

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JAMES J. THOLE, ET AL.,)
)
Petitioners,)
)
v.) No. 17-1712
U.S. BANK, N.A., ET AL.,)
)
Respondents.)

Pages: 1 through 72
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3 JAMES J. THOLE, ET AL.,)
4 Petitioners,)
5 v.) No. 17-1712
6 U.S. BANK, N.A., ET AL.,)
7 Respondents.)
8 - - - - -
9 Washington, D.C.
10 Monday, January 13, 2020

11
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United
14 States at 11:09 a.m.

15
16 APPEARANCES:
17 PETER K. STRIS, Los Angeles, California;
18 on behalf of the Petitioners.
19 SOPAN JOSHI, Assistant to the Solicitor General,
20 Department of Justice, Washington, D.C.;
21 for the United States, as amicus curiae,
22 supporting the Petitioners.
23 JOSEPH R. PALMORE, Washington, D.C.;
24 on behalf of the Respondents.

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	PETER K. STRIS, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	SOPAN JOSHI, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioners	21
9	ORAL ARGUMENT:	
10	JOSEPH R. PALMORE, ESQ.	
11	On behalf of the Respondents	34
12	REBUTTAL ARGUMENT OF:	
13	PETER K. STRIS, ESQ.	
14	On behalf of the Petitioners	69
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
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13
14
15
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18
19
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22
23
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P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 17-1712, Thole versus United States Bank.

Mr. Stris.

ORAL ARGUMENT OF PETER K. STRIS

ON BEHALF OF THE PETITIONERS

MR. STRIS: Thank you, Mr. Chief Justice, and may it please the Court:

My clients are beneficiaries of a pension trust. We allege that the trustees, through disloyalty and imprudence, caused the trust to lose \$750 million. The suit presents a justiciable case or controversy for three reasons:

First, my clients have an equitable interest in all assets of their pension trust. That is a property interest. And when \$750 million of that property was lost, my clients suffered a concrete injury.

Respondents are between a rock and a hard place. They can't argue that participants have an equitable interest in only some of the trust corpus, because the trust is unsegregated

1 and undivided. So they're forced to take the
2 incredible position, to quote their brief, that
3 defined-benefit plan participants have no
4 interest in plan assets.

5 If Respondents were right, no one
6 would have an equitable interest in any of the
7 trust's assets. But a trust can't exist unless
8 someone holds equitable title to its assets, and
9 that someone here can only be the participants.

10 Second, and independently, my clients
11 have a right to loyal stewardship of their
12 retirement savings. When Respondents engaged in
13 self-dealing, my clients suffered a concrete
14 injury. Under the centuries-old "no further
15 inquiry" rule, beneficiaries could sue even when
16 there was no conceivable possibility of a
17 financial loss. The breach itself gives rise to
18 a case or controversy.

19 In any event, and third, my clients
20 have representational standing to vindicate
21 injury to their plan. Since before the
22 founding, when a trustee was unwilling to sue,
23 equity courts allowed beneficiaries to do so on
24 behalf of the trust.

25 And so I'd like to begin with our

1 property injury. A defined-benefit plan under
2 ERISA is a private exchange of services.
3 Workers forgo wages in exchange for a promise of
4 a future payment secured by trust property.
5 This is critical because there is an
6 unsegregated, undivided pool of assets, the
7 trust, that pays the pension of all the
8 beneficiaries. So plan participants, like my
9 clients, have an equitable interest in those
10 assets.

11 CHIEF JUSTICE ROBERTS: Does your
12 argument depend upon a forward-looking theory of
13 injury? In other words, it's -- if -- it's one
14 thing to have a -- a conflict of interest or all
15 the other things you allege that lead to a
16 situation that causes you no direct financial
17 harm, but is your theory that, well, because
18 they did that in this situation, and even if
19 that didn't hurt us, somebody like that is
20 likely to do it again and that might hurt us?
21 Or is it purely the fact of -- retrospective,
22 this person did something that under common
23 trust law would be regarded as a bad thing, and
24 under the no inquiry rule, that's enough, so you
25 shouldn't worry about the fact that it didn't

1 harm us at all?

2 MR. STRIS: So the answer to that
3 question is we have multiple concrete injuries
4 here. And the things that we're seeking flow
5 from the particular injuries, right?

6 So what I'm talking about right now is
7 our property injury. If we're right that we
8 have an equitable interest in the assets, that
9 theory depends on a diminution in the value of
10 the trust assets. So I don't know -- I wouldn't
11 call that prospective; I would say the trust
12 lost \$750 million, and so --

13 CHIEF JUSTICE ROBERTS: But what did
14 your clients lose? I mean, your friend on the
15 other side says they get nothing. They're in
16 the same position if you win or if you lose.

17 MR. STRIS: Well, so I mean I -- I
18 couldn't disagree with that more. There's
19 always risk. Pension plans fail. Businesses
20 fail. In 2008, AIG had \$100 billion until they
21 didn't. And so --

22 CHIEF JUSTICE ROBERTS: Well, those
23 are other situations. They say in this case --
24 well, just look at it abstractly. You know, say
25 you need \$600 million in your fund so everybody

1 will feel comfortable your clients are going to
2 get everyone's benefits, and, you know, there
3 are \$8 million in the fund and there's some
4 fraud that reduces it to -- 800 million to -- to
5 700 million. Do you think you could sue on that
6 -- that misconduct by the trustee?

7 MR. STRIS: Well, if -- if the assets
8 of the trust are -- are lost and there's been a
9 breach, yes. I don't think it's abstract at
10 all. If I loan -- if I loan Bill Gates money
11 and take -- and I take a security interest, and
12 he destroys the secured property, he encumbers
13 it, he burns it down, I can still sue him even
14 if he makes every progress payment and happens
15 to have \$100 million in assets because we
16 recognize that having a security interest in
17 something is concrete.

18 Our core position --

19 CHIEF JUSTICE ROBERTS: But I
20 understood -- I meant my hypothetical to suppose
21 that the -- your property is -- is secure, your
22 -- your -- your client's property, the
23 beneficiaries' property is completely secure.
24 In the Gates hypothetical, I thought you were
25 suggesting -- you seem to be suggesting the

1 security that -- that protected the -- the
2 interest of your -- your loan was -- was
3 destroyed.

4 MR. STRIS: Oh, but --

5 CHIEF JUSTICE ROBERTS: But in my
6 hypothetical -- it may not be your case -- but
7 -- but in the abstract, what's alleged to have
8 been wrongfully done doesn't affect the
9 financial security of your defined-benefit plan.
10 You can still sue --

11 MR. STRIS: So --

12 CHIEF JUSTICE ROBERTS: -- because the
13 person's a bad guy?

14 MR. STRIS: No. You can still sue,
15 but not because the person is a bad guy, but
16 because your property interest has been
17 impaired. I want to be very clear about this.

18 To have an equitable interest -- this
19 has been the case since the 15th century. To
20 have an equitable interest in trust assets, a
21 beneficiary has never had to show that she's
22 likely to receive the trust assets. As long as
23 she has the possibility of benefiting from the
24 assets, she has a present property right to
25 prevent others from damaging them. That's the

1 lesson from the contingent and discretionary --

2 JUSTICE KAVANAUGH: But would they --

3 CHIEF JUSTICE ROBERTS: But what's the

4 --

5 JUSTICE KAVANAUGH: -- say --

6 MR. STRIS: -- cases.

7 CHIEF JUSTICE ROBERTS: But what's the
8 lesson from Article III? There has to be a
9 tangible injury to the plaintiff. And under my
10 hypothetical, if 600 million's enough to secure
11 them against anything, and the trust corpus goes
12 from 800 million to 700 million, how are they
13 injured in the terms of Article III?

14 MR. STRIS: In the same way that if I
15 own property and you come and you put your toe
16 on it, even though I never saw you, you didn't
17 step on my tulips, you didn't upset me in any
18 way, you impaired my property right.

19 JUSTICE GORSUCH: What if -- what if,
20 counsel -- I mean, just to put the Chief's point
21 in a -- in a finer light even than he has, which
22 I think he has done an admirable job of, let's
23 say this were a defined benefits plan rather
24 than a defined contribution plan. And let's say
25 that -- sorry, this were a defined contribution

1 plan rather than a defined benefits plan. And
2 -- and the menu of options is varied. Most of
3 them are clean. But there is one option that's
4 dirty. Okay? But your client didn't invest in
5 that.

6 MR. STRIS: Sure.

7 JUSTICE GORSUCH: Would you -- could
8 you still sue?

9 MR. STRIS: I don't think -- I don't
10 think --

11 JUSTICE GORSUCH: I mean, even in the
12 law of trusts way back to the 15th century,
13 there was a remoteness limitation --

14 MR. STRIS: Well --

15 JUSTICE GORSUCH: -- on how far
16 someone could sue, wasn't there?

17 MR. STRIS: Well, so, Justice Gorsuch,
18 I think there wouldn't be standing but it would
19 have nothing to do with -- with remoteness. And
20 here's why: In a defined contribution plan, the
21 assets are -- are unsegregated, just as in a
22 defined benefit plan. That's true. But they're
23 not undivided.

24 So the proper analogue there would be
25 -- and this happened a lot -- you had a trust,

1 it held the deed to Whiteacre. It held the deed
2 to Blackacre. We don't suggest that the person
3 who had the beneficial interest in Blackacre
4 could sue for a restoration of losses to
5 Whiteacre. That's the case in a defined
6 contribution plan.

7 JUSTICE GORSUCH: Okay. So there are
8 Article III limits, then, on how far the
9 standing -- whatever is provided for by the
10 statute here.

11 MR. STRIS: Well, there are many
12 limits, just to be clear about the modesty of
13 our position. First of all, from a historical
14 standpoint, this is probably -- this -- what
15 we're describing here in terms of the property
16 interests impairment has more of -- at least as
17 much of a historical pedigree as qui tam suits
18 in Vermont Agency. And this Court has said time
19 and time again that if suits existed at the time
20 of the founding, it fit the definition of case
21 or controversy from a constitutional
22 perspective.

23 JUSTICE BREYER: If we do that -- I
24 don't remember the 15th century, surprisingly,
25 but, nonetheless --

1 (Laughter.)

2 JUSTICE BREYER: We did look up some
3 things. And my -- at least a quick research
4 suggests that -- that there are different
5 duties, fiduciary duties. One is the duty of
6 loyalty. Another is the duty of prudence.

7 And in respect to loyalty, yes, what
8 you say, I think, shows pretty accurate, people
9 with an interest in trust, like beneficiary can
10 sue the trustee for breach of the loyalty where
11 he may be invested in a great investment for
12 them, but he shouldn't have, because it helped
13 him too.

14 But there was a duty of prudence,
15 which seems what you're really interested in.
16 And there you couldn't. That is to say, they
17 said that a -- that a life beneficiary could sue
18 for loss of income but if there is no risk of
19 loss of income, he can't sue.

20 A remainderman could sue to injuries
21 to the principal of the trust, but that's all he
22 has an interest in. And as long as that's safe,
23 he can't sue.

24 Now if that's the right analogy, I
25 would draw from that, yeah, you can sue for

1 duties of breach of loyalty, but not for duties
2 of a breach of prudence.

3 MR. STRIS: So a few responses,
4 Justice Breyer.

5 So loyalty is our second injury. I
6 haven't gotten to that yet. The property injury
7 is prudence. That is what I'm talking about.

8 JUSTICE BREYER: And there the
9 remainderman could not sue, it says.

10 MR. STRIS: We're -- absolutely.
11 We're not a remainderman.

12 JUSTICE BREYER: Oh, you aren't? What
13 is your interest in the money -- in the trust
14 that is any greater since it's fully funded and
15 everything and has many, many sources, that was
16 greater than the remainderman's interest in the
17 income that's being paid out of a body -- a
18 corpus, which you will eventually get, which
19 isn't hurt?

20 MR. STRIS: The answer is, we have an
21 interest in a promise of future payments secured
22 by the entirety of the trust corpus.

23 And let me tell you about history. So
24 the rule for a present beneficiaries with a
25 contingent interest has been settled since at

1 least 1808, according to the English Courts of
2 Chancery. I would point your attention to Allen
3 versus Allen. This is 33 English Reporter 704.
4 Here's what the English Courts of Chancery said
5 and it is followed through in every case that I
6 have seen.

7 A present interest, the enjoyment of
8 which may depend upon the most remote and
9 improbable contingency, is nevertheless a
10 present estate.

11 JUSTICE BREYER: Yes, that's -- you're
12 talking about a contingent interest. A
13 contingent interest is an interest in a certain
14 set of -- a certain property, a certain body of
15 money. A remainderman had no interest.

16 MR. STRIS: That's right. We had --

17 JUSTICE BREYER: But he would receive
18 not a contingent interest. He had no interest
19 in anything except the body of --

20 MR. STRIS: Where the --

21 JUSTICE BREYER: -- and -- and what --
22 it's hard to see a difference between that
23 remainderman and the interest of a beneficiary.

24 MR. STRIS: Here's the difference.

25 JUSTICE BREYER: Go ahead.

1 MR. STRIS: The difference comes both
2 from the plan document in this case and ERISA.

3 Let's start with the plan document.
4 It's pages 60 to 61 of the Joint Appendix.
5 Here's what it says. And this is representative
6 of every defined-benefit plan I've seen.

7 It says, "All of the plan assets," and
8 that's not a contract, that's stocks, bonds,
9 investments, "shall be held in a trust fund
10 separate from the bank's assets." It says, "the
11 trust assets can only be used to benefit the
12 participants, except as permitted by ERISA and
13 the tax code."

14 ERISA and the tax code are very clear,
15 they prohibit taking or wasting any of the trust
16 assets, including the surplus. So the point
17 that's being made here to -- to -- to what I
18 believe you were asking, Mr. Chief Justice,
19 which is a fair point is, well, you may not need
20 the surplus, so how do you have an interest?

21 And -- and our core submission is that
22 since the 15th century, the way trust law has
23 worked is, it has -- it has conferred a property
24 interest in the corpus without any case-by-case
25 assessment. But --

1 JUSTICE ALITO: But you -- you have
2 some strong arguments. I -- I want to get this
3 one question in before your time is up.

4 And you have arguments based on of
5 Congress having granted a right to sue, and you
6 have arguments based on the -- the -- the
7 analogy between trust law and ERISA, but an
8 ERISA plan is not a trust in the normal sense of
9 the word. But put all of that aside. I want to
10 hear about practicalities.

11 So let's say a beneficiary of a
12 defined-benefit plan comes to you and says: I
13 don't know anything about ERISA, I don't even
14 know what it means, I don't know anything about
15 trust law or the 15th century, anything like
16 that.

17 What I want you to tell me is, what is
18 the practical chance -- this is the beneficiary
19 of this plan -- that I'm not going to get paid
20 my benefits? What do you tell that person?

21 MR. STRIS: So that -- that's a --
22 a -- a totally fair question, and let me answer
23 it in the context of this case. And I mean this
24 very seriously.

25 If you look at our complaint, Joint

1 Appendix page 90, paragraph 167, we pled,
2 because we believe that there was a substantial
3 increased risk of default here, there was \$750
4 million less.

5 JUSTICE ALITO: But you pled --

6 MR. STRIS: In answering the --

7 JUSTICE ALITO: You pled that, but
8 compliance with Article III has to be reassessed
9 at different stages of the -- of the proceeding.
10 Is there any -- is the risk greater than the
11 risk of being hit by a meteorite?

12 MR. STRIS: This is my core point,
13 Justice Alito. As -- I think the best example
14 of this is the Pension Rights Center's brief.
15 They explain, based up on their experience that
16 the swings in funding and -- of -- of
17 defined-benefit plans changes incredibly
18 quickly. The Harley case out of the Eighth
19 Circuit. In one year, there was a \$600 million
20 contribution but the plan was 800 billion --
21 \$800 billion dollars underfunded.

22 CHIEF JUSTICE ROBERTS: Well, that --

23 MR. STRIS: Because of --

24 CHIEF JUSTICE ROBERTS: I'm sorry, go
25 ahead.

1 MR. STRIS: Because of that, the --
2 the -- Congress exercised their judgment to say
3 we are going to confer a property interest in
4 the entirety of the trust corpus so we don't
5 have to do a case-by-case assessment. The --

6 JUSTICE KAVANAUGH: But Congress made
7 clear that not only the plan but the employer
8 and then the PBGC, which you haven't mentioned
9 at all, is in play here. And the combination of
10 the plan, the employer, and the PBGC, doesn't
11 that make the practical answer to Justice
12 Alito's question --

13 MR. STRIS: Well, I don't think --
14 that's a fair point. I don't think so at all.
15 The PBGC, which has its own solvency issues --

16 JUSTICE KAVANAUGH: It does, but it's
17 backed by the United States Government.

18 MR. STRIS: Not the full faith and
19 credit of the government. It's -- what happens
20 is there are premium payments so it doesn't
21 function that way. But more importantly, the
22 PBGC doesn't fund anything above a minimum set
23 of benefits. The core -- here's the answer to
24 the core practical question.

25 JUSTICE KAVANAUGH: But they exceed

1 the benefits of your clients in this case.

2 MR. STRIS: There -- there are two
3 things going on here right now. I want to be
4 very --

5 JUSTICE KAVANAUGH: Is that --

6 MR. STRIS -- clear --

7 JUSTICE KAVANAUGH: Is that yes?

8 MR. STRIS: Yes, my two clients, yes.
9 But there's two things going on here, Justice
10 Kavanaugh, and it's really important to separate
11 them out: What matters for standing and what --
12 why we care practically. I am answering the
13 latter one.

14 And what I'm saying is, in any
15 individual case, you don't know whether you're
16 going to need the surplus until it's gone. I
17 think if -- if the financial collapse in AIG and
18 Lehman tells us anything, it's that.

19 So if I am right that Congress said,
20 in exchange for a tax benefit, you have to put
21 all of these assets in trust, you have to confer
22 a property interest in the full -- the full
23 trust, I have -- I'm right on standing and
24 there's -- there's an Article III injury, you
25 don't have to inquire into the risk, but I also

1 have a practical answer that doesn't matter for
2 standing but, so that you don't have heartburn,
3 you can see why a sensible policy-maker would
4 make that decision. That's precisely what they
5 did.

6 And that's precisely how many types of
7 analogous trusts worked in an unbroken line of
8 cases since the 15th century.

9 JUSTICE GINSBURG: Before you -- you
10 finish, can you clarify the precise actions of
11 the fiduciary that you are assailing in this
12 case?

13 MR. STRIS: Yes.

14 JUSTICE GINSBURG: First the district
15 court said that to challenge to the 100 percent
16 equity investment is off the table because it's
17 time-barred. So I think that that's out of the
18 case.

19 MR. STRIS: I -- I don't agree.

20 JUSTICE GINSBURG: All right. Then
21 tell -- tell me -- and then as far as the
22 bank-affiliated funds, they say that they -- the
23 bank says you long ago got rid of all of them.

24 MR. STRIS: So here's what happened,
25 Justice Ginsburg, and this is critical of the

1 procedural posture.

2 May I answer, Your Honor?

3 CHIEF JUSTICE ROBERTS: Briefly.

4 MR. STRIS: I'll be -- I'll be brief.

5 The -- the first claim, the equities,
6 was dismissed on statute of limitations grounds
7 prior to this Court's decision in Tibble. We
8 appealed. The court never -- the court of
9 appeals never reached the question because it
10 held that we have no standing.

11 So you don't assume in doing the
12 standing analysis that that claim is gone. The
13 only reason that it's gone is because we weren't
14 able to appeal it. Based on this Court's
15 decision in Tibble, it will clearly be reversed.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Mr. Joshi.

19 ORAL ARGUMENT OF SOPAN JOSHI

20 FOR THE UNITED STATES, AS AMICUS CURIAE,
21 SUPPORTING THE PETITIONERS

22 MR. JOSHI: Mr. Chief Justice and may
23 it please the Court:

24 When a trustee breaches his fiduciary
25 duties and causes losses to the trust, real

1 money losses, the beneficiary always has been
2 able to sue the trustee for the breach of trust.
3 It's been the law for hundreds of years of trust
4 law and it's expressly in ERISA's text as well.
5 And that rule makes really good sense.

6 The beneficiaries are the ones who are
7 getting paid out of the trust. The
8 beneficiaries are the ones, as this Court
9 recognized in Russell, who have an interest in
10 the financial integrity of the trust. And the
11 beneficiaries are in the best position to
12 monitor and police the trustee for breaches of
13 trust.

14 And that's why the traditional rule,
15 as my friend mentioned earlier, is that even
16 contingent beneficiaries could sue a trustee.
17 But the rule goes even further than that. If
18 you read the treatises, even discretionary
19 beneficiaries could sue a trustee for breach of
20 trust. These are beneficiaries who have
21 absolutely no entitlement to any trust assets,
22 except those that the trustee in his own
23 discretion will give to the beneficiary.
24 Nevertheless, a breach of trust would allow the
25 beneficiary to sue that very trustee.

1 That history, I think, decides this
2 case. We --

3 JUSTICE GORSUCH: Let me propose a
4 hypothetical then about the defined contribution
5 plans. Let's say the trustee is left with
6 discretion. After everybody is paid, if there's
7 extra, you can throw it to somebody, even though
8 it's not in their own contribution plan.

9 So I think you would say the result
10 would be that every single beneficiary could
11 sue, even if all of their investments are clean,
12 for somebody else's defined contribution plan
13 where the -- where the -- where the plan might
14 be dirty; is that right? Does that follow?

15 MR. JOSHI: I -- I think that might
16 follow, and I think it might -- I -- I -- I do
17 think it might and I think that comes from not
18 only our -- our -- you know, the positions we've
19 laid out in the case in trust law and the
20 undifferentiated assets but also from this
21 Court's decision in LaRue.

22 In LaRue, of course, this Court held
23 that the plaintiff, who was suing over harms to
24 his own account, nevertheless could maintain a
25 suit under 502(a)(2) for harm to the entire

1 trust because the trust included the account,
2 the account was part of the trust.

3 So I think on that theory, then, if
4 you just extend it, that would have to be the
5 logic. My answer would have to be yes. But --
6 I want to --

7 JUSTICE GORSUCH: Everybody could sue
8 for everything.

9 MR. JOSHI: -- I want to hasten to add
10 that, as a practical matter, these cases,
11 especially in the posture you just mentioned,
12 are -- are going to arise in the class context,
13 and I think it would be perfectly reasonable for
14 a court to look at that and --

15 JUSTICE GORSUCH: What about -- what
16 about Justice Alito's meteor, the likelihood of
17 getting a discretionary benefit from the trustee
18 might be less than the chance of being hit by a
19 meteor? Would Article III have something to say
20 there? Or are you saying -- suggesting now,
21 everybody can sue for everything anyway?

22 MR. JOSHI: So, historically, trust
23 law has allowed the beneficiary to sue the
24 trustee, a discretionary beneficiary to do so.
25 And one might imagine when you sue the trustee,

1 he's probably not likely to exercise his
2 discretion in your favor; but, nevertheless, you
3 were allowed to sue.

4 What Article III has to say about
5 it -- and -- and I know there's a lot of
6 doctrine around Article III, but I think the key
7 point, and -- and Spokeo reiterated it and 50
8 years of case law has reiterated it, it comes
9 from the words "cases and controversies" in the
10 text of the Constitution. And the meaning of
11 those words at a minimum includes the cases and
12 controversies heard in the courts of Westminster
13 and in the colonies at the --

14 JUSTICE KAVANAUGH: But isn't that --

15 MR. JOSHI: -- time of the founding.

16 JUSTICE KAVANAUGH: -- the -- I'm
17 sorry. The tension in this case as I see it,
18 and I think it's a close case, is the history is
19 strong but the answer to the question -- it's
20 99.99 percent certain that the benefits promised
21 are going to be there. And how do we resolve
22 what I see as that tension? Because it -- it
23 would be odd for us to grant standing in a case
24 where the -- the chances are so small.

25 On the other hand, you're right about

1 the history. I mean, you make a good point
2 about the history.

3 MR. JOSHI: Yeah, I -- I -- I think
4 the answer really is the history, but to the
5 extent, you know, there's a chance, I guess I
6 have two answers to that. One is this Court has
7 and -- and certainly the "no further inquiry"
8 cases made clear that even when the trust
9 benefits from a particular breach of duty, you
10 still have standing, if you will, to sue.

11 And, you know, one case out of many
12 that we cited is Magruder against Drury. That's
13 a decision of this Court in which the trustee
14 was making loans on trust notes and allowing the
15 trust to -- to acquire those notes, and it was
16 on -- there was no question that it was on
17 beneficial terms and there was no question that
18 the trust benefited because it could make these
19 reinvestments and save brokerage fees. That --
20 those are in the facts of -- of the decision of
21 this Court. Nevertheless, the Court said that,
22 you know, not only did the beneficiaries have
23 standing to sue -- it didn't discuss standing --
24 but they -- they were entitled to recover. So
25 that's one answer.

1 The other answer to your -- to your
2 question is, no matter how low the risk might be
3 as my friend mentioned -- PBGC tells me that
4 plans that are highly overfunded the next year
5 become underfunded. So as a practical matter,
6 you don't know and, more importantly --

7 JUSTICE KAVANAUGH: What is -- what is
8 the role -- I'm sorry to interrupt, but the
9 PBGC, how should we think about that, if we get
10 away from the history at all, its role and how
11 it guarantees a back stop?

12 MR. JOSHI: I -- I don't think it
13 matters at all. No one ever suggested that the
14 mere fact that you might have insurance means
15 you don't have standing to sue someone for the
16 harms --

17 JUSTICE KAVANAUGH: It's the --

18 MR. JOSHI: -- they've caused.

19 JUSTICE KAVANAUGH: It's the
20 combination of the plan plus the employer plus
21 the PBGC would all have to --

22 MR. JOSHI: You -- the fact that there
23 may be many layers of insurance, if you will,
24 doesn't change the fact that when a trustee
25 breaches his fiduciary duties, you can sue. And

1 then --

2 JUSTICE ALITO: And how -- how far
3 with you push the analogy to trust law in this?
4 Since -- it -- was there a trust where the
5 settlor of the trust had an obligation to step
6 in and increase the amount of money in the trust
7 in order to -- to ensure that beneficiaries
8 would be paid?

9 MR. JOSHI: Not -- not to my
10 knowledge. And --

11 JUSTICE ALITO: I mean, that's the big
12 difference between the situation here and trust
13 law, right?

14 MR. JOSHI: I -- I don't think it's
15 different. I don't think it's a distinction
16 that -- that makes any practical difference, at
17 least for Article III. It is an additional
18 protection that the drafters of ERISA wanted to
19 make, in addition to making the plan its own
20 entity. Those are all additional protections
21 for beneficiaries, precisely because in
22 Congress's judgment, as this Court laid out in
23 footnote 8 of Russell, trust law was not
24 protective enough of beneficiaries.

25 And -- and here's is the point -- and

1 this is to finish my answer to -- to your
2 question, Justice Kavanaugh -- to merely say
3 it's highly likely you're going to get your
4 money back is -- you might say that if, for
5 example, to -- to pick up on my friend's
6 analogy, you know, you were to loan money to
7 Bill Gates. You're pretty sure he's going to be
8 able to repay your money, but the difference
9 between having the repayment or the -- the money
10 you're entitled to come as a result of a
11 contract and come as a result of a trust is very
12 different.

13 You get a very meaningful benefit from
14 having your money come from a trust. And that
15 is it's managed by a fiduciary --

16 JUSTICE BREYER: All right. Can you
17 just give me -- do you want to finish? Go
18 ahead.

19 MR. JOSHI: Yeah. Sure.

20 JUSTICE BREYER: All right. Just
21 don't spend more than 15 seconds. But what in
22 the law -- see, the stock market goes up and
23 down. And every time it goes down, it's
24 underfunded. Every time it goes up, it's
25 overfunded. Okay? Once it's overfunded,

1 everybody's just as well off as they were
2 before.

3 Now, that happens probably quite a
4 lot. Now, if we -- if you -- what in the law
5 prevents a class action every time it goes down
6 and then it goes back up and they're better off,
7 and you say, well, now we're talking about
8 yesterday? What prevents -- something should
9 prevent that. Now, what is it that prevents
10 that?

11 MR. JOSHI: Well, I -- I'm not certain
12 what context you're talking about.

13 JUSTICE BREYER: I'm just saying the
14 standing thing might be one of the things that
15 prevents that because -- I mean, I -- and you
16 can say, well, they have to have a good case,
17 dah-dah-dah. All right, I understand that.
18 But, what -- is there anything else in the law
19 that, except this standing business, that can
20 protect against that?

21 MR. JOSHI: If you have suffered an
22 injury of a peppercorn, you have standing to
23 sue. Now, you -- there might not be --

24 JUSTICE BREYER: But that's --

25 MR. JOSHI: But the other thing is

1 that --

2 JUSTICE BREYER: -- of course, I want
3 to say, okay, your answer is nothing protects in
4 the law.

5 MR. JOSHI: Well, again, it -- it's
6 hard to answer that question in the abstract.
7 What I do know is that, in this particular
8 context, there are trust duties that are set
9 forth in the law --

10 JUSTICE BREYER: I know --

11 MR. JOSHI: -- of trust --

12 JUSTICE BREYER: -- there's some, but
13 this is a duty of prudence, which means you made
14 a bad investment that -- and you do make bad
15 investments and you say, well, the trustees say
16 dah-dah-dah. Okay. But I wonder if there is
17 anything that prevents against the roller
18 coaster which would mean many, many suits, even
19 though the beneficiaries are even better off
20 sometimes after the stock market's finished its
21 little roller coaster. So you're saying
22 nothing? Okay. I got the answer.

23 MR. JOSHI: Well --

24 JUSTICE KAVANAUGH: Aren't you
25 saying --

1 MR. JOSHI: What I'm --

2 JUSTICE KAVANAUGH: I'm sorry, aren't
3 you saying the deference afforded to the plan
4 administrators on the merits is --

5 MR. JOSHI: That -- that's --

6 JUSTICE BREYER: That's one.

7 JUSTICE KAVANAUGH: If properly
8 applied?

9 JUSTICE BREYER: That's one.

10 MR. JOSHI: That's exactly right. And
11 I think to -- to -- if you just look at it, you
12 know, the -- the funding rules in 303 --

13 JUSTICE BREYER: Yeah.

14 MR. JOSHI: -- and the fiduciary rules
15 in 404 and 406, Congress did not make these --

16 JUSTICE BREYER: Okay, all on the
17 merits --

18 MR. JOSHI: -- to be exclusive.

19 They --

20 JUSTICE BREYER: I -- I -- I --

21 MR. JOSHI: -- they all apply at all
22 times. It's --

23 JUSTICE BREYER: -- I see.

24 CHIEF JUSTICE ROBERTS: I'm not sure
25 you're giving adequate weight to the -- when

1 you're looking at the history, the significance
2 of Article III to our role in the separation of
3 powers.

4 The requirement to decide an actual
5 case or controversy is the only thing that gives
6 us authority to do what we do. And so the fact,
7 well, you say in history in, you know, 14
8 whatever you didn't need to show that, well,
9 that doesn't necessarily take into account how
10 Article III works today under the Constitution.

11 MR. JOSHI: That may be right, but as
12 I said, the Magruder case and many others that
13 we've cited in the briefs do recognize this
14 principle of trust law. And I'd also point out
15 that nobody disputes that if the allegations are
16 true, that the plan's loss of \$748 million -- if
17 I may finish -- is a injury to the plan and the
18 plan itself would have standing to sue. But, of
19 course, the plan's not a human being. Someone
20 has to sue on behalf of it.

21 And when the trustee's the one that
22 caused that loss, the one person who's going to
23 step into the shoes to sue for the plan's injury
24 is the beneficiary.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Palmore.

3 ORAL ARGUMENT OF JOSEPH R. PALMORE

4 ON BEHALF OF THE RESPONDENTS

5 MR. PALMORE: Thank you, Mr. Chief

6 Justice, and may it please the Court:

7 There is no ERISA exception to Article
8 III. Like all plaintiffs in federal court,
9 those with ERISA claims must demonstrate injury.
10 Neither Petitioner here can do that.

11 This month, Petitioner James Thole
12 will receive a pension payment of \$2,198.38,
13 just as he has every month since his retirement
14 from U.S. Bank. And Petitioner Sherry Smith
15 will receive the same \$42.26 payment she has
16 received since her retirement.

17 If this Court affirms dismissal of all
18 of their claims, it is undisputed that those
19 payments will be exactly the same every month
20 for the rest of their lives, not one penny less.

21 If, on the other hand, this Court were
22 to reverse, this case were to be litigated to
23 judgment in favor of plaintiffs and they were to
24 receive every single form of relief they demand,
25 those payments would also be exactly the same,

1 not one penny more.

2 Federal courts are not available to
3 adjudicate claims like this that do not matter
4 to the plaintiffs. Whether viewed as a matter
5 of Article III or statutory standing, none of
6 Petitioners' arguments solve that fundamental
7 problem with their case.

8 First, at trust law, beneficiaries
9 could sue to challenge fiduciary breaches only
10 when they affected their interests, unharmed
11 beneficiaries could not sue.

12 Second, Petitioners lack any property
13 interest in the trust underlying this
14 defined-benefit pension plan. That is because,
15 as this Court explained in Hughes Aircraft,
16 their level of benefits is unconnected with the
17 value of the assets in the trust corpus.

18 U.S. Bank, not a participant, bears
19 the risk of loss from poor performance and U.S.
20 Bank, not a participant, benefits from plan
21 overfunding.

22 Third, Petitioners cannot sue in a
23 representational capacity on behalf of the plan
24 unless they have their own injury. In fact, for
25 the reasons just stated, they don't.

1 Mr. Stris started off by saying they
2 have a property interest in the plan, but under
3 the structure of ERISA and under Hughes
4 Aircraft, they don't. The trustee owns legal
5 title of the plan and owns -- and the equitable
6 interest in the plan is -- is the plan itself
7 holds the equitable interest in the plan.

8 The -- and this -- the fact that they
9 have no right to sue over the fluctuations, the
10 ups and downs in the value in the trust corpus
11 is actually entirely consistent with the history
12 at trust law. They don't have a contingent
13 interest in the plan in the sense of if A
14 happens, they may inherit all of the trust
15 corpus or if B happens, their benefits may get
16 up -- may -- may go up.

17 They have no such interest. And at
18 trust law, a plaintiff or a beneficiary whose
19 interest was completely unconnected to the value
20 of the trust could not sue. And we've cited the
21 -- Bogert, section 871 for that proposition, the
22 restatement second on torts, section 214,
23 comment B, all stand for that proposition.

24 That's -- it's a different situation
25 if you have a contingent beneficiary situation

1 where there are two beneficiaries --

2 JUSTICE KAVANAUGH: Can you imagine a
3 -- a situation in which a participant in a
4 defined-benefit plan would have standing? And
5 can you describe the particular line that would
6 separate that from this case?

7 MR. PALMORE: Yes, Your Honor. I
8 think a -- a participant in a defined-benefit
9 plan would have standing consistent with normal
10 black letter Article III principles if they
11 could show that there was a risk to their
12 benefits.

13 JUSTICE KAVANAUGH: And how would they
14 show that? How would they show that?

15 MR. PALMORE: Well, they could show,
16 A, I'm not getting paid what I was promised.

17 JUSTICE KAVANAUGH: Okay. Put aside
18 the not getting paid. But if they're still
19 getting paid --

20 MR. PALMORE: Right.

21 JUSTICE KAVANAUGH: -- how would they
22 show what are the particulars that you think
23 would be necessary?

24 MR. PALMORE: Well, I think -- you
25 know, I don't think -- first of all, I would

1 just preface my remarks by saying I don't think
2 this case calls for --

3 JUSTICE KAVANAUGH: I understand that.

4 MR. PALMORE: -- the Court to opine on
5 that because they've said that there's no risk
6 at all that's required.

7 But I think this Court -- I think it
8 would be simple factual application of Clapper
9 where the Court talked about imminent risk or a
10 substantial risk.

11 JUSTICE KAVANAUGH: Right. I know the
12 terms. I'm just trying to figure out how --

13 MR. PALMORE: Well, I think --

14 JUSTICE KAVANAUGH: -- to assess --

15 MR. PALMORE: -- and I think those
16 terms are flexible enough to take into account
17 the long-term time horizon of a pension plan.
18 So I don't think you'd have to show that the
19 plan was going to fail tomorrow, but I think
20 it's not -- wouldn't be enough to show that the
21 plan was simply underfunded. The Fifth Circuit
22 --

23 JUSTICE KAVANAUGH: Well, let me pause
24 there. What's the delta between you can take
25 into account the long-term likelihood --

1 MR. PALMORE: Well, I think you have
2 to look --

3 JUSTICE KAVANAUGH: -- and
4 underfunded. It seems like pleading. I guess
5 my point is pleading what you think is necessary
6 won't be as big a hurdle as you're really
7 implying, I don't think.

8 MR. PALMORE: Well, I think you would
9 have to plead not only was the plan at risk but
10 that the employer either could not or would not
11 fulfill its legal obligation to make up any
12 deficit in the plan.

13 So the Fifth Circuit's case in Lee
14 versus Verizon is instructive here. That was
15 post-Spokeo, that was a GVR case in which the --
16 that -- the Verizon pension plan was actually
17 only 66 percent funded. But what the Fifth
18 Circuit said was that the plaintiffs there
19 hadn't adequately alleged injury because they
20 hadn't alleged that Verizon, one of the biggest
21 companies in the country, would be unable to
22 fulfill its legal obligations to make up that
23 deficit and to --

24 CHIEF JUSTICE ROBERTS: Well, we've
25 had --

1 MR. PALMORE: -- make good on their
2 payments.

3 CHIEF JUSTICE ROBERTS: In the not too
4 far off past, there have been situations where
5 people were surprised of some of the companies
6 that turned out not to have enough money to go
7 forward.

8 And it -- let's say that the -- a
9 person running the trust or the, you know,
10 running the company loses \$100 million in the
11 first month and 100 in the second and 100 in the
12 third, and although there is no significant harm
13 to the beneficiaries in the terms that you've
14 discussed it, they look and say: Well, this guy
15 is going to continue to lose a lot of money and
16 can you -- can they bring a suit in that case?

17 MR. PALMORE: If they could show he's
18 going to continue to lose a lot of money and it
19 will result in an impairment of their only
20 interest, which is the stream of payments from
21 the pension plan, then yes, they can bring a
22 suit and they can get an injunction to have him
23 removed.

24 JUSTICE SOTOMAYOR: So, I've --

25 MR. PALMORE: Here, they've --

1 JUSTICE SOTOMAYOR: I've --

2 MR. PALMORE: -- never -- they've
3 never established that or claimed that here.

4 JUSTICE SOTOMAYOR: I'm sorry. I
5 don't know why we need all that, meaning there
6 is a simple -- two simple claims here. One, a
7 breach of loyalty that they invested in -- in a
8 vehicle that cost more money than was needed,
9 and it was self-dealing, so trust law has always
10 said, you can't self-deal. You can't make money
11 off of the assets of the plan.

12 So whether or not they get something
13 or don't, trust law has been clear forever that
14 that belongs to the trust and the plan
15 participants have trustees who are self-dealing,
16 they're not going to sue for themselves, we can
17 sue for that self-dealing.

18 Secondly, the plan lost 750-odd
19 billion dollars or whatever the money was,
20 millions, in imprudent investment. Now, whether
21 we lose money or not, the plan lost money. It
22 lost \$753 million or whatever the figure was.
23 And, in fact, until you contributed 311 million
24 of that 753, the plan was underfunded.

25 You then came along and said: Well,

1 we'll give that much, a part of that loss but
2 not the whole. And so if the trustees are not
3 going to give the whole amount because it's not
4 in their best interests, but it's in the plan's
5 best interests, what does it matter whether the
6 participants get a piece of that or not? The
7 plan gets it and they're representing the plan.

8 So I -- I guess what I'm having
9 trouble with in this case is that they're right,
10 whether they have a property interest or they
11 have a representational interest, they still
12 have standing.

13 MR. PALMORE: Your Honor, first of
14 all, they don't have a property interest for the
15 reasons I stated --

16 JUSTICE SOTOMAYOR: So, why?

17 MR. PALMORE: -- and as the reasons
18 this Court stated in Hughes Aircraft, they don't
19 have a property interest.

20 JUSTICE SOTOMAYOR: Let's remember the
21 following in Hughes. They were seeking a
22 distribution of a surplus that the court said
23 they couldn't seek.

24 MR. PALMORE: And the reason --

25 JUSTICE SOTOMAYOR: But here --

1 MR. PALMORE: Yes.

2 JUSTICE SOTOMAYOR: -- they're not
3 asking for a distribution to themselves of a
4 surplus. They are asking for a payment to the
5 plan.

6 MR. PALMORE: Right. But Hughes
7 rejected that claim on the merits because of the
8 structure of defined-benefits plan.

9 But if I can move to the
10 representational standing question that you
11 asked, a party can sue on behalf of another only
12 if that party has their own injury. That's
13 Perry versus Hollingsworth. That's -- there are
14 many such cases.

15 So in a qui tam case, the relator will
16 personally recover and get money. In a
17 derivative action, that the plaintiff owns a
18 share of the corporation so any benefit to the
19 corporation will flow down and -- and they will
20 get a minute part of it. And if they don't,
21 this Court explained in Gollust versus Mendell,
22 there's an Article III problem.

23 With respect to the first part of your
24 question, which is the no further inquiry rule,
25 I think it is critical to understand there are

1 two separate questions: How is harm
2 established, and then who has the relevant
3 injury to sue to remedy that harm.

4 The "no further inquiry" rule went
5 only to that first question. It said that if
6 the trust engaged in a transaction that was
7 inconsistent with the duty of loyalty or was
8 otherwise prohibited, there would be a
9 presumption of harm to the trust and, therefore,
10 that transaction could be rescinded.

11 But there is always -- they don't need
12 the presumption here. They have alleged harm to
13 the trust. There's always a separate question
14 of whose interest is implicated by harm to the
15 trust.

16 JUSTICE GORSUCH: Counsel, on that,
17 what if Congress had in its statute -- I know
18 you would disagree that it did this -- what if
19 it had said that every beneficiary has a
20 property interest or a private right to a
21 completely clean trustee. Would that suffice
22 for standing in your view?

23 MR. PALMORE: I don't think so, Your
24 Honor. Of course, I don't think you have to
25 address that question. But as Spokeo explained,

1 there are limits on Congress's ability to
2 provide causes of action and to identify
3 injuries and make violation of them concrete.

4 JUSTICE GORSUCH: This isn't creating
5 a cause of action. I agree with you about all
6 of that. I understand your point. But say you
7 actually have a right, a legal right, creating a
8 new -- and we know this is new, we admit it's
9 new --

10 MR. PALMORE: Yeah.

11 JUSTICE GORSUCH: -- but we think it's
12 important, because whatever -- whatever good
13 policy reasons, some of which we have heard
14 articulated here.

15 MR. PALMORE: Well, I think this Court
16 would look to the substance of it. I think if
17 they just labeled it a property interest, I
18 don't think that would be good enough. If they
19 somehow tied the level of benefits to the value
20 in the trust corpus, this would be a whole
21 different ball game, and they clearly would have
22 standing.

23 But like we talked earlier about the
24 questions about the contingent beneficiaries, if
25 you had two beneficiaries at common law, they

1 each had a 50 percent chance of getting the
2 trust corpus, yes, they had standing at common
3 law, because they did have an equitable interest
4 in the trust corpus. They might get all of it.

5 Here we're not talking about
6 50 percent. We're talking about zero percent.
7 These Petitioners will never get any of this
8 money.

9 JUSTICE KAGAN: Mr. Palmore,
10 regardless of whether it's zero or 50, if I
11 understand your argument, you are acknowledging
12 that if they have an equitable interest, then
13 they have standing; is that correct?

14 MR. PALMORE: If they had a property
15 interest in --

16 JUSTICE KAGAN: An equitable interest
17 --

18 MR. PALMORE: -- the trust corpus --

19 JUSTICE KAGAN: -- in the trust
20 corpus.

21 MR. PALMORE: An equitable -- an
22 equitable property interest, then, yes, a -- a
23 loss of a dollar from the trust corpus is loss
24 of a dollar to them, but they don't. That's the
25 critical point.

1 JUSTICE KAGAN: So -- but that's what
2 everything depends on in your view. I mean,
3 your argument just falls apart if we look at
4 ERISA and we say that's exactly what Congress
5 did here, was to give all of the beneficiaries
6 and participants an equitable interest in the
7 integrity of the trust.

8 MR. PALMORE: And I don't want to
9 quibble over terminology, but I would say an
10 equitable property interest, if -- if they did
11 --

12 JUSTICE KAGAN: That's what I --

13 MR. PALMORE: -- in the real. Yes --

14 JUSTICE KAGAN: We're not talking
15 about --

16 MR. PALMORE: -- then perhaps, but
17 they didn't. The plan is -- has the equitable
18 interest and the fiduciary duties run to the
19 plan. And, moreover --

20 JUSTICE KAGAN: And where do you --

21 MR. PALMORE: -- what they are
22 entitled --

23 JUSTICE KAGAN: -- get that from?
24 What does that mean, that the plan has the
25 equitable interest? I mean, the plan is the

1 thing that there's an interest in, isn't there?

2 MR. PALMORE: No, Your Honor. This is
3 -- the structure of an ERISA plan, you have a --
4 legal title is owned by the trustee. And the
5 trustee holds legal title for the benefit of the
6 plan itself.

7 And this Court explained in Russell
8 that the fiduciary duties run to -- for plan
9 asset management, run to the plan, but even if
10 you don't agree with that, I think the history
11 here is still critical because at common law, a
12 remainderman couldn't sue -- and this is Terry
13 versus Allen, it's the -- it's the Connecticut
14 Supreme Court case that we cite, Justice Breyer,
15 the remainderman who had an interest in only the
16 trust principal was a beneficiary but could not
17 sue, didn't have standing to sue for
18 mismanagement of that trust corpus because a
19 bond protected his only interest, which was a
20 certain payment.

21 Here U.S. Bank is the bond. We're
22 talking about one of the best capitalized banks
23 in the country. There is no risk that this plan
24 was not going to be able to make good on the
25 stream of payments to these plaintiffs and that

1 is their only legal interest. It's getting that
2 check every month.

3 Now if they take --

4 JUSTICE ALITO: Do you think that -- I
5 didn't quite understand your answer. Do you
6 think that Article III is satisfied whenever
7 Congress puts the label "property interest" or
8 "equitable interest" on something?

9 MR. PALMORE: No, Your Honor, I didn't
10 -- didn't mean to suggest that. I don't think
11 the label would matter. I was trying to suggest
12 that if it -- if it were substantively a
13 property interest --

14 JUSTICE ALITO: What does that mean
15 for it to be substantively a property interest?

16 MR. PALMORE: I think if their
17 benefits were tried to the value of the trust
18 corpus, then they would have standing. But if
19 their benefits are fixed, as these benefits are,
20 then -- and they can't show that any harm to the
21 trust corpus actually jeopardized that stream of
22 payments, then they don't have standing, just
23 like the remainderman in Terry versus Allen --

24 JUSTICE KAVANAUGH: It's a little --

25 MR. PALMORE: -- didn't have standing.

1 JUSTICE KAVANAUGH: -- different
2 though. I'm sorry to interrupt. It's a little
3 different because we're talking about a
4 predictive judgment, right? And the plaintiffs
5 are going to say there's an increased risk of
6 harm. And, of course, in regulatory cases that
7 we've done, we've confronted that issue.

8 And how much of an increased risk of
9 harm that they won't receive the payments is
10 necessary, and isn't that just going to be a
11 pleading exercise that prevents -- presents a
12 whole new collateral set of cases trying to
13 figure out have you pled exactly enough,
14 increased risk of harm here?

15 And I guess the bottom line is is that
16 worth the candle? I guess, summarizing, if we
17 don't have clarity on the line, is it worth the
18 candle of trying to draw a line rather than just
19 going with the historical approach advocated by
20 the other side?

21 MR. PALMORE: Well, Your Honor, first
22 just to put a footnote on it, I disagree that
23 the history is on their side.

24 JUSTICE KAVANAUGH: Right.

25 MR. PALMORE: But I think it is worth

1 the candle because Article III requires it,
2 right? So Article III and Iqbal and Twombly
3 would require proper pleadings. So here they
4 said --

5 JUSTICE KAVANAUGH: I obviously agree
6 with that --

7 MR. PALMORE: Yeah.

8 JUSTICE KAVANAUGH: -- but you've been
9 referring to these old cases, which kind of said
10 you're out. And you're not saying you're out if
11 you're a participant in a defined-benefit plan.
12 You're in, so long as you can allege a
13 sufficiently increased risk of harm that my
14 benefits won't be paid.

15 And then the question becomes: What
16 do you have to allege to that? Well, it's
17 underfunded and, therefore -- and the company
18 may go belly up and, therefore, that's enough.

19 MR. PALMORE: Yeah, I think if it --
20 if it was significantly underfunded and the
21 company was struggling or was distressed and
22 didn't have adequate assets --

23 JUSTICE KAVANAUGH: That's just going
24 to be a whole mess, isn't it?

25 MR. PALMORE: But that's required in

1 order to show --

2 JUSTICE KAVANAUGH: Okay.

3 MR. PALMORE: -- that you have a
4 injury. So I don't think it's a whole mess.
5 There's a -- there's a ton of information
6 available here.

7 So you look at the facts of Clapper,
8 those plaintiffs had literally no ability to
9 demonstrate that their calls were being --

10 JUSTICE KAVANAUGH: Right.

11 MR. PALMORE: -- surveilled.

12 Here pension plans file annual reports
13 with the Department of Labor, that's the Form
14 5500. There's ample public information about
15 publicly-traded companies. There's a lot of
16 information out there. And that information
17 here showed that even at the time this plan was
18 modestly underfunded, U.S. Bank had \$86 billion
19 in liquid assets.

20 JUSTICE BREYER: But -- but --

21 CHIEF JUSTICE ROBERTS: There's a
22 standard -- Article III, there's a lot of case
23 law about what standard the injury has to
24 satisfy. And if you're analyzing this under
25 Article III, that's not an open issue.

1 Concrete, particularized, and so on and so forth
2 that it has come -- developed through all sorts
3 of cases where there's a challenge to the nature
4 of the injury.

5 MR. PALMORE: No, that's absolutely
6 right, so I think it really would be a
7 fact-bound application of -- of -- of Clapper,
8 of the imminent harm standard in Clapper or the
9 substantial risk standard in Clapper, which --
10 which the Court talked about, but what's --

11 JUSTICE KAVANAUGH: But, but -- sorry
12 to prolong it, but it's bothering me. If you
13 just allege that it's underfunded significantly,
14 and therefore in the complaint it says and there
15 is therefore a substantially increased risk of
16 harm I won't receive my promised benefits, is
17 that enough?

18 MR. PALMORE: That wouldn't be enough.

19 JUSTICE KAVANAUGH: Okay. What more
20 is needed?

21 MR. PALMORE: I think -- and this,
22 again, would be the Fifth Circuit's decision in
23 Lee, which I would commend to the Court.

24 JUSTICE KAVANAUGH: So you agree with
25 -- I just want to make sure, you agree with the

1 Fifth Circuit's formulation?

2 MR. PALMORE: We do. So underfunded
3 isn't enough because of the way that ERISA is
4 structured that the employer is always on the
5 hook to make up any deficit in that plan. So
6 you've got -- it would have to allege both
7 underfunding and an employer who was unwilling
8 or unable --

9 JUSTICE BREYER: That's -- that's --

10 MR. PALMORE: -- to remedy the
11 problem.

12 JUSTICE BREYER: -- that's in a -- I
13 agree with the Chief Justice that I've seen
14 numerous cases. And whenever it's a question of
15 standing and it's a money case, which this is,
16 you have to have some injury to money. All
17 right.

18 But we have two things: One, at least
19 as to the duty of loyalty, the history seems to
20 show that those were fairly typical trust cases
21 brought, although there was no injury to the
22 individual beneficiary or trustee beneficiary,
23 who could have -- that's true of the duty of
24 loyalty.

25 Under the -- that's -- we've looked at

1 the cites and they seem to say that.

2 MR. PALMORE: I respectfully disagree
3 with that but let's --

4 JUSTICE BREYER: All right.

5 MR. PALMORE: -- continue.

6 JUSTICE BREYER: I want to know that.

7 MR. PALMORE: Okay.

8 JUSTICE BREYER: But the other is
9 this: There are exceptions to this harm
10 business quantitatively. The Sierra Club, I
11 mean, their members can sue. And I agree that
12 the members have to have once taken a, you know,
13 a look around Yellowstone or something, but, I
14 mean, it's pretty minimal.

15 And here Congress has tried to create
16 an organization that involves pensions and, you
17 know, the members that they list in the statute
18 as being able to sue. So why isn't that good
19 enough? Why isn't it good enough that -- that
20 Congress has created something like an
21 association, associational members do have the
22 right to sue, even though there's nothing more
23 than their belonging to an association that --
24 that suffered? Shouldn't that be an analogy?
25 Why not?

1 MR. PALMORE: No, Your Honor.

2 JUSTICE BREYER: So I am interested in
3 both of those.

4 MR. PALMORE: Sure. First of all,
5 under *Rings v. Bird*, the simple conferral of a
6 cause of a cause of action is not enough to
7 confer standing. And then what you were
8 alluding to in 502(a)(2) and (a)(3), is simply a
9 bare cause of action. That's not enough. There
10 has to be an invasion of statutorily protected
11 right and there has to be a concrete injury.

12 JUSTICE KAGAN: At the very least,
13 though, Mr. Palmore, that suggests who Congress
14 thought the fiduciary obligations ran to. In
15 other words, this -- this goes back to this
16 question of: Who really owns this thing
17 equitably?

18 Is it the plan or is it the
19 beneficiaries and participants? And in creating
20 those causes of action, Congress essentially,
21 you know, indicated that it thought that the
22 obligations ran to the beneficiaries and the
23 participants, meaning that it's the
24 beneficiaries and the participants who have the
25 equitable ownership stake in the financial

1 integrity of the fund.

2 MR. PALMORE: Your Honor, I -- I read
3 this Court's decision in Russell to -- to be --
4 say exactly the opposite. So 502(a)(2), which
5 goes to claims for fiduciary breach involving
6 plan asset management, which is what we have
7 here, the Court was quite clear that those
8 fiduciary duties run to the plan, not to
9 individual --

10 JUSTICE KAGAN: But even Russell --

11 MR. PALMORE: -- beneficiaries.

12 JUSTICE KAGAN: -- said that
13 beneficiaries have a stake in the financial
14 integrity of the plan and then you have Harris
15 Trust, which says that ERISA gives a fiduciary
16 -- it makes clear that the fiduciary duty goes
17 to the beneficiaries.

18 MR. PALMORE: Your Honor, what this
19 Court said -- has -- has said in subsequent
20 cases after Russell was that there are -- there
21 are other kinds of fiduciary duties which may
22 run directly to a beneficiary, so, for instance,
23 the right to receive truthful information, but
24 the Court reiterated in verity that the -- that
25 the fiduciary duty with respect to plan asset

1 management runs to the trust.

2 But even if you don't --

3 JUSTICE KAGAN: I mean, isn't that a
4 fairly odd thing to say the that fiduciary
5 obligations runs to an abstract plan rather than
6 the beneficiaries and the participants who are
7 supposed to benefit from it?

8 MR. PALMORE: No, Your Honor, because
9 ERISA was an innovation in that it created the
10 plan as an actual legal entity with -- and a
11 heavily regulated one, at trust -- at common
12 law, the trust itself wasn't the legal entity.
13 It was just a series of relationships between
14 individuals.

15 So -- so ERISA was an innovation. But
16 even if you don't agree with me on that, this
17 question would still remain, even if the
18 fiduciary duties flow to the individuals, can
19 they sue if they are not harmed?

20 So at the contingent beneficiary
21 analogy that we have been talking about, if you
22 have two contingent beneficiaries, either of
23 whom could receive 50 -- might have a 50 percent
24 shot at getting the trust corpus, here it's a
25 zero percent shot. None of these -- these

1 Petitioners is going to get that trust corpus.

2 And again, the -- Justice Breyer going
3 back to your question, the no further inquiry
4 rule involved only how you establish harm to the
5 trust itself, to the trust corpus.

6 In not one of their cases do they cite
7 an example of a beneficiary whose concrete
8 financial interest were not tied to the value of
9 assets in the trust corpus, in not one of their
10 cases was that beneficiary able to --

11 JUSTICE BREYER: But if you don't --
12 if you don't have to assess injury to the trust
13 where there is no injury to the trust, how could
14 there be any injury to a beneficiary of the
15 trust?

16 MR. PALMORE: Because there was
17 presumed under the no further inquiry rule,
18 there was presumed injury to the trust.

19 JUSTICE BREYER: It means sometimes
20 you presume that there is injury to the trust --

21 MR. PALMORE: Yes.

22 JUSTICE BREYER: -- when there isn't.
23 All right, focus on those.

24 MR. PALMORE: Correct.

25 JUSTICE BREYER: In that set of cases,

1 there is no injury to the trust. And,
2 therefore, a fortiori, there is no injury to the
3 beneficiary.

4 MR. PALMORE: I would -- I would
5 change your wording slightly. There is a
6 presumed injury to the trust.

7 JUSTICE BREYER: Well -- I know --

8 MR. PALMORE: There is a conclusive --

9 JUSTICE BREYER: -- we're saying the
10 same thing.

11 MR. PALMORE: -- presumption of harm
12 --

13 JUSTICE BREYER: On the duty of --

14 MR. PALMORE: -- to the trust.

15 JUSTICE BREYER: On the duty of
16 loyalty --

17 MR. PALMORE: Yes.

18 JUSTICE BREYER: -- there is a
19 presumed injury to the beneficiary.

20 MR. PALMORE: To the -- to the trust.

21 JUSTICE BREYER: Oh, there's a --

22 MR. PALMORE: To the trust. And then
23 any beneficiary with an interest in the trust
24 could then sue. So if it was the remainderman
25 who had only an interest in the principal, like

1 the plaintiff in Terry versus Allen --

2 JUSTICE BREYER: I see your point.

3 MR. PALMORE: -- and that that
4 interest was fully protected, that plaintiff
5 couldn't sue, right? So there -- it's critical
6 to keep those two separate questions in mind,
7 how is harm established, is it either proved or
8 conclusively presumed under the "no further
9 inquiry" rule but there was always the second
10 question, and this is Bogert 871, restatement
11 214, comment B, there was always a second
12 question of who can sue to remedy that harm to
13 the trust. And there the trust law is quite
14 clear that that "who" is someone whose actual
15 concrete interests were affected.

16 JUSTICE KAVANAUGH: Can I go back to
17 the particulars of your theory of what would be
18 sufficient?

19 MR. PALMORE: Yes.

20 JUSTICE KAVANAUGH: You said if the
21 plan -- if you allege that the plan is
22 underfunded and you allege that the employer is
23 unwilling or unable to meet the obligations, I
24 think you said.

25 MR. PALMORE: Yes.

1 JUSTICE KAVANAUGH: Let's put aside
2 unwilling for a second. In alleging that an
3 employer is unable to meet the obligations, how
4 would you allege that? What do you think would
5 be necessary?

6 MR. PALMORE: I think you would have
7 to look at their -- you know, their publicly
8 disclosed financial information and show that
9 they -- that this was a seriously underfunded
10 plan and that this was a distressed company and
11 it was going to be unable to -- to put in
12 adequate money or unable to comply with the
13 minimum funding requirements that ERISA places
14 --

15 JUSTICE KAVANAUGH: And if that's --

16 MR. PALMORE: -- on them.

17 JUSTICE KAVANAUGH: -- alleged, how
18 can that be disputed at the pleadings stage or
19 what do you envision -- what kind of process do
20 you envision for disputing an allegation to that
21 effect in a complaint?

22 MR. PALMORE: Well, I don't -- I mean,
23 I think if it's -- if it's alleged with
24 sufficient particularity, then -- then they've
25 properly alleged standing and then there would

1 be a factual question --

2 JUSTICE ALITO: Yeah, but then you
3 would --

4 MR. PALMORE: -- down the road.

5 JUSTICE ALITO: Then it's a question
6 of subject matter jurisdiction under Article
7 III. So it's not like Iqbal and Twombly where
8 it's failure to -- a question of whether it
9 stated a claim.

10 Wouldn't you immediately file a motion
11 to dismiss for lack of subject matter
12 jurisdiction? And that wouldn't be -- the
13 determination of that would not be based solely
14 on the pleadings.

15 MR. PALMORE: Exactly right, Your
16 Honor. And that's actually what happened here.
17 We dismissed under 12(b) -- we moved to dismiss
18 under 12(b)(6). That was denied. I think that
19 was incorrect but it was denied.

20 And then we made a motion under
21 12(b)(1) and the district court actually engaged
22 in fact finding and found as as a matter of fact
23 that there were -- there was no risk to these --
24 to the --

25 JUSTICE KAVANAUGH: That's what I was

1 getting at.

2 MR. PALMORE: Because the plan was
3 actually overfunded, right?

4 JUSTICE KAVANAUGH: I think that's
5 right. You have a separate factual proceeding
6 on whether the allegation that the employer
7 wouldn't be able to meet the obligations.

8 MR. PALMORE: Exactly. And that's
9 actually what happened here. The plan then was
10 overfunded and the overfunding line, that's the
11 line that Congress has -- has drawn, it says if
12 you meet that level of funding in the plan,
13 there's enough there to pay all the future
14 benefits, so this plan at the relevant time was
15 overfunded. That was the basis for the
16 dismissal here.

17 And I think that --

18 JUSTICE KAGAN: And Mr. Palmore --

19 MR. PALMORE: Yes?

20 JUSTICE KAGAN: -- what do you do
21 about the fact that these plans can be
22 underfunded in January and overfunded in
23 February and underfunded in March again?

24 And what do you do about the fact that
25 the health of even, you know, secure companies,

1 if you're in 2008, all of a sudden it turns out
2 they're not so secure after all.

3 MR. PALMORE: Well, Your Honor, I
4 think that's why the -- the -- I think if a plan
5 is overfunded, I think that's sufficient to
6 defeat standing. I don't think it's actually
7 necessary.

8 And -- and I think for the reasons
9 that you state, if something is toggling between
10 overfunded and underfunded, there isn't going to
11 be standing unless the critical second step of
12 the inquiry can be alleged or factually
13 determined at a -- at the 12(b)(1) stage that
14 the employer won't be able to meet its legal
15 obligations to make the minimum funding
16 contributions to make sure there's enough money
17 in that plan to insure the stream of benefits.

18 But just kind of speculation about AIG
19 and maybe there will be another market meltdown,
20 that's clearly not enough under -- under Article
21 III. You -- and especially -- and if that's
22 their theory, they picked the wrong defendant
23 because there were, you know, \$86 billion in
24 liquid assets at --

25 JUSTICE KAVANAUGH: Under your theory

1 ----

2 MR. PALMORE: -- the time.

3 JUSTICE KAVANAUGH: -- the PBGC
4 doesn't matter, correct?

5 MR. PALMORE: I think the PBGC does --
6 does -- does matter. It's --

7 JUSTICE KAVANAUGH: You did not -- you
8 did not articulate that when you articulated --

9 MR. PALMORE: Yeah. Well, we
10 articulated that in our brief and the courts of
11 appeals cases that are all on our side do
12 articulate that as well. That's the ultimate
13 backstop. And that's funded through insurance
14 premiums paid by the employer.

15 So it's not what -- what my friend on
16 the other side said, that the beneficiaries
17 somehow had their own insurance that would cover
18 the loss.

19 This is part of the employer's
20 obligation to pay these premiums so that there
21 is an ultimate backstop.

22 JUSTICE KAVANAUGH: Wouldn't --
23 wouldn't that theory, taken to its logical
24 conclusion, mean that a participant could never
25 sue, a defined-benefit participant or

1 beneficiary could never sue?

2 MR. PALMORE: No, Your Honor, because
3 the PBGC guarantees benefits only up to a
4 certain level.

5 JUSTICE KAVANAUGH: Anyone whose
6 benefits are under that limit, they can never
7 sue, is that your theory?

8 MR. PALMORE: That -- that -- it --
9 that would be a theory, Your Honor. I don't
10 think --

11 JUSTICE KAVANAUGH: Is it your theory?

12 MR. PALMORE: Yeah, it is my theory.
13 I don't think you need to adopt that theory here
14 because U.S. Bank by itself was fully
15 sufficient. But to the extent, again, that
16 there -- and to the extent that that's no
17 employee or defined-benefit -- beneficiary whose
18 benefits are at risk and there -- so therefore
19 wouldn't have standing.

20 First of all, that's not a reason to
21 find that they're standing because there are
22 other enforcers -- the Department of Labor,
23 co-fiduciaries -- but that's actually a good
24 thing, not a bad thing.

25 It means that the employer stands

1 ready to make good on the pension payments just
2 as --

3 JUSTICE GINSBURG: We're told --

4 MR. PALMORE: -- the rest of the --

5 JUSTICE GINSBURG: You went quickly --

6 JUSTICE SOTOMAYOR: I'm having a very
7 --

8 JUSTICE GINSBURG: You went quickly
9 over the Department of Labor, but we've heard
10 from the Department of Labor, they can't do this
11 job. It has to be someone who is able to sue.
12 And it's not going to be the trustee because the
13 trustee is the one who has alleged to engaged in
14 imprudent or impermissible transactions.

15 So the only one possible is the plan
16 participant. So the government itself is
17 telling us Congress set this thing up knowing --
18 depending on the participant's ability to sue,
19 because the Department of Labor just doesn't
20 have the resources to do the job.

21 MR. PALMORE: May I answer?

22 CHIEF JUSTICE ROBERTS: Yes.

23 MR. PALMORE: The Department of Labor
24 has the legal authority to bring -- to bring an
25 action. Co-fiduciaries have a -- a legal --

1 have a legal authority to bring an action.
2 Trustees can bring an action. You have to look
3 no further than this Court's own cases. Harris
4 Trust. It's called Harris Trust because the
5 plaintiff there was the trustee that was suing
6 to rescind a transaction.

7 And in this very case, there was an
8 early claim about a securities lending program
9 that fell out because U.S. Bank had taken action
10 against an employee who had committed misconduct
11 and had recovered that money for the plan.

12 So there are plenty of other tools
13 available, other than fiduciary lawsuits brought
14 by uninjured parties.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Three minutes, Mr. Stris.

18 REBUTTAL ARGUMENT OF PETER K. STRIS

19 ON BEHALF OF THE PETITIONERS

20 MR. STRIS: Thank you. Three brief
21 points. The first two have a lot to do, I
22 think, with question begging.

23 So the first is we have a concrete
24 property interest. If we lose that argument, we
25 lose, but saying that we're uninjured doesn't do

1 the work.

2 Justice Alito, you, I think, asked a
3 question that's very important. You said, well,
4 can Congress put a property label on anything?
5 And I think that goes to the heart of this case
6 because they can't and they didn't.

7 Here's what happens in an ERISA plan:
8 Private parties make a bargain with real private
9 interests and real money. A worker gives up
10 wages in exchange for a promise to be paid in
11 the future with money put in a trust as
12 security. That's all fact. No one can dispute
13 that.

14 The question is do we have a -- an
15 interest, my clients in the trust, and what is
16 that interest? So let's sweep aside the
17 question begging and get to the main issue.

18 Our point is it's always been the case
19 since the 15th century that we have an interest.
20 At first, my friend doesn't dispute this. Look
21 at page 25 of their brief. He says in the 15th
22 century, chancellors began to recognize the
23 beneficiaries' interest as a form of ownership,
24 protecting it much like the common law treated
25 the legal interest in property.

1 This is why he spends much of his
2 brief and he gets up here today and he says:
3 Ah, the participants, the beneficiaries, they're
4 not actually the beneficiaries. The plan is the
5 beneficiary.

6 If he's right, we lose. But he's
7 obviously wrong, because the beneficiaries are
8 the beneficiaries. To your questions earlier,
9 Justice Kagan, you don't need to look any
10 further than the congressional statements of
11 purpose. Everything in ERISA says that to
12 protect the interest of these individuals, we're
13 putting the money in the trust.

14 So that's the property interest.
15 There's nothing abstract about it. That's how
16 it's been for a while and for good reason.
17 Okay.

18 I'm going to take my points out of
19 order. The second one is the practical
20 concerns. What is the good reason? Because I
21 think there's a reason why the United States
22 Government across a number of -- of
23 administrations have endorsed this position of
24 standing. It's because -- Justice Breyer, you
25 say imprudence cases. Well, maybe standing

1 should be a gatekeeper, because can people sue
2 in every case, like when there's been a loss --
3 I get it. That's a concern. I don't think it
4 should inform the standing inquiry. Think of
5 the flip side.

6 The flip side is if their rule is
7 correct, you will have to have, to figure out if
8 there's an injury, a battle of experts in every
9 case about the level of risk and potentially
10 throughout the case about the level of risk.
11 Entirely unworkable. Again, this shouldn't
12 drive standing, but if it's the elephant in the
13 room. And in situations of catastrophe like AIG
14 and Enron, there's no solution. We ask that you
15 reverse.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 12:11 p.m., the case
19 was submitted.)
20
21
22
23
24
25

Official - Subject to Final Review

\$	800 [3] 7:4 9:12 17:20	allege [9] 3:12 5:15 51:12,16 53:13 54:6 61:21,22 62:4	associational [1] 55:21
\$100 [3] 6:20 7:15 40:10	871 [2] 36:21 61:10	alleged [9] 8:7 39:19,20 44:12 62:17,23,25 65:12 68:13	assume [1] 21:11
\$2,198.38 [1] 34:12	9	alleging [1] 62:2	attention [1] 14:2
\$42.26 [1] 34:15	90 [1] 17:1	Allen [5] 14:2,3 48:13 49:23 61:1	authority [3] 33:6 68:24 69:1
\$600 [2] 6:25 17:19	99.99 [1] 25:20	allow [1] 22:24	available [3] 35:2 52:6 69:13
\$748 [1] 33:16	A	allowed [3] 4:23 24:23 25:3	away [1] 27:10
\$750 [4] 3:14,19 6:12 17:3	a (3) [1] 56:8	allowing [1] 26:14	B
\$753 [1] 41:22	a.m [2] 1:14 3:2	alluding [1] 56:8	back [7] 10:12 27:11 29:4 30:6 56:15 59:3 61:16
\$8 [1] 7:3	ability [3] 45:1 52:8 68:18	although [2] 40:12 54:21	backed [1] 18:17
\$800 [1] 17:21	able [9] 21:14 22:2 29:8 48:24 55:18 59:10 64:7 65:14 68:11	amicus [3] 1:21 2:7 21:20	backstop [2] 66:13,21
\$86 [2] 52:18 65:23	above [1] 18:22	amount [2] 28:6 42:3	bad [6] 5:23 8:13,15 31:14,14 67:24
1	above-entitled [1] 1:12	ample [1] 52:14	ball [1] 45:21
100 [3] 20:15 40:11,11	absolutely [3] 13:10 22:21 53:5	analogous [1] 20:7	BANK [10] 1:6 3:5 20:23 34:14 35:18,20 48:21 52:18 67:14 69:9
11:09 [2] 1:14 3:2	abstract [5] 7:9 8:7 31:6 58:5 71:15	analogue [1] 10:24	bank's [1] 15:10
12(b) [1] 63:17	abstractly [1] 6:24	analogy [6] 12:24 16:7 28:3 29:6 55:24 58:21	bank-affiliated [1] 20:22
12(b)(1) [2] 63:21 65:13	according [1] 14:1	analysis [1] 21:12	banks [1] 48:22
12(b)(6) [1] 63:18	account [6] 23:24 24:1,2 33:9 38:16,25	analyzing [1] 52:24	bare [1] 56:9
12:11 [1] 72:18	accurate [1] 12:8	Angeles [1] 1:17	bargain [1] 70:8
13 [1] 1:10	acknowledging [1] 46:11	annual [1] 52:12	based [5] 16:4,6 17:15 21:14 63:13
14 [1] 33:7	acquire [1] 26:15	Another [3] 12:6 43:11 65:19	basis [1] 64:15
15 [1] 29:21	across [1] 71:22	answer [18] 6:2 13:20 16:22 18:11,23 20:1 21:2 24:5 25:19 26:4,25 27:1 29:1 31:3,6,22 49:5 68:21	battle [1] 72:8
15th [8] 8:19 10:12 11:24 15:22 16:15 20:8 70:19,21	action [1] 30:5 43:17 45:2,5 56:6,9,20 68:25 69:1,2,9	answering [2] 17:6 19:12	bears [1] 35:18
167 [1] 17:1	actions [1] 20:10	answers [1] 26:6	become [1] 27:5
17-1712 [1] 3:4	actual [3] 33:4 58:10 61:14	anyway [1] 24:21	becomes [1] 51:15
1808 [1] 14:1	actually [11] 36:11 39:16 45:7 49:21 63:16,21 64:3,9 65:6 67:23 71:4	apart [1] 47:3	began [1] 70:22
2	add [1] 24:9	appeal [1] 21:14	begging [2] 69:22 70:17
2008 [2] 6:20 65:1	addition [1] 28:19	appealed [1] 21:8	begin [1] 4:25
2020 [1] 1:10	additional [2] 28:17,20	appeals [2] 21:9 66:11	behalf [12] 1:18,24 2:4,11,14 3:8 4:24 33:20 34:4 35:23 43:11 69:19
21 [1] 2:8	address [1] 44:25	APPEARANCES [1] 1:16	believe [2] 15:18 17:2
214 [2] 36:22 61:11	adequate [3] 32:25 51:22 62:12	Appendix [2] 15:4 17:1	belly [1] 51:18
25 [1] 70:21	adequately [1] 39:19	application [2] 38:8 53:7	belonging [1] 55:23
3	adjudicate [1] 35:3	applied [1] 32:8	belongs [1] 41:14
3 [1] 2:4	administrations [1] 71:23	apply [1] 32:21	beneficial [2] 11:3 26:17
303 [1] 32:12	administrators [1] 32:4	approach [1] 50:19	beneficiaries [36] 3:11 4:15,23 5:8 13:24 22:6,8,11,16,19,20 26:22 28:7,21,24 31:19 35:8,11 37:1 40:13 45:24,25 47:5 56:19,22,24 57:11,13,17 58:6,22 66:16 71:3,4,7,8
311 [1] 41:23	admirable [1] 9:22	aren't [3] 13:12 31:24 32:2	beneficiaries' [2] 7:23 70:23
33 [1] 14:3	admit [1] 45:8	argue [1] 3:23	beneficiary [30] 8:21 12:9,17 14:23 16:11,18 22:1,23,25 23:10 24:23,24 33:24 36:18,25 44:19 48:16 54:22,22 57:22 58:20 59:7,10,14 60:3,19,23 67:1,17 71:5
34 [1] 2:11	adopt [1] 67:13	argument [14] 1:13 2:2,5,9,12 3:4,7 5:12 21:19 34:3 46:11 47:3 69:18,24	benefit [8] 10:22 15:11 19:20 24:17 29:13 43:18 48:5 58:7
4	advocated [1] 50:19	arguments [4] 16:2,4,6 35:6	benefited [1] 26:18
404 [1] 32:15	affect [1] 8:8	arise [1] 24:12	benefiting [1] 8:23
406 [1] 32:15	affected [2] 35:10 61:15	around [2] 25:6 55:13	benefits [23] 7:2 9:23 10:1 16:20 18:23 19:1 25:20 26:9 35:16,20 36:15 37:12 45:19 49:17,19,19 51:14 53:16 64:14 65:17 67:3,6,18
5	affirms [1] 34:17	Article [22] 9:8,13 11:8 17:8 19:24 24:19 25:4,6 28:17 33:2,10 34:7 35:5 37:10 43:22 49:6 51:1,2 52:22,25 63:6 65:20	best [5] 17:13 22:11 42:4,5 48:22
50 [6] 25:7 46:1,6,10 58:23,23	afforded [1] 32:3	articulate [2] 66:8,12	better [2] 30:6 31:19
502(a) (2) [3] 23:25 56:8 57:4	Agency [1] 11:18	articulated [3] 45:14 66:8,10	between [8] 3:22 14:22 16:7 28:12 29:9 38:24 58:13 65:9
5500 [1] 52:14	ago [1] 20:23	aside [4] 16:9 37:17 62:1 70:16	big [2] 28:11 39:6
6	agree [9] 20:19 45:5 48:10 51:5 53:24,25 54:13 55:11 58:16	assailing [1] 20:11	biggest [1] 39:20
60 [1] 15:4	Ah [1] 71:3	assess [2] 38:14 59:12	
600 [1] 9:10	ahead [3] 14:25 17:25 29:18	assessment [2] 15:25 18:5	
61 [1] 15:4	AIG [4] 6:20 19:17 65:18 72:13	asset [3] 48:9 57:6,25	
66 [1] 39:17	Aircraft [3] 35:15 36:4 42:18	assets [27] 3:18 4:4,7,8 5:6,10 6:8,10 7:7,15 8:20,22,24 10:21 15:7,10,11,16 19:21 22:21 23:20 35:17 41:11 51:22 52:19 59:9 65:24	
69 [1] 2:14	AL [2] 1:3,6	Assistant [1] 1:19	
7	ALITO [11] 16:1 17:5,7,13 28:2,11 49:4,14 63:2,5 70:2	association [2] 55:21,23	
700 [2] 7:5 9:12	Alito's [2] 18:12 24:16		
704 [1] 14:3	allegation [2] 62:20 64:6		
750-odd [1] 41:18	allegations [1] 33:15		
753 [1] 41:24			
8			
8 [1] 28:23			

Official - Subject to Final Review

<p>Bill [2] 7:10 29:7 billion [6] 6:20 17:20,21 41:19 52:18 65:23 Bird [1] 56:5 black [1] 37:10 Blackacre [2] 11:2,3 body [3] 13:17 14:14,19 Bogert [2] 36:21 61:10 bond [2] 48:19,21 bonds [1] 15:8 both [3] 15:1 54:6 56:3 bothering [1] 53:12 bottom [1] 50:15 breach [11] 4:17 7:9 12:10 13:1,2 22:2,19,24 26:9 41:7 57:5 breaches [4] 21:24 22:12 27:25 35:9 BREYER [43] 11:23 12:2 13:4,8,12 14:11,17,21,25 29:16,20 30:13,24 31:2,10,12 32:6,9,13,16,20,23 48:14 52:20 54:9,12 55:4,6,8 56:2 59:2,11,19,22,25 60:7,9,13,15,18,21 61:2 71:24 brief [7] 4:2 17:14 21:4 66:10 69:20 70:21 71:2 Briefly [1] 21:3 briefs [1] 33:13 bring [6] 40:16,21 68:24,24 69:1,2 brokerage [1] 26:19 brought [2] 54:21 69:13 burns [1] 7:13 business [2] 30:19 55:10 Businesses [1] 6:19</p>	<p>22 16:15 20:8 70:19,22 certain [7] 14:13,14,14 25:20 30:11 48:20 67:4 certainly [1] 26:7 challenge [3] 20:15 35:9 53:3 chance [4] 16:18 24:18 26:5 46:1 chancellors [1] 70:22 Chancery [2] 14:2,4 chances [1] 25:24 change [2] 27:24 60:5 changes [1] 17:17 check [1] 49:2 CHIEF [26] 3:3,9 5:11 6:13,22 7:19 8:5,12 9:3,7 15:18 17:22,24 21:3,16,22 32:24 33:25 34:5 39:24 40:3 52:21 54:13 68:22 69:15 72:16 Chief's [1] 9:20 Circuit [3] 17:19 38:21 39:18 Circuit's [3] 39:13 53:22 54:1 cite [2] 48:14 59:6 cited [3] 26:12 33:13 36:20 cites [1] 55:1 claim [5] 21:5,12 43:7 63:9 69:8 claimed [1] 41:3 claims [5] 34:9,18 35:3 41:6 57:5 Clapper [5] 38:8 52:7 53:7,8,9 clarify [1] 20:10 clarity [1] 50:17 class [2] 24:12 30:5 clean [3] 10:3 23:11 44:21 clear [10] 8:17 11:12 15:14 18:7 19:6 26:8 41:13 57:7,16 61:14 clearly [3] 21:15 45:21 65:20 client [1] 10:4 client's [1] 7:22 clients [12] 3:11,17,20 4:10,13,19 5:9 6:14 7:1 19:1,8 70:15 close [1] 25:18 Club [1] 55:10 co-fiduciaries [2] 67:23 68:25 coaster [2] 31:18,21 code [2] 15:13,14 collapse [1] 19:17 collateral [1] 50:12 colonies [1] 25:13 combination [2] 18:9 27:20 come [5] 9:15 29:10,11,14 53:2 comes [4] 15:1 16:12 23:17 25:8 comfortable [1] 7:1 commend [1] 53:23 comment [2] 36:23 61:11 committed [1] 69:10 common [6] 5:22 45:25 46:2 48:11 58:11 70:24 companies [4] 39:21 40:5 52:15 64:25 company [4] 40:10 51:17,21 62:10 complaint [3] 16:25 53:14 62:21 completely [3] 7:23 36:19 44:21 compliance [1] 17:8 comply [1] 62:12 conceivable [1] 4:16 concern [1] 72:3</p>	<p>concerns [1] 71:20 conclusion [1] 66:24 conclusive [1] 60:8 conclusively [1] 61:8 concrete [10] 3:21 4:13 6:3 7:17 45:3 53:1 56:11 59:7 61:15 69:23 confer [3] 18:3 19:21 56:7 conferral [1] 56:5 conferred [1] 15:23 conflict [1] 5:14 confronted [1] 50:7 Congress [15] 16:5 18:2,6 19:19 32:15 44:17 47:4 49:7 55:15,20 56:13,20 64:11 68:17 70:4 Congress's [2] 28:22 45:1 congressional [1] 71:10 Connecticut [1] 48:13 consistent [2] 36:11 37:9 Constitution [2] 25:10 33:10 constitutional [1] 11:21 context [4] 16:23 24:12 30:12 31:8 contingency [1] 14:9 contingent [11] 9:1 13:25 14:12,13,18 22:16 36:12,25 45:24 58:20,22 continue [3] 40:15,18 55:5 contract [2] 15:8 29:11 contributed [1] 41:23 contribution [8] 9:24,25 10:20 11:6 17:20 23:4,8,12 contributions [1] 65:16 controversies [2] 25:9,12 controversy [4] 3:15 4:18 11:21 33:5 core [5] 7:18 15:21 17:12 18:23,24 corporation [2] 43:18,19 corpus [22] 3:25 9:11 13:18,22 15:24 18:4 35:17 36:10,15 45:20 46:2,4,18,20,23 48:18 49:18,21 58:24 59:1,5,9 correct [4] 46:13 59:24 66:4 72:7 cost [1] 41:8 couldn't [5] 6:18 12:16 42:23 48:12 61:5 counsel [6] 9:20 21:17 34:1 44:16 69:16 72:17 country [2] 39:21 48:23 course [5] 23:22 31:2 33:19 44:24 50:6 COURT [36] 1:1,13 3:10 11:18 20:15 21:8,8,23 22:8 23:22 24:14 26:6,13,21,21 28:22 34:6,8,17,21 35:15 38:4,7,9 42:18,22 43:21 45:15 48:7,14 53:10,23 57:7,19,24 63:21 Court's [5] 21:7,14 23:21 57:3 69:3 courts [6] 4:23 14:1,4 25:12 35:2 66:10 cover [1] 66:17 create [1] 55:15 created [2] 55:20 58:9 creating [3] 45:4,7 56:19</p>	<p>credit [1] 18:19 critical [7] 5:5 20:25 43:25 46:25 48:11 61:5 65:11 curiae [3] 1:21 2:8 21:20</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C. [3] 1:9,20,23 dah-dah-dah [2] 30:17 31:16 damaging [1] 8:25 decide [1] 33:4 decides [1] 23:1 decision [8] 20:4 21:7,15 23:21 26:13,20 53:22 57:3 deed [2] 11:1,1 default [1] 17:3 defeat [1] 65:6 defendant [1] 65:22 deference [1] 32:3 deficit [3] 39:12,23 54:5 defined [9] 9:23,24,25 10:1,20,22 11:5 23:4,12 defined-benefit [12] 4:3 5:1 8:9 15:6 16:12 17:17 35:14 37:4,8 51:11 66:25 67:17 defined-benefits [1] 43:8 definition [1] 11:20 delta [1] 38:24 demand [1] 34:24 demonstrate [2] 34:9 52:9 denied [2] 63:18,19 Department [7] 1:20 52:13 67:22 68:9,10,19,23 depend [2] 5:12 14:8 depending [1] 68:18 depends [2] 6:9 47:2 derivative [1] 43:17 describe [1] 37:5 describing [1] 11:15 destroyed [1] 8:3 destroys [1] 7:12 determination [1] 63:13 determined [1] 65:13 developed [1] 53:2 difference [6] 14:22,24 15:1 28:12,16 29:8 different [8] 12:4 17:9 28:15 29:12 36:24 45:21 50:1,3 diminution [1] 6:9 direct [1] 5:16 directly [1] 57:22 dirty [2] 10:4 23:14 disagree [4] 6:18 44:18 50:22 55:2 disclosed [1] 62:8 discretion [3] 22:23 23:6 25:2 discretionary [4] 9:1 22:18 24:17,24 discuss [1] 26:23 discussed [1] 40:14 disloyalty [1] 3:13 dismiss [2] 63:11,17 dismissal [2] 34:17 64:16 dismissed [2] 21:6 63:17 dispute [2] 70:12,20</p>
--	---	--	--

Official - Subject to Final Review

<p>disputed ^[1] 62:18 disputes ^[1] 33:15 disputing ^[1] 62:20 distinction ^[1] 28:15 distressed ^[2] 51:21 62:10 distribution ^[2] 42:22 43:3 district ^[2] 20:14 63:21 doctrine ^[1] 25:6 document ^[2] 15:2,3 doing ^[1] 21:11 dollar ^[2] 46:23,24 dollars ^[2] 17:21 41:19 done ^[3] 8:8 9:22 50:7 down ^[6] 7:13 29:23,23 30:5 43:19 63:4 downs ^[1] 36:10 drafters ^[1] 28:18 draw ^[2] 12:25 50:18 drawn ^[1] 64:11 drive ^[1] 72:12 Drury ^[1] 26:12 duties ^[12] 12:5,5 13:1,1 21:25 27:25 31:8 47:18 48:8 57:8,21 58:18 duty ^[12] 12:5,6,14 26:9 31:13 44:7 54:19,23 57:16,25 60:13,15</p> <hr/> <p style="text-align: center;">E</p> <p>each ^[1] 46:1 earlier ^[3] 22:15 45:23 71:8 early ^[1] 69:8 effect ^[1] 62:21 Eighth ^[1] 17:18 either ^[3] 39:10 58:22 61:7 elephant ^[1] 72:12 else's ^[1] 23:12 employee ^[2] 67:17 69:10 employer ^[12] 18:7,10 27:20 39:10 54:4,7 61:22 62:3 64:6 65:14 66:14 67:25 employer's ^[1] 66:19 encumbers ^[1] 7:12 endorsed ^[1] 71:23 enforcers ^[1] 67:22 engaged ^[4] 4:12 44:6 63:21 68:13 English ^[3] 14:1,3,4 enjoinment ^[1] 14:7 enough ^[19] 5:24 9:10 28:24 38:16,20 40:6 45:18 50:13 51:18 53:17,18 54:3 55:19,19 56:6,9 64:13 65:16,20 Enron ^[1] 72:14 ensure ^[1] 28:7 entire ^[1] 23:25 entirely ^[2] 36:11 72:11 entirety ^[2] 13:22 18:4 entitled ^[3] 26:24 29:10 47:22 entitlement ^[1] 22:21 entity ^[3] 28:20 58:10,12 envision ^[2] 62:19,20 equitable ^[21] 3:17,24 4:6,8 5:9 6:8 8:18,20 36:5,7 46:3,12,16,21,22 47:6,10,17,25 49:8 56:25 equitably ^[1] 56:17</p>	<p>equities ^[1] 21:5 equity ^[2] 4:23 20:16 ERISA ^[20] 5:2 15:2,12,14 16:7,8,13 28:18 34:7,9 36:3 47:4 48:3 54:3 57:15 58:9,15 62:13 70:7 71:11 ERISA's ^[1] 22:4 especially ^[2] 24:11 65:21 ESQ ^[4] 2:3,6,10,13 essentially ^[1] 56:20 establish ^[1] 59:4 established ^[3] 41:3 44:2 61:7 estate ^[1] 14:10 ET ^[2] 1:3,6 even ^[23] 4:15 5:18 7:13 9:16,21 10:11 16:13 22:15,17,18 23:7,11 26:8 31:18,19 48:9 52:17 55:22 57:10 58:2,16,17 64:25 event ^[1] 4:19 eventually ^[1] 13:18 everybody ^[4] 6:25 23:6 24:7,21 everybody's ^[1] 30:1 everyone's ^[1] 7:2 everything ^[5] 13:15 24:8,21 47:2 71:11 exactly ^[8] 32:10 34:19,25 47:4 50:13 57:4 63:15 64:8 example ^[3] 17:13 29:5 59:7 exceed ^[1] 18:25 except ^[4] 14:19 15:12 22:22 30:19 exception ^[1] 34:7 exceptions ^[1] 55:9 exchange ^[4] 5:2,3 19:20 70:10 exclusive ^[1] 32:18 exercise ^[2] 25:1 50:11 exercised ^[1] 18:2 exist ^[1] 4:7 existed ^[1] 11:19 experience ^[1] 17:15 experts ^[1] 72:8 explain ^[1] 17:15 explained ^[4] 35:15 43:21 44:25 48:7 expressly ^[1] 22:4 extend ^[1] 24:4 extent ^[3] 26:5 67:15,16 extra ^[1] 23:7</p> <hr/> <p style="text-align: center;">F</p> <p>fact ^[14] 5:21,25 27:14,22,24 33:6 35:24 36:8 41:23 63:22,22 64:21,24 70:12 fact-bound ^[1] 53:7 facts ^[2] 26:20 52:7 factual ^[3] 38:8 63:1 64:5 factually ^[1] 65:12 fail ^[3] 6:19,20 38:19 failure ^[1] 63:8 fair ^[3] 15:19 16:22 18:14 fairly ^[2] 54:20 58:4 faith ^[1] 18:18 falls ^[1] 47:3 far ^[5] 10:15 11:8 20:21 28:2 40:4 favor ^[2] 25:2 34:23</p>	<p>February ^[1] 64:23 federal ^[2] 34:8 35:2 feel ^[1] 7:1 fees ^[1] 26:19 fell ^[1] 69:9 few ^[1] 13:3 fiduciary ^[19] 12:5 20:11 21:24 27:25 29:15 32:14 35:9 47:18 48:8 56:14 57:5,8,15,16,21,25 58:4,18 69:13 Fifth ^[5] 38:21 39:13,17 53:22 54:1 figure ^[4] 38:12 41:22 50:13 72:7 file ^[2] 52:12 63:10 financial ^[9] 4:17 5:16 8:9 19:17 22:10 56:25 57:13 59:8 62:8 find ^[1] 67:21 finding ^[1] 63:22 finer ^[1] 9:21 finish ^[4] 20:10 29:1,17 33:17 finished ^[1] 31:20 First ^[16] 3:17 11:13 20:14 21:5 35:8 37:25 40:11 42:13 43:23 44:5 50:21 56:4 67:20 69:21,23 70:20 fit ^[1] 11:20 fixed ^[1] 49:19 flexible ^[1] 38:16 flip ^[2] 72:5,6 flow ^[3] 6:4 43:19 58:18 fluctuations ^[1] 36:9 focus ^[1] 59:23 follow ^[2] 23:14,16 followed ^[1] 14:5 following ^[1] 42:21 footnote ^[2] 28:23 50:22 forced ^[1] 4:1 forever ^[1] 41:13 forgo ^[1] 5:3 form ^[3] 34:24 52:13 70:23 formulation ^[1] 54:1 forth ^[2] 31:9 53:1 fortiori ^[1] 60:2 forward ^[1] 40:7 forward-looking ^[1] 5:12 found ^[1] 63:22 founding ^[3] 4:22 11:20 25:15 fraud ^[1] 7:4 friend ^[5] 6:14 22:15 27:3 66:15 70:20 friend's ^[1] 29:5 fulfill ^[2] 39:11,22 full ^[3] 18:18 19:22,22 fully ^[3] 13:14 61:4 67:14 function ^[1] 18:21 fund ^[5] 6:25 7:3 15:9 18:22 57:1 fundamental ^[1] 35:6 funded ^[3] 13:14 39:17 66:13 funding ^[5] 17:16 32:12 62:13 64:12 65:15 funds ^[1] 20:22 further ^[10] 4:14 22:17 26:7 43:24 44:4 59:3,17 61:8 69:3 71:10 future ^[4] 5:4 13:21 64:13 70:11</p> <hr/> <p style="text-align: center;">G</p>	<p>game ^[1] 45:21 gatekeeper ^[1] 72:1 Gates ^[3] 7:10,24 29:7 General ^[1] 1:19 gets ^[2] 42:7 71:2 getting ^[9] 22:7 24:17 37:16,18,19 46:1 49:1 58:24 64:1 GINSBURG ^[7] 20:9,14,20,25 68:3,5,8 give ^[5] 22:23 29:17 42:1,3 47:5 gives ^[4] 4:17 33:5 57:15 70:9 giving ^[1] 32:25 Gollust ^[1] 43:21 GORSUCH ^[12] 9:19 10:7,11,15,17 11:7 23:3 24:7,15 44:16 45:4,11 got ^[3] 20:23 31:22 54:6 gotten ^[1] 13:6 Government ^[4] 18:17,19 68:16 71:22 grant ^[1] 25:23 granted ^[1] 16:5 great ^[1] 12:11 greater ^[3] 13:14,16 17:10 grounds ^[1] 21:6 guarantees ^[2] 27:11 67:3 guess ^[5] 26:5 39:4 42:8 50:15,16 guy ^[3] 8:13,15 40:14 GVR ^[1] 39:15</p> <hr/> <p style="text-align: center;">H</p> <p>hand ^[2] 25:25 34:21 happened ^[4] 10:25 20:24 63:16 64:9 happens ^[6] 7:14 18:19 30:3 36:14,15 70:7 hard ^[3] 3:23 14:22 31:6 Harley ^[1] 17:18 harm ^[21] 5:17 6:1 23:25 40:12 44:1,3,9,12,14 49:20 50:6,9,14 51:13 53:8,16 55:9 59:4 60:11 61:7,12 harmed ^[1] 58:19 harms ^[2] 23:23 27:16 Harris ^[3] 57:14 69:3,4 hasten ^[1] 24:9 health ^[1] 64:25 hear ^[2] 3:3 16:10 heard ^[3] 25:12 45:13 68:9 heart ^[1] 70:5 heartburn ^[1] 20:2 heavily ^[1] 58:11 held ^[5] 11:1,1 15:9 21:10 23:22 helped ^[1] 12:12 highly ^[2] 27:4 29:3 historical ^[3] 11:13,17 50:19 historically ^[1] 24:22 history ^[13] 13:23 23:1 25:18 26:1,2,4 27:10 33:1,7 36:11 48:10 50:23 54:19 hit ^[2] 17:11 24:18 holds ^[3] 4:8 36:7 48:5 Hollingsworth ^[1] 43:13 Honor ^[15] 21:2 37:7 42:13 44:24 48:2 49:9 50:21 56:1 57:2,18 58:8</p>
---	--	--	--

Official - Subject to Final Review

<p>63:16 65:3 67:2,9 hook [1] 54:5 horizon [1] 38:17 Hughes [5] 35:15 36:3 42:18,21 43:6 human [1] 33:19 hundreds [1] 22:3 hurdle [1] 39:6 hurt [3] 5:19,20 13:19 hypothetical [5] 7:20,24 8:6 9:10 23:4</p> <hr/> <p>I</p> <p>identify [1] 45:2 Ill [22] 9:8,13 11:8 17:8 19:24 24:19 25:4,6 28:17 33:2,10 34:8 35:5 37:10 43:22 49:6 51:1,2 52:22,25 63:7 65:21 imagine [2] 24:25 37:2 immediately [1] 63:10 imminent [2] 38:9 53:8 impaired [2] 8:17 9:18 impairment [2] 11:16 40:19 impermissible [1] 68:14 implicated [1] 44:14 implying [1] 39:7 important [3] 19:10 45:12 70:3 importantly [2] 18:21 27:6 improbable [1] 14:9 imprudence [2] 3:13 71:25 imprudent [2] 41:20 68:14 included [1] 24:1 includes [1] 25:11 including [1] 15:16 income [3] 12:18,19 13:17 inconsistent [1] 44:7 incorrect [1] 63:19 increase [1] 28:6 increased [6] 17:3 50:5,8,14 51:13 53:15 incredible [1] 4:2 incredibly [1] 17:17 independently [1] 4:10 indicated [1] 56:21 individual [3] 19:15 54:22 57:9 individuals [3] 58:14,18 71:12 inform [1] 72:4 information [6] 52:5,14,16,16 57:23 62:8 inherit [1] 36:14 injunction [1] 40:22 injured [1] 9:13 injuries [4] 6:3,5 12:20 45:3 injury [34] 3:21 4:14,21 5:1,13 6:7 9:9 13:5,6 19:24 30:22 33:17,23 34:9 35:24 39:19 43:12 44:3 52:4,23 53:4 54:16,21 56:11 59:12,13,14,18,20 60:1,2,6,19 72:8 innovation [2] 58:9,15 inquire [1] 19:25 inquiry [10] 4:15 5:24 26:7 43:24 44:4 59:3,17 61:9 65:12 72:4 instance [1] 57:22 instructive [1] 39:14</p>	<p>insurance [4] 27:14,23 66:13,17 insure [1] 65:17 integrity [4] 22:10 47:7 57:1,14 interest [78] 3:18,19,24 4:4,6 5:9,14 6:8 7:11,16 8:2,16,18,20 11:3 12:9,22 13:13,16,21,25 14:7,12,13,13,15,18,18,23 15:20,24 18:3 19:22 22:9 35:13 36:2,6,7,13,17,19 40:20 42:10,11,14,19 44:14,20 45:17 46:3,12,15,16,22 47:6,10,18,25 48:1,15,19 49:1,7,8,13,15 59:8 60:23,25 61:4 69:24 70:15,16,19,23,25 71:12,14 interested [2] 12:15 56:2 interests [6] 11:16 35:10 42:4,5 61:15 70:9 interrupt [2] 27:8 50:2 invasion [1] 56:10 invest [1] 10:4 invested [2] 12:11 41:7 investment [4] 12:11 20:16 31:14 41:20 investments [3] 15:9 23:11 31:15 involved [1] 59:4 involves [1] 55:16 involving [1] 57:5 lqbal [2] 51:2 63:7 isn't [12] 13:19 25:14 45:4 48:1 50:10 51:24 54:3 55:18,19 58:3 59:22 65:10 issue [3] 50:7 52:25 70:17 issues [1] 18:15 itself [8] 4:17 33:18 36:6 48:6 58:12 59:5 67:14 68:16</p> <hr/> <p>J</p> <p>JAMES [2] 1:3 34:11 January [2] 1:10 64:22 jeopardized [1] 49:21 job [3] 9:22 68:11,20 Joint [2] 15:4 16:25 JOSEPH [3] 1:23 2:10 34:3 JOSHI [29] 1:19 2:6 21:18,19,22 23:15 24:9,22 25:15 26:3 27:12,18,22 28:9,14 29:19 30:11,21,25 31:5,11,23 32:1,5,10,14,18,21 33:11 judgment [4] 18:2 28:22 34:23 50:4 jurisdiction [2] 63:6,12 Justice [175] 1:20 3:3,10 5:11 6:13,22 7:19 8:5,12 9:2,3,5,7,19 10:7,11,15,17 11:7,23 12:2 13:4,8,12 14:11,17,21,25 15:18 16:1 17:5,7,13,22,24 18:6,11,16,25 19:5,7,9 20:9,14,20,25 21:3,16,22 23:3 24:7,15,16 25:14,16 27:7,17,19 28:2,11 29:2,16,20 30:13,24 31:2,10,12,24 32:2,6,7,9,13,16,20,23,24 33:25 34:6 37:2,13,17,21 38:3,11,14,23 39:3,24 40:3,24 41:1,4 42:16,20,25 43:2 44:16 45:4,11 46:9,16,19 47:1,12,14,20,23 48:14 49:4,14,24 50:1,24 51:5,8,23 52:2,10,20,</p>	<p>21 53:11,19,24 54:9,12,13 55:4,6,8 56:2,12 57:10,12 58:3 59:2,11,19,22,25 60:7,9,13,15,18,21 61:2,16,20 62:1,15,17 63:2,5,25 64:4,18,20 65:25 66:3,7,22 67:5,11 68:3,5,6,8,22 69:15 70:2 71:9,24 72:16 justiciable [1] 3:15</p> <hr/> <p>K</p> <p>KAGAN [15] 46:9,16,19 47:1,12,14,20,23 56:12 57:10,12 58:3 64:18,20 71:9 KAVANAUGH [50] 9:2,5 18:6,16,25 19:5,7,10 25:14,16 27:7,17,19 29:2 31:24 32:2,7 37:2,13,17,21 38:3,11,14,23 39:3 49:24 50:1,24 51:5,8,23 52:2,10 53:11,19,24 61:16,20 62:1,15,17 63:25 64:4 65:25 66:3,7,22 67:5,11 keep [1] 61:6 key [1] 25:6 kind [3] 51:9 62:19 65:18 kinds [1] 57:21 knowing [1] 68:17 knowledge [1] 28:10</p> <hr/> <p>L</p> <p>label [3] 49:7,11 70:4 labeled [1] 45:17 Labor [6] 52:13 67:22 68:9,10,19,23 lack [2] 35:12 63:11 laid [2] 23:19 28:22 LaRue [2] 23:21,22 latter [1] 19:13 Laughter [1] 12:1 law [31] 5:23 10:12 15:22 16:7,15 22:3,4 23:19 24:23 25:8 28:3,13,23 29:22 30:4,18 31:4,9 33:14 35:8 36:12,18 41:9,13 45:25 46:3 48:11 52:23 58:12 61:13 70:24 lawsuits [1] 69:13 layers [1] 27:23 lead [1] 5:15 least [6] 11:16 12:3 14:1 28:17 54:18 56:12 Lee [2] 39:13 53:23 left [1] 23:5 legal [14] 36:4 39:11,22 45:7 48:4,5 49:1 58:10,12 65:14 68:24,25 69:1 70:25 Lehman [1] 19:18 landing [1] 69:8 less [3] 17:4 24:18 34:20 lesson [2] 9:1,8 letter [1] 37:10 level [6] 35:16 45:19 64:12 67:4 72:9,10 life [1] 12:17 light [1] 9:21 likelihood [2] 24:16 38:25 likely [4] 5:20 8:22 25:1 29:3 limit [1] 67:6</p>	<p>limitation [1] 10:13 limitations [1] 21:6 limits [3] 11:8,12 45:1 line [7] 20:7 37:5 50:15,17,18 64:10,11 liquid [2] 52:19 65:24 list [1] 55:17 literally [1] 52:8 litigated [1] 34:22 little [3] 31:21 49:24 50:2 lives [1] 34:20 loan [4] 7:10,10 8:2 29:6 loans [1] 26:14 logic [1] 24:5 logical [1] 66:23 long [4] 8:22 12:22 20:23 51:12 long-term [2] 38:17,25 look [15] 6:24 12:2 16:25 24:14 32:11 39:2 40:14 45:16 47:3 52:7 55:13 62:7 69:2 70:20 71:9 looked [1] 54:25 looking [1] 33:1 Los [1] 1:17 lose [9] 3:14 6:14,16 40:15,18 41:21 69:24,25 71:6 loses [1] 40:10 loss [11] 4:17 12:18,19 33:16,22 35:19 42:1 46:23,23 66:18 72:2 losses [3] 11:4 21:25 22:1 lost [6] 3:20 6:12 7:8 41:18,21,22 lot [8] 10:25 25:5 30:4 40:15,18 52:15,22 69:21 low [1] 27:2 loyal [1] 4:11 loyalty [10] 12:6,7,10 13:1,5 41:7 44:7 54:19,24 60:16</p> <hr/> <p>M</p> <p>made [5] 15:17 18:6 26:8 31:13 63:20 Magruder [2] 26:12 33:12 main [1] 70:17 maintain [1] 23:24 managed [1] 29:15 management [3] 48:9 57:6 58:1 many [10] 11:11 13:15,15 20:6 26:11 27:23 31:18,18 33:12 43:14 March [1] 64:23 market [2] 29:22 65:19 market's [1] 31:20 matter [14] 1:12 20:1 24:10 27:2,5 35:3,4 42:5 49:11 63:6,11,22 66:4,6 matters [2] 19:11 27:13 mean [19] 6:14,17 9:20 10:11 16:23 26:1 28:11 30:15 31:18 47:2,24,25 49:10,14 55:11,14 58:3 62:22 66:24 meaning [3] 25:10 41:5 56:23 meaningful [1] 29:13 means [5] 16:14 27:14 31:13 59:19 67:25 meant [1] 7:20 meet [5] 61:23 62:3 64:7,12 65:14</p>
---	--	---	--

Official - Subject to Final Review

<p>meltdown ^[1] 65:19 members ^[4] 55:11,12,17,21 Mendell ^[1] 43:21 mentioned ^[4] 18:8 22:15 24:11 27:3 menu ^[1] 10:2 mere ^[1] 27:14 merely ^[1] 29:2 merits ^[3] 32:4,17 43:7 mess ^[2] 51:24 52:4 meteor ^[2] 24:16,19 meteorite ^[1] 17:11 might ^[14] 5:20 23:13,15,16,17 24:18,25 27:2,14 29:4 30:14,23 46:4 58:23 million ^[16] 3:14,20 6:12,25 7:3,4,5,15 9:12,12 17:4,19 33:16 40:10 41:22,23 million's ^[1] 9:10 millions ^[1] 41:20 mind ^[1] 61:6 minimal ^[1] 55:14 minimum ^[4] 18:22 25:11 62:13 65:15 minute ^[1] 43:20 minutes ^[1] 69:17 misconduct ^[2] 7:6 69:10 mismanagement ^[1] 48:18 modestly ^[1] 52:18 modesty ^[1] 11:12 Monday ^[1] 1:10 money ^[28] 7:10 13:13 14:15 22:1 28:6 29:4,6,8,9,14 40:6,15,18 41:8,10,19,21,21 43:16 46:8 54:15,16 62:12 65:16 69:11 70:9,11 71:13 monitor ^[1] 22:12 month ^[5] 34:11,13,19 40:11 49:2 moreover ^[1] 47:19 morning ^[1] 3:4 Most ^[2] 10:2 14:8 motion ^[2] 63:10,20 move ^[1] 43:9 moved ^[1] 63:17 much ^[5] 11:17 42:1 50:8 70:24 71:1 multiple ^[1] 6:3 must ^[1] 34:9</p> <hr/> <p style="text-align: center;">N</p> <p>N.A ^[1] 1:6 nature ^[1] 53:3 necessarily ^[1] 33:9 necessary ^[5] 37:23 39:5 50:10 62:5 65:7 need ^[8] 6:25 15:19 19:16 33:8 41:5 44:11 67:13 71:9 needed ^[2] 41:8 53:20 Neither ^[1] 34:10 never ^[10] 8:21 9:16 21:8,9 41:2,3 46:7 66:24 67:1,6 nevertheless ^[5] 14:9 22:24 23:24 25:2 26:21 new ^[4] 45:8,8,9 50:12 next ^[2] 3:4 27:4</p>	<p>nobody ^[1] 33:15 none ^[2] 35:5 58:25 nonetheless ^[1] 11:25 normal ^[2] 16:8 37:9 notes ^[2] 26:14,15 nothing ^[6] 6:15 10:19 31:3,22 55:22 71:15 number ^[1] 71:22 numerous ^[1] 54:14</p> <hr/> <p style="text-align: center;">O</p> <p>obligation ^[3] 28:5 39:11 66:20 obligations ^[8] 39:22 56:14,22 58:5 61:23 62:3 64:7 65:15 obviously ^[2] 51:5 71:7 odd ^[2] 25:23 58:4 Okay ^[12] 10:4 11:7 29:25 31:3,16,22 32:16 37:17 52:2 53:19 55:7 71:17 old ^[1] 51:9 Once ^[2] 29:25 55:12 one ^[30] 4:5 5:13 10:3 12:5 16:3 17:19 19:13 24:25 26:6,11,25 27:13 30:14 32:6,9 33:21,22 34:20 35:1 39:20 41:6 48:22 54:18 58:11 59:6,9 68:13,15 70:12 71:19 ones ^[2] 22:6,8 only ^[21] 3:24 4:9 15:11 18:7 21:13 23:18 26:22 33:5 35:9 39:9,17 40:19 43:11 44:5 48:15,19 49:1 59:4 60:25 67:3 68:15 open ^[1] 52:25 opine ^[1] 38:4 opposite ^[1] 57:4 option ^[1] 10:3 options ^[1] 10:2 oral ^[7] 1:12 2:2,5,9 3:7 21:19 34:3 order ^[3] 28:7 52:1 71:19 organization ^[1] 55:16 other ^[16] 5:13,15 6:15,23 25:25 27:1 30:25 34:21 50:20 55:8 56:15 57:21 66:16 67:22 69:12,13 others ^[2] 8:25 33:12 otherwise ^[1] 44:8 out ^[19] 13:17 17:18 19:11 20:17 22:7 23:19 26:11 28:22 33:14 38:12 40:6 50:13 51:10,10 52:16 65:1 69:9 71:18 72:7 over ^[4] 23:23 36:9 47:9 68:9 overfunded ^[9] 27:4 29:25,25 64:3,10,15,22 65:5,10 overfunding ^[2] 35:21 64:10 own ^[10] 9:15 18:15 22:22 23:8,24 28:19 35:24 43:12 66:17 69:3 owned ^[1] 48:4 ownership ^[2] 56:25 70:23 owns ^[4] 36:4,5 43:17 56:16</p> <hr/> <p style="text-align: center;">P</p> <p>p.m ^[1] 72:18 PAGE ^[3] 2:2 17:1 70:21 pages ^[1] 15:4 paid ^[11] 13:17 16:19 22:7 23:6 28:8 37:16,18,19 51:14 66:14 70:10</p>	<p>PALMORE ^[92] 1:23 2:10 34:2,3,5 37:7,15,20,24 38:4,13,15 39:1,8 40:1,17,25 41:2 42:13,17,24 43:1,6 44:23 45:10,15 46:9,14,18,21 47:8,13,16,21 48:2 49:9,16,25 50:21,25 51:7,19,25 52:3,11 53:5,18,21 54:2,10 55:2,5,7 56:1,4,13 57:2,11,18 58:8 59:16,21,24 60:4,8,11,14,17,20,22 61:3,19,25 62:6,16,22 63:4,15 64:2,8,18,19 65:3 66:2,5,9 67:2,8,12 68:4,21,23 paragraph ^[1] 17:1 part ^[5] 24:2 42:1 43:20,23 66:19 participant ^[8] 35:18,20 37:3,8 51:11 66:24,25 68:16 participants ^[1] 68:18 participants ^[13] 3:23 4:3,9 5:8 15:12 41:15 42:6 47:6 56:19,23,24 58:6 71:3 particular ^[4] 6:5 26:9 31:7 37:5 particularity ^[1] 62:24 particularized ^[1] 53:1 particulars ^[2] 37:22 61:17 parties ^[2] 69:14 70:8 party ^[2] 43:11,12 past ^[1] 40:4 pause ^[1] 38:23 pay ^[2] 64:13 66:20 payment ^[6] 5:4 7:14 34:12,15 43:4 48:20 payments ^[10] 13:21 18:20 34:19,25 40:2,20 48:25 49:22 50:9 68:1 pays ^[1] 5:7 PBGC ^[10] 18:8,10,15,22 27:3,9,21 66:3,5 67:3 pedigree ^[1] 11:17 penny ^[2] 34:20 35:1 pension ^[12] 3:12,18 5:7 6:19 17:14 34:12 35:14 38:17 39:16 40:21 52:12 68:1 pensions ^[1] 55:16 people ^[3] 12:8 40:5 72:1 peppercorn ^[1] 30:22 percent ^[8] 20:15 25:20 39:17 46:1,6,6 58:23,25 perfectly ^[1] 24:13 performance ^[1] 35:19 perhaps ^[1] 47:16 permitted ^[1] 15:12 Perry ^[1] 43:13 person ^[6] 5:22 8:15 11:2 16:20 33:22 40:9 person's ^[1] 8:13 personally ^[1] 43:16 perspective ^[1] 11:22 PETER ^[5] 1:17 2:3,13 3:7 69:18 Petitioner ^[3] 34:10,11,14 Petitioners ^[13] 1:4,18,22 2:4,8,14 3:8 21:21 35:12,22 46:7 59:1 69:19 Petitioners' ^[1] 35:6 pick ^[1] 29:5 picked ^[1] 65:22 piece ^[1] 42:6</p>	<p>place ^[1] 3:23 places ^[1] 62:13 plaintiff ^[7] 9:9 23:23 36:18 43:17 61:1,4 69:5 plaintiffs ^[7] 34:8,23 35:4 39:18 48:25 50:4 52:8 plan ^[90] 4:3,4,21 5:1,8 8:9 9:23,24 10:1,1,20,22 11:6 15:2,3,6,7 16:8,12,19 17:20 18:7,10 23:8,12,13 27:20 28:19 32:3 33:17,18 35:14,20,23 36:2,5,6,6,7,13 37:4,9 38:17,19,21 39:9,12,16 40:21 41:11,14,18,21,24 42:7,7 43:5,8 47:17,19,24,25 48:3,6,8,9,23 51:11 52:17 54:5 56:18 57:6,8,14,25 58:5,10 61:21,21 62:10 64:2,9,12,14 65:4,17 68:15 69:11 70:7 71:4 plan's ^[4] 33:16,19,23 42:4 plans ^[6] 6:19 17:17 23:5 27:4 52:12 64:21 play ^[1] 18:9 plead ^[1] 39:9 pleading ^[3] 39:4,5 50:11 pleadings ^[3] 51:3 62:18 63:14 please ^[3] 3:10 21:23 34:6 pled ^[4] 17:1,5,7 50:13 plenty ^[1] 69:12 plus ^[2] 27:20,20 point ^[15] 9:20 14:2 15:16,19 17:12 18:14 25:7 26:1 28:25 33:14 39:5 45:6 46:25 61:2 70:18 points ^[2] 69:21 71:18 police ^[1] 22:12 policy ^[1] 45:13 policy-maker ^[1] 20:3 pool ^[1] 5:6 poor ^[1] 35:19 position ^[6] 4:2 6:16 7:18 11:13 22:11 71:23 positions ^[1] 23:18 possibility ^[2] 4:16 8:23 possible ^[1] 68:15 post-Spokeo ^[1] 39:15 posture ^[2] 21:1 24:11 potentially ^[1] 72:9 powers ^[1] 33:3 practical ^[8] 16:18 18:11,24 20:1 24:10 27:5 28:16 71:19 practicalities ^[1] 16:10 practically ^[1] 19:12 precise ^[1] 20:10 precisely ^[3] 20:4,6 28:21 predictive ^[1] 50:4 preface ^[1] 38:1 premium ^[1] 18:20 premiums ^[2] 66:14,20 present ^[4] 8:24 13:24 14:7,10 presents ^[2] 3:14 50:11 presume ^[1] 59:20 presumed ^[5] 59:17,18 60:6,19 61:8 presumption ^[3] 44:9,12 60:11 pretty ^[3] 12:8 29:7 55:14 prevent ^[2] 8:25 30:9</p>
---	---	---	--

Official - Subject to Final Review

<p>prevents ^[6] 30:5,8,9,15 31:17 50:11</p> <p>principal ^[3] 12:21 48:16 60:25</p> <p>principle ^[1] 33:14</p> <p>principles ^[1] 37:10</p> <p>prior ^[1] 21:7</p> <p>private ^[4] 5:2 44:20 70:8,8</p> <p>probably ^[3] 11:14 25:1 30:3</p> <p>problem ^[3] 35:7 43:22 54:11</p> <p>procedural ^[1] 21:1</p> <p>proceeding ^[2] 17:9 64:5</p> <p>process ^[1] 62:19</p> <p>program ^[1] 69:8</p> <p>progress ^[1] 7:14</p> <p>prohibit ^[1] 15:15</p> <p>prohibited ^[1] 44:8</p> <p>prolong ^[1] 53:12</p> <p>promise ^[3] 5:3 13:21 70:10</p> <p>promised ^[3] 25:20 37:16 53:16</p> <p>proper ^[2] 10:24 51:3</p> <p>properly ^[2] 32:7 62:25</p> <p>property ^[36] 3:19,20 5:1,4 6:7 7:12,21,22,23 8:16,24 9:15,18 11:15 13:6 14:14 15:23 18:3 19:22 35:12 36:2 42:10,14,19 44:20 45:17 46:14,22 47:10 49:7,13,15 69:24 70:4,25 71:14</p> <p>propose ^[1] 23:3</p> <p>proposition ^[2] 36:21,23</p> <p>prospective ^[1] 6:11</p> <p>protect ^[2] 30:20 71:12</p> <p>protected ^[4] 8:1 48:19 56:10 61:4</p> <p>protecting ^[1] 70:24</p> <p>protection ^[1] 28:18</p> <p>protections ^[1] 28:20</p> <p>protective ^[1] 28:24</p> <p>protects ^[1] 31:3</p> <p>proved ^[1] 61:7</p> <p>provide ^[1] 45:2</p> <p>provided ^[1] 11:9</p> <p>prudence ^[5] 12:6,14 13:2,7 31:13</p> <p>public ^[1] 52:14</p> <p>publicly ^[1] 62:7</p> <p>publicly-traded ^[1] 52:15</p> <p>purely ^[1] 5:21</p> <p>purpose ^[1] 71:11</p> <p>push ^[1] 28:3</p> <p>put ^[10] 9:15,20 16:9 19:20 37:17 50:22 62:1,11 70:4,11</p> <p>puts ^[1] 49:7</p> <p>putting ^[1] 71:13</p>	<p>quick ^[1] 12:3</p> <p>quickly ^[3] 17:18 68:5,8</p> <p>quite ^[4] 30:3 49:5 57:7 61:13</p> <p>quote ^[1] 4:2</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>ran ^[2] 56:14,22</p> <p>rather ^[4] 9:23 10:1 50:18 58:5</p> <p>reached ^[1] 21:9</p> <p>read ^[2] 22:18 57:2</p> <p>ready ^[1] 68:1</p> <p>real ^[4] 21:25 47:13 70:8,9</p> <p>really ^[7] 12:15 19:10 22:5 26:4 39:6 53:6 56:16</p> <p>reason ^[6] 21:13 42:24 67:20 71:16,20,21</p> <p>reasonable ^[1] 24:13</p> <p>reasons ^[6] 3:16 35:25 42:15,17 45:13 65:8</p> <p>reassessed ^[1] 17:8</p> <p>REBUTTAL ^[2] 2:12 69:18</p> <p>receive ^[9] 8:22 14:17 34:12,15,24 50:9 53:16 57:23 58:23</p> <p>received ^[1] 34:16</p> <p>recognize ^[3] 7:16 33:13 70:22</p> <p>recognized ^[1] 22:9</p> <p>recover ^[2] 26:24 43:16</p> <p>recovered ^[1] 69:11</p> <p>reduces ^[1] 7:4</p> <p>referring ^[1] 51:9</p> <p>regarded ^[1] 5:23</p> <p>regardless ^[1] 46:10</p> <p>regulated ^[1] 58:11</p> <p>regulatory ^[1] 50:6</p> <p>reinvestments ^[1] 26:19</p> <p>reiterated ^[3] 25:7,8 57:24</p> <p>rejected ^[1] 43:7</p> <p>relationships ^[1] 58:13</p> <p>relator ^[1] 43:15</p> <p>relevant ^[2] 44:2 64:14</p> <p>relief ^[1] 34:24</p> <p>remain ^[1] 58:17</p> <p>remainderman ^[9] 12:20 13:9,11 14:15,23 48:12,15 49:23 60:24</p> <p>remainderman's ^[1] 13:16</p> <p>remarks ^[1] 38:1</p> <p>remedy ^[3] 44:3 54:10 61:12</p> <p>remember ^[2] 11:24 42:20</p> <p>remote ^[1] 14:8</p> <p>remoteness ^[2] 10:13,19</p> <p>removed ^[1] 40:23</p> <p>repay ^[1] 29:8</p> <p>repayment ^[1] 29:9</p> <p>Reporter ^[1] 14:3</p> <p>reports ^[1] 52:12</p> <p>representational ^[4] 4:20 35:23 42:11 43:10</p> <p>representative ^[1] 15:5</p> <p>representing ^[1] 42:7</p> <p>require ^[1] 51:3</p> <p>required ^[2] 38:6 51:25</p> <p>requirement ^[1] 33:4</p> <p>requirements ^[1] 62:13</p> <p>requires ^[1] 51:1</p>	<p>rescind ^[1] 69:6</p> <p>rescinded ^[1] 44:10</p> <p>research ^[1] 12:3</p> <p>resolve ^[1] 25:21</p> <p>resources ^[1] 68:20</p> <p>respect ^[3] 12:7 43:23 57:25</p> <p>respectfully ^[1] 55:2</p> <p>Respondents ^[7] 1:7,24 2:11 3:22 4:5,12 34:4</p> <p>responses ^[1] 13:3</p> <p>rest ^[2] 34:20 68:4</p> <p>restatement ^[2] 36:22 61:10</p> <p>restoration ^[1] 11:4</p> <p>result ^[4] 23:9 29:10,11 40:19</p> <p>retirement ^[3] 4:12 34:13,16</p> <p>retrospective ^[1] 5:21</p> <p>reverse ^[2] 34:22 72:15</p> <p>reversed ^[1] 21:15</p> <p>rid ^[1] 20:23</p> <p>Rights ^[1] 17:14</p> <p>Rings ^[1] 56:5</p> <p>rise ^[1] 4:17</p> <p>risk ^[24] 6:19 12:18 17:3,10,11 19:25 27:2 35:19 37:11 38:5,9,10 39:9 48:23 50:5,8,14 51:13 53:9,15 63:23 67:18 72:9,10</p> <p>road ^[1] 63:4</p> <p>ROBERTS ^[2] 3:3 5:11 6:13,22 7:19 8:5,12 9:3,7 17:22,24 21:3,16 32:24 33:25 39:24 40:3 52:21 68:22 69:15 72:16</p> <p>rock ^[1] 3:22</p> <p>role ^[3] 27:8,10 33:2</p> <p>roller ^[2] 31:17,21</p> <p>room ^[1] 72:13</p> <p>rule ^[12] 4:15 5:24 13:24 22:5,14,17 43:24 44:4 59:4,17 61:9 72:6</p> <p>rules ^[2] 32:12,14</p> <p>run ^[5] 47:18 48:8,9 57:8,22</p> <p>running ^[2] 40:9,10</p> <p>runs ^[2] 58:1,5</p> <p>Russell ^[6] 22:9 28:23 48:7 57:3,10,20</p>	<p>secure ^[5] 7:21,23 9:10 64:25 65:2</p> <p>secured ^[3] 5:4 7:12 13:21</p> <p>securities ^[1] 69:8</p> <p>security ^[5] 7:11,16 8:1,9 70:12</p> <p>see ^[7] 14:22 20:3 25:17,22 29:22 32:23 61:2</p> <p>seek ^[1] 42:23</p> <p>seeking ^[2] 6:4 42:21</p> <p>seem ^[2] 7:25 55:1</p> <p>seems ^[3] 12:15 39:4 54:19</p> <p>seen ^[3] 14:6 15:6 54:13</p> <p>self-deal ^[1] 41:10</p> <p>self-dealing ^[4] 4:13 41:9,15,17</p> <p>sense ^[3] 16:8 22:5 36:13</p> <p>sensible ^[1] 20:3</p> <p>separate ^[7] 15:10 19:10 37:6 44:1,13 61:6 64:5</p> <p>separation ^[1] 33:2</p> <p>series ^[1] 58:13</p> <p>seriously ^[2] 16:24 62:9</p> <p>services ^[1] 5:2</p> <p>set ^[6] 14:14 18:22 31:8 50:12 59:25 68:17</p> <p>settled ^[1] 13:25</p> <p>settlor ^[1] 28:5</p> <p>shall ^[1] 15:9</p> <p>share ^[1] 43:18</p> <p>she's ^[1] 8:21</p> <p>Sherry ^[1] 34:14</p> <p>shoes ^[1] 33:23</p> <p>shot ^[2] 58:24,25</p> <p>shouldn't ^[4] 5:25 12:12 55:24 72:11</p> <p>show ^[14] 8:21 33:8 37:11,14,14,15,22 38:18,20 40:17 49:20 52:1 54:20 62:8</p> <p>showed ^[1] 52:17</p> <p>shows ^[1] 12:8</p> <p>side ^[7] 6:15 50:20,23 66:11,16 72:5,6</p> <p>Sierra ^[1] 55:10</p> <p>significance ^[1] 33:1</p> <p>significant ^[1] 40:12</p> <p>significantly ^[2] 51:20 53:13</p> <p>simple ^[4] 38:8 41:6,6 56:5</p> <p>simply ^[2] 38:21 56:8</p> <p>Since ^[10] 4:21 8:19 13:14,25 15:22 20:8 28:4 34:13,16 70:19</p> <p>single ^[2] 23:10 34:24</p> <p>situation ^[6] 5:16,18 28:12 36:24,25 37:3</p> <p>situations ^[3] 6:23 40:4 72:13</p> <p>slightly ^[1] 60:5</p> <p>small ^[1] 25:24</p> <p>Smith ^[1] 34:14</p> <p>solely ^[1] 63:13</p> <p>Solicitor ^[1] 1:19</p> <p>solution ^[1] 72:14</p> <p>solve ^[1] 35:6</p> <p>solvency ^[1] 18:15</p> <p>somebody ^[3] 5:19 23:7,12</p> <p>somehow ^[2] 45:19 66:17</p> <p>someone ^[7] 4:8,9 10:16 27:15 33:19 61:14 68:11</p>
<p style="text-align: center;">Q</p> <hr/> <p>quantitatively ^[1] 55:10</p> <p>question ^[3] 6:3 16:3,22 18:12,24 21:9 25:19 26:16,17 27:2 29:2 31:6 43:10,24 44:5,13,25 51:15 54:14 56:16 58:17 59:3 61:10,12 63:1,5,8 69:22 70:3,14,17</p> <p>questions ^[4] 44:1 45:24 61:6 71:8</p> <p>qui ^[2] 11:17 43:15</p> <p>quibble ^[1] 47:9</p>	<p style="text-align: center;">S</p> <hr/> <p>safe ^[1] 12:22</p> <p>same ^[6] 6:16 9:14 34:15,19,25 60:10</p> <p>satisfied ^[1] 49:6</p> <p>satisfy ^[1] 52:24</p> <p>save ^[1] 26:19</p> <p>savings ^[1] 4:12</p> <p>saw ^[1] 9:16</p> <p>saying ^[1] 19:14 24:20 30:13 31:21,25 32:3 36:1 38:1 51:10 60:9 69:25</p> <p>says ^[13] 6:15 13:9 15:5,7,10 16:12 20:23 53:14 57:15 64:11 70:21 71:2,11</p> <p>Second ^[10] 4:10 13:5 35:12 36:22 40:11 61:9,11 62:2 65:11 71:19</p> <p>Secondly ^[1] 41:18</p> <p>seconds ^[1] 29:21</p> <p>section ^[2] 36:21,22</p>		

Official - Subject to Final Review

<p>sometimes ^[2] 31:20 59:19 SOPAN ^[3] 1:19 2:6 21:19 sorry ^[8] 9:25 17:24 25:17 27:8 32:2 41:4 50:2 53:11 sorts ^[1] 53:2 SOTOMAYOR ^[8] 40:24 41:1,4 42:16,20,25 43:2 68:6 sources ^[1] 13:15 speculation ^[1] 65:18 spend ^[1] 29:21 spends ^[1] 71:1 Spokeo ^[2] 25:7 44:25 stage ^[2] 62:18 65:13 stages ^[1] 17:9 stake ^[2] 56:25 57:13 stand ^[1] 13:23 standard ^[4] 52:22,23 53:8,9 standing ^[4] 4:20 10:18 11:9 19:11,23 20:2 21:10,12 25:23 26:10,23,23 27:15 30:14,19,22 33:18 35:5 37:4,9 42:12 43:10 44:22 45:22 46:2,13 48:17 49:18,22,25 54:15 56:7 62:25 65:6,11 67:19,21 71:24,25 72:4,12 standpoint ^[1] 11:14 stands ^[1] 67:25 start ^[1] 15:3 started ^[1] 36:1 state ^[1] 65:9 stated ^[4] 35:25 42:15,18 63:9 statements ^[1] 71:10 STATES ^[8] 1:1,14,21 2:7 3:5 18:17 21:20 71:21 statute ^[4] 11:10 21:6 44:17 55:17 statutorily ^[1] 56:10 statutory ^[1] 35:5 step ^[4] 9:17 28:5 33:23 65:11 stewardship ^[1] 4:11 still ^[7] 7:13 8:10,14 10:8 26:10 37:18 42:11 48:11 58:17 stock ^[2] 29:22 31:20 stocks ^[1] 15:8 stop ^[1] 27:11 stream ^[4] 40:20 48:25 49:21 65:17 STRIS ^[44] 1:17 2:3,13 3:6,7,9 6:2,17 7:7 8:4,11,14 9:6,14 10:6,9,14,17 11:11 13:3,10,20 14:16,20,24 15:1 16:21 17:6,12,23 18:1,13,18 19:2,6,8 20:13,19,24 21:4 36:1 69:17,18,20 strong ^[2] 16:2 25:19 structure ^[3] 36:3 43:8 48:3 structured ^[1] 54:4 struggling ^[1] 51:21 subject ^[2] 63:6,11 submission ^[1] 15:21 submitted ^[2] 72:17,19 subsequent ^[1] 57:19 substance ^[1] 45:16 substantial ^[3] 17:2 38:10 53:9 substantially ^[1] 53:15 substantively ^[2] 49:12,15 sudden ^[1] 65:1</p>	<p>sue ^[60] 4:15,22 7:5,13 8:10,14 10:8,16 11:4 12:10,17,19,20,23,25 13:9 16:5 22:2,16,19,25 23:11 24:7,21,23,25 25:3 26:10,23 27:15,25 30:23 33:18,20,23 35:9,11,22 36:9,20 41:16,17 43:11 44:3 48:12,17,17 55:11,18,22 58:19 60:24 61:5,12 66:25 67:1,7 68:11,18 72:1 suffered ^[4] 3:21 4:13 30:21 55:24 suffice ^[1] 44:21 sufficient ^[4] 61:18 62:24 65:5 67:15 sufficiently ^[1] 51:13 suggest ^[3] 11:2 49:10,11 suggested ^[1] 27:13 suggesting ^[3] 7:25,25 24:20 suggests ^[2] 12:4 56:13 suing ^[2] 23:23 69:5 suit ^[4] 3:14 23:25 40:16,22 suits ^[3] 11:17,19 31:18 summarizing ^[1] 50:16 supporting ^[3] 1:22 2:8 21:21 suppose ^[1] 7:20 supposed ^[1] 58:7 SUPREME ^[3] 1:1,13 48:14 surplus ^[5] 15:16,20 19:16 42:22 43:4 surprised ^[1] 40:5 surprisingly ^[1] 11:24 surveilled ^[1] 52:11 sweep ^[1] 70:16 swings ^[1] 17:16</p> <hr/> <p style="text-align: center;">T</p> <p>table ^[1] 20:16 talked ^[3] 38:9 45:23 53:10 tam ^[2] 11:17 43:15 tangible ^[1] 9:9 tax ^[3] 15:13,14 19:20 tells ^[2] 19:18 27:3 tension ^[2] 25:17,22 terminology ^[1] 47:9 terms ^[6] 9:13 11:15 26:17 38:12,16 40:13 Terry ^[3] 48:12 49:23 61:1 text ^[2] 22:4 25:10 themselves ^[2] 41:16 43:3 theory ^[13] 5:12,17 6:9 24:3 61:17 65:22,25 66:23 67:7,9,11,12,13 There's ^[3] 6:18 7:3,8 19:9,24,24 23:6 25:5 26:5 31:12 38:5 43:22 44:13 48:1 50:5 52:5,5,14,15,21,22 53:3 55:22 60:21 64:13 65:16 71:15,21 72:2,8,14 therefore ^[7] 44:9 51:17,18 53:14,15 60:2 67:18 they've ^[5] 27:18 38:5 40:25 41:2 62:24 third ^[3] 4:19 35:22 40:12 THOLE ^[3] 1:3 3:5 34:11 though ^[6] 9:16 23:7 31:19 50:2 55:22 56:13 three ^[3] 3:15 69:17,20 throughout ^[1] 72:10</p>	<p>throw ^[1] 23:7 Tibble ^[2] 21:7,15 tied ^[2] 45:19 59:8 time-barred ^[1] 20:17 title ^[4] 4:8 36:5 48:4,5 today ^[2] 33:10 71:2 toe ^[1] 9:15 toggleing ^[1] 65:9 tomorrow ^[1] 38:19 ton ^[1] 52:5 tools ^[1] 69:12 torts ^[1] 36:22 totally ^[1] 16:22 traditional ^[1] 22:14 transaction ^[3] 44:6,10 69:6 transactions ^[1] 68:14 treated ^[1] 70:24 treatises ^[1] 22:18 tried ^[2] 49:17 55:15 trouble ^[1] 42:9 true ^[3] 10:22 33:16 54:23 trust ^[115] 3:12,14,18,25,25 4:7,24 5:4,7,23 6:10,11 7:8 8:20,22 9:11 10:25 12:9,21 13:13,22 15:9,11,15,22 16:7,8,15 18:4 19:21,23 21:25 22:2,3,7,10,13,20,21,24 23:19 24:1,1,2,22 26:8,14,15,18 28:3,4,5,6,12,23 29:11,14 31:8,11 33:14 35:8,13,17 36:10,12,14,18,20 40:9 41:9,13,14 44:6,9,13,15 45:20 46:2,4,18,19,23 47:7 48:16,18 49:17,21 54:20 57:15 58:1,11,12,24 59:1,5,5,9,12,13,15,18,20 60:1,6,14,20,22,23 61:13,13 69:4,4 70:11,15 71:13 trust's ^[1] 4:7 trustee ^[24] 4:22 7:6 12:10 21:24 22:2,12,16,19,22,25 23:5 24:17,24,25 26:13 27:24 36:4 44:21 48:4,5 54:22 68:12,13 69:5 trustee's ^[1] 33:21 trustees ^[5] 3:12 31:15 41:15 42:2 69:2 trusts ^[2] 10:12 20:7 truthful ^[1] 57:23 trying ^[4] 38:12 49:11 50:12,18 tulips ^[1] 9:17 turned ^[1] 40:6 turns ^[1] 65:1 two ^[12] 19:2,8,9 26:6 37:1 41:6 44:1 45:25 54:18 58:22 61:6 69:21 Twombly ^[2] 51:2 63:7 types ^[1] 20:6 typical ^[1] 54:20</p> <hr/> <p style="text-align: center;">U</p> <p>U.S. ^[8] 1:6 34:14 35:18,19 48:21 52:18 67:14 69:9 ultimate ^[2] 66:12,21 unable ^[6] 39:21 54:8 61:23 62:3,11,12 unbroken ^[1] 20:7 unconnected ^[2] 35:16 36:19 Under ^[22] 4:14 5:1,22,24 9:9 23:25 33:10 36:2,3 52:24 54:25 56:5 59:17 61:8 63:6,17,18,20 65:20,20,25 67:6 underfunded ^[16] 17:21 27:5 29:24 38:21 39:4 41:24 51:17,20 52:18 53:13 54:2 61:22 62:9 64:22,23 65:10 underfunding ^[1] 54:7 underlying ^[1] 35:13 understand ^[6] 30:17 38:3 43:25 45:6 46:11 49:5 understood ^[1] 7:20 undifferentiated ^[1] 23:20 undisputed ^[1] 34:18 undivided ^[3] 4:1 5:6 10:23 unharmd ^[1] 35:10 uninjured ^[2] 69:14,25 UNITED ^[8] 1:1,13,21 2:7 3:5 18:17 21:20 71:21 unless ^[3] 4:7 35:24 65:11 unsegregated ^[3] 3:25 5:6 10:21 until ^[3] 6:20 19:16 41:23 unwilling ^[4] 4:22 54:7 61:23 62:2 unworkable ^[1] 72:11 up ^[17] 12:2 16:3 17:15 29:5,22,24 30:6 36:16,16 39:11,22 51:18 54:5 67:3 68:17 70:9 71:2 ups ^[1] 36:10 upset ^[1] 9:17</p> <hr/> <p style="text-align: center;">V</p> <p>value ^[7] 6:9 35:17 36:10,19 45:19 49:17 59:8 varied ^[1] 10:2 vehicle ^[1] 41:8 verity ^[1] 57:24 Verizon ^[3] 39:14,16,20 Vermont ^[1] 11:18 versus ^[8] 3:5 14:3 39:14 43:13,21 48:13 49:23 61:1 view ^[2] 44:22 47:2 viewed ^[1] 35:4 vindicate ^[1] 4:20 violation ^[1] 45:3</p> <hr/> <p style="text-align: center;">W</p> <p>wages ^[2] 5:3 70:10 wanted ^[1] 28:18 Washington ^[3] 1:9,20,23 wasting ^[1] 15:15 way ^[6] 9:14,18 10:12 15:22 18:21 54:3 weight ^[1] 32:25 Westminster ^[1] 25:12 whatever ^[6] 11:9 33:8 41:19,22 45:12,12 whenever ^[2] 49:6 54:14 Whereupon ^[1] 72:18 whether ^[9] 19:15 35:4 41:12,20 42:5,10 46:10 63:8 64:6 Whiteacre ^[2] 11:1,5 who's ^[1] 33:22 whole ^[6] 42:2,3 45:20 50:12 51:24 52:4</p>
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Official - Subject to Final Review

whom ^[1] 58:23
will ^[16] 7:1 13:18 21:15 22:23 26:
 10 27:23 34:12,15,19 40:19 43:15,
 19,19 46:7 65:19 72:7
win ^[1] 6:16
without ^[1] 15:24
wonder ^[1] 31:16
word ^[1] 16:9
wording ^[1] 60:5
words ^[4] 5:13 25:9,11 56:15
work ^[1] 70:1
worked ^[2] 15:23 20:7
worker ^[1] 70:9
Workers ^[1] 5:3
works ^[1] 33:10
worry ^[1] 5:25
worth ^[3] 50:16,17,25
wrongfully ^[1] 8:8

Y

year ^[2] 17:19 27:4
years ^[2] 22:3 25:8
Yellowstone ^[1] 55:13
yesterday ^[1] 30:8

Z

zero ^[3] 46:6,10 58:25