SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

\- - - - - - - - - - - - - - - - - -

ROMAG FASTENERS, INC.,)

Petitioner,)

v.) No. 18-1233

FOSSIL, INC., ET AL.,)

Respondents.)

\- - - - - - - - - - - - - - - - - -

Pages: 1 through 65

Place: Washington, D.C.

Date: January 14, 2020

HERITAGE REPORTING CORPORATION

Official Reporters

1220 L Street, N.W., Suite 206

Washington, D.C. 20005

(202) 628-4888

www.hrccourtreporters.com

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - - -

3 ROMAG FASTENERS, INC.,)

4 Petitioner,)

5 v.) No. 18-1233

6 FOSSIL, INC., ET AL.,)

7 Respondents.)

8 - - - - - - - - - - - - - - - - - -

9 Washington, D.C.

10 Tuesday, January 14, 2020

11

12 The above-entitled matter came on for

13 oral argument before the Supreme Court of the

14 United States at 11:13 a.m.

15

16 APPEARANCES:

17

18 LISA S. BLATT, Washington, D.C.;

19 on behalf of the Petitioner.

20

21 NEAL K. KATYAL, Washington, D.C.;

22 on behalf of the Respondents.

23

24

25

1 C O N T E N T S

2 ORAL ARGUMENT OF: PAGE:
3 LISA S. BLATT, ESQ.
4 On behalf of the Petitioner 3
5 ORAL ARGUMENT OF:
6 NEAL K. KATYAL, ESQ.
7 On behalf of the Respondents 30
8 REBUTTAL ARGUMENT OF:
9 LISA S. BLATT, ESQ.
10 On behalf of the Petitioner 59
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 P R O C E E D I N G S
2 (11:13 a.m.)
3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 18-1233, Romag Fasteners
5 versus Fossil, Inc.
6 Ms. Blatt.
7 ORAL ARGUMENT OF LISA S. BLATT
8 ON BEHALF OF THE PETITIONER
9 MS. BLATT: Thank you, Mr. Chief
10 Justice, and may it please the Court:
11 The Lanham Act authorizes courts to
12 remedy trademark violations by awarding
13 infringers profits subject to the principles of
14 equity. The question presented here is whether
15 the phrase "principles of equity" requires
16 trademark owners to prove willfulness as an
17 absolute precondition to profit awards.
18 The answer is no for three reasons.
19 First, the phrase "principles of equity"
20 signifies a multifactor analysis where no one
21 factor is controlling.
22 Second, the phrase -- excuse me. The
23 statutory text and structure supersede any
24 settled willfulness requirement.
25 And, third, there was no such settled

1 background willfulness requirement.
2 First, the phrase "principles of
3 equity" refers to the familiar equitable
4 principles that courts have long applied in
5 determining whether to award profits in
6 trademark cases. A defendant's culpability is a
7 weighty factor, but it should not be
8 controlling. Other traditional equitable
9 factors are also important to further the
10 landmark -- the Lanham Act's purposes to protect
11 consumers and trademark owners' goodwill.
12 Such traditional factors include
13 whether other relief adequately compensates the
14 plaintiff and whether the defendant is enriched
15 by his violation of law.
16 And these factors can all exist along
17 a spectrum. For instance, culpability can range
18 from fraudulent to innocent and everything in
19 between, including callous disregard and
20 negligence. So in a case where a defendant is
21 completely innocent, courts should require a
22 greater showing of other factors before awarding
23 profits.
24 Conversely, greater culpability
25 justifies a profit award that deters future

1 infringement. And courts can be trusted to use
2 their discretion to balance the equities for the
3 cases in between. The statute also requires the
4 amount of any award to be compensatory and not a
5 penalty and just according to the circumstances.
6 Second, even assuming a settled
7 willfulness requirement before the Lanham Act,
8 the statutory text and structure reflect a
9 congressional intent to supersede it. From the
10 Act's inception, i.e., from 1946, Congress has
11 expressly distinguished and protected defendants
12 and which defendants from awards of monetary
13 relief based on a heightened mental state.
14 Today the Lanham Act contains eight
15 provisions tying monetary relief to a heightened
16 mental state. That's a lot of provisions. The
17 provision that dictates monetary relief, Section
18 117(a), is the provision that controls this
19 case. That case -- that provision, excuse me,
20 requires a willful violation for trademark
21 dilution under 1125(c), but no such mental state
22 requirement appears for infringement violations
23 under Section 1125(a) or any other cause of
24 action under the Lanham Act.
25 We think the inference is particularly

1 strong that the omission of a willfulness
2 requirement is intentional. The same Congress
3 in 1999 that amended the statute to add a
4 willfulness requirement for trademark dilution
5 cases under subsection (c) affirmatively
6 distinguished this type of infringement case
7 under subsection (a) because the amendment
8 simultaneously struck out the word "violation"
9 of Sections 1125(a) and then reinserted that
10 same phrase, violation of subsection (a), and
11 then added a willful infringement form.
12 JUSTICE SOTOMAYOR: Ms. Blatt, could
13 you concentrate on the word "equity"? Do you
14 think equity would sustain an award for innocent
15 or good-faith infringement without a more
16 culpable state of mind? Because there's a wide
17 swath of behavior between truly innocent, truly
18 good faith, and willful. There could be
19 reckless. There could be callous disregard.
20 Would equity consonance an award for negligence
21 or good faith?
22 MS. BLATT: Yes. And as I said in the
23 earlier --
24 JUSTICE SOTOMAYOR: But how?
25 MS. BLATT: -- the earlier case, you

1 would need a greater showing of the other
2 purposes or the other equitable factors. And
3 those are two. The first and foremost is
4 whether if no other relief could adequately
5 compensate the plaintiff.
6 And even in a case of a completely
7 innocent defendant, damages are notoriously hard
8 to prove. They're almost never recovered in
9 trademark cases. And they're particularly
10 impossible to prove in component cases.
11 The other equitable factor -- so
12 that's one, is that even a dollar, that they
13 would rule that out the instant case, even
14 though there's no other relief, but the second
15 equitable factor is the basic principle of
16 equity, which is just you don't get to hold on
17 to profits that don't correctly belong to you if
18 you violated the law to get them.
19 And, again, here, let's just take the
20 example, the other side says, at a minimum, we
21 concede $900. That's their argument. All we're
22 entitled to for profits is $900. Their view is
23 we can't even get $900 unless you show
24 willfulness, and you, otherwise, you just walk
25 away with nothing.

1 Now, they say that there's the
2 statutory damages, you can always opt for the
3 $200,000 statutory damages, which is certainly
4 nice, but the problem with that is multifold.
5 One is that it's not even available unless the
6 mark is both registered and counterfeit, so
7 countless trademark plaintiffs aren't even
8 eligible for this.
9 And, second, it's supposed to be a
10 floor and an alternative. So in a hypothetical
11 case, that is our position. Now, in this case
12 we have a little more. The parties on a remand
13 have lots of arguments why the amount should be
14 closer to 900. We have arguments why it should
15 be higher because this is not only just a small
16 business, but the manufacturer set up its
17 operations in China, where counterfeiting is
18 rampant and there's no incentive -- if all you
19 have to pay is nothing, there's just really not
20 that much incentive to prevent counterfeiting.
21 So those would be the arguments on
22 remand. And let me just say, at the common law,
23 we did cite examples, they're not voluminous,
24 but there are examples, both pre-Lanham Act and
25 post-Lanham Act, where courts in cases of

1 innocent infringement did award profits. It's
2 just not routine.
3 JUSTICE KAVANAUGH: Pre- -- pre-Lanham
4 Act, that's not much, right?
5 MS. BLATT: Three? Well, sure. Sure,
6 three's a lot when --
7 JUSTICE KAVANAUGH: Pre- -- pre-Lanham
8 Act, I said.
9 MS. BLATT: Yes.
10 JUSTICE KAVANAUGH: Yeah.
11 MS. BLATT: Yeah. So the one of them
12 was the Mishawaka.
13 JUSTICE KAVANAUGH: Yes.
14 MS. BLATT: And that was a Supreme
15 Court case.
16 JUSTICE KAVANAUGH: Right.
17 MS. BLATT: You didn't award profits,
18 but the -- the district court did. The second
19 was the Oakes case, which is, I don't know,
20 1888. It was from Alabama. Nothing wrong with
21 Alabama. It counts as a case.
22 (Laughter.)
23 MS. BLATT: So -- and then we had a
24 third case that -- the third case is
25 Prest-O-Lite, and that's from New Jersey. So I

1 don't know why these cases don't count just
2 because there are other cases that say we're
3 going to award profits.
4 So if you just look at the -- the
5 common law, and the most significant aspect of
6 the common law, of course, is that the very
7 cases from the common law that articulate a
8 willfulness requirement say in the very same
9 sentence: But there was some conflict in the
10 decision.
11 So a conflict is a conflict is a
12 conflict. It's not a -- the kind of clear rule
13 that you could say would always rule it out.
14 JUSTICE GINSBURG: How is willfulness
15 defined? I mean, here the jury found callous
16 disregard, but not willfulness. Did the judge
17 charge on what those terms meant?
18 MS. BLATT: Yes. Yes. So the -- the
19 charge on willfulness was -- it includes
20 intentional conduct and willful blindness, which
21 is awareness of a high probability of harm and
22 you take affirmative steps to avoid learning
23 about it.
24 Callous disregard is a rubric of
25 willfulness, but it doesn't rise to either of

1 those levels. It's closer on the recklessness
2 spectrum. So generally in your case law,
3 willfulness is defined usually to include
4 reckless, but here the parties, meaning our
5 side, did not object to recklessness being taken
6 out so that the jury was only instructed on
7 willfulness and not recklessness.
8 JUSTICE BREYER: Is it --
9 MS. BLATT: But they're similar
10 because callous disregard under Second Circuit
11 case law was a function of willfulness, it just
12 wasn't willful blindness.
13 JUSTICE BREYER: I can't work out,
14 there's maybe an obvious answer to this that
15 I've missed, but in reading the statute, I
16 thought, well, suppose you do have to have
17 willfulness in order to get profits, and there
18 would be a certain number of cases you don't get
19 profits, right, okay. Think of those cases.
20 Then I see this sentence in 1117, it
21 says, "if the court shall find that the amount
22 of recovery based on profits is either
23 inadequate or excessive, the court may in its
24 discretion enter judgment for such sum as the
25 court shall find to be just, according to the

1 circumstances of the case."
2 So if you did have to have
3 willfulness, but all these things in China and
4 so forth were -- were -- were right there in the
5 case, the -- the -- the court could give the --
6 the -- the plaintiff more money, couldn't they,
7 under that sentence?
8 MS. BLATT: Maybe I don't understand
9 the question. The other side is no, we don't
10 get any money --
11 JUSTICE BREYER: In this case --
12 -- absent willfulness.
13 JUSTICE BREYER: -- they did that, but
14 I want to know why. And even if we were arguing
15 about willfulness, so I say suppose they're
16 right that willfulness does apply, you think it
17 doesn't apply, right?
18 MS. BLATT: Right.
19 JUSTICE BREYER: But suppose they win.
20 Suppose you produce your instance which you just
21 did, that in China they'll go around and,
22 dah-dah-dah, and we won't be able to get any
23 significant amount of money, why wouldn't you
24 say to the judge, read that sentence, Judge,
25 they weren't willful, we agree but we're giving

1 you reasons why in this case we should get more
2 relief.
3 MS. BLATT: Well, if you're saying you
4 should read willfulness into the --
5 JUSTICE BREYER: No, I'm not -- I'm
6 saying --
7 MS. BLATT: No --
8 JUSTICE BREYER: -- it's what you do,
9 yeah.
10 MS. BLATT: Yeah, so if your view is
11 that you read it into it but then courts can
12 read it out --
13 JUSTICE BREYER: They did not say they
14 can read it out. They can say it's there, they
15 weren't willful but we have a sentence here
16 which gives us total discretion in the interest
17 of justice to give the damages that we think are
18 just and fair.
19 So nobody is going to be hurt by
20 accepting their side. All it's going to do is
21 give this -- more discretion to the district
22 court to award as much money or as little as he
23 thinks is fair.
24 MS. BLATT: So --
25 JUSTICE BREYER: Now why isn't that

1 what that sentence does? I just want to --

2 MS. BLATT: I think this sentence --

3 JUSTICE BREYER: -- know what it does.

4 MS. BLATT: -- helps us. Here's just

5 my concerns. Six circuits read that sentence as

6 saying they cannot award profits if willfulness

7 is not shown.

8 JUSTICE BREYER: No matter how

9 appealing the case?

10 MS. BLATT: Yes, that's why we're here

11 on a petition.

12 JUSTICE BREYER: Has anybody argued

13 about this sentence?

14 MS. BLATT: Yes.

15 JUSTICE BREYER: In our brief -- in

16 your brief you put that?

17 MS. BLATT: Yes.

18 JUSTICE BREYER: Good. Where -- what

19 -- where can I read it?

20 (Laughter.)

21 MS. BLATT: I mean, it's -- it's in

22 the intro and it's in the --

23 JUSTICE BREYER: Fine. Will you just

24 tell me. I obviously, you know, sometimes I

25 read these fast.

1 MS. BLATT: I don't know the page. I
2 mean, it's definitely -- the gestalt of the
3 cases going our way is, look, we'd like to see
4 willfulness, but if we don't see it, it's not
5 controlling, and it's just one of these weighty
6 factors but there's always been a list of
7 traditional factors, before the Lanham Act and
8 after he Lanham Act. The culpability is one and
9 the two that I ever -- the two that I mentioned
10 are the other ones that are critical, whether
11 there's some form of compensation and whether
12 there's just a sense of unjust enrichment. But
13 yes, you can go down or above.
14 But I think that we use that sentence
15 to say, there's no harm, there's no risk of a
16 windfall because no matter where you come up
17 with your award, the Court can always reduce it
18 or raise it, depending on the circumstances. So
19 I don't -- maybe I just don't understand your
20 question.
21 JUSTICE BREYER: Well, I was trying to
22 understand the significance of the case. And
23 you're saying, unless we read willfulness out of
24 it, there are going to be some terrible cases
25 where, in fact, the -- the infringer did it

1 totally by accident, totally by accident. He
2 had a dream with this symbol appeared to him and
3 he put it on his thing not knowing that somebody
4 else had it, a total accident.
5 MS. BLATT: So --
6 JUSTICE BREYER: Now, you say still
7 this is very bad because don't you know, that
8 the trademark is owned by some widows and
9 orphans and terribly suffering people and --
10 and -- and you should certainly give them some
11 money or goodness knows what'll happen, you know
12 --
13 MS. BLATT: Right, so --
14 JUSTICE BREYER: -- very appealing
15 case. But you're worried about, therefore you
16 say --
17 MS. BLATT: Yeah.
18 JUSTICE BREYER: -- read willfulness
19 out of it. I say why do you need to do that?
20 Why not just point to the sentence?
21 MS. BLATT: So we're not reading it
22 out. We're just saying that it's not a
23 precondition in step one. It is -- no question,
24 I mean, our view is that it's a sliding scale,
25 all of these traditional equitable factors are

1 appropriate and then when you get to the amount,
2 you can adjust it.
3 So it just would seem odd to write an
4 opinion that says, even though it's not in the
5 statute, even though it wasn't a clearly stated
6 rule, just because the other side asked for it,
7 we want to read it in because we want to be nice
8 to the Respondent. I don't think that's a good
9 way to write an opinion.
10 CHIEF JUSTICE ROBERTS: Ms. --
11 Ms. Blatt, your -- your lead argument, of
12 course, is the phrase willful violation under
13 Section 1125(c) and the willfulness is not --
14 doesn't appear in the other part, but 1125(c)
15 includes willfulness, it's about willfulness.
16 So, I gather this is the argument on
17 the other side. Saying willful violation under
18 -- that's kind of like just the label, this is
19 what it is. And so when you just stick the
20 label in, it's about a willful violation, that
21 shouldn't have the same sort of exprecionias --
22 whatever it is, argue -- impact as you suggest.
23 MS. BLATT: Right. And that's a --
24 that's a fair argument. The argument is it is
25 just mirroring the cause of action. And so that

1 just begs the question of why did they even need
2 to put willfulness in the trademark dilution as
3 a protection against profits and damages in the
4 first place. That's our whole argument about it
5 appearing eight times.
6 The underlying 1125(c), when it was
7 passed, says you need a willful violation for a
8 cause of action to collect monetary relief. And
9 our point is simply it is not the most natural
10 inference or the most natural inference is if
11 they didn't think that there was already an
12 omnibus willfulness requirement for all profit
13 awards because they took such care in 1125(c),
14 in the statutory damages, and in the treble
15 damages and profits. They basically say you
16 can't get monetary relief, damages, and profits
17 absent these heightened scienter. And the other
18 side says: Well, but those apply to damages
19 too.
20 And our point is, sure, but it seems
21 odd that Congress went out of its way to protect
22 from the beginning in 1125(c) against profits
23 when, under their view you didn't need it
24 because it was already read into the statute as
25 a principle of equity in all cases.

1 So, in other words, take section --
2 the -- the -- the original Trademark Act of --
3 the original 1946 act has 1114, which is the
4 violation for registered trademarks. So it's
5 very similar, like 1125(c), it says, here's
6 going to be a class of cases where we don't want
7 monetary relief.
8 So innocent printers and innocent
9 publishers, no damages, no profits. And any
10 defendant who preprints -- or excuse me, who
11 prints an infringe mark without knowing that the
12 infringement was intended to confuse, can't get
13 profits or damages.
14 The other side says, well, it's not
15 superfluous because it at least applies to
16 damages. And our point is, well, it's at least
17 superfluous as to profits. Congress is taking
18 its care in eight provisions to keep saying no
19 profits here, no profits there, no profits left
20 and right, based under these heightened
21 scienter.
22 So whatever you think principles of
23 equity means, the one thing it can't mean is a
24 heightened scienter because the statutory
25 structure is so overwhelming that Congress had

1 this carefully calibrated scheme where they're
2 spelling out when willfulness is required.
3 JUSTICE ALITO: Of the cases where the
4 courts have said that willfulness is a necessary
5 condition, which one would you cite as being --
6 as leading to the most unjust result?
7 The case where -- where a court said
8 we're not going to award profits because there
9 wasn't any willfulness and that's very unjust
10 based on the facts of the case, is there one you
11 would cite as an example?
12 MS. BLATT: No, they don't say, like
13 their -- the leading case, that Regis case by
14 the highest court in Massachusetts, it just
15 says, we're not going to -- although the law is
16 conflicted, we're not going to allow profits,
17 and they're mostly relating to a fraud-based
18 tort. So the underlying tort at the common law
19 is one of fraud.
20 And so I'm not sure they see it as
21 particularly unjust if you're suing for fraud
22 that you don't get relief if there's no fraud.
23 But in the technical trademark cases where most
24 of our cases come from, they are including the
25 three cases -- well, the Hamilton-Brown case,

1 they're saying you -- this property, your
2 property was infringed so there's a pot of money
3 that's going to rightfully belongs to you.
4 And by the time you get around to your
5 three cases, the Champion Sparkplug case and the
6 Mishawaka case, the Court is balancing the
7 circumstances. It's saying, the willfulness is
8 relevant but it also said, look, we don't think
9 the plaintiff is really hurt, we don't think the
10 defendant really benefitted. You know, you get
11 an injunction and go home.
12 And so I just haven't seen cases where
13 there was a mean court saying: Looks like you
14 deserve it but I'm constrained by this
15 willfulness requirement. I don't know if that
16 answers your question.
17 JUSTICE KAGAN: Do you think it's open
18 to us, Ms. Blatt, to pick a position someplace
19 between you and Mr. Katyal? In other words, Mr.
20 Katyal says, never under any circumstances can
21 you get profits without willfulness and you say,
22 well, willfulness is just one factor among the
23 things that you think about.
24 But I -- I would think that there's
25 some kind of intermediate position, which is

1 based on the history and -- and a general sense
2 of it, which is that willfulness might not be a
3 -- an absolute necessity but it certainly should
4 be entitled to very significant weight.
5 You know, you could say like a
6 presumption of a kind.
7 MS. BLATT: No, I would not say a
8 presumption unless you're going to give us the
9 same presumption, the presumption of
10 compensation when other remedies aren't adequate
11 and a presumption against unjust enrichment.
12 And here's why we sort of used the Kirtsaeng
13 case as an -- as an example in terms of
14 fashioning our rule, is that I do think it's a
15 sliding scale. The more innocent the defendant,
16 you better have a greater justification for
17 compensation; and the more guilty the defendant
18 is -- and then you might have some cases in
19 between.
20 But you could have a negligent or a
21 reckless defendant, and I don't know where the
22 presumption would fit. And the Court should
23 just balance it, should the plaintiff get at
24 least one dollar in that case? And so a
25 presumption just puts the -- the scales too

1 heavy.

2 I think all the courts recognize, and

3 I said, it's a weighty and important factor.

4 JUSTICE BREYER: Let me do this.

5 MS. BLATT: Sure.

6 JUSTICE BREYER: I think -- I guess

7 your view is there's no willfulness requirement.

8 But what it says is the plaintiff shall be

9 entitled to recover defendant's profits,

10 damages, and the cost of the action -- okay, it

11 says that -- subject to principles of equity.

12 Okay?

13 Now, we have a problem. One thing to

14 say is equity has always held that willfulness

15 is necessary. Good, we're finished with this

16 case. But that's not your position. Your

17 position --

18 MS. BLATT: It's also not true.

19 JUSTICE BREYER: No, well, I -- I -- I

20 understand. I understand. Okay. Can we say

21 anything about what principles of equity

22 require?

23 MS. BLATT: Sure.

24 JUSTICE BREYER: All right. Now, I

25 notice the Sixth Circuit uses the word

1 "wrongful." Do you want us to use that word?
2 MS. BLATT: No.
3 JUSTICE BREYER: How do you want us to
4 write that sentence? What principles of equity
5 require?
6 MS. BLATT: So -- and I think it helps
7 to say that all of the courts have agreed on
8 what the principles of equity mean. They're the
9 factors that start from the English cases up and
10 through your cases. The ones I said. The
11 defendant's culpability, the need that other
12 relief doesn't adequately compensate the
13 plaintiff, and the theory or are there profits
14 that are -- is there just a -- you're holding on
15 to profits that don't rightfully belong. Those
16 are the three. Now, the Fifth Circuit and the
17 Second Circuit has articulated this maybe in a
18 six-factor test, but they're all getting at
19 those three things.
20 So the factors are clearly defined
21 already in the case law. The courts are all
22 happy. The only thing they're disagreeing about
23 is whether willfulness is a gateway on/off
24 switch.
25 So I would be very happy with an

1 opinion -- and this, if you want to advance the
2 case law further away from where it is on our
3 side, it's perfectly -- I think it's appropriate
4 to say, because the defendant's culpability is a
5 weighty factor, you should have other reasons.
6 But part of the purposes where I would turn to
7 in terms of -- you know, there is no other
8 relief in almost all of these cases. And the
9 whole point of this is not only to -- it' not
10 just giving the -- the mark owner some money; it
11 is protecting consumers.
12 The only other choice would be an
13 injunction, and an injunction in some cases is
14 either hard to get or it just doesn't work.
15 Otherwise, there's no incentive for negligence.
16 You might as well just take your -- you might as
17 well just see what happens if you put some
18 counterfeit stuff on. If it's negligent, you're
19 probably not going to have to pay. It wasn't
20 willful; it was just negligent. Who cares? And
21 so it seems like you should at least have
22 something to deter infringement when -- just
23 look at the statute. The -- ^ Overlap with
24 Breyer Congress obviously cares about trademark
25 infringement.

1 JUSTICE BREYER: Is it all right to
2 say this, that there could be cases where some
3 profits but not all profits?
4 MS. BLATT: Yes.
5 JUSTICE BREYER: Is the equitable
6 thing to do?
7 MS. BLATT: Yes.
8 JUSTICE BREYER: Yes, so we could say
9 that?
10 MS. BLATT: Yes. Yes. And the
11 parties on remand are actually, you know, going
12 to debate about how much profits, and the
13 ranges, you know, can be as low as $900 and they
14 go all the way up from there.
15 CHIEF JUSTICE ROBERTS: Well, that's a
16 little strange. I mean, equity either includes
17 profits or it doesn't. I don't know why you
18 would just sort of split the baby and so each
19 side is a little happy. It's a principle of --
20 of equity. And -- and you either get them or
21 you don't.
22 I mean, equity is not -- doesn't mean
23 what seems fair. It -- it's a little more
24 complicated.
25 MS. BLATT: Sorry, I was -- yeah, and

1 this is a different, separate issue that I was
2 referring to, not just profits, but there's a
3 debate in this case whether you get profits that
4 are attributable to the infringement. So
5 because this is a purse and a snap, there's
6 the --
7 CHIEF JUSTICE ROBERTS: Oh, sure.
8 MS. BLATT: That --
9 CHIEF JUSTICE ROBERTS: Well, that's a
10 --
11 MS. BLATT: That --
12 CHIEF JUSTICE ROBERTS: -- different
13 legal basis. It's not the --
14 MS. BLATT: That's all I was talking
15 about, yes.
16 CHIEF JUSTICE ROBERTS: In response to
17 Justice Breyer, you didn't --
18 MS. BLATT: No.
19 CHIEF JUSTICE ROBERTS: -- didn't say,
20 okay, profits are $100,000, you take 50; I'll
21 take 50.
22 MS. BLATT: No, so the profits that
23 are attributable to the infringement, at least
24 the other side would say, you know, you don't
25 even get your $900. Now, the only reason courts

1 have lowered them would be laches. You know,
2 there are -- or unclean hands. So there are
3 principles. Or for some reason you thought, I
4 don't know, that -- it can't be a penalty, so
5 for some reason you thought it was a penalty or
6 excessive. I could probably think of some
7 hypotheticals where you might want to lower it,
8 like say you thought the plaintiff was no longer
9 going to be in business or who cared about the
10 -- the goodwill. But, yeah, the -- you're
11 entitled to your profits and then -- but the
12 court does allow an adjustment. But --
13 JUSTICE BREYER: Profits on the purse
14 of -- of -- are $4 million. The infringer did
15 put in a copy of the trademark in a tiny little
16 inside purse that nobody ever saw. So now he's
17 entitled to profits, $4 million, when it's
18 unlikely that anybody or maybe only three people
19 were lured into buying his purse because -- so
20 that's what I was thinking of. Maybe what he is
21 entitled to is the purse -- is the profits on --
22 MS. BLATT: So --
23 JUSTICE BREYER: -- on -- on three
24 purchases.
25 MS. BLATT: So --

1 JUSTICE BREYER: -- or maybe --
2 MS. BLATT: -- there's a separate
3 legal issue which the parties haven't briefed
4 and there's no dispute in the case law, but it's
5 just an amount, whether you're either limited to
6 the attribution or -- and, if not, what kind of
7 mental state would go over that. I can make a
8 very good argument --
9 CHIEF JUSTICE ROBERTS: Yeah, but it's
10 still -- I mean, it's unlikely that there will
11 be $4 million in profits attributable to this
12 little thing that nobody could see, and that's a
13 question. But -- but I don't think that --
14 well, maybe it's right, maybe equity allows you
15 of there -- you know, it just seems like too
16 much, you say, well, I'm going to just give you
17 less.
18 MS. BLATT: I would say that the
19 equity -- the traditional factors are -- are the
20 equity ones I talked about. The -- the statute
21 does allow, the provision that Justice Breyer
22 was focusing on, an adjustment for -- because
23 you either think it's inadequate or excessive
24 and it can't be a penalty or compensatory.
25 I don't think that relates to equity.

1 I think that's just a legal thing that the --
2 that the statute gives the courts discretion.
3 If I can make -- make one other thing.
4 The statute actually says you can go up to three
5 times damages. So --
6 CHIEF JUSTICE ROBERTS: Thank you.
7 Thank you, counsel.
8 Mr. Katyal.
9 ORAL ARGUMENT OF NEAL K. KATYAL
10 ON BEHALF OF THE RESPONDENTS
11 MR. KATYAL: Thank you, Mr. Chief
12 Justice, and may it please the Court:
13 My friend tries to make this case seem
14 easy, but to do that, she has to sweep both
15 Congress's words and two centuries of history
16 under the rug. We're here today because
17 Congress expressly made that Lanham Act's
18 monetary awards principles subject to the --
19 monetary awards subject to the "principles of
20 equity," and over many decades courts developed
21 a principle that governs cases like this one.
22 They required willfulness for the equitable
23 remedy of profits awards, unlike for
24 injunctions.
25 For all the dust my friend tries to

1 kick up about the cases in her brief, here's the
2 bottom line on all the cited cases: Not one of
3 them, none, actually awarded profits without
4 willfulness in two centuries, either here or in
5 the U.K., and in response to Justice Alito, she
6 hasn't been able to give you a single example of
7 an unjust result as a result of this long
8 tradition.
9 Now, trademark infringement isn't some
10 newfangled violation like cyber-squatting. It's
11 one of the oldest violations in the book. And
12 that book, both before 1946 and after, required
13 willfulness before a defendant could be forced
14 to go through the burdensome process of
15 accounting for its profits and risking a
16 windfall.
17 Five different treatises set out this
18 rule. Many cases speak of this categorical
19 rule. The remainder demonstrate a long-standing
20 practice that -- which is, to use Judge Friendly
21 and the Court's phrase in Halo, has narrowed the
22 channel of discretion for awarding profits.
23 Congress legislated against the
24 backdrop of that practice, which is why even the
25 1905 Act was interpreted to have a willfulness

1 requirement, and that requirement is now
2 expressed in the Lanham Act's reference to the
3 principles of equity.
4 With respect to my friend's textual
5 arguments, she's asking you to believe that
6 Congress, by implication in the '90s, invited --
7 intended to invite Congress -- the courts to do
8 something they had never done in practice. If
9 Congress wanted to take that step, that would be
10 huge news. They would have said so.
11 Her best argument is the 1999
12 amendment changes things, which is what she
13 walked away from in her brief but is now
14 resurrecting here. And that has four problems:
15 First, Congress in 1999 didn't repeal
16 the textual hook for the willfulness
17 requirement, which was the phrase "principles of
18 equity." That's the way court after court had
19 interpreted it, including the Tenth Circuit just
20 the year before in the Bishop case. Congress
21 left that phrase untouched.
22 Second, Congress never indicated
23 anywhere in this -- in the 1999 Act that they
24 were trying to modify the willfulness
25 requirement in any way, which is what Judge Dyk

1 said below, what the law professor's, Lemley,
2 brief says here.
3 Third, the 1999 amendment did
4 something unique. It was newfangled. It
5 introduced a new cause of action, trademark
6 dilution, one which had no historical analogue.
7 It didn't have a customer confusion element.
8 JUSTICE SOTOMAYOR: Mr. Katyal, my
9 basic problem is that as I'm looking at these
10 cases, the term "willfulness" over the centuries
11 has been differently defined by different
12 people. Some people have included recklessness.
13 Others haven't.
14 McCarthy, if you read his definition
15 of willfulness, it does include recklessness and
16 callous disregard and a whole bunch of
17 blameworthy features. There was a circuit split
18 on this very issue when Congress acted in 1999.
19 You don't think they count for much.
20 You try to distinguish them. But there are
21 cases -- not many, I grant you -- where
22 something less than willfulness was the basis
23 for a recovery.
24 Given the uncertainty of what
25 willfulness means, the fact that there were

1 exceptions to the common law rule, whether you
2 recognize them as significant or not, how do we
3 write an opinion that says you need willfulness
4 a -- a la what you mean, willfulness being just
5 conscious avoidance, not recklessness, not
6 callous disregard, not this, not that?
7 MR. KATYAL: Justice Sotomayor, at the
8 time of the --
9 JUSTICE SOTOMAYOR: How do we do that
10 in light of 117(a), which doesn't have an equity
11 limitation. It says -- 117(a) says you can
12 award profits. If you think it's too much or
13 too little, use your discretion.
14 MR. KATYAL: Absolutely, Justice
15 Sotomayor. That's what Congress said. Once you
16 pass the threshold of getting a profits award,
17 which is of course in 1117(a), quote, "subject
18 to the principles of equity," then we absolutely
19 agree there's discretion at the back end.
20 That's where those equitable principles come in.
21 But Congress at the front end did here
22 exactly when it did in the injunction context
23 and what this Court said in eBay, which is,
24 there's a hard and fast requirement for
25 principles of equity to show their irreparable

1 harm. You said it must be shown, even though
2 equity is generally flexible, you've got to go
3 through the gate.
4 Here that gate is the same thing. In
5 1946, she has --
6 JUSTICE SOTOMAYOR: Go --
7 MR. KATYAL: -- not a case --
8 JUSTICE SOTOMAYOR: -- go to the more
9 important part of my question, which is: What
10 does willfulness mean --
11 MR. KATYAL: All right.
12 JUSTICE SOTOMAYOR: And where is there
13 a universal definition?
14 MR. KATYAL: Yes, we think there is a
15 universal lowest common denominator of
16 willfulness at least meaning what exactly the
17 district court charged here, the petition
18 appendix page 43A which is --
19 JUSTICE SOTOMAYOR: Common denominator
20 --
21 MR. KATYAL: Yeah --
22 JUSTICE SOTOMAYOR: -- to say it was
23 the only --
24 MR. KATYAL: -- which is the
25 defendants must be actually aware of the

1 infringing activity. So there are five separate
2 treatises that set that out as a hard and fast
3 requirement, Nims and Ludlow and Jenkins and
4 Heseltine, which, by the way, she misstates
5 because she cites the wrong provision about
6 Heseltine about injunctions, but page 305 with
7 respect to profits says willfulness is required.
8 JUSTICE KAVANAUGH: Why should --
9 MR. KATYAL: Case after case says
10 willfulness meaning knowledge is -- is required.
11 And my basic point is, she's got no
12 case on the other side that disagrees with this
13 with except the possible hypothetical of Oakes
14 in 1883, which, again, didn't actually award
15 profits in the absence of willfulness.
16 And --
17 JUSTICE GINSBURG: Mr. Katyal --
18 JUSTICE KAVANAUGH: Why should --
19 JUSTICE GINSBURG: -- you say that
20 principle of equity means willfulness, but in
21 many cases, as Ms. Blatt pointed out, the
22 statute uses the word willfulness, so you say
23 plain text, principles of equity. I would say
24 if it said willfulness, that would be plain
25 text, but principles of equity?

1 MR. KATYAL: So, Justice Ginsburg, as
2 our brief explains, every time Congress -- and
3 they certainly didn't use willfulness in the
4 1946 act. Every time they added to it later on,
5 there was a reason for it.
6 So for example, in 1999, the reason
7 they added to it is because you couldn't look to
8 principles of equity to determine what was
9 trademark dilution because that was a brand
10 newfangled defense which didn't have consumer
11 confusion as a element. So -- but here we're
12 talking about the oldest violation in the book,
13 trademark law.
14 And I'd say, Justice Ginsburg, if you
15 adopted that reading, which is -- she's trying
16 to do, which is, oh, if Congress says the word
17 in some other places by negative implication,
18 then it's -- then it's out in other places, that
19 would be a dangerous cannonball to the statute.
20 So, for example, Section 1115(b)(9), which you
21 can look at Joint Appendix page 135, that has
22 that, that says that laches is available to
23 fight incontestability and Section 1069 from the
24 '46 Act says laches is available to contest
25 inter partes determinations.

1 If you adopted her reading, you'd be
2 saying, well --
3 JUSTICE KAVANAUGH: No, no, no --
4 MR. KATYAL: -- laches isn't anywhere
5 else in the statute.
6 JUSTICE KAVANAUGH: Why should -- why
7 should we assume that Congress wanted to exclude
8 reckless infringement?
9 MR. KATYAL: Because Congress in 1946
10 acted against the backdrop of long-standing,
11 consistent practice. There is not a single
12 example --
13 JUSTICE KAVANAUGH: But there --
14 MR. KATYAL: -- she is able to give
15 you in which there was an award given.
16 JUSTICE KAVANAUGH: But as Justice
17 Sotomayor points out, willfulness is a -- a
18 vague word, ambiguous word, sometimes covered
19 what we would consider recklessness. So why
20 would you, therefore --
21 MR. KATYAL: Because --
22 JUSTICE KAVANAUGH: -- exclude
23 reckless?
24 MR. KATYAL: -- here, Justice
25 Kavanaugh, there's a more specific tradition.

1 There's no doubt, cases like Ratzlaf say
2 willfulness means different things in different
3 contexts, but here it is always meant at least
4 actual knowledge, subjective knowledge --
5 JUSTICE KAVANAUGH: What would be --
6 MR. KATYAL: -- and not recklessness.
7 JUSTICE KAVANAUGH: What would be the
8 policy objective achieved by excluding reckless
9 infringement?
10 MR. KATYAL: So we do think they are
11 there, but we think Congress used this phrase
12 and your job is to interpret the phrase --
13 JUSTICE KAVANAUGH: I agree -- I --
14 MR. KATYAL: -- and to essentially get
15 to it. But --
16 JUSTICE KAVANAUGH: I understand that
17 --
18 MR. KATYAL: But --
19 JUSTICE KAVANAUGH: But can you answer
20 --
21 MR. KATYAL: -- the policy --
22 JUSTICE KAVANAUGH: Yeah.
23 MR. KATYAL: -- objectives are -- are,
24 I think, incredibly strong, that is, the
25 tradition of profits comes from equity and the

1 idea that damages weren't -- weren't at that
2 point in time available in courts of equity.
3 And so courts looked to profits.
4 Then there was a separate rationale of
5 unjust enrichment but that was all about moral
6 blameworthiness, about wrongdoing. And someone
7 who was innocent is not wrongdoing, which is why
8 this Court in Saxel, Henner, and in McLean which
9 states --
10 JUSTICE KAVANAUGH: But if you're
11 reckless, you're -- there is some wrongdoing.
12 MR. KATYAL: But I -- it's always been
13 more than that. The courts have always said you
14 actually have to be subjectively knowing what
15 you're doing -- subjectively on knowledge of
16 what you're doing.
17 The Moet case, which this Court
18 referred to twice as stating the rule both in
19 1877 and McLean and in 1900 in Saxel, Henner is
20 a perfect example of this because in Moet what
21 happened -- Moet, what happened is you had a
22 champagne dealer who imported some bottles not
23 knowing they were spurious.
24 And what the Court said in England and
25 this Court cited with approval twice before the

1 Lanham Act was, that's someone who's innocent,
2 they're not engaged in wrongdoing. You can even
3 have situations in which they're reckless. For
4 example, the Gorham case in 1912 was one in
5 which you had a silverware dealer who was
6 reckless, who blew off the fact that the -- that
7 there was a stamp used on the -- on the
8 silverware, which was really the -- a mark of a
9 famous silverware company.
10 But what this Court said is: No --
11 excuse me, what the southern district said is,
12 no, you need more than that. You need actual
13 knowledge, and that --
14 JUSTICE GORSUCH: Mr. Katyal, can we
15 return to Justice Ginsburg's question for just a
16 moment on the statutory text and whether
17 principles of equity might be an unusual way of
18 saying willfulness?
19 As I understood your response to
20 Justice Ginsburg, that we would -- we would
21 perhaps read out laches as a defense, and -- and
22 I -- I just -- my problem with that is that when
23 we say "principles of equity," we -- we mean
24 laches. Those are -- that is part of the trans-
25 substantive history of equity.

1 And if I go look at a treaty in
2 equity, I'm going to find laches. What I'm not
3 going to find is a substantive rule about
4 trademark. For that, I have to go look at a
5 trademark treatise, and so that's my problem
6 textually. And I -- I just want to give you a
7 chance to respond to it.
8 And I might ask you, really, isn't
9 your argument nothing about principles of equity
10 but about willfulness in the air?
11 And why didn't you make an argument
12 that we should, as a background principle,
13 assume some sort of consistency with the common
14 law when Congress was legislating?
15 You seem to have disclaimed that and
16 said no, no, there's a textual hook here and
17 it's principles of equity. So that's a long
18 wind-up, but those are my concerns that --
19 MR. KATYAL: We certainly made exactly
20 that argument citing Morissette in our brief for
21 the idea, even if there weren't the price --
22 principles of equity, Congress acts against the
23 backdrop of the common law and is deemed to
24 interpret it. So that's certainly there.
25 I think it's common ground that

1 principles of equity include will -- include
2 knowledge and willfulness because she's even
3 saying it's a factor. That's how she started
4 her argument, and it's at page 8 of her reply
5 brief.
6 So I think everyone agrees that it is
7 a principle of equity, the -- the state of mind,
8 it's just a question of how much weight you give
9 it.
10 Our point to you is, Congress in 1946
11 when they used the phrase principles of equity,
12 I don't think just meant trans-substantive
13 principles. After all, it was the bedrock of a
14 profits award. Profits is, after all, an
15 equitable remedy in the first place.
16 And so in order to decide whether that
17 equitable remedy should be given, you would look
18 to the tradition of equity. And that tradition
19 has always been -- the long-standing practice
20 for two centuries is that -- is that willfulness
21 has been required. And that's why there's not a
22 single example on the other side.
23 Now she says, well, this is hard,
24 you're going to have to read all these cases,
25 but I think that's the dog that didn't bark.

1 Every single case that's given profits awards in
2 two centuries has required willfulness, so the
3 question is, is it worth the candle to make it a
4 factor and run into the kind of standardless
5 result that I think should be --
6 JUSTICE GINSBURG: But -- but as
7 Justice Sotomayor just pointed out, there wasn't
8 -- there isn't in the cases a uniform agreement
9 on what "willful" means. And Justice Kagan had
10 suggested that maybe it isn't all one way or all
11 the other, so you can say the innocent
12 infringer, no profits when it's innocent. But
13 then there are shades of blameworthiness.
14 And we not -- we're not going to make
15 willfulness the essential one. Maybe callous
16 disregard. Maybe reckless.
17 MR. KATYAL: Justice Ginsburg, ask her
18 to cite a case in which callous disregard was
19 enough before 1946 to find -- to -- to find a
20 profits award. She won't be able to cite one
21 except for the theoretical possibility of Oakes.
22 And my point to you is when you were
23 interpreting the phrase "principles of equity"
24 just as in Halo, just as in eBay, what this
25 Court did is look to the long-standing practice

1 -- Justice -- the Chief Justice's separate
2 opinion in eBay referred to a page of history
3 being worth a volume of logic. And that's
4 exactly what's happened here.
5 CHIEF JUSTICE ROBERTS: That wasn't
6 original with me.
7 (Laughter.)
8 MR. KATYAL: And that's exactly what
9 has happened here, is that you've had two
10 centuries in which this phrase, at equity, has
11 been interpreted by court after court, and it is
12 a fast rule. Indeed, this Court in the McLean
13 case, Justice Ginsburg, in 1877, said courts
14 constantly refuse profits awards without that.
15 And there isn't any tradition, there
16 isn't any example on the other side, and there's
17 treatise after treatise. And, by the way,
18 Justice Gorsuch, the restatement is a general
19 treatise -- the Restatement on Torts, it's not
20 like, you know -- so -- but I do think actually
21 the trademark-specific treatises would be what
22 would be the relevant tradition here, if you're
23 trying to understand.
24 JUSTICE BREYER: Reading all those
25 I'll -- I'll try this again and maybe I should

1 ask you. All right. Suppose you win. And so
2 the callous disregard person can't get -- don't
3 -- profits doesn't apply. But this is really a
4 rotten infringer. And he behaved very badly.
5 Can the winning trademark owner point
6 to the sentence I read initially and say, Judge,
7 it's not fair that they're not counting profits
8 here, so don't call it profits, but give me a
9 lot more money?
10 MR. KATYAL: Absolutely. The statute
11 -- this is what we say at page 54 of our brief
12 allows treble damages for that --
13 JUSTICE BREYER: No, I'm not just --
14 treble, but up to a limit?
15 MR. KATYAL: -- profits, but you can't
16 treble profits --
17 JUSTICE BREYER: Up to a limit? But a
18 sentence --
19 MR. KATYAL: You can't just treble
20 profits because that is a harder --
21 JUSTICE BREYER: Correct. So -- so --
22 but the sentence I read has no such limitation.
23 That's what's confusing me about it.
24 MR. KATYAL: Well --
25 JUSTICE BREYER: So I thought is this

1 all much ado about nothing?

2 MR. KATYAL: Well, again, I think that

3 the award is subject in the first instance of

4 the gate to principles of equity.

5 JUSTICE BREYER: Yeah, all right.

6 Fine.

7 MR. KATYAL: But there's a much more

8 important answer here, Justice -- Justice

9 Breyer. She can't come up in response to

10 Justice Alito with a single time in which this

11 happened, an unjust result, in two centuries.

12 And the reason for that is trademark

13 law focuses on protection of consumers in which

14 injunctions and damages has always been enough,

15 which is why there isn't an example on the other

16 side.

17 To the extent she has some theoretical

18 argument, it should be one made to Congress.

19 Congress dealt with it actually here, in this

20 idea that --

21 JUSTICE BREYER: I'm still trying to

22 get the -- it's -- I don't know why I -- I can't

23 get it. I -- I must be missing something.

24 Where it turns out for you having won

25 that there is a case, imaginary, where the

1 person does behave badly but doesn't meet the --
2 the thresh -- the threshold, does this
3 sentence -- do you come across anything that
4 suggests the sentence that I read does any work,
5 where you would say, Judge, I agree, we don't
6 get profits? It wasn't willful what he did, but
7 it was pretty bad.
8 MR. KATYAL: Justice Breyer --
9 JUSTICE BREYER: And so we want more
10 money.
11 MR. KATYAL: Yes, Justice Breyer, it
12 does work with respect to damages, not with
13 respect to profits, because up above in 1117 --
14 JUSTICE BREYER: Yeah.
15 MR. KATYAL: -- profits is subject to
16 the principles of equity. And that is a
17 limitation. But --
18 JUSTICE KAVANAUGH: But damages is
19 notoriously hard to prove, correct?
20 MR. KATYAL: Well, I actually disagree
21 with that. She doesn't cite any study or
22 anything. The only study I'm aware of is the
23 Lex Machina study in 2017, which surveyed 2009
24 to 2017, and every trademark award and found
25 that profits accounted for a total of 13 percent

1 of profits awards and also 13 percent of the
2 dollars.
3 And so to the extent you think that's
4 somehow, you know -- you know, worth the candle
5 or something and you should bump that up, that's
6 something that I think Congress should be
7 dealing with, but of course here they did. They
8 have a statutory damages provision to deal with
9 low damages awards --
10 JUSTICE KAVANAUGH: You -- you've
11 mentioned a couple times whether it's worth the
12 candle to not have a willfulness requirement,
13 but is it worth the candle to exclude all
14 reckless cases as Justice Breyer has stated --
15 MR. KATYAL: Yes. The reason --
16 JUSTICE KAVANAUGH: -- when -- when
17 willfulness will usually be a key factor in the
18 calculus regardless of who wins here?
19 MR. KATYAL: Right. We don't doubt
20 that -- if we were to lose this case on remand,
21 you should make very clear that willfulness is a
22 key factor, the big kahuna or something like
23 that, but our point to you is that the reason
24 why a -- a reason why the common law rule makes
25 sense is that willfulness cuts off, I think, the

1 threat of very large profits awards.
2 And this case is a perfect example.
3 She sought $6 million, every dollar in profits
4 for the sale of these handbags, and that's what
5 she was referring to with this attribution
6 thing. And, indeed, they sought every dollar of
7 Macy's profits, $7 million. And Macy's is an
8 entity that, you know, nobody is arguing had any
9 knowledge whatsoever, way -- way, shape, or
10 form, or even recklessness with respect to what
11 was going on with these little snaps in the
12 handbags.
13 CHIEF JUSTICE ROBERTS: Well,
14 counsel --
15 MR. KATYAL: That's the danger.
16 CHIEF JUSTICE ROBERTS: I -- how much
17 would you have asked for? I mean -- I mean,
18 it's -- it doesn't strike me as overreaching to
19 ask for every dollar of the profits if you think
20 you're entitled to profits.
21 MR. KATYAL: Well, that's the down --
22 that's the downside here. And, indeed, the
23 statute puts the burden on the defendant to
24 disprove any attribution. And so what -- one of
25 the reasons why you have the willfulness

1 requirement is to knock out and block
2 circumstances in which high awards are
3 threatened, and indeed settlements are forced,
4 which happened in this very case.
5 Now, she says, well, that's not going
6 to deter enough and you need to have something
7 extra, which, again, is something for Congress.
8 Again, this is a perfect illustration, just the
9 injunction alone cost us $4 million. We had to
10 remove all of these bags, right on the eve of
11 Thanksgiving's big sales and the like.
12 And so in a world in which you have
13 injunctions and damages and all the attendant
14 consequences of pulling inventory, would
15 Congress really have intended to disrupt a
16 200-year-long tradition in order to -- to do
17 this? And --
18 JUSTICE KAGAN: May I ask two
19 questions about that tradition? The first is
20 you've said several times that Ms. Blatt has
21 zero cases, and I believe Ms. Blatt said that
22 she had three cases. So if you would address
23 that.
24 And the second is, although you point
25 to a lot of cases in which the results come out

1 your way, there are comparatively few where the
2 court sets out the rule as a categorical one.
3 You know, in many of these cases, the courts do
4 seem to be thinking of willfulness as a factor,
5 a significant factor, but not a gateway
6 requirement.
7 So those results might come out your
8 way, but they don't articulate the rule that you
9 propose, do they?
10 MR. KATYAL: Five -- yes. Five
11 separate treaties -- treatises and 37 of the 50
12 cited cases do set out the rule or say
13 willfulness is the only factor. But I think
14 that's not the test this Court applies. So, for
15 example, in Halo, what this Court did was look
16 to the long practice, and indeed the first case,
17 main case, it cited was a case called Cincinnati
18 Siemens, and it -- which was a case just about
19 the facts of -- of a -- of damage awards and
20 treble damages awards, but from that
21 long-standing practice what the Court did was to
22 -- was to -- was derive a principle.
23 And that's what we're saying here.
24 You've had a long-standing practice for 200
25 years, and, yes, Justice Kagan, those three

1 cases do not stand up. Even if she had three
2 cases, we don't think an outlier three cases in
3 200 years is going to get her where she needs to
4 go.
5 But taking them in turn, one,
6 Mishawaka Rubber. This is the Sixth Circuit's
7 determination, at 119 Federal Second 323. The
8 rule prevails in Michigan that an account of
9 profits will not be taken where the wrongful use
10 of a trademark has been merely accidental. And
11 then saying this rule is in harmony with the
12 rule prevailing in the federal courts. And,
13 indeed, in Mishawaka Rubber, the Court limited
14 the profits award to the period after May 19th,
15 1933, which was when they were on notice.
16 So that's --
17 JUSTICE SOTOMAYOR: Mr. Katyal, the
18 problem is, as I read those cases, you do have a
19 handful, a little bit more than a handful, that
20 say you need willful. But a lot of those cases,
21 including the quote you gave me, give the
22 negative. Accidental, good faith, is not
23 enough. That's not the same thing.
24 MR. KATYAL: We -- we agree not every
25 case states the rule, but our --

1 JUSTICE SOTOMAYOR: But it also --

2 MR. KATYAL: She doesn't have a case

3 on the other side with the exception of the

4 theoretical possibility of Oakes --

5 JUSTICE SOTOMAYOR: Why don't you --

6 MR. KATYAL: -- which doesn't.

7 JUSTICE SOTOMAYOR: Why don't you deal

8 with the three cases that she points to.

9 MR. KATYAL: Yeah. So the second case

10 is Oakes, which has never once been cited again

11 for that proposition. We're not saying it's

12 because it's from Alabama or something like

13 that. It's literally never been cited again for

14 that proposition. And, again, there was no

15 award in that case.

16 JUSTICE SOTOMAYOR: Well, it's only

17 the last 20, maybe 30 years that we had Lexis to

18 cite cases like that, but --

19 MR. KATYAL: Well, I think, you know

20 -- I think --

21 JUSTICE SOTOMAYOR: Lexis and Westlaw,

22 but --

23 MR. KATYAL: But, Justice Sotomayor, I

24 think, you know, this Court in the McLean case

25 said courts constantly refuse profits awards

1 because of a lack of willfulness, citing the
2 English case of Moet, which is the best case.
3 It's on all fours with this. That's the case
4 that, case after case, Liberty Oil, the Nims
5 treatise -- all of them are based on that
6 fundamental root.
7 And her third case was -- was
8 Prest-O-Lite. And, again, Prest-O-Lite -- and
9 this is our -- in our red brief at page 42. In
10 page 444 of Prest-O-Lite is made clear that the
11 conduct in that case was willful and that's why
12 a profits award was given. "What the defendants
13 did was to fill tanks bearing the Complainant's
14 trademark and either sell or distribute them for
15 sale. I have already found the defendant had
16 knowledge of the practice of the dealers" and
17 the like.
18 So every single one of the cases she
19 points to, I think, actually boomerangs. It
20 doesn't say what she says it does.
21 This is true of other language in
22 Romag's brief which makes this look a lot more
23 complicated than it is. McLean and Heseltine
24 and -- and even Draper, she cites Draper but
25 that's -- she -- it's only one judge. She

1 doesn't point out the other two judges disagreed
2 with this.
3 So, look, at the end of the day, she's
4 got one case from Alabama in 1883, which was
5 never actually resulted in an award of profits.
6 You have five treatises on the other side. You
7 have 37 of the 50 cases which do state a rule,
8 and 13 cases which are fully consistent with the
9 rule. I think that's at least as good as what
10 the Frag Music case was.
11 JUSTICE KAVANAUGH: In stating the
12 rule in your brief, you consistently say good
13 faith, not willful, innocent, not willful. But
14 there's a huge gray area, maybe not huge, but
15 there is a gray area of behavior that's not good
16 faith or innocent but reckless but nonetheless
17 is not willful.
18 And that -- and that -- your
19 description in the brief consistent also seems
20 consistent as Justice Sotomayor says with the
21 rule.
22 MR. KATYAL: And I should have made
23 this clear with respect to Justice Ginsburg's
24 question. Yes, the cases sometimes say
25 ignorance or accidental or something like that.

1 And so -- but there's at least a threshold of
2 actual knowledge.
3 There is no case that she's able to
4 cite in which -- outside of the Oakes language
5 in 1883, that you could read to say that
6 something lower than -- something in which
7 there's objective recklessness is enough to
8 sustain a award of profits. They always rely on
9 subjective actual knowledge.
10 JUSTICE KAVANAUGH: How about
11 subjective recklessness, conscious disregard of
12 a substantial risk?
13 MR. KATYAL: Yeah. So, you know, I
14 don't think that -- I don't think the cases have
15 gotten too into that one way or the other,
16 but --
17 JUSTICE KAVANAUGH: Right. And that's
18 that's key, right?
19 MR. KATYAL: No, I don't think so.
20 Here, I think -- you know, here the question is
21 that, you know, because here the district court
22 here found, this is at page 47A, the evidence at
23 trial at most could support a finding that
24 Fossil was negligent, not that it acted in
25 reckless disregard with willful blindness and

1 the like. So --

2 JUSTICE GINSBURG: Mr. Katyal, could

3 you explain the features of trademark that make

4 it different from copyright and patent where

5 as -- if I understand correctly, you can get

6 profits without showing willfulness?

7 MR. KATYAL: Yeah. So trademark law

8 is fundamentally different from those. Those

9 are about ownership. Here this is about

10 consumer confusion and protection of consumers.

11 And as our brief explains, once you go

12 down that path, you have to worry -- and this is

13 one of the reasons for the willfulness

14 requirement, that willfulness litigation will be

15 used to browbeat entities like Fossil and to

16 seek massive amounts of profits, every dollar

17 they made, and also downstream, not just the --

18 you know, not just the designer of the handbags

19 but every entity that sells them, the Macy's of

20 the world to the tune of $7 million.

21 If Congress really wanted to do that

22 and authorize such a revolutionary change in

23 trademark law, one would think they'd say so and

24 not leave it to negative implication because at

25 the end of the day, what she's asking you to do

1 is to say that Congress in 1999 put into the
2 statute something that literally had never been
3 done once in practice. She has not a single
4 time it's done.
5 That's why this Court in interpreting
6 the phrase "principles of equity" in the Halo
7 case said, look to the long tradition, look to
8 what actually happened.
9 You don't need an ironclad rule, just
10 look to what happened. Here what happened is
11 one thing in the U.K. and in the U.S., for at
12 least 180 years, which is no profits awards in
13 the absence of willful conduct, at least
14 subjective knowledge that what they were doing
15 was wrong.
16 That is the common denominator in
17 Nims, the restatement, and Ludlow and Jenkins
18 and -- and the 37 cases cited in the brief.
19 No other questions?
20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. Ms. Blatt, five minutes.
22 REBUTTAL ARGUMENT OF LISA S. BLATT
23 ON BEHALF OF THE PETITIONER
24 MS. BLATT: You may want to cut me
25 off.

1 So I don't know what to say. I didn't
2 go to a fancy law school, but I'm very confident
3 in my representation of the case law. Mishawaka
4 is a case by you guys and you said in there, in
5 the dissent, it was an innocent infringer,
6 profits were awarded.
7 The district court case says, hey, I
8 don't like the assertion that innocent people
9 shouldn't get profits, but you guys can read the
10 case and decide whether our assertion is
11 credible but that is a district court case and
12 it's a Supreme Court case by the dissent that
13 acknowledges innocence.
14 Oakes, it is what it is. You can read
15 it. And Prest-O-Lite is the same. In terms of
16 give me an example of an unjust case, I would
17 start with this case, the argument is we get
18 zero, even though there was callous disregard,
19 even though their snaps were ripped off, even
20 though it's a small business, even though, you
21 know, that's all they make and it was a
22 counterfeit snap, if we get zero or even a
23 quarter, that would be unjust. So that's my
24 example.
25 Second, on the treatises, I hope you

1 read them. Four of them use the word damages.
2 They don't distinguish profits. They say a
3 principal of trademark law is you don't get
4 damages. No damages absent willfulness. He
5 doesn't have a response to that.
6 All of their cases but one say
7 fraudulent intent. So every case that
8 articulates the rule uses the word fraudulent.
9 Not wrongful but fraudulent. And that's not his
10 argument here.
11 Third, no case that we found under the
12 1905 Act applied a mental state requirement. I
13 don't -- I didn't hear him say a case.
14 Four, he did drop the law professor
15 brief, which I'm so glad because I'm going to
16 quote from the leading cite of the law
17 professor's brief, Thurman.
18 The law was "not clear from 1870
19 through 1905. The issue was "unclear when the
20 Lanham Act was enacted. Specifically notes" --
21 this is my favorite -- "there was a majority and
22 minority rule on the subject and the Supreme
23 Court was in the minority."
24 So you guys had the minority rule
25 because you didn't require willfulness in the

1 Champion Sparkplug case and then apparently you
2 muddied the waters in Mishawaka. So that --
3 that's their treatise. Oh. Wait a minute, "the
4 end result is ambiguity." So that's from their
5 treatise. And -- and four out of their five
6 treatises use the word fraud.
7 JUSTICE BREYER: You're quite right
8 that I'll read the treatises and I read the
9 Lemly brief, and I will read the sources, but I
10 don't understand your statement that they would
11 receive no damages.
12 MS. BLATT: So --
13 JUSTICE BREYER: I thought the statute
14 I have in front of me says that they're entitled
15 to recover profits and any damages sustained.
16 MS. BLATT: Right.
17 JUSTICE BREYER: And so you don't need
18 willfulness to recover any damages sustained, do
19 you, or have am I missed --
20 MS. BLATT: No. I'm just saying the
21 logic of the Respondent's argument is that the
22 same common law rule that required willfulness
23 for profits in the same breath said fraudulent
24 intent was also required for damages.
25 So it's a --

1 JUSTICE BREYER: All of those cases
2 say that --
3 MS. BLATT: All of the treatises, four
4 out of the five.
5 JUSTICE BREYER: All of the treatises.
6 MS. BLATT: One of the cases.
7 JUSTICE BREYER: Nobody is claiming,
8 are they? No.
9 MS. BLATT: No. No, that's our
10 argument.
11 JUSTICE BREYER: Nobody is claiming
12 that you need willfulness for -- that the
13 client, no matter how poor, no matter how -- he
14 gets his damages, right?
15 MS. BLATT: Right. Our argument is
16 the other side just wants to take you up to
17 where they win this case. The actual common law
18 sources say fraudulent intent and it also
19 extends to damages.
20 This is just another way of saying the
21 law was a mess and it wasn't that clear. When
22 three out of their eight cases say there was a
23 conflict, I just think the whole notion of the
24 Morissette or we cite that Fogerty versus
25 Fantasy cases, if you just have a lack of

1 clarity on the issue, you don't have a basis to
2 presume that Congress wanted you to read in an
3 unstated requirement.
4 And I think in at least in the --
5 the -- Justice Scalia and Garner book, it says,
6 when you're talking about clarity, it's
7 something that all the members of the bar had to
8 agree was settled, and if the very case as it's
9 -- that was conflicted, if the treatises say it
10 wasn't clear, and if the cases are all over the
11 map, again, the fact that we have three cases
12 where they award profits is kind of either here
13 nor there when we had eight cases that are just
14 inconsistent with the willfulness requirement,
15 including, I will end with, I will sit down
16 early, this Champion Sparkplug case. It's a
17 case in 1947, it was construing the 1905 Act,
18 said it's relevant. And then it cited two other
19 factors as part of the equities.
20 That's, to me, you know, just -- it
21 would be hard to find a settled rule from 40
22 years of silence under the Lanham Act's
23 predecessor. Thank you.
24 JUSTICE GINSBURG: Ms. Blatt, Texas is
25 a fine law school.

1 (Laughter.)

2 MS. BLATT: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,

4 counsel. The case is submitted.

5 (Whereupon, at 12:11 p.m. , the case

6 was submitted.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

$

$100,000 [1] **27:**20
$200,000 [1] **8:**3
$4 [4] **28:**14,17 **29:**11 **51:**9
$6 [1] **50:**3
$7 [2] **50:**7 **58:**20
$900 [5] **7:**21,22,23 **26:**13 **27:**25

1

1069 [1] **37:**23
11:13 [2] **1:**14 **3:**2
1114 [1] **19:**3
1115(b)(9 [1] **37:**20
1117 [2] **11:**20 **48:**13
1117(a [1] **34:**17
1125(a [2] **5:**23 **6:**9
1125(c [7] **5:**21 **17:**13,14 **18:**6,13, 22 **19:**5
117(a [3] **5:**18 **34:**10,11
119 [1] **53:**7
12:11 [1] **65:**5
13 [3] **48:**25 **49:**1 **56:**8
135 [1] **37:**21
14 [1] **1:**10
18-1233 [1] **3:**4
180 [1] **59:**12
1870 [1] **61:**18
1877 [2] **40:**19 **45:**13
1883 [3] **36:**14 **56:**4 **57:**5
1888 [1] **9:**20
1900 [1] **40:**19
1905 [4] **31:**25 **61:**12,19 **64:**17
1912 [1] **41:**4
1933 [1] **53:**15
1946 [8] **5:**10 **19:**3 **31:**12 **35:**5 **37:**4 **38:**9 **43:**10 **44:**19
1947 [1] **64:**17
1999 [8] **6:**3 **32:**11,15,23 **33:**3,18 **37:**6 **59:**1
19th [1] **53:**14

2

20 [1] **54:**17
200 [2] **52:**24 **53:**3
200-year-long [1] **51:**16
2009 [1] **48:**23
2017 [2] **48:**23,24
2020 [1] **1:**10

3

3 [1] **2:**4
30 [2] **2:**7 **54:**17
305 [1] **36:**6
323 [1] **53:**7
37 [3] **52:**11 **56:**7 **59:**18

4

40 [1] **64:**21
42 [1] **55:**9
43A [1] **35:**18
444 [1] **55:**10
46 [1] **37:**24
47A [1] **57:**22

5

50 [4] **27:**20,21 **52:**11 **56:**7
54 [1] **46:**11
59 [1] **2:**10

8

8 [1] **43:**4

9

900 [1] **8:**14
90s [1] **32:**6

^

^ [1] **25:**23

A

a.m [2] **1:**14 **3:**2
able [5] **12:**22 **31:**6 **38:**14 **44:**20 **57:** 3
above [2] **15:**13 **48:**13
above-entitled [1] **1:**12
absence [2] **36:**15 **59:**13
absent [3] **12:**12 **18:**17 **61:**4
absolute [2] **3:**17 **22:**3
Absolutely [3] **34:**14,18 **46:**10
accepting [1] **13:**20
accident [3] **16:**1,1,4
accidental [3] **53:**10,22 **56:**25
according [2] **5:**5 **11:**25
account [1] **53:**8
accounted [1] **48:**25
accounting [1] **31:**15
achieved [1] **39:**8
acknowledges [1] **60:**13
across [1] **48:**3
Act [20] **3:**11 **5:**7,14,24 **8:**24,25 **9:**4, 8 **15:**7,8 **19:**2,3 **31:**25 **32:**23 **37:**4, 24 **41:**1 **61:**12,20 **64:**17
Act's [5] **4:**10 **5:**10 **30:**17 **32:**2 **64:** 22
acted [3] **33:**18 **38:**10 **57:**24
action [5] **5:**24 **17:**25 **18:**8 **23:**10 **33:**5
activity [1] **36:**1
acts [1] **42:**22
actual [5] **39:**4 **41:**12 **57:**2,9 **63:**17
actually [12] **26:**11 **30:**4 **31:**3 **35:** 25 **36:**14 **40:**14 **45:**20 **47:**19 **48:**20 **55:**19 **56:**5 **59:**8
add [1] **6:**3
added [3] **6:**11 **37:**4,7
address [1] **51:**22
adequate [1] **22:**10
adequately [3] **4:**13 **7:**4 **24:**12
adjust [1] **17:**2
adjustment [2] **28:**12 **29:**22
ado [1] **47:**1
adopted [2] **37:**15 **38:**1
advance [1] **25:**1
affirmative [1] **10:**22
affirmatively [1] **6:**5
agree [6] **12:**25 **34:**19 **39:**13 **48:**5 **53:**24 **64:**8
agreed [1] **24:**7
agreement [1] **44:**8
agrees [1] **43:**6
air [1] **42:**10
AL [1] **1:**6
Alabama [4] **9:**20,21 **54:**12 **56:**4
ALITO [3] **20:**3 **31:**5 **47:**10
allow [3] **20:**16 **28:**12 **29:**21
allows [2] **29:**14 **46:**12
almost [2] **7:**8 **25:**8
alone [1] **51:**9
already [4] **18:**11,24 **24:**21 **55:**15
alternative [1] **8:**10
although [2] **20:**15 **51:**24
ambiguity [1] **62:**4
ambiguous [1] **38:**18
amended [1] **6:**3
amendment [3] **6:**7 **32:**12 **33:**3
among [1] **21:**22
amount [6] **5:**4 **8:**13 **11:**21 **12:**23 **17:**1 **29:**5
amounts [1] **58:**16
analogue [1] **33:**6
analysis [1] **3:**20
another [1] **63:**20
answer [4] **3:**18 **11:**14 **39:**19 **47:**8
answers [1] **21:**16
anybody [2] **14:**12 **28:**18
apparently [1] **62:**1
appealing [2] **14:**9 **16:**14
appear [1] **17:**14
APPEARANCES [1] **1:**16
appeared [1] **16:**2
appearing [1] **18:**5
appears [1] **5:**22
appendix [2] **35:**18 **37:**21
applied [2] **4:**4 **61:**12
applies [2] **19:**15 **52:**14
apply [4] **12:**16,17 **18:**18 **46:**3
appropriate [2] **17:**1 **25:**3
approval [1] **40:**25
area [2] **56:**14,15
aren't [2] **8:**7 **22:**10
argue [1] **17:**22
argued [1] **14:**12
arguing [2] **12:**14 **50:**8
argument [26] **1:**13 **2:**2,5,8 **3:**4,7 **7:** 21 **17:**11,16,24,24 **18:**4 **29:**8 **30:**9 **32:**11 **42:**9,11,20 **43:**4 **47:**18 **59:** 22 **60:**17 **61:**10 **62:**21 **63:**10,15
arguments [4] **8:**13,14,21 **32:**5
around [2] **12:**21 **21:**4
articulate [2] **10:**7 **52:**8
articulated [1] **24:**17
articulates [1] **61:**8
aspect [1] **10:**5
assertion [2] **60:**8,10
assume [2] **38:**7 **42:**13
assuming [1] **5:**6
attendant [1] **51:**13
attributable [3] **27:**4,23 **29:**11
attribution [3] **29:**6 **50:**5,24
authorize [1] **58:**22
authorizes [1] **3:**11
available [4] **8:**5 **37:**22,24 **40:**2
avoid [1] **10:**22
avoidance [1] **34:**5
award [26] **4:**5,25 **5:**4 **6:**14,20 **9:**1, 17 **10:**3 **13:**22 **14:**6 **15:**17 **20:**8 **34:** 12,16 **36:**14 **38:**15 **43:**14 **44:**20 **47:** 3 **48:**24 **53:**14 **54:**15 **55:**12 **56:**5 **57:**8 **64:**12
awarded [2] **31:**3 **60:**6
awarding [3] **3:**12 **4:**22 **31:**22
awards [16] **3:**17 **5:**12 **18:**13 **30:**18, 19,23 **44:**1 **45:**14 **49:**1,9 **50:**1 **51:**2 **52:**19,20 **54:**25 **59:**12
aware [2] **35:**25 **48:**22
awareness [1] **10:**21
away [3] **7:**25 **25:**2 **32:**13

B

baby [1] **26:**18
back [1] **34:**19
backdrop [3] **31:**24 **38:**10 **42:**23
background [2] **4:**1 **42:**12
bad [2] **16:**7 **48:**7
badly [2] **46:**4 **48:**1
bags [1] **51:**10
balance [2] **5:**2 **22:**23
balancing [1] **21:**6
bar [1] **64:**7
bark [1] **43:**25
based [6] **5:**13 **11:**22 **19:**20 **20:**10 **22:**1 **55:**5
basic [3] **7:**15 **33:**9 **36:**11
basically [1] **18:**15
basis [3] **27:**13 **33:**22 **64:**1
bearing [1] **55:**13
bedrock [1] **43:**13
beginning [1] **18:**22
begs [1] **18:**1
behalf [8] **1:**19,22 **2:**4,7,10 **3:**8 **30:** 10 **59:**23
behave [1] **48:**1
behaved [1] **46:**4
behavior [2] **6:**17 **56:**15
believe [2] **32:**5 **51:**21
belong [2] **7:**17 **24:**15
belongs [1] **21:**3
below [1] **33:**1
benefitted [1] **21:**10
best [2] **32:**11 **55:**2
better [1] **22:**16
between [5] **4:**19 **5:**3 **6:**17 **21:**19 **22:**19
big [2] **49:**22 **51:**11
Bishop [1] **32:**20
bit [1] **53:**19
blameworthiness [2] **40:**6 **44:**13
blameworthy [1] **33:**17
BLATT [72] **1:**18 **2:**3,9 **3:**6,7,9 **6:**12, 22,25 **9:**5,9,11,14,17,23 **10:**18 **11:** 9 **12:**8,18 **13:**3,7,10,24 **14:**2,4,10, 14,17,21 **15:**1 **16:**5,13,17,21 **17:**11, 23 **20:**12 **21:**18 **22:**7 **23:**5,18,23 **24:**2,6 **26:**4,7,10,25 **27:**8,11,14,18, 22 **28:**22,25 **29:**2,18 **36:**21 **51:**20, 21 **59:**21,22,24 **62:**12,16,20 **63:**3,6,

9,15 **64:**24 **65:**2
blew [1] **41:**6
blindness [3] **10:**20 **11:**12 **57:**25
block [1] **51:**1
book [4] **31:**11,12 **37:**12 **64:**5
boomerangs [1] **55:**19
both [5] **8:**6,24 **30:**14 **31:**12 **40:**18
bottles [1] **40:**22
bottom [1] **31:**2
brand [1] **37:**9
breath [1] **62:**23
BREYER [53] **11:**8,13 **12:**11,13,19 **13:**5,8,13,25 **14:**3,8,12,15,18,23 **15:**21 **16:**6,14,18 **23:**4,6,19,24 **24:**3 **25:**24 **26:**1,5,8 **27:**17 **28:**13,23 **29:**1,21 **45:**24 **46:**13,17,21,25 **47:**5,9,21 **48:**8,9,11,14 **49:**14 **62:**7,13,17 **63:**1,5,7,11
brief [18] **14:**15,16 **31:**1 **32:**13 **33:**2 **37:**2 **42:**20 **43:**5 **46:**11 **55:**9,22 **56:**12,19 **58:**11 **59:**18 **61:**15,17 **62:**9
briefed [1] **29:**3
browbeat [1] **58:**15
bump [1] **49:**5
bunch [1] **33:**16
burden [1] **50:**23
burdensome [1] **31:**14
business [3] **8:**16 **28:**9 **60:**20
buying [1] **28:**19

C

calculus [1] **49:**18
calibrated [1] **20:**1
call [1] **46:**8
called [1] **52:**17
callous [11] **4:**19 **6:**19 **10:**15,24 **11:**10 **33:**16 **34:**6 **44:**15,18 **46:**2 **60:**18
came [1] **1:**12
candle [4] **44:**3 **49:**4,12,13
cannonball [1] **37:**19
cannot [1] **14:**6
care [2] **18:**13 **19:**18
cared [1] **28:**9
carefully [1] **20:**1
cares [2] **25:**20,24
Case [90] **3:**4 **4:**20 **5:**19,19 **6:**6,25 **7:**6,13 **8:**11,11 **9:**15,19,21,24,24 **11:**2,11 **12:**1,5,11 **13:**1 **14:**9 **15:**22 **16:**15 **20:**7,10,13,13,25 **21:**5,6 **22:**13,24 **23:**16 **24:**21 **25:**2 **27:**3 **29:**4 **30:**13 **32:**20 **35:**7 **36:**9,9,12 **40:**17 **41:**4 **44:**1,18 **45:**13 **47:**25 **49:**20 **50:**2 **51:**4 **52:**16,17,17,18 **53:**25 **54:**2,9,15,24 **55:**2,2,3,4,4,7,11 **56:**4,10 **57:**3 **59:**7 **60:**3,4,7,10,11,12,16,17 **61:**7,11,13 **62:**1 **63:**17 **64:**8,16,17 **65:**4
cases [64] **4:**6 **5:**3 **6:**5 **7:**9,10 **8:**25 **10:**1,2,7 **11:**18,19 **15:**3,24 **18:**25 **19:**6 **20:**3,23,24,25 **21:**5,12 **22:**18 **24:**9,10 **25:**8,13 **26:**2 **30:**21 **31:**1,2,18 **33:**10,21 **36:**21 **39:**1 **43:**24 **44:**8 **49:**14 **51:**21,22,25 **52:**3,12 **53:**1,2,2,18,20 **54:**8,18 **55:**18 **56:**7,8,24 **57:**14 **59:**18 **61:**6 **63:**1,6,22,25 **64:**10,11,13
categorical [2] **31:**18 **52:**2
cause [4] **5:**23 **17:**25 **18:**8 **33:**5
centuries [7] **30:**15 **31:**4 **33:**10 **43:**20 **44:**2 **45:**10 **47:**11
certain [1] **11:**18
certainly [6] **8:**3 **16:**10 **22:**3 **37:**3 **42:**19,24
champagne [1] **40:**22
Champion [3] **21:**5 **62:**1 **64:**16
chance [1] **42:**7
change [1] **58:**22
changes [1] **32:**12
channel [1] **31:**22
charge [2] **10:**17,19
charged [1] **35:**17
CHIEF [18] **3:**3,9 **17:**10 **26:**15 **27:**7,9,12,16,19 **29:**9 **30:**6,11 **45:**1,5 **50:**13,16 **59:**20 **65:**3
China [3] **8:**17 **12:**3,21
choice [1] **25:**12
Cincinnati [1] **52:**17
Circuit [6] **11:**10 **23:**25 **24:**16,17 **32:**19 **33:**17
Circuit's [1] **53:**6
circuits [1] **14:**5
circumstances [6] **5:**5 **12:**1 **15:**18 **21:**7,20 **51:**2
cite [10] **8:**23 **20:**5,11 **44:**18,20 **48:**21 **54:**18 **57:**4 **61:**16 **63:**24
cited [8] **31:**2 **40:**25 **52:**12,17 **54:**10,13 **59:**18 **64:**18
cites [2] **36:**5 **55:**24
citing [2] **42:**20 **55:**1
claiming [2] **63:**7,11
clarity [2] **64:**1,6
class [1] **19:**6
clear [7] **10:**12 **49:**21 **55:**10 **56:**23 **61:**18 **63:**21 **64:**10
clearly [2] **17:**5 **24:**20
client [1] **63:**13
closer [2] **8:**14 **11:**1
collect [1] **18:**8
come [7] **15:**16 **20:**24 **34:**20 **47:**9 **48:**3 **51:**25 **52:**7
comes [1] **39:**25
common [15] **8:**22 **10:**5,6,7 **20:**18 **34:**1 **35:**15,19 **42:**13,23,25 **49:**24 **59:**16 **62:**22 **63:**17
company [1] **41:**9
comparatively [1] **52:**1
compensate [2] **7:**5 **24:**12
compensates [1] **4:**13
compensation [3] **15:**11 **22:**10,17
compensatory [2] **5:**4 **29:**24
Complainant's [1] **55:**13
completely [2] **4:**21 **7:**6
complicated [2] **26:**24 **55:**23
component [1] **7:**10
concede [1] **7:**21
concentrate [1] **6:**13
concerns [2] **14:**5 **42:**18
condition [1] **20:**5
conduct [3] **10:**20 **55:**11 **59:**13
confident [1] **60:**2
conflict [5] **10:**9,11,11,12 **63:**23
conflicted [2] **20:**16 **64:**9
confuse [1] **19:**12
confusing [1] **46:**23
confusion [3] **33:**7 **37:**11 **58:**10
Congress [33] **5:**10 **6:**2 **18:**21 **19:**17,25 **25:**24 **30:**17 **31:**23 **32:**6,7,9,15,20,22 **33:**18 **34:**15,21 **37:**2,16 **38:**7,9 **39:**11 **42:**14,22 **43:**10 **47:**18,19 **49:**6 **51:**7,15 **58:**21 **59:**1 **64:**2
Congress's [1] **30:**15
congressional [1] **5:**9
conscious [2] **34:**5 **57:**11
consequences [1] **51:**14
consider [1] **38:**19
consistency [1] **42:**13
consistent [4] **38:**11 **56:**8,19,20
consistently [1] **56:**12
consonance [1] **6:**20
constantly [2] **45:**14 **54:**25
constrained [1] **21:**14
construing [1] **64:**17
consumer [2] **37:**10 **58:**10
consumers [4] **4:**11 **25:**11 **47:**13 **58:**10
contains [1] **5:**14
contest [1] **37:**24
context [1] **34:**22
contexts [1] **39:**3
controlling [3] **3:**21 **4:**8 **15:**5
controls [1] **5:**18
Conversely [1] **4:**24
copy [1] **28:**15
copyright [1] **58:**4
Correct [2] **46:**21 **48:**19
correctly [2] **7:**17 **58:**5
cost [2] **23:**10 **51:**9
couldn't [2] **12:**6 **37:**7
counsel [4] **30:**7 **50:**14 **59:**21 **65:**4
count [2] **10:**1 **33:**19
counterfeit [3] **8:**6 **25:**18 **60:**22
counterfeiting [2] **8:**17,20
counting [1] **46:**7
countless [1] **8:**7
counts [1] **9:**21
couple [1] **49:**11
course [4] **10:**6 **17:**12 **34:**17 **49:**7
COURT [43] **1:**1,13 **3:**10 **9:**15,18 **11:**21,23,25 **12:**5 **13:**22 **15:**17 **20:**7,14 **21:**6,13 **22:**22 **28:**12 **30:**12 **32:**18,18 **34:**23 **35:**17 **40:**8,17,24,25 **41:**10 **44:**25 **45:**11,11,12 **52:**2,14,15,21 **53:**13 **54:**24 **57:**21 **59:**5 **60:**7,11,12 **61:**23
Court's [1] **31:**21
courts [21] **3:**11 **4:**4,21 **5:**1 **8:**25 **13:**11 **20:**4 **23:**2 **24:**7,21 **27:**25 **30:**2,20 **32:**7 **40:**2,3,13 **45:**13 **52:**3 **53:**12 **54:**25
covered [1] **38:**18
credible [1] **60:**11
critical [1] **15:**10
culpability [6] **4:**6,17,24 **15:**8 **24:**11 **25:**4
culpable [1] **6:**16
customer [1] **33:**7
cut [1] **59:**24
cuts [1] **49:**25
cyber-squatting [1] **31:**10

D

D.C [3] **1:**9,18,21
dah-dah-dah [1] **12:**22
damage [1] **52:**19
damages [32] **7:**7 **8:**2,3 **13:**17 **18:**3,14,15,16,18 **19:**9,13,16 **23:**10 **30:**5 **40:**1 **46:**12 **47:**14 **48:**12,18 **49:**8,9 **51:**13 **52:**20 **61:**1,4,4 **62:**11,15,18,24 **63:**14,19
danger [1] **50:**15
dangerous [1] **37:**19
day [2] **56:**3 **58:**25
deal [2] **49:**8 **54:**7
dealer [2] **40:**22 **41:**5
dealers [1] **55:**16
dealing [1] **49:**7
dealt [1] **47:**19
debate [2] **26:**12 **27:**3
decades [1] **30:**20
decide [2] **43:**16 **60:**10
decision [1] **10:**10
deemed [1] **42:**23
defendant [11] **4:**14,20 **7:**7 **19:**10 **21:**10 **22:**15,17,21 **31:**13 **50:**23 **55:**15
defendant's [4] **4:**6 **23:**9 **24:**11 **25:**4
defendants [4] **5:**11,12 **35:**25 **55:**12
defense [2] **37:**10 **41:**21
defined [4] **10:**15 **11:**3 **24:**20 **33:**11
definitely [1] **15:**2
definition [2] **33:**14 **35:**13
demonstrate [1] **31:**19
denominator [3] **35:**15,19 **59:**16
depending [1] **15:**18
derive [1] **52:**22
description [1] **56:**19
deserve [1] **21:**14
designer [1] **58:**18
deter [2] **25:**22 **51:**6
determination [1] **53:**7
determinations [1] **37:**25
determine [1] **37:**8
determining [1] **4:**5
deters [1] **4:**25
developed [1] **30:**20
dictates [1] **5:**17
different [8] **27:**1,12 **31:**17 **33:**11 **39:**2,2 **58:**4,8
differently [1] **33:**11
dilution [5] **5:**21 **6:**4 **18:**2 **33:**6 **37:**9

disagree [1] 48:20
disagreed [1] 56:1
disagreeing [1] 24:22
disagrees [1] 36:12
disclaimed [1] 42:15
discretion [8] 5:2 11:24 13:16,21 30:2 31:22 34:13,19
disprove [1] 50:24
dispute [1] 29:4
disregard [13] 4:19 6:19 10:16,24 11:10 33:16 34:6 44:16,18 46:2 57:11,25 60:18
disrupt [1] 51:15
dissent [2] 60:5,12
distinguish [2] 33:20 61:2
distinguished [2] 5:11 6:6
distribute [1] 55:14
district [7] 9:18 13:21 35:17 41:11 57:21 60:7,11
dog [1] 43:25
doing [3] 40:15,16 59:14
dollar [6] 7:12 22:24 50:3,6,19 58:16
dollars [1] 49:2
done [3] 32:8 59:3,4
doubt [2] 39:1 49:19
down [4] 15:13 50:21 58:12 64:15
downside [1] 50:22
downstream [1] 58:17
Draper [2] 55:24,24
dream [1] 16:2
drop [1] 61:14
dust [1] 30:25
Dyk [1] 32:25

E

each [1] 26:18
earlier [2] 6:23,25
early [1] 64:16
easy [1] 30:14
eBay [3] 34:23 44:24 45:2
eight [5] 5:14 18:5 19:18 63:22 64:13
either [10] 10:25 11:22 25:14 26:16,20 29:5,23 31:4 55:14 64:12
element [2] 33:7 37:11
eligible [1] 8:8
enacted [1] 61:20
end [6] 34:19,21 56:3 58:25 62:4 64:15
engaged [1] 41:2
England [1] 40:24
English [2] 24:9 55:2
enough [5] 44:19 47:14 51:6 53:23 57:7
enriched [1] 4:14
enrichment [3] 15:12 22:11 40:5
enter [1] 11:24
entities [1] 58:15
entitled [8] 7:22 22:4 23:9 28:11,17,21 50:20 62:14
entity [2] 50:8 58:19
equitable [11] 4:3,8 7:2,11,15 16:25 26:5 30:22 34:20 43:15,17
equities [2] 5:2 64:19
equity [51] 3:14,15,19 4:3 6:13,14,20 7:16 18:25 19:23 23:11,14,21 24:4,8 26:16,20,22 29:14,19,20,25 30:20 32:3,18 34:10,18,25 35:2 36:20,23,25 37:8 39:25 40:2 41:17,23,25 42:2,9,17,22 43:1,7,11,18 44:23 45:10 47:4 48:16 59:6
ESQ [3] 2:3,6,9
essential [1] 44:15
essentially [1] 39:14
ET [1] 1:6
eve [1] 51:10
even [25] 5:6 7:6,12,13,23 8:5,7 12:14 17:4,5 18:1 27:25 31:24 35:1 41:2 42:21 43:2 50:10 53:1 55:24 60:18,19,19,20,22
everyone [1] 43:6
everything [1] 4:18
evidence [1] 57:22
exactly [5] 34:22 35:16 42:19 45:4,8
example [16] 7:20 20:11 22:13 31:6 37:6,20 38:12 40:20 41:4 43:22 45:16 47:15 50:2 52:15 60:16,24
examples [2] 8:23,24
except [2] 36:13 44:21
exception [1] 54:3
exceptions [1] 34:1
excessive [3] 11:23 28:6 29:23
exclude [3] 38:7,22 49:13
excluding [1] 39:8
excuse [4] 3:22 5:19 19:10 41:11
exist [1] 4:16
explain [1] 58:3
explains [2] 37:2 58:11
exprecionias [1] 17:21
expressed [1] 32:2
expressly [2] 5:11 30:17
extends [1] 63:19
extent [2] 47:17 49:3
extra [1] 51:7

F

fact [4] 15:25 33:25 41:6 64:11
factor [14] 3:21 4:7 7:11,15 21:22 23:3 25:5 43:3 44:4 49:17,22 52:4,5,13
factors [12] 4:9,12,16,22 7:2 15:6,7 16:25 24:9,20 29:19 64:19
facts [2] 20:10 52:19
fair [5] 13:18,23 17:24 26:23 46:7
faith [5] 6:18,21 53:22 56:13,16
familiar [1] 4:3
famous [1] 41:9
fancy [1] 60:2
Fantasy [1] 63:25
fashioning [1] 22:14
fast [4] 14:25 34:24 36:2 45:12
FASTENERS [2] 1:3 3:4
favorite [1] 61:21
features [2] 33:17 58:3
Federal [2] 53:7,12
few [1] 52:1
Fifth [1] 24:16
fight [1] 37:23
fill [1] 55:13
find [7] 11:21,25 42:2,3 44:19,19 64:21
finding [1] 57:23
Fine [3] 14:23 47:6 64:25
finished [1] 23:15
First [9] 3:19 4:2 7:3 18:4 32:15 43:15 47:3 51:19 52:16
fit [1] 22:22
Five [8] 31:17 36:1 52:10,10 56:6 59:21 62:5 63:4
flexible [1] 35:2
floor [1] 8:10
focuses [1] 47:13
focusing [1] 29:22
Fogerty [1] 63:24
forced [2] 31:13 51:3
foremost [1] 7:3
form [3] 6:11 15:11 50:10
forth [1] 12:4
FOSSIL [4] 1:6 3:5 57:24 58:15
found [5] 10:15 48:24 55:15 57:22 61:11
four [5] 32:14 61:1,14 62:5 63:3
fours [1] 55:3
Frag [1] 56:10
fraud [4] 20:19,21,22 62:6
fraud-based [1] 20:17
fraudulent [6] 4:18 61:7,8,9 62:23 63:18
friend [2] 30:13,25
friend's [1] 32:4
Friendly [1] 31:20
front [2] 34:21 62:14
fully [1] 56:8
function [1] 11:11
fundamental [1] 55:6
fundamentally [1] 58:8
further [2] 4:9 25:2
future [1] 4:25

G

Garner [1] 64:5
gate [3] 35:3,4 47:4
gateway [2] 24:23 52:5
gather [1] 17:16
gave [1] 53:21
general [2] 22:1 45:18
generally [2] 11:2 35:2
gestalt [1] 15:2
gets [1] 63:14
getting [2] 24:18 34:16
GINSBURG [11] 10:14 36:17,19 37:1,14 41:20 44:6,17 45:13 58:2 64:24
Ginsburg's [2] 41:15 56:23
give [13] 12:5 13:17,21 16:10 22:8 29:16 31:6 38:14 42:6 43:8 46:8 53:21 60:16
Given [5] 33:24 38:15 43:17 44:1 55:12
gives [2] 13:16 30:2
giving [2] 12:25 25:10
glad [1] 61:15
good-faith [1] 6:15
goodness [1] 16:11
goodwill [2] 4:11 28:10
Gorham [1] 41:4
GORSUCH [2] 41:14 45:18
got [3] 35:2 36:11 56:4
gotten [1] 57:15
governs [1] 30:21
grant [1] 33:21
gray [2] 56:14,15
greater [4] 4:22,24 7:1 22:16
ground [1] 42:25
guess [1] 23:6
guilty [1] 22:17
guys [3] 60:4,9 61:24

H

Halo [4] 31:21 44:24 52:15 59:6
Hamilton-Brown [1] 20:25
handbags [3] 50:4,12 58:18
handful [2] 53:19,19
hands [1] 28:2
happen [1] 16:11
happened [9] 40:21,21 45:4,9 47:11 51:4 59:8,10,10
happens [1] 25:17
happy [3] 24:22,25 26:19
hard [7] 7:7 25:14 34:24 36:2 43:23 48:19 64:21
harder [1] 46:20
harm [3] 10:21 15:15 35:1
harmony [1] 53:11
hear [2] 3:3 61:13
heavy [1] 23:1
heightened [5] 5:13,15 18:17 19:20,24
held [1] 23:14
helps [2] 14:4 24:6
Henner [2] 40:8,19
Heseltine [3] 36:4,6 55:23
high [2] 10:21 51:2
higher [1] 8:15
highest [1] 20:14
historical [1] 33:6
history [4] 22:1 30:15 41:25 45:2
hold [1] 7:16
holding [1] 24:14
home [1] 21:11
hook [2] 32:16 42:16
hope [1] 60:25
huge [3] 32:10 56:14,14
hurt [2] 13:19 21:9
hypothetical [2] 8:10 36:13
hypotheticals [1] 28:7

I

i.e [1] 5:10
idea [3] 40:1 42:21 47:20
ignorance [1] 56:25
illustration [1] 51:8
imaginary [1] 47:25
impact [1] 17:22

implication [3] **32**:6 **37**:17 **58**:24
important [4] **4**:9 **23**:3 **35**:9 **47**:8
imported [1] **40**:22
impossible [1] **7**:10
inadequate [2] **11**:23 **29**:23
INC [3] **1**:3,6 **3**:5
incentive [3] **8**:18,20 **25**:15
inception [1] **5**:10
include [5] **4**:12 **11**:3 **33**:15 **43**:1,1
included [1] **33**:12
includes [3] **10**:19 **17**:15 **26**:16
including [5] **4**:19 **20**:24 **32**:19 **53**:21 **64**:15
inconsistent [1] **64**:14
incontestability [1] **37**:23
incredibly [1] **39**:24
Indeed [6] **45**:12 **50**:6,22 **51**:3 **52**:16 **53**:13
indicated [1] **32**:22
inference [3] **5**:25 **18**:10,10
infringe [1] **19**:11
infringed [1] **21**:2
infringement [14] **5**:1,22 **6**:6,11,15 **9**:1 **19**:12 **25**:22,25 **27**:4,23 **31**:9 **38**:8 **39**:9
infringer [5] **15**:25 **28**:14 **44**:12 **46**:4 **60**:5
infringers [1] **3**:13
infringing [1] **36**:1
initially [1] **46**:6
injunction [5] **21**:11 **25**:13,13 **34**:22 **51**:9
injunctions [4] **30**:24 **36**:6 **47**:14 **51**:13
innocence [1] **60**:13
innocent [17] **4**:18,21 **6**:14,17 **7**:7 **9**:1 **19**:8,8 **22**:15 **40**:7 **41**:1 **44**:11,12 **56**:13,16 **60**:5,8
inside [1] **28**:16
instance [3] **4**:17 **12**:20 **47**:3
instant [1] **7**:13
instructed [1] **11**:6
intended [3] **19**:12 **32**:7 **51**:15
intent [4] **5**:9 **61**:7 **62**:24 **63**:18
intentional [2] **6**:2 **10**:20
inter [1] **37**:25
interest [1] **13**:16
intermediate [1] **21**:25
interpret [2] **39**:12 **42**:24
interpreted [3] **31**:25 **32**:19 **45**:11
interpreting [2] **44**:23 **59**:5
intro [1] **14**:22
introduced [1] **33**:5
inventory [1] **51**:14
invite [1] **32**:7
invited [1] **32**:6
ironclad [1] **59**:9
irreparable [1] **34**:25
isn't [9] **13**:25 **31**:9 **38**:4 **42**:8 **44**:8,10 **45**:15,16 **47**:15
issue [5] **27**:1 **29**:3 **33**:18 **61**:19 **64**:1
it' [1] **25**:9

J

January [1] **1**:10
Jenkins [2] **36**:3 **59**:17
Jersey [1] **9**:25
job [1] **39**:12
Joint [1] **37**:21
judge [8] **10**:16 **12**:24,24 **31**:20 **32**:25 **46**:6 **48**:5 **55**:25
judges [1] **56**:1
judgment [1] **11**:24
jury [2] **10**:15 **11**:6
JUSTICE [142] **3**:3,10 **6**:12,24 **9**:3,7,10,13,16 **10**:14 **11**:8,13 **12**:11,13,19 **13**:5,8,13,17,25 **14**:3,8,12,15,18,23 **15**:21 **16**:6,14,18 **17**:10 **20**:3 **21**:17 **23**:4,6,19,24 **24**:3 **26**:1,5,8,15 **27**:7,9,12,16,17,19 **28**:13,23 **29**:1,9,21 **30**:6,12 **31**:5 **33**:8 **34**:7,9,14 **35**:6,8,12,19,22 **36**:8,17,18,19 **37**:1,14 **38**:3,6,13,16,16,22,24 **39**:5,7,13,16,19,22 **40**:10 **41**:14,15,20 **44**:6,7,9,17 **45**:1,5,13,18,24 **46**:13,17,21,25 **47**:5,8,8,10,21 **48**:8,9,11,14,18 **49**:10,14,16 **50**:13,16 **51**:18 **52**:25 **53**:17 **54**:1,5,7,16,21,23 **56**:11,20,23 **57**:10,17 **58**:2 **59**:20 **62**:7,13,17 **63**:1,5,7,11 **64**:5,24 **65**:3
Justice's [1] **45**:1
justification [1] **22**:16
justifies [1] **4**:25

K

KAGAN [4] **21**:17 **44**:9 **51**:18 **52**:25
kahuna [1] **49**:22
KATYAL [61] **1**:21 **2**:6 **21**:19,20 **30**:8,9,11 **33**:8 **34**:7,14 **35**:7,11,14,21,24 **36**:9,17 **37**:1 **38**:4,9,14,21,24 **39**:6,10,14,18,21,23 **40**:12 **41**:14 **42**:19 **44**:17 **45**:8 **46**:10,15,19,24 **47**:2,7 **48**:8,11,15,20 **49**:15,19 **50**:15,21 **52**:10 **53**:17,24 **54**:2,6,9,19,23 **56**:22 **57**:13,19 **58**:2,7
KAVANAUGH [26] **9**:3,7,10,13,16 **36**:8,18 **38**:3,6,13,16,22,25 **39**:5,7,13,16,19,22 **40**:10 **48**:18 **49**:10,16 **56**:11 **57**:10,17
keep [1] **19**:18
key [3] **49**:17,22 **57**:18
kick [1] **31**:1
kind [7] **10**:12 **17**:18 **21**:25 **22**:6 **29**:6 **44**:4 **64**:12
Kirtsaeng [1] **22**:12
knock [1] **51**:1
knowing [4] **16**:3 **19**:11 **40**:14,23
knowledge [11] **36**:10 **39**:4,4 **40**:15 **41**:13 **43**:2 **50**:9 **55**:16 **57**:2,9 **59**:14
knows [1] **16**:11

L

la [1] **34**:4
label [2] **17**:18,20
laches [7] **28**:1 **37**:22,24 **38**:4 **41**:21,24 **42**:2
lack [2] **55**:1 **63**:25
landmark [1] **4**:10
language [2] **55**:21 **57**:4
Lanham [12] **3**:11 **4**:10 **5**:7,14,24 **15**:7,8 **30**:17 **32**:2 **41**:1 **61**:20 **64**:22
large [1] **50**:1
last [1] **54**:17
later [1] **37**:4
Laughter [4] **9**:22 **14**:20 **45**:7 **65**:1
law [32] **4**:15 **7**:18 **8**:22 **10**:5,6,7 **11**:2,11 **20**:15,18 **24**:21 **25**:2 **29**:4 **33**:1 **34**:1 **37**:13 **42**:14,23 **47**:13 **49**:24 **58**:7,23 **60**:2,3 **61**:3,14,16,18 **62**:22 **63**:17,21 **64**:25
lead [1] **17**:11
leading [3] **20**:6,13 **61**:16
learning [1] **10**:22
least [12] **19**:15,16 **22**:24 **25**:21 **27**:23 **35**:16 **39**:3 **56**:9 **57**:1 **59**:12,13 **64**:4
leave [1] **58**:24
left [2] **19**:19 **32**:21
legal [3] **27**:13 **29**:3 **30**:1
legislated [1] **31**:23
legislating [1] **42**:14
Lemley [1] **33**:1
Lemly [1] **62**:9
less [2] **29**:17 **33**:22
levels [1] **11**:1
Lex [1] **48**:23
Lexis [2] **54**:17,21
Liberty [1] **55**:4
light [1] **34**:10
limit [2] **46**:14,17
limitation [3] **34**:11 **46**:22 **48**:17
limited [2] **29**:5 **53**:13
line [1] **31**:2
LISA [5] **1**:18 **2**:3,9 **3**:7 **59**:22
list [1] **15**:6
literally [2] **54**:13 **59**:2
litigation [1] **58**:14
little [10] **8**:12 **13**:22 **26**:16,19,23 **28**:15 **29**:12 **34**:13 **50**:11 **53**:19
logic [2] **45**:3 **62**:21
long [5] **4**:4 **31**:7 **42**:17 **52**:16 **59**:7
long-standing [6] **31**:19 **38**:10 **43**:19 **44**:25 **52**:21,24
longer [1] **28**:8
look [16] **10**:4 **15**:3 **21**:8 **25**:23 **37**:7,21 **42**:1,4 **43**:17 **44**:25 **52**:15 **55**:22 **56**:3 **59**:7,7,10
looked [1] **40**:3
looking [1] **33**:9
Looks [1] **21**:13
lose [1] **49**:20
lot [6] **5**:16 **9**:6 **46**:9 **51**:25 **53**:20 **55**:22
lots [1] **8**:13
low [2] **26**:13 **49**:9
lower [2] **28**:7 **57**:6
lowered [1] **28**:1
lowest [1] **35**:15
Ludlow [2] **36**:3 **59**:17
lured [1] **28**:19

M

Machina [1] **48**:23
Macy's [3] **50**:7,7 **58**:19
made [6] **30**:17 **42**:19 **47**:18 **55**:10 **56**:22 **58**:17
main [1] **52**:17
majority [1] **61**:21
manufacturer [1] **8**:16
many [5] **30**:20 **31**:18 **33**:21 **36**:21 **52**:3
map [1] **64**:11
mark [4] **8**:6 **19**:11 **25**:10 **41**:8
Massachusetts [1] **20**:14
massive [1] **58**:16
matter [5] **1**:12 **14**:8 **15**:16 **63**:13,13
McCarthy [1] **33**:14
McLean [5] **40**:8,19 **45**:12 **54**:24 **55**:23
mean [16] **10**:15 **14**:21 **15**:2 **16**:24 **19**:23 **21**:13 **24**:8 **26**:16,22,22 **29**:10 **34**:4 **35**:10 **41**:23 **50**:17,17
meaning [3] **11**:4 **35**:16 **36**:10
means [5] **19**:23 **33**:25 **36**:20 **39**:2 **44**:9
meant [3] **10**:17 **39**:3 **43**:12
meet [1] **48**:1
members [1] **64**:7
mental [5] **5**:13,16,21 **29**:7 **61**:12
mentioned [2] **15**:9 **49**:11
merely [1] **53**:10
mess [1] **63**:21
Michigan [1] **53**:8
might [8] **22**:2,18 **25**:16,16 **28**:7 **41**:17 **42**:8 **52**:7
million [7] **28**:14,17 **29**:11 **50**:3,7 **51**:9 **58**:20
mind [2] **6**:16 **43**:7
minimum [1] **7**:20
minority [3] **61**:22,23,24
minute [1] **62**:3
minutes [1] **59**:21
mirroring [1] **17**:25
Mishawaka [6] **9**:12 **21**:6 **53**:6,13 **60**:3 **62**:2
missed [2] **11**:15 **62**:19
missing [1] **47**:23
misstates [1] **36**:4
modify [1] **32**:24
Moet [4] **40**:17,20,21 **55**:2
moment [1] **41**:16
monetary [8] **5**:12,15,17 **18**:8,16 **19**:7 **30**:18,19
money [9] **12**:6,10,23 **13**:22 **16**:11 **21**:2 **25**:10 **46**:9 **48**:10
moral [1] **40**:5
Morissette [2] **42**:20 **63**:24
most [6] **10**:5 **18**:9,10 **20**:6,23 **57**:23
mostly [1] **20**:17

Ms [68] 3:6,9 6:12,22,25 9:5,9,11, 14,17,23 10:18 11:9 12:8,18 13:3, 7,10,24 14:2,4,10,14,17,21 15:1 16:5,13,17,21 17:10,11,23 20:12 21:18 22:7 23:5,18,23 24:2,6 26:4, 7,10,25 27:8,11,14,18,22 28:22,25 29:2,18 36:21 51:20,21 59:21,24 62:12,16,20 63:3,6,9,15 64:24 65: 2
much [11] 8:20 9:4 13:22 26:12 29: 16 33:19 34:12 43:8 47:1,7 50:16
muddied [1] 62:2
multifactor [1] 3:20
multifold [1] 8:4
Music [1] 56:10
must [3] 35:1,25 47:23

N

narrowed [1] 31:21
natural [2] 18:9,10
NEAL [3] 1:21 2:6 30:9
necessary [2] 20:4 23:15
necessity [1] 22:3
need [14] 7:1 16:19 18:1,7,23 24: 11 34:3 41:12,12 51:6 53:20 59:9 62:17 63:12
needs [1] 53:3
negative [3] 37:17 53:22 58:24
negligence [3] 4:20 6:20 25:15
negligent [4] 22:20 25:18,20 57: 24
never [8] 7:8 21:20 32:8,22 54:10, 13 56:5 59:2
New [2] 9:25 33:5
newfangled [3] 31:10 33:4 37:10
news [1] 32:10
next [1] 3:4
nice [2] 8:4 17:7
Nims [3] 36:3 55:4 59:17
nobody [6] 13:19 28:16 29:12 50: 8 63:7,11
none [1] 31:3
nonetheless [1] 56:16
nor [1] 64:13
notes [1] 61:20
nothing [5] 7:25 8:19 9:20 42:9 47: 1
notice [2] 23:25 53:15
notion [1] 63:23
notoriously [2] 7:7 48:19
number [1] 11:18

O

Oakes [7] 9:19 36:13 44:21 54:4, 10 57:4 60:14
object [1] 11:5
objective [2] 39:8 57:7
objectives [1] 39:23
obvious [1] 11:14
obviously [2] 14:24 25:24
odd [2] 17:3 18:21
Oil [1] 55:4
okay [5] 11:19 23:10,12,20 27:20
oldest [2] 31:11 37:12
omission [1] 6:1
omnibus [1] 18:12
on/off [1] 24:23
Once [4] 34:15 54:10 58:11 59:3
one [36] 3:20 7:12 8:5 9:11 15:5,8 16:23 19:23 20:5,10,19 21:22 22: 24 23:13 30:3,21 31:2,11 33:6 41: 4 44:10,15,20 47:18 50:24 52:2 53:5 55:18,25 56:4 57:15 58:13, 23 59:11 61:6 63:6
ones [3] 15:10 24:10 29:20
only [12] 8:15 11:6 24:22 25:9,12 27:25 28:18 35:23 48:22 52:13 54: 16 55:25
open [1] 21:17
operations [1] 8:17
opinion [5] 17:4,9 25:1 34:3 45:2
opt [1] 8:2
oral [5] 1:13 2:2,5 3:7 30:9
order [3] 11:17 43:16 51:16
original [3] 19:2,3 45:6
orphans [1] 16:9
Other [42] 4:8,13,22 5:23 7:1,2,4, 11,14,20 10:2 12:9 15:10 17:6,14, 17 18:17 19:1,14 21:19 22:10 24: 11 25:5,7,12 27:24 30:3 36:12 37: 17,18 43:22 44:11 45:16 47:15 54: 3 55:21 56:1,6 57:15 59:19 63:16 64:18
Others [1] 33:13
otherwise [2] 7:24 25:15
out [29] 6:8 7:13 10:13 11:6,13 13: 12,14 15:23 16:19,22 18:21 20:2 31:17 36:2,21 37:18 38:17 41:21 44:7 47:24 51:1,25 52:2,7,12 56:1 62:5 63:4,22
outlier [1] 53:2
outside [1] 57:4
over [4] 29:7 30:20 33:10 64:10
Overlap [1] 25:23
overreaching [1] 50:18
overwhelming [1] 19:25
owned [1] 16:8
owner [2] 25:10 46:5
owners [1] 3:16
owners' [1] 4:11
ownership [1] 58:9

P

p.m [1] 65:5
PAGE [11] 2:2 15:1 35:18 36:6 37: 21 43:4 45:2 46:11 55:9,10 57:22
part [5] 17:14 25:6 35:9 41:24 64: 19
partes [1] 37:25
particularly [3] 5:25 7:9 20:21
parties [4] 8:12 11:4 26:11 29:3
pass [1] 34:16
passed [1] 18:7
patent [1] 58:4
path [1] 58:12
pay [2] 8:19 25:19
penalty [4] 5:5 28:4,5 29:24
people [5] 16:9 28:18 33:12,12 60: 8
percent [2] 48:25 49:1
perfect [3] 40:20 50:2 51:8
perfectly [1] 25:3
perhaps [1] 41:21
period [1] 53:14
person [2] 46:2 48:1
petition [2] 14:11 35:17
Petitioner [6] 1:4,19 2:4,10 3:8 59: 23
phrase [15] 3:15,19,22 4:2 6:10 17: 12 31:21 32:17,21 39:11,12 43:11 44:23 45:10 59:6
pick [1] 21:18
place [2] 18:4 43:15
places [2] 37:17,18
plain [2] 36:23,24
plaintiff [8] 4:14 7:5 12:6 21:9 22: 23 23:8 24:13 28:8
plaintiffs [1] 8:7
please [2] 3:10 30:12
point [13] 16:20 18:9,20 19:16 25: 9 36:11 40:2 43:10 44:22 46:5 49: 23 51:24 56:1
pointed [2] 36:21 44:7
points [3] 38:17 54:8 55:19
policy [2] 39:8,21
poor [1] 63:13
position [5] 8:11 21:18,25 23:16, 17
possibility [2] 44:21 54:4
possible [1] 36:13
post-Lanham [1] 8:25
pot [1] 21:2
practice [11] 31:20,24 32:8 38:11 43:19 44:25 52:16,21,24 55:16 59: 3
Pre [2] 9:3,7
pre-Lanham [3] 8:24 9:3,7
precondition [2] 3:17 16:23
predecessor [1] 64:23
preprints [1] 19:10
presented [1] 3:14
Prest-O-Lite [5] 9:25 55:8,8,10 60: 15
presume [1] 64:2
presumption [7] 22:6,8,9,9,11,22, 25
pretty [1] 48:7
prevailing [1] 53:12
prevails [1] 53:8
prevent [1] 8:20
price [1] 42:21
principal [1] 61:3
principle [8] 7:15 18:25 26:19 30: 21 36:20 42:12 43:7 52:22
principles [33] 3:13,15,19 4:2,4 19:22 23:11,21 24:4,8 28:3 30:18, 19 32:3,17 34:18,20,25 36:23,25 37:8 41:17,23 42:9,17,22 43:1,11, 13 44:23 47:4 48:16 59:6
printers [1] 19:8
prints [1] 19:11
probability [1] 10:21
probably [2] 25:19 28:6
problem [6] 8:4 23:13 33:9 41:22 42:5 53:18
problems [1] 32:14
process [1] 31:14
produce [1] 12:20
professor [1] 61:14
professor's [2] 33:1 61:17
profit [3] 3:17 4:25 18:12
profits [88] 3:13 4:5,23 7:17,22 9:1, 17 10:3 11:17,19,22 14:6 18:3,15, 16,22 19:9,13,17,19,19,19 20:8,16 21:21 23:9 24:13,15 26:3,3,12,17 27:2,3,20,22 28:11,13,17,21 29:11 30:23 31:3,15,22 34:12,16 36:7, 15 39:25 40:3 43:14,14 44:1,12, 20 45:14 46:3,7,8,15,16,20 48:6, 13,15,25 49:1 50:1,3,7,19,20 53:9, 14 54:25 55:12 56:5 57:8 58:6,16 59:12 60:6,9 61:2 62:15,23 64:12
property [2] 21:1,2
propose [1] 52:9
proposition [2] 54:11,14
protect [2] 4:10 18:21
protected [1] 5:11
protecting [1] 25:11
protection [3] 18:3 47:13 58:10
prove [4] 3:16 7:8,10 48:19
provision [6] 5:17,18,19 29:21 36: 5 49:8
provisions [3] 5:15,16 19:18
publishers [1] 19:9
pulling [1] 51:14
purchases [1] 28:24
purposes [3] 4:10 7:2 25:6
purse [5] 27:5 28:13,16,19,21
put [6] 14:16 16:3 18:2 25:17 28: 15 59:1
puts [2] 22:25 50:23

Q

quarter [1] 60:23
question [13] 3:14 12:9 15:20 16: 23 18:1 21:16 29:13 35:9 41:15 43:8 44:3 56:24 57:20
questions [2] 51:19 59:19
quite [1] 62:7
quote [3] 34:17 53:21 61:16

R

raise [1] 15:18
rampant [1] 8:18
range [1] 4:17
ranges [1] 26:13
rationale [1] 40:4
Ratzlaf [1] 39:1
read [27] 12:24 13:4,11,12,14 14:5, 19,25 15:23 16:18 17:7 18:24 33: 14 41:21 43:24 46:6,22 48:4 53: 18 57:5 60:9,14 61:1 62:8,8,9 64: 2
reading [5] 11:15 16:21 37:15 38: 1 45:24
really [8] 8:19 21:9,10 41:8 42:8

46:3 51:15 58:21
reason [9] 27:25 28:3,5 37:5,6 47:12 49:15,23,24
reasons [5] 3:18 13:1 25:5 50:25 58:13
REBUTTAL [2] 2:8 59:22
receive [1] 62:11
reckless [13] 6:19 11:4 22:21 38:8,23 39:8 40:11 41:3,6 44:16 49:14 56:16 57:25
recklessness [11] 11:1,5,7 33:12,15 34:5 38:19 39:6 50:10 57:7,11
recognize [2] 23:2 34:2
recover [3] 23:9 62:15,18
recovered [1] 7:8
recovery [2] 11:22 33:23
red [1] 55:9
reduce [1] 15:17
reference [1] 32:2
referred [2] 40:18 45:2
referring [2] 27:2 50:5
refers [1] 4:3
reflect [1] 5:8
refuse [2] 45:14 54:25
regardless [1] 49:18
Regis [1] 20:13
registered [2] 8:6 19:4
reinserted [1] 6:9
relates [1] 29:25
relating [1] 20:17
relevant [3] 21:8 45:22 64:18
relief [13] 4:13 5:13,15,17 7:4,14 13:2 18:8,16 19:7 20:22 24:12 25:8
rely [1] 57:8
remainder [1] 31:19
remand [4] 8:12,22 26:11 49:20
remedies [1] 22:10
remedy [4] 3:12 30:23 43:15,17
remove [1] 51:10
repeal [1] 32:15
reply [1] 43:4
representation [1] 60:3
require [4] 4:21 23:22 24:5 61:25
required [9] 20:2 30:22 31:12 36:7,10 43:21 44:2 62:22,24
requirement [23] 3:24 4:1 5:7,22 6:2,4 10:8 18:12 21:15 23:7 32:1,1,17,25 34:24 36:3 49:12 51:1 52:6 58:14 61:12 64:3,14
requires [3] 3:15 5:3,20
respect [6] 32:4 36:7 48:12,13 50:10 56:23
respond [1] 42:7
Respondent [1] 17:8
Respondent's [1] 62:21
Respondents [4] 1:7,22 2:7 30:10
response [5] 27:16 31:5 41:19 47:9 61:5
restatement [3] 45:18,19 59:17
result [6] 20:6 31:7,7 44:5 47:11 62:4
resulted [1] 56:5
results [2] 51:25 52:7
resurrecting [1] 32:14
return [1] 41:15
revolutionary [1] 58:22
rightfully [2] 21:3 24:15
ripped [1] 60:19
rise [1] 10:25
risk [2] 15:15 57:12
risking [1] 31:15
ROBERTS [15] 3:3 17:10 26:15 27:7,9,12,16,19 29:9 30:6 45:5 50:13,16 59:20 65:3
ROMAG [2] 1:3 3:4
Romag's [1] 55:22
root [1] 55:6
rotten [1] 46:4
routine [1] 9:2
Rubber [2] 53:6,13
rubric [1] 10:24
rug [1] 30:16
rule [29] 7:13 10:12,13 17:6 22:14 31:18,19 34:1 40:18 42:3 45:12 49:24 52:2,8,12 53:8,11,12,25 56:7,9,12,21 59:9 61:8,22,24 62:22 64:21
run [1] 44:4

S

sale [2] 50:4 55:15
sales [1] 51:11
same [10] 6:2,10 10:8 17:21 22:9 35:4 53:23 60:15 62:22,23
saw [1] 28:16
Saxel [2] 40:8,19
saying [18] 13:3,6 14:6 15:23 16:22 17:17 19:18 21:1,7,13 38:2 41:18 43:3 52:23 53:11 54:11 62:20 63:20
says [28] 7:20 11:21 17:4 18:7,18 19:5,14 20:15 21:20 23:8,11 30:4 33:2 34:3,11,11 36:7,9 37:16,22,24 43:23 51:5 55:20 56:20 60:7 62:14 64:5
scale [2] 16:24 22:15
scales [1] 22:25
Scalia [1] 64:5
scheme [1] 20:1
school [2] 60:2 64:25
scienter [3] 18:17 19:21,24
Second [12] 3:22 5:6 7:14 8:9 9:18 11:10 24:17 32:22 51:24 53:7 54:9 60:25
Section [6] 5:17,23 17:13 19:1 37:20,23
Sections [1] 6:9
see [6] 11:20 15:3,4 20:20 25:17 29:12
seek [1] 58:16
seem [4] 17:3 30:13 42:15 52:4
seems [5] 18:20 25:21 26:23 29:15 56:19
seen [1] 21:12
sell [1] 55:14
sells [1] 58:19
sense [3] 15:12 22:1 49:25
sentence [17] 10:9 11:20 12:7,24 13:15 14:1,2,5,13 15:14 16:20 24:4 46:6,18,22 48:3,4
separate [6] 27:1 29:2 36:1 40:4 45:1 52:11
set [4] 8:16 31:17 36:2 52:12
sets [1] 52:2
settled [5] 3:24,25 5:6 64:8,21
settlements [1] 51:3
several [1] 51:20
shades [1] 44:13
shall [3] 11:21,25 23:8
shape [1] 50:9
she's [7] 32:5 36:11 37:15 43:2 56:3 57:3 58:25
shouldn't [2] 17:21 60:9
show [2] 7:23 34:25
showing [3] 4:22 7:1 58:6
shown [2] 14:7 35:1
side [18] 7:20 11:5 12:9 13:20 17:6,17 18:18 19:14 25:3 26:19 27:24 36:12 43:22 45:16 47:16 54:3 56:6 63:16
Siemens [1] 52:18
significance [1] 15:22
significant [5] 10:5 12:23 22:4 34:2 52:5
signifies [1] 3:20
silence [1] 64:22
silverware [3] 41:5,8,9
similar [2] 11:9 19:5
simply [1] 18:9
simultaneously [1] 6:8
single [7] 31:6 38:11 43:22 44:1 47:10 55:18 59:3
sit [1] 64:15
situations [1] 41:3
Six [1] 14:5
six-factor [1] 24:18
Sixth [2] 23:25 53:6
sliding [2] 16:24 22:15
small [2] 8:15 60:20
snap [2] 27:5 60:22
snaps [2] 50:11 60:19
somebody [1] 16:3
somehow [1] 49:4
someone [2] 40:6 41:1
someplace [1] 21:18
sometimes [3] 14:24 38:18 56:24
Sorry [1] 26:25
sort [4] 17:21 22:12 26:18 42:13
SOTOMAYOR [21] 6:12,24 33:8 34:7,9,15 35:6,8,12,19,22 38:17 44:7 53:17 54:1,5,7,16,21,23 56:20
sought [2] 50:3,6
sources [2] 62:9 63:18
southern [1] 41:11
Sparkplug [3] 21:5 62:1 64:16
specific [1] 38:25
Specifically [1] 61:20
spectrum [2] 4:17 11:2
spelling [1] 20:2
split [2] 26:18 33:17
spurious [1] 40:23
stamp [1] 41:7
stand [1] 53:1
standardless [1] 44:4
start [2] 24:9 60:17
started [1] 43:3
state [8] 5:13,16,21 6:16 29:7 43:7 56:7 61:12
stated [2] 17:5 49:14
statement [1] 62:10
STATES [4] 1:1,14 40:9 53:25
stating [2] 40:18 56:11
statute [16] 5:3 6:3 11:15 17:5 18:24 25:23 29:20 30:2,4 36:22 37:19 38:5 46:10 50:23 59:2 62:13
statutory [8] 3:23 5:8 8:2,3 18:14 19:24 41:16 49:8
step [2] 16:23 32:9
steps [1] 10:22
stick [1] 17:19
still [3] 16:6 29:10 47:21
strange [1] 26:16
strike [1] 50:18
strong [2] 6:1 39:24
struck [1] 6:8
structure [3] 3:23 5:8 19:25
study [3] 48:21,22,23
stuff [1] 25:18
subject [8] 3:13 23:11 30:18,19 34:17 47:3 48:15 61:22
subjective [4] 39:4 57:9,11 59:14
subjectively [2] 40:14,15
submitted [2] 65:4,6
subsection [3] 6:5,7,10
substantial [1] 57:12
substantive [2] 41:25 42:3
suffering [1] 16:9
suggest [1] 17:22
suggested [1] 44:10
suggests [1] 48:4
suing [1] 20:21
sum [1] 11:24
superfluous [2] 19:15,17
supersede [2] 3:23 5:9
support [1] 57:23
suppose [5] 11:16 12:15,19,20 46:1
supposed [1] 8:9
SUPREME [5] 1:1,13 9:14 60:12 61:22
surveyed [1] 48:23
sustain [2] 6:14 57:8
sustained [2] 62:15,18
swath [1] 6:17
sweep [1] 30:14
switch [1] 24:24
symbol [1] 16:2

T

talked [1] 29:20
tanks [1] 55:13
technical [1] 20:23
Tenth [1] 32:19

term [1] **33**:10
terms [4] **10**:17 **22**:13 **25**:7 **60**:15
terrible [1] **15**:24
terribly [1] **16**:9
test [2] **24**:18 **52**:14
Texas [1] **64**:24
text [5] **3**:23 **5**:8 **36**:23,25 **41**:16
textual [3] **32**:4,16 **42**:16
textually [1] **42**:6
Thanksgiving's [1] **51**:11
theoretical [3] **44**:21 **47**:17 **54**:4
theory [1] **24**:13
there's [31] **6**:16 **7**:14 **8**:1,18,19 **11**:14 **15**:6,11,12,15,15 **20**:22 **21**:2,24 **23**:7 **25**:15 **27**:2,5 **29**:2,4 **34**:19,24 **38**:25 **39**:1 **42**:16 **43**:21 **45**:16 **47**:7 **56**:14 **57**:1,7
therefore [2] **16**:15 **38**:20
they'll [1] **12**:21
thinking [2] **28**:20 **52**:4
thinks [1] **13**:23
third [6] **3**:25 **9**:24,24 **33**:3 **55**:7 **61**:11
though [8] **7**:14 **17**:4,5 **35**:1 **60**:18,19,20,20
threat [1] **50**:1
threatened [1] **51**:3
three [16] **3**:18 **9**:5 **20**:25 **21**:5 **24**:16,19 **28**:18,23 **30**:4 **51**:22 **52**:25 **53**:1,2 **54**:8 **63**:22 **64**:11
three's [1] **9**:6
thresh [1] **48**:2
threshold [3] **34**:16 **48**:2 **57**:1
Thurman [1] **61**:17
tiny [1] **28**:15
Today [2] **5**:14 **30**:16
took [1] **18**:13
tort [2] **20**:18,18
Torts [1] **45**:19
total [3] **13**:16 **16**:4 **48**:25
totally [2] **16**:1,1
trademark [29] **3**:12,16 **4**:6,11 **5**:20 **6**:4 **7**:9 **8**:7 **16**:8 **18**:2 **19**:2 **20**:23 **25**:24 **28**:15 **31**:9 **33**:5 **37**:9,13 **42**:4,5 **46**:5 **47**:12 **48**:24 **53**:10 **55**:14 **58**:3,7,23 **61**:3
trademark-specific [1] **45**:21
trademarks [1] **19**:4
tradition [10] **31**:8 **38**:25 **39**:25 **43**:18,18 **45**:15,22 **51**:16,19 **59**:7
traditional [5] **4**:8,12 **15**:7 **16**:25 **29**:19
trans [1] **41**:24
trans-substantive [1] **43**:12
treaties [1] **52**:11
treatise [7] **42**:5 **45**:17,17,19 **55**:5 **62**:3,5
treatises [11] **31**:17 **36**:2 **45**:21 **52**:11 **56**:6 **60**:25 **62**:6,8 **63**:3,5 **64**:9
treaty [1] **42**:1
treble [6] **18**:14 **46**:12,14,16,19 **52**:20
trial [1] **57**:23
tries [2] **30**:13,25
true [2] **23**:18 **55**:21
truly [2] **6**:17,17
trusted [1] **5**:1
try [2] **33**:20 **45**:25
trying [5] **15**:21 **32**:24 **37**:15 **45**:23 **47**:21
Tuesday [1] **1**:10
tune [1] **58**:20
turn [2] **25**:6 **53**:5
turns [1] **47**:24
twice [2] **40**:18,25
two [12] **7**:3 **15**:9,9 **30**:15 **31**:4 **43**:20 **44**:2 **45**:9 **47**:11 **51**:18 **56**:1 **64**:18
tying [1] **5**:15
type [1] **6**:6

U

U.K [2] **31**:5 **59**:11
U.S [1] **59**:11
uncertainty [1] **33**:24
unclean [1] **28**:2
unclear [1] **61**:19
under [15] **5**:21,23,24 **6**:5,7 **11**:10 **12**:7 **17**:12,17 **18**:23 **19**:20 **21**:20 **30**:16 **61**:11 **64**:22
underlying [2] **18**:6 **20**:18
understand [9] **12**:8 **15**:19,22 **23**:20,20 **39**:16 **45**:23 **58**:5 **62**:10
understood [1] **41**:19
uniform [1] **44**:8
unique [1] **33**:4
UNITED [2] **1**:1,14
universal [2] **35**:13,15
unjust [10] **15**:12 **20**:6,9,21 **22**:11 **31**:7 **40**:5 **47**:11 **60**:16,23
unless [4] **7**:23 **8**:5 **15**:23 **22**:8
unlike [1] **30**:23
unlikely [2] **28**:18 **29**:10
unstated [1] **64**:3
untouched [1] **32**:21
unusual [1] **41**:17
up [13] **8**:16 **15**:16 **24**:9 **26**:14 **30**:4 **31**:1 **46**:14,17 **47**:9 **48**:13 **49**:5 **53**:1 **63**:16
uses [3] **23**:25 **36**:22 **61**:8

V

vague [1] **38**:18
versus [2] **3**:5 **63**:24
view [5] **7**:22 **13**:10 **16**:24 **18**:23 **23**:7
violated [1] **7**:18
violation [11] **4**:15 **5**:20 **6**:8,10 **17**:12,17,20 **18**:7 **19**:4 **31**:10 **37**:12
violations [3] **3**:12 **5**:22 **31**:11
volume [1] **45**:3
voluminous [1] **8**:23

W

Wait [1] **62**:3
walk [1] **7**:24
walked [1] **32**:13
wanted [4] **32**:9 **38**:7 **58**:21 **64**:2
wants [1] **63**:16
Washington [3] **1**:9,18,21
waters [1] **62**:2
way [16] **15**:3 **17**:9 **18**:21 **26**:14 **32**:18,25 **36**:4 **41**:17 **44**:10 **45**:17 **50**:9,9 **52**:1,8 **57**:15 **63**:20
weight [2] **22**:4 **43**:8
weighty [4] **4**:7 **15**:5 **23**:3 **25**:5
Westlaw [1] **54**:21
what'll [1] **16**:11
whatever [2] **17**:22 **19**:22
whatsoever [1] **50**:9
Whereupon [1] **65**:5
whether [15] **3**:14 **4**:5,13,14 **7**:4 **15**:10,11 **24**:23 **27**:3 **29**:5 **34**:1 **41**:16 **43**:16 **49**:11 **60**:10
who's [1] **41**:1
whole [4] **18**:4 **25**:9 **33**:16 **63**:23
wide [1] **6**:16
widows [1] **16**:8
Will [9] **14**:23 **29**:10 **43**:1 **49**:17 **53**:9 **58**:14 **62**:9 **64**:15,15
willful [21] **5**:20 **6**:11,18 **10**:20 **11**:12 **12**:25 **13**:15 **17**:12,17,20 **18**:7 **25**:20 **44**:9 **48**:6 **53**:20 **55**:11 **56**:13,13,17 **57**:25 **59**:13
willfulness [87] **3**:16,24 **4**:1 **5**:7 **6**:1,4 **7**:24 **10**:8,14,16,19,25 **11**:3,7,11,17 **12**:3,12,15,16 **13**:4 **14**:6 **15**:4,23 **16**:18 **17**:13,15,15 **18**:2,12 **20**:2,4,9 **21**:7,15,21,22 **22**:2 **23**:7,14 **24**:23 **30**:22 **31**:4,13,25 **32**:16,24 **33**:10,15,22,25 **34**:3,4 **35**:10,16 **36**:7,10,15,20,22,24 **37**:3 **38**:17 **39**:2 **41**:18 **42**:10 **43**:2,20 **44**:2,15 **49**:12,17,21,25 **50**:25 **52**:4,13 **55**:1 **58**:6,13,14 **61**:4,25 **62**:18,22 **63**:12 **64**:14
win [3] **12**:19 **46**:1 **63**:17
wind-up [1] **42**:18
windfall [2] **15**:16 **31**:16
winning [1] **46**:5
wins [1] **49**:18
without [6] **6**:15 **19**:11 **21**:21 **31**:3 **45**:14 **58**:6
won [1] **47**:24
word [11] **6**:8,13 **23**:25 **24**:1 **36**:22 **37**:16 **38**:18,18 **61**:1,8 **62**:6
words [3] **19**:1 **21**:19 **30**:15
work [4] **11**:13 **25**:14 **48**:4,12
world [2] **51**:12 **58**:20
worried [1] **16**:15
worry [1] **58**:12
worth [5] **44**:3 **45**:3 **49**:4,11,13
write [4] **17**:3,9 **24**:4 **34**:3
wrongdoing [4] **40**:6,7,11 **41**:2
wrongful [3] **24**:1 **53**:9 **61**:9

Y

year [1] **32**:20
years [5] **52**:25 **53**:3 **54**:17 **59**:12 **64**:22

Z

zero [3] **51**:21 **60**:18,22