



1 JULIA P. CLARK, ESQ., Washington, D.C.; on behalf of  
2 Respondents.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	M. MILLER BAKER, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF	
6	MATTHEW D. ROBERTS, ESQ.	
7	On behalf of the United States, as amicus	
8	curiae, supporting Petitioner	18
9	ORAL ARGUMENT OF	
10	JULIA P. CLARK, ESQ.	
11	On behalf of Respondents	27
12	REBUTTAL ARGUMENT OF	
13	M. MILLER BAKER, ESQ.	
14	On behalf of the Petitioner	50
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

[11:02 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 05-1448, Beck versus PACE International Union.

Mr. Baker.

ORAL ARGUMENT OF M. MILLER BAKER

ON BEHALF OF THE PETITIONER

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

After filing for bankruptcy, Crown Vantage decided to terminate 12 over-funded pension plans. By terminating these pension plans, Crown was able to provide its plan participants with 100 percent of their accrued benefits and at the same time recover almost \$5 million in surplus plan assets for the benefits of both Crown's creditors as well as plan members who made individual contributions to those pension plans.

After Crown made the decision to terminate these pension plans, it received a merger proposal from the PACE union to merge the pension plan into the PACE multiemployer pension plan. Crown rejected that proposal. The Ninth Circuit held that Crown breached its fiduciary duty by not sufficiently considering that merger proposal.

1           This Court should reverse the Ninth Circuit  
2 for two separate and independent reasons. First, merger  
3 is a nonfiduciary plan sponsor function and Crown could  
4 not have had a fiduciary duty to consider the merger  
5 proposal by PACE. A series of this Court's decisions  
6 beginning with Curtiss-Wright and continuing with  
7 Lockheed, Hughes aircraft and Pegasus hold that decisions  
8 to create, to modify, to terminate, or to amend pension  
9 plans are sponsor functions, settlor functions under  
10 trust law, that are not subject to ERISA fiduciary  
11 duties.

12           JUSTICE GINSBURG: I could understand that  
13 if the plan is being set up or it's -- there's going to  
14 be a change to the multiemployer plan while the business  
15 is ongoing. But in this situation, you -- you say if  
16 the employer elects to have an annuity, then choosing  
17 which insurance company is going to supply the annuity  
18 that would be a fiduciary function. Well, this is --  
19 the termination -- the merger that's proposed here, is  
20 instead of having an annuity we'll put the assets into  
21 this other plan. It's quite different from choosing a  
22 form for an ongoing operation and saying, we're out of  
23 it and we're now going to try to distribute the assets  
24 in the way that will best protect the beneficiaries.

25           MR. BAKER: Justice -- Justice Ginsburg,

1 that's not correct. The answer to that question is that  
2 a decision to terminate a plan or a decision to merge a  
3 plan requires that a plan sponsor consider as a  
4 threshold matter several factors. First, what will the  
5 plan form be of the acquiring plan? And PACE's proposal  
6 would have required the merger into a multiemployer plan  
7 as opposed to a single-employer plan. That goes to the  
8 form of the plan. PACE's proposal would have resulted  
9 in a new plan sponsor and a new plan administrator. It  
10 would have resulted in a new dispute resolution  
11 mechanism. That goes to the content of the plan. And  
12 finally, most importantly, the PACE proposal would have  
13 gone to the level of benefits provided by the plan and  
14 the level of benefits, as this Court has repeatedly  
15 recognized, is a decision that is a plan sponsor  
16 decision.

17 JUSTICE KENNEDY: Well if you're correct and  
18 this was a sponsor decision, not a fiduciary decision,  
19 let me ask you when you're wearing -- when the company  
20 is wearing its sponsor hat and says we're going to  
21 terminate this plan, does it have a duty to consider the  
22 best interests and the security of the employees, number  
23 one, when it picks an insurance company? It can't pick  
24 some flaky insurance company if there is a much more  
25 solid insurance company, can it?

1           MR. BAKER: Justice Kennedy, it depends upon  
2 the function at issue. If the function is the selection  
3 of an insurance company to provide the annuity, that is  
4 a plan administrator function and it is subject to ERISA  
5 fiduciary duties. But you have to analyze it from --

6           JUSTICE KENNEDY: But if have this duty to  
7 consider the interest of the employees in selecting the  
8 -- the insurance company, in selecting the amount of the  
9 annuity, et cetera, if you have that duty it seems to me  
10 that that's a fiduciary duty.

11          MR. BAKER: It absolutely is, Justice  
12 Kennedy -- Kennedy. But it is only in the context of  
13 the selection of the annuity that the plan sponsor, the  
14 plan administrator, must purchase after the plan sponsor  
15 has made that threshold decision to terminate the plan.  
16 There is that threshold decision. And likewise, merger  
17 is a threshold decision that goes to the --

18          JUSTICE SOUTER: No, but that's I think our  
19 sticking point. If the -- if the plan sponsor decides to  
20 purchase an annuity, it's accepted I think by you and by  
21 everybody that there are two decisions being made.  
22 Decision one is terminate the plan. Decision two,  
23 distribute the assets by purchasing an annuity that  
24 gives the beneficiaries what they should get. And so  
25 on.

1           But when we come to the question of merger,  
2 you're saying there's only one decision, and I think  
3 that's where I'm having trouble with your argument.  
4 When we come to the question of merger, it seems to me  
5 there are two decisions again. The first decision is  
6 we're going to terminate the plan that we've got. What  
7 do we do with our assets? We have decided to merge --  
8 one possible decision as an alternative to annuities is  
9 to merge the plan with -- with another one. Why aren't  
10 there two decisions in the merger case just as there are  
11 two decisions in the annuity case?

12           MR. BAKER: There are two decisions in a  
13 merger case and the threshold question, Justice Souter,  
14 is whether to merge. Whether to merge is a --

15           JUSTICE SOUTER: Why do you say that's the  
16 threshold question? I thought the threshold question is  
17 whether to terminate what we've got now.

18           MR. BAKER: That's a different question,  
19 Justice Souter. The question is whether to merge, and a  
20 question whether to merge goes to plan form, it goes to  
21 the content of the plan and it also --

22           JUSTICE SOUTER: If they say, look, we're  
23 not ending our plan. Let's assume you have an ongoing  
24 business and they say, we're just sick of the form that  
25 it's in now and we can get a good deal by letting

1 somebody else administer this, so we're going to merge.  
2 I can see that as a single decision. But that's not  
3 what you've got here. As I understand it, the decision  
4 to terminate was made, it was over and done with. The  
5 question was what are they going to do with these  
6 assets? It's at that point that PACE arrived and said:  
7 Give them to us through a merger.

8 I don't see how you eliminate the -- the  
9 termination decision before the merger decision.

10 MR. BAKER: Justice Souter, there are two  
11 different questions. One question is termination, one  
12 question is merger, and they're not the same. And the  
13 question whether to merge is a sponsor decision because  
14 you have to make those threshold questions as to what  
15 will the form of the plan be, what will the benefits  
16 provided be.

17 JUSTICE SOUTER: The form of the plan is  
18 going to be zero. Our plan is over. We are terminating  
19 our plan. What do we do now? We have two choices  
20 roughly, maybe three. We can either buy annuities, we  
21 can give the assets to the beneficiaries or we can give  
22 the assets to PACE in the form of a merger.

23 MR. BAKER: It's not a disposition of  
24 assets, Justice Souter.

25 JUSTICE SOUTER: Are you saying you can't

1 have a merger of a plan that has already been  
2 terminated, so that the merger decision is necessarily a  
3 decision that has to be made before the termination --  
4 before a termination decision?

5 MR. BAKER: It is -- once a plan decision --  
6 once a termination decision has been made, and once that  
7 decision has been executed, it's impossible to merge the  
8 plan.

9 JUSTICE SCALIA: Mr. Baker, I thought your  
10 position in your briefs, and I don't know why you do not  
11 make this reply to this exchange, is that the merger  
12 with another plan is not a termination. Isn't that your  
13 basic position?

14 JUSTICE SOUTER: That's what I keep  
15 suggesting.

16 MR. BAKER: Absolutely, it's not a  
17 termination. There are --

18 JUSTICE SCALIA: Because if it were a  
19 termination, in a termination, you must distribute the  
20 assets to the participants. And here when you merge  
21 with somebody else, the assets are not distributed to  
22 the participants, but they are thrown into a pot with  
23 other people.

24 MR. BAKER: That's absolutely correct,  
25 Justice Scalia.

1 JUSTICE SOUTER: Okay, but -- then why --

2 JUSTICE KENNEDY: I agree with Justice  
3 Scalia, that that's one answer. On the other hand, you  
4 have -- there are two arguments here. And what we are  
5 exploring now is whether this is a fiduciary obligation  
6 or a sponsor obligation.

7 MR. BAKER: That's absolutely correct.

8 JUSTICE KENNEDY: So we will have to assume  
9 for that -- if you can't do it by merger, then the whole  
10 case goes away anyway. If merger is not permitted under  
11 the statute, then we don't need to worry whether it's a  
12 fiduciary or a sponsor, correct?

13 MR. BAKER: That's correct.

14 JUSTICE KENNEDY: All right. So what we're  
15 asking in the first prong of this argument is whether or  
16 not it's fiduciary or sponsor. And that's what Justice  
17 Souter and I are questioning. And it does seem to me,  
18 assume that there is a meeting of the board of  
19 directors, we think we are going to terminate this plan.  
20 At that point, choices are made as to how to terminate  
21 it. And it's difficult for me to see why the interests  
22 of the employees are not uppermost in -- in your duties,  
23 i.e. a fiduciary duty, when you decide how you're going  
24 to terminate it.

25 MR. BAKER: The answer, Justice Kennedy, is

1 that it is a business decision to decide in what form  
2 the benefits are going to be provided. And the very  
3 choice between a termination and a merger goes to that  
4 issue. For example, in a merger, there is no automatic  
5 vesting --

6 JUSTICE KENNEDY: Why can't you say it's a  
7 business decision as to which insurance company you're  
8 going to select? Maybe you do say that.

9 MR. BAKER: Because at that point, it's a  
10 mere execution of the prior policy decision.

11 JUSTICE KENNEDY: Well, but that's the way  
12 you characterize it. I don't know why it's mere  
13 execution, when it's an annuity and it's not mere  
14 execution when it's a merger, once the determination  
15 decision has been made.

16 MR. BAKER: Because the merger decision --  
17 you have to answer -- ask those threshold questions,  
18 Justice Kennedy: What are the level of benefits that  
19 are going to be provided in the acquiring plan. In a  
20 merger, there is no automatic vesting of accrued  
21 benefits as there is in a termination. That --

22 JUSTICE BREYER: I'm just listening to this.  
23 It sounds to me as if you're saying, one, the employer  
24 decides to terminate, okay? Now that's done. Then we  
25 go to the next question. How would we terminate? And

1 in respect to that, I think Justice Kennedy was asking,  
2 as I heard him, don't you have a fiduciary duty when you  
3 decide how? And your answer, as I heard it, was yes,  
4 you do.

5 And now there is a third question. Does  
6 what happened in terminating mean that although you have  
7 a fiduciary duty, you couldn't consider a merger,  
8 because that's just not consistent with the basic plan  
9 of terminating? Is that right? If it's wrong, don't  
10 even bother to answer it.

11 (Laughter.)

12 JUSTICE SCALIA: He doesn't like to hear  
13 that he is wrong.

14 (Laughter.)

15 MR. BAKER: None of us do, Justice Scalia.  
16 The answer to the third part of that question, Justice  
17 Breyer, is yes. But where I disagree with you is in the  
18 second predicate, which is that the -- the execution of  
19 the termination is necessarily --

20 JUSTICE BREYER: Why did you answer yes to  
21 his question, Justice Kennedy's, about the insurance  
22 company?

23 MR. BAKER: Perhaps I was imprecise. If I  
24 was imprecise, I apologize. The answer is, it depends  
25 upon the function at issue. A broad generalization that

1 any decision taken after termination is necessarily a  
2 plan sponsor function is just wrong. One has to look at  
3 the function at issue, and the function in connection  
4 with a merger is a plan sponsor decision, because you  
5 can't get away from those threshold questions as to the  
6 form, the content, and the benefits that are to be  
7 provided in that plan.

8 JUSTICE SOUTER: Why isn't exactly the same  
9 point true with respect to purchasing annuities?

10 MR. BAKER: Because the decision has already  
11 been made, usually it's in the plan document, to provide  
12 for annuities. And the only question is providing the  
13 annuity that is best suited to the interest of the  
14 principals.

15 JUSTICE SOUTER: What if the plan document  
16 doesn't say anything about what will follow termination?  
17 There is nothing in there about annuities. Is the  
18 annuity -- the decision to purchase annuities a decision  
19 subject to fiduciary obligation?

20 MR. BAKER: You mean the decision to offer  
21 annuities? Yes, Justice Souter. The decision to offer  
22 annuities, that is the provision, the actual selection  
23 of the annuities -- and I note that the Internal Revenue  
24 Service will require --

25 JUSTICE SOUTER: The decision to -- to take

1 the option of purchasing annuities or offering annuities  
2 to the beneficiaries. That is a fiduciary decision?

3 MR. BAKER: No, Justice -- the -- if the  
4 plan is silent --

5 JUSTICE SOUTER: If the plan is silent.

6 MR. BAKER: If the plan is silent, and the  
7 plan sponsor -- and the question is, how do we  
8 distribute, the mechanism of distribution. That is a  
9 plan sponsor function in the absence of any provision --

10 JUSTICE SOUTER: What if they say, we will  
11 distribute it by going to the top of the building and  
12 throwing the money out onto the street. Fiduciary  
13 problem?

14 MR. BAKER: Well, that would not be  
15 permitted by the -- by the --

16 CHIEF JUSTICE ROBERTS: Right --

17 MR. BAKER: By operation of law, Justice --  
18 so it -- you don't even --

19 CHIEF JUSTICE ROBERTS: I thought your  
20 argument was, once you make a decision to terminate,  
21 there are various rules that are triggered, you just  
22 can't take the money and run with it. You've got to  
23 make provision. And that merger was not one of the  
24 permitted ways of terminating a plan. Is that wrong?

25 MR. BAKER: Well, that is a second argument,

1 it's an alternative argument, Chief Justice Roberts,  
2 that merger is not a means of termination. But the  
3 threshold question is --

4 JUSTICE SCALIA: Maybe it's a simpler  
5 argument than this first one we've been wrestling with.

6 MR. BAKER: Justice Scalia, I think both  
7 arguments have merit and they have different issues  
8 associated with them. But the threshold question here  
9 is whether or not this is a plan sponsor decision. And  
10 a plan sponsor decision is always a decision that goes  
11 to the content and the form of the plan, as well as to  
12 level of benefits to be provided.

13 JUSTICE ALITO: Is what's really involved in  
14 this, who is going to get the \$5 million reversion that  
15 you would get if you purchased an annuity? Is that  
16 what's really in dispute?

17 MR. BAKER: That's what's really in dispute,  
18 Justice Alito.

19 JUSTICE ALITO: And PACE would like that,  
20 you would like it. I mean, how would a fiduciary decide  
21 between those two, if it were a fiduciary duty?

22 MR. BAKER: Well, it's not a fiduciary duty.  
23 This Court's cases are -- the PBGC and the agencies  
24 recognize that the decision to terminate in order to  
25 recapture a reversion is perfectly permissible, so long

1 as the plan sponsor complies with all the relevant  
2 requirements of a termination.

3 JUSTICE KENNEDY: But Justice Alito's  
4 question -- and I have the same question. Let's assume,  
5 A -- I know this is not your position -- but the merger  
6 is a permissible option. And B, let's assume -- and I  
7 know this is not your position -- that this is a  
8 fiduciary obligation. I assume then you would lose,  
9 because the extra assets must go -- the reversion  
10 interest -- must go to the employees if it's in their  
11 benefit.

12 MR. BAKER: If we lose on both the issues  
13 that we have argued, yes, Justice Kennedy.

14 CHIEF JUSTICE ROBERTS: No, I thought you --  
15 but the point is the \$5 million is not going to these  
16 employees, it's being thrown into this vast sea of all  
17 these other employees, whose employers have not done as  
18 good a job of funding their plans. This is to the  
19 benefit not to the beneficiaries of this plan, but to  
20 other union members who don't have the luxury of having  
21 an employer who has over-funded their plan, and are  
22 trying to get that five million to help them, not your  
23 beneficiaries.

24 MR. BAKER: Well, that's absolutely correct.  
25 The money here would have gone not to the plan members,

1 but to another union.

2 JUSTICE KENNEDY: But then you say that if  
3 it's a fiduciary obligation, and a merger is a  
4 permitted option, that the administrator, A, can, or B,  
5 must still give the money back to you?

6 MR. BAKER: If it's a fiduciary obligation,  
7 no. If it's a fiduciary obligation, the plan sponsor,  
8 plan administrator -- because now we're talking about an  
9 administrative function -- the plan administrator has a  
10 duty to carefully consider that option. It doesn't  
11 necessarily result in the money automatically flowing  
12 over to the --

13 JUSTICE KENNEDY: The administrator, as a  
14 fiduciary, can consider the interest of the employer as  
15 well as the employees?

16 MR. BAKER: No. The plan administrator,  
17 acting as a fiduciary has only -- can only consider the  
18 interest of the employees.

19 JUSTICE SOUTER: Would it be consistent with  
20 the -- no. Reserve your time.

21 MR. BAKER: I'd like to reserve my time.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
23 Mr. Roberts.

24 ORAL ARGUMENT OF MATTHEW D. ROBERTS

25 ON BEHALF OF THE UNITED STATES

1 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

2 MR. ROBERTS: Mr. Chief Justice, and may it  
3 please the Court:

4 An employer does not have a fiduciary duty  
5 to consider merger as a means of terminating a defined  
6 benefit pension plan. First of all, just like the  
7 decision to terminate the plan, the decision to merge  
8 the plan is a sponsor function, because it's a choice to  
9 alter the design, composition and structure of the plan.  
10 And because both the decision to terminate and the  
11 decision to merge are sponsor functions, the choice  
12 between the two is a sponsor function.

13 The plan administrator has a duty to carry  
14 out the sponsor's decision to terminate the plan, not to  
15 revisit that decision by considering whether to merge  
16 the plan instead.

17 JUSTICE GINSBURG: Suppose the argument is  
18 made very forcefully that the insurance companies with  
19 these annuities haven't been doing so well, but there is  
20 this multiemployer plan that has been just performing  
21 so well, and so the -- an appeal is made to the company,  
22 you're going out of business, you're not going to be  
23 running a plan anymore. Put those assets, distribute  
24 those assets to the place where they will serve the  
25 employees best.

1           MR. ROBERTS: Well, that would be not be a  
2 distribution of the assets as a means of terminating a  
3 plan, but the employer as a sponsor could, of course,  
4 decide to merge the plan instead of to terminate the  
5 plan, if the employer made that choice.

6           JUSTICE GINSBURG: You're making the same  
7 rigid argument that Mr. Baker made, that whatever the  
8 termination, even though the company is going out of  
9 business, it's bankrupt, it's always -- a merger is  
10 always characterized as a sponsor business, not  
11 fiduciary.

12           MR. ROBERTS: Yes. There are two reasons  
13 that I say that. First, even in the case of a sponsor  
14 of a plan that's going out of business, and that isn't  
15 going to be participating in any merged plan, the merger  
16 still is a decision to alter the design and composition  
17 and structure of the plan, as this case illustrates for  
18 the reasons that Mr. Baker said. That it's going to  
19 change fundamentally the plan from a single employer  
20 plan to a multiemployer plan, that it's going to change  
21 the -- who is the administrator, that it's going to  
22 increase the pool of participants, that it's going to  
23 affect the benefits, because the assets that were  
24 available to pay the benefits are now going to be  
25 available to pay benefits of other participants in the

1 -- in the successor plan, that the PBGC's guarantee of  
2 the benefits is going to be lower in a multiemployer  
3 plan.

4           So for all those reasons, it's going to  
5 change, still change the structure of the plan. But in  
6 addition to that, the employer of -- the sponsor of this  
7 plan that would either terminate, or possibly merge, has  
8 a legitimate interest in choosing termination rather  
9 than merger, because in a termination, the sponsor can  
10 obtain a reversion of the surplus assets, and still  
11 fully provide all the benefits of the employees.

12           JUSTICE KENNEDY: Could an administrator  
13 make that decision in its fiduciary capacity?

14           MR. ROBERTS: No, Your Honor, and that goes  
15 back to a confusion that I think was -- was present  
16 before, that the decision about the distribution options  
17 at termination is a sponsor decision that the employer  
18 makes in the plan documents, because those distribution  
19 options are benefits under the plan.

20           And while section 1341(b)(3)(A), in  
21 isolation, might appear to permit the plan administrator  
22 to choose which of those distribution options that are  
23 in the plan to make available, other provisions of ERISA  
24 and the Tax Code prohibit the plan from vesting that  
25 discretion in the plan administrator.

1           So in other words, the way it works is when  
2     the employer sets up the plan, the employer provides for  
3     the forms of distribution that are going to be available  
4     at termination. And those forms are just forms of  
5     benefits, optional ways of providing the accrued  
6     benefits to the participants. And then the participants  
7     get to pick among those options at termination.

8           JUSTICE SOUTER: Then why are we having this  
9     argument? Why isn't it simply a question of construing  
10    the provision for options in the original plan?

11          MR. ROBERTS: Well, we think that one  
12    requirement is that it's consistent with the plan, and  
13    the plan didn't provide that here.

14          JUSTICE SOUTER: Then why isn't --

15          MR. ROBERTS: The court of appeals held that  
16    that was waived.

17          JUSTICE SOUTER: Then why isn't the simple  
18    argument, you can't merge because the plan didn't  
19    provide that as an option?

20          MR. ROBERTS: That would certainly be a  
21    basis on which the court of appeals could have correctly  
22    decided this case, other than the way it did.

23          JUSTICE SOUTER: Was that position  
24    presented? I should have asked your brother.

25          MR. ROBERTS: It was presented. The court

1 of appeals held that Petitioner had waived the argument,  
2 based on the terms of the plan, because Petitioner  
3 hadn't made that argument in the bankruptcy court, even  
4 though the district court had actually addressed the  
5 terms of the plan, but mistakenly construed the plan to  
6 permit merger, Your Honor.

7 JUSTICE SOUTER: So we've got to assume that  
8 the plan is silent in the sense that, so far as the  
9 plan documents are concerned, merger is at least a  
10 possibility.

11 MR. ROBERTS: I don't think that you have to  
12 assume that, Your Honor. I think that because the court  
13 of appeals vacated the district court's decision, you  
14 know, there is no decision on it. And if it's necessary  
15 to -- to resolving the questions presented, I think the  
16 Court could address that question. We don't think it's  
17 necessary to resolve the questions presented because we  
18 think that merger is a fiduciary -- is a sponsor  
19 decision as a choice to alter the design, composition  
20 and the structure of the plan even if it arises in the  
21 context of termination.

22 And in addition, we also think that  
23 merger is not a permissible method of plan termination  
24 under the statute or PBGC regulations which treat merger  
25 and termination as distinct procedures. The statute

1 requires that the assets of a terminating plan be  
2 distributed by allocating them among the participants of  
3 that plan. That just doesn't occur in a merger.  
4 Instead the assets are transferred to the successor plan  
5 and in the successor plan they are commingled to fund  
6 the benefits of all the participants in that plan.

7 JUSTICE KENNEDY: Could a plan document  
8 provide that upon termination the employer is entitled  
9 to a refund of any excess funding? And would that then  
10 be binding on an administrator in a fiduciary capacity?

11 MR. ROBERTS: The plan document could  
12 provide for a reversion for the employer and in fact  
13 this -- that does. But the --

14 JUSTICE KENNEDY: And I take it the  
15 administrator would then have the duty to obey that?

16 MR. ROBERTS: That -- yes, because that  
17 would be consistent with ERISA and the administrator has  
18 to follow the provisions of the plan in accordance with  
19 ERISA.

20 JUSTICE SOUTER: Then why doesn't the  
21 administrator here take the position that it's going to  
22 reserve the five million for itself and merge what's  
23 left? If PACE wants a merger with what's left, fine; if  
24 PACE doesn't, end of problem.

25 MR. ROBERTS: Well, an employer, not an

1 administrator could, could as a sponsor of the plan  
2 decide to do a transfer of assets and liabilities of  
3 some portion of the, of the plan assets and retain some  
4 assets in the plan.

5 JUSTICE SOUTER: My question is why -- why  
6 isn't it an option here to say all right, number one, we  
7 got a \$5 million surplus. We are going to terminate  
8 this plan and we are going to take the five million.  
9 Question number two, should we, should we use what's  
10 left to merge into the PACE plan? Is that an option?

11 MR. ROBERTS: What the employer would have  
12 to do would be make a sponsor decision to make a  
13 transfer of assets and liabilities to the PACE plan  
14 before terminating the plan. The employer could make  
15 that decision but that -- that decision and the decision  
16 afterwards to terminate the remains of the plan would  
17 both be sponsor decisions that the employer wouldn't  
18 make in a fiduciary capacity.

19 JUSTICE SOUTER: By doing it in that  
20 sequence could it reserve the five million for itself?

21 MR. ROBERTS: It -- it could conceivably do  
22 that, Your Honor, subject to the fact that there are  
23 guidelines that the agencies have put out, the 1984  
24 joint guidelines that require in some cases, in order to  
25 prevent circumvention of the termination requirements,

1 that require the purchase of annuities or the other  
2 distribution of the assets, that those guidelines  
3 require that if there is a spinoff or a transfer of  
4 assets that's followed by the -- by the termination of  
5 the remains of the transferee plan, that in some  
6 circumstances annuities have to be purchased for the  
7 accrued benefits of the participants that are  
8 transferred into the other ongoing plan and that are  
9 going to be participants of that plan.

10 JUSTICE SOUTER: If we assume that, can they  
11 keep the five million?

12 MR. ROBERTS: Yes, Your Honor but that would  
13 be a decision that they make as sponsor of the plan.

14 JUSTICE SOUTER: I don't care how they make  
15 it; I just want to know under the terms of the plan and  
16 consistently with ERISA, could they keep the five  
17 million and in some sequence provide for a merger with  
18 PACE? And I think you're telling me yes.

19 MR. ROBERTS: Yes, Your Honor, subject to  
20 the fact that here it's quite possible that the PBGC  
21 would consider a transfer of assets and liabilities just  
22 to leave assets in a plan as a reversion, that they  
23 would be subject to that requirement. And so they would  
24 have to annuitize the benefits of -- of the participants  
25 in the plan. Because the PBGC would -- would look at

1 that and they would say that looks like an effort just  
2 to extract assets out of what's really an ongoing plan  
3 because the employer is not going to be participating in  
4 that other plan. The -- they are just stripping it.

5 JUSTICE KENNEDY: Then why couldn't the PBGC  
6 say, you know, we are not quite sure how these insurance  
7 companies work. So we'll buy the annuity and then the  
8 five million is an extra guarantee to make sure the  
9 annuities are paid and that also goes to the insurance  
10 company?

11 MR. ROBERTS: If I could answer the  
12 question. The -- the -- they could not -- the plan  
13 administrator could decide to give the reversion to the  
14 employees and not -- not take the reversion. It could  
15 amend the plan to allow that but the point is it has a  
16 legitimate interest in taking the reversion and that  
17 that interest encourages plan sponsors to fully fund  
18 their plan, and depriving it of that would prevent them  
19 from that and discourage full funding of plans.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Ms. Clark.

22 ORAL ARGUMENT OF JULIA P. CLARK,

23 ON BEHALF OF RESPONDENTS

24 MS. CLARK: Mr. Chief Justice, and may it  
25 please the Court:

1 It's notable that neither the Petitioner nor the  
2 Government in their argument here has referred at all to  
3 the definition of "fiduciary" in ERISA. But that is the  
4 beginning point of every one of this Court's decisions  
5 as to what is a fiduciary function and what is not. The  
6 statute -- and I'm quoting from 29 U.S.C. section  
7 1002(21)(A) it's in the first page of the appendix to  
8 our brief -- is that "a person is a fiduciary with  
9 respect to a plan to the extent that" -- and then it  
10 goes on and there are three subparts, two of which are  
11 relevant in this case.

12 One of them -- and I'm taking them out of  
13 order because I think subpart 3 is the simplest way to  
14 resolve this case -- "to the extent that he has any  
15 discretionary authority or discretionary responsibility  
16 in the administration of the plan." The other one  
17 that's relevant is subpart 1, which is "to the extent he  
18 has" -- "he exercises any authority or control  
19 respecting disposition of its assets."

20 The reason that the plan administration  
21 subpart is the simplest way to resolve this case is that  
22 Congress in section 1341 of 29 U.S. Code -- and that's  
23 quoted just immediately below what I was just citing to  
24 the Court -- specifically assigned to the plan  
25 administrator all of the decisions that must be made

1 with respect to implementing the termination of a  
2 pension plan. Throughout that section, everything that  
3 must be done is stated specifically to be done by the  
4 plan administrator.

5 JUSTICE SCALIA: Of course this argument  
6 would not have any force whatever if indeed,  
7 transferring the assets to another plan does not  
8 constitute a termination of the plan.

9 MS. CLARK: Justice Scalia, that of course  
10 is the second major issue in the case, and the  
11 Government's attorney admitted that in a two-stage  
12 transaction, the assets and liabilities of a plan can be  
13 transferred to another plan, and the plan can be  
14 terminated and assuming the plan provisions are  
15 correctly in place, the employer can take the reversion  
16 of any excess assets. And then --

17 JUSTICE SCALIA: But the first step would be  
18 the transfer. And at that -- at that stage it would not  
19 be a termination and therefore it would not be within  
20 the authority of the administrator under this provision.

21 MS. CLARK: Justice Scalia, the  
22 implementation guidelines which the Government attorney  
23 also referred to have as their entire focus to make  
24 certain that two-part transactions of just the sort that  
25 you have referred to are treated as a single whole in

1 determining whether a plan has been legitimately  
2 terminated or not. The entire focus of those guidelines  
3 is, we are not going to permit an employer by separating  
4 things out into two parts, first a transfer of assets  
5 and liabilities, then a termination, to do in form what  
6 in substance is simply the continuation of the same  
7 plan.

8 JUSTICE SCALIA: That's fine, but that still  
9 does not convert the termination decision into -- into  
10 a, an administrator's decision, rather than a sponsor's  
11 decision.

12 MS. CLARK: I agree completely --

13 JUSTICE SCALIA: Sure, you can oversee it  
14 and make sure that there is no hanky-panky going on in  
15 the two-step process but the -- but the determination  
16 whether to terminate or not is a sponsor's  
17 determination.

18 MS. CLARK: I agree completely, Justice  
19 Scalia. There is no question here but that the decision  
20 to terminate a plan is the plan sponsor's decision. But  
21 when the plan sponsor has made that decision and the  
22 question on the table is how shall we implement that  
23 decision to terminate, it does not matter whether that's  
24 done through a two-step transaction in which assets are  
25 first transferred to another plan and then the formal

1 termination of what's left remains. The implementation  
2 guidelines make very clear that you can't tease those  
3 apart and say no, we are only going to look at the final  
4 step and that's a termination and nothing else is.

5 JUSTICE SCALIA: But they -- but they don't  
6 say that in -- in looking at the two of them, you  
7 suddenly transform the decision whether to -- to  
8 transfer as -- as a termination. You transfer that  
9 decision from the plan sponsor to the administrator.

10 MS. CLARK: No, Justice Scalia. The  
11 implementation guidelines did not address the question  
12 of in what capacity these decisions would be made. My  
13 point in referring to it is simply to say that it is --  
14 it is a form-over-substance argument to say that there  
15 is a difference between decision to terminate in which  
16 the plan administrator then has a choice of implementing  
17 it by either transferring the assets and liabilities to  
18 another plan or purchasing an annuity, versus as the  
19 Government and as the -- I mean as the Petitioner would  
20 have it -- that that's a completely different  
21 transaction from merger as a means of implementing --

22 JUSTICE STEVENS: I'm a bit puzzled. Can I  
23 just get myself straightened out a little bit?

24 If there is a decision to terminate you're  
25 -- you're suggesting that it's after that decision made

1 -- is made, there can be a decision to merge which would  
2 not be a termination?

3 MS. CLARK: That is correct, Justice  
4 Stevens.

5 JUSTICE STEVENS: Your, your adversary --

6 MS. CLARK: -- that the termination decision  
7 has been made.

8 JUSTICE STEVENS: -- disagree with you on  
9 that.

10 MS. CLARK: I'm sorry; I didn't hear the  
11 first part of the question.

12 JUSTICE STEVENS: Your adversary takes a  
13 position that the merger would be not a termination.

14 MS. CLARK: That is what my adversary says.  
15 And if I might focus on the termination section itself,  
16 29 U.S.C. section 1341, their position has been that a  
17 merger with another plan is completely different from  
18 the purchase of annuities to provide those benefits.

19 JUSTICE STEVENS: It would seem to me that a  
20 merger is a continuation rather than a termination. And  
21 explain to me why I'm wrong on that.

22 MS. CLARK: The Government's regulations on  
23 single employer plan mergers take the very clear  
24 position -- and we've cited them in our brief, it's the  
25 regulations under section 414(l) -- the clear position

1 that any time there is a transfer of assets and  
2 liabilities from one plan to another, whether a complete  
3 transfer or not, that is treated as a spinoff of a plan  
4 from the original plan and a merger of the spun off  
5 assets and liabilities into the other plan.

6 So that "merger" is a more flexible concept.  
7 It is not just the all-in kind of merger where two plans  
8 merge and continue down the road as a single entity.  
9 "Merger" also in the Government's own usage describes a  
10 transaction in which all or some portion of liabilities  
11 and all or some portion of assets are separated from the  
12 original plan and transferred to the second plan.

13 Now, that being the case, the question  
14 really as to whether this is the proposed -- the proposal  
15 of any merger -- and the question presented to the Court  
16 is in the abstract, is any plan merger an acceptable  
17 means of terminating a plan under section 1341?

18 JUSTICE SCALIA: Right. And -- and the  
19 argument your adversaries make is that termination  
20 requires that the plan assets be distributed to the  
21 beneficiaries.

22 MS. CLARK: Yes, Justice Scalia. That's  
23 what it says.

24 JUSTICE SCALIA: And that in the case of a  
25 merger the assets are not distributed to the

1 beneficiaries, they are distributed to this new plan,  
2 which benefits not only the beneficiaries of this plan  
3 but the beneficiaries of other plans.

4 MS. CLARK: Justice Scalia, we disagree for  
5 the following reason. section 1341 specifically  
6 provides that the plan administrator implementing a plan  
7 termination may -- and here I'm referring to the  
8 language that's again in the appendix to our brief; this  
9 is the last page of that appendix, right at the top --  
10 "plan administrator may purchase irrevocable commitments  
11 from an insurer" -- that's an insured annuity -- "to  
12 provide all benefit liabilities under the plan, or, in  
13 accordance with provisions of the plan and any  
14 applicable regulations, otherwise fully provide all  
15 benefit liabilities under the plan."

16 Now, this Court just last week in James  
17 versus United States construed a similar statute that  
18 had a list of crimes followed by the phrase "or  
19 otherwise involves a serious risk of potential harm to  
20 persons" -- I'm paraphrasing. I didn't get it exactly  
21 right. Both the majority and the dissenting opinion  
22 in that case agreed that an "otherwise" structure of  
23 this sort means that what precedes the "otherwise"  
24 phrase is taken as a baseline against which to judge  
25 what follows it, and that it tells you what Congress

1 had in mind as something that satisfies in this case the  
2 distribution requirements of the statute.

3 JUSTICE SCALIA: Right. Now, does  
4 indeed the transfer here meet the requirement of little  
5 (i)? Does the transferee plan undertake an irrevocable  
6 commitment to provide to these beneficiaries all that  
7 they're entitled to, even at the expense of some of the  
8 other beneficiaries of that plan? In other words, if  
9 the plan's investments go south does that plan have the  
10 authority to say, oh, you know, our first payments have  
11 to go to the beneficiaries under this plan that was  
12 transferred and the rest of you will get -- will get the  
13 leavings? I don't think that the plan has the authority  
14 to do that.

15 MS. CLARK: But Justice Scalia, it does it  
16 in exactly the same way the purchase of an insurance  
17 policy to provide annuities from an insurer does. In  
18 each case the assets are commingled with the entire  
19 assets of the financial institution to which these  
20 liabilities are transferred.

21 CHIEF JUSTICE ROBERTS: But I thought we  
22 just heard that the PBGC might look at it a little  
23 differently, that they are more comfortable with the  
24 annuity insuring that these beneficiaries get their  
25 benefits as opposed to just throwing the beneficiaries

1 into a pool with your other union members.

2 MS. CLARK: Mr. Chief Justice, it's very  
3 clear that if as we are correct -- I mean, as we argue  
4 here, if we're correct -- that it is a fiduciary  
5 responsibility for the plan administrator to select the  
6 option on the table that is most secure for providing  
7 the benefits in the future to the participants, that if  
8 the multiemployer plan in question were poorly funded or  
9 shaky for any other reason and there is a solid  
10 insurance company offering an annuity, that the plan  
11 administrator would --

12 CHIEF JUSTICE ROBERTS: Doesn't that put you  
13 in an awfully difficult position? I mean, you're  
14 representing the union, which has other members besides  
15 these beneficiaries, and you're saying even though under  
16 their plan the beneficiaries are fully protected with  
17 irrevocable annuities, we think they're going to be  
18 better off if they're thrown in with our other members  
19 and we get the \$5 million to spread out, not to these  
20 beneficiaries but among all these other members. Isn't  
21 that an awkward position to be in?

22 MS. CLARK: The plan administrator is the  
23 one that ultimately makes the determination. The union  
24 may advocate for what it believes to be in the best  
25 interest of its members, but the party that makes the

1 decision is the plan administrator wearing a fiduciary  
2 hat under which it can make no decisions --

3 JUSTICE ALITO: Well, why would the  
4 beneficiaries be better off if there were a merger?  
5 What would their benefit be, as opposed to an annuity?

6 MS. CLARK: Probably the single advantage to  
7 participants in a multiemployer plan is portability,  
8 which is to say some of these participants were working  
9 for employers that purchased facilities from Crown and  
10 if their employer participated in the multiemployer plan  
11 in the future, they would be able to add to the benefits  
12 that they had accrued and perhaps to reach something  
13 like an enhanced benefit at 25 years of service or the  
14 like. In terms of advantage to the participant in  
15 comparison to an annuity, that would be the major one.

16 But I want to come back to why it is that  
17 the multiemployer plan distributes the assets in  
18 precisely the same way that the purchase of an annuity  
19 from an insurance company does.

20 JUSTICE SCALIA: Does it make a commitment,  
21 a commitment to fully provide all benefit liabilities  
22 under the now deceased plan?

23 MS. CLARK: Yes, it does, Justice Scalia.  
24 The law requires that. In any plan merger or transfer  
25 of assets and liabilities from one plan to the other,

1 the fundamental requirement is that all benefits earned  
2 to the date of the transfer must be protected on both  
3 sides of the transaction for all participants.

4 JUSTICE BREYER: What's the -- I'm trying to  
5 work this out now. Suppose I buy the annuity for these  
6 employees from the X insurance company, all right, and  
7 so the insurance company promises when they retire we'll  
8 pay them a thousand dollars a month. Suppose the  
9 company goes bankrupt. Does the -- what is it, the  
10 PGPB, what do you call it, the Pension Guarantee --

11 MS. CLARK: PBGC.

12 JUSTICE BREYER: Yes. Do they pick up any  
13 of that?

14 MS. CLARK: They do not.

15 JUSTICE BREYER: They do not, okay. So I'm  
16 trying to understand this, then, the -- there's a reg  
17 under this, and it says: Administrator, you buy the --  
18 the annuity from an insurance company, for example, or  
19 do the same thing, get an irrevocable commitment in  
20 another permitted form. So one question is when they  
21 do that the administrator doesn't have to have any  
22 fiduciary thought in his mind.

23 The second position is -- that's their  
24 position. The second position is, even if that's so,  
25 this is not another permitted form because a merger

1 isn't a termination. And the third position is,  
2 that's what we were just getting to, is that we don't  
3 see any way in which this could help the employee. Now  
4 you say, oh yes, there is a way.

5 Now suppose we're choosing between two  
6 insurance companies. Insurance company A says: We will  
7 pay precisely what is owed, precisely; we're as solid as  
8 a rock. Insurance company B is hungry for business, so  
9 it says: We'll give those employees exactly what's owed  
10 and we'll write each of them a check for \$500. Now, is  
11 that something that means then -- remember, this statute  
12 says you have to get what they promised them, not a  
13 penny more. Is that something that the insurance, the  
14 administrator then has to do? He has to take B because  
15 the insurance company is promising him a bonus?

16 MS. CLARK: No.

17 JUSTICE BREYER: Well then, if not that why  
18 this?

19 MS. CLARK: No. The Department of Labor has  
20 made clear that when making a fiduciary choice among  
21 annuities that are offered by an insurer, it is the plan  
22 administrator's fiduciary duty to look to the security  
23 of the benefits. That is its sole guiding concern.

24 CHIEF JUSTICE ROBERTS: And beyond as well?  
25 I mean, let's say we have 5 million extra dollars here.

1 See, that's what I don't understand. If you're saying  
2 it's a fiduciary, I mean, how can they make a decision  
3 ever to do anything other than just give the five  
4 million to the beneficiaries?

5 MS. CLARK: That would depend on the terms  
6 of the plan, Mr. Chief Justice. If the plan --

7 CHIEF JUSTICE ROBERTS: Well, the terms, the  
8 plans terms here, did not provide for merger in the  
9 event of termination, right?

10 MS. CLARK: No, we disagree. The district  
11 court determined that they did authorize the merger for  
12 this purpose.

13 JUSTICE SCALIA: The other side said that  
14 the district court found that the argument was waived,  
15 or the court of appeals did.

16 MS. CLARK: Justice Scalia, it was the court  
17 of appeals that held that the argument was waived. The  
18 court of appeals said that because this was not  
19 presented in the bankruptcy court that the argument  
20 would not be considered by the court of appeals in  
21 Petitioner's urging the court of appeals to overturn  
22 what the district court had done.

23 CHIEF JUSTICE ROBERTS: Even though the  
24 district court decided it? Usually in a waiver  
25 situation it's whether you argued it or it was

1 addressed by the court.

2 MS. CLARK: In this case, I could see a  
3 reason why that would make sense, because in the  
4 bankruptcy proceeding both parties presented evidence,  
5 and the interpretation of a plan document is like  
6 interpreting any other contract. You may have the  
7 opportunity to present evidence on what it means.

8 CHIEF JUSTICE ROBERTS: If you're -- if you  
9 prevail here -- I mean, the reason we have a case is  
10 because the employer overfunded the plan to the tune of  
11 \$5 million. If you prevail and they cannot get that  
12 back even after fully insuring the benefits for the  
13 beneficiaries, employers in the future will be very  
14 careful not to put in one penny more than what's  
15 required to fund the plan; isn't that right?

16 MS. CLARK: Mr. Chief Justice, I don't  
17 believe that that's the case, because the funding rules  
18 of ERISA do encourage employers to fund well at times  
19 when times are good. But --

20 JUSTICE KENNEDY: Well, if you prevail won't  
21 plan documents be -- or shouldn't plan documents be  
22 amended to say that merger is not an option and any  
23 reversion goes to the employer?

24 MS. CLARK: That may well be the case,  
25 Justice Kennedy. Or they may say whatever the method of

1 implementing the termination that the plan administrator  
2 chooses, it must provide for a reversion to the  
3 employer.

4 CHIEF JUSTICE ROBERTS: What possible  
5 equitable basis does the union have to claim this extra  
6 \$5 million?

7 MS. CLARK: The actual --

8 CHIEF JUSTICE ROBERTS: It's not for these  
9 beneficiaries. It's for all the others. It's spread  
10 out among this pool in the multiemployer plan. These  
11 are the employer excess contributions. What -- looking  
12 at it as an equitable matter, what claim do they have to  
13 the extra money?

14 MS. CLARK: Mr. Chief Justice, I could  
15 answer that on two levels. One is that the record of  
16 this case does not preclude the possibility that this  
17 would have been negotiated to leave the reversion for  
18 the employer. But that's speculation because, since the  
19 fiduciary didn't go down that path, we don't know where  
20 it could have taken it.

21 CHIEF JUSTICE ROBERTS: Are there a lot of  
22 plans that look like that, that if there's extra money,  
23 we've overfunded, then it goes back to the union, not  
24 back to the company?

25 MS. CLARK: It never goes to the union.

1 That would be a violation of a different section of  
2 Federal law.

3 CHIEF JUSTICE ROBERTS: The union plan.

4 MS. CLARK: But to a plan. The reason --  
5 and plans simply don't address this, except for  
6 authorize merger --

7 JUSTICE KENNEDY: Well, how could the  
8 administrator -- how could the administrator negotiate  
9 with the employer to give the \$5 million back if it's  
10 a fiduciary?

11 MS. CLARK: If the employer had said, had  
12 amended the plan to say, whatever you do by way of  
13 terminating this plan, you must protect our right to the  
14 reversion, then the plan administrator would have been  
15 --

16 JUSTICE KENNEDY: Well, I suppose if it  
17 would have been amended. But what happens -- what  
18 happens if the employer wants to continue in business,  
19 but simply turn the plan over to a multiemployer plan?  
20 Is that a fiduciary -- and you have an employer that  
21 wears two hats. The employer is also the administrator.  
22 Is that a fiduciary decision?

23 MS. CLARK: No, Justice Kennedy, it is not,  
24 because there there really is an impact on the form and  
25 the amount of benefits that will be accrued in the

1 future under an ongoing plan, as well as --

2 JUSTICE KENNEDY: So then it's the ongoing  
3 significance of the decision to the employer that  
4 determines whether there's a fiduciary obligation?

5 MS. CLARK: No, Justice Kennedy. It's the  
6 ongoing significance to the participants, because then  
7 what you have is truly a plan design decision, which  
8 does not come within plan administration, while in the  
9 case of a merger as a means of implementing termination,  
10 the law fixes those benefits. They are what they are.

11 JUSTICE KENNEDY: I can't see why it's a  
12 fiduciary obligation in case A -- a sponsor obligation  
13 in case A and a fiduciary obligation in case B. That  
14 just depends on the sequence of timing.

15 MS. CLARK: Again, it's not -- it's not the  
16 timing. It's the context. In a case like this one,  
17 where the employer is clearly going out of business,  
18 it's talking termination, it's got annuity quotes on the  
19 table, it's -- everything is the implementation of the  
20 termination of the plan. If instead this employer  
21 remains in business and is continuing to employ people  
22 who are going to be accruing benefits in the future,  
23 then that is the question of what are the benefits they  
24 are going to be accruing in the future.

25 JUSTICE SOUTER: Okay. But what about the

1 employees who are on board at the time the merger  
2 decision is made? Are you saying that a -- an employer  
3 who continues to operate can say, I'm going to merge my  
4 sound plan, I'm sick of having to worry about it, I'm  
5 going to merge this financially sound plan into plan A  
6 out here, which is very, very shaky, and I know  
7 perfectly well that plan A, you know, may very well  
8 collapse, but I don't care. I just want to get rid of  
9 what I have. Is that an option for the plan sponsor?

10 MS. CLARK: That would be a plan sponsor  
11 decision, but the plan sponsor would be subjecting  
12 itself to obligations for future enhanced funding of the  
13 plan that it joins.

14 JUSTICE BREYER: Could you go back for just  
15 one second to Justice Alito's question, because that's  
16 what I'm having trouble with, because I think the  
17 question is what -- assuming you're right on all the  
18 other points for argument's sake -- but what is the  
19 advantage to the worker here? And the answer I heard  
20 you give was the advantage is, well, maybe the worker  
21 if he goes and works in the right place will get some  
22 more money.

23 Well, and I wonder is that relevant. And  
24 you told me in respect to the two insurance companies it  
25 wasn't relevant. So if it isn't relevant in respect to

1 the two insurance companies, how can that be relevant  
2 here, and if that isn't relevant here what is the  
3 possible advantage to the worker?

4 MS. CLARK: Justice Breyer, I believe I was  
5 cut off and didn't finish my answer to your question  
6 when you asked it before. In determining which of two  
7 annuities on the table are to be chosen, the Department  
8 of Labor's instructions to employers have clearly said  
9 if they're equal on the basis of safety and security of  
10 the benefits, then it's appropriate for the fiduciary to  
11 take other considerations into account. So our position  
12 here would be that, by parallel to that, if the  
13 fiduciary were to conclude that the multiemployer plan  
14 is of equal safety and security to the participants  
15 benefits that they have earned to date, it would then be  
16 able to take into consideration in the interest of  
17 participants any other difference.

18 JUSTICE BREYER: So then you're saying that  
19 the answer -- we have annuity company A and B, they're  
20 identical, the worker has a pension that promises them  
21 \$1,000 a month, not a penny more, and company A says,  
22 we'll give you \$500 extra. Then in your opinion under  
23 the current regs and so forth, the administrator must  
24 choose that company; is that right?

25 MS. CLARK: Only if the two companies are

1 equivalent in terms of their security.

2 JUSTICE BREYER: I said they are equivalent  
3 in terms of -- of the security and so forth; they are  
4 each good companies and one will write out a check for  
5 \$500, which is what I thought my example was. And now  
6 you're saying under the law the fiduciary must choose  
7 the first but you're hesitating on that which means I  
8 think I don't understand it fully.

9 MS. CLARK: I'm trying to make sure that I  
10 understand your question fully, Justice Breyer.

11 The -- the choice must be made and the  
12 Department of Labor's instructions to employers are very  
13 clear on this, in the interest of the security of those  
14 benefits which have been accrued, that's the guiding  
15 principle, (i) single to the rights and interests of the  
16 beneficiaries. If they are equal, then the Department  
17 of Labor guidelines permit the fiduciary to take other  
18 factors into consideration. So that the first decision  
19 has to be made in terms of the security of those  
20 benefits that the individual has already earned.

21 JUSTICE SCALIA: Well, I don't think that in  
22 the -- I just don't read 1341 the way you do. It seems  
23 to me that little (i) at the top of your page 2a is a  
24 safe harbor. I don't think that the, even if it is a  
25 fiduciary decision that he has to, once he has found an

1 insurer that is rock solid, that is willing to provide  
2 all the benefit liabilities, I don't think he has to  
3 look throughout the rest of the world to see if there is  
4 anything that might be better for his plan participants.  
5 I think that's a safe harbor and if he purchases an  
6 irrevocable commitment from an insurer and then that  
7 insurer is as solvent as any other insurer he is home  
8 free. You're saying he is not home free. He has to  
9 consider little (ii) and see what other ways of fully  
10 providing all benefit liabilities might be better for  
11 the plan participants. I -- I think that's a -- that's  
12 placing on him an obligation that I don't see there.

13 MS. CLARK: Well, Justice Scalia, a safe  
14 harbor doesn't necessarily mean that it isn't  
15 appropriate for the fiduciary to consider other  
16 alternatives. It would mean I believe if he chooses an  
17 annuity that is a safe and secure way to provide the  
18 benefit and is equally good with anything else, he would  
19 be solidly protected from any challenge that a  
20 participant might make.

21 JUSTICE KENNEDY: Well -- excuse me. Excuse  
22 me. I'm just not sure I understand your answer.

23 If the employer finds the rock solid  
24 insurance company under -- pardon me, the administrator  
25 finds the rock solid insurance company under Justice

1 Scalia's hypothetical under (i), he also must consider  
2 all other options under (ii)?

3 MS. CLARK: If -- if options have been  
4 proposed and they are of equal or better security for  
5 the participants, yes, Justice Kennedy.

6 JUSTICE SOUTER: And you're saying in this  
7 case -- this is sort of the square one question that I  
8 want to be clear on. You're saying in this case simply  
9 that the employer had to give consideration to PACE's  
10 proposal rather than cutting off consideration, we  
11 presume in part, because of the issue of the \$5 million.  
12 It had to think about it some more. Is that correct?

13 MS. CLARK: Yes, Justice Souter.

14 JUSTICE SOUTER: Okay.

15 CHIEF JUSTICE ROBERTS: Counsel, your little  
16 (ii) that you're relying on begins by saying "in  
17 accordance with the provisions of the plan," the other  
18 solution otherwise provides. Where in the provisions of  
19 the plan does it say that they will consider merger?

20 MS. CLARK: That was what the district court  
21 found, that the provisions of the plan authorized the  
22 merger, as an option.

23 CHIEF JUSTICE ROBERTS: Do you know, is  
24 there a particular provision in the plan that says that?  
25 Or --

1 MS. CLARK: The district court cited what it  
2 was relying on; I don't have those at my fingertips.

3 JUSTICE GINSBURG: Was it specific in the  
4 plan or it just didn't exclude, the plan didn't exclude  
5 the possibility of merger?

6 MS. CLARK: Well -- the usual reading of a  
7 term "in accordance with" means that it must not  
8 violate. It must be consistent with the terms of the  
9 plan.

10 JUSTICE GINSBURG: So that could be if they  
11 just didn't say anything so it would be a choice. Just  
12 like it doesn't say, may not say anything about a lump  
13 sum, which would be an alternative. But your point --

14 CHIEF JUSTICE ROBERTS: I don't read in  
15 accordance with the way you do. I read in accordance  
16 with to mean provided by the plan.

17 MS. CLARK: Certainly if the plan has a  
18 provision then it must be followed. If the plan is  
19 silent, Mr. Chief Justice, your -- your question  
20 suggests that there must be an affirmative authorization  
21 in the plan. The district court found there was  
22 sufficient authorization here in whatever form that the  
23 district court found satisfactory. And because that  
24 issue was not raised in the bankruptcy court there was  
25 no opportunity to present evidence on that matter.

1 JUSTICE GINSBURG: Do I understand that your  
2 position is twofold? One is you say you -- you put this  
3 on the table, the board was bound to consider it with  
4 their fiduciary hat. So it's not just that they were to  
5 consider it. But they had to consider it as a fiduciary  
6 and not as a sponsor?

7 MS. CLARK: Precisely, Justice Ginsburg.  
8 Now, I have -- my time is up. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you  
10 Ms. Clark.

11 Mr. Baker, you have three minutes remaining.

12 REBUTTAL ARGUMENT OF M. MILLER BAKER,  
13 ON BEHALF OF PETITIONER

14 MR. BAKER: Thank you, Mr. Chief Justice.  
15 I'm going to turn -- cover a couple points on function  
16 and then turn to the statutory question.

17 First, I would like to return the Court to  
18 the factual context of this case. In this case, PACE  
19 made not a two-step proposal, PACE proposed an outright  
20 merger in which all assets and liabilities would be  
21 transferred to the PACE union. That's in the record.  
22 It's plaintiff's trial exhibit 25. And what's  
23 significant about the merger proposal that PACE sent to  
24 Crown is that this is PACE's merger proposal. It had  
25 Crown signing the merger in Crown's planned sponsor

1 capacity not as a -- not as an administrator but as a  
2 plan sponsor. That's what PACE proposed, recognizing  
3 that the decision whether to merge the plan was a plan  
4 sponsor function.

5 I'd like to turn now to the question of the  
6 -- also the second-stage issue here. Even -- even if  
7 this was a two-stage transaction, which was not  
8 proposed, each stage of that transaction is a plan  
9 sponsor decision. A plan sponsor has to make the  
10 decision whether to transfer assets and then a plan  
11 sponsor has to make the decision whether or not to then  
12 terminate the plan. Each separate stage is a plan  
13 sponsor function.

14 In terms of the plan sponsor function  
15 changing because the company is going out of business,  
16 that simply cannot be. A plan sponsor function depends  
17 upon what the function is, and it doesn't matter whether  
18 the business is going out of business or whether the  
19 business is an ongoing concern. If anything, because  
20 it's going out of business, it's important to protect  
21 the -- the discretion of a plan sponsor.

22 In terms of the textual argument, it's  
23 very important to note that nowhere -- that section 1341  
24 which governs standard termination does not  
25 cross-reference mergers and the section 1412 governing

1 mergers does not apply to terminations. In fact the  
2 only place in the statute where the two words appear  
3 together is in section 1058, in which the two procedures  
4 are actually compared to each other.

5           There are some significant differences  
6 between termination and merger. In a termination, there  
7 is a reversion to the company. There is also reversion  
8 to employees based upon their individual contributions.  
9 There is no similar reversion in a merger. That is why  
10 a merger simply cannot be a method of termination. The  
11 two are different. You might have a two-stage  
12 transaction but they are two separate transactions each  
13 of which is a plan sponsor function.

14           JUSTICE SCALIA: I'm not sure I understand  
15 what you mean by a reversion to the employees who have  
16 made contributions. They get their cash back?

17           MR. BAKER: Yes. If employees, under 1344  
18 -- if employees have made individual contributions to  
19 the plan, it's not merely paid by the employer --

20           JUSTICE SCALIA: Right.

21           MR. BAKER: -- the employee has a right to a  
22 pro rata percentage of the surplus plan assets in the  
23 event of termination. There is no similar right of  
24 reversion to the employee in the event of a merger.

25           JUSTICE SOUTER: What if the plan -- the

1 plan provides that in the event of a merger there will  
2 in fact be a reversion to the employees, if they've paid  
3 in too much or to -- or to the sponsor if the sponsor  
4 has overfunded, and there will be no merger except on  
5 those terms? Is that enforceable?

6 MR. BAKER: I'm not sure I -- I understand  
7 your question.

8 JUSTICE SOUTER: If the plan document says  
9 look, if we decide to merge, anybody who has paid in  
10 more than he has to, employee or employer, gets the  
11 money back or there's no merger. In other words it's  
12 going to be the terms of the merger that there is a  
13 reversion. Can a plan provide for that?

14 MR. BAKER: A plan cannot provide for that  
15 because it would be contrary to ERISA, Justice Souter.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 The case is submitted.

18 (Whereupon, at 12:03 p.m., the case in the  
19 above-entitled matter was submitted.)

20  
21  
22  
23  
24  
25

<b>A</b>	
<b>able</b> 4:13 37:11 46:16	36:22 37:1 38:17,21 39:14 42:1 43:8,8,14 43:21 46:23 48:24 52:1
<b>above-entitled</b> 1:16 54:19	<b>administrator's</b> 30:10 39:22
<b>absence</b> 15:9	<b>admitted</b> 29:11
<b>absolutely</b> 7:11 10:16,24 11:7 17:24	<b>advantage</b> 37:6 37:14 45:19,20 46:3
<b>abstract</b> 33:16	<b>adversaries</b> 33:19
<b>acceptable</b> 33:16	<b>adversary</b> 32:5 32:12,14
<b>accepted</b> 7:20	<b>advocate</b> 36:24
<b>account</b> 46:11	<b>affect</b> 20:23
<b>accrued</b> 4:15 12:20 22:5 26:7 37:12 43:25 47:14	<b>affirmative</b> 50:20
<b>accruing</b> 44:22 44:24	<b>agencies</b> 16:23 25:23
<b>acquiring</b> 6:5 12:19	<b>agree</b> 11:2 30:12 30:18
<b>acting</b> 18:17	<b>agreed</b> 34:22
<b>actual</b> 14:22 42:7	<b>aircraft</b> 5:7
<b>add</b> 37:11	<b>AL</b> 1:11
<b>addition</b> 21:6 23:22	<b>Alito</b> 16:13,18 16:19 37:3
<b>address</b> 23:16 31:11 43:5	<b>Alito's</b> 17:3 45:15
<b>addressed</b> 23:4 41:1	<b>allocating</b> 24:2
<b>administer</b> 9:1	<b>allow</b> 27:15
<b>administration</b> 28:16,20 44:8	<b>all-in</b> 33:7
<b>administrative</b> 18:9	<b>alter</b> 19:9 20:16 23:19
<b>administrator</b> 6:9 7:4,14 18:4 18:8,9,13,16 19:13 20:21 21:12,21,25 24:10,15,17,21 25:1 27:13 28:25 29:4,20 31:9,16 34:6 34:10 36:5,11	<b>alternative</b> 8:8 16:1 50:13
	<b>alternatives</b> 48:16
	<b>amend</b> 5:8 27:15
	<b>amended</b> 41:22 43:12,17
	<b>amicus</b> 1:24 3:7 19:1
	<b>amount</b> 7:8 43:25
	<b>analyze</b> 7:5
	<b>annuities</b> 8:8 9:20 14:9,12 14:17,18,21,22 14:23 15:1,1 19:19 26:1,6 27:9 32:18 35:17 36:17 39:21 46:7
	<b>annuitize</b> 26:24
	<b>annuity</b> 5:16,17 5:20 7:3,9,13 7:20,23 8:11 12:13 14:13,18 16:15 27:7 31:18 34:11 35:24 36:10 37:5,15,18 38:5,18 44:18 46:19 48:17
	<b>answer</b> 6:1 11:3 11:25 12:17 13:3,10,16,20 13:24 27:11 42:15 45:19 46:5,19 48:22
	<b>anybody</b> 54:9
	<b>anymore</b> 19:23
	<b>anyway</b> 11:10
	<b>apart</b> 31:3
	<b>apologize</b> 13:24
	<b>appeal</b> 19:21
	<b>appeals</b> 22:15 22:21 23:1,13 40:15,17,18,20 40:21
	<b>appear</b> 21:21 53:2
	<b>APPEARAN...</b> 1:19
	<b>appendix</b> 28:7 34:8,9
	<b>applicable</b> 34:14
	<b>apply</b> 53:1
	<b>appropriate</b> 46:10 48:15
	<b>April</b> 1:14
	<b>argue</b> 36:3
	<b>argued</b> 17:13 40:25
	<b>argument</b> 1:17 3:2,5,9,12 4:3 4:7 8:3 11:15 15:20,25 16:1 16:5 18:24 19:17 20:7 22:9,18 23:1,3 27:22 28:2 29:5 31:14 33:19 40:14,17 40:19 51:12 52:22
	<b>arguments</b> 11:4 16:7
	<b>argument's</b> 45:18
	<b>arises</b> 23:20
	<b>arrived</b> 9:6
	<b>asked</b> 22:24 46:6
	<b>asking</b> 11:15 13:1
	<b>assets</b> 4:16 5:20 5:23 7:23 8:7 9:6,21,22,24 10:20,21 17:9 19:23,24 20:2 20:23 21:10 24:1,4 25:2,3,4 25:13 26:2,4 26:21,22 27:2 28:19 29:7,12 29:16 30:4,24 31:17 33:1,5 33:11,20,25 35:18,19 37:17 37:25 51:20 52:10 53:22
	<b>assigned</b> 28:24
	<b>Assistant</b> 1:22
	<b>associated</b> 16:8
	<b>assume</b> 8:23 11:8,18 17:4,6 17:8 23:7,12 26:10
	<b>assuming</b> 29:14 45:17
	<b>attorney</b> 29:11 29:22
	<b>authority</b> 28:15 28:18 29:20 35:10,13
	<b>authorization</b> 50:20,22
	<b>authorize</b> 40:11 43:6
	<b>authorized</b> 49:21
	<b>automatic</b> 12:4 12:20
	<b>automatically</b> 18:11
	<b>available</b> 20:24 20:25 21:23 22:3
	<b>awfully</b> 36:13
	<b>awkward</b> 36:21
	<b>a.m</b> 1:18 4:2
<b>B</b>	
	<b>B</b> 17:6 18:4 39:8 39:14 44:13 46:19
	<b>back</b> 18:5 21:15 37:16 41:12 42:23,24 43:9 45:14 53:16 54:11
	<b>Baker</b> 1:20 3:3 3:13 4:6,7,9 5:25 7:1,11 8:12,18 9:10 9:23 10:5,9,16 10:24 11:7,13 11:25 12:9,16 13:15,23 14:10 14:20 15:3,6 15:14,17,25 16:6,17,22 17:12,24 18:6 18:16,21 20:7 20:18 51:11,12

51:14 53:17,21 54:6,14 <b>bankrupt</b> 20:9 38:9 <b>bankruptcy</b> 4:11 23:3 40:19 41:4 50:24 <b>based</b> 23:2 53:8 <b>baseline</b> 34:24 <b>basic</b> 10:13 13:8 <b>basis</b> 22:21 42:5 46:9 <b>Beck</b> 1:3 4:4 <b>beginning</b> 5:6 28:4 <b>begins</b> 49:16 <b>behalf</b> 1:20,24 2:1 3:4,7,11,14 4:8 18:25 27:23 51:13 <b>believe</b> 41:17 46:4 48:16 <b>believes</b> 36:24 <b>beneficiaries</b> 5:24 7:24 9:21 15:2 17:19,23 33:21 34:1,2,3 35:6,8,11,24 35:25 36:15,16 36:20 37:4 40:4 41:13 42:9 47:16 <b>benefit</b> 17:11,19 19:6 34:12,15 37:5,13,21 48:2,10,18 <b>benefits</b> 4:15,16 6:13,14 9:15 12:2,18,21 14:6 16:12 20:23,24,25 21:2,11,19 22:5,6 24:6 26:7,24 32:18 34:2 35:25 36:7 37:11	38:1 39:23 41:12 43:25 44:10,22,23 46:10,15 47:14 47:20 <b>best</b> 5:24 6:22 14:13 19:25 36:24 <b>better</b> 36:18 37:4 48:4,10 49:4 <b>beyond</b> 39:24 <b>binding</b> 24:10 <b>bit</b> 31:22,23 <b>board</b> 11:18 45:1 51:3 <b>bonus</b> 39:15 <b>bother</b> 13:10 <b>bound</b> 51:3 <b>breached</b> 4:23 <b>Breyer</b> 12:22 13:17,20 38:4 38:12,15 39:17 45:14 46:4,18 47:2,10 <b>brief</b> 28:8 32:24 34:8 <b>briefs</b> 10:10 <b>broad</b> 13:25 <b>brother</b> 22:24 <b>building</b> 15:11 <b>business</b> 5:14 8:24 12:1,7 19:22 20:9,10 20:14 39:8 43:18 44:17,21 52:15,18,18,19 52:20 <b>buy</b> 9:20 27:7 38:5,17	<b>care</b> 26:14 45:8 <b>careful</b> 41:14 <b>carefully</b> 18:10 <b>carry</b> 19:13 <b>case</b> 4:4 8:10,11 8:13 11:10 20:13,17 22:22 28:11,14,21 29:10 33:13,24 34:22 35:1,18 41:2,9,17,24 42:16 44:9,12 44:13,13,16 49:7,8 51:18 51:18 54:17,18 <b>cases</b> 16:23 25:24 <b>cash</b> 53:16 <b>certain</b> 29:24 <b>certainly</b> 22:20 50:17 <b>cetera</b> 7:9 <b>challenge</b> 48:19 <b>change</b> 5:14 20:19,20 21:5 21:5 <b>changing</b> 52:15 <b>characterize</b> 12:12 <b>characterized</b> 20:10 <b>check</b> 39:10 47:4 <b>Chief</b> 4:3,9 15:16,19 16:1 17:14 18:22 19:2 27:20,24 35:21 36:2,12 39:24 40:6,7 40:23 41:8,16 42:4,8,14,21 43:3 49:15,23 50:14,19 51:9 51:14 54:16 <b>choice</b> 12:3 19:8 19:11 20:5 23:19 31:16	39:20 47:11 50:11 <b>choices</b> 9:19 11:20 <b>choose</b> 21:22 46:24 47:6 <b>chooses</b> 42:2 48:16 <b>choosing</b> 5:16 5:21 21:8 39:5 <b>chosen</b> 46:7 <b>Circuit</b> 4:23 5:1 <b>circumstances</b> 26:6 <b>circumvention</b> 25:25 <b>cited</b> 32:24 50:1 <b>citing</b> 28:23 <b>claim</b> 42:5,12 <b>Clark</b> 2:1 3:10 27:21,22,24 29:9,21 30:12 30:18 31:10 32:3,6,10,14 32:22 33:22 34:4 35:15 36:2,22 37:6 37:23 38:11,14 39:16,19 40:5 40:10,16 41:2 41:16,24 42:7 42:14,25 43:4 43:11,23 44:5 44:15 45:10 46:4,25 47:9 48:13 49:3,13 49:20 50:1,6 50:17 51:7,10 <b>clear</b> 31:2 32:23 32:25 36:3 39:20 47:13 49:8 <b>clearly</b> 44:17 46:8 <b>Code</b> 21:24 28:22 <b>collapse</b> 45:8	<b>come</b> 8:1,4 37:16 44:8 <b>comfortable</b> 35:23 <b>commingled</b> 24:5 35:18 <b>commitment</b> 35:6 37:20,21 38:19 48:6 <b>commitments</b> 34:10 <b>companies</b> 19:18 27:7 39:6 45:24 46:1,25 47:4 <b>company</b> 1:7 5:17 6:19,23 6:24,25 7:3,8 12:7 13:22 19:21 20:8 27:10 36:10 37:19 38:6,7,9 38:18 39:6,8 39:15 42:24 46:19,21,24 48:24,25 52:15 53:7 <b>compared</b> 53:4 <b>comparison</b> 37:15 <b>complete</b> 33:2 <b>completely</b> 30:12,18 31:20 32:17 <b>complies</b> 17:1 <b>composition</b> 19:9 20:16 23:19 <b>conceivably</b> 25:21 <b>concept</b> 33:6 <b>concern</b> 39:23 52:19 <b>concerned</b> 23:9 <b>conclude</b> 46:13 <b>confusion</b> 21:15 <b>Congress</b> 28:22
	<b>C</b>			
	<b>C</b> 3:1 4:1 <b>call</b> 38:10 <b>capacity</b> 21:13 24:10 25:18 31:12 52:1			

<p>34:25  <b>connection</b> 14:3  <b>consider</b> 5:4 6:3          6:21 7:7 13:7          18:10,14,17          19:5 26:21          48:9,15 49:1          49:19 51:3,5,5  <b>consideration</b>          46:16 47:18          49:9,10  <b>considerations</b>          46:11  <b>considered</b>          40:20  <b>considering</b>          4:24 19:15  <b>consistent</b> 13:8          18:19 22:12          24:17 50:8  <b>consistently</b>          26:16  <b>constitute</b> 29:8  <b>construed</b> 23:5          34:17  <b>construing</b> 22:9  <b>content</b> 6:11          8:21 14:6          16:11  <b>context</b> 7:12          23:21 44:16          51:18  <b>continuation</b>          30:6 32:20  <b>continue</b> 33:8          43:18  <b>continues</b> 45:3  <b>continuing</b> 5:6          44:21  <b>contract</b> 41:6  <b>contrary</b> 54:15  <b>contributions</b>          4:18 42:11          53:8,16,18  <b>control</b> 28:18  <b>convert</b> 30:9  <b>correct</b> 6:1,17</p>	<p>10:24 11:7,12          11:13 17:24          32:3 36:3,4          49:12  <b>correctly</b> 22:21          29:15  <b>counsel</b> 18:22          27:20 49:15          54:16  <b>couple</b> 51:15  <b>course</b> 20:3 29:5          29:9  <b>court</b> 1:1,17          4:10 5:1 6:14          19:3 22:15,21          22:25 23:3,4          23:12,16 27:25          28:24 33:15          34:16 40:11,14          40:15,16,18,19          40:20,21,22,24          41:1 49:20          50:1,21,23,24          51:17  <b>court's</b> 5:5          16:23 23:13          28:4  <b>cover</b> 51:15  <b>create</b> 5:8  <b>creditors</b> 4:17  <b>crimes</b> 34:18  <b>cross-reference</b>          52:25  <b>Crown</b> 1:5,6          4:11,13,19,22          4:23 5:3 37:9          51:24,25  <b>Crown's</b> 4:17          51:25  <b>curiae</b> 1:24 3:8          19:1  <b>current</b> 46:23  <b>Curtiss-Wright</b>          5:6  <b>cut</b> 46:5  <b>cutting</b> 49:10</p>	<p style="text-align: center;"><b>D</b></p> <p><b>D</b> 1:22 3:6 4:1          18:24  <b>date</b> 38:2 46:15  <b>deal</b> 8:25  <b>deceased</b> 37:22  <b>decide</b> 11:23          12:1 13:3          16:20 20:4          25:2 27:13          54:9  <b>decided</b> 4:12 8:7          22:22 40:24  <b>decides</b> 7:19          12:24  <b>decision</b> 4:19          6:2,2,15,16,18          6:18 7:15,16          7:17,22,22 8:2          8:5,8 9:2,3,9,9          9:13 10:2,3,4,5          10:6,7 12:1,7          12:10,15,16          14:1,4,10,18          14:18,20,21,25          15:2,20 16:9          16:10,10,24          19:7,7,10,11          19:14,15 20:16          21:13,16,17          23:13,14,19          25:12,15,15,15          26:13 30:9,10          30:11,19,20,21          30:23 31:7,9          31:15,24,25          32:1,6 37:1          40:2 43:22          44:3,7 45:2,11          47:18,25 52:3          52:9,10,11  <b>decisions</b> 5:5,7          7:21 8:5,10,11          8:12 25:17          28:4,25 31:12          37:2  <b>defined</b> 19:5</p>	<p><b>definition</b> 28:3  <b>Department</b>          1:23 39:19          46:7 47:12,16  <b>depend</b> 40:5  <b>depends</b> 7:1          13:24 44:14          52:16  <b>depriving</b> 27:18  <b>describes</b> 33:9  <b>design</b> 19:9          20:16 23:19          44:7  <b>determination</b>          12:14 30:15,17          36:23  <b>determined</b>          40:11  <b>determines</b> 44:4  <b>determining</b>          30:1 46:6  <b>difference</b> 31:15          46:17  <b>differences</b> 53:5  <b>different</b> 5:21          8:18 9:11 16:7          31:20 32:17          43:1 53:11  <b>differently</b>          35:23  <b>difficult</b> 11:21          36:13  <b>directors</b> 11:19  <b>disagree</b> 13:17          32:8 34:4          40:10  <b>discourage</b>          27:19  <b>discretion</b> 21:25          52:21  <b>discretionary</b>          28:15,15  <b>disposition</b> 9:23          28:19  <b>dispute</b> 6:10          16:16,17  <b>dissenting</b> 34:21</p>	<p><b>distinct</b> 23:25  <b>distribute</b> 5:23          7:23 10:19          15:8,11 19:23  <b>distributed</b>          10:21 24:2          33:20,25 34:1  <b>distributes</b>          37:17  <b>distribution</b>          15:8 20:2          21:16,18,22          22:3 26:2 35:2  <b>district</b> 23:4,13          40:10,14,22,24          49:20 50:1,21          50:23  <b>document</b> 14:11          14:15 24:7,11          41:5 54:8  <b>documents</b>          21:18 23:9          41:21,21  <b>doing</b> 19:19          25:19  <b>dollars</b> 38:8          39:25  <b>duties</b> 5:11 7:5          11:22  <b>duty</b> 4:24 5:4          6:21 7:6,9,10          11:23 13:2,7          16:21,22 18:10          19:4,13 24:15          39:22  <b>D.C</b> 1:13,20,23          2:1</p> <p style="text-align: center;"><b>E</b></p> <p><b>E</b> 3:1 4:1,1  <b>earned</b> 38:1          46:15 47:20  <b>effort</b> 27:1  <b>either</b> 9:20 21:7          31:17  <b>elects</b> 5:16  <b>eliminate</b> 9:8</p>
--	--	---	---	--

<b>employ</b> 44:21	<b>equivalent</b> 47:1	<b>factual</b> 51:18	32:15	24:9 27:19
<b>employee</b> 39:3	47:2	<b>far</b> 23:8	<b>follow</b> 14:16	41:17 45:12
53:21,24 54:10	<b>ERISA</b> 5:10 7:4	<b>Federal</b> 43:2	24:18	<b>future</b> 36:7
<b>employees</b> 6:22	21:23 24:17,19	<b>fiduciary</b> 4:24	<b>followed</b> 26:4	37:11 41:13
7:7 11:22	26:16 28:3	5:4,10,18 6:18	34:18 50:18	44:1,22,24
17:10,16,17	41:18 54:15	7:5,10 11:5,12	<b>following</b> 34:5	45:12
18:15,18 19:25	<b>ESQ</b> 1:20,22 2:1	11:16,23 13:2	<b>follows</b> 34:25	
21:11 27:14	3:3,6,10,13	13:7 14:19	<b>force</b> 29:6	<b>G</b>
38:6 39:9 45:1	<b>ESTATES</b> 1:5	15:2,12 16:20	<b>forcefully</b> 19:18	<b>G</b> 4:1
53:8,15,17,18	<b>et</b> 1:11 7:9	16:21,22 17:8	<b>form</b> 5:22 6:5,8	<b>General</b> 1:23
54:2	<b>event</b> 40:9 53:23	18:3,6,7,14,17	8:20,24 9:15	<b>generalization</b>
<b>employer</b> 5:16	53:24 54:1	19:4 20:11	9:17,22 12:1	13:25
12:23 17:21	<b>everybody</b> 7:21	21:13 23:18	14:6 16:11	<b>getting</b> 39:2
18:14 19:4	<b>evidence</b> 41:4,7	24:10 25:18	30:5 38:20,25	<b>Ginsburg</b> 5:12
20:3,5,19 21:6	50:25	28:3,5,8 36:4	43:24 50:22	5:25 19:17
21:17 22:2,2	<b>exactly</b> 14:8	37:1 38:22	<b>formal</b> 30:25	20:6 50:3,10
24:8,12,25	34:20 35:16	39:20,22 40:2	<b>forms</b> 22:3,4,4	51:1,7
25:11,14,17	39:9	42:19 43:10,20	<b>form-over-su...</b>	<b>give</b> 9:7,21,21
27:3 29:15	<b>example</b> 12:4	43:22 44:4,12	31:14	18:5 27:13
30:3 32:23	38:18 47:5	44:13 46:10,13	<b>forth</b> 46:23 47:3	39:9 40:3 43:9
37:10 41:10,23	<b>excess</b> 24:9	47:6,17,25	<b>found</b> 40:14	45:20 46:22
42:3,11,18	29:16 42:11	48:15 51:4,5	47:25 49:21	49:9
43:9,11,18,20	<b>exchange</b> 10:11	<b>filing</b> 4:11	50:21,23	<b>gives</b> 7:24
43:21 44:3,17	<b>exclude</b> 50:4,4	<b>final</b> 31:3	<b>free</b> 48:8,8	<b>go</b> 12:25 17:9,10
44:20 45:2	<b>excuse</b> 48:21,21	<b>finally</b> 6:12	<b>full</b> 27:19	35:9,11 42:19
48:23 49:9	<b>executed</b> 10:7	<b>financial</b> 35:19	<b>fully</b> 21:11	45:14
53:19 54:10	<b>execution</b> 12:10	<b>financially</b> 45:5	27:17 34:14	<b>goes</b> 6:7,11 7:17
<b>employers</b> 17:17	12:13,14 13:18	<b>finds</b> 48:23,25	36:16 37:21	8:20,20 11:10
37:9 41:13,18	<b>exercises</b> 28:18	<b>fine</b> 24:23 30:8	41:12 47:8,10	12:3 16:10
46:8 47:12	<b>exhibit</b> 51:22	<b>fingertips</b> 50:2	48:9	21:14 27:9
<b>encourage</b> 41:18	<b>expense</b> 35:7	<b>finish</b> 46:5	<b>function</b> 5:3,18	28:10 38:9
<b>encourages</b>	<b>explain</b> 32:21	<b>first</b> 5:2 6:4 8:5	7:2,2,4 13:25	41:23 42:23,25
27:17	<b>exploring</b> 11:5	11:15 16:5	14:2,3,3 15:9	45:21
<b>enforceable</b>	<b>extent</b> 28:9,14	19:6 20:13	18:9 19:8,12	<b>going</b> 5:13,17,23
54:5	28:17	28:7 29:17	28:5 51:15	6:20 8:6 9:1,5
<b>enhanced</b> 37:13	<b>extra</b> 17:9 27:8	30:4,25 32:11	52:4,13,14,16	9:18 11:19,23
45:12	39:25 42:5,13	35:10 47:7,18	52:17 53:13	12:2,8,19
<b>entire</b> 29:23	42:22 46:22	51:17	<b>functions</b> 5:9,9	15:11 16:14
30:2 35:18	<b>extract</b> 27:2	<b>five</b> 17:22 24:22	19:11	17:15 19:22,22
<b>entitled</b> 24:8		25:8,20 26:11	<b>fund</b> 24:5 27:17	20:8,14,15,18
35:7	<b>F</b>	26:16 27:8	41:15,18	20:20,21,22,24
<b>entity</b> 33:8	<b>facilities</b> 37:9	40:3	<b>fundamental</b>	21:2,4 22:3
<b>equal</b> 46:9,14	<b>fact</b> 24:12 25:22	<b>fixes</b> 44:10	38:1	24:21 25:7,8
47:16 49:4	26:20 53:1	<b>flaky</b> 6:24	<b>fundamentally</b>	26:9 27:3 30:3
<b>equally</b> 48:18	54:2	<b>flexible</b> 33:6	20:19	30:14 31:3
<b>equitable</b> 42:5	<b>factors</b> 6:4	<b>flowing</b> 18:11	<b>funded</b> 36:8	36:17 44:17,22
42:12	47:18	<b>focus</b> 29:23 30:2	<b>funding</b> 17:18	44:24 45:3,5

51:15 52:15,18 52:20 54:12 <b>good</b> 8:25 17:18 41:19 47:4 48:18 <b>governing</b> 52:25 <b>Government</b> 28:2 29:22 31:19 <b>Government's</b> 29:11 32:22 33:9 <b>governs</b> 52:24 <b>guarantee</b> 21:1 27:8 38:10 <b>guidelines</b> 25:23 25:24 26:2 29:22 30:2 31:2,11 47:17 <b>guiding</b> 39:23 47:14	23:6,12 25:22 26:12,19 <b>Hughes</b> 5:7 <b>hungry</b> 39:8 <b>hypothetical</b> 49:1	35:17 39:21 48:1,6,7,7 <b>insuring</b> 35:24 41:12 <b>interest</b> 7:7 14:13 17:10 18:14,18 21:8 27:16,17 36:25 46:16 47:13 <b>interests</b> 6:22 11:21 47:15 <b>Internal</b> 14:23 <b>International</b> 1:10 4:4 <b>interpretation</b> 41:5 <b>interpreting</b> 41:6 <b>investments</b> 35:9 <b>involved</b> 16:13 <b>involves</b> 34:19 <b>irrevocable</b> 34:10 35:5 36:17 38:19 48:6 <b>isolation</b> 21:21 <b>issue</b> 7:2 12:4 13:25 14:3 29:10 49:11 50:24 52:6 <b>issues</b> 16:7 17:12 <b>i.e</b> 11:23	7:18 8:13,15 8:19,22 9:10 9:17,24,25 10:9,14,18,25 11:1,2,2,8,14 11:16,25 12:6 12:11,18,22 13:1,12,15,16 13:20,21 14:8 14:15,21,25 15:3,5,10,16 15:17,19 16:1 16:4,6,13,18 16:19 17:3,3 17:13,14 18:2 18:13,19,22 19:2,17 20:6 21:12 22:8,14 22:17,23 23:7 24:7,14,20 25:5,19 26:10 26:14 27:5,20 27:24 29:5,9 29:17,21 30:8 30:13,18 31:5 31:10,22 32:3 32:5,8,12,19 33:18,22,24 34:4 35:3,15 35:21 36:2,12 37:3,20,23 38:4,12,15 39:17,24 40:6 40:7,13,16,23 41:8,16,20,25 42:4,8,14,21 43:3,7,16,23 44:2,5,11,25 45:14,15 46:4 46:18 47:2,10 47:21 48:13,21 48:25 49:5,6 49:13,14,15,23 50:3,10,14,19 51:1,7,9,14 53:14,20,25 54:8,15,16	<b>K</b> <b>keep</b> 10:14 26:11,16 <b>Kennedy</b> 6:17 7:1,6,12,12 11:2,8,14,25 12:6,11,18 13:1 17:3,13 18:2,13 21:12 24:7,14 27:5 41:20,25 43:7 43:16,23 44:2 44:5,11 48:21 49:5 <b>Kennedy's</b> 13:21 <b>kind</b> 33:7 <b>know</b> 10:10 12:12 17:5,7 23:14 26:15 27:6 35:10 42:19 45:6,7 49:23
<b>H</b> <b>H</b> 1:3 <b>hand</b> 11:3 <b>hanky-panky</b> 30:14 <b>happened</b> 13:6 <b>happens</b> 43:17 43:18 <b>harbor</b> 47:24 48:5,14 <b>harm</b> 34:19 <b>hat</b> 6:20 37:2 51:4 <b>hats</b> 43:21 <b>hear</b> 4:3 13:12 32:10 <b>heard</b> 13:2,3 35:22 45:19 <b>held</b> 4:23 22:15 23:1 40:17 <b>help</b> 17:22 39:3 <b>hesitating</b> 47:7 <b>hold</b> 5:7 <b>home</b> 48:7,8 <b>Honor</b> 21:14	<b>I</b> <b>identical</b> 46:20 <b>ii</b> 48:9 49:2,16 <b>illustrates</b> 20:17 <b>immediately</b> 28:23 <b>impact</b> 43:24 <b>implement</b> 30:22 <b>implementation</b> 29:22 31:1,11 44:19 <b>implementing</b> 29:1 31:16,21 34:6 42:1 44:9 <b>important</b> 52:20 52:23 <b>importantly</b> 6:12 <b>impossible</b> 10:7 <b>imprecise</b> 13:23 13:24 <b>increase</b> 20:22 <b>independent</b> 5:2 <b>individual</b> 4:18 47:20 53:8,18 <b>institution</b> 35:19 <b>instructions</b> 46:8 47:12 <b>insurance</b> 5:17 6:23,24,25 7:3 7:8 12:7 13:21 19:18 27:6,9 35:16 36:10 37:19 38:6,7 38:18 39:6,6,8 39:13,15 45:24 46:1 48:24,25 <b>insured</b> 34:11 <b>insurer</b> 34:11	<b>J</b> <b>James</b> 34:16 <b>JEFFREY</b> 1:3 <b>job</b> 17:18 <b>joins</b> 45:13 <b>joint</b> 25:24 <b>judge</b> 34:24 <b>JULIA</b> 2:1 3:10 27:22 <b>Justice</b> 1:23 4:3 4:9 5:12,25,25 6:17 7:1,6,11	<b>L</b> <b>Labor</b> 39:19 47:17 <b>Labor's</b> 46:8 47:12 <b>language</b> 34:8 <b>Laughter</b> 13:11 13:14 <b>law</b> 5:10 15:17 37:24 43:2 44:10 47:6 <b>leave</b> 26:22 42:17 <b>leavings</b> 35:13 <b>left</b> 24:23,23 25:10 31:1 <b>legitimate</b> 21:8 27:16 <b>legitimately</b> 30:1 <b>letting</b> 8:25 <b>let's</b> 8:23 17:4,6 39:25	

<p><b>level</b> 6:13,14 12:18 16:12 <b>levels</b> 42:15 <b>liabilities</b> 25:2 25:13 26:21 29:12 30:5 31:17 33:2,5 33:10 34:12,15 35:20 37:21,25 48:2,10 51:20 <b>likewise</b> 7:16 <b>LIQUIDATI...</b> 1:4 <b>list</b> 34:18 <b>listening</b> 12:22 <b>little</b> 31:23 35:4 35:22 47:23 48:9 49:15 <b>Lockheed</b> 5:7 <b>long</b> 16:25 <b>look</b> 8:22 14:2 26:25 31:3 35:22 39:22 42:22 48:3 54:9 <b>looking</b> 31:6 42:11 <b>looks</b> 27:1 <b>lose</b> 17:8,12 <b>lot</b> 42:21 <b>lower</b> 21:2 <b>lump</b> 50:12 <b>luxury</b> 17:20</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>M</b> 1:20 3:3,13 4:7 51:12 <b>major</b> 29:10 37:15 <b>majority</b> 34:21 <b>making</b> 20:6 39:20 <b>matter</b> 1:16 6:4 30:23 42:12 50:25 52:17 54:19 <b>MATTHEW</b></p>	<p>1:22 3:6 18:24 <b>mean</b> 13:6 14:20 16:20 31:19 36:3,13 39:25 40:2 41:9 48:14,16 50:16 53:15 <b>means</b> 16:2 19:5 20:2 31:21 33:17 34:23 39:11 41:7 44:9 47:7 50:7 <b>mechanism</b> 6:11 15:8 <b>meet</b> 35:4 <b>meeting</b> 11:18 <b>members</b> 4:17 17:20,25 36:1 36:14,18,20,25 <b>mere</b> 12:10,12 12:13 <b>merely</b> 53:19 <b>merge</b> 4:21 6:2 8:7,9,14,14,19 8:20 9:1,13 10:7,20 19:7 19:11,15 20:4 21:7 22:18 24:22 25:10 32:1 33:8 45:3 45:5 52:3 54:9 <b>merged</b> 20:15 <b>merger</b> 4:20,25 5:2,4,19 6:6 7:16 8:1,4,10 8:13 9:7,9,12 9:22 10:1,2,11 11:9,10 12:3,4 12:14,16,20 13:7 14:4 15:23 16:2 17:5 18:3 19:5 20:9,15 21:9 23:6,9,18,23 23:24 24:3,23 26:17 31:21 32:13,17,20</p>	<p>33:4,6,7,9,15 33:16,25 37:4 37:24 38:25 40:8,11 41:22 43:6 44:9 45:1 49:19,22 50:5 51:20,23,24,25 53:6,9,10,24 54:1,4,11,12 <b>mergers</b> 32:23 52:25 53:1 <b>merit</b> 16:7 <b>method</b> 23:23 41:25 53:10 <b>MILLER</b> 1:20 3:3,13 4:7 51:12 <b>million</b> 4:16 16:14 17:15,22 24:22 25:7,8 25:20 26:11,17 27:8 36:19 39:25 40:4 41:11 42:6 43:9 49:11 <b>mind</b> 35:1 38:22 <b>minutes</b> 51:11 <b>mistakenly</b> 23:5 <b>modify</b> 5:8 <b>money</b> 15:12,22 17:25 18:5,11 42:13,22 45:22 54:11 <b>month</b> 38:8 46:21 <b>multiemployer</b> 4:22 5:14 6:6 19:20 20:20 21:2 36:8 37:7 37:10,17 42:10 43:19 46:13</p> <hr/> <p style="text-align: center;"><b>N</b></p> <p><b>N</b> 3:1,1 4:1 <b>necessarily</b> 10:2 13:19 14:1 18:11 48:14</p>	<p><b>necessary</b> 23:14 23:17 <b>need</b> 11:11 <b>negotiate</b> 43:8 <b>negotiated</b> 42:17 <b>neither</b> 28:1 <b>never</b> 42:25 <b>new</b> 6:9,9,10 34:1 <b>Ninth</b> 4:23 5:1 <b>nonfiduciary</b> 5:3 <b>notable</b> 28:1 <b>note</b> 14:23 52:23 <b>number</b> 6:22 25:6,9</p> <hr/> <p style="text-align: center;"><b>O</b></p> <p><b>O</b> 3:1 4:1 <b>obey</b> 24:15 <b>obligation</b> 11:5 11:6 14:19 17:8 18:3,6,7 44:4,12,12,13 48:12 <b>obligations</b> 45:12 <b>obtain</b> 21:10 <b>occur</b> 24:3 <b>offer</b> 14:20,21 <b>offered</b> 39:21 <b>offering</b> 15:1 36:10 <b>oh</b> 35:10 39:4 <b>okay</b> 11:1 12:24 38:15 44:25 49:14 <b>once</b> 10:5,6,6 12:14 15:20 47:25 <b>ongoing</b> 5:15,22 8:23 26:8 27:2 44:1,2,6 52:19 <b>operate</b> 45:3 <b>operation</b> 5:22 15:17</p>	<p><b>opinion</b> 34:21 46:22 <b>opportunity</b> 41:7 50:25 <b>opposed</b> 6:7 35:25 37:5 <b>option</b> 15:1 17:6 18:4,10 22:19 25:6,10 36:6 41:22 45:9 49:22 <b>optional</b> 22:5 <b>options</b> 21:16,19 21:22 22:7,10 49:2,3 <b>oral</b> 1:16 3:2,5,9 4:7 18:24 27:22 <b>order</b> 16:24 25:24 28:13 <b>original</b> 22:10 33:4,12 <b>outright</b> 51:19 <b>overfunded</b> 41:10 42:23 54:4 <b>oversee</b> 30:13 <b>overturn</b> 40:21 <b>over-funded</b> 4:12 17:21 <b>owed</b> 39:7,9</p> <hr/> <p style="text-align: center;"><b>P</b></p> <p><b>P</b> 2:1 3:10 4:1 27:22 <b>PACE</b> 1:10 4:4 4:21,21 5:5 6:12 9:6,22 16:19 24:23,24 25:10,13 26:18 51:18,19,21,23 52:2 <b>PACE's</b> 6:5,8 49:9 51:24 <b>page</b> 3:2 28:7 34:9 47:23 <b>paid</b> 27:9 53:19</p>
---	--	---	--	--

54:2,9 <b>PAPER</b> 1:7 <b>parallel</b> 46:12 <b>paraphrasing</b> 34:20 <b>pardon</b> 48:24 <b>part</b> 13:16 32:11 49:11 <b>participant</b> 37:14 48:20 <b>participants</b> 4:14 10:20,22 20:22,25 22:6 22:6 24:2,6 26:7,9,24 36:7 37:7,8 38:3 44:6 46:14,17 48:4,11 49:5 <b>participated</b> 37:10 <b>participating</b> 20:15 27:3 <b>particular</b> 49:24 <b>parties</b> 41:4 <b>parts</b> 30:4 <b>party</b> 36:25 <b>path</b> 42:19 <b>pay</b> 20:24,25 38:8 39:7 <b>payments</b> 35:10 <b>PBGC</b> 16:23 23:24 26:20,25 27:5 35:22 38:11 <b>PBGC's</b> 21:1 <b>Pegram</b> 5:7 <b>penny</b> 39:13 41:14 46:21 <b>pension</b> 4:12,13 4:18,20,21,22 5:8 19:6 29:2 38:10 46:20 <b>people</b> 10:23 44:21 <b>percent</b> 4:14 <b>percentage</b> 53:22	<b>perfectly</b> 16:25 45:7 <b>performing</b> 19:20 <b>permissible</b> 16:25 17:6 23:23 <b>permit</b> 21:21 23:6 30:3 47:17 <b>permitted</b> 11:10 15:15,24 18:4 38:20,25 <b>person</b> 28:8 <b>persons</b> 34:20 <b>Petitioner</b> 1:8 1:21,25 3:4,8 3:14 4:8 19:1 23:1,2 28:1 31:19 51:13 <b>Petitioner's</b> 40:21 <b>PGPB</b> 38:10 <b>phrase</b> 34:18,24 <b>pick</b> 6:23 22:7 38:12 <b>picks</b> 6:23 <b>place</b> 19:24 29:15 45:21 53:2 <b>placing</b> 48:12 <b>plaintiff's</b> 51:22 <b>plan</b> 4:14,16,17 4:21,22 5:3,13 5:14,21 6:2,3,3 6:5,5,6,7,8,9,9 6:11,13,15,21 7:4,13,14,14 7:15,19,22 8:6 8:9,20,21,23 9:15,17,18,19 10:1,5,8,12 11:19 12:19 13:8 14:2,4,7 14:11,15 15:4 15:5,6,7,9,24 16:9,10,11	17:1,19,21,25 18:7,8,9,16 19:6,7,8,9,13 19:14,16,20,23 20:3,4,5,14,15 20:17,19,20,20 21:1,3,5,7,18 21:19,21,23,24 21:25 22:2,10 22:12,13,18 23:2,5,5,8,9,20 23:23 24:1,3,4 24:5,6,7,11,18 25:1,3,4,8,10 25:13,14,16 26:5,8,9,13,15 26:22,25 27:2 27:4,12,15,17 27:18 28:9,16 28:20,24 29:2 29:4,7,8,12,13 29:13,14 30:1 30:7,20,20,21 30:25 31:9,16 31:18 32:17,23 33:2,3,4,5,12 33:12,16,17,20 34:1,2,6,6,10 34:12,13,15 35:5,8,9,11,13 36:5,8,10,16 36:22 37:1,7 37:10,17,22,24 37:25 39:21 40:6,6 41:5,10 41:15,21,21 42:1,10 43:3,4 43:12,13,14,19 43:19 44:1,7,8 44:20 45:4,5,5 45:7,9,10,11 45:13 46:13 48:4,11 49:17 49:19,21,24 50:4,4,9,16,17 50:18,21 52:2 52:3,3,8,9,10	52:12,12,14,16 52:21 53:13,19 53:22,25 54:1 54:8,13,14 <b>planned</b> 51:25 <b>plans</b> 4:12,13,18 4:20 5:9 17:18 27:19 33:7 34:3 40:8 42:22 43:5 <b>plan's</b> 35:9 <b>please</b> 4:10 19:3 27:25 <b>point</b> 7:19 9:6 11:20 12:9 14:9 17:15 27:15 28:4 31:13 50:13 <b>points</b> 45:18 51:15 <b>policy</b> 12:10 35:17 <b>pool</b> 20:22 36:1 42:10 <b>poorly</b> 36:8 <b>portability</b> 37:7 <b>portion</b> 25:3 33:10,11 <b>position</b> 10:10 10:13 17:5,7 22:23 24:21 32:13,16,24,25 36:13,21 38:23 38:24,24 39:1 46:11 51:2 <b>possibility</b> 23:10 42:16 50:5 <b>possible</b> 8:8 26:20 42:4 46:3 <b>possibly</b> 21:7 <b>pot</b> 10:22 <b>potential</b> 34:19 <b>precedes</b> 34:23 <b>precisely</b> 37:18 39:7,7 51:7 <b>preclude</b> 42:16	<b>predicate</b> 13:18 <b>present</b> 21:15 41:7 50:25 <b>presented</b> 22:24 22:25 23:15,17 33:15 40:19 41:4 <b>presume</b> 49:11 <b>prevail</b> 41:9,11 41:20 <b>prevent</b> 25:25 27:18 <b>principals</b> 14:14 <b>principle</b> 47:15 <b>prior</b> 12:10 <b>pro</b> 53:22 <b>Probably</b> 37:6 <b>problem</b> 15:13 24:24 <b>procedures</b> 23:25 53:3 <b>proceeding</b> 41:4 <b>process</b> 30:15 <b>prohibit</b> 21:24 <b>promised</b> 39:12 <b>promises</b> 38:7 46:20 <b>promising</b> 39:15 <b>prong</b> 11:15 <b>proposal</b> 4:20 4:23,25 5:5 6:5 6:8,12 33:14 49:10 51:19,23 51:24 <b>proposed</b> 5:19 33:14 49:4 51:19 52:2,8 <b>protect</b> 5:24 43:13 52:20 <b>protected</b> 36:16 38:2 48:19 <b>provide</b> 4:14 7:3 14:11 21:11 22:13,19 24:8 24:12 26:17 32:18 34:12,14 35:6,17 37:21
--	--	--	---	--

<p>40:8 42:2 48:1 48:17 54:13,14 <b>provided</b> 6:13 9:16 12:2,19 14:7 16:12 50:16 <b>provides</b> 22:2 34:6 49:18 54:1 <b>providing</b> 14:12 22:5 36:6 48:10 <b>provision</b> 14:22 15:9,23 22:10 29:20 49:24 50:18 <b>provisions</b> 21:23 24:18 29:14 34:13 49:17,18 49:21 <b>purchase</b> 7:14 7:20 14:18 26:1 32:18 34:10 35:16 37:18 <b>purchased</b> 16:15 26:6 37:9 <b>purchases</b> 48:5 <b>purchasing</b> 7:23 14:9 15:1 31:18 <b>purpose</b> 40:12 <b>put</b> 5:20 19:23 25:23 36:12 41:14 51:2 <b>puzzled</b> 31:22 <b>p.m</b> 54:18</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>question</b> 6:1 8:1 8:4,13,16,16 8:18,19,20 9:5 9:11,12,13 12:25 13:5,16 13:21 14:12 15:7 16:3,8</p>	<p>17:4,4 22:9 23:16 25:5,9 27:12 30:19,22 31:11 32:11 33:13,15 36:8 38:20 44:23 45:15,17 46:5 47:10 49:7 50:19 51:16 52:5 54:7 <b>questioning</b> 11:17 <b>questions</b> 9:11 9:14 12:17 14:5 23:15,17 <b>quite</b> 5:21 26:20 27:6 <b>quoted</b> 28:23 <b>quotes</b> 44:18 <b>quoting</b> 28:6</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>R</b> 4:1 <b>raised</b> 50:24 <b>rata</b> 53:22 <b>reach</b> 37:12 <b>read</b> 47:22 50:14,15 <b>reading</b> 50:6 <b>really</b> 16:13,16 16:17 27:2 33:14 43:24 <b>reason</b> 28:20 34:5 36:9 41:3 41:9 43:4 <b>reasons</b> 5:2 20:12,18 21:4 <b>REBUTTAL</b> 3:12 51:12 <b>recapture</b> 16:25 <b>received</b> 4:20 <b>recognize</b> 16:24 <b>recognized</b> 6:15 <b>recognizing</b> 52:2 <b>record</b> 42:15 51:21</p>	<p><b>recover</b> 4:15 <b>referred</b> 28:2 29:23,25 <b>referring</b> 31:13 34:7 <b>refund</b> 24:9 <b>reg</b> 38:16 <b>regs</b> 46:23 <b>regulations</b> 23:24 32:22,25 34:14 <b>rejected</b> 4:22 <b>relevant</b> 17:1 28:11,17 45:23 45:25,25 46:1 46:2 <b>relying</b> 49:16 50:2 <b>remaining</b> 51:11 <b>remains</b> 25:16 26:5 31:1 44:21 <b>remember</b> 39:11 <b>repeatedly</b> 6:14 <b>reply</b> 10:11 <b>representing</b> 36:14 <b>require</b> 14:24 25:24 26:1,3 <b>required</b> 6:6 41:15 <b>requirement</b> 22:12 26:23 35:4 38:1 <b>requirements</b> 17:2 25:25 35:2 <b>requires</b> 6:3 24:1 33:20 37:24 <b>reserve</b> 18:20,21 24:22 25:20 <b>resolution</b> 6:10 <b>resolve</b> 23:17 28:14,21 <b>resolving</b> 23:15</p>	<p><b>respect</b> 13:1 14:9 28:9 29:1 45:24,25 <b>respecting</b> 28:19 <b>Respondents</b> 2:2 3:11 27:23 <b>responsibility</b> 28:15 36:5 <b>rest</b> 35:12 48:3 <b>result</b> 18:11 <b>resulted</b> 6:8,10 <b>retain</b> 25:3 <b>retire</b> 38:7 <b>return</b> 51:17 <b>Revenue</b> 14:23 <b>reverse</b> 5:1 <b>reversion</b> 16:14 16:25 17:9 21:10 24:12 26:22 27:13,14 27:16 29:15 41:23 42:2,17 43:14 53:7,7,9 53:15,24 54:2 54:13 <b>revisit</b> 19:15 <b>rid</b> 45:8 <b>right</b> 11:14 13:9 15:16 25:6 33:18 34:9,21 35:3 38:6 40:9 41:15 43:13 45:17,21 46:24 53:20,21,23 <b>rights</b> 47:15 <b>rigid</b> 20:7 <b>risk</b> 34:19 <b>road</b> 33:8 <b>Roberts</b> 1:22 3:6 4:3 15:16,19 16:1 17:14 18:22,23,24 19:2 20:1,12 21:14 22:11,15 22:20,25 23:11 24:11,16,25 25:11,21 26:12</p>	<p>26:19 27:11,20 35:21 36:12 39:24 40:7,23 41:8 42:4,8,21 43:3 49:15,23 50:14 51:9 54:16 <b>rock</b> 39:8 48:1 48:23,25 <b>roughly</b> 9:20 <b>rules</b> 15:21 41:17 <b>run</b> 15:22 <b>running</b> 19:23</p> <hr/> <p style="text-align: center;"><b>S</b></p> <p><b>S</b> 3:1 4:1 <b>safe</b> 47:24 48:5 48:13,17 <b>safety</b> 46:9,14 <b>sake</b> 45:18 <b>satisfactory</b> 50:23 <b>satisfies</b> 35:1 <b>saying</b> 5:22 8:2 9:25 12:23 36:15 40:1 45:2 46:18 47:6 48:8 49:6 49:8,16 <b>says</b> 6:20 32:14 33:23 38:17 39:6,9,12 46:21 49:24 54:8 <b>Scalia</b> 10:9,18 10:25 11:3 13:12,15 16:4 16:6 29:5,9,17 29:21 30:8,13 30:19 31:5,10 33:18,22,24 34:4 35:3,15 37:20,23 40:13 40:16 47:21 48:13 53:14,20 <b>Scalia's</b> 49:1</p>
--	---	--	--	--



14:1,16 16:2 17:2 20:8 21:8 21:9,17 22:4,7 23:21,23,25 24:8 25:25 26:4 29:1,8,19 30:5,9 31:1,4,8 32:2,6,13,15 32:20 33:19 34:7 39:1 40:9 42:1 44:9,18 44:20 52:24 53:6,6,10,23 <b>terminations</b> 53:1 <b>terms</b> 23:2,5 26:15 37:14 40:5,7,8 47:1,3 47:19 50:8 52:14,22 54:5 54:12 <b>textual</b> 52:22 <b>Thank</b> 4:9 18:22 27:20 51:8,9 51:14 54:16 <b>thing</b> 38:19 <b>things</b> 30:4 <b>think</b> 7:18,20 8:2 11:19 13:1 16:6 21:15 22:11 23:11,12 23:15,16,18,22 26:18 28:13 35:13 36:17 45:16 47:8,21 47:24 48:2,5 48:11 49:12 <b>third</b> 13:5,16 39:1 <b>thought</b> 8:16 10:9 15:19 17:14 35:21 38:22 47:5 <b>thousand</b> 38:8 <b>three</b> 9:20 28:10 51:11 <b>threshold</b> 6:4	7:15,16,17 8:13,16,16 9:14 12:17 14:5 16:3,8 <b>throwing</b> 15:12 35:25 <b>thrown</b> 10:22 17:16 36:18 <b>time</b> 4:15 18:20 18:21 33:1 45:1 51:8 <b>times</b> 41:18,19 <b>timing</b> 44:14,16 <b>told</b> 45:24 <b>top</b> 15:11 34:9 47:23 <b>transaction</b> 29:12 30:24 31:21 33:10 38:3 52:7,8 53:12 <b>transactions</b> 29:24 53:12 <b>transfer</b> 25:2,13 26:3,21 29:18 30:4 31:8,8 33:1,3 35:4 37:24 38:2 52:10 <b>transferee</b> 26:5 35:5 <b>transferred</b> 24:4 26:8 29:13 30:25 33:12 35:12,20 51:21 <b>transferring</b> 29:7 31:17 <b>transform</b> 31:7 <b>treat</b> 23:24 <b>treated</b> 29:25 33:3 <b>trial</b> 51:22 <b>triggered</b> 15:21 <b>trouble</b> 8:3 45:16 <b>true</b> 14:9 <b>truly</b> 44:7	<b>trust</b> 5:10 <b>TRUSTEE</b> 1:4 <b>try</b> 5:23 <b>trying</b> 17:22 38:4,16 47:9 <b>Tuesday</b> 1:14 <b>tune</b> 41:10 <b>turn</b> 43:19 51:15 51:16 52:5 <b>two</b> 5:2 7:21,22 8:5,10,11,12 9:10,19 11:4 16:21 19:12 20:12 25:9 28:10 30:4 31:6 33:7 39:5 42:15 43:21 45:24 46:1,6 46:25 53:2,3 53:11,12 <b>twofold</b> 51:2 <b>two-part</b> 29:24 <b>two-stage</b> 29:11 52:7 53:11 <b>two-step</b> 30:15 30:24 51:19	<b>usage</b> 33:9 <b>use</b> 25:9 <b>usual</b> 50:6 <b>usually</b> 14:11 40:24 <b>U.S</b> 28:22 <b>U.S.C</b> 28:6 32:16	27:7 38:7 39:9 39:10 46:22 <b>we're</b> 5:22,23 6:20 8:6,22,24 9:1 11:14 18:8 36:4 39:5,7 <b>we've</b> 8:6,17 16:5 23:7 32:24 42:23 <b>willing</b> 48:1 <b>wonder</b> 45:23 <b>words</b> 22:1 35:8 53:2 54:11 <b>work</b> 27:7 38:5 <b>worker</b> 45:19,20 46:3,20 <b>working</b> 37:8 <b>works</b> 22:1 45:21 <b>world</b> 48:3 <b>worry</b> 11:11 45:4 <b>wouldn't</b> 25:17 <b>wrestling</b> 16:5 <b>write</b> 39:10 47:4 <b>wrong</b> 13:9,13 14:2 15:24 32:21
<b>V</b>				
v 1:9 <b>vacated</b> 23:13 <b>Vantage</b> 1:6 4:11 <b>various</b> 15:21 <b>vast</b> 17:16 <b>versus</b> 4:4 31:18 34:17 <b>vesting</b> 12:5,20 21:24 <b>violate</b> 50:8 <b>violation</b> 43:1				
<b>W</b>				
<b>waived</b> 22:16 23:1 40:14,17 <b>waiver</b> 40:24 <b>want</b> 26:15 37:16 45:8 49:8 <b>wants</b> 24:23 43:18 <b>Washington</b> 1:13,20,23 2:1 <b>wasn't</b> 45:25 <b>way</b> 5:24 12:11 22:1,22 28:13 28:21 35:16 37:18 39:3,4 43:12 47:22 48:17 50:15 <b>ways</b> 15:24 22:5 48:9 <b>wearing</b> 6:19,20 37:1 <b>wears</b> 43:21 <b>week</b> 34:16 <b>we'll</b> 4:3 5:20				
<b>U</b>				
<b>ultimately</b> 36:23 <b>understand</b> 5:12 9:3 38:16 40:1 47:8,10 48:22 51:1 53:14 54:6 <b>undertake</b> 35:5 <b>union</b> 1:10 4:5 4:21 17:20 18:1 36:1,14 36:23 42:5,23 42:25 43:3 51:21 <b>United</b> 1:1,17,24 3:7 18:25 34:17 <b>uppermost</b> 11:22 <b>urging</b> 40:21				
<b>X</b>				
x 1:2,12 38:6				
<b>Y</b>				
<b>years</b> 37:13				
<b>Z</b>				
<b>zero</b> 9:18				
<b>\$</b>				
<b>\$1,000</b> 46:21 <b>\$5</b> 4:15 16:14 17:15 25:7 36:19 41:11 42:6 43:9 49:11 <b>\$500</b> 39:10 46:22 47:5				

<hr/> <b>0</b> <hr/> <b>05-1448</b> 1:9 4:4 <hr/> <b>1</b> <hr/> <b>1</b> 28:17 <b>100</b> 4:14 <b>1002(21)(A)</b> 28:7 <b>1058</b> 53:3 <b>11:02</b> 1:18 4:2 <b>12</b> 4:12 <b>12:03</b> 54:18 <b>1341</b> 28:22 32:16 33:17 34:5 47:22 52:23 <b>1341(b)(3)(A)</b> 21:20 <b>1344</b> 53:17 <b>1412</b> 52:25 <b>18</b> 3:8 <b>1984</b> 25:23 <hr/> <b>2</b> <hr/> <b>2a</b> 47:23 <b>2007</b> 1:14 <b>24</b> 1:14 <b>25</b> 37:13 51:22 <b>27</b> 3:11 <b>29</b> 28:6,22 32:16 <hr/> <b>3</b> <hr/> <b>3</b> 28:13 <hr/> <b>4</b> <hr/> <b>4</b> 3:4 <b>414(l)</b> 32:25 <hr/> <b>5</b> <hr/> <b>5</b> 39:25 <b>50</b> 3:14				
---	--	--	--	--