IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD F. MARACICH, ET AL., :

Petitioners : No. 12-25

v. :

MICHAEL EUGENE SPEARS, ET AL. :

- x

Washington, D.C.

Wednesday, January 9, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:16 a.m.

APPEARANCES:

JOSEPH R. GUERRA, ESQ., Washington, D.C.; on behalf of Petitioners.

PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of Respondents.

C O N T E N T S

ORAL ARGUMENT OF	PAGE
JOSEPH R. GUERRA, ESQ.	
On behalf of the Petitioners	3
ORAL ARGUMENT OF	
PAUL D. CLEMENT, ESQ.	
On behalf of the Respondents	27
REBUTTAL ARGUMENT OF	
JOSEPH R. GUERRA, ESQ.	
On behalf of the Petitioners	59

P R O C E E D I N G S

(11:16 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 12-25, Maracich v. Spears.

Mr. Guerra?

ORAL ARGUMENT OF JOSEPH R. GUERRA

ON BEHALF OF THE PETITIONERS

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

The DPPA requires express consent when personal information in the DMV databases is used for bulk solicitation. The express consent requirement is Congress's considered response to one of the core problems that the DPPA targets, and the litigation exception creates no exception for lawyers.

In fact, when Congress intended to create an explicit exception --

JUSTICE SOTOMAYOR: Does it create an exception for research? Let's assume that a university wanted to do a research project, and it needs subjects. I get solicited for it all the time.

Does this exception apply to them, too?

MR. GUERRA: Our view, Your Honor, as we indicated in our reply brief, is it would not because we believe (b)(12)'s consent requirement governs commercial

bulk use of DMV information, which is clear from the fact that it's focusing on marketing and solicitation and also from the history behind the statute, which is very much aimed at use of DMV information --

JUSTICE SOTOMAYOR: It says, "surveys," not just marketing or solicitations.

MR. GUERRA: Yes, it does, Justice Sotomayor.

JUSTICE SOTOMAYOR: I mean, there is a commercial component, but there appears to be a noncommercial component as well.

MR. GUERRA: We -- we think, Justice Sotomayor, that this statute is sensibly construed to -- under the noscitur a sociis principle that we are relying on elsewhere in our argument with respect to (b)(4). That that same principle applies to the three things that -- that the bulk solicitation -- the bulk use provision governs and, particularly, when you look at the history underlying the statute which was very much aimed at use of the information for direct marketing.

And so -- as I was saying, Congress made clear --

JUSTICE SOTOMAYOR: Does that apply to the States, too, when they want to market against drunk

driving, they want to market against -- for their health insurance processes versus private processes for State drug provided --

MR. GUERRA: Justice Sotomayor, I believe what your first question sounded -- your first example sounded like it was a noncommercial use. I think that in the -- in the case where the State is acting as a commercial entity, the same rules we would -- we would apply with respect to lawyer solicitation would apply there.

And the reason I say that -- and the reason I think it's so clear that Congress intended that really lies in the language of Subsection (b)(2) because, there, Congress made clear that it understood that these provisions are not wholly independent permissions and, in fact, that the consent requirement governs all commercial bulk use, absent an explicit exception.

And, if you take a look, it's in the second page of the addendum to our opening brief. And it says that, "Personal information may be used in connection with matters of motor vehicle market research activity, including survey research."

Congress included the survey research clause because a commercial bulk survey using personal information would otherwise be governed by (b)(12)'s

consent requirement, and so Congress had to make clear that it was creating an exception for one industry to engage in this one particular type of bulk use.

And the reason we know that the survey research clause means that is because, under Respondent's interpretation, it has no affect whatsoever. If -- if, as they say, each of these clauses is wholly independent and sufficient to authorize whatever it covers, a phrase covering "in connection with matters of motor vehicle market research activities" would, in and of itself, cover the subset of motor vehicle market research survey research.

So to give that clause any effect, you must understand that it's overriding the express consent requirement of (b)(12) and -- such that you now have to, when you look at the other provisions that might authorize bulk commercial use, find a comparably explicit authorization, and you can't find that in (b)(4). (B)(4) says nothing about solicitation, much less bulk solicitation. And --

JUSTICE GINSBURG: It says, "anticipation of litigation in connection" --

MR. GUERRA: Yes.

JUSTICE GINSBURG: Not only ongoing litigation, but it can be used in connection with

anticipation of litigation.

MR. GUERRA: Yes, Justice Ginsburg. But my point is that, in (b)(2), you find an explicit authorization for survey research, which is one of the very three topics covered in (b)(12) itself. When you look at (b)(4), you don't see anything about solicitation, which is the kind of explicit override that (b)(2) indicates Congress wanted or -- or is necessary in order to conclude that another subsection overrides (b)(12)'s express consent requirement.

JUSTICE KAGAN: Mr. -- Mr. Guerra, I have to admit that, given what a mess this statute is, those three words don't quite do it for me. So, I mean, the -- the argument against you, right, is -- as to using (b)(12) to define (b)(4), is that, look, this is just a list of exceptions to a general prohibition, and no one is more general or specific than any other, and all you have to do is fit within one of them. And it doesn't matter whether you don't fit within two of them, if you don't fit within one of them.

So then the question would be: Are you covered by (b)(4) or not? If not, are you covered by (b)(12) or not?

MR. GUERRA: Well, Justice Kagan, with respect, number one, I don't think you can so readily

dismiss the -- the interpretive import of those three words because they don't have any function other than to override the express consent requirement in (b)(12). And, if there is no need -- if (b)(12) doesn't apply to any other subsection, there is no need to be overriding it in (b)(2).

But we don't rely solely on that -- the force of those three words. It's also the case that (b)(2) -- excuse me, (b)(12) is one of the core provisions of the statute, in the sense that it's aimed at one of the fundamental problems that prompted passage of the Act in the first place, which was DMVs collecting information, then making it available to direct marketers.

And so you are in a situation where you've got a core restriction aimed at a core problem this Statute is designed to -- to resolve, but -- whereas (b)(4) is one of the few subsections that authorize access to the most sensitive information that Congress -- excuse me, that DMVs were -- were collecting.

CHIEF JUSTICE ROBERTS: It's kind of hard to argue, when you have (b)s (1) through (14), that (b)(12) is the core provision. Usually, it's -- it's 1 of 14 items in a list.

MR. GUERRA: Mr. Chief Justice, what I mean

by that is that we know it's -- it's core in the sense that it's aimed at one of the core problems that Congress was addressing. And (b)(4), by contrast, is one of the few provisions in which Congress authorized access to the most sensitive information DMVs collect, such as medical and disability status and Social Security numbers.

And we submit it's simply implausible to think that a Congress concerned with undue public/private access to DMV information would, in the same statute, grant lawyers the right -- a unique right, to use that highly sensitive information in order to engage in bulk solicitation.

And, in fact, the legislative record here is devoid of any evidence that Congress was aware that lawyers ever made use of DMV information for solicitation, much less that -- or that they contemplated it, much less that Congress made a conscious decision to allow them to --

JUSTICE GINSBURG: Do you recognize that you could use (b)(4) to identify class members?

MR. GUERRA: We do, Your Honor. And -- and that's -- that is because that is not a solicitation. That class notice is advising people who are not aware that there is pending litigation that could affect their

rights.

JUSTICE GINSBURG: So -- so if it's -- if it's a solicitation, suppose this information was a -- the recent automobile purchaser was asked: Did you buy a car recently? Were you charged this additional fee? Period. That would be okay?

MR. GUERRA: Your Honor, yes. It would be okay -- well, let me just say if -- if the person --

JUSTICE GINSBURG: That would come under (b)(4)?

MR. GUERRA: Justice Ginsburg, if I may just qualify my answer, yes, if you were investigating claims on behalf of a potential client. I don't think -- I don't think people can just go down to the DMV and answer questions of personal interests to themselves -- or lawyers, for that matter. But that is an instance in which you are simply engaging in investigation, assuming that you are investigating a possible lawsuit, and not a circumstance in which you are engaging in solicitation. And that is a fundamental difference.

JUSTICE KENNEDY: Well, aren't we going to be told the whole essence of the class action is you have to see if there is an injury that goes beyond some particular clients that you know. And isn't this -- isn't this investigation in anticipation?

MR. GUERRA: Your Honor -- Justice Kennedy, if they had limited their activities to conducting an investigation, to determine the scope of a potential claim, we would have no quarrel with that.

JUSTICE KENNEDY: Well, the anticipation is, are -- are you willing to join the class?

MR. GUERRA: But that --

JUSTICE KENNEDY: Isn't that critical?

MR. GUERRA: No -- no, Justice Kennedy, I don't think so. And I think the point of (b)(4) is it's focused on proceedings, not on lawyers. And it's asking -- its basic goal is to ensure that tribunals can do their job.

JUSTICE KENNEDY: Well, I do think you are helped somewhat by the -- the chronological progression here, is it including the service of process, which means the case has already started, and then investigation in anticipation of the litigation that follows the service of process.

So it -- it is true that there is a chronological aspect. In order, it seems to me, for the Respondents to prevail, they have to say that investigation in anticipation of litigation also precedes service of process.

MR. GUERRA: They would, and I think they do

make that argument, Justice Kennedy. My point is that the focus of (b)(4) is on the tribunals, in ensuring that they have -- they can have the information, that they can do their job, which is to make and enforce judgments. Lawyers get information under (b)(4) when they act as officers of these tribunals, not for their own commercial benefit. When --

JUSTICE KAGAN: Mr. Guerra, where do you get that from, in (b)(4), this focus on tribunals, rather than lawyers? Because -- you know, the -- the investigation is done by lawyers, right? And that's a critical part of (b)(4), so where -- where does that come from in the statute?

MR. GUERRA: It comes from the phrase "for use in connection with any civil, criminal, administrative or arbitral proceeding in any Federal, State, or local court or agency." And --

JUSTICE KAGAN: But then it includes things that are clearly done by lawyers.

MR. GUERRA: Right. My point is that lawyers get access when they act as officers of those tribunals, not for their own commercial self-interests. And an investigation in anticipation of litigation is an obligation that all lawyers have, to ensure that they have a well-founded factual basis for bringing a lawsuit

in the first instance.

JUSTICE KENNEDY: Well, are -- are you saying that the study must be either a solicitation or an investigation? It can't be both? Why can't it be both?

MR. GUERRA: Because, Justice Kennedy, the DM -- the DPPA is designed to -- it was aiming at a fundamental problem of private individuals obtaining DMV information for commercial solicitation purposes. And Congress, we know, wanted to stop that in the absence of consent. So -- by the same token, they wanted to make sure that they weren't intruding on the information that courts and other tribunals need to do their jobs.

And so the -- the distinction is you can engage in an investigation because that's acting as an officer of the court, in order to help the court ultimately render its judgment.

JUSTICE GINSBURG: That's why -- would you -- I want to make sure I understood your prior answer. You said, I thought, that it would have been okay to get the information from the bureau and then ask, did you buy a car recently? Did you have this additional charge? Now, suppose -- you said that was all right?

MR. GUERRA: That -- Justice Ginsburg, I

apologize if I am not making myself clear enough. The vital distinction is between investigative activity to ensure that you have a well-founded basis to file a lawsuit, versus solicitation --

JUSTICE GINSBURG: Well, isn't that -- wasn't that crystal-clear here? Because the dealers were saying, you can't go forward unless you have a plaintiff to match every dealer. You're trying to bring a representative action, but your list of plaintiffs, none of them bought from Dealer Z. So we are investigating to see if we can have a representative action with a line-up of plaintiffs, each of whom has purchased from a list of defendants.

MR. GUERRA: Justice Ginsburg, determining that there are -- there are enough plaintiffs to justify a class or group action is the -- the investigative activity, but, when you go on to invite them -- and the Fourth Circuit ruled that these letters were solicitations, and that ruling is not before this Court at this point --

JUSTICE GINSBURG: Well, suppose we had -- what -- it was limited to did you buy the car, did you pay the fee? And then somebody who --

MR. GUERRA: Justice Ginsburg -- I'm sorry to interrupt, but something distracted my -- I couldn't

hear the beginning of your question.

JUSTICE GINSBURG: We -- we have just those questions, no -- are you interested in joining a lawsuit, please call us. But somebody who receives this notice, it just asks, did you buy a car, did you pay the charge, then calls the lawyer's office and says, tell me something about this letter that you told me -- that you -- you sent to me.

And how does the lawyer answer?

MR. GUERRA: If the lawyer answers by asking investigative questions, when did you buy the car, were you charged these fees, were -- were you advised, were they prominently displayed, all of which is in gathering information for the lawsuit, then the lawyer is engaging in permissible investigative prefiling activity --

JUSTICE SOTOMAYOR: If the lawyer had said more -- did you buy a car, did you get charged the fee, we're investigating this to determine whether this is -- violates the law -- is that okay?

MR. GUERRA: It still is, Your -- Your Honor. The critical line --

JUSTICE SOTOMAYOR: So the only -- the only thing that's bad is to say, come call us for a consultation?

MR. GUERRA: If you were interested in

participating as -- in this proceeding. And --

JUSTICE SOTOMAYOR: So what's the difference between that and how you answered Justice Ginsburg, when she said class notice would be okay?

MR. GUERRA: Because class notice is not a proposal of a -- of a relation -- a commercial transaction. It is noticed --

JUSTICE SOTOMAYOR: Wait a minute. It's joining the class or opting out.

MR. GUERRA: Correct.

JUSTICE SOTOMAYOR: And, when you join the class, you have a commercial relationship with the lawyer no different than being a named plaintiff.

MR. GUERRA: But the function of class notice is not to enable class lawyers to solicit clients. It is to enable courts to render binding judgments and to satisfy due process requirements, so that people unaware of a litigation do not have their rights forfeited. That is fundamentally different than -- than soliciting clients.

And I realize that --

JUSTICE KAGAN: Mr. Guerra, that distinction -- I understand that you are deriving some of it from (b)(12), but if I -- just -- just assume with me that (b)(12) has nothing to do with anything, and you

were just limited to (b)(4), can you find that distinction in (b)(4)?

MR. GUERRA: Your Honor, I think the point here is that, if you look at the conduct that is specified in the three examples, it is all activity that lawyers would be engaging in as officers of a court. And this Court has repeatedly recognized that there is a fundamental difference between lawyers acting in their own commercial capacities, as opposed to officers of a court.

And --

CHIEF JUSTICE ROBERTS: How -- how is somebody conducting an investigation in anticipation of litigation -- it hasn't started yet -- acting as an officer of the court?

MR. GUERRA: Because they're discharging their responsibility to ensure that they bring well-founded claims and don't file suits without -- I mean, under Rule 11, you have to have a well-founded factual basis for the allegations in the complaint.

So you need to do --

CHIEF JUSTICE ROBERTS: Well, that just seems to me to be saying a lawyer is always acting as an officer of the court.

MR. GUERRA: Mr. Chief Justice, with

respect --

CHIEF JUSTICE ROBERTS: When you're preparing a discovery request, when you're -- anything -- anything that the officer functions --

MR. GUERRA: I think most times, when you are in -- engaging in litigation or pre-filing an investigation, that would be true, and that's -- that would be all protected under (b)(4). The difference is -- there is a -- there is a distinction. This Court has recognized that lawyers have multiple capacities. They wear three hats. They are -- they represent clients, they're officers of courts, and they're commercial actors --

JUSTICE KAGAN: Mr. Guerra, don't you think -- I mean, I understand the distinction. The lawyer as commercial actor versus lawyer as officer of the court. But, boy, it's hard to get that from the words here. I mean, that -- that seems like the kind of old-time legislative interpretation, where we just figured out the statute that we hoped Congress would have written, as opposed to the statute that it did.

I mean, tell me where that distinction is in this -- in this provision.

MR. GUERRA: Well, Justice Kagan, for one thing, I think that, even if you decide that (b)(12) is

not governing (b) -- (b)(4), it's still part of the statute. And it still demonstrates that Congress was concerned about people using DMV information in order to engage in commercial activity.

And so the question then is, here's (b)(4), which says, we're authorizing use of information for use in tribunals. There's no mention of lawyers here. And so the question is -- and this provision authorizes use of the most sensitive information that -- that DMVs collect.

So the question you have to ask yourself is: In light of (b)(12) and the fact that we know Congress was trying to stop use of DMV information for non-consensual solicitations, is it reasonable to think that this clause authorizes lawyers to use disability status and medical information in order to go find and solicit clients?

And I submit it is not, particularly if you take the same broad reading that the Respondents argue for, the "in connection with" language, and you apply that to (b)(6) and (b)(10), then you have these truly incongruous results, where this Court in Condon recognized that insurers were one of the purchasers of the information that DMVs were selling and using it to direct market, and yet, in connection with underwriting,

we've demonstrated that would mean that that is an activity in connection with the business of insurance.

JUSTICE KENNEDY: Well, I -- I understand your argument about (12), but I -- I do think that you ought to assume we might interpret this statute, so that each of these is independent, and you have to concentrate on (4). You keep going back to (12), when we're talking about (4).

If you talk about (4) for a minute, it seems to me that you might give away too much because the statute says, "including service of process," which means the suit has to begin and then investigation in anticipation of the litigation that will follow after that suit has come in.

But you seem to give that away. You seem to think that investigation in anticipation of litigation can be before the suit is filed. You -- you seem to concede that.

MR. GUERRA: Justice Kennedy --

JUSTICE KENNEDY: I don't know why you concede that.

MR. GUERRA: I guess I -- I've never understood that -- after service of process, it's still in anticipation of litigation. It's been my understanding that service of process --

JUSTICE GINSBURG: It doesn't necessarily follow --

MR. GUERRA: It initiates --

JUSTICE GINSBURG: -- that they -- they are describing only what goes on in the court. If you just took the phrase "investigation in anticipation of litigation," "in anticipation of" sounds like before litigation begins.

MR. GUERRA: I am not disputing that, Justice Ginsburg. My point is, though, even the -- the (b)(6) and (b)(10) examples I just gave, Justice Kennedy, don't -- it's not a reliance on (b)(12) anymore. It's just demonstrating why it's implausible to think that the phrase "in connection with" should be read so literally that it authorizes anything that can be shown to have a connection with the subject matter.

JUSTICE SOTOMAYOR: You -- you said earlier, and it set me to thinking, that why would in anticipation of litigation permit access to all of this very personal information? And I don't know that, yes, it does permit access, but only in anticipation of litigation. So you have to prove, before you get things like Social Security number, driver -- anything else -- all they asked for was name and addresses, I understand.

MR. GUERRA: Justice Sotomayor, that's true

in this case, but if you -- if you read before, the way Respondents are asking you to read it, there's no limitation in the statute that says you can specify --

JUSTICE SOTOMAYOR: Well, yes, there is. There is a limitation that you're actually going to use it in relationship to the litigation, number one. And the States are obligated to ensure that what they release is actually covered by one of these exceptions.

MR. GUERRA: If you interpret (b)(4) to authorize access by lawyers in connection -- based on the theory that they are -- it's in connection with some litigation, they will have access --

JUSTICE SOTOMAYOR: But they have to explain why.

MR. GUERRA: You -- the -- the request in this case simply said, "pursuant to (b)(4) of the statute."

JUSTICE SOTOMAYOR: No, no, no. As I read, the first one is: We want to see if there is a pattern of overcharging; give us the names and addresses of people who have recently bought a car. That seems, to me, pretty specific as to what they want and why they need it. And I think it's pretty easy for the State to say this fits.

MR. GUERRA: Justice Sotomayor, two points:

The four requests that followed after the first two said nothing of the sort, and the State gave me information. It just said pursuant to the subsection that we're talking about right now.

In addition, there is no reason why lawyers couldn't go in and say, I would like to identify -- I am investigating whether people have claims for a disability claims or -- or based on their medical status, and I would like information of that ilk from -- from the DMV. (B)(4) authorizes those -- that -- the provision of that information. And it doesn't say that there has to be some heightened showing by -- by the lawyers in order to obtain it. So --

JUSTICE KAGAN: Mr. Guerra, suppose I am a lawyer, and I want to bring a toxic tort case, and I am really -- I am looking for witnesses who have the same kind of symptoms as my client had. And so I put out a letter saying -- you know, have you have been exposed and -- and tell me about it, so that I can find out if you are a good witness, and -- you know, if you have, I would also like to represent you. Would -- would that count?

MR. GUERRA: Two points, Justice Kagan. The first is that you have highlighted why this is such a unique loophole for one very discrete class of lawyers.

Most -- toxic tort lawyers cannot go to a DMV and say, I need the names and address of people.

JUSTICE KAGAN: Well, I guess what I was suggesting was that, if I was just asking for witnesses, you would have to say that that was included by (b)(4); is that right?

MR. GUERRA: I do. I do acknowledge that.

JUSTICE KAGAN: So, now, the court -- the lawyer is saying, in addition to your help as a witness, if you have the same symptoms -- you know, you can join the suit.

MR. GUERRA: And I think that that's an improper use. The Congress did not create this authorization to go down to get the most sensitive information in order to enable lawyers to find clients more easily than they might otherwise find them. And so investigation in anticipation of litigation is one use that Congress authorized, and, as I have suggested, it's a use that helps a lawyer discharge his or her responsibility to a court.

Asking somebody --

JUSTICE GINSBURG: I don't know why this case doesn't fit that description because the -- the position that the dealers were taking was you can't -- you ought to maintain a representative action. The

State has such an animal, it's not quite a class action, representative action. To qualify, the group must be numerous.

So how am I going to find out if it's numerous, without asking these questions?

MR. GUERRA: You -- you can ask every question up to, "Would you like to be a plaintiff in the lawsuit," and that would be fine. That's the dividing line.

JUSTICE GINSBURG: Might that get the lawyer into some difficulty with the Bar Association? They'll look at this and say, look, we told you, if you are -- if you are seeking clients, then you have to put advertising material. And a letter like that would tip the recipient off to something is going on, I should find out about it, and maybe I should join it.

MR. GUERRA: Justice Ginsburg, I think that the -- the fact that that might trigger an obligation to make a disclosure is not dispositive of whether it's a solicitation. It would still be an objective factual inquiry. And, if there were no indications in the letter that someone is being invited to join a lawsuit, then it would be permissible investigation.

I would like to point out, though, in terms of why they needed this information, these lawyers filed

suits initially against dozens and, later, against hundreds of defendants, where they had no client with any claim against that defendant. Then they went to the DMV, and they found over 30,000 names and addresses and sent out what the Fourth Circuit determined were solicitations, in order to get clients in the claims they had already improperly asserted.

They did not need that information to indicate the interest of the named plaintiffs they already had. Those people had standing to sue --

JUSTICE GINSBURG: But then there is a whole string of defendants who were doing the same thing -- the same allegedly unlawful practice, they couldn't reach without getting additional plaintiffs.

MR. GUERRA: But their -- their clients have no interest or need to reach those other dealerships. They have a claim against the dealers with whom they dealt --

JUSTICE GINSBURG: But their client is a -- is a group. This -- this is not an individual action --

MR. GUERRA: That's true, Justice Ginsburg.

JUSTICE GINSBURG: The statute says sue for the benefit of the whole.

MR. GUERRA: And -- and the South Carolina State court said that each named individual could sue

for the benefit of everyone who dealt with the same dealer that that plaintiff dealt with, so there is no inconsistency. And, of course, even if they want to try to affect the conduct of the -- of the dealerships, with whom their clients never dealt with, they could still get declaratory relief.

I would like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Clement?

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE RESPONDENTS

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

The DPPA is an unusual statute. It directly regulates the State's use of their own databases and imposes massive civil liability and criminal penalties for violations. It regulates it in a relatively distinct way, which is it makes disclosures presumptively unlawful, but then has 14 permissible use provisions for which the State may, but does not must, may disclose the information.

The scope of those 14 permissible use provisions then becomes quite important for determining whether or not a statute that was originally designed

primarily to regulate the commercial sale of DMV information becomes intrusive into matters of traditional State regulation or imposes massive liability without the requisite clarity.

Now, I would have thought that it was fairly clear that, but for a resort to the specific controls to the general canon, that all of the activity at issue here comes comfortably within the language of (b)(4) because, if you look at that language, it is remarkably broad. Congress uses the word "any" three times. It uses "in connection with," which I think we all know is a term of breadth. And then it uses "including" and uses illustrative examples.

And I think the only thing that really brings these examples together is Congress seems to be covering the litigation process from cradle to grave.

CHIEF JUSTICE ROBERTS: One thing we also know about the "in connection with" language is that we have said, it can't really mean "in connection with," as broadly as that -- the Morales case, I guess, it has to have a more narrow meaning. Otherwise, everything would be covered.

MR. CLEMENT: Mr. Chief Justice, that's exactly right. But the whole reason it has to have some limit is because it's presumptively quite broad.

And if -- I mean, for those who look at legislative history, the evolution of this provision, as it -- it was changed twice in the legislative process.

And it started out that Congress was going to have a permissible use just for use in litigation involving motor vehicles. Then they dropped "motor vehicles" and just said, "use in litigation." And then, in the final iteration, they said, "use in connection with litigation." So, clearly, they were trying to broaden it.

Now, I -- I would be the first to admit that there has to be some limit, and we certainly wouldn't say, for example, that if lawyers -- you know, decide in this case, well -- you know, we got this DMV information for perfectly legitimate purposes involved in a litigation, but, now, we are sitting on a gold mine, so we should try to sell -- sell these same people floor mats or wiper blades or something. I mean, of course, they can't do that. So there are limits, but I think --

JUSTICE BREYER: Can they do this: Can -- can Lawyer Smith say -- you know, there are some products in this State that I really suspect are not being properly made, and I have probably a tort suit; and the damages are awfully small; I would like to get 10 or 20,000 plaintiffs. I wonder if there is anybody

interested?

And then what he does is -- I have to write them a letter, and I know where I can get the names and addresses, from the DMV.

So he goes to the DMV and says, I would like the names of everybody who -- I'd like all your names and addresses, and I intend to write them all and send them a letter and say, I suspect there is some fishy business going on here in the dress manufacturers; would you like to tell me about what happened? Is that possible? Can they do that?

MR. CLEMENT: It may or may not, depending on where you draw the line.

JUSTICE BREYER: Well, what do you --

MR. CLEMENT: But can I say something before we talk about that? You know, if they are really trying to go after the dress manufacturers --

JUSTICE BREYER: Yes.

MR. CLEMENT: -- they can go to the phone book, they can go to the title records office, there is lots of places they can go, if what they want is just general information about people. And the only State database that Congress has seen fit to regulate is DMV databases.

JUSTICE BREYER: Well, maybe they -- maybe

this is all passe. Maybe -- perhaps they could get this information elsewhere, but I guess we have to deal with this statute --

MR. CLEMENT: But, Justice Breyer, that's part of the reason I'm pointing --

JUSTICE BREYER: So maybe what they want is they want the names of all the people who've ever had a car -- you know, because they think there's something special about a car, and they think that's going to be connected. But you see what I'm driving at.

MR. CLEMENT: I --

JUSTICE BREYER: You have no lawsuit, but you are going to get one if you can, and you have grounds for thinking that there is some suspicious defendants, and what you are looking for is plaintiffs. That's all.

MR. CLEMENT: Sure. And --

JUSTICE BREYER: All you are looking for is plaintiffs. Now, can you, under this statute, go and get the information, where all you are looking for is plaintiffs for your lawsuit? So far, you know how many plaintiffs you have? None.

MR. CLEMENT: I think, actually, the best answer, at the end of the day, is it depends on whether you are focused on a specific transaction, occurrence,

defect, so I think you might ultimately --

JUSTICE BREYER: All right. Is your answer what I have in my mind -- I'm just repeating the same question. I will do that -- I have some reason for thinking there are a whole bunch of defendants here who have done something wrong. All I am lacking is a plaintiff, and what I want to do is get the names of potential plaintiffs. It's the same question. I have asked that three times. Either you can, in your view, get it under this lawsuit, or you cannot.

MR. CLEMENT: I would say the best answer is that you can. If you don't like that answer and you want to draw the line in a different place --

JUSTICE BREYER: No, no. I'm not liking or disliking. All I want to know is --

MR. CLEMENT: Well, here -- here's the thing -- is I think there is a couple of places you could draw the line, and I think there is a line drawing question any time you have language like "in connection with." The first would be, okay, I'm lawyers, and I want to get clients for litigation.

You could say, well, that's enough of an "in connection" requirement, so you can use that. I would say that that's probably on the other side of the line, but you could just say that's close enough.

The other place you could draw the line is when you have a specific transaction, occurrence, defect, so that there be would be a difference. If I -- if I get this information and send people letters and say, I see you bought a new car in the last two years -- you know, there is a lemon law in this State --

JUSTICE BREYER: Wait, wait. Now, that's your -- now, that's the line. As to some of these defendants, what he's saying is, these lawyers had no client that my defendant hurt, none.

MR. CLEMENT: Well --

JUSTICE BREYER: And as to some of these, but not all the requests, all they were doing was they were looking for somebody who bought a car from me. And the reason they want that is to ask them what the practice was, so they can get a plaintiff to do what the complaint is about. So it's at least two -- or one or two of the requests are like that.

MR. CLEMENT: No, they are not in the following sense, Justice Breyer -- okay. Just to understand kind of the chronology here, no request -- FOIA request is made at all here until my clients have been approached by individuals who are complaining, okay? No letter goes out until the litigation is actually filed. Now, they want to say --

JUSTICE BREYER: Okay. So, now, repeat to me -- I've got your point.

MR. CLEMENT: Okay.

JUSTICE BREYER: You have don't have to prove it to me. All -- what I'm trying to get at is the statement that I could write in an opinion that will draw the boundary of this provision south of -- well, the lawyer can go out when he has reason to believe that a defendant has done something wrong and, to use a pejorative, troll for clients.

MR. CLEMENT: Right.

JUSTICE BREYER: I want it south of that, and, now, you will tell me the words I can use that will both help your client because they will cover this case, but will also be south of that. What are --

JUSTICE SCALIA: What is -- what is south? I don't have a compass here.

(Laughter.)

JUSTICE BREYER: South means -- south means it does not -- you can't just go and troll for clients, simply because you think a defendant has done something wrong, and you have no client.

MR. CLEMENT: If you want to draw the line south of the trolling line, then I think what you would say is this is an easy case because no communication

took place until my clients had a client. And then they want to say, well, wait a second, your clients didn't have a beef with the other dealers.

That's wrong. At all times in this suit, they had a conspiracy claim against those other dealers. So, even as to the individuals they already represented, they had a beef with those dealers.

JUSTICE KENNEDY: I want -- I want to interrupt just -- just one moment. I may have misheard, or you may have misspoke. I thought you said that no requests were sent until the suit was filed, but the request was -- the first FOIA request was June 23rd, 2005; the second FOIA request was August 24, 2006; and this Herron suit was filed August 29, 2006.

MR. CLEMENT: Justice Kennedy --

JUSTICE KENNEDY: So letters were sent before the suit was filed.

MR. CLEMENT: A FOIA request was made before the suit was filed. No letter to a potential witness/client was sent until after it was filed.

JUSTICE KENNEDY: But the -- yes, but the FOIA suit was made before the suit was filed.

MR. CLEMENT: Sure. And the FOIA -- the two FOIA requests that were made beforehand were specifically noted that they were in anticipation of

litigation, and they were investigating, as Justice Ginsburg suggested, as they needed to under State law, whether this was a widespread practice. And --

JUSTICE GINSBURG: Suppose you -- you said that you had a few people came and complained to the lawyers, and then the lawyers wanted to see how widespread this was. Suppose the lawyer herself bought a car recently, and she got this administrative fee. And, now, she has -- no clients have approached her, but she would like to find out how many similarly situated people there are, so she can get one of these representative actions going.

Could -- on that basis, would it be permissible to use -- would that come under the litigation exception?

MR. CLEMENT: I think it would, Justice Ginsburg, because I think that, when you are trying to figure out where to draw the line, you look to the words in the statute, which you know that "investigation in anticipation of litigation" is covered, and I would think that would fit comfortably within "investigation in anticipation of litigation." And the --

CHIEF JUSTICE ROBERTS: It would be -- it would be a very poor lawyer who couldn't figure out how

to write this -- the letter he's going to send out in a way that it could not be said to be investigation, as opposed to solicitation.

If you have a problem with the windshield wipers, you just send a letter saying, there is this big problem with windshield wipers. I am a lawyer, I'm representing -- or I hope to represent, or I will represent a group of people who have this problem, and I think we will recover some damages. Would you like to be a witness in that case?

That is in anticipation of litigation, but it's also, quite plainly, an effort to solicit clients, not just witnesses.

MR. CLEMENT: I couldn't agree more, Mr. Chief Justice, which is why the line can't really be between investigation in anticipation of litigation and solicitation in anticipation of litigation because that is too thin a line to make a $200 million difference.

CHIEF JUSTICE ROBERTS: So where -- where is the line?

MR. CLEMENT: The line is whether or not it is in anticipation of litigation or in connection with litigation --

CHIEF JUSTICE ROBERTS: No, that's the words -- that's the words of the statute. I'm trying to

figure out what they mean. If you think there is some type of solicitation that the statute was meant to prohibit, how do you draw a line that prohibits that, but allows the sort of thing that you want to do?

MR. CLEMENT: I think the way you do is you would basically say that, when they are saying, "in anticipation of litigation," they mean in anticipation of a particular litigation, particular problem, and so it's different --

CHIEF JUSTICE ROBERTS: That doesn't have to be filed in court, that may just be --

MR. CLEMENT: Oh, absolutely not. I mean, it seems to me --

CHIEF JUSTICE ROBERTS: -- residing in the brain of any lawyer who's looking for work.

MR. CLEMENT: No. They are -- they are concerned about a particular thing, and I think the "in anticipation of litigation" language, I mean, that's not the only time you have ever seen it before --

JUSTICE SCALIA: It's not just that language. It's "investigation in anticipation of litigation." If I understand you correctly, you are saying investigation includes solicitation.

MR. CLEMENT: It --

JUSTICE SCALIA: Isn't that your position?

MR. CLEMENT: I think it is, though I guess my point would be, even if you can identify some solicitation that is not investigation, as long as it's in connection with litigation, it's in (b)(4), and then I think --

JUSTICE BREYER: Okay. So you are saying that really this is a -- the way the statute works is it says nobody can solicit, but for lawyers. And that's not -- that makes more sense than you might think because this was not a statute that was meant to interfere with solicitation rules; it was meant to interfere with commercial selling.

And -- and that's what this is about, and there is a requirement, the requirement as to the lawyer, in good faith, has to believe that, if he finds a client, there's a case.

MR. CLEMENT: I agree with everything, except the first thing you said --

JUSTICE BREYER: All right.

MR. CLEMENT: -- which is that this is a prohibition on solicitation. If you look at the structure of the statute, it says, presumptively, you can't use this for anything. And then there are 14 permissions. And some of the permissions, like (b)(4), are unconditional. If you come within (b)(4), you get

to use it.

Now, when you get to the end of the statute, which is -- I respectfully suggest is not where you put the core provisions, it's where you put the less favored provisions -- then you have, in (b)(12), a conditional permission that you can use it, but only if you get consent.

Now, the thrust of their position is, if you are in one of the unconditional permissions, but you also are, presumptively, in one of the conditional permissions, somehow, that condition from (b)(12) hops over to (b)(12) -- (b)(4) and says --

JUSTICE SCALIA: I don't -- I don't think that is fair. I think their position is, to harmonize (b)(4) and (b)(12), you have to interpret investigation, not to include solicitation, because, otherwise, you have a conflict, that (b)(12) prohibits solicitation, unless you have the consent; whereas, (b)(4), which says, "investigation," does not require consent.

Now, the two exist in perfect harmony if investigation does not include solicitation, but there -- there is a discrepancy between the two if it does include solicitation. And you have to say, well, this is an exception from (b)(12).

MR. CLEMENT: No, you don't. There is no

discrepancy. A conditional -- like you get a green light for use in litigation. You get a yellow light for solicitation. If you have solicitation in connection with litigation, you're covered by both, you take the green light, there is no conflict.

And the premise for your discussion was we have to harmonize. I would take issue with that. If you look at these 14 exemptions, there is tons of overlap in them. Congress is not telling you that each of these 14 exceptions has an exclusive area, and you have to find out which field is preempted by (1), (2), (3), (4), (5), (6), (7). If you look at (b)(1) and (b)(4), there is complete overlap.

One of the things I would take issue with is my brother said that, well, (b)(4) is about the tribunal. No, it's not. (B)(1) is principally about the tribunal. (B)(1) is the provision that talks about government actors and their functions, and it specifically talks about torts.

JUSTICE ALITO: (B)(4) is about -- (b)(4) is about very sensitive information. You're talking about people's Social Security numbers. You're talking about whether the person has a disability that they may not want to disclose to the general public -- a person has Parkinson's or -- or epilepsy or is diabetic.

And so you're just -- you're saying lawyers, they -- they get all that stuff. Nobody else can, but lawyers are a privileged class, and they get it.

MR. CLEMENT: Justice Alito, it is important to recognize lawyers presumptively get it under Federal law, but Federal law is only a floor. And so let's take Social Security numbers, please, because, sure, as to (b)(4) and (b)(1) and two other provisions, Congress says, presumptively, you can get Social Security numbers.

You know what -- you know what State -- the State of South Carolina says? You never get Social Security numbers, unless you have a court order. They put that right in their State FOIA law. And so that is just another example of how -- this is a Federal floor. States can release this information. They don't have to.

And, to Justice Breyer's point, it makes sense that you would distinguish between an attorney who is subject to the Bar discipline, is subject to oversight and solicitation process, and treat that solicitation differently from a solicitation by a direct marketer, which is what (b)(12) is clearly aimed at, not the practice of law.

JUSTICE BREYER: The difficulty that

Justice Alito brings out is -- I see your interpretation, and I hope the other side will give me some line because they have the same problem -- you know, but in reverse. What is the line?

But your way, it doesn't become that much of a privacy statute. It's sort of a misnomer. It's a -- it's a statute that is designed to prevent the commercial use of your -- of this personal information. It's not really a privacy statute.

MR. CLEMENT: It's certainly not an all-purpose privacy statute. I do think that's fair. And the principal thing that they were concerned about, of course, is that you could look at somebody's license plate and indiscriminately go down, pay a fee, and get their home address.

Now, the one thing we know from (b)(4) is, if a lawyer wants to do that exact thing, to serve process, the lawyer gets to do it. You can get somebody's license plate, go to the DMV, get an address, and serve process. And they specifically preserve that. So we know, as to the core of the statute, they treated lawyers differently.

They were also concerned with direct marketers taking this information and using it to market people, but I don't think you'd lump lawyer solicitation

in anticipation of litigation, which may put some limit on it, together with that.

JUSTICE KENNEDY: But in anticipation of litigation does come after service of process, and an additional way to harmonize this statute with (12) is to say that, after the suit has been filed, then -- in anticipation of the litigation that that suit will engender, then you may get the information. But you didn't do that.

MR. CLEMENT: There's two problems with that way of looking at the statute, I think I would respectfully suggest, Justice Kennedy. One is we are talking about items on an inclusive list, so even if you took your premise that -- that the anticipation of litigation in that list somehow is anticipation post service of process -- which I want to come back to -- even if you took that position, they are just things on an inclusive list. And so it wouldn't stop you from saying that the ultimate test here is whether it's in connection with litigation.

But I guess I would go back to that and say I've never once thought that investigation in anticipation of litigation was something that would take place after service of process. I thought -- I mean --

JUSTICE KENNEDY: That's the way the

statute's written.

MR. CLEMENT: Yeah, but I don't think that that was an intentional thing on the Court's part, that we're going to name these and we're going to name them in chronological order. If they tried to do it, I think they got it wrong.

JUSTICE SOTOMAYOR: Mr. Clement, I'm not sure I'm satisfied with the answer you gave to Justice Scalia. He said, look, we've got to harmonize; instead of general-specific, solicitation of clients is different than investigation, and we just say they're mutually exclusive. It is a little bit of a general and specific. And that's proven by (b)(2) because, when (b)(2) wants to permit solicitation, it expressly says it, and they didn't expressly say, "solicitation," in (4).

That's, I think, your adversary's main argument. And I'm -- I'm still not sure I'm comfortable with the answer you're giving. You're saying they're independent, but why are they necessarily conflicting?

MR. CLEMENT: Last word "conflicting"?

JUSTICE SOTOMAYOR: "Conflicting," exactly, or -- or conflicting or overlapping.

MR. CLEMENT: I think --

JUSTICE SOTOMAYOR: I guess it's why are

they necessarily overlapping?

MR. CLEMENT: I think they are necessarily overlapping, and I guess I would point to several things. First of all, the language in (b)(2), I don't think helps them nearly as much as they do. I think that language in there about survey research, like much language in many statutes, maybe avoids the marketers -- or the -- the motor vehicle marketers from having to be here in a lawsuit because it removes all doubt about it. But I think they would be covered, even without those words.

But the point is -- you may say, well, that's horrible, that's superfluous. But, no, if you look at the way the statute operates generally, there's lots of overlap. So this isn't a context where you want to make sure that there is no overlap and everyone operates independently.

I pointed to (b)(1) and (b)(4). They both cover courts and litigation. If this Court uses DMV information in its opinion, it's covered by (b)(1), it's covered by (b)(4).

Or look at (b)(3). (B)(3) is a provision that says, generally, companies can use DMV information to verify somebody's identity. And then it specifically says, and if somebody lies to you about their identity,

you can pursue legal remedies.

Okay. When you're pursuing that legal remedy pursuant to (b)(3), you're also doing things in connection with litigation pursuant to --

CHIEF JUSTICE ROBERTS: Well, that's -- well, that's right. I understand your point, that this is -- they're not separate categories, and there's no overlap. But the word is "harmonizing," and the problem is we have to give some limiting construction to "in connection with."

And it seems to me that, if you are involved in that endeavor, it does make sense to see how what you're going to cover under the "in connection with" relates to what's exempt under the other provisions.

MR. CLEMENT: But, as we've discussed, Mr. Chief Justice, if you -- if you are saying you are not going to apply the specific controls the general, but you may be using a junior varsity version of it to harmonize the statute --

CHIEF JUSTICE ROBERTS: Exactly.

MR. CLEMENT: -- as -- as we suggested in our colloquy, I think the line between solicitation in anticipation of litigation and investigation in anticipation is far too thin a line to make a $200 million difference.

And if I could direct the Court to page 93 of the Joint Appendix because that will show you just an example of the postcard that is attached to these letters. And the postcard does ask specifically, as Justice Ginsburg was suggesting -- again, this is at 93 of the Joint Appendix -- it asks people to fill out their name, address, the dealership they bought the car from, the type of car, and then the administrative fee or processing fee that was charged.

Now, I think it's common ground between the parties that we get to ask about that administrative or processing fee because that is investigation in anticipation of the -- of the litigation. As I understand where my clients arguably made a $200 million mistake is by adding the line "I'm interested" -- "I am interested in participating" signature, that crosses the line into solicitation.

JUSTICE BREYER: Well, the reason -- the reason that would be so -- I agree with you, that it's very hard to figure out what the line is here between the investigation and solicitation.

But that's where the solicitation thing comes into play because what it -- the words that go the other way, in my mind, that cut against you, is that this card could have asked for Social Security numbers,

I guess.

MR. CLEMENT: Not under South Carolina law, it absolutely couldn't.

JUSTICE BREYER: Not under South Carolina law. All right. But then, under another State, under this statute, they could. Now, that's helpful, that answer.

But if -- when I think of asking for Social Security numbers, I -- the words -- exaggerated, but they go through my mind -- are "identity theft run wild."

MR. CLEMENT: Absolutely.

JUSTICE BREYER: And, if that is a concern -- if that is a concern, then, by reading this as a solicitation -- you know, the pure case -- and throwing the other exception to cover it, you force the State to focus on it.

And the State then has to decide whether they are going to permit or not permit the solicitor, who -- you see, might -- might include the lawyer here, to ask for the Social Security number, and better to have them focus on that decision. That's the connection that I see between the two.

MR. CLEMENT: But, Justice Breyer, let me try to help you this way, which, is first of all, every

State in the country is focused on identity theft. And the only circumstances in which I can imagine a State ever giving Social Security numbers to a lawyer is if there case was -- you know, these car dealers are putting the Social Security numbers on the forms and we are --

JUSTICE BREYER: Okay. So are we -- do we know -- by the way, that is helpful because do we know under how many States' law the DMV would be forbidden to give Social Security numbers?

MR. CLEMENT: I don't know that offhand. I can get that to you in a supplemental letter. I just know South Carolina, it says, right in their FOIA statute, you can't get that information. And, like I said, the only situation -- it's kind of --

JUSTICE SOTOMAYOR: Is there a Federal law to that effect?

MR. CLEMENT: What's that?

JUSTICE SOTOMAYOR: There may be a Federal law to that effect.

MR. CLEMENT: Right.

JUSTICE SOTOMAYOR: A separate one.

MR. CLEMENT: And it may be -- it may be lawyers -- it may be the lawyers want to enforce that Federal law against the dealers. And in enforcing that

Federal law against the dealers, they might ask for the information. It's the same kind of thing.

The only circumstances in which I could imagine a State would ever give a lawyer disability information is if they were bringing an ADA suit. If they were bringing an ADA suit against a dealer, you might actually want them --

CHIEF JUSTICE ROBERTS: Well, if they are -- if they were thinking they might bring an ADA suit --

MR. CLEMENT: Fair point --

CHIEF JUSTICE ROBERTS: Your position does create a special -- the point your friend makes -- it does create a special exemption from a solicitation bar for lawyers. Lawyers can solicitate -- you know, Acme Products can't.

MR. CLEMENT: Well, sure, but they can -- they can solicit for their legal services in connection with litigation. And that, I think, is different --

CHIEF JUSTICE ROBERTS: In connection with something they hope might someday become litigation, depending upon the answers they get.

MR. CLEMENT: Well, again, if you're going to draw a line -- there's two things here -- you know, there's -- there's an impulse to draw a line with "in connection with," and, at some point, you will have to.

But I don't think solicitation provides the line because the --

JUSTICE KAGAN: Can I ask about your line, Mr. Clement?

MR. CLEMENT: Sure.

JUSTICE KAGAN: Let me just see if I understand it, and I'll give you two things --

MR. CLEMENT: Sure.

JUSTICE KAGAN: -- and I think one falls on one side of your line --

MR. CLEMENT: Yeah.

JUSTICE KAGAN: -- and the other falls on the other, but this is just to clarify where your line is.

One is -- you know, I'm a lawyer, have you ever been in a car accident lately? If you have, contact me, and I would love to represent you. That -- the other is, I'm a lawyer, I think that there's a -- a real -- I'm -- I'm bringing a lawsuit about these red light cameras and saying that they're unlawful, and would you like to join me in that litigation?

Am I right to think that the first falls on one side of the line, it's not enough, there's no litigation there; and the seconds falls on the other side, according to you?

MR. CLEMENT: I think that's right, Justice Kagan. And I just want to emphasize that my -- my clients fall on the other side of even yet another line, which is they already had clients before they asked DMV anything.

JUSTICE KAGAN: But your line --

JUSTICE SCALIA: They're north of that line, right?

(Laughter.)

JUSTICE KAGAN: -- is a contemplated litigation.

MR. CLEMENT: Yes.

JUSTICE KAGAN: A specific contemplated litigation.

MR. CLEMENT: Exactly. Or to put -- you know, to give just another sort of example, this seems to be what clearly surely should be covered is, okay, I understand there's a defect with the particular make and model of a car. I've used the DMV records, consistent with State law, to get access to the fact that you've bought one of these cars; do you want to join the suit?

I don't think there's anything nefarious with that. There's certainly nothing --

CHIEF JUSTICE ROBERTS: Would you want to start the suit? It doesn't matter in your position.

MR. CLEMENT: Yeah, that's -- that's not my case because this -- these people came to us before we did anything. But I don't think there's anything wrong with that, Your Honor. And, yes, you might say it's solicitation, but I don't think, if you look at these provisions, that you would interpret them that way when they're all permissive uses. And --

JUSTICE ALITO: Well, if Congress wanted to draw the line between possible -- you know, some unknown lawsuit and an actual lawsuit that's in the mind of the lawyer, why did it use the term "litigation," when it had already used earlier, in the same subsection, "proceeding," civil, criminal, administrative, or arbitral proceeding?

MR. CLEMENT: Well, Justice Alito, I think when it uses "in anticipation of litigation," it actually wants to cover activity that takes place before there's an actual proceeding. And what I was going to say is -- you know, that language doesn't come out of the ether. I mean, that's the language you use in attorney work product.

And, as I understand it -- I've looked into this a little bit, the basic rule there is you distinguish between litigation in the abstract and the point at which you've identified a particular

transaction, occurrence, defect. And, at that point, if you're doing something, it's in -- it's in anticipation of litigation.

The one other point I haven't yet made, which is, to the extent you're going to resort to the specific controls of the general, I think it is worth noting that this would be the first time, that I'm aware of, that the Court would ever have applied that canon to impose this kind of massive civil liability and even potentially criminal liability.

JUSTICE SCALIA: I don't know which is specific and which is general. I mean, that's the problem I have with that.

MR. CLEMENT: I agree, and I think that's the best reason why the canon doesn't work. These are equally specific. And, in the case of an overlap between the two that you have here -- and you have in (b)(1) and (b)(4) and (b)(3) and (b)(4) -- you just say, okay, Congress thought it was okay, and you just call it a day.

JUSTICE KAGAN: But what you say, Mr. Clement, that you and your varsity version of the -- which is stronger than the other one is --

MR. CLEMENT: Paradoxically.

JUSTICE KAGAN: -- is something like, if

(b)(4) is hard, we have to draw a line someplace, we can look to (b)(12) as expressing some kind of concern that we can use to draw that line.

MR. CLEMENT: Yeah. And the reason I think that --

JUSTICE KAGAN: It's not a conflict, we don't have to -- you know, it's not inconsistent, it's just this is an expression of what Congress was thinking about, we're going to use it as a clue.

MR. CLEMENT: Right. But the line-drawing problem is really drawing the line about "in connection with." The line-drawing problem -- drawing the line between solicitation in anticipation of litigation and investigation in -- in anticipation of litigation just doesn't work. They're two sides of the same coin.

As Justice Ginsburg pointed out, if my clients had sent a letter that nobody objects to, that says, we're bringing a lawsuit, we think you may have been charged the same kind of fee, I think what the State Bar would have said -- the natural next question for anybody getting that letter is, will you represent me? And precisely because of that, we want you -- we want to treat this like it's solicitation, and we want to add these additional bells and whistles.

And part of the irony here is, I think, the

things that make our letter look most like it's advertisement or solicitation are the things that are required by the State Bar.

And, keep in mind, that's another reason why treating attorney solicitation differently from general solicitation makes perfect sense because they're subject to --

JUSTICE SCALIA: I don't understand what you're saying. You're saying the State Bar requirements would have required you to say, are you interested in joining the lawsuit?

MR. CLEMENT: Well, and -- they would -- it's so natural that somebody will say, can I join your lawsuit --

JUSTICE SCALIA: Yes.

MR. CLEMENT: -- that they would require all the language that says, you have alternatives, other people can -- can -- can hire you.

JUSTICE KENNEDY: Well, that's because -- that's because the State is allowing solicitation, and it puts certain conditions on what your solicitation --

MR. CLEMENT: Exactly.

JUSTICE KENNEDY: You point to page 94, you say, oh, it's just the last line, the whole thrust of the letter was solicitation. You have to be fair about

that.

MR. CLEMENT: Exactly.

JUSTICE KENNEDY: You have to be fair about that.

MR. CLEMENT: And, Justice Scalia, the last thing you can infer from the statute is that Congress wanted, for the first time ever, get in the business of managing attorney solicitation, a subject they'd always left to the States. And --

JUSTICE SOTOMAYOR: Counsel, I just want to, before you leave, because -- in response to Justice Kagan, I think you've changed positions a little bit. You started by saying there were three ways to draw a line. Getting clients is okay; getting clients is okay if you get a specific treatment, occurrence, or defect. And you didn't mention what the third was.

So what's your preferred reading?

MR. CLEMENT: My -- my preferred reading is that transaction, occurrence, defect -- which I took her red light camera to be an example of a particular identified defect. But I do want to emphasize, before I sit down -- it's the last thing I'll emphasize, that my case is a little bit better because we had a client and a specific defect before anything happened.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Guerra, you have four minutes remaining.

REBUTTAL ARGUMENT OF JOSEPH R. GUERRA

ON BEHALF OF THE PETITIONERS

MR. GUERRA: Thank you.

First of all, I'd just like to point out that the consequence of Respondent's argument is that -- is they gave the example of going to get the license plate and then getting the name and address to serve process.

But, on their theory, you can also go down and -- you can witness an accident on the side of the road, you can go down to DMV, get the name and license -- use the license plate to get the name and address and send a solicitation letter. And that is trolling.

And I think everybody -- as I understand it, the line seems to be everybody wants it somewhere south of trolling. And yet --

JUSTICE BREYER: Well, why don't you give us the line that's north?

(Laughter.)

MR. GUERRA: My line -- my line --

JUSTICE SCALIA: North of trolling?

JUSTICE BREYER: No, not north of trolling, but you understand the point. What's your line?

MR. GUERRA: Our line is solicitation, Justice Breyer, and there are two ways to get that. There is the -- we -- I submit, is the strong textual evidence in (b)(2), that Congress did, in fact, understand that the consent requirement governs all bulk solicitation or surveys or marketing, and it had to give an explicit override in (b)(2) because, otherwise, (b)(12) would have restricted the ability to do nonconsent --

JUSTICE BREYER: In the middle of the -- in the middle of the class action, several of the clients, the only ones who brought -- who bought the cars -- which there is loads of evidence they're defective, from Dealer Smith, died, and they want to see if they can find three others, so they don't have to dismiss them from the class, they're almost certain -- and has loads of evidence there is the -- you know, the harm caused by the defendant. They are missing a client. They died.

And so can they get it then?

MR. GUERRA: I'm not sure I understand the question.

JUSTICE BREYER: Can they go to the board and say, look, Dealer Smith here -- we're in the middle of the case, we're finished with discovery. We're just -- he just died and --

MR. GUERRA: Are you talking about --

JUSTICE BREYER: -- we want to find three others, and I'm sure there's loads of evidence here that there were a hundred thousand others, who bought this defective thing from this defendant, we want to find out the names and addresses. Can they get it or not?

MR. GUERRA: For purposes of soliciting new class representatives, I think not.

JUSTICE BREYER: Not.

MR. GUERRA: And I think -- and there are loads of ways to find class representatives without going to DMVs. And, in fact, that's what most class action lawyers have to do, is advertise in one fashion or another. So that's not, to my mind, in Congress's conclusion.

But I would just point out that, according to Respondents, the phrase "survey research" is surplusage, and this Court says that's -- you're not supposed to reach that conclusion, if you can avoid it, and you can avoid it by understanding it to be the meaning -- the meaning -- its effect is to override the consent requirement, so that -- that you can do commercial bulk surveys in (b)(2), which would otherwise require consent as a -- as a consequence of (b)(12).

And then there is the so-called "junior

varsity" harmonization basis for reaching solicitation. And I would point out that Respondents are saying, it can't be that you -- that some -- certain statements in a letter means you crossed the line into solicitation and that that has all kinds of massive civil liability consequences.

Congress used the word "solicitation" in this statute. Congress meant to draw some kind of line around solicitation. Now, admittedly, we're saying that the harmonization means that that's the same line you would draw in (b)(4). But it's not inconceivable to think that Congress was -- was drawing a line at solicitation and that liability would flow, depending upon whether somebody crossed it or not.

JUSTICE KAGAN: But, Mr. Guerra, it didn't draw the line at solicitation in (b)(4), and the advantage of Mr. Clement's argument is that the line that he sets up actually has a textual basis in (b)(4) because it focuses on words like "what is a litigation," and "what is a proceeding," and "are we there yet." And that seems to be what the language of (b)(4) indicates.

MR. GUERRA: Your Honor, our point is -- sort of, if you step back, and you -- and this is the question for the harmonization purpose: (b)(4) covers solicitation only because of the indeterminacy of the

phrase "in connection with." Without that language, there's no basis for saying (b)(4) is authorizing lawyers' solicitations. So it is, I would submit, at the periphery of the authorization that (b)(4) provides.

(B)(12) solicitation is at the core of what that provision is about and that -- the -- the mass marketing of using DMV information is one of the fundamental problems Congress was addressing.

And I just think it's implausible to conclude that the -- at the periphery concept in (b)(4) should take precedence over the core function of (b)(12).

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:17 p.m., the case in the above-entitled matter was submitted.)

A

ability 60:8
above-entitled 1:11 63:16
absence 13:10
absent 5:17
absolutely 38:12 49:3,12
abstract 54:24
access 8:19 9:5 9:10 12:21 21:19,21 22:10 22:12 53:20
accident 52:16 59:11
acknowledge 24:7
Acme 51:14
act 8:12 12:6,21
acting 5:7 13:15 17:8,14,23
action 10:22 14:9,12,16 24:25 25:1,2 26:20 60:11 61:13
actions 36:12
activities 6:11 11:2
activity 5:21 14:2,17 15:15 17:5 19:4 20:2 28:7 54:17
actor 18:16
actors 18:13 41:18
actual 54:10,18
ADA 51:5,6,9
add 56:24
addendum 5:19
adding 48:15
addition 23:5 24:9
additional 10:5 13:23 26:14 44:5 56:24
address 24:2 43:15,19 48:7 59:8,14
addresses 21:24 22:20 26:4 30:4,7 61:6
addressing 9:3 63:8
administrative 12:16 36:8 48:8,11 54:13
admit 7:12 29:11
admittedly 62:9
advantage 62:17
adversary's 45:17
advertise 61:13
advertisement 57:2
advertising 25:14
advised 15:12
advising 9:24
affect 6:6 9:25 27:4
agency 12:17
agree 37:14 39:17 48:19 55:14
aimed 4:4,20 8:10,16 9:2 42:23
aiming 13:7
AL 1:3,6
Alito 41:20 42:4 43:1 54:8,15
allegations 17:20
allegedly 26:13
allow 9:19
allowing 57:20
allows 38:4
all-purpose 43:11
alternatives 57:17
animal 25:1
answer 10:12,15 13:20 15:9 31:24 32:2,11 32:12 45:8,19 49:7
answered 16:3
answers 15:10 51:21
anticipation 6:21 7:1 10:25 11:5,18,23 12:23 17:13 20:13,16,24 21:6,7,19,21 24:17 35:25 36:20,22 37:11 37:16,17,22 38:7,7,18,21 44:1,3,7,14,15 44:23 47:23,24 48:13 54:16 55:2 56:13,14
anybody 29:25 56:21
anymore 21:13
apologize 14:1
APPEARAN... 1:14
appears 4:10
Appendix 48:2,6
applied 55:8
applies 4:16
apply 3:22 4:24 5:9,9 8:4 19:20 47:17
approached 33:23 36:9
arbitral 12:16 54:14
area 41:10
arguably 48:14
argue 8:23 19:19
argument 1:12 2:2,5,8 3:4,6 4:15 7:14 12:1 20:4 27:11 45:18 59:2,6 62:17
asked 10:4 21:24 32:9 48:25 53:4
asking 11:12 15:10 22:2 24:4,21 25:5 49:8
asks 15:5 48:6
aspect 11:21
asserted 26:7
Association 25:11
assume 3:19 16:24 20:5
assuming 10:17
attached 48:3
attorney 42:19 54:21 57:5 58:8
August 35:13,14
authorization 6:18 7:4 24:14 63:4
authorize 6:9,17 8:19 22:10
authorized 9:4 24:18
authorizes 19:8 19:15 21:15 23:10
authorizing 19:6 63:2
automobile 10:4
available 8:13
avoid 61:19,20
avoids 46:7
aware 9:15,24 55:7
awfully 29:24
a.m 1:13 3:2

B

b 3:25 4:16 5:13 5:25 6:15,19 6:19 7:3,5,6,8 7:10,15,15,22 7:23 8:3,4,6,9 8:9,18,23 9:3 9:21 10:10 11:10 12:2,5,9 12:12 16:24,25 17:1,2 18:8,25 19:1,1,5,12,21 19:21 21:11,11 21:12 22:9,16 23:10 24:5 28:8 39:4,24 39:25 40:5,11 40:12,12,15,15 40:17,18,24 41:12,13,15,16 41:17,20,20 42:8,8,23 43:16 45:13,14 46:4,18,18,20 46:21,22,22 47:3 55:18,18 55:18,18 56:1 56:2 60:4,7,8 61:23,24 62:11 62:16,18,21,24 63:2,4,5,11,12
back 20:7 44:16 44:21 62:23
bad 15:23
balance 27:7
bar 25:11 42:20 51:13 56:20 57:3,9
based 22:10 23:8
basic 11:12 54:23
basically 38:6
basis 12:25 14:3 17:20 36:13 62:1,18 63:2
beef 35:3,7
beginning 15:1
begins 21:8
behalf 1:15,17 2:4,7,10 3:7

10:13 27:12 59:3
believe 3:25 5:4 34:8 39:15
bells 56:24
benefit 12:7 26:23 27:1
best 31:23 32:11 55:15
better 49:21 58:23
beyond 10:23
big 37:5
binding 16:16
bit 45:12 54:23 58:13,23
blades 29:18
board 60:22
book 30:20
bought 14:10 22:21 33:5,14 36:7 48:7 53:21 60:12 61:4
boundary 34:7
boy 18:17
brain 38:15
breadth 28:12
Breyer 29:20 30:14,18,25 31:4,6,12,18 32:2,14 33:7 33:12,20 34:1 34:4,12,19 39:6,19 42:25 48:18 49:4,13 49:24 50:7 59:19,24 60:2 60:10,22 61:2 61:9
Breyer's 42:18
brief 3:24 5:19
bring 14:8 17:17 23:15 51:9
bringing 12:25 51:5,6 52:19 56:18
brings 28:15 43:1
broad 19:19 28:10,25
broaden 29:10
broadly 28:20
brother 41:15
brought 60:12
bulk 3:11 4:1,17 4:17 5:17,24 6:3,17,20 9:13 60:5 61:23
bunch 32:5
bureau 13:21
business 20:2 30:9 58:7
buy 10:4 13:22 14:22 15:5,11 15:17
b)s 8:23

C

C 2:1 3:1
call 15:4,23 55:19
calls 15:6
camera 58:20
cameras 52:20
canon 28:7 55:8 55:15
capacities 17:9 18:10
car 10:5 13:22 14:22 15:5,11 15:17 22:21 31:8,9 33:5,14 36:8 48:7,8 50:4 52:16 53:19
card 48:25
Carolina 26:24 42:12 49:2,4 50:13
cars 53:21 60:12
case 3:4 5:7 8:8 11:17 22:1,16 23:15 24:23 28:20 29:14 34:14,25 37:10 39:16 49:15 50:4 54:2 55:16 58:23 60:24 63:14,15
categories 47:7
caused 60:17
certain 57:21 60:16 62:3
certainly 29:12 43:10 53:23
changed 29:3 58:12
charge 13:23 15:6
charged 10:5 15:12,17 48:9 56:19
Chief 3:3,8 8:22 8:26 17:12,22 17:25 18:2 27:9,13 28:17 28:23 36:24 37:15,19,24 38:10,14 47:5 47:16,20 51:8 51:11,19 53:24 58:25 63:13
chronological 11:15,21 45:5
chronology 33:21
Circuit 14:18 26:5
circumstance 10:19
circumstances 50:2 51:3
civil 12:15 27:17 54:13 55:9 62:5
claim 11:4 26:3 26:17 35:5
claims 10:12 17:18 23:7,8 26:6
clarify 52:13
clarity 28:4
class 9:21,24 10:22 11:6 14:16 16:4,5,9 16:12,14,15 23:25 25:1 42:3 60:11,16 61:8,11,12
clause 5:23 6:5 6:13 19:15
clauses 6:8
clear 4:1,23 5:12 5:14 6:1 14:1 28:6
clearly 12:19 29:9 42:23 53:17
Clement 1:17 2:6 27:10,11 27:13 28:23 30:12,15,19 31:4,11,17,23 32:11,16 33:11 33:19 34:3,11 34:23 35:15,18 35:23 36:16 37:14,21 38:5 38:12,16,24 39:1,17,20 40:25 42:4 43:10 44:10 45:2,7,21,24 46:2 47:15,21 49:2,12,24 50:11,18,21,23 51:10,16,22 52:4,5,8,11 53:1,12,15 54:1,15 55:14 55:22,24 56:4 56:10 57:12,16 57:22 58:2,5 58:18
Clement's 62:17
client 10:13 23:17 26:2,19 33:10 34:14,22 35:1 39:16 58:23 60:18
clients 10:24 16:16,20 18:12 19:17 24:15 25:13 26:6,15 27:5 32:21 33:22 34:10,20 35:1,2 36:9 37:12 45:10 48:14 53:3,4 56:17 58:14,14 60:11
close 32:25
clue 56:9
coin 56:15
collect 9:5 19:10
collecting 8:12 8:21
colloquy 47:22
come 10:9 12:13 15:23 20:14 36:14 39:25 44:4,16 54:19
comes 12:14 28:8 48:23
comfortable 45:18
comfortably 28:8 36:21
commercial 3:25 4:10 5:8 5:17,24 6:17 12:7,22 13:9 16:6,12 17:9 18:13,16 19:4 28:1 39:12 43:8 61:23
common 48:10
communication 34:25
companies 46:23
comparably 6:17
compass 34:17

complained 36:5
complaining 33:23
complaint 17:20 33:17
complete 41:13
component 4:10 4:11
concede 20:18 20:21
concentrate 20:7
concept 63:10
concern 49:14 49:14 56:2
concerned 9:9 19:3 38:17 43:12,23
conclude 7:9 63:10
conclusion 61:15,19
condition 40:11
conditional 40:5 40:10 41:1
conditions 57:21
Condon 19:22
conduct 17:4 27:4
conducting 11:2 17:13
conflict 40:17 41:5 56:6
conflicting 45:20,21,22,23
Congress 3:16 4:22 5:12,14 5:23 6:1 7:8 8:20 9:3,4,9,15 9:18 13:10 18:20 19:2,12 24:13,18 28:10 28:15 29:4 30:23 41:9 42:8 54:8 55:19 56:8 58:6 60:4 62:7 62:8,12 63:8
Congress's 3:13 61:14
connected 31:10
connection 5:20 6:10,22,25 12:15 19:20,25 20:2 21:14,16 22:10,11 28:11 28:18,19 29:8 32:19,23 37:22 39:4 41:3 44:20 47:4,10 47:13 49:22 51:17,19,25 56:11 63:1
conscious 9:19
consent 3:10,12 3:25 5:16 6:1 6:14 7:10 8:3 13:11 40:7,18 40:19 60:5 61:22,24
consequence 59:6 61:24
consequences 62:6
considered 3:13
consistent 53:19
conspiracy 35:5
construction 47:9
construed 4:13
consultation 15:24
contact 52:17
contemplated 9:18 53:10,13
context 46:15
contrast 9:3
controls 28:6 47:17 55:6
core 3:13 8:9,16 8:16,24 9:1,2 40:4 43:21 63:5,11
Correct 16:10
correctly 38:22
counsel 27:9 58:10,25 63:13
count 23:22
country 50:1
couple 32:17
course 27:3 29:18 43:13
court 1:1,12 3:9 12:17 13:16,16 14:19 17:6,7 17:10,15,24 18:9,17 19:22 21:5 24:8,20 26:25 27:14 38:11 42:13 46:19 48:1 55:8 61:18
courts 13:13 16:16 18:12 46:19
Court's 45:3
cover 6:11 34:14 46:19 47:13 49:16 54:17
covered 7:5,22 7:22 22:8 28:22 36:21 41:4 46:10,20 46:21 53:17
covering 6:9 28:16
covers 6:9 62:24
cradle 28:16
create 3:16,18 24:13 51:12,13
creates 3:15
creating 6:2
criminal 12:15 27:17 54:13 55:10
critical 11:8 12:12 15:21
crossed 62:4,14
crosses 48:16
crystal-clear 14:6
cut 48:24

D

D 1:17 2:6 3:1 27:11
damages 29:24 37:9
database 30:23
databases 3:11 27:16 30:24
day 31:24 55:20
deal 31:2
dealer 14:8,10 27:2 51:6 60:14,23
dealers 14:6 24:24 26:17 35:3,5,7 50:4 50:25 51:1
dealership 48:7
dealerships 26:16 27:4
dealt 26:18 27:1 27:2,5
decide 18:25 29:13 49:18
decision 9:19 49:22
declaratory 27:6
defect 32:1 33:3 53:18 55:1 58:16,19,21,24
defective 60:13 61:5
defendant 26:3 33:10 34:9,21 60:18 61:5
defendants 14:13 26:2,12 31:15 32:5 33:9
define 7:15
demonstrated 20:1
demonstrates 19:2
demonstrating 21:13
depending 30:12 51:21 62:13
depends 31:24
deriving 16:23
describing 21:5
description 24:23
designed 8:18 13:7 27:25 43:7
determine 11:3 15:18
determined 26:5
determining 14:14 27:24
devoid 9:15
diabetic 41:25
died 60:14,18,25
difference 10:20 16:2 17:8 18:8 33:3 37:18 47:25
different 16:13 16:19 32:13 38:9 45:11 51:18
differently 42:22 43:22 57:5
difficulty 25:11 42:25
direct 4:20 8:13 19:25 42:22 43:23 48:1
directly 27:15
disability 9:6 19:15 23:8 41:23 51:4
discharge 24:19
discharging 17:16
discipline 42:20
disclose 27:22

41:24
disclosure 25:19
disclosures 27:19
discovery 18:3 60:24
discrepancy 40:22 41:1
discrete 23:25
discussed 47:15
discussion 41:6
disliking 32:15
dismiss 8:1 60:15
displayed 15:13
dispositive 25:19
disputing 21:9
distinct 27:19
distinction 13:14 14:2 16:23 17:2 18:9,15,22
distinguish 42:19 54:24
distracted 14:25
dividing 25:8
DM 13:7
DMV 3:11 4:1,4 9:10,16 10:14 13:8 19:3,13 23:10 24:1 26:4 28:1 29:14 30:4,5 30:23 43:19 46:19,23 50:9 53:4,19 59:12 63:7
DMVs 8:12,21 9:5 19:9,24 61:12
doing 26:12 33:13 47:3 55:2
doubt 46:9
dozens 26:1
DPPA 3:10,14 13:7 27:15
draw 30:13 32:13,18 33:1 34:7,23 36:18 38:3 51:23,24 54:9 56:1,3 58:14 62:8,11 62:16
drawing 32:18 56:11,12 62:12
dress 30:9,17
driver 21:23
driving 5:1 31:10
dropped 29:6
drug 5:3
drunk 4:25
due 16:17
D.C 1:8,15,17

E

E 2:1 3:1,1
earlier 21:17 54:12
easily 24:16
easy 22:23 34:25
EDWARD 1:3
effect 6:13 50:17 50:20 61:21
effort 37:12
either 13:3 32:9
emphasize 53:2 58:21,22
enable 16:15,16 24:15
endeavor 47:12
enforce 12:4 50:24
enforcing 50:25
engage 6:3 9:13 13:15 19:4
engaging 10:17 10:19 15:14 17:6 18:6
engender 44:8
ensure 11:12 12:24 14:3 17:17 22:7
ensuring 12:2
entity 5:8
epilepsy 41:25
equally 55:16
ESQ 1:15,17 2:3 2:6,9
essence 10:22
ET 1:3,6
ether 54:20
EUGENE 1:6
everybody 30:6 59:16,17
evidence 9:15 60:4,13,17 61:3
evolution 29:2
exact 43:17
exactly 28:24 45:22 47:20 53:15 57:22 58:2
exaggerated 49:9
example 5:5 29:13 42:15 48:3 53:16 58:20 59:7
examples 17:5 21:11 28:13,15
exception 3:15 3:15,17,19,22 5:17 6:2 36:15 40:24 49:16
exceptions 7:16 22:8 41:10
exclusive 41:10 45:12
excuse 8:9,20
exempt 47:14
exemption 51:13
exemptions 41:8
exist 40:20
explain 22:13
explicit 3:17 5:17 6:18 7:3,7 60:7
exposed 23:18
express 3:10,12 6:14 7:10 8:3
expressing 56:2
expression 56:8
expressly 45:14 45:15
extent 55:5

F

F 1:3
fact 3:16 4:2 5:16 9:14 19:12 25:18 53:20 60:4 61:12
factual 12:25 17:20 25:20
fair 40:14 43:11 51:10 57:25 58:3
fairly 28:5
faith 39:15
fall 53:3
falls 52:9,12,22 52:24
far 31:21 47:24
fashion 61:13
favored 40:4
Federal 12:16 42:5,6,15 50:16,19,25 51:1
fee 10:5 14:23 15:17 36:8 43:14 48:8,9 48:12 56:19
fees 15:12
field 41:11
figure 36:18,25 38:1 48:20
figured 18:20
file 14:3 17:18
filed 20:17 25:25 33:25 35:11,14 35:17,19,20,22 38:11 44:6
fill 48:6
final 29:8
find 6:17,18 7:3 17:1 19:16 23:19 24:15,16 25:4,16 36:10 41:11 60:15 61:2,5,11
finds 39:15
fine 25:8
finished 60:24
first 5:5,5 8:12 13:1 22:19 23:1,24 29:11 32:20 35:12 39:18 46:4 49:25 52:22 55:7 58:7 59:5
fishy 30:8
fit 7:18,19,20 24:23 30:23 36:21
fits 22:24
floor 29:17 42:6 42:15
flow 62:13
focus 12:2,9 49:17,22
focused 11:11 31:25 50:1
focuses 62:19
focusing 4:2
FOIA 33:22 35:12,13,18,22 35:23,24 42:14 50:13
follow 20:13 21:2
followed 23:1
following 33:20
follows 11:19
forbidden 50:9
force 8:8 49:16
forfeited 16:19
forms 50:5
forward 14:7

found 26:4
four 23:1 59:1
Fourth 14:18 26:5
friend 51:12
function 8:2 16:14 63:11
functions 18:4 41:18
fundamental 8:11 10:20 13:8 17:8 63:8
fundamentally 16:19

G

G 3:1
gathering 15:13
general 7:16,17 28:7 30:22 41:24 45:12 47:17 55:6,12 57:5
generally 46:14 46:23
general-specific 45:10
getting 26:14 56:21 58:14,14 59:8
Ginsburg 6:21 6:24 7:2 9:20 10:2,9,11 13:18,25 14:5 14:14,21,24 15:2 16:3 21:1 21:4,10 24:22 25:10,17 26:11 26:19,21,22 36:2,4,17 48:5 56:16
give 6:13 20:10 20:15 22:20 43:2 47:9 50:10 51:4 52:7 53:16 59:19 60:6
given 7:12
giving 45:19 50:3
go 10:14 14:7,17 19:16 23:6 24:1,14 30:17 30:19,20,21 31:19 34:8,20 43:14,19 44:21 48:23 49:10 59:10,12 60:22
goal 11:12
goes 10:23 21:5 30:5 33:24
going 10:21 20:7 22:5 25:4,15 29:4 30:9 31:9 31:13 36:12 37:1 45:4,4 47:13,17 49:19 51:22 54:18 55:5 56:9 59:7 61:12
gold 29:16
good 23:20 39:15
governed 5:25
governing 19:1
government 41:18
governs 3:25 4:18 5:16 60:5
grant 9:11
grave 28:16
green 41:1,5
ground 48:10
grounds 31:14
group 14:16 25:2 26:20 37:8
Guerra 1:15 2:3 2:9 3:5,6,8,23 4:7,12 5:4 6:23 7:2,11,24 8:26 9:22 10:7,11 11:1,7,9,25 12:8,14,20 13:6,25 14:14 14:24 15:10,20 15:25 16:5,10 16:14,22 17:3 17:16,25 18:5 18:14,24 20:19 20:22 21:3,9 21:25 22:9,15 22:25 23:14,23 24:7,12 25:6 25:17 26:15,21 26:24 59:1,2,4 59:22 60:1,20 61:1,7,10 62:15,22
guess 20:22 24:3 28:20 31:2 39:1 44:21 45:25 46:3 49:1

H

happened 30:10 58:24
hard 8:22 18:17 48:20 56:1
harm 60:17
harmonization 62:1,10,24
harmonize 40:14 41:7 44:5 45:9 47:19
harmonizing 47:8
harmony 40:20
hats 18:11
health 5:1
hear 3:3 15:1
heightened 23:12
help 13:16 24:9 34:14 49:25
helped 11:15
helpful 49:6 50:8
helps 24:19 46:5
Herron 35:14
highlighted 23:24
highly 9:12
hire 57:18
history 4:3,19 29:2
home 43:15
Honor 3:23 9:22 10:7 11:1 15:21 17:3 54:4 62:22
hope 37:7 43:2 51:20
hoped 18:20
hops 40:11
horrible 46:13
hundred 61:4
hundreds 26:2
hurt 33:10

I

identified 54:25 58:21
identify 9:21 23:6 39:2
identity 46:24 46:25 49:10 50:1
ilk 23:9
illustrative 28:13
imagine 50:2 51:4
implausible 9:8 21:13 63:9
import 8:1
important 27:24 42:4
impose 55:9
imposes 27:17 28:3
improper 24:13
improperly 26:7
impulse 51:24
include 40:16,21 40:23 49:20
included 5:23 24:5
includes 12:18 38:23
including 5:22 11:16 20:11 28:12
inclusive 44:13 44:18
inconceivable 62:11
incongruous 19:22
inconsistency 27:3
inconsistent 56:7
independent 5:15 6:8 20:6 45:20
independently 46:17
indeterminacy 62:25
indicate 26:9
indicated 3:24
indicates 7:8 62:21
indications 25:21
indiscriminat... 43:14
individual 26:20 26:25
individuals 13:8 33:23 35:6
industry 6:2
infer 58:6
information 3:11 4:1,4,20 5:20,25 8:13 8:20 9:5,10,12 9:16 10:3 12:3 12:5 13:9,12 13:21 15:14 19:3,6,9,13,16 19:24 21:20

23:2,9,11 24:15 25:25 26:8 27:22 28:2 29:14 30:22 31:2,20 33:4 41:21 42:16 43:8,24 44:8 46:20,23 50:14 51:2,5 63:7
initially 26:1
initiates 21:3
injury 10:23
inquiry 25:21
instance 10:16 13:1
insurance 5:2 20:2
insurers 19:23
intend 30:7
intended 3:16 5:12
intentional 45:3
interest 26:9,16
interested 15:3 15:25 30:1 48:15,16 57:10
interests 10:15
interfere 39:11 39:12
interpret 20:5 22:9 40:15 54:6
interpretation 6:6 18:19 43:2
interpretive 8:1
interrupt 14:25 35:9
intruding 13:12
intrusive 28:2
investigating 10:12,18 14:11 15:18 23:7 36:1
investigation 10:17,25 11:3 11:18,23 12:11 12:23 13:4,15 17:13 18:7 20:12,16 21:6 24:17 25:23 36:20,22 37:2 37:16 38:21,23 39:3 40:15,19 40:21 44:22 45:11 47:23 48:12,21 56:14
investigative 14:2,16 15:11 15:15
invite 14:17
invited 25:22
involved 29:15 47:11
involving 29:6
irony 56:25
issue 28:7 41:7 41:14
items 8:25 44:13
iteration 29:8

J

January 1:9
job 11:13 12:4
jobs 13:13
join 11:6 16:11 24:10 25:16,22 52:21 53:21 57:13
joining 15:3 16:9 57:11
Joint 48:2,6
JOSEPH 1:15 2:3,9 3:6 59:2
judgment 13:17
judgments 12:5 16:17
June 35:12
junior 47:18 61:25
Justice 3:3,8,18 4:5,7,9,12,24 5:4 6:21,24 7:2 7:11,24 8:22 8:26 9:20 10:2 10:9,11,21 11:1,5,8,9,14 12:1,8,18 13:2 13:6,18,25 14:5,14,21,24 15:2,16,22 16:2,3,8,11,22 17:12,22,25 18:2,14,24 20:3,19,20 21:1,4,10,12 21:17,25 22:4 22:13,18,25 23:14,23 24:3 24:8,22 25:10 25:17 26:11,19 26:21,22 27:9 27:13 28:17,23 29:20 30:14,18 30:25 31:4,6 31:12,18 32:2 32:14 33:7,12 33:20 34:1,4 34:12,16,19 35:8,15,16,21 36:1,4,17,24 37:15,19,24 38:10,14,20,25 39:6,19 40:13 41:20 42:4,18 42:25 43:1 44:3,12,25 45:7,9,22,25 47:5,16,20 48:5,18 49:4 49:13,24 50:7 50:16,19,22 51:8,11,19 52:3,6,9,12 53:1,6,7,10,13 53:24 54:8,15 55:11,21,25 56:6,16 57:8 57:15,19,23 58:3,5,10,12 58:25 59:19,23 59:24 60:2,10 60:22 61:2,9 62:15 63:13
justify 14:15

K

Kagan 7:11,24 12:8,18 16:22 18:14,24 23:14 23:23 24:3,8 52:3,6,9,12 53:2,6,10,13 55:21,25 56:6 58:12 62:15
keep 20:7 57:4
Kennedy 10:21 11:1,5,8,9,14 12:1 13:2,6 20:3,19,20 21:12 35:8,15 35:16,21 44:3 44:12,25 57:19 57:23 58:3
kind 7:7 8:22 18:18 23:17 33:21 50:15 51:2 55:9 56:2 56:19 62:8
kinds 62:5
know 6:4 9:1 10:24 12:10 13:10 19:12 20:20 21:20 23:18,20 24:10 24:22 28:11,18 29:13,14,21 30:3,16 31:8 31:21 32:15 33:6 36:19 42:11,11 43:4 43:16,21 49:15 50:4,8,8,11,13 51:14,23 52:15 53:16 54:9,19 55:11 56:7 60:17

L

lacking 32:6
language 5:13 19:20 28:8,9 28:18 32:19 38:18,21 46:4 46:6,7 54:19 54:20 57:17 62:21 63:1
lately 52:16
Laughter 34:18 53:9 59:21
law 15:19 33:6 36:2 42:6,6,14 42:24 49:2,5 50:9,16,20,25 51:1 53:20
lawsuit 10:18 12:25 14:4 15:4,14 25:8 25:22 31:12,21 32:10 46:9 52:19 54:10,10 56:18 57:11,14
lawyer 5:9 15:9 15:10,14,16 16:13 17:23 18:16,16 23:15 24:9,19 25:10 29:21 34:8 36:7,25 37:6 38:15 39:15 43:17,18,25 49:20 50:3 51:4 52:15,18 54:11
lawyers 3:15 9:11,16 10:16 11:11 12:5,10 12:11,19,21,24 16:15 17:6,8 18:10 19:7,15 22:10 23:5,13 23:25 24:1,15 25:25 29:13 32:20 33:9 36:6,6 39:8

42:1,3,5 43:22 50:24,24 51:14 51:14 61:13 63:3
lawyer's 15:6
leave 58:11
left 58:9
legal 47:1,2 51:17
legislative 9:14 18:19 29:1,3
legitimate 29:15
lemon 33:6
letter 15:7 23:18 25:14,22 30:3 30:8 33:24 35:19 37:1,5 50:12 56:17,21 57:1,25 59:14 62:4
letters 14:18 33:4 35:16 48:4
let's 3:19 42:6
liability 27:17 28:4 55:9,10 62:5,13
license 43:13,19 59:7,13,13
lies 5:13 46:25
light 19:12 41:2 41:2,5 52:20 58:20
liking 32:14
limit 28:25 29:12 44:1
limitation 22:3,5
limited 11:2 14:22 17:1
limiting 47:9
limits 29:19
line 15:21 25:9 30:13 32:13,18 32:18,24 33:1 33:8 34:23,24 36:18 37:15,18 37:20,21 38:3 43:3,4 47:22 47:24 48:15,17 48:20 51:23,24 52:1,3,10,13 52:23 53:3,6,7 54:9 56:1,3,11 56:12 57:24 58:14 59:17,20 59:22,22,25 60:1 62:4,8,10 62:12,16,17
line-drawing 56:10,12
line-up 14:12
list 7:16 8:25 14:9,13 44:13 44:15,18
literally 21:15
litigation 3:14 6:22,25 7:1 9:25 11:18,23 12:23 16:18 17:14 18:6 20:13,16,24 21:7,8,19,22 22:6,12 24:17 28:16 29:5,7,9 29:16 32:21 33:24 36:1,15 36:20,22 37:11 37:16,17,22,23 38:7,8,18,22 39:4 41:2,4 44:1,4,7,15,20 44:23 46:19 47:4,23 48:13 51:18,20 52:21 52:24 53:11,14 54:11,16,24 55:3 56:13,14 62:19
little 45:12 54:23 58:12,23
loads 60:13,16 61:3,11
local 12:17
long 39:3
look 4:18 5:18 6:16 7:6,15 17:4 25:12,12 28:9 29:1 36:18 39:21 41:8,12 43:13 45:9 46:14,22 54:5 56:2 57:1 60:23
looked 54:22
looking 23:16 31:15,18,20 33:14 38:15 44:11
loophole 23:25
lots 30:21 46:15
love 52:17
lump 43:25

M

main 45:17
maintain 24:25
making 8:13 14:1
managing 58:8
manufacturers 30:9,17
Maracich 1:3 3:4
market 4:25 5:1 5:21 6:10,12 19:25 43:24
marketer 42:23
marketers 8:14 43:24 46:7,8
marketing 4:2,6 4:21 60:6 63:7
mass 63:6
massive 27:17 28:3 55:9 62:5
match 14:8
material 25:14
mats 29:18
matter 1:11 7:19 10:16 21:16 53:25 63:16
matters 5:21 6:10 28:2
mean 4:9 7:13 8:26 17:19 18:15,18,22 20:1 28:19 29:1,18 38:1,7 38:12,18 44:24 54:20 55:12
meaning 28:21 61:21,21
means 6:5 11:17 20:12 34:19,19 62:4,10
meant 38:2 39:10,11 62:8
medical 9:6 19:16 23:8
members 9:21
mention 19:7 58:16
mess 7:12
MICHAEL 1:6
middle 60:10,11 60:23
million 37:18 47:25 48:14
mind 32:3 48:24 49:10 54:10 57:4 61:14
mine 29:16
minute 16:8 20:9
minutes 59:1
misheard 35:9
misnomer 43:6
missing 60:18
misspoke 35:10
mistake 48:15
model 53:19
moment 35:9
Morales 28:20
motor 5:21 6:10 6:12 29:6,6 46:8
multiple 18:10
mutually 45:12

N

N 2:1,1 3:1
name 21:24 45:4 45:4 48:7 59:8 59:12,13
named 16:13 26:9,25
names 22:20 24:2 26:4 30:3 30:6,6 31:7 32:7 61:6
narrow 28:21
natural 56:20 57:13
nearly 46:5
necessarily 21:1 45:20 46:1,2
necessary 7:9
need 8:4,5 13:13 17:21 22:23 24:2 26:8,16
needed 25:25 36:2
needs 3:20
nefarious 53:22
never 20:22 27:5 42:12 44:22
new 33:5 61:7
noncommercial 4:11 5:6
nonconsent 60:9
non-consensual 19:14
north 53:7 59:20 59:23,24
noscitur 4:14
noted 35:25
notice 9:24 15:5 16:4,5,15
noticed 16:7
noting 55:7
number 7:25 21:23 22:6 49:21
numbers 9:7 41:22 42:7,10 42:13 48:25

49:9 50:3,5,10
numerous 25:3 25:5

O

O 2:1 3:1
objective 25:20
objects 56:17
obligated 22:7
obligation 12:24 25:18
obtain 23:13
obtaining 13:8
occurrence 31:25 33:2 55:1 58:15,19
offhand 50:11
office 15:6 30:20
officer 13:16 17:15,24 18:4 18:16
officers 12:6,21 17:6,9 18:12
oh 38:12 57:24
okay 10:6,8 13:21 15:19 16:4 32:20 33:20,24 34:1 34:3 39:6 47:2 50:7 53:17 55:19,19 58:14 58:15
old-time 18:19
once 44:22
ones 60:12
ongoing 6:24
opening 5:19
operates 46:14 46:17
opinion 34:6 46:20
opposed 17:9 18:21 37:3
opting 16:9
oral 1:11 2:2,5 3:6 27:11
order 7:9 9:12 11:21 13:16 19:3,16 23:13 24:15 26:6 42:13 45:5
originally 27:25
ought 20:5 24:25
overcharging 22:20
overlap 41:9,13 46:15,16 47:8 55:16
overlapping 45:23 46:1,3
override 7:7 8:3 60:7 61:21
overrides 7:10
overriding 6:14 8:5
oversight 42:21

P

P 3:1
page 2:2 5:19 48:1 57:23
Paradoxically 55:24
Parkinson's 41:25
part 12:12 19:1 31:5 45:3 56:25
participating 16:1 48:16
particular 6:3 10:24 38:8,8 38:17 53:18 54:25 58:20
particularly 4:18 19:18
parties 48:11
passage 8:11
passe 31:1
pattern 22:19
PAUL 1:17 2:6 27:11
pay 14:23 15:5 43:14
pejorative 34:10
penalties 27:17
pending 9:25
people 9:24 10:14 16:18 19:3 22:21 23:7 24:2 26:10 29:17 30:22 31:7 33:4 36:5,11 37:8 43:25 48:6 54:2 57:18
people's 41:22
perfect 40:20 57:6
perfectly 29:15
Period 10:6
periphery 63:4 63:10
permissible 15:15 25:23 27:20,23 29:5 36:14
permission 40:6
permissions 5:15 39:24,24 40:9,11
permissive 54:7
permit 21:19,21 45:14 49:19,19
person 10:8 41:23,24
personal 3:10 5:20,24 10:15 21:20 43:8
Petitioners 1:4 1:16 2:4,10 3:7 59:3
phone 30:19
phrase 6:9 12:14 21:6,14 61:17 63:1
place 8:12 32:13 33:1 35:1 44:24 54:17
places 30:21 32:17
plainly 37:12
plaintiff 14:8 16:13 25:7 27:2 32:7 33:16
plaintiffs 14:9 14:12,15 26:9 26:14 29:25 31:15,19,21,22 32:8
plate 43:14,19 59:8,13
play 48:23
please 3:9 15:4 27:14 42:7
point 7:3 11:10 12:1,20 14:20 17:3 21:10 25:24 34:2 39:2 42:18 46:3,12 47:6 51:10,12,25 54:25 55:1,4 57:23 59:5,25 61:16 62:2,22
pointed 46:18 56:16
pointing 31:5
points 22:25 23:23
poor 36:25
position 24:24 38:25 40:8,14 44:17 51:11 53:25
positions 58:12
possible 10:18 30:11 54:9
post 44:15
postcard 48:3,4
potential 10:13 11:3 32:8 35:19
potentially 55:10
practice 26:13 33:16 36:3 42:24
precedence 63:11
precedes 11:24
precisely 56:22
preempted 41:11
preferred 58:17 58:18
prefiling 15:15
premise 41:6 44:14
preparing 18:3
preserve 43:20
presumptively 27:20 28:25 39:22 40:10 42:5,9
pretty 22:22,23
prevail 11:22
prevent 43:7
pre-filing 18:6
primarily 28:1
principal 43:12
principally 41:16
principle 4:14 4:16
prior 13:19
privacy 43:6,9 43:11
private 5:2 13:8
privileged 42:3
probably 29:23 32:24
problem 8:16 13:8 37:4,6,8 38:8 43:3 47:8 55:13 56:11,12
problems 3:14 8:11 9:2 44:10 63:8
proceeding 12:16 16:1 54:13,14,18

62:20
proceedings 11:11
process 11:16,19 11:24 16:17 20:11,23,25 28:16 29:3 42:21 43:18,20 44:4,16,24 59:9
processes 5:2,2
processing 48:9 48:12
product 54:21
products 29:22 51:15
progression 11:15
prohibit 38:3
prohibition 7:16 39:21
prohibits 38:3 40:17
project 3:20
prominently 15:13
prompted 8:11
properly 29:23
proposal 16:6
protected 18:8
prove 21:22 34:5
proven 45:13
provided 5:3
provides 52:1 63:4
provision 4:18 8:24 18:23 19:8 23:11 29:2 34:7 41:17 46:22 63:6
provisions 5:15 6:16 8:10 9:4 27:21,24 40:4 40:5 42:8 47:14 54:6
public 41:24
public/private 9:10
purchased 14:13
purchaser 10:4
purchasers 19:23
pure 49:15
purpose 62:24
purposes 13:9 29:15 61:7
pursuant 22:16 23:3 47:3,4
pursue 47:1
pursuing 47:2
put 23:17 25:13 40:3,4 42:14 44:1 53:15
puts 57:21
putting 50:5
p.m 63:15

Q

qualify 10:12 25:2
quarrel 11:4
question 5:5 7:21 15:1 19:5 19:8,11 25:7 32:4,8,19 56:20 60:21 62:24
questions 10:15 15:3,11 25:5
quite 7:13 25:1 27:24 28:25 37:12

R

R 1:15 2:3,9 3:1 3:6 59:2
reach 26:14,16 61:19
reaching 62:1
read 21:15 22:1 22:2,18
readily 7:25
reading 19:19 49:14 58:17,18
real 52:19
realize 16:21
really 5:12 23:16 28:14,19 29:22 30:16 37:15 39:7 43:9 56:11
reason 5:11,11 6:4 23:5 28:24 31:5 32:4 33:15 34:8 48:18,19 55:15 56:4 57:4
reasonable 19:14
REBUTTAL 2:8 59:2
receives 15:4
recipient 25:15
recognize 9:20 42:5
recognized 17:7 18:10 19:23
record 9:14
records 30:20 53:19
recover 37:9
red 52:19 58:20
regulate 28:1 30:23
regulates 27:16 27:18
regulation 28:3
relates 47:14
relation 16:6
relationship 16:12 22:6
relatively 27:18
release 22:8 42:16
reliance 21:12
relief 27:6
rely 8:7
relying 4:15
remaining 59:1
remarkably 28:9
remedies 47:1
remedy 47:3
removes 46:9
render 13:17 16:16
repeat 34:1
repeatedly 17:7
repeating 32:3
reply 3:24
represent 18:11 23:21 37:7,8 52:17 56:21
representative 14:9,11 24:25 25:2 36:12
representatives 61:8,11
represented 35:6
representing 37:7
request 18:3 22:15 33:21,22 35:12,12,13,18
requests 23:1 33:13,18 35:11 35:24
require 40:19 57:16 61:24
required 57:3 57:10
requirement 3:12,25 5:16 6:1,15 7:10 8:3 32:23 39:14,14 60:5 61:22
requirements 16:17 57:9
requires 3:10
requisite 28:4
research 3:19,20 5:21,22,23 6:5 6:10,12,12 7:4 46:6 61:17
reserve 27:7
residing 38:14
resolve 8:18
resort 28:6 55:5
respect 4:15 5:9 7:25 18:1
respectfully 40:3 44:12
Respondents 1:18 2:7 11:22 19:19 22:2 27:12 61:17 62:2
Respondent's 6:6 59:6
response 3:13 58:11
responsibility 17:17 24:20
restricted 60:8
restriction 8:16
results 19:22
reverse 43:4
right 7:14 9:11 9:11 12:11,20 13:24 23:4 24:6 28:24 32:2 34:11 39:19 42:14 47:6 49:5 50:13,21 52:22 53:1,8 56:10
rights 10:1 16:19
road 59:12
ROBERTS 3:3 8:22 17:12,22 18:2 27:9 28:17 36:24 37:19,24 38:10 38:14 47:5,20 51:8,11,19 53:24 58:25 63:13
rule 17:19 54:23
ruled 14:18
rules 5:8 39:11

ruling 14:19
run 49:10

S

s 2:1 3:1,25 5:25 7:10
sale 28:1
satisfied 45:8
satisfy 16:17
saying 4:22 13:3 14:7 17:23 23:18 24:9 33:9 37:5 38:6 38:23 39:6 42:1 44:19 45:19 47:16 52:20 57:9,9 58:13 62:2,9 63:2
says 4:5 5:19 6:19,21 15:6 19:6 20:11 22:3 26:22 30:5 39:8,22 40:12,19 42:9 42:12 45:14 46:23,25 50:13 56:18 57:17 61:18
Scalia 34:16 38:20,25 40:13 45:9 53:7 55:11 57:8,15 58:5 59:23
scope 11:3 27:23
second 5:18 35:2 35:13
seconds 52:24
Security 9:7 21:23 41:22 42:7,9,13 48:25 49:9,21 50:3,5,10
see 7:6 10:23 14:11 22:19 31:10 33:5 36:6 43:1 47:12 49:20,23 52:6 60:14
seeking 25:13
seen 30:23 38:19
self-interests 12:22
sell 29:17,17
selling 19:24 39:12
send 30:7 33:4 37:1,5 59:14
sense 8:10 9:1 33:20 39:9 42:19 47:12 57:6
sensibly 4:13
sensitive 8:20 9:5,12 19:9 24:14 41:21
sent 15:8 26:5 35:11,16,20 56:17
separate 47:7 50:22
serve 43:17,20 59:8
service 11:16,19 11:24 20:11,23 20:25 44:4,16 44:24
services 51:17
set 21:18
sets 62:18
show 48:2
showing 23:12
shown 21:16
side 32:24 43:2 52:10,23,25 53:3 59:11
sides 56:15
signature 48:16
similarly 36:10
simply 9:8 10:17 22:16 34:21
sit 58:22
sitting 29:16
situated 36:10
situation 8:15 50:15
small 29:24
Smith 29:21 60:14,23
Social 9:6 21:23 41:22 42:7,9 42:12 48:25 49:8,21 50:3,5 50:10
sociis 4:14
solely 8:7
solicit 16:15 19:17 37:12 39:8 51:17
solicitate 51:14
solicitation 3:12 4:2,17 5:9 6:19 6:20 7:7 9:13 9:17,23 10:3 10:19 13:3,9 14:4 25:20 37:3,17 38:2 38:23 39:3,11 39:21 40:16,17 40:21,23 41:3 41:3 42:21,22 42:22 43:25 45:10,14,15 47:22 48:17,21 48:22 49:15 51:13 52:1 54:5 56:13,23 57:2,5,6,20,21 57:25 58:8 59:14 60:1,6 62:1,4,7,9,13 62:16,25 63:5
solicitations 4:6 14:19 19:14 26:6 63:3
solicited 3:21
soliciting 16:20 61:7
solicitor 49:19
somebody 14:23 15:4 17:13 24:21 33:14 46:25 57:13 62:14
somebody's 43:13,19 46:24
someday 51:20
someplace 56:1
somewhat 11:15
sorry 14:24
sort 23:2 38:4 43:6 53:16 62:23
Sotomayor 3:18 4:5,8,9,13,24 5:4 15:16,22 16:2,8,11 21:17,25 22:4 22:13,18,25 45:7,22,25 50:16,19,22 58:10
sounded 5:5,6
sounds 21:7
south 26:24 34:7 34:12,15,16,19 34:19,24 42:12 49:2,4 50:13 59:17
so-called 61:25
Spears 1:6 3:4
special 31:9 51:12,13
specific 7:17 22:22 28:6 31:25 33:2 45:13 47:17 53:13 55:6,12 55:16 58:15,24
specifically 35:25 41:19 43:20 46:24 48:4
specified 17:5
specify 22:3
standing 26:10
start 53:25
started 11:17 17:14 29:4 58:13
State 5:2,7 12:17 22:23 23:2 25:1 26:25 27:21 28:3 29:22 30:22 33:6 36:2 42:11,12 42:14 49:5,17 49:18 50:1,2 51:4 53:20 56:20 57:3,9 57:20
statement 34:6
statements 62:3
States 1:1,12 4:25 22:7 42:16 50:9 58:9
State's 27:16
status 9:6 19:16 23:9
statute 4:3,13,19 7:12 8:10,17 9:11 12:13 18:20,21 19:2 20:5,11 22:3 22:17 26:22 27:15,25 31:3 31:19 36:19 37:25 38:2 39:7,10,22 40:2 43:6,7,9 43:11,21 44:5 44:11 46:14 47:19 49:6 50:14 58:6 62:8
statutes 46:7
statute's 45:1
step 62:23
stop 13:10 19:13 44:18
string 26:12
strong 60:3
stronger 55:23

structure 39:22
study 13:3
stuff 42:2
subject 21:16 42:20,20 57:6 58:8
subjects 3:20
submit 9:8 19:18 60:3 63:3
submitted 63:14 63:16
subsection 5:13 7:9 8:5 23:3 54:12
subsections 8:19
subset 6:11
sue 26:10,22,25
sufficient 6:8
suggest 40:3 44:12
suggested 24:18 36:2 47:21
suggesting 24:4 48:5
suit 20:12,14,17 24:11 29:23 35:4,11,14,17 35:19,22,22 44:6,7 51:5,6,9 53:21,25
suits 17:18 26:1
superfluous 46:13
supplemental 50:12
suppose 10:3 13:23 14:21 23:14 36:4,7
supposed 61:19
Supreme 1:1,12
sure 13:12,19 31:17 35:23 42:7 45:8,18 46:16 51:16 52:5,8 60:20 61:3
surely 53:17
surplusage 61:18
survey 5:22,23 5:24 6:4,12 7:4 46:6 61:17
surveys 4:5 60:6 61:23
suspect 29:22 30:8
suspicious 31:14
symptoms 23:17 24:10

T

T 2:1,1
take 5:18 19:19 41:4,7,14 42:6 44:23 63:11
takes 54:17
talk 20:9 30:16
talking 20:8 23:4 41:21,22 44:13 61:1
talks 41:17,19
targets 3:14
tell 15:6 18:22 23:19 30:10 34:13
telling 41:9
term 28:12 54:11
terms 25:24
test 44:19
textual 60:3 62:18
Thank 27:9 58:25 59:4 63:13
theft 49:10 50:1
theory 22:11 59:10
they'd 58:8
thin 37:18 47:24
thing 15:23 18:25 26:12 28:14,17 32:17 38:4,17 39:18 43:12,16,17 45:3 48:22 51:2 58:6,22 61:5
things 4:17 12:18 21:22 41:14 44:17 46:4 47:3 51:23 52:7 57:1,2
think 4:12 5:6 5:12 7:25 9:9 10:13,14 11:10 11:10,14,25 17:3 18:5,15 18:25 19:14 20:4,16 21:14 22:23 24:12 25:17 28:11,14 29:19 31:8,9 31:23 32:1,17 32:18 34:21,24 36:16,17,21 37:9 38:1,5,17 39:1,5,9 40:13 40:14 43:11,25 44:11 45:2,5 45:17,24 46:2 46:5,5,10 47:22 48:10 49:8 51:18 52:1,9,18,22 53:1,22 54:3,5 54:15 55:6,14 56:4,18,19,25 58:12 59:16 61:8,10 62:12 63:9
thinking 21:18 31:14 32:5 51:9 56:8
third 58:16
thought 13:20 28:5 35:10 44:22,24 55:19
thousand 61:4
three 4:16 7:5 7:13 8:1,8 17:5 18:11 28:10 32:9 58:13 60:15 61:2
throwing 49:16
thrust 40:8 57:24
time 3:21 27:8 32:19 38:19 55:7 58:7
times 18:5 28:10 32:9 35:4
tip 25:14
title 30:20
token 13:11
told 10:22 15:7 25:12
tons 41:8
topics 7:5
tort 23:15 24:1 29:23
torts 41:19
toxic 23:15 24:1
traditional 28:3
transaction 16:7 31:25 33:2 55:1 58:19
treat 42:21 56:23
treated 43:21
treating 57:5
treatment 58:15
tribunal 41:16 41:17
tribunals 11:12 12:2,6,9,22 13:13 19:7
tried 45:5
trigger 25:18
troll 34:10,20
trolling 34:24 59:15,18,23,24
true 11:20 18:7 21:25 26:21
truly 19:21
try 27:3 29:17 49:25
trying 14:8 19:13 29:9 30:16 34:5 36:18 37:25
twice 29:3
two 7:19 22:25 23:1,23 33:5 33:17,18 35:23 40:20,22 42:8 44:10 49:23 51:23 52:7 55:17 56:15 60:2
type 6:3 38:2 48:8

U

ultimate 44:19
ultimately 13:17 32:1
unaware 16:18
unconditional 39:25 40:9
underlying 4:19
understand 6:14 16:23 18:15 20:3 21:24 33:21 38:22 47:6 48:14 52:7 53:18 54:22 57:8 59:16,25 60:5 60:20
understanding 20:25 61:20
understood 5:14 13:19 20:23
underwriting 19:25
undue 9:9
unique 9:11 23:25
United 1:1,12
university 3:19
unknown 54:9
unlawful 26:13

27:20 52:20
unusual 27:15
use 4:1,4,18,20 5:6,17 6:3,17 9:12,16,21 12:15 19:6,6,8 19:13,15 22:5 24:13,17,19 27:16,20,23 29:5,5,7,8 32:23 34:9,13 36:14 39:23 40:1,6 41:2 43:8 46:23 54:11,20 56:3 56:9 59:13
uses 28:10,11,12 28:13 46:19 54:7,16
Usually 8:24

V

v 1:5 3:4
varsity 47:18 55:22 62:1
vehicle 5:21 6:10,12 46:8
vehicles 29:6,7
verify 46:24
version 47:18 55:22
versus 5:2 14:4 18:16
view 3:23 32:9
violates 15:19
violations 27:18
vital 14:2

W

wait 16:8 33:7,7 35:2
want 4:25 5:1 13:19 22:19,22 23:15 27:3 30:21 31:6,7 32:7,13,15,21 33:15,25 34:12 34:23 35:2,8,8 38:4 41:24 44:16 46:15 50:24 51:7 53:2,21,24 56:22,23,23 58:10,21 60:14 61:2,5
wanted 3:20 7:8 13:10,11 36:6 54:8 58:7
wants 43:17 45:14 54:17 59:17
Washington 1:8 1:15,17
wasn't 14:6
way 22:1 27:19 37:2 38:5 39:7 43:5 44:5,11 44:25 46:14 48:24 49:25 50:8 54:6
ways 58:13 60:2 61:11
wear 18:11
Wednesday 1:9
well-founded 12:25 14:3 17:18,19
went 26:3
weren't 13:12
we're 15:18 19:6 20:8 23:3 45:4 45:4 56:9,18 60:23,24,24 62:9
we've 20:1 45:9 47:15
whatsoever 6:7
whistles 56:24
wholly 5:15 6:8
who've 31:7
widespread 36:3 36:7
wild 49:11
willing 11:6
windshield 37:4 37:6
wiper 29:18
wipers 37:5,6
witness 23:20 24:9 37:10 59:11
witnesses 23:16 24:4 37:13
witness/client 35:20
wonder 29:25
word 28:10 45:21 47:8 62:7
words 7:13 8:2,8 18:18 34:13 36:19 37:25,25 46:11 48:23 49:9 62:19
work 38:15 54:21 55:15 56:15
works 39:7
worth 55:6
wouldn't 29:12 44:18
write 30:2,7 34:6 37:1
written 18:21 45:1
wrong 32:6 34:9 34:22 35:4 45:6 54:3

X

x 1:2,7

Y

Yeah 45:2 52:11 54:1 56:4
years 33:5
yellow 41:2

Z

Z 14:10

$

$200 37:18 47:25 48:14

1

1 8:23,24 41:11 41:12,16,17 42:8 46:18,20 55:18
10 19:21 21:11 29:25
11 17:19
11:16 1:13 3:2
12 3:25 5:25 6:15 7:5,10,15 7:23 8:3,4,9,23 16:24,25 18:25 19:12 20:4,7 21:12 40:5,11 40:12,15,17,24 42:23 44:5 56:2 60:8 61:24 63:5,12
12-25 1:4 3:4
12:17 63:15
14 8:23,24 27:20 27:23 39:23 41:8,10

2

2 5:13 7:3,8 8:6 8:9 41:11 45:13,14 46:4 60:4,7 61:23
20,000 29:25
2005 35:13
2006 35:13,14
2013 1:9
23rd 35:12
24 35:13
27 2:7
29 35:14

3

3 2:4 41:12 46:22,22 47:3 55:18
30,000 26:4

4

4 4:16 6:19,19 7:6,15,22 8:18 9:3,21 10:10 11:10 12:2,5,9 12:12 17:1,2 18:8 19:1,5 20:7,8,9 22:9 22:16 23:10 24:5 28:8 39:4 39:24,25 40:12 40:15,18 41:12 41:13,15,20,20 42:8 43:16 45:16 46:18,21 55:18,18 56:1 62:11,16,18,21 62:24 63:2,4 63:11

5

5 41:12
59 2:10

6

6 19:21 21:11 41:12

7

7 41:12

9

9 1:9
93 48:1,5
94 57:23