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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 21-71312

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In re: STATE OF ARIZONA; et al.,

STATE OF ARIZONA; et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF ARIZONA, TUCSON,

Respondent,

RUSSELL B. TOOMEY; et al.,

Real Parties in Interest.

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Oral Argument

March 10, 2022

B E F O R E :

HON. PAUL J. WATFORD

HON. RICHARD A. PAEZ

HON. RICHARD CLIFTON

1 MR. BERG: May it please the Court.
2 I'm Timothy Berg of Fennemore Craig, representing
3 Petitioner, State of Arizona, Andy Tobin, and
4 Paul Shannon.

5 The issue presented here is whether the
6 Petitioners waived their attorney/client
7 privilege by stating in answers to
8 interrogatories that they consulted Counsel with
9 respect to the policy at issue here, by
10 identifying those Counsel, and by identifying
11 attorney/client privileged documents, but not
12 disclosing the contents of the communications or
13 documents, or raising an advice of counsel
14 defense. The answer has to be no, there has been
15 no waiver here, and the District Court committed
16 clear error.

17 As then-Judge, later Justice Ginsburg
18 stated in United States versus White, implied
19 waiver in sum is not appropriately invoked when a
20 client has gone to an attorney in good faith,
21 seeking an opinion as to the legality of certain
22 conduct in an area where legal boundaries may be
23 difficult for the layman to discern. I think the
24 clear lesson of the White case is, simply because
25 someone says, I didn't have intent to commit a

1 crime, or I didn't have intent to discriminate,
2 and as part of the discovery they reveal that
3 they talked to their lawyer, that isn't a waiver
4 of the attorney/client privilege. It takes
5 something more. Again, as Justice Ginsburg said,
6 it has to be specific -- then-Judge Ginsburg,
7 pardon me said it has to be specific in a
8 positive waiver, and that hasn't happened here.

9 HON. MIDDLE: Can I change the facts
10 here just -- only slightly? What if the
11 Plaintiff sues, says, you know, we've
12 discriminated against us in not providing this
13 coverage, and you -- your clients say, well, the
14 reason we didn't provide the coverage has nothing
15 to do with discrimination? We consulted with our
16 lawyers, and they told us the law prohibited us
17 from offering that coverage.

18 MR. BERG: Well, I think, Your Honors,
19 if what we say is, we didn't have bad intent here
20 because we relied on the advice of our lawyers in
21 deciding we didn't have bad intent, that is a
22 waiver. But that isn't what happened here.

23 HON. PAUL WATFORD: Okay. And, just to
24 stop --

25 MR. BERG: Okay.

1 HON. PAUL WATFORD: -- that is, though,
2 what the District Court thought you had done. Is
3 that right?

4 MR. BERG: Yes. But I think the
5 District Court is in error, and I think --

6 HON. PAUL WATFORD: Okay.

7 MR. BERG: -- this is something this
8 Court can decide itself de novo, because you have
9 in front of you the materials the District Court
10 looked at, the interrogatory answers.

11 HON. PAUL WATFORD: Right.

12 MR. BERG: Unlike a typical case, where
13 we might put a witness on and there's a
14 credibility issue, this Court has in front of it
15 the specific interrogatory answers the District
16 Court relied on --

17 HON. PAUL WATFORD: Right.

18 MR. BERG: -- in concluding there was a
19 waive. So, it seems to me, what you have in
20 front of you isn't a fact question. You have a
21 legal question of whether those interrogatory
22 answers are sufficient to create a waiver.

23 HON. PAUL WATFORD: Okay. So, why is
24 what happened here different from the
25 hypothetical I posed?

1 MR. BERG: Because we didn't say, we
2 had no intent here. Our lawyers told us we could
3 do this legally, and therefore, we thought it was
4 legal. What we said is, we had no intent. We
5 were asked, what are the reasons that you did
6 this? We said, well, we talked to our lawyers,
7 and we also had cost concern and cost containment
8 issues. It is different.

9 I think that the attorney/client
10 privilege is important, and drawing this line is
11 really important. And it may seem subtle, but I
12 think there's a significant difference between
13 saying, I talked to my lawyer. I had no intent
14 to discriminate. I looked at other things, which
15 is true here -- again, the record reflects that
16 our client went out to its insurance brokers, it
17 gathered legal opinions from legal periodicals,
18 it did all sorts of other things other than just
19 talk to its lawyers -- and say, we had no
20 malintent, and saying, the reason I can prove I
21 didn't have discriminatory intent here is that I
22 talked to my lawyer, and my lawyer told me it was
23 legal to do this. And that isn't what happened
24 here.

25 And that's the kind of defense that I

1 think, if you found in the White, case would be a
2 waiver. Just, again, Judge Ginsburg in that case
3 makes the distinction between saying, generally,
4 I had no -- I think in that case, it was intent
5 to commit a crime rather than discriminatory, but
6 I had no mis intent, and oh, by the way, part of
7 what I did was walk to my lawyer, and saying, the
8 reason I can defend and I didn't have mis intent
9 is I relied on the advice of my Counsel in making
10 this decision. And because I relied on advice of
11 counsel, the Court can't find that I had bad
12 intent.

13 HON. PAUL WATFORD: So, the reason I
14 put the hypothetical the way I did is that I'm
15 not sure I see a huge difference between what you
16 actually said. So, instead of saying, we
17 consulted with our lawyers, and we were told it's
18 prohibited to offer this coverage, when asked,
19 give us the reasons why you didn't offer the
20 coverage, you say, well, we consulted with our
21 lawyers, and they told us we didn't have to. And
22 that's our reason, and that's why there's no
23 discrimination, because they told us we didn't
24 have to offer it. And it seems to me, isn't it
25 just half-dozen of one and six of the other?

1 MR. BERG: Your Honor, Your Honor,
2 you've taken it a step further than I think the
3 interrogatory answer does.

4 HON. PAUL WATFORD: Okay.

5 MR. BERG: We have not said -- the
6 interrogatory answers said, what considerations
7 did you take into account in deciding not to
8 offer this?

9 HON. PAUL WATFORD: It said, what are
10 the reasons why you didn't. Okay?

11 MR. BERG: Right.

12 HON. PAUL WATFORD: So, and one of the
13 reasons given --

14 MR. BERG: One of them was, we talked
15 to our -- we talked to our lawyers --

16 HON. PAUL WATFORD: -- and they told us
17 we didn't have to do it.

18 MR. BERG: Okay. That isn't what the -
19 - I don't think that's what the interrogatory
20 answer says, Your Honor.

21 HON. PAUL WATFORD: Okay. Well, let's
22 look at the interrogatory. Pull it up and you
23 can quote it to me.

24 MR. BERG: Let me -- I don't think I
25 have the exact words of the interrogatory answer

1 in front of me. I have it back over there. But
2 I don't believe we said, and therefore, we didn't
3 do it. I think we said, we talked to our lawyer,
4 we -- and we were told -- you're right -- we were
5 told it was not legally required. We also looked
6 at cost containment and cost (indiscernible).

7 HON. PAUL WATFORD: Right. Two
8 reasons.

9 MR. BERG: Again -- okay.

10 HON. PAUL WATFORD: You gave two
11 reasons, and that's why you said there was no
12 discrimination.

13 MR. BERG: But -- but no, that -- there
14 is -- you're making a -- you're making a step
15 we're not making.

16 HON. PAUL WATFORD: Okay.

17 MR. BERG: What we said is, this is why
18 we did it. We haven't said, those reasons in and
19 of themselves aren't discriminatory. Again, we
20 relied on our lawyer's advice in deciding we
21 could legally do this, and therefore, we had no
22 malintent. Plaintiff is still entitled to prove
23 that our intent was bad or that -- or if they can
24 prove without intent that we've discriminated in
25 some way, they can do that.

1 The defense -- because the
2 attorney/client privilege is so important, I
3 think the Court has to be careful in how broadly
4 you read waivers. And to me, if you read the
5 White case, if you read the other cases in the
6 circuit, the -- what a client does to waive the
7 defense is to say, you can't find me guilty, or
8 you can't find me liable, because I relied on my
9 lawyer's advice. And that isn't what --

10 HON. RICHARD CLIFTON: Are you saying
11 that there was no reliance on the Counsel's
12 advice?

13 MR. BERG: What I'm saying, Your Honor,
14 is that the interrogatory response doesn't
15 reflect --

16 HON. RICHARD CLIFTON: Other question.

17 MR. BERG: Okay.

18 HON. RICHARD CLIFTON: What is the
19 State's position as to whether or not it relied
20 upon advice of counsel? Would it disclaim
21 reliance upon advice of counsel as a defense?

22 MR. BERG: I think it would disclaim
23 reliance on advice of counsel as a defense, Your
24 Honor, yes. If you're asking me, what did the
25 State consider, I think the interrogatory

1 reflects that we talked to our lawyers, we talked
2 to insurance brokers --

3 HON. RICHARD CLIFTON: Let me be more
4 focused --

5 MR. BERG: Okay. I'm sorry.

6 HON. RICHARD CLIFTON: -- because I
7 don't want to lose all your time. What role does
8 advice of counsel play in this case, from your
9 perspective?

10 MR. BERG: I don't think it plays any
11 role unless we raise advice of counsel as a
12 defense, and we haven't done that. So --

13 HON. RICHARD CLIFTON: And are you
14 prepared to disclaim raising advice of counsel as
15 a defense?

16 MR. BERG: Yes, Your Honor, we are. We
17 are not sitting here, saying -- we are not saying
18 to the Court -- obviously, the issue before this
19 Court is privilege and not liability for whether
20 or not the plan is invalid. But I think what we
21 are saying is, no one is claiming we -- that
22 advice of counsel is a defense to the underlying
23 claim here, which is of course what is not in
24 front of the Court today. What's in front of the
25 Court today is a privilege question and a

1 mandamus question.

2 HON. PAUL WATFORD: Okay. So, I think
3 that's helpful, but let me -- and we'll have to
4 ask your opponents and see what they say about
5 this. But as I understand, what you're saying is
6 that you've provided these interrogatory
7 responses. You're saying that the District Court
8 and the Plaintiffs misinterpreted what you were
9 trying to say there. And you're saying now, to
10 the extent that any of you all thought that we
11 were trying to raise some kind of an advice of
12 counsel defense, we are not doing so. We are,
13 you know, assuming this case were to go to a jury
14 or whatever, we are not going to be arguing that.
15 And I guess, if we or the District Court were to
16 hold you to that, then there'd be no reason for
17 them to get access to these documents? Is that
18 what you're saying?

19 MR. BERG: Correct, Your Honor.
20 Exactly. That's precisely the argument we're
21 making.

22 HON. RICHARD PAEZ: Is that what you
23 told the District Court?

24 MR. BERG: Your Honor, I believe so. I
25 was not --

1 HON. RICHARD PAEZ: But did you tell
2 the District Court you were not going to rely on
3 a advice of counsel defense?

4 MR. BERG: I don't -- I do not believe
5 -- I don't know the answer to that question.

6 HON. RICHARD PAEZ: So, why -- how can
7 we say that the District Court clearly erred?

8 MR. BERG: Because --

9 HON. RICHARD PAEZ: This is a -- you
10 know, mandamus, we don't go around issuing writs
11 of mandamus against the District Court very
12 often. They have to -- there has to be clear
13 error. There has to be, you know, a case that
14 they've just disregarded. It's pretty tough.

15 MR. BERG: It would be my position,
16 Your Honor, that the interrogatory answers, even
17 without the concession I just made -- and I'm
18 sorry I hit the microphone; I know I'm not
19 supposed to touch it. Even if -- even without
20 the concession that I just made in response to
21 Judge Clifton, it is still clear we were not
22 raising an advice of counsel defense, and the
23 Court's finding that we were is a clear legal
24 error, based on what's in the interrogatories.

25 HON. RICHARD PAEZ: It's a legal error,

1 or a factual error?

2 MR. BERG: Legal error. I think it's -
3 - I think the question here is whether what is in
4 these interrogatory answers is sufficient as a
5 legal matter --

6 HON. RICHARD PAEZ: I thought you -- I
7 thought one of the bases for the District Court's
8 ruling was that they found a waiver by
9 implication.

10 MR. BERG: Yes, Your Honor. And the
11 waiver by implication would be if we'd raised an
12 advice of counsel defense. That is -- that is
13 waiver by implication.

14 HON. RICHARD PAEZ: Well, I mean, you
15 didn't raise it in your answer.

16 MR. BERG: Well, Your Honor, if we
17 raised it in these interrogatory answers, that
18 would be a waiver by -- I think an explicit
19 waiver would say, we're waiving our
20 attorney/client privilege. Nobody suggests we
21 did that. Nobody suggests we disclosed the
22 content of attorney -- or at least the District
23 Court didn't find we disclosed the content.

24 What it found was an implied waiver,
25 based on its interpretation of these

1 interrogatory answers as legally meeting the
2 provisions of an advice of counsel defense. And
3 our position is, they do not do that, that if you
4 read the interrogatory answers, we are not
5 saying, we are relying on advice of counsel as a
6 defense in this case, and we're waiving our
7 attorney/client privilege by doing so. It simply
8 isn't here.

9 HON. PAUL WATFORD: Well, it took me a
10 little while, but I have it in front of me.

11 MR. BERG: Okay.

12 HON. PAUL WATFORD: So let me just
13 quote it and make sure you're on board with this.
14 So, Interrogatory Number 1 -- let's forget about
15 4 and 7. Those other ones didn't seem --

16 MR. BERG: Okay. I agree with Your
17 Honor, the key one is 1.

18 HON. PAUL WATFORD: Okay. So,
19 Interrogatory 1 asks you to identify and describe
20 all reasons why the plan excludes coverage for
21 gender reassignment surgery. And then, what your
22 clients say is, the State of Arizona's self-
23 funded health plan excludes coverage for gender
24 reassignment surgery because the State concluded
25 under the law that it was not legally required to

1 change its health plan to provide such coverage
2 under Title 7, blah, blah, blah. And then,
3 later, you say, hey, by the way, that legal
4 advice we got is privileged.

5 MR. BERG: Yeah.

6 HON. PAUL WATFORD: So, that seems to
7 be -- okay, well, you respond to that, then.
8 That's what you said.

9 MR. BERG: Okay. To me, that is not
10 saying, we are defending based on that advice of
11 counsel, and we're arguing we didn't have intent,
12 based on the fact we got advice from our counsel
13 on that. And that is what I'm suggesting to you
14 in light of the United States versus White would
15 be required to be a waiver here. It takes
16 something more than us saying, we talked to our
17 lawyers about this, and one of the reasons we
18 took into account in making our decision was that
19 we talked to our lawyers.

20 If we had said, you cannot prove we had
21 intent here because we went and talked to our
22 lawyers, and they told us it was legal, and we
23 went ahead and did it anyway, that would be an
24 advice of counsel defense. That would be
25 sufficient to be an implied waiver. That would

1 permit the discovery order here.

2 HON. RICHARD PAEZ: To prevail, do the
3 Plaintiffs have to prove intent?

4 MR. BERG: I think, Your Honor, that
5 certainly, on at least some of their theories,
6 they do. I do think intent is an issue here. I
7 wouldn't quarrel with that proposition. But I
8 don't think that what we -- I don't think that
9 that interrogatory answer says we have a defense
10 to intent based on advice of counsel, and I think
11 that's what it would need to do.

12 HON. RICHARD PAEZ: So, what would one
13 of your witnesses say, just that they determined
14 that it wasn't -- it wasn't illegal?

15 MR. BERG: Deposition testimony was
16 taken, Your Honor. In this case, it was
17 deposition testimony of people who did not have
18 the ability to waive the privilege. They don't
19 have the authority to waive the privilege. I
20 think frankly, one of the reasons the District
21 Court focused on the interrogatory responses is
22 that, if you get into the deposition testimony,
23 you have to worry about whether a former employee
24 can, at a time of a deposition when she no longer
25 works for our client, waive their privilege. And

1 so, I think that's why the focus here was on the
2 interrogatory answers, Your Honor.

3 HON. RICHARD PAEZ: I don't think that
4 answers my question.

5 MR. BERG: Okay. I believe if you look
6 at the -- if you look at --

7 HON. RICHARD PAEZ: What would a
8 witness say on the stand about intent or about
9 counsel? Would they --

10 MR. BERG: Oh, I --

11 HON. RICHARD PAEZ: Is it your -- does
12 your concession mean that no witness is going to
13 get up there and say, we consulted with a lawyer?
14 That's not going to be -- you're not going to do
15 that.

16 MR. BERG: I think what my concession
17 means is no witness is going to get up there and
18 said, because we had legal advice that we could
19 do this, we didn't have the intent. What they're
20 going to get up and say is, we looked at a whole
21 bunch of things, and here was what we decided to
22 do, and one of the reasons was cost containment.
23 And one of the reasons is, when we looked at all
24 this stuff, including stuff from our insurance
25 company and outside periodicals, we didn't think

1 we had to cover them, and we didn't think we had
2 bad intent.

3 But that's not, in my -- again, I think
4 if you read the White case, a waiver, even an
5 implied waiver, has to be positive and specific,
6 and we don't get there here.

7 HON. RICHARD PAEZ: Okay.

8 MR. BERG: I'd like to save a little
9 bit of time for rebuttal, if I may, Your Honor.
10 Thank you.

11 HON. PAUL WATFORD: We'll make sure you
12 have time for rebuttal.

13 MR. BERG: Okay.

14 HON. PAUL WATFORD: Okay. Let's hear
15 from Counsel for the Respondent.

16 MR. BERG: I'll just get out of your
17 way here.

18 MR. WALL: Good morning, Your Honors.
19 May it please the Court, Jordan Wall, Wilkie Farr
20 & Gallagher, on behalf of the real party in
21 interest, Dr. Russell B. Toomey. Thank you for
22 this opportunity to be heard.

23 As the Court has noted, a petition for
24 a writ of mandamus is indisputably a drastic and
25 extraordinary remedy that is granted in the case

1 of extraordinary causes involving exceptional
2 circumstances. As this Court has consistently
3 recognized, and including in in re Van Dusen,
4 this is not an instance where the mandamus is
5 warranted because it is not a case of
6 extraordinary circumstances. Yes, Your Honor?

7 HON. PAUL WATFORD: Yeah, yeah, and you
8 -- I don't want to cut off the rest of your
9 argument, but maybe can you just respond, like,
10 the concession you just heard on -- from the
11 lectern today? That's good enough, not good
12 enough? Tell us your response to that.

13 MR. WALL: Your Honor, it's not good
14 enough, and it was not an argument that was
15 presented to the District Court, and I think
16 there are several reasons for that. Backing out,
17 the Petitioners claim that it is all focused on
18 Interrogatory Number 1 is plainly incorrect. The
19 record is replete with instances in which the
20 Petitioners put forward affirmatively the advice
21 of counsel. You can look -- we've already
22 discussed Interrogatory Number 1, which they were
23 responding to the question as to, why do you
24 maintain the exclusion? And the answer, that we
25 reached a legal conclusion that we were not

1 required to provide such care, and the legal
2 advice we received on this --

3 HON. PAUL WATFORD: Okay. Right, we
4 just went through that. And so, then, your
5 opponent stands up and says, to the extent there
6 was any confusion on that, I'm going to clear it
7 up right now. We were not trying to interject
8 the advice we got from our lawyers, and we are
9 not going to interject, going forward, the advice
10 of our lawyers as a defense to the -- you know,
11 the intent element of your claims. Why doesn't
12 that eliminate the need for you now -- as a
13 matter of fairness, because that's the basis on
14 which the District Court ruled -- why doesn't
15 that eliminate the need for you to get access to
16 these privileged documents?

17 MR. WALL: Well, Your Honor, because
18 the involvement of Counsel here has now become a
19 factual point in the case. And so, even though
20 Petitioners have disclaimed that they will rely
21 on this, it is the burden of Dr. Toomey to
22 establish an evidentiary record refuting their
23 defense. For instance, in response to
24 Interrogatory Number 4 and Number 7, which I
25 heard Your Honor say you didn't think mattered, I

1 would point to Petitioner's own cases, Hernandez
2 versus Canyon. They have miscited those for
3 different reasons about, you know, a blanket
4 waiver of --

5 HON. PAUL WATFORD: Can I tell you why
6 I don't think those are relevant? It's because
7 they're just -- you asked them questions that
8 they have to give truthful answers to. Tell us
9 all the people you consulted with. Okay, well, I
10 can't lie and not mention my lawyer, so you can't
11 possibly predicate a waiver of attorney/client
12 privilege on a truthful -- you're just asking for
13 truthful factual information. If the person
14 doesn't intend in the litigation to interject
15 advice of counsel as any kind of defense, the
16 mere answering your question truthfully can't be
17 a waiver. That's why I just think you've got to
18 put everything on the response to Interrogatory
19 Number 1, right?

20 MR. WALL: And I understand your point,
21 Your Honor. And what I would say is that the
22 Petitioners fundamentally misunderstand the
23 nature of an implied waiver in the at-issue
24 doctrine. As the Court established in Chevron
25 Corp v. Pennzoil, what undergirds the at-issue

1 doctrine is the fairness principle. By putting
2 forward the advice of counsel both in
3 Interrogatory Number 1, but also noting the
4 involvement of counsel in the decision making
5 here at Interrogatory Number 4, these are issues
6 of fact that now Dr. Toomey needs to establish an
7 evidentiary record on. In Hernandez, what the
8 Court noted was that the involvement of counsel -
9 -

10 HON. RICHARD CLIFTON: Well, let me --
11 why? I mean, if the question of whether this
12 constitutes discrimination is a legal question as
13 to which advice of counsel you have to assume
14 happened. If they thought that they had to, they
15 presumably would have provided the coverage
16 that's being sought. But the Court's going to
17 decide whether the law requires the provision of
18 that coverage, and the Court, to be polite about
19 it, really doesn't care very much about what the
20 advice of counsel some years before was. So, why
21 does it matter? Is the advice of counsel really
22 an issue in the underlying case?

23 MR. WALL: Your Honor, I think it
24 matters for two reasons. The first is because
25 the advice of counsel is the stated reason why

1 the government has maintained this --

2 HON. RICHARD CLIFTON: You have to
3 assume that's the case. I mean, even if they had
4 never mentioned lawyer, I think you would accept
5 that if they'd been told by their lawyers, you
6 don't have a prayer, this is clearly covered as -
7 - this would be discriminatory not to cover this.
8 So, I just take as a given that's out there. I
9 don't think it's going to be passionately
10 disputed. On your point, you don't think you
11 have to persuade the Court that the State's
12 lawyers gave them advice that they didn't follow.
13 You're interested in what the state of the law
14 is, which the Court will decide. So, why is it
15 you have to prove something about advice of
16 counsel if it's not offered as a defense beyond
17 this interpretation of the law?

18 MR. WALL: Well, Your Honor, because
19 t's been offered as a defense both by the witness
20 -- by numerous witnesses that the Petitioners
21 have put forward as persons with knowledge about
22 the decision making here. And so, we have to
23 establish a record to be able to refute this
24 defense.

25 HON. RICHARD CLIFTON: Well, but what

1 are you going to refute?

2 MR. WALL: Well, that's what we're
3 looking for the discovery, Your Honor. We want
4 to be able to examine the advice that was
5 provided, because one of the reasons Petitioners
6 have claimed that they have -- they decided to
7 main the exclusion is because of the legal
8 reasoning.

9 HON. RICHARD CLIFTON: But well, but
10 still, the Court's not going to be persuaded by
11 whatever legal reasoning was offered by counsel
12 to the State some years before. You're not going
13 to argue to the Court that it has to accept
14 whatever the Arizona lawyer said to the State.
15 You're going to argue to the Court the law
16 requires these services to be provided;
17 otherwise, you're violating -- it constitutes sex
18 discrimination. So, why is advice of counsel
19 relevant?

20 MR. WALL: Well, Your Honor, because
21 intent is a factor in this case.

22 HON. RICHARD CLIFTON: How is intent a
23 factor?

24 MR. WALL: Well, Your Honor, Dr.
25 Toomey's alleged claims under both it's a

1 violation of the Equal Protection Clause of the
2 14th Amendment and Title VII. Under Title VII,
3 Dr. Toomey is pleading a case based on disparate
4 treatment or disparate impact, of which this may
5 be supporting evidence as to animus or
6 discriminatory intent on the part of the
7 government. For instance, if the documents
8 corroborate that the Petitioners were informed
9 that, yes, this exclusion is illegal, we think
10 that would be a relevant fact as part of the
11 record to present before the District Court.

12 We also think the involvement of
13 counsel in the actual decision making here puts
14 their involvement as a factual point in the
15 record to be developed. We cannot simply accept
16 Petitioner's representation that we received
17 legal advice and everything is, you know, okay.
18 Dr. Toomey, again, has the burden of establishing
19 that evidentiary record.

20 What I would also say is, the Court
21 asks fairly, you know, when we get to trial, what
22 will witnesses say? And I think, as you look
23 through the record -- and it's established in all
24 of our papers, as we had cited the deposition
25 testimony itself -- that all the witnesses have

1 repudiated, now, that cost was a significant
2 factor in the Court -- in the Petitioner's
3 decision making. They have all uniformly pointed
4 to the legal advice they received about his
5 decision making, and that was the basis for the
6 Petitioner's decision to maintain the exclusion.

7 HON. RICHARD CLIFTON: Okay, but I
8 don't really understand that. I mean, the fact
9 that the -- a lawyer says you don't have to do it
10 doesn't explain why you don't do it. It just
11 says that's a permissible course. And if they
12 disclaim cost, is there any other reason offered
13 for not providing the service that your client
14 seeks to obtain?

15 MR. WALL: Well, yes, Your Honor,
16 because I believe Dr. Toomey -- it's incumbent
17 upon him to be able to examine that record if
18 that is now, as we believe through discovery, the
19 only reason why they maintained the exclusion.

20 HON. RICHARD CLIFTON: But that's not a
21 reason to maintain the exclusion. To say that
22 you don't have to do something doesn't mean you
23 don't do something. It just says it's an option
24 available. You can do it or you can not do it
25 for whatever reason. But that you don't have to

1 do it isn't, by itself, an explanation for why
2 you don't do it. Cost is what I anticipated the
3 response to be, and that's what I'd understood
4 until you just said they disclaimed cost, so...

5 MR. WALL: Well, Your Honor, I would
6 say that we have to think in the context of how
7 this response from Petitioners came about. And
8 the answer, Petitioners averred that there are
9 legitimate nondiscriminatory and non-pretextual
10 reasons why they maintain the exclusion. When
11 they were asked what those reasons were, the very
12 first thing they pointed to was, we are -- the
13 legal conclusion was that we are not required to
14 do so. It is their explanation as to -- and they
15 have affirmatively (indiscernible) into this case
16 that the legitimate reason why they do not have
17 to cover it -- they can maintain the exclusion is
18 legal advice.

19 HON. PAUL WATFORD: I mean, I think I
20 understand your argument if they said in response
21 to your assertion that you acted with
22 discriminatory intent, and they said, no, no, no.
23 We weren't trying to discriminate. Our policy is
24 always to do the bare minimum that the law, you
25 know, requires, and we went to our lawyers, and

1 they told us, no, the law doesn't require it.
2 And so, we said, okay, well, that settles it. I
3 mean, that wouldn't negate intent, I suppose. It
4 would be a nondiscriminatory, you know, neutral
5 reason for why they took the course of action
6 they did.

7 But I guess my problem still, and I
8 wanted to come back to your response on this, if
9 they now come forward and say that is not -- that
10 is most definitely not the defense we are going
11 to assert, the advice we got from Counsel is
12 never going to be interjected as a basis to
13 defend against the intent element of your claims,
14 I guess I'm still struggling to understand why
15 you need, and as a matter of fairness, access to
16 these documents. I just -- maybe if there's
17 another -- you can take another run at answering
18 that, because I'm still not clear on how this
19 concession doesn't eliminate this problem.

20 MR. WALL: True, Your Honor. And I
21 think the reason for that is because the Court
22 understood that even if Petitioners will sit here
23 and disclaim that they're going to rely on the
24 advice of counsel, it's not so much that there
25 are magic words as to the assertion of that

1 defense. It's not that you have to say, we're
2 asserting advice of counsel defense or that we
3 relied on certain evidence. The Court
4 established in Chevron Corp v. Pennzoil that once
5 a party has placed its knowledge of the law at
6 issue, it also places the basis of its
7 understanding of what the law requires at issue.

8 And so, everything is relevant to our
9 ability to develop the record. That includes the
10 newspaper articles; that includes consultation
11 with other governmental entities, as well as the
12 legal advice they relied upon on forming that
13 understanding of the law, which they cite as
14 their chief reason for maintaining the exclusion.
15 We need all of that evidence to be able to refute
16 this defense that there were legitimate reasons
17 to maintaining the exclusion.

18 HON. PAUL WATFORD: And is it your
19 understanding from our cases that once you've put
20 at issue legal advice you got from counsel, it's
21 kind of -- it's just a one-way street? You can
22 never take that back? Do you know what I mean?
23 Because they're kind of saying, this was all a
24 mistake. To the extent that the way we drafted
25 the interrogatory response that led you and the

1 District Court to think that we were trying to
2 put at issue the legal advice, that was just --
3 it was all a big misunderstanding, we're ready to
4 step back from that; you're basically saying, as
5 I hear you, nope, that's not an option. Once
6 you've kind of, you know, gone down that road,
7 you're stuck, and we now get access to all these
8 documents, whether you like it or not. So --

9 MR. WALL: Well, Your Honor, I think
10 this goes to your question of whether this is a
11 legal question for determination or a factual
12 question. And that's my point in saying that
13 it's not just Interrogatory Number 1. It's the
14 involvement of counsel which is the factual point
15 in this case in that decision making.

16 HON. RICHARD CLIFTON: How could
17 counsel not be involved? I mean, just by nature,
18 your argument is that the law requires. Anybody
19 looking at it would say, well, the first
20 question, does the law require? So, the fact
21 that they consulted with counsel doesn't strike
22 me as very meaningful here. If they hadn't
23 consulted with counsel, that might be meaningful.
24 But that's the -- this is the dog that barked.

25 MR. WALL: Well, Your Honor, I would

1 say that it's not the mere consultation with
2 counsel. And that's why I think Petitioner's
3 concerns that somehow, allowing the District
4 Court's order to stand will entail a parade of
5 horrors for every instance in which the
6 Government says it consulted counsel, is that the
7 specific reason they explained for maintaining
8 this exclusion is the legal rationale. You can
9 imagine that the Government might have other
10 legitimate bases for maintaining exclusion, such
11 as costs, such as a facially neutral policy that
12 they only was the bare minimum, which discovery
13 has now repudiated as the case. They did not
14 have that policy, and they do treat -- cover
15 other policies that -- or other benefits that are
16 not legally required.

17 But the reason the -- the reason the
18 Petitioners asserted for maintaining the
19 exclusion is the advice of counsel. And so, that
20 is an entirely relevant fact that we need to be
21 able to explore.

22 HON. RICHARD PAEZ: Let me ask you
23 this. I was not expecting the concession that
24 Counsel offered during his argument. That wasn't
25 in my, you know, on my radar screen at the time.

1 It seems to me, though, that it's significant
2 enough that the District Court should be able to
3 consider that and maybe rethink whether or not
4 she -- ordering disclosure is the appropriate
5 thing.

6 MR. WALL: Well, Your Honor, I would --
7 I would say that, you know, the club of mandamus,
8 as we've all noted, is extraordinary, and the
9 fact that --

10 HON. RICHARD PAEZ: I'm reluctant --
11 you know, the concession was made in front of us,
12 and I'm just reluctant to say, you know, the
13 concession, and therefore, District Court, you
14 clearly erred. Mandamus; set aside that order.
15 I'm not sure that that -- well, I'm not sure that
16 I'm prepared to do that just because we got a
17 concession here today.

18 It seems like the District Court should
19 be able to consider that and to think through
20 some of the questions that I was asking, because,
21 you know, when I asked him about what would a
22 witness testify to, and he said, well, we can --
23 you know, we determined that it was lawful or
24 whatever, and we considered this -- we consulted
25 with people. Well, the first thing the cross-

1 examination is going to be, who did you consult
2 with?

3 MR. WALL: You're right, Your Honor,
4 and I would say that --

5 HON. RICHARD PAEZ: And it seems to me
6 that those kinds of issues that relate to the
7 litigation itself ought to be explored by the
8 District Court, not by -- I mean, this is -- I
9 wasn't expecting this.

10 MR. WALL: Well, Your Honor, that's
11 exactly why I would say the petition of mandamus
12 should not warn here. If you consider the other
13 Bauman factors, particularly the first factor
14 about the availability of other adequate means of
15 relief, Petitioners certainly could have failed
16 to comply with the Court's discovery order, and
17 they would have had available to them post-
18 judgment relief, where a court could have
19 reviewed this and said, you know, they didn't
20 actually put this at issue, that, you know, could
21 remand it for a new trial and have this evidence
22 excluded. But they didn't do that. They --

23 HON. RICHARD PAEZ: Well, they could
24 file a motion for reconsideration and say, hey,
25 look, Judge, you got it all wrong. We're not

1 going to raise this as a defense.

2 MR. WALL: Well, Your Honor, they
3 didn't file a motion for reconsideration.

4 HON. RICHARD PAEZ: Oh, I know. I'm
5 saying, but there's ways they could have brought
6 this to the District Court's attention, and they
7 didn't do it.

8 MR. WALL: Exactly, and that's why the
9 petition does not lie. Because they could have
10 failed to comply with the order, and the District
11 Court could have entered a discovery sanction
12 saying that you cannot assert this defense,
13 exactly what Petitioners have conceded here
14 before. And that's why the petition should lie.
15 None of the Bauman factors, specifically the
16 clear error that we've discussed already, support
17 granting this petition. The District Court did
18 not err. It certainly got this right. And it
19 certainly did not commit clear error.

20 HON. PAUL WATFORD: Okay.

21 MR. WALL: Thank you, Your Honors.

22 HON. PAUL WATFORD: Thank you very much
23 for your argument. Let's put two minutes on the
24 clock for rebuttal.

25 MR. BERG: Let me start with the last

1 point. To argue that the State of Arizona should
2 have disobeyed an order of the District Court,
3 permitted itself to be found in contempt, and
4 then proceed to litigate this issue is something
5 this Court has rejected in a couple -- in several
6 cases we've cited in our reply, but also, I
7 think, ignores the reality that to say it's an
8 adequate remedy to violate a court order seems to
9 me to be inappropriate.

10 HON. RICHARD PAEZ: Well, you could
11 have gone back and filed a motion for
12 reconsideration, saying, hey, Judge, you know,
13 there's been a -- there's been a mistake here.

14 MR. BERG: Well, what we did do is,
15 first we were in front of the magistrate judge.
16 We made our argument. Then we went to the
17 District Court, and we made our argument. I
18 don't think --

19 HON. RICHARD PAEZ: You didn't make
20 this concession in front of the District Court,
21 did you?

22 MR. BERG: Your Honor, I didn't argue
23 this. I don't know exactly what was said in
24 front of the District Court on oral --

25 HON. RICHARD PAEZ: Right, but

1 something --

2 MR. BERG: There wasn't any oral
3 argument --

4 HON. RICHARD PAEZ: But wait a minute.
5 Something clicked along the way, and you decided,
6 well, you know, I've got to make it clear. I'm
7 going to make it clear to the Ninth Circuit that
8 this is not -- that the District Court
9 misunderstood, and I'm going to concede in front
10 of the District Court that we will not raise an
11 advice of counsel defense. It's all a
12 misconception. And now you're asking us, on
13 that basis, to issue a writ of mandamus against
14 the District Court.

15 MR. BERG: Yes, because we think it was
16 clear from the interrogatory answer that we
17 weren't raising that defense, Your Honor. I
18 mean, it may be clearer because I got asked the
19 specific question today and I answered it
20 specifically. But remember, in this case,
21 neither the magistrate judge nor the district
22 judge had oral argument. We didn't have a
23 dialogue like we've had here today. We filed
24 papers. We took our position, which we still
25 stand by, which is that the interrogatory answer

1 to Interrogatory Number 1, which is the only one
2 I think that is even close, isn't sufficient to
3 raise an advice of counsel defense, and
4 therefore, there wasn't a waiver.

5 Now, had we had oral argument, and had
6 we had a chance to have the kind of exchange
7 we've had here, it may have -- it may have been
8 clear. The attorney/client privilege is an
9 incredibly important privilege. It is the oldest
10 privilege known to the law, and --

11 HON. RICHARD CLIFTON: Let me ask you
12 about that.

13 MR. BERG: Yes.

14 HON. RICHARD CLIFTON: And we're --

15 MR. BERG: Sure, Your Honor.

16 HON. RICHARD CLIFTON: -- I'm going to
17 beg your indulgence and my colleagues'. We've
18 all lived with the attorney/client privilege. We
19 understand its importance. In this particular
20 case, how does it really matter? I mean, unless,
21 in fact, it turns out that, as your colleague
22 suggested, maybe the advice was, you can't do
23 this, and they decided to disregard it. I don't
24 expect that's the case. I expect you have your
25 usual lawyer qualifications and so forth, but --

1 I used to write those letters myself.

2 But in practical terms, okay, suppose
3 those documents are produced. How does it
4 matter?

5 MR. BERG: Well, I think -- first of
6 all, I think going forward, it may chill the
7 State in how it uses its lawyers. And that's a
8 harm that revises -- I think when the
9 attorney/client privilege for government agencies
10 is undermined.

11 Secondly, without -- without -- there
12 may well be information in those attorney/client
13 confidences about, like for example, future
14 litigation strategy, I don't know -- I am
15 speculating -- that you would not want to turn
16 over to the other side in litigation. I mean,
17 there are lots of reasons why there's an
18 attorney/client privilege and a work product
19 privilege, and one of them is to prevent one side
20 from going to school in their case on the other
21 side's legal theories and legal thought, Your
22 Honor.

23 HON. PAUL WATFORD: Okay. Thank you
24 very much.

25 MR. BERG: Thank you very much, Your

1 Honors.

2 HON. PAUL WATFORD: We appropriate it.
3 The case just argued is submitted, and we are
4 adjourned for the day.

5 CLERK: All rise.

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sonya M. Ledanski Hyde

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Date: May 2, 2022

&	adjourned 39:4	anyway 15:23	authority 16:19
& 18:20	advice 2:13 3:20 6:9,10 8:20 9:9,12 9:20,21,23 10:8,11 10:14,22 11:11 12:3,22 13:12 14:2,5 15:4,10,12 15:24 16:10 17:18 19:20 20:2,8,9 21:15 22:2,13,20 22:21,25 23:12,15 24:4,18 25:17 26:4 27:18 28:11 28:24 29:2,12,20 30:2 31:19 36:11 37:3,22	appeals 1:1 appropriate 32:4 39:2 appropriately 2:19 area 2:22 argue 24:13,15 35:1,22 argued 39:3 arguing 11:14 15:11 argument 1:17 11:20 19:9,14 27:20 30:18 31:24 34:23 35:16,17 36:3,22 37:5 arizona 1:6,8,12 2:3 24:14 35:1 arizona's 14:22 articles 29:10 aside 32:14 asked 5:5 6:18 21:7 27:11 32:21 36:18 asking 9:24 21:12 32:20 36:12 asks 14:19 25:21 assert 28:11 34:12 asserted 31:18 asserting 29:2 assertion 27:21 28:25 assume 22:13 23:3 assuming 11:13 attention 34:6 attorney 2:6,11,20 3:4 5:9 9:2 13:20 13:22 14:7 21:11 37:8,18 38:9,12,18	availability 33:14 available 26:24 33:17 averred 27:8
1			b
1 14:14,17,19 19:18,22 21:19 22:3 30:13 37:1			b 1:14,22 18:21 back 8:1 28:8 29:22 30:4 35:11 backing 19:16 bad 3:19,21 6:11 8:23 18:2 bare 27:24 31:12 barked 30:24 based 12:24 13:25 15:10,12 16:10 25:3 bases 13:7 31:10 basically 30:4 basis 20:13 26:5 28:12 29:6 36:13 bauman 33:13 34:15 beg 37:17 behalf 18:20 believe 8:2 11:24 12:4 17:5 26:16 26:18 benefits 31:15 berg 2:1,2 3:18,25 4:4,7,12,18 5:1 7:1,5,11,14,18,24 8:9,13,17 9:13,17 9:22 10:5,10,16 11:19,24 12:4,8,15 13:2,10,16 14:11 14:16 15:5,9 16:4 16:15 17:5,10,16 18:8,13,16 34:25 35:14,22 36:2,15 37:13,15 38:5,25
10 1:18			
11501 40:14			
12151 40:8			
14th 25:2			
2			
2 40:16			
2022 1:18 40:16			
21-71312 1:4			
3	affirmatively 19:20 27:15 agencies 38:9 agree 14:16 ahead 15:23 al 1:6,8,14 alleged 24:25 allowing 31:3 amendment 25:2 andy 2:3 animus 25:5 answer 2:14 7:3 7:20,25 12:5 13:15 16:9 19:24 27:8 36:16,25 answered 36:19 answering 21:16 28:17 answers 2:7 4:10 4:15,22 7:6 12:16 13:4,17 14:1,4 17:2,4 21:8 anticipated 27:2 anybody 30:18		
300 40:13			
330 40:12			
4			
4 14:15 20:24 22:5			
7			
7 14:15 15:2 20:24			
a			
ability 16:18 29:9 able 23:23 24:4 26:17 29:15 31:21 32:2,19 accept 23:4 24:13 25:15 access 11:17 20:15 28:15 30:7 account 7:7 15:18 accurate 40:4 acted 27:21 action 28:5 actual 25:13 adequate 33:14 35:8			

[beyond - court]

Page 2

<p>beyond 23:16 big 30:3 bit 18:9 blah 15:2,2,2 blanket 21:3 board 14:13 boundaries 2:22 broadly 9:3 brokers 5:16 10:2 brought 34:5 bunch 17:21 burden 20:21 25:18</p>	<p>circuit 1:2 9:6 36:7 circumstances 19:2,6 cite 29:13 cited 25:24 35:6 claim 10:23 19:17 claimed 24:6 claiming 10:21 claims 20:11 24:25 28:13 clause 25:1 clear 2:16,24 12:12,21,23 20:6 28:18 34:16,19 36:6,7,16 37:8 clearer 36:18 clearly 12:7 23:6 32:14 clerk 39:5 clicked 36:5 client 2:6,11,20 3:4 5:9,16 9:2,6 13:20 14:7 16:25 21:11 26:13 37:8 37:18 38:9,12,18 clients 3:13 14:22 clifton 1:25 9:10 9:16,18 10:3,6,13 12:21 22:10 23:2 23:25 24:9,22 26:7,20 30:16 37:11,14,16 clock 34:24 close 37:2 club 32:7 colleague 37:21 colleagues 37:17 come 28:8,9 commit 2:25 6:5 34:19</p>	<p>committed 2:15 communications 2:12 company 17:25 comply 33:16 34:10 concede 36:9 conceded 34:13 concern 5:7 concerns 31:3 concession 12:17 12:20 17:12,16 19:10 28:19 31:23 32:11,13,17 35:20 concluded 14:24 concluding 4:18 conclusion 19:25 27:13 conduct 2:22 confidences 38:13 confusion 20:6 consider 9:25 32:3 32:19 33:12 considerations 7:6 considered 32:24 consistently 19:2 constitutes 22:12 24:17 consult 33:1 consultation 29:10 31:1 consulted 2:8 3:15 6:17,20 17:13 21:9 30:21,23 31:6 32:24 containment 5:7 8:6 17:22 contempt 35:3 content 13:22,23 contents 2:12</p>	<p>context 27:6 corp 21:25 29:4 correct 11:19 corroborate 25:8 cost 5:7,7 8:6,6 17:22 26:1,12 27:2,4 costs 31:11 counsel 2:8,10,13 6:9,11 9:20,21,23 10:8,11,14,22 11:12 12:3,22 13:12 14:2,5 15:11,12,24 16:10 17:9 18:15 19:21 20:18 21:15 22:2 22:4,8,13,20,21,25 23:16 24:11,18 25:13 28:11,24 29:2,20 30:14,17 30:21,23 31:2,6,19 31:24 36:11 37:3 counsel's 9:11 country 40:12 couple 35:5 course 10:23 26:11 28:5 court 1:1,11 2:1 2:15 4:2,5,8,9,14 4:16 6:11 9:3 10:18,19,24,25 11:7,15,23 12:2,7 12:11 13:23 16:21 18:19,23 19:2,15 20:14 21:24 22:8 22:18 23:11,14 24:13,15 25:11,20 26:2 28:21 29:3 30:1 32:2,13,18 33:8,18 34:11,17 35:2,5,8,17,20,24</p>
<p>c</p>			
<p>c 40:1,1 canyon 21:2 care 20:1 22:19 careful 9:3 case 2:24 4:12 6:1 6:2,4 9:5 10:8 11:13 12:13 14:6 16:16 18:4,25 19:5 20:19 22:22 23:3 24:21 25:3 27:15 30:15 31:13 36:20 37:20,24 38:20 39:3 cases 9:5 21:1 29:19 35:6 causes 19:1 certain 2:21 29:3 certainly 16:5 33:15 34:18,19 certify 40:3 chance 37:6 change 3:9 15:1 chevron 21:24 29:4 chief 29:14 chill 38:6</p>			

<p>36:8,10,14 court's 12:23 13:7 22:16 24:10 31:4 33:16 34:6 cover 18:1 23:7 27:17 31:14 coverage 3:13,14 3:17 6:18,20 14:20,23 15:1 22:15,18 covered 23:6 craig 2:2 create 4:22 credibility 4:14 crime 3:1 6:5 cross 32:25 cut 19:8</p>	<p>36:11,17 37:3 definitely 28:10 deposition 16:15 16:17,22,24 25:24 describe 14:19 determination 30:11 determined 16:13 32:23 develop 29:9 developed 25:15 dialogue 36:23 difference 5:12 6:15 different 4:24 5:8 21:3 difficult 2:23 discern 2:23 disclaim 9:20,22 10:14 26:12 28:23 disclaimed 20:20 27:4 disclosed 13:21,23 disclosing 2:12 disclosure 32:4 discovery 3:2 16:1 24:3 26:18 31:12 33:16 34:11 discriminate 3:1 5:14 27:23 discriminated 3:12 8:24 discrimination 3:15 6:23 8:12 22:12 24:18 discriminatory 5:21 6:5 8:19 23:7 25:6 27:22 discussed 19:22 34:16</p>	<p>disobeyed 35:2 disparate 25:3,4 disputed 23:10 disregard 37:23 disregarded 12:14 distinction 6:3 district 1:11,12 2:15 4:2,5,9,15 11:7,15,23 12:2,7 12:11 13:7,22 16:20 19:15 20:14 25:11 30:1 31:3 32:2,13,18 33:8 34:6,10,17 35:2,17 35:20,24 36:8,10 36:14,21 doctrine 21:24 22:1 documents 2:11 2:13 11:17 20:16 25:7 28:16 30:8 38:3 dog 30:24 doing 11:12 14:7 dozen 6:25 dr 18:21 20:21 22:6 24:24 25:3 25:18 26:16 drafted 29:24 drastic 18:24 drawing 5:10 dusen 19:3</p>	<p>entered 34:11 entirely 31:20 entities 29:11 entitled 8:22 equal 25:1 err 34:18 erred 12:7 32:14 error 2:16 4:5 12:13,24,25 13:1,2 34:16,19 establish 20:22 22:6 23:23 established 21:24 25:23 29:4 establishing 25:18 et 1:6,8,14 evidence 25:5 29:3 29:15 33:21 evidentiary 20:22 22:7 25:19 exact 7:25 exactly 11:20 33:11 34:8,13 35:23 examination 33:1 examine 24:4 26:17 example 38:13 exceptional 19:1 exchange 37:6 excluded 33:22 excludes 14:20,23 exclusion 19:24 24:7 25:9 26:6,19 26:21 27:10,17 29:14,17 31:8,10 31:19 expect 37:24,24 expecting 31:23 33:9</p>
d			
<p>date 40:16 day 39:4 de 4:8 decide 4:8 22:17 23:14 decided 17:21 24:6 36:5 37:23 deciding 3:21 7:7 8:20 decision 6:10 15:18 22:4 23:22 25:13 26:3,5,6 30:15 defend 6:8 28:13 defending 15:10 defense 2:14 5:25 9:1,7,21,23 10:12 10:15,22 11:12 12:3,22 13:12 14:2,6 15:24 16:9 20:10,23 21:15 23:16,19,24 28:10 29:1,2,16 34:1,12</p>			
		e	
		<p>e 1:22,22 40:1 element 20:11 28:13 eliminate 20:12,15 28:19 employee 16:23 entail 31:4</p>	

explain 26:10 explained 31:7 explanation 27:1 27:14 explicit 13:18 explore 31:21 explored 33:7 extent 11:10 20:5 29:24 extraordinary 18:25 19:1,6 32:8 f f 1:22 40:1 facially 31:11 fact 4:20 15:12 22:6 25:10 26:8 30:20 31:20 32:9 37:21 factor 24:21,23 26:2 33:13 factors 33:13 34:15 facts 3:9 factual 13:1 20:19 21:13 25:14 30:11 30:14 failed 33:15 34:10 fairly 25:21 fairness 20:13 22:1 28:15 faith 2:20 farr 18:19 fennemore 2:2 file 33:24 34:3 filed 35:11 36:23 find 6:11 9:7,8 13:23 finding 12:23 first 22:24 27:12 30:19 32:25 33:13 35:15 38:5	focus 17:1 focused 10:4 16:21 19:17 follow 23:12 foregoing 40:4 forget 14:14 former 16:23 forming 29:12 forth 37:25 forward 19:20 20:9 22:2 23:21 28:9 38:6 found 6:1 13:8,24 35:3 frankly 16:20 front 4:9,14,20 8:1 10:24,24 14:10 32:11 35:15,20,24 36:9 fundamentally 21:22 funded 14:23 further 7:2 future 38:13 g gallagher 18:20 gathered 5:17 gender 14:21,23 generally 6:3 ginsburg 2:17 3:5 3:6 6:2 give 6:19 21:8 given 7:13 23:8 go 11:13 12:10 goes 30:10 going 11:14 12:2 17:12,14,14,17,20 20:6,9,9 22:16 23:9 24:1,10,12,15 28:10,12,23 33:1 34:1 36:7,9 37:16	38:6,20 good 2:20 18:18 19:11,11,13 government 23:1 25:7 31:6,9 38:9 governmental 29:11 granted 18:25 granting 34:17 guess 11:15 28:7 28:14 guilty 9:7 h half 6:25 happened 3:8,22 4:24 5:23 22:14 harm 38:8 health 14:23 15:1 hear 18:14 30:5 heard 18:22 19:10 20:25 helpful 11:3 hernandez 21:1 22:7 hey 15:3 33:24 35:12 hit 12:18 hold 11:16 hon 1:23,24,25 3:9 3:23 4:1,6,11,17 4:23 6:13 7:4,9,12 7:16,21 8:7,10,16 9:10,16,18 10:3,6 10:13 11:2,22 12:1,6,9,25 13:6 13:14 14:9,12,18 15:6 16:2,12 17:3 17:7,11 18:7,11,14 19:7 20:3 21:5 22:10 23:2,25 24:9,22 26:7,20	27:19 29:18 30:16 31:22 32:10 33:5 33:23 34:4,20,22 35:10,19,25 36:4 37:11,14,16 38:23 39:2 honor 7:1,1,20 9:13,24 10:16 11:19,24 12:16 13:10,16 14:17 16:4,16 17:2 18:9 19:6,13 20:17,25 21:21 22:23 23:18 24:3,20,24 26:15 27:5 28:20 30:9 30:25 32:6 33:3 33:10 34:2 35:22 36:17 37:15 38:22 honors 3:18 18:18 34:21 39:1 horribles 31:5 huge 6:15 hyde 40:3 hypothetical 4:25 6:14 i identify 14:19 identifying 2:10 2:10 ignores 35:7 illegal 16:14 25:9 imagine 31:9 impact 25:4 implication 13:9 13:11,13 implied 2:18 13:24 15:25 18:5 21:23 importance 37:19 important 5:10,11 9:2 37:9
--	--	--	--

[inappropriate - making]

Page 5

<p>inappropriate 35:9</p> <p>includes 29:9,10</p> <p>including 17:24 19:3</p> <p>incorrect 19:18</p> <p>incredibly 37:9</p> <p>incumbent 26:16</p> <p>indiscernible 8:6 27:15</p> <p>indisputably 18:24</p> <p>indulgence 37:17</p> <p>information 21:13 38:12</p> <p>informed 25:8</p> <p>instance 19:4 20:23 25:7 31:5</p> <p>instances 19:19</p> <p>insurance 5:16 10:2 17:24</p> <p>intend 21:14</p> <p>intent 2:25 3:1,19 3:21 5:2,4,13,21 6:4,6,8,12 8:23,24 15:11,21 16:3,6,10 17:8,19 18:2 20:11 24:21,22 25:6 27:22 28:3 28:13</p> <p>interest 1:15 18:21</p> <p>interested 23:13</p> <p>interject 20:7,9 21:14</p> <p>interjected 28:12</p> <p>interpretation 13:25 23:17</p> <p>interrogatories 2:8 12:24</p> <p>interrogatory 4:10,15,21 7:3,6</p>	<p>7:19,22,25 9:14,25 11:6 12:16 13:4 13:17 14:1,4,14,19 16:9,21 17:2 19:18,22 20:24 21:18 22:3,5 29:25 30:13 36:16 36:25 37:1</p> <p>invalid 10:20</p> <p>invoked 2:19</p> <p>involved 30:17</p> <p>involvement 20:18 22:4,8 25:12,14 30:14</p> <p>involving 19:1</p> <p>issue 2:5,9 4:14 10:18 16:6 21:23 21:25 22:22 29:6 29:7,20 30:2 33:20 35:4 36:13</p> <p>issues 5:8 22:5 33:6</p> <p>issuing 12:10</p> <p style="text-align:center">j</p> <p>j 1:23</p> <p>jordan 18:19</p> <p>judge 2:17 3:6 6:2 12:21 33:25 35:12 35:15 36:21,22</p> <p>judgment 33:18</p> <p>jury 11:13</p> <p>justice 2:17 3:5</p> <p style="text-align:center">k</p> <p>key 14:17</p> <p>kind 5:25 11:11 21:15 29:21,23 30:6 37:6</p> <p>kinds 33:6</p> <p>know 3:11 11:13 12:5,10,13,18</p>	<p>20:10 21:3 25:17 25:21 27:25 28:4 29:22 30:6 31:25 32:7,11,12,21,23 33:19,20 34:4 35:12,23 36:6 38:14</p> <p>knowledge 23:21 29:5</p> <p>known 37:10</p> <p style="text-align:center">l</p> <p>law 3:16 14:25 22:17 23:13,17 24:15 27:24 28:1 29:5,7,13 30:18,20 37:10</p> <p>lawful 32:23</p> <p>lawyer 3:3 5:13,22 5:22 6:7 8:3 17:13 21:10 23:4 24:14 26:9 37:25</p> <p>lawyer's 8:20 9:9</p> <p>lawyers 3:16,20 5:2,6,19 6:17,21 7:15 10:1 15:17 15:19,22 20:8,10 23:5,12 27:25 38:7</p> <p>layman 2:23</p> <p>lectern 19:11</p> <p>led 29:25</p> <p>ledanski 40:3</p> <p>legal 2:22 4:21 5:4 5:17,17,23 12:23 12:25 13:2,5 15:3 15:22 17:18 19:25 20:1 22:12 24:7 24:11 25:17 26:4 27:13,18 29:12,20 30:2,11 31:8 38:21,21 40:11</p>	<p>legality 2:21</p> <p>legally 5:3 8:5,21 14:1,25 31:16</p> <p>legitimate 27:9,16 29:16 31:10</p> <p>lesson 2:24</p> <p>letters 38:1</p> <p>liability 10:19</p> <p>liable 9:8</p> <p>lie 21:10 34:9,14</p> <p>light 15:14</p> <p>line 5:10</p> <p>litigate 35:4</p> <p>litigation 21:14 33:7 38:14,16</p> <p>little 14:10 18:8</p> <p>lived 37:18</p> <p>longer 16:24</p> <p>look 7:22 17:5,6 19:21 25:22 33:25</p> <p>looked 4:10 5:14 8:5 17:20,23</p> <p>looking 24:3 30:19</p> <p>lose 10:7</p> <p>lots 38:17</p> <p style="text-align:center">m</p> <p>magic 28:25</p> <p>magistrate 35:15 36:21</p> <p>main 24:7</p> <p>maintain 19:24 26:6,21 27:10,17</p> <p>maintained 23:1 26:19</p> <p>maintaining 29:14 29:17 31:7,10,18</p> <p>making 6:9 8:14 8:14,15 11:21 15:18 22:4 23:22 25:13 26:3,5 30:15</p>
---	--	---	--

<p>malintent 5:20 8:22</p> <p>mandamus 11:1 12:10,11 18:24 19:4 32:7,14 33:11 36:13</p> <p>march 1:18</p> <p>materials 4:9</p> <p>matter 13:5 20:13 22:21 28:15 37:20 38:4</p> <p>mattered 20:25</p> <p>matters 22:24</p> <p>mean 13:14 17:12 22:11 23:3 26:8 26:22 27:19 28:3 29:22 30:17 33:8 36:18 37:20 38:16</p> <p>meaningful 30:22 30:23</p> <p>means 17:17 33:14</p> <p>meeting 14:1</p> <p>mention 21:10</p> <p>mentioned 23:4</p> <p>mere 21:16 31:1</p> <p>microphone 12:18</p> <p>middle 3:9</p> <p>mineola 40:14</p> <p>minimum 27:24 31:12</p> <p>minute 36:4</p> <p>minutes 34:23</p> <p>mis 6:6,8</p> <p>miscited 21:2</p> <p>misconstruction 36:12</p> <p>misinterpreted 11:8</p> <p>mistake 29:24 35:13</p>	<p>misunderstand 21:22</p> <p>misunderstanding 30:3</p> <p>misunderstood 36:9</p> <p>morning 18:18</p> <p>motion 33:24 34:3 35:11</p> <hr/> <p style="text-align: center;">n</p> <hr/> <p>n 40:1</p> <p>nature 21:23 30:17</p> <p>need 16:11 20:12 20:15 28:15 29:15 31:20</p> <p>needs 22:6</p> <p>negate 28:3</p> <p>neither 36:21</p> <p>neutral 28:4 31:11</p> <p>never 23:4 28:12 29:22</p> <p>new 33:21</p> <p>newspaper 29:10</p> <p>ninth 1:2 36:7</p> <p>non 27:9</p> <p>nondiscriminatory 27:9 28:4</p> <p>nope 30:5</p> <p>noted 18:23 22:8 32:8</p> <p>noting 22:3</p> <p>novo 4:8</p> <p>number 14:14 19:18,22 20:24,24 21:19 22:3,5 30:13 37:1</p> <p>numerous 23:20</p> <p>ny 40:14</p>	<p style="text-align: center;">o</p> <hr/> <p>o 1:22 40:1</p> <p>obtain 26:14</p> <p>obviously 10:18</p> <p>offer 6:18,19,24 7:8</p> <p>offered 23:16,19 24:11 26:12 31:24</p> <p>offering 3:17</p> <p>oh 6:6 17:10 34:4</p> <p>okay 3:23,25 4:6 4:23 7:4,10,18,21 8:9,16 9:17 10:5 11:2 14:11,16,18 15:7,9 17:5 18:7 18:13,14 20:3 21:9 25:17 26:7 28:2 34:20 38:2 38:23</p> <p>old 40:12</p> <p>oldest 37:9</p> <p>once 29:4,19 30:5</p> <p>ones 14:15</p> <p>opinion 2:21</p> <p>opinions 5:17</p> <p>opponent 20:5</p> <p>opponents 11:4</p> <p>opportunity 18:22</p> <p>option 26:23 30:5</p> <p>oral 1:17 35:24 36:2,22 37:5</p> <p>order 16:1 31:4 32:14 33:16 34:10 35:2,8</p> <p>ordering 32:4</p> <p>ought 33:7</p> <p>outside 17:25</p> <hr/> <p style="text-align: center;">p</p> <hr/> <p>paez 1:24 11:22 12:1,6,9,25 13:6</p>	<p>13:14 16:2,12 17:3,7,11 18:7 31:22 32:10 33:5 33:23 34:4 35:10 35:19,25 36:4</p> <p>papers 25:24 36:24</p> <p>parade 31:4</p> <p>pardon 3:7</p> <p>part 3:2 6:6 25:6 25:10</p> <p>particular 37:19</p> <p>particularly 33:13</p> <p>parties 1:15</p> <p>party 18:20 29:5</p> <p>passionately 23:9</p> <p>paul 1:23 2:4 3:23 4:1,6,11,17,23 6:13 7:4,9,12,16 7:21 8:7,10,16 11:2 14:9,12,18 15:6 18:11,14 19:7 20:3 21:5 27:19 29:18 34:20 34:22 38:23 39:2</p> <p>pennzoil 21:25 29:4</p> <p>people 16:17 21:9 32:25</p> <p>periodicals 5:17 17:25</p> <p>permissible 26:11</p> <p>permit 16:1</p> <p>permitted 35:3</p> <p>person 21:13</p> <p>persons 23:21</p> <p>perspective 10:9</p> <p>persuade 23:11</p> <p>persuaded 24:10</p> <p>petition 18:23 33:11 34:9,14,17</p>
--	--	---	--

<p>petitioner 2:3 petitioner's 21:1 25:16 26:2,6 31:2 petitioners 1:9 2:6 19:17,20 20:20 21:22 23:20 24:5 25:8 27:7,8 28:22 31:18 33:15 34:13 placed 29:5 places 29:6 plainly 19:18 plaintiff 3:11 8:22 plaintiffs 11:8 16:3 plan 10:20 14:20 14:23 15:1 play 10:8 plays 10:10 pleading 25:3 please 2:1 18:19 point 20:19 21:1 21:20 23:10 25:14 30:12,14 35:1 pointed 26:3 27:12 policies 31:15 policy 2:9 27:23 31:11,14 polite 22:18 posed 4:25 position 9:19 12:15 14:3 36:24 positive 3:8 18:5 possibly 21:11 post 33:17 practical 38:2 prayer 23:6 precisely 11:20 predicate 21:11 prepared 10:14 32:16</p>	<p>present 25:11 presented 2:5 19:15 presumably 22:15 pretextual 27:9 pretty 12:14 prevail 16:2 prevent 38:19 principle 22:1 privilege 2:7 3:4 5:10 9:2 10:19,25 13:20 14:7 16:18 16:19,25 21:12 37:8,9,10,18 38:9 38:18,19 privileged 2:11 15:4 20:16 problem 28:7,19 proceed 35:4 proceedings 40:5 produced 38:3 product 38:18 prohibited 3:16 6:18 proposition 16:7 protection 25:1 prove 5:20 8:22,24 15:20 16:3 23:15 provide 3:14 15:1 20:1 provided 11:6 22:15 24:5,16 providing 3:12 26:13 provision 22:17 provisions 14:2 pull 7:22 put 4:13 6:14 19:20 21:18 23:21 29:19 30:2 33:20 34:23</p>	<p>puts 25:13 putting 22:1</p> <p style="text-align: center;">q</p> <p>qualifications 37:25 quarrel 16:7 question 4:20,21 9:16 10:25 11:1 12:5 13:3 17:4 19:23 21:16 22:11 22:12 30:10,11,12 30:20 36:19 questions 21:7 32:20 quote 7:23 14:13</p> <p style="text-align: center;">r</p> <p>r 1:22 40:1 radar 31:25 raise 10:11 11:11 13:15 34:1 36:10 37:3 raised 13:11,17 raising 2:13 10:14 12:22 36:17 rationale 31:8 reached 19:25 read 9:4,4,5 14:4 18:4 ready 30:3 real 1:15 18:20 reality 35:7 really 5:11 22:19 22:21 26:8 37:20 reason 3:14 5:20 6:8,13,22 11:16 22:25 26:12,19,21 26:25 27:16 28:5 28:21 29:14 31:7 31:17,17</p>	<p>reasoning 24:8,11 reasons 5:5 6:19 7:10,13 8:8,11,18 14:20 15:17 16:20 17:22,23 19:16 21:3 22:24 24:5 27:10,11 29:16 38:17 reassignment 14:21,24 rebuttal 18:9,12 34:24 received 20:2 25:16 26:4 recognized 19:3 reconsideration 33:24 34:3 35:12 record 5:15 19:19 20:22 22:7 23:23 25:11,15,19,23 26:17 29:9 40:5 reflect 9:15 reflects 5:15 10:1 refute 23:23 24:1 29:15 refuting 20:22 rejected 35:5 relate 33:6 relevant 21:6 24:19 25:10 29:8 31:20 reliance 9:11,21 9:23 relied 3:20 4:16 6:9,10 8:20 9:8,19 29:3,12 relief 33:15,18 reluctant 32:10,12 rely 12:2 20:20 28:23</p>
--	---	--	--

[relying - thank]

Page 8

relying 14:5 remand 33:21 remedy 18:25 35:8 remember 36:20 replete 19:19 reply 35:6 representation 25:16 representing 2:2 repudiated 26:1 31:13 require 28:1 30:20 required 8:5 14:25 15:15 20:1 27:13 31:16 requires 22:17 24:16 27:25 29:7 30:18 respect 2:9 respond 15:7 19:9 respondent 1:13 18:15 responding 19:23 response 9:14 12:20 19:12 20:23 21:18 27:3,7,20 28:8 29:25 responses 11:7 16:21 rest 19:8 rethink 32:3 reveal 3:2 reviewed 33:19 revises 38:8 richard 1:24,25 9:10,16,18 10:3,6 10:13 11:22 12:1 12:6,9,25 13:6,14 16:2,12 17:3,7,11 18:7 22:10 23:2 23:25 24:9,22	26:7,20 30:16 31:22 32:10 33:5 33:23 34:4 35:10 35:19,25 36:4 37:11,14,16 right 4:3,11,17 7:11 8:4,7 20:3,7 21:19 33:3 34:18 35:25 rise 39:5 road 30:6 40:12 role 10:7,11 ruled 20:14 ruling 13:8 run 28:17 russell 1:14 18:21	sex 24:17 shannon 2:4 side 38:16,19 side's 38:21 signature 40:8 significant 5:12 26:1 32:1 simply 2:24 14:7 25:15 sit 28:22 sitting 10:17 six 6:25 slightly 3:10 solutions 40:11 sonya 40:3 sorry 10:5 12:18 sorts 5:18 sought 22:16 specific 3:6,7 4:15 18:5 31:7 36:19 specifically 34:15 36:20 speculating 38:15 stand 17:8 31:4 36:25 stands 20:5 start 34:25 state 1:6,8 2:3 9:25 14:22,24 23:13 24:12,14 35:1 38:7 state's 9:19 23:11 stated 2:18 22:25 states 1:1,11 2:18 15:14 stating 2:7 step 7:2 8:14 30:4 stop 3:24 strategy 38:14 street 29:21	strike 30:21 struggling 28:14 stuck 30:7 stuff 17:24,24 submitted 39:3 subtle 5:11 sues 3:11 sufficient 4:22 13:4 15:25 37:2 suggested 37:22 suggesting 15:13 suggests 13:20,21 suite 40:13 sum 2:19 support 34:16 supporting 25:5 suppose 28:3 38:2 supposed 12:19 sure 6:15 14:13 18:11 32:15,15 37:15 surgery 14:21,24
	s		t
	sanction 34:11 save 18:8 saying 5:13,20 6:3 6:7,16 9:10,13 10:17,17,21 11:5,7 11:9,18 14:5 15:10,16 29:23 30:4,12 34:5,12 35:12 says 2:25 3:11 7:20 16:9 20:5 26:9,11,23 31:6 school 38:20 screen 31:25 secondly 38:11 see 6:15 11:4 seeking 2:21 seeks 26:14 self 14:22 service 26:13 services 24:16 set 32:14 settles 28:2		t 40:1,1 t's 23:19 take 7:7 23:8 28:17 29:22 taken 7:2 16:16 takes 3:4 15:15 talk 5:19 talked 3:3 5:6,13 5:22 7:14,15 8:3 10:1,1 15:16,19,21 tell 12:1 19:12 21:5,8 terms 38:2 testify 32:22 testimony 16:15 16:17,22 25:25 thank 18:10,21 34:21,22 38:23,25

theories 16:5 38:21 thing 27:12 32:5 32:25 things 5:14,18 17:21 think 2:23 3:18 4:4,5 5:9,12 6:1,4 7:2,19,24 8:3 9:3 9:22,25 10:10,20 11:2 13:2,3,18 16:4,6,8,8,10,20 17:1,3,16,25 18:1 18:3 19:15 20:25 21:6,17 22:23 23:4,9,10 25:9,12 25:22 27:6,19 28:21 30:1,9 31:2 32:19 35:7,18 36:15 37:2 38:5,6 38:8 thought 4:2 5:3 11:10 13:6,7 22:14 38:21 time 10:7 16:24 18:9,12 31:25 timothy 2:2 title 15:2 25:2,2 tobin 2:3 today 10:24,25 19:11 32:17 36:19 36:23 told 3:16 5:2,22 6:17,21,23 7:16 8:4,5 11:23 15:22 23:5 28:1 toomey 1:14 18:21 20:21 22:6 25:3 25:18 26:16 toomey's 24:25	touch 12:19 tough 12:14 transcript 40:4 treat 31:14 treatment 25:4 trial 25:21 33:21 true 5:15 28:20 40:4 truthful 21:8,12 21:13 truthfully 21:16 trying 11:9,11 20:7 27:23 30:1 tucson 1:12 turn 38:15 turns 37:21 two 8:7,10 22:24 34:23 typical 4:12	veritext 40:11 versus 2:18 15:14 21:2 vii 25:2,2 violate 35:8 violating 24:17 violation 25:1	27:19 29:18 34:20 34:22 38:23 39:2 way 6:6,14 8:25 15:3 18:17 29:21 29:24 36:5 ways 34:5 we've 3:11 8:24 19:21 32:8 34:16 35:6 36:23 37:7 37:17 went 5:16 15:21 15:23 20:4 27:25 35:16 white 2:18,24 6:1 9:5 15:14 18:4 wilkie 18:19 witness 4:13 17:8 17:12,17 23:19 32:22 witnesses 16:13 23:20 25:22,25 words 7:25 28:25 work 38:18 works 16:25 worry 16:23 writ 18:24 36:13 write 38:1 writs 12:10 wrong 33:25
	u	w	
	undergirds 21:25 underlying 10:22 22:22 undermined 38:10 understand 11:5 21:20 26:8 27:20 28:14 37:19 understanding 29:7,13,19 understood 27:3 28:22 uniformly 26:3 united 1:1,11 2:18 15:14 uses 38:7 usual 37:25	wait 36:4 waive 4:19 9:6 16:18,19,25 waived 2:6 waiver 2:15,19 3:3 3:8,22 4:22 6:2 13:8,11,13,18,19 13:24 15:15,25 18:4,5 21:4,11,17 21:23 37:4 waivers 9:4 waiving 13:19 14:6 walk 6:7 wall 18:18,19 19:13 20:17 21:20 22:23 23:18 24:2 24:20,24 26:15 27:5 28:20 30:9 30:25 32:6 33:3 33:10 34:2,8,21 want 10:7 19:8 24:3 38:15 wanted 28:8 warn 33:12 warranted 19:5 watford 1:23 3:23 4:1,6,11,17,23 6:13 7:4,9,12,16 7:21 8:7,10,16 11:2 14:9,12,18 15:6 18:11,14 19:7 20:3 21:5	
	v		
	v 1:10 21:25 29:4 van 19:3		
			x
			x 1:3,5,16
			y
			yeah 15:5 19:7,7 years 22:20 24:12