



1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DANIEL R. ORTIZ, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	JOSEPH R. PALMORE, ESQ.	
7	On behalf of the United States, as	
8	amicus curiae, supporting Petitioners	18
9	ORAL ARGUMENT OF	
10	ERIC SCHNAPPER, ESQ.	
11	On behalf of the Respondent	27
12	REBUTTAL ARGUMENT OF	
13	DANIEL R. ORTIZ, ESQ.	
14	On behalf of the Petitioners	51
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 09-1476, The Borough  
5 of Duryea v. Guarnieri.

6 Mr. Ortiz.

7 ORAL ARGUMENT OF DANIEL R. ORTIZ

8 ON BEHALF OF THE PETITIONERS

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

11 In asking this Court to cabin Connick v.  
12 Myers' public concern requirement, Respondent would  
13 constitutionalize, under the Petition Clause, large  
14 parts of the law of public employee discipline, and  
15 thereby grant to public employees a broad constitutional  
16 employment right that private employees do not enjoy.  
17 Two independent reasons, however, argue strongly for  
18 applying the public concern requirement to discipline  
19 claims brought both under the Free Speech and the  
20 Petition Clauses.

21 First, the constitutional framework  
22 principles this Court has repeatedly identified in its  
23 public employment cases argue strongly for requiring it.  
24 And second, McDonald v. Smith's principle of parity  
25 argues strongly for creating no hierarchy between the

1 Free Speech and Petition Clauses.

2 When --

3 JUSTICE SCALIA: You agree that the Petition  
4 Clause is -- is different and does have a separate  
5 content?

6 MR. ORTIZ: Your Honor, we agree that the  
7 Petition Clause -- that when the Petition Clause and the  
8 Free Speech Clause cover the same activity, they  
9 apply -- they cover it under McDonald in the same way.

10 JUSTICE SCALIA: But the Speech Clause, in  
11 the employment context, has been interpreted to cover  
12 the content. Whether it -- whether it applies or not  
13 depends upon the content, right?

14 MR. ORTIZ: One part of that inquiry turns  
15 on the content.

16 JUSTICE SCALIA: And you want the Petition  
17 Clause also to turn on the content?

18 MR. ORTIZ: Part of the inquiry, yes, Your  
19 Honor, should turn on the content.

20 JUSTICE SCALIA: But it seems to me you're  
21 either petitioning the government or you're not  
22 petitioning the government. Why -- why shouldn't the  
23 line be, if you're petitioning the government as  
24 employer is different from petitioning the government as  
25 ruler? Why shouldn't that be the line that we draw?

1 MR. ORTIZ: Well, the --

2 JUSTICE SCALIA: Which wouldn't necessarily  
3 break out the same way as whether it's a matter of  
4 private concern versus a matter of public concern.

5 MR. ORTIZ: Your Honor, this -- under the  
6 constitutional background principles this Court has  
7 developed, this Court should look at -- looks at how  
8 close to the core a particular example of employee  
9 activity is, and then talks about how much of a burden  
10 that kind of activity poses to the efficient operation  
11 of the workplace.

12 JUSTICE SCALIA: But the core -- the core of  
13 the Petition Clause is petitioning. The core of the  
14 Free Speech Clause is political speech, of course --  
15 speech in public interest -- but the core of the  
16 Petition Clause is quite different. It's simply whether  
17 you're petitioning. Surely you -- you could petition  
18 the -- most of the petitions in the early years were  
19 regarding private matters; isn't that right?

20 MR. ORTIZ: That is right, Your Honor, just  
21 as most examples of speech concern private matters, too.  
22 Yet that does not define the core of the Free Speech  
23 Clause. There's not an empirical inquiry. That depends  
24 upon the purpose of the clause. And as this Court  
25 stated very definitely in McDonald, the core of the

1     Petition Clause, like the Free Speech Clause, was -- was  
2     aimed at promoting democratic self-government.

3                 Petitioning is a particular form of speech.  
4     It is speech directed to a particular audience, the  
5     government, some arm of government, some individual in  
6     government, and it is speech that has a particular  
7     purpose: Asking for a change of some sort in government  
8     policy.

9                 JUSTICE SCALIA: That's true, and it seems  
10    to me the -- the core is involved whenever you're asking  
11    for a change. And it seems to me that the key  
12    distinction, if there is one, is whether you're asking  
13    for a change in -- by your employer in your employment  
14    conditions or a change by the government in some matters  
15    over which the government has control as -- as  
16    sovereign.

17                MR. ORTIZ: Well, Your Honor, in practice,  
18    that inquiry would not align much differently than the  
19    Connick inquiry.

20                JUSTICE SCALIA: It may well be, may well  
21    be.

22                MR. ORTIZ: And in this particular case,  
23    designing a kind of threshold inquiry along those lines  
24    would actually advantage Petitioners.

25                One difficulty in application, though, is

1     that this Court has always identified the purpose of the  
2     Connick threshold test as categoricalizing in a way the  
3     Pickering balancing inquiry. And if you had a threshold  
4     test that basically did not match, was a little oblique  
5     to the Pickering balancing inquiry, it would create much  
6     more work for the lower courts along the way. Or  
7     perhaps this Court would want to change the Pickering  
8     balancing inquiry.

9                     JUSTICE SCALIA: Would they have to do both?  
10    Would they have to do both?

11                    MR. ORTIZ: They might well, Your Honor. If  
12    the Pickering balancing inquiry still aligns with the  
13    traditional framework that this Court has described in  
14    its employment cases, what I describe, and this other  
15    inquiry, which you're suggesting, Justice Scalia, was  
16    somewhat oblique to it, then it might conceivably be  
17    necessary to do both. One --

18                    JUSTICE SCALIA: If you're proceeding with a  
19    claim under two separate provisions of the Constitution,  
20    it should not be surprising that you might have two  
21    different tests.

22                    MR. ORTIZ: Well, Your Honor, then that  
23    might argue for more reengineering of the rest of the --  
24    the enterprise as well, a step that this Court has not  
25    identified as appropriate under --

1 JUSTICE GINSBURG: Why would it make -- why  
2 would it make a difference at what you call the  
3 balancing stage whether it is -- whether the distinction  
4 is between public speech and private speech on the one  
5 hand or government as employer and government as  
6 sovereign on the other? Why would there be any  
7 difference?

8 MR. ORTIZ: Well, Your Honor, if at the  
9 first stage the Court is running an inquiry that is  
10 something different from Connick, that is not going to  
11 map onto traditional Pickering balancing, at least as  
12 this Court has described it, at the second stage.

13 JUSTICE GINSBURG: Why not?

14 MR. ORTIZ: Because, Your Honor, Pickering  
15 balancing has gone to things like how -- how -- how  
16 important that particular example of speech is, how  
17 close it is to the core of what the First Amendment  
18 protects, and then that is weighed against the kind of  
19 burden it would place on the government to have that  
20 activity protected in a very strong way.

21 JUSTICE SCALIA: I think all you're saying  
22 is that one of the elements of Pickering balancing is  
23 the element of Petition Clause jurisprudence, as I  
24 suggested it -- it might be applied; that is, in  
25 Pickering balancing, certainly you have to ask, was what



1 the individual was asking for a change in employment  
2 conditions? That would be one of the questions. If so,  
3 it was a private matter, and then you go on to the rest  
4 of the balancing.

5 But it seems to me you have to make that  
6 determination under Pickering balancing anyway, and once  
7 you make it, you've answered the -- the Petition Clause  
8 question.

9 MR. ORTIZ: Well, Your Honor, if this -- if  
10 this Court were to proceed down that road, Petitioners,  
11 I believe, would still end up victorious. This is a  
12 case, as I understand your -- your approach, where the  
13 petition does concern purely employment matters. It is  
14 not a petition aimed at or directed at the government in  
15 its capacity as sovereign, so under that kind of  
16 analysis, that is where the initial trigger, this case,  
17 would have not been constitutionalized.

18 JUSTICE SOTOMAYOR: What kind of case,  
19 hypothetically, would qualify under your theory as a  
20 petitioning case to the sovereign? Would a claim of  
21 retaliation because of a termination based on race  
22 qualify?

23 MR. ORTIZ: It would depend upon the  
24 particular claims involved, or statements in the  
25 petition. If it were a statement that there was a

1 policy, involved a petition against a policy in a  
2 government department involving race, that would  
3 certainly qualify. That would be like the Gibbons case  
4 under the Free Speech Clause, Your Honor.

5 If, however, it were a one-off allegation  
6 that a particular, say, low-level governmental  
7 supervisor had engaged in a form of discriminatory  
8 activity --

9 JUSTICE SOTOMAYOR: Doesn't that get to  
10 the -- to the merits of the case? You have to from --  
11 you can't invite a question as to whether the sovereign  
12 is responsible until you litigate the issue.

13 So what is the -- addressing Justice  
14 Scalia's question to you, what would qualify as a  
15 petition to the employer as opposed to a petition to the  
16 sovereign and why?

17 MR. ORTIZ: Your Honor, a petition to the  
18 employer about changing the hours of employment --

19 JUSTICE SOTOMAYOR: Those are clear cases.

20 MR. ORTIZ: -- for overtime --

21 JUSTICE SOTOMAYOR: I was asking the flip.

22 MR. ORTIZ: The flip. A petition, a  
23 complaint to an employer about the employer's pervasive  
24 or apparently pervasive policies in violation of the  
25 law, would certainly qualify as something to -- a

1 petition to the sovereign.

2 JUSTICE SCALIA: Of course, you have to  
3 wrestle with the same problem if you apply the other  
4 test that you -- you were proposing.

5 MR. ORTIZ: For sure.

6 JUSTICE SCALIA: Namely, whether it's a  
7 private matter or a matter of public concern. You  
8 confront the same difficulty, don't you?

9 MR. ORTIZ: You certainly do, Your Honor,  
10 and presumably this Court would look at some of the same  
11 factors involved there: The form, the content, and the  
12 context of the communication. All of those things are  
13 relevant. This Court has admitted that that inquiry is  
14 sometimes messy, that there are some -- many cases where  
15 the line of distinction is not clear. But it is -- this  
16 Court has not hesitated to apply that test because of  
17 its importance to the public employment environment.

18 JUSTICE GINSBURG: Mr. Ortiz, you're not  
19 drawing any line depending on the branch of government,  
20 in other words, executive, legislature. Those are  
21 certainly branches of government to which one can  
22 petition. But access to court you agree comes within  
23 the Petition Clause?

24 MR. ORTIZ: A lawsuit, pursuing a lawsuit,  
25 is definitely a form of petitioning activity, Your

1 Honor. Petitioners do not contest that.

2 JUSTICE GINSBURG: What about the -- this as  
3 I understand it, came up originally as arbitration under  
4 the -- wasn't it under the collective bargaining  
5 contract?

6 MR. ORTIZ: Yes, Your Honor, that is the  
7 case.

8 JUSTICE GINSBURG: Would that count also,  
9 because it is a mechanism set up by a government  
10 employer?

11 MR. ORTIZ: It would qualify under the  
12 original conception of what a petition is all about that  
13 was in this case. It is Petitioner's view that it would  
14 not qualify under the access to courts definition or  
15 conception of petition that Respondent has developed  
16 since the case was first before the district court.

17 JUSTICE SCALIA: If -- if lawsuits are  
18 covered by the Petition Clause, why is it that in the  
19 innumerable cases this Court has had concerning what due  
20 process of law consists of, we've never mentioned what  
21 the Petition Clause requires. I mean, if the Petition  
22 Clause guarantees access to the courts, certainly there  
23 are some minimum requirements that it imposes as well,  
24 and I don't recall any of our cases dealing with  
25 lawsuits that mention the Petition Clause. That's

1     rather extraordinary if indeed it governs all lawsuits.

2                   MR. ORTIZ:   Well, Your Honor, that might be  
3     explained by the fact that the Due Process Clause has  
4     been interpreted more robustly and supplies a certain  
5     floor of constitutional protection for lawsuits.   And  
6     the Petition Clause, since it is directed at petitions  
7     generally and in particular the framers, the evidence  
8     is, had in mind not petitions to the courts, but  
9     petitions to the legislature, if lawsuits --

10                  JUSTICE SCALIA:   Maybe that's all they had  
11     in mind, or petitions to the executive as well.   What --  
12     what evidence do you have that it applied to lawsuits?

13                  MR. ORTIZ:   The evidence is that developed  
14     by Professor Andrews, and the argument is a somewhat  
15     slender one that goes as follows:   At the time of  
16     founding, Congress was the central sort of clearinghouse  
17     for petitions and handled both what we think of as the  
18     stereotypical paradigmatic petitions, pleas to Congress  
19     to sort of change the law, and also handled a lot of  
20     private bills.   Over time, Congress handed over much of  
21     the responsibility for handling the things that came  
22     through private bills to the courts, and so to the  
23     extent -- this is Respondent's argument -- that the  
24     courts handled, took over those things, the lawsuits are  
25     protected.

1 JUSTICE SCALIA: I agree with you that  
2 that's slender.

3 MR. ORTIZ: Thank you, Your Honor.

4 JUSTICE GINSBURG: But you are not  
5 challenging that, as I understand.

6 MR. ORTIZ: No, Your Honor. In the district  
7 court it was conceded that the grievance activity would  
8 be -- was protected. However, Petitioners do contest  
9 quite sharply that under Respondent's new view of the  
10 Petition Clause that the things of central importance  
11 are lawsuits and other communications that would be  
12 protected, perhaps be protected, otherwise under the  
13 access to courts doctrine, that arbitration, the  
14 arbitration involved in this case, does not count and  
15 should not receive any kind of heightened protection.  
16 The problem, much of the problem here, is the theory of  
17 what is a petition from Respondent's side has changed  
18 from the district court to this Court.

19 JUSTICE KAGAN: Mr. Ortiz, can I try a  
20 hypothetical on you? Suppose that there is a city  
21 employee and unrelated to the fact that he is a city  
22 employee the government takes some part of his property  
23 without just compensation. And he sues the government,  
24 and the government says, somebody says, his employer,  
25 that his supervisor said: Do you know what he's just

1 done? He's just sued the city; I think we should fire  
2 him. And he brings a retaliation claim. Is that  
3 protected under the Petition Clause?

4 MR. ORTIZ: Yes, Your Honor, it would be  
5 protected for two different reasons. First, that would  
6 -- similar activity would be protected under the Free  
7 Speech Clause, so that would preserve the principle of  
8 parity.

9 Second --

10 JUSTICE KAGAN: Really? What has he done  
11 that's protected under the Free Speech Clause? He has  
12 brought a suit saying: I'm entitled to just  
13 compensation. It seems to me -- the reason I ask is  
14 because this seems to me a purely private matter which  
15 would not get protection under your test.

16 MR. ORTIZ: It's not employment-related or  
17 related to his particular job, and this Court has always  
18 drawn the distinction there. For example, in National  
19 Treasury Employees Union this Court applied that kind of  
20 analysis.

21 JUSTICE KAGAN: I see, so that goes back to  
22 Justice Scalia's difference test, which is it's not a  
23 matter of public concern versus private concern, but  
24 it's a matter of employment-related versus not  
25 employment-related, correct? Is that correct?

1                   MR. ORTIZ: Well, that shows how closely  
2     those two things have been related in this Court's  
3     approach. In -- but certainly something that is  
4     privately-related, a public employee is complaining  
5     about tax assessment or something like that and tries to  
6     sue for retaliation under, under that theory, not for  
7     anything related to his or her job, this Court -- under  
8     this Court's and the lower court's application of the  
9     Connick principles, there would be no problem there  
10    treating it as speech or as a petition.

11                  So it is only when the lawsuit or the  
12    petition involves something related to the person's  
13    employment that these particular -- this particular test  
14    would kick in. And that's consistent, Your Honor, with  
15    this Court's twin background constitutional framework  
16    principles, one that you look at how much disruption  
17    something is likely to pose to the workforce and how  
18    central it is to the particular constitutional provision  
19    involved.

20                  In this case, if in general it's not  
21    employment-related the government has much less interest  
22    in worrying over it this way and applying the Connick  
23    threshold test is much less justified. You would have  
24    to do Pickering balancing, proceed directly to Pickering  
25    balancing in that case.



1                   Now, Your Honor, Respondent's view presents  
2   several problems of sort of practical application, or  
3   would, to this Court. First, it would allow for the  
4   easy circumvention of Connick, which is a test that on  
5   the free speech side this Court has long held is very  
6   important for the public employment field to work  
7   efficiently. It would be very easy for a particular  
8   employee to take activity that Connick would not allow  
9   to proceed, to turn into a lawsuit on the free speech  
10   clause, and just by rephrasing it, respinning it,  
11   whatever, to turn it into a petition where under  
12   Respondent's rule the result would be very different.

13                  It also would require the Court to create a  
14   hierarchy between speech claims and petition claims,  
15   and, more importantly, if the Court were to go down the  
16   particular road that Respondent describes and see the  
17   center of the Petition Clause as defined by the access  
18   to courts doctrine it would create a hierarchy among  
19   different forms of petition. All of a sudden, petitions  
20   that at the founding were thought to be at the  
21   periphery, if there, of the Petition Clause would define  
22   its center, and a paradigmatic petition of a letter to  
23   Congress asking it to change its position on something  
24   would not be covered at all.

25                  If there are no further questions, I would

1 like to retain my remaining time for rebuttal.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 Mr. Ortiz.

4 Mr. Palmore.

5 ORAL ARGUMENT OF JOSEPH R. PALMORE,

6 ON BEHALF OF THE UNITED STATES,

7 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

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

10 The Third Circuit rule here at issue is  
11 flawed for two fundamental reasons. First, contrary to  
12 this Court's admonitions, it quite literally  
13 constitutionalizes the employee grievance process by  
14 supplanting carefully calibrated nonconstitutional  
15 safeguards and by providing a potential First Amendment  
16 claim in Federal court to any employee who has filed a  
17 grievance on a matter of only private interest. And  
18 second --

19 JUSTICE SOTOMAYOR: How much of your  
20 argument is premised on the fact that there was an  
21 alternative mechanism to the court system available.

22 MR. PALMORE: That certainly --

23 JUSTICE SOTOMAYOR: Meaning let's assume  
24 there wasn't a collective bargaining agreement, let's  
25 assume there wasn't a State law protection, all of the

1 items that you mention in your brief as existing to  
2 resolve disputes, that the only avenue for redress were  
3 the courts. So where would that put your argument?

4 MR. PALMORE: Well, it's a hard hypothetical  
5 to answer, of course, because the grievance was filed  
6 pursuant to the collective bargaining agreement.

7 JUSTICE SOTOMAYOR: Putting it aside.  
8 You -- you were talking about constitutionalizing a  
9 grievance process. I'm going more broadly and saying  
10 how much of your argument depends on that fact?

11 MR. PALMORE: Well, I think that's an  
12 important part --

13 JUSTICE SOTOMAYOR: What was the meaning  
14 would -- it is harder if all they have access to is a  
15 court proceeding.

16 MR. PALMORE: I think that's an important  
17 part of the argument, for this reason: If you look at  
18 the Third Circuit's case in San Filippo, the court had a  
19 kind of a doctrinal basis for its ruling, but it also  
20 had a practical concern that not affording protection  
21 for this kind of petitioning activity would be a trap to  
22 the unwary. But there was really no basis for that  
23 concern, because the issue here is when a sovereign  
24 provides a remedial mechanism or enters into a  
25 collective bargaining agreement that provides a remedial

1 mechanism --

2 JUSTICE SOTOMAYOR: How about if they don't?

3 MR. PALMORE: It typically -- well --

4 JUSTICE SOTOMAYOR: How about if they don't?

5 That's my point. Then what happens to the Third  
6 Circuit's definition?

7 MR. PALMORE: Well, then I think the -- the  
8 result is the same, and -- and our position is you --  
9 you still apply Connick, just as speech on matters of  
10 private concern is protected by the First Amendment, yet  
11 under Connick, an employee who engages in speech on a  
12 matter of private concern is not going to be protected  
13 in the employment context in all respects.

14 And that reflects a very important balance  
15 that this Court has struck between its view of how the  
16 Constitution applies to the government as sovereign  
17 regulator of the general public and how it applies to  
18 the government and its proprietary status as an  
19 employer. And in that latter situation, Connick has  
20 been critical in providing a bulwark against allowing  
21 run-of-the-mill employment disputes from becoming  
22 constitutional cases in Federal Court.

23 And the second main problem with the Third  
24 Circuit's approach, and it's one that Mr. Ortiz  
25 highlighted, is that it privileges petition activity

1 over speech activity, contrary to this Court's numerous  
2 statements that there is no such hierarchy in the First  
3 Amendment. So going back to Thomas v. Collins in 1945,  
4 the Court called the two rights inseparable.

5 In the United Mine Workers case, which is a  
6 case relied on by the other side, it's an access to  
7 courts case, the Court interchangeably applied the  
8 speech right, the petition right, and the assembly  
9 right, and it said they were intimately connected in  
10 origin and purpose. And, of course --

11 JUSTICE KAGAN: Mr. Palmore -- I'm sorry.

12 MR. PALMORE: No, please.

13 JUSTICE KAGAN: Suppose a State legislature  
14 passes a law depriving all State employees of collective  
15 bargaining rights, and a State employee files a lawsuit  
16 saying that this law violates the State constitution,  
17 and the State employee is thereupon fired. Is that a  
18 matter of public concern or not?

19 MR. PALMORE: It -- it likely would be, and  
20 I think this -- this goes to some of the questions  
21 Justice Scalia was asking. But as this Court said in  
22 Connick that the question about -- of whether speech is  
23 a matter of public concern is assessed not only by the  
24 content, but by the form and the context.

25 So in the case that Your Honor is positing,

1 the content of the -- of the speech, which was that an  
2 act of the legislature was illegal, would suggest that  
3 it was a matter of public concern, the form, the form of  
4 a lawsuit is relevant to the consideration, and the  
5 context that it came in part of a larger political  
6 debate would likely be relevant, too.

7 The problem with the Third Circuit approach  
8 is that it never engages in that kind of inquiry.

9 JUSTICE KAGAN: And suppose -- now going  
10 back to Justice Sotomayor's example, suppose that there  
11 were a -- a class action alleging systemic  
12 discrimination in some governmental workplace. Would  
13 that be a matter of public concern?

14 MR. PALMORE: It very well might be. That's  
15 similar to this Court's decision in the GiVon case. So  
16 that was a case where a teacher went to complain to her  
17 principal about the school's general policy of  
18 discrimination, and this Court held that that was speech  
19 on a matter of public concern, that it affected more  
20 than just that individual employee's employment status.

21 So many of these hypotheticals and many  
22 submissions and petitions to the government as sovereign  
23 will, in fact, satisfy the public concern test, and then  
24 you'll get into Pickering balancing.

25 JUSTICE KENNEDY: Do you -- can you think of

1 any instance where speech by the employee would not be  
2 protected under the Pickering-Connick free speech  
3 calculus but would be protected under the Petition  
4 Clause?

5 MR. PALMORE: I think that, no, if you put  
6 it in that way; this Court has never separately analyzed  
7 the two. But I think it is important to note that I  
8 think the Connick test already takes into account the  
9 distinction between what might be deemed petitioning  
10 conduct and non-petitioning conduct because of its use  
11 of the term "form." So, again, the Connick test calls  
12 on courts to look on the content, the context and the  
13 form. So if the form of an employee complaint takes the  
14 form of a lawsuit filed in Federal court, that's  
15 something that -- that should be taken into account.

16 JUSTICE SCALIA: What -- wouldn't a -- a  
17 written letter to -- to the employer, the government  
18 employer, similarly be a petition? Is a lawsuit any  
19 more of a petition, if indeed it is a petition at all,  
20 which I doubt? Surely filing a statement with the  
21 employer is a petition as well. So how does the form  
22 make any difference?

23 MR. PALMORE: I -- it's -- I think it's a  
24 serious question about whether a letter submitted to an  
25 employer as an employer, not as a sovereign, is a

1 petition. But that's the kind of line-drawing that the  
2 Third Circuit approach requires.

3 This Court has had a very broad conception  
4 of what counts as petitioning activity, so in *Edwards v.*  
5 *South Carolina* the Court said that a march to the  
6 grounds of the State capitol in South Carolina to  
7 protest segregation was an example of petitioning  
8 conduct in its most classic and pristine form.

9 The Third Circuit doesn't -- doesn't  
10 count -- wouldn't count that as a petition for this  
11 purpose. It has kind of a gerrymandered view of what  
12 will count as a petition, basically a lawsuit and an  
13 employee grievance.

14 Now, the -- the approach followed by the  
15 majority of the circuits and the approach we advocate  
16 today doesn't require that kind of line-drawing, because  
17 whether, for example, the grievance filed in this case  
18 is a petition or not, it's certainly speech, and so we  
19 would agree that it's susceptible to analysis under the  
20 normal *Connick v. Myers* framework.

21 JUSTICE GINSBURG: Mr. Palmore, what about  
22 the distinction that the other side brings up that  
23 *Connick* is about what happens inside the workplace --  
24 you don't want to disrupt the routine by the kind of  
25 activity in which *Myers* was involved -- but the Petition



1 Clause, they're talking about conduct outside the  
2 workplace, that is a complaint filed in court, nothing  
3 that's happening in the workplace.

4 MR. PALMORE: Well, I think it's workplace-  
5 related and I think that's the test. So I don't think  
6 it -- you know, where an employee physically was when he  
7 or she filed the petition isn't really relevant. The  
8 question is the connection to the workplace and the  
9 connection to the employer-employee relationship.

10 So as Mr. Ortiz answered before, the NTEU  
11 case provides a separate set of protections under the  
12 First Amendment, under the speech protection for  
13 employees who engage in speech conduct that has no  
14 connection to the workplace, and it would limit the  
15 ability of a government employer to take action against  
16 such an employee.

17 But the conduct here is the -- the  
18 grievances that were filed here were obviously  
19 intimately connected to the workplace relationship  
20 between Chief Guarnieri and the Borough Council. This  
21 was not a case like NTEU, where someone wanted to go out  
22 and give a speech on something that had no connection to  
23 their job or go out and file a lawsuit or some kind of  
24 petitioning activity on something that had no connection  
25 to the workplace.

1 JUSTICE KAGAN: Mr. Palmore, on that matter,  
2 one last hypothetical. Suppose the New York City  
3 council passed a resolution that said a precinct house  
4 would be closed all night long from 7 p.m. to 7 a.m.,  
5 and the chief of -- of that precinct filed suit saying  
6 that this was micromanagement and it was going to affect  
7 the public safety of the citizenry, and then that chief  
8 of police was fired.

9 Is that a matter of public concern?

10 MR. PALMORE: It very well might be. It's  
11 hard to answer in the abstract, because what this Court  
12 has said is that the question has to be analyzed in  
13 light of the whole record and in light of the context --  
14 content, the context, and the form.

15 It's not necessary for this Court in this  
16 case to decide whether the petitioning and speech  
17 activity here was on a matter of public or private  
18 concern. The question presented says that it was on a  
19 matter of private concern. So all the Court needs to  
20 decide is -- is whether that makes a difference or not  
21 in terms of the constitutional analysis. And then the  
22 Third Circuit on remand could -- could decide, assuming  
23 the arguments were preserved, could look at the whole  
24 record and decide whether the speech activity here was  
25 on a matter of public or private concern.

1                   If there are no further questions, we ask  
2   the judgment be reversed.

3                   CHIEF JUSTICE ROBERTS: Thank you, counsel.  
4                   Mr. Schnapper.

5                   ORAL ARGUMENT OF ERIC SCHNAPPER  
6                   ON BEHALF OF THE RESPONDENT

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

9                   Neither the text, history, or purpose of the  
10   Petition Clause nor the interest of a government  
11   employer in an efficient workplace provide a basis for  
12   distinguishing and giving less protection to a petition  
13   because it didn't involve a matter of public concern.

14                  The text of the Petition Clause certainly  
15   draws no such distinction. The subject of the petition  
16   must be a grievance and a grievance I think is measured  
17   by whether the matter is of concern to the petitioner.  
18   If it's a problem of concern to the petitioner, that  
19   satisfies that constitutional element. It does not  
20   matter whether the public cares a lot, it doesn't  
21   care --

22                  CHIEF JUSTICE ROBERTS: But all of our cases  
23   have equated the Petition Clause reach with that of the  
24   First Amendment, and our cases under the First Amendment  
25   have made clear that we don't want to constitutionalize

1 the -- the employee grievance procedures.

2 MR. SCHNAPPER: Well, with all respect, Mr.  
3 Chief Justice, I don't think this Court is committed to  
4 the view that the Petition Clause and the Free Speech  
5 Clause cover exactly the same things. In fact,  
6 emphatically they -- obviously they don't because the  
7 Free Speech Clause covers many things that the Petition  
8 Clause would not. It covered, for example, the  
9 remark --

10 CHIEF JUSTICE ROBERTS: Does the Petition  
11 Clause cover anything that the First Amendment does not?

12 MR. SCHNAPPER: I believe so, Your Honor.  
13 This Court's decisions in the antitrust area and under  
14 the National Labor Relations Act with regard to -- an --  
15 access to the government or -- or the courts, they've  
16 always been framed solely in terms of the Petition  
17 Clause, not the Free Speech Clause. It would be at  
18 least very awkward to characterize those -- those  
19 problems as free speech cases, particularly where, as is  
20 typically the case, the -- the underlying activity was  
21 on the part of, say, a lawyer rather than an individual  
22 who -- who is asserting the petition right.

23 CHIEF JUSTICE ROBERTS: Well, getting back  
24 to the second part of my question --

25 MR. SCHNAPPER: Yes.

1 CHIEF JUSTICE ROBERTS: -- in the First  
2 Amendment cases we were concerned about, as I said,  
3 constitutionalizing employee grievances. If you  
4 constitutionalize it under the Petition Clause, how is  
5 that any less a problem of constitutionalizing it under  
6 the First Amendment?

7 MR. SCHNAPPER: Well, it -- it's our view,  
8 Mr. Chief Justice, that -- and in this respect to some  
9 extent I think we agree with a statement made by  
10 Petitioners -- that every gripe that an individual  
11 employee might have, indeed most of them, wouldn't be  
12 covered by the Petition Clause. In the petition reply  
13 brief, the Petitioners state, and we agree with this,  
14 that the ordinary, routine e-mails, give and take within  
15 the office, that's not covered by the Petition Clause.  
16 We would agree with that.

17 CHIEF JUSTICE ROBERTS: All you have to do  
18 then is add a sentence to your complaint saying: This  
19 is an example of how the government employer mistreats  
20 its employees?

21 MR. SCHNAPPER: No.

22 CHIEF JUSTICE ROBERTS: And then it becomes  
23 more generalized?

24 MR. SCHNAPPER: No, no, Your Honor. That --  
25 that -- that's their view, that -- that it becomes a

1 matter of public concern if you say it affects a lot of  
2 people. Our view is that that's not relevant. It --

3 JUSTICE GINSBURG: What if added to that is  
4 "and I'm going to sue" or "I'm going to file a  
5 grievance"?

6 MR. SCHNAPPER: No, Your Honor, saying that  
7 wouldn't have that effect. The case to which they refer  
8 is one in which an employee indicated, as indeed  
9 occurred, that he was going to file a lawsuit, and the  
10 employer retaliated in a peremptory fashion because of  
11 that. That -- that's been the rule in the Third  
12 Circuit, it has only come up twice, but if I might point  
13 out, that's the rule under any -- any number of Federal  
14 statutes which protect filing a charge with the EEOC or  
15 filing a lawsuit. The lower courts have agreed --

16 JUSTICE KENNEDY: Well, under -- under the  
17 First Amendment speech clause --

18 MR. SCHNAPPER: Yes.

19 JUSTICE KENNEDY: We have said that an  
20 employee's, public employee's, right to speech can be  
21 regulated, can be confined, can be restricted beyond  
22 what the State could do for a nonemployee. Are you  
23 saying that if -- if the Petition Clause is involved  
24 there is no right to restrict what the -- employer does?

25 MR. SCHNAPPER: No, Your Honor. No, Your

1 Honor. The government --

2 JUSTICE KENNEDY: Then you have to offer a  
3 test and you don't want the public concern test, so  
4 what's your test?

5 MR. SCHNAPPER: The, the -- that it, the  
6 government's interest as an employer is part of the  
7 calculus if -- if this issue arose under the Petition  
8 Clause, and under ordinary balancing one would look at  
9 the nature of the government's interest and the degree  
10 of burden that's imposed, and that's the way the Court  
11 has administered the Petition Clause.

12 JUSTICE KENNEDY: And you would be content  
13 to apply that analytic, broad analytic framework to the  
14 Petition Clause?

15 MR. SCHNAPPER: Yes, that's what the Court  
16 has done. Now, that said, I think there are  
17 circumstances where the government would be hard pressed  
18 to argue that it had a generalized interest in stopping  
19 a particular form of petition. For example, the  
20 Petitioners express a considerable unhappiness that  
21 they're subject to suit under section 1983. It's  
22 expensive, it requires lawyers, they could have to pay  
23 counsel fees. Those are judgments that the Congress of  
24 the United States made in 1871 when it adopted section  
25 1983. It knew the government was -- local governments

1 would be subject to it. When the Congress strikes that  
2 balance, and -- and of course, section 1983 is a very  
3 complicated piece of machinery -- the balance Congress  
4 struck is -- is ordinarily going to be controlling --

5 JUSTICE SCALIA: Well, let's talk about it.  
6 I find it difficult to believe that lawsuits are covered  
7 by the Petition Clause when it is very clear that the  
8 Congress can prevent all lawsuits against the Federal  
9 Government by simply refusing to waive sovereign  
10 immunity. Now, you know, how can you have a  
11 constitutional guarantee of the right to petition the  
12 government, which you say includes the -- the right to  
13 -- to be in law court, and yet the Federal Government  
14 can exempt itself from suits in law courts?

15 MR. SCHNAPPER: Your Honor, the -- the  
16 Federal Government is not obligated to provide a -- a  
17 lower court system for -- authorized to hear suits  
18 against it.

19 JUSTICE SCALIA: I'm not talking about just  
20 a lower court system. I'm talking about all suits,  
21 right up to the Supreme Court. The Federal Government  
22 can say: You can't sue us.

23 MR. SCHNAPPER: It can. But it cannot set  
24 up a court system and then punish government employees  
25 for using it. They are not -- historic -- if I might



1 step back a couple hundred years here, the --

2 JUSTICE SCALIA: You're saying that the  
3 Petition Clause only covers those petitions that the  
4 government chooses to allow; is -- is that what the  
5 constitutional guarantee is? If you choose to allow a  
6 certain kind of petition, it is constitutionally  
7 guaranteed. That's not much of a guarantee.

8 MR. SCHNAPPER: No, I think -- I think  
9 historically that -- that's a fairly accurate  
10 description of what has happened with the emergence of  
11 the Petition Clause over the last 6 or 700 years of  
12 Anglo-American history. There were no courts to which  
13 people could seek redress against the crown at the time  
14 of Magna Carta. Over time the courts became available  
15 to do that. Insofar as they did, on our view, the  
16 Petition Clause would now apply.

17 And if I might turn to a question you asked  
18 earlier. You expressed some skepticism about whether  
19 the Petition Clause applies to lawsuits. I note that in  
20 at least half a dozen decisions that this Court has held  
21 that, and I think that was the premise of your  
22 concurring opinion in the BE & K Construction case a few  
23 years ago.

24 And we don't in this regard have to get  
25 deeply into history in the debate about whether courts

1 are covered. The text of the First -- of the Petition  
2 Clause is sufficient on its face. It doesn't say  
3 petitions to the legislature. It says petitions to the  
4 government, and that was clearly a deliberate choice,  
5 because the States --

6 JUSTICE GINSBURG: Mr. Schnapper, you can  
7 write a letter to the president, you can write a letter  
8 to your congressional representative, but getting to a  
9 court, you have to pay a filing fee. And since this  
10 would be a civil case, this Court has held if you  
11 haven't got whatever is the filing fee amount, too bad,  
12 you don't have access to the Court.

13 MR. SCHNAPPER: Yes, Your Honor, and I think  
14 those cases are clearly distinguishable. The -- the  
15 core historical purpose of concern of the Petition  
16 Clause was reprisals by the government against people  
17 for -- for petitioning the government. There's a  
18 fundamental difference here between what's at stake  
19 here, where the Borough is asserting a right to punish  
20 people for going to court, and the question about  
21 whether the government has an affirmative obligation to  
22 remove the incidental barriers that may exist to  
23 bringing lawsuits.

24 JUSTICE ALITO: Do you -- do you think --

25 MR. SCHNAPPER: And so, we think those

1 cases are distinguishable.

2 JUSTICE GINSBURG: Are you suggesting that  
3 in one of these suits you wouldn't have to pay the  
4 filing fee?

5 MR. SCHNAPPER: No, no, precisely to the  
6 contrary. We are asserting only that the government  
7 cannot punish Mr. Guarneri for filing a lawsuit. We  
8 are not suggesting the government has to pay his filing  
9 fee, any more than if -- if the -- if Mr. Guarneri  
10 wants to go to Harrisburg and meet with his or her  
11 representative, the government, our view, Duryea, can't  
12 punish him for doing it, but they don't have to give him  
13 gas money, and if he doesn't have enough money for gas  
14 that's just too bad.

15 JUSTICE ALITO: Suppose the Borough here  
16 bought something from a company under a contract that  
17 included an arbitration clause. Would that, would the  
18 right of the company to engage in arbitration be  
19 protected by the Petition Clause?

20 MR. SCHNAPPER: Yes. The -- we believe the  
21 Petition Clause applies to government-created mechanisms  
22 for redressing grievances; and if the government sets up  
23 an arbitration procedure like that, we think that that's  
24 covered. An arbitration agreement between two private  
25 parties would not be, be covered by the Petition Clause,

1 because the government wouldn't have been involved in  
2 standing that up. And that distinction really has its  
3 roots in history. The petition started out; back at the  
4 time of Magna Carta petitions only went to the king.  
5 Over time the British government and ultimately the  
6 American government developed other mechanisms that were  
7 simply more efficient.

8           So that, for example, at the time the  
9 Petition Clause was written, Congress received a large  
10 number of petitions from wounded veterans, and after  
11 several years of dealing with that it adopted the  
12 Invalid Pension Act and turned that over to a somewhat  
13 unusual combination of administrative and judicial  
14 officials. So I think the creation of --

15           JUSTICE SCALIA: What's the earliest English  
16 or American case you have that refers to a lawsuit as  
17 protected by the Petition Clause?

18           MR. SCHNAPPER: I'm not familiar with  
19 English law in that respect. With regard to the  
20 decisions of this Court, I think it's California Motor  
21 Transport, which I think is about 40 years ago.

22           JUSTICE SCALIA: How many?

23           MR. SCHNAPPER: About 40.

24           JUSTICE SCALIA: 40 years ago.

25           MR. SCHNAPPER: There's precious little --

1 JUSTICE SCALIA: So for a couple hundred  
2 years, nobody -- nobody connected the two?

3 MR. SCHNAPPER: Many of the constitutional  
4 issues this Court deals with were not raised for -- for  
5 a very long period of time.

6 JUSTICE KENNEDY: In the Garcetti case, the  
7 district attorney was disciplined for sending a memo  
8 because he disagreed with how the trial strategy was  
9 supposed to unfold, and then he actually made that  
10 argument in court and was disciplined for that.

11 Would he have been protected if he had just  
12 gone to court to sue the office of the district attorney  
13 on some sort of a prospective injunction saying, with  
14 reference to all search warrants you should follow the  
15 following procedures? Would that have been protected,  
16 even though the memo was not?

17 MR. SCHNAPPER: Well, it would have been a  
18 petition. It would not necessarily have been protected.  
19 The government has an interest in such matters as an  
20 employer, and that might indeed outweigh --

21 JUSTICE KENNEDY: Would you have objected if  
22 the same analysis were used in the Petition Clause case  
23 as in the actual case? Just take the --

24 MR. SCHNAPPER: Right, right. The question  
25 is, was the --

1 JUSTICE KENNEDY: Just white out "Speech  
2 Clause" and put in "Petition Clause" and file the same  
3 opinion?

4 MR. SCHNAPPER: The question I take it  
5 you're asking is -- is whether the Garcetti principle  
6 would apply to a Petition Clause case where the  
7 government -- it was part of the official --

8 JUSTICE KENNEDY: I want to know how the  
9 analytic framework differs.

10 MR. SCHNAPPER: I don't -- I don't think --  
11 the specific question is whether the Garcetti rule  
12 should apply in a Petition Clause case. I don't think  
13 we have a position on that. It's not raised in this  
14 case.

15 JUSTICE KAGAN: Well, Mr. Schnapper, can I  
16 ask Justice Kennedy's question in maybe a little bit of  
17 a different way?

18 In -- in the Connick inquiry, you have a  
19 threshold inquiry and then you have a balancing test.  
20 Now, you're suggesting that the threshold inquiry, the  
21 public concern inquiry, is kind of apples and oranges  
22 here; it's just not appropriate for the Petition Clause.

23 But the question that then follows is,  
24 should there be a replacement threshold inquiry before  
25 you get to the balancing that Connick suggests is the

1 second stage of the process?

2 MR. SCHNAPPER: Probably not in the sense  
3 that you're asking. There would be a threshold inquiry  
4 as to whether what had happened was petitioning. If it  
5 were, this Court's decisions indicate that the Court  
6 might impose a threshold inquiry consistent with, say,  
7 the line of cases, most recently BE&K Construction, as  
8 to whether the underlying petition had a -- a reasonable  
9 basis or was -- had been pursued in good faith. But I  
10 think if you got past that, then there would be no  
11 further threshold.

12 JUSTICE ALITO: What if a number of  
13 municipal employees prepare a formal document called  
14 "Petition," and they say: We have a grievance, and our  
15 grievance is that the quality of the food in the  
16 cafeteria is poor? Now, is that protected by the  
17 Petition Clause?

18 MR. SCHNAPPER: As you describe it, on our  
19 view, not so, because our view is that, putting aside  
20 the historical and somewhat unusual but less common  
21 instance of a petition directed to, let's say at the  
22 Federal level the Congress or the president, the  
23 Petition Clause ordinarily applies only where the  
24 government has created a specific remedial mechanism for  
25 addressing a particular kind of grievance. It's

1 something that's just outside the ordinary give-and-take  
2 of the office, something like, you know, a separate  
3 agency or an arbitrator or a court, something like that.  
4 And that -- there's an historical --

5 JUSTICE ALITO: Where does that rule come  
6 from? It's drawn out of thin air?

7 MR. SCHNAPPER: No. No, it isn't. That's  
8 the -- historically, that's the kind of distinction that  
9 was there. If you had a problem in England, if the  
10 undersheriff took your cow, you could go to the sheriff,  
11 but historically, that wasn't called a petition. If you  
12 went to the king, that was a petition. It was not going  
13 to the local.

14 So we -- we do have a great deal of  
15 historical material, as Justice Scalia points out, about  
16 individuals, including Federal Government officials,  
17 petitioning Congress. And I -- we think the framers  
18 would have regarded those as petitions. I don't think  
19 they would regard a beef with the Secretary of the  
20 Treasury as -- as -- so we would -- there's no --

21 JUSTICE GINSBURG: Mr. Schnapper, this is  
22 not -- if you're -- if you're talking about the  
23 practical significance, Myers in Connick was going  
24 around the office, collecting signatures. She was  
25 taking a poll. She was taking a poll and the poll was



1 going to be presented to the employer. That sounds much  
2 more petition-like than filing a grievance pursuant to a  
3 collective bargaining agreement.

4 So the -- the distinction between Connick,  
5 who was taking a poll -- why wasn't that a petition?  
6 Maybe -- did she just put the wrong label on it? If she  
7 called her case a petition case, it would have been all  
8 right?

9 MR. SCHNAPPER: No. No, Your Honor. Our  
10 view, as I indicated to Justice Alito, is that a gripe  
11 within the office, whether you label it a petition or  
12 not, would not, except in maybe some extraordinary  
13 circumstance, constitute a petition.

14 But if I might respond, I think your  
15 question raises a second important linguistic point,  
16 which is the word "petition" today has acquired a  
17 somewhat different meaning than it would have probably  
18 had in the 18th century. We think of petitions as the  
19 things you see out on tables, along the street; people  
20 say, come on, sign my petition to do this, that, or the  
21 other thing.

22 That was not a common phenomena in the 18th  
23 century. Petitions were ordinarily things from one  
24 individual or a couple of people. There were some  
25 exceptions, but that was -- that was not the normal --

1 the normal practice. In fact, the very idea that you  
2 could have large numbers of people signing something  
3 called a petition was much controverted at that time.

4 JUSTICE KENNEDY: Well, you're the expert in  
5 this area, but that -- that surprises me. I thought it  
6 was quite common in the early 1800s for you to go to all  
7 your neighbors -- and the book "Quarreling About  
8 Slavery" explains this, where there were petitions  
9 signed by many of the constituents in the congressman's  
10 district.

11 MR. SCHNAPPER: There -- there were. It  
12 came to be used that way as -- that is largely a --

13 JUSTICE KENNEDY: And there were scores,  
14 scores of -- of signatures on these petitions. So  
15 that's like your card table.

16 MR. SCHNAPPER: It is, but what I'm  
17 suggesting is that is a 19th and 20th-century  
18 phenomenon. You see very little of that in the 18th  
19 century or earlier. And I'd note, although -- I mean,  
20 I, I think that if that's done by private individuals  
21 and directed to the government, it would be protected by  
22 the Petition Clause.

23 I note, just to give you a sense of the  
24 history, that at the time that happened, its legitimacy  
25 was challenged, and the argument was made by the

1   proponents of slavery in support of a gag order adopted  
2   by Congress that this was not really a legitimate  
3   petition. The legitimate petition ought to be something  
4   about your personal problems; an abolitionist really had  
5   no business signing these things; it wasn't a personal  
6   grievance.

7                   Now, I think that's wrong. I think it's  
8   certainly not consistent with current case law. But it  
9   illustrates how the position advanced by Petitioners  
10  stands on its head the historical evolution of the  
11  Petition Clause, which starts as about private matters,  
12  and only over time and after a good deal of struggle is  
13  it extended to things of broader concern and possibly a  
14  petition signed by people who don't have a personal  
15  stake in --

16                  JUSTICE KENNEDY: That was the Calhoun  
17  position, not the John Q. Adams position.

18                  MR. SCHNAPPER: Right. Right. That's  
19  right.

20                  JUSTICE GINSBURG: Mr. Schnapper, let's come  
21  to the century in which we are now living. We have  
22  Title VII. Title VII has this provision, an explicit  
23  provision against retaliation. But suppose it didn't.  
24  Suppose it just prohibited discrimination and it didn't  
25  have a retaliation clause. It's the thrust of your

1 arguments that the government employee would have a  
2 claim for retaliation, although someone in the private  
3 sector would not?

4 MR. SCHNAPPER: Exactly. Exactly. And here  
5 we part company with -- I think the government expressed  
6 the concern in its brief and perhaps at oral argument --  
7 I guess it was Petitioner that made this point -- that  
8 there was something amiss about government employees  
9 having rights that private employees don't. That  
10 distinction exists because the Bill of Rights and the --  
11 and the other constitutional guarantees, with the  
12 exception of the Thirteenth Amendment and the right to  
13 travel in interstate commerce, those rights don't apply  
14 to private -- to people dealing with private employers.  
15 That's just --

16 CHIEF JUSTICE ROBERTS: But -- but that's  
17 the basis of our law in this area is that when the  
18 government is actually the employer the rights of the  
19 individuals are somewhat different, and they're closer  
20 to the rights that private employees have. So simply  
21 saying that these constitutional provisions apply  
22 against the government and therefore, you don't have to  
23 worry about the distinction between private employers  
24 and government employers doesn't seem to be -- me to be  
25 completely responsive to our precedent.

1                   MR. SCHNAPPER: And -- and we're not taking  
2     issue with the assertion of the government that the  
3     government as an employer has interests which are  
4     different than it -- it -- those it has just as a  
5     sovereign. But that distinction has nothing to do with  
6     the distinction they propose in this case between  
7     matters of public concern and matters of only private  
8     concern.

9                   Indeed, to the contrary. To the extent that  
10    the government's -- the government's interests might be  
11    greater, surely a petition that deals with a matter of  
12    public importance is going to cause the government a lot  
13    more trouble than a purely private matter. A lawsuit  
14    alleging systemic employment discrimination on the basis  
15    of religion or even an individual, if -- if  
16    Mr. Guarnieri had alleged and a court had found that he  
17    had been fired because he was Catholic, the  
18    ramifications politically and in terms of just -- the  
19    ramifications in terms of the workplace would have been  
20    far more serious than the --

21                  JUSTICE KAGAN: Mr. Schnapper, isn't the  
22    real question in these cases whether the employee is  
23    acting as a citizen or instead whether the employee is  
24    acting as an employee? And in the speech cases, that  
25    distinction suggests a public concern threshold inquiry.

1 Maybe in the petition cases it suggests something else,  
2 but that that's really the question we should be asking  
3 is, is this employee acting as an employee or as a  
4 citizen?

5 MR. SCHNAPPER: With all due respect, our  
6 view is it depends whether or not the -- the employee is  
7 acting as a petitioner within the meaning of the  
8 Petition Clause. The petition Clause was not adopted,  
9 like the Free Speech Clause, to foster a vigorous public  
10 debate. The purpose of the Petition Clause, as the  
11 Court said in Christopher v. Harbury, is to enable an  
12 individual to seek relief for a wrong. And that has --  
13 that's not the same as the -- the free speech interests  
14 that -- that might exist to engage as a citizen in a  
15 robust public debate.

16 Mr. Guarnieri didn't file his complaint in  
17 Federal court, for example, looking to the second  
18 petition, in the hopes of a robust debate between  
19 himself and Judge Caputo. He -- he filed that complaint  
20 to get redress for an alleged violation of his  
21 constitutional rights.

22 So -- so the citizen versus employee  
23 distinction in -- in Connick is inapt here. It's --  
24 it's -- it's rooted in the purpose of the -- of the Free  
25 Speech Clause, which is protecting vigorous public

1 debate on matters of public concern. The Petition  
2 Clause is not about matters of public concern. It's  
3 about -- about people's ability to seek redress. It  
4 doesn't guarantee redress, but it protects the ability  
5 to ask for it.

6 The --

7 JUSTICE GINSBURG: You do, I think,  
8 recognize that it would be possible then to circumvent  
9 Connick if you could turn around and file a pleading and  
10 say: Now I have a petition, not just a grievance.

11 MR. SCHNAPPER: Your Honor, we don't think  
12 that that is a serious problem for three reasons. First  
13 of all, the Petitioners have in -- in highly expressive  
14 language described the decision in Filippo as one which  
15 would lead to an avalanche, tsunami, an overwhelming  
16 number of new lawsuits.

17 We pointed out in our reply brief that they  
18 had not adduced any evidence that any such thing had  
19 happened in the 17 years since San Filippo. Their reply  
20 brief does not purport to have any information to -- to  
21 support that.

22 CHIEF JUSTICE ROBERTS: Well, but things  
23 will be a lot different if we give the sanction to your  
24 theory. I think the idea that it hasn't happened in 17  
25 years in the wake of San Filippo is a little bit -- it's

1 not very compelling.

2 MR. SCHNAPPER: Well, I think your -- I  
3 think there are two -- two other reasons why this is not  
4 a -- a major concern. The first one is it simply isn't  
5 the case that you could take any beef, write "Federal  
6 complaint" at the top of it and file it in Federal court  
7 and be protected. Most internal gripes don't raise a  
8 colorable claim under Federal or State law, and this  
9 Court's Petition Clause cases make it clear that a  
10 petition, particularly a lawsuit, that doesn't have a  
11 reasonable basis simply isn't going to be protected.

12 It's also, to be frank, based on my contact  
13 with private petitioners, it's highly unrealistic to  
14 suggest that if an employee, government employee, took  
15 some gripe and went to a lawyer and said, let's file  
16 this in Federal court, I want to get it off my chest, to  
17 find a lawyer on a contingent fee basis that is going to  
18 do that. If a chance case has no chance of success,  
19 you're not going to find a lawyer who will do it; and on  
20 a police officer's salary, you're certainly not going to  
21 be able to hire one.

22 Third --

23 CHIEF JUSTICE ROBERTS: Well, but the most  
24 likely solution when you have an employee grievance  
25 along with it is that some umbrella settlement -- I



1 mean, the employer doesn't want to spend -- I mean,  
2 that's part of the reason our doctrine developed under  
3 the First Amendment. The employer doesn't want to have  
4 to worry about spending time and money in court to  
5 resolve what is essentially an employee grievance.

6 MR. SCHNAPPER: Few -- few private lawyers  
7 who aren't independently wealthy are going to take a  
8 baseless case on the theory that they're going to get  
9 some umbrella settlement. It's just -- it simply  
10 doesn't happen. It -- it -- and realistically, we don't  
11 really have a plausible account of why an employee would  
12 do this. I mean, you're an employee, you're unhappy  
13 with the way you're being treated at work, you --

14 JUSTICE SOTOMAYOR: Counselor, your client  
15 won everything in his collective bargaining grievance.  
16 He got his pay back, he got them to stop doing what they  
17 did, and he found a lawyer to file a constitutional  
18 claim. So your suggestion that lawyers won't fight  
19 semi-chaotic adventures is realistic as well.

20 MR. SCHNAPPER: Your Honor, this --

21 JUSTICE SOTOMAYOR: People get upset about  
22 how they're treated all of the time, and they find  
23 lawyers to file suits about that treatment.

24 MR. SCHNAPPER: Your Honor, I can certainly  
25 tell you that people who are upset all the time call me

1     ostensibly unable to find lawyers. I mean, remember,  
2     the -- the fact that Mr. Guarnieri was able to find a  
3     lawyer to take this case doesn't prove that people can  
4     find lawyers to take baseless cases. Mr. Guarnieri  
5     found a lawyer, she brought this case, she got past  
6     summary judgment, she took it to trial and she won.  
7     This is a case that not only had a substantial basis,  
8     but on the facts, and this issue is no longer before us,  
9     she prevailed.

10                     If the Court has no --

11                     JUSTICE ALITO: Your submission is there are  
12     not very many -- throughout the whole country there are  
13     very few frivolous 1983 cases or employment cases,  
14     that's your point?

15                     MR. SCHNAPPER: No, they -- they --  
16     certainly they happen, but the notion that this is going  
17     to unleash a flood of them seems to me unrealistic.

18                     A particular institution like this where the  
19     theory of this is that the private -- the government  
20     employee reads Connick, realizes they can't write a  
21     letter to the boss with -- with their gripe, and  
22     undissatisfied with their ability to talk about it with  
23     friends and family and gripe with pals at the bar,  
24     decides that the only way they can get it off their  
25     chest is to have it be in a complaint in some Federal

1 courthouse, where it would then probably be dismissed.  
2 I think in the real world that's something that would  
3 make very little sense to an employee.

4 If the Court has no further questions --  
5 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
6 Mr. Ortiz, you have a minute left.

7 REBUTTAL ARGUMENT OF DANIEL R. ORTIZ  
8 ON BEHALF OF THE PETITIONERS

9 MR. ORTIZ: Your Honor, it defies the  
10 imagination that the radical Republicans and the framers  
11 understood that the Petition Clause would  
12 constitutionalize public employee grievance, and as  
13 academic commentary that Respondent cites suggests,  
14 their -- Respondents long-centered view of the Petition  
15 Clause would call into question, sovereign immunity  
16 doctrine, parts of Rule 11, suggest a right to appeal  
17 and a right to judicial review whenever anyone has  
18 agreed to government action.

19 There is also a danger that it would  
20 constitutionalize the arbitration process whenever the  
21 government is a party.

22 If I can just answer one question. Connick  
23 is focused not on where speech happens, as Respondent  
24 insists, but rather where its effects occur. As this  
25 Court held in the City of San Diego v. Roe, employee

1 speech completely outside of the workplace raises the  
2 same kind of concerns.

3 If there are no further questions,  
4 Petitioners will rest on their submissions.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
6 The case is submitted.

7 (Whereupon, at 11:09 a.m., the case in the  
8 above-entitled matter was submitted.)

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18  
19  
20  
21  
22  
23  
24  
25

<b>A</b>	18:12	27:24,24 28:11	<b>approach</b> 9:12	<b>authorized</b> 32:17
<b>ability</b> 25:15 47:3	<b>adopted</b> 31:24	29:2,6 30:17	16:3 20:24 22:7	<b>available</b> 18:21
47:4 50:22	36:11 43:1 46:8	44:12 49:3	24:2,14,15	33:14
<b>able</b> 48:21 50:2	<b>advanced</b> 43:9	<b>American</b> 36:6	<b>appropriate</b> 7:25	<b>avalanche</b> 47:15
<b>abolitionist</b> 43:4	<b>advantage</b> 6:24	36:16	38:22	<b>avenue</b> 19:2
<b>above-entitled</b>	<b>adventures</b>	<b>amicus</b> 1:20 2:8	<b>arbitration</b> 12:3	<b>awkward</b> 28:18
1:12 52:8	49:19	18:7	14:13,14 35:17	<b>a.m</b> 1:14 3:2 26:4
<b>abstract</b> 26:11	<b>advocate</b> 24:15	<b>amiss</b> 44:8	35:18,23,24	52:7
<b>academic</b> 51:13	<b>affect</b> 26:6	<b>amount</b> 34:11	51:20	<b>B</b>
<b>access</b> 11:22	<b>affirmative</b>	<b>analysis</b> 9:16	<b>arbitrator</b> 40:3	<b>back</b> 15:21 21:3
12:14,22 14:13	34:21	15:20 24:19	<b>area</b> 28:13 42:5	22:10 28:23
17:17 19:14	<b>affording</b> 19:20	26:21 37:22	44:17	33:1 36:3 49:16
21:6 28:15	<b>agency</b> 40:3	<b>analytic</b> 31:13,13	<b>argue</b> 3:17,23	<b>background</b> 5:6
34:12	<b>ago</b> 33:23 36:21	38:9	7:23 31:18	16:15
<b>account</b> 23:8,15	36:24	<b>analyzed</b> 23:6	<b>argues</b> 3:25	<b>bad</b> 34:11 35:14
49:11	<b>agree</b> 4:3,6	26:12	<b>argument</b> 1:13	<b>balance</b> 20:14
<b>accurate</b> 33:9	11:22 14:1	<b>Andrews</b> 13:14	2:2,5,9,12 3:4,7	32:2,3
<b>acquired</b> 41:16	24:19 29:9,13	<b>Anglo-American</b>	13:14,23 18:5	<b>balancing</b> 7:3,5,8
<b>act</b> 22:2 28:14	29:16	33:12	18:20 19:3,10	7:12 8:3,11,15
36:12	<b>agreed</b> 30:15	<b>answer</b> 19:5	19:17 27:5	8:22,25 9:4,6
<b>acting</b> 45:23,24	51:18	26:11 51:22	37:10 42:25	16:24,25 22:24
46:3,7	<b>agreement</b> 18:24	<b>answered</b> 9:7	44:6 51:7	31:8 38:19,25
<b>action</b> 22:11	19:6,25 35:24	25:10	<b>arguments</b> 26:23	<b>bar</b> 50:23
25:15 51:18	41:3	<b>antitrust</b> 28:13	44:1	<b>bargaining</b> 12:4
<b>activity</b> 4:8 5:9	<b>aimed</b> 6:2 9:14	<b>anyway</b> 9:6	<b>arm</b> 6:5	18:24 19:6,25
5:10 8:20 10:8	<b>air</b> 40:6	<b>apparently</b> 10:24	<b>arose</b> 31:7	21:15 41:3
11:25 14:7 15:6	<b>AL</b> 1:4	<b>appeal</b> 51:16	<b>aside</b> 19:7 39:19	49:15
17:8 19:21	<b>align</b> 6:18	<b>APPEARANC...</b>	<b>asked</b> 33:17	<b>barriers</b> 34:22
20:25 21:1 24:4	<b>aligns</b> 7:12	1:15	<b>asking</b> 3:11 6:7	<b>based</b> 9:21 48:12
24:25 25:24	<b>Alito</b> 34:24 35:15	<b>apples</b> 38:21	6:10,12 9:1	<b>baseless</b> 49:8
26:17,24 28:20	39:12 40:5	<b>application</b> 6:25	10:21 17:23	50:4
<b>actual</b> 37:23	41:10 50:11	16:8 17:2	21:21 38:5 39:3	<b>basically</b> 7:4
<b>Adams</b> 43:17	<b>allegation</b> 10:5	<b>applied</b> 8:24	46:2	24:12
<b>add</b> 29:18	<b>alleged</b> 45:16	13:12 15:19	<b>assembly</b> 21:8	<b>basis</b> 19:19,22
<b>added</b> 30:3	46:20	21:7	<b>asserting</b> 28:22	27:11 39:9
<b>addressing</b> 10:13	<b>alleging</b> 22:11	<b>applies</b> 4:12	34:19 35:6	44:17 45:14
39:25	45:14	20:16,17 33:19	<b>assertion</b> 45:2	48:11,17 50:7
<b>adduced</b> 47:18	<b>allow</b> 17:3,8 33:4	35:21 39:23	<b>assessed</b> 21:23	<b>becoming</b> 20:21
<b>administered</b>	33:5	<b>apply</b> 4:9 11:3,16	<b>assessment</b> 16:5	<b>beef</b> 40:19 48:5
31:11	<b>allowing</b> 20:20	20:9 31:13	<b>Assistant</b> 1:18	<b>behalf</b> 1:17,20
<b>administrative</b>	<b>alternative</b> 18:21	33:16 38:6,12	<b>assume</b> 18:23,25	1:22 2:4,7,11
36:13	<b>Amendment</b> 8:17	44:13,21	<b>assuming</b> 26:22	2:14 3:8 18:6
<b>admitted</b> 11:13	18:15 20:10	<b>applying</b> 3:18	<b>attorney</b> 37:7,12	27:6 51:8
<b>admonitions</b>	21:3 25:12	16:22	<b>audience</b> 6:4	<b>believe</b> 9:11

28:12 32:6 35:20 <b>beyond</b> 30:21 <b>BE&amp;K</b> 39:7 <b>Bill</b> 44:10 <b>bills</b> 13:20,22 <b>bit</b> 38:16 47:25 <b>book</b> 42:7 <b>Borough</b> 1:3 3:4 25:20 34:19 35:15 <b>boss</b> 50:21 <b>bought</b> 35:16 <b>branch</b> 11:19 <b>branches</b> 11:21 <b>break</b> 5:3 <b>brief</b> 19:1 29:13 44:6 47:17,20 <b>bringing</b> 34:23 <b>brings</b> 15:2 24:22 <b>British</b> 36:5 <b>broad</b> 3:15 24:3 31:13 <b>broader</b> 43:13 <b>broadly</b> 19:9 <b>brought</b> 3:19 15:12 50:5 <b>bulwark</b> 20:20 <b>burden</b> 5:9 8:19 31:10 <b>business</b> 43:5	<b>calls</b> 23:11 <b>capacity</b> 9:15 <b>capitol</b> 24:6 <b>Caputo</b> 46:19 <b>card</b> 42:15 <b>care</b> 27:21 <b>carefully</b> 18:14 <b>cares</b> 27:20 <b>Carolina</b> 24:5,6 <b>Carta</b> 33:14 36:4 <b>case</b> 3:4 6:22 9:12,16,18,20 10:3,10 12:7,13 12:16 14:14 16:20,25 19:18 21:5,6,7,25 22:15,16 24:17 25:11,21 26:16 28:20 30:7 33:22 34:10 36:16 37:6,22 37:23 38:6,12 38:14 41:7,7 43:8 45:6 48:5 48:18 49:8 50:3 50:5,7 52:6,7 <b>cases</b> 3:23 7:14 10:19 11:14 12:19,24 20:22 27:22,24 28:19 29:2 34:14 35:1 39:7 45:22,24 46:1 48:9 50:4 50:13,13 <b>categoricalizing</b> 7:2 <b>Catholic</b> 45:17 <b>cause</b> 45:12 <b>center</b> 17:17,22 <b>central</b> 13:16 14:10 16:18 <b>century</b> 41:18,23 42:19 43:21 <b>certain</b> 13:4 33:6	<b>certainly</b> 8:25 10:3,25 11:9,21 12:22 16:3 18:22 24:18 27:14 43:8 48:20 49:24 50:16 <b>challenged</b> 42:25 <b>challenging</b> 14:5 <b>chance</b> 48:18,18 <b>change</b> 6:7,11,13 6:14 7:7 9:1 13:19 17:23 <b>changed</b> 14:17 <b>changing</b> 10:18 <b>characterize</b> 28:18 <b>charge</b> 30:14 <b>CHARLES</b> 1:7 <b>Charlottesville</b> 1:16 <b>chest</b> 48:16 50:25 <b>chief</b> 3:3,9 18:2,8 25:20 26:5,7 27:3,7,22 28:3 28:10,23 29:1,8 29:17,22 44:16 47:22 48:23 51:5 52:5 <b>choice</b> 34:4 <b>choose</b> 33:5 <b>chooses</b> 33:4 <b>Christopher</b> 46:11 <b>Circuit</b> 18:10 22:7 24:2,9 26:22 30:12 <b>circuits</b> 24:15 <b>Circuit's</b> 19:18 20:6,24 <b>circumstance</b> 41:13 <b>circumstances</b>	31:17 <b>circumvent</b> 47:8 <b>circumvention</b> 17:4 <b>cites</b> 51:13 <b>citizen</b> 45:23 46:4,14,22 <b>citizenry</b> 26:7 <b>city</b> 14:20,21 15:1 26:2 51:25 <b>civil</b> 34:10 <b>claim</b> 7:19 9:20 15:2 18:16 44:2 48:8 49:18 <b>claims</b> 3:19 9:24 17:14,14 <b>class</b> 22:11 <b>classic</b> 24:8 <b>clause</b> 3:13 4:4,7 4:7,8,10,17 5:13,14,16,23 5:24 6:1,1 8:23 9:7 10:4 11:23 12:18,21,22,25 13:3,6 14:10 15:3,7,11 17:10 17:17,21 23:4 25:1 27:10,14 27:23 28:4,5,7 28:8,11,17,17 29:4,12,15 30:17,23 31:8 31:11,14 32:7 33:3,11,16,19 34:2,16 35:17 35:19,21,25 36:9,17 37:22 38:2,2,6,12,22 39:17,23 42:22 43:11,25 46:8,8 46:9,10,25 47:2 48:9 51:11,15 <b>Clauses</b> 3:20 4:1 <b>clear</b> 10:19 11:15	27:25 32:7 48:9 <b>clearinghouse</b> 13:16 <b>clearly</b> 34:4,14 <b>client</b> 49:14 <b>close</b> 5:8 8:17 <b>closed</b> 26:4 <b>closely</b> 16:1 <b>closer</b> 44:19 <b>collecting</b> 40:24 <b>collective</b> 12:4 18:24 19:6,25 21:14 41:3 49:15 <b>Collins</b> 21:3 <b>colorable</b> 48:8 <b>combination</b> 36:13 <b>come</b> 30:12 40:5 41:20 43:20 <b>comes</b> 11:22 <b>commentary</b> 51:13 <b>commerce</b> 44:13 <b>committed</b> 28:3 <b>common</b> 39:20 41:22 42:6 <b>communication</b> 11:12 <b>communications</b> 14:11 <b>company</b> 35:16 35:18 44:5 <b>compelling</b> 48:1 <b>compensation</b> 14:23 15:13 <b>complain</b> 22:16 <b>complaining</b> 16:4 <b>complaint</b> 10:23 23:13 25:2 29:18 46:16,19 48:6 50:25 <b>completely</b> 44:25 52:1
<hr/> <b>C</b> <hr/>				
<b>C</b> 2:1 3:1 <b>cabin</b> 3:11 <b>cafeteria</b> 39:16 <b>calculus</b> 23:3 31:7 <b>Calhoun</b> 43:16 <b>calibrated</b> 18:14 <b>California</b> 36:20 <b>call</b> 8:2 49:25 51:15 <b>called</b> 21:4 39:13 40:11 41:7 42:3				

<b>complicated</b> 32:3	21:22 23:8,11	<b>context</b> 4:11	25:2 26:11,15	<b>DANIEL</b> 1:16
<b>conceded</b> 14:7	24:20,23 38:18	11:12 20:13	26:19 27:8 28:3	2:3,13 3:7 51:7
<b>conceivably</b> 7:16	38:25 40:23	21:24 22:5	31:10,15 32:13	<b>deal</b> 40:14 43:12
<b>conception</b> 12:12	41:4 46:23 47:9	23:12 26:13,14	32:17,20,21,24	<b>dealing</b> 12:24
12:15 24:3	50:20 51:22	<b>contingent</b> 48:17	33:20 34:9,10	36:11 44:14
<b>concern</b> 3:12,18	<b>considerable</b>	<b>contract</b> 12:5	34:12,20 36:20	<b>deals</b> 37:4 45:11
5:4,4,21 9:13	31:20	35:16	37:4,10,12 39:5	<b>debate</b> 22:6
11:7 15:23,23	<b>consideration</b>	<b>contrary</b> 18:11	40:3 45:16	33:25 46:10,15
19:20,23 20:10	22:4	21:1 35:6 45:9	46:11,17 48:6	46:18 47:1
20:12 21:18,23	<b>consistent</b> 16:14	<b>control</b> 6:15	48:16 49:4	<b>decide</b> 26:16,20
22:3,13,19,23	39:6 43:8	<b>controlling</b> 32:4	50:10 51:4,25	26:22,24
26:9,18,19,25	<b>consists</b> 12:20	<b>controverted</b>	<b>courthouse</b> 51:1	<b>decides</b> 50:24
27:13,17,18	<b>constituents</b> 42:9	42:3	<b>courts</b> 7:6 12:14	<b>decision</b> 22:15
30:1 31:3 34:15	<b>constitute</b> 41:13	<b>core</b> 5:8,12,12	12:22 13:8,22	47:14
38:21 43:13	<b>constitution</b> 7:19	5:13,15,22,25	13:24 14:13	<b>decisions</b> 28:13
44:6 45:7,8,25	20:16 21:16	6:10 8:17 34:15	17:18 19:3 21:7	33:20 36:20
47:1,2 48:4	<b>constitutional</b>	<b>correct</b> 15:25,25	23:12 28:15	39:5
<b>concerned</b> 29:2	3:15,21 5:6	<b>council</b> 25:20	30:15 32:14	<b>deemed</b> 23:9
<b>concerning</b> 12:19	13:5 16:15,18	26:3	33:12,14,25	<b>deeply</b> 33:25
<b>concerns</b> 52:2	20:22 26:21	<b>counsel</b> 27:3	<b>court's</b> 16:2,8,8	<b>defies</b> 51:9
<b>concurring</b> 33:22	27:19 32:11	31:23 51:5 52:5	16:15 18:12	<b>define</b> 5:22 17:21
<b>conditions</b> 6:14	33:5 37:3 44:11	<b>Counselor</b> 49:14	21:1 22:15	<b>defined</b> 17:17
9:2	44:21 46:21	<b>count</b> 12:8 14:14	28:13 39:5 48:9	<b>definitely</b> 5:25
<b>conduct</b> 23:10,10	49:17	24:10,10,12	<b>cover</b> 4:8,9,11	11:25
24:8 25:1,13,17	<b>constitutionalize</b>	<b>country</b> 50:12	28:5,11	<b>definition</b> 12:14
<b>confined</b> 30:21	3:13 27:25 29:4	<b>counts</b> 24:4	<b>covered</b> 12:18	20:6
<b>confront</b> 11:8	51:12,20	<b>couple</b> 33:1 37:1	17:24 28:8	<b>degree</b> 31:9
<b>Congress</b> 13:16	<b>constitutional...</b>	41:24	29:12,15 32:6	<b>deliberate</b> 34:4
13:18,20 17:23	9:17	<b>course</b> 5:14 11:2	34:1 35:24,25	<b>democratic</b> 6:2
31:23 32:1,3,8	<b>constitutional...</b>	19:5 21:10 32:2	<b>covers</b> 28:7 33:3	<b>department</b> 1:19
36:9 39:22	18:13	<b>court</b> 1:1,13 3:10	<b>cow</b> 40:10	10:2
40:17 43:2	<b>constitutional...</b>	3:11,22 5:6,7	<b>create</b> 7:5 17:13	<b>depend</b> 9:23
<b>congressional</b>	19:8 29:3,5	5:24 7:1,7,13	17:18	<b>depending</b> 11:19
34:8	<b>constitutionally</b>	7:24 8:9,12	<b>created</b> 39:24	<b>depends</b> 4:13
<b>congressman's</b>	33:6	9:10 11:10,13	<b>creating</b> 3:25	5:23 19:10 46:6
42:9	<b>Construction</b>	11:16,22 12:16	<b>creation</b> 36:14	<b>depriving</b> 21:14
<b>connected</b> 21:9	33:22 39:7	12:19 14:7,18	<b>critical</b> 20:20	<b>describe</b> 7:14
25:19 37:2	<b>contact</b> 48:12	14:18 15:17,19	<b>crown</b> 33:13	39:18
<b>connection</b> 25:8	<b>content</b> 4:5,12	16:7 17:3,5,13	<b>curiae</b> 1:20 2:8	<b>described</b> 7:13
25:9,14,22,24	4:13,15,17,19	17:15 18:9,16	18:7	8:12 47:14
<b>Connick</b> 3:11	11:11 21:24	18:21 19:15,18	<b>current</b> 43:8	<b>describes</b> 17:16
6:19 7:2 8:10	22:1 23:12	20:15,22 21:4,7		<b>description</b>
16:9,22 17:4,8	26:14 31:12	21:21 22:18	<b>D</b>	33:10
20:9,11,19	<b>contest</b> 12:1 14:8	23:6,14 24:3,5	<b>D</b> 3:1	<b>designing</b> 6:23
			<b>danger</b> 51:19	

<b>determination</b> 9:6	45:5,6,25 46:23	<b>emergence</b> 33:10	3:16,23 4:11	<b>executive</b> 11:20 13:11
<b>developed</b> 5:7	<b>distinguishable</b> 34:14 35:1	<b>emphatically</b> 28:6	6:13 7:14 9:1	<b>exempt</b> 32:14
12:15 13:13	<b>distinguishing</b> 27:12	<b>empirical</b> 5:23	9:13 10:18	<b>exist</b> 34:22 46:14
36:6 49:2	<b>district</b> 12:16	<b>employee</b> 3:14	11:17 16:13	<b>existing</b> 19:1
<b>Diego</b> 51:25	14:6,18 37:7,12	5:8 14:21,22	17:6 20:13,21	<b>exists</b> 44:10
<b>difference</b> 8:2,7	42:10	16:4 17:8 18:13	22:20 45:14	<b>expensive</b> 31:22
15:22 23:22	<b>doctrinal</b> 19:19	18:16 20:11	50:13	<b>expert</b> 42:4
26:20 34:18	<b>doctrine</b> 14:13	21:15,17 23:1	<b>employment-r...</b> 15:16,24,25	<b>explained</b> 13:3
<b>different</b> 4:4,24	17:18 49:2	23:13 24:13	16:21	<b>explains</b> 42:8
5:16 7:21 8:10	51:16	25:6,16 28:1	<b>enable</b> 46:11	<b>explicit</b> 43:22
15:5 17:12,19	<b>document</b> 39:13	29:3,11 30:8	<b>engage</b> 25:13	<b>express</b> 31:20
38:17 41:17	<b>doing</b> 35:12	44:1 45:22,23	35:18 46:14	<b>expressed</b> 33:18
44:19 45:4	49:16	45:24 46:3,3,6	<b>engaged</b> 10:7	44:5
47:23	<b>doubt</b> 23:20	46:22 48:14,14	<b>engages</b> 20:11	<b>expressive</b> 47:13
<b>differently</b> 6:18	<b>dozen</b> 33:20	48:24 49:5,11	22:8	<b>extended</b> 43:13
<b>differs</b> 38:9	<b>draw</b> 4:25	49:12 50:20	<b>England</b> 40:9	<b>extent</b> 13:23
<b>difficult</b> 32:6	<b>drawing</b> 11:19	51:3,12,25	<b>English</b> 36:15,19	29:9 45:9
<b>difficulty</b> 6:25	<b>drawn</b> 15:18 40:6	<b>employees</b> 3:15	<b>enjoy</b> 3:16	<b>extraordinary</b>
11:8	<b>draws</b> 27:15	3:16 15:19	<b>enterprise</b> 7:24	13:1 41:12
<b>directed</b> 6:4 9:14	<b>due</b> 12:19 13:3	21:14 25:13	<b>enters</b> 19:24	<b>e-mails</b> 29:14
13:6 39:21	46:5	29:20 32:24	<b>entitled</b> 15:12	
42:21	<b>Duryea</b> 1:3 3:5	39:13 44:8,9,20	<b>environment</b>	<hr/>
<b>directly</b> 16:24	35:11	<b>employee's</b>	11:17	<b>F</b>
<b>disagreed</b> 37:8	<b>D.C</b> 1:9,19	22:20 30:20,20	<b>equated</b> 27:23	<b>face</b> 34:2
<b>discipline</b> 3:14	<hr/>	<b>employer</b> 4:24	<b>ERIC</b> 1:22 2:10	<b>fact</b> 13:3 14:21
3:18	<b>E</b>	6:13 8:5 10:15	27:5	18:20 19:10
<b>disciplined</b> 37:7	<b>E</b> 2:1 3:1,1	10:18,23 12:10	<b>ESQ</b> 1:16,18,22	22:23 28:5 42:1
37:10	<b>earlier</b> 33:18	14:24 20:19	2:3,6,10,13	50:2
<b>discrimination</b>	42:19	23:17,18,21,25	<b>essentially</b> 49:5	<b>factors</b> 11:11
22:12,18 43:24	<b>earliest</b> 36:15	23:25 25:15	<b>ET</b> 1:4	<b>facts</b> 50:8
45:14	<b>early</b> 5:18 42:6	27:11 29:19	<b>evidence</b> 13:7,12	<b>fairly</b> 33:9
<b>discriminatory</b>	<b>easy</b> 17:4,7	30:10,24 31:6	13:13 47:18	<b>faith</b> 39:9
10:7	<b>Edwards</b> 24:4	37:20 41:1	<b>evolution</b> 43:10	<b>familiar</b> 36:18
<b>dismissed</b> 51:1	<b>EEOC</b> 30:14	44:18 45:3 49:1	<b>exactly</b> 28:5 44:4	<b>family</b> 50:23
<b>disputes</b> 19:2	<b>effect</b> 30:7	49:3	44:4	<b>far</b> 45:20
20:21	<b>effects</b> 51:24	<b>employers</b> 44:14	<b>example</b> 5:8 8:16	<b>fashion</b> 30:10
<b>disrupt</b> 24:24	<b>efficient</b> 5:10	44:23,24	15:18 22:10	<b>Federal</b> 18:16
<b>disruption</b> 16:16	27:11 36:7	<b>employer's</b>	24:7,17 28:8	20:22 23:14
<b>distinction</b> 6:12	<b>efficiently</b> 17:7	10:23	29:19 31:19	30:13 32:8,13
8:3 11:15 15:18	<b>either</b> 4:21	<b>employer-emp...</b>	36:8 46:17	32:16,21 39:22
23:9 24:22	<b>element</b> 8:23	25:9	<b>examples</b> 5:21	40:16 46:17
27:15 36:2 40:8	27:19	<b>employment</b>	<b>exception</b> 44:12	48:5,6,8,16
41:4 44:10,23	<b>elements</b> 8:22		<b>exceptions</b> 41:25	50:25
				<b>fee</b> 34:9,11 35:4
				35:9 48:17



<b>fees</b> 31:23	22:3,3 23:11,13	<b>gerrymandered</b>	32:13,16,21,24	45:16 46:16
<b>field</b> 17:6	23:13,14,21	24:11	33:4 34:4,16,17	50:2,4
<b>fight</b> 49:18	24:8 26:14	<b>getting</b> 28:23	34:21 35:6,8,11	<b>guess</b> 44:7
<b>file</b> 25:23 30:4,9	31:19	34:8	35:22 36:1,5,6	<hr/> <b>H</b> <hr/>
38:2 46:16 47:9	<b>formal</b> 39:13	<b>Gibbons</b> 10:3	37:19 38:7	<b>half</b> 33:20
48:6,15 49:17	<b>forms</b> 17:19	<b>GINSBURG</b> 8:1	39:24 40:16	<b>hand</b> 8:5
49:23	<b>foster</b> 46:9	8:13 11:18 12:2	42:21 44:1,5,8	<b>handed</b> 13:20
<b>filed</b> 18:16 19:5	<b>found</b> 45:16	12:8 14:4 24:21	44:18,22,24	<b>handled</b> 13:17,19
23:14 24:17	49:17 50:5	30:3 34:6 35:2	45:2,3,12 48:14	13:24
25:2,7,18 26:5	<b>founding</b> 13:16	40:21 43:20	50:19 51:18,21	<b>handling</b> 13:21
46:19	17:20	47:7	<b>governmental</b>	<b>happen</b> 49:10
<b>files</b> 21:15	<b>framed</b> 28:16	<b>give</b> 25:22 29:14	10:6 22:12	50:16
<b>filing</b> 23:20 30:14	<b>framers</b> 13:7	35:12 42:23	<b>governments</b>	<b>happened</b> 33:10
30:15 34:9,11	40:17 51:10	47:23	31:25	39:4 42:24
35:4,7,8 41:2	<b>framework</b> 3:21	<b>give-and-take</b>	<b>government's</b>	47:19,24
<b>Filippo</b> 19:18	7:13 16:15	40:1	31:6,9 45:10,10	<b>happening</b> 25:3
47:14,19,25	24:20 31:13	<b>giving</b> 27:12	<b>government-cr...</b>	<b>happens</b> 20:5
<b>find</b> 32:6 48:17	38:9	<b>GiVon</b> 22:15	35:21	24:23 51:23
48:19 49:22	<b>frank</b> 48:12	<b>go</b> 9:3 17:15	<b>governs</b> 13:1	<b>Harbury</b> 46:11
50:1,2,4	<b>free</b> 3:19 4:1,8	25:21,23 35:10	<b>grant</b> 3:15	<b>hard</b> 19:4 26:11
<b>fire</b> 15:1	5:14,22 6:1	40:10 42:6	<b>great</b> 40:14	31:17
<b>fired</b> 21:17 26:8	10:4 15:6,11	<b>goes</b> 13:15 15:21	<b>greater</b> 45:11	<b>harder</b> 19:14
45:17	17:5,9 23:2	21:20	<b>grievance</b> 14:7	<b>Harrisburg</b>
<b>first</b> 3:4,21 8:9	28:4,7,17,19	<b>going</b> 8:10 19:9	18:13,17 19:5,9	35:10
8:17 12:16 15:5	46:9,13,24	20:12 21:3 22:9	24:13,17 27:16	<b>head</b> 43:10
17:3 18:11,15	<b>friends</b> 50:23	26:6 30:4,4,9	27:16 28:1 30:5	<b>hear</b> 3:3 32:17
20:10 21:2	<b>frivolous</b> 50:13	32:4 34:20	39:14,15,25	<b>heightened</b>
25:12 27:24,24	<b>fundamental</b>	40:12,23 41:1	41:2 43:6 47:10	14:15
28:11 29:1,6	18:11 34:18	45:12 48:11,17	48:24 49:5,15	<b>held</b> 17:5 22:18
30:17 34:1	<b>further</b> 17:25	48:19,20 49:7,8	51:12	33:20 34:10
47:12 48:4 49:3	27:1 39:11 51:4	50:16	<b>grievances</b> 25:18	51:25
<b>flawed</b> 18:11	52:3	<b>good</b> 39:9 43:12	29:3 35:22	<b>hesitated</b> 11:16
<b>flip</b> 10:21,22	<hr/> <b>G</b> <hr/>	<b>government</b> 4:21	<b>gripe</b> 29:10	<b>hierarchy</b> 3:25
<b>flood</b> 50:17	<b>G</b> 3:1	4:22,23,24 6:5	41:10 48:15	17:14,18 21:2
<b>floor</b> 13:5	<b>gag</b> 43:1	6:5,6,7,14,15	50:21,23	<b>highlighted</b>
<b>focused</b> 51:23	<b>Garcetti</b> 37:6	8:5,5,19 9:14	<b>gripes</b> 48:7	20:25
<b>follow</b> 37:14	38:5,11	10:2 11:19,21	<b>grounds</b> 24:6	<b>highly</b> 47:13
<b>followed</b> 24:14	<b>gas</b> 35:13,13	12:9 14:22,23	<b>guarantee</b> 32:11	48:13
<b>following</b> 37:15	<b>general</b> 1:19	14:24 16:21	33:5,7 47:4	<b>hire</b> 48:21
<b>follows</b> 13:15	16:20 20:17	20:16,18 22:22	<b>guaranteed</b> 33:7	<b>historic</b> 32:25
38:23	22:17	23:17 25:15	<b>guarantees</b>	<b>historical</b> 34:15
<b>food</b> 39:15	<b>generalized</b>	27:10 28:15	12:22 44:11	39:20 40:4,15
<b>form</b> 6:3 10:7	29:23 31:18	29:19 31:1,17	<b>Guarnieri</b> 1:7 3:5	43:10
11:11,25 21:24	<b>generally</b> 13:7	31:25 32:9,12	25:20 35:7,9	<b>historically</b> 33:9

40:8,11 <b>history</b> 27:9 33:12,25 36:3 42:24 <b>Honor</b> 4:6,19 5:5 5:20 6:17 7:11 7:22 8:8,14 9:9 10:4,17 11:9 12:1,6 13:2 14:3,6 15:4 16:14 17:1 21:25 28:12 29:24 30:6,25 31:1 32:15 34:13 41:9 47:11 49:20,24 51:9 <b>hopes</b> 46:18 <b>hours</b> 10:18 <b>house</b> 26:3 <b>hundred</b> 33:1 37:1 <b>hypothetical</b> 14:20 19:4 26:2 <b>hypothetically</b> 9:19 <b>hypotheticals</b> 22:21	41:15 <b>importantly</b> 17:15 <b>impose</b> 39:6 <b>imposed</b> 31:10 <b>imposes</b> 12:23 <b>inapt</b> 46:23 <b>incidental</b> 34:22 <b>included</b> 35:17 <b>includes</b> 32:12 <b>including</b> 40:16 <b>independent</b> 3:17 <b>independently</b> 49:7 <b>indicate</b> 39:5 <b>indicated</b> 30:8 41:10 <b>individual</b> 6:5 9:1 22:20 28:21 29:10 41:24 45:15 46:12 <b>individuals</b> 40:16 42:20 44:19 <b>information</b> 47:20 <b>initial</b> 9:16 <b>injunction</b> 37:13 <b>innumerable</b> 12:19 <b>inquiry</b> 4:14,18 5:23 6:18,19,23 7:3,5,8,12,15 8:9 11:13 22:8 38:18,19,20,21 38:24 39:3,6 45:25 <b>inseparable</b> 21:4 <b>inside</b> 24:23 <b>insists</b> 51:24 <b>Insofar</b> 33:15 <b>instance</b> 23:1 39:21 <b>institution</b> 50:18	<b>interchangeably</b> 21:7 <b>interest</b> 5:15 16:21 18:17 27:10 31:6,9,18 37:19 <b>interests</b> 45:3,10 46:13 <b>internal</b> 48:7 <b>interpreted</b> 4:11 13:4 <b>interstate</b> 44:13 <b>intimately</b> 21:9 25:19 <b>Invalid</b> 36:12 <b>invite</b> 10:11 <b>involve</b> 27:13 <b>involved</b> 6:10 9:24 10:1 11:11 14:14 16:19 24:25 30:23 36:1 <b>involves</b> 16:12 <b>involving</b> 10:2 <b>issue</b> 10:12 18:10 19:23 31:7 45:2 50:8 <b>issues</b> 37:4 <b>items</b> 19:1	<b>Justice</b> 1:19 3:3 3:9 4:3,10,16 4:20 5:2,12 6:9 6:20 7:9,15,18 8:1,13,21 9:18 10:9,13,19,21 11:2,6,18 12:2 12:8,17 13:10 14:1,4,19 15:10 15:21,22 18:2,8 18:19,23 19:7 19:13 20:2,4 21:11,13,21 22:9,10,25 23:16 24:21 26:1 27:3,7,22 28:3,10,23 29:1 29:8,17,22 30:3 30:16,19 31:2 31:12 32:5,19 33:2 34:6,24 35:2,15 36:15 36:22,24 37:1,6 37:21 38:1,8,15 38:16 39:12 40:5,15,21 41:10 42:4,13 43:16,20 44:16 45:21 47:7,22 48:23 49:14,21 50:11 51:5 52:5 <b>justified</b> 16:23	<b>key</b> 6:11 <b>kick</b> 16:14 <b>kind</b> 5:10 6:23 8:18 9:15,18 14:15 15:19 19:19,21 22:8 24:1,11,16,24 25:23 33:6 38:21 39:25 40:8 52:2 <b>king</b> 36:4 40:12 <b>knew</b> 31:25 <b>know</b> 14:25 25:6 32:10 38:8 40:2
<hr/> <b>I</b> <hr/>		<hr/> <b>J</b> <hr/>	<hr/> <b>K</b> <hr/>	<hr/> <b>L</b> <hr/>
<b>idea</b> 42:1 47:24 <b>identified</b> 3:22 7:1,25 <b>illegal</b> 22:2 <b>illustrates</b> 43:9 <b>imagination</b> 51:10 <b>immunity</b> 32:10 51:15 <b>importance</b> 11:17 14:10 45:12 <b>important</b> 8:16 17:6 19:12,16 20:14 23:7		<b>J</b> 1:7 <b>job</b> 15:17 16:7 25:23 <b>John</b> 43:17 <b>JOSEPH</b> 1:18 2:6 18:5 <b>Judge</b> 46:19 <b>judgment</b> 27:2 50:6 <b>judgments</b> 31:23 <b>judicial</b> 36:13 51:17 <b>jurisprudence</b> 8:23	<b>K</b> 33:22 <b>KAGAN</b> 14:19 15:10,21 21:11 21:13 22:9 26:1 38:15 45:21 <b>KENNEDY</b> 22:25 30:16,19 31:2,12 37:6,21 38:1,8 42:4,13 43:16 <b>Kennedy's</b> 38:16	<b>label</b> 41:6,11 <b>Labor</b> 28:14 <b>language</b> 47:14 <b>large</b> 3:13 36:9 42:2 <b>largely</b> 42:12 <b>larger</b> 22:5 <b>law</b> 3:14 10:25 12:20 13:19 18:25 21:14,16 32:13,14 36:19 43:8 44:17 48:8 <b>lawsuit</b> 11:24,24 16:11 17:9 21:15 22:4 23:14,18 24:12 25:23 30:9,15 35:7 36:16 45:13 48:10 <b>lawsuits</b> 12:17 12:25 13:1,5,9 13:12,24 14:11 32:6,8 33:19 34:23 47:16 <b>lawyer</b> 28:21 48:15,17,19 49:17 50:3,5 <b>lawyers</b> 31:22 49:6,18,23 50:1

<p>50:4  <b>lead</b> 47:15  <b>left</b> 51:6  <b>legislature</b> 11:20  13:9 21:13 22:2  34:3  <b>legitimacy</b> 42:24  <b>legitimate</b> 43:2,3  <b>letter</b> 17:22  23:17,24 34:7,7  50:21  <b>let's</b> 18:23,24  32:5 39:21  43:20 48:15  <b>level</b> 39:22  <b>light</b> 26:13,13  <b>limit</b> 25:14  <b>line</b> 4:23,25  11:15,19 39:7  <b>lines</b> 6:23  <b>line-drawing</b>  24:1,16  <b>linguistic</b> 41:15  <b>literally</b> 18:12  <b>litigate</b> 10:12  <b>little</b> 7:4 36:25  38:16 42:18  47:25 51:3  <b>living</b> 43:21  <b>local</b> 31:25 40:13  <b>long</b> 17:5 26:4  37:5  <b>longer</b> 50:8  <b>long-centered</b>  51:14  <b>look</b> 5:7 11:10  16:16 19:17  23:12 26:23  31:8  <b>looking</b> 46:17  <b>looks</b> 5:7  <b>lot</b> 13:19 27:20  30:1 45:12  47:23</p>	<p><b>lower</b> 7:6 16:8  30:15 32:17,20  <b>low-level</b> 10:6</p> <hr/> <p style="text-align: center;"><b>M</b></p> <hr/> <p><b>machinery</b> 32:3  <b>Magna</b> 33:14  36:4  <b>main</b> 20:23  <b>major</b> 48:4  <b>majority</b> 24:15  <b>map</b> 8:11  <b>march</b> 1:10 24:5  <b>match</b> 7:4  <b>material</b> 40:15  <b>matter</b> 1:12 5:3,4  9:3 11:7,7  15:14,23,24  18:17 20:12  21:18,23 22:3  22:13,19 26:1,9  26:17,19,25  27:13,17,20  30:1 45:11,13  52:8  <b>matters</b> 5:19,21  6:14 9:13 20:9  37:19 43:11  45:7,7 47:1,2  <b>McDonald</b> 3:24  4:9 5:25  <b>mean</b> 12:21  42:19 49:1,1,12  50:1  <b>meaning</b> 18:23  19:13 41:17  46:7  <b>measured</b> 27:16  <b>mechanism</b> 12:9  18:21 19:24  20:1 39:24  <b>mechanisms</b>  35:21 36:6  <b>meet</b> 35:10  <b>memo</b> 37:7,16</p>	<p><b>mention</b> 12:25  19:1  <b>mentioned</b> 12:20  <b>merits</b> 10:10  <b>messy</b> 11:14  <b>micromanage...</b>  26:6  <b>mind</b> 13:8,11  <b>Mine</b> 21:5  <b>minimum</b> 12:23  <b>minute</b> 51:6  <b>mistreats</b> 29:19  <b>money</b> 35:13,13  49:4  <b>morning</b> 3:4  <b>Motor</b> 36:20  <b>municipal</b> 39:13  <b>Myers</b> 3:12  24:20,25 40:23</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N</b> 2:1,1 3:1  <b>National</b> 15:18  28:14  <b>nature</b> 31:9  <b>necessarily</b> 5:2  37:18  <b>necessary</b> 7:17  26:15  <b>needs</b> 26:19  <b>neighbors</b> 42:7  <b>Neither</b> 27:9  <b>never</b> 12:20 22:8  23:6  <b>new</b> 14:9 26:2  47:16  <b>night</b> 26:4  <b>nonconstitutio...</b>  18:14  <b>nonemployee</b>  30:22  <b>non-petitioning</b>  23:10  <b>normal</b> 24:20  41:25 42:1</p>	<p><b>note</b> 23:7 33:19  42:19,23  <b>notion</b> 50:16  <b>NTEU</b> 25:10,21  <b>number</b> 30:13  36:10 39:12  47:16  <b>numbers</b> 42:2  <b>numerous</b> 21:1</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O</b> 2:1 3:1  <b>objected</b> 37:21  <b>obligated</b> 32:16  <b>obligation</b> 34:21  <b>oblique</b> 7:4,16  <b>obviously</b> 25:18  28:6  <b>occur</b> 51:24  <b>occurred</b> 30:9  <b>offer</b> 31:2  <b>office</b> 29:15  37:12 40:2,24  41:11  <b>officer's</b> 48:20  <b>official</b> 38:7  <b>officials</b> 36:14  40:16  <b>once</b> 9:6  <b>one-off</b> 10:5  <b>operation</b> 5:10  <b>opinion</b> 33:22  38:3  <b>opposed</b> 10:15  <b>oral</b> 1:12 2:2,5,9  3:7 18:5 27:5  44:6  <b>oranges</b> 38:21  <b>order</b> 43:1  <b>ordinarily</b> 32:4  39:23 41:23  <b>ordinary</b> 29:14  31:8 40:1  <b>origin</b> 21:10  <b>original</b> 12:12</p>	<p><b>originally</b> 12:3  <b>Ortiz</b> 1:16 2:3,13  3:6,7,9 4:6,14  4:18 5:1,5,20  6:17,22 7:11,22  8:8,14 9:9,23  10:17,20,22  11:5,9,18,24  12:6,11 13:2,13  14:3,6,19 15:4  15:16 16:1 18:3  20:24 25:10  51:6,7,9  <b>ostensibly</b> 50:1  <b>ought</b> 43:3  <b>outside</b> 25:1 40:1  52:1  <b>outweigh</b> 37:20  <b>overtime</b> 10:20  <b>overwhelming</b>  47:15</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>P</b> 3:1  <b>PAGE</b> 2:2  <b>Palmore</b> 1:18 2:6  18:4,5,8,22  19:4,11,16 20:3  20:7 21:11,12  21:19 22:14  23:5,23 24:21  25:4 26:1,10  <b>pals</b> 50:23  <b>paradigmatic</b>  13:18 17:22  <b>parity</b> 3:24 15:8  <b>part</b> 4:14,18  14:22 19:12,17  22:5 28:21,24  31:6 38:7 44:5  49:2  <b>particular</b> 5:8 6:3  6:4,6,22 8:16  9:24 10:6 13:7  15:17 16:13,13</p>
--	---	--	--	--

16:18 17:7,16 31:19 39:25 50:18 <b>particularly</b> 28:19 48:10 <b>parties</b> 35:25 <b>parts</b> 3:14 51:16 <b>party</b> 51:21 <b>passed</b> 26:3 <b>passes</b> 21:14 <b>pay</b> 31:22 34:9 35:3,8 49:16 <b>PENNSYLVANIA</b> ... 1:3 <b>Pension</b> 36:12 <b>people</b> 30:2 33:13 34:16,20 41:19,24 42:2 43:14 44:14 49:21,25 50:3 <b>people's</b> 47:3 <b>peremptory</b> 30:10 <b>period</b> 37:5 <b>periphery</b> 17:21 <b>personal</b> 43:4,5 43:14 <b>person's</b> 16:12 <b>pervasive</b> 10:23 10:24 <b>petition</b> 3:13,20 4:1,3,7,7,16 5:13,16,17 6:1 8:23 9:7,13,14 9:25 10:1,15,15 10:17,22 11:1 11:22,23 12:12 12:15,18,21,21 12:25 13:6 14:10,17 15:3 16:10,12 17:11 17:14,17,19,21 17:22 20:25 21:8 23:3,18,19	23:19,21 24:1 24:10,12,18,25 25:7 27:10,12 27:14,15,23 28:4,7,10,16 28:22 29:4,12 29:12,15 30:23 31:7,11,14,19 32:7,11 33:3,6 33:11,16,19 34:1,15 35:19 35:21,25 36:3,9 36:17 37:18,22 38:2,6,12,22 39:8,14,17,21 39:23 40:11,12 41:5,7,11,13 41:16,20 42:3 42:22 43:3,3,11 43:14 45:11 46:1,8,8,10,18 47:1,10 48:9,10 51:11,14 <b>petitioner</b> 27:17 27:18 44:7 46:7 <b>petitioners</b> 1:5 1:17,21 2:4,8 2:14 3:8 6:24 9:10 12:1 14:8 18:7 29:10,13 31:20 43:9 47:13 48:13 51:8 52:4 <b>Petitioner's</b> 12:13 <b>petitioning</b> 4:21 4:22,23,24 5:13 5:17 6:3 9:20 11:25 19:21 23:9 24:4,7 25:24 26:16 34:17 39:4 40:17 <b>petitions</b> 5:18	13:6,8,9,11,17 13:18 17:19 22:22 33:3 34:3 34:3 36:4,10 40:18 41:18,23 42:8,14 <b>petition-like</b> 41:2 <b>phenomena</b> 41:22 <b>phenomenon</b> 42:18 <b>physically</b> 25:6 <b>Pickering</b> 7:3,5,7 7:12 8:11,14,22 8:25 9:6 16:24 16:24 22:24 <b>Pickering-Con...</b> 23:2 <b>piece</b> 32:3 <b>place</b> 8:19 <b>plausible</b> 49:11 <b>pleading</b> 47:9 <b>pleas</b> 13:18 <b>please</b> 3:10 18:9 21:12 27:8 <b>point</b> 20:5 30:12 41:15 44:7 50:14 <b>pointed</b> 47:17 <b>points</b> 40:15 <b>police</b> 26:8 48:20 <b>policies</b> 10:24 <b>policy</b> 6:8 10:1,1 22:17 <b>political</b> 5:14 22:5 <b>politically</b> 45:18 <b>poll</b> 40:25,25,25 41:5 <b>poor</b> 39:16 <b>pose</b> 16:17 <b>poses</b> 5:10 <b>positing</b> 21:25 <b>position</b> 17:23	20:8 38:13 43:9 43:17,17 <b>possible</b> 47:8 <b>possibly</b> 43:13 <b>potential</b> 18:15 <b>practical</b> 17:2 19:20 40:23 <b>practice</b> 6:17 42:1 <b>precedent</b> 44:25 <b>precinct</b> 26:3,5 <b>precious</b> 36:25 <b>precisely</b> 35:5 <b>premise</b> 33:21 <b>premised</b> 18:20 <b>prepare</b> 39:13 <b>presented</b> 26:18 41:1 <b>presents</b> 17:1 <b>preserve</b> 15:7 <b>preserved</b> 26:23 <b>president</b> 34:7 39:22 <b>pressed</b> 31:17 <b>presumably</b> 11:10 <b>prevailed</b> 50:9 <b>prevent</b> 32:8 <b>principal</b> 22:17 <b>principle</b> 3:24 15:7 38:5 <b>principles</b> 3:22 5:6 16:9,16 <b>pristine</b> 24:8 <b>private</b> 3:16 5:4 5:19,21 8:4 9:3 11:7 13:20,22 15:14,23 18:17 20:10,12 26:17 26:19,25 35:24 42:20 43:11 44:2,9,14,14 44:20,23 45:7 45:13 48:13	49:6 50:19 <b>privately-relat...</b> 16:4 <b>privileges</b> 20:25 <b>probably</b> 39:2 41:17 51:1 <b>problem</b> 11:3 14:16,16 16:9 20:23 22:7 27:18 29:5 40:9 47:12 <b>problems</b> 17:2 28:19 43:4 <b>procedure</b> 35:23 <b>procedures</b> 28:1 37:15 <b>proceed</b> 9:10 16:24 17:9 <b>proceeding</b> 7:18 19:15 <b>process</b> 12:20 13:3 18:13 19:9 39:1 51:20 <b>Professor</b> 13:14 <b>prohibited</b> 43:24 <b>promoting</b> 6:2 <b>property</b> 14:22 <b>proponents</b> 43:1 <b>propose</b> 45:6 <b>proposing</b> 11:4 <b>proprietary</b> 20:18 <b>prospective</b> 37:13 <b>protect</b> 30:14 <b>protected</b> 8:20 13:25 14:8,12 14:12 15:3,5,6 15:11 20:10,12 23:2,3 35:19 36:17 37:11,15 37:18 39:16 42:21 48:7,11 <b>protecting</b> 46:25
--	--	---	--	---

<p><b>protection</b> 13:5 14:15 15:15 18:25 19:20 25:12 27:12 <b>protections</b> 25:11 <b>protects</b> 8:18 47:4 <b>protest</b> 24:7 <b>prove</b> 50:3 <b>provide</b> 27:11 32:16 <b>provides</b> 19:24 19:25 25:11 <b>providing</b> 18:15 20:20 <b>provision</b> 16:18 43:22,23 <b>provisions</b> 7:19 44:21 <b>public</b> 3:12,14,15 3:18,23 5:4,15 8:4 11:7,17 15:23 16:4 17:6 20:17 21:18,23 22:3,13,19,23 26:7,9,17,25 27:13,20 30:1 30:20 31:3 38:21 45:7,12 45:25 46:9,15 46:25 47:1,2 51:12 <b>punish</b> 32:24 34:19 35:7,12 <b>purely</b> 9:13 15:14 45:13 <b>purport</b> 47:20 <b>purpose</b> 5:24 6:7 7:1 21:10 24:11 27:9 34:15 46:10,24 <b>pursuant</b> 19:6 41:2</p>	<p><b>pursued</b> 39:9 <b>pursuing</b> 11:24 <b>put</b> 19:3 23:5 38:2 41:6 <b>putting</b> 19:7 39:19 <b>p.m</b> 26:4</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>qualify</b> 9:19,22 10:3,14,25 12:11,14 <b>quality</b> 39:15 <b>Quarreling</b> 42:7 <b>question</b> 9:8 10:11,14 21:22 23:24 25:8 26:12,18 28:24 33:17 34:20 37:24 38:4,11 38:16,23 41:15 45:22 46:2 51:15,22 <b>questions</b> 9:2 17:25 21:20 27:1 51:4 52:3 <b>quite</b> 5:16 14:9 18:12 42:6</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>R</b> 1:16,18 2:3,6 2:13 3:1,7 18:5 51:7 <b>race</b> 9:21 10:2 <b>radical</b> 51:10 <b>raise</b> 48:7 <b>raised</b> 37:4 38:13 <b>raises</b> 41:15 52:1 <b>ramifications</b> 45:18,19 <b>reach</b> 27:23 <b>reads</b> 50:20 <b>real</b> 45:22 51:2 <b>realistic</b> 49:19 <b>realistically</b></p>	<p>49:10 <b>realizes</b> 50:20 <b>really</b> 15:10 19:22 25:7 36:2 43:2,4 46:2 49:11 <b>reason</b> 15:13 19:17 49:2 <b>reasonable</b> 39:8 48:11 <b>reasons</b> 3:17 15:5 18:11 47:12 48:3 <b>rebuttal</b> 2:12 18:1 51:7 <b>recall</b> 12:24 <b>receive</b> 14:15 <b>received</b> 36:9 <b>recognize</b> 47:8 <b>record</b> 26:13,24 <b>redress</b> 19:2 33:13 46:20 47:3,4 <b>redressing</b> 35:22 <b>reengineering</b> 7:23 <b>refer</b> 30:7 <b>reference</b> 37:14 <b>refers</b> 36:16 <b>reflects</b> 20:14 <b>refusing</b> 32:9 <b>regard</b> 28:14 33:24 36:19 40:19 <b>regarded</b> 40:18 <b>regarding</b> 5:19 <b>regulated</b> 30:21 <b>regulator</b> 20:17 <b>related</b> 15:17 16:2,7,12 25:5 <b>Relations</b> 28:14 <b>relationship</b> 25:9 25:19 <b>relevant</b> 11:13</p>	<p>22:4,6 25:7 30:2 <b>relied</b> 21:6 <b>relief</b> 46:12 <b>religion</b> 45:15 <b>remaining</b> 18:1 <b>remand</b> 26:22 <b>remark</b> 28:9 <b>remedial</b> 19:24 19:25 39:24 <b>remember</b> 50:1 <b>remove</b> 34:22 <b>repeatedly</b> 3:22 <b>rephrasing</b> 17:10 <b>replacement</b> 38:24 <b>reply</b> 29:12 47:17,19 <b>representative</b> 34:8 35:11 <b>reprisals</b> 34:16 <b>Republicans</b> 51:10 <b>require</b> 17:13 24:16 <b>requirement</b> 3:12,18 <b>requirements</b> 12:23 <b>requires</b> 12:21 24:2 31:22 <b>requiring</b> 3:23 <b>resolution</b> 26:3 <b>resolve</b> 19:2 49:5 <b>respect</b> 28:2 29:8 36:19 46:5 <b>respects</b> 20:13 <b>respinning</b> 17:10 <b>respond</b> 41:14 <b>Respondent</b> 1:23 2:11 3:12 12:15 17:16 27:6 51:13,23 <b>Respondents</b></p>	<p>51:14 <b>Respondent's</b> 13:23 14:9,17 17:1,12 <b>responsibility</b> 13:21 <b>responsible</b> 10:12 <b>responsive</b> 44:25 <b>rest</b> 7:23 9:3 52:4 <b>restrict</b> 30:24 <b>restricted</b> 30:21 <b>result</b> 17:12 20:8 <b>retain</b> 18:1 <b>retaliated</b> 30:10 <b>retaliation</b> 9:21 15:2 16:6 43:23 43:25 44:2 <b>reversed</b> 27:2 <b>review</b> 51:17 <b>right</b> 3:16 4:13 5:19,20 21:8,8 21:9 28:22 30:20,24 32:11 32:12,21 34:19 35:18 37:24,24 41:8 43:18,18 43:19 44:12 51:16,17 <b>rights</b> 21:4,15 44:9,10,13,18 44:20 46:21 <b>road</b> 9:10 17:16 <b>ROBERTS</b> 3:3 18:2 27:3,22 28:10,23 29:1 29:17,22 44:16 47:22 48:23 51:5 52:5 <b>robust</b> 46:15,18 <b>robustly</b> 13:4 <b>Roe</b> 51:25 <b>rooted</b> 46:24 <b>roots</b> 36:3</p>
---	--	---	---	---

<b>routine</b> 24:24 29:14 <b>rule</b> 17:12 18:10 30:11,13 38:11 40:5 51:16 <b>ruler</b> 4:25 <b>ruling</b> 19:19 <b>running</b> 8:9 <b>run-of-the-mill</b> 20:21	29:21,24 30:6 30:18,25 31:5 31:15 32:15,23 33:8 34:6,13,25 35:5,20 36:18 36:23,25 37:3 37:17,24 38:4 38:10,15 39:2 39:18 40:7,21 41:9 42:11,16 43:18,20 44:4 45:1,21 46:5 47:11 48:2 49:6 49:20,24 50:15 <b>school's</b> 22:17 <b>scores</b> 42:13,14 <b>search</b> 37:14 <b>Seattle</b> 1:22 <b>second</b> 3:24 8:12 15:9 18:18 20:23 28:24 39:1 41:15 46:17 <b>Secretary</b> 40:19 <b>section</b> 31:21,24 32:2 <b>sector</b> 44:3 <b>see</b> 15:21 17:16 41:19 42:18 <b>seek</b> 33:13 46:12 47:3 <b>segregation</b> 24:7 <b>self-government</b> 6:2 <b>semi-chaotic</b> 49:19 <b>sending</b> 37:7 <b>sense</b> 39:2 42:23 51:3 <b>sentence</b> 29:18 <b>separate</b> 4:4 7:19 25:11 40:2 <b>separately</b> 23:6 <b>serious</b> 23:24	45:20 47:12 <b>set</b> 12:9 25:11 32:23 <b>sets</b> 35:22 <b>settlement</b> 48:25 49:9 <b>sharply</b> 14:9 <b>sheriff</b> 40:10 <b>shows</b> 16:1 <b>side</b> 14:17 17:5 21:6 24:22 <b>sign</b> 41:20 <b>signatures</b> 40:24 42:14 <b>signed</b> 42:9 43:14 <b>significance</b> 40:23 <b>signing</b> 42:2 43:5 <b>similar</b> 15:6 22:15 <b>similarly</b> 23:18 <b>simply</b> 5:16 32:9 36:7 44:20 48:4 48:11 49:9 <b>situation</b> 20:19 <b>skepticism</b> 33:18 <b>slavery</b> 42:8 43:1 <b>slender</b> 13:15 14:2 <b>Smith's</b> 3:24 <b>solely</b> 28:16 <b>Solicitor</b> 1:18 <b>solution</b> 48:24 <b>somebody</b> 14:24 <b>somewhat</b> 7:16 13:14 36:12 39:20 41:17 44:19 <b>sorry</b> 21:11 <b>sort</b> 6:7 13:16,19 17:2 37:13 <b>SOTOMAYOR</b> 9:18 10:9,19,21	18:19,23 19:7 19:13 20:2,4 49:14,21 <b>Sotomayor's</b> 22:10 <b>sounds</b> 41:1 <b>South</b> 24:5,6 <b>sovereign</b> 6:16 8:6 9:15,20 10:11,16 11:1 19:23 20:16 22:22 23:25 32:9 45:5 51:15 <b>specific</b> 38:11 39:24 <b>speech</b> 3:19 4:1 4:8,10 5:14,14 5:15,21,22 6:1 6:3,4,6 8:4,4,16 10:4 15:7,11 16:10 17:5,9,14 20:9,11 21:1,8 21:22 22:1,18 23:1,2 24:18 25:12,13,22 26:16,24 28:4,7 28:17,19 30:17 30:20 38:1 45:24 46:9,13 46:25 51:23 52:1 <b>spend</b> 49:1 <b>spending</b> 49:4 <b>stage</b> 8:3,9,12 39:1 <b>stake</b> 34:18 43:15 <b>standing</b> 36:2 <b>stands</b> 43:10 <b>started</b> 36:3 <b>starts</b> 43:11 <b>state</b> 18:25 21:13 21:14,15,16,17 24:6 29:13	30:22 48:8 <b>stated</b> 5:25 <b>statement</b> 9:25 23:20 29:9 <b>statements</b> 9:24 21:2 <b>States</b> 1:1,13,20 2:7 18:6 31:24 34:5 <b>status</b> 20:18 22:20 <b>statutes</b> 30:14 <b>step</b> 7:24 33:1 <b>stereotypical</b> 13:18 <b>stop</b> 49:16 <b>stopping</b> 31:18 <b>strategy</b> 37:8 <b>street</b> 41:19 <b>strikes</b> 32:1 <b>strong</b> 8:20 <b>strongly</b> 3:17,23 3:25 <b>struck</b> 20:15 32:4 <b>struggle</b> 43:12 <b>subject</b> 27:15 31:21 32:1 <b>submission</b> 50:11 <b>submissions</b> 22:22 52:4 <b>submitted</b> 23:24 52:6,8 <b>substantial</b> 50:7 <b>success</b> 48:18 <b>sudden</b> 17:19 <b>sue</b> 16:6 30:4 32:22 37:12 <b>sued</b> 15:1 <b>sues</b> 14:23 <b>sufficient</b> 34:2 <b>suggest</b> 22:2 48:14 51:16
---	---	---	---	--

<p><b>suggested</b> 8:24  <b>suggesting</b> 7:15  35:2,8 38:20  42:17  <b>suggestion</b> 49:18  <b>suggests</b> 38:25  45:25 46:1  51:13  <b>suit</b> 15:12 26:5  31:21  <b>suits</b> 32:14,17,20  35:3 49:23  <b>summary</b> 50:6  <b>supervisor</b> 10:7  14:25  <b>supplanting</b>  18:14  <b>supplies</b> 13:4  <b>support</b> 43:1  47:21  <b>supporting</b> 1:21  2:8 18:7  <b>suppose</b> 14:20  21:13 22:9,10  26:2 35:15  43:23,24  <b>supposed</b> 37:9  <b>Supreme</b> 1:1,13  32:21  <b>sure</b> 11:5  <b>surely</b> 5:17 23:20  45:11  <b>surprises</b> 42:5  <b>surprising</b> 7:20  <b>susceptible</b>  24:19  <b>system</b> 18:21  32:17,20,24  <b>systemic</b> 22:11  45:14</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>T</b> 2:1,1  <b>table</b> 42:15  <b>tables</b> 41:19</p>	<p><b>take</b> 17:8 25:15  29:14 37:23  38:4 48:5 49:7  50:3,4  <b>taken</b> 23:15  <b>takes</b> 14:22 23:8  23:13  <b>talk</b> 32:5 50:22  <b>talking</b> 19:8 25:1  32:19,20 40:22  <b>talks</b> 5:9  <b>tax</b> 16:5  <b>teacher</b> 22:16  <b>tell</b> 49:25  <b>term</b> 23:11  <b>termination</b> 9:21  <b>terms</b> 26:21  28:16 45:18,19  <b>test</b> 7:2,4 11:4,16  15:15,22 16:13  16:23 17:4  22:23 23:8,11  25:5 31:3,3,4  38:19  <b>tests</b> 7:21  <b>text</b> 27:9,14 34:1  <b>Thank</b> 14:3 18:2  27:3 51:5 52:5  <b>theory</b> 9:19  14:16 16:6  47:24 49:8  50:19  <b>thin</b> 40:6  <b>thing</b> 41:21 47:18  <b>things</b> 8:15 11:12  13:21,24 14:10  16:2 28:5,7  41:19,23 43:5  43:13 47:22  <b>think</b> 8:21 13:17  15:1 19:11,16  20:7 21:20  22:25 23:5,7,8  23:23 25:4,5,5</p>	<p>27:16 28:3 29:9  31:16 33:8,8,21  34:13,24,25  35:23 36:14,20  36:21 38:10,12  39:10 40:17,18  41:14,18 42:20  43:7,7 44:5  47:7,11,24 48:2  48:3 51:2  <b>Third</b> 18:10  19:18 20:5,23  22:7 24:2,9  26:22 30:11  48:22  <b>Thirteenth</b> 44:12  <b>Thomas</b> 21:3  <b>thought</b> 17:20  42:5  <b>three</b> 47:12  <b>threshold</b> 6:23  7:2,3 16:23  38:19,20,24  39:3,6,11 45:25  <b>thrust</b> 43:25  <b>time</b> 13:15,20  18:1 33:13,14  36:4,5,8 37:5  42:3,24 43:12  49:4,22,25  <b>Title</b> 43:22,22  <b>today</b> 24:16  41:16  <b>top</b> 48:6  <b>traditional</b> 7:13  8:11  <b>Transport</b> 36:21  <b>trap</b> 19:21  <b>travel</b> 44:13  <b>Treasury</b> 15:19  40:20  <b>treated</b> 49:13,22  <b>treating</b> 16:10  <b>treatment</b> 49:23</p>	<p><b>trial</b> 37:8 50:6  <b>tries</b> 16:5  <b>trigger</b> 9:16  <b>trouble</b> 45:13  <b>true</b> 6:9  <b>try</b> 14:19  <b>tsunami</b> 47:15  <b>Tuesday</b> 1:10  <b>turn</b> 4:17,19 17:9  17:11 33:17  47:9  <b>turned</b> 36:12  <b>turns</b> 4:14  <b>twice</b> 30:12  <b>twin</b> 16:15  <b>two</b> 3:17 7:19,20  15:5 16:2 18:11  21:4 23:7 35:24  37:2 48:3,3  <b>typically</b> 20:3  28:20</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>ultimately</b> 36:5  <b>umbrella</b> 48:25  49:9  <b>unable</b> 50:1  <b>underlying</b> 28:20  39:8  <b>undersheriff</b>  40:10  <b>understand</b> 9:12  12:3 14:5  <b>understood</b>  51:11  <b>undissatisfied</b>  50:22  <b>unfold</b> 37:9  <b>unhappiness</b>  31:20  <b>unhappy</b> 49:12  <b>Union</b> 15:19  <b>United</b> 1:1,13,20  2:7 18:6 21:5  31:24</p>	<p><b>unleash</b> 50:17  <b>unrealistic</b> 48:13  50:17  <b>unrelated</b> 14:21  <b>unusual</b> 36:13  39:20  <b>unwary</b> 19:22  <b>upset</b> 49:21,25  <b>use</b> 23:10</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>v</b> 1:6 3:5,11,24  21:3 24:4,20  46:11 51:25  <b>versus</b> 5:4 15:23  15:24 46:22  <b>veterans</b> 36:10  <b>victorious</b> 9:11  <b>view</b> 12:13 14:9  17:1 20:15  24:11 28:4 29:7  29:25 30:2  33:15 35:11  39:19,19 41:10  46:6 51:14  <b>vigorous</b> 46:9,25  <b>VII</b> 43:22,22  <b>violates</b> 21:16  <b>violation</b> 10:24  46:20  <b>Virginia</b> 1:16</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>waive</b> 32:9  <b>wake</b> 47:25  <b>want</b> 4:16 7:7  24:24 27:25  31:3 38:8 48:16  49:1,3  <b>wanted</b> 25:21  <b>wants</b> 35:10  <b>warrants</b> 37:14  <b>Washington</b> 1:9  1:19,22  <b>wasn't</b> 12:4</p>
---	---	--	--	---

18:24,25 40:11 41:5 43:5 <b>way</b> 4:9 5:3 7:2,6 8:20 16:22 23:6 31:10 38:17 42:12 49:13 50:24 <b>wealthy</b> 49:7 <b>weighed</b> 8:18 <b>went</b> 22:16 36:4 40:12 48:15 <b>we're</b> 45:1 <b>we've</b> 12:20 <b>white</b> 38:1 <b>won</b> 49:15 50:6 <b>word</b> 41:16 <b>words</b> 11:20 <b>work</b> 7:6 17:6 49:13 <b>Workers</b> 21:5 <b>workforce</b> 16:17 <b>workplace</b> 5:11 22:12 24:23 25:2,3,4,8,14 25:19,25 27:11 45:19 52:1 <b>world</b> 51:2 <b>worry</b> 44:23 49:4 <b>worrying</b> 16:22 <b>wouldn't</b> 5:2 23:16 24:10 29:11 30:7 35:3 36:1 <b>wounded</b> 36:10 <b>wrestle</b> 11:3 <b>write</b> 34:7,7 48:5 50:20 <b>written</b> 23:17 36:9 <b>wrong</b> 41:6 43:7 46:12	<hr/> <b>Y</b> <hr/> <b>years</b> 5:18 33:1 33:11,23 36:11 36:21,24 37:2 47:19,25 <b>York</b> 26:2 <hr/> <b>0</b> <hr/> <b>09-1476</b> 1:5 3:4 <hr/> <b>1</b> <hr/> <b>10:11</b> 1:14 3:2 <b>11</b> 51:16 <b>11:09</b> 52:7 <b>17</b> 47:19,24 <b>18</b> 2:8 <b>18th</b> 41:18,22 42:18 <b>1800s</b> 42:6 <b>1871</b> 31:24 <b>19th</b> 42:17 <b>1945</b> 21:3 <b>1983</b> 31:21,25 32:2 50:13 <hr/> <b>2</b> <hr/> <b>20th-century</b> 42:17 <b>2011</b> 1:10 <b>22</b> 1:10 <b>27</b> 2:11 <hr/> <b>3</b> <hr/> <b>3</b> 2:4 <hr/> <b>4</b> <hr/> <b>40</b> 36:21,23,24 <hr/> <b>5</b> <hr/> <b>51</b> 2:14 <hr/> <b>6</b> <hr/> <b>6</b> 33:11 <hr/> <b>7</b> <hr/> <b>7</b> 26:4,4	<b>700</b> 33:11		
<hr/> <b>X</b> <hr/> <b>x</b> 1:2,8				