SUPREME COURT
OF THE UNITED STATES

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GOOGLE LLC,   )

             Petitioner,   )

               v.   ) No. 18-956

ORACLE AMERICA, INC.,   )

             Respondent.   )

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Pages: 1 through 96

Place: Washington, D.C.

Date: October 7, 2020

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9   Washington, D.C.

10   Wednesday, October 7, 2020

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12   The above-entitled matter came on for

13   oral argument before the Supreme Court of the

14   United States at 10:00 a.m.

15

16   APPEARANCES:

17

18   THOMAS C. GOLDSTEIN, ESQUIRE, Bethesda, Maryland;

19   on behalf of the Petitioner.

20   E. JOSHUA ROSENKRANZ, ESQUIRE, New York, New York;

21   on behalf of the Respondent.

22   MALCOLM L. STEWART, Deputy Solicitor General,

23   Department of Justice, Washington, D.C.;

24   for the United States, as amicus curiae,

25   supporting the Respondent.

1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:00 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument first this morning in Case 18-956,

5   Google versus Oracle.

6   Mr. Goldstein.

7   ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

8   ON BEHALF OF THE PETITIONER

9   MR. GOLDSTEIN: Mr. Chief Justice, and

10   may it please the Court:

11   The merger doctrine resolved the

12   copyrightability question in this case. Oracle

13   has a copyright to the computer code in Java SE

14   but not a patent. That means that the public,

15   not Oracle, has the right to Java SE's function,

16   and Oracle cannot leverage its copyright to

17   create patent-like rights. Specifically, under

18   the merger doctrine, there is no copyright

19   protection for computer code that is the only

20   way to perform those functions.

21   Here, Java software developers have

22   the right to use certain commands to create

23   applications for Google's Android smartphone

24   platform, but, to work, the commands require

25   Google to reuse an exact set of declarations

1   from Java SE, like a key that fits into a lock.

2   Because there are no substitutes, Oracle is

3   impermissibly claiming the exclusive right not

4   merely to what the declarations say but also to

5   what the declarations do. That is not a

6   copyright; it is a patent right.

7   With respect to fair use, the

8   long-settled practice of reusing software

9   interfaces is critical to modern interoperable

10   computer software. Here, reusing the minimally

11   creative declarations allowed the developers to

12   write millions of creative applications that are

13   used by more than a billion people.

14   But those policy questions are almost

15   academic because the issue is not whether this

16   Court would find fair use. The standard of

17   review asks the much narrower question whether

18   the jury could reasonably find fair use. Oracle

19   now obviously regrets its demand that the jury

20   weigh all the evidence and decide fair use in a

21   general verdict that contains no subsidiary

22   findings.

23   No previous court ever held that only

24   a court may decide fair use. It is so

25   fact-bound that no prior appellate court ever

1   overturned a fair use verdict. This uniquely

2   contested case should not be the first.

3   Today, you will hear three lawyers

4   present legal arguments for an hour. In 2016,

5   the jury heard the starkly conflicting testimony

6   of almost 30 witnesses and reviewed roughly 200

7   exhibits over two-and-a-half weeks. This case

8   perfectly illustrates, as this Court recently

9   reiterated in Georgia versus Public.Resource,

10   that fair use "is notoriously fact-sensitive and

11   often cannot be resolved without a trial."

12   CHIEF JUSTICE ROBERTS: Mr. Goldstein,

13   let's say someone copies the headings in your --

14   your brief and they copy the organization in

15   your brief, which sections you put first and how

16   you organized them.

17   Is your argument -- would your

18   argument say that that's perfectly fine so long

19   as they write their own text?

20   MR. GOLDSTEIN: No, sir. A computer

21   program is entirely different. And, in

22   addition, you wouldn't have the issue of the

23   merger doctrine. The issue here is that it is

24   not possible to provide the functionality that

25   we have the right to with Android without

1   recreating that structure --

2   CHIEF JUSTICE ROBERTS: No, I

3   understand --

4   MR. GOLDSTEIN: -- in this structure.

5   CHIEF JUSTICE ROBERTS: -- I

6   understand your merger doctrine -- argument is

7   different, but I -- I don't think that was the

8   question I asked.

9   MR. GOLDSTEIN: That -- sir, in terms

10   of whether you could simply recreate the

11   headings from a -- a -- a brief or a book and

12   recreate the structure, not unless it was

13   necessary to do so, and that's what's true here.

14   CHIEF JUSTICE ROBERTS: Well, if

15   you're talking about necessary to do so, and,

16   again, you're force -- forcing me back to the

17   merger -- to the merger doctrine, and that's --

18   that's fine, but the only reason that there's

19   only one way to do it is because Sun and

20   Oracle's product expression was -- was very

21   successful.

22   There were a lot of ways to do it when

23   they did it. And the fact that everybody --

24   programmers really liked it and that's what

25   everybody used, it seems a bit much to penalize

 1   them for that.

 2   MR. GOLDSTEIN: Well, we don't intend

 3   to penalize them, sir. But our point is that in

 4   the language of Section 102(b), they may well

 5   have come up with a novel method of operation.

 6   They may have created one. But they don't get

 7   the rights to it. That is a patent-like right.

 8   I suppose, just as in -- as your point

 9   illustrates, in Baker versus Selden, you could

10   have said, well, Mr. Selden came up with a very

11   innovative form of bookkeeping, and other people

12   could have used a different one. But that was

13   not enough to -- to give him a copyright.

14   CHIEF JUSTICE ROBERTS: I don't think

15   it's a patent right. I mean, it's the -- it's

16   their particular expression. And you want to --

17   you say the only way for you to say what you

18   want to say in the -- the new material that you

19   provide is to copy -- copy theirs. That's not a

20   -- a patent. That's -- that's copyright.

21   MR. GOLDSTEIN: Ah. Sorry. Our point

22   is this: We have the right to provide a certain

23   functionality to make a computer do something.

24   That right is given to us under Section 102(b).

25   If there were other ways for us to do

1   it, that would be another matter. But, because

2   there is only one way, then there is no

3   copyright protection. But, in all events, even

4   if you took the perspective that copyright looks

5   at the options that were available to Oracle to

6   begin with, clearly, fair use looks at it from

7   the other end of the telescope.

8   And there was enormous creativity that

9   is unleashed by the ability to reuse the

10   declarations --

11   CHIEF JUSTICE ROBERTS: Well, before

12   we --

13   MR. GOLDSTEIN: -- that only --

14   CHIEF JUSTICE ROBERTS: -- before --

15   before you get into fair use, you say that was

16   the only way for you to do it. But, you know,

17   cracking the safe may be the only way to get the

18   money that you want, but that doesn't mean you

19   can do it. I mean, if it's the only way, the

20   way for you to get it is to get a license.

21   MR. GOLDSTEIN: Well, Your Honor, I

22   think then that analogy would help us because,

23   if you get a patent on the safe, you may well be

24   able to keep us out. But, if you write a book

25   about the safe, that is about how to crack

1   safes, that doesn't give you the exclusive right

2   to do it.

3   CHIEF JUSTICE ROBERTS: Well, all

4   right. I mean, you're -- but what about the --

5   the -- the combination to the lock on the safe?

6   Can you copy that just because somebody else has

7   it and that's the only way to get in?

8   MR. GOLDSTEIN: Well, certainly, if

9   you write a book about how to, you know, unlock

10   the combination of something, unlock the

11   combination of a lock, that doesn't give you the

12   exclusive right to the lock.

13   All it does is it shares the knowledge

14   about how to crack safes or open locks. What

15   copyright wants is for people to be able to use

16   that knowledge. And that's what we want here

17   too. The developers --

18   CHIEF JUSTICE ROBERTS: Thank --

19   MR. GOLDSTEIN: -- the developers --

20   CHIEF JUSTICE ROBERTS: -- thank you,

21   counsel. Thank you, counsel.

22   Justice Thomas.

23   JUSTICE THOMAS: Yes. Thank you, Mr.

24   Chief Justice.

25   Mr. Goldstein, you seem to rely quite

 1   a bit on Section 102. Why don't we rely on

 2   Section 101, which is more specific with respect

 3   to computer programs?

 4   MR. GOLDSTEIN: So, Your Honor,

 5   Section 101 tells us that Oracle holds a

 6   copyright in Java SE as a computer program.

 7   Then Section 102(b), what it tells us is that,

 8   okay, that copyright does not extend to any

 9   method of operation in Java SE.

10   And what the merger doctrine tells

11   us -- that's called the idea-expression

12   dichotomy -- and then what the merger doctrine

13   tells us is that if there is only way -- one way

14   to provide the method of operation of Java SE,

15   you cannot get a copyright on that expression.

16   So our point here is that the method

17   of operation of Java SE is the combination of

18   commands by the developers and the declarations

19   in Java SE. If there are no substitutes, if we

20   cannot use anything else, then you would be

21   giving Oracle effectively patent rights by

22   preventing us from reusing the declarations.

23   JUSTICE THOMAS: So at what -- at what

24   point should we determine the merger, whether or

25   not there is merger? When Oracle or Sun

 1   develops this program or when you decide to use

 2   it?

 3   MR. GOLDSTEIN: The latter. And

 4   that's the teaching of Baker versus Selden and

 5   the text of 102(b). What that tells us is that

 6   when you copyright something and you publish it,

 7   you disclose it to the public. Selden disclosed

 8   his system of bookkeeping, the dual entry

 9   system. What the Court said is once that's

10   published, then the public has the right to use

11   it.

12   So too here. Once Oracle published

13   Java SE, people in the public, developers,

14   companies like Google, had the right to create

15   their own versions of it that would provide the

16   same functionality.

17   Then the question was, is there any

18   way to do it without reusing the expression of

19   the original? When, as here, there is not,

20   there is no copyright protection.

21   JUSTICE THOMAS: You know, you could

22   -- someone could argue, though, that, look, if a

23   -- a team -- if a team takes your best players,

24   a football team, that the only way that those

25   players could actually perform at a high level

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 1      is if you give that team your playbook.  I don't
 2      think anybody would say that is -- is right.
 3               MR. GOLDSTEIN:  Yes, sir -- oh, I'm
 4      sorry.
 5               JUSTICE THOMAS:  No, go on.
 6               MR. GOLDSTEIN:  Yeah, our point isn't
 7      that we can't do it at a high level.  Remember,
 8      everyone agrees that we have the right as Google
 9      to write a computer program that provides all
10      the same functionality as Java SE.
11               And in Android, we wrote new and
12      better versions that were more suitable for use
13      in a modern -- modern smartphone.  So it's not
14      like we are trying to take someone's fan base or
15      their football players or anything else.
16               Oracle doesn't want a fan base.  It --
17      it effectively wants prisoners.  It wants the
18      people who used its work, the developers, only
19      to be able to use it with Java SE.  That's not
20      what a copyright gives you.  You don't get a fan
21      base with a computer program the way you do with
22      J.K. Rowling's novels.
23               JUSTICE THOMAS:  Well, actually, my
24      concern was having to turn over the playbook.
25      But let's go to fair use briefly in -- in -- in
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1   the time that I have.

2   How would you distinguish Harper?

3   MR. GOLDSTEIN: Harper & Row is a case

4   in which the district judge made findings, and

5   this Court said when there are established

6   findings and the court, not a jury, is going to

7   resolve fair use. It can be the appellate court

8   or the district court.

9   Here, you have the opposite. You have

10   a general jury verdict. There are no subsidiary

11   findings whatsoever. The jury was asked to and

12   properly instructed to weigh all the evidence

13   and the fair use factors.

14   You can't unpack it in nearly the same

15   way you could with a court in Harper & Row.

16   JUSTICE THOMAS: So should we -- is

17   that because of the fact-finder or because it

18   was a general verdict?

19   MR. GOLDSTEIN: Both. Both of those

20   are critically important here. It's not the

21   court that is assigned the responsibility for

22   deciding fair use under Rule 39(c) and the

23   Seventh Amendment. It is the role, instead, of

24   the jury, and you would have to construe

25   everything in our favor, which the Federal

    1   Circuit disavowed doing.

    2   JUSTICE THOMAS: Thank you.

    3   CHIEF JUSTICE ROBERTS: Justice

    4   Breyer.

    5   JUSTICE BREYER: Well, I have a

    6   question for each side that I'm trying to answer

    7   in my own mind. For you, I'd -- I'd like to ask

    8   this: I write down at the computer, I have a

    9   computer in front of me, and I put

   10   java.lang.math.max(410), okay? And that calls

   11   up a certain program, which you did not copy,

   12   the one it calls up, which is setting the

   13   switches of a computer.

   14   Well, the thing I -- the words I just

   15   spoke also call up a particular program, i.e., a

   16   set of computer switches that will get me to the

   17   program that does the -- you know, that does a

   18   particular thing.

   19   Well, it's a computer program, isn't

   20   it? And you can copyright computer programs.

   21   And so what's the difference between java.lang,

   22   et cetera, which sets switches on the computer,

   23   and any other program that sets switches on the

   24   computer?

   25   MR. GOLDSTEIN: That's our point, Your

1   Honor. And that is --

2   JUSTICE BREYER: I know that's your

3   point. That's why I wanted you to say it

4   clearly enough so I can understand it, which is

5   pretty tough.

6   MR. GOLDSTEIN: Sure. Okay. So there

7   are two parts to these shortcut programs. There

8   is what we call the implementing code that

9   actually does the program. It -- it provides

10   the function there. It will produce the larger

11   of two numbers.

12   Oracle agrees that if there's only one

13   way to write that, we can reuse that

14   implementing code. But it can't explain why the

15   same isn't true for the code that you mentioned,

16   which is the combination of the calls written by

17   the developer and the declarations that appear

18   in Android and Java SE.

19   If there is only one way to do it, and

20   you give someone a copyright on that that's

21   exclusive, then you are saying that person is

22   the only one who can make the computer do the

23   thing, whether it's invoke the implementing code

24   through the call and declaration or actually

25   perform the function of the program through the

1   implementing code.

2   JUSTICE BREYER: I bet there aren't --

3   MR. GOLDSTEIN: Principally --

4   JUSTICE BREYER: -- just one way to do

5   it. Why is there just one way to do it? If you

6   spent enough time and you had the most brilliant

7   computer programmers, don't you think they could

8   devise a system of calling up the Java program,

9   though it might be expensive to do and take a

10   long time, that didn't use the word

11   java.lang.math?

12   MR. GOLDSTEIN: Well, two things:

13   First, why would we have a copyright system that

14   does that, where the only upshot of Oracle's

15   rule that it wants you to -- to adopt is to make

16   computer programming credibly inefficient so

17   that we have fewer creative computer programs?

18   But the second is, no, we -- we

19   actually do have very good computer programmers.

20   And when you use that instruction, math dot --

21   max.math.java.lang, the language itself -- it is

22   a rule of the language that there is only one

23   declaration that will work with it. That is a

24   plain finding of the district court that is

25   uncontested.

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1              JUSTICE BREYER:  Okay.  Thank you.
2              CHIEF JUSTICE ROBERTS:  Justice Alito.
3              JUSTICE ALITO:  Mr. Goldstein, I --
4    I'm concerned that, under your argument, all
5    computer code is at risk of losing protection
6    under 102(b).  How do you square your position
7    with Congress's express intent to provide
8    protection for computer codes?
9              MR. GOLDSTEIN:  So, Your Honor, I
10   think that that is a criticism that's been
11   levied at our kind of pure textualist argument
12   about a method of operation, but it is not a
13   criticism, I think, that's fair of our argument
14   about merger.
15             And that is our argument is strictly
16   limited in that sense to circumstances in which
17   the function that is disclosed, that is here the
18   relationship between the calls and the
19   declarations, can only be written one way.  And
20   it's a -- it's a principle that Oracle concedes,
21   as I mentioned, with respect to the implementing
22   code that actually makes the shortcut programs
23   work, that produces, for example, the larger of
24   two numbers.
25             JUSTICE ALITO:  Well, there have been
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 1      --
 2              MR. GOLDSTEIN:  In that --
 3              JUSTICE ALITO:  -- a lot of questions
 4      already about the merger argument, but how do
 5      you respond to Oracle's argument that you're --
 6      you are arguing in a circle, that there is only
 7      one way to write a declaring code like Oracle
 8      did?
 9              MR. GOLDSTEIN:  Well, that is not what
10      we're trying to do.  We are not -- our analysis
11      isn't circular.  It is by reference to what the
12      developers are trying to do.
13              The developers, it is conceded, have a
14      right to use the commands that they have learned
15      in Java, including the ones that work with Java
16      SE.  When the developers use those commands, we
17      have the right to write a computer that will
18      respond to those commands.  We would happily not
19      reuse the Java SE declarations if we could.  It
20      is that the language only permits us to use
21      those.
22              You could make the same circularity
23      argument about the merger doctrine for anything
24      in English because you could say, well, every
25      word in English, if you get that specific, is
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 1   the only one that has that precise meaning.

 2   But we haven't abandoned the merger

 3   doctrine. What we have said is, if a work

 4   discloses something, as Java SE discloses this

 5   relationship between calls and declarations,

 6   then you have the right to perform that

 7   function, unless somebody wants to go and get a

 8   patent.

 9   JUSTICE ALITO: All right. Let me --

10   let me switch to fair use. What should I do if

11   I think that the purpose and character of the

12   use and the effect on market value here weigh

13   very heavily against you on the fair use issue,

14   that a jury couldn't reasonably find in your

15   favor on those factors?

16   MR. GOLDSTEIN: You should recognize,

17   I think, that those factors are continuums. And

18   so, if you were to say, well, I do think, you

19   know, notwithstanding the jury verdict, that

20   there was some market effect here, and you

21   couldn't -- you'd have to check the box that's

22   saying that there is a market effect, what you

23   have to recognize is that a jury, looking at all

24   the evidence, could reasonably conclude that

25   nonetheless the other fair use factors,

1   including, importantly, the fact that the

2   original material here, the declarations, is

3   barely creative and the fact that it unleashed

4   millions of creative computer programs used by a

5   billion people, that that on the whole, it is

6   not unreasonable for the jury to find fair use,

7   given that it was the jury's responsibility.

8   JUSTICE ALITO: All right. Thank you.

9   CHIEF JUSTICE ROBERTS: Justice

10   Sotomayor.

11   JUSTICE SOTOMAYOR: Counsel, I -- I --

12   I go back to the essence of the question that I

13   think my colleagues are asking, is how do you

14   differentiate between declaring codes and

15   implementing codes? Because you agree -- you

16   agree that you couldn't have copied their

17   implementing code because there are multiple

18   ways of doing that.

19   But you fight the declaring codes

20   because there are multiple ways of declaring as

21   well. Apple has a different way of declaring

22   the same functions. They spent the billions of

23   dollars necessary. Presumably, you could have.

24   And yet, you spent so much time in

25   your brief convincing me that implementing and

1   declaring codes go together in this hand. They

2   merge. How do we draw the line?

3   MR. GOLDSTEIN: You don't. It is

4   actually Oracle that is trying to draw the

5   distinction that you say is not recognized by

6   the statute or common sense.

7   The legal principle that you can reuse

8   computer codes that can only be written one way

9   applies to both declaring code and implementing

10   code. Oracle concedes that if the implementing

11   code could only be written one way, we could

12   reuse it.

13   It cannot explain why it is that --

14   that given that the declaring code will not

15   function if it's written another way, we cannot

16   reuse that. They are trying to draw that line.

17   With respect to Apple, it is true that

18   Apple didn't reuse the Java SE declarations

19   because it wasn't using Java. It did reuse

20   other declarations, as the amicus briefs say.

21   That's like saying merger doesn't apply --

22   JUSTICE SOTOMAYOR: Could I --

23   MR. GOLDSTEIN: -- to something in --

24   JUSTICE SOTOMAYOR: May I -- may I

25   stop you right there? That's the nub of the

1   problem, which is, what gives you the right to

2   use their original work? What -- how do you

3   define "method of operation" so that there's a

4   clean line between that and when you have to

5   create new code?

6   MR. GOLDSTEIN: So --

7   JUSTICE SOTOMAYOR: Like an

8   implementing code.

9   MR. GOLDSTEIN: Sure. So Section

10   102(b), what it tells you is that you can't get

11   a copyright in the functionality of a computer

12   code. And there are so many things listed in

13   Section 102(b), like method of operation,

14   because Congress wanted to be encompassing. You

15   get to copyright none of the functionality.

16   It's the merger doctrine that tells us

17   that if there is only one way to write the

18   computer code that will provide that

19   functionality, then you can't get a copyright,

20   copyright protection. You have to get patent

21   protection.

22   With respect to the implementing code,

23   because there are numerous ways to write the

24   implementing code, as the district court found,

25   we wrote it, millions of lines of it. The only

1   reason that we reused the declaring code -- we

2   would have happily rewritten our own -- is that

3   we had no other choice. We couldn't write a

4   computer program that would respond to the

5   developers' instructions without reusing this

6   limited set of instructions.

7   JUSTICE SOTOMAYOR: My problem with

8   your argument is, what's your definition of

9   "interoperability"? It seems one-directional.

10   You seem to define it as the extent to which

11   existing third-party applications can run on

12   your platform, but not whether apps developed on

13   your platform can run on systems that use Java

14   SE. So it's one way.

15   MR. GOLDSTEIN: No, Your Honor. The

16   --

17   JUSTICE SOTOMAYOR: So could people

18   now copy your -- your -- you now have developed

19   many different packages and platforms and things

20   like that. Can they copy yours now?

21   MR. GOLDSTEIN: They can copy any part

22   of our code, including certainly our interfaces,

23   our declarations, that can only be written this

24   one -- this way.

25   We have interoperability in the fact

 1   that the developers' instructions work with our

 2   methods, our classes, and our packages. It very

 3   frequently is the case that you have, in modern

 4   computer programming, interoperability that

 5   means you have a new software program that comes

 6   in and supplants an older, less superior one,

 7   one that doesn't work nearly as well.

 8   That is actually incredibly important

 9   and what Congress would want, and that is to be

10   able to take the functionality of a computer

11   program, someone else comes along and does it

12   better. It's no surprise that we don't use all

13   of the packages because they don't have anything

14   to do with a modern smartphone. They don't have

15   a GPS function to them.

16   On the other hand, the smartphone

17   doesn't have a computer mouse. There's no

18   reason in the world to think you would reuse all

19   of them. And it would be impracticable given

20   the constraints of a smartphone.

21   JUSTICE SOTOMAYOR: Thank you,

22   counsel.

23   CHIEF JUSTICE ROBERTS: Justice Kagan.

24   JUSTICE KAGAN: Mr. Goldstein, I have

25   to confess to being a little bit surprised or

 1   confused about some of the arguments you're

 2   making this morning. And maybe it's just me and

 3   I don't understand it, but I'm hoping you'll

 4   explain it to me, because, when I read your

 5   briefs, I took you to be making a somewhat

 6   different argument, principally, than the one

 7   you're making today.

 8   I took you to be saying that the

 9   declaring code is unprotected because it's a

10   method of operation, that it's what allows Java

11   programmers to operate the computer, and to be

12   setting forth a pretty flat rule on that -- of

13   -- of that kind.

14   And -- and I don't hear you saying

15   that today. Instead, I hear you saying, you

16   know, the real question is, are there multiple

17   ways of doing the same thing?

18   So are those different arguments? And

19   which one are you making?

20   MR. GOLDSTEIN: They're both different

21   arguments. We're making both of them. I'm

22   focusing on merger. The argument that you

23   mentioned as our lead argument I don't think

24   honestly is.

25   We do have a straight, pure textualist

1   argument that the declaring code is a method of

2   operation because it is the instructions to the

3   developer on how to operate the shortcut

4   pre-written computer program.

5   Today, I have focused on the argument

6   that if you disagree with that and you believe

7   that Section 102(b) instead embodies only the

8   idea-expression dichotomy, then you apply the

9   merger doctrine and you say: Okay, 102(b) says

10   that you can't copyright all the ways of having

11   the method of operation of Java SE.

12   And my point is that's what they're

13   trying to do here. The district court found --

14   JUSTICE KAGAN: And when you say --

15   MR. GOLDSTEIN: -- that the only --

16   JUSTICE KAGAN: Excuse me. Sorry, Mr.

17   Goldstein. But, if -- if -- if -- if that's

18   your test that you're focusing on today, is that

19   essentially the test that comes out of the

20   Second Circuit Altai case? Is there any

21   difference between what you're saying today and

22   -- and -- and what Altai says, which is

23   essentially that we have to figure out how to

24   separate out the expressive elements of

25   something?

1   MR. GOLDSTEIN: Well, that -- that --

2   the Second Circuit does have the abstraction

3   filtration test, and an element of that test is

4   that you take out the elements that are not

5   subject to copyright protection. And merger

6   fits in there.

7   And that is one of the reasons that

8   something, an element of a computer program,

9   would not receive copyright protection is the

10   fact that it merges, that it's the only

11   available form of expression. So it fits within

12   the Second Circuit framework. It just -- it

13   just doesn't supplant it.

14   JUSTICE KAGAN: And if I could go back

15   to something that I think the Chief Justice was

16   asking about, I mean, suppose I'm -- I'm -- I'm

17   sitting in a mathematics class and the professor

18   says: Do a proof of -- of -- of something or

19   other. And, you know, it turns out that 20

20   people in this mathematics class actually come

21   up with more than one proof, and some are better

22   than others, you know, some are elegant and some

23   are less elegant.

24   So there are more than one way of

25   proving whatever proposition there is. How do

 1   we deal with that? I would think that that's

 2   pretty analogous to the situation here, that

 3   there are more than one way and Oracle happened

 4   to come up with a particularly elegant one.

 5   MR. GOLDSTEIN: It just depends, Your

 6   Honor, on what the "it" is. A computer program

 7   works in a very technical and specific way, and

 8   that is someone, here, the developer, will type

 9   something into the computer. It will put in --

10   that person will put in particular information.

11   And the question is, how is it that

12   you are going to write a computer program that

13   recognizes what they're going to say and

14   responds appropriately?

15   And if you say that you can get a

16   copyright over the only computer code that will

17   listen to -- that will understand the proof,

18   right, if there's only one computer program that

19   will look at students' proofs and understand

20   them, if you give someone a copyright on that,

21   you've given them a patent on it because no one

22   else can make a computer do that particular

23   thing.

24   And Section 102(b) is extremely

25   granular. It doesn't ask the big picture

1   question: Could you generally find the larger

2   of two numbers or prove something? It gets way

3   down into the details.

4   You cannot get copyright protection

5   with respect to any method of operation. This

6   is plainly the method of operating Java SE.

7   JUSTICE KAGAN: Thank you, Mr.

8   Goldstein.

9   CHIEF JUSTICE ROBERTS: Justice

10   Gorsuch.

11   JUSTICE GORSUCH: Good morning, Mr.

12   Goldstein. If -- if I understand the

13   conversation so far, you are moving past, rather

14   rapidly, the -- the primary argument in your

15   brief that the code just simply isn't

16   copyrightable.

17   And I -- I -- I think that's probably

18   a wise move given the fact that 101 says

19   computer programs, including statements or

20   instructions, in order to bring about a certain

21   result, may be copyrighted.

22   We might not think otherwise that it

23   should be, but there it is. And, normally, the

24   -- the specific instruction there in 101 would

25   govern the more general idea-expression

 1   dichotomy in 102.

 2   So am I right, that we can move past

 3   that rather rapidly?

 4   MR. GOLDSTEIN: Well, our main

 5   argument actually is the merger doctrine, but

 6   it's not the case that --

 7   JUSTICE GORSUCH: So I take that as a

 8   yes. I'll be honest with you.

 9   MR. GOLDSTEIN: Well, I was going to

10   -- sorry.

11   JUSTICE GORSUCH: So, if we're moving

12   straight on to the merger doctrine, there, I

13   guess I'm stuck in a similar place as Justice

14   Kagan, which is the argument strikes me very

15   much me as I wish to share the facilities of a

16   more successful rival because they've come up

17   with a particularly elegant or efficient or

18   successful or highly adopted solution in the

19   marketplace, and -- and ride on -- on -- on

20   their innovation.

21   What do we do about the -- the fact

22   that the other competitors, Apple, Microsoft,

23   who I know is one of your amici, have, in fact,

24   been able to come up with phones that work just

25   fine without engaging in this kind of copying?

1   MR. GOLDSTEIN: Well, everyone agrees

2   that every platform, including Java SE, actually

3   does what we talk about, which is re-implement

4   prior languages or prior platforms.

5   Apple and Microsoft use different

6   languages entirely. It's like saying we can't

7   have merger in English because someone could

8   write something in French.

9   The rule that Oracle wants is

10   fundamentally, you talk about an essential

11   facility, is something that has a real-world

12   analog, again, in an exclusive right like a

13   patent.

14   What Congress said is that you can

15   have the exclusive right to the words on the

16   page, the actual computer code, but not to what

17   the computer does.

18   JUSTICE GORSUCH: Isn't it --

19   MR. GOLDSTEIN: Oracle wants to --

20   JUSTICE GORSUCH: -- isn't it -- isn't

21   it pretty difficult to say that this is an

22   essential facility-type problem when -- when

23   others have managed to -- to innovate their way

24   around it?

25   MR. GOLDSTEIN: Ah, if -- if this was

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 1    antitrust law and an essential facility test,

 2    then perhaps.  What Section 102(b) tells us is

 3    that you get the -- you can't have an exclusive

 4    right to inessential facilities.  It doesn't say

 5    you can get a copyright with respect to a method

 6    of operation so long as it's really unimportant

 7    or a system that's, you know, easy to work

 8    around.

 9              JUSTICE GORSUCH:  I accept that, but

10    if -- if -- if -- if we're worried about ideas

11    and expressions merging, and -- and others have

12    been able to accomplish the task without

13    reliance on what -- what you might claim to be

14    the essential facility, where -- where do we

15    stand?

16              MR. GOLDSTEIN:  We -- we -- we're

17    misunderstanding then what the task is.  If the

18    task is at a high level of generality, as you

19    say, an idea of just being able to create a

20    phone, fair enough.  But that is not the test.

21              The test is look at the actual

22    copyrighted work and find its methods of

23    operation.  Inside there, in Java SE, you will

24    find this relationship between the declarations

25    and the developers' commands.
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1   That is something, a function in the

2   computer program, that you cannot get a

3   copyright with. In any event, you would still

4   look to the jury's fair use verdict, I think,

5   very, very, very plainly, given that the jury

6   heard all these debates about the relationship

7   between Java SE and Android and concluded on the

8   whole, as was its responsibility, that this was

9   a fair use.

10   JUSTICE GORSUCH: Thank you.

11   CHIEF JUSTICE ROBERTS: Justice

12   Kavanaugh.

13   JUSTICE KAVANAUGH: Thank you, Mr.

14   Chief Justice.

15   And good morning, Mr. Goldstein.

16   To the extent you're still making the

17   method of operation argument, the other side and

18   the solicitor general say that declaring code is

19   a method of operation only in the same sense

20   that computer programs as a whole are methods of

21   operation and that, therefore, your method of

22   operation argument would swallow the protection

23   for computer programs.

24   Your response to that?

25   MR. GOLDSTEIN: Is that declaring code

1   does something very distinct in computer code,

2   and that is it tells -- and this is Oracle's own

3   point -- it is unique in that it tells the

4   outside developer what to do.

5   The developer looks at the declaring

6   code and then knows how to operate the shortcut

7   pre-written programs. That is, it tells someone

8   else how to operate the computer program. That

9   is absolutely unlike any other code.

10   JUSTICE KAVANAUGH: On your merger

11   argument, one concern that has been raised

12   already is the timing issue. Another concern

13   that I want you to respond to is that it seems

14   to define the relevant idea in terms of what you

15   copy. You're not allowed to copy a song just

16   because it's the only way to express that song.

17   Why is that principle not at play

18   here?

19   MR. GOLDSTEIN: Because we're not

20   defining merger self-reflectively. We are not

21   saying, I want to copy these declarations

22   because I like these declarations.

23   We're saying, I have to reuse these

24   declarations because I'm trying to respond to

25   commands from other people. The developers are

1   writing something, in Justice Breyer's

2   hypothetical, max, math, java.lang, again, not

3   very creative, inspired by the declarations.

4   And when they do write that, I have to

5   be able to write a computer program, and Oracle

6   concedes I can write a computer program that

7   does those things. So I -- it is, in the sense

8   of Baker versus Selden teaches that if you have

9   a copyrighted work and it shows the public how

10   to do something, then the public can do it.

11   And if they can only do it by using

12   part of a copyrighted work, that part does not

13   get copyright protection.

14   JUSTICE KAVANAUGH: One of the points

15   in some of the amicus briefs, and I want to

16   compliment the briefing of the parties and all

17   the amicus briefs, which have been enormously

18   helpful, of the 83 computer scientists is that

19   the sky will fall, in essence, if we rule

20   against you in this case, threaten significant

21   disruption.

22   One question I had about that, though,

23   is the Federal Circuit ruled in 2014, this Court

24   denied cert in 2015 on the first issue. I'm not

25   aware that the sky has fallen in the last five

1   or six years with that ruling on the books.

2   I know it's different if we rule here,

3   but can you respond to that?

4   MR. GOLDSTEIN: Absolutely. After the

5   copyrightability ruling, it was entirely open

6   that we would prevail on fair use, and we did.

7   We won the fair use trial.

8   And that went up to the Federal

9   Circuit. And when the Federal Circuit did rule

10   against us, then the Court granted cert. I

11   would not then say the representations of not

12   only the country's leading computer scientists

13   but the software industry itself, because the

14   premise is not in dispute.

15   Interfaces have been reused for

16   decades. It has always been the understanding

17   that this, you know, purely functional,

18   non-creative code that is essentially the glue

19   that keeps computer programs together could be

20   reused, and it would upend that world to rule

21   the other way.

22   JUSTICE KAVANAUGH: Thank you.

23   CHIEF JUSTICE ROBERTS: Mr. Goldstein,

24   would you like to take a minute to wrap up?

25   MR. GOLDSTEIN: Thank you, sir.

1   I want to address the argument that it

2   is sufficient that Google could write new

3   declarations that would require developers to

4   learn new instructions and that we're

5   effectively just stealing this efficient way of

6   doing it.

7   The sole effect of Oracle's rule would

8   be to make the creation of innovative computer

9   programs less efficient. That would turn the

10   Copyright Act on its head. If anything, the

11   declarations so lack creativity that they

12   deserve the least copyright protection.

13   There's no practical or textual basis

14   for that theory. Connecting the developers'

15   commands is essential to the method, without

16   which they're worthless. By claiming the

17   exclusive right to the declarations function,

18   Oracle is inevitably asserting, as I said, a

19   patent right in order to insulate itself from

20   competition.

21   Textually, Section 102(b) provides

22   that copyright does not extend to any method of

23   operation that is embodied in Java SE. There's

24   no exception for the methods for which there are

25   possible substitutes.

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 1                 Saying that the developers could use
 2      different commands is just another way of saying
 3      they could use a different method of operation,
 4      and that would be in conflict with Baker versus
 5      Selden.
 6                 Finally, the argument proves too much
 7      because it would apply equally to the
 8      implementing code.  Developers don't have to use
 9      the pre-written programs at all.  They could
10      just write their own computer code from scratch.
11      It would just be less efficient and no one would
12      be --
13                 CHIEF JUSTICE ROBERTS:  Thank you,
14      Mr. Goldstein.
15                 Mr. Rosenkranz.
16                 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ
17                     ON BEHALF OF THE RESPONDENT
18                 MR. ROSENKRANZ:  Thank you, Mr. Chief
19      Justice, and may it please the Court:
20                 Google's whole argument this morning
21      is code is different.
22                 Now a few basic legal principles and
23      concessions control the outcome of this case.
24                 Legal principle 1:  Congress defined
25      literary work to include software and granted
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         1   copyright protection as long as the code is

         2   original. Google conceded Oracle's code is

         3   original. That's the end of the question.

         4   Google asks this Court to carve out

         5   declaring code, but Congress rejected the very

         6   carveout in multiple ways, including in its

         7   definition of computer program and by not

         8   including Google's carveout among the

         9   limitations in Section 117.

        10   Legal principle 2: This Court held in

        11   Harper and in Stewart that a superseding use is

        12   always unfair as a matter of law. No court has

        13   found fair use or upheld a fair use verdict

        14   where a copyist copied so much valuable

        15   expression into a competing commercial sequel to

        16   mean the same thing and serve the same purpose

        17   as the original. Google conceded the purpose

        18   and the meaning are the same. That's the end of

        19   Question 2.

        20   No one else thought that innovating

        21   required copying Sun's code without a license.

        22   As Justice Alito notes, Apple and Microsoft did

        23   not copy to create their competing platforms.

        24   Neither did others who wrote competing platforms

        25   in the Java language.

 1   There was and still is a huge market

 2   for declaring code. Other major companies like

 3   IBM and SAP were paying a lot of money to

 4   license just the Sun declaring code precisely

 5   because it was created. And throughout this

 6   litigation, Google never denied this.

 7   If this Court holds that a jury may

 8   conclude that copying declaring code is fair, it

 9   will encourage copying, create legal

10   uncertainty, and decimate the business model

11   which a lot of companies depend on, undermining

12   the very incentives copyright was designed to

13   promote.

14   CHIEF JUSTICE ROBERTS: Mr.

15   Rosenkranz, let's say you want to open a

16   restaurant. You've got a great new chef. He's

17   got great new dishes. And you say: Well, we've

18   got to figure out what the menu should look

19   like. You know, of course, you're going to

20   have, you know, appetizers first, then entrees,

21   and then desserts. Now you shouldn't have to

22   worry about whether that organization is

23   copyrighted.

24   And I think Mr. Goldstein is saying

25   that that's what's going on -- on here. Every

1   restaurant organizes its menu that way, and you

2   don't want to discourage people from opening it

3   because they're going to have to spend their own

4   time trying to figure out what the menu should

5   look like.

6   Why isn't that exactly what Google is

7   saying here?

8   MR. ROSENKRANZ: Well, Your Honor,

9   this will be a constant theme, I think. It's

10   like there's an app for that. There's a

11   doctrine for that, two, actually.

12   First, for the -- for the menu,

13   there's standard fare. If it's a standard way

14   of doing things, it is not protected, or it's

15   unoriginal by your own description.

16   What we've got here is very different.

17   It's not a menu just saying here are apps and

18   here are dinner plates with standard

19   descriptions that everyone uses of those apps

20   and dinner plates. We fill the blanks in 30,000

21   times over, and each item had its own

22   description that no one else was using.

23   CHIEF JUSTICE ROBERTS: Well, you say

24   that they did have a choice; in other words,

25   your work did not leave them with no -- no

1   option. Well, what choice did they have without

2   having to spend billions of dollars, which would

3   be wasteful and impede the development of the

4   high-tech business?

5   MR. ROSENKRANZ: Oh, my goodness, Your

6   Honor, so -- so without spending the billions of

7   dollars? Microsoft and -- and Apple both spent

8   billions of dollars creating their competing

9   platform. That's exactly what the Copyright Act

10   requires.

11   The Copyright Act does not give Google

12   a pass just because it would be expensive to

13   recreate our expression.

14   CHIEF JUSTICE ROBERTS: Well,

15   Mr. Goldstein --

16   MR. ROSENKRANZ: The Copyright --

17   CHIEF JUSTICE ROBERTS: -- Mr.

18   Goldstein says the most efficient, the best way

19   to do it, the way to keep programmers doing new

20   things, rather than old things, is to use Java.

21   MR. ROSENKRANZ: Right, Your Honor.

22   In -- in -- in no other context would it be

23   appropriate to be asking whether there's either

24   unprotected -- whether the work is unprotected

25   or whether there's fair use by saying that the

 1   audience has learned the words by heart.

 2   I mean, if -- if -- if someone wanted

 3   to write a book that preserved -- that

 4   reproduced the 11,000 best lines of Seinfeld,

 5   they couldn't do it by claiming but -- but we

 6   had to do it because those are the lines that

 7   everyone knows. And the --

 8   CHIEF JUSTICE ROBERTS: Thank you,

 9   counsel. Thank you.

10   Justice Thomas.

11   JUSTICE THOMAS: Yes, thank you,

12   Mr. Chief Justice.

13   Mr. Rosenkranz, in your brief, you

14   seem to be arguing for more than the declaring

15   code. If I'm right there, do we need to decide

16   more than that?

17   MR. ROSENKRANZ: No, Your Honor. All

18   this Court has to decide is whether the

19   declaring code, for purposes of

20   copyrightability, whether the declaring code was

21   original -- it was -- and for purposes of fair

22   use, whether it was fair to copy the declaring

23   code.

24   Our point, I think, that you're noting

25   in the brief is the point that several Justices

1   made this morning. You can't distinguish

2   declaring code from implementing code, certainly

3   not in the way that Congress defined the code.

4   There's no principle distinguished --

5   distinction and -- and no distinction that

6   courts are capable of drawing. As Justice

7   Breyer noted, code is code. Declaring and

8   implementing code both consist of "words,

9   numbers, or other numerical symbols within the

10   definition of literary work." Both operate a

11   computer.

12   Mr. Goldstein says that his rule is

13   what Congress would have wanted, but Congress

14   rejected the exact line that Google proposed

15   when it defined "computer programs" in Section

16   101 as code to be used "directly or indirectly"

17   to bring about a result.

18   JUSTICE THOMAS: You argue that -- you

19   seem to argue, in any case, that Google's use

20   was not transformative because the use of

21   declaring code operates in Android the same way

22   it operates in Java.

23   What would, in your way of thinking,

24   transformative look like in the context of a

25   computer code?

 1   MR. ROSENKRANZ: Well, Your Honor, in

 2   -- in the context of computer code, the Ninth

 3   Circuit in both Sega and Sony versus Connectix

 4   gave a great example of transformative use.

 5   The code was never incorporated into a

 6   competing product. Instead, it was used to

 7   study, to figure out how the machine worked, and

 8   that was a transformative use.

 9   In order to preserve the author's

10   statutory right to create derivative works, this

11   Court has held a transformative use must alter

12   the original work's expression, meaning, or

13   message. Google did not do that.

14   It concedes that every line of code it

15   copies -- copied serves the same purpose and

16   communicates the same thing. And adapting our

17   code for the supposedly new smartphone

18   environment does not change the meaning and is

19   no more transformative than adapting a short

20   story into a movie.

21   What Google did is the epitome of

22   commercial superseding use, what Campbell

23   describes as "using a work to get attention or

24   to avoid the drudgery of working up something

25   fresh."

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1              CHIEF JUSTICE ROBERTS:  Thank you,
2    counsel.
3              Justice Breyer.
4              JUSTICE BREYER:  All right.  Please
5    assume with me the following:  Assume that the
6    -- what you read, the computer -- computer
7    programs which do something, after all, are
8    copyrightable, but then it says methods of
9    operation are not, whether they're computer
10   programs or not.
11             The problem for us is, is this more
12   like Baker v. Selden, where they said the
13   accounting is not, it's a method of operation?
14   Or is it more like an ordinary computer program?
15             All right.  Now what I got out of
16   reading through this very good briefing is,
17   look, Java's people divided the universe of
18   tasks, of which there are billions, in a certain
19   way.  All the things that tell the computer to
20   do one of those things, we'll do.  But that
21   which tells the computer which to do, that's the
22   declaration.
23             Here is what it's like.  It's like, as
24   Judge Boudin said, the QWERTY keyboard.  You
25   didn't have to have a QWERTY keyboard on
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 1   typewriters at the beginning, but, my God, if

 2   you let somebody have a copyright on that now,

 3   they would control all typewriters, which really

 4   has nothing to do with copyright.

 5   Or it's like switchboards on

 6   old-fashioned telephone systems. You could have

 7   done it in 1,000 ways. But, once you did it,

 8   all those operators across the world learned

 9   that system, and you don't want to give a

10   copyright holder a monopoly of -- hmm --

11   telephone systems.

12   Or it's like, to use the Chief

13   Justice's example, a chef who figures out

14   brilliant ways of mixing spices and then putting

15   the spices for this and that in a certain order

16   on a shelf, and then he writes something that

17   tells you which shelf to go to and which shelf

18   to pick out and which spice to pick out for

19   which dish.

20   Now all those things are somewhat

21   ordinary programs, but they also are doing

22   something. They're giving you an instruction as

23   to how to call up those programs that reflect

24   Java's organization.

25   And at this point in time, it's really

 1   tough, just like the QWERTY keyboard, to go

 2   backwards, and very bad consequences will flow

 3   if you don't see that distinction. Okay?

 4   Long question, but that's what I got

 5   out of their method of operation argument. And

 6   I wanted you to say what you want about that.

 7   MR. ROSENKRANZ: Thank you, Your

 8   Honor. So I'll -- I'll answer your several

 9   questions, I think, with really two answers.

10   The first is this is not like the

11   QWERTY keyboard. There was never anything

12   expressive in QWERTY. Semi, L, K, J, H doesn't

13   mean anything to anyone. It was purely

14   mechanical. That is true of all of your

15   examples.

16   But -- but you're -- you get -- you

17   got right to the nub of it, Justice Breyer, by

18   asking about Baker. In Baker, the author Selden

19   published a book describing a bookkeeping

20   system. Selden tried to extend his copyright in

21   the description to block everyone else from

22   using that system.

23   His book attached some ledger forms

24   that were necessary to use the system. Baker's

25   forms were not even the same as Selden's, but

     1   Selden sued for copyright infringement because

     2   Baker's forms used Selden's system, which was to

     3   say they just depicted debits and credits on a

     4   single page, and this Court said you can't

     5   monopolize lined paper.

     6   CHIEF JUSTICE ROBERTS: Thank you,

     7   counsel.

     8   Justice Alito?

     9   JUSTICE ALITO: Mr. Rosenkranz, can I

    10   ask you about the -- the standard of review

    11   question on fair use? The jury returned a

    12   verdict on fair use, and Oracle moved for

    13   judgment as a matter of law.

    14   Why wasn't the Federal Circuit

    15   required to apply the Rule 50 standard and ask

    16   whether the evidence presented at trial viewed

    17   in the light most favorable to Google would have

    18   been sufficient as a matter of law to support

    19   the jury's fair use verdict?

    20   MR. ROSENKRANZ: Well, Your Honor, so

    21   I'll -- I'll -- I'll first say that that is, in

    22   fact, what the Federal Circuit did. The court

    23   of appeals performed the "no reasonable jury

    24   standard" that Google now urges.

    25   The court said "no reasonable juror"

1   five times, at Petition Appendix 27 to 28, 42,

2   46, 51, and 52. Having found that Factors 1 and

3   4 strongly favored Oracle and that Google's use

4   was superseding, there was no other reasonable

5   conclusion but that Google's use was an unfair

6   use.

7   So -- so -- but then I'll circle back

8   to the first half of your question. The

9   standard of review is de novo, by which I mean

10   it respects the jury's findings of historical

11   fact but then allows the courts, as courts have

12   been doing for decades, usually on summary

13   judgment, to decide what legal conclusions to

14   draw from those facts.

15   De novo is the right standard because

16   resolving fair use requires primarily legal

17   work. In an area of law where stability is

18   paramount and where precedents matter, as this

19   Court's fair use precedents illustrate, fair use

20   cases typically turn on disputes about the legal

21   standard.

22   JUSTICE ALITO: There are some --

23   MR. ROSENKRANZ: What it didn't --

24   JUSTICE ALITO: -- there are some

25   mixed questions of fact and law that are

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 1      submitted to juries, and -- and that was -- that
 2      is what was done here, wasn't it, under fair
 3      use, so was that an error?
 4                MR. ROSENKRANZ:  No, Your Honor.  I --
 5      I -- I think what this Court has done under fair
 6      use is de novo review.  Harper was a -- was a de
 7      novo case.  This Court said explicitly that it
 8      was not sending it back to the district court to
 9      resolve anything, that this Court could decide,
10      "an appellate" -- and I'll quote here, "an
11      appellate court may conclude, as a matter of
12      law, that the challenged use does not qualify as
13      fair use once it has the factual record and
14      resolves all factual -- subsidiary factual
15      questions in favor of the fact-finder."
16                Now note there were numerous disputes
17      in Harper, including how you weigh various
18      factors, questions like the value of news
19      reporting weighed against the original author's
20      derivative work rights.
21                I grant you that a lot of mixed
22      questions are more factual.  But the stability
23      the judicial review provides is essential for
24      fair use because it has constitutional
25      implications.
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1   CHIEF JUSTICE ROBERTS: Thank you,

2   counsel.

3   Justice Sotomayor.

4   JUSTICE SOTOMAYOR: Counsel, at the --

5   in your beginning statement, you had the sky

6   falling if we ruled in favor of Google.

7   The problem with that argument for me

8   is that it seems that since 1992, and Justice

9   Kagan mentioned the case, the Second Circuit

10   case, a Ninth Circuit case, an Eleventh Circuit

11   case, a First Circuit case, that a basic

12   principle has developed in the case law, up

13   until the Federal Circuit's decision.

14   I know there was a Third Circuit

15   decision earlier on in the 1980s. But the other

16   circuits moved away from that. They and the

17   entire computer world have not tried to

18   analogize computer codes to other methods of

19   expression because it's sui generis.

20   They've looked at its functions, and

21   they've said the API, the Application

22   Programming Interface, of which the declaring

23   code is a part, is not copyrightable.

24   Implementing codes are.

25   And on that understanding, industries

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 1      have built up around applications that know they

 2      can -- they can copy only what's necessary to

 3      run on the application, but they have to change

 4      everything else.  That's what Google did here.

 5      That's why it took less than 1 percent of the

 6      Java code.

 7              So I guess that's the way the world

 8      has run in every other system, whether it's

 9      Apple's desktop or Amazon's web services,

10      everybody knows that APIs are not -- declaring

11      codes are not copyrightable.  Implementing codes

12      are.

13              So please explain to me why we should

14      now upend what the industry has viewed as the

15      copyrightable elements and has declared that

16      some are methods of operation and some are

17      expressions.  Why should we change that

18      understanding?

19              MR. ROSENKRANZ:  Well, Your Honor, I

20      -- I beg to differ with the understanding in --

21      of the lower court cases.  Not a single case has

22      ever said that you can copy this vast amount of

23      code into a competing platform to use for the

24      same purpose.

25              The Third Circuit, the First Circuit,
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         1   the Ninth Circuit, the Tenth Circuit, they all

         2   agree with that. No one draw that -- drew that

         3   distinction between implementing code and

         4   declaring code. You will not find a single case

         5   that does this.

         6   Google is just wrong that the success

         7   of the software industry depends on unlicensed

         8   copying. Major corporate entities were paying a

         9   lot of money just to license our declaring code.

        10   Google and its amici point to non-record

        11   examples that involved either no copying at all,

        12   licensed copying, or copying of elements that

        13   were so uncreative that no one would say they

        14   were protectable.

        15   CHIEF JUSTICE ROBERTS: Thank you,

        16   counsel.

        17   Justice Kagan.

        18   JUSTICE KAGAN: Mr. Rosenkranz, as --

        19   as I understand it, there are two features of

        20   your declaring code that you think merit

        21   copyright. And I want to make sure I'm -- I'm

        22   -- I'm right on this first.

        23   The -- the first feature, and this is

        24   pretty basic, is that we need some way of

        25   connecting a programmer's inputs, whatever they

 1   happen to be, some way of connecting those

 2   inputs to implementing code.

 3   And then the second feature is that

 4   there needs to be a way to organize those

 5   inputs, those calls, into various classes and

 6   packages.

 7   So one is like the trigger and one is

 8   the method of organization. Is that right? Is

 9   that the thing that you're saying merits

10   copyright?

11   MR. ROSENKRANZ: No, Your Honor.

12   There are two things that we say merit copyright

13   protection.

14   The first is the manner in which we

15   describe each function, each -- each method.

16   That is itself creative. And it's -- each line

17   of declaring code actually teaches the user what

18   that method does, how it's used, how it relates

19   to others, and what the result will be.

20   The second piece is the overall

21   structure, sequence, and organization. Those

22   are the two things that --

23   JUSTICE KAGAN: Okay. So let's start

24   with that, the taxonomy, the structure, the

25   organization, and we can, if we have time, get

1   back to the other.

2   I'll give you an example that's

3   similar to one that the Chief Justice used, but

4   I think you won't be -- you won't be able to

5   answer in quite the same way.

6   Suppose I own a grocery store and I

7   come up with a really terrific way of organizing

8   all my fresh produce, all my fruits and

9   vegetables, into these categories and

10   sub-categories, very intuitive for the shopper.

11   And this is not the standard way. So it's

12   different from the Chief Justice's hypothetical

13   in that way. It's novel. And it's great. And

14   a rival grocery store, all rival grocery stores

15   want to copy it.

16   Do I have a copyright claim?

17   MR. ROSENKRANZ: Your Honor, you don't

18   have a copyright claim in anything that isn't

19   set down in writing. So your hypothesizing that

20   you've put down, let's say, in outline form the

21   way of organizing.

22   I'd say maybe. I mean, there -- there

23   would be a lot of fair use questions about that,

24   but this is worlds different from what --

25   JUSTICE KAGAN: So why is it worlds

          1   different? I mean, it seems to me that there

          2   are all kinds of methods of organization in the

          3   world. You know, whether it's the QWERTY

          4   keyboard or whether it's the periodic table or

          5   whether the system of kingdoms and classes and

          6   phyla and so forth that animals are organized

          7   into.

          8   I mean, there are a thousand ways of

          9   organizing things, which the first person who

         10   developed them, you're saying, could have a

         11   copyright and then prevent anybody else from

         12   using them.

         13   MR. ROSENKRANZ: Well, so, Your Honor,

         14   two answers. First, let's not forget that the

         15   declaring code itself would be -- is -- is

         16   enough volume to take up 600 pages in the Joint

         17   Appendix. So the declaring code itself gets

         18   protection.

         19   But the answer is the relationships of

         20   the methods, classes, and packages, it's not --

         21   it's not just the most intricate hierarchy

         22   you've ever seen. If you look at one package on

         23   page 9, you will see it, and multiple pages of

         24   the supplemental appendix. But the

         25   relationships cross from one package to the

1   next, from one class to the next.

2   It is extraordinarily intricate in a

3   way that does deserve copyright protection, the

4   same way the plot of a novel --

5   JUSTICE KAGAN: Thank you,

6   Mr. Rosenkranz.

7   CHIEF JUSTICE ROBERTS: Justice

8   Gorsuch.

9   JUSTICE GORSUCH: Good morning,

10   counsel.

11   Your -- your colleagues on the other

12   side suggest that the Federal Circuit did not

13   give sufficient deference to the jury's finding

14   of fair use. And I'd like to follow up on that

15   and some of Justice Alito's questions.

16   Often, you know, fact-specific

17   questions like fair use that are multifactor

18   balancing kind of inquiries are -- are reviewed

19   for substantial evidence in the record, and that

20   is not what the Federal Circuit here did,

21   particularly when -- when the questions are kind

22   of novel and yet -- and legal rules have yet to

23   crystalize and form around them. Why -- why --

24   why should the Federal Circuit not have used

25   that traditional standard of review?

1   MR. ROSENKRANZ: Well, Your Honor, so

2   -- so my first answer is the same as the answer

3   to Justice Gorsuch. It actually did when it was

4   conducting its analysis at those page numbers

5   that I mentioned.

6   JUSTICE GORSUCH: Well, then --

7   then -- I'm sorry to interrupt, but let's just

8   suppose that's not how I read the Federal

9   Circuit's decision. Let's suppose I -- I agree

10   with you -- I think you've said elsewhere that

11   it properly reviewed it de novo.

12   Why -- why should -- why shouldn't we

13   remand the case for consideration of it under --

14   under a more deferential standard of review

15   normally applied to jury findings and general

16   verdicts?

17   MR. ROSENKRANZ: Well, Your Honor,

18   this Court certainly could if it believes that

19   that's not what the Federal Circuit did. But I

20   would say, in addition to the point that I made

21   earlier about the need for clear rules for the

22   business, I would also say in terms of

23   institutional confidence, this is a question

24   that courts have primacy.

25   I mean, the key difference between us

1   and -- and Google is that it thinks that only a

2   jury can balance the factors. Now, that can't

3   be right. That would mean that even if parties

4   stipulate on all the historical facts, a court

5   cannot grant summary judgment.

6   But granting summary judgment is what

7   courts do all the time. Professor Beebe

8   identifies over -- over a hundred fair use cases

9   decided by courts on summary judgment in a

10   30-year time span. Google could find only five

11   cases that even went to a jury in a similar

12   30-year span.

13   Under Google's approach -- approach,

14   summary judgment would be nearly impossible

15   because weighing would be a fact question for

16   every jury.

17   JUSTICE GORSUCH: Thank you, counsel.

18   CHIEF JUSTICE ROBERTS: Justice

19   Kavanaugh.

20   JUSTICE KAVANAUGH: Thank you, Chief

21   Justice.

22   And welcome back, Mr. Rosenkranz. I

23   just want you to follow up on two of my

24   colleagues' questions.

25   First, any more you want to say about

 1   Justice Breyer's QWERTY keyboard question? And,

 2   second, Justice Sotomayor's question about

 3   settled expectations and -- and I would add the

 4   83 computer scientists' concern about

 5   threatening significant disruption. If you

 6   could just follow up on those two, and I have no

 7   further questions after that.

 8   MR. ROSENKRANZ: Thank you, Justice

 9   Kavanaugh.

10   Yes, I -- let me just finish the

11   answer on Baker. I was saying that this case

12   would be like Baker if we were trying to block

13   others from using their own package, class,

14   method, structure, to organize their own

15   prewritten programs.

16   But Sun wrote its own specific layout

17   and filled in the blanks 30,000 times over. We

18   seek to protect only that fully realized

19   expression. And others are free to write and

20   organize their own prewritten programs however

21   they see fit, as long as they don't copy ours.

22   And to answer the second half about

23   settled expectations -- and we've heard dire

24   predictions from Google about the future of

25   software innovation, but two different

         1   administrations would not be supporting us if

         2   our position were a threat to innovation.

         3   The software industry rose to world

         4   dominance since the 1980s because of copyright

         5   protection, not unlicensed copying. And as --

         6   as you pointed out earlier, Justice Kavanaugh,

         7   the -- the sky hasn't fallen in six years since

         8   the court of appeals' first decision have

         9   brought new bursts of innovation and

        10   interoperability. In that time frame, we've

        11   seen the explosion of interoperability, cloud

        12   computing, 5G, machine -- machine learning, and

        13   autonomous vehicles.

        14   I can tell you two things that will

        15   kill software innovation. The first is change

        16   the rules under which the industry has thrived

        17   for 40 years and substitute a rule that what is

        18   fair to copy is what every jury decides as a

        19   matter of public policy. And the second is take

        20   away the incentive to write original code.

        21   CHIEF JUSTICE ROBERTS: Thank you,

        22   counsel. Do you want to take a minute to wrap

        23   up?

        24   MR. ROSENKRANZ: Yes, Mr. Chief

        25   Justice. Thank you.

1   Let me -- let me just say -- say two

2   things. The first is that ruling for Google

3   will decimate the incentive to create

4   high-quality user-facing declaring code, close

5   the code that the amici on both sides insist is

6   essential for the industry to survive.

7   That will hurt app developers and the

8   industry in the long run because who will invest

9   the excruciating time it takes to refine code

10   from the passable to the masterful if all of it

11   can be stolen? Big companies are paying lots of

12   money right now to license declaring code. No,

13   Justice Sotomayor, it is simply not true that

14   they're all paying for nothing because it's all

15   unprotected.

16   The whole market, that whole market,

17   will be gone with the stroke of a pen. Congress

18   passed the Copyright Act to further the

19   long-term incentive to create, not short-term

20   expedience to copy.

21   Ruling for Google will also

22   destabilize copyright law. Our rule protects

23   original code. It's a simple rule. It comports

24   with traditional copyright principles.

25   Google's rule that code can be copied

1   whenever necessary for a user to bring about a

2   result is poorly defined and will doom courts

3   and the industry to decades of uncertainty.

4   CHIEF JUSTICE ROBERTS: Thank you,

5   counsel.

6   MR. ROSENKRANZ: For this reason, this

7   Court should affirm.

8   CHIEF JUSTICE ROBERTS: Mr. Stewart.

9   ORAL ARGUMENT OF MALCOLM L. STEWART

10   FOR THE UNITED STATES, AS AMICUS CURIAE,

11   SUPPORTING THE RESPONDENT

12   MR. STEWART: Thank you, Mr. Chief

13   Justice, and may it please the Court:

14   In the mid 1970s, Congress established

15   a national commission to study problems related

16   to copyright law and computer code. And in 1978

17   the Commission issued its report which is known

18   as the CON2 report. It recommended that

19   computer code continue to be eligible for

20   copyright protection.

21   And the central justification it gave

22   was that computer code is much more expensive to

23   draft than it is to copy. And, consequently, if

24   potential authors of computer code knew that

25   their works could be freely copied, there would

1   be a pronounced disincentive to creation.

2   And, of course, it's the creation --

3   it's the preservation of those economic

4   incentives to create that is the core

5   justification for having copyright protection in

6   the first place.

7   Here Google's core argument is that

8   once the app developers have -- have learned the

9   calls, it would be inefficient to make them

10   learn new calls in order to invoke new

11   declarations.

12   But in a wide variety of

13   circumstances, once a work has been created, if

14   you focus exclusively on that work, it will

15   often seem more efficient to allow

16   indiscriminate copying. The part of --

17   CHIEF JUSTICE ROBERTS: Thank you,

18   counsel. Mr. Stewart, you represent the United

19   States, of course, and we're told that if we

20   agree with Oracle, we will ruin our tech

21   industry in the United States.

22   Why -- why is that not true, if we --

23   why is that not true, if you think it is?

24   MR. STEWART: I think three or four

25   reasons. The first has been explored already

1   that the Federal Circuit issued its

2   copyrightability opinion in 2014 and we haven't

3   seen deleterious effects from that.

4   The -- the second is that the briefs

5   talk about the practice of copying interfaces or

6   APIs, but those terms are very vague and

7   potentially expansive. And a -- a lot of things

8   that might be called interfaces would be

9   segments of code that are so short that they --

10   they don't exhibit necessary creativity,

11   segments of code that are necessary to preserve

12   interoperability.

13   It may be that in particular

14   circumstances, particular interfaces can be

15   copied without authorization, but that's not a

16   basis for a general rule.

17   And the third thing is there's a

18   prevalent practice of licensed copying of

19   declarations.

20   And often that is done through what is

21   called open source licensing. One way it can be

22   done is that the copyright holder can simply

23   announce to the world: You are free to copy

24   this code as long as you comply with the

25   following conditions, a common --

1   CHIEF JUSTICE ROBERTS: Thank -- thank

2   you, Mr. Stewart.

3   Justice Thomas.

4   JUSTICE THOMAS: Thank you, Chief

5   Justice.

6   Mr. Stewart, a couple of quick

7   questions. One, do you think the Federal

8   Circuit applied the proper review standard?

9   MR. STEWART: We do. And we agree

10   that the Rule 50 standard applies, could any

11   reasonable jury have reached this verdict, but

12   in litigation it's obviously very common that

13   there can be disputed questions both of fact and

14   of law.

15   And even when the questions of law are

16   close and reasonable, judges could disagree, the

17   district court is supposed to say what is the

18   right answer to those legal questions.

19   And so when we ask could a reasonable

20   jury have found use here, fair use here, we

21   should be asking could a reasonable jury

22   applying an accurate version of the law have

23   found fair use?

24   And so we assume that the jury made

25   the factual findings that are most favorable to

1   Google, but then we ask: What is the right

2   answer? Was this transformative? And I think

3   that's the way that the Federal Circuit did it.

4   The Federal Circuit said: We'll

5   assume the version of the facts that is most in

6   Google's favor, but then we will determine as a

7   matter of law whether this is transformative.

8   And that's the way that the Court did it in

9   Harper & Row.

10   That was a bench trial. But there's

11   no reason that a lay jury's resolution of

12   questions like was this use transformative or

13   how do we balance the relevant factors should be

14   given greater weight than the view of the

15   district court with respect to the same

16   questions.

17   JUSTICE THOMAS: The one final

18   question. The -- Congress's -- in the fair use

19   analysis, Congress has provided four factors.

20   And we've said that those were non-exhaustive.

21   Can you think of anything else that

22   should be added to -- in that analysis?

23   MR. STEWART: I -- I -- I can't think

24   of any -- anything else. There -- there may be

25   other factors in particular cases. The -- the

1   only thing I would emphasize is that in deciding

2   questions of fair use, the Court shouldn't just

3   be asking how would consumers potentially

4   benefit from widespread copying with respect to

5   this particular work.

6   The Court should also be asking: What

7   incentives to future innovation would a rule of

8   a particular sort create?

9   JUSTICE THOMAS: Thank you.

10   CHIEF JUSTICE ROBERTS: Justice

11   Breyer.

12   JUSTICE BREYER: I'm curious as to why

13   the government thinks the balance of harms lies

14   the way you do. I do think of the QWERTY

15   keyboard. The QWERTY, the keyboard, calls up

16   the metal rods that make an impression on a

17   piece of paper and then that's how you write

18   words.

19   This system calls up a system of

20   dividing the world into a variety of tasks,

21   which then will be done.

22   Now, nothing in copyright is meant to

23   give the owner of the QWERTY, whoever thought of

24   that beginning, QWERTY, a copy -- a monopoly of

25   typewriting.

         1   And nothing here, they say, if, in

         2   fact, you give them a monopoly of this, the

         3   millions of people who have learned this, as

         4   Justice Sotomayor says, will have to spend vast

         5   amounts of money when we get all kinds of new

         6   methods for using computers turning on heaters,

         7   stoves, et cetera, and a million others.

         8   And teaching them is unbelievable. It

         9   will give the owner of the declaration monopoly

        10   power over all those uses.

        11   Now, that, I think, is roughly what

        12   they're arguing. Why does the government reject

        13   that?

        14   MR. STEWART: Well, I think there are

        15   all sorts of things like -- like the QWERTY

        16   keyboard that have become standard but that

        17   wouldn't have been eligible for copyright

        18   protection in the first instance because, for

        19   instance, they're not sufficiently creative.

        20   Here Google has conceded that the --

        21   the large volume of individual declarations and

        22   the intricate method of organization that's

        23   reflected in the SSO are sufficiently creative

        24   to qualify for copyright protection in the first

        25   place.

1   The -- the second thing is, when we

2   talk about the people who will have to learn new

3   calls in order to invoke the declarations, we're

4   -- we're not talking about consumers. We're not

5   talking about people who actually use the

6   Smartphones.

7   We're talking about app developers.

8   And these are economic actors. Their interests

9   happen to align with Google's, because if they

10   can create popular apps, then the app developers

11   will gain money and Google will gain advertising

12   revenue because the Android platform will become

13   more popular.

14   But if Google --

15   CHIEF JUSTICE ROBERTS: Thank you,

16   counsel.

17   Justice Alito.

18   JUSTICE ALITO: Well, my question for

19   the government is essentially the one the Chief

20   Justice asked them. There has been some

21   elaboration on it.

22   And obviously there is this argument

23   that the sky is going to fall if we do not rule

24   for Google, so unless you have -- do you have

25   anything you want to add on that, on that point?

1   MR. STEWART: The only thing I would

2   flesh out a little bit was the last point that I

3   had gotten to towards the end, which is that

4   there is this phenomenon of licensed copying.

5   And sometimes, often, the license

6   terms don't include the payment of money. They

7   simply include a requirement, like whatever

8   improvements to the code you make have to be

9   given back to the programming community, have to

10   be made known to other potential programmers.

11   But the copyright holders' authority

12   to impose and enforce those licenses obviously

13   depends upon the proposition that the code is

14   copyrightable to begin with. And so those

15   licenses would be a pointless gesture otherwise.

16   And the very fact that those licenses

17   are offered with such frequency, I think tends

18   to dispel the idea that there is a common

19   understanding in the relevant community that

20   this material is not copyrightable at all.

21   JUSTICE ALITO: Thank you.

22   CHIEF JUSTICE ROBERTS: Justice

23   Sotomayor.

24   JUSTICE SOTOMAYOR: Counsel, could you

25   tell me why you think that Google's work was not

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 1      transformative?  It moved Java's platform from a

 2      PC, essentially, to mobile phones.

 3                 Why wasn't that a transformative step?

 4      I mean, the -- the answer is that all -- that

 5      all fair use involves copying.  So to do fair

 6      use you have to copy something and create

 7      something new from it.

 8                 So why wasn't that a giant step of

 9      fair use?

10                 MR. STEWART:  I guess I'd say three or

11      four things as to why this wasn't

12      transformative.

13                 The first is when Google explains why

14      it copied these particular declarations and not

15      others within the Java platform, the explanation

16      that it gives is -- is these are the

17      declarations, these are the functionalities that

18      will carry over to a smartphone platform.

19                 These are the declarations that will

20      be useful in the new technological environment.

21      So even though a lot of the code that Oracle had

22      written might not be useful, this -- this code

23      is.

24                 The second is when they talk about --

25                 JUSTICE SOTOMAYOR:  That's the only
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 1   way to make -- I mean, what they copied in terms

 2   of the declaring code was only that that would

 3   function in the new environment, that needed to

 4   function in the new environment.

 5   MR. STEWART: It's not the only way

 6   they could do it that would make it function in

 7   the new environment. It's the -- they're very

 8   careful about this. It's the only way that

 9   would do it that would allow the developers, the

10   app developers, to use the preexisting calls in

11   order to call up the established methods.

12   The second thing I would say about

13   transformativeness is that whole argument about

14   allowing app developers to use their knowledge,

15   the only way it works is that app developers can

16   have confidence that when they use a call with

17   which they are familiar, it will trigger the

18   same functionality that it has triggered on the

19   Java platform. And so it's not transformative

20   in that sense. The code is performing exactly

21   the same function that it performed on Java.

22   The third thing I would say is, if you

23   imagine a motion picture that has only been

24   released in theaters and somebody gets the print

25   and offers to live stream it over the Internet.

1   It's the same content that has been -- being --

2   simply being used on a different platform. No

3   one would think of that as transformative.

4   Similarly --

5   CHIEF JUSTICE ROBERTS: Thank you,

6   counsel.

7   Justice Kagan.

8   JUSTICE KAGAN: Mr. Stewart, suppose

9   that I come up with a new and very useful

10   keyboard, you know, not QWERTY, but something

11   better than QWERTY. And it's so useful that

12   everybody starts using it.

13   Now let's assume, for the purposes of

14   my question, that this is copyrightable, which

15   it might be or it might not be. But let's

16   assume it is and -- and go to the fair use

17   question. When -- when a -- a -- a -- a cell

18   phone, a smartphone manufacturer takes that

19   layout, takes that keyboard, and uses it for its

20   next phone, is that fair use and why or why not?

21   MR. STEWART: Well, the fair use

22   analysis would depend upon a lot of factors,

23   but, yes, I think, in fair use analysis, you

24   could take into account kind of developing

25   expectations, concerns about interoperability.

        1   We don't -- we're assuming, for -- for these

        2   purposes, as -- as you asked, that this is

        3   copyrightable, and so that would be a factor to

        4   consider in fair use analysis.

        5   We -- we don't have a quarrel, for

        6   instance, with the proposition that preserving

        7   interoperability can be a favored purpose for

        8   fair use analysis. It's just that they're --

        9   JUSTICE KAGAN: So why -- why is it

       10   any -- any different here; in other words, that

       11   Google took Java's interface so the programmers

       12   wouldn't have to learn a whole new system for

       13   coding, just as the cell -- the cell phone

       14   manufacturer took my keyboard so that people

       15   could rely on something familiar?

       16   MR. STEWART: One of the differences

       17   is that the app developers are in a

       18   fundamentally different position from the -- the

       19   consumers, the smartphone users. And if Google

       20   had tasked its own employees with creating new

       21   apps so that the Google platform -- that the

       22   Android platform would become more popular to

       23   consumers, nobody would think that the desire to

       24   make it easier on those employees by not

       25   requiring them to learn new calls would be the

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 1    basis for finding fair use.  As -- as the Court

 2    said in Campbell, that was the paradigmatic

 3    example of copying in order to avoid the

 4    drudgery of working up something new.

 5              And the analysis shouldn't be

 6    different simply because the app developers are

 7    independent economic actors whose interests

 8    happen to align with Google's rather than Google

 9    employees.  Those -- those people are a defined

10    --

11              CHIEF JUSTICE ROBERTS:  Thank you,

12    counsel.

13              Justice Gorsuch.

14              JUSTICE GORSUCH:  Mr. Stewart, the

15    government concedes that this work is

16    copyrightable but then says the fair use

17    analysis has to -- to permit the -- the copying

18    here.

19              And I wonder whether it -- it -- it

20    gives with one hand and takes away with another.

21    The -- the fair use analysis for incommensurable

22    factors that need to be weighed, why could no

23    reasonable jury have concluded that it was fair

24    use here?  Aren't you essentially saying that,

25    yes, code, is copyrightable, but, really, it --
```

1   it -- it's always subject to fair use?

2   MR. STEWART: I mean, we're certainly

3   saying it's subject to fair use analysis, but

4   we've argued in our brief that the use here was

5   not fair.

6   And the reason we think that the --

7   the error we think the district court made, or

8   at least the primary error, was that it treated

9   as a factual question what it should have

10   treated as a subsidiary legal judgment; that is,

11   on the question of transformativeness, Google

12   argued this is transformative because it's being

13   used in a new platform. Oracle argued it's the

14   same code being used for the same purposes.

15   It's not transformative.

16   The district court didn't decide which

17   of those views was right. It simply said a

18   reasonable jury could have sided with Google.

19   That -- that would be fine if this had

20   been a factual determination, but the question

21   is that sufficient to make for a transformative

22   use is fundamentally a legal question. The

23   court of appeals appropriately reviewed that

24   determination de novo and found -- and correctly

25   found that it was not transformative.

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1              JUSTICE GORSUCH:  If we disagree with
2   you on -- on the standard of review that should
3   apply here, what should we do?
4              MR. STEWART:  I -- I think, if you
5   disagreed and you thought that questions about
6   is this transformative or not, given a stable
7   body of facts, if you think that is a question
8   as to which the view of a reasonable jury should
9   be deferred to, then a remand probably is the --
10  the appropriate course.
11             I'd point out that is not only going
12  to affect jury trial practice; it's going to
13  affect summary judgment practice because a lot
14  of fair use questions are decided on summary
15  judgment.  That -- that won't be possible any
16  longer if issues like does putting it on a new
17  platform make for transformativeness are
18  regarded as jury questions.
19             CHIEF JUSTICE ROBERTS:  Thank you,
20  counsel.
21             Justice Kavanaugh.
22             JUSTICE KAVANAUGH:  Thank you, Chief
23  Justice.
24             Good morning, Mr. Stewart.  One
25  question on merger doctrine and one question on
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1   method of operation.

2   First, Google says in its reply brief

3   that the dispositive undisputed fact in this

4   case is that the declarations could not be

5   written in any other way and still properly

6   respond to the calls used by Java programmers.

7   Are they wrong in saying that?

8   MR. STEWART: I don't think that they

9   are wrong in saying that, but that argument is

10   circular; that is, they are invoking the correct

11   proposition that merger applies if there's only

12   a way of getting the computer to perform a

13   particular function. But they are defining the

14   function as invoking the implementing code in

15   response to calls that are known to developers.

16   And that's wrong for two or three

17   reasons. The first is Section 302(a) says

18   copyright protection subsists from the work's

19   creation. And at the time that the work was

20   created, there were no calls known to

21   developers. The argument wouldn't have flown as

22   a justification for copying at that time.

23   The second is, as the Chief Justice

24   pointed out in -- in an earlier part of the

25   argument, that would effectively penalize Oracle

 1   for its marketplace success. The fact that the

 2   calls were well known was simply a function of

 3   the fact that the Java platform was popular and

 4   a lot of people had written a lot of apps for

 5   it.

 6   JUSTICE KAVANAUGH: And the method of

 7   operation, Google says that the declarations are

 8   a method of operation because they are for the

 9   developers to use, while the implementing code

10   instructs the computer.

11   Your response to that?

12   MR. STEWART: I think the -- the CONTU

13   report -- the term "method of operation" comes

14   from Baker versus Selden, and what the Court

15   said in Baker versus Selden -- and it was a long

16   list of examples of, if you write a book about

17   how to do a useful task, you can get a copyright

18   on the book but no exclusive rights in the

19   performance of a task. And the Court said a

20   mathematician who propounded -- who -- who wrote

21   a treatise couldn't get an exclusive right to

22   his methods of operation.

23   The CONTU report discussed the way in

24   which Section 102(b) would apply to computer

25   code. And I think the -- the -- the clearest

1   expression was on page 21 of the CONTU report

2   where it said one is always free to make the

3   machine do the same thing as it would have if it

4   had the copyright work -- copyrighted work

5   placed in it but only by one --

6   CHIEF JUSTICE ROBERTS: Mr. Stewart,

7   if you'd like to take a minute to wrap up.

8   MR. STEWART: Thank you, Mr. Chief

9   Justice.

10   I think that the fundamental line that

11   should be drawn for purposes of merger analysis,

12   for purposes of 102(b), is, if a particular line

13   of code is, without regard to the -- the

14   acquired expertise of other actors, the only way

15   to make the computer perform a particular

16   function, then the code is not copyrightable.

17   Here, it's really undisputed that

18   Google could have written new declarations and

19   they could have been used to invoke the relevant

20   methods so long as the developers were -- were

21   willing to -- to learn new calls.

22   And that is a -- analyzing the case

23   that way gives appropriate weight to the

24   copyright policy of creating adequate incentives

25   for the creation of new works of author --

1   authorship.

2   Thank you, Mr. Chief Justice.

3   CHIEF JUSTICE ROBERTS: Thank you.

4   Mr. Goldstein, to even out the time a

5   little bit here, I think we'll go through

6   another round of questioning for you if that's

7   all right.

8   MR. GOLDSTEIN: Thank you, Mr. Chief

9   Justice.

10   CHIEF JUSTICE ROBERTS: Okay. I guess

11   I'll -- I'll start.

12   I wonder if you had any further

13   response to Mr. Stewart's representation about

14   the effects of the case on the technology market

15   if we rule in favor of Oracle.

16   MR. GOLDSTEIN: Yes, Mr. Chief

17   Justice. I don't think that Mr. Stewart is

18   accurately reflecting how the industry operates.

19   You have briefs from the country's leading

20   computer scientists and the software industry

21   that say that the non-licensed re-implementation

22   of interfaces is widespread. That's the concern

23   about decimating how the industry operates.

24   But I would pay very close attention

25   to the wisdom of what he says, when he says

          1   categorical rules in this area are bad in

          2   response to, example, your question about how

          3   would this play out with other kinds of

          4   interfaces, and Justice Kagan's restaurant

          5   hypothetical, he says there are lots of factors

          6   involved.

          7   That's why deferring to the jury's

          8   fair use verdict, which is extremely fact-bound

          9   about the record in this case, is a perfectly

         10   appropriate and sensible way to resolve the

         11   case.

         12   CHIEF JUSTICE ROBERTS: I wonder if

         13   you wanted to take a bit more time to respond

         14   further to my question about why your merger

         15   argument doesn't make Sun and Oracle a -- a

         16   victim of its -- of its own success.

         17   The -- the -- Mr. Rosenkranz mentioned

         18   that several tech companies did, in fact, find a

         19   way to develop their programs without relying on

         20   the Java coding. So why shouldn't we impose

         21   that -- that same obligation on Oracle?

         22   MR. GOLDSTEIN: Well, that wouldn't,

         23   of course, resolve whether we had the fair use

         24   right to reuse the code, but, in any event, I

         25   think that's an optical illusion.

1   The computer scientists' brief at page

2   18, the Microsoft brief at 14, explain that both

3   Apple and Microsoft, Oracle's examples, did

4   re-implement prior interfaces. The reason that

5   they didn't use these interfaces is they were

6   using a different language, as if they were

7   writing in French, rather than English.

8   We are not -- Oracle does not get to

9   claim as -- the exclusive right to a highly

10   functional computer program without a patent.

11   It gets to claim the words on the page.

12   And if those are the only words on the

13   page that will produce this result in the

14   computer, they don't get that exclusive

15   copyright.

16   CHIEF JUSTICE ROBERTS: Justice

17   Thomas, do you have further questions?

18   JUSTICE THOMAS: I have no further

19   questions, Chief Justice.

20   CHIEF JUSTICE ROBERTS: Justice

21   Breyer?

22   JUSTICE BREYER: I -- I have heard

23   from the other side, yes, that may be true, but

24   this result is simply calling up a set of

25   programs that were written by Java. And maybe

```
1      at the beginning you could have done this in

2      different ways, with different divisions of

3      tasks in a world with different call-up numbers.

4      And there weren't people trained at that time.

5      And copyright, you just heard quoted, runs from

6      the beginning.

7                What do you do about that?

8                MR. GOLDSTEIN:  Well, fair use

9      certainly runs from the end.

10               JUSTICE BREYER:  I'm not talking about

11     fair use.  I'm talking about --

12               MR. GOLDSTEIN:  Okay.

13               JUSTICE BREYER:  -- your merger

14     argument and let's say the -- the method of

15     operation argument.

16               MR. GOLDSTEIN:  Sure.  So there's the

17     difference between the fact that they have a

18     copyrighted work, which ran from the point of

19     publication, from whether merger applies.  This

20     is Baker versus Selden.

21               Selden, when he published his book of

22     dual column accounting, on that day he was the

23     person who had created that.  But the Court said

24     what about a later user that wants to use this

25     system, can they do it without part of the work?
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 1      This Court said no, and that meant that there is

 2      no copyright protection within the copyrighted

 3      work for that particular piece of expression.

 4                  JUSTICE BREYER:  All right.  Thank

 5      you.

 6                  CHIEF JUSTICE ROBERTS:  Justice Alito.

 7                  JUSTICE ALITO:  No further questions.

 8                  CHIEF JUSTICE ROBERTS:  Justice

 9      Sotomayor.

10                  JUSTICE SOTOMAYOR:  Mr. Goldstein, is

11      this your answer to Mr. Malcolm's transformative

12      use argument, and what's your best argument on

13      fair use?

14                  MR. GOLDSTEIN:  Our answer with

15      respect to transformative uses, it cannot be

16      that transformative use only exists when

17      computer code does something different.

18      Computer code only does one thing.  There is no

19      parity of computer code.

20                  That would mean ironically that this

21      highly and functional expression is less

22      susceptible of fair use than a highly creative

23      novel.  That cannot be right.

24                  And, in any event, even if -- if the

25      jury was entitled to conclude based on the
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1   record evidence that this was an entirely new

2   context, the Java SE was not useable in this

3   particular -- in a smartphone, with respect to

4   fair use, more broadly, our best argument is

5   about the standard of review.

6   Under Rule 39(c) this mixed question

7   of fact and law was put to the jury at Oracle's

8   insistence. The question is could the jury have

9   balanced these factors? I know that the other

10   side is concerned about providing legal

11   guidance. That's why we have jury instructions.

12   But the Court in Georgia versus Public

13   Resource and in other cases has made quite clear

14   this is incredibly fact-bound. It will depend

15   on the circumstances. And Mr. Stewart has only

16   reinforced that point.

17   In that context, you cannot say that

18   the jury couldn't reasonably find that this

19   massive creativity with a million applications

20   and a new, entirely new way of computing on the

21   smartphone is not fair use.

22   JUSTICE SOTOMAYOR: Thank you,

23   counsel.

24   CHIEF JUSTICE ROBERTS: Justice Kagan.

25   JUSTICE KAGAN: I -- I'm wondering,

 1   Mr. Goldstein, whether the first part of the

 2   answer that you gave to Justice Sotomayor,

 3   whether that suggests that transformative use

 4   isn't the right question here, although it is in

 5   other contexts.

 6   I mean, as -- as I understand it,

 7   you're using this for the exact same purpose.

 8   It's just that the purpose, to make sure that

 9   users are dealing with a familiar interface, is

10   one that should favor fair use.

11   So is that right? Is the

12   transformative use question really a mismatch in

13   this context?

14   MR. GOLDSTEIN: As articulated by

15   Oracle, it is. Call it what you will. The

16   statute doesn't say transformative. It asks

17   about the nature of the use.

18   What we're doing here is using an

19   interface, which is connective tissue between

20   computer programs. It is at the most barely

21   creative. Even the Federal Circuit acknowledged

22   that's the only inference that's possible from

23   the jury verdict.

24   And then you ask: Well, what comes of

25   it? What is the nature of this use? Are we

 1   using on a desktop computer any more? No, we're

 2   using it in an entirely different environment.

 3   And there was extensive evidence

 4   before the jury. The nature of the use here is

 5   quite significantly different from the original

 6   use. I think that's the statutory question.

 7   And, of course, the jury's question

 8   was, balancing that and all the other factors,

 9   is it fair use?

10   JUSTICE KAGAN: Thank you, Mr.

11   Goldstein.

12   CHIEF JUSTICE ROBERTS: Justice

13   Gorsuch.

14   JUSTICE GORSUCH: Briefly, just to

15   follow up on -- on that, Justice Sotomayor's

16   question.

17   Mr. Stewart argued that if -- if we

18   were to uphold the jury verdict or send it back

19   on fair use, that we would be negatively

20   impacting summary judgment practice and that

21   most district courts take these questions up as

22   a matter of law in summary judgment.

23   MR. GOLDSTEIN: Yes, this is the exact

24   argument that was made and rejected in the

25   Court's Hana Financial decision and, that is,

1   sure, some issues are decided very frequently on

2   summary judgment, but that doesn't deem that

3   there aren't other incredibly, highly contested

4   facts -- cases that arise in new environments,

5   as I believe you pointed out earlier.

6   This is that kind of case. It went to

7   the jury under Rule 39(c). Oracle didn't move

8   for summary judgment in this case.

9   When you have such a case, the fact

10   that others are resolved on summary judgment,

11   isn't a license to just throw out the actual

12   standard of review that applies. Courts have

13   had no problem reaching summary judgment where

14   it's appropriate because generally there, you

15   don't have anything like a factual fight, did

16   Android supplant Java SE in the marketplace?

17   How is it that they were technically different?

18   Classical fair use cases are things

19   like parities or news reporting in which we have

20   established legal rules. Mr. Stewart is

21   cautioning you against writing an opinion that

22   articulates categorical rules. And I don't

23   understand how he wants to do that and adopt a

24   categorical rule against the reuse here.

25   JUSTICE GORSUCH: Thank you.

1   CHIEF JUSTICE ROBERTS: Justice

2   Kavanaugh.

3   JUSTICE KAVANAUGH: Thank you. Mr.

4   Stewart responded to my question quoting page 7

5   of your reply brief about the merger doctrine.

6   And I wanted to see if you had anything further

7   you wanted to add on the merger doctrine to help

8   us understand that.

9   MR. GOLDSTEIN: Sure. So Mr.

10   Stewart's answer is effectively we are -- we are

11   asking the wrong question. He agrees with the

12   district court's factual findings that the only

13   way to respond to these developers' calls is

14   with these instructions.

15   That's a very important point. His

16   point is: Well, so what? The developers can

17   write other calls. That is a way of saying that

18   we can use a different method of operation.

19   It also is nonsensical as a matter of

20   copyright law. Why would Congress want a rule

21   that says: Okay, these developers are extremely

22   familiar with these commands. They are used to

23   write creative computer programs. Let's just

24   make it as inefficient as possible for them.

25   That's not trying to create a fan base

 1   for Oracle. It's trying to create a set of

 2   prisoners. They want to lock the developers

 3   only into using Java SE. That is not a right

 4   that you can get from copyright or that Congress

 5   would want to confer.

 6   JUSTICE KAVANAUGH: All right. Thank

 7   you, Mr. Goldstein.

 8   CHIEF JUSTICE ROBERTS: Mr. Goldstein,

 9   you have got three minutes left, if you want to

10   shift to rebuttal.

11   REBUTTAL ARGUMENT OF THOMAS C.

12   GOLDSTEIN ON BEHALF OF THE PETITIONER

13   MR. GOLDSTEIN: Thank you, Mr. Chief

14   Justice.

15   I do want to focus on the question of

16   fair use and the fair use jury verdict because I

17   do think that Mr. Stewart's argument that

18   categorical rules are inappropriate is point

19   that different kinds of interfaces might call

20   for different kinds of results, as might

21   different kinds of uses, is the exact reason why

22   the Rule 50 standard should be applied with such

23   vigor here, because the jury heard testimony on

24   a variety of points that Mr. Rosenkranz is just

25   attempting to deny and assert the opposite as a

 1   factual matter.

 2   I don't think there is actual debate

 3   about the expectations of the industry. And

 4   they have nothing to do with licensed reuse of

 5   interfaces. The -- there is a widespread

 6   consensus in the industry and among computer

 7   scientists that this has been the practice.

 8   So what do you do if you are asked to

 9   adopt a categorical rule that all those people

10   say will upend the industry's expectations and

11   how it's operated? I think what you realize is

12   that, of course, the jury's fair use verdict was

13   reasonable here. It is ultimately, in fair use,

14   an inquiry would this be a reasonable

15   application of copyright or would it, on net,

16   reduce expression?

17   Here you have minimally creative

18   declarations and they are being invoked to block

19   the publication of millions of programs on an

20   innovative smartphone platform.

21   Now, I do think that there was no

22   traction to Mr. Rosenkranz and Mr. Stewart's

23   argument that the Federal Circuit had correctly

24   applied the right standard of review. When, at

25   page 24a of the petition appendix, they say the

 1   ultimate question of fair use will be decided

 2   fair -- de novo, at page 53a they say, well,

 3   they will decide it as a matter of law and the

 4   same at page 54a.

 5   The Federal Circuit made the point

 6   they deemed the jury verdict advisory and said,

 7   well, we'll take it from here. That is not

 8   appropriate.

 9   Under rule 39(c), Oracle made the

10   choice to litigate this case in a particular

11   way. It is impossible to unpack the supposed

12   factual findings that they are relying on.

13   And I just want to point out how many

14   times Mr. Rosenkranz is contradicting the jury

15   evidence. The evidence at trial, for example JA

16   56, is the former CEO of Oracle saying that the

17   APIs were never licensed or sold separately from

18   the language, in contrast to his just base

19   assertion that IBM was paying for it.

20   Mr. Rosenkranz says that Android

21   supplanted and superseded Java SE, page JA 255.

22   The market harm expert says expressly Android

23   has not superseded Java SE. They say that the

24   declarations were so important to developers

25   using Oracle's product, but at JA 125, again,

 1   the former CEO says the strategy, which has been

 2   the strategy long before I joined Sun, was that

 3   we agree on the APIs, these declarations, we

 4   share them, and then we compete on

 5   implementations.

 6   The evidence at the trial is certainly

 7   sufficient, easily, to reasonably conclude that

 8   there was fair use.

 9   Thank you very much.

10   CHIEF JUSTICE ROBERTS: Thank you,

11   Mr. Goldstein.

12   Mr. Rosenkranz, Mr. Stewart, thank

13   you.

14   The case is submitted.

15   (Whereupon, at 11:36 a.m., the case

16   was submitted.)

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benefit [1] **69**:4

best [5] **11**:23 **42**:18 **43**:4 **87**:12 **88**:4

bet [1] **16**:2

Bethesda [1] **1**:18

better [4] **12**:12 **24**:12 **27**:21 **75**:11

between [12] **14**:21 **17**:18 **19**:5 **20**:14 **22**:4 **26**:21 **32**:24 **33**:7 **54**:3 **59**:25 **86**:17 **89**:19

big [2] **28**:25 **63**:11

billion [2] **4**:13 **20**:5

billions [5] **20**:22 **42**:2,6,8 **46**:18

bit [6] **6**:25 **10**:1 **24**:25 **72**:2 **83**:5 **84**:13

blanks [2] **41**:20 **61**:17

block [3] **48**:21 **61**:12 **94**:18

body [1] **79**:7

book [9] **6**:11 **8**:24 **9**:9 **43**:3 **48**:19, 23 **81**:16,18 **86**:21

bookkeeping [3] **7**:11 **11**:8 **48**:19

books [1] **36**:1

Both [12] **13**:19,19 **21**:9 **25**:20,21 **42**:7 **44**:8,10 **45**:3 **63**:5 **67**:13 **85**:2

Boudin [1] **46**:24

box [1] **19**:21

Breyer [17] **14**:4,5 **15**:2 **16**:2,4 **17**:1 **44**:7 **46**:3,4 **48**:17 **69**:11,12 **85**:21, 22 **86**:10,13 **87**:4

Breyer's [2] **35**:1 **61**:1

brief [12] **5**:14,15 **6**:11 **20**:25 **29**:15 **43**:13,25 **78**:4 **80**:2 **85**:1,2 **92**:5

briefing [2] **35**:16 **46**:16

briefly [2] **12**:25 **90**:14

briefs [6] **21**:20 **25**:5 **35**:15,17 **66**:4 **83**:19

brilliant [2] **16**:6 **47**:14

bring [3] **29**:20 **44**:17 **64**:1

broadly [1] **88**:4

brought [1] **62**:9

built [1] **53**:1

bursts [1] **62**:9

business [3] **40**:10 **42**:4 **59**:22

C

call [8] **14**:15 **15**:8,24 **47**:23 **74**:11, 16 **89**:15 **93**:19

call-up [1] **86**:3

called [3] **10**:11 **66**:8,21

calling [2] **16**:8 **85**:24

calls [20] **14**:10,12 **15**:16 **17**:18 **19**:5 **55**:5 **65**:9,10 **69**:15,19 **71**:3 **74**:10 **76**:25 **80**:6,15,20 **81**:2 **82**:21 **92**:13,17

came [2] **1**:12 **7**:10

Campbell [2] **45**:22 **77**:2

cannot [12] **3**:16 **5**:11 **10**:15,20 **21**:13,15 **29**:4 **33**:2 **60**:5 **87**:15,23 **88**:17

capable [1] **44**:6

careful [1] **74**:8

carry [1] **73**:18

carve [1] **39**:4

carveout [2] **39**:6,8

Case [33] **3**:4,12 **5**:2,7 **13**:3 **24**:3

26:20 **30**:6 **35**:20 **38**:23 **44**:19 **51**:7 **52**:9,10,10,11,11,12 **53**:21 **54**:4 **59**:13 **61**:11 **80**:4 **82**:22 **83**:14 **84**:9,11 **91**:6,8,9 **95**:10 **96**:14,15

cases [8] **50**:20 **53**:21 **60**:8,11 **68**:25 **88**:13 **91**:4,18

categorical [5] **84**:1 **91**:22,24 **93**:18 **94**:9

categories [1] **56**:9

cautioning [1] **91**:21

cell [3] **75**:17 **76**:13,13

central [1] **64**:21

CEO [2] **95**:16 **96**:1

cert [2] **35**:24 **36**:10

certain [6] **3**:22 **7**:22 **14**:11 **29**:20 **46**:18 **47**:15

certainly [7] **9**:8 **23**:22 **44**:2 **59**:18 **78**:2 **86**:9 **96**:6

cetera [2] **14**:22 **70**:7

challenged [1] **51**:12

change [4] **45**:18 **53**:3,17 **62**:15

character [1] **19**:11

check [1] **19**:21

chef [2] **40**:16 **47**:13

CHIEF [76] **3**:3,9 **5**:12 **6**:2,5,14 **7**:14 **8**:11,14 **9**:3,18,20,24 **14**:3 **17**:2 **20**:9 **24**:23 **27**:15 **29**:9 **33**:11,14 **36**:23 **38**:13,18 **40**:14 **41**:23 **42**:14, 17 **43**:8,12 **46**:1 **47**:12 **49**:6 **52**:1 **54**:15 **56**:3,12 **58**:7 **60**:18,20 **62**:21,24 **64**:4,8,12 **65**:17 **67**:1,4 **69**:10 **71**:15,19 **72**:22 **75**:5 **77**:11 **79**:19,22 **80**:23 **82**:6,8 **83**:2,3,8,10,16 **84**:12 **85**:16,19,20 **87**:6,8 **88**:24 **90**:12 **92**:1 **93**:8,13 **96**:10

choice [4] **23**:3 **41**:24 **42**:1 **95**:10

circle [2] **18**:6 **50**:7

Circuit [30] **14**:1 **26**:20 **27**:2,12 **35**:23 **36**:9,9 **45**:3 **49**:14,22 **52**:9,10, 10,11,14 **53**:25,25 **54**:1,1 **58**:12,20, 24 **59**:19 **66**:1 **67**:8 **68**:3,4 **89**:21 **94**:23 **95**:5

Circuit's [2] **52**:13 **59**:9

circuits [1] **52**:16

circular [2] **18**:11 **80**:10

circularity [1] **18**:22

circumstances [4] **17**:16 **65**:13 **66**:14 **88**:15

claim [5] **32**:13 **56**:16,18 **85**:9,11

claiming [3] **4**:3 **37**:16 **43**:5

class [4] **27**:17,20 **58**:1 **61**:13

classes [4] **24**:2 **55**:5 **57**:5,20

Classical [1] **91**:18

clean [1] **22**:4

clear [2] **59**:21 **88**:13

clearest [1] **81**:25

clearly [2] **8**:6 **15**:4

close [3] **63**:4 **67**:16 **83**:24

cloud [1] **62**:11

code [103] **3**:13,19 **15**:8,14,15,23 **16**:1 **17**:5,22 **18**:7 **20**:17 **21**:9,10, 11,14 **22**:5,8,12,18,22,24 **23**:1,22 **25**:9 **26**:1 **28**:16 **29**:15 **31**:16 **33**:18,25 **34**:1,6,9 **36**:18 **38**:8,10,21

39:1,2,5,21 **40**:2,4,8 **43**:15,19,20, 23 **44**:2,2,3,7,7,8,16,21,25 **45**:2,5, 14,17 **52**:23 **53**:6,23 **54**:3,4,9,20 **55**:2,17 **57**:15,17 **62**:20 **63**:4,5,9, 12,23,25 **64**:16,19,22,24 **66**:9,11, 24 **72**:8,13 **73**:21,22 **74**:2,20 **77**:25 **78**:14 **80**:14 **81**:9,25 **82**:13,16 **84**:24 **87**:17,18,19

codes [10] **17**:8 **20**:14,15,19 **21**:1,8 **52**:18,24 **53**:11,11

coding [2] **76**:13 **84**:20

colleagues [2] **20**:13 **58**:11

colleagues' [1] **60**:24

column [1] **86**:22

combination [5] **9**:5,10,11 **10**:17 **15**:16

come [7] **7**:5 **27**:20 **28**:4 **30**:16,24 **56**:7 **75**:9

comes [5] **24**:5,11 **26**:19 **81**:13 **89**:24

commands [11] **3**:22,24 **10**:18 **18**:14,16,18 **32**:25 **34**:25 **37**:15 **38**:2 **92**:22

commercial [2] **39**:15 **45**:22

commission [2] **64**:15,17

common [4] **21**:6 **66**:25 **67**:12 **72**:18

communicates [1] **45**:16

community [2] **72**:9,19

companies [5] **11**:14 **40**:2,11 **63**:11 **84**:18

compete [1] **96**:4

competing [6] **39**:15,23,24 **42**:8 **45**:6 **53**:23

competition [1] **37**:20

competitors [1] **30**:22

compliment [1] **35**:16

comply [1] **66**:24

comports [1] **63**:23

computer [90] **3**:13,19 **4**:10 **5**:20 **7**:23 **10**:3,6 **12**:9,21 **14**:8,9,13,16,19, 20,22,24 **15**:22 **16**:7,16,17,19 **17**:5, 8 **18**:17 **20**:4 **21**:8 **22**:11,18 **23**:4 **24**:4,10,17 **25**:11 **26**:4 **27**:8 **28**:6,9, 12,16,18,22 **29**:19 **31**:16,17 **33**:2, 20,23 **34**:1,8 **35**:5,6,18 **36**:12,19 **37**:8 **38**:10 **39**:7 **44**:11,15,25 **45**:2 **46**:6,6,9,14,19,21 **52**:17,18 **61**:4 **64**:16,19,22,24 **80**:12 **81**:10,24 **82**:15 **83**:20 **85**:1,10,14 **87**:17,18,19 **89**:20 **90**:1 **92**:23 **94**:6

computers [1] **70**:6

computing [2] **62**:12 **88**:20

CON2 [1] **64**:18

conceded [4] **18**:13 **39**:2,17 **70**:20

concedes [5] **17**:20 **21**:10 **35**:6 **45**:14 **77**:15

concern [5] **12**:24 **34**:11,12 **61**:4 **83**:22

concerned [2] **17**:4 **88**:10

concerns [1] **75**:25

concessions [1] **38**:23

conclude [5] **19**:24 **40**:8 **51**:11 **87**:25 **96**:7

concluded [2] **33**:7 **77**:23

conclusion [1] **50**:5

conclusions [1] **50**:13

conditions [1] **66**:25

conducting [1] **59**:4

confer [1] **93**:5

confess [1] **24**:25

confidence [2] **59**:23 **74**:16

conflict [1] **38**:4

conflicting [1] **5**:5

confused [1] **25**:1

Congress [13] **22**:14 **24**:9 **31**:14 **38**:24 **39**:5 **44**:3,13,13 **63**:17 **64**:14 **68**:19 **92**:20 **93**:4

Congress's [2] **17**:7 **68**:18

Connecting [3] **37**:14 **54**:25 **55**:1

connective [1] **89**:19

Connectix [1] **45**:3

consensus [1] **94**:6

consequences [1] **48**:2

consequently [1] **64**:23

consider [1] **76**:4

consideration [1] **59**:13

consist [1] **44**:8

constant [1] **41**:9

constitutional [1] **51**:24

constraints [1] **24**:20

construe [1] **13**:24

consumers [4] **69**:3 **71**:4 **76**:19, 23

contains [1] **4**:21

content [1] **75**:1

contested [2] **5**:2 **91**:3

context [6] **42**:22 **44**:24 **45**:2 **88**:2, 17 **89**:13

contexts [1] **89**:5

continue [1] **64**:19

continuums [1] **19**:17

contradicting [1] **95**:14

contrast [1] **95**:18

control [2] **38**:23 **47**:3

CONTU [3] **81**:12,23 **82**:1

conversation [1] **29**:13

convincing [1] **20**:25

copied [8] **20**:16 **39**:14 **45**:15 **63**:25 **64**:25 **66**:15 **73**:14 **74**:1

copies [2] **5**:13 **45**:15

copy [23] **5**:14 **7**:19,19 **9**:6 **14**:11 **23**:18,20,21 **34**:15,15,21 **39**:23 **43**:22 **53**:2,22 **56**:15 **61**:21 **62**:18 **63**:20 **64**:23 **66**:23 **69**:24 **73**:6

copying [18] **30**:25 **39**:21 **40**:8,9 **54**:8,11,12,12 **62**:5 **65**:16 **66**:5,18 **69**:4 **72**:4 **73**:5 **77**:3,17 **80**:22

copyist [1] **39**:14

copyright [73] **3**:13,16,18 **4**:6 **7**:13, 20 **8**:3,4 **9**:15 **10**:6,8,15 **11**:6,20 **12**:20 **14**:20 **15**:20 **16**:13 **22**:11,15, 19,20 **26**:10 **27**:5,9 **28**:16,20 **29**:4 **32**:5 **33**:3 **35**:13 **37**:10,12,22 **39**:1 **40**:12 **42**:9,11,16 **47**:2,4,10 **48**:20 **49**:1 **54**:21 **55**:10,12 **56**:16,18 **57**:11 **58**:3 **62**:4 **63**:18,22,24 **64**:16, 20 **65**:5 **66**:22 **69**:22 **70**:17,24 **72**:

11 **80:**18 **81:**17 **82:**4,24 **85:**15 **86:**5 **87:**2 **92:**20 **93:**4 **94:**15
copyrightability [4] **3:**12 **36:**5 **43:**20 **66:**2
copyrightable [12] **29:**16 **46:**8 **52:**23 **53:**11,15 **72:**14,20 **75:**14 **76:**3 **77:**16,25 **82:**16
copyrighted [8] **29:**21 **32:**22 **35:**9,12 **40:**23 **82:**4 **86:**18 **87:**2
core [2] **65:**4,7
corporate [1] **54:**8
correct [1] **80:**10
correctly [2] **78:**24 **94:**23
couldn't [7] **19:**14,21 **20:**16 **23:**3 **43:**5 **81:**21 **88:**18
counsel [21] **9:**21,21 **20:**11 **24:**22 **43:**9 **46:**2 **49:**7 **52:**2,4 **54:**16 **58:**10 **60:**17 **62:**22 **64:**5 **65:**18 **71:**16 **72:**24 **75:**6 **77:**12 **79:**20 **88:**23
country's [2] **36:**12 **83:**19
couple [1] **67:**6
course [7] **40:**19 **65:**2,19 **79:**10 **84:**23 **90:**7 **94:**12
COURT [55] **1:**1,13 **3:**10 **4:**16,23,24,25 **5:**8 **11:**9 **13:**5,6,7,8,15,21 **16:**24 **22:**24 **26:**13 **35:**23 **36:**10 **38:**19 **39:**4,10,12 **40:**7 **43:**18 **45:**11 **49:**4,22,25 **51:**5,7,8,9,11 **53:**21 **59:**18 **60:**4 **62:**8 **64:**7,13 **67:**17 **68:**8,15 **69:**2,6 **77:**1 **78:**7,16,23 **81:**14,19 **86:**23 **87:**1 **88:**12
Court's [3] **50:**19 **90:**25 **92:**12
courts [9] **44:**6 **50:**11,11 **59:**24 **60:**7,9 **64:**2 **90:**21 **91:**12
crack [2] **8:**25 **9:**14
cracking [1] **8:**17
create [16] **3:**17,22 **11:**14 **22:**5 **32:**19 **39:**23 **40:**9 **45:**10 **63:**3,19 **65:**4 **69:**8 **71:**10 **73:**6 **92:**25 **93:**1
created [5] **7:**6 **40:**5 **65:**13 **80:**20 **86:**23
creating [3] **42:**8 **76:**20 **82:**24
creation [5] **37:**8 **65:**1,2 **80:**19 **82:**25
creative [13] **4:**11,12 **16:**17 **20:**3,4 **35:**3 **55:**16 **70:**19,23 **87:**22 **89:**21 **92:**23 **94:**17
creativity [4] **8:**8 **37:**11 **66:**10 **88:**19
credibly [1] **16:**16
credits [1] **49:**3
critical [1] **4:**9
critically [1] **13:**20
criticism [2] **17:**10,13
cross [1] **57:**25
crystalize [1] **58:**23
curiae [3] **1:**24 **2:**11 **64:**10
curious [1] **69:**12

D

D.C [2] **1:**9,23
day [1] **86:**22
de [7] **50:**9,15 **51:**6,6 **59:**11 **78:**24 **95:**2

deal [1] **28:**1
dealing [1] **89:**9
debate [1] **94:**2
debates [1] **33:**6
debits [1] **49:**3
decades [3] **36:**16 **50:**12 **64:**3
decide [9] **4:**20,24 **11:**1 **43:**15,18 **50:**13 **51:**9 **78:**16 **95:**3
decided [4] **60:**9 **79:**14 **91:**1 **95:**1
decides [1] **62:**18
deciding [2] **13:**22 **69:**1
decimate [2] **40:**10 **63:**3
decimating [1] **83:**23
decision [5] **52:**13,15 **59:**9 **62:**8 **90:**25
declaration [4] **15:**24 **16:**23 **46:**22 **70:**9
declarations [36] **3:**25 **4:**4,5,11 **8:**10 **10:**18,22 **15:**17 **17:**19 **18:**19 **19:**5 **20:**2 **21:**18,20 **23:**23 **32:**24 **34:**21,22,24 **35:**3 **37:**3,11,17 **65:**11 **66:**19 **70:**21 **71:**3 **73:**14,17,19 **80:**4 **81:**7 **82:**18 **94:**18 **95:**24 **96:**3
declared [1] **53:**15
declaring [36] **18:**7 **20:**14,19,20,21 **21:**1,9,14 **23:**1 **25:**9 **26:**1 **33:**18,25 **34:**5 **39:**5 **40:**2,4,8 **43:**14,19,20,22 **44:**2,7,21 **52:**22 **53:**10 **54:**4,9,20 **55:**17 **57:**15,17 **63:**4,12 **74:**2
deem [1] **91:**2
deemed [1] **95:**6
deference [1] **58:**13
deferential [1] **59:**14
deferred [1] **79:**9
deferring [1] **84:**7
define [3] **22:**3 **23:**10 **34:**14
defined [5] **38:**24 **44:**3,15 **64:**2 **77:**9
defining [2] **34:**20 **80:**13
definition [3] **23:**8 **39:**7 **44:**10
deleterious [1] **66:**3
demand [1] **4:**19
denied [2] **35:**24 **40:**6
deny [1] **93:**25
Department [1] **1:**23
depend [3] **40:**11 **75:**22 **88:**14
depends [3] **28:**5 **54:**7 **72:**13
depicted [1] **49:**3
Deputy [1] **1:**22
derivative [2] **45:**10 **51:**20
describe [1] **55:**15
describes [1] **45:**23
describing [1] **48:**19
description [3] **41:**15,22 **48:**21
descriptions [1] **41:**19
deserve [2] **37:**12 **58:**3
designed [1] **40:**12
desire [1] **76:**23
desktop [2] **53:**9 **90:**1
desserts [1] **40:**21
destabilize [1] **63:**22
details [1] **29:**3
determination [2] **78:**20,24
determine [2] **10:**24 **68:**6

develop [1] **84:**19
developed [4] **23:**12,18 **52:**12 **57:**10
developer [5] **15:**17 **26:**3 **28:**8 **34:**4,5
developers [32] **3:**21 **4:**11 **9:**17,19 **10:**18 **11:**13 **12:**18 **18:**12,13,16 **34:**25 **37:**3 **38:**1,8 **63:**7 **65:**8 **71:**7,10 **74:**9,10,14,15 **76:**17 **77:**6 **80:**15,21 **81:**9 **82:**20 **92:**16,21 **93:**2 **95:**24
developers' [5] **23:**5 **24:**1 **32:**25 **37:**14 **92:**13
developing [1] **75:**24
development [1] **42:**3
develops [1] **11:**1
devise [1] **16:**8
dichotomy [3] **10:**12 **26:**8 **30:**1
differ [1] **53:**20
difference [4] **14:**21 **26:**21 **59:**25 **86:**17
differences [1] **76:**16
different [34] **5:**21 **6:**7 **7:**12 **20:**21 **23:**19 **25:**6,18,20 **31:**5 **36:**2 **38:**2,3,21 **41:**16 **56:**12,24 **57:**1 **61:**25 **75:**2 **76:**10,18 **77:**6 **85:**6 **86:**2,2,3 **87:**17 **90:**2,5 **91:**17 **92:**18 **93:**19,20,21
differentiate [1] **20:**14
difficult [1] **31:**21
dinner [2] **41:**18,20
dire [1] **61:**23
directly [1] **44:**16
disagree [3] **26:**6 **67:**16 **79:**1
disagreed [1] **79:**5
disavowed [1] **14:**1
disclose [1] **11:**7
disclosed [2] **11:**7 **17:**17
discloses [2] **19:**4,4
discourage [1] **41:**2
discussed [1] **81:**23
dish [1] **47:**19
dishes [1] **40:**17
disincentive [1] **65:**1
dispel [1] **72:**18
dispositive [1] **80:**3
dispute [1] **36:**14
disputed [1] **67:**13
disputes [2] **50:**20 **51:**16
disruption [2] **35:**21 **61:**5
distinct [1] **34:**1
distinction [5] **21:**5 **44:**5,5 **48:**3 **54:**3
distinguish [2] **13:**2 **44:**1
distinguished [1] **44:**4
district [12] **13:**4,8 **16:**24 **22:**24 **26:**13 **51:**8 **67:**17 **68:**15 **78:**7,16 **90:**21 **92:**12
divided [1] **46:**17
dividing [1] **69:**20
divisions [1] **86:**2
doctrine [17] **3:**11,18 **5:**23 **6:**6,17 **10:**10,12 **18:**23 **19:**3 **22:**16 **26:**9 **30:**5,12 **41:**11 **79:**25 **92:**5,7

doing [9] **14:**1 **20:**18 **25:**17 **37:**6 **41:**14 **42:**19 **47:**21 **50:**12 **89:**18
dollars [4] **20:**23 **42:**2,7,8
dominance [1] **62:**4
done [7] **47:**7 **51:**2,5 **66:**20,22 **69:**21 **86:**1
doom [1] **64:**2
dot [1] **16:**20
down [4] **14:**8 **29:**3 **56:**19,20
draft [1] **64:**23
draw [5] **21:**2,4,16 **50:**14 **54:**2
drawing [1] **44:**6
drawn [1] **82:**11
drew [1] **54:**2
drudgery [2] **45:**24 **77:**4
dual [2] **11:**8 **86:**22

E

each [6] **14:**6 **41:**21 **55:**15,15,15,16
earlier [5] **52:**15 **59:**21 **62:**6 **80:**24 **91:**5
easier [1] **76:**24
easily [1] **96:**7
easy [1] **32:**7
economic [3] **65:**3 **71:**8 **77:**7
effect [4] **19:**12,20,22 **37:**7
effectively [5] **10:**21 **12:**17 **37:**5 **80:**25 **92:**10
effects [2] **66:**3 **83:**14
efficient [6] **30:**17 **37:**5,9 **38:**11 **42:**18 **65:**15
either [2] **42:**23 **54:**11
elaboration [1] **71:**21
elegant [4] **27:**22,23 **28:**4 **30:**17
element [2] **27:**3,8
elements [4] **26:**24 **27:**4 **53:**15 **54:**12
Eleventh [1] **52:**10
eligible [2] **64:**19 **70:**17
elsewhere [1] **59:**10
embodied [1] **37:**23
embodies [1] **26:**7
emphasize [1] **69:**1
employees [3] **76:**20,24 **77:**9
encompassing [1] **22:**14
encourage [1] **40:**9
end [5] **8:**7 **39:**3,18 **72:**3 **86:**9
enforce [1] **72:**12
engaging [1] **30:**25
English [4] **18:**24,25 **31:**7 **85:**7
enormous [1] **8:**8
enormously [1] **35:**17
enough [5] **7:**13 **15:**4 **16:**6 **32:**20 **57:**16
entire [1] **52:**17
entirely [6] **5:**21 **31:**6 **36:**5 **88:**1,20 **90:**2
entities [1] **54:**8
entitled [1] **87:**25
entrees [1] **40:**20
entry [1] **11:**8
environment [6] **45:**18 **73:**20 **74:**3,4,7 **90:**2
environments [1] **91:**4

epitome [1] **45**:21
equally [1] **38**:7
error [3] **51**:3 **78**:7,8
ESQ [4] **2**:3,6,9,13
ESQUIRE [2] **1**:18,20
essence [2] **20**:12 **35**:19
essential [7] **31**:10,22 **32**:1,14 **37**:15 **51**:23 **63**:6
essentially [6] **26**:19,23 **36**:18 **71**:19 **73**:2 **77**:24
established [4] **13**:5 **64**:14 **74**:11 **91**:20
et [2] **14**:22 **70**:7
even [9] **8**:3 **48**:25 **60**:3,11 **67**:15 **73**:21 **83**:4 **87**:24 **89**:21
event [3] **33**:3 **84**:24 **87**:24
events [1] **8**:3
everybody [4] **6**:23,25 **53**:10 **75**:12
everyone [5] **12**:8 **31**:1 **41**:19 **43**:7 **48**:21
everything [2] **13**:25 **53**:4
evidence [10] **4**:20 **13**:12 **19**:24 **49**:16 **58**:19 **88**:1 **90**:3 **95**:15,15 **96**:6
exact [5] **3**:25 **44**:14 **89**:7 **90**:23 **93**:21
exactly [3] **41**:6 **42**:9 **74**:20
example [7] **17**:23 **45**:4 **47**:13 **56**:2 **77**:3 **84**:2 **95**:15
examples [4] **48**:15 **54**:11 **81**:16 **85**:3
exception [1] **37**:24
exclusive [12] **4**:3 **9**:1,12 **15**:21 **31**:12,15 **32**:3 **37**:17 **81**:18,21 **85**:9,14
exclusively [1] **65**:14
excruciating [1] **63**:9
Excuse [1] **26**:16
exhibit [1] **66**:10
exhibits [1] **5**:7
existing [1] **23**:11
exists [1] **87**:16
expansive [1] **66**:7
expectations [5] **61**:3,23 **75**:25 **94**:3,10
expedience [1] **63**:20
expensive [3] **16**:9 **42**:12 **64**:22
expert [1] **95**:22
expertise [1] **82**:14
explain [5] **15**:14 **21**:13 **25**:4 **53**:13 **85**:2
explains [1] **73**:13
explanation [1] **73**:15
explicitly [1] **51**:7
explored [1] **65**:25
explosion [1] **62**:11
express [2] **17**:7 **34**:16
expression [14] **6**:20 **7**:16 **10**:15 **11**:18 **27**:11 **39**:15 **42**:13 **45**:12 **52**:19 **61**:19 **82**:1 **87**:3,21 **94**:16
expressions [2] **32**:11 **53**:17
expressive [2] **26**:24 **48**:12
expressly [1] **95**:22
extend [3] **10**:8 **37**:22 **48**:20

extensive [1] **90**:3
extent [2] **23**:10 **33**:16
extraordinarily [1] **58**:2
extremely [3] **28**:24 **84**:8 **92**:21

F

facilities [2] **30**:15 **32**:4
facility [3] **31**:11 **32**:1,14
facility-type [1] **31**:22
fact [22] **6**:23 **20**:1,3 **23**:25 **27**:10 **29**:18 **30**:21,23 **49**:22 **50**:11,25 **60**:15 **67**:13 **70**:2 **72**:16 **80**:3 **81**:1,3 **84**:18 **86**:17 **88**:7 **91**:9
fact-bound [3] **4**:25 **84**:8 **88**:14
fact-finder [2] **13**:17 **51**:15
fact-sensitive [1] **5**:10
fact-specific [1] **58**:16
factor [1] **76**:3
factors [15] **13**:13 **19**:15,17,25 **50**:2 **51**:18 **60**:2 **68**:13,19,25 **75**:22 **77**:22 **84**:5 **88**:9 **90**:8
facts [5] **50**:14 **60**:4 **68**:5 **79**:7 **91**:4
factual [11] **51**:13,14,14,22 **67**:25 **78**:9,20 **91**:15 **92**:12 **94**:1 **95**:12
fair [84] **4**:7,16,18,20,24 **5**:1,10 **8**:6,15 **12**:25 **13**:7,13,22 **17**:13 **19**:10,13,25 **20**:6 **32**:20 **33**:4,9 **36**:6,7 **39**:13,13 **40**:8 **42**:25 **43**:21,22 **49**:11,12,19 **50**:16,19,19 **51**:2,5,13,24 **56**:23 **58**:14,17 **60**:8 **62**:18 **67**:20,23 **68**:18 **69**:2 **73**:5,5,9 **75**:16,20,21,23 **76**:4,8 **77**:1,16,21,23 **78**:1,3,5 **79**:14 **84**:8,23 **86**:8,11 **87**:13,22 **88**:4,21 **89**:10 **90**:9,19 **91**:18 **93**:16,16 **94**:12,13 **95**:1,2 **96**:8
fall [2] **35**:19 **71**:23
fallen [2] **35**:25 **62**:7
falling [1] **52**:6
familiar [4] **74**:17 **76**:15 **89**:9 **92**:22
fan [4] **12**:14,16,20 **92**:25
far [1] **29**:13
fare [1] **41**:13
favor [7] **13**:25 **19**:15 **51**:15 **52**:6 **68**:6 **83**:15 **89**:10
favorable [2] **49**:17 **67**:25
favored [2] **50**:3 **76**:7
feature [2] **54**:23 **55**:3
features [1] **54**:19
Federal [19] **13**:25 **35**:23 **36**:8,9 **49**:14,22 **52**:13 **58**:12,20,24 **59**:8,19 **66**:1 **67**:7 **68**:3,4 **89**:21 **94**:23 **95**:5
few [1] **38**:22
fewer [1] **16**:17
fight [2] **20**:19 **91**:15
figure [4] **26**:23 **40**:18 **41**:4 **45**:7
figures [1] **47**:13
fill [1] **41**:20
filled [1] **61**:17
filtration [1] **27**:3
final [1] **68**:17
Finally [1] **38**:6
Financial [1] **90**:25
find [11] **4**:16,18 **19**:14 **20**:6 **29**:1

32:22,24 **54**:4 **60**:10 **84**:18 **88**:18
finding [3] **16**:24 **58**:13 **77**:1
findings [9] **4**:22 **13**:4,6,11 **50**:10 **59**:15 **67**:25 **92**:12 **95**:12
fine [4] **5**:18 **6**:18 **30**:25 **78**:19
finish [1] **61**:10
first [30] **3**:4 **5**:2,15 **16**:13 **35**:24 **40**:20 **41**:12 **48**:10 **49**:21 **50**:8 **52**:11 **53**:25 **54**:22,23 **55**:14 **57**:9,14 **59**:2 **60**:25 **62**:8,15 **63**:2 **65**:6,25 **70**:18,24 **73**:13 **80**:2,17 **89**:1
fit [1] **61**:21
fits [4] **4**:1 **27**:6,11
five [3] **35**:25 **50**:1 **60**:10
flat [1] **25**:12
flesh [1] **72**:2
flow [1] **48**:2
flown [1] **80**:21
focus [2] **65**:14 **93**:15
focused [1] **26**:5
focusing [2] **25**:22 **26**:18
follow [4] **58**:14 **60**:23 **61**:6 **90**:15
following [2] **46**:5 **66**:25
football [2] **11**:24 **12**:15
force [1] **6**:16
forcing [1] **6**:16
forget [1] **57**:14
form [4] **7**:11 **27**:11 **56**:20 **58**:23
former [2] **95**:16 **96**:1
forms [3] **48**:23,25 **49**:2
forth [2] **25**:12 **57**:6
found [8] **22**:24 **26**:13 **39**:13 **50**:2 **67**:20,23 **78**:24,25
four [3] **65**:24 **68**:19 **73**:11
frame [1] **62**:10
framework [1] **27**:12
free [3] **61**:19 **66**:23 **82**:2
freely [1] **64**:25
French [2] **31**:8 **85**:7
frequency [1] **72**:17
frequently [2] **24**:3 **91**:1
fresh [2] **45**:25 **56**:8
front [1] **14**:9
fruits [1] **56**:8
fully [1] **61**:18
function [18] **3**:15 **15**:10,25 **17**:17 **19**:7 **21**:15 **24**:15 **33**:1 **37**:17 **55**:15 **74**:3,4,6,21 **80**:13,14 **81**:2 **82**:16
functional [3] **36**:17 **85**:10 **87**:21
functionalities [1] **73**:17
functionality [9] **5**:24 **7**:23 **11**:16 **12**:10 **22**:11,15,19 **24**:10 **74**:18
functions [3] **3**:20 **20**:22 **52**:20
fundamental [1] **82**:10
fundamentally [3] **31**:10 **76**:18 **78**:22
further [8] **61**:7 **63**:18 **83**:12 **84**:14 **85**:17,18 **87**:7 **92**:6
future [2] **61**:24 **69**:7

G

gain [2] **71**:11,11
gave [3] **45**:4 **64**:21 **89**:2

General [8] **1**:22 **4**:21 **13**:10,18 **29**:25 **33**:18 **59**:15 **66**:16
generality [1] **32**:18
generally [2] **29**:1 **91**:14
generis [1] **52**:19
Georgia [2] **5**:9 **88**:12
gesture [1] **72**:15
gets [4] **29**:2 **57**:17 **74**:24 **85**:11
getting [1] **80**:12
giant [1] **73**:8
give [13] **7**:13 **9**:1,11 **12**:1 **15**:20 **28**:20 **42**:11 **47**:9 **56**:2 **58**:13 **69**:23 **70**:2,9
given [10] **7**:24 **20**:7 **21**:14 **24**:19 **28**:21 **29**:18 **33**:5 **68**:14 **72**:9 **79**:6
gives [5] **12**:20 **22**:1 **73**:16 **77**:20 **82**:23
giving [2] **10**:21 **47**:22
glue [1] **36**:18
God [1] **47**:1
GOLDSTEIN [82] **1**:18 **2**:3,13 **3**:6,7,9 **5**:12,20 **6**:4,9 **7**:2,21 **8**:13,21 **9**:8,19,25 **10**:4 **11**:3 **12**:3,6 **13**:3,19 **14**:25 **15**:6 **16**:3,12 **17**:3,9 **18**:2,9 **19**:16 **21**:3,23 **22**:6,9 **23**:15,21 **24**:24 **25**:20 **26**:15,17 **27**:1 **28**:5 **29**:8,12 **30**:4,9 **31**:1,19,25 **32**:16 **33**:15,25 **34**:19 **36**:4,23,25 **38**:14 **40**:24 **42**:15,18 **44**:12 **83**:4,8,16 **84**:22 **86**:8,12,16 **87**:10,14 **89**:1,14 **90**:11,23 **92**:9 **93**:7,8,12,13 **96**:11
goodness [1] **42**:5
GOOGLE [41] **1**:3 **3**:5,25 **11**:14 **12**:8 **37**:2 **39**:2,4,17 **40**:6 **41**:6 **42**:11 **44**:14 **45**:13,21 **49**:17,24 **52**:6 **53**:4 **54**:6,10 **60**:1,10 **61**:24 **63**:2,21 **68**:1 **70**:20 **71**:11,14,24 **73**:13 **76**:11,19,21 **77**:8 **78**:11,18 **80**:2 **81**:7 **82**:18
Google's [13] **3**:23 **38**:20 **39**:8 **44**:19 **50**:3,5 **60**:13 **63**:25 **65**:7 **68**:6 **71**:9 **72**:25 **77**:8
Gorsuch [19] **29**:10,11 **30**:7,11 **31**:18,20 **32**:9 **33**:10 **58**:8,9 **59**:3,6 **60**:17 **77**:13,14 **79**:1 **90**:13,14 **91**:25
got [8] **40**:16,17,18 **41**:16 **46**:15 **48**:4,17 **93**:9
gotten [1] **72**:3
govern [1] **29**:25
government [4] **69**:13 **70**:12 **71**:19 **77**:15
GPS [1] **24**:15
grant [2] **51**:21 **60**:5
granted [2] **36**:10 **38**:25
granting [1] **60**:6
granular [1] **28**:25
great [4] **40**:16,17 **45**:4 **56**:13
greater [1] **68**:14
grocery [3] **56**:6,14,14
guess [4] **30**:13 **53**:7 **73**:10 **83**:10
guidance [1] **88**:11

H

half [2] **50**:8 **61**:22

Official - Subject to Final Review

Hana [1] 90:25
hand [3] 21:1 24:16 77:20
happen [3] 55:1 71:9 77:8
happened [1] 28:3
happily [2] 18:18 23:2
harm [1] 95:22
harms [1] 69:13
Harper [7] 13:2,3,15 39:11 51:6,17 68:9
head [1] 37:10
headings [2] 5:13 6:11
hear [4] 3:3 5:3 25:14,15
heard [6] 5:5 33:6 61:23 85:22 86:5 93:23
heart [1] 43:1
heaters [1] 70:6
heavily [1] 19:13
held [3] 4:23 39:10 45:11
help [2] 8:22 92:7
helpful [1] 35:18
hierarchy [1] 57:21
high [3] 11:25 12:7 32:18
high-quality [1] 63:4
high-tech [1] 42:4
highly [5] 30:18 85:9 87:21,22 91:3
historical [2] 50:10 60:4
hmm [1] 47:10
holder [2] 47:10 66:22
holders' [1] 72:11
holds [2] 10:5 40:7
honest [1] 30:8
honestly [1] 25:24
Honor [20] 8:21 10:4 15:1 17:9 23:15 28:6 41:8 42:6,21 43:17 45:1 48:8 49:20 51:4 53:19 55:11 56:17 57:13 59:1,17
hoping [1] 25:3
hour [1] 5:4
however [1] 61:20
huge [1] 40:1
hundred [1] 60:8
hurt [1] 63:7
hypothesizing [1] 56:19
hypothetical [3] 35:2 56:12 84:5

I

i.e [1] 14:15
IBM [2] 40:3 95:19
idea [3] 32:19 34:14 72:18
idea-expression [3] 10:11 26:8 29:25
ideas [1] 32:10
identifies [1] 60:8
illusion [1] 84:25
illustrate [1] 50:19
illustrates [2] 5:8 7:9
imagine [1] 74:23
impacting [1] 90:20
impede [1] 42:3
impermissibly [1] 4:3
implementations [1] 96:5
implementing [22] 15:8,14,23 16:1 17:21 20:15,17,25 21:9,10 22:8,

22,24 38:8 44:2,8 52:24 53:11 54:3 55:2 80:14 81:9
implications [1] 51:25
important [4] 13:20 24:8 92:15 95:24
importantly [1] 20:1
impose [2] 72:12 84:20
impossible [2] 60:14 95:11
impracticable [1] 24:19
impression [1] 69:16
improvements [1] 72:8
inappropriate [1] 93:18
INC [1] 1:6
incentive [3] 62:20 63:3,19
incentives [4] 40:12 65:4 69:7 82:24
include [3] 38:25 72:6,7
including [8] 18:15 20:1 23:22 29:19 31:2 39:6,8 51:17
incommensurable [1] 77:21
incorporated [1] 45:5
incredibly [3] 24:8 88:14 91:3
independent [1] 77:7
indirectly [1] 44:16
indiscriminate [1] 65:16
individual [1] 70:21
industries [1] 52:25
industry [14] 36:13 53:14 54:7 62:3,16 63:6,8 64:3 65:21 83:18,20,23 94:3,6
industry's [1] 94:10
inefficient [3] 16:16 65:9 92:24
inessential [1] 32:4
inevitably [1] 37:18
inference [1] 89:22
information [1] 28:10
infringement [1] 49:1
innovate [1] 31:23
innovating [1] 39:20
innovation [6] 30:20 61:25 62:2,9,15 69:7
innovative [3] 7:11 37:8 94:20
inputs [3] 54:25 55:2,5
inquiries [1] 58:18
inquiry [1] 94:14
Inside [1] 32:23
insist [1] 63:5
insistence [1] 88:8
inspired [1] 35:3
instance [3] 70:18,19 76:6
instead [4] 13:23 25:15 26:7 45:6
institutional [1] 59:23
instructed [1] 13:12
instruction [3] 16:20 29:24 47:22
instructions [8] 23:5,6 24:1 26:2 29:20 37:4 88:11 92:14
instructs [1] 81:10
insulate [1] 37:19
intend [1] 7:2
intent [1] 17:7
interests [2] 71:8 77:7
Interface [4] 52:22 76:11 89:9,19
interfaces [12] 4:9 23:22 36:15 66:5,8,14 83:22 84:4 85:4,5 93:19 94:

5
Internet [1] 74:25
interoperability [8] 23:9,25 24:4 62:10,11 66:12 75:25 76:7
interoperable [1] 4:9
interrupt [1] 59:7
intricate [3] 57:21 58:2 70:22
intuitive [1] 56:10
invest [1] 63:8
invoke [4] 15:23 65:10 71:3 82:19
invoked [1] 94:18
invoking [2] 80:10,14
involved [2] 54:11 84:6
involves [1] 73:5
ironically [1] 87:20
isn't [12] 12:6 14:19 15:15 18:11 29:15 31:18,20,20 41:6 56:18 89:4 91:11
issue [6] 4:15 5:22,23 19:13 34:12 35:24
issued [2] 64:17 66:1
issues [2] 79:16 91:1
item [1] 41:21
itself [6] 16:21 36:13 37:19 55:16 57:15,17

J

J.K [1] 12:22
JA [3] 95:15,21,25
Java [44] 3:13,15,21 4:1 10:6,9,14,17,19 11:13 12:10,19 15:18 16:8 18:15,15,19 19:4 21:18,19 23:13 25:10 26:11 29:6 31:2 32:23 33:7 37:23 39:25 42:20 44:22 53:6 73:15 74:19,21 80:6 81:3 84:20 85:25 88:2 91:16 93:3 95:21,23
Java's [4] 46:17 47:24 73:1 76:11
java.lang [2] 14:21 35:2
java.lang.math [1] 16:11
java.lang.math.max(410 [1] 14:10
joined [1] 96:2
Joint [1] 57:16
JOSHUA [3] 1:20 2:6 38:16
judge [2] 13:4 46:24
judges [1] 67:16
judgment [15] 49:13 50:13 60:5,6,9,14 78:10 79:13,15 90:20,22 91:2,8,10,13
judicial [1] 51:23
juries [1] 51:1
juror [1] 49:25
jury [42] 4:18,19 5:5 13:6,10,11,24 19:14,19,23 20:6 33:5 40:7 49:11,23 59:15 60:2,11,16 62:18 67:11,20,21,24 77:23 78:18 79:8,12,18 87:25 88:7,8,11,18 89:23 90:4,18 91:7 93:16,23 95:6,14
jury's [9] 20:7 33:4 49:19 50:10 58:13 68:11 84:7 90:7 94:12
Justice [203] 1:23 3:3,9 5:12 6:2,5,14 7:14 8:11,14 9:3,18,20,22,23,24 10:23 11:21 12:5,23 13:16 14:2,3,5 15:2 16:2,4 17:1,2,2,3,25

18:3 19:9 20:8,9,9,11 21:22,24 22:7 23:7,17 24:21,23,23,24 26:14,16 27:14,15 29:7,9,9,11 30:7,11,13 31:18,20 32:9 33:10,11,11,13,14 34:10 35:1,14 36:22,23 38:13,19 39:22 40:14 41:23 42:14,17 43:8,10,11,12 44:6,18 46:1,3,4 48:17 49:6,8,9 50:22,24 52:1,3,4,8 54:15,17,18 55:23 56:3,25 58:5,7,7,9,15 59:3,6 60:17,18,18,20,21 61:1,2,8 62:6,21,25 63:13 64:4,8,13 65:17 67:1,3,4,5 68:17 69:9,10,10,12 70:4 71:15,17,18,20 72:21,22,22,24 73:25 75:5,7,8 76:9 77:11,13,14 79:1,19,21,22,23 80:23 81:6 82:6,9 83:2,3,9,10,17 84:4,12 85:16,16,18,19,20,20,22 86:10,13 87:4,6,6,7,8,8,10 88:22,24,24,25 89:2 90:10,12,12,14,15 91:25 92:1,1,3 93:6,8,14 96:10
Justice's [2] 47:13 56:12
Justices [1] 43:25
justification [3] 64:21 65:5 80:22

K

Kagan [19] 24:23,24 26:14,16 27:14 29:7 30:14 52:9 54:17,18 55:23 56:25 58:5 75:7,8 76:9 88:24,25 90:10
Kagan's [1] 84:4
Kavanaugh [15] 33:12,13 34:10 35:14 36:22 60:19,20 61:9 62:6 79:21,22 81:6 92:2,3 93:6
keep [2] 8:24 42:19
keeps [1] 36:19
key [2] 4:1 59:25
keyboard [12] 46:24,25 48:1,11 57:4 61:1 69:15,15 70:16 75:10,19 76:14
kill [1] 62:15
kind [7] 17:11 25:13 30:25 58:18,21 75:24 91:6
kinds [6] 57:2 70:5 84:3 93:19,20,21
kingdoms [1] 57:5
knowledge [3] 9:13,16 74:14
known [5] 64:17 72:10 80:15,20 81:2
knows [3] 34:6 43:7 53:10

L

lack [1] 37:11
language [7] 7:4 16:21,22 18:20 39:25 85:6 95:18
languages [2] 31:4,6
large [1] 70:21
larger [3] 15:10 17:23 29:1
last [2] 35:25 72:2
later [1] 86:24
latter [1] 11:3
law [18] 32:1 39:12 49:13,18 50:17,25 51:12 52:12 63:22 64:16 67:14,15,22 68:7 88:7 90:22 92:20 95:3
lawyers [1] 5:3

Heritage Reporting Corporation

lay [1] **68**:11
layout [2] **61**:16 **75**:19
lead [1] **25**:23
leading [2] **36**:12 **83**:19
learn [6] **37**:4 **65**:10 **71**:2 **76**:12,25 **82**:21
learned [5] **18**:14 **43**:1 **47**:8 **65**:8 **70**:3
learning [1] **62**:12
least [2] **37**:12 **78**:8
leave [1] **41**:25
ledger [1] **48**:23
left [1] **93**:9
legal [15] **5**:4 **21**:7 **38**:22,24 **39**:10 **40**:9 **50**:13,16,20 **58**:22 **67**:18 **78**:10,22 **88**:10 **91**:20
less [6] **24**:6 **27**:23 **37**:9 **38**:11 **53**:5 **87**:21
level [3] **11**:25 **12**:7 **32**:18
leverage [1] **3**:16
levied [1] **17**:11
license [7] **8**:20 **39**:21 **40**:4 **54**:9 **63**:12 **72**:5 **91**:11
licensed [5] **54**:12 **66**:18 **72**:4 **94**:4 **95**:17
licenses [3] **72**:12,15,16
licensing [1] **66**:21
lies [1] **69**:13
light [1] **49**:17
limitations [1] **39**:9
limited [2] **17**:16 **23**:6
line [8] **21**:2,16 **22**:4 **44**:14 **45**:14 **55**:16 **82**:10,12
lined [1] **49**:5
lines [3] **22**:25 **43**:4,6
list [1] **81**:16
listed [1] **22**:12
listen [1] **28**:17
literary [2] **38**:25 **44**:10
litigate [1] **95**:10
litigation [2] **40**:6 **67**:12
little [3] **24**:25 **72**:2 **83**:5
live [1] **74**:25
LLC [1] **1**:3
lock [5] **4**:1 **9**:5,11,12 **93**:2
locks [1] **9**:14
long [11] **5**:18 **16**:10 **32**:6 **39**:1 **48**:4 **61**:21 **63**:8 **66**:24 **81**:15 **82**:20 **96**:2
long-settled [1] **4**:8
long-term [1] **63**:19
longer [1] **79**:16
look [9] **11**:22 **28**:19 **32**:21 **33**:4 **40**:18 **41**:5 **44**:24 **46**:17 **57**:22
looked [1] **52**:20
looking [1] **19**:23
looks [3] **8**:4,6 **34**:5
losing [1] **17**:5
lot [13] **6**:22 **18**:3 **40**:3,11 **51**:21 **54**:9 **56**:23 **66**:7 **73**:21 **75**:22 **79**:13 **81**:4,4
lots [2] **63**:11 **84**:5
lower [1] **53**:21

M

machine [4] **45**:7 **62**:12,12 **82**:3
made [10] **13**:4 **44**:1 **59**:20 **67**:24 **72**:10 **78**:7 **88**:13 **90**:24 **95**:5,9
main [1] **30**:4
major [2] **40**:2 **54**:8
MALCOLM [3] **1**:22 **2**:9 **64**:9
Malcolm's [1] **87**:11
managed [1] **31**:23
manner [1] **55**:14
manufacturer [2] **75**:18 **76**:14
many [3] **22**:12 **23**:19 **95**:13
market [8] **19**:12,20,22 **40**:1 **63**:16,16 **83**:14 **95**:22
marketplace [3] **30**:19 **81**:1 **91**:16
Maryland [1] **1**:18
massive [1] **88**:19
masterful [1] **63**:10
material [3] **7**:18 **20**:2 **72**:20
math [2] **16**:20 **35**:2
mathematician [1] **81**:20
mathematics [2] **27**:17,20
matter [13] **1**:12 **8**:1 **39**:12 **49**:13,18 **50**:18 **51**:11 **62**:19 **68**:7 **90**:22 **92**:19 **94**:1 **95**:3
max [1] **35**:2
max.math.java.lang [1] **16**:21
mean [19] **7**:15 **8**:18,19 **9**:4 **27**:16 **39**:16 **43**:2 **48**:13 **50**:9 **56**:22 **57**:1,8 **59**:25 **60**:3 **73**:4 **74**:1 **78**:2 **87**:20 **89**:6
meaning [4] **19**:1 **39**:18 **45**:12,18
means [2] **3**:14 **24**:5
meant [2] **69**:22 **87**:1
mechanical [1] **48**:14
mentioned [6] **15**:15 **17**:21 **25**:23 **52**:9 **59**:5 **84**:17
menu [5] **40**:18 **41**:1,4,12,17
merely [1] **4**:4
merge [1] **21**:2
merger [32] **3**:11,18 **5**:23 **6**:6,17,17 **10**:10,12,24,25 **17**:14 **18**:4,23 **19**:2 **21**:21 **22**:16 **25**:22 **26**:9 **27**:5 **30**:5,12 **31**:7 **34**:10,20 **79**:25 **80**:11 **82**:11 **84**:14 **86**:13,19 **92**:5,7
merges [1] **27**:10
merging [1] **32**:11
merit [2] **54**:20 **55**:12
merits [1] **55**:9
message [1] **45**:13
metal [1] **69**:16
method [32] **7**:5 **10**:9,14,16 **17**:12 **22**:3,13 **25**:10 **26**:1,11 **29**:5,6 **32**:5 **33**:17,19,21 **37**:15,22 **38**:3 **46**:13 **48**:5 **55**:8,15,18 **61**:14 **70**:22 **80**:1 **81**:6,8,13 **86**:14 **92**:18
methods [13] **24**:2 **32**:22 **33**:20 **37**:24 **46**:8 **52**:18 **53**:16 **57**:2,20 **70**:6 **74**:11 **81**:22 **82**:20
Microsoft [6] **30**:22 **31**:5 **39**:22 **42**:7 **85**:2,3
mid [1] **64**:14
might [9] **16**:9 **29**:22 **32**:13 **66**:8 **73**:22 **75**:15,15 **93**:19,20
million [2] **70**:7 **88**:19
millions [5] **4**:12 **20**:4 **22**:25 **70**:3 **94**:19
mind [1] **14**:7
minimally [2] **4**:10 **94**:17
minute [3] **36**:24 **62**:22 **82**:7
minutes [1] **93**:9
mismatch [1] **89**:12
misunderstanding [1] **32**:17
mixed [3] **50**:25 **51**:21 **88**:6
mixing [1] **47**:14
mobile [1] **73**:2
model [1] **40**:10
modern [5] **4**:9 **12**:13,13 **24**:3,14
money [7] **8**:18 **40**:3 **54**:9 **63**:12 **70**:5 **71**:11 **72**:6
monopolize [1] **49**:5
monopoly [4] **47**:10 **69**:24 **70**:2,9
morning [8] **3**:4 **25**:2 **29**:11 **33**:15 **38**:20 **44**:1 **58**:9 **79**:24
most [8] **16**:6 **42**:18 **49**:17 **57**:21 **67**:25 **68**:5 **89**:20 **90**:21
motion [1] **74**:23
mouse [1] **24**:17
move [3] **29**:18 **30**:2 **91**:7
moved [3] **49**:12 **52**:16 **73**:1
movie [1] **45**:20
moving [2] **29**:13 **30**:11
much [8] **4**:17 **6**:25 **20**:24 **30**:15 **38**:6 **39**:14 **64**:22 **96**:9
multifactor [1] **58**:17
multiple [5] **20**:17,20 **25**:16 **39**:6 **57**:23
must [1] **45**:11

N

narrower [1] **4**:17
national [1] **64**:15
nature [3] **89**:17,25 **90**:4
nearly [3] **13**:14 **24**:7 **60**:14
necessary [8] **6**:13,15 **20**:23 **48**:24 **53**:2 **64**:1 **66**:10,11
need [4] **43**:15 **54**:24 **59**:21 **77**:22
needed [1] **74**:3
needs [1] **55**:4
negatively [1] **90**:19
Neither [1] **39**:24
net [1] **94**:15
never [4] **40**:6 **45**:5 **48**:11 **95**:17
New [36] **1**:20,20 **7**:18 **12**:11 **22**:5 **24**:5 **37**:2,4 **40**:16,17 **42**:19 **45**:17 **62**:9 **65**:10,10 **70**:5 **71**:2 **73**:7,20 **74**:3,4,7 **75**:9 **76**:12,20,25 **77**:4 **78**:13 **79**:16 **82**:18,21,25 **88**:1,20,20 **91**:4
news [2] **51**:18 **91**:19
next [3] **58**:1,1 **75**:20
Ninth [3] **45**:2 **52**:10 **54**:1
nobody [1] **76**:23
non-creative [1] **36**:18
non-exhaustive [1] **68**:20
non-licensed [1] **83**:21
non-record [1] **54**:10
none [1] **22**:15
nonetheless [1] **19**:25
nonsensical [1] **92**:19
normally [2] **29**:23 **59**:15
note [1] **51**:16
noted [1] **44**:7
notes [1] **39**:22
nothing [5] **47**:4 **63**:14 **69**:22 **70**:1 **94**:4
noting [1] **43**:24
notoriously [1] **5**:10
notwithstanding [1] **19**:19
novel [5] **7**:5 **56**:13 **58**:4,22 **87**:23
novels [1] **12**:22
novo [7] **50**:9,15 **51**:6,7 **59**:11 **78**:24 **95**:2
nub [2] **21**:25 **48**:17
numbers [6] **15**:11 **17**:24 **29**:2 **44**:9 **59**:4 **86**:3
numerical [1] **44**:9
numerous [2] **22**:23 **51**:16

O

obligation [1] **84**:21
obviously [4] **4**:19 **67**:12 **71**:22 **72**:12
October [1] **1**:10
offered [1] **72**:17
offers [1] **74**:25
often [5] **5**:11 **58**:16 **65**:15 **66**:20 **72**:5
okay [10] **10**:8 **14**:10 **15**:6 **17**:1 **26**:9 **48**:3 **55**:23 **83**:10 **86**:12 **92**:21
old [1] **42**:20
old-fashioned [1] **47**:6
older [1] **24**:6
once [6] **11**:9,12 **47**:7 **51**:13 **65**:8,13
one [60] **6**:19 **7**:6,12 **8**:2 **10**:13 **14**:12 **15**:12,19,22 **16**:4,5,22 **17**:19 **18**:7 **19**:1 **21**:8,11 **22**:17 **23**:14,24 **24**:6,7 **25**:6,19 **27**:7,21,24 **28**:3,4,18,21 **30**:23 **34**:11 **35**:14,22 **38**:11 **39**:20 **41**:22 **46**:20 **54**:2,13 **55**:7,7 **56**:3 **57**:22,25 **58**:1 **66**:21 **67**:7 **68**:17 **71**:19 **75**:3 **76**:16 **77**:20 **79**:24,25 **82**:2,5 **87**:18 **89**:10
one-directional [1] **23**:9
ones [1] **18**:15
only [60] **3**:19 **4**:23 **6**:18,19 **7**:17 **8**:2,13,16,17,19 **9**:7 **10**:13 **11**:24 **12**:18 **15**:12,19,22 **16**:14,22 **17**:19 **18**:6,20 **19**:1 **21**:8,11 **22**:17,25 **23**:23 **26**:7,15 **27**:10 **28**:16,18 **33**:19 **34**:16 **35**:11 **36**:12 **53**:2 **60**:1,10 **61**:18 **69**:1 **72**:1 **73**:25 **74**:2,5,8,15,23 **79**:11 **80**:11 **82**:5,14 **85**:12 **87**:16,18 **88**:15 **89**:22 **92**:12 **93**:3
open [4] **9**:14 **36**:5 **40**:15 **66**:21
opening [1] **41**:2
operate [5] **25**:11 **26**:3 **34**:6,8 **44**:10
operated [1] **94**:11
operates [4] **44**:21,22 **83**:18,23

operating [1] 29:6
operation [30] 7:5 10:9,14,17 17:12 22:3,13 25:10 26:2,11 29:5 32:6,23 33:17,19,21,22 37:23 38:3 46:9,13 48:5 53:16 80:1 81:7,8,13,22 86:15 92:18
operators [1] 47:8
opinion [2] 66:2 91:21
opposite [2] 13:9 93:25
optical [1] 84:25
option [1] 42:1
options [1] 8:5
ORACLE [38] 1:6 3:5,12,15,16 4:2,18 8:5 10:5,21,25 11:12 12:16 15:12 17:20 18:7 21:4,10 28:3 31:9,19 35:5 37:18 49:12 50:3 65:20 73:21 78:13 80:25 83:15 84:15,21 85:8 89:15 91:7 93:1 95:9,16
Oracle's [9] 6:20 16:14 18:5 34:2 37:7 39:2 85:3 88:7 95:25
oral [7] 1:13 2:2,5,8 3:7 38:16 64:9
order [8] 29:20 37:19 45:9 47:15 65:10 71:3 74:11 77:3
ordinary [2] 46:14 47:21
organization [8] 5:14 40:22 47:24 55:8,21,25 57:2 70:22
organize [3] 55:4 61:14,20
organized [2] 5:16 57:6
organizes [1] 41:1
organizing [3] 56:7,21 57:9
original [12] 11:19 20:2 22:2 39:2,3,17 43:21 45:12 51:19 62:20 63:23 90:5
other [37] 7:11,25 8:7 14:23 19:25 21:20 23:3 24:16 27:19 30:22 33:17 34:9,25 36:21 40:2 41:24 42:22 44:9 50:4 52:15,18 53:8 56:1 58:11 68:25 72:10 76:10 80:5 82:14 84:3 85:23 88:9,13 89:5 90:8 91:3 92:17
others [10] 27:22 31:23 32:11 39:24 55:19 61:13,19 70:7 73:15 91:10
otherwise [2] 29:22 72:15
out [24] 8:24 26:19,23,24 27:4,19 39:4 40:18 41:4 45:7 46:15 47:13,18,18 48:5 62:6 72:2 79:11 80:24 83:4 84:3 91:5,11 95:13
outcome [1] 38:23
outline [1] 56:20
outside [1] 34:4
over [10] 5:7 12:24 28:16 41:21 60:8,8 61:17 70:10 73:18 74:25
overall [1] 55:20
overturned [1] 5:1
own [16] 5:19 11:15 14:7 23:2 34:2 38:10 41:3,15,21 56:6 61:13,14,16,20 76:20 84:16
owner [2] 69:23 70:9

P

package [3] 57:22,25 61:13
packages [5] 23:19 24:2,13 55:6 57:20

PAGE [14] 2:2 31:16 49:4 57:23 59:4 82:1 85:1,11,13 92:4 94:25 95:2,4,21
pages [2] 57:16,23
paper [2] 49:5 69:17
paradigmatic [1] 77:2
paramount [1] 50:18
parities [1] 91:19
parity [1] 87:19
part [8] 23:21 35:12,12 52:23 65:16 80:24 86:25 89:1
particular [17] 7:16 14:15,18 28:10,22 66:13,14 68:25 69:5,8 73:14 80:13 82:12,15 87:3 88:3 95:10
particularly [3] 28:4 30:17 58:21
parties [2] 35:16 60:3
parts [1] 15:7
pass [1] 42:12
passable [1] 63:10
passed [1] 63:18
past [2] 29:13 30:2
patent [12] 3:14 4:6 7:15,20 8:23 10:21 19:8 22:20 28:21 31:13 37:19 85:10
patent-like [2] 3:17 7:7
pay [1] 83:24
paying [5] 40:3 54:8 63:11,14 95:19
payment [1] 72:6
PC [1] 73:2
pen [1] 63:17
penalize [3] 6:25 7:3 80:25
people [19] 4:13 7:11 9:15 11:13 12:18 20:5 23:17 27:20 34:25 41:2 46:17 70:3 71:2,5 76:14 77:9 81:4 86:4 94:9
percent [1] 53:5
perfectly [3] 5:8,18 84:9
perform [6] 3:20 11:25 15:25 19:6 80:12 82:15
performance [1] 81:19
performed [2] 49:23 74:21
performing [1] 74:20
perhaps [1] 32:2
periodic [1] 57:4
permit [1] 77:17
permits [1] 18:20
person [4] 15:21 28:10 57:9 86:23
perspective [1] 8:4
Petition [2] 50:1 94:25
Petitioner [6] 1:4,19 2:4,14 3:8 93:12
phenomenon [1] 72:4
phone [4] 32:20 75:18,20 76:13
phones [2] 30:24 73:2
phyla [1] 57:6
pick [2] 47:18,18
picture [2] 28:25 74:23
piece [3] 55:20 69:17 87:3
place [3] 30:13 65:6 70:25
placed [1] 82:5
plain [1] 16:24
plainly [2] 29:6 33:5

plates [2] 41:18,20
platform [18] 3:24 23:12,13 31:2 42:9 53:23 71:12 73:1,15,18 74:19 75:2 76:21,22 78:13 79:17 81:3 94:20
platforms [4] 23:19 31:4 39:23,24
play [2] 34:17 84:3
playbook [2] 12:1,24
players [3] 11:23,25 12:15
please [5] 3:10 38:19 46:4 53:13 64:13
plot [1] 58:4
point [25] 7:3,8,21 10:16,24 12:6 14:25 15:3 26:12 34:3 43:24,25 47:25 54:10 59:20 71:25 72:2 79:11 86:18 88:16 92:15,16 93:18 95:5,13
pointed [3] 62:6 80:24 91:5
pointless [1] 72:15
points [2] 35:14 93:24
policy [3] 4:14 62:19 82:24
poorly [1] 64:2
popular [4] 71:10,13 76:22 81:3
position [3] 17:6 62:2 76:18
possible [5] 5:24 37:25 79:15 89:22 92:24
potential [2] 64:24 72:10
potentially [2] 66:7 69:3
power [1] 70:10
practical [1] 37:13
practice [7] 4:8 66:5,18 79:12,13 90:20 94:7
pre-written [3] 26:4 34:7 38:9
precedents [2] 50:18,19
precise [1] 19:1
precisely [1] 40:4
predictions [1] 61:24
preexisting [1] 74:10
premise [1] 36:14
present [1] 5:4
presented [1] 49:16
preservation [1] 65:3
preserve [2] 45:9 66:11
preserved [1] 43:3
preserving [1] 76:6
Presumably [1] 20:23
pretty [5] 15:5 25:12 28:2 31:21 54:24
prevail [1] 36:6
prevalent [1] 66:18
prevent [1] 57:11
preventing [1] 10:22
previous [1] 4:23
prewritten [2] 61:15,20
primacy [1] 59:24
primarily [1] 50:16
primary [2] 29:14 78:8
Principally [2] 16:3 25:6
principle [7] 17:20 21:7 34:17 38:24 39:10 44:4 52:12
principles [2] 38:22 63:24
print [1] 74:24
prior [4] 4:25 31:4,4 85:4
prisoners [2] 12:17 93:2

probably [2] 29:17 79:9
problem [6] 22:1 23:7 31:22 46:11 52:7 91:13
problems [1] 64:15
produce [3] 15:10 56:8 85:13
produces [1] 17:23
product [3] 6:20 45:6 95:25
professor [2] 27:17 60:7
program [28] 5:21 10:6 11:1 12:9,21 14:11,15,17,19,23 15:9,25 16:8 23:4 24:5,11 26:4 27:8 28:6,12,18 33:2 34:8 35:5,6 39:7 46:14 85:10
programmer's [1] 54:25
programmers [8] 6:24 16:7,19 25:11 42:19 72:10 76:11 80:6
programming [4] 16:16 24:4 52:22 72:9
programs [25] 10:3 14:20 15:7 16:17 17:22 20:4 29:19 33:20,23 34:7 36:19 37:9 38:9 44:15 46:7,10 47:21,23 61:15,20 84:19 85:25 89:20 92:23 94:19
promote [1] 40:13
pronounced [1] 65:1
proof [3] 27:18,21 28:17
proofs [1] 28:19
proper [1] 67:8
properly [3] 13:12 59:11 80:5
proposed [1] 44:14
proposition [4] 27:25 72:13 76:6 80:11
propounded [1] 81:20
protect [1] 61:18
protectable [1] 54:14
protected [1] 41:14
protection [24] 3:19 8:3 11:20 17:5,8 22:20,21 27:5,9 29:4 33:22 35:13 37:12 39:1 55:13 57:18 58:3 62:5 64:20 65:5 70:18,24 80:18 87:2
protects [1] 63:22
prove [1] 29:2
proves [1] 38:6
provide [7] 5:24 7:19,22 10:14 11:15 17:7 22:18
provided [1] 68:19
provides [4] 12:9 15:9 37:21 51:23
providing [1] 88:10
proving [1] 27:25
public [8] 3:14 11:7,10,13 35:9,10 62:19 88:12
Public.Resource [1] 5:9
publication [2] 86:19 94:19
publish [1] 11:6
published [4] 11:10,12 48:19 86:21
pure [2] 17:11 25:25
purely [2] 36:17 48:13
purpose [8] 19:11 39:16,17 45:15 53:24 76:7 89:7,8
purposes [7] 43:19,21 75:13 76:2 78:14 82:11,12
put [6] 5:15 14:9 28:9,10 56:20 88:

7

putting [2] **47**:14 **79**:16

Q

qualify [2] **51**:12 **70**:24
quarrel [1] **76**:5
question [43] **3**:12 **4**:17 **6**:8 **11**:17 **14**:6 **20**:12 **25**:16 **28**:11 **29**:1 **35**: 22 **39**:3,19 **48**:4 **49**:11 **50**:8 **59**:23 **60**:15 **61**:1,2 **68**:18 **71**:18 **75**:14, 17 **78**:9,11,20,22 **79**:7,25,25 **84**:2, 14 **88**:6,8 **89**:4,12 **90**:6,7,16 **92**:4, 11 **93**:15 **95**:1
questioning [1] **83**:6
questions [27] **4**:14 **18**:3 **48**:9 **50**: 25 **51**:15,18,22 **56**:23 **58**:15,17,21 **60**:24 **61**:7 **67**:7,13,15,18 **68**:12, 16 **69**:2 **79**:5,14,18 **85**:17,19 **87**:7 **90**:21
quick [1] **67**:6
quite [4] **9**:25 **56**:5 **88**:13 **90**:5
quote [1] **51**:10
quoted [1] **86**:5
quoting [1] **92**:4
QWERTY [14] **46**:24,25 **48**:1,11,12 **57**:3 **61**:1 **69**:14,15,23,24 **70**:15 **75**:10,11

R

raised [1] **34**:11
ran [1] **86**:18
rapidly [2] **29**:14 **30**:3
rather [5] **29**:13 **30**:3 **42**:20 **77**:8 **85**:7
re-implement [2] **31**:3 **85**:4
re-implementation [1] **83**:21
reached [1] **67**:11
reaching [1] **91**:13
read [3] **25**:4 **46**:6 **59**:8
reading [1] **46**:16
real [1] **25**:16
real-world [1] **31**:11
realize [1] **94**:11
realized [1] **61**:18
really [9] **6**:24 **32**:6 **47**:3,25 **48**:9 **56**:7 **77**:25 **82**:17 **89**:12
reason [8] **6**:18 **23**:1 **24**:18 **64**:6 **68**:11 **78**:6 **85**:4 **93**:21
reasonable [12] **49**:23,25 **50**:4 **67**: 11,16,19,21 **77**:23 **78**:18 **79**:8 **94**: 13,14
reasonably [5] **4**:18 **19**:14,24 **88**: 18 **96**:7
reasons [3] **27**:7 **65**:25 **80**:17
REBUTTAL [3] **2**:12 **93**:10,11
receive [1] **27**:9
recently [1] **5**:8
recognize [2] **19**:16,23
recognized [1] **21**:5
recognizes [1] **28**:13
recommended [1] **64**:18
record [4] **51**:13 **58**:19 **84**:9 **88**:1
recreate [3] **6**:10,12 **42**:13
recreating [1] **6**:1

reduce [1] **94**:16
reference [1] **18**:11
refine [1] **63**:9
reflect [1] **47**:23
reflected [1] **70**:23
reflecting [1] **83**:18
regard [1] **82**:13
regarded [1] **79**:18
regrets [1] **4**:19
reinforced [1] **88**:16
reiterated [1] **5**:9
reject [1] **70**:12
rejected [3] **39**:5 **44**:14 **90**:24
related [1] **64**:15
relates [1] **55**:18
relationship [4] **17**:18 **19**:5 **32**:24 **33**:6
relationships [2] **57**:19,25
released [1] **74**:24
relevant [4] **34**:14 **68**:13 **72**:19 **82**: 19
reliance [1] **32**:13
rely [3] **9**:25 **10**:1 **76**:15
relying [2] **84**:19 **95**:12
remand [2] **59**:13 **79**:9
Remember [1] **12**:7
reply [2] **80**:2 **92**:5
report [5] **64**:17,18 **81**:13,23 **82**:1
reporting [2] **51**:19 **91**:19
represent [1] **65**:18
representation [1] **83**:13
representations [1] **36**:11
reproduced [1] **43**:4
require [2] **3**:24 **37**:3
required [2] **39**:21 **49**:15
requirement [1] **72**:7
requires [2] **42**:10 **50**:16
requiring [1] **76**:25
resolution [1] **68**:11
resolve [4] **13**:7 **51**:9 **84**:10,23
resolved [3] **3**:11 **5**:11 **91**:10
resolves [1] **51**:14
resolving [1] **50**:16
Resource [1] **88**:13
respect [11] **4**:7 **10**:2 **17**:21 **21**:17 **22**:22 **29**:5 **32**:5 **68**:15 **69**:4 **87**:15 **88**:3
respects [1] **50**:10
respond [9] **18**:5,18 **23**:4 **34**:13,24 **36**:3 **80**:6 **84**:13 **92**:13
responded [1] **92**:4
Respondent [7] **1**:7,21,25 **2**:7,11 **38**:17 **64**:11
responds [1] **28**:14
response [5] **33**:24 **80**:15 **81**:11 **83**:13 **84**:2
responsibility [3] **13**:21 **20**:7 **33**:8
restaurant [3] **40**:16 **41**:1 **84**:4
result [6] **29**:21 **44**:17 **55**:19 **64**:2 **85**:13,24
results [1] **93**:20
returned [1] **49**:11
reuse [14] **3**:25 **8**:9 **15**:13 **18**:19 **21**: 7,12,16,18,19 **24**:18 **34**:23 **84**:24

91:24 **94**:4
reused [3] **23**:1 **36**:15,20
reusing [5] **4**:8,10 **10**:22 **11**:18 **23**: 5
revenue [1] **71**:12
review [12] **4**:17 **49**:10 **50**:9 **51**:6, 23 **58**:25 **59**:14 **67**:8 **79**:2 **88**:5 **91**: 12 **94**:24
reviewed [4] **5**:6 **58**:18 **59**:11 **78**: 23
rewritten [1] **23**:2
ride [1] **30**:19
rights [5] **3**:17 **7**:7 **10**:21 **51**:20 **81**: 18
risk [1] **17**:5
rival [3] **30**:16 **56**:14,14
ROBERTS [54] **3**:3 **5**:12 **6**:2,5,14 **7**: 14 **8**:11,14 **9**:3,18,20 **14**:3 **17**:2 **20**: 9 **24**:23 **29**:9 **33**:11 **36**:23 **38**:13 **40**:14 **41**:23 **42**:14,17 **43**:8 **46**:1 **49**:6 **52**:1 **54**:15 **58**:7 **60**:18 **62**:21 **64**:4,8 **65**:17 **67**:1 **69**:10 **71**:15 **72**: 22 **75**:5 **77**:11 **79**:19 **82**:6 **83**:3,10 **84**:12 **85**:16,20 **87**:6,8 **88**:24 **90**: 12 **92**:1 **93**:8 **96**:10
rods [1] **69**:16
role [1] **13**:23
rose [1] **62**:3
ROSENKRANZ [36] **1**:20 **2**:6 **38**: 15,16,18 **40**:15 **41**:8 **42**:5,16,21 **43**:13,17 **45**:1 **48**:7 **49**:9,20 **50**:23 **51**:4 **53**:19 **54**:18 **55**:11 **56**:17 **57**: 13 **58**:6 **59**:1,17 **60**:22 **61**:8 **62**:24 **64**:6 **84**:17 **93**:24 **94**:22 **95**:14,20 **96**:12
roughly [2] **5**:6 **70**:11
round [1] **83**:6
Row [3] **13**:3,15 **68**:9
Rowling's [1] **12**:22
ruin [1] **65**:20
Rule [28] **13**:22 **16**:15,22 **25**:12 **31**: 9 **35**:19 **36**:2,9,20 **37**:7 **44**:12 **49**: 15 **62**:17 **63**:22,23,25 **66**:16 **67**:10 **69**:7 **71**:23 **83**:15 **88**:6 **91**:7,24 **92**: 20 **93**:22 **94**:9 **95**:9
ruled [2] **35**:23 **52**:6
rules [7] **58**:22 **59**:21 **62**:16 **84**:1 **91**:20,22 **93**:18
ruling [4] **36**:1,5 **63**:2,21
run [5] **23**:11,13 **53**:3,8 **63**:8
runs [2] **86**:5,9

S

safe [4] **8**:17,23,25 **9**:5
safes [2] **9**:1,14
same [29] **11**:16 **12**:10 **13**:14 **15**:15 **18**:22 **20**:22 **25**:17 **33**:19 **39**:16,16, 18 **44**:21 **45**:15,16 **48**:25 **53**:24 **56**: 5 **58**:4 **59**:2 **68**:15 **74**:18,21 **75**:1 **78**:14,14 **82**:3 **84**:21 **89**:7 **95**:4
SAP [1] **40**:3
saying [25] **15**:21 **19**:22 **21**:21 **25**:8, 14,15 **26**:21 **31**:6 **34**:21,23 **38**:1,2 **40**:24 **41**:7,17 **42**:25 **55**:9 **57**:10

61:11 **77**:24 **78**:3 **80**:7,9 **92**:17 **95**: 16
says [19] **26**:9,22 **27**:18 **29**:18 **42**: 18 **44**:12 **46**:8 **70**:4 **77**:16 **80**:2,17 **81**:7 **83**:25,25 **84**:5 **92**:21 **95**:20, 22 **96**:1
scientists [4] **35**:18 **36**:12 **83**:20 **94**:7
scientists' [2] **61**:4 **85**:1
scratch [1] **38**:10
SE [27] **3**:13 **4**:1 **10**:6,9,14,17,19 **11**: 13 **12**:10,19 **15**:18 **18**:16,19 **19**:4 **21**:18 **23**:14 **26**:11 **29**:6 **31**:2 **32**: 23 **33**:7 **37**:23 **88**:2 **91**:16 **93**:3 **95**: 21,23
SE's [1] **3**:15
second [15] **16**:18 **26**:20 **27**:2,12 **52**:9 **55**:3,20 **61**:2,22 **62**:19 **66**:4 **71**:1 **73**:24 **74**:12 **80**:23
Section [16] **7**:4,24 **10**:1,2,5,7 **22**:9, 13 **26**:7 **28**:24 **32**:2 **37**:21 **39**:9 **44**: 15 **80**:17 **81**:24
sections [1] **5**:15
see [4] **48**:3 **57**:23 **61**:21 **92**:6
seek [1] **61**:18
seem [5] **9**:25 **23**:10 **43**:14 **44**:19 **65**:15
seems [5] **6**:25 **23**:9 **34**:13 **52**:8 **57**: 1
seen [3] **57**:22 **62**:11 **66**:3
Sega [1] **45**:3
segments [2] **66**:9,11
Seinfeld [1] **43**:4
Selden [14] **7**:9,10 **11**:4,7 **35**:8 **38**: 5 **46**:12 **48**:18,20 **49**:1 **81**:14,15 **86**:20,21
Selden's [2] **48**:25 **49**:2
self-reflectively [1] **34**:20
Semi [1] **48**:12
send [1] **90**:18
sending [1] **51**:8
sense [5] **17**:16 **21**:6 **33**:19 **35**:7 **74**:20
sensible [1] **84**:10
separate [1] **26**:24
separately [1] **95**:17
sequel [1] **39**:15
sequence [1] **55**:21
serve [1] **39**:16
serves [1] **45**:15
services [1] **53**:9
set [6] **3**:25 **14**:16 **23**:6 **56**:19 **85**:24 **93**:1
sets [2] **14**:22,23
setting [2] **14**:12 **25**:12
settled [2] **61**:3,23
Seventh [1] **13**:23
several [3] **43**:25 **48**:8 **84**:18
share [2] **30**:15 **96**:4
shares [1] **9**:13
shelf [3] **47**:16,17,17
shift [1] **93**:10
shopper [1] **56**:10
short [2] **45**:19 **66**:9

short-term [1] 63:19
shortcut [4] 15:7 17:22 26:3 34:6
shouldn't [5] 40:21 59:12 69:2 77: 5 84:20
shows [1] 35:9
side [5] 14:6 33:17 58:12 85:23 88: 10
sided [1] 78:18
sides [1] 63:5
significant [2] 35:20 61:5
significantly [1] 90:5
similar [3] 30:13 56:3 60:11
Similarly [1] 75:4
simple [1] 63:23
simply [10] 6:10 29:15 63:13 66:22 72:7 75:2 77:6 78:17 81:2 85:24
since [3] 52:8 62:4,7
single [3] 49:4 53:21 54:4
sir [5] 5:20 6:9 7:3 12:3 36:25
sitting [1] 27:17
situation [1] 28:2
six [2] 36:1 62:7
sky [5] 35:19,25 52:5 62:7 71:23
smartphone [12] 3:23 12:13 24: 14,16,20 45:17 73:18 75:18 76:19 88:3,21 94:20
Smartphones [1] 71:6
software [11] 3:21 4:8,10 24:5 36: 13 38:25 54:7 61:25 62:3,15 83: 20
sold [1] 95:17
sole [1] 37:7
Solicitor [2] 1:22 33:18
solution [1] 30:18
somebody [4] 9:6 19:7 47:2 74:24
someone [9] 5:13 11:22 15:20 24: 11 28:8,20 31:7 34:7 43:2
someone's [1] 12:14
sometimes [1] 72:5
somewhat [2] 25:5 47:20
song [2] 34:15,16
Sony [1] 45:3
Sorry [5] 7:21 12:4 26:16 30:10 59: 7
sort [1] 69:8
sorts [1] 70:15
Sotomayor [19] 20:10,11 21:22,24 22:7 23:7,17 24:21 52:3,4 63:13 70:4 72:23,24 73:25 87:9,10 88: 22 89:2
Sotomayor's [2] 61:2 90:15
source [1] 66:21
span [2] 60:10,12
specific [5] 10:2 18:25 28:7 29:24 61:16
Specifically [1] 3:17
spend [3] 41:3 42:2 70:4
spending [1] 42:6
spent [4] 16:6 20:22,24 42:7
spice [1] 47:18
spices [2] 47:14,15
spoke [1] 14:15
square [1] 17:6
SSO [1] 70:23

stability [2] 50:17 51:22
stable [1] 79:6
stand [1] 32:15
standard [21] 4:16 41:13,13,18 49: 10,15,24 50:9,15,21 56:11 58:25 59:14 67:8,10 70:16 79:2 88:5 91: 12 93:22 94:24
starkly [1] 5:5
start [2] 55:23 83:11
starts [1] 75:12
statement [1] 52:5
statements [1] 29:19
STATES [7] 1:1,14,24 2:10 64:10 65:19,21
statute [2] 21:6 89:16
statutory [2] 45:10 90:6
stealing [1] 37:5
step [2] 73:3,8
STEWART [33] 1:22 2:9 39:11 64: 8,9,12 65:18,24 67:2,6,9 68:23 70: 14 72:1 73:10 74:5 75:8,21 76:16 77:14 78:2 79:4,24 80:8 81:12 82: 6,8 83:17 88:15 90:17 91:20 92:4 96:12
Stewart's [4] 83:13 92:10 93:17 94:22
still [4] 33:3,16 40:1 80:5
stipulate [1] 60:4
stolen [1] 63:11
stop [1] 21:25
store [2] 56:6,14
stores [1] 56:14
story [1] 45:20
stoves [1] 70:7
straight [2] 25:25 30:12
strategy [2] 96:1,2
stream [1] 74:25
strictly [1] 17:15
strikes [1] 30:14
stroke [1] 63:17
strongly [1] 50:3
structure [6] 6:1,4,12 55:21,24 61: 14
stuck [1] 30:13
students' [1] 28:19
study [2] 45:7 64:15
sub-categories [1] 56:10
subject [3] 27:5 78:1,3
submitted [3] 51:1 96:14,16
subsidiary [4] 4:21 13:10 51:14 78:10
subsists [1] 80:18
substantial [1] 58:19
substitute [1] 62:17
substitutes [3] 4:2 10:19 37:25
success [3] 54:6 81:1 84:16
successful [3] 6:21 30:16,18
sued [1] 49:1
sufficient [5] 37:2 49:18 58:13 78: 21 96:7
sufficiently [2] 70:19,23
suggest [1] 58:12
suggests [1] 89:3
sui [1] 52:19

suitable [1] 12:12
summary [13] 50:12 60:5,6,9,14 79:13,14 90:20,22 91:2,8,10,13
Sun [6] 6:19 10:25 40:4 61:16 84: 15 96:2
Sun's [1] 39:21
superior [1] 24:6
superseded [2] 95:21,23
superseding [3] 39:11 45:22 50:4
supplant [2] 27:13 91:16
supplanted [1] 95:21
supplants [1] 24:6
supplemental [1] 57:24
support [1] 49:18
supporting [4] 1:25 2:11 62:1 64: 11
suppose [6] 7:8 27:16 56:6 59:8,9 75:8
supposed [2] 67:17 95:11
supposedly [1] 45:17
SUPREME [2] 1:1,13
surprise [1] 24:12
surprised [1] 24:25
survive [1] 63:6
susceptible [1] 87:22
swallow [1] 33:22
switch [1] 19:10
switchboards [1] 47:5
switches [4] 14:13,16,22,23
symbols [1] 44:9
system [16] 11:8,9 16:8,13 32:7 47:9 48:20,22,24 49:2 53:8 57:5 69:19,19 76:12 86:25
systems [3] 23:13 47:6,11

T
---

table [1] 57:4
task [5] 32:12,17,18 81:17,19
tasked [1] 76:20
tasks [3] 46:18 69:20 86:3
taxonomy [1] 55:24
teaches [2] 35:8 55:17
teaching [2] 11:4 70:8
team [4] 11:23,23,24 12:1
tech [2] 65:20 84:18
technical [1] 28:7
technically [1] 91:17
technological [1] 73:20
technology [1] 83:14
telephone [2] 47:6,11
telescope [1] 8:7
tells [13] 10:5,7,10,13 11:5 22:10, 16 32:2 34:2,3,7 46:21 47:17
tends [1] 72:17
Tenth [1] 54:1
term [1] 81:13
terms [6] 6:9 34:14 59:22 66:6 72: 6 74:1
terrific [1] 56:7
test [7] 26:18,19 27:3,3 32:1,20,21
testimony [2] 5:5 93:23
text [2] 5:19 11:5
textual [1] 37:13
textualist [2] 17:11 25:25

Textually [1] 37:21
theaters [1] 74:24
theirs [1] 7:19
theme [1] 41:9
theory [1] 37:14
there's [17] 6:18 15:12 22:3 24:17 28:18 37:13,23 41:10,10,13 42:23, 25 44:4 66:17 68:10 80:11 86:16
therefore [1] 33:21
they've [3] 30:16 52:20,21
thinking [1] 44:23
thinks [2] 60:1 69:13
Third [4] 52:14 53:25 66:17 74:22
third-party [1] 23:11
THOMAS [22] 1:18 2:3,13 3:7 9:22, 23 10:23 11:21 12:5,23 13:16 14: 2 43:10,11 44:18 67:3,4 68:17 69: 9 85:17,18 93:11
though [4] 11:22 16:9 35:22 73:21
thousand [1] 57:8
threat [1] 62:2
threaten [1] 35:20
threatening [1] 61:5
three [5] 5:3 65:24 73:10 80:16 93: 9
thrived [1] 62:16
throughout [1] 40:5
throw [1] 91:11
timing [1] 34:12
tissue [1] 89:19
Today [6] 5:3 25:7,15 26:5,18,21
together [2] 21:1 36:19
took [6] 8:4 25:5,8 53:5 76:11,14
tough [2] 15:5 48:1
towards [1] 72:3
traction [1] 94:22
traditional [2] 58:25 63:24
trained [1] 86:4
transformative [25] 44:20,24 45:4, 8,11,19 68:2,7,12 73:1,3,12 74:19 75:3 78:12,15,21,25 79:6 87:11, 15,16 89:3,12,16
transformativeness [3] 74:13 78: 11 79:17
treated [2] 78:8,10
treatise [1] 81:21
trial [7] 5:11 36:7 49:16 68:10 79: 12 95:15 96:6
tried [2] 48:20 52:17
trigger [2] 55:7 74:17
triggered [1] 74:18
true [8] 6:13 15:15 21:17 48:14 63: 13 65:22,23 85:23
trying [12] 12:14 14:6 18:10,12 21: 4,16 26:13 34:24 41:4 61:12 92: 25 93:1
turn [3] 12:24 37:9 50:20
turning [1] 70:6
turns [1] 27:19
two [17] 15:7,11 16:12 17:24 29:2 41:11 48:9 54:19 55:12,22 57:14 60:23 61:6,25 62:14 63:1 80:16
two-and-a-half [1] 5:7
type [1] 28:8

typewriters [2] **47:**1,3
typewriting [1] **69:**25
typically [1] **50:**20

U

ultimate [1] **95:**1
ultimately [1] **94:**13
unbelievable [1] **70:**8
uncertainty [2] **40:**10 **64:**3
uncontested [1] **16:**25
uncreative [1] **54:**13
under [14] **3:**17 **7:**24 **13:**22 **17:**4,6 **51:**2,5 **59:**13,14 **60:**13 **62:**16 **88:**6 **91:**7 **95:**9
undermining [1] **40:**11
understand [11] **6:**3,6 **15:**4 **25:**3 **28:**17,19 **29:**12 **54:**19 **89:**6 **91:**23 **92:**8
understanding [5] **36:**16 **52:**25 **53:**18,20 **72:**19
undisputed [2] **80:**3 **82:**17
unfair [2] **39:**12 **50:**5
unimportant [1] **32:**6
unique [1] **34:**3
uniquely [1] **5:**1
UNITED [7] **1:**1,14,24 **2:**10 **64:**10 **65:**18,21
universe [1] **46:**17
unleashed [2] **8:**9 **20:**3
unless [3] **6:**12 **19:**7 **71:**24
unlicensed [2] **54:**7 **62:**5
unlike [1] **34:**9
unlock [2] **9:**9,10
unoriginal [1] **41:**15
unpack [2] **13:**14 **95:**11
unprotected [4] **25:**9 **42:**24,24 **63:**15
unreasonable [1] **20:**6
until [1] **52:**13
up [31] **7:**5,10 **14:**11,12,15 **16:**8 **27:**21 **28:**4 **30:**16,24 **36:**8,24 **45:**24 **47:**23 **52:**12 **53:**1 **56:**7 **57:**16 **58:**14 **60:**23 **61:**6 **62:**23 **69:**15,19 **74:**11 **75:**9 **77:**4 **82:**7 **85:**24 **90:**15,21
upend [3] **36:**20 **53:**14 **94:**10
upheld [1] **39:**13
uphold [1] **90:**18
upshot [1] **16:**14
urges [1] **49:**24
useable [1] **88:**2
useful [5] **73:**20,22 **75:**9,11 **81:**17
user [3] **55:**17 **64:**1 **86:**24
user-facing [1] **63:**4
users [2] **76:**19 **89:**9
uses [5] **41:**19 **70:**10 **75:**19 **87:**15 **93:**21
using [16] **21:**19 **35:**11 **41:**22 **45:**23 **48:**22 **57:**12 **61:**13 **70:**6 **75:**12 **85:**6 **89:**7,18 **90:**1,2 **93:**3 **95:**25

V

vague [1] **66:**6
valuable [1] **39:**14
value [2] **19:**12 **51:**18

variety [3] **65:**12 **69:**20 **93:**24
various [2] **51:**17 **55:**5
vast [2] **53:**22 **70:**4
vegetables [1] **56:**9
vehicles [1] **62:**13
verdict [16] **4:**21 **5:**1 **13:**10,18 **19:**19 **33:**4 **39:**13 **49:**12,19 **67:**11 **84:**8 **89:**23 **90:**18 **93:**16 **94:**12 **95:**6
verdicts [1] **59:**16
version [2] **67:**22 **68:**5
versions [2] **11:**15 **12:**12
versus [11] **3:**5 **5:**9 **7:**9 **11:**4 **35:**8 **38:**4 **45:**3 **81:**14,15 **86:**20 **88:**12
victim [1] **84:**16
view [2] **68:**14 **79:**8
viewed [2] **49:**16 **53:**14
views [1] **78:**17
vigor [1] **93:**23
volume [2] **57:**16 **70:**21

W

wanted [8] **15:**3 **22:**14 **43:**2 **44:**13 **48:**6 **84:**13 **92:**6,7
wants [9] **9:**15 **12:**17,17 **16:**15 **19:**7 **31:**9,19 **86:**24 **91:**23
Washington [2] **1:**9,23
wasteful [1] **42:**3
way [75] **3:**20 **6:**19 **7:**17 **8:**2,16,17,19,20 **9:**7 **10:**13,13 **11:**18,24 **12:**21 **13:**15 **15:**13,19 **16:**4,5 **17:**19 **18:**7 **20:**21 **21:**8,11,15 **22:**17 **23:**14,24 **27:**24 **28:**3,7 **29:**2 **31:**23 **34:**16 **36:**21 **37:**5 **38:**2 **41:**1,13 **42:**18,19 **44:**3,21,23 **46:**19 **53:**7 **54:**24 **55:**1,4 **56:**5,7,11,13,21 **58:**3,4 **66:**21 **68:**3,8 **69:**14 **74:**1,5,8,15 **80:**5,12 **81:**23 **82:**14,23 **84:**10,19 **88:**20 **92:**13,17 **95:**11
ways [12] **6:**22 **7:**25 **20:**18,20 **22:**23 **25:**17 **26:**10 **39:**6 **47:**7,14 **57:**8 **86:**2
web [1] **53:**9
Wednesday [1] **1:**10
weeks [1] **5:**7
weigh [4] **4:**20 **13:**12 **19:**12 **51:**17
weighed [2] **51:**19 **77:**22
weighing [1] **60:**15
weight [2] **68:**14 **82:**23
welcome [1] **60:**22
whatever [3] **27:**25 **54:**25 **72:**7
whatsoever [1] **13:**11
whenever [1] **64:**1
Whereupon [1] **96:**15
whether [25] **4:**15,17 **6:**10 **10:**24 **15:**23 **23:**12 **40:**22 **42:**23,24,25 **43:**18,20,22 **46:**9 **49:**16 **53:**8 **57:**3,4,5 **68:**7 **77:**19 **84:**23 **86:**19 **89:**1,3
whoever [1] **69:**23
whole [8] **20:**5 **33:**8,20 **38:**20 **63:**16,16 **74:**13 **76:**12
wide [1] **65:**12
widespread [3] **69:**4 **83:**22 **94:**5
will [48] **3:**3 **5:**3 **14:**16 **15:**10 **16:**23 **18:**17 **21:**14 **22:**18 **28:**8,9,10,16,

17,19 **32:**23 **35:**19 **40:**9 **41:**9 **48:**2 **54:**4 **55:**19 **57:**23 **62:**14 **63:**3,7,8,17,21 **64:**2 **65:**14,20 **68:**6 **69:**21 **70:**4,9 **71:**2,11,11,12 **73:**18,19 **74:**17 **85:**13 **88:**14 **89:**15 **94:**10 **95:**1,3
willing [1] **82:**21
wisdom [1] **83:**25
wise [1] **29:**18
wish [1] **30:**15
within [4] **27:**11 **44:**9 **73:**15 **87:**2
without [15] **5:**11,25 **11:**18 **23:**5 **30:**25 **32:**12 **37:**15 **39:**21 **42:**1,6 **66:**15 **82:**13 **84:**19 **85:**10 **86:**25
witnesses [1] **5:**6
won [1] **36:**7
wonder [3] **77:**19 **83:**12 **84:**12
wondering [1] **88:**25
word [2] **16:**10 **18:**25
words [9] **14:**14 **31:**15 **41:**24 **43:**1 **44:**8 **69:**18 **76:**10 **85:**11,12
work [32] **3:**24 **12:**18 **16:**23 **17:**23 **18:**15 **19:**3 **22:**2 **24:**1,7 **30:**24 **32:**7,22 **35:**9,12 **38:**25 **41:**25 **42:**24 **44:**10 **45:**23 **50:**17 **51:**20 **65:**13,14 **69:**5 **72:**25 **77:**15 **80:**19 **82:**4,4 **86:**18,25 **87:**3
work's [2] **45:**12 **80:**18
worked [1] **45:**7
working [2] **45:**24 **77:**4
works [5] **28:**7 **45:**10 **64:**25 **74:**15 **82:**25
world [10] **24:**18 **36:**20 **47:**8 **52:**17 **53:**7 **57:**3 **62:**3 **66:**23 **69:**20 **86:**3
worlds [2] **56:**24,25
worried [1] **32:**10
worry [1] **40:**22
worthless [1] **37:**16
wrap [3] **36:**24 **62:**22 **82:**7
write [26] **4:**12 **5:**19 **8:**24 **9:**9 **12:**9 **14:**8 **15:**13 **18:**7,17 **22:**17,23 **23:**3 **28:**12 **31:**8 **35:**4,5,6 **37:**2 **38:**10 **43:**3 **61:**19 **62:**20 **69:**17 **81:**16 **92:**17,23
writes [1] **47:**16
writing [4] **35:**1 **56:**19 **85:**7 **91:**21
written [11] **15:**16 **17:**19 **21:**8,11,15 **23:**23 **73:**22 **80:**5 **81:**4 **82:**18 **85:**25
wrote [5] **12:**11 **22:**25 **39:**24 **61:**16 **81:**20

Y

years [3] **36:**1 **62:**7,17
York [2] **1:**20,20