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IN THE SUPREME COURT OF THE UNITED STATES

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BRISTOL-MYERS SQUIBB COMPANY, :
Petitioner : No. 16-466

v. :

SUPERIOR COURT OF CALIFORNIA, :
SAN FRANCISCO COUNTY, ET AL., :
Respondents. :

- - - - - x

Washington, D.C.

Tuesday, April 25, 2017

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:08 a.m.

APPEARANCES:

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Petitioner.

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Petitioner.

THOMAS C. GOLDSTEIN, ESQ., Bethesda, Md.; on behalf of
the Respondents.

	C O N T E N T S	
		PAGE
1		
2	ORAL ARGUMENT OF	
3	NEAL K. KATYAL, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	RACHEL P. KOVNER, ESQ.	
7	For United States, as amicus curiae,	
8	supporting the Petitioner	20
9	ORAL ARGUMENT OF	
10	THOMAS C. GOLDSTEIN, ESQ.	
11	On behalf of the Respondents	30
12	REBUTTAL ARGUMENT OF	
13	NEAL K. KATYAL, ESQ.	
14	On behalf of the Petitioner	61
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
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23
24
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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 16-466, Bristol-Myers Squibb Company v. The Superior Court of California.

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE PETITIONER

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

The California Supreme Court ruled that hundreds of plaintiffs who were not prescribed a drug in California, who did not take it in California, who lacked any injury in California, and who had no other connection to California could sue in California.

The court reasoned there was a sliding scale whereby the defendant's other conduct with other Californians could establish specific jurisdiction. Those concepts have some footing in the law, but that footing is limited to general jurisdiction, which is lacking here, and this Court has never permitted specific jurisdiction in such circumstances, which is presumably why Respondents don't bother defending the California Supreme Court.

1 Instead, they mint a whole new test, never
2 before seen by any court whereby an ad hoc
3 reasonableness inquiry with any number of undetermined
4 balancing factors will create jurisdiction.

5 JUSTICE KENNEDY: You've conceded that
6 there's fair play and substantial justice. That almost,
7 not quite, perhaps, takes away the due process argument,
8 which basically has to be the argument that you're
9 making here.

10 MR. KATYAL: Justice Kennedy, I don't think
11 that's actually what we conceded. What we did say is
12 that the reasonability -- reasonableness inquiry is with
13 respect to the third kind of safety valve factor. We
14 didn't make the argument with respect to the third
15 prong, but we absolutely did make the argument that
16 jurisdiction here was unreasonable below.

17 At pages 4 and 18 in the court of -- in the
18 California Supreme Court brief, we made very clear. We
19 said it would, quote, "Offend basic notions of
20 federalism and fairness" at page 4. At page 18, we
21 said, "Instead of achieving jurisdictional fairness,
22 their rule would distribute their burden of defending
23 mass torts in a lopsided way."

24 JUSTICE SOTOMAYOR: I'm sorry.

25 MR. KATYAL: But we absolutely did.

1 JUSTICE SOTOMAYOR: How is it
2 unreasonable --

3 MR. KATYAL: How to --

4 JUSTICE SOTOMAYOR: -- to have -- yes.

5 Now, you're not fighting that pending
6 jurisdiction permits a court to take multiple claims of
7 damages nationwide, or even worldwide, and even
8 unrelated causes of action and bring them to a
9 jurisdiction, correct, by one plaintiff? So you're not
10 -- you're not claiming that that offends due process.

11 MR. KATYAL: Pending jurisdiction, at least
12 personal jurisdiction, is only applied in some Federal
13 courts by dint of common law. We're absolutely
14 fighting. I mean, it's not the law in any court -- any
15 State court anywhere that pendent personal jurisdiction.

16 JUSTICE SOTOMAYOR: So how do you deal -- so
17 you're saying that pendent jurisdiction for claims that,
18 in some way, are connected violates due process?

19 MR. KATYAL: We're saying --

20 JUSTICE SOTOMAYOR: Do you go any further?

21 MR. KATYAL: We're saying that there has to
22 be a causation between the underlying cause of action.

23 JUSTICE SOTOMAYOR: With every single
24 individual action. And so you're destroying pendent
25 jurisdiction on every level.

1 MR. KATYAL: We're not destroying it. There
2 is no -- there is no pendent jurisdiction for State
3 claims as it exists right now. This Court has said time
4 and again, starting with *International Shoe*, the
5 relevant locus of analysis, Justice Sotomayor --

6 JUSTICE SOTOMAYOR: That's assuming I buy
7 your argument.

8 MR. KATYAL: -- is always --

9 JUSTICE SOTOMAYOR: Let's put it aside.

10 MR. KATYAL: But I'm just saying that that
11 has been the law, and always is --

12 JUSTICE SOTOMAYOR: But your position right
13 now is that in no suit will one court, State court, ever
14 be able to hear the entire controversy between a
15 plaintiff and a defendant.

16 MR. KATYAL: Oh, definitely not. Heavens be
17 that is not our position at all, Justice Sotomayor. So,
18 for example, every place in which there was general
19 jurisdiction, you can have that court hear it --

20 JUSTICE SOTOMAYOR: Only when that's general
21 jurisdiction.

22 MR. KATYAL: No, not -- again, that's one
23 place. So Delaware, for example, here. But there's
24 also the ability for specific jurisdiction in places in
25 which the underlying activity was launched. So here

1 they have --

2 JUSTICE GINSBURG: If --

3 MR. KATYAL: -- for example, effective
4 marketing --

5 JUSTICE GINSBURG: If, for example, the
6 drugs that -- that everyone bought all over the country
7 was manufactured in one place, even though it wasn't
8 the -- the place of business or the place of
9 incorporation?

10 MR. KATYAL: Right. It may be that that's
11 enough for specific jurisdiction, depending on what the
12 underlying claim is. Exactly, Justice Ginsburg.

13 The question here is can theyglom on to the
14 180 million pills that had -- that Bristol-Myers has
15 sold in California? That's the --

16 JUSTICE SOTOMAYOR: What's efficient about
17 having piecemeal litigations across the country?

18 MR. KATYAL: Well --

19 JUSTICE SOTOMAYOR: For years we've been
20 approving pendent jurisdiction, or at least not taking
21 any case that disturbed it, and there are cases in which
22 we've just assumed it. What's the efficiency there?
23 And what's the reasonableness there?

24 MR. KATYAL: So -- so first of all, Justice
25 Sotomayor, I disagree with the premise. I don't know

1 this Court has ever accepted the idea of pendant
2 jurisdiction of State court claims that are -- are
3 without causality. Indeed, our brief, at pages 19 to
4 21, explains every precedent of this Court winds up on
5 the causality principle. And your most reason decisions
6 in Goodyear and Daimler, I think, make this very clear.

7 Now, with respect to the reasonability --
8 the efficiency, I think the first thing to say is their
9 rule doesn't create any efficiency at all. That is,
10 just take a look at the facts of this case. Even after
11 the California Supreme Court ruled, you already -- you
12 still have action going on in New York, coordinated
13 actions, you have law of MDL in New Jersey, and you have
14 lawsuits in Delaware. Petition Appendix page 72 says
15 before you had lawsuits in Arizona, Illinois, Hawaii --

16 JUSTICE KENNEDY: If -- if this suit went
17 forward just with the California plaintiffs and
18 Bristol-Myers did not prevail, would there be issue
19 preclusion in other States, assuming that judgment was
20 final?

21 MR. KATYAL: I don't think so. And -- and
22 our brief -- our reply brief does -- you know, cites a
23 bunch of, you know, literature on this that, basically,
24 because there's no much divergence in the underlying
25 causes of action, collateral estoppel just doesn't work.

1 JUSTICE GINSBURG: But if they all -- if
2 they -- if they all allege the same basic flaw in the
3 drug, the -- the drug was defective but cost, and that's
4 determined in suit number 1, I take it that would be
5 issue preclusion.

6 MR. KATYAL: But the -- the problem is there
7 are so many different substantive standards as a matter
8 of actual reality as opposed to, you know, kind of a
9 theory about deceptive marketing or something. They do
10 differ so much from State to State.

11 JUSTICE KENNEDY: Well, let's -- let's
12 assume that New York and California are basically the
13 same, the facts are basically the same. If there's a
14 California judgment that's valid, I assume, the
15 plaintiff is going to argue for issue preclusion. And
16 it -- it seems to me that actually helps you because --
17 because it shows that this rule that you're proposing is
18 not so inefficient as the Respondent would say.

19 MR. KATYAL: Absolutely, Justice Kennedy.
20 There's no -- there's no -- you know, we can, of course,
21 waive -- waive that and -- and seek collateral estoppel.

22 But to go back to --

23 JUSTICE KAGAN: Mr. Katyal, could we go back
24 to a form of Justice Kennedy's first question, which is,
25 just could you explain what defendant's interests are at

1 stake here? In other words, you know, usually we've
2 looked to fairness for the defendant when we make the
3 due process inquiry. So what is the unfairness here,
4 given that there is another suit that's going to be
5 going forward in California, and what Mr. Goldstein
6 wants is just for additional claims of the exact same
7 kind to be joined to that suit?

8 MR. KATYAL: Exactly. So there's three
9 values this Court's isolated: Federalism,
10 predictability, and fairness. The fact that we --

11 JUSTICE KAGAN: So could we just start with
12 the fairness?

13 MR. KATYAL: Absolutely. So the fairness
14 concern -- and this is going to take me about 45 seconds
15 to walk through the lifecycle of --

16 JUSTICE KAGAN: You've timed it.

17 MR. KATYAL: -- but -- I have.

18 (Laughter.)

19 MR. KATYAL: And -- but our view is to
20 affirm Bristol-Myers in -- to affirm the judgment below
21 or to accept his theory is going to be -- you know, be
22 complex, it's going to be inefficient and unfair, and do
23 something this Court has never blessed before internally
24 that Bristol-Myers didn't open itself up to.

25 So the first thing that would happen in this

1 lawsuit is a determination of choice of laws he
2 acknowledges. There are 575 out-of-State plaintiffs
3 from 33 States. So the California court's going to have
4 to first figure that out.

5 Second, it's then going to have to apply
6 California procedure to all of these cases, which is
7 markedly different than the procedure in the places in
8 which Bristol-Myers sold the drugs as to which caused
9 the underlying injury.

10 So, for example, California has different
11 rules about summary judgment. It's really hard to get
12 summary judgment, very easy to go to trial. It's
13 also -- they don't have a Daubert rule, so they have
14 very lenient permissive testimony with respect to
15 experts. That isn't something Bristol-Myers bought into
16 when they sold, for example, a drug in Ohio to an Ohio
17 plaintiff.

18 Then you get to the trial. And this is, I
19 think, the most important part, because their reply --
20 because their brief points it out as, oh, this is
21 efficient and it's coordinating all of these actions.
22 Take a look at Joint Appendix page 74, which is their
23 jury trial demand. This is not one jury trial. They
24 are seeking 661 individual jury trials, and in each of
25 those jury trials, the court is going to have to

1 determine a whole variety of things which are going to
2 diverge from case to case; things about different rules
3 about -- legally, different States have different rules
4 on contributory negligence, they ever different rules on
5 the learned intermediary doctrine, which is a critical
6 doctrine in failure to warn cases. Some States don't
7 have it at all. Others restrict it in all sorts of
8 various ways. Could be fact determinations about what
9 is specific injury or not. And that is why this
10 Court --

11 JUSTICE SOTOMAYOR: I'm sorry. Don't all
12 those issues have to be decided in the 600 individual
13 cases anyhow?

14 MR. KATYAL: Oh, they do.

15 JUSTICE SOTOMAYOR: The question is what's
16 the unfairness of coordinating the common questions in
17 one place when there is so much overlap in the essence
18 of the claim, which is false marketing?

19 MR. KATYAL: So -- so, Justice Sotomayor,
20 first of all, I don't think that they would be
21 coordinated. They would be decided at individual trial
22 by trial. I don't think they would be coordinated. To
23 the extent you wanted coordination, the Federal system,
24 obviously, has a way to do that from the perspective
25 of --

1 JUSTICE KAGAN: But it seems you're
2 conflating two things, Mr. Katyal. I mean,
3 individual -- a lot of individual California claims can
4 be joined, and then we can have an argument about what
5 should probably be joined and what can go off
6 individually. But -- but that's a different question
7 than the question in this case, which is, why is it
8 unfair toglom on Texas claims and New York claims to
9 the California claims, once we already have a mass
10 action which will have multiple injury trials?

11 MR. KATYAL: So -- and the reasons are both
12 procedure and substance. So procedurally, you'll be
13 playing by different rules than what the defendant has
14 accepted, and this Court's always said, one of the goals
15 in specific jurisdiction litigation is to make sure and
16 tee up to businesses, particularly small businesses,
17 like the Plack brief points out, look, if you are enter
18 a jurisdiction, here's what you're going to face. And
19 Bristol-Myers doesn't disagree. When they sold the
20 180 million pills in California, they opened themselves
21 up to the jurisdiction for those pills. The question
22 is, can the folks from the 33 other States sue on that?
23 And then it does create substantive unfairness for
24 different juries. There's all sorts of things that
25 happen.

1 And if I could, Justice Kagan, just return
2 to the first two values. Predictability is really
3 important. There are 4 million people who take Plavix
4 in -- in America. If you accept their rule, it's not as
5 if they have to sue in California. Each of those people
6 can sue in any of the 50 States. That's 200 million
7 possibilities. That is the --

8 JUSTICE KAGAN: But you already know because
9 this is a nationwide marketing that you do, nationwide
10 drug, you already know that you're subject to
11 jurisdiction in any of the 50 States and have to be
12 prepared to confront jurisdiction in any of the 50
13 States.

14 MR. KATYAL: But -- but Justice Kagan,
15 critically, we know that we confronted with respect to
16 each individual State's procedure and substance. We
17 don't accept the idea that plaintiffs can play by least
18 common denominator rules and file Ohio claims in
19 California or Alaska.

20 JUSTICE KAGAN: Well, I guess what I'm
21 saying is that I -- the unfairness aspect of this is
22 what I really want to drive at, because predictability
23 just honestly doesn't seem like what's at issue here
24 given that you know it's perfectly predictable to have
25 litigation in any of the 50 States.

1 So the question is, why is it unfair to have
2 more litigation than you would in one of those States
3 rather than another?

4 MR. KATYAL: Justice Kagan, it's not a
5 numbers game. It's not the amount of litigation. It's
6 the way in which the litigation unfolds, both
7 procedurally and substantively. And this Court's
8 specific jurisdiction jurisprudence has always tried to
9 say to defendants, look, we want you to know the
10 consequences that follow when you enter into a new
11 market. And when Bristol-Myers, for example, sells in
12 Ohio to an Ohio plaintiff, I don't think they sit there
13 and think, oh, that allows me to be sued in California.
14 Of course they can be sued in --

15 JUSTICE KAGAN: Could you make this as
16 concrete as you can for me? And I -- I'm assuming that
17 your interests are the flip side to the plaintiffs'
18 interests. So why is it that a person would choose to
19 sue in California, and why is it that Bristol-Squibb
20 does not want more suits than necessary to happen in
21 California?

22 MR. KATYAL: Well, I suppose one thing, the
23 plaintiffs only have one thing to think about, which is
24 what's kind of jurisdictionally advantageous for them,
25 either procedurally or substantively. You know, for us,

1 when we're, for example, thinking about where to
2 incorporate and set up our principal place of operations
3 in New Jersey. I mean, nobody could say New Jersey is
4 kind of a defendant-friendly State. It's done so for
5 all sorts of reasons about employment and things like
6 that.

7 And so I do think this Court has identified
8 a concern in this area about forum shopping. We do
9 think that concern exist -- exists here. But I think
10 that kind of underlying this is a notion about
11 predictability and what their rule does, fairness, and
12 then federalism, which I'd like to get to, because this
13 Court's identified it, starting in World-Wide
14 Volkswagen, as a critical thing.

15 And the idea that the Ohio plaintiffs -- or
16 that the State of Ohio can't adjudicate these cases
17 because they're grabbed by California is something,
18 again, that this Court hasn't --

19 JUSTICE KAGAN: I guess -- I guess I'm --
20 I'm feeling a little bit stymied here because I thought
21 you were going to come at me with saying, look, the
22 juries in California are different or there's punitive
23 damages in California when there's not someplace else or
24 the substantive rules might be different. And I'm not
25 hearing any of that.

1 MR. KATYAL: All of the above,
2 Justice Kagan. There's a bunch of stuff wrong with this
3 rule --

4 JUSTICE BREYER: All of those things. Now,
5 I'm starting here; this is my problem.

6 Before International Shoe, I think basic
7 rule with qualifications, et cetera, a State is a
8 sovereign and can open its doors to whom it wants. End
9 of the matter. No. That isn't quite, but basic rule.
10 Now, along comes International Shoe, no, you can't, not
11 if it's unfair. Hence the questions.

12 Now, if that's what it is, if that's the
13 basic way to look at it -- and I hear the answers you've
14 given. Many, but not all, of those answers I could, I
15 think, have said the same thing in respect to
16 multidistrict litigation. And -- and so it sounds to
17 me, if I'm right on that -- which I might not be, you'd
18 have to say which ones aren't -- that what we need here
19 is a rule. We need a panel. We need Congress. We need
20 the multidistrict panel. But that isn't the
21 Constitution.

22 And then what I fear is if we say it's the
23 Constitution, what do we do to either the class actions
24 or maybe even multidistrict litigation? I think you
25 could solve that problem by putting the jurisdiction

1 transfer our court. But -- but you see, that's why I
2 think, what is it specifically that's special -- sorry,
3 but --

4 MR. KATYAL: So, Justice Breyer, we -- we
5 think you should write an opinion for us that doesn't
6 deal with multidistrict litigation or class actions, and
7 that's easy to do. The first thing to do is do what
8 this Court did in *Omni Capital*, footnote 5, and say
9 Federal is different than States, that the due process
10 guaranties apply differently, precisely because --

11 JUSTICE SOTOMAYOR: I have no idea how you
12 draw that line.

13 MR. KATYAL: Because there's not
14 rivalrous --

15 JUSTICE SOTOMAYOR: If it is due process,
16 then -- and how do you say that it's not due process
17 merely because it's Federal?

18 MR. KATYAL: For two reasons: Because it's
19 not rivalrous jurisdiction, it's not Ohio versus
20 California and every State in between; and because the
21 whole question in due process is minimal contacts, and
22 people are deemed to have minimal contacts with the
23 Federal government as a sovereign. That's why this
24 Court has always bracketed --

25 JUSTICE SOTOMAYOR: But that is not a

1 Federal claim in -- that is a State law claim that would
2 be brought in -- in Federal court.

3 MR. KATYAL: But -- but the --

4 JUSTICE SOTOMAYOR: Why would due process be
5 different?

6 MR. KATYAL: The constitutional rule that
7 Justice Breyer was asking would apply differently.
8 That's why this Court's always reserved it.

9 And multidistrict litigation, of course,
10 operates very differently. It's only pretrial
11 coordination, it's not trial, and so it's a very, very
12 different process.

13 JUSTICE GINSBURG: But could Congress make
14 it for trial? Right now, the multidistrict litigation
15 panels is only for pretrial. It can be a trial if
16 everyone consents. But absent consent, you have to go
17 back to where you began.

18 But would there be any constitutional
19 impediment to having a multidistrict statute amended so
20 that the -- the forum in which the cases are
21 consolidated could go on to the merits?

22 MR. KATYAL: Justice Ginsburg, I certainly
23 think the Court could write an opinion which says that
24 that is perfectly permissible and still reject
25 Mr. Goldstein's theory 100 percent, which is what this

1 Court has done time and again.

2 May I reserve?

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Ms. Kovner.

5 ORAL ARGUMENT OF RACHEL P. KOVNER

6 FOR UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING THE PETITIONER

8 MS. KOVNER: Mr. Chief Justice, and may it
9 please the Court:

10 This Court in Goodyear and Daimler rejected
11 approaches to general jurisdiction that would allow
12 plaintiff in one State to sue a national company for
13 product liability in all of the other 49 States, calling
14 those approaches exorbitant and unacceptably grasping.
15 The California Supreme Court misunderstood this Court's
16 decisions when it allowed that same result under the
17 label of specific jurisdiction.

18 As this Court explained in Goodyear,
19 specific jurisdiction lets a State exercise authority
20 over activity within its borders, which it has a strong
21 interest in controlling. But a State lacks a comparable
22 interest in exercising authority over out-of-State
23 defendants for entirely out-of-State conduct.

24 JUSTICE GINSBURG: But if this were -- if
25 this were a case where the nonresident plaintiffs were

1 suing Bristol-Myer in California, then everything you
2 say follows. But that's -- no one is urging that
3 California could assert jurisdiction against
4 Bristol-Myers on behalf of out-of State plaintiffs.
5 It's -- essential to this case is that there be a case
6 of Californians against Bristol-Myers, and this is
7 tagged on to it.

8 MS. KOVNER: That's right, Your Honor. So I
9 agree that the question here is whether the fact that
10 the out-of State plaintiffs have joined their claims in
11 a single lawsuit with California plaintiffs makes a
12 difference. And I don't think that it does, if you
13 looked at the interest that the Court has considered in
14 its specific and its general jurisdiction decisions.
15 Because I don't think that California has a greater
16 interest in exercising control over the conduct of
17 out-of-State defendants in another State just because
18 those claims have been joined with in-State plaintiffs.

19 I think the principal reason that
20 respondents suggest that California does have that
21 interest is an efficiency interest. But this Court has
22 defined general jurisdiction in a way that allows
23 plaintiffs to bring their suit together in a single
24 forum for efficiency purposes --

25 JUSTICE GINSBURG: What about McKesson?

1 There -- there are two defendants here. McKesson is a
2 California corporation or principal place. Is there
3 another place where these plaintiffs could sue McKesson
4 as well as Bristol-Myers?

5 MS. KOVNER: So I think it's not -- it's not
6 clear. We agree that personal jurisdiction is defendant
7 by defendant. So there may be some cases -- and this
8 may be such a case -- in which there's not one place
9 where any group of defendants can be joined together.
10 We think generally, there will be, because if the
11 allegation is that two defendants have engaged in a
12 course of conduct together, there's going to be some
13 place where those defendants engaged in that course of
14 conduct --

15 JUSTICE KENNEDY: Could the plaintiffs here
16 have filed against McKesson and then, under California
17 procedure, added Bristol-Myers as a necessary party?

18 MS. KOVNER: I'm not -- I'm not sure as a
19 matter of California law. We don't --

20 JUSTICE KENNEDY: Assume California law will
21 have that. Would that be -- would that be consistent
22 with due process?

23 MS. KOVNER: No. We don't think that the --
24 the procedure that was used would make a difference. We
25 think that the problem with McKesson here -- and I think

1 page 59A to 60A of the opinion below makes -- makes it
2 clear is, is it's not clear what the Respondents are
3 alleging that McKesson did. They're not alleging that
4 McKesson distributed the drugs that plaintiffs received.
5 If McKesson did, then there would obviously be some
6 conduct that occurred in California that was connected
7 to both plaintiffs that would make a lawsuit --

8 JUSTICE SOTOMAYOR: Can we go to the logic
9 of your position? Assume a foreign corporation. Under
10 your theory, that foreign corporation might be sued in
11 the particular State in which an injury occurred. But
12 since it has no home State in the United States, that
13 means that in that situation, there's no place for
14 plaintiffs to come together and sue that person;
15 correct?

16 MS. KOVNER: I think that it might not be in
17 the United States. There will not be a general
18 jurisdiction location for international defendants --

19 JUSTICE SOTOMAYOR: Products are sold here
20 across the United States. All the marketing, everything
21 is the same. The theory is the same. But because it's
22 a foreign State, there's no one jurisdiction -- a
23 foreign company, there's no one jurisdiction in the
24 United States now under your theory.

25 MS. KOVNER: That's true for some.

1 JUSTICE SOTOMAYOR: There is an amicus brief
2 here that talked about all of the criminal laws that
3 would be subject to questioning under your theory of --
4 of constitutional due process.

5 What is your response to them? Is it the
6 same as Mr. Katyal's? We'll face that when we get to
7 it?

8 MS. KOVNER: No. I don't think that the --
9 this Court has applied its civil personal jurisdiction
10 cases in the same way in a criminal context. The United
11 States has a strong sovereign interest in regulating
12 certain conduct when it occurs overseas --

13 JUSTICE SOTOMAYOR: If due process says that
14 you can't hail someone into a court with which they've
15 had no contacts, how do you justify the many criminal
16 statutes we have -- RICO, CERCLA, there's a whole bunch
17 of them -- that permit the joinder of all of these
18 defendants in one indictment?

19 MS. KOVNER: Well, Your Honor, if we're
20 talking about criminal statutes, these are statutes that
21 are based on the idea that this is conduct that
22 exercises some --

23 JUSTICE SOTOMAYOR: All of them have a civil
24 component.

25 MS. KOVNER: Yes. And with respect to the

1 civil component, I mean, courts have looked to personal
2 jurisdiction considerations. We think if it's a Federal
3 statute, the relevant question would be a Fifth
4 Amendment analysis. But if you look to the statutes
5 that -- that Respondent cites, we're talking about
6 statutes that exert some kind of -- that involve conduct
7 that exert some kind of effect on US citizens or -- or
8 the United States.

9 JUSTICE GORSUCH: Counsel, one thing we
10 haven't talked about, we've talked a fair amount about
11 fairness and predictability, but we haven't talked about
12 federalism. I know Mr. Katyal was trying to get to
13 that. I was hoping you might just give us a couple of
14 words about what implications there are for the
15 interests, say, of Ohio in administering its own
16 procedures with respect to its own citizens for torts
17 that occur in its own State.

18 MS. KOVNER: Yes, Your Honor. So going back
19 to World-Wide Volkswagen and continuing --

20 JUSTICE GORSUCH: Or -- or McIntyre, maybe?

21 MS. KOVNER: Yes, and continuing through
22 McIntyre, this Court has made clear that specific
23 jurisdiction needs to be defined with -- with an eye to
24 the view that there are 50 different States, and that
25 other States are also going to have an interest in

1 adjudicating conduct that occurs within their borders.
2 So if specific jurisdiction is defined in a very
3 permissive way that allows States that don't have a
4 strong interest in regulating the conduct to --

5 JUSTICE KAGAN: So who -- which State are we
6 worried about here? Are we worried about the
7 plaintiff's State, or are we worried about the
8 defendant's State?

9 MS. KOVNER: I think there are two States
10 that have a very strong interest, at least two States
11 that have a very strong interest in providing a forum
12 for the conduct at issue here. It's States where the
13 plaintiffs were injured, and States where the defendants
14 are at home, because States have an interest in
15 regulating the conduct of their --

16 JUSTICE KAGAN: So on the plaintiff's side,
17 that seems a pretty attenuated interest, if -- because
18 usually when we say that the State has an interest, it's
19 in protecting their own citizens and providing their own
20 citizens with a forum. But here the citizen has decided
21 he doesn't want that protection, he wants to go
22 someplace else. It seems, you know, a little bit weak
23 to say that the State has a very strong interest in
24 protecting its own citizen that doesn't want to be
25 there.

1 MS. KOVNER: I don't think so at all. I
2 think, Your Honor, that the State has a strong interest
3 in regulating the conduct that occurs within its
4 borders, and defining what's fair with respect to how
5 that conduct is adjudicated. That's --

6 JUSTICE KENNEDY: And it's also true, it
7 would seem to me, that a State A has a very strong
8 interest in confining State B to State B's
9 territorial --

10 MS. KOVNER: That's right, Your Honor.

11 JUSTICE KENNEDY: Which doesn't -- that's
12 why due process is the same for Federal and State, but
13 there's a different set of criteria to which you apply
14 it. The States are limited in their jurisdiction to
15 nationwide, the Federal government isn't.

16 MS. KOVNER: That's right, Your Honor. And
17 that's exactly what this Court has already said in
18 World-Wide Volkswagen and Nicastro. And we think if the
19 Court applies that principle here, it counsels strongly
20 against expanding specific jurisdiction to allow States
21 to reach claims in which they don't have an interest,
22 because it does tend to crowd out the jurisdiction.

23 JUSTICE BREYER: So what -- what is your --
24 (Laughter.)

25 CHIEF JUSTICE ROBERTS: Justice Breyer.

1 JUSTICE BREYER: What is your solution to
2 mass torts?

3 MS. KOVNER: So we think there are a couple
4 solutions. Claims like this, which are, I think, mass
5 tort claims can be brought in a jurisdiction of general
6 jurisdiction. They can also be brought in Federal
7 courts and consolidated for schemes like the MDL scheme.
8 These are both solutions that provide efficiency. And,
9 of course, Congress can step in, if it sees a particular
10 kind of mass tort that it doesn't -- that it wants to
11 provide an additional forum for. It's done that for
12 specific kinds of -- for instance, mass accidents. So
13 that's an additional vehicle. There are forums where
14 claims like this can be brought efficiently.

15 JUSTICE BREYER: How, if it's
16 constitutional?

17 MS. KOVNER: I'm sorry?

18 JUSTICE BREYER: How? How? How can
19 Congress step in if it's constitutional?

20 MS. KOVNER: Because Congress is acting
21 under the Fifth Amendment. And as this Court indicated
22 in *Nicastro*, it's --

23 JUSTICE BREYER: Fifth is different from the
24 Fourteenth?

25 MS. KOVNER: Well, it's the -- it's

1 different in the following sense --

2 JUSTICE BREYER: Isn't that what you write?

3 MS. KOVNER: It's different in the sense
4 that the sovereign is different, and so the kind of
5 contexts that you're talking about in the Fifth
6 Amendment are contexts with the national sovereign. So
7 in that case, you would look to, does this company have
8 the relevant minimum context to make it fair for the
9 national sovereign --

10 JUSTICE GINSBURG: So it's context with the
11 United States as opposed to an individual State. So if
12 we -- if it's a Federal statute, then that -- and not
13 hemmed in by State boundaries, it can create a
14 nationwide claim.

15 MS. KOVNER: That's right, Your Honor, and
16 the court -- courts of appeals have agreed on this.
17 There are, you know, nationwide service of process
18 provisions in which Congress has exercised that kind of
19 authority. And there's been no disagreement in the
20 court of appeals -- courts of appeals, although this
21 Court has reserved the issue itself in Omni. We think
22 it's a different sovereign, and so a different kind of
23 context that would be --

24 JUSTICE ALITO: Could you say how you would
25 phrase the rule that you would like us to apply in this

1 situation?

2 MS. KOVNER: Yes, Your Honor. I think the
3 Court could simply say in this case that for purposes of
4 specific jurisdiction, when we're talking about conduct
5 that arises out of -- takes activity within the forum,
6 there has to be something that's connected to the claim,
7 some causal connection between the individual claim
8 and -- and the forum, the parties in the forum.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MS. KOVNER: Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: Mr. Goldstein.

12 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

13 ON BEHALF OF THE RESPONDENTS

14 MR. GOLDSTEIN: Mr. Chief Justice, and may
15 it please the Court:

16 We believe that four facts make -- are
17 sufficient to establish specific personal jurisdiction
18 in this case. If I could just very briefly summarize
19 them.

20 The first is that the defendant engaged in
21 the systematic and continuous exploitation of this
22 market, California, the forum, with respect to the
23 matter that gave rise to the claim, so the sale of
24 Plavix. The second is the case was decided below, and
25 certiorari was granted on the understanding that

1 litigating here would not place a significant additional
2 burden on BMS, it wouldn't be unfair because the claims
3 arise not from parallel activity, but the same activity
4 by BMS. It's the same legal theory and the same
5 operative facts.

6 The third is that there is a significant
7 governmental interest that is implicated by this case in
8 that the courts are able to bring together a large
9 volume of litigation that would otherwise be atomized
10 across the States.

11 And the fourth is that there is what --

12 JUSTICE KENNEDY: The States or the State?

13 MR. GOLDSTEIN: That would be atomized
14 across the States.

15 My point is that, you know, we have a large
16 number of cases about Plavix, and what's happening here
17 for the benefit of the States, this is discussed in
18 Keeton, is to bring the cases together so that the
19 multistate judicial process can operate more
20 efficiently.

21 JUSTICE GINSBURG: But that's really not
22 possible. And it would be ideal if we could get all the
23 Plavix plaintiffs together in one forum. We have no way
24 of doing that because plaintiffs have many choices. And
25 so some individual plaintiffs chose to hook up with the

1 California, but there's lots of -- there's one footnote
2 that says all the cases, some are multidistrict cases,
3 some are multiple plaintiff cases.

4 The -- so whatever we rule in -- in this
5 case, there's still going to be a lot of -- a lot of
6 Plavix litigation spread around the United States.

7 MR. GOLDSTEIN: Yeah, Justice Ginsburg, if I
8 can come back that -- in one second, I -- I think it's a
9 fair point. I want to give you my sense of why our rule
10 is better with respect to that --

11 JUSTICE KENNEDY: And could we have the
12 fourth of -- I interrupted --

13 MR. GOLDSTEIN: Yeah, exactly right. That's
14 why I just --

15 JUSTICE KENNEDY: I interrupted you at
16 first --

17 MR. GOLDSTEIN: No, no --

18 JUSTICE KENNEDY: But what was the fourth?

19 MR. GOLDSTEIN: Right. The fourth is that
20 this case has what Justice Breyer, in Nicastro, talked
21 about as a special feature, and that's McKesson. What
22 we have here is Bristol-Myers' decision to contract with
23 a California company to distribute this drug nationally.
24 McKesson distributed 700,000 pills of Plavix outside
25 California a week, and we think that's quite significant

1 for multiple reasons. It is a choice by BMS, a contact
2 that involves California in the nationwide distribution.
3 In addition --

4 JUSTICE KAGAN: But not necessarily to all
5 the plaintiffs here.

6 MR. GOLDSTEIN: Okay. A -- a couple things
7 about that. It is impossible to trace a particular pill
8 to a particular person, because what happens is you're
9 admitted to a hospital, you're given Plavix, you then go
10 see your doctor who gives you a sample, and then
11 prescribes it to you, and then you may be in an assisted
12 living facility. It's not possible for us to track
13 particularly to McKesson.

14 My point is simply is that they made a
15 choice to contract with a major national distributor of
16 the drug located in California, and that has a
17 significant point for California-specific interests in
18 this litigation.

19 CHIEF JUSTICE ROBERTS: Counsel, I -- I
20 think Justice Ginsburg's question is still pending.

21 MR. GOLDSTEIN: Excellent. Thank you.

22 And, Justice Ginsburg, you're quite right
23 that we don't have a perfect solution, but what we can
24 do is aid the States' judicial systems by allowing the
25 litigation to be centralized. You just compare our rule

1 with theirs. The upshot of their rule, precisely
2 because in multi-defendant mass tort actions, you don't
3 have a common general jurisdiction, is that there's
4 going to be a bunch of litigation in Ohio and Nevada and
5 Texas and --

6 JUSTICE KENNEDY: But that's a very
7 patronizing view of federalism. California will tell
8 Ohio, oh, don't worry, Ohio, we'll take care of you.
9 That's not -- that's -- that's not the idea of the
10 Federal system. The Federal system says that States are
11 limited.

12 MR. GOLDSTEIN: Sir, let me just analogize
13 this case to Keeton, if I might, because there you have
14 a very similar situation. And that is, you have the New
15 Hampshire State courts -- or a New Hampshire court, and
16 it is adjudicating a claim --

17 JUSTICE KENNEDY: There was an injury in New
18 Hampshire to that plaintiff.

19 MR. GOLDSTEIN: That's --

20 JUSTICE KENNEDY: And that's not present
21 here.

22 MR. GOLDSTEIN: That is absolutely correct.
23 But what the Court said was that that wasn't the special
24 feature of it, and that was that that claim would
25 otherwise be litigated in the 50 States, and that the

1 States had an interest in centralizing it.

2 If I could just make the final point about
3 McKesson --

4 JUSTICE GINSBURG: That's peculiar to -- to
5 libel claims.

6 JUSTICE KENNEDY: Right.

7 JUSTICE GINSBURG: I mean, they -- what are
8 they called, the single --

9 MR. GOLDSTEIN: Publication.

10 JUSTICE KENNEDY: Single publication.

11 JUSTICE GINSBURG: Yes, yes.

12 CHIEF JUSTICE ROBERTS: Exactly. And -- and
13 that -- that's why, I mean, you've cited Keeton twice,
14 it's cited innumerable times in your brief. It is
15 completely sui generis in that respect.

16 I -- it involved the single publication
17 rule, and what that is, it says, this is a restatement,
18 as to any single publication, only one action for
19 damages can be maintained. All damages suffered in all
20 jurisdictions can be recovered in that one action and a
21 judgment for or against the plaintiff upon the merits of
22 that bars any other action.

23 It's a very, very unique situation that --
24 that, you know, maps on a position you want to apply
25 generally. And -- and it seems to me that that's a real

1 overuse of -- of Keeton.

2 MR. GOLDSTEIN: Okay. If I could just give
3 you my thoughts about that.

4 It has never been cited subsequently by --
5 the Court has cited Keeton multiple times, never limited
6 in that sense. And though the single publication rule
7 exists in most, not all, States, remember Keeton quite
8 clearly says it doesn't exist in every State, but all of
9 the claims are allowed in New Hampshire, but it still
10 has to be constitutional, is my point. And that is, the
11 States can make whatever decisions they like, but Keeton
12 makes quite clear that each publication is a separate
13 libel, each arises under each individual State's laws.

14 My general point is that there are two
15 federalism interests here. I quite take the point that
16 California doesn't have an interest in adjudicating
17 Ohio's claim, and it is territorially limited.

18 On the other hand, the Court has recognized
19 in cases like Keeton that the States do have an interest
20 in trying to make this simpler, not more complicated.

21 JUSTICE KAGAN: Well, how about the interest
22 of the State that Bristol-Myers resides in? In other
23 words, they might have an interest in not having their
24 citizens hailed into court against their will in another
25 part of the country.

1 MR. GOLDSTEIN: Yeah. I don't think that
2 can be right. And I would point out that Mr. Katyal and
3 the United States agree that specific personal
4 jurisdiction outside the home forum is entirely
5 appropriate here. They just want it to be in
6 New Jersey.

7 I don't understand how any of their
8 arguments map onto the concession that a New Jersey
9 State court, which is not their home State, could
10 adjudicate the claims from Ohio, Nevada, and Texas, just
11 like California here, when all of the same things are
12 true. That State is adjudicating a claim from another
13 place.

14 If I could just make the final --

15 JUSTICE BREYER: The obvious is that this is
16 your home State.

17 MR. GOLDSTEIN: It isn't, though.

18 JUSTICE BREYER: But let's imagine it's a
19 home or whatever, and you say that a business is in that
20 State. You make it -- you -- you do business here, you
21 make things here. I don't care if you're home or not.
22 Make things here, do business here, incorporate here.

23 Now, you can be sued in any State still,
24 under special jurisdiction, where you cause harm, but
25 you can't be sued in States where you didn't. Now,

1 that, I think, is what -- I think that's what they're
2 saying is the special federalism interest of either the
3 home State or the State where they did the
4 manufacturing, or the State where they, you know,
5 whatever the other one is where you count as a home
6 State. That does sound special.

7 MR. GOLDSTEIN: Well, all I can say is that
8 in New -- the example of New Jersey and specific
9 jurisdiction, they would be adjudicating the claim of
10 somebody who was harmed in Ohio, even though it's not
11 their home.

12 But I did really want to focus on the -- the
13 special interest that California has here because of the
14 role of McKesson. You know, the Court is involved in --

15 JUSTICE GORSUCH: Well, but, Mr. Goldstein,
16 that's a very fact-specific argument. And we took this,
17 I thought, to decide the legal question whether we have
18 some sort of causation requirement or permit this
19 sliding scale business that California engages in, as a
20 legal matter. And on that, I just wonder if -- if we
21 move to this all-things-considered approach, are we
22 collapsing what had been previously two separate due
23 process inquiries, one was purposeful availment, and the
24 other was fundamental fairness. And as I hear it,
25 really, it all just boils down to fundamental fairness.

1 And as Judge Silverman said, a length of the
2 chancellor's foot.

3 So I'm just wondering what happens
4 doctrinally to the first test? Does it have any bite?
5 And if it doesn't, does that suggest some problem
6 doctrinally, formally, with your position?

7 MR. GOLDSTEIN: If I could give you a
8 narrower answer and then a bigger picture answer.

9 The -- the narrow answer is that our view of
10 the relatedness inquiry that is articulated in
11 International Shoe does require that they engage in what
12 Keeton and International Shoe refer to as the continuous
13 and systematic exploitation of the market. That's a
14 contact. And the relationship has to be that it is the
15 same claim on the same operative facts.

16 There's no general --

17 JUSTICE KAGAN: But that's like saying,
18 Mr. Goldstein, that the claim relates to another claim
19 that relates to contacts with the forum. I mean, I
20 guess I'm -- I'm missing what the relationship is
21 between an Ohio plaintiff's claim and the defendant's
22 contacts with the forum that doesn't go through another
23 claim.

24 MR. GOLDSTEIN: Well, here is how we
25 understand that it would operate, and that is, the

1 California court is providing a forum to adjudicate a
2 claim about the lawfulness of BMS's design and
3 manufacturing and distribution of this drug Plavix.
4 That is activity that didn't occur in California. Okay?
5 That is activity that they quite clearly say happened in
6 New Jersey.

7 So the California court is going to make an
8 adjudication of that. Our point is simply that when the
9 California court has the unquestioned power to determine
10 under a legal standard that that was lawful and a set of
11 facts, it's not limited --

12 JUSTICE KAGAN: No, I understand that that's
13 your point. But I guess what I've always thought that
14 our personal jurisdiction cases require is somebody to
15 state in -- state something like this: The plaintiff's
16 claim relates to or arises out of the defendant's
17 contacts with the forum State. So here, Bristol-Myers'
18 contacts with California. And I just want you to tell
19 me how an Ohio plaintiff's claim arises out of or
20 relates to the defendant's contacts with California.
21 Just it -- it does because why?

22 MR. GOLDSTEIN: It does because the relevant
23 contact is the nationwide activity. That has to be
24 correct, by the way, because just take a company that is
25 trying to exploit -- it manufactures something in

1 New Jersey, hands it off to a distributor, knowing that
2 the distributor will exploit the California market.

3 The only thing the defendant does is do
4 something in New Jersey, right? It's not activity in
5 California that gives rise to specific jurisdiction.
6 The California court's jurisdiction attaches to the
7 activity outside. It's the same conduct. It is not --

8 JUSTICE KAGAN: Let me see if I understand
9 that, because you're saying -- usually we say how does
10 the claim relate to the contacts in a particular State,
11 say in California. Here we can't answer that question,
12 really. So we say now the contacts in California are
13 nationwide contacts, and the plaintiff's claim relates
14 to those nationwide contacts.

15 MR. GOLDSTEIN: It arises from those same
16 nationwide contacts. But I have a second answer --

17 JUSTICE KAGAN: Those nationwide contacts
18 being a nationwide advertising campaign, a nationwide
19 marketing campaign, and so forth.

20 MR. GOLDSTEIN: Right. Exactly. But I have
21 a second answer, and that is, there is a critical
22 additional contact here that gives rise to a very
23 significant interest of California.

24 And understanding, Justice Gorsuch, there's
25 a big picture question about the standard, but then we

1 do have a set of facts here. The California court did
2 draw on McKesson's role. It can't just be taken away
3 from us, and it would be very confusing to the lower
4 courts to simply cast it aside. And that is, California
5 has a very significant interest --

6 JUSTICE GORSUCH: What's confusing, though,
7 about simply saying here's the correct test, reverse,
8 remand, go apply the correct test?

9 MR. GOLDSTEIN: Well, you're going to have
10 to say something about McKesson is all I'm saying.
11 The -- the other side really wants to put it entirely to
12 the side. And there have been a lot of important
13 questions here about the interests of California. And I
14 just don't think you can get rid of BMS's most
15 significant contacts with California and say that it's
16 irrelevant here. And that is, California has a very
17 significant interest in providing a complete
18 adjudication of this claim, and so do all of the States.

19 The problem in mass torts is that you can
20 have multi-defendant actions, and you're going to
21 require that they be litigated multiple times so that --

22 JUSTICE GINSBURG: Could one of these
23 Plavix -- could the Plavix claim have been brought as a
24 class action?

25 MR. GOLDSTEIN: The Plavix claim could

1 have -- it depends on who we're talking about, but yes,
2 there could have been a class action. And I take the --
3 the necessary implication.

4 JUSTICE GINSBURG: And where -- if -- if so,
5 where could it be brought?

6 MR. GOLDSTEIN: The -- it could be
7 brought -- depending on whether you think McKesson plays
8 a significant role, it would have been brought, I think,
9 in California is the place where the class action would
10 have been brought. I will -- can I just bracket one
11 important thing for you to realize about all of this
12 litigation, Justice Ginsburg? It will illustrate, I
13 think, how the States do work together.

14 You mentioned all of the cases are out
15 there, and Mr. Katyal has stressed that. He just
16 doesn't mention that there is a special master that --
17 who is responsible for disputes relating to all of the
18 litigation all around the country, both Federal and
19 State. There is a great deal of collaboration here.

20 Now, my point about --

21 JUSTICE GINSBURG: Special master is where?

22 MR. GOLDSTEIN: In New York. It's by
23 agreement of the parties. And if there's -- there's --
24 discovery is handled through all of the cases in all
25 the --

1 JUSTICE KENNEDY: In the State court or the
2 Southern District?

3 MR. GOLDSTEIN: It is -- I think it's --

4 JUSTICE KENNEDY: Is it a Federal or State
5 master?

6 MR. GOLDSTEIN: I don't think it is actually
7 regarded that way. It's probably best regarded as
8 Federal, but it's -- it's a person who resolves by
9 agreement all of the discovery disputes, for example,
10 across all of the litigation. The United States has a
11 discussion of this in its brief about how this is
12 relatively common.

13 But the important thing about McKesson's
14 role in the case is that California does have a
15 significant interest in providing a single forum where
16 this case against McKesson can be resolved, because look
17 at the dilemma to McKesson. If McKesson loses the
18 case -- remember, the out-of-State plaintiffs
19 unquestionably can sue McKesson in California. If they
20 win against McKesson, what is McKesson supposed to do?
21 It is going to have to go litigate against Bristol-Myers
22 somewhere else and try and get indemnification --

23 JUSTICE BREYER: Why isn't the answer to
24 this, to my question, your question, which you raise a
25 lot, this is going to be a terrible problem for mass

1 torts. Answer: Bring your case in Federal court. Now,
2 why couldn't these 572 or whatever people bring their
3 cases in Federal court?

4 MR. GOLDSTEIN: Well, I -- it would depend
5 on things --

6 JUSTICE BREYER: Not all can. Not all can.

7 MR. GOLDSTEIN: Right.

8 JUSTICE BREYER: But -- but a very large --

9 MR. GOLDSTEIN: Right.

10 JUSTICE BREYER: -- number. And then that
11 very large number is no problem. They bring the case in
12 the place where there is jurisdiction, it's consolidated
13 in a multidistrict panel, and the multidistrict panel
14 sends it to that venue for trial, which is convenient
15 for all.

16 Now, what they'll say, yeah, I'll agree with
17 that. And then they'll say, the solution to this great
18 mass tort problem is that's what Federal courts are for.
19 It doesn't work perfectly, but neither does -- does
20 yours work perfectly.

21 JUSTICE GINSBURG: Here that's not
22 possible --

23 JUSTICE BREYER: So what is the response to
24 that?

25 JUSTICE GINSBURG: This -- the -- this case

1 couldn't be in Federal court because there's no complete
2 diversity.

3 MR. GOLDSTEIN: That's what --

4 JUSTICE GINSBURG: McKesson is California.

5 MR. GOLDSTEIN: That's what --

6 JUSTICE BREYER: Well, what you do is --

7 MR. GOLDSTEIN: Justice Breyer says you
8 could redesign the case.

9 JUSTICE BREYER: Yeah. Correct.

10 MR. GOLDSTEIN: Okay. A couple things about
11 that -- that's true. Okay? A couple of things about
12 that.

13 Remember that a bunch of Mr. Katyal's points
14 about one forum making choice of law decisions, or
15 having its own procedures that are different from the
16 home forum are obviously true in MDL litigation. It
17 raises the same constitutional question.

18 JUSTICE GORSUCH: But in MDL litigation,
19 you're in Federal court. So the procedures are common
20 across courts, in theory.

21 MR. GOLDSTEIN: Well -- but remember --

22 JUSTICE GORSUCH: Maybe more in theory than
23 in practice.

24 MR. GOLDSTEIN: Maybe so. And also, choice
25 of law is the substantive law, is his concern. And

1 the -- so I do think there's a lot of --

2 But the other thing is this. Two points,
3 Justice Breyer. The first is, yes, there are other ways
4 to do it, but that doesn't make the way we are doing it
5 unconstitutional. What the Court has talked about here
6 is minimum due process. Remember this: If Mr. Katyal
7 walked up to me in California and handed me a subpoena,
8 he could sue me in California on absolutely anything.

9 Now, his client sold \$918 million worth of
10 Plavix in California and says it violates the
11 Constitution. Now, that may not be a lot of money
12 necessarily to some people, but it is greater than the
13 gross domestic product of 21 countries. But --

14 CHIEF JUSTICE ROBERTS: Counsel, we're
15 dealing with the jurisdictional rule, and when we do
16 that, we want the rules to be as simple as possible.

17 MR. GOLDSTEIN: Yes.

18 CHIEF JUSTICE ROBERTS: And you have -- you
19 started out with the four different factors and all
20 that. But I'm particularly concerned -- your brief at
21 page 54, you say, well, if there were only a handful of
22 people from California and hundreds from Texas or
23 Tennessee, that would be a different case. By which, I
24 think, you mean it wouldn't satisfy due process, right?

25 MR. GOLDSTEIN: Yes. And that is --

1 CHIEF JUSTICE ROBERTS: Okay. Well, you
2 have 86 in California and 575 elsewhere. And there's a
3 difference, I suppose, between handfuls and hundreds and
4 86 and 575, but where exactly that difference is, it
5 seems to me is going to be impossible to determine.

6 MR. GOLDSTEIN: Right. So, Mr. Chief
7 Justice, it's true.

8 CHIEF JUSTICE ROBERTS: But that's right.
9 You say handful in California, hundreds Tennessee and
10 Texas, no good. 86 in California, 575 somewhere else,
11 okay.

12 MR. GOLDSTEIN: Right. And let me explain
13 why that's true. Because I agree that when the Court
14 announced International Shoe, it said quite clearly,
15 they're not going to be formulaic. They are going to be
16 case-by-case judgment.

17 What happened here is that there were two,
18 per se, categorical rules. The first is there used to
19 be general jurisdiction because they're doing business,
20 and Pennoyer said that we could get any -- that
21 California could adjudicate anything in California, and
22 with respect -- insofar as they had assets in the State.
23 Those were clear, categorical rules. You were convinced
24 that those clear, categorical rules could produce some
25 unfairness.

1 And so the Court announced a rule that is
2 much more encompassing of the facts that it accounts
3 for. If the Court wanted a clearer rule, clearer rules
4 have existed. The Court has abandoned them in fairness
5 to defendants. It's very hard, I think, to blame us for
6 saying, now we're going to look at the factors
7 involved --

8 CHIEF JUSTICE ROBERTS: I know, but you're
9 articulating a rule that requires businesses trying to
10 figure out where to do business and plaintiffs where to
11 sue and courts whether it's real. Your rule depends
12 upon some line between handful and -- and hundreds, and
13 86 and 575.

14 Where is it, exactly?

15 MR. GOLDSTEIN: It -- there -- there is no
16 precise number. I will say --

17 CHIEF JUSTICE ROBERTS: If there were 20 in
18 California and 575, would that satisfy due process?

19 MR. GOLDSTEIN: I think that it is -- I
20 cannot answer that question, because --

21 CHIEF JUSTICE ROBERTS: But it's your case.
22 You ought to be able to at least answer --

23 MR. GOLDSTEIN: Well, I know my case is
24 Constitutional, Mr. Chief Justice. All I'm saying is
25 that -- that when you have the continuous and systematic

1 exploitation of the market, when you have the ability to
2 bring a bunch of cases together for the benefit of all
3 of the States, it is true that there is going to be --
4 and the reason that this is not a practical problem, I
5 will tell you, is that the bar does what it did here,
6 and that is, it tries, for efficiency purposes, even if
7 for its own sake, to bring these cases together. So you
8 really don't end up in situations where you have five in
9 one place, and people try and --

10 JUSTICE KAGAN: Mr. Goldstein, it seems to
11 me, on your theory, it could be zero California
12 plaintiffs, because here's what you told me. You told
13 me that the reason that this -- that an Ohio citizen's
14 claim arises out of the contacts in California is
15 because the contacts in California are really nationwide
16 contacts. And if that's so, it's met regardless of
17 whether there are any California plaintiffs are not.

18 MR. GOLDSTEIN: Right.

19 JUSTICE KAGAN: So if that's your theory, it
20 doesn't matter whether there are 86 or 20 or zero,
21 because the contacts arise out of the
22 nationwide/California contacts.

23 MR. GOLDSTEIN: That's not correct.

24 JUSTICE KAGAN: The claim arises out of
25 that.

1 MR. GOLDSTEIN: That's not correct, because
2 your test that you've articulated has two core parts to
3 it. The first is, the minimum contacts, the
4 relationship between the contacts with the State and the
5 litigation. And the second is the fairness of the
6 litigation, and what is absolutely critical to our case
7 and was critical to the --

8 JUSTICE KAGAN: Yeah. I don't think that's
9 right, Mr. Goldstein. Our arising out of relating to
10 test, has always been about the first part of the
11 inquiry, and then all of the four factors is a backstop
12 to that. It's an additional test after we decide
13 whether your claim arises out of the forum contacts.

14 MR. GOLDSTEIN: I agree. But we have to
15 satisfy both in order for there to be specific
16 jurisdiction. Justice Kagan, remember that it is the
17 case that not that much weight in your prior precedents
18 has been placed on the reasonableness factors, because
19 these have always been general jurisdiction cases.
20 These cases have always been brought as we're describing
21 them.

22 JUSTICE SOTOMAYOR: Mr. Goldstein, go back
23 to articulating for me.

24 MR. GOLDSTEIN: Yes.

25 JUSTICE SOTOMAYOR: What is your definition

1 of "related to"?

2 MR. GOLDSTEIN: That is -- it is -- it is
3 the claim that is the same legal claim arising from the
4 same operative facts. And the conduct is the same
5 conduct that gives rise to the State litigation. And
6 that is, it maps on perfectly. And that is really
7 important because it means --

8 JUSTICE SOTOMAYOR: So is that a yes to
9 Justice Kagan's question about it wouldn't matter if
10 there were no California plaintiffs?

11 MR. GOLDSTEIN: It would relate to, but it
12 would not be constitutional because it would not be
13 reasonable under the second part of the test. Because
14 they're already in California, en masse. They are
15 facing dozens upon dozens upon dozens of the same claim.

16 Remember what the Court said in making the
17 move from Pennoyer to International Shoe, which I'd like
18 to come back to --

19 JUSTICE GORSUCH: Well, if you don't --
20 sorry, Mr. Goldstein -- but if you don't need a single
21 plaintiff to satisfy the first prong of the due process
22 inquiry, again, what function does that first prong have
23 left to do? Why doesn't it all just run into the second
24 fundamental fairness test?

25 MR. GOLDSTEIN: Well --

1 JUSTICE GORSUCH: What's left?

2 MR. GOLDSTEIN: Well, because it gives the
3 State the power, the territorial power, because it does
4 have the power to adjudicate with respect to that
5 conduct. It is both parts that are important.

6 I had said that I wanted to come back to you
7 about a bigger picture answer a -- a little while ago,
8 and that is, I do think it's really important that this
9 may be the beginning or the middle of a multi-decade
10 effort to try and take a look at the original
11 understanding of the due process clause, and do that
12 across the Court's body of precedent.

13 And we have urged the Court, if it is
14 serious about that endeavor, to take a look at the
15 relationship of *International Shoe* and *Pennoyer*, because
16 from the founding of the country up through the adoption
17 of the Fourteenth Amendment, it was perfectly clear and
18 undisputed that California could adjudicate this claim,
19 at least up to and including the assets that they have
20 in the State of California. They are within
21 California's territory. There is no dispute about that.

22 *International Shoe* and *Shaffer* say we are
23 going to modernize our understanding of the Fourteenth
24 Amendment.

25 JUSTICE GORSUCH: Great question. Is it

1 presented?

2 MR. GOLDSTEIN: Yes, it is. Because we
3 affirmatively argue to you that you should overrule this
4 Court's precedents or not extend them. We, of course,
5 could lay, as an alternative ground for defending the
6 judgment below, we specifically urge it in our brief.
7 It is squarely in front of you. I do not think you can
8 pass it by. And if the -- if the --

9 JUSTICE GINSBURG: What you're suggesting is
10 that the Court was wrong in -- in Daimler and in the one
11 before it --

12 JUSTICE ALITO: Goodyear.

13 MR. GOLDSTEIN: Goodyear and Daimler.

14 JUSTICE GINSBURG: -- Goodyear in confining
15 general jurisdiction. And in this -- this very case, it
16 was originally argued as a general jurisdiction case.
17 Then we came out with Daimler, and then they said oh,
18 no, we know it's not general jurisdiction. It's got to
19 be specific.

20 MR. GOLDSTEIN: Yes.

21 JUSTICE GINSBURG: So one comment that --
22 that you, no doubt, know has been made about this case,
23 is that it is an attempt to reintroduce general
24 jurisdiction, which was lost in Daimler, by the
25 backdoor.

1 MR. GOLDSTEIN: The backdoor. Yes, exactly.
2 So important things about why that can't be right. I do
3 think the driving concern in cases like Daimler and
4 Goodyear about general jurisdiction is that you can hail
5 somebody into the forum and sue them about absolutely
6 anything. And this is a world of difference because
7 this is being -- this suit is being brought on behalf --
8 on the basis of their conduct in the State with respect
9 to this drug.

10 And the second is, I do think the Court
11 recognized in Daimler quite explicitly that the
12 retrenchment of general jurisdiction, how these cases
13 had always been brought -- and so there's no argument
14 that we've -- we're disrupting the legal system -- the
15 retrenchment of general jurisdiction was going to induce
16 an examination of the Court's specific personal
17 jurisdiction to fill in the gaps.

18 JUSTICE BREYER: Can you -- this is answer
19 this in a sense -- all right. This is -- because you
20 just started to with Justice Ginsburg, no general
21 jurisdiction. Why am I here, says defendant. Because,
22 says the judge, you have enough activity in our State
23 for us to call you into court to answer to one of our
24 citizens who was hurt. That's special jurisdiction,
25 right?

1 MR. GOLDSTEIN: Specific, yes.

2 JUSTICE BREYER: But why am I here in
3 respect to Smith? Because, you see, Smith isn't a
4 citizen of our State.

5 So where that answer sounded -- this is
6 logic, and what's bothering about the whole case is its
7 logic, and I don't know the practicalities. All right.
8 But -- but the -- you see, the logic doesn't seem the
9 same.

10 MR. GOLDSTEIN: Right.

11 JUSTICE BREYER: I cannot say, because you
12 are a citizen of Texas, because that cuts no ice in
13 California. So what is it I say in a single sentence
14 that does make it clear to that defendant why he is
15 here?

16 MR. GOLDSTEIN: You're already here on this
17 claim, and there is nothing unfair about having you have
18 it with respect to another plaintiff, because that
19 plaintiff could quite clearly get you estopped on the
20 basis of --

21 JUSTICE BREYER: I was here for that
22 purpose, not --

23 MR. GOLDSTEIN: You're here.

24 JUSTICE BREYER: So once I'm here, I can now
25 sue him. And then --

1 MR. GOLDSTEIN: On the exact same.

2 JUSTICE BREYER: -- that's when lines -- all
3 right.

4 MR. GOLDSTEIN: Well, Justice Breyer, all --

5 JUSTICE BREYER: I'm not disagreeing with
6 you.

7 MR. GOLDSTEIN: Thank you.

8 JUSTICE BREYER: I'm trying to get the
9 answer in. I've got it.

10 MR. GOLDSTEIN: All right. Well, all I will
11 tell you is this point about nonmutual offensive
12 collateral estoppel is a big deal. And that is when you
13 have the identical claim, identical legal theory,
14 identical operative facts, it -- so take away all of his
15 it's all very different, the premise of this case is
16 that it's all the same.

17 JUSTICE KAGAN: Can I take you back?

18 CHIEF JUSTICE ROBERTS: Well, that's the
19 same thing applies, just completely flipped. They could
20 be doing the same thing in Ohio, saying, we've got a lot
21 of plaintiffs here from California, but we're going
22 to -- we're going to let them sue in Ohio. And the same
23 thing's going to happen in every other State. I don't
24 see that it increases the efficiency at all.

25 MR. GOLDSTEIN: Oh, well, sir, remember,

1 the -- the -- an important part of our analysis is that
2 there is the governmental interest in that the
3 litigation in this forum does consolidate things and
4 make it simpler. The State's interest in having 600
5 cases litigated together rather than in 50 different
6 forums, it's material to our case that it does simplify
7 things.

8 But at the very least, the role of McKesson
9 here does distinguish California from every other State.
10 If they contract with a California company for the
11 nationwide distribution of this drug so that it's
12 perfectly understandable that the legal issues that
13 arise from that agreement and the distribution would be
14 in this forum, it's completely predictable and does
15 distinguish California from everyone else, everywhere
16 else.

17 JUSTICE KAGAN: Can I take you back to
18 Justice Breyer's question about Federal courts --

19 MR. GOLDSTEIN: Yeah.

20 JUSTICE KAGAN: -- and multidistrict
21 litigation? Because you didn't say something that makes
22 me think, if you didn't say it, I don't understand.
23 Assuming that there was subject matter jurisdiction,
24 that there's diversity, it still it seems to me that the
25 way -- there's no nationwide service of process here.

1 So the Federal courts have to mimic the State courts;
2 isn't that correct?

3 MR. GOLDSTEIN: Right. Then -- then I can
4 get to the end of your question, and that is it's
5 generally understood that it's the transfer of court's
6 specific personal jurisdiction. So if it's -- what
7 would happen, Justice Breyer is saying, is you would
8 have a lawsuit, a class action that would be removed to
9 Federal court, specific jurisdiction would exist under
10 Federal Rule of Civil Procedure 4K there. Then it would
11 be transferred for pretrial purposes to the MDL forum
12 and then returned for purposes of trial.

13 And so his point, I think, would be that it
14 would be okay in Federal court in the -- in the MDL
15 system.

16 My answer back is that there are still lots
17 of other objections about it being inconvenient, it's
18 not where he's at, there'd be choice of law issues that
19 does really -- a lot of the fairness concerns that
20 Mr. Katyal is talking about do arise in MDL, do arise in
21 the New Jersey example he gives of specific personal
22 jurisdiction. But at the very least, what I would say
23 is that the Court can write an opinion that simply says,
24 this is not your ordinary case. If it were your
25 ordinary case and McKesson wasn't in it, if the members

1 of the Court believed it, there wouldn't be
2 jurisdiction. But they made this conscious choice to go
3 into California with respect to this -- with respect to
4 this drug.

5 And then the other argument that I do think
6 has to be confronted is that, at the very least, the
7 Court has to consider that when it went to International
8 Shoe, it excluded the Pennoyer basis of jurisdiction,
9 which is the traditional power of the States from the
10 founding within their territory that always existed. It
11 doesn't seem unfair to me to say his clients did almost
12 a billion dollars' worth of business in the State of
13 California. They have enormous assets that they have
14 placed in the State. That they could be held liable up
15 to the extent of those assets is not a violation of due
16 process.

17 JUSTICE ALITO: If -- if I heard you
18 correctly, you said something about overruling cases; is
19 that right?

20 MR. GOLDSTEIN: If it were necessary to. We
21 do not think it's necessary to for multiple reasons,
22 including that if you just simply say that the Pennoyer
23 basis of jurisdiction exists, in addition to, the
24 International Shoe basis of jurisdiction, we clearly
25 would prevail up to at least being able to get the

1 Bristol-Myers assets in California.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Three minutes, Mr. Katyal.

4 REBUTTAL ARGUMENT OF NEAL K. KATYAL

5 ON BEHALF OF THE PETITIONER

6 MR. KATYAL: Thank you, Mr. Chief Justice.

7 JUSTICE SOTOMAYOR: Mr. Katyal, assume a set

8 of facts that I know have not been proven.

9 Bristol-Myers sells the drugs to McKesson. McKesson
10 distributes the drugs to all the other States, and all
11 of the plaintiffs have taken McKesson drugs.

12 Under your theory, could they sue McKesson
13 and Bristol-Myer in California?

14 MR. KATYAL: Well, they might or might not.
15 That's a purposeful availment stream-of-commerce theory,
16 which we're not trying to, you know, push here. That's
17 a very different thing.

18 JUSTICE SOTOMAYOR: Articulate --

19 MR. KATYAL: But I definitely --

20 JUSTICE SOTOMAYOR: -- your theory in a way
21 that it wouldn't implicate -- articulate your --

22 MR. KATYAL: So my --

23 JUSTICE SOTOMAYOR: -- proximate cause and
24 your causation theories --

25 MR. KATYAL: Justice --

1 JUSTICE SOTOMAYOR: -- in a way that
2 wouldn't preclude that suit.

3 MR. KATYAL: So, Justice Sotomayor, my
4 theory is exactly what this Court said in Rush, which is
5 why his argument in McKesson doesn't work.

6 It's, quote, plainly unconstitutional to
7 exert jurisdiction over one defendant based on the
8 activities of another. The requirements of
9 International Shoe must be met as to each.

10 So McKesson doesn't answer -- help him, nor
11 does it move the ball. You still have to show that the
12 underlying conduct by the defendant did something.

13 So, here when he talks about \$918 million,
14 we have no problem saying we're liable for the sales
15 over there. The question was -- what Justice Breyer was
16 asking is, what about Mr. Smith? You know, I'm selling
17 to Mr. Smith in Ohio, and, yes, I'm also separately
18 selling \$918 million in California, but you can't add
19 those two things up together and confer personal
20 jurisdiction. This Court has never done that, which is
21 why his rule is a novel one.

22 So as Justice Kennedy said, I think that one
23 of the goals here, here in this jurisprudence, has been
24 to stay State A has an interest in combining State B's
25 adjudicatory authority.

1 JUSTICE SOTOMAYOR: But -- but my real
2 problem is that -- following your theory, I'm not sure
3 what Bristol-Myers is doing there in the California
4 case. They -- they -- it was McKesson who sold the
5 drugs to the plaintiffs, not Bristol-Myers directly.

6 MR. KATYAL: But I think that when -- when
7 they make an arrangement with the distributor to -- to
8 launch drugs in a particular location, they're liable
9 for that. That's -- we've done ceded that below.
10 That's, I think, the way specific jurisdiction works.

11 The reason why Federal -- Federal actions
12 are permissible, and they could have been permissible
13 here, Justice Breyer, is because the Fifth Amendment and
14 the Fourteenth Amendment operate differently. Justice
15 Kennedy's point about State A and B doesn't apply to
16 Federal government vis-à-vis States.

17 And CAFA allows for jurisdiction right now
18 over these claims. The only reason we're not in Federal
19 Court right now, Justice Ginsburg, is because they filed
20 less than a hundred claims in each action. They
21 smirked them. But, ordinarily, these would be Federal
22 court actions right now. And the rule we are seeking
23 doesn't disturb that in any way, shape, or form. All we
24 are saying is that when they have unrelated claims,
25 uncausal claims in California to -- with respect to the

1 33 other States, that's something as to which the other
2 States have an interest.

3 And the predictability here is incredibly
4 important. Your -- your opinion in Hertz, for example,
5 picking up on the Chief Justice's question about
6 business predictability, is important. This is a
7 jurisdictional matter and clean rules for businesses to
8 follow are important. They need to know if I sell to
9 Mr. Smith, what happens? Their rule doesn't tell you.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 The case is submitted.

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

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A	28:11,13 31:1 41:22 51:12	allowed 20:16 36:9	20:11,14	58:23
a.m 1:15 3:2 64:12	adjudicate 16:16 37:10 40:1 48:21 53:4,18	allowing 33:24	appropriate 37:5	atomized 31:9 31:13
abandoned 49:4	adjudicated 27:5	allows 15:13 21:22 26:3 63:17	approving 7:20	attaches 41:6
ability 6:24 50:1	adjudicating 26:1 34:16 36:16 37:12 38:9	alternative 54:5	April 1:11	attempt 54:23
able 6:14 31:8 49:22 60:25	adjudication 40:8 42:18	amended 19:19	area 16:8	attenuated 26:17
above-entitled 1:13 64:13	adjudicatory 62:25	Amendment 25:4 28:21 29:6 53:17,24 63:13,14	argue 9:15 54:3	authority 20:19 20:22 29:19 62:25
absent 19:16	administering 25:15	amicus 1:21 2:7 20:6 24:1	argued 54:16	availment 38:23 61:15
absolutely 4:15 4:25 5:13 9:19 10:13 34:22 47:8 51:6 55:5	admitted 33:9	amount 15:5 25:10	argument 1:14 2:2,5,9,12 3:4 3:8 4:7,8,14,15 6:7 13:4 20:5 30:12 38:16 55:13 60:5 61:4 62:5	B
accept 10:21 14:4,17	adoption 53:16	analyze 34:12	arguments 37:8	B 27:8 63:15
accepted 8:1 13:14	advantageous 15:24	analysis 6:5 25:4 58:1	arises 30:5 36:13 40:16,19 41:15 50:14,24 51:13	B's 27:8 62:24
accidents 28:12	advertising 41:18	announced 48:14 49:1	arising 51:9 52:3	back 9:22,23 19:17 25:18 32:8 51:22 52:18 53:6 57:17 58:17 59:16
accounts 49:2	affirm 10:20,20	answer 39:8,8,9 41:11,16,21 44:23 45:1 49:20,22 53:7 55:18,23 56:5 57:9 59:16 62:10	Arizona 8:15	backdoor 54:25 55:1
achieving 4:21	affirmatively 54:3	answers 17:13 17:14	arrangement 63:7	backstop 51:11
acknowledges 11:2	ago 53:7	appeals 29:16 29:20,20	articulate 61:18 61:21	balancing 4:4
acting 28:20	agree 21:9 22:6 37:3 45:16 48:13 51:14	APPEARAN... 1:16	articulated 39:10 51:2	ball 62:11
action 5:8,22,24 8:12,25 13:10 35:18,20,22 42:24 43:2,9 59:8 63:20	agreed 29:16	Appendix 8:14 11:22	articulating 49:9 51:23	bar 50:5
actions 8:13 11:21 17:23 18:6 34:2 42:20 63:11,22	agreement 43:23 44:9 58:13	applied 5:12 24:9	aside 6:9 42:4	bars 35:22
activities 62:8	aid 33:24	applies 27:19 57:19	asking 19:7 62:16	based 24:21 62:7
activity 6:25 20:20 30:5 31:3,3 40:4,5 40:23 41:4,7 55:22	AL 1:7	apply 11:5 18:10 19:7 27:13 29:25 35:24 42:8 63:15	aspect 14:21	basic 4:19 9:2 17:6,9,13
actual 9:8	Alaska 14:19	approach 38:21	assert 21:3	basically 4:8 8:23 9:12,13
ad 4:2	ALITO 29:24 54:12 60:17	approaches	assets 48:22 53:19 60:13,15 61:1	basis 55:8 56:20 60:8,23,24
add 62:18	all-things-con... 38:21		Assistant 1:19	began 19:17
added 22:17	allegation 22:11		assisted 33:11	beginning 53:9
addition 33:3 60:23	allege 9:2		assume 9:12,14 22:20 23:9 61:7	behalf 1:17,23 2:4,11,14 3:9 21:4 30:13 55:7 61:5
additional 10:6	alleging 23:3,3		assumed 7:22	believe 30:16
	allow 20:11 27:20		assuming 6:6 8:19 15:16	believed 60:1
				benefit 31:17 50:2

<p>best 44:7 Bethesda 1:23 better 32:10 big 41:25 57:12 bigger 39:8 53:7 billion 60:12 bit 16:20 26:22 bite 39:4 blame 49:5 blessed 10:23 BMS 31:2,4 33:1 BMS's 40:2 42:14 body 53:12 boils 38:25 borders 20:20 26:1 27:4 bother 3:24 bothering 56:6 bought 7:6 11:15 boundaries 29:13 bracket 43:10 bracketed 18:24 Breyer 17:4 18:4 19:7 27:23,25 28:1 28:15,18,23 29:2 32:20 37:15,18 44:23 45:6,8,10,23 46:6,7,9 47:3 55:18 56:2,11 56:21,24 57:2 57:4,5,8 59:7 62:15 63:13 Breyer's 58:18 brief 4:18 8:3,22 8:22 11:20 13:17 24:1 35:14 44:11 47:20 54:6 briefly 30:18 bring 5:8 21:23 31:8,18 45:1,2 45:11 50:2,7</p>	<p>Bristol-Myer 21:1 61:13 Bristol-Myers 1:3 3:5 7:14 8:18 10:20,24 11:8,15 13:19 15:11 21:4,6 22:4,17 36:22 44:21 61:1,9 63:3,5 Bristol-Myers' 32:22 40:17 Bristol-Squibb 15:19 brought 19:2 28:5,6,14 42:23 43:5,7,8 43:10 51:20 55:7,13 bunch 8:23 17:2 24:16 34:4 46:13 50:2 burden 4:22 31:2 business 7:8 37:19,20,22 38:19 48:19 49:10 60:12 64:6 businesses 13:16 13:16 49:9 64:7 buy 6:6</p> <hr/> <p style="text-align: center;">C</p> <p>C 1:23 2:1,10 3:1 30:12 CAFA 63:17 California 1:6 3:6,12,14,14 3:15,16,16,25 4:18 7:15 8:11 8:17 9:12,14 10:5 11:3,6,10 13:3,9,20 14:5 14:19 15:13,19 15:21 16:17,22</p>	<p>16:23 18:20 20:15 21:1,3 21:11,15,20 22:2,16,19,20 23:6 30:22 32:1,23,25 33:2,16 34:7 36:16 37:11 38:13,19 40:1 40:4,7,9,18,20 41:2,5,6,11,12 41:23 42:1,4 42:13,15,16 43:9 44:14,19 46:4 47:7,8,10 47:22 48:2,9 48:10,21,21 49:18 50:11,14 50:15,17 52:10 52:14 53:18,20 56:13 57:21 58:9,10,15 60:3,13 61:1 61:13 62:18 63:3,25 California's 53:21 California-spe... 33:17 Californians 3:19 21:6 call 55:23 called 35:8 calling 20:13 campaign 41:18 41:19 Capital 18:8 care 34:8 37:21 case 3:4 7:21 8:10 12:2,2 13:7 20:25 21:5,5 22:8 29:7 30:3,18 30:24 31:7 32:5,20 34:13 44:14,16,18 45:1,11,25</p>	<p>46:8 47:23 49:21,23 51:6 51:17 54:15,16 54:22 56:6 57:15 58:6 59:24,25 63:4 64:11,12 case-by-case 48:16 cases 7:21 11:6 12:6,13 16:16 19:20 22:7 24:10 31:16,18 32:2,2,3 36:19 40:14 43:14,24 45:3 50:2,7 51:19,20 55:3 55:12 58:5 60:18 cast 42:4 categorical 48:18,23,24 causal 30:7 causality 8:3,5 causation 5:22 38:18 61:24 cause 5:22 37:24 61:23 caused 11:8 causes 5:8 8:25 ceded 63:9 centralized 33:25 centralizing 35:1 CERCLA 24:16 certain 24:12 certainly 19:22 certiorari 30:25 cetera 17:7 chancellor's 39:2 Chief 3:3,10 20:3,8 27:25 30:9,11,14 33:19 35:12 47:14,18 48:1</p>	<p>48:6,8 49:8,17 49:21,24 57:18 61:2,6 64:5,10 choice 11:1 33:1 33:15 46:14,24 59:18 60:2 choices 31:24 choose 15:18 chose 31:25 circumstances 3:23 cited 35:13,14 36:4,5 cites 8:22 25:5 citizen 26:20,24 56:4,12 citizen's 50:13 citizens 25:7,16 26:19,20 36:24 55:24 civil 24:9,23 25:1 59:10 claim 7:12 12:18 19:1,1 29:14 30:6,7,23 34:16,24 36:17 37:12 38:9 39:15,18,18,21 39:23 40:2,16 40:19 41:10,13 42:18,23,25 50:14,24 51:13 52:3,3,15 53:18 56:17 57:13 claiming 5:10 claims 5:6,17 6:3 8:2 10:6 13:3,8,8,9 14:18 21:10,18 27:21 28:4,5 28:14 31:2 35:5 36:9 37:10 63:18,20 63:24,25 class 17:23 18:6 42:24 43:2,9</p>
---	--	---	---	---

59:8	conceded 4:5,11	45:12	corporation	45:3 46:1,19
clause 53:11	concepts 3:20	Constitution	22:2 23:9,10	47:5 48:13
clean 64:7	concern 10:14	17:21,23 47:11	correct 5:9	49:1,3,4 52:16
clear 4:18 8:6	16:8,9 46:25	constitutional	23:15 34:22	53:13 54:10
22:6 23:2,2	55:3	19:6,18 24:4	40:24 42:7,8	55:10,23 59:9
25:22 36:12	concerned 47:20	28:16,19 36:10	46:9 50:23	59:14,23 60:1
48:23,24 53:17	concerns 59:19	46:17 49:24	51:1 59:2	60:7 62:4,20
56:14	concession 37:8	52:12	correctly 60:18	63:19,22
clearer 49:3,3	concrete 15:16	contact 33:1	cost 9:3	court's 10:9
clearly 36:8 40:5	conduct 3:18	39:14 40:23	counsel 20:3	11:3 13:14
48:14 56:19	20:23 21:16	41:22	25:9 30:9	15:7 16:13
60:24	22:12,14 23:6	contacts 18:21	33:19 47:14	19:8 20:15
client 47:9	24:12,21 25:6	18:22 24:15	61:2 64:10	41:6 53:12
clients 60:11	26:1,4,12,15	39:19,22 40:17	counsels 27:19	54:4 55:16
collaboration	27:3,5 30:4	40:18,20 41:10	count 38:5	59:5
43:19	41:7 52:4,5	41:12,13,14,16	countries 47:13	courts 5:13 25:1
collapsing 38:22	53:5 55:8	41:17 42:15	country 7:6,17	28:7 29:16,20
collateral 8:25	62:12	50:14,15,16,21	36:25 43:18	31:8 34:15
9:21 57:12	confer 62:19	50:22 51:3,4	53:16	42:4 45:18
combining	confining 27:8	51:13	COUNTY 1:7	46:20 49:11
62:24	54:14	context 24:10	couple 25:13	58:18 59:1,1
come 16:21	conflating 13:2	29:8,10,23	28:3 33:6	create 4:4 8:9
23:14 32:8	confront 14:12	contexts 29:5,6	46:10,11	13:23 29:13
52:18 53:6	confronted	continuing	course 9:20	criminal 24:2,10
comes 17:10	14:15 60:6	25:19,21	15:14 19:9	24:15,20
comment 54:21	confusing 42:3,6	continuous	22:12,13 28:9	criteria 27:13
common 5:13	Congress 17:19	30:21 39:12	54:4	critical 12:5
12:16 14:18	19:13 28:9,19	49:25	court 1:1,6,14	16:14 41:21
34:3 44:12	28:20 29:18	contract 32:22	3:5,11,12,17	51:6,7
46:19	connected 5:18	33:15 58:10	3:22,25 4:2,17	critically 14:15
company 1:3 3:5	23:6 30:6	contributory	4:18 5:6,14,15	crowd 27:22
20:12 23:23	connection 3:16	12:4	6:3,13,13,19	curiae 1:21 2:7
29:7 32:23	30:7	control 21:16	8:1,2,4,11	20:6
40:24 58:10	conscious 60:2	controlling	10:23 11:25	cuts 56:12
comparable	consent 19:16	20:21	12:10 16:7,18	
20:21	consents 19:16	controversy	18:1,8,24 19:2	D
compare 33:25	consequences	6:14	19:23 20:1,9	D 3:1
complete 42:17	15:10	convenient	20:10,15,18	D.C 1:10,17,20
46:1	consider 60:7	45:14	21:13,21 24:9	Daimler 8:6
completely	considerations	convinced 48:23	24:14 25:22	20:10 54:10,13
35:15 57:19	25:2	coordinated	27:17,19 28:21	54:17,24 55:3
58:14	considered	8:12 12:21,22	29:16,20,21	55:11
complex 10:22	21:13	coordinating	30:3,15 34:15	damages 5:7
complicated	consistent 22:21	11:21 12:16	34:23 36:5,18	16:23 35:19,19
36:20	consolidate 58:3	coordination	36:24 37:9	Daubert 11:13
component	consolidated	12:23 19:11	38:14 40:1,7,9	deal 5:16 18:6
24:24 25:1	19:21 28:7	core 51:2	42:1 44:1 45:1	43:19 57:12

<p>dealing 47:15 deceptive 9:9 decide 38:17 51:12 decided 12:12 12:21 26:20 30:24 decision 32:22 decisions 8:5 20:16 21:14 36:11 46:14 deemed 18:22 defective 9:3 defendant 6:15 10:2 13:13 22:6,7 30:20 41:3 55:21 56:14 62:7,12 defendant's 3:18 9:25 26:8 39:21 40:16,20 defendant-frie... 16:4 defendants 15:9 20:23 21:17 22:1,9,11,13 23:18 24:18 26:13 49:5 defending 3:24 4:22 54:5 defined 21:22 25:23 26:2 defining 27:4 definitely 6:16 61:19 definition 51:25 Delaware 6:23 8:14 demand 11:23 denominator 14:18 Department 1:20 depend 45:4 depending 7:11 43:7 depends 43:1</p>	<p> 49:11 describing 51:20 design 40:2 destroying 5:24 6:1 determination 11:1 determinations 12:8 determine 12:1 40:9 48:5 determined 9:4 differ 9:10 difference 21:12 22:24 48:3,4 55:6 different 9:7 11:7,10 12:2,3 12:3,4 13:6,13 13:24 16:22,24 18:9 19:5,12 25:24 27:13 28:23 29:1,3,4 29:22,22 46:15 47:19,23 57:15 58:5 61:17 differently 18:10 19:7,10 63:14 dilemma 44:17 dint 5:13 directly 63:5 disagree 7:25 13:19 disagreeing 57:5 disagreement 29:19 discovery 43:24 44:9 discussed 31:17 discussion 44:11 dispute 53:21 disputes 43:17 44:9 disrupting 55:14 distinguish 58:9</p>	<p> 58:15 distribute 4:22 32:23 distributed 23:4 32:24 distributes 61:10 distribution 33:2 40:3 58:11,13 distributor 33:15 41:1,2 63:7 District 44:2 disturb 63:23 disturbed 7:21 diverge 12:2 divergence 8:24 diversity 46:2 58:24 doctor 33:10 doctrinally 39:4 39:6 doctrine 12:5,6 doing 31:24 47:4 48:19 57:20 63:3 dollars' 60:12 domestic 47:13 doors 17:8 doubt 54:22 dozens 52:15,15 52:15 draw 18:12 42:2 drive 14:22 driving 55:3 drug 3:13 9:3,3 11:16 14:10 32:23 33:16 40:3 55:9 58:11 60:4 drugs 7:6 11:8 23:4 61:9,10 61:11 63:5,8 due 4:7 5:10,18 10:3 18:9,15 18:16,21 19:4</p>	<p> 22:22 24:4,13 27:12 38:22 47:6,24 49:18 52:21 53:11 60:15 <hr/> <p style="text-align: center;">E</p> <hr/> E 2:1 3:1,1 easy 11:12 18:7 effect 25:7 effective 7:3 efficiency 7:22 8:8,9 21:21,24 28:8 50:6 57:24 efficient 7:16 11:21 efficiently 28:14 31:20 effort 53:10 either 15:25 17:23 38:2 employment 16:5 en 52:14 encompassing 49:2 endeavor 53:14 engage 39:11 engaged 22:11 22:13 30:20 engages 38:19 enormous 60:13 enter 13:17 15:10 entire 6:14 entirely 20:23 37:4 42:11 ESQ 1:17,19,23 2:3,6,10,13 essence 12:17 essential 21:5 establish 3:19 30:17 estopped 56:19 estoppel 8:25 9:21 57:12</p>	<p>et 1:7 17:7 exact 10:6 57:1 exactly 7:12 10:8 27:17 32:13 35:12 41:20 48:4 49:14 55:1 62:4 examination 55:16 example 6:18,23 7:3,5 11:10,16 15:11 16:1 38:8 44:9 59:21 64:4 Excellent 33:21 excluded 60:8 exercise 20:19 exercised 29:18 exercises 24:22 exercising 20:22 21:16 exert 25:6,7 62:7 exist 16:9 36:8 59:9 existed 49:4 60:10 exists 6:3 16:9 36:7 60:23 exorbitant 20:14 expanding 27:20 experts 11:15 explain 9:25 48:12 explained 20:18 explains 8:4 explicitly 55:11 exploit 40:25 41:2 exploitation 30:21 39:13 50:1 extend 54:4 extent 12:23 60:15 eye 25:23</p>
--	---	--	--	--

F	<p>Fifth 25:3 28:21 28:23 29:5 63:13 fighting 5:5,14 figure 11:4 49:10 file 14:18 filed 22:16 63:19 fill 55:17 final 8:20 35:2 37:14 first 3:4 7:24 8:8 9:24 10:25 11:4 12:20 14:2 18:7 30:20 32:16 39:4 47:3 48:18 51:3,10 52:21,22 five 50:8 flaw 9:2 flip 15:17 flipped 57:19 focus 38:12 folks 13:22 follow 15:10 64:8 following 29:1 63:2 follows 21:2 foot 39:2 footing 3:20,21 footnote 18:8 32:1 foreign 23:9,10 23:22,23 form 9:24 63:23 formally 39:6 formulaic 48:15 forth 41:19 forum 16:8 19:20 21:24 26:11,20 28:11 30:5,8,8,22 31:23 37:4 39:19,22 40:1 40:17 44:15</p>	<p>46:14,16 51:13 55:5 58:3,14 59:11 forums 28:13 58:6 forward 8:17 10:5 founding 53:16 60:10 four 30:16 47:19 51:11 Fourteenth 28:24 53:17,23 63:14 fourth 31:11 32:12,18,19 FRANCISCO 1:7 front 54:7 function 52:22 fundamental 38:24,25 52:24 further 5:20</p>	<p>43:4,12,21 45:21,25 46:4 54:9,14,21 55:20 63:19 Ginsburg's 33:20 give 25:13 32:9 36:2 39:7 given 10:4 14:24 17:14 33:9 gives 33:10 41:5 41:22 52:5 53:2 59:21 glom 7:13 13:8 go 5:20 9:22,23 11:12 13:5 19:16,21 23:8 26:21 33:9 39:22 42:8 44:21 51:22 60:2 goals 13:14 62:23 going 8:12 9:15 10:4,5,14,21 10:22 11:3,5 11:25 12:1 13:18 16:21 22:12 25:18,25 32:5 34:4 40:7 42:9,20 44:21 44:25 48:5,15 48:15 49:6 50:3 53:23 55:15 57:21,22 57:23 Goldstein 1:23 2:10 10:5 30:11,12,14 31:13 32:7,13 32:17,19 33:6 33:21 34:12,19 34:22 35:9 36:2 37:1,17 38:7,15 39:7 39:18,24 40:22 41:15,20 42:9</p>	<p>42:25 43:6,22 44:3,6 45:4,7,9 46:3,5,7,10,21 46:24 47:17,25 48:6,12 49:15 49:19,23 50:10 50:18,23 51:1 51:9,14,22,24 52:2,11,20,25 53:2 54:2,13 54:20 55:1 56:1,10,16,23 57:1,4,7,10,25 58:19 59:3 60:20 Goldstein's 19:25 good 48:10 Goodyear 8:6 20:10,18 54:12 54:13,14 55:4 Gorsuch 25:9,20 38:15 41:24 42:6 46:18,22 52:19 53:1,25 government 18:23 27:15 63:16 governmental 31:7 58:2 grabbed 16:17 granted 30:25 grasping 20:14 great 43:19 45:17 53:25 greater 21:15 47:12 gross 47:13 ground 54:5 group 22:9 guaranties 18:10 guess 14:20 16:19,19 39:20 40:13</p>
		G		
	<p>G 3:1 game 15:5 gaps 55:17 general 1:20 3:21 6:18,20 20:11 21:14,22 23:17 28:5 34:3 36:14 39:16 48:19 51:19 54:15,16 54:18,23 55:4 55:12,15,20 generally 22:10 35:25 59:5 generis 35:15 Ginsburg 7:2,5 7:12 9:1 19:13 19:22 20:24 21:25 29:10 31:21 32:7 33:22 35:4,7 35:11 42:22</p>			
		H		

<p>hail 24:14 55:4 hailed 36:24 Hampshire 34:15,15,18 36:9 hand 36:18 handed 47:7 handful 47:21 48:9 49:12 handfuls 48:3 handled 43:24 hands 41:1 happen 10:25 13:25 15:20 57:23 59:7 happened 40:5 48:17 happening 31:16 happens 33:8 39:3 64:9 hard 11:11 49:5 harm 37:24 harmed 38:10 Hawaii 8:15 hear 3:3 6:14,19 17:13 38:24 heard 60:17 hearing 16:25 Heavens 6:16 held 60:14 help 62:10 helps 9:16 hemmed 29:13 Hertz 64:4 hoc 4:2 home 23:12 26:14 37:4,9 37:16,19,21 38:3,5,11 46:16 honestly 14:23 Honor 21:8 24:19 25:18 27:2,10,16 29:15 30:2,10 hook 31:25</p>	<p>hoping 25:13 hospital 33:9 hundred 63:20 hundreds 3:13 47:22 48:3,9 49:12 hurt 55:24</p> <hr/> <p style="text-align: center;">I</p> <p>ice 56:12 idea 8:1 14:17 16:15 18:11 24:21 34:9 ideal 31:22 identical 57:13 57:13,14 identified 16:7 16:13 Illinois 8:15 illustrate 43:12 imagine 37:18 impediment 19:19 implicate 61:21 implicated 31:7 implication 43:3 implications 25:14 important 11:19 14:3 42:12 43:11 44:13 52:7 53:5,8 55:2 58:1 64:4 64:6,8 impossible 33:7 48:5 in-State 21:18 including 53:19 60:22 inconvenient 59:17 incorporate 16:2 37:22 incorporation 7:9 increases 57:24 incredibly 64:3</p>	<p>indemnification 44:22 indicated 28:21 indictment 24:18 individual 5:24 11:24 12:12,21 13:3,3 14:16 29:11 30:7 31:25 36:13 individually 13:6 induce 55:15 inefficient 9:18 10:22 injured 26:13 injury 3:15 11:9 12:9 13:10 23:11 34:17 innumerable 35:14 inquiries 38:23 inquiry 4:3,12 10:3 39:10 51:11 52:22 insofar 48:22 instance 28:12 interest 20:21 20:22 21:13,16 21:21,21 24:11 25:25 26:4,10 26:11,14,17,18 26:23 27:2,8 27:21 31:7 35:1 36:16,19 36:21,23 38:2 38:13 41:23 42:5,17 44:15 58:2,4 62:24 64:2 interests 9:25 15:17,18 25:15 33:17 36:15 42:13 intermediary 12:5 internally 10:23</p>	<p>international 6:4 17:6,10 23:18 39:11,12 48:14 52:17 53:15,22 60:7 60:24 62:9 interrupted 32:12,15 involve 25:6 involved 35:16 38:14 49:7 involves 33:2 irrelevant 42:16 isolated 10:9 issue 8:18 9:5,15 14:23 26:12 29:21 issues 12:12 58:12 59:18</p> <hr/> <p style="text-align: center;">J</p> <p>Jersey 8:13 16:3 16:3 37:6,8 38:8 40:6 41:1 41:4 59:21 joinder 24:17 joined 10:7 13:4 13:5 21:10,18 22:9 Joint 11:22 judge 39:1 55:22 judgement 48:16 judgment 8:19 9:14 10:20 11:11,12 35:21 54:6 judicial 31:19 33:24 juries 13:24 16:22 jurisdiction 3:19 3:21,23 4:4,16 5:6,9,11,12,15 5:17,25 6:2,19 6:21,24 7:11 7:20 8:2 13:15 13:18,21 14:11 14:12 15:8 17:25 18:19 20:11,17,19 21:3,14,22 22:6 23:18,22 23:23 24:9 25:2,23 26:2 27:14,20,22 28:5,6 30:4,17 34:3 37:4,24 38:9 40:14 41:5,6 45:12 48:19 51:16,19 54:15,16,18,24 55:4,12,15,17 55:21,24 58:23 59:6,9,22 60:2 60:8,23,24 62:7,20 63:10 63:17 jurisdictional 4:21 47:15 64:7 jurisdictionally 15:24 jurisdictions 35:20 jurisprudence 15:8 62:23 jury 11:23,23,24 11:25 justice 1:20 3:3 3:10 4:5,6,10 4:24 5:1,4,16 5:20,23 6:5,6,9 6:12,17,20 7:2 7:5,12,16,19 7:24 8:16 9:1 9:11,19,23,24 10:11,16 12:11 12:15,19 13:1 14:1,8,14,20 15:4,15 16:19 17:2,4 18:4,11 18:15,25 19:4 19:7,13,22</p>
--	--	--	---

20:3,8,24 21:25 22:15,20 23:8,19 24:1 24:13,23 25:9 25:20 26:5,16 27:6,11,23,25 27:25 28:1,15 28:18,23 29:2 29:10,24 30:9 30:11,14 31:12 31:21 32:7,11 32:15,18,20 33:4,19,20,22 34:6,17,20 35:4,6,7,10,11 35:12 36:21 37:15,18 38:15 39:17 40:12 41:8,17,24 42:6,22 43:4 43:12,21 44:1 44:4,23 45:6,8 45:10,21,23,25 46:4,6,7,9,18 46:22 47:3,14 47:18 48:1,7,8 49:8,17,21,24 50:10,19,24 51:8,16,22,25 52:8,9,19 53:1 53:25 54:9,12 54:14,21 55:18 55:20 56:2,11 56:21,24 57:2 57:4,5,8,17,18 58:17,18,20 59:7 60:17 61:2,6,7,18,20 61:23,25 62:1 62:3,15,22 63:1,13,14,19 64:10 Justice's 64:5 justify 24:15	3:8 61:4 Kagan 9:23 10:11,16 13:1 14:1,8,14,20 15:4,15 16:19 17:2 26:5,16 33:4 36:21 39:17 40:12 41:8,17 50:10 50:19,24 51:8 51:16 57:17 58:17,20 Kagan's 52:9 Katyal 1:17 2:3 2:13 3:7,8,10 4:10,25 5:3,11 5:19,21 6:1,8 6:10,16,22 7:3 7:10,18,24 8:21 9:6,19,23 10:8,13,17,19 12:14,19 13:2 13:11 14:14 15:4,22 17:1 18:4,13,18 19:3,6,22 25:12 37:2 43:15 47:6 59:20 61:3,4,6 61:7,14,19,22 61:25 62:3 63:6 Katyal's 24:6 46:13 Keeton 31:18 34:13 35:13 36:1,5,7,11,19 39:12 Kennedy 4:5,10 8:16 9:11,19 22:15,20 27:6 27:11 31:12 32:11,15,18 34:6,17,20 35:6,10 44:1,4 62:22 Kennedy's 9:24	63:15 kind 4:13 9:8 10:7 15:24 16:4,10 25:6,7 28:10 29:4,18 29:22 kinds 28:12 know 7:25 8:22 8:23 9:8,20 10:1,21 14:8 14:10,15,24 15:9,25 25:12 26:22 29:17 31:15 35:24 38:4,14 49:8 49:23 54:18,22 56:7 61:8,16 62:16 64:8 knowing 41:1 Kovner 1:19 2:6 20:4,5,8 21:8 22:5,18,23 23:16,25 24:8 24:19,25 25:18 25:21 26:9 27:1,10,16 28:3,17,20,25 29:3,15 30:2 30:10	laws 11:1 24:2 36:13 lawsuit 11:1 21:11 23:7 59:8 lawsuits 8:14,15 lay 54:5 learned 12:5 left 52:23 53:1 legal 31:4 38:17 38:20 40:10 52:3 55:14 57:13 58:12 legally 12:3 length 39:1 lenient 11:14 let's 6:9 9:11,11 37:18 level 5:25 liability 20:13 liable 60:14 62:14 63:8 libel 35:5 36:13 lifecycle 10:15 limited 3:21 27:14 34:11 36:5,17 40:11 line 18:12 49:12 lines 57:2 literature 8:23 litigate 44:21 litigated 34:25 42:21 58:5 litigating 31:1 litigation 13:15 14:25 15:2,5,6 17:16,24 18:6 19:9,14 31:9 32:6 33:18,25 34:4 43:12,18 44:10 46:16,18 51:5,6 52:5 58:3,21 litigations 7:17 little 16:20 26:22 53:7 living 33:12	located 33:16 location 23:18 63:8 locus 6:5 logic 23:8 56:6,7 56:8 look 8:10 11:22 13:17 15:9 16:21 17:13 25:4 29:7 44:16 49:6 53:10,14 looked 10:2 21:13 25:1 lopsided 4:23 loses 44:17 lost 54:24 lot 13:3 32:5,5 42:12 44:25 47:1,11 57:20 59:19 lots 32:1 59:16 lower 42:3
M				
		label 20:17 lacked 3:15 lacking 3:22 lacks 20:21 large 31:8,15 45:8,11 Laughter 10:18 27:24 launch 63:8 launched 6:25 law 3:20 5:13,14 6:11 8:13 19:1 22:19,20 46:14 46:25,25 59:18 lawful 40:10 lawfulness 40:2	maintained 35:19 major 33:15 making 4:9 46:14 52:16 manufactured 7:7 manufactures 40:25 manufacturing 38:4 40:3 map 37:8 maps 35:24 52:6 markedly 11:7 market 15:11 30:22 39:13 41:2 50:1 marketing 7:4 9:9 12:18 14:9 23:20 41:19 mass 4:23 13:9 28:2,4,10,12	
K K 1:17 2:3,13				

<p>34:2 42:19 44:25 45:18 masse 52:14 master 43:16,21 44:5 material 58:6 matter 1:13 9:7 17:9 22:19 30:23 38:20 50:20 52:9 58:23 64:7,13 McIntyre 25:20 25:22 McKesson 21:25 22:1,3,16,25 23:3,4,5 32:21 32:24 33:13 35:3 38:14 42:10 43:7 44:16,17,17,19 44:20,20 46:4 58:8 59:25 61:9,9,11,12 62:5,10 63:4 McKesson's 42:2 44:13 Md 1:23 MDL 8:13 28:7 46:16,18 59:11 59:14,20 mean 5:14 13:2 16:3 25:1 35:7 35:13 39:19 47:24 means 23:13 52:7 members 59:25 mention 43:16 mentioned 43:14 merely 18:17 merits 19:21 35:21 met 50:16 62:9 middle 53:9 million 7:14 13:20 14:3,6</p>	<p>47:9 62:13,18 mimic 59:1 minimal 18:21 18:22 minimum 29:8 47:6 51:3 mint 4:1 minutes 61:3 missing 39:20 misunderstood 20:15 modernize 53:23 money 47:11 morning 3:4 move 38:21 52:17 62:11 multi-decade 53:9 multi-defendant 34:2 42:20 multidistrict 17:16,20,24 18:6 19:9,14 19:19 32:2 45:13,13 58:20 multiple 5:6 13:10 32:3 33:1 36:5 42:21 60:21 multistate 31:19</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,1 3:1 narrow 39:9 narrower 39:8 national 20:12 29:6,9 33:15 nationally 32:23 nationwide 5:7 14:9,9 27:15 29:14,17 33:2 40:23 41:13,14 41:16,17,18,18 50:15 58:11,25 nationwide/C... 50:22</p>	<p>NEAL 1:17 2:3 2:13 3:8 61:4 necessarily 33:4 47:12 necessary 15:20 22:17 43:3 60:20,21 need 17:18,19 17:19,19 52:20 64:8 needs 25:23 negligence 12:4 neither 45:19 Nevada 34:4 37:10 never 3:22 4:1 10:23 36:4,5 62:20 new 4:1 8:12,13 9:12 13:8 15:10 16:3,3 34:14,15,17 36:9 37:6,8 38:8,8 40:6 41:1,4 43:22 59:21 Nicastro 27:18 28:22 32:20 nonmutual 57:11 nonresident 20:25 notion 16:10 notions 4:19 novel 62:21 number 4:3 9:4 31:16 45:10,11 49:16 numbers 15:5</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objections 59:17 obvious 37:15 obviously 12:24 23:5 46:16 occur 25:17 40:4</p>	<p>occurred 23:6 23:11 occurs 24:12 26:1 27:3 Offend 4:19 offends 5:10 offensive 57:11 oh 6:16 11:20 12:14 15:13 34:8 54:17 57:25 Ohio 11:16,16 14:18 15:12,12 16:15,16 18:19 25:15 34:4,8,8 37:10 38:10 39:21 40:19 50:13 57:20,22 62:17 Ohio's 36:17 okay 33:6 36:2 40:4 46:10,11 48:1,11 59:14 Omni 18:8 29:21 once 13:9 56:24 ones 17:18 open 10:24 17:8 opened 13:20 operate 31:19 39:25 63:14 operates 19:10 operations 16:2 operative 31:5 39:15 52:4 57:14 opinion 18:5 19:23 23:1 59:23 64:4 opposed 9:8 29:11 oral 1:13 2:2,5,9 3:8 20:5 30:12 order 51:15 ordinarily 63:21 ordinary 59:24 59:25</p>	<p>original 53:10 originally 54:16 ought 49:22 out-of 21:4,10 out-of-State 11:2 20:22,23 21:17 44:18 outside 32:24 37:4 41:7 overlap 12:17 overrule 54:3 overruling 60:18 overseas 24:12 overuse 36:1</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 1:19 2:6 3:1 20:5 page 2:2 4:20,20 8:14 11:22 23:1 47:21 pages 4:17 8:3 panel 17:19,20 45:13,13 panels 19:15 parallel 31:3 part 11:19 36:25 51:10 52:13 58:1 particular 23:11 28:9 33:7,8 41:10 63:8 particularly 13:16 33:13 47:20 parties 30:8 43:23 parts 51:2 53:5 party 22:17 pass 54:8 patronizing 34:7 peculiar 35:4 pendant 8:1 pendent 5:15,17 5:24 6:2 7:20 pending 5:5,11</p>
---	--	--	--	--

<p>33:20 Pennoyer 48:20 52:17 53:15 60:8,22 people 14:3,5 18:22 45:2 47:12,22 50:9 percent 19:25 perfect 33:23 perfectly 14:24 19:24 45:19,20 52:6 53:17 58:12 permissible 19:24 63:12,12 permissive 11:14 26:3 permit 24:17 38:18 permits 5:6 permitted 3:22 person 15:18 23:14 33:8 44:8 personal 5:12,15 22:6 24:9 25:1 30:17 37:3 40:14 55:16 59:6,21 62:19 perspective 12:24 Petition 8:14 Petitioner 1:4,18 1:22 2:4,8,14 3:9 20:7 61:5 phrase 29:25 picking 64:5 picture 39:8 41:25 53:7 piecemeal 7:17 pill 33:7 pills 7:14 13:20 13:21 32:24 place 6:18,23 7:7,8,8 12:17 16:2 22:2,3,8 22:13 23:13</p>	<p>31:1 37:13 43:9 45:12 50:9 placed 51:18 60:14 places 6:24 11:7 Plack 13:17 plainly 62:6 plaintiff 5:9 6:15 9:15 11:17 15:12 20:12 32:3 34:18 35:21 52:21 56:18,19 plaintiff's 26:7 26:16 39:21 40:15,19 41:13 plaintiffs 3:13 8:17 11:2 14:17 15:23 16:15 20:25 21:4,10,11,18 21:23 22:3,15 23:4,7,14 26:13 31:23,24 31:25 33:5 44:18 49:10 50:12,17 52:10 57:21 61:11 63:5 plaintiffs' 15:17 Plavix 14:3 30:24 31:16,23 32:6,24 33:9 40:3 42:23,23 42:25 47:10 play 4:6 14:17 playing 13:13 plays 43:7 please 3:11 20:9 30:15 point 31:15 32:9 33:14,17 35:2 36:10,14,15 37:2 40:8,13 43:20 57:11 59:13 63:15</p>	<p>points 11:20 13:17 46:13 47:2 position 6:12,17 23:9 35:24 39:6 possibilities 14:7 possible 31:22 33:12 45:22 47:16 power 40:9 53:3 53:3,4 60:9 practical 50:4 practicalities 56:7 practice 46:23 precedent 8:4 53:12 precedents 51:17 54:4 precise 49:16 precisely 18:10 34:1 preclude 62:2 preclusion 8:19 9:5,15 predictability 10:10 14:2,22 16:11 25:11 64:3,6 predictable 14:24 58:14 premise 7:25 57:15 prepared 14:12 prescribed 3:13 prescribes 33:11 present 34:20 presented 54:1 presumably 3:24 pretrial 19:10 19:15 59:11 pretty 26:17 prevail 8:18 60:25</p>	<p>previously 38:22 principal 16:2 21:19 22:2 principle 8:5 27:19 prior 51:17 probably 13:5 44:7 problem 9:6 17:5,25 22:25 39:5 42:19 44:25 45:11,18 50:4 62:14 63:2 procedurally 13:12 15:7,25 procedure 11:6 11:7 13:12 14:16 22:17,24 59:10 procedures 25:16 46:15,19 process 4:7 5:10 5:18 10:3 18:9 18:15,16,21 19:4,12 22:22 24:4,13 27:12 29:17 31:19 38:23 47:6,24 49:18 52:21 53:11 58:25 60:16 produce 48:24 product 20:13 47:13 Products 23:19 prong 4:15 52:21,22 proposing 9:17 protecting 26:19 26:24 protection 26:21 proven 61:8 provide 28:8,11 providing 26:11 26:19 40:1 42:17 44:15</p>	<p>provisions 29:18 proximate 61:23 publication 35:9 35:10,16,18 36:6,12 punitive 16:22 purpose 56:22 purposeful 38:23 61:15 purposes 21:24 30:3 50:6 59:11,12 push 61:16 put 6:9 42:11 putting 17:25</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualifications 17:7 question 7:13 9:24 12:15 13:6,7,21 15:1 18:21 21:9 25:3 33:20 38:17 41:11,25 44:24,24 46:17 49:20 52:9 53:25 58:18 59:4 62:15 64:5 questioning 24:3 questions 12:16 17:11 42:13 quite 4:7 17:9 32:25 33:22 36:7,12,15 40:5 48:14 55:11 56:19 quote 4:19 62:6</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 RACHEL 1:19 2:6 20:5 raise 44:24 raises 46:17</p>
---	---	--	---	--

<p>reach 27:21 real 35:25 49:11 63:1 reality 9:8 realize 43:11 really 11:11 14:2,22 31:21 38:12,25 41:12 42:11 50:8,15 52:6 53:8 59:19 reason 8:5 21:19 50:4,13 63:11 63:18 reasonability 4:12 8:7 reasonable 52:13 reasonableness 4:3,12 7:23 51:18 reasoned 3:17 reasons 13:11 16:5 18:18 33:1 60:21 REBUTTAL 2:12 61:4 received 23:4 recognized 36:18 55:11 recovered 35:20 redesign 46:8 refer 39:12 regarded 44:7,7 regardless 50:16 regulating 24:11 26:4,15 27:3 reintroduce 54:23 reject 19:24 rejected 20:10 relate 41:10 52:11 related 52:1 relatedness 39:10 relates 39:18,19</p>	<p> 40:16,20 41:13 relating 43:17 51:9 relationship 39:14,20 51:4 53:15 relatively 44:12 relevant 6:5 25:3 29:8 40:22 remand 42:8 remember 36:7 44:18 46:13,21 47:6 51:16 52:16 57:25 removed 59:8 reply 8:22 11:19 require 39:11 40:14 42:21 requirement 38:18 requirements 62:8 requires 49:9 reserve 20:2 reserved 19:8 29:21 resides 36:22 resolved 44:16 resolves 44:8 respect 4:13,14 8:7 11:14 14:15 17:15 24:25 25:16 27:4 30:22 32:10 35:15 48:22 53:4 55:8 56:3,18 60:3,3 63:25 Respondent 9:18 25:5 respondents 1:8 1:24 2:11 3:24 21:20 23:2 30:13 response 24:5 45:23</p>	<p>responsible 43:17 restatement 35:17 restrict 12:7 result 20:16 retrenchment 55:12,15 return 14:1 returned 59:12 reverse 42:7 RICO 24:16 rid 42:14 right 6:3,12 7:10 17:17 19:14 21:8 27:10,16 29:15 32:13,19 33:22 35:6 37:2 41:4,20 45:7,9 47:24 48:6,8,12 50:18 51:9 55:2,19,25 56:7,10 57:3 57:10 59:3 60:19 63:17,19 63:22 rise 30:23 41:5 41:22 52:5 rivalrous 18:14 18:19 ROBERTS 3:3 20:3 27:25 30:9,11 33:19 35:12 47:14,18 48:1,8 49:8,17 49:21 57:18 61:2 64:10 role 38:14 42:2 43:8 44:14 58:8 rule 4:22 8:9 9:17 11:13 14:4 16:11 17:3,7,9,19 19:6 29:25 32:4,9 33:25</p>	<p> 34:1 35:17 36:6 47:15 49:1,3,9,11 59:10 62:21 63:22 64:9 ruled 3:12 8:11 rules 11:11 12:2 12:3,4 13:13 14:18 16:24 47:16 48:18,23 48:24 49:3 64:7 run 52:23 Rush 62:4</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:1 3:1 safety 4:13 sake 50:7 sale 30:23 sales 62:14 sample 33:10 SAN 1:7 satisfy 47:24 49:18 51:15 52:21 saying 5:17,19 5:21 6:10 14:21 16:21 38:2 39:17 41:9 42:7,10 49:6,24 57:20 59:7 62:14 63:24 says 8:14 19:23 24:13 32:2 34:10 35:17 36:8 46:7 47:10 55:21,22 59:23 scale 3:17 38:19 scheme 28:7 schemes 28:7 se 48:18 second 11:5 30:24 32:8 41:16,21 51:5</p>	<p> 52:13,23 55:10 seconds 10:14 see 18:1 33:10 41:8 56:3,8 57:24 seek 9:21 seeking 11:24 63:22 seen 4:2 sees 28:9 sell 64:8 selling 62:16,18 sells 15:11 61:9 sends 45:14 sense 29:1,3 32:9 36:6 55:19 sentence 56:13 separate 36:12 38:22 separately 62:17 serious 53:14 service 29:17 58:25 set 16:2 27:13 40:10 42:1 61:7 Shaffer 53:22 shape 63:23 Shoe 6:4 17:6,10 39:11,12 48:14 52:17 53:15,22 60:8,24 62:9 shopping 16:8 show 62:11 shows 9:17 side 15:17 26:16 42:11,12 significant 31:1 31:6 32:25 33:17 41:23 42:5,15,17 43:8 44:15 Silverman 39:1 similar 34:14 simple 47:16 simpler 36:20</p>
---	--	--	---	---

<p>58:4 simplify 58:6 simply 30:3 33:14 40:8 42:4,7 59:23 60:22 single 5:23 21:11,23 35:8 35:10,16,18 36:6 44:15 52:20 56:13 sir 34:12 57:25 sit 15:12 situation 23:13 30:1 34:14 35:23 situations 50:8 sliding 3:17 38:19 small 13:16 smirked 63:21 Smith 56:3,3 62:16,17 64:9 sold 7:15 11:8 11:16 13:19 23:19 47:9 63:4 Solicitor 1:19 solution 28:1 33:23 45:17 solutions 28:4,8 solve 17:25 somebody 38:10 40:14 55:5 someplace 16:23 26:22 sorry 4:24 12:11 18:2 28:17 52:20 sort 38:18 sorts 12:7 13:24 16:5 Sotomayor 4:24 5:1,4,16,20,23 6:5,6,9,12,17 6:20 7:16,19 7:25 12:11,15</p>	<p>12:19 18:11,15 18:25 19:4 23:8,19 24:1 24:13,23 51:22 51:25 52:8 61:7,18,20,23 62:1,3 63:1 sound 38:6 sounded 56:5 sounds 17:16 Southern 44:2 sovereign 17:8 18:23 24:11 29:4,6,9,22 special 18:2 32:21 34:23 37:24 38:2,6 38:13 43:16,21 55:24 specific 3:19,23 6:24 7:11 12:9 13:15 15:8 20:17,19 21:14 25:22 26:2 27:20 28:12 30:4,17 37:3 38:8 41:5 51:15 54:19 55:16 56:1 59:6,9,21 63:10 specifically 18:2 54:6 spread 32:6 squarely 54:7 Squibb 1:3 3:5 stake 10:1 standard 40:10 41:25 standards 9:7 start 10:11 started 47:19 55:20 starting 6:4 16:13 17:5 state 5:15 6:2,13 8:2 9:10,10</p>	<p>16:4,16 17:7 18:20 19:1 20:12,19,21 21:4,10,17 23:11,12,22 25:17 26:5,7,8 26:18,23 27:2 27:7,8,8,12 29:11,13 31:12 34:15 36:8,22 37:9,9,12,16 37:20,23 38:3 38:3,4,6 40:15 40:15,17 41:10 43:19 44:1,4 48:22 51:4 52:5 53:3,20 55:8,22 56:4 57:23 58:9 59:1 60:12,14 62:24,24 63:15 State's 14:16 36:13 58:4 States 1:1,14,21 2:7 8:19 11:3 12:3,6 13:22 14:6,11,13,25 15:2 18:9 20:6 20:13 23:12,17 23:20,24 24:11 25:8,24,25 26:3,9,10,12 26:13,14 27:14 27:20 29:11 31:10,12,14,17 32:6 34:10,25 35:1 36:7,11 36:19 37:3,25 42:18 43:13 44:10 50:3 60:9 61:10 63:16 64:1,2 States' 33:24 statute 19:19 25:3 29:12 statutes 24:16 24:20,20 25:4</p>	<p>25:6 stay 62:24 step 28:9,19 stream-of-co... 61:15 stressed 43:15 strong 20:20 24:11 26:4,10 26:11,23 27:2 27:7 strongly 27:19 stuff 17:2 stymied 16:20 subject 14:10 24:3 58:23 submitted 64:11 64:13 subpoena 47:7 subsequently 36:4 substance 13:12 14:16 substantial 4:6 substantive 9:7 13:23 16:24 46:25 substantively 15:7,25 sue 3:16 13:22 14:5,6 15:19 20:12 22:3 23:14 44:19 47:8 49:11 55:5 56:25 57:22 61:12 sued 15:13,14 23:10 37:23,25 suffered 35:19 sufficient 30:17 suggest 21:20 39:5 suggesting 54:9 sui 35:15 suing 21:1 suit 6:13 8:16 9:4 10:4,7 21:23 55:7</p>	<p>62:2 suits 15:20 summarize 30:18 summary 11:11 11:12 Superior 1:6 3:5 supporting 1:21 2:8 20:7 suppose 15:22 48:3 supposed 44:20 Supreme 1:1,14 3:12,25 4:18 8:11 20:15 sure 13:15 22:18 63:2 system 12:23 34:10,10 55:14 59:15 systematic 30:21 39:13 49:25 systems 33:24</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 tagged 21:7 take 3:14 5:6 8:10 9:4 10:14 11:22 14:3 34:8 36:15 40:24 43:2 53:10,14 57:14 57:17 58:17 taken 42:2 61:11 takes 4:7 30:5 talked 24:2 25:10,10,11 32:20 47:5 talking 24:20 25:5 29:5 30:4 43:1 59:20 talks 62:13 tee 13:16 tell 34:7 40:18 50:5 57:11 64:9</p>
--	---	---	---	---

tend 27:22	12:20,22 15:12	trial 11:12,18,23	undisputed	violation 60:15
Tennessee 47:23	15:13,23 16:7	11:23 12:21,22	53:18	vis-à-vis 63:16
48:9	16:9,9 17:6,15	19:11,14,15	unfair 10:22	Volkswagen
terrible 44:25	17:24 18:2,5	45:14 59:12	13:8 15:1	16:14 25:19
territorial 27:9	19:23 21:12,15	trials 11:24,25	17:11 31:2	27:18
53:3	21:19 22:5,10	13:10	56:17 60:11	volume 31:9
territorially	22:23,25,25	tried 15:8	unfairness 10:3	
36:17	23:16 24:8	tries 50:6	12:16 13:23	W
territory 53:21	25:2 26:9 27:1	true 23:25 27:6	14:21 48:25	waive 9:21,21
60:10	27:2,18 28:3,4	37:12 46:11,16	unfolds 15:6	walk 10:15
test 4:1 39:4	29:21 30:2	48:7,13 50:3	unique 35:23	walked 47:7
42:7,8 51:2,10	32:8,25 33:20	try 44:22 50:9	United 1:1,14,21	want 14:22 15:9
51:12 52:13,24	37:1 38:1,1	53:10	2:7 20:6 23:12	15:20 26:21,24
testimony 11:14	42:14 43:7,8	trying 25:12	23:17,20,24	32:9 35:24
Texas 13:8 34:5	43:13 44:3,6	36:20 40:25	24:10 25:8	37:5 38:12
37:10 47:22	47:1,24 49:5	49:9 57:8	29:11 32:6	40:18 47:16
48:10 56:12	49:19 51:8	61:16	37:3 44:10	wanted 12:23
Thank 3:10 20:3	53:8 54:7 55:3	Tuesday 1:11	unquestionably	49:3 53:6
30:9,10 33:21	55:10 58:22	twice 35:13	44:19	wants 10:6 17:8
57:7 61:2,6	59:13 60:5,21	two 13:2 14:2	unquestioned	26:21 28:10
64:10	62:22 63:6,10	18:18 22:1,11	40:9	42:11
theirs 34:1	thinking 16:1	26:9,10 36:14	unreasonable	warn 12:6
theories 61:24	third 4:13,14	38:22 47:2	4:16 5:2	Washington
theory 9:9 10:21	31:6	48:17 51:2	unrelated 5:8	1:10,17,20
19:25 23:10,21	THOMAS 1:23	62:19	63:24	wasn't 7:7 34:23
23:24 24:3	2:10 30:12	U	upshot 34:1	59:25
31:4 46:20,22	thought 16:20	unacceptably	urge 54:6	way 4:23 5:18
50:11,19 57:13	38:17 40:13	20:14	urged 53:13	12:24 15:6
61:12,15,20	thoughts 36:3	uncausal 63:25	urging 21:2	17:13 21:22
62:4 63:2	three 10:8 61:3	unconstitutio...	usually 10:1	24:10 26:3
thing 8:8 10:25	time 6:3 20:1	47:5 62:6	26:18 41:9	31:23 40:24
15:22,23 16:14	timed 10:16	underlying 5:22	V	44:7 47:4
17:15 18:7	times 35:14 36:5	6:25 7:12 8:24	v 1:5 3:5	58:25 61:20
25:9 41:3	42:21	11:9 16:10	valid 9:14	62:1 63:10,23
43:11 44:13	told 50:12,12	62:12	values 10:9 14:2	ways 12:8 47:3
47:2 57:19,20	tort 28:5,10 34:2	understand 37:7	valve 4:13	we'll 24:6 34:8
61:17	45:18	39:25 40:12	variety 12:1	we're 5:13,19,21
thing's 57:23	torts 4:23 25:16	41:8 58:22	various 12:8	6:1 16:1 24:19
things 12:1,2	28:2 42:19	understandable	vehicle 28:13	25:5 30:4 43:1
13:2,24 16:5	45:1	58:12	venue 45:14	47:14 49:6
17:4 33:6	trace 33:7	understanding	versus 18:19	51:20 55:14
37:11,21,22	track 33:12	30:25 41:24	view 10:19	57:21,22 61:16
45:5 46:10,11	traditional 60:9	53:11,23	25:24 34:7	62:14 63:18
55:2 58:3,7	transfer 18:1	understood 59:5	39:9	we've 7:19,22
62:19	59:5	undetermined	violates 5:18	10:1 25:10
think 4:10 8:6,8	transferred	4:3	47:10	55:14 57:20
8:21 11:19	59:11			63:9

weak 26:22	1	700,000 32:24		
week 32:25	1 9:4	72 8:14		
weight 51:17	10:08 1:15 3:2	74 11:22		
went 8:16 60:7	100 19:25			
win 44:20	11:09 64:12	8		
winds 8:4	16-466 1:4 3:4	86 48:2,4,10		
wonder 38:20	18 4:17,20	49:13 50:20		
wondering 39:3	180 7:14 13:20	9		
words 10:1	19 8:3	918 47:9 62:13		
25:14 36:23		62:18		
work 8:25 43:13	2			
45:19,20 62:5	20 2:8 49:17			
works 63:10	50:20			
world 55:6	200 14:6			
World-Wide	2017 1:11			
16:13 25:19	21 8:4 47:13			
27:18	25 1:11			
worldwide 5:7				
worried 26:6,6,7	3			
worry 34:8	3 2:4			
worth 47:9	30 2:11			
60:12	33 11:3 13:22			
wouldn't 31:2	64:1			
47:24 52:9				
60:1 61:21	4			
62:2	4 4:17,20 14:3			
write 18:5 19:23	45 10:14			
29:2 59:23	49 20:13			
wrong 17:2	4K 59:10			
54:10				
	5			
X	5 18:8			
x 1:2,9	50 14:6,11,12,25			
	25:24 34:25			
Y	58:5			
yeah 32:7,13	54 47:21			
37:1 45:16	572 45:2			
46:9 51:8	575 11:2 48:2,4			
58:19	48:10 49:13,18			
years 7:19	59A 23:1			
York 8:12 9:12				
13:8 43:22	6			
	600 12:12 58:4			
Z	60A 23:1			
zero 50:11,20	61 2:14			
	661 11:24			
0				
	7			