19 noted that Congress, when it wished to impose heightened  
20 standards, had done --

21 JUSTICE SCALIA: Excuse me. That -- that  
22 statement may be wrong depending upon how you read Price  
23 Waterhouse, might it not? The first statement, that  
24 we've never imposed such a requirement. I mean, if you  
25 think Justice O'Connor's opinion was the determinative

1 opinion in Price Waterhouse, then -- then we had.

2 MR. SCHNAPPER: That -- that's true, Your  
3 Honor. That was not the view of the Court in Desert  
4 Palace. Desert Palace may have misspoken in that  
5 regard.

6 JUSTICE SCALIA: It was dictum. They may  
7 have been wrong.

8 MR. SCHNAPPER: Well, we -- we'd like to  
9 think they are right. I mean, we think they are right.  
10 But of course, as you say, that is, in a sense, one of  
11 the questions before us.

12 JUSTICE KENNEDY: Well, but -- I just want  
13 -- you said that the Court has never imposed a burden of  
14 proof-shifting requirement absent a directive from  
15 Congress? Are you --

16 MR. SCHNAPPER: No. I --

17 JUSTICE KENNEDY: Or maybe -- maybe I  
18 misheard.

19 MR. SCHNAPPER: Well, I may have misspoken,  
20 Your Honor. What the Court said was that this Court had  
21 never imposed a direct evidence requirement --

22 JUSTICE KENNEDY: All right.

23 MR. SCHNAPPER: -- in the absence of an  
24 affirmative directive from Congress.

25 CHIEF JUSTICE ROBERTS: There is some

1 disagreement among the parties, of course, what "direct  
2 evidence" means, whether it means direct as opposed to  
3 circumstantial, or direct in the terms that for example  
4 Judge Collatin put it in the decision below.

5 MR. SCHNAPPER: Your Honor, there is not a  
6 difference between the parties. We take no position on  
7 that. There is a considerable variety of views about --

8 CHIEF JUSTICE ROBERTS: So you are telling  
9 us we never required direct evidence, but you are not  
10 taking a position on what direct evidence is?

11 MR. SCHNAPPER: The --

12 CHIEF JUSTICE ROBERTS: I mean, you may be  
13 right or you may be wrong. But we kind of have to know  
14 what we're dealing with.

15 MR. SCHNAPPER: Yes, the Court hasn't put  
16 those two things together in the way you did. I think  
17 that's fair. The Court's statement in Desert Palace  
18 didn't define direct evidence. It's not -- it's not  
19 clear in that sense exactly what the Court meant. I  
20 think it's fair to say it certainly meant that the Court  
21 hadn't required direct evidence in the sense of  
22 non-circumstantial evidence, but --

23 CHIEF JUSTICE ROBERTS: Well, in your  
24 petition, you asked -- you used the phrase "direct  
25 evidence," and I just want to know in what sense you

1 mean that?

2 MR. SCHNAPPER: We -- it's our view that no  
3 special evidence is required to get the instruction in  
4 this case.

5 JUSTICE GINSBURG: Is there a variety of  
6 views among the circuits on what Justice O'Connor meant  
7 by the term "direct evidence"? It wasn't defined in  
8 Price Waterhouse either.

9 MR. SCHNAPPER: No, it was not, Your Honor.

10 JUSTICE GINSBURG: So there is a range of  
11 views on what it means, starting from direct versus  
12 circumstantial, to something like strong evidence.

13 MR. SCHNAPPER: There is a range of views on  
14 that, but our view is the burden on the plaintiff is to  
15 show by a preponderance of the evidence that in this  
16 case age was a motivating factor, but it's not required  
17 to show it by any particular kind of evidence or to show  
18 it by strong evidence as opposed to merely evidence  
19 sufficient to establish that by a preponderance of the  
20 evidence.

21 JUSTICE ALITO: Price Waterhouse was a bench  
22 trial.

23 MR. SCHNAPPER: Yes.

24 JUSTICE ALITO: And Mt. Healthy was a bench  
25 trial, wasn't it?

1 MR. SCHNAPPER: I believe so, yes.

2 JUSTICE ALITO: Now, would the -- if there  
3 is a direct evidence requirement, it may arguably cause  
4 a great deal of problem when the trial judge has to give  
5 an instruction to the jury, because then the -- the jury  
6 will first have to decide whether a particular type of  
7 evidence is present in the case before it can tell  
8 what -- who has the burden of proof and what the  
9 standard is, but if Price Waterhouse is understood  
10 simply as a way for a judge conducting a bench trial to  
11 look at the evidence, does it present any of the  
12 problems that have been identified with the Price  
13 Waterhouse -- that interpretation of Price Waterhouse as  
14 applied to jury trials?

15 MR. SCHNAPPER: Well, it wouldn't present  
16 the same -- there are special problems applying it to  
17 jury trials. We think that the requirement of direct  
18 evidence is simply wrong for a number of reasons. At  
19 the least, the Court would have to finally resolve what  
20 direct evidence means in this particular context.

21 JUSTICE ALITO: Well, if it's just an  
22 instruction to a judge conducting a bench trial, it  
23 could mean that if the judge sitting as the trier of  
24 fact finds that there is direct evidence, strong  
25 evidence supporting the plaintiff's claim, then the

1 judge will need to have strong evidence, stronger  
2 evidence on the other side in order to rule against the  
3 plaintiff. It's not hard to figure out how it might  
4 work out in that situation.

5 The problem comes when it has to be posed in  
6 the form of a jury instruction.

7 MR. SCHNAPPER: Well, it's a particularly  
8 serious problem there, but if you were to announce this  
9 as a rule, you would -- I think the time has come to  
10 explain definitively what "direct evidence" means. The  
11 courts of appeals are in wide disagreement about that,  
12 and --

13 JUSTICE GINSBURG: And it was the view of  
14 only one justice, Justice O'Connor alone. She did make  
15 the fifth vote, but no one else accepted a direct  
16 evidence test.

17 MR. SCHNAPPER: Your Honor, she made the  
18 sixth vote. There were five members of the Court other  
19 than Justice O'Connor who agreed in the result in that  
20 case. The plurality expressly rejected a direct  
21 evidence requirement. Justice White --

22 JUSTICE GINSBURG: Well, would you urge that  
23 we should count Justice white's decision as the  
24 controlling decision rather than Justice O'Connor's?

25 MR. SCHNAPPER: To the extent that you were



1 disposed to resolve this case based an interpretation of  
2 Price Waterhouse. But it's our view that the subsequent  
3 decision, unanimous decision in Desert Palace, makes it  
4 unnecessary. Desert Palace indicates that heightened  
5 proof requirements that -- those are the words of the  
6 opinion. It suggest they should not be imposed by the  
7 courts absent a statutory directive.

8 JUSTICE ALITO: But Desert Palace was a  
9 Title VII case, wasn't it, under the 1991 amendment to  
10 Title VII?

11 MR. SCHNAPPER: It was. But that part of  
12 the reasoning of the case is not based on the language  
13 of Title VII other than the absence from Title VII of  
14 that specific language. The structure of the opinion  
15 first talks about the definition of "demonstrate" in  
16 section 701(n). That's obviously not relevant to the  
17 ADEA. But it goes on to say that the absence in Title  
18 VII of any heightened proof requirement also weighs  
19 heavily against the Court's inferring, and that part of  
20 the reasoning isn't limited to Title VII.

21 JUSTICE KENNEDY: But your -- your position,  
22 you rest heavily on the argument, I think, but there is  
23 no textual support in the ADEA for a heightened evidence  
24 requirement in order to shift the burden of proof. But  
25 isn't it true there is no textural support for shifting

1 the burden of proof at all? I mean, I don't see how  
2 you can -- can convince us of the first proposition  
3 without confronting the second.

4 MR. SCHNAPPER: Well, this Court has on a  
5 number of occasions allocated the burden of proof among  
6 the parties, including to a defendant, without a  
7 specific textual basis. The Court did so, for example,  
8 in Burlington Industries v. Eller, where the Court's  
9 opinion places on the defendant the burden of  
10 establishing an affirmative defense in certain types of  
11 sexual harassment cases. There wasn't a textual basis  
12 for that.

13 JUSTICE KENNEDY: Well, of course,  
14 affirmative defenses, usually the burden of persuasion  
15 is on the party asserting the affirmative defense.

16 MR. SCHNAPPER: In Justice -- in the case of  
17 Price Waterhouse, Justice White characterized this  
18 allocation as the burden, as an affirmative defense.  
19 But this sort of thing routinely with regard to the  
20 allocation of burdens. It does not happen routinely  
21 with regard to heightened evidence requirement.

22 JUSTICE SOUTER: I take it the only issue  
23 that you have raised before us is whether the evidence  
24 that does raise a burden on the defendant's part has got  
25 to be, whatever this means, direct or not? That's the

1     only issue?

2                   MR. SCHNAPPER:   That's the only issue before  
3     the --

4                   JUSTICE SOUTER:   Am I right that the only  
5     source of argument for the proposition that it does have  
6     to be direct evidence is Justice O'Connor's opinion,  
7     separate opinion?

8                   MR. SCHNAPPER:   Well, that has been the  
9     primary basis for the argument in the courts below.   I  
10    think Respondent has other arguments as well.

11                   JUSTICE SOUTER:   There are arguments about  
12    the need for substantial evidence.   But the argument for  
13    direct evidence goes back to the separate O'Connor --  
14    O'Connor opinion.

15                   MR. SCHNAPPER:   That's certainly the origin.

16                   JUSTICE SOUTER:   And are you -- I mean,  
17    we're going to hear about this.   Are you going to make  
18    an argument to the effect that that should not be  
19    regarded as the controlling opinion, and if that is the  
20    source of it, that is the end of the issue.   Are you  
21    going to get into that?

22                   MR. SCHNAPPER:   Well, I would be happy -- I  
23    would be happy to get into it, Your Honor.

24                   JUSTICE SOUTER:   I think you should.

25                   MR. SCHNAPPER:   As -- as Justice Ginsburg

1 pointed out, there are -- there were actually six  
2 members of the Court in Price Waterhouse who concurred  
3 in the result. Four members of the Court in the  
4 plurality expressly rejected a direct evidence  
5 requirement and said there were no limit on the type of  
6 evidence that could be used.

7 Justice White said that the plaintiff's  
8 burden was to show that in that case gender was a  
9 substantial factor. He didn't say substantial evidence  
10 was required.

11 JUSTICE SOUTER: As I understand the White  
12 opinion, it had nothing to do with the character of the  
13 evidence. It had to do with the degree of  
14 persuasiveness of the evidence; is that correct?

15 MR. SCHNAPPER: With due respect, no, Your  
16 Honor. It had to do --

17 JUSTICE SOUTER: Then I don't understand  
18 what "substantial" means. What do you think he meant by  
19 that?

20 MR. SCHNAPPER: The "substantial factor" was  
21 somewhere on the scale of a very unimportant factor or a  
22 very, very important factor, which is separate from how  
23 clear the evidence was that it was a small or large  
24 factor.

25 JUSTICE SOUTER: Okay.

1 CHIEF JUSTICE ROBERTS: In your response to  
2 Justice Souter's question you said you're only focusing  
3 on the direct evidence threshold. But if direct  
4 evidence is the threshold to give you the benefit of  
5 shifting the burden of persuasion of the employer, is it  
6 really fair for you to be able to say, we are only going  
7 to take out one side of the behalf, we are going to  
8 leave the other side of the balance there? It seems to  
9 me that it's artificial to separate the two  
10 requirements, the two aspects of the Price Waterhouse  
11 inquiry.

12 MR. SCHNAPPER: Well, the -- the Price  
13 Waterhouse plurality and Justice White didn't see two  
14 aspects. The requirement was proof by a preponderance  
15 of the evidence that in the case gender was a motivating  
16 factor, and for five members of the Court that was  
17 sufficient. There wasn't -- there wasn't something else  
18 that went with it. There was for Justice O'Connor, but  
19 she's the sixth vote. And -- and --

20 CHIEF JUSTICE ROBERTS: I understand the  
21 difficulty of figuring out who is controlling in -- in  
22 Price Waterhouse. But at least as it has been applied,  
23 my understanding -- I understand it has been applied in  
24 different ways. My understanding of what people mean  
25 when they say "the Price Waterhouse approach," which is

1    that there is a higher showing of evidence, direct  
2    evidence, whatever -- people don't agree on what that  
3    means. But if you meet that showing, then the burden of  
4    persuasion shifts to the employer on the issue of  
5    causation.

6                   MR. SCHNAPPER: Your Honor, that is  
7    precisely the issue on which the lower courts have been  
8    divided. Some courts have expressly rejected that view  
9    and have taken the view that there is no special  
10   heightened standard of any kind. Other courts think  
11   that it is required. That is what we are -- what --

12                   JUSTICE GINSBURG: But, Mr. Schnapper, there  
13   is a difference -- and I think it's critical to your  
14   case -- between what is called the prima facia case that  
15   the plaintiff would make under the McDonnell Douglas  
16   test and proving by a preponderance of the evidence that  
17   in this case age discrimination was a motivating factor.  
18   I think you must concede that in order to fit within  
19   this double motive frame you must show not simply a  
20   prima facia case, but by a preponderance of the evidence  
21   that the discriminatory factor was a motivating factor.

22                   MR. SCHNAPPER: Yes. We -- we are obligated  
23   to do that, and the -- the defendant has argued below  
24   and would, I think, on remand still be in a position to  
25   argue that we didn't have enough evidence to meet that

1     burden.   But that question isn't before us.

2                   JUSTICE GINSBURG:   Can -- can one know if  
3     you've met that burden before the case goes to the jury?  
4     That is, when -- when the case starts out, it's unknown  
5     whether you have established by a preponderance of the  
6     evidence that age discrimination was a motivating  
7     factor.

8                   MR. SCHNAPPER:   Well, whether there is  
9     sufficient evidence is often tested by a motion for  
10    summary judgment.   So courts do look at that matter,  
11    that issue, before trial.   What -- what isn't knowable  
12    before trial -- and -- and frankly is often known only  
13    to the jury -- is whether the jury will conclude that  
14    the defendant acted with two motives or one motive.  
15    That -- that isn't something you would normally be able  
16    to -- to resolve before the case went to trial or even  
17    during the course of the trial.

18                   JUSTICE SOUTER:   Well, correct me if I am  
19    wrong.   I assume that in a jury case that simply was  
20    left to the jury, and the instructions would be  
21    something like this:   If you find that the plaintiff has  
22    shown that age was a motivating factor, then you look to  
23    the next question.   And that is:   Has the defendant  
24    shown that he would have fired the plaintiff anyway?  
25    Isn't that the way it works?

1                   MR. SCHNAPPER: That's the -- that's the way  
2   it works. Yes, that's the way it works. And that --  
3   that is the way it works in -- in a Title VII case  
4   because of the language of the statute. The juries  
5   routinely get that instruction in those cases. That's  
6   certainly proof --

7                   JUSTICE KENNEDY: Well, in -- in response  
8   further to Justice Ginsburg's question, and I think  
9   Justice Souter's, too, is there -- are there any  
10  tactical difficulties or strategic difficulties that  
11  counsel face if they don't quite know which way the  
12  burden is going to shift before trial: The -- the  
13  number of witnesses you have waiting in the hallway or  
14  -- this -- this would be after summary judgment.

15                  MR. SCHNAPPER: No more than would normally  
16  be the case. What happened here in terms of jury  
17  instructions was typical, which was the parties proposed  
18  their differing instructions a week before trial, the  
19  instructions were resolved at the end of trial. That --  
20  that happens all the time.

21                  Sometimes if the parties don't know how the  
22  instructions are going to come out, that complicates  
23  their tactics, but that happens every day in trials.

24                  Thank you.

25                  JUSTICE SCALIA: Could -- before you sit



1 down, I -- I have been trying to figure out Justice  
2 White's opinion in Price Waterhouse. I mean, indeed he  
3 -- he voted to -- to remand the case, as did -- as did  
4 the four in the plurality, but for a very different  
5 reason. They remanded because -- "We reverse the court  
6 of appeals' judgment against Price Waterhouse because  
7 the courts below erred by deciding that the defendant  
8 must make" the proof of he would have been fired anyway  
9 by clear and convincing evidence. That -- that was the  
10 basis for their reversing and remanding.

11 That was not Justice White's, because -- he  
12 said "because the court of appeals required Price  
13 Waterhouse to prove by clear and convincing evidence  
14 that it would have reached the same" -- "in the absence  
15 of the improper motive. Rather than merely requiring  
16 proof by a preponderance of the evidence, I concur in  
17 the judgment reversing this case in part and remanding.  
18 With respect to the employer's burden, however, the  
19 plurality seems to require that the employer submit  
20 objective evidence." And he disagreed with that.

21 MR. SCHNAPPER: All right. There -- there  
22 were a number of different issues in the case. The  
23 first, the court of appeals had held that when the  
24 burden is on the employer to show it would have made the  
25 same decision anyway, the employer has to meet that

1 burden with clear and convincing evidence.

2 The plurality and Justice White, the whole  
3 court rejected that.

4 Secondly, the plurality suggested that the  
5 employer in response would have to have objective  
6 evidence. Justice White rejected that and the objective  
7 evidence standard has not been followed by the lower  
8 courts in -- in the wake of that.

9 The third question was whether the burden  
10 should be placed on the employer. On that issue the  
11 Court was divided six to three. Six Justices, as we --  
12 as we noted, were for that burden allocation. The --  
13 Justice Kennedy and -- and yourself and the Chief  
14 Justice dissented. So there were many issues.

15 Thank you. I would like to reserve the --  
16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 Ms. Blatt.

18 ORAL ARGUMENT OF LISA S. BLATT  
19 ON BEHALF OF THE UNITED STATES,  
20 AS AMICUS CURIAE,  
21 SUPPORTING THE PETITIONER

22 MS. BLATT: Thank you, Mr. Chief Justice,  
23 and may it please the Court:

24 I think both on a substantive level and a  
25 procedural level Desert Palace largely resolves this

1 case. The question presented is the one of should you  
2 have a direct evidence requirement to obtain a mixed  
3 motive instruction under the Age Act. And there is the  
4 procedural posture, which is Desert Palace left  
5 unresolved a lot of very difficult and complicated  
6 questions about when do you get to the jury on mixed  
7 motive and what is the requirement that separates a  
8 mixed motive motivating factor instruction from the  
9 "but-for" or commonly known as the McDonnell Douglas.  
10 And Desert Palace left all that unresolved.

11 On the question presented, there is the same  
12 conflict in the circuits under the Age Act. It is the  
13 same conflict in the circuits that was under Title VII  
14 -- is do you need any kind of evidentiary special  
15 showing to get to a mixed motive; and, if so, is it non-  
16 circumstantial evidence or evidence that directly ties  
17 --

18 JUSTICE ALITO: Could I ask you this? Do  
19 you think that there is a tenable distinction between a  
20 mixed motives case and a non-mixed motives case? In  
21 every employment discrimination case that gets beyond  
22 summary judgment, aren't there mixed motives at play?

23 MS. BLATT: I think there is a lot to be  
24 said for that argument, and this is a very difficult and  
25 unsettled question under Title VII. I think what would

1 be on the table if this Court ever had an appropriate  
2 vehicle -- and this certainly is not the appropriate  
3 vehicle to get into this question -- there would be  
4 several options on the table. You could have what your  
5 view suggests, which is after summary judgment you could  
6 get a motivated factor instruction that the jury would  
7 be permitted to find both impermissible and permissible  
8 motives.

9           You could also have a special verdict form  
10 that asks the jury: Do you find that there were two  
11 causes, one of which was an impermissible factor? And  
12 you could have a situation which I think prevails in  
13 trial courts now -- and it has been the EEOC's practice  
14 -- which is -- and it's not the most analytically clean,  
15 but they basically give the instruction, either a  
16 determinative cause or motivating factor instruction, on  
17 what they think best fits the evidence.

18           And I think it's important for the Court to  
19 understand, as we -- the law exists now under Title VII  
20 and under all the other anti-discrimination acts, there  
21 are two regimes out there. There is a mixed motive  
22 regime and a determining factor regime.

23           JUSTICE GINSBURG: Couldn't -- couldn't any  
24 Title VII case be presented in either framework?

25           MS. BLATT: Yes. But this is -- I will also

1 give you, which I think is important especially when you  
2 write your opinion, the three reasons why you should not  
3 resolve this very difficult question in this case. And  
4 the first is that it wasn't pressed or passed on below  
5 or raised in the brief in opposition and did not receive  
6 full briefing by the parties and all the amici.

7 And, second, just as you left this issue  
8 open in footnote 1 of your opinion in Desert Palace,  
9 Judge Collatin writing for the court recognized this  
10 precise issue in footnote 3 of the court's opinion on  
11 petition appendix page 12, saying: Assuming there is no  
12 direct evidence requirement, we are going to have to  
13 figure out when is it appropriate to give a motivating  
14 factor instruction, absent the -- the language,  
15 expressed language in Title VII?

16 CHIEF JUSTICE ROBERTS: Why don't you --

17 MS. BLATT: The third reason --

18 CHIEF JUSTICE ROBERTS: I will let you get  
19 your third reason in in a minute, but why -- do you  
20 really think it's fair to pick one part of a complicated  
21 test that the court has constructed and say, well, this  
22 one doesn't make any sense, and pull it out? I mean,  
23 maybe it only makes sense in the context of the whole  
24 construct, or maybe none of the elements actually make  
25 sense. But it seems to me very artificial to focus on

1 one aspect and say, let's fix this, without assessing  
2 what its impact is on the rest of the text.

3 MS. BLATT: I see your point, even though  
4 that is exactly what you did in Desert Palace. But  
5 Price Waterhouse is a two-decade-old decision. We're 20  
6 years past that and it has been essentially codified in  
7 Title VII. So no matter what you do to, quote unquote,  
8 "fix this" under the Age Act, every -- the bulk of the  
9 discrimination cases fall under Title VII, and a  
10 motivating factor instruction is codified, and you  
11 unanimously held in Desert Palace there is no special  
12 evidentiary requirement.

13 CHIEF JUSTICE ROBERTS: That was -- that was  
14 because -- that was because of the 1991 Act which  
15 addressed Title VII and quite deliberately left ADEA  
16 out.

17 MS. BLATT: Unless you overrule Price  
18 Waterhouse, which would be an upheaval in the law, and  
19 certainly -- this wouldn't be the appropriate case to do  
20 it, all the courts of appeals have unanimously held  
21 under the Age Act and under a wide variety of State  
22 statutes and other Federal discrimination statutes that  
23 the Price Waterhouse burden-shifting framework applies.

24 CHIEF JUSTICE ROBERTS: You are asking us to  
25 overrule the aspect of Price Waterhouse involving direct

1 evidence, at least if you look at Justice O'Connor's  
2 opinion.

3 MS. BLATT: I don't think you need to decide  
4 that question. In a lot of other contexts, you have  
5 said, well, there is language in our opinion that may  
6 have been confusing or it's not clear what the holding  
7 is, but we henceforth are going to clarify, here's what  
8 the law is.

9 You did it in the recent crack cocaine case  
10 in Spears, you did it in your nude dancing case, and you  
11 did it in a case called Jefferson v. City of Tarrant  
12 County, an opinion Justice Ginsburg authored, that you  
13 said: Well, there is language here that substantive  
14 cases make clear, and there is lots of reasons why you  
15 would not impose a direct evidence requirement, however  
16 you define that term.

17 Since Desert Palace, there is a decision of  
18 Sprint/United v. Mendelsohn. And I think that case a  
19 fortiori forecloses all the arguments made by the other  
20 side that, well, even if it doesn't mean  
21 non-circumstantial evidence, it must mean something that  
22 is highly relevant to the issue of discrimination. In  
23 Sprint/United you said we're not going to have a per se  
24 rule about what is relevant to prove discrimination.  
25 The Court said the same thing in Reeves. I think that

1 was a unanimous decision.

2 CHIEF JUSTICE ROBERTS: What -- what would  
3 be the position of the Solicitor General on just saying  
4 let's get rid of all these artificial court  
5 constructions and say this is like any other case, the  
6 plaintiff has the burden of persuasion and the defendant  
7 can come up with what defenses he has, including that, I  
8 did this for some other reason, it wasn't because of  
9 age, and the jury looks at it and decides who they  
10 believe?

11 MS. BLATT: You would still have the same  
12 issue as you have under the constitutional regime of  
13 what is causation? And if you ask my opinion, the  
14 Solicitor General in Price Waterhouse itself argued  
15 something different that no Justice adopted. We argued  
16 a standard of causation that no one -- no one was  
17 persuaded by. Six went off on this motivating factor  
18 with the burden shifting approach, and three of the  
19 Justices would have applied a straight "but for"  
20 causation --

21 CHIEF JUSTICE ROBERTS: The statute -- the  
22 statute has language. It says "because of." Tell the  
23 jury that.

24 MS. BLATT: Absolutely. And it did in Title  
25 VII, and this Court, for better or worse -- regardless



1 of what you think, in Price Waterhouse six Justices  
2 defined the language "because of." And we have Price  
3 Waterhouse now that is codified. And so --

4 JUSTICE ALITO: Is there any -- is there any  
5 empirical evidence to show whether any of this really  
6 makes a difference. Have there been studies on the  
7 effect of the 1991 amendments, whether they have made a  
8 difference in the way cases actually come out?

9 MS. BLATT: No. Let me just say two  
10 responses. Not that I have seen empirical. I can tell  
11 you the EEOC's experience, and that is they sometimes  
12 prefer a "but for" all the burden being on them and  
13 sometimes they prefer the motivating factor instruction.  
14 And despite what Respondent points out, they have some  
15 defendants that think they like the affirmative defense.

16 And sometimes counsel just agree on what the  
17 instruction should be. And it hasn't caused that much  
18 of a problem, although there is a lot of confusion about  
19 this kind of case, where the defendant is insisting on  
20 one instruction and the plaintiff wants another  
21 instruction, and that's what Judge Collatin is reserving  
22 in a footnote saying: On remand I am going to have to  
23 sort this out.

24 JUSTICE SOUTER: Regardless of what the  
25 parties may prefer, isn't it likely that the jury,

1 regardless of instruction, is going to say something  
2 like this: If we find that -- that age really was in  
3 the boss's mind when he fired the person, and the boss  
4 comes in, regardless of the instructions, and says the  
5 guy's work was no good, he got late -- he arrived late  
6 and so on, the jury is going to say: Did they really  
7 fire him because he was old or because he didn't come to  
8 work on time?

9                   They are going to do the same thing that  
10 they are going to do on the burden-shifting instruction,  
11 probably, aren't they?

12                   MS. BLATT: I mean -- there are two kinds of  
13 jury findings. There is -- but the problem in all this  
14 area, if you do ever get a case that is appropriate, I  
15 think what the Court should start with the assumption  
16 which Justice Alito alluded to: Price Waterhouse was a  
17 bench trial. The 1991 amendments under Title VII were  
18 against the backdrop of non-jury trials. And both the  
19 Price Waterhouse decision and the language of Title VII  
20 are written ex post. It's assuming some artificial  
21 world where there was a finding of mixed motive.

22                   But in today's world everything needs to be  
23 done ex ante. We need to know how to instruct the jury,  
24 and that's the fundamental problem.

25                   If you are looking at ex post world, you are

1 exactly right, a jury could either find this was all a  
2 pretext, I think what was really going on was ageism or  
3 sexism or racism, or it could find, a split the baby, I  
4 think it's both. But you can't possibly know that --

5 JUSTICE SOUTER: You can't know it --

6 MS. BLATT: -- going in.

7 JUSTICE SOUTER: But if you said to the  
8 jury, do the right thing, they'd probably come out the  
9 same way it would come out if you gave the burden  
10 shifting instruction, I think.

11 MS. BLATT: I think you are basically  
12 catching on the point that a lot of counsel in the real  
13 world are basically deciding, what do we think the jury  
14 is going to be most on our side with, with which  
15 instruction. And it's not always clear going into the  
16 case, and maybe depending on the relative strength of  
17 the legitimate factor being asserted. Some defendants  
18 may prefer the affirmative defense. Some may think, no,  
19 it's prejudicial, we don't want that, we want a straight  
20 determining factor instruction.

21 JUSTICE SOUTER: But the reason I raise the  
22 issue is, if -- if we are saying do we ditch Price  
23 Waterhouse, my questions I guess are suggesting  
24 something to the effect, what difference does it make?

25 MS. BLATT: Well, I don't think you can

1 ditch Price Waterhouse as a practical matter, because  
2 you are going to create -- I mean -- massive confusion,  
3 not only under the Age Act, but under the Americans with  
4 Disabilities Act, the Family Medical Leave Act, a  
5 variety of labor statutes, disciplinary statutes --

6 JUSTICE SOUTER: Juries -- juries are  
7 smarter than judges.

8 MS. BLATT: Well, you can do that, but all  
9 the problems you think you are solving, you are going to  
10 have to face them in Title VII. That is the bulk of  
11 discrimination law, and you have two standards of  
12 causation in that statute right now.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Go ahead and make  
15 your third point briefly.

16 MS. BLATT: Oh, on why you shouldn't decide  
17 it? It's essentially this, that this is complicated,  
18 difficult under Title VII. That's the leading  
19 anti-discrimination statute. I think the Court may want  
20 to resolve these very legitimate important questions in  
21 a Title VII case, because you have got statutory  
22 language.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Phillips?

25 ORAL ARGUMENT OF CARTER G. PHILLIPS

1                   ON BEHALF OF THE RESPONDENT

2                   MR. PHILLIPS: Thank you, Mr. Chief Justice,  
3 and may it please the Court:

4                   It does seem to me in some ways the  
5 Petitioner and Respondent in this case are ships passing  
6 in the night because the issues here are unbelievably  
7 complicated. I will say in 25 years of advocacy before  
8 this Court I have not seen one area of the law that  
9 seems to me as difficult to sort out as this particular  
10 one is.

11                  That said, I would hope that the Court would  
12 seize upon this as an opportunity to provide some  
13 significant clarity in the law, rather than seize this  
14 as an opportunity to decide this case on the potentially  
15 most narrow ground, which, frankly, as far as I can  
16 tell, will not only not decide this case, ultimately,  
17 but certainly will not do anything to resolve the mass  
18 confusion that seems to exist among the lower courts.

19                  So, I would urge the Court not to evaluate  
20 this case strictly on the question of whether direct  
21 versus circumstantial evidence is the appropriate way to  
22 proceed. In part that's because that is not the basis  
23 on which the Eighth Circuit decided this case.

24                  The Eighth Circuit said that it interpreted  
25 Justice O'Connor's separate opinion calling for direct

1 evidence as talking about a specific link between the  
2 proof -- in the proof of the discriminatory  
3 considerations and the adverse action that was taken.  
4 So, direct versus circumstantial doesn't even -- you  
5 know, if you remand to evaluate non-circumstantial  
6 evidence, you are still not going to be in a position  
7 where that is going to affect the outcome.

8 JUSTICE GINSBURG: As I understand the court  
9 of appeals, it said that Justice O'Connor's opinion was  
10 the controlling opinion, it was the decision on the  
11 narrowest ground; therefore, the lower courts ought to  
12 take that decision as the law made by Price Waterhouse.

13 Then there's a question of what did she mean  
14 by direct evidence? But I think the Eighth Circuit  
15 certainly did say Justice O'Connor's opinion states the  
16 law of Price Waterhouse, and that was the basis on which  
17 their decision turned.

18 MR. PHILLIPS: Well, then -- of course, they  
19 go on to say what they think that decision means. But  
20 there is no question, Justice Ginsburg, that that is the  
21 basis for that holding.

22 So, I mean, I suppose the Court could say,  
23 no, we disagree with the basis of Price Waterhouse as  
24 Justice White's separate concurring opinion, which,  
25 frankly, I think it is -- you know, having read it more

1 times than I care to admit, is not exactly clear as to  
2 what he thinks the appropriate standard would have been.  
3 At least Justice Ginsburg's provides the formulation  
4 that the lower courts can use to try to provide some  
5 kind of a jury instruction --

6 JUSTICE GINSBURG: Justice O'Connor.

7 MR. PHILLIPS: Did I say Ginsburg?

8 JUSTICE GINSBURG: Yes.

9 (Laughter.)

10 MR. PHILLIPS: I'm going to hear about this  
11 one.

12 (Laughter.)

13 MR. PHILLIPS: I apologize.

14 But the problem -- you know, the -- but the  
15 fundamental problem is, it's just simply not clear what  
16 Justice White's opinion means. And therefore, the lower  
17 courts have seized upon an opinion that at least  
18 provided serious guidance that they could embody into a  
19 jury instruction.

20 It goes to the point that Justice Alito was  
21 making, which is that, it's one thing when you are  
22 dealing with bench trials and what do you ask the judge  
23 to do, it's something fundamentally different when you  
24 are shifting the burden of proof.

25 Justice Kennedy asked the question does it

1 make a difference tactically, and the same question  
2 Justice Souter in some ways was asking and the answer is  
3 clearly it does, and you can see it in this case.  
4 Here's a situation where the defendant prior to the  
5 trial shows up, or when the jury gets selected. Opening  
6 statement says there is going to be no evidence of  
7 actual age discrimination in this case. The case is  
8 tried on that theory. The basis for the judgment that  
9 there is going to be no evidence of age discrimination  
10 in this case is the discovery, extensive discovery that  
11 has taken place, where there is no statements by anyone  
12 talking about age, no other employee who believes that  
13 he or she had been ever been affected by age. It's all  
14 of this very abstract claim and the notion that somehow  
15 there is no better explanation for what happened except  
16 for age.

17           You go through the entirety of the trial  
18 saying to the jury, there is no evidence of age, there  
19 is no evidence of age discrimination, and then at the  
20 last minute, not because you have asserted an  
21 affirmative defense -- because we didn't assert an  
22 affirmative defense -- one is foisted on us by the jury  
23 instruction that the plaintiff asked for in this  
24 particular case that says that if there is a motivating  
25 factor, if you can prove a motivating factor -- which it



1 is interesting to get to the specifics of a motivating  
2 factor, which means it played a part or a role, which is  
3 about as minimalist as you can have it -- then the  
4 burden shifts and we then have the burden to prove that  
5 we would have taken the same action notwithstanding age.

6 Well, that's a very different inquiry, and  
7 when you go to the jury at the end you can't conceive --

8 JUSTICE STEVENS: Mr. Phillips, can I ask  
9 you --

10 MR. PHILLIPS: I'm sorry.

11 JUSTICE STEVENS: Can I ask you your views  
12 on a question that I've asked myself over and over again  
13 and had trouble finding the answer. Supposing a company  
14 appointed a committee to decide whether or not to fire  
15 X. And the committee came back and said: "Yes, you  
16 should fire him; he's too old and he's late to work  
17 every day."

18 Now -- and that's all the evidence in the  
19 record. Would the -- would the judge be obliged to  
20 enter a judgment on summary judgment -- at the end of  
21 the plaintiff's case, to enter judgment for the  
22 defendant?

23 MR. PHILLIPS: No, I don't believe he would  
24 be required to enter judgment on the defendant.

25 JUSTICE STEVENS: Because all that would

1 have been proved was there is one motivating factor  
2 there, but not necessarily a decisive one.

3 MR. PHILLIPS: Right, but I -- it does seem  
4 to me that the jury -- it would be fair to ask the jury  
5 to decide which of those two considerations probably  
6 played the greater role. But I think -- and that's why  
7 I think taking it to the jury is one thing. Switching  
8 the burden of proof to insist that we prove that the --  
9 that the nondiscriminatory ground was the primary reason  
10 for the decision is -- is an inappropriate way to  
11 proceed because there is no basis in the statute for  
12 that. The plaintiff still retains the burden to prove  
13 that there was discrimination because of.

14 JUSTICE STEVENS: But he has only proved  
15 that it is one of two possible motivating factors, but  
16 that is sufficient in your view to get to the jury.

17 MR. PHILLIPS: I would think that that would  
18 be sufficient to get to the jury, because I don't think  
19 we have to prove -- I don't think the plaintiff has to  
20 prove, you know, obviously, beyond a reasonable doubt or  
21 anything. I mean, I think the jury could fairly say  
22 that those are the two grounds, and I think in some ways  
23 that -- that is the sort of common sense basis on which  
24 Price Waterhouse was decided. And it's -- you know,  
25 it's important -- if -- you know, the Chamber of

1 Commerce brief actually focuses a great deal, Justice  
2 Stevens, on this multi-member decisionmaking body. And  
3 you know, it seems to me if you look at cases like Mt.  
4 Healthy and Price Waterhouse, those are all cases where  
5 you have multi-member decisionmakers, and some of whom  
6 may have expressed some biases and others of whom  
7 clearly didn't, and how do you deal with that situation,  
8 which impresses me as fundamentally different that the  
9 situation here where you have a single supervisor  
10 dealing with a single employee and where the case is  
11 tried on the theory that there has been no  
12 discrimination whatsoever, and it's up to the jury to  
13 make that determination at the end, and at the last  
14 minute we have the jury instruction that shifts the  
15 burden to us notwithstanding that --

16 JUSTICE BREYER: Would you --

17 MR. PHILLIPS: -- we never sought to make  
18 this an affirmative defense.

19 JUSTICE BREYER: Would you think you should  
20 have the burden in the following situation? At 10:00  
21 o'clock on March 21st the employer says: I am going to  
22 get rid of Smith because he's too old.

23 MR. PHILLIPS: Uh-huh.

24 JUSTICE BREYER: That's it. Writes out the  
25 letter, "Good-Bye, Smith." An hour later someone walks

1 into the employer's office and says: "I've discovered  
2 that Smith was just convicted of larceny." All right?  
3 Now, he already fired Smith because he was too old. But  
4 I take it he can make the defense: Well, Smith would  
5 have been fired anyway; that isn't the reason I fired  
6 him, but he would have been fired anyway, and he can get  
7 off. But he should make that defense, shouldn't he?

8 MR. PHILLIPS: I mean, that's a Banner case.

9 JUSTICE BREYER: Fine. So the answer is  
10 yes?

11 MR. PHILLIPS: Yes, absolutely.

12 JUSTICE BREYER: All right. So now we have  
13 the same situation, but the jury has said this bad  
14 reason, his age, was a motivating factor.

15 MR. PHILLIPS: Played a role.

16 JUSTICE BREYER: To me -- it didn't say  
17 played a role.

18 MR. PHILLIPS: Yeah, it did.

19 JUSTICE BREYER: Well, what it says in this  
20 instruction that I have -- I don't see the other one --

21 MR. PHILLIPS: It's on page 10 of the joint  
22 appendix.

23 JUSTICE BREYER: Well, I have on page 7 of  
24 the -- of appellant's brief that the instruction was  
25 "the plaintiff's age was a motivating factor in

1 defendant's decision."

2 MR. PHILLIPS: Right. But -- right. It  
3 just --

4 JUSTICE BREYER: Now when I read that, I  
5 think --

6 MR. PHILLIPS: Can I just, if you go to the  
7 next instruction --

8 JUSTICE BREYER: Yes.

9 MR. PHILLIPS: -- it says a -- "Plaintiff's  
10 age was a motivating factor if plaintiff's age played a  
11 part or a role in the defendant's decision." So "a  
12 motivating factor" is a very narrow formulation --

13 JUSTICE BREYER: Fine, okay, all right,  
14 fine.

15 MR. PHILLIPS: -- as instruction in this  
16 particular case.

17 JUSTICE BREYER: Perfect, perfect. I didn't  
18 want to complicate it, but that may work in your favor  
19 to complicate it, and I want to be fair.

20 (Laughter.)

21 JUSTICE BREYER: Fine. It played a part.  
22 It did have a role: Age motivated in part. Now why  
23 isn't that the end of the matter? Because we have a  
24 statute that says age shouldn't play a role in. "Play a  
25 role" means it made a difference. I mean, to me.

1 Otherwise it played no role. It was an understudy, a  
2 ghost. It "played a role" if it would have made a  
3 difference. "Played a part," it would have made a  
4 difference, just like my first case.

5 So we have an action, other things being  
6 equal, that should be illegal under this statute. But  
7 then, just as in the first case, we give the employer a  
8 defense: If you can show that in the absence of that  
9 age there in your mind, you would have done it anyway,  
10 which means the mix of motives would have been  
11 different, then you get off.

12 So, if in the first case we in fact say it  
13 should be on the -- burden should be on the employer,  
14 why shouldn't it be in the second case?

15 MR. PHILLIPS: Well, I mean -- in the first  
16 place, saying that something is a motivating factor or  
17 played a role is, as a sufficient basis on which to  
18 impose liability, is flatly inconsistent with what this  
19 Court has said numerous time. It said it in Burdine, it  
20 said it in Reeves, it said it in Hazen Paper, it said it  
21 I think last term in the Kentucky case, where it says it  
22 has to play a role and be determinative. And that's the  
23 standard the Court has announced over and over again in  
24 age discrimination cases.

25 The "a motivating factor" formulation does

1     come in Title VII, but that's because of the 1991  
2     statute that specifically frames the argument in terms  
3     of "a motivating factor." So the -- the bottom line  
4     here is that, unless the Court deviates from the  
5     historic practice, which is if you are in civil  
6     litigation the plaintiff retains the burden of proof  
7     throughout the process --

8                   JUSTICE GINSBURG: But Price Waterhouse  
9     deviated -- that was --

10                  MR. PHILLIPS: I'm sorry?

11                  JUSTICE GINSBURG: We have these two regimes  
12     out there. You are reciting McDonnell Douglas and say  
13     everything should follow that pattern, but to do that  
14     you have to overrule Price Waterhouse, which gave  
15     recognition to the mixed motive framework that comes out  
16     of Mt. Healthy.

17                  MR. PHILLIPS: Well, my basic point on Price  
18     Waterhouse is that it seemed to me reasonably clear that  
19     a majority of the Court, whether you -- whether you rely  
20     upon Justice White or Justice O'Connor -- clearly didn't  
21     intend for the jury -- for the burden of proof to shift  
22     willy-nilly. But it's supposed to be an exception to  
23     the rule, narrowly defined. And the reality --

24                  JUSTICE GINSBURG: Mr. Schnapper recognized  
25     when I asked this question, how does this differ from

1 the prima facie case that you make under McDonnell  
2 Douglas and -- he said: We don't have to just make a  
3 preliminary showing; we have to establish by a  
4 preponderance of the evidence that the prohibited  
5 discrimination was a motivating factor.

6 MR. PHILLIPS: Played -- played a role.  
7 There is no question about that, Justice Ginsburg. But  
8 that is not much different, frankly, from a prima facie  
9 showing. The truth is if you only make a prima facie  
10 showing and the defendant doesn't show up, you will have  
11 in fact satisfied your burden.

12 JUSTICE SOUTER: Well, you will get to the  
13 jury and if the jury accepts all your evidence, the jury  
14 can find in your favor. But the difference between a  
15 prima facie showing and what has to be shown here is,  
16 the jury must actually find, based on your at least  
17 prima facie evidence, that age was a motivating factor,  
18 and until the jury makes that finding, if it is properly  
19 instructed, it doesn't get to the question of whether  
20 the defendant has any burden to show something in  
21 response. Isn't that correct?

22 MR. PHILLIPS: Well, there is no question --  
23 I mean, although again what a motivating factor means is  
24 still to my mind extraordinarily narrow in this --

25 JUSTICE STEVENS: Mr. Phillips, let me



1 just --

2 MR. PHILLIPS: -- or limited in terms of  
3 what is required here.

4 JUSTICE STEVENS: I'm not quite sure I  
5 understand one thing. If it's a motivating factor, it's  
6 enough to get by summary judgment and get the case to  
7 the jury, but the -- the defendant will still win, if I  
8 understand all this, if he -- if the defendant proves,  
9 yes, I did do and it may have had an influence on it,  
10 but he would have fired him anyway. And if he -- if he  
11 can prove under Mt. Healthy that, yes, he thought about  
12 age and that -- what raised the issue and everything  
13 else, but after he got all through, he was clear he  
14 fired him because he was a lousy salesman --

15 MR. PHILLIPS: But, Justice --

16 JUSTICE STEVENS: -- and he wins.

17 MR. PHILLIPS: Clearly he would win under  
18 those circumstances, but the problem there is --

19 JUSTICE STEVENS: So he does not lose just  
20 because you say it's a motivating factor.

21 MR. PHILLIPS: No, he doesn't lose, but the  
22 question is, what do you do once you make that finding?  
23 Do you, in fact, at the plaintiff's behest, shift the  
24 burden of proof to the defendant? I mean, it admits one  
25 thing, and the Solicitor General, you know, has properly

1 identified that in some instances the defendants as a  
2 tactical matter are willing to accept as an affirmative  
3 defense and -- and pursue the course you just  
4 articulated, Justice Stevens.

5 But that's not what happened in this case.  
6 We were not prepared to accept the idea that age played  
7 a role. We still don't think the evidence supports  
8 that. That's obviously not the issue here before us,  
9 but it does make it extremely important to resolve the  
10 question of, at what stage can you foist, essentially --

11 JUSTICE BREYER: Will you --

12 MR. PHILLIPS: --- an affirmative defense on  
13 the other side?

14 JUSTICE BREYER: Will you go back? I'm  
15 sorry to be hung up on this point. Maybe there are  
16 15 cases that just prove I am wrong. But I'm -- I'm  
17 trying to figure out -- let's try other areas of the  
18 law. The dam is a nuisance. We now show, to prove that  
19 it's a nuisance, that it played a role in the death of  
20 my fish. I mean, isn't that the end of the case?  
21 Damages might be at issue -- how much of a role -- but  
22 as far as liability is concerned the gears were rusty.  
23 The rusty gears played a role in the derailling of the  
24 train. Again, it might be a question of who is  
25 responsible for what, but that there is liability I

1 think in most areas of tort law would be over once you  
2 prove that the defendant's factor played a role.

3 MR. PHILLIPS: Well --

4 JUSTICE BREYER: So is the law here -- am I  
5 wrong about ordinary tort law? Possibly. I don't know  
6 it that well. Is it that I -- is it that this area is  
7 special? Is it that there are cases so you can say any  
8 of those three? I am prepared to be totally wrong. I  
9 hope not.

10 MR. PHILLIPS: I am always reluctant to say  
11 that, Justice Breyer.

12 JUSTICE BREYER: You can say that.

13 MR. PHILLIPS: I think that, in ordinary  
14 tort law, the standard of causation is both a  
15 combination of "but for" and proximate causation, so --

16 JUSTICE BREYER: And I think "played a role"  
17 combines at least the necessary condition, but I don't  
18 know --

19 MR. PHILLIPS: Well, I don't think --

20 JUSTICE BREYER: -- if you have to --

21 MR. PHILLIPS: -- that's a fair --

22 JUSTICE BREYER: "Played a role" -- how did  
23 it play a role if it was not a necessary?

24 MR. PHILLIPS: Justice Ginsburg, at least as  
25 I read the difference between the plurality opinion in

1 Price Waterhouse and -- and all of the other opinions in  
2 that case, Price Waterhouse's plurality said a  
3 motivating factor is actually a standard below "but for"  
4 causation. The plurality was unwilling to accept even  
5 "but for" causation as a requirement under the Age  
6 Discrimination and Employment Act. The rest of the  
7 Justices seemed to not -- not accept that. But that  
8 seems to me the very -- yes, the basic holding of the  
9 plurality -- again, not of the Court -- is that  
10 something less than "but for" causation is required. I  
11 would be delighted, candidly, if the court would go back  
12 to just "but for" causation as the element of age  
13 discrimination because I think, if you get to that  
14 point, you get out of this business of trying to figure  
15 out at what point do you shift the burden. If you --

16 JUSTICE GINSBURG: But that question -- I  
17 think it can't be before us. We would certainly want to  
18 know what the government's position is on it. And Ms.  
19 Blatt was very clear that the government is not taking a  
20 position on that issue today. Your brief in opposition  
21 did not so much as mention McDonnell Douglas. So how is  
22 anybody to think that was at stake, that that regime,  
23 which you later clarify in your Respondent's brief, you  
24 think should be the sole test? How could that come into  
25 this case when it's not in the brief in opposition and,

1     therefore, it's not in the Petitioner's brief and it's  
2     not in the government's brief?

3                 MR. PHILLIPS: Well, to be clear about this,  
4     I'm not pushing so much the, quote, McDonnell Douglas  
5     framework as I am Burdine, Hazen Paper, and the other  
6     cases that talk about "determinative factor." And all  
7     we're saying is --

8                 JUSTICE GINSBURG: But your line is  
9     following that same formula. All those cases are  
10    following that litany: prima facie case, discriminatory  
11    reason --

12                MR. PHILLIPS: Determinative factor, right.  
13    I think the answer to the question, Justice Ginsburg, is  
14    the -- the way the Chief Justice asked the question,  
15    which is, how sensible is it to pull the one thread out  
16    of -- out of the Price Waterhouse analysis, assuming  
17    that Justice O'Connor speaks for the Court in some  
18    sense, you know, without examining how that plays in,  
19    given the underlying theory of the case? And I think  
20    that's a perfectly valid point. If the Court thinks  
21    additional briefing is warranted, then it would seem to  
22    me the right answer is to -- is to call for additional  
23    briefing, but I think --

24                JUSTICE KENNEDY: The Solicitor General  
25    says, well, this is going to affect Title VII. It's

1 going to affect all kinds of other acts. This is a  
2 watershed.

3 MR. PHILLIPS: Well, Justice Kennedy,  
4 clearly it's going to affect Title VII.

5 JUSTICE KENNEDY: You -- pardon me?

6 MR. PHILLIPS: Clearly is it going to affect  
7 Title VII.

8 JUSTICE KENNEDY: Because it's statutory.

9 MR. PHILLIPS: Right, because there's a  
10 specific statute that defines it as a motivating factor,  
11 shifts the burden, and creates an entire remedial regime  
12 that doesn't exist under the age discrimination statute.

13 JUSTICE KENNEDY: Let's -- let's assume we  
14 have authority to incorporate the Title VII  
15 jurisprudence into the ADEA area as a matter of choice.  
16 Are there reasons why there should be distinctions  
17 between the two regimes?

18 MR. PHILLIPS: Well, I think the primary one  
19 is the 1991 amendment, where Congress clearly changed  
20 the language in Title VII.

21 JUSTICE KENNEDY: Are there reasons of  
22 administration or fairness other than -- I recognize  
23 that one is statutory and the others would -- would be  
24 our case law.

25 MR. PHILLIPS: Well, it seems to me it's

1 beyond that. I mean, there's almost a separation of  
2 powers problem when you say it's statutory because,  
3 again, Congress very consciously decided to modify Title  
4 VII, created a complete regime. It would be a bit of a  
5 stretch for this Court not only to modify the standards  
6 in a way that would change substantive liability but  
7 would create the -- the affirmative defense as a  
8 remedial component of it.

9 JUSTICE ALITO: Well, in addition to that,  
10 Mr. Phillips, isn't age more closely correlated with  
11 legitimate reasons for employment discrimination than  
12 race and other factors that are proscribed by Title VII?

13 MR. PHILLIPS: Both Congress and this Court  
14 have recognized precisely that as a problem. I mean,  
15 there are reasons to treat age discrimination  
16 differently from other forms of discrimination. But,  
17 again, you know, there's no question that if you revisit  
18 Price Waterhouse, it will change some -- the Americans  
19 with Disabilities Act and some of the other provisions.

20 But the reality is, if you are talking about  
21 a mess to begin with, the truth is the lower courts are  
22 in a state of -- of disrepair at this point in any  
23 event. And it's even shown in this case.

24 I mean, the truth is the Eighth Circuit has  
25 three different formulations of Justice O'Connor's

1 evidence standard: circumstantial, strong evidence, and  
2 substantial evidence, substantial factor. So if you are  
3 a district court judge sitting in the Eighth Circuit,  
4 you can pick any one of those -- those three to go with.

5 CHIEF JUSTICE ROBERTS: Can I get back to  
6 Justice Stevens's hypothetical? You have two people  
7 making a decision; one says it's because of age and the  
8 one says it's because of something, and -- a legitimate  
9 factor -- and you acknowledge that could get to the  
10 jury?

11 MR. PHILLIPS: Yes, I believe it could.

12 CHIEF JUSTICE ROBERTS: And is it under an  
13 instruction that simply says "because of"?

14 MR. PHILLIPS: Yes -- I mean, if you were  
15 asking me how I would decide that case, yes, I think it  
16 ought to be -- it ought to be because of.

17 Now, if the Court wants to formulate some  
18 greater specificity of how the causation standards  
19 apply, that's fine. But, at a minimum, it seems to me  
20 the Court would do well to go back at least to the  
21 notion of "but for" causation as embodied in the Age  
22 Discrimination and Employment Act.

23 CHIEF JUSTICE ROBERTS: Well, but I mean --  
24 you say --

25 MR. PHILLIPS: It has never rejected that as



1 a Court.

2 CHIEF JUSTICE ROBERTS: You say "but for"  
3 causation, but my understanding of Justice Stevens's  
4 hypothetical is that it's going to be very hard to say  
5 that one would not have had -- the discrimination, the  
6 alleged action, would not have happened but for one  
7 factor or the other if they are just two different  
8 factors. You would just leave that up to the jury to  
9 say because of?

10 MR. PHILLIPS: I -- it seems to me juries  
11 are asked to make that kind of a decision. I agree with  
12 Justice Souter: Juries are a lot smarter than the  
13 lawyers.

14 JUSTICE STEVENS: Well, but not only that,  
15 but the jury would be free to say, well, there were both  
16 clauses, and the one was illegal. But under the Mt.  
17 Healthy defense, if they are convinced they would have  
18 fired this guy anyway, the company gets off.

19 MR. PHILLIPS: Right, and I understand that.  
20 And in those situations -- look, Justice O'Connor's  
21 analysis of this certainly -- certainly plays to a kind  
22 of gut feeling. When you -- and Mt. Healthy is a good  
23 illustration of it, even maybe more so, when you say:  
24 We are firing you for two reasons; one of them is  
25 completely invalid, and the other is completely valid.

1 What are you supposed to do in that situation?

2 But it seems to me that under -- under  
3 normal civil litigation rules, and the ones that  
4 Congress clearly had in its mind, the approach you would  
5 take under those circumstances say that's enough to get  
6 you to the jury, but that's not enough to force the jury  
7 to be instructed that they have to rule in favor of the  
8 plaintiff unless the defendant can show that but-for,  
9 that -- that no matter -- regardless of the  
10 discriminatory animus, they nevertheless would have  
11 taken precisely the same action. That, to me, is the  
12 guts of -- of what -- of what this case is about.

13 It's not about direct versus circumstantial  
14 evidence. It's about under what circumstances does the  
15 burden of proof shift? And -- and in a case like this  
16 where there's no assertion of an affirmative defense --  
17 whereas, I think, Justice Stevens, in your situations,  
18 there were -- you know, most likely you would expect a  
19 defendant to say, I want to accept that burden because I  
20 think I can in fact prove something.

21 JUSTICE STEVENS: I know, but inevitably in  
22 these cases the employer is really -- whether he calls  
23 it an affirmative defense or -- or just a regular  
24 resistance to the plaintiff 's case, the issue is: Did  
25 -- would he have fired him anyway? And -- and if he --

1 if -- if that's what the jury believes, you can take  
2 Justice Breyer's view and say that's -- that's not a  
3 sufficient defense because they acted illegally.

4 But if you are allowed that, you are saying  
5 notwithstanding the illegal motive, if you show that the  
6 real reason I fired him was unrelated to that, then the  
7 compelling reason, you win. And you win despite the  
8 fact that the process may have violated the statute.

9 MR. PHILLIPS: There -- there is no question  
10 about that. And it is -- again, the only question is:  
11 Who bears the burden of proof? And what do you do with  
12 all of those decisions of this Court that say that  
13 the -- that the -- that the burden to -- to show that  
14 age, or whatever, was the determinative factor rests  
15 throughout on the plaintiff?

16 JUSTICE GINSBURG: But those weren't --  
17 those weren't thought of in the mixed motive framework.  
18 And what you want to do is get rid of the mixed motive  
19 and say in a discrimination case there should be only  
20 one regime, and the plaintiff should have the burden of  
21 persuasion from start to finish. But that's not what  
22 McDonnell Douglas did. It's not what the Eighth Circuit  
23 did, which you acknowledge by not even bringing this up  
24 until the brief on the merits.

25 So -- and you also said that Title VII is

1 out of it. The statute has taken care of it in 1991.  
2 Ms. Blatt, I heard her say distinctly that -- that Title  
3 VII would be affected. She urges us not to touch this  
4 question.

5 MR. PHILLIPS: Well, I think you have to go  
6 back to the -- to the question that Justice Alito posed  
7 actually, to say -- when -- when he asked her: How do  
8 you -- how much sense does it make to think about mixed  
9 motive versus other motive? Isn't it true that by the  
10 time the case gets to the jury everything is mixed  
11 motive, because there is going to be the claim that this  
12 was -- and this is a great illustration of that concept.  
13 There is a claim that age was the basis for the  
14 decision, and there is a claim that there are any of a  
15 thousand other possible reasons that are out there, and  
16 age just didn't happen to be one.

17 And under those circumstances the question  
18 is: What's the reasonable way to proceed?

19 Now, Justice Ginsburg, I apologize that we  
20 didn't raise this specifically in the brief in  
21 opposition. On the other hand, the reality is that the  
22 primary position that was taken by the other side was  
23 that this Court essentially can ignore or should  
24 overrule a portion of Price Waterhouse as a consequence  
25 of the -- of the intervening Costa decision.

1                   And it seems to me under those  
2   circumstances, if you are going to put the issue of the  
3   validity of Price Waterhouse -- whatever it means -- at  
4   issue, then it seems to us a reasonable response on the  
5   merits to say, well, you shouldn't do it as -- as a --  
6   in isolation. That that's a completely artificial  
7   inquiry, and you ought to take a step back and say,  
8   maybe we haven't gotten this right in the first place,  
9   particularly given the difficulty of the lower courts in  
10   trying to figure out exactly what Price Waterhouse  
11   means.

12                   Whose is the controlling opinion, and how do  
13   you allocate these burdens and under what circumstances?  
14   And given that the lower courts are in disarray, it  
15   would seem to me this is a situation where I don't know  
16   whether this is the best vehicle or the worst vehicle,  
17   but it is certainly an appropriate vehicle for the Court  
18   to step back and evaluate it.

19                   And if the Court is concerned about whether  
20   it has enough information to allow it to assess what  
21   would be the -- the significant impact of revising Price  
22   Waterhouse, then it seems to me the right answer would  
23   be to ask the parties to -- to brief that in addition to  
24   the way they briefed it at this stage. And now you  
25   simply throw up your hands.

1 JUSTICE GINSBURG: And I assume -- and I  
2 assume the government, because it would certainly be  
3 informative to know what the agency responsible for the  
4 administration of Title VII thinks of this question.

5 MR. PHILLIPS: I -- I don't disagree with  
6 that, Justice Ginsburg. I -- I don't think there are  
7 any -- any guidelines out there that speak directly to  
8 this specific question. But, obviously, to the extent  
9 that the Solicitor General could speak for the EEOC,  
10 that would -- I am not denying that that would -- that  
11 might be helpful. But I think what the -- what the  
12 Court needs to do is recognize that what it cannot --  
13 what it should not do in this case is take the -- the  
14 very narrowest way of vacating and remanding. Because  
15 if it follows that course, nothing will move. Nothing  
16 will have been achieved by all the work that has been  
17 put into this case at this point, because the court of  
18 appeals didn't believe the difference was between direct  
19 and circumstantial evidence. And, therefore, the Court  
20 at some point is going to have to evaluate beyond the  
21 quality of the evidence what quantity of evidence is  
22 appropriate under the circumstances.

23 It seems to me the Court has that in front  
24 of it. The jury instruction in this case shifted the  
25 burden way too early or on -- on way too little showing.

1 A part, a role, that's not enough to shift the burden  
2 under -- I don't even think under Justice White's  
3 version.

4 JUSTICE SOUTER: We can't -- I mean there is  
5 no question about quantitative evidence here.

6 MR. PHILLIPS: Well, there is a question  
7 about the adequacy of the jury instruction.

8 JUSTICE SOUTER: The adequacy of the jury  
9 instruction, but there isn't a question as to whether  
10 the issue should have gone to the jury in the first  
11 place. And I -- I think that --

12 MR. PHILLIPS: Right. No, I don't -- there  
13 is no question that -- that -- well, there is a question  
14 on that. It's not before you. It's -- it's back in  
15 front of the Eighth Circuit.

16 But there is still the issue of whether a  
17 motivating factor, meaning that it played a role, is a  
18 sufficient basis on which to trigger the -- the burden  
19 shifting instruction in this case. That -- that is the  
20 narrowest basis on which this Court could affirm by  
21 simply saying that Justice White's opinion requires a  
22 substantial showing. The instruction in this case  
23 clearly doesn't accomplish that, and, therefore, the  
24 Court should set that aside, or the Court should affirm  
25 the Eighth Circuit and remand so that the district court

1 can have a new trial on that issue.

2 If there are no further questions, I'd urge  
3 the Court to affirm.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 Now, Mr. Schnapper, two minutes.

6 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

7 ON BEHALF OF THE PETITIONER

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

10 We are in agreement with the government that  
11 the Court should decide the -- the narrow question  
12 presented and not revisit Price Waterhouse. If I might  
13 respond to the question from Justice Breyer -- and I am  
14 going to summarize to some extent materials which were  
15 referred to in footnote 18 of our reply brief.

16 The Court ruled that there was a  
17 circumstance, very well established, which under tort  
18 law but-for causation was not the standard. And that  
19 was the situation in Cory versus Havener, which is the  
20 leading case in this area in which there were two  
21 causes, each sufficient to have brought about the  
22 result. And Cory was a case of two motorcyclists in  
23 district court.

24 And the rule in those cases was that -- that  
25 either cause -- that the tort feason involved with



1 either cause could be held liable.

2 JUSTICE ALITO: Don't those cases involve  
3 two independent physical causes of an event, not the  
4 breaking down of human motivation into -- into separate  
5 factors?

6 MR. SCHNAPPER: Well, it's -- it's -- but  
7 it's the analogous area of tort law.

8 JUSTICE BREYER: What they are trying to  
9 say, which is -- which is making me think -- it is a lot  
10 about -- we have a human being who did certain acts.  
11 And we know this. We know that human being had a mix of  
12 motives and that the bad motive played a role. It was a  
13 motivating force. And that might be sufficient. It is  
14 under Title VII. And if you want to interpret this by  
15 Title VII, that's fine. That's the end of it.

16 But then we are going to let someone off if  
17 we imagine a different, but hypothetical, situation.  
18 The hypothetical is where the bad motive isn't there.

19 Well, it's hard to prove what human beings  
20 would do in a hypothetical situation that isn't the real  
21 situation. And I take it that's the reason we have  
22 imposed this burden upon the employer.

23 Is there an analogy to that in tort law?

24 MR. SCHNAPPER: The -- the problem that  
25 comes up with multiple causes is it is hard to

1 reconstruct what would happen. And there is a long line  
2 of cases, including a number of decisions by Learned  
3 Hand in 1938, one which we have cited, Transportation  
4 Management, in which the lower courts have agreed that  
5 where multiple factors are involved it's reasonable to  
6 put the burden on the defendant which -- of sorting it  
7 all out. And we think that is appropriate here.

8 Thank you.

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

11 (Whereupon, at 11:08 a.m, the case in the  
12 above-entitled matter was submitted.)

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<b>A</b>	<b>affect</b> 30:7 45:25 46:1,4,6	<b>amendments</b> 25:7 26:17	24:18 50:4	<b>assume</b> 15:19 46:13 54:1,2
<b>able</b> 13:6 15:15	<b>affirm</b> 55:20,24 56:3	<b>Americans</b> 28:3 47:18	<b>appropriate</b> 20:1,2 21:13	<b>assuming</b> 21:11 26:20 45:16
<b>above-entitled</b> 1:12 58:12	<b>affirmative</b> 3:17 4:24 10:10,14	<b>amici</b> 21:6	22:19 26:14	<b>assumption</b> 26:15
<b>absence</b> 4:23 9:13,17 17:14	10:15,18 25:15	<b>amicus</b> 1:20 2:6 18:20	29:21 31:2	<b>authored</b> 23:12
38:8	27:18 32:21,22	<b>analogous</b> 57:7	53:17 54:22	<b>authority</b> 46:14
<b>absent</b> 4:14 9:7 21:14	35:18 42:2,12	<b>analogy</b> 57:23	58:7	<b>a.m</b> 1:14 3:2 58:11
<b>absolutely</b> 24:24 36:11	47:7 50:16,23	<b>analysis</b> 45:16 49:21	<b>area</b> 26:14 29:8 43:6 46:15	
<b>abstract</b> 32:14	<b>age</b> 6:16 14:17 15:6,22 19:3	<b>analytically</b> 20:14	56:20 57:7	<b>B</b>
<b>accept</b> 42:2,6 44:4,7 50:19	19:12 22:8,21	<b>animus</b> 50:10	<b>areas</b> 42:17 43:1	<b>baby</b> 27:3
<b>accepted</b> 8:15	24:9 26:2 28:3	<b>announce</b> 8:8	<b>arguably</b> 7:3	<b>back</b> 11:13 33:15 42:14
<b>accepts</b> 40:13	32:7,9,12,13	<b>announced</b> 38:23	<b>argue</b> 14:25	44:11 48:5,20
<b>accomplish</b> 55:23	32:16,18,19	<b>answer</b> 32:2 33:13 36:9	<b>argued</b> 14:23 24:14,15	52:6 53:7,18 55:14
<b>achieved</b> 54:16	33:5 36:14,25	45:13,22 53:22	<b>argument</b> 1:13 2:2,10 3:4,7	<b>backdrop</b> 26:18
<b>acknowledge</b> 48:9 51:23	37:10,10,22,24	<b>ante</b> 26:23	9:22 11:5,9,12	<b>bad</b> 36:13 57:12 57:18
<b>Act</b> 19:3,12 22:8 22:14,21 28:3	38:9,24 40:17	<b>anti-discrimin...</b> 20:20 28:19	11:18 18:18	<b>balance</b> 13:8
28:4,4 44:6	41:12 42:6	<b>anybody</b> 44:22	19:24 28:25	<b>Banner</b> 36:8
47:19 48:22	44:5,12 46:12	<b>anyway</b> 15:24 17:8,25 36:5,6	39:2 56:6	<b>based</b> 9:1,12 40:16
<b>acted</b> 15:14 51:3	47:10,15 48:7	38:9 41:10	<b>arguments</b> 11:10,11 23:19	<b>basic</b> 39:17 44:8
<b>action</b> 30:3 33:5 38:5 49:6	48:21 51:14	49:18 50:25	<b>arrived</b> 26:5	<b>basically</b> 20:15 27:11,13
50:11	52:13,16	<b>apologize</b> 31:13 52:19	<b>articulated</b> 42:4	<b>basis</b> 10:7,11 11:9 17:10
<b>acts</b> 20:20 46:1 57:10	<b>ageism</b> 27:2	<b>appeals</b> 3:11 8:11 17:6,12	<b>artificial</b> 13:9 21:25 24:4	29:22 30:16,21
<b>actual</b> 32:7	<b>agency</b> 54:3	17:23 22:20	26:20 53:6	30:23 32:8
<b>addition</b> 47:9 53:23	<b>agree</b> 14:2 25:16 49:11	30:9 54:18	<b>aside</b> 55:24	34:11,23 38:17
<b>additional</b> 45:21 45:22	<b>agreed</b> 8:19 58:4	<b>APPEARAN...</b> 1:15	<b>asked</b> 5:24 31:25 32:23	52:13 55:18,20
<b>addressed</b> 22:15	<b>agreement</b> 56:10	<b>appellant's</b> 36:24	33:12 39:25	<b>bears</b> 51:11
<b>ADEA</b> 9:17,23 22:15 46:15	<b>ahead</b> 28:14	<b>appendix</b> 21:11 36:22	45:14 49:11	<b>behalf</b> 1:16,19 1:22 2:4,6,9,12
<b>adequacy</b> 55:7,8	<b>Alito</b> 6:21,24 7:2 7:21 9:8 19:18	<b>applied</b> 7:14 13:22,23 24:19	52:7	3:8 13:7 18:19
<b>administration</b> 46:22 54:4	25:4 26:16	<b>applies</b> 22:23	<b>asking</b> 22:24 32:2 48:15	29:1 56:7
<b>admit</b> 31:1	31:20 47:9	<b>apply</b> 48:19	<b>asks</b> 20:10	<b>behest</b> 41:23
<b>admits</b> 41:24	52:6 57:2	<b>applying</b> 7:16	<b>aspect</b> 22:1,25	<b>beings</b> 57:19
<b>adopted</b> 24:15	<b>alleged</b> 49:6	<b>appointed</b> 33:14	<b>aspects</b> 13:10,14	<b>believe</b> 7:1 24:10 33:23
<b>adverse</b> 30:3	<b>allocate</b> 53:13	<b>approach</b> 13:25	<b>assert</b> 32:21	48:11 54:18
<b>advocacy</b> 29:7	<b>allocated</b> 10:5		<b>asserted</b> 27:17 32:20	<b>believes</b> 32:12 51:1
	<b>allocation</b> 10:18 10:20 18:12		<b>asserting</b> 10:15	<b>bench</b> 6:21,24
	<b>allow</b> 53:20		<b>assertion</b> 50:16	
	<b>allowed</b> 51:4		<b>assess</b> 53:20	
	<b>alluded</b> 26:16		<b>assessing</b> 22:1	
	<b>amendment</b> 9:9 46:19		<b>Assistant</b> 1:18	

7:10,22 26:17 31:22 <b>benefit</b> 13:4 <b>best</b> 20:17 53:16 <b>better</b> 24:25 32:15 <b>beyond</b> 19:21 34:20 47:1 54:20 <b>biases</b> 35:6 <b>bit</b> 47:4 <b>Blatt</b> 1:18 2:5 18:17,18,22 19:23 20:25 21:17 22:3,17 23:3 24:11,24 25:9 26:12 27:6,11,25 28:8,16 44:19 52:2 <b>body</b> 35:2 <b>boss</b> 26:3 <b>boss's</b> 26:3 <b>bottom</b> 39:3 <b>breaking</b> 57:4 <b>Breyer</b> 35:16,19 35:24 36:9,12 36:16,19,23 37:4,8,13,17 37:21 42:11,14 43:4,11,12,16 43:20,22 56:13 57:8 <b>Breyer's</b> 51:2 <b>brief</b> 21:5 35:1 36:24 44:20,23 44:25 45:1,2 51:24 52:20 53:23 56:15 <b>briefed</b> 53:24 <b>briefing</b> 21:6 45:21,23 <b>briefly</b> 28:15 <b>bringing</b> 51:23 <b>brought</b> 56:21 <b>bulk</b> 22:8 28:10 <b>burden</b> 4:13	6:14 7:8 9:24 10:1,5,9,14,18 10:24 12:8 13:5 14:3 15:1 15:3 16:12 17:18,24 18:1 18:9,12 24:6 24:18 25:12 27:9 31:24 33:4,4 34:8,12 35:15,20 38:13 39:6,21 40:11 40:20 41:24 44:15 46:11 50:15,19 51:11 51:13,20 54:25 55:1,18 57:22 58:6 <b>burdens</b> 10:20 53:13 <b>burden-shifting</b> 22:23 26:10 <b>Burdine</b> 38:19 45:5 <b>Burlington</b> 10:8 <b>business</b> 44:14 <b>but-for</b> 19:9 50:8 56:18 <hr/> <b>C</b> <b>C</b> 2:1 3:1 <b>call</b> 45:22 <b>called</b> 14:14 23:11 <b>calling</b> 29:25 <b>calls</b> 50:22 <b>candidly</b> 44:11 <b>care</b> 31:1 52:1 <b>CARTER</b> 1:22 2:8 28:25 <b>case</b> 3:4,13 6:4 6:16 7:7 8:20 9:1,9,12 10:16 12:8 13:15 14:14,14,17,20 15:3,4,16,19 16:3,16 17:3	17:17,22 19:1 19:20,20,21 20:24 21:3 22:19 23:9,10 23:11,18 24:5 25:19 26:14 27:16 28:21 29:5,14,16,20 29:23 32:3,7,7 32:10,24 33:21 35:10 36:8 37:16 38:4,7 38:12,14,21 40:1 41:6 42:5 42:20 44:2,25 45:10,19 46:24 47:23 48:15 50:12,15,24 51:19 52:10 54:13,17,24 55:19,22 56:20 56:22 58:10,11 <b>cases</b> 10:11 16:5 22:9 23:14 25:8 35:3,4 38:24 42:16 43:7 45:6,9 50:22 56:24 57:2 58:2 <b>catching</b> 27:12 <b>causation</b> 14:5 24:13,16,20 28:12 43:14,15 44:4,5,10,12 48:18,21 49:3 56:18 <b>cause</b> 7:3 20:16 56:25 57:1 <b>caused</b> 25:17 <b>causes</b> 20:11 56:21 57:3,25 <b>certain</b> 10:10 57:10 <b>certainly</b> 5:20 11:15 16:6 20:2 22:19 29:17 30:15	44:17 49:21,21 53:17 54:2 <b>Chamber</b> 34:25 <b>change</b> 47:6,18 <b>changed</b> 46:19 <b>character</b> 12:12 <b>characterized</b> 10:17 <b>Chief</b> 3:3,10 4:25 5:8,12,23 13:1,20 18:13 18:16,22 21:16 21:18 22:13,24 24:2,21 28:14 28:23 29:2 45:14 48:5,12 48:23 49:2 56:4,8 58:9 <b>choice</b> 46:15 <b>Circuit</b> 29:23,24 30:14 47:24 48:3 51:22 55:15,25 <b>circuits</b> 6:6 19:12,13 <b>circumstance</b> 56:17 <b>circumstances</b> 41:18 50:5,14 52:17 53:2,13 54:22 <b>circumstantial</b> 5:3 6:12 19:16 29:21 30:4 48:1 50:13 54:19 <b>cited</b> 58:3 <b>City</b> 23:11 <b>civil</b> 39:5 50:3 <b>claim</b> 7:25 32:14 52:11,13,14 <b>clarify</b> 23:7 44:23 <b>clarity</b> 29:13 <b>clauses</b> 49:16 <b>clean</b> 20:14 <b>clear</b> 5:19 12:23	17:9,13 18:1 23:6,14 27:15 31:1,15 39:18 41:13 44:19 45:3 <b>clearly</b> 32:3 35:7 39:20 41:17 46:4,6,19 50:4 55:23 <b>closely</b> 47:10 <b>cocaine</b> 23:9 <b>codified</b> 22:6,10 25:3 <b>Collatin</b> 5:4 21:9 25:21 <b>combination</b> 43:15 <b>combines</b> 43:17 <b>come</b> 8:9 16:22 24:7 25:8 26:7 27:8,9 39:1 44:24 <b>comes</b> 8:5 26:4 39:15 57:25 <b>Commerce</b> 35:1 <b>committee</b> 33:14,15 <b>common</b> 34:23 <b>commonly</b> 19:9 <b>company</b> 33:13 49:18 <b>compelling</b> 51:7 <b>complete</b> 47:4 <b>completely</b> 49:25,25 53:6 <b>complicate</b> 37:18,19 <b>complicated</b> 19:5 21:20 28:17 29:7 <b>complicates</b> 16:22 <b>component</b> 47:8 <b>concede</b> 14:18 <b>conceive</b> 33:7 <b>concept</b> 52:12 <b>concerned</b> 42:22
---	--	--	---	--

53:19	<b>Costa</b> 52:25	<b>create</b> 28:2 47:7	41:8,24 50:8	38:22 45:6,12
<b>conclude</b> 15:13	<b>counsel</b> 16:11	<b>created</b> 47:4	50:19 58:6	51:14
<b>concur</b> 17:16	18:16 25:16	<b>creates</b> 46:11	<b>defendants</b>	<b>determining</b>
<b>concurred</b> 12:2	27:12 28:23	<b>critical</b> 14:13	25:15 27:17	20:22 27:20
<b>concurring</b>	56:4 58:9	<b>curiae</b> 1:20 2:7	42:1	<b>deviated</b> 39:9
30:24	<b>count</b> 8:23	18:20	<b>defendant's</b>	<b>deviates</b> 39:4
<b>condition</b> 43:17	<b>County</b> 23:12	<hr/>	10:24 37:1,11	<b>dictum</b> 4:6
<b>conducting</b> 7:10	<b>course</b> 4:10 5:1	<b>D</b>	43:2	<b>differ</b> 39:25
7:22	10:13 15:17	<b>D</b> 3:1	<b>defense</b> 10:10,15	<b>difference</b> 5:6
<b>conflict</b> 19:12,13	30:18 42:3	<b>dam</b> 42:18	10:18 25:15	14:13 25:6,8
<b>confronting</b>	54:15	<b>Damages</b> 42:21	27:18 32:21,22	27:24 32:1
10:3	<b>court</b> 1:1,13	<b>dancing</b> 23:10	35:18 36:4,7	37:25 38:3,4
<b>confusing</b> 23:6	3:10,11,16,16	<b>day</b> 16:23 33:17	38:8 42:3,12	40:14 43:25
<b>confusion</b> 25:18	3:18 4:3,13,20	<b>deal</b> 7:4 35:1,7	47:7 49:17	54:18
28:2 29:18	4:20 5:15,19	<b>dealing</b> 5:14	50:16,23 51:3	<b>different</b> 13:24
<b>Congress</b> 3:18	5:20 7:19 8:18	31:22 35:10	<b>defenses</b> 10:14	17:4,22 24:15
3:19 4:15,24	10:4,7 12:2,3	<b>death</b> 42:19	24:7	31:23 33:6
46:19 47:3,13	13:16 17:5,12	<b>decide</b> 7:6 23:3	<b>define</b> 5:18	35:8 38:11
50:4	17:23 18:3,11	28:16 29:14,16	23:16	40:8 47:25
<b>consciously</b> 47:3	18:23 20:1,18	33:14 34:5	<b>defined</b> 6:7 25:2	49:7 57:17
<b>consequence</b>	21:9,21 23:25	48:15 56:11	39:23	<b>differently</b>
52:24	24:4,25 26:15	<b>decided</b> 29:23	<b>defines</b> 46:10	47:16
<b>considerable</b> 5:7	28:19 29:3,8	34:24 47:3	<b>definition</b> 9:15	<b>differing</b> 16:18
<b>considerations</b>	29:11,19 30:8	<b>decides</b> 24:9	<b>definitively</b> 8:10	<b>difficult</b> 19:5,24
30:3 34:5	30:22 38:19,23	<b>deciding</b> 17:7	<b>degree</b> 12:13	21:3 28:18
<b>constitutional</b>	39:4,19 44:9	27:13	<b>deliberately</b>	29:9
24:12	44:11 45:17,20	<b>decision</b> 3:14	22:15	<b>difficulties</b>
<b>construct</b> 21:24	47:5,13 48:3	5:4 8:23,24 9:3	<b>delighted</b> 44:11	16:10,10
<b>constructed</b>	48:17,20 49:1	9:3 17:25 22:5	<b>demonstrate</b>	<b>difficulty</b> 13:21
21:21	51:12 52:23	23:17 24:1	9:15	53:9
<b>constructions</b>	53:17,19 54:12	26:19 30:10,12	<b>denying</b> 54:10	<b>direct</b> 3:12,17
24:5	54:17,19,23	30:17,19 34:10	<b>Department</b>	4:21 5:1,2,3,9
<b>context</b> 7:20	55:20,24,24,25	37:1,11 48:7	1:19	5:10,18,21,24
21:23	56:3,9,11,16	49:11 52:14,25	<b>depending</b> 3:22	6:7,11 7:3,17
<b>contexts</b> 23:4	56:23	<b>decisionmakers</b>	27:16	7:20,24 8:10
<b>controlling</b> 8:24	<b>courts</b> 8:11 9:7	35:5	<b>derailing</b> 42:23	8:15,20 10:25
11:19 13:21	11:9 14:7,8,10	<b>decisionmaking</b>	<b>Desert</b> 3:14 4:3	11:6,13 12:4
30:10 53:12	15:10 17:7	35:2	4:4 5:17 9:3,4	13:3,3 14:1
<b>convicted</b> 36:2	18:8 20:13	<b>decisions</b> 51:12	9:8 18:25 19:4	19:2 21:12
<b>convince</b> 10:2	22:20 29:18	58:2	19:10 21:8	22:25 23:15
<b>convinced</b> 49:17	30:11 31:4,17	<b>decisive</b> 34:2	22:4,11 23:17	29:20,25 30:4
<b>convincing</b> 17:9	47:21 53:9,14	<b>defendant</b> 10:6	<b>despite</b> 25:14	30:14 50:13
17:13 18:1	58:4	10:9 14:23	51:7	54:18
<b>correct</b> 12:14	<b>court's</b> 3:14	15:14,23 17:7	<b>determination</b>	<b>directive</b> 3:18
15:18 40:21	5:17 9:19 10:8	24:6 25:19	35:13	4:14,24 9:7
<b>correlated</b> 47:10	21:10	32:4 33:22,24	<b>determinative</b>	<b>directly</b> 19:16
<b>Cory</b> 56:19,22	<b>crack</b> 23:9	40:10,20 41:7	3:25 20:16	54:7

<b>Disabilities</b> 28:4 47:19	<b>D.C</b> 1:9,19,22	<b>essentially</b> 22:6 28:17 42:10 52:23	45:18	44:3 45:6,12 46:10 48:2,9 49:7 51:14 55:17
<b>disagree</b> 30:23 54:5	<b>E</b>	<b>establish</b> 6:19 40:3	<b>example</b> 5:3 10:7	<b>factors</b> 34:15 47:12 49:8 57:5 58:5
<b>disagreed</b> 17:20	<b>E 2:1</b> 3:1,1	<b>established</b> 15:5 56:17	<b>exception</b> 39:22	<b>fair</b> 5:17,20 13:6 21:20 34:4 37:19 43:21
<b>disagreement</b> 5:1 8:11	<b>early</b> 54:25	<b>establishing</b> 10:10	<b>Excuse</b> 3:21	<b>fairly</b> 34:21
<b>disarray</b> 53:14	<b>EEOC</b> 54:9	<b>evaluate</b> 29:19 30:5 53:18 54:20	<b>exist</b> 29:18 46:12	<b>fairness</b> 46:22
<b>disciplinary</b> 28:5	<b>EEOC's</b> 20:13 25:11	<b>event</b> 47:23 57:3	<b>exists</b> 20:19	<b>fall</b> 22:9
<b>discovered</b> 36:1	<b>effect</b> 11:18 25:7 27:24	<b>evidence</b> 3:12,17 4:21 5:2,9,10 5:18,21,22,25 6:3,7,12,15,17 6:18,18,20 7:3 7:7,11,18,20 7:24,25 8:1,2 8:10,16,21 9:23 10:21,23 11:6,12,13 12:4,6,9,13,14 12:23 13:3,4 13:15 14:1,2 14:16,20,25 15:6,9 17:9,13 17:16,20 18:1 18:6,7 19:2,16 19:16 20:17 21:12 23:1,15 23:21 25:5 29:21 30:1,6 30:14 32:6,9 32:18,19 33:18 40:4,13,17 42:7 48:1,1,2 50:14 54:19,21 54:21 55:5	<b>expect</b> 50:18	<b>Family</b> 28:4
<b>discovery</b> 32:10 32:10	<b>Eighth</b> 29:23,24 30:14 47:24 48:3 51:22 55:15,25		<b>experience</b> 25:11	<b>far</b> 29:15 42:22
<b>discrimination</b> 14:17 15:6 19:21 22:9,22 23:22,24 28:11 32:7,9,19 34:13 35:12 38:24 40:5 44:6,13 46:12 47:11,15,16 48:22 49:5 51:19	<b>either</b> 6:8 20:15 20:24 27:1 56:25 57:1		<b>explain</b> 8:10	<b>favor</b> 37:18 40:14 50:7
<b>discriminatory</b> 14:21 30:2 45:10 50:10	<b>element</b> 44:12		<b>explanation</b> 32:15	<b>FBL</b> 1:6 3:4
<b>disposed</b> 9:1	<b>elements</b> 21:24		<b>expressed</b> 21:15 35:6	<b>feaseor</b> 56:25
<b>disrepair</b> 47:22	<b>Eller</b> 10:8		<b>expressly</b> 8:20 12:4 14:8	<b>Federal</b> 22:22
<b>dissented</b> 18:14	<b>embodied</b> 48:21		<b>extensive</b> 32:10	<b>feeling</b> 49:22
<b>distinction</b> 19:19	<b>embody</b> 31:18		<b>extent</b> 8:25 54:8 56:14	<b>fifth</b> 8:15
<b>distinctions</b> 46:16	<b>empirical</b> 25:5 25:10		<b>extraordinarily</b> 40:24	<b>figure</b> 8:3 17:1 21:13 42:17 44:14 53:10
<b>distinctly</b> 52:2	<b>employee</b> 32:12 35:10		<b>extremely</b> 42:9	<b>figuring</b> 13:21
<b>district</b> 48:3 55:25 56:23	<b>employer</b> 13:5 14:4 17:19,24 17:25 18:5,10 35:21 38:7,13 50:22 57:22		<b>F</b>	<b>finally</b> 7:19
<b>ditch</b> 27:22 28:1	<b>employer's</b> 17:18 36:1		<b>face</b> 16:11 28:10	<b>Financial</b> 1:6 3:5
<b>divided</b> 14:8 18:11	<b>employment</b> 19:21 44:6 47:11 48:22		<b>facia</b> 14:14,20	<b>find</b> 15:21 20:7 20:10 26:2 27:1,3 40:14 40:16
<b>double</b> 14:19	<b>enter</b> 33:20,21 33:24		<b>facie</b> 40:1,8,9,15 40:17 45:10	<b>finding</b> 26:21 33:13 40:18 41:22
<b>doubt</b> 34:20	<b>entire</b> 46:11		<b>fact</b> 7:24 38:12 40:11 41:23 50:20 51:8	<b>findings</b> 26:13
<b>Douglas</b> 14:15 19:9 39:12 40:2 44:21 45:4 51:22	<b>entirety</b> 32:17		<b>factor</b> 6:16 12:9 12:20,21,22,24 13:16 14:17,21 14:21 15:7,22 19:8 20:6,11 20:16,22 21:14 22:10 24:17 25:13 27:17,20 32:25,25 33:2 34:1 36:14,25 37:10,12 38:16 38:25 39:3 40:5,17,23 41:5,20 43:2	<b>finds</b> 7:24
<b>due</b> 12:15	<b>equal</b> 38:6	<b>evidentiary</b> 19:14 22:12		<b>fine</b> 36:9 37:13 37:14,21 48:19 57:15
	<b>ERIC</b> 1:16 2:3 2:11 3:7 56:6	<b>ex</b> 26:20,23,25		<b>finish</b> 51:21
	<b>erred</b> 3:11 17:7	<b>exactly</b> 5:19 22:4 27:1 31:1 53:10		<b>fire</b> 26:7 33:14 33:16
	<b>especially</b> 21:1	<b>examining</b>		<b>fired</b> 15:24 17:8 26:3 36:3,5,5,6 41:10,14 49:18
	<b>ESQ</b> 1:16,18,22 2:3,5,8,11			

<p>50:25 51:6  <b>firing</b> 49:24  <b>first</b> 3:15,23 7:6  9:15 10:2  17:23 21:4  38:4,7,12,15  53:8 55:10  <b>fish</b> 42:20  <b>fit</b> 14:18  <b>fits</b> 20:17  <b>five</b> 8:18 13:16  <b>fix</b> 22:1,8  <b>flatly</b> 38:18  <b>focus</b> 21:25  <b>focuses</b> 35:1  <b>focusing</b> 13:2  <b>foist</b> 42:10  <b>foisted</b> 32:22  <b>follow</b> 39:13  <b>followed</b> 18:7  <b>following</b> 35:20  45:9,10  <b>follows</b> 54:15  <b>footnote</b> 21:8,10  25:22 56:15  <b>force</b> 50:6 57:13  <b>forecloses</b> 23:19  <b>form</b> 8:6 20:9  <b>forms</b> 47:16  <b>formula</b> 45:9  <b>formulate</b> 48:17  <b>formulation</b>  31:3 37:12  38:25  <b>formulations</b>  47:25  <b>fortiori</b> 23:19  <b>four</b> 12:3 17:4  <b>frame</b> 14:19  <b>frames</b> 39:2  <b>framework</b>  20:24 22:23  39:15 45:5  51:17  <b>frankly</b> 15:12  29:15 30:25  40:8</p>	<p><b>free</b> 49:15  <b>front</b> 54:23  55:15  <b>full</b> 21:6  <b>fundamental</b>  26:24 31:15  <b>fundamentally</b>  31:23 35:8  <b>further</b> 16:8  56:2</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>G</b> 1:22 2:8 3:1  28:25  <b>gears</b> 42:22,23  <b>gender</b> 12:8  13:15  <b>General</b> 1:18  24:3,14 41:25  45:24 54:9  <b>ghost</b> 38:2  <b>Ginsburg</b> 6:5,10  8:13,22 11:25  14:12 15:2  20:23 23:12  30:8,20 31:6,7  31:8 39:8,11  39:24 40:7  43:24 44:16  45:8,13 51:16  52:19 54:1,6  <b>Ginsburg's</b> 16:8  31:3  <b>give</b> 7:4 13:4  20:15 21:1,13  38:7  <b>given</b> 45:19 53:9  53:14  <b>go</b> 28:14 30:19  32:17 33:7  37:6 42:14  44:11 48:4,20  52:5  <b>goes</b> 9:17 11:13  15:3 31:20  <b>going</b> 11:17,17  11:21 13:6,7</p>	<p>16:12,22 21:12  23:7,23 25:22  26:1,6,9,10  27:2,6,14,15  28:2,9 30:6,7  31:10 32:6,9  35:21 45:25  46:1,4,6 49:4  52:11 53:2  54:20 56:14  57:16  <b>good</b> 26:5 49:22  <b>Good-Bye</b> 35:25  <b>gotten</b> 53:8  <b>government</b>  44:19 54:2  56:10  <b>government's</b>  44:18 45:2  <b>great</b> 7:4 35:1  52:12  <b>greater</b> 34:6  48:18  <b>Gross</b> 1:3 3:4  <b>ground</b> 29:15  30:11 34:9  <b>grounds</b> 34:22  <b>guess</b> 27:23  <b>guidance</b> 31:18  <b>guidelines</b> 54:7  <b>gut</b> 49:22  <b>guts</b> 50:12  <b>guy</b> 49:18  <b>guy's</b> 26:5</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>hallway</b> 16:13  <b>hand</b> 52:21 58:3  <b>hands</b> 53:25  <b>happen</b> 10:20  52:16 58:1  <b>happened</b> 16:16  32:15 42:5  49:6  <b>happens</b> 16:20  16:23  <b>happy</b> 11:22,23</p>	<p><b>harassment</b>  10:11  <b>hard</b> 8:3 49:4  57:19,25  <b>Havener</b> 56:19  <b>Hazen</b> 38:20  45:5  <b>Healthy</b> 6:24  35:4 39:16  41:11 49:17,22  <b>hear</b> 3:3 11:17  31:10  <b>heard</b> 52:2  <b>heavily</b> 9:19,22  <b>heightened</b> 3:19  9:4,18,23  10:21 14:10  <b>held</b> 17:23 22:11  22:20 57:1  <b>helpful</b> 54:11  <b>henceforth</b> 23:7  <b>higher</b> 14:1  <b>highly</b> 23:22  <b>historic</b> 39:5  <b>holding</b> 3:11  23:6 30:21  44:8  <b>Honor</b> 4:3,20  5:5 6:9 8:17  11:23 12:16  14:6  <b>hope</b> 29:11 43:9  <b>hour</b> 35:25  <b>human</b> 57:4,10  57:11,19  <b>hung</b> 42:15  <b>hypothetical</b>  48:6 49:4  57:17,18,20</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> 42:6  <b>identified</b> 7:12  42:1  <b>ignore</b> 52:23  <b>illegal</b> 38:6  49:16 51:5</p>	<p><b>illegally</b> 51:3  <b>illustration</b>  49:23 52:12  <b>imagine</b> 57:17  <b>impact</b> 22:2  53:21  <b>impermissible</b>  20:7,11  <b>important</b> 3:15  12:22 20:18  21:1 28:20  34:25 42:9  <b>impose</b> 3:19  23:15 38:18  <b>imposed</b> 3:16,24  4:13,21 9:6  57:22  <b>impresses</b> 35:8  <b>improper</b> 17:15  <b>inappropriate</b>  34:10  <b>including</b> 10:6  24:7 58:2  <b>inconsistent</b>  38:18  <b>incorporate</b>  46:14  <b>independent</b>  57:3  <b>indicates</b> 9:4  <b>Industries</b> 10:8  <b>inevitably</b> 50:21  <b>inferring</b> 9:19  <b>influence</b> 41:9  <b>information</b>  53:20  <b>informative</b>  54:3  <b>inquiry</b> 13:11  33:6 53:7  <b>insist</b> 34:8  <b>insisting</b> 25:19  <b>instances</b> 42:1  <b>instruct</b> 26:23  <b>instructed</b> 40:19  50:7  <b>instruction</b> 3:13</p>
---	--	--	---	--

6:3 7:5,22 8:6 16:5 19:3,8 20:6,15,16 21:14 22:10 25:13,17,20,21 26:1,10 27:10 27:15,20 31:5 31:19 32:23 35:14 36:20,24 37:7,15 48:13 54:24 55:7,9 55:19,22 <b>instructions</b> 15:20 16:17,18 16:19,22 26:4 <b>intend</b> 39:21 <b>interesting</b> 33:1 <b>interpret</b> 57:14 <b>interpretation</b> 7:13 9:1 <b>interpreted</b> 29:24 <b>intervening</b> 52:25 <b>invalid</b> 49:25 <b>involve</b> 57:2 <b>involved</b> 56:25 58:5 <b>involving</b> 22:25 <b>isolation</b> 53:6 <b>issue</b> 3:13 10:22 11:1,2,20 14:4 14:7 15:11 18:10 21:7,10 23:22 24:12 27:22 41:12 42:8,21 44:20 50:24 53:2,4 55:10,16 56:1 <b>issues</b> 17:22 18:14 29:6	7:22,23 8:1 21:9 25:21 31:22 33:19 48:3 <b>judges</b> 28:7 <b>judgment</b> 15:10 16:14 17:6,17 19:22 20:5 32:8 33:20,20 33:21,24 41:6 <b>juries</b> 16:4 28:6 28:6 49:10,12 <b>jurisprudence</b> 46:15 <b>jury</b> 7:5,5,14,17 8:6 15:3,13,13 15:19,20 16:16 19:6 20:6,10 24:9,23 25:25 26:6,13,23 27:1,8,13 31:5 31:19 32:5,18 32:22 33:7 34:4,4,7,16,18 34:21 35:12,14 36:13 39:21 40:13,13,13,16 40:18 41:7 48:10 49:8,15 50:6,6 51:1 52:10 54:24 55:7,8,10 <b>justice</b> 1:19 3:3 3:10,21,25 4:6 4:12,17,22,25 5:8,12,23 6:5,6 6:10,21,24 7:2 7:21 8:13,14 8:14,19,21,22 8:23,24 9:8,21 10:13,16,17,22 11:4,6,11,16 11:24,25 12:7 12:11,17,25 13:1,2,13,18 13:20 14:12 15:2,18 16:7,8	16:9,25 17:1 17:11 18:2,6 18:13,14,16,22 19:18 20:23 21:16,18 22:13 22:24 23:1,12 24:2,15,21 25:4,24 26:16 27:5,7,21 28:6 28:14,23 29:2 29:25 30:8,9 30:15,20,24 31:3,6,6,8,16 31:20,25 32:2 33:8,11,25 34:14 35:1,16 35:19,24 36:9 36:12,16,19,23 37:4,8,13,17 37:21 39:8,11 39:20,20,24 40:7,12,25 41:4,15,16,19 42:4,11,14 43:4,11,12,16 43:20,22,24 44:16 45:8,13 45:14,17,24 46:3,5,8,13,21 47:9,25 48:5,6 48:12,23 49:2 49:3,12,14,20 50:17,21 51:2 51:16 52:6,19 54:1,6 55:2,4,8 55:21 56:4,8 56:13 57:2,8 58:9 <b>Justices</b> 18:11 24:19 25:1 44:7	45:24 46:3,5,8 46:13,21 <b>Kentucky</b> 38:21 <b>kind</b> 5:13 6:17 14:10 19:14 25:19 31:5 49:11,21 <b>kinds</b> 26:12 46:1 <b>know</b> 5:13,25 15:2 16:11,21 26:23 27:4,5 30:5,25 31:14 34:20,24,25 35:3 41:25 43:5,18 44:18 45:18 47:17 50:18,21 53:15 54:3 57:11,11 <b>knowable</b> 15:11 <b>known</b> 15:12 19:9	<b>leave</b> 13:8 28:4 49:8 <b>left</b> 15:20 19:4 19:10 21:7 22:15 <b>legitimate</b> 27:17 28:20 47:11 48:8 <b>letter</b> 35:25 <b>let's</b> 22:1 24:4 42:17 46:13,13 <b>level</b> 18:24,25 <b>liability</b> 38:18 42:22,25 47:6 <b>liable</b> 57:1 <b>limit</b> 12:5 <b>limited</b> 9:20 41:2 <b>line</b> 39:3 45:8 58:1 <b>link</b> 30:1 <b>LISA</b> 1:18 2:5 18:18 <b>litany</b> 45:10 <b>litigation</b> 39:6 50:3 <b>little</b> 54:25 <b>long</b> 58:1 <b>look</b> 7:11 15:10 15:22 23:1 35:3 49:20 <b>looking</b> 26:25 <b>looks</b> 24:9 <b>lose</b> 41:19,21 <b>lot</b> 19:5,23 23:4 25:18 27:12 49:12 57:9 <b>lots</b> 23:14 <b>lousy</b> 41:14 <b>lower</b> 14:7 18:7 29:18 30:11 31:4,16 47:21 53:9,14 58:4
<b>J</b> <b>JACK</b> 1:3 <b>Jefferson</b> 23:11 <b>joint</b> 36:21 <b>judge</b> 5:4 7:4,10		<b>K</b> <b>Kennedy</b> 4:12 4:17,22 9:21 10:13 16:7 18:13 31:25		<b>M</b> <b>majority</b> 39:19 <b>making</b> 31:21



48:7 57:9 <b>Management</b> 58:4 <b>March</b> 1:10 35:21 <b>mass</b> 29:17 <b>massive</b> 28:2 <b>materials</b> 56:14 <b>matter</b> 1:12 15:10 22:7 28:1 37:23 42:2 46:15 50:9 58:12 <b>McDonnell</b> 14:15 19:9 39:12 40:1 44:21 45:4 51:22 <b>mean</b> 3:24 4:9 5:12 6:1 7:23 10:1 11:16 13:24 17:2 21:22 23:20,21 26:12 28:2 30:13,22 34:21 36:8 37:25 38:15 40:23 41:24 42:20 47:1,14,24 48:14,23 55:4 <b>meaning</b> 55:17 <b>means</b> 5:2,2 6:11 7:20 8:10 10:25 12:18 14:3 30:19 31:16 33:2 37:25 38:10 40:23 53:3,11 <b>meant</b> 5:19,20 6:6 12:18 <b>Medical</b> 28:4 <b>meet</b> 14:3,25 17:25 <b>members</b> 8:18 12:2,3 13:16 <b>Mendelsohn</b> 23:18	<b>mention</b> 44:21 <b>merely</b> 6:18 17:15 <b>merits</b> 51:24 53:5 <b>mess</b> 47:21 <b>met</b> 15:3 <b>mind</b> 26:3 38:9 40:24 50:4 <b>minimalist</b> 33:3 <b>minimum</b> 48:19 <b>minute</b> 21:19 32:20 35:14 <b>minutes</b> 56:5 <b>misheard</b> 4:18 <b>misspoken</b> 4:4 4:19 <b>mix</b> 38:10 57:11 <b>mixed</b> 19:2,6,8 19:15,20,22 20:21 26:21 39:15 51:17,18 52:8,10 <b>modify</b> 47:3,5 <b>morning</b> 3:4 <b>motion</b> 15:9 <b>motivated</b> 20:6 37:22 <b>motivating</b> 6:16 13:15 14:17,21 15:6,22 19:8 20:16 21:13 22:10 24:17 25:13 32:24,25 33:1 34:1,15 36:14,25 37:10 37:12 38:16,25 39:3 40:5,17 40:23 41:5,20 44:3 46:10 55:17 57:13 <b>motivation</b> 57:4 <b>motive</b> 14:19 15:14 17:15 19:3,7,8,15 20:21 26:21 39:15 51:5,17	51:18 52:9,9 52:11 57:12,18 <b>motives</b> 15:14 19:20,20,22 20:8 38:10 57:12 <b>motorcyclists</b> 56:22 <b>move</b> 54:15 <b>Mt</b> 6:24 35:3 39:16 41:11 49:16,22 <b>multiple</b> 57:25 58:5 <b>multi-member</b> 35:2,5 <hr/> <b>N</b> <b>N</b> 2:1,1 3:1 <b>narrow</b> 29:15 37:12 40:24 56:11 <b>narrowest</b> 30:11 54:14 55:20 <b>narrowly</b> 39:23 <b>necessarily</b> 34:2 <b>necessary</b> 43:17 43:23 <b>need</b> 8:1 11:12 19:14 23:3 26:23 <b>needs</b> 26:22 54:12 <b>never</b> 3:24 4:13 4:21 5:9 35:17 48:25 <b>nevertheless</b> 50:10 <b>new</b> 56:1 <b>night</b> 29:6 <b>non</b> 19:15 <b>nondiscrimin...</b> 34:9 <b>non-circumst...</b> 5:22 23:21 30:5 <b>non-jury</b> 26:18	<b>non-mixed</b> 19:20 <b>normal</b> 50:3 <b>normally</b> 15:15 16:15 <b>noted</b> 3:16,19 18:12 <b>notion</b> 32:14 48:21 <b>notwithstandi...</b> 33:5 35:15 51:5 <b>nude</b> 23:10 <b>nuisance</b> 42:18 42:19 <b>number</b> 7:18 10:5 16:13 17:22 58:2 <b>numerous</b> 38:19 <hr/> <b>O</b> <b>O</b> 2:1 3:1 <b>objective</b> 17:20 18:5,6 <b>obligated</b> 14:22 <b>obliged</b> 33:19 <b>obtain</b> 3:13 19:2 <b>obviously</b> 9:16 34:20 42:8 54:8 <b>occasions</b> 10:5 <b>office</b> 36:1 <b>Oh</b> 28:16 <b>okay</b> 12:25 37:13 <b>old</b> 26:7 33:16 35:22 36:3 <b>once</b> 41:22 43:1 <b>ones</b> 50:3 <b>open</b> 21:8 <b>Opening</b> 32:5 <b>opinion</b> 3:25 4:1 9:6,14 10:9 11:6,7,14,19 12:12 17:2 21:2,8,10 23:2 23:5,12 24:13	29:25 30:9,10 30:15,24 31:16 31:17 43:25 53:12 55:21 <b>opinions</b> 44:1 <b>opportunity</b> 29:12,14 <b>opposed</b> 5:2 6:18 <b>opposition</b> 21:5 44:20,25 52:21 <b>options</b> 20:4 <b>oral</b> 1:12 2:2 3:7 18:18 28:25 <b>order</b> 3:12 8:2 9:24 14:18 <b>ordinary</b> 43:5 43:13 <b>origin</b> 11:15 <b>ought</b> 30:11 48:16,16 53:7 <b>outcome</b> 30:7 <b>overrule</b> 22:17 22:25 39:14 52:24 <b>o'clock</b> 35:21 <b>O'Connor</b> 6:6 8:14,19 11:13 11:14 13:18 31:6 39:20 45:17 <b>O'Connor's</b> 3:25 8:24 11:6 23:1 29:25 30:9,15 47:25 49:20 <hr/> <b>P</b> <b>P</b> 3:1 <b>page</b> 2:2 21:11 36:21,23 <b>Palace</b> 3:14 4:4 4:4 5:17 9:3,4 9:8 18:25 19:4 19:10 21:8 22:4,11 23:17 <b>Paper</b> 38:20
--	---	--	---	---

45:5 <b>pardon</b> 46:5 <b>part</b> 9:11,19 10:24 17:17 21:20 29:22 33:2 37:11,21 37:22 38:3 55:1 <b>particular</b> 6:17 7:6,20 29:9 32:24 37:16 <b>particularly</b> 8:7 53:9 <b>parties</b> 5:1,6 10:6 16:17,21 21:6 25:25 53:23 <b>party</b> 10:15 <b>passed</b> 21:4 <b>passing</b> 29:5 <b>pattern</b> 39:13 <b>people</b> 13:24 14:2 48:6 <b>perfect</b> 37:17,17 <b>perfectly</b> 45:20 <b>permissible</b> 20:7 <b>permitted</b> 20:7 <b>person</b> 26:3 <b>persuaded</b> 24:17 <b>persuasion</b> 10:14 13:5 14:4 24:6 51:21 <b>persuasiveness</b> 12:14 <b>petition</b> 5:24 21:11 <b>Petitioner</b> 1:4 1:17,21 2:4,7 2:12 3:8 18:21 29:5 56:7 <b>Petitioner's</b> 45:1 <b>Phillips</b> 1:22 2:8 28:24,25 29:2 30:18 31:7,10 31:13 33:8,10	33:23 34:3,17 35:17,23 36:8 36:11,15,18,21 37:2,6,9,15 38:15 39:10,17 40:6,22,25 41:2,15,17,21 42:12 43:3,10 43:13,19,21,24 45:3,12 46:3,6 46:9,18,25 47:10,13 48:11 48:14,25 49:10 49:19 51:9 52:5 54:5 55:6 55:12 <b>phrase</b> 5:24 <b>physical</b> 57:3 <b>pick</b> 21:20 48:4 <b>place</b> 32:11 38:16 53:8 55:11 <b>placed</b> 18:10 <b>places</b> 10:9 <b>plaintiff</b> 3:12 6:14 8:3 14:15 15:21,24 24:6 25:20 32:23 34:12,19 39:6 50:8,24 51:15 51:20 <b>plaintiff's</b> 7:25 12:7 33:21 36:25 37:9,10 41:23 <b>play</b> 19:22 37:24 37:24 38:22 43:23 <b>played</b> 33:2 34:6 36:15,17 37:10 37:21 38:1,2,3 38:17 40:6,6 42:6,19,23 43:2,16,22 55:17 57:12 <b>plays</b> 45:18 49:21	<b>please</b> 3:10 18:23 29:3 56:9 <b>plurality</b> 8:20 12:4 13:13 17:4,19 18:2,4 43:25 44:2,4,9 <b>point</b> 22:3 27:12 28:15 31:20 39:17 42:15 44:14,15 45:20 47:22 54:17,20 <b>pointed</b> 12:1 <b>points</b> 3:15 25:14 <b>portion</b> 52:24 <b>posed</b> 8:5 52:6 <b>position</b> 5:6,10 9:21 14:24 24:3 30:6 44:18,20 52:22 <b>possible</b> 34:15 52:15 <b>possibly</b> 27:4 43:5 <b>post</b> 26:20,25 <b>posture</b> 19:4 <b>potentially</b> 29:14 <b>powers</b> 47:2 <b>practical</b> 28:1 <b>practice</b> 20:13 39:5 <b>precise</b> 21:10 <b>precisely</b> 14:7 47:14 50:11 <b>prefer</b> 25:12,13 25:25 27:18 <b>prejudicial</b> 27:19 <b>preliminary</b> 40:3 <b>prepared</b> 42:6 43:8 <b>preponderance</b> 6:15,19 13:14 14:16,20 15:5	17:16 40:4 <b>present</b> 7:7,11 7:15 <b>presented</b> 19:1 19:11 20:24 56:12 <b>pressed</b> 21:4 <b>pretext</b> 27:2 <b>prevails</b> 20:12 <b>Price</b> 3:22 4:1 6:8,21 7:9,12 7:13 9:2 10:17 12:2 13:10,12 13:22,25 17:2 17:6,12 22:5 22:17,23,25 24:14 25:1,2 26:16,19 27:22 28:1 30:12,16 30:23 34:24 35:4 39:8,14 39:17 44:1,2 45:16 47:18 52:24 53:3,10 53:21 56:12 <b>prima</b> 14:14,20 40:1,8,9,15,17 45:10 <b>primary</b> 11:9 34:9 46:18 52:22 <b>prior</b> 32:4 <b>probably</b> 26:11 27:8 34:5 <b>problem</b> 7:4 8:5 8:8 25:18 26:13,24 31:14 31:15 41:18 47:2,14 57:24 <b>problems</b> 7:12 7:16 28:9 <b>procedural</b> 18:25 19:4 <b>proceed</b> 29:22 34:11 52:18 <b>process</b> 39:7 51:8	<b>prohibited</b> 40:4 <b>proof</b> 7:8 9:5,18 9:24 10:1,5 13:14 16:6 17:8,16 30:2,2 31:24 34:8 39:6,21 41:24 50:15 51:11 <b>proof-shifting</b> 4:14 <b>properly</b> 40:18 41:25 <b>proposed</b> 16:17 <b>proposition</b> 10:2 11:5 <b>proscribed</b> 47:12 <b>prove</b> 17:13 23:24 32:25 33:4 34:8,12 34:19,20 41:11 42:16,18 43:2 50:20 57:19 <b>proved</b> 34:1,14 <b>proves</b> 41:8 <b>provide</b> 29:12 31:4 <b>provided</b> 31:18 <b>provides</b> 31:3 <b>proving</b> 14:16 <b>provisions</b> 47:19 <b>proximate</b> 43:15 <b>pull</b> 21:22 45:15 <b>pursue</b> 42:3 <b>pushing</b> 45:4 <b>put</b> 5:4,15 53:2 54:17 58:6 <hr/> <b>Q</b> <hr/> <b>quality</b> 54:21 <b>quantitative</b> 55:5 <b>quantity</b> 54:21 <b>question</b> 13:2 15:1,23 16:8 18:9 19:1,11 19:25 20:3
--	---	--	---	--

21:3 23:4 29:20 30:13,20 31:25 32:1 33:12 39:25 40:7,19,22 41:22 42:10,24 44:16 45:13,14 47:17 51:9,10 52:4,6,17 54:4 54:8 55:5,6,9 55:13,13 56:11 56:13 <b>questions</b> 4:11 19:6 27:23 28:20 56:2 <b>quite</b> 16:11 22:15 41:4 <b>quote</b> 22:7 45:4	<b>reasonably</b> 39:18 <b>reasoning</b> 9:12 9:20 <b>reasons</b> 7:18 21:2 23:14 46:16,21 47:11 47:15 49:24 52:15 <b>REBUTTAL</b> 2:10 56:6 <b>receive</b> 21:5 <b>reciting</b> 39:12 <b>recognition</b> 39:15 <b>recognize</b> 46:22 54:12 <b>recognized</b> 21:9 39:24 47:14 <b>reconstruct</b> 58:1 <b>record</b> 33:19 <b>Reeves</b> 23:25 38:20 <b>referred</b> 56:15 <b>regard</b> 4:5 10:19 10:21 <b>regarded</b> 11:19 <b>regardless</b> 24:25 25:24 26:1,4 50:9 <b>regime</b> 20:22,22 24:12 44:22 46:11 47:4 51:20 <b>regimes</b> 20:21 39:11 46:17 <b>regular</b> 50:23 <b>rejected</b> 8:20 12:4 14:8 18:3 18:6 48:25 <b>relative</b> 27:16 <b>relevant</b> 3:15 9:16 23:22,24 <b>reluctant</b> 43:10 <b>rely</b> 39:19 <b>remand</b> 14:24 17:3 25:22	30:5 55:25 <b>remanded</b> 17:5 <b>remanding</b> 17:10,17 54:14 <b>remedial</b> 46:11 47:8 <b>reply</b> 56:15 <b>require</b> 17:19 <b>required</b> 5:9,21 6:3,16 12:10 14:11 17:12 33:24 41:3 44:10 <b>requirement</b> 3:17,24 4:14 4:21 7:3,17 8:21 9:18,24 10:21 12:5 13:14 19:2,7 21:12 22:12 23:15 44:5 <b>requirements</b> 9:5 13:10 <b>requires</b> 55:21 <b>requiring</b> 17:15 <b>reserve</b> 18:15 <b>reserving</b> 25:21 <b>resistance</b> 50:24 <b>resolve</b> 7:19 9:1 15:16 21:3 28:20 29:17 42:9 <b>resolved</b> 16:19 <b>resolves</b> 18:25 <b>respect</b> 12:15 17:18 <b>respond</b> 56:13 <b>Respondent</b> 2:9 11:10 25:14 29:1,5 <b>Respondents</b> 1:23 <b>Respondent's</b> 44:23 <b>response</b> 13:1 16:7 18:5 40:21 53:4	<b>responses</b> 25:10 <b>responsible</b> 42:25 54:3 <b>rest</b> 9:22 22:2 44:6 <b>rests</b> 51:14 <b>result</b> 8:19 12:3 56:22 <b>retains</b> 34:12 39:6 <b>reverse</b> 17:5 <b>reversing</b> 17:10 17:17 <b>revising</b> 53:21 <b>revisit</b> 47:17 56:12 <b>rid</b> 24:4 35:22 51:18 <b>right</b> 4:9,9,22 5:13 11:4 17:21 27:1,8 28:12 34:3 36:2,12 37:2,2 37:13 45:12,22 46:9 49:19 53:8,22 55:12 <b>ROBERTS</b> 3:3 4:25 5:8,12,23 13:1,20 18:16 21:16,18 22:13 22:24 24:2,21 28:14,23 48:5 48:12,23 49:2 56:4 58:9 <b>role</b> 33:2 34:6 36:15,17 37:11 37:22,24,25 38:1,2,17,22 40:6 42:7,19 42:21,23 43:2 43:16,22,23 55:1,17 57:12 <b>routinely</b> 10:19 10:20 16:5 <b>rule</b> 8:2,9 23:24 39:23 50:7 56:24	<b>ruled</b> 56:16 <b>rules</b> 50:3 <b>rusty</b> 42:22,23 <hr/> <b>S</b> <b>s</b> 1:18 2:1,5 3:1 18:18 50:24 <b>salesman</b> 41:14 <b>satisfied</b> 40:11 <b>saying</b> 21:11 24:3 25:22 27:22 32:18 38:16 45:7 51:4 55:21 <b>says</b> 24:22 26:4 32:6,24 35:21 36:1,19 37:9 37:24 38:21 45:25 48:7,8 48:13 <b>scale</b> 12:21 <b>SCALIA</b> 3:21 4:6 16:25 <b>Schnapper</b> 1:16 2:3,11 3:6,7,9 4:2,8,16,19,23 5:5,11,15 6:2,9 6:13,23 7:1,15 8:7,17,25 9:11 10:4,16 11:2,8 11:15,22,25 12:15,20 13:12 14:6,12,22 15:8 16:1,15 17:21 39:24 56:5,6,8 57:6 57:24 <b>se</b> 23:23 <b>Seattle</b> 1:16 <b>second</b> 10:3 21:7 38:14 <b>Secondly</b> 3:18 18:4 <b>section</b> 9:16 <b>see</b> 10:1 13:13 22:3 32:3 36:20
--	---	---	--	---

<b>seen</b> 25:10 29:8	23:20 27:14	<b>Souter's</b> 13:2	37:24 38:6	27:23
<b>seize</b> 29:12,13	42:13 52:22	16:9	39:2 46:10,12	<b>suggests</b> 20:5
<b>seized</b> 31:17	<b>significant</b>	<b>speak</b> 54:7,9	51:8 52:1	<b>summarize</b>
<b>selected</b> 32:5	29:13 53:21	<b>speaks</b> 45:17	<b>statutes</b> 22:22	56:14
<b>sense</b> 4:10 5:19	<b>simply</b> 7:10,18	<b>Spears</b> 23:10	22:22 28:5,5	<b>summary</b> 15:10
5:21,25 21:22	14:19 15:19	<b>special</b> 6:3 7:16	<b>statutory</b> 9:7	16:14 19:22
21:23,25 34:23	31:15 48:13	14:9 19:14	28:21 46:8,23	20:5 33:20
45:18 52:8	53:25 55:21	20:9 22:11	47:2	41:6
<b>sensible</b> 45:15	<b>single</b> 35:9,10	43:7	<b>step</b> 53:7,18	<b>supervisor</b> 35:9
<b>separate</b> 11:7,13	<b>sit</b> 16:25	<b>specific</b> 3:13	<b>Stevens</b> 33:8,11	<b>support</b> 9:23,25
12:22 13:9	<b>sitting</b> 7:23 48:3	9:14 10:7 30:1	33:25 34:14	<b>supporting</b> 1:20
29:25 30:24	<b>situation</b> 8:4	46:10 54:8	35:2 40:25	2:7 7:25 18:21
57:4	20:12 32:4	<b>specifically</b> 39:2	41:4,16,19	<b>supports</b> 42:7
<b>separates</b> 19:7	35:7,9,20	52:20	42:4 49:14	<b>suppose</b> 30:22
<b>separation</b> 47:1	36:13 50:1	<b>specificity</b> 48:18	50:17,21	<b>supposed</b> 39:22
<b>serious</b> 8:8	53:15 56:19	<b>specifics</b> 33:1	<b>Stevens's</b> 48:6	50:1
31:18	57:17,20,21	<b>split</b> 27:3	49:3	<b>Supposing</b>
<b>Services</b> 1:6 3:5	<b>situations</b> 49:20	<b>Sprint/United</b>	<b>straight</b> 24:19	33:13
<b>set</b> 55:24	50:17	23:18,23	27:19	<b>Supreme</b> 1:1,13
<b>sexism</b> 27:3	<b>six</b> 12:1 18:11	<b>stage</b> 42:10	<b>strategic</b> 16:10	<b>sure</b> 41:4
<b>sexual</b> 10:11	18:11 24:17	53:24	<b>strength</b> 27:16	<b>Switching</b> 34:7
<b>shift</b> 9:24 16:12	25:1	<b>stake</b> 44:22	<b>stretch</b> 47:5	
39:21 41:23	<b>sixth</b> 8:18 13:19	<b>standard</b> 7:9	<b>strictly</b> 29:20	<b>T</b>
44:15 50:15	<b>small</b> 12:23	14:10 18:7	<b>strong</b> 6:12,18	<b>T</b> 2:1,1
55:1	<b>smarter</b> 28:7	24:16 31:2	7:24 8:1 48:1	<b>table</b> 20:1,4
<b>shifted</b> 54:24	49:12	38:23 43:14	<b>stronger</b> 8:1	<b>tactical</b> 16:10
<b>shifting</b> 9:25	<b>Smith</b> 35:22,25	44:3 48:1	<b>structure</b> 9:14	42:2
13:5 24:18	36:2,3,4	56:18	<b>studies</b> 25:6	<b>tactically</b> 32:1
27:10 31:24	<b>sole</b> 44:24	<b>standards</b> 3:20	<b>submit</b> 17:19	<b>tactics</b> 16:23
55:19	<b>Solicitor</b> 1:18	28:11 47:5	<b>submitted</b> 58:10	<b>take</b> 5:6 10:22
<b>shifts</b> 14:4 33:4	24:3,14 41:25	48:18	58:12	13:7 30:12
35:14 46:11	45:24 54:9	<b>start</b> 26:15	<b>subsequent</b> 9:2	36:4 50:5 51:1
<b>ships</b> 29:5	<b>solving</b> 28:9	51:21	<b>substantial</b>	53:7 54:13
<b>show</b> 6:15,17,17	<b>sorry</b> 33:10	<b>starting</b> 6:11	11:12 12:9,9	57:21
12:8 14:19	39:10 42:15	<b>starts</b> 15:4	12:18,20 48:2	<b>taken</b> 14:9 30:3
17:24 25:5	<b>sort</b> 10:19 25:23	<b>state</b> 22:21	48:2 55:22	32:11 33:5
38:8 40:10,20	29:9 34:23	47:22	<b>substantive</b>	50:11 52:1,22
42:18 50:8	<b>sorting</b> 58:6	<b>statement</b> 3:22	18:24 23:13	<b>talk</b> 45:6
51:5,13	<b>sought</b> 35:17	3:23 5:17 32:6	47:6	<b>talking</b> 30:1
<b>showing</b> 14:1,3	<b>source</b> 11:5,20	<b>statements</b>	<b>sufficient</b> 6:19	32:12 47:20
19:15 40:3,9	<b>Souter</b> 10:22	32:11	13:17 15:9	<b>talks</b> 9:15
40:10,15 54:25	11:4,11,16,24	<b>states</b> 1:1,13,20	34:16,18 38:17	<b>Tarrant</b> 23:11
55:22	12:11,17,25	2:6 18:19	51:3 55:18	<b>tell</b> 7:7 24:22
<b>shown</b> 15:22,24	15:18 25:24	30:15	56:21 57:13	25:10 29:16
40:15 47:23	27:5,7,21 28:6	<b>statute</b> 16:4	<b>suggest</b> 9:6	<b>telling</b> 5:8
<b>shows</b> 32:5	32:2 40:12	24:21,22 28:12	<b>suggested</b> 18:4	<b>tenable</b> 19:19
<b>side</b> 8:2 13:7,8	49:12 55:4,8	28:19 34:11	<b>suggesting</b>	<b>term</b> 6:7 23:16

38:21 <b>terms</b> 5:3 16:16 39:2 41:2 <b>test</b> 8:16 14:16 21:21 44:24 <b>tested</b> 15:9 <b>text</b> 22:2 <b>textual</b> 9:23 10:7,11 <b>textural</b> 9:25 <b>Thank</b> 3:9 16:24 18:15,16,22 28:13,23 29:2 56:4 58:8,9 <b>theory</b> 32:8 35:11 45:19 <b>they'd</b> 27:8 <b>thing</b> 10:19 23:25 26:9 27:8 31:21 34:7 41:5,25 <b>things</b> 5:16 38:5 <b>think</b> 3:25 4:9,9 5:16,20 7:17 8:9 9:22 11:10 11:24 12:18 14:10,13,18,24 16:8 18:24 19:19,23,25 20:12,17,18 21:1,20 23:3 23:18,25 25:1 25:15 26:15 27:2,4,10,11 27:13,18,25 28:9,19 30:14 30:19,25 34:6 34:7,17,18,19 34:21,22 35:19 37:5 38:21 42:7 43:1,13 43:16,19 44:13 44:17,22,24 45:13,19,23 46:18 48:15 50:17,20 52:5 52:8 54:6,11	55:2,11 57:9 58:7 <b>thinks</b> 31:2 45:20 54:4 <b>third</b> 18:9 21:17 21:19 28:15 <b>thought</b> 41:11 51:17 <b>thousand</b> 52:15 <b>thread</b> 45:15 <b>three</b> 18:11 21:2 24:18 43:8 47:25 48:4 <b>threshold</b> 13:3,4 <b>throw</b> 53:25 <b>ties</b> 19:16 <b>time</b> 3:16 8:9 16:20 26:8 38:19 52:10 <b>times</b> 31:1 <b>Title</b> 9:9,10,13 9:13,17,20 16:3 19:13,25 20:19,24 21:15 22:7,9,15 24:24 26:17,19 28:10,18,21 39:1 45:25 46:4,7,14,20 47:3,12 51:25 52:2 54:4 57:14,15 <b>today</b> 3:15 44:20 <b>today's</b> 26:22 <b>tort</b> 43:1,5,14 56:17,25 57:7 57:23 <b>totally</b> 43:8 <b>touch</b> 52:3 <b>train</b> 42:24 <b>Transportation</b> 58:3 <b>treat</b> 47:15 <b>trial</b> 6:22,25 7:4 7:10,22 15:11 15:12,16,17 16:12,18,19	20:13 26:17 32:5,17 56:1 <b>trials</b> 7:14,17 16:23 26:18 31:22 <b>tried</b> 32:8 35:11 <b>trier</b> 7:23 <b>trigger</b> 55:18 <b>trouble</b> 33:13 <b>true</b> 4:2 9:25 52:9 <b>truth</b> 40:9 47:21 47:24 <b>try</b> 31:4 42:17 <b>trying</b> 17:1 42:17 44:14 53:10 57:8 <b>Tuesday</b> 1:10 <b>turned</b> 30:17 <b>two</b> 3:15 5:16 13:9,10,13 15:14 20:10,21 25:9 26:12 28:11 34:5,15 34:22 39:11 46:17 48:6 49:7,24 56:5 56:20,22 57:3 <b>two-decade-old</b> 22:5 <b>type</b> 7:6 12:5 <b>types</b> 10:10 <b>typical</b> 16:17	13:23 20:19 30:8 41:5,8 49:19 <b>understanding</b> 13:23,24 49:3 <b>understood</b> 7:9 <b>understudy</b> 38:1 <b>unimportant</b> 12:21 <b>United</b> 1:1,13,20 2:6 18:19 <b>unknown</b> 15:4 <b>unnecessary</b> 9:4 <b>unquote</b> 22:7 <b>unrelated</b> 51:6 <b>unresolved</b> 19:5 19:10 <b>unsettled</b> 19:25 <b>unwilling</b> 44:4 <b>upheaval</b> 22:18 <b>urge</b> 8:22 29:19 56:2 <b>urges</b> 52:3 <b>use</b> 31:4 <b>usually</b> 10:14	<b>views</b> 5:7 6:6,11 6:13 33:11 <b>VII</b> 9:9,10,13,13 9:18,20 16:3 19:13,25 20:19 20:24 21:15 22:7,9,15 24:25 26:17,19 28:10,18,21 39:1 45:25 46:4,7,14,20 47:4,12 51:25 52:3 54:4 57:14,15 <b>violated</b> 51:8 <b>vote</b> 8:15,18 13:19 <b>voted</b> 17:3
<hr/>				
<b>W</b>				
<hr/>				
<b>waiting</b> 16:13 <b>wake</b> 18:8 <b>walks</b> 35:25 <b>want</b> 4:12 5:25 27:19,19 28:19 37:18,19 44:17 50:19 51:18 57:14 <b>wants</b> 25:20 48:17 <b>warranted</b> 45:21 <b>Wash</b> 1:16 <b>Washington</b> 1:9 1:19,22 <b>wasn't</b> 6:7,25 9:9 10:11 13:17,17 21:4 24:8 <b>Waterhouse</b> 3:23 4:1 6:8,21 7:9,13,13 9:2 10:17 12:2 13:10,13,22,25 17:2,6,13 22:5 22:18,23,25 24:14 25:1,3				

26:16,19 27:23 28:1 30:12,16 30:23 34:24 35:4 39:8,14 39:18 44:1 45:16 47:18 52:24 53:3,10 53:22 56:12 <b>Waterhouse's</b> 44:2 <b>watershed</b> 46:2 <b>way</b> 5:16 7:10 15:25 16:1,2,3 16:11 25:8 27:9 29:21 34:10 45:14 47:6 52:18 53:24 54:14,25 54:25 <b>ways</b> 13:24 29:4 32:2 34:22 <b>week</b> 16:18 <b>weighs</b> 9:18 <b>went</b> 13:18 15:16 24:17 <b>weren't</b> 51:16 51:17 <b>we're</b> 5:14 11:17 22:5 23:23 45:7 <b>we've</b> 3:24 <b>whatsoever</b> 35:12 <b>White</b> 8:21 10:17 12:7,11 13:13 18:2,6 39:20 <b>white's</b> 8:23 17:2,11 30:24 31:16 55:2,21 <b>wide</b> 8:11 22:21 <b>willing</b> 42:2 <b>willy-nilly</b> 39:22 <b>win</b> 41:7,17 51:7 51:7 <b>wins</b> 41:16 <b>wished</b> 3:19	<b>witnesses</b> 16:13 <b>words</b> 9:5 <b>work</b> 8:4 26:5,8 33:16 37:18 54:16 <b>works</b> 15:25 16:2,2,3 <b>world</b> 26:21,22 26:25 27:13 <b>worse</b> 24:25 <b>worst</b> 53:16 <b>wouldn't</b> 7:15 22:19 <b>write</b> 21:2 <b>Writes</b> 35:24 <b>writing</b> 21:9 <b>written</b> 26:20 <b>wrong</b> 3:22 4:7 5:13 7:18 15:19 42:16 43:5,8 <hr/> <b>X</b> <hr/> <b>x</b> 1:2,8 33:15 <hr/> <b>Y</b> <hr/> <b>Yeah</b> 36:18 <b>years</b> 22:6 29:7 <hr/> <b>0</b> <hr/> <b>08-441</b> 1:5 3:4 <hr/> <b>1</b> <hr/> <b>1</b> 21:8 <b>10</b> 36:21 <b>10:00</b> 35:20 <b>10:08</b> 1:14 3:2 <b>11:08</b> 58:11 <b>12</b> 21:11 <b>15</b> 42:16 <b>18</b> 2:7 56:15 <b>1938</b> 58:3 <b>1991</b> 9:9 22:14 25:7 26:17 39:1 46:19 52:1 <hr/> <b>2</b> <hr/>	<b>20</b> 22:5 <b>2009</b> 1:10 <b>21st</b> 35:21 <b>25</b> 29:7 <b>28</b> 2:9 <hr/> <b>3</b> <hr/> <b>3</b> 2:4 21:10 <b>31</b> 1:10 <hr/> <b>5</b> <hr/> <b>56</b> 2:12 <hr/> <b>7</b> <hr/> <b>7</b> 36:23 <b>701(n)</b> 9:16		
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