

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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BEVERLY R. GILL, et al., )  
                                Appellants, )  
                                v. ) No. 16-1161  
WILLIAM WHITFORD, et al., )  
                                Appellees. )  
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3     BEVERLY R. GILL, et al.,                            )  
4                                    Appellants,                            )  
5                                    v.   ) No. 16-1161  
6     WILLIAM WHITFORD, et al.,                        )  
7                                    Appellees.                            )  
8     - - - - -  
9                                    Washington, D.C.  
10                                  Tuesday, October 3, 2017

11  
12                                  The above-entitled matter came on for oral  
13     argument before the Supreme Court of the United States  
14     at 10:04 a.m.

15  
16     APPEARANCES:  
17     MISHA TSEYTLIN, Solicitor General, Madison, Wisconsin;  
18                                  on behalf of the Appellants.  
19     ERIN E. MURPHY, Washington, D.C., for Wisconsin State  
20                                  Senate, et al., as amici curiae.  
21     PAUL M. SMITH, Washington, D.C. ;  
22                                  on behalf of the Appellees.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MISHA TSEYTLIN	
4	On behalf of the Appellants	3
5	ORAL ARGUMENT OF:	
6	ERIN E. MURPHY	
7	For Wisconsin State Senate,	
8	as amicus curiae	18
9	ORAL ARGUMENT OF:	
10	PAUL M. SMITH,	
11	On behalf of Appellees	30
12	REBUTTAL ARGUMENT OF:	
13	MISHA TSEYTLIN	
14	On behalf of the Appellants	63
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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2  
3  
4  
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25

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 16-1161, Gill versus Whitford.

Mr. Tseytlin?

ORAL ARGUMENT OF MISHA TSEYTLIN

ON BEHALF OF APPELLANTS

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

This Court has never uncovered judicially manageable standards for determining when politicians have acted too politically in drawing district lines. Plaintiff's social science metrics composed of statewide vote to seat ratios and hypothetical projections do not solve any of these problems.

Instead, they would merely shift districting from elected public officials to federal courts, who would decide the fate of maps based upon battles of the experts.

Now, as a threshold matter, this Court should hold that federal courts lack jurisdiction to entertain statewide political gerrymandering challenges, leaving for another

1 day the question of district-specific  
2 gerrymandering challenges.

3 JUSTICE KENNEDY: I -- I think it's  
4 true that there's no case that directly helps  
5 Respondents very strongly on the standing  
6 issue. You have a -- a strong argument there.

7 But suppose the Court -- and you just  
8 have to assume, we won't know exactly the  
9 parameters of it -- decided that this is a  
10 First Amendment issue, not an equal protection  
11 issue.

12 Would that change the calculus so  
13 that, if you're in one part of the state, you  
14 have a First Amendment interest in having your  
15 party strong or the other party weak?

16 MR. TSEYTLIN: No, it wouldn't, Your  
17 Honor. And I think the reason for that is,  
18 even if it's a First Amendment issue, it's  
19 still grounded in the right to vote.

20 And in our country's single district  
21 election system, folks only vote in their own  
22 district. For example, you might have some  
23 vague interest in the party that you associate  
24 with having more members in Congress, for  
25 example, like a Wisconsin Republican might want

1 more Texas Republicans in Congress.

2 But no one would say that you have a  
3 First Amendment or a first -- Fourteenth  
4 Amendment right in that sort of circumstance to  
5 challenge some Texas law that you would, for  
6 example, argue led to less Republicans from  
7 Texas coming to the Congress.

8 CHIEF JUSTICE ROBERTS: Well, but I  
9 -- I think the argument is pretty  
10 straightforward which you, in your district,  
11 have a right of association and you want to  
12 exercise that right of association with other  
13 people elsewhere in the state.

14 And if you can't challenge the  
15 districting throughout the state, then your  
16 claim seems to be -- there's no way for to you  
17 to raise your claim.

18 JUSTICE KENNEDY: And this of course  
19 -- and this of course confines it to the state  
20 and eliminates the problem of out-of-state, as  
21 the way the Chief Justice stated the  
22 hypothetical.

23 MR. TSEYTLIN: Well, Your Honor, I  
24 don't think it would solve the interstate  
25 problem because, of course, the structural

1 relationship of, for example, Mr. --

2 JUSTICE KENNEDY: Let's -- let's  
3 assume that it does.

4 (Laughter.)

5 MR. TSEYTLIN: Well -- well, Your  
6 Honor, I still think that this Court should be  
7 very careful about enacting that kind of  
8 doctrine.

9 As we know, race and politics are  
10 often correlated in this country, so political  
11 gerrymandering claims and racially  
12 gerrymandering claims, even if they're  
13 ultimately grounded in a different  
14 constitutional amendment, will often be raised  
15 together.

16 And it cannot be -- possibly be the  
17 case that, if there's a showing that the map  
18 drawer turned on the racial screen, the person  
19 is limited to a single district claim.

20 But if that same map drawer turned on  
21 the political screen, then the plaintiff would  
22 get access to the holy grail of a statewide  
23 claim based on --

24 JUSTICE SOTOMAYOR: I'm not --

25 JUSTICE GINSBURG: On the question of

1 -- of race, some years ago, this Court dealt  
2 with what the -- the so-called "max-Black"  
3 plan, said it was a deliberate attempt by the  
4 legislature to make as many African American  
5 districts as possible.

6 This bears a certain resemblance  
7 because the effort here, intentionally, was to  
8 create as many Republican districts. So is  
9 max-Republican, it -- doesn't it have the same  
10 problem that "max-Black" did?

11 MR. TSEYTLIN: Well, Your Honor, that  
12 turns to the issue of justiciability, and I do  
13 not think that raises the same problems  
14 because, of course, politics is not a suspect  
15 classification like race.

16 And I think the easiest way to see  
17 this is to take a look at a chart that  
18 Plaintiff's own expert created, and that's  
19 available on Supplemental Appendix 235. This  
20 is plain -- Plaintiff's expert studied maps  
21 from 30 years, and he identified the 17 worst  
22 of the worst maps. What is so striking about  
23 that list of 17 is that 10 were neutral draws.

24 There were court-drawn maps,  
25 commission-drawn maps, bipartisan drawn maps,



1 including the immediately prior Wisconsin drawn  
2 map. And I think the Court should learn two  
3 lessons from this list of 17, 10 of which were  
4 neutral.

5 The first lesson is that partisan  
6 symmetry is simply not a neutral districting  
7 criteria. It is not a neutral method of  
8 drawing districts. For if it were, all of  
9 these commissions would not be drawing partisan  
10 asymmetry maps.

11 The second lesson that this Court  
12 should learn from that -- from that list is  
13 that Plaintiffs are asking this Court to launch  
14 a redistricting revolution based upon their  
15 social science metrics.

16 JUSTICE ALITO: Before you get too  
17 deeply into the merits, which I -- I assume  
18 you'll want to do in a minute, can I just ask  
19 you a question about standing along the lines  
20 of those asked by my colleagues?

21 Suppose that it was alleged that town  
22 officials in someplace in northern Wisconsin  
23 where the Republicans predominate were  
24 discriminating against the Democratic candidate  
25 for a legislative district by, let's say, not

1 allowing that candidate's signs to be put up  
2 along the roadsides, but allowing the  
3 Republican signs to be put up along the  
4 roadsides, or they were pressuring town --  
5 let's just leave it at that.

6           They're discriminating with respect to  
7 these signs. Now, who would have standing to  
8 raise a First Amendment challenge to that?  
9 Would it be just the candidate in that district  
10 or maybe voters in that district? Or could a  
11 -- a Democratic voter in, let's say, Milwaukee  
12 have standing to raise that First Amendment  
13 argument?

14           MR. TSEYTLIN: I would certainly  
15 think, Your Honor, the candidate would have  
16 standing, and I -- I'm not so sure about the  
17 voters in the district, but probably.

18           But certainly, voters in Milwaukee who  
19 don't vote for that candidate, they're not  
20 eligible to vote for that candidate any more  
21 than someone in California is eligible to vote  
22 for that candidate.

23           And I think we see this from --

24           CHIEF JUSTICE ROBERTS: Wait. I'm  
25 sorry. Certainly, voters in Milwaukee -- you

1 left out the -- would not have standing?

2 MR. TSEYTLIN: Would not have  
3 standing.

4 And I -- I think we see this from the  
5 testimony of -- of the lead plaintiff, who is  
6 the only plaintiff that testified in this case.

7 He was asked, during his testimony,  
8 what harm does Act 43 put on you, given that  
9 you live in a Democratic-dominated district in  
10 Madison under any possible map.

11 Well, he said, I want to be able to  
12 campaign for a majority in assembly, which  
13 shows that his injury has nothing to do with  
14 him as a voter. It's just a generalized  
15 interest in more Wisconsinites -- more  
16 Wisconsin Democrats being elected, which  
17 someone in Wisconsin can have or someone  
18 outside of Wisconsin --

19 JUSTICE GINSBURG: May I --

20 JUSTICE KENNEDY: I think we're  
21 anxious to get to the merits, but one more  
22 thing on the sign. Suppose the sign in the  
23 southern part of the state had talked about an  
24 issue which was very important to the people in  
25 Milwaukee.

1           MR. TSEYTLIN: I think that one could  
2 frame a hypothetical where, if it was some sort  
3 of a home rule thing, where Milwaukee's right  
4 to have certain height buildings was affected,  
5 you could have a no longer generalized  
6 interest, but we don't have anything like that  
7 here.

8           JUSTICE BREYER: All right. So can I  
9 do this? Because I think the hard issue in  
10 this case is are there standards manageable by  
11 a court, not by some group of social science  
12 political ex -- you know, computer experts. I  
13 understand that, and I am quite sympathetic to  
14 that.

15           So let me spend exactly 30 seconds, if  
16 I can, giving you, as you've read all these  
17 briefs, I have too, this is -- this is where I  
18 am at the moment -- not that I'm for this,  
19 react to this as you wish, and if you wish to  
20 say nothing, say nothing, and it's for  
21 everybody because it's a little complicated.

22           When I read all that social science  
23 stuff and the computer stuff, I said, well,  
24 what -- is there a way of reducing it to  
25 something that's manageable?

1           So I'd have step one, the judge says,  
2           was there one party control of the  
3           redistricting? If the answer to that is no,  
4           say there was a bipartisan commission, end of  
5           case. Okay?

6           Step two, is there partisan asymmetry?  
7           In other words, does the map treat the  
8           political parties differently? And a good  
9           evidence of that is a party that got 48 percent  
10          of the vote got a majority of the legislature.

11          Other evidence of that is what they  
12          call the EG, which is not quite so complicated  
13          as the opposition makes it think. Okay? In  
14          other words, you look to see.

15          Question 3, is -- is there going to be  
16          persistent asymmetry over a range of votes?  
17          That is to say one party, A, gets 48 percent,  
18          49 percent, 50 percent, 51, that's sort of the  
19          S-curve shows you that, you know, whether there  
20          is or is not. And there has to be some.

21          And if there is, you say is this an  
22          extreme outlier in respect to asymmetry? And  
23          there we have Eric Lander's brief, okay? You  
24          know that one.

25          And -- and we look through thousands

1 and thousands of maps, and somebody did it with  
2 real maps and said how bad is this compared to,  
3 you know, the worst in the country.

4 And then, if all those -- the -- the  
5 test flunks all those things, you say is there  
6 any justification, was there any other motive,  
7 was there any other justification?

8 Now, I suspect that that's manageable.  
9 I'm not positive. And so I throw it out there  
10 as my effort to take the technicalities and  
11 turn them into possibly manageable questions  
12 for a response from anyone insofar as you wish  
13 to respond, and if you wish to say, I wish to  
14 say nothing, that's okay with me.

15 (Laughter.)

16 MR. TSEYTLIN: Thank you, Your Honor.  
17 I'd like to talk about the third and fourth  
18 aspects of that because I think those are --  
19 I've already talked about the second a little  
20 bit.

21 But with regard to the third, which is  
22 persistence, that is exactly the kind of  
23 conjectural, hypothetical state of affairs  
24 inquiry that was submitted to this Court in  
25 LULAC in Professor King's amicus brief because,

1 of course, as your suggestion -- suggested  
2 steps recognize, a single election doesn't mean  
3 much. A single election, you could have an EG  
4 for any particular reason.

5 So you would have federal courts  
6 engaging in battles of the hypothetical experts  
7 deciding, well, what would it be under this map  
8 or that map? So I think that's a non-starter  
9 for that reason.

10 Now, with regard to extremity, this  
11 was an arg --

12 JUSTICE KAGAN: Well, if I could just  
13 stop you there for a second, because I was  
14 under the impression that legislators are  
15 capable of doing this actually pretty easily  
16 now.

17 You know, the world of voting  
18 technology has changed a great deal, and when  
19 legislatures think about drawing these maps,  
20 they're not only thinking about the next  
21 election, they're thinking often -- not  
22 always -- but often about the election after  
23 that and the election after that and the  
24 election after that, and they do sensitivity  
25 testing, and they use other methods in order to

1 ensure that certain results will obtain not  
2 only in the next one but eight years down the  
3 road.

4           And it seems to me that, just as  
5 legislatures do that, in order to entrench  
6 majorities -- or minorities, as the case may  
7 be -- in order to entrench a party in power,  
8 so, too, those same techniques, which have  
9 become extremely sophisticated, can be used to  
10 evaluate what they're doing.

11           MR. TSEYTLIN: Well, Your Honor,  
12 legislatures don't have to worry about judicial  
13 manageability standards. Legislatures don't  
14 have to worry about false positives, false  
15 negatives. Legislatures don't have to worry  
16 about conjecture. They can --

17           JUSTICE KAGAN: What -- what I'm  
18 suggesting is that this is not kind of  
19 hypothetical, airy-fairy, we guess, and then we  
20 guess again. I mean, this is pretty scientific  
21 by this point.

22           MR. TSEYTLIN: Well, Your Honor,  
23 they're just estimates. They're not all  
24 scientific. And let me give you one example  
25 from the record --



1 JUSTICE SOTOMAYOR: I'm sorry.  
2 They're -- they're estimates where you haven't  
3 put any social scientist to say that the  
4 estimate's wrong. You've poked holes, but  
5 every single social science metric points in  
6 the same direction.

7 So there are five of them. Your map  
8 drawer is one of them, by the way, the person  
9 who actually drew these maps, and what we know  
10 is that they started out with the court plan,  
11 they created three or four different maps, they  
12 weren't partisan enough. They created three or  
13 four more maps, they weren't partisan enough.

14 And they finally got to the final map,  
15 after maybe 10 different tries of making it  
16 more partisan, and they achieved a map that was  
17 the most partisan on the S-curve.

18 And it worked. It worked better than  
19 they even expected. So the estimate wasn't  
20 wrong. The estimate was pretty right.

21 So, if it's the most extreme map they  
22 could make, why isn't that enough to prove --

23 MR. TSEYTLIN: Well, Your Honor, I  
24 think --

25 JUSTICE SOTOYMAJOR: -- partisan

1 asymmetry and unconstitutional gerrymandering?

2 MR. TSEYTLIN: Well, Your Honor, I  
3 think the facts in this case, which is what you  
4 were discussing, are significantly less  
5 troubling than the facts in the cases that this  
6 Court has previously faced, for example,  
7 Bandemer and Vieth, and that's for two reasons.  
8 One, the map drawers here complied fastidiously  
9 with traditional districting principles, which  
10 was not true in Bandemer and Vieth.

11 JUSTICE SOTOMAYOR: But they kept  
12 going back to fix the map to make it more  
13 gerrymandered. That's undisputed. The people  
14 involved in the process had traditional maps  
15 that complied with traditional criteria and  
16 then went back and threw out those maps and  
17 created more -- some that were more partisan.

18 MR. TSEYTLIN: That's correct, Your  
19 Honor. And, of course, there were computers  
20 used in --

21 JUSTICE SOTOMAYOR: So why didn't they  
22 take one of the earlier maps?

23 MR. TSEYTLIN: Because there was no  
24 constitutional requirement that they do so.  
25 They complied with all state law.

1 JUSTICE SOTOMAYOR: That's the point.

2 MR. TSEYTLIN: And they complied with  
3 all traditional districting principles.

4 JUSTICE ALITO: Can I take you back to  
5 -- to Justice Kagan's question about the  
6 legislators' use of these techniques? Are all  
7 the techniques that are used by politicians in  
8 order to try to maximize their chances of  
9 electoral success scientific? I think they  
10 rely a lot on polls, don't they? How  
11 scientific have they proven to be?

12 MR. TSEYTLIN: Of course, Your Honor.  
13 Legislatures can very much rest on conjecture,  
14 whereas courts cannot. If I could reserve the  
15 balance of my time.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Ms. Murphy.

19 ORAL ARGUMENT OF ERIN E. MURPHY  
20 FOR WISCONSIN STATE SENATE, AS AMICUS CURIAE

21 MS. MURPHY: Mr. Chief Justice, and  
22 may it please the Court:

23 Plaintiffs have not identified a  
24 workable standard for determining when the  
25 inherently political task of districting

1 becomes too political for the Constitution to  
2 tolerate.

3           Indeed, the only thing Plaintiffs have  
4 added to the mix since LULAC is a wasted votes  
5 test that identifies court-drawn maps as  
6 enduring partisan gerrymanders and conveniently  
7 favors their own political party.

8           JUSTICE KENNEDY: You've probably  
9 considered the hypo many times. Suppose a  
10 state constitution or a state statute says all  
11 districts shall be designed as closely as  
12 possible to conform with traditional  
13 principles, but the overriding concern is to  
14 increase -- have a maximum number of votes for  
15 party X or party Y. What result?

16           MS. MURPHY: I think if -- if you have  
17 something that says the ultimate principle that  
18 we're going to follow is abandon all other  
19 criteria in favor of partisan advantage, at  
20 least you're closer at that point --

21           JUSTICE GINSBURG: I don't think -- I  
22 don't think that was the question. It was it  
23 satisfies all the traditional criteria,  
24 contiguous, but it was a deliberate attempt to  
25 maximize the number of seats that Republicans

1 would hold.

2 JUSTICE KENNEDY: This is mandated by  
3 the state constitution.

4 MS. MURPHY: I don't think that in a  
5 world where the legislature is required to and  
6 is, in fact, complying with a number of other  
7 metrics and is as one of those things taking  
8 into account partisan advantage, that you've  
9 proven a constitutional violation.

10 JUSTICE ALITO: It's not a -- that's  
11 not a manageable standard. It's not a  
12 manageable standard that you cannot have a law  
13 that says draw maps to favor one party or the  
14 other.

15 MS. MURPHY: If it's --

16 JUSTICE ALITO: That seems like a  
17 perfectly manageable standard.

18 MS. MURPHY: If it's on --

19 JUSTICE ALITO: You cannot have that.

20 MS. MURPHY: -- the face of the  
21 statute, I think you have a different scenario  
22 because at least at that point, you know the  
23 intent. You know there's no debate to have  
24 about the intent of what the legislature is  
25 doing and if they are intentionally drawing for

1 one purpose or other purposes.

2 JUSTICE KAGAN: Well, there are plenty  
3 areas of law, Ms. Murphy, where we look at  
4 intent beyond the face of a statute. And, you  
5 know, sometimes that's harder than other times.  
6 We understand it can be difficult. We  
7 understand in other cases it can be easy. But  
8 we do it all over the place in our law. We  
9 don't -- we don't say, oh, if it's not on the  
10 face of the statute, we're never going to look  
11 at it.

12 So, if your answer to Justice Alito  
13 is, well, on the face of the statute, that's  
14 certainly a manageable standard, I guess I  
15 would ask why not if it's not on the face of  
16 the statute? But you absolutely -- you know,  
17 but you have good evidence that there was the  
18 intent here, and you have good evidence that  
19 the intent led to a certain kind of effect,  
20 which was to entrench a party in power.

21 MS. MURPHY: I think what  
22 differentiates this from a lot of other  
23 contexts is that here we have opinion after  
24 opinion from this Court, dissenting opinions,  
25 concurring opinions, plurality opinions, what

1 have you, saying that considering politics in  
2 districting is not in and of itself inherently  
3 unconstitutional.

4 JUSTICE GORSUCH: Ms. Murphy --

5 MS. MURPHY: So just finding the  
6 intent isn't a problem.

7 JUSTICE KAGAN: But there is a  
8 difference --

9 JUSTICE GORSUCH: I'd like to go back  
10 to Justice Breyer's question. It would be  
11 helpful to get an answer for me on that. What  
12 criteria would a state need to know in order to  
13 avoid having every district and every case and  
14 every election subject to litigation? Because  
15 the -- the standards given in -- in the lower  
16 court here was, well, a little bit of partisan  
17 symmetry problem, a little bit of an efficiency  
18 gap problem, not a real set of criteria.

19 And here, you know, is it 7 percent,  
20 how durable, how many elections would we need?  
21 How much data would we have to gather? Walk us  
22 through Justice Breyer's question and provide  
23 some answers, if you -- if you would.

24 MS. MURPHY: Sure. So I think some of  
25 the problems with the criteria that have been

1 suggested, in particular with the tests that  
2 focus on these symmetry metrics, is that so far  
3 the metrics that we have, I mean, they identify  
4 false positives roughly 50 percent of the time.

5           And I don't know how a legislature is  
6 supposed to comply with criteria that can't  
7 differentiate between a court-drawn map and a  
8 map drawn for partisan advantage. So, when you  
9 start with this partisan symmetry concept, you  
10 automatically have the basic problem that you  
11 have to have some way to decide what is the  
12 appropriate partisan asymmetry.

13           JUSTICE GORSUCH: Okay. But what are  
14 the questions -- you know, I need two years or  
15 two cycles worth of data. I need an S curve of  
16 a certain shape and size. I need an efficiency  
17 gap of something. What are the numbers, what  
18 are the criteria we'd have to fill in as a  
19 constitutional matter in order for a state to  
20 be able to administer this?

21           MS. MURPHY: Well, I mean, with all  
22 due respect, I -- I -- I'm not convinced that  
23 there are manageable criteria for the courts to  
24 be putting on legislatures for how to go about  
25 this process. And I certainly don't think that



1 anyone in this case has identified that.

2 JUSTICE GORSUCH: But if you could try  
3 to answer --

4 MS. MURPHY: But I would suggest that,  
5 you know, one of the starting points for me  
6 would have to be that traditional districting  
7 criteria should matter in the analysis.

8 If you have a legislature that has  
9 started by saying we're going to comply with  
10 everything that we're supposed to do, not only  
11 as a legal matter, but also all of these  
12 practical constraints, we're going to draw  
13 districts that comply --

14 JUSTICE GINSBURG: Ms. Murphy, because  
15 -- because your time is running out, I would  
16 like to ask you what's really behind all of  
17 this. The precious right to vote, if you can  
18 stack a legislature in this way, what incentive  
19 is there for a voter to exercise his vote?  
20 Whether it's a Democratic district or a  
21 Republican district, the result -- using this  
22 map, the result is preordained in most of the  
23 districts.

24 Isn't that -- what becomes of the  
25 precious right to vote? Would we have that

1 result when the individual citizen says: I  
2 have no choice, I'm in this district, and we  
3 know how this district is going to come out? I  
4 mean, that's something that this society should  
5 be concerned about.

6 MS. MURPHY: Well, a -- a couple of  
7 responses to that, Your Honor. First of all,  
8 it's inherent in our districting scheme that  
9 there are plenty of people who are always going  
10 to be voting in districts where they know what  
11 the result is going to be. And that has  
12 nothing to do with partisan gerrymandering; it  
13 has to do with the geography of politics and  
14 the fact that some of us just live in districts  
15 where --

16 JUSTICE GINSBURG: Some of us, but --

17 MS. MURPHY: -- we know that our vote  
18 will come out one way or another.

19 JUSTICE GINSBURG: In Wisconsin,  
20 before this plan, was it the case that when it  
21 was something like 49 out of 99 districts were  
22 uncontested, nobody -- the election was --  
23 wasn't contested because the one party or the  
24 other was going to win.

25 MS. MURPHY: Well, I -- I don't think

1 you can quite draw that conclusion from the  
2 fact there's uncontested races. I mean, the  
3 reality is that political parties have to make  
4 decisions about where to put their resources,  
5 and they're going to have to do that for  
6 reasons that, again, have nothing to do with  
7 districting for partisan advantage. They have  
8 to do with the fact that drawing districts is  
9 always going to reflect political calculations  
10 and it's always going to be driven by  
11 communities of interest, and communities of  
12 interest sometimes feel very strongly about one  
13 political party rather than another.

14 JUSTICE KENNEDY: I have to say that I  
15 don't think you ever answered the question: If  
16 the state has a law or a constitutional  
17 amendment that's saying all legitimate factors  
18 must be used in a way to favor party X or party  
19 Y, is that lawful?

20 MS. MURPHY: I think it's -- on the  
21 face of the Constitution as a requirement the  
22 district must -- the legislature must comply  
23 with, then that could be your instance of a --  
24 a problem that can be actually solved by the  
25 Constitution, but it's quite different to me

1 when you have a facially neutral districting  
2 matter --

3 JUSTICE KENNEDY: Is that an equal  
4 protection violation or a First Amendment  
5 violation?

6 MS. MURPHY: Well, it's a little hard  
7 to say at this point because, you know, it  
8 really just hasn't been fully explored, this  
9 concept of how you would come at all of this  
10 from a First Amendment perspective. I think  
11 this comes back to really the standing question  
12 --

13 JUSTICE KENNEDY: Well, you said  
14 there's a Constitution -- is it equal  
15 protection?

16 MS. MURPHY: I think the question -- I  
17 mean, it would be who has standing to bring  
18 their --

19 JUSTICE KENNEDY: Well, assume  
20 standing. I'd like an answer to the question.

21 MS. MURPHY: Yes. It would be an  
22 unconstitutional if it was on the face of it,  
23 and I think that that would be better thought  
24 of probably as an equal protection violation,  
25 but you could think of it just as well, I

1 think, as a First Amendment violation in the  
2 sense that it is viewpoint discrimination  
3 against the individuals who the legislation is  
4 saying you have to specifically draw the maps  
5 in a way to injure, but, again, I --

6 JUSTICE SOTOMAYOR: Could you tell me  
7 what the value is to democracy from political  
8 gerrymandering? How -- how does that help our  
9 system of government?

10 MS. MURPHY: Sure. Well, I would  
11 point to --

12 JUSTICE SOTOMAYOR: You -- you almost  
13 concede that it doesn't when you say if a state  
14 filed -- has a constitutional amendment or has  
15 a law that says you must comply with  
16 traditional criteria, but you must also  
17 politically gerrymander, you're saying that  
18 might be unconstitutional?

19 MS. MURPHY: It might be, but I don't  
20 think that necessarily means that districting  
21 for partisan advantage has no positive values.  
22 I would point you to, for instance, Justice  
23 Breyer's dissenting opinion in Vieth which has  
24 an extensive discussion of how it can actually  
25 do good things for our system to have districts

1 drawn in a way that makes it easier for voters  
2 to understand who they are account -- who the  
3 legislature is. It produces values in terms of  
4 accountability that are valuable so that the  
5 people understand who isn't and who is in  
6 power.

7 JUSTICE SOTOMAYOR: I really don't  
8 understand how any of that -- what that means.  
9 I mean, it -- it's okay to stack the decks so  
10 that for 10 years or an indefinite period of  
11 time one party, even though it gets a minority  
12 of votes, can't get a minor -- gets a minority  
13 of votes, can get the majority of seats?

14 MS. MURPHY: With all due respect, you  
15 know, I would certainly dispute the premise  
16 that the decks are stacked here. At the end of  
17 the day, what matters is how people vote in  
18 elections and that's what's going to determine  
19 the outcomes, as it has in Wisconsin where the  
20 Republicans have won majorities because they've  
21 actually won the majority of the vote in most  
22 of the elections over the past four years.  
23 Thank you, Your Honor

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 Counsel.

1 Mr. Smith.

2 ORAL ARGUMENT OF PAUL M. SMITH

3 ON BEHALF OF APPELLEES

4 MR. SMITH: Mr. Chief Justice, and may  
5 it please the Court:

6 What the state is asking for here is a  
7 free pass to continue using an assembly map  
8 that is so extreme that it effectively  
9 nullifies democracy.

10 As this case illustrates, it's now  
11 possible even in a 50/50 state like Wisconsin  
12 to draw a district map that is so reliably and  
13 extremely biased that it effectively decides in  
14 advance who's going to control the legislative  
15 body for the entire decade.

16 CHIEF JUSTICE ROBERTS: Maybe we can  
17 just talk briefly about the standing issue.

18 It is a little arresting to have a  
19 rule that we establish that when your claim is  
20 racial gerrymandering, it has to be limited to  
21 your district, you can't complain about racial  
22 gerrymandering elsewhere in the state, but  
23 here, if the claim is going to be political  
24 gerrymandering, you can raise claims about  
25 whole statewide issues even if there is no

1 argument that you're gerrymandered, like the  
2 first plaintiff who votes in Madison, his vote  
3 isn't diluted in any way, and yet he is able to  
4 complain about voting anywhere in the state.

5 MR. SMITH: Well, Mr. Chief Justice, I  
6 think that standing has to follow from the  
7 nature of the injury and that follows from the  
8 nature of the constitutional violation.

9 A racial gerrymandering claim, a Shaw  
10 v. Reno claim, is an attack on a particular  
11 district for being drawn with excessive focus  
12 on race. In that situation, the injury has to  
13 be localized to the place where that district  
14 is.

15 Partial -- partisan gerrymandering has  
16 the same word in it, but it's an entirely  
17 different kind of injury because it involves  
18 dilution of votes. Racial gerrymandering is  
19 analytically distinct from any dilution case.

20 JUSTICE ALITO: I don't understand --

21 CHIEF JUSTICE ROBERTS: What about --  
22 what about the sign hypothetical? You know,  
23 you're up in far north of Wisconsin and  
24 somebody is -- is taking down the signs for the  
25 one candidate in the far south.



1           That affects that individual's -- the  
2 strength of his vote for the state-wide  
3 purposes. Is he really have standing to  
4 complain about that?

5           MR. SMITH: Well, Your Honor, I think  
6 you could decide that while it might have some  
7 de minimis effect on the interest of any  
8 Democrat attempting to carry out that group's  
9 political agenda, that it's sufficiently de  
10 minimis that you wouldn't want to give standing  
11 to people outside the directly affected area.

12           JUSTICE ALITO: Why -- why is it de  
13 minimis? It seems to me it's exactly the same  
14 thing. If you have a system, let's extend it  
15 to many towns that are controlled by the  
16 Republicans and they're taking down all the  
17 Democratic signs. And if that's an effective  
18 strategy, it will mean fewer members of the  
19 legislature are Democrats and, therefore, the  
20 interests of the Democratic voter in Milwaukee  
21 or Madison will be impaired. It seems like  
22 exactly the same thing.

23           MR. SMITH: Well, Your Honor, if you  
24 had a systematic effort in a lot of places by  
25 members of one party to prevent the other party

1 from campaigning effectively, I think that  
2 anybody in the Democratic Party in the state  
3 would have standing.

4 JUSTICE ALITO: All right. Well, on  
5 the -- let's -- let's look at the race issue.

6 So you have a state where there you  
7 have an African American voter in -- in a -- in  
8 one part of the state who wants to complain  
9 that districts in another part of the state are  
10 -- are packed or cracked and, as a result of  
11 that, there are going to be fewer African  
12 Americans in the legislature than there should  
13 be.

14 And that's going to impair that  
15 person's interests, including, I would suppose,  
16 their right of association. What -- what is  
17 the difference between those two situations?

18 MR. SMITH: Well, Your Honor, that's a  
19 Section 2 vote dilution claim, and I think that  
20 the law appropriately limits standing in that  
21 situation to people who live in the region of  
22 the state where there's an absence of an  
23 additional minority district.

24 You wouldn't want to assume that some  
25 African American from a different part of the

1 state has a collective interest with people  
2 over here in this part of the state just  
3 because of race. That's just stereotyping.  
4 But with party, people join the party to -- to  
5 work together to achieve a collective end. So  
6 you're not --

7 CHIEF JUSTICE ROBERTS: Well, but  
8 that's equally stereotyping. Sometimes people  
9 vote for a wide variety of reasons. Maybe the  
10 candidate, although he's of a different party,  
11 is a -- is a friend, is a neighbor. Maybe they  
12 think it's a good idea to have the  
13 representatives from their district to balance  
14 out what they view would be necessary -- likely  
15 candidates from other districts.

16 MR. SMITH: Maybe they do --

17 CHIEF JUSTICE ROBERTS: I don't think  
18 it's any more -- any less stereotypical to say  
19 that people are going to vote for parties  
20 because they support everything the party does  
21 statewide.

22 MR. SMITH: Well, but to have  
23 standing, I think you'd want to find plaintiffs  
24 who do that, Your Honor. And certainly the  
25 plaintiffs we have here are thorough going

1 supporters of the disfavored party. Their  
2 party has been punished by the law of the State  
3 of Wisconsin. And I think that the -- the  
4 standing issue ought to be satisfied by the  
5 description of what our claim is, which comes  
6 right out of Justice Kennedy's concurrence in  
7 Vieth where -- this is on page 86-A of the  
8 jurisdictional statement, The White Appendix.

9           It's just a two-sentence description  
10 of our claim: "First Amendment concerns arise  
11 where a state enacts a law that has the purpose  
12 and effect of subjecting a group of voters or  
13 their party to disfavored treatment by reason  
14 of their views. In the context of partisan  
15 gerrymandering, that means that First Amendment  
16 concerns arise where an apportionment has the  
17 purpose and effect of burdening a group of  
18 voters' representational rights."

19           So the group is -- is the targeted  
20 people, those are the people who have the  
21 injury, the injury to their First Amendment  
22 interests, and anybody in the group has --  
23 ought -- should be able to -- to bring a First  
24 Amendment argument saying --

25           JUSTICE KAGAN: Mr. Smith.

1 CHIEF JUSTICE ROBERTS: Mr. Smith --  
2 do you have standing? Well, Justice Kagan?

3 JUSTICE KAGAN: In a one-person  
4 one-vote case, does one person in an  
5 overpopulated district have standing to  
6 challenge not only that district, those  
7 district lines, but the entire state map?

8 MR. SMITH: That is true. That is the  
9 way that it's been handled ever since the  
10 Reynolds case.

11 JUSTICE KAGAN: And why is that, and  
12 does it -- is it an analogy to this case?

13 MR. SMITH: Well, it's certainly a  
14 helpful analogy. It's not exactly the same  
15 because they have to live in an overpopulated  
16 district rather than an underpopulated  
17 district.

18 But those are the people in -- who  
19 suffer vote dilution because they're living in  
20 the overpopulated districts. And the Court has  
21 said not only does that person have standing to  
22 challenge their own district but also to  
23 challenge the entire map and make all of the  
24 districts closer in population. That's just  
25 the way that's been handled since the '60s.

1 CHIEF JUSTICE ROBERTS: Mr. Smith, I'm  
2 going to follow an example of one of my  
3 colleagues and lay out for you as concisely as  
4 I can what -- what is the main problem for me  
5 and give you an opportunity to address it.

6 I would think if these -- if the claim  
7 is allowed to proceed, there will naturally be  
8 a lot of these claims raised around the  
9 country. Politics is a very important driving  
10 force and those claims will be raised.

11 And every one of them will come here  
12 for a decision on the merits. These cases are  
13 not within our discretionary jurisdiction.  
14 They're the mandatory jurisdiction. We will  
15 have to decide in every case whether the  
16 Democrats win or the Republicans win. So it's  
17 going to be a problem here across the board.

18 And if you're the intelligent man on  
19 the street and the Court issues a decision, and  
20 let's say, okay, the Democrats win, and that  
21 person will say: "Well, why did the Democrats  
22 win?" And the answer is going to be because EG  
23 was greater than 7 percent, where EG is the  
24 sigma of party X wasted votes minus the sigma  
25 of party Y wasted votes over the sigma of party

1 X votes plus party Y votes.

2 And the intelligent man on the street  
3 is going to say that's a bunch of baloney. It  
4 must be because the Supreme Court preferred the  
5 Democrats over the Republicans. And that's  
6 going to come out one case after another as  
7 these cases are brought in every state.

8 And that is going to cause very  
9 serious harm to the status and integrity of the  
10 decisions of this Court in the eyes of the  
11 country.

12 MR. SMITH: Your Honor --

13 CHIEF JUSTICE ROBERTS: It is just  
14 not, it seems, a palatable answer to say the  
15 ruling was based on the fact that EG was  
16 greater than 7 percent. That doesn't sound  
17 like language in the Constitution.

18 MR. SMITH: Your Honor, first thing I  
19 would say in response to that is that those  
20 challenges are already being brought. Partisan  
21 gerrymandered maps get challenged -- they get  
22 challenged in other ways, under the one person,  
23 one vote doctrine, under the racial  
24 gerrymandering doctrine, under Section 2. And  
25 -- and so you're getting those cases. Most of

1 the -- the statewide redistricting maps in this  
2 country are challenged every 10 years in some  
3 way or another.

4           What -- what would make the system  
5 work better is if people could bring a  
6 challenge to what they actually think is wrong  
7 with the map, which is that it's anti-  
8 democratic, it decides in advance that one  
9 party is going to control the state government  
10 for 10 years and maybe for 20 years because  
11 they can replicate it at the end of the 10  
12 years and do it again.

13           That is the real problem. And I think  
14 what -- what the Court needs to know is it's --  
15 this is a cusp of a really serious, more  
16 serious problem as gerrymandering becomes more  
17 sophisticated with computers and data analytics  
18 and a -- and an electorate that is very  
19 polarized and more predictable than it's ever  
20 been before. If you let this go, if you say  
21 this is -- we're not going to have a judicial  
22 remedy for this problem, in 2020, you're going  
23 to have a festival of copycat gerrymandering  
24 the likes of which this country has never seen.

25           And it may be that you can protect the



1 Court from seeming political, but the country  
2 is going to lose faith in democracy big time  
3 because voters are going to be like --  
4 everywhere are going to be like the voters in  
5 Wisconsin and, no, it really doesn't matter  
6 whether I vote.

7 JUSTICE ALITO: Well, Mr. Smith --

8 CHIEF JUSTICE ROBERTS: No, but you're  
9 going to take these -- the whole point is  
10 you're taking these issues away from democracy  
11 and you're throwing them into the courts  
12 pursuant to, and it may be simply my  
13 educational background, but I can only describe  
14 as sociological gobbledygook.

15 MR. SMITH: Your Honor, this is --  
16 this is not complicated. It is a measure of  
17 how unfair the map is. How much burden can the  
18 party --

19 JUSTICE BREYER: Can you say this?  
20 Look, don't agree with me just because it  
21 sounds favorable, because he won't in two  
22 minutes. Can you answer the Chief Justice's  
23 question and say the reason they lost is  
24 because if party A wins a majority of votes,  
25 party A controls the legislature. That seems

1 fair.

2 And if party A loses a majority of  
3 votes, it still controls the legislature. That  
4 doesn't seem fair. And can we say that without  
5 going into what I agree is pretty good  
6 gobbledygook?

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: And if you  
9 need a convenient label for that approach, you  
10 can call it proportional representation, which  
11 has never been accepted as a political  
12 principle in the history of this country.

13 MR. SMITH: Your Honor, we are not  
14 arguing for proportional representation. We  
15 are arguing for partisan symmetry, a map which  
16 within rough bounds at least treats the two  
17 parties relatively equal in terms of their  
18 ability to translate votes into seats.  
19 That's --

20 CHIEF JUSTICE ROBERTS: That sounds  
21 exactly like proportional representation to me.

22 MR. SMITH: Proportional  
23 representation is when you give the same  
24 percentage of seats as they have in percentage  
25 of votes. That's what proportional

1 representation means. And our -- our claim  
2 simply doesn't remotely do that. It says if  
3 party A at 54 percent gets 58 percent of the  
4 seats, party B when it gets 54 percent ought to  
5 get 58 percent of the seats. That's symmetry.

6 That's what the political scientists  
7 say is the right way to think about a map that  
8 does not distort the outcome and put a thumb on  
9 the scale. Now what --

10 JUSTICE ALITO: Mr. Smith, can I just  
11 say something -- ask you a question about the  
12 political science? I mean, I -- gerrymandering  
13 is distasteful. But if we are going to impose  
14 a standard on the courts, it has to be  
15 something that's manageable and it has to be  
16 something that's sufficiently concrete so that  
17 the public reaction to decisions is not going  
18 to be the one that the Chief Justice mentioned,  
19 that this three-judge court decided this, that  
20 -- this way because two of the three were  
21 appointed by a Republican president or two of  
22 the three were appointed by a Democratic  
23 president.

24 Now, it's been 30 years since  
25 Bandemer, and before then and since then,

1 judges, scholars, legal scholars, political  
2 scientists have been looking for a manageable  
3 standard. All right.

4 In 2014, a young researcher publishes  
5 a paper, Eric McGhee publishes a paper, in  
6 which he says that the measures that were  
7 previously -- the leading measures previously,  
8 symmetry and responsiveness, are inadequate.  
9 But I have discovered the key. I have  
10 discovered the Rosetta stone and it's -- it is  
11 the efficiency gap.

12 And then a year later you bring this  
13 suit and you say: There it is, that is the  
14 constitutional standard. It's been finally --  
15 after 200 years, it's been finally discovered  
16 in this paper by a young researcher, who  
17 concludes in the end -- this is the end of his  
18 paper -- after saying symmetry and  
19 responsiveness have shown to be -- looked to be  
20 inappropriate, "The measure I have offered  
21 here, relative wasted votes, is arguably" --  
22 arguably -- "a more valid and flexible measure  
23 of -- of partisan -- of partisan  
24 gerrymandering."

25 Now, is this -- is this the time for

1 us to jump into this? Has there been a great  
2 body of scholarship that has tested this  
3 efficiency gap? It's full of questions.  
4 Mr. McGhee's own amicus brief outlines numerous  
5 unanswered questions with -- with this theory.

6 What do you do in -- in elections that  
7 are not contested? Well, then you have to --  
8 you have to make two guesses. How many people  
9 would have voted for the winning candidate if  
10 it had been a contested election? How many  
11 people would have voted for the losing  
12 candidate if it had been a contested election?

13 One of the judges in the court below  
14 asks: Why do you calculate EG by map, by  
15 subtracting from the votes obtained by the  
16 winner, 50 percent of the votes, instead of the  
17 votes obtained by the runner up? And  
18 Mr. McGhee says: Well, I have an answer to  
19 this, and I have a forthcoming paper and I'll  
20 answer it in the forthcoming paper.

21 (Laughter.)

22 JUSTICE ALITO: And there are all of  
23 these questions. This is -- 2017 is the time  
24 to jump into this? That's a question.

25 MR. SMITH: Is there a question there,

1 Your Honor?

2 JUSTICE ALITO: Yeah, there is a  
3 question there. There are about 10 of them.

4 (Laughter.)

5 MR. SMITH: I would say this if I  
6 might, Justice Alito. In Vieth, the Court  
7 appropriately laid down a challenge and said if  
8 you want us to do this, you've got to give us a  
9 lot more than you've given us. You've got to  
10 give us two things, a substantive definition of  
11 fairness and a way to measure it so we can  
12 limit judicial intervention to the really  
13 serious cases, and so we won't have the Court  
14 entering into the political fray all the time,  
15 but we'll have standards that say you go this  
16 far, we're going to go -- we're going to go  
17 after you, but in the meantime, anything less  
18 serious than that, we're going to leave to the  
19 political branches.

20 And so the social scientists stepped  
21 up and said we have three different ways to  
22 calculate asymmetry, not just one: the  
23 median-mean measure; the partisan bias measure,  
24 where you're equalizing to 50/50; and the --  
25 the efficiency gap. And in this case, they all

1     come to the exact same conclusion that this is  
2     one of the most extreme gerrymanders ever drawn  
3     in -- in living memory of the United States,  
4     one of the five worst out of the 230 maps that  
5     Professor Jackman studied.

6             And so there is no -- there's no  
7     question here about this being the --  
8     maximizing one party control as far as they  
9     could go. As Justice Sotomayor was saying,  
10    they pushed the limits and pushed the limits  
11    and pushed the limits. And it --

12            JUSTICE KAGAN: Mr. Smith, may I --  
13    I'm sorry. Please.

14            MR. SMITH: Please go ahead, Your  
15    Honor.

16            JUSTICE KAGAN: I -- I think that this  
17    symmetry idea is both an intuitive and an  
18    attractive principle. So, if the first  
19    question was do you have a substantive  
20    principle, I actually think you do.

21            The second question is, is there  
22    ways -- are there ways to make sure that not  
23    every district is subject to challenge as  
24    violating that principle? And so I'd like to  
25    hear you talk about that.

1           How is it that we are not going to  
2           create a world in which in every district  
3           somebody can come in and say: A-ha, there's  
4           been a violation of partisan symmetry; we're  
5           entitled to a redrawn map?

6           What's the threshold? Where do you  
7           draw the line?

8           MR. SMITH: Well, the --

9           JUSTICE KAGAN: Because this -- this  
10          -- it seems to me that this map goes over  
11          pretty much every line you can name.

12          MR. SMITH: That's true.

13          JUSTICE KAGAN: But where do you draw  
14          the line in another case and another case?

15          MR. SMITH: Well, Justice Kagan, the  
16          great virtue of these three different measures,  
17          none of which were presented to the Court in  
18          Vieth when I argued the Vieth case -- and I  
19          didn't do a very good job -- is that they each  
20          allow you to assign a number to each  
21          gerrymander and that allows you to compare them  
22          across the country and back in history. And,  
23          therefore, it is possible to draw a line.

24          Now, in addition to just measuring the  
25          degree of asymmetry, the other thing that's



1 important to do is to measure the likelihood of  
2 durability of that asymmetry. And you do that  
3 with the sensitivity testing so you make sure  
4 you don't have the kind of map that, with a  
5 small swing of voting over the next decade, is  
6 going to flip over, as the map in Pennsylvania  
7 in Vieth actually did. That -- if we had the  
8 right tests, the ones that I'm now presenting  
9 to you, we wouldn't have won that case in -- in  
10 2004.

11 But this map is never going to flip  
12 over. The evidence is unequivocal that the  
13 Democrats would have to have an earthquake of  
14 unprecedented proportions to even have a chance  
15 to get up to 50 votes out of 99.

16 CHIEF JUSTICE ROBERTS: All of those  
17 predictions -- I mean, Bandemer predicted the  
18 Democrats would never be able to attain a  
19 majority. It was 50/50 the next election, and  
20 they got a majority the one after that. You  
21 already mentioned Vieth. It was five days,  
22 right, after the District Court said, oh, the  
23 -- I forget who it was -- Republicans are never  
24 going to get elected. And they won every  
25 single race. Predicting on the basis of the

1 statistics that are before us has been a very  
2 hazardous enterprise.

3 MR. SMITH: The technique of  
4 sensitivity testing, which was done by the  
5 Defendants' expert in the -- in the process of  
6 drawing the map to make sure that they were  
7 drawing a permanent, non-flippable gerrymander,  
8 and then done again by the experts for the  
9 Plaintiffs in this case in court and tested by  
10 the court, is a -- a method by which you  
11 identify one thing about the map: Does it have  
12 a lot of swing districts in it, a lot of  
13 competitive districts in it? Because if it  
14 does, you can have a map that looks very biased  
15 in one year when all those districts go one  
16 way, but it might flip over. That was  
17 Bandemer. That was Vieth.

18 That is not this case. They spent  
19 their entire time in that -- those four months  
20 in that locked room doing two things, trying to  
21 maximize the amount of bias and eliminating  
22 systematically competitive districts, reducing  
23 it down to something less than 10 when it had  
24 been up around 20, and then even though those  
25 10, they tinkered with it and tinkered with it

1 to make sure that even of that 10, they thought  
2 they could get at least seven. They ended up  
3 getting eight and then eventually all 10.

4 CHIEF JUSTICE ROBERTS: Mr. Smith, I'm  
5 --

6 JUSTICE KAGAN: So are you suggesting  
7 that we should be looking for outliers or are  
8 you suggesting that we should be trying to  
9 filter out all manner of partisan  
10 consideration, or is it someplace in between?

11 MR. SMITH: Your Honor, the word  
12 "outlier" is probably an appropriate one.  
13 Certainly, we don't think -- and we've followed  
14 the lead of this Court in Justice Kennedy's  
15 concurrence and other decisions of this Court  
16 -- that all partisanship is unconstitutional.

17 What you need is a method by which the  
18 extreme gerrymander, the one that is  
19 fundamentally anti-democratic and is going to  
20 last for the full decade, can be identified and  
21 -- and held unconstitutional. And that --  
22 that's the only thing we're asking you to do  
23 here.

24 JUSTICE GORSUCH: So, Mr. Smith, what  
25 is the formula that achieves that? Because the

1 court below didn't rely on efficiency gap  
2 entirely. It looked also at the partisan  
3 symmetry test. It reminds me a little bit of  
4 my steak rub. I like some turmeric, I like a  
5 few other little ingredients, but I'm not going  
6 to tell you how much of each.

7 And so what's this Court supposed to  
8 do? A pinch of this, a pinch of that? Or are  
9 we supposed to actually specify it's going to  
10 be the Chief Justice's formula of the  
11 efficiency gap of 7 percent for the country?  
12 Is that what you're asking us to do? What is  
13 it that you want us to constitutionalize?

14 MR. SMITH: Well, Your Honor, the  
15 first thing I want to make clear is -- is that  
16 symmetry is what's being measured by the  
17 efficiency gap, by the other two tests that I  
18 mentioned. Symmetry is the underlying  
19 substantive --

20 JUSTICE GORSUCH: Well, but there are  
21 different tests for measuring symmetry --

22 MR. SMITH: Right.

23 JUSTICE GORSUCH: -- right?

24 MR. SMITH: Right. There are.

25 JUSTICE GORSUCH: There is the test

1 you previously proposed. Now there is the  
2 efficiency gap test. And the Court relied on  
3 both and said a little bit -- a pinch this and  
4 a pinch of that --

5 MR. SMITH: Right.

6 JUSTICE GORSUCH: -- and we're not  
7 telling you how much of each. So --

8 MR. SMITH: Well, I think it's fair --

9 JUSTICE GORSUCH: -- so that doesn't  
10 seem very fair to the states to me, to -- to --  
11 to know how to -- what they're supposed to do  
12 to avoid the kind of litigation we're talking  
13 about. As I understand the efficiency gap test  
14 itself, and tell me if I'm wrong, that it would  
15 yield about a third of all the districts in the  
16 country winding up in court.

17 MR. SMITH: Not true. Not true.

18 JUSTICE GORSUCH: Now, that's what the  
19 other side says. So tell me where that's wrong  
20 and tell me what test you'd have this Court  
21 adopt.

22 MR. SMITH: Well, first of all, I -- I  
23 would go with the -- the screens that Justice  
24 Breyer mentioned, the first one being it has to  
25 be a one-party state. That one-third figure

1 they keep throwing around ignores the fact that  
2 a number of those maps were drawn either by  
3 commissions or by courts or by divided  
4 legislatures.

5 And so they get -- those all get taken  
6 off the table from the very beginning. If you  
7 have a one-party state, you then have to  
8 measure whether it's unusually asymmetrical,  
9 pretty extreme, and we --

10 JUSTICE GORSUCH: How? I am still  
11 stuck on Justice Breyer's question.

12 MR. SMITH: You can use the -- you can  
13 use any of those three tests that were all  
14 applied here.

15 JUSTICE GORSUCH: Any of them?

16 MR. SMITH: Yes.

17 JUSTICE GORSUCH: Any -- any of the  
18 three?

19 MR. SMITH: And if they don't -- I --  
20 I would suggest you apply all of them, and --

21 JUSTICE GORSUCH: All of them?

22 MR. SMITH: -- if they disagree, that  
23 would -- that would tell you maybe this isn't  
24 the right case to be holding something  
25 unconstitutional. That might be a fly in the

1 ointment. But the court below did not set the  
2 --

3 JUSTICE ALITO: Excuse me. Isn't it  
4 true that --

5 MR. SMITH: -- the line -- I'm sorry.

6 JUSTICE ALITO: Just on that, isn't it  
7 true that you could -- you can get very high  
8 levels of -- very high EG based on factors that  
9 have nothing to do with gerrymandering? The --  
10 the political geography can lead to it;  
11 protection of incumbents, which has been said  
12 to be a legitimate factor, can lead to a high  
13 EG; compliance with the Voting Rights Act can  
14 affect that?

15 MR. SMITH: Certainly, there are  
16 various factors that -- that -- other than  
17 partisan bias that can lead you to draw a map  
18 that does not have a zero EG.

19 In our test, with the intents  
20 requirement, the effects requirement, and the  
21 justification requirement, all of those  
22 problems are taken care of either at the intent  
23 stage or at the justification stage.

24 JUSTICE ALITO: How are they taken  
25 care of at the justification stage? The

1 proposal is to run many -- you know, millions  
2 of -- of alternative maps to see whether using  
3 some traditional districting requirements, you  
4 can produce a map that has a lower -- a lower  
5 EG. But my understanding is that when that's  
6 done, those maps do not take into account  
7 either incumbent protection or compliance with  
8 the Voting Rights Act, both of which can have a  
9 very big effect. It's just one of the dozens  
10 of uncertainties about this whole process.

11 MR. SMITH: Actually, they do -- they  
12 do take into account the Voting Rights Act.  
13 The Chen study that was discussed in one of the  
14 amicus briefs and is discussed somewhat in the  
15 merits briefs here, where they -- he produced  
16 200 randomly generated maps of Wisconsin using  
17 all the state's traditional criteria, he  
18 started with the minority districts that were  
19 already drawn by the state in Act 43 and kept  
20 those in place.

21 And so then he generated -- randomly  
22 generated maps, and he found that the degree of  
23 bias created by the political geography in  
24 Wisconsin is minute, modest, a little bit,  
25 something -- just like what the District Court



1 found, maybe 1 or 2 percent, not even remotely  
2 like what they have in the map. And so --

3 JUSTICE KAGAN: Would it be fair to  
4 require plaintiffs to provide those maps, many,  
5 many of them, so that one can tell whether the  
6 actual map is an outlier?

7 MR. SMITH: Well, I think in -- in the  
8 cases going forward after this -- these  
9 technologies are there, they will be in the  
10 record in almost every case. It has become the  
11 state of the art.

12 Whether it ought to be something that  
13 the plaintiffs have to produce as part of their  
14 initial case, I'd have to think about it. It  
15 certainly could be done that way.

16 There are -- as the Lander brief and  
17 the -- and a couple of other briefs and -- and  
18 the -- the political geographers' brief all  
19 show, people who have developed a capacity for  
20 generating random maps that teach you a lot of  
21 lessons about the effects of neutral criteria  
22 -- of where people live and allow you to say  
23 that has nothing to do with the degree of bias  
24 that we have here. And I think it will become  
25 a part of how these cases are decided at the

1 justification stage. It may also become  
2 evidence of intent or of -- of how severe the  
3 effects are.

4 It can be useful in a whole variety of  
5 ways. Now that, again, social science has  
6 stepped up to the challenge.

7 JUSTICE KAGAN: So, for an example,  
8 that becomes a way to filter out the effects of  
9 geography from the effects of partisan  
10 advantage?

11 MR. SMITH: Yes, Your Honor. I would  
12 say that at the remedy stage, if they -- if  
13 they come back with a remedy map that matches  
14 the sort of neutral geography, even if it's  
15 somewhat favorable to the -- the party that's  
16 in charge, that should be okay. They don't  
17 have to go to zero just to -- at the remedy  
18 stage, but they have to come up with something  
19 much less extreme than their intentional  
20 gerrymandering, one that basically makes  
21 democracy no longer function because,  
22 basically, gerrymanders now are not your  
23 father's gerrymander. These are going to be  
24 really serious incursions on democracy if this  
25 Court doesn't do something. And this is really

1 the last opportunity before we see this huge  
2 festival of new extreme gerrymanders all done  
3 along the model of Wisconsin but probably even  
4 more serious.

5 I -- I would commend the political  
6 scientists' brief, which talk about the  
7 revolution in data analytics that has happened  
8 since this map was drawn. You're going to see  
9 people coming in and -- and slicing and dicing  
10 a very polarized electorate to the point where  
11 one -- one-party control will be guaranteed.  
12 That's going to become the norm. Indeed, in  
13 any one-party state, if you don't do it that  
14 way, they're going to say, you know, that's  
15 malpractice. Why aren't you doing what  
16 Wisconsin did?

17 JUSTICE GINSBURG: Mr. Smith, will you  
18 clarify what you mean by one-party state?  
19 Here, we know that the maps were drawn by the  
20 Republicans and every -- everybody else was  
21 excluded, even some Republicans were excluded.

22 But suppose the legislature has a  
23 Republican majority, but there are Democrats,  
24 say it's 60/40, 40 percent Democrat, and the  
25 redistricting is done by the legislature. Does

1 -- does that count? Would you count that as  
2 one party?

3 MR. SMITH: I do, Your Honor. I think  
4 if there's a majority, one party has a majority  
5 in both houses of the legislature and the  
6 governorship, the fact that there -- there are  
7 some representatives of the other party in a  
8 minority status would not negate the  
9 possibility that the thing was --

10 JUSTICE GORSUCH: Mr. Smith, is that a  
11 -- is that a republican form of government  
12 claim?

13 MR. SMITH: I think it's a First  
14 Amendment claim and an equal protection claim.  
15 I -- I'm not going to try to revive the  
16 republican form of government clause at this  
17 late stage of --

18 JUSTICE GORSUCH: Isn't that -- isn't  
19 that exactly what you're trying to do, though?

20 MR. SMITH: No.

21 JUSTICE GORSUCH: You're saying it's a  
22 one-party rule and that would violate a  
23 republican form of government guarantee.  
24 Wouldn't that be the more specific  
25 constitutional provision to look to, rather

1 than the generic equal protection clause?

2 MR. SMITH: Well, I --

3 JUSTICE GORSUCH: For that matter,  
4 maybe we can just for a second talk about the  
5 arcane matter, the Constitution.

6 And where exactly do we get authority  
7 to revise state legislative lines? When --  
8 when the Constitution authorizes the federal  
9 government to step in on state -- state  
10 legislative matters, it's pretty clear. If you  
11 look at the Fifteenth Amendment, you look at  
12 the Nineteenth Amendment, the Twenty-Sixth  
13 Amendment, and even the Fourteenth Amendment,  
14 Section 2, says Congress has the power, when  
15 state legislators don't provide the right to  
16 vote equally, to dilute congressional  
17 representation. Aren't those all textual  
18 indications in the Constitution itself that  
19 maybe we ought to be cautious about stepping in  
20 here?

21 MR. SMITH: Well, I don't think  
22 there's anything unusual about using the First  
23 Amendment and the Fourteenth Amendment to  
24 regulate the abusive management of state  
25 elections by state government. That's what the

1 Court has been doing.

2 JUSTICE GINSBURG: Where did  
3 one-person/one-vote come from?

4 MR. SMITH: That's what Reynolds  
5 versus Sims and Baker versus Carr did and a  
6 number of other cases that have followed along  
7 since. And the fact that Congress could  
8 conceivably regulate this problem under the  
9 Fourteenth Amendment does not mean that the  
10 Court should not.

11 There's a number of cases, the term  
12 limits case, Cook versus Gralike, where  
13 Congress could have used the elections clause  
14 to fix a problem, but the Court said, well, in  
15 the absence of Congressional action, we're --  
16 we're going to regulate an abusive, a misuse of  
17 the power to run federal elections, and in this  
18 case, it's state elections, you'd have to rely  
19 on, Congress would have to rely on Section 5 of  
20 the Fourteenth Amendment, and maybe they could  
21 in theory, but this is a problem which --

22 JUSTICE GORSUCH: Do you see any  
23 impediment to Congress acting in this this  
24 area?

25 MR. SMITH: Other than the fact that

1 politicians are never going to fix  
2 gerrymandering. They like gerrymandering.

3 (Laughter.)

4 MR. SMITH: This is -- the problem in  
5 this area is if you don't do it, it's locked  
6 up. The voters of Wisconsin can't get it on  
7 the ballot without the legislature's consent.  
8 And that's true in most of the states that  
9 don't have commissions now.

10 And so you have -- we're here telling  
11 you you are the only institution in the United  
12 States that can do -- that can solve this  
13 problem just as democracy is about to get worse  
14 because of the way gerrymandering is getting so  
15 much worse.

16 JUSTICE ALITO: You -- you paint a  
17 very dire picture about gerrymandering and its  
18 effects, but I was struck by something in the  
19 seminal article by your expert, Mr. McGhee, and  
20 he says there, "I show that the effects of  
21 party control on bias are small and decay  
22 rapidly, suggesting that redistricting is at  
23 best a blunt tool for promoting partisan  
24 interests."

25 So he was wrong in that. He's right

1 with the EG. That's the Rosetta Stone, but  
2 he's wrong in that.

3 MR. SMITH: Your Honor, I'd have to  
4 see what that sentence is saying in context.  
5 I'm quite confident Mr. McGhee does not think  
6 that redistricting is not a -- is a non-problem  
7 or that --

8 JUSTICE ALITO: Well, that's what he  
9 said.

10 MR. SMITH: -- or that gerrymandering  
11 is a non-problem. Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
13 Smith.

14 Mr. Tseytlin, you have five minutes  
15 remaining.

16 REBUTTAL ARGUMENT BY MISHA TSEYTLIN  
17 ON BEHALF OF APPELLANTS

18 MR. TSEYTLIN: I'd like to begin by  
19 answering Justice Kennedy's question.

20 A facially discriminatory law in a  
21 state would violate the First Amendment because  
22 it would stigmatize that party. This case --  
23 this Court's cases could not be clearer that  
24 when you have neutral lines -- neutrally,  
25 facially neutral lines, the question is not of



1 partisan intent, because there will always be  
2 partisan intent.

3 The question is have the Plaintiffs  
4 presented a -- a burden on representational  
5 rights based upon a limited, precise,  
6 judicially amenable standard. There has been  
7 nothing new presented to this Court.

8 Basically, what the Plaintiffs have  
9 done here is they've taken Professor King's  
10 amicus brief from LULAC, they have taken the  
11 exact same central concept, partisan asymmetry,  
12 and they've recycled it here. There is nothing  
13 new before this Court.

14 Second, we've heard something about  
15 the various tests that they're now proposing.  
16 There was only one test that was subjected to  
17 adversarial scrutiny in this case, in a  
18 four-day trial. That efficiency gap test  
19 proved so fatally flawed that the District  
20 Court rejected it as the test and Plaintiffs  
21 abandoned it as the primary test on appeal.

22 And then my final point about the  
23 scare tactics, about what will happen next.  
24 Plaintiff's expert did a comprehensive study  
25 from 1972 at the -- when the Baker

1     redistricting had happened, to 2014. And he --  
2     and you can look at that study. The chart on  
3     that study is on Supplemental Appendix 227.

4             It shows that the asymmetry was worse,  
5     was worse in 1972 than in 2014. You're always  
6     going to have scare tactics. You're always  
7     going to have partisan intent.

8             We have not had any advancement in  
9     terms of what has been presented to this Court  
10    since LULAC, where this Court properly  
11    criticized partisan asymmetry as not a neutral  
12    standard that has uniform acceptance.

13            And we are asking for those reasons  
14    for this Court to reverse the District Court.  
15    Thank you, Your Honors.

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

18            (Whereupon, at 11:03 a.m., the hearing  
19    was concluded.)

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## Official - Subject to Final Review

<b>1</b>	<b>abusive</b> [2] 60:24 61:16 <b>acceptance</b> [1] 65:12 <b>accepted</b> [1] 41:11 <b>access</b> [1] 6:22 <b>account</b> [4] 20:8 29:2 55:6,12 <b>accountability</b> [1] 29:4 <b>achieve</b> [1] 34:5 <b>achieved</b> [1] 16:16 <b>achieves</b> [1] 50:25 <b>across</b> [2] 37:17 47:22 <b>act</b> [5] 10:8 54:13 55:8,12,19 <b>acted</b> [1] 3:13 <b>acting</b> [1] 61:23 <b>action</b> [1] 61:15 <b>actual</b> [1] 56:6 <b>actually</b> [10] 14:15 16:9 26:24 28:24 29:21 39:6 46:20 48:7 51:9 55:11 <b>added</b> [1] 19:4 <b>addition</b> [1] 47:24 <b>additional</b> [1] 33:23 <b>address</b> [1] 37:5 <b>administer</b> [1] 23:20 <b>adopt</b> [1] 52:21 <b>advance</b> [2] 30:14 39:8 <b>advancement</b> [1] 65:8 <b>advantage</b> [6] 19:19 20:8 23:8 26:7 28:21 57:10 <b>adversarial</b> [1] 64:17 <b>affairs</b> [1] 13:23 <b>affect</b> [1] 54:14 <b>affected</b> [2] 11:4 32:11 <b>affects</b> [1] 32:1 <b>african</b> [4] 7:4 33:7,11,25 <b>agenda</b> [1] 32:9 <b>ago</b> [1] 7:1 <b>agree</b> [2] 40:20 41:5 <b>ahead</b> [1] 46:14 <b>airy-fairy</b> [1] 15:19 <b>al</b> [3] 1:3,6,20 <b>alito</b> [19] 8:16 18:4 20:10,16,19 21:12 31:20 32:12 33:4 40:7 42:10 44:22 45:2,6 54:3,6,24 62:16 63:8 <b>alleged</b> [1] 8:21 <b>allow</b> [2] 47:20 56:22 <b>allowed</b> [1] 37:7 <b>allowing</b> [2] 9:1,2 <b>allows</b> [1] 47:21 <b>almost</b> [2] 28:12 56:10 <b>already</b> [4] 13:19 38:20 48:21 55:19 <b>alternative</b> [1] 55:2 <b>although</b> [1] 34:10 <b>amenable</b> [1] 64:6 <b>amendment</b> [27] 4:10,14,18 5:3,4 6:14 9:8,12 26:17 27:4,10 28:1,14 35:10,15,21,24 59:14 60:11,12,13,13,23,23 61:9,20 63:21 <b>american</b> [3] 7:4 33:7,25 <b>americans</b> [1] 33:12 <b>amici</b> [1] 1:20 <b>amicus</b> [6] 2:8 13:25 18:20 44:4 55:14 64:10 <b>amount</b> [1] 49:21	<b>analogy</b> [2] 36:12,14 <b>analysis</b> [1] 24:7 <b>analytically</b> [1] 31:19 <b>analytics</b> [2] 39:17 58:7 <b>another</b> [8] 3:25 25:18 26:13 33:9 38:6 39:3 47:14,14 <b>answer</b> [10] 12:3 21:12 22:11 24:3 27:20 37:22 38:14 40:22 44:18,20 <b>answered</b> [1] 26:15 <b>answering</b> [1] 63:19 <b>answers</b> [1] 22:23 <b>anti</b> [1] 39:7 <b>anti-democratic</b> [1] 50:19 <b>anxious</b> [1] 10:21 <b>anybody</b> [2] 33:2 35:22 <b>appeal</b> [1] 64:21 <b>appearances</b> [1] 1:16 <b>appellants</b> [6] 1:4,18 2:4,14 3:8 63:17 <b>appellees</b> [4] 1:7,22 2:11 30:3 <b>appendix</b> [3] 7:19 35:8 65:3 <b>applied</b> [1] 53:14 <b>apply</b> [1] 53:20 <b>appointed</b> [2] 42:21,22 <b>apportionment</b> [1] 35:16 <b>approach</b> [1] 41:9 <b>appropriate</b> [2] 23:12 50:12 <b>appropriately</b> [2] 33:20 45:7 <b>arcane</b> [1] 60:5 <b>area</b> [3] 32:11 61:24 62:5 <b>areas</b> [1] 21:3 <b>aren't</b> [2] 58:15 60:17 <b>arg</b> [1] 14:11 <b>arguably</b> [2] 43:21,22 <b>argue</b> [1] 5:6 <b>argued</b> [1] 47:18 <b>arguing</b> [2] 41:14,15 <b>argument</b> [15] 1:13 2:2,5,9,12 3:4,7 4:6 5:9 9:13 18:19 30:2 31:1 35:24 63:16 <b>arise</b> [2] 35:10,16 <b>around</b> [3] 37:8 49:24 53:1 <b>arresting</b> [1] 30:18 <b>art</b> [1] 56:11 <b>article</b> [1] 62:19 <b>asks</b> [1] 44:14 <b>aspects</b> [1] 13:18 <b>assembly</b> [2] 10:12 30:7 <b>assign</b> [1] 47:20 <b>associate</b> [1] 4:23 <b>association</b> [3] 5:11,12 33:16 <b>assume</b> [5] 4:8 6:3 8:17 27:19 33:24 <b>asymmetrical</b> [1] 53:8 <b>asymmetry</b> [12] 8:10 12:6,16,22 17:1 23:12 45:22 47:25 48:2 64:11 65:4,11 <b>attack</b> [1] 31:10 <b>attain</b> [1] 48:18 <b>attempt</b> [2] 7:3 19:24 <b>attempting</b> [1] 32:8 <b>attractive</b> [1] 46:18 <b>authority</b> [1] 60:6 <b>authorizes</b> [1] 60:8	<b>automatically</b> [1] 23:10 <b>available</b> [1] 7:19 <b>avoid</b> [2] 22:13 52:12 <b>away</b> [1] 40:10
<b>2</b>	<b>2</b> [4] 33:19 38:24 56:1 60:14 <b>20</b> [2] 39:10 49:24 <b>200</b> [2] 43:15 55:16 <b>2004</b> [1] 48:10 <b>2014</b> [3] 43:4 65:1,5 <b>2017</b> [2] 1:10 44:23 <b>2020</b> [1] 39:22 <b>227</b> [1] 65:3 <b>230</b> [1] 46:4 <b>235</b> [1] 7:19		<b>B</b>
<b>3</b>	<b>3</b> [3] 1:10 2:4 12:15 <b>30</b> [4] 2:11 7:21 11:15 42:24		<b>back</b> [7] 17:12,16 18:4 22:9 27:11 47:22 57:13 <b>background</b> [1] 40:13 <b>bad</b> [1] 13:2 <b>baker</b> [2] 61:5 64:25 <b>balance</b> [2] 18:15 34:13 <b>ballot</b> [1] 62:7 <b>baloney</b> [1] 38:3 <b>bandemer</b> [5] 17:7,10 42:25 48:17 49:17 <b>based</b> [6] 3:21 6:23 8:14 38:15 54:8 64:5 <b>basic</b> [1] 23:10 <b>basically</b> [3] 57:20,22 64:8 <b>basis</b> [1] 48:25 <b>battles</b> [2] 3:21 14:6 <b>bears</b> [1] 7:6 <b>become</b> [5] 15:9 56:10,24 57:1 58:12 <b>becomes</b> [4] 19:1 24:24 39:16 57:8 <b>begin</b> [1] 63:18 <b>beginning</b> [1] 53:6 <b>behalf</b> [8] 1:18,22 2:4,11,14 3:8 30:3 63:17 <b>behind</b> [1] 24:16 <b>below</b> [3] 44:13 51:1 54:1 <b>best</b> [1] 62:23 <b>better</b> [3] 16:18 27:23 39:5 <b>between</b> [3] 23:7 33:17 50:10 <b>beverly</b> [1] 1:3 <b>beyond</b> [1] 21:4 <b>bias</b> [6] 45:23 49:21 54:17 55:23 56:23 62:21 <b>biased</b> [2] 30:13 49:14 <b>big</b> [2] 40:2 55:9 <b>bipartisan</b> [2] 7:25 12:4 <b>bit</b> [6] 13:20 22:16,17 51:3 52:3 55:24 <b>blunt</b> [1] 62:23 <b>board</b> [1] 37:17 <b>body</b> [2] 30:15 44:2 <b>both</b> [4] 46:17 52:3 55:8 59:5 <b>bounds</b> [1] 41:16 <b>branches</b> [1] 45:19 <b>breyer</b> [3] 11:8 40:19 52:24 <b>breyer's</b> [4] 22:10,22 28:23 53:11 <b>brief</b> [7] 12:23 13:25 44:4 56:16,18 58:6 64:10 <b>briefly</b> [1] 30:17 <b>briefs</b> [4] 11:17 55:14,15 56:17 <b>bring</b> [4] 27:17 35:23 39:5 43:12 <b>brought</b> [2] 38:7,20 <b>buildings</b> [1] 11:4 <b>bunch</b> [1] 38:3 <b>burden</b> [2] 40:17 64:4 <b>burdening</b> [1] 35:17
<b>4</b>	<b>40</b> [1] 58:24 <b>43</b> [2] 10:8 55:19 <b>48</b> [2] 12:9,17 <b>49</b> [2] 12:18 25:21		
<b>5</b>	<b>5</b> [1] 61:19 <b>50</b> [4] 12:18 23:4 44:16 48:15 <b>50/50</b> [3] 30:11 45:24 48:19 <b>51</b> [1] 12:18 <b>54</b> [2] 42:3,4 <b>58</b> [2] 42:3,5		
<b>6</b>	<b>60/40</b> [1] 58:24 <b>60s</b> [1] 36:25 <b>63</b> [1] 2:14		
<b>7</b>	<b>7</b> [4] 22:19 37:23 38:16 51:11		
<b>8</b>	<b>86-a</b> [1] 35:7		
<b>9</b>	<b>99</b> [2] 25:21 48:15		
<b>A</b>	<b>a-ha</b> [1] 47:3 <b>a.m</b> [3] 1:14 3:2 65:18 <b>abandon</b> [1] 19:18 <b>abandoned</b> [1] 64:21 <b>ability</b> [1] 41:18 <b>able</b> [5] 10:11 23:20 31:3 35:23 48:18 <b>above-entitled</b> [1] 1:12 <b>absence</b> [2] 33:22 61:15 <b>absolutely</b> [1] 21:16		

## Official - Subject to Final Review

C			
<p><b>calculate</b> [2] 44:14 45:22  <b>calculations</b> [1] 26:9  <b>calculus</b> [1] 4:12  <b>california</b> [1] 9:21  <b>call</b> [2] 12:12 41:10  <b>came</b> [1] 1:12  <b>campaign</b> [1] 10:12  <b>campaigning</b> [1] 33:1  <b>candidate</b> [10] 8:24 9:9,15,19,20, 22 31:25 34:10 44:9,12  <b>candidate's</b> [1] 9:1  <b>candidates</b> [1] 34:15  <b>cannot</b> [4] 6:16 18:14 20:12,19  <b>capable</b> [1] 14:15  <b>capacity</b> [1] 56:19  <b>care</b> [2] 54:22,25  <b>careful</b> [1] 6:7  <b>carr</b> [1] 61:5  <b>carry</b> [1] 32:8  <b>case</b> [33] 3:4 4:4 6:17 10:6 11:10 12:5 15:6 17:3 22:13 24:1 25:20 30:10 31:19 36:4,10,12 37:15 38:6 45:25 47:14,14,18 48:9 49:9,18 53:24 56:10,14 61:12,18 63:22 64:17 65:17  <b>cases</b> [11] 17:5 21:7 37:12 38:7,25 45:13 56:8,25 61:6,11 63:23  <b>cause</b> [1] 38:8  <b>cautious</b> [1] 60:19  <b>central</b> [1] 64:11  <b>certain</b> [5] 7:6 11:4 15:1 21:19 23:16  <b>certainly</b> [11] 9:14,18,25 21:14 23:25 29:15 34:24 36:13 50:13 54:15 56:15  <b>challenge</b> [10] 5:5,14 9:8 36:6,22, 23 39:6 45:7 46:23 57:6  <b>challenged</b> [3] 38:21,22 39:2  <b>challenges</b> [3] 3:25 4:2 38:20  <b>chance</b> [1] 48:14  <b>chances</b> [1] 18:8  <b>change</b> [1] 4:12  <b>changed</b> [1] 14:18  <b>charge</b> [1] 57:16  <b>chart</b> [2] 7:17 65:2  <b>chen</b> [1] 55:13  <b>chief</b> [27] 3:3,9 5:8,21 9:24 18:16, 21 29:24 30:4,16 31:5,21 34:7,17 36:1 37:1 38:13 40:8,22 41:8,20 42:18 48:16 50:4 51:10 63:12 65:16  <b>choice</b> [1] 25:2  <b>circumstance</b> [1] 5:4  <b>citizen</b> [1] 25:1  <b>claim</b> [16] 5:16,17 6:19,23 30:19, 23 31:9,10 33:19 35:5,10 37:6 42:1 59:12,14,14  <b>claims</b> [5] 6:11,12 30:24 37:8,10  <b>clarify</b> [1] 58:18  <b>classification</b> [1] 7:15  <b>clause</b> [3] 59:16 60:1 61:13  <b>clear</b> [2] 51:15 60:10</p>	<p><b>clearer</b> [1] 63:23  <b>closely</b> [1] 19:11  <b>closer</b> [2] 19:20 36:24  <b>colleagues</b> [2] 8:20 37:3  <b>collective</b> [2] 34:1,5  <b>come</b> [10] 25:3,18 27:9 37:11 38:6 46:1 47:3 57:13,18 61:3  <b>comes</b> [2] 27:11 35:5  <b>coming</b> [2] 5:7 58:9  <b>commend</b> [1] 58:5  <b>commission</b> [1] 12:4  <b>commission-drawn</b> [1] 7:25  <b>commissions</b> [3] 8:9 53:3 62:9  <b>communities</b> [2] 26:11,11  <b>compare</b> [1] 47:21  <b>compared</b> [1] 13:2  <b>competitive</b> [2] 49:13,22  <b>complain</b> [4] 30:21 31:4 32:4 33:8  <b>compliance</b> [2] 54:13 55:7  <b>complicated</b> [3] 11:21 12:12 40:16  <b>complied</b> [4] 17:8,15,25 18:2  <b>comply</b> [5] 23:6 24:9,13 26:22 28:15  <b>complying</b> [1] 20:6  <b>composed</b> [1] 3:15  <b>comprehensive</b> [1] 64:24  <b>computer</b> [2] 11:12,23  <b>computers</b> [2] 17:19 39:17  <b>concede</b> [1] 28:13  <b>conceivably</b> [1] 61:8  <b>concept</b> [3] 23:9 27:9 64:11  <b>concern</b> [1] 19:13  <b>concerned</b> [1] 25:5  <b>concerns</b> [2] 35:10,16  <b>concisely</b> [1] 37:3  <b>concluded</b> [1] 65:19  <b>concludes</b> [1] 43:17  <b>conclusion</b> [2] 26:1 46:1  <b>concrete</b> [1] 42:16  <b>concurrence</b> [2] 35:6 50:15  <b>concurring</b> [1] 21:25  <b>confident</b> [1] 63:5  <b>confines</b> [1] 5:19  <b>conform</b> [1] 19:12  <b>congress</b> [8] 4:24 5:1,7 60:14 61:7,13,19,23  <b>congressional</b> [2] 60:16 61:15  <b>conjunctural</b> [1] 13:23  <b>conjecture</b> [2] 15:16 18:13  <b>consent</b> [1] 62:7  <b>consideration</b> [1] 50:10  <b>considered</b> [1] 19:9  <b>considering</b> [1] 22:1  <b>constitution</b> [10] 19:1,10 20:3 26:21,25 27:14 38:17 60:5,8,18  <b>constitutional</b> [9] 6:14 17:24 20:9 23:19 26:16 28:14 31:8 43:14 59:25  <b>constitutionalize</b> [1] 51:13  <b>constraints</b> [1] 24:12  <b>contested</b> [4] 25:23 44:7,10,12  <b>context</b> [2] 35:14 63:4  <b>contexts</b> [1] 21:23</p>	<p><b>contiguous</b> [1] 19:24  <b>continue</b> [1] 30:7  <b>control</b> [6] 12:2 30:14 39:9 46:8 58:11 62:21  <b>controlled</b> [1] 32:15  <b>controls</b> [2] 40:25 41:3  <b>convenient</b> [1] 41:9  <b>conveniently</b> [1] 19:6  <b>convinced</b> [1] 23:22  <b>cook</b> [1] 61:12  <b>copycat</b> [1] 39:23  <b>correct</b> [1] 17:18  <b>correlated</b> [1] 6:10  <b>counsel</b> [3] 18:17 29:25 65:17  <b>count</b> [2] 59:1,1  <b>country</b> [11] 6:10 13:3 37:9 38:11 39:2,24 40:1 41:12 47:22 51:11 52:16  <b>country's</b> [1] 4:20  <b>couple</b> [2] 25:6 56:17  <b>course</b> [7] 5:18,19,25 7:14 14:1 17:19 18:12  <b>court</b> [53] 1:1,13 3:10,11,22 4:7 6:6 7:1 8:2,11,13 11:11 13:24 16:10 17:6 18:22 21:24 22:16 30:5 36:20 37:19 38:4,10 39:14 40:1 42:19 44:13 45:6,13 47:17 48:22 49:9,10 50:14,15 51:1,7 52:2,16,20 54:1 55:25 57:25 61:1,10,14 64:7,13,20 65:9,10,14,14  <b>court's</b> [1] 63:23  <b>court-drawn</b> [3] 7:24 19:5 23:7  <b>courts</b> [8] 3:20,23 14:5 18:14 23:23 40:11 42:14 53:3  <b>cracked</b> [1] 33:10  <b>create</b> [2] 7:8 47:2  <b>created</b> [5] 7:18 16:11,12 17:17 55:23  <b>criteria</b> [14] 8:7 17:15 19:19,23 22:12,18,25 23:6,18,23 24:7 28:16 55:17 56:21  <b>criticized</b> [1] 65:11  <b>curiae</b> [3] 1:20 2:8 18:20  <b>curve</b> [1] 23:15  <b>cusps</b> [1] 39:15  <b>cycles</b> [1] 23:15</p>	<p>15  <b>decks</b> [2] 29:9,16  <b>deeply</b> [1] 8:17  <b>defendants'</b> [1] 49:5  <b>definition</b> [1] 45:10  <b>degree</b> [3] 47:25 55:22 56:23  <b>deliberate</b> [2] 7:3 19:24  <b>democracy</b> [7] 28:7 30:9 40:2,10 57:21,24 62:13  <b>democrat</b> [2] 32:8 58:24  <b>democratic</b> [8] 8:24 9:11 24:20 32:17,20 33:2 39:8 42:22  <b>democratic-dominated</b> [1] 10:9  <b>democrats</b> [9] 10:16 32:19 37:16, 20,21 38:5 48:13,18 58:23  <b>describe</b> [1] 40:13  <b>description</b> [2] 35:5,9  <b>designed</b> [1] 19:11  <b>determine</b> [1] 29:18  <b>determining</b> [2] 3:12 18:24  <b>developed</b> [1] 56:19  <b>dicing</b> [1] 58:9  <b>difference</b> [2] 22:8 33:17  <b>different</b> [11] 6:13 16:11,15 20:21 26:25 31:17 33:25 34:10 45:21 47:16 51:21  <b>differentiate</b> [1] 23:7  <b>differentiates</b> [1] 21:22  <b>differently</b> [1] 12:8  <b>difficult</b> [1] 21:6  <b>dilute</b> [1] 60:16  <b>diluted</b> [1] 31:3  <b>dilution</b> [4] 31:18,19 33:19 36:19  <b>dire</b> [1] 62:17  <b>direction</b> [1] 16:6  <b>directly</b> [2] 4:4 32:11  <b>disagree</b> [1] 53:22  <b>discovered</b> [3] 43:9,10,15  <b>discretionary</b> [1] 37:13  <b>discriminating</b> [2] 8:24 9:6  <b>discrimination</b> [1] 28:2  <b>discriminatory</b> [1] 63:20  <b>discussed</b> [2] 55:13,14  <b>discussing</b> [1] 17:4  <b>discussion</b> [1] 28:24  <b>disfavored</b> [2] 35:1,13  <b>dispute</b> [1] 29:15  <b>dissenting</b> [2] 21:24 28:23  <b>distasteful</b> [1] 42:13  <b>distinct</b> [1] 31:19  <b>distort</b> [1] 42:8  <b>district</b> [34] 3:14 4:20,22 5:10 6:19 8:25 9:9,10,17 10:9 22:13 24:20, 21 25:2,3 26:22 30:12,21 31:11, 13 33:23 34:13 36:5,6,7,16,17,22 46:23 47:2 48:22 55:25 64:19 65:14  <b>district-specific</b> [1] 4:1  <b>districting</b> [13] 3:19 5:15 8:6 17:9 18:3,25 22:2 24:6 25:8 26:7 27:1 28:20 55:3  <b>districts</b> [21] 7:5,8 8:8 19:11 24:13,23 25:10,14,21 26:8 28:25 33:9 34:15 36:20,24 49:12,13,15,22</p>
		<p style="text-align: center;"><b>D</b></p> <p><b>d.c</b> [3] 1:9,19,21  <b>data</b> [4] 22:21 23:15 39:17 58:7  <b>day</b> [2] 4:1 29:17  <b>days</b> [1] 48:21  <b>de</b> [3] 32:7,9,12  <b>deal</b> [1] 14:18  <b>dealt</b> [1] 7:1  <b>debate</b> [1] 20:23  <b>decade</b> [3] 30:15 48:5 50:20  <b>decay</b> [1] 62:21  <b>decide</b> [4] 3:20 23:11 32:6 37:15  <b>decided</b> [3] 4:9 42:19 56:25  <b>decides</b> [2] 30:13 39:8  <b>deciding</b> [1] 14:7  <b>decision</b> [2] 37:12,19  <b>decisions</b> [4] 26:4 38:10 42:17 50:</p>	

## Official - Subject to Final Review

<p>52:15 55:18  <b>divided</b> <sup>[1]</sup> 53:3  <b>doctrine</b> <sup>[3]</sup> 6:8 38:23,24  <b>doing</b> <sup>[6]</sup> 14:15 15:10 20:25 49:20  58:15 61:1  <b>done</b> <sup>[7]</sup> 49:4,8 55:6 56:15 58:2,25  64:9  <b>down</b> <sup>[5]</sup> 15:2 31:24 32:16 45:7 49:  23  <b>dozens</b> <sup>[1]</sup> 55:9  <b>draw</b> <sup>[9]</sup> 20:13 24:12 26:1 28:4 30:  12 47:7,13,23 54:17  <b>drawer</b> <sup>[3]</sup> 6:18,20 16:8  <b>drawers</b> <sup>[1]</sup> 17:8  <b>drawing</b> <sup>[8]</sup> 3:14 8:8,9 14:19 20:  25 26:8 49:6,7  <b>drawn</b> <sup>[10]</sup> 7:25 8:1 23:8 29:1 31:  11 46:2 53:2 55:19 58:8,19  <b>draws</b> <sup>[1]</sup> 7:23  <b>drew</b> <sup>[1]</sup> 16:9  <b>driven</b> <sup>[1]</sup> 26:10  <b>driving</b> <sup>[1]</sup> 37:9  <b>due</b> <sup>[2]</sup> 23:22 29:14  <b>durability</b> <sup>[1]</sup> 48:2  <b>durable</b> <sup>[1]</sup> 22:20  <b>during</b> <sup>[1]</sup> 10:7</p> <hr/> <p style="text-align: center;"><b>E</b></p> <p><b>each</b> <sup>[4]</sup> 47:19,20 51:6 52:7  <b>earlier</b> <sup>[1]</sup> 17:22  <b>earthquake</b> <sup>[1]</sup> 48:13  <b>easier</b> <sup>[1]</sup> 29:1  <b>easiest</b> <sup>[1]</sup> 7:16  <b>easily</b> <sup>[1]</sup> 14:15  <b>easy</b> <sup>[1]</sup> 21:7  <b>educational</b> <sup>[1]</sup> 40:13  <b>effect</b> <sup>[5]</sup> 21:19 32:7 35:12,17 55:9  <b>effective</b> <sup>[1]</sup> 32:17  <b>effectively</b> <sup>[3]</sup> 30:8,13 33:1  <b>effects</b> <sup>[7]</sup> 54:20 56:21 57:3,8,9 62:  18,20  <b>efficiency</b> <sup>[11]</sup> 22:17 23:16 43:11  44:3 45:25 51:1,11,17 52:2,13 64:  18  <b>effort</b> <sup>[3]</sup> 7:7 13:10 32:24  <b>eg</b> <sup>[11]</sup> 12:12 14:3 37:22,23 38:15  44:14 54:8,13,18 55:5 63:1  <b>eight</b> <sup>[2]</sup> 15:2 50:3  <b>either</b> <sup>[3]</sup> 53:2 54:22 55:7  <b>elected</b> <sup>[3]</sup> 3:19 10:16 48:24  <b>election</b> <sup>[12]</sup> 4:21 14:2,3,21,22,23,  24 22:14 25:22 44:10,12 48:19  <b>elections</b> <sup>[8]</sup> 22:20 29:18,22 44:6  60:25 61:13,17,18  <b>electoral</b> <sup>[1]</sup> 18:9  <b>electorate</b> <sup>[2]</sup> 39:18 58:10  <b>eligible</b> <sup>[2]</sup> 9:20,21  <b>eliminates</b> <sup>[1]</sup> 5:20  <b>eliminating</b> <sup>[1]</sup> 49:21  <b>elsewhere</b> <sup>[2]</sup> 5:13 30:22  <b>enacting</b> <sup>[1]</sup> 6:7  <b>enacts</b> <sup>[1]</sup> 35:11  <b>end</b> <sup>[6]</sup> 12:4 29:16 34:5 39:11 43:  17,17</p>	<p><b>ended</b> <sup>[1]</sup> 50:2  <b>enduring</b> <sup>[1]</sup> 19:6  <b>engaging</b> <sup>[1]</sup> 14:6  <b>enough</b> <sup>[3]</sup> 16:12,13,22  <b>ensure</b> <sup>[1]</sup> 15:1  <b>entering</b> <sup>[1]</sup> 45:14  <b>enterprise</b> <sup>[1]</sup> 49:2  <b>entertain</b> <sup>[1]</sup> 3:24  <b>entire</b> <sup>[4]</sup> 30:15 36:7,23 49:19  <b>entirely</b> <sup>[2]</sup> 31:16 51:2  <b>entitled</b> <sup>[1]</sup> 47:5  <b>entrench</b> <sup>[3]</sup> 15:5,7 21:20  <b>equal</b> <sup>[7]</sup> 4:10 27:3,14,24 41:17 59:  14 60:1  <b>equalizing</b> <sup>[1]</sup> 45:24  <b>equally</b> <sup>[2]</sup> 34:8 60:16  <b>eric</b> <sup>[2]</sup> 12:23 43:5  <b>erin</b> <sup>[3]</sup> 1:19 2:6 18:19  <b>establish</b> <sup>[1]</sup> 30:19  <b>estimate</b> <sup>[2]</sup> 16:19,20  <b>estimate's</b> <sup>[1]</sup> 16:4  <b>estimates</b> <sup>[2]</sup> 15:23 16:2  <b>et</b> <sup>[3]</sup> 1:3,6,20  <b>evaluate</b> <sup>[1]</sup> 15:10  <b>even</b> <sup>[14]</sup> 4:18 6:12 16:19 29:11 30:  11,25 48:14 49:24 50:1 56:1 57:  14 58:3,21 60:13  <b>eventually</b> <sup>[1]</sup> 50:3  <b>everybody</b> <sup>[2]</sup> 11:21 58:20  <b>everything</b> <sup>[2]</sup> 24:10 34:20  <b>everywhere</b> <sup>[1]</sup> 40:4  <b>evidence</b> <sup>[6]</sup> 12:9,11 21:17,18 48:  12 57:2  <b>ex</b> <sup>[1]</sup> 11:12  <b>exact</b> <sup>[2]</sup> 46:1 64:11  <b>exactly</b> <sup>[9]</sup> 4:8 11:15 13:22 32:13,  22 36:14 41:21 59:19 60:6  <b>example</b> <sup>[8]</sup> 4:22,25 5:6 6:1 15:24  17:6 37:2 57:7  <b>excessive</b> <sup>[1]</sup> 31:11  <b>excluded</b> <sup>[2]</sup> 58:21,21  <b>excuse</b> <sup>[1]</sup> 54:3  <b>exercise</b> <sup>[2]</sup> 5:12 24:19  <b>expected</b> <sup>[1]</sup> 16:19  <b>expert</b> <sup>[5]</sup> 7:18,20 49:5 62:19 64:  24  <b>experts</b> <sup>[4]</sup> 3:21 11:12 14:6 49:8  <b>explored</b> <sup>[1]</sup> 27:8  <b>extend</b> <sup>[1]</sup> 32:14  <b>extensive</b> <sup>[1]</sup> 28:24  <b>extreme</b> <sup>[8]</sup> 12:22 16:21 30:8 46:2  50:18 53:9 57:19 58:2  <b>extremely</b> <sup>[2]</sup> 15:9 30:13  <b>extremity</b> <sup>[1]</sup> 14:10  <b>eyes</b> <sup>[1]</sup> 38:10</p> <hr/> <p style="text-align: center;"><b>F</b></p> <p><b>face</b> <sup>[7]</sup> 20:20 21:4,10,13,15 26:21  27:22  <b>faced</b> <sup>[1]</sup> 17:6  <b>facially</b> <sup>[3]</sup> 27:1 63:20,25  <b>fact</b> <sup>[9]</sup> 20:6 25:14 26:2,8 38:15 53:  1 59:6 61:7,25  <b>factor</b> <sup>[1]</sup> 54:12</p>	<p><b>factors</b> <sup>[3]</sup> 26:17 54:8,16  <b>facts</b> <sup>[2]</sup> 17:3,5  <b>fair</b> <sup>[5]</sup> 41:1,4 52:8,10 56:3  <b>fairness</b> <sup>[1]</sup> 45:11  <b>faith</b> <sup>[1]</sup> 40:2  <b>false</b> <sup>[3]</sup> 15:14,14 23:4  <b>far</b> <sup>[5]</sup> 23:2 31:23,25 45:16 46:8  <b>fastidiously</b> <sup>[1]</sup> 17:8  <b>fatally</b> <sup>[1]</sup> 64:19  <b>fate</b> <sup>[1]</sup> 3:20  <b>father's</b> <sup>[1]</sup> 57:23  <b>favor</b> <sup>[3]</sup> 19:19 20:13 26:18  <b>favorable</b> <sup>[2]</sup> 40:21 57:15  <b>favours</b> <sup>[1]</sup> 19:7  <b>federal</b> <sup>[5]</sup> 3:20,23 14:5 60:8 61:  17  <b>feel</b> <sup>[1]</sup> 26:12  <b>festival</b> <sup>[2]</sup> 39:23 58:2  <b>few</b> <sup>[1]</sup> 51:5  <b>fewer</b> <sup>[2]</sup> 32:18 33:11  <b>fifteenth</b> <sup>[1]</sup> 60:11  <b>figure</b> <sup>[1]</sup> 52:25  <b>filed</b> <sup>[1]</sup> 28:14  <b>fill</b> <sup>[1]</sup> 23:18  <b>filter</b> <sup>[2]</sup> 50:9 57:8  <b>final</b> <sup>[2]</sup> 16:14 64:22  <b>finally</b> <sup>[3]</sup> 16:14 43:14,15  <b>find</b> <sup>[1]</sup> 34:23  <b>finding</b> <sup>[1]</sup> 22:5  <b>first</b> <sup>[26]</sup> 3:4 4:10,14,18 5:3,3 8:5 9:  8,12 25:7 27:4,10 28:1 31:2 35:10,  15,21,23 38:18 46:18 51:15 52:22,  24 59:13 60:22 63:21  <b>five</b> <sup>[4]</sup> 16:7 46:4 48:21 63:14  <b>fix</b> <sup>[3]</sup> 17:12 61:14 62:1  <b>flawed</b> <sup>[1]</sup> 64:19  <b>flexible</b> <sup>[1]</sup> 43:22  <b>flip</b> <sup>[3]</sup> 48:6,11 49:16  <b>flunks</b> <sup>[1]</sup> 13:5  <b>fly</b> <sup>[1]</sup> 53:25  <b>focus</b> <sup>[2]</sup> 23:2 31:11  <b>folks</b> <sup>[1]</sup> 4:21  <b>follow</b> <sup>[3]</sup> 19:18 31:6 37:2  <b>followed</b> <sup>[2]</sup> 50:13 61:6  <b>follows</b> <sup>[1]</sup> 31:7  <b>force</b> <sup>[1]</sup> 37:10  <b>forget</b> <sup>[1]</sup> 48:23  <b>form</b> <sup>[3]</sup> 59:11,16,23  <b>formula</b> <sup>[2]</sup> 50:25 51:10  <b>forthcoming</b> <sup>[2]</sup> 44:19,20  <b>forward</b> <sup>[1]</sup> 56:8  <b>found</b> <sup>[2]</sup> 55:22 56:1  <b>four</b> <sup>[4]</sup> 16:11,13 29:22 49:19  <b>four-day</b> <sup>[1]</sup> 64:18  <b>fourteenth</b> <sup>[5]</sup> 5:3 60:13,23 61:9,  20  <b>fourth</b> <sup>[1]</sup> 13:17  <b>frame</b> <sup>[1]</sup> 11:2  <b>fray</b> <sup>[1]</sup> 45:14  <b>free</b> <sup>[1]</sup> 30:7  <b>friend</b> <sup>[1]</sup> 34:11  <b>full</b> <sup>[2]</sup> 44:3 50:20  <b>fully</b> <sup>[1]</sup> 27:8  <b>function</b> <sup>[1]</sup> 57:21</p>	<p><b>fundamentally</b> <sup>[1]</sup> 50:19</p> <hr/> <p style="text-align: center;"><b>G</b></p> <p><b>gap</b> <sup>[11]</sup> 22:18 23:17 43:11 44:3 45:  25 51:1,11,17 52:2,13 64:18  <b>gather</b> <sup>[1]</sup> 22:21  <b>general</b> <sup>[1]</sup> 1:17  <b>generalized</b> <sup>[2]</sup> 10:14 11:5  <b>generated</b> <sup>[3]</sup> 55:16,21,22  <b>generating</b> <sup>[1]</sup> 56:20  <b>generic</b> <sup>[1]</sup> 60:1  <b>geographers'</b> <sup>[1]</sup> 56:18  <b>geography</b> <sup>[5]</sup> 25:13 54:10 55:23  57:9,14  <b>gerrymander</b> <sup>[5]</sup> 28:17 47:21 49:  7 50:18 57:23  <b>gerrymandered</b> <sup>[3]</sup> 17:13 31:1 38:  21  <b>gerrymandering</b> <sup>[26]</sup> 3:25 4:2 6:  11,12 17:1 25:12 28:8 30:20,22,  24 31:9,15,18 35:15 38:24 39:16,  23 42:12 43:24 54:9 57:20 62:2,2,  14,17 63:10  <b>gerrymanders</b> <sup>[4]</sup> 19:6 46:2 57:  22 58:2  <b>gets</b> <sup>[5]</sup> 12:17 29:11,12 42:3,4  <b>getting</b> <sup>[3]</sup> 38:25 50:3 62:14  <b>gill</b> <sup>[2]</sup> 1:3 3:5  <b>ginsburg</b> <sup>[8]</sup> 6:25 10:19 19:21 24:  14 25:16,19 58:17 61:2  <b>give</b> <sup>[6]</sup> 15:24 32:10 37:5 41:23 45:  8,10  <b>given</b> <sup>[3]</sup> 10:8 22:15 45:9  <b>giving</b> <sup>[1]</sup> 11:16  <b>gobbledygook</b> <sup>[2]</sup> 40:14 41:6  <b>gorsuch</b> <sup>[20]</sup> 22:4,9 23:13 24:2 50:  24 51:20,23,25 52:6,9,18 53:10,15,  17,21 59:10,18,21 60:3 61:22  <b>got</b> <sup>[6]</sup> 12:9,10 16:14 45:8,9 48:20  <b>government</b> <sup>[7]</sup> 28:9 39:9 59:11,  16,23 60:9,25  <b>governorship</b> <sup>[1]</sup> 59:6  <b>grail</b> <sup>[1]</sup> 6:22  <b>gralike</b> <sup>[1]</sup> 61:12  <b>great</b> <sup>[3]</sup> 14:18 44:1 47:16  <b>greater</b> <sup>[2]</sup> 37:23 38:16  <b>grounded</b> <sup>[2]</sup> 4:19 6:13  <b>group</b> <sup>[5]</sup> 11:11 35:12,17,19,22  <b>group's</b> <sup>[1]</sup> 32:8  <b>guarantee</b> <sup>[1]</sup> 59:23  <b>guaranteed</b> <sup>[1]</sup> 58:11  <b>guess</b> <sup>[3]</sup> 15:19,20 21:14  <b>guesses</b> <sup>[1]</sup> 44:8</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>handled</b> <sup>[2]</sup> 36:9,25  <b>happen</b> <sup>[1]</sup> 64:23  <b>happened</b> <sup>[2]</sup> 58:7 65:1  <b>hard</b> <sup>[2]</sup> 11:9 27:6  <b>harder</b> <sup>[1]</sup> 21:5  <b>harm</b> <sup>[2]</sup> 10:8 38:9  <b>hazardous</b> <sup>[1]</sup> 49:2  <b>hear</b> <sup>[2]</sup> 3:3 46:25  <b>heard</b> <sup>[1]</sup> 64:14</p>
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## Official - Subject to Final Review

<p><b>hearing</b> <sup>[1]</sup> 65:18  <b>height</b> <sup>[1]</sup> 11:4  <b>held</b> <sup>[1]</sup> 50:21  <b>help</b> <sup>[1]</sup> 28:8  <b>helpful</b> <sup>[2]</sup> 22:11 36:14  <b>helps</b> <sup>[1]</sup> 4:4  <b>high</b> <sup>[3]</sup> 54:7,8,12  <b>history</b> <sup>[2]</sup> 41:12 47:22  <b>hold</b> <sup>[2]</sup> 3:23 20:1  <b>holding</b> <sup>[1]</sup> 53:24  <b>holes</b> <sup>[1]</sup> 16:4  <b>holy</b> <sup>[1]</sup> 6:22  <b>home</b> <sup>[1]</sup> 11:3  <b>honor</b> <sup>[30]</sup> 4:17 5:23 6:6 7:11 9:15  13:16 15:11,22 16:23 17:2,19 18:  12 25:7 29:23 32:5,23 33:18 34:  24 38:12,18 40:15 41:13 45:1 46:  15 50:11 51:14 57:11 59:3 63:3,  11  <b>honors</b> <sup>[1]</sup> 65:15  <b>houses</b> <sup>[1]</sup> 59:5  <b>huge</b> <sup>[1]</sup> 58:1  <b>hypo</b> <sup>[1]</sup> 19:9  <b>hypothetical</b> <sup>[7]</sup> 3:16 5:22 11:2  13:23 14:6 15:19 31:22</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>idea</b> <sup>[2]</sup> 34:12 46:17  <b>identified</b> <sup>[4]</sup> 7:21 18:23 24:1 50:  20  <b>identifies</b> <sup>[1]</sup> 19:5  <b>identify</b> <sup>[2]</sup> 23:3 49:11  <b>ignores</b> <sup>[1]</sup> 53:1  <b>illustrates</b> <sup>[1]</sup> 30:10  <b>immediately</b> <sup>[1]</sup> 8:1  <b>impair</b> <sup>[1]</sup> 33:14  <b>impaired</b> <sup>[1]</sup> 32:21  <b>impediment</b> <sup>[1]</sup> 61:23  <b>important</b> <sup>[3]</sup> 10:24 37:9 48:1  <b>impose</b> <sup>[1]</sup> 42:13  <b>impression</b> <sup>[1]</sup> 14:14  <b>inadequate</b> <sup>[1]</sup> 43:8  <b>inappropriate</b> <sup>[1]</sup> 43:20  <b>incentive</b> <sup>[1]</sup> 24:18  <b>including</b> <sup>[2]</sup> 8:1 33:15  <b>increase</b> <sup>[1]</sup> 19:14  <b>incumbent</b> <sup>[1]</sup> 55:7  <b>incumbents</b> <sup>[1]</sup> 54:11  <b>incursions</b> <sup>[1]</sup> 57:24  <b>indeed</b> <sup>[2]</sup> 19:3 58:12  <b>indefinite</b> <sup>[1]</sup> 29:10  <b>indications</b> <sup>[1]</sup> 60:18  <b>individual</b> <sup>[1]</sup> 25:1  <b>individual's</b> <sup>[1]</sup> 32:1  <b>individuals</b> <sup>[1]</sup> 28:3  <b>ingredients</b> <sup>[1]</sup> 51:5  <b>inherent</b> <sup>[1]</sup> 25:8  <b>inherently</b> <sup>[2]</sup> 18:25 22:2  <b>initial</b> <sup>[1]</sup> 56:14  <b>injure</b> <sup>[1]</sup> 28:5  <b>injury</b> <sup>[6]</sup> 10:13 31:7,12,17 35:21,  21  <b>inquiry</b> <sup>[1]</sup> 13:24  <b>insofar</b> <sup>[1]</sup> 13:12</p>	<p><b>instance</b> <sup>[2]</sup> 26:23 28:22  <b>instead</b> <sup>[2]</sup> 3:18 44:16  <b>institution</b> <sup>[1]</sup> 62:11  <b>integrity</b> <sup>[1]</sup> 38:9  <b>intelligent</b> <sup>[2]</sup> 37:18 38:2  <b>intent</b> <sup>[11]</sup> 20:23,24 21:4,18,19 22:  6 54:22 57:2 64:1,2 65:7  <b>intentional</b> <sup>[1]</sup> 57:19  <b>intentionally</b> <sup>[2]</sup> 7:7 20:25  <b>intents</b> <sup>[1]</sup> 54:19  <b>interest</b> <sup>[8]</sup> 4:14,23 10:15 11:6 26:  11,12 32:7 34:1  <b>interests</b> <sup>[4]</sup> 32:20 33:15 35:22 62:  24  <b>interstate</b> <sup>[1]</sup> 5:24  <b>intervention</b> <sup>[1]</sup> 45:12  <b>intuitive</b> <sup>[1]</sup> 46:17  <b>involved</b> <sup>[1]</sup> 17:14  <b>involves</b> <sup>[1]</sup> 31:17  <b>isn't</b> <sup>[10]</sup> 16:22 22:6 24:24 29:5 31:  3 53:23 54:3,6 59:18,18  <b>issue</b> <sup>[10]</sup> 4:6,10,11,18 7:12 10:24  11:9 30:17 33:5 35:4  <b>issues</b> <sup>[3]</sup> 30:25 37:19 40:10  <b>itself</b> <sup>[3]</sup> 22:2 52:14 60:18</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>jackman</b> <sup>[1]</sup> 46:5  <b>job</b> <sup>[1]</sup> 47:19  <b>join</b> <sup>[1]</sup> 34:4  <b>judge</b> <sup>[1]</sup> 12:1  <b>judges</b> <sup>[2]</sup> 43:1 44:13  <b>judicial</b> <sup>[3]</sup> 15:12 39:21 45:12  <b>judicially</b> <sup>[2]</sup> 3:12 64:6  <b>jump</b> <sup>[2]</sup> 44:1,24  <b>jurisdiction</b> <sup>[3]</sup> 3:24 37:13,14  <b>jurisdictional</b> <sup>[1]</sup> 35:8  <b>justice</b> <sup>[19]</sup> 3:3,9 4:3 5:8,18,21 6:  2,24,25 8:16 9:24 10:19,20 11:8  14:12 15:17 16:1,25 17:11,21 18:  1,4,5,16,21 19:8,21 20:2,10,16,19  21:2,12 22:4,7,9,10,22 23:13 24:2,  14 25:16,19 26:14 27:3,13,19 28:  6,12,22 29:7,24 30:4,16 31:5,20,  21 32:12 33:4 34:7,17 35:6,25 36:  1,2,3,11 37:1 38:13 40:7,8,19 41:  8,20 42:10,18 44:22 45:2,6 46:9,  12,16 47:9,13,15 48:16 50:4,6,14,  24 51:20,23,25 52:6,9,18,23 53:10,  11,15,17,21 54:3,6,24 56:3 57:7  58:17 59:10,18,21 60:3 61:2,22  62:16 63:8,12,19 65:16  <b>justice's</b> <sup>[2]</sup> 40:22 51:10  <b>justifiability</b> <sup>[1]</sup> 7:12  <b>justification</b> <sup>[6]</sup> 13:6,7 54:21,23,  25 57:1</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>kagan</b> <sup>[16]</sup> 14:12 15:17 21:2 22:7  35:25 36:2,3,11 46:12,16 47:9,13,  15 50:6 56:3 57:7  <b>kagan's</b> <sup>[1]</sup> 18:5  <b>keep</b> <sup>[1]</sup> 53:1  <b>kennedy</b> <sup>[10]</sup> 4:3 5:18 6:2 10:20</p>	<p>19:8 20:2 26:14 27:3,13,19  <b>kennedy's</b> <sup>[3]</sup> 35:6 50:14 63:19  <b>kept</b> <sup>[2]</sup> 17:11 55:19  <b>key</b> <sup>[1]</sup> 43:9  <b>kind</b> <sup>[7]</sup> 6:7 13:22 15:18 21:19 31:  17 48:4 52:12  <b>king's</b> <sup>[2]</sup> 13:25 64:9</p> <hr/> <p style="text-align: center;"><b>L</b></p> <p><b>label</b> <sup>[1]</sup> 41:9  <b>lack</b> <sup>[1]</sup> 3:23  <b>laid</b> <sup>[1]</sup> 45:7  <b>lander</b> <sup>[1]</sup> 56:16  <b>lander's</b> <sup>[1]</sup> 12:23  <b>language</b> <sup>[1]</sup> 38:17  <b>last</b> <sup>[2]</sup> 50:20 58:1  <b>late</b> <sup>[1]</sup> 59:17  <b>later</b> <sup>[1]</sup> 43:12  <b>laughter</b> <sup>[6]</sup> 6:4 13:15 41:7 44:21  45:4 62:3  <b>launch</b> <sup>[1]</sup> 8:13  <b>law</b> <sup>[11]</sup> 5:5 17:25 20:12 21:3,8 26:  16 28:15 33:20 35:2,11 63:20  <b>lawful</b> <sup>[1]</sup> 26:19  <b>lay</b> <sup>[1]</sup> 37:3  <b>lead</b> <sup>[5]</sup> 10:5 50:14 54:10,12,17  <b>leading</b> <sup>[1]</sup> 43:7  <b>learn</b> <sup>[2]</sup> 8:2,12  <b>least</b> <sup>[4]</sup> 19:20 20:22 41:16 50:2  <b>leave</b> <sup>[2]</sup> 9:5 45:18  <b>leaving</b> <sup>[1]</sup> 3:25  <b>led</b> <sup>[2]</sup> 5:6 21:19  <b>left</b> <sup>[1]</sup> 10:1  <b>legal</b> <sup>[2]</sup> 24:11 43:1  <b>legislation</b> <sup>[1]</sup> 28:3  <b>legislative</b> <sup>[4]</sup> 8:25 30:14 60:7,10  <b>legislators</b> <sup>[2]</sup> 14:14 60:15  <b>legislators'</b> <sup>[1]</sup> 18:6  <b>legislature</b> <sup>[16]</sup> 7:4 12:10 20:5,24  23:5 24:8,18 26:22 29:3 32:19 33:  12 40:25 41:3 58:22,25 59:5  <b>legislature's</b> <sup>[1]</sup> 62:7  <b>legislatures</b> <sup>[8]</sup> 14:19 15:5,12,13,  15 18:13 23:24 53:4  <b>legitimate</b> <sup>[2]</sup> 26:17 54:12  <b>less</b> <sup>[6]</sup> 5:6 17:4 34:18 45:17 49:23  57:19  <b>lesson</b> <sup>[2]</sup> 8:5,11  <b>lessons</b> <sup>[2]</sup> 8:3 56:21  <b>levels</b> <sup>[1]</sup> 54:8  <b>likelihood</b> <sup>[1]</sup> 48:1  <b>likely</b> <sup>[1]</sup> 34:14  <b>likes</b> <sup>[1]</sup> 39:24  <b>limit</b> <sup>[1]</sup> 45:12  <b>limited</b> <sup>[3]</sup> 6:19 30:20 64:5  <b>limits</b> <sup>[5]</sup> 33:20 46:10,10,11 61:12  <b>line</b> <sup>[5]</sup> 47:7,11,14,23 54:5  <b>lines</b> <sup>[6]</sup> 3:14 8:19 36:7 60:7 63:24,  25  <b>list</b> <sup>[3]</sup> 7:23 8:3,12  <b>litigation</b> <sup>[2]</sup> 22:14 52:12  <b>little</b> <sup>[10]</sup> 11:21 13:19 22:16,17 27:  6 30:18 51:3,5 52:3 55:24  <b>live</b> <sup>[5]</sup> 10:9 25:14 33:21 36:15 56:</p>	<p>22  <b>living</b> <sup>[2]</sup> 36:19 46:3  <b>localized</b> <sup>[1]</sup> 31:13  <b>locked</b> <sup>[2]</sup> 49:20 62:5  <b>longer</b> <sup>[2]</sup> 11:5 57:21  <b>look</b> <sup>[11]</sup> 7:17 12:14,25 21:3,10 33:  5 40:20 59:25 60:11,11 65:2  <b>looked</b> <sup>[2]</sup> 43:19 51:2  <b>looking</b> <sup>[2]</sup> 43:2 50:7  <b>looks</b> <sup>[1]</sup> 49:14  <b>lose</b> <sup>[1]</sup> 40:2  <b>loses</b> <sup>[1]</sup> 41:2  <b>losing</b> <sup>[1]</sup> 44:11  <b>lost</b> <sup>[1]</sup> 40:23  <b>lot</b> <sup>[8]</sup> 18:10 21:22 32:24 37:8 45:9  49:12,12 56:20  <b>lower</b> <sup>[3]</sup> 22:15 55:4,4  <b>lulac</b> <sup>[4]</sup> 13:25 19:4 64:10 65:10</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>madison</b> <sup>[4]</sup> 1:17 10:10 31:2 32:  21  <b>main</b> <sup>[1]</sup> 37:4  <b>majorities</b> <sup>[2]</sup> 15:6 29:20  <b>majority</b> <sup>[11]</sup> 10:12 12:10 29:13,21  40:24 41:2 48:19,20 58:23 59:4,4  <b>malpractice</b> <sup>[1]</sup> 58:15  <b>man</b> <sup>[2]</sup> 37:18 38:2  <b>manageability</b> <sup>[1]</sup> 15:13  <b>manageable</b> <sup>[12]</sup> 3:12 11:10,25  13:8,11 20:11,12,17 21:14 23:23  42:15 43:2  <b>management</b> <sup>[1]</sup> 60:24  <b>mandated</b> <sup>[1]</sup> 20:2  <b>mandatory</b> <sup>[1]</sup> 37:14  <b>manner</b> <sup>[1]</sup> 50:9  <b>many</b> <sup>[10]</sup> 7:4,8 19:9 22:20 32:15  44:8,10 55:1 56:4,5  <b>map</b> <sup>[39]</sup> 6:17,20 8:2 10:10 12:7 14:  7,8 16:7,14,16,21 17:8,12 23:7,8  24:22 30:7,12 36:7,23 39:7 40:17  41:15 42:7 44:14 47:5,10 48:4,6,  11 49:6,11,14 54:17 55:4 56:2,6  57:13 58:8  <b>maps</b> <sup>[30]</sup> 3:21 7:20,22,24,25,25 8:  10 13:1,2 14:19 16:9,11,13 17:14,  16,22 19:5 20:13 28:4 38:21 39:1  46:4 53:2 55:2,6,16,22 56:4,20 58:  19  <b>matches</b> <sup>[1]</sup> 57:13  <b>matter</b> <sup>[9]</sup> 1:12 3:22 23:19 24:7,11  27:2 40:5 60:3,5  <b>matters</b> <sup>[2]</sup> 29:17 60:10  <b>max-black</b> <sup>[2]</sup> 7:2,10  <b>max-republican</b> <sup>[1]</sup> 7:9  <b>maximize</b> <sup>[3]</sup> 18:8 19:25 49:21  <b>maximizing</b> <sup>[1]</sup> 46:8  <b>maximum</b> <sup>[1]</sup> 19:14  <b>mcghee</b> <sup>[4]</sup> 43:5 44:18 62:19 63:5  <b>mcghee's</b> <sup>[1]</sup> 44:4  <b>mean</b> <sup>[13]</sup> 14:2 15:20 23:3,21 25:4  26:2 27:17 29:9 32:18 42:12 48:  17 58:18 61:9  <b>means</b> <sup>[4]</sup> 28:20 29:8 35:15 42:1</p>
---	---	--	--

## Official - Subject to Final Review

<p><b>meantime</b> <sup>[1]</sup> 45:17</p> <p><b>measure</b> <sup>[8]</sup> 40:16 43:20,22 45:11, 23,23 48:1 53:8</p> <p><b>measured</b> <sup>[1]</sup> 51:16</p> <p><b>measures</b> <sup>[3]</sup> 43:6,7 47:16</p> <p><b>measuring</b> <sup>[2]</sup> 47:24 51:21</p> <p><b>median-mean</b> <sup>[1]</sup> 45:23</p> <p><b>members</b> <sup>[3]</sup> 4:24 32:18,25</p> <p><b>memory</b> <sup>[1]</sup> 46:3</p> <p><b>mentioned</b> <sup>[4]</sup> 42:18 48:21 51:18 52:24</p> <p><b>merely</b> <sup>[1]</sup> 3:18</p> <p><b>merits</b> <sup>[4]</sup> 8:17 10:21 37:12 55:15</p> <p><b>method</b> <sup>[3]</sup> 8:7 49:10 50:17</p> <p><b>methods</b> <sup>[1]</sup> 14:25</p> <p><b>metric</b> <sup>[1]</sup> 16:5</p> <p><b>metrics</b> <sup>[5]</sup> 3:15 8:15 20:7 23:2,3</p> <p><b>might</b> <sup>[8]</sup> 4:22,25 28:18,19 32:6 45:6 49:16 53:25</p> <p><b>millions</b> <sup>[1]</sup> 55:1</p> <p><b>milwaukee</b> <sup>[5]</sup> 9:11,18,25 10:25 32:20</p> <p><b>milwaukee's</b> <sup>[1]</sup> 11:3</p> <p><b>minimis</b> <sup>[3]</sup> 32:7,10,13</p> <p><b>minor</b> <sup>[1]</sup> 29:12</p> <p><b>minorities</b> <sup>[1]</sup> 15:6</p> <p><b>minority</b> <sup>[5]</sup> 29:11,12 33:23 55:18 59:8</p> <p><b>minus</b> <sup>[1]</sup> 37:24</p> <p><b>minute</b> <sup>[2]</sup> 8:18 55:24</p> <p><b>minutes</b> <sup>[2]</sup> 40:22 63:14</p> <p><b>misha</b> <sup>[5]</sup> 1:17 2:3,13 3:7 63:16</p> <p><b>misuse</b> <sup>[1]</sup> 61:16</p> <p><b>mix</b> <sup>[1]</sup> 19:4</p> <p><b>model</b> <sup>[1]</sup> 58:3</p> <p><b>modest</b> <sup>[1]</sup> 55:24</p> <p><b>moment</b> <sup>[1]</sup> 11:18</p> <p><b>months</b> <sup>[1]</sup> 49:19</p> <p><b>morning</b> <sup>[1]</sup> 3:4</p> <p><b>most</b> <sup>[7]</sup> 16:17,21 24:22 29:21 38:25 46:2 62:8</p> <p><b>motive</b> <sup>[1]</sup> 13:6</p> <p><b>ms</b> <sup>[25]</sup> 18:18,21 19:16 20:4,15,18, 20 21:3,21 22:4,5,24 23:21 24:4, 14 25:6,17,25 26:20 27:6,16,21 28:10,19 29:14</p> <p><b>much</b> <sup>[9]</sup> 14:3 18:13 22:21 40:17 47:11 51:6 52:7 57:19 62:15</p> <p><b>murphy</b> <sup>[28]</sup> 1:19 2:6 18:18,19,21 19:16 20:4,15,18,20 21:3,21 22:4, 5,24 23:21 24:4,14 25:6,17,25 26:20 27:6,16,21 28:10,19 29:14</p> <p><b>must</b> <sup>[6]</sup> 26:18,22,22 28:15,16 38:4</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>name</b> <sup>[1]</sup> 47:11</p> <p><b>naturally</b> <sup>[1]</sup> 37:7</p> <p><b>nature</b> <sup>[2]</sup> 31:7,8</p> <p><b>necessarily</b> <sup>[1]</sup> 28:20</p> <p><b>necessary</b> <sup>[1]</sup> 34:14</p> <p><b>need</b> <sup>[7]</sup> 22:12,20 23:14,15,16 41:9 50:17</p> <p><b>needs</b> <sup>[1]</sup> 39:14</p>	<p><b>negate</b> <sup>[1]</sup> 59:8</p> <p><b>negatives</b> <sup>[1]</sup> 15:15</p> <p><b>neighbor</b> <sup>[1]</sup> 34:11</p> <p><b>neutral</b> <sup>[10]</sup> 7:23 8:4,6,7 27:1 56:21 57:14 63:24,25 65:11</p> <p><b>neutrally</b> <sup>[1]</sup> 63:24</p> <p><b>never</b> <sup>[8]</sup> 3:11 21:10 39:24 41:11 48:11,18,23 62:1</p> <p><b>new</b> <sup>[3]</sup> 58:2 64:7,13</p> <p><b>next</b> <sup>[5]</sup> 14:20 15:2 48:5,19 64:23</p> <p><b>nineteenth</b> <sup>[1]</sup> 60:12</p> <p><b>nobody</b> <sup>[1]</sup> 25:22</p> <p><b>non-flippable</b> <sup>[1]</sup> 49:7</p> <p><b>non-problem</b> <sup>[2]</sup> 63:6,11</p> <p><b>non-starter</b> <sup>[1]</sup> 14:8</p> <p><b>none</b> <sup>[1]</sup> 47:17</p> <p><b>norm</b> <sup>[1]</sup> 58:12</p> <p><b>north</b> <sup>[1]</sup> 31:23</p> <p><b>northern</b> <sup>[1]</sup> 8:22</p> <p><b>nothing</b> <sup>[10]</sup> 10:13 11:20,20 13:14 25:12 26:6 54:9 56:23 64:7,12</p> <p><b>nullifies</b> <sup>[1]</sup> 30:9</p> <p><b>number</b> <sup>[7]</sup> 19:14,25 20:6 47:20 53:2 61:6,11</p> <p><b>numbers</b> <sup>[1]</sup> 23:17</p> <p><b>numerous</b> <sup>[1]</sup> 44:4</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>obtain</b> <sup>[1]</sup> 15:1</p> <p><b>obtained</b> <sup>[2]</sup> 44:15,17</p> <p><b>october</b> <sup>[1]</sup> 1:10</p> <p><b>offered</b> <sup>[1]</sup> 43:20</p> <p><b>officials</b> <sup>[2]</sup> 3:19 8:22</p> <p><b>often</b> <sup>[4]</sup> 6:10,14 14:21,22</p> <p><b>ointment</b> <sup>[1]</sup> 54:1</p> <p><b>okay</b> <sup>[8]</sup> 12:5,13,23 13:14 23:13 29:9 37:20 57:16</p> <p><b>one</b> <sup>[52]</sup> 4:13 5:2 10:21 11:1 12:1,2, 17,24 15:2,24 16:8 17:8,22 20:7, 13 21:1 24:5 25:18,23 26:12 29:11 31:25 32:25 33:8 36:4 37:2,11 38:6,22,23 39:8 42:18 44:13 45:22 46:2,4,8 48:20 49:11,15,15 50:12,18 52:24 55:9,13 56:5 57:20 58:11 59:2,4 64:16</p> <p><b>one-party</b> <sup>[6]</sup> 52:25 53:7 58:11,13, 18 59:22</p> <p><b>one-person</b> <sup>[1]</sup> 36:3</p> <p><b>one-person/one-vote</b> <sup>[1]</sup> 61:3</p> <p><b>one-third</b> <sup>[1]</sup> 52:25</p> <p><b>one-vote</b> <sup>[1]</sup> 36:4</p> <p><b>ones</b> <sup>[1]</sup> 48:8</p> <p><b>only</b> <sup>[12]</sup> 4:21 10:6 14:20 15:2 19:3 24:10 36:6,21 40:13 50:22 62:11 64:16</p> <p><b>opinion</b> <sup>[3]</sup> 21:23,24 28:23</p> <p><b>opinions</b> <sup>[3]</sup> 21:24,25,25</p> <p><b>opportunity</b> <sup>[2]</sup> 37:5 58:1</p> <p><b>opposition</b> <sup>[1]</sup> 12:13</p> <p><b>oral</b> <sup>[7]</sup> 1:12 2:2,5,9 3:7 18:19 30:2</p> <p><b>order</b> <sup>[6]</sup> 14:25 15:5,7 18:8 22:12 23:19</p> <p><b>other</b> <sup>[29]</sup> 4:15 5:12 12:7,11,14 13:6,7 14:25 19:18 20:6,14 21:1,5,7, 22 25:24 32:25 34:15 38:22 47:25 50:15 51:5,17 52:19 54:16 56:17 59:7 61:6,25</p> <p><b>ought</b> <sup>[5]</sup> 35:4,23 42:4 56:12 60:19</p> <p><b>out</b> <sup>[17]</sup> 10:1 13:9 16:10 17:16 24:15 25:3,18,21 32:8 34:14 35:6 37:3 38:6 46:4 48:15 50:9 57:8</p> <p><b>out-of-state</b> <sup>[1]</sup> 5:20</p> <p><b>outcome</b> <sup>[1]</sup> 42:8</p> <p><b>outcomes</b> <sup>[1]</sup> 29:19</p> <p><b>outlier</b> <sup>[3]</sup> 12:22 50:12 56:6</p> <p><b>outliers</b> <sup>[1]</sup> 50:7</p> <p><b>outlines</b> <sup>[1]</sup> 44:4</p> <p><b>outside</b> <sup>[2]</sup> 10:18 32:11</p> <p><b>over</b> <sup>[11]</sup> 12:16 21:8 29:22 34:2 37:25 38:5 47:10 48:5,6,12 49:16</p> <p><b>overpopulated</b> <sup>[3]</sup> 36:5,15,20</p> <p><b>overriding</b> <sup>[1]</sup> 19:13</p> <p><b>own</b> <sup>[5]</sup> 4:21 7:18 19:7 36:22 44:4</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>packed</b> <sup>[1]</sup> 33:10</p> <p><b>page</b> <sup>[2]</sup> 2:2 35:7</p> <p><b>paint</b> <sup>[1]</sup> 62:16</p> <p><b>palatable</b> <sup>[1]</sup> 38:14</p> <p><b>paper</b> <sup>[6]</sup> 43:5,5,16,18 44:19,20</p> <p><b>parameters</b> <sup>[1]</sup> 4:9</p> <p><b>part</b> <sup>[8]</sup> 4:13 10:23 33:8,9,25 34:2 56:13,25</p> <p><b>partial</b> <sup>[1]</sup> 31:15</p> <p><b>particular</b> <sup>[3]</sup> 14:4 23:1 31:10</p> <p><b>parties</b> <sup>[4]</sup> 12:8 26:3 34:19 41:17</p> <p><b>partisan</b> <sup>[37]</sup> 8:5,9 12:6 16:12,13, 16,17,25 17:17 19:6,19 20:8 22:16 23:8,9,12 25:12 26:7 28:21 31:15 35:14 38:20 41:15 43:23,23 45:23 47:4 50:9 51:2 54:17 57:9 62:23 64:1,2,11 65:7,11</p> <p><b>partisanship</b> <sup>[1]</sup> 50:16</p> <p><b>party</b> <sup>[45]</sup> 4:15,15,23 12:2,9,17 15:7 19:7,15,15 20:13 21:20 25:23 26:13,18,18 29:11 32:25,25 33:2 34:4,4,10,20 35:1,2,13 37:24,25, 25 38:1 39:9 40:18,24,25 41:2 42:3,4 46:8 57:15 59:2,4,7 62:21 63:22</p> <p><b>pass</b> <sup>[1]</sup> 30:7</p> <p><b>past</b> <sup>[1]</sup> 29:22</p> <p><b>paul</b> <sup>[3]</sup> 1:21 2:10 30:2</p> <p><b>pennsylvania</b> <sup>[1]</sup> 48:6</p> <p><b>people</b> <sup>[21]</sup> 5:13 10:24 17:13 25:9 29:5,17 32:11 33:21 34:1,4,8,19 35:20,20 36:18 39:5 44:8,11 56:19,22 58:9</p> <p><b>percent</b> <sup>[16]</sup> 12:9,17,18,18 22:19 23:4 37:23 38:16 42:3,3,4,5 44:16 51:11 56:1 58:24</p> <p><b>percentage</b> <sup>[2]</sup> 41:24,24</p> <p><b>perfectly</b> <sup>[1]</sup> 20:17</p> <p><b>period</b> <sup>[1]</sup> 29:10</p> <p><b>permanent</b> <sup>[1]</sup> 49:7</p> <p><b>persistence</b> <sup>[1]</sup> 13:22</p> <p><b>persistent</b> <sup>[1]</sup> 12:16</p> <p><b>person</b> <sup>[6]</sup> 6:18 16:8 36:4,21 37:21 38:22</p> <p><b>person's</b> <sup>[1]</sup> 33:15</p> <p><b>perspective</b> <sup>[1]</sup> 27:10</p> <p><b>picture</b> <sup>[1]</sup> 62:17</p> <p><b>pinch</b> <sup>[4]</sup> 51:8,8 52:3,4</p> <p><b>place</b> <sup>[3]</sup> 21:8 31:13 55:20</p> <p><b>places</b> <sup>[1]</sup> 32:24</p> <p><b>plain</b> <sup>[1]</sup> 7:20</p> <p><b>plaintiff</b> <sup>[4]</sup> 6:21 10:5,6 31:2</p> <p><b>plaintiff's</b> <sup>[4]</sup> 3:14 7:18,20 64:24</p> <p><b>plaintiffs</b> <sup>[11]</sup> 8:13 18:23 19:3 34:23,25 49:9 56:4,13 64:3,8,20</p> <p><b>plan</b> <sup>[3]</sup> 7:3 16:10 25:20</p> <p><b>please</b> <sup>[5]</sup> 3:10 18:22 30:5 46:13, 14</p> <p><b>plenty</b> <sup>[2]</sup> 21:2 25:9</p> <p><b>plurality</b> <sup>[1]</sup> 21:25</p> <p><b>plus</b> <sup>[1]</sup> 38:1</p> <p><b>point</b> <sup>[10]</sup> 15:21 18:1 19:20 20:22 27:7 28:11,22 40:9 58:10 64:22</p> <p><b>points</b> <sup>[2]</sup> 16:5 24:5</p> <p><b>poked</b> <sup>[1]</sup> 16:4</p> <p><b>polarized</b> <sup>[2]</sup> 39:19 58:10</p> <p><b>political</b> <sup>[25]</sup> 3:24 6:10,21 11:12 12:8 18:25 19:1,7 26:3,9,13 28:7 30:23 32:9 40:1 41:11 42:6,12 43:1 45:14,19 54:10 55:23 56:18 58:5</p> <p><b>politically</b> <sup>[2]</sup> 3:13 28:17</p> <p><b>politicians</b> <sup>[3]</sup> 3:13 18:7 62:1</p> <p><b>politics</b> <sup>[5]</sup> 6:9 7:14 22:1 25:13 37:9</p> <p><b>polls</b> <sup>[1]</sup> 18:10</p> <p><b>population</b> <sup>[1]</sup> 36:24</p> <p><b>positive</b> <sup>[2]</sup> 13:9 28:21</p> <p><b>positives</b> <sup>[2]</sup> 15:14 23:4</p> <p><b>possibility</b> <sup>[1]</sup> 59:9</p> <p><b>possible</b> <sup>[5]</sup> 7:5 10:10 19:12 30:11 47:23</p> <p><b>possibly</b> <sup>[2]</sup> 6:16 13:11</p> <p><b>power</b> <sup>[5]</sup> 15:7 21:20 29:6 60:14 61:17</p> <p><b>practical</b> <sup>[1]</sup> 24:12</p> <p><b>precious</b> <sup>[2]</sup> 24:17,25</p> <p><b>precise</b> <sup>[1]</sup> 64:5</p> <p><b>predictable</b> <sup>[1]</sup> 39:19</p> <p><b>predicted</b> <sup>[1]</sup> 48:17</p> <p><b>predicting</b> <sup>[1]</sup> 48:25</p> <p><b>predictions</b> <sup>[1]</sup> 48:17</p> <p><b>predominate</b> <sup>[1]</sup> 8:23</p> <p><b>preferred</b> <sup>[1]</sup> 38:4</p> <p><b>premise</b> <sup>[1]</sup> 29:15</p> <p><b>preordained</b> <sup>[1]</sup> 24:22</p> <p><b>presented</b> <sup>[4]</sup> 47:17 64:4,7 65:9</p> <p><b>presenting</b> <sup>[1]</sup> 48:8</p> <p><b>president</b> <sup>[2]</sup> 42:21,23</p> <p><b>pressuring</b> <sup>[1]</sup> 9:4</p> <p><b>pretty</b> <sup>[8]</sup> 5:9 14:15 15:20 16:20 41:5 47:11 53:9 60:10</p> <p><b>prevent</b> <sup>[1]</sup> 32:25</p> <p><b>previously</b> <sup>[4]</sup> 17:6 43:7,7 52:1</p> <p><b>primary</b> <sup>[1]</sup> 64:21</p> <p><b>principle</b> <sup>[5]</sup> 19:17 41:12 46:18,20, 24</p>
---	--

## Official - Subject to Final Review

<p><b>principles</b> [3] 17:9 18:3 19:13</p> <p><b>prior</b> [1] 8:1</p> <p><b>probably</b> [5] 9:17 19:8 27:24 50:12 58:3</p> <p><b>problem</b> [18] 5:20,25 7:10 22:6,17, 18 23:10 26:24 37:4,17 39:13,16, 22 61:8,14,21 62:4,13</p> <p><b>problems</b> [4] 3:17 7:13 22:25 54:22</p> <p><b>proceed</b> [1] 37:7</p> <p><b>process</b> [4] 17:14 23:25 49:5 55:10</p> <p><b>produce</b> [2] 55:4 56:13</p> <p><b>produced</b> [1] 55:15</p> <p><b>produces</b> [1] 29:3</p> <p><b>professor</b> [3] 13:25 46:5 64:9</p> <p><b>projections</b> [1] 3:16</p> <p><b>promoting</b> [1] 62:23</p> <p><b>properly</b> [1] 65:10</p> <p><b>proportional</b> [5] 41:10,14,21,22, 25</p> <p><b>proportions</b> [1] 48:14</p> <p><b>proposal</b> [1] 55:1</p> <p><b>proposed</b> [1] 52:1</p> <p><b>proposing</b> [1] 64:15</p> <p><b>protect</b> [1] 39:25</p> <p><b>protection</b> [8] 4:10 27:4,15,24 54:11 55:7 59:14 60:1</p> <p><b>prove</b> [1] 16:22</p> <p><b>proved</b> [1] 64:19</p> <p><b>proven</b> [2] 18:11 20:9</p> <p><b>provide</b> [3] 22:22 56:4 60:15</p> <p><b>provision</b> [1] 59:25</p> <p><b>public</b> [2] 3:19 42:17</p> <p><b>publishes</b> [2] 43:4,5</p> <p><b>punished</b> [1] 35:2</p> <p><b>purpose</b> [3] 21:1 35:11,17</p> <p><b>purposes</b> [2] 21:1 32:3</p> <p><b>pursuant</b> [1] 40:12</p> <p><b>pushed</b> [3] 46:10,10,11</p> <p><b>put</b> [6] 9:1,3 10:8 16:3 26:4 42:8</p> <p><b>putting</b> [1] 23:24</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>question</b> [24] 4:1 6:25 8:19 12:15 18:5 19:22 22:10,22 26:15 27:11, 16,20 40:23 42:11 44:24,25 45:3 46:7,19,21 53:11 63:19,25 64:3</p> <p><b>questions</b> [5] 13:11 23:14 44:3,5, 23</p> <p><b>quite</b> [5] 11:13 12:12 26:1,25 63:5</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>race</b> [7] 6:9 7:1,15 31:12 33:5 34:3 48:25</p> <p><b>races</b> [1] 26:2</p> <p><b>racial</b> [6] 6:18 30:20,21 31:9,18 38:23</p> <p><b>racially</b> [1] 6:11</p> <p><b>raise</b> [4] 5:17 9:8,12 30:24</p> <p><b>raised</b> [3] 6:14 37:8,10</p> <p><b>raises</b> [1] 7:13</p> <p><b>random</b> [1] 56:20</p> <p><b>randomly</b> [2] 55:16,21</p>	<p><b>range</b> [1] 12:16</p> <p><b>rapidly</b> [1] 62:22</p> <p><b>rather</b> [3] 26:13 36:16 59:25</p> <p><b>ratios</b> [1] 3:16</p> <p><b>react</b> [1] 11:19</p> <p><b>reaction</b> [1] 42:17</p> <p><b>read</b> [2] 11:16,22</p> <p><b>real</b> [3] 13:2 22:18 39:13</p> <p><b>reality</b> [1] 26:3</p> <p><b>really</b> [10] 24:16 27:8,11 29:7 32:3 39:15 40:5 45:12 57:24,25</p> <p><b>reason</b> [5] 4:17 14:4,9 35:13 40:23</p> <p><b>reasons</b> [4] 17:7 26:6 34:9 65:13</p> <p><b>rebuttal</b> [2] 2:12 63:16</p> <p><b>recognize</b> [1] 14:2</p> <p><b>record</b> [2] 15:25 56:10</p> <p><b>recycled</b> [1] 64:12</p> <p><b>redistricting</b> [7] 8:14 12:3 39:1 58:25 62:22 63:6 65:1</p> <p><b>redrawn</b> [1] 47:5</p> <p><b>reducing</b> [2] 11:24 49:22</p> <p><b>reflect</b> [1] 26:9</p> <p><b>regard</b> [2] 13:21 14:10</p> <p><b>region</b> [1] 33:21</p> <p><b>regulate</b> [3] 60:24 61:8,16</p> <p><b>rejected</b> [1] 64:20</p> <p><b>relationship</b> [1] 6:1</p> <p><b>relative</b> [1] 43:21</p> <p><b>relatively</b> [1] 41:17</p> <p><b>reliably</b> [1] 30:12</p> <p><b>relied</b> [1] 52:2</p> <p><b>rely</b> [4] 18:10 51:1 61:18,19</p> <p><b>remaining</b> [1] 63:15</p> <p><b>remedy</b> [4] 39:22 57:12,13,17</p> <p><b>reminds</b> [1] 51:3</p> <p><b>remotely</b> [2] 42:2 56:1</p> <p><b>reno</b> [1] 31:10</p> <p><b>replicate</b> [1] 39:11</p> <p><b>representation</b> [6] 41:10,14,21, 23 42:1 60:17</p> <p><b>representational</b> [2] 35:18 64:4</p> <p><b>representatives</b> [2] 34:13 59:7</p> <p><b>republican</b> [9] 4:25 7:8 9:3 24:21 42:21 58:23 59:11,16,23</p> <p><b>republicans</b> [11] 5:1,6 8:23 19:25 29:20 32:16 37:16 38:5 48:23 58:20,21</p> <p><b>require</b> [1] 56:4</p> <p><b>required</b> [1] 20:5</p> <p><b>requirement</b> [5] 17:24 26:21 54:20,20,21</p> <p><b>requirements</b> [1] 55:3</p> <p><b>researcher</b> [2] 43:4,16</p> <p><b>resemblance</b> [1] 7:6</p> <p><b>reserve</b> [1] 18:14</p> <p><b>resources</b> [1] 26:4</p> <p><b>respect</b> [4] 9:6 12:22 23:22 29:14</p> <p><b>respond</b> [1] 13:13</p> <p><b>respondents</b> [1] 4:5</p> <p><b>response</b> [2] 13:12 38:19</p> <p><b>responses</b> [1] 25:7</p> <p><b>responsiveness</b> [2] 43:8,19</p> <p><b>rest</b> [1] 18:13</p>	<p><b>result</b> [6] 19:15 24:21,22 25:1,11 33:10</p> <p><b>results</b> [1] 15:1</p> <p><b>reverse</b> [1] 65:14</p> <p><b>revise</b> [1] 60:7</p> <p><b>revive</b> [1] 59:15</p> <p><b>revolution</b> [2] 8:14 58:7</p> <p><b>reynolds</b> [2] 36:10 61:4</p> <p><b>rights</b> [5] 35:18 54:13 55:8,12 64:5</p> <p><b>road</b> [1] 15:3</p> <p><b>roadsides</b> [2] 9:2,4</p> <p><b>roberts</b> [19] 3:3 5:8 9:24 18:16 29:24 30:16 31:21 34:7,17 36:1 37:1 38:13 40:8 41:8,20 48:16 50:4 63:12 65:16</p> <p><b>room</b> [1] 49:20</p> <p><b>rosetta</b> [2] 43:10 63:1</p> <p><b>rough</b> [1] 41:16</p> <p><b>roughly</b> [1] 23:4</p> <p><b>rub</b> [1] 51:4</p> <p><b>rule</b> [3] 11:3 30:19 59:22</p> <p><b>ruling</b> [1] 38:15</p> <p><b>run</b> [2] 55:1 61:17</p> <p><b>runner</b> [1] 44:17</p> <p><b>running</b> [1] 24:15</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>s-curve</b> [2] 12:19 16:17</p> <p><b>same</b> [12] 6:20 7:9,13 15:8 16:6 31:16 32:13,22 36:14 41:23 46:1 64:11</p> <p><b>satisfied</b> [1] 35:4</p> <p><b>satisfies</b> [1] 19:23</p> <p><b>saying</b> [10] 22:1 24:9 26:17 28:4, 17 35:24 43:18 46:9 59:21 63:4</p> <p><b>says</b> [12] 12:1 19:10,17 20:13 25:1 28:15 42:2 43:6 44:18 52:19 60:14 62:20</p> <p><b>scale</b> [1] 42:9</p> <p><b>scare</b> [2] 64:23 65:6</p> <p><b>scenario</b> [1] 20:21</p> <p><b>scheme</b> [1] 25:8</p> <p><b>scholars</b> [2] 43:1,1</p> <p><b>scholarship</b> [1] 44:2</p> <p><b>science</b> [7] 3:15 8:15 11:11,22 16:5 42:12 57:5</p> <p><b>scientific</b> [4] 15:20,24 18:9,11</p> <p><b>scientist</b> [1] 16:3</p> <p><b>scientists</b> [3] 42:6 43:2 45:20</p> <p><b>scientists'</b> [1] 58:6</p> <p><b>screen</b> [2] 6:18,21</p> <p><b>screens</b> [1] 52:23</p> <p><b>scrutiny</b> [1] 64:17</p> <p><b>seat</b> [1] 3:16</p> <p><b>seats</b> [6] 19:25 29:13 41:18,24 42:4,5</p> <p><b>second</b> [6] 8:11 13:19 14:13 46:21 60:4 64:14</p> <p><b>seconds</b> [1] 11:15</p> <p><b>section</b> [4] 33:19 38:24 60:14 61:19</p> <p><b>see</b> [9] 7:16 9:23 10:4 12:14 55:2 58:1,8 61:22 63:4</p> <p><b>seem</b> [2] 41:4 52:10</p>	<p><b>seeming</b> [1] 40:1</p> <p><b>seems</b> [8] 5:16 15:4 20:16 32:13, 21 38:14 40:25 47:10</p> <p><b>seen</b> [1] 39:24</p> <p><b>seminal</b> [1] 62:19</p> <p><b>senate</b> [3] 1:20 2:7 18:20</p> <p><b>sense</b> [1] 28:2</p> <p><b>sensitivity</b> [3] 14:24 48:3 49:4</p> <p><b>sentence</b> [1] 63:4</p> <p><b>serious</b> [7] 38:9 39:15,16 45:13,18 57:24 58:4</p> <p><b>set</b> [2] 22:18 54:1</p> <p><b>seven</b> [1] 50:2</p> <p><b>severe</b> [1] 57:2</p> <p><b>shall</b> [1] 19:11</p> <p><b>shape</b> [1] 23:16</p> <p><b>shaw</b> [1] 31:9</p> <p><b>shift</b> [1] 3:18</p> <p><b>show</b> [2] 56:19 62:20</p> <p><b>showing</b> [1] 6:17</p> <p><b>shown</b> [1] 43:19</p> <p><b>shows</b> [3] 10:13 12:19 65:4</p> <p><b>side</b> [1] 52:19</p> <p><b>sigma</b> [3] 37:24,24,25</p> <p><b>sign</b> [3] 10:22,22 31:22</p> <p><b>significantly</b> [1] 17:4</p> <p><b>signs</b> [5] 9:1,3,7 31:24 32:17</p> <p><b>simply</b> [3] 8:6 40:12 42:2</p> <p><b>sims</b> [1] 61:5</p> <p><b>since</b> [8] 19:4 36:9,25 42:24,25 58:8 61:7 65:10</p> <p><b>single</b> [6] 4:20 6:19 14:2,3 16:5 48:25</p> <p><b>situation</b> [2] 31:12 33:21</p> <p><b>situations</b> [1] 33:17</p> <p><b>size</b> [1] 23:16</p> <p><b>slicing</b> [1] 58:9</p> <p><b>small</b> [2] 48:5 62:21</p> <p><b>smith</b> [63] 1:21 2:10 30:1,2,4 31:5 32:5,23 33:18 34:16,22 35:25 36:1,8,13 37:1 38:12,18 40:7,15 41:13,22 42:10 44:25 45:5 46:12,14 47:8,12,15 49:3 50:4,11,24 51:14, 22,24 52:5,8,17,22 53:12,16,19,22 54:5,15 55:11 56:7 57:11 58:17 59:3,10,13,20 60:2,21 61:4,25 62:4 63:3,10,13</p> <p><b>so-called</b> [1] 7:2</p> <p><b>social</b> [8] 3:14 8:15 11:11,22 16:3, 5 45:20 57:5</p> <p><b>society</b> [1] 25:4</p> <p><b>sociological</b> [1] 40:14</p> <p><b>solicitor</b> [1] 1:17</p> <p><b>solve</b> [3] 3:17 5:24 62:12</p> <p><b>solved</b> [1] 26:24</p> <p><b>somebody</b> [3] 13:1 31:24 47:3</p> <p><b>someone</b> [3] 9:21 10:17,17</p> <p><b>someplace</b> [2] 8:22 50:10</p> <p><b>sometimes</b> [3] 21:5 26:12 34:8</p> <p><b>somewhat</b> [2] 55:14 57:15</p> <p><b>sophisticated</b> [2] 15:9 39:17</p> <p><b>sorry</b> [4] 9:25 16:1 46:13 54:5</p> <p><b>sort</b> [4] 5:4 11:2 12:18 57:14</p> <p><b>sotomayor</b> [9] 6:24 16:1 17:11,21</p>
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## Official - Subject to Final Review

<p>18:1 28:6,12 29:7 46:9  <b>sotoymayor</b> <sup>[1]</sup> 16:25  <b>sound</b> <sup>[1]</sup> 38:16  <b>sounds</b> <sup>[2]</sup> 40:21 41:20  <b>south</b> <sup>[1]</sup> 31:25  <b>southern</b> <sup>[1]</sup> 10:23  <b>specific</b> <sup>[1]</sup> 59:24  <b>specifically</b> <sup>[1]</sup> 28:4  <b>specify</b> <sup>[1]</sup> 51:9  <b>spend</b> <sup>[1]</sup> 11:15  <b>spent</b> <sup>[1]</sup> 49:18  <b>stack</b> <sup>[2]</sup> 24:18 29:9  <b>stacked</b> <sup>[1]</sup> 29:16  <b>stage</b> <sup>[7]</sup> 54:23,23,25 57:1,12,18 59:17  <b>standard</b> <sup>[10]</sup> 18:24 20:11,12,17 21:14 42:14 43:3,14 64:6 65:12  <b>standards</b> <sup>[5]</sup> 3:12 11:10 15:13 22:15 45:15  <b>standing</b> <sup>[21]</sup> 4:5 8:19 9:7,12,16 10:1,3 27:11,17,20 30:17 31:6 32:3,10 33:3,20 34:23 35:4 36:2,5,21  <b>start</b> <sup>[1]</sup> 23:9  <b>started</b> <sup>[3]</sup> 16:10 24:9 55:18  <b>starting</b> <sup>[1]</sup> 24:5  <b>state</b> <sup>[47]</sup> 1:19 2:7 4:13 5:13,15,19 10:23 13:23 17:25 18:20 19:10,10 20:3 22:12 23:19 26:16 28:13 30:6,11,22 31:4 33:2,6,8,9,22 34:1,2 35:2,11 36:7 38:7 39:9 52:25 53:7 55:19 56:11 58:13,18 60:7,9,9,15, 24,25 61:18 63:21  <b>state's</b> <sup>[1]</sup> 55:17  <b>state-wide</b> <sup>[1]</sup> 32:2  <b>stated</b> <sup>[1]</sup> 5:21  <b>statement</b> <sup>[1]</sup> 35:8  <b>states</b> <sup>[6]</sup> 1:1,13 46:3 52:10 62:8, 12  <b>statewide</b> <sup>[6]</sup> 3:15,24 6:22 30:25 34:21 39:1  <b>statistics</b> <sup>[1]</sup> 49:1  <b>status</b> <sup>[2]</sup> 38:9 59:8  <b>statute</b> <sup>[6]</sup> 19:10 20:21 21:4,10,13, 16  <b>steak</b> <sup>[1]</sup> 51:4  <b>step</b> <sup>[3]</sup> 12:1,6 60:9  <b>stepped</b> <sup>[2]</sup> 45:20 57:6  <b>stepping</b> <sup>[1]</sup> 60:19  <b>steps</b> <sup>[1]</sup> 14:2  <b>stereotypical</b> <sup>[1]</sup> 34:18  <b>stereotyping</b> <sup>[2]</sup> 34:3,8  <b>stigmatize</b> <sup>[1]</sup> 63:22  <b>still</b> <sup>[4]</sup> 4:19 6:6 41:3 53:10  <b>stone</b> <sup>[2]</sup> 43:10 63:1  <b>stop</b> <sup>[1]</sup> 14:13  <b>straightforward</b> <sup>[1]</sup> 5:10  <b>strategy</b> <sup>[1]</sup> 32:18  <b>street</b> <sup>[2]</sup> 37:19 38:2  <b>strength</b> <sup>[1]</sup> 32:2  <b>striking</b> <sup>[1]</sup> 7:22  <b>strong</b> <sup>[2]</sup> 4:6,15  <b>strongly</b> <sup>[2]</sup> 4:5 26:12  <b>struck</b> <sup>[1]</sup> 62:18  <b>structural</b> <sup>[1]</sup> 5:25</p>	<p><b>stuck</b> <sup>[1]</sup> 53:11  <b>studied</b> <sup>[2]</sup> 7:20 46:5  <b>study</b> <sup>[4]</sup> 55:13 64:24 65:2,3  <b>stuff</b> <sup>[2]</sup> 11:23,23  <b>subject</b> <sup>[2]</sup> 22:14 46:23  <b>subjected</b> <sup>[1]</sup> 64:16  <b>subjecting</b> <sup>[1]</sup> 35:12  <b>submitted</b> <sup>[2]</sup> 13:24 65:17  <b>substantive</b> <sup>[3]</sup> 45:10 46:19 51:19  <b>subtracting</b> <sup>[1]</sup> 44:15  <b>success</b> <sup>[1]</sup> 18:9  <b>suffer</b> <sup>[1]</sup> 36:19  <b>sufficiently</b> <sup>[2]</sup> 32:9 42:16  <b>suggest</b> <sup>[2]</sup> 24:4 53:20  <b>suggested</b> <sup>[2]</sup> 14:1 23:1  <b>suggesting</b> <sup>[4]</sup> 15:18 50:6,8 62: 22  <b>suggestion</b> <sup>[1]</sup> 14:1  <b>suit</b> <sup>[1]</sup> 43:13  <b>supplemental</b> <sup>[2]</sup> 7:19 65:3  <b>support</b> <sup>[1]</sup> 34:20  <b>supporters</b> <sup>[1]</sup> 35:1  <b>suppose</b> <sup>[6]</sup> 4:7 8:21 10:22 19:9 33:15 58:22  <b>supposed</b> <sup>[5]</sup> 23:6 24:10 51:7,9 52:11  <b>supreme</b> <sup>[3]</sup> 1:1,13 38:4  <b>suspect</b> <sup>[2]</sup> 7:14 13:8  <b>swing</b> <sup>[2]</sup> 48:5 49:12  <b>symmetry</b> <sup>[14]</sup> 8:6 22:17 23:2,9 41: 15 42:5 43:8,18 46:17 47:4 51:3, 16,18,21  <b>sympathetic</b> <sup>[1]</sup> 11:13  <b>system</b> <sup>[5]</sup> 4:21 28:9,25 32:14 39: 4  <b>systematic</b> <sup>[1]</sup> 32:24  <b>systematically</b> <sup>[1]</sup> 49:22</p> <hr/> <p style="text-align: center;"><b>T</b></p> <p><b>table</b> <sup>[1]</sup> 53:6  <b>tactics</b> <sup>[2]</sup> 64:23 65:6  <b>talked</b> <sup>[2]</sup> 10:23 13:19  <b>targeted</b> <sup>[1]</sup> 35:19  <b>task</b> <sup>[1]</sup> 18:25  <b>teach</b> <sup>[1]</sup> 56:20  <b>technicalities</b> <sup>[1]</sup> 13:10  <b>technique</b> <sup>[1]</sup> 49:3  <b>techniques</b> <sup>[3]</sup> 15:8 18:6,7  <b>technologies</b> <sup>[1]</sup> 56:9  <b>technology</b> <sup>[1]</sup> 14:18  <b>term</b> <sup>[1]</sup> 61:11  <b>terms</b> <sup>[3]</sup> 29:3 41:17 65:9  <b>test</b> <sup>[12]</sup> 13:5 19:5 51:3,25 52:2,13, 20 54:19 64:16,18,20,21  <b>tested</b> <sup>[2]</sup> 44:2 49:9  <b>testified</b> <sup>[1]</sup> 10:6  <b>testimony</b> <sup>[2]</sup> 10:5,7  <b>testing</b> <sup>[3]</sup> 14:25 48:3 49:4  <b>tests</b> <sup>[6]</sup> 23:1 48:8 51:17,21 53:13 64:15  <b>texas</b> <sup>[3]</sup> 5:1,5,7  <b>textual</b> <sup>[1]</sup> 60:17  <b>theory</b> <sup>[2]</sup> 44:5 61:21  <b>there's</b> <sup>[12]</sup> 4:4 5:16 6:17 20:23 26:</p>	<p>2 27:14 33:22 46:6 47:3 59:4 60: 22 61:11  <b>therefore</b> <sup>[2]</sup> 32:19 47:23  <b>they've</b> <sup>[3]</sup> 29:20 64:9,12  <b>thinking</b> <sup>[2]</sup> 14:20,21  <b>third</b> <sup>[3]</sup> 13:17,21 52:15  <b>thorough</b> <sup>[1]</sup> 34:25  <b>thought</b> <sup>[3]</sup> 29:11 49:24 59:19  <b>thousands</b> <sup>[2]</sup> 12:25 13:1  <b>three</b> <sup>[8]</sup> 16:11,12 42:20,22 45:21 47:16 53:13,18  <b>three-judge</b> <sup>[1]</sup> 42:19  <b>threshold</b> <sup>[2]</sup> 3:22 47:6  <b>threw</b> <sup>[1]</sup> 17:16  <b>throughout</b> <sup>[1]</sup> 5:15  <b>throw</b> <sup>[1]</sup> 13:9  <b>throwing</b> <sup>[2]</sup> 40:11 53:1  <b>thumb</b> <sup>[1]</sup> 42:8  <b>tinkered</b> <sup>[2]</sup> 49:25,25  <b>together</b> <sup>[2]</sup> 6:15 34:5  <b>tolerate</b> <sup>[1]</sup> 19:2  <b>tool</b> <sup>[1]</sup> 62:23  <b>town</b> <sup>[2]</sup> 8:21 9:4  <b>towns</b> <sup>[1]</sup> 32:15  <b>traditional</b> <sup>[10]</sup> 17:9,14,15 18:3 19: 12,23 24:6 28:16 55:3,17  <b>translate</b> <sup>[1]</sup> 41:18  <b>treat</b> <sup>[1]</sup> 12:7  <b>treatment</b> <sup>[1]</sup> 35:13  <b>treats</b> <sup>[1]</sup> 41:16  <b>trial</b> <sup>[1]</sup> 64:18  <b>tries</b> <sup>[1]</sup> 16:15  <b>troubling</b> <sup>[1]</sup> 17:5  <b>true</b> <sup>[9]</sup> 4:4 17:10 36:8 47:12 52:17, 17 54:4,7 62:8  <b>try</b> <sup>[3]</sup> 18:8 24:2 59:15  <b>trying</b> <sup>[3]</sup> 49:20 50:8 59:19  <b>tseytlin</b> <sup>[25]</sup> 1:17 2:3,13 3:6,7,9 4: 16 5:23 6:5 7:11 9:14 10:2 11:1 13:16 15:11,22 16:23 17:2,18,23 18:2,12 63:14,16,18  <b>tuesday</b> <sup>[1]</sup> 1:10  <b>turmeric</b> <sup>[1]</sup> 51:4  <b>turn</b> <sup>[1]</sup> 13:11  <b>turned</b> <sup>[2]</sup> 6:18,20  <b>turns</b> <sup>[1]</sup> 7:12  <b>twenty-sixth</b> <sup>[1]</sup> 60:12  <b>two</b> <sup>[14]</sup> 8:2 12:6 17:7 23:14,15 33: 17 40:21 41:16 42:20,21 44:8 45: 10 49:20 51:17  <b>two-sentence</b> <sup>[1]</sup> 35:9</p> <hr/> <p style="text-align: center;"><b>U</b></p> <p><b>ultimate</b> <sup>[1]</sup> 19:17  <b>ultimately</b> <sup>[1]</sup> 6:13  <b>unanswered</b> <sup>[1]</sup> 44:5  <b>uncertainties</b> <sup>[1]</sup> 55:10  <b>unconstitutional</b> <sup>[7]</sup> 17:1 22:3 27:22 28:18 50:16,21 53:25  <b>uncontested</b> <sup>[2]</sup> 25:22 26:2  <b>uncovered</b> <sup>[1]</sup> 3:11  <b>under</b> <sup>[7]</sup> 10:10 14:7,14 38:22,23, 24 61:8  <b>underlying</b> <sup>[1]</sup> 51:18</p>	<p><b>underpopulated</b> <sup>[1]</sup> 36:16  <b>understand</b> <sup>[8]</sup> 11:13 21:6,7 29:2, 5,8 31:20 52:13  <b>understanding</b> <sup>[1]</sup> 55:5  <b>undisputed</b> <sup>[1]</sup> 17:13  <b>unequivocal</b> <sup>[1]</sup> 48:12  <b>unfair</b> <sup>[1]</sup> 40:17  <b>uniform</b> <sup>[1]</sup> 65:12  <b>united</b> <sup>[4]</sup> 1:1,13 46:3 62:11  <b>unprecedented</b> <sup>[1]</sup> 48:14  <b>unusual</b> <sup>[1]</sup> 60:22  <b>unusually</b> <sup>[1]</sup> 53:8  <b>up</b> <sup>[12]</sup> 9:1,3 31:23 44:17 45:21 48: 15 49:24 50:2 52:16 57:6,18 62:6  <b>useful</b> <sup>[1]</sup> 57:4  <b>using</b> <sup>[5]</sup> 24:21 30:7 55:2,16 60:22</p> <hr/> <p style="text-align: center;"><b>V</b></p> <p><b>vague</b> <sup>[1]</sup> 4:23  <b>valid</b> <sup>[1]</sup> 43:22  <b>valuable</b> <sup>[1]</sup> 29:4  <b>value</b> <sup>[1]</sup> 28:7  <b>values</b> <sup>[2]</sup> 28:21 29:3  <b>variety</b> <sup>[2]</sup> 34:9 57:4  <b>various</b> <sup>[2]</sup> 54:16 64:15  <b>versus</b> <sup>[4]</sup> 3:5 61:5,5,12  <b>vieth</b> <sup>[10]</sup> 17:7,10 28:23 35:7 45:6 47:18,18 48:7,21 49:17  <b>view</b> <sup>[1]</sup> 34:14  <b>viewpoint</b> <sup>[1]</sup> 28:2  <b>views</b> <sup>[1]</sup> 35:14  <b>violate</b> <sup>[2]</sup> 59:22 63:21  <b>violating</b> <sup>[1]</sup> 46:24  <b>violation</b> <sup>[7]</sup> 20:9 27:4,5,24 28:1 31:8 47:4  <b>virtue</b> <sup>[1]</sup> 47:16  <b>vote</b> <sup>[22]</sup> 3:15 4:19,21 9:19,20,21 12:10 24:17,19,25 25:17 29:17,21 31:2 32:2 33:19 34:9,19 36:19 38: 23 40:6 60:16  <b>voted</b> <sup>[2]</sup> 44:9,11  <b>voter</b> <sup>[5]</sup> 9:11 10:14 24:19 32:20 33:7  <b>voters</b> <sup>[9]</sup> 9:10,17,18,25 29:1 35: 12 40:3,4 62:6  <b>voters'</b> <sup>[1]</sup> 35:18  <b>votes</b> <sup>[20]</sup> 12:16 19:4,14 29:12,13 31:2,18 37:24,25 38:1,1 40:24 41: 3,18,25 43:21 44:15,16,17 48:15  <b>voting</b> <sup>[7]</sup> 14:17 25:10 31:4 48:5 54:13 55:8,12</p> <hr/> <p style="text-align: center;"><b>W</b></p> <p><b>wait</b> <sup>[1]</sup> 9:24  <b>walk</b> <sup>[1]</sup> 22:21  <b>wants</b> <sup>[1]</sup> 33:8  <b>washington</b> <sup>[3]</sup> 1:9,19,21  <b>wasted</b> <sup>[4]</sup> 19:4 37:24,25 43:21  <b>way</b> <sup>[23]</sup> 5:16,21 7:16 11:24 16:8 23:11 24:18 25:18 26:18 28:5 29: 1 31:3 36:9,25 39:3 42:7,20 45:11 49:16 56:15 57:8 58:14 62:14  <b>ways</b> <sup>[5]</sup> 38:22 45:21 46:22,22 57: 5</p>
---	---	---	---

**weak** <sup>[1]</sup> 4:15  
**whereas** <sup>[1]</sup> 18:14  
**whereupon** <sup>[1]</sup> 65:18  
**whether** <sup>[8]</sup> 12:19 24:20 37:15 40:6 53:8 55:2 56:5,12  
**white** <sup>[1]</sup> 35:8  
**whitford** <sup>[2]</sup> 1:6 3:5  
**who's** <sup>[1]</sup> 30:14  
**whole** <sup>[4]</sup> 30:25 40:9 55:10 57:4  
**wide** <sup>[1]</sup> 34:9  
**will** <sup>[16]</sup> 6:14 15:1 25:18 32:18,21 37:7,10,11,14,21 56:9,24 58:11,17 64:1,23  
**william** <sup>[1]</sup> 1:6  
**win** <sup>[5]</sup> 25:24 37:16,16,20,22  
**winding** <sup>[1]</sup> 52:16  
**winner** <sup>[1]</sup> 44:16  
**winning** <sup>[1]</sup> 44:9  
**wins** <sup>[1]</sup> 40:24  
**wisconsin** <sup>[21]</sup> 1:17,19 2:7 4:25 8:1,22 10:16,17,18 18:20 25:19 29:19 30:11 31:23 35:3 40:5 55:16,24 58:3,16 62:6  
**wisconsinites** <sup>[1]</sup> 10:15  
**wish** <sup>[5]</sup> 11:19,19 13:12,13,13  
**within** <sup>[2]</sup> 37:13 41:16  
**without** <sup>[2]</sup> 41:4 62:7  
**won** <sup>[4]</sup> 29:20,21 48:9,24  
**word** <sup>[2]</sup> 31:16 50:11  
**words** <sup>[2]</sup> 12:7,14  
**work** <sup>[2]</sup> 34:5 39:5  
**workable** <sup>[1]</sup> 18:24  
**worked** <sup>[2]</sup> 16:18,18  
**world** <sup>[3]</sup> 14:17 20:5 47:2  
**worry** <sup>[3]</sup> 15:12,14,15  
**worse** <sup>[4]</sup> 62:13,15 65:4,5  
**worst** <sup>[4]</sup> 7:21,22 13:3 46:4  
**worth** <sup>[1]</sup> 23:15

---

**Y**


---

**year** <sup>[2]</sup> 43:12 49:15  
**years** <sup>[12]</sup> 7:1,21 15:2 23:14 29:10,22 39:2,10,10,12 42:24 43:15  
**yield** <sup>[1]</sup> 52:15  
**young** <sup>[2]</sup> 43:4,16

---

**Z**


---

**zero** <sup>[2]</sup> 54:18 57:17