

1 IN THE SUPREME COURT OF THE UNITED STATES

3 LOUIS B. BULLARD, :

4 Petitioner : No. 14-116

6 BLUE HILLS BANK, FKA HYDE :

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10 Wednesday, April 1, 2015

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

16 JAMES A. FELDMAN, ESQ., Washington, D.C.; on behalf  
17 of Petitioner.

19 General, Department of Justice, Washington, D.C.; for  
20 United States, as amicus curiae, supporting  
21 Petitioner.

24

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JAMES A. FELDMAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ZACHARY TRIPP, ESQ.	
7	For the United States, as amicus curiae,	
8	supporting the Petitioner	23
9	ORAL ARGUMENT OF	
10	DOUGLAS HALLWARD-DRIEMEIER, ESQ.	
11	On behalf of the Respondent	34
12	REBUTTAL ARGUMENT OF	
13	JAMES A. FELDMAN, ESQ.	
14	On behalf of the Petitioner	59
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next in Case 14-116, Bullard v. Blue Hills Bank.

5 Mr. Feldman.

6 ORAL ARGUMENT OF JAMES A. FELDMAN

7 ON BEHALF OF THE PETITIONER

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

10 A denial of a confirmation of a bankruptcy  
11 plan is appealable as of right under 28 U.S.C. Section  
12 158, the bankruptcy-specific provision that deals with  
13 appeals in bankruptcy cases as opposed to other civil  
14 cases.

15 That is because the denial of confirmation  
16 finally determines the debtor's right to the disposition  
17 of property and future income that's provided for in the  
18 plan that was denied.

19 CHIEF JUSTICE ROBERTS: How often, when you  
20 have a plan denied, is there typically --  
21 okay, we'll try again, the judge says, I don't like this  
22 part of it, you address it and fix it. In other words,  
23 you -- you try again, or maybe a third time, until you  
24 get it. Okay, now it's perfect. Let's go ahead.

25 MR. FELDMAN: I would say very frequently

1 that occurs.

2 CHIEF JUSTICE ROBERTS: I'm sorry, very --

3 MR. FELDMAN: Very frequently.

4 CHIEF JUSTICE ROBERTS: Well, if it occurs  
5 very frequently, why does it make sense to allow an  
6 appeal from the first denial? Why not wait until -- why  
7 isn't it proceeding, the consideration of whether to  
8 confirm the plan, and you wait until it's all done, and  
9 the judge says, I'm not going to do this, I'm done,  
10 rather than -- if -- if you go through three versions of  
11 the plan, under your theory, you would have the right to  
12 appeal each one.

13 MR. FELDMAN: Well, I -- you would have the  
14 right to appeal each one. I don't think anybody would  
15 ever do it. They -- there are many, many incentives for  
16 debtors, especially in Chapter 13, to not go ahead with  
17 appeals. But they want to get a plan confirmed and move  
18 on with their lives, and they don't have the -- the --  
19 the money or the time or anything else to go through  
20 appeals of every issue. The importance of this is not  
21 for your --

22 JUSTICE SOTOMAYOR: The problem is that that  
23 may be because they never thought they had the right to  
24 appeal --

25 MR. FELDMAN: I -- I don't --

1 JUSTICE SOTOMAYOR: -- because it's very  
2 easy to get an interlocutory ruling if there's -- if the  
3 rejection of the plan is on a legal question. I still  
4 don't understand why you didn't go that route.

5 MR. FELDMAN: I -- actually, we did go that  
6 route.

7 JUSTICE SOTOMAYOR: Yeah. And the circuit  
8 said --

9 MR. FELDMAN: And the --

10 JUSTICE SOTOMAYOR: -- you already filed  
11 your appeal, so we don't have to.

12 MR. FELDMAN: The bankruptcy appellate panel  
13 said, for a reason that I don't understand, that they  
14 just didn't want to certify it to the court of appeals.  
15 They did certify it to themselves --

16 JUSTICE SCALIA: Is it --

17 MR. FELDMAN: -- but --

18 JUSTICE SCALIA: -- is it only the -- the  
19 debtor who can appeal a rejection of a plan?

20 MR. FELDMAN: I think our view would be,  
21 yes, it's only the debtor -- well, only the proponent of  
22 the plan. And in Chapter 11, after a period of  
23 exclusivity, it could be a creditor who proposed the  
24 plan.

25 JUSTICE SCALIA: And what we say for 13

1 would apply to 11, as well, I assume?

2 MR. FELDMAN: I -- I think as a -- as a  
3 general matter, that's probably correct. This is a 13  
4 case and not an 11 case, but I think as a generally --  
5 the question in both cases would be: What is the nature  
6 of the proceeding? And it's similar, but not identical  
7 in both cases. So it would turn on how --

8 JUSTICE SCALIA: Well, in 11, you -- you  
9 would have some well-heeled litigants who would --  
10 would -- would appeal --

11 MR. FELDMAN: I -- I think --

12 JUSTICE SCALIA: -- two or three times.

13 MR. FELDMAN: Actually, I -- I think it's  
14 unlikely in 11 also. The -- the debtor in 11 is  
15 somebody who usually wants to get -- they have a huge  
16 incentive to get the company -- you're trying to  
17 reorganize the company, and they're trying to get this  
18 company through the 11 process. It's very hard to  
19 operate in a Chapter 11. More -- they're trying to get  
20 it through as quickly as possible, and taking an appeal  
21 is just an impediment to that --

22 JUSTICE SCALIA: Well, what about --

23 MR. FELDMAN: -- but --

24 JUSTICE SCALIA: -- what about the other  
25 side? You say the other side could appeal.

1           MR. FELDMAN:           A creditor -- creditors also  
2 actually want their money. They usually want the  
3 plan -- want -- they want a plan to go into effect. The  
4 kinds of appeals in both 11 and especially in 13 that  
5 are going to happen is not where the court says, well,  
6 you know, if you give another \$5 a week out of your --  
7 your projected -- you have to devote your whole  
8 projected disposable income to plan in 13. If you give  
9 another \$5 a week, I -- that I would approve it.  
10 Debtors are going to -- all of those are going to be  
11 modified, and they're going go through like that.

12           CHIEF JUSTICE ROBERTS:           So it's only in the  
13 important cases where this is a possibility?

14           MR. FELDMAN:           -- yes, but it's cases  
15 that are important to the debtor.

16           CHIEF JUSTICE ROBERTS:           Well, if it's an  
17 important case, then the avenues that are provided --  
18 the -- the multiple avenues that are provided for an  
19 interlocutory appeal would seem to be satisfied.

20           MR. FELDMAN:           I -- I don't think that's  
21 right. Interlocutory appeal serves a fundamentally  
22 different purpose than appeal as of right.  
23 Interlocutory appeal is generally for the benefit of the  
24 system in systematically important cases. But we rely  
25 on the parties for issues that are important to them and

1 they also help with the development of the law to have  
2 appeal as of right. The debtor may feel that their  
3 house -- in fact, the debtor's house frequently is at  
4 stake. I would say most or a majority or a lot of  
5 Chapter 13 cases.

6 JUSTICE SOTOMAYOR: I -- I don't understand.

7 MR. FELDMAN: And if they're going to lose  
8 the house --

9 JUSTICE SOTOMAYOR: What would be the  
10 purpose of all those alternative interlocutory appeal if  
11 we accept your argument that in every contested matter a  
12 decision is final?

13 MR. FELDMAN: We -- we haven't argued that  
14 every contested matter would result in a right to  
15 appeal. It would depend on what the contested matter  
16 is. But the point of those is just the kinds of -- if  
17 you look up the kinds of things that have been certified  
18 for interlocutory appeals. The Court -- there is  
19 discovery disputes in bankruptcy cases that have going  
20 to interlocutory appeals that nobody thinks would be  
21 appealable as of right. There is denials of motions to  
22 dismiss the case that nobody thinks is appealable as of  
23 right, but the courts have taken on interlocutory  
24 appeals. The attorney disqualification --

25 JUSTICE KENNEDY: If we interpreted the --



1 the statute to say that there is jurisdiction here  
2 appeals from final judgments and final orders, do you --  
3 is your case still just as strong? Is this, in your  
4 view, a final order?

5 MR. FELDMAN: Yes it's a final order,  
6 because it finally determined the debtor's rights to the  
7 property -- the disposition of property and future  
8 income that's provided for on the plan that's now  
9 settled and it's not going to be litigated again.

10 CHIEF JUSTICE ROBERTS: Well, the first  
11 thing the judge said is that I want you to file an  
12 amended plan --

13 JUSTICE KENNEDY: That's what I don't  
14 understand.

15 CHIEF JUSTICE ROBERTS: -- in a month.

16 MR. FELDMAN: Right.

17 CHIEF JUSTICE ROBERTS: So at least the  
18 judge didn't think it was done and over.

19 MR. FELDMAN: No, the judge thought for this  
20 plan, it was over. I think everybody agrees that the  
21 judge thought that this debtor can't get what the debtor  
22 wanted in this plan. He can't get this treatment --

23 CHIEF JUSTICE ROBERTS: Well, I guess it,  
24 again, maybe --

25 MR. FELDMAN: -- but --

1 CHIEF JUSTICE ROBERTS: -- the way you look  
2 at it is whether the proceeding is the confirmation or  
3 denial of this plan, or if the proceeding is whether to  
4 confirm or deny a plan. Right?

5 MR. FELDMAN: Yes, yes. That -- that's  
6 right. And the -- the point is that -- that the denial  
7 of this plan kept the debtor from getting this  
8 particular relief that he wanted and that is finished  
9 and not going to be litigated --

10 JUSTICE KENNEDY: If -- if the debtor had  
11 wanted to file a -- a new plan to try and satisfy the  
12 judge's concerns, would he have had to file a new action  
13 with a new number?

14 MR. FELDMAN: No. It wouldn't have had to  
15 be a new -- but --

16 JUSTICE KENNEDY: Well, then why is it a  
17 final order? That's what I don't understand.

18 MR. FELDMAN: Well, because in bankruptcy,  
19 you -- you know, there are many, many appeals that are  
20 allowed by the -- in bankruptcy including appeals of  
21 priority among creditors that don't --

22 JUSTICE KENNEDY: And are these all final  
23 orders?

24 MR. FELDMAN: Yes. They don't -- they don't  
25 complete the whole bankruptcy case. The point in

1 bankruptcy, and Congress enshrined this in Section 158,  
2 is you look at it proceeding by proceeding. And the  
3 question is when the proceeding ended -- ends. And the  
4 only way to give the debtor an effective right to appeal  
5 at all, really, is to allow the debtor --

6 JUSTICE BREYER: Why? Why -- why doesn't  
7 the debtor just say -- Judge says, debtor, I don't like  
8 your plan. I'm not confirming it. But if you amend it  
9 in this way, that way, or the other way, then I'll  
10 probably confirm it.

11 MR. FELDMAN: Right.

12 JUSTICE BREYER: Okay? And then -- and then  
13 the debtor says, I don't want to amend it that way.  
14 Okay? I'm not doing it. No amendment filed. Then what  
15 happens?

16 MR. FELDMAN: Then I think that the court  
17 probably dismiss the case.

18 JUSTICE BREYER: Fine, and then the debtor  
19 has an appeal.

20 MR. FELDMAN: Right.

21 JUSTICE BREYER: So what's the problem?

22 MR. FELDMAN: So here's the problem: If you  
23 require the debtor -- so the debtor here has been denied  
24 the right to the hybrid treatment of his mortgage that  
25 he wanted in a plan. If you require the debtor to go to

1 a dismissal on the entire bankruptcy case in order to  
2 appeal that, the debtor and other creditors lose the  
3 right to the automatic stay.

4 JUSTICE BREYER: Oh, is that a good idea?  
5 What we do is we do there the same as any other case.  
6 We say I appreciate your staying this so I don't lose  
7 the advantage while I have an opportunity to appeal.  
8 And if the bankruptcy judge doesn't do it, you ask the  
9 appellate panel to do it. That comes every day in the  
10 week, it comes up in criminal cases, civil cases all the  
11 time.

12 MR. FELDMAN: Right, but at that point -- at  
13 that point the debtor's burden in showing that they're  
14 entitled to a stay, courts have viewed that as a  
15 similar --

16 JUSTICE BREYER: Does he have a good reason  
17 or not?

18 MR. FELDMAN: I'm -- he does have a good  
19 reason, but --

20 JUSTICE BREYER: Okay. Then he'll get it.

21 MR. FELDMAN: But -- well --

22 JUSTICE BREYER: Courts make mistakes  
23 sometimes, by the way.

24 MR. FELDMAN: Yes.

25 JUSTICE BREYER: But it seems to me that to

1 guard against a potential mistake, to potentially have  
2 appeals -- potentially anyway, none of us knows -- in  
3 dozens of cases, and then you say contested matters,  
4 there are all kinds of contested matters so we'll have  
5 to invent a new set of distinctions about which  
6 contested matters do count as final and which ones  
7 don't. That seems to me to be throwing a very giant  
8 baby out with the bath water.

9 MR. FELDMAN: Your Honor, we're not arguing  
10 that all contested matters should be appealable. We're  
11 arguing that denials of plan confirmation are --

12 JUSTICE BREYER: And they're the only ones.  
13 And then -- then fee -- fee matters or not, though  
14 they're contested matters. I have a list of about 47  
15 contested matters here, that Collier has, and it seemed  
16 to me I couldn't figure out. Maybe that's my failing,  
17 but I couldn't figure out what, under your rule, which  
18 contested matters were and which were not.

19 JUSTICE GINSBURG: It's give --

20 MR. FELDMAN: Right. There's no --

21 JUSTICE GINSBURG: It's a given, isn't it,  
22 the -- the confirmation of a plan, the confirmation of a  
23 plan can be appealed?

24 MR. FELDMAN: Yes, confirmation of a plan  
25 can be appealed.

1 JUSTICE GINSBURG: And I thought your  
2 argument was that this is just the flip side. You can  
3 confirm or you can deny. Creditors can appeal if -- if  
4 it's confirmed.

5 MR. FELDMAN: That's right.

6 JUSTICE GINSBURG: So you're defining the  
7 contest as yes or no to this plan.

8 MR. FELDMAN: Right. And the very same  
9 issue would be at issue if, had the court confirmed it,  
10 as it would be at issue in this appeal of the denial --

11 JUSTICE BREYER: I didn't see that. Because  
12 I thought when a court confirms a plan then there is  
13 nothing left to do but execute the plan. So obviously  
14 what you have to do is give an appeal, or the plan will  
15 be executed, the wages will be garnished, you'll be  
16 paying forever. But when you deny the plan, nothing  
17 more will happen and, therefore, there is appeal.

18 MR. FELDMAN: No --

19 JUSTICE BREYER: Now that's what I thought  
20 the way it worked.

21 MR. FELDMAN: Actually --

22 JUSTICE BREYER: I didn't see why you give  
23 an additional set of appeals when only an amendment is  
24 at stake.

25 MR. FELDMAN: But -- I guess, let me address

1 first the issue of amendment. The -- the -- to be  
2 talking about this as leave -- the question is what is a  
3 proceeding, not what is a contested matter. And  
4 everybody agrees that you can have proceedings that are  
5 smaller than the bankruptcy case and the question is  
6 whether this is one of them or not.

7 Now the fact that the court granted leave to  
8 amend is really equivalent in the norm or similar in a  
9 normal civil case, to a court denying without prejudice.  
10 It means, yes, debtor, you can come back with another  
11 plan. You are permitted to do that.

12 That starts a new proceeding. The -- At that  
13 point the debtor files the plan, the creditor objects, you  
14 have whatever litigation you need over that plan. The  
15 judge holds a hearing just like he held the hearing  
16 before, and ultimately the judge decides whether to  
17 grant or deny confirmation. And that is -- that looks  
18 like a proceeding. It has a beginning and a middle and  
19 an end and it follows a series of steps and comes to a  
20 conclusion on that.

21 The -- the fact that in a civil, in a normal  
22 civil case, of course when a judge denies with leave  
23 to -- a court dismisses a complaint with leave to amend  
24 frequently on the ground just that the complaint is  
25 defective or something. But when a court does that,

1     you're operating under 1291 where you're not looking for  
2     what a proceeding is. Maybe in a normal civil case that  
3     would be seen as a proceeding. But that's not the  
4     question that you ask. But that is the question that  
5     you ask here.

6             As far as stays, courts are reluctant to --  
7     it's one thing -- a debtor gets an automatic stay when  
8     they file their bankruptcy petition. Courts have --  
9     look -- view an attempt to get a stay of a dismissal,  
10    they generally judge those under the standards for  
11    preliminary injunction which is not easy to meet.  
12    You're going to the judge --

13            JUSTICE KAGAN:             Does that mean that they  
14    would have to say that there's a likelihood that their  
15    own ruling is wrong?

16            MR. FELDMAN:             Yes. They -- Yes, it does. And  
17    they're very reluctant to do that. The automatic stay  
18    is a very powerful and important thing. But the  
19    important --

20            JUSTICE KAGAN:             Because if Justice Breyer  
21    were right, that that's a possibility, you would think  
22    that that would be a very good way to solve this  
23    problem. But you're just saying that they're -- the  
24    automatic stays are going to disappear on most of these  
25    debtors?



1           MR. FELDMAN:           Yes. And also the debtor, I  
2 would say also if the debtor, there's actually four  
3 different disabilities that a debtor would have if the  
4 case is dismissed. But one of the most important parts  
5 of it is, it's not just the debtor who gets harmed by  
6 that, it's other creditors. If the debtor doesn't get  
7 the automatic stay other creditors are going to also  
8 have problems because they'll start grabbing property,  
9 and the whole point of the bankruptcy could be lost  
10 while the appeal is going --

11           JUSTICE SCALIA:           Am I -- am I correct in my  
12 recollection that your brief says that some  
13 jurisdictions have adopted the principle that you're  
14 urging and the sky has not fallen?

15           MR. FELDMAN:           That's right. The Fifth  
16 Circuit, the Third, Fourth and Fifth Circuits have all  
17 adopted rules that are similar to what we're proposing  
18 here.

19           JUSTICE BREYER:           What happened on the other  
20 side?

21           MR. FELDMAN:           You actually -- with -- we  
22 haven't found any case where -- in one of the other six  
23 circuits where a debtor has -- a -- sought a -- a stay --  
24 let me get this right -- where -- where a debtor has --  
25 has got -- had a dismissal and sought to extend the

1 automatic stay so he can take an appeal of a dismissal.

2 JUSTICE BREYER: Did they all lose their  
3 houses or something in the interim?

4 MR. FELDMAN: That -- that is what happens  
5

6 JUSTICE BREYER: Do we know that?

7 MR. FELDMAN: Actually, I don't know what --

8 JUSTICE BREYER: I mean, that's a pretty --  
9 I mean, you know, I realize judges are difficult, but it  
10 seems to me if somebody was going to lose his house  
11 because you wouldn't grant a stay where he has some kind  
12 of an issue on appeal, that's a pretty appealing case  
13 for issuing that stay.

14 MR. FELDMAN: I think courts --

15 JUSTICE BREYER: Or they're rather  
16 hard-hearted if they don't --

17 MR. FELDMAN: Courts have kind of a  
18 uniform -- I think have uniformly applied the standard  
19 that you have to show a likelihood of success. Not a  
20 possibility of success, but a likelihood of success,  
21 which is very hard to show once you've just been  
22 denied -- once the court has just dismissed the case --

23 JUSTICE SCALIA: There is no lose-your-house  
24 exception to that?

25 MR. FELDMAN: Not that I know of. But there

1 is -- there is three other --

2 JUSTICE BREYER: I agree if there is some  
3 merit to your appeal --

4 MR. FELDMAN: There is --

5 JUSTICE BREYER: But are we then turning  
6 this on whether there's some -- you want to give a lot  
7 of appeals with no merit?

8 MR. FELDMAN: I don't think that you will,  
9 and the Fifth Circuits have had this rule since 2000.  
10 We found three cases I think in the court of appeals,  
11 three other cases in the district court. Since then,  
12 the cases don't --

13 CHIEF JUSTICE ROBERTS: Reported cases, or  
14 any cases?

15 MR. FELDMAN: I beg your pardon?

16 CHIEF JUSTICE ROBERTS: Reported cases, or  
17 any cases?

18 MR. FELDMAN: All the cases we were able to  
19 find on Westlaw which involved reported and unreported.  
20 It didn't involve all cases. No. -Um - The --

21 JUSTICE GINSBURG: How much -- how much  
22 time, Mr. Feldman, would be involved? So nothing is  
23 going to go on while this issue goes up on appeal.

24 MR. FELDMAN: That -- it's actually --  
25 that's only kind of true. In a Chapter 13 case, the

1 debtor has to start making payments as soon as the plan  
2 is proposed, which is in about 30 days or so of the time  
3 the petition is filed. And the debtor makes payments  
4 usually for three to five years.

5       So I would say in virtually every case and  
6 probably every case while the appeal is going on, the  
7 debtor is still making the payments under the plan.  
8 The -- it is true the money isn't disbursed to the  
9 creditor until after there is an ultimate confirmation,  
10 but meanwhile, the -- as I think you just heard in the  
11 other case, the trustee is supposed to invest the money  
12 in an interest-bearing account. Those proceeds will  
13 eventually go to the creditors. So things are -- in a  
14 Chapter 13 case -- are going on in the course of the  
15 appeal.

16       JUSTICE GINSBURG:           Something about your  
17 claim, yes, you can amend. But as I understood, your  
18 claim is -- the answer you've been given is never. You  
19 cannot have a hybrid.

20       MR. FELDMAN:                Yes. That is what --

21       JUSTICE GINSBURG:           So --

22       MR. FELDMAN:                This plan --

23       JUSTICE GINSBURG:           -- to never amend -- to  
24 make a little change here or there. It just can't  
25 happen at all.

1           MR. FELDMAN:           And those cases which involve  
2   issues that are really of importance, are of importance  
3   to the debtor, and perhaps importance to the whole  
4   bankruptcy system, are the ones that are going to be  
5   appealed and that won't ever be appealed if you don't  
6   allow an appeal at this stage.

7           And I think as shown by the presence of the  
8   United States and Bank of America, both of which, I  
9   think, are probably among the largest creditors in the  
10   country and probably participate as creditors in more  
11   bankruptcy cases than anyone else, on our side of the  
12   case, this -- allowing an appeal at this stage is -- is  
13   important for the sake of sound functionality of the  
14   bankruptcy system for allowing bankruptcy -- appellate  
15   courts to develop and harmonize the law in bankruptcy,  
16   which is a need that many observers have noted.

17          And it won't do any undue harm to creditors  
18   because the -- especially in a Chapter 13 case, the  
19   creditor is -- the debtor is continuing to pay, and in  
20   any case, the cases that are going to be appealed are  
21   not the ones where you can negotiate a small difference.  
22   Parties have incentives, especially debtors --

23          JUSTICE SOTOMAYOR:           You have --

24          MR. FELDMAN:           -- to get these cases --

25          JUSTICE SOTOMAYOR:           My problem still

1 remains. You have multiple ways of getting an  
2 interlocutory appeal. You can go to the bankruptcy  
3 court. You can go to the back court. You can go to the  
4 district court. And you can even ask the court of  
5 appeals to -- to grant one.

6 MR. FELDMAN: You do, but the --

7 JUSTICE SOTOMAYOR: So you have four levels  
8 of protection in the event that a -- one court, like the  
9 one you applied to, says no to an interlocutory appeal.

10 MR. FELDMAN: But I would just say that  
11 those are designed for the exceptional case as -- where  
12 they're used, not for classes of cases like denials --  
13 denials of confirmation where the debtor -- if something  
14 is important to that policy --

15 JUSTICE SOTOMAYOR: But if you have a novel  
16 issue of law like this one, you had all of those  
17 avenues.

18 MR. FELDMAN: Right. But and -- and we  
19 didn't actually get the certification, and it's also a  
20 burden on the courts of appeals and on the various  
21 courts to deal with all of the certifications. It adds  
22 an additional level of overhead.

23 JUSTICE SOTOMAYOR: Well, that's probably  
24 because there aren't that many denials that are based on  
25 novel issues of law.

1           MR. FELDMAN:           It -- it can be based on  
2   the -- the -- the debtors losing their house.  If I  
3   could reserve the balance of my time.

4           CHIEF JUSTICE ROBERTS:           Thank you, counsel.  
5           Mr. Tripp, welcome.

6           ORAL ARGUMENT OF ZACHARY D. TRIPP  
7           FOR THE UNITED STATES, AS AMICUS CURIAE,  
8           SUPPORTING THE PETITIONER

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

11           To just pick up on a couple of the  
12   questions.  In the -- in the circumstance after there  
13   has already been a dismissal of the case, it's -- and  
14   this is in our -- in our brief at page 28.  The -- the  
15   courts treat that as an affirmative injunction, right?  
16   Because that's an injunction against collection efforts  
17   by third parties that would need to be put in place.  
18   That's an extraordinary remedy, and -- and were not  
19   available at any circumstance in which that -- that has  
20   been granted.

21           And then the second piece, just to pick up  
22   quickly on the safety valves.  We just want to -- two  
23   points about that.  One, is we're not asking for -- this  
24   is not a case like Mohawk, where we're asking for an  
25   exception to the ordinary rule of finality because

1   it's -- it's really important to take an ordinary -- an  
2   appeal soon.

3           What we're saying is we want to apply the  
4   ordinary rule as written because the order here ended a  
5   discrete dispute, and so there is -- there is an appeal  
6   by right under --

7           CHIEF JUSTICE ROBERTS:           But that just begs  
8   the question.  Is -- if the discrete dispute is the  
9   confirmation of this particular plan, yes.  If the  
10   discrete dispute is consideration of the plan that is  
11   going to be part of the bankruptcy, then what you just  
12   said is wrong.

13          MR. TRIPP:           Right.  And I think that's  
14   absolutely the nub of the case is trying to determine  
15   whether this is a discrete dispute, and -- and so it's  
16   not about whether it's -- it's substantive rights or  
17   procedural.  It's really -- it's whether it's discrete.

18          And I think the path we suggest in our brief  
19   which is drawn from the Collier treatise is really by  
20   far the clearest way of getting at this.  So what we say  
21   is -- is first, you just recognize that a bankruptcy  
22   case is -- consists of adversary proceedings in  
23   contested matters, and then you just apply ordinary  
24   principles of finality to those contested matters.

25          And that will tell you three things.           It



1 will tell you that -- that there's -- so it will tell  
2 you that any order that did not end the adversary  
3 proceeding or contested matter, you know that's not  
4 final, and that could only be taken up as an  
5 interlocutory appeal. You know that it's ended a  
6 dispute because there's been a dispute, and then you  
7 know that it's at least formally distinct, right?  
8 Because you have this formally distinct adversary  
9 proceeding or contested matter.

10 JUSTICE KAGAN: But I think that the  
11 intuition --

12 MR. TRIPP: But if I could just follow up --

13 CHIEF JUSTICE ROBERTS: If you're going to  
14 talk about the formality, the bankruptcy judge who  
15 doesn't want to be appealed, and I assume most of them  
16 don't, simply has to say, you know, I think I will  
17 probably deny this unless you come back with something  
18 and tell me that -- why this creditor shouldn't get, you  
19 know, 200 dollars as opposed to 10 dollars. And then,  
20 although in substance, it's exactly the same as here,  
21 where he says this one's denied, but come back with  
22 another one --

23 MR. TRIPP: Right.

24 CHIEF JUSTICE ROBERTS: And yet I assume  
25 you'd have to say there are different results in those

1 two cases.

2 MR. TRIPP: Right. And -- and under  
3 Respondent's own rule, if that order comes out the other  
4 way, creditors have an absolute right to take that  
5 appeal over a \$100 difference, over a \$1  
6 difference, they can two levels of appeal straight to  
7 the court of appeals. And the creditors make that own  
8 judgment, and I think if there was a reason --

9 CHIEF JUSTICE ROBERTS: Well, but creditors  
10 want to get on with it. They want to get paid and out  
11 of it. I mean, the problem here is that we're dealing  
12 with bankruptcy where speed is of the essence. I mean,  
13 you've got dissipating assets and -- and all that.

14 MR. TRIPP: Right.

15 CHIEF JUSTICE ROBERTS: And yet, your  
16 creditors aren't terribly interested in delaying things.  
17 They want to move forward.

18 MR. TRIPP: No. And I think neither are  
19 debtors. Everybody has a very strong incentive to move  
20 on, and I think that's one of the reasons, you know --  
21 if there was a serious concern that there was going to  
22 be a flood of these -- of these debtor appeals about  
23 \$10, I think, frankly, you wouldn't see us supporting  
24 Petitioner, or you wouldn't see Bank of America  
25 supporting Petitioner. You'd expect to see creditor

1 groups supporting Respondent.

2 JUSTICE BREYER: Well, why isn't there, I  
3 mean, just the converse of what's been argued? The  
4 debtor is -- there's an automatic stay. He's living in  
5 his house every day. He's submitting plans. Let's say,  
6 the lawyer decides one every three days. They're not  
7 dismissed, but they say, do it -- do it over again. And  
8 I think this is great. Now, I'll appeal each one. And  
9 then I live in my house for ten years, because it takes  
10 a long time to resolve that. I'm not saying that that's  
11 good or bad, but I just wonder why -- apparently, that  
12 hasn't happened in any of the these circuits, and you  
13 explain to me why.

14 MR. TRIPP: Right. I think there's a number  
15 of reasons. One is that as soon as you propose a plan  
16 under 1326(a), within 30 days of that, you need to start  
17 making your payments. And if you're not making adequate  
18 protection payments to your secured creditors, then it  
19 doesn't matter what you're saying with your plan. Your  
20 entire case can and should be dismissed. And so I think  
21 we also --

22 JUSTICE BREYER: In other words, they would  
23 catch abuses.

24 MR. TRIPP: They would -- they would catch  
25 abuses. And -- and the other way to catch abuses

1 is -- is not only with respect to secured creditors,  
2 but -- but if you propose an absurd plan, then -- then  
3 that would be valid grounds for stay relief on behalf  
4 of -- of a creditor who was coming in to complain.

5 JUSTICE BREYER: My example uses absurd  
6 plans to make a point, but the point is just as good  
7 where the plans are not absurd, but plausible, but  
8 there's this, that, and the other thing. They're  
9 borderline cases. They do and can take time. You could  
10 and might proliferate appeals, so why hasn't that  
11 happened? I'm -- that's the question. Why hasn't that  
12 happened?

13 MR. TRIPP: Right. I think the number one  
14 reason is that nobody -- nobody -- somebody who is  
15 bankrupt and is going into Chapter 13 to save their  
16 house or their car or their bank account from imminent  
17 collection efforts isn't going to spend thousands of  
18 dollars they don't have taking an appeal to fight about  
19 what to do with \$100. The cases that we're most  
20 concerned about here -- and this is where Respondent's  
21 rule is really most perverse -- the most important cases  
22 where it's really dispositive as to whether you're going  
23 to be able to save your house, your car, or your bank  
24 account, they're saying first you need to dismiss the  
25 case and potentially lose your house, your car, or your

1 bank account before you can even take the appeal.

2 JUSTICE BREYER: Or -- or you ask for an  
3 interlocutory appeal.

4 MR. TRIPP: And -- and -- and I -- I think,  
5 frankly, as I was saying before about the  
6 interlocutory appeals, we don't -- we don't think that  
7 that's the right way to look at it because we're not  
8 asking for an expectation.

9 The other piece --

10 JUSTICE KAGAN: But do you think --

11 MR. TRIPP: -- you know, Respondent --

12 JUSTICE KAGAN: -- just -- just --

13 MR. TRIPP: Sorry.

14 JUSTICE KAGAN: -- would the interlocutory  
15 appeal route work? I mean, especially if this Court  
16 were to say in an opinion, you know, interlocutory  
17 appeals are really good for this exact purpose. Is  
18 there anything in the structure of the system, is there  
19 anything in the incentives of judges that would prevent  
20 them from doing interlocutory appeals?

21 MR. TRIPP: I -- I think a couple different  
22 answers to that. Some of these cases are going to be  
23 mixed questions of law and fact which are going to be  
24 difficult to take up in an interlocutory appeal.  
25 Creditors already have the right to take up the mixed --

1 mixed -- mixed question cases as of right, however they  
2 want to take them.

3 And then I think the other answer is,  
4 it's -- it's, frankly, completely backward to think of  
5 158(d) as a sort of -- as -- as a reason to say you  
6 should allow more -- more -- as a reason to -- to read  
7 finality relatively narrowly here, because Congress  
8 enacted 158(d) to expand the -- the path to appeal  
9 beyond that which 158(a) already had, because Congress  
10 in 2005 was concerned not that there were too many  
11 bankruptcy appeals, but there were too few --

12 JUSTICE KENNEDY: I -- I didn't  
13 understand --

14 MR. TRIPP: -- and the problem --

15 JUSTICE KENNEDY: -- the first part of your  
16 answer to -- to Justice Kagan. You -- you said, well,  
17 there's some cases where the interlocutory appeals won't  
18 work because it's -- it's partly factual and so forth.  
19 But those are the very cases you say there's an  
20 automatic right. Your position is there's a right to  
21 appeal. You don't even need the interlocutory orders.

22 MR. TRIPP: Well -- well, the --

23 JUSTICE KENNEDY: So it seems to me you're  
24 saying that now there are going to appeals in -- in --  
25 under your view, that really shouldn't be taken at all.

1 It seems to me that works against you.

2 MR. TRIPP: No, no, no. That's -- that's  
3 not what we're saying. What we're saying is that  
4 creditors have to right to make the judgment of whether  
5 it's important enough to them to take the appeal -- I'm  
6 sorry -- debtors should have that right. Creditors  
7 already that right. When it's a mixed question of law  
8 and fact, they can take two levels of appeals. They can  
9 take it all the way to the court of appeals. But if --  
10 if on the -- on the way up, if a -- if a court of  
11 appeals rules in favor of the creditor, and now the  
12 debtor wants to take another appeal, this is exact --  
13 the -- that -- and the debtor wants to take another  
14 appeal, then they're stuck, because on Respondent's  
15 rule, it becomes an interlocutory ruling --

16 JUSTICE KAGAN: The -- the --

17 MR. TRIPP: -- even though it's  
18 substantially symmetrical. It's either the plan will go  
19 into operation, or it will never go into operation.

20 JUSTICE KAGAN: The intuition that you're  
21 running up against here, Mr. Tripp --

22 MR. TRIPP: Right.

23 JUSTICE KAGAN: -- and the reason why people  
24 are searching to see if there are alternatives to your  
25 rule, is this idea that you're short-circuit --

1 short-circuiting what ought to be a kind of negotiated  
2 outcome. And, you know, what I -- what I hear you  
3 saying is just, no, you're not, because nobody will ever  
4 want to short-circuit a negotiated outcome. Is that --  
5 is that your answer?

6 MR. TRIPP: I think in the situations where  
7 a negotiated outcome is -- is fairly available, the  
8 incentives to reach that are overwhelming. They're  
9 very, very, very strong. And I think that's one of the  
10 reasons we just haven't seen a flood of appeals and one  
11 of the reasons that -- that both the United States and  
12 Bank of America is here for Petitioner and -- and  
13 nobody's come out to support Respondent.

14 And, I mean, I think, the -- the other --  
15 just -- just to think about the -- the intuition here,  
16 a -- a plan order is -- is basically in the nature of an  
17 injunction. It's saying that we want to put this thing  
18 into effect on the ground.

19 And for more than a century, even in  
20 ordinary civil litigation, the rule is that an order  
21 granting an injunction or an order denying an injunction  
22 is immediately appealable by right, and that you don't  
23 need to ask permission in order to take that appeal.

24 JUSTICE BREYER: That's a symmetrical  
25 argument, but we're asking a practical argument. I'm



1 not --

2 MR. TRIPP: Right.

3 JUSTICE BREYER: -- sure I accept the  
4 symmetrical argument, but I have to think about it.

5 The practical argument is imagine you're a  
6 bankruptcy judge, and you get a plan, and it's not  
7 perfect, and you think, you know, they ought to change  
8 this, they ought to change that, they ought to change  
9 the other thing, it would be okay. Now, if you say, go  
10 change it, go change it, I deny this one, but go change  
11 it, well, you'd have to take into account, gee, maybe  
12 I'll get an appeal. God, this is going to slow  
13 everything down.

14 It's just simpler to say, figure out some  
15 way around this. I'm afraid, in other words, that the  
16 bankruptcy judges will -- would get confused on your  
17 approach. Is there a concern there that the negotiation  
18 will be made more difficult?

19 MR. TRIPP: May I still answer?

20 CHIEF JUSTICE ROBERTS: Sure.

21 MR. TRIPP: I'm -- I'm not sure I  
22 understand. Get confused about when the order becomes  
23 final?

24 JUSTICE BREYER: No, forget it. Forget it.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Hallward-Driemeier.

2 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

3 ON BEHALF OF THE RESPONDENT

4 MR. HALLWARD-DRIEMEIER: Mr. Chief Justice,  
5 and may it please the Court:

6 I agree with Your Honor's question, Mr.  
7 Chief Justice, that confirmation is sort of the central  
8 focus of the Chapter 13 proceeding, and, in fact, speed  
9 is of the essence; and, Justice Kagan, your question  
10 suggesting that it is supposed to be, in -- in many  
11 respects, a negotiated process.

12 And suggesting and -- and creating an  
13 opportunity for debtors to take an immediate appeal for  
14 two layers, as of right, perhaps multiple times through  
15 the confirmation process would dramatically change that  
16 dynamic.

17 JUSTICE SOTOMAYOR: The -- who -- who has  
18 the incentive to do that? The incentive is someone like  
19 you, who has a pure legal question. But they're saying  
20 there isn't an incentive to do that in a Chapter 13.

21 MR. HALLWARD-DRIEMEIER: Well, I think there  
22 are incentives. There are both offensive incentives and  
23 defensive incentives: Defensive, first, the -- the  
24 person who is trying to save their home and thinks that  
25 they'll be able to stay there longer if they're able to

1 take multiple appeals, each of which could take two  
2 years; offensively, by taking an appeal or at least  
3 threatening to take an appeal that would delay the  
4 process for years significantly increases the leverage  
5 that the debtor has over the creditors in terms of the  
6 negotiating. It dramatically shifts --

7 JUSTICE GINSBURG: Do we have any --

8 MR. HALLWARD-DRIEMEIER: -- the --

9 JUSTICE GINSBURG: Do we have any history,  
10 in the circuits that have the rule, that you can appeal  
11 of right from a denial of a plan proposal?

12 MR. HALLWARD-DRIEMEIER: There -- there is  
13 not much history to look at here. The -- the Fifth  
14 Circuit was the first to suggest that there might be a  
15 right to appeal, but they actually held that that was  
16 only true where there was no leave to amend. So in our  
17 case, it would not have allowed an immediate right of  
18 appeal.

19 The -- the Third and Fourth Circuits have  
20 adopted the rule relatively recently, since 2005, after  
21 Congress amended the statute last. When Congress  
22 amended it, all of the courts of appeals that had  
23 clearly ruled had ruled in our way. So --

24 JUSTICE KAGAN: Well, 2005 --

25 MR. HALLWARD-DRIEMEIER: -- we don't have --

1 JUSTICE KAGAN: -- that's, you know, 10  
2 years. And these cases are coming up all of the time,  
3 and it seems as though you have a good natural  
4 experiment that goes on here. And -- and it hasn't  
5 really led to the kinds of bad consequences that we're  
6 all --

7 MR. HALLWARD-DRIEMEIER: Well --

8 JUSTICE KAGAN: -- surmising about.

9 MR. HALLWARD-DRIEMEIER: -- I -- I think  
10 there are -- there are certainly potential reasons for  
11 that. One is none of those circuits have a bankruptcy  
12 appellate panel, and there is a general impression,  
13 rightly or wrongly, that bankruptcy judges are more  
14 debtor-friendly than Article III judges. And so the  
15 opportunity to take an immediate appeal as of right to a  
16 panel of three other bankruptcy judges may well be  
17 more -- more attractive to a debtor than going to an  
18 Article III judge who might well be perceived as being  
19 less hospitable than the bankruptcy judge --

20 JUSTICE KENNEDY: When --

21 MR. HALLWARD-DRIEMEIER: -- than you  
22 might --

23 JUSTICE KENNEDY: When you argue as -- as  
24 you've just argued that this would give the debtors too  
25 much unfair leverage, how does that account for the fact

1 that some of the very major creditors in the country on  
2 the Petitioner's side?

3 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I  
4 think --

5 JUSTICE KENNEDY: I mean, they must not  
6 think there's too much leverage.

7 MR. HALLWARD-DRIEMEIER: Well, Your Honor,  
8 the -- the rule that Congress has adopted about the --  
9 the safety valve, if you will, for getting issues  
10 reviewed in the courts of appeals gives the ultimate  
11 control of the docket to the court, not the parties.  
12 Even if the parties agree that the issue should go to  
13 the court of appeals, the court of appeals has to agree  
14 to accept it.

15 JUSTICE GINSBURG: Do we know why --

16 MR. HALLWARD-DRIEMEIER: It's not surprising  
17 to me at all --

18 JUSTICE GINSBURG: Do we know why, in this  
19 case, the -- the bankruptcy -- whatever you call it --  
20 the BAP, they would not certify an appeal?

21 MR. HALLWARD-DRIEMEIER: Well, I think that,  
22 first, they gave a procedural basis, that the -- the  
23 debtor had already filed the notice of appeal before  
24 they sought leave to appeal, and -- and they cited that.  
25 But they also, I think, recognized that at that point,

1 four bankruptcy judges had already ruled against the --  
2 the debtor.

3 The -- the First Circuit looked like at  
4 this --

5 CHIEF JUSTICE ROBERTS: Counsel, just to --  
6 you were winding up to answer Justice Kennedy's  
7 question, and -- and you haven't -- you didn't throw the  
8 pitch. So what is your answer to his question?

9 JUSTICE SCALIA: About -- about why the Bank  
10 of America and the United States are on the other side.

11 MR. HALLWARD-DRIEMEIER: Well, I -- I think  
12 that a good reason is that they would rather that the  
13 control over ability to take an appeal be in the  
14 parties' hands, rather than the court's hands, which is  
15 where Congress put it in terms of the interlocutory  
16 appeal avenue.

17 JUSTICE KENNEDY: But that --

18 JUSTICE SCALIA: Well, it's already in their  
19 hands, isn't it, when -- when -- when it's a  
20 confirmation of a plan, right? It's in the -- it's in  
21 their hands, in the parties' hands.

22 MR. HALLWARD-DRIEMEIER: That -- that's  
23 right because --

24 JUSTICE SCALIA: They -- they -- they want  
25 it to be in the debtor's hands?

1           MR. HALLWARD-DRIEMEIER:           As -- as the Court  
2   held in Espinosa, when a -- a plan is confirmed, it has  
3   immediate legal effect, res judicata effect even. So  
4   clearly that is appealable. There is no res judicata  
5   effect, or at least it's never been thought that there  
6   was from the denial of a plan --

7           JUSTICE SCALIA:           So why do they want the  
8   debtor to have control of bringing an appeal? That's  
9   what I'm asking.

10          MR. HALLWARD-DRIEMEIER:           Well, if we  
11   actually look --

12          JUSTICE SCALIA:           You really don't know. It  
13   doesn't make any sense, does it?

14          MR. HALLWARD-DRIEMEIER:           The Bank of America  
15   brief, I have to say, is somewhat surprising to me,  
16   because the rationale that they give is that in their  
17   case, which is also pending here on the petition for  
18   cert., they won in the district court, but that's not  
19   good enough for them. They want to force the court of  
20   appeals to decide this issue so that they have  
21   controlling circuit preference.

22          JUSTICE BREYER:           What -- what is the -- why  
23   is it that a debtor can't -- a creditor can't appeal? I  
24   mean, suppose you had a plan, the proposed plan said, I  
25   want to give \$200 a month to Smith and a \$100 to Jones,

1 and the bankruptcy judge said, I'm sorry, I cannot  
2 approve that. I want it the other way around. Well,  
3 Smith is hurt by what he said, so why can't Smith  
4 appeal?

5 MR. HALLWARD-DRIEMEIER: Your Honor, I  
6 agree, the -- the Petitioner answered the question  
7 earlier suggesting that only the debtor could appeal.  
8 If the determination of this Court is that the order  
9 denying confirmation with leave to appeal is a final  
10 order, it would follow, I would think, that there is res  
11 judicata effect of that order just as Espinosa held, and  
12 that not only could a creditor appeal, the creditor must  
13 appeal in order to preserve their rights.

14 And when one thinks about this in the -- how  
15 it would apply in the Chapter 11 context, when you don't  
16 simply have one plan, at least after the period of  
17 exclusivity has expired, but rather multiple plans, the  
18 debtor has suggested and the creditors have proposed  
19 theirs, it raises very serious questions of what the  
20 bankruptcy court is to do. While one plan that's been  
21 denied confirmation is up on appeal, we have all these  
22 other plans that are pending in the bankruptcy court.  
23 Congress envisioned that that was going to be the period  
24 of negotiation. That there would be ultimately a  
25 consensus plan.



1           In bankruptcy, perhaps above any other  
2   circumstance, the right plan is very often not any  
3   party's first plan; it's everybody's second plan. And I  
4   want to make clear, again, that there are actually three  
5   avenues for a debtor whose proposed plan has been  
6   denied. The first, as the Court has discussed already,  
7   is to seek leave for interlocutory appeal. The Ransom  
8   case, which has already been discussed earlier today, is  
9   an example of that. The question there was whether  
10  automobile ownership costs were an allowable expense  
11  when the -- the debtor was not making payments on a car.  
12  That issue was -- the plan was denied confirmation on  
13  that basis, the bankruptcy court certified it for  
14  interlocutory appeal, it came up through the court of  
15  appeals --

16           JUSTICE KAGAN:           But Mr. Hallward-Driemeier  
17  --

18           MR. HALLWARD-DRIEMEIER:           -- all the way to  
19  this Court.

20           JUSTICE KAGAN:           -- I mean, you have to admit  
21  that it's very unpredictable. Some judges will do it,  
22  some judges won't. It won't be completely clear when  
23  they do it or why they do it, it will just be kind of  
24  luck of the draw.

25           MR. HALLWARD-DRIEMEIER:           And -- And -- indeed

1 the amicus briefs complain that Congress's solution to  
2 this problem which was to expand the avenues for  
3 interlocutory appeal are inadequate because courts  
4 aren't giving leave freely enough. That, Your Honors,  
5 is not a reason to adopt a rule of finality that puts  
6 the power in the parties' --

7 JUSTICE KAGAN: Well, yes it is. I mean,  
8 we're trying to figure out what's the best alternative  
9 of these systems in a world in which we're not  
10 particularly limited by text.

11 MR. HALLWARD-DRIEMEIER: Well --

12 JUSTICE KAGAN: So it's quite important how  
13 the other alternatives work. And if the interlocutory  
14 appeal alternative really isn't working because courts  
15 aren't using it for these kinds of purposes, then that's  
16 an important factor to know about, isn't it?

17 MR. HALLWARD-DRIEMEIER: Well, I think  
18 that -- I think that the proper reaction to that would  
19 be, as Your Honor's question earlier suggested, to  
20 instruct the courts that they should apply it more  
21 liberally. That that -- that's the way to gauge.  
22 The -- the Petitioner says --

23 JUSTICE SCALIA: What are the other two?  
24 You started off saying there were three. You got out  
25 the first.

1 MR. HALLWARD-DRIEMEIER: Seeking  
2 interlocutory --

3 JUSTICE SCALIA: And I'm on -- on the edge  
4 of my seat, waiting to hear the other two.

5 (Laughter.)

6 MR. HALLWARD-DRIEMEIER: The second would be  
7 to accept dismissal, to say, Your Honor, I don't seek to  
8 file an amended plan, seek -- permit dismissal, which  
9 would have happened two days after --

10 JUSTICE SOTOMAYOR: Assume we don't think  
11 that's very effective.

12 MR. HALLWARD-DRIEMEIER: Okay. That would  
13 be with seeking a stay. I think the party could seek an  
14 indicative ruling of whether a stay would be granted  
15 before choosing that option. And then the third  
16 opportunity would be to so-called file the second  
17 amended plan, to file a plan that would get confirmed,  
18 and then take an appeal from that.

19 JUSTICE KAGAN: But that -- but you can see  
20 why that doesn't seem very good from anybody's point of  
21 view, including the system's point of view, right?  
22 You're going to file a plan that you don't like, that  
23 you don't want to live under, just in order to get an  
24 appeal right where you can come in and say, really what  
25 we want you to review is three-months ago when we had a

1 different plan.

2 MR. HALLWARD-DRIEMEIER: Well, I think  
3 what's important is that it's not your preferred plan as  
4 the debtor. But it's not that you wouldn't be  
5 willing -- that it's not better than, for example,  
6 dismissal. Here in this case, the debtor chose to take  
7 an immediate appeal but, importantly, they moved the  
8 bankruptcy court to extend the time to file an amended  
9 plan until after the case came back from the court of  
10 appeals.

11 This debtor wants to file another plan if  
12 the bankruptcy's decision is upheld, and that's  
13 because --

14 JUSTICE GINSBURG: Well, can we go back to  
15 the route that you just described? Because it sounds  
16 strange to me.

17 So the debtor's first plan is denied. He  
18 comes up with a second plan. Still in the second plan,  
19 the judge says, okay, he's in the position of being a  
20 winner. I don't know of a situation where somebody  
21 who -- who asks for certain relief, got it, can then  
22 appeal that relief, because there is a relief that would  
23 be more favorable.

24 MR. HALLWARD-DRIEMEIER: Oh, oh, it happens  
25 all the time in civil litigation, Your Honor, because

1 the interlocutory orders merge with the final order. So  
2 if the -- if -- in typical civil litigation, if the  
3 plaintiff believed that they were entitled to multiple  
4 damages or they believed that they were entitled to lost  
5 profits or some other measure of damages and instead  
6 they were awarded something, but lesser measure of  
7 damages --

8 JUSTICE KAGAN: Well, I take it some courts  
9 will do it and some courts won't. But even, let's say  
10 you're right, that all courts will say, okay, now, that  
11 we're here, I'll go and I'll look back at the plan that  
12 you really wanted. I mean, you are -- you said, well,  
13 it wasn't his first choice plan, but he's accepted it.  
14 But maybe he's accepted it just to get the appeal on the  
15 other plan. If he's stuck with that latter plan, he's  
16 actually going to bag the whole thing and go into  
17 Chapter 7 or something.

18 MR. HALLWARD-DRIEMEIER: I --

19 JUSTICE KAGAN: And you're just making  
20 people run through hoops and -- and agree to plans that  
21 nobody is willing to live under.

22 MR. HALLWARD-DRIEMEIER: I - I -- actually  
23 think it's very unlikely. The facts of this case are, I  
24 think, a very good example. The debtor here, the entire  
25 premise of the proposed plan, is this debtor is entirely

1 capable of making his monthly mortgage payment according  
2 to the terms of his mortgage.

3       There are certain other unsecured creditors.  
4 And the debtor says, and I'm able to pay monthly \$155 on  
5 those two. On a -- and then there are other creditors  
6 who failed to file proofs of claim. Those creditors  
7 which are in the tens of thousands of dollars, they're  
8 going to go away if a plan is confirmed, any plan is  
9 confirmed.

10       So what this debtor could have done is say,  
11 okay, I'm going to keep making the same monthly payments  
12 just as I proposed, just as I should under my mortgage,  
13 but I'm not going to get to cram down to the bank. I'm  
14 not going to get to force them to take a haircut. I'm  
15 still going to get to pay off in a very regular way my  
16 other unsecured creditors \$155 a month, that will be  
17 done in I think we calculated about 20 months. That is  
18 definitely a preferred plan than anything else, again,  
19 because those creditors who failed to file proofs of  
20 claim, they're gone. Tens of thousands of dollars of  
21 debt.

22       JUSTICE BREYER:       All right. Now, I asked  
23 the other side this, I'd like to hear your answer,  
24 though it's more -- I -- this is a contested matter.  
25 Collier says there are endless contested matters. He

1 lists about 47. All right. Now, when I asked, but does  
2 that mean in all those cases where there is an order in  
3 a contested matter, there will be an appeal? The answer  
4 was no. No. But this case is different because it has  
5 a beginning, middle, and an end, and it's a discrete  
6 proceeding.

7 Now, is that, in your opinion, the correct  
8 test for sifting among contested matters? Are there  
9 other contested matters, where appeal, as if they were  
10 final orders, is allowed? What is the criterion? Will  
11 it, in fact, produce a nightmare? You're going to say,  
12 yes, but I mean, I'd like to know why.

13 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I  
14 guess I would start by answering that I don't think that  
15 contested matter is the -- the standard.

16 JUSTICE BREYER: They don't either.

17 MR. HALLWARD-DRIEMEIER: Well, the  
18 United States did propose that -- that standard. And I  
19 think that we've shown that that can't possibly be  
20 correct.

21 JUSTICE BREYER: All right, then I think  
22 they might now agree. So what is the standard?

23 MR. HALLWARD-DRIEMEIER: So - So -- we think  
24 that the proper question is, what is a proceeding?

25 JUSTICE BREYER: Yes.

1           MR. HALLWARD-DRIEMEIER:           -- pursuant to the  
2 Bankruptcy Code. Section 157(b)(2) lists a number of  
3 proceedings, one of which is confirmations of plans,  
4 which I think is fully consistent with our view that  
5 it's confirmation that is the purpose of this, and until  
6 you get there, you haven't reached the end, especially  
7 when it's denied with leave to amend any small factual  
8 dispute, any -- it can be big or small. It can be many,  
9 many --

10          JUSTICE BREYER:           So far, it sounds to me as  
11 if you may agree with them that the correct test is, is  
12 it a discrete proceeding within the larger case, and  
13 there's nothing that will help me get more specific than  
14 that.

15          MR. HALLWARD-DRIEMEIER:           Well, I think that  
16 their --

17          JUSTICE BREYER:           Am I right about -- on the  
18 standard of what counts as a final order for appeal? I  
19 can't -- I don't want to put words in your mouth --

20          MR. HALLWARD-DRIEMEIER:           We --

21          JUSTICE BREYER:           -- but that I can say there  
22 is basic agreement there.

23          MR. HALLWARD-DRIEMEIER:           Well, I -- I would  
24 say that this -- there -- there has been in the  
25 briefing, at least, this amount of disagreement between



1 us. We think that the word "finality" -- or "final,"  
2 rather, as used in Section 158, the bankruptcy appeal  
3 provision, is the same as "final" as it's used in -- in  
4 1291 for civil appeals, that the judicial unit is  
5 different. It can be a proceeding as opposed to the  
6 whole case. But "final" has been interpreted to mean  
7 terminates the judicial unit.

8 The -- the Court has, in a sense,  
9 dissociated -- it's not, we're -- we're done with this  
10 one now. Okay? They have suggested that "final" may mean  
11 something a little bit broader in bankruptcy or that the  
12 use of the word "order" instead of "decision" in  
13 bankruptcy may be something different.

14 That argument there which -- and they've  
15 invoked this notion of flexible finality -- that should  
16 send off alarm bells in the Court's mind, because  
17 flexible finality is basically the same as a practical  
18 construction of finality, which is the clause that  
19 spawned the Collateral Order Doctrine which the Court  
20 has spent the last 30 years trying to put back in a box.

21 And that is really the problem here; that  
22 unless there is a clear rule -- and we think it's the  
23 statutory language proceeding. We think Section 157  
24 provides a list of such proceedings, and for these  
25 purposes, it's --

1 JUSTICE SOTOMAYOR: Well, but that --

2 MR. HALLWARD-DRIEMEIER: -- confirmation of  
3 a plan.

4 JUSTICE SOTOMAYOR: But that is your -- it's  
5 still begging the question, because they're saying  
6 the -- the proceeding is the confirmation of a plan, and  
7 if the confirmation of the plan is a denial, that -- that  
8 ends that proceeding. So you are begging the question.

9 MR. HALLWARD-DRIEMEIER: Well, I -- I - I  
10 don't think so, Your Honor, because I think that -- I'm  
11 drawing the analogy to 1291. I think final means the  
12 same thing. And in 1291, if you have a -- a complaint  
13 that's dismissed with leave to amend, that's not final.  
14 If you have a plan that's denied confirmation with leave  
15 to amend, that's not final.

16 If you have a claim, a proof of claim, that  
17 is rejected with leave to amend or a claim of priority  
18 that isn't rejected with leave to amend, that's not  
19 final in our view.

20 On their view, I don't know, because they  
21 assume that if you had a proof of claim, and it was  
22 denied with leave to amend, that must be immediately  
23 appealable as final, because now the creditors'  
24 preferred view of their claim has been rejected. Or  
25 maybe their rule is -- I don't know -- only if the basis

1 of the denial was a rule of law.

2 But their -- I think they rightly understand  
3 that you can't have a rule of finality that turns on  
4 whether it is or is not a rule of law, so as this  
5 Court's precedent instructs, we decide as a category.  
6 And as a category, plans are denied multiple times  
7 within a bankruptcy, many times for minute, fact-based  
8 reasons. And, again, the incentive structure that would  
9 be created -- we've talked so far about Chapter 13  
10 pretty exclusively, but the -- the Petitioner agreed  
11 that the rule would likely apply to Chapter 11, as well.

12 In Chapter 11, things are quite different.  
13 In Chapter 11, the debtor is often the  
14 debtor-in-possession is the estate. They're playing  
15 with house money. They're spending the creditors' money  
16 because the administrative expenses of the estate read  
17 the lawyers' fees come off of the estate.

18 So for them to take an appeal on any issue  
19 that they can, you know, reasonably claim a legitimate  
20 dispute about and thereby prolong their control over  
21 the -- of the estate, prolong the date when  
22 distributions will be made --

23 JUSTICE KENNEDY: And they have resources to  
24 do it.

25 MR. HALLWARD-DRIEMEIER: And they have the

1 resources to do it.

2 JUSTICE KENNEDY: And Chapter 13 doesn't?

3 MR. HALLWARD-DRIEMEIER: That's right. But  
4 the rule is going to be the same. And in Chapter 13,  
5 what we've seen -- we didn't see the -- the -- the big  
6 numbers. We did see over seven hundred reported, or --  
7 or at least on Westlaw, decisions in appeals that had  
8 been pursued pro se.

9 So an individual debtor who is intent on  
10 preserving their ability to stay in the house certainly  
11 could take a number of appeals. Again, this case, I  
12 think, proves the point. This case started with an  
13 objection by the Trustee to the fact that this Debtor  
14 claimed an automobile ownership cost, the same one that  
15 was ultimately rejected by the Court in Ransom. That  
16 issue could have been taken up on immediate appeal.

17 The second time they amended it was because  
18 the bank had objected that when they listed the payments  
19 that would be made on the mortgage, they only gave the  
20 principal and interest. They weren't going to pay the  
21 insurance or the taxes to escrow. That could have been  
22 taken all the way up.

23 And then we had the question of the hybrid  
24 plan. That's setting aside any other disputes that  
25 might have existed about the value of the -- the home,

1    whether Zillow is an appropriate measure. That was an  
2    issue of dispute between the parties. Any of those  
3    could have given rise to an appeal.

4           And, again, there can be a defensive reason  
5    for taking an appeal because the -- the debtor wants to  
6    stay in the house to prevent foreclosure, or it could be  
7    offensive because they want those creditors to know  
8    they -- if they want to see their money, they better  
9    agree to the debtor's terms.

10           So it's -- it's a significant concern, I  
11    think, and, again, because you're making these  
12    determinations on the basis of the category, it's  
13    important to remember that even those factual disputes  
14    could be -- and when we think of, you know -- which do  
15    we think is -- is -- is more unlikely? That the debtors  
16    are going to exercise restraint. Trust the debtors.  
17    They won't take appeals when they shouldn't be taken.  
18    Or do we trust the courts to apply the rules, the very  
19    liberal rules, for interlocutory review. And to do  
20    that --

21           JUSTICE KAGAN:           Mr. Hallward-Driemeier, I  
22    mean --

23           MR. HALLWARD-DRIEMEIER:           -- wisely --

24           JUSTICE KAGAN:           -- one of the things that  
25    confuses me about this case, quite honestly, is why you

1 don't have more people on your side. In other words,  
2 where are the creditors, and where are the amicus briefs  
3 from the creditors who think that your position is  
4 important in order to prevent all of these appeals that  
5 you say are going to ruin the system?

6 MR. HALLWARD-DRIEMEIER: Well, without, I  
7 hope, being too flippant, when the Bank of America is on  
8 the other side, a lot of creditors give pause as to  
9 whether they want to be adverse to them on our side.

10 A lot of counsel have concern about whether  
11 they should file a brief on our side.

12 But the -- I've already, I think, explained  
13 that the Bank of America, in their amicus brief, have  
14 explained their reason for wanting to get --

15 JUSTICE KAGAN: Well --

16 MR. HALLWARD-DRIEMEIER: -- reviewed.

17 JUSTICE KAGAN: -- you explained a reason  
18 why a particular company, creditor, is on the other  
19 side. But, I mean, really, do you think everybody in  
20 the world is so intimidated by the Bank of America?

21 (Laughter.)

22 JUSTICE KAGAN: That no --

23 CHIEF JUSTICE ROBERTS: Maybe they thought  
24 you could handle it on your own.

25 (Laughter.)

1           MR. HALLWARD-DRIEMEIER:           I think -- you --  
2   you know, Your Honor, it -- I think it -- it is actually  
3   interesting because here the Court has -- and again,  
4   I'm -- I'm borrowing from the Collateral Order Doctrine  
5   cases -- what the Court has stressed is that even though  
6   the parties may have an interest in being able to force  
7   the court of appeals to decide an issue, the judicial  
8   system has its own interest. The courts have their own  
9   interest. The court of appeals have an interest in not  
10  being forced to resolve issues before they need to be  
11  resolved because some of those issues are going to go  
12  away.

13           If there is an appeal from a later plan  
14  that's ultimately confirmed, I would suspect strongly  
15  that there will be many disputes along the way that will  
16  have fallen out either because they became moot --

17           JUSTICE BREYER:           I thought that was the  
18  reason that -- that the -- the -- all are debating about  
19  what the incentives are. Who's going to take more  
20  appeals and who isn't really has nothing to do with it.  
21  What they -- world they actually face is where nobody  
22  takes appeals, period, from denials anyway. And -- and  
23  they say the bankruptcy judges are all over the lot on  
24  some of this, and they'd like to generate some appeals  
25  because they believe that then you would have a more

1 uniform law. It would be easier for the creditors as  
2 well as the debtors. And I think that's their basic  
3 argument in their brief.

4 MR. HALLWARD-DRIEMEIER: It -- it -- it is  
5 their argument and --

6 JUSTICE BREYER: I -- I don't know where to  
7 put that --

8 MR. HALLWARD-DRIEMEIER: Well --

9 JUSTICE BREYER: -- in this --

10 MR. HALLWARD-DRIEMEIER: I guess I look at  
11 this Court's docket and it seems to me that bankruptcy  
12 cases are fairly well represented in the appellate  
13 courts. I -- I do agree that there are issues on which  
14 parties would like to get reviewed, but Congress has  
15 considered that very issue. And in the statute -- in  
16 2005, at a time when it was effectively 5-0 our way on  
17 this issue. The only question was the Fifth Circuit.  
18 But, again, they had suggested that if leave was given  
19 to amend, it would not be final.

20 When Congress looked at it in that context,  
21 they didn't change the final order rule which had been  
22 construed by five courts of appeals at that time. What  
23 they did was they created a new avenue for interlocutory  
24 appeal direct to the court of appeals precisely to get  
25 that kind of guidance, but -- but they gave the power to



1 the court of appeals to decide whether the issue was  
2 coming up --

3 JUSTICE BREYER: So one -- one thing. If  
4 you were -- maybe there's an argument against this --  
5 but suppose for argument's sake I agreed with you on the  
6 basic point. It would then seem important to put in the  
7 opinion there is a problem here about there being  
8 insufficient appeals to generate law, but there is a  
9 mechanism, namely, the interlocutory mechanism, which  
10 perhaps has been used too sparingly. Now, what do you  
11 think of that?

12 MR. HALLWARD-DRIEMEIER: I -- I think that  
13 would be very wise on the Court's part.

14 JUSTICE BREYER: That was Justice Kagan's  
15 point initially.

16 MR. HALLWARD-DRIEMEIER: Because -- and --  
17 and I think we should -- should recall that under  
18 Section 158, the first level of review which is  
19 exercised by the district court over interlocutory  
20 orders is really plenary. They can review any  
21 interlocutory order of the bankruptcy court.

22 JUSTICE SCALIA: You know, sometimes they  
23 even ignore our holdings. Do you think they're not  
24 going to ignore this --

25 (Laughter.)

1 JUSTICE SCALIA: -- this -- this piece of  
2 advice?

3 MR. HALLWARD-DRIEMEIER: Well, Your -- Your  
4 Honor --

5 (Laughter.)

6 MR. HALLWARD-DRIEMEIER: I think that the --  
7 I think that this -- this approach is the same one the  
8 Court took in Mohawk. In Mohawk, the Court said, No,  
9 we're not going to create an appeal as of right to  
10 challenge in order to disclose one's attorney-client  
11 confidential material, but -- but the courts should  
12 apply the rules of interlocutory appeal or mandamus in a  
13 way --

14 JUSTICE BREYER: And did they take our  
15 advice?

16 MR. HALLWARD-DRIEMEIER: Well, I have not --  
17 I have not researched that, Your Honor. But to  
18 conclude, I think that the critical question is what's  
19 the proceeding. And the proceeding as set forth in  
20 157(b)(2) is confirmation of plans.

21 That is the core purpose of a Chapter 13 or  
22 a Chapter 11. Until that happens, there are no legal  
23 rights that are affected. That's the difference between  
24 denial of plan confirmation with leave to amend and  
25 confirmation. One sets rights. Of course, it's

1 immediately appealable. Res judicata, even, under this  
 2 Court's decision in Espinosa, but denial of plan  
 3 confirmation with leave the amend maybe even, as Your  
 4 Honor suggested earlier -- Justice Breyer, suggesting  
 5 precisely how to amend in order to get it confirmed,  
 6 that is not immediately appealable.

7 And I don't think that the Court should rely  
 8 on the self-restraint of the parties to avoid the  
 9 problems with that problem. Instead, it's proper use of  
 10 the tools that Congress gave the courts in the 2005  
 11 amendments.

12 If there are no further questions, thank  
 13 you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
 15 Mr. Feldman, two minutes.

16 REBUTTAL ARGUMENT OF JAMES A. FELDMAN  
 17 ON BEHALF OF THE PETITIONER

18 MR. FELDMAN: Thank you.

19 For -- just one thing on -- on Section  
 20 158(a), the plenary, the -- so what my friend said was  
 21 plenary right of interlocutory review, actually every  
 22 court that has looked at that has said -- they applied  
 23 the same standard as under 1292(b). But the main point  
 24 here is that what the debtor is faced with is two very,  
 25 very difficult roads to actually getting review of what

1     could be an important legal decision. On the dismissal  
2     side, in addition to the problems caused by losing the  
3     automatic stay and trying to convince the court to grant  
4     a stay, there's also the disability of if you  
5     file -- file within -- what is it? A year, I think.  
6     The automatic -- if you refile a case, you only get an  
7     automatic stay for 30 days. And there's other  
8     disabilities that we talk about in our brief.

9             So that is a very hard thing to impose on  
10    somebody where the creditor can make -- take an appeal  
11    just as of right because they don't like what the  
12    confirmed plan said.

13            On the other hand, as far as trying to  
14    confirm a later plan, what this forces the debtor into  
15    is a situation where a debtor may have to try to figure  
16    out and propose a plan that the debtor might even prefer  
17    not to be in bankruptcy at all rather than to live under  
18    that plan. But yet, the only way for the debtor to get  
19    the review of the earlier denial of confirmation is to  
20    propose some plan that maybe disposes of property in a  
21    way that the debtor completely doesn't want and would  
22    rather have just given up on the whole thing.  
23    Nonetheless, they have to propose the plan, wait for  
24    objections, litigate it through, get it confirmed, and  
25    then appeal that. And that -- those are severe burdens

1 to put on the debtor.

2 Now, every -- the reasons why Bank of  
3 America and the United States are here, I think, is that  
4 there is a need for bankruptcy precedent to be  
5 developed. And one problem is that debtors in this  
6 situation are not able to get the review of the court of  
7 appeals, which is their only way of getting actually to  
8 an Article III judge at all. And they're not able to  
9 get that, and for those reasons, we ask that the  
10 decision of the court of appeals should be reversed.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

13 (Whereupon, at 12:06 p.m., the case in the  
14 above-entitled matter was submitted.)  
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<p><b>A</b></p> <p><b>ability</b> 38:13 52:10</p> <p><b>able</b> 19:18 28:23 34:25,25 46:4 55:6 61:6,8</p> <p><b>aboveentitled</b> 1:12 61:14</p> <p><b>absolute</b> 26:4</p> <p><b>absolutely</b> 24:14</p> <p><b>absurd</b> 28:2,5,7</p> <p><b>abuses</b> 27:23,25,25</p> <p><b>accept</b> 8:11 33:3 37:14 43:7</p> <p><b>accepted</b> 45:13,14</p> <p><b>account</b> 20:12 28:16,24 29:1 33:11 36:25</p> <p><b>action</b> 10:12</p> <p><b>addition</b> 60:2</p> <p><b>additional</b> 14:23 22:22</p> <p><b>address</b> 3:22 14:25</p> <p><b>adds</b> 22:21</p> <p><b>adequate</b> 27:17</p> <p><b>administrative</b> 51:16</p> <p><b>admit</b> 41:20</p> <p><b>adopt</b> 42:5</p> <p><b>adopted</b> 17:13,17 35:20 37:8</p> <p><b>advantage</b> 12:7</p> <p><b>adversary</b> 24:22 25:2,8</p> <p><b>adverse</b> 54:9</p> <p><b>advice</b> 58:2,15</p> <p><b>affirmative</b> 23:15</p> <p><b>afraid</b> 33:15</p> <p><b>ago</b> 43:25</p> <p><b>agree</b> 19:2 34:6 37:12,13 40:6 45:20 47:22 48:11 53:9 56:13</p> <p><b>agreed</b> 51:10 57:5</p> <p><b>agreement</b> 48:22</p> <p><b>agrees</b> 9:20 15:4</p> <p><b>ahead</b> 3:24 4:16</p>	<p><b>alarm</b> 49:16</p> <p><b>allow</b> 4:5 11:5 21:6 30:6</p> <p><b>allowable</b> 41:10</p> <p><b>allowed</b> 10:20 35:17 47:10</p> <p><b>allowing</b> 21:12,14</p> <p><b>alternative</b> 8:10 42:8,14</p> <p><b>alternatives</b> 31:24 42:13</p> <p><b>amend</b> 11:8,13 15:8,23 20:17,23 35:16 48:7 50:13 50:15,17,18,22 56:19 58:24 59:3 59:5</p> <p><b>amended</b> 9:12 35:21,22 43:8,17 44:8 52:17</p> <p><b>amendment</b> 11:14 14:23 15:1</p> <p><b>amendments</b> 59:11</p> <p><b>america</b> 21:8 26:24 32:12 38:10 39:14 54:7,13,20 61:3</p> <p><b>amicus</b> 1:20 2:7 23:7 42:1 54:2,13</p> <p><b>amount</b> 48:25</p> <p><b>analogy</b> 50:11</p> <p><b>answer</b> 20:18 30:3 30:16 32:5 33:19 38:6,8 46:23 47:3</p> <p><b>answered</b> 40:6</p> <p><b>answering</b> 47:14</p> <p><b>answers</b> 29:22</p> <p><b>anybody</b> 4:14</p> <p><b>anybodys</b> 43:20</p> <p><b>anyway</b> 13:2 55:22</p> <p><b>apparently</b> 27:11</p> <p><b>appeal</b> 4:6,12,14,24 5:11,19 6:10,20 6:25 7:19,21,22 7:23 8:2,10,15 11:4,19 12:2,7 14:3,10,14,17</p>	<p>17:10 18:1,12 19:3,23 20:6,15 21:6,12 22:2,9 24:2,5 25:5 26:5,6 27:8 28:18 29:1,3 29:15,24 30:8,21 31:5,12,14 32:23 33:12 34:13 35:2 35:3,10,15,18 36:15 37:20,23,24 38:13,16 39:8,23 40:4,7,9,12,13,21 41:7,14 42:3,14 43:18,24 44:7,22 45:14 47:3,9 48:18 49:2 51:18 52:16 53:3,5 55:13 56:24 58:9 58:12 60:10,25</p> <p><b>appealable</b> 3:11 8:21,22 13:10 32:22 39:4 50:23 59:1,6</p> <p><b>appealed</b> 13:23,25 21:5,5,20 25:15</p> <p><b>appealing</b> 18:12</p> <p><b>appeals</b> 3:13 4:17 4:20 5:14 7:4 8:18,20,24 9:2 10:19,20 13:2 14:23 19:7,10 22:5,20 26:7,22 28:10 29:6,17,20 30:11,17,24 31:8 31:9,11 32:10 35:1,22 37:10,13 37:13 39:20 41:15 44:10 49:4 52:7 52:11 53:17 54:4 55:7,9,20,22,24 56:22,24 57:1,8 61:7,10</p> <p><b>appearances</b> 1:15</p> <p><b>appellate</b> 5:12 12:9 21:14 36:12 56:12</p> <p><b>applied</b> 18:18 22:9</p>	<p>59:22</p> <p><b>apply</b> 6:1 24:3,23 40:15 42:20 51:11 53:18 58:12</p> <p><b>appreciate</b> 12:6</p> <p><b>approach</b> 33:17 58:7</p> <p><b>appropriate</b> 53:1</p> <p><b>approve</b> 7:9 40:2</p> <p><b>april</b> 1:10</p> <p><b>arent</b> 22:24 26:16 42:4,15</p> <p><b>argue</b> 36:23</p> <p><b>argued</b> 8:13 27:3 36:24</p> <p><b>arguing</b> 13:9,11</p> <p><b>argument</b> 1:13 2:2 2:5,9,12 3:3,6 8:11 14:2 23:6 32:25,25 33:4,5 34:2 49:14 56:3,5 57:4 59:16</p> <p><b>arguments</b> 57:5</p> <p><b>article</b> 36:14,18 61:8</p> <p><b>aside</b> 52:24</p> <p><b>asked</b> 46:22 47:1</p> <p><b>asking</b> 23:23,24 29:8 32:25 39:9</p> <p><b>asks</b> 44:21</p> <p><b>assets</b> 26:13</p> <p><b>assistant</b> 1:18</p> <p><b>assume</b> 6:1 25:15 25:24 43:10 50:21</p> <p><b>attempt</b> 16:9</p> <p><b>attorney</b> 8:24</p> <p><b>attorneyclient</b> 58:10</p> <p><b>attractive</b> 36:17</p> <p><b>automatic</b> 12:3 16:7,17,24 17:7 18:1 27:4 30:20 60:3,6,7</p> <p><b>automobile</b> 41:10 52:14</p> <p><b>available</b> 23:19</p>	<p>32:7</p> <p><b>avenue</b> 38:16 56:23</p> <p><b>avenues</b> 7:17,18 22:17 41:5 42:2</p> <p><b>avoid</b> 59:8</p> <p><b>awarded</b> 45:6</p> <p><b>B</b></p> <p><b>b</b> 1:3 48:2 58:20 59:23</p> <p><b>baby</b> 13:8</p> <p><b>back</b> 15:10 22:3 25:17,21 44:9,14 45:11 49:20</p> <p><b>backward</b> 30:4</p> <p><b>bad</b> 27:11 36:5</p> <p><b>bag</b> 45:16</p> <p><b>balance</b> 23:3</p> <p><b>bank</b> 1:6,7 3:4 21:8 26:24 28:16,23 29:1 32:12 38:9 39:14 46:13 52:18 54:7,13,20 61:2</p> <p><b>bankrupt</b> 28:15</p> <p><b>bankruptcy</b> 3:10 3:13 5:12 8:19 10:18,20,25 11:1 12:1,8 15:5 16:8 17:9 21:4,11,14 21:14,15 22:2 24:11,21 25:14 26:12 30:11 33:6 33:16 36:11,13,16 36:19 37:19 38:1 40:1,20,22 41:1 41:13 44:8 48:2 49:2,11,13 51:7 55:23 56:11 57:21 60:17 61:4</p> <p><b>bankruptcys</b> 44:12</p> <p><b>bankruptcyspeci...</b> 3:12</p> <p><b>bap</b> 37:20</p> <p><b>based</b> 22:24 23:1</p> <p><b>basic</b> 48:22 56:2 57:6</p>
---	--	---	---	--

<b>basically</b> 32:16 49:17	<b>burden</b> 12:13 22:20 <b>burdens</b> 60:25	<b>certain</b> 44:21 46:3 <b>certainly</b> 36:10 52:10	<b>claimed</b> 52:14 <b>classes</b> 22:12 <b>clause</b> 49:18	60:19 <b>confirmations</b> 48:3 <b>confirmed</b> 4:17
<b>basis</b> 37:22 41:13 50:25 53:12	<b>C</b>	<b>certification</b> 22:19 <b>certifications</b> 22:21	<b>clear</b> 41:4,22 49:22 <b>clearest</b> 24:20	14:4,9 39:2 43:17 46:8,9 55:14 59:5 60:12,24
<b>bath</b> 13:8	<b>c</b> 1:9,16,19,22 2:1 3:1,11	<b>certified</b> 8:17 41:13 <b>certify</b> 5:14,15 37:20	<b>clearly</b> 35:23 39:4 <b>code</b> 48:2	<b>confirming</b> 11:8 <b>confirms</b> 14:12
<b>beg</b> 19:15	<b>calculated</b> 46:17	<b>challenge</b> 58:10	<b>collateral</b> 49:19 55:4	<b>confused</b> 33:16,22 <b>confuses</b> 53:25
<b>begging</b> 50:5,8	<b>call</b> 37:19	<b>change</b> 20:24 33:7 33:8,8,10,10,10 34:15 56:21	<b>collection</b> 23:16 28:17	<b>congress</b> 11:1 30:7 30:9 35:21,21 37:8 38:15 40:23 56:14,20 59:10
<b>beginning</b> 15:18 47:5	<b>cant</b> 9:21,22 20:24 39:23,23 40:3 47:19 48:19 51:3	<b>chapter</b> 4:16 5:22 6:19 8:5 19:25 20:14 21:18 28:15 34:8,20 40:15 45:17 51:9,11,12 51:13 52:2,4 58:21,22	<b>collier</b> 13:15 24:19 46:25	<b>congresss</b> 42:1 <b>consensus</b> 40:25 <b>consequences</b> 36:5 <b>consideration</b> 4:7 24:10
<b>begs</b> 24:7	<b>capable</b> 46:1	<b>chief</b> 3:3,8,19 4:2,4 7:12,16 9:10,15 9:17,23 10:1 19:13,16 23:4,9 24:7 25:13,24 26:9,15 33:20,25 34:4,7 38:5 54:23 59:14 61:11	<b>come</b> 15:10 25:17 25:21 32:13 43:24 51:17	<b>considered</b> 56:15 <b>consistent</b> 48:4 <b>consists</b> 24:22 <b>construction</b> 49:18 <b>construed</b> 56:22 <b>contest</b> 14:7
<b>believe</b> 55:25	<b>car</b> 28:16,23,25 41:11	<b>choice</b> 45:13 <b>choosing</b> 43:15 <b>chose</b> 44:6	<b>coming</b> 28:4 36:2 57:2	<b>contested</b> 8:11,14 8:15 13:3,4,6,10 13:14,15,18 15:3 24:23,24 25:3,9 46:24,25 47:3,8,9 47:15
<b>believed</b> 45:3,4	<b>case</b> 3:4 6:4,4 7:17 8:22 9:3 10:25 11:17 12:1,5 15:5 15:9,22 16:2 17:4 17:22 18:12,22 19:25 20:5,6,11 20:14 21:12,18,20 22:11 23:13,24 24:14,22 27:20 28:25 35:17 37:19 39:17 41:8 44:6,9 45:23 47:4 48:12 49:6 52:11,12 53:25 60:6 61:12 61:13	<b>circuit</b> 5:7 17:16 35:14 38:3 39:21 56:17	<b>company</b> 6:16,17 6:18 54:18	<b>context</b> 40:15 56:20 <b>continuing</b> 21:19 <b>control</b> 37:11 38:13 39:8 51:20
<b>bells</b> 49:16	<b>cases</b> 3:13,14 6:5,7 7:13,14,24 8:5,19 12:10,10 13:3 19:10,11,12,13,14 19:16,17,18,20 21:1,11,20,24 22:12 26:1 28:9 28:19,21 29:22 30:1,17,19 36:2 47:2 55:5 56:12	<b>circuits</b> 17:16,23 19:9 27:12 35:10 35:19 36:11	<b>complain</b> 28:4 42:1 <b>complaint</b> 15:23,24 50:12	<b>controlling</b> 39:21 <b>converse</b> 27:3 <b>convince</b> 60:3 <b>core</b> 58:21
<b>benefit</b> 7:23	<b>catch</b> 27:23,24,25 53:12	<b>circumstance</b> 23:12 23:19 41:2	<b>complete</b> 10:25 <b>completely</b> 30:4 41:22 60:21	<b>correct</b> 6:3 17:11 47:7,20 48:11
<b>best</b> 42:8	<b>category</b> 51:5,6 53:12	<b>civil</b> 3:13 12:10 15:9,21,22 16:2 32:20 44:25 45:2 49:4	<b>concern</b> 26:21 33:17 53:10 54:10	<b>cost</b> 52:14 <b>costs</b> 41:10
<b>better</b> 44:5 53:8	<b>caused</b> 60:2	<b>claim</b> 20:17,18 46:6 46:20 50:16,16,17 50:21,24 51:19	<b>concerned</b> 28:20 30:10	<b>couldnt</b> 13:16,17 <b>counsel</b> 23:4 33:25 38:5 54:10 59:14
<b>beyond</b> 30:9	<b>central</b> 34:7		<b>concerns</b> 10:12 <b>conclude</b> 58:18 <b>conclusion</b> 15:20 <b>confidential</b> 58:11 <b>confirm</b> 4:8 10:4 11:10 14:3 60:14	
<b>big</b> 48:8 52:5	<b>century</b> 32:19		<b>confirmation</b> 3:10 3:15 10:2 13:11 13:22,22,24 15:17 20:9 22:13 24:9 34:7,15 38:20 40:9,21 41:12 48:5 50:2,6,7,14 58:20,24,25 59:3	
<b>bit</b> 49:11	<b>cert</b> 39:18			
<b>blue</b> 1:6 3:4				
<b>borderline</b> 28:9				
<b>borrowing</b> 55:4				
<b>box</b> 49:20				
<b>breyer</b> 11:6,12,18 11:21 12:4,16,20 12:22,25 13:12 14:11,19,22 16:20 17:19 18:2,6,8,15 19:2,5 27:2,22 28:5 29:2 32:24 33:3,24 39:22 46:22 47:16,21,25 48:10,17,21 55:17 56:6,9 57:3,14 58:14 59:4				
<b>brief</b> 17:12 23:14 24:18 39:15 54:11 54:13 56:3 60:8				
<b>briefing</b> 48:25				
<b>briefs</b> 42:1 54:2				
<b>bringing</b> 39:8				
<b>broad</b> 49:11				
<b>bullard</b> 1:3 3:4				

61:11 <b>count</b> 13:6 <b>country</b> 21:10 37:1 <b>counts</b> 48:18 <b>couple</b> 23:11 29:21 <b>course</b> 15:22 20:14 58:25 <b>court</b> 1:1,13 3:9 5:14 7:5 8:18 11:16 14:9,12 15:7,9,23,25 18:22 19:10,11 22:3,3,4,4,8 23:10 26:7 29:15 31:9 31:10 34:5 37:11 37:13,13 39:1,18 39:19 40:8,20,22 41:6,13,14,19 44:8,9 49:8,19 52:15 55:3,5,7,9 56:24 57:1,19,21 58:8,8 59:7,22 60:3 61:6,10 <b>courts</b> 8:23 12:14 12:22 16:6,8 18:14,17 21:15 22:20,21 23:15 35:22 37:10 38:14 42:3,14,20 45:8,9 45:10 49:16 51:5 53:18 55:8 56:11 56:13,22 57:13 58:11 59:2,10 <b>cram</b> 46:13 <b>create</b> 58:9 <b>created</b> 51:9 56:23 <b>creating</b> 34:12 <b>creditor</b> 5:23 7:1 15:13 20:9 21:19 25:18 26:25 28:4 31:11 39:23 40:12 40:12 54:18 60:10 <b>creditors</b> 7:1 10:21 12:2 14:3 17:6,7 20:13 21:9,10,17 26:4,7,9,16 27:18	28:1 29:25 31:4,6 35:5 37:1 40:18 46:3,5,6,16,19 50:23 51:15 53:7 54:2,3,8 56:1 <b>criminal</b> 12:10 <b>criterion</b> 47:10 <b>critical</b> 58:18 <b>curiae</b> 1:20 2:7 23:7  <b>D</b> <b>d</b> 1:9,16,18,19,22 3:1 23:6 30:5,8 <b>damages</b> 45:4,5,7 <b>date</b> 51:21 <b>day</b> 12:9 27:5 <b>days</b> 20:2 27:6,16 43:9 60:7 <b>deal</b> 22:21 <b>dealing</b> 26:11 <b>deals</b> 3:12 <b>debating</b> 55:18 <b>debt</b> 46:21 <b>debtor</b> 5:19,21 6:14 7:15 8:2 9:21,21 10:7,10 11:4,5,7,7 11:13,18,23,23,25 12:2 15:10,13 16:7 17:1,2,3,5,6 17:23,24 20:1,3,7 21:3,19 22:13 26:22 27:4 31:12 31:13 35:5 36:17 37:23 38:2 39:8 39:23 40:7,18 41:5,11 44:4,6,11 45:24,25 46:4,10 51:13 52:9,13 53:5 59:24 60:14 60:15,16,18,21 61:1 <b>debtorfriendly</b> 36:14 <b>debtorinpossession</b> 51:14	<b>debtors</b> 3:16 4:16 7:10 8:3 9:6 12:13 16:25 21:22 23:2 26:19 31:6 34:13 36:24 38:25 44:17 53:9,15,16 56:2 61:5 <b>decide</b> 39:20 51:5 55:7 57:1 <b>decides</b> 15:16 27:6 <b>decision</b> 8:12 44:12 49:12 59:2 60:1 61:10 <b>decisions</b> 52:7 <b>defective</b> 15:25 <b>defensive</b> 34:23,23 53:4 <b>defining</b> 14:6 <b>definitely</b> 46:18 <b>delay</b> 35:3 <b>delaying</b> 26:16 <b>denial</b> 3:10,15 4:6 10:3,6 14:10 35:11 39:6 50:7 51:1 58:24 59:2 60:19 <b>denials</b> 8:21 13:11 22:12,13,24 55:22 <b>denied</b> 3:18,20 11:23 18:22 25:21 40:21 41:6,12 44:17 48:7 50:14 50:22 51:6 <b>denies</b> 15:22 <b>deny</b> 10:4 14:3,16 15:17 25:17 33:10 <b>denying</b> 15:9 32:21 40:9 <b>department</b> 1:19 <b>depend</b> 8:15 <b>described</b> 44:15 <b>designed</b> 22:11 <b>determination</b> 40:8 <b>determinations</b> 53:12 <b>determine</b> 24:14	<b>determined</b> 9:6 <b>determines</b> 3:16 <b>develop</b> 21:15 <b>developed</b> 61:5 <b>development</b> 8:1 <b>devote</b> 7:7 <b>didnt</b> 5:4,14 9:18 14:11,22 19:20 22:19 30:12 38:7 52:5 56:21 <b>difference</b> 21:21 26:5,6 58:23 <b>different</b> 7:22 17:3 25:25 29:21 44:1 47:4 49:5,13 51:12 <b>difficult</b> 18:9 29:24 33:18 59:25 <b>direct</b> 56:24 <b>disabilities</b> 17:3 60:8 <b>disability</b> 60:4 <b>disagreement</b> 48:25 <b>disappear</b> 16:24 <b>disbursed</b> 20:8 <b>disclose</b> 58:10 <b>discovery</b> 8:19 <b>discrete</b> 24:5,8,10 24:15,17 47:5 48:12 <b>discussed</b> 41:6,8 <b>dismiss</b> 8:22 11:17 28:24 <b>dismissal</b> 12:1 16:9 17:25 18:1 23:13 43:7,8 44:6 60:1 <b>dismissed</b> 17:4 18:22 27:7,20 50:13 <b>dismisses</b> 15:23 <b>disposable</b> 7:8 <b>disposes</b> 60:20 <b>disposition</b> 3:16 9:7 <b>dispositive</b> 28:22	<b>dispute</b> 24:5,8,10 24:15 25:6,6 48:8 51:20 53:2 <b>disputes</b> 8:19 52:24 53:13 55:15 <b>disqualification</b> 8:24 <b>dissipating</b> 26:13 <b>dissociated</b> 49:9 <b>distinct</b> 25:7,8 <b>distinctions</b> 13:5 <b>distributions</b> 51:22 <b>district</b> 19:11 22:4 39:18 57:19 <b>docket</b> 37:11 56:11 <b>doctrine</b> 49:19 55:4 <b>doesnt</b> 11:6 12:8 17:6 25:15 27:19 39:13 43:20 52:2 60:21 <b>doing</b> 11:14 29:20 <b>dollars</b> 25:19,19 28:18 46:7,20 <b>dont</b> 3:21 4:14,18 4:25 5:4,11,13 7:20 8:6 9:13 10:17,21,24,24 11:7,13 12:6 13:7 18:7,16 19:8,12 21:5 25:16 28:18 29:6,6 30:21 32:22 35:25 39:12 40:15 43:7,10,22 43:23 44:20 47:14 47:16 48:19 50:10 50:20,25 54:1 56:6 59:7 60:11 <b>douglas</b> 1:22 2:10 34:2 <b>dozens</b> 13:3 <b>dramatically</b> 34:15 35:6 <b>draw</b> 41:24 <b>drawing</b> 50:11 <b>drawn</b> 24:19 <b>dynamic</b> 34:16
---	--	---	--	--



<p><b>E</b></p> <p><b>e</b> 2:1 3:1,1  <b>earlier</b> 40:7 41:8  42:19 59:4 60:19  <b>easier</b> 56:1  <b>easy</b> 5:2 16:11  <b>edge</b> 43:3  <b>effect</b> 7:3 32:18  39:3,3,5 40:11  <b>effective</b> 11:4 43:11  <b>effectively</b> 56:16  <b>efforts</b> 23:16 28:17  <b>either</b> 31:18 47:16  55:16  <b>enacted</b> 30:8  <b>ended</b> 11:3 24:4  25:5  <b>endless</b> 46:25  <b>ends</b> 11:3 50:8  <b>enshrined</b> 11:1  <b>entire</b> 12:1 27:20  45:24  <b>entirely</b> 45:25  <b>entitled</b> 12:14 45:3  45:4  <b>envisioned</b> 40:23  <b>equivalent</b> 15:8  <b>escrow</b> 52:21  <b>especially</b> 4:16 7:4  21:18,22 29:15  48:6  <b>espinosa</b> 39:2 40:11  59:2  <b>esq</b> 1:16,18,22 2:3  2:6,10,13  <b>essence</b> 26:12 34:9  <b>estate</b> 51:14,16,17  51:21  <b>event</b> 22:8  <b>eventually</b> 20:13  <b>everybody</b> 9:20  15:4 26:19 54:19  <b>everybodys</b> 41:3  <b>exact</b> 29:17 31:12  <b>exactly</b> 25:20  <b>example</b> 28:5 41:9</p>	<p>44:5 45:24  <b>exception</b> 18:24  23:25  <b>exceptional</b> 22:11  <b>exclusively</b> 51:10  <b>exclusivity</b> 5:23  40:17  <b>execute</b> 14:13  <b>executed</b> 14:15  <b>exercise</b> 53:16  <b>exercised</b> 57:19  <b>existed</b> 52:25  <b>expand</b> 30:8 42:2  <b>expect</b> 26:25  <b>expectation</b> 29:8  <b>expense</b> 41:10  <b>expenses</b> 51:16  <b>experiment</b> 36:4  <b>expired</b> 40:17  <b>explain</b> 27:13  <b>explained</b> 54:12,14  54:17  <b>extend</b> 17:25 44:8  <b>extraordinary</b>  23:18</p> <p><b>F</b></p> <p><b>face</b> 55:21  <b>faced</b> 59:24  <b>fact</b> 8:3 15:7,21  29:23 31:8 34:8  36:25 47:11 52:13  <b>factbased</b> 51:7  <b>factor</b> 42:16  <b>facts</b> 45:23  <b>factual</b> 30:18 48:7  53:13  <b>failed</b> 46:6,19  <b>failing</b> 13:16  <b>fairly</b> 32:7 56:12  <b>fallen</b> 17:14 55:16  <b>far</b> 16:6 24:20  48:10 51:9 60:13  <b>favor</b> 31:11  <b>favorable</b> 44:23  <b>fee</b> 13:13,13</p>	<p><b>feel</b> 8:2  <b>fees</b> 51:17  <b>feldman</b> 1:16 2:3  2:13 3:5,6,8,25  4:3,13,25 5:5,9,12  5:17,20 6:2,11,13  6:23 7:1,14,20 8:7  8:13 9:5,16,19,25  10:5,14,18,24  11:11,16,20,22  12:12,18,21,24  13:9,20,24 14:5,8  14:18,21,25 16:16  17:1,15,21 18:4,7  18:14,17,25 19:4  19:8,15,18,22,24  20:20,22 21:1,24  22:6,10,18 23:1  59:15,16,18  <b>fifth</b> 17:15,16 19:9  35:13 56:17  <b>fight</b> 28:18  <b>figure</b> 13:16,17  33:14 42:8 60:15  <b>file</b> 9:11 10:11,12  16:8 43:8,16,17  43:22 44:8,11  46:6,19 54:11  60:5,5  <b>filed</b> 5:10 11:14  20:3 37:23  <b>files</b> 15:13  <b>final</b> 8:12 9:2,2,4,5  10:17,22 13:6  25:4 33:23 40:9  45:1 47:10 48:18  49:1,3,6,10 50:11  50:13,15,19,23  56:19,21  <b>finality</b> 23:25 24:24  30:7 42:5 49:1,15  49:17,18 51:3  <b>finally</b> 3:16 9:6  <b>find</b> 19:19  <b>fine</b> 11:18  <b>finished</b> 10:8</p>	<p><b>first</b> 4:6 9:10 15:1  24:21 28:24 30:15  34:23 35:14 37:22  38:3 41:3,6 42:25  44:17 45:13 57:18  <b>five</b> 20:4 56:22  <b>fix</b> 3:22  <b>fka</b> 1:6  <b>flexible</b> 49:15,17  <b>flip</b> 14:2  <b>flippant</b> 54:7  <b>flood</b> 26:22 32:10  <b>focus</b> 34:8  <b>follow</b> 25:12 40:10  <b>follows</b> 15:19  <b>force</b> 39:19 46:14  55:6  <b>forced</b> 55:10  <b>forces</b> 60:14  <b>foreclosure</b> 53:6  <b>forever</b> 14:16  <b>forget</b> 33:24,24  <b>formality</b> 25:14  <b>formally</b> 25:7,8  <b>forth</b> 30:18 58:19  <b>forward</b> 26:17  <b>found</b> 17:22 19:10  <b>four</b> 17:2 22:7 38:1  <b>fourth</b> 17:16 35:19  <b>frankly</b> 26:23 29:5  30:4  <b>freely</b> 42:4  <b>frequently</b> 3:25 4:3  4:5 8:3 15:24  <b>friend</b> 59:20  <b>fully</b> 48:4  <b>functionality</b> 21:13  <b>fundamentally</b>  7:21  <b>further</b> 59:12  <b>future</b> 3:17 9:7</p> <p><b>G</b></p> <p><b>g</b> 3:1  <b>garnished</b> 14:15  <b>gauge</b> 42:21</p>	<p><b>gee</b> 33:11  <b>general</b> 1:19 6:3  36:12  <b>generally</b> 6:4 7:23  16:10  <b>generate</b> 55:24  57:8  <b>getting</b> 10:7 22:1  24:20 37:9 59:25  61:7  <b>giant</b> 13:7  <b>ginsburg</b> 13:19,21  14:1,6 19:21  20:16,21,23 35:7  35:9 37:15,18  44:14  <b>give</b> 7:6,8 11:4  13:19 14:14,22  19:6 36:24 39:16  39:25 54:8  <b>given</b> 13:21 20:18  53:3 56:18 60:22  <b>gives</b> 37:10  <b>giving</b> 42:4  <b>go</b> 3:24 4:10,16,19  5:4,5 7:3,11 11:25  19:23 20:13 22:2  22:3,3 31:18,19  33:9,10,10 37:12  44:14 45:11,16  46:8 55:11  <b>god</b> 33:12  <b>goes</b> 19:23 36:4  <b>going</b> 4:9 7:5,10,10  7:11 8:7,19 9:9  10:9 16:12,24  17:7,10 18:10  19:23 20:6,14  21:4,20 24:11  25:13 26:21 28:15  28:17,22 29:22,23  30:24 33:12 36:17  40:23 43:22 45:16  46:8,11,13,14,15  47:11 52:4,20  53:16 54:5 55:11</p>
---	---	---	--	---

55:19 57:24 58:9 <b>good</b> 12:4,16,18 16:22 27:11 28:6 29:17 36:3 38:12 39:19 43:20 45:24 <b>grabbing</b> 17:8 <b>grant</b> 15:17 18:11 22:5 60:3 <b>granted</b> 15:7 23:20 43:14 <b>granting</b> 32:21 <b>great</b> 27:8 <b>ground</b> 15:24 32:18 <b>grounds</b> 28:3 <b>groups</b> 27:1 <b>guard</b> 13:1 <b>guess</b> 9:23 14:25 47:14 56:10 <b>guidance</b> 56:25	43:9 <b>happens</b> 11:15 18:4 44:24 58:22 <b>hard</b> 6:18 18:21 60:9 <b>hardhearted</b> 18:16 <b>harm</b> 21:17 <b>harmed</b> 17:5 <b>harmonize</b> 21:15 <b>hasnt</b> 27:12 28:10 28:11 36:4 <b>havent</b> 8:13 17:22 32:10 38:7 48:6 <b>hear</b> 3:3 32:2 43:4 46:23 <b>heard</b> 20:10 <b>hearing</b> 15:15,15 <b>held</b> 15:15 35:15 39:2 40:11 <b>hell</b> 12:20 <b>help</b> 8:1 48:13 <b>heres</b> 11:22 <b>hes</b> 27:4,5 44:19 45:13,14,15,15 <b>hills</b> 1:6 3:4 <b>history</b> 35:9,13 <b>holdings</b> 57:23 <b>holds</b> 15:15 <b>home</b> 34:24 52:25 <b>honestly</b> 53:25 <b>honor</b> 13:9 37:3,7 40:5 43:7 44:25 47:13 50:10 55:2 58:4,17 59:4 <b>honors</b> 34:6 42:4 42:19 <b>hoops</b> 45:20 <b>hope</b> 54:7 <b>hospitable</b> 36:19 <b>house</b> 8:3,3,8 18:10 23:2 27:5,9 28:16 28:23,25 51:15 52:10 53:6 <b>houses</b> 18:3 <b>huge</b> 6:15 <b>hundred</b> 52:6	<b>hurt</b> 40:3 <b>hybrid</b> 11:24 20:19 52:23 <b>hyde</b> 1:6 <hr/> <b>I</b> <b>id</b> 46:23 47:12 <b>idea</b> 12:4 31:25 <b>identical</b> 6:6 <b>ignore</b> 57:23,24 <b>iii</b> 36:14,18 61:8 <b>ill</b> 11:9 27:8 33:12 45:11,11 <b>im</b> 4:2,9,9 11:8,14 12:18 27:10 28:11 31:5 32:25 33:15 33:21,21 39:9 40:1 43:3 46:4,11 46:13,13,14 50:10 55:4,4 <b>imagine</b> 33:5 <b>immediate</b> 34:13 35:17 36:15 39:3 44:7 52:16 <b>immediately</b> 32:22 50:22 59:1,6 <b>imminent</b> 28:16 <b>impediment</b> 6:21 <b>importance</b> 4:20 21:2,2,3 <b>important</b> 7:13,15 7:17,24,25 16:18 16:19 17:4 21:13 22:14 24:1 28:21 31:5 42:12,16 44:3 53:13 54:4 57:6 60:1 <b>importantly</b> 44:7 <b>impose</b> 60:9 <b>impression</b> 36:12 <b>inadequate</b> 42:3 <b>incentive</b> 6:16 26:19 34:18,18,20 51:8 <b>incentives</b> 4:15 21:22 29:19 32:8	34:22,22,23 55:19 <b>including</b> 10:20 43:21 <b>income</b> 3:17 7:8 9:8 <b>increases</b> 35:4 <b>indicative</b> 43:14 <b>individual</b> 52:9 <b>initially</b> 57:15 <b>injunction</b> 16:11 23:15,16 32:17,21 32:21 <b>instruct</b> 42:20 <b>instructs</b> 51:5 <b>insufficient</b> 57:8 <b>insurance</b> 52:21 <b>intent</b> 52:9 <b>interest</b> 52:20 55:6 55:8,9,9 <b>interestbearing</b> 20:12 <b>interested</b> 26:16 <b>interesting</b> 55:3 <b>interim</b> 18:3 <b>interlocutory</b> 5:2 7:19,21,23 8:10 8:18,20,23 22:2,9 25:5 29:3,6,14,16 29:20,24 30:17,21 31:15 38:15 41:7 41:14 42:3,13 43:2 45:1 53:19 56:23 57:9,19,21 58:12 59:21 <b>interpreted</b> 8:25 49:6 <b>intimidated</b> 54:20 <b>intuition</b> 25:11 31:20 32:15 <b>invent</b> 13:5 <b>invest</b> 20:11 <b>invoked</b> 49:15 <b>involve</b> 19:20 21:1 <b>involved</b> 19:19,22 <b>isnt</b> 4:7 13:21 20:8 27:2 28:17 34:20 38:19 42:14,16	50:18 55:20 <b>issue</b> 4:20 14:9,9,10 15:1 18:12 19:23 22:16 37:12 39:20 41:12 51:18 52:16 53:2 55:7 56:15 56:17 57:1 <b>issues</b> 7:25 21:2 22:25 37:9 55:10 55:11 56:13 <b>issuing</b> 18:13 <b>ive</b> 54:12 <hr/> <b>J</b> <b>james</b> 1:16 2:3,13 3:6 59:16 <b>jones</b> 39:25 <b>judge</b> 3:21 4:9 9:11 9:18,19,21 11:7 12:8 15:15,16,22 16:10,12 25:14 33:6 36:18,19 40:1 44:19 61:8 <b>judges</b> 10:12 18:9 29:19 33:16 36:13 36:14,16 38:1 41:21,22 55:23 <b>judgment</b> 26:8 31:4 <b>judgments</b> 9:2 <b>judicata</b> 39:3,4 40:11 59:1 <b>judicial</b> 49:4,7 55:7 <b>jurisdiction</b> 9:1 <b>jurisdictions</b> 17:13 <b>justice</b> 1:19 3:3,8 3:19 4:2,4,22 5:1 5:7,10,16,18,25 6:8,12,22,24 7:12 7:16 8:6,9,25 9:10 9:13,15,17,23 10:1,10,16,22 11:6,12,18,21 12:4,16,20,22,25 13:12,19,21 14:1 14:6,11,19,22 16:13,20,20 17:11
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17:19 18:2,6,8,15 18:23 19:2,5,13 19:16,21 20:16,21 20:23 21:23,25 22:7,15,23 23:4,9 24:7 25:10,13,24 26:9,15 27:2,22 28:5 29:2,10,12 29:14 30:12,15,16 30:23 31:16,20,23 32:24 33:3,20,24 33:25 34:4,7,9,17 35:7,9,24 36:1,8 36:20,23 37:5,15 37:18 38:5,6,9,17 38:18,24 39:7,12 39:22 41:16,20 42:7,12,23 43:3 43:10,19 44:14 45:8,19 46:22 47:16,21,25 48:10 48:17,21 50:1,4 51:23 52:2 53:21 53:24 54:15,17,22 54:23 55:17 56:6 56:9 57:3,14,14 57:22 58:1,14 59:4,14 61:11	<b>kept</b> 10:7 <b>kind</b> 18:11,17 19:25 32:1 41:23 56:25 <b>kinds</b> 7:4 8:16,17 13:4 36:5 42:15 <b>know</b> 7:6 10:19 18:6,7,9,25 25:3,5 25:7,16,19 26:20 29:11,16 32:2 33:7 36:1 37:15 37:18 39:12 42:16 44:20 47:12 50:20 50:25 51:19 53:7 53:14 55:2 56:6 57:22 <b>knows</b> 13:2	<b>liberal</b> 53:19 <b>liberally</b> 42:21 <b>likelihood</b> 16:14 18:19,20 <b>limited</b> 42:10 <b>list</b> 13:14 49:24 <b>listed</b> 52:18 <b>lists</b> 47:1 48:2 <b>litigants</b> 6:9 <b>litigate</b> 60:24 <b>litigated</b> 9:9 10:9 <b>litigation</b> 15:14 32:20 44:25 45:2 <b>little</b> 20:24 49:11 <b>live</b> 27:9 43:23 45:21 60:17 <b>lives</b> 4:18 <b>living</b> 27:4 <b>long</b> 27:10 <b>longer</b> 34:25 <b>look</b> 8:17 10:1 11:2 16:9 29:7 35:13 39:11 45:11 56:10 <b>looked</b> 38:3 56:20 59:22 <b>looking</b> 16:1 <b>looks</b> 15:17 <b>lose</b> 8:7 12:2,6 18:2 18:10 28:25 <b>loseyourhouse</b> 18:23 <b>losing</b> 23:2 60:2 <b>lost</b> 17:9 45:4 <b>lot</b> 8:4 19:6 54:8,10 55:23 <b>louis</b> 1:3 <b>luck</b> 41:24	53:11 <b>mandamus</b> 58:12 <b>material</b> 58:11 <b>matter</b> 1:12 6:3 8:11,14,15 15:3 25:3,9 27:19 46:24 47:3,15 61:14 <b>matters</b> 13:3,4,6,10 13:13,14,15,18 24:23,24 46:25 47:8,9 <b>mean</b> 16:13 18:8,9 26:11,12 27:3 29:15 32:14 37:5 39:24 41:20 42:7 45:12 47:2,12 49:6,10 53:22 54:19 <b>means</b> 15:10 50:11 <b>measure</b> 45:5,6 53:1 <b>mechanism</b> 57:9,9 <b>meet</b> 16:11 <b>merge</b> 45:1 <b>merit</b> 19:3,7 <b>middle</b> 15:18 47:5 <b>mind</b> 49:16 <b>minute</b> 51:7 <b>minutes</b> 59:15 <b>mistake</b> 13:1 <b>mistakes</b> 12:22 <b>mixed</b> 29:23,25 30:1,1 31:7 <b>modified</b> 7:11 <b>mohawk</b> 23:24 58:8,8 <b>money</b> 4:19 7:2 20:8,11 51:15,15 53:8 <b>month</b> 9:15 39:25 46:16 <b>monthly</b> 46:1,4,11 <b>months</b> 46:17 <b>moot</b> 55:16 <b>mortgage</b> 11:24	46:1,2,12 52:19 <b>motions</b> 8:21 <b>mouth</b> 48:19 <b>move</b> 4:17 26:17,19 <b>moved</b> 44:7 <b>multiple</b> 7:18 22:1 34:14 35:1 40:17 45:3 51:6
<b>K</b>	<b>L</b>	<b>M</b>	<b>N</b>	
<b>kagan</b> 16:13,20 25:10 29:10,12,14 30:16 31:16,20,23 34:9 35:24 36:1,8 41:16,20 42:7,12 43:19 45:8,19 53:21,24 54:15,17 54:22 <b>kagans</b> 57:14 <b>keep</b> 46:11 <b>kennedy</b> 8:25 9:13 10:10,16,22 30:12 30:15,23 36:20,23 37:5 38:17 51:23 52:2 <b>kennedys</b> 38:6	<b>language</b> 49:23 <b>larger</b> 48:12 <b>largest</b> 21:9 <b>laughter</b> 43:5 54:21 54:25 57:25 58:5 <b>law</b> 8:1 21:15 22:16 22:25 29:23 31:7 51:1,4 56:1 57:8 <b>lawyer</b> 27:6 <b>lawyers</b> 51:17 <b>layers</b> 34:14 <b>leave</b> 15:2,7,22,23 35:16 37:24 40:9 41:7 42:4 48:7 50:13,14,17,18,22 56:18 58:24 59:3 <b>led</b> 36:5 <b>left</b> 14:13 <b>legal</b> 5:3 34:19 39:3 58:22 60:1 <b>legitimate</b> 51:19 <b>lesser</b> 45:6 <b>level</b> 22:22 57:18 <b>levels</b> 22:7 26:6 31:8 <b>leverage</b> 35:4 36:25 37:6	<b>m</b> 1:14 3:2 61:13 <b>main</b> 59:23 <b>major</b> 37:1 <b>majority</b> 8:4 <b>making</b> 20:1,7 27:17,17 41:11 45:19 46:1,11	<b>n</b> 2:1,1 3:1 <b>narrowly</b> 30:7 <b>natural</b> 36:3 <b>nature</b> 6:5 32:16 <b>need</b> 15:14 21:16 23:17 27:16 28:24 30:21 32:23 55:10 61:4 <b>negotiate</b> 21:21 <b>negotiated</b> 32:1,4,7 34:11 <b>negotiating</b> 35:6 <b>negotiation</b> 33:17 40:24 <b>neither</b> 26:18 <b>never</b> 4:23 20:18 20:23 31:19 39:5 <b>new</b> 10:11,12,13,15 13:5 15:12 56:23 <b>nightmare</b> 47:11 <b>nobodys</b> 32:13 <b>norm</b> 15:8 <b>normal</b> 15:9,21 16:2 <b>noted</b> 21:16 <b>notice</b> 37:23 <b>notion</b> 49:15 <b>novel</b> 22:15,25 <b>nub</b> 24:14 <b>number</b> 10:13 27:14 28:13 48:2 52:11 <b>numbers</b> 52:6	
			<b>O</b>	
			<b>o</b> 2:1 3:1	

<b>objected</b> 52:18 <b>objection</b> 52:13 <b>objections</b> 60:24 <b>objects</b> 15:13 <b>observers</b> 21:16 <b>obviously</b> 14:13 <b>occurs</b> 4:1,4 <b>offensive</b> 34:22 53:7 <b>offensively</b> 35:2 <b>oh</b> 12:4 44:24,24 <b>okay</b> 3:21,24 11:12 11:14 12:20 33:9 43:12 44:19 45:10 46:11 49:10 <b>once</b> 18:21,22 <b>ones</b> 13:6,12 21:4 21:21 25:21 58:10 <b>operate</b> 6:19 <b>operating</b> 16:1 <b>operation</b> 31:19,19 <b>opinion</b> 29:16 47:7 57:7 <b>opportunity</b> 12:7 34:13 36:15 43:16 <b>opposed</b> 3:13 25:19 49:5 <b>option</b> 43:15 <b>oral</b> 1:12 2:2,5,9 3:6 23:6 34:2 <b>order</b> 9:4,5 10:17 12:1 24:4 25:2 26:3 32:16,20,21 32:23 33:22 40:8 40:10,11,13 43:23 45:1 47:2 48:18 49:12,19 54:4 55:4 56:21 57:21 58:10 59:5 <b>orders</b> 9:2 10:23 30:21 45:1 47:10 57:20 <b>ordinary</b> 23:25 24:1,4,23 32:20 <b>ought</b> 32:1 33:7,8,8 <b>outcome</b> 32:2,4,7	<b>overhead</b> 22:22 <b>overwhelming</b> 32:8 <b>ownership</b> 41:10 52:14 <hr/> <b>P</b> <hr/> <b>p</b> 3:1 61:13 <b>page</b> 2:2 23:14 <b>paid</b> 26:10 <b>panel</b> 5:12 12:9 36:12,16 <b>pardon</b> 19:15 <b>park</b> 1:7 <b>part</b> 3:22 24:11 30:15 57:13 <b>participate</b> 21:10 <b>particular</b> 10:8 24:9 54:18 <b>particularly</b> 42:10 <b>parties</b> 7:25 21:22 23:17 37:11,12 38:14,21 42:6 53:2 55:6 56:14 59:8 <b>partly</b> 30:18 <b>parts</b> 17:4 <b>party</b> 43:13 <b>partys</b> 41:3 <b>path</b> 24:18 30:8 <b>pause</b> 54:8 <b>pay</b> 21:19 46:4,15 52:20 <b>paying</b> 14:16 <b>payment</b> 46:1 <b>payments</b> 20:1,3,7 27:17,18 41:11 46:11 52:18 <b>pending</b> 39:17 40:22 <b>people</b> 31:23 45:20 54:1 <b>perceived</b> 36:18 <b>perfect</b> 3:24 33:7 <b>period</b> 5:22 40:16 40:23 55:22 <b>permission</b> 32:23	<b>permit</b> 43:8 <b>permitted</b> 15:11 <b>person</b> 34:24 <b>perverse</b> 28:21 <b>petition</b> 16:8 20:3 39:17 <b>petitioner</b> 1:4,17 1:21 2:4,8,14 3:7 23:8 26:24,25 32:12 40:6 42:22 51:10 59:17 <b>petitioners</b> 37:2 <b>pick</b> 23:11,21 <b>piece</b> 23:21 29:9 58:1 <b>pitch</b> 38:8 <b>place</b> 23:17 <b>plaintiff</b> 45:3 <b>plan</b> 3:11,18,20 4:8 4:11,17 5:3,19,22 5:24 7:3,3,8 9:8 9:12,20,22 10:3,4 10:7,11 11:8,25 13:11,22,23,24 14:7,12,13,14,16 15:11,13,14 20:1 20:7,22 24:9,10 27:15,19 28:2 31:18 32:16 33:6 35:11 38:20 39:2 39:6,24,24 40:16 40:20,25 41:2,3,3 41:5,12 43:8,17 43:17,22 44:1,3,9 44:11,17,18,18 45:11,13,15,15,25 46:8,8,18 50:3,6,7 50:14 52:24 55:13 58:24 59:2 60:12 60:14,16,18,20,23 <b>plans</b> 27:5 28:6,7 40:17,22 45:20 48:3 51:6 58:20 <b>plausible</b> 28:7 <b>playing</b> 51:14 <b>please</b> 3:9 23:10	34:5 <b>plenary</b> 57:20 59:20,21 <b>point</b> 8:16 10:6,25 12:12,13 15:13 17:9 28:6,6 37:25 43:20,21 52:12 57:6,15 59:23 <b>points</b> 23:23 <b>policy</b> 22:14 <b>position</b> 30:20 44:19 54:3 <b>possibility</b> 7:13 16:21 18:20 <b>possible</b> 6:20 <b>possibly</b> 47:19 <b>potential</b> 13:1 36:10 <b>potentially</b> 13:1,2 28:25 <b>power</b> 42:6 56:25 <b>powerful</b> 16:18 <b>practical</b> 32:25 33:5 49:17 <b>precedent</b> 51:5 61:4 <b>precisely</b> 56:24 59:5 <b>prefer</b> 60:16 <b>preference</b> 39:21 <b>preferred</b> 44:3 46:18 50:24 <b>prejudice</b> 15:9 <b>preliminary</b> 16:11 <b>premise</b> 45:25 <b>presence</b> 21:7 <b>preserve</b> 40:13 <b>preserving</b> 52:10 <b>pretty</b> 18:8,12 51:10 <b>prevent</b> 29:19 53:6 54:4 <b>principal</b> 52:20 <b>principle</b> 17:13 <b>principles</b> 24:24 <b>priority</b> 10:21	50:17 <b>pro</b> 52:8 <b>probably</b> 6:3 11:10 11:17 20:6 21:9 21:10 22:23 25:17 <b>problem</b> 4:22 11:21 11:22 16:23 21:25 26:11 30:14 42:2 49:21 57:7 59:9 61:5 <b>problems</b> 17:8 59:9 60:2 <b>procedural</b> 24:17 37:22 <b>proceeding</b> 4:7 6:6 10:2,3 11:2,2,3 15:3,12,18 16:2,3 25:3,9 34:8 47:6 47:24 48:12 49:5 49:23 50:6,8 58:19,19 <b>proceedings</b> 15:4 24:22 48:3 49:24 <b>proceeds</b> 20:12 <b>process</b> 6:18 34:11 34:15 35:4 <b>produce</b> 47:11 <b>profits</b> 45:5 <b>projected</b> 7:7,8 <b>proliferate</b> 28:10 <b>prolong</b> 51:20,21 <b>proof</b> 50:16,21 <b>proofs</b> 46:6,19 <b>proper</b> 42:18 47:24 59:9 <b>property</b> 3:17 9:7,7 17:8 60:20 <b>proponent</b> 5:21 <b>proposal</b> 35:11 <b>propose</b> 27:15 28:2 47:18 60:16,20,23 <b>proposed</b> 5:23 20:2 39:24 40:18 41:5 45:25 46:12 <b>proposing</b> 17:17 <b>protection</b> 22:8
--	--	---	--	--

<p>27:18  <b>proves</b> 52:12  <b>provided</b> 3:17 7:17  7:18 9:8  <b>provides</b> 49:24  <b>provision</b> 3:12 49:3  <b>pure</b> 34:19  <b>purpose</b> 7:22 8:10  29:17 48:5 58:21  <b>purposes</b> 42:15  49:25  <b>pursuant</b> 48:1  <b>pursued</b> 52:8  <b>put</b> 23:17 32:17  38:15 48:19 49:20  56:7 57:6 61:1  <b>puts</b> 42:5</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>question</b> 5:3 6:5  11:3 15:2,5 16:4,4  24:8 28:11 30:1  31:7 34:6,9,19  38:7,8 40:6 41:9  42:19 47:24 50:5  50:8 52:23 56:17  58:18  <b>questions</b> 23:12  29:23 40:19 59:12  <b>quickly</b> 6:20 23:22  <b>quite</b> 42:12 51:12  53:25</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>r</b> 3:1  <b>raises</b> 40:19  <b>ransom</b> 41:7 52:15  <b>rationale</b> 39:16  <b>reach</b> 32:8  <b>reached</b> 48:6  <b>reaction</b> 42:18  <b>read</b> 30:6 51:16  <b>realize</b> 18:9  <b>really</b> 11:5 15:8  21:2 24:1,17,19  28:21,22 29:17</p>	<p>30:25 36:5 39:12  42:14 43:24 45:12  49:21 54:19 55:20  57:20  <b>reason</b> 5:13 12:16  12:19 26:8 28:14  30:5,6 31:23  38:12 42:5 53:4  54:14,17 55:18  <b>reasonably</b> 51:19  <b>reasons</b> 26:20  27:15 32:10,11  36:10 51:8 61:2,9  <b>rebuttal</b> 2:12 59:16  <b>recall</b> 57:17  <b>recognize</b> 24:21  <b>recognized</b> 37:25  <b>recollection</b> 17:12  <b>refile</b> 60:6  <b>regular</b> 46:15  <b>rejected</b> 50:17,18  50:24 52:15  <b>rejection</b> 5:3,19  <b>relatively</b> 30:7  35:20  <b>relief</b> 10:8 28:3  44:21,22,22  <b>reluctant</b> 16:6,17  <b>rely</b> 7:24 59:7  <b>remains</b> 22:1  <b>remedy</b> 23:18  <b>remember</b> 53:13  <b>reorganize</b> 6:17  <b>reported</b> 19:13,16  19:19 52:6  <b>represented</b> 56:12  <b>require</b> 11:23,25  <b>res</b> 39:3,4 40:10  59:1  <b>researched</b> 58:17  <b>reserve</b> 23:3  <b>resolve</b> 27:10 55:10  <b>resolved</b> 55:11  <b>resources</b> 51:23  52:1  <b>respect</b> 28:1</p>	<p><b>respects</b> 34:11  <b>respondent</b> 1:23  2:11 27:1 29:11  32:13 34:3  <b>respondents</b> 26:3  28:20 31:14  <b>restraint</b> 53:16  <b>result</b> 8:14  <b>results</b> 25:25  <b>reversed</b> 61:10  <b>review</b> 43:25 53:19  57:18,20 59:21,25  60:19 61:6  <b>reviewed</b> 37:10  54:16 56:14  <b>right</b> 3:11,16 4:11  4:14,23 7:21,22  8:2,14,21,23 9:16  10:4,6 11:4,11,20  11:24 12:3,12  13:20 14:5,8  16:21 17:15,24  22:18 23:15 24:6  24:13 25:7,23  26:2,4,14 27:14  28:13 29:7,25  30:1,20,20 31:4,6  31:7,22 32:22  33:2 34:14 35:11  35:15,17 36:15  38:20,23 41:2  43:21,24 45:10  46:22 47:1,21  48:17 52:3 58:9  59:21 60:11  <b>rightly</b> 36:13 51:2  <b>rights</b> 9:6 24:16  40:13 58:23,25  <b>rise</b> 53:3  <b>roads</b> 59:25  <b>roberts</b> 3:3,19 4:2,4  7:12,16 9:10,15  9:17,23 10:1  19:13,16 23:4  24:7 25:13,24  26:9,15 33:20,25</p>	<p>38:5 54:23 59:14  61:11  <b>route</b> 5:4,6 29:15  44:15  <b>ruin</b> 54:5  <b>rule</b> 13:17 19:9  23:25 24:4 26:3  28:21 31:15,25  32:20 35:10,20  37:8 42:5 49:22  50:25 51:1,3,4,11  52:4 56:21  <b>ruled</b> 35:23,23 38:1  <b>rules</b> 17:17 31:11  53:18,19 58:12  <b>ruling</b> 5:2 16:15  31:15 43:14  <b>run</b> 45:20  <b>running</b> 31:21</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>s</b> 2:1 3:1,11  <b>safety</b> 23:22 37:9  <b>sake</b> 21:13 57:5  <b>satisfied</b> 7:19  <b>satisfy</b> 10:11  <b>save</b> 28:15,23 34:24  <b>savings</b> 1:7  <b>saying</b> 16:23 24:3  27:10,19 28:24  29:5 30:24 31:3,3  32:3,17 34:19  42:24 50:5  <b>says</b> 3:21 4:9 7:5  11:7,13 17:12  22:9 25:21 42:22  44:19 46:4,25  <b>scalia</b> 5:16,18,25  6:8,12,22,24  17:11 18:23 38:9  38:18,24 39:7,12  42:23 43:3 57:22  58:1  <b>se</b> 52:8  <b>searching</b> 31:24  <b>seat</b> 43:4</p>	<p><b>second</b> 23:21 41:3  43:6,16 44:18,18  52:17  <b>section</b> 3:11 11:1  48:2 49:2,23  57:18 59:19  <b>secured</b> 27:18 28:1  <b>see</b> 14:11,22 26:23  26:24,25 31:24  43:19 52:5,6 53:8  <b>seek</b> 41:7 43:7,8,13  <b>seeking</b> 43:1,13  <b>seen</b> 16:3 32:10  52:5  <b>selfrestraint</b> 59:8  <b>send</b> 49:16  <b>sense</b> 4:5 39:13  49:8  <b>series</b> 15:19  <b>serious</b> 26:21 40:19  <b>serves</b> 7:21  <b>set</b> 13:5 14:23  58:19  <b>sets</b> 58:25  <b>setting</b> 52:24  <b>settled</b> 9:9  <b>seven</b> 52:6  <b>severe</b> 60:25  <b>shifts</b> 35:6  <b>shortcircuit</b> 31:25  32:4  <b>shortcircuiting</b>  32:1  <b>shouldnt</b> 25:18  30:25 53:17  <b>show</b> 18:19,21  <b>showing</b> 12:13  <b>shown</b> 21:7 47:19  <b>side</b> 6:25,25 14:2  17:20 21:11 37:2  38:10 46:23 54:1  54:8,9,11,19 60:2  <b>sifting</b> 47:8  <b>significant</b> 53:10  <b>significantly</b> 35:4  <b>similar</b> 6:6 12:15</p>
---	---	--	--	---

15:8 17:17 <b>simpler</b> 33:14 <b>simply</b> 25:16 40:16 <b>situation</b> 44:20 60:15 61:6 <b>situations</b> 32:6 <b>six</b> 17:22 <b>sky</b> 17:14 <b>slow</b> 33:12 <b>small</b> 21:21 48:7,8 <b>smaller</b> 15:5 <b>smith</b> 39:25 40:3,3 <b>socalled</b> 43:16 <b>solicitor</b> 1:18 <b>solution</b> 42:1 <b>solve</b> 16:22 <b>somebody</b> 6:15 18:10 28:14 44:20 60:10 <b>somewhat</b> 39:15 <b>soon</b> 20:1 24:2 27:15 <b>sorry</b> 4:2 29:13 31:6 40:1 <b>sort</b> 30:5 34:7 <b>sotomayor</b> 4:22 5:1 5:7,10 8:6,9 21:23 21:25 22:7,15,23 34:17 43:10 50:1 50:4 <b>sought</b> 17:23,25 37:24 <b>sound</b> 21:13 <b>sounds</b> 44:15 48:10 <b>sparingly</b> 57:10 <b>spawned</b> 49:19 <b>specific</b> 48:13 <b>speed</b> 26:12 34:8 <b>spend</b> 28:17 <b>spending</b> 51:15 <b>spent</b> 49:20 <b>stage</b> 21:6,12 <b>stake</b> 8:4 14:24 <b>standard</b> 18:18 47:15,18,22 48:18 59:23	<b>standards</b> 16:10 <b>start</b> 17:8 20:1 27:16 47:14 <b>started</b> 42:24 52:12 <b>starts</b> 15:12 <b>states</b> 1:1,13,20 2:7 21:8 23:7 32:11 38:10 47:18 61:3 <b>statute</b> 9:1 35:21 56:15 <b>statutory</b> 49:23 <b>stay</b> 12:3,14 16:7,9 16:17 17:7,23 18:1,11,13 27:4 28:3 34:25 43:13 43:14 52:10 53:6 60:3,4,7 <b>staying</b> 12:6 <b>stays</b> 16:6,24 <b>steps</b> 15:19 <b>straight</b> 26:6 <b>strange</b> 44:16 <b>stressed</b> 55:5 <b>strong</b> 9:3 26:19 32:9 <b>strongly</b> 55:14 <b>structure</b> 29:18 51:8 <b>stuck</b> 31:14 45:15 <b>submitted</b> 61:12,14 <b>submitting</b> 27:5 <b>substance</b> 25:20 <b>substantially</b> 31:18 <b>substantive</b> 24:16 <b>success</b> 18:19,20,20 <b>suggest</b> 24:18 35:14 <b>suggested</b> 40:18 42:19 49:10 56:18 59:4 <b>suggesting</b> 34:10 34:12 40:7 59:4 <b>support</b> 32:13 <b>supporting</b> 1:20 2:8 23:8 26:23,25 27:1 <b>suppose</b> 39:24 57:5	<b>supposed</b> 20:11 34:10 <b>supreme</b> 1:1,13 <b>sure</b> 33:3,20,21 <b>surmising</b> 36:8 <b>surprising</b> 37:16 39:15 <b>suspect</b> 55:14 <b>symmetrical</b> 31:18 32:24 33:4 <b>system</b> 7:24 21:4,14 29:18 54:5 55:8 <b>systematically</b> 7:24 <b>systems</b> 42:9 43:21	9:8,8,13 10:5,17 13:16 14:5,19 16:3,21 17:15 18:8,12 19:25 22:23 23:16,18 24:13 25:3 26:20 27:10 28:11 29:7 31:2,2 32:9,24 36:1 38:22 39:8 39:18 40:20 42:15 42:21 43:11 44:12 50:13,13,14,15,18 52:3,24 55:14 56:2 58:23 <b>theirs</b> 40:19 <b>theory</b> 4:11 <b>theres</b> 5:2 13:20 16:14 17:2 19:6 25:1,6 27:4,14 28:8 30:17,19,20 37:6 48:13 57:4 60:4,7 <b>theyll</b> 17:8 34:25 <b>theyre</b> 6:17,19 7:11 8:7 12:13 13:12 13:14 16:17,23 18:15 22:12 27:6 28:8,24 31:14 32:8 34:19,25 46:7,20 50:5 51:14,15 57:23 61:8 <b>theyve</b> 49:14 <b>thing</b> 9:11 16:7,18 28:8 32:17 33:9 45:16 50:12 57:3 59:19 60:9,22 <b>things</b> 8:17 20:13 24:25 26:16 51:12 53:24 <b>think</b> 4:14 5:20 6:2 6:4,11,13 7:20 9:18,20 11:16 16:21 18:14,18 19:8,10 20:10 21:7,9 24:13,18	25:10,16 26:8,18 26:20,23 27:8,14 27:20 28:13 29:4 29:6,10,21 30:3,4 32:6,9,14,15 33:4 33:7 34:21 36:9 37:4,6,21,25 38:11 40:10 42:17 42:18 43:10,13 44:2 45:23,24 46:17 47:14,19,21 47:23 48:4,15 49:1,22,23 50:10 50:10,11 51:2 52:12 53:11,14,15 54:3,12,19 55:1,2 56:2 57:11,12,17 57:23 58:6,7,18 59:7 60:5 61:3 <b>thinks</b> 8:20,22 34:24 40:14 <b>third</b> 3:23 17:16 23:17 35:19 43:15 <b>thought</b> 4:23 9:19 9:21 14:1,12,19 39:5 54:23 55:17 <b>thousands</b> 28:17 46:7,20 <b>threatening</b> 35:3 <b>three</b> 4:10 6:12 19:1,10,11 20:4 24:25 27:6 36:16 41:4 42:24 <b>threemonths</b> 43:25 <b>throw</b> 38:7 <b>throwing</b> 13:7 <b>time</b> 3:23 4:19 12:11 19:22 20:2 23:3 27:10 28:9 36:2 44:8,25 52:17 56:16,22 <b>times</b> 6:12 34:14 51:6,7 <b>today</b> 41:8 <b>tools</b> 59:10 <b>treat</b> 23:15
---	--	--	--	--

<b>treatise</b> 24:19	2:7 21:8 23:7	<b>washington</b> 1:9,16	44:4	<b>13</b> 4:16 5:25 6:3 7:4
<b>treatment</b> 9:22	32:11 38:10 47:18	1:19,22	<b>written</b> 24:4	7:8 8:5 19:25
11:24	61:3	<b>wasnt</b> 45:13	<b>wrong</b> 16:15 24:12	20:14 21:18 28:15
<b>tripp</b> 1:18 2:6 23:5	<b>unpredictable</b>	<b>water</b> 13:8	<b>wrongly</b> 36:13	34:8,20 51:9 52:2
23:6,9 24:13	41:21	<b>way</b> 10:1 11:4,9,9,9	<hr/> <b>X</b> <hr/>	52:4 58:21
25:12,23 26:2,14	<b>unreported</b> 19:19	11:13 12:23 14:20	x 1:2,8	<b>1326</b> 27:16
26:18 27:14,24	<b>unsecured</b> 46:3,16	16:22 24:20 26:4	<hr/> <b>Y</b> <hr/>	<b>14116</b> 1:4 3:4
28:13 29:4,11,13	<b>upheld</b> 44:12	27:25 29:7 31:9	<b>yeah</b> 5:7	<b>155</b> 46:4,16
29:21 30:14,22	<b>urging</b> 17:14	31:10 33:15 35:23	<b>year</b> 60:5	<b>157</b> 48:2 49:23
31:2,17,21,22	<b>use</b> 49:12 59:9	40:2 41:18 42:21	<b>years</b> 20:4 27:9	58:20
32:6 33:2,19,21	<b>uses</b> 28:5	46:15 52:22 55:15	35:2,4 36:2 49:20	<b>158</b> 3:12 11:1 30:5
<b>true</b> 19:25 20:8	<b>usually</b> 6:15 7:2	56:16 58:13 60:18	<b>youd</b> 25:25 26:25	30:8,9 49:2 57:18
35:16	20:4	60:21 61:7	33:11	59:20
<b>trust</b> 53:16,18	<hr/> <b>V</b> <hr/>	<b>ways</b> 22:1	<b>youll</b> 14:15	<hr/> <b>2</b> <hr/>
<b>trustee</b> 20:11 52:13	<b>v</b> 1:5 3:4	<b>wednesday</b> 1:10	<b>youre</b> 6:16 14:6	2 48:2 58:20
<b>try</b> 3:21,23 10:11	<b>valid</b> 28:3	<b>week</b> 7:6,9 12:10	16:1,1,12,23	<b>20</b> 46:17
60:15	<b>value</b> 52:25	<b>welcome</b> 23:5	17:13 25:13 27:17	<b>200</b> 25:19 39:25
<b>trying</b> 6:16,17,19	<b>valve</b> 37:9	<b>wellheeled</b> 6:9	27:19 28:22 30:23	<b>2000</b> 19:9
24:14 34:24 42:8	<b>valves</b> 23:22	<b>westlaw</b> 19:19 52:7	31:20,25 32:3	<b>2005</b> 30:10 35:20
49:20 60:3,13	<b>various</b> 22:20	<b>weve</b> 47:19 51:9	33:5 43:22 45:10	35:24 56:16 59:10
<b>turn</b> 6:7	<b>versions</b> 4:10	52:5	45:19 47:11 53:11	<b>2015</b> 1:10
<b>turning</b> 19:5	<b>view</b> 5:20 9:4 16:9	<b>whats</b> 11:21 27:3	<b>youve</b> 18:21 20:18	<b>23</b> 2:8
<b>turns</b> 51:3	30:25 43:21,21	42:8 44:3 58:18	26:13 36:24	<b>28</b> 3:11 23:14
<b>two</b> 6:12 23:22 26:1	48:4 50:19,20,24	<b>whos</b> 55:19	<hr/> <b>Z</b> <hr/>	<hr/> <b>3</b> <hr/>
26:6 31:8 34:14	<b>viewed</b> 12:14	<b>willing</b> 44:5 45:21	<b>zachary</b> 1:18 2:6	3 2:4
35:1 42:23 43:4,9	<b>virtually</b> 20:5	<b>winding</b> 38:6	23:6	<b>30</b> 20:2 27:16 49:20
46:5 59:15,24	<hr/> <b>W</b> <hr/>	<b>winner</b> 44:20	<b>zillow</b> 53:1	60:7
<b>typical</b> 45:2	<b>wages</b> 14:15	<b>wise</b> 57:13	<hr/> <b>0</b> <hr/>	<b>34</b> 2:11
<b>typically</b> 3:20	<b>wait</b> 4:6,8 60:23	<b>wisely</b> 53:23	<b>06</b> 1:14 3:2 61:13	<hr/> <b>4</b> <hr/>
<hr/> <b>U</b> <hr/>	<b>waiting</b> 43:4	<b>won</b> 39:18	<hr/> <b>1</b> <hr/>	<hr/> <b>5</b> <hr/>
<b>u</b> 3:11	<b>want</b> 4:17 5:14 7:2	<b>wonder</b> 27:11	1 1:10 26:5	5 7:6,9
<b>ultimate</b> 20:9 37:10	7:2,3,3 9:11 11:13	<b>wont</b> 21:5,17 30:17	<b>10</b> 25:19 26:23 36:1	<b>50</b> 56:16
<b>ultimately</b> 15:16	19:6 23:22 24:3	41:22,22 45:9	<b>100</b> 26:5 28:19	<b>59</b> 2:14
40:24 52:15 55:14	25:15 26:10,10,17	53:17	39:25	<hr/> <b>6</b> <hr/>
<b>um</b> 19:20	30:2 32:4,17	<b>word</b> 49:1,12	<b>11</b> 1:14 3:2 5:22 6:1	<hr/> <b>7</b> <hr/>
<b>understand</b> 5:4,13	38:24 39:7,19,25	<b>words</b> 3:22 27:22	6:4,8,14,14,18,19	7 45:17
8:6 9:14 10:17	40:2 41:4 43:23	33:15 48:19 54:1	7:4 40:15 51:11	<hr/> <b>8</b> <hr/>
30:13 33:22 51:2	43:25 48:19 53:7	<b>work</b> 29:15 30:18	51:12,13 58:22	<hr/> <b>9</b> <hr/>
<b>understood</b> 20:17	53:8 54:9 60:21	42:13	<b>12</b> 61:13	
<b>undue</b> 21:17	<b>wanted</b> 9:22 10:8	<b>worked</b> 14:20	<b>1291</b> 16:1 49:4	
<b>unfair</b> 36:25	10:11 11:25 45:12	<b>working</b> 42:14	50:11,12	
<b>uniform</b> 18:18 56:1	<b>wanting</b> 54:14	<b>works</b> 31:1	<b>1292</b> 59:23	
<b>uniformly</b> 18:18	<b>wants</b> 6:15 31:12	<b>world</b> 42:9 54:20		
<b>unit</b> 49:4,7	31:13 44:11 53:5	55:21		
<b>united</b> 1:1,13,20		<b>wouldnt</b> 10:14		
		18:11 26:23,24		