

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD J. TRUMP, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 23-719  
 )  
 NORMA ANDERSON, ET AL., )  
 )  
 Respondents. )  
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Place: Washington, D.C.  
Date: February 8, 2024

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v. ) No. 23-719  
NORMA ANDERSON, ET AL., )  
Respondents. )  
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Washington, D.C.

Thursday, February 8, 2024

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

APPEARANCES:

JONATHAN F. MITCHELL, ESQUIRE, Austin, Texas; on behalf of the Petitioner.

JASON C. MURRAY, ESQUIRE, Denver, Colorado; on behalf of Respondents Anderson, et al.

SHANNON W. STEVENSON, Solicitor General, Denver, Colorado; on behalf of Respondent Griswold.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	JONATHAN F. MITCHELL, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	JASON C. MURRAY, ESQ.	
7	On behalf of Respondents Anderson,	
8	et al.	65
9	ORAL ARGUMENT OF:	
10	SHANNON W. STEVENSON, ESQ.	
11	On behalf of Respondent Griswold	123
12	REBUTTAL ARGUMENT OF:	
13	JONATHAN F. MITCHELL, ESQ.	
14	On behalf of the Petitioner	137
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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3  
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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument  
this morning in Case 23-719, Trump versus Anderson.

Mr. Mitchell.

ORAL ARGUMENT OF JONATHAN F. MITCHELL

ON BEHALF OF THE PETITIONER

MR. MITCHELL: Mr. Chief Justice, and may  
it please the Court:

The Colorado Supreme Court held that  
President Donald J. Trump is constitutionally  
disqualified from serving as president under  
Section 3 of the Fourteenth Amendment. The Colorado  
Supreme Court's decision is wrong and should be  
reversed for numerous independent reasons.

The first reason is that President Trump is  
not covered by Section 3 because the President is not  
"an officer of the United States" as that term is  
used throughout the Constitution. "Officer of the  
United States" refers only to appointed officials,  
and it does not encompass elected individuals, such  
as the President or members of Congress. This is  
clear from the Commissions Clause, the Impeachment  
Clause, and the Appointments Clause, each of which  
uses "officer of the United States" to refer only to

1 appointed and not elected officials.

2           The second reason is that Section 3 cannot  
3 be used to exclude a presidential candidate from the  
4 ballot even if that candidate is disqualified from  
5 serving as president under Section 3 because Congress  
6 can lift that disability after the candidate is  
7 elected but before he takes office. A state cannot  
8 exclude any candidate for federal office from the  
9 ballot on account of Section 3, and any state that  
10 does so is violating the holding of Term Limits by  
11 altering the Constitution's qualifications for  
12 federal office.

13           The Colorado Supreme Court's decision is no  
14 different from a state residency law that requires  
15 members of Congress to inhabit the state prior to  
16 Election Day, when the Constitution requires only  
17 that members of Congress inhabit the state that they  
18 represent when elected.

19           In both situations, a state is accelerating  
20 the deadline to meet a constitutionally imposed  
21 qualification and is thereby violating the holding of  
22 Term Limits. And in this situation, a ruling from  
23 this Court that affirms the decision below would not  
24 only violate Term Limits but take away the votes of  
25 potentially tens of millions of Americans.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Mr. Mitchell, would you --  
3 you didn't spend much time on your argument with  
4 respect to whether or not Section 3 is  
5 self-executing, so would you address that? And --  
6 and in doing that, your argument is that it's not  
7 self-executing, but then, in that case, what would  
8 the role of the State be, or is it entirely up to  
9 Congress to implement the disqualification in  
10 Section 3?

11 MR. MITCHELL: It is entirely up to  
12 Congress, Justice Thomas. And our argument goes  
13 beyond actually saying that Section 3 is  
14 non-self-executing. We need to say something more  
15 than that because a non-self-executing treaty or a  
16 non-self-executing constitutional provision normally  
17 can still be enforced by a state if it chooses to  
18 enact legislation.

19 The holding of Griffin's Case goes beyond  
20 even that by saying that a state is not allowed to  
21 implement or enforce Section 3 of the Fourteenth  
22 Amendment unless and until Congress enacts  
23 implementing legislation allowing it to do so. So,  
24 under Griffin's Case, which we believe is correctly  
25 decided -- the Anderson litigants disagree with us on

1       that point -- but, if this Court were to adhere to  
2       the holding of Griffin's Case, there would not be any  
3       role for the states in enforcing Section 3 unless  
4       Congress were to enact a statute that gives them that  
5       authority.

6                CHIEF JUSTICE ROBERTS: Counsel, what if  
7       somebody came into a state secretary of state's  
8       office and said, I took the oath specified in Section  
9       3, I participated in an insurrection, and I want to  
10      be on the ballot? Can the -- does the secretary of  
11      state have the authority in that situation to say no,  
12      you're disqualified?

13               MR. MITCHELL: No, the secretary of state  
14      could not do that, consistent with Term Limits,  
15      because even if the candidate is an admitted  
16      insurrectionist, Section 3 still allows the candidate  
17      to run for office and even win election to office and  
18      then see whether Congress lifts that disability after  
19      the election.

20               This happened frequently in the wake of the  
21      Fourteenth Amendment where Confederate  
22      insurrectionists were elected to Congress, and  
23      sometimes they obtained a waiver; sometimes they did  
24      not. And each House would determine for itself  
25      whether to seat that elected insurrectionist because

1 each House is the sole judge of the qualifications of  
2 its members.

3 So, if a state banned even an admitted  
4 insurrectionist from the ballot, it would be adding  
5 to and altering the Constitution's qualifications for  
6 office because, under Section 3, the candidate need  
7 only qualify during the time the candidate holds the  
8 office to which he's been elected. And under Your  
9 Honor's hypothetical, the secretary of state would be  
10 demanding essentially that the candidate obtain a  
11 waiver from Congress earlier than the candidate needs  
12 to obtain that waiver.

13 CHIEF JUSTICE ROBERTS: Well, even though  
14 it's pretty unlikely or at least would be difficult  
15 for an individual who says, you know, I -- I am an  
16 insurrectionist and I had taken the oath, that would  
17 require two-thirds of votes in Congress, right?

18 MR. MITCHELL: Correct.

19 CHIEF JUSTICE ROBERTS: Well, that's a  
20 pretty unlikely scenario.

21 MR. MITCHELL: It may be unlikely, but no  
22 secretary of state is permitted to predict the  
23 likelihood of a waiver because, in doing so, they're  
24 adding a new qualification to the ability to run for  
25 Congress.



1                   And the proper analogy, Mr. Chief Justice,  
2                   is to state residency laws because the Constitution  
3                   says that a member of Congress must inhabit the state  
4                   that he represents when elected. And the lower  
5                   courts have all held, in reliance on Term Limits,  
6                   that a state election official cannot move that  
7                   deadline any earlier by requiring the candidate for  
8                   Congress to inhabit the state --

9                   CHIEF JUSTICE ROBERTS: So even if somebody  
10                  --

11                  MR. MITCHELL: -- before the date of  
12                  election.

13                  CHIEF JUSTICE ROBERTS: -- comes in and  
14                  says I'm -- I'm a resident of -- to the secretary of  
15                  state's office in Illinois and says, I'm a resident  
16                  of Indiana, I have been all my life, I want to run  
17                  for office in Illinois, the secretary of state can't  
18                  say, no, you can't?

19                  MR. MITCHELL: Well, the question would be  
20                  is that person going to inhabit the state when the  
21                  election is held. So, if the candidate makes clear,  
22                  perhaps through a sworn declaration or through his  
23                  own statements, that he has no intention of  
24                  relocating to that state before Election Day, then  
25                  the secretary of state would be enforcing an extant

1 constitutional qualification rather than enforcing a  
2 new state-imposed qualification.

3 And that's the key under Term Limits. Is  
4 the state in any way altering the criteria for a  
5 federal office, either for Congress or for the  
6 presidency? And in this situation, the Colorado  
7 Supreme Court is going slightly beyond what Section 3  
8 requires because Section 3 on its face bans an  
9 insurrectionist only from holding office.

10 JUSTICE SOTOMAYOR: Counsel, can I stop you  
11 a moment and -- and back up a minute? You admitted  
12 that the concept of self-executing does generally  
13 permit states to provide a cause of action for  
14 breaches of a constitutional provision.

15 MR. MITCHELL: Correct.

16 JUSTICE SOTOMAYOR: In fact, they do it  
17 frequently for takings clauses. Here, there's no  
18 debate that Colorado has placed that -- provided that  
19 cause of action. You want to go a step further and  
20 say that this, like the Treaty Clause, requires  
21 implementing legislation to permit the state to  
22 disqualify an insurrectionist --

23 MR. MITCHELL: That's correct. So --

24 JUSTICE SOTOMAYOR: -- under Section 3.

25 MR. MITCHELL: That's right.

1 JUSTICE SOTOMAYOR: So history proves a lot  
2 to me --

3 MR. MITCHELL: Mm-hmm.

4 JUSTICE SOTOMAYOR: -- and to my colleagues  
5 generally. There's a whole lot of examples of states  
6 relying on Section 3 to disqualify insurrectionists  
7 for state offices, and you're basically telling us  
8 that you want us to go two steps further.

9 You want to -- maybe three. You want us to  
10 say that self-execution doesn't mean what it  
11 generally means. You want us now to say it means  
12 that Congress must permit states or require states to  
13 stop insurrectionists from taking state office. And  
14 -- and so this is a complete preemption in a way  
15 that's very rare, isn't it?

16 MR. MITCHELL: Well, the only thing I would  
17 --

18 JUSTICE SOTOMAYOR: It's rare under the  
19 Fourteenth Amendment.

20 MR. MITCHELL: Oh, of course, it's rare.  
21 This is -- this is a one-off situation. And, Your  
22 Honor, the only thing I'm --

23 JUSTICE SOTOMAYOR: Well, it is one-off. I  
24 don't disagree with you. But it's not with -- with  
25 respect to how we define self-executing.

1 MR. MITCHELL: We're not asking this Court  
2 to redefine the concept of non-self-execution. We  
3 were careful in our brief not to rely on that phrase.  
4 And Griffin's Case doesn't --

5 JUSTICE SOTOMAYOR: Right, you are, because  
6 it's not.

7 MR. MITCHELL: That's right.

8 JUSTICE SOTOMAYOR: All right.

9 MR. MITCHELL: And Griffin's Case --

10 JUSTICE SOTOMAYOR: So now the question is  
11 a very different one --

12 MR. MITCHELL: Mm-hmm.

13 JUSTICE SOTOMAYOR: -- in my mind. I  
14 understand you're relying on Griffin. Let's just be  
15 very clear.

16 MR. MITCHELL: Right.

17 JUSTICE SOTOMAYOR: Griffin was not a  
18 precedential Supreme Court decision.

19 MR. MITCHELL: That's correct.

20 JUSTICE SOTOMAYOR: All right. It was a  
21 circuit court decision by a justice who, when he  
22 becomes a justice, writes in the Davis case, he  
23 assumed that Jefferson Davis would be ineligible to  
24 hold any office, particularly the presidency, and  
25 treated -- and this is his words --

1 MR. MITCHELL: Mm-hmm.

2 JUSTICE SOTOMAYOR: -- Section 3 as  
3 executing itself, needing no legislation on the part  
4 of Congress to give it effect.

5 So you're relying on a non-precedential  
6 case by a justice who later takes back what he said.

7 MR. MITCHELL: But the key point with  
8 Griffin's Case and why it's an important precedent,  
9 despite everything Your Honor said, it is not a  
10 precedent of this Court, but Griffin's Case provided  
11 the backdrop against which Congress legislated the  
12 Enforcement Act of 1870 when it first provided an  
13 enforcement mechanism for Section 3.

14 JUSTICE SOTOMAYOR: Then did away with it  
15 later.

16 MR. MITCHELL: It did away with it later.  
17 But, as --

18 JUSTICE SOTOMAYOR: But -- but that has  
19 nothing to say with respect to what Section 3 means.

20 Can we get to the issue, which is, I think,  
21 one that I go back to that I started with, and -- and  
22 very briefly, what sense does it say that states  
23 can't enforce Section 3 against their own officials?

24 MR. MITCHELL: Be --

25 JUSTICE SOTOMAYOR: And I think, logically,

1 those are two separate issues in my mind: Can states  
2 enforce the Insurrection Clause against their own  
3 office holders, or can they enforce it against  
4 federal officials, or can they enforce it against the  
5 president? Those are all three different questions  
6 in my mind.

7 MR. MITCHELL: And the -- the answer to all  
8 three of those questions turns on whether this Court  
9 agrees with the holding of Griffin's Case. If  
10 Griffin's Case is the proper enunciation of the law,  
11 then a state cannot do any of the things Your Honor  
12 suggested unless Congress gives it authority to do so  
13 through implementing legislation.

14 JUSTICE SOTOMAYOR: So a non-precedential  
15 decision that relies on policy doesn't look at the  
16 language, doesn't look at the history, doesn't  
17 analyze anything than the disruption that such a suit  
18 would bring, you want us to credit as precedential?

19 MR. MITCHELL: Because Congress relied on  
20 Griffin's Case when it enacted the Enforcement Act of  
21 1870 and established the --

22 JUSTICE KAGAN: So, Mr. Mitchell, if I may  
23 interrupt just to clarify, I mean, this sounds like  
24 your reply brief, where it sounds like you're not  
25 making a constitutional argument, you're really

1 making a statutory preemption argument. And --

2 MR. MITCHELL: Right.

3 JUSTICE KAGAN: -- is that -- is that what  
4 you're doing here? You're not saying that the  
5 Constitution gives you this rule. It's the kind of  
6 combination of Griffin's Case plus the way Congress  
7 acted after Griffin's Case --

8 MR. MITCHELL: Yes.

9 JUSTICE KAGAN: -- that gives you the rule?

10 MR. MITCHELL: That's exactly right,  
11 Justice Kagan, because we have implementing  
12 legislation, Congress took up the invitation provided  
13 by Griffin's Case and established writs of quo  
14 warranto in the 1870 Enforcement Act, later repealed  
15 them.

16 The only enforcement legislation that's  
17 currently on the books is the insurrection criminal  
18 statute, Section 2383. And when Congress made all of  
19 these decisions, the initial enactment of the  
20 Enforcement Act in 1870, the repeal of the quo  
21 warranto provisions in 1948, all of those were made  
22 with Griffin's Case as the backdrop. The under --

23 JUSTICE KAGAN: I -- please.

24 MR. MITCHELL: Well, the understanding was  
25 that these congressionally established remedies would

1 be exclusive of state court remedies. So there's not  
2 an express statement of preemption in these statutes,  
3 but there didn't need to be because Griffin's Case  
4 provided the backdrop.

5 JUSTICE KAGAN: And if I could just  
6 understand the argument a little bit better, suppose  
7 that we took all of that way away. You know, suppose  
8 there were no Griffin's Case and there were no  
9 subsequent congressional enactment. What do you then  
10 think the rule would be?

11 MR. MITCHELL: So in just as a matter of  
12 first principles without Griffin's Case, it's a much  
13 harder argument for us to make because, normally, I  
14 mean, every other provision of the Fourteenth  
15 Amendment has been treated as self-executing.

16 What we would argue in the hypothetical  
17 that Your Honor has suggested is that there are  
18 practical considerations unique to Section 3 that  
19 counsel in favor of a rule similar to what Chief  
20 Justice Chase spelled out in Griffin's Case and it  
21 goes to I think the policy concerns he talks about,  
22 where this was a case -- Griffin's Case involved a  
23 convicted criminal who was seeking a writ of habeas  
24 corpus on the ground that the judge who tried his  
25 case was an insurrectionist disqualified under



1 Section 3, and Chief Justice Chase realizes that if  
2 he enforces Section 3 in this situation, it would  
3 nullify every official act taken not only by this  
4 particular judge but by anyone who is an  
5 insurrectionist or arguably an insurrectionist under  
6 Section 3, and that was --

7 JUSTICE BARRETT: Well, why do you need  
8 those consequential concerns, though? I mean, it  
9 kind of seems to me that what Justice Kagan is  
10 getting at is why don't you have an argument that the  
11 Constitution of its own force, that Section 3 of its  
12 own force, preempts the state's ability not -- not  
13 necessarily, I think, not, to enforce Section 3  
14 against its own officers but against federal  
15 officers, like in a Tarble's Case kind of way.

16 MR. MITCHELL: So there could also be an  
17 argument that's more limited. You're suggesting  
18 there may be a barrier under the Constitution to a  
19 state legislating an enforcement mechanism for  
20 Section 3 specific to federal officers.

21 We could rely on precedents such as McClung  
22 that says that state courts lack the authority to  
23 issue mandamus relief against federal officials and  
24 extend that principle here.

25 JUSTICE BARRETT: Well, why aren't you

1 making those arguments?

2 MR. MITCHELL: Because that doesn't get us  
3 -- that -- Griffin's Case --

4 JUSTICE BARRETT: That only gets you out of  
5 state court, it doesn't get you out of federal court?

6 MR. MITCHELL: Right. And also the holding  
7 of Griffin's Case went well beyond that because Chief  
8 Justice Chase said in this opinion, which again  
9 provided the backdrop for the congressional  
10 enforcement legislation, that states had no role in  
11 enforcing Section 3 unless Congress was to give them  
12 that authority through a statute that they passed  
13 pursuant to their legislative powers.

14 JUSTICE GORSUCH: I --

15 JUSTICE BARRETT: But your argument's --

16 JUSTICE GORSUCH: Please go ahead.

17 JUSTICE BARRETT: I was just going to add  
18 one last thing. I think your argument's a little  
19 broader than that because I think, if we accept your  
20 position that disqualifying someone from the ballot  
21 is adding a qualification, really, your position is  
22 that Congress can't enact a statute that would allow  
23 Colorado to do what it's done either because then  
24 Congress would be adding a qualification, which it  
25 can't do either.

1           MR. MITCHELL: No, I don't agree with that,  
2 Justice Barrett. Congress is not bound by the  
3 holding of Term Limits. Term Limits only prohibits  
4 the states from adding additional qualifications or  
5 altering the Constitution's qualifications for  
6 federal office. It does not purport to restrain  
7 Congress.

8           So, if Congress were to enact implementing  
9 legislation that authorized the states to exclude  
10 insurrectionists from the ballot, we believe that  
11 would be valid enforcement legislation under Section  
12 3 with an important caveat. There has to be  
13 congruence and proportionality under this Court's  
14 precedents.

15           JUSTICE ALITO: Well, why would that be an  
16 important -- why would that be permissible? Because  
17 Section 3 refers to the holding of office, not  
18 running for office.

19           And so, if a state or Congress were to go  
20 further and say that you can't run for the office,  
21 you can't compete in a primary, wouldn't that be  
22 adding an additional qualification for serving for  
23 president? You must have been free from this  
24 disqualification at an earlier point in time than  
25 Section 3 specifies.

1           MR. MITCHELL: I think the answer to your  
2 question, Justice Alito, depends on how you interpret  
3 the word "enforce" in Section 5. And some members of  
4 this Court, such as Justice Scalia, thought that  
5 "enforce" means you can do nothing more than enact  
6 legislation that mirrors the Fourteenth Amendment's  
7 self-executing requirements and you can't go an inch  
8 beyond that. That's not the current jurisprudence of  
9 this Court --

10           JUSTICE ALITO: No. Well, all right. You  
11 have --

12           MR. MITCHELL: -- that allow --

13           JUSTICE ALITO: -- to decide whether it's  
14 congruent and proportional.

15           MR. MITCHELL: Right.

16           JUSTICE ALITO: And we would get into the  
17 question of whether that would be congruent and  
18 proportional.

19           Well, let me shift gear a little bit. I --  
20 I take you to -- to argue, and I think this is right,  
21 that the term "self-executing" is a misnomer as  
22 applied here.

23           MR. MITCHELL: Yes, it is.

24           JUSTICE ALITO: Very often, when we use the  
25 term, what we're referring to is the proposition that

1 a particular provision of the Constitution or a  
2 statute in and of itself creates a private right of  
3 action. That's not what the issue is here.

4 MR. MITCHELL: No, that's not the issue  
5 here. And sometimes the phrase "self-executing" is  
6 used that way. The only thing I would add is  
7 sometimes it's used in a different sense. With  
8 self-executing treaties or non-self-executing  
9 treaties, the issue is whether that treaty has any  
10 force as domestic law whatsoever.

11 JUSTICE ALITO: Right. Right. Well, I  
12 don't see what is gained by using this term which is  
13 used in different contexts rather than directly  
14 addressing what's involved here, which is the  
15 question of who can enforce Section 3 with respect to  
16 a presidential candidate.

17 MR. MITCHELL: Mm-hmm.

18 JUSTICE ALITO: The consequences of what  
19 the Colorado Supreme Court did, some people claim,  
20 would be quite severe. Would it not permit -- would  
21 it not lead to the possibility that other states  
22 would say, using their choice-of-law rules and their  
23 rules on -- on collateral estoppel, that there's  
24 non-mutual collateral estoppel against former  
25 President Trump and so the decision of the Colorado

1 Supreme Court could effectively decide this question  
2 for many other states, perhaps all other states?  
3 Could it not lead to that consequence?

4 MR. MITCHELL: I don't think so because  
5 Colorado law does not recognize non-mutual collateral  
6 estoppel. And I believe the preclusive effect of the  
7 decision would be determined by Colorado law rather  
8 than the law of another state.

9 But I think your question, Justice Alito,  
10 gives rise to an even greater concern because, if  
11 this decision does not have preclusive effect in  
12 other lawsuits, it opens the possibility that a  
13 different factual record could be developed in some  
14 of the litigation that occurs in other states, and  
15 different factual findings could be entered by state  
16 trial court judges. They might conclude as a matter  
17 of fact that President Trump did not have any intent  
18 to engage in incitement or make some other finding  
19 that differs from what this trial court judge found.

20 JUSTICE ALITO: Yeah, exactly. So this --  
21 in this decision, the -- the trial court in Colorado  
22 thought that it was proper to admit the January 6th  
23 report, and it also admitted the testimony of an  
24 expert --

25 MR. MITCHELL: Mm-hmm.

1 JUSTICE ALITO: -- who testified about the  
2 meaning of certain words and phrases to people who  
3 communicate with and among extremists, right?

4 MR. MITCHELL: Yes.

5 JUSTICE ALITO: Another -- another state  
6 court could reach an opposite conclusion on both of  
7 those questions.

8 MR. MITCHELL: Certainly. Other states  
9 could conclude that the January 6th report is  
10 inadmissible hearsay. They might also conclude that  
11 statements within the January 6th report were hearsay  
12 even if the report itself is not. And they could  
13 certainly reach a different conclusion with respect  
14 to the expert testimony of Professor Simi. Perhaps  
15 in another state, we would have time to produce our  
16 own sociology expert who would contradict Professor  
17 Simi.

18 JUSTICE ALITO: Now should -- should these  
19 considerations be dismissed as simply  
20 consequentialist arguments, or do they support a  
21 structural argument that supports the position that  
22 you're taking here?

23 MR. MITCHELL: I think they all mutually  
24 reinforce each other. We have an argument, we  
25 believe, that is sufficient to dispose of this case

1 just based on the meaning of "officer of the United  
2 States," as well as the argument we're making based  
3 on Term Limits, but all of the consequentialist  
4 considerations that Your Honor has suggested are  
5 additional reasons to reverse the Colorado Supreme  
6 Court, although we don't think it's necessary to get  
7 into consequences because the law is clearly on our  
8 side.

9 JUSTICE SOTOMAYOR: Can I -- you keep  
10 saying Term Limits. There are other presidential  
11 qualifications in the Constitution, age.

12 MR. MITCHELL: Yes.

13 JUSTICE SOTOMAYOR: Citizenship. There's a  
14 separate amendment, the Twenty-Second Amendment, that  
15 doesn't permit anyone to run for a second term.

16 We have a history of states disqualifying  
17 -- not all, but some -- of disqualifying candidates  
18 who won't be of age if elected. We have a history of  
19 at least one state disqualifying someone who wasn't a  
20 U.S. citizen.

21 MR. MITCHELL: Right.

22 JUSTICE SOTOMAYOR: Is -- are your  
23 arguments limited to Section 3?

24 MR. MITCHELL: Not quite. The question,  
25 Justice Sotomayor, is whether the state is violating



1 Term Limits by adding to or altering the extant  
2 qualifications for the presidency in the  
3 Constitution. Now the hypo --

4 JUSTICE SOTOMAYOR: So you want us to say  
5 -- I'm wondering why the Term Limits qualification is  
6 important to you.

7 MR. MITCHELL: Because it --

8 JUSTICE SOTOMAYOR: Are you setting up so  
9 that if some president runs for a third term, that a  
10 state can't disqualify him from the ballot?

11 MR. MITCHELL: Of course, a state can  
12 disqualify him from the ballot because that is a  
13 qualification that is categorical. It's not  
14 defeasible by Congress. So a state is enforcing the  
15 Constitution when it says you can't appear on our  
16 ballot if you've already served two terms as  
17 president.

18 The same goes --

19 JUSTICE SOTOMAYOR: The same if they're  
20 under age when elected and the same if they're not a  
21 U.S. citizen.

22 MR. MITCHELL: The same if they're not --  
23 well, the same if they're not a U.S. citizen for  
24 sure. The age is a little more nuanced because you  
25 can imagine a scenario where the person is 34 years

1 old at the time of the election, but he turns 35  
2 before Inauguration Day.

3 JUSTICE SOTOMAYOR: Well, then that would  
4 come up --

5 MR. MITCHELL: A state could not --

6 JUSTICE SOTOMAYOR: -- that would probably  
7 come up to us at some point. The state would make a  
8 decision and say he's ineligible, and we would have  
9 to decide that question then.

10 But my point is so what -- adding  
11 qualifications to what term limit --

12 MR. MITCHELL: You're --

13 JUSTICE SOTOMAYOR: -- is your argument  
14 based on?

15 MR. MITCHELL: You're changing --

16 JUSTICE SOTOMAYOR: I'm just confused.

17 MR. MITCHELL: Okay. With respect to the  
18 -- maybe I'll start with the age example.

19 JUSTICE SOTOMAYOR: Mm-hmm.

20 MR. MITCHELL: If a state like Colorado  
21 says you can't appear on our presidential ballot  
22 unless you are 35 years old on the day of the  
23 election, that would be a violation of Term Limits  
24 because there could be a 34-year-old on the day of  
25 the election who turns 35 before Inauguration Day.

1                   What Colorado has done here, what their  
2                   supreme court has done, is similar because, under  
3                   Section 3, President Trump needs to qualify during  
4                   the time that he would hold office, and the Colorado  
5                   Supreme Court is saying to President Trump: You have  
6                   to show that you would qualify under Section 3 now,  
7                   at the time of the election, or at the time that we,  
8                   the state supreme court --

9                   JUSTICE SOTOMAYOR: Now I understand.

10                  JUSTICE KAGAN: So what -- what --

11                  CHIEF JUSTICE ROBERTS: Now just -- just a  
12                  point of clarification so we're all on the same page.  
13                  When you say "Term Limits," you mean our decision in  
14                  the Term Limits case --

15                  MR. MITCHELL: Yes. I'm sorry.

16                  CHIEF JUSTICE ROBERTS: -- not the  
17                  constitutional provision governing term limits?

18                  MR. MITCHELL: Yes. U.S. Term Limits  
19                  against Thornton. Maybe I should call it Thornton  
20                  instead of Term Limits.

21                  CHIEF JUSTICE ROBERTS: That would be  
22                  easier.

23                  MR. MITCHELL: I'm sorry.

24                  JUSTICE JACKSON: And does it have some --

25                  JUSTICE SOTOMAYOR: I -- I was confused.

1 JUSTICE JACKSON: So does it have something  
2 to do with the fact that the particular circumstance  
3 that you're talking about can change? Is that what  
4 you mean? I'm trying to understand --

5 MR. MITCHELL: Yeah.

6 JUSTICE JACKSON: -- the distinction  
7 between the provision in the Constitution that  
8 relates to disqualification on the basis of  
9 insurrection behavior --

10 MR. MITCHELL: Mm-hmm.

11 JUSTICE JACKSON: -- and these other  
12 provisions that Justice Sotomayor points out. They  
13 all seem to me to be extant constitutional  
14 requirements. So you -- but you're drawing a  
15 distinction.

16 MR. MITCHELL: Right. I'm drawing a  
17 distinction because some of them are categorical,  
18 such as --

19 JUSTICE JACKSON: What do you mean by  
20 "categorical"? Whether or not you are an  
21 insurrectionist is or is not categorical?

22 MR. MITCHELL: It is not categorical  
23 because Congress --

24 JUSTICE JACKSON: Because?

25 MR. MITCHELL: -- because Congress can lift

1 the disability by a two-thirds vote. And there is --

2 JUSTICE JACKSON: But -- but why does --  
3 why does that change the initial determination of  
4 whether or not you fall into the category? I don't  
5 understand the fact that you can be excused from  
6 having been in the category -- why does that not make  
7 it a categorical determination?

8 MR. MITCHELL: Because we don't know  
9 whether President Trump will be excused before he's  
10 sworn in, if he wins the election, on January 20th,  
11 2025. And a -- and a court that is saying that  
12 President Trump has to show now, today, that he would  
13 qualify under Section 3 is accelerating the deadline  
14 that the Constitution provides for him to obtain a  
15 waiver from Congress.

16 JUSTICE JACKSON: But that's by virtue of  
17 the "hold," right, "hold office." This is --

18 MR. MITCHELL: Correct. Yes.

19 JUSTICE JACKSON: Okay.

20 MR. MITCHELL: Section 3 bans him only from  
21 holding office. It does not --

22 JUSTICE JACKSON: All right. Can I ask you  
23 -- I'm just -- now that I have the floor --

24 MR. MITCHELL: Yes.

25 JUSTICE JACKSON: -- can I ask you to

1 address your first argument, which is the  
2 office/officer point?

3 JUSTICE KAGAN: Could -- could --

4 JUSTICE JACKSON: Oh, sorry.

5 CHIEF JUSTICE ROBERTS: Yeah, why don't we

6 --

7 JUSTICE KAGAN: -- could we --

8 JUSTICE JACKSON: Oh.

9 JUSTICE KAGAN: Is that okay if we do this  
10 and then we go to that?

11 JUSTICE JACKSON: Sure. Sure, sure, sure.

12 JUSTICE KAGAN: You know, but --

13 JUSTICE JACKSON: Go ahead.

14 JUSTICE KAGAN: Will there be an  
15 opportunity to do "officer" stuff, or should we --

16 CHIEF JUSTICE ROBERTS: Absolutely.

17 Absolutely.

18 (Laughter.)

19 JUSTICE KAGAN: I just want to understand.  
20 So, on -- on -- on this theory, what is the sum total  
21 of ways that the -- that Section 3 can be enforced,  
22 that -- that -- that -- that -- that some --

23 MR. MITCHELL: Yeah.

24 JUSTICE KAGAN: -- that somebody out there  
25 can say, yes, there has been a former president who

1 engaged or led or participated in an insurrection and  
2 so should be disqualified from office, putting aside  
3 the officer argument --

4 MR. MITCHELL: Right.

5 JUSTICE KAGAN: -- what is the sum total of  
6 ways that that enforcement can happen?

7 MR. MITCHELL: So the answer to that  
8 question is going to depend on what Your Honor thinks  
9 of Griffin's Case. So, if this Court were to affirm  
10 the rationale of Griffin's Case, then the only way  
11 Section 3 could be enforced is through congressional  
12 legislation that creates a remedy. So Congress could  
13 reinstate the quo warranto provisions that they  
14 initially had in the 1870 --

15 JUSTICE KAGAN: Is that your position?

16 MR. MITCHELL: Yes, because we believe  
17 Griffin's Case is correctly decided and should be  
18 followed --

19 JUSTICE KAGAN: And how does that fit with  
20 -- a lot of the -- the -- the answers to the  
21 questions that we've been giving, you said, well,  
22 Congress has to have the ability by a two-thirds vote  
23 to lift the disqualification.

24 MR. MITCHELL: Right.

25 JUSTICE KAGAN: But so too I -- I would

1 think that that provision would -- would -- would be  
2 in some tension with what you just said --

3 MR. MITCHELL: There is some, yeah.

4 JUSTICE KAGAN: -- because, if Congress has  
5 the ability to lift the vote by a two-thirds  
6 majority, then surely it can't be right that one  
7 House of Congress can do the exact same thing by a  
8 simple majority.

9 MR. MITCHELL: Yeah, there certainly is  
10 some tension, Justice Kagan, and some commentators  
11 have pointed this out. Professor Baude and Professor  
12 Paulson criticized Griffin's Case very sharply.

13 JUSTICE KAGAN: Then I must be right.

14 (Laughter.)

15 MR. MITCHELL: Well, we don't think it's --  
16 we don't think this problem is fatal because, to us,  
17 the two-thirds provision that allows Congress to lift  
18 a disability is something akin to a pardon power,  
19 where Congress, through enforcement legislation,  
20 creates a mechanism by which the insurrectionist  
21 issue is to be determined by some entity, it could be  
22 the legislature in the case of an elected member of  
23 Congress, each House has the ability to judge the  
24 qualifications of their members, or if it's outside  
25 the situation of Congress, it would be whatever



1 Congress enacts.

2 So, when it was the writs of quo warranto,  
3 each federal prosecutor had the authority to bring a  
4 quo warranto writ against an incumbent official and  
5 seek his ouster from office under Section 3, but it  
6 was still subject to that amnesty provision in  
7 Section 3 of the Fourteenth Amendment.

8 So we do acknowledge the tension, but we  
9 don't think that's an insurmountable obstacle in the  
10 case.

11 JUSTICE ALITO: I don't even see why  
12 there's -- why there's a tension. If you analogize  
13 the -- the lifting by Congress of the  
14 disqualification by a two-thirds vote to a pardon,  
15 then, surely, one would not argue that the fact that  
16 the president or a governor can pardon someone from a  
17 criminal conviction or a criminal offense means that  
18 the person couldn't be prosecuted in the first place  
19 for the criminal offense.

20 MR. MITCHELL: That's right.

21 JUSTICE ALITO: Right?

22 MR. MITCHELL: Yes.

23 JUSTICE ALITO: So I don't see what the  
24 tension is. They're two separate things. Did the  
25 person engage in this activity which is prohibited,

1 and second, even if the person did engage in the  
2 activity, are there reasons why the disqualification  
3 or the -- should be lifted or the pardon should be  
4 granted.

5 MR. MITCHELL: That's right. I mean, if --  
6 again, if the Court accepts the holding of Griffin's  
7 Case, that's exactly the regime that we would have,  
8 like the Court described.

9 JUSTICE ALITO: Yeah. I don't see there's  
10 a tension.

11 JUSTICE KAGAN: But I guess I don't --

12 JUSTICE ALITO: But, also, there's a limit  
13 on what one can infer from the mere fact that  
14 Congress can lift the disqualification. You can't  
15 infer from that that it is impermissible to have a  
16 prior determination that the person did engage in the  
17 insurrection. You can't make that inference.

18 MR. MITCHELL: Okay.

19 JUSTICE ALITO: It's not logical.

20 JUSTICE KAGAN: Well, but I think --

21 JUSTICE JACKSON: Yet isn't that what  
22 you're doing?

23 JUSTICE KAGAN: -- what's -- what's --  
24 what's -- what's -- what's in tension is that you  
25 would have the exact same actor and say, look, that

1 actor can lift --

2 MR. MITCHELL: Right.

3 JUSTICE KAGAN: -- the disqualification by  
4 a two-thirds vote.

5 But you're saying only that actor can put  
6 the disqualification into effect in the first place  
7 and it can do that by far less than two-thirds. It  
8 can do that just by a simple majority of one House.

9 MR. MITCHELL: Or -- or it could do that by  
10 doing nothing at all if -- if the holding of  
11 Griffin's Case is correct because just --

12 JUSTICE KAGAN: Yes, exactly.

13 MR. MITCHELL: -- congressional inaction  
14 would --

15 JUSTICE KAGAN: But that means that there  
16 will --

17 MR. MITCHELL: -- effectively act as a --

18 JUSTICE KAGAN: The only thing it takes --

19 MR. MITCHELL: Yeah.

20 JUSTICE KAGAN: -- to have no action --

21 MR. MITCHELL: Right.

22 JUSTICE KAGAN: -- is -- you know, is, you  
23 know, half plus one saying we don't feel like it.

24 MR. MITCHELL: But that's why we tried to  
25 characterize our Griffin's Case argument the way we

1 did where we rely on preemption doctrines as well.

2 So we have --

3 JUSTICE KAVANAUGH: Well, don't -- don't  
4 you think --

5 CHIEF JUSTICE ROBERTS: Why don't we --

6 JUSTICE KAVANAUGH: -- Griffin's Case is  
7 also relevant to trying to figure out what the  
8 original public meaning of Section 3 of the  
9 Fourteenth Amendment is? It's by the Chief Justice  
10 of the United States a year after the Fourteenth  
11 Amendment. That seems to me --

12 MR. MITCHELL: Yes.

13 JUSTICE KAVANAUGH: -- highly probative of  
14 what the meaning or understanding of that language,  
15 otherwise elusive language, is.

16 MR. MITCHELL: I do think it's probative,  
17 Justice Kavanaugh. We didn't rely too heavily on the  
18 point that you're making, partly because we have this  
19 other opinion from Justice Chase in the Jefferson  
20 Davis case. So that argument could potentially  
21 boomerang on us, which is why we didn't push it very  
22 hard in our briefing.

23 CHIEF JUSTICE ROBERTS: Thank you.

24 MR. MITCHELL: But I think Your Honor is  
25 right. This is --

1 CHIEF JUSTICE ROBERTS: Why don't you  
2 finish your sentence and then we'll move on.

3 MR. MITCHELL: Just it is -- it is relevant  
4 and probative for sure, but I think there is other  
5 evidence too that might perhaps undercut the  
6 usefulness of trying to characterize Griffin's Case  
7 as completely emblematic of the original  
8 understanding.

9 CHIEF JUSTICE ROBERTS: Then why don't we  
10 move on to the officer point.

11 MR. MITCHELL: Certainly.

12 CHIEF JUSTICE ROBERTS: And, Justice  
13 Jackson, I think you --

14 JUSTICE JACKSON: Yes. So I had a question  
15 about it because you're making a textualist argument.

16 MR. MITCHELL: Mm-hmm.

17 JUSTICE JACKSON: And as I look at Section  
18 3, I see two parts of the first sentence of Section  
19 3.

20 MR. MITCHELL: Mm-hmm.

21 JUSTICE JACKSON: The first is a list of  
22 offices that a disqualified person is barred from  
23 holding, and the second are specific circumstances  
24 that give rise to disqualification.

25 So, first, am I right about seeing that

1           there are two different things happening in the first  
2           sentence?

3                         MR. MITCHELL:   Yes, for sure.

4                         JUSTICE JACKSON:   Okay.   So are you arguing  
5           both in this case or just one?   Are you arguing both  
6           that the office of the presidency should not be  
7           considered one of the barred offices --

8                         MR. MITCHELL:   Mm-hmm.

9                         JUSTICE JACKSON:   -- and that the person --  
10          a person who previously took the presidential oath is  
11          not subject to disqualification?

12                        MR. MITCHELL:   We are arguing both, Your  
13          Honor.

14                        JUSTICE JACKSON:   I don't see that in your  
15          brief.

16                        MR. MITCHELL:   Well --

17                        JUSTICE JACKSON:   I see a lot of focus on  
18          the second but not on the first.

19                        MR. MITCHELL:   -- there is definitely more  
20          focus on the second, and we acknowledge that we have  
21          a somewhat heavier lift on the first point just  
22          because --

23                        JUSTICE JACKSON:   Why?   It seems to me that  
24          you have a list and president is not on it.

25                        MR. MITCHELL:   That -- that's certainly an

1 argument in our favor, but there are also -- with  
2 respect to "officer of the United States," that's  
3 used repeatedly in the Constitution and the  
4 Commissions Clause and the Appointments Clause and  
5 also in the Impeachment Clause, and every time it  
6 appears, it's used in a way that clearly excludes the  
7 president.

8 JUSTICE JACKSON: No, I understand.

9 MR. MITCHELL: So we don't --

10 JUSTICE JACKSON: But that's the second  
11 argument.

12 MR. MITCHELL: That is. And the --

13 JUSTICE JACKSON: So the first argument --

14 MR. MITCHELL: Mm-hmm.

15 JUSTICE JACKSON: -- is we have a list of  
16 offices --

17 MR. MITCHELL: Yes.

18 JUSTICE JACKSON: -- that a person is  
19 barred from holding, right --

20 MR. MITCHELL: Yes.

21 JUSTICE JACKSON: -- under your theory or  
22 under the -- the language of --

23 MR. MITCHELL: Mm-hmm.

24 JUSTICE JACKSON: -- and we see it begins  
25 with senator, representative, elector --

1 MR. MITCHELL: Elector.

2 JUSTICE JACKSON: -- of the president and  
3 vice president, and all other civil or military  
4 officers -- offices.

5 MR. MITCHELL: Offices under the United  
6 States --

7 JUSTICE JACKSON: Offices under the United  
8 States.

9 MR. MITCHELL: -- is how it's phrased.

10 JUSTICE JACKSON: But the word "president  
11 or vice president" does not in it appear -- not  
12 appear specifically --

13 MR. MITCHELL: That's right.

14 JUSTICE JACKSON: -- in that list. So I  
15 guess I'm trying to understand, are you giving up  
16 that argument?

17 MR. MITCHELL: No.

18 JUSTICE JACKSON: And, if so, why?

19 MR. MITCHELL: No, we're not giving it up  
20 at all. You're right, the president and the vice  
21 president are not specifically listed, but the  
22 Anderson litigants claim that they are encompassed  
23 within the meaning of the phrase "office under the  
24 United States." And that --

25 JUSTICE JACKSON: And do you agree that --



1 that the Framers would have put such a high and  
2 significant and important office, sort of smuggled it  
3 in through that catch-all phrase?

4 MR. MITCHELL: No, we don't agree at all.  
5 That's why we're still making the argument that the  
6 presidency is excluded from the covered offices that  
7 are listed at the beginning of Section 3.

8 JUSTICE SOTOMAYOR: I -- I'm sorry, your  
9 brief says you didn't take a position on that point.

10 MR. MITCHELL: I'm sorry.

11 JUSTICE SOTOMAYOR: And your brief said --  
12 I don't have the -- the cite, I -- I apologize --

13 MR. MITCHELL: Okay.

14 JUSTICE SOTOMAYOR: -- you don't  
15 affirmatively argue that point I think is what your  
16 brief said.

17 MR. MITCHELL: In the blue brief?

18 JUSTICE SOTOMAYOR: Yes.

19 MR. MITCHELL: Well, we certainly argued it  
20 in the reply brief and I'll have to look at what we  
21 -- how we phrased it. But we did point out in our  
22 opening brief that there are potential issues if this  
23 Court were to rule on "office under" because that  
24 phrase appears in other parts of the Constitution,  
25 including the Emoluments Clause, the Impeachment

1 Disqualification Clause, and it would --

2 JUSTICE JACKSON: Would we necessarily have  
3 to say -- I mean, I thought -- I thought the point  
4 was that Section 3 was unique, that there was  
5 something happening with Section 3 that could explain  
6 why certain offices were left off or whatnot.

7 MR. MITCHELL: Perhaps, but there are also  
8 implications from other parts of the Constitution  
9 which really help us on the "officer of the United  
10 States" argument in that second part of Section 3 but  
11 somewhat cut against us when it comes to "office  
12 under the United States."

13 And the Anderson litigants point this out  
14 in Footnote 9 in the red brief where they say, if  
15 this Court were to say the presidency is an excluded  
16 office under the United States, that could imply, for  
17 example, the president is not covered by the  
18 Emoluments --

19 JUSTICE GORSUCH: Mr. -- Mr. Mitchell --

20 MR. MITCHELL: Yes.

21 JUSTICE GORSUCH: -- stepping back on this  
22 --

23 MR. MITCHELL: Mm-hmm.

24 JUSTICE GORSUCH: -- a -- a lot hinges on  
25 the difference between -- in your argument between

1 the term "office" and "officer."

2 MR. MITCHELL: Yes.

3 JUSTICE GORSUCH: And I -- I -- I guess I'm  
4 wondering what theory do you have from an original  
5 understanding or a textualist perspective --

6 MR. MITCHELL: Mm-hmm.

7 JUSTICE GORSUCH: -- why those two terms so  
8 closely related would carry such different weight?

9 MR. MITCHELL: Because it's clear from the  
10 constitutional text that there are officers that do  
11 not hold offices under the United States, for  
12 example, the Speaker of the House and the president  
13 pro tempore. They're described as officers in  
14 Article I who are chosen by the legislature.

15 They also have to be officers if they're  
16 able to be covered by the Presidential Succession Act  
17 because, under the Constitution, only officers can  
18 serve when there's a vacancy in both the presidency  
19 and the vice presidency.

20 So they're officers, but they're not  
21 offices under the United States because of the  
22 Incompatibility Clause, which says that if you're a  
23 member of Congress, you cannot simultaneously hold an  
24 office under the United States. So that provision of  
25 the Constitution clearly demonstrates that --

1 JUSTICE GORSUCH: I -- I --

2 MR. MITCHELL: -- members of Congress can't  
3 hold offices.

4 JUSTICE GORSUCH: -- I -- I appreciate that  
5 response. Is -- is there anything in the original  
6 drafting, history, discussion that you think  
7 illuminates why that distinction would carry such  
8 profound weight?

9 MR. MITCHELL: Not -- not of which we're  
10 aware. So these are textual inferences that we're  
11 drawing --

12 JUSTICE GORSUCH: Yeah.

13 MR. MITCHELL: -- from constitutional  
14 structure, intratextualist analysis.

15 JUSTICE GORSUCH: Yeah.

16 MR. MITCHELL: But we aren't relying  
17 necessarily on the thought processes of the people  
18 who drafted these provisions because they're  
19 unknowable. But, even if they were knowable, we're  
20 not sure they would be relevant in any event because  
21 this language, especially in Section 3, was enacted  
22 as a compromise.

23 There were certainly radical Republicans  
24 who wanted to go much further if you look at some of  
25 the earlier drafts that were proposed. Some people

1 wanted to ban all insurrectionists from holding  
2 office regardless of whether they previously swore an  
3 oath. Some people wanted to go further and ban them  
4 even from voting.

5 CHIEF JUSTICE ROBERTS: Thank you. Thank  
6 you, counsel.

7 I just have one very technical question.  
8 The statute in 1870, if it were still in effect,  
9 would require you to modify your arguments slightly.  
10 It was repealed, as you say, in 1948.

11 I tried to find it, but I couldn't. Do you  
12 know why it was repealed?

13 MR. MITCHELL: No, we don't know why. It  
14 looks like it was done as part of a reorganization of  
15 the U.S. Code, so it doesn't appear there was any  
16 policy motivation behind that decision. I think a  
17 lot of things got repealed during the 1948 decisions  
18 that were made.

19 CHIEF JUSTICE ROBERTS: Okay.  
20 Justice Thomas, anything further?  
21 Justice Alito?

22 JUSTICE ALITO: Is there any history of  
23 states using Section 3 as a way to bar federal  
24 officeholders?

25 MR. MITCHELL: Not that I'm aware, Justice

1 Alito, because of Griffin's Case. I mean, Griffin's  
2 Case has been the law -- and I shouldn't say that  
3 it's been the law because it was just a circuit court  
4 decision, but that has been the settled understanding  
5 of Section 3 since 1870 when it was decided.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

8 JUSTICE SOTOMAYOR: I just want to pin down  
9 your principal argument on Section 3. You argue  
10 that, even though the president may or may not  
11 qualify -- presidency may or may not qualify as an  
12 office under the United States, your principal  
13 argument is that the president is not an officer of  
14 the United States, correct?

15 MR. MITCHELL: Yeah, I would say it a  
16 little more forcefully than what Your Honor just  
17 described. We believe the presidency is excluded  
18 from "office under the United States," but the  
19 argument we have that he's excluded, the president,  
20 as an officer of the United States is the stronger of  
21 the two textually.

22 JUSTICE SOTOMAYOR: Ah.

23 MR. MITCHELL: It has fewer implications  
24 for other constitutional --

25 JUSTICE SOTOMAYOR: A bit of a

1 gerrymandered rule, isn't it, designed to benefit  
2 only your client?

3 MR. MITCHELL: I certainly wouldn't call it  
4 gerrymandered. That implies nefarious intent. We're  
5 --

6 JUSTICE SOTOMAYOR: Well, that you didn't  
7 make it up. I know some scholars have been  
8 discussing it. But just so we're clear, under that  
9 reading, only -- only the Petitioner is disqualified  
10 because virtually every other president except  
11 Washington --

12 MR. MITCHELL: Mm-hmm.

13 JUSTICE SOTOMAYOR: -- has taken an oath to  
14 support the Constitution, correct?

15 MR. MITCHELL: That's right. Every  
16 president -- to our knowledge, every other president  
17 -- John Adams might also be excluded because he took  
18 the oath as a vice president, which is not an officer  
19 -- but, yes, President Biden would certainly be  
20 covered. He took the oath as a member of Congress.  
21 And that's true of every previous president.

22 JUSTICE SOTOMAYOR: Would that be true if  
23 we were to hold more narrowly in a reversal that it's  
24 not Section 3 that's at issue but Thornton and others  
25 as to whether Section 3 can be enforced by states

1 against the president?

2 MR. MITCHELL: That would extend to every  
3 presidential candidate --

4 JUSTICE SOTOMAYOR: Exactly.

5 MR. MITCHELL: -- not just our client.  
6 That's correct.

7 JUSTICE SOTOMAYOR: Not just to yours.

8 MR. MITCHELL: Yes.

9 JUSTICE SOTOMAYOR: Okay. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: And if I could just  
12 understand, I mean, given that you say you don't have  
13 a lot of evidence that the founding generation -- or  
14 the generation that we're looking at is really  
15 thinking about "office" versus "officer of the United  
16 States," I mean, it -- it -- it would suggest that we  
17 should ask what -- is that rule a sensible one? You  
18 know, if they had thought about it, what reason would  
19 they have given for that rule?

20 And it does seem as though there -- there's  
21 no particular reason, and you can think of lots of  
22 reasons for the contrary --

23 MR. MITCHELL: Right.

24 JUSTICE KAGAN: -- to say that the only  
25 people who have engaged in insurrection who are not



1 disqualified from office are presidents who have not  
2 held high office before. Why would that rule exist?

3 MR. MITCHELL: Yeah. I don't think there  
4 is a good rationale given that this was compromise  
5 legislation. And sometimes this happens with  
6 statutory compromises and even constitutional  
7 compromises. There's an agreed-upon set of words  
8 that can pass both Houses of Congress, but different  
9 legislators may have had goals and motivations. They  
10 didn't all get their way. In a compromise, everyone  
11 goes away miserable.

12 But this was the text that was settled  
13 upon. And it does seem odd that President Trump  
14 would fall through the cracks in a sense, but if  
15 "officer of the United States" means appointed  
16 officials, there's just no way he can be covered  
17 under Section 3. The Court would have to reject our  
18 officer argument to get to that point.

19 JUSTICE KAGAN: And is there any better  
20 reason, if you go to the office argument that Justice  
21 Jackson was suggesting, is there any better reason  
22 for saying that an insurrectionist cannot hold the  
23 whole panoply of offices in the United States, but  
24 we're perfectly fine with that insurrectionist being  
25 president?

1                   MR. MITCHELL: I think that's an even  
2                   tougher argument for us to make as a policy matter  
3                   because one would think, of all offices, the  
4                   presidency would be the one you'd want to keep out  
5                   the Confederate insurrectionists. That's the  
6                   commander-in-chief of the Army. So, again, that's  
7                   why we're leaning more on the "officer of" argument  
8                   than the "office under."

9                   We're not conceding "office under," but we  
10                  definitely have the stronger textual case and  
11                  structural case on "officer of the United States."

12                 JUSTICE KAGAN: Thank you.

13                 MR. MITCHELL: Thanks.

14                 CHIEF JUSTICE ROBERTS: Justice Gorsuch?

15                 JUSTICE GORSUCH: Do you want to respond to  
16                 some of the specific textual arguments on the  
17                 "officer of" with respect to the Appointments Clause,  
18                 the Impeachment Clause, and some of the others?

19                 MR. MITCHELL: Yeah. So the way -- let's  
20                 start with --

21                 JUSTICE GORSUCH: But why --

22                 MR. MITCHELL: Well, I'll start with the  
23                 Commissions Clause.

24                 JUSTICE GORSUCH: The ball has been  
25                 bouncing --

1 MR. MITCHELL: Yeah.

2 JUSTICE GORSUCH: -- on that back and  
3 forth, and I wanted to see where you landed today.

4 MR. MITCHELL: There are three textual  
5 inferences that could be drawn from each of those  
6 provisions Your Honor just mentioned, but the  
7 Commissions Clause, I think, is the strongest because  
8 it says "the president shall," you know, commission  
9 all the officers of the United States. "Shall" is  
10 mandatory. "All" is all-encompassing. And the  
11 president doesn't commission himself, and he can't  
12 commission himself. So that's one of the first  
13 problems.

14 I think the Anderson litigants are trying  
15 to say, you know, there's somehow an implied  
16 exception there because the president obviously can't  
17 commission himself, so we should construe that to  
18 mean all officers of the United States besides the  
19 president. But you also have members of Congress who  
20 are not commissioned by the president, and that's  
21 because they're not officers of the United States.

22 So the only sensible distinction that we  
23 can see, given the language of the Commissions  
24 Clause, is that officers of the United States are  
25 appointed officials, and elected officials, such as

1 members of Congress and the president and the vice  
2 president, are not.

3 And the Impeachment Clause reinforces that.  
4 The president, the vice president, and all civil  
5 officers of the United States shall be removed from  
6 office upon impeachment for and conviction of all  
7 high crimes and misdemeanors. The president and the  
8 vice president are listed separately from officers of  
9 the United States.

10 And then, of course, the Appointments  
11 Clause, we know the president is not appointed  
12 pursuant to Article II. Neither is the vice  
13 president. Neither are members of Congress. So they  
14 can't be officers either.

15 JUSTICE GORSUCH: And how does Article I,  
16 Section 6, fit into this discussion?

17 MR. MITCHELL: And this is about officers  
18 being in the line of succession?

19 JUSTICE GORSUCH: Yes, exactly.

20 MR. MITCHELL: Right. So you have to be an  
21 officer to be in the line of succession. We have a  
22 federal statute that puts the Speaker and the  
23 President Pro Tempore in the line of succession.  
24 They are officers. But they're not officers of the  
25 United States because they're not subject to

1 impeachment, they're not commissioned by the  
2 president, and they're not appointed pursuant to  
3 Article II.

4 So there is this gap between the term  
5 "officer" and the phrase "officers of the United  
6 States," reinforcing the idea that "officers of the  
7 United States" is a term of art that doesn't refer  
8 just to federal officeholders, which is what the  
9 Anderson litigants are claiming, but refers only to  
10 those who are appointed, not to those who are  
11 elected.

12 JUSTICE GORSUCH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

14 JUSTICE KAVANAUGH: Can I just make sure I  
15 understand how you're using Griffin's Case again?  
16 Section 3 refers to insurrection and raises questions  
17 about who decides what processes are to be used.  
18 That's ratified in 1868. The next year, Chief  
19 Justice Chase opines that states do not have the  
20 authority, that only Congress has the authority to  
21 enforce that. That could be evidence, as you say, of  
22 the original public meaning, at least some evidence.

23 MR. MITCHELL: Mm-hmm.

24 JUSTICE KAVANAUGH: It's a precedent,  
25 although not binding. But your point then is it's

1 reinforced because Congress itself relies on that  
2 precedent in the Enforcement Act of 1870 and forms  
3 the backdrop against which Congress does legislate.  
4 And then, as Justice Alito says, the historical  
5 practice for 155 years has been that that's the way  
6 it's gone. There hasn't -- there haven't been state  
7 attempts to enforce disqualification under Section 3  
8 against federal officers in the years since.

9 MR. MITCHELL: Right.

10 JUSTICE KAVANAUGH: So whether that's a  
11 Federalist 37 liquidation argument, it all reinforces  
12 what happened back in 1868, 1869, and 1870.

13 MR. MITCHELL: Right.

14 JUSTICE KAVANAUGH: Do you want to add to  
15 that, alter that?

16 MR. MITCHELL: No, I think that's exactly  
17 right. And the last part you mentioned, Your Honor,  
18 is crucial to our argument, that Congress relied on  
19 Griffin's Case. It provided the backdrop against  
20 which they legislated, which is why we should read  
21 these extant enforcement mechanisms -- and, right  
22 now, the only one left is the federal insurrection  
23 statute, 2383 -- as exclusive of state court  
24 remedies. It's a -- it's a form of implied  
25 preemption, almost Sea Clammers implicit preemption

1 of other remedies, because Congress made these  
2 decisions in explicit reliance on Griffin's Case.

3 JUSTICE KAVANAUGH: And if we agree with  
4 you on Griffin's Case and what you've elaborated on  
5 there, that's the end of the case, right?

6 MR. MITCHELL: It should be, yes, unless  
7 Congress decides to enact a statute, which we can't  
8 --

9 JUSTICE KAVANAUGH: A new --

10 MR. MITCHELL: -- rule out the possibility.

11 JUSTICE KAVANAUGH: -- a new statute in  
12 addition to 2383. And just to be clear, under 2383,  
13 you agree that someone could be prosecuted for  
14 insurrection by federal prosecutors and, if  
15 convicted, could be or shall be disqualified then  
16 from office?

17 MR. MITCHELL: Yes. But the only caveat  
18 that I would add is that our client is arguing that  
19 he has presidential immunity. So we would not  
20 concede that he can be prosecuted for what he did on  
21 January 6th under 2383.

22 JUSTICE KAVANAUGH: Understood. Asking --

23 MR. MITCHELL: Yes.

24 JUSTICE KAVANAUGH: -- the question about  
25 the theory of 2383. Thank you.

1 MR. MITCHELL: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Barrett?

3 JUSTICE BARRETT: So Griffin's Case was a  
4 collateral proceeding, so it's habeas relief.

5 MR. MITCHELL: Yes.

6 JUSTICE BARRETT: Could Griffin have -- so  
7 even if Section 3 is not a basis for collateral  
8 relief in habeas, which was new at the time, could  
9 Griffin have raised at his trial or in direct appeal  
10 the argument that Sheffey, Judge Sheffey, you know,  
11 you can't legitimately sit -- or constitutionally sit  
12 on my case because you're an insurrectionist and  
13 you're disqualified? Could he have won then?

14 MR. MITCHELL: No.

15 JUSTICE BARRETT: Why?

16 MR. MITCHELL: Not if -- not if Griffin's  
17 Case is correct. So a court would have to reject the  
18 rationale of Griffin's Case to accept what Your Honor  
19 was suggesting.

20 JUSTICE BARRETT: Well, why? Like I said,  
21 Griffin's Case -- I mean, I think there's some  
22 language that might be a little bit broad --

23 MR. MITCHELL: Mm-hmm.

24 JUSTICE BARRETT: -- but, at bottom,  
25 Griffin's Case is about a collateral habeas



1 proceeding. And Griffin had brought his case after  
2 the fact. He made it a cause of action.

3 Why wouldn't it work in a trial for him to  
4 challenge Sheffey's constitutional ability to  
5 adjudicate his case?

6 MR. MITCHELL: But what Griffin's Case  
7 holds is that only Congress can provide the means of  
8 enforcing Section 3. And under Your Honor's  
9 hypothetical, Congress has not enacted any such  
10 statute that would give Mr. Griffin the right to  
11 raise those types of arguments at his trial. So he  
12 would have to await legislation from Congress.

13 JUSTICE BARRETT: Okay. Let's assume that  
14 I disagree with you about the officer argument, so  
15 Section 3 covers President Trump. Let's say that  
16 Congress enacts a quo warranto provision that would  
17 allow a state or I guess it doesn't really matter for  
18 this purpose, even -- even a federal prosecutor, to  
19 bring such an action against him to remove him from  
20 office --

21 MR. MITCHELL: Mm-hmm.

22 JUSTICE BARRETT: -- in a quo warranto way.

23 Wouldn't that be in some tension with  
24 impeachment? He would be extracted from office  
25 outside of the process of impeachment. Couldn't then

1 President Trump simply say, well, the only way to get  
2 me out of office is the impeachment process and not  
3 this quo warranto action?

4 MR. MITCHELL: So I don't know how that  
5 would play out because the quo warranto actions that  
6 were brought that I'm aware of under the 1870  
7 Enforcement Act were brought against state officials.  
8 And Your Honor's impeachment hypothetical would apply  
9 not only to the president but any federal --

10 JUSTICE BARRETT: I know.

11 MR. MITCHELL: -- officer of the United  
12 States.

13 JUSTICE BARRETT: I know.

14 MR. MITCHELL: So I don't know how that  
15 played out in the courts and whether anyone ever  
16 tried to argue that impeachment was the exclusive  
17 remedy for --

18 JUSTICE BARRETT: Well, I don't think  
19 anybody did argue it. I guess what I'm asking is,  
20 you know, you said it's Congress's exclusive  
21 province.

22 MR. MITCHELL: Yes.

23 JUSTICE BARRETT: And you also said that it  
24 has to apply, you know, after one is holding office,  
25 is elected. And I'm asking whether then the

1       implication of your argument is that Congress could  
2       not enact such a provision that applied against  
3       federal officeholders that were covered by Section 3  
4       as opposed to state ones?

5               MR. MITCHELL: I believe they could. The  
6       Impeachment Clause says that the president, the vice  
7       president, and also the officers of the United States  
8       shall be removed from office upon impeachment and  
9       conviction, but it doesn't say that's the only way  
10      you can remove them.

11             I mean, Congress can defund a position and  
12      effectively, it's not quite the same as formal  
13      removal, but the other relevant precedent is Stuart  
14      against Laird when the Jeffersonians repealed the  
15      Midnight Judges Act and abolished all of these  
16      positions for federal judges. And some people  
17      thought that was unconstitutional because they  
18      thought the only way you could eliminate federal  
19      judges was through impeachment, but Chief Justice  
20      Marshall upheld that statute.

21             So that to me is a relevant precedent  
22      showing that impeachment is not the only way to get  
23      rid of a federal official.

24             JUSTICE BARRETT: Okay. Let me ask one  
25      question, and this is just a point of clarification.

1                   Does President Trump have any kind of due  
2 process right here? I mean, I'm wondering, this kind  
3 of goes not to the cause of action point or the  
4 preemption point but more to the question of what  
5 procedures he might have been entitled to. You don't  
6 make the argument that he was entitled to any, nor  
7 did I see the argument that he had any kind of  
8 constitutionally protected right to ballot access so  
9 that he was, you know, constitutionally entitled to  
10 an opportunity to be heard.

11                   Is that right?

12                   MR. MITCHELL: We -- we made --

13                   JUSTICE BARRETT: He had no due process  
14 right?

15                   MR. MITCHELL: We made that argument below.  
16 We did not make that in our briefs to this Court for  
17 several reasons. I mean, Your Honor's, I think,  
18 suggesting and this is correct that the proceedings  
19 below, to put it charitably, were highly irregular.

20                   JUSTICE BARRETT: Well, I wasn't suggesting  
21 that. I was just asking --

22                   MR. MITCHELL: I'm sorry. The question --

23                   JUSTICE BARRETT: Yeah.

24                   MR. MITCHELL: -- seems to suggest that  
25 there might be due process issues. But we didn't

1 develop that argument in this Court for several  
2 issues.

3           Winning on due process doesn't really do as  
4 much for our client as the other arguments that we've  
5 made because that would be a ruling specific to this  
6 particular proceeding in the State of Colorado and  
7 would leave the door open for Colorado to continue on  
8 remand to exclude him from the ballot.

9           JUSTICE BARRETT: Okay. Thank you.

10           CHIEF JUSTICE ROBERTS: Justice Jackson?

11           JUSTICE JACKSON: Going back to whether the  
12 presidency is one of the barred offices, I -- I guess  
13 I'm a little surprised at your response to Justice  
14 Kagan because I thought that the history of the  
15 Fourteenth Amendment actually provides the reason for  
16 why the presidency may not be included.

17           And by that, I mean I didn't see any  
18 evidence that the presidency was top of mind for the  
19 Framers when they were drafting Section 3 because  
20 they were actually dealing with a different issue.

21           The pressing concern, at least as I see the  
22 historical record, was actually what was going on at  
23 lower levels of the government, the possible  
24 infiltration and embedding of insurrectionists into  
25 the state government apparatus and the real risk that

1 former Confederates might return to power in the  
2 south via state-level elections either in local  
3 offices or as representatives of the states in  
4 Congress. And that's a very different lens.

5 Your concern is trying to make sure that  
6 these people don't come back through the state  
7 apparatus and control the government in that  
8 direction seems to me very different than the worry  
9 that an insurrectionist will seize control of the  
10 entire national government through the presidency.

11 And so I just am surprised that you would  
12 -- given the text of the provision and the historical  
13 context that seems to demonstrate that their concern  
14 or their focus was not about the presidency, I just  
15 don't understand why you're giving that argument up.

16 MR. MITCHELL: There -- there is some  
17 evidence to suggest that, Justice Jackson, but --

18 JUSTICE JACKSON: Is there any evidence to  
19 suggest that the presidency was what they were  
20 focused on?

21 MR. MITCHELL: There is some evidence of  
22 that. There were people saying we don't want  
23 Jefferson Davis to be elected president, and there  
24 was also -- one of the drafts of Section 3  
25 specifically mentioned the presidency and the vice

1       presidency --

2                   JUSTICE JACKSON:  But it wasn't the final

3       --

4                   MR. MITCHELL:  -- as an office.

5                   JUSTICE JACKSON:  -- but it wasn't the  
6       final enactment.  So where do you --

7                   MR. MITCHELL:  It wasn't the final -- it  
8       wasn't --

9                   JUSTICE JACKSON:  Right.

10                  MR. MITCHELL:  I'm sorry.  It wasn't the  
11       final enactment, but it does show that there was some  
12       concern by some people about Confederate  
13       insurrectionists ascending to the presidency.

14                  And we didn't want to make a law office  
15       history type argument where you just look at the  
16       historical evidence and pick the evidence that we  
17       like and interpret it tangentially because the other  
18       side can come back with us and throw this  
19       countervailing evidence back in our face.

20                  So we wanted to focus more on the text of  
21       the Constitution because this was ultimately a  
22       compromise provision that was enacted in Section 3,  
23       and --

24                  JUSTICE JACKSON:  All right.  Let me ask  
25       you another question --

1 MR. MITCHELL: Mm-hmm.

2 JUSTICE JACKSON: -- about the states  
3 because you have forcefully made an argument about  
4 the states not being able to enforce Section 3.

5 So, if we agree with you on that, what  
6 happens next? I mean, I thought you also wanted us  
7 to end the litigation. So is there a possibility  
8 that this case continues in federal court if that's  
9 our conclusion?

10 MR. MITCHELL: I don't see how it could  
11 unless Congress were to enact a statute in response  
12 to this Court's decision.

13 JUSTICE JACKSON: So your point is that it  
14 would -- we would have to say congressional enacting  
15 legislation is necessary for either state or federal  
16 enforcement?

17 MR. MITCHELL: That's correct.

18 JUSTICE JACKSON: All right. Final  
19 question. The Colorado Supreme Court concluded that  
20 the violent attempts of the Petitioner's supporters  
21 in this case to halt the count on January 6th  
22 qualified as an insurrection as defined by Section 3.

23 And I read your opening brief to accept  
24 that those events counted as an insurrection, but  
25 then your reply seemed to suggest that they were not.



1                   So what is your position as to that?

2                   MR. MITCHELL: Oh, we -- we never accepted  
3 or conceded in our opening brief that this was an  
4 insurrection. What we said in our opening brief was  
5 President Trump did not engage in any act that can  
6 plausibly be characterized as insurrection because he  
7 did not engage --

8                   JUSTICE JACKSON: All right. So why would  
9 this not be an -- what is your argument that it's not  
10 -- your reply brief says that it wasn't because, I  
11 think, you say, it did not involve an organized  
12 attempt to overthrow the government. So --

13                   MR. MITCHELL: That's one of many reasons.  
14 But, for an insurrection, there needs to be an  
15 organized, concerted effort to overthrow the  
16 government of the United States through violence.  
17 And this riot that occurred --

18                   JUSTICE JACKSON: So your point is that a  
19 chaotic effort to overthrow the government is not an  
20 insurrection?

21                   MR. MITCHELL: No, we didn't concede that  
22 it's an effort to overthrow the government either,  
23 Justice Jackson. None of these criteria were met.  
24 This was a riot. It was not an insurrection. The  
25 events were shameful, criminal, violent, all of those

1 things, but it did not qualify as insurrection as  
2 that term is used in Section 3 because --

3 JUSTICE JACKSON: Thank you.

4 MR. MITCHELL: Thanks.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 MR. MITCHELL: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Murray.

8 ORAL ARGUMENT OF JASON C. MURRAY

9 ON BEHALF OF RESPONDENTS ANDERSON, ET AL.

10 MR. MURRAY: Mr. Chief Justice, and may it  
11 please the Court:

12 We are here because, for the first time  
13 since the War of 1812, our nation's capitol came  
14 under violent assault. For the first time in  
15 history, the attack was incited by a sitting  
16 president of the United States to disrupt the  
17 peaceful transfer of presidential power.

18 By engaging an insurrection against the  
19 Constitution, President Trump disqualified himself  
20 from public office. As we heard earlier, President  
21 Trump's main argument is that this Court should  
22 create a special exemption to Section 3 that would  
23 apply to him and to him alone. He says Section 3  
24 disqualifies all oath-breaking insurrectionists,  
25 except a former president who never before held other

1 state or federal office.

2 There is no possible rationale for such an  
3 exemption, and the Court should reject the -- the  
4 claim that the Framers made an extraordinary mistake.  
5 Section 3 uses deliberately broad language to cover  
6 all positions of federal power requiring an oath to  
7 the Constitution.

8 My friend relies on a claimed difference  
9 between "an office under" and "an officer of the  
10 United States," but this case does not come down to  
11 mere prepositions. The two phrases are two sides of  
12 the same coin, referring to any federal office or to  
13 anyone who holds one.

14 President Trump's other arguments for  
15 reversal ignore the constitutional role of the states  
16 in running presidential elections. Under Article II  
17 and the Tenth Amendment, states have the power to  
18 ensure that their citizens' electoral votes are not  
19 wasted on a candidate who is constitutionally barred  
20 from holding office.

21 States are allowed to safeguard their  
22 ballots by excluding those who are under age,  
23 foreign-born, running for a third presidential term,  
24 or, as here, those who have engaged in insurrection  
25 against the Constitution, in violation of their oath.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Do you have  
3 contemporaneous examples -- and by contemporaneous, I  
4 mean shortly after the adoption of the Fourteenth  
5 Amendment -- where the states disqualified national  
6 candidates, not its own candidates, but national  
7 candidates?

8 MR. MURRAY: The only example I can think  
9 of, Justice Thomas, is the example of governor -- of  
10 -- of Congressman Christy, who was elected in Georgia  
11 in I believe 1868, and the governor of Georgia  
12 refused -- or -- or declined to certify the results  
13 of that election because Mr. Christy was  
14 disqualified.

15 But I think it's not surprising that there  
16 are few examples because we didn't have ballots in  
17 the same way back then. Candidates were either  
18 write-in or they were party ballots, so the states  
19 didn't run the ballots in the same way, and there  
20 wouldn't have been a process for determining before  
21 an election whether a candidate was qualified, unlike  
22 the processes that we have now that states have  
23 created under their Article I and Article II powers  
24 to run elections.

25 JUSTICE THOMAS: But it would seem that

1 particularly after Reconstruction and after the  
2 Compromise of 1877 and during the period of redeemers  
3 that you would have that kind of conflict. There  
4 were a plethora of Confederates still around. There  
5 were any number of people who would continue to  
6 either run for state offices or national offices.

7 So it would seem -- that would suggest that  
8 there would at least be a few examples of national  
9 candidates being disqualified if your reading is  
10 correct.

11 MR. MURRAY: Well, there were certainly  
12 national candidates who were disqualified by Congress  
13 refusing to seat them.

14 JUSTICE THOMAS: I understand that, but  
15 that's not this case. I'm talking -- did states  
16 disqualify them? That's what we're talking about  
17 here. I understand Congress would not seat them.

18 MR. MURRAY: Other than the example I gave,  
19 no, but, again, Your Honor, that's not surprising  
20 because there wouldn't have been -- states certainly  
21 wouldn't have the authority to remove a sitting  
22 federal officer.

23 JUSTICE THOMAS: So what's the purpose of  
24 the -- what was the purpose of the -- of Section 3?  
25 The states were sending people -- the concern was

1 that the former Confederate states would continue  
2 being bad actors, and the effort was to prevent them  
3 from doing this.

4 And you're saying that, well, this also  
5 authorized states to disqualify candidates. So what  
6 I'm asking you for, if you are right, what are the  
7 examples?

8 MR. MURRAY: Well, Your Honor, the examples  
9 are states excluded many candidates for state office,  
10 individuals holding state offices. We have a number  
11 of published cases of states concerning that.

12 JUSTICE THOMAS: I understand that. I -- I  
13 understand the states controlling state elections and  
14 state positions. What we are talking about here are  
15 national candidates.

16 The -- I understand. You look at Foner or  
17 Foote, Shelby Foote, or McPherson, they all talk  
18 about, of course, the conflict after the Civil War,  
19 and there were people who felt very strongly about  
20 retaliating against the South, the radical  
21 Republicans, but they did not think about authorizing  
22 the South to disqualify national candidates.

23 And that's the argument you're making, and  
24 what I would like to know is you give -- is do you  
25 have any examples of this?

1           MR. MURRAY: Many of those historians have  
2           filed briefs in our support in this case, making the  
3           point that the -- the -- the idea of the Fourteenth  
4           Amendment was that both states and the federal  
5           government would ensure rights and that if states  
6           failed to do so, the federal government certainly  
7           would also step in.

8           But I think the reason why there aren't  
9           examples of states doing this is an idiosyncratic one  
10          of the fact that elections worked differently back  
11          then. States have a background power under Article  
12          II and the Tenth Amendment to run presidential  
13          elections. They didn't use that power to police  
14          ballot access until about the 1890s. And by the  
15          1890s, everyone had received amnesty and these issues  
16          had become moot. So I don't think the history tells  
17          us --

18          CHIEF JUSTICE ROBERTS: I'd like to sort of  
19          look at Justice Thomas's question sort of from the  
20          30,000-foot level. I mean, the whole point of the  
21          Fourteenth Amendment was to restrict state power,  
22          right? States shall not abridge privilege of  
23          immunity, they won't deprive people of property  
24          without due process, they won't deny equal  
25          protection. And on the other hand, it augmented

1 federal power under Section 5. Congress has the  
2 power to enforce it.

3 So wouldn't that be the last place that  
4 you'd look for authorization for the states,  
5 including Confederate states, to enforce --  
6 implicitly authorized to enforce the presidential  
7 election process? That -- that seems to be a  
8 position that is at -- at war with the whole thrust  
9 of the Fourteenth Amendment and very ahistorical.

10 MR. MURRAY: No, Your Honor. First, we  
11 would locate the states' authority to run  
12 presidential elections not in the Fourteenth  
13 Amendment but in Article II. And that power is  
14 merely plenary to determine the means --

15 CHIEF JUSTICE ROBERTS: Yeah, but you're  
16 relying on -- you have no reliance on Section 3, is  
17 that what you're saying?

18 MR. MURRAY: No, Your Honor. Certainly, we  
19 have reliance on Section 3 insofar as Article II  
20 gives states this broad power to determine how their  
21 electors are selected, and that broad power implies  
22 the narrower power to enforce federal constitutional  
23 qualifications like --

24 CHIEF JUSTICE ROBERTS: Well, but the  
25 narrower power you're looking for is the power of



1       disqualification, right? That is a very specific  
2       power in the Fourteenth Amendment. And you're saying  
3       that was implicitly extended to the states under a  
4       clause that doesn't address that at all?

5               MR. MURRAY: We would say that nothing in  
6       the Fourteenth Amendment takes away from the states  
7       their broad and merely plenary power to determine the  
8       manner of selecting their electors in the manner that  
9       they see fit. As this Court said in Chiafalo, that  
10      power is merely plenary unless something in the  
11      Constitution tells states they can't do it.

12             And -- and the structure of the Fourteenth  
13      Amendment certainly was intended to expand federal  
14      power and certainly to restrict state power in some  
15      ways, but states are bound to enforce and apply, for  
16      example, Section 1 of the Fourteenth Amendment. And  
17      so it's hard to see why states wouldn't be similarly  
18      bound or at least authorized --

19             JUSTICE KAVANAUGH: But that's -- that's a  
20      --

21             JUSTICE KAGAN: Well, just --

22             JUSTICE KAVANAUGH: -- "greater includes  
23      the lesser" argument. The -- the states have the  
24      power, the legislature has the power to choose  
25      electors. Granted. But just because there's one

1 authorized means in the Constitution to a particular  
2 end does not mean that there's any means to that end.

3 And so I think you're taking that electors  
4 argument and bringing it into Section 3, where, as  
5 the Chief Justice says, there's just no -- and  
6 Justice Thomas, there's no historical evidence to  
7 support kind of the theory of Section 3, nor the  
8 overall -- to explain the overall structure of -- of  
9 the Fourteenth Amendment.

10 MR. MURRAY: We certainly have a long  
11 history in this country of states using their power  
12 to determine the manner of selecting presidential  
13 electors to enforce other qualifications in the  
14 Constitution. I don't -- I don't take it there's a  
15 great debate about whether or not states are allowed  
16 to exclude underaged or foreign-born candidates or,  
17 if President Bush or Obama wanted to run for a third  
18 term, that they could be excluded under that broad  
19 Article II power.

20 I don't see why Section 3 should be treated  
21 any differently. Section 3 speaks in the same  
22 mandatory terms.

23 JUSTICE KAVANAUGH: Well, when you look at  
24 Section 3, the term "insurrection" jumps out, and the  
25 question is -- the questions are: What does that

1 mean? How do you define it? Who decides? Who  
2 decides whether someone engaged in it? What  
3 processes -- as Justice Barrett alluded to, what  
4 processes are appropriate for figuring out whether  
5 someone did engage in that?

6 And that's all what Chief Justice Chase  
7 focused on a year after the Fourteenth Amendment to  
8 say these are difficult questions and you look right  
9 at Section 5 of the Fourteenth Amendment, as the  
10 Chief Justice said, and that tells you Congress has  
11 the primary role here.

12 I think what's different is -- is the  
13 processes, the definition, who decides questions  
14 really jump out at you when you look at Section 3.

15 MR. MURRAY: Cert --

16 JUSTICE KAVANAUGH: Your response to that?

17 MR. MURRAY: Well, certainly, Justice  
18 Kavanaugh, there has to be some process for  
19 determining those questions, and then the question  
20 becomes, does anything in the Fourteenth Amendment  
21 say that only Congress can create that process? And  
22 Section 5 very clearly is not an exclusive provision.  
23 It says Congress shall have power. And --

24 JUSTICE KAGAN: But maybe put most boldly,  
25 I think that the question that you have to confront

1 is why a single state should decide who gets to be  
2 president of the United States. In other words, you  
3 know, this question of whether a former president is  
4 disqualified for insurrection to be president again  
5 is, you know, just say it, it sounds awfully national  
6 to me. So whatever means there are to enforce it  
7 would suggest that they have to be federal, national  
8 means.

9 Why does -- you know, if you weren't from  
10 Colorado and you were from Wisconsin or you were from  
11 Michigan and it really -- you know, what the Michigan  
12 secretary of state did is going to make the  
13 difference between, you know, whether Candidate A is  
14 elected or Candidate B is elected, I mean, that seems  
15 quite extraordinary, doesn't it?

16 MR. MURRAY: No, Your Honor, because,  
17 ultimately, it's this Court that's going to decide  
18 that question of federal constitutional eligibility  
19 and settle the issue for the nation. And, certainly,  
20 it's not unusual that questions of national  
21 importance come up through different states.

22 JUSTICE KAGAN: Well, I suppose this Court  
23 would be saying something along the lines of that a  
24 state has the power to do it. But I guess I was -- I  
25 was asking you to go a little bit further in saying

1       why should that be the right rule? Why should a  
2       single state have the ability to make this  
3       determination not only for their own citizens but for  
4       the rest of the nation?

5               MR. MURRAY: Because Article II gives them  
6       the power to -- to appoint their own electors as they  
7       see fit. But if they're going to use a federal  
8       constitutional qualification as a ballot access  
9       determinant, then it's creating a federal  
10      constitutional question that then this Court decides  
11      and other courts, other states -- if this Court  
12      affirms the decision below, determining that  
13      President Trump is ineligible to be president, other  
14      states would still have to determine what effect that  
15      would have on their own state's law and state  
16      procedure --

17             JUSTICE BARRETT: Well, if we --

18             MR. MURRAY: -- in terms of how --

19             JUSTICE BARRETT: If we affirmed and we  
20      said he was ineligible to be president, yes, maybe  
21      some states would say well, you know, we're going to  
22      keep him on the ballot anyway but, I mean, really  
23      it's going to have, as Justice Kagan said, the effect  
24      of Colorado deciding. And it's true, I just want to  
25      push back a little bit on well, it's a national thing

1           because this Court will decide it.

2                        You say that we have to review Colorado's  
3           factual record with clear error as the standard of  
4           review. So we would be stuck. The first mover state  
5           here, Colorado, we're stuck with that record. And,  
6           you know, I -- I -- I don't want to get into whether  
7           the -- the record -- I mean, maybe the record is  
8           great, but what if the record wasn't? I mean, what  
9           if it wasn't a fulsome record? What if, you know,  
10          the hearsay rules are, you know, one-offs or what if  
11          this is just made by the secretary of state without  
12          much process at all?

13                      How do we review those factual findings?  
14          Why should clear error review apply and doesn't that  
15          buckle back into this point that Justice Kagan was  
16          making, you know, that -- that we made with Mr.  
17          Mitchell too that it just doesn't seem like a state  
18          call?

19                      MR. MURRAY: Three points, Your Honor. The  
20          first is that ordinarily, of course this Court  
21          reviews factual findings for clear error but  
22          President Trump made the point in -- in his reply  
23          brief that sometimes on constitutional questions that  
24          require a uniform resolution, this Court can do more,  
25          something more like a Bose Corp. Style independent

1 review of the factual record.

2 And we would have no objection to that,  
3 given that the record here -- really -- really the  
4 facts that are disputed here are incredibly narrow.  
5 The essence of our case is President Trump's own  
6 statements that he made in public view for all to  
7 see.

8 JUSTICE BARRETT: But then that's saying  
9 that in this context, which is very high stakes, if  
10 we review the facts essentially de novo you want us  
11 all to just watch the video of the ellipse and then  
12 make a decision without any deference to or guidance  
13 from lower court fact finding? That's unusual.

14 MR. MURRAY: Well, ultimately President  
15 Trump himself urges this Court to decide the merits  
16 of his eligibility on the factual record here at page  
17 2 of his brief. He's never at any point in this  
18 proceeding suggested there was something else that  
19 needed to be in the factual record, any other  
20 witnesses that he wanted to call to present his case  
21 and, again, the essence of our case is his own  
22 statements.

23 And -- and -- and in particular, his own  
24 videotaped statements on the ellipse --

25 JUSTICE GORSUCH: Mr. Murray, just to

1 circle back -- I'm sorry to interrupt. But I  
2 wanted -- before we left it, I wanted to circle back  
3 to where Justice Kagan was.

4 Do you agree that the state's powers here  
5 over its ballot for federal officer election have to  
6 come from some constitutional authority?

7 MR. MURRAY: Members of this Court have  
8 disagreed about that.

9 JUSTICE GORSUCH: I'm asking you.

10 (Laughter.)

11 MR. MURRAY: The -- the majority of this  
12 Court has said that those powers come from Article  
13 II. But we think that the result is the same,  
14 whether the Court locates it in Article II or in a  
15 reserved power under the Tenth Amendment.

16 JUSTICE GORSUCH: Okay. But you accept  
17 that this Court has held, you're not contesting this  
18 or asking us to revisit that decision in Thornton or  
19 Term Limits or whatever you want to call it that has  
20 to come from some federal constitutional authority?

21 MR. MURRAY: No, we are not, Your Honor.

22 JUSTICE GORSUCH: Okay. And -- and -- and  
23 here we're not talking about the Qualifications  
24 Clause, right? Nobody's talking about whether he's  
25 35 years old or a natural born, whatever, right, not



1 at issue, okay.

2 We're talking about something under the  
3 Fourteenth Amendment and Section 3, so that's where  
4 you have to find your authority, right?

5 MR. MURRAY: We find our authority in  
6 Article II in state's plenary power to run their  
7 elections.

8 JUSTICE GORSUCH: Federal election -- but  
9 this is for a federal office. It has to come from  
10 the Constitution. And you're seeking to enforce  
11 Section 3?

12 MR. MURRAY: We're suggesting that in their  
13 broad power to determine the -- to select  
14 presidential electors in any manner they see fit,  
15 they can take account of Section 3 and apply Section  
16 3 --

17 JUSTICE GORSUCH: Could they do it without  
18 Section 3? Could they disqualify somebody for -- you  
19 know, on whatever basis they wanted outside of the  
20 Qualifications Clause?

21 MR. MURRAY: That would run into Term  
22 Limits.

23 JUSTICE GORSUCH: Yeah, I would think so.  
24 So it has to come back to Section 3. And if that's  
25 true, how does that work given that Section 3 talks

1 about holding office, not who may run for office. It  
2 was a point Mr. Mitchell was making earlier and I  
3 just wanted to give you a chance to respond to it  
4 because it seems to me that -- that, you know, that  
5 you're asking to enforce in an election context a  
6 provision of the Constitution that speaks to holding  
7 an office. So it's different than the Qualifications  
8 Clause, which is all about who can run and then  
9 serve, yeah.

10 MR. MURRAY: I -- I don't know that it is  
11 different.

12 JUSTICE GORSUCH: Okay.

13 MR. MURRAY: Other qualifications for  
14 office similarly talk about eligibility for the  
15 office. There's nothing unconstitutional about a  
16 30-year-old trying to get on the ballot.

17 JUSTICE GORSUCH: Except for this  
18 disability can be removed, right, under Section 3.  
19 That's what's different about it. So, thoughts on  
20 that?

21 MR. MURRAY: Well -- well, the fact that  
22 there's an extraordinary provision for removing the  
23 disability does not negate the fact that the  
24 disability exists today and it's existed since  
25 January 6th, 2021 when President Trump engaged in

1           insurrection against the Constitution.

2                         JUSTICE GORSUCH:   So were his actions after  
3           that date, before he left office, ultra vires, is  
4           that -- is that where your theory leads?

5                         MR. MURRAY:   Well, that would raise the  
6           separate question of whether one can collaterally  
7           attack the actions of a de facto officer.  And that  
8           may be the one place in Griffin's case's at the very  
9           end where we would agree which is -- which is when  
10          Justice Chase said I've talked to my Supreme Court  
11          colleagues and we unanimously agree that you can't  
12          collaterally attack all official actions of an  
13          officer who's holding -- who's, in fact, holding the  
14          position.

15                        JUSTICE GORSUCH:  All right.  But just  
16          circle back to where we started, right?  This is  
17          Section 3.  Your authority has to come from there.  
18          And it's about holding office and it's a particular  
19          kind of disability that can be removed by Congress  
20          and it's the only one like that, right?  They can't  
21          remove age or citizenship.

22                        How should that inform our thoughts about a  
23          state's efforts to regulate the ballot for a federal  
24          office?

25                        MR. MURRAY:   The colloquy that my friend

1 had with Justice Alito earlier, I think is  
2 illustrative here. The fact that Congress has an  
3 extraordinary removal power does not negate that the  
4 disability exists today and exists indefinitely into  
5 the future, much like the fact that Congress -- that  
6 the president can pardon somebody for criminal  
7 conviction doesn't make that conviction somehow --  
8 somehow contingent.

9 And -- and I would note that if President  
10 Trump were appointed to an office today, if he were  
11 appointed as a state judge, he could not hold that  
12 office, which shows that the disability exists now.

13 And -- and the fact that Congress has a  
14 power to remove the disability doesn't negate the  
15 present qualification, nor does it implicitly bestow  
16 on President Trump a constitutional right to run for  
17 offices that he cannot hold in violation of state law  
18 and state procedure under Article II.

19 JUSTICE SOTOMAYOR: In fact, there was a --  
20 a congressional action to permit confederate officers  
21 or people who supported the confederacy to hold  
22 office before the Fourteenth Amendment, correct? So  
23 there must have been a thought that there was a -- a  
24 preexisting disqualification.

25 MR. MURRAY: That's absolutely right.

1 There were a flood of amnesty requests, even before  
2 Section 3 went into effect because everybody  
3 understood at the time that those people would be  
4 disqualified the moment that Section 3 was enacted  
5 forever, unless they received amnesty.

6 CHIEF JUSTICE ROBERTS: Counsel, what do  
7 you do with the -- what would seem to me to be plain  
8 consequences of your position. If -- if Colorado's  
9 position is upheld, surely there will be  
10 disqualification proceedings on the other side. And  
11 some of those will succeed.

12 Some of them will have different standards  
13 of proof. Some of them will have different rules  
14 about evidence. Maybe the Senate report won't be  
15 accepted. In others because it's hearsay. Maybe  
16 it's beyond a reasonable doubt, whatever.

17 In very quick order, I would expect,  
18 although my predictions never have been correct --  
19 (Laughter.)

20 CHIEF JUSTICE ROBERTS: -- I would expect  
21 that, you know, a goodly number of states will say,  
22 whoever the democratic candidate is, you're off the  
23 ballot. And others for the Republican candidate,  
24 you're off the ballot. It'll come down to just a  
25 handful of states that are going to decide the

1 presidential election. That's a pretty daunting  
2 consequence.

3 MR. MURRAY: Well, certainly, Your Honor,  
4 the fact that there are potential frivolous  
5 applications of a constitutional provision isn't a  
6 reason --

7 CHIEF JUSTICE ROBERTS: Well now, hold on.  
8 You might think they're frivolous but the people who  
9 are bringing them may not think they're frivolous.  
10 Insurrection is a broad, broad term. And if there's  
11 some debate about it, I suppose that will go into the  
12 decision and then eventually, what, we would be  
13 deciding whether it was an insurrection when one  
14 president did something as opposed to when somebody  
15 else did something else? And what do we do? Do we  
16 wait until near the time of counting the ballots and  
17 sort of go through which states are valid and which  
18 states aren't?

19 MR. MURRAY: There's a reason Section 3 has  
20 been dormant for 150 years. And it's because we  
21 haven't seen anything like January 6th since  
22 reconstruction.

23 Insurrection against the Constitution is  
24 something extraordinary. And --

25 CHIEF JUSTICE ROBERTS: It seems to me

1       you're avoiding the question, which is other states  
2       may have different views about what constitutes  
3       insurrection.

4               And now you're saying well, it's all right,  
5       because somebody, presumably us, are going to decide,  
6       well, they said they thought that was an insurrection  
7       but they were wrong. And maybe they thought it was  
8       right. And we'd have to develop rules for what  
9       constitutes an insurrection.

10              MR. MURRAY: Yes, Your Honor, just like  
11       this Court interprets other constitutional  
12       provisions, this Court can make clear that an  
13       insurrection against the Constitution is something  
14       extraordinary.

15              And, in particular, it really requires a  
16       concerted group effort to resist through violence,  
17       not some ordinary application of state or federal  
18       law, but the functions mandated by the Constitution  
19       itself.

20              JUSTICE KAVANAUGH: On -- on your point it  
21       that it's been dormant for 155 years, I think the  
22       other side would say the reason for that is Chief  
23       Justice Chase's opinion in 1869 in Griffin's Case to  
24       start, which says that Congress has the authority  
25       here, not the states. That's followed up by the

1 Enforcement Act of 1870, in which Congress acts upon  
2 that understanding, which is followed -- and there's  
3 no history contrary in that period, as Justice Thomas  
4 pointed out, there's no history contrary in all the  
5 years leading up to this of states exercising such  
6 authority.

7 I think the reason it's been dormant is  
8 because there's been a settled understanding that  
9 Chief Justice Chase, even if not right in every  
10 detail, was essentially right, and the branches of  
11 the government have acted under that settled  
12 understanding for 155 years.

13 And Congress can change that. And Congress  
14 does have Section 2383, of course, the Insurrection  
15 Act, a criminal statute. But Congress could change  
16 it, but they have not, in the 155 years, in relevant  
17 respects for what you want here today, at least.

18 MR. MURRAY: No, Justice Kavanaugh. The  
19 reason why it's been dormant is because, by 1876,  
20 essentially all former Confederates had received  
21 amnesty. And we haven't seen anything like an  
22 insurrection since then.

23 I'd like to address your point --

24 JUSTICE ALITO: Well, you know, we didn't  
25 --



1 JUSTICE SOTOMAYOR: Can I go to that  
2 point --

3 JUSTICE ALITO: After the --

4 JUSTICE SOTOMAYOR: Sorry.

5 CHIEF JUSTICE ROBERTS: Justice Alito.

6 JUSTICE ALITO: I don't know how much we  
7 can infer from the fact that we haven't seen anything  
8 like this before and therefore conclude that we're --  
9 we're not going to see something in the future.

10 From the time of the impeachment of  
11 President Johnson until the impeachment of President  
12 Clinton more than 100 years later, there were no  
13 impeachments of presidents. And in fairly short  
14 order, over the last couple of decades, we've had  
15 three. So I don't know how much you can infer from  
16 that.

17 MR. MURRAY: Certainly, but if this Court  
18 affirms, this Court can write an opinion that  
19 emphasizes how extraordinary insurrection against the  
20 Constitution is and how rare that is because it  
21 requires an assault, not just on the application of  
22 law, but on constitutionally mandated functions  
23 themselves, like we saw on January 6th, a coordinated  
24 attempt to -- to disrupt a function mandated by the  
25 Twelfth Amendment and essential to constitutional

1 transfer of presidential power.

2 JUSTICE ALITO: Well, let me ask you a  
3 question about whether the power that you've  
4 described as plenary really is plenary. Suppose that  
5 the outcome of an election for president comes down  
6 to the vote of a single state, how the electors of  
7 the vote of a single state are going to vote. And  
8 suppose that candidate A gets a majority of the votes  
9 in that state, but the legislature really doesn't  
10 like candidate A, thinks candidate A is an  
11 insurrectionist, so the legislature then passes a law  
12 ordering its electors to vote for the other  
13 candidate.

14 Do you think the state has that power?

15 MR. MURRAY: I think there may be  
16 principles that come into play in terms of after the  
17 people have voted, that Congress -- that the state  
18 can't change the rules midstream. I'm not sure  
19 because I'm not aware of this Court addressing it.  
20 And, certainly, as the --

21 JUSTICE ALITO: Well, let's change it so  
22 that it's not after the election; it's three days  
23 before the election based on the fact that the polls  
24 in that state look bad. Can they do it?

25 MR. MURRAY: I think they probably could

1 under this Court's decision in Chiafalo, where this  
2 Court emphasized that, for much of American history,  
3 state legislatures picked their -- their own electors  
4 and assigned their own electors themselves. But, of  
5 course, that would be much more extraordinary than  
6 what we have here, which is simple application of  
7 normal state ballot access principles to say that  
8 we're only going to put on the ballot an individual  
9 who is qualified to assume the office.

10 JUSTICE ALITO: Can I ask you again the  
11 question that Justice Gorsuch asked, and you -- to  
12 which you responded by citing the de facto officer  
13 doctrine. But suppose we look at that going forward,  
14 rather than judging the validity of an act committed  
15 between the time when a president allegedly engages  
16 in an insurrection and the time when the president  
17 leaves office.

18 During that interim period, would it be  
19 lawful for military commanders and other officers to  
20 disobey orders of the -- of the -- the president in  
21 question?

22 MR. MURRAY: I'm not sure that anything  
23 gives military officers the authority to adjudicate  
24 effectively the -- the -- the legality of the  
25 presidency.

1 JUSTICE GORSUCH: Why -- why -- why -- why  
2 not? You say he's disqualified from the moment it  
3 happens. Now, I understand the de facto officer  
4 doctrine might be used to prohibit people from  
5 seeking judicial remedies for decisions that take  
6 place after the date he was disqualified.

7 But if he is, in fact, disqualified, from  
8 that moment, why would anybody have to obey a  
9 direction from him?

10 MR. MURRAY: Well, ultimately, there still  
11 has to be some kind of procedure in place to  
12 adjudicate the disqualification. Certainly, Congress  
13 could impeach a sitting president, but that's the  
14 only remedy I'm aware of that exists for -- for  
15 removal or otherwise negating the authority of a  
16 sitting president.

17 JUSTICE GORSUCH: Why?

18 MR. MURRAY: Well, the --

19 JUSTICE GORSUCH: On what theory? Because  
20 Section 3 speaks about disqualification from holding  
21 office. You say he is disqualified from holding  
22 office from the moment it happens.

23 MR. MURRAY: Correct. But, nevertheless --

24 JUSTICE GORSUCH: So -- so it operates --  
25 you say there's no -- no legislation necessary. I

1 thought that was the whole theory of your case. And  
2 no procedure necessary -- it happens automatically.

3 MR. MURRAY: Well, certainly, you need a  
4 procedure in order to have any remedy to enforce the  
5 disqualification, which is different --

6 JUSTICE GORSUCH: I -- that's a whole  
7 separate question. That's the de facto -- doesn't  
8 work here. Okay? Put that aside.

9 He's disqualified from the moment.  
10 Self-executing, done. And I would think that a  
11 person who would receive a direction from that  
12 person -- president, former president, in your view,  
13 would be free to act as he or she wishes without  
14 regard to that individual.

15 MR. MURRAY: I don't think so because I  
16 think, again, the --

17 JUSTICE GORSUCH: Why?

18 MR. MURRAY: -- de facto officer doctrine  
19 would nevertheless come into play to say this is the  
20 --

21 JUSTICE GORSUCH: No, de facto -- that --  
22 that doesn't work, Mr. Murray, because de facto  
23 officer is to ratify the conduct that's done  
24 afterwards and -- and insulate it from judicial  
25 review. Put that aside. I'm not going to say it

1           again. Put it aside, okay?

2                       I think Justice Alito is asking a very  
3           different question and a more pointed one and a more  
4           difficult one for you, I understand, but I think it  
5           deserves an answer.

6                       On your theory, would anything compel a  
7           lower official to obey an order from, in your view,  
8           the former president?

9                       MR. MURRAY: I'm imagining a situation  
10          where, for example, a former president was -- you  
11          know, a -- a president was elected and they were 25  
12          and they were ineligible to hold office --

13                      JUSTICE GORSUCH: No. No.

14                      MR. MURRAY: -- but, nevertheless, they  
15          were put into that office --

16                      JUSTICE GORSUCH: No. No. We're talking  
17          about Section 3.

18                      MR. MURRAY: And --

19                      JUSTICE GORSUCH: Please don't change the  
20          hypothetical, okay?

21                      MR. MURRAY: I'm --

22                      JUSTICE GORSUCH: Please don't change the  
23          hypothetical. I know. I like doing it too, but  
24          please don't do it, okay?

25                      MR. MURRAY: Well, the -- the point I'm

1       trying to make is --

2                   JUSTICE GORSUCH:  He's disqualified from  
3       the moment he committed an insurrection, whoever it  
4       is, which -- whichever party.  It -- that happens.  
5       Boom.  It happened.

6                   What would compel -- and I'm not going to  
7       say it again, so just try and answer the question.  
8       If you don't want to answer it, fair enough, we'll  
9       move on.  What would compel a lower official to obey  
10      an order from that individual?

11                  MR. MURRAY:  Because, ultimately, we have  
12      -- we have statutes and rules requiring chains of  
13      command.  The person is in the office, and even if  
14      they don't have the authority to hold the office, the  
15      only way to get someone out of the Office of the  
16      Presidency is impeachment, and so I think if you  
17      interpreted Section 3 in light of other provisions in  
18      the Constitution like impeachment, while they hold  
19      office, impeachment's the only way to validate that  
20      they don't have the ability to hold that office and  
21      should be removed.

22                  JUSTICE JACKSON:  Mr. Murray, can I -- oh.  
23      Can I just ask you about something Justice Kagan  
24      brought up earlier, which is the concern about  
25      uniformity and the lack thereof if states are

1 permitted to enforce Section 3 in presidential  
2 elections.

3 And I guess I -- I didn't really understand  
4 your argument or your response to her about that.

5 MR. MURRAY: Well, certainly if Congress is  
6 concerned about uniformity, they can provide for  
7 legislation and they can preempt state legislation.

8 JUSTICE JACKSON: Yes --

9 MR. MURRAY: But --

10 JUSTICE JACKSON: -- but you say that's not  
11 necessary.

12 MR. MURRAY: But it's not necessary in the  
13 absence of federal enforcement legislation. These  
14 questions come up to this Court in the same way that  
15 other federal questions come up to this Court, which  
16 is that a state adjudicates them. If the state  
17 hasn't provided sufficient process to comport with  
18 due process and notice and opportunity to be heard,  
19 one can make those challenges. But assuming, as  
20 here, we have a full evidentiary record, an  
21 opportunity to present evidence --

22 JUSTICE JACKSON: No, I understand -- I  
23 understand that we could resolve it so that we have a  
24 uniform ultimate ruling on it.

25 I guess my question is why the Framers



1 would have designed a system that would -- could  
2 result in interim disuniformity in this way where we  
3 have elections pending and different states suddenly  
4 saying you're eligible, you're not, on the basis of  
5 this kind of thing?

6 MR. MURRAY: Well, what they were concerned  
7 most about was ensuring that insurrectionists and  
8 rebels don't hold office. And so once one  
9 understands the sort of imperative that they had to  
10 ensure that oath-breakers wouldn't take office, it  
11 would be a little bit odd to say that states can't  
12 enforce it, that only the federal government can  
13 enforce it, and that Congress can essentially rip the  
14 heart out of Section 3 by a simple majority just by  
15 failing to pass enforcement legislation.

16 Federalism creates redundancy. And here  
17 the fact that states have the ability to enforce it  
18 as well, absent federal preemption, provides an  
19 additional layer of safeguards around what really  
20 Section 3 --

21 JUSTICE JACKSON: Yeah, and I'll --

22 MR. MURRAY: -- supports.

23 JUSTICE JACKSON: -- ask you about the  
24 history when I get a chance again. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Justice Thomas?

2 Justice Alito?

3 JUSTICE ALITO: Suppose there's a country  
4 that proclaims again and again and again that the  
5 United States is its biggest enemy and suppose that  
6 the president of the United States for diplomatic  
7 reasons think that it's in the best interests of the  
8 United States to provide funds or release funds so  
9 that they can be used by that -- by that country.

10 Could a state determine that that person  
11 has given aid and comfort to the enemy and,  
12 therefore, keep that person off the ballot?

13 MR. MURRAY: No, Your Honor. This Court  
14 has never interpreted the aid and comfort language,  
15 which also is present in the Treason Clause, but  
16 commentators have suggested -- it's been rarely  
17 applied because treason prosecutions are so rare, but  
18 commentators have suggested that, first of all, that  
19 aid and comfort really only applies in the context of  
20 a declared war or at least an adversarial  
21 relationship where there is, in fact, a war between  
22 two countries.

23 And, second, the intent standard would do a  
24 lot of work there because, under Section 3, whatever  
25 the underlying conduct is, engaging in insurrection

1 or aid and comfort, has to be done with the intent to  
2 further the unlawful purpose of the insurrection or  
3 -- or to aid the enemies in their pursuit of war  
4 against the United States.

5 JUSTICE ALITO: Let me come back to the  
6 question of what we would do if we were -- if  
7 different states had adjudicated the question of  
8 whether former President Trump is an insurrectionist  
9 using a different record, different rulings on the  
10 admissibility of evidence, perhaps different  
11 standards of proof. Then what would we do?

12 MR. MURRAY: Ultimately, this Court would  
13 -- first of all, if there were deficiencies in the  
14 record, the Court could either refuse to hear the  
15 case or it could decide on the basis of deficiencies  
16 of the record.

17 JUSTICE ALITO: Well, would we have to  
18 decide what is the appropriate rule of evidence that  
19 should be applied in this -- in this case? Would we  
20 have to decide what is the appropriate standard of  
21 proof? Would we give any deference to these findings  
22 by state court judges, some of whom may be elected?  
23 Would we have to have our own trial?

24 MR. MURRAY: No, Your Honor. This Court  
25 takes the evidentiary record as -- as it's given.

1 And, here, we have an evidentiary record that all the  
2 parties agree is sufficient for a decision in -- in  
3 this case.

4 And then, as -- as I discussed earlier,  
5 there's a possibility of a Bose Corp. independent  
6 review of the facts, but, ultimately, what we have  
7 here is an insurrection that was incited in plain  
8 sight for all to see.

9 JUSTICE ALITO: Yeah, but you're really not  
10 answering my question. It's not helpful if you don't  
11 do that.

12 We have -- suppose we have two different  
13 records, two different bodies of evidence, two  
14 different rulings on questions of admissibility, two  
15 different standards of proof, two different sets of  
16 fact findings by two different judges or maybe  
17 multiple judges in multiple states.

18 Then what do we do?

19 MR. MURRAY: Well, first, this Court would  
20 set the legal standard, and then it would decide  
21 which view of the record was -- was correct, I think,  
22 under that -- if -- if this Court had two cases --

23 JUSTICE ALITO: Which view of -- which view  
24 of what record?

25 MR. MURRAY: If this Court --

1 JUSTICE ALITO: Of which record?

2 MR. MURRAY: If this Court had two cases  
3 before it and both of the records were sufficient  
4 insofar as both sides had the opportunity to present  
5 their case and -- and the essential facts in the  
6 record that everyone agreed was sufficient for a  
7 decision, then this Court would have to look at  
8 the -- the evidence -- the evidence presented and  
9 decide which -- which holding was correct and then  
10 decide that issue for the country.

11 And, certainly, here, when -- when there is  
12 a complete record, lower courts then will be applying  
13 that decision and I think it's unlikely that any  
14 court would say we're going to reach a different  
15 decision than the U.S. Supreme Court did,  
16 particularly if the Court relies on the facts, the  
17 indisputable facts of what President Trump said on  
18 video and in his Twitter feed, which is really the  
19 essence of our case here.

20 JUSTICE ALITO: Well, you had an expert --  
21 just take -- let's just take that example -- an  
22 expert testify about the meaning of what President  
23 Trump said. But do you -- do you think it's possible  
24 that a different state court would apply Daubert  
25 differently and say that this person should not be

1 allowed to express an expert opinion on that  
2 question? Do you think that's beyond the realm of  
3 imagination?

4 MR. MURRAY: Not -- not at all, Your Honor.  
5 Two points on that. Number one, President Trump  
6 didn't appeal the admission of that evidence in this  
7 case, but, number two, you know, the second point is  
8 that Professor Simi really -- he didn't opine on the  
9 meaning of President Trump's words.

10 He opined on the effect that those words  
11 had on violent extremists, and the essence of his  
12 testimony was built around videotaped statements of  
13 President Trump himself encouraging, inciting, and  
14 praising political violence when --

15 JUSTICE ALITO: Well, I -- I'm not taking a  
16 position one way or the other about whether the  
17 expert's testimony should have been admitted or  
18 anything like that or the meaning of President  
19 Trump's words.

20 I'm just trying to get you to grapple with  
21 what some people have seen as the consequences of the  
22 argument that you're advancing, which is that there  
23 will be conflicts in decisions among the states, that  
24 different states will disqualify different  
25 candidates, but I -- I'm not getting a whole lot of

1 help from you about how this would not be an  
2 unmanageable situation.

3 MR. MURRAY: If this Court writes an  
4 opinion affirming on the basis of the indisputable  
5 facts of what President Trump said on January 6th and  
6 in the weeks leading up to it and his virtual  
7 confession on Twitter after the fact, then it would  
8 be reversible error for any other state to conclude  
9 otherwise on that question of federal law, or -- or,  
10 at the very least, this Court could address that when  
11 those issues come up, but it seems unlikely.

12 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

13 JUSTICE SOTOMAYOR: There's two sides to --  
14 to the other side's position. The first is that it's  
15 not self-executing. I want to put that aside.

16 Deal with if we were to hold that states  
17 don't have the right to enforce or create a cause of  
18 action in this situation. They want the flip to say  
19 that nobody -- even Congress can't do it because they  
20 need implementing legislation. Address that  
21 argument.

22 MR. MURRAY: That -- that --

23 JUSTICE SOTOMAYOR: Because assume we rule  
24 that states don't have it. What would you have us  
25 say for the other side of the argument? One of my

1 colleagues says you need or what -- what not -- not  
2 then Chief Justice but Circuit Court Justice Chase  
3 said, which is that somehow you need implementing  
4 legislation, like the 1870 Act.

5 You seem to say that's not true because  
6 they could decide not to seek the -- see the  
7 candidate, et cetera. So I don't know that  
8 legislation's necessary.

9 MR. MURRAY: And, certainly, there are  
10 historical examples of member -- members of Congress  
11 under their Article -- under Congress's Article I  
12 power to judge the qualifications of its members, of  
13 members of Congress refusing to seat ineligible  
14 candidates under Section 3 who have won election.

15 In the context of the presidency, I think  
16 it would create a number of really difficult issues  
17 if the Court says there's no procedure for  
18 determining President Trump's eligibility until after  
19 the election.

20 And then what happens when members of  
21 Congress on January 6th, when they count the  
22 electoral votes, say we're not going to count  
23 electoral votes cast for President Trump because he's  
24 disqualified under Section 3 under the Electoral  
25 Count Reform Act.



1           A number of the amicus briefs, such as  
2           those of Professor Ginsburg, Hassan, and Foley, have  
3           made the point that that is kind of a  
4           disenfranchisement and constitutional crisis in the  
5           making and is all the more reason to address those  
6           issues now in a judicial process on a full  
7           evidentiary record so that everybody can have  
8           certainty on those issues before they go to the  
9           polls.

10           CHIEF JUSTICE ROBERTS: Justice Kagan?

11           JUSTICE KAGAN: Mr. Murray, you talked --  
12           you relied on the states' extensive powers under the  
13           Electors Clause. You talked about the states having  
14           a role in enacting, you know, typical ballot access  
15           provisions.

16           I -- I guess, you know, it strikes me that  
17           we've put some limits on that. And I'll just give  
18           you Anderson versus Celebrezze as an example of that,  
19           where we said, in fact, states are limited in who  
20           they can take off a ballot, and that was a case about  
21           minor party candidates, but the reason was that one  
22           state's decision to take a candidate off the ballot  
23           affects everybody else's rights.

24           And we talked about the pervasive national  
25           interest in the selection of candidates for national

1 office. We talked about how an individual state's  
2 decision would have an impact beyond its own borders.  
3 So, if that goes for minor political party  
4 candidates, why doesn't it go a fortiori for the  
5 situation in this case?

6 MR. MURRAY: Well, certainly,  
7 constitutional principles like Section 3 apply to  
8 everybody, but in Celebrezze, the issue there was a  
9 First Amendment question. And, certainly, there's no  
10 doubt that states' exercise of their power under  
11 Article II is constrained by First Amendment  
12 principles.

13 And -- and in -- in that case, the -- the  
14 state law deadlines for when a minor party candidate  
15 got on the ballot just came too soon to be reactive  
16 to what major parties had done and, therefore, risked  
17 disenfranchising people who were disillusioned with  
18 who the major parties had picked and it raised First  
19 Amendment problems. Here, there's no real First  
20 Amendment problem and -- and a state is just trying  
21 to enforce an existing qualification that's baked  
22 into our constitutional fabric.

23 JUSTICE KAGAN: Yeah, I -- I guess, you  
24 know, it -- it did come up in the First Amendment,  
25 but there's a broader principle there and it's a

1 broader principle about who has power over certain  
2 things in our federal system, and, you know, within  
3 our federal system, states have great power over many  
4 different areas. But that there's some broader  
5 principle about that there are certain national  
6 questions that -- that -- that -- that, you know,  
7 states -- where states are not the repository of  
8 authority. And I took a lot -- First Amendment, not  
9 First Amendment -- a lot of Anderson's reasoning is  
10 really about that. Like, what's a state doing  
11 deciding who gets to -- who -- other citizens get to  
12 vote for for president?

13 MR. MURRAY: Colorado is not deciding who  
14 other states get to vote for for president. It's  
15 deciding how to assign its own electors under its  
16 Article II power. And the Constitution grants them  
17 that broad power as --

18 JUSTICE KAGAN: Well, but the effect of  
19 that is obvious, yes?

20 MR. MURRAY: No, Your Honor, because  
21 different states can have different procedures. Some  
22 states may allow insurrectionists to be on the  
23 ballot. They may say we're not looking past the  
24 papers; we're not going to look into federal  
25 constitutional questions. It's the sort of -- even

1 in this election cycle, there are -- there are  
2 candidates who are on the ballot in some states even  
3 though they're not natural-born citizens and off the  
4 ballot in other states. And that's just a function  
5 of states' power to enforce -- to preserve their own  
6 electors and avoid disenfranchisement of their own  
7 citizens.

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Gorsuch?

10 JUSTICE GORSUCH: You haven't had a chance  
11 to talk about the officer point, and I just want to  
12 give you an opportunity to do that. Mr. Mitchell  
13 makes the argument that particularly in the  
14 Commissions Clause, for example, all officers are to  
15 be commissioned by the president, seems to be  
16 all-encompassing, that language. And I'm curious to  
17 your response to that.

18 And along the way, if you would, I -- I --  
19 I poked a little bit at the difference between  
20 "office" and "officer" in the earlier discussion, you  
21 may recall, but I -- I think one point your -- your  
22 friends on the other side would make is, well, that's  
23 just how the Constitution uses those terms. So, for  
24 example, we know that the President Pro Tem of the  
25 Senate and the Speaker of the House are officers of

1 the United States because the Constitution says they  
2 are, but we also know that they don't hold an office  
3 under the United States because of the  
4 Incompatibility Clause that says they can't.

5 So maybe the Constitution to us today, to a  
6 lay reader, might look a little odd in distinguishing  
7 between "office" and "officer," not prepositions,  
8 nouns, a distinction. But maybe that's exactly how  
9 it works. Thoughts?

10 MR. MURRAY: Well, I'd start with the idea  
11 that the meaning of "officer" in the 1780s was the  
12 same meaning that it has today, which is a person who  
13 holds an office. And, certainly, in particular  
14 contexts like the Commissions Clause, it appears that  
15 that's referring -- you know, that that is referring  
16 to a narrower class of officers because we know that  
17 there are --

18 JUSTICE GORSUCH: Except it says "all."

19 MR. MURRAY: Well, we know that there are  
20 classes of officers, like the President Pro Tem, who  
21 don't get their commissions from the President.

22 JUSTICE GORSUCH: Well, that's because the  
23 Constitution elsewhere says that.

24 MR. MURRAY: We know that the Appointments  
25 Clause refers to a class of officers who get their

1 appointment from the Constitution itself --

2 JUSTICE GORSUCH: Mm-hmm.

3 MR. MURRAY: -- rather than from  
4 presidential appointment. People who get their  
5 commissions from the president himself are not  
6 commissioned by the president. And so, if you read  
7 the Appointments Clause in line with the Commissions  
8 Clause, then the Commissions Clause is really talking  
9 about the president's power. If one needs a  
10 commission, it's the president who grants it.

11 But I think it's important to bring us back  
12 to Section 3 in particular because that was 80 years  
13 --

14 JUSTICE GORSUCH: But, before -- before we  
15 get to that, though, just the distinction between  
16 "office" and "officer," do you -- do you agree that  
17 the Constitution does make that distinction,  
18 particularly with respect to the Speaker and  
19 President Pro Tem?

20 MR. MURRAY: The Constitution makes that  
21 distinction, but the -- at least in Section 3, an  
22 officer of the United States is a person who swears  
23 an oath and holds an office. Now the President Pro  
24 Tem and the Speaker of the House, they don't swear a  
25 constitutional oath in that capacity. They swear a

1 constitutional oath if they are a senator or  
2 representative in Congress in that separate  
3 non-official capacity. But I think that narrow --

4 JUSTICE GORSUCH: You agree they are  
5 officers who don't hold an office?

6 MR. MURRAY: They're officers who -- who  
7 may hold an office but don't swear an oath under  
8 Article VI in that official capacity.

9 JUSTICE GORSUCH: Well, how can they hold  
10 an office under the Incompatibility Clause? It says  
11 they can't.

12 MR. MURRAY: Well, I think that's a fair  
13 point, and I think that that may be an exception to  
14 the general rule, and one might consider them perhaps  
15 officers of the House and Senate because they are  
16 appointed by those bodies and preside over those  
17 bodies.

18 JUSTICE GORSUCH: Well, no, the  
19 Constitution says they're officers of the United  
20 States -- so -- so there are some instances when you  
21 have an officer but not an office?

22 MR. MURRAY: Those may be an exceptional  
23 circumstance.

24 JUSTICE GORSUCH: Okay. Okay.

25 MR. MURRAY: But I would --

1 JUSTICE GORSUCH: Thank you.

2 MR. MURRAY: You're welcome.

3 CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

4 JUSTICE KAVANAUGH: The concerns of some  
5 questions have been the states having such power over  
6 a national office, other questions about different  
7 states having different standards of proof, and they  
8 seem underscored by this case, at least the  
9 dissenting opinion below. Justice Samour said, "I've  
10 been involved" -- "I've been involved in the justice  
11 system for 33 years now, and what took place here  
12 doesn't resemble anything I've seen in a courtroom"  
13 and then added, "What transpired in this litigation  
14 fell woefully short of what due process demands."

15 Now I don't know whether I agree or not.  
16 I'm not going to take a position on that, but the --  
17 the fact that someone's complaining not about the  
18 bottom-line conclusion but about the very processes  
19 that were used in the state would seem to -- and that  
20 that would be permitted, seems to underscore the  
21 concerns that have been raised about state power.  
22 Just wanted to give you a chance to address that  
23 because that was powerful language. Again, not  
24 disagreeing about the conclusion but about the very  
25 fairness of the process.



1                   MR. MURRAY: Yes, Your Honor, but that  
2                   language was, with respect to Justice Samour, just  
3                   not correct. President Trump had a five-day trial in  
4                   this case. He had the opportunity to call any  
5                   witnesses that he wanted. He had the opportunity to  
6                   cross-examine our witnesses. He had the opportunity  
7                   to testify if he wanted to testify. And, of course,  
8                   the process was expedited because ballot access  
9                   decisions are always on a fast schedule.

10                   But, in this whole case, from the trial  
11                   court all the way up to this Court, President Trump  
12                   has never identified a single process, other than  
13                   expert depositions, that he wanted to have that he  
14                   didn't get. He had the opportunity for fact witness  
15                   depositions. He had the opportunity to call  
16                   witnesses remotely. He didn't use all of his time at  
17                   trial. There was ample process here, and this is how  
18                   ballot access determinations in election cases are  
19                   decided all the time.

20                   JUSTICE KAVANAUGH: Okay. Second question,  
21                   some of the rhetoric of your position -- I don't  
22                   think it is your position, but some of the rhetoric  
23                   of your position seems to suggest, unless the states  
24                   can do this, no one can prevent insurrectionists from  
25                   holding federal office. But, obviously, Congress has

1 enacted statutes, including one still in effect.  
2 Section 2383 of Title 18 prohibits insurrection.  
3 It's a federal criminal statute. And if you're  
4 convicted of that, you are -- it says, "shall be  
5 disqualified" from holding any office.

6 And so there is a federal statute on the  
7 books, but President Trump has not been charged with  
8 that. So what -- what are we to make of that?

9 MR. MURRAY: Two things, Your Honor.  
10 Section 2383 was initially enacted about six years  
11 before Section 3. It wasn't meant as implementing  
12 legislation related to Section 3. And I would  
13 emphasize that by the time that Section 3 was  
14 ratified, most Confederates had already received a  
15 criminal pardon.

16 JUSTICE KAVANAUGH: I guess the question is  
17 --

18 MR. MURRAY: So --

19 JUSTICE KAVANAUGH: -- a little bit  
20 different, which is, if the concern you have, which I  
21 understand, is that insurrectionists should not be  
22 able to hold federal office, there is a tool to  
23 ensure that that does not happen, namely, federal  
24 prosecution of insurrectionists. And if convicted,  
25 Congress made clear you are automatically barred from

1 holding a federal office. That tool exists, you  
2 agree, and could be used but has not -- could be used  
3 against someone who committed insurrection. You  
4 agree with that?

5 MR. MURRAY: That's absolutely right, Your  
6 Honor. But I would just make the point that the  
7 Framers of Section 3 clearly understood that criminal  
8 prosecutions weren't sufficient because oftentimes  
9 insurrectionists go unpunished, as was the case in  
10 the Civil War, and that the least we can do is impose  
11 a civil disqualification penalty so that even if we  
12 don't have the stomach to throw someone in jail --

13 JUSTICE KAVANAUGH: Well, they had the quo  
14 warranto provision that was in effect then from 18 --  
15 1870 until 1948, but then, obviously, that dropped  
16 out and hasn't been seen as necessary since then.

17 Last question. In trying to figure out  
18 what Section 3 means and kind of to the extent it's  
19 elusive language or vague language, what about the  
20 idea that we should think about democracy, think  
21 about the right of the people to elect candidates of  
22 their choice, of letting the people decide? Because  
23 your position has the effect of disenfranchising  
24 voters to a significant degree.

25 And should that be something -- does that

1       come in when we think about should we read Section 3  
2       this way or read it that way? What about the  
3       background principle, if you agree, of democracy?

4               MR. MURRAY: I'd like to make three points  
5       on that, Justice Kavanaugh. The first is that  
6       constitutional safeguards are for the purpose of  
7       safeguarding our democracy not just for the next  
8       election cycle but for generations to come.

9               And, second, Section 3 is designed to  
10       protect our democracy in that very way. The Framers  
11       of Section 3 knew from painful experience that those  
12       who had violently broken their oaths to the  
13       Constitution couldn't be trusted to hold power again  
14       because they could dismantle our constitutional  
15       democracy from within, and so they created a  
16       democratic safety valve. President Trump can go ask  
17       Congress to give him amnesty by a two-thirds vote.  
18       But, unless he does that, our Constitution protects  
19       us from insurrectionists.

20               And, third, this case illustrates the  
21       danger of refusing to apply Section 3 as written  
22       because the reason we're here is that President Trump  
23       tried to disenfranchise 80 million Americans who  
24       voted against him. And the Constitution doesn't  
25       require that he be given another chance.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Barrett?

3 JUSTICE BARRETT: So the general rule is  
4 that, absent rare circumstances, state courts and  
5 federal courts share authorities. State courts have  
6 authority to enforce the Constitution, but there are  
7 certain limits to that, certain situations in which  
8 the Constitution itself preempts the state's ability  
9 to resolve constitutional questions.

10 And, you know, Tarble's Case is one. And  
11 you said earlier that once a president is elected,  
12 you accepted that a state couldn't do anything about  
13 that, like you couldn't -- Colorado couldn't enact  
14 its own say quo warranto provision and then use it to  
15 get the secretary of state or the president or anyone  
16 else out of office.

17 And I assume that's because of this  
18 principle of structural preemption. Am I right?

19 MR. MURRAY: Yes, Your Honor.

20 JUSTICE BARRETT: Okay. So I just want to  
21 clarify what that means for your argument. That  
22 means that your eggs are really in the basket of the  
23 Electors Clause, really in the Article I basket,  
24 because you're saying that even though all of the  
25 questions that people have been asking have suggested

1 that there's a problem with giving a single state the  
2 authority to render a decision that would have an  
3 effect on a national election, but you're saying that  
4 those structural concerns, which might otherwise lead  
5 to the kind of result that you would accept after  
6 someone is in office, are overcome by the Electors  
7 Clause?

8 MR. MURRAY: Absolutely. States run  
9 presidential elections. That's very clear from  
10 Article II. Once states have selected the electors  
11 and the electors have voted, states have no more  
12 power over the candidate who has been them nominated  
13 for president. But until then, the states do have  
14 the power to adjudicate those issues.

15 JUSTICE BARRETT: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Jackson?

17 JUSTICE JACKSON: So when I asked you  
18 earlier about the uniformity concern and the  
19 troubling potential disuniformity of having different  
20 states enforce Section 3 with respect to presidential  
21 elections, you seemed to point to history in a  
22 certain way. You said, I think, that the Framers  
23 actually envisioned states enforcing Section 3, at  
24 least in some circumstances where there were  
25 insurgents and Confederates.

1           And I guess in my view of the history, I'm  
2           wondering, really, whether presidential elections  
3           were such a circumstance, that the Framers actually  
4           envisioned states enforcing Section 3 with respect to  
5           presidential elections as opposed to senatorial  
6           elections, representatives, the sort of more local  
7           concerns.

8           So can you speak to the argument that  
9           really Section 3 was about preventing the south from  
10          rising again in the context of these sort of local  
11          elections as opposed to focusing on the Presidency?

12          MR. MURRAY: Well, two points on that,  
13          Justice Jackson. First is that, as I discussed  
14          earlier, there isn't the same history of states  
15          regulating ballot access at this time. So ballot  
16          access rules to restrict presidential candidates  
17          wouldn't have -- wouldn't have existed. They  
18          wouldn't have been raised one way or another.

19          JUSTICE JACKSON: Right, but --

20

21          MR. MURRAY: So --

22          JUSTICE JACKSON: -- I'm not making a --

23          MR. MURRAY: But --

24          JUSTICE JACKSON: -- distinction between  
25          ballot access and --

1 MR. MURRAY: Well --

2 JUSTICE JACKSON: -- anything else. Yeah.

3 MR. MURRAY: Understood.

4 JUSTICE JACKSON: Yeah.

5 MR. MURRAY: But the more broad point I  
6 want to make is what is very clear from the history  
7 is -- is that the Framers were concerned about  
8 charismatic rebels who might rise through the ranks  
9 up to and including the Presidency of the United  
10 States.

11 JUSTICE JACKSON: But then why didn't they  
12 put the word "President" in the very enumerated list  
13 in Section 3? The thing that really is troubling to  
14 me is I totally understand your argument, but they  
15 were listing people that were barred and president is  
16 not there.

17 And so I guess that just makes me worry  
18 that maybe they weren't focusing on the president  
19 and, for example, the fact that electors of vice  
20 president and president are there suggests that  
21 really what they thought was if we're worried about  
22 the charismatic person, we're going to bar  
23 insurrectionist electors and, therefore, that person  
24 is never going to rise?

25 MR. MURRAY: This came up in the debates in



1 Congress over Section 3 where Reverdy Johnson said  
2 why haven't you included president and vice president  
3 in the language? And Senator Moore responds: We  
4 have. Look at the language, "any office under the  
5 United States."

6 JUSTICE JACKSON: Yes. But doesn't that at  
7 least suggest ambiguity? And this sort of ties into  
8 Justice Kavanaugh's point.

9 In other words, we had a person right there  
10 at the time saying what I'm saying, the -- the  
11 language here doesn't seem to include president, why  
12 is that?

13 And so if there's an ambiguity, why would  
14 we construe it to -- as Justice Kavanaugh pointed  
15 out -- against democracy?

16 MR. MURRAY: Well, Reverdy Johnson came  
17 back and agreed with that reading. "Any office" is  
18 clear, the Constitution says about 20 times that the  
19 presidency in office --

20 JUSTICE JACKSON: No, I'm not going to  
21 that. So let me just say so your point is that  
22 there's no ambiguity with -- with having a list and  
23 not having "president" in it, with having a history  
24 that suggests that they were focused on local  
25 concerns in the south, with this conversation where

1 the legislators actually discussed what looked like  
2 an ambiguity, you're saying there is no ambiguity in  
3 Section 3?

4 MR. MURRAY: Let me take the point  
5 specifically about electors and senators, if I might,  
6 because I think that --

7 JUSTICE JACKSON: Yes.

8 MR. MURRAY: -- is important. Presidential  
9 electors were not covered because they don't hold an  
10 office. They vote. And this decision --

11 JUSTICE JACKSON: No, I'm talking about the  
12 barred office part of this. Right?

13 MR. MURRAY: Exactly. So the barred office  
14 is, if you want to include everybody, first, you have  
15 to specify presidential electors because they're not  
16 offices. So they wouldn't fall under any office.

17 Second of all, senators and representatives  
18 don't hold office either. The Constitution tells us  
19 that under the Incompatibility Clause and refers to  
20 them as holding seats, not offices.

21 And so you want to make sure that there is  
22 no doubt that senators and representatives are  
23 covered, given that the Constitution suggests  
24 otherwise, you have to include them.

25 The Constitution says the presidency holds

1 an office, as do members of this Court. And so other  
2 high offices, the president, vice president, members  
3 of this Court --

4 JUSTICE JACKSON: All right. Let me ask  
5 you -- I appreciate that argument.

6 If we think that the states can't enforce  
7 this provision for whatever reason in this context,  
8 in the presidential context, what happens next in  
9 this case? I mean, are -- is it done?

10 MR. MURRAY: If this Court concludes that  
11 Colorado did not have the authority to exclude  
12 President Trump from the presidential ballot on  
13 procedural grounds, I think -- I think this case  
14 would be done, but I think it could come back with a  
15 vengeance because ultimately members of Congress  
16 would -- may have to make the determination after a  
17 presidential election if President Trump wins about  
18 whether or not he is disqualified from office and  
19 whether to count votes cast for him under the  
20 Electoral Count Reform Act.

21 So President Trump himself urges this Court  
22 in the first few pages of his brief to resolve the  
23 issues on the merits, and we think that the Court  
24 should do so as well.

25 JUSTICE JACKSON: And there is no federal

1 litigation, you would say?

2 MR. MURRAY: Well, that's correct, because  
3 there is no federal procedure for deciding these  
4 issues, short of a criminal prosecution.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Ms. Stevenson. Ms. Anderson -- no it's  
8 Stevenson, I'm sorry.

9 ORAL ARGUMENT OF SHANNON W. STEVENSON

10 ON BEHALF OF RESPONDENT GRISWOLD

11 MS. STEVENSON: Mr. Chief Justice and may  
12 it please the Court:

13 Exercising its far-reaching powers under  
14 the Electors Clause Colorado's legislature  
15 specifically directed Colorado's courts to resolve  
16 any challenges to the listing of any candidate on the  
17 presidential primary ballot before Coloradans cast  
18 their votes.

19 Despite this law, Petitioner contends that  
20 Colorado must put him on the ballot because of the  
21 possibility there would be a super majority act of  
22 Congress to remove his legal disability.

23 Under this theory, Colorado and every other  
24 state would have to indulge this possibility, not  
25 just for the primary but through the general election

1 and up to the moment that an ineligible candidate was  
2 sworn into office.

3 Nothing in the Constitution strips the  
4 states of their power to direct presidential  
5 elections in this way. This case was handled capably  
6 and efficiently by the Colorado courts under a  
7 process that we have used to decide ballot challenges  
8 for more than a century. And as everyone agrees, the  
9 Court now has the record that it needs to resolve  
10 these important issues.

11 I welcome your questions.

12 JUSTICE THOMAS: Is there an express  
13 provision with respect to -- that defines what a  
14 qualified candidate is?

15 MS. STEVENSON: No, Your Honor. There's  
16 not an express provision. When the Colorado Supreme  
17 Court looked at this, they looked at the need to be  
18 qualified, plus the fact that the -- this part was --

19 JUSTICE THOMAS: So what does it say then,  
20 if it is not express? How do we get to this issue of  
21 qualified candidate?

22 MS. STEVENSON: What the court -- the  
23 Colorado Supreme Court did -- and let me, if I could  
24 have a standing objection, I do want to make the  
25 argument that you shouldn't review the Court's

1 statutory interpretation.

2 JUSTICE THOMAS: No, I'm just looking at  
3 the statute.

4 MS. STEVENSON: Right. What the Court did  
5 was to say that we have three important provisions in  
6 this section that show that candidates have to be  
7 qualified. First, it requires that under 12032(a)  
8 that a political party that wants to participate has  
9 to have a qualified candidate.

10 It also looked at the fact that the  
11 comparable write-in candidates also had to be  
12 qualified.

13 JUSTICE THOMAS: I know, but this isn't a  
14 write-in candidate. So we're actually talking about  
15 the participation of a political party, right? We're  
16 not talking about the participation of a candidate?

17 MS. STEVENSON: Sure. I think that the  
18 fact that the write-in candidate also had to be  
19 qualified was confirmatory of the fact that the  
20 political party candidate also had to be qualified,  
21 and it would be otherwise incongruous to read those  
22 things differently.

23 JUSTICE THOMAS: So how is Section 3 a  
24 qualification?

25 MS. STEVENSON: Under the reasoning of the

1 Colorado Supreme Court --

2 JUSTICE THOMAS: No, just on the -- on its  
3 face.

4 MS. STEVENSON: A -- a candidate must have,  
5 meet all the criteria for eligibility. And I don't  
6 perceive any distinction between being -- meeting the  
7 --

8 JUSTICE THOMAS: Okay.

9 MS. STEVENSON: -- eligibility criteria and  
10 not being disqualified. There's -- I just don't see  
11 any meaningful difference between those two things.

12 JUSTICE THOMAS: Thank you.

13 CHIEF JUSTICE ROBERTS: You -- you  
14 represent the secretary of state, right?

15 MS. STEVENSON: That's correct, Your Honor.

16 CHIEF JUSTICE ROBERTS: If you're the  
17 secretary of state somewhere and someone comes in and  
18 says I think this candidate should be disqualified,  
19 what -- what do you do next?

20 MS. STEVENSON: Administratively, and what  
21 the deputy elections director testified to at the  
22 hearing, is that if they obtain objective --  
23 objective knowable information, the secretary can act  
24 on that and inform the candidate --

25 CHIEF JUSTICE ROBERTS: So the secretary at

1 first decides whether that's objective, knowable  
2 information?

3 MS. STEVENSON: In some instances. In this  
4 case, the challenge was actually brought before the  
5 candidate's paperwork had even been submitted, and  
6 because there had already been a challenge asserted  
7 and -- and put into the proper court procedure, the  
8 secretary didn't even make that determination because  
9 she didn't have the paperwork.

10 CHIEF JUSTICE ROBERTS: Well, what -- in  
11 another case where that wasn't the procedure that was  
12 filed --

13 MS. STEVENSON: Sure.

14 CHIEF JUSTICE ROBERTS: -- somebody comes  
15 in, maybe they've got a stack of papers saying here's  
16 why I think this person is guilty of insurrection,  
17 it's not a big insurrection, something that, you  
18 know, happened down -- down the street, but they say  
19 this is still an insurrection, I don't know what the  
20 standard is for when it arises to that.

21 MS. STEVENSON: I think anything that even  
22 presented that level of controversy about one person  
23 having a set of facts that they said proved this  
24 would send this case to the 113 procedure that we use  
25 to resolve ballot challenge issues like that. And if



1 -- if another elector or the individual who brought  
2 the information didn't want to bring it, the  
3 secretary herself could bring that action.

4 CHIEF JUSTICE ROBERTS: Is there a  
5 provision for judicial review of secretary of state's  
6 action both in Colorado and perhaps what you know  
7 about other states?

8 MS. STEVENSON: Well, certainly in  
9 Colorado, if -- any action that the secretary takes  
10 that anyone wants to challenge, they can use the 113  
11 process to do so. I think states have varying  
12 degrees of that. There are certainly other states  
13 that allow versions of that, and then I don't know  
14 whether there are others that don't. I certainly  
15 know that there are some that do.

16 JUSTICE ALITO: I think we're told that  
17 there are states that do not provide for any judicial  
18 review of a secretary of state's determination. Is  
19 that incorrect?

20 MS. STEVENSON: No, no. I think that's  
21 right, and I think there are some states that  
22 actually have no mechanism, to come to, I think,  
23 Justice Kagan's point, or there are some states that  
24 don't have any mechanism to exclude a disqualified  
25 candidate from the ballot at all. And I do want to

1 speak to that for just a minute about the actual --

2 JUSTICE ALITO: Well, wouldn't that be  
3 constitutional? If the secretary of state's  
4 determination was final?

5 MS. STEVENSON: I think so, under Article  
6 II, the Electors Clause, Your Honor, that that be  
7 would be constitutional. States get very broad  
8 authority to determine how to run their presidential  
9 elections.

10 JUSTICE ALITO: Could a state enact a  
11 statute that provides different rules of evidence and  
12 different rules of procedure and different standards  
13 of proof for this type of proceeding than for other  
14 civil proceedings?

15 MS. STEVENSON: Yes, Your Honor, I believe  
16 it could under the same Electors Clause power.

17 JUSTICE SOTOMAYOR: That issue would be  
18 determined under perhaps a different constitutional  
19 provision like the Due Process Clause, correct?

20 MS. STEVENSON: Correct. The bounds of the  
21 Electors Clause are other constitutional constraints,  
22 which would include due process, equal protection,  
23 First Amendment.

24 JUSTICE BARRETT: What's the due process  
25 right? Does the candidate have a due process right?

1       What's the liberty interest?

2               MS. STEVENSON: I think it's not very  
3       precisely defined in the case law, but I think there  
4       is a recognition that there is a liberty interest of  
5       a candidate and there is some due process interests  
6       in being able to access the ballot.

7               JUSTICE BARRETT: I thought that was -- I  
8       thought that was for voters. You -- you think for  
9       the candidate too, that there's -- that it would be  
10      taking something away from the candidate?

11              MS. STEVENSON: Certainly, yes. And I  
12      think a lot of times you see that in the First  
13      Amendment context where candidates can have an issue  
14      about being on the ballot, but it's sort of a hybrid  
15      or oftentimes First Amendment, Fourteenth Amendment,  
16      Qualifications Clause, all discussed together.

17              JUSTICE BARRETT: Let me ask you a question  
18      about -- just follow-up to Justice Alito. You know,  
19      these decisions might be made different ways in  
20      different states. Maybe a secretary of state makes  
21      it in one state with very little process, or a  
22      process more like Colorado's could be followed by  
23      others.

24              Would our standard of review of the record  
25      vary depending on the procedure employed by the

1 state?

2 MS. STEVENSON: I think this Court has  
3 tremendous discretion to decide its standard of  
4 review, and it might be based on the process that was  
5 employed by an individual state. I think you could  
6 exercise the independent review of Bose Corp. that  
7 Mr. Murray talked about, or you could give deference  
8 where you have a full-blown proceeding like the one  
9 here that had all the protections of Rules of  
10 Evidence and cross-examination and things like that.

11 CHIEF JUSTICE ROBERTS: You -- I'm sorry.  
12 You think we should give deference in reviewing the  
13 factual record, the legal conclusions? What -- in  
14 other words, we shouldn't undertake a de novo review?

15 MS. STEVENSON: I don't think the review  
16 should be de novo. However, I -- I am amenable to  
17 the suggestion that the Court would do the Bose  
18 Corp.-type independent review that might provide  
19 greater certainty to states around the country as to  
20 what the Court's position is on the factual record in  
21 this case.

22 CHIEF JUSTICE ROBERTS: Of course, if it  
23 were not de novo review, we could reach disparate  
24 results even on the same record, right?

25 MS. STEVENSON: I -- I think that's

1 possible.

2 JUSTICE KAGAN: I take it your position is  
3 that this disqualification is really the same as any  
4 other disqualification, age or residence or what have  
5 you.

6 MS. STEVENSON: That's correct.

7 JUSTICE KAGAN: And -- and -- and what if I  
8 were to push back on that and say, well, this  
9 disqualification, number one, it's in the Fourteenth  
10 Amendment, and the point of the Fourteenth Amendment  
11 was to take away certain powers from the states?  
12 Number two, Section 3 itself gives Congress a very  
13 definite role, which Mr. Mitchell says is interfered  
14 with by the ability of states to take somebody off  
15 the ballot? And maybe, number three, it's just more  
16 complicated and more contested, and, if you want,  
17 more political? And why don't all of those things  
18 make a difference in our thinking about this  
19 qualification as opposed to any other?

20 MS. STEVENSON: And so, Your Honor, I think  
21 the trouble with the -- categorizing the insurrection  
22 issue as -- as necessarily more difficult is it's  
23 just an assumption that's coming up, I think, because  
24 of this case.

25 And, again, back to the Chief Justice's

1 point, we could have a very easy case under the  
2 Fourteenth Amendment with an avowed insurrectionist  
3 who, you know, came in and wrote on his paperwork: I  
4 engaged in an insurrection in violation of the  
5 Fourteenth Amendment. And it would be open-and-shut  
6 case as to whether or not that person would meet the  
7 qualifications to be on the Colorado ballot.

8 With respect to your other questions about  
9 the Fourteenth Amendment, my positions are based on  
10 the assumption that, under the Fourteenth Amendment,  
11 the states have the power to enforce Section 3, just  
12 like they do other presidential qualifications, and I  
13 would defer to the electors arguments on those  
14 points.

15 JUSTICE ALITO: Suppose a state that does  
16 recognize non-mutual collateral estoppel makes a  
17 determination, using whatever procedures it decides  
18 to adopt, that a particular candidate is an  
19 insurrectionist.

20 Could that have a cascading effect, and so  
21 the decision by a court in one state -- the decision  
22 by a single judge whose factual findings are given  
23 deference, maybe an elected trial judge, would have  
24 potentially an enormous effect on the candidates who  
25 run for president across the country? Is that

1 something we should be concerned about?

2 MS. STEVENSON: I think you should be  
3 concerned about it, Your Honor, but I think the  
4 concern is not as high as maybe it's made out to be  
5 in particularly some of the amicus briefs. And,  
6 again, under Article II, there is a huge amount of  
7 disparity in the candidates that end up on the ballot  
8 on -- in different states in every election.

9 Just this election, there's a candidate who  
10 Colorado excluded from the primary ballot, who is on  
11 the ballot in other states even though he is not a  
12 natural-born citizen. And that's just -- that's a  
13 feature of our process. It's not a bug.

14 And then I think, with respect to the  
15 decision-making and -- you know, we're here so that  
16 this Court can give us nationwide guidance on some of  
17 the legal principles that are involved. I think that  
18 reduces the potential amount of disparity that would  
19 arise between the states.

20 And then with respect to the factual record  
21 and how that gets issued and implemented, the states  
22 have processes for this. And I think we need to let  
23 that play out and accept that there may be some  
24 messiness of federalism here because that's what the  
25 Electors Clause assumes will happen. And if

1 different states apply their principles of -- of  
2 collateral estoppel and come to different results,  
3 that's okay. And -- and Congress can act at any time  
4 if -- if it thinks that it's truly federalism run  
5 amok.

6 CHIEF JUSTICE ROBERTS: Justice Thomas,  
7 anything further?

8 Justice Alito?

9 JUSTICE ALITO: Well, just one further  
10 question, and it's along the same lines of a lot of  
11 other questions. We have been told that if what  
12 Colorado did here is sustained, other states are  
13 going to retaliate and they are going to potentially  
14 exclude another candidate from the ballot. What  
15 about that situation?

16 MS. STEVENSON: Your Honor, I think we have  
17 to have faith in our system that people will follow  
18 their election process -- processes appropriately,  
19 that they will take realistic views of what  
20 insurrection is under the Fourteenth Amendment.  
21 Courts will review those decisions. This Court may  
22 review some of them.

23 But I don't think that this Court should --  
24 should take those threats too seriously in its  
25 resolution of this case.



1 JUSTICE ALITO: You don't think that's a  
2 serious threat?

3 MS. STEVENSON: I -- I think we have  
4 processes --

5 JUSTICE ALITO: We should proceed on the  
6 assumption that it's not a serious threat?

7 MS. STEVENSON: I think we have  
8 institutions in place to handle those types of  
9 allegations.

10 JUSTICE ALITO: What -- what are those  
11 institutions?

12 MS. STEVENSON: Our -- our states, their  
13 own electoral rules, the administrators who enforce  
14 those rules, the courts that will review those  
15 decisions, and up to this Court to ultimately review  
16 that decision.

17 CHIEF JUSTICE ROBERTS: Justice Sotomayor?

18 Justice Kagan?

19 Justice Gorsuch?

20 Justice Kavanaugh?

21 Justice Barrett?

22 Justice Jackson? Anything further?

23 Thank you counsel.

24 MS. STEVENSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.

1 Mitchell?

2 REBUTTAL ARGUMENT OF JONATHAN F. MITCHELL  
3 ON BEHALF OF THE PETITIONER

4 MR. MITCHELL: Both Mr. Murray and Ms.  
5 Stevenson rely heavily on the Electors Clause and the  
6 authority that it gives the legislature of each state  
7 to direct the manner of appointing presidential  
8 electors.

9 But that prerogative under Article II must  
10 be exercised in a manner consistent with other  
11 constitutional provisions and restrictions. And  
12 Justice Kagan alluded to one of those restrictions  
13 that might be imposed by the First Amendment, but  
14 there are others.

15 A state cannot use its power under Article  
16 II's Electors Clause to instruct its presidential  
17 electors only to vote for white candidates. That  
18 would violate the Equal Protection Clause, but nor  
19 can it exercise its power in a manner that would  
20 violate the constitutional holding of U.S. Term  
21 Limits against Thornton and they cannot use the  
22 Electors Clause as an excuse to impose additional  
23 qualifications for the presidency to go beyond what  
24 the Constitution enumerates in Article II.

25 And the problem with what the Colorado

1 Supreme Court has done is they have in a way changed  
2 the criteria in Section 3 by making it a requirement  
3 that must be met before the candidate who is seeking  
4 office actually holds the office effectively moving  
5 forward in time the deadline that the candidate has  
6 for obtaining a congressional waiver.

7           There has still been no answer from the  
8 Anderson litigants on how to distinguish the  
9 congressional residency cases, where the courts of  
10 appeals, not decisions from this Court, but the  
11 courts of appeals in applying this Court's holding in  
12 U.S. Term Limits have unanimously disapproved state  
13 laws requiring congressional candidates to show that  
14 they inhabit the state from which they seek election  
15 prior to Election Day.

16           And there is still in our view no possible  
17 way to distinguish those from the situation below in  
18 the Colorado Supreme Court.

19           Mr. Murray also invoked the de facto  
20 officer doctrine as a possible way to mitigate the  
21 dramatic consequences that would follow from the  
22 decision of this Court that rejects the rationale of  
23 Griffin's case and that also agrees with Mr. Murray's  
24 contentions that President Trump is disqualified from  
25 holding office on account of the events of January

1 6th and that he's covered by Section 3 as an officer  
2 of the United States.

3 This Court's recent decisions in Lucia and  
4 Arthrex held that officers who are unconstitutionally  
5 appointed under Article II and that made decisions  
6 under the APA that were attacked as invalid, those  
7 decisions were still vacated and this Court did not  
8 use any variant of the De Facto Officer Doctrine to  
9 salvage the decisions that were made by these  
10 unconstitutionally appointed officers.

11 There is no way to escape the conclusion  
12 that if this Court rejects Griffin's case, and also  
13 agrees with Mr. Murray's construction of Section 3,  
14 that every executive action taken by the Trump  
15 administration during its last two weeks in office is  
16 vulnerable to attack under the APA and, further, that  
17 if President Trump is reelected and sworn in as the  
18 next president, that any executive action that he  
19 takes could be attacked in federal court by anyone  
20 who continues to believe that President Trump is  
21 barred from office under Section 3.

22 I'm happy to answer any other questions  
23 that the Court may have.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 MR. MITCHELL: Thank you.

1 CHIEF JUSTICE ROBERTS: The case is  
2 submitted.

3 (Whereupon, at 12:17 p.m., the case was  
4 submitted.)

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## Official - Subject to Final Review

<p style="text-align: center;"><b>1</b></p> <p><b>1</b> [1] 72:16  <b>10:08</b> [2] 1:15 3:2  <b>100</b> [1] 88:12  <b>113</b> [2] 127:24 128:10  <b>12:17</b> [1] 140:3  <b>12032(a)</b> [1] 125:7  <b>123</b> [1] 2:11  <b>137</b> [1] 2:14  <b>150</b> [1] 85:20  <b>155</b> [4] 53:5 86:21 87:12,16  <b>1780s</b> [1] 108:11  <b>18</b> [2] 113:2 114:14  <b>1812</b> [1] 65:13  <b>1868</b> [3] 52:18 53:12 67:11  <b>1869</b> [2] 53:12 86:23  <b>1870</b> [3] 12:12 13:21 14:14,20 30:14 44:8 45:5 53:2,12 57:6 87:1 103:4 114:15  <b>1876</b> [1] 87:19  <b>1877</b> [1] 68:2  <b>1890s</b> [2] 70:14,15  <b>1948</b> [4] 14:21 44:10,17 114:15</p>	<p><b>30,000-foot</b> [1] 70:20  <b>30-year-old</b> [1] 81:16  <b>33</b> [1] 111:11  <b>34</b> [1] 24:25  <b>34-year-old</b> [1] 25:24  <b>35</b> [4] 25:1,22,25 79:25  <b>37</b> [1] 53:11</p> <p style="text-align: center;"><b>5</b></p> <p><b>5</b> [4] 19:3 71:1 74:9,22</p> <p style="text-align: center;"><b>6</b></p> <p><b>6</b> [1] 51:16  <b>65</b> [1] 2:8  <b>6th</b> [1] 21:22 22:9,11 54:21 63:21 81:25 85:21 88:23 102:5 103:21 139:1</p> <p style="text-align: center;"><b>8</b></p> <p><b>8</b> [1] 1:11  <b>80</b> [2] 109:12 115:23</p> <p style="text-align: center;"><b>9</b></p> <p><b>9</b> [1] 41:14</p> <p style="text-align: center;"><b>A</b></p> <p><b>a.m</b> [2] 1:15 3:2  <b>ability</b> [1] 7:24 16:12 30:22 31:5,23 56:4 76:2 94:20 96:17 116:8 132:14  <b>able</b> [4] 42:16 63:4 113:22 130:6  <b>abolished</b> [1] 58:15  <b>above-entitled</b> [1] 1:13  <b>abridge</b> [1] 70:22  <b>absence</b> [1] 95:13  <b>absent</b> [2] 96:18 116:4  <b>Absolutely</b> [5] 29:16,17 83:25 114:5 117:8  <b>accelerating</b> [2] 4:19 28:13  <b>accept</b> [6] 17:19 55:18 63:23 79:16 117:5 134:23  <b>accepted</b> [3] 64:2 84:15 116:12  <b>accepts</b> [1] 33:6  <b>access</b> [1] 59:8 70:14 76:8 90:7 104:14 112:8,18 118:15,16,25 130:6  <b>account</b> [3] 4:9 80:15 138:25  <b>acknowledge</b> [2] 32:8 37:20  <b>across</b> [1] 133:25  <b>Act</b> [2] 12:12 13:20 14:14,20 16:3 34:17 42:16 53:2 57:7 58:15 64:5 87:1,15 90:14 92:13 103:4,25 122:20 123:21 126:23 135:3  <b>acted</b> [2] 14:7 87:11  <b>action</b> [15] 9:13,19 20:3 34:20 56:2,19 57:3 59:3 83:20 102:18 128:3,6,9 139:14,18</p>	<p><b>actions</b> [4] 57:5 82:2,7,12  <b>activity</b> [2] 32:25 33:2  <b>actor</b> [3] 33:25 34:1,5  <b>actors</b> [1] 69:2  <b>acts</b> [1] 87:1  <b>actual</b> [1] 129:1  <b>actually</b> [1] 5:13 60:15,20,22 117:23 118:3 121:1 125:14 127:4 128:22 138:4  <b>Adams</b> [1] 46:17  <b>add</b> [4] 17:17 20:6 53:14 54:18  <b>added</b> [1] 111:13  <b>adding</b> [8] 7:4,24 17:21,24 18:4,22 24:1 25:10  <b>addition</b> [1] 54:12  <b>additional</b> [5] 18:4,22 23:5 96:19 137:22  <b>address</b> [8] 5:5 29:1 72:4 87:23 102:10,20 104:5 111:22  <b>addressing</b> [2] 20:14 89:19  <b>adhere</b> [1] 6:1  <b>adjudicate</b> [4] 56:5 90:23 91:12 117:14  <b>adjudicated</b> [1] 98:7  <b>adjudicates</b> [1] 95:16  <b>administration</b> [1] 139:15  <b>Administratively</b> [1] 126:20  <b>administrators</b> [1] 136:13  <b>admissibility</b> [2] 98:10 99:14  <b>admission</b> [1] 101:6  <b>admit</b> [1] 21:22  <b>admitted</b> [5] 6:15 7:3 9:11 21:23 101:17  <b>adopt</b> [1] 133:18  <b>adoption</b> [1] 67:4  <b>advancing</b> [1] 101:22  <b>adversarial</b> [1] 97:20  <b>affects</b> [1] 104:23  <b>affirm</b> [1] 30:9  <b>affirmatively</b> [1] 40:15  <b>affirmed</b> [1] 76:19  <b>affirming</b> [1] 102:4  <b>affirms</b> [3] 4:23 76:12 88:18  <b>afterwards</b> [1] 92:24  <b>age</b> [8] 23:11,18 24:20,24 25:18 66:22 82:21 132:4  <b>agree</b> [16] 18:1 39:25 40:4 54:3,13 63:5 79:4 82:9,11 99:2 109:16 110:4 111:15 114:2,4 115:3  <b>agreed</b> [2] 100:6 120:17  <b>agreed-upon</b> [1] 48:7  <b>agrees</b> [4] 13:9 124:8 138:23 139:13  <b>Ah</b> [1] 45:22</p>	<p><b>ahead</b> [2] 17:16 29:13  <b>ahistorical</b> [1] 71:9  <b>aid</b> [5] 97:11,14,19 98:1,3  <b>akin</b> [1] 31:18  <b>AL</b> [4] 1:6,21 2:8 65:9  <b>ALITO</b> [52] 18:15 19:2,10,13,16,24 20:11,18 21:9,20 22:1,5,18 32:11,21,23 33:9,12,19 44:21,22 45:1,6 53:4 83:1 87:24 88:3,5,6 89:2,21 90:10 93:2 97:2,3 98:5,17 99:9,23 100:1,20 101:15 128:16 129:2,10 130:18 133:15 135:8,9 136:1,5,10  <b>all-encompassing</b> [2] 50:10 107:16  <b>allegations</b> [1] 136:9  <b>allegedly</b> [1] 90:15  <b>allow</b> [5] 17:22 19:12 56:17 106:22 128:13  <b>allowed</b> [4] 5:20 66:21 73:15 101:1  <b>allowing</b> [1] 5:23  <b>allows</b> [2] 6:16 31:17  <b>alluded</b> [2] 74:3 137:12  <b>almost</b> [1] 53:25  <b>alone</b> [1] 65:23  <b>already</b> [3] 24:16 113:14 127:6  <b>alter</b> [1] 53:15  <b>altering</b> [5] 4:11 7:5 9:4 18:5 24:1  <b>although</b> [3] 23:6 52:25 84:18  <b>ambiguity</b> [5] 120:7,13,22 121:2,2  <b>amenable</b> [1] 131:16  <b>Amendment</b> [49] 3:13 5:22 6:21 10:19 15:15 23:14,14 32:7 35:9,11 60:15 66:17 67:5 70:4,12,21 71:9,13 72:2,6,13,16 73:9 74:7,9,20 79:15 80:3 83:22 88:25 105:9,11,19,20,24 106:8,9 129:23 130:13,15,15 132:10,10 133:2,5,9,10 135:20 137:13  <b>Amendment's</b> [1] 19:6  <b>American</b> [1] 90:2  <b>Americans</b> [2] 4:25 115:23  <b>amicus</b> [2] 104:1 134:5  <b>amnesty</b> [6] 32:6 70:15 84:1,5 87:21 115:17  <b>amok</b> [1] 135:5  <b>among</b> [2] 22:3 101:23  <b>amount</b> [2] 134:6,18  <b>ample</b> [1] 112:17  <b>analogize</b> [1] 32:12  <b>analogy</b> [1] 8:1  <b>analysis</b> [1] 43:14  <b>analyze</b> [1] 13:17  <b>ANDERSON</b> [13] 1:6,21 2:</p>	<p>7 3:4 5:25 39:22 41:13 50:14 52:9 65:9 104:18 123:7 138:8  <b>Anderson's</b> [1] 106:9  <b>another</b> [10] 21:8 22:5,5,15 62:25 115:25 118:18 127:11 128:1 135:14  <b>answer</b> [8] 13:7 19:1 30:7 93:5 94:7,8 138:7 139:22  <b>answering</b> [1] 99:10  <b>answers</b> [1] 30:20  <b>anybody</b> [2] 57:19 91:8  <b>anyway</b> [1] 76:22  <b>APA</b> [2] 139:6,16  <b>apologize</b> [1] 40:12  <b>apparatus</b> [2] 60:25 61:7  <b>appeal</b> [2] 55:9 101:6  <b>appeals</b> [2] 138:10,11  <b>appear</b> [5] 24:15 25:21 39:11,12 44:15  <b>APPEARANCES</b> [1] 1:17  <b>appears</b> [3] 38:6 40:24 108:14  <b>application</b> [3] 86:17 88:21 90:6  <b>applications</b> [1] 85:5  <b>applied</b> [4] 19:22 58:2 97:17 98:19  <b>applies</b> [1] 97:19  <b>apply</b> [10] 57:8,24 65:23 72:15 77:14 80:15 100:24 105:7 115:21 135:1  <b>applying</b> [2] 100:12 138:11  <b>appoint</b> [1] 76:6  <b>appointed</b> [12] 3:20 4:1 48:15 50:25 51:11 52:2,10 83:10,11 110:16 139:5,10  <b>appointing</b> [1] 137:7  <b>appointment</b> [2] 109:1,4  <b>Appointments</b> [6] 3:24 38:4 49:17 51:10 108:24 109:7  <b>appreciate</b> [2] 43:4 122:5  <b>appropriate</b> [3] 74:4 98:18,20  <b>appropriately</b> [1] 135:18  <b>areas</b> [1] 106:4  <b>aren't</b> [4] 16:25 43:16 70:8 85:18  <b>arguably</b> [1] 16:5  <b>argue</b> [7] 15:16 19:20 32:15 40:15 45:9 57:16,19  <b>argued</b> [1] 40:19  <b>arguing</b> [4] 37:4,5,12 54:18  <b>argument</b> [69] 1:14 2:2,5,9,12 3:3,6 5:3,6,12 13:25 14:1 15:6,13 16:10,17 22:21,24 23:2 25:13 29:1 30:3 34:25 35:20 36:15 38:1,11,13 39:16 40:5 41:10,25 45:9,13,19 48:18,20 49:2,7 53:</p>
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## Official - Subject to Final Review

11,18 55:10 56:14 58:1 59: 6,7,15 60:1 61:15 62:15 63:3 64:9 65:8,21 69:23 72:23 73:4 95:4 101:22 102:21,25 107:13 116:21 118:8 119:14 122:5 123:9 124:25 137:2 argument's <sup>[2]</sup> 17:15,18 arguments <sup>[9]</sup> 17:1 22:20 23:23 44:9 49:16 56:11 60: 4 66:14 133:13 arise <sup>[1]</sup> 134:19 arises <sup>[1]</sup> 127:20 Army <sup>[1]</sup> 49:6 around <sup>[4]</sup> 68:4 96:19 101: 12 131:19 art <sup>[1]</sup> 52:7 Arthrex <sup>[1]</sup> 139:4 Article <sup>[29]</sup> 42:14 51:12,15 52:3 66:16 67:23,23 70:11 71:13,19 73:19 76:5 79:12, 14 80:6 83:18 103:11,11 105:11 106:16 110:8 116: 23 117:10 129:5 134:6 137:9,15,24 139:5 ascending <sup>[1]</sup> 62:13 aside <sup>[5]</sup> 30:2 92:8,25 93:1 102:15 assault <sup>[2]</sup> 65:14 88:21 asserted <sup>[1]</sup> 127:6 assign <sup>[1]</sup> 106:15 assigned <sup>[1]</sup> 90:4 assume <sup>[4]</sup> 56:13 90:9 102: 23 116:17 assumed <sup>[1]</sup> 11:23 assumes <sup>[1]</sup> 134:25 assuming <sup>[1]</sup> 95:19 assumption <sup>[3]</sup> 132:23 133:10 136:6 attack <sup>[4]</sup> 65:15 82:7,12 139:16 attacked <sup>[2]</sup> 139:6,19 attempt <sup>[2]</sup> 64:12 88:24 attempts <sup>[2]</sup> 53:7 63:20 augmented <sup>[1]</sup> 70:25 Austin <sup>[1]</sup> 1:18 authorities <sup>[1]</sup> 116:5 authority <sup>[26]</sup> 6:5,11 13:12 16:22 17:12 32:3 52:20,20 68:21 71:11 79:6,20 80:4, 5 82:17 86:24 87:6 90:23 91:15 94:14 106:8 116:6 117:2 122:11 129:8 137:6 authorization <sup>[1]</sup> 71:4 authorized <sup>[5]</sup> 18:9 69:5 71:6 72:18 73:1 authorizing <sup>[1]</sup> 69:21 automatically <sup>[2]</sup> 92:2 113:25 avoid <sup>[1]</sup> 107:6 avoiding <sup>[1]</sup> 86:1 avowed <sup>[1]</sup> 133:2	await <sup>[1]</sup> 56:12 aware <sup>[5]</sup> 43:10 44:25 57:6 89:19 91:14 away <sup>[8]</sup> 4:24 12:14,16 15: 7 48:11 72:6 130:10 132: 11 awfully <sup>[1]</sup> 75:5 <hr/> <b>B</b> <hr/> back <sup>[24]</sup> 9:11 12:6,21 41: 21 50:2 53:12 60:11 61:6 62:18,19 67:17 70:10 76: 25 77:15 79:1,2 80:24 82: 16 98:5 109:11 120:17 122:14 132:8,25 backdrop <sup>[6]</sup> 12:11 14:22 15:4 17:9 53:3,19 background <sup>[2]</sup> 70:11 115: 3 bad <sup>[2]</sup> 69:2 89:24 baked <sup>[1]</sup> 105:21 ball <sup>[1]</sup> 49:24 ballot <sup>[49]</sup> 4:4,9 6:10 7:4 17:20 18:10 24:10,12,16 25:21 59:8 60:8 70:14 76: 8,22 79:5 81:16 82:23 84: 23,24 90:7,8 97:12 104:14, 20,22 105:15 106:23 107:2, 4 112:8,18 118:15,15,25 122:12 123:17,20 124:7 127:25 128:25 130:6,14 132:15 133:7 134:7,10,11 135:14 ballots <sup>[5]</sup> 66:22 67:16,18, 19 85:16 ban <sup>[2]</sup> 44:1,3 banned <sup>[1]</sup> 7:3 bans <sup>[2]</sup> 9:8 28:20 bar <sup>[2]</sup> 44:23 119:22 barred <sup>[10]</sup> 36:22 37:7 38: 19 60:12 66:19 113:25 119:15 121:12,13 139:21 BARRETT <sup>[35]</sup> 16:7,25 17: 4,15,17 18:2 55:2,3,6,15, 20,24 56:13,22 57:10,13, 18,23 58:24 59:13,20,23 60:9 74:3 76:17,19 78:8 116:2,3,20 117:15 129:24 130:7,17 136:21 barrier <sup>[1]</sup> 16:18 based <sup>[6]</sup> 23:1,2 25:14 89: 23 131:4 133:9 basically <sup>[1]</sup> 10:7 basis <sup>[6]</sup> 27:8 55:7 80:19 96:4 98:15 102:4 basket <sup>[2]</sup> 116:22,23 Baude <sup>[1]</sup> 31:11 become <sup>[1]</sup> 70:16 becomes <sup>[2]</sup> 11:22 74:20 beginning <sup>[1]</sup> 40:7 begins <sup>[1]</sup> 38:24 behalf <sup>[1]</sup> 1:18,20,23 2:4,7, 11,14 3:7 65:9 123:10 137:	3 behavior <sup>[1]</sup> 27:9 behind <sup>[1]</sup> 44:16 believe <sup>[10]</sup> 5:24 18:10 21: 6 22:25 30:16 45:17 58:5 67:11 129:15 139:20 below <sup>[6]</sup> 4:23 59:15,19 76: 12 111:9 138:17 benefit <sup>[1]</sup> 46:1 besides <sup>[1]</sup> 50:18 best <sup>[1]</sup> 97:7 bestow <sup>[1]</sup> 83:15 better <sup>[3]</sup> 15:6 48:19,21 between <sup>[15]</sup> 27:7 41:25, 25 52:4 66:9 75:13 90:15 97:21 107:19 108:7 109: 15 118:24 126:6,11 134:19 beyond <sup>[9]</sup> 5:13,19 9:7 17: 7 19:8 84:16 101:2 105:2 137:23 Biden <sup>[1]</sup> 46:19 big <sup>[1]</sup> 127:17 biggest <sup>[1]</sup> 97:5 binding <sup>[1]</sup> 52:25 bit <sup>[9]</sup> 15:6 19:19 45:25 55: 22 75:25 76:25 96:11 107: 19 113:19 blue <sup>[1]</sup> 40:17 bodies <sup>[3]</sup> 99:13 110:16,17 boldly <sup>[1]</sup> 74:24 books <sup>[2]</sup> 14:17 113:7 Boom <sup>[1]</sup> 94:5 boomerang <sup>[1]</sup> 35:21 borders <sup>[1]</sup> 105:2 born <sup>[1]</sup> 79:25 Bose <sup>[4]</sup> 77:25 99:5 131:6, 17 both <sup>[12]</sup> 4:19 22:6 37:5,5, 12 42:18 48:8 70:4 100:3, 4 128:6 137:4 bottom <sup>[1]</sup> 55:24 bottom-line <sup>[1]</sup> 111:18 bouncing <sup>[1]</sup> 49:25 bound <sup>[3]</sup> 18:2 72:15,18 bounds <sup>[1]</sup> 129:20 branches <sup>[1]</sup> 87:10 breaches <sup>[1]</sup> 9:14 brief <sup>[17]</sup> 11:13 13:24 37:15 40:9,11,16,17,20,22 41:14 63:23 64:3,4,10 77:23 78: 17 122:22 briefing <sup>[1]</sup> 35:22 briefly <sup>[1]</sup> 12:22 briefs <sup>[4]</sup> 59:16 70:2 104:1 134:5 bring <sup>[6]</sup> 13:18 32:3 56:19 109:11 128:2,3 bringing <sup>[2]</sup> 73:4 85:9 broad <sup>[12]</sup> 55:22 66:5 71: 20,21 72:7 73:18 80:13 85: 10,10 106:17 119:5 129:7 broader <sup>[4]</sup> 17:19 105:25	106:1,4 broken <sup>[1]</sup> 115:12 brought <sup>[6]</sup> 56:1 57:6,7 94: 24 127:4 128:1 buckle <sup>[1]</sup> 77:15 bug <sup>[1]</sup> 134:13 built <sup>[1]</sup> 101:12 Bush <sup>[1]</sup> 73:17 <hr/> <b>C</b> <hr/> call <sup>[7]</sup> 26:19 46:3 77:18 78: 20 79:19 112:4,15 came <sup>[7]</sup> 1:13 6:7 65:13 105:15 119:25 120:16 133: 3 candidate <sup>[50]</sup> 4:3,4,6,8 6: 15,16 7:6,7,10,11 8:7,21 20:16 47:3 66:19 67:21 75: 13,14 84:22,23 89:8,10,10, 13 103:7 104:22 105:14 117:12 123:16 124:1,14,21 125:9,14,16,18,20 126:4, 18,24 128:25 129:25 130:5, 9,10 133:18 134:9 135:14 138:3,5 candidate's <sup>[1]</sup> 127:5 candidates <sup>[27]</sup> 23:17 67: 6,6,7,17 68:9,12 69:5,9,15, 22 73:16 101:25 103:14 104:21,25 105:4 107:2 114:21 118:16 125:6,11 130:13 133:24 134:7 137: 17 138:13 cannot <sup>[9]</sup> 4:2,7 8:6 13:11 42:23 48:22 83:17 137:15, 21 capably <sup>[1]</sup> 124:5 capacity <sup>[3]</sup> 109:25 110:3, 8 capitol <sup>[1]</sup> 65:13 careful <sup>[1]</sup> 11:3 carry <sup>[2]</sup> 42:8 43:7 cascading <sup>[1]</sup> 133:20 Case <sup>[102]</sup> 3:4 5:7,19,24 6: 2 11:4,9,22 12:6,8,10 13:9, 10,20 14:6,7,13,22 15:3,8, 12,20,22,22,25 16:15 17:3, 7 22:25 26:14 30:9,10,17 31:12,22 32:10 33:7 34:11, 25 35:6,20 36:6 37:5 45:1, 2 49:10,11 52:15 53:19 54: 2,4,5 55:3,12,17,18,21,25 56:1,5,6 63:8,21 66:10 68: 15 70:2 78:5,20,21 86:23 92:1 98:15,19 99:3 100:5, 19 101:7 104:20 105:5,13 111:8 112:4,10 114:9 115: 20 116:10 122:9,13 124:5 127:4,11,24 130:3 131:21 132:24 133:1,6 135:25 138:23 139:12 140:1,3 case's <sup>[1]</sup> 82:8 cases <sup>[5]</sup> 69:11 99:22 100:	2 112:18 138:9 cast <sup>[3]</sup> 103:23 122:19 123: 17 catch-all <sup>[1]</sup> 40:3 categorical <sup>[6]</sup> 24:13 27: 17,20,21,22 28:7 categorizing <sup>[1]</sup> 132:21 category <sup>[2]</sup> 28:4,6 cause <sup>[5]</sup> 9:13,19 56:2 59: 3 102:17 caveat <sup>[2]</sup> 18:12 54:17 Celebrezze <sup>[2]</sup> 104:18 105: 8 century <sup>[1]</sup> 124:8 Cert <sup>[1]</sup> 74:15 certain <sup>[8]</sup> 22:2 41:6 106:1, 5 116:7,7 117:22 132:11 Certainly <sup>[33]</sup> 22:8,13 31:9 36:11 37:25 40:19 43:23 46:3,19 68:11,20 70:6 71: 18 72:13,14 73:10 74:17 75:19 85:3 88:17 89:20 91: 12 92:3 95:5 100:11 103:9 105:6,9 108:13 128:8,12, 14 130:11 certainty <sup>[2]</sup> 104:8 131:19 certify <sup>[1]</sup> 67:12 cetera <sup>[1]</sup> 103:7 chains <sup>[1]</sup> 94:12 challenge <sup>[5]</sup> 56:4 127:4,6, 25 128:10 challenges <sup>[3]</sup> 95:19 123: 16 124:7 chance <sup>[5]</sup> 81:3 96:24 107: 10 111:22 115:25 change <sup>[8]</sup> 27:3 28:3 87:13, 15 89:18,21 93:19,22 changed <sup>[1]</sup> 138:1 changing <sup>[1]</sup> 25:15 chaotic <sup>[1]</sup> 64:19 characterize <sup>[2]</sup> 34:25 36: 6 characterized <sup>[1]</sup> 64:6 charged <sup>[1]</sup> 113:7 charismatic <sup>[2]</sup> 119:8,22 charitably <sup>[1]</sup> 59:19 Chase <sup>[9]</sup> 15:20 16:1 17:8 35:19 52:19 74:6 82:10 87: 9 103:2 Chase's <sup>[1]</sup> 86:23 Chiafalo <sup>[2]</sup> 72:9 90:1 CHIEF <sup>[72]</sup> 3:3,8 6:6 7:13, 19 8:1,9,13 15:19 16:1 17: 7 26:11,16,21 29:5,16 35:5, 9,23 36:1,9,12 44:5,19 45: 7 47:10 49:14 52:13,18 55: 2 58:19 60:10 65:5,7,10 70:18 71:15,24 73:5 74:6, 10 84:6,20 85:7,25 86:22 87:9 88:5 96:25 102:12 103:2 104:10 107:9 111:3 116:2 117:16 123:6,11
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## Official - Subject to Final Review

<p>126:13,16,25 127:10,14 128:4 131:11,22 132:25 135:6 136:17,25 139:24 140:1 choice [1] 114:22 choice-of-law [1] 20:22 choose [1] 72:24 chooses [1] 5:17 chosen [1] 42:14 Christy [2] 67:10,13 circle [3] 79:1,2 82:16 circuit [3] 11:21 45:3 103:2 circumstance [3] 27:2 110:23 118:3 circumstances [3] 36:23 116:4 117:24 cite [1] 40:12 citing [1] 90:12 citizen [4] 23:20 24:21,23 134:12 citizens [4] 76:3 106:11 107:3,7 citizens' [1] 66:18 Citizenship [2] 23:13 82: 21 civil [6] 39:3 51:4 69:18 114:10,11 129:14 claim [3] 20:19 39:22 66:4 claimed [1] 66:8 claiming [1] 52:9 Clammers [1] 53:25 clarification [2] 26:12 58: 25 clarify [2] 13:23 116:21 class [2] 108:16,25 classes [1] 108:20 Clause [47] 3:23,24,24 9: 20 13:2 38:4,4,5 40:25 41: 1 42:22 49:17,18,23 50:7, 24 51:3,11 58:6 72:4 79: 24 80:20 81:8 97:15 104: 13 107:14 108:4,14,25 109: 7,8,8 110:10 116:23 117:7 121:19 123:14 129:6,16,19, 21 130:16 134:25 137:5,16, 18,22 clauses [1] 9:17 clear [14] 3:23 8:21 11:15 42:9 46:8 54:12 77:3,14, 21 86:12 113:25 117:9 119:6 120:18 clearly [5] 23:7 38:6 42:25 74:22 114:7 client [4] 46:2 47:5 54:18 60:4 Clinton [1] 88:12 closely [1] 42:8 Code [1] 44:15 coin [1] 66:12 collateral [8] 20:23,24 21: 5 55:4,7,25 133:16 135:2 collaterally [2] 82:6,12</p>	<p>colleagues [3] 10:4 82:11 103:1 colloquy [1] 82:25 Coloradans [1] 123:17 Colorado [39] 1:20,23 3:10, 13 4:13 9:6,18 17:23 20: 19,25 21:5,7,21 23:5 25:20 26:1,4 60:6,7 63:19 75:10 76:24 77:5 106:13 116:13 122:11 123:20,23 124:6,16, 23 126:1 128:6,9 133:7 134:10 135:12 137:25 138: 18 Colorado's [5] 77:2 84:8 123:14,15 130:22 combination [1] 14:6 come [25] 25:4,7 61:6 62: 18 66:10 75:21 79:6,12,20 80:9,24 82:17 84:24 89:16 92:19 95:14,15 98:5 102: 11 105:24 115:1,8 122:14 128:22 135:2 comes [5] 8:13 41:11 89:5 126:17 127:14 comfort [4] 97:11,14,19 98: 1 coming [1] 132:23 command [1] 94:13 commander-in-chief [1] 49:6 commanders [1] 90:19 commentators [3] 31:10 97:16,18 commission [5] 50:8,11, 12,17 109:10 commissioned [4] 50:20 52:1 107:15 109:6 Commissions [1] 3:23 38:4 49:23 50:7,23 107:14 108:14,21 109:5,7,8 committed [3] 90:14 94:3 114:3 communicate [1] 22:3 comparable [1] 125:11 compel [3] 93:6 94:6,9 compete [1] 18:21 complaining [1] 111:17 complete [2] 10:14 100:12 completely [1] 36:7 complicated [1] 132:16 comport [1] 95:17 compromise [5] 43:22 48: 4,10 62:22 68:2 compromises [2] 48:6,7 concede [2] 54:20 64:21 conceded [1] 64:3 conceding [1] 49:9 concept [2] 9:12 11:2 concern [10] 21:10 60:21 61:5,13 62:12 68:25 94:24 113:20 117:18 134:4 concerned [5] 95:6 96:6</p>	<p>119:7 134:1,3 concerning [1] 69:11 concerns [7] 15:21 16:8 111:4,21 117:4 118:7 120: 25 concerted [2] 64:15 86:16 conclude [5] 21:16 22:9, 10 88:8 102:8 concluded [1] 63:19 concludes [1] 122:10 conclusion [6] 22:6,13 63: 9 111:18,24 139:11 conclusions [1] 131:13 conduct [2] 92:23 97:25 confederacy [1] 83:21 Confederate [6] 6:21 49:5 62:12 69:1 71:5 83:20 Confederates [5] 61:1 68: 4 87:20 113:14 117:25 confession [1] 102:7 confirmatory [1] 125:19 conflict [2] 68:3 69:18 conflicts [1] 101:23 confront [1] 74:25 confused [2] 25:16 26:25 Congress [99] 3:22 4:5,15, 17 5:9,12,22 6:4,18,22 7: 11,17,25 8:3,8 9:5 10:12 12:4,11 13:12,19 14:6,12, 18 17:11,22,24 18:2,7,8,19 24:14 27:23,25 28:15 30: 12,22 31:4,7,17,19,23,25 32:1,13 33:14 42:23 43:2 46:20 48:8 50:19 51:1,13 52:20 53:1,3,18 54:1,7 56: 7,9,12,16 58:1,11 61:4 63: 11 68:12,17 71:1 74:10,21, 23 82:19 83:2,5,13 86:24 87:1,13,13,15 89:17 91:12 95:5 96:13 102:19 103:10, 13,21 110:2 112:25 113:25 115:17 120:1 122:15 123: 22 132:12 135:3 Congress's [2] 57:20 103: 11 congressional [9] 15:9 17: 9 30:11 34:13 63:14 83:20 138:6,9,13 congressionally [1] 14:25 Congressman [1] 67:10 congruence [1] 18:13 congruent [2] 19:14,17 consequence [2] 21:3 85: 2 consequences [5] 20:18 23:7 84:8 101:21 138:21 consequential [1] 16:8 consequentialist [2] 22: 20 23:3 consider [1] 110:14 considerations [3] 15:18 22:19 23:4</p>	<p>considered [1] 37:7 consistent [2] 6:14 137:10 constitutes [2] 86:2,9 Constitution [53] 3:19 4: 16 8:2 14:5 16:11,18 20:1 23:11 24:3,15 27:7 28:14 38:3 40:24 41:8 42:17,25 46:14 62:21 65:19 66:7,25 72:11 73:1,14 80:10 81:6 82:1 85:23 86:13,18 88:20 94:18 106:16 107:23 108: 1,5,23 109:1,17,20 110:19 115:13,18,24 116:6,8 120: 18 121:18,23,25 124:3 137: 24 Constitution's [3] 4:11 7: 5 18:5 constitutional [38] 5:16 9: 1,14 13:25 26:17 27:13 42: 10 43:13 45:24 48:6 56:4 66:15 71:22 75:18 76:8,10 77:23 79:6,20 83:16 85:5 86:11 88:25 104:4 105:7, 22 106:25 109:25 110:1 115:6,14 116:9 129:3,7,18, 21 137:11,20 constitutionally [7] 3:11 4:20 55:11 59:8,9 66:19 88:22 constrained [1] 105:11 constraints [1] 129:21 construction [1] 139:13 construe [2] 50:17 120:14 contemporaneous [2] 67: 3,3 contends [1] 123:19 contentions [1] 138:24 contested [1] 132:16 contesting [1] 79:17 context [9] 61:13 78:9 81:5 97:19 103:15 118:10 122: 7,8 130:13 contexts [2] 20:13 108:14 contingent [1] 83:8 continue [3] 60:7 68:5 69: 1 continues [2] 63:8 139:20 contradict [1] 22:16 contrary [3] 47:22 87:3,4 control [2] 61:7,9 controlling [1] 69:13 controversy [1] 127:22 conversation [1] 120:25 convicted [4] 15:23 54:15 113:4,24 conviction [5] 32:17 51:6 58:9 83:7,7 coordinated [1] 88:23 Corp [3] 77:25 99:5 131:6 Corp.-type [1] 131:18 corpus [1] 15:24 Correct [24] 7:18 9:15,23</p>	<p>11:19 28:18 34:11 45:14 46:14 47:6 55:17 59:18 63: 17 68:10 83:22 84:18 91: 23 99:21 100:9 112:3 123: 2 126:15 129:19,20 132:6 correctly [2] 5:24 30:17 couldn't [7] 32:18 44:11 56:25 115:13 116:12,13,13 Counsel [10] 6:6 9:10 15: 19 44:6 65:5 84:6 96:25 123:6 136:23 139:24 count [6] 63:21 103:21,22, 25 122:19,20 counted [1] 63:24 countervailing [1] 62:19 counting [1] 85:16 countries [1] 97:22 country [6] 73:11 97:3,9 100:10 131:19 133:25 couple [1] 88:14 course [9] 10:20 24:11 51: 10 69:18 77:20 87:14 90:5 112:7 131:22 COURT [115] 1:1,14 3:9,10 4:23 6:1 9:7 11:1,18,21 12: 10 13:8 15:1 17:5,5 19:4,9 20:19 21:1,16,19,21 22:6 23:6 26:2,5,8 28:11 30:9 33:6,8 40:23 41:15 45:3 48:17 53:23 55:17 59:16 60:1 63:8,19 65:11,21 66: 3 72:9 75:17,22 76:10,11 77:1,20,24 78:13,15 79:7, 12,14,17 82:10 86:11,12 88:17,18 89:19 90:2 95:14, 15 97:13 98:12,14,22,24 99:19,22,25 100:2,7,14,15, 16,24 102:3,10 103:2,17 112:11,11 122:1,3,10,21, 23 123:12 124:9,17,22,23 125:4 126:1 127:7 131:2, 17 133:21 134:16 135:21, 23 136:15 138:1,10,18,22 139:7,12,19,23 Court's [11] 3:14 4:13 5:1 18:13 63:12 67:1 90:1 124: 25 131:20 138:11 139:3 courtroom [1] 111:12 courts [14] 8:5 16:22 57:15 76:11 100:12 116:4,5,5 123:15 124:6 135:21 136: 14 138:9,11 cover [1] 66:5 covered [10] 3:17 40:6 41: 17 42:16 46:20 48:16 58:3 121:9,23 139:1 covers [1] 56:15 cracks [1] 48:14 create [4] 65:22 74:21 102: 17 103:16 created [2] 67:23 115:15 creates [4] 20:2 30:12 31:</p>
--	--	--	--	---



## Official - Subject to Final Review

<p>20 96:16  <b>creating</b> [1] 76:9  <b>credit</b> [1] 13:18  <b>crimes</b> [1] 51:7  <b>criminal</b> [2] 14:17 15:23  32:17,17,19 64:25 83:6 87:  15 113:3,15 114:7 123:4  <b>crisis</b> [1] 104:4  <b>criteria</b> [5] 9:4 64:23 126:5,  9 138:2  <b>criticized</b> [1] 31:12  <b>cross-examination</b> [1]  131:10  <b>cross-examine</b> [1] 112:6  <b>crucial</b> [1] 53:18  <b>curious</b> [1] 107:16  <b>current</b> [1] 19:8  <b>currently</b> [1] 14:17  <b>cut</b> [1] 41:11  <b>cycle</b> [2] 107:1 115:8</p> <hr/> <p style="text-align: center;"><b>D</b></p> <p><b>D.C</b> [1] 1:10  <b>danger</b> [1] 115:21  <b>date</b> [3] 8:11 82:3 91:6  <b>Daubert</b> [1] 100:24  <b>daunting</b> [1] 85:1  <b>Davis</b> [4] 11:22,23 35:20  61:23  <b>Day</b> [7] 4:16 8:24 25:2,22,  24,25 138:15  <b>days</b> [1] 89:22  <b>de</b> [13] 78:10 82:7 90:12 91:  3 92:7,18,21,22 131:14,16,  23 138:19 139:8  <b>deadline</b> [4] 4:20 8:7 28:  13 138:5  <b>deadlines</b> [1] 105:14  <b>Deal</b> [1] 102:16  <b>dealing</b> [1] 60:20  <b>debate</b> [3] 9:18 73:15 85:  11  <b>debates</b> [1] 119:25  <b>decades</b> [1] 88:14  <b>decide</b> [19] 19:13 21:1 25:9  75:1,17 77:1 78:15 84:25  86:5 98:15,18,20 99:20  100:9,10 103:6 114:22  124:7 131:3  <b>decided</b> [4] 5:25 30:17 45:  5 112:19  <b>decides</b> [8] 52:17 54:7 74:  1,2,13 76:10 127:1 133:17  <b>deciding</b> [6] 76:24 85:13  106:11,13,15 123:3  <b>decision</b> [32] 3:14 4:13,23  11:18,21 13:15 20:25 21:7,  11,21 25:8 26:13 44:16 45:  4 63:12 76:12 78:12 79:18  85:12 90:1 99:2 100:7,13,  15 104:22 105:2 117:2  121:10 133:21,21 136:16  138:22</p>	<p><b>decision-making</b> [1] 134:  15  <b>decisions</b> [14] 14:19 44:17  54:2 91:5 101:23 112:9  130:19 135:21 136:15 138:  10 139:3,5,7,9  <b>declaration</b> [1] 8:22  <b>declared</b> [1] 97:20  <b>declined</b> [1] 67:12  <b>defeasible</b> [1] 24:14  <b>defer</b> [1] 133:13  <b>deference</b> [5] 78:12 98:21  131:7,12 133:23  <b>deficiencies</b> [2] 98:13,15  <b>define</b> [2] 10:25 74:1  <b>defined</b> [2] 63:22 130:3  <b>defines</b> [1] 124:13  <b>definite</b> [1] 132:13  <b>definitely</b> [2] 37:19 49:10  <b>definition</b> [1] 74:13  <b>defund</b> [1] 58:11  <b>degree</b> [1] 114:24  <b>degrees</b> [1] 128:12  <b>deliberately</b> [1] 66:5  <b>demanding</b> [1] 7:10  <b>demands</b> [1] 111:14  <b>democracy</b> [6] 114:20 115:  3,7,10,15 120:15  <b>democratic</b> [2] 84:22 115:  16  <b>demonstrate</b> [1] 61:13  <b>demonstrates</b> [1] 42:25  <b>Denver</b> [2] 1:20,22  <b>deny</b> [1] 70:24  <b>depend</b> [1] 30:8  <b>depending</b> [1] 130:25  <b>depends</b> [1] 19:2  <b>depositions</b> [2] 112:13,15  <b>deprive</b> [1] 70:23  <b>deputy</b> [1] 126:21  <b>described</b> [4] 33:8 42:13  45:17 89:4  <b>deserves</b> [1] 93:5  <b>designed</b> [3] 46:1 96:1  115:9  <b>despite</b> [2] 12:9 123:19  <b>detail</b> [1] 87:10  <b>determinant</b> [1] 76:9  <b>determination</b> [9] 28:3,7  33:16 76:3 122:16 127:8  128:18 129:4 133:17  <b>determinations</b> [1] 112:  18  <b>determine</b> [9] 6:24 71:14,  20 72:7 73:12 76:14 80:13  97:10 129:8  <b>determined</b> [3] 21:7 31:21  129:18  <b>determining</b> [4] 67:20 74:  19 76:12 103:18  <b>develop</b> [2] 60:1 86:8  <b>developed</b> [1] 21:13</p>	<p><b>difference</b> [6] 41:25 66:8  75:13 107:19 126:11 132:  18  <b>different</b> [55] 4:14 11:11  13:5 20:7,13 21:13,15 22:  13 37:1 42:8 48:8 60:20  61:4,8 74:12 75:21 81:7,  11,19 84:12,13 86:2 92:5  93:3 96:3 98:7,9,9,10 99:  12,13,14,15,15,16 100:14,  24 101:24,24 106:4,21,21  111:6,7 113:20 117:19  129:11,12,12,18 130:19,20  134:8 135:1,2  <b>differently</b> [4] 70:10 73:21  100:25 125:22  <b>differs</b> [1] 21:19  <b>difficult</b> [5] 7:14 74:8 93:4  103:16 132:22  <b>diplomatic</b> [1] 97:6  <b>direct</b> [3] 55:9 124:4 137:7  <b>directed</b> [1] 123:15  <b>direction</b> [3] 61:8 91:9 92:  11  <b>directly</b> [1] 20:13  <b>director</b> [1] 126:21  <b>disability</b> [12] 4:6 6:18 28:  1 31:18 81:18,23,24 82:19  83:4,12,14 123:22  <b>disagree</b> [3] 5:25 10:24 56:  14  <b>disagreed</b> [1] 79:8  <b>disagreeing</b> [1] 111:24  <b>disapproved</b> [1] 138:12  <b>discretion</b> [1] 131:3  <b>discussed</b> [4] 99:4 118:13  121:1 130:16  <b>discussing</b> [1] 46:8  <b>discussion</b> [3] 43:6 51:16  107:20  <b>disenfranchise</b> [1] 115:23  <b>disenfranchisement</b> [2]  104:4 107:6  <b>disenfranchising</b> [2] 105:  17 114:23  <b>disillusioned</b> [1] 105:17  <b>dismantle</b> [1] 115:14  <b>dismissed</b> [1] 22:19  <b>disobey</b> [1] 90:20  <b>disparate</b> [1] 131:23  <b>disparity</b> [2] 134:7,18  <b>dispose</b> [1] 22:25  <b>disputed</b> [1] 78:4  <b>disqualification</b> [23] 5:9  18:24 27:8 30:23 32:14 33:  2,14 34:3,6 36:24 37:11  41:1 53:7 72:1 83:24 84:  10 91:12,20 92:5 114:11  132:3,4,9  <b>disqualified</b> [30] 3:12 4:4  6:12 15:25 30:2 36:22 46:  9 48:1 54:15 55:13 65:19</p>	<p>67:5,14 68:9,12 75:4 84:4  91:2,6,7,21 92:9 94:2 103:  24 113:5 122:18 126:10,18  128:24 138:24  <b>disqualifies</b> [1] 65:24  <b>disqualify</b> [9] 9:22 10:6 24:  10,12 68:16 69:5,22 80:18  101:24  <b>disqualifying</b> [4] 17:20 23:  16,17,19  <b>disrupt</b> [2] 65:16 88:24  <b>disruption</b> [1] 13:17  <b>dissenting</b> [1] 111:9  <b>distinction</b> [11] 27:6,15,17  43:7 50:22 108:8 109:15,  17,21 118:24 126:6  <b>distinguish</b> [2] 138:8,17  <b>distinguishing</b> [1] 108:6  <b>disuniformity</b> [2] 96:2 117:  19  <b>doctrine</b> [5] 90:13 91:4 92:  18 138:20 139:8  <b>doctrines</b> [1] 35:1  <b>doing</b> [9] 5:6 7:23 14:4 33:  22 34:10 69:3 70:9 93:23  106:10  <b>domestic</b> [1] 20:10  <b>DONALD</b> [2] 1:3 3:11  <b>done</b> [11] 17:23 26:1,2 44:  14 92:10,23 98:1 105:16  122:9,14 138:1  <b>door</b> [1] 60:7  <b>dormant</b> [4] 85:20 86:21  87:7,19  <b>doubt</b> [3] 84:16 105:10 121:  22  <b>down</b> [6] 45:8 66:10 84:24  89:5 127:18,18  <b>drafted</b> [1] 43:18  <b>drafting</b> [2] 43:6 60:19  <b>drafts</b> [2] 43:25 61:24  <b>dramatic</b> [1] 138:21  <b>drawing</b> [3] 27:14,16 43:11  <b>drawn</b> [1] 50:5  <b>dropped</b> [1] 114:15  <b>due</b> [2] 59:1,13,25 60:3 70:  24 95:18 111:14 129:19,22,  24,25 130:5  <b>during</b> [6] 7:7 26:3 44:17  68:2 90:18 139:15</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>each</b> [8] 3:24 6:24 7:1 22:  24 31:23 32:3 50:5 137:6  <b>earlier</b> [13] 7:11 8:7 18:24  43:25 65:20 81:2 83:1 94:  24 99:4 107:20 116:11  117:18 118:14  <b>easier</b> [1] 26:22  <b>easy</b> [1] 133:1  <b>effect</b> [16] 12:4 21:6,11 34:  6 44:8 76:14,23 84:2 101:  10 106:18 113:1 114:14,23</p>	<p>117:3 133:20,24  <b>effectively</b> [5] 21:1 34:17  58:12 90:24 138:4  <b>efficiently</b> [1] 124:6  <b>effort</b> [5] 64:15,19,22 69:2  86:16  <b>efforts</b> [1] 82:23  <b>eggs</b> [1] 116:22  <b>either</b> [11] 9:5 17:23,25 51:  14 61:2 63:15 64:22 67:17  68:6 98:14 121:18  <b>elaborated</b> [1] 54:4  <b>elect</b> [1] 114:21  <b>elected</b> [22] 3:21 4:1,7,18  6:22,25 7:8 8:4 23:18 24:  20 31:22 50:25 52:11 57:  25 61:23 67:10 75:14,14  93:11 98:22 116:11 133:  23  <b>Election</b> [35] 4:16 6:17,19  8:6,12,21,24 25:1,23,25 26:  7 28:10 67:13,21 71:7 79:  5 80:8 81:5 85:1 89:5,22,  23 103:14,19 107:1 112:18  115:8 117:3 122:17 123:  25 134:8,9 135:18 138:14,  15  <b>elections</b> [19] 61:2 66:16  67:24 69:13 70:10,13 71:  12 80:7 95:2 96:3 117:9,  21 118:2,5,6,11 124:5 126:  21 129:9  <b>elector</b> [3] 38:25 39:1 128:  1  <b>electoral</b> [6] 66:18 103:22,  23,24 122:20 136:13  <b>electors</b> [34] 71:21 72:8,25  73:3,13 76:6 80:14 89:6,  12 90:3,4 104:13 106:15  107:6 116:23 117:6,10,11  119:19,23 121:5,9,15 123:  14 129:6,16,21 133:13 134:  25 137:5,8,16,17,22  <b>eligibility</b> [6] 75:18 78:16  81:14 103:18 126:5,9  <b>eligible</b> [1] 96:4  <b>eliminate</b> [1] 58:18  <b>ellipse</b> [2] 78:11,24  <b>else's</b> [1] 104:23  <b>elsewhere</b> [1] 108:23  <b>elusive</b> [2] 35:15 114:19  <b>embedding</b> [1] 60:24  <b>emblematic</b> [1] 36:7  <b>Emoluments</b> [2] 40:25 41:  18  <b>emphasize</b> [1] 113:13  <b>emphasized</b> [1] 90:2  <b>emphasizes</b> [1] 88:19  <b>employed</b> [2] 130:25 131:  5  <b>enact</b> [10] 5:18 6:4 17:22  18:8 19:5 54:7 58:2 63:11</p>
--	---	---	--	--

## Official - Subject to Final Review

<p>116:13 129:10  <b>enacted</b> [7] 13:20 43:21 56:9 62:22 84:4 113:1,10  <b>enacting</b> [2] 63:14 104:14  <b>enactment</b> [4] 14:19 15:9 62:6,11  <b>enacts</b> [3] 5:22 32:1 56:16  <b>encompass</b> [1] 3:21  <b>encompassed</b> [1] 39:22  <b>encouraging</b> [1] 101:13  <b>end</b> [6] 54:5 63:7 73:2,2 82:9 134:7  <b>enemies</b> [1] 98:3  <b>enemy</b> [2] 97:5,11  <b>enforce</b> [34] 5:21 12:23 13:2,3,4 16:13 19:3,5 20:15 52:21 53:7 63:4 71:2,5,6,22 72:15 73:13 75:6 80:10 81:5 92:4 95:1 96:12,13,17 102:17 105:21 107:5 116:6 117:20 122:6 133:11 136:13  <b>enforced</b> [4] 5:17 29:21 30:11 46:25  <b>Enforcement</b> [18] 12:12,13 13:20 14:14,16,20 16:19 17:10 18:11 30:6 31:19 53:2,21 57:7 63:16 87:1 95:13 96:15  <b>enforces</b> [1] 16:2  <b>enforcing</b> [8] 6:3 8:25 9:1 17:11 24:14 56:8 117:23 118:4  <b>engage</b> [7] 21:18 32:25 33:1,16 64:5,7 74:5  <b>engaged</b> [6] 30:1 47:25 66:24 74:2 81:25 133:4  <b>engages</b> [1] 90:15  <b>engaging</b> [2] 65:18 97:25  <b>enormous</b> [1] 133:24  <b>enough</b> [1] 94:8  <b>ensure</b> [4] 66:18 70:5 96:10 113:23  <b>ensuring</b> [1] 96:7  <b>entered</b> [1] 21:15  <b>entire</b> [1] 61:10  <b>entirely</b> [2] 5:8,11  <b>entitled</b> [3] 59:5,6,9  <b>entity</b> [1] 31:21  <b>enumerated</b> [1] 119:12  <b>enumerates</b> [1] 137:24  <b>enunciation</b> [1] 13:10  <b>envisioned</b> [2] 117:23 118:4  <b>equal</b> [3] 70:24 129:22 137:18  <b>error</b> [4] 77:3,14,21 102:8  <b>escape</b> [1] 139:11  <b>especially</b> [1] 43:21  <b>ESQ</b> [4] 2:3,6,10,13  <b>ESQUIRE</b> [2] 1:18,20  <b>essence</b> [4] 78:5,21 100:</p>	<p>19 101:11  <b>essential</b> [2] 88:25 100:5  <b>essentially</b> [5] 7:10 78:10 87:10,20 96:13  <b>established</b> [3] 13:21 14:13,25  <b>estoppel</b> [5] 20:23,24 21:6 133:16 135:2  <b>ET</b> [5] 1:6,21 2:8 65:9 103:7  <b>even</b> [32] 4:4 5:20 6:15,17 7:3,13 8:9 21:10 22:12 32:11 33:1 43:19 44:4 45:10 48:6 49:1 55:7 56:18,18 84:1 87:9 94:13 102:19 106:25 107:2 114:11 116:24 127:5,8,21 131:24 134:11  <b>event</b> [1] 43:20  <b>events</b> [3] 63:24 64:25 138:25  <b>eventually</b> [1] 85:12  <b>everybody</b> [5] 84:2 104:7,23 105:8 121:14  <b>everyone</b> [4] 48:10 70:15 100:6 124:8  <b>everything</b> [1] 12:9  <b>evidence</b> [22] 36:5 47:13 52:21,22 60:18 61:17,18,21 62:16,16,19 73:6 84:14 95:21 98:10,18 99:13 100:8,8 101:6 129:11 131:10  <b>evidentiary</b> [4] 95:20 98:25 99:1 104:7  <b>exact</b> [2] 31:7 33:25  <b>exactly</b> [9] 14:10 21:20 33:7 34:12 47:4 51:19 53:16 108:8 121:13  <b>example</b> [13] 25:18 41:17 42:12 67:8,9 68:18 72:16 93:10 100:21 104:18 107:14,24 119:19  <b>examples</b> [9] 10:5 67:3,16 68:8 69:7,8,25 70:9 103:10  <b>except</b> [4] 46:10 65:25 81:17 108:18  <b>exception</b> [2] 50:16 110:13  <b>exceptional</b> [1] 110:22  <b>exclude</b> [8] 4:3,8 18:9 60:8 73:16 122:11 128:24 135:14  <b>excluded</b> [8] 40:6 41:15 45:17,19 46:17 69:9 73:18 134:10  <b>excludes</b> [1] 38:6  <b>excluding</b> [1] 66:22  <b>exclusive</b> [5] 15:1 53:23 57:16,20 74:22  <b>excuse</b> [1] 137:22  <b>excused</b> [2] 28:5,9  <b>executing</b> [1] 12:3</p>	<p><b>executive</b> [2] 139:14,18  <b>exemption</b> [2] 65:22 66:3  <b>exercise</b> [3] 105:10 131:6 137:19  <b>exercised</b> [1] 137:10  <b>exercising</b> [2] 87:5 123:13  <b>exist</b> [1] 48:2  <b>existed</b> [2] 81:24 118:17  <b>existing</b> [1] 105:21  <b>exists</b> [6] 81:24 83:4,4,12 91:14 114:1  <b>expand</b> [1] 72:13  <b>expect</b> [2] 84:17,20  <b>expedited</b> [1] 112:8  <b>experience</b> [1] 115:11  <b>expert</b> [7] 21:24 22:14,16 100:20,22 101:1 112:13  <b>expert's</b> [1] 101:17  <b>explain</b> [2] 41:5 73:8  <b>explicit</b> [1] 54:2  <b>express</b> [5] 15:2 101:1 124:12,16,20  <b>extant</b> [4] 8:25 24:1 27:13 53:21  <b>extended</b> [2] 16:24 47:2  <b>extended</b> [1] 72:3  <b>extensive</b> [1] 104:12  <b>extent</b> [1] 114:18  <b>extracted</b> [1] 56:24  <b>extraordinary</b> [8] 66:4 75:15 81:22 83:3 85:24 86:14 88:19 90:5  <b>extremists</b> [2] 22:3 101:11</p> <p style="text-align: center;"><b>F</b></p> <p><b>fabric</b> [1] 105:22  <b>face</b> [3] 9:8 62:19 126:3  <b>fact</b> [32] 9:16 21:17 27:2 28:5 32:15 33:13 56:2 70:10 78:13 81:21,23 82:13 83:2,5,13,19 85:4 88:7 89:23 91:7 96:17 97:21 99:16 102:7 104:19 111:17 112:14 119:19 124:18 125:10,18,19  <b>facto</b> [9] 82:7 90:12 91:3 92:7,18,21,22 138:19 139:8  <b>facts</b> [8] 78:4,10 99:6 100:5,16,17 102:5 127:23  <b>factual</b> [12] 21:13,15 77:3,13,21 78:1,16,19 131:13,20 133:22 134:20  <b>failed</b> [1] 70:6  <b>failing</b> [1] 96:15  <b>fair</b> [2] 94:8 110:12  <b>fairly</b> [1] 88:13  <b>fairness</b> [1] 111:25  <b>faith</b> [1] 135:17  <b>fall</b> [3] 28:4 48:14 121:16  <b>far</b> [1] 34:7  <b>far-reaching</b> [1] 123:13  <b>fast</b> [1] 112:9</p>	<p><b>fatal</b> [1] 31:16  <b>favor</b> [2] 15:19 38:1  <b>feature</b> [1] 134:13  <b>February</b> [1] 1:11  <b>federal</b> [6] 4:8,12 9:5 13:4 16:14,20,23 17:5 18:6 32:3 44:23 51:22 52:8 53:8,22 54:14 56:18 57:9 58:3,16,18,23 63:8,15 66:1,6,12 68:22 70:4,6 71:1,22 72:13 75:7,18 76:7,9 79:5,20 80:8,9 82:23 86:17 95:13,15 96:12,18 102:9 106:2,3,24 112:25 113:3,6,22,23 114:1 116:5 122:25 123:3 139:19  <b>Federalism</b> [3] 96:16 134:24 135:4  <b>Federalist</b> [1] 53:11  <b>feed</b> [1] 100:18  <b>feel</b> [1] 34:23  <b>fell</b> [1] 111:14  <b>felt</b> [1] 69:19  <b>few</b> [3] 67:16 68:8 122:22  <b>fewer</b> [1] 45:23  <b>figure</b> [2] 35:7 114:17  <b>figuring</b> [1] 74:4  <b>filed</b> [2] 70:2 127:12  <b>final</b> [6] 62:2,6,7,11 63:18 129:4  <b>find</b> [3] 44:11 80:4,5  <b>finding</b> [2] 21:18 78:13  <b>findings</b> [6] 21:15 77:13,21 98:21 99:16 133:22  <b>fine</b> [1] 48:24  <b>finish</b> [1] 36:2  <b>first</b> [40] 3:16 12:12 15:12 29:1 32:18 34:6 36:18,21,25 37:1,18,21 38:13 50:12 65:12,14 71:10 77:4,20 97:18 98:13 99:19 102:14 105:9,11,18,19,24 106:8,9 115:5 118:13 121:14 122:22 125:7 127:1 129:23 130:12,15 137:13  <b>fit</b> [5] 30:19 51:16 72:9 76:7 80:14  <b>five-day</b> [1] 112:3  <b>flip</b> [1] 102:18  <b>flood</b> [1] 84:1  <b>floor</b> [1] 28:23  <b>focus</b> [4] 37:17,20 61:14 62:20  <b>focused</b> [3] 61:20 74:7 120:24  <b>focusing</b> [2] 118:11 119:18  <b>Foley</b> [1] 104:2  <b>follow</b> [2] 135:17 138:21  <b>follow-up</b> [1] 130:18  <b>followed</b> [4] 30:18 86:25 87:2 130:22</p>	<p><b>Foner</b> [1] 69:16  <b>Foote</b> [2] 69:17,17  <b>Footnote</b> [1] 41:14  <b>force</b> [3] 16:11,12 20:10  <b>forcefully</b> [2] 45:16 63:3  <b>foreign-born</b> [2] 66:23 73:16  <b>forever</b> [1] 84:5  <b>form</b> [1] 53:24  <b>formal</b> [1] 58:12  <b>former</b> [11] 20:24 29:25 61:1 65:25 69:1 75:3 87:20 92:12 93:8,10 98:8  <b>forms</b> [1] 53:2  <b>forth</b> [1] 50:3  <b>fortiori</b> [1] 105:4  <b>forward</b> [2] 90:13 138:5  <b>found</b> [1] 21:19  <b>founding</b> [1] 47:13  <b>Fourteenth</b> [33] 3:13 5:21 6:21 10:19 15:14 19:6 32:7 35:9,10 60:15 67:4 70:3,21 71:9,12 72:2,6,12,16 73:9 74:7,9,20 80:3 83:22 130:15 132:9,10 133:2,5,9,10 135:20  <b>Framers</b> [9] 40:1 60:19 66:4 95:25 114:7 115:10 117:22 118:3 119:7  <b>free</b> [2] 18:23 92:13  <b>frequently</b> [2] 6:20 9:17  <b>friend</b> [2] 66:8 82:25  <b>friends</b> [1] 107:22  <b>frivolous</b> [3] 85:4,8,9  <b>full</b> [2] 95:20 104:6  <b>full-blown</b> [1] 131:8  <b>fulsome</b> [1] 77:9  <b>function</b> [2] 88:24 107:4  <b>functions</b> [2] 86:18 88:22  <b>funds</b> [2] 97:8,8  <b>further</b> [12] 9:19 10:8 18:20 43:24 44:3,20 75:25 98:2 135:7,9 136:22 139:16  <b>future</b> [2] 83:5 88:9</p> <p style="text-align: center;"><b>G</b></p> <p><b>gained</b> [1] 20:12  <b>gap</b> [1] 52:4  <b>gave</b> [1] 68:18  <b>gear</b> [1] 19:19  <b>General</b> [4] 1:22 110:14 116:3 123:25  <b>generally</b> [3] 9:12 10:5,11  <b>generation</b> [2] 47:13,14  <b>generations</b> [1] 115:8  <b>Georgia</b> [2] 67:10,11  <b>gerrymandered</b> [2] 46:1,4  <b>gets</b> [5] 17:4 75:1 89:8 106:11 134:21  <b>getting</b> [2] 16:10 101:25  <b>Ginsburg</b> [1] 104:2  <b>give</b> [14] 12:4 17:11 36:24 56:10 69:24 81:3 98:21</p>
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## Official - Subject to Final Review

<p>104:17 107:12 111:22 115:17 131:7,12 134:16  <b>given</b> [12] 47:12,19 48:4 50:23 61:12 78:3 80:25 97:11 98:25 115:25 121:23 133:22  <b>gives</b> [10] 6:4 13:12 14:5,9 21:10 71:20 76:5 90:23 132:12 137:6  <b>giving</b> [5] 30:21 39:15,19 61:15 117:1  <b>goals</b> [1] 48:9  <b>goodly</b> [1] 84:21  <b>GORSUCH</b> [55] 17:14,16 41:19,21,24 42:3,7 43:1,4,12,15 49:14,15,21,24 50:2 51:15,19 52:12 78:25 79:9,16,22 80:8,17,23 81:12,17 82:2,15 90:11 91:1,17,19,24 92:6,17,21 93:13,16,19,22 94:2 107:9,10 108:18,22 109:2,14 110:4,9,18,24 111:1 136:19  <b>got</b> [3] 44:17 105:15 127:15  <b>governing</b> [1] 26:17  <b>government</b> [12] 60:23,25 61:7,10 64:12,16,19,22 70:5,6 87:11 96:12  <b>governor</b> [3] 32:16 67:9,11  <b>granted</b> [2] 33:4 72:25  <b>grants</b> [2] 106:16 109:10  <b>grapple</b> [1] 101:20  <b>great</b> [3] 73:15 77:8 106:3  <b>greater</b> [3] 21:10 72:22 131:19  <b>Griffin</b> [6] 11:14,17 55:6,9 56:1,10  <b>Griffin's</b> [46] 5:19,24 6:2 11:4,9 12:8,10 13:9,10,20 14:6,7,13,22 15:3,8,12,20,22 17:3,7 30:9,10,17 31:12 33:6 34:11,25 35:6 36:6 45:1,1 52:15 53:19 54:2,4 55:3,16,18,21,25 56:6 82:8 86:23 138:23 139:12  <b>Griswold</b> [3] 1:23 2:11 123:10  <b>ground</b> [1] 15:24  <b>grounds</b> [1] 122:13  <b>group</b> [1] 86:16  <b>guess</b> [14] 33:11 39:15 42:3 56:17 57:19 60:12 75:24 95:3,25 104:16 105:23 113:16 118:1 119:17  <b>guidance</b> [2] 78:12 134:16  <b>guilty</b> [1] 127:16</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>habeas</b> [4] 15:23 55:4,8,25  <b>half</b> [1] 34:23  <b>halt</b> [1] 63:21  <b>hand</b> [1] 70:25  <b>handful</b> [1] 84:25</p>	<p><b>handle</b> [1] 136:8  <b>handled</b> [1] 124:5  <b>happen</b> [3] 30:6 113:23 134:25  <b>happened</b> [4] 6:20 53:12 94:5 127:18  <b>happening</b> [2] 37:1 41:5  <b>happens</b> [8] 48:5 63:6 91:3,22 92:2 94:4 103:20 122:8  <b>happy</b> [1] 139:22  <b>hard</b> [2] 35:22 72:17  <b>harder</b> [1] 15:13  <b>Hassan</b> [1] 104:2  <b>hear</b> [2] 3:3 98:14  <b>heard</b> [3] 59:10 65:20 95:18  <b>hearing</b> [1] 126:22  <b>hearsay</b> [4] 22:10,11 77:10 84:15  <b>heart</b> [1] 96:14  <b>heavier</b> [1] 37:21  <b>heavily</b> [2] 35:17 137:5  <b>held</b> [7] 3:10 8:5,21 48:2 65:25 79:17 139:4  <b>help</b> [2] 41:9 102:1  <b>helpful</b> [1] 99:10  <b>herself</b> [1] 128:3  <b>high</b> [6] 40:1 48:2 51:7 78:9 122:2 134:4  <b>highly</b> [2] 35:13 59:19  <b>himself</b> [8] 50:11,12,17 65:19 78:15 101:13 109:5 122:21  <b>hinges</b> [1] 41:24  <b>historians</b> [1] 70:1  <b>historical</b> [6] 53:4 60:22 61:12 62:16 73:6 103:10  <b>history</b> [20] 10:1 13:16 23:16,18 43:6 44:22 60:14 62:15 65:15 70:16 73:11 87:3,4 90:2 96:24 117:21 118:1,14 119:6 120:23  <b>hold</b> [27] 11:24 26:4 28:17,17 42:11,23 43:3 46:23 48:22 83:11,17,21 85:7 93:12 94:14,18,20 96:8 102:16 108:2 110:5,7,9 113:22 115:13 121:9,18  <b>holders</b> [1] 13:3  <b>holding</b> [33] 4:10,21 5:19 6:2 9:9 13:9 17:6 18:3,17 28:21 33:6 34:10 36:23 38:19 44:1 57:24 66:20 69:10 81:1,6 82:13,13,18 91:20,21 100:9 112:25 113:5 114:1 121:20 137:20 138:11,25  <b>holds</b> [7] 7:7 56:7 66:13 108:13 109:23 121:25 138:4  <b>Honor</b> [36] 10:22 12:9 13:11 15:17 23:4 30:8 35:24</p>	<p>37:13 45:16 50:6 53:17 55:18 68:19 69:8 71:10,18 75:16 77:19 79:21 85:3 86:10 97:13 98:24 101:4 106:20 112:1 113:9 114:6 116:19 124:15 126:15 129:6,15 132:20 134:3 135:16  <b>Honor's</b> [4] 7:9 56:8 57:8 59:17  <b>House</b> [9] 6:24 7:1 31:7,23 34:8 42:12 107:25 109:24 110:15  <b>Houses</b> [1] 48:8  <b>However</b> [1] 131:16  <b>huge</b> [1] 134:6  <b>hybrid</b> [1] 130:14  <b>hypo</b> [1] 24:3  <b>hypothetical</b> [6] 7:9 15:16 56:9 57:8 93:20,23</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>idea</b> [4] 52:6 70:3 108:10 114:20  <b>identified</b> [1] 112:12  <b>idiosyncratic</b> [1] 70:9  <b>ignore</b> [1] 66:15  <b>Il</b> [2] 51:12 52:3 66:16 67:23 70:12 71:13,19 73:19 76:5 79:13,14 80:6 83:18 105:11 106:16 117:10 129:6 134:6 137:9,24 139:5  <b>Il's</b> [1] 137:16  <b>Illinois</b> [2] 8:15,17  <b>illuminates</b> [1] 43:7  <b>illustrates</b> [1] 115:20  <b>illustrative</b> [1] 83:2  <b>imagination</b> [1] 101:3  <b>imagine</b> [1] 24:25  <b>imagining</b> [1] 93:9  <b>immunity</b> [2] 54:19 70:23  <b>impact</b> [1] 105:2  <b>impeach</b> [1] 91:13  <b>Impeachment</b> [20] 3:23 38:5 40:25 49:18 51:3,6 52:1 56:24,25 57:2,8,16 58:6,8,19,22 88:10,11 94:16,18  <b>impeachment's</b> [1] 94:19  <b>impeachments</b> [1] 88:13  <b>imperative</b> [1] 96:9  <b>impermissible</b> [1] 33:15  <b>implement</b> [2] 5:9,21  <b>implemented</b> [1] 134:21  <b>implementing</b> [8] 5:23 9:21 13:13 14:11 18:8 102:20 103:3 113:11  <b>implication</b> [1] 58:1  <b>implications</b> [2] 41:8 45:23  <b>implicit</b> [1] 53:25  <b>implicitly</b> [3] 71:6 72:3 83:15  <b>implied</b> [2] 50:15 53:24  <b>implies</b> [2] 46:4 71:21</p>	<p><b>imply</b> [1] 41:16  <b>importance</b> [1] 75:21  <b>important</b> [9] 12:8 18:12,16 24:6 40:2 109:11 121:8 124:10 125:5  <b>impose</b> [2] 114:10 137:22  <b>imposed</b> [2] 4:20 137:13  <b>inaction</b> [1] 34:13  <b>inadmissible</b> [1] 22:10  <b>Inauguration</b> [2] 25:2,25  <b>inch</b> [1] 19:7  <b>incited</b> [2] 65:15 99:7  <b>incitement</b> [1] 21:18  <b>inciting</b> [1] 101:13  <b>include</b> [4] 120:11 121:14,24 129:22  <b>included</b> [2] 60:16 120:2  <b>includes</b> [1] 72:22  <b>including</b> [4] 40:25 71:5 113:1 119:9  <b>Incompatibility</b> [4] 42:22 108:4 110:10 121:19  <b>incongruous</b> [1] 125:21  <b>incorrect</b> [1] 128:19  <b>incredibly</b> [1] 78:4  <b>incumbent</b> [1] 32:4  <b>indefinitely</b> [1] 83:4  <b>independent</b> [5] 3:15 77:25 99:5 131:6,18  <b>Indiana</b> [1] 8:16  <b>indisputable</b> [2] 100:17 102:4  <b>individual</b> [7] 7:15 90:8 92:14 94:10 105:1 128:1 131:5  <b>individuals</b> [2] 3:21 69:10  <b>indulge</b> [1] 123:24  <b>ineligible</b> [7] 11:23 25:8 76:13,20 93:12 103:13 124:1  <b>infer</b> [4] 33:13,15 88:7,15  <b>inference</b> [1] 33:17  <b>inferences</b> [2] 43:10 50:5  <b>infiltration</b> [1] 60:24  <b>inform</b> [2] 82:22 126:24  <b>information</b> [3] 126:23 127:2 128:2  <b>inhabit</b> [6] 4:15,17 8:3,8,20 138:14  <b>initial</b> [2] 14:19 28:3  <b>initially</b> [2] 30:14 113:10  <b>insofar</b> [2] 71:19 100:4  <b>instances</b> [2] 110:20 127:3  <b>instead</b> [1] 26:20  <b>institutions</b> [2] 136:8,11  <b>instruct</b> [1] 137:16  <b>insulate</b> [1] 92:24  <b>insurgents</b> [1] 117:25  <b>insurmountable</b> [1] 32:9  <b>insurrection</b> [46] 6:9 13:2 14:17 27:9 30:1 33:17 47:</p>	<p>25 52:16 53:22 54:14 63:22,24 64:4,6,14,20,24 65:1,18 66:24 73:24 75:4 82:1 85:10,13,23 86:3,6,9,13 87:14,22 88:19 90:16 94:3 97:25 98:2 99:7 113:2 114:3 127:16,17,19 132:21 133:4 135:20  <b>insurrectionist</b> [20] 6:16,25 7:4,16 9:9,22 15:25 16:5,5 27:21 31:20 48:22,24 55:12 61:9 89:11 98:8 119:23 133:2,19  <b>insurrectionists</b> [16] 6:22 10:6,13 18:10 44:1 49:5 60:24 62:13 65:24 96:7 106:22 112:24 113:21,24 114:9 115:19  <b>intended</b> [1] 72:13  <b>intent</b> [4] 21:17 46:4 97:23 98:1  <b>intention</b> [1] 8:23  <b>interest</b> [3] 104:25 130:1,4  <b>interests</b> [2] 97:7 130:5  <b>interfered</b> [1] 132:13  <b>interim</b> [2] 90:18 96:2  <b>interpret</b> [2] 19:2 62:17  <b>interpretation</b> [1] 125:1  <b>interpreted</b> [2] 94:17 97:14  <b>interprets</b> [1] 86:11  <b>interrupt</b> [2] 13:23 79:1  <b>intratextualist</b> [1] 43:14  <b>invalid</b> [1] 139:6  <b>invitation</b> [1] 14:12  <b>invoked</b> [1] 138:19  <b>involve</b> [1] 64:11  <b>involved</b> [5] 15:22 20:14 111:10,10 134:17  <b>irregular</b> [1] 59:19  <b>isn't</b> [6] 10:15 33:21 46:1 85:5 118:14 125:13  <b>issue</b> [16] 12:20 16:23 20:3,4,9 31:21 46:24 60:20 75:19 80:1 100:10 105:8 124:20 129:17 130:13 132:22  <b>issued</b> [1] 134:21  <b>issues</b> [14] 13:1 40:22 59:25 60:2 70:15 102:11 103:16 104:6,8 117:14 122:23 123:4 124:10 127:25  <b>It'll</b> [1] 84:24  <b>itself</b> [9] 6:24 12:3 20:2 22:12 53:1 86:19 109:1 116:8 132:12</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>JACKSON</b> [78] 26:24 27:1,6,11,19,24 28:2,16,19,22,25 29:4,8,11,13 33:21 36:13,14,17,21 37:4,9,14,17,23 38:8,10,13,15,18,21,24 39:2,7,10,14,18,25 41:2 48:</p>
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## Official - Subject to Final Review

<p>21 <b>60</b>:10,11 <b>61</b>:17,18 <b>62</b>:2,5,9,24 <b>63</b>:2,13,18 <b>64</b>:8,18,23 <b>65</b>:3 <b>94</b>:22 <b>95</b>:8,10,22 <b>96</b>:21,23 <b>117</b>:16,17 <b>118</b>:13,19,22,24 <b>119</b>:2,4,11 <b>120</b>:6,20 <b>121</b>:7,11 <b>122</b>:4,25 <b>123</b>:5 <b>136</b>:22</p> <p><b>jail</b> <sup>[1]</sup> <b>114</b>:12</p> <p><b>January</b> <sup>[12]</sup> <b>21</b>:22 <b>22</b>:9,11 <b>28</b>:10 <b>54</b>:21 <b>63</b>:21 <b>81</b>:25 <b>85</b>:21 <b>88</b>:23 <b>102</b>:5 <b>103</b>:21 <b>138</b>:25</p> <p><b>JASON</b> <sup>[3]</sup> <b>1</b>:20 <b>2</b>:6 <b>65</b>:8</p> <p><b>Jefferson</b> <sup>[3]</sup> <b>11</b>:23 <b>35</b>:19 <b>61</b>:23</p> <p><b>Jeffersonians</b> <sup>[1]</sup> <b>58</b>:14</p> <p><b>John</b> <sup>[1]</sup> <b>46</b>:17</p> <p><b>Johnson</b> <sup>[3]</sup> <b>88</b>:11 <b>120</b>:1,16</p> <p><b>JONATHAN</b> <sup>[5]</sup> <b>1</b>:18 <b>2</b>:3,13 <b>3</b>:6 <b>137</b>:2</p> <p><b>judge</b> <sup>[10]</sup> <b>7</b>:1 <b>15</b>:24 <b>16</b>:4 <b>21</b>:19 <b>31</b>:23 <b>55</b>:10 <b>83</b>:11 <b>103</b>:12 <b>133</b>:22,23</p> <p><b>judges</b> <sup>[7]</sup> <b>21</b>:16 <b>58</b>:15,16,19 <b>98</b>:22 <b>99</b>:16,17</p> <p><b>judging</b> <sup>[1]</sup> <b>90</b>:14</p> <p><b>judicial</b> <sup>[5]</sup> <b>91</b>:5 <b>92</b>:24 <b>104</b>:6 <b>128</b>:5,17</p> <p><b>jump</b> <sup>[1]</sup> <b>74</b>:14</p> <p><b>jumps</b> <sup>[1]</sup> <b>73</b>:24</p> <p><b>jurisprudence</b> <sup>[1]</sup> <b>19</b>:8</p> <p><b>JUSTICE</b> <sup>[464]</sup> <b>3</b>:3,8 <b>5</b>:2,12 <b>6</b>:6 <b>7</b>:13,19 <b>8</b>:1,9,13 <b>9</b>:10,16,24 <b>10</b>:1,4,18,23 <b>11</b>:5,8,10,13,17,20,21,22 <b>12</b>:2,6,14,18,25 <b>13</b>:14,22 <b>14</b>:3,9,11,23 <b>15</b>:5,20 <b>16</b>:1,7,9,25 <b>17</b>:4,8,14,15,16,17 <b>18</b>:2,15 <b>19</b>:2,4,10,13,16,24 <b>20</b>:11,18 <b>21</b>:9,20 <b>22</b>:1,5,18 <b>23</b>:9,13,22,25 <b>24</b>:4,8,19 <b>25</b>:3,6,13,16,19 <b>26</b>:9,10,11,16,21,24,25 <b>27</b>:1,6,11,12,19,24 <b>28</b>:2,16,19,22,25 <b>29</b>:3,4,5,7,8,9,11,12,13,14,16,19,24 <b>30</b>:5,15,19,25 <b>31</b>:4,10,13 <b>32</b>:11,21,23 <b>33</b>:9,11,12,19,20,21,23 <b>34</b>:3,12,15,18,20,22 <b>35</b>:3,5,6,9,13,17,19,23 <b>36</b>:1,9,12,12,14,17,21 <b>37</b>:4,9,14,17,23 <b>38</b>:8,10,13,15,18,21,24 <b>39</b>:2,7,10,14,18,25 <b>40</b>:8,11,14,18 <b>41</b>:2,19,21,24 <b>42</b>:3,7 <b>43</b>:1,4,12,15 <b>44</b>:5,19,20,21,22,25 <b>45</b>:6,7,7,8,22,25 <b>46</b>:6,13,22 <b>47</b>:4,7,9,10,10,11,24 <b>48</b>:19,20 <b>49</b>:12,14,14,15,21,24 <b>50</b>:2 <b>51</b>:15,19 <b>52</b>:12,13,13,14,19,24 <b>53</b>:4,10,14 <b>54</b>:3,9,11,22,24 <b>55</b>:2,2,3,6,15,20,24</p>	<p><b>56</b>:13,22 <b>57</b>:10,13,18,23 <b>58</b>:19,24 <b>59</b>:13,20,23 <b>60</b>:9,10,10,11,13 <b>61</b>:17,18 <b>62</b>:2,5,9,24 <b>63</b>:2,13,18 <b>64</b>:8,18,23 <b>65</b>:3,5,7,10 <b>67</b>:2,9,25 <b>68</b>:14,23 <b>69</b>:12 <b>70</b>:18,19 <b>71</b>:15,24 <b>72</b>:19,21,22 <b>73</b>:5,6,23 <b>74</b>:3,6,10,16,17,24 <b>75</b>:22 <b>76</b>:17,19,23 <b>77</b>:15 <b>78</b>:8,25 <b>79</b>:3,9,16,22 <b>80</b>:8,17,23 <b>81</b>:12,17 <b>82</b>:2,10,15 <b>83</b>:1,19 <b>84</b>:6,20 <b>85</b>:7,25 <b>86</b>:20,23 <b>87</b>:3,9,18,24 <b>88</b>:1,3,4,5,5,6 <b>89</b>:2,21 <b>90</b>:10,11 <b>91</b>:1,17,19,24 <b>92</b>:6,17,21 <b>93</b>:2,13,16,19,22 <b>94</b>:2,22,23 <b>95</b>:8,10,22 <b>96</b>:21,23,25 <b>97</b>:1,2,3 <b>98</b>:5,17 <b>99</b>:9,23 <b>100</b>:1,20 <b>101</b>:15 <b>102</b>:12,12,13,23 <b>103</b>:2,2 <b>104</b>:10,10,11 <b>105</b>:23 <b>106</b>:18 <b>107</b>:8,9,9,10 <b>108</b>:18,22 <b>109</b>:2,14 <b>110</b>:4,9,18,24 <b>111</b>:1,3,3,4,9,10 <b>112</b>:2,20 <b>113</b>:16,19 <b>114</b>:13 <b>115</b>:5 <b>116</b>:1,2,2,3,20 <b>117</b>:15,16,16,17 <b>118</b>:13,19,22,24 <b>119</b>:2,4,11 <b>120</b>:6,8,14,20 <b>121</b>:7,11 <b>122</b>:4,25 <b>123</b>:5,6,11 <b>124</b>:12,19 <b>125</b>:2,13,23 <b>126</b>:2,8,12,13,16,25 <b>127</b>:10,14 <b>128</b>:4,16,23 <b>129</b>:2,10,17,24 <b>130</b>:7,17,18 <b>131</b>:11,22 <b>132</b>:2,7 <b>133</b>:15 <b>135</b>:6,6,8,9 <b>136</b>:1,5,10,17,17,18,19,20,21,22,25 <b>137</b>:12 <b>139</b>:24 <b>140</b>:1</p> <p><b>Justice's</b> <sup>[1]</sup> <b>132</b>:25</p> <p style="text-align: center;"><b>K</b></p> <p><b>KAGAN</b> <sup>[53]</sup> <b>13</b>:22 <b>14</b>:3,9,11,23 <b>15</b>:5 <b>16</b>:9 <b>26</b>:10 <b>29</b>:3,7,9,12,14,19,24 <b>30</b>:5,15,19,25 <b>31</b>:4,10,13 <b>33</b>:11,20,23 <b>34</b>:3,12,15,18,20,22 <b>47</b>:10,11,24 <b>48</b>:19 <b>49</b>:12 <b>60</b>:14 <b>72</b>:21 <b>74</b>:24 <b>75</b>:22 <b>76</b>:23 <b>77</b>:15 <b>79</b>:3 <b>94</b>:23 <b>104</b>:10,11 <b>105</b>:23 <b>106</b>:18 <b>107</b>:8 <b>132</b>:2,7 <b>136</b>:18 <b>137</b>:12</p> <p><b>Kagan's</b> <sup>[1]</sup> <b>128</b>:23</p> <p><b>KAVANAUGH</b> <sup>[31]</sup> <b>35</b>:3,6,13,17 <b>52</b>:13,14,24 <b>53</b>:10,14 <b>54</b>:3,9,11,22,24 <b>72</b>:19,22 <b>73</b>:23 <b>74</b>:16,18 <b>86</b>:20 <b>87</b>:18 <b>111</b>:3,4 <b>112</b>:20 <b>113</b>:16,19 <b>114</b>:13 <b>115</b>:5 <b>116</b>:1 <b>120</b>:14 <b>136</b>:20</p> <p><b>Kavanaugh's</b> <sup>[1]</sup> <b>120</b>:8</p> <p><b>keep</b> <sup>[4]</sup> <b>23</b>:9 <b>49</b>:4 <b>76</b>:22 <b>97</b>:12</p> <p><b>key</b> <sup>[2]</sup> <b>9</b>:3 <b>12</b>:7</p> <p><b>kind</b> <sup>[14]</sup> <b>14</b>:5 <b>16</b>:9,15 <b>59</b>:1,2,7 <b>68</b>:3 <b>73</b>:7 <b>82</b>:19 <b>91</b>:11</p>	<p><b>96</b>:5 <b>104</b>:3 <b>114</b>:18 <b>117</b>:5</p> <p><b>knowable</b> <sup>[3]</sup> <b>43</b>:19 <b>126</b>:23 <b>127</b>:1</p> <p><b>knowledge</b> <sup>[1]</sup> <b>46</b>:16</p> <p style="text-align: center;"><b>L</b></p> <p><b>lack</b> <sup>[2]</sup> <b>16</b>:22 <b>94</b>:25</p> <p><b>Laird</b> <sup>[1]</sup> <b>58</b>:14</p> <p><b>landed</b> <sup>[1]</sup> <b>50</b>:3</p> <p><b>language</b> <sup>[17]</sup> <b>13</b>:16 <b>35</b>:14,15 <b>38</b>:22 <b>43</b>:21 <b>50</b>:23 <b>55</b>:22 <b>66</b>:5 <b>97</b>:14 <b>107</b>:16 <b>111</b>:23 <b>112</b>:2 <b>114</b>:19,19 <b>120</b>:3,4,11</p> <p><b>last</b> <sup>[6]</sup> <b>17</b>:18 <b>53</b>:17 <b>71</b>:3 <b>88</b>:14 <b>114</b>:17 <b>139</b>:15</p> <p><b>later</b> <sup>[5]</sup> <b>12</b>:6,15,16 <b>14</b>:14 <b>88</b>:12</p> <p><b>Laughter</b> <sup>[4]</sup> <b>29</b>:18 <b>31</b>:14 <b>79</b>:10 <b>84</b>:19</p> <p><b>law</b> <sup>[19]</sup> <b>4</b>:14 <b>13</b>:10 <b>20</b>:10 <b>21</b>:5,7,8 <b>23</b>:7 <b>45</b>:2,3 <b>62</b>:14 <b>76</b>:15 <b>83</b>:17 <b>86</b>:18 <b>88</b>:22 <b>89</b>:11 <b>102</b>:9 <b>105</b>:14 <b>123</b>:19 <b>130</b>:3</p> <p><b>lawful</b> <sup>[1]</sup> <b>90</b>:19</p> <p><b>laws</b> <sup>[2]</sup> <b>8</b>:2 <b>138</b>:13</p> <p><b>lawsuits</b> <sup>[1]</sup> <b>21</b>:12</p> <p><b>lay</b> <sup>[1]</sup> <b>108</b>:6</p> <p><b>layer</b> <sup>[1]</sup> <b>96</b>:19</p> <p><b>lead</b> <sup>[3]</sup> <b>20</b>:21 <b>21</b>:3 <b>117</b>:4</p> <p><b>leading</b> <sup>[2]</sup> <b>87</b>:5 <b>102</b>:6</p> <p><b>leads</b> <sup>[1]</sup> <b>82</b>:4</p> <p><b>leaning</b> <sup>[1]</sup> <b>49</b>:7</p> <p><b>least</b> <sup>[14]</sup> <b>7</b>:14 <b>23</b>:19 <b>52</b>:22 <b>60</b>:21 <b>68</b>:8 <b>72</b>:18 <b>87</b>:17 <b>97</b>:20 <b>102</b>:10 <b>109</b>:21 <b>111</b>:8 <b>114</b>:10 <b>117</b>:24 <b>120</b>:7</p> <p><b>leave</b> <sup>[1]</sup> <b>60</b>:7</p> <p><b>leaves</b> <sup>[1]</sup> <b>90</b>:17</p> <p><b>led</b> <sup>[1]</sup> <b>30</b>:1</p> <p><b>left</b> <sup>[4]</sup> <b>41</b>:6 <b>53</b>:22 <b>79</b>:2 <b>82</b>:3</p> <p><b>legal</b> <sup>[4]</sup> <b>99</b>:20 <b>123</b>:22 <b>131</b>:13 <b>134</b>:17</p> <p><b>legality</b> <sup>[1]</sup> <b>90</b>:24</p> <p><b>legislate</b> <sup>[1]</sup> <b>53</b>:3</p> <p><b>legislated</b> <sup>[2]</sup> <b>12</b>:11 <b>53</b>:20</p> <p><b>legislating</b> <sup>[1]</sup> <b>16</b>:19</p> <p><b>legislation</b> <sup>[24]</sup> <b>5</b>:18,23 <b>9</b>:21 <b>12</b>:3 <b>13</b>:13 <b>14</b>:12,16 <b>17</b>:10 <b>18</b>:9,11 <b>19</b>:6 <b>30</b>:12 <b>31</b>:19 <b>48</b>:5 <b>56</b>:12 <b>63</b>:15 <b>91</b>:25 <b>95</b>:7,7,13 <b>96</b>:15 <b>102</b>:20 <b>103</b>:4 <b>113</b>:12</p> <p><b>legislators</b> <sup>[1]</sup> <b>103</b>:8</p> <p><b>legislative</b> <sup>[1]</sup> <b>17</b>:13</p> <p><b>legislators</b> <sup>[2]</sup> <b>48</b>:9 <b>121</b>:1</p> <p><b>legislature</b> <sup>[7]</sup> <b>31</b>:22 <b>42</b>:14 <b>72</b>:24 <b>89</b>:9,11 <b>123</b>:14 <b>137</b>:6</p> <p><b>legislatures</b> <sup>[1]</sup> <b>90</b>:3</p> <p><b>legitimately</b> <sup>[1]</sup> <b>55</b>:11</p> <p><b>lens</b> <sup>[1]</sup> <b>61</b>:4</p>	<p><b>less</b> <sup>[1]</sup> <b>34</b>:7</p> <p><b>lesser</b> <sup>[1]</sup> <b>72</b>:23</p> <p><b>letting</b> <sup>[1]</sup> <b>114</b>:22</p> <p><b>level</b> <sup>[2]</sup> <b>70</b>:20 <b>127</b>:22</p> <p><b>levels</b> <sup>[1]</sup> <b>60</b>:23</p> <p><b>liberty</b> <sup>[2]</sup> <b>130</b>:1,4</p> <p><b>life</b> <sup>[1]</sup> <b>8</b>:16</p> <p><b>lift</b> <sup>[8]</sup> <b>4</b>:6 <b>27</b>:25 <b>30</b>:23 <b>31</b>:5,17 <b>33</b>:14 <b>34</b>:1 <b>37</b>:21</p> <p><b>lifted</b> <sup>[1]</sup> <b>33</b>:3</p> <p><b>lifting</b> <sup>[1]</sup> <b>32</b>:13</p> <p><b>lifts</b> <sup>[1]</sup> <b>6</b>:18</p> <p><b>light</b> <sup>[1]</sup> <b>94</b>:17</p> <p><b>likelihood</b> <sup>[1]</sup> <b>7</b>:23</p> <p><b>limit</b> <sup>[2]</sup> <b>5</b>:11 <b>33</b>:12</p> <p><b>limited</b> <sup>[3]</sup> <b>16</b>:17 <b>23</b>:23 <b>104</b>:19</p> <p><b>Limits</b> <sup>[24]</sup> <b>4</b>:10,22,24 <b>6</b>:14 <b>8</b>:5 <b>9</b>:3 <b>18</b>:3,3 <b>23</b>:3,10 <b>24</b>:1,5 <b>25</b>:23 <b>26</b>:13,14,17,18,20 <b>79</b>:19 <b>80</b>:22 <b>104</b>:17 <b>116</b>:7 <b>137</b>:21 <b>138</b>:12</p> <p><b>line</b> <sup>[4]</sup> <b>51</b>:18,21,23 <b>109</b>:7</p> <p><b>lines</b> <sup>[2]</sup> <b>75</b>:23 <b>135</b>:10</p> <p><b>liquidation</b> <sup>[1]</sup> <b>53</b>:11</p> <p><b>list</b> <sup>[6]</sup> <b>36</b>:21 <b>37</b>:24 <b>38</b>:15 <b>39</b>:14 <b>119</b>:12 <b>120</b>:22</p> <p><b>listed</b> <sup>[3]</sup> <b>39</b>:21 <b>40</b>:7 <b>51</b>:8</p> <p><b>listing</b> <sup>[2]</sup> <b>119</b>:15 <b>123</b>:16</p> <p><b>litigants</b> <sup>[6]</sup> <b>5</b>:25 <b>39</b>:22 <b>41</b>:13 <b>50</b>:14 <b>52</b>:9 <b>138</b>:8</p> <p><b>litigation</b> <sup>[4]</sup> <b>21</b>:14 <b>63</b>:7 <b>111</b>:13 <b>123</b>:1</p> <p><b>little</b> <sup>[14]</sup> <b>15</b>:6 <b>17</b>:18 <b>19</b>:19 <b>24</b>:24 <b>45</b>:16 <b>55</b>:22 <b>60</b>:13 <b>75</b>:25 <b>76</b>:25 <b>96</b>:11 <b>107</b>:19 <b>108</b>:6 <b>113</b>:19 <b>130</b>:21</p> <p><b>local</b> <sup>[4]</sup> <b>61</b>:2 <b>118</b>:6,10 <b>120</b>:24</p> <p><b>locate</b> <sup>[1]</sup> <b>71</b>:11</p> <p><b>locates</b> <sup>[1]</sup> <b>79</b>:14</p> <p><b>logical</b> <sup>[1]</sup> <b>33</b>:19</p> <p><b>logically</b> <sup>[1]</sup> <b>12</b>:25</p> <p><b>long</b> <sup>[1]</sup> <b>73</b>:10</p> <p><b>look</b> <sup>[19]</sup> <b>13</b>:15,16 <b>33</b>:25 <b>36</b>:17 <b>40</b>:20 <b>43</b>:24 <b>62</b>:15 <b>69</b>:16 <b>70</b>:19 <b>71</b>:4 <b>73</b>:23 <b>74</b>:8,14 <b>89</b>:24 <b>90</b>:13 <b>100</b>:7 <b>106</b>:24 <b>108</b>:6 <b>120</b>:4</p> <p><b>looked</b> <sup>[4]</sup> <b>121</b>:1 <b>124</b>:17,17 <b>125</b>:10</p> <p><b>looking</b> <sup>[4]</sup> <b>47</b>:14 <b>71</b>:25 <b>106</b>:23 <b>125</b>:2</p> <p><b>looks</b> <sup>[1]</sup> <b>44</b>:14</p> <p><b>lot</b> <sup>[13]</sup> <b>10</b>:1,5 <b>30</b>:20 <b>37</b>:17 <b>41</b>:24 <b>44</b>:17 <b>47</b>:13 <b>97</b>:24 <b>101</b>:25 <b>106</b>:8,9 <b>130</b>:12 <b>135</b>:10</p> <p><b>lots</b> <sup>[1]</sup> <b>47</b>:21</p> <p><b>lower</b> <sup>[6]</sup> <b>8</b>:4 <b>60</b>:23 <b>78</b>:13 <b>93</b>:7 <b>94</b>:9 <b>100</b>:12</p> <p><b>Lucia</b> <sup>[1]</sup> <b>139</b>:3</p>	<p style="text-align: center;"><b>M</b></p> <p><b>made</b> <sup>[20]</sup> <b>14</b>:18,21 <b>44</b>:18 <b>54</b>:1 <b>56</b>:2 <b>59</b>:12,15 <b>60</b>:5 <b>63</b>:3 <b>66</b>:4 <b>77</b>:11,16,22 <b>78</b>:6 <b>104</b>:3 <b>113</b>:25 <b>130</b>:19 <b>134</b>:4 <b>139</b>:5,9</p> <p><b>main</b> <sup>[1]</sup> <b>65</b>:21</p> <p><b>major</b> <sup>[2]</sup> <b>105</b>:16,18</p> <p><b>majority</b> <sup>[7]</sup> <b>31</b>:6,8 <b>34</b>:8 <b>79</b>:11 <b>89</b>:8 <b>96</b>:14 <b>123</b>:21</p> <p><b>mandamus</b> <sup>[1]</sup> <b>16</b>:23</p> <p><b>mandated</b> <sup>[3]</sup> <b>86</b>:18 <b>88</b>:22,24</p> <p><b>mandatory</b> <sup>[2]</sup> <b>50</b>:10 <b>73</b>:22</p> <p><b>manner</b> <sup>[7]</sup> <b>72</b>:8,8 <b>73</b>:12 <b>80</b>:14 <b>137</b>:7,10,19</p> <p><b>many</b> <sup>[5]</sup> <b>21</b>:2 <b>64</b>:13 <b>69</b>:9 <b>70</b>:1 <b>106</b>:3</p> <p><b>Marshall</b> <sup>[1]</sup> <b>58</b>:20</p> <p><b>matter</b> <sup>[5]</sup> <b>1</b>:13 <b>15</b>:11 <b>21</b>:16 <b>49</b>:2 <b>56</b>:17</p> <p><b>McClung</b> <sup>[1]</sup> <b>16</b>:21</p> <p><b>McPherson</b> <sup>[1]</sup> <b>69</b>:17</p> <p><b>mean</b> <sup>[28]</sup> <b>10</b>:10 <b>13</b>:23 <b>15</b>:14 <b>16</b>:8 <b>26</b>:13 <b>27</b>:4,19 <b>33</b>:5 <b>41</b>:3 <b>45</b>:1 <b>47</b>:12,16 <b>50</b>:18 <b>55</b>:21 <b>58</b>:11 <b>59</b>:2,17 <b>60</b>:17 <b>63</b>:6 <b>67</b>:4 <b>70</b>:20 <b>73</b>:2 <b>74</b>:1 <b>75</b>:14 <b>76</b>:22 <b>77</b>:7,8 <b>122</b>:9</p> <p><b>meaning</b> <sup>[11]</sup> <b>22</b>:2 <b>23</b>:1 <b>35</b>:8,14 <b>39</b>:23 <b>52</b>:22 <b>100</b>:22 <b>101</b>:9,18 <b>108</b>:11,12</p> <p><b>meaningful</b> <sup>[1]</sup> <b>126</b>:11</p> <p><b>means</b> <sup>[16]</sup> <b>10</b>:11,11 <b>12</b>:19 <b>19</b>:5 <b>32</b>:17 <b>34</b>:15 <b>48</b>:15 <b>56</b>:7 <b>71</b>:14 <b>73</b>:1,2 <b>75</b>:6,8 <b>114</b>:18 <b>116</b>:21,22</p> <p><b>meant</b> <sup>[1]</sup> <b>113</b>:11</p> <p><b>mechanism</b> <sup>[5]</sup> <b>12</b>:13 <b>16</b>:19 <b>31</b>:20 <b>128</b>:22,24</p> <p><b>mechanisms</b> <sup>[1]</sup> <b>53</b>:21</p> <p><b>meet</b> <sup>[3]</sup> <b>4</b>:20 <b>126</b>:5 <b>133</b>:6</p> <p><b>meeting</b> <sup>[1]</sup> <b>126</b>:6</p> <p><b>member</b> <sup>[5]</sup> <b>8</b>:3 <b>31</b>:22 <b>42</b>:23 <b>46</b>:20 <b>103</b>:10</p> <p><b>members</b> <sup>[18]</sup> <b>3</b>:22 <b>4</b>:15,17 <b>7</b>:2 <b>19</b>:3 <b>31</b>:24 <b>43</b>:2 <b>50</b>:19 <b>51</b>:1,13 <b>79</b>:7 <b>103</b>:10,12,13,20 <b>122</b>:1,2,15</p> <p><b>mentioned</b> <sup>[3]</sup> <b>50</b>:6 <b>53</b>:17 <b>61</b>:25</p> <p><b>mere</b> <sup>[2]</sup> <b>33</b>:13 <b>66</b>:11</p> <p><b>merely</b> <sup>[3]</sup> <b>71</b>:14 <b>72</b>:7,10</p> <p><b>merits</b> <sup>[2]</sup> <b>78</b>:15 <b>122</b>:23</p> <p><b>messiness</b> <sup>[1]</sup> <b>134</b>:24</p> <p><b>met</b> <sup>[2]</sup> <b>64</b>:23 <b>138</b>:3</p> <p><b>Michigan</b> <sup>[2]</sup> <b>75</b>:11,11</p> <p><b>Midnight</b> <sup>[1]</sup> <b>58</b>:15</p> <p><b>midstream</b> <sup>[1]</sup> <b>89</b>:18</p> <p><b>might</b> <sup>[19]</sup> <b>21</b>:16 <b>22</b>:10 <b>36</b>:5 <b>46</b>:17 <b>55</b>:22 <b>59</b>:5,25 <b>61</b>:</p>
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## Official - Subject to Final Review

<p>1 85:8 91:4 108:6 110:14 117:4 119:8 121:5 130:19 131:4,18 137:13 military [3] 39:3 90:19,23 million [1] 115:23 millions [1] 4:25 mind [4] 11:13 13:1,6 60: 18 minor [3] 104:21 105:3,14 minute [2] 9:11 129:1 mirrors [1] 19:6 misdemeanors [1] 51:7 miserable [1] 48:11 misnomer [1] 19:21 mistake [1] 66:4 MITCHELL [1] 27:25 MITCHELL [199] 1:18 2:3, 13 3:5,6,8 5:2,11 6:13 7: 18,21 8:11,19 9:15,23,25 10:3,16,20 11:1,7,9,12,16, 19 12:1,7,16,24 13:7,19,22 14:2,8,10,24 15:11 16:16 17:2,6 18:1 19:1,12,15,23 20:4,17 21:4,25 22:4,8,23 23:12,21,24 24:7,11,22 25: 5,12,15,17,20 26:15,18,23 27:5,10,16,22 28:8,18,20, 24 29:23 30:4,7,16,24 31:3, 9,15 32:20,22 33:5,18 34:2, 9,13,17,19,21,24 35:12,16, 24 36:3,11,16,20 37:3,8,12, 16,19,25 38:9,12,14,17,20, 23 39:1,5,9,13,17,19 40:4, 10,13,17,19 41:7,19,20,23 42:2,6,9 43:2,9,13,16 44: 13,25 45:15,23 46:3,12,15 47:2,5,8,23 48:3 49:1,13, 19,22 50:1,4 51:17,20 52: 23 53:9,13,16 54:6,10,17, 23 55:1,5,14,16,23 56:6,21 57:4,11,14,22 58:5 59:12, 15,22,24 61:16,21 62:4,7, 10 63:1,10,17 64:2,13,21 65:4,6 77:17 81:2 107:12 132:13 137:1,2,4 139:25 mitigate [1] 138:20 Mm-hmm [20] 10:3 11:12 12:1 20:17 21:25 25:19 27: 10 36:16,20 37:8 38:14,23 41:23 42:6 46:12 52:23 55: 23 56:21 63:1 109:2 modify [1] 44:9 moment [8] 9:11 84:4 91:2, 8,22 92:9 94:3 124:1 Moore [1] 120:3 moot [1] 70:16 morning [1] 3:4 most [3] 74:24 96:7 113:14 motivation [1] 44:16 motivations [1] 48:9 move [4] 8:6 36:2,10 94:9 mover [1] 77:4</p>	<p>moving [1] 138:4 Ms [34] 123:7,7,11 124:15, 22 125:4,17,25 126:4,9,15, 20 127:3,13,21 128:8,20 129:5,15,20 130:2,11 131: 2,15,25 132:6,20 134:2 135:16 136:3,7,12,24 137: 4 much [10] 5:3 15:12 43:24 60:4 77:12 83:5 88:6,15 90:2,5 multiple [2] 99:17,17 MURRAY [108] 1:20 2:6 65: 7,8,10 67:8 68:11,18 69:8 70:1 71:10,18 72:5 73:10 74:15,17 75:16 76:5,18 77: 19 78:14,25 79:7,11,21 80: 5,12,21 81:10,13,21 82:5, 25 83:25 85:3,19 86:10 87: 18 88:17 89:15,25 90:22 91:10,18,23 92:3,15,18,22 93:9,14,18,21,25 94:11,22 95:5,9,12 96:6,22 97:13 98:12,24 99:19,25 100:2 101:4 102:3,22 103:9 104: 11 105:6 106:13,20 108:10, 19,24 109:3,20 110:6,12, 22,25 111:2 112:1 113:9, 18 114:5 115:4 116:19 117:8 118:12,21,23 119:1, 3,5,25 120:16 121:4,8,13 122:10 123:2 131:7 137:4 138:19 Murray's [2] 138:23 139:13 must [9] 8:3 10:12 18:23 31:13 83:23 123:20 126:4 137:9 138:3 mutually [1] 22:23</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p>namely [1] 113:23 narrow [2] 78:4 110:3 narrower [3] 71:22,25 108: 16 narrowly [1] 46:23 nation [2] 75:19 76:4 nation's [1] 65:13 national [17] 61:10 67:5,6 68:6,8,12 69:15,22 75:5,7, 20 76:25 104:24,25 106:5 111:6 117:3 nationwide [1] 134:16 natural [1] 79:25 natural-born [2] 107:3 134:12 near [1] 85:16 necessarily [4] 16:13 41:2 43:17 132:22 necessary [8] 23:6 63:15 91:25 92:2 95:11,12 103:8 114:16 need [10] 5:14 7:6 15:3 16: 7 92:3 102:20 103:1,3 124:</p>	<p>17 134:22 needed [1] 78:19 needing [1] 12:3 needs [5] 7:11 26:3 64:14 109:9 124:9 nefarious [1] 46:4 negate [3] 81:23 83:3,14 negating [1] 91:15 Neither [2] 51:12,13 never [7] 64:2 65:25 78:17 84:18 97:14 112:12 119: 24 nevertheless [3] 91:23 92: 19 93:14 new [5] 7:24 9:2 54:9,11 55: 8 next [6] 52:18 63:6 115:7 122:8 126:19 139:18 nobody [1] 102:19 Nobody's [1] 79:24 nominated [1] 117:12 non-mutual [3] 20:24 21:5 133:16 non-official [1] 110:3 non-precedential [2] 12:5 13:14 non-self-executing [4] 5: 14,15,16 20:8 non-self-execution [1] 11:2 None [1] 64:23 nor [4] 59:6 73:7 83:15 137: 18 NORMA [1] 1:6 normal [1] 90:7 normally [2] 5:16 15:13 note [1] 83:9 nothing [6] 12:19 19:5 34: 10 72:5 81:15 124:3 notice [1] 95:18 nouns [1] 108:8 novo [4] 78:10 131:14,16, 23 nuanced [1] 24:24 nullify [1] 16:3 number [10] 68:5 69:10 84: 21 101:5,7 103:16 104:1 132:9,12,15 numerous [1] 3:15</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p>oath [13] 6:8 7:16 37:10 44: 3 46:13,18,20 66:6,25 109: 23,25 110:1,7 oath-breakers [1] 96:10 oath-breaking [1] 65:24 oaths [1] 115:12 Obama [1] 73:17 obey [3] 91:8 93:7 94:9 objection [2] 78:2 124:24 objective [3] 126:22,23 127:1 obstacle [1] 32:9</p>	<p>obtain [4] 7:10,12 28:14 126:22 obtained [1] 6:23 obtaining [1] 138:6 obvious [1] 106:19 obviously [3] 50:16 112:25 114:15 occurred [1] 64:17 occurs [1] 21:14 odd [3] 48:13 96:11 108:6 offense [2] 32:17,19 office [115] 4:7,8,12 6:8,17, 17 7:6,8 8:15,17 9:5,9 10: 13 11:24 13:3 18:6,17,18, 20 26:4 28:17,21 30:2 32: 5 37:6 39:23 40:2,23 41: 11,16 42:1,24 44:2 45:12, 18 47:15 48:1,2,20 49:8,9 51:6 54:16 56:20,24 57:2, 24 58:8 62:4,14 65:20 66: 1,9,12,20 69:9 80:9 81:1,1, 7,14,15 82:3,18,24 83:10, 12,22 90:9,17 91:21,22 93: 12,15 94:13,14,15,19,20 96:8,10 105:1 107:20 108: 2,7,13 109:16,23 110:5,7, 10,21 111:6 112:25 113:5, 22 114:1 116:16 117:6 120:4,17,19 121:10,12,13, 16,18 122:1,18 124:2 138: 4,4,25 139:15,21 office/officer [1] 29:2 officeholders [3] 44:24 52: 8 58:3 officer [42] 3:18,19,25 23:1 29:15 30:3 36:10 38:2 41: 9 42:1 45:13,20 46:18 47: 15 48:15,18 49:7,11,17 51: 21 52:5 56:14 57:11 66:9 68:22 79:5 82:7,13 90:12 91:3 92:18,23 107:11,20 108:7,11 109:16,22 110:21 138:20 139:1,8 officers [37] 16:14,15,20 39:4 42:10,13,15,17,20 50: 9,18,21,24 51:5,8,14,17,24, 24 52:5,6 53:8 58:7 83:20 90:19,23 107:14,25 108:16, 20,25 110:5,6,15,19 139:4, 10 offices [23] 10:7 36:22 37: 7 38:16 39:4,5,7 40:6 41:6 42:11,21 43:3 48:23 49:3 60:12 61:3 68:6,6 69:10 83:17 121:16,20 122:2 official [8] 8:6 16:3 32:4 58: 23 82:12 93:7 94:9 110:8 officials [9] 3:20 4:1 12:23 13:4 16:23 48:16 50:25,25 57:7 often [1] 19:24 oftentimes [2] 114:8 130:</p>	<p>15 Okay [25] 25:17 28:19 29:9 33:18 37:4 40:13 44:19 47: 9 56:13 58:24 60:9 79:16, 22 80:1 81:12 92:8 93:1, 20,24 110:24,24 112:20 116:20 126:8 135:3 old [3] 25:1,22 79:25 once [3] 96:8 116:11 117: 10 one [51] 11:11 12:21 17:18 23:19 31:6 32:15 33:13 34: 8,23 37:5,7 44:7 47:17 49: 3,4 50:12 53:22 57:24 58: 24 60:12 61:24 64:13 66: 13 70:9 72:25 82:6,8,20 85:13 93:3,4 95:19 96:8 101:5,16 102:25 104:21 107:21 109:9 110:14 112: 24 113:1 116:10 118:18 127:22 130:21 131:8 132: 9 133:21 135:9 137:12 one-off [2] 10:21,23 one-offs [1] 77:10 ones [1] 58:4 only [44] 3:20,25 4:16,24 7: 7 9:9 10:16,22 14:16 16:3 17:4 18:3 20:6 28:20 30: 10 34:5,18 42:17 46:2,9,9 47:24 50:22 52:9,20 53:22 54:17 56:7 57:1,9 58:9,18, 22 67:8 74:21 76:3 82:20 90:8 91:14 94:15,19 96:12 97:19 137:17 open [1] 60:7 open-and-shut [1] 133:5 opening [4] 40:22 63:23 64:3,4 opens [1] 21:12 operates [1] 91:24 opine [1] 101:8 opined [1] 101:10 opines [1] 52:19 opinion [7] 17:8 35:19 86: 23 88:18 101:1 102:4 111: 9 opportunity [11] 29:15 59: 10 95:18,21 100:4 107:12 112:4,5,6,14,15 opposed [5] 58:4 85:14 118:5,11 132:19 opposite [1] 22:6 oral [7] 1:13 2:2,5,9 3:6 65: 8 123:9 order [5] 84:17 88:14 92:4 93:7 94:10 ordering [1] 89:12 orders [1] 90:20 ordinarily [1] 77:20 ordinary [1] 86:17 organized [2] 64:11,15 original [5] 35:8 36:7 42:4</p>
---	---	---	--	--

## Official - Subject to Final Review

<p>43:5 52:22  <b>other</b> <sup>[69]</sup> 15:14 20:21 21:2, 2,12,14,18 22:8,24 23:10 27:11 35:19 36:4 39:3 40:24 41:8 45:24 46:10,16 54:1 58:13 60:4 62:17 65:25 66:14 68:18 70:25 73:13 75:2 76:11,11,13 78:19 81:13 84:10 86:1,11,22 89:12 90:19 94:17 95:15 101:16 102:8,14,25 106:11,14 107:4,22 111:6 112:12 120:9 122:1 123:23 128:7,12 129:13,21 131:14 132:4,19 133:8,12 134:11 135:11,12 137:10 139:22  <b>others</b> <sup>[7]</sup> 46:24 49:18 84:15,23 128:14 130:23 137:14  <b>otherwise</b> <sup>[6]</sup> 35:15 91:15 102:9 117:4 121:24 125:21  <b>ouster</b> <sup>[1]</sup> 32:5  <b>out</b> <sup>[26]</sup> 15:20 17:4,5 27:12 29:24 31:11 35:7 40:21 41:13 49:4 54:10 57:2,5,15 73:24 74:4,14 87:4 94:15 96:14 114:16,17 116:16 120:15 134:4,23  <b>outcome</b> <sup>[1]</sup> 89:5  <b>outside</b> <sup>[3]</sup> 31:24 56:25 80:19  <b>over</b> <sup>[8]</sup> 79:5 88:14 106:1,3 110:16 111:5 117:12 120:1  <b>overall</b> <sup>[2]</sup> 73:8,8  <b>overcome</b> <sup>[1]</sup> 117:6  <b>overthrow</b> <sup>[4]</sup> 64:12,15,19,22  <b>own</b> <sup>[23]</sup> 8:23 12:23 13:2 16:11,12,14 22:16 67:6 76:3,6,15 78:5,21,23 90:3,4 98:23 105:2 106:15 107:5,6 116:14 136:13</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>p.m</b> <sup>[1]</sup> 140:3  <b>PAGE</b> <sup>[3]</sup> 2:2 26:12 78:16  <b>pages</b> <sup>[1]</sup> 122:22  <b>painful</b> <sup>[1]</sup> 115:11  <b>panoply</b> <sup>[1]</sup> 48:23  <b>papers</b> <sup>[2]</sup> 106:24 127:15  <b>paperwork</b> <sup>[3]</sup> 127:5,9 133:3  <b>pardon</b> <sup>[6]</sup> 31:18 32:14,16 33:3 83:6 113:15  <b>part</b> <sup>[6]</sup> 12:3 41:10 44:14 53:17 121:12 124:18  <b>participate</b> <sup>[1]</sup> 125:8  <b>participated</b> <sup>[2]</sup> 6:9 30:1  <b>participation</b> <sup>[2]</sup> 125:15,16  <b>particular</b> <sup>[12]</sup> 16:4 20:1</p>	<p>27:2 47:21 60:6 73:1 78:23 82:18 86:15 108:13 109:12 133:18  <b>particularly</b> <sup>[6]</sup> 11:24 68:1 100:16 107:13 109:18 134:5  <b>parties</b> <sup>[3]</sup> 99:2 105:16,18  <b>partly</b> <sup>[1]</sup> 35:18  <b>parts</b> <sup>[3]</sup> 36:18 40:24 41:8  <b>party</b> <sup>[8]</sup> 67:18 94:4 104:21 105:3,14 125:8,15,20  <b>pass</b> <sup>[2]</sup> 48:8 96:15  <b>passed</b> <sup>[1]</sup> 17:12  <b>passes</b> <sup>[1]</sup> 89:11  <b>past</b> <sup>[1]</sup> 106:23  <b>Paulson</b> <sup>[1]</sup> 31:12  <b>peaceful</b> <sup>[1]</sup> 65:17  <b>penalty</b> <sup>[1]</sup> 114:11  <b>pending</b> <sup>[1]</sup> 96:3  <b>people</b> <sup>[27]</sup> 20:19 22:2 43:17,25 44:3 47:25 58:16 61:6,22 62:12 68:5,25 69:19 70:23 83:21 84:3 85:8 89:17 91:4 101:21 105:17 109:4 114:21,22 116:25 119:15 135:17  <b>perceive</b> <sup>[1]</sup> 126:6  <b>perfectly</b> <sup>[1]</sup> 48:24  <b>perhaps</b> <sup>[9]</sup> 8:22 21:2 22:14 36:5 41:7 98:10 110:14 128:6 129:18  <b>period</b> <sup>[3]</sup> 68:2 87:3 90:18  <b>permissible</b> <sup>[1]</sup> 18:16  <b>permit</b> <sup>[9]</sup> 9:13,21 10:12 20:20 23:15 83:20  <b>permitted</b> <sup>[3]</sup> 7:22 95:1 111:20  <b>person</b> <sup>[24]</sup> 8:20 24:25 32:18,25 33:1,16 36:22 37:9,10 38:18 92:11,12 94:13 97:10,12 100:25 108:12 109:22 119:22,23 120:9 127:16,22 133:6  <b>perspective</b> <sup>[1]</sup> 42:5  <b>pervasive</b> <sup>[1]</sup> 104:24  <b>Petitioner</b> <sup>[8]</sup> 1:4,19 2:4,14 3:7 46:9 123:19 137:3  <b>Petitioner's</b> <sup>[1]</sup> 63:20  <b>phrase</b> <sup>[6]</sup> 11:3 20:5 39:23 40:3,24 52:5  <b>phrased</b> <sup>[2]</sup> 39:9 40:21  <b>phrases</b> <sup>[2]</sup> 22:2 66:11  <b>pick</b> <sup>[1]</sup> 62:16  <b>picked</b> <sup>[2]</sup> 90:3 105:18  <b>pin</b> <sup>[1]</sup> 45:8  <b>place</b> <sup>[8]</sup> 32:18 34:6 71:3 82:8 91:6,11 111:11 136:8  <b>placed</b> <sup>[1]</sup> 9:18  <b>plain</b> <sup>[2]</sup> 84:7 99:7  <b>plausibly</b> <sup>[1]</sup> 64:6  <b>play</b> <sup>[4]</sup> 57:5 89:16 92:19 134:23</p>	<p><b>played</b> <sup>[1]</sup> 57:15  <b>please</b> <sup>[8]</sup> 3:9 14:23 17:16 65:11 93:19,22,24 123:12  <b>plenary</b> <sup>[6]</sup> 71:14 72:7,10 80:6 89:4,4  <b>plethora</b> <sup>[1]</sup> 68:4  <b>plus</b> <sup>[3]</sup> 14:6 34:23 124:18  <b>point</b> <sup>[46]</sup> 6:1 12:7 18:24 25:7,10 26:12 29:2 35:18 36:10 37:21 40:9,15,21 41:3,13 48:18 52:25 58:25 59:3,4 63:13 64:18 70:3,20 77:15,22 78:17 81:2 86:20 87:23 88:2 93:25 101:7 104:3 107:11,21 110:13 114:6 117:21 119:5 120:8,21 121:4 128:23 132:10 133:1  <b>pointed</b> <sup>[4]</sup> 31:11 87:4 93:3 120:14  <b>points</b> <sup>[6]</sup> 27:12 77:19 101:5 115:4 118:12 133:14  <b>poked</b> <sup>[1]</sup> 107:19  <b>police</b> <sup>[1]</sup> 70:13  <b>policy</b> <sup>[4]</sup> 13:15 15:21 44:16 49:2  <b>political</b> <sup>[6]</sup> 101:14 105:3 125:8,15,20 132:17  <b>polls</b> <sup>[2]</sup> 89:23 104:9  <b>position</b> <sup>[20]</sup> 17:20,21 22:21 30:15 40:9 58:11 64:1 71:8 82:14 84:8,9 101:16 102:14 111:16 112:21,22,23 114:23 131:20 132:2  <b>positions</b> <sup>[4]</sup> 58:16 66:6 69:14 133:9  <b>possibility</b> <sup>[7]</sup> 20:21 21:12 54:10 63:7 99:5 123:21,24  <b>possible</b> <sup>[6]</sup> 60:23 66:2 100:23 132:1 138:16,20  <b>potential</b> <sup>[4]</sup> 40:22 85:4 117:19 134:18  <b>potentially</b> <sup>[4]</sup> 4:25 35:20 133:24 135:13  <b>power</b> <sup>[54]</sup> 31:18 61:1 65:17 66:6,17 70:11,13,21 71:1,2,13,20,21,22,25,25 72:2,7,10,14,14,24,24 73:11,19 74:23 75:24 76:6 79:15 80:6,13 83:3,14 89:1,3,14 103:12 105:10 106:1,3,16,17 107:5 109:9 111:5,21 115:13 117:12,14 124:4 129:16 133:11 137:15,19  <b>powerful</b> <sup>[1]</sup> 111:23  <b>powers</b> <sup>[7]</sup> 17:13 67:23 79:4,12 104:12 123:13 132:11  <b>practical</b> <sup>[1]</sup> 15:18  <b>practice</b> <sup>[1]</sup> 53:5  <b>praising</b> <sup>[1]</sup> 101:14  <b>precedent</b> <sup>[6]</sup> 12:8,10 52:24 53:2 58:13,21</p>	<p><b>precedential</b> <sup>[2]</sup> 11:18 13:18  <b>precedents</b> <sup>[2]</sup> 16:21 18:14  <b>precisely</b> <sup>[1]</sup> 130:3  <b>preclusive</b> <sup>[2]</sup> 21:6,11  <b>predict</b> <sup>[1]</sup> 7:22  <b>predictions</b> <sup>[1]</sup> 84:18  <b>preempt</b> <sup>[1]</sup> 95:7  <b>preemption</b> <sup>[9]</sup> 10:14 14:1 15:2 35:1 53:25,25 59:4 96:18 116:18  <b>preempts</b> <sup>[2]</sup> 16:12 116:8  <b>preexisting</b> <sup>[1]</sup> 83:24  <b>prepositions</b> <sup>[2]</sup> 66:11 108:7  <b>perogative</b> <sup>[1]</sup> 137:9  <b>present</b> <sup>[5]</sup> 78:20 83:15 95:21 97:15 100:4  <b>presented</b> <sup>[2]</sup> 100:8 127:22  <b>preserve</b> <sup>[1]</sup> 107:5  <b>preside</b> <sup>[1]</sup> 110:16  <b>presidency</b> <sup>[28]</sup> 9:6 11:24 24:2 37:6 40:6 41:15 42:18,19 45:11,17 49:4 60:12,16,18 61:10,14,19,25 62:1,13 90:25 94:16 103:15 118:11 119:9 120:19 121:25 137:23  <b>President</b> <sup>[145]</sup> 3:11,12,16,17,22 4:5 13:5 18:23 20:25 21:17 24:9,17 26:3,5 28:9,12 29:25 32:16 37:24 38:7 39:2,3,10,11,20,21 41:17 42:12 45:10,13,19 46:10,16,16,18,19,21 47:1 48:13,25 50:8,11,16,19,20 51:1,2,4,4,7,8,11,13,23 52:2 56:15 57:1,9 58:6,7 59:1 61:23 64:5 65:16,19,20,25 66:14 73:17 75:2,3,4 76:13,13,20 77:22 78:5,14 81:25 83:6,9,16 85:14 88:11,11 89:5 90:15,16,20 91:13,16 92:12,12 93:8,10,11 97:6 98:8 100:17,22 101:5,9,13,18 102:5 103:18,23 106:12,14 107:15,24 108:20,21 109:5,6,10,19,23 112:3,11 113:7 115:16,22 116:11,15 117:13 119:12,15,18,20,20 120:2,2,11,23 122:2,2,12,17,21 133:25 138:24 139:17,18,20  <b>president's</b> <sup>[1]</sup> 109:9  <b>presidential</b> <sup>[36]</sup> 4:3 20:16 23:10 25:21 37:10 42:16 47:3 54:19 65:17 66:16,23 70:12 71:6,12 73:12 80:14 85:1 89:1 95:1 109:4 117:9,20 118:2,5,16 121:8,15</p>	<p>122:8,12,17 123:17 124:4 129:8 133:12 137:7,16  <b>presidents</b> <sup>[2]</sup> 48:1 88:13  <b>pressing</b> <sup>[1]</sup> 60:21  <b>presumably</b> <sup>[1]</sup> 86:5  <b>pretty</b> <sup>[3]</sup> 7:14,20 85:1  <b>prevent</b> <sup>[2]</sup> 69:2 112:24  <b>preventing</b> <sup>[1]</sup> 118:9  <b>previous</b> <sup>[1]</sup> 46:21  <b>previously</b> <sup>[2]</sup> 37:10 44:2  <b>primary</b> <sup>[5]</sup> 18:21 74:11 123:17,25 134:10  <b>principal</b> <sup>[2]</sup> 45:9,12  <b>principle</b> <sup>[6]</sup> 16:24 105:25 106:1,5 115:3 116:18  <b>principles</b> <sup>[7]</sup> 15:12 89:16 90:7 105:7,12 134:17 135:1  <b>prior</b> <sup>[3]</sup> 4:15 33:16 138:15  <b>private</b> <sup>[1]</sup> 20:2  <b>privilege</b> <sup>[1]</sup> 70:22  <b>pro</b> <sup>[6]</sup> 42:13 51:23 107:24 108:20 109:19,23  <b>probably</b> <sup>[2]</sup> 25:6 89:25  <b>probative</b> <sup>[3]</sup> 35:13,16 36:4  <b>problem</b> <sup>[4]</sup> 31:16 105:20 117:1 137:25  <b>problems</b> <sup>[2]</sup> 50:13 105:19  <b>procedural</b> <sup>[1]</sup> 122:13  <b>procedure</b> <sup>[12]</sup> 76:16 83:18 91:11 92:2,4 103:17 123:3 127:7,11,24 129:12 130:25  <b>procedures</b> <sup>[3]</sup> 59:5 106:21 133:17  <b>proceed</b> <sup>[1]</sup> 136:5  <b>proceeding</b> <sup>[6]</sup> 55:4 56:1 60:6 78:18 129:13 131:8  <b>proceedings</b> <sup>[3]</sup> 59:18 84:10 129:14  <b>process</b> <sup>[32]</sup> 56:25 57:2 59:2,13,25 60:3 67:20 70:24 71:7 74:18,21 77:12 95:17,18 104:6 111:14,25 112:8,12,17 124:7 128:11 129:19,22,24,25 130:5,21,22 131:4 134:13 135:18  <b>processes</b> <sup>[10]</sup> 43:17 52:17 67:22 74:3,4,13 111:18 134:22 135:18 136:4  <b>proclaims</b> <sup>[1]</sup> 97:4  <b>produce</b> <sup>[1]</sup> 22:15  <b>Professor</b> <sup>[6]</sup> 22:14,16 31:11,11 101:8 104:2  <b>profound</b> <sup>[1]</sup> 43:8  <b>prohibit</b> <sup>[1]</sup> 91:4  <b>prohibited</b> <sup>[1]</sup> 32:25  <b>prohibits</b> <sup>[2]</sup> 18:3 113:2  <b>proof</b> <sup>[6]</sup> 84:13 98:11,21 99:15 111:7 129:13  <b>proper</b> <sup>[4]</sup> 8:1 13:10 21:22</p>
--	--	--	--	--

## Official - Subject to Final Review

<p>127:7  <b>property</b> [1] 70:23  <b>proportional</b> [2] 19:14,18  <b>proportionality</b> [1] 18:13  <b>proposed</b> [1] 43:25  <b>proposition</b> [1] 19:25  <b>prosecuted</b> [3] 32:18 54:13,20  <b>prosecution</b> [2] 113:24 123:4  <b>prosecutions</b> [2] 97:17 114:8  <b>prosecutor</b> [2] 32:3 56:18  <b>prosecutors</b> [1] 54:14  <b>protect</b> [1] 115:10  <b>protected</b> [1] 59:8  <b>protection</b> [3] 70:25 129:22 137:18  <b>protections</b> [1] 131:9  <b>protects</b> [1] 115:18  <b>proved</b> [1] 127:23  <b>proves</b> [1] 10:1  <b>provide</b> [6] 9:13 56:7 95:6 97:8 128:17 131:18  <b>provided</b> [8] 9:18 12:10,12 14:12 15:4 17:9 53:19 95:17  <b>provides</b> [4] 28:14 60:15 96:18 129:11  <b>province</b> [1] 57:21  <b>provision</b> [25] 5:16 9:14 15:14 20:1 26:17 27:7 31:1,17 32:6 42:24 56:16 58:2 61:12 62:22 74:22 81:6, 22 85:5 114:14 116:14 122:7 124:13,16 128:5 129:19  <b>provisions</b> [10] 14:21 27:12 30:13 43:18 50:6 86:12 94:17 104:15 125:5 137:11  <b>public</b> [4] 35:8 52:22 65:20 78:6  <b>published</b> [1] 69:11  <b>purport</b> [1] 18:6  <b>purpose</b> [5] 56:18 68:23, 24 98:2 115:6  <b>pursuant</b> [3] 17:13 51:12 52:2  <b>pursuit</b> [1] 98:3  <b>push</b> [3] 35:21 76:25 132:8  <b>put</b> [14] 34:5 40:1 59:19 74:24 90:8 92:8,25 93:1,15 102:15 104:17 119:12 123:20 127:7  <b>puts</b> [1] 51:22  <b>putting</b> [1] 30:2</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>qualification</b> [14] 4:21 7:24 9:1,2 17:21,24 18:22 24:5,13 76:8 83:15 105:21 125:24 132:19</p>	<p><b>qualifications</b> [20] 4:11 7:1,5 18:4,5 23:11 24:2 25:11 31:24 71:23 73:13 79:23 80:20 81:7,13 103:12 130:16 133:7,12 137:23  <b>qualified</b> [11] 63:22 67:21 90:9 124:14,18,21 125:7,9, 12,19,20  <b>qualify</b> [7] 7:7 26:3,6 28:13 45:11,11 65:1  <b>question</b> [45] 8:19 11:10 19:2,17 20:15 21:1,9 23:24 25:9 30:8 36:14 44:7 54:24 58:25 59:4,22 62:25 63:19 70:19 73:25 74:19, 25 75:3,18 76:10 82:6 86:1 89:3 90:11,21 92:7 93:3 94:7 95:25 98:6,7 99:10 101:2 102:9 105:9 112:20 113:16 114:17 130:17 135:10  <b>questions</b> [26] 5:1 13:5,8 22:7 30:21 52:16 67:1 73:25 74:8,13,19 75:20 77:23 95:14,15 99:14 106:6,25 111:5,6 116:9,25 124:11 133:8 135:11 139:22  <b>quick</b> [1] 84:17  <b>quite</b> [4] 20:20 23:24 58:12 75:15  <b>quo</b> [11] 14:13,20 30:13 32:2,4 56:16,22 57:3,5 114:13 116:14</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>radical</b> [2] 43:23 69:20  <b>raise</b> [2] 56:11 82:5  <b>raised</b> [4] 55:9 105:18 111:21 118:18  <b>raises</b> [1] 52:16  <b>ranks</b> [1] 119:8  <b>rare</b> [6] 10:15,18,20 88:20 97:17 116:4  <b>rarely</b> [1] 97:16  <b>rather</b> [5] 9:1 20:13 21:7 90:14 109:3  <b>ratified</b> [2] 52:18 113:14  <b>ratify</b> [1] 92:23  <b>rationale</b> [5] 30:10 48:4 55:18 66:2 138:22  <b>reach</b> [4] 22:6,13 100:14 131:23  <b>reactive</b> [1] 105:15  <b>read</b> [6] 53:20 63:23 109:6 115:1,2 125:21  <b>reader</b> [1] 108:6  <b>reading</b> [3] 46:9 68:9 120:17  <b>real</b> [2] 60:25 105:19  <b>realistic</b> [1] 135:19  <b>realizes</b> [1] 16:1  <b>really</b> [30] 13:25 17:21 41:9 47:14 56:17 60:3 74:14 75:</p>	<p>11 76:22 78:3,3 86:15 89:4,9 95:3 96:19 97:19 99:9 100:18 101:8 103:16 106:10 109:8 116:22,23 118:2, 9 119:13,21 132:3  <b>realm</b> [1] 101:2  <b>reason</b> [17] 3:16 4:2 47:18, 21 48:20,21 60:15 70:8 85:6,19 86:22 87:7,19 104:5, 21 115:22 122:7  <b>reasonable</b> [1] 84:16  <b>reasoning</b> [2] 106:9 125:25  <b>reasons</b> [7] 3:15 23:5 33:2 47:22 59:17 64:13 97:7  <b>rebels</b> [2] 96:8 119:8  <b>REBUTTAL</b> [3] 2:12 136:25 137:2  <b>recall</b> [1] 107:21  <b>receive</b> [1] 92:11  <b>received</b> [4] 70:15 84:5 87:20 113:14  <b>recent</b> [1] 139:3  <b>recognition</b> [1] 130:4  <b>recognize</b> [2] 21:5 133:16  <b>Reconstruction</b> [2] 68:1 85:22  <b>record</b> [30] 21:13 60:22 77:3,5,7,7,8,9 78:1,3,16,19 95:20 98:9,14,16,25 99:1,21, 24 100:1,6,12 104:7 124:9 130:24 131:13,20,24 134:20  <b>records</b> [2] 99:13 100:3  <b>red</b> [1] 41:14  <b>redeemers</b> [1] 68:2  <b>redefine</b> [1] 11:2  <b>reduces</b> [1] 134:18  <b>redundancy</b> [1] 96:16  <b>reelected</b> [1] 139:17  <b>refer</b> [2] 3:25 52:7  <b>referring</b> [4] 19:25 66:12 108:15,15  <b>refers</b> [6] 3:20 18:17 52:9, 16 108:25 121:19  <b>Reform</b> [2] 103:25 122:20  <b>refuse</b> [1] 98:14  <b>refused</b> [1] 67:12  <b>refusing</b> [3] 68:13 103:13 115:21  <b>regard</b> [1] 92:14  <b>regardless</b> [1] 44:2  <b>regime</b> [1] 33:7  <b>regulate</b> [1] 82:23  <b>regulating</b> [1] 118:15  <b>reinforce</b> [1] 22:24  <b>reinforced</b> [1] 53:1  <b>reinforces</b> [2] 51:3 53:11  <b>reinforcing</b> [1] 52:6  <b>reinstate</b> [1] 30:13  <b>reject</b> [3] 48:17 55:17 66:3  <b>rejects</b> [2] 138:22 139:12</p>	<p><b>related</b> [2] 42:8 113:12  <b>relates</b> [1] 27:8  <b>relationship</b> [1] 97:21  <b>release</b> [1] 97:8  <b>relevant</b> [6] 35:7 36:3 43:20 58:13,21 87:16  <b>reliance</b> [4] 8:5 54:2 71:16, 19  <b>relied</b> [3] 13:19 53:18 104:12  <b>relief</b> [3] 16:23 55:4,8  <b>relies</b> [4] 13:15 53:1 66:8 100:16  <b>relocating</b> [1] 8:24  <b>rely</b> [5] 11:3 16:21 35:1,17 137:5  <b>relying</b> [5] 10:6 11:14 12:5 43:16 71:16  <b>remand</b> [1] 60:8  <b>remedies</b> [5] 14:25 15:1 53:24 54:1 91:5  <b>remedy</b> [4] 30:12 57:17 91:14 92:4  <b>remotely</b> [1] 112:16  <b>removal</b> [3] 58:13 83:3 91:15  <b>remove</b> [6] 56:19 58:10 68:21 82:21 83:14 123:22  <b>removed</b> [5] 51:5 58:8 81:18 82:19 94:21  <b>removing</b> [1] 81:22  <b>render</b> [1] 117:2  <b>reorganization</b> [1] 44:14  <b>repeal</b> [1] 14:20  <b>repealed</b> [5] 14:14 44:10, 12,17 58:14  <b>repeatedly</b> [1] 38:3  <b>reply</b> [5] 13:24 40:20 63:25 64:10 77:22  <b>report</b> [5] 21:23 22:9,11,12 84:14  <b>repository</b> [1] 106:7  <b>represent</b> [2] 4:18 126:14  <b>representative</b> [2] 38:25 110:2  <b>representatives</b> [4] 61:3 118:6 121:17,22  <b>represents</b> [1] 8:4  <b>Republican</b> [1] 84:23  <b>Republicans</b> [2] 43:23 69:21  <b>requests</b> [1] 84:1  <b>require</b> [5] 7:17 10:12 44:9 77:24 115:25  <b>requirement</b> [1] 138:2  <b>requirements</b> [2] 19:7 27:14  <b>requires</b> [7] 4:14,16 9:8,20 86:15 88:21 125:7  <b>requiring</b> [4] 8:7 66:6 94:12 138:13  <b>resemble</b> [1] 111:12</p>	<p><b>reserved</b> [1] 79:15  <b>residence</b> [1] 132:4  <b>residency</b> [3] 4:14 8:2 138:9  <b>resident</b> [2] 8:14,15  <b>resist</b> [1] 86:16  <b>resolution</b> [2] 77:24 135:25  <b>resolve</b> [6] 95:23 116:9 122:22 123:15 124:9 127:25  <b>respect</b> [16] 5:4 10:25 12:19 20:15 22:13 25:17 38:2 49:17 109:18 112:2 117:20 118:4 124:13 133:8 134:14,20  <b>respects</b> [1] 87:17  <b>respond</b> [2] 49:15 81:3  <b>responded</b> [1] 90:12  <b>Respondent</b> [3] 1:23 2:11 123:10  <b>Respondents</b> [4] 1:7,21 2:7 65:9  <b>responds</b> [1] 120:3  <b>response</b> [6] 43:5 60:13 63:11 74:16 95:4 107:17  <b>rest</b> [1] 76:4  <b>restrain</b> [1] 18:6  <b>restrict</b> [3] 70:21 72:14 118:16  <b>restrictions</b> [2] 137:11,12  <b>result</b> [3] 79:13 96:2 117:5  <b>results</b> [3] 67:12 131:24 135:2  <b>retaliate</b> [1] 135:13  <b>retaliating</b> [1] 69:20  <b>return</b> [1] 61:1  <b>Reverdy</b> [2] 120:1,16  <b>reversal</b> [2] 46:23 66:15  <b>reverse</b> [1] 23:5  <b>reversed</b> [1] 3:15  <b>reversible</b> [1] 102:8  <b>review</b> [22] 77:2,4,13,14 78:1,10 92:25 99:6 124:25 128:5,18 130:24 131:4,6, 14,15,18,23 135:21,22 136:14,15  <b>reviewing</b> [1] 131:12  <b>reviews</b> [1] 77:21  <b>revisit</b> [1] 79:18  <b>rhetoric</b> [2] 112:21,22  <b>rid</b> [1] 58:23  <b>rights</b> [2] 70:5 104:23  <b>riot</b> [2] 64:17,24  <b>rip</b> [1] 96:13  <b>rise</b> [4] 21:10 36:24 119:8, 24  <b>rising</b> [1] 118:10  <b>risk</b> [1] 60:25  <b>risked</b> [1] 105:16  <b>ROBERTS</b> [55] 3:3 6:6 7:13,19 8:9,13 26:11,16,21</p>
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## Official - Subject to Final Review

<p>29:5,16 35:5,23 36:1,9,12 44:5,19 45:7 47:10 49:14 52:13 55:2 60:10 65:5,7 70:18 71:15,24 84:6,20 85: 7,25 88:5 96:25 102:12 104:10 107:9 111:3 116:2 117:16 123:6 126:13,16,25 127:10,14 128:4 131:11,22 135:6 136:17,25 139:24 140:1 role [7] 5:8 6:3 17:10 66:15 74:11 104:14 132:13 rule [15] 14:5,9 15:10,19 40: 23 46:1 47:17,19 48:2 54: 10 76:1 98:18 102:23 110: 14 116:3 rules [13] 20:22,23 77:10 84:13 86:8 89:18 94:12 118:16 129:11,12 131:9 136:13,14 ruling [3] 4:22 60:5 95:24 rulings [2] 98:9 99:14 run [20] 6:17 7:24 8:16 18: 20 23:15 67:19,24 68:6 70: 12 71:11 73:17 80:6,21 81: 1,8 83:16 117:8 129:8 133: 25 135:4 running [3] 18:18 66:16,23 runs [1] 24:9</p> <p style="text-align: center;"><b>S</b></p> <p>safeguard [1] 66:21 safeguarding [1] 115:7 safeguards [2] 96:19 115: 6 safety [1] 115:16 salvage [1] 139:9 same [21] 24:18,19,20,22, 23 26:12 31:7 33:25 58:12 66:12 67:17,19 73:21 79: 13 95:14 108:12 118:14 129:16 131:24 132:3 135: 10 Samour [2] 111:9 112:2 saw [1] 88:23 saying [24] 5:13,20 14:4 23: 10 26:5 28:11 34:5,23 48: 22 61:22 69:4 71:17 72:2 75:23,25 78:8 86:4 96:4 116:24 117:3 120:10,10 121:2 127:15 says [30] 7:15 8:3,14,15 16: 22 24:15 25:21 40:9 42:22 50:8 53:4 58:6 64:10 65: 23 73:5 74:23 86:24 103:1, 17 108:1,4,18,23 110:10, 19 113:4 120:18 121:25 126:18 132:13 Scalia [1] 19:4 scenario [2] 7:20 24:25 schedule [1] 112:9 scholars [1] 46:7 Sea [1] 53:25</p>	<p>seat [4] 6:25 68:13,17 103: 13 seats [1] 121:20 second [13] 4:2 23:15 33:1 36:23 37:18,20 38:10 41: 10 97:23 101:7 112:20 115:9 121:17 secretary [22] 6:7,10,13 7: 9,22 8:14,17,25 75:12 77: 11 116:15 126:14,17,23,25 127:8 128:3,5,9,18 129:3 130:20 Section [138] 3:13,17 4:2,5, 9 5:4,10,13,21 6:3,8,16 7: 6 9:7,8,24 10:6 12:2,13,19, 23 14:18 15:18 16:1,2,6,11, 13,20 17:11 18:11,17,25 19:3 20:15 23:23 26:3,6 28:13,20 29:21 30:11 32:5, 7 35:8 36:17,18 40:7 41:4, 5,10 43:21 44:23 45:5,9 46:24,25 48:17 51:16 52: 16 53:7 55:7 56:8,15 58:3 60:19 61:24 62:22 63:4,22 65:2,22,23 66:5 68:24 71: 1,16,19 72:16 73:4,7,20,21, 24 74:9,14,22 80:3,11,15, 15,18,24,25 81:18 82:17 84:2,4 85:19 87:14 91:20 93:17 94:17 95:1 96:14,20 97:24 103:14,24 105:7 109:12,21 113:2,10,11,12, 13 114:7,18 115:1,9,11,21 117:20,23 118:4,9 119:13 120:1 121:3 125:6,23 132: 12 133:11 138:2 139:1,13, 21 see [26] 6:18 20:12 32:11, 23 33:9 36:18 37:14,17 38: 24 50:3,23 59:7 60:17,21 63:10 70:19,17 73:20 76:7 78:7 80:14 88:9 99:8 103: 6 126:10 130:12 seeing [1] 36:25 seek [3] 32:5 103:6 138:14 seeking [4] 15:23 80:10 91: 5 138:3 seem [11] 27:13 47:20 48: 13 67:25 68:7 77:17 84:7 103:5 111:8,19 120:11 seemed [2] 63:25 117:21 seems [14] 16:9 35:11 37: 23 59:24 61:8,13 71:7 75: 14 81:4 85:25 102:11 107: 15 111:20 112:23 seen [6] 85:21 87:21 88:7 101:21 111:12 114:16 seize [1] 61:9 select [1] 80:13 selected [2] 71:21 117:10 selecting [2] 72:8 73:12 selection [1] 104:25</p>	<p>self-executing [11] 5:5,7 9:12 10:25 15:15 19:7,21 20:5,8 92:10 102:15 self-execution [1] 10:10 Senate [3] 84:14 107:25 110:15 senator [3] 38:25 110:1 120:3 senatorial [1] 118:5 senators [3] 121:5,17,22 send [1] 127:24 sending [1] 68:25 sense [3] 12:22 20:7 48:14 sensible [2] 47:17 50:22 sentence [3] 36:2,18 37:2 separate [6] 13:1 23:14 32: 24 82:6 92:7 110:2 separately [1] 51:8 serious [2] 136:2,6 seriously [1] 135:24 serve [2] 42:18 81:9 served [1] 24:16 serving [3] 3:12 4:5 18:22 set [3] 48:7 99:20 127:23 sets [1] 99:15 setting [1] 24:8 settle [1] 75:19 settled [4] 45:4 48:12 87:8, 11 several [2] 59:17 60:1 severe [1] 20:20 shall [8] 50:8,9 51:5 54:15 58:8 70:22 74:23 113:4 shameful [1] 64:25 SHANNON [3] 1:22 2:10 123:9 share [1] 116:5 sharply [1] 31:12 Sheffey [2] 55:10,10 Sheffey's [1] 56:4 Shelby [1] 69:17 shift [1] 19:19 short [3] 88:13 111:14 123: 4 shortly [1] 67:4 shouldn't [3] 45:2 124:25 131:14 show [5] 26:6 28:12 62:11 125:6 138:13 showing [1] 58:22 shows [1] 83:12 side [6] 23:8 62:18 84:10 86:22 102:25 107:22 side's [1] 102:14 sides [3] 66:11 100:4 102: 13 sight [1] 99:8 significant [2] 40:2 114:24 Simi [3] 22:14,17 101:8 similar [2] 15:19 26:2 similarly [2] 72:17 81:14 simple [4] 31:8 34:8 90:6</p>	<p>96:14 simply [2] 22:19 57:1 simultaneously [1] 42:23 since [7] 45:5 53:8 65:13 81:24 85:21 87:22 114:16 single [7] 75:1 76:2 89:6,7 112:12 117:1 133:22 sit [2] 55:11,11 sitting [4] 65:15 68:21 91: 13,16 situation [12] 4:22 6:11 9:6 10:21 16:2 31:25 93:9 102: 2,18 105:5 135:15 138:17 situations [2] 4:19 116:7 six [1] 113:10 slightly [2] 9:7 44:9 smuggled [1] 40:2 sociology [1] 22:16 sole [1] 7:1 Solicitor [1] 1:22 somebody [9] 6:7 8:9 29: 24 80:18 83:6 85:14 86:5 127:14 132:14 somehow [4] 50:15 83:7,8 103:3 someone [11] 17:20 23:19 32:16 54:13 74:2,5 94:15 114:3,12 117:6 126:17 someone's [1] 111:17 sometimes [6] 6:23,23 20: 5,7 48:5 77:23 somewhat [2] 37:21 41:11 somewhere [1] 126:17 soon [1] 105:15 sorry [11] 26:15,23 29:4 40: 8,10 59:22 62:10 79:1 88: 4 123:8 131:11 sort [10] 40:2 70:18,19 85: 17 96:9 106:25 118:6,10 120:7 130:14 SOTOMAYOR [55] 9:10,16, 24 10:1,4,18,23 11:5,8,10, 13,17,20 12:2,14,18,25 13: 14 23:9,13,22,25 24:4,8,19 25:3,6,13,16,19 26:9,25 27: 12 40:8,11,14,18 45:7,8,22, 25 46:6,13,22 47:4,7,9 83: 19 88:1,4 102:12,13,23 129:17 136:17 sounds [3] 13:23,24 75:5 south [5] 61:2 69:20,22 118:9 120:25 Speaker [5] 42:12 51:22 107:25 109:18,24 speaks [3] 73:21 81:6 91: 20 special [1] 65:22 specific [5] 16:20 36:23 49: 16 60:5 72:1 specifically [5] 39:12,21 61:25 121:5 123:15 specified [1] 6:8</p>	<p>specifies [1] 18:25 specify [1] 121:15 spelled [1] 15:20 spend [1] 5:3 stack [1] 127:15 stakes [1] 78:9 standard [7] 77:3 97:23 98: 20 99:20 127:20 130:24 131:3 standards [5] 84:12 98:11 99:15 111:7 129:12 standing [1] 124:24 start [5] 25:18 49:20,22 86: 24 108:10 started [2] 12:21 82:16 state [114] 4:7,9,14,15,17, 19 5:8,17,20 6:7,11,13 7:3, 9,22 8:2,3,6,8,17,20,24,25 9:4,21 10:7,13 13:11 15:1 16:19,22 17:5 18:19 21:8, 15 22:5,15 23:19,25 24:10, 11,14 25:5,7,20 26:8 53:6, 23 56:17 57:7 58:4 60:6, 25 61:6 63:15 66:1 68:6 69:9,10,13,14 70:21 72:14 75:1,12,24 76:2,15 77:4,11, 17 83:11,17,18 86:17 89:6, 7,9,14,17,24 90:3,7 95:7, 16,16 97:10 98:22 100:24 102:8 105:14,20 106:10 111:19,21 116:4,5,12,15 117:1 123:24 126:14,17 129:10 130:20,21 131:1,5 133:15,21 137:6,15 138:12, 14 state's [13] 6:7 8:15 16:12 76:15 79:4 80:6 82:23 104: 22 105:1 116:8 128:5,18 129:3 state-imposed [1] 9:2 state-level [1] 61:2 statement [1] 15:2 statements [8] 8:23 22:11 78:6,22,24 101:12 STATES [166] 1:1,15 3:18, 20,25 6:3 9:13 10:5,12,12 12:22 13:1 17:10 18:4,9 20:21 21:2,2,14 22:8 23:2, 16 35:10 38:2 39:6,8,24 41:10,12,16 42:11,21,24 44:23 45:12,14,18,20 46: 25 47:16 48:15,23 49:11 50:9,18,21,24 51:5,9,25 52: 6,7,19 57:12 58:7 61:3 63: 2,4 64:16 65:16 66:10,15, 17,21 67:5,18,22 68:15,20, 25 69:1,5,9,11,13 70:4,5,9, 11,22 71:4,5,20 72:3,6,11, 15,17,23 73:11,15 75:2,21 76:11,14,21 84:21,25 85: 17,18 86:1,25 87:5 94:25 96:3,11,17 97:5,6,8 98:4,7</p>
---	---	---	---	---



## Official - Subject to Final Review

<p>99:17 101:23,24 102:16,24  104:13,19 106:3,7,7,14,21,  22 107:2,4 108:1,3 109:22  110:20 111:5,7 112:23  117:8,10,11,13,20,23 118:  4,14 119:10 120:5 122:6  124:4 128:7,11,12,17,21,  23 129:7 130:20 131:19  132:11,14 133:11 134:8,11,  19,21 135:1,12 136:12 139:  2  <b>states'</b> [4] 71:11 104:12  105:10 107:5  <b>statute</b> [18] 6:4 14:18 17:  12,22 20:2 44:8 51:22 53:  23 54:7,11 56:10 58:20 63:  11 87:15 113:3,6 125:3  129:11  <b>statutes</b> [3] 15:2 94:12  113:1  <b>statutory</b> [3] 14:1 48:6 125:  1  <b>step</b> [2] 9:19 70:7  <b>stepping</b> [1] 41:21  <b>steps</b> [1] 10:8  <b>STEVENSON</b> [37] 1:22 2:  10 123:7,8,9,11 124:15,22  125:4,17,25 126:4,9,15,20  127:3,13,21 128:8,20 129:  5,15,20 130:2,11 131:2,15,  25 132:6,20 134:2 135:16  136:3,7,12,24 137:5  <b>still</b> [13] 5:17 6:16 32:6 40:  5 44:8 68:4 76:14 91:10  113:1 127:19 138:7,16  139:7  <b>stomach</b> [1] 114:12  <b>stop</b> [2] 9:10 10:13  <b>street</b> [1] 127:18  <b>strikes</b> [1] 104:16  <b>strips</b> [1] 124:3  <b>stronger</b> [2] 45:20 49:10  <b>strongest</b> [1] 50:7  <b>strongly</b> [1] 69:19  <b>structural</b> [4] 22:21 49:11  116:18 117:4  <b>structure</b> [3] 43:14 72:12  73:8  <b>Stuart</b> [1] 58:13  <b>stuck</b> [2] 77:4,5  <b>stuff</b> [1] 29:15  <b>Style</b> [1] 77:25  <b>subject</b> [3] 32:6 37:11 51:  25  <b>submitted</b> [3] 127:5 140:2,  4  <b>subsequent</b> [1] 15:9  <b>succeed</b> [1] 84:11  <b>Succession</b> [4] 42:16 51:  18,21,23  <b>suddenly</b> [1] 96:3  <b>sufficient</b> [6] 22:25 95:17</p>	<p>99:2 100:3,6 114:8  <b>suggest</b> [9] 47:16 59:24  61:17,19 63:25 68:7 75:7  112:23 120:7  <b>suggested</b> [7] 13:12 15:17  23:4 78:18 97:16,18 116:  25  <b>suggesting</b> [6] 16:17 48:  21 55:19 59:18,20 80:12  <b>suggestion</b> [1] 131:17  <b>suggests</b> [3] 119:20 120:  24 121:23  <b>suit</b> [1] 13:17  <b>sum</b> [2] 29:20 30:5  <b>super</b> [1] 123:21  <b>support</b> [4] 22:20 46:14 70:  2 73:7  <b>supported</b> [1] 83:21  <b>supporters</b> [1] 63:20  <b>supports</b> [2] 22:21 96:22  <b>suppose</b> [11] 15:6,7 75:22  85:11 89:4,8 90:13 97:3,5  99:12 133:15  <b>SUPREME</b> [21] 1:1,14 3:10,  14 4:13 9:7 11:18 20:19  21:1 23:5 26:2,5,8 63:19  82:10 100:15 124:16,23  126:1 138:1,18  <b>surely</b> [3] 31:6 32:15 84:9  <b>surprised</b> [2] 60:13 61:11  <b>surprising</b> [2] 67:15 68:19  <b>sustained</b> [1] 135:12  <b>swear</b> [3] 109:24,25 110:7  <b>swears</b> [1] 109:22  <b>swore</b> [1] 44:2  <b>sworn</b> [4] 8:22 28:10 124:2  139:17  <b>system</b> [5] 96:1 106:2,3  111:11 135:17</p> <p style="text-align: center;"><b>T</b></p> <p><b>takings</b> [1] 9:17  <b>talked</b> [6] 82:10 104:11,13,  24 105:1 131:7  <b>talks</b> [2] 15:21 80:25  <b>tangentially</b> [1] 62:17  <b>Tarble's</b> [2] 16:15 116:10  <b>technical</b> [1] 44:7  <b>tells</b> [4] 70:16 72:11 74:10  121:18  <b>Tem</b> [4] 107:24 108:20 109:  19,24  <b>tempore</b> [2] 42:13 51:23  <b>tens</b> [1] 4:25  <b>tension</b> [8] 31:2,10 32:8,12,  24 33:10,24 56:23  <b>Tenth</b> [3] 66:17 70:12 79:  15  <b>term</b> [37] 3:18 4:10,22,24 6:  14 8:5 9:3 18:3,3 19:21,25  20:12 23:3,10,15 24:1,5,9  25:11,23 26:13,14,17,18,  20 42:1 52:4,7 65:2 66:23</p>	<p>73:18,24 79:19 80:21 85:  10 137:20 138:12  <b>terms</b> [6] 24:16 42:7 73:22  76:18 89:16 107:23  <b>testified</b> [2] 22:1 126:21  <b>testify</b> [3] 100:22 112:7,7  <b>testimony</b> [4] 21:23 22:14  101:12,17  <b>Texas</b> [1] 1:18  <b>text</b> [4] 42:10 48:12 61:12  62:20  <b>textual</b> [4] 43:10 49:10,16  50:4  <b>textualist</b> [2] 36:15 42:5  <b>textually</b> [1] 45:21  <b>Thanks</b> [2] 49:13 65:4  <b>themselves</b> [2] 88:23 90:4  <b>theory</b> [10] 29:20 38:21 42:  4 54:25 73:7 82:4 91:19  92:1 93:6 123:23  <b>there's</b> [43] 9:17 10:5 15:1  20:23 23:13 32:12,12 33:9,  12 42:18 47:20 48:7,16 50:  15 55:21 72:25 73:2,5,6,14  81:15,22 85:10,19 87:2,4,8  91:25 97:3 99:5 102:13  103:17 105:9,19,25 106:4  117:1 120:13,22 124:15  126:10 130:9 134:9  <b>thereby</b> [1] 4:21  <b>therefore</b> [4] 88:8 97:12  105:16 119:23  <b>thereof</b> [1] 94:25  <b>they've</b> [1] 127:15  <b>thinking</b> [2] 47:15 132:18  <b>thinks</b> [3] 30:8 89:10 135:4  <b>third</b> [4] 24:9 66:23 73:17  115:20  <b>THOMAS</b> [21] 5:2,12 44:20  67:2,9,25 68:14,23 69:12  73:6 87:3 97:1 124:12,19  125:2,13,23 126:2,8,12  135:6  <b>Thomas's</b> [1] 70:19  <b>Thornton</b> [5] 26:19,19 46:  24 79:18 137:21  <b>though</b> [8] 7:13 16:8 45:10  47:20 107:3 109:15 116:  24 134:11  <b>thoughts</b> [3] 81:19 82:22  108:9  <b>threat</b> [2] 136:2,6  <b>threats</b> [1] 135:24  <b>three</b> [10] 10:9 13:5,8 50:4  77:19 88:15 89:22 115:4  125:5 132:15  <b>throughout</b> [1] 3:19  <b>throw</b> [2] 62:18 114:12  <b>thrust</b> [1] 71:8  <b>Thursday</b> [1] 1:11  <b>ties</b> [1] 120:7  <b>Title</b> [1] 113:2</p>	<p><b>today</b> [8] 28:12 50:3 81:24  83:4,10 87:17 108:5,12  <b>together</b> [1] 130:16  <b>took</b> [8] 6:8 14:12 15:7 37:  10 46:17,20 106:8 111:11  <b>tool</b> [2] 113:22 114:1  <b>top</b> [1] 60:18  <b>total</b> [2] 29:20 30:5  <b>totally</b> [1] 119:14  <b>tougher</b> [1] 49:2  <b>transfer</b> [2] 65:17 89:1  <b>transpired</b> [1] 111:13  <b>Treason</b> [2] 97:15,17  <b>treated</b> [3] 11:25 15:15 73:  20  <b>treaties</b> [2] 20:8,9  <b>treaty</b> [3] 5:15 9:20 20:9  <b>tremendous</b> [1] 131:3  <b>trial</b> [11] 21:16,19,21 55:9  56:3,11 98:23 112:3,10,17  133:23  <b>tried</b> [5] 15:24 34:24 44:11  57:16 115:23  <b>trouble</b> [1] 132:21  <b>troubling</b> [2] 117:19 119:  13  <b>true</b> [5] 46:21,22 76:24 80:  25 103:5  <b>truly</b> [1] 135:4  <b>TRUMP</b> [41] 1:3 3:4,11,16  20:25 21:17 26:3,5 28:9,  12 48:13 56:15 57:1 59:1  64:5 65:19 76:13 77:22 78:  15 81:25 83:10,16 98:8  100:17,23 101:5,13 102:5  103:23 112:3,11 113:7  115:16,22 122:12,17,21  138:24 139:14,17,20  <b>Trump's</b> [6] 65:21 66:14  78:5 101:9,19 103:18  <b>trusted</b> [1] 115:13  <b>try</b> [1] 94:7  <b>trying</b> [11] 27:4 35:7 36:6  39:15 50:14 61:5 81:16 94:  1 101:20 105:20 114:17  <b>turns</b> [3] 13:8 25:1,25  <b>Twelfth</b> [1] 88:25  <b>Twenty-Second</b> [1] 23:14  <b>Twitter</b> [2] 100:18 102:7  <b>two</b> [27] 10:8 13:1 24:16 32:  24 36:18 37:1 42:7 45:21  66:11,11 97:22 99:12,13,  13,14,15,16,22 100:2 101:  5,7 102:13 113:9 118:12  126:11 132:12 139:15  <b>two-thirds</b> [9] 7:17 28:1  30:22 31:5,17 32:14 34:4,  7 115:17  <b>type</b> [2] 62:15 129:13  <b>types</b> [2] 56:11 136:8  <b>typical</b> [1] 104:14</p> <p style="text-align: center;"><b>U</b></p>	<p><b>U.S.</b> [8] 23:20 24:21,23 26:  18 44:15 100:15 137:20  138:12  <b>ultimate</b> [1] 95:24  <b>ultimately</b> [9] 62:21 75:17  78:14 91:10 94:11 98:12  99:6 122:15 136:15  <b>ultra</b> [1] 82:3  <b>unanimously</b> [2] 82:11  138:12  <b>unconstitutional</b> [2] 58:  17 81:15  <b>unconstitutionally</b> [2]  139:4,10  <b>under</b> [92] 3:12 4:5 5:24 7:  6,8 9:3,24 10:18 14:22 15:  25 16:5,18 18:11,13 24:20  26:2,6 28:13 32:5 38:21,  22 39:5,7,23 40:23 41:12,  16 42:11,17,21,24 45:12,  18 46:8 48:17 49:8,9 53:7  54:12,21 56:8 57:6 65:14  66:9,16,22 67:23 70:11 71:  1 72:3 73:18 79:15 80:2  81:18 83:18 87:11 90:1 97:  24 99:22 103:11,11,14,24,  24 104:12 105:10 106:15  108:3 110:7,10 120:4 121:  16,19 122:19 123:13,23  124:6 125:7,25 129:5,16,  18 133:1,10 134:6 135:20  137:9,15 139:5,6,16,21  <b>underaged</b> [1] 73:16  <b>undercut</b> [1] 36:5  <b>underlying</b> [1] 97:25  <b>underscore</b> [1] 111:20  <b>underscored</b> [1] 111:8  <b>understand</b> [23] 11:14 15:  6 26:9 27:4 28:5 29:19 38:  8 39:15 47:12 52:15 61:15  68:14,17 69:12,13,16 91:3  93:4 95:3,22,23 113:21  119:14  <b>understanding</b> [8] 14:24  35:14 36:8 42:5 45:4 87:2,  8,12  <b>understands</b> [1] 96:9  <b>Understood</b> [4] 54:22 84:  3 114:7 119:3  <b>undertake</b> [1] 131:14  <b>uniform</b> [2] 77:24 95:24  <b>uniformity</b> [3] 94:25 95:6  117:18  <b>unique</b> [2] 15:18 41:4  <b>UNITED</b> [51] 1:1,14 3:18,20,  25 23:1 35:10 38:2 39:5,7,  24 41:9,12,16 42:11,21,24  45:12,14,18,20 47:15 48:  15,23 49:11 50:9,18,21,24  51:5,9,25 52:5,7 57:11 58:  7 64:16 65:16 66:10 75:2  97:5,6,8 98:4 108:1,3 109:</p>
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## Official - Subject to Final Review

22 110:19 119:9 120:5 139:2 <b>unknowable</b> <sup>[1]</sup> 43:19 <b>unlawful</b> <sup>[1]</sup> 98:2 <b>unless</b> <sup>[1]</sup> 5:22 6:3 13:12 17:11 25:22 54:6 63:11 72: 10 84:5 112:23 115:18 <b>unlike</b> <sup>[1]</sup> 67:21 <b>unlikely</b> <sup>[5]</sup> 7:14,20,21 100: 13 102:11 <b>unmanageable</b> <sup>[1]</sup> 102:2 <b>unpunished</b> <sup>[1]</sup> 114:9 <b>until</b> <sup>[7]</sup> 5:22 70:14 85:16 88:11 103:18 114:15 117: 13 <b>unusual</b> <sup>[2]</sup> 75:20 78:13 <b>up</b> <sup>[27]</sup> 5:8,11 9:11 14:12 24:8 25:4,7 39:15,19 46:7 61:15 75:21 86:25 87:5 94: 24 95:14,15 102:6,11 105: 24 112:11 119:9,25 124:1 132:23 134:7 136:15 <b>upheld</b> <sup>[2]</sup> 58:20 84:9 <b>urges</b> <sup>[2]</sup> 78:15 122:21 <b>usefulness</b> <sup>[1]</sup> 36:6 <b>uses</b> <sup>[3]</sup> 3:25 66:5 107:23 <b>using</b> <sup>[7]</sup> 20:12,22 44:23 52:15 73:11 98:9 133:17	<b>violently</b> <sup>[1]</sup> 115:12 <b>vires</b> <sup>[1]</sup> 82:3 <b>virtual</b> <sup>[1]</sup> 102:6 <b>virtually</b> <sup>[1]</sup> 46:10 <b>virtue</b> <sup>[1]</sup> 28:16 <b>vote</b> <sup>[14]</sup> 28:1 30:22 31:5 32:14 34:4 89:6,7,7,12 106:12,14 115:17 121:10 137:17 <b>voted</b> <sup>[3]</sup> 89:17 115:24 117: 11 <b>voters</b> <sup>[2]</sup> 114:24 130:8 <b>votes</b> <sup>[8]</sup> 4:24 7:17 66:18 89:8 103:22,23 122:19 123:18 <b>voting</b> <sup>[1]</sup> 44:4 <b>vulnerable</b> <sup>[1]</sup> 139:16	77:6 79:14,24 82:6 85:13 89:3 98:8 101:16 111:15 118:2 122:18,19 127:1 128:14 133:6 <b>whichever</b> <sup>[1]</sup> 94:4 <b>white</b> <sup>[1]</sup> 137:17 <b>who's</b> <sup>[2]</sup> 82:13,13 <b>whoever</b> <sup>[2]</sup> 84:22 94:3 <b>whole</b> <sup>[8]</sup> 10:5 48:23 70:20 71:8 92:1,6 101:25 112:10 <b>whom</b> <sup>[1]</sup> 98:22 <b>will</b> <sup>[19]</sup> 28:9 29:14 34:16 61:9 77:1 84:9,11,12,13,21 85:11 100:12 101:23,24 134:25 135:17,19,21 136: 14 <b>win</b> <sup>[1]</sup> 6:17 <b>Winning</b> <sup>[1]</sup> 60:3 <b>wins</b> <sup>[2]</sup> 28:10 122:17 <b>Wisconsin</b> <sup>[1]</sup> 75:10 <b>wishes</b> <sup>[1]</sup> 92:13 <b>within</b> <sup>[4]</sup> 22:11 39:23 106: 2 115:15 <b>without</b> <sup>[6]</sup> 15:12 70:24 77: 11 78:12 80:17 92:13 <b>witness</b> <sup>[1]</sup> 112:14 <b>witnesses</b> <sup>[4]</sup> 78:20 112:5, 6,16 <b>woefully</b> <sup>[1]</sup> 111:14 <b>won</b> <sup>[2]</sup> 55:13 103:14 <b>wondering</b> <sup>[4]</sup> 24:5 42:4 59:2 118:2 <b>word</b> <sup>[3]</sup> 19:3 39:10 119:12 <b>words</b> <sup>[9]</sup> 11:25 22:2 48:7 75:2 101:9,10,19 120:9 131:14 <b>work</b> <sup>[5]</sup> 56:3 80:25 92:8, 22 97:24 <b>worked</b> <sup>[1]</sup> 70:10 <b>works</b> <sup>[1]</sup> 108:9 <b>worried</b> <sup>[1]</sup> 119:21 <b>worry</b> <sup>[2]</sup> 61:8 119:17 <b>writ</b> <sup>[2]</sup> 15:23 32:4 <b>write</b> <sup>[1]</sup> 88:18 <b>write-in</b> <sup>[4]</sup> 67:18 125:11, 14,18 <b>writes</b> <sup>[2]</sup> 11:22 102:3 <b>writs</b> <sup>[2]</sup> 14:13 32:2 <b>written</b> <sup>[1]</sup> 115:21 <b>wrote</b> <sup>[1]</sup> 133:3
<b>V</b>	<b>W</b>	<b>Y</b>
<b>vacancy</b> <sup>[1]</sup> 42:18 <b>vacated</b> <sup>[1]</sup> 139:7 <b>vague</b> <sup>[1]</sup> 114:19 <b>valid</b> <sup>[2]</sup> 18:11 85:17 <b>validate</b> <sup>[1]</sup> 94:19 <b>validity</b> <sup>[1]</sup> 90:14 <b>valve</b> <sup>[1]</sup> 115:16 <b>variant</b> <sup>[1]</sup> 139:8 <b>vary</b> <sup>[1]</sup> 130:25 <b>varying</b> <sup>[1]</sup> 128:11 <b>vengeance</b> <sup>[1]</sup> 122:15 <b>versions</b> <sup>[1]</sup> 128:13 <b>versus</b> <sup>[3]</sup> 3:4 47:15 104: 18 <b>VI</b> <sup>[1]</sup> 110:8 <b>via</b> <sup>[1]</sup> 61:2 <b>vice</b> <sup>[14]</sup> 39:3,11,20 42:19 46:18 51:1,4,8,12 58:6 61: 25 119:19 120:2 122:2 <b>video</b> <sup>[2]</sup> 78:11 100:18 <b>videotaped</b> <sup>[2]</sup> 78:24 101: 12 <b>view</b> <sup>[8]</sup> 78:6 92:12 93:7 99: 21,23,23 118:1 138:16 <b>views</b> <sup>[2]</sup> 86:2 135:19 <b>violate</b> <sup>[3]</sup> 4:24 137:18,20 <b>violating</b> <sup>[3]</sup> 4:10,21 23:25 <b>violation</b> <sup>[4]</sup> 25:23 66:25 83:17 133:4 <b>violence</b> <sup>[3]</sup> 64:16 86:16 101:14 <b>violent</b> <sup>[4]</sup> 63:20 64:25 65: 14 101:11	<b>wait</b> <sup>[1]</sup> 85:16 <b>waiver</b> <sup>[6]</sup> 6:23 7:11,12,23 28:15 138:6 <b>wake</b> <sup>[1]</sup> 6:20 <b>wanted</b> <sup>[16]</sup> 43:24 44:1,3 50:3 62:20 63:6 73:17 78: 20 79:2,2 80:19 81:3 111: 22 112:5,7,13 <b>wants</b> <sup>[2]</sup> 125:8 128:10 <b>War</b> <sup>[7]</sup> 65:13 69:18 71:8 97:20,21 98:3 114:10 <b>warranto</b> <sup>[11]</sup> 14:14,21 30: 13 32:2,4 56:16,22 57:3,5 114:14 116:14 <b>Washington</b> <sup>[2]</sup> 1:10 46: 11 <b>wasted</b> <sup>[1]</sup> 66:19 <b>watch</b> <sup>[1]</sup> 78:11 <b>way</b> <sup>[38]</sup> 9:4 10:14 14:6 15: 7 16:15 20:6 30:10 34:25 38:6 44:23 48:10,16 49:19 53:5 56:22 57:1 58:9,18, 22 67:17,19 94:15,19 95: 14 96:2 101:16 107:18 112:11 115:2,2,10 117:22 118:18 124:5 138:1,17,20 139:11 <b>ways</b> <sup>[4]</sup> 29:21 30:6 72:15 130:19 <b>weeks</b> <sup>[2]</sup> 102:6 139:15 <b>weight</b> <sup>[2]</sup> 42:8 43:8 <b>welcome</b> <sup>[4]</sup> 5:1 67:1 111: 2 124:11 <b>whatever</b> <sup>[9]</sup> 31:25 75:6 79:19,25 80:19 84:16 97: 24 122:7 133:17 <b>whatnot</b> <sup>[1]</sup> 41:6 <b>whatsoever</b> <sup>[1]</sup> 20:10 <b>Whereupon</b> <sup>[1]</sup> 140:3 <b>whether</b> <sup>[38]</sup> 5:4 6:18,25 13:8 19:13,17 20:9 23:25 27:20 28:4,9 44:2 46:25 53:10 57:15,25 60:11 67: 21 73:15 74:2,4 75:3,13	<b>year</b> <sup>[3]</sup> 35:10 52:18 74:7 <b>years</b> <sup>[14]</sup> 24:25 25:22 53:5, 8 79:25 85:20 86:21 87:5, 12,16 88:12 109:12 111:11 113:10