

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 SHAUN MCCUTCHEON, ET AL., :

4 Appellants : No. 12-536

5 v. :

6 FEDERAL ELECTION COMMISSION :

7 - - - - - x

8 Washington, D.C.

9 Tuesday, October 8, 2013

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:03 a.m.

14 APPEARANCES:

15 ERIN E. MURPHY, ESQ., Washington, D.C.; on behalf of
16 Appellants.

17 BOBBY R. BURCHFIELD, ESQ., Washington, D.C., for Senator
18 Mitch McConnell, as amicus curiae, supporting
19 Appellants.

20 DONALD B. VERRILLI, JR., ESQ., Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf of
22 Appellee.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ERIN E. MURPHY, ESQ.	
4	On behalf of the Appellants	3
5	ORAL ARGUMENT OF	
6	BOBBY R. BURCHFIELD, ESQ.	
7	For Senator Mitch McConnell, as amicus	
8	curiae, supporting Appellants	18
9	ORAL ARGUMENT OF	
10	DONALD B. VERRILLI, JR., ESQ.	
11	On behalf of the Appellee	27
12	REBUTTAL ARGUMENT OF	
13	ERIN E. MURPHY, ESQ.	
14	On behalf of the Appellants	56
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 12-536, McCutcheon v. The
5 Federal Election Commission.

6 Ms. Murphy.

7 ORAL ARGUMENT OF ERIN E. MURPHY

8 ON BEHALF OF THE APPELLANTS

9 MS. MURPHY: Mr. Chief Justice, and may it
10 please the Court:

11 BCRA's aggregate contribution limits are an
12 impermissible attempt to equalize the relative ability
13 of individuals to participate in the political process.
14 By prohibiting contributions that are within the modest
15 base limits Congress has already imposed to combat the
16 reality or appearance of corruption, these limits simply
17 seek to prevent individuals from engaging in too much
18 First Amendment activity.

19 These limits cannot be justified on
20 circumvention grounds because the concerns the
21 Government hypothesizes are already addressed by BCRA's
22 multitude of more direct anti-circumvention measures.

23 JUSTICE BREYER: How is that?

24 MS. MURPHY: Because BCRA imposes numerous
25 direct circumvention measures. For instance, we have

1 earmarking provisions on earmarking contributions for a
2 particular candidate. We have coordination restrictions on
3 coordinated expenditures with a candidate. There are
4 proliferation restrictions on creating multiple PACs
5 that are all designed --

6 JUSTICE BREYER: Now, all these were there
7 at -- but for one -- were there at the time of
8 Buckley vs. Valeo, and I guess the Court thought
9 something could happen like the following: Candidate
10 Smith, we can only give him \$2,600, but he has a lot of
11 supporters. And each of them -- 40 of them gets a
12 brainstorm. And each of the 40 puts on the internet a
13 little sign that says, "Sam Smith PAC. This money goes
14 to people like Sam Smith. Great people."

15 Now, we can give each of those 40 \$5,000.
16 They aren't coordinated. They're not established by a
17 single person. Each is independently run. And we know
18 pretty well that that total of \$5,000 times 40 will go
19 to Sam Smith.

20 Okay? What does that violate.

21 MS. MURPHY: Well, there's a couple problems
22 with that hypothetical, Your Honor. First of all, there
23 are base limits both on what can be given to a PAC --

24 JUSTICE BREYER: \$5,000 is --

25 MS. MURPHY: -- and on what a PAC can give

1 to a candidate.

2 JUSTICE BREYER: \$5,000. So we all have is
3 my \$5,000 going to the PAC, and there happened to be 400
4 PACs. So 5,000 times -- 4,000. Five times 40, five
5 times 400, how much is that? I'm not too good at math.

6 (Laughter.)

7 MS. MURPHY: Without doing the math, I will
8 tell you that earmarking and proliferation
9 restrictions --

10 JUSTICE BREYER: No, no. There is no
11 earmarking.

12 MS. MURPHY: But -- but there's --

13 JUSTICE BREYER: Because earmarking requires
14 that you write on a check or in an accompanying letter
15 that you want the money to go to something.

16 MS. MURPHY: But actually, it does not.

17 JUSTICE BREYER: It does not?

18 MS. MURPHY: Earmarking -- the FEC's
19 earmarking regulations are broader than that. If you
20 have a PAC that is going to contribute only to one
21 candidate, you're not --

22 JUSTICE BREYER: No, no. They'll contribute
23 to several because they'll get more than one
24 contribution.

25 MS. MURPHY: And at that point, then you

1 don't have the kind of traceability you're talking about
2 because there is more money coming into the PAC than can
3 find its way to any one particular candidate.

4 JUSTICE SCALIA: I would think, if you named
5 the PAC after a particular candidate, as the
6 hypothetical assumes, I would be surprised if the
7 Federal Election Commission wouldn't come after you for
8 earmarking.

9 MS. MURPHY: That's -- that's exactly my
10 point.

11 JUSTICE KAGAN: Well, let's say this one,
12 Ms. Murphy -- let's say this one, you have 100 PACs, and
13 each of them say that they're going to support the five
14 contest -- the five candidates in the most contested
15 Senate races. There are really only five very contested
16 Senate races, and 100 PACs say that they're going to
17 support those five candidates.

18 So a donor gives \$5,000 to each of those 100
19 PACs, which support those candidates, the PAC divides up
20 the money, \$1,000 goes to each candidate. The total --
21 all those PACs, \$100,000 goes to each of the -- of the
22 Senate candidates in the five most contested races, 20
23 times what the individual contribution limits allow.

24 MS. MURPHY: A couple of responses to that,
25 Your Honor. I mean, first of all, we're talking about

1 scenarios where there isn't coordination at all between
2 the first person who makes the contribution and the
3 candidate, later on, that's receiving it. So --

4 JUSTICE KAGAN: This candidate knows all of
5 his \$100,000 donors. There are not all that many of
6 them. He can keep them all in his head in a mental
7 Rolodex.

8 MS. MURPHY: But they're not actually donors
9 to him at that point. They're contributing to a PAC
10 that, in your hypothetical, is contributing to multiple
11 different candidates and --

12 JUSTICE KAGAN: Five of the most contested
13 Senate races. So a person gives \$100,000 to each of
14 five candidates who, if they win, become the five
15 senators that are most attuned to donors. And he knows
16 who's given him \$100,000, each of those five senators
17 who gets in on the strength of these contributions that
18 are 20 times what the individual limits allow.

19 MS. MURPHY: I don't think it works to think
20 of these as direct contributions in excess of the base
21 limits because the PAC is limited itself in how much it
22 can contribute, so you would have to have --

23 JUSTICE BREYER: All we're trying to do --
24 because it's hard to do in oral argument. But what
25 we're trying to do in both, I think, our cases is that

1 we looked up all the rules and the regs -- or my law
2 clerk did -- and -- and what she discovered -- and it
3 may be wrong because I'll look at it again -- is there
4 has been no significant change in the earmarking rules,
5 in any of the rules that you're talking about, but for
6 one change since Buckley.

7 The one change -- the one change is the
8 change that all contributions made by political
9 committees established by or financed or maintained or
10 controlled by a single person will count as one.

11 So what you're seeing in these hypotheticals
12 is, simply, the construction of precisely the same
13 situation that existed in Buckley while being careful to
14 have not one person control the 4,000 PACs, which is
15 pretty easy to do.

16 And if you want to say, is this a reality?
17 Turn on your television set or internet because we found
18 instances, without naming names, where it certainly is a
19 reality.

20 MS. MURPHY: Two responses. There are
21 changes in earmarking, more than what you've suggested
22 because the restrictions that the FEC has put out in
23 regulations are -- are -- they cover more than the
24 statute itself.

25 And specifically, they cover these instances

1 of a PAC that is only going to be contributing to one
2 candidate, which is where a lot of the concern comes
3 from.

4 JUSTICE KENNEDY: I just want to be clear
5 what your answer to Justice Kagan was, her hypothetical.
6 Is -- is part of your answer that this might -- the
7 hypothetical that she gives -- contravene earmarking?
8 Or --

9 MS. MURPHY: That's part -- it can pose both
10 earmarking concerns and proliferation concerns, if we're
11 talking about something. And if we're talking about a
12 PAC that's --

13 JUSTICE KENNEDY: So is part of your answer
14 to her there that the hypothetical isn't real or isn't
15 going to happen or --

16 MS. MURPHY: Yes, I think --

17 JUSTICE KENNEDY: -- or can't happen under
18 the existing law? Is that your answer?

19 MS. MURPHY: That's part of the answer. I
20 don't think it's a particularly realistic scenario under
21 existing regulations.

22 JUSTICE KENNEDY: Is this -- is this --
23 would the other side concede that this is true?

24 MS. MURPHY: I -- I doubt they would concede
25 that it's true. But -- you know, I think that if you

1 look at it, if you have a bunch of PACs that are getting
2 contributions from this same group of individuals, you
3 are going to run into earmarking and proliferation
4 restrictions. But the other thing I would say --

5 JUSTICE KAGAN: I'm sorry. You --

6 JUSTICE SCALIA: I can't imagine that if you
7 have a PAC which says we're going to give money to
8 Smith, that's bad, but if you have a PAC that says we're
9 going to give all the money that you contribute to us to
10 Smith and Jones, that's okay -- or Smith, Jones, and
11 three others. It seems to me that that's earmarking.

12 MS. MURPHY: Exactly. If the earmarking
13 restrictions, if you know that your contributions --

14 JUSTICE KAGAN: Ms. Murphy, if you think
15 it's earmarking to have a PAC that gives money to the
16 five most -- the candidates in the five most contested
17 Senate races, I just don't think any FEC would say that
18 that's earmarking.

19 JUSTICE ALITO: Well, I may have an overly
20 suspicious mind, but I don't know. If I saw 100 PACs
21 rise up and all of them said exactly the same thing,
22 we're going to make contributions to the five most
23 contested Senate -- the candidates in the five most
24 contested Senate races, I would be suspicious.

25 And maybe the FEC would also be suspicious

1 that they didn't just all spring up independently.

2 MS. MURPHY: I think that's absolutely
3 right. I think the FEC would be suspicious, but --

4 JUSTICE KENNEDY: Well, suppose -- suppose a
5 number of PACs -- I forget the number in Justice Kagan's
6 example -- said, we're going to give to congressional
7 and senatorial candidates who -- who want to cut down on
8 governmental spending, and we know there's only about
9 four people that are like that.

10 MS. MURPHY: Well --

11 (Laughter.)

12 MS. MURPHY: I mean, at that point, I
13 think -- you know, that -- that when you have a PAC
14 that's not saying to any certainty what they're going to
15 do, then you -- you don't -- it's not clear you have
16 something to target there, because the PAC might be
17 spending money in different ways that are not operating
18 as a conduit to -- for circumvention.

19 So -- you know, I think that gets, again, to
20 why this doesn't have the kind of coordination you need.

21 JUSTICE GINSBURG: Ms. Murphy --

22 JUSTICE KAGAN: Ms. Murphy, can I give you
23 another one? There are 150 House candidates with
24 completely safe seats, all right? And there are
25 maybe -- you know, 30 or 40 or something like that in

1 their party who don't have safe seats. So the 150 get
2 together, and they say, we're going to run a joint
3 fundraiser, and anybody can contribute \$2,600 to each of
4 these candidates, 150 of them, right? So that makes
5 about \$400,000.

6 And then these 150 candidates with
7 completely safe seats just transfer all this money to
8 the one person who doesn't have a safe seat, so that's
9 about \$400,000. Double it for a primary and a general
10 election, that's about \$800,000 that all goes to one
11 candidate from one donor because of the ability for
12 candidates to transfer money to each other.

13 MS. MURPHY: That is not legal, Justice
14 Kagan. The candidates do not have the ability to
15 transfer money to each other. They only have --

16 JUSTICE KAGAN: A candidate can transfer a
17 maximum of \$2,600 to another candidate per election.

18 MS. MURPHY: A candidate can transfer \$2,000
19 to a candidate per election, and that's a
20 contribution --

21 JUSTICE KAGAN: I stand corrected on the
22 basis of \$600.

23 MS. MURPHY: That's a hard contribution
24 limit on how much they can contribute. But -- but I
25 think all of this also gets to another problem, which is

1 there's an overbreadth problem here, because if -- if
2 you're talking about this scenario, in your scenario,
3 there's only one person who can even make a contribution
4 at that point after the first \$2,600 is received --

5 JUSTICE KAGAN: You're exactly right.
6 You're exactly right, Ms. Murphy. One person could make
7 an \$800,000 contribution to a House race, where \$800,000
8 goes a long way. And then what these 150 candidates can
9 do is they can do it for every single other candidate in
10 a contested seat. So take your 30 or 40 House contested
11 seats, and it becomes a conduit for a single person to
12 make an \$800,000 contribution to a candidate in a
13 contested district.

14 MS. MURPHY: I mean, I think, even if you
15 accept this scenario where all of these candidates are
16 independently deciding to give all their money to one
17 candidate, you can't have a law that is designed to
18 prevent this one person from circumvention by
19 prohibiting everybody else from engaging in
20 contributions that don't --

21 JUSTICE GINSBURG: Ms. Murphy, on the
22 "everyone else," can you give us an idea of whose
23 expression is at stake? I mean, most people couldn't
24 come even near the -- the limit. So what percentage --
25 is there any information on what percentage of all

1 contributors are able to contribute over the
2 aggregate --

3 MS. MURPHY: I don't have a percentage on
4 how many are able. I mean, we aren't talking about a
5 large number of individuals. We certainly are talking
6 about more individuals than whose First Amendment rights
7 were implicated by the provision at issue in Davis, for
8 example.

9 JUSTICE SCALIA: I assume that a law that
10 only -- only prohibits the speech of 2 percent of the
11 country is okay.

12 MS. MURPHY: Absolutely not. I mean --

13 JUSTICE SCALIA: Oh, it isn't?

14 CHIEF JUSTICE ROBERTS: Ms. Murphy, we
15 haven't talked yet about the effect of the aggregate
16 limits on the ability of donors to give the minimum
17 amount to as many candidates as they want. The effect
18 of the aggregate limits is to limit someone's
19 contribution of the maximum amount to about nine
20 candidates, right?

21 MS. MURPHY: That's right. If you're
22 talking about a general --

23 CHIEF JUSTICE ROBERTS: Is there -- is there
24 a way to eliminate that aspect while retaining some of
25 the aggregate limits? In other words, is that a

1 necessary consequence of any way you have aggregate
2 limits? Or are there alternative ways of enforcing the
3 aggregate limitation that don't have that consequence?

4 MS. MURPHY: Well, it's certainly a
5 necessary consequence of BCRA's scheme, in which there's
6 a distinct aggregate limit on contributions to
7 candidates alone. I think, though, aggregate limits in
8 general are always going to have this effect of
9 prohibiting people from giving contributions that don't,
10 themselves, give rise to quid pro quo corruption
11 concerns.

12 And that's why, if the government is really
13 concerned about the things it's talking about, there are
14 narrower avenues to get at them. If the concern is
15 joint fundraising committees, you could have --

16 JUSTICE SOTOMAYOR: I'm a little confused,
17 okay? I'm confused because we're talking in the
18 abstract. This decision was based on a motion to
19 dismiss, and there is a huge colloquy about what happens
20 and doesn't happen. We don't have a record below.

21 MS. MURPHY: Well --

22 JUSTICE SOTOMAYOR: I mean, I can go into
23 the news, as Justice Breyer suggested. It's very hard
24 to think that any candidate doesn't know the contributor
25 who has enough money to give, not only to himself or

1 herself, but to any of his or her affiliates who are
2 supporting him or her.

3 I mean, it's nearly common sense, hard to
4 dispute. So you're saying it can't happen, but I don't
5 see charges of coordination going on that much.

6 MS. MURPHY: I guess I'm not sure what
7 you're talking about happening. I mean, if you're just
8 talking about knowing that some individuals are making
9 contributions to other candidates or state parties who
10 are not going to share those contributions with a
11 particular candidate, then I don't see how that -- or
12 gives rise to any corruption or circumvention concern.

13 JUSTICE BREYER: Here is the actual ad --
14 the actual ad. I won't name the candidate. You see a
15 picture of the candidate. There is a sign that says
16 "Smith PAC." Okay? That's what it says. And then it
17 says, "Make a donation to help Smith PAC support
18 Republican," if you like, or "Democratic candidates."
19 Period. And then they have an address. All right.

20 Now, it doesn't take a genius to figure out
21 what they're going to do with the money and that maybe
22 Smith will get a pretty good share of it. Now, if Smith
23 has 400 people who figure this out, he will have 400
24 times 5,000 times one person.

25 Now, you say that really couldn't happen

1 because of the designation. We haven't found a
2 designation rule that would stop it. But then Justice
3 Sotomayor is saying, I don't know. And I don't either
4 because there's been no hearing, there's been no
5 evidence presented. There is nothing but dismissal.

6 MS. MURPHY: Two points, Your Honor. First
7 of all, the case was briefed on cross-motion for
8 injunctive relief, so the government had an opportunity
9 to make a record, and it chose to treat this as a legal
10 case, not as one in which --

11 JUSTICE SCALIA: Ms. Murphy, do -- do we
12 need a record to figure out issues of law?

13 MS. MURPHY: And that's my second point.
14 Really, this is --

15 JUSTICE SCALIA: No, no. I agree.

16 (Laughter.)

17 JUSTICE SCALIA: I agree -- I agree that --
18 that this campaign finance law is so intricate that I
19 can't figure it out. It might have been nice to have
20 the -- you know, the lower court tell me what the law
21 is. But we don't normally require a record to decide
22 questions of law.

23 MS. MURPHY: And you shouldn't need one here
24 either because these limits are facially over- and
25 under-inclusive. They're not closely tailored and

1 evidence can't --

2 JUSTICE SOTOMAYOR: You're taking a
3 position -- you're taking a position that the law stops
4 corruption. And you're suggesting that the government
5 is incapable of showing facts that the law doesn't work?

6 MS. MURPHY: I'm suggesting that --

7 JUSTICE SOTOMAYOR: As it is? Don't you
8 need facts to prove that or disprove that proposition?

9 MS. MURPHY: Even if the government could
10 prove that proposition, there would still be an over-
11 and under-breadth problem.

12 If I may, I'd like to reserve the remainder
13 of my time.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Burchfield.

16 ORAL ARGUMENT OF BOBBY R. BURCHFIELD,
17 FOR SENATOR MITCH McCONNELL,
18 AS AMICUS CURIAE, SUPPORTING APPELLANTS

19 MR. BURCHFIELD: Mr. Chief Justice, and may
20 it please the Court:

21 Senator McConnell agrees that this aggregate
22 limit does not pass exacting scrutiny. Senator
23 McConnell believes that all restrictions of this nature
24 should be reviewed under strict scrutiny. To begin
25 with, this is a severe restriction on political speech.

1 It --

2 JUSTICE GINSBURG: Mr. Burchfield, I'd like
3 you to address this question about the restriction on
4 speech. It has been argued that these limits promote
5 expression, promote democratic participation because
6 what they require the candidate to do is, instead of
7 concentrating fundraising on the super-affluent, the
8 candidate would then have to try to raise money more
9 broadly in the electorate.

10 So that, by having these limits, you are
11 promoting democratic participation, then the little
12 people will count some, and you won't have the
13 super-affluent as the speakers that will control the
14 election.

15 MR. BURCHFIELD: Your Honor, I disagree with
16 that, for this reason. First of all, this limit -- the
17 aggregate limit on political parties places like-minded
18 political parties in the position of competing against
19 each other, rather than collaborating against each
20 other.

21 All the national political parties on the
22 Republican side and the state political parties compete
23 against each other for an artificially limited pool of
24 money from each contributor.

25 The same is true on the candidate side.

1 They compete against each other for the same
2 artificially limited pool of money, even though each
3 individual contribution to the candidate or to the party
4 is limited by the base limits.

5 The Federal Election Commission
6 regulations -- and, Justice Breyer, I would -- I would
7 propose that you look at Section 110.1(h), which
8 specifically -- which specifically prohibits a PAC of
9 the nature you describe.

10 If a person contributes to a PAC with
11 knowledge his contribution is going to a particular
12 candidate, that is an earmark under the -- under the
13 precedents of the Federal Election Commission.

14 JUSTICE SCALIA: Counsel, is it -- is it
15 correct that the consequence of this provision has been
16 very severe with respect to national political parties?

17 MR. BURCHFIELD: It is, Your Honor,
18 particularly in the current environment where the
19 national political parties are -- are being marginalized
20 by outside forces.

21 JUSTICE SCALIA: And -- and much of the
22 money that used to go to them now goes to PACs; isn't
23 that what has happened?

24 MR. BURCHFIELD: Exactly right, Your Honor.

25 JUSTICE SCALIA: So that this is really --

1 you know, turning the dials on -- on regulating
2 elections. Now, I ask myself, why would -- why would
3 members of Congress want to hurt their political
4 parties? And I answer -- I answer to myself --

5 (Laughter.)

6 JUSTICE SCALIA: -- well, ordinarily, the
7 national political parties will devote their money to
8 elections in those states where the incumbent has a good
9 chance of losing. So, in fact, if you're an incumbent
10 who cares about political parties, I don't want money to
11 go to my opponents.

12 And if you -- if you turn down the amount of
13 money that the national political parties have,
14 that's that much less money that can be devoted
15 against you if you're challenged in a close race. Isn't
16 that the consequence of this?

17 MR. BURCHFIELD: Let me see you and raise
18 you one. There are separate limits here, Your Honor,
19 for candidates and for political parties. The effect of
20 this is to insulate the incumbents from competing with
21 the political parties for the dollars. And by imposing
22 a cap on the candidate -- on the amount candidates can
23 raise, the incumbents realized that they're the favored
24 class among -- among candidates who are going to be
25 getting the contributions.

1 JUSTICE SCALIA: What a surprise.

2 JUSTICE GINSBURG: Has it worked out that
3 way in practice? Has it worked out -- because there was
4 one brief at least saying no, that -- that that's wrong.
5 In fact, it's the challengers who are aided.

6 MR. BURCHFIELD: Well, Your Honor, I think
7 it is -- it is -- there's a hard cap on the number any
8 contributor can give to all candidates, and a separate
9 cap on the amount that contributor can give to all party
10 committees.

11 JUSTICE BREYER: So -- so I read in one
12 summer before BCRA -- I spent several weeks reading the
13 record before the District Court in that very lengthy
14 case on this.

15 And it was filled with testimony by senators
16 and congressmen that a handful of people can give
17 hundreds of thousands of dollars. They know who those
18 people are and that those people do have undue
19 influence, which means, in First Amendment terms, that
20 the individual who, in fact, has wonderful ideas and
21 convinces others, even by paying three cents to buy the
22 internet or something, hasn't a shot because it will
23 influence people, not ideas, but the money. Now, there
24 was a record on that.

25 Here, there is no record showing whether

1 this aspect does or does not have the same tendency.
2 That is why I ask: How can I decide this on the basis
3 of theory when the record previously showed the contrary
4 of what's been argued and, in fact, at least might show
5 that even in respect to these limits?

6 MR. BURCHFIELD: Well, Your -- Your Honor,
7 this case comes to the Court as an as-applied challenge.
8 Mr. McCutcheon does not want to go through -- does not
9 want to go through the committees you're talking about.
10 He wants to write checks directly to the candidates and
11 directly to the committees. He is constrained by the
12 aggregate limit.

13 JUSTICE GINSBURG: But he can -- he can
14 write checks to everyone that he wants to write checks
15 to. It's just he can't give his special number of 1776.

16 MR. BURCHFIELD: If -- if he wanted to give
17 a contribution to every candidate running for a federal
18 congressional seat -- congressional and Senate, he would
19 be limited to \$86 or some -- some number like that.

20 JUSTICE GINSBURG: In his own case, it would
21 be something over \$1,000, right? Because he identified
22 12 more candidates that he'd like to give 1776 to, but
23 he could give each of them over \$1,000.

24 MR. BURCHFIELD: Your Honor, he could. But,
25 again, you're -- you're diminishing his right to

1 associate and the intensity of his association by
2 applying this aggregate limit.

3 JUSTICE KAGAN: Mr. Burchfield, if you take
4 off the aggregate limits, people will be allowed, if you
5 put together the national committees and all the State
6 committees and all the candidates in the House and the
7 Senate, it comes to over \$3.5 million.

8 So I can write checks totaling \$3.5 million
9 to the Republican Party committees and all its
10 candidates or to the Democratic Party committees and all
11 its committees, even before I start writing checks to
12 independent PACs.

13 Now, having written a check to -- for 3.5 or
14 so million dollars to a single party's candidates, are
15 you suggesting that that party and the members of that
16 party are not going to owe me anything, that I won't get
17 any special treatment?

18 Because I thought that that was exactly what
19 we said in McConnell, that, when we talked about soft
20 money restrictions, we understood that you give
21 \$3.5 million, you get a very, very special place at the
22 table. So this is effectively to -- to reintroduce the
23 soft money scheme of McConnell, isn't it?

24 MR. BURCHFIELD: No. No, Your Honor, it is
25 absolutely not because McConnell dealt with the

1 situations where there were -- you were not considering
2 the base limits. The soft money, by definition, was not
3 subject to the base limits.

4 To take your example of the joint
5 fundraising committee, the joint fundraising regulation,
6 which consumes more than three pages in the -- in the
7 Federal Code of Federal Regulations -- it's at
8 102.17(c) -- it specifically reaffirms the base limits.
9 It specifically reaffirms the anti-earmarking
10 restriction, and it says that the joint fundraising
11 committee must inform all contributors of those
12 restrictions.

13 So, again, it's a situation where the
14 money leaves the contributor's hands, he loses control
15 over it, and the person who receives it makes the
16 direction.

17 JUSTICE KAGAN: But the money -- but the
18 money goes to a single party. And indeed, I could make
19 this even worse. I could say, let's say the Speaker of
20 the House or the Majority Leader of the House solicits
21 this money from particular people, so solicits somebody
22 to ante up his \$3.6 million.

23 And then -- you know, Justice Kennedy said
24 in McConnell the making of a solicited gift is a quid
25 both to the recipient of the money and to the one who

1 solicits the payment. So the Speaker, the Majority
2 Leader, can solicit \$3.6 million to all the party
3 members, and you're telling me there's just no special
4 influence that goes along with that?

5 MR. BURCHFIELD: Well, we know from the
6 Citizens United decision, Your Honor, that gratitude and
7 influence are not considered to be quid pro quo
8 corruption, so I think that's what you're talking about.

9 That is not the sort of corruption that
10 would sustain this limit, especially in light of the
11 severe restrictions on speech and association that it
12 imposes as the political parties compete against each
13 other and as they -- and as -- as the candidates have to
14 compete against each other.

15 Justice Alito --

16 JUSTICE ALITO: In Buckley, the Court
17 sustained -- sustained aggregate limits. What has
18 changed since Buckley?

19 MR. BURCHFIELD: Your Honor, the -- the
20 statute has changed significantly to impose base limits
21 on the parties, to impose -- on both the state and --
22 and federal parties. It has changed to prohibit
23 proliferation of political committees.

24 One of the concerns in Buckley was the dairy
25 industry, which contributed to hundreds of PACs

1 supporting President Nixon's re-election. That is no
2 longer possible.

3 JUSTICE ALITO: Those were all created by
4 the dairy industry or by the Nixon campaign; is that
5 correct?

6 MR. BURCHFIELD: That's not -- as I
7 understand -- as I read the lower court decision in
8 Buckley, that is correct. In addition, you also have --
9 you also have a thick volume --

10 JUSTICE SOTOMAYOR: Then how is it that --
11 I'm sorry.

12 MR. BURCHFIELD: In addition, you also
13 have -- you also have a thick volume -- you have a thick
14 volume of the Code of Federal Regulations of the Federal
15 Election Commission, which did not exist at the time of
16 Buckley.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 MR. BURCHFIELD: Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: General Verrilli.

20 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

21 ON BEHALF OF THE APPELLEE

22 GENERAL VERRILLI: Mr. Chief Justice, and
23 may it please the Court:

24 Aggregate limits combat corruption. Let me
25 start by explaining exactly how. Aggregate limits

1 combat corruption both by blocking circumvention of
2 individual contribution limits and, equally,
3 fundamentally, by serving as a bulwark against a
4 campaign finance system dominated by massive individual
5 contributions in which the dangers of quid pro quo
6 corruption would be obvious and inherent and the
7 corrosive appearance of corruption would be
8 overwhelming.

9 Now, the Appellants in this case have tried
10 to present the case as though the issue were whether
11 there were some corrupting potential in giving
12 contribution to the nineteenth candidate after someone
13 has already contributed to -- the maximum to the
14 eighteenth. But that is not what this case is about.

15 The Appellants are not arguing that the
16 aggregate limit is drawn in the wrong place. They are
17 arguing that there can be no aggregate limit because the
18 base contribution limits do all the work. And so what
19 that means is that you -- you're taking the lid off the
20 aggregate contribution limit, and as Justice Kagan and
21 her question earlier indicated, that means that an
22 individual can contribute, every two years, up to
23 \$3.6 million to candidates for a party, party national
24 committees and state committees --

25 CHIEF JUSTICE ROBERTS: That's because they

1 can transfer the funds among themselves and to a
2 particular candidate. Is -- is the possibility of
3 prohibiting those transfers perhaps a way of protecting
4 against that corruption appearance while, at the same
5 time, allowing an individual to contribute to however
6 many House candidates he wants to contribute to?

7 I mean, the concern is you have somebody who
8 is very interested, say, in environmental regulation,
9 and very interested in gun control. The current system,
10 the way the anti-aggregation system works, is he's got
11 to choose. Is he going to express his belief in
12 environmental regulation by donating to more than nine
13 people there? Or is he going to choose the gun control
14 issue?

15 GENERAL VERRILLI: So, Mr. Chief Justice, I
16 want to make two different points in response to that
17 question. The first is that restricting transfers would
18 have a bearing on the circumvention problem. It
19 wouldn't eliminate all circumvention risk, but would
20 have a bearing on that problem.

21 But there is a more fundamental problem
22 here. It's a problem analogous to the one that was at
23 issue with soft money in McConnell, which is the very
24 fact of delivering a \$3.6 million check to the --
25 whoever it is, the Speaker of the House, the Senate

1 Majority Leader, whoever it is who solicits that check,
2 the very fact of delivering that check creates the
3 inherent opportunity for quid pro quo corruption,
4 exactly the kind of risk that the Court identified in
5 Buckley, wholly apart from where that money goes after
6 it's delivered.

7 But the delivery of it --

8 CHIEF JUSTICE ROBERTS: What -- what is the
9 framework -- what is the framework for analyzing? I
10 agree with you on the aggregation, but it has this
11 consequence with respect to limiting how many candidates
12 an individual can support within the limits that
13 Congress has said don't present any danger of
14 corruption.

15 So what is the framework for analyzing that?
16 Give you your argument with respect to the transfers and
17 the appearance there, but it does have that other
18 consequence on something we've recognized as a
19 significant right. So --

20 GENERAL VERRILLI: Let me make a specific
21 point about that and then work into the framework. The
22 specific point is this: The -- the aggregate limit
23 would have the effect of restricting the ability of a
24 contributor to make the maximum contribution to more
25 than a certain number of candidates. That's true. We

1 can't help but acknowledge that. It's math.

2 But that doesn't mean that that individual
3 cannot spend as much as the individual wants on
4 independent expenditures to try to advance the interest
5 of those candidates or the interests of the causes that
6 those candidates stand for.

7 Mr. McCutcheon, for example, can spend as
8 much of his considerable fortune as he wants on
9 independent expenditure advocating the election of these
10 candidates.

11 JUSTICE SCALIA: And that does not -- that
12 does not evoke any gratitude on the part of the people?
13 I mean, if gratitude is -- is corruption -- you know,
14 don't those independent expenditures evoke gratitude?
15 And is -- is not the evil of big money -- 3.2 million,
16 an individual can give that to an independent PAC and
17 spend it, right?

18 GENERAL VERRILLI: The foundation --

19 JUSTICE SCALIA: It's not that we're
20 stopping people from spending big money on politics.

21 GENERAL VERRILLI: The foundation of this
22 Court's jurisprudence in this area is the careful line
23 between independent expenditures, which this Court has
24 held repeatedly, do not create a sufficient risk of quid
25 pro quo -- quid pro quo corruption to justify their

1 regulation, and contributions which do.

2 JUSTICE SCALIA: Wait. That -- that --

3 MR. BURCHFIELD: So we're not talk --

4 JUSTICE SCALIA: That line eliminates some
5 of the arguments that have been made here, which are
6 arguments against big money in politics. There -- big
7 money can be in politics. The thing is you can't give
8 it to the Republican Party or the Democratic Party, but
9 you can start your own PAC. That's perfectly good. I'm
10 not sure that that's a benefit to our political system.

11 GENERAL VERRILLI: Well, I do think we have
12 limits on contributions to political parties, in
13 addition to limits on contributions to candidates. And
14 I think that does help establish the point here, which
15 is that candidates are not hermetically sealed off from
16 each other, and parties are not hermetically sealed off
17 from candidates.

18 They -- you know, they're all on the same
19 team. And we limit the amount that an -- that an
20 individual can contribute to a political party, as well
21 as the amount that an individual can contribute to
22 candidates --

23 JUSTICE BREYER: That actually does very
24 much -- while I don't -- I'm looking for an answer here.
25 It's not that I have one at all. It is rather basic,

1 the point I think that's being made now. I mean, as I
2 understand it, the whole reason -- it is no doubt that
3 campaign limits take an ordinary person, and they say,
4 you cannot give more than such-and-such an amount.

5 There are apparently, from the Internet, 200
6 people in the United States who would like to give
7 \$117,000 or more. We're telling them, you can't; you
8 can't support your beliefs. That is a First Amendment
9 negative.

10 But that tends to be justified on the other
11 side by the First Amendment positive because, if the
12 average person thinks that what he says, exercising his
13 First Amendment rights, just can't have an impact
14 through public opinion upon his representative, he says,
15 what is the point of the First Amendment? And that's a
16 First Amendment point. All right. So that's basic, I
17 think.

18 Now, once that's so, Congress has leeway.
19 And you are saying -- and I have seen all over the
20 place, that that's why we don't want those 200 people to
21 spend more than 117- or 120,000 because the average
22 person thinks the election is -- after the election, all
23 the actions are affected by the pocketbook and not by
24 the merits of the First Amendment arguments.

25 Okay. And now, you say the person can do

1 the same thing anyway; just call it independent. And
2 what independent does, he can spend 40 million. He can
3 spend 50 million. And all that does is sort of mix up
4 the messages because the parties can't control it.

5 Now, that's, I think, the question that's
6 being asked. And I think that that is a very serious
7 question, and I'd like to know what flows from it. Is
8 it true? So what? What are we supposed to do? What is
9 your opinion about that question?

10 JUSTICE KENNEDY: And I have the same
11 question. You have two -- two persons. One person
12 gives an amount to a candidate that's limited. The
13 other takes out ads, uncoordinated, just all on his own,
14 costing \$500,000.

15 Don't you think that second person has more
16 access to the candidate who's -- when the candidate is
17 successful, than the first? I think that was at the
18 root of Justice Scalia's question and Justice Breyer's.

19 GENERAL VERRILLI: Let me try to answer this
20 with an analogy, if I could, Justice Kennedy.

21 I think the right way to think about it is
22 this, if somebody thinks the Secretary of Defense is
23 doing a great job, they can take out an ad in the
24 Washington Post, spend \$500,000 on that ad saying, the
25 Secretary of Defense has done a great job. And -- and

1 they would have an undoubted First Amendment right to do
2 that. No one could think that there's a content -- it's
3 hard to imagine a content-neutral justification for
4 prohibiting that speech.

5 But if, instead, the person wanted to
6 express their symbolic --

7 JUSTICE SCALIA: What if Boeing does it? I
8 mean, you know --

9 GENERAL VERRILLI: I still think --

10 JUSTICE SCALIA: You think, no problem?

11 GENERAL VERRILLI: -- that would be an
12 independent expression. But if, instead, somebody
13 wanted to express symbolically their view that the
14 Secretary of Defense has done a great job by giving the
15 Secretary of Defense a Maserati, nobody would think that
16 there was a First Amendment ground that could be -- that
17 could be invoked.

18 JUSTICE ALITO: But we are talking here
19 about -- we're talking here about campaign
20 contributions. Isn't it illegal for a candidate to take
21 campaign contributions and use it to buy a Maserati?

22 GENERAL VERRILLI: We -- yes, it is, but the
23 point --

24 JUSTICE ALITO: Well, then I don't see how
25 that -- that really gets to the point.

1 GENERAL VERRILLI: But -- it get -- I think
2 it does, if I may, Justice Alito, because I think that
3 the point is that the -- that the rule against gifts,
4 the conflict of interest rules, they exist to advance a
5 content-neutral government interest of the highest
6 importance. That --

7 JUSTICE ALITO: Well, what troubles me about
8 your -- what troubles me about your argument, General
9 Verrilli, and about the District Court's opinion is that
10 what I see are wild hypotheticals that are not,
11 obviously, plausible or -- and lack -- certainly lack
12 any empirical support.

13 Now, you've -- you've chosen to use the same
14 hypothetical the District Court used about the
15 \$3.5 million contribution that would be -- that could be
16 given by a coordinate -- which involves all of the House
17 candidates and all of the Senate candidates in a
18 particular year getting together with all of the -- all
19 of the parties' national party committees, plus all of
20 the state party committees, and then -- and that's how
21 you get up to the \$3.5 million figure; isn't that right?

22 GENERAL VERRILLI: Yes.

23 JUSTICE ALITO: Now, how -- how realistic is
24 that? How realistic is it that all of the state party
25 committees, for example, are going to get money and

1 they're all going to transfer it to one candidate?

2 For 49 of them, it's going to be a candidate
3 who is not in their own state. And there are virtually
4 no instances of state party committees contributing to
5 candidates from another state.

6 And the other part of it that seems dubious,
7 on its face, is that all of the party -- all of the
8 candidates for the House and the Senate of a particular
9 party are going to get together, and they are going to
10 transfer money to one candidate. There really -- you
11 cited in your brief the example -- the best examples, I take
12 it, of -- of contributions from some candidates to other
13 candidates. They are very small. Isn't that true?

14 GENERAL VERRILLI: Yes. But I think there
15 are two -- Justice Alito, I think that, with all due
16 respect, I think the point Your Honor is making confuses
17 two different ways in which these laws combat the risk
18 of corruption.

19 The first one is that the -- the handing
20 over of the large check and whether it's a \$3.6 million
21 check for everyone or a \$2.2 million check for the House
22 candidates or a \$1 million check for all the state
23 committees, the very -- just as the Court found in
24 McConnell, with respect to massive soft money
25 contributions and the inherent risks of -- of corruption

1 there, there's an inherent risk of corruption.

2 And that's why, indeed, as I said, we have
3 limits on how much we can contribute to a political
4 party for that reason --

5 JUSTICE ALITO: Well, I don't understand
6 that --

7 GENERAL VERRILLI: -- and that's apart from
8 how it gets transferred.

9 JUSTICE ALITO: Unless the money is
10 transferred to -- you have to get it from the person who
11 wants to corrupt to the person who is going to be
12 corrupted. And unless the money can make it from A to
13 B, I don't see where the quid pro quo argument is.

14 GENERAL VERRILLI: Well, I think that the --
15 I think that the way these joint fundraising committees
16 work is you hand over a single check to a candidate who
17 solicits it. Now, it could be any candidate who sets up
18 a joint fundraising committee, says, give to me and give
19 to the rest of my team.

20 And that's -- so the handing over the check
21 to that candidate is a -- seems to me -- you know,
22 creates a significant risk of indebtedness on the part
23 of that candidate, even though a lot of the money is
24 flowing through to others.

25 In addition, the party leaders are often

1 going to be the ones who solicit those contributions,
2 and they're going to be -- have a particular
3 indebtedness to candidates because, of course, their
4 power, their authority depends on the party retaining
5 or -- or gaining a majority in the legislature.

6 And so they're going to feel a particular
7 sense of indebtedness, that this person is helping, not
8 only them, but everybody --

9 JUSTICE ALITO: I understand --

10 GENERAL VERRILLI: -- in these massive
11 amounts and then -- I'm sorry, if I may just make my
12 third point, Mr. Chief Justice?

13 CHIEF JUSTICE ROBERTS: Sure.

14 GENERAL VERRILLI: And then the third point
15 I think is that every -- every candidate in the party is
16 going to be affected by this because every candidate is
17 going to get a slice of the money, and every candidate
18 is going to know that this person who wrote the
19 multimillion dollar check has helped, not only the
20 candidate, but the whole team, and that creates a
21 particular sense of indebtedness.

22 And, of course, every member of the party is
23 likely to -- every -- every officeholder in the party is
24 likely to be leaned on by the party leadership to
25 deliver legislation to the people who are buttering

1 their bread.

2 JUSTICE ALITO: These -- these aggregate
3 limits might not all stand or fall together. Let --
4 just take this example, if you can just take a minute
5 and walk me through this step-by-step.

6 You have somebody who wants to corrupt a
7 member of the House, and this person's strategy is to
8 make contributions to multiple House candidates with the
9 hope, the expectation, the plan that those candidates
10 are going to transfer -- transfer the money to the --
11 the member that this person wants to corrupt.

12 Now, how is that person going to accomplish
13 that, given the earmarking regulations, and -- and the
14 limits on how much one member can contribute to another?

15 GENERAL VERRILLI: So -- you know, I think
16 that that -- I think it's possible, but I think, if
17 somebody had that goal, that circumvention goal, but by
18 far better ways of achieving it would be giving
19 significant -- and you've taken the aggregate caps
20 off -- would be making significant contributions to
21 state parties and national parties who are free to
22 transfer money among themselves without restriction, and
23 by -- and by making contributions to PACs. And so --

24 JUSTICE ALITO: Well, if you're -- I mean,
25 if you're not going to defend the application of the

1 aggregate limits in that situation, doesn't it follow
2 that, as applied to that situation, these are -- these
3 are unconstitutional?

4 GENERAL VERRILLI: No. No, I don't think
5 so. I think it -- I think it -- I think it -- first of
6 all, I think it could happen in that situation, but I
7 think it's more likely to happen in those --

8 JUSTICE ALITO: Well, then just explain to
9 me how it's going to be done. The person gives to
10 member A with the hope that member A is going to give it
11 to member B. If the person even implies, when making
12 the contribution to A, that person wants it to go to B,
13 that's earmarked. So how is this going to be done?

14 GENERAL VERRILLI: Well, I think -- well,
15 I -- in McConnell and in Colorado Republican to this
16 Court said that earmarking is not the outer limit of the
17 government's authority to regulate here. And the reason
18 the Court said that is because a lot of this can be done
19 with winks and nods and subtly. And so I -- and so I
20 don't think it's the case that earmarking would work to
21 prohibit that.

22 But I also think that the -- when we're
23 talking about aggregate limits, they're part of an
24 overall system of regulation. And I think that they
25 work to keep the -- to keep the circumvention risk in

1 check, and they work to make sure that you don't have
2 the kind of problem that you identified in McConnell.

3 JUSTICE BREYER: So what would you think? I
4 was just listening to your dialogue, and you heard --
5 this is pretty tough, we try to construct some
6 hypotheticals, and -- and the counsel says, oh, I've got
7 this part wrong or that part wrong or the other one, and
8 they may be right. And we can't do this, figuring out
9 all these factual things in an hour, frankly.

10 And they may be right. I'm not sure. There
11 hasn't been a full hearing. It seemed to me there are
12 things to explore in respect to the circumvention. Who
13 is right? Should you change the hypothetical slightly,
14 or what? There are things to explore in respect to the
15 question of whether being able to write a \$3.6 million
16 check to a lot of people does leave the average person
17 to think, my First Amendment speech, in terms of
18 influencing my representative, means nothing.

19 There are things to explore in terms of the
20 relationship between what is permissible; namely, spend
21 \$40 million independently. And what isn't permissible;
22 namely, spending more than 117,000. None of these have
23 been considered. They would seem relevant.

24 So what do you think about going into these
25 matters in a district court where the evidentiary

1 aspects of them can be explored at some length?

2 GENERAL VERRILLI: Well, I think,
3 Justice Breyer, that the statute can be upheld under the
4 current state of the record. I understand and take Your
5 Honor's point.

6 But I do think that you had a substantial
7 record in Buckley, you had a substantial record in
8 McConnell, but that substantial record bears directly on
9 the question of whether massive aggregate contributions
10 pose the inherent danger of corruption and the corrosive
11 appearance of corruption and that the case can be
12 decided on that basis.

13 JUSTICE GINSBURG: General Verrilli, the
14 Government in the proceeding below didn't suggest in
15 response to the -- to the proceedings before the
16 three-judge court that an evidentiary hearing was --
17 both sides seem to treat this as a matter that could be
18 disposed of without an evidentiary hearing; is that
19 right?

20 GENERAL VERRILLI: That's correct, Your
21 Honor.

22 JUSTICE GINSBURG: There's the point that
23 the Chief made about what this does is limit
24 particularly on the national strategy. It drives
25 contributions toward the PACs and away from the

1 parties, that money -- without these limits, the money
2 would flow to the candidate, to the party organization,
3 but now, instead, it's going to the PACs.

4 What is your response to that?

5 GENERAL VERRILLI: Well, the -- we take the
6 constitutional First Amendment framework of this Court's
7 decisions as a given. The Court has -- the Court has
8 determined that independent expenditures do not present
9 a risk of quid pro quo corruption that allows their
10 regulation; that contributions -- direct contributions
11 to candidates and to parties can pose that risk --

12 JUSTICE SCALIA: That's fine. They're
13 regulated. That's the law, but the question says --
14 what the question is directed at, given that that's the
15 law, isn't the consequence of -- of this particular
16 provision to sap the vitality of political parties and
17 to encourage -- what should I say -- you know, drive-by
18 PACs for each election? Isn't -- isn't that the
19 consequence?

20 GENERAL VERRILLI: So I think the answer is
21 we don't know, one way or another, whether that's the
22 consequence, but we --

23 JUSTICE SCALIA: I think we do.

24 GENERAL VERRILLI: Well, I don't -- with all
25 due respect, Justice Scalia, I don't think we do. The

1 parties still raise and spend very substantial amounts
2 of money, and so I don't think that -- that we know.

3 But beyond that, what -- the Congress has
4 made a determination that there is a real risk of quid
5 pro quo corruption and -- the appearance of quid pro quo
6 corruption here and has regulated with respect to that
7 risk, and Congress is, of course, free to take this into
8 consideration.

9 JUSTICE SCALIA: You say -- you say it's
10 \$3.5 million. If you assume somebody that gives the
11 maximum to every possible candidate and party he can
12 contribute to throughout the United States, 3.5 million.
13 Just to put that in perspective, how much money is spent
14 by political parties and PACs in all elections
15 throughout the country --

16 GENERAL VERRILLI: Well, I think that's --

17 JUSTICE SCALIA: -- in one election cycle?

18 GENERAL VERRILLI: I think that's a good
19 point, Justice Scalia. I think it helps illustrate --

20 JUSTICE SCALIA: Do you -- Do you have any
21 idea much?

22 GENERAL VERRILLI: I do, I do. Take the
23 2010 election, non-presidential year. Each
24 party spent -- parties and candidates together, on each
25 side, spent approximately \$1.5 billion.

1 JUSTICE SCALIA: 1.5 billion.

2 GENERAL VERRILLI: Right.

3 JUSTICE SCALIA: And what about PACs?

4 GENERAL VERRILLI: That -- that, I don't
5 have specifics for, but if that were --

6 JUSTICE SCALIA: Oh, but that was a lot in
7 the last few elections, wasn't it?

8 GENERAL VERRILLI: But -- but the parties --
9 but here's the problem --

10 JUSTICE SCALIA: And -- and what about
11 newspapers that -- that spend a lot of money in
12 endorsing candidates and promoting their candidacy. I
13 suppose -- you know, you -- you have to put in that
14 money, too. That is money that is directed to political
15 speech.

16 When you add all that -- add -- when you add
17 all that up, I don't think 3.5 million is a heck of a
18 lot of money --

19 GENERAL VERRILLI: I don't think --

20 JUSTICE SCALIA: -- spread throughout the
21 country.

22 GENERAL VERRILLI: I don't think that's the
23 right way to look at it, Your Honor. If you think that
24 a party's got to get \$1.5 billion together to run a
25 congressional campaign, parties and candidates together,

1 and you've got a maximum of \$3.6 million, that is about
2 450 people you need to round up. Less than 500 people
3 can fund the whole shooting match.

4 And that, I think, is part of the problem
5 here, is that you are going to create a situation, if
6 you take off the aggregate limits, in which there is a
7 very real risk that -- that both -- that the government
8 will be run of, by, and for those 500 people and that
9 the public will perceive that the government is being
10 run of, by, and for those 500 people.

11 And that is why we have these aggregate
12 limits and why they need to remain in place.

13 CHIEF JUSTICE ROBERTS: But the -- the
14 consequence is -- just to get back to my prior question,
15 the consequence is you are telling somebody who doesn't
16 want to give 3.4 million, but wants to contribute to
17 more than nine House candidates, just up to the maximum,
18 which would be the \$5,000 per the double cycle, you are
19 telling him that he can't make that contribution,
20 however modest, certainly within the limits Congress has
21 said does not present the problem of corruption, to a
22 tenth candidate.

23 I appreciate the argument you are making
24 about the 3-point-whatever million-dollar check and the
25 need for the aggregate limits to address that. I

1 understand that point. But what do you do with the flip
2 side? I mean, you can't pretend that that is pursued
3 with no First Amendment cost quite apart from the one
4 that's there.

5 It seems to me a very direct restriction on
6 much smaller contributions that Congress said do not
7 present a problem with corruption.

8 GENERAL VERRILLI: I take that point,
9 Mr. Chief Justice. But I think the right -- you asked
10 earlier about the right analytical framework. I think
11 the right analytical framework under the First Amendment
12 is to think about this in terms of content neutrality.

13 The government's interest in preventing
14 corruption and the appearance of corruption, which is
15 why I brought up the example of the Maserati to the
16 Secretary of Defense, is an entirely content-neutral
17 justification --

18 CHIEF JUSTICE ROBERTS: No, but that
19 wouldn't -- doesn't normally get you very far on the
20 First Amendment. You could not have a rule that says
21 the -- the Post or the New York Times can only endorse
22 nine candidates --

23 GENERAL VERRILLI: No --

24 CHIEF JUSTICE ROBERTS: -- because -- I
25 mean, it's completely content neutral; you don't care

1 who the tenth is, but that -- that limit would not be --

2 GENERAL VERRILLI: I would think that would
3 be a content-based justification because the -- you are
4 not -- you are not trying to prevent corruption or the
5 appearance of corruption by doing that, and there is no
6 other neutral justification that I can think of for why
7 you would impose such a rule.

8 But the point is, with respect to elected
9 officials and the giving of money to the elected
10 officials, there is this content-neutral justification
11 that just doesn't exist with respect to any other entity
12 out there in the world.

13 And, yes, it is not free of First Amendment
14 costs and we acknowledge that, but -- but that cost is
15 mitigated in that this is not a prohibition, that you
16 can -- you can't make it at the maximum, but you can
17 make less. And then you have all the --

18 CHIEF JUSTICE ROBERTS: Is there -- is there
19 any way to prevent the concern you have about the
20 3-point-whatever-it-is million-dollar check without
21 imposing the limit on the person who wants to support
22 ten candidates, rather than one?

23 GENERAL VERRILLI: Well, I suppose you could
24 try to calculate an aggregate contribution limit that is
25 different and higher than the one that is here now, but

1 the problem with that is that the Appellants are not
2 making that argument.

3 They're making the argument that you cannot
4 have -- the only argument they've made in this case is
5 that you cannot have aggregate limits because base
6 contribution limits do all the work.

7 JUSTICE ALITO: Well, they are making --
8 they are making the argument that there are -- that the
9 regulations that already exist about transfers from one
10 entity to another prevent a lot of what you're
11 complaining -- what you're -- what you are worried
12 about.

13 But if they are not sufficient, they could
14 be bolstered. The aggregate limits are a very blunt way
15 of trying to get out -- get at the problem that you
16 are -- that you are worried about. That's their
17 argument.

18 What -- are -- is that wrong? There is
19 nothing more that could be done to prevent transfers
20 from joint fundraising committees or from one member to
21 another or from state parties to candidates?

22 GENERAL VERRILLI: So, again, I apologize
23 for repeating myself, Justice Alito, but circumvention
24 is not the only problem. The delivery of the -- the
25 solicitation and receipt of these very large checks is a

1 problem, a direct corruption problem, and none of the
2 alternatives that the Appellant's have identified
3 address that problem.

4 JUSTICE ALITO: I just don't understand
5 that. You mean, at the time when the person sends the
6 money to this hypothetical joint fundraising committee,
7 there is a corruption problem immediately, even
8 though -- what if they just took the money and they
9 burned it? That would be a corruption problem there?

10 GENERAL VERRILLI: Well, they're not -- they
11 are not going to burn it.

12 CHIEF JUSTICE ROBERTS: Well, all right.
13 But -- so then --

14 GENERAL VERRILLI: And -- but -- and that's
15 the point. They're not going to burn it. They need it.

16 JUSTICE ALITO: When does the corruption --
17 yes. When does the corruption occur? It occurs when
18 it's transferred to -- to the person who has power
19 and -- and they want to corrupt.

20 GENERAL VERRILLI: I -- I beg to differ,
21 Your Honor. I think what it does is create the sense of
22 indebtedness on the part of the recipient and on a part
23 of the party leadership when it's delivered, and -- and
24 that's the inherent risk of corruption in that
25 situation.

1 It's -- it's quite parallel to McConnell.
2 It's why we have aggregate limits on what you can give
3 to a party because these people are not hermetically
4 sealed off from each other. They are all on the same
5 team. They all have an interest in each other's
6 success. And so party leaders, in particular, are going
7 to feel a sense of indebtedness, and their less
8 restrictive alternatives don't deal with that.

9 But now, going -- if I could, I will try to
10 address the circumvention problem. You know, they --
11 what they have done is come up with a whole series of
12 things that you would have to -- there is not one thing
13 that you would have to do to take care of this problem.

14 You would have to say no transfers. You
15 would have to say segregated accounts. You would have
16 to say no giving money to PACs who have indicated that
17 they are going to give money to candidates once you have
18 already given money.

19 You're going to have to do five or six
20 things to deal with the risks of corruption. The idea
21 that that is a less-restrictive means -- it seems to me
22 like a significantly more restrictive means, and it's
23 going to impose First Amendment costs of its own.

24 I'm sure the PACs are going to say, what do
25 you mean we can't say who we want to give money to? We

1 have a First Amendment right to do that. So --

2 JUSTICE SCALIA: General Verrilli, it seems
3 to me -- it seems to me fanciful to think that the sense
4 of gratitude that an individual senator or congressman
5 is going to feel because of a substantial contribution
6 to the Republican National Committee or Democratic
7 National Committee is any greater than the sense of
8 gratitude that that senator or congressman will feel to
9 a PAC which is spending enormous amount of money in his
10 district or in his state for his election.

11 I mean, it seems to me the latter is much
12 more identifiable, and there is nothing in the law that
13 excludes that. So apparently, that's not too much of a
14 risk.

15 GENERAL VERRILLI: Well, Justice Scalia, I'm
16 not here to debate the question of whether the Court's
17 jurisprudence is correct with respect to the risks of
18 corruption from independent expenditures.

19 JUSTICE SCALIA: It is what it is, though.

20 GENERAL VERRILLI: But we accept it and --
21 and the line is that there -- in this Court's
22 jurisprudence, that there is an unacceptable risk when
23 contributions are too high. And if I may just say this
24 in conclusion --

25 JUSTICE KENNEDY: Okay. But so your answer

1 to the questions that have been put previously from --
2 from me and Justice Breyer and Justice Scalia is that's
3 the law?

4 GENERAL VERRILLI: It's -- well --

5 JUSTICE KENNEDY: I mean, that's -- just to
6 be fair, that's -- I'm -- I'm coming -- I'm coming off
7 the bench --

8 GENERAL VERRILLI: Congress isn't --

9 JUSTICE KENNEDY: -- with the understanding
10 that your answer is Buckley has settled that issue; no
11 more discussion necessary?

12 GENERAL VERRILLI: The -- the risk -- we --
13 we think the risk of corruption is real. And we think
14 it's, in fact, profound when you are talking about the
15 kinds of contributions that can be made if you take --
16 if you take the lid off on aggregate contributions.

17 If it -- if Justice Scalia's critique of the
18 situation proves correct and it is deeply disabling to
19 candidates and parties, Congress can address that by
20 changing the contribution limits. And --

21 JUSTICE KAGAN: And, General, I suppose
22 that, if this Court is having second thoughts about its
23 rulings that independent expenditures are not
24 corrupting, we could change that part of the law.

25 (Laughter.)

1 GENERAL VERRILLI: And far be it from me to
2 suggest that you don't, Your Honor.

3 JUSTICE BREYER: Well, if it's interrelated.
4 But the -- the record, as far as I recall it from
5 several years ago, talked about at length, I don't like
6 to use the word "corrupting"; I like to use
7 integration -- "integrity of the process," that notion
8 to get people to think that their First Amendment
9 speech makes a difference, etcetera.

10 Let's say "corruption." Mostly when it got
11 to this part, the aggregate, it was about circumvention.
12 And I think you are quite right to say, but there is a
13 huge corruption aspect to this.

14 But we don't have a lot of information in
15 the record about that, do we? If I just -- did I just
16 miss it? Did I miss something?

17 GENERAL VERRILLI: Well, I -- well, I think
18 with respect to McConnell, this is --

19 JUSTICE BREYER: Yeah.

20 GENERAL VERRILLI: -- it is really a very
21 close parallel.

22 JUSTICE BREYER: It is a close parallel when
23 I think about it, maybe -- or you think about it, but if
24 you're really talking -- they don't think about it that
25 way. And so that's why I've been pushing this idea, you

1 see, of let's go into this, okay? If they want us to go
2 into it, go into it.

3 GENERAL VERRILLI: May I answer that?

4 CHIEF JUSTICE ROBERTS: Sure.

5 GENERAL VERRILLI: I understand that, Your
6 Honor. I would say that I think the record -- you know,
7 after all, these aggregate limits were enacted in BCRA,
8 the same statute that -- to which that legislative
9 record pertains, and that really does go to the same
10 problem.

11 And, therefore, I think it bears upon it,
12 and it's -- it's ample evidence that would justify
13 upholding these aggregate limits, and I would strongly
14 urge the Court to do so.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, General.

17 Ms. Murphy, you have three minutes
18 remaining.

19 REBUTTAL ARGUMENT OF ERIN E. MURPHY

20 ON BEHALF OF THE APPELLANTS

21 MS. MURPHY: Thank you, Mr. Chief Justice.
22 Just a few quick points.

23 First, we haven't heard the Solicitor
24 General talk that much about circumvention today, and I
25 think that's because the circumvention argument just

1 doesn't really work.

2 It's already addressed by all of the
3 multiple prophylactic measures that BCRA contains. And
4 to the extent those aren't sufficient, there are much
5 narrower, tailored ways to get at this, as the questions
6 from Justice Alito and the Chief Justice pointed out.

7 What we're really hearing today is a
8 corruption argument. But as the questioning revealed,
9 once you accept the corruption theory that the
10 Government is putting forward here, there really isn't a
11 way to continue to draw a line between independent
12 expenditures and the three-point million dollar check to all of
13 these different individuals that is in small based
14 limited amounts because there's certainly going to be
15 just as much gratitude to the individual who spends
16 \$3.6 million directly supporting one candidate through
17 ads on that candidate's behalf.

18 So what we really have is a system that's
19 forcing money out of the most transparent way possible
20 to make contributions which is directly to the
21 candidates and the parties and the PACs.

22 If there's no further questions, thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 (Whereupon, at 11:02 a.m., the case in the

1 above-entitled matter was submitted.)
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<p style="text-align: center;">A</p> <p>ability 3:12 12:11 12:14 14:16 30:23</p> <p>able 14:1,4 42:15</p> <p>aboveentitled 1:11 58:1</p> <p>absolutely 11:2 14:12 24:25</p> <p>abstract 15:18</p> <p>accept 13:15 53:20 57:9</p> <p>access 34:16</p> <p>accompanying 5:14</p> <p>accomplish 40:12</p> <p>accounts 52:15</p> <p>achieving 40:18</p> <p>acknowledge 31:1 49:14</p> <p>actions 33:23</p> <p>activity 3:18</p> <p>actual 16:13,14</p> <p>ad 16:13,14 34:23 34:24</p> <p>add 46:16,16,16</p> <p>addition 27:8,12 32:13 38:25</p> <p>address 16:19 19:3 47:25 51:3 52:10 54:19</p> <p>addressed 3:21 57:2</p> <p>ads 34:13 57:17</p> <p>advance 31:4 36:4</p> <p>advocating 31:9</p> <p>affiliates 16:1</p> <p>aggregate 3:11 14:2,15,18,25 15:1,3,6,7 18:21 19:17 23:12 24:2 24:4 26:17 27:24 27:25 28:16,17,20 30:22 40:2,19 41:1,23 43:9 47:6 47:11,25 49:24 50:5,14 52:2</p>	<p>54:16 55:11 56:7 56:13</p> <p>aggregation 30:10</p> <p>ago 55:5</p> <p>agree 17:15,17,17 30:10</p> <p>agrees 18:21</p> <p>aided 22:5</p> <p>al 1:3</p> <p>alito 10:19 26:15 26:16 27:3 35:18 35:24 36:2,7,23 37:15 38:5,9 39:9 40:2,24 41:8 50:7 50:23 51:4,16 57:6</p> <p>allow 6:23 7:18</p> <p>allowed 24:4</p> <p>allowing 29:5</p> <p>allows 44:9</p> <p>alternative 15:2</p> <p>alternatives 51:2 52:8</p> <p>amendment 3:18 14:6 22:19 33:8 33:11,13,15,16,24 35:1,16 42:17 44:6 48:3,11,20 49:13 52:23 53:1 55:8</p> <p>amicus 1:18 2:7 18:18</p> <p>amount 14:17,19 21:12,22 22:9 32:19,21 33:4 34:12 53:9</p> <p>amounts 39:11 45:1 57:14</p> <p>ample 56:12</p> <p>analogous 29:22</p> <p>analogy 34:20</p> <p>analytical 48:10,11</p> <p>analyzing 30:9,15</p> <p>answer 9:5,6,13,18 9:19 21:4,4 32:24 34:19 44:20 53:25</p>	<p>54:10 56:3</p> <p>ante 25:22</p> <p>antiaggregation 29:10</p> <p>anticircumvention 3:22</p> <p>antiarmarking 25:9</p> <p>anybody 12:3</p> <p>anyway 34:1</p> <p>apart 30:5 38:7 48:3</p> <p>apologize 50:22</p> <p>apparently 33:5 53:13</p> <p>appearance 3:16 28:7 29:4 30:17 43:11 45:5 48:14 49:5</p> <p>appearances 1:14</p> <p>appellants 1:4,16 1:19 2:4,8,14 3:8 18:18 28:9,15 50:1 51:2 56:20</p> <p>appellee 1:22 2:11 27:21</p> <p>application 40:25</p> <p>applied 41:2</p> <p>applying 24:2</p> <p>appreciate 47:23</p> <p>approximately 45:25</p> <p>area 31:22</p> <p>arent 4:16 14:4 57:4</p> <p>argued 19:4 23:4</p> <p>arguing 28:15,17</p> <p>argument 1:12 2:2 2:5,9,12 3:3,7 7:24 18:16 27:20 30:16 36:8 38:13 47:23 50:2,3,4,8 50:17 56:19,25 57:8</p> <p>arguments 32:5,6 33:24</p>	<p>artificially 19:23 20:2</p> <p>asapplied 23:7</p> <p>asked 34:6 48:9</p> <p>aspect 14:24 23:1 55:13</p> <p>aspects 43:1</p> <p>associate 24:1</p> <p>association 24:1 26:11</p> <p>assume 14:9 45:10</p> <p>assumes 6:6</p> <p>attempt 3:12</p> <p>attuned 7:15</p> <p>authority 39:4 41:17</p> <p>avenues 15:14</p> <p>average 33:12,21 42:16</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>b 1:20 2:10 27:20 38:13 41:11,12</p> <p>back 47:14</p> <p>bad 10:8</p> <p>base 3:15 4:23 7:20 20:4 25:2,3,8 26:20 28:18 50:5</p> <p>based 15:18 57:13</p> <p>basic 32:25 33:16</p> <p>basis 12:22 23:2 43:12</p> <p>bcra 3:24 22:12 56:7 57:3</p> <p>bcras 3:11,21 15:5</p> <p>bearing 29:18,20</p> <p>bears 43:8 56:11</p> <p>beg 51:20</p> <p>behalf 1:15,21 2:4 2:11,14 3:8 27:21 56:20 57:17</p> <p>belief 29:11</p> <p>beliefs 33:8</p> <p>believes 18:23</p> <p>bench 54:7</p> <p>benefit 32:10</p>	<p>best 37:11</p> <p>better 40:18</p> <p>beyond 45:3</p> <p>big 31:15,20 32:6,6</p> <p>billion 45:25 46:1 46:24</p> <p>blocking 28:1</p> <p>blunt 50:14</p> <p>bobby 1:17 2:6 18:16</p> <p>boeing 35:7</p> <p>bolstered 50:14</p> <p>brainstorm 4:12</p> <p>bread 40:1</p> <p>breyer 3:23 4:6,24 5:2,10,13,17,22 7:23 15:23 16:13 20:6 22:11 32:23 42:3 43:3 54:2 55:3,19,22</p> <p>breyers 34:18</p> <p>brief 22:4 37:11</p> <p>briefed 17:7</p> <p>broader 5:19</p> <p>broadly 19:9</p> <p>brought 48:15</p> <p>buckley 4:8 8:6,13 26:16,18,24 27:8 27:16 30:5 43:7 54:10</p> <p>bulwark 28:3</p> <p>bunch 10:1</p> <p>burchfield 1:17 2:6 18:15,16,19 19:2 19:15 20:17,24 21:17 22:6 23:6 23:16,24 24:3,24 26:5,19 27:6,12 27:18 32:3</p> <p>burn 51:11,15</p> <p>burned 51:9</p> <p>buttering 39:25</p> <p>buy 22:21 35:21</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>c 1:8,15,17,21 2:1</p>
--	--	---	--	--

<p>3:1 25:8 calculate 49:24 call 34:1 campaign 17:18 27:4 28:4 33:3 35:19,21 46:25 candidacy 46:12 candidate 4:2,3,9 5:1,21 6:3,5,20 7:3,4 9:2 12:11,16 12:17,18,19 13:9 13:12,17 15:24 16:11,14,15 19:6 19:8,25 20:3,12 21:22 23:17 28:12 29:2 34:12,16,16 35:20 37:1,2,10 38:16,17,21,23 39:15,16,17,20 44:2 45:11 47:22 57:16 candidates 6:14,17 6:19,22 7:11,14 10:16,23 11:7,23 12:4,6,12,14 13:8 13:15 14:17,20 15:7 16:9,18 21:19,22,24 22:8 23:10,22 24:6,10 24:14 26:13 28:23 29:6 30:11,25 31:5,6,10 32:13 32:15,17,22 36:17 36:17 37:5,8,12 37:13,22 39:3 40:8,9 44:11 45:24 46:12,25 47:17 48:22 49:22 50:21 52:17 54:19 57:17,21 cant 9:17 10:6 13:17 16:4 17:19 18:1 23:15 31:1 32:7 33:7,8,13 34:4 42:8 47:19 48:2 49:16 52:25</p>	<p>cap 21:22 22:7,9 caps 40:19 care 48:25 52:13 careful 8:13 31:22 cares 21:10 case 3:4 17:7,10 22:14 23:7,20 28:9,10,14 41:20 43:11 50:4 57:24 57:25 cases 7:25 causes 31:5 cents 22:21 certain 30:25 certainly 8:18 14:5 15:4 36:11 47:20 57:14 certainty 11:14 challenge 23:7 challenged 21:15 challengers 22:5 chance 21:9 change 8:4,6,7,7,8 42:13 54:24 changed 26:18,20 26:22 changes 8:21 changing 54:20 charges 16:5 check 5:14 24:13 29:24 30:1,2 37:20,21,21,22 38:16,20 39:19 42:1,16 47:24 49:20 57:12 checks 23:10,14,14 24:8,11 50:25 chief 3:3,9 14:14,23 18:14,19 27:17,19 27:22 28:25 29:15 30:8 39:12,13 43:23 47:13 48:9 48:18,24 49:18 51:12 56:4,16,21 57:6,23 choose 29:11,13</p>	<p>chose 17:9 chosen 36:13 circumvention 3:20 3:25 11:18 13:18 16:12 28:1 29:18 29:19 40:17 41:25 42:12 50:23 52:10 55:11 56:24,25 cited 37:11 citizens 26:6 class 21:24 clear 9:4 11:15 clerk 8:2 close 21:15 55:21 55:22 closely 17:25 code 25:7 27:14 collaborating 19:19 colloquy 15:19 colorado 41:15 combat 3:15 27:24 28:1 37:17 come 6:7 13:24 52:11 comes 9:2 23:7 24:7 coming 6:2 54:6,6 commission 1:6 3:5 6:7 20:5,13 27:15 committee 25:5,11 38:18 51:6 53:6,7 committees 8:9 15:15 22:10 23:9 23:11 24:5,6,9,10 24:11 26:23 28:24 28:24 36:19,20,25 37:4,23 38:15 50:20 common 16:3 compete 19:22 20:1 26:12,14 competing 19:18 21:20 complaining 50:11 completely 11:24 12:7 48:25</p>	<p>concede 9:23,24 concentrating 19:7 concern 9:2 15:14 16:12 29:7 49:19 concerned 15:13 concerns 3:20 9:10 9:10 15:11 26:24 conclusion 53:24 conduit 11:18 13:11 conflict 36:4 confused 15:16,17 confuses 37:16 congress 3:15 21:3 30:13 33:18 45:3 45:7 47:20 48:6 54:8,19 congressional 11:6 23:18,18 46:25 congressman 53:4 53:8 congressmen 22:16 consequence 15:1,3 15:5 20:15 21:16 30:11,18 44:15,19 44:22 47:14,15 considerable 31:8 consideration 45:8 considered 26:7 42:23 considering 25:1 constitutional 44:6 constrained 23:11 construct 42:5 construction 8:12 consumes 25:6 contains 57:3 content 35:2 48:12 48:25 contentbased 49:3 contentneutral 35:3 36:5 48:16 49:10 contest 6:14 contested 6:14,15 6:22 7:12 10:16</p>	<p>10:23,24 13:10,10 13:13 continue 57:11 contrary 23:3 contravene 9:7 contribute 5:20,22 7:22 10:9 12:3,24 14:1 28:22 29:5,6 32:20,21 38:3 40:14 45:12 47:16 contributed 26:25 28:13 contributes 20:10 contributing 7:9,10 9:1 37:4 contribution 3:11 5:24 6:23 7:2 12:20,23 13:3,7 13:12 14:19 20:3 20:11 23:17 28:2 28:12,18,20 30:24 36:15 41:12 47:19 49:24 50:6 53:5 54:20 contributions 3:14 4:1 7:17,20 8:8 10:2,13,22 13:20 15:6,9 16:9,10 21:25 28:5 32:1 32:12,13 35:20,21 37:12,25 39:1 40:8,20,23 43:9 43:25 44:10,10 48:6 53:23 54:15 54:16 57:20 contributor 15:24 19:24 22:8,9 30:24 contributors 14:1 25:11,14 control 8:14 19:13 25:14 29:9,13 34:4 controlled 8:10 convinces 22:21 coordinate 36:16</p>
---	--	--	--	--

<p>coordinated 4:3,16 coordination 4:2 7:1 11:20 16:5 correct 20:15 27:5 27:8 43:20 53:17 54:18 corrected 12:21 corrosive 28:7 43:10 corrupt 38:11 40:6 40:11 51:19 corrupted 38:12 corrupting 28:11 54:24 55:6 corruption 3:16 15:10 16:12 18:4 26:8,9 27:24 28:1 28:6,7 29:4 30:3 30:14 31:13,25 37:18,25 38:1 43:10,11 44:9 45:5,6 47:21 48:7 48:14,14 49:4,5 51:1,7,9,16,17,24 52:20 53:18 54:13 55:10,13 57:8,9 cost 48:3 49:14 costing 34:14 costs 49:14 52:23 couldnt 13:23 16:25 counsel 18:14 20:14 27:17 42:6 57:23 count 8:10 19:12 country 14:11 45:15 46:21 couple 4:21 6:24 course 39:3,22 45:7 court 1:1,12 3:10 4:8 17:20 18:20 22:13 23:7 26:16 27:7,23 30:4 31:23 36:9,14 37:23 41:16,18 42:25 43:16 44:7</p>	<p>44:7 54:22 56:14 courts 31:22 44:6 53:16,21 cover 8:23,25 create 31:24 47:5 51:21 created 27:3 creates 30:2 38:22 39:20 creating 4:4 critique 54:17 crossmotion 17:7 curiae 1:18 2:8 18:18 current 20:18 29:9 43:4 cut 11:7 cycle 45:17 47:18</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>d 1:8,15,17,21 3:1 dairy 26:24 27:4 danger 30:13 43:10 dangers 28:5 davis 14:7 deal 52:8,20 dealt 24:25 debate 53:16 decide 17:21 23:2 decided 43:12 deciding 13:16 decision 15:18 26:6 27:7 decisions 44:7 deeply 54:18 defend 40:25 defense 34:22,25 35:14,15 48:16 definition 25:2 deliver 39:25 delivered 30:6 51:23 delivering 29:24 30:2 delivery 30:7 50:24 democratic 16:18</p>	<p>19:5,11 24:10 32:8 53:6 department 1:21 depends 39:4 describe 20:9 designation 17:1,2 designed 4:5 13:17 determination 45:4 determined 44:8 devote 21:7 devoted 21:14 dialogue 42:4 dials 21:1 didnt 11:1 43:14 differ 51:20 difference 55:9 different 7:11 11:17 29:16 37:17 49:25 57:13 diminishing 23:25 direct 3:22,25 7:20 44:10 48:5 51:1 directed 44:14 46:14 direction 25:16 directly 23:10,11 43:8 57:16,20 disabling 54:18 disagree 19:15 discovered 8:2 discussion 54:11 dismiss 15:19 dismissal 17:5 disposed 43:18 disprove 18:8 dispute 16:4 distinct 15:6 district 13:13 22:13 36:9,14 42:25 53:10 divides 6:19 doesnt 11:20 12:8 15:20,24 16:20 18:5 31:2 41:1 47:15 48:19 49:11 57:1</p>	<p>doing 5:7 34:23 49:5 dollar 39:19 57:12 dollars 21:21 22:17 24:14 dominated 28:4 donald 1:20 2:10 27:20 donating 29:12 donation 16:17 donor 6:18 12:11 donors 7:5,8,15 14:16 dont 6:1 7:19 9:20 10:17,20 11:15 12:1 13:20 14:3 15:3,9,20 16:4,11 17:3,3,21 18:7 21:10 30:13 31:14 32:24 33:20 34:15 35:24 38:5,13 41:4,20 42:1 44:21,24,25 45:2 46:4,17,19,22 48:25 51:4 52:8 55:2,5,14,24 double 12:9 47:18 doubt 9:24 33:2 draw 57:11 drawn 28:16 driveby 44:17 drives 43:24 dubious 37:6 due 37:15 44:25</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>e 1:15 2:1,3,13 3:1 3:1,7 56:19 earlier 28:21 48:10 earmark 20:12 earmarked 41:13 earmarking 4:1,1 5:8,11,13,18,19 6:8 8:4,21 9:7,10 10:3,11,12,15,18 40:13 41:16,20</p>	<p>easy 8:15 effect 14:15,17 15:8 21:19 30:23 effectively 24:22 eighteenth 28:14 either 17:3,24 elected 49:8,9 election 1:6 3:5 6:7 12:10,17,19 19:14 20:5,13 27:15 31:9 33:22,22 44:18 45:17,23 53:10 elections 21:2,8 45:14 46:7 electorate 19:9 eliminate 14:24 29:19 eliminates 32:4 empirical 36:12 enacted 56:7 encourage 44:17 endorse 48:21 endorsing 46:12 enforcing 15:2 engaging 3:17 13:19 enormous 53:9 entirely 48:16 entity 49:11 50:10 environment 20:18 environmental 29:8,12 equalize 3:12 equally 28:2 erin 1:15 2:3,13 3:7 56:19 especially 26:10 esq 1:15,17,20 2:3 2:6,10,13 establish 32:14 established 4:16 8:9 et 1:3 etcetera 55:9 everybody 13:19</p>
---	---	--	---	--

<p>39:8 evidence 17:5 18:1 56:12 evidentiary 42:25 43:16,18 evil 31:15 evoke 31:12,14 exacting 18:22 exactly 6:9 10:12 10:21 13:5,6 20:24 24:18 27:25 30:4 example 11:6 14:8 25:4 31:7 36:25 37:11 40:4 48:15 examples 37:11 excess 7:20 excludes 53:13 exercising 33:12 exist 27:15 36:4 49:11 50:9 existed 8:13 existing 9:18,21 expectation 40:9 expenditure 31:9 expenditures 4:3 31:4,14,23 44:8 53:18 54:23 57:12 explain 41:8 explaining 27:25 explore 42:12,14 42:19 explored 43:1 express 29:11 35:6 35:13 expression 13:23 19:5 35:12 extent 57:4</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 37:7 facially 17:24 fact 21:9 22:5,20 23:4 29:24 30:2 54:14 facts 18:5,8</p>	<p>factual 42:9 fair 54:6 fall 40:3 fanciful 53:3 far 40:18 48:19 55:1,4 favored 21:23 fec 8:22 10:17,25 11:3 feces 5:18 federal 1:6 3:5 6:7 20:5,13 23:17 25:7,7 26:22 27:14,14 feel 39:6 52:7 53:5 53:8 figure 16:20,23 17:12,19 36:21 figuring 42:8 filled 22:15 finance 17:18 28:4 financed 8:9 find 6:3 fine 44:12 first 3:4,18 4:22 6:25 7:2 13:4 14:6 17:6 19:16 22:19 29:17 33:8 33:11,13,15,16,24 34:17 35:1,16 37:19 41:5 42:17 44:6 48:3,11,20 49:13 52:23 53:1 55:8 56:23 five 5:4,4 6:13,14 6:15,17,22 7:12 7:14,14,16 10:16 10:16,22,23 52:19 flip 48:1 flow 44:2 flowing 38:24 flows 34:7 follow 41:1 following 4:9 forces 20:20 forcing 57:19</p>	<p>forget 11:5 fortune 31:8 forward 57:10 found 8:17 17:1 37:23 foundation 31:18 31:21 four 11:9 framework 30:9,9 30:15,21 44:6 48:10,11 frankly 42:9 free 40:21 45:7 49:13 full 42:11 fund 47:3 fundamental 29:21 fundamentally 28:3 fundraiser 12:3 fundraising 15:15 19:7 25:5,5,10 38:15,18 50:20 51:6 funds 29:1 further 57:22</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>g 3:1 gaining 39:5 general 1:20 12:9 14:22 15:8 27:19 27:22 29:15 30:20 31:18,21 32:11 34:19 35:9,11,22 36:1,8,22 37:14 38:7,14 39:10,14 40:15 41:4,14 43:2,13,20 44:5 44:20,24 45:16,18 45:22 46:2,4,8,19 46:22 48:8,23 49:2,23 50:22 51:10,14,20 53:2 53:15,20 54:4,8 54:12,21 55:1,17</p>	<p>55:20 56:3,5,16 56:24 genius 16:20 getting 10:1 21:25 36:18 gift 25:24 gifts 36:3 ginsburg 11:21 13:21 19:2 22:2 23:13,20 43:13,22 give 4:10,15,25 10:7,9 11:6,22 13:16,22 14:16 15:10,25 22:8,9 22:16 23:15,16,22 23:23 24:20 30:16 31:16 32:7 33:4,6 38:18,18 41:10 47:16 52:2,17,25 given 4:23 7:16 36:16 40:13 44:7 44:14 52:18 gives 6:18 7:13 9:7 10:15 16:12 34:12 41:9 45:10 giving 15:9 28:11 35:14 40:18 49:9 52:16 go 4:18 5:15 15:22 20:22 21:11 23:8 23:9 41:12 56:1,1 56:2,9 goal 40:17,17 goes 4:13 6:20,21 12:10 13:8 20:22 25:18 26:4 30:5 going 5:3,20 6:13 6:16 9:1,15 10:3,7 10:9,22 11:6,14 12:2 15:8 16:5,10 16:21 20:11 21:24 24:16 29:11,13 36:25 37:1,2,9,9 38:11 39:1,2,6,16 39:17,18 40:10,12 40:25 41:9,10,13</p>	<p>42:24 44:3 47:5 51:11,15 52:6,9 52:17,19,23,24 53:5 57:14 good 5:5 16:22 21:8 32:9 45:18 government 3:21 15:12 17:8 18:4,9 36:5 43:14 47:7,9 57:10 governmental 11:8 governments 41:17 48:13 gratitude 26:6 31:12,13,14 53:4 53:8 57:15 great 4:14 34:23,25 35:14 greater 53:7 ground 35:16 grounds 3:20 group 10:2 guess 4:8 16:6 gun 29:9,13</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>h 20:7 hand 38:16 handful 22:16 handing 37:19 38:20 hands 25:14 happen 4:9 9:15,17 15:20 16:4,25 41:6,7 happened 5:3 20:23 happening 16:7 happens 15:19 hard 7:24 12:23 15:23 16:3 22:7 35:3 hasnt 22:22 42:11 havent 14:15 17:1 56:23 head 7:6</p>
--	---	---	--	---

<p>hear 3:3 heard 42:4 56:23 hearing 17:4 42:11 43:16,18 57:7 heck 46:17 hed 23:22 held 31:24 help 16:17 31:1 32:14 helped 39:19 helping 39:7 helps 45:19 heres 46:9 hermetically 32:15 32:16 52:3 hes 29:10 high 53:23 higher 49:25 highest 36:5 honor 4:22 6:25 17:6 19:15 20:17 20:24 21:18 22:6 23:6,24 24:24 26:6,19 27:18 37:16 43:21 46:23 51:21 55:2 56:6 honors 43:5 hope 40:9 41:10 hour 42:9 house 11:23 13:7 13:10 24:6 25:20 25:20 29:6,25 36:16 37:8,21 40:7,8 47:17 huge 15:19 55:13 hundreds 22:17 26:25 hurt 21:3 hypothesizes 3:21 hypothetical 4:22 6:6 7:10 9:5,7,14 36:14 42:13 51:6 hypotheticals 8:11 36:10 42:6</p> <hr/> <p style="text-align: center;">I</p> <hr/>	<p>id 18:12 19:2 34:7 idea 13:22 45:21 52:20 55:25 ideas 22:20,23 identifiable 53:12 identified 23:21 30:4 42:2 51:2 ill 8:3 illegal 35:20 illustrate 45:19 im 5:5 10:5 15:16 15:17 16:6 18:6 32:9,24 39:11 42:10 52:24 53:15 54:6,6,6 imagine 10:6 35:3 immediately 51:7 impact 33:13 impermissible 3:12 implicated 14:7 implies 41:11 importance 36:6 impose 26:20,21 49:7 52:23 imposed 3:15 imposes 3:24 26:12 imposing 21:21 49:21 incapable 18:5 incumbent 21:8,9 incumbents 21:20 21:23 indebtedness 38:22 39:3,7,21 51:22 52:7 independent 24:12 31:4,9,14,16,23 34:1,2 35:12 44:8 53:18 54:23 57:11 independently 4:17 11:1 13:16 42:21 indicated 28:21 52:16 individual 6:23 7:18 20:3 22:20 28:2,4,22 29:5</p>	<p>30:12 31:2,3,16 32:20,21 53:4 57:15 individuals 3:13,17 10:2 14:5,6 16:8 57:13 industry 26:25 27:4 influence 22:19,23 26:4,7 influencing 42:18 inform 25:11 information 13:25 55:14 inherent 28:6 30:3 37:25 38:1 43:10 51:24 injunctive 17:8 instance 3:25 instances 8:18,25 37:4 insulate 21:20 integration 55:7 integrity 55:7 intensity 24:1 interest 31:4 36:4,5 48:13 52:5 interested 29:8,9 interests 31:5 internet 4:12 8:17 22:22 33:5 interrelated 55:3 intricate 17:18 invoked 35:17 involves 36:16 isnt 7:1 9:14,14 14:13 20:22 21:15 24:23 35:20 36:21 37:13 42:21 44:15 44:18,18 54:8 57:10 issue 14:7 28:10 29:14,23 54:10 issues 17:12 ive 42:6 55:25</p> <hr/> <p style="text-align: center;">J</p> <hr/>	<p>job 34:23,25 35:14 joint 12:2 15:15 25:4,5,10 38:15 38:18 50:20 51:6 jones 10:10,10 jr 1:20 2:10 27:20 jurisprudence 31:22 53:17,22 justice 1:21 3:3,9 3:23 4:6,24 5:2,10 5:13,17,22 6:4,11 7:4,12,23 9:4,5,13 9:17,22 10:5,6,14 10:19 11:4,5,21 11:22 12:13,16,21 13:5,21 14:9,13 14:14,23 15:16,22 15:23 16:13 17:2 17:11,15,17 18:2 18:7,14,19 19:2 20:6,14,21,25 21:6 22:1,2,11 23:13,20 24:3 25:17,23 26:15,16 27:3,10,17,19,22 28:20,25 29:15 30:8 31:11,19 32:2,4,23 34:10 34:18,18,20 35:7 35:10,18,24 36:2 36:7,23 37:15 38:5,9 39:9,12,13 40:2,24 41:8 42:3 43:3,13,22 44:12 44:23,25 45:9,17 45:19,20 46:1,3,6 46:10,20 47:13 48:9,18,24 49:18 50:7,23 51:4,12 51:16 53:2,15,19 53:25 54:2,2,5,9 54:17,21 55:3,19 55:22 56:4,16,21 57:6,6,23 justification 35:3 48:17 49:3,6,10</p>	<p>justified 3:19 33:10 justify 31:25 56:12</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>kagan 6:11 7:4,12 9:5 10:5,14 11:22 12:14,16,21 13:5 24:3 25:17 28:20 54:21 kagans 11:5 keep 7:6 41:25,25 kennedy 9:4,13,17 9:22 11:4 25:23 34:10,20 53:25 54:5,9 kind 6:1 11:20 30:4 42:2 kinds 54:15 know 4:17 9:25 10:13,20 11:8,13 11:19,25 15:24 17:3,20 21:1 22:17 25:23 26:5 31:13 32:18 34:7 35:8 38:21 39:18 40:15 44:17,21 45:2 46:13 52:10 56:6 knowing 16:8 knowledge 20:11 knows 7:4,15</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack 36:11,11 large 14:5 37:20 50:25 laughter 5:6 11:11 17:16 21:5 54:25 law 8:1 9:18 13:17 14:9 17:12,18,20 17:22 18:3,5 44:13,15 53:12 54:3,24 laws 37:17 leader 25:20 26:2 30:1</p>
---	--	---	---	--

<p>leaders 38:25 52:6 leadership 39:24 51:23 leaned 39:24 leave 42:16 leaves 25:14 leeway 33:18 legal 12:13 17:9 legislation 39:25 legislative 56:8 legislature 39:5 length 43:1 55:5 lengthy 22:13 lessrestrictive 52:21 letter 5:14 lid 28:19 54:16 light 26:10 likeminded 19:17 limit 12:24 13:24 14:18 15:6 18:22 19:16,17 23:12 24:2 26:10 28:16 28:17,20 30:22 32:19 41:16 43:23 49:1,21,24 limitation 15:3 limited 7:21 19:23 20:2,4 23:19 34:12 57:14 limiting 30:11 limits 3:11,15,16,19 4:23 6:23 7:18,21 14:16,18,25 15:2 15:7 17:24 19:4 19:10 20:4 21:18 23:5 24:4 25:2,3,8 26:17,20 27:24,25 28:2,18 30:12 32:12,13 33:3 38:3 40:3,14 41:1 41:23 44:1 47:6 47:12,20,25 50:5 50:6,14 52:2 54:20 56:7,13 line 31:22 32:4</p>	<p>53:21 57:11 listening 42:4 little 4:13 15:16 19:11 long 13:8 longer 27:2 look 8:3 10:1 20:7 46:23 looked 8:1 looking 32:24 loses 25:14 losing 21:9 lot 4:10 9:2 38:23 41:18 42:16 46:6 46:11,18 50:10 55:14 lower 17:20 27:7</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>m 1:13 3:2 27:11 57:25 maintained 8:9 majority 25:20 26:1 30:1 39:5 making 16:8 25:24 37:16 40:20,23 41:11 47:23 50:2 50:3,7,8 marginalized 20:19 maserati 35:15,21 48:15 massive 28:4 37:24 39:10 43:9 match 47:3 math 5:5,7 31:1 matter 1:11 43:17 58:1 matters 42:25 maximum 12:17 14:19 28:13 30:24 45:11 47:1,17 49:16 mcconnell 1:18 2:7 18:17,21,23 24:19 24:23,25 25:24 29:23 37:24 41:15</p>	<p>42:2 43:8 52:1 55:18 mccutcheon 1:3 3:4 23:8 31:7 mean 6:25 11:12 13:14,23 14:4,12 15:22 16:3,7 29:7 31:2,13 33:1 35:8 40:24 48:2,25 51:5 52:25 53:11 54:5 means 22:19 28:19 28:21 42:18 52:21 52:22 measures 3:22,25 57:3 member 39:22 40:7 40:11,14 41:10,10 41:11 50:20 members 21:3 24:15 26:3 mental 7:6 merits 33:24 messages 34:4 million 24:7,8,14 24:21 25:22 26:2 28:23 29:24 31:15 34:2,3 36:15,21 37:20,21,22 42:15 42:21 45:10,12 46:17 47:1,16 57:12,16 milliondollar 47:24 49:20 mind 10:20 minimum 14:16 minute 40:4 minutes 56:17 mitch 1:18 2:7 18:17 mitigated 49:15 mix 34:3 modest 3:14 47:20 money 4:13 5:15 6:2,20 10:7,9,15 11:17 12:7,12,15</p>	<p>13:16 15:25 16:21 19:8,24 20:2,22 21:7,10,13,14 22:23 24:20,23 25:2,14,17,18,21 25:25 29:23 30:5 31:15,20 32:6,7 36:25 37:10,24 38:9,12,23 39:17 40:10,22 44:1,1 45:2,13 46:11,14 46:14,18 49:9 51:6,8 52:16,17 52:18,25 53:9 57:19 morning 3:4 motion 15:18 multimillion 39:19 multiple 4:4 7:10 40:8 57:3 multitude 3:22 murphy 1:15 2:3 2:13 3:6,7,9,24 4:21,25 5:7,12,16 5:18,25 6:9,12,24 7:8,19 8:20 9:9,16 9:19,24 10:12,14 11:2,10,12,21,22 12:13,18,23 13:6 13:14,21 14:3,12 14:14,21 15:4,21 16:6 17:6,11,13 17:23 18:6,9 56:17,19,21</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>n 2:1,1 3:1 name 16:14 named 6:4 names 8:18 naming 8:18 narrower 15:14 57:5 national 19:21 20:16,19 21:7,13 24:5 28:23 36:19</p>	<p>40:21 43:24 53:6 53:7 nature 18:23 20:9 near 13:24 nearly 16:3 necessary 15:1,5 54:11 need 11:20 17:12 17:23 18:8 47:2 47:12,25 51:15 negative 33:9 neutral 48:25 49:6 neutrality 48:12 new 48:21 news 15:23 newspapers 46:11 nice 17:19 nine 14:19 29:12 47:17 48:22 nineteenth 28:12 nixon 27:4 nixons 27:1 nods 41:19 nonpresidential 45:23 normally 17:21 48:19 notion 55:7 number 11:5,5 14:5 22:7 23:15 23:19 30:25 numerous 3:24</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>o 2:1 3:1 obvious 28:6 obviously 36:11 occur 51:17 occurs 51:17 october 1:9 officeholder 39:23 officials 49:9,10 oh 14:13 42:6 46:6 okay 4:20 10:10 14:11 15:17 16:16 33:25 53:25 56:1</p>
--	--	--	---	--

<p>once 33:18 52:17 57:9 ones 39:1 operating 11:17 opinion 33:14 34:9 36:9 opponents 21:11 opportunity 17:8 30:3 oral 1:11 2:2,5,9 3:7 7:24 18:16 27:20 ordinarily 21:6 ordinary 33:3 organization 44:2 outer 41:16 outside 20:20 overall 41:24 overbreadth 13:1 overly 10:19 overwhelming 28:8 owe 24:16</p> <hr/> <p style="text-align: center;">P</p> <p>p 3:1 pac 4:13,23,25 5:3 5:20 6:2,5,19 7:9 7:21 9:1,12 10:7,8 10:15 11:13,16 16:16,17 20:8,10 31:16 32:9 53:9 pacs 4:4 5:4 6:12 6:16,19,21 8:14 10:1,20 11:5 20:22 24:12 26:25 40:23 43:25 44:3 44:18 45:14 46:3 52:16,24 57:21 page 2:2 pages 25:6 parallel 52:1 55:21 55:22 part 9:6,9,13,19 31:12 37:6 38:22 41:23 42:7,7 47:4 51:22,22 54:24</p>	<p>55:11 participate 3:13 participation 19:5 19:11 particular 4:2 6:3,5 16:11 20:11 25:21 29:2 36:18 37:8 39:2,6,21 44:15 52:6 particularly 9:20 20:18 43:24 parties 16:9 19:17 19:18,21,22 20:16 20:19 21:4,7,10 21:13,19,21 26:12 26:21,22 32:12,16 34:4 36:19 40:21 40:21 44:1,11,16 45:1,14,24 46:8 46:25 50:21 54:19 57:21 party 12:1 20:3 22:9 24:9,10,15 24:16 25:18 26:2 28:23,23 32:8,8 32:20 36:19,20,24 37:4,7,9 38:4,25 39:4,15,22,23,24 44:2 45:11,24 51:23 52:3,6 partys 24:14 46:24 pass 18:22 paying 22:21 payment 26:1 people 4:14,14 11:9 13:23 15:9 16:23 19:12 22:16,18,18 22:23 24:4 25:21 29:13 31:12,20 33:6,20 39:25 42:16 47:2,2,8,10 52:3 55:8 perceive 47:9 percent 14:10 percentage 13:24 13:25 14:3</p>	<p>perfectly 32:9 period 16:19 permissible 42:20 42:21 person 4:17 7:2,13 8:10,14 12:8 13:3 13:6,11,18 16:24 20:10 25:15 33:3 33:12,22,25 34:11 34:15 35:5 38:10 38:11 39:7,18 40:11,12 41:9,11 41:12 42:16 49:21 51:5,18 persons 34:11 40:7 perspective 45:13 pertains 56:9 picture 16:15 place 24:21 28:16 33:20 47:12 places 19:17 plan 40:9 plausible 36:11 please 3:10 18:20 27:23 plus 36:19 pocketbook 33:23 point 5:25 6:10 7:9 11:12 13:4 17:13 30:21,22 32:14 33:1,15,16 35:23 35:25 36:3 37:16 39:12,14 43:5,22 45:19 48:1,8 49:8 51:15 pointed 57:6 points 17:6 29:16 56:22 political 3:13 8:8 18:25 19:17,18,21 19:22 20:16,19 21:3,7,10,13,19 21:21 26:12,23 32:10,12,20 38:3 44:16 45:14 46:14 politics 31:20 32:6</p>	<p>32:7 pool 19:23 20:2 pose 9:9 43:10 44:11 position 18:3,3 19:18 positive 33:11 possibility 29:2 possible 27:2 40:16 45:11 57:19 post 34:24 48:21 potential 28:11 power 39:4 51:18 practice 22:3 precedents 20:13 precisely 8:12 present 28:10 30:13 44:8 47:21 48:7 presented 17:5 president 27:1 pretend 48:2 pretty 4:18 8:15 16:22 42:5 prevent 3:17 13:18 49:4,19 50:10,19 preventing 48:13 previously 23:3 54:1 primary 12:9 prior 47:14 pro 15:10 26:7 28:5 30:3 31:25,25 38:13 44:9 45:5,5 problem 12:25 13:1 18:11 29:18,20,21 29:22 35:10 42:2 46:9 47:4,21 48:7 50:1,15,24 51:1,1 51:3,7,9 52:10,13 56:10 problems 4:21 proceeding 43:14 proceedings 43:15 process 3:13 55:7 profound 54:14</p>	<p>prohibit 26:22 41:21 prohibiting 3:14 13:19 15:9 29:3 35:4 prohibition 49:15 prohibits 14:10 20:8 proliferation 4:4 5:8 9:10 10:3 26:23 promote 19:4,5 promoting 19:11 46:12 prophylactic 57:3 propose 20:7 proposition 18:8,10 protecting 29:3 prove 18:8,10 proves 54:18 provision 14:7 20:15 44:16 provisions 4:1 public 33:14 47:9 pursued 48:2 pushing 55:25 put 8:22 24:5 45:13 46:13 54:1 puts 4:12 putting 57:10</p> <hr/> <p style="text-align: center;">Q</p> <p>question 19:3 28:21 29:17 34:5,7,9,11 34:18 42:15 43:9 44:13,14 47:14 53:16 questioning 57:8 questions 17:22 54:1 57:5,22 quick 56:22 quid 15:10 25:24 26:7 28:5 30:3 31:24,25 38:13 44:9 45:4,5 quite 48:3 52:1</p>
---	--	---	---	--

<p>55:12 quo 15:10 26:7 28:5 30:3 31:25 31:25 38:13 44:9 45:5,5</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>r 1:17 2:6 3:1 18:16 race 13:7 21:15 races 6:15,16,22 7:13 10:17,24 raise 19:8 21:17,23 45:1 read 22:11 27:7 reading 22:12 reaffirms 25:8,9 real 9:14 45:4 47:7 54:13 realistic 9:20 36:23 36:24 reality 3:16 8:16,19 realized 21:23 really 6:15 15:12 16:25 17:14 20:25 35:25 37:10 55:20 55:24 56:9 57:1,7 57:10,18 reason 19:16 33:2 38:4 41:17 rebuttal 2:12 56:19 recall 55:4 receipt 50:25 received 13:4 receives 25:15 receiving 7:3 recipient 25:25 51:22 recognized 30:18 record 15:20 17:9 17:12,21 22:13,24 22:25 23:3 43:4,7 43:7,8 55:4,15 56:6,9 reelection 27:1 regs 8:1 regulate 41:17</p>	<p>regulated 44:13 45:6 regulating 21:1 regulation 25:5 29:8,12 32:1 41:24 44:10 regulations 5:19 8:23 9:21 20:6 25:7 27:14 40:13 50:9 reintroduce 24:22 relationship 42:20 relative 3:12 relevant 42:23 relief 17:8 remain 47:12 remainder 18:12 remaining 56:18 repeatedly 31:24 repeating 50:23 representative 33:14 42:18 republican 16:18 19:22 24:9 32:8 41:15 53:6 require 17:21 19:6 requires 5:13 reserve 18:12 respect 20:16 23:5 30:11,16 37:16,24 42:12,14 44:25 45:6 49:8,11 53:17 55:18 response 29:16 43:15 44:4 responses 6:24 8:20 rest 38:19 restricting 29:17 30:23 restriction 18:25 19:3 25:10 40:22 48:5 restrictions 4:2,4 5:9 8:22 10:4,13 18:23 24:20 25:12 26:11</p>	<p>restrictive 52:8,22 retaining 14:24 39:4 revealed 57:8 reviewed 18:24 right 11:3,24 12:4 13:5,6 14:20,21 16:19 20:24 23:21 23:25 30:19 31:17 33:16 34:21 35:1 36:21 42:8,10,13 43:19 46:2,23 48:9,10,11 51:12 53:1 55:12 rights 14:6 33:13 rise 10:21 15:10 16:12 risk 29:19 30:4 31:24 37:17 38:1 38:22 41:25 44:9 44:11 45:4,7 47:7 51:24 53:14,22 54:12,13 risks 37:25 52:20 53:17 roberts 3:3 14:14 14:23 18:14 27:17 27:19 28:25 30:8 39:13 47:13 48:18 48:24 49:18 51:12 56:4,16 57:23 rolodex 7:7 root 34:18 round 47:2 rule 17:2 36:3 48:20 49:7 rules 8:1,4,5 36:4 rulings 54:23 run 4:17 10:3 12:2 46:24 47:8,10 running 23:17</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>s 2:1 3:1 36:9 safe 11:24 12:1,7,8 sam 4:13,14,19</p>	<p>sap 44:16 saw 10:20 saying 11:14 16:4 17:3 22:4 33:19 34:24 says 4:13 10:7,8 16:15,16,17 25:10 33:12,14 38:18 42:6 44:13 48:20 scalia 6:4 10:6 14:9 14:13 17:11,15,17 20:14,21,25 21:6 22:1 31:11,19 32:2,4 35:7,10 44:12,23,25 45:9 45:17,19,20 46:1 46:3,6,10,20 53:2 53:15,19 54:2 scalias 34:18 54:17 scenario 9:20 13:2 13:2,15 scenarios 7:1 scheme 15:5 24:23 scrutiny 18:22,24 sealed 32:15,16 52:4 seat 12:8 13:10 23:18 seats 11:24 12:1,7 13:11 second 17:13 34:15 54:22 secretary 34:22,25 35:14,15 48:16 section 20:7 see 16:5,11,14 21:17 35:24 36:10 38:13 56:1 seeing 8:11 seek 3:17 seen 33:19 segregated 52:15 senate 6:15,16,22 7:13 10:17,23,24 23:18 24:7 29:25 36:17 37:8</p>	<p>senator 1:17 2:7 18:17,21,22 53:4 53:8 senatorial 11:7 senators 7:15,16 22:15 sends 51:5 sense 16:3 39:7,21 51:21 52:7 53:3,7 separate 21:18 22:8 series 52:11 serious 34:6 serving 28:3 set 8:17 sets 38:17 settled 54:10 severe 18:25 20:16 26:11 share 16:10,22 shaun 1:3 shooting 47:3 shot 22:22 shouldnt 17:23 show 23:4 showed 23:3 showing 18:5 22:25 side 9:23 19:22,25 33:11 45:25 48:2 sides 43:17 sign 4:13 16:15 significant 8:4 30:19 38:22 40:19 40:20 significantly 26:20 52:22 simply 3:16 8:12 single 4:17 8:10 13:9,11 24:14 25:18 38:16 situation 8:13 25:13 41:1,2,6 47:5 51:25 54:18 situations 25:1 six 52:19 slice 39:17 slightly 42:13</p>
---	---	---	---	--

<p>small 37:13 57:13 smaller 48:6 smith 4:10,13,14,19 10:8,10,10 16:16 16:17,22,22 soft 24:19,23 25:2 29:23 37:24 solicit 26:2 39:1 solicitation 50:25 solicited 25:24 solicitor 1:20 56:23 solicits 25:20,21 26:1 30:1 38:17 somebody 25:21 29:7 34:22 35:12 40:6,17 45:10 47:15 someones 14:18 sorry 10:5 27:11 39:11 sort 26:9 34:3 sotomayor 15:16 15:22 17:3 18:2,7 27:10 speaker 25:19 26:1 29:25 speakers 19:13 special 23:15 24:17 24:21 26:3 specific 30:20,22 specifically 8:25 20:8,8 25:8,9 specifics 46:5 speech 14:10 18:25 19:4 26:11 35:4 42:17 46:15 55:9 spend 31:3,7,17 33:21 34:2,3,24 42:20 45:1 46:11 spending 11:8,17 31:20 42:22 53:9 spends 57:15 spent 22:12 45:13 45:24,25 spread 46:20 spring 11:1</p>	<p>stake 13:23 stand 12:21 31:6 40:3 start 24:11 27:25 32:9 state 16:9 19:22 24:5 26:21 28:24 36:20,24 37:3,4,5 37:22 40:21 43:4 50:21 53:10 states 1:1,12 21:8 33:6 45:12 statute 8:24 26:20 43:3 56:8 stepbystep 40:5 stop 17:2 stopping 31:20 stops 18:3 strategy 40:7 43:24 strength 7:17 strict 18:24 strongly 56:13 subject 25:3 submitted 57:24 58:1 substantial 43:6,7 43:8 45:1 53:5 subtly 41:19 success 52:6 successful 34:17 suchandsuch 33:4 sufficient 31:24 50:13 57:4 suggest 43:14 55:2 suggested 8:21 15:23 suggesting 18:4,6 24:15 summer 22:12 superaffluent 19:7 19:13 support 6:13,17,19 16:17 30:12 33:8 36:12 49:21 supporters 4:11 supporting 1:18</p>	<p>2:8 16:2 18:18 27:1 57:16 suppose 11:4,4 46:13 49:23 54:21 supposed 34:8 supreme 1:1,12 sure 16:6 32:10 39:13 42:1,10 52:24 56:4 surprise 22:1 surprised 6:6 suspicious 10:20,24 10:25 11:3 sustain 26:10 sustained 26:17,17 symbolic 35:6 symbolically 35:13 system 28:4 29:9,10 32:10 41:24 57:18</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>t 2:1,1 table 24:22 tailored 17:25 57:5 take 13:10 16:20 24:3 25:4 33:3 34:23 35:20 37:11 40:4,4 43:4 44:5 45:7,22 47:6 48:8 52:13 54:15,16 taken 40:19 takes 34:13 talk 32:3 56:24 talked 14:15 24:19 55:5 talking 6:1,25 8:5 9:11,11 13:2 14:4 14:5,22 15:13,17 16:7,8 23:9 26:8 35:18,19 41:23 54:14 55:24 target 11:16 team 32:19 38:19 39:20 52:5 television 8:17 tell 5:8 17:20</p>	<p>telling 26:3 33:7 47:15,19 ten 49:22 tendency 23:1 tends 33:10 tenth 47:22 49:1 terms 22:19 42:17 42:19 48:12 testimony 22:15 thank 18:14 27:17 27:18 56:15,16,21 57:22,23 thats 6:9,9 7:3 9:9 9:12,19 10:8,10 10:11,18 11:2,14 12:8,10,19,23 14:21 15:12 16:16 17:13 21:14 22:4 26:8 27:6 28:25 30:25 32:9,10 33:1,15,16,18,20 34:5,5,12 36:20 38:2,7,20 41:13 43:20 44:12,13,14 44:21 45:16,18 46:22 48:4 50:16 51:14,24 53:13 54:2,5,6 55:25 56:25 57:18 theory 23:3 57:9 theres 4:21 5:12 11:8 13:1,3 15:5 17:4,4 22:7 26:3 35:2 38:1 43:22 57:14,22 theyll 5:22,23 theyre 4:16 6:13,16 7:8,9 11:14 16:21 17:25 21:23 32:18 37:1 39:2,6 41:23 44:12 50:3 51:10 51:15 theyve 50:4 thick 27:9,13,13 thing 10:4,21 32:7 34:1 52:12</p>	<p>things 15:13 42:9 42:12,14,19 52:12 52:20 think 6:4 7:19,19 7:25 9:16,20,25 10:14,17 11:2,3 11:13,19 12:25 13:14 15:7,24 22:6 26:8 32:11 32:14 33:1,17 34:5,6,15,17,21 34:21 35:2,9,10 35:15 36:1,2 37:14,15,16 38:14 38:15 39:15 40:15 40:16,16 41:4,5,5 41:5,6,7,14,20,22 41:24 42:3,17,24 43:2,6 44:20,23 44:25 45:2,16,18 45:19 46:17,19,22 46:23 47:4 48:9 48:10,12 49:2,6 51:21 53:3 54:13 54:13 55:8,12,17 55:23,23,24 56:6 56:11,25 thinks 33:12,22 34:22 third 39:12,14 thought 4:8 24:18 thoughts 54:22 thousands 22:17 three 10:11 22:21 25:6 56:17 threejudge 43:16 threepoint 57:12 time 4:7 18:13 27:15 29:5 51:5 times 4:18 5:4,4,5 6:23 7:18 16:24 16:24 48:21 today 56:24 57:7 total 4:18 6:20 totaling 24:8 tough 42:5</p>
--	--	--	---	--

<p>traceability 6:1 transfer 12:7,12,15 12:16,18 29:1 37:1,10 40:10,10 40:22 transferred 38:8,10 51:18 transfers 29:3,17 30:16 50:9,19 52:14 transparent 57:19 treat 17:9 43:17 treatment 24:17 tried 28:9 troubles 36:7,8 true 9:23,25 19:25 30:25 34:8 37:13 try 19:8 31:4 34:19 42:5 49:24 52:9 trying 7:23,25 49:4 50:15 tuesday 1:9 turn 8:17 21:12 turning 21:1 two 8:20 17:6 28:22 29:16 34:11,11 37:15,17</p>	<p>undue 22:18 united 1:1,12 26:6 33:6 45:12 upheld 43:3 upholding 56:13 urge 56:14 use 35:21 36:13 55:6,6</p> <hr/> <p style="text-align: center;">V</p> <p>v 1:5 3:4 valeo 4:8 verrilli 1:20 2:10 27:19,20,22 29:15 30:20 31:18,21 32:11 34:19 35:9 35:11,22 36:1,9 36:22 37:14 38:7 38:14 39:10,14 40:15 41:4,14 43:2,13,20 44:5 44:20,24 45:16,18 45:22 46:2,4,8,19 46:22 48:8,23 49:2,23 50:22 51:10,14,20 53:2 53:15,20 54:4,8 54:12 55:1,17,20 56:3,5 view 35:13 violate 4:20 virtually 37:3 vitality 44:16 volume 27:9,13,14 vs 4:8</p>	<p>wants 23:10,14 29:6 31:3,8 38:11 40:6,11 41:12 47:16 49:21 washington 1:8,15 1:17,21 34:24 wasnt 46:7 way 6:3 13:8 14:24 15:1 22:3 29:3,10 34:21 38:15 44:21 46:23 49:19 50:14 55:25 57:11,19 ways 11:17 15:2 37:17 40:18 57:5 weeks 22:12 weve 30:18 whats 23:4 wholly 30:5 whos 7:16 34:16 wild 36:10 win 7:14 winks 41:19 wonderful 22:20 wont 16:14 19:12 24:16 word 55:6 words 14:25 work 18:5 28:18 30:21 38:16 41:20 41:25 42:1 50:6 57:1 worked 22:2,3 works 7:19 29:10 world 49:12 worried 50:11,16 worse 25:19 wouldnt 6:7 29:19 48:19 write 5:14 23:10,14 23:14 24:8 42:15 writing 24:11 written 24:13 wrong 8:3 22:4 28:16 42:7,7 50:18 wrote 39:18</p>	<hr/> <p style="text-align: center;">X</p> <hr/> <p>x 1:2,7</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>yeah 55:19 year 36:18 45:23 years 28:22 55:5 york 48:21 youre 5:21 6:1 8:5 8:11 13:2,5,6 14:21 16:4,7,7 18:2,3,4 21:9,15 23:9,25,25 26:3,8 28:19 40:24,25 50:10,11 52:19 55:24 youve 8:21 36:13 36:13 40:19 47:1</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>000 4:15,18,24 5:2 5:3,4,4 6:18,20,21 7:5,13,16 8:14 12:5,9,10,18 13:7 13:7,12 16:24 23:21,23 33:7,21 34:14,24 42:22 47:18 02 57:25 03 1:13 3:2</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 6:20 20:7 23:21 23:23 37:22 45:25 46:1,24 10 1:13 3:2 100 6:12,16,18,21 7:5,13,16 10:20 102 25:8 11 57:25 110 20:7 117 33:7,21 42:22 12 23:22 120 33:21 12536 1:4 3:4</p>	<p>150 11:23 12:1,4,6 13:8 17 25:8 1776 23:15,22 18 2:8</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 4:10 12:3,17,18 13:4 14:10 31:15 37:21,21 20 6:22 7:18 200 33:5,20 2010 45:23 2013 1:9 27 2:11</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 2:4 24:7,8,13,21 25:22 26:2 28:23 29:24 31:15 36:15 36:21 37:20 42:15 45:10,12 46:17 47:1,16 57:16 30 11:25 13:10 3pointwhatever 47:24 3pointwhateveritis 49:20</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 5:4 8:14 47:16 40 4:11,12,15,18 5:4 11:25 13:10 34:2 42:21 400 5:3,5 12:5,9 16:23,23 450 47:2 49 37:2</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 4:15,18,24 5:2,3,4 6:18 16:24 24:7,8 24:13,21 36:15,21 45:10,12,25 46:1 46:17,24 47:18 50 34:3 500 34:14,24 47:2,8</p>
---	--	--	--	---

47:10
562:14

6

625:22 26:2 28:23
29:24 37:20 42:15
47:1 57:16
6004:10 12:3,17,22
13:4

7

8

81:9
80012:10 13:7,7,12
8623:19

9
